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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

CASE NO. CA 03-5045 AI

AGREED ORDER GRANTING VERIFIED MOTION TO PERMIT FOREIGN ATTORNEY TO APPEAR

THIS CAUSE having come before the Court upon Plaintiff Coleman (Parent) Holdings Inc.'s ("CPH") Verified Motion to Permit Foreign Attorney Sam Hirsch to Appear *pro hac vice*, and the Court having been advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

CPH's Verified Motion to Permit Foreign Attorney Sam Hirsch to Appear *pro hac vice* is GRANTED. contingent upon payment of F.S. 77.041 Fees

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 11 day of February, 2005.

TIMOTHY P. McCARTH

ELIZABETH T. MAASS
Circuit Court Judge

16div-011001

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

CASE NO. CA 03-5045 AI

AGREED ORDER GRANTING VERIFIED MOTION TO PERMIT FOREIGN ATTORNEY TO APPEAR

THIS CAUSE having come before the Court upon Plaintiff Coleman (Parent) Holdings Inc.'s ("CPH") Verified Motion to Permit Foreign Attorney Paul M. Smith to Appear *pro hac vice*, and the Court having been advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

CPH's Verified Motion to Permit Foreign Attorney Paul M. Smith to Appear *pro hac vice* is GRANTED Conditioned upon payment of F.S. 77.041 Fees (Paid)

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 11 day of February, 2005.

TIMOTHY P. McCARTHY

ELIZABETH T. MAASS
Circuit Court Judge

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

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

CASE NO: CA 03-5045 AI

AGREED ORDER GRANTING VERIFIED MOTION TO ADMIT FREDERICK L. BLOCK, PRO HAC VICE

THIS CAUSE came before the Court on Morgan Stanley & Co. Incorporated's Verified Motion to Admit Frederick L. Block, Pro Hac Vice and the Court being advised of the agreement of the parties, it is:

ORDERED AND ADJUDGED that Morgan Stanley's Verified Motion to Admit Frederick L. Block, Pro Hac Vice is GRANTED. Mr. Block is admitted to practice in this case.

DONE AND ORDERED in West Palm Beach County, Florida this ____ of February, 2005.

Elizabeth T. Maass
Circuit Court Judge

cc: Counsel of Record on attached Service List

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

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

CASE NO: CA 03-5045 AI

AGREED ORDER GRANTING VERIFIED MOTION TO ADMIT MICHAEL D. JONES, PRO HAC VICE

THIS CAUSE came before the Court on Morgan Stanley & Co. Incorporated's Verified Motion to Admit Michael D. Jones, Pro Hac Vice and the Court being advised of the agreement of the parties, it is: ORDERED AND ADJUDGED that Morgan Stanley's Verified Motion to Admit Michael D. Jones, Pro Hac Vice is GRANTED. Mr. Jones is admitted to practice in this case.

DONE AND ORDERED in West Palm Beach County, Florida this ____ of February, 2005.

Elizabeth T. Maass
Circuit Court Judge

Copies provide to counsel on attached service list

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

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

CASE NO: CA 03-5045 AI

AGREED ORDER GRANTING VERIFIED MOTION TO ADMIT ANTONY B. KLAPPER, PRO HAC VICE

THIS CAUSE came before the Court on Morgan Stanley & Co. Incorporated's Verified Motion to Admit Antony B. Klapper, Pro Hac Vice, and the Court be advised of the agreement of the parties, it is

ORDERED AND ADJUDGED that Morgan Stanley's Verified Motion to Admit Antony B. Klapper, Pro Hac Vice is GRANTED, and Mr. Klapper is admitted to practice in this case.

DONE AND ORDERED in West Palm Beach County, Florida this ____ of February, 2005.

Elizabeth T. Maass
Circuit Court Judge

Copies provided to counsel on attached sheet

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COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

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Defendant.
_____/

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

CASE NO: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.'S RESPONSE TO MORGAN STANLEY'S MOTION FOR ENTRY OF UNDISPUTED FACTS PURSUANT TO RULE 1.510

Morgan Stanley just won't take no for an answer.

After presenting a 332-paragraph set of supposedly "undisputed facts" in support of its summary judgment motion, and having had its motion rejected in total by the Court (except for the finding that CPH is a sophisticated investor under New York law), Morgan Stanley seeks a finding of five so-called "undisputed facts" — so-called facts that reflect neither a fair nor an accurate account of the circumstances of this case. Some of these so-called facts are cherry-picked from Morgan Stanley's utterly time-wasting 332-paragraph set of proposed findings that this Court already considered and rejected in its summary judgment ruling, but in at least one instance (the proposed finding that "[t]he information contained in the comfort letters merely restated information contained in the interim financial statements"), the finding appears nowhere in Morgan Stanley's prior written submissions.

Morgan Stanley's continued attempt to abuse the procedure authorized by Rule 1.510 — an attempt that seeks to undermine this Court's summary judgment ruling—should be rejected. Rule 1.510(d) authorizes trial courts to enter findings of fact at the summary judgment phase of the case only if five conditions are met: (1) the court's decision on the summary judgment

motion must not end the whole case, (2) the findings must involve material facts, (3) the material facts must exist without substantial controversy, (4) it must be practicable for the court to separate those material, uncontroverted facts from the controverted ones, and (5) those material, uncontroverted facts must be admissible in evidence at trial. Here, in connection with its summary judgment ruling, this Court complied with Rule 1.510(d) by making the one finding (concerning CPH's sophistication) deemed material and practicable, while rejecting Morgan Stanley's additional proposals for factual findings — which started at a whopping 332 in the proposed findings, dropped precipitously to seven in Morgan Stanley's reply brief, and dropped even further to a mere three at the summary judgment hearings.

There is no basis for this Court to revisit this matter. The goal of Rule 1.510(d) is to promote judicial economy, so that some of the work necessary to resolve the summary judgment motion can be put to use later in the proceedings. *See National Union Fire Insurance Co. v. Myers Co. Group,* 937 F. Supp. 276, 285 (S.D.N.Y. 1996) (highlighting the need "to save time and expense and to simplify the trial"); Bruce J. Berman, *Rule 1.510 Summary Judgment,* in 4 Florida Practice: Civil Procedure ¶ 510.6 (West 2005 ed.) (Rule 1.510(d) "tries to extract some usefulness from the court's effort to discern whether factual disputes remain where a motion is denied, by capturing at least that portion of the issues that need not be tried, despite denial of the motion").[1] Morgan Stanley's attempt to cherry-pick a few conclusory facts that it considers to be helpful to its cause, after the parties' summary judgment arguments have been vetted fully and resolved by this Court, obviously subverts Rule 1.510's goal. *See Mendenhall v. Barber-Greene*

[1] When interpreting Rule 1.510(d), Florida courts have relied on federal court interpretations of Federal Rule of Civil Procedure 56(d), which contains almost verbatim language. *See, e.g., West Am. Ins. Co. v. Rauch,* 412 So. 2d 956, 958 (Fla. 4th DCA 1982); *Fontainebleau Hotel Corp. v. Young,* 162 So. 303, 305 (Fla. 3d DCA 1964).

Co., 531 F. Supp. 947, 948 (N.D. Ill. 1981) (the rule "is not an independent provision permitting the singling out of limited issues on which the Court's advice may be obtained").

WHEREFORE, CPH respectfully requests that this Court deny Morgan Stanley's motion for the entry of so-called undisputed facts.

Dated: February 11, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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#1210764.v2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and hand delivery to all counsel on the attached list on this 11th day of February, 2005.

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COLEMAN (PARENT) HOLDINGS INC.,

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Defendant.

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

CASE NO: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ITS E-MAIL MOTION

Coleman (Parent) Holdings Inc. ("CPH"), in accordance with this Court's February 4, 2005 Order setting CPH's e-mail motion for hearing on February 14, hereby submits this supplemental memorandum following the completion of the e-mail discovery ordered by this Court. As is demonstrated below, that discovery confirms that Morgan Stanley not only allowed countless relevant e-mails to be irretrievably lost, but also has flagrantly disregarded this Court's April 16, 2004 Order concerning the production of restorable e-mails over a period of many months. Significant sanctions therefore are necessary and appropriate.

Background

I. Morgan Stanley's Prior Systematic Destruction Of E-Mails Pursuant To Its Illegal Internal Non-Retention Policy.

As this Court is aware, this controversy has arisen because of Morgan Stanley's systematic destruction of e-mails from the relevant time period, notwithstanding SEC regulations requiring Morgan Stanley to retain e-mails in a readily accessible fashion for at least two years. *See* 17 C.F.R. § 240.17a-4 (1997); *see also* CPH E-Mail Mot. Ex. D at 2. Morgan Stanley failed to preserve e-mails relevant to this case even after it anticipated Sunbeam-related litigation, which according to Morgan Stanley's privilege log was no later than March 25, 1998. *See* CPH

E-Mail Mot. Ex. C. Morgan Stanley further failed to preserve relevant e-mails even though Morgan Stanley's document custodian, Plotnick, has testified that, by February 1999 at the latest, he had called all of the bankers from the Sunbeam deal and instructed them to retain their Sunbeam-related documents. *See* CPH E-Mail Mot. Ex. B, Plotnick Dep. at 65. Plotnick gathered Morgan Stanley's non-electronic files by that time as well. Given that Morgan Stanley's practice in this time period was to keep backup tapes for all e-mails generated in the previous 12 months, *id.* at 64-66, e-mails dating back to at least February 1998 also should have been collected and preserved by Morgan Stanley.

But Morgan Stanley did not collect responsive e-mails called for in this litigation. An Executive Director in Morgan Stanley's Information Technology department testified on February 10, 2004 that he is unaware of anyone in the Compliance or Legal Divisions of Morgan Stanley instructing that e-mails be preserved in anticipation of litigation. *See* Ex. A, Saunders Dep. (2/10/04) at 95-96. Consequently, nearly all of the e-mails responsive to CPH's document requests were destroyed. Indeed, Morgan Stanley's original production in this case included only a small handful of e-mails.

Morgan Stanley never has provided direct answers concerning the volume of its e-mail traffic in 1997 and 1998, but based on the testimony of one of the heads of Information Technology, the volume would have been immense. He testified that, by 1999, the Morgan Stanley network was supporting more than six million messages per week. *See* Ex. A, Saunders Dep. at 47. Thus, the virtual absence from Morgan Stanley's production of e-mail messages in this litigation is not due to a lack of e-mail usage in the relevant time period. Instead, it is due to Morgan Stanley's systematic destruction of e-mails, in violation of federal law and Morgan Stanley's duties to preserve documents in anticipation of litigation.

II. CPH's Longstanding Efforts To Obtain Responsive E-Mails, The Resulting April 16, 2004 Agreed Order, And Morgan Stanley's Purported "Compliance" With That Order.

Because of Morgan Stanley's woefully inadequate e-mail production, CPH filed a motion to compel in October 2003, seeking to have Morgan Stanley find and restore its lost e-mails. After months of negotiations and hearings, on April 16, 2004, this Court entered an Agreed Order requiring Morgan Stanley to: (1) search the oldest full e-mail backups for 36 Morgan Stanley employees involved in the Sunbeam transaction, (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004 all non-privileged e-mails responsive to CPH's document requests, (4) give CPH a privilege log, and (5) also provide CPH a certificate confirming compliance with the foregoing requirements. *See* CPH E-Mail Mot. Ex. A.

Morgan Stanley produced some e-mails on May 14, 2004, but in violation of the April 16 Agreed Order, Morgan Stanley did not certify that it had complied with the Court's instructions. When CPH pressed Morgan Stanley to do so, Morgan Stanley grudgingly provided a certification on June 23, 2004, from a Morgan Stanley employee named Arthur Riel. *See* CPH E-Mail Mot. Ex. I.

It turns out that Morgan Stanley's choice of Riel as the person to attest to Morgan Stanley's compliance was a strange choice indeed. CPH has learned – from the discovery ordered by this Court in its February 3 Order – that Riel was fired within two months of signing the certification because of issues of integrity (he was suspected of reading other people's e-mails) and incompetence (he failed to anticipate the computer hardware needs of the e-mail

archive system he was supposed to build and maintain). *See* Ex. B, Gorman Dep. at 12-13, 58-60.

Riel certified on behalf of Morgan Stanley that the firm had "complied with Paragraphs 1 and 2 of the April 16 Agreed Order," which required the company to search the tapes and provide the relevant e-mails for counsel to review. *See* CPH E-Mail Mot. Ex. I. Riel's certification should have marked the end of an e-mail-related discovery process that already had consumed too much time and expense. But five months later, on November 17, 2004, Morgan Stanley revealed that its certificate of compliance was incorrect and that additional e-mail backup tapes existed that had not been searched. *See* CPH E-Mail Mot. Ex. O.

That revelation led to the present controversy and the resulting discovery ordered by this Court. That discovery has revealed that Morgan Stanley: (1) knew at the time of the certification that its representations were incorrect, (2) knew within days of the certification that its representations were false, (3) proceeded at a snail's pace to do anything about it, and (4) never took minimally adequate steps. Only today — nine months after the April 16, 2004 Agreed Order required full production — has Morgan Stanley once again claimed to have completed its production of all responsive, non-privileged e-mails that were not previously destroyed. *See* Ex. C (fax received from Morgan Stanley at 2:38 a.m. on Friday, February 11, 2005).

III. Discovery Has Revealed That Morgan Stanley Found "Missing" Backup Containing E-Mails Before Morgan Stanley Made Its E-Mail Production Under The Agreed Order On May 14, 2004, And Before Riel Certified Compliance With The Order On June 23, 2004.

At the February 2, 2005 hearing, Morgan Stanley's counsel represented that "sometime during the summer [of 2004], 1,400 DLT tapes were found in a closet, in a closet in an off-site storage facility in Brooklyn." *See* Ex. D, 2/2/05 Tr. 132. In fact, as the Court-ordered discovery

following that hearing has revealed, there are three sources of unproduced e-mail, at least two of which were discovered before the May 14, 2004 production deadline set forth in the Agreed Order.[1]

A. Source Of Unproduced E-Mails No. 1: The 1,423 "Brooklyn Found" DLT Tapes.

These 1,423 DLT tapes, which were discovered in a Brooklyn security room, are the tapes addressed at the February 2, 2005 hearing. Each of these tapes is about 2/3 the size of a video cassette (Ex. F, Saunders Dep. (2/10/05) at 35), so the volume of these "found" tapes is sufficient to fill an entire wall. The amount of data that can be held on 1,423 DLT tapes is enormous – indeed, Morgan Stanley's outside vendor eventually identified more than 2,000,000 unique e-mail messages on those tapes. *See* Ex. G (7/16/04 e-mail from Bruce Buchanan, NDCI, to Wray Stewart, Morgan Stanley, at MS 0112889). Meeting minutes of the Morgan Stanley Information Technology E-mail Archive Group reveal that these tapes (erroneously estimated at the time to amount to just over 1,000) were discovered as early as May 6, 2004, seven weeks before Morgan Stanley certified that it had produced everything. *See* Ex. H (Minutes of May 6, 2004 Meeting, MS 0112286).

[1] In response to the discovery ordered by this Court, Morgan Stanley produced three live witnesses for their depositions, and approximately 1,500 pages of documents supposedly related to the recovery of e-mails from the backup tapes. The documents, with a few prominent exceptions discussed in the text below, are largely irrelevant and the witnesses knew little about them. Morgan Stanley also produced a privilege log indicating that Morgan Stanley has withheld documents on privilege grounds that do not pass the straight-face test. For example, numerous reports generated by a non-attorney third-party vendor have been withheld on the ground that they are protected by the attorney-client privilege. *See* Ex. E. Other examples abound, but for present purposes, the reports described reveal the inherently suspect nature of Morgan Stanley's privilege log and the need for this Court to engage in a critical examination of Morgan Stanley's assertions of privilege. That need is all the more essential here because, all told, Morgan Stanley has claimed to have found this month 68 e-mails responsive to CPH's original requests — but has withheld all but 15 of those e-mails on privilege grounds. Thus, CPH requests that the Court review Morgan Stanley's withheld documents *in camera* to evaluate Morgan Stanley's claims of privilege.

The E-mail Archive Group aware of this discovery included a large number of Morgan Stanley employees. In addition to Riel, the group included Wray Stewart, John Pamula, Don Haight, Kay Gunn, among others. *See* Ex. F. Saunders Dep. (2/10/05) at 14. The group met on a weekly basis and minutes were circulated to the entire group. Each set of minutes, beginning with May 6, lists as a pending item, the processing of what came to be known as the "Brooklyn found" tapes. *See, e.g.*, Ex. I (Minutes of May 20, 2004 Meeting, MS 0112291).

Therefore, at the time that it certified full compliance with the Court-ordered production, it is undisputed that Morgan Stanley knew that additional backup tapes existed that had not been reviewed. And just a few days after the certification, Morgan Stanley was unequivocally informed not only that the tapes contained e-mails, but that the e-mails dated back to time periods critical to this lawsuit. In direct contrast to counsel's representation at the February 2, 2005 hearing that "late October of 2004 . . . [is] the date I'm representing to the Court is the first time anybody knew that there was recoverable e-mail data" on the tapes (Ex. D, 2/2/05 Tr. 133-34, emphasis added), on July 2, 2004, just nine days after Riel executed his certification of compliance, Riel received an e-mail (copied to several other Morgan Stanley employees) marked "high importance" from NDCI (Morgan Stanley's third-party vendor), informing Morgan Stanley that the tapes contained recoverable e-mail data:

> Hey Arthur
>
> We looked at the "found" tapes we were able to restore and 90 of them had mail. We got the label (internal) off 4 of them and the dates are 5/12/99, 5/14/99, 8/03/99, and 2/18/01. Obviously there is pre 2000 mail.
>
> We also catalogued 2 of the 8mm test tapes we have and the dates on those are 6/16/98 and 6/7/98 so again there is pre 2000 mail there.

If you need any more info please let me know.

Have a nice holiday weekend!

Bruce [Buchanan, NDCI]

See Ex. J (7/2/04 E-mail from Bruce Buchanan, NDCI, to Arthur Riel et al., Morgan Stanley, at MS 0112327) (emphasis added). Despite hearing that the "Brooklyn found" tapes — which are discussed in the first paragraph of the NDCI e-mail — contained responsive e-mails, Morgan Stanley did not correct Reil's June 23 certification or inform either the Court or CPH of the known falsity of its certification.

B. Source Of Missing E-Mails No. 2: The 738 8mm Tapes Found In 2002.

But Morgan Stanley knew even more when it falsely certified that it had made full production. CPH was unaware until the discovery it was allowed to take this week that Morgan Stanley had located — in 2002 — 738 8mm backup tapes in a filing cabinet in Manhattan. *See* Ex. K, Seickel Dep. at 74. Those tapes are the 8mm tapes discussed in the second paragraph of NDCI's July 2, 2004 e-mail to Morgan Stanley — which disclosed that these 8mm tapes had e-mail backup from June 7 and June 16, 1998. *See* Ex. J.

Morgan Stanley thus knew on July 2, 2004 that it had backup tapes containing e-mails from early- to mid-June 1998 — the time frame in which *Barron's* published a scathing article charging that Sunbeam's books had been fraudulently manipulated and Sunbeam fired Al Dunlap. Despite that knowledge, Morgan Stanley took no steps to correct the grossly erroneous certification Riel had signed nine days earlier.

C. Source Of Missing E-Mails No. 3: The 169 Additional DLT Tapes.

Discovery into the e-mail issue has revealed a third previously undisclosed source of e-mails: At this week's discovery, CPH learned that Morgan Stanley found another 169 DLT tapes

in January 2005. Morgan Stanley's only explanation for its late discovery of these tapes is testimony that they had been misplaced by an off-site storage vendor. *See* Ex. F, Saunders Dep. (2/10/05) at 39-40.

IV. Morgan Stanley Delays Disclosing The "New" Sources Of E-Mails To CPH And Is Lackadaisical In Its Efforts To Extract E-Mails From Them.

Morgan Stanley's efforts to produce e-mails from these multiple sources have been contemptuously meager. Here is what this week's discovery has revealed:

Morgan Stanley knew about most of the 2,200 unsearched backup tapes (the 1,423 Brooklyn found tapes and the 738 8mm tapes) by May 6, 2004, and knew that they contained e-mails by July 2, 2004. But no one ever made the processing of those tapes a priority.

Even if they had not been a priority, CPH understands from a third-party vendor whose testimony will be available at the hearing of the e-mail motion that it should have taken no more than 90 days to process, restore, search, and produce relevant e-mails from these 2,200 tapes. But that process was not completed in 90 days. It was only completed today (at least so we are told) — 280 days later, more than seven months late, 80 days after the close of fact discovery, and only week before trial.

When Morgan Stanley terminated Riel for incompetence and dishonesty, it did nothing to infuse his successor, Allison Gorman Nachtigal, with any sense of urgency. Gorman did not undertake to process the 1,423 DLT tapes when she arrived on the job in August 2004 because Morgan Stanley supposedly "had a lot of more critical and time sensitive issues that needed to be handled." *See* Ex. B, Gorman Dep. at 51-53. Instead, even though the tapes were available for processing, Gorman focused on processing current e-mails for a routine internal archive. *Id.* It was not until sometime in October 2004 that lawyers, including lawyers from Kirkland & Ellis, instructed Gorman to make the 1,423 tapes a "priority." *See id.* at 68-69.

Making the long-overdue production of e-mails a "priority," however, did not result in Morgan Stanley finally taking reasonable steps to produce e-mails from the tapes expeditiously. Morgan Stanley could have sent the tapes to an outside vendor for the entire job, not just for the first stage of processing that Riel used NDCI for back in June and July. The vendor could have uploaded the tapes onto a simple database and searched for responsive e-mails within a few months. *See* Ex. F, Saunders Dep. (2/10/05) at 77-79 (confirming NDCI's ability to pull e-mails off a magnetic backup tape and return it in a searchable format). But Morgan Stanley did not do that. Morgan Stanley instead asked NDCI to identify which tapes contained any e-mails, so that Morgan Stanley could integrate the e-mails into Morgan Stanley's archive database. *See* Ex. B, Gorman Dep. at 50-51, 91 (explaining that she was given only the tapes that NDCI identified as having e-mails). Morgan Stanley then ordered Gorman to upload the tapes onto Morgan Stanley's own internal archive. *See id.* at 77.

This decision slowed the processing immensely. Integrating the recovered data into Morgan Stanley's all-purpose archive was much more complex than uploading the data into a simple database created solely for the purpose of searching the "found" tapes. According to Gorman, the internal archive required new hardware, which took several weeks to obtain. *See id.* at 54. Once the hardware was installed, it took until mid-January to debug the software, and only then could the actual processing commence. *See id.* at 70-71. The search process proceeded very slowly because, instead of searching just the missing e-mails for responsive material, the entire Morgan Stanley database had to be canvassed and then compared with what was already produced. *See id.* at 74-76.

V. Without Disclosing Its Intentions During Two Full Days of Depositions On February 9 And 10, 2005, At 2:38 a.m. On February 11, Morgan Stanley Sends A Fax Purporting To Attach The Three-Page "Final" Production Of E-Mails, In A Transparent Attempt To Moot The Hearing Set By This Court.

After refusing to provide this Court with definitive answers at the February 2 hearing as to when its e-mail production would be complete, and after requiring CPH to expend precious pretrial preparation time in preparing for and taking two days of e-mail-related depositions on February 9 and 10, 2005, Morgan Stanley attempted to bring this matter to a surprise ending early this morning. Specifically, at 2:38 a.m. today (Friday, February 11), Morgan Stanley faxed CPH a letter purporting to attach "the final installment of Morgan Stanley's supplemental production of e-mail messages." *See* Ex. C. Attached to the fax were a grand total of three pages of e-mails that — no surprise here — are utterly meaningless. The fax also attached a supplemental privilege log listing several intriguing documents withheld on attorney-client privilege grounds — including a June 22, 1998 e-mail from William Strong to in-house counsel "seeking legal advice regarding Sunbeam press coverage." *See id.* Even without knowing the contents of the communication, knowledge that Strong was sufficiently concerned about Sunbeam press coverage in June 1998 to be seeking legal advice, is knowledge that would have produced significant further inquiry during Strong's deposition if CPH has been properly informed.

Morgan Stanley — following months of using, in the words of its counsel at the February 2 hearing, "all deliberate speed" (Ex. D, 2/2/05 Tr. 139) — thus has attempted to moot the e-mail controversy. But Morgan Stanley should not be let off the hook so easily. CPH has been prejudiced severely by Morgan Stanley's tactics, spending countless hours for months and also this week in attempting to secure Morgan Stanley's compliance with the April 16, 2004 Agreed Order. CPH further has been prejudiced because, had CPH received a complete e-mail

production in a timely fashion along with the privilege log, CPH would have undertaken new areas of deposition questioning with Morgan Stanley witnesses, and would have had time to test Morgan Stanley's assertions of privilege in a meaningful way.

A key example appears in Morgan Stanley's 2:38 a.m. February 11 fax. Regardless of whether the June 22, 1998 e-mail from William Strong concerning the Sunbeam press coverage is privileged, CPH most certainly would have examined Strong about his obvious interest and concern in the press coverage in that time period. Thus, notwithstanding Morgan Stanley's effort to moot the e-mail issue at the last minute, this issue is by no means resolved.

Appropriate Relief

In sum, CPH has now learned from the e-mail discovery ordered by the Court that:

- Morgan Stanley knew of sources of undisclosed e-mails before the May 14, 2004 compliance date set forth in the Agreed Order, and indeed, knew about at least one of these sources in 2002.
- Arthur Riel, who certified on June 23, 2004 that Morgan Stanley's e-mail production was complete, knew of the existence of sources of e-mails when he signed the false certification.
- Riel and other members of the Morgan Stanley E-Mail Archive Group knew on July 2, 2004 that two of the previously unsearched sources had responsive e-mails but Morgan Stanley never informed CPH or provided a corrected certificate of compliance.
- Morgan Stanley's efforts to restore responsive e-mails from the unsearched sources has been shown to be demonstrably inadequate.
- Morgan Stanley has exhibited a complete lack of candor, both to this Court and CPH, in disclosing the unsearched sources of e-mails and its efforts to comply with the Agreed Order.
- Morgan Stanley's bad faith is illustrated by its attempt to moot the e-mail controversy by the fax it sent at 2:38 a.m. on February 11 — after being coy with the Court on February 2 and after sitting mute in depositions with CPH's counsel on February 9 and 10.

Morgan Stanley's conduct, in short, shows that Morgan Stanley has been in unrepentant violation of the Agreed Order from the time of its entry. February 14, 2005, the date of the e-

mail hearing, is three days short of nine months after Morgan Stanley's purportedly "final" e-mail production was due under the Agreed Order. Given Morgan Stanley's complete failure to comply with this Court's Agreed Order, and Morgan Stanley's false certificate of compliance, this Court should award the following sanctions:

CPH should be allowed to argue an adverse inference to the jury based on Morgan Stanley's e-mail destruction. It is clear, based on the history of the e-mail episode, that Morgan Stanley has destroyed a vast number of potentially relevant e-mails. In these circumstances, in the interest of justice, CPH must be allowed to argue to the jury that an adverse inference should be drawn from the missing e-mails. *See Martino v. Wal-Mart Stores, Inc.*, 835 So. 2d 1251, 1257 (Fla. 4th DCA 2003) (concluding that adverse-inference argument should be permitted "where potentially self-damaging evidence is in the possession of a party and that party either loses or destroys the evidence"); *see also Palmas y Bambu, S.A. v. E.I. DuPont de Nemours & Co.*, 881 So. 2d 565, 581-83 (Fla. 3d DCA 2004) (allowing counsel to argue that the jury should draw an adverse inference from the defendant's destruction of evidence); *Jordan* ex rel. *Shealey v. Masters*, 821 So. 2d 342, 346-48 (Fla. 4th DCA 2002) ("Lawyers are entitled to argue adverse inferences from the evidence as part of their closing arguments.").

CPH should be allowed to present evidence of Morgan Stanley's discovery misconduct on the issue of punitive damages. The e-mail episode is yet another instance — and an especially glaring one at that — in which Morgan Stanley has delayed, obstructed, and interfered with CPH's efforts to obtain indisputably relevant discovery. Florida law is clear that the suppression of evidence and discovery misconduct such as that at issue here are admissible on the issue of punitive damages. See, *e.g.*, *General Motors Corp. v. McGee*, 837 So. 2d 1010, 1035-36 (Fla. 4th DCA 2002).

CPH is entitled to compensation for Morgan Stanley's misconduct. Because Morgan Stanley has failed to obey the Agreed Order, in addition to the above sanctions, CPH also should be awarded fair compensation for all e-mail-related motion practice and hearings. *See* Fla. R. Civ. P. 1.380(b)(2) (in addition to, or in lieu of, other sanctions the court "shall require the party failing to obey the order to pay the reasonable expenses caused by the failure, which may include attorneys' fees, unless the court finds that the failure was justified or that other circumstances make an award of expenses unjust").

Conclusion

For the foregoing reasons, and for those stated in CPH's initial e-mail motion, this Court should sanction Morgan Stanley for its violations of the April 16, 2004 Agreed Order and the filing of a false certificate of compliance in the following ways: (1) CPH should be allowed to argue to the jury that an adverse inference can be drawn from Morgan Stanley's destruction of virtually all responsive e-mails from the relevant time period; (2) CPH should be allowed to present evidence concerning Morgan Stanley's discovery misconduct on the issue of punitive damages; (3) CPH should be awarded its attorneys' fees and costs incurred in connection with all

e-mail-related motions and proceedings; and (4) this Court should review *in camera* the e-mails withheld from Morgan Stanley's recent productions on privilege grounds.

Dated: February 11, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and hand delivery to all counsel on the attached list on this 11th day of Feb., 2005.

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CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

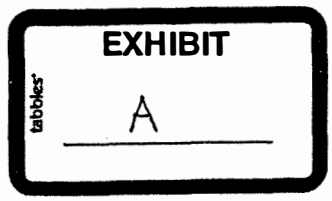
VS.

MORGAN STANLEY & CO., INC.,

Defendant.

DEPOSITION OF ROBERT J. SAUNDERS
New York, New York
Tuesday, February 10, 2004

Reported by:
Robert X. Shaw, CSR
CSR NO. 817
JOB NO. 157127



Saunders

Speculation.

A. Other colleagues from that time could potentially, may have some idea; but, as I stated before, you know -- tracking of volume at that point was not a significant challenge, nor a part of our Charter.

Q. Backup at that time, as I understand it, was -- let's be specific here: Backup in 1997 included both e-mail and other electronic data?

A. For disaster recovery purposes, yes.

Q. At that time, was backup done for any purpose other than disaster recovery?

MS. BROWN: Objection. Foundation.

A. To my knowledge, backup was done primarily for disaster recovery at that time.

THE WITNESS: Could I take a break in ten minutes?

MS. BROWN: All right. Do you want to do it now?

THE WITNESS: No.

Q. Have you ever seen a quantification of the percentage of the backup at that time that was comprised of e-mail?

Saunders

A. Specifically the '97, '98 time frame?

Q. Correct.

A. I have not seen any such facts or figures.

Q. Is it fair to say, then, that you have no idea of the volume of e-mail at Morgan Stanley in 1997?

MS BROWN: Objection. Mischaracterization.

A. I think, as my previous testimony has indicated, it is less than it is now.

You know, on record is the 6,000,000 e-mails per week in the '99 time frame. You know, I can't specifically state to '97, because I don't wish to lie; I don't wish to say facts that I am not aware of and that I can't commit to.

Q. All right.

You testified to this, I believe: Morgan Stanley was using e-mail prior to the time that you were hired with the company?

A. Yes. The e-mail systems did exist prior to my joining the firm.

Saunders

Q. All right.

MR. JOHNSON: Do you want to take a break? We are moving to a new topic.

MS. BROWN: All right.

Off the record.

(Recess.)

Q. Back on the record.

Going book to the '97, '98 time frame, can you tell me what system or systems Morgan Stanley used to back up its data?

A. I am trained and, you know, responsible for the distributing systems area, and I can speak to that area and to some history. The mainframe area I am not responsible for and I cannot speak to.

Q. All right. Are you familiar with the Legato system?

A. I am.

Q. What can you tell me about that system?

A. Legato Networker, and the product is called Networker, was an Enterprise backup system in the late '90s, specifically for the UNIX platform.

Saunders

Q. And Morgan Stanley used that system?

A. Yes.

Q. To be clear, the Legato Networker system for backup.

Do you have any idea of what system or systems Morgan Stanley used in the late '90s for mainframe backup?

A. I am not specifically aware, as I indicated in my previous answer.

Q. I believe you testified that in mid-1997 e-mail existed on mainframe, rather than on distributed network?

A. I believe my testimony was that the majority of e-mail was on the mainframe system, the EMC and APL systems, but a chunk of folks were on distributed e-mail platforms, UNIX and CC mail at that time, as well.

Q. Can you describe to the extent possible, in lay terms, how the Legato backup would function?

A. The Legato Networker is a product to back up data on individual UNIX servers. Legato is composed of a master database server, and media servers which had actual

Saunders

A. All right.
Q. The first sentence indicates: "Before January, 2001, Morgan Stanley's compliance personnel believed that e-mail backups were being retained for three years or longer and did not know of this recycling practice." What was the basis for compliance personnel's belief?
MS. BROWN: Objection. Foundation. Outside of the scope.
A. I am afraid I can't speculate to what compliance was speaking about or what their knowledge was at that time.
Q. Are you aware of any communication between compliance and IT, prior to January, 2001, relating to the length of time that e-mail backup would be retained?
MS. BROWN: Same objections.
A. I am not specifically aware of any such conversations.
Q. Do you have any general knowledge of any of those conversations?
A. I think I have already answered that question. I am not specifically aware of any

Saunders

conversations happening.
Q. I am asking, generally, putting aside date and time and participants, are you aware, as a general matter, of any conversations between IT and compliance relating to the length of time that e-mail backup should be retained?
A. The scope of my responsibility at the time did not include such conversations and I don't have any general knowledge either.
Q. Okay.
To your knowledge, did anyone in compliance ever, prior to January of 2001, verify that e-mail was being retained for any certain period of time?
MS. BROWN: Objection. Outside of the scope.
A. Again, I can't speak to what compliance did or did not do in that time frame.
Q. Prior to January of 2001, are you aware of anyone in compliance or legal asking for IT to provide any e-mail backup for any time period?

Saunders

MS. BROWN: Same objection.
A. Can you restate the time frame?
Q. Sure. The question is whether, prior to January of 2001, anyone in legal or compliance sought IT's assistance in obtaining backup e-mail.
A. In that time frame I have no knowledge whether or not such requests did or did not occur.
Q. Would you look at page 15, the same paragraph which is the carryover paragraph, and specifically the last sentence of that paragraph.
A. All right.
Q. It indicates that Morgan Stanley had never been called upon, prior to the Commission investigation, to restore so many e-mails from so long ago for backup.
Can you identify any instance, prior to the Commission investigation, in which Morgan Stanley attempted to restore any e-mail from backup in connection with any litigation?
MS. BROWN: Objection. Outside of the scope.

Saunders

A. I am not specifically aware of any restore requests prior to that time frame.
Q. I believe you testified, at the start of this morning, that you looked at Morgan Stanley's Code of Conduct.
Let me see if I have that, if I have the right copy of that.
I am giving the witness a document previously marked as Plaintiff's Exhibit 3, bearing the stamp Morgan Stanley confidential 80435 through 437.
Mr. Saunders, is this an excerpt of the document that you reviewed?
A. Yes.
Q. When did you first see this document?
MS. BROWN: Without the exhibit sticker?
Q. Fair enough.
When did you first see Morgan Stanley's Code of Conduct 2001?
A. I believe that I saw it in 2001.
Q. Okay. When it was promulgated?
A. Yes. I assume that means sent out?

IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA
CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

DEPOSITION OF ALLISON GORMAN NACHTIGAL

Taken before Tracey L. Spatara, Registered Professional Reporter, Notary Public in and for the State of Florida at Large, pursuant to Notice of Taking Deposition filed by the Plaintiff in the above cause.

Wednesday, February 9, 2004
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida
3:10 p.m. to 5:30 p.m.

APPEARANCES:

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EXHIBIT
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DIRECT EXAMINATION 4
BY MR. BYMAN:

EXHIBITS

	PAGE
Plaintiff's Exhibit 420	21
Plaintiff's Exhibit 421	23
Plaintiff's Exhibit 422	23
Plaintiff's Exhibit 423	24
Plaintiff's Exhibit 424	24
Plaintiff's Exhibit 425	60
Plaintiff's Exhibit 426	89

00004

P R O C E E D I N G S

- - -

THEREUPON,

ALLISON GORMAN NACHTIGAL

being by the undersigned Notary Public first duly sworn, testified as follows:

THE WITNESS: I do.

DIRECT EXAMINATION

BY MR. BYMAN:

Q. The record should reflect that this is the deposition of Allison Gorman Nachtigal taken pursuant to the order of court dated February 3rd, 2005 and the designation pursuant to that order of Ms. Gorman Nachtigal as one of three witnesses.

Before we started the deposition, you gave me permission to call you Ms. Gorman, is that all right?

A. Yes.

Q. And I appreciate that, because I'm not very good at five syllable names?

A. Me neither.

Q. Would you state your full name for the record, please?

A. Allison Gorman Nachtigal.

Q. Where do you reside?

00005

A. Mamaroneck, New York.

Q. I apologize for asking, but how old are you?

A. 36.

Q. What's your educational background?

A. I went through and got a BA in computer science at Hamilton College.

Q. In what year?

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A. I graduated in 1990.
Q. Since 1990 how have you been employed?
A. I worked for Morgan Stanley from August of 1990 through August of -- no, I'm sorry. Back up. July of 1996 I left for a year. I worked at Smith Barney. And I returned to Morgan Stanley in August of 1997. I've been there since.
Q. When you were at Morgan Stanley for your first tour of duty, what jobs did you hold?
A. I joined as a trainee. I was a floor support person. I went into a rotation in our data center where I did development and a combination of that and shift work. We operated the main frame systems.

When I came off that rotation, I continued to do development, management for the back-end systems on the main frame.

From there I started to manage a help desk

00006

part-time and that subsequently became my full-time job. And I did a help desk consolidation. That was my last role before going to Smith Barney.
Q. What did you do at Smith Barney?
A. I was brought over to do a help desk consolidation. Shifted gears about three times there managing a number of different help desk service-based areas. And left.
Q. And when you came back to Morgan Stanley in 1997 did you have a title?
A. No, I came in as an associate and my job description was integration engineering.
Q. Did there come a time when you did get a title?
A. Yes, I was promoted to VP in 1999. No, I'm sorry, 1998. And I made ED in 2000.
Q. ED being executive director?
A. Executive director.
Q. As VP what were your duties?
A. When, I came back and I was doing integration engineering, that job essentially developed over the next few years. And so I moved into being responsible for the infrastructure that interconnected Morgan Stanley, the merger that we had done with Dean Witter and Discover. So there was infrastructure we

00007

put in place to connect those. And I was responsible for that.

I took on a service-based role and sort of tacked that on to my responsibilities. That included providing frontline based services for our -- what we consider our company functions like HR and legal.

I shed that piece of the role, but kept the cost company integration role and moved over into the group that I'm a part of now, Enterprise and Client Technologies, at the end of 2000, which was when I got the second promotion.
Q. And that was the promotion to executive director?
A. Yes.
Q. Have you had any promotions or changes in job responsibilities since the year 2000?
A. Yes.
Q. Would you tell me what those are?

A. I took on product management for a number of intercompany based products that ECT, which is Enterprise and Client Technologies, I was responsible for including the Internet, the firm-wide directory services. I took on a development team for our e-based learning training team. I took on responsibility for the on-demand product that we have for IBM, which is used for records retention.

I took on some risk management based sort of responsibilities across ECT as well, which I still carry. I got out of a few of those, not all, and took on the e-mail archive responsibilities in August of this year. That pretty much brings you to current.

Q. Who had been in charge of e-mail archive responsibilities prior to your doing it in August of 2004?

A. Arthur Reil.

Q. Is Mr. Reil still with Morgan Stanley?

A. He is on leave from Morgan Stanley.

Q. Do you know where he's located?

A. No.

Q. Do you know if he's still on Morgan Stanley's payroll?

A. I know he was for some time. I don't know currently if he is.

Q. To your knowledge or understanding did he go on leave in August of 2004 or at some other time?

A. He went on leave the same day I took over.

Q. And I really don't mean to pry into his personal affairs, but do you know if there was a medical reason for that or a --

A. He was placed on administrative leave by the firm.

Q. Do you know what the reason for that was?

A. I don't know the specifics.

Q. Was it a disciplinary action?

A. I think there were general concerns about his work.

Q. Were there general concerns about his work on the e-mail archive project?

A. Yes.

Q. And what was the nature of those concerns?

A. I don't know the details.

Q. What did you do to get up to speed in order to perform your duties with respect to the e-mail archive project?

A. We gathered together all of the people who were familiar with the system and had, essentially, a turn over meeting with myself and a couple people that I had collected within the day or so it took us to put the meeting together.

They started to train us as best they could on how the system operated. And shortly following that, over the next two weeks, we conducted interviews with Arthur and two people -- actually, two people on his team and then later in September we conducted an interview with somebody in the offshore development team that had previously supported the product.

Q. Let me back up a bit. Is there something called the e-mail archive project? Is there some

official name we should call it?
A. The e-mail archive system, yeah.
Q. Had you had any exposure or knowledge of that system prior to August of 2004?
A. Peripherally.
Q. You just knew that it existed?
A. I knew it existed. Arthur -- and I knew Arthur and I supported him in other capacities, not directly in that one, but we talked.
Q. Prior to him being placed on administrative leave was he in a co-equal position to you or superior position or inferior position?
A. We were in different organizations, but roughly equal in terms of level.
Q. And when you were -- and I don't know if you were offered this job or were assigned to it. I guess I should figure that out first.
Was this something you were told to do or was it something that was an opportunity?
A. It was something I was asked to do.
Q. Did you view it as an opportunity?
A. Yes, on some level.

00011

Q. Who was it that gave you this opportunity or asked you to do it?
A. My manager.
Q. And who is that?
A. Jonathan Saxe, S-A-X-E.
Q. And had he also been Mr. Reil's manager?
A. No.
Q. Do you know who Mr. Reil's manager was?
A. Yes, Moyra Kilcoyne, K-I-L-C-O-Y-N-E.
Q. I take it from the fact that you were offered this job by a different manager that the project moved from one manager to another?
A. Yes, there was a decision --
Q. How did that happen?
A. Arthur was a part of an organization called company IT. It's an application development team that is responsible for all of the systems that legal, HR and all these company-based functions run.
When they -- there had actually been prior discussions about this, but when he was asked to leave, they decided to move ahead with the change that had already been under discussion, which was to move it over to ECT. We have responsibility for e-mail, web, which is one of the other content types we're interested in. All the messaging type, instant

00012

messenger, faxing. So, essentially, Arthur archived what ECT was generating. So since we generated it, we would be better at archiving it. Therefore, the decision between Moyra and John to move it over between the organizations.
Q. And when Mr. Saxe asked you to take on this responsibility what did he tell you your job was going to be?
A. He told me I was going to be responsible for the applications, development of the e-mail archive and actually the supervisory system, which is closely linked to that.
Q. Did he tell you that there was some problem with the project up until that date that precipitated

your taking it over?
A. He told me that the team that supported the system was put on leave. I knew the people were going. I didn't know anything about the system.
Q. Well, in order to fix whatever it was that put those people on leave, you had to know what the problem was, didn't you?
A. I didn't assume there was any problem with the system. It was a problem with the people.
Q. All right. But there was some problem somewhere that required a change in personnel. Did you

00013

ever identify what the problem was?
MR. JONES: Object to the form of the question, asked and answered.
You can answer.
THE WITNESS: It came out over the course of discussions that they were concerned with Arthur and his team. They thought he was reading people's e-mail. They didn't trust the offshore that he had commissioned to do the work. And so they let them go.
BY MR. BYMAN:
Q. So this was an integrity issue as opposed to a performance issue?
A. It was an integrity issue.
Q. When you took over in August of 2004, what did you do to get up to speed other than what you've just told me?
A. One of the people -- we took two people from the e-mail engineering team, which is essentially part of ECT, and we put them on the team. Because they had the most knowledge of the system since they had worked closely with Arthur's team in order to feed him the content. And from there we essentially dug into the code.
Q. Did you retain anybody who had been on

00014

Arthur's team?
A. I did not.
Q. I mean, did you keep on your team people that had been on his team?
A. No.
Q. So there was a complete turnover in personnel?
A. There was one person who stayed, but that person did not come to me.
Q. Who was that person?
A. Boy, I can't spell her name. It's D-A-N-I-L-Y-A-N, I believe. She went to work for the IT security team. They took over operating the inquiry tool.
Q. What was the purpose of the e-mail archive project, what was it supposed to do?
A. We built a system to meet the regulations from the various regulatory bodies to retain all of our e-mail on worm compliance storage, meet all the third-party supervisor requirements and make it possible to make inquiries into e-mail as required by the SEC, HR.
Q. Did you have any knowledge about any SEC requirements that you were supposed to meet? What did you do to find out what requirements you were meeting?

00015
A. I read the 17A4 regulation, which the system was built to meet, so that I would be educated from that perspective.
I met with my key user in compliance.
Q. Who is that?
A. Scott Rockoff, to get an understanding of the system.
Q. Were you aware that there had been an SEC fine imposed against Morgan Stanley with respect to its past e-mail practices?
A. At that time, no.
Q. You later learned that?
A. I learned that later.
Q. Were you aware that the e-mail archive project grew out of reacting to that fine?
A. NO.
Q. Did you have any understanding as to what it grew out of other than to comply with the law?
A. Yeah, just to comply with the law. Everybody on the street was building an e-mail archive. I didn't scratch my head too much.
Q. The idea then was to archive e-mails on an ongoing basis?
A. Yes. The focus of the live system is to pick messages out of the infrastructure as they flow

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through and archive them.
Q. And keep them in a searchable format for three years?
A. Yes.
Q. Was part of the project, what, to reconstruct and archive past e-mails?
A. Yes.
Q. How far back?
A. Not reconstruct, but...
Q. Was there any reconstruction involved? Recovery? I'm not going to speak the same language that you do, Ms. Gorman. I apologize.
A. Reconstruction is a little different.
Yes, recover. Migrate, as we say.
Yes, there was a tape restoration process underway.
Q. And what was the goal of that process? How far back were you trying to go?
A. I don't know if there was a date. I believe we were basically migrating all the tapes that were available. I never heard it associated with a date.
Q. So anything you could find?
A. So anything we could find we were putting in.
Q. What did you do to cast your net to make

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sure you found as much as possible?
MR. JONES: Object to the form.
THE WITNESS: That's not my area to cover.
BY MR. BYMAN:
Q. Whose area is that?
A. Bob Saunders, the enterprise competing group.
Q. Does he report to you on the e-mail archive system?
A. No.

Q. Do you know who he does report to?
A. Jerry DeMarco.
Q. Who is Mr. DeMarco?
A. Jerry DeMarco runs a group that we call enterprise computer, which is -- actually he probably runs a subset of that, responsible for the UNIX and Windows-based server infrastructure, and desktop infrastructure.
Q. Do you still report to Mr. Saxe?
A. Yes.
Q. Do you know who he reports to?
A. He has a dual report to Richard Anfang and Guy Chiarello.
Q. And who were they?
A. Richard Anfang runs an organization called

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EI and guy is the CIO.
Q. Chief institutional officer?
A. Yes.
Q. Do you know who Mr. DeMarco reports to?
A. Jerry reports to Jeff Birnbaum.
Q. And who is he?
A. He oversees both enterprise computing and a group we call enterprise application infrastructure.
Q. This may be above your pay grade, but is there a point at which --
A. All this comes together?
Q. Yes.
A. Richard. So John and Jeff both report directly to Richard.
Q. Richard Anfang?
A. Yes.
Q. Let me back up a little bit about your preparation today and your reason for being here today. Did you do anything to prepare for your deposition today?
A. I met with the lawyers.
Q. When did you meet with them?
A. Last night and today on the plane.
Q. And I don't want to know what you said, but I would like to know how long you talked, how much time

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did you spend in preparation?
A. Last night we spoke just a little over an hour.
Q. And your plane ride couldn't have been more than --
A. The plane ride I think we talked for about two hours maybe.
Q. Other than last night and today on the plane, have you had any other contact with the lawyers with respect to e-mail issues? And, again, I don't want the substance, I just want to know if you've had contact?
A. I need you to be a little more specific. I talk to lawyers about e-mail every day.
Q. Let me be more specific. In front of us is a stack of documents that were provided to us yesterday. Again, the court order, which you may or may not be aware of, but let me represent to you that there was a court order that directed Morgan Stanley to advise us of the identity of witnesses who would testify at a hearing on Monday. You are one of three

persons who has been identified to us. And it also directed Morgan Stanley to produce any document that might be used in connection with the testimony of those three witnesses.

I have the entire stack in front of you. My first question is: Did you help prepare any of those documents to your knowledge?

A. I produced --

MR. JONES: Hold on. You ought to look to see what the documents are.

THE WITNESS: That's a good point.

MR. BYMAN: Please feel free.

BY MR. BYMAN:

Q. And what I'd like you to do, Ms. Gorman, if you could, is let's keep them in numerical order and go through them and tell me if any of the documents as you go through them are documents that you provided to counsel so that they could be provided to us.

A. I'm assuming these are bundled in some way.

Q. I think that's the way they were produced to us.

A. No, this isn't any of the stuff I gave them.

MR. JONES: Why don't you look through it again, because there should be -- I wasn't in charge of production, so I can't...

I don't know if you guys brought everything.

MR. BYMAN: It could be that she's looking for the supplemental things.

BY MR. BYMAN:

Q. Ms. Gorman, I didn't mean to mislead you. That was the initial thing we got at noon yesterday. Then we got a small supplemental package later. And I'm going to show you this. Does this look familiar?

A. That one looks familiar.

Q. Let me separately do those, but why don't you go through that stack and see if there's anything.

A. I didn't produce anything that was a printed e-mail or report like this.

Q. So nothing in that stack --

A. No, nothing in that stack.

Q. And for the record, the stack is Morgan Stanley confidential 0112286 through 113899.

Nothing in that stack is something that looks familiar to you?

A. No.

(Plaintiff's Exhibit 420 was marked for identification.)

BY MR. BYMAN:

Q. And now let me mark a series of documents.

I'm going to show you first what I'll mark as CPH 420, document 113912 through 918. Is that one of the documents that you provided for production to us?

A. Yes.

Q. And why did you produce that document?

A. Legal asked me to produce documents that referred to the project and the taper store piece.

Q. I'm sorry, I'm having trouble hearing you.

A. All the documents that related to the e-mail archive.

Q. All of the documents?
MR. JONES: Well, you're not going to get into a conversation about the lawyers. You asked her why did she produce it and you know as an order we asked her to gather documents. And this is what we provided to you.
BY MR. BYMAN:
Q. Let's talk about what you have.
And we can tell now, and I'll mark the rest of these, but we're talking about a fairly thin stack of documents?
A. Yes.
Q. Am I correct in understanding that you have not worked for the last nearly seven months, five months, since August 2004 and generated only about 100 pieces of paper?
In other words, the documentary record of your efforts on the e-mail project would consume, I presume, thousands of pieces of paper?

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A. No, I produce monthly status reports. I've done -- which actually we skipped December, so it would be one less. I produced two interim reports. I produced on -- and a working project list, which I've tried to keep consolidated, so it's one document that I update on a regular basis.
Q. But I take it you did not produce all of those to counsel for production to us?
A. I produced a lot of -- yeah. Did I? I pretty much produced all my notes and all my status reports and the project list.
Q. All right. Then let me mark next as Exhibit 421 a document with production numbers 113900 through -- well, it's cut off, but there's a page 910 and the next one doesn't have the number on it, so I presume it's 911.
(Plaintiff's Exhibit 421 was marked for identification.)
BY MR. BYMAN:
Q. Is that one of the documents that you produced?
A. Yes.
(Plaintiff's Exhibit 422 was marked for identification.)
BY MR. BYMAN:

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Q. Then as Exhibit 422, a two-page document with numbers 113919 and 920.
A. Yes.
Q. Is that a document that you produced?
A. Yes.
Q. Next as Exhibit 423, document with production numbers 921 through 923.
(Plaintiff's Exhibit 423 was marked for identification.)
BY MR. BYMAN:
Q. Is that a document that you produced?
A. Yes.
Q. And the last one I have is 924 through 926, which I'll mark as Exhibit 424.
(Plaintiff's Exhibit 424 was marked for identification.)
BY MR. BYMAN:

Q. Is that a document you produced?
A. Yes.
Q. Ms. Gorman, I'll represent to you that with those five exhibits that we've just marked I've now given you everything that was produced to us yesterday pursuant to the court order.
Is the stack of things that are now in front of you, Exhibits 420 through 424, the universe of what

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you gave to counsel, or did you give them a greater quantity of documents?
A. I gave them a greater quantity of documents.
Q. Again, I don't want to know what's in that -- actually I do want to know what's in it, but he's not going to let me find out. But I'd like to know the bulk difference. How big was the set you gave them versus the set they gave us?
A. I'd say roughly double.
MR. BYMAN: Mike, I'm inclined to ask her what was in the other documents, but can I correctly presume you won't let her tell me?
MR. JONES: That's right. Any documents that she provided to us that we did not provide were held on the grounds of privilege.
MR. BYMAN: We can expect a privilege log in due course?
MR. JONES: Actually, you may already have one.
MR. BYMAN: We didn't have it at the time we left for this deposition.
MR. JONES: There will be a privilege log.
MR. BYMAN: On that representation, I will not inquire now, but obviously we reserve the right, if it's appropriate, to go further into

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that.
BY MR. BYMAN:
Q. Let me go back, Ms. Gorman, to what you've done that got you here today.
In addition to what you did to prepare for the deposition, have you had any conversations relating to the migration of e-mails or the restoration of e-mails with Mr. Saunders?
A. Yes.
Q. How many conversations have you had with him on those subjects?
MR. JONES: Object to the question as vague. Time period.
BY MR. BYMAN:
Q. Well, is he somebody that you talk to frequently?
A. I talk to Bob frequently about many things. He provides infrastructure to us, so to quantify that in abstract.
Q. Well, did you talk to him about the subject of this upcoming hearing or your depositions?
A. We discussed the fact that we were both -- we didn't even talk verbally. I knew he was going. We didn't discuss anything, other than we'd both be down here.

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Q. How often do you interface with Mr. Saunders?

A. Sometimes once a week, sometimes not for two weeks. It depends on the time of month. Again, he provides us infrastructure. If I'm waiting for something, I might talk to him every day.
Q. You and he are officed in the same building in Manhattan; is that correct?
A. Yes.
Q. Are you on the same floor?
A. No.
Q. How many floors separate you?
A. About 23.
Q. What floor are you on?
A. I'm on 34.
Q. And what floor is he on?
A. He's on 9. I never see him.
Q. Are you in separate elevator banks?
A. Yes.
Q. What about Mr. -- is it pronounced Seickel or Seickel, Glenn Seickel?
A. Glenn Seickel, yes.
Q. Have you spoken with him on the subject of the upcoming hearing or your depositions?
A. No.

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Q. Were you aware that he was one of the three people that was identified?
A. Yes.
Q. Have you ever spoken to Mr. Seickel?
A. Yes.
Q. On what subjects?
A. Primarily because his team hands off the -- is responsible for taking the data off the tapes and loading it into the staging area. My conversations with Glenn are typically about whether he's passed stuff over to us and status around that.
Q. Who is Grant Jonas?
A. Grant is responsible for running the inquiry tool, which is the front end to the e-mail archive.
Q. By inquiry tool is that what a layman such as myself would call a search engine?
A. That would be a little glorified, but, yes. It's the way people pull results out of the e-mail archive.
Q. And does he operate that tool, at least in part, to find old e-mails?
A. Yes.
Q. Was he the designer of the tool?
A. No.
Q. He simply operates it?

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A. Yes.
Q. Who did design the tool?
A. Arthur Reil's team designed the tool.
Q. Do you know who specifically designed it?
A. No.
Q. Once the tool identifies something and actually extracts an e-mail, how does it get put into searchable form?
A. That's not --
Q. That's not an articulate question because I'm speaking the wrong language.
Let's take it in small steps.
My understanding is if you get an e-mail

while it's still on an operating system of some sort it's searchable by various parameters, for example, an idiot like me can search something by date or by author. There are ways to search things, is that correct?

A. Are you thinking of mail in a system where you would have like Outlook in front of it?

Q. Yes.

A. That would not work based on the way we store mail.

Q. How do you store mail?

A. We store mail in basically a flat file

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format. We search it -- closest equivalent I could give you would be a text file.

Q. So it would be the equivalent of doing a word search in a Word document?

A. Yes, only it's all UNIX, so you would have to do a grep, which means you would have to take a class.

Q. And the searches that you do, are they case sensitive or word sensitive?

A. The searches that we do go against our database, typically -- and our database is case sensitive.

Q. So that if you were searching for Dunlap, for example, and you didn't capitalize the "D" you would not get the name if you did it in all small letters?

A. You wouldn't search for a word, but, yes.

Q. How would you search?

A. Well, the way the tool operates is it takes e-mail addresses and date ranges and then it creates an extract of e-mail that matches that criteria.

Q. I'm sorry, we've been talking about two different things, I think. And that's the problem with my not knowing your field.

In the first instance I understand that the

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inquiry tool that we were talking about that Mr. Jonas is in charge of is designed to locate the e-mails, so it searches for the e-mail messages themselves.

My question was: Once you found the e-mails, in whatever way you do that, is it possible to load them on to some sort of software so that somebody can do a search for substance within the e-mails?

A. Yes.

Q. And that's the search that I had moved on to.

A. Yes. And that would be outside the system I'm responsible for.

Q. So you don't know how that operates?

A. I don't do that part. We do have limited key word functionality, if that's what you're asking me.

Q. Well, what I'm looking for is, let's put it in the confines of what we actually care about for purposes of today and Monday. We're looking for old e-mail, e-mails from the 1998 time period when the events of this lawsuit were. And we understand that some of those e-mails may exist on backup tapes.

So the first step is to find out if they exist.

The next step is to extract them into some sort of searchable form.

And the third is to actually search them so that we can find out if they really have something to do with our case?

A. Okay.

Q. Is that a fair way of putting it?

And you fall within the first two steps, if I understand correctly, and not the third?

MR. JONES: Can I just have that read back?

THE WITNESS: You're using very different terminology.

(A portion of the record was read by the reporter.)

MR. JONES: I guess I would first object to the statement. I was going to say the form of the statement. It's not clear to me that it was a question.

I object to the question as vague and ambiguous.

BY MR. BYMAN:

Q. Were you able to understand that, are you able to answer it?

A. I understand what you're asking, but it's hard to answer you accurately based on the way you painted the system. Based on the steps as you described it.

Q. Put it in your words instead of how I described it. How do we get something that there might be something on the backup tape to figure out what's on the backup tape and finding it?

A. Roughly, relating to the way you phrased it, we're responsible for the middle piece, the making that e-mail searchable. Grant's team is responsible for actually inquiring against that data. We do assist him. So I would say we do play some role on occasion in that last piece.

Q. Let me make sure I understand this.

By middle piece you mean you don't find the missing backup tapes?

A. I don't find the tapes.

Q. But once somebody has found them, you figure out a way to put them into searchable form?

A. Yes.

Q. And then Mr. Jonas is the one that actually searches them?

A. He searches them. And if he has a problem, he contacts my team and we help him.

Q. Who is in charge of the first step of making sure that we have all of the backup tapes?

A. Bob Saunders' team.

MR. JONES: Hold it. Object to the form of the question, particularly the statement that "make sure that we have all the backup tapes."

Are you talking about in the context -- it's a different question to ask it generally, to make sure that all the backup tapes have been found. When you seem to be making it specific to the Coleman case, I object to that. Because it may assume a role for this witness that may

or may not exist.
BY MR. BYMAN:
Q. Okay. I think you understood my question because you already answered that it was Mr. Saunders.
A. I think.
MR. JONES: Fine.
THE WITNESS: You understand the question a bit better than I did, but, yes.
BY MR. BYMAN:
Q. So Mr. Saunders brings to you whatever it is he finds. You then load it on the system so that it becomes searchable in some way?
A. Yes.
Q. And once that's done, unless Mr. Jonas has some problems doing it, your role is over and he's the one that actually does the searches?

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A. Yes.
Q. Who is Wray Stewart,
A. Wray, I believe, works on Bob's team. He's in that group. I know him as a person.
Q. Do you know what his position or title is?
A. Not right now.
Q. Let me represent to you that there are e-mails that suggest that he was involved at the same time that Mr. Reil was involved. Would that suggest that maybe he is no longer involved if the whole team has changed, or is he somebody that carried over?
A. His name has come up in the context of the project; as having played a role from Bob's team.
If you're asking what does he do today? I don't know the answer.
Q. Who is Kay Gunn, G-U-N-N?
A. I met her once. She works on Bob's team, I believe.
Q. Who is Donald Haight, H-A-I-G-H-T?
A. Don Haight is a consultant who worked for Arthur Reil who is responsible for the system, the archive system.
Q. Is he with NDCI?
A. No.
Q. Do you know what his firm is?

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A. No.
Q. Do you know Bruce Buchannan?
A. No.
Q. Have you heard of a firm called NDCI?
A. Yes.
Q. Have you heard of Mr. Buchannan in that context?
A. No.
Q. What is your understanding of NDCI's role?
A. They're the vendor that was contracted to take what were our smaller DLT, or any type of tape, and essentially compress it into a SDLT, a Super DLT tape, which is then processed, is then handed off and loaded on to the system for us.
Q. What does the acronym DLT stand for?
A. I do not know.
Q. Digital something?
A. I don't know much about tapes.
Q. But SDL tapes, which is whatever DLT is with a super in front of it?

A. They're bigger, they hold more data. The whole purpose is to take lots of little tapes and put it into one big tape.
Q. And Morgan Stanley is able to internally work with the SDL tapes?

A. Yes.
Q. You don't have to go to an outside vendor to do that?
A. No.
Q. Do you know how many DLT tapes could be put on an SDL tape?
A. No.
Q. Can you describe physically the size of the DLT tape? Is it as big as a cassette tape or videotape?
A. Never saw one.
Q. So you don't have any idea?
A. Not since my main frame days have I seen a tape or a tape drive.
Q. If somebody was talking about 1,000 DLT tapes, then you would have no idea whether that would fit in a bread box or a file cabinet or a book case?
A. No.
Q. Do you know someone named Annaline Dinkelmann?
A. Yes.
Q. Who is she?
A. She is the integration engineer who -- I know her a few different ways. She works at Morgan Stanley. Her current role is she's an integration

engineer.
Q. Does she have anything to do with the e-mail archive project?
A. She used to.
Q. Was she part of Mr. Reil's team?
A. No, she was in a different part of the organization that supported Arthur's team.
Q. Do you know John Pamula?
A. No.
Q. Mohammed Hasan?
A. No.
Q. Danny Bailey?
A. No.
Q. Who are the people that are on your team?
A. Horace Sequeira, S-E-Q-U-E-I-R-A.
Q. What is his function?
A. He's the development manager.
Q. Who else is on your team?
A. Tim Brown.
Q. What's Mr. Brown's role?
A. Product manager.
Q. What product does he manage?
A. The e-mail archive and the supervisory system.
Q. Who else is on your team?

A. David Matteo.
Q. What's his role?
A. He's a developer.
Q. What does he develop?
A. He supports the e-mail archive and the

supervisory system.
Q. Who else is on the team?
A. Andrew Brown.
Q. Did we already have a Mr. Brown?
A. Yes.
Q. Different Brown?
A. Yes.
Q. What does the second Mr. Brown do?
A. Same as David Matteo.
Q. Anyone else?
A. Sabita Arumalla, A-R-U-M-A-L-L-A. And she's also a developer for the two systems.
Q. Anyone else?
A. That's it.
Q. What does Morgan Stanley do to migrate data from backup tapes on to a searchable database?
A. We run a set of scripts that index the content on our database and then insert it into our file system.
Q. And how do you do that? Can you explain it

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in lay person's terms?
I can tell you that I think the Judge's computer background is better than mine, but not perhaps that much better.
A. All the e-mail content is sitting on a file system, just in a regular file directory structure. And so we run a set of code, what I would call a script, that reads through that content, creates entries on a key database which acts as our index. Those entries would contain header data, "to," "from," "cc," "subject line," "date." Then the address or the file system location path, really being the proper word, of the content where it's been inserted into the file system. And the file system represents where the actual content, which is e-mails and attachments, sits.
Did that help?
Q. How long does it take once you have an SDLT tape to load it on and create it in some sort of searchable form?
A. It is dependent on -- there's no specific number I could give you. Because the amount of content that comes off an SDLT can vary. And the insertion rate can vary depending on whether the messages are perceived to be duplicates or not in our system.
Q. What's the maximum amount of data that can

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fit on an SDLT tape? Can you express it in some number of gigabytes or terabytes?
A. I think it's 200 gig.
Q. So if we assume the maximum amount, can you give me an approximate amount of time that it takes to process it?
A. If I were doing an estimate for the business, I would say five days, give or take a day.
Q. And a terabyte would be five SDLT tapes then if they were maxed out?
A. Yeah, if it was maxed out.
Q. Is it possible to load more than one tape at a time? In other words, when you do your five-day estimate would you have to do one in five days, then wait to do the next one?
A. By the time we're loading it, it's no longer

a tape. So it doesn't really equate that way. We will run through as many messages that are in staging. And as big as they make our file system that we call staging is as much as we can hold off a tape.

Q. Let me put it this way, if you've got five full SDLT tapes at the same time and you started staging them immediately, would it take 25 days or would it be some shorter period of time because you could overlap?

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A. There would be no overlap. It's not at that layer. We don't actually read it off the tape. We copy it off the tape into the file system, then we process the file system in a serial fashion.

Q. Right. But it doesn't take the five days to copy the tape?

A. No. No.

Q. How long does that take?

A. Normally -- I don't know. I don't know how long the copy process takes. I've never calculated that.

Q. So within the five days, some part is for copying and some part is for processing?

A. No, I was thinking solely about processing actually. I'm sorry, because in my mind I pick it up once it's on disk. So I do not know how long it takes to copy off the tape.

Q. Can it take as much as a full day?

A. I don't know how long it takes.

MR. JONES: Can we take a short we've-been-at-this-an-hour break?

MR. BYMAN: Sure.

(A recess was taken.)

BY MR. BYMAN:

Q. Without regard to how long it may take to

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load the data off of the tape and on to your, I presume some part of your hard drive?

A. Uh-huh.

Q. Once it's there, would it take 25 days to process a terabyte of data or would it take less or more?

A. It would take approximately 25 days give or take three days. It's not an exact science.

Q. I think even I understand that much of it.

A. Very much depends on what's there.

Q. Does it also depend on what else the computer is doing, or is this computer dedicated to this work?

A. It very much depends on what the rest of the system is doing.

Q. How much of the system's resources has Morgan Stanley assigned for this particular project that has us here today?

MR. JONES: Object to the form as vague and ambiguous, lacking foundation.

BY MR. BYMAN:

Q. Well, let me be more specific. You filed a declaration in this case in which you said that this matter is one of your priorities?

A. Yes.

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Q. What other priorities have you had during

this same period of time?
A. We keep the system running, which is an operational task.
We support the supervisory system with the same team. And we have some changes that we're making to that system as well that are high priority.
And we have been running inquiries supporting Grant's team, running inquiries.
Q. Does your team for this project have its own dedicated hardware or does it work on a larger, as a part of Morgan Stanley's overall system?
A. We have dedicated hardware on the tape side so the machines that run the tape restores are dedicated, but the database that they insert into and the file system that they insert into are the archive. So if we are running let's say an inquiry at the same time that we are inserting data, there might be some contention at that level.
Q. What I'm trying to drive at, Ms. Gorman, and I'm having trouble articulating the question because of my lack of education in your field.
I presume that the speed with which you can process this data has something to do with the speed of your processors, but also the other tasks that the

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processor is being asked to do simultaneously. So if we start with an optimum condition of absolutely nothing else is happening to the computer system at the time that you're doing the processing, would it still take 25 days give or take three?
A. That estimate is based on minimal contention, yes.
Q. And to the extent that it expands, it's because there are other competing forces for that processing capacity?
A. Yes. Hence the give or take a couple days.
Q. But is it only give or take a couple days? Is there some optimal bad set of circumstance where it would take 50 days, for example?
A. Yeah. You could hammer a system to the point where it breaks.
Q. Has that happened to you?
A. No.
Q. When did you first learn that you had some tapes to load to do your middle step in the process?
A. I knew there was tape restore data waiting for us in staging in August when I took over.
Q. And did you learn what the quantity was when you took over in August?
A. I was given rough estimates by nontechnical

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people.
Q. Who gave you those rough estimates?
A. Annaline Dinkelmann.
Q. What did she tell you?
A. I don't remember exactly. There were some number of tapes and some -- and some number of gig, a large number. I don't remember the exact number.
Q. When did you first hear that there was a lawsuit that related in some way to the restoration of e-mails?
MR. JONES: Object to the form of the question.

You can answer if you understand it.
BY MR. BYMAN:
Q. You seem to be confused, so let me step back.
You're aware that you're here today because this is a piece of a proceeding in a pending lawsuit?
A. Yes.
Q. You're aware that there's a lawsuit between CPH, who is the plaintiff in this case?
A. Yes.
Q. And Morgan Stanley, your employer?
A. Yes.
Q. When did you first hear about that lawsuit?

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A. That lawsuit. Let me just think for a second.
Mid January.
Q. Of this year?
A. Of this year.
Q. How did you hear about it?
A. We were told there was --
MR. JONES: We don't want to have any conversations between you and counsel.
THE WITNESS: It was all counsel conversation.
MR. BYMAN: Well, Mike, respectfully, I doubt this would be a privileged communication.
MR. JONES: Okay, she can say she learned by counsel.
THE WITNESS: Yeah.
BY MR. BYMAN:
Q. When was the first time that you learned that there was some need or requirement that Morgan Stanley produce e-mails?
A. In general?
Q. For this lawsuit.
A. For this lawsuit. The same time.
Q. Did anyone ever tell you from the time that you took over in August 2004 until mid January that

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there was some need to identify and or produce e-mails for some external purpose?
And what I'm driving at -- that was an oblique question. Let me try to explain my question, then maybe it will make more sense.
I understand that you didn't know there was a lawsuit until January. So you couldn't have known in August that you needed to produce e-mails for a lawsuit.
But did anybody tell you prior to mid January that you needed to produce e-mails, didn't tell you precisely why, but when you found out later in January that there's a lawsuit, you would then be able to make the connection, oh, that's why I was asked to produce the e-mails.
Do you follow what I'm saying?
You may not have known why somebody asked you to produce e-mails in August or September?
A. To produce e-mails is part of what I'm --
Q. To identify them?
A. Again, I don't really run the inquiry tool unless Grant has a problem. So I'm typically not asked to produce e-mails, maybe that's why I'm having a hard

time with your question.
Q. Were you asked to process tapes and get them into searchable form so that Grant could do his work and you later figured out, ah-ha, that must have been for the lawsuit?
A. Yes, to the first part.
Q. No, you never made the connection?
A. I was processing the tapes ahead of the lawsuit.
Q. I understand. What I'm trying to say is now that you know that there's a lawsuit, do you realize that you were processing them at least in part for the lawsuit?
A. Yes.
MR. JONES: Fine, if you understood it, then fine.
BY MR. BYMAN:
Q. And that was something that was already --
A. I mean, in January.
Q. And that was something, the processing part was something that was already underway when you took over in August and you continued to do it?
A. Yes.
Q. Through the present day, I take it?
A. Yes.
Q. Where are you in that process? Is it almost done? Is it completely done, is it nowhere near done?

MR. JONES: Object to the question as vague and ambiguous.
But if you understand it.
THE WITNESS: We're almost done.
BY MR. BYMAN:
Q. What quantity of material have you processed?
A. We have -- overall? Or in general? Have we processed or is in the archive, I guess?
Q. Have you processed from tapes that were discovered after May of 2004?
MR. JONES: Object to the question as vague and ambiguous.
THE WITNESS: I don't know that I have it quantified that way.
BY MR. BYMAN:
Q. Do you understand that there were some tapes discovered after May of 2004?
A. Yes.
Q. Do you have an understanding of the quantity of those tapes?
A. I've heard a number that is associated with those tapes, yes.
Q. What number have you heard?
A. 112.

Q. You haven't heard a larger number?
A. I'm sorry. I heard 1400 of which 112 contain e-mail.
Q. Were you ever asked to process those 1400 or 112?
A. Yes.
Q. And have you?
A. Yes.

Q. When did you begin that process?
A. Those were imbedded in what was in staging which we began processing in mid January. Processing meaning physically moving over.
Q. Is there a reason that that migration didn't begin until mid January?
A. The preparation for that process began back in November and it took that long to get the system ready to begin the processing again.
Q. Why did the preparation only begin in November?
A. It was in November -- let me see.
In October we prioritized needing to start the process, but it took us until November to locate the code that we needed in order to restart the process. And it took us through January to test, debug and restart that process.

Q. What happened in October, as opposed to some other time, that suggested you should begin work on these 112 tapes or 1400, whatever the number was?
A. Conversations with legal that made it clear --
MR. JONES: Not the content. You can just say you had a conversation.
BY MR. BYMAN:
Q. You already had the tapes prior to that conversation, right?
A. We knew there was data in staging.
Q. And you knew that as of the date you took over in August, isn't that right?
A. Yes.
Q. Is there some reason why those had not been given a priority until your conversations with counsel?
A. Yes.
Q. What was the reason?
A. We had a small team. And we had a lot of more critical and time sensitive issues that needed to be handled.
Q. What were the issues that were more critical and time sensitive?
A. There were a series. When we took over the system, we had to figure out what we were doing. And

that took several weeks. We had to, for example, understand an operational procedure that recovered rotating our database at the end of August, and then subsequently every month. And so that was our key focus because everything would have broken if we hadn't done that.
We had no disk space to unpack our live content. And so we were focused on making sure that the system didn't corrupt or drop any of our live content. And getting disk space in place and moving things around so if there was an open inquiry that needed to get to content that was sitting in an unprocessed fashion, we could get that done.
We were supporting inquiries. And understanding what it took to support an inquiry from a technical perspective. And we were supporting the supervisory system, which is a live system, needs to work every day correctly. And was having ultimately little problems here and there, but we weren't trained

in it, so.
Q. One of the things you said was, if I heard you correctly, that you didn't have enough disk space?
A. Yes.
Q. To address the problem?
A. We didn't have any place to unpack the stuff

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anyway, until the end of October.
Q. You mean physically unpack the tapes?
A. Physically unpack the tapes.
Q. But once you unpacked the tapes, you also didn't have any room on your disk to unload them?
A. The place that I call staging where we actually take the tape and copy it over is a very different place than our archive. It's locked down in a very different way and it's a very different type of disk. Our system is kind of technical. It's a different kind of disk, think about it that way. So we didn't have any space in the proper archive until the end of October.
Q. And what did it take to get that space? Did you have to buy more hardware?
A. Yes, we did. They installed a whole new device at the end of October.
Q. Do you know what the cost of that was?
A. No, not offhand.
Q. More than $10,000, less than $10,000?
A. More than $10,000. I assume. The way our internal finances work, I don't know.
Plus that order was already pending before I took over. I don't know offhand.
Q. If someone, counsel or anyone had told you

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in August 2004 that doing something to these 112 tapes or 1400 tapes, whatever the number was, was a priority, would you have been able to do something sooner than October?
A. No.
Q. Why not?
A. We wouldn't have had any place to put the data, because we didn't have space until October. That space had been on order for months.
Q. So there was nothing that could have been moved sooner?
A. It was more than space. No.
Q. Could you have gone to an outside vendor to have gone through that stage?
A. Going to an outside vendor would not insert it in our system, so, no.
Q. Well, it would have put it into that other kind of disk that you needed to get it into that system, right? Did I misunderstand what your space limitation was?
A. It --
Q. I thought your archive system itself didn't have the space limitation, it was a limitation on this hardware that had this other kind of disk --
A. The hardware is on our premise. A

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conversation about how long it takes to get hardware installed is not a conversation that I am well versed in. I go to Bob's team in this case for disks. He could speak more appropriately to lead times to getting

disks or servers or anything like that installed.
Q. So the simple answer to my question then could you have done something in August is something better addressed to Mr. Saunders than to you?
MR. JONES: Objection, asked and answered.
BY MR. BYMAN:
Q. I genuinely don't understand, Ms. Gorman. You told me you couldn't have done it any sooner than October, but then when I asked you why couldn't you go to a vendor or gotten hardware sooner you said Mr. Saunders?
A. I said the lead time to getting that stuff in is something that you would need to talk to Bob about. So the logistics of ordering a disk and getting it installed and making it available to my team is something that Bob would speak to better than myself.
Q. And this thing that has to be done that you didn't have the capacity for until October, what does that generate? Does it generate a disk that then gets fed into the main archive system?
A. We're having a terminology problem, I think.

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Q. What does it generate?
A. The archive, the container, you can think of the mail sitting on a disk, it's a device from net app. So I don't know what your question is. Because I'm not sure --
Q. Take me through the process. You have one of these SDLT tapes. You need to take it off of the tape and put it on to some sort of hard disk drive, right?
A. Yes.
Q. And is that the same disk drive that then processes it to make it searchable, or does it have to migrate from there to something else?
A. We run a script against it. And we take it and we insert it in the archive, which is a different place also, hard disk. And we index it on our database.
Q. So there's a machine --
A. The hard disk that was associated with our archive was full.
Q. Which you say associated with your archive, it's not the hard disk on the archive itself that's full. It's the thing on your piece of hardware that runs the script?
A. No. Our archive had no more room in it to

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accept more content.
Q. Not even current content?
A. No, we were backlogged. They hadn't unpacked current content since the beginning of August. They ran out of space.
Q. Did that sneak up on you?
A. It was not my job then. I inherited it.
MR. JONES: So the question is who is the "you."
MR. BYMAN: I didn't mean you personally.
BY MR. BYMAN:
Q. Couldn't somebody have predicted when the hard drive was going to fill up?
MR. JONES: Object to the form of the question.

THE WITNESS: Not a question for me.
BY MR. BYMAN:
Q. A question for Mr. Saunders?
A. Question for Arthur Reil.
Q. And Mr. Reil is in places unknown right now.
A. By me.
Q. So are you suggesting that it wasn't simply an integrity issue, that it might have been an incompetence issue with Mr. Reil?
MR. JONES: Object to the form of the

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question. Both asked and answered previously.
THE WITNESS: It would be speculation on my part. I don't know.
BY MR. BYMAN:
Q. Well, you took over for the guy. You must have formed some impressions about whether he did a good or a bad job based upon what you inherited. What's your impression?
A. My impression is that he didn't do a very good job.
Q. And one of the things he didn't do a very good job on was predicting when he would run out of disk space?
A. That's on the list.
Q. Is that a pretty major thing on the list?
A. It's huge. It's one of several things, but it's a big one.
Q. What are the other things?
A. He didn't keep a proper development environment so when we took over we didn't know where our source code was located, which is one of the reasons we couldn't find our scripts right away.
Every technologist has their opinion. So I'm trying to be a little bit thoughtful in terms of the things that we think he didn't do well.

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Not keeping a development environment is bad practice.
Not predicting disk space well, while I appreciate the complexity now that I have to do it, it was bad practice.
And there are certain other flaws in the system I think they could have done a better job with.
Q. Let me show you what I'm going to mark for identification, a group of documents that come from within this stack. And I'll represent to you that I've taken them out. They are not necessarily in numerical order. So I've put them together. They're various production numbers 112286, 291, 296, 301, 306, 311, 312, 313 and 314.
And I've marked that as CPH 425.
(Plaintiff's Exhibit 425 was marked for identification.)
BY MR. BYMAN:
Q. Have you ever seen this collection of documents either -- and of course you wouldn't have seen them this way. I'll represent to you that each of the cover documents had other documents either as attachments or things for them.
What I've done is I've pulled out what appear to be the text of minutes of something called

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Archive Meeting Minutes without putting the attachments for each of the minutes behind it, which are comprised of graphs and things.

Bearing in mind that you may not have seen them in exactly this form, have you seen this type of minutes?

MR. JONES: Can I just ask, are you asking -- we started out by asking had she seen these. Now you're asking has she seen this type.

MR. BYMAN: I guess I'd like both. If she's seen these specific ones, great. Also if she's seen something like them, I'd also like to know that.

THE WITNESS: I have seen one of these.

BY MR. BYMAN:

Q. Which one have you seen?

A. The last one that is September 9th.

Q. And that would have been done when you were in charge of this?

A. Yes.

Q. What about the one on August 13th?

A. No, I don't think so. Looks surprisingly like the other one, but I recognize the format and I only saw one and I'm pretty sure it was this last one.

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Q. These particular ones appear to have been faxed on October 21st, 2004. And I'll represent to you that the fax number to which they're addressed is the fax number of a law firm in Washington, D.C. Sidley Austin, Brown and Wood I think it is. I keep forgetting what their new name is.

Do you have any knowledge as to whether or not these were faxed to a law firm?

A. No.

Q. Does the fax header of October 21st, 2004 help you place in time the directions you got from counsel in October to prioritize the migration of these missing tapes?

MR. JONES: Can you just read that back, please?

(A portion of the record was read by the reporter.)

MR. JONES: Object to the form of the question. It's vague and ambiguous.

BY MR. BYMAN:

Q. Do you understand my question?

A. I think I do. No.

Q. At the risk of asking something I have already, let me try to recap.

Until some time in October when counsel told

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you to prioritize the migration of these 112 tapes or 1400, whatever the number was, until that time, these were a low priority, is that fair?

MR. JONES: First of all, I object to the form of the question. And I object to the extent that you are trying to elicit attorney-client communications.

That's my objection. And also it's been asked and answered in a different form.

THE WITNESS: Although I lost track of it, could you say it again?

BY MR. BYMAN:
Q. Sure. You told us earlier that some time in October you had a conversation with counsel and moved these -- let me stop.
Let's back up and try to get some shorthand here. We talk about the tapes that you've been processing that are the reason we're here today. We talk about 112 tapes that have been represented to us may contain e-mails that were part of a larger universe of tapes that were reviewed. We've heard various numbers of that. You've used the number 1400. Counsel in a recent hearing said 2200. But whatever that number is, can we call those the found tapes? And I'm going to say that because it's in these e-mails.

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A. Okay.
Q. I'll show it to you if you'd like.
A. Sure.
Q. Some time in October of this year I think you've already told us you were told --
MR. JONES: First of all, here's the problem I have with that. She never talked about a conversation with counsel. If you go back in the record, you'll see she had a meeting with counsel and then she further described how she -- what she did with the tapes and the processing after that.
You seem to, I guess you're assuming that counsel told her to prioritize the tapes. And you've used that in several of your questions. I'm not going to comments as to whether that was or wasn't told. That's really the problem I'm having as to how you're phrasing your questions.
I don't know if that's something that could be fixed or not, Bob. If it could be -- because I don't mind her answering the question you asked again about this document if that's ultimately what you're trying to get to.
I don't know if all that was helpful or not.
MR. BYMAN: Let me try to meet that.

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BY MR. BYMAN:
Q. Until some time in October, you did not place any priority on migrating the found tapes, is that fair to say? They were in line, but they were pretty far back in line?
A. I would say I didn't prioritize processing the data that was in staging.
Q. From these found tapes?
A. There was more in staging than the found tapes.
Q. I understand. And they were patiently awaiting their turn, but they weren't going to the head of the line?
A. I'm being careful. I didn't know about found tapes. It wasn't -- that was not my focus.
Q. The set of minutes that you did look at, and this is the last page 0112314.
A. I received it. I filed it. I actually didn't read it until later.
Q. But I just want to direct your attention towards the bottom there's a series of numbered pending items, number 4 talks about 1423 DL tapes were found to

be in the Brooklyn security room, do you see that?
A. Right.
Q. That's the found tapes I'm talking about.

A. Okay.
Q. And they were patiently waiting their turn in line for processing in October, is that right?
A. Yes.
Q. And I'll represent to you that those found tapes have been waiting in somebody's line since at least May of 2004. And if you'd look at the first page of the document you'll see that there's a reference, at that time the number is 1,024 but by May it grows to 1421.
A. Okay.
MR. JONES: Was that a question or --
MR. BYMAN: I'm representing to her that they had been around since May.
BY MR. BYMAN:
Q. Is it fair to say that they were waiting for processing for at least May, June, July, August, September, October, six months?
A. I can only speak to August forward. They were waiting since I took over.
Q. Do you have any reason to believe that they weren't waiting since May?
A. No reason. I have no knowledge.
Q. Whatever was ahead of them was ahead of them, whatever was behind them was behind them. But

some time in October you moved them to the front of the line, right?
A. Again, I didn't move these specific tapes to the front of the line. I prioritized processing the data that was in the staging.
Q. Meaning all of the data in staging?
A. All of the data in staging.
Q. What was in staging other than these found tapes?
A. Content from other tapes. We had at the end about 600 gig in staging. This would have been a subset of that.
I mean, we didn't -- technically -- it probably would have taken us longer to identify and try and put them at the top of the cue, because the data is fairly extracted at that point. So we focused on processing everything from staging.
Q. So you had 600 gig in staging in mid October?
A. Yes.
Q. And I think you've told us that 200 gig, if it was all on one SDLT tape, could be processing in five days?
A. But we didn't have scripts that worked in October, yes. We didn't start in October.

Q. And the thing that made you get moving processing that 600 gigs of data was a conversation with counsel in October?
A. Over the course of a series of conversations with counsel.
MR. JONES: Don't talk about the content of the conversation with counsel.

Besides, this has already been asked and answered.
THE WITNESS: We prioritized the work.
BY MR. BYMAN:
Q. When in October?
A. I don't remember the exact date.
Q. Was it inside counsel or outside counsel?
A. There was mixture on various calls.
Q. Did you ever participate in a call in October with anyone from Kirkland and Ellis?
A. Yes.
Q. Do you recall the individual's name?
A. We talked with Lisa Horton, Andy Klubach.
If I say it was a sea of lawyers will I insult anybody in the room?
Unfortunately, I didn't really check the names of external counsel in this. I spoke to them more than a couple of times. So I really couldn't get

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specific --
Q. But is it your recollection that somebody identified them as not a Morgan Stanley employee lawyer, but an outside lawyer?
A. Yes, Kirkland was on the phone and swapped around enough that I couldn't accurately name who it was or remember.
Q. Was Mr. Doyle on the phone? Do you know Mr. Doyle, who is a Morgan Stanley lawyer?
A. Jim was not on the phone, no.
Q. Do you recall what Morgan Stanley lawyers were on the phone?
A. Again, it was --
Q. By that I mean employees of Morgan Stanley.
A. Different conversations and different combinations over the course of October. It would have been Jim Cusick and Jimmy Lee.
Q. In addition to Kirkland and Ellis, did you have any conversations in October or November with any other outside lawyers?
A. Not that I remember, no.
Q. Do you recall ever having any conversations with anyone from Sidley and Austin?
A. Sidley rings a bell, but I don't remember a specific conversation.

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Q. Is it fair to say that some time in October of 2004 it became a priority to process the 600 gigabytes of data that had been in stage for processing?
MR. JONES: Objection, asked and answered four or five times.
THE WITNESS: I was going to say, could you say it again? I'm starting to get a headache.
(A portion of the record was read by the reporter.)
THE WITNESS: Yes.
BY MR. BYMAN:
Q. And what did you do to actually get it processed once it became a priority?
A. In October we looked for the scripts in the location that Don Haight had told us they should be in and they weren't there.
So we spent more time hunting around and

trying to figure out if we had to rewrite -- reconstruct them from scratch what they might have been doing. We knew at a high level what they were doing, but the technical detail of what they're updating is sort of a complicated thing to back into.

Somewhere in I think early November we actually located the scripts in a different directory.

And we ran a test. They didn't process the data correctly. And since we hadn't found them where we had been told, we were particularly concerned that we found the right thing.

We had Thanksgiving, then it was December. We did more testing. And juggled quite a number of things through December between vacations and testing and inquiries. And some issue on the supervisory system.

Then we came into January. Early January we debugged the scripts that we had found, recoded the piece that wasn't working properly and started the processing.

Q. When in January did you start the processing?

A. On the 14th we kicked it off against, what I would say we started. We had been running tests for the prior two weeks.

Q. All right. So it became a priority in October to process it. During all of November and December you were locating the scripts, finally finding them, testing them, debugging them and finally approximately 75 days later were actually ready to start processing?

A. Right. I would just keep in mind those were short months.

Q. Right.

A. So we weren't working in full staff mode.

Q. I understand that those 75 days weren't all working days.

A. Yes. Interrupted by a vacation or two that I couldn't force people to cancel.

Q. If you had been able to assign more personnel, would you have been able to shorten that 75-day period?

A. No, because the person who was assigned had spent two to three months coming up to speed on the system. And assigning somebody who was not a part of the team and not educated would have probably slowed it down.

Q. Well, it sounds like it wasn't so much a team as a one-person show the way you just described it.

A. The staffing that I told you about has grown. So it was pretty much a combination of Horace and Andrew who were focusing on it. And really Horace is the -- in the context of this -- the lead developer on the site. So Andrew was assisting him. It's a skill set break. So it was mostly Horace.

Q. Is the processing completed now?

A. All of the data that's been given to us is processed, yes.

Q. When was it completely processed?

A. In the context of the found tapes?
Q. Yes.
A. Those were finished on February 2nd. The terabyte -- the terabyte that turned out to be 600 gig was finished on February 2nd, again, the 112 were in there.
Q. Well, you anticipated my next question.
MR. JONES: Give me 30 seconds.
(There was an interruption in the proceedings.)
BY MR. BYMAN:
Q. We have heard that there was a terabyte of data that needed to be looked at. You've told us that it was actually 600 gigabytes, which is of course 60 percent of a terabyte. And that 600 gigs included more than the 112 tapes, is that right?
A. Yes.
Q. Of the 600 gigabytes that were actually there and processing that you turned to as a priority in October, how much of it was the 112 tapes?
A. I do not know.
Q. Was it the majority of it, a small fraction

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of it, can you give any estimation?
A. I have no estimation because I don't know how big they were.
Q. Okay. But in any event, the processing is complete, at least your step of the processing is complete as of February 2nd, right?
A. Yes.
Q. Then you've turned it over to Grant so he can do the actual searches; is that correct?
A. At that point my team was running the searches.
Q. So you actually did do some content searching?
A. Yes.
Q. And who designed those searches?
A. David Matteo.
Q. And what's your understanding of what the searches were designed to do?
A. Based on the criteria passed to us through Grant, they pulled back e-mail for the people named in the list and the date ranges that we were handed.
Q. How long does it take to perform those searches now that you've got it all on the archive?
A. We were -- the first set of searches that we ran took longer than they are taking now, because we've

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optimized the process. So the first set took about a week. And now we're processing it in about 1 to 2 days.
Q. And what kinds of chunks are you processing? I take it you can't do a search on the entire 600 gigabytes?
A. No. The 600 gigabytes is inserted into the archive, so it's now a part of the full body. There's a -- so for example, all of our e-mail that's pre-2003 is 15 terabytes of data. When we run a search against the archive, we put the query against the database, the index and pull all mail that matches that criteria, and then pull it off the file system.
So we are actually returning a super set,

everything that matches the criteria, not just the mail that might have come out of the 600 terabytes.
Q. Was that design necessitated by something, or was that just for your convenience?
A. That is the design. There's no -- it would be very difficult to -- there's no identifier in the database telling us this specific mail was inserted as a part of that 600, that concept is lost.
Q. I take it it takes longer, let's say you're searching for only one thing you want to find out where the word "Dunlap" appears on any e-mail anywhere in the

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system. I take it if you were doing that search against 600 gigabytes of information as opposed to 15 terabytes, it would be faster if you could do it just on the 600 gigabytes?
A. Again, we're not searching the 600 gigabytes we're going against the data base. It would be faster, but the database doesn't know.
Q. But if somebody had said to you: Speed is important, so don't insert it into the 15 terabyte system, let's segregate this data. Let's apply some sort of software to it so we can get it off by itself and search that, would it still be faster?
A. I'd still be writing that code potentially. I'd have to write a whole new database and change the scripts to write to that data.
Q. What is it about Morgan Stanley's database --
A. The database schema has no field on it to indicate that the content is unique in some way that you would want to identify it. If we really wanted to keep that 600 gig separate, we would have built a new database, inserted it into that database and ran it against that database, that would have probably taken longer.
Q. So it would not have been possible to have

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taken --
A. It would have been longer on the front end.
Q. It would not have been possible to have inserted the 600 gigabytes of data into some other form of database, some off-the-shelf database that already exists?
A. Then you wouldn't be using the Morgan Stanley system at all, so I would be evaluating a vendor product and installing it.
Q. Could you have gone to a vendor that is in the database business that already has a database, simply takes your data and searches it?
MR. JONES: Object to the question.
BY MR. BYMAN:
Q. You know that such vendors exist, don't you? You know that we've hired a vendor that is going to do exactly that.
A. It was not my judgment call. I was given instruction to load that data into the system for the system I'm responsible. You're asking me to speculate on a question I was never asked for.
Q. I'm not criticizing you for making a judgment call when you weren't given the opportunity to make the judgment.
If somebody had said to you in October:

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What is the fastest way to find out what's on those 112 tapes, would a faster way have been to give it to an outside vendor?

A. I really don't know enough about this to answer that question.

Q. So you don't know yes or no whether it would have been faster?

MR. JONES: Objection, asked and answer.

THE WITNESS: I don't know.

BY MR. BYMAN:

Q. Does Morgan Stanley have an outside vendor who is doing anything with respect to these 112 tapes presently?

A. NDCI is processing this and handing it to us. I don't know.

Q. What are they doing? They're giving you the thing that you then have to load on to your system, right?

A. They are, yes.

Q. I'm talking about do you have any outside vendors that are helping you either with the loading or the analysis of your own database?

A. I give results to legal. However they -- I believe they have vendors that they use. I'm not well versed in those vendors.

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Q. Is there a reason why your team was doing the searches rather than Grant's team?

A. Yes.

Q. What was the reason?

A. The inquiry tool was not searching the pre-2003 data in a thorough fashion.

Q. Why was that?

A. There were issues with the way e-mail group membership was being evaluated. And there were issues with pulling out e-mail if it had been restored from our notes, our Lotus Notes e-mail system.

Q. What were those issues?

A. The way that the system works for pulling data -- when we store the information in the index we don't actually store all the recipients, if the mail is sent to a group, restore the e-mail group name. Which implies you then need to be able to evaluate who was a part of any given mail group.

The tool when we took it over for pre-2003 e-mail was looking at a snapshot of e-mail group membership that had been created in early 2003.

So we needed to physically create a data source that would tell us a more accurate representation of who was in a group at a point in time and then run scripts, code in abstract from the inquiry

00080

tool in order to leverage that data.

Does that make sense?

Q. And why couldn't Mr. Jonas's team have done all of that?

A. They're not developers.

Q. So they're simply implementers --

A. They use our tool.

Q. Have you been able to develop it sufficiently that you've now passed it off to Mr. Jonas's group?

A. We are in the process of doing that, yes. We actually used the last set of queries to refine our scripts, improve the speed of our scripts. And we are in what I would call the 90 percent turned over so he can operate them.
Q. And, again, where are we in the process? When will we be done reviewing and searching all of these 112 tapes? And when I say "we," I mean you.
A. That should be done.
Q. It was done as of February 2nd?
A. We provided a -- okay, I know my end. So I don't know when it actually makes its way through all the other people. But we provided one pull at the end of last week, which would have been the 4th. That should have included that data. And then we provided

00081

another one early this week that should have also actually included any potential data that we -- we inserted some additional data over the weekend.
Q. When you say it was pulled?
A. I'm sorry, I refer to a pull. We run -- the inquiry was -- all the data was extracted, put in a file and handed over.
Q. To whom did you hand it over?
A. We hand it to Grant's team.
Q. And what else is left for Grant's team to do?
A. I'm not sure what he does. He gives it to counsel or whoever he gives it to.
Q. Is he something more than a messenger? Is there some work he has to do on it to your knowledge?
MR. JONES: Object, asked and answered. You can answer again.
THE WITNESS: There's no work he does on it. He passes it over.
BY MR. BYMAN:
Q. Does he do any review on it to cull out something from something else?
A. I don't know. We have a very specific division of responsibilities. I don't ask Grant what he does with data when I hand it to him.

00082

Q. In terms of when you hand it over to him, what quantity of material did you give him?
A. I don't know offhand.
Q. Did you hand it over to him in electronic form?
A. We gave him the file, yes.
Q. And when you say gave him a file, did you simply e-mail something to him?
A. No, we're all on the -- we zipped up a file and put it in the file system. And his team had access to that.
Q. So you don't know if it was 5 gigabytes or 50 gigabytes or 500 gigabytes?
A. Personally, no.
Q. If you don't know the size of the electronic file I take it you can't tell me how many pages of e-mails there might be on it?
A. We would not look, no.
Q. Once you've given him that file, is there anything further that needs to be done to turn it into something that would be readable? In other words,

somebody that was on your system with that file, would you be able to see it on a screen and print off from the screen whatever the information was?
A. Yeah, you would have a giant file full of e-mail.
Q. Would it also be in searchable form at that point? You've already searched to find something, I take it, but...
A. At that point we would have done the pull based on people and dates. And any key word type search that might need to be done would either be done with grep or, yeah, or a tool, there's a bunch of tools that do that.
Q. So further searches could be done?
A. Yeah. We would not be involved in that.
Q. But you've given him a file that is manipulable and searchable?
A. Yes. There's no index at that point, it's a blob of mail and contents and attachments.
Q. Would that file, for example, be able to be reordered by date?
A. I don't know.
Q. Or by recipient?
A. I have not personally seen the file and what it looks like.
Q. Who in your group has personally seen it?
A. David Matteo wrote the scripts and created the file.
Q. Have you ever heard of a vendor called Forensic and Heat Restoration?
A. No.
MR. JONES: "And" or "in."
MR. BYMAN: "And." Forensic & Heat Restoration.
BY MR. BYMAN:
Q. Were you aware that in June of 2004 Mr. Reil on behalf of Morgan Stanley signed a certification that all relevant e-mail in this case had been produced?
A. No.
Q. Has anyone ever told you that other than me just now?
A. That, no.
MR. JONES: Well.
BY MR. BYMAN:
Q. Were you aware that in July of 2004 Morgan Stanley was aware that there were backup tapes which contained e-mail going back to 1998 that had not been searched?
MR. JONES: Object to the form of the question. And perhaps lack of foundation.
Why don't you read the question back.
(A portion of the record was read by the reporter.)
MR. JONES: That was my objection to the form and foundation.
THE WITNESS: It's kind of a confusing question. In July I didn't know anything about this project.
BY MR. BYMAN:
Q. Well, in terms of getting up to speed to do

your job, did you look at anything that occurred prior to your getting the job? Did you look at any of the historical files?

A. I did not look at anything having to do with investigations. Unless Grant asked us to. And then we only looked at it from a technical perspective. And typically I did not personally look at it.

Q. Do you know who Mr. Reil reported to in July of 2004? Would it have been Mr. Saxe?

A. No.

Q. That's right. He reported to somebody different than you.

A. Yeah. I'm just not sure when Moyra started. I can't remember when she started. Yes, in July I think it was Moyra, yes.

Q. If I were to tell you that an estimate was made that there were as many as 2,183,000 unique e-mails on the found tapes, would that be consistent with the amount of found data that was in processing in

00086

October?

MR. JONES: Can I have that read back, please?

(A portion of the record was read by the reporter.)

MR. JONES: I guess you can't type a frown, I better say that I object to the form of the question as vague and ambiguous.

THE WITNESS: Well, it's really that we don't look at it in the context of messages. We look at it in the context of size. I never knew how many messages there were in the 600. And since it's a mixture of messages and attachments, you can't even apply a good fraction.

BY MR. BYMAN:

Q. If it were simply text, how many pages would 600 gigabytes be?

A. I have no idea.

Q. Would it be 10 million pages?

A. I really don't know.

Q. More than a million? You can't give me even a --

A. Pages? I really don't think in terms of pages.

00087

Q. All right. How many words?

A. It's getting further away from how I think about it.

MR. JONES: Let me object. Asked and answered. She said she didn't know. But you want to take another shot.

THE WITNESS: I don't know those stats. We do -- I could sit here and do a little math in my head, but we don't think about it that way.

Actually I couldn't. Part of the challenge of even doing the math in my head is that the attachments are mixed in with the mails. So even if I tried to say a rough average message size and use some of the stats that I know from current processing, it would be way different back then.

BY MR. BYMAN:

Q. Well, let me try to put it this way, Ms. Gorman, if I were to represent to you that Bruce Buchannan of NDCI sent an e-mail to Wray Stewart in July of 2004 in which he said that they had reviewed the found tapes and that there were 2,183,331 total unique messages within those tapes, would that be consistent with the amount of data that you knew was in line for processing in October?

MR. JONES: Okay. Objection, asked and answered three or four times already.

BY MR. BYMAN:

Q. You can answer.

A. Again, I can't quantify -- I don't quantify it that way.

Q. That's not what I'm asking. I'm asking --

A. Try again, I'm sorry.

MR. JONES: It is what you're asking, Bob.

MR. BYMAN: Let me finish, Mike, or we're going to be here all night.

BY MR. BYMAN:

Q. I want to know if the 600 gigabytes you're talking about is 2 million individual e-mails a reasonable number or is it wildly wrong?

A. It's probably a subset, yes.

Q. I take it that you did not give any instructions to Mr. Jonas, that whatever it is he did he got his instructions from somebody else?

A. Yes.

Q. Are you familiar with the term brick level backups?

A. No.

Q. Let me show you a document that I'm going to mark as Exhibit 426 for identification.

(Plaintiff's Exhibit 426 was marked for identification.)

BY MR. BYMAN:

Q. It has production numbers 112593 through 601.

And of course I don't see your name on this. Do you have any recollection, however, of ever seeing it?

A. This mail? No.

Q. Do you see on the very last line on the first page: "We have experienced restoring brick level backups." And actually the subject of the e-mail is brick level backups. Take a look at that and see if it refreshes your recollection about the term?

A. Oh, no, I've never heard the term.

Q. You've never heard the term?

A. No.

Q. Were you aware that some time in late January 2005 an issue had arisen with respect to processing certain tapes?

A. Late January 2005?

Q. Yes.

A. Meaning a couple weeks ago?

Q. Yes.

A. No. No.

Q. The information that you processed that was in line in October when you made it a priority, that

began to be processed in mid January when the scripts were finally written and debugged, was that a static set of data?
A. Yes, that was already on hard disk.
Q. So it was data that was already there in October and may have been there for months or weeks or days, but it was already there?
A. Yes.
Q. Nobody added anything to it?
A. No, there was no room.
Q. Has any new data come in since then?
A. Yes.
Q. And from what source?
A. There were additional tapes that needed to be processed that were put on SDLTs and sent to us. In the middle of December Bob's team asked us if we had room. We didn't because we were still waiting to process the stuff out of staging.
We made room for it at the end of January.
Q. And what quantity was that additional data?
A. Although it was two SDLTs it ended up being only about less than 50 gig.
Q. Has all of that been processed?

00091

A. Yes, that was done in two days.
Q. Do you have any understanding where that data came from?
A. 8 millimeter tapes that had been found. Very old tapes.
Q. Do you know where they were found?
A. No.
Q. Is that a question better addressed to Mr. Saunders?
A. Probably.
Q. Was there any e-mail on those tapes?
A. They only give me what has e-mail on it. So of the 8 millimeters, however much e-mail they found is what I got.
Q. By the time you get it --
A. By the time I get it, it's e-mail.
Q. Do you have any understanding of whether anybody did any searches on any of the things that became e-mail and were sent to you to see if there were things that were possibly relevant to the lawsuit that weren't e-mail on those 8 millimeter tapes or the other tapes?
A. I don't have any knowledge of any searches that were done against those.
Q. As a result of the search of the 50

00092

gigabytes of data from the 8 millimeter tapes, was there some product that was pulled and forwarded on to Mr. Jonas?
A. Yes.
Q. So it didn't come up empty, it came up with something?
A. No. Well, again, we did a full super set. I do not know if there was a delta.
Q. In other words, you don't know if it was duplicated?
A. I don't know -- yeah. I don't remember. I actually didn't get the numbers from my group, this all happened -- I was actually on vacation the end of last

week.
Q. Good for you.
A. I don't particularly have all the details because I wasn't standing there. I just know we got the work done.
Q. I appreciate the fact that you don't know how many pages it is, how many individual e-mails it is, the content. But the point is out of the 600 gigabytes of data you do know that your searches yielded something that was turned over to Mr. Jonas?
A. Yes.
Q. And your search of the 8 millimeter tapes,

the 50 gigabytes yielded something that was turned over to Mr. Jonas?
A. Our next search as well as some additional data that had been loaded. There were, I believe, some additional tapes found very recently like in the last few weeks.
Q. What tapes are those?
A. More DLT tapes that were found. I don't know the context. I was told like two or three weeks ago that there were some more tapes coming our way. And that they need to be processed as quickly as possible.
Q. What quantity was that?
A. That was also a very small amount. I know we finished it over the weekend, this last weekend at the same time we finished the 8 millimeter. So on February 2nd we finished the big bulk that had been in staging. And then these two smaller amounts came that represented what was on the 8 millimeters and what was found very recently. We processed all of that by the weekend and -- that's why we reran the search at the beginning of this week.
Q. I just want to be sure that I'm clear on this. So there were three separate sources of things that you had. One was already in line for processing

when you got there?
A. Yes.
Q. Two was the output of the 8 millimeter tapes that was approximately 50 gigabytes?
A. Yes.
Q. And three was some quantity of tapes that were found in some other location that were given to you very recently?
A. Yes.
Q. And can you estimate the size of that third quantity? Was it also about 50 gigabytes?
A. I know it was small because I know we processed it very quickly. So I could say, you know, but that's all I could say. I never got a number from the person in my group. Horace did the work over the weekend, but it had to have been small. We did it very quickly.
Q. We know that as to the first group, the things that were in line when you got there, there was some output that you gave to Mr. Jonas.
A. Yes.
Q. As to two and three we know that there was something for the combination of them, but we don't know whether it was for both or for each?

A. Again, well, we ran another full search and gave them another, call it a super set. And that data had been inserted at that point. So anything found between -- any new data produced between the search -- if you did a difference between what we gave them Friday and what we gave them Monday, you'd have the answer to your question, but I don't know. I don't happen to know the answer.

Q. I think I'm finally starting to get it. So the search you did most recently would have come up with the same things you did out of the things you already had in October?

A. Yes.

Q. So unless we know that the file you first gave Mr. Jonas was smaller than the file you just gave Mr. Jonas, we won't know if there's anything in the new things?

A. Right. And we just gave it to him, so I haven't had a chance to --

Q. So either Mr. Jonas or Mr. Seickel will have to tell us that?

A. Glenn would not know that.

Q. Is there anybody on the list of --

A. Bob's team would not know anything about the size of a pull that we gave to Grant. They shouldn't, it's not their job.

MR. BYMAN: Why don't we take a little break.

(A recess was taken.)

BY MR. BYMAN:

Q. Ms. Gorman, do you have any reason to believe, by rumor or by actual statement, that there's anything else that you might be asked to process in terms of e-mails that predate 2000?

A. There is another set of data we are waiting for. And I don't know the dates.

Q. And who has told you that there's more data coming?

A. The last bucket of tapes that I mentioned we didn't get all of the data. So the tapes were found, they were sent to NDCI, NDCI processed some percentage of that. Sent it to us, we did that and I'm waiting for the last bit.

Q. Do you know what percentage they've processed?

A. I don't know.

Q. More than half, less than half?

A. I don't know.

Q. Do you have any information about when you will get them from NDCI?

A. We're hoping any day, I don't know what day it's going to show up. We're ready.

Q. When was the last time you talked to NDCI about where they are?

A. I don't talk directly to NDCI. I know I talked to Horace today, we did not have it yet.

Q. I'm sorry, Horace's last name is?

A. Sequeira.

Q. And Mr. Sequeira is the one that's interfacing with NDCI?

A. No, he interfaces with Bob Saunders' team.
Q. So again, this is a question for Mr. Saunders?
A. Yes.
Q. Well, that makes it easier and harder on Mr. Saunders.
MR. BYMAN: Unless Mr. Hirsch tackles me and says I forgot something, I have no further questions.
MR. JONES: Thank you.
(Whereupon, the deposition concluded at 5:30 p.m.)

- - -

C E R T I F I C A T E

- - -

STATE OF FLORIDA

COUNTY OF PALM BEACH

I, ALLISON GORMAN NACHTIGAL, hereby certify that I have read the foregoing transcript of my deposition and that the statements contained therein, together with any additions or corrections made on the attached Errata Sheet, are true and correct.

Dated this day of , 2005.

ALLISON GORMAN NACHTIGAL

The foregoing certificate was subscribed to before me this day of , 2005, by the witness who has produced a as identification and who did not take an additional oath.

Notary Public

CERTIFICATE OF OATH

STATE OF FLORIDA
COUNTY OF PALM BEACH

I, the undersigned authority, certify that ALLISON GORMAN NACHTIGAL personally appeared before me and was duly sworn.

WITNESS my hand and official seal this day of , 2005.

TRACEY L. SPATARA
Notary Public
Commission #DD 0327757
Expires July 31, 2008

REPORTER'S CERTIFICATE

STATE OF FLORIDA
COUNTY OF PALM BEACH

I, TRACEY L. SPATARA, RPR, certify that I was authorized to and did stenographically report the foregoing deposition/proceedings; and that the transcript is a true record thereof.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this day of , 2005.

TRACEY L. SPATARA, RPR

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February 6, 2005

VIA FACSIMILE

Michael T. Brody, Esq.
c/o Mafco Holdings Inc.
777 S. Flagler Drive
Suite 1200 -- West Tower
West Palm Beach, FL 33401-6136

Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. Incorporated*

Dear Mike:

Pursuant to the Court's February 4, 2005 Order, I am enclosing documents bates numbered MSE020605-0000001 - 0000004 — the next installment of Morgan Stanley's supplemental production of e-mail messages. No privileged responsive materials have been identified.

Sincerely,

Thomas A. Clare

Thomas A. Clare

Enclosures

cc: Joseph Ianno, Esq. (by facsimile w/o enclosures)
John Scarola, Esq. (by facsimile w/o enclosures)
Mark C. Hansen, Esq. (by facsimile w/o enclosures)

EXHIBIT
tabbies
C

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February 11, 2005

VIA FACSIMILE

Michael T. Brody, Esq.
c/o Mafco Holdings Inc.
777 S. Flagler Drive
Suite 1200 -- West Tower
West Palm Beach, FL 33401-6136

Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. Incorporated*

Dear Mike:

Pursuant to the Court's February 4, 2005 Order, I am enclosing documents bates numbered MSE021105-0000001 - 0000003 — the final installment of Morgan Stanley's supplemental production of e-mail messages. A few responsive privilege documents were found and are identified on the enclosed privilege log.

Sincerely,

Thomas A. Clare

Thomas A. Clare

Enclosures

cc: Joseph Ianno, Esq. (by facsimile w/o enclosures)
John Scarola, Esq. (by facsimile w/o enclosures)
Mark C. Hansen, Esq. (by facsimile w/o enclosures)

Return-Path: <rickf>
Received: from ms.com (hqpc55.morgan.com [144.14.242.165])
by hqsmh2.ms.com (8.8.5/imap v1.86) with ESMTP id QAA19049;
Fri, 19 Jun 1998 16:01:57 -0400 (EDT)
Message-ID: <358AC3B7.926298B5@ms.com>
Date: Fri, 19 Jun 1998 16:01:59 -0400
From: Richard Felix <rickf@ms.com>
Reply-To: rickf@ms.com
Organization: Morgan Stanley
X-Mailer: Mozilla 4.04 [en] (WinNT; I)
MIME-Version: 1.0
To: wwcredit@ms.com, Marcelo Modica <mod@ms.com>,
Linda Tipping <tippingl@ms.com>
Subject: Agenda for Morning Meeting of June 22, 1998
Content-Type: text/plain; charset=us-ascii
Content-Transfer-Encoding: 7bit

MEMORANDUM

TO: Worldwide Credit Department Professionals

FROM: Rick Felix

DATE: 6/19/98

RE: Agenda for Morning Meeting of June 22, 1998

---

1. LESLIE

NOTEWORTHY TRANSACTIONS:
* Technology Resources Industries repo - 25% margin.
* YPL Power - 1st Malaysian IPP. Wants to finance Asian Power projects with proceeds of $250MM convertible bond. Rating estimate:BBB.
* COLT - 600MM Pounds new financing: 200MM Pounds bonds, 200MM Pounds convertible bonds, 200MM Pounds equity.
* 1st Telecom - 10MM Pounds bridge loan for telephone reseller.
- 100MM Pounds units deal.
* Leica Geosystems - Bank & bond pitch.
* Ultrapar - commitment for $200MM bank loan for Brazilian chemical/LNG producer. Expected to sell down to $140MM.
* Sunbeam.
* Armstrong World Industries - acquisition of Triangle Pacific for $1 billion.
* DuPont/Conoco - Capital structure analysis and presentation to CFO's of both companies.

OTHER ITEMS:
* Convertible Bond conference in Shanghai - MChan speech to 100 attendees.
* Meeting with Moody's - "Issuer rating" introduced - proxy for senior unsecured (see attachment in the weekly package).
* Two new CRASD members joining today: Morgan Edwards, VP

Adnan Bhanpuri

* Triple Notching Case -Gty's from operating companies + debt incurrance test.
* Sovereign Risk Managers' lunch - from eight firms, to be hosted by STurner.
* JRS speaking at High Tech Conference on "Why You Need a Rating Advisor".

2. JON

INTERESTING:

* LTCB - We may see if the MOF quasi guarantee means anything. If it doesn't LTCB is the least of our worries.
* Tiger - Would like to view equity financing a bit more like fixed income financing. This is an important client so we have to take the request seriously.
* ASCOTS - An asset swap and an equity option rolled into one. We can't net the two and may face some small ($250,000) exposure with Yamaichi.
* Commodities off site will be held on site in London (Wed. and Thurs. this week). Attendees will be RICKF, DIAZP, LYONS, LUPIANO, CLARE, BUTLERTA, and JONL. Focus will be on staffing and integration of the commodities product into counterparty credit generally.
* Cross default is a provision in ISDA documents. We are sometimes asked if we will give this up as part of document negotiation. Let's be sure that senior business unit people are aware of these requests. I don't want credit to be the final yes or no on this.
* Fill up your back yard tanks (every other tank in the world is already full). Oil prices are very low and very volatile.

Our exposure is to end users (railroads and airlines).

3. RISK MONITORING GROUP

ADDITIONS:

* Nikko Securities FX PE>0.75
* Dai-Ichi Kangyo Bank FX PE>0.75
* MLC Emerging Markets swap PE>0.75
* Idemitsu Kosan commodities PE>0.75
* Crown Trade commodities PE>0.75

DELETIONS:

* Giat Industries FX PE<0.75
* Asia Pulp and Paper swap PE<0.75

VACATIONS/TRIPS

* LEB - vacation - 6/23 - 6/23
* VG - Hong Kong - 6/22 - 7/6
* JRS & JM - Wilmington, DE - 6/23
* AHK - vacation - 6/22 - 6/26

Return-Path: <FreeEdgarWatchList@partes.com>
Received: from sasmh1.ms.com (sasmh1.morgan.com [144.14.19.186])
by hqsmh1.ms.com (8.8.5/imap+ldap v2.2) with ESMTP id SAA10583
for <jakef@hqsmh1>; Thu, 12 Nov 1998 18:59:32 -0500 (EST)
Received: (from root@localhost)
by sasmh1.ms.com (8.8.5/hub+ldap v2.2) with X.500 id SAA11389
for jakef@hqsmh1.ms.com; Thu, 12 Nov 1998 18:59:31 -0500 (EST)
Received: from piinbh1.ms.com (piinbh1-i0.morgan.com [199.89.110.33])
by sasmh1.ms.com (8.8.5/hub+ldap v2.2) with ESMTP id SAA11371
for <jakef@ms.com>; Thu, 12 Nov 1998 18:59:29 -0500 (EST)
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by piinbh1.ms.com (8.8.6/fw v1.22) id SAA22942
for <jakef@ms.com>; Thu, 12 Nov 1998 18:59:28 -0500 (EST)
Received: from partesone.partes.com(204.118.154.69) by piinbh1.ms.com via smap (4.1)
id xma022717; Thu, 12 Nov 98 18:59:05 -0500
Received: by partesone.partes.com with Internet Mail Service (5.5.1960.3)
id <WLHZTDN3>; Thu, 12 Nov 1998 16:01:29 -0800
Message-ID: <2268E1723847D211A0380060081651E3D68CA9@partesone.partes.com>
From: FreeEdgar Watch List <FreeEdgarWatchList@partes.com>
To: "'jakef@ms.com'" <jakef@ms.com>
Subject: FreeEDGAR Alert: SUNBEAM CORP/FL/ 10-K/A
Date: Thu, 12 Nov 1998 16:01:28 -0800
MIME-Version: 1.0
X-Mailer: Internet Mail Service (5.5.1960.3)
Content-Type: text/plain

Dear Jake Foley:

SUNBEAM CORP/FL/ has filed a Form 10-K/A with the United States Securities and Exchange Commission.

Click on the following hyperlink to view this filing:
http://www.freeedgar.com/search/WL.asp?C=3662&F=10-K/A&D=11/12/1998

Click on the following hyperlink to manage your watch list:
http://www.freeedgar.com/companies/watchlist/index.htm.

Please Note: The hyperlink for the filing may not retrieve the filing if the address extends to more than one line. If this should occur, please copy the full text of the address for the filing into the address box in your web browser.

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Coleman (Parent) Holdings, Inc. v. Morgan Stanley Incorporated
2/11/2005 Email Privilege Log

Priv	Date	Author(s)	Recipient(s)	Priv	Privilege Description	Redact Bates
3	6/22/1998	Jeanmarie McFadden (MS)	William Strong (MS)	AC	E-mail thread reflecting intended communciatons with specifically identified in-house counsel (M. Zuckert) to seek legal advice regarding Sunbeam press release, with e-mail chain to corporate communications reflecting legal advice provided by in-house counsel (M. Zuckert)	
4	6/26/1998	John Andrews (MS)	Jeanmarie McFadden (MS) CC: Philip Purcell (MS); John Mack (MS); Peter Karches (MS); Stephan Newhouse (MS); Christine Edwards (MS); Michael Zuckert (MS); Eileen Wallace (MS); Joseph Perella (MS)	AC	E-mail thread to listed recipients and in-house counsel (M. Zuckert) seeking legal advice regarding Sunbeam press coverage	
5	6/22/1998	Jeanmarie McFadden (MS)	William Strong (MS);	AC	E-mail thread reflecting intended communciatons with specifically identified in-house counsel (M. Zuckert) to seek legal advice regarding Sunbeam press release, with e-mail chain to corporate communications reflecting legal advice provided by in-house counsel (M. Zuckert)	
6	6/22/1998	William Strong (MS)	Jeanmarie McFadden (MS) CC: Michael Zuckert (MS)	AC	E-mail to in-house counsel (M. Zuckert) and corporate communications seeking legal advice regarding Sunbeam press coverage.	
7	6/25/1998	John Andrews (MS)	Jeanmarie McFadden (MS); Philip Purcell (MS); John Mack (MS); Peter Karches (MS); Stephan Newhouse (MS); Christine Edwards (MS) CC: Michael Zuckert (MS); John Andrews (MS) Eileen Wallace (MS); Joseph Perella (MS)	AC	E-mail thread to listed recipients and in-house counsel (M. Zuckert) seeking legal advice regarding Sunbeam press coverage	

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

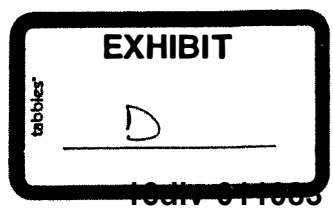
Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Wednesday, February 2, 2005
9:21 a.m. - 3:23 p.m.



we've been able to find out over the lunch break.

THE COURT: Okay.

MR. CLARE: And I'll give you the headlines first, and then I'll walk you through as much detail as I've been able to uncover in the last two hours.

THE COURT: Just like to see an end.

MR. CLARE: Just like to see an end. I'd like to hand up to the court, if I might, the beginning of what I think the headline is, which is the Certificate of Compliance that was provided by Morgan Stanley in connection with the court's order. This will be the beginning point of the chronology that I'm going to walk the court through. It's dated June 23rd, 2004. It relates to our May production.

THE COURT: Right.

MR. CLARE: The headline is that the first time that anyone -- that anyone at Morgan Stanley knew that there was recoverable e-mail data that might fall within the court's order was not until late October 2004 consistent with Mr. Doyle's declaration. And I'm prepared to walk the court through and explain

where the tapes were found, how they were found.

THE COURT: Why don't you make a proffer, and we'll figure out where we're going.

MR. CLARE: Very good. In the summer of 2004 -- I do not have a precise date on that, but sometime during the summer, 1,400 DLT tapes were found in a closet, in a closet in an off-site storage facility in Brooklyn. Those tapes --

THE COURT: What's DLT mean?

MR. CLARE: DLT is a type of tape that describes the capacity of the tape. It's a digital tape. And DLT is an indication that indicates how much data it can containment and I'll get to how -- who wit

would down that number in a minute. Those tapes were sent to an outside vendor to determine what, if anything was on them. There was no indication that there was anything on them at all.

In late October of 2004, which is the date that Mr. Doyle alluded to in his declaration and the date that I'm representing to the court is the first time anybody knew that there was

recoverable e-mail data --

THE COURT: Do we know when the tapes were sent to the outside vendor?

MR. CLARE: They were sent shortly after they were discovered.

THE COURT: We don't know that date yet?

MR. CLARE: We do not know the date. That is one of the irons that we still have in the fire. But we have reason to believe throughout the summer of 2004 there were constant updates that were being provided on this, all of which indicated that the tapes were still at the vendor, so we believe they were at the

vendor for a while during the summer of 2004.

In late October 2004, the report came back the from the vendor that 112 of those tapes had e-mail, recoverable e-mail data on them. And they immediately or promptly within days of learning that began to be uploaded onto a system to make them searchable so that we could run the searches. It was at that point that counsel learned that these tapes existed and that they might have recoverable

e-mail data and so the searches were run in early November as described in Mr. Jonas's declaration, which is before the court, on all of the tapes that had been restored up to that point. Some portion of those 112 tapes had been restored and made searchable by the middle of November.

THE COURT: We do not know how many?

MR. CLARE: We do not know how many. The other portion was being uploaded continuously since then, and those tapes are what came online today or early

yesterday morning consistent with our representation to the plaintiff that the additional tapes would be searchable at the end of January.

THE COURT: I'm sorry. Are you talking about the additional tapes, of the 112?

MR. CLARE: Yes.

THE COURT: Have all those been searched now?

MR. CLARE: All of those tapes have now come online, and those tapes I'll get to in a moment in terms of when they'll be searchable. They've now been uploaded to the system to become searchable. We get

that they can do given the dates that they found the tape, the dates that they were returned from the vendor, the amount of time it takes to process them and the amount of time it takes to run the

searches.

THE COURT: Okay.

MR. CLARE: The client has committed to move with deliberate speed and use best efforts.

THE COURT: Is that different than old deliberate speed?

MR. CLARE: Whatever standard you want they're willing to and they have committed and did commit back in November to do that. And so we, the outside counsel, have committed to turn the data around as soon as it's provided to us by the client to provide them with responsive data with the goal being that by the date of the first pretrial conference we will know whether there are any additional e-mails to be produced.

That's the other point of this that I alluded to before the lunch break, and I don't want it to get lost, is that we just don't know as we sit here.

THE COURT: Sure. But then the question is -- that's precisely the point, we don't know. The question is if we

don't find out, whose fault is that? And I have to assume it's sort of Morgan Stanley's fault, and then we talk about what's appropriate.

MR. CLARE: Let me respond to that in a couple ways. First, I don't think that there's any evidence from what we've submitted to the court or from what I've been told, and the proffer we'd be happy to make under oath, supplemental proffer if that's the way the court wants to handle it, of any intentional delay of this. At worst, at the absolute worst it can be said that an outside vendor took a long time to get these tapes to us and that the technical limitations limit our ability to upload and search them quickly. There's no indication any of this was intentional or anything of the like.

Morgan Stanley's executive director of the information technology department has given you a sworn affidavit that this has been a priority of her department since December of 2004.

February 10, 2005 Privilege Log

Priv No.	Date	Author(s)	Recipient(s)	Priv	Privilege Description	Redact Bates
514	11/22/2004	Bruce Buchanan (NDCI)	Wray Stewart (MS), Glenn Seickel (MS)	WP	E-mail from IT professional to in-house IT attaching spreadsheets prepared at the request of counsel regarding e-mail restoration process.	
514-A	11/22/2004	Bruce Buchanan (NDCI)		WP	Spreadsheet prepared by IT professionals at the request of in-house counsel regarding e-mail restoration priorities.	
515	11/22/2004	Bruce Buchanan (NDCI)	Wray Stewart (MS), Glenn Seickel (MS)	WP	E-mail from IT professional to in-house IT attaching spreadsheets prepared at the request of counsel regarding e-mail restoration process.	
515-A	11/22/2004	Bruce Buchanan (NDCI)		WP	Spreadsheet prepared by IT professionals at the request of in-house counsel regarding e-mail restoration priorities.	
516	11/22/2004	Bruce Buchanan (NDCI)	Wray Stewart (MS), Glenn Seickel (MS)	WP	E-mail from IT professional to in-house IT attaching spreadsheets prepared at the request of counsel regarding e-mail restoration process.	
517	11/22/2004	Bruce Buchanan (NDCI)	Wray Stewart (MS), Glenn Seickel (MS)	WP	E-mail from IT professional to in-house IT attaching spreadsheets prepared at the request of counsel regarding e-mail restoration process.	
518	11/5/2004	Bruce Buchanan (NDCI)	John Pamula (MS); Wray Stewart (MS); Glenn Seickel (MS)	WP	E-mail from IT professional to in-house IT attaching spreadsheets prepared at the request of counsel regarding e-mail restoration process.	
518-A	11/5/2004	Bruce Buchanan (NDCI)		WP	Spreadsheet prepared by IT professionals at the request of in-house counsel regarding e-mail restoration priorities.	
519	11/5/2004	Wray Stewart (MS)	Soo-Mi Lee(MS) CC: Robert Saunders (MS); Glenn Seickel (MS)	AC/WP	E-mail from IT professional to in-house counsel attaching spreadsheets prepared at the request of counsel regarding e-mail restoration process.	

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EXHIBIT
17

Feb-10-05 12:42am From-
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16div-011090

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IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA
CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

DEPOSITION OF ROBERT JOHN SAUNDERS

Taken before Tracey L. Spatara, Registered Professional Reporter, Notary Public in and for the State of Florida at Large, pursuant to Notice of Taking Deposition filed by the Plaintiff in the above cause.

Thursday, February 10, 2005
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida
9:00 a.m. to 11:40 a.m.

0002

APPEARANCES:

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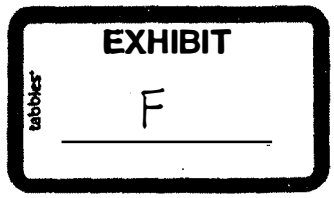
Attorneys for Defendant



0003

I N D E X

PAGE

DIRECT EXAMINATION 4
BY MR. BYMAN:

EXHIBITS

PAGE
Plaintiff's Exhibit 427 40
Plaintiff's Exhibit 428 76
Plaintiff's Exhibit 429 81
Plaintiff's Exhibit 430 89

P R O C E E D I N G S

THEREUPON,

ROBERT JOHN SAUNDERS

having been first duly sworn, was examined and testified as follows:

THE WITNESS: I do.

DIRECT EXAMINATION

BY MR. BYMAN:

Q. The record should reflect that this is the deposition of Mr. Robert Saunders taken pursuant to the order of Court dated February 3rd, 2005, and the designation of Mr. Saunders as one of the three persons that Morgan Stanley and Company intends to offer at an evidentiary hearing on Monday.

Would you state your full name for the record, please?

A. Robert John Saunders.

Q. Mr. Saunders, you've given a deposition in this case already on February 10, 2004. Do you recall that?

A. Yes.

Q. And at that time you told us that was the first time you had ever given a deposition. Have you given any depositions since then?

A. I have not.

Q. So we've had the honor of giving you all of your deposition experience?

A. Yes.

MR. KLAPPER: All on the same day, February 10th.

THE WITNESS: It was exactly a year ago today. Better weather, though.

BY MR. BYMAN:
Q. Have your titles or job responsibilities changed in the last year?
A. They have not.
Q. So you are still an executive director at Morgan Stanley?
A. Yes.
Q. Do you still report to Joe Sidor?
A. I do not. I have a new manager.
Q. And who is your manager now?
A. His name is Jerry DeMarco. D-E-M-A-R-C-O.
Q. And when did that change occur?
A. Change occurred this summer.
Q. What happened to Mr. Sidor?
A. Mr. Sidor was moved to another area within information technology.
Q. Are you familiar with an individual named

0006

Arthur Reil?
A. Yes.
Q. Did Mr. Sidor's move have anything to do with the events that precipitated Mr. Reil's being placed on administrative leave?
A. To my knowledge, no.
Q. What, if anything, was your relationship with Mr. Reil prior to his being placed on administrative leave?
A. Can you elaborate on relationship?
Q. Were you colleagues? Did you report to him? Did he report to you? Did you work together in any way?
A. I would say that we were colleagues. Part of my team was responsible for working with Arthur in providing him with services in order to complete the e-mail restoration project.
Q. And what services was your team providing to him?
A. Specifically, access to the DLT Legato tapes and working with our external vendor, NDCI, to process those tapes as part of the e-mail restoration project.
Q. Did your team have a title?
A. One of their names is the back up and restore team, also known as BURP, B-U-R-P.

0007

Q. When was that team formed?
A. The team has been in existence for several years. I wouldn't -- I couldn't give an exact time frame as to when it was formed.
Q. Who are the members of the team?
A. Glenn Seickel is the -- I would call him the operational manager of that team. John Pamula is basically the head of the BURP group. He is a Siemens contractor, and, in fact, the other members of that team are also Siemens contractors.
Q. So the only Morgan Stanley employees in that group are yourself and Mr. Seickel?
A. I'd say that's accurate.
Q. And what is your role in the team? If Mr. Seickel is the operations manager, are you over all in charge?
A. I'm the senior manager responsible for UNIX and storage in North America. One of my duties -- one of the areas that I'm responsible for is the back up

plant, and by nature of that, the backup tapes that exist in our store.
Q. And what precisely was your team charged with to help Mr. Reil in whatever it was he was doing?
A. My team was responsible for providing access to what we call the Legacy Legato DLT tapes and

0008

basically working with Arthur Reil's team to have those tapes delivered from our off-site storage vendor, Recall -- capital R -- having those tapes delivered to a third party vendor, a forensics data company called National Data Conversion Institution, NDCI.
After NDCI was through with their part of the project, they would deliver back to us SDLT tapes with the relevant information, a/k/a e-mails. Then my team would take the information off of those SDLTs, move that information to disk -- so online storage -- take it off of media, removable media, and basically provide that to the e-mail archive team where they could upload that information into the e-mail archive.
Q. Let me go back and try to do this in small steps. And I apologize, Mr. Saunders, my knowledge of computers is the on/off button. So if I speak a different language than you do, please try to help me with terms.
The Legato DLT tapes are some sort of magnetic tape; is that correct?
A. That's correct.
Q. What is the storage capacity of each tape?
A. My understanding -- and I am not the most technical member of my team, as you might imagine -- that the storage capability of a DLT tape is somewhere

0009

on the order of 35 gigabytes per tape.
Q. And what is the storage capacity of a super DLT tape, an SDLT?
A. Again, my general understanding is it's around 150 gigabytes per tape.
Q. Is the data that's stored on an SDLT compressed data?
A. My understanding is that it could either be compressed or uncompressed, depending on the software that you use to record data.
Q. On the SDLT tapes that are provided to you by NDCI, are those compressed or noncompressed?
A. I don't know.
Q. If they were compressed, do you know how much data they would have when expanded?
A. Again, I don't know.
Q. And if I understand what you've said -- and I'm going to try to repeat it in what I consider to be layman's language, but that's a different thing for different people. And if you could understand what I've said, then that means I've understood what you've said.
You take the raw DLT tapes, provide them to NDCI. They extract what they understand to be the relevant information you're looking for, and they take

0010

it off of the DLT tapes and put it onto an SDLT, deliver it back to you so it can be processed in your system.
A. That's correct.

Q. Does NDCI have the technical capability to put the information that it culls out of the DLT tapes into some sort of searchable database itself and perform searches?
A. I'm not aware of their capacity to do so.
Q. Do you know that they cannot, or you just don't know --
A. I don't know.
Q. Have you asked them?
A. I personally have not asked.
Q. To your knowledge has anyone at Morgan Stanley asked them?
A. I don't know.
Q. The work that you've been doing with Mr. Reil's group -- or had been doing with Mr. Reil's group before he left, was that related to the e-mail archive project specifically, or was it related to something else?
A. The work that we had been performing with Mr. Reil specifically was an effort chartered in 2003 to go back to a store of tapes that were from prior to

0011

the e-mail archive's existence, prior to January 1st, 2003, take that sum of tapes, extract available e-mail, duplicate that e-mail, then upload it into the archive for the purpose of more expeditiously providing search capability of e-mail prior to 2003 for litigations or for regulatory requests.
Q. So it was a generic project, but could have related to this litigation, for example?
A. I was not party to the decision of why to do the effort. However, I do know that I have been involved for several years, you know, with providing response to ad hoc requests from various bodies, some of them having to do with litigations. And that Morgan Stanley made a decision in good faith to move forward with taking that information off of the tapes in a comprehensive fashion rather than continuing with ad hoc queries over time, which take a lot more time and basically were inefficient.
Q. Well, they take a lot more time if you're doing them one at a time because you're redoing things. But if you were doing a specific search it would take less time than reconstructing the entire system, wouldn't it?
A. It would depend. It would depend on the scope of the request. Some of the requests we've

0012

received have been, we need information over the period of 11 or 12 months for 100 people. So it needs to be very clear what the request would be.
Q. Let me show you something that we marked yesterday as Exhibit 425.
MR. BYMAN: And I apologize, Tony, I don't have extra copies of what I gave yesterday to Mike.
MR. JONES: I'll dig it out.
MR. KLAPPER: You say Exhibit 425?
MR. BYMAN: Yes.
It's possible I have another copy of that. Let me see if I do.
I do.
BY MR. BYMAN:

Q. Mr. Saunders, let me represent to you that this is actually a cull of the documents that were given to us. It does not bear sequential numbers.
MR. KLAPPER: Let me also say if you feel like you want to review it before any questions are asked, feel free to do so.
THE WITNESS: Actually, could I have two minutes to take a look at this?
MR. BYMAN: Of course.
THE WITNESS: Okay.

BY MR. BYMAN:
Q. Again, I was starting to explain that I suspect you have not seen these documents in this form, because I have extracted them from a body of other things. Let me tell you what I did so we're on the same page.
The materials that were produced to us included a somewhat thicker set of things, all of which included fax headers dated October 21, 2004, with a phone number indicated, that happens to be the fax phone number of the Washington office of the law firm Sidley and Austin.
It's apparently a series of different transmissions, because they are different times, and there are different headers for the pages. Some of them, for example, just say page 23. Some say page 2 of 6. But they are each of what appear to be cover pages that reflect minutes of e-mail archive meetings on various dates.
Have you ever seen these documents, whether or not in this collection?
A. Yes.
Q. Were you the one that provided these documents to counsel so that they could be provided to us?

A. I don't believe so.
Q. When did you first see any of these documents?
A. Some of these documents I became aware of through discussions with counsel over the last several months.
Q. Do you see the "to" indication, e-mail archive space core?
A. Uh-huh.
Q. Is that an address group?
A. Yes.
Q. Were you one of the people within that address group?
A. I was not.
Q. Do you know who is within that address group?
A. I could speculate, but I'm not sure.
Q. Give me your best estimate of who would be in it?
A. My guess of the people that would have been in that e-mail group would have been Arthur Reil, Don Haight, Kay Gunn, Wray Stewart.
Q. John Pamula?
A. John Pamula, possibly.
Q. Annaline Dinkelmann?

A. I don't know whether or not she would be in that group.
Q. There's also a cc to DSMGR-NA; is that another group?
A. That is.
Q. Who would be within that group?
A. I was within that group.
Q. Who else is in that group?
A. That group is a mix of managers and senior members of the level to UNIX and Windows support team of which I am a manager.
Q. And what other persons are within that group?
A. Some folks that had previously been in our area that are now affiliated with our area but no longer directly in the group.
Q. Can you give me their names?
A. I think that Isaac Hollander was still in the group.
Joe Peraglia, P-E-R-A-G-L-I-A.
Vaughn Turner.
I think that's the extent of my recollection.
Q. Were you a member of DSMGR-NA as of May 2004?

0016

A. Yes.
Q. Were you still a member of that group as of September 2004?
A. Yes.
Q. So is it fair to say that you would have received, more or less in real time, copies of each of these documents when they were generated?
A. Yes.
Q. Did you ever forward any of these documents to any other person?
A. No.
Q. What would you typically do when you received copies of these minutes?
A. These minutes reflect meetings and updates on the status of the e-mail archive restoration project of which I testified a few minutes before. Wray Stewart, who is one of the key members who helps to keep this group moving forward, would send out weekly minutes.
I would receive them on a weekly basis. By the summer of 2004, the project had been moving along, was certainly at a run rate capacity. I had stepped away from the effort, and, in fact, my responsibility was solely to provide care and feeding for my team members that were assisting Arthur with the project.

0017

Arthur had responsibility for decision-making and ultimate responsibility to IT management for the successful completion of the effort.
So the way I would handle these documents is I would receive them on a weekly basis, but as the information and as the effort largely was well underway and then appeared to be coming to conclusion, I was not reviewing them in real time, as you said.
Q. Was there anyone on your team or who reported to you that was charged with reviewing them in greater detail?

A. Wray Stewart was -- continued to be affiliated with this project in helping to make sure that the flow of tapes between our vendors and making sure that the information was getting into the staging area so that Arthur's team could upload it. I would say he was the closest to it.

Glenn Seickel was also my operational manager, would obviously be continuing to be closely involved to make sure that we were fulfilling our obligations.

Q. Were you aware that Mr. Reil was placed on administrative leave in August 2004?

A. Could you specify the time frame?

Q. Well, I'm not sure I know the date.

0018

Ms. Gorman testified yesterday that it was August 2004, and I don't recall --

A. So to be clear with your question, are you asking me am I now aware, or if I was aware at some point?

Q. Are you aware?

A. I am aware.

Q. When did you become aware?

A. I believe I became aware, and I think the date you just said was the 18th.

Q. Actually, I didn't give you a date. It's August of 2004.

A. Okay. I received a phone call in August of '04, and I think my general recollection is it was the 18th, a Thursday, that Arthur was no longer with the firm or was no longer responsible for the effort for the e-mail archive effort.

Q. Who did you receive that phone call from?

A. From Rob Place, P-L-A-C-E. Rob is a direct report of mine. He works in my group.

Q. What is Mr. Place's role in your group?

A. Rob is responsible for storage and infrastructure. And Glenn Seickel reports to Rob.

Q. What did Mr. Place tell you about Mr. Reil?

A. He let me know that a meeting had been set

0019

up -- had happened where it was announced that Arthur was no longer responsible for the archive and that where some decisions were made with respect to how to continue to move forward with this effort.

Q. Were you aware during that phone call or shortly thereafter that Mr. Reil was replaced by Allison Gorman Nachtigal?

A. I was made aware, I believe, within several weeks of that event.

Q. Were you consulted by anyone about Mr. Reil's performance prior to the announcement of his departure?

A. I was not.

Q. So far as you know, you did not play any role in his jettison?

A. I do not believe I played any role.

Q. Were you ever asked to review his performance?

A. No.

Q. Did you ever do a peer review of him?

A. I did not do a peer review of him.

Q. Did you do any kind of review of him?

A. I believe I may have been asked by, you know, my previous boss, Joe Sidor, as to how it was to work with Arthur. In sort of an informal kind of way, but not a formal peer review.
Q. When did that conversation occur?
A. Generally I would guess that it was in earlier -- in the first half of '04.
Q. Did you ever form any impressions, whether or not you conveyed them to anybody, about Mr. Reil's competence?
A. Could you be more specific?
Q. His competence for the e-mail archive project.
A. Yes.
Q. What was your impression?
A. My impression is that Arthur was someone who senior members of IT had entrusted with a large set of responsibilities; that his responsibility was to not only create an application, like a searchable, indexable archive, but to -- so from an application perspective, but also responsible for infrastructure strategy and design.
That's a pretty large scope for one individual. In general, in my experience, people are generally experts at one or the other. Although various IT groups, including my own, would provide assistance with infrastructure strategy, et cetera.
My overall impression was that he had a previous history, a lengthy history of experience in the industry and that people were of the opinion that he could deliver over a several-year time frame a tool that the firm needed.
Q. So is that a way of saying that you thought he was performing his job adequately?
A. I would say the answer to your question right there is, I wasn't going in that direction with my answer. I was merely -- you asked my -- what my understanding of his -- impressions of him were.
Q. Well, did you ever form an impression as to whether he was or was not performing his job adequately?
A. Yes.
Q. And what was your impression?
A. My impression was that the archive itself did go live, as was previously planned, on January 1st, 2003. So he delivered on time.
In terms of working with him specifically on the e-mail restoration project, his team was coordinating getting this information, this Legacy information, prior to 2003, working with various different groups together that -- the group was working together. The information was flowing between the different vendors and coming back to Morgan Stanley, and progress did appear to be made.
Q. So is that a way of saying that he was or was not performing adequately?
A. So from my perspective, he was performing adequately.
Q. Did you ever share that view with any of your bosses or his bosses?

A. I don't know if I shared my view of his competence with my superiors.
Q. Do you ever have interface with lawyers in the performance of your duties, other than getting ready for depositions?
A. Would you restate the question?
Q. Well, is any part of your duties over the last couple of years been to supply support or other services to legal counsel?
A. Yes.
Q. And would you describe what that function has been?
MR. KLAPPER: And let me just interject, Counsel.
You're not to reveal anything about the specific services, conversations that you've had with counsel relating to those services, or discussions that you've had with counsel.

With that understanding, you can answer the question.
THE WITNESS: Sure. Since my team is one of the groups responsible for data protection and back ups of documents and information, we have been involved in requests for documents, information, e-mail over the past several years.
I've spoken already about the fact that we have a number of tapes which were off-sited to our vendor, Recall, and that we would -- when requests would come in, ad hoc requests for certain information, we would assist legal and IT security in executing those search requests.
BY MR. BYMAN:
Q. Specifically to this case, first of all, you are aware that this is a lawsuit between Coleman Parent Holdings and Morgan Stanley and Company, Incorporated, are you not?
A. Yes.
Q. Have you ever been asked by anyone to provide support to the legal team for this specific case?
And that's just a yes or no. I'm not trying to find out what you did.
A. Yes.

Q. And now to the extent that you can do it -- and I do not want to invade privileges, but to the extent you can, tell me what task you've been given for this case.
MR. KLAPPER: I'm going to object. Because it's unclear to me that in describing the tasks we can somehow protect the privilege. In terms of description of the tasks, that gets into the mental impression of the attorneys in terms of what they've asked him to do in assisting counsel.
If you want to ask him questions about who he interacted with, when he had meetings with attorneys, et cetera, those atmospherics, I'm all for it. Go forth. But I believe you're invading the privilege if we start getting into the litany of tasks that he may or may not have been asked to do.

MR. BYMAN: Let me see if I can get to at least some specific.

BY MR. BYMAN:

Q. Have you ever been asked to attempt to locate e-mails that might be relevant to this litigation?

MR. KLAPPER: And let me confer with him

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with respect to whether or not -- and with co-counsel -- with respect to whether or not this is getting into the privilege area.

MR. BYMAN: Sure.

(A discussion was held off the record.)

(A portion of the record was read by the reporter.)

MR. KLAPPER: And I'm just going to go on the record and indicate that it's our position that, feel free to ask him generally about what he has done in terms of searching for e-mails and things of that sort. But if we're going to get into specific questions as to who asked him to perform those functions, we're going to invoke the privilege, and I'm going instruct him not to answer that.

With the exception of any -- I guess the order in place in this particular case for purposes of this deposition required us to identify documents that Mr. Saunders may have had in his possession. And feel free to ask about that pursuant to the order.

But other than that, in terms of specific tasks asked by lawyers, I'm going to invoke the privilege and instruct the witness not to

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answer.

MR. BYMAN: I'm confused, Tony. Why would the identity of someone who made the request be privileged.

MR. KLAPPER: Because the nature of the question is what are the tasks you've been asked to do. Once you link that up to the attorney, you're getting into the attorneys' mental impressions in terms of what he has decided or not decided to do or asked Mr. Saunders to do.

So I'm not suggesting you have nefarious motives here, but it's a backdoor way of getting at what the attorney is intending to do.

MR. BYMAN: Well, I disagree with your definition of what falls within the privilege. So I'm going to ask the question and ask you to make whatever you -- instructions you need to do.

BY MR. BYMAN:

Q. Has anyone ever asked you to aid in the location and identification of e-mails relevant to this specific litigation?

MR. KLAPPER: And let me just interject.

You can answer that question so long as you don't reveal if it was attorney based or not

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attorney based.

You may answer.

THE WITNESS: To be specific, are you asking

whether I've looked at my own e-mails, or I've looked at all e-mails that are available to Morgan Stanley?

BY MR. BYMAN:

Q. My question is: Have you been asked to search Morgan Stanley files or aid in a search of Morgan Stanley files for any e-mails that are related to this litigation?

A. Okay. I was specifically asked to check my own e-mail for any information or documents relevant to this proceeding.

Q. And have you or your team provided any support specifically related to this litigation to extract, locate, or identify e-mails for production in this litigation?

A. I guess the strict answer to that question is yes, specifically related to the three tranches of tapes that have been under discussion in the last several weeks and in a hearing to which I was party. I believe it was last Friday or Thursday. It was last Friday, I think.

Q. Let's make sure that we get the definition

0028

of what you mean by the three tranches of tapes. What do you mean?

A. Sure. So outside of what we've talked about in general as the 35,000 Legacy Legato tapes or the universe of tapes prior to 2003, some of which contained e-mail, some of which did not, there were some groups of tapes which have become -- which surfaced in this past year that may or may not have contained additional information.

And I know that in this proceeding that there's been some concern about that information, whether it's discoverable, whether or not it's privileged, and how to make that available to both sides, the plaintiff and the defendant, in order to help move this matter forward.

Q. So the first tranche is the 35,000 tapes?

A. So that makes it four tranches. The 35,000 would be the original set of tapes.

Q. The original set of what Morgan Stanley believed to be the universe of pre-2003 tapes?

A. That's correct.

Q. And then something surfaced that expanded the universe?

A. That's right.

Q. And that's tranche two?

0029

A. Sure.

Q. And what's the quantity of tranche two tapes?

A. My understanding is that 1423 DLT tapes that were found this past year.

Q. What's tranche three?

A. Tranche three is the 8-millimeter tapes.

Q. And what's the quantity of those tapes?

A. I'm not specifically aware of that number.

Q. Do you have any general estimate?

A. Somewhere -- I think somewhere around 700.

Q. You've told us what the storage capacity was of a DLT tape. What's the storage capacity of an 8-millimeter tape?

A. I'm really not sure, but I'm thinking it's under 10 gig per tape. But that's a guess.
Q. What is tranche four?
A. Tranche four would be the 169 tapes, DLT tapes, that were found in the last couple of months.
Q. Let's go back to tranche two. As to the 1423 DLT tapes, when were those first discovered?
A. My understanding is that they were discovered somewhere in -- early in the summer of 2004.
Q. Well, take a look at the first document in Exhibit 425, which is dated May 6. Under pending

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items, paragraph two, there's a reference to 1,024 unlabeled tapes that were found in the Brooklyn security room. Is that a reference to what became the 1423 tapes?
And if you look at the next page, you'll see it's already grown to 1421 on May 20th. And if you'll look at the next page, we finally get to the 1423.
A. Is there a question?
Q. Yes. Is this a reference to the tranche two tapes?
A. I believe so.
Q. So they were found at least as of May 6th, 2004; is that right?
A. According to this document, that sounds right.
Q. Do you have any reason to believe that this document is incorrect?
A. I don't.
Q. Or that it's dated incorrectly?
A. I don't.
Q. How were these tapes found on or before May 6th, 2004?
A. I'm not aware of how they were found.
Q. Do you know who found them?
A. I do not.

0031

Q. Have you ever asked anyone?
A. I don't recall asking anyone how they were found.
Q. There's a reference on the first page of Exhibit 425 to Wray Stewart/Glenn to investigate the origin of the tapes. Was someone tasked to find out what the origin of the tapes was?
A. It would appear here that Wray or Glenn were going to investigate.
Q. But you have no knowledge other than what's on this document?
A. I specifically don't remember.
Q. Did anyone ever report to you that they figured out why these tapes turned up?
A. There were conversations after this event that I'm generally aware of regarding: How did this happen? What do we know about it? What could we do to make sure that we've located the universe of tapes?
Q. Who did you have those conversations with?
A. Glenn and Wray.
Q. When did you have those conversations?
A. Again, general knowledge, I would say in the same time period, May, June.
Q. Did you come up with some answer as to how you could make sure this wouldn't happen again?

0032

A. I believe through conversations with Wray and Glenn, and I'm not sure if it was a directive of mine or whether they took action upon themselves, but we did decide to do a sweep, a physical, visual search of our communication rooms, to go out and look for any other tapes that may have been missed or may have been in a place that wasn't part of normal business practice.

Q. Who conducted that sweep?

A. Again, general knowledge about what was done, but I believe that the BURP team, that the Siemens contractors, the tape handlers themselves, were sent out to the different comm rooms.

Q. How many people would that involve?

A. I think it's six people.

Q. Were the instructions to the BURP team oral or in writing?

A. Again, general knowledge, I do not know.

Q. Would it make sense that it be oral? It would have been in writing, wouldn't it?

A. Again, I don't know.

Q. Let me represent to you that we haven't seen anything in this stack that indicates that any such instructions were sent out. If they were sent out, would you have been copied with those instructions?

0033

A. As the senior manager of the team, I am not always copied on actions that are taken by the team in this space. And I think that oral instructions were often the way that we would ask people to take care of one off requests.

Q. However the instructions were given, you would have expected to see a report of the results, would you not, of that sweep?

MR. KLAPPER: Objection, vague and ambiguous as to the report and whether you're referring to --

MR. BYMAN: Let me start over.

BY MR. BYMAN:

Q. Did you ever see a report?

A. I generally recall either Wray or Glenn coming back to me and indicating that a sweep had been performed and that nothing was found.

Q. So that was an oral report?

A. Yes.

Q. Did you ever see a written report?

A. Not to my knowledge.

Q. What is the Brooklyn security room?

A. The Brooklyn security room is a separate dedicated area, part of our communication rooms. And by communication room we mean large floor spaces that

0034

are cooled that contain our computer -- our computing equipment, so mainframes, Dell computers, Sun computers, our storage, EMC storage area network equipment.

Specifically within that communication room there is a cage, which is actually a physical cage where some more critical equipment is kept, some equipment that has higher levels of physical security than the rest of the room.

Q. Is the Brooklyn security room part of the

same facility located in One Pier Point Plaza in Brooklyn Heights that you testified about in your first deposition?
A. Yes.
Q. Is there some reason why that room wasn't searched initially when the original tranche of 35,000 tapes were put together?
A. So -- with respect to the original universe of tapes, of the 35,000, those are the tapes that were located at our Recall off-site facility. Our standard business practice is to off-site tapes on a regular basis. And those were the tapes that we believed to be the sum total of our DLT tapes.
Q. Right. But that's not quite responsive to my question. The question is: Why didn't somebody

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think to look in the Brooklyn security room when you were developing the original universe?
A. So at the time when the project was conceived, there was no reasonable -- there was no reason to believe that there were tapes outside of our Recall facility in New Jersey.
Q. What changed? Why did you suddenly decide that you should look in the Brooklyn security room?
A. Again, I testified that I'm not aware of how they were found. So I can't speak to that question.
Q. Do you have any knowledge as to why somebody thought that they found 1,024 and then two weeks later thought that they found 1421 and then a couple of weeks after that decided it was 1423?
A. I have no knowledge.
Q. How big is a DLT tape? Can you describe it physically?
A. Not for something on the record.
Q. Well, compare it to a video cassette, a VHS tape?
A. I guess it's about two-thirds the size of a VHS tape.
Q. So 1,000 of these would fill up a bookcase at least, maybe a couple of bookcases?
A. It's possible.

0036

Q. 1424 of them would fill up a larger bookcase or a couple of bookcases, right?
A. Sure.
Q. Have you ever been to the location where these tapes were found?
A. I have not been in the security area -- the caged area itself. But I have been to the room in which that cage area sits.
Q. How big is that caged area?
A. I'm not aware specifically.
Q. So you've never even looked at it from afar?
A. No.
Q. Do you have any understanding of its dimensions?
A. No, I don't.
Q. So you don't know if this bookcase full of tapes would be a big part of the room, a small part of the room?
A. I do not know.
Q. Do you know how they were found? In other words, were they stored in a bookcase or in a file

cabinet or in a bunch of boxes or behind a coat rack?
A. I have a general knowledge that they were found in a bin. So something that you might see -- laundry bin kind of comes to mind. Like a cloth type

0037

of bin and that the dimensions would be something like 4 feet by 3 feet by 3 feet high would be my general recollection.
Q. Were there other similar bins in the room?
A. My understanding of what I heard after the event is that there was just one bin.
Q. What did you hear after the event about this bin?
A. Merely of its existence and that the tapes were contained within it.
Q. Who told you that?
A. I do not recall.
Q. Was it somebody on your team?
A. I would guess that it would be Wray or Glenn, most likely Wray.
Q. Once the second tranche of tapes surfaced and you realized that Recall did not have the universe, did Morgan Stanley do anything to cast its net wide to make sure that there weren't third and fourth tranches?
A. I believe that I've testified already that we did enter into a comm room sweep to do a visual inspection of our premises to determine whether there were any other tapes out there that we weren't aware of at the time.
Q. And did that sweep result in the discovery

0038

of tranches three and four, or was it something else?
A. My understanding is that three and four were the result of something else.
Q. What was the something else?
A. For the third tranche, the 8-millimeters, I actually have very little knowledge about those tapes, about where they were found. With respect to the 169, I am aware of that circumstance.
Q. Let's start with the third tranche, even though you don't know much about it. What do you know about it?
A. Merely of its existence.
Q. Who told you about it?
A. Again, I believe it was either Wray or Glenn.
Q. Do you know where those tapes were located?
A. I do not know.
Q. They weren't in Brooklyn?
A. Again, I don't know. You can keep asking the questions, but I don't know.
Q. I'm sorry. I have to ask the questions. I get paid by the word.
A. Or the pound.
Q. So you don't know if they were found in Brooklyn, Houston, Barcelona, Spain, whatever?

0039

A. No, sir.
Q. Do you know when they were found?
A. No.
Q. Let's move on to the -- well, let me just try to box this out.
Have I exhausted your knowledge of the third

tranche?
A. Yes.
Q. With respect to the fourth tranche, when were they discovered?
A. My understanding of that event is that John Pamula had been working with our off-site vendor, Recall, in late '04. He had knowledge of some tapes and some boxes of tapes that should have been at Recall that Recall was indicating they did not have, and that he made repeated attempts to have those tapes delivered to Morgan Stanley. And after several attempts, Recall did discover those tapes and did send them back to Morgan Stanley.
Q. How did Mr. Pamula, if you know, have knowledge of these tapes at Recall?
A. He was reviewing logs of deliveries from Morgan Stanley, from the back up and recovery team, the BURP team, in a time frame earlier than 2004 -- earlier than 2003, actually -- and came up with box numbers

0040

that we were aware of having sent to Recall.
Q. So these are tapes that should have been in the universe that Recall had, but for some reason they didn't recall that they had them?
Other than the Brooklyn facility, how many other communications rooms are there?
A. From a building perspective, we have communication rooms in 1585 Broadway, which is Morgan Stanley's headquarters, a data center and a building in Pavonia Newport, which is in Jersey City, New Jersey.
We have a communication room in 757 Seventh Avenue, which is where a lot of IT staff are staffed and where my office is.
And the Brooklyn facility.
Each of those buildings has one or multiple of these comm room or communication room spaces.
If needed, I could count the number of floors in each of those buildings that specifically house communication rooms.
Q. I'm going to mark as CPH 427 a piece of paper, which apparently was faxed to our office this morning, which bears production number 0113927.
(Plaintiff's Exhibit 427 was marked for identification.)
BY MR. BYMAN:

0041

Q. Have you ever seen this document before?
A. I have.
Q. Did you provide this to counsel so it could be provided to us?
A. I did not.
Q. Do you know who provided it?
A. I do not.
Q. When did you see this --
A. Actually, I'm sorry, that's not quite correct. I believe that I heard that Glenn Seickel provided this to counsel.
Q. There's a reference to canvassing both sites, Pavonia and Brooklyn, and finding three other containers. Do you know what that reference is to?
A. Could you be more specific with your question?
Q. Well, does it refer to tapes that may

contain e-mail?
A. Could you restate the question?
Q. Is there anything in this document, as you understand it, that relates to the location of any of the tranches of documents -- tranches of tapes that we've identified?
A. My understanding is that this document speaks to the events around the fourth tranche of

0042

tapes, the 169.
Q. This actually is Mr. Pamula's. I don't know if this is a note or a letter or a memo, but whatever it is, this shows his process in figuring out that Recall should have these additional tapes?
A. That is my understanding.
Q. He ends up by saying, I believe there may be additional containers at Recall that are not on the Recall inventory.
Does that refer to something over and above the 169 tapes, or does it refer simply to tranche four?
A. This is John Pamula's document, and the first time that I saw this document was this morning. I would hesitate to speculate about what John Pamula was indicating or what his state of mind was when he wrote this document.
Q. So you have not had any conversation with him about this document?
A. I have not.
Q. Have you had any conversation with him about whether he believes there may be a fifth tranche out there?
A. I have not.
Q. Do you have any reason to believe that there is something else out there?

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A. I have no reason to believe.
Q. Do you have any reason to believe that you have actually located everything that is out there?
A. I believe that we have made repeated efforts to be comprehensive in our search of Morgan Stanley premises, areas where tapes have been stored in the different communication rooms, and that John Pamula, in addition to the BURP team, have been diligent in their efforts to make sure that we have found everything that is out there.
Q. I'm not questioning what may have been done in the past, Mr. Saunders. Others may. And on Monday you can expect others will question you, maybe in a harsher tone of voice.
My question is a little more direct, and it's innocent. That is: As you sit here today, are you confident that you've located everything?
A. I'm confident that we've made every effort to do so.
Q. I understand you've made efforts. Are you confident that those efforts have been successful?
A. Yes.
Q. And what's the basis of that confidence given the fact that tranche one didn't work, tranche two wasn't the end of it, tranche three wasn't the end

0044

of it?
MR. KLAPPER: Objection, argumentative.

You can answer.
THE WITNESS: Again, go back to my earlier answer, which is: We have made various efforts, strenuous efforts, to locate the universe of tapes, and I believe we've done so.
BY MR. BYMAN:
Q. Did anyone ever task you with finding the most expeditious way of finding out what the content of the tapes that you located was?
A. Could you restate the question?
Q. Sure. My understanding is your role in this was to locate tapes that may contain e-mail; is that a fair characterization?
A. No, that's not a fair characterization.
Q. What's unfair about that?
A. I believe that our responsibility was for the tapes that Morgan Stanley had from previous backups, that we would manage the storage and the production of those tapes to various parts of the business.
Q. So you were tasked with producing backups that contained e-mail; is that right?
A. Among other things, yes.

Q. But you were not tasked with actually searching those e-mails for content?
A. That's correct.
Q. Do you know who was tasked with that responsibility?
A. Could you be more specific about the searching, like the specific function you're looking for?
Q. Sure. I mean, what you delivered was data which contained e-mails; is that right?
A. What we provided was DLT tapes that contained backups of data from Morgan Stanley systems. Some of those contained e-mail.
Q. And some of those e-mails might have related to the college basketball betting pool or they might have related to CPH versus Morgan Stanley, right?
A. Yes.
Q. Some of them would have been totally irrelevant to this litigation; some of them might have been relevant?
A. Sure.
Q. Someone would have to perform some sort of search to determine which was which, right?
A. Yes.
Q. And you were not that someone?

A. No.
Q. Do you know who that someone was?
A. Can you be specific about the time frame?
Q. At any time.
A. The players have changed over time.
Q. I'm interested in the evolution.
A. It would help me to know when you want to start.
Q. Start with the first time when you were tasked with anything having to do with the e-mail archiving system anytime after this lawsuit, which I believe was sometime in 2003.
A. So my general understanding of the search

process was that a combination of Arthur Reil's group and IT security were responsible for carrying out searches in the e-mail archive to look for discoverable documents in such a case as this.

Q. You never had any of that responsibility?

A. That's correct.

Q. If somebody had asked you to do it, was it something that you had the ability to do?

A. No. Neither myself nor my teams have any access to these systems.

Q. Would you have had the ability to do it through the use of an outside vendor?

0047

A. Well, since we, Morgan Stanley, created an e-mail archive and had it inhouse and then went to the further length of getting information that was prior to its existence, prior to 2003, and getting that information uploaded into said e-mail archive system, I'd say, no, I'm unaware of any vendor that was capable of this, which is my understanding of why the firm decided in the early 2000s to go ahead and create such a system at considerable expense.

Q. I understand that nobody had the ability to search the entire Morgan Stanley archive without having access to the entire Morgan Stanley archive. My question is a little more specific.

Let's take just the last tranche, for example, the 169 DLT tapes. It is possible, is it not, to segregate e-mails from those tapes, put those e-mails on a searchable database apart from the Morgan Stanley archive system and search them for key word searches, is it not?

A. That's possible.

Q. And an outside vendor could do that, right?

A. It's possible.

Q. Does Morgan Stanley have the inhouse capability of doing that?

A. I would say that other than the archive, the

0048

comprehensive archive that we created, I would say that we do not have the ability to do that.

Q. Is that something you could create?

A. In the past, previous to our experience with and our relationship with NDCI, National Data Conversion Institute, we did attempt to do some ad hoc restores. And I believe that -- I'm not sure who was doing the searching capability at that time, but I can tell you that our efforts to quickly and accurately restore data, even in small amounts of tapes, seemingly small numbers of requests, they were not successful. And, in fact, when we took those same set of tapes, we went to an external vendor. They were much more successful after they had tried.

Q. The outside vendor was much more successful?

A. Yes.

Q. Do you have any knowledge one way or the other whether sending -- and again, let's talk about the fourth tranche, the 169 tapes. If you were to send that quantity of information to an outside vendor to restore and put into some sort of searchable database, would that take more or less time than it does to restore the tapes, load them into the Morgan Stanley archive and then search them?

A. So -- that information is outside of my area of expertise and I couldn't answer.
Q. So you don't know one way or the other?
A. No.
Q. Mr. Saunders, in front of us is a stack of documents bearing production numbers 112286 through 113899. And I'll represent to you, sir, that with the exception of what I just marked as Exhibit 427 and a series of documents that we marked as Exhibits 420 through 424 --
MR. KLAPPER: Could you repeat that Bates range?
MR. BYMAN: 112286, 113899.
BY MR. BYMAN:
Q. And I'm sorry, we've now lost the train of my question, so I'm going to start over.
The stack of documents that I've just identified by Bates range, with the exception of what we marked as Exhibits 420 through 424 and 427, constitute the universe of materials that were provided to us pursuant to the court's order of February 3rd, which require that Morgan Stanley give us all documents that might be used or related to the testimony that they expect to give at the hearing scheduled for next Monday.
I'd like you to just look at the physical stack, sir, and tell me whether or not any of these documents are documents that you provided to counsel so that they could be provided to us.
And while you do that, I suggest that the rest of us take a little short break.
(A recess was taken.)
BY MR. BYMAN:
Q. Mr. Saunders, I see you've now taken about 15 minutes to go through this entire stack. Were any of these materials materials that you supplied to counsel so they could be supplied to us?
A. No.
Q. Were any of these materials documents that you have seen before today?
A. A few of them.
Q. Which ones?
A. I saw a document in there which had to do with a discussion of the finances around what NDCI was charging us, a renegotiation. It was an e-mail, Diane Kennelly, myself, Wray.
Another document in there which was a kind of a project plan with a description of a list of actions to take and how much time it would take. And that was in Excel format with kind of variation of colors that Glenn put together for another effort.
And the rest of it I'm generally aware of, which is communications between NDCI, my staff and many, many, many pages of Excel spreadsheets with respect to tapes and states of tapes, e-mails coming off of tape, duplicated and deduplicated -- or rather unique and nonunique.
Q. When you say you're generally familiar, you mean you've seen things like this as opposed to these particular documents?

A. That's right.
Q. Do you know if you've seen any of these particular documents?
A. I don't recall.
Q. And I really don't want to burden the record with thick documents. So I want to just show you something. If we need to actually mark it, we will. Bates ranges 0012353 through 112493. This is apparently a 141-page document that has a long list of things on it. Would this be representative of the type of things you saw that simply detailed a quantity of tapes by numeric description and dates as to when it was imported and restored?
A. To be quite honest, I'm not familiar with this document. I'm also not -- I mean, I'm familiar with lists of tapes, but in terms of the information in

0052

the third and fourth columns, I couldn't really tell you what it's about. And there's really very little context around this document.
MR. KLAPPER: Let me know, are you going to be marking that as an exhibit or just referencing the Bates range?
MR. BYMAN: I think just referencing the Bates range is sufficient. Unless you have stock in a paper company.
MR. KLAPPER: Not yet.
BY MR. BYMAN:
Q. Let me, again, just reference by Bates range a document with production numbers 0112672 through 2796.
This document -- and it was produced to us clipped in this way -- but it includes some e-mails. It includes lists of what appear to be tapes by numbers. It also has some invoices towards the very end of it. Is this one of the documents you would have generally reviewed?
A. Well, so, to be clear, your question is: Did I generally review these documents in the past, yes?
Q. Yes.
A. The answer is no, I would not have reviewed

0053

documents like this in the past. My earlier testimony was some of my work with counsel over the past few months I've seen documents like these, but it was not my practice to review communication between NDCI and my staff or to check into the details of the financing and the funding -- or rather the financing, paying of bills, as you indicated at end of this document.
Q. So I may have misunderstood you in your earlier question. When you said that you have seen documents like this before, you mean in the last couple of months with counsel as opposed to at the time they were generated?
A. So to be specific, I have seen documents, Excel spreadsheets, that contain tapes with various information about those tapes. The documents that are before me, such as e-mails or invoices or discussions between various parties and NDCI where I am not copied, I have not been reviewing them, nor would I have seen them.
So of this I would say somewhere around 10

inch pile of paper, I would say I'm familiar with less than 1 percent of the information there. You know, specifically personally having reviewed it before.

Q. And the 1 percent that you have reviewed before would have been either e-mails addressed to you or invoices from NDCI?

A. So I was not -- I have not been reviewing the NDCI invoices, so I've not seen those. I think I mentioned earlier two documents that I did see in the pack that I had seen.

Q. All right. Let me return your attention to Exhibit 427.

Do you have any understanding of what Mr. Pamula was referring to by containers? And there are four numbers under the heading these containers are in.

A. My guess, not having spoken to John about this document, is that he's talking about containers of tapes.

Q. And by container, are we talking about a box that has tapes in it?

A. I believe so, yes, a box of tapes.

Q. Is there any standard nomenclature for a container, that it contains X number of tapes?

A. My general knowledge is that a box of tapes could contain up to about 60 tapes, but does not have to contain 60 tapes.

Q. Is there any protocol you're aware of for the numbers system for containers? In other words, would somebody who had the code be able to tell something about the contents of a particular container by looking at the number?

A. I know that there is a nomenclature. I'm not aware of how it works. To answer your question, I would guess that the person who knows the code would know how to interpret this.

Q. Do you know who that person would be?

A. I would guess the back up and restore team.

Q. Somebody that reports to you?

A. A team that's under my -- in my area, yes.

Q. Would Mr. Seickel be one of those people who might know?

A. He might know.

Q. Returning to the four tranches that we've identified. Did any of those tranches include information on a storage medium other than magnetic tape?

A. Could you be more -- I guess I don't understand the question.

Q. Are DLT magnetic tapes?

A. Yes.

Q. They're not optical tapes?

A. No.

Q. And are they read by a particular reader? Is there a name of a device that's used to read those tapes?

A. Yes. And actually, in the tranches there are a couple of different types of magnetic media of tapes. And for each of those tape types, there is a type of -- a physical device that would read that tape.

Q. And that's what I'm driving at. For all of the tranches I'd like to know what the universe is of the types of media and the types of hardware you would need to read them.
A. Okay.
Q. Can you tell me that?
A. Do you want to walk me through the tranches?
Q. Tranche one, the 35,000 tapes that were originally assembled as the universe.
A. My understanding is those are DLT tapes, and they are read with a DLT drive. We use storage tech jukeboxes, and a juke -- jukeboxes range from a single tape drive, which could read a single tape all the way, up to essentially a refrigerator-sized jukebox, which could contain 10 to 20 drives, a robotic arm, and an ability to store and manipulate hundreds of tapes, upwards of 700, 800 tapes in a single jukebox.
Another word that you'll hear me use is silo. So jukebox and silo is interchangeable.
Q. Silo means it stacks the tapes, retrieves

0057

them, and puts them into the player?
A. That sounds right.
Q. Are the players for these kinds of DLT tapes standard hardware that people can get on the market? They're not proprietary to Morgan Stanley or your vendor?
A. No, DLT is a standard. DLT tapes and DLT drives are industry standard.
Q. Let's move to the second tranche, the 1423 DLT tapes that were found in the Brooklyn security area. Are those the same -- are they read by the same kind of hardware?
A. I believe they're also DLT tapes.
Q. And read by the same hardware?
A. I believe so.
Q. The third tranche is the 700 or so 8-millimeter tapes. Is that a different type of magnetic storage?
A. Yes.
Q. And you physically described a DLT tape as being about two-thirds the size of a VHS cassette. Can you physically describe an 8-millimeter tape?
A. I believe, and, again, this is general knowledge, that an 8-millimeter tape is roughly the size of an old school audio tape.

0058

Q. Audio cassette?
A. Audio cassette.
Q. The kind that play in people's cars?
A. Yes.
Q. What kind of reader is required to read an 8-millimeter tape?
A. 8-millimeter tape drive.
Q. Is that also standard hardware that's available?
A. I would say it used to be standard hardware. It's pretty much been out of spec for a number of years now, over five years. I would say it's not currently industry wide available. I would guess it was fairly difficult to get now.
Q. It would be if you didn't already have one?
A. That's correct.

Q. But if you already had one, it would work as long as it was functioning?
A. To be honest, in certain cases -- and part of my responsibilities is for hardware maintenance, we maintain the storage and the peripherals -- I would not be surprised if 8-millimeter tapes are no longer serviced and that it was very expensive and very few vendors would provide that.
Q. NDCI has that kind of readers?

0059

A. Yes. I would say forensic data firms would obviously specialize in not just current, but Legacy media types and their support and infrastructure. My guess is that's their core business.
Q. Any vendor that holds itself out as a restoration service is likely to get their hands on that kind of equipment if they don't already have it?
A. I would guess that to be true.
Q. The fourth tranche was 169 DLT tapes found in the last few months. Are those the same kind of DLT tapes, readable in the same kind of hardware as we've described for tranches one and two?
A. To my knowledge they are the same as described in tranche one and two, yes.
Q. Is there any storage medium for any of the tranches other than DLT and 8-millimeter?
A. No.
Q. In terms of your back up storage system, you mentioned the Legato system -- and I probably lost some of the other words to describe it -- but is there any other system that's used by Morgan Stanley for the back up of its e-mail archives?
A. Can you please be more specific about the time frame, because obviously some products come into use and are decommissioned and then are no longer used.

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Q. As to the universe now that comprises the e-mail archive of Morgan Stanley, was that derived solely from Legato or from some other system?
A. So to be specific -- and I apologize, because I'm going to have to be very clear here -- are you asking about what is inside -- what was the origin of the information inside the archive?
Q. Yes.
A. So my knowledge of the information that's inside the archive is as of January 1st, 2003, e-mails that were sent within the firm and to and from externally from the firm. So new mails going forward.
And then we entered into an effort in 2003 and through 2004 to take the universe of tapes prior to that time frame and take that information, restore it, deduplicate it and then enter that into the archive.
So to my knowledge those are the two types of information that are in the archive.
Q. And does that relate to any particular type of back up system?
A. So the tapes, the pre-2003 tapes are Legato based. And Legato is -- Legato is a company. The software product, the enterprise back up software product that we used was called LegatoNetworker, one word. And it's a piece of software that runs on

0061

servers and also on clients that you would use to

manage backups for many, you know -- for an enterprise scale type of infrastructure of an enterprise scale UNIX plant.

Q. With respect to the e-mail archive itself, what is the total amount of data that's currently on it?

A. I am not aware of that information.

Q. Is it correct that approximately 14 terabytes of data were restored for pre-2003 e-mails?

A. Again, I couldn't speculate as to that information. I would direct you to Allison Gorman for that type of information.

Q. Let me just ask you to look at Exhibit 425. And on each of these pages there seems to be a format that it talks about under restore status. E-mails restored. Total size of e-mails restored. And then it goes on.

And I'm looking at the last page of it, which I presume would be as current as we get, at least in this document of September 9, 2004. Does that indicate that restored e-mails numbered approximately 320 million and the total size of the restoration was approximately 14 gigabytes, 14 terabytes?

A. According to this document. But, again, I

0062

stated I don't have a general knowledge of this.

Q. With respect to the data that was in tranche one, the 35,000 tapes, did those tapes contain any information other than stored e-mails?

A. Yes.

Q. What other information did they contain?

A. I do not have a specific knowledge of what those tapes contained.

Q. Do you have any general knowledge?

A. Yes.

Q. What is your knowledge?

A. My general knowledge is that the universe of the Legato tapes, the pre-2003 tapes, were UNIX server backups from the period of the 2000 time frame forward to the end of 2002.

Q. And what were they backing up?

A. They were backing up UNIX servers in North America. So there were e-mail servers. There were Sybase, so database backups. There were trade histories. There were production -- production market data server information. Information of that type.

Q. To put this in English that a juror might understand, does that mean it would include internal spreadsheets analyzing individual companies that were being used in Morgan Stanley's day-to-day work?

0063

A. So the UNIX infrastructure contains -- does have certain file servers within it. And certain trading business units, fixed income and equities specifically, those users would have both a UNIX home directory where they could store files. They also had a Windows based directory where they could also store their files.

From my general knowledge, those traders were basically not of a mind to be able to move documents between a Windows and a UNIX work station, so they would be filing their Excel, Word type documents in their Windows file server space, but they would not

go anywhere near their UNIX file server space.
Q. Was there a back up for individual users Windows' files?
A. As long as those files were stored on the network drive -- and network drive and their home directory is synonymous -- they were Windows based backups. And obviously Windows and UNIX are two separate. So there were back ups.
Q. Were any of those Windows backups contained on the 35,000 tapes in tranche one?
A. My understanding is no.
Q. Can you give me an example of what types of files other than e-mail files would actually be

0064

contained on the 35,000 tapes?
A. So specifically a database, a Sybase database, in order to back that up, the contents, the row by row contents of that database would be dumped into a text file, that text file would be written to a system on the UNIX server, often it would be the same Sybase server, and the LegatoNetworker back up server would back up to that text file. And that would be the Sybase information.
I also mentioned a couple of other data types, market data logs, system log, each of these servers has an operating system. And there would be logs of the operation of that system. They would be backed up.
I can go further if necessary.
Q. If an individual business person were doing spreadsheets that were too complex or too voluminous to be used with Excel, would those be backed up on the UNIX type server?
A. To my knowledge we do not have any UNIX-based spreadsheet capabilities. And, again, I'm outside of my space here, because I'm more infrastructure and not really desktop or business application aligned.
But to my knowledge, no, the user base

0065

information was in large part stored in the Windows user drives.
Q. Did anyone ever ask you or your team to do any restoration to enable a searchable format for information other than e-mails?
A. Could you rephrase the question?
Q. I'm sorry. That was awkward.
The 35,000 tapes were specifically -- and I don't know if manipulated is a fair word, but I don't mean it pejoratively.
A. Say it again.
Q. Manipulated. They were manipulated or migrated or something was done to them in order to put it in a searchable database?
A. Restored.
Q. Did anyone ever ask you to restore any other types of files in a similar fashion other than e-mail files?
A. My team was not asked to perform any restores other than e-mail restores off of the Legato tapes.
Q. To your knowledge was anyone else's team asked to do that?

A. I have a general awareness of when in matters like these, where relevant discoverable information is requested that requests go to appropriate business parties to provide relevant documents in a timely fashion to help these matters move forward.

Q. Do you know if that was done with these 35,000 tapes?

A. Could you be more specific?

Q. That for anything other than e-mails, was somebody asked to restore them into a searchable format?

A. I am not aware of anyone asking for that.

Q. Do you have any knowledge with respect to what types of e-mail systems were used by Morgan Stanley from 1997 through the year 2000?

A. Yes.

Q. What systems were used?

A. My recollection is that in the late '90s, specifically in the pre-'98 time frame, that the majority of the firm's e-mail was located on mainframe based systems, and there was the APL system and the EMC system.

There was also a smattering of users that were using different types of mail servers. I believe that investment banking and equity research were using CC Mail, which was a Lotus product.

There were also some pilots for some newer e-mail products, which then led to an effort to get the firm to consolidate. I believe there were seven e-mail platforms at that time that were consolidated down to two in the '99, 2000 time frame.

Q. What were the seven and the two?

A. I hope I can come up with them.

So APL, EMC. Those were mainframe based.

Z Mail, which is a UNIX based product. And I believe that investment management or Morgan Stanley asset management was on Z Mail.

CC Mail, which was investment management, banking and equity research.

Pop Mail. So Pop Mail users, there were many different clients, so what we know of now as Netscape Mail, that was one back in the day.

That's five.

Simeon, which was iMap Mail, and that was -- Simeon was a client, but iMap Mail was the back end.

Q. Bloomberg?

A. Bloomberg was -- I have no knowledge of Bloomberg Mail back at that time frame. But that's also not an inhouse Morgan Stanley product. That's a third-party product. Until recently it was their own proprietary box.

I'll let my behind brain work on the seventh. But I can't think of it right now.

Q. What were the two that you came down to?

A. So eventually between business management and IT management, it was decided that the firm would consolidate to two platforms; that was iMap back end, which was a UNIX-based platform with Netscape Navigator as the client. And then Lotus Notes. Those were the

two platforms.
Q. And did that remain constant through today, or has there been some other evolution?
A. Yes, there's been another evolution in the early 2000, as now in the mid 2000s, that an effort was taken to move the firm to Microsoft Exchange.
Q. Is that finished?
A. That has happened in large part. I believe we're 98 percent complete as a firm at this point.
MR. KLAPPER: Just a sense time-wise? Do you think you've got a half hour, two hours? Are we going to be taking a lunch break?
MR. BYMAN: I'm sure we'll be done before lunch.
(A discussion was held off the record.)
BY MR. BYMAN:
Q. With respect to the first tranche of tapes,

0069

the 35,000 universe, what e-mail services or platforms were included in that database?
A. Well, to be specific, it's not a database. It was individual tapes.
Q. I'm sorry. That set of data?
A. Right. That set of data would contain -- so the time frame we're talking about here is the 2000 through 2002 time frame. So it would contain UNIX-based data, which would mean you would have iMap servers, so you would have the Netscape iMap mail. And Lotus Notes was also UNIX based. So you would have that type of e-mail.
And it would not -- it would obviously not contain any Microsoft Exchange e-mail, because that was Windows based. And I believe there were pilots going on, but there wouldn't be any exchange information in there, to my knowledge.
Q. If somebody wanted to find backup tapes for any Windows-based e-mail or other Windows-based documents, where would they go look?
A. If you could be more specific with the question, because I think you asked about both tapes and information. Which is it?
Q. It's information I really care about.
A. So Windows-based documents?

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Q. Yes.
A. Within Morgan Stanley we have file servers, you know, enterprise scale file servers, that contain both group shares of information, where a team would share documents, a document repository, and also be individual user directories, as I indicated previously.
The firm's practice is to keep those documents in perpetuity. So if a user placed a file in their home directory and they took no action upon that file, the system itself would also take no action, and that document would sit there in perpetuity.
We do have an ability to search through that information, you know, kind of crawling the data from a name perspective. So that information is available online.
Q. Do you know if those -- and do we call this a disk?
A. Sure. It's disk. It's a file server which has got a very large disk with multiple files on it.

Q. Do you know if those disks were searched in this litigation?
A. I do not know if they specifically were or not.
Q. That would have been outside of your area?
A. Right. Legal would work with IT security to perform such a search, or as I previously testified, legal would ask the relevant business units, please search your files for relevant discoverable information.
Q. With respect to the second tranche, the 1423 tapes, what e-mail platforms were contained in that set of data?
A. So -- I know that there's been a great deal of effort over the last several months to get the information extracted from those tapes. I am not specifically aware at this time of what was on there, whether that was UNIX data or not UNIX data.
Q. What about the 8-millimeter tapes, the third tranche?
A. The 8-millimeter tapes, I do understand that there was e-mail on a subset of those tapes, and that has been extracted.
Q. Do you know what e-mail platforms were extracted?
A. I do not know.
Q. With respect to the fourth tranche, the 169 DLT tapes, do you know what e-mail platforms were on that data?
A. I do not specifically know.
Q. Is there any significance to the fact that some of this data is on 8-millimeter tape versus DLT tape?
A. The significance is that the 8-millimeter tapes are significantly older than the DLT tapes.
Q. So it would be older data?
A. Logically, yes.
Q. Do you know when 8-millimeter tape back up was phased out?
A. My general knowledge is somewhere in the '98 or '99 time frame is when 8-millimeter was phased out.
Q. Do you know of any locations that continued to use 8-millimeter tape for back up after 1998?
A. Could you be more specific? Within Morgan Stanley? Outside Morgan Stanley?
Q. Within Morgan Stanley.
A. I'm not aware of Morgan Stanley continuing to use 8-millimeter tape in general after the '99 time frame.
Q. Do you know what quantity of material was extracted from the 8-millimeter tapes in terms of data?
A. I do not know.
Q. Do you know what quantity of data was extracted from any of the tranches, two, three or four?
A. No, I do not.
Q. Even in a ballpark range? Are we talking about a gigabyte? 10 gigabytes? 100 gigabytes?
A. I'm really not generally aware of how much was extracted. I'm not even generally aware of how much was extracted.

Q. Does the fact that the 8-millimeters tapes were discovered suggest that somehow they did not get reused or destroyed after one year, as had been the case for other backups prior to the 2003 project?
A. Would you mind restating the question?
Q. Yes. I'm having trouble understanding what I meant by that, too. So let me start over.
The 8-millimeter tapes by definition, since they're an old, phased-out format from 1998, probably include old data; is that a fair assumption?
A. Yes.
Q. At least as of the year 2000 it was Morgan Stanley's practice to recycle backup tapes after one year; is that correct?
A. That's correct.
Q. Somehow these 8-millimeter tapes did not get caught up in that general practice, right?
A. That would seem to be the case. Again, I don't have -- I don't have general knowledge of the practice prior to my stint in this group. And that time frame predates my being in this group.

0074

Q. Do you have any understanding or explanation for how those 8-millimeter tapes survived until the present time?
A. I do not.
Q. Was it an accident or did somebody consciously try to save them?
A. I have no knowledge of that.
Q. And I apologize. You may have told me this already. But when did Morgan Stanley first discover that it had these 700 8-millimeter tapes?
A. I believe my testimony is I'm not aware when they were found.
Q. Or by whom?
A. Or by whom.
Q. Or where?
A. Or where.
Q. Who would know the answers to those questions?
A. I believe Glenn Seickel would be more knowledgeable about that than I would.
THE WITNESS: Why don't we go ahead and take a five-minute break.
MR. BYMAN: That would be great.
(A recess was taken.)
BY MR. BYMAN:

0075

Q. Mr. Saunders, I'm going to make a representation to you that I don't know to be a fact, but people that I believe in have told me that some time in the November time frame of last year approximately 8,000 pages of e-mails were produced to us in discovery in this case.
Are you aware of a quantity of e-mails that were identified and produced in the latter part of last year?
A. Are you asking if I have knowledge of what has been produced by Morgan Stanley for this case?
Q. Yes.
A. Okay. I have no knowledge of that.
Q. Then I take it you have no knowledge as to from which tranche those 8,000 pages would have come?

A. That's correct.
Q. When was the first time that Morgan Stanley knew that tranche two, the 1423 DLT tapes, contained e-mail?
A. Could you be clear as to what you mean by Morgan Stanley?
Q. Well, first of all, let me start with when was the first time you knew.
A. I believe -- per my previous testimony, I believe I was made generally aware of it in the

0076

May/June time frame. I can't speak anymore specifically than that.
Q. You were generally aware in the May/June time frame that someone had located unlabeled tapes in the Brooklyn security room. Did you also know whether or not there was e-mail on those tapes?
A. No, I had no knowledge of what was contained on those tapes or if anything was contained on those tapes.
Q. My question is: When was the first time that you were aware that there was e-mail on those tapes?
A. My guess would be somewhere in the last two to three months.
Q. And from what source did you get that information?
A. I believe that in general I would have received that knowledge from Glenn Seickel.
MR. BYMAN: I'm going to mark for identification as CPH 428 a document with production numbers -- the first page is cropped off, and, in fact, it was cropped off in the production that we got, I think.
But the second page is 0112324 through 2330.
(Plaintiff's Exhibit 428 was marked for

0077

identification.)
MR. KLAPPER: Was this used during yesterday's deposition, or is this a new exhibit?
MR. BYMAN: No, this is new.
BY MR. BYMAN:
Q. This is a document that was in the stack of things that you looked through earlier this morning, Mr. Saunders. So you have seen it, at least a few minutes ago.
But take a moment and take a look specifically at it and see if you have any recollection seeing it before this morning.
A. Is there a specific page you would like me to refer to?
Q. Yes, actually the third page, 0112327, which has the text of an e-mail that I'm interested in.
A. Not to quibble, but it appears in mine that that Bates number is page 5.
Q. Okay. You're correct. I had my finger on the wrong place. But it's the number that matters.
A. Which section of this page specifically?
Q. "Hey, Arthur, we looked at found tapes. We were able to restore, and 90 of them have mail."
A. Ah. Okay.

0078

Q. Did anyone ever report to you that on July 2nd, 2004 NDCI had reported to Mr. Reil and to others that some of the found tapes, which I'll represent to you are the Brooklyn security tapes, contain mail?
A. I have no knowledge of being notified of that.
Q. In the e-mail chain in these documents there's another address that we haven't talked about, ECMGR-NA. Do you recognize that address group?
A. Yes.
Q. Are you a member of that group?
A. I am a member of that group.
Q. So you would have received this chain of e-mail at the time?
A. Honestly, the document I'm looking at right now, I cannot perceive it as a chain. It looks almost as though -- I can't tell if it's a chain or if it's mails that are end to end or a thread, to be honest. I wouldn't be able to represent that this is, in fact, a real thread. Doesn't look like anything I've seen before as a thread, at least printed out.
Q. Does this jog your memory in any way that in July of 2004 you were aware that the found tapes included mail?
A. No, this does not give me any sort of -- it

0079

does not jog my memory whatsoever.
Q. There's also a reference to cataloging of the 8-millimeter tapes and that some of the dates on those tapes are June 16, 1998 and June 6th, 1998. Were you ever aware that some of the mail found in the 8-millimeter tapes dates back to that period of time?
A. No.
Q. Did Mr. Stewart report to you in July of 2004?
A. No, he did not.
Q. Was he on any of the teams you were a member of in 2004?
A. Yes.
Q. What teams was he a member of that you were also a member of?
A. Wray's position, he reported to a colleague of mine, Adrien Salageanu, S-A-L-A-G-E-A-N-U, who was the Windows operations manager. So I'm UNIX and he's Windows.
Wray continued being the liaison with NDCI and continued working with the restoration projects as a legacy of work he had started in 2002 under my previous boss, Bill Hollister. So his job was twofold; one was project manager working under Adrien Salageanu, and the second was liaising with my team and Glenn

0080

Seickel with NDCI.
Q. So he was part of the e-mail archive restore project?
A. Yes.
Q. Have you ever met Bruce Buchanan?
A. Yes.
Q. Did you ever have any conversations with Mr. Buchanan in the summer of 2004 about what he was finding on the tapes that he was restoring on behalf of NDCI?
A. No, I did not.

Q. Did Mr. Reil ever report to you -- and I don't mean to use the word report in any formal sense -- did he ever say to you in the summer of 2004 that he was aware that the tapes found in the Brooklyn security area contained e-mail?
A. No, he did not.
Q. Did anyone ever tell you that?
A. No.
Q. So reading this is the first time that you're aware that someone from Morgan Stanley knew that in July of 2004?
A. That would be accurate.
Q. Have you ever asked any of the members of your team, Mr. Stewart, or anyone else on the teams

0081

that you belonged to, when they first learned that tranches two, three, or four contained e-mail?
A. I did not.
Q. Do you have any understanding of how much e-mail was found on tranches two, three, and four?
A. I believe previous to my earlier testimony, that, no, I have no specific knowledge.
Q. Let me show what you I'm going to mark as Exhibit 429 for identification, bearing production numbers 0112888 and 889.
(Plaintiff's Exhibit 429 was marked for identification.)
BY MR. BYMAN:
Q. Again, that's within the stack of the things you looked at this morning. Other than looking at it this morning, do you have any recollection of seeing either of these two pages before?
A. Please give me a moment to take a look at this.
Q. Of course.
A. Okay. I've reviewed the document.
Q. Have you ever seen this before this morning?
A. I have not.
Q. There's a reference to IIM exchange mail tapes. Does that term mean anything to you?

0082

A. My general knowledge of the subject is that, I don't know when, but Arthur was also asked to take some Legacy mail tapes from the investment management area of Morgan Stanley and to work with NDCI to essentially do the same process that we've been doing for the other institutional securities group Legacy tapes, to extract the e-mails, deduplicate the e-mails, put them on SDLTs, send them to Morgan Stanley, put them on disk, and then upload them into the archive.
My understanding is that my team had very little to do with this, because it's a completely different area with Morgan Stanley. In fact, I think in terms of legal entity, investment management is separate from institutional securities group for which I work and my team's work.
Q. Is IIM an acronym that has to do with institutional investment management?
A. That's correct. Which it's also known as IM. So there's a couple names. IIM is one. IM is another.
So to finish my statement. My team was really, to my knowledge, not involved with this. That

the tapes were shipped from whoever, from the IT group within IM, and that was shipped to NDCI for the same process to occur that had been going on with the DLT tapes. Arthur was responsible for that. And I don't know anything about the timing, the content, you know, the directives with respect to prioritization.

Q. If you'll look briefly again at Exhibit 425. There's a reference in these sets of minutes -- and don't lose 429, because we're not done with that yet.

There's a reference in pending item number 6 to IMM 2200?

A. Could you be clear about which page?

Q. The very first.

A. The very first, okay.

Q. So that appears to be the IMM tapes that were within Mr. Reil's purview?

A. This does look like what we have just been speaking about.

Q. I'll represent to you that there's a continued reference to the IMM tapes in the next set of minutes on the next page. And then they appear to have dropped that from pending items.

A. Is there a question you'd like me to address?

Q. No, I'm directing you to that. And then I'd like to go back to Exhibit 429.

Do you know why Mr. Stewart would have been involved with this IMM restoration project if it wasn't part of what your team was doing?

A. So my understanding of Wray's responsibilities were to record the minutes from those meetings as a way of keeping people informed generally about what was going on with the effort. And that while he was not materially involved with the IM tapes, that he recorded at the meeting that such an event was going on, and that it was part of the effort overall.

Q. Are you familiar with the term "EDB files"?

A. I am not.

Q. So you don't know what this reference is on the first page of Exhibit 429 to EDB files?

A. I do not.

Q. On the second page of Exhibit 429, there's an e-mail from Mr. Buchanan to Mr. Stewart dated July 16, 2004 referring to the Brooklyn found tapes. And let me, again, represent to you that I believe the Brooklyn found tapes refers to your -- the 1423 tapes located in Brooklyn.

By the way, have you ever heard of those 1423 tapes, what we've been calling the second tranche, referred to as Brooklyn found tapes?

A. Yes.

Q. And Mr. Buchanan reports that at least as of that date a total of 2,183,031 total unique messages were found in the Brooklyn found tapes and written to SDLTs.

Does that help refresh your recollection about the quantity of e-mail messages that was found?

A. It doesn't help refresh my memory. It informs me. I don't believe I've ever been in possession of that knowledge.

Q. But you have no knowledge that is contrary to what's expressed here, I take it?
A. I have no knowledge about this. You're correct.
Q. Were you involved in negotiating with NDCI the charges for the restoration work?
A. No.
Q. Who was?
A. At what period of time?
Q. At any period of time.
A. I believe that Wray Stewart and Diane Kennelly were involved with negotiating rates with NDCI.
Q. Did NDCI propose different rates given different levels of resources that might be applied to the project?
A. I have a general knowledge that would lead your statement to be true, that efforts that were more

0086

intensive that might require 24-by-7 type efforts rather than efforts that could be done 9 to 5 during business hours were different charges. I'm not sure what those charges were or how they were differentiated.
Q. In addition to expanding beyond a single shift and going to 24/7 shifts, were there also alternatives proposed by putting more hardware or more platoons of people on the project?
A. I'm really not more specifically aware than what I just indicated. I do know there was kind of a standard body of work and a time frame and that there were accelerated time frames, but further than that, I couldn't say.
Q. Which did Morgan Stanley go with, the standard or the accelerated?
A. I think depending on different efforts we would make choices as to which type of service we would require.
Q. Are you aware of any particular service for any of the four tranches in which the accelerated approach was accepted?
A. I'm not specifically aware of what level of service we asked for, but I know that in the last several months -- and certainly in the wake of the

0087

disruption caused when Arthur Reil left, was no longer part of the e-mail archive and kind of head got cut off of the body -- that there were efforts to expedite getting the information off of these tapes and back to Morgan Stanley. But specifically I can't speak to what choices were made and when.
Q. Who would know that?
A. Counsel would know. I'm not sure if you can ask them questions.
Q. I can ask them. They just won't answer.
A. Glenn Seickel is someone you could ask; although, I'm not sure what level of detail he would know about how much was asked for and by when.
Q. On the February 4th hearing before the court on which you participated by phone, at least according to the transcript, you referred to a third-party vendor, Forensic and Heat Restoration. Who is Forensic and Heat Restoration?

A. I've not -- I've reviewed my -- I'm not sure if it was testimony or what the appropriate word is, but I reviewed my statement.
Q. You said it to the judge, so it better be accurate.
A. I reviewed my statements this morning, but I've not been asked to amend my statements as I did in

0088

my previous deposition a year ago. That sentence makes very little sense. I believe I was misunderstood over the phone. What I was trying to get at was a forensic and tape investigation over the phone.
Q. Was there a firm other than NDCI that you were referring to?
A. No.
Q. So you were basically just describing --
A. I was speaking in general about those types of firms. I know that NDCI is not alone in the universe.
Q. So you were simply describing generically the type of vendor you would use. Your specific vendor was and is NDCI?
A. That's correct.
Q. What other forensic restoration firms are out there besides NDCI?
A. I'm not specifically aware of any others other than a company called Renew, which I believe you guys asked us to work with, or rather that we delivered tapes to this past week.
Q. Have you ever done any investigation into what other vendors are out there in case NDCI is too busy to help you or you need to go to a different firm?
A. NDCI's performance over the last several

0089

years has been timely. They have been excellent partners. And in terms of our relationship with them, it's been satisfactory, very satisfactory. I have not personally gone out and done any investigation into alternative vendors for reasons of not having a need.
Q. Let me show you what I'm going to mark as Exhibit 430 for identification.
(Plaintiff's Exhibit 430 was marked for identification.)
BY MR. BYMAN:
Q. Let me represent to you that this is a two-page fax that was addressed to one of my partners, Deirdre Connell, from one of Mr. Klapper's partners, Mr. Clare, on February 8, 2005. And it involved the contract with Renew that the parties were trying to mutually arrive at.
Mr. Clare's e-mail suggests a change in paragraph 1-B to the then draft to the agreement, struck out a reference to the 2300 tapes, and then inserted something that talks about Morgan Stanley and Co. believes do not contain e-mail or in some cases contain e-mail that has already been culled onto original tape media.
Do you have any understanding as to the meaning of that phrase?

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A. This is the first time that I'm seeing this document. I wasn't involved in this transaction other than supplying tapes and having them delivered to Renew

after our attorneys instructed us that it was time to execute on that.

I'm really not sure what this is saying at all, either the original document or the addition by whoever you said made the addition. I couldn't really speculate.

Q. The things that you delivered, was there a batch of 120 tapes and another batch of 2300 tapes? And these are approximate numbers.

A. Yeah, these numbers are not -- I'm really not sure exactly what they're referring to, to be quite honest. There's really not a lot of context here.

What I know as to what we delivered was all of the original tapes, the raw DLT tapes, and the raw 8-millimeter tapes. Those were to be delivered. My understanding is that number, I think in total, and I think I did the math afterwards, was 2330 tapes. Those are the original 8-millimeter and DLT tapes.

In addition, I believe that your -- the plaintiffs requested not just those, but also the deduplicated and unique -- well, the deduplicated SDLTs that were the product of NDCI.

0091

So what we were to provide was the originals and the product of NDCI, which was the SDLTs.

Q. Okay. Let me see if I can parse that into pieces.

NDCI took the 2330 DLT and 8-millimeter tapes and extracted from those tapes things that they believe to be e-mail content and put them onto approximately 120 SDLT tapes?

A. No, that's not my knowledge. I don't know how many SDLTs were the result of the 2330.

Q. Putting aside the number, 2330 is the universe that they had to work with from tranches two, three, and four?

A. That's correct.

Q. They put them on some number of SDLT tapes?

A. Yes.

Q. And that number might be 120, or it might be some other number?

A. Sure.

Q. And you don't have any other number that you can offer as a better estimate of that number?

A. I do not.

And the other point I want to make is, when I talked about deduplicated e-mails, NDCI has a database, and part of their core value add of their

0092

projects of restoring the tapes prior to January 1st, 2003, they have a record of every single tape and every single e-mail by unique ID that has been restored as part of the project in order to make sure that motor Morgan Stanley was not uploading multiple copies, that we have an efficient archive, so those SDLTs will not contain every single e-mail that is on that original universe of the raw 2330.

I made that statement to our counsel last week.

Q. And when you talk about deduping, you dedup, you know, things that are identical, you take out duplicates that are identical, but you don't take out something that's contained in a lighter e-mail chain,

do you?
A. That's correct. So if an e-mail contains multiple -- if it's a long thread with multiple replies back and forth, that multiple thread is the unique e-mail. Affirming your statement, you would not go and remove those thread pieces and just retain the last answer. It would contain the full text of the e-mail thread.
Q. So if I sent you an e-mail, you replied, I forwarded it to Mr. Klapper, he forwarded it to Mr. Jones, who then forwarded it back to everybody

0093

else, that would be six separate e-mails, it wouldn't be just one?
A. That's correct.
Q. And that would be true even if all of that forwarding and replying had no new information on it other than just forwarding it and replying it?
A. That's correct.
Q. So that you would at least get the chain of who had seen the e-mail?
A. That's right.
Q. So we now know that the number of tapes that were in tranches two, three, and four, if we add them all up, is 2330?
A. According to me and only me.
Q. But you're a pretty good authority on that subject?
A. I would say I'm one of the authorities.
Q. We know that 1423 of those 2330 was tranche two, right?
A. Say that again.
Q. Tranche two was 1423 DLT tapes?
A. I believe that's correct.
Q. And we know that tranche four was 169 DLT tapes?
A. That's right.

0094

Q. So if we add those two numbers and subtract them from 2330, we would get the number of 8-millimeter tapes?
A. And I would guess it would be reasonably accurate.
Q. If you'll forgive long addition, I'll do that. I get 1592 by adding 1423 and 169. Would that leave 738 for the 8-millimeter tapes?
A. That sounds about right.
Can I also get the word "Yahtzee" on the record?
Q. Are you familiar with the term "brick level" as used in the restoration business?
A. I'm sorry?
Q. Brick level?
A. I don't believe so.
Q. Let me show you what we marked yesterday as Exhibit 426. I'm sorry. I don't think I have that handy.
MR. KLAPPER: That's fine.
THE WITNESS: This is a pretty long document. Would you like me to review it all, or would you like to direct my attention to a certain page?
BY MR. BYMAN:

0095

Q. The first page at the bottom.
MR. KLAPPER: You've not used this document in today's deposition, correct?
MR. BYMAN: That's right.
MR. KLAPPER: Do you happen to have an extra copy?
MR. BYMAN: I don't think I do, Tony. I'm just asking him to look at the bottom of the first page. There's a reference to "we have experienced restoring brick level backups, and quite frankly, it is not an easy or reliable process using standard procedures."
BY MR. BYMAN:
Q. I'm just asking if that helps put into context or refresh your recollection, sir, about the term "brick level"?
A. I'll take a moment to look at this first and second page as you requested.
Q. Sure.
A. Okay. I've reviewed the first page and the top of the second page, so the e-mail from Bruce Buchanan regarding the brick level back ups to Wray and Glenn.
Q. And does that help you recall any understanding of the term "brick level"?

0096

A. It does not. I have no knowledge of this terminology or of this event. This is the first time I've seen this thread, and it's the first time I've heard of this particular topic.
Q. Were you aware that Mr. Buchanan and NDCI were reviewing a total of 3,030 IMM tapes -- I'm sorry -- IIM tapes?
A. Previous to -- my previous testimony, I was aware that many tapes became a matter of the project during the summer and that NDCI was going to be working with them at Arthur's direction. I'm not aware of the number of tapes or any of the issues, the technical issues with respect to that part of the project.
Q. So I take it that you have no knowledge with respect to the 293 SDLT tapes and 500 DLT tapes on which some sort of e-mail appears?
A. If the question is, do I have any knowledge of the 293 or the 500, the answer is no.
Q. I take it none of those are part of any of the four tranches we've been talking about today?
A. No. Again, and if we want to call this the fifth tranche, this is again the investment management tapes that Arthur Reil was directed to as part of the effort to restore the information and get it into the archive. My team really played very little role in

0097

this.
And it appears that Bruce Buchanan had a conversation with them about the data and about his feelings as to whether or not it was valid, these backups were going to result in valid data.
Q. Are you able, as you sit here today, to exclude the possibility that these 793 tapes that contain e-mail have e-mail that is relevant to this litigation?
A. Could you restate the question?

MR. BYMAN: Could you read it back?
(A portion of the record was read by the reporter.)
THE WITNESS: The question is: Am I able to exclude the possibility?
MR. BYMAN: Yes.
MR. KLAPPER: Let me interject an objection. Vague and ambiguous and calls for speculation. You can answer.
THE WITNESS: Investment management -- per my previous testimony, investment management and institutional securities are two separate entities. Knowing what I know today and knowing what I knew then, I would say it's very unlikely that this has anything to do with the Coleman matter whatsoever.

BY MR. BYMAN:

Q. And that's because they're different divisions of Morgan Stanley?

A. Absolutely. Different servers, different communication rooms, different procedures, different IT staff.

Q. I think you even said at one point that IM might be a different legal entity. Do you know what the entity is?

A. Right. So I probably shouldn't speculate. But I know that it is a separate entity other than institutional security. And I know that in my previous testimony they were asking what MS & Co means. I'm not sure. Or either ISG and IM are part of that.

Q. Is the investment banking company of Morgan Stanley in institutional securities?

A. That's correct.

Q. Is Morgan Stanley senior funding within institutional securities or IM or some other area?

A. Could you restate the question?

Q. Are you familiar with an entity called Morgan Stanley senior funding?

A. No.

Q. Do you know what division or entity within the Morgan Stanley family does bond underwriting?

A. I believe that's within institutional securities.

Q. Do you know what entity within the Morgan Stanley family does capital loans?

A. I do not know that answer.

MR. BYMAN: Let me have a moment to check with my colleague, but I think we're nearing the end.
(A discussion was held off the record.)
MR. BYMAN: Actually, I think we're going to say we're done.
(Whereupon, the deposition concluded at 5:40 p.m.)

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2 C E R T I F I C A T E
3
4
5 STATE OF FLORIDA
6 COUNTY OF PALM BEACH
7
8 I, ROBERT JOHN SAUNDERS, hereby certify that I have read the foregoing transcript of my deposition
9 and that the statements contained therein, together with any additions or corrections made on the attached
10 Errata Sheet, are true and correct.
11 Dated this day of , 2005.
12
13 ROBERT JOHN SAUNDERS
14
15 The foregoing certificate was subscribed to before me this day of , 2005, by the witness who has produced a as
16 identification and who did not take an additional oath.
17
18
Notary Public
19
20
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0101
1 CERTIFICATE OF OATH
2
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5 STATE OF FLORIDA
6 COUNTY OF PALM BEACH
7
8 I, the undersigned authority, certify that
9 ROBERT JOHN SAUNDERS personally appeared before me and
10 was duly sworn.
11
12 WITNESS my hand and official seal this
13 day of , 2005.
14
15
16
17
18
19 TRACEY L. SPATARA
20 Notary Public
21 Commission #DD 0327757
22 Expires July 31, 2008
23
24
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0102

REPORTER'S CERTIFICATE

STATE OF FLORIDA
COUNTY OF PALM BEACH

I, TRACEY L. SPATARA, RPR, certify that I was authorized to and did stenographically report the foregoing deposition/proceedings; and that the transcript is a true record thereof.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this day of , 2005.

TRACEY L. SPATARA, RPR

0001

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CASE NO.: 03 CA 005045 AI
COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,
vs.
MORGAN STANLEY & CO., INC.,
Defendant.

DEPOSITION OF GLENN SEICKEL
TAKEN AT THE INSTANCE OF THE PLAINTIFFS

West Palm Beach, Florida
Thursday, February 10, 2005
1:24 p.m. - 4:14 p.m.

0002

APPEARANCES:

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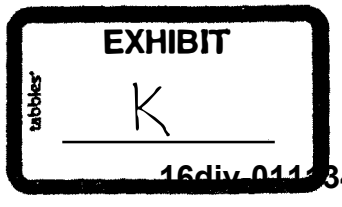
0003



INDEX

WITNESS:	PAGE
GLENN SEICKEL	
Direct Examination by Mr. Byman	4

The deposition of GLENN SEICKEL was taken before me, BARBARA GALLO, RMR-CRR, Registered Merit Reporter-Certified Realtime Reporter, Notary Public, State of Florida at Large, at 2139 Palm Beach Lakes Boulevard, in the City of West Palm Beach, County of Palm Beach, State of Florida, beginning at the hour of 1:24 p.m., on Thursday, February 10, 2005, pursuant to Notice filed herein, at the instance of the Plaintiffs in the above-entitled cause pending before the above-named Court.

- - -

THEREUPON,

GLENN SEICKEL,

being by me first duly sworn to testify the whole truth, as hereinunder certified, testified as follows:

DIRECT EXAMINATION.

MR. BYMAN: The record should reflect that this is a deposition taken pursuant to the court's order dated February 3rd, 2005 and the designation by Morgan Stanley and company of the witnesses whom it intends to call at the hearing scheduled for February 14th, one of whom is Mr. Seickel.

BY MR. BYMAN:

Q. Mr. Seickel, would you state your full name for the record.

A. Glenn Charles Seickel.

Q. How old are you, sir?

A. 44.

Q. What's your educational background?

A. My highest education is college. I've completed, you know, normal education through the public schools. I had a certificate degree with Hofstra University in computer programming. And I think that's it other than some certified classes and

professional classes that Morgan Stanley offers.
Q. Your certificate degree in computer programming is in addition to your BA or BS?
A. Correct.
Q. What is your degree in?
A. Accounting.
Q. When did you receive your degree and from what institution?
A. It's 1984 from Queens College.
Q. When did you receive your computer programming certificate?
A. I believe it was '93, summer of '93.
Q. Did you ever sit for the certified public accountant's exam?

0006

A. No.
Q. Have you ever practiced public accounting?
A. No.
Q. Since 1984 how have you been employed?
A. Since 1984 I started after college with Marsh McLennan, worked there for about a year and a half, maybe a little less. I then worked for Intercounty Mortgagee on Long Island. That company wound up getting bought by Northstar Bank, then merged with Fleet Bank. And I was there until, I believe, '95. Mellon Bank then subsequently bought our division, and I wound up working for Mellon Bank for two years and then coming to Morgan Stanley.
Q. When did you arrive at Morgan Stanley?
A. November '98.
Q. Prior to arriving at Morgan Stanley can you just tell me briefly what kinds of jobs you held within the institutions you've described?
A. Okay. With Marsh McLennan, I was a corporate accountant for about -- for the time being, for the time I was there. When I left there I went to work for Intercounty Mortgagee. I was a mortgage loan processor. I subsequently became involved with sales and then processing mortgages and servicing mortgages. And that's with --

0007

Q. Does that take us through November of '98?
A. No. Let me think. '98. Yes, it does take you through '98. I was also, after I took the certificate program with Hofstra I was also employed for, I think, three years part time for a small company writing and debugging software programs. Mostly database.
Q. What was that company?
A. I think it was called Program Management Services.
Q. What kinds of databases were you working with?
A. FoxPro.
Q. Is that an off-the-shelf database?
A. Yes.
Q. Can somebody buy it?
A. Yes.
Q. What sort of programming and debugging were you doing on FoxPro?
A. It was mostly for printing. They would do a lot of certificate printing for a pharmacist where they would issue the certificates and test the

pharmacist and issue certificates for credits, I think certification credits that they had to maintain.
Q. I thought I heard you say you're doing

database programming. Is FoxPro database programming?
A. Correct.
Q. Then what does it have to do with printing certificates?
A. That's what the programming, that's what the programming surrounded. In other words, the programming that I did and debugging was centered around printing certificates for this company.
Q. So a portion of the database that you were working on?
A. Correct.
Q. In November of 1998 when you came to Morgan Stanley, for what job were you hired?
A. I was hired a Distributor Command Center shift manager's position.
Q. What does that mean in English?
A. In English basically I supervised three or four people on a shift for either three or four days a week.
Q. And what was it you were --
A. The service that we did?
Q. Yes.
A. We monitored the servers for North America. We had an application that basically told us if there was issues with a particular server. We would then

evaluate the problem and also involve other people in resolving the issue. In addition to that, the Distributor Command Center was involved in monitoring backups for North America.
Q. Backups of what kind of data?
A. For a UNIX data.
Q. Did you have anything to do with any Windows data backups?
A. Not at that time, no. There was a separate group that ran the Windows backups.
Q. For the UNIX backups that you were working on, was that firmwide or for some particular division within Morgan Stanley?
A. Repeat that question. I'm sorry.
Q. Sure. It was for all of Morgan Stanley or for some business unit within Morgan Stanley?
A. It was all of North America.
Q. For all of Morgan Stanley's North American operations?
A. Correct.
Q. When we say Morgan Stanley, the actual party to this litigation is Morgan Stanley & Company, Incorporated. Are you aware of other Morgan Stanley entities other than that particular legal entity?
A. I'm not sure. No.

Q. Do you know what entity pays your paycheck now?
A. Institutional is the division that I fall under, Morgan Stanley Institutional. I'm not sure if that falls into the category you're saying.
Q. Have you ever heard of an entity called Morgan Stanley Senior Funding?

A. No.
Q. Do you know how that fits into the corporate structure of Morgan Stanley?
A. No.
Q. All right. That was the job you were hired for in November of '98. Did your job title or responsibilities ever change between then and now?
A. Yes.
Q. Take me through each change that you've had within Morgan Stanley.
A. So I was hired in November '98. I stayed in that position until January of 2001. At that time I became the manager of the Distributor Command Center.
Q. So you were in the same area, but you had a promotion and more responsibility?
A. Correct.
Q. Now you were supervising a group of supervisors?

A. Correct.
Q. Other than that were your duties and responsibilities the same?
A. Yeah, they were -- no. They were basically the same in that my supervisory duties took me further away from actually doing the work.
Q. When you were the manager -- I'm sorry. Was that a division? What do we call that?
A. Group.
Q. When you were the manager of the group, to whom did you report?
A. I reported to -- when I was a manager of the group?
Q. No, when you were promoted in '01.
A. When I was promoted in '01 who did I then report to?
Q. Yes.
A. I reported to Robert Saunders and Bill Hollister.
Q. And who had you reported to prior to that promotion?
A. Prior to that promotion I reported to Zender Morales and also Wray Stewart.
Q. After your promotion did you become at the same level as Wray Stewart? In other words, you used

to report to him. Now you're reporting to Mr. Saunders. What happened to Mr. Stewart?
A. Mr. Stewart went on to do other things in the company. I'm not sure at that time what he did.
Q. Did you have any further promotions or changes in job duties since January of '01?
A. Yes. In December of '03 I relinquished the management position of the Distributor Command Center, and I fell under a group called Distributed Storage reporting to Robert Place.
Q. When you say "relinquished," what does that mean?
A. The group was being outsourced. My responsibilities had ended for that group, and I moved over to the Distributor Storage to focus on things concerning storage directly.
Q. Was that a lateral move? A promotion?
A. A lateral move.

Q. And it's because the thing that you were running before was becoming outsourced and wasn't going to exist anymore?
A. Yes. And also I wanted to focus myself on distributed -- on storage.
Q. And when you say "storage," what do you mean?
A. Anything regarding where you can save data or store data.
Q. Were you still working strictly on UNIX data, or were you also responsible for Windows data?
A. As part of the migration into what we call net backup, an application that we do backups with, that also became Windows backups.
Q. And you reported as of December of '03 to Mr. Place?
A. Correct.
Q. Do you know to whom he reported?
A. Robert Saunders.
Q. So since at least January of '01 you have reported either directly or indirectly to Mr. Saunders?
A. Correct.
Q. Have you had any further promotions, demotion, lateral moves since December of '03?
A. No.
Q. So you are still in Distributed Storage?
A. Correct.
Q. Do you have a title?
A. No. The best thing I can give you is storage specialist.
Q. Do you have a business card? Do you know what it says on your business card?
A. Glenn Seickel.
Q. And an address?
A. Pretty much.
Q. Do you have a title within Morgan Stanley? Are you an officer?
A. I'm an associate.
Q. And in the Morgan Stanley hierarchy...
A. That's the lowest rung.
Q. There's nothing wrong with being at the lowest rung.
Mr. Seickel, in front of us is a stack of documents that has been produced to us pursuant to the court order, which also has produced you to us. They bear a production range of 112286 to 113899. I'd like you to take a moment to look through the stack. And when I say "a moment," take as many moments as you'd like.
A. It's a big stack.
Q. I'm going to ask you a series of questions about your familiarity with the stack when you're done, but what I'm interested in, and at the risk of making this a compound question --
MR. KLAPPER: I won't object.
MR. BYMAN: Thank you.
MR. KLAPPER: You're welcome.

BY MR. BYMAN:
Q. I'm going to want to know, A, did you provide any of these documents so that they can be provided to

us; B, have you seen any of these documents before; or, C, are they documents with which you are familiar by description. So as you go through the stack, we can give you some post-it notes or you can put it into piles of things you have seen and things you haven't seen, and then I'll have a more focused question.

A. Okay. This pile or this pile or both?

Q. This pile.

A. I was hoping for the smaller one.

MR. KLAPPER: I guess if we're on the record, the Bates range that you articulated reflects these documents in this big stack on the table. Are there other documents that we produced that's not in this stack that was part of the production? Because I know we got a bunch of stuff that's been marked separately as Exhibits.

MR. BYMAN: Let me make sure that's clear, Tony, since you weren't here yesterday. We received three, I'll use the word tranches since Mr. Saunders used

0016

it, three tranches of production from Kirkland & Ellis with respect to the February 3 order. At approximately noon on Tuesday we received the set of things that Mr. Seickel is now looking through.

MR. KLAPPER: Right.

MR. BYMAN: Later in the day we received additional documents which we marked Exhibits 420 through 424.

MR. KLAPPER: And those were marked during Allison Gorman's deposition?

MR. BYMAN: Right. And sometime today we received a fax which included one piece of paper we marked as Exhibit 427.

MR. KLAPPER: Okay.

THE WITNESS: There's some stuff stuck together that -- some of which I'm familiar with and some I'm not.

BY MR. BYMAN:

Q. Put aside the stuff --

MR. KLAPPER: He's saying it's connected.

MR. BYMAN: We'll sort that out when we look at individual things. That's how it was produced to us.

MR. HIRSCH: So put it with the stuff

0017

that looks familiar.

THE WITNESS: Anything that has some familiarity I'm putting in one file.

MR. HIRSCH: Okay.

(A recess was taken from 1:43 p.m. to 2:00 p.m.)

BY MR. BYMAN:

Q. Okay. Let's go back on the record. You've had a chance now over the last approximately 20 or 25 minutes to actually look at this big thick stack that we showed you. And I see it's now in two piles.

A. This is -- let me just look to make sure I used...

MR. KLAPPER: There's no rush. So, seriously, take your time if you have to do more looking.

THE WITNESS: If I don't know what it applies to, then I'm putting it -- this is the only thing I don't think I have any idea of what it applies to specifically.

BY MR. BYMAN:

Q. And by "this," we're looking at MS-113 -- well, we're looking at MS-113450-113500 which is a sheet saying intentionally left blank, so it simply

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means those 50 pieces of paper got assigned a number, but we didn't get anything for it other than this T-shirt.

Then we have 113501 through 113899, which I take it you do not have any familiarity with?

A. I'm not -- based on what I see there I'm not sure what it applies to.

MR. KLAPPER: And let me just -- I don't know if the Bates numbers are consecutive within that pile. I guess that's my only question. With that caveat -- you're going to give me that job, huh? Let me take a quick peek before we move on.

MR. BYMAN: While you're looking at it, Tony, for the record, I'll say this is the third of the three witnesses that we've been given to tell us what this stack of documents is all about. Ms. Gorman had never seen that document before. Mr. Saunders, if I recall his testimony correctly, didn't have anything to do with that document and said that he'd only seen one percent of the entire stack, which would be 16 pages. So I guess we're wondering why it's in the stack if

0019

Mr. Seickel doesn't know what it's all about.

MR. KLAPPER: I can't say exactly why they're in the stack, but I believe the reason they're in the stack is because it was responsive to the order. So, you know -- we'll move forward with the questions.

MR. BYMAN: The order said you're supposed to give us anything that these three witnesses were going to testify about. I'm just making sure we are not missing something. If it got put in by inadvertence, that's fine, but we don't want to be sandbagged at the hearing if there's something you're not telling us about that document.

MR. KLAPPER: I don't know the details of what the first witness said about these documents, and I don't know if we walked through in as organized a fashion with the last witness, Mr. Saunders, what he had seen or had not seen. I know he generally talked about having recalled two documents, et cetera. There's no

intention to sandbag you.
Sitting here right now, I don't know what, if anything, any of these three witnesses will do with respect to these documents and if they rely upon them. If it becomes an issue, certainly at the hearing, where you feel that our -- the witnesses' reliance upon these documents, if this is the subset, whatever it might be, that none of the three could articulate having some knowledge about those documents, then raise the objection at that point. We're certainly not trying to sandbag you. Sitting here right now, I don't know. We can discuss this off the record if you'd like at some future point to sort of try to figure out if there's a way to parse through this. But sitting here now, I can't do that.
MR. BYMAN: Okay. All I'm trying to do, Tony, is make sure somebody doesn't say, gosh, you had a chance to ask a question about it; you didn't.
MR. KLAPPER: I know. But I did recognize with the last deponent,

Mr. Saunders, that we hadn't gone through this sort of two-pile in/out dichotomy. It was a little rougher in terms of the line of questions. And I'm not trying to suggest that, you know, you didn't close him out on that issue or you did. I don't know. We didn't go through the clear demarcation that certainly exists right now with Mr. Seickel.
MR. BYMAN: I'm confident with his one-percent estimation with a guy as careful as Mr. Saunders that he wouldn't have overlooked a document that thick.
MR. KLAPPER: That may be the case. I don't know. But I know he referenced documents that he had familiarity with, and I don't know if he was referencing this collection or not. But the record will speak for itself.
MR. BYMAN: I think that's enough tap dancing for now. Why don't we get back to Mr. Seickel.
MR. KLAPPER: That's fair enough. If you could indulge me just for a second, I just want to finish thumbing this. I'm

almost done. All right.
MR. BYMAN: All right.
MR. KLAPPER: Yes. I'm fine.

BY MR. BYMAN:

Q. With the exception of the approximately two-and-a-half-inch, three-inch thick document that Mr. Klapper has now verified have consecutive Bates numbers that you haven't seen, you have got some familiarity with the rest of the stack; is that right?

A. I have some familiarity with a portion of

each of the pieces of this stack.
Q. Okay. To your knowledge, were you the person that segregated and identified the documents in this stack so that they could be produced to us?
A. I'm not sure what you mean specifically.
Q. Did you have any input in compiling this stack of documents for us?
A. I may have. I don't recall.
Q. Were you asked to compile any documents in connection with this case?
A. Yes.
Q. And what did you do to respond to that inquiry?
A. I supplied them a document yesterday. And I don't see it. This pile. Not that it's not there,

0023

but I don't see it there.
Q. What was the documents that you provided yesterday?
A. It was a document from John Pamula that basically described the circumstances of the 169 tapes.
Q. Is that what we've marked as Exhibit 427?
A. Yes.
Q. Okay. We'll get back to that later. Other than that one piece of paper did you provide anything in response to any request in connection with this litigation?
A. Yes. I submitted e-mails. I don't recall if any specifically are in this pile.
Q. What you supplied was done electronically I take it.
A. Yes.
Q. Do you have any idea what quantity you supplied would comprise in paper once it was printed out?
A. If you're asking me to guess as to the end number, I would say 10 or 12.
Q. E-mails or pages?
A. Yeah, e-mails.
Q. With attachments?

0024

A. I don't recall. Maybe.
Q. What I'm trying drive at is if you printed out what you gave them, would it be something like this six-inch stack that we have left?
A. I didn't print out anything.
Q. I know. I'm just saying if you did, can you estimate would it have been a six-inch stack? Would it have been a two-foot stack? Would it have been a one-inch stack?
A. I would estimate it would be less than one inch.
Q. Why don't you take us through each of the documents in this stack, tell us for the record what the Bates numbers are, and then tell us what it is about each document that you've seen before.
A. Where is the Bates number?
Q. It's the production number on the bottom.
A. Oh, this number right here?
MR. KLAPPER: Yes. And "this" referring, just because there was a little ambiguity with stacks, "this" referring to the stack

that is in front of him in the deposition today.

BY MR. BYMAN:

Q. Yes. What we're talking about is from the universe of the first set of things that were produced to us by your law firm, Tony, Mr. Seickel segregated out the things that you've never seen before. We still have about six inches of it. And now I want you to tell me what in those six inches you've seen and what it is.

A. Okay. This is document Bates document 0112887.

Q. And what's the last number in the range at the last page?

MR. KLAPPER: If you turn to the last page and see the number...

THE WITNESS: 0112895.

MR. KLAPPER: And I would just suggest when you thumb through to make sure the numbers are consecutive. I'm sure they are, but just to make sure.

THE WITNESS: 91, 92, 93, and 95...

Yes, they are consecutive.

BY MR. BYMAN:

Q. Okay. What is that document?

A. This first document is an e-mail from somebody named Bezak (phonetic) at NDCI.com to Wray Stewart. And then -- actually, it also includes an e-mail from -- it's like a CC or forwarded from an earlier mail to Bruce Buchanan from Wray Stewart.

Q. Okay. And what in that set of documents have you seen before?

A. Discussion about 112 tapes, number that had mail data.

Q. What page are you referring to?

A. I'm referring to page three or 0112889.

Q. Okay. This is referring to the Brooklyn found tapes?

A. Yes.

Q. Is that a term that's familiar to you?

A. Yes.

Q. Does that refer to the 1,423 tapes that were located in Brooklyn?

A. I believe so.

Q. And this is an update in July of 2004 talking about what NDCI had found on the found tapes; is that right?

A. Um-hum.

Q. You have to answer audibly for the reporter.

A. I'm sorry. Yes.

Q. And what they had found as of July 2004 was that there were in excess of 2,183,000 total unique e-mail messages; is that right?

A. Okay.

Q. Is that right, sir?

A. It's saying it here. I don't know that for a fact.

Q. Do you have any information that what was reported to you by NDCI was inaccurate?

A. I have no reason to believe that.

Q. You're not copied on this particular e-mail, but do you have a recollection of it being forwarded to you or shared with you?
A. Just in conversations.
Q. With Mr. Stewart?
A. Yeah.
Q. With anyone else?
A. Just with legal counsel.
Q. Did you have a conversation with Mr. Stewart in July of 2004 about the contents of this tape?
A. I don't recall. It's possible.
Q. Well, when is the first time you recall being aware that the Brooklyn found tapes contained e-mail?
A. The last recall I have was being involved with it in October of this year.
Q. You mean of last year?
A. I'm sorry. Of last year, 2004.
Q. I'm not asking you for the last recall. When's the first time you knew that the Brooklyn found

0028

tapes had e-mail on them?
A. That's what I meant.
Q. So you had a conversation with Mr. Stewart in October of this year?
A. Correct.
Q. Did he tell you that he knew that they contained e-mail in July?
A. I don't recall if he said that to me, no.
Q. Well, when you saw this e-mail that's dated July 16, 2004, did you go back to him and say, hey, Wray, you must have known in July that these files had e-mail or words to that effect?
A. I don't remember having a conversation like that with him.
Q. By the way, I'm going to mark as CPH 31 what I think is the document that you're actually looking for or looking at there.
A. Yes. Do you want this document back?
Q. Keep the one with the Exhibit on it.
MR. BYMAN: And did you get his yes in answer to my question?

BY MR. BYMAN:

Q. Have you ever actually seen the e-mail that is 112889 prior to today)?
A. I don't recall. It's possible, but I don't

0029

recall.
Q. What were the circumstances in October of last year that caused you and Mr. Wray to talk about the subject of e-mails being on the found tape?
A. We were pursuing getting those, the 112 tapes processed by NDCI, and uploaded to our system.
Q. What was it about October that made you pursue it at that point?
A. I don't know. That was when it was brought to my attention.
Q. Who brought it to your attention?
A. Wray Stewart.
Q. What did he say?
A. He said we have these tapes that we have to process.
Q. Did he say that he had just found out about it, or did he say that he had known about it for

sometime?
MR. KLAPPER: Objection; asked and answered.
THE WITNESS: I don't recall.
BY MR. BYMAN:
Q. Did you ever attempt to find out when he first knew that there were 112 tapes that needed to be processed?

A. I did not ask him that.
Q. Was there anybody else present during the conversation you had with Mr. Stewart?
A. I don't think so.
Q. Was he directing you to do something about the processing, or was he simply saying, hey, we've got to do it, and he was going to have somebody else do it or he was going to do it?
A. I think they would be processed as part of the e-mail archive tapes as we would do any other tapes.
Q. Well, what was your role in processing the tapes?
A. I managed John Pamula who runs the group that handles the tapes, and I helped coordinate his activity to do so.
Q. And what I'm trying to drive at, Mr. Seickel -- And it may just be a language problem, and I may not be speaking your language here. I'm trying to find out why it was October that he was doing this.
A. I don't know.
Q. Was it because he had just received them, because he had just realized that he had received them a long time ago and he should have done it sooner?

Was it because he got some direction? You just don't know?
MR. KLAPPER: Objection. Asked and answered, but you can answer.
THE WITNESS: If you want me to guess as to why it was October --
MR. KLAPPER: He's not asking you to guess.
BY MR. BYMAN:
Q. I want you to give me your best understanding as to why you were asked to do this then.
A. I don't know.
Q. What specifically did you do after Mr. Stewart and you had your conversation?
A. The tapes were processed by NDCI, meaning they gave us the e-mails on tapes of the 112. Well, they wrote to the tapes and processed them as quickly as they could, sent them to us, and we -- or my understanding is that they were then uploaded to the e-mail archive sometime late last year.
Q. So in October when you had your conversation with Mr. Stewart, had these 112 tapes containing e-mail been extracted from the raw tapes?
A. When I had my conversation, I believe at that point the raw data was already moved.

Q. Moved into SD --
A. SDLT's.

Q. And did Morgan Stanley have possession of the SDLT tapes?
A. I believe so, yes. I believe so to the best of my knowledge.
Q. What's the basis of your belief?
A. Conversations with Wray Steward.
Q. Let me make sure I understand the mechanics of how this works. The raw tapes are the 1,423 tapes that were found in Brooklyn, right?
A. (Nodding head).
Q. You have to answer audibly for me.
A. Okay. Yes. Sorry.
Q. The raw tapes gets shipped to NDCI?
A. Yes.
Q. Where is NDCI located?
A. Manhattan.
Q. So when we say "shipped," we just mean across the river?
A. Yes.
Q. Then NDCI extracts information from the raw tapes and puts the extracted information on and SDLT tape; is that correct?
A. Correct.

0033

Q. And they ship the SDLT tape over to you at Morgan Stanley?
A. Correct.
Q. Once Morgan Stanley has the SDLT tape, it loads it onto a hard disk on its mainframe computer; is that right?
A. Slightly incorrect.
Q. All right. What is correct?
A. It's not a mainframe.
Q. What is it?
A. It's a UNIX or a LINUX based system with storage attached to it and a tape drive attached to it.
Q. And once it is loaded onto disk what is the next step in order to make it searchable?
A. The e-mail archives, the people governing the e-mail archive application are notified there's data in the staging area and they have to process it.
Q. And how do they process it?
A. I'm not exactly sure.
Q. Do you understand that a script has to be run against the data?
A. I'm sure, yeah, from that level.
Q. To your knowledge, does NDCI have the ability to put the data it extracts from raw tapes into some

0034

sort of searchable database?
A. I'm not aware of it.
Q. Are you aware that they do not have that capability?
A. No.
Q. So they may or may not have that capability?
A. Correct.
Q. To your knowledge, were they ever -- were they ever asked if they had that capability?
A. I don't know.
Q. To your knowledge, were they ever asked to perform any searches of the data that they were extracting?

A. I don't know.
Q. So in October when you and Mr. Stewart had your conversation, NDCI had already sent back the SDLT tapes to Morgan Stanley; is that correct?
A. I believe so, yes.
Q. Did you have anything to do, then, with loading those tapes onto the UNIX hardware that you were talking about?
A. No.
Q. Who did?
A. John Pamula and his team.
Q. And when did he complete that task?

0035

A. I don't know.
Q. He was reporting to you at that time, right?
A. He's -- yeah, he reports to me.
Q. Did he ever tell you and you've just forgotten or he just never told you?
A. No, those communications were dealt with with Wray Stewart.
Q. Did Mr. Stewart ever tell you when it was done?
A. No. In other words, not that I recall.
Q. And whether it was loaded then in a day or a week or a month, it still had to have the scripts run against it in order to become searchable; is that right?
A. I don't know. I'm not sure.
Q. Okay. So you don't know when it was loaded and you don't know when it became searchable?
A. Correct.
Q. Let me show you a document previously marked as Exhibit 425. And I don't know if we've gotten to that point in these piles, but is that something that you've seen before?
A. Yeah. These are meeting minutes that Wray would send out.
Q. were you copied with them on the -- at the

0036

time?
A. I believe so because one of the groups that are CCd on it I'm in.
Q. Is that DSMGR-NA?
A. Yes.
Q. Are you also in the group ECMGR-NA?
A. No.
Q. Do you know who is in that group? Have you ever heard of that group?
A. I'm not sure.
Q. So you believe you would have seen anything that was addressed to DSMGR-NA more or less in realtime?
A. I would have received it in my e-mail box.
Q. So you knew that the Brooklyn found tapes had been found at least as of May 6, 2004; is that right?
A. That sounds about right.
Q. This, I'll represent to you, is the earliest that I was able no find in this stack of documents referring to the Brooklyn found tapes. Do you have any recollection as to when the actual date of finding was?
A. No.
Q. Would it have been shortly before May 6th or

some period of time before May 6th?

A. It sounds about right. I'm not sure to be honest.

Q. Who actually found them?

A. From what I recall in conversations with John Pamula, that he was alerted to it by facilities, one of the facilities workers there that there were tapes that had to be removed or moved, and he, as a result of that, he alerted both myself and Wray Stewart in conversations.

Q. According to the first page of Exhibit 425, Wray and you were to investigate the origin on the tapes. Do you see that under bullet paragraph number two?

A. Yes, I see it.

Q. Did you do anything to investigate the origin of the tapes?

A. The only thing I recall is that we decided to make it a part of the e-mail archive project to ensure that we were not missing anything.

Q. And when you say "we decided," who is the we?

A. The group, the e-mail archive group that were meeting on a weekly basis.

Q. The attendees shown on this, Kay Gunn, Bruce Buchanan, Annaline Dinkelman, John Pamula, Wray Stewart. I take it you were also a member of that group.

A. Yeah. I was one of the attendees from one time to the other. I was invited to these meetings on a weekly basis.

Q. Invited, or were you actually part of the group?

A. I was part of the group that I was supposed to attend the meetings.

Q. And then who else other than the persons identified and yourself was a member of the group?

A. Kay Gunn, Bruce Buchanan, Annaline Dinkelman, John Pamula, Wray Stewart. Other than these members there was Arthur Riel, Don Haight, and over time it changed somewhat. Annaline Dinkelman. I'm trying to think if there's -- Robert Saunders.

Q. Allison Gorman?

A. Allison Gorman. Deb Speyer. I'm not sure who else.

Q. Mr. Seickel, were you aware that litigation between Morgan Stanley and CPH, the case that has you here today, was underway as of May of 2004?

A. No.

Q. When was the first time you heard about this lawsuit?

A. Recently within the last week, I'd say, something like that.

Q. Were you aware that as part of his duties Mr. Riel had certified that production of responsive documents was complete in this case sometime in 2004?

A. I wasn't aware of that.

Q. Are you aware of that as you sit here today, or did you just hear about it for the first time from me?

A. What you just said I heard for the first

time. The general case I've heard about for the past week.
Q. Had anybody told you prior to the time that you heard about this lawsuit that there was an obligation on Morgan Stanley to produce documents in connection with litigation, e-mail documents?
A. Can you be more specific? I'm not sure what you're asking.
Q. Let me back up a moment. The archive project that you were a member of this group for was designed for the ongoing business of Morgan Stanley, right?
A. (No response).
Q. You have to answer audibly.
A. I'm still trying to understand what the question is.
MR. KLAPPER: Objection; vague.

MR. BYMAN: If he doesn't understand it, by definition, it's vague.
BY MR. BYMAN:
Q. What was the business purpose, if you know, of the e-mail archive group?
A. The e-mail archive group was to congregate or gather people with different areas of either expertise and/or responsibility to eventually migrate all the e-mail messages from tape that existed into this e-mail archive system.
Q. And that was for all of North America?
A. Yes.
Q. And what was the business purpose for doing that?
A. My understanding is that it would make it easier to respond to requests for information.
Q. And would that be requests for use in the business or for some other reason?
A. Again, my understanding is in relation to litigation requests and business requests.
Q. So this was going to be something that Morgan Stanley would use for a variety of purposes; is that fair to say?
A. I'm not sure.
Q. Did anybody ever explain to you why this

group was assembling on a weekly basis to undertake this project?
A. Again, my understanding is to make sure that the e-mails were migrated to this e-mail archive product to preserve the data.
Q. Right. That's the task. What was the reason for the task? Did anybody ever explain that to you?
A. No.
MR. KLAPPER: Let me state the objection. Objection; asked and answered.
BY MR. BYMAN:
Q. In any of the conversations you had with Mr. Stewart about the need to process these tapes, did he say anything about specific dates of tapes that were of particular significance?
A. Not that I recall.
Q. Did he say anything about trying to find old e-mails from the 1998 period of time?
A. No, he did not.

Q. When, if ever, was the first time that you learned that the found tapes included e-mails that might date back to 1998?
A. I think this is the first time.
Q. You mean with my question?

A. Yes.
Q. Were you also aware that in addition to the found tapes there were other groups of tapes that contained e-mail that were discovered by Morgan Stanley?
A. Repeat that question. I'm sorry.
Q. Sure. Let me back up a bit, and I'm going to make a representation to you. During Mr. Saunders' deposition this morning, we identified actually five tranches of --
A. It's a Saunders word.
Q. It's not actually his word, but he adapted it for this. It actually is a word, I think. But the five groups of things that we talked about included, number one, something like 35,000 raw tapes of pre-2003 e-mails. Number two was the 1,423 tapes that we've been calling the found tapes from the Brooklyn security area. Number three was 728 eight-millimeter tapes that were located some place else. Number four was 169 DLT tapes found in the last few months that I take it is the subject of Exhibit 427. And number five was 169 -- approximately 2,200 exchange DLT tapes that are referred to on --
A. Can we go back a second? Because I think I might have misstated something. You asked me how did

the 1,400 came to our attention.
Q. Yes.
A. And I think I misstated because I was thinking of the eight-millimeter tapes. The 1,400 tapes were in a security room in Brooklyn, and just in conversations I believe sometime in the summer of 2004 we had -- well, somebody had an epiphany, I don't recall who, and thought that this security room may have had -- and it was a locked room held by IT security -- had these tapes. And that's how they came to be found.
Q. Okay. So let's back up and make sure that we're clear. As to the found tapes, the 1,423, that was somebody's epiphany, and that epiphany occurred just prior to May 6, 2004?
A. Yeah, correct.
Q. And as to Mr. Saunders' third tranche, the eight-millimeter tapes, how were those located?
A. Those were located, as I testified to previously, they were something Facilities would have alerted John Pamula's group that there were tapes there. He then alerted myself and Wray Stewart, and the group decided to then act on those tapes.
Q. And what facility alerted Mr. Pamula?
A. Facilities. They're a building -- there are

certain building people, maintenance people, workers that it was my understanding that one of them alerted them to these tapes.
Q. Where were the tapes physically located?
A. They were in a com rom in 1221 Avenue of the

Americas.
Q. In Manhattan?
A. Correct.
Q. Did anyone attempt to find an explanation of why they had not been located sooner?
A. I don't recall.
Q. Mr. Saunders told us that by the very fact that these are eight-millimeter tapes they would tend to be older tapes because it's an older technology. Is that consistent with your understanding?
A. Yes.
Q. Was anything done after the discovery of the 728 eight-millimeter tapes to make sure that there weren't others, other similar tapes located in other com rooms somehow?
A. It was my understanding based on conversation with John Pamula that he would have himself and his employees do a thorough search of not only the com rooms but any storage areas that he had access to.
Q. And when was the first time that Morgan

0045

Stanley knew what was actually on the eight-millimeter tapes?
MR. KLAPPER: Objection; foundation. You can answer.
THE WITNESS: Last week or a week before that, something like that. Recently.
BY MR. BYMAN:
Q. How did you come to know what was on the tapes?
A. NDCI reported it to us and I was one of the recipients.
Q. What did they report?
A. They reported a certain number of e-mails on those tapes.
Q. Do you remember what number of e-mails?
A. I don't recall.
Q. Is that report in this stack of documents? Did you see it?
A. I didn't see it. I don't recall seeing it. It doesn't mean it's not there. I just didn't recall seeing it.
Q. Who else was copied on that report?
A. I'm not sure, but definitely myself, Wray Stewart. Beyond that, I can't recall. I would

0046

say also that it was reported to legal counsel as soon as we found out. I just can't recall the specific e-mail addresses on it.
Q. Do you recall the date of that report?
A. No.
Q. But it was within the last week?
A. If was fairly recently.
Q. Well, fairly recently can mean different things to different people.
A. It was, I would say, within the last two weeks. That's what I recall. I don't recall to be honest with you. I'm just guessing. But it was recent.
MR. BYMAN: Tony, if that document is in that stack, I haven't been able to locate it and identify it. Are you aware of

anything being withheld from the production that would constitute the report that Mr. Seickel has described?
MR. KLAPPER: I don't know if legal counsel is copied on it and, therefore, would be referenced on a privilege log. Sitting here today, I don't know one way or the other. Certainly there's no -- there was no attempt to keep out of this

collection of documents produced documents that are responsive unless, of course, they were privileged and in that case would have been placed on the log.
MR. BYMAN: Well, that's a pretty fancy way of saying you don't have any way of answering my question.
MR. KLAPPER: No, I think I answered your question.
MR. BYMAN: I guess the record will reflect that. I'm just asking you if that document that Mr. Seickel just described, the reporting, was on the 728 tapes that have been produced to us, and you don't know the answer to that I take it. You just know if it was privileged, you would have claimed the privilege.
MR. KLAPPER: I think I already gave you the answer to the question. So sitting here today, do I know whether or not it was produced? No, I don't know whether or not it was produced. If it was supposed to be produced and -- and existed, I'm sure it would have been produced or placed on the privilege log if there was a

communication with counsel.
MR. BYMAN: Well, with all due respect, you better take another look at what constitutes privilege. The mere fact that it's addressed to you doesn't make it privileged.

BY MR. BYMAN:

Q. What do you recall the report disclosing? Was it one e-mail they found? A million e-mails? A zillion e-mails?

A. There was definitely more than one e-mail. Beyond that, I can't speculate.

Q. Was there anything about the content of the e-mails disclosed in the report?

A. Just that I believe it was broken down to type, like the two types that we have are iMap and notes most notably on UNIX.

Q. So by type you're just talking about what platform the e-mails are on; is that right?

A. Correct.

Q. I take it that NDCIS was never asked to actually search for and identify individual e-mails so they wouldn't be in a position of talking about the subsequent content of an e-mail; is that correct?

A. I believe that is correct.

Q. In addition to their report, did you also get

some sort of electronic medium from them that included the extracted e-mails they had identified?
A. No.
Q. Have you gotten those yet?
A. Wait. Rephrase that again. I'm sorry.
Q. Well, they have --
MR. KLAPPER: Let me just direct him. Take your time. Make sure you guys are communicating. If you don't understand the question -- just make sure you understand the question.
BY MR. BYMAN:
Q. And I second that. I don't want you answering questions you don't understand, sir. You have 728 eight-millimeter tapes that you've sent to NDCI, right?
A. Right.
Q. A week or two they reported back to you we have confirmed that those tapes contain e-mails in one or more e-mail platforms; is that right, sir?
A. Correct.
MR. KLAPPER: My objection -- allow me to object. I don't know if he testified the time frame was one or two weeks or he

0050

wasn't sure about the time frame.
BY MR. BYMAN:
Q. Whatever it was you've just gotten done telling us about when you saw this report.
A. Um-hum.
MR. KLAPPER: Or based on your prior testimony. You may answer.
BY MR. BYMAN:
Q. In addition to simply reporting to you, we have identified that there are e-mails. Have they also sent back to you either a SDLT tape or some other type of electronic medium that says here, they are?
A. Yes.
Q. And when did you receive those?
A. We received them all by the end of last week, which was, I believe, Friday was the last tape for the eight-millimeters.
Q. And what quantity of electronic medium did you receive representing those 728 eight-millimeter tapes?
A. Three SDLT tapes.
Q. Were those three SDLT tapes full?
A. I don't know.
Q. Do you know what quantity of data was on those tapes?

0051

A. No.
Q. And who actually made the receipt of those tapes from NDCI?
A. John Pamula.
Q. What, if you know, did Mr. Pamula do with those tapes when he received them?
A. It was my understanding that he had one of his subordinates upload the tapes, the data from the tapes onto the e-mail archive staging area.
Q. And how long did that take?
A. I think that was completed either Friday or Saturday.

Q. So it is possible to load three SDLT tapes in a day or two?
MR. KLAPPER: Objection. Vague and ambiguous.
BY MR. BYMAN:
Q. Whether possible or not, was done between your receipt on Friday and Friday or Saturday; is that right?
A. Well, the -- I'm not -- I don't know -- I'm not sure what your whole question is. Are you saying that -- Well, I'll let you explain it.
Q. All right. Let me again do this in small pieces. Let's say you get one full SDLT tape which

0052

holds approximately 150 gigabytes; is that right?
A. Correct.
Q. How long would it take on the assumption that you had nothing else to do, that you could assign all of your resources to do nothing except process that one tape, how long would it take to do the upload that you've been talking about?
A. The best estimate I can give you is one day.
Q. 24 hours?
A. Probably less than -- a business day, like eight hours.
Q. All right. And if you got three tapes at the same time and had nothing else to do, no other demands on your resources, would it take three eight-hour shifts, or could you do some of that in parallel?
A. If there was no restraint on resources, then you should be able to do them in parallel.
Q. What restraints on resources might there be?
A. We had two SDLT drives, three tapes. Also two of the tapes were received on Wednesday or Thursday. One of them was received after that.
Q. What I'm trying to drive at -- and this is starting to sound like one of these things you get in airline magazines that say you have three ducks and two row boats, and how do you get them across the

0053

river, but would it take one SDLT drive eight hours to upload one full SDLT tape?
MR. KLAPPER: Let me just object. This is really unclear to me if we're talking about a tape that is working properly, a tape that has problems, any tape or the particular tapes -- Are you asking him about the particular tapes that came from the eight-millimeter or any tape that may or may not have problems? I just --
BY MR. BYMAN:
Q. I like my question. Unless you don't understand it, why don't you try answering it. Would you like to hear it again.
Let me see if I can simplify this, Mr. Seickel. What I'm trying to find out is in an optimum environment, assume no problems with the tapes, assume that the tape is full, though, so that we know what the maximum amount of time it would take to do it, assume that you have just one tape and one driver. How long would it take to upload the information onto your disk?
A. Less than one business day.

Q. So less than eight hours?
A. (Nodding head).

Q. I need an oral answer. I'm sorry.
A. Yes, I'm sorry.
Q. So if you have two drivers and two full tapes and two people to load them, you could get two of those taken care of in less than one business day; is that right?
A. That's correct.
Q. And if you had three tapes, two drivers, and it doesn't really matter how many people at this point, it would take something more than one business day but less than two business days; is that right?
A. Correct.
Q. With respect to the three tapes you actually received, you received some of them on Wednesday or Thursday, the last one on Friday, and they were all fully loaded by Saturday; is that correct?
A. Correct.
Q. Once they're loaded do you know how long it takes to migrate them into some sort of searchable form?
A. No, I don't.
Q. That's something that is in Ms. Gorman's bailiwick?
A. Correct.
Q. So you don't know if they are searchable as

we sit here today or not; is that correct?
A. Correct.
Q. No one has told you whether or not they've been migrated into searchable form?
A. I did receive mail, I believe yesterday, saying that they processed the tapes. I have no idea what that means.
Q. So by processed you don't know if that means searchable?
A. Correct.
Q. Or labeled or something else?
A. Correct.
Q. Has anyone told you that they've been able to determine what the content, the substantive content of those processed tapes are?
A. No.
Q. Have you ever been advised that someone at Morgan Stanley was aware in early July 2004 that those 728 eight-millimeter tapes contained e-mail dating back to June of 1998?
A. Repeat the question.
(The record was read as requested.)
THE WITNESS: No.
BY MR. BYMAN:
Q. By the way, I've just been advised it's 738,

not 28. When I've been saying 28 or 38, we both understand we're talking about the universe of eight-millimeter tapes that were found as you earlier described, is that okay?
A. Yes.
Q. Let me show you what we previously marked --
MR. KLAPPER: It's your call, your call if we need to take a bathroom break. Is this

a good breaking point?
THE WITNESS: Sure. We can take a bathroom break.
(A recess was taken from 2:48 p.m. to 2:58 p.m.)
BY MR. BYMAN:
Q. Mr. Seickel, I'm going to show you what we marked earlier as CPH 428. Have you ever seen the e-mail from Mr. Buchanan to Mr. Riel dated July 2, 2004 before?
A. Before today?
Q. Yes.
A. No.
Q. Has either Mr. Pamula or Mr. Haight or Mr. Stewart ever told you that they were aware on or about July 2nd, 2004 that the eight-millimeter test tapes included e-mail and that the dates on some of

0057

those e-mails went back to June of 1998?
A. No.
Q. So reading this --
A. I don't recall anything being told to me regarding that.
Q. I'll take that back.
MR. KLAPPER: What Bates number?
BY MR. BYMAN:
Q. Okay. I think we wrestled Exhibit 431 to the ground. And what's the stack that you've seen before? Let me identify it for the record as 112672 through 796. Would you describe that and what your previous involvement in it was.
A. The only part that I recognize at all is and just in general terms from the time periods that I see are the eight-millimeter tapes.
Q. And you're referring to the printout of --
A. And I'm referring to specifically 0112676 where the subject states eight-millimeter tapes.
Q. I'm sorry. What specifically on page 676 are you referring to?
A. The subject areas that say eight millimeters. Just that I know that there were eight-millimeter tapes. That's the only thing that's familiar.
Q. So just the words "eight-millimeter tapes"

0058

sounds familiar?
A. Correct.
Q. What about the page after page of listing of tapes? For example, 112690?
A. 112690. Not specifically. I mean, nothing...
Q. So you didn't create this listing, I take it.
A. Correct.
Q. You're not even sure you ever reviewed it?
A. Correct.
Q. And other than the fact that the word "eight-millimeter tapes" appears somewhere in the body of that document, you don't know anything else about its substance?
A. Correct.
Q. Okay. Then let's put this one aside. The next one is 112896 through 969.
MR. KLAPPER: Have we established on the record what he's looking at, the full

Bates range?
MR. BYMAN: I think I just gave those numbers.
MR. KLAPPER: I just want to make sure it's a consecutive range. Let me just quickly look.

THE WITNESS: My familiarity with it, again, is that I believe I contributed to some, like the work flow product that was put together and how the tapes were being processed.

BY MR. BYMAN:

Q. Are you referring to a specific page?
A. I'm referring to 0112935.
Q. And that's a flow chart schematic diagram of the work?
A. Yeah. I believe I was in one of the meetings that discussed this because it looks familiar.
Q. Did you actually prepare the flow chart?
A. No, I did not.
Q. If we were to look at that flow chart, is one of the boxes or diamonds or circles an area in which you fit?
A. I don't recall exactly what my contribution was to it.
Q. Or whether you're part of the process now that the flow chart has been identified?
A. Correct.
Q. Other than that flow chart that you've identified is there anything else about the document?
A. Just that it talks about 35,000 DLT tapes and eight-millimeter tapes.
Q. Other than the fact that you recognize some of the terms or concepts, did you prepare any of these documents?
A. I don't believe so, no.
Q. Did you receive any of the documents contemporaneously?
A. I don't think so. It could be. I don't recall.
Q. Let's put that aside. The next set of documents is 113416 through 113449. Would you tell me what the significance of that document is?
A. Okay. On 418 -- Can I just refer to the last three digits?
Q. Sure.
A. This is in regarding the 169 tapes that were recently found. There's some communication between me and Bruce and in re: discussing what we were doing with the 169 tapes.
Q. May I see that page a moment?
A. Sure.
Q. If I understand this chain correctly -- And I apologize. This is the only copy of this that I have with us here today. On January 12th, 2005, you send an e-mail to Mr. Buchanan at NDCI saying, "We've reviewed your website and found that there are several that they are not on your list as processed. Can you please double-check?" Is that correct?
A. Correct.

Q. Now was there some sort of intranet that you could get on so that you could check his work in progress over the Internet?
A. They have a website that tells us what certain information is. Now I have never accessed the website to look at the data. Wray has from time to time to verify what tapes have been processed. I'm not sure what additional information is on the website. I just don't recall.
Q. Is it your understanding, though, that they have some sort of secure site so that they can monitor their work in progress?
A. Correct.
MR. KLAPPER: Just for the record and for my benefit, if you don't mind, is there a Bates number or an Exhibit Number?
MR. BYMAN: Yes, he's identified 113418.
BY MR. BYMAN:
Q. And then approximately a little over two weeks later he gets back to you on January 28th, hey, Glenn, attached is spread sheet with header dates for

0062

the 169 tapes. Do you see that?
A. Correct.
Q. Now I'm looking at the pages that were produced immediately after that, and they appear to be invoices.
A. Correct. I didn't see those. Those usually went through Wray Stewart.
Q. And then after the invoices starting at page 113426 there does appear to be a listing of tapes.
A. Um-hum.
Q. Is that the attached spread sheet that he was referred to by Mr. Buchanan?
A. I don't -- I don't know if those apply to the 169 tapes. I just don't recall.
Q. Might be; might not?
A. Yeah.
Q. And then you respond to him about 18 minutes later saying when will you have the SDLT's with the mail, do you see that?
A. Correct.
Q. And that's what he eventually responded to?
A. I think so, yeah. We were obviously trying to get the SDLT's with the data from the 169 tapes.
Q. Now we know that the 738 eight-millimeter tapes, you eventually got all of that on SDLT tape as

0063

of last Friday; is that right?
A. Um-hum.
Q. When did you get the SDLT tapes from the 169 tapes?
A. We received two on Thursday of last week, and the final one we did not receive until, what is today? Today is --
MR. KLAPPER: The 10th.
BY MR. BYMAN:
Q. Wednesday. I'm sorry. Thursday. Time flies.
A. I believe we received the tape Monday. Tuesday or Monday. Tuesday. The final tape for the 169, the SDLT. No, I'm sorry. We received it Wednesday and had it uploaded yesterday.

Q. Yesterday was Wednesday.
A. Yeah. We received it Wednesday and had it uploaded Wednesday.
Q. Let me make sure again that I understand. For the 738 eight-millimeter tapes, you received three SDLT tapes, all of which were uploaded by Saturday?
A. Saturday.
Q. Of last week? Last Saturday?
A. This past Saturday.
Q. For the 169 DLT tapes you received, was it

0064

two or three SDLT's?
A. Total of three.
Q. And all of those have been uploaded as of yesterday?
A. As of late yesterday, yes.
Q. The last of which was not loaded until yesterday; is that right?
A. Yes.
Q. And I've asked you all these questions with respect to the three SDLTs for the 738 eight-millimeter tapes. As to the three SDLT's for the 169, have those been processed into searchable form yet?
A. I don't know.
Q. So your answers would be the same, you don't know what happens once they get uploaded?
A. Correct.
Q. Or what the time table is for having them into searchable form?
A. Correct.
Q. While we're on the subject, how were these 169 DLT tapes discovered?
A. We discovered them at our offsite vendor, Recall.
Q. And how was it that you discovered them?

0065

A. We were doing a search for a database that we were trying to restore for a particular server. As part of that, I created a list of tapes for John Pamula to then identify the boxes that they were in and to send them to NDCI. As a result of that, NDCI -- Recall, sorry, was able to locate most of the boxes except for a finite amount of them.
John Pamula, after processing the boxes that they could find, went back and looked at what they keep as a tape database, a manually maintained database of the location of tapes. According to the database, Recall should have had those boxes. We first did an exhaustive search to try to locate -- my understanding is he did an exhaustive search for those boxes on Morgan Stanley sites to confirm that we didn't have them. He subsequently escalated the issue to a manager at Recall to attempt to locate the boxes.
We subsequently obtained those boxes from Recall. In those boxes -- well, number one, those boxes did not have labels that were consistent with boxes that were processed by NDCI, and he brought that to my attention. John Pamula brought it to my attention and to Wray Stewart's attention. We then had confirmed, went ahead and confirmed with Bruce Buchanan, meaning I confirmed with

0066

Bruce Buchanan that there were tapes in that -- of which in those boxes were not processed by NDCI.
We alerted -- at that time we alerted legal counsel that that was the case, that we had additional tapes that were found and that we were going to process them as part of the e-mail archive project.
Q. And when was it that you notified legal counsel?
A. I believe it was the same day or within a day or two of finding out, which I believe was like the second week in January.
Q. How long was the process between figuring out that these 169 tapes existed and notifying legal counsel?
A. I don't recall. It was a day. Maybe a day, two days tops. I don't recall exactly.
Q. When did you first find out that the 169 tapes that had been located contained e-mail?
A. That they had e-mail? I learned of that when I got the first spread sheet on the 169 tapes, which I believe I received on Thursday or Friday of last week.
Q. So you found out about these tapes in January, the first week or two in January; is that right?

0067

A. I would say sometime in the first two weeks of January.
Q. You didn't know whether or not they had e-mail on them at the time?
A. Correct.
Q. And was any priority placed on finding out if they had e-mail?
A. What do you mean by priority?
Q. Well, let me make sure that we're clear on the dates. You found out that they had e-mail last week; is that right?
A. I found out, yeah, Thursday or Friday when they sent me the spread sheet that they had -- I think it was Thursday or Friday that they had, some of them had e-mail on them.
Q. So it was two, two and a half weeks after you discovered that you had these 169 tapes that you discovered that they had e-mail on them?
A. Yeah, because they had -- NDCI had processed the tapes.
Q. It doesn't take two and a half weeks to take a look at a DLT tape and find out if it has e-mail on it, does it?
A. It depends. And I'm not sure what your question means.

0068

Q. Well, in other words, when you sent these to NDCI, it was as part of the e-mail archive project, wasn't it?
A. Yes.
Q. You suspected that they had e-mail, didn't you?
A. Yes.
Q. By that time you were sensitive to the fact that there was some legal consideration involved in making sure that these things got produced, right?
A. Correct.

Q. That's why you contacted legal counsel within a day or two?
A. Correct.
Q. So why didn't you when you sent these to NDCI in mid January say, we really have to know right away if they have e-mail; don't do this in ordinary course; tell us tomorrow; tell us yesterday?
A. I can't -- I can only reply to you what NDCI gave to me. There is a process that they may have to go through to process the tapes, so I can't -- I can't give you information to that. All I can tell you is when I received information on those tapes.
Q. I understand that, Mr. Seickel. What I'm driving at is when you told NDCI you had these 169

0069

tapes that you wanted processed, did you say process them, period? Did you say process them as slowly as possible, or did you say process them quickly?
A. As I recall, Bruce Buchanan asked me what priority. He goes -- and I said, "The typical priority." And he responded, "Yesterday," meaning as soon as possible. And that's how I believe the conversation went almost word for word.
Q. Has it ever taken NDCI as much as two and a half weeks to tell you what the content of a particular tape was before?
A. I can't recall. You're asking me for a specific instance. If I would have sent them one tape and said process this tape, I would have a framework to answer your question. But I have no framework to answer that question. Do you understand what I'm saying?
Q. You could have done a test on them, right? You sent them 169. You could have said take five or ten of them and test them, right?
A. We didn't do that.
Q. Any reason why not?
A. We wanted them all to be processed, so I don't know how to answer that.
Q. Let's move to the next document. This is

0070

113209 through 113415. What's the significance of that document?
MR. KLAPPER: Just let me do my little check on the Bates range. And, again, take your time and refresh your memory about the entire stack if necessary.
THE WITNESS: Okay. The first page refers to tapes -- it says -- and I'll refer to it as 209, document 209. "Attached spread sheet containing the bar codes numbers from all tapes from the original job that contain no mail data at all."
MR. KLAPPER: Slow down for the court reporter.
THE WITNESS: "This excludes any error, read error tapes, IIM tapes or any tapes that had no unique mail output. I'm familiar with this --
THE COURT REPORTER: IIM?
THE WITNESS: IIM. It says, "...any read errors, IIM tapes or any tapes that

had unique mail output."

BY MR. BYMAN:

Q. Okay. And how are you familiar with this?
A. It was in discussions with legal and -- legal counsel in regard to this whole project.
Q. May I see the page you're looking at? Okay. So this spread sheet was sent to you on or about October 2004; is that right?
A. Yeah, if that's the date, yes.
Q. And other than it being sent to you, did you have any involvement with it?
A. The only involvement was that John Pamula was the one -- these tapes pertained to the population of 35,000 tapes or thereabouts that were sent to NDCI for processing.
Q. Okay. So this was just a routine report from that process?
A. This is one of the reports from that process it looks like.
Q. Is there any other significance to the report that you're aware of?
A. Nothing really. Some of it was just mundane communication regarding an extension number change. Just it seems like normal communication back and forth other than that.
Q. May I see that again? Sorry.
A. Sure.

Q. Did receipt of this document on or about October 25, 2004 cause you to consult counsel?
A. Cause me to consult counsel?
Q. Yes.
A. I don't recall. I don't know if it was the cause or the discussion -- I don't recall.
Q. Well, did something in October of 2004 cause you to consult counsel?
A. Well, just be aware, we consult counsel fairly regularly regarding the e-mail archive project.
Q. Was there something in October of 2004 relating to finding additional e-mail backup tape that caused you to consult counsel?
A. Repeat that. I'm sorry. I just don't understand the question.
Q. Sure. Actually, let me represent to you, sir, that in a filing in this case James Doyle -- Are you familiar with Mr. Doyle?
A. James Doyle, yeah, he works for Morgan Stanley.
Q. He's a Morgan Stanley in-house lawyer?
A. I believe so.
Q. Mr. Doyle filed a declaration, and I'm going to quote from it. "At the end of October 2004 I learned that additional e-mail backup tapes had been

located within Morgan Stanley and that the data on those tapes had not been restored or searched prior to Morgan Stanley's May 14, 2004 e-mail production."
Were you the source of information of Mr. Doyle in 2004?
A. No.
Q. Do you know who was?

A. I'm not sure.
Q. Did you have any communications with Mr. Doyle in October of 2004?
A. No.
Q. Did you have any communications with any lawyer who you know reports to or works with Mr. Doyle?
A. In October?
Q. Yes.
A. I don't think so.
Q. Do you recall the names of any Morgan Stanley in-house lawyers that you did have communications with in 2004? And I only want their names. I don't want to know what you talked to them about.
A. Soo-Mi-Lee and Zachary Stern.
Q. Was there any event in October 2004 relating to the discovery of e-mail backup tapes that had not been previously located?

0074

A. Be more specific.
Q. Okay. Going back to our tranches, the 1,423 tapes we know were discovered back in May --
A. Yeah.
Q. The 738 eight-millimeter tapes were discovered when?
A. Eight-millimeter tapes were discovered sometime in 2002, I believe.
Q. Okay. So way before May of 2004?
A. (Nodding head).
Q. You have to answer "yes" or "no."
A. Yes. I'm sorry. Bad habit.
Q. The 169 tapes that we were talking about recently were discovered when?
A. In January of 2005.
Q. Were there any discoveries of previously undiscovered backup tapes containing e-mail around the October 2004 time frame?
A. No.
Q. And, in fact, the closest --
A. Other than those, no.
Q. And those, the closest one to October would have been the one in May or earlier?
A. Yeah. Yes.
Q. Let's move on to the next document. We have

0075

an intentionally left blank page with the numbers 112970 through 113068 and we have 113069 through 113208. And I'm assuming that Mr. Klapper wants to make sure I haven't misread the numbers.

MR. KLAPPER: It's not meant to suggest that you're trying to misread. Are these two separate? Because the chain that you gave, you ended 113068 and then 113069. You said two different numbers, two ranges. At the end of the first range you went to the beginning of the second range.

MR. BYMAN: Tell you what. Rather than debate what I said, let me just say it again. Give it to me again.

MR. KLAPPER: Actually, hold on a second. I thought you said -- I see what you're saying. You don't need to. That's fine. We're on the same page.

BY MR. BYMAN:
Q. What's the significance of that document? And I presume the intentionally left blank you don't know about.
A. (Shaking head).
Q. Again, you have to answer audibly for the reporter.

A. No. I have to get out of that habit.
070, it was communication in regard to this database restored that I was referring to earlier. He needed sequencing information for the restorers. I believe this refers to it. And he also needed the exact client that we were looking for.
Q. May I see the page you're referring to?
A. Sure.
Q. This is 113070. There's an e-mail chain that involves you dated December 2004.
A. Um-hum.
Q. And what, sir, is the significance of this e-mail chain?
A. The significance of it was that he needed certain information. We were doing a database restore, and he needed certain sequencing and server information for the restorers to commence.
Q. He being Mr. Buchanan?
A. Mr. Buchanan at NDCI.
Q. Other than that page and that reference is there anything else in that inch-thick bundle of documents?
A. Well, just to finalize the significance --
Q. Sure.
A. -- that was the initiation of the process was

for -- in getting these restorers helped us to discover the 169 tapes.
Q. It was the beginning of the process because you were trying to reconcile?
A. Before we started reconciling I provided a list of tapes that I needed restored to John Pamula. He identified the boxes. This was the process that started this.
Q. Okay. But at this point you hadn't discovered there was something missing?
A. Correct.
Q. All right.
A. No.
Q. There's nothing else of significance there?
A. No.
Q. Next document is 112819 through 112886.
A. This e-mail on page 819 or document 819 looks like it reflects the same thing that was on the previous one.
Q. So it's just a dup?
A. It looks like it because it's from -- it's from December 15th. I don't remember the date on that, on the previous one.
Q. It was 070, right?
A. Yes. What's the date on this?

Q. This one says the 13th.
A. The 13th. Let me just see what -- but this one is the 15th. Yeah, it's the same date.

Q. Okay. So this is just a duplicate?
A. This particular page. I just want to look through the rest of it to see. Yes, a lot of it looks like it's a duplicate. So let me look through the rest of it to make sure. Yes, this one looks like a duplicate of the previous one.
Q. Okay. Next we have 112797 through 112818.
A. Some of these mails, and I'll refer to it as 798 -- wait. The bottom of 798 and going to 799 refer to another project that we were working on.
Q. It's a project unrelated to e-mail archive?
A. It's a project -- well --
MR. KLAPPER are you looking at me? Is this getting into attorney-client issues?
THE WITNESS: Yes.
MR. KLAPPER: Okay. Let's confer.
(A recess was taken from 3:37 p.m. to 3:47 p.m.)
MR. KLAPPER: Okay. I don't know what the last question is, but questions relating to this document I'm going to instruct the witness not to respond to. I believe this

0079

may have been an inadvertent production as the e-mails and issues referenced therein apparently relate to a non-public investigation that either occurred or may still be occurring. I'm not sure of the context. So with that, you know, we're going to instruct him not to answer any substantive questions about this document.
MR. BYMAN: And that would be the entire document?
THE WITNESS: No --
MR. KLAPPER: I asked you to look at it and see if there's a way to segregate it.
THE WITNESS: Yes. I mean some of it related to the database restore I was talking about regarding the finding the 169 tapes.

BY MR. BYMAN:

Q. Okay. Where is that?
A. That's on 799 as well. That's the bottom part.
Q. So the same page includes things that I can't ask you about.
A. Correct.
Q. And things that I can?

0080

A. Correct.
Q. Except that there's nothing for you to add to the things that I can because you already told us everything you know about the 169 tapes?
A. Correct.
Q. Is there anything on this document that relates to something I haven't asked you about?
A. I don't think so.
MR. BYMAN: Okay. And for the record, Tony, my view is that all of these documents have been inadvertently produced because apparently nobody is ponying up to a reason why they're going to be used at the hearing on Monday. So I'm happy to

move on.
MR. KLAPPER: I'm sorry. What is your point?
MR. BYMAN: You said this document was inadvertently produced. As near as I can tell from the testimony of these three witnesses, two of the witnesses have never seen most of these documents. Mr. Seickel has seen only small tiny portions of thick documents, and to the extent that he's seen them, he just says, yep, those relate

0081

to stuff I know. I'm having a lot of trouble figuring out why we have these 600 pages -- excuse me -- 1,600 pages of documents because it's my job to make sure we don't get surprised on Monday.
MR. KLAPPER: I don't think you'll be surprised. But these documents were only produced --
MR. JONES: Bob, you're inviting further conversation, but I didn't interpret it that way. I didn't know.
MR. BYMAN: I'm inviting you to tell me what the significance of these 1,600 pages are so we can either stop wasting our time or you can not sandbag us. Because either we're being sandbagged or we're wasting our time. I can't think of any other reason why we've had these 1,600 documents given to us.
MR. KLAPPER: We're going to go off the record for a second. I don't know if we are on the record.
THE COURT REPORTER: Off the record.
(A discussion was held off the record.)
BY MR. BYMAN:

0082

Q. Next go to the next document, 112633 through 112671. What's the significance of that document, Mr. Seickel?
A. 633 is just a process by which we are retrieving the certain data from -- and I'm not clear as to specifically which tapes. And I believe that because of the time frame and what we were doing with the database restores that it relates to the database restores that we were doing, the database restores that lead to finding the 169 tapes.
Same thing, same thing.
Q. You're flipping pages and saying same thing.
A. Meaning that each subject seems to relate to the same thing I just spoke to you about. Do you want me to relate each one?
Q. If all these documents do is say, yep, they have words that relate to a subject we're talking about --
A. Then we can skip them. Should I just say no, no additional?
Q. I just want to know if they add something to your knowledge of the 169 issue or some other issue that you've testified to or if they simply contain --
A. No, it doesn't add anything. From what I can see, there's nothing in this one that adds to what

0083
we've already discussed.
Q. All right. Does it help refine anything? Does it help you pin down any dates in any way?
A. No.
Q. Does it change any of the substantive testimony you've given about the 169 tapes?
A. Not that I can see.
Q. Okay. Let's move to the next document. This is 112602 to 112632.
A. 605 -- 605 seems to relate to communications with NDCI regarding read errors, tapes that were identified with read errors that had to be redone.
Q. And what's the significance of that?
A. The significance, as in my mind, would be giving an idea of the processing time for the project.
Q. Is there anything from that document that allowed you to tell how much processing time was consumed as a result of read errors?
A. Not -- no. You couldn't quantify it. Just that it would give you an idea of the -- an explanation of it.
Q. So it would let you know that that was a potential issue, but you couldn't quantity the issue?
A. Correct.
Q. Is there anything in the document that allows

0084
you to quantify it?
A. No.
Q. Is there anything else of significance in that document?
MR. KLAPPER: And I just encourage you to take a close look at it, make sure that you're comfortable knowing what the document says to be responsive.
THE WITNESS: I don't see anything additional that would add to.
BY MR. BYMAN:
Q. All right. Thank you. Next we have 112593 through 601. And actually I think we've marked that very document as an Exhibit 426. What significance do you attach to that document?
A. The first page, which is 593 --
Q. Um-hum.
A. -- this was a question that came up in discussions with Wray Stewart and Bruce Buchanan the week I was sick, which was about two weeks ago, two and a half weeks ago where they were processing these IIM tapes, and they were normally -- these are exchanged backups, backups of exchanged servers, mail servers. And normally we do them as a database, but for some reason there was a period of time where they

0085
weren't done as a database. They were done as a mailbox level, which he's referring to as brick level. And the reason why it came to Bruce's attention was because as he was processing the tapes, these IIM tapes, he was finding a low return of e-mails on those tapes.
So they did some investigative work to see, because they knew there was data on the tapes to see what was going on, and they found that there was a period of time that they had switched. And I'm not

sure if it was earlier part or later part, they had switched the type of backup they were doing for these e-mail servers. So -- and that's basically it. Just a discussion of what he had to do and that he was going to make sure that he was checking the tapes for both.

Q. Is this an example of something that might have slowed down NDCI's work?

A. Could you be more specific in relation to the overall project or specific parts of the project?

Q. Well, suppose somebody had said to NDCI, and I'm not suggesting they did, but suppose somebody said to them, we need to produce all e-mail relevant to the Morgan Stanley CPH lawsuit, and that means we need to make sure --

0086

A. I don't think it's relevant. That's my personal perspective on it. I don't believe that these -- this piece of the project had anything to do with it.

Q. Either for or against it?

A. I believe so.

Q. Okay. In part because the IIM tapes had nothing to do with the investment banking side of the business, right?

A. I think so.

Q. Is there anything else of significance in Exhibit 426?

A. This is just confirming what we were doing -- not really. We had processed a couple of boxes. We had retained boxes, two boxes of duplicate tapes from NDCI prior to the e-mail archive project. So we were doing another project prior to that. They supplied us with duplicate tapes which we used instead of -- at that point we were using DLT's instead of SDLT's, and so we still had those tapes. Those were the two boxes we sent to them to just have them review them to make sure what was on the tape, on those tapes. Even though we thought we knew what they were, we wanted to make certain.

Q. So that was just a double-check of something

0087

that was duplicative?

A. Yes.

Q. Anything else of significance?

A. No. A couple of these e-mails look like they were duplicated in one of the others. It was just discussing the list that I sent them of the 169 tapes and getting back a list from him of the creation dates of those tapes. Other than that, no.

Q. The next?

A. I think there was another one under here. Oh, maybe it's a copy.

Q. It's a copy of the same thing?

A. Do you want these back as well?

Q. Yes, please. We'll keep them together. The next group of documents is production number 0112286 through 112493. I'll represent to you, sir, that the thing that I earlier showed you as CPH 425 is a few pages taken within that range that I culled out from this group of documents as the minutes that were produced of the e-mail archive group. But other than those, I'd like you to tell me if there's anything of

significance in this package when your attorney has had a chance to look at it. DLT's.

MR. KLAPPER: While the question is pending, this is an instruction and somewhat of an objection. It relates to what you mean by significance, so I'll object to vagueness as a general matter. If you understand what that means, you can answer the question.

THE WITNESS: I can't add any more as far as this is, no, nothing notable in addition.

BY MR. BYMAN:

Q. With respect to the minutes of the e-mail archive group, which we separately culled out of that last document and marked as Exhibit 425, there are, and I may not have counted them accurately, but I think minutes of nine meetings in that set. They don't seem to be on any regular basis, and they seem to skip gaps. For example, they go from May 20th to June 18th, and then there's one on June 25th. How regularly were these meetings held?

A. Typically they were scheduled for once a week.

Q. Was there any week that stands out in your mind as a week in which the meeting was cancelled?

A. Not that I recall. However, I didn't attend every meeting.

Q. I understand. But you were copied on the distribution list for every meeting, right?

A. I believe so.

Q. Do you recall when the meetings began?

A. The closest approximation would be in June, July time frame of 2003.

Q. And do the meetings still continue to this day?

A. No.

Q. When did they stop?

A. I don't recall.

Q. Was it sometime in 2004?

A. That would be a guess, but, I think that's accurate.

Q. Well, was there a meeting this year?

A. No.

Q. And we know that there were meetings in 2004 so it had to be sometime in 2004 if not this year, right?

A. I agree.

Q. Was it sometime after September of 2004, which is the last one we have in this group Exhibit?

A. It sounds possible, but I'm not sure. I'm not absolutely sure.

Q. Do you know if there's anyone charged with actually maintaining the full set of minutes?

A. The full set of minutes meaning every meeting minutes, I don't think so, but I don't know.

(Telephonic interruption)

MR. KLAPPER: Could you -- I'm sorry. I was distracted by the cell phone

(The record was read as requested.)

BY MR. BYMAN:
Q. The last, and I'm very happy to use the word the last set of documents in this stack is production number 0112494 through 112592. After your attorney has had a chance to look at it please tell me what the significance of that document is.
A. I mean, the only significance of 494 is that we're paying our bills. Well, actually the bottom of the page on that 494 just relates to the communication with NDCI/Bruce Buchanan who works for NDCI that a list was sent to him, and it relates to the 169 tapes. And I think we've covered that already, so that's not really significant.
Q. Does this add anything --
A. Let me go through the rest.
Q. I'm sorry.
A. Just let me go through the rest.
Q. While we're on the subject of the 169, does anything you have looked at add to delete or modify

0091

your previous testimony?
A. No.
MR. KLAPPER: Let him get the question out and let me get an objection in. The objection is vague and ambiguous.
BY MR. BYMAN:
Q. And your answer is no?
A. No.
Q. No, there's nothing else of significance?
A. Correct.
Q. Mr. Seickel, do you have any understanding as to why Mr. Riel is no longer associated with the e-mail archive project?
A. No.
Q. Do you have any understanding of whether he left amicably or was dismissed?
A. Explain further what you mean by that.
Q. Well, let me represent to you, sir, that Ms. Gorman testified that he was placed on administrative leave by Morgan Stanley and that he was removed from his position in charge of this project both because of questions of integrity and competence. You don't have to accept her testimony. I'm just representing to you that that's what she said.
A. I do know that the ownership of the e-mail

0092

archive was transferred to Allison Gorman. That's what I know for a fact.
Q. And you don't know of any other reasons for it?
A. No.
Q. Have you had any contact with Mr. Riel since August of 2004?
A. I'm not sure -- I know I have not had contact with him for at least six or seven months, since before September of '04. I'm not sure if that was August or much earlier.
Q. What was your last contact with him?
A. Any contact that I would have had with him would have been in the e-mail archive meeting, and it would be the last one we both attended.
Q. So it would have been a business contact?
A. Correct.

Q. Do you have any idea where Mr. Riel is today?
A. No.
Q. Do you have any understanding as to whether he's still a Morgan Stanley employee?
A. No, I don't.
Q. Mr. Seickel, what steps, if any, are you aware of that Morgan Stanley has made to make sure that there are no more as yet undiscovered backup

tapes that contain e-mail?
A. It's my understanding working with John Pamula that he's performed an exhaustive search of everything on site at Morgan Stanley, on Morgan Stanley premises, and he's requested everything from Recall, and Recall has complied with our request. That's the extent.
Q. And when did Mr. Pamula undertake that job?
A. As part of the e-mail archive process he started it, but we, again, reiterated it with Recall recently in regard to the 169 tapes.
Q. And that was done in mid January?
A. In January, correct.
Q. I'm sorry. Mid January?
A. Correct.
MR. BYMAN: Thank you, Mr. Seickel. That's all I have.
THE WITNESS: No problem.
(The Witness was excused.)
(At 4:13 p.m. the proceedings were concluded.)

C E R T I F I C A T E

THE STATE OF FLORIDA,)
)
COUNTY OF PALM BEACH.)

I, BARBARA GALLO, RMR-CRR, Registered Merit Reporter-Certified Realtime Reporter and Notary Public, State of Florida at Large,
DO HEREBY CERTIFY that I was authorized to and did stenographically report the foregoing deposition; and that the transcript is a true and correct transcription of the testimony given by the witness.
I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.
Dated this____day of_____, 2005.

_____
BARBARA GALLO, RMR-CRR
Notary Public-State of Florida
My Commission Expires September 17, 2007

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

CASE NO: CA 03-5045 AI

MORGAN STANLEY'S MOTION IN LIMINE NO. 21 TO PERMIT CROSS-EXAMINATION OF ARTHUR ANDERSEN LLP WITNESSES REGARDING SUNBEAM'S FINANCIAL CONDITION

Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully requests that the Court permit it to examine or cross-examine any former Arthur Andersen LLP ("Andersen") partners, or employees called to testify by Coleman (Parent) Holdings Inc. ("CPH") on (1) Sunbeam Corporation's ("Sunbeam") financial condition during the time that Morgan Stanley advised Sunbeam on its acquisition of The Coleman Company, Inc. ("Coleman"); (2) Andersen's 1996 and 1997 audits of Sunbeam; and (3) the restatement of Sunbeam's 1996 and 1997 financial results submitted by Andersen to Sunbeam's board of directors in October 1998.

STATEMENT OF FACTS

1. CPH apparently intends to call Andersen witnesses to testify that, on March 19, 1998, they "warned" Morgan Stanley employees that Sunbeam's March 19, 1998 press release was inaccurate, considering Sunbeam's first-quarter sales figures. (*See* Dec. 23, 2004 CPH Resp. in Opp. to Morgan Stanley's Mot. for Summ. J. at 27-29 ("CPH Summ. J. Opp.") (describing an Andersen audit manager's claims that he objected to the inclusion of the March 19, 1998 press release in the debenture offering memorandum).)

2. The witnesses CPH has identified as having knowledge of these March 19, 1998 "warnings" (Lawrence Bornstein, Mark Brockelman, and Phillip Harlow, *see id.* at 27-28) also participated in the preparation and approval of the March 19, 1998 "comfort" letter given to Morgan Stanley. In that comfort letter, Andersen assured Morgan Stanley that the "consolidated financial statements audited by us and included in the Offering Memorandum [*e.g.*, Sunbeam's 1996 and 1997 year-end financial statements] comply as to form in all material respects with the applicable accounting requirements of the [federal Securities Act of 1933] and the related published rules and regulations." (*See* MS 9 (Mar. 19, 1998 comfort letter) (Ex. 1); *see also* CPH Tr. 314 (Mar. 18, 1998 e-mail from Dennis Pastrana to Harlow, Bornstein, and Brockelman transmitting draft comfort letter) (Ex. 2).)[1]

3. These witnesses likewise participated in the preparation of the March 25, 1998 comfort letter given to Morgan Stanley, in which Andersen again assured Morgan Stanley that Sunbeam's financial statements complied with the federal Securities Act of 1993 and the applicable rules and regulations. (*See* MS 10 (Mar. 25, 1998 comfort letter) (Ex. 3).)

4. In addition, and as CPH acknowledges, the Andersen witnesses that CPH has identified as having knowledge of these so-called "warnings" all played important roles in the audit of Sunbeam's 1996 and 1997 financial statements. (*See* CPH Summ. J. Opp. at 27-28.) On March 6, 1998, Sunbeam filed its Form 10-K with the SEC, setting forth Sunbeam's 1997 audited financial statements. With Andersen's consent and the knowledge of Harlow, Bornstein,

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[1] The Securities and Exchange Commission's ("SEC") rules and regulations require that financial statements filed with the Commission be prepared in accordance with generally accepted accounting principles or "GAAP," as well as with generally accepted auditing standards, or "GAAS." *See*, *e.g.*, 17 C.F.R. § 210.4-01.

and Brockelman, Sunbeam's Form 10-K contained comparative information for 1995 and 1996, as well as Andersen's unqualified opinion concerning Sunbeam's 1997 financial statements: that these statements "present fairly, in all materials respects, the financial position of Sunbeam." (MS 208 at CPH 1428856 (Sunbeam 1997 Form 10-K) (Ex. 4).)

5. However, three months after certifying Sunbeam's 1997 financial statements, Andersen withdrew its opinion on Sunbeam's 1997 financial statements, and four months after that, restated Sunbeam's 1996 and 1997 financial statements with huge "corrections" (*e.g.*, Sunbeam's 1997 earnings were revised downward by 65%). (*See* MS 726 (Ex. 5).)

ARGUMENT

6. On cross-examination, a witness may be questioned regarding "the subject matter of the direct examination and matters affecting the credibility of the witness," as well as, in the trial court's discretion, any additional matters. Fla. Evid. Code § 90.612(c)(2). The scope of questioning on cross-examination is within the discretion of the trial judge. *See Jones v. State*, 580 So. 2d 143, 145 (Fla. 1991). Under Florida law, Morgan Stanley should be permitted to question Andersen witnesses regarding all aspects of the comfort letters and Sunbeam's financial condition, including Sunbeam's audited 1996 and 1997 financial statements and its 1998 restatement of those results.

7. *First*, issues concerning Sunbeam's financial condition and its 1996 and 1997 financial statements are plainly within the scope of any direct testimony concerning Andersen's supposed "warnings" about Sunbeam's first-quarter financials. The Andersen witnesses were Sunbeam's auditors. Morgan Stanley should be permitted to explore the basis for any views that these witnesses expressed on Sunbeam's financial condition, which were based on the audit work they performed on the company's 1996 and 1997 financial statements.

8. Moreover, direct testimony by Andersen witnesses on their purported March 19, 1998 "warnings" to Morgan Stanley will "open the door" to questioning on the many ***other*** statements that Andersen contemporaneously made to Morgan Stanley regarding Sunbeam's financial condition — including Andersen's representations in the March 19, 1998 comfort letter. *See Stotler v. State*, 834 So. 2d 940, 943 (Fla. 4th DCA 2003) ("'[W]hen the direct examination opens a general subject, the cross-examination may go into any phase, and may not be restricted to mere parts . . . or to the specific facts developed by the direct examination. Cross-examination should always be allowed relative to the details of an event or transaction a portion only of which has been testified to on direct examination.'") (quoting *Zerquera v. State*, 549 So. 2d 189, 192 (Fla. 1989)). The comfort letter directly addresses Sunbeam's 1996 and 1997 audited financial statements. Given that, on the very same day that Andersen supposedly "warned" Morgan Stanley about Sunbeam's sales shortfall, Andersen also assured Morgan Stanley (in writing) that Sunbeam's 1996 and 1997 financial statements were reliable, Morgan Stanley should be permitted to cross-examine the Andersen witnesses on these aspects of the comfort letter, as well.

9. *Second*, the topics on which Morgan Stanley wishes to cross-examine Andersen witnesses called by CPH bear directly on the credibility of those witnesses. Approximately three months after Andersen certified Sunbeam's 1997 financial statements (and directly assured Morgan Stanley of their accuracy) and the Andersen witnesses supposedly "warned" Morgan Stanley about the inaccuracies of Sunbeam's press release, Andersen notified the public that Sunbeam's 1997 financial statements were not reliable after all. Then, in October 1998, Andersen submitted a report to Sunbeam's board of directors containing a restatement of Sunbeam's 1996 and 1997 financial results. That report revealed that — in violation of

numerous accounting rules — Sunbeam had misrepresented its 1996 and 1997 financial statements by many tens of millions of dollars. (*See* MS 726 (Oct. 16, 1998, Report to Board of Directors, Restatement Adjustments).)

10. The jury should be permitted to know that any Andersen auditor who now claims that, in March 1998, he "warned" Morgan Stanley about Sunbeam's financial performance was subsequently implicated in the Andersen restatement. Such matters plainly bear on the credibility, bias, or prejudice of these witnesses. "Whenever a witness takes the stand, he *ipso facto* places his credibility in issue. Cross-examination of such a witness in matters relevant to credibility ought to be given a wide scope in order to delve into a witness's story, to test a witness's perceptions and memory, and to impeach that witness." *Russ v. City of Jacksonville*, 734 So. 2d 508, 510 (Fla. 1st DCA 1999) (internal quotations omitted).

WHEREFORE Morgan Stanley respectfully requests that this Court enter an Order permitting it to it to cross-examine any former Andersen partners or employees called to testify by CPH on (1) Sunbeam's financial condition during the time that Morgan Stanley advised Sunbeam on its acquisition of Coleman; (2) Andersen's 1996 and 1997 audits of Sunbeam; and (3) Andersen's 1998 restatement of Sunbeam's 1996 and 1997 financial statements.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 11th day of February 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

MORGAN STANLEY'S RESPONSE TO CPH'S MOTION IN LIMINE (NO. 22) TO BAR IMPROPER PUNITIVE DAMAGES-RELATED EVIDENCE AND ARGUMENT

Coleman (Parent) Holdings Inc. ("CPH")'s motion in limine improperly seeks to ensure that the evidence and argument the jury will hear in deciding both the liability for and amount of punitive damages is unfairly one-sided and unbalanced. The wealth of CPH and its principal Ronald Perelman is relevant to this case because such evidence sheds light on the plaintiff's sophistication, its relative bargaining power, and its resources to conduct properly and thoroughly its due diligence in the Coleman-Sunbeam merger.[1] Given that the plaintiff is now seeking punitive damages, the plaintiff's wealth also shows that the plaintiff was successful in business and had the resources to repeat that success, which demonstrates the balance of power between the plaintiff and Morgan Stanley. Punitive damages may be awarded only when behavior is "sufficiently outrageous." *Schief v. Live Supply, Inc.*, 431 So. 2d 602, 603 (Fla. 4th

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[1] CPH previously moved in limine to exclude evidence and argument regarding the wealth of MAFCO, CPH, or Coleman employees. (*See* CPH's MIL No. 2.) Morgan Stanley's opposition to that motion explains why that evidence is relevant to issues apart from punitive damages, such as financial sophistication, how CPH came into possession of the Sunbeam Offering Memorandum, and CPH's claims against Morgan Stanley based on Sunbeam's debenture offering. (*See* Morgan Stanley Resp. to CPH's MIL No. 2.)

DCA 1983). The jury should be able to hear evidence on and argument about the balance of power in order to gauge whether Morgan Stanley's behavior met that high bar. Furthermore, as suggested by the Florida Supreme Court, the jury should be able to consider whether it is rational for innocent shareholders to bear the brunt of "society's collective outrage" for a single act by Morgan Stanley. *American Cynamid Co. v. Roy*, 498 So. 2d 859, 861 (Fla. 1986).

In support of its position, Morgan Stanley states as follows:

I. CPH'S WEALTH IS RELEVANT TO PUNITIVE DAMAGES BECAUSE IT SHOWS CPH'S SOPHISTICATION AND RESOURCES FOR ACCESSING INFORMATION.

1. The wealth of CPH and Perelman demonstrates the balance of power between CPH and Perelman, on the one hand, and Morgan Stanley, on the other hand. This was not David and Goliath; it was CPH and Perelman — aided by its advisors — and Sunbeam — aided by its advisors (one of whom was Morgan Stanley). If the punitive damages claim survives a directed verdict, the jury will be charged with deciding whether Morgan Stanley's behavior was "sufficiently outrageous so as to justify an award of punitive damages." *Schief*, 431 So. 2d at 603. The jury's decision is "in a sense explicitly based on juror emotion, in that one function of the award is to express society's collective outrage at unacceptable behavior ... [and] punish and deter." *American Cynamid*, 498 So. 2d at 861. Simply put, a harm among equals is not as "outrageous" as a harm inflicted by the powerful on the weak, and Morgan Stanley should be able to make that argument and show the jury the evidentiary basis of it with evidence of the wealth of CPH and Perelman. That is particularly true here when Perelman's advisors told him not to take stock, told him that Sunbeam's business plan was quite a stretch and probably not achievable, and did not even look at Sunbeam's financial statements for January and February 1998, which would have disclosed the same information Morgan Stanley received from Andersen.

2. In deciding whether Morgan Stanley's behavior was "sufficiently outrageous" to merit "express[ing] society's collective outrage," Morgan Stanley should be able to argue to the jury that CPH and Perelman had the money — and the access to information and advice that comes with it — to avoid the harm they allegedly suffered. Here, the evidence is undisputed that CSFB was paid $4 million for its advice and "due diligence."

3. CPH's ability to access information, which could have averted its alleged harm, is relevant to liability for punitive damages. By analogy, the Florida Supreme Court overturned a jury award of punitive damages against a chemical manufacturer for environmental contamination when the plaintiff had access to warnings on bags (but failed to read or follow them) and users of the chemical received detailed manuals and other materials regarding safe use. *See id.* at 860-62. The Supreme Court found that "[t]he facts simply do not reflect the kind of flagrant misconduct that would justify a finding of willful and wanton disregard for the safety of persons such as [the plaintiff]." *Id.* at 863 (internal quotations & citation omitted).

4. Here, the vast wealth of CPH and Perelman allowed the plaintiff access to a dream team of accountants, attorneys, investment bankers, and other advisors to analyze information in the Coleman-Sunbeam merger. The jury should hear that in deciding whether Morgan Stanley's behavior was "sufficiently outrageous" to merit punitive damages.

II. NO FLORIDA AUTHORITY RESTRICTS MORGAN STANLEY FROM EXPLAINING TO THE JURY THAT ITS SHAREHOLDERS WOULD BE HURT BY A PUNITIVE DAMAGES AWARD.

5. The only Florida case CPH cites on the issue of argument to the jury about punitive damages and shareholders is *Johns-Mansville Sales Corp. v. Janssens*, 463 So. 2d 242, 252 (Fla. 1st DCA 1984). That case, however, supports Morgan Stanley. The defendant in that case argued that, as a matter of law, punitive damages should not be awarded because those who would pay for the damages, among others, included today's shareholders. *Id.* The court

concluded, however, that Johns-Manville's "contentions ... ***are more properly argued to the jury as factual matters to be considered in avoidance or mitigation of punitive damages***. It is for the jury, not the court, to accept or reject these arguments in the exercise of its discretion to allow or deny an award of punitive damages." *Id.* (emphasis added). Here, all Morgan Stanley wants is to argue its case to the jury. This Court should conclude that such argument is proper, just like the *Janssens* court did.

6. On the other hand, CPH cites no authoritative or persuasive case law that would prevent Morgan Stanley from explaining that punitive damages would hurt its shareholders. The three other cases CPH cites are not authoritative because none are Florida cases or even based on Florida law. *See Fischer v. Johns-Manville Corp.*, 512 A.2d 466 (N.J. 1986) (New Jersey law); *Moran v. Johns-Manville Sales Corp.*, 691 F.2d 811 (6th Cir. 1982) (Ohio law); *Doralee Estates, Inc. v. Cities Service Oil Co.*, 569 F.2d 716 (2d Cir. 1977) (New York law). And those cases are not persuasive because each involved long-term corporate misdeeds — decades of hiding knowledge of the links between asbestos and asbestosis in the two *Johns-Manville* cases and years of environmental pollution and violation of a court order in the *Doralee Estates* case.

7. Here, by contrast, CPH accuses Morgan Stanley of a misdeeds arising from a single transaction, not a long pattern of malfeasance. Imposing punitive damages against Morgan Stanley based allegedly on a "single management sin" would punish "innocent stockholders," as Judge Friendly warned against in *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 841 (2d Cir. 1967).

8. Furthermore, shareholder harm is relevant here because of the unique function of punitive damages to "express society's collective outrage at unacceptable behavior ... [and] punish and deter." *American Cynamid*, 498 So. 2d at 861. The jury should be aware of

collateral damage that an expression of outrage may cause to innocent shareholders; those shareholders are, after all, part of the society on whose behalf the jury acts. The jury should be able to consider whether it makes sense to punish Morgan Stanley shareholders for the "single management sin" the plaintiff alleges here.

WHEREFORE, Morgan Stanley respectfully requests that this Court deny CPH's Motion in Limine No. 22 to bar improper punitive damages-related evidence and argument.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 11th day of February 2005.

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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
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COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

MORGAN STANLEY'S RESPONSE TO
CPH'S MOTION TO BIFURCATE TRIAL

Coleman (Parent) Holdings Inc.'s ("CPH") Motion to Bifurcate Trial should be denied because a plaintiff does not have the right (is not entitled) to bifurcation of punitive damages issues under Florida law. CPH's reliance on *W.R. Grace & Co. v. Waters*, 638 So. 2d 502 (Fla. 1994), to support its motion is wholly unfounded and clearly wrong: there is nothing in the *W.R. Grace* opinion that supports CPH's motion or any right of the plaintiff to bifurcation. On the contrary, the bifurcation procedures announced in *W.R. Grace* were clearly intended to prevent prejudice to the defendant and protect the defendant's due process rights. Here the defendant, Morgan Stanley, has determined that it does not want to be subjected to the added burden and expense of a bifurcated process (or subject the court and jury to the added time and expense), and because none of the factors present in *W.R. Grace* are present here, Morgan Stanley has determined that it will not be prejudiced by a non-bifurcated process. Furthermore, CPH has not even attempted to show that it would be prejudiced in any way if this case proceeds to trial without bifurcation.

W.R. Grace & Co. v. Waters

The bifurcation procedure announced in *W.R. Grace*, was predicated on concerns for the constitutional due process rights of the ***defendant*** and potential prejudice to the ***defendant***, if evidence of prior punitive damage awards against that defendant were admitted into evidence at the trial on liability. The problem presented was that the only way a defendant could defend against and mitigate the effect of previous punitive damage awards would be to advise the jury of those previous awards, during the trial on liability. The defendant asserted that "[t]he introduction of such evidence would be extremely ***prejudicial*** to a defendant trying to convince a jury that its conduct is worthy of no punishment at all." *W.R. Grace* 638 So. 2d at 506.

The central issue in *W.R. Grace* was the fairness of the proceedings to the defendant and the propriety of imposing successive punitive damage awards against a single defendant for the same course of conduct in mass tort asbestos litigation. *Id.* at 503. The defendant asked the Florida Supreme Court to limit successive awards in such cases to prevent "overkill" and depletion of assets that might otherwise be available for compensatory awards. *Id.* at 504. The defendant also attacked punitive damages on constitutional grounds, arguing that such awards "which exceed an amount which is reasonably necessary to punish and deter, violate the concept of 'fundamental fairness' inherent in due process." *Id.* at 505.

The Florida Supreme Court agreed with the defendant's position and recognized that defendants "who are ***forced*** to litigate the issue of liability and punitive damages in the same proceeding are at a ***severe disadvantage***." *Id.* at 506 (emphasis added). The Court also recognized that even defendants with no prior punitive damage awards are "prejudiced by the current procedure" which allows evidence of financial net worth before liability is determined. *Id.*

Accordingly, the Supreme Court announced a change in procedure, providing for the bifurcation of punitive damage issues, when the court is "presented with a timely motion." *Id.* The clear purpose was to avoid the problem of previous punitive damage awards being introduced into evidence in the liability phase of the trial. The court also stated that the new procedure was meant only to "supplement, not replace, the limitations on punitive damages ... in sections 768.71- 768.24, Florida Statutes (1993)."

Nothing in the *W.R. Grace* opinion indicates any concern regarding the rights of plaintiffs in punitive damage cases, or that plaintiffs were entitled to the "relief" of bifurcated proceedings. The new procedures granted rights to defendants, who presumably could waive those rights and protections for their own reasons. Bifurcated proceedings were not meant to be a new weapon for plaintiffs to gain some supposed advantage over defendants.

Morgan Stanley's analysis of the *W.R. Grace* opinion is further supported by the language and intent of the statute on punitive damages. The court in *W.R. Grace* recognized that Fla. Stat. § 768.71-74 provided "limitations on punitive damages." *Id.* at 506. The remedial and limiting nature of the punitive damage statute was further recognized and strengthened in *Globe Newspaper Co. v. King*, 658 So. 2d 518 (Fla. 1995). There, the court held that under the statute a defendant had a substantive right not to be subject to a claim for punitive damages, unless there was full compliance with the requirements of the statute. *Accord Holmes v. Bridgestone/Firestone Inc.*, Case Nos. 4D03-3554 & 4D03-3593, 2005 WL 235843 (Fla. 4th DCA Feb. 2, 2005). The express language of the statute imposes strict limitations on the right to pursue and obtain punitive damages and demonstrates legislative intent to protect the substantive and due process rights of defendants.

Turner v. Fitzsimmons And Other Authorities

CPH's reliance on certain *obiter dictum* in *Turner v. Fitzsimmons*, 673 So. 2d 532 (Fla. 1st DCA 1990), is unfounded and does not overcome the plain meaning of the *W.R. Grace* opinion. In *Turner* the plaintiff sued for fraud and negligent misrepresentation in regard to a real estate transaction. ***During trial*** and just before the jury was to retire for deliberations, the plaintiff moved to amend the pleadings to conform to the evidence and add a claim for punitive damages. The opposing party objected on the basis that there was no pleading requesting or setting forth a claim for punitive damages; that the motion to amend during trial was ***untimely***; and there was insufficient notice that the issue of punitive damages would be injected into the case. The trial court refused to submit punitive damages to the jury and the plaintiff appealed.

The court in *Turner* affirmed on the basis that plaintiff's requested jury instructions and verdict form submitted the case to the jury only on the issue of negligent misrepresentation (not the intentional tort of fraud). Thus, there was no automatic entitlement to punitive damages. In addition the court held that plaintiff's motion to amend was ***untimely***; did not comply with the requirements of Fla. Stat. § 768.72 (1993); and, the late attempt to interject punitive damages into the case was prejudicial to the defense. *Turner,* 673 So. 2d at 536. As an aside, and apparently referring again to the timeliness issue, the court in *Turner* made note of the *W.R. Grace* decision, "which ***permits*** a trial court *upon timely motion*, to bifurcate...." *Id.* (first emphasis added, second in original). The court further noted that bifurcation "may have been appropriate in the instant case," but the plaintiff "did not request it." *Id.* at 536.

With all do respect, Morgan Stanley asserts that the issue of bifurcation and who may be ***entitled*** to the procedure was not presented in *Turner*, nor was there any serious analysis of the *W.R. Grace* decision or the reasoning behind the announced new bifurcation procedures: that is, to prevent prejudice to the defendant and to protect the defendant's due process rights. The fact

that *Turner* erroneously interpreted *W.R. Grace* as merely '***permitting***' bifurcation indicates no serious analysis of *W.R. Grace*, or the bifurcation issue, or the ***defendant's right*** to bifurcation. The First District did not hold that a plaintiff had a right to bifurcation and its *orbiter dictum* is not binding on this Court. *See Town of Lantana v. Pelczynski,* 290 So. 2d 566, 568 (Fla. 4th DCA), *aff'd*, 303 So. 2d 326 (Fla. 1974). Furthermore, because of its lack of reasoning and analysis, its dictum is not persuasive.

Finally, CPH's reliance on a Texas court decision and a meager survey of other jurisdictions is both irrelevant and unpersuasive in regard to understanding and applying the rule announced in *W.R. Grace.* The fact that eight out of fifty states make bifurcation mandatory is hardly overwhelming or persuasive. It merely reflects a policy decision made in those states that has not been made in this state. The fact that three additional states (out of fifty) permit either plaintiff or defendant to request bifurcation, reveals nothing about the current status of Florida law, nor does it reveal anything about what criteria a court might apply to determine whether to grant bifurcation in a particular case in those jurisdictions.

CONCLUSION

The plaintiff, CPH, does not have the right to demand bifurcation of the punitive damages issues in this case. The right to bifurcate was created to protect defendants from prejudice and that right belongs solely to the defendant. Morgan Stanley has not requested bifurcation, and CPH's motion should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand-delivery on this 11th day of February 2005.

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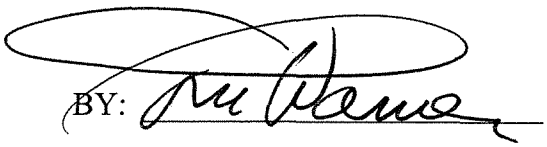
BY: 

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COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

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

CASE NO: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.'S RESPONSE TO MORGAN STANLEY'S MOTION IN LIMINE NO. 21 TO PERMIT CROSS-EXAMINATION OF ARTHUR ANDERSEN LLP WITNESSES REGARDING SUNBEAM'S FINANCIAL CONDITION

Before any Andersen witness has been called to testify, and without knowing the precise scope of any such witness' direct examination, Morgan Stanley is asking for this Court for a broad license to cross-examine any Andersen witness called during CPH's case-in-chief about a wide array of matters relating to: (1) Sunbeam's financial condition while Morgan Stanley was advising Sunbeam; (2) Andersen's 1996 and 1997 audits of Sunbeam; and (3) Andersen's restatement of Sunbeam's 1996 and 1997 financial results. Morgan Stanley's request, which amounts to an attempt by Morgan Stanley to try its case in CPH's case, is both premature and without merit.

First, contrary to Morgan Stanley's contention (at ¶ 7), it is impossible at this point to rule that the broad areas of cross-examination that Morgan Stanley wishes to explore would be within the scope of CPH direct examination because no one has testified yet. If Mr. Bornstein were to testify and confine his testimony to the incident at the printer, for example, clearly, the broad areas of inquiry identified by Morgan Stanley would be beyond the scope of the direct examination. This is a matter on which this Court cannot rule in a vacuum without having heard the direct testimony involved.

Second, contrary to Morgan Stanley's assertion that the subjects it has identified for cross-examination "bear directly on the credibility of [Andersen] witnesses" (at ¶ 9), Morgan Stanley has not begun to tie any of the potential Andersen witnesses to any purported wrongdoing. And even if the potential witnesses were involved in the wrongdoing in some way, Morgan Stanley has not shown that such evidence would be proper cross-examination.

Third, Morgan Stanley's motion should be rejected for one more reason: Morgan Stanley has subpoenaed the Andersen witnesses and can present them in its own case. So if Morgan Stanley truly wishes to explore in detail Sunbeam's finances and Andersen's role in various audits, and to attempt to challenge the creditability of the Andersen witnesses by delving into issues that are unrelated to the scope of CPH's direct examinations, Morgan Stanley is free to do so in its case. Morgan Stanley, however, should not be allowed to obstruct and confuse the presentation of CPH's proofs by questioning witnesses about matters that fall well outside CPH direct examination.

WHEREFORE, for the foregoing reasons, CPH requests that this Court deny Morgan Stanley's motion in limine No. 21 concerning the cross-examination of Arthur Andersen LLP witnesses.

Dated: February 14, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and hand delivery to all counsel on the attached list on this 14th day of Feb., 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

DEFENDANT'S NOTICE TO PRODUCE AT TRIAL

Morgan Stanley, by and through the undersigned counsel, requests, pursuant to Rule 1.350 of the Florida Rules of Civil Procedure, that Plaintiff, Coleman (Parent) Holdings Inc. ("CPH") produce and permit Defendant to inspect and copy each of the documents described below. It is requested that the aforesaid production be made at the commencement of trial in this matter. Inspection will be made by visual observation, examination, and/or copying.

DEFINITIONS

Morgan Stanley incorporates by reference the Definitions and Instructions set forth in Defendant's First Request for Production of Documents served in this action. In addition, Morgan Stanley defines the following terms as follows:

1. "Coleman" means The Coleman Company, Inc. and any of its officers, directors, former or present employees, representatives, or agents.

2. "CPH" means Coleman (Parent) Holdings Inc. and any of its officers, directors, former or present employees, representatives, or agents.

3. "MAFCO" means MacAndrews & Forbes Holdings, Inc. and any of its officers, directors, former or present employees, representatives, agents, or affiliated holding and operating companies, including without limitation Mafco Holdings, Inc., Mafco Consolidated

Group, CPH, CLN Holdings Inc., New Coleman Holdings, Coleman Worldwide Corporation, and Coleman.

DOCUMENTS REQUESTED

1. All documents involving, relating to, or referring to the value of the Sunbeam shares received by CPH as part of the Coleman Transaction, including without limitation all non-public financial statements, general ledger entries or other "accounting value" or "book value" documents relating to the value of the Sunbeam shares.

2. All documents produced by MAFCO, Credit Suisse First Boston or Ernst & Young in *Prescott Group Small Cap, L.P. et al. v. The Coleman Company, Inc.*, C.A. No. 17802 NC (Del. Chan. Ct.).

3. All discovery requests and responses in *Prescott Group Small Cap, L.P. et al. v. The Coleman Company, Inc.*, C.A. No. 17802 NC (Del. Chan. Ct.).

4. All deposition transcripts and exhibits produced in *Prescott Group Small Cap, L.P. et al. v. The Coleman Company, Inc.*, C.A. No. 17802 NC (Del. Chan. Ct.), including without limitation the trial transcripts and exhibits of Mr. Levin, Mr. Jenkins, Dr. Kursh, and Mr. Garvey.

5. All expert reports and supporting materials filed by Dr. Kursh and Mr. Garvey in *Prescott Group Small Cap, L.P. et al. v. The Coleman Company, Inc.*, C.A. No. 17802 NC (Del. Chan. Ct.).

6. All trial transcripts and exhibits from *Prescott Group Small Cap, L.P. et al. v. The Coleman Company, Inc.*, C.A. No. 17802 NC (Del. Chan. Ct.), including without limitation the trial transcripts and exhibits of Mr. Levin, Mr. Jenkins, Dr. Kursh, and Mr. Garvey.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 17th day of February 2005.

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COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

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

CASE NO: 2003 CA 005045 AI

NOTICE OF VOLUNTARY DISMISSAL

COMES NOW the Plaintiff Coleman (Parent) Holdings Inc., by and through its undersigned attorneys, and hereby files this Notice of Voluntary Dismissal of its fraudulent misrepresentation claim (Count I) and its negligent misrepresentation claim (Count IV) against the Defendant, Morgan Stanley & Company, Inc. All other claims remain in full force and effect.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Hand Delivery to all Counsel on the attached list, this 15th day of February, 2005.

COLEMAN (PARENT) HOLDINGS INC.

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

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

MORGAN STANLEY'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its attorneys, respectfully requests that the Court enter an order, pursuant to Fla. R. Civ. P. 1.350(b), compelling Coleman (Parent) Holdings Inc. ("CPH") to produce MAFCO's non-financial statements and general ledger entries reflecting the "accounting value" or "book value" that MAFCO placed on its Sunbeam investment. Morgan Stanley has only recently learned of the existence of such documents, which are highly relevant to CPH's estimate of its damages in this case and have been subject to an outstanding discovery request for over a year and a half. CPH, has steadfastly refused to produce the documents. Accordingly, Morgan Stanley respectfully requests that the Court enter an order compelling production.

In support of its motion, Morgan Stanley states as follows:

STATEMENT OF FACTS

1. On July 14, 2003, a little over two months after the Complaint was first filed, Morgan Stanley served its first set of discovery requests upon CPH. (*See* July 14, 2003 Morgan Stanley's 1st Req. for Prod. of Docs. to Plf. (Ex. 1).) Amongst these initial requests, Morgan Stanley specifically requested "[a]ll documents reflecting, referring, or relating to the value of Sunbeam securities." (*Id.* at Req. 9)

2. Initially, CPH attempted to "interpret" this request so as to narrowly focus on "the market valuation of Sunbeam securities." (*See* Aug. 15, 2003 CPH's Resp. to Morgan Stanley's 1st Req. for Prod. of Docs. (Ex. 2).) Morgan Stanley objected, noting that this limitation would of course "exclude ... other valuations of Sunbeam's securities, ***such as CPH's internal valuations***." (*See* Aug. 27, 2003 Letter from K. DeBord to M. Brody at 2 (Ex. 3) (emphasis added).) Morgan Stanley asked CPH to reconsider the objection and inquired as to whether CPH had withheld any documents based on it. (*Id.*) In response, CPH represented that it was investigating its production regarding this request, and over a month later, agreed to produce documents responsive to the request without regard to the previous objection. (*See* Sept. 12, 2003 M. Brody Letter to K. DeBord (Ex. 4); Oct. 8, 2003 M. Brody Letter to K. DeBord (Ex. 5).)

3. Subsequently, over a year later, Morgan Stanley learned that MAFCO maintained non-public financial statements with general ledger entries for Sunbeam investments that reflected MAFCO's estimation of the "accounting value" or "book value" of those investments, which had been audited by Coleman's auditors at Ernst & Young. For example, at the deposition of Lawrence Winoker, Morgan Stanley learned that CPH had recorded a $41.7 million accounting value on its non-public financial statements for the Sunbeam settlement warrants as part of a December 1998 audit even though a MAFCO executive had previously testified under oath that such shares were worthless. (Nov. 18, 2004 Winoker Dep. at 51 (Ex. 6).) Mr. Gittis confirmed this fact and explained that the financial recognition of Sunbeam investments would "always go[] up to the parent" and be reflected in MAFCO's non-public financial statements. (Nov. 19, 2004 Gittis Dep. at 188-90 (Ex. 7).)

4. Soon thereafter, Morgan Stanley's counsel requested that CPH immediately remedy its failure to produce these documents in response to its longstanding requests. (*See*

Nov. 22, 2004 K. DeBord Letter to M. Brody (Ex. 8).) CPH provided a general ledger entry specifying the value that MAFCO had recognized for the Sunbeam settlement warrants, but refused to produce the non-public financial statements and failed to provide any general ledger entries for the Sunbeam shares it had originally received. (*See* Nov. 24, 2004 CPH's Resps. & Objs. to Morgan Stanley's 8th Req. for Prod. of Docs. (Ex. 9).)

5. After it became apparent that CPH's experts would offer opinion testimony as to the value of the Sunbeam shares and that CPH also likely had general ledger entries for those shares (as it did with the warrants), Morgan Stanley requested that CPH remedy its ongoing discovery failure and produce the requested documents immediately. (*See* Feb. 3, 2005 L. Bemis Letter to M. Brody (Ex. 10).) Without challenging the existence or obvious relevance of such documents, CPH refused to produce any additional responsive documents. (*See* Feb. 11, 2005 M. Brody Letter to L. Bemis.

ARGUMENT

6. MAFCO's non-financial statements and general ledger entries reflecting the "accounting value" or "book value" that MAFCO placed on its Sunbeam investment during the relevant time period are properly discoverable and highly relevant to CPH's claim for billions of dollars of damages as a result of the Sunbeam fraud. Indeed, the value of the 14.1 million Sunbeam shares that CPH received as part of Sunbeam's acquisition of Coleman is one of the most significant damages issues in this case. "In cases involving a fraudulent sale of stock," under either an out-of-pocket or "benefit-of-the-bargain" measure of damages, CPH "must prove the actual value" of the Sunbeam shares it received. *Totale, Inc. v. Smith*, 877 So. 2d 813, 815 (Fla. 4th DCA 2004) (internal quotations & citation omitted). Moreover, if the "benefit-of-the-bargain" measure of damages applies, CPH must establish the expected value of the Sunbeam

shares at the time of the acquisition. Accordingly, the value that MAFCO placed on its Sunbeam shares at the time of the transaction, after the Sunbeam fraud was revealed, and up to and through the bankruptcy is directly relevant to damages issues in this case.

7. Moreover, the expeditious production of the requested documents would impose little to no burden upon CPH. From the general ledger entries for the Sunbeam settlement warrants previously produced, it appears that CPH was able to simply run a report with specified parameters in its financial database to generate a printout of the requested information. The report was run at 4:00 p.m. on November 23, 2004, and CPH was able to produce it to Morgan Stanley less than 24 hours later. There is no reason that CPH could not simply generate another report for the value of the Sunbeam shares it received and produce the results within a similar amount of time.

CONCLUSION

Morgan Stanley respectfully requests that the Court enter an order, pursuant to Fla. R. Civ. P. 1.350(b), compelling Coleman (Parent) Holdings Inc. to produce MAFCO's non-financial statements and general ledger entries reflecting the "accounting value" or "book value" that MAFCO placed on its Sunbeam investment during the relevant time period. Moreover, as a result of CPH's failure to produce these documents for over a year and a half, Morgan Stanley should be awarded its attorney fees and costs, pursuant to Rules 1.350(b); 1.380(a)(1), (4), incurred in presenting this motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 15th day of February 2005.

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Exhibit 1

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

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

MORGAN STANLEY & CO. INCORPORATED'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF

Pursuant to Rules 1.280 and 1.350 of the Florida Rules of Civil Procedure, Morgan Stanley & Co. Incorporated ("MS & Co.") requests that plaintiff produce the documents and things referred to in the following specific requests. The specific requests are preceded by Instructions and Definitions which shall govern the specific requests. Documents and things responsive to these requests should be produced to counsel for Morgan Stanley & Co. Incorporated at the law firm of Carlton Fields, P.A., 222 Lakeview Avenue, Suite 1200, West Palm Beach, FL 33401, within the time required by Florida Rule of Civil Procedure 1.350(b) or as otherwise agreed to by the parties or specified by the Court.

INSTRUCTIONS

1. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

26. "Synergies" means post-acquisition gains through increased revenue and/or decreased cost.

27. The terms "you" or "your" means "CPH" as defined in Definition 7.

DOCUMENTS TO BE PRODUCED

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

2. All documents referring or relating to the Coleman Transaction.

3. All documents reflecting, referring, or relating to communications between CPH and MS & Co. regarding the Coleman Transaction.

4. All documents reflecting, referring, or relating to communications between CPH and its Advisors regarding the Coleman Transaction.

5. All documents referring or relating to the December 1997 Meeting.

6. All documents supporting your allegation that MS & Co. knew about accounting irregularities at Sunbeam.

7. All documents supporting your allegation that MS & Co. developed a "strategy" to "conceal" Sunbeam's accounting fraud.

8. All documents referring or relating to Arthur Andersen's 1996 and 1997 audit of Sunbeam, including without limitation any review, investigation, analysis, and due diligence of the audit conducted by CPH personnel or its Advisors.

9. All documents reflecting, referring, or relating to the value of Sunbeam securities.

10. All documents referring or relating to the January-February 1998 discussions between representatives of CPH and MS & Co. referred to in your complaint.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and e-mail to all counsel of record on the attached service list on this 14th day of July, 2003.

Thomas D. Yannucci, P.C.
Thomas A. Clare
Larissa Paule-Carres
Brett H. McGurk
Kathryn DeBord
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Counsel for Defendant
Morgan Stanley & Co. Incorporated

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BY: Thomas A. Clare
Thomas A. Clare

SERVICE LIST

John Scarola **SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A.** 2139 Palm Beach Lakes Boulevard West Palm Beach, Florida 33409	Counsel for Plaintiff
Michael Brody **JENNER & BLOCK, LLC** One IBM Plaza Suite 4400 Chicago, Illinois 60611	Counsel for Plaintiff

Exhibit 2

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

COLEMAN (PARENT) HOLDINGS INC.,	)	
Plaintiff,	)	Case No. 2003 CA 005045 AI
v.	)	Judge Elizabeth T. Maass
MORGAN STANLEY & CO., INC.,	)	
Defendant.	)	

CPH'S RESPONSE TO MORGAN STANLEY & CO. INCORPORATED'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Plaintiff Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys and pursuant to Florida Rules of Civil Procedure 1.280 and 1.350, hereby responds and objects to Morgan Stanley & Co. Incorporated's ("Morgan Stanley") First Request for Production of Documents to Plaintiff ("Requests for Production") dated July 15, 2003:

INITIAL OBJECTIONS

1. CPH objects to the Requests for Production, including all Definitions and Instructions, to the extent that they purport to impose upon CPH any requirements that exceed or are inconsistent with the requirements of the Florida Rules of Civil Procedure or any other applicable rule or court order. For example, CPH will not comply with Instructions Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, and 16 or Definitions Nos. 9 and 15 to the extent that they purport to impose on CPH obligations that are not required by Florida rules and case law. CPH will comply with the applicable rules and law.

RESPONSE: Subject to and without waiving the foregoing Initial Objections, CPH will produce documents responsive to this request.

REQUEST NO. 7: All documents supporting your allegation that MS & Co. developed a "strategy" to "conceal" Sunbeam's accounting fraud.

RESPONSE: Subject to and without waiving the foregoing Initial Objections, CPH will produce documents responsive to this request.

REQUEST NO. 8: All documents referring or relating to Arthur Andersen's 1996 and 1997 audit of Sunbeam, including without limitation any review, investigation, analysis, and due diligence of the audit conducted by CPH personnel or its advisors.

RESPONSE: CPH objects to this request as overbroad. CPH interprets this request to seek documents relating to any review, investigation, analysis, and due diligence by CPH personnel or CPH's advisors of Arthur Andersen's 1996 and 1997 audit of Sunbeam. Subject to and without waiving this objection or the foregoing Initial Objections, and consistent with CPH's interpretation of this request, CPH will produce documents responsive to this request.

REQUEST NO. 9: All documents reflecting, referring, or relating to the value of Sunbeam securities.

RESPONSE: CPH objects to the phrase "reflecting, referring, or relating to the value" as vague and ambiguous. CPH interprets this request to seek documents referring or relating to the market valuation of Sunbeam securities. Subject to and without waiving these objections or the foregoing Initial Objections, and consistent with CPH's interpretation of this request, CPH will produce documents responsive to this request.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 14th day of August, 2003.

Dated: August 14, 2003

COLEMAN (PARENT) HOLDINGS INC.

By: Deirdre Connell
One of Its Attorneys

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Exhibit 3

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AND AFFILIATED PARTNERSHIPS

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Kathryn R. DeBord
To Call Writer Directly:
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August 27, 2003

By Facsimile

Michael Brody, Esq.
Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603

Re: ***Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.***
MSSF v. MacAndrews & Forbes Holdings Inc. et al.

Dear Mike:

I write regarding your responses and objections to MS & Co.'s and MSSF's First Request for Production of Documents, which were served on August 15, 2003.

I first address your responses and objections to MS & Co.'s Request for Production. I then address your responses and objections to MSSF's Request for Production, to the extent that those responses and objections are unique to MSSF.

Initial Objections to MS & Co.'s First Request for Production of Documents:

1. Initial Objection 1.

You stated in your Initial Objection Number 1 that you would not comply with MS & Co.'s and MSSF's instructions 3, 4, 5, 6, 7, 8, 9, 10, 11, and 16 to the extent that they exceed or are inconsistent with applicable law. You objected, for example, to MS & Co. and MSSF's instruction number 11, which states: "[i]f the requested documents are maintained in a file, the file folder is included in the request for production of those documents." Likewise, instruction 16 directs that "[u]nless otherwise specified, this Request calls for the production of documents created, delivered, distributed, sent, received, accessed or modified up to the date of your response to this Request." Do you intend to withhold documents (or copies of file folders) based on your objections to any of the enumerated instructions? If so, please inform us promptly what documents you plan to withhold.

In addition, you objected to Definitions 9 (defining "documents") and 15 (defining "identify") to the extent they impose requirements that exceed or are inconsistent with the

applicable rules. Do you intend to withhold documents based on your objections to these definitions? If so, please inform us promptly what documents you plan to withhold.

2. Initial Objection 3.

You narrowed MS & Co. and MSSF's definition of the "Coleman Transaction" to exclude "all related communications, agreements, and transactions, including the February 27, 1998 Agreements and the March 30, 1998 closing." We do not accept this limitation and ask you to reconsider.

Responses and Further Objections to MS & Co.'s First Request for Production

1. Request No. 1.

You objected to Request No. 1 on the grounds that the term "implementation" is vague and ambiguous, and you construed "implementation" to refer to the closing of the transaction by which CPH transferred its interest in the Coleman Company to Sunbeam. Your objection is unclear. "Implementation" means "to put into effect," and we are not sure what, if any, documents you are withholding based on your construction. Please inform us if you intend to withhold documents based on your objection.

2. Request No. 8.

Request No. 8 asks for all documents referring or relating to Arthur Andersen's 1996 and 1997 audit of Sunbeam. You construed this request as seeking only those documents relating to any review, investigation, analysis, and due diligence of Arthur Andersen's audit by *CPH personnel or advisors of CPH.* MS & Co. does not accept your limitation, which excludes documents created by non-CPH entities concerning Arthur Andersen's audit that are equally relevant to this litigation. We ask you to withdraw your objection and limitation. In addition, have you withheld documents based on this objection from your production?

3. Request No. 9.

You construed this request, seeking all documents reflecting, referring or relating to the value of Sunbeam securities, as seeking only those documents referring or relating to the *market* valuation of Sunbeam securities. This limitation excludes other valuations of Sunbeam securities, such as CPH's internal valuations. Furthermore, your own requests 13 (in the MS & Co. action) and 47 (in the MSSF action) seek "[a]ll documents concerning any valuation of Sunbeam or Sunbeam securities," and yet you object to our request -- seeking the very same

types of documents -- as "vague and ambiguous." We ask you to reconsider. In addition, have you withheld documents based on this objection from your production?

4. Request No. 15.

Request 15 seeks "All documents referring or relating to any review, investigation, analysis, or due diligence of Sunbeam conducted by CPH or its Advisors..." You limited this request to seek only those documents referring or relating to any review, investigation, etc. concerning the *valuation of Sunbeam or Sunbeam securities.* This limitation changes the substance of this request and would exclude documents relating to any investigation, analysis, etc. of Sunbeam not necessarily related to the valuation of Sunbeam or Sunbeam Securities. In addition, your own requests 3 (in the MS & Co. action) and 43 (in the MSSF action) are virtually identical to our request. We ask you to withdraw your objection to this request and your limitation of this request. In addition, please inform us if you have withheld documents from your production based on your objection.

5. Request. No. 16.

You limited this request to the due diligence performed by CPH or its Advisors in connection with the transfer of CPH's interest in The Coleman Company to Sunbeam and CPH's general due diligence guidelines or policies. We ask that you also produce to us all due diligence-related materials provided to you by your financial advisors (including general due diligence guidelines or policies). In addition, please inform us if you have withheld documents from your production based on your objection.

7. Request No. 28.

You state in your objection to this request that, due to the manner in which Morgan Stanley has chosen to define "your," there are no documents responsive to this request. Please explain what this means. In addition, your objection to this request for organizational charts limits your production to documents sufficient to show the ownership relationship among CPH and its corporate subsidiaries at the time of the February 27, 1998 Agreements. We object to this limitation, which would exclude documents showing your organizational structure, your corporate relationship, and the reporting relationships within your corporation prior to and post February 27, 1998. We ask you to withdraw your objection and limitation. In addition, please inform us if you have withheld documents from your production based on your objection.

8. Request 31.

You limited our requests for the calendars and dayplanners of "Ronald Perelman, Howard Gittis, William Nesbitt, Lorelie Borland, Steve Fasman, and James Maher from December 1997 through March 1998" to calendar entries that also relate to the "transaction by which CPH transferred its interest in The Coleman Company to Sunbeam." We do not accept this limitation and ask you to withdraw your limitation and objection. In addition, please inform us if you have withheld documents based on your objection.

9. Request No. 32.

With regard to your objections to and enumerated limitations of this request, do you intend to withhold documents otherwise responsive to this request? If so, what documents?

10. Request No. 33.

With regard to your objections to and enumerated limitations of this request, do you intend to withhold documents otherwise responsive to this request? If so, what documents?

11. Request No. 34.

With regard to your objections to and enumerated limitations of this request, do you intend to withhold documents otherwise responsive to this request? If so, what documents?

12. Request No. 35.

With regard to your objections to and enumerated limitations of this request, do you intend to withhold documents otherwise responsive to this request? If so, what documents?

13. Request No. 40.

With regard to your objection to producing documents relating to the settlement agreement between CPH and Arthur Andersen, please provide to us the provisions specifying the circumstances under which the terms of the settlement agreement can be disclosed.

Initial Objections to MSSF's First Request for Production of Documents

1. Initial Objection No. 1.

I refer you to Initial Objection No. 1 in the MS & Co. action discussed above.

2. Initial Objection No. 3

I refer you to Initial Objection No. 3 in the MS & Co. action discussed above.

3. Initial Objection No. 6.

MSSF defined "MAFCO" to mean "MacAndrews & Forbes and any of its officers, directors, former or present employees, representatives and agents." You objected to this definition as "vague and ambiguous" and limited the definition of "MAFCO" to "MacAndrews & Forbes Holdings Inc." You made this limitation despite the fact that you have rejected our efforts to narrow your own definitions of corporate entities and despite the fact that *your own requests* define "MAFCO" to mean "MacAndrews & Forbes or any of their present and former officers, directors, employees, representatives, and agents." We ask you to withdraw this objection and limitation.

Responses and Further Objections to MSSF's First Request for Production

1. Request No. 1.

I refer you to Request No. 1 in the MS & Co. action discussed above.

2. Request No. 6.

There appears to be a typographical error in your response to Request No. 6. Please confirm that, subject to your objections, CPH and MAFCO will produce all documents referring or relating to the December 1997 meeting.

3. Request No. 8.

I refer you to Request No. 15 in the MS & Co. action discussed above.

4. Request No. 9.

Request 9 seeks "All documents referring or relating to any review, investigation, analysis, or due diligence of Sunbeam conducted by MAFCO or its Advisors..." You limited this request to seek only those documents referring or relating to any review, investigation, etc. concerning the *valuation of Sunbeam or Sunbeam securities.* This limitation changes the substance of this request and would exclude documents relating to any investigation, analysis, etc. of Sunbeam not necessarily related to the valuation of Sunbeam or Sunbeam Securities. In

addition, your own Request 3 (in the MS & Co. action) and Request 43 (in the MSSF action) is virtually identical to our request. We ask you to withdraw your objection to this request and your limitation of this request. In addition, please inform us if you have withheld documents from your production based on this objection.

5. Request No. 15.

Your response to this request is ambiguous. Do you intend to withhold documents responsive to this request? If so, please identify those documents.

6. Request No. 22.

You construed this request, seeking all documents reflecting the value of Coleman stock, as seeking only those documents reflecting the *market* valuation of Coleman stock. This limitation excludes other valuations of Coleman stock, such as internal CPH valuations. Furthermore, your own requests 15 (in the MS & Co. action) and 49 (in the MSSF action) seek "[a]ll documents concerning any valuation of Coleman or Coleman securities," and yet you object to our own request -- seeking the very same types of documents -- as "vague and ambiguous." We ask you to withdraw your objections to and limitations of this request. In addition, please inform us if you have withheld documents based on your objection.

7. Request 30.

Your objection to this request for organizational charts limits your production to documents sufficient to show the ownership relationship among CPH and its corporate subsidiaries the time of the February 27, 1998 Agreements. We object to this limitation, which would exclude documents showing CPH and MAFCO's organizational structure, CPH and MAFCO's corporate relationship, and CPH and MAFCO's reporting relationships prior to and post February 27, 1998. We ask you to withdraw this objection and limitation. In addition, please inform us if you have withheld documents based on your objection.

9. Request 34.

I refer you to Request No. 16 in the MS & Co. action discussed above.

10. Request 36.

I refer you to Request No. 31 in the MS & Co. action discussed above.

11. Request 37.

With regard to your objections to and enumerated limitations of this request, do you intend to withhold documents otherwise responsive to this request? If so, what documents?

12. Request 38.

With regard to your objections to and enumerated limitations of this request, do you intend to withhold documents otherwise responsive to this request? If so, what documents?

13. Request 39.

With regard to your objections to and enumerated limitations of this request, do you intend to withhold documents otherwise responsive to this request? If so, what documents?

14. Request 40.

With regard to your objections to and enumerated limitations of this request, do you intend to withhold documents otherwise responsive to this request? If so, what documents?

15. Request 41.

With regard to your objections to and enumerated limitations of this request, do you intend to withhold documents otherwise responsive to this request? If so, what documents?

16. Request 42.

With regard to your objections to and enumerated limitations of this request, do you intend to withhold documents otherwise responsive to this request? If so, what documents?

* * * * *

In addition, of the boxes of documents that you "made available" to us for review, we found that very few of those boxes of documents actually contained CPH or MAFCO documents. The overwhelming majority of those documents were our own documents, third-party documents, or documents from the prior litigations and other related actions. Will your next production include more CPH/MAFCO documents? When can we expect your next production?

I look forward to your prompt response.

Sincerely,

Kathryn R. DeBord

cc: Joseph Ianno, Jr., Esq. (by facsimile)
Deirdre Connell, Esq. (by facsimile)
Jerold S. Solovy, Esq. (by facsimile)
John Scarola, Esq. (by facsimile)

Exhibit 4

JENNER&BLOCK

September 12, 2003

By Facsimile

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Kathryn R. DeBord, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005

Re: Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.
Morgan Stanley Senior Funding v. MacAndrews & Forbes Holdings Inc., et al.

Dear Kathryn:

I write in response to your letter of August 27, 2003 concerning CPH's objections and responses to Morgan Stanley's first requests for production of documents and CPH's and Mafco's objections and responses to MSSF's first requests for production of documents.

Objections and Responses to Morgan Stanley's Requests For Production

Initial Objection 1. CPH and Mafco produced to Morgan Stanley and MSSF over a million pages of documents within 30 days of receiving your documents requests. We have made every effort to provide complete and accurate responses in accordance with the Florida Rules of Civil Procedure. To the extent Morgan Stanley seeks to impose additional burdens or requirements that exceed or are inconsistent with the Florida Rules, we advised you that CPH and Mafco will not comply with your additional demands. Morgan Stanley has lodged many of the same objections to our document requests, including its General Objections Nos. 3, 5, 8, and 10.

You have inquired whether we intend to withhold documents based upon our objections to your instructions and definitions. To the extent your requests call for the production of documents protected by the attorney-client privilege or work product doctrine, we intend to withhold documents that otherwise would be responsive, as we state in our Initial Objection 2. We will comply with the stipulation entered by the court regarding the production of privilege logs. We stand on our objection that Instructions 3, 4, 5, 6, 7, 8, 9, 10, 11, and 16, and Definitions 9 and 15 (Morgan Stanley) and 11 and 17 (MSSF) go beyond the requirements of applicable law. We will address these in turn.

Instructions No. 3 and 8: CPH and Mafco will produce all documents in their possession, custody, or control as required by the Florida Rules. We have produced documents originally in the possession of CPH's prior counsel. We note that Morgan Stanley is willing to produce documents in the possession of certain of its counsel, but not others. You have been unwilling to explain your inconsistent position with respect to documents in the possession of third parties.

See Brody to Clare letter, August 20, 2003. CPH and Mafco will not withhold documents on the basis of these objections.

Instruction No. 4: In response to specific document requests, we have identified ambiguities in your requests and have provided the construction we used in our responses to those ambiguous requests. Unless noted in response to a specific request, CPH and Mafco will not withhold documents on the basis of this initial objection.

Instruction No. 5: We will produce a privilege log in accordance with the Florida Rules and in the manner stipulated to by the parties, as entered by the Court on September 4, 2003.

Instruction 6: We object to the production of documents where production would be unduly burdensome. We have not interposed this objection in response to any of your specific requests and therefore will not withhold any documents on the basis of this objection.

Instruction 7: We will produce documents in redacted form when necessary to prevent the production of privileged communications, work product, or non-responsive information in accordance with the Florida Rules. CPH and Mafco will not otherwise withhold documents on the basis of this objection.

Instructions 9 and 10: CPH and Mafco have not withheld documents on the basis of these objections.

Instruction 11: This instruction seeks the production of documents protected from disclosure by the attorney-client privilege or work product doctrine. CPH and Mafco will not produce file folders that were created by Jenner & Block, and which therefore constitute work product.

Instruction 16: This instruction is exceptionally broad, and seeks documents over a longer time frame than is encompassed by Morgan Stanley's or MSSF's responses. We invite you to propose a reasonable time frame for your requests.

Morgan Stanley Definition 9 / MSSF Definition 11: CPH and Mafco stand on their objection to the definition of "documents" to the extent the definition is inconsistent with their obligations under the Florida Rules of Civil Procedure. CPH and Mafco will not withhold any documents based on these objections.

Morgan Stanley Definition 15 / MSSF Definition 17: We objected to your definition of "identify," and your August 27 letter does not offer any explanation of the term. We note, however, that this term, although defined, is not used in your document requests.

Initial Objection 3. We remain unwilling to accept Morgan Stanley's definition of "Coleman Transaction." You have defined that term to mean "Sunbeam's acquisition of Coleman Company, Inc. from CPH," which did not occur, and further to include other "related agreements and transactions," which we do not understand. In our objection, we explained that we would

produce documents concerning the transaction that actually took place. What more are you interested in receiving?

Morgan Stanley Request No. 1. We objected to the use of the term "implementation." We explained that we would construe that term to mean the closing of the transaction. We further explained that if you meant the term to mean the actual integration of the companies, those documents were encompassed by your Request 26, which seeks "all documents concerning potential or actual integration of Coleman, First Alert, and/or Signature Brands with Sunbeam . . ." Your attempt to clarify your Request by defining "implementation" to mean "to put into effect" is unhelpful and does not allow us to further respond to this Request. Based on our construction of Requests 1 and 26, we believe we have fully responded to your requests.

Morgan Stanley Request No. 8. CPH stands on its objection and response to this Request. CPH will not withhold documents based on this objection.

Morgan Stanley Request No. 9. We are investigating our production regarding this request, and we will respond under separate cover.

Morgan Stanley Request No. 15. This Request sought information concerning due diligence, which we agreed to provide. It continues to state: "including without limitation" documents reflecting all "Financial Information" CPH ever obtained about Sunbeam. As we understand your definition, the request for "Financial Information" is broader than the request for due diligence information, in which it is supposedly encompassed. We have not withheld any documents responsive to what we understand this request to seek – due diligence. The further request, for all Financial Information, is overbroad.

Morgan Stanley Request No. 16. In this request, you sought various due diligence materials. We agreed to provide exactly what you have agreed to provide: documents relating to due diligence for this transaction, and general due diligence materials. We are not providing (nor are you) due diligence materials from other transactions. Why are you entitled to receive documents you are not willing to produce to us? Do you intend to modify your prior response to our Request No. 43?

Morgan Stanley Request No. 28. In response to this request, we offered to produce more documents than you requested. Morgan Stanley's definition of "your" was limited to "CPH." CPH does not have an organizational chart or a chart of reporting relationships, and therefore there are no documents responsive to this Request. Nonetheless, we responded by voluntarily producing documents sufficient to show the relationship of CPH with its corporate parent at the time of the February 27, 1998 Agreements. We specifically refer Morgan Stanley to the 10-Ks filed by the Coleman Co., Inc. in 1997 and 1998, which we produced, which explain the relationship between CPH and its parent and subsidiaries at all relevant times. We have also provided a written response describing corporate structure. CPH stands on its objections and response to this Request.

Morgan Stanley Request No. 31. CPH produced redacted calendars responsive to this Request that include relevant entries. You apparently want calendar entries that have nothing to do with Coleman or Sunbeam. We invite you to explain what other information from these calendars you believe you are entitled to receive, and why.

Morgan Stanley Request Nos. 32-35. In response to these requests, we outlined precisely what we were producing. We are not producing documents that reflect attorney-client communications or work product from other litigation arising from the Sunbeam transaction. We invite you to explain what other documents you believe you are entitled to receive that we are not providing in our responses.

Morgan Stanley Request No. 40. As we explained in our response, CPH would be in violation of the terms of the settlement agreement between CPH and Arthur Andersen if CPH disclosed any of the terms of the settlement agreement. We therefore are unable to agree to your request to produce a portion of the agreement. We invite you to explain why you believe you are entitled to any portion of the settlement agreement and the legitimate purpose that would be served by disclosure of the terms of the settlement agreement.

Objections and Responses to MSSF's First Request for Production

Certain of the issues you raise relating to the MSSF requests are duplicative of the same issues you raise with regard to the Morgan Stanley requests. I will not repeat the discussion below of items I have already addressed.

Initial Objection No. 6. We objected to MSSF's definition of "MAFCO," because it is incorrect. CPH and Mafco will construe the definition to refer to MacAndrews & Forbes Holdings Inc. and any of its officers, directors, former or present employees, representatives, and agents. We are not withholding any documents based upon this definition, as corrected.

MSSF Request No. 6. Our response to Request No. 6 contained a typographical error. The response should read: "Defendants object to the multiple false premises contained in the request. Subject to and without waiving these objections and the foregoing Initial Objections, including without limitation defendants' objection to the term 'Schedule of Synergies,' CPH and Mafco will produce documents referring or relating to the December 1997 meeting."

MSSF Request No. 9. See our discussion of Morgan Stanley Request No. 15 above.

MSSF Request No. 15. We stand by our objection to this request. There was never any "decision" to make any such "representation," and therefore there are no documents responsive to this Request.

MSSF Request No. 22. We are investigating our production regarding this request, and we will respond under separate cover.

JENNER&BLOCK

MSSF Request No. 30. We have fully responded to this request. We have produced documents, as you request, sufficient to show the corporate relationships between the relevant entities at the relevant time. CPH and MacAndrews & Forbes Holdings Inc. do not have any organization charts of internal reporting relationships. Please advise me if you believe you are entitled to additional documents.

MSSF Request Nos. 37–42. In response to these requests, we outlined precisely what we were producing. We are not producing documents that reflect attorney-client communications or work product from other litigation arising from the Sunbeam transaction. We invite you to explain what other documents you believe you are entitled to receive that we are not providing in our responses.

* * *

Finally, you complain that we have not produced enough documents from CPH or Mafco. CPH and Mafco produced an extraordinary number of documents and other discovery materials to Morgan Stanley and MSSF. As we have advised you on several occasions, a majority of the documents in our production are documents we received from third parties arising from Sunbeam's fraudulent practices and related litigation. We have produced documents from our clients' files relating to the relevant topics. In stark contrast, Morgan Stanley and MSSF, two global financial and investment institutions, have produced a small number of documents and Morgan Stanley has been afforded almost four months to respond to our requests.

Please contact me if you would like to discuss any of these issues.

Very truly yours,

Michael T. Brody

cc: Joseph Ianno, Esq. (by facsimile)
John Scarola, Esq. (by facsimile)
Jerold S. Solovy, Esq.

Doc. No. 972199

Exhibit 5

JENNER&BLOCK

October 8, 2003

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By Telecopy

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655 15th St., NW
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Re: ***Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.***
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Kathryn:

I write in response to your letter of October 6, 2003. You request our position regarding documents concerning (1) the value of Sunbeam securities, (2) Financial Information, and (3) unredacted calendars.

1. Further to my September 12, 2003 letter to you, we have investigated Mafco's and CPH's productions and will produce additional documents responsive to Morgan Stanley's Request No. 9 (value of Sunbeam securities) and MSSF's Request No. 22 (value of Coleman stock).

2. As stated in my September 12, 2003 letter, Morgan Stanley's request for all Financial Information, as defined by you, is overbroad and goes beyond the documents sought in Request No. 15. CPH advised you in its document responses and in my prior letter that CPH has produced documents that are responsive to Request No. 15, which should resolve this issue.

3. We remain of the view that your request for unredacted calendar entries is an unwarranted invasion of privacy in search of documents that have no bearing on the issues in this case. Nonetheless, we will produce the unredacted calendar pages, subject to the protective order in this case. Our willingness to produce these documents stands in contrast to your refusal to produce the information we seek about the Morgan Stanley personnel who worked on the Sunbeam engagement. Notwithstanding your demand that we produce calendars of Mafco executives pertaining to events that are unrelated to the issues in this case, you have refused to produce documents showing whether the Morgan Stanley employees who worked on this deal were disciplined or rewarded for their actions, among other documents.

Very truly yours,

Michael T. Brody

cc: Joseph Ianno, Esq. (by facsimile)
John Scarola, Esq. (by facsimile)
Jerold S. Solovy, Esq.

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S MEMORANDUM IN OPPOSITION TO MORGAN STANLEY'S MOTION TO INSTRUCT THE JURY ON RELIANCE AND DAMAGES UNDER THE CLEAR-AND-CONVINCING EVIDENCE STANDARD IN PHASE I

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") submits this response to Morgan Stanley's most recent motion arguing for application of the clear-and-convincing standard to all elements of liability during Phase I of the trial. The Court should not accede to Morgan Stanley's utterly unprecedented suggestion, which is supported neither by law nor by logic. Indeed, the procedure proposed by Morgan Stanley effectively "bifurcates" the determination of entitlement to punitive damages -- the one determination that is subject to the clear-and-convincing standard -- by requiring that the jury first determine at the end of Phase I whether the elements of the underlying torts have been proved by clear-and-convincing evidence. Only if the jury has first said yes to that question would CPH then have the chance, in Phase II, to present much of the other evidence supporting entitlement to punitive damages, such as the glaring evidence of a Morgan Stanley cover-up, and to argue for an award of punitive damages based on instructions fully addressing the applicable standards.. That makes no sense. As this Court has ruled, entitlement to punitive damages should be determined entirely in Phase II, during which

the clear-and-convincing standard can properly be applied to assess the wrongfulness of Morgan Stanley's scienter as the law requires. It would be unwise and unjust if the Court's prior ruling as to the manner of trying this case, designed to protect Morgan Stanley, were now revised to the prejudice of CPH -- the party guilty of no misconduct in this case. Moreover such a procedure would be unprecedented and contrary to established Florida law.

Introduction

It is important, after all the briefing on these issues, to review how we got here:

First, the Court initially granted, over Morgan Stanley's opposition, a *W.R. Grace* bifurcation of the case. Ex. A, 2/16/05 Order on CPH Motion to Bifurcate Trial. Under that approach, issues of liability and entitlement to punitive damages would have been heard in Phase I and CPH could have presented most of the evidence supporting punitive damages including, for example, evidence of litigation misconduct designed to cover up the fraud. Only two types of evidence -- Morgan Stanley's net worth and prior punitive awards (serving as possible mitigation) -- would have had to be deferred to the Phase II "amount" determination because of their potentially prejudicial effects. *See W.R. Grace & Co. v. Waters*, 638 So. 2d 502, 506 (Fla. 1994).

Second, when Morgan Stanley moved to have both the "established facts" and the "litigation misconduct" statements excluded from Phase I, the Court responded with a March 31, 2005 Order directing that "Phase I of the trial shall be limited to the liability, if any, of MS & Co. for compensatory damages." Ex. B, 3/31 Order. The Court indicated that it was acting to prevent undue prejudice to Morgan Stanley in Phase I through exposure to punitive-damages-related evidence like the litigation misconduct statement; the Court's rebifurcation order therefore confined such evidence to Phase II. Ex. C (3/31 Tr. at 6267-75).

Third, having won this novel departure from the usual *W.R. Grace* bifurcation procedure, Morgan Stanley immediately set out to further customize the bifurcation to suit its purposes -- contending (1) that Florida law requires a second finding of all elements of liability by clear-and-convincing evidence and (2) that this issue should be assessed in isolation in Phase I, before evidence and instructions relating to entitlement to punitive damages have been presented. *See* Ex. D (Morgan Stanley's Motion Regarding the Reliance and Damages Issues to Be Determined at Phase I of the Trial, filed 4/4/05). The Court denied Morgan Stanley's first motion seeking this dual relief on April 5. Ex. E, 4/5/05 Order. But Morgan Stanley has since filed three additional briefs seeking some or all of the same relief, including the instant motion, which should be treated as a motion for rehearing.

As shown below, there is no reason to depart from the Court's original rebifurcation order, which was crafted solely for the benefit of Morgan Stanley. Certainly there is no basis for adopting the novel hybrid procedure now being proposed by Morgan Stanley, under which the jury would be asked to address only one part of the "entitlement" issue during Phase I, prior to hearing the full range of evidence relevant to entitlement to punitive damages. Nor is there any basis for Morgan Stanley's' contention that the clear-and-convincing standard properly applies to all elements of CPH's underlying tort claims.

Argument

Morgan Stanley's novel and illogical proposals suffer from several ills.

First, Morgan Stanley's motion is predicated on the erroneous assumption that to obtain punitive damages, CPH must prove all elements of its liability claims under two standards, the greater weight of the evidence and the clear-and-convincing standard. That is not correct. As demonstrated in CPH's April 25, 2005 brief regarding the limited applicability of the clear-and-

convincing standard of proof in Phase II, attached as Ex. F, the clear-and-convincing standard of proof applies only to one issue in this case: whether Morgan Stanley acted with sufficiently egregious intent to cause harm that it merits punishment. All other issues, including the remaining elements of CPH's liability claims (reliance and causation of damages), are liability issues that are decided by the greater weight of the evidence and then taken as established during the consideration of punitive damages.

Morgan Stanley's counter-argument, unsupported by any case law whatsoever, starts with the statutory requirement that a plaintiff "establish at trial, by clear and convincing evidence, its entitlement to an award of punitive damages," Fla. Stat. § 768.725, and combines it with the rule that punitive damages must be premised on a prior finding of tort liability, to produce the startling conclusion that the elements of tort liability, in toto, must be found twice with each finding made under a different standard of proof. *See* Ex. G (Morgan Stanley's Reply to CPH's Brief Regarding the Requirement that Plaintiff Prove Entitlement to an Award of Punitive Damages by Clear and Convincing Evidence in Phase II, filed 4/27/05).

As previously argued, the statutorily elevated burden of proof is in derogation of the common law and must, accordingly, be strictly construed -- i.e., given the narrowest possible application consistent with the statutory language. Especially given that rule, there is no basis for applying the clear-and-convincing standard to any issue beyond the issue of scienter, which has long been the touchstone for awarding punitive damages in Florida. As the Florida Supreme Court put it in *Winn & Lovett Grocery Co. v. Archer*, "[e]xemplary damages are given solely as a punishment, where torts are committed with fraud, actual malice or deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others." 171 So. 214, 221-22 (Fla. 1936), quoted in *First*

Interstate Devel. Corp. v. Ablanedo, 511 So. 2d 536, 539 (Fla. 1987). Similarly, the Supreme Court explained in *Ablanedo* that proof of a fraud claim is sufficient to create a jury question regarding punitive damages "because intentional misconduct is a necessary element of fraud." 511 So. 2d at 539 (emphasis added). The focus on scienter did not change in 1999 when the legislature mandated proof of entitlement by clear and convincing evidence. To the contrary, the very statute on which Morgan Stanley primarily relies, Fla. Stat. § 768.72, which applies only to post-1999 torts, provides that entitlement can be based either on "intentional misconduct" or "gross negligence."

Morgan Stanley suggests that the term "misconduct" incorporates all elements of intentional torts, but neglects to explain why the legislature would have permitted a less serious state of mind -- gross negligence -- to suffice on its own for entitlement to punitive damages without proof of other elements like causation and damages. There is no plausible explanation, and experience teaches volumes here: if Morgan Stanley were correct that all elements of torts have to be proved twice under different standards of proof, then verdict forms would routinely ask juries to apply each standard of proof to each element -- as Morgan Stanley's proposed form does. The fact that no such verdict form has ever, to our knowledge, been proposed or used is telling. Clearly, at the entitlement stage, the real issue is the wrongfulness of the defendants' conduct, which depends on an assessment of state of mind, not all the other elements of the tort.[1]

Second, and in any event, there is still no legal basis for following the procedure proposed by Morgan Stanley. The ultimate issue to be determined under the clear-and-

[1] Here, for example, if the jury has found liability, and finds that Morgan Stanley acted with a level of intentional wrongfulness justifying punitive damages, why should it matter whether the jury only believes that reliance has been proven by the greater weight of the evidence? That should not affect the question of punishment in any way, given that Morgan Stanley intended to induce reliance and profit from reliance.

convincing standard is "entitlement to an award of punitive damages" as a whole. Fla. Stat. § 768.725. Morgan Stanley seeks to separate out what it sees as one part of the entitlement determination -- proof of the tort elements -- and pose it as a question to the jury, applying the clear-and-convincing standard, without telling the jury the purpose. Under such a procedure, the jury would address only the elements of the underlying tort under the clear-and-convincing standard in Phase I, before even hearing the rest of the evidence relevant to the entitlement determination -- such as a pattern of similar misconduct, or efforts to cover up the wrongdoing, as occurred here.

Thus, under Morgan Stanley's proposed procedure, the entitlement issue would itself be "bifurcated" between Phase I, when only the elements of the tort would be assessed, and Phase II, when the jury would first hear about other aspects of the defendant's conduct bearing on the issue of punishment. In this case, for example, the jury would first apply the clear-and-convincing standard to the tort elements before hearing anything about Morgan Stanley's massive and contumacious cover-up. They would do so either with no understanding of the purpose of the inquiry (as we had originally assumed) or after being told, without further explanation, that the inquiry relates to punitive damages (as Morgan Stanley's proposed verdict form appears to assume).

Either way, the clear result of the procedure proposed by Morgan Stanley would be a risk of a compromise verdict in Phase I, precluding the jury from ever even exercising its fully informed discretion about the ultimate issue of entitlement to punitive damages. Such an outcome would flatly contravene the longstanding principle that the question of entitlement to punitive damages is one for the jury to decide in every case in which a defendant has been found liable for fraud. *See First Interstate Devel. Corp. v. Ablanedo, supra.*

Third, administrative convenience cannot trump CPH's right to present all evidence relevant to the jury's determination of punitive damages before the jury makes any decision under the clear-and-convincing standard. Morgan Stanley's justifications for creating such an illogical, pro-defendant hurdle for plaintiffs are (1) administrative convenience (*i.e.*, avoiding the need to reinstruct on the elements of the tort in Phase II), and (2) fairness (*i.e.*, avoiding the prejudicial effects of the jury hearing the other evidence relevant to punitive damages before the elements of the tort are assessed under the higher standard of proof). *See* Mot. at __. But the convenience concern derives solely from the Court's departure -- for Morgan Stanley's protection and at Morgan Stanley's urging -- from the *W.R. Grace* bifurcation procedure under which liability and entitlement to punitive damages are decided simultaneously in Phase I. Morgan Stanley, having sought and received the benefit of the Court's March 31 ruling, should not now be allowed to argue that it would be more convenient to ask the jury some questions at the end of Phase I that are custom-designed to create a risk of cutting off punitive damages before the jury is fully informed and knows what it is deciding.

Morgan Stanley's prejudice argument is equally unavailing. It amounts to a claim that it would be prejudicial for the jury to hear all the evidence relevant to the determination of entitlement to punitive damages before effectively deciding entitlement to punitive damages under the standard of proof (clear and convincing) applicable only to the issue of entitlement to punitive damages. In addition to being nonsensical, the argument flies in the face of *W.R. Grace*, which, as noted, calls for the liability and entitlement issue to be tried and decided together -- with only the issues of prior punitive awards and net worth relegated to the second phase where the amount of punitive damages would be set. *See* 638 So. 2d at 506.

Asking the jury to apply the clear-and-convincing standard to the tort elements in Phase I not only would be unprecedented and create an inappropriate bifurcation of the entitlement determination, but it also would confuse the jury about the appropriate burden of proof applicable to the underlying Phase I liability issues. It is beyond dispute that the unresolved elements of CPH's claims (*i.e*, reliance and damages) are to be decided in Phase I by the greater weight of the evidence. Instructing the jury on two different standards of proof — in a phase of the trial that, at the urging of Morgan Stanley, will not include any punitive-damages-related evidence — would introduce the considerable danger that the jury will assume erroneously that CPH is required to prove its underlying liability case by clear-and-convincing evidence. That should not be allowed to occur.

Conclusion

For all of these reasons, the Court should not accept Morgan Stanley's claim that the clear-and-convincing standard applies to all elements of CPH's claims and certainly should not accept Morgan Stanley's invitation to ask a limited set of questions relevant only to entitlement to punitive damages at a stage of the trial when the plaintiff has not yet had the opportunity to put on its punitive damages case. Morgan Stanley's motion that this Court instruct the jury to determine reliance and damages under the clear-and-convincing evidence standard during Phase I should be denied.

Dated: May 9, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 9th day of May, 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

CASE NO: 2003 CA 005045 AI

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO BIFURCATE TRIAL

THIS CAUSE having come to be considered upon Coleman (Parent) Holdings Inc.'s Motion to Bifurcate Trial, and the Court having reviewed the file and being fully advised in the premises, it is hereby,

ORDERED and ADJUDGED: the Motion is Granted. Trial of the amount of punitive damages to be assessed shall be bifurcated from for trial from the remaining issues.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, this 16 day of Feb, 2005.

ELIZABETH T. MAASS
CIRCUIT COURT JUDGE

Copies have been furnished to all counsel on the attached counsel list.

EXHIBIT
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A

16div-011248

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION TO CLARIFY THE PROPER SCOPE OF THE LIABILITY AND PUNITIVE PHASES OF TRIAL

THIS CAUSE came before the Court March 31, 2005 on Morgan Stanley's Motion to Clarify the Proper Scope of the Liability and Punitive Phases of Trial, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion to Clarify the Proper Scope of the Liability and Punitive Phases of Trial is Granted, in part. Phase I of the trial shall be limited to the liability, if any, of MS & Co. for compensatory damages. Phase II shall address entitlement and, if necessary, amount of punitive damages to be assessed if liability is determined in CPH's favor.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 31 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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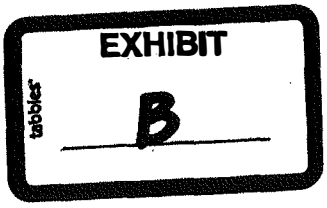

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IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 54

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Thursday, March 31, 2005

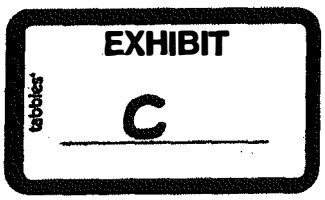
Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

1:00 p.m. to 5:05 p.m.



regard to bifurcation with you, I think, this morning. But it wasn't what I wanted to do. What I wanted to do addressed -- I don't think you can decide that issue unless you decide some issues we wish to raise in regard to how your order, sanctions order, affects the ability of the Defendant to defend itself on both liability and amount to punitive damages.

THE COURT: Let me be honest with both sides and lay our cards on the table, and then you can tell me what, if anything, you need to do.

Please understand, as I sit here now, I'm not contemplating redoing any of the orders I've done.

That said, I do understand Morgan Stanley's concern about having a fair trial on the issues that remain in the case. And given that concern, why would we not do liability and compensatory damages first, wholly apart from punitive damages, and have phase two be both entitlement to punitive damages and amount? And that way, quite honestly, under my prior ruling I don't know that the statement of litigation misconduct would be read to the jury during the liability phase.

And then I would hope we eliminate the possibility that a juror may inappropriately think this is bad stuff, so we're just going to give Coleman money. And then we can still argue the other stuff on the appropriateness of the statement to entitlement and amount of punitive damages. But why went wouldn't I do that just to be fair to Morgan Stanley?

MR. SCAROLA: Because the Supreme Court has told you that is not the appropriate way.

THE COURT: Have they said I can't do it that way, or that's not the way they suggest?

MR. SCAROLA: The response to your question is that they have not precluded you from readjusting the bifurcation line. There clearly is discretion pursuant to Rule 1.270 to sever claims for separate trial. Your Honor has the discretion to do that.

The weight of authority clearly indicates that that is an unnecessary bifurcation in this proceeding. And just so that we get ourselves properly procedurally oriented, this did begin because we filed motion in limine number 28, which asked to make a determination as to what evidence would be admissible in phase one and

what evidence would be admissible in phase two. And Morgan Stanley did indeed respond by saying, it is our intention to request a redrawing of the bifurcation line.

They told us that we would have such a motion by noon today. And at approximately noon we were served with what Morgan Stanley styled: Morgan Stanley's motion to clarify the proper scope of the liability in punitive phases of trial.

I assume Your Honor has received that.

THE COURT: I do. I do.

MR. SCAROLA: Okay. That memorandum, which was supposed to address both our motion in limine and raise the new issue, really presents three questions to be determined.

One is a redrawing of the bifurcation line.

The second is the appropriate burden of proof on a fraud claim.

And the third, although only obliquely referenced, relates to what evidence is admissible on first phase, second phase, and, quite frankly, fails to address most of the issues that we raised in our motion in limine.

I agree that the first issue that we ought

to address is redrawing the bifurcation line.

THE COURT: Why would we not redraw it in the fashion I suggested?

MR. SCAROLA: The only response I have to that, Your Honor, is that the arguments that are being made for the redrawing of the bifurcation line are not unique to this case in any respect at all. Any time there is a punitive damage claim associated with an underlying tort, the evidence that would be introduced to support the claim for punitive damages that is unrelated to the liability aspect of the case, that is, the entitlement evidence, if we can refer to that in a shorthand fashion, could be argued to prejudice the Defendant on the liability aspects of the case.

Those were matters that were considered by the Supreme Court in W.R. Grace. They decided that the only appropriate evidence to excuse from the principal trial was evidence with regard to the Defendant's financial circumstances, their pecuniary circumstances, and evidence that related to other punitive liability, stating, quite reasonably, that Defendant was placed in a very difficult, if not

completely, untenable position in appearing before the jury and saying, we have already been punished enough as a consequence of other punitive damage awards that have been imposed against us, and therefore, we should not be punished more, at the same time that they are saying, we didn't do this.

THE COURT: I understand the Supreme Court has said I can do it that way.

Why in this case, though, specifically? What is the prejudice to your client, the legal prejudice to your client if that's where we draw the line?

MR. SCAROLA: I can't tell Your Honor that there is any legal prejudice that I can specifically identify as a consequence of drawing the line in that fashion. However, I believe it to be entirely unnecessary. I can cite a number of cases where the issue has been directly dealt with. And the appellate courts have held very specific that that type of bifurcation is completely unnecessary.

And in addition to that, because of the Defendant's choices in this case, such a bifurcation no longer makes any sense at all.

THE COURT: Why do you say that?

MR. SCAROLA: Just this morning, the Defendant was given the option of delaying voir dire until after this hearing so that the Defendant could decide whether to directly address both what I will refer to as the litigation misconduct order and the liability order. The Defendant chose, after these arguments were clearly placed before it, to say, no, I want to go forward now, and I want to tell the jury about both orders now.

The initial panel, because the Defendant chose to do it, has been informed that Morgan Stanley has been found to have engaged in very serious litigation misconduct. That's almost a direct quote from Mr. Hansen. This panel has been told exactly the same thing.

Beyond that, this, again, is almost a direct quote from Mr. Hansen from this morning's voir dire, as a consequence of not following court orders, Morgan Stanley can't defend itself.

Now, Your Honor cautioned Mr. Hansen about making exactly that kind of statement repeatedly yesterday. He has chosen to do it again. And we are now placed in the position that I

expressed a concern about yesterday. I laid it out about as clearly as I could lay it out. Our fear is that Morgan Stanley appears before this Court and tells this jury, we have been severely punished by the Judge for litigation misconduct. And they don't get to hear about whether that punishment is justified or not and they feel sorry for Morgan Stanley because Morgan Stanley isn't allowed to defend itself anymore.

That's just totally unfair to the Plaintiff.

Once they have chosen to link the liability findings to the litigation misconduct findings, their voluntary choice repeatedly, the jury is entitled to know that the punishment fits the crime. And they are entitled to know that at both phases of this proceeding.

The prejudice we suffer is as a result of the voluntary choices they have made to link those two things, which Your Honor very carefully tried to separate.

You were scrupulous in your efforts to avoid doing that. There is no mention in Your Honor's order about the violation of court orders, except obliquely an agreed order that the parties entered into.

But this jury is not being told, as Your Honor's statement presently stands, that Morgan Stanley repeatedly violated court orders. That is a fact. But nonetheless, Mr. Hansen has chosen to say, as a consequence of not following court orders, Morgan Stanley can't defend itself.

Well, once he presents that issue to the jury, in fairness to us, the jury is entitled to know that the punishment indeed fits the crime in both phases.

THE COURT: I don't need you to respond.

I can tell you, this is something I've thought about. And I understand the parties may have different opinions. My purpose here is to have a fair trial. And the only way I think we can protect Morgan Stanley against the inappropriate reference to litigation misconduct, that has nothing to do with liability. And I've already found that on the issues we have left is to segregate that and do both entitlement and amount of punitive damages as a phase two. What that means is I would not read a statement about litigation misconduct to the jury in phase one.

That said, I'm also sensitive to Plaintiff's position, because we spoke about that yesterday, that -- and we spoke about it in conjunction of having the statement of litigation misconduct read in phase one -- that the litigation misconduct that resulted in the order on the renewed motion for default judgment is much broader than the litigation misconduct that will be read to the jury at some point.

And I understand Plaintiff's concern that if jurors listen solely to the second statement they might tell themselves, that doesn't seem so bad, I think the Judge was unfair, and I'm going to somehow compensate in the case for it.

What we need to do is assure our service with both panels of jurors, that the jurors we select are able to take the statements of fact that I read them and not question them. And we still have both panels with us, and I'm sure we're able to do that.

And certainly, if I need to give some further instruction when we get to the statement of facts in phase one, we can certainly do it.

That said, Mr. Solovy, yes, sir?

MR. SOLOVY: Well, I think what I understood

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

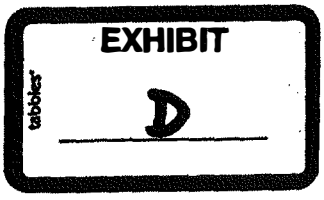
Defendant. /

DEFENDANT'S MOTION REGARDING THE RELIANCE AND DAMAGES ISSUES TO BE DETERMINED AT PHASE I OF TRIAL

Morgan Stanley & Co. Incorporated ("Morgan Stanley") moves for an order providing that the issues of reliance and damages will be determined during Phase I of the trial under both relevant standards of proof -- proof by the greater weight of the evidence, and proof by clear and convincing evidence.

In support of this motion, Morgan Stanley states:

1. In this Court's order of March 16, 2005, the Court granted Plaintiff Coleman (Parent) Holding, Inc.'s ("CPH's") motion for entry of default judgment in part, holding that CPH's claims that Morgan Stanley aided and abetted Sunbeam's fraud and conspired with Sunbeam to commit fraud would be deemed established, but that the other elements of CPH's claims, reliance and damages, would be fully litigated. See Tr. Hearing March 31, 2005, at 6276-77; id. at 6279. Following that Order, this Court ruled that it would bifurcate the case. Phase I of the trial is "limited to liability, if any, . . . for compensatory damages." In contrast, Phase II shall address the availability and, "if



necessary, amount of punitive damages." Order of March 31, 2005, at 1 ("Bifurcation Order").

2. To prove entitlement to compensatory damages, CPH must prove the elements of fraud – the undefaulted elements – by the greater weight of the evidence. By contrast, to establish that punitive damages are even available, CPH must prove fraud – once again, the undefaulted elements – by clear and convincing evidence. See Fla. Stat. § 768.72 ("A defendant may be held liable for punitive damages only if the trier of fact, based on *clear and convincing evidence*, finds that the defendant was personally guilty of intentional misconduct") (emphasis added).[1]

3. The Court's current orders appear to contemplate having the jury decide the first issue, namely whether reliance and damages were proved by the greater weight of the evidence, at Phase I of the trial and the second issue, whether the same elements were proved by clear and convincing evidence, at Phase II of the trial. That procedure is neither efficient nor just. Because the jury will be deliberating on whether there was proof of reliance and damages by the greater weight of the evidence in any event at Phase I, it imposes no additional burden to ask the jury at the same time to decide whether those elements have been proved by clear and convincing evidence. Indeed, the jury would merely complete one verdict form question inquiring whether the elements had been proved by a preponderance of the evidence (resolving whether compensatory damages are available), and a second inquiring whether they had been proved by clear and convincing evidence (resolving whether punitive damages are available). See Attachment 1 (sample excerpt verdict form). Upon a determination that

[1] We assume for present purposes that the Court's order deems the defaulted elements established for purposes of both compensatory and punitive damages. As we have advised the Court by separate motion, however, deeming those elements established and foreclosing Morgan Stanley from contesting them for purposes of punitive damages is itself an excessive and unfair addition to an already severe sanction, is unprecedented in Florida, and is inconsistent with constitutional standards and binding decisions of Florida's appellate courts.

the elements were all proved by clear and convincing evidence -- thus establishing the availability of punitive damages – the case would proceed to Phase II so the jury could determine whether to award them and, if so, in what amount. Or, upon determining that some elements were not so proved, the trial would terminate without need for Phase II.

4. Deferring the determination whether there was clear and convincing proof of reliance and damages to Phase II, in contrast, would waste the Court's, the party's, and the jury's time and energy and would constitute an unnecessary distraction from the central focus of that proceeding. After having litigated reliance and damages in Phase I, the parties would be required to remind the jury of the same evidence, and present the same arguments, again in Phase II to resolve precisely the same issue -- reliance and damages -- but under a different standard of proof. The jury will be required to deliberate on the same issue again, and consider the same evidence again, again with no difference but the standard of proof. Further, the jury would be required to sit through evidence relating to the amount of punitive damages despite the possibility that, because of a failure to prove fraud by clear and convincing evidence, punitive damages may turn out to be legally unavailable in any event. There is no sensible reason to proceed in that fashion.

5. There is, moreover, a powerful reason for not proceeding in that fashion -- it introduces an unacceptable risk of undue prejudice. Under the Court's current orders, the evidence introduced during Phase II will include potentially inflammatory evidence relating to punitive damages. For example, the Court currently plans to read a statement to the jury setting forth its findings of litigation misconduct.[2] Such evidence has *no* bearing on whether CPH reasonably relied (or whether there was clear and convincing proof of reasonable reliance). But it has the undeniable potential to inflame the jury and taint that determination. Deferring resolution of whether there is clear and

[2] Morgan Stanley, as the Court understands, disputes the propriety of reading such a statement, as its other motions and papers in this case make clear.

convincing proof of reliance and damages to Phase II thus serves not only efficiency, but fairness as well.

6. Morgan Stanley is aware of the Court's considerable frustration (and more) with the way discovery and other matters were handled in this case. But that frustration should not cause the Court to lose sight of its duty to establish procedures that are both efficient and fair. Because the procedures currently contemplated by the Court's orders fall short on both accounts, they must be modified at least in this one respect.

CONCLUSION

For all the foregoing reasons, Defendant Morgan Stanley respectfully requests that this Court reconsider its order of March 31st.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 4th day of April, 2004.

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ATTACHMENT 1

[SAMPLE FOR ILLUSTRATIVE PURPOSES ONLY]

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

CASE NO: CA 03-5045 AI

VERDICT

We, the jury, return the following verdict:

COUNT I—AIDING AND ABETTING

1. Did Defendant Coleman (Parent) Holdings, Inc. ("CPH") actually rely on Sunbeam's allegedly false statements?

A. Was this proved by the greater weight of the evidence?

YES_____ NO_____

B. Was this proved by clear and convincing evidence?

YES_____ NO_____

If your answer to Question 1 is NO, your verdict on this count is for Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley"), and you should proceed to COUNT II—CONSPIRACY. If your answer to Question 1 is YES, please answer Question 2.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON DEFENDANT'S MOTION REGARDING THE RELIANCE AND DAMAGES ISSUES TO BE DETERMINED AT PHASE I OF TRIAL

THIS CAUSE came before the Court April 5, 2005 on Defendant's Motion Regarding the Reliance and Damages Issues to be Determined at Phase I of Trial, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Defendant's Motion Regarding the Reliance and Damages Issues to be Determined at Phase I of Trial is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 5 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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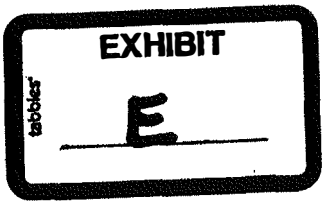

THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO. 2003CA 005045 AI

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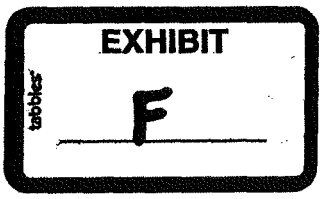
PLAINTIFF'S BRIEF REGARDING THE LIMITED APPLICABILITY OF THE "CLEAR AND CONVINCING" STANDARD OF PROOF IN PHASE TWO OF TRIAL

Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, respectfully submits this brief regarding the limited applicability of the "clear and convincing" standard of proof in Phase Two of this bifurcated trial, in response to Defendant Morgan Stanley & Co. Incorporated's ("Morgan Stanley's") April 22, 2005 submission on this topic.[1]

The "clear and convincing" standard of proof applies to only one issue in this case: whether Morgan Stanley violated CPH's rights in a manner warranting the imposition of punitive damages. All other issues — including the remaining elements of CPH's claims (*i.e.*, reliance and causation of damages) — are to be decided by the "greater weight of the evidence." In other words, the fact of the violation of CPH's rights is subject to the "greater weight" standard;

[1] The Court has previously rejected Morgan Stanley's argument that the "clear and convincing" standard applies to every element of CPH's underlying claims, explaining that the standard applies only to CPH's overall entitlement to punitive damages. *See* Ex. A, MS Mot. Regarding the Reliance and Damages Issues to be Determined at Phase I of Trial, at 2 (filed April 4, 2005) (claiming that "to establish that punitive damages are even available, CPH must prove fraud — once again, the undefaulted elements — by clear and convincing evidence"); Ex. B, 4/5/05 Order Denying MS Mot.; Ex. C, 4/5/05 Tr. at 6828-35; Ex. D, 4/19/05 Tr. at 9367.



Morgan Stanley's conscious awareness of or reckless indifference to the fact that it was violating CPH's rights must be proved by clear and convincing evidence.

The first issue that the jury must decide in Phase Two of this trial (which will take place only if the jury has already found each element of one or both of CPH's claims by the "greater weight of the evidence" standard) is whether Morgan Stanley's misconduct warrants punitive damages because it either was intentional or was so wanton and reckless as to serve as the legal equivalent of an intentional violation of CPH's rights. Specifically, in the present intentional-tort context, punitive damages are warranted if the jury finds by clear and convincing evidence that Morgan Stanley intentionally violated CPH's rights.

As Florida's Standard Jury Instructions make clear, what must be proved by clear and convincing evidence is the defendant's wrongful intent or reckless indifference — not all the elements of the underlying tort. For example, for pre-October 1, 1999 negligence actions, the instructions provide: "Punitive damages are warranted if you find by clear and convincing evidence that: (1) the conduct causing [loss] [injury] [or] [damage] to (claimant) was so gross and flagrant as to show a reckless disregard of human life or of the safety of persons exposed to the effects of such conduct; or (2) the conduct showed such an entire lack of care that the defendant must have been consciously indifferent to the consequences; or (3) the conduct showed such an entire lack of care that the defendant must have wantonly or recklessly disregarded the safety and welfare of the public; or (4) the conduct showed such reckless indifference to the rights of others as to be equivalent to an intentional violation of those rights." Florida Standard Civil Jury Instructions PD 1a(2)(a) (2003) (emphasis added); *accord id.* PD

2a(1).[2] Similarly, for post-October 1, 1999 torts, the instructions provide: "Punitive damages are warranted if you find by clear and convincing evidence that (name person whose conduct may warrant punitive damages) was personally guilty of intentional misconduct or gross negligence." *Id.* PD 1a(2)(b) (emphasis added); *accord id.* PD 2a(2).

Thus, the jury's assessment of the quantum of proof for any element of a plaintiff's intentional-tort claim — other than intent — is irrelevant when determining punitive damages. So long as the jury has found each element of at least one claim by the "greater weight of the evidence," that is enough to find liability for compensatory damages and to propel the jury to address the next issue, entitlement to punitive damages. Entitlement to punitive damages, in turn, hinges on clear and convincing evidence that the defendant acted with wrongful intent. Then, once the jury finds that the plaintiff is indeed entitled to an award of punitive damages, all disputed factual issues going to the proper amount of those damages must be decided using the "greater weight of the evidence" standard. *See* Florida Standard Civil Jury Instruction PD 1b(1) (2003) (for amount of punitive damages, "you should decide any disputed factual issues by the greater weight of the evidence"); *accord id.* PD 2d(1).

Morgan Stanley has provided no relevant authority contradicting plaintiff's straightforward reading of the Florida Standard Jury Instructions and Florida caselaw. Rather, Morgan Stanley has cited a slew of inapposite cases, none of which holds or even suggests that a plaintiff must prove each element of the underlying tort by clear and convincing evidence to be

[2] The Standard Jury Instructions applicable to pre-October 1, 1999 causes of action are designed primarily for use in negligence cases, but the notes for those instructions expressly state that the instructions may be modified for particular intentional torts. *See* Florida Standard Civil Jury Instructions PD 1 n.3 & PD 2 n.2 (2003) (citing *First Interstate Dev. Corp. v. Ablanedo*, 511 So. 2d 536 (Fla. 1987); *Metropolitan Life Ins. Co. v. McCarson*, 467 So. 2d 277 (Fla. 1985)). In any event, these instructions make clear that what must be proved by "clear and convincing" evidence is a sufficiently egregious mental state — not each element of the tort cause of action.

entitled to punitive damages. In particular, Morgan Stanley incorrectly claims that *First Interstate Development Corp. v. Ablanedo*, 511 So. 2d 536 (Fla. 1987), supports its argument. Although *First Interstate* does hold, as Morgan Stanley concedes, that "proof of fraud sufficient to support compensatory damages necessarily is sufficient to create a jury question regarding punitive damages," *id.* at 539, Morgan Stanley entirely omits the relevant reasoning from *First Interstate*: "This is so because intentional misconduct is a necessary element of fraud." *Id.* (emphasis added). As this and other caselaw,[3] as well as the Standard Jury Instructions, makes clear, the touchstone for entitlement to punitive damages is the defendant's egregious mental state; it is thus only to that mental state that the clear-and-convincing standard applies.

Finally, the Court should expressly instruct the jury that it has the discretion to decline to award punitive damages. *See, e.g.*, Ex. E, Plaintiff's Proposed Instruction No. 20 ("You may in your discretion decline to assess punitive damages."). At the same time, however, the Court should expressly acknowledge that the facts set forth in "Exhibit A" — including, for example, the fact that "Morgan Stanley knew of [Sunbeam CEO Al] Dunlap's fraudulent scheme and helped to conceal it until after Sunbeam could close the purchase of Coleman," Ex. F, Exhibit A to 3/23/05 Order, at 25 — have been deemed established for all purposes in this action, including with respect to the jury's decision whether to impose punitive damages, and if so, in what amount. Expressly instructing the jury to that effect in no way challenges its discretion to

[3] *See, e.g.*, *First Interstate*, 511 So. 2d at 539 (allowing punitive damages "'where torts are committed with fraud, actual malice or deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others'" (quoting *Winn & Lovett Grocery Co. v. Archer*, 171 So. 214, 221-22 (Fla. 1936)) (emphasis in original)); *Ingram v. Pettit*, 340 So. 2d 922, 924 (Fla. 1976) ("The intentional infliction of harm, or a recklessness which is the result of an intentional act, authorize[s] punishment which may deter future harm to the public by the particular party involved and by others acting similarly.").

decline to award any punitive damages; rather, it merely states the obvious fact that the "conclusively established" facts easily satisfy the "clear and convincing" standard of proof.

CONCLUSION

Accordingly, the Court should reject Defendant's repeated contention that elements of CPH's claims must be proved by clear and convincing evidence for CPH to prove entitlement to punitive damages.

Dated: April 25, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 25th day of April, 2005.

/s/ Jeffrey T. Shaw /SH
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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

MORGAN STANLEY'S REPLY TO CPH'S BRIEF REGARDING THE REQUIREMENT THAT PLAINTIFF PROVE ENTITLEMENT TO AN AWARD OF PUNITIVE DAMAGES BY CLEAR AND CONVINCING EVIDENCE IN PHASE II

In its response to Morgan Stanley's April 22 motion, CPH has now shifted its position regarding the burden of proof for "entitlement" to punitive damages. Whereas CPH previously endorsed a sort of "sliding scale" approach to the clear and convincing evidence requirement, under which the aggregate "expected value" that ***all*** the elements of fraud were established had to exceed some threshold, 4/19/05 Tr. at 9370, it now argues that ***only*** the defendant's "wrongful intent" needs to be proved by clear and convincing evidence. *See* 4/25/05 CPH Motion in Response at 3. This new position is also clearly wrong under Florida law.[1]

Morgan Stanley's April 22 motion identifies four controlling principles, none of which CPH even attempts to dispute. ***First***, Florida Statutes section 768.725 applies in this case, providing that a plaintiff seeking punitive damages "must establish at trial, by clear and convincing evidence, its entitlement to an award of punitive damages." ***Second***, entitlement is a well-defined Florida common law concept that requires a plaintiff to establish certain legal prerequisites to be eligible to receive an award of punitive damages. *See, e.g., Winn & Lovett*

[1] CPH has not attempted to controvert Morgan Stanley's explanation of why a "sliding scale" approach to the different elements of fraud is both illogical and unprecedented. *See* 4/22/05 Morgan Stanley Motion at 3-4.

EXHIBIT
6

Grocery Co. v. Archer, 171 So. 214, 219, 222-23 (Fla. 1936). ***Third***, under Florida law, the prerequisites to receiving an award of punitive damages include proving ***all*** of the elements of the underlying cause of action. *See Oliveira v. Ilion Taxi Aero Ltda*, 830 So. 2d 241, 242 (Fla. 4th DCA 2002) (punitive damages may not be awarded as a matter of law "where there is no finding of liability"); *Liggett Group Inc. v. Engle*, 853 So. 2d 434, 451 (Fla. 3d DCA 2003) (plaintiff must prove all elements of the underlying cause of action, including damages, as "a prerequisite to an award of punitive damages"), *rev. granted*, 873 So. 2d 1222 (Fla. 2004). ***Fourth***, where a tort or offense has multiple elements, Florida courts have consistently required the requisite level of certainty to apply ***to each individual element***. *See, e.g., Stanley v. State*, 560 So. 2d 1269, 1270 (Fla. 3d DCA 1990) (beyond reasonable doubt); *Ritter v. Shamas*, 452 So. 2d 1057, 1059 (Fla. 3d DCA 1984) (clear and convincing evidence); *Sharp v. Long*, 283 So. 2d 567, 568 (Fla. 4th DCA 1973) (preponderance). Considered together, these propositions establish that there must be clear and convincing evidence of each element of fraud — misrepresentation, materiality, reliance, causation, and damages — before CPH may recover punitive damages in this case.

Instead of directly responding to the statutes and case law citations raised in Morgan Stanley's motion, CPH simply recites several standard jury instructions and asserts, ***without any supporting authority***, that "[e]ntitlement to punitive damages * * * hinges on clear and convincing evidence that the defendant acted with wrongful intent." 4/25/05 CPH Motion in Response at 3. While that assertion is no doubt true as far as it goes, the above showing demonstrates that the clear and convincing evidence requirement goes further. While the Florida Legislature ***could have*** required that only the existence of "wrongful intent" be proven by clear

and convincing evidence before punitive damages are legally recoverable, that is not what the legislature actually did.

The instructions CPH cites track Florida Statutes section 768.72, which provides that in all causes of action arising after October 1, 1999, "[a] defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence." §§ 768.72(2), (4). But CPH ignores section 768.725 and neglects to mention that section 768.72 goes on to define "intentional misconduct" in a way that is critical to understanding how section 768.72 operates in fraud cases: According to the statute, "'[i]ntentional misconduct' means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, ***resulting in injury or damage.***" *Id.* § 768.72(2)(a) (emphasis added).[2] These requirements clearly go beyond the mere existence of "wrongful intent," because the phrase "resulting in injury or damage" necessarily incorporates the existence of reliance, causation, and damages; without proof of those elements there is no "resulting" injury. Thus, both sections 768.72 and 768.725 require clear and convincing proof of ***all the elements of fraud.***[3]

CPH's discussion of *Ablanedo* — the sole case cited in Morgan Stanley's April 22 motion that CPH discusses at any length — similarly misses the point. At the time of *Ablanedo*, proof of each element of fraud was ***both necessary and sufficient*** to establish liability for punitive damages. *See First Interstate Dev. Corp. v. Ablanedo*, 511 So. 2d 536, 539 (Fla. 1987). That the

---

[2] Because fraud is an intentional tort, the definition of "gross negligence" is irrelevant here.

[3] The remaining two elements of fraud — misrepresentation and materiality — are respectively encompassed in section 768.72 by the requirement that the "defendant had actual knowledge of the wrongfulness of the conduct" and the requirement that there be a "high probability that injury or damage to the claimant would result."

Legislature subsequently raised the burden of proof to establish punitive "entitlement" to clear and convincing evidence does nothing to disrupt the requirement that the plaintiff demonstrate ***all*** elements of the cause of action by the applicable standard before punitive damages may be awarded. CPH never addresses this point.

Accordingly, CPH must prove reliance, causation, and damages (the elements of fraud that are not established by virtue of the Court's sanction in its March 23, 2005 Default Order) by clear and convincing evidence in order to receive punitive damages in this case.[4]

[4] This is of course assuming *arguendo* that the Court does not grant Morgan Stanley's request to withdraw the sanction from the Phase II proceedings. Morgan Stanley reiterates the point that it violates Florida law and due process to extend the effect of the sanction to Phase II of the trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 27th day of April 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO: 2003 CA 005045 AI

AGREED ORDER PERMITTING FOREIGN ATTORNEYS TO APPEAR

THIS CAUSE having come to be considered upon the Plaintiff's Coleman (Parent) Holdings Inc.'s Motion to Permit Foreign Attorney to Appear, and the Court having reviewed the file and being fully advised in the premises, it is hereby,

ORDERED and ADJUDGED that Thalia Myrianthopoulos of Jenner & Block LLP is admitted Pro Hac Vice in the above-styled matter on behalf of the Plaintiff.

DONE AND ORDERED at West Palm Beach, County, Florida, this 16 day of February, 2005.

ELIZABETH T. MAASS
CIRCUIT COURT JUDGE

Copies have been furnished to all counsel on the attached counsel list.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

CASE NO. CA 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,
Defendant.

COLEMAN (PARENT) HOLDINGS INC.'S MOTION FOR LEAVE TO WITHDRAW COUNTS I AND IV OF ITS COMPLAINT

Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, respectfully requests that this Court enter an Order granting CPH leave to withdraw its fraudulent misrepresentation claim (Count I) and its negligent misrepresentation claim (Count IV) while leaving the remaining two claims in full force and effect. In support of this motion, CPH states as follows:

1. On February 15, 2005, in open Court, CPH presented its notice of voluntary dismissal of Counts I and IV of its complaint. Morgan Stanley objected to this notice.

2. In light of Morgan Stanley's objection, out of an abundance of caution, CPH is seeking by this motion leave to withdraw Counts I and IV. Florida law provides that a party seeking to withdraw some but not all of its claims may do so by way of motion. *See, e.g.*, *Trawick's Florida Practice & Procedure* § 21-3 (2005 edition) ("A party seeking affirmative relief who wants to eliminate less than all parties or causes of action may not do so under Rule 1.420(a)(1) or Rule 12.420. . . . Causes of action are withdrawn or stricken on motion."); *see also Byxbee v. Reyes*, 850 So. 2d 595, 596 (Fla. 4th DCA 2003) (case in which plaintiff withdrew claim for mental anguish); *McCormick v. Molenkamp*, 449 So. 2d 384, 385 (Fla. 1st DCA 1984) (case in which plaintiff filed a motion during trial for voluntary dismissal of specific performance count that was granted by the trial court); *Broward Cty. Port Auth. v. F.M. Rule & Co.*, 119 So. 2d 82, 84 (Fla. 2d DCA 1960) (case in which court granted plaintiff's motion to

withdraw and dismiss one count of its complaint during hearing on motion for summary judgment).

3. This Court plainly has the authority to grant CPH's motion to withdraw Counts I and IV. Indeed, under Florida law, trial courts indisputably have authority to allow amendments to pleadings even during trial to conform the pleadings to the evidence. *See, e.g., Florida East Coast Ry. Co. v. Shulman*, 481 So. 2d 965, 967 (Fla. 3rd DCA 1986) (upholding trial court's decision to allow plaintiff to amend his complaint to add an allegation even after plaintiff had rested his case); *Holy Temple Church of God in Christ, Inc. v. Maxwell*, 578 So. 2d 877, 879 (Fla. 1st DCA 1991) (concluding that trial court improperly denied party's request to amend its complaint at trial to add a claim). If trial courts possess authority to allow amendments to complaints pursuant to motion at trial — even to add claims — then *a fortiori*, a trial court has the authority to allow motions to withdraw claims before trial.

4. The cases cited by Morgan Stanley in its filing on this issue are not to the contrary. They all address situations in which the plaintiff sought to voluntarily dismiss some, but not all, of their claims as of right. Here, in contrast, CPH is seeking leave of Court to withdraw two of its four claims. The authorities cited above demonstrate the Court's power to grant that relief. *Cf. Landa v. H.F. Mason*, 407 So. 2d 392, 394 (Fla. 3d DCA 1981) ("There can be no dismissal without order of court of less than all the causes in the action") (emphasis added).

5. Allowing CPH to withdraw two of its four claims would cause Morgan Stanley no prejudice whatsoever. Indeed, Morgan Stanley sought that very same relief in its recent summary judgment filings, and argued in response to one of CPH's expert motions in limine that CPH's fraudulent misrepresentation and negligent misrepresentation claims should be dismissed. *See* MS Resp. to CPH's Mot. In Limine No. 19 at 3 n.2 (Morgan Stanley arguing in response to

CPH's motion in limine concerning Grinblatt's testimony that "[i]f CPH's Motion in Limine No. 19 is construed as a formal election and a rejection by CPH of out of pocket losses, then the Court should dismiss Counts I and IV").

6. CPH's motion, if granted, will simplify the trial of this case immensely. Thus, this Court should grant CPH leave to withdraw Counts I and IV of its complaint, while leaving the remaining two counts in full force and effect.

Dated: February 16, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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1214116 v1

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and hand delivery to all counsel on the attached list on this 16th day of Feb., 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

CASE NO. CA 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S RESPONSE TO MORGAN STANLEY'S MOTION IN LIMINE (NO. 22) TO EXCLUDE TESTIMONY OF EVIDENCE REGARDING PREJUDGMENT INTEREST

Morgan Stanley has filed a motion in limine to "exclude CPH from presenting any testimony, evidence, or argument to the jury regarding prejudgment interest" (at 1) on the ground that "the Court must protect and retain its ministerial role and only address prejudgment interest in the event the jury were to render a verdict awarding compensatory damages" (at 3). Given that Morgan Stanley's motion seeks to clarify that the Court will decide CPH's entitlement to prejudgment interest, and does not ask the Court to address the merits of that entitlement at this time, CPH has no objection to Morgan Stanley's motion.

Dated: February 16, 2005

Respectfully submitted,

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

MORGAN STANLEY'S MOTION FOR RECONSIDERATION AND CLARIFICATION OF ORDER ON PLAINTIFF'S MOTION IN LIMINE (NO. 18) TO BAR EVIDENCE AND ARGUMENT CONCERNING PLAINTIFF'S COUNSEL'S RETENTION OF PROFESSOR MARK GRINBLATT AS AN EXPERT IN PRIOR UNRELATED CASES

Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully moves the Court for reconsideration and clarification of its order on CPH's Motion in Limine No. 18 regarding Morgan Stanley's right, on redirect, to question Mr. Grinblatt regarding Jenner & Block's prior retention of Mr. Grinblatt. Such questioning on redirect is appropriate where, as here, the opposing party focuses on an expert's credibility. *See Tomlian ex rel. Tomlian v. Grenitz*, 782 So. 2d 905, 907 (Fla. 4th DCA 2001) (defendant's expert could testify, over plaintiff's objection, that he had been retained in the past by plaintiff's counsel because "the expert's credibility was in issue from the beginning"), *disapproved in part on other grounds*, 858 So. 2d 999 (2003).

In support of its motion, Morgan Stanley states as follows:

STATEMENT OF FACTS

CPH filed its Motion in Limine No. 18 to seek to bar evidence and argument regarding Jenner & Block's retention of Mr. Grinblatt in two cases. CPH argued that the prior retention was irrelevant and would cause unfair prejudice. The Court granted CPH's motion but "without prejudice to MS & Co.'s right on redirect, if otherwise appropriate, to question the witness

concerning whether other clients have paid him fees for similar work equal to or in excess of the fees charged here." (Feb. 3, 2005 Order on Plf's Mot. in Limine (No. 18).)

CPH also moved in a section of its Motion in Limine No. 19 to bar Mr. Grinblatt, for the same reasons as in its Motion in Limine No. 18, from testifying that Jenner & Block retained him in previous cases. The Court has yet to rule on that motion.

ARGUMENT

Morgan Stanley has only one expert on damages, Mr. Grinblatt, so his credibility is key. Morgan Stanley anticipates that CPH will attack his credibility because he charges $1,000 an hour. If CPH challenges Mr. Grinblatt's credibility, Morgan Stanley would like him to be permitted to testify on redirect that Jenner & Block's clients have hired him twice in the past. (Jan. 7, 2005 Grinblatt Dep. 29:14-19 (Ex. 1).) In one of those cases, about four years ago, Jenner & Block's client paid Mr. Grinblatt $800 an hour. (*Id*.)

Florida courts allow a party to rehabilitate an expert's credibility on redirect by testifying that he or she was retained previously by the opposing party's law firm. *See Tomlian*, 782 So. 2d at 907. In *Tomlian*, the defendant's expert testified that the plaintiff's law firm had retained him in the past. *Id.* The trial court overruled the plaintiff's objection to that testimony. *Id.* The District Court of Appeal affirmed, noting that "[a]lthough that fact would not be relevant in a case in which there were going to be no attacks on the credibility or bias of the experts, in this case the experts' credibility was in issue from the beginning." *Id.* If CPH attacks Mr. Grinblatt's credibility or bias, then *Tomlian* should apply to allow Morgan & Stanley to rehabilitate him on redirect through testimony that he has testified in the past for Jenner & Block.

Other Florida courts have followed the same rule as *Tomlian. See Williams v. State*, 397 So. 2d 1049 (Fla. 4th DCA 1981) (no error in State showing that fingerprint expert had been first hired by the defense); *Broward County v. Cento*, 611 So. 2d 1339 (Fla. 4th DCA 1993) (no error

in denying motion in limine to prohibit personal injury plaintiff from referring to the fact that the expert had been originally hired by the defendant).

The District Court of Appeal, Second District, has reached a different conclusion on a different set of facts. In *Milburn v. State*, 742 So. 2d 362, 365 (Fla. 2d DCA 1999), the court found that it was error for the prosecution's expert to testify on redirect that defendant's counsel attempted to hire him after the prosecution had already retained him. The *Milburn* court recognized, however, that "[t]he Fourth District [] has reached a contrary holding." *Id.*

Milburn does not apply here. First, this Court is bound to follow the rule the Fourth District established in *Tomlian.* *See State v. Hayes*, 333 So. 2d 51, 53 (Fla. 1976) ("[I]f the district court of the district in which the trial court has decided the issue, the trial court is bound to follow it."). Second, in this case, Jenner & Block actually hired Mr. Grinblatt — twice. That demonstrates a more substantial link between Mr. Grinblatt and Jenner & Block than between the expert and defendant in *Milburn*, and thus greater relevance.

Furthermore, or in the alternative, Morgan Stanley respectfully requests that the Court clarify its position on the extent to which Morgan Stanley may question Mr. Grinblatt about prior engagements. The Court's order granted CPH's motion "without prejudice to MS & Co.'s right on redirect, if otherwise appropriate, to question the witness concerning whether other clients have paid him fees for similar work equal to or in excess of the fees charged here." (Feb. 3, 2005 Order.) This statement is ambiguous — it is unclear whether it is a limitation or an illustration, in other words, whether (a) Mr. Grinblatt may testify ***only*** as to those past cases in which he was paid $1,000 or more (the amount Mr. Grinblatt charged for this case), or (b) Mr. Grinblatt may testify as to such engagements and those in which he was paid less than $1,000. Because Mr. Grinblatt's rates have increased over the years (as have the rates for CPH's

experts),[1] if the Court intended this portion of its order as a limitation, then he would effectively be barred from testifying as to any previous engagements because he previously charged less than $1,000 an hour. This would unfairly prejudice Morgan Stanley because it would be unable to address CPH's inevitable attack on Mr. Grinblatt's compensation.

[1] Mr. Nye, for example, increased his rates from $500 an hour about a year ago to $550 an hour today. (Jan. 12, 2005 Nye Dep. 25:6-21 (Ex. 2).) Mr. Horton increased his rates from $400 an hour about six months ago to $450 an hour today. (Horton Dep. 70:7-13, 72:3-17 (Ex. 3).)

WHEREFORE, Morgan Stanley respectfully requests that this Court (a) reconsider its order barring Mr. Grinblatt from testifying on redirect, if CPH questions his credibility, that Jenner & Block previously retained him; and, (b) clarify its order and allow Mr. Grinblatt, if otherwise appropriate, to testify as to any prior engagement regardless of the hourly rate charge in such engagement.

CERTIFICATE OF SERVICE

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

MORGAN STANLEY'S MOTION FOR RECONSIDERATION AND CLARIFICATION OF ORDER ON PLAINTIFF'S MOTION IN LIMINE (NO. 18) TO BAR EVIDENCE AND ARGUMENT CONCERNING PLAINTIFF'S COUNSEL'S RETENTION OF PROFESSOR MARK GRINBLATT AS AN EXPERT IN PRIOR UNRELATED CASES

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 16th day of February 2005.

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Exhibit 1

CIRCUIT COURT, FIFTEENTH JUDICIAL DISTRICT

IN AND FOR PALM BEACH COUNTY, FLORIDA

- - - - - - - - - - - - - - - - X

COLEMAN (PARENT) HOLDINGS, :

Plaintiff, : Case No. 2003 CA

v. : 005045 AI

MORGAN STANLEY & CO., INC., :

Defendant. :

- - - - - - - - - - - - - - - - X Pages 1-348

COPY

VIDEOTAPE DEPOSITION OF MARK GRINBLATT
District of Columbia
Friday, January 7, 2005

Reported by: Marijane Simon, RDR

Job No. 165111

A. No.
Q. Adverse to Kirkland & Ellis?
A. I'm sorry. I didn't --
Q. Adverse to Kirkland & Ellis, where they were on the other side.
A. I don't know specifically the answer to that, but I suspect the answer is no.
Q. What is the nature of your compensation in this matter? What describes -- How are you being paid?
A. I'm being paid on an hourly rate --
Q. And what is that?
A. -- plus out of pocket expenses.
My hourly rate is very similar to the hourly rate when I last worked with Jenner & Block but is a little bit higher. I worked -- I worked at $800 an hour for Jenner & Block, and I'm -- about four or five years ago, and now I'm at a thousand dollars per hour.
Q. Do you know how many hours you've put into this matter?
A. I could easily be off by a hundred hours on this, in part because I've been out of town for such a long period of time and haven't looked at my files on this matter since early

Exhibit 2

Confidential Exhibit

Exhibit 3

Confidential Exhibit

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S MOTION TO STRIKE THE PLAINTIFF'S NOTICE OF VOLUNTARY DISMISSAL

Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby requests that the Court enter an order striking the Notice of Voluntary Dismissal filed by the plaintiff Coleman (Parent) Holdings Inc. as a nullity and compelling the plaintiff to amend its complaint as required by controlling precedent from the Fourth District Court of Appeal. In support, Morgan Stanley states as follows:

1. On February 15, 2005, the plaintiff filed a Notice of Voluntary Dismissal ("Notice") that improperly sought to dismiss two counts of its four count complaint against Morgan Stanley. The plaintiff's Notice stated that it was dismissing its fraudulent misrepresentation claim (Count I) and its negligent misrepresentation claim (Count IV).

2. The plaintiff's Notice is ineffective and "a nullity" under Florida Rule of Civil Procedure 1.420(a)(1) and controlling precedent from the Fourth District Court of Appeal. In

Deseret Ranches of Fla., Inc. v. Bowman, 340 So. 2d 1232, 1233 (Fla. 4th DCA 1976), the Court held:

> Only an entire action may be voluntarily dismissed under Fla. R. Civ. P. 1.420(a)(1); there can be no partial dismissal, no dismissal of less than all causes of action.

The Court also stated that "Appellees attempted to *do the impossible* when they filed a Notice of Dismissal as to one count of a two count complaint." Id. (emphasis added). Further, the Court specifically held that the purported Notice in *Deseret Ranches* "was a nullity." Id. The plaintiff's Notice purporting to voluntarily dismiss two counts of their four count complaint against Morgan Stanley is likewise a nullity.

3. In *Deseret Ranches*, the Court also held that "[t]he proper method of deleting less than all counts from a pleading is amendment of the pleading pursuant to Fla. R. Civ. P. 1.190." *Deseret Ranches*, 340 So. 2d at 1233. Therefore, instead of attempting to voluntarily dismiss these counts, the plaintiff should be compelled to amend its complaint to delete references to these counts.

4. The Fourth District recently revisited its decision in Deseret Ranches, but distinguished its prior decision only in a situation when the dismissed count and the remaining count were "completely unrelated" causes of action based upon "totally different sets of facts." *See Guess v. City of Miramar*, 889 So. 2d 840, 848 (Fla. 4th DCA 2004).[1] That is clearly not the case here. The claims voluntarily dismissed by the plaintiff arose from the very same set of facts that are the basis for its remaining claims against Morgan Stanley. Therefore, the holding of

[1] The *Guess* court agreed that there was a need to change the rule, but "also acknowledge[d] that the rule was in fact amended three times since …[1975]…, yet this particular provision has never been altered.

Deseret Ranches is still controlling in this case. The plaintiff's Notice is a nullity; therefore, the plaintiff should amend its complaint to accomplish the result that it improperly attempted to obtain through its Notice.

5. Morgan Stanley has been severely prejudiced in its trial preparation and strategy for defense by the plaintiff's attempt to amend its complaint and cause of action by voluntarily dismissing Counts I and IV of its complaint on the eve of trial. As this court knows, Morgan Stanley has consistently argued that New York law applies to the plaintiff's claims and has based its trial preparation, defense strategy (including issues such as "sophisticated investor" and "special relationship"), witness preparation, expert witnesses, and jury instructions at least partly on this court rulings that New York law applies to the plaintiff's claims in Counts I and IV and that there appeared to be two separate frauds within the plaintiff's complaint. Now, on the eve of trial, in the midst of crucial motions regarding the evidence, expert witnesses, and the issues, the plaintiff has changed the entire complexion of the case and the nature of its cause of action.

WHEREFORE, Morgan Stanley requests that this Court enter an order granting this Motion, strike the plaintiff's Notice of Voluntary Dismissal as a nullity, compel the plaintiff to amend its complaint to delete references to Counts I and IV, and grant such further relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and hand delivery on this 10th day of February, 2005.

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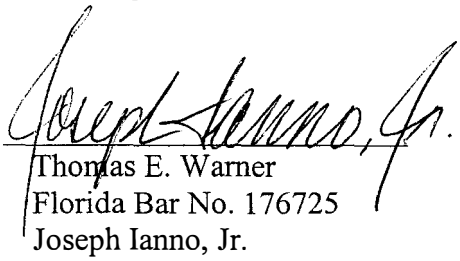
BY: 
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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

NOTICE OF FILING PLEADING UNDER SEAL

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed exhibits 2 and 3 of its Motion for Reconsideration and Clarification of Order on Plaintiff's Motion in Limine (No. 18) to Bar Evidence and Argument Concerning Plaintiff's Counsel's Retention of Professor Mark Ginblatt as an Expert in Prior Unrelated Cases under seal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and hand delivered on this 15th day of February, 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

CASE NO: CA 03-5045 AI

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SHARON R. BOCK
CLERK & COMPTROLLER
CIRCUIT CIVIL DIVISION

MORGAN STANLEY & CO. NOTICE OF FILING OF PROPOSED ORDER

Pursuant to this Court's order, Morgan Stanley submits its Proposed Order on Plaintiff's Motion for an Adverse Inference. Morgan Stanley incorporates the findings of fact that were set forth by the Court during its February 15, 2005, Pre-Trial Hearing. Although, as the Court is aware, Morgan Stanley does not agree with and, indeed, objects to the Court's findings, Morgan Stanley submits them, reserving all rights on appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 16th day of February 2005.

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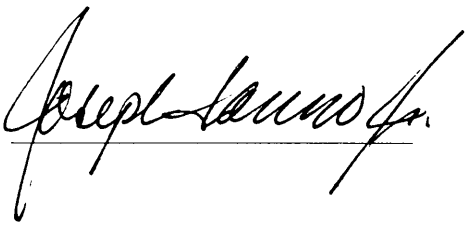
BY: 

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

CASE NO: CA 03-5045 AI

[*PROPOSED*] ORDER

THIS CAUSE came before the Court for an evidentiary hearing on Plaintiffs' Motion For Adverse Inference. This Court has reviewed the motion and the parties' memoranda of law, has reviewed the evidence, has considered the parties' arguments, and is otherwise fully advised in the premises. Based on the foregoing, this Court makes the following findings of fact and conclusions of law.

Findings of Fact

The Agreed Order entered April 16, 2004, required Morgan Stanley to search the oldest full backup that exists for e-mails for certain identified employees or former employees, required Morgan Stanley to provide its counsel the responses for responsiveness and privilege review all the e-mails that either were dated between February and April 15, 1998 and all e-mails containing one of 29 key words. The Agreed Order further provided that all non-privileged e-mails responsive to the request had to be produced by May 14th and a privilege log generated and a certificate of compliance completed.

The SEC regulations required Morgan Stanley to maintain e-mails in readily accessible form for three years. Morgan Stanley knew Sunbeam litigation was likely as of March of 1998. Despite the affirmative duty on Morgan Stanley's part arising out of the litigation to produce its

e-mails and contrary to federal law requiring it to preserve the e-mails, Morgan Stanley failed to preserve some e-mails and failed to produce all e-mails required by the agreed order.

The failings include overwriting e-mails after 12 months; failing to conduct proper searches for tapes that may contain e-mails; providing a certificate of compliance known to be false when made and never amended to reflect its falsity; failing to timely notice CPH when additional tapes were located; failing to use reasonable efforts to search the newly discovered tapes; failing to timely process and search data held in the search area or notify CPH of the deficiency; failing to write a program consistent with the agreed order; and discovering the deficiencies only after CPH was given the opportunity to check Morgan Stanley's work and the Morgan Stanley attorneys were required to certify the completeness of the prior searches; and that many of these failings were done knowingly, deliberately and in bad faith.

Conclusions of Law

The Court has the authority and discretion to impose a wide range of sanctions in a case such as this including those set forth in Florida Rule of Civil Procedure 1.380(b)(2).

In its written motion, Plaintiff asked the Court for a number of different remedies, including an adverse inference that Morgan Stanley's noncompliance with the April 16, 2004 Agreed Order can give rise to an adverse inference that the contents of the missing e-mails would be harmful to Morgan Stanley's defense in this case; that CPH should be allowed to present evidence of Morgan Stanley's discovery misconduct on the issue of punitive damages; and that CPH is entitled to compensation for Morgan Stanley's misconduct. In an *Ore Tenus* Motion made on February 14, 2005, Plaintiff further asked this court for a default judgment against Morgan Stanley or in the alternative a switching of the burden of proof at trial.

As for Plaintiff's first requested remedy for an adverse inference, such an instruction is not an appropriate remedy here. An adverse inference instruction is generally not appropriate

under Florida law. Such an instruction is appropriate only in the limited circumstances where the moving party establishes "to the satisfaction of the court that the absence of the records hinders his ability to establish a prima facie case." *Public Health Trust of Dade county v. Valcin*, 507 So. 2d 596, 599, 600 (Fla. 1987). The Fourth District has strictly interpreted this requirement, holding that the missing evidence be "essential to the opposing party's prima facie case." *Jordan ex rel. Shealey v. Masters*, 821 So. 2d 342, 346-47 (Fla. 4th DCA 2002). The Fourth District "found no case approving an instruction for an adverse inference to be drawn from the failure to produce evidence." *Id.* As to the shifting of the burden of proof, there too this is appropriate only "where evidence necessary to prove a prima facie case is missing due to the action of the opposing party. . ." *Id.*

While this Court finds that Morgan Stanley's actions have impacted Plaintiff's ability to prove its case, the Court cannot find at this time that Plaintiff is incapable of proving its prima facie case without evidence that might come from the missing, unprocessed or unreviewed tapes, particularly while that process is ongoing and the results unknown. Accordingly, this Court does not believe an adverse inference is warranted.

As for Plaintiff's request that Morgan Stanley be defaulted, that remedy is also too extreme. So too is a complete shifting of the burden of proof.

The Court finds that the appropriate remedy here is that Plaintiff shall be permitted to use any newly discovered evidence in support of its case, but the defendant shall be barred from using any newly discovered evidence in support of its defenses.

Plaintiff may elect to proceed to trial as scheduled and subject to this Order, or plaintiff may elect a reasonable continuance to complete discovery regarding the subject e-mails. Morgan Stanley shall bear the cost and expense of any such discovery.

An order imposing monetary sanctions is appropriate, as is an order requiring Morgan Stanley to pay all costs reasonably related to attempts Plaintiff may make to evaluate any additional evidence produced after Morgan Stanley completes its production of e-mail messages.

Based on the foregoing findings of fact and conclusions of law, it is ORDERED AND ADJUDGED that Plaintiffs' Motion for An Inference is DENIED, but that pursuant to Florida Rule of Civil Procedure 1.380, Morgan Stanley shall pay a monetary sanction [that compensates Plaintiff for reasonable expenses caused by the failure of Morgan Stanley to obey the Agreed Order, including attorneys' fees], and if Plaintiff elects a continuance until such time as Morgan Stanley completes its production of e-mail messages and Plaintiff has had an opportunity to evaluate the produced evidence, Morgan Stanley is ordered to pay all costs reasonably related to the continuance.

DONE AND ORDERED at Palm Beach County, Florida, this 16th day of February, 2005.

ELIZABETH T. MAASS
CIRCUIT COURT JUDGE

Copies have been furnished to all counsel on the attached counsel list.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO: 2003 CA 005045 AI

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO BIFURCATE TRIAL

THIS CAUSE having come to be considered upon Coleman (Parent) Holdings Inc.'s Motion to Bifurcate Trial, and the Court having reviewed the file and being fully advised in the premises, it is hereby,

ORDERED and ADJUDGED: the Motion is Granted. Trial of the amount of punitive damages to be assessed shall be bifurcated from for trial from the remaining issues.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, this 16 day of Feb, 2005.

ELIZABETH T. MAASS
CIRCUIT COURT JUDGE

Copies have been furnished to all counsel on the attached counsel list.

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

ORDER ON Defendant's MOTION IN LIMINE NUMBER 18

THIS CAUSE having come before this Court on February 16, 2005 upon Defendant's Motion in Limine Number 18, and the Court having reviewed the pleadings on file, heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is granted, in part, and denied, in part. Dr. Gnory shall be examined outside the jury's presence to establish that he has a sufficient factual basis to support the opinions to be expressed, or if a sufficient factual basis otherwise has been presented to the jury. ~~The~~ See Fla. Stat. 90.705(2). Only he testifies, he shall be permitted to testify generally as to relevant economic and financial terms and transactions; as to what Sunbeam did; and as to

the effects, what Sunbeam did, without ascribing a motive thereto. G

"Granted" for purposes of the Motion in Limine addressed in this Order shall mean that the parties and their counsel shall not refer to or attempt to introduce into evidence, or otherwise place before the jury, the matter referred to without first proffering the good faith basis to believe that the matter is relevant and admissible outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 16 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

WPB#589635.1

16div-011334

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

ORDER ON Defendant's **MOTION IN LIMINE NUMBER** 19

THIS CAUSE having come before this Court on February 16, 2005 upon Defendant's Motion in Limine Number 19, and the Court having reviewed the pleadings on file, heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is Granted, in part, and Denied, in part. Mr. Horton's opinions shall be limited to the customs and practices of investment bankers involved in mergers and acquisitions, and the customs and practices of parties involved in such transactions who conduct due diligence. He may testify that, in his opinion, certain events constituted a material adverse change under the contracts. When testifying as to the ~~importance of items~~ other whether certain alleged representations or omissions made by

Morgan Stanley were important, he still not testify whether or not he believed them to be "material," as a term of art. Finally, this Order is without prejudice to MS & Co.'s right to seek an instruction to the jury to not consider evidence of custom in determining the reasonableness of reliance, if NY law is ultimately found to control at any point, if such an instruction is otherwise proper.

"Granted" for purposes of the Motion in Limine addressed in this Order shall mean that the parties and their counsel shall not refer to or attempt to introduce into evidence, or otherwise place before the jury, the matter referred to without first proffering the good faith basis to believe that the matter is relevant and admissible outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 16 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

WPB#589635.1

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

ORDER ON Defendant's **MOTION IN LIMINE NUMBER** 20

THIS CAUSE having come before this Court on February 16, 2005 upon Defendant's Motion in Limine Number 20, and the Court having reviewed the pleadings on file, heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is Granted, in part, and Denied, in part. Mr. Gillfillan may testify as to the reasons of secured loan funding, including its relationship to shareholder equity, without incorporating an inference or statement that the alleged fraud placed the Branch shares held by CPH at risk. He may not testify to MSL & Co. or MSSF's motivation in extending the loan, but may testify to the economic analysis that would be conducted in determining whether such a loan should be extended. He will be examined as to

WPB#589635.1

16div-011339

the jury's presence to determine whether there is a sufficient factual predicate for him to opine that Sunbeam had a sufficient asset base to support the loan. He may not testify that some types of banking organizations have mechanisms in place to prevent economic self interest of employees from overriding the economic interest of the institution, or whether MS & Co. or MSSF had such a mechanism in place. He may testify that in the industry, abandoning a deal is perceived as a detriment to future business, and successfully completing a deal is seen as a draw to future business, without applying that those factors did motivate MS & Co. or MSSF.

"Granted" for purposes of the Motion in Limine addressed in this Order shall mean that the parties and their counsel shall not refer to or attempt to introduce into evidence, or otherwise place before the jury, the matter referred to without first proffering the good faith basis to believe that the matter is relevant and admissible outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 16 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

AGREED ORDER GRANTING DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S NOTICE OF VOLUNTARY DISMISSAL

THIS CAUSE having come before this Court on February 16, 2005 upon Defendant's Motion to Strike Plaintiff's Notice of Voluntary Dismissal, and the Court being fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Defendant's Motion to Strike Plaintiff's Notice of Voluntary Dismissal is granted. Plaintiff's Notice of Voluntary Dismissal dated February 15, 2005 is hereby stricken.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 16 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

WPB#587529.14

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO: 2003 CA 005045 AI

AGREED ORDER PERMITTING FOREIGN ATTORNEYS TO APPEAR

THIS CAUSE having come to be considered upon the Plaintiff's Coleman (Parent) Holdings Inc.'s Motion to Permit Foreign Attorney to Appear, and the Court having reviewed the file and being fully advised in the premises, it is hereby,

ORDERED and ADJUDGED that Thalia Myrianthopoulos of Jenner & Block LLP is admitted Pro Hac Vice in the above-styled matter on behalf of the Plaintiff.

DONE AND ORDERED at West Palm Beach, County, Florida, this 16 day of February, 2005.

ELIZABETH T. MAASS
CIRCUIT COURT JUDGE

Copies have been furnished to all counsel on the attached counsel list.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

CASE NO. CA 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S RESPONSE TO MORGAN STANLEY'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Almost three months after the close of fact discovery and over 20 months after Morgan Stanley served its document request cited in its motion, Morgan Stanley has moved to compel the production of internal MAFCO statements and ledger entries reflecting the value at which MAFCO placed its Sunbeam investment on its internal books, contending (at 1) that it "only recently learned of the existence of such documents" and that the documents "have been subject to an outstanding discovery request for over a year and a half." Morgan Stanley's motion is untimely and baseless because: (1) on August 14, 2003, CPH responded to the document request cited by Morgan Stanley by declining to produce the documents in question; (2) on April 9, 2004, CPH responded to another document request that Morgan Stanley ignores by stating that it was refusing to produce statements and ledgers of the type Morgan Stanley now requests; and (3) Morgan Stanley, despite knowing of the existence of these statements and ledgers and CPH's refusal to produce them, never filed a motion to compel. It is too late to do so now.

1. CPH Refuses On August 14, 2003 To Provide The Documents Now Requested By Morgan Stanley In Response To Its First Document Request Dated June 25, 2003.

Although Morgan Stanley states that documents reflecting the accounting or book value that MAFCO recorded for its Sunbeam investment are responsive to Request No. 9 in Morgan Stanley's first request for production of documents, CPH objected to the overbreadth of that

request and consented to produce only "documents referring or relating to the market valuation of Sunbeam securities" (Ex. A, Response to Request No. 9):

> CPH objects to the phrase "reflecting, referring, or relating to the value" as vague and ambiguous. CPH interprets this request to seek documents referring or relating to the market valuation of Sunbeam securities. Subject to and without waiving these objections or the foregoing Objections, and consistent with CPH's interpretation of this request, CPH will produce documents responsive to this request.

Morgan Stanley describes (at ¶ 2) some back and forth between the parties following the service of this written response, but as the correspondence reveals, CPH never reconsidered or backed down from this limitation.

2. CPH Again Refuses On April 9, 2004 To Provide The Documents Now Requested In Response To A March 10, 2004 Discovery Request That Specifically Sought The Documents Now Demanded by Morgan Stanley.

Morgan Stanley's early knowledge that CPH was refusing to produce internal statements and ledgers of the type Morgan Stanley now demands, is confirmed by CPH's response to Morgan Stanley's sixth request for production, which Morgan Stanley chooses to ignore in its motion. In that document request, Morgan Stanley sought "[a]ll documents that evidence the recognition of revenue or loss of CPH, MAFCO or affiliate company, or the tax treatment and consequences thereof from the sale of Coleman common stock to Sunbeam, including any recognition of revenue concerning the settlement with Sunbeam." *See* Ex. B, Request No. 1. These are exactly the type of documents Morgan Stanley now requests, and based on CPH's response to that request, Morgan Stanley was well aware long ago that CPH was refusing to produce those documents. Specifically, in its April 9, 2004 response to the document request just cited, CPH refused to produce any documents. *See id.*

3. Morgan Stanley Never Moved To Compel Despite Its Early Knowledge Of The Documents At Issue.

Despite CPH's objections to and limitations on the above document requests, Morgan Stanley never filed a motion to compel production while fact discovery was ongoing. Morgan Stanley failed to do so even though it long ago knew that CPH maintained the kind of records now requested. Indeed, although Morgan Stanley was well aware of these kinds of records much earlier, Morgan Stanley concedes (at ¶ 3) that it was aware of the ledgers no later than November 2004. Yet, Morgan Stanley did nothing for three months, waiting to the week of trial to demand production of the documents. Given that the discovery closed on November 23, 2004, Morgan Stanley's demand is an afterthought that comes much too late.

WHEREFORE, for the foregoing reasons, CPH respectfully requests that this Court deny Morgan Stanley's motion to compel production of documents.

Dated: February 17, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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

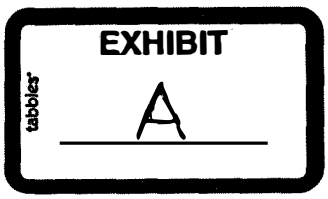
COLEMAN (PARENT) HOLDINGS INC.,	)	
Plaintiff,	)	Case No. 2003 CA 005045 AI
v.	)	Judge Elizabeth T. Maass
MORGAN STANLEY & CO., INC.,	)	
Defendant.	)	

CPH'S RESPONSE TO MORGAN STANLEY & CO. INCORPORATED'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Plaintiff Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys and pursuant to Florida Rules of Civil Procedure 1.280 and 1.350, hereby responds and objects to Morgan Stanley & Co. Incorporated's ("Morgan Stanley") First Request for Production of Documents to Plaintiff ("Requests for Production") dated July 15, 2003:

INITIAL OBJECTIONS

1. CPH objects to the Requests for Production, including all Definitions and Instructions, to the extent that they purport to impose upon CPH any requirements that exceed or are inconsistent with the requirements of the Florida Rules of Civil Procedure or any other applicable rule or court order. For example, CPH will not comply with Instructions Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, and 16 or Definitions Nos. 9 and 15 to the extent that they purport to impose on CPH obligations that are not required by Florida rules and case law. CPH will comply with the applicable rules and law.



2. CPH objects to the Requests for Production to the extent that they seek the production of any documents or information protected from discovery by reason of the attorney-client privilege, the work product doctrine, or any other applicable privilege, doctrine, immunity, or rule. CPH reserves the right to assert any and all privileges to which CPH is entitled under the law. CPH will provide a log of documents withheld from production on the basis of the attorney-client privilege, the work product doctrine, or any other applicable privilege, doctrine, immunity, or rule.

3. CPH objects to the definition of "Coleman Transaction" because Morgan Stanley's definition mischaracterizes the transaction that closed on March 30, 1998 and because the definition is vague and ambiguous to the extent it includes "all related communications, agreements, and transactions." CPH will construe the term "Coleman Transaction" to mean the transaction by which CPH transferred its interest in The Coleman Company to Sunbeam Corporation ("Sunbeam").

4. CPH objects to the extent that any Request for Production seeks documents that are in the public domain and accessible to all parties. In responding to the Requests for Production, CPH will produce publicly available documents to the extent that copies exist in CPH's files of otherwise non-public information responsive to these requests.

5. CPH objects to the definition of "CPH" and "You" to the extent it includes CPH's counsel in this litigation. CPH interprets these definitions to exclude Jenner & Block, LLC and Searcy Denney Scarola Barnhart & Shipley P.A., and their respective attorneys.

6. By stating that CPH will produce documents responsive to a particular document request, CPH does not represent that any such documents exist. Rather, CPH is responding that to the extent such documents are located, they will be produced.

7. By stating that CPH will produce responsive documents, CPH does not concede the relevance of any of the produced documents to the subject matter of this litigation or to the admissibility of those documents at trial.

8. CPH's objections and responses are based on a good-faith search for documents within CPH's possession, custody, and control. CPH expressly reserves the right to amend and/or modify its objections and responses.

9. CPH responds to Morgan Stanley's document requests without waiving the Initial Objections. CPH incorporates, as though fully set forth therein, these Initial Objections into each of the Responses and Objections set forth below.

RESPONSES AND FURTHER OBJECTIONS

REQUEST NO. 1: All documents concerning the negotiation, signing, and implementation of the February 27, 1998 Agreements.

RESPONSE: CPH objects to this request on the grounds that the term "implementation" is vague and ambiguous. CPH will construe the term "implementation" to mean the closing of the transaction by which CPH transferred its interest in The Coleman Company to Sunbeam. To the extent that "implementation" is intended to refer to the integration of The Coleman Company, Inc. into Sunbeam, CPH refers Morgan Stanley to CPH's response to Request No. 26. Subject to and without waiving these objections and the foregoing Initial Objections and consistent with CPH's interpretation of this request, CPH will produce documents responsive to this request.

REQUEST NO. 2: All documents referring or relating to the Coleman Transaction.

RESPONSE: Subject to and without waiving the foregoing Initial Objections, including without limitation CPH's objection to the term "Coleman Transaction," CPH will produce documents responsive to this request.

REQUEST NO. 3: All documents reflecting, referring, or relating to communications between CPH and MS& Co. regarding the Coleman Transaction.

RESPONSE: *Subject to and without waiving the foregoing Initial Objections, including without* limitation CPH's objection to the term "Coleman Transaction," CPH will produce documents responsive to this request.

REQUEST NO. 4: All documents reflecting, referring, or relating to communications between CPH and its Advisors regarding the Coleman Transaction.

RESPONSE: Subject to and without waiving the foregoing Initial Objections, including without limitation CPH's objection to the term "Coleman Transaction," CPH will produce documents responsive to this request.

REQUEST NO. 5: All documents referring or relating to the December 1997 Meeting.

RESPONSE: Subject to and without waiving the foregoing Initial Objections, CPH will produce documents responsive to this request.

REQUEST NO. 6: All documents supporting your allegation that MS & Co. knew about accounting irregularities at Sunbeam.

RESPONSE: Subject to and without waiving the foregoing Initial Objections, CPH will produce documents responsive to this request.

REQUEST NO. 7: All documents supporting your allegation that MS & Co. developed a "strategy" to "conceal" Sunbeam's accounting fraud.

RESPONSE: Subject to and without waiving the foregoing Initial Objections, CPH will produce documents responsive to this request.

REQUEST NO. 8: All documents referring or relating to Arthur Andersen's 1996 and 1997 audit of Sunbeam, including without limitation any review, investigation, analysis, and due diligence of the audit conducted by CPH personnel or its advisors.

RESPONSE: CPH objects to this request as overbroad. CPH interprets this request to seek documents relating to any review, investigation, analysis, and due diligence by CPH personnel or CPH's advisors of Arthur Andersen's 1996 and 1997 audit of Sunbeam. Subject to and without waiving this objection or the foregoing Initial Objections, and consistent with CPH's interpretation of this request, CPH will produce documents responsive to this request.

REQUEST NO. 9: All documents reflecting, referring, or relating to the value of Sunbeam securities.

RESPONSE: CPH objects to the phrase "reflecting, referring, or relating to the value" as vague and ambiguous. CPH interprets this request to seek documents referring or relating to the market valuation of Sunbeam securities. Subject to and without waiving these objections or the foregoing Initial Objections, and consistent with CPH's interpretation of this request, CPH will produce documents responsive to this request.

REQUEST NO. 10: All documents referring or relating to the January-February 1998 discussions between representatives of CPH and MS & Co. referred to in your complaint.

RESPONSE: Subject to and without waiving the foregoing Initial Objections, CPH will produce documents responsive to this request.

REQUEST NO. 11: All documents upon which you will rely for your allegation that MS & Co. "persuaded CPH to sell its shares of Coleman to Sunbeam and accept 14.1 million shares of Sunbeam stock as part of the consideration."

RESPONSE: CPH objects to this request as premature to the extent it seeks exhibits that CPH will seek to introduce at trial. CPH will produce a list of its exhibits in accordance with the rules and the schedule set by the Court. Nevertheless, subject to and without waiving this objection and the foregoing Initial Objections, CPH will produce documents supporting its allegation that MS persuaded CPH to sell its shares of Coleman to Sunbeam and accept 14.1 million shares of Sunbeam stock as part of the consideration.

REQUEST NO. 12: All documents referring or relating to the February 27, 1998 Meeting.

RESPONSE: Subject to and without waiving the foregoing Initial Objections, CPH will produce documents responsive to this request.

REQUEST NO. 13: All documents identified, described, or referred to in your Complaint, including without limitation all documents you allege were prepared by MS & Co.

RESPONSE: Subject to and without waiving the foregoing Initial Objections, CPH will produce documents responsive to this request.

REQUEST NO. 14: All documents identified, described, or referred to in your Complaint that you allege were reviewed by MS & Co.

RESPONSE: Subject to and without waiving the foregoing Initial Objections, CPH will produce documents responsive to this request.

REQUEST NO. 15: All documents referring or relating to any review, investigation, analysis, or due diligence of Sunbeam conducted by CPH or its Advisors, including without limitation all documents reflecting Financial Information obtained by CPH or its Advisors.

RESPONSE: CPH objects to this request as overbroad. CPH further objects to the term "Financial Information" as vague and ambiguous to the extent it seeks "information concerning the past and present financial condition of Sunbeam or Sunbeam securities." CPH will interpret this request to seek documents referring or relating to any review, investigation, analysis, or due diligence conducted by CPH or its Advisors concerning the valuation of Sunbeam or Sunbeam securities. Subject to and without waiving these objections and the foregoing Initial Objections and consistent with CPH's interpretation of this request, CPH will produce documents responsive to this request.

REQUEST NO. 16: All documents reflecting, referring, or relating to due diligence performed by your [sic] or your Advisors in connection with the sale of any company in which you received stock as part of the consideration for sale.

RESPONSE: CPH objects to this request on the grounds that it is overbroad and seeks documents that are not relevant nor reasonably calculated to lead to the discovery of admissible evidence. CPH interprets this request to seek documents reflecting, referring, or relating to due diligence performed by CPH or its Advisors in connection with the transfer of CPH's interest in The Coleman Company to Sunbeam on March 30, 1998, and CPH's general due diligence guidelines or policies. Subject

and without waiving these objections or the foregoing Initial Objections, and consistent with CPH's interpretation of this request, CPH will produce documents responsive to this request.

REQUEST NO. 17: All documents referring or relating to Sunbeam's public announcement of the Coleman Transaction.

RESPONSE: Subject to and without waiving the foregoing Initial Objections, including without limitation CPH's objection to the term "Coleman Transaction," CPH will produce documents responsive to this request.

REQUEST NO. 18: All documents upon which you will rely for your allegations that MS & Co. *knew or had reason to know that Sunbeam's reported Financial Statements were false and/or* misleading.

RESPONSE: CPH objects to this request as premature to the extent it seeks exhibits that CPH will seek to introduce at trial. CPH will produce a list of its exhibits in accordance with the rules and the schedule set by the Court. Nevertheless, subject to and without waiving this objection and the foregoing Initial Objections, CPH will produce documents supporting the allegations contained in its complaint that Morgan Stanley knew or had reason to know that Sunbeam's reported financial statements were false and/or misleading.

REQUEST NO. 19: All documents supporting your allegation that MS & Co. "misrepresented Sunbeam's financial performance" in the road show meetings and conference calls.

RESPONSE: Subject to and without waiving the foregoing Initial Objections, CPH will produce documents responsive to this request.

REQUEST NO. 20: All documents referring or relating to the March 19, 1998 Press Release.

RESPONSE: Subject to and without waiving the foregoing Initial Objections, CPH will produce documents responsive to this request.

REQUEST NO. 21: All documents supporting the allegation in your complaint that MS & Co. was "fully aware" that the "March 19, 1998 press release was false, misleading, and failed to disclose material information."

RESPONSE: Subject to and without waiving the foregoing Initial Objections, CPH will produce documents responsive to this request.

REQUEST NO. 22: All documents concerning or identifying any communications that took place between MS & Co. and Arthur Andersen concerning Sunbeam.

RESPONSE: Subject to and without waiving the foregoing Initial Objections, CPH will produce documents responsive to this request.

REQUEST NO. 23: All documents reflecting, referring, or relating to any communications that took place between MS & Co. and Sunbeam.

RESPONSE: Subject to and without waiving the foregoing Initial Objections, CPH will produce documents responsive to this request.

REQUEST NO. 24: All Financial Statements CPH claims it relied upon in connection with the Coleman Transaction.

RESPONSE: Subject to and without waiving the foregoing Initial Objections, including without limitation CPH's objection to the term "Coleman Transaction," CPH will produce documents responsive to this request.

REQUEST NO. 25: All documents concerning synergies that might be achieved from the Coleman Transaction.

RESPONSE: Subject to and without waiving the foregoing Initial Objections, including without limitation CPH's objection to the term "Coleman Transaction," CPH will produce documents responsive to this request.

REQUEST NO. 26: All documents concerning the potential or actual integration of Coleman, First Alert, and/or Signature Brands with Sunbeam, including, but not limited to, studies, reports, analyses, evaluations, projections, estimates, comments, or other work performed by Coopers & Lybrand, MS & Co., MSSF, Bank of America, or First Union.

RESPONSE: Subject to and without waiving the foregoing Initial Objections, CPH will produce documents responsive to this request.

REQUEST NO. 27: All documents referring or relating to your Document Retention Policy.

RESPONSE: CPH objects to this request on the grounds that Morgan Stanley's definition of "Document Retention Policy" is overbroad and seeks documents that are not relevant nor reasonably calculated to lead to the discovery of admissible evidence in two respects: (1) Morgan Stanley's "definition" demands an index or list of all computer back-up tapes; and (2) Morgan Stanley's "definition" also requests specific communications regarding other litigation. CPH interprets this request to exclude documents concerning (1) back-up tapes and (2) specific communications

regarding other litigation. Subject to and without waiving these objections or the foregoing Initial Objections, and consistent with CPH's interpretation of this request, CPH will produce documents responsive to this request.

REQUEST NO. 28: Organization charts sufficient to show your organization as a whole, and the detail of all divisions of your organization during the Relevant Period.

RESPONSE: Due to the manner in which Morgan Stanley has chosen to define "your," there are no documents responsive to this request. Nevertheless, subject to and without waiving the foregoing Initial Objections, CPH will produce documents sufficient to show the ownership relationship among CPH, its corporate parent, and its corporate subsidiaries at the time of the February 27, 1998 Agreements.

REQUEST NO. 29: All documents referring or relating to CPH's policies, procedures, manuals, guidelines, reference materials, or checklists for performing due diligence that were in effect during the Relevant Period.

RESPONSE: CPH objects to this request on the grounds that it is overbroad and seeks documents that are not relevant nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving these objections or the foregoing Initial Objections, CPH refers Morgan Stanley to CPH's response to Request No. 16.

REQUEST NO. 30: All calendars and other day planners, whether paper or electronic, reflecting meetings, events, telephone conferences or other communications regarding the Coleman Transaction.

RESPONSE: Subject to and without waiving the foregoing Initial Objections and consistent with its interpretation of the term "Coleman Transaction," CPH will produce documents responsive to this request.

REQUEST NO. 31: All calendars and other day planners, whether paper electronic [sic], belonging to Ronald Perelman, Howard Gittis, William Nesbitt, Lorelie Borland, Steve Fasman, and James Maher from December 1997 through March 1998.

RESPONSE: Subject to and without waiving the foregoing Initial Objections, CPH will produce documents responsive to this request to the extent that those documents reflect meetings, events, telephone conferences, or other communications regarding the transaction by which CPH transferred its interest in The Coleman Company to Sunbeam.

REQUEST NO. 32: All documents you have provided or produced to any party in any of the Litigations, Arbitrations, or SEC Administrative Proceedings, including documents responding to discovery requests, interrogatories, privilege logs, reports, communications, filings, testimony, legal memoranda, statements, affidavits, declarations and other documents.

RESPONSE: CPH objects to this request on the grounds that it is overbroad and seeks documents that are not relevant nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving this objection and the foregoing Initial Objections, CPH will produce the following documents to the extent that CPH served those documents on a party in connection with the Litigations, Arbitrations, or SEC Administrative Proceedings: (a) documents produced by CPH pursuant to CPH's written discovery responses; (b) testimony provided by CPH; (c) subpoenas, discovery requests, and discovery responses served by CPH; and (d) privilege logs served by CPH

and (e) motions, briefs, memoranda, declarations, and affidavits concerning CPH's written discovery responses or documents produced by CPH.

REQUEST NO. 33: All documents you have received from any party in any of the Litigations, Arbitrations, or SEC Administrative Proceedings, including documents responding to discovery requests, interrogatories, privilege logs, reports, communications, filings, testimony, legal memoranda, statements, affidavits, declarations and other documents.

RESPONSE: CPH objects to this request on the grounds that it is overbroad and seeks documents that are not relevant nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving this objection or the foregoing Initial Objections, CPH will produce the following documents to the extent a party served those documents on CPH in connection with the Litigations, Arbitrations, or SEC Administrative Proceedings: (a) documents produced by another party to CPH pursuant to CPH's written discovery requests; (b) testimony provided to CPH; (c) subpoenas, discovery requests, and discovery responses served on CPH; (d) privilege logs served on CPH; and (e) motions, briefs, memoranda, declarations, and affidavits concerning CPH's written discovery requests or documents produced to CPH pursuant to CPH's written discovery requests.

REQUEST NO. 34: All documents you have provided to the SEC or any other state or federal governmental or regulatory body concerning Sunbeam or MS & Co.

RESPONSE: CPH objects to this request on the grounds that it is overbroad and seeks documents that are not relevant nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving this objection or the foregoing Initial Objections, CPH refers Morgan Stanley to CPH's response to Request No. 32.

REQUEST NO. 35: All documents you have received from the SEC or any other state or federal governmental or regulatory body concerning Sunbeam or MS & Co.

RESPONSE: CPH objects to this request on the grounds that it is overbroad and seeks documents that are not relevant nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving this objection or the foregoing General Objections, CPH refers Morgan Stanley to CPH's response to Request No. 33.

REQUEST NO. 36: All discovery requests or subpoenas served on you in any of the Litigations, Arbitrations, or SEC Administrative Proceedings.

RESPONSE: CPH objects to this request to the extent that it seeks the same documents that are sought in Request No. 33. CPH refers Morgan Stanley to CPH's response to Request No. 33.

REQUEST NO. 37: All responses and/or objections that you made in response to a discovery request or subpoena served on you in any of the Litigations, Arbitrations or SEC Administrative Proceedings, including without limitation responses to interrogatories and privilege logs.

RESPONSE: CPH objects to this request to the extent that it seeks the same documents that are sought in Request No. 32. CPH refers Morgan Stanley to CPH's response to Request No. 32.

REQUEST NO. 38: All communications concerning any discovery request or subpoena served on you in any of the Litigations, Arbitrations, or SEC Administrative Proceedings.

RESPONSE: Subject to and without waiving the Initial Objections, CPH will produce documents responsive to this request.

REQUEST NO. 39: All documents referring or relating to the settlement agreement between CPH and Sunbeam.

RESPONSE: Subject to and without waiving the foregoing Initial Objections, CPH will produce documents responsive to this request.

REQUEST NO. 40: All documents referring or relating to the settlement agreement between CPH and Arthur Andersen.

RESPONSE: CPH objects to this request for the reasons set forth in the foregoing Initial Objections and on the grounds that this request is overbroad and seeks documents that are not relevant nor reasonably calculated to lead to the discovery of admissible evidence. CPH further objects that the settlement agreement between CPH and Arthur Andersen bars CPH from disclosing the settlement agreement between CPH and Arthur Andersen or any of its terms.

REQUEST NO. 41: All documents or other things related to the investigation, analysis, opinions, conclusions or other results of work by any expert retained for purposes of litigation relating to the Coleman Transaction or aftermath, including, but not limited to any resume or curriculum vitae of such experts, any correspondence to or from such experts, and any report, notes, work papers and documents or things relied upon by each expert.

RESPONSE: To the extent that this request calls for documents concerning the above-captioned litigation, CPH objects to this request for the reasons set forth in its Initial Objections and on the grounds that it is premature and does not comply with the rules of discovery relating to experts pursuant to Florida Rules of Civil Procedure 1.280(b)(4). CPH will respond to this request in accordance with the rules and the schedule set by the Court. To the extent that this Request seeks documents from the Litigations, Arbitrations or SEC Administrative Proceedings, CPH refers Morgan Stanley to CPH's responses to Request Nos. 32 and 33.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 14th day of August, 2003.

Dated: August 14, 2003

COLEMAN (PARENT) HOLDINGS INC.

By: Deirdre Connell
One of Its Attorneys

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).
_____/

RESPONSE AND OBJECTIONS TO MORGAN STANLEY & CO. INCORPORATED'S SIXTH REQUEST FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF

Plaintiff Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys and pursuant to Florida Rules of Civil Procedure 1.280 and 1.350, hereby responds and objects to Morgan Stanley & Co. Incorporated's ("Morgan Stanley") Sixth Request for Production of Documents to Plaintiff ("Requests for Production"):

INITIAL OBJECTIONS

1. CPH objects to the Requests for Production, including all Definitions and Instructions, to the extent that they purport to impose upon CPH any requirements that exceed or are inconsistent with the requirements of the Florida Rules of Civil Procedure or any other applicable rule or court order. For example, CPH will not comply with Instructions Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, and 16 or Definitions No. 9 to the extent that they purport to impose on CPH

EXHIBIT
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obligations that are not required by Florida rules and case law. CPH will comply with the applicable rules and law.

2. CPH objects to the Requests for Production to the extent that they seek the production of any documents or information protected from discovery by reason of the attorney-client privilege, the work product doctrine, or any other applicable privilege, doctrine, immunity, or rule. CPH reserves the right to assert any and all privileges to which CPH is entitled under the law. CPH will provide a log of documents withheld from production on the basis of the attorney-client privilege, the work product doctrine, or any other applicable privilege, doctrine, immunity, or rule.

3. CPH objects to the definition of "Coleman Transaction" because Morgan Stanley's definition mischaracterizes the transaction that closed on March 30, 1998 and because the definition is vague and ambiguous to the extent it includes "all related communications, agreements, and transactions." CPH will construe the term "Coleman Transaction" to mean the transaction by which CPH transferred its interest in The Coleman Company to Sunbeam Corporation ("Sunbeam").

4. CPH objects to the extent that any Request for Production seeks documents that are in the public domain and accessible to all parties. In responding to the Requests for Production, CPH will produce publicly available documents to the extent that copies exist in CPH's files of otherwise non-public information responsive to these requests.

5. CPH objects to the definition of "CPH" to the extent it includes CPH's counsel in this litigation. CPH interprets these definitions to exclude Jenner & Block LLP and Searcy Denney Scarola Barnhart & Shipley P.A., and their respective attorneys.

6. By stating that CPH will produce documents responsive to a particular document request, CPH does not represent that any such documents exist. Rather, CPH is responding that to the extent such documents are located, they will be produced.

7. By stating that CPH will produce responsive documents, CPH does not concede the relevance of any of the produced documents to the subject matter of this litigation or to the admissibility of those documents at trial.

8. CPH's objections and responses are based on a good-faith search for documents within CPH's possession, custody, and control. CPH expressly reserves the right to amend and/or modify its objections and responses.

9. CPH responds to Morgan Stanley's document requests without waiving the Initial Objections. CPH incorporates, as though fully set forth therein, these Initial Objections into each of the Responses and Objections set forth below.

DOCUMENTS TO BE PRODUCED

1. All documents that evidence the recognition of revenue or loss of CPH, MAFCO or affiliate company, and the tax treatment or consequences thereof from the sale of Coleman common stock to Sunbeam, including any recognition of revenue concerning the settlement with Sunbeam.

ANSWER: CPH objects to this request as overbroad, burdensome, and not reasonably calculated to call for the discovery of admissible evidence. Documents showing the recognition of revenue or loss by CPH, Mafco, or any affiliated companies, or the tax treatment and consequences thereof, are not relevant issues in this case and their production would require the disclosure of highly confidential information that has no bearing on the issues in this case. Moreover, CPH has not placed its tax treatment of the Coleman Transaction at issue, and Morgan Stanley has failed to show that documents relating to CPH's tax treatment of the Coleman Transaction are likely to provide information that is unavailable from other sources.

2. All documents concerning Scott Paper, including internal or third party analysis of its financial performance and acquisition by Kimberly-Clark.

ANSWER: Subject to and without waiving the foregoing initial objections, CPH will produce documents responsive to this request.

3. All documents concerning Albert Dunlap, including documents referring to his professional employment history.

ANSWER: Subject to and without waiving the foregoing initial objections, CPH will produce documents responsive to this request.

4. All documents concerning the issuance of private placement notes by Revlon Escrow Corporation in February 1998.

ANSWER: CPH objects to this request as overbroad, burdensome, and not reasonably calculated to call for the discovery of admissible evidence. CPH further notes that Morgan Stanley has taken the position in this case that documents relating to transactions other than the Coleman Transaction are not relevant and need not be produced.

5. All documents concerning any transaction contemplated or consummated between October 1, 1997 and March 30, 1998 by or among CPH, MAFCO, or any subsidiary or affiliate regarding Aames Financial Corporation, Bushnell, Day International, Golden State Bancorp, Gucci, Panavision, Timber REITs, or any other transaction contemplated or consummated between October 1, 1997 and March 30, 1998 where the value of consideration offered or received was expected to, or did, exceed $5 million.

ANSWER: CPH objects to this request as overbroad, burdensome, and not reasonably calculated to call for the discovery of admissible evidence. CPH further notes that Morgan Stanley has taken the position in this case that documents relating to transactions other than the Coleman Transaction are not relevant and need not be produced.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and mail to all counsel on the attached Service List, this 9th day of April, 2004.

Dated: April 9, 2004

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

~~PROPOSED~~ ORDER GRANTING MOTION TO AMEND COMPLAINT

THIS CAUSE having come to be considered upon the Plaintiff's Motion to Amend Complaint, and the court having reviewed the file and having been fully advised in the premises, it is hereby,

ORDERED and ADJUDGED: that the Motion to Amend Complaint has been granted. The Amended Complaint shall be deemed filed as of the time of Plaintiff's filing the Motion to Amend Complaint. Pursuant to the agreement of the parties, the Defendants shall respond within 5 days of the date of this Order, or 5 days any order directed to any motion filed as to the Amended Complaint. Hearing in any such will be held Feb. 24, 2005.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, this 17 day of Feb., 2005.

CIRCUIT COURT JUDGE
ELIZABETH T. MAASS

Copies have been furnished to all counsel on the attached counsel list.

16div-011371

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO: 2003 CA 005045 AI

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS RELATING TO WILLIAM STRONG

THIS CAUSE having come to be considered upon Coleman (Parent) Holdings Inc.'s Motion to Compel Production of Documents Relating to William Strong, and the Court having reviewed the file and being fully advised in the premises, it is hereby,

ORDERED and ADJUDGED: The Mot. is Granted. MS & Co. shall be prepared at trial who the documents and privilege log, if appropriate, will be available at hearing on Feb. 15, 2005 at 8:30 a.m.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, this 17 day of Feb., 2005.

ELIZABETH T. MAASS
CIRCUIT COURT JUDGE

Copies have been furnished to all counsel on the attached counsel list.

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

ORDER ON CPH's **MOTION IN LIMINE NUMBER** 1

THIS CAUSE having come before this Court on February 17, 2005 upon & CPH's Motion in Limine Number 1, and the Court having reviewed the pleadings on file, heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is Granted, in part, and Denied, in part. MS&Co. may not elicit testimony or evidence concerning whether CPH had made profit from its investment in Coleman, or the amount thereof. This ruling is without prejudice to MS&Co. ability to elicit testimony or evidence that CPH or its related entities or decision-making investors had reason to believe the ~~stock~~ relative value of Coleman stock compared to Sunbeam ~~stock~~ or the cash value of the Coleman stock was declining prior to

WPB#589635.1

16div-011375

"Granted" for purposes of the Motion in Limine addressed in this Order shall mean that the parties and their counsel shall not refer to or attempt to introduce into evidence, or otherwise place before the jury, the matter referred to without first proffering the good faith basis to believe that the matter is relevant and admissible outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 17 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

WPB#589635.1

16div-011376

Copies furnished to:

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

ORDER ON Plaintiff's **MOTION IN LIMINE NUMBER** 2

THIS CAUSE having come before this Court on February 17, 2005 upon Plaintiff's Motion in Limine Number 2, and the Court having reviewed the pleadings on file, heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is Granted.

HH Neither party may present evidence or argue concerning the wealth, net worth, income, or financial status of any principal or employee of CPH or a related entity. This ruling is without prejudice to either party's right to present evidence or argue concerning an individual's business or financial sophistication.

WPB#589635.1

16div-011378

"Granted" for purposes of the Motion in Limine addressed in this Order shall mean that the parties and their counsel shall not refer to or attempt to introduce into evidence, or otherwise place before the jury, the matter referred to without first proffering the good faith basis to believe that the matter is relevant and admissible outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 17 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

WPB#589635.1

Copies furnished to:

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

ORDER ON CPH's **MOTION IN LIMINE NUMBER** 3

THIS CAUSE having come before this Court on February 17, 2005 upon CPH's Motion in Limine Number 3, and the Court having reviewed the pleadings on file, heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is Granted. MSI Co. shall not offer evidence or argue concerning any loss it or an affiliate actually experienced as a result of the transaction.

WPB#589635.1

16div-011381

"Granted" for purposes of the Motion in Limine addressed in this Order shall mean that the parties and their counsel shall not refer to or attempt to introduce into evidence, or otherwise place before the jury, the matter referred to without first proffering the good faith basis to believe that the matter is relevant and admissible outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 17 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

WPB#589635.1

Copies furnished to:

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

ORDER ON CPH's **MOTION IN LIMINE NUMBER** 4

THIS CAUSE having come before this Court on February 17, 2005 upon CPH's Motion in Limine Number 4, and the Court having reviewed the pleadings on file, heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is Granted.

WPB#589635.1

16div-011384

"Granted" for purposes of the Motion in Limine addressed in this Order shall mean that the parties and their counsel shall not refer to or attempt to introduce into evidence, or otherwise place before the jury, the matter referred to without first proffering the good faith basis to believe that the matter is relevant and admissible outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 17 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

WPB#589635.1

Copies furnished to:

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

ORDER ON CPH's **MOTION IN LIMINE NUMBER** 6

THIS CAUSE having come before this Court on February 17, 2005 upon CPH's Motion in Limine Number 17, and the Court having reviewed the pleadings on file, heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is Granted, as pow. There shall be no reference to any investigation or inquiry from the NYSE. Only the chronology portions of the responses to the SEC inquiries shall be offered into evidence or refered to. The parties will attempt to agree to language that conveys that those chronologies were presented to the SEC by CPH's counsel in this transaction, based on information supplied by CPH, but without implying or stating that the SEC filing was

WPB#589635.1

16div-011387

indicates anything other than a routine filing.

"Granted" for purposes of the Motion in Limine addressed in this Order shall mean that the parties and their counsel shall not refer to or attempt to introduce into evidence, or otherwise place before the jury, the matter referred to without first proffering the good faith basis to believe that the matter is relevant and admissible outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 17 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

WPB#589635.1

Copies furnished to:

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

ORDER ON CPH's **MOTION IN LIMINE NUMBER** 9

THIS CAUSE having come before this Court on February 17, 2005 upon CPH's Motion in Limine Number 9, and the Court having reviewed the pleadings on file, heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is Granted. There shall be no argument evidence or this shall be SEC investigated MS & Co. or MS & Co. was not ultimately charged.

WPB#589635.1

16div-011390

"Granted" for purposes of the Motion in Limine addressed in this Order shall mean that the parties and their counsel shall not refer to or attempt to introduce into evidence, or otherwise place before the jury, the matter referred to without first proffering the good faith basis to believe that the matter is relevant and admissible outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 17 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

WPB#589635.1

Copies furnished to:

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

ORDER ON CPH's **MOTION IN LIMINE NUMBER** 10

THIS CAUSE having come before this Court on February 17, 2005 upon CPH's Motion in Limine Number 10, and the Court having reviewed the pleadings on file, heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is granted.

WPB#589635.1

16div-011393

"Granted" for purposes of the Motion in Limine addressed in this Order shall mean that the parties and their counsel shall not refer to or attempt to introduce into evidence, or otherwise place before the jury, the matter referred to without first proffering the good faith basis to believe that the matter is relevant and admissible outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 17 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

WPB#589635.1

Copies furnished to:

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

ORDER ON CPH's **MOTION IN LIMINE NUMBER** 11

THIS CAUSE having come before this Court on February 17, 2005 upon CPH's Motion in Limine Number 11, and the Court having reviewed the pleadings on file, heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is granted, in part. MS & Co. shall not make reference to the Revlon litigation before the jury. MS & Co. may not present evidence concerning Revlon's alleged business practices without first establishing, outside the jury's presence and (1) CPH + Revlon enjoyed common management at the relevant times; (2) the acts MS & Co. claims Revlon engaged in; & (3) that those acts are sufficiently similar to the acts CPH claims MS & Co. had knowledge of here. dfg

WPB#589635.1

16div-011396

"Granted" for purposes of the Motion in Limine addressed in this Order shall mean that the parties and their counsel shall not refer to or attempt to introduce into evidence, or otherwise place before the jury, the matter referred to without first proffering the good faith basis to believe that the matter is relevant and admissible outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 17 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

WPB#589635.1

Copies furnished to:

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West Palm Beach, Fl 33409

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

ORDER ON CPH's **MOTION IN LIMINE NUMBER** 12

THIS CAUSE having come before this Court on February 17, 2005 upon CPH's Motion in Limine Number 12, and the Court having reviewed the pleadings on file, heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is granted, in part, and denied, in part. MS&Co. may question CPH personnel about their other duties during the relevant time, but shall not offer evidence concerning the specific execution of those duties, including the specific due diligence conducted about the Petrovision transaction.

WPB#589635.1

16div-011399

"Granted" for purposes of the Motion in Limine addressed in this Order shall mean that the parties and their counsel shall not refer to or attempt to introduce into evidence, or otherwise place before the jury, the matter referred to without first proffering the good faith basis to believe that the matter is relevant and admissible outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 17 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

WPB#589635.1

Copies furnished to:

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

ORDER ON CPH's **MOTION IN LIMINE NUMBER** 13

THIS CAUSE having come before this Court on February 17, 2005 upon CPH's Motion in Limine Number 13, and the Court having reviewed the pleadings on file, heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is granted, as pro. There shall be no evidence or argument offered about the terms of the Feb 23, 1998 purported letter agreement absent the Court's first finding that a sufficient evidentiary predicate has been laid that would allow a reasonable juror to conclude that CPH assented to its terms.

WPB#589635.1

16div-011402

"Granted" for purposes of the Motion in Limine addressed in this Order shall mean that the parties and their counsel shall not refer to or attempt to introduce into evidence, or otherwise place before the jury, the matter referred to without first proffering the good faith basis to believe that the matter is relevant and admissible outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 17 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

WPB#589635.1

Copies furnished to:

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#230580/mep

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO: 2003 CA 005045 AI

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION FOR LEAVE TO WITHDRAW COUNTS I AND IV OF ITS COMPLAINT

THIS CAUSE having come to be considered upon the Coleman (Parent) Holdings, Inc.'s Motion for Leave to Withdraw Counts I and IV of Its Complaint, and the Court having reviewed the file and being fully advised in the premises, it is hereby,

ORDERED and ADJUDGED: the Motion is Denied, without prejudice to Plaintiff's right to seek to amend its Complaint.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, this 17 day of February, 2005.

ELIZABETH T. MAASS
CIRCUIT COURT JUDGE

Copies have been furnished to all counsel on the attached counsel list.

16div-011405

COUNSEL LIST

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COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

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

CASE NO: 2003 CA 005045 AI

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S *ORE TENUS* MOTION FOR *IN CAMERA* INSPECTION OF DOCUMENTS ON MORGAN STANLEY'S E-MAIL PRIVILEGE LOGS

THIS CAUSE having come to be considered upon Coleman (Parent) Holdings Inc.'s *ore tenus* motion for *in camera* inspection of the documents listed on Morgan Stanley's privilege logs dated February 8, 10, and 11, 2005, and the Court having reviewed the file and being fully advised in the premises, it is hereby,

ORDERED and ADJUDGED that: (1) Morgan Stanley shall produce the documents listed on the privilege logs dated February 8, 10, and 11, 2005 to the Court for *in camera* inspection by 9:30 a.m. on February 15, 2005 and (2) Morgan Stanley shall produce an affidavit or affidavits detailing the specific factual bases to support each privilege claim for each listed document to the Court by 5:00 p.m. on February 15, 2005.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, this 15th day of February 2005.

SIGNED & DATED

FEB 15 2005

JUDGE ELIZABETH T. MAASS
ELIZABETH T. MAASS
CIRCUIT COURT JUDGE

Copies have been furnished to all counsel on the attached counsel list.

COUNSEL LIST

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#1213795 v1

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

ORDER ON MS&Co.'s Mot to Compel Production of Documents

THIS CAUSE having come before this Court on Feb. 17, 2005 upon MS&Co.'s Mot to Compel Production of Documents, and the Court having heard argument of counsel, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

1. The Motion is hereby Granted. Plaintiff shall produce for inspection and copying by MS&Co. by Noon Feb. 18, 2005 all account value, ~~book value~~ documents within the care, custody, or control of it or any related entity reflecting the account value, book value, balance sheet value, or internal valuation of the Sunbeam stock received by CPH in the transaction, produced during the time or reflecting a value during the day or at any time between the date the transaction closed and the date Sunbeam first sought bankruptcy protection. By Noon Feb. 23, 2005, any party may serve motions or discovery directly related to any newly produced items, which must be responded to by Noon Feb. 25, 2005.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 18 day of Feb, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

WPB#587529.12

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West Palm Beach, FL 33401

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant

_____/

ORDER ON MS & Co.'s **MOTION IN LIMINE NUMBER** 2

THIS CAUSE having come before this Court on February 17, 2005 upon MS & Co.'s Motion in Limine Number 2, and the Court having reviewed the pleadings on file, heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is Granted. There shall be no evidence or argument about the SEC finding.

WPB#589635.1

16div-011411

"Granted" for purposes of the Motion in Limine addressed in this Order shall mean that the parties and their counsel shall not refer to or attempt to introduce into evidence, or otherwise place before the jury, the matter referred to without first proffering the good faith basis to believe that the matter is relevant and admissible outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 17 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

WPB#589635.1

16div-011412

Copies furnished to:

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

ORDER ON MSLG. Motion for Reconsideration, etc. (re: Plaintiff's Mot. - Limine # 18)

THIS CAUSE having come before this Court on Feb. 17, 2005, 2005 upon MSLG.'s Motion for Reconsideration, etc. (CPH # 18), and the Court having heard argument of counsel, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

1. The Motion is hereby granted, - part, and denied, - part. The Motion for reconsideration is Denied. See Local Rule 6. However, the Order is clarified to provide that Mr. Grinblatt shall not be questioned before the jury as to any prior employment by Plaintiff's law firm, without prior court permission granted outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 17 day of Feb., 2005.

ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

WPB#587529.12

16div-011414

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West Palm Beach, FL 33401

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

ORDER ON Defendant's Motion to Continue

THIS CAUSE having come before this Court on Feb. 17, 2005 upon Defendant's Motion to Continue, and the Court having heard argument of counsel, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

1. The Motion is hereby granted. Hearing on CPH's Motion to Deem Certain Documents Admissible, etc., set Feb. 17, 2005 is canceled and reset to Feb. 22, 2005 at 9:30 a.m. By 12 noon Feb. 18, 2005, MSLG shall provide CPH a list of all expected witnesses, together with a summary of each's expected testimony. CPH shall serve a similar list and summary by 5pm Feb 18, 2005. Each* party shall make its witnesses available for deposition prior to the hearing. Counsel shall be prepared to argue and, if necessary, present evidence on the date by which all discovery must be ceased, absent extraordinary and unforseen circumstances.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 17 day of Feb, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

WPB#587529.12

16div-011416

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2005 WL 5653281 (Fla.Cir.Ct.) (Trial Pleading)
Circuit Court of Florida,
Fifteenth Judicial Circuit.
Palm Beach County

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

No. 2003 CA 005045 AI.
February 18, 2005.

Jury Trial Demanded

First Amended Complaint

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Plaintiff Coleman (Parent) Holdings Inc. ("CPI") hereby submits its First Amended Complaint and alleges the following against Morgan Stanley & Co., Inc. ("Morgan Stanley").

NATURE OF THE ACTION

1. This action arises from Morgan Stanley's participation in a massive fraud centered on Florida-based Sunbeam Corporation ("Sunbeam"). As a direct result of that fraud, CPH was induced to accept 14.1 million shares of Sunbeam stock when CPH sold its 82% interest in The Coleman Company, Inc. ("Coleman") to Sunbeam on March 30, 1998. Morgan Stanley misrepresented Sunbeam's financial condition and assisted Sunbeam's CEO, Albert Dunlap, in concealing Sunbeam's true financial condition so that Sunbeam could complete the purchase of Coleman on March 30, 1998.

2. In April 1997, Morgan Stanley began serving as Sunbeam's investment banker. Morgan Stanley originally attempted to find someone to buy Sunbeam. When Morgan Stanley was unable to find a buyer, Morgan Stanley developed a strategy for Sunbeam to use its fraudulently-inflated stock to acquire a large company that Sunbeam would own and operate. Then, trading on Morgan Stanley's relationships with CPH's senior officers, Morgan Stanley found Coleman for Sunbeam. At the time of the sale to Sunbeam, Coleman was a leading manufacturer and marketer of consumer products for the worldwide outdoor recreation market, with annual revenues in excess of$1 billion. With Morgan Stanley's active and direct participation, CPH was persuaded to sell its interest in Coleman to Sunbeam in return for 14.1 million shares of Sunbeam stock and other consideration.

3. After Sunbeam announced plans to acquire Coleman, Morgan Stanley agreed to underwrite a $750 million debenture offering for Sunbeam. Sunbeam needed the proceeds of that debenture offering to complete the acquisition of Coleman. As Sunbeam's investment banker and as the sole underwriter for the $750 million debenture offering, Morgan Stanley received detailed and specific information concerning Sunbeam's financial condition and performance. Morgan Stanley received information that directly contradicted Sunbeam's and Morgan Stanley's assertions to CPH that Sunbeam had

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undergone a successful turnaround and that its financial performance had dramatically improved. By no later than March 18, 1998, Morgan Stanley knew that Sunbeam's January and February 1998 sales were only 50% of January and February 1997 sales, and Morgan Stanley also knew that the shortfall was caused by Sunbeam's practice of accelerating sales which otherwise would have occurred in 1998 in order to boost Sunbeam's income in 1997. Although Morgan Stanley and Sunbeam previously had advised CPH that Sunbeam's sales were running ahead of analysts' expectations for the first quarter, Morgan Stanley decided not to correct those material misrepresentations. Instead, in March 1998, Morgan Stanley assisted Sunbeam in concealing the problems with Sunbeam's first quarter 1998 sales in order to close transactions that should have been slopped before CPH and others were swindled.

4. CPH brings this action to recover for the losses it has suffered as a result of Morgan Stanley's active participation in successfully defrauding CPH. CPH's Complaint consists of two counts: Aiding and Abetting Fraud (Count I) and Conspiracy (Count II).

5. CPH seeks compensatory damages for Morgan Stanley's wrongful conduct. Using Morgan Stanley's own valuation of Coleman, CPH has lost at least $485 million, In addition, CPH has amended its complaint pursuant to Fla. Stat. §768.72 to assert claims for an additional recovery of punitive damages in excess of $1.5 billion.

JURISDICTION AND VENUE

6. This Court has jurisdiction over the subject matter of this action pursuant to Fla. Stat. § 26.012(2)(a). This Court has jurisdiction over Morgan Stanley pursuant to Fla. Stat. § 48.193.

7. Venue is proper in this district pursuant to Fla. Stat. § 47.051.

PARTIES AND OTHER KEY PARTICIPANTS

8. Plaintiff Coleman (Parent) Holdings Inc. (“CPH”) directly or indirectly owned 44,067,520 shares - or approximately 82% - of Coleman prior to the transactions at issue. On March 30, 1998, Sunbeam acquired CPH's interest in Coleman. Sunbeam paid for the Coleman shares with 14.1 million shares of Sunbeam common stock and other consideration.

9. Defendant Morgan Stanley & Co., Inc. (“Morgan Stanley”) is a highly sophisticated investment banking firm that provides a wide range of financial and securities services. Among other things, Morgan Stanley provides advice on mergers and acquisitions and raises capital co in the equity and debt markets. Morgan Stanley served as Sunbeam's investment banker and as the underwriter of securities issued by Sunbeam in connection with the events at issue herein.

10. Sunbeam Corporation (“Sunbeam”) was a publicly-traded company headquartered in Delray Beach, Florida. Sunbeam designed and manufactured small household appliances and outdoor consumer products, which it marketed under the Sunbeam and Oster brand names. Sunbeam filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code in February 2001.

11. Albert Dunlap (“Dunlap”) was the Chief Executive Officer of Sunbeam from July 1996 until June 1998 when he was terminated by Sunbeam's Board of Directors. In May 2001, the United States Securities and Exchange Commission (“SEC”) filed a civil injunctive suit in Miami, Florida against Dunlap based on Dunlap's fraudulent and illegal conduct at Sunbeam. In September 2002, Dunlap consented to the entry of a judgment against him in that action. The judgment, among other things, imposed a civil fine and permanently barred Dunlap from serving as an officer or director of a public company. Dunlap still resides in Boca Raton, Florida.

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12. Russell Kersh ("Kersh") was the Executive Vice President of Sunbeam from July 1996 until June 1998 when he was terminated by Sunbeam's Board of Directors. In May 2001, the SEC filed a civil injunctive suit in Miami, Florida against Kersh based on Kersh's fraudulent and illegal conduct at Sunbeam. In September 2002, Kersh consented to the entry of a judgment against him in that action. The judgment, among other things, imposed a civil fine and permanently barred Kersh from serving as an officer or director of a public company. Upon information and belief, Kersh still resides in Boca Raton, Florida.

13. Arthur Andersen LLP ("Andersen") provided outside accounting services to Sunbeam through its West Palm Beach, Florida office. Andersen auditors provided information concerning Sunbeam's first quarter 1998 sales and earnings to Morgan Stanley. Upon information and belief, several of the Andersen auditors who provided information to Morgan Stanley concerning Sunbeam, including Lawrence Bornstein, still reside in Florida.

FACTUAL BACKGROUND

A. Sunbeam's Lackluster Performance (1995-1996).

14. Sunbeam designed and manufactured outdoor and household consumer products, which it marketed under the Sunbeam and Oster brand names. Sunbeam's products included small kitchen appliances, humidifiers, electric blankets, and grills. Many of the country's leading retail stores, including Wal-Mart, Target, and Home Depot, were among Sunbeam's major customers.

15. Despite Sunbeam's well-known brands and strong customer base, its financial performance was disappointing. In 1994, Sunbeam earned $1.30 per share. In 1995, Sunbeam's earnings declined to $0.61 per share. In 1996, Sunbeam's earnings continued to suffer. On March 22, 1996, Sunbeam issued an early warning that its first quarter earnings would be well under analysts' expectations and down from first quarter 1995. Shortly after issuing the March 22 earnings warning, Sunbeam's Chief Executive Officer and two of Sunbeam's directors announced their resignations. Less than a week later, Sunbeam announced that its first quarter 1996 earnings had plunged 42% from first quarter 1995 levels. Sunbeam also announced that its second quarter 1996 earnings would be lower than its second quarter 1995 earnings.

16. Sunbeam's disappointing earnings caused its stock price to plummet. During 1995, the price at which Sunbeam's stock traded fell 40%, from a high of $25-1/2. In 1996, Sunbeam's stock price continued to decline until it reached a low of $12-1/4 in July.

B. Sunbeam Hires A New Management Team (July 1996).

17. On July 18, 1996, Sunbeam's board of directors hired Albert Dunlap as Sunbeam's new Chief Executive Officer. Based upon brief terms as Chief Executive Officer of other publicly traded companies, including Scott Paper Company ("Scott Paper"), Dunlap was viewed as a "turnaround specialist" - that is, someone who could lake a poorly performing company and significantly increase its value by "turning around" its financial performance. Because Dunlap touted the benefits from firing large numbers of employees and closing large numbers of plants, Dunlap became widely known as "Chainsaw Al." Dunlap lived in Boca Raton, Florida, and one of his first tasks at Sunbeam was to consolidate the company's six headquarters into one located in Delray Beach, Florida.

18. Immediately after joining Sunbeam, Dunlap hired Kersh as Sunbeam's Chief Financial Officer. Kersh had teamed with Dunlap for over 15 years, serving as a senior executive with Dunlap at other companies, including Scott Paper. Dunlap also brought in several other hand-picked executives to make up his senior management team.

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19. Dunlap and his senior management team entered into employment agreements with Sunbeam. Under those agreements, Dunlap and his senior management team stood to make tens of millions of dollars if they were able to boost Sunbeam's apparent value and then sell Sunbeam to another company at a premium.

C. Dunlap Cooks The Books At Sunbeam (1996-1997).

20. In order to convince other companies that they should want to purchase Sunbeam, Dunlap needed to improve Sunbeam's reported financial performance quickly and dramatically. It was, of course, no small task to transform Sunbeam from a poorly performing company, with weak sales and declining profits, into a strong company with growing sales and soaring profits. In fact, as the world later learned, Dunlap did not achieve that change in Sunbeam's fortunes. Instead, Dunlap created the illusion of a dramatic turnaround at Sunbeam by engaging in what SEC officials subsequently described as a "case study" in financial fraud.

21. Dunlap had a three-step plan at Sunbeam. In the first step, Dunlap overstated Sunbeam's financial problems so that Sunbeam appeared to be in worse shape than it really was. After making Sunbeam look worse, Dunlap moved to step two, where he made Sunbeam look more valuable than it really was by inflating Sunbeam's sales and engaging in other earnings manipulations. In step three, Dunlap planned to sell Sunbeam to another company before it became apparent that the "improved" results were fictional. By doing so, Dunlap would make tens of millions of dollars and would be free to blame his successor for any subsequent problems.

1. Step One: Make Sunbeam Appear Worse Than It Really Was (1996).

22. Dunlap began implementing his strategy soon after his arrival at Sunbeam in 1996. Claiming to be engaged in a clean-up of Sunbeam's financial problems, Dunlap recorded artificially high reserves and booked expenses that should not have been recorded until later periods. Both of those actions made Sunbeam's financial condition appear worse than it really was, thus lowering the benchmark for measuring Sunbeam's performance in future years.

23. The overstated reserves also provided Dunlap a means by which he could inflate Sunbeam's future results during the second step of his plan. Dunlap later could "re-evaluate" and release millions of dollars from the overstated reserves to boost income in later periods. The income from released reserves contributed to the illusion of a rapid turnaround in Sunbeam's performance. Using inflated reserves to enhance income in future periods is a fraudulent practice and overstated reserves are commonly called "cookie jar" reserves.

2. Step Two: Create The False Appearance Of Dramatically Improved Performance (1997).

24. After making Sunbeam look worse than it really was in 1996, Dunlap manipulated Sunbeam's sales and expenses in 1997 to create the false appearance of quarter after quarter improvement in financial performance. For example, Dunlap caused Sunbeam to inflate its sales by engaging in phony "bill and hold" sales. Under this practice, Sunbeam recognized revenues from "sales," even though customers did not actually pay for or even take delivery of the products, which continued to sit in Sunbeam's own warehouses. Although Sunbeam recorded the "bill and hold" sales as if they were current sales, they were, in reality, simply sales stolen from future quarters. In 1997, phony "bill and hold" sales added approximately $29 million in sales and $4.5 million in income.

25. Throughout 1997, Sunbeam also engaged in a sales practice known as "channel stuffing" - accelerating sales that otherwise would occur in a later period, sometimes by offering steep discounts or other extraordinary customer inducements. On the grand scale employed by Sunbeam, channel stuffing inevitably leads to major sales shortfalls in later periods when "stuffed" customers simply stop buying. Sunbeam's senior sales officer referred to Sunbeam's unsustainable practice of inflating performance through accelerated sales as the "doom loop."

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26. Dunlap further "enhanced" Sunbeam's income in 1997 by causing Sunbeam to record a "profit" of $10 million from a sham sale of its warranty and spare parts business. Dunlap also made Sunbeam appear to be more successful than it really was by reaching into the "cookie jar," reversing inflated reserves, and recording $35 million as income, Sunbeam's 1997 profit margins also looked better than they really were because Dunlap already had recorded millions of dollars of 1997 expenses in 1996.

27. In October 1997, Dunlap announced that Sunbeam's "turnaround" was complete. Compared to the third quarter of 1996, Sunbeam's third quarter 1997 performance was remarkable. In the third quarter of 1996, Sunbeam had reported a loss of $18.1 million. In the third quarter of 1997, however, Sunbeam reported earnings of $34.5 million - an extraordinary turnaround from substantial losses to hefty profits. Sunbeam's combined results for the first three quarters showed dramatic improvement as well. Sunbeam reported that its profits for the first nine months were up tenfold over the same period the year before - from $6.5 million in 1996 to $67.7 million in 1997. Sunbeam's reversal of fortune caused a spectacular increase in the price of its stock. In July 1996, when Dunlap was hired, Sunbeam's shares traded at $12-1/4. By October 1997, Sunbeam's shares had risen to $49-13/16.

3. Step Three: Cash In Before The Turnaround Fraud Is Discovered (1997-1998).

28. With steps one and two successfully completed, Dunlap was more than eager to complete the final step of his scheme: to sell Sunbeam to another company and collect tens of millions of dollars for himself before the outside world could learn the truth about Sunbeam's phony "turnaround." To accomplish that third and final step, Dunlap needed an investment banking firm to serve as his shill. Morgan Stanley was pleased to play that role.

D. Morgan Stanley Vies For A Spot On Dunlap's Team (April - September 1997).

29. When Dunlap announced in early 1997 that he would begin interviewing investment bankers, Morgan Stanley immediately began pursuing the job. Although Morgan Stanley had no previous relationship with Sunbeam, one of Morgan Stanley's senior executives, William Strong, had worked closely with Dunlap on other large transactions between 1986 and 1993, when Strong was employed by Salomon Brothers.

30. Morgan Stanley knew that it was competing with other investment bankers, including Mark Davis, for Dunlap's business. Davis was the head of the mergers and acquisitions department at Chase Securities and had worked previously with Strong at Salomon Brothers. Davis had a very strong relationship with Dunlap, and Davis had served as Dunlap's investment advisor on numerous transactions, including Dunlap's sale of Scott Paper. Shortly after arriving at Sunbeam, Dunlap hired Davis to handle the sale of Sunbeam's furniture business.

31. Morgan Stanley put together a team headed by its Vice Chairman, Bruce Fiedorek, and Strong. Beginning in April 1997, Morgan Stanley's personnel traveled to Sunbeam's offices in Delray Beach, Florida to study Sunbeam and woo Dunlap. After months of uncompensated work, in September 1997, Morgan Stanley finally persuaded Dunlap to name Morgan Stanley as Sunbeam's exclusive investment banker. Dunlap instructed Morgan Stanley to find a buyer for Sunbeam. Morgan Stanley knew that if it failed to deliver a major transaction, Morgan Stanley would not be compensated for the extensive work it had performed for Sunbeam. Morgan Stanley also knew that Davis and Chose Securities were standing by - ready and willing to reclaim their position as Dunlap's investment banker of choice.

E. Morgan Stanley Seeks A Buyer For Sunbeam (Fall 1997).

32. Throughout the fall of 1997, Morgan Stanley aggressively searched for a buyer for Sunbeam. Morgan Stanley put together extensive and detailed materials to use in marketing Sunbeam to potential buyers. Morgan Stanley pitched the

transaction to more than 10 companies - including Gillette, Colgate, Sara Lee, Rubbermaid, Whirlpool, and Black & Decker - that Morgan Stanley hoped might have an interest in acquiring Sunbeam. Morgan Stanley, however, was not able to find a buyer.

33. As 1998 approached, the pressure on Dunlap increased, Dunlap was aware that Sunbeam would be unable to sustain the appearance of a successful turnaround in 1998 because Sunbeam had stolen sales from 1998 to boost 1997's numbers and the "cookie jar" reserves had been depleted. Dunlap needed a way to conceal Sunbeam's phony turnaround until a buyer could be found. Morgan Stanley provided the solution to Dunlap's problem.

F. Unable To Find A Buyer For Sunbeam, Morgan Stanley Looks For An Acquisition (December 1997).

34. Morgan Stanley knew that its failure to find a buyer for Sunbeam could prove fatal to the relationship it had worked so hard to establish with Dunlap. As the pressure on Dunlap increased, the pressure on Morgan Stanley increased as well. Although Morgan Stanley was not able to find a buyer for Sunbeam, Morgan Stanley responded with a plan that would allow Dunlap to conceal his fraud. Morgan Stanley recommended that Sunbeam acquire other companies, using Sunbeam's stock, which was fraudulently inflated, as the "currency" that would be used to pay for the acquisitions.

35. Morgan Stanley's strategy was doubly deceptive. First, Morgan Stanley's acquisition strategy would allow Dunlap to consolidate Sunbeam's results with those of the newly-acquired companies. That would help Dunlap camouflage Sunbeam's results and make it difficult to detect any shortfall in Sunbeam's performance. Dunlap simply could label any problems that were detected as attributable to the poor performance of the acquired companies or as a temporary "blip" caused by the distraction of integrating the acquired companies with Sunbeam. Second, Morgan Stanley's strategy would allow Dunlap to take new massive restructuring charges (purportedly relating to the acquisitions) and thus create more "cookie jar" reserves that could be tapped to bolster the future earnings of the combined companies.

36. Morgan Stanley identified Coleman as one of the key potential acquisition targets. CPH owned 82% of Coleman's stock. Morgan Stanley searched the ranks of its investment bankers to locate those with the best access to CPH. Drawing on relationships between some of Morgan Stanley's investment bankers and senior CPH officers, Morgan Stanley set about trying to persuade CPH to sell its interest in Coleman to Sunbeam - and, most importantly, to accept Sunbeam stock as consideration.

37. Morgan Stanley laid the groundwork for a meeting to take place in December 1997 in Palm Beach, Florida between Dunlap and Kersh and representatives of CPH. In advance of the Palm Beach meeting, Morgan Stanley provided materials to Sunbeam to prepare Sunbeam for the meeting. Morgan Stanley also met with Kersh and other Sunbeam personnel to prepare for the Palm Beach meeting. However, Dunlap nearly scuttled Morgan Stanley's carefully crafted plan at the outset. During the December 1997 Palm Beach meeting, when CPH rejected Dunlap's initial all-stock offer, Dunlap became so angry that he cursed and ranted at the CPH representatives and stormed out,

G. Morgan Stanley Revives The Deal And Negotiates With CPH (January-February 1998).

38. Dunlap's tantrum appeared to kill any chance that CPH would sell its interest in Coleman to Sunbeam. Morgan Stanley, however, worked to revive the discussions. Drawing again on Morgan Stanley's relationships with CPH officers, Morgan Stanley was able to restart the discussions with CPH with the promise that Dunlap would be kept away from the negotiating table. Thereafter, Morgan Stanley, through Managing Directors Strong, James Stynes, and Robert Kitts, led the discussions with CPH on Sunbeam's behalf.

39. Morgan Stanley knew that it had to persuade CPH not only to sell Coleman, but also to accept Sunbeam stock - ultimately, 14.1 million shares of Sunbeam stock-as a major part of the purchase price. During the course of negotiations,

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Morgan Stanley prepared and provided CPH with false financial and business information about Sunbeam designed to create the appearance that Sunbeam was prospering and that Sunbeam's stock had great value. For example, Morgan Stanley provided CPH with false 1996 and 1997 sales and revenue figures, as well as false projections that Sunbeam could not expect to achieve. Together, in face-to-face discussions, Morgan Stanley and Sunbeam assured CPH that (a) Sunbeam would meet or exceed its first quarter 1998 earnings estimates; (b) analysts' 1998 earnings estimates for Sunbeam were correct; and (c) Sunbeam's plan to earn $2.20 per share in 1998 was easily achievable and probably low. Morgan Stanley and Sunbeam also falsely assured CPH that Sunbeam's "early buy" sales program would not hurt Sunbeam's future revenues. However, the "early buy" program was one of Sunbeam's revenue acceleration programs - and the devastating effects of Sunbeam's revenue acceleration programs already had begun to materialize at Sunbeam. Sunbeam's January and February 1998 sales were down drastically, although those results were not disclosed to CPH or the public. To the contrary, Morgan Stanley and Sunbeam together specifically advised CPH that Sunbeam's first quarter 1998 sales were "tracking fine" and running ahead of analysts' estimates.

40. Before the truth was revealed, Morgan Stanley persuaded CPH to sell its shares in Coleman to Sunbeam and to accept 14.1 million shares of Sunbeam stock as part of the consideration. Based on the price at which Sunbeam's stock was trading, the 14.1 million shares of Sunbeam stock were worth approximately $600 million.

H. Morgan Stanley Advises Sunbeam's Board On The Acquisition (February 27, 1998).

41. On February 27, 1998, Sunbeam's Board of Directors met at Morgan Stanley's offices to consider the purchase of Coleman, as negotiated by Morgan Stanley.

42. At the February 27, 1998 meeting, Morgan Stanley made an extensive presentation to Sunbeam's Board concerning the proposed transaction. Numerous Morgan Stanley representatives, including Managing Directors Strong, Kitts, Stynes, Ruth Porat, and Vikram Pandit, attended the meeting.

43. Morgan Stanley presented Sunbeam's board with Morgan Stanley's opinion on the value of Coleman. Using a discounted cash flow analysis, which Morgan Stanley represented was the best gauge of stand-alone economic value and the best method of capturing the unique value of Coleman, Morgan Stanley valued CPH's Coleman stock at a range of $31.06 to $53.24 per Coleman share. CPH's 44,067,520 Coleman shares were worth, therefore, between $1.369 billion and $2.346 billion.

44. Following Morgan Stanley's presentation, Sunbeam's Board of Directors voted to acquire Coleman on the very favorable terms that Morgan Stanley had negotiated.

1. Morgan Stanley Develops Sunbeam's Public Announcement Of The Coleman Acquisition (February 28-March 1, 1998).

45. Morgan Stanley spent the following weekend developing Sunbeam's public relations strategy to announce the Coleman transaction. Morgan Stanley scripted the points for Dunlap to make in a conference call with analysts. Morgan Stanley also crafted a list of "key media messages" for Dunlap to use in his communications with the press. On Sunday, March 1, 1998, Morgan Stanley spoke with a reporter for the Wall Street Journal to inform him that Sunbeam would announce its acquisition of Coleman the following morning.

46. Sunbeam announced its acquisition of Coleman on Monday, March 2, 1998, prior to the opening of the financial markets, Consistent with Morgan Stanley's valuation, investors viewed Sunbeam's purchase of Coleman - and the price that Sunbeam had paid - very favorably. The day before the acquisition was announced, Sunbeam's stock closed at

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$41-3/4. In the days following Sunbeam's announcement of the transaction, Sunbeam's stock rose approximately 25%, to a high of $52.

J. Morgan Stanley Serves As The Underwriter For Sunbeam's $750 Million Convertible Debenture Offering (March 1998).

47. Dunlap knew that Sunbeam needed to raise funds to pay the cash portion of the acquisition consideration. Dunlap also knew that Sunbeam needed cash to purchase two other smaller companies in addition to Coleman. Morgan Stanley recommended that Sunbeam raise funds through a $500 million offering of convertible subordinated debentures. To assure the offering's success, Morgan Stanley lent its name to the offering. Indeed, Morgan Stanley agreed to serve as the sole underwriter for the offering.

48. The money raised from the sale of the debentures was used by Sunbeam to complete the acquisition of Coleman.

49. Unbeknownst to CPH or the public, Sunbeam's first quarter 1998 sales were a small fraction of the financial community's expectations for the quarter. f Dunlap could consolidate Sunbeam's sales with Coleman's sales. Dunlap knew that he could obscure Sunbeam's actual first quarter sales. As a result, Dunlap was especially anxious to complete the acquisition of Coleman before Sunbeam announced its first quarter 1998 sales. Indeed, the success of the scheme depended upon Sunbeam's ability to complete the Coleman acquisition before Sunbeam's first quarter results were announced. To satisfy Dunlap's objectives, Morgan Stanley moved up the launch date of the offering.

50. The debentures were marketed to investors at a series of “road show” meetings and conference calls arranged by Morgan Stanley. Morgan Stanley prepared and distributed a memorandum for its sales force to use in marketing the debentures to investors. Morgan Stanley also developed the script for Dunlap and Kersh to deliver during the road show. In those materials, Morgan Stanley misrepresented Sunbeam's financial performance and emphasized Dunlap's purported “turnaround” accomplishments.

51. Morgan Stanley launched the debenture offering with a research analyst presentation to the Morgan Stanley sales force. As part of Morgan Stanley's growing relationship with Sunbeam, one of Morgan Stanley's top-rated research analysts planned to initiate equity coverage of Sunbeam. That Morgan Stanley analyst had modeled values for Sunbeam's acquisition of Coleman that were higher than even Sunbeam's management had predicted.

52. Although Morgan Stanley initially planned to sell $500 million worth of debentures, Morgan Stanley's efforts were so successful that the size of the offering was increased to $750 million on March 19, 1998 - the day of the last road show. The debentures were sold to investors nationwide, including investors based in Florida.

K. Morgan Stanley Is Told That Sunbeam's First Quarter Sales Are Down Dramatically (March 17 -18, 1998).

53. As Sunbeam's investment banker and the sole underwriter for the debenture offering, Morgan Stanley had a duty to investigate Sunbeam's finances and business operations. As a matter of law, that duty included an obligation to verify management's claims about Sunbeam's finances and business. Morgan Stanley, which had been working hand-in-hand with Sunbeam for almost a year and had traveled to Sunbeam's Florida offices, repeatedly asserted that it had satisfied that duty.

54. Strong, who was one of the senior Morgan Stanley investment bankers involved, has admitted in sworn testimony that he may have had more than 100 telephone conversations with Dunlap and Kersh (whose offices were in Sunbeam's Delray Beach headquarters) and that Strong was “sure” that he would have been apprised of Sunbeam's financial performance during the first two months of 1998.

55. With the $750 million debenture offering and the Coleman transaction set to close at the end of March 1998, Sunbeam's Florida-based outside auditors were shocked that Morgan Stanley had not asked them about Sunbeam's financial performance for first quarter 1998. Sunbeam's auditors were alarmed because Sunbeam's first quarter results were a disaster, but Dunlap, Kersh, and Morgan Stanley were telling CPH and the investing public, including investors in Florida, that Sunbeam's turnaround was a success, that Sunbeam's sales for the first quarter of 1998 were ahead of the expectations of outside financial analysts, and that Sunbeam was poised for record sales.

56. On March 17, Sunbeam's auditors forced the issue. From their Florida offices, Sunbeam's auditors sent Morgan Stanley a letter reporting that Sunbeam's net sales through January 1998 were down 60% - $28 million in January 1998, as compared to $73 million in January 1997. The March 17 letter explained that the decline was "primarily due to the... new early buy program for grills which accelerated grill sales into the fourth quarter of fiscal 1997."

57. The next day, Morgan Stanley was faxed a schedule from Sunbeam's Florida office that showed that Sunbeam's January and February 1998 net sales totaled $72 million, an amount that was 50% lower than Sunbeam's January and February 1997 net sales of $143.5 million.

8. Based on information that Sunbeam and Morgan Stanley had disseminated, CPH, investors, and Wall Street analysts were anticipating that Sunbeam's first quarter 1998 net sales would be in the range of $285 million to $295 million. Sales in that range would have been approximately 15% higher than first quarter 1997 sales. Sunbeam's January and February 1998 sales, however, totaled barely 25% of $285 million. As Sunbeam's outside auditors advised Morgan Stanley in writing, the sales drop-off was caused by Sunbeam's sales acceleration program. The information put into Morgan Stanley's hands on March 17 and March 18 showed that Morgan Stanley's and Sunbeam's assertions to CPH and other investors were false. Contrary to what Morgan Stanley and Sunbeam had represented, Sunbeam had not undergone a successful turnaround, Sunbeam's financial performance had not dramatically improved, and Sunbeam's performance in 1998 was not better than Wall Street analysts' expectations. It was imperative, therefore, that the truth be kept from CPH until the Coleman transaction closed at the end of March 1998.

L. Morgan Stanley Assists Sunbeam In Concealing The Fraud: The False March 19, 1998 Press Release.

59. Morgan Stanley did not disclose Sunbeam's disastrous first quarter, Morgan Stanley did not insist that Sunbeam disclose its disastrous first quarter, Morgan Stanley did not correct any of the false and misleading statements it and Sunbeam had made to CPH about Sunbeam's business or performance, and Morgan Stanley did not suspend any of the critical transactions that were scheduled to close in the next two weeks. Instead, with Morgan Stanley's knowledge and assistance, Sunbeam prepared and issued a false press release on March 19, 1998 that affirmatively misstated and concealed Sunbeam's true condition.

60. The March 19, 1998 press release staled: "Sunbeam Corporation ... said today that it is possible that its net sales for the first quarter of 1 998 may be lower than the range of Wall Street analysts' estimates for $285 million to *$295* million, but net sales are expected to exceed 1997 first quarter net sales of $253.4 million... The shortfall from analysts' estimates, if any, would be due to changes in inventory management and order patterns at certain of the Company's major retail customers. The Company further stated that based on the strength of its new product offerings and powerful brand names, it remains highly confident about the overall sales outlook for its products for the entire year."

61. As Morgan Stanley was fully aware, the March 19, 1998 press release was false, misleading, and failed to disclose material information. The March 19, 1998 press release failed to disclose Sunbeam's actual January and February 1998 sales or the true reasons for the poor results. Instead, the press release held out the false possibility that Sunbeam still could achieve sales of $285 million to $295 million and suggested that, if any shortfall occurred, that shortfall would be due to the fact that certain retailers had decided to defer first quarter purchases to the second quarter. The press release

also assured that Sunbeam at least would exceed first quarter 1997 net sales of $253.4 million 62. Based on information that Morgan Stanley had in its hands on March 18, 1998, it was obvious that Sunbeam would not achieve sales of $285 million to $295 million and that Sunbeam's first quarter 1998 sales would be below its first quarter 1997 numbers. To simply meet 1997 first quarter sales, Sunbeam needed sales of $123.3 million over the 12 remaining days of the quarter - an average of $10.28 million per day. Sales of $10.28 million per day would be 306% more than the average per day sales in March 1997, and 281 % more than the average per day sales for the first 17 days of March 1998. Furthermore, Morgan Stanley knew that the shortfall from analysts' estimates was not caused by retailers' deciding to defer purchases from the first quarter of 1998 to the second quarter, as the press release indicated. Rather, as Sunbeam's outside auditors had advised Morgan Stanley in writing, the collapse in first quarter sales was caused by Sunbeam's acceleration of 1998 sales into the fourth quarter of 1997.

63. After Sunbeam's false press release was issued, Morgan Stanley stood arm-in-arm with Sunbeam while Dunlap and Kersh told CPH, analysts, and investors that the March 19, 1998 release was a purely cautionary statement because some first quarter 1998 sales might simply “spillover” into the second quarter and that Sunbeam still believed that it actually would meet analysts' estimates of $285 million to $295 million in first quarter 1998 sales.

64. Morgan Stanley knew that a full and truthful disclosure of Sunbeam's first quarter sales would doom the debenture offering, which was scheduled to close on March 25, 1998, and Sunbeam's purchase of Coleman, which was scheduled to close on March 30, 1998.

65. As Morgan Stanley was fully aware, the written contract between CPH and Sunbeam gave CPH the express legal right to refuse to close the sale if there was a material adverse change in Sunbeam's “business, results of operation or financial condition.” Morgan Stanley knew that CPH would exercise its right and walk away from the transaction if CPH became aware of the extent and reasons for Sunbeam's disastrous first quarter results.

66. Furthermore, if the transactions did not close, Morgan Stanley would not be paid its $10.28 million fee for the Coleman acquisition or its $22.5 million fee for underwriting the subordinated debenture offering. Morgan Stanley also knew that Sunbeam would promptly replace Morgan Stanley with another investment banking firm - such as the Chase Securities team led by Mark Davis. Everything, therefore, depended on closing the Coleman acquisition before CPH learned the truth.

M. Sunbeam's Auditors Advise Morgan Stanley That The March 19, 1998 Release Is False.

67. Although Sunbeam's outside auditors already had made it perfectly clear to Morgan Stanley that Sunbeam's first quarter 1998 sales were a disaster, Morgan Stanley seemed intent on proceeding based upon the false March 19, 1998 press release.

68. One of Sunbeam's senior outside auditors, Lawrence Bornstein, has testified under oath that on March 19, 1998, he told Morgan Stanley's John Tyree that the statement in Sunbeam's March 19, 1998 press release - that Sunbeam would at least exceed first quarter 1997 sales of$253.4 million - was not credible: “Just do the math ... they've done a million dollars in sales the first 70 days of the year and now they need to do $10 million worth of sales for the next ... I think it was 11 days ... I mean, something ridiculous.” Bornstein also told Tyree: “I've been to every shipping dock domestically, I've been to Hattiesburg, I've been to Neosho, I've been to Mexico City, and 1 don't think these guys can physically ship this much stuff.”

N. Morgan Stanley Marches Ahead With The Closings (March 19-March 30, 1998).

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69. Morgan Stanley knew that the March 19 press release was false and misleading. Despite that knowledge and Bornstein's explicit statements, Morgan Stanley continued with its preparations to close the debenture offering on March 25, 1998 and the Coleman acquisition on March 30, 1998.

70. As part of those preparations, on March 24, 1998, Morgan Stanley's Tyree spoke by telephone with Sunbeam's Kersh, who was located in Sunbeam's Delray Beach offices, to obtain an updated report concerning Sunbeam's first quarter performance. By the time of that March 24, 1998 call, Sunbeam had fallen even further behind first quarter 1997 sales. As of March 18, 1998, Sunbeam needed to achieve average sales of $10.28 million per day, over 12 days, to reach first quarter 1997 sales. Sunbeam's sales between March 18 and March 24, 1998 had averaged only $6.81 million per day - well short of the $10.28 million per day that Sunbeam needed to achieve. Sunbeam's March 18 through March 24, 1998 sales were further proof that Sunbeam's March 19, 1998 press release was false and that Sunbeam would not achieve first quarter 1998 sales in excess of first quarter 1997 sales.

71. Morgan Stanley also knew no later than March 25, 1998, if not much earlier, that Sunbeam's earnings for the first quarter of 1998 were going to miss Wall Street analysts' earnings expectations, which were in the range of $0.28 to $0.31 per share (excluding one-time charges). Sunbeam's outside auditors advised Morgan Stanley on March 25 that Sunbeam had suffered a $41.19 million loss during the first two months of 1998, including a one-time charge of $30.2 million. Even excluding that one-time charge, Sunbeam's loss for the first two months was $0.13 per share. To achieve first quarter 1998 operating earnings of $0.28 per share, which were at the low end of analyst expectations, Sunbeam needed to realize a profit of $35.5 million during March 1998 alone. A net profit of $35.5 million in March was 500% more than Sunbeam's net profit for the entire first quarter of 1997. In fact, Sunbeam's first quarter 1998 earnings fell far short of Wall Street's expectations, Although Sunbeam's first quarter earnings were material, that information was not disclosed to CPH or the public until after the closing of the Coleman transaction on March 30, 1998.

O. Morgan Stanley Allows The Debenture Offering And The Coleman Acquisition To Close (March 25-30, 1998).

72. Having directly participated in misleading CPH and other investors, Morgan Stanley had a duty to disclose the true facts before the closing of the debenture offering and the Coleman acquisition. Morgan Stanley also could have required Sunbeam to postpone the closings of those transactions until the necessary disclosures were made, Morgan Stanley did neither. Instead, Morgan Stanley marched forward and closed the $750 million debenture offering on March 25, 1998, which was needed to close the Coleman transaction, and assisted Sunbeam in closing the acquisition of Coleman on March 30, 1998.

73. Morgan Stanley was richly rewarded for facilitating Sunbeam's fraud. Morgan Stanley received $22.5 million for the subordinated debenture offering and $10.28 million for the Coleman acquisition. Morgan Stanley would have received nothing if the transactions had failed to close.

P. Sunbeam's Fraud Is Revealed, Causing The Market Value Of Sunbeam's Stock To Plummet.

74. On April 3, 1998 - just four days after the Coleman transaction closed-- Sunbeam announced that sales for the first quarter of 1998 would be approximately 5% below the $253.4 million in sales that Sunbeam reported in the first quarter of 1997. In other words, Sunbeam was expecting sales in the range of $240 million. That sales shortfall was shocking news, particularly in view of assurances provided by Sunbeam both in and after its March 19, 1998 press release that $285 million to $295 million of sales was still a real possibility. The April 3, 1998 press release also disclosed that Sunbeam expected to show a loss for the quarter, although the release did not disclose the magnitude of the loss or how much of the loss was attributable to operating earnings as opposed to one-time charges. Sunbeam's news stunned CPH and the market. On April 3rd, Sunbeam's stock price dropped 25% - from $45-9/16 to $34-3/8.

75. Sunbeam's actual first quarter 1998 performance was even worse than Sunbeam disclosed on April 3, 1998. The April 3, 1998 release indicated that Sunbeam's first quarter sales were in the range of $240 million. In fact, Sunbeam's first quarter sales were $224.5 million. Sunbeam obscured the true shortfall by extending its quarter from March 29 to March 31, 1998- thereby adding two more days of Sunbeam sales. Sunbeam also failed to disclose that it had included two days of Coleman sales after the Coleman transaction closed on March 30. Further, Sunbeam inflated first quarter 1998 sales with $29 million of new phony "bill and hold" sales.

76. Just as Sunbeam's first quarter 1998 sales had been a disaster, so, too, were Sunbeam's first quarter 1998 earnings. Morgan Stanley and Sunbeam had represented to CPH that Sunbeam would achieve or exceed analyst first quarter 1998 earnings estimates. At the time of that representation, the consensus among analysts was that Sunbeam would enjoy first quarter 1998 earnings of $0.33 per share. However, on May 9, 1998, Sunbeam disclosed that it would record a first quarter loss of $0.09 per share (excluding one-time charges) - more than $0.40 per share lower than CPH had been told to expect.

77. Within weeks, Dunlap's fraudulent scheme began to unravel. In June 1998, after a number of news articles critical of Sunbeam's practices, Sunbeam's Board of Directors launched an internal investigation. That investigation led quickly to the firing of Dunlap and Kersh, and, subsequently, to a restatement of Sunbeam's financial statements for 1996, 1997, and the first quarter of 1998.

78. [Paragraph deleted pursuant to amendment of Complaint.]

79. As detailed above, Morgan Stanley participated in a scheme to mislead CPH and others and cover up the massive fraud at Sunbeam until Morgan Stanley and Sunbeam could close the purchase of Coleman. Morgan Stanley provided CPI with false information concerning Sunbeam's 1996 and 1997 financial performance, its business operations, and the value of Sunbeam's stock. Morgan Stanley also actively assisted Sunbeam in concealing Sunbeam's disastrous first quarter 1998 sales and earnings and the true reasons for Sunbeam's poor performance.

80. Morgan Stanley knew that its statements to CPH were materially false and misleading and omitted the true facts.

81. Morgan Stanley intended that CPH rely on Morgan Stanley's representations concerning Sunbeam.

82. In agreeing to accept approximately 14.1 million shares of Sunbeam stock in connection with the sale of CPH's interest in Coleman, CPH reasonably and justifiably relied upon Morgan Stanley's representations concerning Sunbeam.

83. As a result of Morgan Stanley's misconduct, CPH has suffered damages in excess of $485 million,

COUNT I

Aiding And Abetting Fraud

84. CPH repeats and realleges the allegations of paragraphs 1 through 77 and 79 through 83 above as if set forth fully herein.

85. As detailed above, Dunlap engaged in a fraudulent scheme to inflate the price of Sunbeam's stock by improperly manipulating Sunbeam's 1996 and 1997 performance, by falsely asserting that Sunbeam had successfully "turned around," and by concealing the collapse of Sunbeam's first quarter 1998 sales and earnings and the reasons for Sunbeam's first quarter 1998 performance.

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86. As detailed above, Morgan Stanley knew of Dunlap's fraudulent scheme and helped to conceal it until after Sunbeam could close the purchase of Coleman.

87. As detailed above, Morgan Stanley provided substantial assistance to Dunlap and Sunbeam, including: (a) concealing Sunbeam's first quarter 1998 sales collapse; (b) assisting with the false March 19, 1998 press release; (c) arranging road shows and meetings with prospective debenture purchasers at which Morgan Stanley, Dunlap, and others made false statements concerning Sunbeam's financial condition and business operations; (d) preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam's financial condition and business operations; (e) providing CPH with false financial and business information concerning Sunbeam; (f) scripting Dunlap's false public statements concerning Sunbeam's acquisition of Coleman; (g) persuading CPH to sell its interest in Coleman and to accept 14.1 million shares of Sunbeam stock and other consideration; and (h) underwriting the $750 million convertible debenture offering, proceeds from which were used to fund Sunbeam's purchase of Coleman.

88. As a result of Morgan Stanley's misconduct, CPH has suffered damages in excess of $485 million.

WHEREFORE, plaintiff Coleman (Parent) Holdings Inc. demands judgment against defendant Morgan Stanley & Co., Inc. as follows:
A. Compensatory damages to be determined at trial in an amount in excess of $485 million;

B. An award of costs and expenses incurred in this action, including reasonable attorneys' and experts' fees and expenses; and

C. Punitive damages; and

D. Any further relief as the Court may deem just and proper in light of all the circumstances of the case.

COUNT II

Conspiracy

89. CPH repeats and realleges the allegations of paragraphs 1 through 77 and 79 through 83 above as if set forth fully herein.

90. As detailed above, Morgan Stanley conspired with Dunlap and other senior Sunbeam executives to conceal the truth about Sunbeam's financial performance and business operations.

91. As detailed above, Morgan Stanley committed overt acts in furtherance of the conspiracy, including: (a) concealing Sunbeam's first quarter 1998 sales collapse; (b) assisting with the false March 19, 1998 press release; (c) arranging road shows and meetings with prospective debenture purchasers at which Morgan Stanley, Dunlap, and others made false statements concerning Sunbeam's financial condition and business operations; (d) preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam's financial condition and business operations; (e) providing CPH with false financial and business information concerning Sunbeam; (f) scripting Dunlap's false public statements concerning Sunbeam's acquisition of Coleman; (g) persuading CPH to sell its interest in Coleman and to accept 14.1 million shares of Sunbeam stock and other consideration; and (h) underwriting the $750 million convertible debenture offering, proceeds from which were used to fund Sunbeam's purchase of Coleman.

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92. As a result of Morgan Stanley's misconduct, CPH has suffered damages in excess of $485 million.

WHEREFORE, plaintiff Coleman (Parent) Holdings Inc. demands judgment against defendant Morgan Stanley & Co., Inc. as follows:
A. Compensatory damages to be determined at trial in an amount in excess of $485 million;

B. An award of costs and expenses incurred in this action, including reasonable attorneys' and experts' fees and expenses; and

C. Punitive damages; and

D.Any further relief as the Court may deem just and proper in light of all the circumstances of the case

JURY DEMAND

Plaintiff demands a trial by jury on all claims.

Dated: February 17, 2005

COLEMAN (PARENT) HOLDINGS C.

By: <<signature>>

One of Its Attorneys

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COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

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

CASE NO: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO DETERMINE THE APPROPRIATE SCOPE OF DISCOVERY

Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, respectfully requests that this Court determine the appropriate scope of discovery called for by this Court's February 17, 2005 Order granting Morgan Stanley's motion to compel production of documents. In support of this motion, CPH states as follows:

1. This Court's Order on Morgan Stanley's motion to compel required production, by 12:00 p.m. on February 18, of all documents within the care, custody, and control of CPH or any related entity reflecting the accounting value, book value, balance sheet value, or internal valuation of the 14.1 million shares of Sunbeam stock received by CPH in the transaction produced during or reflecting a value at any point in time between the date the transaction closed and the date Sunbeam first sought bankruptcy protection. Before noon on February 18, CPH complied with this Court's Order by producing responsive documents, which have been redacted to exclude financial information that this Court has ruled to be undiscoverable or irrelevant in prior discovery and *in limine* orders.

2. Out of an abundance of caution, CPH is filing this motion and will be prepared to submit to this Court, should the Court wish to review them, unredacted copies of the documents

produced to Morgan Stanley as well as certain documents withheld from the production so that this Court can determine whether any further disclosure is required. CPH will present these documents to the Court at the beginning of the hearing on Tuesday, February 22.

Dated: February 18, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
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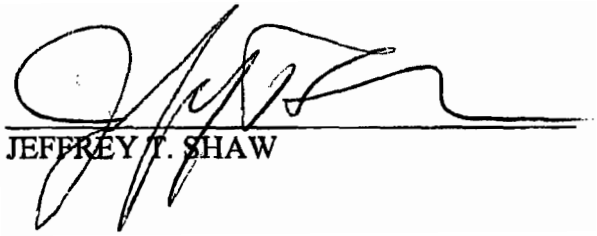
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Hand Delivery to all counsel on the attached list on this 18th day of February, 2005.



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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S OBJECTIONS TO COLEMAN (PARENT) HOLDINGS INC.'S NOTICE TO PRODUCE AT HEARING AND MOTION FOR PROTECTIVE ORDER

Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), pursuant to Fla. R. Civ. P. Rules 1.280 and 1.350, provides the following Objections to Plaintiff Coleman (Parent) Holdings Inc.'s Notice to Produce at Hearing ("Notice to Produce") served via facsimile on Morgan Stanley on Sunday, February 20, 2005. As grounds therefore, Morgan Stanley states as follows:

GENERAL OBJECTIONS

The following General Objections apply to the Notice to Produce in its entirety:

1. Morgan Stanley objects to the Notice to Produce to the extent that it seeks materials protected from disclosure by the attorney-client privilege, the attorney-work-product doctrine, the common-interest doctrine, or any other applicable constitutional, statutory, or common-law privilege, doctrine, immunity, or rule. Pursuant to the Agreed Order entered in this matter, a privilege log is not necessary at this time.

2. Morgan Stanley objects to the Notice to Produce because it seeks materials that are neither relevant nor likely to lead to the discovery of evidence related to Morgan Stanley's current net worth and to the subject matter of the pending action as framed by the pleadings in the above-captioned consolidated actions.

3. Morgan Stanley objects to the Notice to Produce to the extent that it seeks the production of documents that are publicly available or otherwise equally accessible to both parties, including deposition transcripts and court records.

4. It should not be inferred from the form or substance of any objection or response contained herein that documents responsive to any particular Request exist.

5. Morgan Stanley's objections are based on its good-faith investigations and discovery to date. Morgan Stanley expressly reserves the right to modify and supplement these objections.

SPECIFIC OBJECTIONS

1. Morgan Stanley objects to the Notice to Produce because Fla.R.Civ.P., Rule 1.350 does not provide a procedure that requires a party to produce documents at a hearing.

2. To the extent that the Notice to Produce can be viewed as a Request for Production pursuant to Rule 1.350, the Notice to Produce is procedurally defective. Rule 1.350 provides that a response is due 30 days after service of the Request. Plaintiff's Notice to Produce was served late Sunday afternoon. In addition, Monday, February 21, 2005 is a Court holiday; therefore, the first business day after service of the Request is Tuesday, February 22, 2005, the same day Plaintiff purports to require compliance with the Notice to Produce. Clearly, insufficient notice has been provided.

3. Moreover, since the Notice to Produce requests documents from as early as 1998, Plaintiff is barred from first seeking this discovery beyond the discovery cut-off imposed by this Court.

4. Because Morgan Stanley has been provided absolutely no notice whatsoever of the Notice to Produce, Morgan Stanley respectfully requests that the Court not permit the discovery sought by Plaintiff.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 21st day of February 2005.

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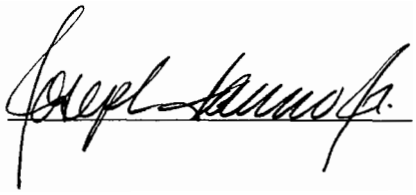
BY: 

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COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

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

CASE NO: 2003 CA 005045 AI

PLAINTIFF'S MOTION TO COMPEL FURTHER DISCOVERY REGARDING MORGAN STANLEY'S DESTRUCTION AND NONPRODUCTION OF E-MAILS

Coleman (Parent) Holdings Inc. ("CPH") respectfully seeks leave to conduct certain discovery relating to the willful failure of Morgan Stanley & Co. Incorporated ("Morgan Stanley") to make full production of responsive e-mails, as it falsely certified it had done prior to June 23, 2004. CPH seeks this discovery not to buttress the record supporting the pending motion for sanctions relating to Morgan Stanley's failure to produce e-mails, but to obtain information for use at trial. The record as to the former issue is complete and justifies the immediate entry of a default judgment as to liability. But as explained below, this discovery is warranted to ascertain the full magnitude of the e-mail problem, which in turn can inform the jury's determinations about liability (if the Court does not grant a default judgment) and about the award of punitive damages.

Specifically, CPH asks that the Court (1) order Morgan Stanley to produce the 46 documents listed on Morgan Stanley's February 10, 2005 Privilege Log (Priv. Nos. 486-524), as well as any other documents reflecting when and how Morgan Stanley agents or employees, including in-house and outside counsel, learned about the existence and discovery of all electronic data storage sources potentially containing e-mail-related discovery materials, the

failure to make complete production of e-mail-related discovery materials, and when and how Morgan Stanley's agents and employees responded; (2) order Morgan Stanley to make available for deposition in the next two weeks key personnel who were parties to attorney-client communications involving the production of e-mails in this case, including but not limited to Thomas A. Clare, James P. Cusick, James F. Doyle, Grant Jonas, Soo-Mi Lee, Arthur Riel, Zachary Stern, and Wray Stewart; and (3) bar Morgan Stanley from asserting attorney-client privilege to justify withholding documents or instructing deponents not to answer questions about Morgan Stanley's retention, destruction, production, or nonproduction of e-mails or backup tapes, based on the crime/fraud exception recognized in FLA. STAT. ANN. § 90.502(4)(a) (West 2004). For the reasons stated below, Morgan Stanley — which owns and repeatedly has invoked the attorney-client privilege — should no longer be permitted to assert the privilege to hide the fraud it has perpetrated upon this Court and CPH.

CPH needs the opportunity to inquire into these matters to establish the magnitude and seriousness of Morgan Stanley's repeated and egregious violations of the April 16, 2004 Agreed Order — the latest of which was revealed just this weekend when Morgan Stanley once again advised CPH that it had located yet another batch of backup tapes that have not yet been searched. *See* Ex. A (February 19 e-mail advising CPH that "Morgan Stanley has located additional boxes of backup tapes"); *see also* Ex. B (CPH's proposed order presenting a menu of possible sanctions). In recent days, Morgan Stanley has sought to minimize the severity of its misconduct by arguing (1) that Arthur Riel, the former head of Morgan Stanley's e-mail archive project, was a renegade employee who for some unknown reason orchestrated a fraudulent discovery scheme on his own; and (2) that counsel took every appropriate step to address the problem when they learned about it in October. MS Supp. Opp'n at 2-3, 6. Neither argument,

however, is supported by any record evidence, and Morgan Stanley has used assertions of privilege to block CPH from inquiring into these matters, both in depositions and in open court. Moreover, as explained below, there are multiple reasons to doubt the veracity of these assertions — reasons that fully justify revoking the protections of privilege in view of Morgan Stanley's failure to satisfy its discovery obligations even today, despite having certified its full compliance eight months ago.

BACKGROUND

As the Court is aware, it is only as a result of CPH's persistence that Morgan Stanley has begun taking steps in the direction of compliance with the April 16, 2004 Order, eight months after Morgan Stanley certified that it already had fully complied. How close Morgan Stanley now is to full compliance and whether it will ever reach the Court-ordered destination remain unsolved mysteries. If CPH had not made an appropriate motion, it is highly unlikely that Morgan Stanley ever would have located multiple sets of additional, unsearched tapes or would have done anything beyond processing an incomplete set of tapes on its own schedule, at its own pace. *See, e.g.,* Ex. C at 187, 195 (Mr. Clare testifying that he learned only after CPH filed its January 26, 2005 motion that the "Brooklyn found" tapes had been discovered before the certification on June 23); *id.* at 202 (Mr. Clare testifying that he only recently learned that Ms. Gorman had "been instructed [in October] that the processing of these tapes was to be given a higher priority than it had previously"); Ex. D at 155-56 (Mr. Saunders testifying that his deposition inspired additional searches that turned up another 243 tapes); Ex. E (February 16, 2005 notice revoking Morgan Stanley's June 23, 2004 certificate of compliance).

But the problems continue. Remarkably, just this weekend, Morgan Stanley once again revealed that it was <u>still</u> finding additional backup tapes that have never been analyzed or

searched. On Saturday afternoon, Morgan Stanley's counsel, Mr. Thomas A. Clare of Kirkland & Ellis LLP, sent CPH's attorneys an e-mail message stating, in full:

> We have been informed that Morgan Stanley has located additional boxes of backup tapes in a security room. Morgan Stanley is working to catalog the tapes and determine their contents. We will provide you with this information when it becomes available. As of this morning, however, Morgan Stanley has identified four (unlabelled) DLT tapes among the collection. Those four tapes will be sent to NDCI for further analysis.

Ex. A (e-mail sent at 12:54 p.m. on Saturday, February 19, 2005).[1] This message arrived only days after Morgan Stanley's Robert Saunders twice testified under oath that he was "confident" all tapes had already been located. Ex. D at 152-56 (Saunders's testimony at February 14, 2005 hearing, recounting his February 10, 2005 deposition testimony).

The Court already has determined based on evidence presented at the February 14 hearing that Morgan Stanley's failure to make a complete and timely production of e-mails in compliance with the Court's Order was willful. But the full magnitude of the effort to commit fraud on the Court and on CPH remains unknown. Morgan Stanley continues to assert (1) that this problem was originated by one employee, Mr. Riel, who was subsequently placed on "administrative leave" for incompetence and lack of integrity; and (2) that Morgan Stanley acted appropriately and with dispatch when its legal department learned of the issue in October. MS

---

[1] This is not the first time Morgan Stanley has been less than forthcoming when describing its discoveries. The Court will recall that Morgan Stanley, the day after it had certified in its brief filed on February 11 that production was 100% complete, sheepishly notified the Court via e-mail that it had found "some" additional backup tapes; yet at the February 14 evidentiary hearing, it became apparent that "some" was actually 243 tapes (whose storage capacity is something like 20 to 30 gigabytes each, a total capacity equal to roughly half a billion printed pages). Now, instead of disclosing how many boxes they have found, or how many tapes, Morgan Stanley merely states it has located "additional boxes of backup tapes." Nor does Morgan Stanley explain why it has chosen to send only four of these tapes to NDCI for further analysis.

Supp. Opp'n at 2-3, 6. This motion seeks a way to test those assertions for purposes of establishing the truth, which can in turn be disclosed at trial.

A review of the chronology of key events reveals why additional discovery is justified and why Morgan Stanley no longer should be allowed to invoke privilege to hamper that discovery:

- On May 14, 2004, Morgan Stanley made what purported to be a complete production of e-mails pursuant to the Agreed Order, based on electronic searches run in April.
- But two years earlier, hundreds of eight-millimeter tapes had been discovered (but not uploaded or searched), and by no later than May 6, 2004 (a full week before the May 14 production), the Morgan Stanley employee responsible for this project, Arthur Riel, knew there were other backup tapes (the "Brooklyn tapes") whose contents also had not been uploaded to the archive and searched. Ex. F, MS 112286 (May 6 minutes). He also knew that Morgan Stanley's vendor, NDCI, had not yet completed processing all of the original 35,000 backup tapes in order to allow them to be uploaded. *See* MS Supp. Opp'n at 8-9 (noting that, as of May 6, 2004, NDCI had yet to process more than 2,000 of the original 35,000 tapes).
- Despite that knowledge, on June 23 Mr. Riel falsely certified in writing that Morgan Stanley had fully complied with the Agreed Order.
- By July 2, Mr. Riel learned that there were potentially responsive e-mails on the tapes still being processed. Ex. G, MS 112327 (July 2 minutes).

But according to Morgan Stanley, no one in the legal department had any knowledge until late October that the May 14 production was not complete and that the June 23 certificate was therefore false. There are several reasons to doubt this story.

First, it is inherently implausible. No reason is suggested why Mr. Riel would take it upon himself to orchestrate a fraud not only on CPH but on Morgan Stanley's own counsel. Certainly there must have been multiple communications between counsel and Mr. Riel in April, May, and June 2004 about this very topic.

Second, Morgan Stanley has not offered any actual evidence of this story — instead offering only a carefully phrased declaration by Mr. Doyle stating that he learned in late October "that additional e-mail backup tapes had been located within Morgan Stanley, and that the data on those tapes had not been restored or searched prior to Morgan Stanley's May 14, 2004 e-mail production." Ex. H. Mr. Doyle, who was present but not called as a witness at the February 14 hearing, says nothing in his declaration about whether he was otherwise aware that the May 14 production was incomplete, nor does he describe any inquiry he made of other counsel at Morgan Stanley about when they acquired such knowledge.

Third, and even more glaringly, Morgan Stanley's latest privilege log lists a June 7, 2004 e-mail from Mr. Riel to two in-house Morgan Stanley attorneys, James Cusick and Soo-Mi Lee, "seeking legal advice regarding [the] status of [Morgan Stanley's] e-mail restoration process." Ex. I (privilege log, entry no. 490). The timing of that June 7 request for legal advice is disturbing, as it came after Mr. Riel oversaw the May 14 production of e-mails but before he signed the June 23 certificate stating that Morgan Stanley had fully complied with the Agreed Order, which he knew at the time was false. Morgan Stanley's attempt to portray Mr. Riel as a renegade employee is undercut by the fact that he affirmatively sought legal guidance from

Morgan Stanley's counsel before affixing his name to the knowingly false certificate. On the one hand, if in June 2004 Mr. Riel or his staff revealed to Morgan Stanley's counsel that certain backup tapes had not yet been searched, that could serve to establish that Mr. Riel conspired with attorneys at Morgan Stanley to conceal the falsity of Morgan Stanley's certificate and thereby to defraud both this Court and CPH. That misconduct should trigger the crime/fraud exception to the privilege, under FLA. STAT. ANN. § 90.502(4)(a) (West 2004). On the other hand, if Mr. Riel or his staff manipulated counsel to keep them ignorant and thereby to perpetrate a fraud on CPH and on this Court, that too should trigger the crime/fraud exception, as it is the client's knowledge — not the attorney's — that matters for purposes of the exception.

CPH should be allowed to depose both Mr. Riel and the in-house counsel (Mr. Cusick and Ms. Lee) from whom Mr. Riel sought legal advice on June 7, 2004. But the discovery also should go further, to include other key inside and outside counsel and information-technology professionals whose names appear repeatedly on Morgan Stanley's recent privilege log. Roughly half of the 46 documents on that log date from October or November 2004, when there was a flurry of communications about the e-mail production situation. At some point, a decision was made to produce 8,000 pages of e-mails and to tell CPH that these were a first installment of production from "additional e-mail backup tapes" that Morgan Stanley allegedly had discovered "since [its] e-mail production in May 2004." Ex. J (November 17, 2004 letter from Thomas A. Clare to CPH's counsel); *see id.* (referring to "newly discovered tapes"). But Morgan Stanley's own witnesses at the February 14, 2005 hearing testified that the data from the DLT tapes found in Brooklyn and the 8-mm tapes found in Manhattan were not put into searchable form until January 2005. Ex. K at 52, 65, 68-69 (Gorman). Morgan Stanley's false claim that the November production came from "newly discovered" backup tapes apparently was designed to

conceal the fact that not all of the 35,000 original tapes stored at the Recall facility in New Jersey had been searched in April 2004. CPH should be allowed to take discovery on the genesis of this cover story. CPH and this Court should learn the full story, under oath, with all witnesses fully subject to all the penalties for providing false testimony.

So far, CPH's efforts to learn that full story have been stymied by Morgan Stanley's repeated assertions of privilege. *See, e.g.*, Ex. L at 63-64 (invoking the privilege during Ms. Gorman's February 14, 2005 in-court testimony); Ex. M at 181-82, 196 (invoking the privilege during Mr. Clare's February 14, 2005 in-court testimony); Ex. N at 47, 63-65 (invoking the privilege during Ms. Gorman's February 9, 2005 deposition); Ex. O at 23-27 (invoking the privilege during Mr. Saunders's February 10, 2005 deposition). Those assertions of privilege might have been appropriate if there had been a record here of good faith. But the opposite is the case. Representation after representation of complete production has proved false, as carefully worded declarations obfuscate the truth and leave more questions than answers. The privilege log reveals the fingerprints of counsel on these clumsy, false representations. It is time for the full facts to be aired, under oath and under penalty of perjury.

ARGUMENT

The crime/fraud exception recognizes that the attorney-client privilege "ceas[es] to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing." *United States v. Zolin*, 491 U .S. 554, 562-63 (1989). Under Florida law, the crime/fraud exception bars any party from claiming as privileged any communications with a lawyer when the lawyer's services "were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud." FLA. STAT. ANN. § 90.502(4)(a) (West 2004) (emphasis added); *see Butler, Pappas, Weihmuller v. Coral Reef of Key Biscayne*

Developers, Inc., 873 So. 2d 339, 342 (Fla. 3d DCA 2004) (requiring showing that communication was part of effort to commit fraud, and party sought attorney's advice in order to further fraud); *First Union Nat'l Bank v. Turney*, 824 So. 2d 172, 187 (1st DCA 2001) (requiring showing that communication with counsel was "in order to obtain advice or assistance in perpetrating what the client knows to be a crime or fraud"). It does not matter whether the lawyers knew of the fraud, so long as the client knew and used its lawyers to commit (or plan to commit) a fraud. *First Union Nat'l Bank v. Turney*, 824 So. 2d at 187. As this Court put it, even counsel's sincere belief that it acted in good faith does not "absolve[] its client of the consequences of any of the client's bad acts. . . . [S]ometimes the [sins] of a client come back and visit the client." Ex. P at 618-19.

Florida law has long recognized "fraud on the court," a species of fraud designed to "produc[e] a judicial act by fraudulent representations to the Judge." *State v. Burton*, 314 So. 2d 136, 137 (Fla. 1975). Furthermore, "fraud on the court" encompasses abuses not only in open court, but also in pretrial discovery. Thus, in *Medina v. Florida East Coast Railway, L.L.C.*, 866 So. 2d 89 (Fla. 3d DCA 2004), where the plaintiff had repeatedly lied under oath at his deposition, the appellate court reaffirmed the principle that a Florida trial court, after giving the plaintiff an opportunity to be heard, has "the inherent authority to dismiss an action when it finds that a plaintiff has perpetrated a fraud on the court." *Id.* at 90.

Courts in Florida and elsewhere have not hesitated to apply the crime/fraud exception to frauds on the court, including discovery abuses, destruction of evidence, and obstruction of justice. *See, e.g., Volcanic Gardens Mgmt. Co. v. Paxson*, 847 S.W.2d 343, 348 (Tex. Ct. App. 1993) ("[U]nder the crime/fraud exception to the lawyer-client privilege, 'fraud' would include the commission and/or attempted commission of fraud on the court or on a third person," as

when a "client seeks the assistance of an attorney in order to make a false statement or statements of material fact or law to a third person or the court for personal advantage.").

In *Gutter v. E.I. DuPont de Nemours*, 124 F. Supp. 2d 1291 (S.D. Fla. 2000), a Florida federal court applied the crime/fraud exception when DuPont's counsel made false and misleading statements to the court regarding privilege logs. Although the court could identify no single lawyer at DuPont who knew all the facts behind the misstatements, there was "ample evidence that DuPont itself had the requisite knowledge and intent" for a finding of fraud on the court. *Id.* at 1313. The parallels to the present case are striking: Certain of the defendant's lawyers knew that certain documents could be produced (and had been in other litigation), but the defendant withheld the documents and informed the court that the documents could not be produced. *See id.* at 1302. When the pieces were fit together, the defendant's fraud was revealed.

Such discovery misconduct triggers the crime/fraud exception because the destruction of records eviscerates "the court's ability to ascertain the truth." *In re Sealed Case*, 754 F.2d 395, 401 (D.C. Cir. 1985); *see id.* (invoking the crime/fraud exception where a party "perpetrated a continuing fraud connected with, but not limited to, the actual destruction of records"). The destruction of evidence is every bit as troubling with electronic documents as with traditional paper documents. As this Court put it on February 15, "This is a case of fraud. And electronic data is the functional equivalent of a paper trail." Ex. P at 614-15.

For these reasons, courts do not hesitate to deny the protections of privilege when circumstances suggest, for example, that a party and its lawyers were overseeing the destruction of e-mails and other documents while anticipating litigation. *See Rambus, Inc. v. Infineon Techs. AG*, 220 F.R.D. 264, 283, 287-88 (E.D. Va. 2004). In *Rambus*, a suit involving counterclaims of

fraud, the defendant sought discovery of documents, including attorney-client communications, relating to the plaintiff's document-retention program, on the theory that the document-retention program resulted in the intentional spoliation of relevant documents, and therefore the crime/fraud exception to the attorney-client privilege applied. In response to the plaintiff's claim that it had destroyed documents to reduce the potential cost of discovery in future cases, not to suppress evidence in this particular case, the court held that even if the plaintiff "did not institute its policy in bad faith, if it reasonably anticipated litigation when it did so, it is guilty of spoliation." *Id.* at 286. The court concluded that "the crime/fraud exception extends to materials or communication created for planning, or in furtherance of, spoliation." *Id.* at 283; *see also State Farm Fire & Cas. Co. v. Superior Court of Los Angeles County*, 54 Cal. App. 4th 625, 648-49 (Cal. Ct. App. 1997) (applying the crime/fraud exception to discovery abuses).

When parties engage in discovery misconduct and abuse the attorney-client privilege, Florida courts similarly have not hesitated to reject those parties' claims of privilege and to require production of documents that otherwise would have been protected from disclosure. *See, e.g., Metabolife Int'l, Inc. v. Holster*, 888 So. 2d 140, 140-41 (Fla. 1st DCA 2004) (holding that defendant's failure timely to file a privilege log waived its claims of privilege and required production of documents that otherwise would have been subject to attorney-client and work-product privileges); *General Motors Corp. v. McGee*, 837 So. 2d 1010, 1032 (Fla. 4th DCA 2002) (holding that defendant's misconduct during discovery justified a finding that defendant had waived its privilege claims); *Omega Consulting Group, Inc. v. Templeton*, 805 So. 2d 1058, 1060 (Fla. 4th DCA 2002) (affirming the trial court's order requiring corporate defendant to disclose three e-mails, and rejecting the corporation's claims that the communications were protected from disclosure by the attorney-client privilege).

This Court's April 16, 2004 Order gave Morgan Stanley one full month to produce all responsive, nonprivileged e-mails. Today, more than 10 months later, Morgan Stanley has yet to comply with that Order. And for almost the entire period of delay, up until a few days ago (when Morgan Stanley finally revoked its certificate of compliance, *see* Ex. E), Morgan Stanley insisted on telling CPH and this Court that it had complied with the Order. The time has come for this Court to stop accepting Morgan Stanley's blanket claims of attorney-client privilege and to acknowledge that Morgan Stanley has used its lawyers to "carry[] out [its] misrepresentations and concealment." *American Tobacco Co. v. State*, 697 So. 2d 1249, 1257 (Fla. 4th DCA 1997).

CONCLUSION

For the foregoing reasons, this Court should invoke the crime/fraud exception to order Morgan Stanley (1) to produce the 46 documents listed on Morgan Stanley's February 10, 2005 Privilege Log (Priv. Nos. 486-524), as well as any other documents reflecting when and how Morgan Stanley agents or employees, including in-house and outside counsel, learned about the existence and discovery of all electronic data storage sources potentially containing e-mail-related discovery materials, the failure to make complete production of e-mail-related discovery materials, and when and how Morgan Stanley's agents and employees responded; (2) to make available for deposition in the next two weeks key personnel who were parties to attorney-client communications involving the production of e-mails in this case, including but not limited to Thomas A. Clare, James P. Cusick, James F. Doyle, Grant Jonas, Soo-Mi Lee, Arthur Riel, Zachary Stern, and Wray Stewart; and (3) not to assert attorney-client privilege as a basis for withholding documents or when the deponents are asked questions about Morgan Stanley's retention, destruction, production, or nonproduction of e-mails or backup tapes.

Dated: February 22, 2005

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been served to all counsel on the attached Service List by the means indicated this 21st day of February 2005.

Dated: February 21, 2005

COLEMAN (PARENT) HOLDINGS INC.

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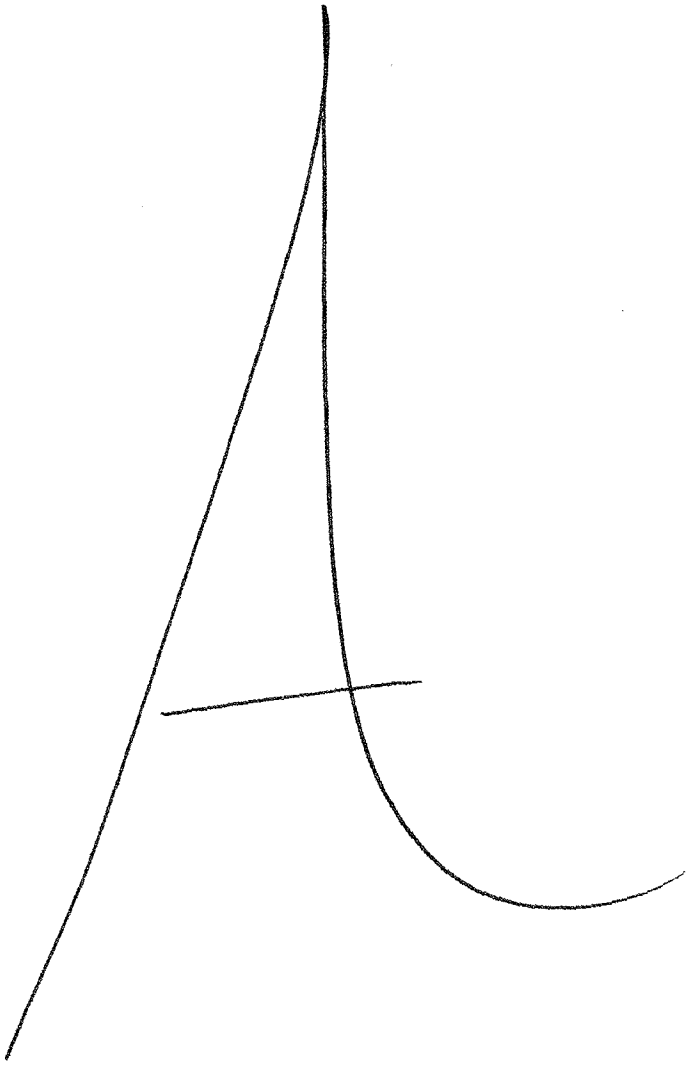

Hirsch, Sam

From: Thomas Clare [tclare@kirkland.com]
Sent: Saturday, February 19, 2005 12:54 PM
To: Brody, Michael T; Hirsch, Sam
Cc: JIanno@CarltonFields.com; LBemis@kirkland.com; Jeffrey Davidson
Subject: Morgan Stanley Backup Tapes

We have been informed that Morgan Stanley has located additional boxes of backup tapes in a security room. Morgan Stanley is working to catalog the tapes and determine their contents. We will provide you with this information when it becomes available. As of this morning, however, Morgan Stanley has identified four (unlabelled) DLT tapes among the collection. Those four tapes will be sent to NDCI for further analysis.

Thomas A. Clare | Kirkland & Ellis LLP

655 Fifteenth Street, NW --12th Floor | Washington D.C. 20005
(202) 879-5993 DIRECT | (202) 879-5200 FAX | tclare@kirkland.com

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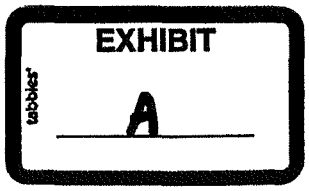
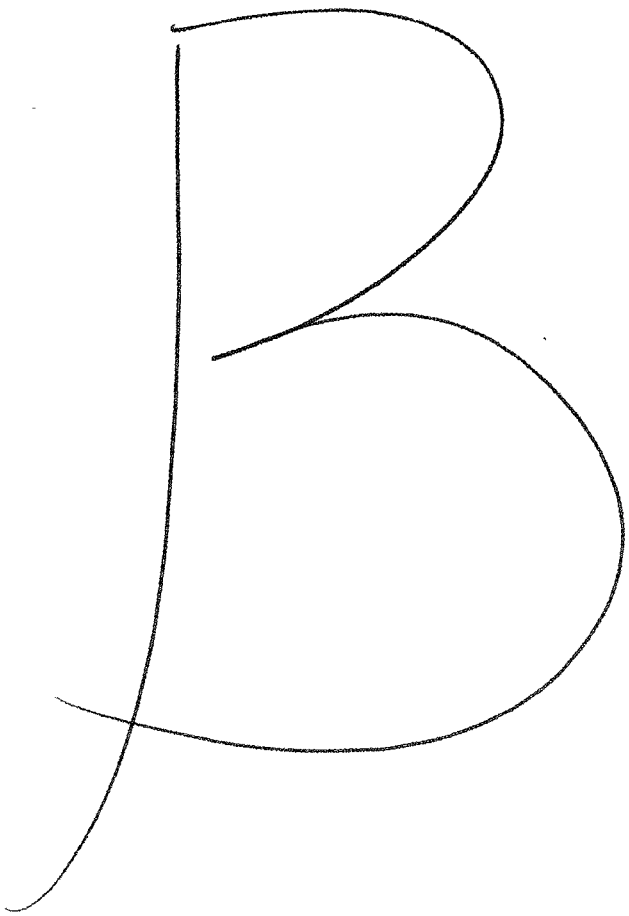




IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

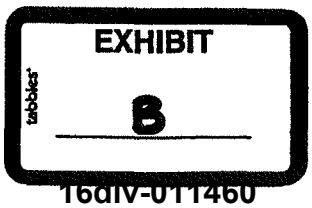
MORGAN STANLEY & CO., INC.,
Defendant.
_____/

[CPH'S PROPOSED] ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION REGARDING MORGAN STANLEY & CO. INCORPORATED'S DESTRUCTION OF E-MAILS AND NONCOMPLIANCE WITH THE COURT'S APRIL 16, 2004 AGREED ORDER

THIS CAUSE came before the Court February 14, 2005 on Coleman (Parent) Holdings, Inc.'s ("CPH's") Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, as modified by CPH's February 14, 2005 ore tenus motion for additional relief. Based on the evidence introduced at an evidentiary hearing, the Court FINDS as follows:

1. This is a case of fraud. And electronic data are the functional equivalent of a paper trail. Morgan Stanley's actions here have had a crucial impact on plaintiff CPH's ability to prove its case.

2. Because a central issue in this case is the extent of Morgan Stanley's knowledge of the fraudulent scheme undertaken by its client Sunbeam Corporation during 1997 and early 1998, CPH has long sought access to Morgan Stanley's internal files, including e-mails. Morgan Stanley has impeded that discovery, however, by making no effort to preserve the relevant e-mails even when, as early as February 1999, making concerted efforts to maintain other (non-



electronic) records in Morgan Stanley's possession in anticipation of potential Sunbeam-related litigation. Indeed, Morgan Stanley knew Sunbeam-related litigation was likely as of March 1998. Morgan Stanley destroyed countless e-mails when it systematically re-used and "over-wrote" computer backup tapes on a rolling basis every 12 months. That 12-month retention policy violated applicable Securities and Exchange Commission regulations requiring companies like Morgan Stanley to maintain e-mails for at least three years and to maintain them in a readily accessible form for at least two years. *See* 17 C.F.R. § 240.17a-4 (1997).

3. The need for Morgan Stanley to redouble its efforts to recover some fraction of the relevant e-mails became a major issue in this litigation, culminating in an Agreed Order on April 16, 2004. The Agreed Order required Morgan Stanley to (1) search the oldest full backup tape that exists for e-mail of each of 36 Morgan Stanley employees or former employees involved in the Sunbeam transaction; (2) provide to its attorneys for responsiveness and privilege review all e-mails dated from February 15, 1998 through April 15, 1998 and all e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004 all nonprivileged e-mails responsive to CPH's document requests; and (4) give CPH a privilege log listing any materials withheld on privilege grounds. Morgan Stanley was also required to certify its full compliance with the Agreed Order. The assumption was that this process would lead to production of e-mails from a set of roughly 35,000 backup tapes that had been located and had not been overwritten.

4. On May 14, 2004, Morgan Stanley produced approximately 1,300 pages of e-mails but failed to provide the required certification. Finally, on June 23, 2004, after inquiries by CPH, Morgan Stanley provided CPH with a certificate of full compliance with the April 16 Agreed Order signed by Arthur Riel, the manager at Morgan Stanley assigned this task.

5. As organized by Morgan Stanley, the effort to recover e-mails from any remaining backup tapes had several stages. First, the relevant backup tapes (in various formats, such as "DLT" tapes and eight-millimeter tapes) had to be located by searching the potential storage locations. Second, the tapes were sent to a vendor called National Data Conversion Inc. (NDCI) to be processed, and the data were returned to Morgan Stanley in the form of "SDLT" tapes. Third, Morgan Stanley had to find a way to upload the contents of these SDLT tapes into its new e-mail archive. Fourth, Morgan Stanley would run "scripts" to transform this data into a searchable form, so that it could later be searched for responsive e-mails. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when SDLT tapes remained in limbo, waiting to be uploaded to the archive.

6. At some point prior to May 6, 2004, Arthur Riel and his team became aware that more than 1,000 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423 DLT tapes had not been processed by NDCI and thus had not been included in the archive or searched when Morgan Stanley made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification that it was false. He and others on Morgan Stanley's e-mail archive team were further informed by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990s. But Morgan Stanley neither withdrew its certification nor informed CPH about the potential for additional production of e-mails. During the summer of 2004, it appears that the Brooklyn tapes were processed and sent to the staging area, but they were not uploaded to the e-mail archive so as to be available to be searched until January 2005 (at least eight months after they were found).

7. Morgan Stanley also failed to timely produce e-mails from 738 8-millimeter backup tapes found at a Morgan Stanley facility in Manhattan even earlier, in 2002. These 738 8-mm tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched when Morgan Stanley made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Mr. Riel and others were further informed by their vendor NDCI by July 2, 2004 that the 8-mm tapes contained e-mail dating back at least to 1998. But Morgan Stanley neither withdrew its certification nor informed CPH about the potential for additional production of e-mails. During the summer of 2004, it appears that the 8-mm tapes were processed and sent to the staging area. But, like the Brooklyn tapes, they also were not uploaded to Morgan Stanley's e-mail archive.

8. In August 2004, Mr. Riel was relieved of his employment responsibilities. He and his team were replaced by a new team headed by Allison Gorman Nachtigal. Ms. Gorman testified that she was instructed to describe the circumstances of Mr. Riel's replacement as his having been "placed on administrative leave." That same term appears by interlineation over the original typed description in Morgan Stanley's memorandum addressing these issues. The typed language stated: "[Mr. Riel was] dismissed for integrity issues."

9. Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area, and she was not even informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman met with a group of Morgan Stanley attorneys. Following that meeting, Ms. Gorman gave the project somewhat greater priority, although even then it clearly did not move as expeditiously as possible. For example, Morgan Stanley apparently gave no thought to using an

outside contractor to expedite the process of completing the discovery, even though Morgan Stanley had certified completion months earlier and even though Morgan Stanley lacked the technological capacity to upload and search the data at that time (and would not attain that capacity for many months). Even at this point, no one from Morgan Stanley or its outside counsel, Kirkland & Ellis LLP, gave CPH or this Court any hint that the June certification was false.

10. On November 17, 2004, more than six months after the May 14, 2004 deadline for producing e-mails in response to the Agreed Order, Morgan Stanley sent CPH a letter revealing that its June 23 certificate of compliance was incorrect. The letter stated:

> Morgan Stanley has discovered additional e-mail backup tapes since our e-mail production in May 2004. The data on some of [the] newly discovered tapes has been restored and, to ensure continued compliance with the agreed order, we have re-run the searches described in the order. Some responsive e-mails have been located as a result of that process. We will produce the responsive documents to you as soon as the production is finalized.

The letter also foreshadowed further delays: "Some of the backup tapes are still being restored. To ensure continued compliance with the agreed order, we intend to re-run the searches again when the restoration process is complete and will produce any responsive documents that result."

11. The next day, on November 18, 2004, Morgan Stanley produced an additional 8,000 pages of e-mails and attachments from backup tapes. Morgan Stanley's November 2004 letters stated that the 8,000 pages came from "newly discovered" tapes; but the testimony now makes clear that this statement was likely false because Ms. Gorman's team did not figure out how to upload and make searchable the materials from the staging area until January 2005. Instead, it appears the 8,000 pages were from the original set of 35,000 backup tapes that were known to exist but that were not fully uploaded or searched the previous spring — further contradicting the June 23 certificate of compliance. Morgan Stanley has completely failed to

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offer any explanation to reconcile the obvious conflict between its assertions at the time of production that the 8,000 pages came from "newly discovered" tapes (*i.e.*, the "Brooklyn tapes") and the testimony of their own witness, Ms. Gorman, that data from those newly discovered tapes were not capable of being searched until two months later, in January.

12. After a follow-up inquiry by CPH, on December 17, 2004, Morgan Stanley produced a privilege log and advised CPH that "[n]o additional responsive e-mails have been located since our November production." But Morgan Stanley refused to answer CPH's questions about whether Morgan Stanley had restored all the backup tapes described in its November 17 letter and about why the tapes had not been located earlier.

13. On December 30, 2004, CPH sought confirmation that Morgan Stanley had reviewed all e-mail backup tapes and produced all responsive e-mails, and if not, asking when the review would be completed. On January 11, 2005, Morgan Stanley informed CPH that the "restoration of e-mail backup tapes is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

14. On January 19, 2005, CPH wrote asking Morgan Stanley to explain the circumstances under which Morgan Stanley located the "newly discovered" backup tapes and to disclose when the tapes were located. CPH also asked Morgan Stanley to explain why the backup tapes could not be restored sooner.

15. On January 21, 2005, Morgan Stanley sent CPH a letter that failed to answer CPH's questions. Instead, Morgan Stanley described its efforts to restore the backup tapes as "ongoing"; informed CPH that "there is no way for Morgan Stanley to know or accurately predict the type or time period of data that might be recovered"; and stated that "Morgan Stanley

cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes." Ominously, the letter closed by noting that, "when the agreed-upon searches are run again," they "will include approximately one terabyte of additional data." One terabyte equals about 1 million megabytes.

16. On January 26, 2005, CPH filed the Motion at issue here, asking the Court to instruct the jury that Morgan Stanley's destruction of e-mails and other electronic documents and Morgan Stanley's noncompliance with the April 16, 2004 Agreed Order can give rise to an adverse inference that the contents of the missing e-mails would be harmful to Morgan Stanley's defense in this case.

17. Meanwhile, Morgan Stanley found another 169 DLT tapes in January 2005 that allegedly had been misplaced by its New Jersey storage vendor, Recall. And again, Morgan Stanley chose to provide no specifics to CPH or to the Court.

18. At a February 2, 2005 hearing on CPH's motion, Mr. Thomas A. Clare of Kirkland & Ellis LLP, representing Morgan Stanley, stated that "late October of 2004 . . . [is] the date I represent to the Court is the first time that anyone knew that there was recoverable e-mail data" on the Brooklyn tapes. Hr'g Tr. (2/2/05) at 133-34. The actual date, however, was at least three months earlier, by July 2, 2004. Furthermore, Morgan Stanley refused to provide the Court with definitive answers as to when its e-mail production would be complete, merely stating that it would proceed with "all deliberate speed." *Id.* at 139. Also at the February 2 hearing, Mr. Clare not only neglected to inform the Court about the 8-mm tapes that had been located in 2002, but also informed the Court that the 1,423 DLT tapes had been found in Brooklyn "sometime during the summer" of 2004. *Id.* at 132. The truth of this assertion is belied not only by the evidence showing that the tapes were found before May 6, 2004, but by Mr. Clare's

acknowledgement on cross-examination that he became aware of that chronology after CPH filed its present motion on January 26, 2005 — a week before he unambiguously told the Court the tapes had been found during the summer. Hr'g Tr. (2/14/05) at 187, 195.

19. On February 3, 2005, the Court ordered further discovery and set an evidentiary hearing for February 14, 2005. The discovery took place on February 9 and 10, when CPH deposed the three e-mail witnesses that Morgan Stanley identified.

20. Beginning on Sunday, February 6, Morgan Stanley produced a few dozen additional pages of e-mails. At 2:38 a.m. on Friday, February 11, 2005, Morgan Stanley produced three additional pages of e-mails, announced that its e-mail production was complete, and asked the Court to dismiss CPH's Motion as moot.

21. But on Saturday afternoon, February 12, Morgan Stanley informed the Court that it had, in the previous 24 hours, discovered additional tapes. Also, Morgan Stanley stated that its recent production omitted certain "attachments" to e-mails. Morgan Stanley did not attempt to clarify or substantiate either of these statements to CPH or to the Court until the Monday, February 14, 2005 hearing.

22. At the February 14 hearing, none of the witnesses Morgan Stanley presented was involved in or familiar with the actual electronic searches conducted using the parameters specified in this Court's April 16, 2004 Order. And none explained where the 8,000 pages produced in November 2004 had come from. Morgan Stanley's witnesses did, however, describe three new developments. First, Mr. Robert Saunders, had returned to New York after his February 10 deposition and, concerned about his unqualified assertion that he was "confident" that a complete search for backup tapes had been conducted, decided finally to undertake a personal search of Morgan Stanley's "communication rooms." By doing so, he

discovered more than 200 additional backup tapes openly stored in locations known to be used for tape storage. Those discoveries were made on Friday and Saturday, February 11 and 12. But as of the February 14 hearing, NDCI had not yet determined which, if any, of these newly discovered backup tapes contained e-mails. Second, Ms. Gorman reported that on Friday she and her team had discovered that a flaw in the software they had written had prevented Morgan Stanley from locating all responsive e-mail attachments. Third, Ms. Gorman reported discovering on Sunday evening that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so there were at least 7,000 additional e-mail messages that appeared to fall within the scope of the Agreed Order but had yet to be fully reviewed by Kirkland & Ellis for responsiveness and privilege. As counsel for Morgan Stanley admitted, this problem "dwarf[s]" their previous problems. Hr'g Tr. (2/14/05) at 13. And Ms. Gorman indicated she was "90 percent sure" that the problem infected their original searches in May, which means that they even failed to timely produce relevant materials that had been uploaded into the archive by that point. *Id.* at 82-83.

23. Throughout this entire process, lack of candor on the part of Morgan Stanley and its Kirkland & Ellis attorneys frustrated the Court's ability to be fully and timely informed with respect to these issues.

24. Morgan Stanley's failure during the summer and fall of 2004 to timely process a substantial amount of data that was languishing in the "staging area," rather than being put into searchable form and then searched, was willful.

25. Morgan Stanley's failure to timely notify CPH of the existence of the DLT and 8-mm tapes — which Morgan Stanley had located as early as 2002 and certainly prior to the June

23, 2004 certification — and Morgan Stanley's failure to timely process those raw backup tapes was willful and a gross abuse of its discovery obligations.

26. Morgan Stanley's failure to produce all e-mail attachments was negligent, and it was discovered and revealed only as a result of CPH hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check Morgan Stanley's compliance with the April 16, 2004 Agreed Order.

27. Morgan Stanley's failure to produce all of the Lotus Notes e-mails was negligent, and it was discovered and revealed only as a result of CPH hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check Morgan Stanley's compliance with the April 16, 2004 Agreed Order.

28. Morgan Stanley's failure to locate all potentially responsive backup tapes before Saturday, February 12, 2005 (if then) was grossly negligent.

29. In sum, despite the affirmative duty on Morgan Stanley's part arising out of the litigation to produce its e-mails, and contrary to federal law requiring it to preserve the e-mails, Morgan Stanley failed to preserve many e-mails and failed to produce all e-mails required by the Agreed Order. The failings include overwriting e-mails after 12 months; failing to conduct proper searches for tapes that may contain e-mails; providing a certificate of compliance known to be false when made and never amended to reflect its falsity; failing to timely notify CPH when additional tapes were located; failing to use reasonable efforts to search the newly discovered tapes; failing to timely process and search data held in the staging area or notify CPH of the deficiency; failing to write software scripts consistent with the Agreed Order; and discovering the deficiencies only after CPH was given the opportunity to check Morgan Stanley's work and

the Morgan Stanley attorneys were required to certify the completeness of the prior searches. Many of these failings were done knowingly, deliberately, and in bad faith.

WHEREFORE, based on this Court's authority under Rule 1.380(b)(2) of the Florida Rules of Civil Procedure and other authority cited herein, and based on the foregoing findings of fact and the briefs and arguments of counsel, it is hereby ORDERED AND ADJUDGED as follows:

1. The Motion is GRANTED.

2. The findings of fact set forth above shall be deemed established for the purposes of this action and shall be disclosed to the jury at the start of the trial. Fla. R. Civ. P. 1.380(b)(2)(A).

3. Morgan Stanley is held in contempt of Court for its repeated, egregious failures to obey the Court's April 16, 2004 Agreed Order and for its efforts to conceal that noncompliance. The Court reserves for further hearing the determination of the amount and type of financial sanctions appropriate for this contempt. Fla. R. Civ. P. 1.380(b)(2)(D).

4. CPH will be allowed to present argument and evidence concerning Morgan Stanley's e-mail destruction, e-mail nonproduction, and other discovery misconduct when presenting argument and evidence going to the issue of punitive damages. *See, e.g., General Motors Corp. v. McGee*, 837 So. 2d 1010, 1035-36 (Fla. 4th DCA 2002).

5. [*Alternative One*] Because of its failure to produce relevant evidence on a timely basis, Morgan Stanley's answer is stricken and, therefore, CPH's allegations of liability are deemed admitted and Morgan Stanley is held liable on all counts of CPH's complaint. The trial therefore will be limited to (1) the amount of compensatory damages; (2) CPH's entitlement to punitive damages; and (3) the amount of punitive damages. Fla. R. Civ. P. 1.380(b)(2)(C).

[*Alternative Two*] The Court will instruct the jury (both at the start of the trial and when delivering other jury instructions as to liability) to presume that, beginning no later than February 15, 1998, Morgan Stanley knew of the fraud that Sunbeam was committing against CPH and was aware that it was part of an overall activity that was improper. At trial, Morgan Stanley will thus bear the burden of disproving its knowledge of the Sunbeam fraud. *See, e.g., Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596, 599 (Fla. 1987); *Safeguard Mgmt. v. Pinedo*, 865 So. 2d 672, 674 (Fla. 4th DCA 2004).

[*Alternative Three*] The Court will instruct the jury (both at the start of the trial and when delivering other jury instructions as to liability) that it may infer that the contents of the e-mails that were destroyed or not produced would be harmful to Morgan Stanley's position in this case. Specifically, this adverse-inference jury instruction will state: "In this case, as in every civil case in Florida, as part of the trial preparation process the parties are entitled to request information from each other in a process that is known as discovery. You have heard that, during the discovery process in this case, Morgan Stanley failed to produce many of the e-mails sent or received by Morgan Stanley employees during the relevant time period in 1998. You are permitted, but not required, to infer that Morgan Stanley's destruction or nonproduction of e-mails had a fraudulent purpose. And you are permitted, but not required, to infer that, if produced, the missing e-mails would have been unfavorable to Morgan Stanley. Any inference you decide to draw should be based on all of the facts and circumstances in this case. You should give the fact of the missing e-mails the weight you think proper under all the circumstances; you may consider that fact decisive with respect to any or all of CPH's claims, you may ignore it altogether, or you may give it weight between those extremes, as you determine appropriate."

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ___ day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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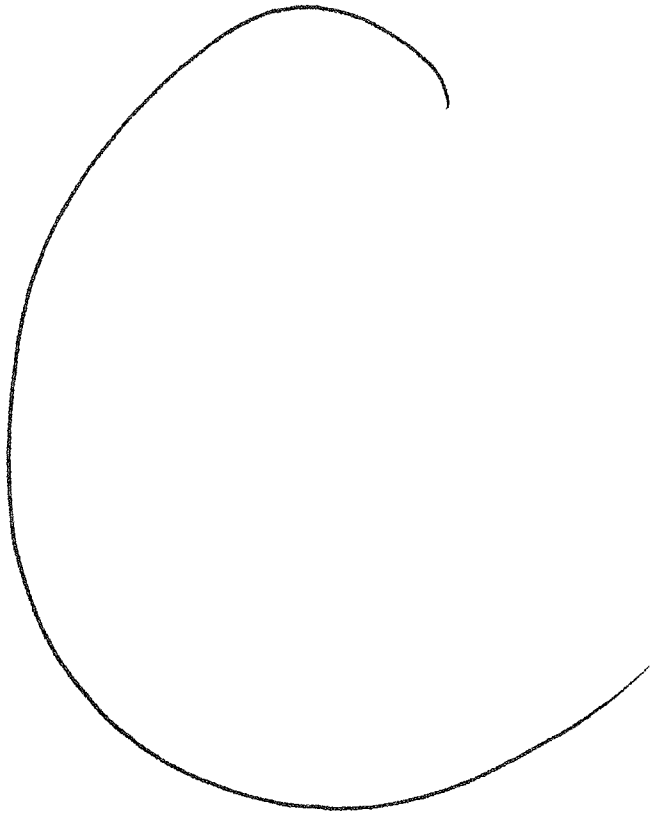


IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. VOLUME 2

MORGAN STANLEY & CO., INC.,

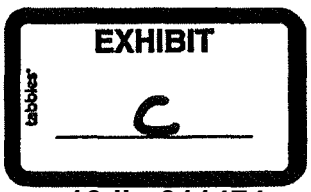
Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Monday, February 14, 2005
1:30 p.m. - 5:00 p.m.



were found sometime before June 17, 2004, correct?

A. Sorry. Could you repeat that?

Q. Yes, sir. The Brooklyn tapes were found before the certification, right?

A. I have heard that testimony, yes.

Q. Okay. My first question to you is when did you learn that the tapes, the Brooklyn tapes were found before the certification? When did you first find that out?

A. That particular data point I would say I first personally learned of that after your motion for an adverse inference.

Q. Do you have knowledge as to whether any other Kirkland lawyer learned of that before we filed our motion?

A. I don't. I can only speak to my own personal knowledge. I would say, however, that I have been the primary Kirkland lawyer interfacing with the client on this issue.

Q. Since both the 738 eight-millimeter backup tapes and the 1,423 DLT tapes were found before the certification but not searched as of the time of the certification, correct? We know that.

A. I've heard that testimony this morning.

Q. Okay. So since they were found before the

THE WITNESS: I have not asked specifically who the attorney was who had that.

BY MR. SCAROLA:

Q. I gather from the clarification that you made with regard to my misunderstanding of your earlier testimony that what it is that you didn't find out until after our motion was filed were the specifics with regard to when tapes were found that were outside the scope of the certification; is that correct?

A. I believe it is correct. What I testified to is the exact chronology of when, which batches of tapes were found as they relate to when the certification was signed.

Q. And I think the way I phrased the question initially was a reference to general problems with Morgan Stanley's compliance with their e-mail discovery obligations. So let's focus on that. When did you first become aware that there were problems with Morgan Stanley's compliance with the April 2004 order?

A. If by problems you mean --

Q. Anything and everything is what I mean.

A. Well, let me tell you what I understand your question to mean, and if I'm not answering it, please

facts about which you no longer have knowledge of their truth or falsity, do you recognize an obligation to immediately inform the interested parties and the court?

MR. JONES: Your Honor, I object. We're now entering into hypothetical kinds of questions.

THE COURT: I would sustain it. I mean -- Well, I would sustain it.

BY MR. SCAROLA:

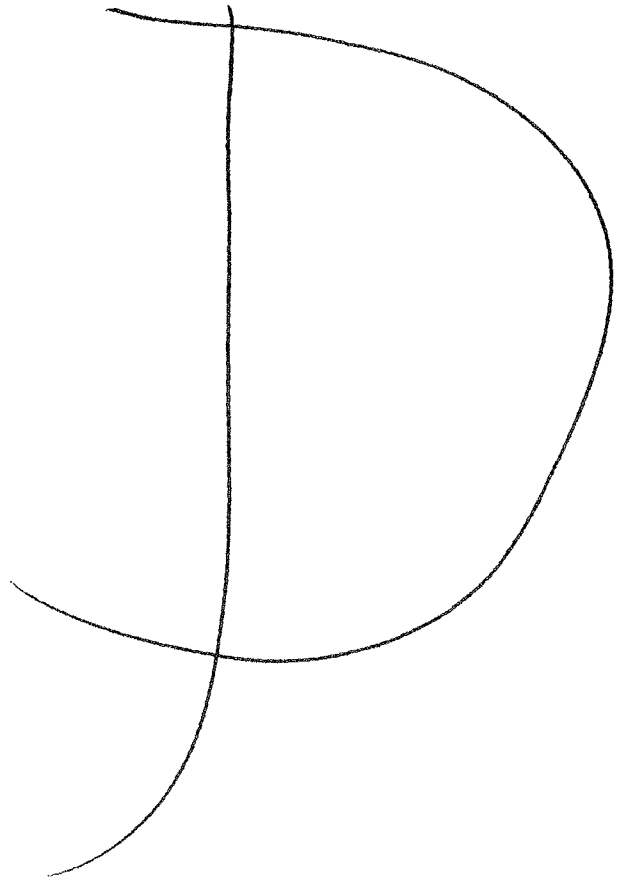
Q. At what point in time did you personally become aware of Miss Gorman having been instructed that the processing of these tapes was to be given a higher priority than it had previously?

A. I can't fix in my mind when I first became aware of that, but it was probably within the last several weeks in response to your motion.

Q. Whose responsibility was it within Kirkland & Ellis to assure that the discovery obligations imposed by court order were met expeditiously?

A. Well, I would say that every attorney on our team would have an obligation to comply with the court's orders.

Q. I'm talking specifically about the April 2004 order. Whose responsibility was it within Kirkland &



IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

VOLUME 2

MORGAN STANLEY & CO., INC.,

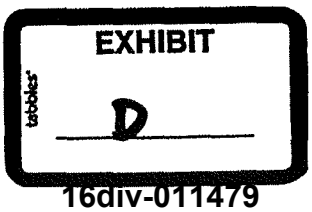
Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Monday, February 14, 2005
1:30 p.m. - 5:00 p.m.



comes --

Q. How many are you aware of?

A. I'm aware of the work Morgan Stanley has done with the Security and Exchange Committee over the last -- over the last several months, and I'm aware of this case.

Q. To your knowledge, have any other parties, either government agencies or regulatory bodies or other litigants been informed that searches made of Morgan Stanley's database may not have been complete because there were 182 tapes you just found?

A. My understanding is that in this matter information was given and that we are working on letting the SEC know as well.

Q. What about other litigants?

A. I'm not aware specifically of any other communication that Legal might have outside of these two matters.

Q. And if I understood your testimony today, you're confident that you've now found everything; is that right?

A. Yes.

Q. Are you confident with the same degree of confidence that you expressed to me on Thursday that as of Thursday you had found everything?

A. Well, as my earlier testimony indicated, I certainly was not happy about the fact that on a Friday afternoon, you know, with my feelings and having given the testimony on Thursday that I go out and I go to, you know, the first room I go to and I find some tapes. That was a disheartening event. There's no question about that.

Q. Excuse me. But that's not the question I had.

A. So I can continue my testimony, which is that at this point having exhaustively gone through 1221 and 1585 and my experience with the firm and knowing those rooms, and in addition to John Pamula and Robert Volk looking at Brooklyn and Pavonia, I do feel we have made an exhaustive search.

THE COURT: That wasn't the question asked. Do you have the same level of confidence you have today as you did on Thursday at your deposition?

THE WITNESS: That's an interesting question, is it the same level of confidence. I would say it's a more personal level of confidence, but I actfully searched myself and I directed the search.

BY MR. BYMAN:

Q. Let me refresh your recollection, sir, with what you told us Thursday with your level of confidence. And this is at page -- I apologize. With old eyes, it's hard to see the page, but I believe this is 43.

Question, "Do you have any reason to believe that you have actually located everything that is out there?"

Answer, "I believe that we have made repeated efforts to be comprehensive in our search of Morgan Stanley premises, areas where tapes have been stored and the different communication rooms and the John Pamula, in addition to the BURP team have been diligent in their efforts to make sure that we have found everything that is out there."

Question, "I'm not questioning what they may have done in the past, Mr. Saunders. Others may. And on Monday you can expect others will question you, maybe in a harsher tone of voice, but my question is a little more direct, and it's innocent. That is, as you sit here today, are you confident that you've located everything?"

Answer, "I'm confident that we've made every effort to do so."

Question, "I understand that you've made efforts. Are you confident that those efforts have been successful?"

Answer, "Yes."

Question, "And what's the basis of that confidence given the fact that tranche one didn't work; tranche two wasn't the end of it; tranche three wasn't the end of it?"

And your answer was, after an objection, which I presume, Mr. Klapper, you don't want ruled on, "Again, go back to my earlier answer, which is, we have made various efforts, strenuous efforts to locate the universe of tapes, and I believe we've done so."

Now, sir, that was your testimony on Thursday. Measuring your degree of confidence, then, to your degree of confidence today, where are we?

A. I'd say I have a higher level of confidence today because I personally searched this past weekend and I directed a search; whereas, in the past my testimony was that I was made aware of searches and I had conversations about searches. So I would say it's a different and higher level of confidence than on Thursday.

Q. Sir, my recollection of the Thursday deposition was that we were all pretty friendly. We

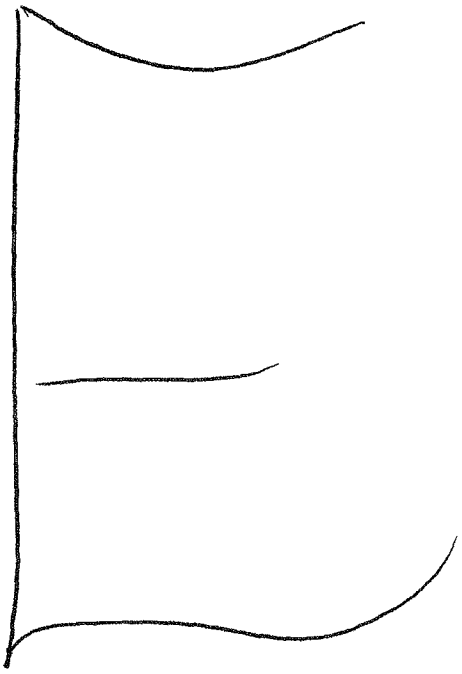
weren't wearing ties. Nobody yelled at anybody. What was it about that deposition that made you decide to conduct a personal search the next day that you had not thought to do any earlier?

A. I think that after being asked repeatedly by counsel and searching my own memory and realizing that the basis of my confidence and you specifically questioning what was the basis of my knowledge and my confidence, and I realized that a hole was that I personally had not gotten involved. And because of my knowledge of the communication rooms, having spent some significant time in there over the last several years, that what if I made a cursory search of 1221, third floor. If I went there and found nothing, and that was a room I thought might not have been touched for sometime, but I was aware of that room and knowledgeable about it, that perhaps, you know, all is good in the world, wouldn't need to go further.

Q. Sir, you were the same Robert John Saunders, or is it John Robert Saunders, I'm sorry, but the same Mr. Saunders who gave a deposition in this case on February 10, 2004, right?

A. That's correct.

Q. So you knew about this lawsuit over a year ago; is that right?



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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

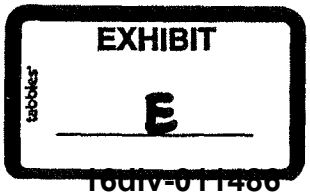
vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

NOTICE OF WITHDRAWAL OF CERTIFICATION OF ARTHUR RIEL

Morgan Stanley & Co. Incorporated ("Morgan Stanley"), through undersigned counsel, respectfully withdraws the June 23, 2005 Certification of Compliance by Arthur Riel. Morgan Stanley will submit such further declarations and certifications as the Court instructs.



so again there is pre 2000 mail there.

If you need any more info please let me know.

Have a nice holiday weekend!
Bruce

Bruce Buchanan
National Data Conversion
212.467.7511 ext 716
----- Message from "Stewart, Wray (IT)" <Wray.Stewart@morganstanley.com> on Fri, 2 Jul 2004 13:10:25 -0500 -----

To: "emailarchive_core" <emailarchive_core@morganstanley.com>
Subject: FW: Tape dates

FYI,

From: Bruce Buchanan [mailto:bbuchanan@ndci.com]
Sent: Friday, July 02, 2004 1:47 PM
To: Riel, Arthur (Company IT)
Cc: Pamula, John R Jr. (IT); Haight, Donald (Company IT); Stewart, Wray (IT)
Subject: Tape dates
Importance: High

Hey Arthur

We looked at the "found" tapes we were able to restore and 90 of them had mail. We got the label (internal) off 4 of them and the dates are 5/12/99, 5/14/99, 8/03/99, and 2/18/01. Obviously there is pre 2000 mail.

We also catalogued 2 of the 8mm test tapes we have and the dates on those are 6/16/98 and 6/7/98 so again there is pre 2000 mail there.

If you need any more info please let me know.

Have a nice holiday weekend!
Bruce

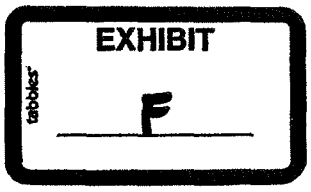
Bruce Buchanan
National Data Conversion
212.467.7511 ext 716
----- Message from "Stewart, Wray (IT)" <Wray.Stewart@morganstanley.com> on Thu, 8 Jul 2004 17:32:37 -0500 -----

To: "emailarchive_core" <emailarchive_core@morganstanley.com>
cc: "ecmgr-na" <ecmgr-na@morganstanley.com>
Subject: Email archive meeting minutes 7/8/04

Restore status:

- Emails restored – 317,925,024
- Total size of emails restored – 13,992.25GB
- Email data archived – 4.729 TB Compressed

- Tapes shipped to NDCI – 35,380



MORGAN STANLEY
CONFIDENTIAL
0112327
16div-011488

Stewart, Wray (IT)

From: Stewart, Wray (IT)
Sent: Thursday, May 06, 2004 5:49 PM
To: emailarchive_core
Cc: dsmgr-na
Subject: Email archive meeting minutes 5/6/04

Attendees: Kay Gunn, Bruce Buchanan, Annaline Dinkelmann, John Pamula and Wray Stewart.

Restore status:

- Emails restored – 307,427,169
- Total size of emails restored – 13,671.5 GB
- Email data archived – 3.666 TB Compressed

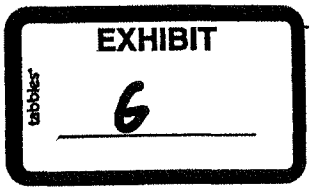
- Tapes shipped to NDCI – 34,291
- Tapes processed – 32,832
- Output (SDLT) tapes received – 124 SDLT
- Output (SDLT) tapes restored – 114 SDLT

- Number of tapes not containing any user mail – 9,107 DLT
- Number of DLT tapes with read errors – 1,519 DLT

Pending Items:

1. Seventy broken DLT tapes were reported by NDCI. Glenn Seickel to follow-up with Bois to see if those tapes can be repaired.
2. 1024 unlabeled tapes were found in the Brooklyn security room. Wray Stewart/Glenn to investigate the origin on the tapes.
3. 150 DLT tapes have conflicting internal and external labels. NDCI will process tapes using the internal labels and change the external to reflect the internal label.
4. Per Arthur Riel, we will start processing the IIM DLT tapes after the Veritas DLT tapes are complete. The 8mm tapes will be processed after the IIM DLT tapes.
5. Arthur Riel requested a restore of all NA emails for three dates in 2003. Kay Gunn and John Pamula to provide timeframe for identifying the required tapes and performing the restores. Per Donald Haight, EI should begin the restores when the 1999-2002 email restore project is complete. In the interim, EI will complete a test restore of data against one of our test servers.
   - 2/26/04 the following dates were requested:
     1) 2/15/03 - 2/18/03 – Full backup
     2) 5/22/03 Incremental backup
     3) 10/30/03 Incremental backup
   - 3/4/04 Due to space issues, the tape restores will be placed on hold until the 1999-2002 email archive is complete, so that we may leverage the NetApp to restore the data.
5. NDCI is receiving more read errors than expected on the DLT tapes and have purchased a DLT tape cleaning and retention unit to help address this issue. NDCI will run each error tape through the DLT tape cleaning and retention device for free, but will charge an additional fee of $150 to extract all readable data from each DLT error tape not addressed by the cleaner and retention unit. Error tapes will be addressed after the 1999-2002 email archive project.
6. IIM has 2,200 Exchange DLT tapes to restore. NDCI has provided a cost estimate of $150 per tape. This project is scheduled to start after the 1999-2002 email archives in completed. MER 9MEV191 was approved for this project.

10/21/2004



MORGAN STANLEY
CONFIDENTIAL
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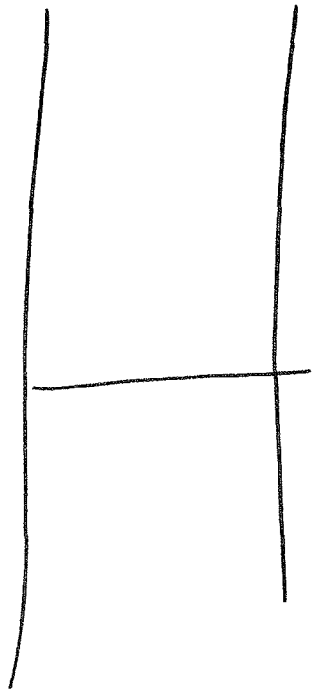

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

DECLARATION OF JAMES F. DOYLE

1. I am James F. Doyle. I am employed as an Executive Director in the Law Division of Morgan Stanley & Co. Incorporated ("Morgan Stanley"). In that capacity, I have personal knowledge of the matters set forth herein.

2. On information and belief, Morgan Stanley produced restored e-mail documents in the above-captioned matter on May 14, 2004.

3. At the end of October 2004, I learned that additional e-mail backup tapes had been located within Morgan Stanley, and that the data on those tapes had not been restored or searched prior to Morgan Stanley's May 14, 2004 e-mail production. Upon learning that information, I directed that the electronic searches described in the April 16, 2004 Agreed Order be conducted for any backup tapes that had been restored and made searchable at that point, and that the process of restoring the remaining backup tapes continue as expeditiously as possible.

UNDER PENALTY OF PERJURY, I HEREBY DECLARE THAT THE FOREGOING IS TRUE AND CORRECT.

James F. Doyle, Esq.

EXHIBIT
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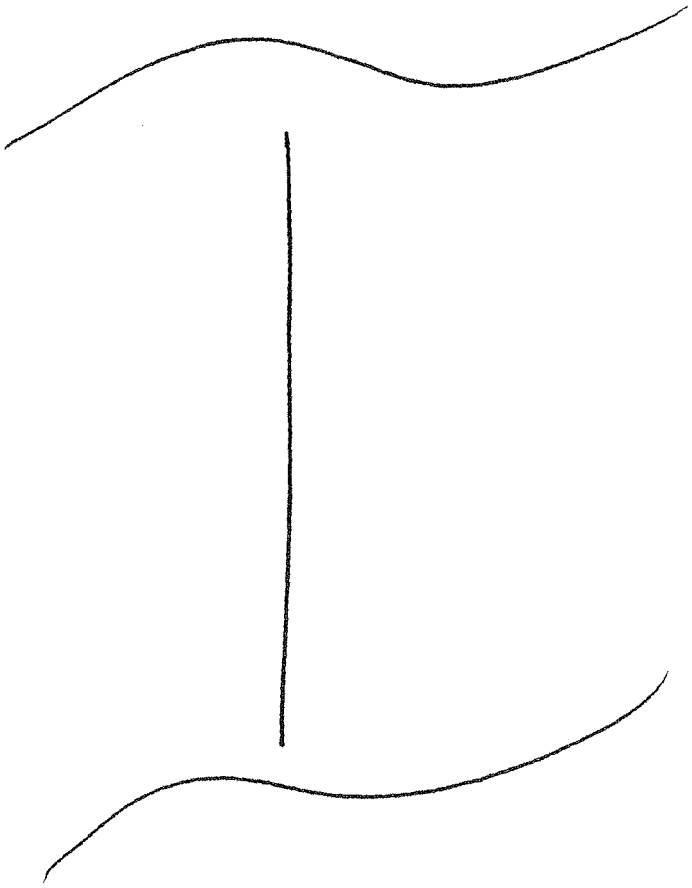

Coleman (Parent) Holdings, Inc. v. Morgan Stanley Co. Incorporated

February 10, 2005 Privilege Log

Priv No.	Date	Author(s)	Recipient(s)	Priv	Privilege Description	Redact Bates
486	10/27/2004	James Cusick (MS)	Soo-Mi Lee(MS); James Mangan (MS); James Doyle (MS); Zachary Stern (MS); Mary Lou Peters (MS); Ronald Colombo (MS) CC: Vincent LaGreca (MS); David Restaino (MS); Caren Pennington (MS); David Elston (MS); Allison Gorman Nachtigal (MS)	AC	E-mail from one in-house counsel to other in-house counsel reflecting legal advice provided by in-house counsel re existence of additional e-mail backup tapes.	
487	11/16/2004	James Cusick (MS)	Soo-Mi Lee(MS); James Mangan (MS); James Doyle (MS); Zachary Stern (MS); Mary Lou Peters (MS); Ronald Colombo (MS) CC: Vincent LaGreca (MS); David Restaino (MS); Caren Pennington (MS); David Elston (MS); Allison Gorman Nachtigal (MS)	AC	E-mail from one in-house counsel to other in-house counsel reflecting legal advice provided by in-house counsel re existence of additional e-mail backup tapes.	
488	11/29/2004	Allison Gorman Nachtigal (MS)	James Cusick (MS); Zachary Stern (MS); Soo-Mi Lee (MS)	AC	E-mail to in-house counsel seeking legal advice regarding issues with restoration process..	
489	Various Dates	Allison Gorman Nachtigal (MS)	None	AC/WP	Notes containing conversations with in-house counsel where legal advice was provided re e-mail restoration process.	
490	6/7/2004	Arthur Riel (MS)	James Cusick (MS); Soo-Mi Lee (MS)	AC	E-mail to in-house counsel seeking legal advice regarding status of e-mail restoration process..	
491	10/28/2004	Wray Stewart (MS)	Alexander Lenderman (MS); Bruce Buchanan (NDCI); John Pamula (Siemens); Zachary Stern (MS); Robert Saunders (MS); Glenn Seickel (MS)	AC/WP	E-mails to Information Technology professionals containing in-house counsel's thoughts and impressions and legal advice re e-mail restoration process..	
492	11/8/2004	Wray Stewart (MS)	Bruce Buchanan (NDCI); Glenn Seickel (MS)	AC/WP	E-mail to Information Technology professionals containing in-house counsel's thoughts and impressions and legal advice re e-mail restoration process..	
493	Various Dates Beginning 10/25/2004	James Cusick (MS)	None	AC/WP	In-house counsel's handwritten notes containing both advice given to client as well as mental impressions re e-mail restoration process.	

EXHIBIT

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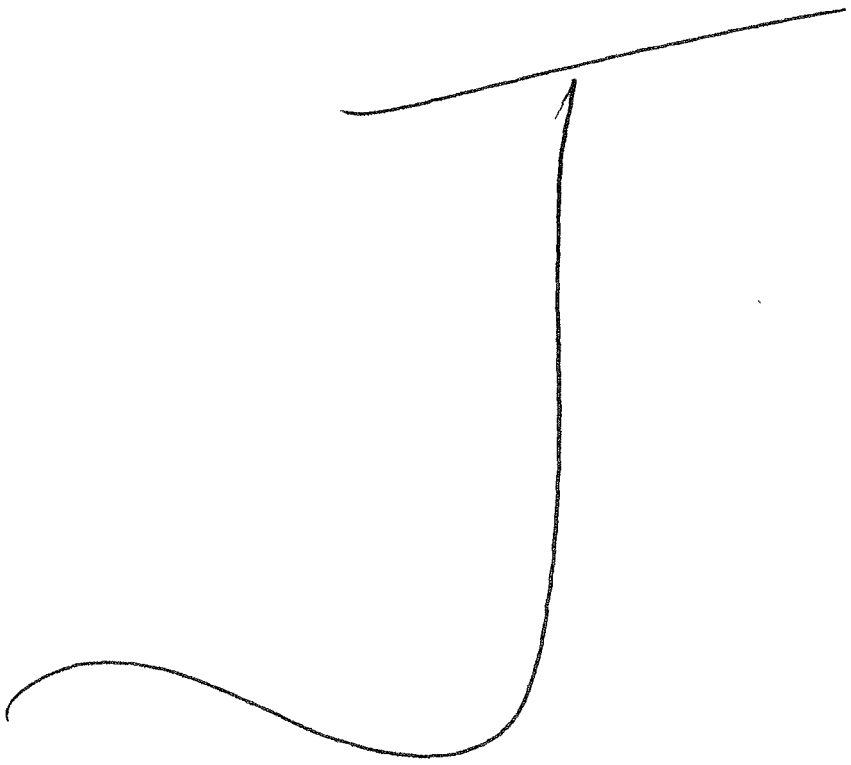
16div-011494

Feb-10-05 12:41am From- T-127 P.04/09 F-283



KIRKLAND & ELLIS LLP
AND AFFILIATED PARTNERSHIPS

855 Fifteenth Street, N.W.
Washington, D.C. 20005

Thomas A. Clare
To Call Writer Directly:
(202) 879-5993
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202 879-5200

November 17, 2004

BY FACSIMILE

Michael Brody, Esq.
Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603

Re: ***Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.***

Dear Mike:

I write regarding supplementation of Morgan Stanley's document production.

Morgan Stanley has discovered additional e-mail backup tapes since our e-mail production in May 2004. The data on some of newly discovered tapes has been restored and, to ensure continued compliance with the agreed order, we have re-run the searches described in the order. Some responsive e-mails have been located as a result of this process. We will produce the responsive documents to you as soon as the production is finalized.

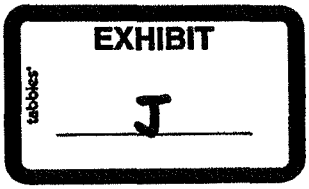
Some of the backup tapes are still being restored. To ensure continued compliance with the agreed order, we intend to re-run the searches again when the restoration process is complete and will produce any responsive documents that result.

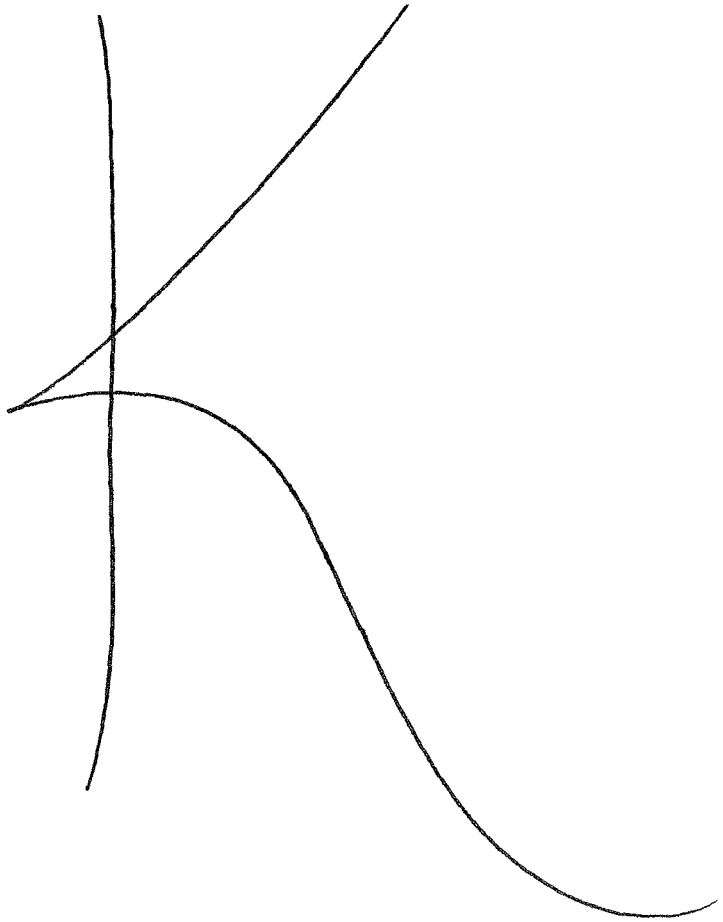
Sincerely,

Thomas A. Clare /HP

Thomas A. Clare

cc: Joseph Ianno, Esq. (by facsimile)
John Scarola, Esq. (by facsimile)
Mark C. Hansen, Esq. (by facsimile)





IN THE CIRCUIT Court FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME I

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Monday, February 14, 2004

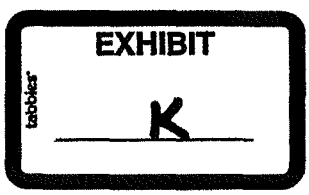
Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

9:30 a.m. to 12:15 p.m.



we had to look around essentially.

Q. Did you ever find the scripts?

A. We found scripts that we believed to be those scripts. We found scripts that had the right names that appeared to perform the right operations, so we began to test those.

Q. When did you find the scripts?

A. In early November.

Q. You said you began testing them when?

A. Right around there.

Q. Tell us what you did in December and January.

A. So in November we ran initial tests on the scripts and we weren't comfortable with the scripts. It looked like the scripts weren't processing messages properly. So we spent a good bit of December, albeit months somewhat chopped up because of the holidays, testing those scripts and debugging them and essentially came into January, really got our arms wrapped around and put some fixes in the code. And in mid January we began the process of loading the data out of staging.

Q. When you say you were debugging the scripts in November, December, can you just please explain to Your Honor what that means and what that entails?

A. That would be the very end. It was mid, not the first week, not the last week, one of those two in the middle.

Q. Sort of mid October?

A. Sort of mid October.

Q. And it took us until sort of mid January before you were actually ready to start processing that data, right, because you were finding scripts, debugging scripts?

A. Yes.

Q. Quality controlling scripts?

A. Yes.

Q. Roughly the three months you said it takes to develop a program to do all of that, right?

A. No. When I was referring to the program I was referring to the search tool, not the scripts.

Q. Well, the search tool was already in existence, wasn't it? You didn't have any trouble finding that.

A. No, the search tool was in existence, but the search tool had certain issues and those are the scripts that we were writing to compensate for those issues. We were doing those two things in parallel.

Q. When you were told in mid October that this was a priority, that it was a rush, did it move from

let's not even talk about between August and October.

From the point that you were told that it was a priority, you know you could have done it faster if you had gone to an outside vendor and focused just on this subset of data; isn't that right?

A. No.

Q. You don't know that?

A. An outside vendor can't insert data into our system.

Q. I'm not talking about getting it into your firm-wide system.

I agree with you that only you know how to take care of your 15 terabytes of firm-wide data, but you do know there are vendors out there that can take 600 gigabytes of data and process it and search it independent of your system, right?

A. I suspect there are, yes.

Q. Did you do any research to find out whether those vendors were available and could do it faster than you do?

A. I was not asked to, so I did not do that.

Q. When you were told that this was the utmost priority, did it occur to you that, hey, we could do this faster if we went to an outside vendor?

A. The priority I was given was first to insert

the data into the archive and then to later in January run the inquiries for this case. I would say by the time that came up, we could run an inquiry into our system faster than a vendor could have.

Q. By mid January.

I'm asking if somebody had told you in August when you took over for Mr. Reil, it's really important, we have a Court order that says we're supposed to produce everything. We want to do it as quickly as possible. You know you could have done it faster with an outside vendor, don't you?

MR. JONES: I object to the form of the question.

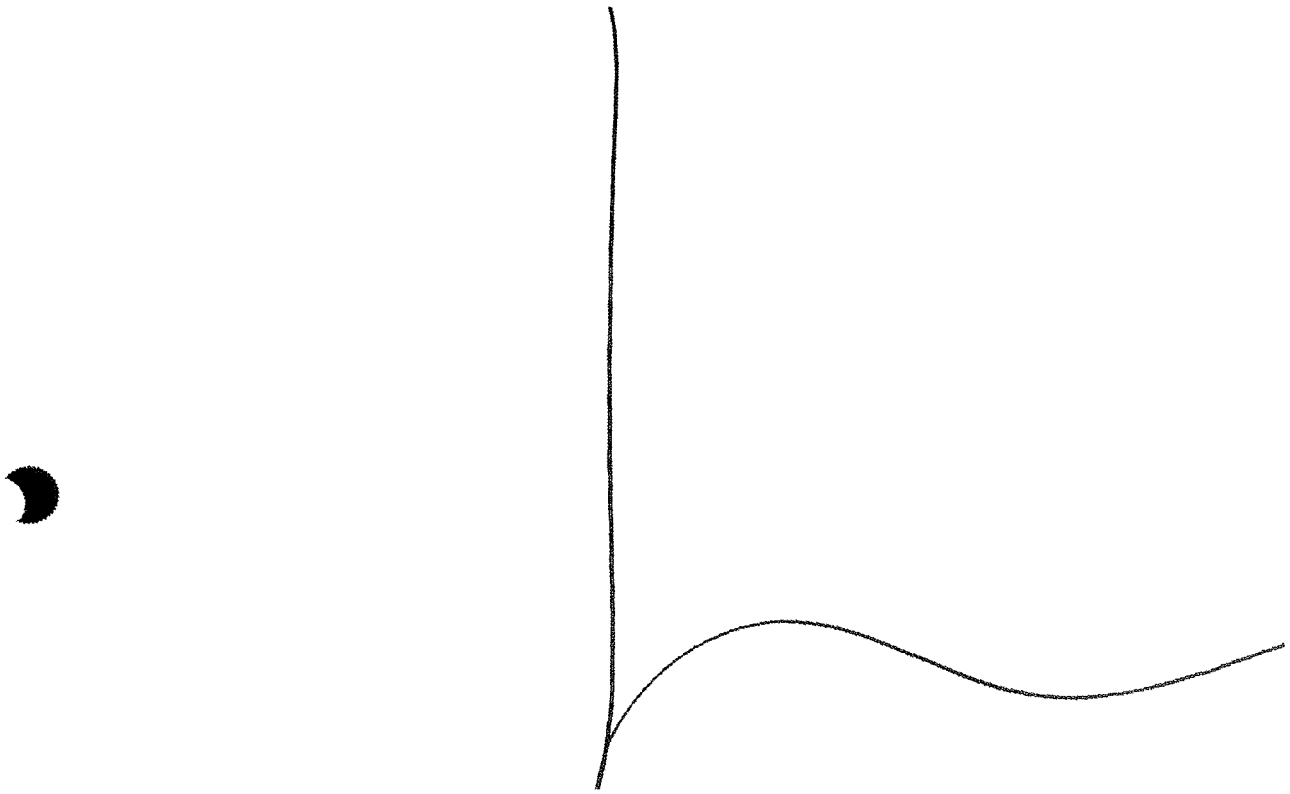
THE COURT: What's the legal objection?

MR. JONES: Because the question was you've got an order that you should have produced everything, it's not been established that this witness really is familiar with this Court order.

THE COURT: Do you want to -- why don't you rephrase it eliminating that?

BY MR. BYMAN:

Q. Let's put aside Court orders. Lawyers very seldom tell you why they're doing anything because they don't know themselves.



IN THE CIRCUIT Court FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME I

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Monday, February 14, 2004

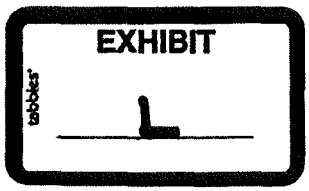
Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

9:30 a.m. to 12:15 p.m.



Q. In the fullness of time?

A. In the fullness of -- yeah, sooner than later, but in some logical order given --

Q. In October it became a priority when counsel told you that it was, right?

A. Yes.

Q. And by the way, I think that there was some reference in your testimony to Morgan Stanley counsel, that October meeting also included Kirkland and Ellis, didn't it?

A. Yes, some of them did.

Q. You understood that they were outside counsel to Morgan Stanley?

A. Yes, sir.

Q. Was there some event in October that moved that data from low priority to higher priority other than counsel contacted you?

A. A series of discussions with counsel --

MR. JONES: Your Honor, I would object to the content of discussions with counsel or attorney-client privilege. Talk about she had a meeting, but I would invoke the privilege as to discussions with counsel.

MR. BYMAN: I don't know that my question asked for that. I wasn't trying to do that.

THE COURT: Why don't we complete the question.

MR. SCAROLA: But do ask.

BY MR. BYMAN:

Q. Let me make sure that my question was clear. I wanted to know if there was some event, other than counsel, in October that moved it from low priority to priority?

A. No, it was prioritized as a result of discussions with counsel.

Q. And what was it that made it a priority, what were you told?

MR. JONES: Objection, Your Honor, attorney-client privilege.

THE COURT: Any response?

MR. BYMAN: Your Honor, it's their burden to try to show why this wasn't --

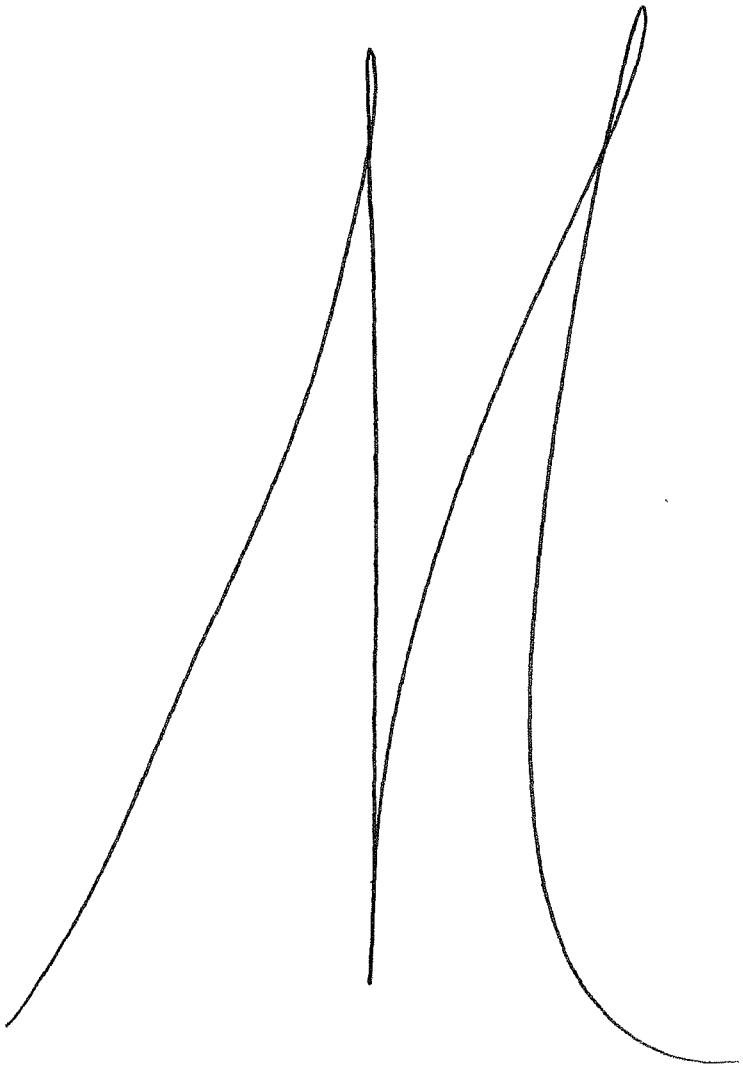
THE COURT: And I think they're alleging to privilege.

BY MR. BYMAN:

Q. In any event, in October -- by the way, early October, mid October, late October, do you remember the date?

A. Don't remember the date.

Q. Was it before Halloween, after Halloween?



IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. VOLUME 2

MORGAN STANLEY & CO., INC.,

Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

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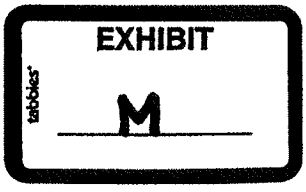
West Palm Beach, Florida
Monday, February 14, 2005
1:30 p.m. - 5:00 p.m.



order to comply with the court's order; is that right?
A. At a certain level of generality, yes. For example, I could not communicate to my client the specific way it would be implemented at Morgan Stanley in its Intellectual Technology Department. I don't possess those technical capabilities or understanding.
Q. What did you tell your client about how thorough a search they needed to conduct?
A. I am concerned, now, Mr. Scarola that your questions will intend to impinge upon attorney-client.
Q. They're intended to.
MR. JONES: We object to these questions as attorney-client.
THE COURT: What's the response to the objection to that question?
MR. SCAROLA: I think that that is a well-taken objection. I just want to find out where they intend to draw the line, Your Honor.
THE COURT: That's fine.
BY MR. SCAROLA:
Q. So you choose not to tell us about instructions given regarding the scope of the search by you to the client, correct?
A. I would regard your question to require me to

disclose privileged communications.

Q. And I agree that it does. And that privilege is being asserted; is that correct?

A. My understanding is Morgan Stanley has asserted that privilege, and I am respecting their instruction.

Q. Now what I would then like to know is what Morgan Stanley communicated back to you about the scope of the search that they conducted when they were initially informed of the obligation that they had to conduct a search. What did they tell you they did?

A. I would give you the same answer.

Q. Okay. So, again -- and I will, for the record, acknowledge that that's an appropriate assertion of attorney-client privilege, and the question is being asked in order to define the scope of the assertion.

Is there any aspect of the communications between you and Morgan Stanley, either from you to Morgan Stanley or from Morgan Stanley to you, and by you I mean Kirkland & Ellis, that you and/or your client are prepared to discuss now that you have taken the witness stand to discuss these matters?

MR. JONES: Your Honor, I object to the form of the question as overly broad,

let me know. If by your question you mean when did I first become aware that there were additional tapes that had not been subject to the prior searches that were done, I became aware of that in November of 2004.

Q. How is it that you first became aware in November 2004?

A. In a privileged conversation.

Q. With whom?

A. With Mr. Jim Doyle in the Morgan Stanley law department.

Q. And having identified it as a privileged conversation, I assume that means when I ask you who said what to whom during the course of that conversation, your response will be privileged; is that correct?

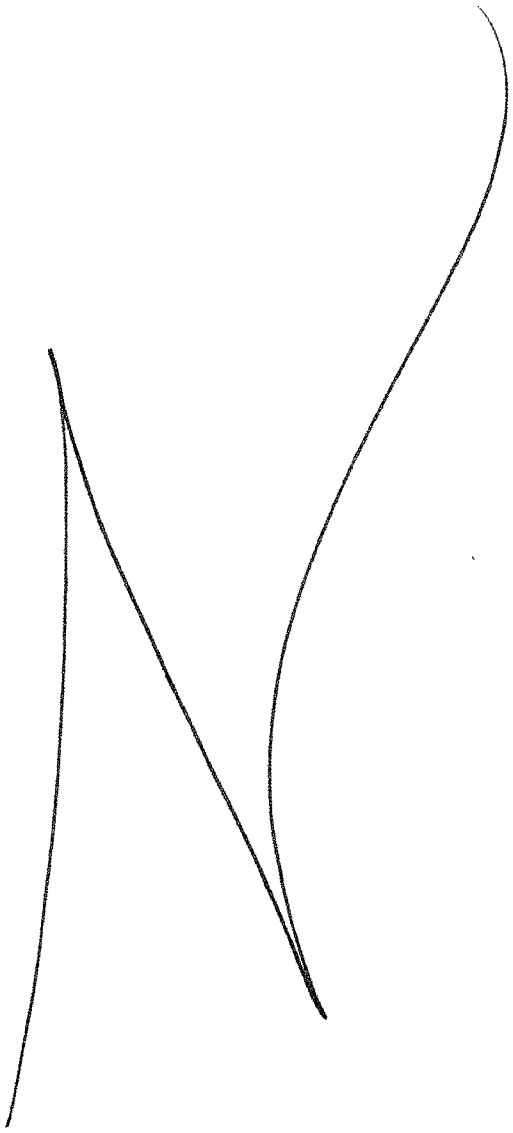
A. That is a conversation that I would consider privileged, yes.

Q. Okay. Do you know when Mr. Doyle first found out?

A. I do not.

Q. When in November of 2004 is it that you had this conversation with Mr. Doyle where you learned that there were unsearched tapes?

A. I don't recall the precise date. I do recall generally the chronology of steps that we took, and so



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IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA
CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

DEPOSITION OF ALLISON GORMAN NACHTIGAL

Taken before Tracey L. Spatara, Registered Professional Reporter, Notary Public in and for the State of Florida at Large, pursuant to Notice of Taking Deposition filed by the Plaintiff in the above cause.

Wednesday, February 9, 2004
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida
3:10 p.m. to 5:30 p.m.

00002

APPEARANCES:

JENNER & BLOCK LLP
One IBM Plaza
Chicago, Illinois 60611-7603
Phone: (312) 222-9350
By: ROBERT L. BYMAN ESQ.
SAM HIRSCH, ESQ.
Attorneys for Plaintiff

KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Washington D.C. 20005
Phone: (202) 879-5294
By: MICHAEL D. JONES, ESQ.
Attorneys for Defendant

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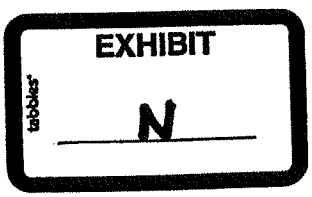

16div-011514

Archive Meeting Minutes without putting the attachments for each of the minutes behind it, which are comprised of graphs and things.

Bearing in mind that you may not have seen them in exactly this form, have you seen this type of minutes?

MR. JONES: Can I just ask, are you asking -- we started out by asking had she seen these. Now you're asking has she seen this type.

MR. BYMAN: I guess I'd like both. If she's seen these specific ones, great. Also if she's seen something like them, I'd also like to know that.

THE WITNESS: I have seen one of these.

BY MR. BYMAN:

Q. Which one have you seen?

A. The last one that is September 9th.

Q. And that would have been done when you were in charge of this?

A. Yes.

Q. What about the one on August 13th?

A. No, I don't think so. Looks surprisingly like the other one, but I recognize the format and I only saw one and I'm pretty sure it was this last one.

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Q. These particular ones appear to have been faxed on October 21st, 2004. And I'll represent to you that the fax number to which they're addressed is the fax number of a law firm in Washington, D.C. Sidley Austin, Brown and Wood I think it is. I keep forgetting what their new name is.

Do you have any knowledge as to whether or not these were faxed to a law firm?

A. No.

Q. Does the fax header of October 21st, 2004 help you place in time the directions you got from counsel in October to prioritize the migration of these missing tapes?

MR. JONES: Can you just read that back, please?

(A portion of the record was read by the reporter.)

MR. JONES: Object to the form of the question. It's vague and ambiguous.

BY MR. BYMAN:

Q. Do you understand my question?

A. I think I do. No.

Q. At the risk of asking something I have already, let me try to recap.

Until some time in October when counsel told

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you to prioritize the migration of these 112 tapes or 1400, whatever the number was, until that time, these were a low priority, is that fair?

MR. JONES: First of all, I object to the form of the question. And I object to the extent that you are trying to elicit attorney-client communications.

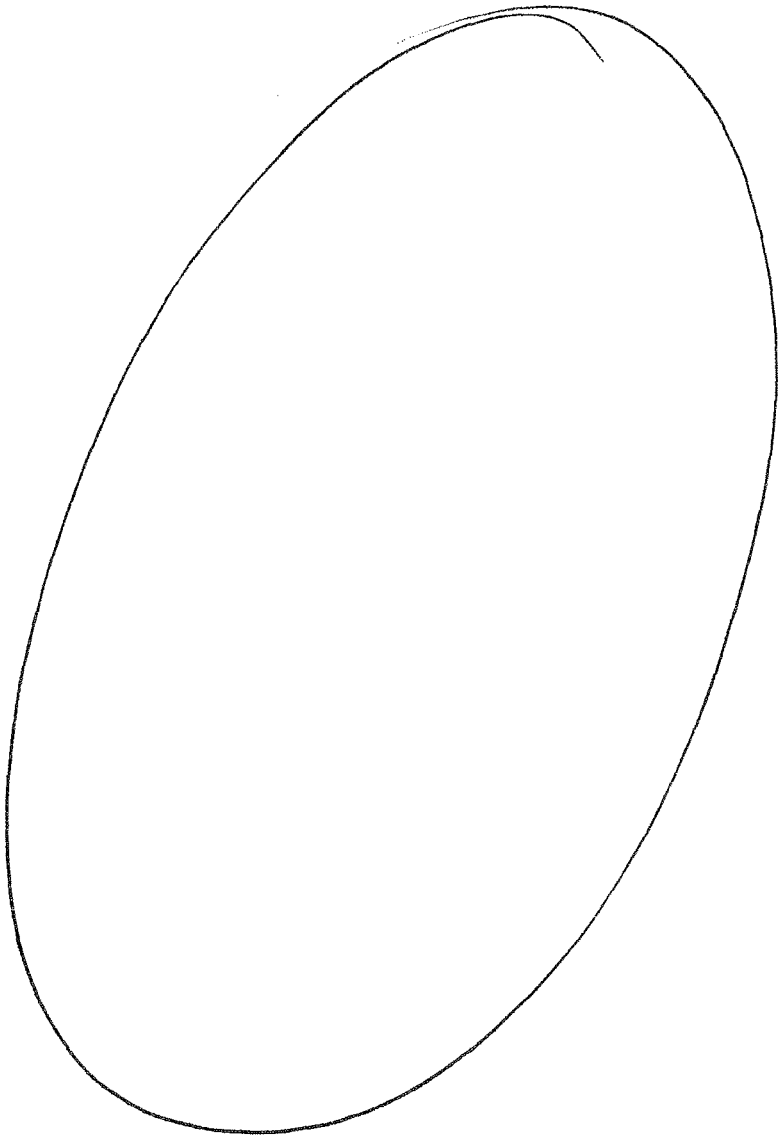
That's my objection. And also it's been asked and answered in a different form.

THE WITNESS: Although I lost track of it, could you say it again?

BY MR. BYMAN:
Q. Sure. You told us earlier that some time in October you had a conversation with counsel and moved these -- let me stop.
Let's back up and try to get some shorthand here. We talk about the tapes that you've been processing that are the reason we're here today. We talk about 112 tapes that have been represented to us may contain e-mails that were part of a larger universe of tapes that were reviewed. We've heard various numbers of that. You've used the number 1400. Counsel in a recent hearing said 2200. But whatever that number is, can we call those the found tapes? And I'm going to say that because it's in these e-mails.

A. Okay.
Q. I'll show it to you if you'd like.
A. Sure.
Q. Some time in October of this year I think you've already told us you were told --
MR. JONES: First of all, here's the problem I have with that. She never talked about a conversation with counsel. If you go back in the record, you'll see she had a meeting with counsel and then she further described how she -- what she did with the tapes and the processing after that.
You seem to, I guess you're assuming that counsel told her to prioritize the tapes. And you've used that in several of your questions. I'm not going to comments as to whether that was or wasn't told. That's really the problem I'm having as to how you're phrasing your questions.
I don't know if that's something that could be fixed or not, Bob. If it could be -- because I don't mind her answering the question you asked again about this document if that's ultimately what you're trying to get to.
I don't know if all that was helpful or not.
MR. BYMAN: Let me try to meet that.

BY MR. BYMAN:
Q. Until some time in October, you did not place any priority on migrating the found tapes, is that fair to say? They were in line, but they were pretty far back in line?
A. I would say I didn't prioritize processing the data that was in staging.
Q. From these found tapes?
A. There was more in staging than the found tapes.
Q. I understand. And they were patiently awaiting their turn, but they weren't going to the head of the line?
A. I'm being careful. I didn't know about found tapes. It wasn't -- that was not my focus.
Q. The set of minutes that you did look at, and this is the last page 0112314.
A. I received it. I filed it. I actually didn't read it until later.
Q. But I just want to direct your attention towards the bottom there's a series of numbered pending items, number 4 talks about 1423 DL tapes were found to



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IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA
CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

/

DEPOSITION OF ROBERT JOHN SAUNDERS

Taken before Tracey L. Spatara, Registered Professional Reporter, Notary Public in and for the State of Florida at Large, pursuant to Notice of Taking Deposition filed by the Plaintiff in the above cause.

Thursday, February 10, 2005
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida
9:00 a.m. to 11:40 a.m.

0002

APPEARANCES:

JENNER & BLOCK LLP
One IBM Plaza
Chicago, Illinois 60611-7603
Phone: (312) 222-9350
By: ROBERT L. BYMAN, ESQ.
SAM HIRSCH, ESQ.
Attorneys for Plaintiff

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Phone: (202) 879-5294
By: ANTONY B. KLAPPER, ESQ.
MICHAEL D. JONES, ESQ.
Attorneys for Defendant

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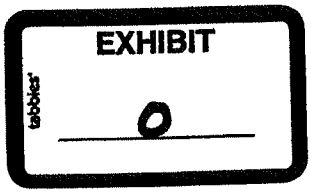

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A. I don't know if I shared my view of his competence with my superiors.
Q. Do you ever have interface with lawyers in the performance of your duties, other than getting ready for depositions?
A. Would you restate the question?
Q. Well, is any part of your duties over the last couple of years been to supply support or other services to legal counsel?
A. Yes.
Q. And would you describe what that function has been?

MR. KLAPPER: And let me just interject, Counsel.
You're not to reveal anything about the specific services, conversations that you've had with counsel relating to those services, or discussions that you've had with counsel.

With that understanding, you can answer the question.

THE WITNESS: Sure. Since my team is one of the groups responsible for data protection and back ups of documents and information, we have been involved in requests for documents, information, e-mail over the past several years.
I've spoken already about the fact that we have a number of tapes which were off-sited to our vendor, Recall, and that we would -- when requests would come in, ad hoc requests for certain information, we would assist legal and IT security in executing those search requests.

BY MR. BYMAN:
Q. Specifically to this case, first of all, you are aware that this is a lawsuit between Coleman Parent Holdings and Morgan Stanley and Company, Incorporated, are you not?
A. Yes.
Q. Have you ever been asked by anyone to provide support to the legal team for this specific case?
And that's just a yes or no. I'm not trying to find out what you did.
A. Yes.

Q. And now to the extent that you can do it -- and I do not want to invade privileges, but to the extent you can, tell me what task you've been given for this case.

MR. KLAPPER: I'm going to object. Because it's unclear to me that in describing the tasks we can somehow protect the privilege. In terms of description of the tasks, that gets into the mental impression of the attorneys in terms of what they've asked him to do in assisting counsel.
If you want to ask him questions about who he interacted with, when he had meetings with attorneys, et cetera, those atmospherics, I'm all for it. Go forth. But I believe you're invading the privilege if we start getting into the litany of tasks that he may or may not have been asked to do.

16div-011519

MR. BYMAN: Let me see if I can get to at least some specific.

BY MR. BYMAN:

Q. Have you ever been asked to attempt to locate e-mails that might be relevant to this litigation?

MR. KLAPPER: And let me confer with him

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with respect to whether or not -- and with co-counsel -- with respect to whether or not this is getting into the privilege area.

MR. BYMAN: Sure.

(A discussion was held off the record.)

(A portion of the record was read by the reporter.)

MR. KLAPPER: And I'm just going to go on the record and indicate that it's our position that, feel free to ask him generally about what he has done in terms of searching for e-mails and things of that sort. But if we're going to get into specific questions as to who asked him to perform those functions, we're going to invoke the privilege, and I'm going instruct him not to answer that.

With the exception of any -- I guess the order in place in this particular case for purposes of this deposition required us to identify documents that Mr. Saunders may have had in his possession. And feel free to ask about that pursuant to the order.

But other than that, in terms of specific tasks asked by lawyers, I'm going to invoke the privilege and instruct the witness not to

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answer.

MR. BYMAN: I'm confused, Tony. Why would the identity of someone who made the request be privileged.

MR. KLAPPER: Because the nature of the question is what are the tasks you've been asked to do. Once you link that up to the attorney, you're getting into the attorneys' mental impressions in terms of what he has decided or not decided to do or asked Mr. Saunders to do.

So I'm not suggesting you have nefarious motives here, but it's a backdoor way of getting at what the attorney is intending to do.

MR. BYMAN: Well, I disagree with your definition of what falls within the privilege. So I'm going to ask the question and ask you to make whatever you -- instructions you need to do.

BY MR. BYMAN:

Q. Has anyone ever asked you to aid in the location and identification of e-mails relevant to this specific litigation?

MR. KLAPPER: And let me just interject.

You can answer that question so long as you don't reveal if it was attorney based or not

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attorney based.

You may answer.

THE WITNESS: To be specific, are you asking

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whether I've looked at my own e-mails, or I've looked at all e-mails that are available to Morgan Stanley?

BY MR. BYMAN:

Q. My question is: Have you been asked to search Morgan Stanley files or aid in a search of Morgan Stanley files for any e-mails that are related to this litigation?

A. Okay. I was specifically asked to check my own e-mail for any information or documents relevant to this proceeding.

Q. And have you or your team provided any support specifically related to this litigation to extract, locate, or identify e-mails for production in this litigation?

A. I guess the strict answer to that question is yes, specifically related to the three tranches of tapes that have been under discussion in the last several weeks and in a hearing to which I was party. I believe it was last Friday or Thursday. It was last Friday, I think.

Q. Let's make sure that we get the definition

0028

of what you mean by the three tranches of tapes. What do you mean?

A. Sure. So outside of what we've talked about in general as the 35,000 Legacy Legato tapes or the universe of tapes prior to 2003, some of which contained e-mail, some of which did not, there were some groups of tapes which have become -- which surfaced in this past year that may or may not have contained additional information.

And I know that in this proceeding that there's been some concern about that information, whether it's discoverable, whether or not it's privileged, and how to make that available to both sides, the plaintiff and the defendant, in order to help move this matter forward.

Q. So the first tranche is the 35,000 tapes?

A. So that makes it four tranches. The 35,000 would be the original set of tapes.

Q. The original set of what Morgan Stanley believed to be the universe of pre-2003 tapes?

A. That's correct.

Q. And then something surfaced that expanded the universe?

A. That's right.

Q. And that's tranche two?

0029

A. Sure.

Q. And what's the quantity of tranche two tapes?

A. My understanding is that 1423 DLT tapes that were found this past year.

Q. What's tranche three?

A. Tranche three is the 8-millimeter tapes.

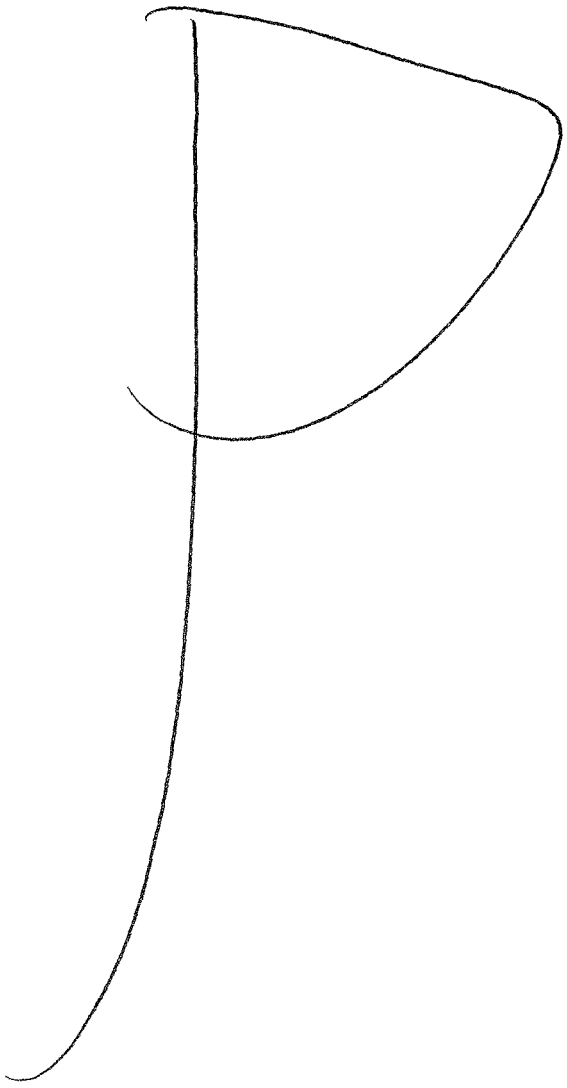
Q. And what's the quantity of those tapes?

A. I'm not specifically aware of that number.

Q. Do you have any general estimate?

A. Somewhere -- I think somewhere around 700.

Q. You've told us what the storage capacity was of a DLT tape. What's the storage capacity of an 8-millimeter tape?



IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. VOLUME 5

MORGAN STANLEY & CO., INC.,

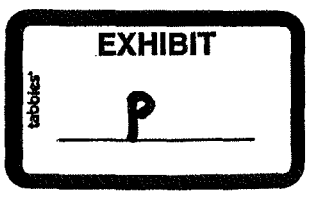
Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Tuesday, February 15, 2005
1:25 p.m. - 5:36 p.m.



holidays, testing those scripts and debugging them and essentially came into January, really got our arms wrapped around and put some fixes in the codes. And in mid January we began the process of loading the data out of staging. That's referring to the Brooklyn tape data that is first loaded, first loaded beginning in mid January."

THE COURT: Okay. You know what, I just want to get my own notes because I don't have them here in front of me. Thanks.

MR. SCAROLA: And we should have our proposed order to Your Honor within just a short time, the last edition.

THE COURT: Okay. I'll be right back. I have them sitting on my desk.

I can tell you all I did come in and review my notes, and I did go through and make my own notes on the summary of findings and facts. And I don't think anything I've been told today would alter what I believed this morning, and let me tell you what they are: That the agreed

order entered April 16th of last year required Morgan Stanley to search the oldest full backup that exists for e-mails of certain -- I'm sorry -- for certain identified employees or former employees; required Morgan Stanley to provide its counsel the responses for responsiveness and privilege review all the e-mails that either were dated between February and April 15th of 1998 and all e-mails containing one of 29 keywords; all nonprivileged e-mails responsive to the request had to be produced by May 14th and a privilege log generated and a certificate of compliance completed. The SEC regulations required Morgan Stanley to maintain e-mails readily access -- in readily accessible form for three years. Morgan Stanley knew Sunbeam litigation was likely as of March of 1998. Despite the affirmative duty on Morgan Stanley's part arising out of the litigation to produce its e-mails and contrary to federal law requiring it to preserve the e-mails, Morgan Stanley failed to preserve some

e-mails and failed to produce all e-mails required by the agreed order. The failings include overwriting e-mails after 12 months; failing to conduct proper searches for tapes that may contain e-mails; providing a certificate of compliance known to be false when made and never amended to reflect its falsity; failing to timely notify CPH when additional tapes were located; failing to use reasonable -- reasonable efforts to search the newly discovered tapes; failing to file timely, process and search data held in the search area or notify CPH of the deficiency; failing to write a program consistent with the agreed order; and discovering the deficiencies only after CPH was given the opportunity to check Morgan Stanley's work and the Morgan Stanley attorneys required to certify the completeness of the prior searches; and that many of these failings were done knowingly, deliberately and in bad faith.

In my concern, this is a case of fraud. And electronic data is the functional

equivalent of a paper trail. And I think Morgan Stanley's actions have had a crucial impact on plaintiff's ability to prove its case, and I think, in all honesty, what are the proper implications of that. If you want to wait until the morning to come up with a proposed order that incorporates what are my findings of fact, that's fine.

MR. SCAROLA: Your Honor, I've obviously heard what Your Honor said and tried to compare it mentally to what we've included in the order that we have already prepared for Your Honor. I think that we have virtually covered everything that Your Honor has described. Obviously not in exactly the same words but very close to the words that you have described.

We can do two things: We can give Your Honor the order that we have prepared and then also provide Your Honor in the morning an alternative order that exactly tracks the language that you have recited.

THE COURT: Why don't you do both, and you guys are welcome to, obviously, share

whatever it is you provide, and you guys are welcome to submit your own proposed order as well. I can tell you I've not decided what I think are the appropriate sanctions.

MR. SCAROLA: What we have done, Your Honor, is to provide in our proposed order alternative sanctions that are simply listed hierarchically and described as alternatives so that Your Honor would simply need to indicate which of the alternatives you wanted to incorporate in the final form. We obviously have the disk and will prepare it as Your Honor directs.

THE COURT: I'll be honest with you, part of it, too, and the reason I was asking these particular questions, and, frankly, I didn't incorporate into my notes this morning because I was waiting to hear the transcript portions today, is that I had affirmative representations that the November production represented the newly discovered Brooklyn tapes. And I think based on the evidence I had

yesterday that's virtually impossible. And, you know, to me that's just symptomatic of the course of conduct by Morgan Stanley. I mean, I understand you guys disagree, but that's my conclusion of fact based on the evidence I heard yesterday.

MR. DAVIDSON: I understand that, Your Honor, but there is a further issue here, and that is -- which disturbs me or which concerns me, let me say that, because I want to be -- although we apparently failed to appreciate the significance of an issue and not knowing going into the hearing that we were going to have to deal precisely with this issue, and, therefore, confessing, apparently, did not other than the testimony that you saw that I pointed out to you from Mr. Clare, did not present evidence yesterday at the hearing, and that may go to the court's order, so the court understands the good faith basis of counsel, though, in taking a position.

Now there is a declaration in the record that counsel is aware of. It's the

Jonas declaration, which was Exhibit 3 to the original brief. Mr. Clare knows about it. I know about it. In which he says that the search that was done in November was done in electronic searches of e-mail data that had been restored and made searchable since May 14th.

We started with that baseline. And I understand that we didn't put testimony on on that, and I understand that, but we did not even think of the fact that there was a question about that. We just didn't. And I'm just addressing the good faith of counsel.

THE COURT: I don't mean to impugn the good faith of counsel. But I have seen a pattern where counsel believes if it acted in good faith, it absolves its client of the consequences of any of the client's bad acts. And, for instance, I have a certificate of compliance signed by Mr. Reil in June that he knew to be false at the time he signed it. And that's an act by Morgan Stanley. It's not an act by counsel. The only thing perhaps we could

visit on counsel is the failure to cause it to be amended once its falsity was apparent. And it's the same thing that, frankly, I was stunned at when Mr. Clare argued to me two weeks ago that you all were still unwilling to admit that that certification was false, where clearly it was.

But, again, sometimes the act of a client come back and visit the client. And I think that's what's happened here.

MR. DAVIDSON: I understand. And not to -- could I extract my --

THE COURT: Yes, you may.

MR. DAVIDSON: Thank you very much.

THE COURT: Where do we want to go now?

MR. SCAROLA: Where do we want to go? Are you taking a survey?

MR. MARKOWSKI: Something other than e-mail and damages, Your Honor. Motion number 20.

THE COURT: And this is plaintiff's motion.

MR. MARKOWSKI: I have a couple documents, Your Honor, that I tabbed that

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

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

CASE NO: 2003 CA 005045 AI

PLAINTIFF'S MOTION TO COMPEL FURTHER DISCOVERY REGARDING MORGAN STANLEY'S DESTRUCTION AND NONPRODUCTION OF E-MAILS

Coleman (Parent) Holdings Inc. ("CPH") respectfully seeks leave to conduct certain discovery relating to the willful failure of Morgan Stanley & Co. Incorporated ("Morgan Stanley") to make full production of responsive e-mails, as it falsely certified it had done prior to June 23, 2004. CPH seeks this discovery not to buttress the record supporting the pending motion for sanctions relating to Morgan Stanley's failure to produce e-mails, but to obtain information for use at trial. The record as to the former issue is complete and justifies the immediate entry of a default judgment as to liability. But as explained below, this discovery is warranted to ascertain the full magnitude of the e-mail problem, which in turn can inform the jury's determinations about liability (if the Court does not grant a default judgment) and about the award of punitive damages.

Specifically, CPH asks that the Court (1) order Morgan Stanley to produce the 46 documents listed on Morgan Stanley's February 10, 2005 Privilege Log (Priv. Nos. 486-524), as well as any other documents reflecting when and how Morgan Stanley agents or employees, including in-house and outside counsel, learned about the existence and discovery of all electronic data storage sources potentially containing e-mail-related discovery materials, the

failure to make complete production of e-mail-related discovery materials, and when and how Morgan Stanley's agents and employees responded; (2) order Morgan Stanley to make available for deposition in the next two weeks key personnel who were parties to attorney-client communications involving the production of e-mails in this case, including but not limited to Thomas A. Clare, James P. Cusick, James F. Doyle, Grant Jonas, Soo-Mi Lee, Arthur Riel, Zachary Stern, and Wray Stewart; and (3) bar Morgan Stanley from asserting attorney-client privilege to justify withholding documents or instructing deponents not to answer questions about Morgan Stanley's retention, destruction, production, or nonproduction of e-mails or backup tapes, based on the crime/fraud exception recognized in FLA. STAT. ANN. § 90.502(4)(a) (West 2004). For the reasons stated below, Morgan Stanley — which owns and repeatedly has invoked the attorney-client privilege — should no longer be permitted to assert the privilege to hide the fraud it has perpetrated upon this Court and CPH.

CPH needs the opportunity to inquire into these matters to establish the magnitude and seriousness of Morgan Stanley's repeated and egregious violations of the April 16, 2004 Agreed Order — the latest of which was revealed just this weekend when Morgan Stanley once again advised CPH that it had located yet another batch of backup tapes that have not yet been searched. *See* Ex. A (February 19 e-mail advising CPH that "Morgan Stanley has located additional boxes of backup tapes"); *see also* Ex. B (CPH's proposed order presenting a menu of possible sanctions). In recent days, Morgan Stanley has sought to minimize the severity of its misconduct by arguing (1) that Arthur Riel, the former head of Morgan Stanley's e-mail archive project, was a renegade employee who for some unknown reason orchestrated a fraudulent discovery scheme on his own; and (2) that counsel took every appropriate step to address the problem when they learned about it in October. MS Supp. Opp'n at 2-3, 6. Neither argument,

however, is supported by any record evidence, and Morgan Stanley has used assertions of privilege to block CPH from inquiring into these matters, both in depositions and in open court. Moreover, as explained below, there are multiple reasons to doubt the veracity of these assertions — reasons that fully justify revoking the protections of privilege in view of Morgan Stanley's failure to satisfy its discovery obligations even today, despite having certified its full compliance eight months ago.

BACKGROUND

As the Court is aware, it is only as a result of CPH's persistence that Morgan Stanley has begun taking steps in the direction of compliance with the April 16, 2004 Order, eight months after Morgan Stanley certified that it already had fully complied. How close Morgan Stanley now is to full compliance and whether it will ever reach the Court-ordered destination remain unsolved mysteries. If CPH had not made an appropriate motion, it is highly unlikely that Morgan Stanley ever would have located multiple sets of additional, unsearched tapes or would have done anything beyond processing an incomplete set of tapes on its own schedule, at its own pace. *See, e.g.*, Ex. C at 187, 195 (Mr. Clare testifying that he learned only after CPH filed its January 26, 2005 motion that the "Brooklyn found" tapes had been discovered before the certification on June 23); *id.* at 202 (Mr. Clare testifying that he only recently learned that Ms. Gorman had "been instructed [in October] that the processing of these tapes was to be given a higher priority than it had previously"); Ex. D at 155-56 (Mr. Saunders testifying that his deposition inspired additional searches that turned up another 243 tapes); Ex. E (February 16, 2005 notice revoking Morgan Stanley's June 23, 2004 certificate of compliance).

But the problems continue. Remarkably, just this weekend, Morgan Stanley once again revealed that it was still finding additional backup tapes that have never been analyzed or

searched. On Saturday afternoon, Morgan Stanley's counsel, Mr. Thomas A. Clare of Kirkland & Ellis LLP, sent CPH's attorneys an e-mail message stating, in full:

> We have been informed that Morgan Stanley has located additional boxes of backup tapes in a security room. Morgan Stanley is working to catalog the tapes and determine their contents. We will provide you with this information when it becomes available. As of this morning, however, Morgan Stanley has identified four (unlabelled) DLT tapes among the collection. Those four tapes will be sent to NDCI for further analysis.

Ex. A (e-mail sent at 12:54 p.m. on Saturday, February 19, 2005).[1] This message arrived only days after Morgan Stanley's Robert Saunders twice testified under oath that he was "confident" all tapes had already been located. Ex. D at 152-56 (Saunders's testimony at February 14, 2005 hearing, recounting his February 10, 2005 deposition testimony).

The Court already has determined based on evidence presented at the February 14 hearing that Morgan Stanley's failure to make a complete and timely production of e-mails in compliance with the Court's Order was willful. But the full magnitude of the effort to commit fraud on the Court and on CPH remains unknown. Morgan Stanley continues to assert (1) that this problem was originated by one employee, Mr. Riel, who was subsequently placed on "administrative leave" for incompetence and lack of integrity; and (2) that Morgan Stanley acted appropriately and with dispatch when its legal department learned of the issue in October. MS

[1] This is not the first time Morgan Stanley has been less than forthcoming when describing its discoveries. The Court will recall that Morgan Stanley, the day after it had certified in its brief filed on February 11 that production was 100% complete, sheepishly notified the Court via e-mail that it had found "some" additional backup tapes; yet at the February 14 evidentiary hearing, it became apparent that "some" was actually 243 tapes (whose storage capacity is something like 20 to 30 gigabytes each, a total capacity equal to roughly half a billion printed pages). Now, instead of disclosing how many boxes they have found, or how many tapes, Morgan Stanley merely states it has located "additional boxes of backup tapes." Nor does Morgan Stanley explain why it has chosen to send only four of these tapes to NDCI for further analysis.

Supp. Opp'n at 2-3, 6. This motion seeks a way to test those assertions for purposes of establishing the truth, which can in turn be disclosed at trial.

A review of the chronology of key events reveals why additional discovery is justified and why Morgan Stanley no longer should be allowed to invoke privilege to hamper that discovery:

- On May 14, 2004, Morgan Stanley made what purported to be a complete production of e-mails pursuant to the Agreed Order, based on electronic searches run in April.
- But two years earlier, hundreds of eight-millimeter tapes had been discovered (but not uploaded or searched), and by no later than May 6, 2004 (a full week before the May 14 production), the Morgan Stanley employee responsible for this project, Arthur Riel, knew there were other backup tapes (the "Brooklyn tapes") whose contents also had not been uploaded to the archive and searched. Ex. F, MS 112286 (May 6 minutes). He also knew that Morgan Stanley's vendor, NDCI, had not yet completed processing all of the original 35,000 backup tapes in order to allow them to be uploaded. *See* MS Supp. Opp'n at 8-9 (noting that, as of May 6, 2004, NDCI had yet to process more than 2,000 of the original 35,000 tapes).
- Despite that knowledge, on June 23 Mr. Riel falsely certified in writing that Morgan Stanley had fully complied with the Agreed Order.
- By July 2, Mr. Riel learned that there were potentially responsive e-mails on the tapes still being processed. Ex. G, MS 112327 (July 2 minutes).

But according to Morgan Stanley, no one in the legal department had any knowledge until late October that the May 14 production was not complete and that the June 23 certificate was therefore false. There are several reasons to doubt this story.

First, it is inherently implausible. No reason is suggested why Mr. Riel would take it upon himself to orchestrate a fraud not only on CPH but on Morgan Stanley's own counsel. Certainly there must have been multiple communications between counsel and Mr. Riel in April, May, and June 2004 about this very topic.

Second, Morgan Stanley has not offered any actual evidence of this story — instead offering only a carefully phrased declaration by Mr. Doyle stating that he learned in late October "that additional e-mail backup tapes had been located within Morgan Stanley, and that the data on those tapes had not been restored or searched prior to Morgan Stanley's May 14, 2004 e-mail production." Ex. H. Mr. Doyle, who was present but not called as a witness at the February 14 hearing, says nothing in his declaration about whether he was otherwise aware that the May 14 production was incomplete, nor does he describe any inquiry he made of other counsel at Morgan Stanley about when they acquired such knowledge.

Third, and even more glaringly, Morgan Stanley's latest privilege log lists a June 7, 2004 e-mail from Mr. Riel to two in-house Morgan Stanley attorneys, James Cusick and Soo-Mi Lee, "seeking legal advice regarding [the] status of [Morgan Stanley's] e-mail restoration process." Ex. I (privilege log, entry no. 490). The timing of that June 7 request for legal advice is disturbing, as it came after Mr. Riel oversaw the May 14 production of e-mails but before he signed the June 23 certificate stating that Morgan Stanley had fully complied with the Agreed Order, which he knew at the time was false. Morgan Stanley's attempt to portray Mr. Riel as a renegade employee is undercut by the fact that he affirmatively sought legal guidance from

Morgan Stanley's counsel before affixing his name to the knowingly false certificate. On the one hand, if in June 2004 Mr. Riel or his staff revealed to Morgan Stanley's counsel that certain backup tapes had not yet been searched, that could serve to establish that Mr. Riel conspired with attorneys at Morgan Stanley to conceal the falsity of Morgan Stanley's certificate and thereby to defraud both this Court and CPH. That misconduct should trigger the crime/fraud exception to the privilege, under FLA. STAT. ANN. § 90.502(4)(a) (West 2004). On the other hand, if Mr. Riel or his staff manipulated counsel to keep them ignorant and thereby to perpetrate a fraud on CPH and on this Court, that too should trigger the crime/fraud exception, as it is the client's knowledge — not the attorney's — that matters for purposes of the exception.

CPH should be allowed to depose both Mr. Riel and the in-house counsel (Mr. Cusick and Ms. Lee) from whom Mr. Riel sought legal advice on June 7, 2004. But the discovery also should go further, to include other key inside and outside counsel and information-technology professionals whose names appear repeatedly on Morgan Stanley's recent privilege log. Roughly half of the 46 documents on that log date from October or November 2004, when there was a flurry of communications about the e-mail production situation. At some point, a decision was made to produce 8,000 pages of e-mails and to tell CPH that these were a first installment of production from "additional e-mail backup tapes" that Morgan Stanley allegedly had discovered "since [its] e-mail production in May 2004." Ex. J (November 17, 2004 letter from Thomas A. Clare to CPH's counsel); *see id.* (referring to "newly discovered tapes"). But Morgan Stanley's own witnesses at the February 14, 2005 hearing testified that the data from the DLT tapes found in Brooklyn and the 8-mm tapes found in Manhattan were not put into searchable form until January 2005. Ex. K at 52, 65, 68-69 (Gorman). Morgan Stanley's false claim that the November production came from "newly discovered" backup tapes apparently was designed to

conceal the fact that not all of the 35,000 original tapes stored at the Recall facility in New Jersey had been searched in April 2004. CPH should be allowed to take discovery on the genesis of this cover story. CPH and this Court should learn the full story, under oath, with all witnesses fully subject to all the penalties for providing false testimony.

So far, CPH's efforts to learn that full story have been stymied by Morgan Stanley's repeated assertions of privilege. *See, e.g.*, Ex. L at 63-64 (invoking the privilege during Ms. Gorman's February 14, 2005 in-court testimony); Ex. M at 181-82, 196 (invoking the privilege during Mr. Clare's February 14, 2005 in-court testimony); Ex. N at 47, 63-65 (invoking the privilege during Ms. Gorman's February 9, 2005 deposition); Ex. O at 23-27 (invoking the privilege during Mr. Saunders's February 10, 2005 deposition). Those assertions of privilege might have been appropriate if there had been a record here of good faith. But the opposite is the case. Representation after representation of complete production has proved false, as carefully worded declarations obfuscate the truth and leave more questions than answers. The privilege log reveals the fingerprints of counsel on these clumsy, false representations. It is time for the full facts to be aired, under oath and under penalty of perjury.

ARGUMENT

The crime/fraud exception recognizes that the attorney-client privilege "ceas[es] to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing." *United States v. Zolin*, 491 U .S. 554, 562-63 (1989). Under Florida law, the crime/fraud exception bars any party from claiming as privileged any communications with a lawyer when the lawyer's services "were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud." FLA. STAT. ANN. § 90.502(4)(a) (West 2004) (emphasis added); *see Butler, Pappas, Weihmuller v. Coral Reef of Key Biscayne*

Developers, Inc., 873 So. 2d 339, 342 (Fla. 3d DCA 2004) (requiring showing that communication was part of effort to commit fraud, and party sought attorney's advice in order to further fraud); *First Union Nat'l Bank v. Turney*, 824 So. 2d 172, 187 (1st DCA 2001) (requiring showing that communication with counsel was "in order to obtain advice or assistance in perpetrating what the client knows to be a crime or fraud"). It does not matter whether the lawyers knew of the fraud, so long as the client knew and used its lawyers to commit (or plan to commit) a fraud. *First Union Nat'l Bank v. Turney*, 824 So. 2d at 187. As this Court put it, even counsel's sincere belief that it acted in good faith does not "absolve[] its client of the consequences of any of the client's bad acts. . . . [S]ometimes the [sins] of a client come back and visit the client." Ex. P at 618-19.

Florida law has long recognized "fraud on the court," a species of fraud designed to "produc[e] a judicial act by fraudulent representations to the Judge." *State v. Burton*, 314 So. 2d 136, 137 (Fla. 1975). Furthermore, "fraud on the court" encompasses abuses not only in open court, but also in pretrial discovery. Thus, in *Medina v. Florida East Coast Railway, L.L.C.*, 866 So. 2d 89 (Fla. 3d DCA 2004), where the plaintiff had repeatedly lied under oath at his deposition, the appellate court reaffirmed the principle that a Florida trial court, after giving the plaintiff an opportunity to be heard, has "the inherent authority to dismiss an action when it finds that a plaintiff has perpetrated a fraud on the court." *Id.* at 90.

Courts in Florida and elsewhere have not hesitated to apply the crime/fraud exception to frauds on the court, including discovery abuses, destruction of evidence, and obstruction of justice. *See, e.g., Volcanic Gardens Mgmt. Co. v. Paxson*, 847 S.W.2d 343, 348 (Tex. Ct. App. 1993) ("[U]nder the crime/fraud exception to the lawyer-client privilege, 'fraud' would include the commission and/or attempted commission of fraud on the court or on a third person," as

when a "client seeks the assistance of an attorney in order to make a false statement or statements of material fact or law to a third person or the court for personal advantage.").

In *Gutter v. E.I. DuPont de Nemours*, 124 F. Supp. 2d 1291 (S.D. Fla. 2000), a Florida federal court applied the crime/fraud exception when DuPont's counsel made false and misleading statements to the court regarding privilege logs. Although the court could identify no single lawyer at DuPont who knew all the facts behind the misstatements, there was "ample evidence that DuPont itself had the requisite knowledge and intent" for a finding of fraud on the court. *Id.* at 1313. The parallels to the present case are striking: Certain of the defendant's lawyers knew that certain documents could be produced (and had been in other litigation), but the defendant withheld the documents and informed the court that the documents could not be produced. *See id.* at 1302. When the pieces were fit together, the defendant's fraud was revealed.

Such discovery misconduct triggers the crime/fraud exception because the destruction of records eviscerates "the court's ability to ascertain the truth." *In re Sealed Case*, 754 F.2d 395, 401 (D.C. Cir. 1985); *see id.* (invoking the crime/fraud exception where a party "perpetrated a continuing fraud connected with, but not limited to, the actual destruction of records"). The destruction of evidence is every bit as troubling with electronic documents as with traditional paper documents. As this Court put it on February 15, "This is a case of fraud. And electronic data is the functional equivalent of a paper trail." Ex. P at 614-15.

For these reasons, courts do not hesitate to deny the protections of privilege when circumstances suggest, for example, that a party and its lawyers were overseeing the destruction of e-mails and other documents while anticipating litigation. *See Rambus, Inc. v. Infineon Techs. AG*, 220 F.R.D. 264, 283, 287-88 (E.D. Va. 2004). In *Rambus*, a suit involving counterclaims of

fraud, the defendant sought discovery of documents, including attorney-client communications, relating to the plaintiff's document-retention program, on the theory that the document-retention program resulted in the intentional spoliation of relevant documents, and therefore the crime/fraud exception to the attorney-client privilege applied. In response to the plaintiff's claim that it had destroyed documents to reduce the potential cost of discovery in future cases, not to suppress evidence in this particular case, the court held that even if the plaintiff "did not institute its policy in bad faith, if it reasonably anticipated litigation when it did so, it is guilty of spoliation." *Id.* at 286. The court concluded that "the crime/fraud exception extends to materials or communication created for planning, or in furtherance of, spoliation." *Id.* at 283; *see also State Farm Fire & Cas. Co. v. Superior Court of Los Angeles County*, 54 Cal. App. 4th 625, 648-49 (Cal. Ct. App. 1997) (applying the crime/fraud exception to discovery abuses).

When parties engage in discovery misconduct and abuse the attorney-client privilege, Florida courts similarly have not hesitated to reject those parties' claims of privilege and to require production of documents that otherwise would have been protected from disclosure. *See, e.g., Metabolife Int'l, Inc. v. Holster*, 888 So. 2d 140, 140-41 (Fla. 1st DCA 2004) (holding that defendant's failure timely to file a privilege log waived its claims of privilege and required production of documents that otherwise would have been subject to attorney-client and work-product privileges); *General Motors Corp. v. McGee*, 837 So. 2d 1010, 1032 (Fla. 4th DCA 2002) (holding that defendant's misconduct during discovery justified a finding that defendant had waived its privilege claims); *Omega Consulting Group, Inc. v. Templeton*, 805 So. 2d 1058, 1060 (Fla. 4th DCA 2002) (affirming the trial court's order requiring corporate defendant to disclose three e-mails, and rejecting the corporation's claims that the communications were protected from disclosure by the attorney-client privilege).

This Court's April 16, 2004 Order gave Morgan Stanley one full month to produce all responsive, nonprivileged e-mails. Today, more than 10 months later, Morgan Stanley has yet to comply with that Order. And for almost the entire period of delay, up until a few days ago (when Morgan Stanley finally revoked its certificate of compliance, *see* Ex. E), Morgan Stanley insisted on telling CPH and this Court that it had complied with the Order. The time has come for this Court to stop accepting Morgan Stanley's blanket claims of attorney-client privilege and to acknowledge that Morgan Stanley has used its lawyers to "carry[] out [its] misrepresentations and concealment." *American Tobacco Co. v. State*, 697 So. 2d 1249, 1257 (Fla. 4th DCA 1997).

CONCLUSION

For the foregoing reasons, this Court should invoke the crime/fraud exception to order Morgan Stanley (1) to produce the 46 documents listed on Morgan Stanley's February 10, 2005 Privilege Log (Priv. Nos. 486-524), as well as any other documents reflecting when and how Morgan Stanley agents or employees, including in-house and outside counsel, learned about the existence and discovery of all electronic data storage sources potentially containing e-mail-related discovery materials, the failure to make complete production of e-mail-related discovery materials, and when and how Morgan Stanley's agents and employees responded; (2) to make available for deposition in the next two weeks key personnel who were parties to attorney-client communications involving the production of e-mails in this case, including but not limited to Thomas A. Clare, James P. Cusick, James F. Doyle, Grant Jonas, Soo-Mi Lee, Arthur Riel, Zachary Stern, and Wray Stewart; and (3) not to assert attorney-client privilege as a basis for withholding documents or when the deponents are asked questions about Morgan Stanley's retention, destruction, production, or nonproduction of e-mails or backup tapes.

Dated: February 22, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been served to all counsel on the attached Service List by the means indicated this 21st day of February 2005.

Dated: February 21, 2005

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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Hirsch, Sam

From: Thomas Clare [tclare@kirkland.com]
Sent: Saturday, February 19, 2005 12:54 PM
To: Brody, Michael T; Hirsch, Sam
Cc: Jianno@CarltonFields.com; LBemis@kirkland.com; Jeffrey Davidson
Subject: Morgan Stanley Backup Tapes

We have been informed that Morgan Stanley has located additional boxes of backup tapes in a security room. Morgan Stanley is working to catalog the tapes and determine their contents. We will provide you with this information when it becomes available. As of this morning, however, Morgan Stanley has identified four (unlabelled) DLT tapes among the collection. Those four tapes will be sent to NDCI for further analysis.

Thomas A. Clare | Kirkland & Ellis LLP

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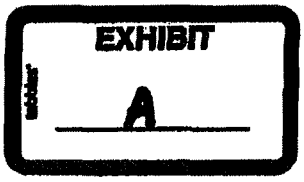

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

[CPH'S PROPOSED] ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION REGARDING MORGAN STANLEY & CO. INCORPORATED'S DESTRUCTION OF E-MAILS AND NONCOMPLIANCE WITH THE COURT'S APRIL 16, 2004 AGREED ORDER

THIS CAUSE came before the Court February 14, 2005 on Coleman (Parent) Holdings, Inc.'s ("CPH's") Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, as modified by CPH's February 14, 2005 ore tenus motion for additional relief. Based on the evidence introduced at an evidentiary hearing, the Court FINDS as follows:

1. This is a case of fraud. And electronic data are the functional equivalent of a paper trail. Morgan Stanley's actions here have had a crucial impact on plaintiff CPH's ability to prove its case.

2. Because a central issue in this case is the extent of Morgan Stanley's knowledge of the fraudulent scheme undertaken by its client Sunbeam Corporation during 1997 and early 1998, CPH has long sought access to Morgan Stanley's internal files, including e-mails. Morgan Stanley has impeded that discovery, however, by making no effort to preserve the relevant e-mails even when, as early as February 1999, making concerted efforts to maintain other (non-

electronic) records in Morgan Stanley's possession in anticipation of potential Sunbeam-related litigation. Indeed, Morgan Stanley knew Sunbeam-related litigation was likely as of March 1998. Morgan Stanley destroyed countless e-mails when it systematically re-used and "over-wrote" computer backup tapes on a rolling basis every 12 months. That 12-month retention policy violated applicable Securities and Exchange Commission regulations requiring companies like Morgan Stanley to maintain e-mails for at least three years and to maintain them in a readily accessible form for at least two years. *See* 17 C.F.R. § 240.17a-4 (1997).

3. The need for Morgan Stanley to redouble its efforts to recover some fraction of the relevant e-mails became a major issue in this litigation, culminating in an Agreed Order on April 16, 2004. The Agreed Order required Morgan Stanley to (1) search the oldest full backup tape that exists for e-mail of each of 36 Morgan Stanley employees or former employees involved in the Sunbeam transaction; (2) provide to its attorneys for responsiveness and privilege review all e-mails dated from February 15, 1998 through April 15, 1998 and all e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004 all nonprivileged e-mails responsive to CPH's document requests; and (4) give CPH a privilege log listing any materials withheld on privilege grounds. Morgan Stanley was also required to certify its full compliance with the Agreed Order. The assumption was that this process would lead to production of e-mails from a set of roughly 35,000 backup tapes that had been located and had not been overwritten.

4. On May 14, 2004, Morgan Stanley produced approximately 1,300 pages of e-mails but failed to provide the required certification. Finally, on June 23, 2004, after inquiries by CPH, Morgan Stanley provided CPH with a certificate of full compliance with the April 16 Agreed Order signed by Arthur Riel, the manager at Morgan Stanley assigned this task.

5. As organized by Morgan Stanley, the effort to recover e-mails from any remaining backup tapes had several stages. First, the relevant backup tapes (in various formats, such as "DLT" tapes and eight-millimeter tapes) had to be located by searching the potential storage locations. Second, the tapes were sent to a vendor called National Data Conversion Inc. (NDCI) to be processed, and the data were returned to Morgan Stanley in the form of "SDLT" tapes. Third, Morgan Stanley had to find a way to upload the contents of these SDLT tapes into its new e-mail archive. Fourth, Morgan Stanley would run "scripts" to transform this data into a searchable form, so that it could later be searched for responsive e-mails. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when SDLT tapes remained in limbo, waiting to be uploaded to the archive.

6. At some point prior to May 6, 2004, Arthur Riel and his team became aware that more than 1,000 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423 DLT tapes had not been processed by NDCI and thus had not been included in the archive or searched when Morgan Stanley made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification that it was false. He and others on Morgan Stanley's e-mail archive team were further informed by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990s. But Morgan Stanley neither withdrew its certification nor informed CPH about the potential for additional production of e-mails. During the summer of 2004, it appears that the Brooklyn tapes were processed and sent to the staging area, but they were not uploaded to the e-mail archive so as to be available to be searched until January 2005 (at least eight months after they were found).

7. Morgan Stanley also failed to timely produce e-mails from 738 8-millimeter backup tapes found at a Morgan Stanley facility in Manhattan even earlier, in 2002. These 738 8-mm tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched when Morgan Stanley made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Mr. Riel and others were further informed by their vendor NDCI by July 2, 2004 that the 8-mm tapes contained e-mail dating back at least to 1998. But Morgan Stanley neither withdrew its certification nor informed CPH about the potential for additional production of e-mails. During the summer of 2004, it appears that the 8-mm tapes were processed and sent to the staging area. But, like the Brooklyn tapes, they also were not uploaded to Morgan Stanley's e-mail archive.

8. In August 2004, Mr. Riel was relieved of his employment responsibilities. He and his team were replaced by a new team headed by Allison Gorman Nachtigal. Ms. Gorman testified that she was instructed to describe the circumstances of Mr. Riel's replacement as his having been "placed on administrative leave." That same term appears by interlineation over the original typed description in Morgan Stanley's memorandum addressing these issues. The typed language stated: "[Mr. Riel was] dismissed for integrity issues."

9. Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area, and she was not even informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman met with a group of Morgan Stanley attorneys. Following that meeting, Ms. Gorman gave the project somewhat greater priority, although even then it clearly did not move as expeditiously as possible. For example, Morgan Stanley apparently gave no thought to using an

outside contractor to expedite the process of completing the discovery, even though Morgan Stanley had certified completion months earlier and even though Morgan Stanley lacked the technological capacity to upload and search the data at that time (and would not attain that capacity for many months). Even at this point, no one from Morgan Stanley or its outside counsel, Kirkland & Ellis LLP, gave CPH or this Court any hint that the June certification was false.

10. On November 17, 2004, more than six months after the May 14, 2004 deadline for producing e-mails in response to the Agreed Order, Morgan Stanley sent CPH a letter revealing that its June 23 certificate of compliance was incorrect. The letter stated:

> Morgan Stanley has discovered additional e-mail backup tapes since our e-mail production in May 2004. The data on some of [the] newly discovered tapes has been restored and, to ensure continued compliance with the agreed order, we have re-run the searches described in the order. Some responsive e-mails have been located as a result of that process. We will produce the responsive documents to you as soon as the production is finalized.

The letter also foreshadowed further delays: "Some of the backup tapes are still being restored. To ensure continued compliance with the agreed order, we intend to re-run the searches again when the restoration process is complete and will produce any responsive documents that result."

11. The next day, on November 18, 2004, Morgan Stanley produced an additional 8,000 pages of e-mails and attachments from backup tapes. Morgan Stanley's November 2004 letters stated that the 8,000 pages came from "newly discovered" tapes; but the testimony now makes clear that this statement was likely false because Ms. Gorman's team did not figure out how to upload and make searchable the materials from the staging area until January 2005. Instead, it appears the 8,000 pages were from the original set of 35,000 backup tapes that were known to exist but that were not fully uploaded or searched the previous spring — further contradicting the June 23 certificate of compliance. Morgan Stanley has completely failed to

offer any explanation to reconcile the obvious conflict between its assertions at the time of production that the 8,000 pages came from "newly discovered" tapes (*i.e.*, the "Brooklyn tapes") and the testimony of their own witness, Ms. Gorman, that data from those newly discovered tapes were not capable of being searched until two months later, in January.

12. After a follow-up inquiry by CPH, on December 17, 2004, Morgan Stanley produced a privilege log and advised CPH that "[n]o additional responsive e-mails have been located since our November production." But Morgan Stanley refused to answer CPH's questions about whether Morgan Stanley had restored all the backup tapes described in its November 17 letter and about why the tapes had not been located earlier.

13. On December 30, 2004, CPH sought confirmation that Morgan Stanley had reviewed all e-mail backup tapes and produced all responsive e-mails, and if not, asking when the review would be completed. On January 11, 2005, Morgan Stanley informed CPH that the "restoration of e-mail backup tapes is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

14. On January 19, 2005, CPH wrote asking Morgan Stanley to explain the circumstances under which Morgan Stanley located the "newly discovered" backup tapes and to disclose when the tapes were located. CPH also asked Morgan Stanley to explain why the backup tapes could not be restored sooner.

15. On January 21, 2005, Morgan Stanley sent CPH a letter that failed to answer CPH's questions. Instead, Morgan Stanley described its efforts to restore the backup tapes as "ongoing"; informed CPH that "there is no way for Morgan Stanley to know or accurately predict the type or time period of data that might be recovered"; and stated that "Morgan Stanley

cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes." Ominously, the letter closed by noting that, "when the agreed-upon searches are run again," they "will include approximately one terabyte of additional data." One terabyte equals about 1 million megabytes.

16. On January 26, 2005, CPH filed the Motion at issue here, asking the Court to instruct the jury that Morgan Stanley's destruction of e-mails and other electronic documents and Morgan Stanley's noncompliance with the April 16, 2004 Agreed Order can give rise to an adverse inference that the contents of the missing e-mails would be harmful to Morgan Stanley's defense in this case.

17. Meanwhile, Morgan Stanley found another 169 DLT tapes in January 2005 that allegedly had been misplaced by its New Jersey storage vendor, Recall. And again, Morgan Stanley chose to provide no specifics to CPH or to the Court.

18. At a February 2, 2005 hearing on CPH's motion, Mr. Thomas A. Clare of Kirkland & Ellis LLP, representing Morgan Stanley, stated that "late October of 2004 . . . [is] the date I represent to the Court is the first time that anyone knew that there was recoverable e-mail data" on the Brooklyn tapes. Hr'g Tr. (2/2/05) at 133-34. The actual date, however, was at least three months earlier, by July 2, 2004. Furthermore, Morgan Stanley refused to provide the Court with definitive answers as to when its e-mail production would be complete, merely stating that it would proceed with "all deliberate speed." *Id.* at 139. Also at the February 2 hearing, Mr. Clare not only neglected to inform the Court about the 8-mm tapes that had been located in 2002, but also informed the Court that the 1,423 DLT tapes had been found in Brooklyn "sometime during the summer" of 2004. *Id.* at 132. The truth of this assertion is belied not only by the evidence showing that the tapes were found before May 6, 2004, but by Mr. Clare's

acknowledgement on cross-examination that he became aware of that chronology after CPH filed its present motion on January 26, 2005 — a week before he unambiguously told the Court the tapes had been found during the summer. Hr'g Tr. (2/14/05) at 187, 195.

19. On February 3, 2005, the Court ordered further discovery and set an evidentiary hearing for February 14, 2005. The discovery took place on February 9 and 10, when CPH deposed the three e-mail witnesses that Morgan Stanley identified.

20. Beginning on Sunday, February 6, Morgan Stanley produced a few dozen additional pages of e-mails. At 2:38 a.m. on Friday, February 11, 2005, Morgan Stanley produced three additional pages of e-mails, announced that its e-mail production was complete, and asked the Court to dismiss CPH's Motion as moot.

21. But on Saturday afternoon, February 12, Morgan Stanley informed the Court that it had, in the previous 24 hours, discovered additional tapes. Also, Morgan Stanley stated that its recent production omitted certain "attachments" to e-mails. Morgan Stanley did not attempt to clarify or substantiate either of these statements to CPH or to the Court until the Monday, February 14, 2005 hearing.

22. At the February 14 hearing, none of the witnesses Morgan Stanley presented was involved in or familiar with the actual electronic searches conducted using the parameters specified in this Court's April 16, 2004 Order. And none explained where the 8,000 pages produced in November 2004 had come from. Morgan Stanley's witnesses did, however, describe three new developments. First, Mr. Robert Saunders, had returned to New York after his February 10 deposition and, concerned about his unqualified assertion that he was "confident" that a complete search for backup tapes had been conducted, decided finally to undertake a personal search of Morgan Stanley's "communication rooms." By doing so, he

discovered more than 200 additional backup tapes openly stored in locations known to be used for tape storage. Those discoveries were made on Friday and Saturday, February 11 and 12. But as of the February 14 hearing, NDCI had not yet determined which, if any, of these newly discovered backup tapes contained e-mails. Second, Ms. Gorman reported that on Friday she and her team had discovered that a flaw in the software they had written had prevented Morgan Stanley from locating all responsive e-mail attachments. Third, Ms. Gorman reported discovering on Sunday evening that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so there were at least 7,000 additional e-mail messages that appeared to fall within the scope of the Agreed Order but had yet to be fully reviewed by Kirkland & Ellis for responsiveness and privilege. As counsel for Morgan Stanley admitted, this problem "dwarf[s]" their previous problems. Hr'g Tr. (2/14/05) at 13. And Ms. Gorman indicated she was "90 percent sure" that the problem infected their original searches in May, which means that they even failed to timely produce relevant materials that had been uploaded into the archive by that point. *Id.* at 82-83.

23. Throughout this entire process, lack of candor on the part of Morgan Stanley and its Kirkland & Ellis attorneys frustrated the Court's ability to be fully and timely informed with respect to these issues.

24. Morgan Stanley's failure during the summer and fall of 2004 to timely process a substantial amount of data that was languishing in the "staging area," rather than being put into searchable form and then searched, was willful.

25. Morgan Stanley's failure to timely notify CPH of the existence of the DLT and 8-mm tapes — which Morgan Stanley had located as early as 2002 and certainly prior to the June

23, 2004 certification — and Morgan Stanley's failure to timely process those raw backup tapes was willful and a gross abuse of its discovery obligations.

26. Morgan Stanley's failure to produce all e-mail attachments was negligent, and it was discovered and revealed only as a result of CPH hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check Morgan Stanley's compliance with the April 16, 2004 Agreed Order.

27. Morgan Stanley's failure to produce all of the Lotus Notes e-mails was negligent, and it was discovered and revealed only as a result of CPH hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check Morgan Stanley's compliance with the April 16, 2004 Agreed Order.

28. Morgan Stanley's failure to locate all potentially responsive backup tapes before Saturday, February 12, 2005 (if then) was grossly negligent.

29. In sum, despite the affirmative duty on Morgan Stanley's part arising out of the litigation to produce its e-mails, and contrary to federal law requiring it to preserve the e-mails, Morgan Stanley failed to preserve many e-mails and failed to produce all e-mails required by the Agreed Order. The failings include overwriting e-mails after 12 months; failing to conduct proper searches for tapes that may contain e-mails; providing a certificate of compliance known to be false when made and never amended to reflect its falsity; failing to timely notify CPH when additional tapes were located; failing to use reasonable efforts to search the newly discovered tapes; failing to timely process and search data held in the staging area or notify CPH of the deficiency; failing to write software scripts consistent with the Agreed Order; and discovering the deficiencies only after CPH was given the opportunity to check Morgan Stanley's work and

the Morgan Stanley attorneys were required to certify the completeness of the prior searches. Many of these failings were done knowingly, deliberately, and in bad faith.

WHEREFORE, based on this Court's authority under Rule 1.380(b)(2) of the Florida Rules of Civil Procedure and other authority cited herein, and based on the foregoing findings of fact and the briefs and arguments of counsel, it is hereby ORDERED AND ADJUDGED as follows:

1. The Motion is GRANTED.

2. The findings of fact set forth above shall be deemed established for the purposes of this action and shall be disclosed to the jury at the start of the trial. Fla. R. Civ. P. 1.380(b)(2)(A).

3. Morgan Stanley is held in contempt of Court for its repeated, egregious failures to obey the Court's April 16, 2004 Agreed Order and for its efforts to conceal that noncompliance. The Court reserves for further hearing the determination of the amount and type of financial sanctions appropriate for this contempt. Fla. R. Civ. P. 1.380(b)(2)(D).

4. CPH will be allowed to present argument and evidence concerning Morgan Stanley's e-mail destruction, e-mail nonproduction, and other discovery misconduct when presenting argument and evidence going to the issue of punitive damages. *See, e.g., General Motors Corp. v. McGee*, 837 So. 2d 1010, 1035-36 (Fla. 4th DCA 2002).

5. [*Alternative One*] Because of its failure to produce relevant evidence on a timely basis, Morgan Stanley's answer is stricken and, therefore, CPH's allegations of liability are deemed admitted and Morgan Stanley is held liable on all counts of CPH's complaint. The trial therefore will be limited to (1) the amount of compensatory damages; (2) CPH's entitlement to punitive damages; and (3) the amount of punitive damages. Fla. R. Civ. P. 1.380(b)(2)(C).

[*Alternative Two*] The Court will instruct the jury (both at the start of the trial and when delivering other jury instructions as to liability) to presume that, beginning no later than February 15, 1998, Morgan Stanley knew of the fraud that Sunbeam was committing against CPH and was aware that it was part of an overall activity that was improper. At trial, Morgan Stanley will thus bear the burden of disproving its knowledge of the Sunbeam fraud. *See, e.g., Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596, 599 (Fla. 1987); *Safeguard Mgmt. v. Pinedo*, 865 So. 2d 672, 674 (Fla. 4th DCA 2004).

[*Alternative Three*] The Court will instruct the jury (both at the start of the trial and when delivering other jury instructions as to liability) that it may infer that the contents of the e-mails that were destroyed or not produced would be harmful to Morgan Stanley's position in this case. Specifically, this adverse-inference jury instruction will state: "In this case, as in every civil case in Florida, as part of the trial preparation process the parties are entitled to request information from each other in a process that is known as discovery. You have heard that, during the discovery process in this case, Morgan Stanley failed to produce many of the e-mails sent or received by Morgan Stanley employees during the relevant time period in 1998. You are permitted, but not required, to infer that Morgan Stanley's destruction or nonproduction of e-mails had a fraudulent purpose. And you are permitted, but not required, to infer that, if produced, the missing e-mails would have been unfavorable to Morgan Stanley. Any inference you decide to draw should be based on all of the facts and circumstances in this case. You should give the fact of the missing e-mails the weight you think proper under all the circumstances; you may consider that fact decisive with respect to any or all of CPH's claims, you may ignore it altogether, or you may give it weight between those extremes, as you determine appropriate."

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ___ day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. VOLUME 2

MORGAN STANLEY & CO., INC.,

Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Monday, February 14, 2005
1:30 p.m. - 5:00 p.m.

were found sometime before June 17, 2004, correct?

A. Sorry. Could you repeat that?

Q. Yes, sir. The Brooklyn tapes were found before the certification, right?

A. I have heard that testimony, yes.

Q. Okay. My first question to you is when did you learn that the tapes, the Brooklyn tapes were found before the certification? When did you first find that out?

A. That particular data point I would say I first personally learned of that after your motion for an adverse inference.

Q. Do you have knowledge as to whether any other Kirkland lawyer learned of that before we filed our motion?

A. I don't. I can only speak to my own personal knowledge. I would say, however, that I have been the primary Kirkland lawyer interfacing with the client on this issue.

Q. Since both the 738 eight-millimeter backup tapes and the 1,423 DLT tapes were found before the certification but not searched as of the time of the certification, correct? We know that.

A. I've heard that testimony this morning.

Q. Okay. So since they were found before the

THE WITNESS: I have not asked specifically who the attorney was who had that.

BY MR. SCAROLA:

Q. I gather from the clarification that you made with regard to my misunderstanding of your earlier testimony that what it is that you didn't find out until after our motion was filed were the specifics with regard to when tapes were found that were outside the scope of the certification; is that correct?

A. I believe it is correct. What I testified to is the exact chronology of when, which batches of tapes were found as they relate to when the certification was signed.

Q. And I think the way I phrased the question initially was a reference to general problems with Morgan Stanley's compliance with their e-mail discovery obligations. So let's focus on that. When did you first become aware that there were problems with Morgan Stanley's compliance with the April 2004 order?

A. If by problems you mean --

Q. Anything and everything is what I mean.

A. Well, let me tell you what I understand your question to mean, and if I'm not answering it, please

facts about which you no longer have knowledge of their truth or falsity, do you recognize an obligation to immediately inform the interested parties and the court?

MR. JONES: Your Honor, I object. We're now entering into hypothetical kinds of questions.

THE COURT: I would sustain it. I mean -- Well, I would sustain it.

BY MR. SCAROLA:

Q. At what point in time did you personally become aware of Miss Gorman having been instructed that the processing of these tapes was to be given a higher priority than it had previously?

A. I can't fix in my mind when I first became aware of that, but it was probably within the last several weeks in response to your motion.

Q. Whose responsibility was it within Kirkland & Ellis to assure that the discovery obligations imposed by court order were met expeditiously?

A. Well, I would say that every attorney on our team would have an obligation to comply with the court's orders.

Q. I'm talking specifically about the April 2004 order. Whose responsibility was it within Kirkland &

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
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COLEMAN (PARENT) HOLDINGS, INC.,

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MORGAN STANLEY & CO., INC.,

Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Monday, February 14, 2005
1:30 p.m. - 5:00 p.m.

EXHIBIT
D

comes --

Q. How many are you aware of?

A. I'm aware of the work Morgan Stanley has done with the Security and Exchange Committee over the last -- over the last several months, and I'm aware of this case.

Q. To your knowledge, have any other parties, either government agencies or regulatory bodies or other litigants been informed that searches made of Morgan Stanley's database may not have been complete because there were 182 tapes you just found?

A. My understanding is that in this matter information was given and that we are working on letting the SEC know as well.

Q. What about other litigants?

A. I'm not aware specifically of any other communication that Legal might have outside of these two matters.

Q. And if I understood your testimony today, you're confident that you've now found everything; is that right?

A. Yes.

Q. Are you confident with the same degree of confidence that you expressed to me on Thursday that as of Thursday you had found everything?

A. Well, as my earlier testimony indicated, I certainly was not happy about the fact that on a Friday afternoon, you know, with my feelings and having given the testimony on Thursday that I go out and I go to, you know, the first room I go to and I find some tapes. That was a disheartening event. There's no question about that.

Q. Excuse me. But that's not the question I had.

A. So I can continue my testimony, which is that at this point having exhaustively gone through 1221 and 1585 and my experience with the firm and knowing those rooms, and in addition to John Pamula and Robert Volk looking at Brooklyn and Pavonia, I do feel we have made an exhaustive search.

THE COURT: That wasn't the question asked. Do you have the same level of confidence you have today as you did on Thursday at your deposition?

THE WITNESS: That's an interesting question, is it the same level of confidence. I would say it's a more personal level of confidence, but I actfully searched myself and I directed the search.

BY MR. BYMAN:

Q. Let me refresh your recollection, sir, with what you told us Thursday with your level of confidence. And this is at page -- I apologize. With old eyes, it's hard to see the page, but I believe this is 43.

Question, "Do you have any reason to believe that you have actually located everything that is out there?"

Answer, "I believe that we have made repeated efforts to be comprehensive in our search of Morgan Stanley premises, areas where tapes have been stored and the different communication rooms and the John Pamula, in addition to the BURP team have been diligent in their efforts to make sure that we have found everything that is out there."

Question, "I'm not questioning what they may have done in the past, Mr. Saunders. Others may. And on Monday you can expect others will question you, maybe in a harsher tone of voice, but my question is a little more direct, and it's innocent. That is, as you sit here today, are you confident that you've located everything?"

Answer, "I'm confident that we've made every effort to do so."

Question, "I understand that you've made efforts. Are you confident that those efforts have been successful?"

Answer, "Yes."

Question, "And what's the basis of that confidence given the fact that tranche one didn't work; tranche two wasn't the end of it; tranche three wasn't the end of it?"

And your answer was, after an objection, which I presume, Mr. Klapper, you don't want ruled on, "Again, go back to my earlier answer, which is, we have made various efforts, strenuous efforts to locate the universe of tapes, and I believe we've done so."

Now, sir, that was your testimony on Thursday. Measuring your degree of confidence, then, to your degree of confidence today, where are we?

A. I'd say I have a higher level of confidence today because I personally searched this past weekend and I directed a search; whereas, in the past my testimony was that I was made aware of searches and I had conversations about searches. So I would say it's a different and higher level of confidence than on Thursday.

Q. Sir, my recollection of the Thursday deposition was that we were all pretty friendly. We

weren't wearing ties. Nobody yelled at anybody. What was it about that deposition that made you decide to conduct a personal search the next day that you had not thought to do any earlier?

A. I think that after being asked repeatedly by counsel and searching my own memory and realizing that the basis of my confidence and you specifically questioning what was the basis of my knowledge and my confidence, and I realized that a hole was that I personally had not gotten involved. And because of my knowledge of the communication rooms, having spent some significant time in there over the last several years, that what if I made a cursory search of 1221, third floor. If I went there and found nothing, and that was a room I thought might not have been touched for sometime, but I was aware of that room and knowledgeable about it, that perhaps, you know, all is good in the world, wouldn't need to go further.

Q. Sir, you were the same Robert John Saunders, or is it John Robert Saunders, I'm sorry, but the same Mr. Saunders who gave a deposition in this case on February 10, 2004, right?

A. That's correct.

Q. So you knew about this lawsuit over a year ago; is that right?

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

NOTICE OF WITHDRAWAL OF CERTIFICATION OF ARTHUR RIEL

Morgan Stanley & Co. Incorporated ("Morgan Stanley"), through undersigned counsel, respectfully withdraws the June 23, 2005 Certification of Compliance by Arthur Riel. Morgan Stanley will submit such further declarations and certifications as the Court instructs.

EXHIBIT
E

so again there is pre 2000 mail there.

If you need any more info please let me know.

--

Have a nice holiday weekend!
Bruce

Bruce Buchanan
National Data Conversion
212.467.7511 ext 716
----- Message from "Stewart, Wray (IT)" <Wray.Stewart@morganstanley.com> on Fri, 2 Jul 2004 13:10:25 -0500 -----

To: "emailarchive_core" <emailarchive_core@morganstanley.com>
Subject: FW: Tape dates

FYI,

From: Bruce Buchanan [mailto:bbuchanan@ndci.com]
Sent: Friday, July 02, 2004 1:47 PM
To: Riel, Arthur (Company IT)
Cc: Pamula, John R Jr. (IT); Haight, Donald (Company IT); Stewart, Wray (IT)
Subject: Tape dates
Importance: High

Hey Arthur

We looked at the "found" tapes we were able to restore and 90 of them had mail. We got the label (internal) off 4 of them and the dates are 5/12/99, 5/14/99, 8/03/99, and 2/18/01. Obviously there is pre 2000 mail.

We also catalogued 2 of the 8mm test tapes we have and the dates on those are 6/16/98 and 6/7/98 so again there is pre 2000 mail there.

If you need any more info please let me know.

Have a nice holiday weekend!
Bruce

Bruce Buchanan
National Data Conversion
212.467.7511 ext 716
----- Message from "Stewart, Wray (IT)" <Wray.Stewart@morganstanley.com> on Thu, 8 Jul 2004 17:32:37 -0500 -----

To: "emailarchive_core" <emailarchive_core@morganstanley.com>
cc: "ecmgr-na" <ecmgr-na@morganstanley.com>
Subject: Email archive meeting minutes 7/8/04

Restore status:

- Emails restored – 317,925,024
- Total size of emails restored – 13,992.25GB
- Email data archived – 4.729 TB Compressed
- Tapes shipped to NDCI – 35,380

MORGAN STANLEY
CONFIDENTIAL
0112327

Stewart, Wray (IT)

From: Stewart, Wray (IT)
Sent: Thursday, May 06, 2004 5:49 PM
To: emailarchive_core
Cc: dsmgr-na
Subject: Email archive meeting minutes 5/6/04

Attendees: Kay Gunn, Bruce Buchanan, Annaline Dinkelmann, John Pamula and Wray Stewart.

Restore status:

- Emails restored – 307,427,169
- Total size of emails restored – 13,671.5 GB
- Email data archived – 3.666 TB Compressed

- Tapes shipped to NDCI – 34,291
- Tapes processed – 32,832
- Output (SDLT) tapes received – 124 SDLT
- Output (SDLT) tapes restored – 114 SDLT

- Number of tapes not containing any user mail – 9,107 DLT
- Number of DLT tapes with read errors – 1,519 DLT

Pending Items:

1. Seventy broken DLT tapes were reported by NDCI. Glenn Seickel to follow-up with Bois to see if those tapes can be repaired.
2. 1024 unlabeled tapes were found in the Brooklyn security room. Wray Stewart/Glenn to investigate the origin on the tapes.
3. 150 DLT tapes have conflicting internal and external labels. NDCI will process tapes using the internal labels and change the external to reflect the internal label.
4. Per Arthur Riel, we will start processing the IIM DLT tapes after the Veritas DLT tapes are complete. The 8mm tapes will be processed after the IIM DLT tapes.
5. Arthur Riel requested a restore of all NA emails for three dates in 2003. Kay Gunn and John Pamula to provide timeframe for identifying the required tapes and performing the restores. Per Donald Haight, EI should begin the restores when the 1999-2002 email restore project is complete. In the interim, EI will complete a test restore of data against one of our test servers.
   - 2/26/04 the following dates were requested:
     1) 2/15/03 - 2/18/03 – Full backup
     2) 5/22/03 Incremental backup
     3) 10/30/03 Incremental backup
   - 3/4/04 Due to space issues, the tape restores will be placed on hold until the 1999-2002 email archive is complete, so that we may leverage the NetApp to restore the data.
5. NDCI is receiving more read errors than expected on the DLT tapes and have purchased a DLT tape cleaning and retention unit to help address this issue. NDCI will run each error tape through the DLT tape cleaning and retention device for free, but will charge an additional fee of $150 to extract all readable data from each DLT error tape not addressed by the cleaner and retention unit. Error tapes will be addressed after the 1999-2002 email archive project.
6. IIM has 2,200 Exchange DLT tapes to restore. NDCI has provided a cost estimate of $150 per tape. This project is scheduled to start after the 1999-2002 email archives in completed. MER 9MEV191 was approved for this project.

10/21/2004

EXHIBIT 6

MORGAN STANLEY
CONFIDENTIAL
0112286

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

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

CASE NO: CA 03-5045 AI

DECLARATION OF JAMES F. DOYLE

1. I am James F. Doyle. I am employed as an Executive Director in the Law Division of Morgan Stanley & Co. Incorporated ("Morgan Stanley"). In that capacity, I have personal knowledge of the matters set forth herein.

2. On information and belief, Morgan Stanley produced restored e-mail documents in the above-captioned matter on May 14, 2004.

3. At the end of October 2004, I learned that additional e-mail backup tapes had been located within Morgan Stanley, and that the data on those tapes had not been restored or searched prior to Morgan Stanley's May 14, 2004 e-mail production. Upon learning that information, I directed that the electronic searches described in the April 16, 2004 Agreed Order be conducted for any backup tapes that had been restored and made searchable at that point, and that the process of restoring the remaining backup tapes continue as expeditiously as possible.

UNDER PENALTY OF PERJURY, I HEREBY DECLARE THAT THE FOREGOING IS TRUE AND CORRECT.

James F. Doyle, Esq.

EXHIBIT
H

Coleman (Parent) Holdings, Inc. v. Morgan Stanley Co. Incorporated

February 10, 2005 Privilege Log

Priv No.	Date	Author(s)	Recipient(s)	Priv	Privilege Description	Redact Bates
486	10/27/2004	James Cusick (MS)	Soo-Mi Lee(MS); James Mangan (MS); James Doyle (MS); Zachary Stern (MS); Mary Lou Peters (MS); Ronald Colombo (MS) CC: Vincent LaGreca (MS); David Restaino (MS); Caren Pennington (MS); David Elston (MS); Allison Gorman Nachtigal (MS)	AC	E-mail from one in-house counsel to other in-house counsel reflecting legal advice provided by in-house counsel re existence of additional e-mail backup tapes.	
487	11/16/2004	James Cusick (MS)	Soo-Mi Lee(MS); James Mangan (MS); James Doyle (MS); Zachary Stern (MS); Mary Lou Peters (MS); Ronald Colombo (MS) CC: Vincent LaGreca (MS); David Restaino (MS); Caren Pennington (MS); David Elston (MS); Allison Gorman Nachtigal (MS)	AC	E-mail from one in-house counsel to other in-house counsel reflecting legal advice provided by in-house counsel re existence of additional e-mail backup tapes.	
488	11/29/2004	Allison Gorman Nachtigal (MS)	James Cusick (MS); Zachary Stern (MS); Soo-Mi Lee (MS)	AC	E-mail to in-house counsel seeking legal advice regarding issues with restoration process..	
489	Various Dates	Allison Gorman Nachtigal (MS)	None	AC/WP	Notes containing conversations with in-house counsel where legal advice was provided re e-mail restoration process.	
490	6/7/2004	Arthur Riel (MS)	James Cusick (MS); Soo-Mi Lee (MS)	AC	E-mail to in-house counsel seeking legal advice regarding status of e-mail restoration process..	
491	10/28/2004	Wray Stewart (MS)	Alexander Lenderman (MS); Bruce Buchanan (NDCI); John Parnula (Siemens); Zachary Stern (MS); Robert Saunders (MS); Glenn Seickel (MS)	AC/WP	E-mails to Information Technology professionals containing in-house counsel's thoughts and impressions and legal advice re e-mail restoration process..	
492	11/8/2004	Wray Stewart (MS)	Bruce Buchanan (NDCI); Glenn Seickel (MS)	AC/WP	E-mail to Information Technology professionals containing in-house counsel's thoughts and impressions and legal advice re e-mail restoration process..	
493	Various Dates Beginning 10/25/2004	James Cusick (MS)	None	AC/WP	In-house counsel's handwritten notes containing both advice given to client as well as mental impressions re e-mail restoration process.	

EXHIBIT
I

16div-011575

KIRKLAND & ELLIS LLP
AND AFFILIATED PARTNERSHIPS

655 Fifteenth Street, N.W.
Washington, D.C. 20005

202 879-5000

www.kirkland.com

Facsimile:
202 879-5200

Thomas A. Clare
To Call Writer Directly:
(202) 879-5993
tclare@kirkland.com

November 17, 2004

BY FACSIMILE

Michael Brody, Esq.
Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603

Re: ***Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.***

Dear Mike:

I write regarding supplementation of Morgan Stanley's document production.

Morgan Stanley has discovered additional e-mail backup tapes since our e-mail production in May 2004. The data on some of newly discovered tapes has been restored and, to ensure continued compliance with the agreed order, we have re-run the searches described in the order. Some responsive e-mails have been located as a result of this process. We will produce the responsive documents to you as soon as the production is finalized.

Some of the backup tapes are still being restored. To ensure continued compliance with the agreed order, we intend to re-run the searches again when the restoration process is complete and will produce any responsive documents that result.

Sincerely,

Thomas A. Clare /HP

Thomas A. Clare

cc: Joseph Ianno, Esq. (by facsimile)
John Scarola, Esq. (by facsimile)
Mark C. Hansen, Esq. (by facsimile)

EXHIBIT
J

IN THE CIRCUIT Court FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

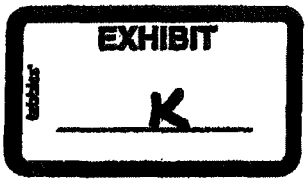
MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME I

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Monday, February 14, 2004
Palm Beach County Courthouse
Courtroom 11-A
205 North Dixie Highway
West Palm Beach, Florida 33401
9:30 a.m. to 12:15 p.m.



we had to look around essentially.

Q. Did you ever find the scripts?

A. We found scripts that we believed to be those scripts. We found scripts that had the right names that appeared to perform the right operations, so we began to test those.

Q. When did you find the scripts?

A. In early November.

Q. You said you began testing them when?

A. Right around there.

Q. Tell us what you did in December and January.

A. So in November we ran initial tests on the scripts and we weren't comfortable with the scripts. It looked like the scripts weren't processing messages properly. So we spent a good bit of December, albeit months somewhat chopped up because of the holidays, testing those scripts and debugging them and essentially came into January, really got our arms wrapped around and put some fixes in the code. And in mid January we began the process of loading the data out of staging.

Q. When you say you were debugging the scripts in November, December, can you just please explain to Your Honor what that means and what that entails?

A. That would be the very end. It was mid, not the first week, not the last week, one of those two in the middle.

Q. Sort of mid October?

A. Sort of mid October.

Q. And it took us until sort of mid January before you were actually ready to start processing that data, right, because you were finding scripts, debugging scripts?

A. Yes.

Q. Quality controlling scripts?

A. Yes.

Q. Roughly the three months you said it takes to develop a program to do all of that, right?

A. No. When I was referring to the program I was referring to the search tool, not the scripts.

Q. Well, the search tool was already in existence, wasn't it? You didn't have any trouble finding that.

A. No, the search tool was in existence, but the search tool had certain issues and those are the scripts that we were writing to compensate for those issues. We were doing those two things in parallel.

Q. When you were told in mid October that this was a priority, that it was a rush, did it move from

let's not even talk about between August and October.

From the point that you were told that it was a priority, you know you could have done it faster if you had gone to an outside vendor and focused just on this subset of data; isn't that right?

A. No.

Q. You don't know that?

A. An outside vendor can't insert data into our system.

Q. I'm not talking about getting it into your firm-wide system.

I agree with you that only you know how to take care of your 15 terabytes of firm-wide data, but you do know there are vendors out there that can take 600 gigabytes of data and process it and search it independent of your system, right?

A. I suspect there are, yes.

Q. Did you do any research to find out whether those vendors were available and could do it faster than you do?

A. I was not asked to, so I did not do that.

Q. When you were told that this was the utmost priority, did it occur to you that, hey, we could do this faster if we went to an outside vendor?

A. The priority I was given was first to insert

the data into the archive and then to later in January run the inquiries for this case. I would say by the time that came up, we could run an inquiry into our system faster than a vendor could have.

Q. By mid January.

I'm asking if somebody had told you in August when you took over for Mr. Rail, it's really important, we have a Court order that says we're supposed to produce everything. We want to do it as quickly as possible. You know you could have done it faster with an outside vendor, don't you?

MR. JONES: I object to the form of the question.

THE COURT: What's the legal objection?

MR. JONES: Because the question was you've got an order that you should have produced everything, it's not been established that this witness really is familiar with this Court order.

THE COURT: Do you want to -- why don't you rephrase it eliminating that?

BY MR. BYMAN:

Q. Let's put aside Court orders. Lawyers very seldom tell you why they're doing anything because they don't know themselves.

IN THE CIRCUIT Court FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME I

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Monday, February 14, 2004

Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

9:30 a.m. to 12:15 p.m.

Q. In the fullness of time?
A. In the fullness of -- yeah, sooner than later, but in some logical order given --
Q. In October it became a priority when counsel told you that it was, right?
A. Yes.
Q. And by the way, I think that there was some reference in your testimony to Morgan Stanley counsel, that October meeting also included Kirkland and Ellis, didn't it?
A. Yes, some of them did.
Q. You understood that they were outside counsel to Morgan Stanley?
A. Yes, sir.
Q. Was there some event in October that moved that data from low priority to higher priority other than counsel contacted you?
A. A series of discussions with counsel --
MR. JONES: Your Honor, I would object to the content of discussions with counsel or attorney-client privilege. Talk about she had a meeting, but I would invoke the privilege as to discussions with counsel.
MR. BYMAN: I don't know that my question asked for that. I wasn't trying to do that.

THE COURT: Why don't we complete the question.

MR. SCAROLA: But do ask.

BY MR. BYMAN:

Q. Let me make sure that my question was clear. I wanted to know if there was some event, other than counsel, in October that moved it from low priority to priority?

A. No, it was prioritized as a result of discussions with counsel.

Q. And what was it that made it a priority, what were you told?

MR. JONES: Objection, Your Honor, attorney-client privilege.

THE COURT: Any response?

MR. BYMAN: Your Honor, it's their burden to try to show why this wasn't --

THE COURT: And I think they're alleging to privilege.

BY MR. BYMAN:

Q. In any event, in October -- by the way, early October, mid October, late October, do you remember the date?

A. Don't remember the date.

Q. Was it before Halloween, after Halloween?

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. VOLUME 2

MORGAN STANLEY & CO., INC.,

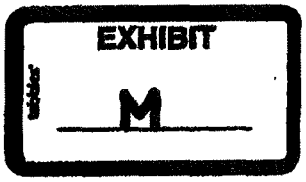
Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Monday, February 14, 2005
1:30 p.m. - 5:00 p.m.



order to comply with the court's order; is that right?
A. At a certain level of generality, yes. For example, I could not communicate to my client the specific way it would be implemented at Morgan Stanley in its Intellectual Technology Department. I don't possess those technical capabilities or understanding.
Q. What did you tell your client about how thorough a search they needed to conduct?
A. I am concerned, now, Mr. Scarola that your questions will intend to impinge upon attorney-client.
Q. They're intended to.
MR. JONES: We object to these questions as attorney-client.
THE COURT: What's the response to the objection to that question?
MR. SCAROLA: I think that that is a well-taken objection. I just want to find out where they intend to draw the line, Your Honor.
THE COURT: That's fine.
BY MR. SCAROLA:
Q. So you choose not to tell us about instructions given regarding the scope of the search by you to the client, correct?
A. I would regard your question to require me to

disclose privileged communications.

Q. And I agree that it does. And that privilege is being asserted; is that correct?

A. My understanding is Morgan Stanley has asserted that privilege, and I am respecting their instruction.

Q. Now what I would then like to know is what Morgan Stanley communicated back to you about the scope of the search that they conducted when they were initially informed of the obligation that they had to conduct a search. What did they tell you they did?

A. I would give you the same answer.

Q. Okay. So, again -- and I will, for the record, acknowledge that that's an appropriate assertion of attorney-client privilege, and the question is being asked in order to define the scope of the assertion.

Is there any aspect of the communications between you and Morgan Stanley, either from you to Morgan Stanley or from Morgan Stanley to you, and by you I mean Kirkland & Ellis, that you and/or your client are prepared to discuss now that you have taken the witness stand to discuss these matters?

MR. JONES: Your Honor, I object to the form of the question as overly broad,

let me know. If by your question you mean when did I first become aware that there were additional tapes that had not been subject to the prior searches that were done, I became aware of that in November of 2004.

Q. How is it that you first became aware in November 2004?

A. In a privileged conversation.

Q. With whom?

A. With Mr. Jim Doyle in the Morgan Stanley law department.

Q. And having identified it as a privileged conversation, I assume that means when I ask you who said what to whom during the course of that conversation, your response will be privileged; is that correct?

A. That is a conversation that I would consider privileged, yes.

Q. Okay. Do you know when Mr. Doyle first found out?

A. I do not.

Q. When in November of 2004 is it that you had this conversation with Mr. Doyle where you learned that there were unsearched tapes?

A. I don't recall the precise date. I do recall generally the chronology of steps that we took, and so

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IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA
CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

DEPOSITION OF ALLISON GORMAN NACHTIGAL

Taken before Tracey L. Spatara, Registered Professional Reporter, Notary Public in and for the State of Florida at Large, pursuant to Notice of Taking Deposition filed by the Plaintiff in the above cause.

Wednesday, February 9, 2004
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida
3:10 p.m. to 5:30 p.m.

00002

APPEARANCES:

JENNER & BLOCK LLP
One IBM Plaza
Chicago, Illinois 60611-7603
Phone: (312) 222-9350
By: ROBERT L. BYMAN ESQ.
SAM HIRSCH, ESQ.
Attorneys for Plaintiff

KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Washington D.C. 20005
Phone: (202) 879-5294
By: MICHAEL D. JONES, ESQ.
Attorneys for Defendant

00003

I N D E X

PAGE

Page 1

EXHIBIT
N

Archive Meeting Minutes without putting the attachments for each of the minutes behind it, which are comprised of graphs and things.

Bearing in mind that you may not have seen them in exactly this form, have you seen this type of minutes?

MR. JONES: Can I just ask, are you asking -- we started out by asking had she seen these. Now you're asking has she seen this type.

MR. BYMAN: I guess I'd like both. If she's seen these specific ones, great. Also if she's seen something like them, I'd also like to know that.

THE WITNESS: I have seen one of these.

BY MR. BYMAN:

Q. Which one have you seen?

A. The last one that is September 9th.

Q. And that would have been done when you were in charge of this?

A. Yes.

Q. What about the one on August 13th?

A. No, I don't think so. Looks surprisingly like the other one, but I recognize the format and I only saw one and I'm pretty sure it was this last one.

00062

Q. These particular ones appear to have been faxed on October 21st, 2004. And I'll represent to you that the fax number to which they're addressed is the fax number of a law firm in Washington, D.C. Sidley Austin, Brown and Wood I think it is. I keep forgetting what their new name is.

Do you have any knowledge as to whether or not these were faxed to a law firm?

A. No.

Q. Does the fax header of October 21st, 2004 help you place in time the directions you got from counsel in October to prioritize the migration of these missing tapes?

MR. JONES: Can you just read that back, please?

(A portion of the record was read by the reporter.)

MR. JONES: Object to the form of the question. It's vague and ambiguous.

BY MR. BYMAN:

Q. Do you understand my question?

A. I think I do. No.

Q. At the risk of asking something I have already, let me try to recap.

Until some time in October when counsel told

00063

you to prioritize the migration of these 112 tapes or 1400, whatever the number was, until that time, these were a low priority, is that fair?

MR. JONES: First of all, I object to the form of the question. And I object to the extent that you are trying to elicit attorney-client communications.

That's my objection. And also it's been asked and answered in a different form.

THE WITNESS: Although I lost track of it, could you say it again?

BY MR. BYMAN:
Q. Sure. You told us earlier that some time in October you had a conversation with counsel and moved these -- let me stop.
Let's back up and try to get some shorthand here. We talk about the tapes that you've been processing that are the reason we're here today. We talk about 112 tapes that have been represented to us may contain e-mails that were part of a larger universe of tapes that were reviewed. We've heard various numbers of that. You've used the number 1400. Counsel in a recent hearing said 2200. But whatever that number is, can we call those the found tapes? And I'm going to say that because it's in these e-mails.

A. Okay.
Q. I'll show it to you if you'd like.
A. Sure.
Q. Some time in October of this year I think you've already told us you were told --
MR. JONES: First of all, here's the problem I have with that. She never talked about a conversation with counsel. If you go back in the record, you'll see she had a meeting with counsel and then she further described how she -- what she did with the tapes and the processing after that.
You seem to, I guess you're assuming that counsel told her to prioritize the tapes. And you've used that in several of your questions. I'm not going to comments as to whether that was or wasn't told. That's really the problem I'm having as to how you're phrasing your questions.
I don't know if that's something that could be fixed or not, Bob. If it could be -- because I don't mind her answering the question you asked again about this document if that's ultimately what you're trying to get to.
I don't know if all that was helpful or not.
MR. BYMAN: Let me try to meet that.

BY MR. BYMAN:
Q. Until some time in October, you did not place any priority on migrating the found tapes, is that fair to say? They were in line, but they were pretty far back in line?
A. I would say I didn't prioritize processing the data that was in staging.
Q. From these found tapes?
A. There was more in staging than the found tapes.
Q. I understand. And they were patiently awaiting their turn, but they weren't going to the head of the line?
A. I'm being careful. I didn't know about found tapes. It wasn't -- that was not my focus.
Q. The set of minutes that you did look at, and this is the last page 0112314.
A. I received it. I filed it. I actually didn't read it until later.
Q. But I just want to direct your attention towards the bottom there's a series of numbered pending items, number 4 talks about 1423 DL tapes were found to

0001

IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA
CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

DEPOSITION OF ROBERT JOHN SAUNDERS

Taken before Tracey L. Spatara, Registered Professional Reporter, Notary Public in and for the State of Florida at Large, pursuant to Notice of Taking Deposition filed by the Plaintiff in the above cause.

Thursday, February 10, 2005
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida
9:00 a.m. to 11:40 a.m.

0002

APPEARANCES:

JENNER & BLOCK LLP
One IBM Plaza
Chicago, Illinois 60611-7603
Phone: (312) 222-9350
By: ROBERT L. BYMAN, ESQ.
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0003

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PAGE

Page 1

A. I don't know if I shared my view of his competence with my superiors.
Q. Do you ever have interface with lawyers in the performance of your duties, other than getting ready for depositions?
A. Would you restate the question?
Q. Well, is any part of your duties over the last couple of years been to supply support or other services to legal counsel?
A. Yes.
Q. And would you describe what that function has been?

MR. KLAPPER: And let me just interject, Counsel.
You're not to reveal anything about the specific services, conversations that you've had with counsel relating to those services, or discussions that you've had with counsel.

With that understanding, you can answer the question.
THE WITNESS: Sure. Since my team is one of the groups responsible for data protection and back ups of documents and information, we have been involved in requests for documents, information, e-mail over the past several years.
I've spoken already about the fact that we have a number of tapes which were off-sited to our vendor, Recall, and that we would -- when requests would come in, ad hoc requests for certain information, we would assist legal and IT security in executing those search requests.

BY MR. BYMAN:
Q. Specifically to this case, first of all, you are aware that this is a lawsuit between Coleman Parent Holdings and Morgan Stanley and Company, Incorporated, are you not?
A. Yes.
Q. Have you ever been asked by anyone to provide support to the legal team for this specific case?
And that's just a yes or no. I'm not trying to find out what you did.
A. Yes.

Q. And now to the extent that you can do it -- and I do not want to invade privileges, but to the extent you can, tell me what task you've been given for this case.

MR. KLAPPER: I'm going to object. Because it's unclear to me that in describing the tasks we can somehow protect the privilege. In terms of description of the tasks, that gets into the mental impression of the attorneys in terms of what they've asked him to do in assisting counsel.
If you want to ask him questions about who he interacted with, when he had meetings with attorneys, et cetera, those atmospherics, I'm all for it. Go forth. But I believe you're invading the privilege if we start getting into the litany of tasks that he may or may not have been asked to do.

MR. BYMAN: Let me see if I can get to at least some specific.

BY MR. BYMAN:

Q. Have you ever been asked to attempt to locate e-mails that might be relevant to this litigation?

MR. KLAPPER: And let me confer with him with respect to whether or not -- and with co-counsel -- with respect to whether or not this is getting into the privilege area.

MR. BYMAN: Sure.

(A discussion was held off the record.)

(A portion of the record was read by the reporter.)

MR. KLAPPER: And I'm just going to go on the record and indicate that it's our position that, feel free to ask him generally about what he has done in terms of searching for e-mails and things of that sort. But if we're going to get into specific questions as to who asked him to perform those functions, we're going to invoke the privilege, and I'm going instruct him not to answer that.

With the exception of any -- I guess the order in place in this particular case for purposes of this deposition required us to identify documents that Mr. Saunders may have had in his possession. And feel free to ask about that pursuant to the order.

But other than that, in terms of specific tasks asked by lawyers, I'm going to invoke the privilege and instruct the witness not to answer.

MR. BYMAN: I'm confused, Tony. Why would the identity of someone who made the request be privileged.

MR. KLAPPER: Because the nature of the question is what are the tasks you've been asked to do. Once you link that up to the attorney, you're getting into the attorneys' mental impressions in terms of what he has decided or not decided to do or asked Mr. Saunders to do.

So I'm not suggesting you have nefarious motives here, but it's a backdoor way of getting at what the attorney is intending to do.

MR. BYMAN: Well, I disagree with your definition of what falls within the privilege. So I'm going to ask the question and ask you to make whatever you -- instructions you need to do.

BY MR. BYMAN:

Q. Has anyone ever asked you to aid in the location and identification of e-mails relevant to this specific litigation?

MR. KLAPPER: And let me just interject.

You can answer that question so long as you don't reveal if it was attorney based or not attorney based.

You may answer.

THE WITNESS: To be specific, are you asking

whether I've looked at my own e-mails, or I've looked at all e-mails that are available to Morgan Stanley?
BY MR. BYMAN:
Q. My question is: Have you been asked to search Morgan Stanley files or aid in a search of Morgan Stanley files for any e-mails that are related to this litigation?
A. Okay. I was specifically asked to check my own e-mail for any information or documents relevant to this proceeding.
Q. And have you or your team provided any support specifically related to this litigation to extract, locate, or identify e-mails for production in this litigation?
A. I guess the strict answer to that question is yes, specifically related to the three tranches of tapes that have been under discussion in the last several weeks and in a hearing to which I was party. I believe it was last Friday or Thursday. It was last Friday, I think.
Q. Let's make sure that we get the definition

0028

of what you mean by the three tranches of tapes. What do you mean?
A. Sure. So outside of what we've talked about in general as the 35,000 Legacy Legato tapes or the universe of tapes prior to 2003, some of which contained e-mail, some of which did not, there were some groups of tapes which have become -- which surfaced in this past year that may or may not have contained additional information.
And I know that in this proceeding that there's been some concern about that information, whether it's discoverable, whether or not it's privileged, and how to make that available to both sides, the plaintiff and the defendant, in order to help move this matter forward.
Q. So the first tranche is the 35,000 tapes?
A. So that makes it four tranches. The 35,000 would be the original set of tapes.
Q. The original set of what Morgan Stanley believed to be the universe of pre-2003 tapes?
A. That's correct.
Q. And then something surfaced that expanded the universe?
A. That's right.
Q. And that's tranche two?

0029

A. Sure.
Q. And what's the quantity of tranche two tapes?
A. My understanding is that 1423 DLT tapes that were found this past year.
Q. What's tranche three?
A. Tranche three is the 8-millimeter tapes.
Q. And what's the quantity of those tapes?
A. I'm not specifically aware of that number.
Q. Do you have any general estimate?
A. Somewhere -- I think somewhere around 700.
Q. You've told us what the storage capacity was of a DLT tape. What's the storage capacity of an 8-millimeter tape?

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. VOLUME 5

MORGAN STANLEY & CO., INC.,

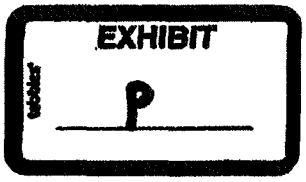
Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Tuesday, February 15, 2005
1:25 p.m. - 5:36 p.m.



holidays, testing those scripts and debugging them and essentially came into January, really got our arms wrapped around and put some fixes in the codes. And in mid January we began the process of loading the data out of staging. That's referring to the Brooklyn tape data that is first loaded, first loaded beginning in mid January."

THE COURT: Okay. You know what, I just want to get my own notes because I don't have them here in front of me. Thanks.

MR. SCAROLA: And we should have our proposed order to Your Honor within just a short time, the last edition.

THE COURT: Okay. I'll be right back. I have them sitting on my desk.

I can tell you all I did come in and review my notes, and I did go through and make my own notes on the summary of findings and facts. And I don't think anything I've been told today would alter what I believed this morning, and let me tell you what they are: That the agreed

order entered April 16th of last year required Morgan Stanley to search the oldest full backup that exists for e-mails of certain -- I'm sorry -- for certain identified employees or former employees; required Morgan Stanley to provide its counsel the responses for responsiveness and privilege review all the e-mails that either were dated between February and April 15th of 1998 and all e-mails containing one of 29 keywords; all nonprivileged e-mails responsive to the request had to be produced by May 14th and a privilege log generated and a certificate of compliance completed. The SEC regulations required Morgan Stanley to maintain e-mails readily access -- in readily accessible form for three years. Morgan Stanley knew Sunbeam litigation was likely as of March of 1998. Despite the affirmative duty on Morgan Stanley's part arising out of the litigation to produce its e-mails and contrary to federal law requiring it to preserve the e-mails, Morgan Stanley failed to preserve some

e-mails and failed to produce all e-mails required by the agreed order. The failings include overwriting e-mails after 12 months; failing to conduct proper searches for tapes that may contain e-mails; providing a certificate of compliance known to be false when made and never amended to reflect its falsity; failing to timely notify CPH when additional tapes were located; failing to use reasonable -- reasonable efforts to search the newly discovered tapes; failing to file timely, process and search data held in the search area or notify CPH of the deficiency; failing to write a program consistent with the agreed order; and discovering the deficiencies only after CPH was given the opportunity to check Morgan Stanley's work and the Morgan Stanley attorneys required to certify the completeness of the prior searches; and that many of these failings were done knowingly, deliberately and in bad faith.

In my concern, this is a case of fraud. And electronic data is the functional

equivalent of a paper trail. And I think Morgan Stanley's actions have had a crucial impact on plaintiff's ability to prove its case, and I think, in all honesty, what are the proper implications of that. If you want to wait until the morning to come up with a proposed order that incorporates what are my findings of fact, that's fine.

MR. SCAROLA: Your Honor, I've obviously heard what Your Honor said and tried to compare it mentally to what we've included in the order that we have already prepared for Your Honor. I think that we have virtually covered everything that Your Honor has described. Obviously not in exactly the same words but very close to the words that you have described.

We can do two things: We can give Your Honor the order that we have prepared and then also provide Your Honor in the morning an alternative order that exactly tracks the language that you have recited.

THE COURT: Why don't you do both, and you guys are welcome to, obviously, share

whatever it is you provide, and you guys are welcome to submit your own proposed order as well. I can tell you I've not decided what I think are the appropriate sanctions.

MR. SCAROLA: What we have done, Your Honor, is to provide in our proposed order alternative sanctions that are simply listed hierarchically and described as alternatives so that Your Honor would simply need to indicate which of the alternatives you wanted to incorporate in the final form. We obviously have the disk and will prepare it as Your Honor directs.

THE COURT: I'll be honest with you, part of it, too, and the reason I was asking these particular questions, and, frankly, I didn't incorporate into my notes this morning because I was waiting to hear the transcript portions today, is that I had affirmative representations that the November production represented the newly discovered Brooklyn tapes. And I think based on the evidence I had

yesterday that's virtually impossible. And, you know, to me that's just symptomatic of the course of conduct by Morgan Stanley. I mean, I understand you guys disagree, but that's my conclusion of fact based on the evidence I heard yesterday.

MR. DAVIDSON: I understand that, Your Honor, but there is a further issue here, and that is -- which disturbs me or which concerns me, let me say that, because I want to be -- although we apparently failed to appreciate the significance of an issue and not knowing going into the hearing that we were going to have to deal precisely with this issue, and, therefore, confessing, apparently, did not other than the testimony that you saw that I pointed out to you from Mr. Clare, did not present evidence yesterday at the hearing, and that may go to the court's order, so the court understands the good faith basis of counsel, though, in taking a position.

Now there is a declaration in the record that counsel is aware of. It's the

Jonas declaration, which was Exhibit 3 to the original brief. Mr. Clare knows about it. I know about it. In which he says that the search that was done in November was done in electronic searches of e-mail data that had been restored and made searchable since May 14th.

We started with that baseline. And I understand that we didn't put testimony on on that, and I understand that, but we did not even think of the fact that there was a question about that. We just didn't. And I'm just addressing the good faith of counsel.

THE COURT: I don't mean to impugn the good faith of counsel. But I have seen a pattern where counsel believes if it acted in good faith, it absolves its client of the consequences of any of the client's bad acts. And, for instance, I have a certificate of compliance signed by Mr. Reil in June that he knew to be false at the time he signed it. And that's an act by Morgan Stanley. It's not an act by counsel. The only thing perhaps we could

visit on counsel is the failure to cause it to be amended once its falsity was apparent. And it's the same thing that, frankly, I was stunned at when Mr. Clare argued to me two weeks ago that you all were still unwilling to admit that that certification was false, where clearly it was.

But, again, sometimes the act of a client come back and visit the client. And I think that's what's happened here.

MR. DAVIDSON: I understand. And not to -- could I extract my --

THE COURT: Yes, you may.

MR. DAVIDSON: Thank you very much.

THE COURT: Where do we want to go now?

MR. SCAROLA: Where do we want to go? Are you taking a survey?

MR. MARKOWSKI: Something other than e-mail and damages, Your Honor. Motion number 20.

THE COURT: And this is plaintiff's motion.

MR. MARKOWSKI: I have a couple documents, Your Honor, that I tabbed that

FAX TRANSMITTAL

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Date: February 21, 2005

TO: Mark C. Hansen, Esq. Fax: (561) 651-1127

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From: Michael T. Brody
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COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

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

CASE NO: 2003 CA 005045 AI

PLAINTIFF'S MOTION TO COMPEL FURTHER DISCOVERY REGARDING MORGAN STANLEY'S DESTRUCTION AND NONPRODUCTION OF E-MAILS

Coleman (Parent) Holdings Inc. ("CPH") respectfully seeks leave to conduct certain discovery relating to the willful failure of Morgan Stanley & Co. Incorporated ("Morgan Stanley") to make full production of responsive e-mails, as it falsely certified it had done prior to June 23, 2004. CPH seeks this discovery not to buttress the record supporting the pending motion for sanctions relating to Morgan Stanley's failure to produce e-mails, but to obtain information for use at trial. The record as to the former issue is complete and justifies the immediate entry of a default judgment as to liability. But as explained below, this discovery is warranted to ascertain the full magnitude of the e-mail problem, which in turn can inform the jury's determinations about liability (if the Court does not grant a default judgment) and about the award of punitive damages.

Specifically, CPH asks that the Court (1) order Morgan Stanley to produce the 46 documents listed on Morgan Stanley's February 10, 2005 Privilege Log (Priv. Nos. 486-524), as well as any other documents reflecting when and how Morgan Stanley agents or employees, including in-house and outside counsel, learned about the existence and discovery of all electronic data storage sources potentially containing e-mail-related discovery materials, the

failure to make complete production of e-mail-related discovery materials, and when and how Morgan Stanley's agents and employees responded; (2) order Morgan Stanley to make available for deposition in the next two weeks key personnel who were parties to attorney-client communications involving the production of e-mails in this case, including but not limited to Thomas A. Clare, James P. Cusick, James F. Doyle, Grant Jonas, Soo-Mi Lee, Arthur Riel, Zachary Stern, and Wray Stewart; and (3) bar Morgan Stanley from asserting attorney-client privilege to justify withholding documents or instructing deponents not to answer questions about Morgan Stanley's retention, destruction, production, or nonproduction of e-mails or backup tapes, based on the crime/fraud exception recognized in FLA. STAT. ANN. § 90.502(4)(a) (West 2004). For the reasons stated below, Morgan Stanley — which owns and repeatedly has invoked the attorney-client privilege — should no longer be permitted to assert the privilege to hide the fraud it has perpetrated upon this Court and CPH.

CPH needs the opportunity to inquire into these matters to establish the magnitude and seriousness of Morgan Stanley's repeated and egregious violations of the April 16, 2004 Agreed Order — the latest of which was revealed just this weekend when Morgan Stanley once again advised CPH that it had located yet another batch of backup tapes that have not yet been searched. *See* Ex. A (February 19 e-mail advising CPH that "Morgan Stanley has located additional boxes of backup tapes"); *see also* Ex. B (CPH's proposed order presenting a menu of possible sanctions). In recent days, Morgan Stanley has sought to minimize the severity of its misconduct by arguing (1) that Arthur Riel, the former head of Morgan Stanley's e-mail archive project, was a renegade employee who for some unknown reason orchestrated a fraudulent discovery scheme on his own; and (2) that counsel took every appropriate step to address the problem when they learned about it in October. MS Supp. Opp'n at 2-3, 6. Neither argument,

however, is supported by any record evidence, and Morgan Stanley has used assertions of privilege to block CPH from inquiring into these matters, both in depositions and in open court. Moreover, as explained below, there are multiple reasons to doubt the veracity of these assertions — reasons that fully justify revoking the protections of privilege in view of Morgan Stanley's failure to satisfy its discovery obligations even today, despite having certified its full compliance eight months ago.

BACKGROUND

As the Court is aware, it is only as a result of CPH's persistence that Morgan Stanley has begun taking steps in the direction of compliance with the April 16, 2004 Order, eight months after Morgan Stanley certified that it already had fully complied. How close Morgan Stanley now is to full compliance and whether it will ever reach the Court-ordered destination remain unsolved mysteries. If CPH had not made an appropriate motion, it is highly unlikely that Morgan Stanley ever would have located multiple sets of additional, unsearched tapes or would have done anything beyond processing an incomplete set of tapes on its own schedule, at its own pace. *See, e.g.,* Ex. C at 187, 195 (Mr. Clare testifying that he learned only after CPH filed its January 26, 2005 motion that the "Brooklyn found" tapes had been discovered before the certification on June 23); *id.* at 202 (Mr. Clare testifying that he only recently learned that Ms. Gorman had "been instructed [in October] that the processing of these tapes was to be given a higher priority than it had previously"); Ex. D at 155-56 (Mr. Saunders testifying that his deposition inspired additional searches that turned up another 243 tapes); Ex. E (February 16, 2005 notice revoking Morgan Stanley's June 23, 2004 certificate of compliance).

But the problems continue. Remarkably, just this weekend, Morgan Stanley once again revealed that it was <u>still</u> finding additional backup tapes that have never been analyzed or

searched. On Saturday afternoon, Morgan Stanley's counsel, Mr. Thomas A. Clare of Kirkland & Ellis LLP, sent CPH's attorneys an e-mail message stating, in full:

> We have been informed that Morgan Stanley has located additional boxes of backup tapes in a security room. Morgan Stanley is working to catalog the tapes and determine their contents. We will provide you with this information when it becomes available. As of this morning, however, Morgan Stanley has identified four (unlabelled) DLT tapes among the collection. Those four tapes will be sent to NDCI for further analysis.

Ex. A (e-mail sent at 12:54 p.m. on Saturday, February 19, 2005).[1] This message arrived only days after Morgan Stanley's Robert Saunders twice testified under oath that he was "confident" all tapes had already been located. Ex. D at 152-56 (Saunders's testimony at February 14, 2005 hearing, recounting his February 10, 2005 deposition testimony).

The Court already has determined based on evidence presented at the February 14 hearing that Morgan Stanley's failure to make a complete and timely production of e-mails in compliance with the Court's Order was willful. But the full magnitude of the effort to commit fraud on the Court and on CPH remains unknown. Morgan Stanley continues to assert (1) that this problem was originated by one employee, Mr. Riel, who was subsequently placed on "administrative leave" for incompetence and lack of integrity; and (2) that Morgan Stanley acted appropriately and with dispatch when its legal department learned of the issue in October. MS

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[1] This is not the first time Morgan Stanley has been less than forthcoming when describing its discoveries. The Court will recall that Morgan Stanley, the day after it had certified in its brief filed on February 11 that production was 100% complete, sheepishly notified the Court via e-mail that it had found "some" additional backup tapes; yet at the February 14 evidentiary hearing, it became apparent that "some" was actually 243 tapes (whose storage capacity is something like 20 to 30 gigabytes each, a total capacity equal to roughly half a billion printed pages). Now, instead of disclosing how many boxes they have found, or how many tapes, Morgan Stanley merely states it has located "additional boxes of backup tapes." Nor does Morgan Stanley explain why it has chosen to send only four of these tapes to NDCI for further analysis.

Supp. Opp'n at 2-3, 6. This motion seeks a way to test those assertions for purposes of establishing the truth, which can in turn be disclosed at trial.

A review of the chronology of key events reveals why additional discovery is justified and why Morgan Stanley no longer should be allowed to invoke privilege to hamper that discovery:

- On May 14, 2004, Morgan Stanley made what purported to be a complete production of e-mails pursuant to the Agreed Order, based on electronic searches run in April.
- But two years earlier, hundreds of eight-millimeter tapes had been discovered (but not uploaded or searched), and by no later than May 6, 2004 (a full week before the May 14 production), the Morgan Stanley employee responsible for this project, Arthur Riel, knew there were other backup tapes (the "Brooklyn tapes") whose contents also had not been uploaded to the archive and searched. Ex. F, MS 112286 (May 6 minutes). He also knew that Morgan Stanley's vendor, NDCI, had not yet completed processing all of the original 35,000 backup tapes in order to allow them to be uploaded. *See* MS Supp. Opp'n at 8-9 (noting that, as of May 6, 2004, NDCI had yet to process more than 2,000 of the original 35,000 tapes).
- Despite that knowledge, on June 23 Mr. Riel falsely certified in writing that Morgan Stanley had fully complied with the Agreed Order.
- By July 2, Mr. Riel learned that there were potentially responsive e-mails on the tapes still being processed. Ex. G, MS 112327 (July 2 minutes).

But according to Morgan Stanley, no one in the legal department had any knowledge until late October that the May 14 production was not complete and that the June 23 certificate was therefore false. There are several reasons to doubt this story.

First, it is inherently implausible. No reason is suggested why Mr. Riel would take it upon himself to orchestrate a fraud not only on CPH but on Morgan Stanley's own counsel. Certainly there must have been multiple communications between counsel and Mr. Riel in April, May, and June 2004 about this very topic.

Second, Morgan Stanley has not offered any actual evidence of this story — instead offering only a carefully phrased declaration by Mr. Doyle stating that he learned in late October "that additional e-mail backup tapes had been located within Morgan Stanley, and that the data on those tapes had not been restored or searched prior to Morgan Stanley's May 14, 2004 e-mail production." Ex. H. Mr. Doyle, who was present but not called as a witness at the February 14 hearing, says nothing in his declaration about whether he was otherwise aware that the May 14 production was incomplete, nor does he describe any inquiry he made of other counsel at Morgan Stanley about when they acquired such knowledge.

Third, and even more glaringly, Morgan Stanley's latest privilege log lists a June 7, 2004 e-mail from Mr. Riel to two in-house Morgan Stanley attorneys, James Cusick and Soo-Mi Lee, "seeking legal advice regarding [the] status of [Morgan Stanley's] e-mail restoration process." Ex. I (privilege log, entry no. 490). The timing of that June 7 request for legal advice is disturbing, as it came after Mr. Riel oversaw the May 14 production of e-mails but before he signed the June 23 certificate stating that Morgan Stanley had fully complied with the Agreed Order, which he knew at the time was false. Morgan Stanley's attempt to portray Mr. Riel as a renegade employee is undercut by the fact that he affirmatively sought legal guidance from

Morgan Stanley's counsel before affixing his name to the knowingly false certificate. On the one hand, if in June 2004 Mr. Riel or his staff revealed to Morgan Stanley's counsel that certain backup tapes had not yet been searched, that could serve to establish that Mr. Riel conspired with attorneys at Morgan Stanley to conceal the falsity of Morgan Stanley's certificate and thereby to defraud both this Court and CPH. That misconduct should trigger the crime/fraud exception to the privilege, under FLA. STAT. ANN. § 90.502(4)(a) (West 2004). On the other hand, if Mr. Riel or his staff manipulated counsel to keep them ignorant and thereby to perpetrate a fraud on CPH and on this Court, that too should trigger the crime/fraud exception, as it is the client's knowledge — not the attorney's — that matters for purposes of the exception.

CPH should be allowed to depose both Mr. Riel and the in-house counsel (Mr. Cusick and Ms. Lee) from whom Mr. Riel sought legal advice on June 7, 2004. But the discovery also should go further, to include other key inside and outside counsel and information-technology professionals whose names appear repeatedly on Morgan Stanley's recent privilege log. Roughly half of the 46 documents on that log date from October or November 2004, when there was a flurry of communications about the e-mail production situation. At some point, a decision was made to produce 8,000 pages of e-mails and to tell CPH that these were a first installment of production from "additional e-mail backup tapes" that Morgan Stanley allegedly had discovered "since [its] e-mail production in May 2004." Ex. J (November 17, 2004 letter from Thomas A. Clare to CPH's counsel); *see id.* (referring to "newly discovered tapes"). But Morgan Stanley's own witnesses at the February 14, 2005 hearing testified that the data from the DLT tapes found in Brooklyn and the 8-mm tapes found in Manhattan were not put into searchable form until January 2005. Ex. K at 52, 65, 68-69 (Gorman). Morgan Stanley's false claim that the November production came from "newly discovered" backup tapes apparently was designed to

conceal the fact that not all of the 35,000 original tapes stored at the Recall facility in New Jersey had been searched in April 2004. CPH should be allowed to take discovery on the genesis of this cover story. CPH and this Court should learn the full story, under oath, with all witnesses fully subject to all the penalties for providing false testimony.

So far, CPH's efforts to learn that full story have been stymied by Morgan Stanley's repeated assertions of privilege. *See, e.g.*, Ex. L at 63-64 (invoking the privilege during Ms. Gorman's February 14, 2005 in-court testimony); Ex. M at 181-82, 196 (invoking the privilege during Mr. Clare's February 14, 2005 in-court testimony); Ex. N at 47, 63-65 (invoking the privilege during Ms. Gorman's February 9, 2005 deposition); Ex. O at 23-27 (invoking the privilege during Mr. Saunders's February 10, 2005 deposition). Those assertions of privilege might have been appropriate if there had been a record here of good faith. But the opposite is the case. Representation after representation of complete production has proved false, as carefully worded declarations obfuscate the truth and leave more questions than answers. The privilege log reveals the fingerprints of counsel on these clumsy, false representations. It is time for the full facts to be aired, under oath and under penalty of perjury.

ARGUMENT

The crime/fraud exception recognizes that the attorney-client privilege "ceas[es] to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing." *United States v. Zolin*, 491 U .S. 554, 562-63 (1989). Under Florida law, the crime/fraud exception bars any party from claiming as privileged any communications with a lawyer when the lawyer's services "were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud." FLA. STAT. ANN. § 90.502(4)(a) (West 2004) (emphasis added); *see Butler, Pappas, Weihmuller v. Coral Reef of Key Biscayne*

Developers, Inc., 873 So. 2d 339, 342 (Fla. 3d DCA 2004) (requiring showing that communication was part of effort to commit fraud, and party sought attorney's advice in order to further fraud); *First Union Nat'l Bank v. Turney*, 824 So. 2d 172, 187 (1st DCA 2001) (requiring showing that communication with counsel was "in order to obtain advice or assistance in perpetrating what the client knows to be a crime or fraud"). It does not matter whether the lawyers knew of the fraud, so long as the client knew and used its lawyers to commit (or plan to commit) a fraud. *First Union Nat'l Bank v. Turney*, 824 So. 2d at 187. As this Court put it, even counsel's sincere belief that it acted in good faith does not "absolve[] its client of the consequences of any of the client's bad acts. . . . [S]ometimes the [sins] of a client come back and visit the client." Ex. P at 618-19.

Florida law has long recognized "fraud on the court," a species of fraud designed to "produc[e] a judicial act by fraudulent representations to the Judge." *State v. Burton*, 314 So. 2d 136, 137 (Fla. 1975). Furthermore, "fraud on the court" encompasses abuses not only in open court, but also in pretrial discovery. Thus, in *Medina v. Florida East Coast Railway, L.L.C.*, 866 So. 2d 89 (Fla. 3d DCA 2004), where the plaintiff had repeatedly lied under oath at his deposition, the appellate court reaffirmed the principle that a Florida trial court, after giving the plaintiff an opportunity to be heard, has "the inherent authority to dismiss an action when it finds that a plaintiff has perpetrated a fraud on the court." *Id.* at 90.

Courts in Florida and elsewhere have not hesitated to apply the crime/fraud exception to frauds on the court, including discovery abuses, destruction of evidence, and obstruction of justice. *See, e.g., Volcanic Gardens Mgmt. Co. v. Paxson*, 847 S.W.2d 343, 348 (Tex. Ct. App. 1993) ("[U]nder the crime/fraud exception to the lawyer-client privilege, 'fraud' would include the commission and/or attempted commission of fraud on the court or on a third person," as

when a "client seeks the assistance of an attorney in order to make a false statement or statements of material fact or law to a third person or the court for personal advantage.").

In *Gutter v. E.I. DuPont de Nemours*, 124 F. Supp. 2d 1291 (S.D. Fla. 2000), a Florida federal court applied the crime/fraud exception when DuPont's counsel made false and misleading statements to the court regarding privilege logs. Although the court could identify no single lawyer at DuPont who knew all the facts behind the misstatements, there was "ample evidence that DuPont itself had the requisite knowledge and intent" for a finding of fraud on the court. *Id.* at 1313. The parallels to the present case are striking: Certain of the defendant's lawyers knew that certain documents could be produced (and had been in other litigation), but the defendant withheld the documents and informed the court that the documents could not be produced. *See id.* at 1302. When the pieces were fit together, the defendant's fraud was revealed.

Such discovery misconduct triggers the crime/fraud exception because the destruction of records eviscerates "the court's ability to ascertain the truth." *In re Sealed Case*, 754 F.2d 395, 401 (D.C. Cir. 1985); *see id.* (invoking the crime/fraud exception where a party "perpetrated a continuing fraud connected with, but not limited to, the actual destruction of records"). The destruction of evidence is every bit as troubling with electronic documents as with traditional paper documents. As this Court put it on February 15, "This is a case of fraud. And electronic data is the functional equivalent of a paper trail." Ex. P at 614-15.

For these reasons, courts do not hesitate to deny the protections of privilege when circumstances suggest, for example, that a party and its lawyers were overseeing the destruction of e-mails and other documents while anticipating litigation. *See Rambus, Inc. v. Infineon Techs. AG*, 220 F.R.D. 264, 283, 287-88 (E.D. Va. 2004). In *Rambus*, a suit involving counterclaims of

fraud, the defendant sought discovery of documents, including attorney-client communications, relating to the plaintiff's document-retention program, on the theory that the document-retention program resulted in the intentional spoliation of relevant documents, and therefore the crime/fraud exception to the attorney-client privilege applied. In response to the plaintiff's claim that it had destroyed documents to reduce the potential cost of discovery in future cases, not to suppress evidence in this particular case, the court held that even if the plaintiff "did not institute its policy in bad faith, if it reasonably anticipated litigation when it did so, it is guilty of spoliation." *Id.* at 286. The court concluded that "the crime/fraud exception extends to materials or communication created for planning, or in furtherance of, spoliation." *Id.* at 283; *see also State Farm Fire & Cas. Co. v. Superior Court of Los Angeles County*, 54 Cal. App. 4th 625, 648-49 (Cal. Ct. App. 1997) (applying the crime/fraud exception to discovery abuses).

When parties engage in discovery misconduct and abuse the attorney-client privilege, Florida courts similarly have not hesitated to reject those parties' claims of privilege and to require production of documents that otherwise would have been protected from disclosure. *See, e.g., Metabolife Int'l, Inc. v. Holster*, 888 So. 2d 140, 140-41 (Fla. 1st DCA 2004) (holding that defendant's failure timely to file a privilege log waived its claims of privilege and required production of documents that otherwise would have been subject to attorney-client and work-product privileges); *General Motors Corp. v. McGee*, 837 So. 2d 1010, 1032 (Fla. 4th DCA 2002) (holding that defendant's misconduct during discovery justified a finding that defendant had waived its privilege claims); *Omega Consulting Group, Inc. v. Templeton*, 805 So. 2d 1058, 1060 (Fla. 4th DCA 2002) (affirming the trial court's order requiring corporate defendant to disclose three e-mails, and rejecting the corporation's claims that the communications were protected from disclosure by the attorney-client privilege).

This Court's April 16, 2004 Order gave Morgan Stanley one full month to produce all responsive, nonprivileged e-mails. Today, more than 10 months later, Morgan Stanley has yet to comply with that Order. And for almost the entire period of delay, up until a few days ago (when Morgan Stanley finally revoked its certificate of compliance, *see* Ex. E), Morgan Stanley insisted on telling CPH and this Court that it had complied with the Order. The time has come for this Court to stop accepting Morgan Stanley's blanket claims of attorney-client privilege and to acknowledge that Morgan Stanley has used its lawyers to "carry[] out [its] misrepresentations and concealment." *American Tobacco Co. v. State*, 697 So. 2d 1249, 1257 (Fla. 4th DCA 1997).

CONCLUSION

For the foregoing reasons, this Court should invoke the crime/fraud exception to order Morgan Stanley (1) to produce the 46 documents listed on Morgan Stanley's February 10, 2005 Privilege Log (Priv. Nos. 486-524), as well as any other documents reflecting when and how Morgan Stanley agents or employees, including in-house and outside counsel, learned about the existence and discovery of all electronic data storage sources potentially containing e-mail-related discovery materials, the failure to make complete production of e-mail-related discovery materials, and when and how Morgan Stanley's agents and employees responded; (2) to make available for deposition in the next two weeks key personnel who were parties to attorney-client communications involving the production of e-mails in this case, including but not limited to Thomas A. Clare, James P. Cusick, James F. Doyle, Grant Jonas, Soo-Mi Lee, Arthur Riel, Zachary Stern, and Wray Stewart; and (3) not to assert attorney-client privilege as a basis for withholding documents or when the deponents are asked questions about Morgan Stanley's retention, destruction, production, or nonproduction of e-mails or backup tapes.

Dated: February 22, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been served to all counsel on the attached Service List by the means indicated this 21st day of February 2005.

Dated: February 21, 2005

COLEMAN (PARENT) HOLDINGS INC.

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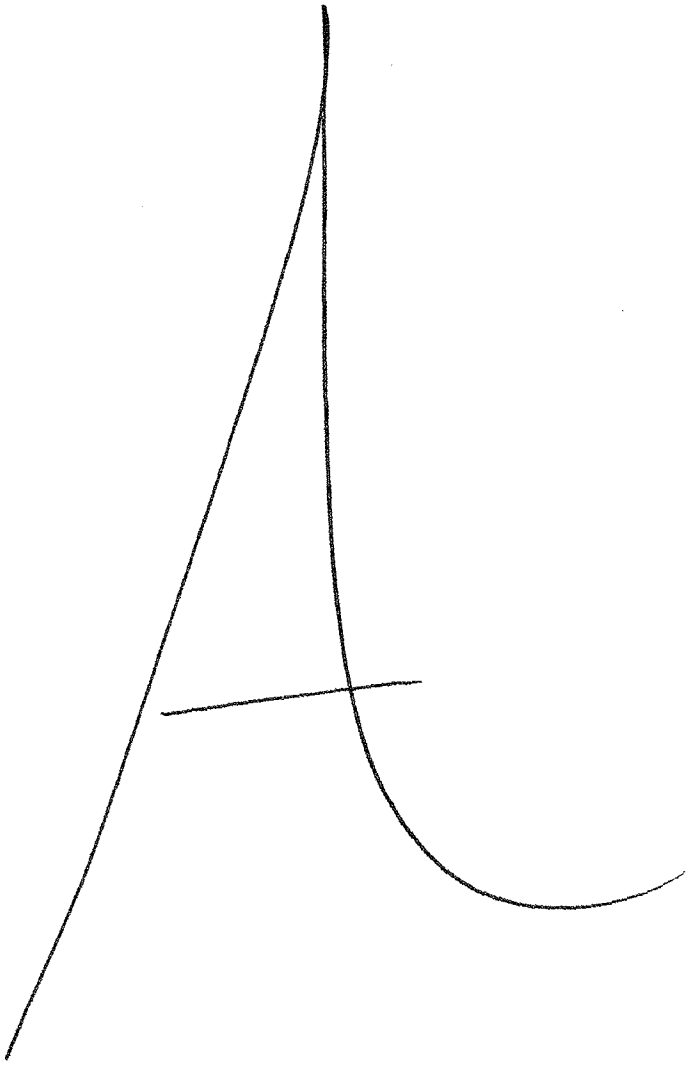

Hirsch, Sam

From: Thomas Clare [tclare@kirkland.com]
Sent: Saturday, February 19, 2005 12:54 PM
To: Brody, Michael T; Hirsch, Sam
Cc: JIanno@CarltonFields.com; LBemis@kirkland.com; Jeffrey Davidson
Subject: Morgan Stanley Backup Tapes

We have been informed that Morgan Stanley has located additional boxes of backup tapes in a security room. Morgan Stanley is working to catalog the tapes and determine their contents. We will provide you with this information when it becomes available. As of this morning, however, Morgan Stanley has identified four (unlabelled) DLT tapes among the collection. Those four tapes will be sent to NDCI for further analysis.

Thomas A. Clare | Kirkland & Ellis LLP

655 Fifteenth Street, NW --12th Floor | Washington D.C. 20005
(202) 879-5993 **DIRECT** | (202) 879-5200 **FAX** | tclare@kirkland.com

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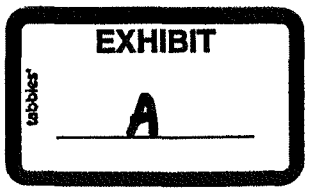
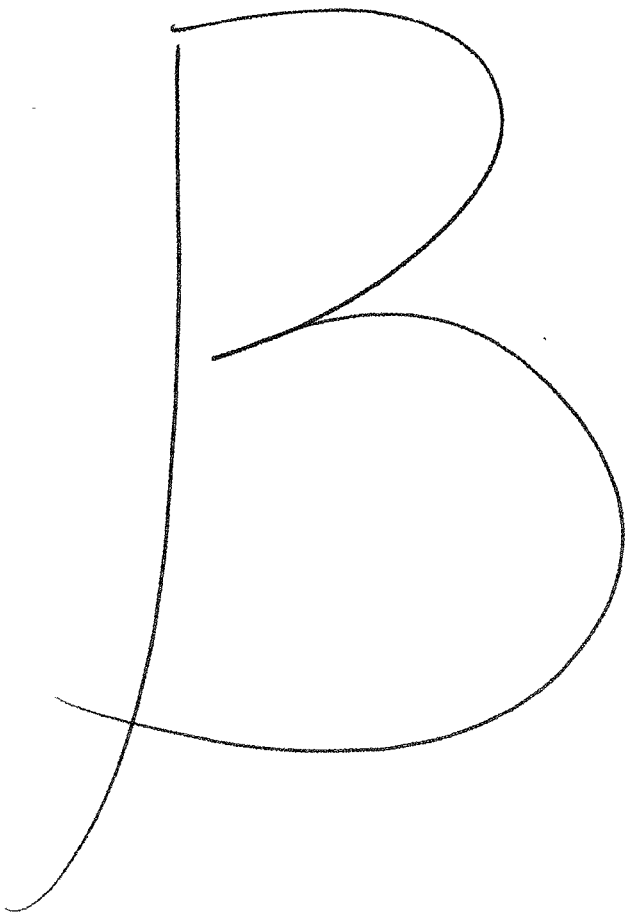




IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

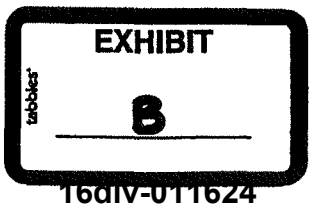
MORGAN STANLEY & CO., INC.,
Defendant.
_____/

[CPH'S PROPOSED] ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION REGARDING MORGAN STANLEY & CO. INCORPORATED'S DESTRUCTION OF E-MAILS AND NONCOMPLIANCE WITH THE COURT'S APRIL 16, 2004 AGREED ORDER

THIS CAUSE came before the Court February 14, 2005 on Coleman (Parent) Holdings, Inc.'s ("CPH's") Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, as modified by CPH's February 14, 2005 ore tenus motion for additional relief. Based on the evidence introduced at an evidentiary hearing, the Court FINDS as follows:

1. This is a case of fraud. And electronic data are the functional equivalent of a paper trail. Morgan Stanley's actions here have had a crucial impact on plaintiff CPH's ability to prove its case.

2. Because a central issue in this case is the extent of Morgan Stanley's knowledge of the fraudulent scheme undertaken by its client Sunbeam Corporation during 1997 and early 1998, CPH has long sought access to Morgan Stanley's internal files, including e-mails. Morgan Stanley has impeded that discovery, however, by making no effort to preserve the relevant e-mails even when, as early as February 1999, making concerted efforts to maintain other (non-



electronic) records in Morgan Stanley's possession in anticipation of potential Sunbeam-related litigation. Indeed, Morgan Stanley knew Sunbeam-related litigation was likely as of March 1998. Morgan Stanley destroyed countless e-mails when it systematically re-used and "over-wrote" computer backup tapes on a rolling basis every 12 months. That 12-month retention policy violated applicable Securities and Exchange Commission regulations requiring companies like Morgan Stanley to maintain e-mails for at least three years and to maintain them in a readily accessible form for at least two years. *See* 17 C.F.R. § 240.17a-4 (1997).

3. The need for Morgan Stanley to redouble its efforts to recover some fraction of the relevant e-mails became a major issue in this litigation, culminating in an Agreed Order on April 16, 2004. The Agreed Order required Morgan Stanley to (1) search the oldest full backup tape that exists for e-mail of each of 36 Morgan Stanley employees or former employees involved in the Sunbeam transaction; (2) provide to its attorneys for responsiveness and privilege review all e-mails dated from February 15, 1998 through April 15, 1998 and all e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004 all nonprivileged e-mails responsive to CPH's document requests; and (4) give CPH a privilege log listing any materials withheld on privilege grounds. Morgan Stanley was also required to certify its full compliance with the Agreed Order. The assumption was that this process would lead to production of e-mails from a set of roughly 35,000 backup tapes that had been located and had not been overwritten.

4. On May 14, 2004, Morgan Stanley produced approximately 1,300 pages of e-mails but failed to provide the required certification. Finally, on June 23, 2004, after inquiries by CPH, Morgan Stanley provided CPH with a certificate of full compliance with the April 16 Agreed Order signed by Arthur Riel, the manager at Morgan Stanley assigned this task.

5. As organized by Morgan Stanley, the effort to recover e-mails from any remaining backup tapes had several stages. First, the relevant backup tapes (in various formats, such as "DLT" tapes and eight-millimeter tapes) had to be located by searching the potential storage locations. Second, the tapes were sent to a vendor called National Data Conversion Inc. (NDCI) to be processed, and the data were returned to Morgan Stanley in the form of "SDLT" tapes. Third, Morgan Stanley had to find a way to upload the contents of these SDLT tapes into its new e-mail archive. Fourth, Morgan Stanley would run "scripts" to transform this data into a searchable form, so that it could later be searched for responsive e-mails. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when SDLT tapes remained in limbo, waiting to be uploaded to the archive.

6. At some point prior to May 6, 2004, Arthur Riel and his team became aware that more than 1,000 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423 DLT tapes had not been processed by NDCI and thus had not been included in the archive or searched when Morgan Stanley made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification that it was false. He and others on Morgan Stanley's e-mail archive team were further informed by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990s. But Morgan Stanley neither withdrew its certification nor informed CPH about the potential for additional production of e-mails. During the summer of 2004, it appears that the Brooklyn tapes were processed and sent to the staging area, but they were not uploaded to the e-mail archive so as to be available to be searched until January 2005 (at least eight months after they were found).

7. Morgan Stanley also failed to timely produce e-mails from 738 8-millimeter backup tapes found at a Morgan Stanley facility in Manhattan even earlier, in 2002. These 738 8-mm tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched when Morgan Stanley made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Mr. Riel and others were further informed by their vendor NDCI by July 2, 2004 that the 8-mm tapes contained e-mail dating back at least to 1998. But Morgan Stanley neither withdrew its certification nor informed CPH about the potential for additional production of e-mails. During the summer of 2004, it appears that the 8-mm tapes were processed and sent to the staging area. But, like the Brooklyn tapes, they also were not uploaded to Morgan Stanley's e-mail archive.

8. In August 2004, Mr. Riel was relieved of his employment responsibilities. He and his team were replaced by a new team headed by Allison Gorman Nachtigal. Ms. Gorman testified that she was instructed to describe the circumstances of Mr. Riel's replacement as his having been "placed on administrative leave." That same term appears by interlineation over the original typed description in Morgan Stanley's memorandum addressing these issues. The typed language stated: "[Mr. Riel was] dismissed for integrity issues."

9. Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area, and she was not even informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman met with a group of Morgan Stanley attorneys. Following that meeting, Ms. Gorman gave the project somewhat greater priority, although even then it clearly did not move as expeditiously as possible. For example, Morgan Stanley apparently gave no thought to using an

outside contractor to expedite the process of completing the discovery, even though Morgan Stanley had certified completion months earlier and even though Morgan Stanley lacked the technological capacity to upload and search the data at that time (and would not attain that capacity for many months). Even at this point, no one from Morgan Stanley or its outside counsel, Kirkland & Ellis LLP, gave CPH or this Court any hint that the June certification was false.

10. On November 17, 2004, more than six months after the May 14, 2004 deadline for producing e-mails in response to the Agreed Order, Morgan Stanley sent CPH a letter revealing that its June 23 certificate of compliance was incorrect. The letter stated:

> Morgan Stanley has discovered additional e-mail backup tapes since our e-mail production in May 2004. The data on some of [the] newly discovered tapes has been restored and, to ensure continued compliance with the agreed order, we have re-run the searches described in the order. Some responsive e-mails have been located as a result of that process. We will produce the responsive documents to you as soon as the production is finalized.

The letter also foreshadowed further delays: "Some of the backup tapes are still being restored. To ensure continued compliance with the agreed order, we intend to re-run the searches again when the restoration process is complete and will produce any responsive documents that result."

11. The next day, on November 18, 2004, Morgan Stanley produced an additional 8,000 pages of e-mails and attachments from backup tapes. Morgan Stanley's November 2004 letters stated that the 8,000 pages came from "newly discovered" tapes; but the testimony now makes clear that this statement was likely false because Ms. Gorman's team did not figure out how to upload and make searchable the materials from the staging area until January 2005. Instead, it appears the 8,000 pages were from the original set of 35,000 backup tapes that were known to exist but that were not fully uploaded or searched the previous spring — further contradicting the June 23 certificate of compliance. Morgan Stanley has completely failed to

offer any explanation to reconcile the obvious conflict between its assertions at the time of production that the 8,000 pages came from "newly discovered" tapes (*i.e.*, the "Brooklyn tapes") and the testimony of their own witness, Ms. Gorman, that data from those newly discovered tapes were not capable of being searched until two months later, in January.

12. After a follow-up inquiry by CPH, on December 17, 2004, Morgan Stanley produced a privilege log and advised CPH that "[n]o additional responsive e-mails have been located since our November production." But Morgan Stanley refused to answer CPH's questions about whether Morgan Stanley had restored all the backup tapes described in its November 17 letter and about why the tapes had not been located earlier.

13. On December 30, 2004, CPH sought confirmation that Morgan Stanley had reviewed all e-mail backup tapes and produced all responsive e-mails, and if not, asking when the review would be completed. On January 11, 2005, Morgan Stanley informed CPH that the "restoration of e-mail backup tapes is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

14. On January 19, 2005, CPH wrote asking Morgan Stanley to explain the circumstances under which Morgan Stanley located the "newly discovered" backup tapes and to disclose when the tapes were located. CPH also asked Morgan Stanley to explain why the backup tapes could not be restored sooner.

15. On January 21, 2005, Morgan Stanley sent CPH a letter that failed to answer CPH's questions. Instead, Morgan Stanley described its efforts to restore the backup tapes as "ongoing"; informed CPH that "there is no way for Morgan Stanley to know or accurately predict the type or time period of data that might be recovered"; and stated that "Morgan Stanley

cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes." Ominously, the letter closed by noting that, "when the agreed-upon searches are run again," they "will include approximately one terabyte of additional data." One terabyte equals about 1 million megabytes.

16. On January 26, 2005, CPH filed the Motion at issue here, asking the Court to instruct the jury that Morgan Stanley's destruction of e-mails and other electronic documents and Morgan Stanley's noncompliance with the April 16, 2004 Agreed Order can give rise to an adverse inference that the contents of the missing e-mails would be harmful to Morgan Stanley's defense in this case.

17. Meanwhile, Morgan Stanley found another 169 DLT tapes in January 2005 that allegedly had been misplaced by its New Jersey storage vendor, Recall. And again, Morgan Stanley chose to provide no specifics to CPH or to the Court.

18. At a February 2, 2005 hearing on CPH's motion, Mr. Thomas A. Clare of Kirkland & Ellis LLP, representing Morgan Stanley, stated that "late October of 2004 . . . [is] the date I represent to the Court is the first time that anyone knew that there was recoverable e-mail data" on the Brooklyn tapes. Hr'g Tr. (2/2/05) at 133-34. The actual date, however, was at least three months earlier, by July 2, 2004. Furthermore, Morgan Stanley refused to provide the Court with definitive answers as to when its e-mail production would be complete, merely stating that it would proceed with "all deliberate speed." *Id.* at 139. Also at the February 2 hearing, Mr. Clare not only neglected to inform the Court about the 8-mm tapes that had been located in 2002, but also informed the Court that the 1,423 DLT tapes had been found in Brooklyn "sometime during the summer" of 2004. *Id.* at 132. The truth of this assertion is belied not only by the evidence showing that the tapes were found before May 6, 2004, but by Mr. Clare's

acknowledgement on cross-examination that he became aware of that chronology after CPH filed its present motion on January 26, 2005 — a week before he unambiguously told the Court the tapes had been found during the summer. Hr'g Tr. (2/14/05) at 187, 195.

19. On February 3, 2005, the Court ordered further discovery and set an evidentiary hearing for February 14, 2005. The discovery took place on February 9 and 10, when CPH deposed the three e-mail witnesses that Morgan Stanley identified.

20. Beginning on Sunday, February 6, Morgan Stanley produced a few dozen additional pages of e-mails. At 2:38 a.m. on Friday, February 11, 2005, Morgan Stanley produced three additional pages of e-mails, announced that its e-mail production was complete, and asked the Court to dismiss CPH's Motion as moot.

21. But on Saturday afternoon, February 12, Morgan Stanley informed the Court that it had, in the previous 24 hours, discovered additional tapes. Also, Morgan Stanley stated that its recent production omitted certain "attachments" to e-mails. Morgan Stanley did not attempt to clarify or substantiate either of these statements to CPH or to the Court until the Monday, February 14, 2005 hearing.

22. At the February 14 hearing, none of the witnesses Morgan Stanley presented was involved in or familiar with the actual electronic searches conducted using the parameters specified in this Court's April 16, 2004 Order. And none explained where the 8,000 pages produced in November 2004 had come from. Morgan Stanley's witnesses did, however, describe three new developments. First, Mr. Robert Saunders, had returned to New York after his February 10 deposition and, concerned about his unqualified assertion that he was "confident" that a complete search for backup tapes had been conducted, decided finally to undertake a personal search of Morgan Stanley's "communication rooms." By doing so, he

discovered more than 200 additional backup tapes openly stored in locations known to be used for tape storage. Those discoveries were made on Friday and Saturday, February 11 and 12. But as of the February 14 hearing, NDCI had not yet determined which, if any, of these newly discovered backup tapes contained e-mails. Second, Ms. Gorman reported that on Friday she and her team had discovered that a flaw in the software they had written had prevented Morgan Stanley from locating all responsive e-mail attachments. Third, Ms. Gorman reported discovering on Sunday evening that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so there were at least 7,000 additional e-mail messages that appeared to fall within the scope of the Agreed Order but had yet to be fully reviewed by Kirkland & Ellis for responsiveness and privilege. As counsel for Morgan Stanley admitted, this problem "dwarf[s]" their previous problems. Hr'g Tr. (2/14/05) at 13. And Ms. Gorman indicated she was "90 percent sure" that the problem infected their original searches in May, which means that they even failed to timely produce relevant materials that had been uploaded into the archive by that point. *Id.* at 82-83.

23. Throughout this entire process, lack of candor on the part of Morgan Stanley and its Kirkland & Ellis attorneys frustrated the Court's ability to be fully and timely informed with respect to these issues.

24. Morgan Stanley's failure during the summer and fall of 2004 to timely process a substantial amount of data that was languishing in the "staging area," rather than being put into searchable form and then searched, was willful.

25. Morgan Stanley's failure to timely notify CPH of the existence of the DLT and 8-mm tapes — which Morgan Stanley had located as early as 2002 and certainly prior to the June

23, 2004 certification — and Morgan Stanley's failure to timely process those raw backup tapes was willful and a gross abuse of its discovery obligations.

26. Morgan Stanley's failure to produce all e-mail attachments was negligent, and it was discovered and revealed only as a result of CPH hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check Morgan Stanley's compliance with the April 16, 2004 Agreed Order.

27. Morgan Stanley's failure to produce all of the Lotus Notes e-mails was negligent, and it was discovered and revealed only as a result of CPH hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check Morgan Stanley's compliance with the April 16, 2004 Agreed Order.

28. Morgan Stanley's failure to locate all potentially responsive backup tapes before Saturday, February 12, 2005 (if then) was grossly negligent.

29. In sum, despite the affirmative duty on Morgan Stanley's part arising out of the litigation to produce its e-mails, and contrary to federal law requiring it to preserve the e-mails, Morgan Stanley failed to preserve many e-mails and failed to produce all e-mails required by the Agreed Order. The failings include overwriting e-mails after 12 months; failing to conduct proper searches for tapes that may contain e-mails; providing a certificate of compliance known to be false when made and never amended to reflect its falsity; failing to timely notify CPH when additional tapes were located; failing to use reasonable efforts to search the newly discovered tapes; failing to timely process and search data held in the staging area or notify CPH of the deficiency; failing to write software scripts consistent with the Agreed Order; and discovering the deficiencies only after CPH was given the opportunity to check Morgan Stanley's work and

the Morgan Stanley attorneys were required to certify the completeness of the prior searches. Many of these failings were done knowingly, deliberately, and in bad faith.

WHEREFORE, based on this Court's authority under Rule 1.380(b)(2) of the Florida Rules of Civil Procedure and other authority cited herein, and based on the foregoing findings of fact and the briefs and arguments of counsel, it is hereby ORDERED AND ADJUDGED as follows:

1. The Motion is GRANTED.

2. The findings of fact set forth above shall be deemed established for the purposes of this action and shall be disclosed to the jury at the start of the trial. Fla. R. Civ. P. 1.380(b)(2)(A).

3. Morgan Stanley is held in contempt of Court for its repeated, egregious failures to obey the Court's April 16, 2004 Agreed Order and for its efforts to conceal that noncompliance. The Court reserves for further hearing the determination of the amount and type of financial sanctions appropriate for this contempt. Fla. R. Civ. P. 1.380(b)(2)(D).

4. CPH will be allowed to present argument and evidence concerning Morgan Stanley's e-mail destruction, e-mail nonproduction, and other discovery misconduct when presenting argument and evidence going to the issue of punitive damages. *See, e.g., General Motors Corp. v. McGee*, 837 So. 2d 1010, 1035-36 (Fla. 4th DCA 2002).

5. [*Alternative One*] Because of its failure to produce relevant evidence on a timely basis, Morgan Stanley's answer is stricken and, therefore, CPH's allegations of liability are deemed admitted and Morgan Stanley is held liable on all counts of CPH's complaint. The trial therefore will be limited to (1) the amount of compensatory damages; (2) CPH's entitlement to punitive damages; and (3) the amount of punitive damages. Fla. R. Civ. P. 1.380(b)(2)(C).

[*Alternative Two*] The Court will instruct the jury (both at the start of the trial and when delivering other jury instructions as to liability) to presume that, beginning no later than February 15, 1998, Morgan Stanley knew of the fraud that Sunbeam was committing against CPH and was aware that it was part of an overall activity that was improper. At trial, Morgan Stanley will thus bear the burden of disproving its knowledge of the Sunbeam fraud. *See, e.g., Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596, 599 (Fla. 1987); *Safeguard Mgmt. v. Pinedo*, 865 So. 2d 672, 674 (Fla. 4th DCA 2004).

[*Alternative Three*] The Court will instruct the jury (both at the start of the trial and when delivering other jury instructions as to liability) that it may infer that the contents of the e-mails that were destroyed or not produced would be harmful to Morgan Stanley's position in this case. Specifically, this adverse-inference jury instruction will state: "In this case, as in every civil case in Florida, as part of the trial preparation process the parties are entitled to request information from each other in a process that is known as discovery. You have heard that, during the discovery process in this case, Morgan Stanley failed to produce many of the e-mails sent or received by Morgan Stanley employees during the relevant time period in 1998. You are permitted, but not required, to infer that Morgan Stanley's destruction or nonproduction of e-mails had a fraudulent purpose. And you are permitted, but not required, to infer that, if produced, the missing e-mails would have been unfavorable to Morgan Stanley. Any inference you decide to draw should be based on all of the facts and circumstances in this case. You should give the fact of the missing e-mails the weight you think proper under all the circumstances; you may consider that fact decisive with respect to any or all of CPH's claims, you may ignore it altogether, or you may give it weight between those extremes, as you determine appropriate."

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ___ day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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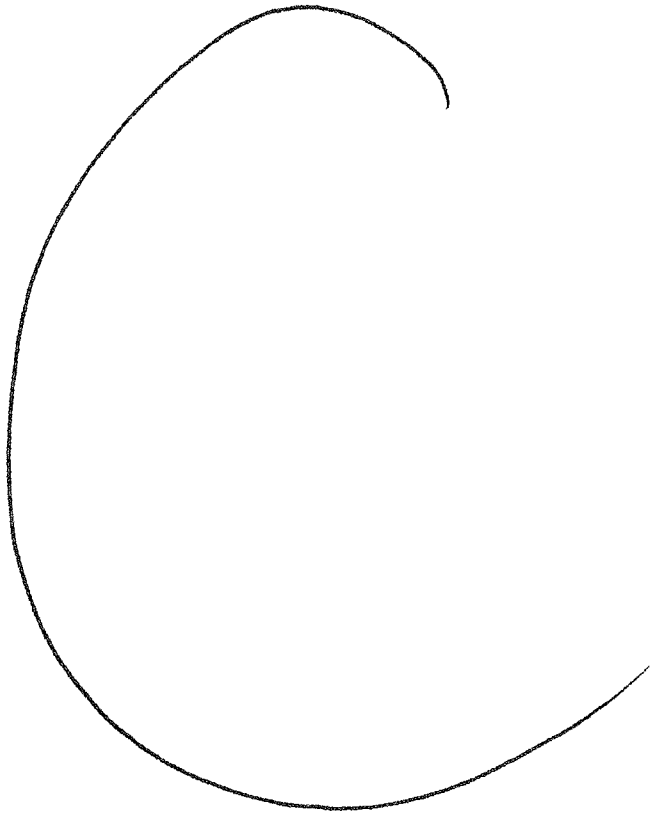


IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. VOLUME 2

MORGAN STANLEY & CO., INC.,

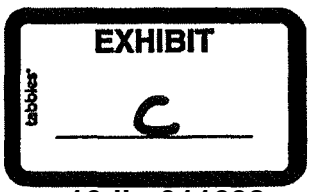
Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Monday, February 14, 2005
1:30 p.m. - 5:00 p.m.



were found sometime before June 17, 2004, correct?

A. Sorry. Could you repeat that?

Q. Yes, sir. The Brooklyn tapes were found before the certification, right?

A. I have heard that testimony, yes.

Q. Okay. My first question to you is when did you learn that the tapes, the Brooklyn tapes were found before the certification? When did you first find that out?

A. That particular data point I would say I first personally learned of that after your motion for an adverse inference.

Q. Do you have knowledge as to whether any other Kirkland lawyer learned of that before we filed our motion?

A. I don't. I can only speak to my own personal knowledge. I would say, however, that I have been the primary Kirkland lawyer interfacing with the client on this issue.

Q. Since both the 738 eight-millimeter backup tapes and the 1,423 DLT tapes were found before the certification but not searched as of the time of the certification, correct? We know that.

A. I've heard that testimony this morning.

Q. Okay. So since they were found before the

THE WITNESS: I have not asked specifically who the attorney was who had that.

BY MR. SCAROLA:

Q. I gather from the clarification that you made with regard to my misunderstanding of your earlier testimony that what it is that you didn't find out until after our motion was filed were the specifics with regard to when tapes were found that were outside the scope of the certification; is that correct?

A. I believe it is correct. What I testified to is the exact chronology of when, which batches of tapes were found as they relate to when the certification was signed.

Q. And I think the way I phrased the question initially was a reference to general problems with Morgan Stanley's compliance with their e-mail discovery obligations. So let's focus on that. When did you first become aware that there were problems with Morgan Stanley's compliance with the April 2004 order?

A. If by problems you mean --

Q. Anything and everything is what I mean.

A. Well, let me tell you what I understand your question to mean, and if I'm not answering it, please

facts about which you no longer have knowledge of their truth or falsity, do you recognize an obligation to immediately inform the interested parties and the court?

MR. JONES: Your Honor, I object. We're now entering into hypothetical kinds of questions.

THE COURT: I would sustain it. I mean -- Well, I would sustain it.

BY MR. SCAROLA:

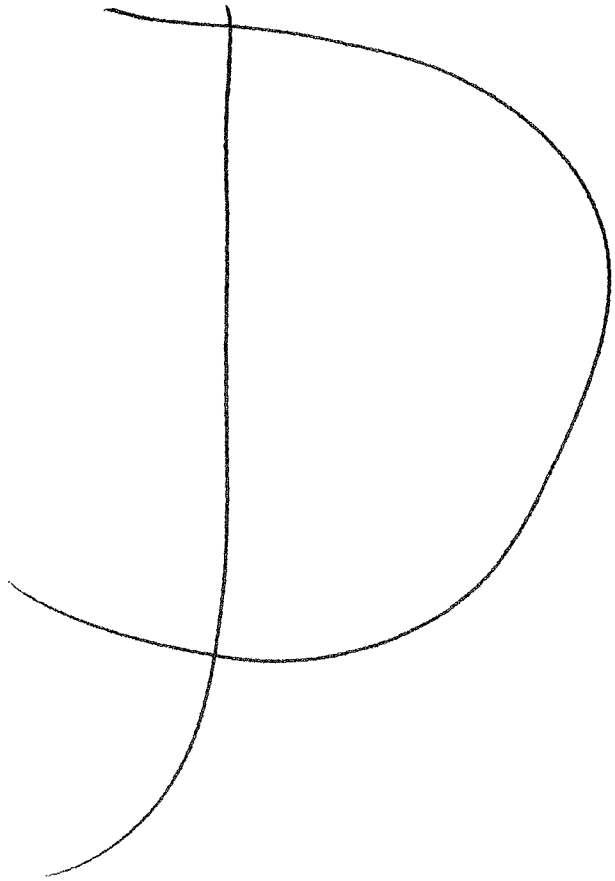
Q. At what point in time did you personally become aware of Miss Gorman having been instructed that the processing of these tapes was to be given a higher priority than it had previously?

A. I can't fix in my mind when I first became aware of that, but it was probably within the last several weeks in response to your motion.

Q. Whose responsibility was it within Kirkland & Ellis to assure that the discovery obligations imposed by court order were met expeditiously?

A. Well, I would say that every attorney on our team would have an obligation to comply with the court's orders.

Q. I'm talking specifically about the April 2004 order. Whose responsibility was it within Kirkland &



IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

VOLUME 2

MORGAN STANLEY & CO., INC.,

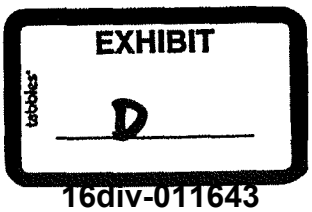
Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Monday, February 14, 2005
1:30 p.m. - 5:00 p.m.



comes --

Q. How many are you aware of?

A. I'm aware of the work Morgan Stanley has done with the Security and Exchange Committee over the last -- over the last several months, and I'm aware of this case.

Q. To your knowledge, have any other parties, either government agencies or regulatory bodies or other litigants been informed that searches made of Morgan Stanley's database may not have been complete because there were 182 tapes you just found?

A. My understanding is that in this matter information was given and that we are working on letting the SEC know as well.

Q. What about other litigants?

A. I'm not aware specifically of any other communication that Legal might have outside of these two matters.

Q. And if I understood your testimony today, you're confident that you've now found everything; is that right?

A. Yes.

Q. Are you confident with the same degree of confidence that you expressed to me on Thursday that as of Thursday you had found everything?

A. Well, as my earlier testimony indicated, I certainly was not happy about the fact that on a Friday afternoon, you know, with my feelings and having given the testimony on Thursday that I go out and I go to, you know, the first room I go to and I find some tapes. That was a disheartening event. There's no question about that.

Q. Excuse me. But that's not the question I had.

A. So I can continue my testimony, which is that at this point having exhaustively gone through 1221 and 1585 and my experience with the firm and knowing those rooms, and in addition to John Pamula and Robert Volk looking at Brooklyn and Pavonia, I do feel we have made an exhaustive search.

THE COURT: That wasn't the question asked. Do you have the same level of confidence you have today as you did on Thursday at your deposition?

THE WITNESS: That's an interesting question, is it the same level of confidence. I would say it's a more personal level of confidence, but I actfully searched myself and I directed the search.

BY MR. BYMAN:

Q. Let me refresh your recollection, sir, with what you told us Thursday with your level of confidence. And this is at page -- I apologize. With old eyes, it's hard to see the page, but I believe this is 43.

Question, "Do you have any reason to believe that you have actually located everything that is out there?"

Answer, "I believe that we have made repeated efforts to be comprehensive in our search of Morgan Stanley premises, areas where tapes have been stored and the different communication rooms and the John Pamula, in addition to the BURP team have been diligent in their efforts to make sure that we have found everything that is out there."

Question, "I'm not questioning what they may have done in the past, Mr. Saunders. Others may. And on Monday you can expect others will question you, maybe in a harsher tone of voice, but my question is a little more direct, and it's innocent. That is, as you sit here today, are you confident that you've located everything?"

Answer, "I'm confident that we've made every effort to do so."

Question, "I understand that you've made efforts. Are you confident that those efforts have been successful?"

Answer, "Yes."

Question, "And what's the basis of that confidence given the fact that tranche one didn't work; tranche two wasn't the end of it; tranche three wasn't the end of it?"

And your answer was, after an objection, which I presume, Mr. Klapper, you don't want ruled on, "Again, go back to my earlier answer, which is, we have made various efforts, strenuous efforts to locate the universe of tapes, and I believe we've done so."

Now, sir, that was your testimony on Thursday. Measuring your degree of confidence, then, to your degree of confidence today, where are we?

A. I'd say I have a higher level of confidence today because I personally searched this past weekend and I directed a search; whereas, in the past my testimony was that I was made aware of searches and I had conversations about searches. So I would say it's a different and higher level of confidence than on Thursday.

Q. Sir, my recollection of the Thursday deposition was that we were all pretty friendly. We

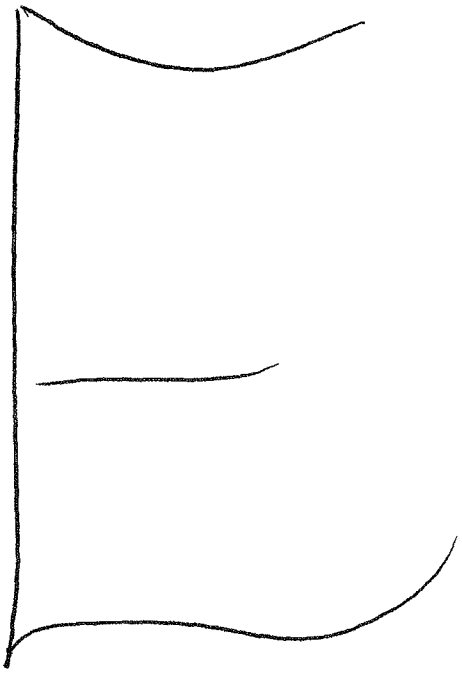
weren't wearing ties. Nobody yelled at anybody. What was it about that deposition that made you decide to conduct a personal search the next day that you had not thought to do any earlier?

A. I think that after being asked repeatedly by counsel and searching my own memory and realizing that the basis of my confidence and you specifically questioning what was the basis of my knowledge and my confidence, and I realized that a hole was that I personally had not gotten involved. And because of my knowledge of the communication rooms, having spent some significant time in there over the last several years, that what if I made a cursory search of 1221, third floor. If I went there and found nothing, and that was a room I thought might not have been touched for sometime, but I was aware of that room and knowledgeable about it, that perhaps, you know, all is good in the world, wouldn't need to go further.

Q. Sir, you were the same Robert John Saunders, or is it John Robert Saunders, I'm sorry, but the same Mr. Saunders who gave a deposition in this case on February 10, 2004, right?

A. That's correct.

Q. So you knew about this lawsuit over a year ago; is that right?



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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

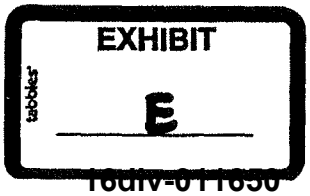
vs.

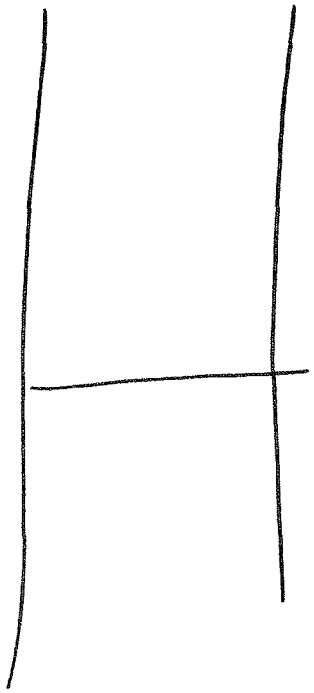
MORGAN STANLEY & CO. INCORPORATED,

Defendant.

NOTICE OF WITHDRAWAL OF CERTIFICATION OF ARTHUR RIEL

Morgan Stanley & Co. Incorporated ("Morgan Stanley"), through undersigned counsel, respectfully withdraws the June 23, 2005 Certification of Compliance by Arthur Riel. Morgan Stanley will submit such further declarations and certifications as the Court instructs.





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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

DECLARATION OF JAMES F. DOYLE

1. I am James F. Doyle. I am employed as an Executive Director in the Law Division of Morgan Stanley & Co. Incorporated ("Morgan Stanley"). In that capacity, I have personal knowledge of the matters set forth herein.

2. On information and belief, Morgan Stanley produced restored e-mail documents in the above-captioned matter on May 14, 2004.

3. At the end of October 2004, I learned that additional e-mail backup tapes had been located within Morgan Stanley, and that the data on those tapes had not been restored or searched prior to Morgan Stanley's May 14, 2004 e-mail production. Upon learning that information, I directed that the electronic searches described in the April 16, 2004 Agreed Order be conducted for any backup tapes that had been restored and made searchable at that point, and that the process of restoring the remaining backup tapes continue as expeditiously as possible.

UNDER PENALTY OF PERJURY, I HEREBY DECLARE THAT THE FOREGOING IS TRUE AND CORRECT.

James F. Doyle, Esq.

EXHIBIT
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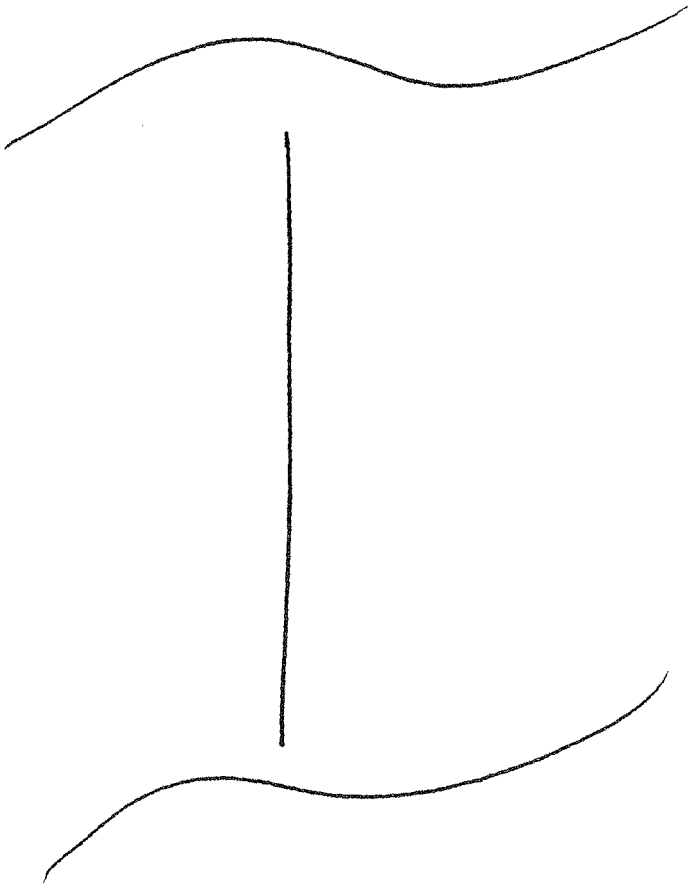

Coleman (Parent) Holdings, Inc. v. Morgan Stanley Co. Incorporated

February 10, 2005 Privilege Log

Priv No.	Date	Author(s)	Recipient(s)	Priv	Privilege Description	Redact Bates
486	10/27/2004	James Cusick (MS)	Soo-Mi Lee(MS); James Mangan (MS); James Doyle (MS); Zachary Stern (MS); Mary Lou Peters (MS); Ronald Colombo (MS) CC: Vincent LaGreca (MS); David Restaino (MS); Caren Pennington (MS); David Elston (MS); Allison Gorman Nachtigal (MS)	AC	E-mail from one in-house counsel to other in-house counsel reflecting legal advice provided by in-house counsel re existence of additional e-mail backup tapes.	
487	11/16/2004	James Cusick (MS)	Soo-Mi Lee(MS); James Mangan (MS); James Doyle (MS); Zachary Stern (MS); Mary Lou Peters (MS); Ronald Colombo (MS) CC: Vincent LaGreca (MS); David Restaino (MS); Caren Pennington (MS); David Elston (MS); Allison Gorman Nachtigal (MS)	AC	E-mail from one in-house counsel to other in-house counsel reflecting legal advice provided by in-house counsel re existence of additional e-mail backup tapes.	
488	11/29/2004	Allison Gorman Nachtigal (MS)	James Cusick (MS); Zachary Stern (MS); Soo-Mi Lee (MS)	AC	E-mail to in-house counsel seeking legal advice regarding issues with restoration process..	
489	Various Dates	Allison Gorman Nachtigal (MS)	None	AC/WP	Notes containing conversations with in-house counsel where legal advice was provided re e-mail restoration process.	
490	6/7/2004	Arthur Riel (MS)	James Cusick (MS); Soo-Mi Lee (MS)	AC	E-mail to in-house counsel seeking legal advice regarding status of e-mail restoration process..	
491	10/28/2004	Wray Stewart (MS)	Alexander Lenderman (MS); Bruce Buchanan (NDCI); John Pamula (Siemens); Zachary Stern (MS); Robert Saunders (MS); Glenn Seickel (MS)	AC/WP	E-mails to Information Technology professionals containing in-house counsel's thoughts and impressions and legal advice re e-mail restoration process..	
492	11/8/2004	Wray Stewart (MS)	Bruce Buchanan (NDCI); Glenn Seickel (MS)	AC/WP	E-mail to Information Technology professionals containing in-house counsel's thoughts and impressions and legal advice re e-mail restoration process..	
493	Various Dates Beginning 10/25/2004	James Cusick (MS)	None	AC/WP	In-house counsel's handwritten notes containing both advice given to client as well as mental impressions re e-mail restoration process.	

EXHIBIT

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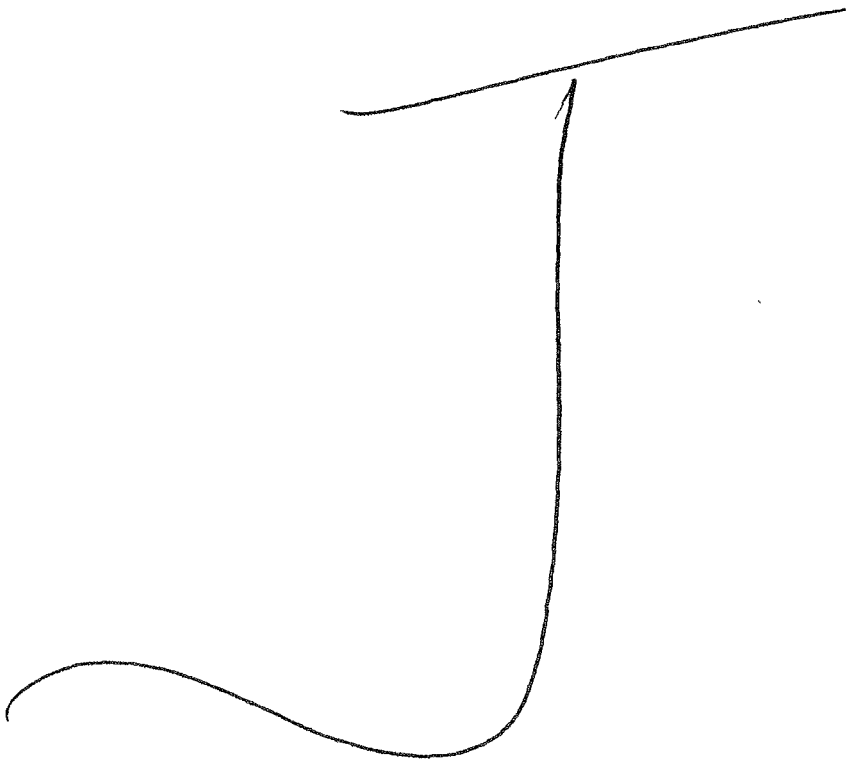
Feb-10-05 12:41am From- T-127 P.04/09 F-283

16div-011654



KIRKLAND & ELLIS LLP
AND AFFILIATED PARTNERSHIPS

855 Fifteenth Street, N.W.
Washington, D.C. 20005

Thomas A. Clare
To Call Writer Directly:
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tclare@kirkland.com

202 879-5000

www.kirkland.com

Facsimile:
202 879-5200

November 17, 2004

BY FACSIMILE

Michael Brody, Esq.
Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603

Re: ***Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.***

Dear Mike:

I write regarding supplementation of Morgan Stanley's document production.

Morgan Stanley has discovered additional e-mail backup tapes since our e-mail production in May 2004. The data on some of newly discovered tapes has been restored and, to ensure continued compliance with the agreed order, we have re-run the searches described in the order. Some responsive e-mails have been located as a result of this process. We will produce the responsive documents to you as soon as the production is finalized.

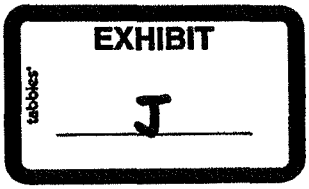
Some of the backup tapes are still being restored. To ensure continued compliance with the agreed order, we intend to re-run the searches again when the restoration process is complete and will produce any responsive documents that result.

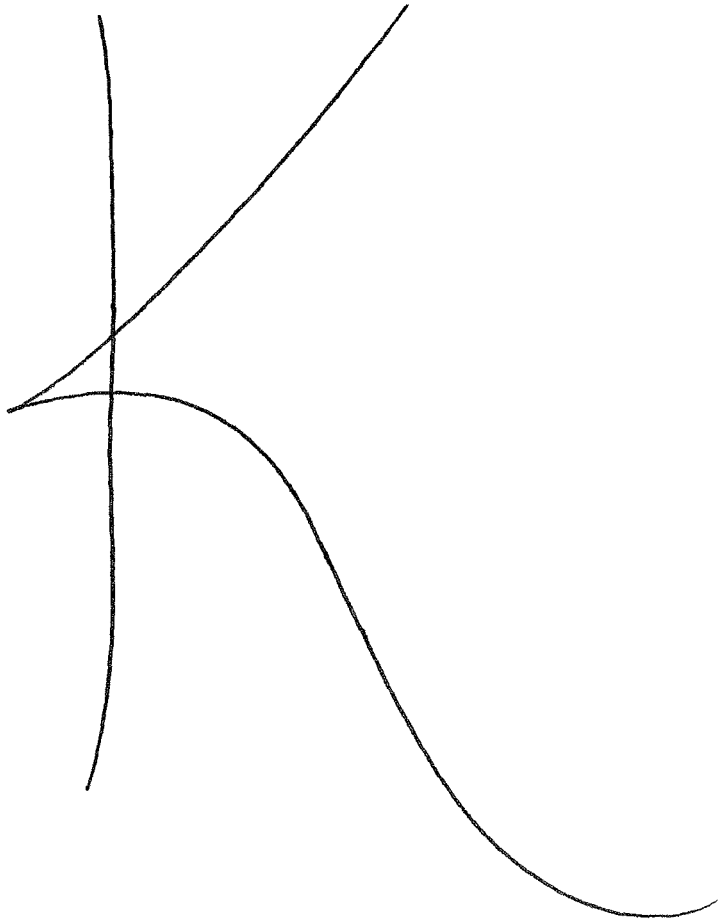
Sincerely,

Thomas A. Clare /HP

Thomas A. Clare

cc: Joseph Ianno, Esq. (by facsimile)
John Scarola, Esq. (by facsimile)
Mark C. Hansen, Esq. (by facsimile)





IN THE CIRCUIT Court FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME I

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Monday, February 14, 2004

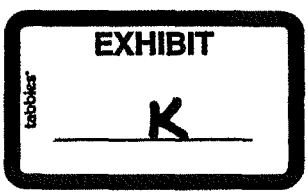
Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

9:30 a.m. to 12:15 p.m.



we had to look around essentially.

Q. Did you ever find the scripts?

A. We found scripts that we believed to be those scripts. We found scripts that had the right names that appeared to perform the right operations, so we began to test those.

Q. When did you find the scripts?

A. In early November.

Q. You said you began testing them when?

A. Right around there.

Q. Tell us what you did in December and January.

A. So in November we ran initial tests on the scripts and we weren't comfortable with the scripts. It looked like the scripts weren't processing messages properly. So we spent a good bit of December, albeit months somewhat chopped up because of the holidays, testing those scripts and debugging them and essentially came into January, really got our arms wrapped around and put some fixes in the code. And in mid January we began the process of loading the data out of staging.

Q. When you say you were debugging the scripts in November, December, can you just please explain to Your Honor what that means and what that entails?

A. That would be the very end. It was mid, not the first week, not the last week, one of those two in the middle.

Q. Sort of mid October?

A. Sort of mid October.

Q. And it took us until sort of mid January before you were actually ready to start processing that data, right, because you were finding scripts, debugging scripts?

A. Yes.

Q. Quality controlling scripts?

A. Yes.

Q. Roughly the three months you said it takes to develop a program to do all of that, right?

A. No. When I was referring to the program I was referring to the search tool, not the scripts.

Q. Well, the search tool was already in existence, wasn't it? You didn't have any trouble finding that.

A. No, the search tool was in existence, but the search tool had certain issues and those are the scripts that we were writing to compensate for those issues. We were doing those two things in parallel.

Q. When you were told in mid October that this was a priority, that it was a rush, did it move from

let's not even talk about between August and October.

From the point that you were told that it was a priority, you know you could have done it faster if you had gone to an outside vendor and focused just on this subset of data; isn't that right?

A. No.

Q. You don't know that?

A. An outside vendor can't insert data into our system.

Q. I'm not talking about getting it into your firm-wide system.

I agree with you that only you know how to take care of your 15 terabytes of firm-wide data, but you do know there are vendors out there that can take 600 gigabytes of data and process it and search it independent of your system, right?

A. I suspect there are, yes.

Q. Did you do any research to find out whether those vendors were available and could do it faster than you do?

A. I was not asked to, so I did not do that.

Q. When you were told that this was the utmost priority, did it occur to you that, hey, we could do this faster if we went to an outside vendor?

A. The priority I was given was first to insert

the data into the archive and then to later in January run the inquiries for this case. I would say by the time that came up, we could run an inquiry into our system faster than a vendor could have.

Q. By mid January.

I'm asking if somebody had told you in August when you took over for Mr. Reil, it's really important, we have a Court order that says we're supposed to produce everything. We want to do it as quickly as possible. You know you could have done it faster with an outside vendor, don't you?

MR. JONES: I object to the form of the question.

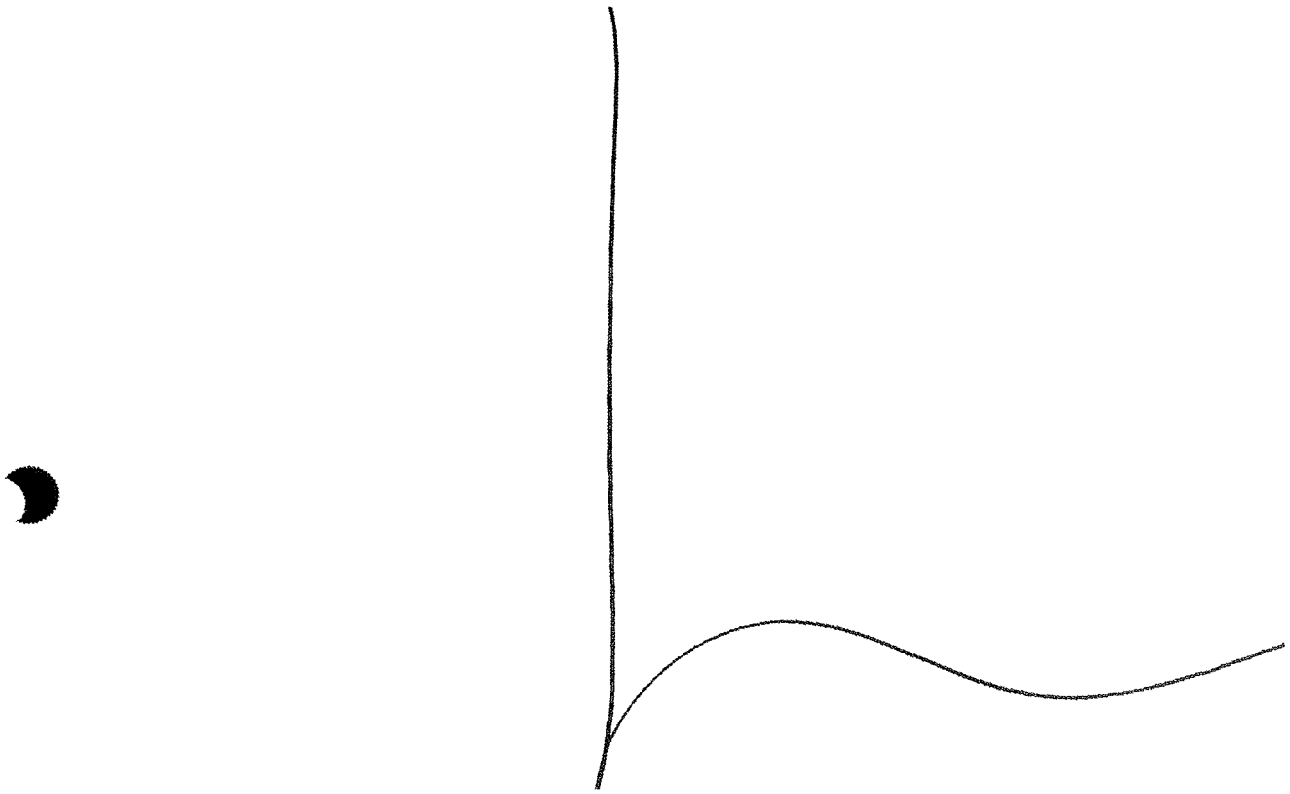
THE COURT: What's the legal objection?

MR. JONES: Because the question was you've got an order that you should have produced everything, it's not been established that this witness really is familiar with this Court order.

THE COURT: Do you want to -- why don't you rephrase it eliminating that?

BY MR. BYMAN:

Q. Let's put aside Court orders. Lawyers very seldom tell you why they're doing anything because they don't know themselves.



IN THE CIRCUIT Court FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME I

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Monday, February 14, 2004

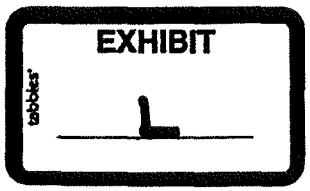
Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

9:30 a.m. to 12:15 p.m.



Q. In the fullness of time?

A. In the fullness of -- yeah, sooner than later, but in some logical order given --

Q. In October it became a priority when counsel told you that it was, right?

A. Yes.

Q. And by the way, I think that there was some reference in your testimony to Morgan Stanley counsel, that October meeting also included Kirkland and Ellis, didn't it?

A. Yes, some of them did.

Q. You understood that they were outside counsel to Morgan Stanley?

A. Yes, sir.

Q. Was there some event in October that moved that data from low priority to higher priority other than counsel contacted you?

A. A series of discussions with counsel --

MR. JONES: Your Honor, I would object to the content of discussions with counsel or attorney-client privilege. Talk about she had a meeting, but I would invoke the privilege as to discussions with counsel.

MR. BYMAN: I don't know that my question asked for that. I wasn't trying to do that.

THE COURT: Why don't we complete the question.

MR. SCAROLA: But do ask.

BY MR. BYMAN:

Q. Let me make sure that my question was clear. I wanted to know if there was some event, other than counsel, in October that moved it from low priority to priority?

A. No, it was prioritized as a result of discussions with counsel.

Q. And what was it that made it a priority, what were you told?

MR. JONES: Objection, Your Honor, attorney-client privilege.

THE COURT: Any response?

MR. BYMAN: Your Honor, it's their burden to try to show why this wasn't --

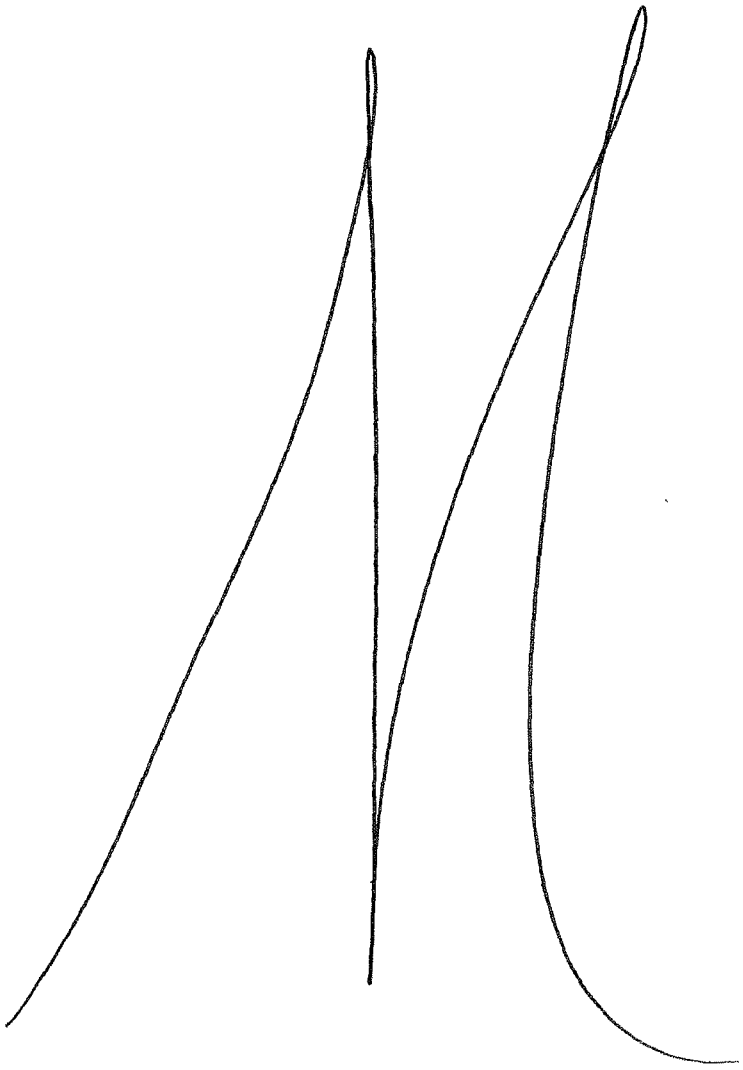
THE COURT: And I think they're alleging to privilege.

BY MR. BYMAN:

Q. In any event, in October -- by the way, early October, mid October, late October, do you remember the date?

A. Don't remember the date.

Q. Was it before Halloween, after Halloween?



IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

VOLUME 2

MORGAN STANLEY & CO., INC.,

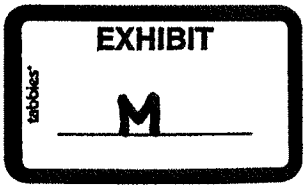
Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Monday, February 14, 2005
1:30 p.m. - 5:00 p.m.



order to comply with the court's order; is that right?
A. At a certain level of generality, yes. For example, I could not communicate to my client the specific way it would be implemented at Morgan Stanley in its Intellectual Technology Department. I don't possess those technical capabilities or understanding.
Q. What did you tell your client about how thorough a search they needed to conduct?
A. I am concerned, now, Mr. Scarola that your questions will intend to impinge upon attorney-client.
Q. They're intended to.
MR. JONES: We object to these questions as attorney-client.
THE COURT: What's the response to the objection to that question?
MR. SCAROLA: I think that that is a well-taken objection. I just want to find out where they intend to draw the line, Your Honor.
THE COURT: That's fine.
BY MR. SCAROLA:
Q. So you choose not to tell us about instructions given regarding the scope of the search by you to the client, correct?
A. I would regard your question to require me to

disclose privileged communications.

Q. And I agree that it does. And that privilege is being asserted; is that correct?

A. My understanding is Morgan Stanley has asserted that privilege, and I am respecting their instruction.

Q. Now what I would then like to know is what Morgan Stanley communicated back to you about the scope of the search that they conducted when they were initially informed of the obligation that they had to conduct a search. What did they tell you they did?

A. I would give you the same answer.

Q. Okay. So, again -- and I will, for the record, acknowledge that that's an appropriate assertion of attorney-client privilege, and the question is being asked in order to define the scope of the assertion.

Is there any aspect of the communications between you and Morgan Stanley, either from you to Morgan Stanley or from Morgan Stanley to you, and by you I mean Kirkland & Ellis, that you and/or your client are prepared to discuss now that you have taken the witness stand to discuss these matters?

MR. JONES: Your Honor, I object to the form of the question as overly broad,

let me know. If by your question you mean when did I first become aware that there were additional tapes that had not been subject to the prior searches that were done, I became aware of that in November of 2004.

Q. How is it that you first became aware in November 2004?

A. In a privileged conversation.

Q. With whom?

A. With Mr. Jim Doyle in the Morgan Stanley law department.

Q. And having identified it as a privileged conversation, I assume that means when I ask you who said what to whom during the course of that conversation, your response will be privileged; is that correct?

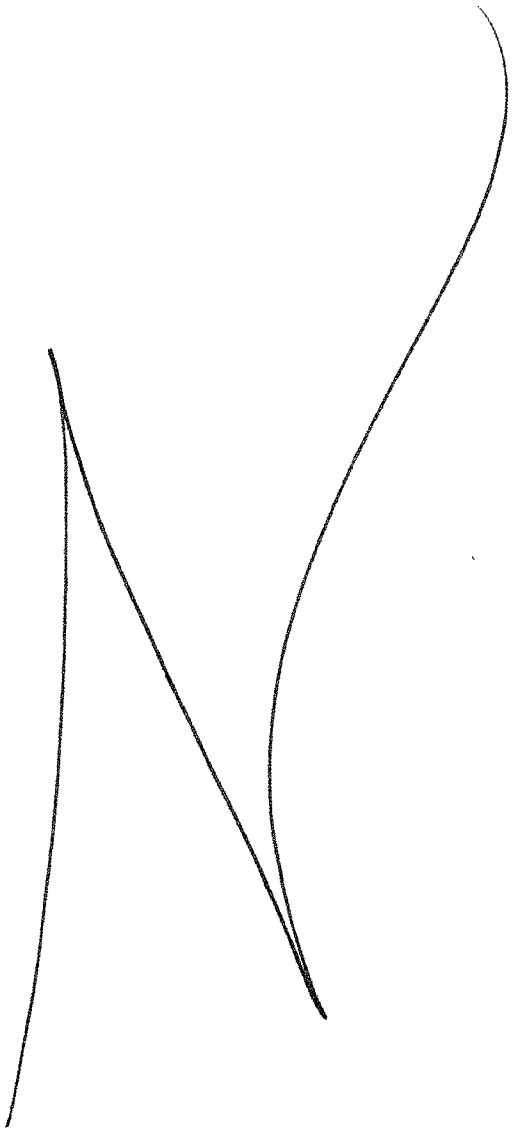
A. That is a conversation that I would consider privileged, yes.

Q. Okay. Do you know when Mr. Doyle first found out?

A. I do not.

Q. When in November of 2004 is it that you had this conversation with Mr. Doyle where you learned that there were unsearched tapes?

A. I don't recall the precise date. I do recall generally the chronology of steps that we took, and so



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IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA
CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

DEPOSITION OF ALLISON GORMAN NACHTIGAL

Taken before Tracey L. Spatara, Registered Professional Reporter, Notary Public in and for the State of Florida at Large, pursuant to Notice of Taking Deposition filed by the Plaintiff in the above cause.

Wednesday, February 9, 2004
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida
3:10 p.m. to 5:30 p.m.

00002

APPEARANCES:

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One IBM Plaza
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Phone: (312) 222-9350
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SAM HIRSCH, ESQ.
Attorneys for Plaintiff

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Washington D.C. 20005
Phone: (202) 879-5294
By: MICHAEL D. JONES, ESQ.
Attorneys for Defendant

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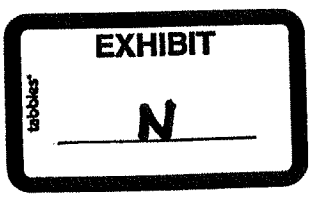

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Archive Meeting Minutes without putting the attachments for each of the minutes behind it, which are comprised of graphs and things.

Bearing in mind that you may not have seen them in exactly this form, have you seen this type of minutes?

MR. JONES: Can I just ask, are you asking -- we started out by asking had she seen these. Now you're asking has she seen this type.

MR. BYMAN: I guess I'd like both. If she's seen these specific ones, great. Also if she's seen something like them, I'd also like to know that.

THE WITNESS: I have seen one of these.

BY MR. BYMAN:

Q. Which one have you seen?

A. The last one that is September 9th.

Q. And that would have been done when you were in charge of this?

A. Yes.

Q. What about the one on August 13th?

A. No, I don't think so. Looks surprisingly like the other one, but I recognize the format and I only saw one and I'm pretty sure it was this last one.

00062

Q. These particular ones appear to have been faxed on October 21st, 2004. And I'll represent to you that the fax number to which they're addressed is the fax number of a law firm in Washington, D.C. Sidley Austin, Brown and Wood I think it is. I keep forgetting what their new name is.

Do you have any knowledge as to whether or not these were faxed to a law firm?

A. No.

Q. Does the fax header of October 21st, 2004 help you place in time the directions you got from counsel in October to prioritize the migration of these missing tapes?

MR. JONES: Can you just read that back, please?

(A portion of the record was read by the reporter.)

MR. JONES: Object to the form of the question. It's vague and ambiguous.

BY MR. BYMAN:

Q. Do you understand my question?

A. I think I do. No.

Q. At the risk of asking something I have already, let me try to recap.

Until some time in October when counsel told

00063

you to prioritize the migration of these 112 tapes or 1400, whatever the number was, until that time, these were a low priority, is that fair?

MR. JONES: First of all, I object to the form of the question. And I object to the extent that you are trying to elicit attorney-client communications.

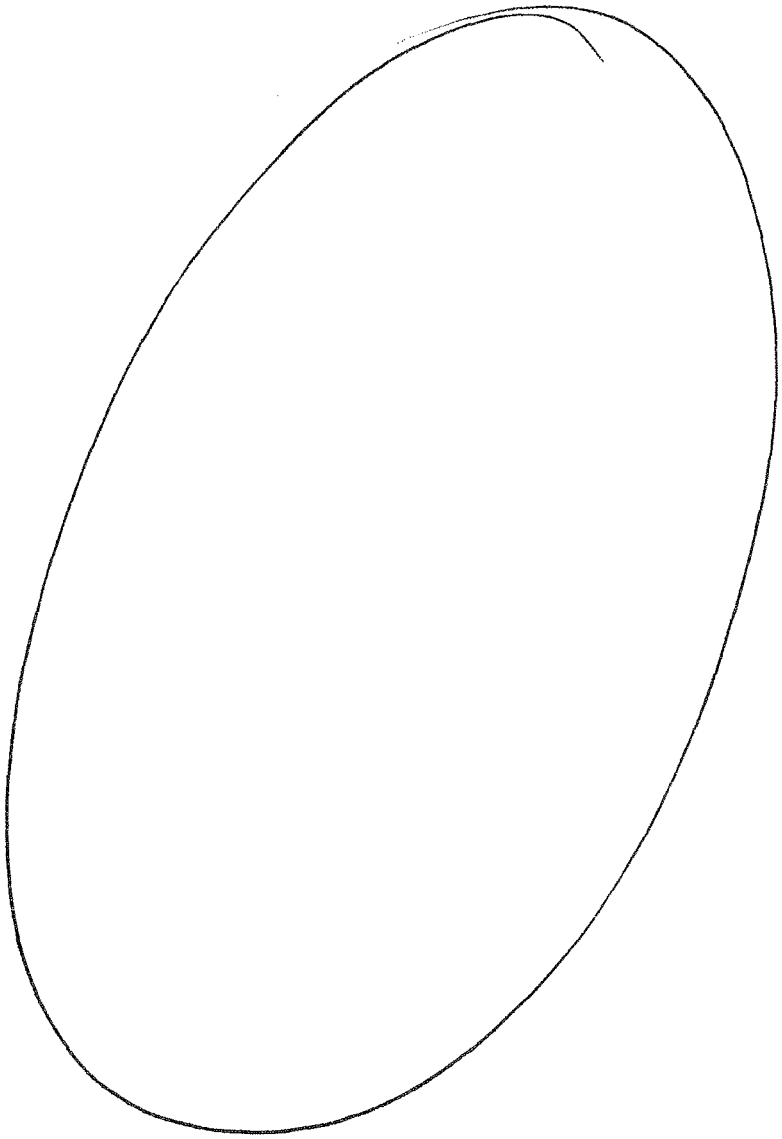
That's my objection. And also it's been asked and answered in a different form.

THE WITNESS: Although I lost track of it, could you say it again?

BY MR. BYMAN:
Q. Sure. You told us earlier that some time in October you had a conversation with counsel and moved these -- let me stop.
Let's back up and try to get some shorthand here. We talk about the tapes that you've been processing that are the reason we're here today. We talk about 112 tapes that have been represented to us may contain e-mails that were part of a larger universe of tapes that were reviewed. We've heard various numbers of that. You've used the number 1400. Counsel in a recent hearing said 2200. But whatever that number is, can we call those the found tapes? And I'm going to say that because it's in these e-mails.

A. Okay.
Q. I'll show it to you if you'd like.
A. Sure.
Q. Some time in October of this year I think you've already told us you were told --
MR. JONES: First of all, here's the problem I have with that. She never talked about a conversation with counsel. If you go back in the record, you'll see she had a meeting with counsel and then she further described how she -- what she did with the tapes and the processing after that.
You seem to, I guess you're assuming that counsel told her to prioritize the tapes. And you've used that in several of your questions. I'm not going to comments as to whether that was or wasn't told. That's really the problem I'm having as to how you're phrasing your questions.
I don't know if that's something that could be fixed or not, Bob. If it could be -- because I don't mind her answering the question you asked again about this document if that's ultimately what you're trying to get to.
I don't know if all that was helpful or not.
MR. BYMAN: Let me try to meet that.

BY MR. BYMAN:
Q. Until some time in October, you did not place any priority on migrating the found tapes, is that fair to say? They were in line, but they were pretty far back in line?
A. I would say I didn't prioritize processing the data that was in staging.
Q. From these found tapes?
A. There was more in staging than the found tapes.
Q. I understand. And they were patiently awaiting their turn, but they weren't going to the head of the line?
A. I'm being careful. I didn't know about found tapes. It wasn't -- that was not my focus.
Q. The set of minutes that you did look at, and this is the last page 0112314.
A. I received it. I filed it. I actually didn't read it until later.
Q. But I just want to direct your attention towards the bottom there's a series of numbered pending items, number 4 talks about 1423 DL tapes were found to



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IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA
CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

/

DEPOSITION OF ROBERT JOHN SAUNDERS

Taken before Tracey L. Spatara, Registered Professional Reporter, Notary Public in and for the State of Florida at Large, pursuant to Notice of Taking Deposition filed by the Plaintiff in the above cause.

Thursday, February 10, 2005
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida
9:00 a.m. to 11:40 a.m.

0002

APPEARANCES:

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By: ANTONY B. KLAPPER, ESQ.
MICHAEL D. JONES, ESQ.
Attorneys for Defendant

0003

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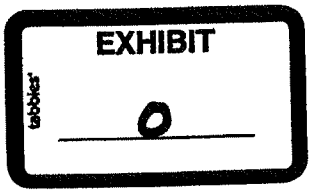

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A. I don't know if I shared my view of his competence with my superiors.
Q. Do you ever have interface with lawyers in the performance of your duties, other than getting ready for depositions?
A. Would you restate the question?
Q. Well, is any part of your duties over the last couple of years been to supply support or other services to legal counsel?
A. Yes.
Q. And would you describe what that function has been?

MR. KLAPPER: And let me just interject, Counsel.
You're not to reveal anything about the specific services, conversations that you've had with counsel relating to those services, or discussions that you've had with counsel.

With that understanding, you can answer the question.

THE WITNESS: Sure. Since my team is one of the groups responsible for data protection and back ups of documents and information, we have been involved in requests for documents, information, e-mail over the past several years.
I've spoken already about the fact that we have a number of tapes which were off-sited to our vendor, Recall, and that we would -- when requests would come in, ad hoc requests for certain information, we would assist legal and IT security in executing those search requests.

BY MR. BYMAN:
Q. Specifically to this case, first of all, you are aware that this is a lawsuit between Coleman Parent Holdings and Morgan Stanley and Company, Incorporated, are you not?
A. Yes.
Q. Have you ever been asked by anyone to provide support to the legal team for this specific case?
And that's just a yes or no. I'm not trying to find out what you did.
A. Yes.

Q. And now to the extent that you can do it -- and I do not want to invade privileges, but to the extent you can, tell me what task you've been given for this case.

MR. KLAPPER: I'm going to object. Because it's unclear to me that in describing the tasks we can somehow protect the privilege. In terms of description of the tasks, that gets into the mental impression of the attorneys in terms of what they've asked him to do in assisting counsel.
If you want to ask him questions about who he interacted with, when he had meetings with attorneys, et cetera, those atmospherics, I'm all for it. Go forth. But I believe you're invading the privilege if we start getting into the litany of tasks that he may or may not have been asked to do.

MR. BYMAN: Let me see if I can get to at least some specific.

BY MR. BYMAN:

Q. Have you ever been asked to attempt to locate e-mails that might be relevant to this litigation?

MR. KLAPPER: And let me confer with him

0025

with respect to whether or not -- and with co-counsel -- with respect to whether or not this is getting into the privilege area.

MR. BYMAN: Sure.

(A discussion was held off the record.)

(A portion of the record was read by the reporter.)

MR. KLAPPER: And I'm just going to go on the record and indicate that it's our position that, feel free to ask him generally about what he has done in terms of searching for e-mails and things of that sort. But if we're going to get into specific questions as to who asked him to perform those functions, we're going to invoke the privilege, and I'm going instruct him not to answer that.

With the exception of any -- I guess the order in place in this particular case for purposes of this deposition required us to identify documents that Mr. Saunders may have had in his possession. And feel free to ask about that pursuant to the order.

But other than that, in terms of specific tasks asked by lawyers, I'm going to invoke the privilege and instruct the witness not to

0026

answer.

MR. BYMAN: I'm confused, Tony. Why would the identity of someone who made the request be privileged.

MR. KLAPPER: Because the nature of the question is what are the tasks you've been asked to do. Once you link that up to the attorney, you're getting into the attorneys' mental impressions in terms of what he has decided or not decided to do or asked Mr. Saunders to do.

So I'm not suggesting you have nefarious motives here, but it's a backdoor way of getting at what the attorney is intending to do.

MR. BYMAN: Well, I disagree with your definition of what falls within the privilege. So I'm going to ask the question and ask you to make whatever you -- instructions you need to do.

BY MR. BYMAN:

Q. Has anyone ever asked you to aid in the location and identification of e-mails relevant to this specific litigation?

MR. KLAPPER: And let me just interject.

You can answer that question so long as you don't reveal if it was attorney based or not

0027

attorney based.

You may answer.

THE WITNESS: To be specific, are you asking

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whether I've looked at my own e-mails, or I've looked at all e-mails that are available to Morgan Stanley?

BY MR. BYMAN:

Q. My question is: Have you been asked to search Morgan Stanley files or aid in a search of Morgan Stanley files for any e-mails that are related to this litigation?

A. Okay. I was specifically asked to check my own e-mail for any information or documents relevant to this proceeding.

Q. And have you or your team provided any support specifically related to this litigation to extract, locate, or identify e-mails for production in this litigation?

A. I guess the strict answer to that question is yes, specifically related to the three tranches of tapes that have been under discussion in the last several weeks and in a hearing to which I was party. I believe it was last Friday or Thursday. It was last Friday, I think.

Q. Let's make sure that we get the definition

0028

of what you mean by the three tranches of tapes. What do you mean?

A. Sure. So outside of what we've talked about in general as the 35,000 Legacy Legato tapes or the universe of tapes prior to 2003, some of which contained e-mail, some of which did not, there were some groups of tapes which have become -- which surfaced in this past year that may or may not have contained additional information.

And I know that in this proceeding that there's been some concern about that information, whether it's discoverable, whether or not it's privileged, and how to make that available to both sides, the plaintiff and the defendant, in order to help move this matter forward.

Q. So the first tranche is the 35,000 tapes?

A. So that makes it four tranches. The 35,000 would be the original set of tapes.

Q. The original set of what Morgan Stanley believed to be the universe of pre-2003 tapes?

A. That's correct.

Q. And then something surfaced that expanded the universe?

A. That's right.

Q. And that's tranche two?

0029

A. Sure.

Q. And what's the quantity of tranche two tapes?

A. My understanding is that 1423 DLT tapes that were found this past year.

Q. What's tranche three?

A. Tranche three is the 8-millimeter tapes.

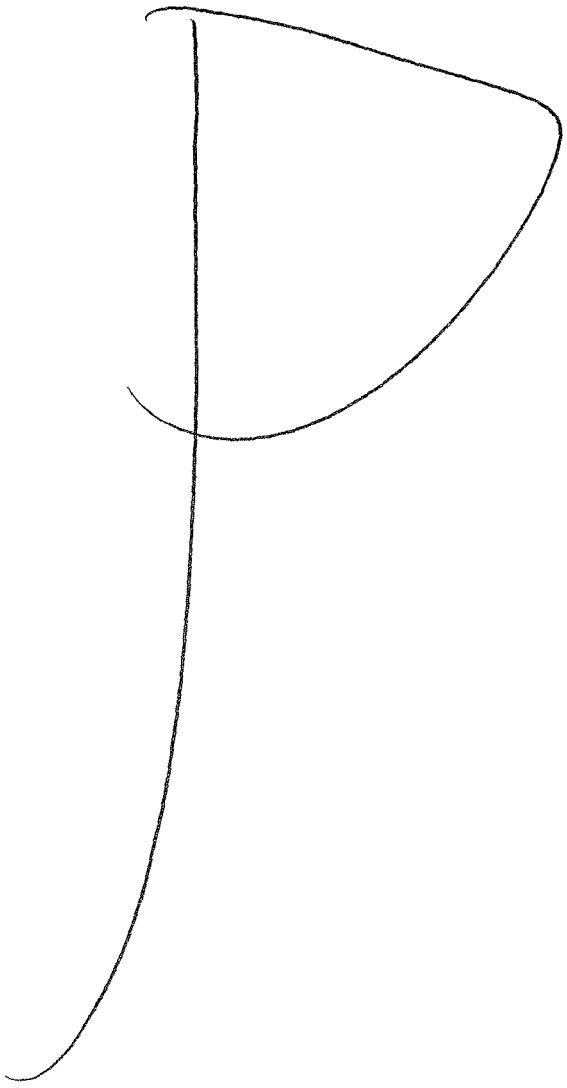
Q. And what's the quantity of those tapes?

A. I'm not specifically aware of that number.

Q. Do you have any general estimate?

A. Somewhere -- I think somewhere around 700.

Q. You've told us what the storage capacity was of a DLT tape. What's the storage capacity of an 8-millimeter tape?



IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. VOLUME 5

MORGAN STANLEY & CO., INC.,

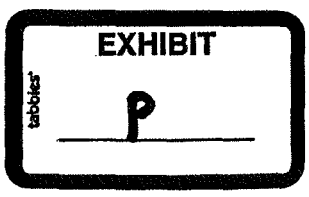
Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Tuesday, February 15, 2005
1:25 p.m. - 5:36 p.m.



holidays, testing those scripts and debugging them and essentially came into January, really got our arms wrapped around and put some fixes in the codes. And in mid January we began the process of loading the data out of staging. That's referring to the Brooklyn tape data that is first loaded, first loaded beginning in mid January."

THE COURT: Okay. You know what, I just want to get my own notes because I don't have them here in front of me. Thanks.

MR. SCAROLA: And we should have our proposed order to Your Honor within just a short time, the last edition.

THE COURT: Okay. I'll be right back. I have them sitting on my desk.

I can tell you all I did come in and review my notes, and I did go through and make my own notes on the summary of findings and facts. And I don't think anything I've been told today would alter what I believed this morning, and let me tell you what they are: That the agreed

order entered April 16th of last year required Morgan Stanley to search the oldest full backup that exists for e-mails of certain -- I'm sorry -- for certain identified employees or former employees; required Morgan Stanley to provide its counsel the responses for responsiveness and privilege review all the e-mails that either were dated between February and April 15th of 1998 and all e-mails containing one of 29 keywords; all nonprivileged e-mails responsive to the request had to be produced by May 14th and a privilege log generated and a certificate of compliance completed. The SEC regulations required Morgan Stanley to maintain e-mails readily access -- in readily accessible form for three years. Morgan Stanley knew Sunbeam litigation was likely as of March of 1998. Despite the affirmative duty on Morgan Stanley's part arising out of the litigation to produce its e-mails and contrary to federal law requiring it to preserve the e-mails, Morgan Stanley failed to preserve some

e-mails and failed to produce all e-mails required by the agreed order. The failings include overwriting e-mails after 12 months; failing to conduct proper searches for tapes that may contain e-mails; providing a certificate of compliance known to be false when made and never amended to reflect its falsity; failing to timely notify CPH when additional tapes were located; failing to use reasonable -- reasonable efforts to search the newly discovered tapes; failing to file timely, process and search data held in the search area or notify CPH of the deficiency; failing to write a program consistent with the agreed order; and discovering the deficiencies only after CPH was given the opportunity to check Morgan Stanley's work and the Morgan Stanley attorneys required to certify the completeness of the prior searches; and that many of these failings were done knowingly, deliberately and in bad faith.

In my concern, this is a case of fraud. And electronic data is the functional

equivalent of a paper trail. And I think Morgan Stanley's actions have had a crucial impact on plaintiff's ability to prove its case, and I think, in all honesty, what are the proper implications of that. If you want to wait until the morning to come up with a proposed order that incorporates what are my findings of fact, that's fine.

MR. SCAROLA: Your Honor, I've obviously heard what Your Honor said and tried to compare it mentally to what we've included in the order that we have already prepared for Your Honor. I think that we have virtually covered everything that Your Honor has described. Obviously not in exactly the same words but very close to the words that you have described.

We can do two things: We can give Your Honor the order that we have prepared and then also provide Your Honor in the morning an alternative order that exactly tracks the language that you have recited.

THE COURT: Why don't you do both, and you guys are welcome to, obviously, share

whatever it is you provide, and you guys are welcome to submit your own proposed order as well. I can tell you I've not decided what I think are the appropriate sanctions.

MR. SCAROLA: What we have done, Your Honor, is to provide in our proposed order alternative sanctions that are simply listed hierarchically and described as alternatives so that Your Honor would simply need to indicate which of the alternatives you wanted to incorporate in the final form. We obviously have the disk and will prepare it as Your Honor directs.

THE COURT: I'll be honest with you, part of it, too, and the reason I was asking these particular questions, and, frankly, I didn't incorporate into my notes this morning because I was waiting to hear the transcript portions today, is that I had affirmative representations that the November production represented the newly discovered Brooklyn tapes. And I think based on the evidence I had

yesterday that's virtually impossible. And, you know, to me that's just symptomatic of the course of conduct by Morgan Stanley. I mean, I understand you guys disagree, but that's my conclusion of fact based on the evidence I heard yesterday.

MR. DAVIDSON: I understand that, Your Honor, but there is a further issue here, and that is -- which disturbs me or which concerns me, let me say that, because I want to be -- although we apparently failed to appreciate the significance of an issue and not knowing going into the hearing that we were going to have to deal precisely with this issue, and, therefore, confessing, apparently, did not other than the testimony that you saw that I pointed out to you from Mr. Clare, did not present evidence yesterday at the hearing, and that may go to the court's order, so the court understands the good faith basis of counsel, though, in taking a position.

Now there is a declaration in the record that counsel is aware of. It's the

Jonas declaration, which was Exhibit 3 to the original brief. Mr. Clare knows about it. I know about it. In which he says that the search that was done in November was done in electronic searches of e-mail data that had been restored and made searchable since May 14th.

We started with that baseline. And I understand that we didn't put testimony on on that, and I understand that, but we did not even think of the fact that there was a question about that. We just didn't. And I'm just addressing the good faith of counsel.

THE COURT: I don't mean to impugn the good faith of counsel. But I have seen a pattern where counsel believes if it acted in good faith, it absolves its client of the consequences of any of the client's bad acts. And, for instance, I have a certificate of compliance signed by Mr. Reil in June that he knew to be false at the time he signed it. And that's an act by Morgan Stanley. It's not an act by counsel. The only thing perhaps we could

visit on counsel is the failure to cause it to be amended once its falsity was apparent. And it's the same thing that, frankly, I was stunned at when Mr. Clare argued to me two weeks ago that you all were still unwilling to admit that that certification was false, where clearly it was.

But, again, sometimes the act of a client come back and visit the client. And I think that's what's happened here.

MR. DAVIDSON: I understand. And not to -- could I extract my --

THE COURT: Yes, you may.

MR. DAVIDSON: Thank you very much.

THE COURT: Where do we want to go now?

MR. SCAROLA: Where do we want to go? Are you taking a survey?

MR. MARKOWSKI: Something other than e-mail and damages, Your Honor. Motion number 20.

THE COURT: And this is plaintiff's motion.

MR. MARKOWSKI: I have a couple documents, Your Honor, that I tabbed that

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

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

CASE NO: 2003 CA 005045 AI

PLAINTIFF'S MOTION TO COMPEL FURTHER DISCOVERY REGARDING MORGAN STANLEY'S DESTRUCTION AND NONPRODUCTION OF E-MAILS

Coleman (Parent) Holdings Inc. ("CPH") respectfully seeks leave to conduct certain discovery relating to the willful failure of Morgan Stanley & Co. Incorporated ("Morgan Stanley") to make full production of responsive e-mails, as it falsely certified it had done prior to June 23, 2004. CPH seeks this discovery not to buttress the record supporting the pending motion for sanctions relating to Morgan Stanley's failure to produce e-mails, but to obtain information for use at trial. The record as to the former issue is complete and justifies the immediate entry of a default judgment as to liability. But as explained below, this discovery is warranted to ascertain the full magnitude of the e-mail problem, which in turn can inform the jury's determinations about liability (if the Court does not grant a default judgment) and about the award of punitive damages.

Specifically, CPH asks that the Court (1) order Morgan Stanley to produce the 46 documents listed on Morgan Stanley's February 10, 2005 Privilege Log (Priv. Nos. 486-524), as well as any other documents reflecting when and how Morgan Stanley agents or employees, including in-house and outside counsel, learned about the existence and discovery of all electronic data storage sources potentially containing e-mail-related discovery materials, the

failure to make complete production of e-mail-related discovery materials, and when and how Morgan Stanley's agents and employees responded; (2) order Morgan Stanley to make available for deposition in the next two weeks key personnel who were parties to attorney-client communications involving the production of e-mails in this case, including but not limited to Thomas A. Clare, James P. Cusick, James F. Doyle, Grant Jonas, Soo-Mi Lee, Arthur Riel, Zachary Stern, and Wray Stewart; and (3) bar Morgan Stanley from asserting attorney-client privilege to justify withholding documents or instructing deponents not to answer questions about Morgan Stanley's retention, destruction, production, or nonproduction of e-mails or backup tapes, based on the crime/fraud exception recognized in FLA. STAT. ANN. § 90.502(4)(a) (West 2004). For the reasons stated below, Morgan Stanley — which owns and repeatedly has invoked the attorney-client privilege — should no longer be permitted to assert the privilege to hide the fraud it has perpetrated upon this Court and CPH.

CPH needs the opportunity to inquire into these matters to establish the magnitude and seriousness of Morgan Stanley's repeated and egregious violations of the April 16, 2004 Agreed Order — the latest of which was revealed just this weekend when Morgan Stanley once again advised CPH that it had located yet another batch of backup tapes that have not yet been searched. *See* Ex. A (February 19 e-mail advising CPH that "Morgan Stanley has located additional boxes of backup tapes"); *see also* Ex. B (CPH's proposed order presenting a menu of possible sanctions). In recent days, Morgan Stanley has sought to minimize the severity of its misconduct by arguing (1) that Arthur Riel, the former head of Morgan Stanley's e-mail archive project, was a renegade employee who for some unknown reason orchestrated a fraudulent discovery scheme on his own; and (2) that counsel took every appropriate step to address the problem when they learned about it in October. MS Supp. Opp'n at 2-3, 6. Neither argument,

however, is supported by any record evidence, and Morgan Stanley has used assertions of privilege to block CPH from inquiring into these matters, both in depositions and in open court. Moreover, as explained below, there are multiple reasons to doubt the veracity of these assertions — reasons that fully justify revoking the protections of privilege in view of Morgan Stanley's failure to satisfy its discovery obligations even today, despite having certified its full compliance eight months ago.

BACKGROUND

As the Court is aware, it is only as a result of CPH's persistence that Morgan Stanley has begun taking steps in the direction of compliance with the April 16, 2004 Order, eight months after Morgan Stanley certified that it already had fully complied. How close Morgan Stanley now is to full compliance and whether it will ever reach the Court-ordered destination remain unsolved mysteries. If CPH had not made an appropriate motion, it is highly unlikely that Morgan Stanley ever would have located multiple sets of additional, unsearched tapes or would have done anything beyond processing an incomplete set of tapes on its own schedule, at its own pace. *See, e.g.*, Ex. C at 187, 195 (Mr. Clare testifying that he learned only after CPH filed its January 26, 2005 motion that the "Brooklyn found" tapes had been discovered before the certification on June 23); *id.* at 202 (Mr. Clare testifying that he only recently learned that Ms. Gorman had "been instructed [in October] that the processing of these tapes was to be given a higher priority than it had previously"); Ex. D at 155-56 (Mr. Saunders testifying that his deposition inspired additional searches that turned up another 243 tapes); Ex. E (February 16, 2005 notice revoking Morgan Stanley's June 23, 2004 certificate of compliance).

But the problems continue. Remarkably, just this weekend, Morgan Stanley once again revealed that it was <u>still</u> finding additional backup tapes that have never been analyzed or

searched. On Saturday afternoon, Morgan Stanley's counsel, Mr. Thomas A. Clare of Kirkland & Ellis LLP, sent CPH's attorneys an e-mail message stating, in full:

> We have been informed that Morgan Stanley has located additional boxes of backup tapes in a security room. Morgan Stanley is working to catalog the tapes and determine their contents. We will provide you with this information when it becomes available. As of this morning, however, Morgan Stanley has identified four (unlabelled) DLT tapes among the collection. Those four tapes will be sent to NDCI for further analysis.

Ex. A (e-mail sent at 12:54 p.m. on Saturday, February 19, 2005).[1] This message arrived only days after Morgan Stanley's Robert Saunders twice testified under oath that he was "confident" all tapes had already been located. Ex. D at 152-56 (Saunders's testimony at February 14, 2005 hearing, recounting his February 10, 2005 deposition testimony).

The Court already has determined based on evidence presented at the February 14 hearing that Morgan Stanley's failure to make a complete and timely production of e-mails in compliance with the Court's Order was willful. But the full magnitude of the effort to commit fraud on the Court and on CPH remains unknown. Morgan Stanley continues to assert (1) that this problem was originated by one employee, Mr. Riel, who was subsequently placed on "administrative leave" for incompetence and lack of integrity; and (2) that Morgan Stanley acted appropriately and with dispatch when its legal department learned of the issue in October. MS

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[1] This is not the first time Morgan Stanley has been less than forthcoming when describing its discoveries. The Court will recall that Morgan Stanley, the day after it had certified in its brief filed on February 11 that production was 100% complete, sheepishly notified the Court via e-mail that it had found "some" additional backup tapes; yet at the February 14 evidentiary hearing, it became apparent that "some" was actually 243 tapes (whose storage capacity is something like 20 to 30 gigabytes each, a total capacity equal to roughly half a billion printed pages). Now, instead of disclosing how many boxes they have found, or how many tapes, Morgan Stanley merely states it has located "additional boxes of backup tapes." Nor does Morgan Stanley explain why it has chosen to send only four of these tapes to NDCI for further analysis.

Supp. Opp'n at 2-3, 6. This motion seeks a way to test those assertions for purposes of establishing the truth, which can in turn be disclosed at trial.

A review of the chronology of key events reveals why additional discovery is justified and why Morgan Stanley no longer should be allowed to invoke privilege to hamper that discovery:

- On May 14, 2004, Morgan Stanley made what purported to be a complete production of e-mails pursuant to the Agreed Order, based on electronic searches run in April.
- But two years earlier, hundreds of eight-millimeter tapes had been discovered (but not uploaded or searched), and by no later than May 6, 2004 (a full week before the May 14 production), the Morgan Stanley employee responsible for this project, Arthur Riel, knew there were other backup tapes (the "Brooklyn tapes") whose contents also had not been uploaded to the archive and searched. Ex. F, MS 112286 (May 6 minutes). He also knew that Morgan Stanley's vendor, NDCI, had not yet completed processing all of the original 35,000 backup tapes in order to allow them to be uploaded. *See* MS Supp. Opp'n at 8-9 (noting that, as of May 6, 2004, NDCI had yet to process more than 2,000 of the original 35,000 tapes).
- Despite that knowledge, on June 23 Mr. Riel falsely certified in writing that Morgan Stanley had fully complied with the Agreed Order.
- By July 2, Mr. Riel learned that there were potentially responsive e-mails on the tapes still being processed. Ex. G, MS 112327 (July 2 minutes).

But according to Morgan Stanley, no one in the legal department had any knowledge until late October that the May 14 production was not complete and that the June 23 certificate was therefore false. There are several reasons to doubt this story.

First, it is inherently implausible. No reason is suggested why Mr. Riel would take it upon himself to orchestrate a fraud not only on CPH but on Morgan Stanley's own counsel. Certainly there must have been multiple communications between counsel and Mr. Riel in April, May, and June 2004 about this very topic.

Second, Morgan Stanley has not offered any actual evidence of this story — instead offering only a carefully phrased declaration by Mr. Doyle stating that he learned in late October "that additional e-mail backup tapes had been located within Morgan Stanley, and that the data on those tapes had not been restored or searched prior to Morgan Stanley's May 14, 2004 e-mail production." Ex. H. Mr. Doyle, who was present but not called as a witness at the February 14 hearing, says nothing in his declaration about whether he was otherwise aware that the May 14 production was incomplete, nor does he describe any inquiry he made of other counsel at Morgan Stanley about when they acquired such knowledge.

Third, and even more glaringly, Morgan Stanley's latest privilege log lists a June 7, 2004 e-mail from Mr. Riel to two in-house Morgan Stanley attorneys, James Cusick and Soo-Mi Lee, "seeking legal advice regarding [the] status of [Morgan Stanley's] e-mail restoration process." Ex. I (privilege log, entry no. 490). The timing of that June 7 request for legal advice is disturbing, as it came after Mr. Riel oversaw the May 14 production of e-mails but before he signed the June 23 certificate stating that Morgan Stanley had fully complied with the Agreed Order, which he knew at the time was false. Morgan Stanley's attempt to portray Mr. Riel as a renegade employee is undercut by the fact that he affirmatively sought legal guidance from

Morgan Stanley's counsel before affixing his name to the knowingly false certificate. On the one hand, if in June 2004 Mr. Riel or his staff revealed to Morgan Stanley's counsel that certain backup tapes had not yet been searched, that could serve to establish that Mr. Riel conspired with attorneys at Morgan Stanley to conceal the falsity of Morgan Stanley's certificate and thereby to defraud both this Court and CPH. That misconduct should trigger the crime/fraud exception to the privilege, under FLA. STAT. ANN. § 90.502(4)(a) (West 2004). On the other hand, if Mr. Riel or his staff manipulated counsel to keep them ignorant and thereby to perpetrate a fraud on CPH and on this Court, that too should trigger the crime/fraud exception, as it is the client's knowledge — not the attorney's — that matters for purposes of the exception.

CPH should be allowed to depose both Mr. Riel and the in-house counsel (Mr. Cusick and Ms. Lee) from whom Mr. Riel sought legal advice on June 7, 2004. But the discovery also should go further, to include other key inside and outside counsel and information-technology professionals whose names appear repeatedly on Morgan Stanley's recent privilege log. Roughly half of the 46 documents on that log date from October or November 2004, when there was a flurry of communications about the e-mail production situation. At some point, a decision was made to produce 8,000 pages of e-mails and to tell CPH that these were a first installment of production from "additional e-mail backup tapes" that Morgan Stanley allegedly had discovered "since [its] e-mail production in May 2004." Ex. J (November 17, 2004 letter from Thomas A. Clare to CPH's counsel); *see id.* (referring to "newly discovered tapes"). But Morgan Stanley's own witnesses at the February 14, 2005 hearing testified that the data from the DLT tapes found in Brooklyn and the 8-mm tapes found in Manhattan were not put into searchable form until January 2005. Ex. K at 52, 65, 68-69 (Gorman). Morgan Stanley's false claim that the November production came from "newly discovered" backup tapes apparently was designed to

conceal the fact that not all of the 35,000 original tapes stored at the Recall facility in New Jersey had been searched in April 2004. CPH should be allowed to take discovery on the genesis of this cover story. CPH and this Court should learn the full story, under oath, with all witnesses fully subject to all the penalties for providing false testimony.

So far, CPH's efforts to learn that full story have been stymied by Morgan Stanley's repeated assertions of privilege. *See, e.g.*, Ex. L at 63-64 (invoking the privilege during Ms. Gorman's February 14, 2005 in-court testimony); Ex. M at 181-82, 196 (invoking the privilege during Mr. Clare's February 14, 2005 in-court testimony); Ex. N at 47, 63-65 (invoking the privilege during Ms. Gorman's February 9, 2005 deposition); Ex. O at 23-27 (invoking the privilege during Mr. Saunders's February 10, 2005 deposition). Those assertions of privilege might have been appropriate if there had been a record here of good faith. But the opposite is the case. Representation after representation of complete production has proved false, as carefully worded declarations obfuscate the truth and leave more questions than answers. The privilege log reveals the fingerprints of counsel on these clumsy, false representations. It is time for the full facts to be aired, under oath and under penalty of perjury.

ARGUMENT

The crime/fraud exception recognizes that the attorney-client privilege "ceas[es] to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing." *United States v. Zolin*, 491 U .S. 554, 562-63 (1989). Under Florida law, the crime/fraud exception bars any party from claiming as privileged any communications with a lawyer when the lawyer's services "were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud." FLA. STAT. ANN. § 90.502(4)(a) (West 2004) (emphasis added); *see Butler, Pappas, Weihmuller v. Coral Reef of Key Biscayne*

Developers, Inc., 873 So. 2d 339, 342 (Fla. 3d DCA 2004) (requiring showing that communication was part of effort to commit fraud, and party sought attorney's advice in order to further fraud); *First Union Nat'l Bank v. Turney*, 824 So. 2d 172, 187 (1st DCA 2001) (requiring showing that communication with counsel was "in order to obtain advice or assistance in perpetrating what the client knows to be a crime or fraud"). It does not matter whether the lawyers knew of the fraud, so long as the client knew and used its lawyers to commit (or plan to commit) a fraud. *First Union Nat'l Bank v. Turney*, 824 So. 2d at 187. As this Court put it, even counsel's sincere belief that it acted in good faith does not "absolve[] its client of the consequences of any of the client's bad acts. . . . [S]ometimes the [sins] of a client come back and visit the client." Ex. P at 618-19.

Florida law has long recognized "fraud on the court," a species of fraud designed to "produc[e] a judicial act by fraudulent representations to the Judge." *State v. Burton*, 314 So. 2d 136, 137 (Fla. 1975). Furthermore, "fraud on the court" encompasses abuses not only in open court, but also in pretrial discovery. Thus, in *Medina v. Florida East Coast Railway, L.L.C.*, 866 So. 2d 89 (Fla. 3d DCA 2004), where the plaintiff had repeatedly lied under oath at his deposition, the appellate court reaffirmed the principle that a Florida trial court, after giving the plaintiff an opportunity to be heard, has "the inherent authority to dismiss an action when it finds that a plaintiff has perpetrated a fraud on the court." *Id.* at 90.

Courts in Florida and elsewhere have not hesitated to apply the crime/fraud exception to frauds on the court, including discovery abuses, destruction of evidence, and obstruction of justice. *See, e.g., Volcanic Gardens Mgmt. Co. v. Paxson*, 847 S.W.2d 343, 348 (Tex. Ct. App. 1993) ("[U]nder the crime/fraud exception to the lawyer-client privilege, 'fraud' would include the commission and/or attempted commission of fraud on the court or on a third person," as

when a "client seeks the assistance of an attorney in order to make a false statement or statements of material fact or law to a third person or the court for personal advantage.").

In *Gutter v. E.I. DuPont de Nemours*, 124 F. Supp. 2d 1291 (S.D. Fla. 2000), a Florida federal court applied the crime/fraud exception when DuPont's counsel made false and misleading statements to the court regarding privilege logs. Although the court could identify no single lawyer at DuPont who knew all the facts behind the misstatements, there was "ample evidence that DuPont itself had the requisite knowledge and intent" for a finding of fraud on the court. *Id.* at 1313. The parallels to the present case are striking: Certain of the defendant's lawyers knew that certain documents could be produced (and had been in other litigation), but the defendant withheld the documents and informed the court that the documents could not be produced. *See id.* at 1302. When the pieces were fit together, the defendant's fraud was revealed.

Such discovery misconduct triggers the crime/fraud exception because the destruction of records eviscerates "the court's ability to ascertain the truth." *In re Sealed Case*, 754 F.2d 395, 401 (D.C. Cir. 1985); *see id.* (invoking the crime/fraud exception where a party "perpetrated a continuing fraud connected with, but not limited to, the actual destruction of records"). The destruction of evidence is every bit as troubling with electronic documents as with traditional paper documents. As this Court put it on February 15, "This is a case of fraud. And electronic data is the functional equivalent of a paper trail." Ex. P at 614-15.

For these reasons, courts do not hesitate to deny the protections of privilege when circumstances suggest, for example, that a party and its lawyers were overseeing the destruction of e-mails and other documents while anticipating litigation. *See Rambus, Inc. v. Infineon Techs. AG*, 220 F.R.D. 264, 283, 287-88 (E.D. Va. 2004). In *Rambus*, a suit involving counterclaims of

fraud, the defendant sought discovery of documents, including attorney-client communications, relating to the plaintiff's document-retention program, on the theory that the document-retention program resulted in the intentional spoliation of relevant documents, and therefore the crime/fraud exception to the attorney-client privilege applied. In response to the plaintiff's claim that it had destroyed documents to reduce the potential cost of discovery in future cases, not to suppress evidence in this particular case, the court held that even if the plaintiff "did not institute its policy in bad faith, if it reasonably anticipated litigation when it did so, it is guilty of spoliation." *Id.* at 286. The court concluded that "the crime/fraud exception extends to materials or communication created for planning, or in furtherance of, spoliation." *Id.* at 283; *see also State Farm Fire & Cas. Co. v. Superior Court of Los Angeles County*, 54 Cal. App. 4th 625, 648-49 (Cal. Ct. App. 1997) (applying the crime/fraud exception to discovery abuses).

When parties engage in discovery misconduct and abuse the attorney-client privilege, Florida courts similarly have not hesitated to reject those parties' claims of privilege and to require production of documents that otherwise would have been protected from disclosure. *See, e.g., Metabolife Int'l, Inc. v. Holster*, 888 So. 2d 140, 140-41 (Fla. 1st DCA 2004) (holding that defendant's failure timely to file a privilege log waived its claims of privilege and required production of documents that otherwise would have been subject to attorney-client and work-product privileges); *General Motors Corp. v. McGee*, 837 So. 2d 1010, 1032 (Fla. 4th DCA 2002) (holding that defendant's misconduct during discovery justified a finding that defendant had waived its privilege claims); *Omega Consulting Group, Inc. v. Templeton*, 805 So. 2d 1058, 1060 (Fla. 4th DCA 2002) (affirming the trial court's order requiring corporate defendant to disclose three e-mails, and rejecting the corporation's claims that the communications were protected from disclosure by the attorney-client privilege).

This Court's April 16, 2004 Order gave Morgan Stanley one full month to produce all responsive, nonprivileged e-mails. Today, more than 10 months later, Morgan Stanley has yet to comply with that Order. And for almost the entire period of delay, up until a few days ago (when Morgan Stanley finally revoked its certificate of compliance, *see* Ex. E), Morgan Stanley insisted on telling CPH and this Court that it had complied with the Order. The time has come for this Court to stop accepting Morgan Stanley's blanket claims of attorney-client privilege and to acknowledge that Morgan Stanley has used its lawyers to "carry[] out [its] misrepresentations and concealment." *American Tobacco Co. v. State*, 697 So. 2d 1249, 1257 (Fla. 4th DCA 1997).

CONCLUSION

For the foregoing reasons, this Court should invoke the crime/fraud exception to order Morgan Stanley (1) to produce the 46 documents listed on Morgan Stanley's February 10, 2005 Privilege Log (Priv. Nos. 486-524), as well as any other documents reflecting when and how Morgan Stanley agents or employees, including in-house and outside counsel, learned about the existence and discovery of all electronic data storage sources potentially containing e-mail-related discovery materials, the failure to make complete production of e-mail-related discovery materials, and when and how Morgan Stanley's agents and employees responded; (2) to make available for deposition in the next two weeks key personnel who were parties to attorney-client communications involving the production of e-mails in this case, including but not limited to Thomas A. Clare, James P. Cusick, James F. Doyle, Grant Jonas, Soo-Mi Lee, Arthur Riel, Zachary Stern, and Wray Stewart; and (3) not to assert attorney-client privilege as a basis for withholding documents or when the deponents are asked questions about Morgan Stanley's retention, destruction, production, or nonproduction of e-mails or backup tapes.

Dated: February 22, 2005

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been served to all counsel on the attached Service List by the means indicated this 21st day of February 2005.

Dated: February 21, 2005

COLEMAN (PARENT) HOLDINGS INC.

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Hirsch, Sam

From: Thomas Clare [tclare@kirkland.com]
Sent: Saturday, February 19, 2005 12:54 PM
To: Brody, Michael T; Hirsch, Sam
Cc: Jianno@CarltonFields.com; LBemis@kirkland.com; Jeffrey Davidson
Subject: Morgan Stanley Backup Tapes

We have been informed that Morgan Stanley has located additional boxes of backup tapes in a security room. Morgan Stanley is working to catalog the tapes and determine their contents. We will provide you with this information when it becomes available. As of this morning, however, Morgan Stanley has identified four (unlabelled) DLT tapes among the collection. Those four tapes will be sent to NDCI for further analysis.

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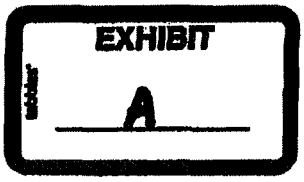

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

[CPH'S PROPOSED] ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION REGARDING MORGAN STANLEY & CO. INCORPORATED'S DESTRUCTION OF E-MAILS AND NONCOMPLIANCE WITH THE COURT'S APRIL 16, 2004 AGREED ORDER

THIS CAUSE came before the Court February 14, 2005 on Coleman (Parent) Holdings, Inc.'s ("CPH's") Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, as modified by CPH's February 14, 2005 ore tenus motion for additional relief. Based on the evidence introduced at an evidentiary hearing, the Court FINDS as follows:

1. This is a case of fraud. And electronic data are the functional equivalent of a paper trail. Morgan Stanley's actions here have had a crucial impact on plaintiff CPH's ability to prove its case.

2. Because a central issue in this case is the extent of Morgan Stanley's knowledge of the fraudulent scheme undertaken by its client Sunbeam Corporation during 1997 and early 1998, CPH has long sought access to Morgan Stanley's internal files, including e-mails. Morgan Stanley has impeded that discovery, however, by making no effort to preserve the relevant e-mails even when, as early as February 1999, making concerted efforts to maintain other (non-

EXHIBIT
8

electronic) records in Morgan Stanley's possession in anticipation of potential Sunbeam-related litigation. Indeed, Morgan Stanley knew Sunbeam-related litigation was likely as of March 1998. Morgan Stanley destroyed countless e-mails when it systematically re-used and "over-wrote" computer backup tapes on a rolling basis every 12 months. That 12-month retention policy violated applicable Securities and Exchange Commission regulations requiring companies like Morgan Stanley to maintain e-mails for at least three years and to maintain them in a readily accessible form for at least two years. *See* 17 C.F.R. § 240.17a-4 (1997).

3. The need for Morgan Stanley to redouble its efforts to recover some fraction of the relevant e-mails became a major issue in this litigation, culminating in an Agreed Order on April 16, 2004. The Agreed Order required Morgan Stanley to (1) search the oldest full backup tape that exists for e-mail of each of 36 Morgan Stanley employees or former employees involved in the Sunbeam transaction; (2) provide to its attorneys for responsiveness and privilege review all e-mails dated from February 15, 1998 through April 15, 1998 and all e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004 all nonprivileged e-mails responsive to CPH's document requests; and (4) give CPH a privilege log listing any materials withheld on privilege grounds. Morgan Stanley was also required to certify its full compliance with the Agreed Order. The assumption was that this process would lead to production of e-mails from a set of roughly 35,000 backup tapes that had been located and had not been overwritten.

4. On May 14, 2004, Morgan Stanley produced approximately 1,300 pages of e-mails but failed to provide the required certification. Finally, on June 23, 2004, after inquiries by CPH, Morgan Stanley provided CPH with a certificate of full compliance with the April 16 Agreed Order signed by Arthur Riel, the manager at Morgan Stanley assigned this task.

5. As organized by Morgan Stanley, the effort to recover e-mails from any remaining backup tapes had several stages. First, the relevant backup tapes (in various formats, such as "DLT" tapes and eight-millimeter tapes) had to be located by searching the potential storage locations. Second, the tapes were sent to a vendor called National Data Conversion Inc. (NDCI) to be processed, and the data were returned to Morgan Stanley in the form of "SDLT" tapes. Third, Morgan Stanley had to find a way to upload the contents of these SDLT tapes into its new e-mail archive. Fourth, Morgan Stanley would run "scripts" to transform this data into a searchable form, so that it could later be searched for responsive e-mails. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when SDLT tapes remained in limbo, waiting to be uploaded to the archive.

6. At some point prior to May 6, 2004, Arthur Riel and his team became aware that more than 1,000 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423 DLT tapes had not been processed by NDCI and thus had not been included in the archive or searched when Morgan Stanley made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification that it was false. He and others on Morgan Stanley's e-mail archive team were further informed by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990s. But Morgan Stanley neither withdrew its certification nor informed CPH about the potential for additional production of e-mails. During the summer of 2004, it appears that the Brooklyn tapes were processed and sent to the staging area, but they were not uploaded to the e-mail archive so as to be available to be searched until January 2005 (at least eight months after they were found).

7. Morgan Stanley also failed to timely produce e-mails from 738 8-millimeter backup tapes found at a Morgan Stanley facility in Manhattan even earlier, in 2002. These 738 8-mm tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched when Morgan Stanley made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Mr. Riel and others were further informed by their vendor NDCI by July 2, 2004 that the 8-mm tapes contained e-mail dating back at least to 1998. But Morgan Stanley neither withdrew its certification nor informed CPH about the potential for additional production of e-mails. During the summer of 2004, it appears that the 8-mm tapes were processed and sent to the staging area. But, like the Brooklyn tapes, they also were not uploaded to Morgan Stanley's e-mail archive.

8. In August 2004, Mr. Riel was relieved of his employment responsibilities. He and his team were replaced by a new team headed by Allison Gorman Nachtigal. Ms. Gorman testified that she was instructed to describe the circumstances of Mr. Riel's replacement as his having been "placed on administrative leave." That same term appears by interlineation over the original typed description in Morgan Stanley's memorandum addressing these issues. The typed language stated: "[Mr. Riel was] dismissed for integrity issues."

9. Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area, and she was not even informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman met with a group of Morgan Stanley attorneys. Following that meeting, Ms. Gorman gave the project somewhat greater priority, although even then it clearly did not move as expeditiously as possible. For example, Morgan Stanley apparently gave no thought to using an

outside contractor to expedite the process of completing the discovery, even though Morgan Stanley had certified completion months earlier and even though Morgan Stanley lacked the technological capacity to upload and search the data at that time (and would not attain that capacity for many months). Even at this point, no one from Morgan Stanley or its outside counsel, Kirkland & Ellis LLP, gave CPH or this Court any hint that the June certification was false.

10. On November 17, 2004, more than six months after the May 14, 2004 deadline for producing e-mails in response to the Agreed Order, Morgan Stanley sent CPH a letter revealing that its June 23 certificate of compliance was incorrect. The letter stated:

> Morgan Stanley has discovered additional e-mail backup tapes since our e-mail production in May 2004. The data on some of [the] newly discovered tapes has been restored and, to ensure continued compliance with the agreed order, we have re-run the searches described in the order. Some responsive e-mails have been located as a result of that process. We will produce the responsive documents to you as soon as the production is finalized.

The letter also foreshadowed further delays: "Some of the backup tapes are still being restored. To ensure continued compliance with the agreed order, we intend to re-run the searches again when the restoration process is complete and will produce any responsive documents that result."

11. The next day, on November 18, 2004, Morgan Stanley produced an additional 8,000 pages of e-mails and attachments from backup tapes. Morgan Stanley's November 2004 letters stated that the 8,000 pages came from "newly discovered" tapes; but the testimony now makes clear that this statement was likely false because Ms. Gorman's team did not figure out how to upload and make searchable the materials from the staging area until January 2005. Instead, it appears the 8,000 pages were from the original set of 35,000 backup tapes that were known to exist but that were not fully uploaded or searched the previous spring — further contradicting the June 23 certificate of compliance. Morgan Stanley has completely failed to

offer any explanation to reconcile the obvious conflict between its assertions at the time of production that the 8,000 pages came from "newly discovered" tapes (*i.e.*, the "Brooklyn tapes") and the testimony of their own witness, Ms. Gorman, that data from those newly discovered tapes were not capable of being searched until two months later, in January.

12. After a follow-up inquiry by CPH, on December 17, 2004, Morgan Stanley produced a privilege log and advised CPH that "[n]o additional responsive e-mails have been located since our November production." But Morgan Stanley refused to answer CPH's questions about whether Morgan Stanley had restored all the backup tapes described in its November 17 letter and about why the tapes had not been located earlier.

13. On December 30, 2004, CPH sought confirmation that Morgan Stanley had reviewed all e-mail backup tapes and produced all responsive e-mails, and if not, asking when the review would be completed. On January 11, 2005, Morgan Stanley informed CPH that the "restoration of e-mail backup tapes is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

14. On January 19, 2005, CPH wrote asking Morgan Stanley to explain the circumstances under which Morgan Stanley located the "newly discovered" backup tapes and to disclose when the tapes were located. CPH also asked Morgan Stanley to explain why the backup tapes could not be restored sooner.

15. On January 21, 2005, Morgan Stanley sent CPH a letter that failed to answer CPH's questions. Instead, Morgan Stanley described its efforts to restore the backup tapes as "ongoing"; informed CPH that "there is no way for Morgan Stanley to know or accurately predict the type or time period of data that might be recovered"; and stated that "Morgan Stanley

cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes." Ominously, the letter closed by noting that, "when the agreed-upon searches are run again," they "will include approximately one terabyte of additional data." One terabyte equals about 1 million megabytes.

16. On January 26, 2005, CPH filed the Motion at issue here, asking the Court to instruct the jury that Morgan Stanley's destruction of e-mails and other electronic documents and Morgan Stanley's noncompliance with the April 16, 2004 Agreed Order can give rise to an adverse inference that the contents of the missing e-mails would be harmful to Morgan Stanley's defense in this case.

17. Meanwhile, Morgan Stanley found another 169 DLT tapes in January 2005 that allegedly had been misplaced by its New Jersey storage vendor, Recall. And again, Morgan Stanley chose to provide no specifics to CPH or to the Court.

18. At a February 2, 2005 hearing on CPH's motion, Mr. Thomas A. Clare of Kirkland & Ellis LLP, representing Morgan Stanley, stated that "late October of 2004 . . . [is] the date I represent to the Court is the first time that anyone knew that there was recoverable e-mail data" on the Brooklyn tapes. Hr'g Tr. (2/2/05) at 133-34. The actual date, however, was at least three months earlier, by July 2, 2004. Furthermore, Morgan Stanley refused to provide the Court with definitive answers as to when its e-mail production would be complete, merely stating that it would proceed with "all deliberate speed." *Id.* at 139. Also at the February 2 hearing, Mr. Clare not only neglected to inform the Court about the 8-mm tapes that had been located in 2002, but also informed the Court that the 1,423 DLT tapes had been found in Brooklyn "sometime during the summer" of 2004. *Id.* at 132. The truth of this assertion is belied not only by the evidence showing that the tapes were found before May 6, 2004, but by Mr. Clare's

acknowledgement on cross-examination that he became aware of that chronology after CPH filed its present motion on January 26, 2005 — a week before he unambiguously told the Court the tapes had been found during the summer. Hr'g Tr. (2/14/05) at 187, 195.

19. On February 3, 2005, the Court ordered further discovery and set an evidentiary hearing for February 14, 2005. The discovery took place on February 9 and 10, when CPH deposed the three e-mail witnesses that Morgan Stanley identified.

20. Beginning on Sunday, February 6, Morgan Stanley produced a few dozen additional pages of e-mails. At 2:38 a.m. on Friday, February 11, 2005, Morgan Stanley produced three additional pages of e-mails, announced that its e-mail production was complete, and asked the Court to dismiss CPH's Motion as moot.

21. But on Saturday afternoon, February 12, Morgan Stanley informed the Court that it had, in the previous 24 hours, discovered additional tapes. Also, Morgan Stanley stated that its recent production omitted certain "attachments" to e-mails. Morgan Stanley did not attempt to clarify or substantiate either of these statements to CPH or to the Court until the Monday, February 14, 2005 hearing.

22. At the February 14 hearing, none of the witnesses Morgan Stanley presented was involved in or familiar with the actual electronic searches conducted using the parameters specified in this Court's April 16, 2004 Order. And none explained where the 8,000 pages produced in November 2004 had come from. Morgan Stanley's witnesses did, however, describe three new developments. First, Mr. Robert Saunders, had returned to New York after his February 10 deposition and, concerned about his unqualified assertion that he was "confident" that a complete search for backup tapes had been conducted, decided finally to undertake a personal search of Morgan Stanley's "communication rooms." By doing so, he

discovered more than 200 additional backup tapes openly stored in locations known to be used for tape storage. Those discoveries were made on Friday and Saturday, February 11 and 12. But as of the February 14 hearing, NDCI had not yet determined which, if any, of these newly discovered backup tapes contained e-mails. Second, Ms. Gorman reported that on Friday she and her team had discovered that a flaw in the software they had written had prevented Morgan Stanley from locating all responsive e-mail attachments. Third, Ms. Gorman reported discovering on Sunday evening that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so there were at least 7,000 additional e-mail messages that appeared to fall within the scope of the Agreed Order but had yet to be fully reviewed by Kirkland & Ellis for responsiveness and privilege. As counsel for Morgan Stanley admitted, this problem "dwarf[s]" their previous problems. Hr'g Tr. (2/14/05) at 13. And Ms. Gorman indicated she was "90 percent sure" that the problem infected their original searches in May, which means that they even failed to timely produce relevant materials that had been uploaded into the archive by that point. *Id.* at 82-83.

23. Throughout this entire process, lack of candor on the part of Morgan Stanley and its Kirkland & Ellis attorneys frustrated the Court's ability to be fully and timely informed with respect to these issues.

24. Morgan Stanley's failure during the summer and fall of 2004 to timely process a substantial amount of data that was languishing in the "staging area," rather than being put into searchable form and then searched, was willful.

25. Morgan Stanley's failure to timely notify CPH of the existence of the DLT and 8-mm tapes — which Morgan Stanley had located as early as 2002 and certainly prior to the June

23, 2004 certification — and Morgan Stanley's failure to timely process those raw backup tapes was willful and a gross abuse of its discovery obligations.

26. Morgan Stanley's failure to produce all e-mail attachments was negligent, and it was discovered and revealed only as a result of CPH hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check Morgan Stanley's compliance with the April 16, 2004 Agreed Order.

27. Morgan Stanley's failure to produce all of the Lotus Notes e-mails was negligent, and it was discovered and revealed only as a result of CPH hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check Morgan Stanley's compliance with the April 16, 2004 Agreed Order.

28. Morgan Stanley's failure to locate all potentially responsive backup tapes before Saturday, February 12, 2005 (if then) was grossly negligent.

29. In sum, despite the affirmative duty on Morgan Stanley's part arising out of the litigation to produce its e-mails, and contrary to federal law requiring it to preserve the e-mails, Morgan Stanley failed to preserve many e-mails and failed to produce all e-mails required by the Agreed Order. The failings include overwriting e-mails after 12 months; failing to conduct proper searches for tapes that may contain e-mails; providing a certificate of compliance known to be false when made and never amended to reflect its falsity; failing to timely notify CPH when additional tapes were located; failing to use reasonable efforts to search the newly discovered tapes; failing to timely process and search data held in the staging area or notify CPH of the deficiency; failing to write software scripts consistent with the Agreed Order; and discovering the deficiencies only after CPH was given the opportunity to check Morgan Stanley's work and

the Morgan Stanley attorneys were required to certify the completeness of the prior searches. Many of these failings were done knowingly, deliberately, and in bad faith.

WHEREFORE, based on this Court's authority under Rule 1.380(b)(2) of the Florida Rules of Civil Procedure and other authority cited herein, and based on the foregoing findings of fact and the briefs and arguments of counsel, it is hereby ORDERED AND ADJUDGED as follows:

1. The Motion is GRANTED.

2. The findings of fact set forth above shall be deemed established for the purposes of this action and shall be disclosed to the jury at the start of the trial. Fla. R. Civ. P. 1.380(b)(2)(A).

3. Morgan Stanley is held in contempt of Court for its repeated, egregious failures to obey the Court's April 16, 2004 Agreed Order and for its efforts to conceal that noncompliance. The Court reserves for further hearing the determination of the amount and type of financial sanctions appropriate for this contempt. Fla. R. Civ. P. 1.380(b)(2)(D).

4. CPH will be allowed to present argument and evidence concerning Morgan Stanley's e-mail destruction, e-mail nonproduction, and other discovery misconduct when presenting argument and evidence going to the issue of punitive damages. *See, e.g., General Motors Corp. v. McGee*, 837 So. 2d 1010, 1035-36 (Fla. 4th DCA 2002).

5. [*Alternative One*] Because of its failure to produce relevant evidence on a timely basis, Morgan Stanley's answer is stricken and, therefore, CPH's allegations of liability are deemed admitted and Morgan Stanley is held liable on all counts of CPH's complaint. The trial therefore will be limited to (1) the amount of compensatory damages; (2) CPH's entitlement to punitive damages; and (3) the amount of punitive damages. Fla. R. Civ. P. 1.380(b)(2)(C).

[*Alternative Two*] The Court will instruct the jury (both at the start of the trial and when delivering other jury instructions as to liability) to presume that, beginning no later than February 15, 1998, Morgan Stanley knew of the fraud that Sunbeam was committing against CPH and was aware that it was part of an overall activity that was improper. At trial, Morgan Stanley will thus bear the burden of disproving its knowledge of the Sunbeam fraud. *See, e.g., Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596, 599 (Fla. 1987); *Safeguard Mgmt. v. Pinedo*, 865 So. 2d 672, 674 (Fla. 4th DCA 2004).

[*Alternative Three*] The Court will instruct the jury (both at the start of the trial and when delivering other jury instructions as to liability) that it may infer that the contents of the e-mails that were destroyed or not produced would be harmful to Morgan Stanley's position in this case. Specifically, this adverse-inference jury instruction will state: "In this case, as in every civil case in Florida, as part of the trial preparation process the parties are entitled to request information from each other in a process that is known as discovery. You have heard that, during the discovery process in this case, Morgan Stanley failed to produce many of the e-mails sent or received by Morgan Stanley employees during the relevant time period in 1998. You are permitted, but not required, to infer that Morgan Stanley's destruction or nonproduction of e-mails had a fraudulent purpose. And you are permitted, but not required, to infer that, if produced, the missing e-mails would have been unfavorable to Morgan Stanley. Any inference you decide to draw should be based on all of the facts and circumstances in this case. You should give the fact of the missing e-mails the weight you think proper under all the circumstances; you may consider that fact decisive with respect to any or all of CPH's claims, you may ignore it altogether, or you may give it weight between those extremes, as you determine appropriate."

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ___ day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. VOLUME 2

MORGAN STANLEY & CO., INC.,

Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Monday, February 14, 2005
1:30 p.m. - 5:00 p.m.

were found sometime before June 17, 2004, correct?

A. Sorry. Could you repeat that?

Q. Yes, sir. The Brooklyn tapes were found before the certification, right?

A. I have heard that testimony, yes.

Q. Okay. My first question to you is when did you learn that the tapes, the Brooklyn tapes were found before the certification? When did you first find that out?

A. That particular data point I would say I first personally learned of that after your motion for an adverse inference.

Q. Do you have knowledge as to whether any other Kirkland lawyer learned of that before we filed our motion?

A. I don't. I can only speak to my own personal knowledge. I would say, however, that I have been the primary Kirkland lawyer interfacing with the client on this issue.

Q. Since both the 738 eight-millimeter backup tapes and the 1,423 DLT tapes were found before the certification but not searched as of the time of the certification, correct? We know that.

A. I've heard that testimony this morning.

Q. Okay. So since they were found before the

THE WITNESS: I have not asked specifically who the attorney was who had that.

BY MR. SCAROLA:

Q. I gather from the clarification that you made with regard to my misunderstanding of your earlier testimony that what it is that you didn't find out until after our motion was filed were the specifics with regard to when tapes were found that were outside the scope of the certification; is that correct?

A. I believe it is correct. What I testified to is the exact chronology of when, which batches of tapes were found as they relate to when the certification was signed.

Q. And I think the way I phrased the question initially was a reference to general problems with Morgan Stanley's compliance with their e-mail discovery obligations. So let's focus on that. When did you first become aware that there were problems with Morgan Stanley's compliance with the April 2004 order?

A. If by problems you mean --

Q. Anything and everything is what I mean.

A. Well, let me tell you what I understand your question to mean, and if I'm not answering it, please

facts about which you no longer have knowledge of their truth or falsity, do you recognize an obligation to immediately inform the interested parties and the court?

MR. JONES: Your Honor, I object. We're now entering into hypothetical kinds of questions.

THE COURT: I would sustain it. I mean -- Well, I would sustain it.

BY MR. SCAROLA:

Q. At what point in time did you personally become aware of Miss Gorman having been instructed that the processing of these tapes was to be given a higher priority than it had previously?

A. I can't fix in my mind when I first became aware of that, but it was probably within the last several weeks in response to your motion.

Q. Whose responsibility was it within Kirkland & Ellis to assure that the discovery obligations imposed by court order were met expeditiously?

A. Well, I would say that every attorney on our team would have an obligation to comply with the court's orders.

Q. I'm talking specifically about the April 2004 order. Whose responsibility was it within Kirkland &

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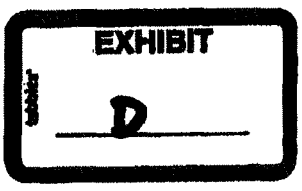
Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Monday, February 14, 2005
1:30 p.m. - 5:00 p.m.



comes --

Q. How many are you aware of?

A. I'm aware of the work Morgan Stanley has done with the Security and Exchange Committee over the last -- over the last several months, and I'm aware of this case.

Q. To your knowledge, have any other parties, either government agencies or regulatory bodies or other litigants been informed that searches made of Morgan Stanley's database may not have been complete because there were 182 tapes you just found?

A. My understanding is that in this matter information was given and that we are working on letting the SEC know as well.

Q. What about other litigants?

A. I'm not aware specifically of any other communication that Legal might have outside of these two matters.

Q. And if I understood your testimony today, you're confident that you've now found everything; is that right?

A. Yes.

Q. Are you confident with the same degree of confidence that you expressed to me on Thursday that as of Thursday you had found everything?

A. Well, as my earlier testimony indicated, I certainly was not happy about the fact that on a Friday afternoon, you know, with my feelings and having given the testimony on Thursday that I go out and I go to, you know, the first room I go to and I find some tapes. That was a disheartening event. There's no question about that.

Q. Excuse me. But that's not the question I had.

A. So I can continue my testimony, which is that at this point having exhaustively gone through 1221 and 1585 and my experience with the firm and knowing those rooms, and in addition to John Pamula and Robert Volk looking at Brooklyn and Pavonia, I do feel we have made an exhaustive search.

THE COURT: That wasn't the question asked. Do you have the same level of confidence you have today as you did on Thursday at your deposition?

THE WITNESS: That's an interesting question, is it the same level of confidence. I would say it's a more personal level of confidence, but I actfully searched myself and I directed the search.

BY MR. BYMAN:

Q. Let me refresh your recollection, sir, with what you told us Thursday with your level of confidence. And this is at page -- I apologize. With old eyes, it's hard to see the page, but I believe this is 43.

Question, "Do you have any reason to believe that you have actually located everything that is out there?"

Answer, "I believe that we have made repeated efforts to be comprehensive in our search of Morgan Stanley premises, areas where tapes have been stored and the different communication rooms and the John Pamula, in addition to the BURP team have been diligent in their efforts to make sure that we have found everything that is out there."

Question, "I'm not questioning what they may have done in the past, Mr. Saunders. Others may. And on Monday you can expect others will question you, maybe in a harsher tone of voice, but my question is a little more direct, and it's innocent. That is, as you sit here today, are you confident that you've located everything?"

Answer, "I'm confident that we've made every effort to do so."

Question, "I understand that you've made efforts. Are you confident that those efforts have been successful?"

Answer, "Yes."

Question, "And what's the basis of that confidence given the fact that tranche one didn't work; tranche two wasn't the end of it; tranche three wasn't the end of it?"

And your answer was, after an objection, which I presume, Mr. Klapper, you don't want ruled on, "Again, go back to my earlier answer, which is, we have made various efforts, strenuous efforts to locate the universe of tapes, and I believe we've done so."

Now, sir, that was your testimony on Thursday. Measuring your degree of confidence, then, to your degree of confidence today, where are we?

A. I'd say I have a higher level of confidence today because I personally searched this past weekend and I directed a search; whereas, in the past my testimony was that I was made aware of searches and I had conversations about searches. So I would say it's a different and higher level of confidence than on Thursday.

Q. Sir, my recollection of the Thursday deposition was that we were all pretty friendly. We

weren't wearing ties. Nobody yelled at anybody. What was it about that deposition that made you decide to conduct a personal search the next day that you had not thought to do any earlier?

A. I think that after being asked repeatedly by counsel and searching my own memory and realizing that the basis of my confidence and you specifically questioning what was the basis of my knowledge and my confidence, and I realized that a hole was that I personally had not gotten involved. And because of my knowledge of the communication rooms, having spent some significant time in there over the last several years, that what if I made a cursory search of 1221, third floor. If I went there and found nothing, and that was a room I thought might not have been touched for sometime, but I was aware of that room and knowledgeable about it, that perhaps, you know, all is good in the world, wouldn't need to go further.

Q. Sir, you were the same Robert John Saunders, or is it John Robert Saunders, I'm sorry, but the same Mr. Saunders who gave a deposition in this case on February 10, 2004, right?

A. That's correct.

Q. So you knew about this lawsuit over a year ago; is that right?

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

NOTICE OF WITHDRAWAL OF CERTIFICATION OF ARTHUR RIEL

Morgan Stanley & Co. Incorporated ("Morgan Stanley"), through undersigned counsel, respectfully withdraws the June 23, 2005 Certification of Compliance by Arthur Riel. Morgan Stanley will submit such further declarations and certifications as the Court instructs.

EXHIBIT
E

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,
vs.
CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

DECLARATION OF JAMES F. DOYLE

1. I am James F. Doyle. I am employed as an Executive Director in the Law Division of Morgan Stanley & Co. Incorporated ("Morgan Stanley"). In that capacity, I have personal knowledge of the matters set forth herein.

2. On information and belief, Morgan Stanley produced restored e-mail documents in the above-captioned matter on May 14, 2004.

3. At the end of October 2004, I learned that additional e-mail backup tapes had been located within Morgan Stanley, and that the data on those tapes had not been restored or searched prior to Morgan Stanley's May 14, 2004 e-mail production. Upon learning that information, I directed that the electronic searches described in the April 16, 2004 Agreed Order be conducted for any backup tapes that had been restored and made searchable at that point, and that the process of restoring the remaining backup tapes continue as expeditiously as possible.

UNDER PENALTY OF PERJURY, I HEREBY DECLARE THAT THE FOREGOING IS TRUE AND CORRECT.

James F. Doyle, Esq.

EXHIBIT
H

Coleman (Parent) Holdings, Inc. v. Morgan Stanley Co. Incorporated

February 10, 2005 Privilege Log

Priv No.	Date	Author(s)	Recipient(s)	Priv	Privilege Description	Redact Bates
486	10/27/2004	James Cusick (MS)	Soo-Mi Lee(MS); James Mangan (MS); James Doyle (MS); Zachary Stern (MS); Mary Lou Peters (MS); Ronald Colombo (MS) CC: Vincent LaGreca (MS); David Restaino (MS); Caren Pennington (MS); David Elston (MS); Allison Gorman Nachtigal (MS)	AC	E-mail from one in-house counsel to other in-house counsel reflecting legal advice provided by in-house counsel re existence of additional e-mail backup tapes.	
487	11/16/2004	James Cusick (MS)	Soo-Mi Lee(MS); James Mangan (MS); James Doyle (MS); Zachary Stern (MS); Mary Lou Peters (MS); Ronald Colombo (MS) CC: Vincent LaGreca (MS); David Restaino (MS); Caren Pennington (MS); David Elston (MS); Allison Gorman Nachtigal (MS)	AC	E-mail from one in-house counsel to other in-house counsel reflecting legal advice provided by in-house counsel re existence of additional e-mail backup tapes.	
488	11/29/2004	Allison Gorman Nachtigal (MS)	James Cusick (MS); Zachary Stern (MS); Soo-Mi Lee (MS)	AC	E-mail to in-house counsel seeking legal advice regarding issues with restoration process..	
489	Various Dates	Allison Gorman Nachtigal (MS)	None	AC/WP	Notes containing conversations with in-house counsel where legal advice was provided re e-mail restoration process.	
490	6/7/2004	Arthur Riel (MS)	James Cusick (MS); Soo-Mi Lee (MS)	AC	E-mail to in-house counsel seeking legal advice regarding status of e-mail restoration process..	
491	10/28/2004	Wray Stewart (MS)	Alexander Lenderman (MS); Bruce Buchanan (NDCI); John Parnula (Siemens); Zachary Stern (MS); Robert Saunders (MS); Glenn Seickel (MS)	AC/WP	E-mails to Information Technology professionals containing in-house counsel's thoughts and impressions and legal advice re e-mail restoration process..	
492	11/8/2004	Wray Stewart (MS)	Bruce Buchanan (NDCI); Glenn Seickel (MS)	AC/WP	E-mail to Information Technology professionals containing in-house counsel's thoughts and impressions and legal advice re e-mail restoration process..	
493	Various Dates Beginning 10/25/2004	James Cusick (MS)	None	AC/WP	In-house counsel's handwritten notes containing both advice given to client as well as mental impressions re e-mail restoration process.	

EXHIBIT

I

16div-011733

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

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Thomas A. Clare
To Call Writer Directly:
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tclare@kirkland.com

November 17, 2004

BY FACSIMILE

Michael Brody, Esq.
Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603

Re: ***Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.***

Dear Mike:

I write regarding supplementation of Morgan Stanley's document production.

Morgan Stanley has discovered additional e-mail backup tapes since our e-mail production in May 2004. The data on some of newly discovered tapes has been restored and, to ensure continued compliance with the agreed order, we have re-run the searches described in the order. Some responsive e-mails have been located as a result of this process. We will produce the responsive documents to you as soon as the production is finalized.

Some of the backup tapes are still being restored. To ensure continued compliance with the agreed order, we intend to re-run the searches again when the restoration process is complete and will produce any responsive documents that result.

Sincerely,

Thomas A. Clare /HP

Thomas A. Clare

cc: Joseph Ianno, Esq. (by facsimile)
John Scarola, Esq. (by facsimile)
Mark C. Hansen, Esq. (by facsimile)

EXHIBIT
J

IN THE CIRCUIT Court FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

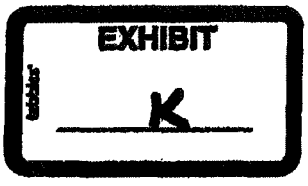
MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME I

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Monday, February 14, 2004
Palm Beach County Courthouse
Courtroom 11-A
205 North Dixie Highway
West Palm Beach, Florida 33401
9:30 a.m. to 12:15 p.m.



we had to look around essentially.

Q. Did you ever find the scripts?

A. We found scripts that we believed to be those scripts. We found scripts that had the right names that appeared to perform the right operations, so we began to test those.

Q. When did you find the scripts?

A. In early November.

Q. You said you began testing them when?

A. Right around there.

Q. Tell us what you did in December and January.

A. So in November we ran initial tests on the scripts and we weren't comfortable with the scripts. It looked like the scripts weren't processing messages properly. So we spent a good bit of December, albeit months somewhat chopped up because of the holidays, testing those scripts and debugging them and essentially came into January, really got our arms wrapped around and put some fixes in the code. And in mid January we began the process of loading the data out of staging.

Q. When you say you were debugging the scripts in November, December, can you just please explain to Your Honor what that means and what that entails?

A. That would be the very end. It was mid, not the first week, not the last week, one of those two in the middle.

Q. Sort of mid October?

A. Sort of mid October.

Q. And it took us until sort of mid January before you were actually ready to start processing that data, right, because you were finding scripts, debugging scripts?

A. Yes.

Q. Quality controlling scripts?

A. Yes.

Q. Roughly the three months you said it takes to develop a program to do all of that, right?

A. No. When I was referring to the program I was referring to the search tool, not the scripts.

Q. Well, the search tool was already in existence, wasn't it? You didn't have any trouble finding that.

A. No, the search tool was in existence, but the search tool had certain issues and those are the scripts that we were writing to compensate for those issues. We were doing those two things in parallel.

Q. When you were told in mid October that this was a priority, that it was a rush, did it move from

let's not even talk about between August and October.

From the point that you were told that it was a priority, you know you could have done it faster if you had gone to an outside vendor and focused just on this subset of data; isn't that right?

A. No.

Q. You don't know that?

A. An outside vendor can't insert data into our system.

Q. I'm not talking about getting it into your firm-wide system.

I agree with you that only you know how to take care of your 15 terabytes of firm-wide data, but you do know there are vendors out there that can take 600 gigabytes of data and process it and search it independent of your system, right?

A. I suspect there are, yes.

Q. Did you do any research to find out whether those vendors were available and could do it faster than you do?

A. I was not asked to, so I did not do that.

Q. When you were told that this was the utmost priority, did it occur to you that, hey, we could do this faster if we went to an outside vendor?

A. The priority I was given was first to insert

the data into the archive and then to later in January run the inquiries for this case. I would say by the time that came up, we could run an inquiry into our system faster than a vendor could have.

Q. By mid January.

I'm asking if somebody had told you in August when you took over for Mr. Rail, it's really important, we have a Court order that says we're supposed to produce everything. We want to do it as quickly as possible. You know you could have done it faster with an outside vendor, don't you?

MR. JONES: I object to the form of the question.

THE COURT: What's the legal objection?

MR. JONES: Because the question was you've got an order that you should have produced everything, it's not been established that this witness really is familiar with this Court order.

THE COURT: Do you want to -- why don't you rephrase it eliminating that?

BY MR. BYMAN:

Q. Let's put aside Court orders. Lawyers very seldom tell you why they're doing anything because they don't know themselves.

IN THE CIRCUIT Court FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME I

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Monday, February 14, 2004

Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

9:30 a.m. to 12:15 p.m.

Q. In the fullness of time?
A. In the fullness of -- yeah, sooner than later, but in some logical order given --
Q. In October it became a priority when counsel told you that it was, right?
A. Yes.
Q. And by the way, I think that there was some reference in your testimony to Morgan Stanley counsel, that October meeting also included Kirkland and Ellis, didn't it?
A. Yes, some of them did.
Q. You understood that they were outside counsel to Morgan Stanley?
A. Yes, sir.
Q. Was there some event in October that moved that data from low priority to higher priority other than counsel contacted you?
A. A series of discussions with counsel --
MR. JONES: Your Honor, I would object to the content of discussions with counsel or attorney-client privilege. Talk about she had a meeting, but I would invoke the privilege as to discussions with counsel.
MR. BYMAN: I don't know that my question asked for that. I wasn't trying to do that.

THE COURT: Why don't we complete the question.

MR. SCAROLA: But do ask.

BY MR. BYMAN:

Q. Let me make sure that my question was clear. I wanted to know if there was some event, other than counsel, in October that moved it from low priority to priority?

A. No, it was prioritized as a result of discussions with counsel.

Q. And what was it that made it a priority, what were you told?

MR. JONES: Objection, Your Honor, attorney-client privilege.

THE COURT: Any response?

MR. BYMAN: Your Honor, it's their burden to try to show why this wasn't --

THE COURT: And I think they're alleging to privilege.

BY MR. BYMAN:

Q. In any event, in October -- by the way, early October, mid October, late October, do you remember the date?

A. Don't remember the date.

Q. Was it before Halloween, after Halloween?

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. VOLUME 2

MORGAN STANLEY & CO., INC.,

Defendant.

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TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

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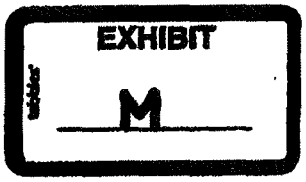
West Palm Beach, Florida
Monday, February 14, 2005
1:30 p.m. - 5:00 p.m.



order to comply with the court's order; is that right?
A. At a certain level of generality, yes. For example, I could not communicate to my client the specific way it would be implemented at Morgan Stanley in its Intellectual Technology Department. I don't possess those technical capabilities or understanding.
Q. What did you tell your client about how thorough a search they needed to conduct?
A. I am concerned, now, Mr. Scarola that your questions will intend to impinge upon attorney-client.
Q. They're intended to.
MR. JONES: We object to these questions as attorney-client.
THE COURT: What's the response to the objection to that question?
MR. SCAROLA: I think that that is a well-taken objection. I just want to find out where they intend to draw the line, Your Honor.
THE COURT: That's fine.
BY MR. SCAROLA:
Q. So you choose not to tell us about instructions given regarding the scope of the search by you to the client, correct?
A. I would regard your question to require me to

disclose privileged communications.

Q. And I agree that it does. And that privilege is being asserted; is that correct?

A. My understanding is Morgan Stanley has asserted that privilege, and I am respecting their instruction.

Q. Now what I would then like to know is what Morgan Stanley communicated back to you about the scope of the search that they conducted when they were initially informed of the obligation that they had to conduct a search. What did they tell you they did?

A. I would give you the same answer.

Q. Okay. So, again -- and I will, for the record, acknowledge that that's an appropriate assertion of attorney-client privilege, and the question is being asked in order to define the scope of the assertion.

Is there any aspect of the communications between you and Morgan Stanley, either from you to Morgan Stanley or from Morgan Stanley to you, and by you I mean Kirkland & Ellis, that you and/or your client are prepared to discuss now that you have taken the witness stand to discuss these matters?

MR. JONES: Your Honor, I object to the form of the question as overly broad,

let me know. If by your question you mean when did I first become aware that there were additional tapes that had not been subject to the prior searches that were done, I became aware of that in November of 2004.

Q. How is it that you first became aware in November 2004?

A. In a privileged conversation.

Q. With whom?

A. With Mr. Jim Doyle in the Morgan Stanley law department.

Q. And having identified it as a privileged conversation, I assume that means when I ask you who said what to whom during the course of that conversation, your response will be privileged; is that correct?

A. That is a conversation that I would consider privileged, yes.

Q. Okay. Do you know when Mr. Doyle first found out?

A. I do not.

Q. When in November of 2004 is it that you had this conversation with Mr. Doyle where you learned that there were unsearched tapes?

A. I don't recall the precise date. I do recall generally the chronology of steps that we took, and so

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IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA
CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

DEPOSITION OF ALLISON GORMAN NACHTIGAL

Taken before Tracey L. Spatara, Registered Professional Reporter, Notary Public in and for the State of Florida at Large, pursuant to Notice of Taking Deposition filed by the Plaintiff in the above cause.

Wednesday, February 9, 2004
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida
3:10 p.m. to 5:30 p.m.

00002

APPEARANCES:

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Attorneys for Defendant

00003

I N D E X

PAGE

EXHIBIT
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Archive Meeting Minutes without putting the attachments for each of the minutes behind it, which are comprised of graphs and things.

Bearing in mind that you may not have seen them in exactly this form, have you seen this type of minutes?

MR. JONES: Can I just ask, are you asking -- we started out by asking had she seen these. Now you're asking has she seen this type.

MR. BYMAN: I guess I'd like both. If she's seen these specific ones, great. Also if she's seen something like them, I'd also like to know that.

THE WITNESS: I have seen one of these.

BY MR. BYMAN:

Q. Which one have you seen?

A. The last one that is September 9th.

Q. And that would have been done when you were in charge of this?

A. Yes.

Q. What about the one on August 13th?

A. No, I don't think so. Looks surprisingly like the other one, but I recognize the format and I only saw one and I'm pretty sure it was this last one.

00062

Q. These particular ones appear to have been faxed on October 21st, 2004. And I'll represent to you that the fax number to which they're addressed is the fax number of a law firm in Washington, D.C. Sidley Austin, Brown and Wood I think it is. I keep forgetting what their new name is.

Do you have any knowledge as to whether or not these were faxed to a law firm?

A. No.

Q. Does the fax header of October 21st, 2004 help you place in time the directions you got from counsel in October to prioritize the migration of these missing tapes?

MR. JONES: Can you just read that back, please?

(A portion of the record was read by the reporter.)

MR. JONES: Object to the form of the question. It's vague and ambiguous.

BY MR. BYMAN:

Q. Do you understand my question?

A. I think I do. No.

Q. At the risk of asking something I have already, let me try to recap.

Until some time in October when counsel told

00063

you to prioritize the migration of these 112 tapes or 1400, whatever the number was, until that time, these were a low priority, is that fair?

MR. JONES: First of all, I object to the form of the question. And I object to the extent that you are trying to elicit attorney-client communications.

That's my objection. And also it's been asked and answered in a different form.

THE WITNESS: Although I lost track of it, could you say it again?

BY MR. BYMAN:
Q. Sure. You told us earlier that some time in October you had a conversation with counsel and moved these -- let me stop.
Let's back up and try to get some shorthand here. We talk about the tapes that you've been processing that are the reason we're here today. We talk about 112 tapes that have been represented to us may contain e-mails that were part of a larger universe of tapes that were reviewed. We've heard various numbers of that. You've used the number 1400. Counsel in a recent hearing said 2200. But whatever that number is, can we call those the found tapes? And I'm going to say that because it's in these e-mails.

A. Okay.
Q. I'll show it to you if you'd like.
A. Sure.
Q. Some time in October of this year I think you've already told us you were told --
MR. JONES: First of all, here's the problem I have with that. She never talked about a conversation with counsel. If you go back in the record, you'll see she had a meeting with counsel and then she further described how she -- what she did with the tapes and the processing after that.
You seem to, I guess you're assuming that counsel told her to prioritize the tapes. And you've used that in several of your questions. I'm not going to comments as to whether that was or wasn't told. That's really the problem I'm having as to how you're phrasing your questions.
I don't know if that's something that could be fixed or not, Bob. If it could be -- because I don't mind her answering the question you asked again about this document if that's ultimately what you're trying to get to.
I don't know if all that was helpful or not.
MR. BYMAN: Let me try to meet that.

BY MR. BYMAN:
Q. Until some time in October, you did not place any priority on migrating the found tapes, is that fair to say? They were in line, but they were pretty far back in line?
A. I would say I didn't prioritize processing the data that was in staging.
Q. From these found tapes?
A. There was more in staging than the found tapes.
Q. I understand. And they were patiently awaiting their turn, but they weren't going to the head of the line?
A. I'm being careful. I didn't know about found tapes. It wasn't -- that was not my focus.
Q. The set of minutes that you did look at, and this is the last page 0112314.
A. I received it. I filed it. I actually didn't read it until later.
Q. But I just want to direct your attention towards the bottom there's a series of numbered pending items, number 4 talks about 1423 DL tapes were found to

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IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA
CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

DEPOSITION OF ROBERT JOHN SAUNDERS

Taken before Tracey L. Spatara, Registered Professional Reporter, Notary Public in and for the State of Florida at Large, pursuant to Notice of Taking Deposition filed by the Plaintiff in the above cause.

Thursday, February 10, 2005
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida
9:00 a.m. to 11:40 a.m.

0002

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MICHAEL D. JONES, ESQ.
Attorneys for Defendant

0003

I N D E X

PAGE

Page 1

EXHIBIT
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A. I don't know if I shared my view of his competence with my superiors.
Q. Do you ever have interface with lawyers in the performance of your duties, other than getting ready for depositions?
A. Would you restate the question?
Q. Well, is any part of your duties over the last couple of years been to supply support or other services to legal counsel?
A. Yes.
Q. And would you describe what that function has been?

MR. KLAPPER: And let me just interject, Counsel.
You're not to reveal anything about the specific services, conversations that you've had with counsel relating to those services, or discussions that you've had with counsel.

With that understanding, you can answer the question.
THE WITNESS: Sure. Since my team is one of the groups responsible for data protection and back ups of documents and information, we have been involved in requests for documents, information, e-mail over the past several years.
I've spoken already about the fact that we have a number of tapes which were off-sited to our vendor, Recall, and that we would -- when requests would come in, ad hoc requests for certain information, we would assist legal and IT security in executing those search requests.

BY MR. BYMAN:
Q. Specifically to this case, first of all, you are aware that this is a lawsuit between Coleman Parent Holdings and Morgan Stanley and Company, Incorporated, are you not?
A. Yes.
Q. Have you ever been asked by anyone to provide support to the legal team for this specific case?
And that's just a yes or no. I'm not trying to find out what you did.
A. Yes.

Q. And now to the extent that you can do it -- and I do not want to invade privileges, but to the extent you can, tell me what task you've been given for this case.

MR. KLAPPER: I'm going to object. Because it's unclear to me that in describing the tasks we can somehow protect the privilege. In terms of description of the tasks, that gets into the mental impression of the attorneys in terms of what they've asked him to do in assisting counsel.
If you want to ask him questions about who he interacted with, when he had meetings with attorneys, et cetera, those atmospherics, I'm all for it. Go forth. But I believe you're invading the privilege if we start getting into the litany of tasks that he may or may not have been asked to do.

MR. BYMAN: Let me see if I can get to at least some specific.

BY MR. BYMAN:

Q. Have you ever been asked to attempt to locate e-mails that might be relevant to this litigation?

MR. KLAPPER: And let me confer with him with respect to whether or not -- and with co-counsel -- with respect to whether or not this is getting into the privilege area.

MR. BYMAN: Sure.

(A discussion was held off the record.)

(A portion of the record was read by the reporter.)

MR. KLAPPER: And I'm just going to go on the record and indicate that it's our position that, feel free to ask him generally about what he has done in terms of searching for e-mails and things of that sort. But if we're going to get into specific questions as to who asked him to perform those functions, we're going to invoke the privilege, and I'm going instruct him not to answer that.

With the exception of any -- I guess the order in place in this particular case for purposes of this deposition required us to identify documents that Mr. Saunders may have had in his possession. And feel free to ask about that pursuant to the order.

But other than that, in terms of specific tasks asked by lawyers, I'm going to invoke the privilege and instruct the witness not to answer.

MR. BYMAN: I'm confused, Tony. Why would the identity of someone who made the request be privileged.

MR. KLAPPER: Because the nature of the question is what are the tasks you've been asked to do. Once you link that up to the attorney, you're getting into the attorneys' mental impressions in terms of what he has decided or not decided to do or asked Mr. Saunders to do.

So I'm not suggesting you have nefarious motives here, but it's a backdoor way of getting at what the attorney is intending to do.

MR. BYMAN: Well, I disagree with your definition of what falls within the privilege. So I'm going to ask the question and ask you to make whatever you -- instructions you need to do.

BY MR. BYMAN:

Q. Has anyone ever asked you to aid in the location and identification of e-mails relevant to this specific litigation?

MR. KLAPPER: And let me just interject.

You can answer that question so long as you don't reveal if it was attorney based or not attorney based.

You may answer.

THE WITNESS: To be specific, are you asking

whether I've looked at my own e-mails, or I've looked at all e-mails that are available to Morgan Stanley?
BY MR. BYMAN:
Q. My question is: Have you been asked to search Morgan Stanley files or aid in a search of Morgan Stanley files for any e-mails that are related to this litigation?
A. Okay. I was specifically asked to check my own e-mail for any information or documents relevant to this proceeding.
Q. And have you or your team provided any support specifically related to this litigation to extract, locate, or identify e-mails for production in this litigation?
A. I guess the strict answer to that question is yes, specifically related to the three tranches of tapes that have been under discussion in the last several weeks and in a hearing to which I was party. I believe it was last Friday or Thursday. It was last Friday, I think.
Q. Let's make sure that we get the definition

0028

of what you mean by the three tranches of tapes. What do you mean?
A. Sure. So outside of what we've talked about in general as the 35,000 Legacy Legato tapes or the universe of tapes prior to 2003, some of which contained e-mail, some of which did not, there were some groups of tapes which have become -- which surfaced in this past year that may or may not have contained additional information.
And I know that in this proceeding that there's been some concern about that information, whether it's discoverable, whether or not it's privileged, and how to make that available to both sides, the plaintiff and the defendant, in order to help move this matter forward.
Q. So the first tranche is the 35,000 tapes?
A. So that makes it four tranches. The 35,000 would be the original set of tapes.
Q. The original set of what Morgan Stanley believed to be the universe of pre-2003 tapes?
A. That's correct.
Q. And then something surfaced that expanded the universe?
A. That's right.
Q. And that's tranche two?

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A. Sure.
Q. And what's the quantity of tranche two tapes?
A. My understanding is that 1423 DLT tapes that were found this past year.
Q. What's tranche three?
A. Tranche three is the 8-millimeter tapes.
Q. And what's the quantity of those tapes?
A. I'm not specifically aware of that number.
Q. Do you have any general estimate?
A. Somewhere -- I think somewhere around 700.
Q. You've told us what the storage capacity was of a DLT tape. What's the storage capacity of an 8-millimeter tape?

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. VOLUME 5

MORGAN STANLEY & CO., INC.,

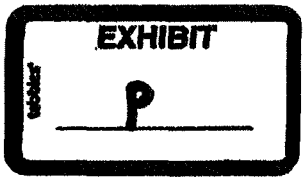
Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Tuesday, February 15, 2005
1:25 p.m. - 5:36 p.m.



holidays, testing those scripts and debugging them and essentially came into January, really got our arms wrapped around and put some fixes in the codes. And in mid January we began the process of loading the data out of staging. That's referring to the Brooklyn tape data that is first loaded, first loaded beginning in mid January."

THE COURT: Okay. You know what, I just want to get my own notes because I don't have them here in front of me. Thanks.

MR. SCAROLA: And we should have our proposed order to Your Honor within just a short time, the last edition.

THE COURT: Okay. I'll be right back. I have them sitting on my desk.

I can tell you all I did come in and review my notes, and I did go through and make my own notes on the summary of findings and facts. And I don't think anything I've been told today would alter what I believed this morning, and let me tell you what they are: That the agreed

order entered April 16th of last year required Morgan Stanley to search the oldest full backup that exists for e-mails of certain -- I'm sorry -- for certain identified employees or former employees; required Morgan Stanley to provide its counsel the responses for responsiveness and privilege review all the e-mails that either were dated between February and April 15th of 1998 and all e-mails containing one of 29 keywords; all nonprivileged e-mails responsive to the request had to be produced by May 14th and a privilege log generated and a certificate of compliance completed. The SEC regulations required Morgan Stanley to maintain e-mails readily access -- in readily accessible form for three years. Morgan Stanley knew Sunbeam litigation was likely as of March of 1998. Despite the affirmative duty on Morgan Stanley's part arising out of the litigation to produce its e-mails and contrary to federal law requiring it to preserve the e-mails, Morgan Stanley failed to preserve some

e-mails and failed to produce all e-mails required by the agreed order. The failings include overwriting e-mails after 12 months; failing to conduct proper searches for tapes that may contain e-mails; providing a certificate of compliance known to be false when made and never amended to reflect its falsity; failing to timely notify CPH when additional tapes were located; failing to use reasonable -- reasonable efforts to search the newly discovered tapes; failing to file timely, process and search data held in the search area or notify CPH of the deficiency; failing to write a program consistent with the agreed order; and discovering the deficiencies only after CPH was given the opportunity to check Morgan Stanley's work and the Morgan Stanley attorneys required to certify the completeness of the prior searches; and that many of these failings were done knowingly, deliberately and in bad faith.

In my concern, this is a case of fraud. And electronic data is the functional

equivalent of a paper trail. And I think Morgan Stanley's actions have had a crucial impact on plaintiff's ability to prove its case, and I think, in all honesty, what are the proper implications of that. If you want to wait until the morning to come up with a proposed order that incorporates what are my findings of fact, that's fine.

MR. SCAROLA: Your Honor, I've obviously heard what Your Honor said and tried to compare it mentally to what we've included in the order that we have already prepared for Your Honor. I think that we have virtually covered everything that Your Honor has described. Obviously not in exactly the same words but very close to the words that you have described.

We can do two things: We can give Your Honor the order that we have prepared and then also provide Your Honor in the morning an alternative order that exactly tracks the language that you have recited.

THE COURT: Why don't you do both, and you guys are welcome to, obviously, share

whatever it is you provide, and you guys are welcome to submit your own proposed order as well. I can tell you I've not decided what I think are the appropriate sanctions.

MR. SCAROLA: What we have done, Your Honor, is to provide in our proposed order alternative sanctions that are simply listed hierarchically and described as alternatives so that Your Honor would simply need to indicate which of the alternatives you wanted to incorporate in the final form. We obviously have the disk and will prepare it as Your Honor directs.

THE COURT: I'll be honest with you, part of it, too, and the reason I was asking these particular questions, and, frankly, I didn't incorporate into my notes this morning because I was waiting to hear the transcript portions today, is that I had affirmative representations that the November production represented the newly discovered Brooklyn tapes. And I think based on the evidence I had

yesterday that's virtually impossible. And, you know, to me that's just symptomatic of the course of conduct by Morgan Stanley. I mean, I understand you guys disagree, but that's my conclusion of fact based on the evidence I heard yesterday.

MR. DAVIDSON: I understand that, Your Honor, but there is a further issue here, and that is -- which disturbs me or which concerns me, let me say that, because I want to be -- although we apparently failed to appreciate the significance of an issue and not knowing going into the hearing that we were going to have to deal precisely with this issue, and, therefore, confessing, apparently, did not other than the testimony that you saw that I pointed out to you from Mr. Clare, did not present evidence yesterday at the hearing, and that may go to the court's order, so the court understands the good faith basis of counsel, though, in taking a position.

Now there is a declaration in the record that counsel is aware of. It's the

Jonas declaration, which was Exhibit 3 to the original brief. Mr. Clare knows about it. I know about it. In which he says that the search that was done in November was done in electronic searches of e-mail data that had been restored and made searchable since May 14th.

We started with that baseline. And I understand that we didn't put testimony on on that, and I understand that, but we did not even think of the fact that there was a question about that. We just didn't. And I'm just addressing the good faith of counsel.

THE COURT: I don't mean to impugn the good faith of counsel. But I have seen a pattern where counsel believes if it acted in good faith, it absolves its client of the consequences of any of the client's bad acts. And, for instance, I have a certificate of compliance signed by Mr. Reil in June that he knew to be false at the time he signed it. And that's an act by Morgan Stanley. It's not an act by counsel. The only thing perhaps we could

visit on counsel is the failure to cause it to be amended once its falsity was apparent. And it's the same thing that, frankly, I was stunned at when Mr. Clare argued to me two weeks ago that you all were still unwilling to admit that that certification was false, where clearly it was.

But, again, sometimes the act of a client come back and visit the client. And I think that's what's happened here.

MR. DAVIDSON: I understand. And not to -- could I extract my --

THE COURT: Yes, you may.

MR. DAVIDSON: Thank you very much.

THE COURT: Where do we want to go now?

MR. SCAROLA: Where do we want to go? Are you taking a survey?

MR. MARKOWSKI: Something other than e-mail and damages, Your Honor. Motion number 20.

THE COURT: And this is plaintiff's motion.

MR. MARKOWSKI: I have a couple documents, Your Honor, that I tabbed that

FAX TRANSMITTAL

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Date: February 21, 2005

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Hon. Elizabeth T. Maass
Palm Beach County Courthouse
Room #11.1208
205 North Dixie Highway
West Palm Beach, FL 33401

Re: Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Matter No.: 029986-230580

Dear Judge Maass:

Enclosed please find a courtesy copy of Plaintiff's Motion to Revalidate Trial Witness Subpoenas. Also enclosed is an original and five copies of a proposed Order. If same meets with your Honor's approval, we ask that your Honor sign same, returning conformed copies to all counsel in the envelopes provided.

Respectfully,

JACK SCAROLA
JS/mep
Enc.

cc: Joseph Ianno, Esq. (via fax)
Thomas Clare, Esq. (via fax)
Mark Hansen, Esq. (via fax)
Jenner and Block LLP (via fax)

#230580/mep

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

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

PLAINTIFF'S MOTION TO REVALIDATE TRIAL WITNESS SUBPOENAS

COMES NOW the Plaintiffs, COLEMAN (PARENT) HOLDINGS INC., by and through their undersigned attorneys, and hereby requests that the trial witness subpoenas that were issued for the trial period beginning February 22, 2005 be revalidated for the trial of the above referenced cause scheduled for the trial docket beginning March 21, 2005.

WHEREFORE, Plaintiffs, COLEMAN (PARENT) HOLDINGS INC., respectfully request the Court to enter an Order revalidating the trial witness subpoenas for trial in the above referenced cause.

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Case No.: 2003 CA 005045 AI
Motion to Revalidate Trial Witness Subpoenas

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Hand Delivery to all counsel on the attached list, this 22nd day of February, 2005.

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Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Case No.: 2003 CA 005045 AI
Motion to Revalidate Trial Witness Subpoenas

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#230580/mep

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

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

ORDER REVALIDATING TRIAL WITNESS SUBPOENAS

THIS CAUSE having come to be heard upon the Plantiffs' Motion to Revalidate Trial Witness Subpoenas and the Court being fully advised in the premises, it is

ORDERED AND ADJUDGED that the witness subpoenas for trial issued by all parties herein for the trial period beginning February 22, 2005, shall be revalidated for the trial period beginning March 21, 2005, and that all persons previously subpoenaed shall appear before this Court on or during the current trial period beginning March 21, 2005, for the trial of this cause, and it is further

ORDERED AND ADJUDGED that a copy of this Order shall be sent certified mail, return receipt requested, to each person previously subpoenaed by the parties requesting revalidation.

DONE AND ORDERED at West Palm Beach, Florida, this _____ day of February, 2005.

_____
ELIZABETH T. MAASS
CIRCUIT COURT JUDGE

Copies furnished to all counsel on the attached list

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Case No.: 2003 CA 005045 AI

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

AMENDED NOTICE OF WITHDRAWAL
OF CERTIFICATION OF ARTHUR RIEL

Morgan Stanley & Co. Incorporated ("Morgan Stanley"), through undersigned counsel, respectfully withdraws the June 23, 2004 Certification of Compliance by Arthur Riel. Morgan Stanley will submit such further declarations and certifications as the Court instructs.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile on this 22nd day of February 2005.

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S MOTION FOR MORE DEFINITE STATEMENT OF PLAINTIFF'S FIRST AMENDED COMPLAINT

Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel and pursuant to Florida Rule of Civil Procedure 1.140(e), hereby requests that the Court enter an order requiring Plaintiff to make a more definite statement of its claims against Morgan Stanley. In support, Morgan Stanley states as follows:

1. Pursuant to the First Amended Complaint, Plaintiff is proceeding only on claims against Morgan Stanley for aiding and abetting a fraud and conspiracy to defraud, but fails to identify the underlying fraud and the allegedly wrongful conduct of Morgan Stanley with particularity. The Florida Rules of Civil Procedure and controlling Florida case law clearly require particularity when alleging causes of action based upon fraud. Fla. R. Civ. P. 1.120(b); *Bankers Mutual Capital Corp. v. United States Fidelity and Guaranty Co.*, 784 So. 2d 485, 490 (Fla. 4th DCA 2001). The rule requiring particularity in pleading fraud also applies to pleading conspiracy to commit fraud. *Ocala Loan Co. v. Smith*, 155 So. 2d 711, 716 (Fla. 1st DCA 1963) (requirements of pleading fraud apply to cause of action for conspiracy). In order for an

allegation arising from fraud to be pled with particularity, it must specifically identify "who made the false statement, the substance of the false statement, the time frame in which it was made and the context in which the statement was made." *Bankers Mutual Capital Corp.*, 784 So. 2d at 490. Morgan Stanley requests that the Court, at a minimum, compel Plaintiff to identify with particularity who at Morgan Stanley committed the wrongful acts, made false statements, or made agreements in conspiracy; the substance of these actions and when and where they were committed or took place. Plaintiff should also state with particularity who at Morgan Stanley acquired actual knowledge of the underlying fraud, the substance of that knowledge, how it was obtained, and when it was acquired.

2. The particularity requirement is especially important in a case like this one where punitive damages have been alleged. Morgan Stanley is entitled to know what individuals at Morgan Stanley are alleged to have committed the allegedly intentional wrongful acts, what those allegedly intentional wrongful acts allegedly were, and when they allegedly happened. *See Schropp v. Crown Eurocars, Inc.*, 654 So. 2d 1158 (Fla. 1995); *Sunrise Olds-Toyota, Inc. v Monroe*, 476 So. 2d 240 (Fla. 5th DCA 1985) (complaint which was vague as to what member or members of corporate employer were grossly negligent and in what capacity they acted for corporation did not make it clear that employer as opposed to some mere employee was at fault, and thus failed to state a cause of action for punitive damages). As set forth below, Plaintiff's First Amended Complaint avers generally regarding many key allegations against Morgan Stanley but utterly fails to support their allegations with the required particularity.

3. In regard to the First Amended Complaint ¶¶ 1, 3, 34, 35, 39, 55, 58, 61, 63, 79, 80, 86, 87, and 91, Plaintiff continually refers to the fact that Morgan Stanley "misrepresented Sunbeam's financial condition," made "material misrepresentations," and also attributes other

allegedly false statements to Morgan Stanley without identifying with particularity the statements that were allegedly false, who at Morgan Stanley specifically made the statements, and when the statements were made. Plaintiff should be required to identify each alleged misrepresentation or omission attributed to Morgan Stanley with particularity and not simply rely on generic allegations of "material misrepresentations" or "false financial and business information." Plainly, Plaintiff seeks to benefit from attempting to mix allegations regarding misrepresentations by Dunlap and other non-parties with alleged conduct by Morgan Stanley. However, the particularity requirement of the Rules of Civil Procedure is intended to guard against that type of result.

4. Even when a particular misrepresentation is supposedly alleged, Plaintiff fails to identify the speaker with particularity. *See e.g.*, First Amended Complaint ¶ 39 ("Morgan Stanley and Sunbeam also falsely assured CPH . . ."); ¶ 79 ("Morgan Stanley provided CPH with false information concerning . . ."). Plaintiff should be required to identify the speaker from Morgan Stanley, the context of the statement, and the time of the statement with particularity before relying on it to allege a cause of action based upon fraud, even when alleging a conspiracy to defraud.

5. In regard to the First Amended Complaint ¶¶ 1, 3, 4, 59, 79, 86, 87, 91, Plaintiff's pleading is rife with generic allegations of Morgan Stanley "assisted," "actively participat[ed]," "helped," and provided "assistance" to Sunbeam or Dunlap. These allegations are improperly generic when describing the actual conduct attributed to Morgan Stanley. Plaintiff fails to identify specific actors within Morgan Stanley who allegedly took these actions. Plaintiff also mixes conduct attributable to non-parties like Dunlap or Sunbeam with Morgan Stanley's alleged misconduct. *See e.g*, First Amended Complaint ¶ 2 ("fraudulently-inflated stock.") Plaintiff

should be required to make a definite statement of the actions by Morgan Stanley that it alleges to have been part of a purported conspiracy or that aided or abetted Sunbeam's fraud. Plaintiff's purported attempts to do so in paragraphs 87 and 91 of their pleading fall woefully short as they fail to particularly allege the actual conduct attributable to Morgan Stanley, the actual "false information" conveyed, and the specific actors involved.

6. Although Plaintiff has represented that it is not going forward with its claim against Morgan Stanley for common law fraud and negligent misrepresentation, it is quite apparent that the remaining allegations in Plaintiff's First Amended Complaint still allege that Morgan Stanley committed fraudulent actions on its own. These allegations create additional ambiguity in Plaintiff's pleading. To the extent that Plaintiff's pleading purports to allege direct fraud on the part of Morgan Stanley, those allegations should be deleted in a more definite statement of Plaintiff's claims because Plaintiff has recently agreed that it is not pleading a cause of action for direct fraud against Morgan Stanley. *See E.I. Du pont De Nemours and Co. v. Desarrollo Industrial Bioacuatico*, 857 So. 2d 925, 930-31 (Fla. 4th DCA 2003) (reversing final judgment because cause of action was not pled and was not tried by implied consent.) Certainly, allegations of direct fraud against Morgan Stanley, especially those that lack particularity, simply add ambiguity and confusion to Plaintiff's pleading.

7. Where Plaintiff alleges that Morgan Stanley had knowledge of Dunlap and Kersh's fraudulent actions or the falsity of certain statements, representations, information, or documents, Plaintiff should be required to state with particularity who at Morgan Stanley obtained that knowledge, how they obtained it, and when.

WHEREFORE, Morgan Stanley requests that this Court enter an order requiring Plaintiff to file an amended complaint that more definitely identifies the nature of the claims against Morgan Stanley including the specific identification of the fraudulent statements or conduct attributed to Morgan Stanley that Plaintiff intends to submit to the jury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and hand delivery on this 22nd day of February, 2005.

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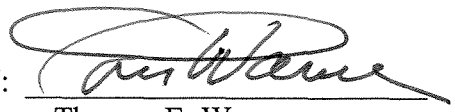
BY: 
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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), moves to dismiss the First Amended Complaint filed by the Plaintiff Coleman (Parent) Holdings Inc. for failure to state a cause of action as to "Aiding and Abetting"; for failure to plead fraud, aiding and abetting, and conspiracy with the particularity required by Rule 1.120(b); and failure to state a cause of action for corporate liability for fraud and punitive damages. As grounds therefore, Morgan Stanley states as follows (all cited cases are attached):

No Cause of Action for Aiding and Abetting Exists Under Florida Law

1. Aiding and Abetting, as pled by Plaintiff in the First Amended Complaint and as defined in the *Restatement (Second) of Torts II*, section 876, does not exist as a civil tort under the common law of Florida. Since neither this court nor the District Court of Appeal has the authority to create or recognize a new cause of action in the common law, Plaintiff cannot pursue this claim. *Hoffman .v Jones*, 280 So. 2d 431 (Fla. 1973); *Conley v. Boyle Drug Co.*, 477 So. 2d 600 (Fla. 4th DCA 1985).

The only authoritative Florida case even remotely on point is *Ft. Myers Development Corporation .v J.W. McWilliams Co.*, 122 So. 264 (Fla. 1929), a case involving the liability of a corporate promoter for breaches of fiduciary duty and fraud. In *Ft. Myers*, the Florida Supreme Court extended the liability of promoters of inchoate corporations for breach of trust and secret profits "to a third person, who is averred to have **conspired** with one of two parties, between whom fiduciary relations exist, to the injury of the other." *Id.* at 269 (emphasis added). Although the court at times referred to the third person as a conspirator **and** as an aider and abettor in the breach of trust and fraud of the promoter, it is clear that the holding of the court is based on the predicate of a conspiracy or secret agreement between the promoter and the third person to breach a fiduciary duty owed by the promoter and carry out the fraudulent scheme. *Id.* at 267-269. In the 76 years following *Ft. Myers*, the Florida Supreme Court has not adopted or recognized "aiding and abetting fraud" as a common law tort: no such tort exists in Florida in the absence of a conspiracy.

It would be reversible error to allow Plaintiff to pursue this unrecognized common law tort and present this claim to the jury. *Conley v. Boyle Drug Co.*, 477 So. 2d 600 (Fla. 4th DCA 1985).

Fraud, Including Fraud as an Element of Conspiracy and Aiding and Abetting, Must Be Plead With Particularity

2. While the First Amended Complaint drops Counts I and IV of the original Complaint, all of the paragraphs of Count I alleging the direct fraud of Morgan Stanley remain. Thus, there are two distinct frauds alleged in the First Amended Complaint and Plaintiff fails to specify which of the two form the basis of the underlying tort for the Aiding and Abetting claim and the Conspiracy claim;

3. As to the Conspiracy claim, Plaintiff fails to state with particularity:

A. what was the underlying fraud;

B. who at Morgan Stanley conspired with Dunlap and when;

C. what the agreement and common objective consisted of;

D. who at Morgan Stanley had actual knowledge of the underlying fraud; what that actual knowledge consisted of; and when and where that person in Morgan Stanley acquired that actual knowledge; and

E. who at Morgan Stanley provided the substantial assistance and when it was provided.

The requirements of Rule 1.120(b), pleading fraud with particularity, apply to averments charging conspiracy. *Ocala Loan Co. v. Smith*, 155 So. 2d 711 (Fla. 1st DCA 1963); *General Dynamics Corp. v. Hewitt*, 225 So. 2d 561 (Fla. 2d DCA 1969). Furthermore, because an underlying fraud is an element of conspiracy, a party alleging conspiracy must allege all of the elements of fraud. *Cf. Buckner v. Lower Florida Keys Hosp. Dist.*, 403 So. 2d 1025, 1027 (Fla. 3d DCA 1981) (holding that complaint for conspiracy to defame failed to state cause of action because it did not allege publication, an element of defamation). In order for a claim of fraud to withstand a motion to dismiss, it must allege fraud with the requisite particularity required by Fla. R. Civ. P. 1.120(b), including **who** made the false statement, the **substance of the false statement**, the **time frame** in which it was made and the context in which the statement was made. *Bankers Mutual Capital Corp. v. United States Fidelity and Guaranty Co.*, 784 So. 2d 485, 490 (Fla. 4th DCA 2001); Robertson *v. PHF Life Insurance Co.*, 702 So. 2d 555 (Fla. 1st DCA 1997) (Appellants' complaint fails to specifically identify misrepresentations or omissions of fact, the time, place or manner in which they were made, and how the representations were false or misleading.).

The particularity Morgan Stanley seeks has now become especially critical, given Plaintiff's election to proceed to trial solely on the theory of what it calls the "big" fraud. Plaintiff has made that significant election, yet turned around and filed, in essence, an amended complaint identical to the one it was previously proceeding under. All the allegations against Morgan Stanley remain the same. The old Complaint fails to allege with particularity Morgan Stanley's **connection** to the "big" fraud. In addition, as a matter of necessary pleading – and fairness – Morgan Stanley is entitled to a straightforward particularized statement of what Plaintiff contends established such a connection: what knowledge and what acts of what people, and when and how that knowledge was supposedly obtained and the acts allegedly committed. If Plaintiff intends to claim at trial knowledge or acts not yet particularized in the First Amended Compliant, Morgan Stanley is entitled to know what it is.

4. Likewise, as to the Aiding and Abetting claim, Plaintiff fails to state with particularity who at Morgan Stanley had actual knowledge of the underlying fraud; what that actual knowledge consisted of; and when and where that person in Morgan Stanley acquired that actual knowledge. Further, Plaintiff fails to state with particularity who at Morgan Stanley provided the substantial assistance and when it was provided. These elements must be pled with particularity. *See generally, Ocala Loan Co., General Dynamic Corp., Bankers Mutual Capital Corp., and Robertson .v PHF Life Ins. Co., supra.*

Corporate Liability and Punitive Damages Must be Plead with Particularity

5. Plaintiff has failed to plead a cause of action for corporate liability against Morgan Stanley because there are no allegations as to what officer or managing agent conspired with Dunlap; what the agreement and common objective consisted of; what officer or managing agent at had actual knowledge of the underlying fraud; when and where officer or managing

agent acquired that actual knowledge; what that actual knowledge consisted of; what officer or managing agent provided the substantial assistance and when it was provided; *Sunrise Olds-Toyota, Inc. v Monroe*, 476 So. 2d 240, 241 (Fla. 5th DCA 1985) (Any intentional conduct attributed to a corporation must be committed by an officer, agent or employee of the corporation.).

6. Plaintiff has failed to plead a cause of action for punitive damages against Morgan Stanley, as a corporate entity, because there are no allegations as to what officer, managing agent, or employee committed the alleged intentional wrongful acts. *See Schropp v. Crown Eurocars, Inc.*, 654 So. 2d 1158 (Fla. 1995); *Sunrise Olds-Toyota, Inc. v. Monroe*, 476 So. 2d 240 (Fla. 5th DCA 1985) (complaint which was vague as to what member or members of corporate employer were grossly negligent and in what capacity they acted for corporation did not make it clear that employer as opposed to some mere employee was at fault, and thus failed to state a cause of action for punitive damages).

WHEREFORE, Morgan Stanley requests that this Court enter an order granting this Motion and dismissing Plaintiff's First Amended Complaint.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 22nd day of February, 2005.

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

MORGAN STANLEY'S MOTION TO STRIKE CERTAIN PARAGRAPHS OF PLAINTIFF'S FIRST AMENDED COMPLAINT PURSUANT TO RULE 1.140(f)

Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), hereby requests that this Court enter an Order pursuant to Fla. R. Civ. P. 1.140(f) striking certain paragraphs from Coleman (Parent) Holdings Inc.'s ("CPH") First Amended Complaint. Given CPH's decision to abandon its core claims of fraud and negligent misrepresentation in favor of the derivative claims of conspiracy and aiding and abetting — and given the Court's rulings on various motions in limine — certain portions of CPH's complaint are now "redundant, immaterial, impertinent, or scandalous." Fla. R. Civ. P. 1.140(f). Accordingly, Morgan Stanley moves to strike the following material from CPH's complaint:

- Paragraph 3: "Although Morgan Stanley and Sunbeam previously had advised CPH that Sunbeam's sales were running ahead of analysts' expectations for the first quarter, Morgan Stanley decided not to correct those material misrepresentations."
- Paragraph 5: "Using Morgan Stanley's own valuation of Coleman, CPH has lost at least $485 million." Additionally, Morgan Stanley moves to strike the words "in excess of $1.5 billion."

- Paragraph 11: Morgan Stanley moves to strike this paragraph in its entirety.

- Paragraph 12: Morgan Stanley moves to strike this paragraph in its entirety.

- Paragraph 20: "Instead, Dunlap created the illusion of a dramatic turnaround at Sunbeam by engaging in what SEC officials subsequently described as a 'case study' in financial fraud."

- Paragraph 28: "To accomplish that third and final step, Dunlap needed an investment banking firm to serve as his shill. Morgan Stanley was pleased to play that role."

- Paragraph 32: Morgan Stanley moves to strike this paragraph in its entirety.

- Paragraph 43: Morgan Stanley moves to strike this paragraph in its entirety.

- Paragraph 46: "Consistent with Morgan Stanley's valuation, investors viewed Sunbeam's purchase of Coleman — and the price that Sunbeam had paid — very favorably."

- Paragraph 55: "... and the investing public, including investors in Florida, ..."

- Paragraph 58: "... investors, and Wall Street analysts ..." and "... and other investors ...."

- Paragraph 61: "... held out the false possibility that Sunbeam still could achieve sales of $285 million to $295 million and ...."

- Paragraph 62: "Based on information that Morgan Stanley had in its hands on March 18, 1998, it was obvious that Sunbeam would not achieve sales of $285 million to $295 million and that Sunbeam's first quarter 1998 sales would be below its first quarter 1997 numbers."

- Paragraph 63: Morgan Stanley moves to strike this paragraph in its entirety.

- Paragraph 66: "Morgan Stanley also knew that Sunbeam would promptly replace Morgan Stanley with another investment banking firm — such as the Chase Securities team led by Mark Davis. Everything, therefore, depended on closing the Coleman acquisition before CPH learned the truth."

- Paragraph 67: Morgan Stanley moves to strike this paragraph in its entirety.

- Paragraph 71: "Although Sunbeam's first quarter earnings were material, that information was not disclosed to CPH or the public until after the closing of the Coleman transaction on March 30, 1998."

- Paragraph 72: "Having directly participated in misleading CPH and other investors, Morgan Stanley had a duty to disclose the true facts before the closing of the

debenture offering and the Coleman acquisition. Morgan Stanley also could have required Sunbeam to postpone the closings of those transactions until the necessary disclosures were made. Morgan Stanley did neither."

- Paragraph 73: "Morgan Stanley was richly rewarded for facilitating Sunbeam's fraud."

- Paragraph 75: "Sunbeam obscured the true shortfall by extending its quarter from March 29 to March 31, 1998 — thereby adding two more days of Sunbeam sales. Sunbeam also failed to disclose that it had included two days of Coleman sales after the Coleman transaction closed on March 30. Further, Sunbeam inflated first quarter 1998 sales with $29 million of new phony 'bill and hold' sales."

- Paragraph 87: "... (c) arranging road shows and meetings with prospective debenture purchasers at which Morgan Stanley, Dunlap, and others made false statements concerning Sunbeam's financial condition and business operations; (d) preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam's financial condition and business operations ...."

- Paragraph 91: : "... (c) arranging road shows and meetings with prospective debenture purchasers at which Morgan Stanley, Dunlap, and others made false statements concerning Sunbeam's financial condition and business operations; (d) preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam's financial condition and business operations ...."

WHEREFORE, Morgan Stanley requests that this Court enter an Order striking the foregoing portions of CPH's First Amended Complaint.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 22nd day of February, 2005.

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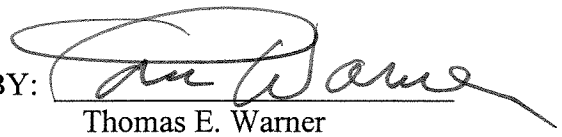
BY: 
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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

NOTICE OF FILING PLEADING UNDER SEAL

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed its Motion for Sanctions and Additional Discovery Concerning Plaintiff's Improper Concealment of the Value of the Sunbeam Warrants under seal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and hand delivered on this 22nd day of February, 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a hearing has been set in the above-styled case as follows:

DATE:	February 23, 2005
TIME:	9:30 a.m.
PLACE:	Palm Beach County Courthouse, Courtroom 11A 205 North Dixie Highway West Palm Beach, Florida 33401
BEFORE:	Judge Elizabeth T. Maass
CONCERNING:	Morgan Stanley's Motion for Sanctions and Additional Discovery Concerning Plaintiff's Improper Concealment of the Value of the Sunbeam Warrants.

KINDLY GOVERN YOURSELVES ACCORDINGLY.

The undersigned counsel hereby certifies that a good faith attempt to resolve the issues contained in the foregoing motions or matters will be made with opposing counsel prior to hearing on these matters on the Court's Motion Calendar.

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no costs to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-2431 within two (2) working days of your receipt of this notice; if you are hearing or voice impaired, call 1-800-955-8771.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand-delivery on this 22nd day of February, 2005.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER AND DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court, in Chambers, on its own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Clerk is directed to docket and file Thomas Clare's facsimile transmission dated February 12, 2005.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 22 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.

CASE NO: 2003 CA 005045 AI

/

PLAINTIFF'S MEMORANDUM OF LAW ON VOIR DIRE AND CHALLENGES FOR CAUSE

Plaintiffs, by and through undersigned attorneys, respectfully submit the following:

The fair and impartial jury, as guaranteed by the Sixth Amendment of the United States Constitution and Section 11 of the Florida Constitution, is crucial to the administration of justice under our legal system. *Singer v. State*, 109 So. 2d 7 (Fla. 1959). The fundamental necessity of a fair and impartial jury was heralded by early court decisions as the judges initiated an effort to secure and safeguard the integrity of the jury trial. Jurors should, if possible, be not only impartial, but beyond even the suspicion of partiality. *O'Connor v. State*, 9 Fla. 215, 222 (Fla. 1869). If there is a doubt as to the juror's sense of fairness or his mental integrity, he should be excused. *Johnson v. Reynolds*, 121 So. 793, 796 (Fla. 1929).

Scope of Voir Dire

In order to adequately assess whether a prospective juror can be impartial, it is crucial that the scope of voir dire not be unnecessarily limited. In *Lavado v. State*, 469 So. 2d 917 (Fla. 3rd DCA 1985), the District Court ruled that the trial court's refusal to permit prospective jurors

to be questioned on voir dire as to their ability to entertain a defense of voluntary intoxication was not an abuse of discretion where the trial court gave appropriate instructions on voluntary intoxication and there was no showing that the jury, having been sworn to follow those instructions, failed to do so. In a vigorous dissent, Judge Pearson asserted that the District Court's ruling was:

> as wrong as it would have been had it approved a ruling which denied counsel the right to question prospective jurors altogether. If he knew nothing else about the prospective jurors, the single thing that defense counsel needed to know was whether the prospective jurors could fairly and impartially consider the defense of voluntary intoxication. Despite this, the majority approves a ruling which precluded counsel from asking the prospective jurors about their bias or prejudice against this defense. *Lavado*, 469 So. 2d at 919.

The Florida Supreme Court agreed with Judge Pearson and reversed the District Court with the observation that "we can add nothing to Judge Pearson's comprehensive, articulate and logical dissenting opinion, and therefore, adopt it in its entirety as our majority opinion. *See Lavado v. State*, 492 So. 2d 1322, 1323 (Fla. 1986). With this commendation, Judge Pearson's thorough and progressive analysis of the "meaningful voir dire" warrants close scrutiny. Judge Pearson relied on the United States Supreme Court ruling in *Rosales-Lozez v. United States*, 451 U.S. 182, 101 S.Ct 1629, 68 L.Ed. 2d 22 (1981) to assert that a "meaningful voir dire" is critical to effectuating an accused's constitutionally guaranteed right to a fair and impartial jury. What is a meaningful voir dire which will satisfy the constitutional imperative of a fair and impartial jury depends on the issues in the case to be tried. The scope of voir dire, therefore, "should be so varied and elaborated as the circumstances surrounding the juror under examination in relation to

the case on trial would seem to require.... Thus, where a juror's attitude about a particular legal doctrine (in the words of the trial court, "the law") is essential to a determination of whether challenges for cause or peremptory challenges are to be made, it is well settled that the scope of voir dire properly includes questions about and references to that legal doctrine even if stated in the form of hypothetical questions." *Lavado*, 469 So. 2d at 919, 920.

With this language, *Lavado* functions as a dependable doorstop for the door that was opened by the Florida Supreme Court in *Purdy v. Gulf Breeze Enterprises, Inc.*, 403 So. 2d 1325 (Fla. 1981). With *Purdy*, Florida courts took on a progressive stance in permitting an open inquiry of the jurors on voir dire about exposure to and impressions regarding the so-called "litigation crisis." Previously, the purposes of voir dire were to learn of juror biases, predispositions, and background. Today, those purposes have been aggravated by sensationalist perceptions of a general "litigation crisis." The contemporary trial attorney faces a more critical function in the course of his voir dire questioning: to discover whether a potential juror is open to fair considerations of the litigant's claims or whether the juror's attitude is prepared to undermine the efficacy of the entire system and stymie the litigant's bid for a fair trial. The Supreme Court ruled in *Purdy* that the plaintiff's interest in receiving a fair trial by an impartial jury is no longer counter balanced by the defendant's interest in not having the subject of insurance mentioned to the jury. The *Purdy* Court asserted "since there is no longer any reason for not mentioning insurance in front of jurors, an attorney may question prospective jurors about any possible prejudice or bias they may have whether it be for or against insurance companies."

Purdy, 403 So. 2d at 1331. Other jurisdictions have also concluded that questions concerning the "insurance crisis" or "lawsuit crisis" should be permitted. *See Sutherlin v. Fenega*, 810 P.2d 353 (N.W. Ct. App. 1991); *See also, Babcock v. Northwest Memorial Hospital*, 767 S.W.2d 705 (Tex. 1989).

In *Jaffe v. Applebaum*, 830 So. 2d 136, 137 (Fla. 4th DCA 2002), the defendant's attorney was allowed to question the potential jury members on whether they had any opinions about people who underwent elective cosmetic surgery and suffered complications as a result. *Id.* As a result, a prospective juror stated that he owed his life to both a plastic surgeon and a surgeon, which would hold some weight in his decision on the case. *Id.*

Additionally, hypothetical questions that correctly state the applicable law are proper. *See Pait v. State*, 112 So. 2d 380 (Fla. 1959); *Lavado v. State*, 469 So. 2d at 920. However, hypotheticals that incorporate evidence to be introduced at trial and ask jurors how they would rule on that evidence is improper. *See Tampa Electric Co. v. Bazemore*. 96 So. 297 (Fla. 1923). It is also improper to ask hypothetical questions regarding the type of verdict the jury would render under a given set of circumstances. *See Smith v. State*, 253 So. 2d 465 (Fla. 2d DCA 1971).

Challenges For Cause

A juror's ability to be fair and impartial should be unequivocally and affirmatively asserted in the record. The implication is that unless the juror's impartiality has been forthrightly asserted in the case, he should be excused by the court. *See Robinson v. State*, 506 So. 2d 1070

(Fla. 5th DCA 1987)(citing *Auriemme v. State*, 501 So. 2d 41 (Fla. 5th DCA 1986).[1] This requirement offers a lifeline to ensure the viability of an impartial jury. Fla. R. Civ. P. 1.431(C)(1) provides that upon motion of any party, the court will examine a prospective juror under oath to determine any bias or prejudice as well as any relationship to the parties, attorneys or similar claimants. The juror's "voir dire" responses are the fundamental source for grounds of impartiality. The testimony or opinion derived from the potential juror's own conscience is relevant, competent and primary evidence on the issue of impartiality. 33 Fla. Jur. 2d *Juries* § 68. Note, however, that any other competent evidence may be introduced to support a challenge for cause. Fla. R. Civ. P. 1.431(C)(1). The question of whether to grant a challenge for cause is a matter for the court's discretion, and the court's discretion will not be disturbed absent a showing of manifest error. *Singer, supra.* As a standard for the court's exercise of discretion, the test used to determine jury competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given by the court. *Lusk v. State*, 446 So. 2d 1038, 1041 (Fla. 1984); *Franco v. State*, 777 So. 2d 1138, 1139 (Fla. 4th DCA 2001).

If there is any reasonable doubt about the juror's ability to be impartial, the juror should be excused. *Franco*, 777 So. 2d at 1139. Where the prospective juror vacillates between assertions of partiality and impartiality, a reasonable doubt has been created which would require that the juror be excused. *Plair v. State*, 453 So. 2d 917 (Fla. 1st DCA 1984); *Graham v. State*,

[1] *Auriemme* has been receded from on other grounds, but is still good law with regard to the proposition for which it is cited.

470 So. 2d 97 (Fla. 1st DCA 1985). Furthermore, where a juror initially demonstrates a predilection in a case which in the juror's mind would prevent him or her from impartially reaching a verdict, a subsequent change in that opinion, arrived at after further questioning by the parties' attorneys or the judge, is properly viewed with some skepticism. The fact that the trial judge extracts a commitment from a prospective juror that he "will try to be fair" or even will be fair does not eliminate the prejudice or the grounds for the challenge. *Leon v. State,* 396 So. 2d 203 (Fla. 3d DCA 1981); *Sikes v. Seaboard Coast Line R. Co.*, 487 So. 2d 1118 (Fla. 1st DCA 1986); *Robinson v. State*, 506 So. 2d 1070 (Fla. 5th DCA 1987). Subsequent statements by a juror that they can be fair in making their decision may not control the decision to excuse the juror for cause when the juror previously expressed genuine reservations as to their preconceived opinions. *Bryant v. State*, 765 So. 2d 68 (Fla. 4th DCA 2000).

Because impartiality of the finders of fact is an absolute prerequisite to our system of justice, Florida Courts have adhered to the proposition that close cases involving challenges to the impartiality of a prospective juror should be resolved in favor of excusing the juror rather than leaving a doubt as to the juror's impartiality. *Sydleman v. Benson*, 463 So. 2d 533 (Fla. 4th DCA 1985) *Williams vs. State*, 638 So. 2d 976, 978 (Fla. 4th DCA 1994)(citing *Montozzi vs. State*, 633 So. 2d 563 (Fla. 4th DCA 1994)). The reason that close calls should be resolved in excusing the juror stems from the many problems associated with rehabilitation. These problems were aptly summarized by the Florida Supreme Court in *Johnson v. Reynolds*, 121 So. 793 when the court stated: "It is difficult, if not impossible, to understand the reasoning which leads to the

conclusion that a person stands free of bias or prejudice who having voluntarily and emphatically asserted its existence in his mind, in the next moment under skillful questioning, declares his freedom from its influence." This sentiment has been reiterated in more recent decisions. *See Fazzolari v. City of West Palm Beach,* 608 So. 2d 927, 929 (Fla. 4th DCA 1992), *rev. denied,* 620 So. 2d 760 (Fla. 1993)[2](in which the court stated that a juror's "subsequent change in their answers, arrived at after further questioning by appellee's counsel, must be reviewed with some skepticism; the assurance of a prospective juror that the juror can decide the case on the facts and the law is not determinative on the issue of a challenge for cause"), and *Goldenberg v. Regional Import & Export Trucking Co., Inc.,* 674 So. 2d 761, 764 (Fla. 4th DCA 1996)(in which the court stated that efforts "at rehabilitating a prospective juror should always be considered in light of what the juror has freely said before the salvage efforts began."); *See also Straw v. Associated Doctors Health and Life,* 728 So. 2d 354 (Fla. 5th DCA 1999).

The problems associated with rehabilitation are compounded when a prospective juror is questioned by the court. Indeed, "a juror who is being asked leading questions [by the Court] is more likely to 'please' the judge and give the rather obvious answers indicated by the leading questions...." *See Price v. State,* 538 So. 2d 486, 489 (Fla. 3rd DCA 1983); *Hagerman v. State,* 613 So. 2d 552 (Fla. 4th DCA 1993). Thus, the juror's responses to questioning by the court must be evaluated in light of this reality. Certainly, "[it is difficult for any person to admit that he is incapable of being able to judge fairly and impartially." *Singer v. State,* 901 So. 2d at 24.

[2] This case was disapproved of on other grounds by *Auto Owners Ins. Co. v. Tompkins,* 651 So. 2d 89 (Fla. 1995). It remains good law for the proposition cited.

As noted above, it becomes even more difficult for a juror to admit impartiality when the Court conducts the questioning.

Over the years, a number of Florida decisions have examined and illustrated the fundamental principles outlined above. The case of *Sikes v. Seaboard Coast Line R. Co.*, 487 So. 2d 1118 (Fla. 1st DCA 1986), provided the court an opportunity to reexamine the merits of using the challenge for cause to preserve the mental integrity of the jury. In *Sikes*, a defense attorney (who played a marginal role in the actual trial) was close family friends with a prospective juror who admitted that she did not think she would be fair and that she probably might give more weight to the defense by virtue of her acquaintance. In response to the trial judge, she promised she would try to be fair. On review, the *Sikes* court held it was "manifest" error to deny the challenge for cause.

Similarly, in *Johnsonv. Reynolds*, 121 So. 2d 793 (Fla. 1929), it was held error not to strike a juror who was friends with plaintiff's attorney. The juror initially said he would be embarrassed not to side with his friend on the plaintiff's side, but later said he could be fair. The *Johnson* court ruled that the switch in answers alone showed the juror should have been excused. The *Sikes* opinion reiterates *Johnson* and chronicles the revitalization of safeguards for the impartial jury, emphasizing the significance of the reasonable doubt standard in the *Singer* rule and questioning the entire propriety of rehabilitating the partial juror.

In the criminal case of *Williams v. State*, 638 So. 2d 976, 977 (Fla. 4th DCA 1994), a juror responded to questioning that he "would like to think [he] could be impartial, but [he] also

would like [the defendant] to know that in this situation [he has] deep feeling in this kind of case..." The juror went on to state, upon questioning by the trial judge, that he hoped he could be fair. *Id.* On appeal, the defendant asserted error when this juror was not dismissed for cause after being timely challenged. In reversing, the District Court found the trial court's questioning of the juror was insufficient to overcome doubts as to his impartiality. The Fourth District noted this juror "never expressed ***unequivocally*** that he could be fair or impartial in this case. He stated only that he hoped he could." *Id* at 978.

In *Overton v. State*, 801 So. 2d 877 (Fla. 2001), the Florida Supreme Court dealt with a situation in which a juror expressed a belief contrary to the law, but testified that he could and would put aside that contrary belief and follow the law if the judge so instructed. The court found that the trial court erred in denying the defendant's challenge for cause. The juror, Russell, was being questioned as to his thoughts on the presumption of innocence and a defendant's right to remain silent during trial. Russell responded, "I understand what Judge Jones said, but I kind of believe like, I'd want to get up there if I was innocent, you know, and say what I had to say to explain myself." Shortly thereafter he added:

> I always think if a person's innocent they should get up on that stand and speak for themselves. That's the way I believe. But also, I understand what the Judge said, too. It's like confusing to me...but in all honesty, that's what I really believe. I believe a person should get up there and say, I didn't do this.

A lengthy exchange took place during which Russell stated he could follow the law but also continued to express his belief that an innocent person would take the stand. The *Overton* Court began its analysis with the premise that the presumption of innocence is defeated if, "a juror is

taken upon a trial whose mind is in such condition that the accused must produce evidence of his innocence to avoid a conviction." The Court noted that Mr. Russell admitted during voir dire that he has "always believed" that "when someone doesn't take the stand ... they've got something to hide." He reiterated this same sentiment on more than one occasion. He also stated, however, that he could "shut that out" and that he was able to "follow [the court's] instructions." The obvious question for the Court was whether Russell's assurances that he would be able to follow instructions sufficiently negate his prior stated beliefs that it was his "honest opinion" that a defendant who does not testify must have something to hide. The Court quoted *Johnson v. Reynolds*, 121 So. 793, 796 (Fla. 1929) for the proposition, "It is difficult, if not impossible, to understand the reasoning which leads to the conclusion that a person stands free of bias or prejudice who having voluntarily and emphatically asserted its existence in his mind, in the next moment under skillful questioning declares his freedom from its influence. By what sort of principle is it to be determined that the latter statement of the man is better and more worthy of belief than the former?"

Based on the totality of Russell's responses, the *Overton* Court concluded that Russell's assurance that he would be able to follow the law did not sufficiently negate his prior abiding adherence to the notion that he had "always believed" that defendants should testify if they have nothing to hide. After thorough consideration and analysis of the totality of Mr. Russell's voir dire statements with respect to the presumption of innocence and a defendant's right to not

testify at trial, the Court concluded that his response sufficiently placed in doubt his ability to be an impartial juror, notwithstanding the tortured attempt at rehabilitation.

In *Franqui v. State of Florida*, 804 So. 2d 1185 (Fla. 2001), the Florida Supreme Court made it clear that a trial court should excuse a juror for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind. The court stated:

> "The test for determining juror competency is "whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the Court." ... Under this test, a trial court should excuse a juror for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind." If there is basis for any reasonable doubt as to any jurors possessing that state of mind which will enable him to render an impartial verdict, based solely on the evidence submitted and the law announced at the trial, he should be excused for cause on motion of a party, or by the court on its own motion. (Citations omitted)

The *Franqui* court upheld the dismissal for cause of juror, Pereira. Pereira initially expressed doubts about her support of the death penalty, but thought it was necessary given the current state of affairs. When asked by the court if she could recommend death if the aggravating circumstances outweighed the mitigating circumstances, Pereira responded, "I think yes." Later Pereira clarified her previous response by stating that she would recommend death if she really believed that it was necessary. Subsequently, Pereira indicated she agreed with another venire member who responded that she would never impose the death sentence. Based upon Pereira's vacillation throughout voir dire, the court found that the trial court did not abuse its discretion in excusing her for cause.

Similarly, the *Franqui* court found that the trial court did not abuse its discretion in excusing juror, Lopez, for cause. Lopez initially stated she was in favor of the death penalty.

She later stated that she could not cast the deciding vote recommending a death sentence. Following an overnight recess, Lopez indicated that she was under a lot of stress because of the trial and the possibility of having to decide about the death penalty. She stated for a second time that she could not cast the deciding vote recommending a death sentence. Upon questioning by defense counsel, however, Lopez indicated that she would be able to recommend the death penalty if voting was done by secret ballot. Given the equivocal responses Lopez provided as to whether she could recommend the death penalty, the court held that the trial court did not abuse its discretion in excusing her for cause.

In *Jaffe v. Applebaum*, 830 So. 2d 136, 137 (Fla. 4th DCA 2002), the personal representative of an estate brought a medical malpractice action against a physician for permanently scarring the patient's face and allowing an infection to form after performing a laser resurfacing procedure. The defendant's attorney questioned the potential jury members on whether they had any opinions about people who underwent elective cosmetic surgery and suffered complications as a result. *Id.* A prospective juror stated that he owed his life to both a plastic surgeon and a surgeon, which would hold some weight in his decision on the case. Id. On review, the court found that although no one attempted to rehabilitate the juror, it would have been futile in light of his responses which were sufficient to create a reasonable doubt as to his impartiality. *Id.*

Even more recently in *Peters v. State*, 874 So. 2d 677 (Fla. 4th DCA 2004), the Fourth District held that the trial court was required, in a trial for battery of a spouse, to excuse for cause

a prospective juror who stated during voir dire that she was still devastated by past abuse she had suffered at the hands of a former spouse. The Fourth District concluded that the trial court committed manifest error in seating this juror, even though she stated that she would try to be fair and impartial.

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Plaintiff's Memorandum Of Law On Voir Dire And Challenges For Cause
Case No.: 2003 CA 005045 AI

Specific instances in which jurors should be excused for cause

Inconsistent Statements. A juror's statement that he can render a verdict based on the law and the evidence is not conclusive if it appears from other statements made by him that he is not possessed of a state of mind that will enable him to do so. *Singer v.* State, 109 So. 2d 7 (Fla. 1959); *Longshore v. Fronrath Chevrolet, supra; Ortiz v.* State, 543 So. 2d 377 (Fla. 3rd DCA 1989); *Club West, Inc. v. Tropigas,* 514 So. 2d 426 (Fla. 3rd. DCA 1987).

Juror's who are related to a party or attorney. Juror should be excused for cause if related to party or attorney within the third degree. *Sikes v. Seaboard Coastline RR Co.,* 487 So. 2d 1118 (Fla. 1st DCA 1986).

A juror's relationship with a party or attorney. Juror's friendly relationship with counsel for a party is grounds for challenge for cause. *Johnson v. Reynolds,* 121 So. 793 (Fla. 1929); *Sikes v. Seaboard Coastline RR Co., supra.*

Employment. A juror who was an employee of one of the parties is subject to a challenge for cause. *Boca Teeca Corp. v. Palm Beach County,* 291 So. 2d 110 (Fla. 4th DCA 1974). A juror's statement that "there may be" something about her employment that would affect her decision in the case, is sufficient to disqualify the juror for cause. *Ortiz v. State, supra*

Stock Ownership. Juror who owned stock in defendant corporation is subject to challenge for cause. *Club West, Inc. v. Tropigas, supra*

Preconceived opinions. "A juror is not impartial when one side must overcome a

preconceived opinion in order to prevail". *Hill v. State*, 477 So. 2d 553 (Fla. 1985).

Negative attitudes about the legal system. Jurors should be excused for cause when they acknowledge negative attitudes toward the legal system resulting from unfavorable experiences due to lawsuits being filed against them or members of their family, and that those predispositions would result in bias. *Levy v. Hawk's Cay, Inc.*, 553 So. 2d 1165 (Fla. 3rd DCA 1989). A juror who expresses clear reservations about awarding money damages for the death of a loved one and also expresses a disapproval of personal injury lawsuits should be excused for cause. *Nash v. General Motors Corp.*, 734 So. 2d 437 (Fla. 3d DCA 1999).

Time Limits on Voir Dire

Fla. R. Civ. P. 1.431(b) provides that the parties have a right to examine jurors orally on voir dire, and that the court may also do so. The provision also states, "The right of the parties to conduct a reasonable examination of each juror orally shall be preserved." Time limitations on voir dire are considered within the trial court's broad discretion. However, the limitations have been held to be error when they infringe on the parties' right to "reasonable examination of each juror."

In *Williams v. State*, 424 So. 2d 148 (Fla. 5th DCA 1982), the court reversed the judgment in a criminal case as a result of the trial court's limiting defense counsel to twenty minutes to voir dire the jury. There was apparently no proper notice that such a time limitation would be imposed. After the Court stopped the voir dire, defense counsel proffered to the court at least two areas of inquiry which had not been addressed by the State's or the court's questioning. In

reversing, the Fifth District noted that restrictions on the time or the number of questions can result in a loss of the "fundamental right" to reasonable voir dire examination. With respect to such limitations as the court stated:

> The [limitations on time or questions] do not flex with the circumstances, such as when a response to one question evokes follow up questions. *Williams*, 424 So. 2d at 149.

In *Gosha v. State*, 534 So. 2d 912 (Fla. 3d DCA 1988), the Third District held, as a matter of law, that it was unreasonable and an abuse of discretion to limit counsel's voir dire examinations of each potential juror to one-to-three minutes. The court noted that the time limitation forced defense counsel to end the voir dire before he had finished his questioning. In *Pineda v. State*, 571 So. 2d 105 (Fla. 3d DCA 1990), *Gosha v. State* was applied to reverse a conviction where the court had limited defendant's voir dire examination of 23 potential jurors to less than thirty minutes.

In *Knapp v. Shores*, 550 So. 2d 1155 (Fla. 3d DCA 1989), the Third District reversed a judgment in a personal injury action, where the trial court limited voir dire of the prospective jury to fifteen minutes for both plaintiffs. The appellate court noted that the time provided was insufficient even though the trial court had also conducted a short voir dire consisting of only seven general questions.

In *Helton v. State*, 719 So. 2d 928, 929 (Fla. 3d DCA 1998), the trial judge limited each side to thirty minutes of voir dire and precluded defense counsel from discussing voluntary intoxication with the 34-member venire panel. On appeal the time limitation of the voir dire to

thirty-eight minutes for a thirty-four-member venire panel was found to be an abuse of discretion. *Id.* The trial court also erred in refusing defense counsel's attempt to explore a substantial area of inquiry that had not been adequately explored previously. *Id.* Where the intended defense is controversial, counsel must be allowed leeway to make an adequate inquiry in to the juror's outlook on the defense. *Id.* In reviewing a judge's discretionary decision to impose time limits on voir dire, the appellate court will consider the nature of the case and the reasonableness of the use of the time allotted to the attorneys are considered. *Anderson v. State*, 739 So. 2d 642, 644 (Fla. 4th DCA 1999).

When a trial court conducts its own voir dire, and allows the plaintiff time for extensive questioning, the court cannot preclude defense counsel from questioning prospective jurors individually or collectively. *Miller v. State*, 785 So. 2d 662, 663 (Fla. 3d DCA 2001). The trial court cannot question jurors on crucial issues and then preclude counsel from further questioning, stating that it would be repetitive. *Id.* Prospective jurors do not respond to a judge's questions in the same manner as questions posed by an attorney, especially when the prospective jurors are collectively asked to volunteer an answer to the judge's question. *Id.* The judge has the discretion to limit repetitive and argumentative questions on voir dire but counsel must be allowed to ascertain suppressed prejudgments by the prospective jurors. *Campbell v. State*, 812 So. 2d 540, 542 (Fla. 4th DCA 2002).

Racially based and gender based peremptory challenges

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Plaintiff's Memorandum Of Law On Voir Dire And Challenges For Cause
Case No.: 2003 CA 005045 AI

The discriminatory exercise of peremptory challenges is unconstitutional. *State v. Neil*, 457 So. 2d 481 (Fla. 1984). The *Neil* holding applies to both criminal and civil cases. *See Watson v. Gulf Power Co.*, 695 So. 2d 904 (Fla. 1st DCA 1997); *City of Miami v. Cornett*, 463 So. 2d 399 (Fla. 3d DCA 1985). To preserve for review an opponent's exercise of a peremptory challenge on discrimination grounds, one must ask the court to conduct a "Neil inquiry," ie, a timely objection must be made that the peremptory challenge is being exercised in a discriminatory manner. *See State v. Johans*, 613 So. 2d 1319 (Fla. 1993). The burden then shifts to the party exercising the challenge to demonstrate that the peremptory challenge was not made based solely on race, religion or some other protected classification. Counsel must provide a clear and reasonably specific racially neutral explanation for the use of the peremptory challenge. *See American Security v. Hettel*, 572 So. 2d 1020 (Fla. 2d DCA 1991); *Mitchell v. CA C-Ramsay Health Plans, Inc.*, 719 So. 2d 930 (Fla. 3rd DCA 1998). The trial court's ruling on whether a party has stricken a juror for racial reasons turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous. *See King v. Byrd*, 733 So. 2d 516 (Fla. 4th DCA 1999).

In *Alen v. State*, 596 So. 2d 1083 (Fla. 3d DCA 1992), the Third District found Hispanics to be a cognizable ethnic group in Florida under the *Neil* analysis. [3] The elimination of Hispanic jurors from a voir dire panel could not be made acceptable although it was done to ensure a different Hispanic juror made the panel. *Id.* Race, gender, native language, shared religious

[3] It should be noted that one does not have a right to serve as a juror; the right is not to be discriminated against based upon race, gender or ethnicity. *Morales v. State*, 768 So. 2d 475, 476 (Fla. 2d DCA 2000). An interpreter will not be allowed to accompany a juror into the jury deliberation room. *Id.*

beliefs and surnames are characteristics of ethnic groups. *Id.* The cognizibility requirement of the *Neil* inquiry requires that the group be objectively discernible from the rest of the community. *State v. Alen*, 616 So. 2d 452 (Fla. 1993). Courts should look to whether the group's population is large enough to be recognized as an identifiable group within the community and if they are distinguishable from the larger community "by an internal cohesiveness of attitudes, ideas, or experiences that may not be adequately represented by other segments of society." *Id.* at 455. Jews are also a cognizable class under *Alen. See Joseph v. State*, 636 So. 2d 777 (Fla. 3d DCA 1994). The Equal Protection Clause prohibits discrimination in jury selection based on gender. *See Abshire v. State*, 642 So. 2d 542 (Fla. 1994).

There are not a set number of challenges that would automatically trigger a *Neil* inquiry but if four out of five prospective African American jurors are stricken without explanation, the trial court should not refuse to conduct a *Neil* inquiry. *See Hall v. Daee*, 602 So. 2d 512, 513 (Fla. 1992). The jury selection process must be evaluated as a whole during a *Neil* inquiry. *Id.* A clear and reasonably specific race neutral reason for the strike must be given at the time of a *Neil* challenge, as the appellate court is not the correct forum for conducting a *Neil* inquiry. *Id.* The proponent of the strike must state a race neutral explanation. *See Melbourne v. State*, 679 So. 2d 759 (Fla. 1996). Unless there is an inherent discriminatory intent, the reason offered will be deemed race neutral. *Id.* The focus is on the genuineness of the motive. *Id.* The objecting party must make a timely objection showing that the venireperson is part of a cognizable group and request that the court ask the striking party their reason for the strike. *Id.* The racial make-

up of the venire, prior strikes exercised against the same racial group, strikes equally applicable to unchallenged jurors and singling a juror out for unique treatment are all circumstances which may overcome a race neutral explanation. *Id.* A *Neil* inquiry must be made whenever there is a likelihood of discrimination. *See Harrison v. Emanuel*, 694 So. 2d 759 (Fla. 4th DCA 1997). The trial court may prompt counsel to raise an objection to a potentially racially motivated peremptory strike. *Id.*

Striking Jurors

The trial court cannot limit or prohibit the use of backstriking and a party can use its peremptory challenges until the jury has been sworn. This process cannot be circumvented by trial court's swearing of individual jurors. *See Tedder v. Video Electronics, Inc.*, 491 So. 2d 533 (Fla. 1986). In *Peacher v. Cohn*, 786 So. 2d 1282 (Fla. 5th DCA 2001), the issue before the court was whether the refusal of the trial judge to allow a third and final peremptory challenge by way of a back strike prior to swearing the jury is reversible error per se. After four jurors were selected for the panel and the plaintiff had two strikes left, the plaintiff did not strike jurors number 9 or 10. *Id.* The judge asked the plaintiff prior to selecting alternates, whether they challenged the six potential jurors who had been chosen. *Id.* The plaintiff struck jurors 9 and 11. Id. The judge asked the attorneys if they were satisfied and no objections were made. *Id.* After the parties moved forward to select the alternate jurors the plaintiff attempted to strike juror 10 and the court refused. *Id.* "[A] trial judge cannot infringe upon a party's right to challenge any juror, whether for cause or peremptorily, prior to the time the jury is sworn. The denial of this

right is per se reversible error." *Id.* This rule applies to civil cases as well as criminal. *Id.* "The right to exercise peremptory challenges is a fundamental part of a right to a fair trial and that the denial of that right should be treated as reversible error." *Id.*; *See also Van Sickle v. Zimmer*, 807 So. 2d 182 (Fla. 2d DCA 2002)("disallowing the exercise of a peremptory challenge by way of a backstrike prior to the swearing in of the jury, is reversible error per se. A litigant is entitled to view the panel as a whole in order to intelligently and effectively use his or her peremptory challenges").

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Federal Express to all counsel on the attached list on this 22nd day of February, 2005.

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Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Plaintiff's Memorandum Of Law On Voir Dire And Challenges For Cause
Case No.: 2003 CA 005045 AI

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2005 WL 6336898 (Fla.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Florida.
Fifteenth Judicial Circuit
Palm Beach County

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

No. CA 03-5045 AI.
February 22, 2005.

Morgan Stanley's Motion to Dismiss Plaintiff's First Amended Complaint

Jeffrey Davidson, Lawrence P. Bemis (FL Bar No. 618349), Thomas A. Clare, Zhonette M. Brown, Kirkland & Ellis LLP, 655 15th Street, N.W., Suite 1200, Washington, D.C. 20005, Telephone: (202) 879-5000, Facsimile: (202) 879-5200; Mark C. Hansen, James M. Webster, III, Rebecca A. Beynon, Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Sumner Square, 1615 M Street, N.W., Suite 400, Washington, D.C. 20036, Telephone: (202) 326-7900, Facsimile: (202) 326-7999, Counsel for Morgan Stanley & Co. Incorporated.

Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), moves to dismiss the First Amended Complaint filed by the Plaintiff Coleman (Parent) Holdings Inc. for failure to state a cause of action as to "Aiding and Abetting"; for failure to plead fraud, aiding and abetting, and conspiracy with the particularity required by Rule 1.120(b); and failure to state a cause of action for corporate liability for fraud and punitive damages. As grounds therefore, Morgan Stanley states as follows (all cited cases are attached):

No Cause of Action for Aiding and Abetting Exists Under Florida Law

1. Aiding and Abetting, as pled by Plaintiff in the First Amended Complaint and as defined in the *Restatement (Second) of Torts II*, section 876, does not exist as a civil tort under the common law of Florida. Since neither this court nor the District Court of Appeal has the authority to create or recognize a new cause of action in the common law, Plaintiff cannot pursue this claim. *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); *Conley v. Boyle Drug Co.*, 477 So. 2d 600 (Fla. 4th DCA 1985).

The only authoritative Florida case even remotely on point is *Ft. Myers Development Corporation v. J.W. McWilliams Co.*, 122 So. 264 (Fla. 1929), a case involving the liability of a corporate promoter for breaches of fiduciary duty and fraud. In *Ft. Myers*, the Florida Supreme Court extended the liability of promoters of inchoate corporations for breach of trust and secret profits "to a third person, who is averred to have ***conspired*** with one of two parties, between whom fiduciary relations exist, to the injury of the other." *Id.* at 269 (emphasis added). Although the court at times referred to the third person as a conspirator ***and*** as an aider and abettor in the breach of trust and fraud of the promoter, it is clear that the holding of the court is based on the predicate of a conspiracy or secret agreement between the promoter and the third person to breach a fiduciary duty owed by the promoter and carry out the fraudulent scheme. *Id.* at 267-269. In the 76 years following *Ft. Myers*, the Florida Supreme Court has not adopted or recognized "aiding and abetting fraud" as a common law tort: no such tort exists in Florida in the absence of a conspiracy.

It would be reversible error to allow Plaintiff to pursue this unrecognized common law tort and present this claim to the jury. *Conley v. Boyle Drug Co.*, 477 So. 2d 600 (Fla. 4th DCA 1985).

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Fraud. Including Fraud as an Element of Conspiracy and Aiding and Abetting. Must Be Plead With Particularity

2. While the First Amended Complaint drops Counts I and IV of the original Complaint, all of the paragraphs of Count I alleging the direct fraud of Morgan Stanley remain. Thus, there are two distinct frauds alleged in the First Amended Complaint and Plaintiff fails to specify which of the two form the basis of the underlying tort for the Aiding and Abetting claim and the Conspiracy claim;

3. As to the Conspiracy claim, Plaintiff fails to state with particularity:

A. what was the underlying fraud;

B. who at Morgan Stanley conspired with Dunlap and when;

C. what the agreement and common objective consisted of;

D. who at Morgan Stanley had actual knowledge of the underlying fraud; what that actual knowledge consisted of; and when and where that person in Morgan Stanley acquired that actual knowledge; and

E. who at Morgan Stanley provided the substantial assistance and when it was provided.

The requirements of Rule 1.120(b), pleading fraud with particularity, apply to averments charging conspiracy. *Ocala Loan Co. v. Smith*, 155 So. 2d 711 (Fla. 1st DCA 1963); *General Dynamics Corp. v. Hewitt*, 225 So. 2d 561 (Fla. 2d DCA 1969). Furthermore, because an underlying fraud is an element of conspiracy, a party alleging conspiracy must allege all of the elements of fraud. *Cf. Buckner v. Lower Florida Keys Hosp. Dist.*, 403 So. 2d 1025, 1027 (Fla. 3d DCA 1981) (holding that complaint for conspiracy to defame failed to state cause of action because it did not allege publication, an element of defamation). In order for a claim of fraud to withstand a motion to dismiss, it must allege fraud with the requisite particularity required by Fla. R. Civ. P. 1.120(b), including ***who*** made the false statement, the **substance of the false statement,** the **time frame** in which it was made and the context in which the statement was made. *Bankers Mutual Capital Corp. v. United States Fidelity and Guaranty Co.*, 784 So. 2d 485, 490 (Fla. 4th DCA 2001); *Robertson v. PHF Life Insurance Co.*, 702 So. 2d 555 (Fla. 1st DCA 1997) (Appellants' complaint fails to specifically identify misrepresentations or omissions of fact, the time, place or manner in which they were made, and how the representations were false or misleading.).

The particularity Morgan Stanley seeks has now become especially critical, given Plaintiff's election to proceed to trial solely on the theory of what it calls the "big" fraud. Plaintiff has made that significant election, yet turned around and filed, in essence, an amended complaint identical to the one it was previously proceeding under. All the allegations against Morgan Stanley remain the same. The old Complaint fails to allege with particularity Morgan Stanley's ***connection*** to the "big" fraud. In addition, as a matter of necessary pleading - and fairness - Morgan Stanley is entitled to a straightforward particularized statement of what Plaintiff contends established such a connection: what knowledge and what acts of what people, and when and how that knowledge was supposedly obtained and the acts allegedly committed. If Plaintiff intends to claim at trial knowledge or acts not yet particularized in the First Amended Compliant, Morgan Stanley is entitled to know what it is.

4. Likewise, as to the Aiding and Abetting claim, Plaintiff fails to state with particularity who at Morgan Stanley had actual knowledge of the underlying fraud; what that actual knowledge consisted of; and when and where that person in Morgan Stanley acquired that actual knowledge. Further, Plaintiff fails to state with particularity who at Morgan Stanley provided the substantial assistance and when it was provided. These elements must be pled with particularity.

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See generally, Ocala Loan Co., General Dynamic Corp., Bankers Mutual Capital Corp., and Robertson v. PHF Life Ins. Co., supra.

Corporate Liability and Punitive Damages Must be Plead with Particularity

5. Plaintiff has failed to plead a cause of action for corporate liability against Morgan Stanley because there are no allegations as to what officer or managing agent conspired with Dunlap; what the agreement and common objective consisted of; what officer or managing agent at had actual knowledge of the underlying fraud; when and where officer or managing agent acquired that actual knowledge; what that actual knowledge consisted of; what officer or managing agent provided the substantial assistance and when it was provided; *Sunrise Olds-Toyota, Inc. v Monroe*, 476 So. 2d 240, 241 (Fla. 5th DCA 1985) (Any intentional conduct attributed to a corporation must be committed by an officer, agent or employee of the corporation.).

6. Plaintiff has failed to plead a cause of action for punitive damages against Morgan Stanley, as a corporate entity, because there are no allegations as to what officer, managing agent, or employee committed the alleged intentional wrongful acts. *See Schropp v. Crown Eurocars, Inc.*, 654 So. 2d 1158 (Fla. 1995); *Sunrise Olds-Toyota, Inc. v. Monroe*, 476 So. 2d 240 (Fla. 5th DCA 1985) (complaint which was vague as to what member or members of corporate employer were grossly negligent and in what capacity they acted for corporation did not make it clear that employer as opposed to some mere employee was at fault, and thus failed to state a cause of action for punitive damages).

WHEREFORE, Morgan Stanley requests that this Court enter an order granting this Motion and dismissing Plaintiff's First Amended Complaint.

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

NOTICE OF FILING PLEADING UNDER SEAL

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed its Motion for Additional Discovery Regarding MAFCO's Internal Valuation of Sunbeam Stock under seal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and hand delivered on this 23nd day of February, 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO. 2003CA 005045 AI

PLAINTIFF'S MEMORANDUM REGARDING CRIME-FRAUD PROCEDURES

Florida has a carefully constructed set of procedures designed to assure that the attorney-client privilege is not lightly cast aside. It is a two-step process.

I. CPH Has Presented Prima Facie Evidence of a Fraud.

In the first step, the party challenging the assertion of privilege must present prima facie evidence that the party communicated with its lawyers as part of furthering a fraud. This showing can be based on circumstantial facts, such as privilege logs and other known evidence, and the court need only consider evidence from the party challenging the privilege. *American Tobacco Co. v. State*, 697 So. 2d 1249, 1255 (Fla. 4th DCA 1997). If the party challenging the privilege shows evidence "plausibly implicating the possible application of the exception," then the court conducts an *in camera* review of the challenged documents. *State v. Marks, P.A.*, 758 So. 2d 1131, 1133-34 (Fla. 4th DCA 2000). The court reviews the documents, considers the available evidence (including evidence outside the allegedly privileged documents), and determines whether there is a prima facie case for the crime/fraud exception.

Here, the Court has already reviewed the allegedly privileged documents, and can make the determination of a prima facie case *now*. It should consider whether the documents reveal that attorney-client communications regarding the e-mail production were infected with fraud either in June 2004, prior to Morgan Stanley's false certification, or in October and November 2004, when Morgan Stanley was manufacturing false explanations of the origins of the 8,000 pages produces on November 17. As the facts laid out in CPH's initial motion make clear, there is more than adequate evidence of a prima facie case.

II. Morgan Stanley Bears the Burden of Proving the Crime/Fraud Exception is Inapplicable.

Once the Court determines that CPH has made a prima facie case, "[t]he burden of persuasion then shifts to the party asserting the privilege to give a reasonable explanation of the conduct or communication," and show that the crime/fraud exception does not apply. *American Tobacco Co.*, 697 So. 2d at 1256. The party asserting the privilege has the right to an evidentiary hearing before the privilege is deemed waived. *IDS Long Distance, Inc. v. Heiffer*, 837 So. 2d 1130, 1131 (Fla. 4th DCA 2003); *see also Butler, Pappas, Weihmuller v. Coral Reef of Key Biscayne Developers, Inc.*, 873 So. 2d 339, 342 (Fla. 3d DCA 2003) (requiring "an evidentiary hearing, at which the [party asserting the privilege] carries the burden of persuasion).

However, CPH has the right to be present at the hearing, and it has the right to present evidence. *American Tobacco Co.*, 697 So. 2d at 1252. The hearing is "an adversarial proceeding where each party could present evidence and argument on whether the evidence presented, if believed by the fact-finder, would be sufficient" to prove whether the crime-fraud exception is triggered or not. *Id.* at 1255. Morgan Stanley may present *materials* ex parte, but its *argument* must be with CPH present. *Id.* at 1252. And the law is clear that Morgan Stanley has the burden of persuading the Court that it did not use its lawyers in furtherance of a fraud.

But "if after considering and weighing the explanation the court does not accept it, then a prima facie case exists as to the exception, and the privilege is lost." *Id.* at 1256.

Dated: February 24, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and hand delivery to all counsel on the attached list on this 24th day of February, 2005.

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

PLAINTIFF'S MOTION FOR ORDER DECLARING ATTORNEY-CLIENT PRIVILEGE WAIVED FOR CERTAIN DOCUMENTS RELATING TO WILLIAM STRONG

Coleman (Parent) Holdings Inc. ("CPH") respectfully requests that the Court enter an Order declaring that Morgan Stanley & Co. Inc. ("Morgan Stanley") cannot claim the joint-defense or common-interest exception with respect to documents pertaining to the Italian investigation and prosecution of William Strong, and that any documents disclosed to Morgan Stanley outside the attorney-client relationship must be produced.

BACKGROUND

In March 2004, this Court ordered Morgan Stanley to produce documents relating to the performance of Morgan Stanley employees involved in the Sunbeam transaction, including "[a]ll references (positive or negative) to the employee's truthfulness, veracity, or moral turpitude." That court-ordered production was due on or before April 2, 2004.

On February 9, 2005, CPH filed a motion asking the Court to order Morgan Stanley to produce documents that it had improperly withheld from that production, relating to Morgan Stanley Managing Director William Strong. Specifically, in violation of the Court's March 2004

Order, Morgan Stanley had failed to produce any documents relating to bribery charges in an Italian criminal court, stemming from his employment at Salomon Brothers International in 1992. On February 17, this Court ordered the immediate production of the documents, and ordered that a privilege log be served by February 20, 2005.

On its face, the privilege log accompanying the production demonstrates a willful disregard for the basic tenets of privilege. Morgan Stanley seeks to assert the attorney-client and work-product privileges for Morgan Stanley's communications with, and for the work of, ten different law firms that purportedly represented Mr. Strong or his prior employer, Salomon Brothers – and not Morgan Stanley. As examples, Morgan Stanley asserts the attorney-client privilege for communications between Morgan Stanley and Salomon Brothers, *e.g.*, Priv. Nos. 526, 619; between Morgan Stanley or its counsel and Salomon Brothers' counsel, *e.g.*, Priv. Nos. 617, 618; and between Morgan Stanley or its counsel and Mr. Strong's counsel, *e.g.*, Priv. Nos. 697, 818A. Morgan Stanley also asserts the attorney-client privilege for communications between Salomon Brothers and Salomon Brothers' own counsel, which were apparently then disclosed to Morgan Stanley and produced from its files. *E.g.*, Priv. Nos. 740, 742.

Presumably, Morgan Stanley received or generated these documents for its own business purposes. It follows that most of the documents on the log are not privileged. First, whatever the reason that Mr. Strong, Salomon Brothers, or their attorneys decided to share the documents with Morgan Stanley, the voluntary act of sharing the communications with Morgan Stanley waived any privileges that otherwise may have existed. *Hamilton v. Hamilton Steel Corp.*, 409 So. 2d 1111, 1114 (Fla. 4th DCA 1982). Thus, absent an exception to this general rule, any previously privileged communications between Salomon Brothers or Mr. Strong and their attorneys lost their privileged status once they were shared with Morgan Stanley. Second, any

communications directly between Morgan Stanley and Salomon Brothers, Mr. Strong, or their attorneys, were never subject to any privilege in the first instance. These two categories cover most of the 400-plus documents on Morgan Stanley's initial February 20, 20 privilege log, as well as the logs subsequently produced on February 22 and 23.

ARGUMENT

The attorney-client privilege "promotes the administration of justice by encouraging clients to lay the facts fully before their counsel." *Brookings v. State*, 495 So. 2d 135, 139 (Fla. 1986) (internal quotation marks omitted). Florida has codified this protection, making clear that "[a] client has a privilege to refuse to disclose, and prevent any other person from disclosing, the contents of confidential communications" made within the attorney-client relationship. FLA. STAT. ANN. § 90.502(2) (West 2004). Ordinarily, when a client voluntarily discloses such communications to one outside the attorney-client circle, "the privilege is waived, and the horse let out of the barn." *Hamilton*, 409 So. 2d at 1114. It is clear, then, that the communications between Mr. Strong and Salomon Brothers and their attorneys that were voluntarily disclosed to Morgan Stanley are no longer privileged. Likewise, communications between Morgan Stanley and those parties, concerning these matters, are not privileged either.

Morgan Stanley cannot meet its burden of establishing that its communications with the lawyers representing Mr. Strong or Salomon Brothers are protected by a joint defense privilege. The joint defense privilege "enables litigants who share unified interests to exchange this privileged information to adequately prepare their cases without losing the protection afforded by the privilege." *Visual Scene, Inc. v. Pilkington Bros., PLC*, 508 So. 2d 437, 440 (Fla. 3d DCA 1987). In order to share privileged information without waiving the privilege, there must be evidence that the parties intended to engage in a cooperative effort to obtain legal assistance, and

that the information was shared as part of that strategy. In other words, Morgan Stanley must show that Morgan Stanley and Mr. Strong (or Morgan Stanley and Salomon Brothers) "had a common legal . . . interest, and that they cooperated in formulating a common legal strategy." *Walsh v. Northrop Grumman Corp.*, 165 F.R.D. 16, 18 (E.D.N.Y. 1996).

Morgan Stanley, however, was not involved in the matters that were the subject of the legal proceedings in Italy. *See SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508 (D. Conn. 1976) (refusing to permit joint defense privilege where party's interest "did not appear to be that of a potential codefendant"). At best, the interest that Morgan Stanley shared with Mr. Strong was commercial, and shared commercial interests cannot create a "common interest" for joint defense purposes. Even when Mr. Strong was prosecuted, his relationship with Morgan Stanley still revolved only around "a joint business strategy that happen[ed] to include a concern about litigation." *Walsh*, 165 F.R.D. at 18. This shared interest was insufficient in *Walsh*, where the common interest exception was denied between a financial adviser and its client, and in *SCM Corp.*, where the common interest was in pursuing a joint venture without creating liability. It is similarly insufficient here.

Florida cases addressing the joint-defense or common-interest exception show its limited availability. In *Visual Scene, Inc.*, the court upheld the attorney-client privilege for communications between one party's investigator and another party's counsel, but only because there was "an affidavit attesting to a before-the-exchange agreement stating their intention to maintain confidentiality and to use the information only in preparation for trial on those issues common to both." *Visual Scene, Inc.*, 508 So. 2d at 441. That is, the communication would have waived the privilege unless it "was exchanged for the limited purpose of assisting in their common cause," and there was evidence to that effect. *See id.* (quotation omitted). Similarly, in

Barnett Banks Trust Co., N.A. v. Compson, 629 So. 2d 849 (Fla. 2d DCA 1993), the court found that two parties had sufficiently common interests to support the common interests exception, but only because their interests – as trustee and beneficiaries aligned with the trustee – were perfectly aligned.

In this case, neither is true: Morgan Stanley had no legal stake in the proceedings arising from Mr. Strong's prior employment, and its business interests cannot support a joint defense claim.

CONCLUSION

For the foregoing reasons, this Court should enter an Order declaring that Morgan Stanley & Co. Inc. ("Morgan Stanley") cannot claim the joint-defense or common-interest exception with respect to documents pertaining to the Italian prosecution of William Strong, and that (i) any documents disclosed to Morgan Stanley by Mr. Strong, Salomon Brothers, or their attorneys must be produced, and (ii) any communications between Morgan Stanley and the attorneys for either Salomon Brothers or Mr. Strong are not privileged and must be produced.

Dated: February 23, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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Ronald L. Marmer
Jeffrey T. Shaw
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John Scarola
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2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and hand delivery to all counsel on the attached list on this 24th day of Feb, 2005.

JOHN SCAROLA
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THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CPH'S RESPONSE TO MORGAN STANLEY'S MOTION FOR SANCTIONS AND OTHER RELIEF CONCERNING THE SUNBEAM WARRANTS

Morgan Stanley claims that CPH improperly withheld documents relating to the value of the warrants received by CPH in August 1998. CPH submits this response to explain to the Court the background of this dispute.

Morgan Stanley cites to three document requests. First, Morgan Stanley points to Request No. 39, First Set (July 15, 2003): "All documents referring or relating to the settlement agreement between CPH and Sunbeam." On August 14, 2003, CPH responded: "Subject to and without waiving its Initial Objections, CPH will produce documents responsive to this request."

Second, Morgan Stanley points to Request No. 2, Third Set (October 13, 2003) (emphasis added): "All documents referring or relating to any consideration received by CPH in exchange for CPH's promise not to sue Sunbeam in connection with the Coleman acquisition or the Settlement Agreement between Sunbeam and CPH, including without limitation all documents related to the warrants received from Sunbeam pursuant to the Settlement Agreement, all documents related to any exercise of those warrants; documents relating to the negotiation of the Settlement Agreement; documents relating to the valuation of the warrants received by CPH pursuant to the Settlement Agreement, including any reports issued by The Blackstone Group;

and for the period June 1, 1998 to the present, documents relating to statements made by Sunbeam or CPH/MAFCO to any public agency or body, asking that the Settlement Agreement be implemented without seeking shareholder approval." On November 12, 2003, CPH responded: "Subject to and without waiving its Initial Objections, CPH will produce documents responsive to this request."

Third, Morgan Stanley points to Request No. 4, Eighth Set (October 25, 2004): "All documents concerning the value of the warrants and other consideration that CPH received from Sunbeam pursuant to the August 12, 1998 Settlement Agreement between CPH and Sunbeam." On November 24, 2003, CPH asserted several objections, but agreed to "produce documents reflecting the journal entries that show how CPH recorded the warrants on CPH's books and records."

On November 24, 2004, CPH produced its accounting entries concerning the warrants. While one could argue that the documents at issue were not called for in response to the first request, CPH should have produced them in November 2003 in response to the second request.

Morgan Stanley further complains that CPH should have produced two additional pages of documents prior to 2005. We agree. In conducting its search for documents responsive to Morgan Stanley's third request (in November 2004), CPH reviewed its general ledger entries, the files supporting the general ledger entries, and the financial statements of CPH's parent company, Mafco Holdings Inc., which is privately held by Mr. Perelman. At the time of CPH's November 24, 2004 document production, CPH believed it had produced all documents that reflected any valuation of the Sunbeam warrants.

CPH later located two additional documents referring to the value of the warrants. CPH located those documents while searching for documents concerning the valuation of the 14.1

million shares of Sunbeam stock that CPH received in the Sunbeam transaction. CPH conducted that search to comply with this Court's February 17, 2005 Order granting Morgan Stanley's motion to compel. In searching for documents responsive to the Court's Order, CPH reviewed again its general ledger entries, the files supporting the general ledger entries, and the financial statements of CPH's parent company, Mafco Holdings Inc. In addition, because the Court's order addressed documents concerning CPH's Sunbeam stock, CPH also reviewed certain documents that support estimates of the potentially realizable value of certain assets of Mafco Holdings Inc. Those documents are not part of Mafco Holdings Inc.'s or CPH's regular accounting records and are not part of the audited financial statements that CPH reviewed earlier. In searching for documents responsive to the Court's Order, CPH thought that the documents which support estimates of potentially realizable value might contain information concerning the 14.1 million shares of Sunbeam stock received by CPH on March 30, 1998, but CPH did not expect that the documents also would refer to the Sunbeam warrants. However, two single-page documents -- one from 1998 and the other from 1999 -- do include reference to the warrants. When CPH produced its documents concerning the accounting treatment of the 14.1 million shares of Sunbeam stock on February 18, 2005, CPH redacted the references to the warrants on those two pages. On February 20, 2005, CPH produced those two pages again in redacted form, but CPH did not redact the references to the warrants. CPH also has agreed to provide a corporate representative to be deposed to explain the two documents at issue here.

Dated: February 24, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By:_____
One of Its Attorneys

16div-011841

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and hand delivery to all counsel on the attached list on this 24th day of February, 2005.

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

SUPPLEMENT TO PENDING MOTIONS CONCERNING THE CRIME-FRAUD EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE

CPH hereby supplements its pending motions concerning the crime-fraud exception to the attorney-client privilege. Misrepresentations were made to the Court and CPH by Morgan Stanley through its legal counsel. The representations were false and known by Morgan Stanley to be false at the time they were made. They were made with the intent to induce reliance on the part of CPH and the Court. CPH and the Court did, in fact, rely upon the misrepresentations.

The misrepresentations concerned the following:

1. the number of tapes on which e-mail data did or may have been included known by Morgan Stanley to be in existence;
2. the scope and thoroughness of the search for relevant tapes;
3. the degree of confidence on the part of Morgan Stanley in the thoroughness and adequacy of the search;
4. the source of discovery materials produced (the 8,000 pages);
5. the extent to which the search of the contents of discovered tapes complied with the Court's Order of April, 2004;
6. the accuracy of the declaration submitted by Arthur Riel;

7. the degree of fault attributable to a single employee, Arthur Riel, in mismanaging the e-mail production and in falsely certifying compliance with the Court's Order of April, 2004; and

8. the employment status of Arthur Riel.

Dated: February 24, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

NOTICE OF FILING

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed the original Declarations of John P. Cooney Jr. and James P. Cusick, and copies of the Declarations of Charles Chasin, Esq., James Mangan, Esq., Michael D. Monico, Robert H. Mundheim, Monroe R. Sonnenborn, Esq., and Robert Sperling.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by fax and hand delivery facsimile and hand delivery on this 24th day of February, 2005.

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

CASE NO: 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

DECLARATION OF JAMES P. CUSICK, ESQ.

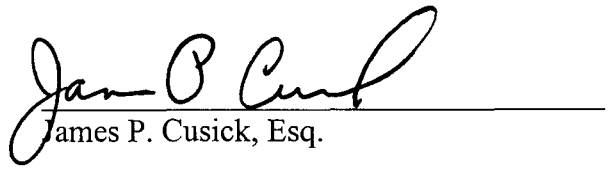
1. I am a Managing Director and Co-Head of Global Litigation at Morgan Stanley. My business address is 1221 Avenue of the Americas, New York, NY 10020. I am a member of the Bar of New York. I joined Morgan Stanley & Co. in March 2001 as an in-house counsel.

2. Since 2001, I have represented Morgan Stanley as part of my regular responsibilities.

3. In connection with William Strong, the scope of my representation of Morgan Stanley included negotiating with Salomon to indemnify Mr. Strong for certain appellate costs, consulting with outside counsel to analyze the legal implications of acquittal, and supervising other Morgan Stanley attorneys preparing regulatory filings on behalf of both Morgan Stanley and Mr. Strong.

4. I am paid by Morgan Stanley and have known my client's identity since I joined Morgan Stanley.

UNDER PENALTY OF PERJURY, I HEREBY DECLARE THAT THE FOREGOING IS TRUE AND CORRECT.



James P. Cusick, Esq.

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

CASE NO: 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant(s).

AFFIDAVIT OF JOHN P. COONEY, JR.

I, John P. Cooney, Jr., being first duly sworn under oath, and under penalty of perjury declare and state as follows:

1. I am a member of the Bar of the State of New York and am and was at the relevant time period a partner with the law firm of Davis Polk & Wardwell.

2. As was the practice in my firm's retentions by Morgan Stanley & Co., Inc. ("Morgan Stanley") in 1995, I was retained orally by Morgan Stanley's in-house counsel, Monroe Sonnenburn, Esq., to assist in representing Mr. William H. Strong's and Morgan Stanley's interests in connection with a criminal investigation being conducted in Italy. The scope of my representation did not include appearance before the Italian courts but, rather, included, inter alia, coordination with Italian counsel for Mr. Strong and with other counsel - pursuant to joint defense arrangements - for other parties.

3. My firm's bills were paid by Salomon Brothers.

4. My clients' identities were known to me from the outset of this assignment.

I declare, under penalty of perjury, that the above statements are true and correct. This 23d day of February, 2005.

John P. Cooney, Jr.

Subscribed and sworn to me at the

City/County of New York, State of New York this 23d day of February, 2005.

Signature

My commission expires: _____

SARAH SUMSION
Notary Public, State of New York
No. 01SU6116600
Qualified in Queens County
Commission Expires Oct. 4, 2006

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

CASE NO: 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant(s).

AFFIDAVIT OF JOHN P. COONEY, JR.

I, John P. Cooney, Jr., being first duly sworn under oath, and under penalty of perjury declare and state as follows:

1. I am a member of the Bar of the State of New York and am and was at the relevant time period a partner with the law firm of Davis Polk & Wardwell.

2. As was the practice in my firm's retentions by Morgan Stanley & Co., Inc. ("Morgan Stanley") in 1995, I was retained orally by Morgan Stanley's in-house counsel, Monroe Sonnenburn, Esq., to assist in representing Mr. William H. Strong's and Morgan Stanley's interests in connection with a criminal investigation being conducted in Italy. The scope of my representation did not include appearance before the Italian courts but, rather, included, inter alia, coordination with Italian counsel for Mr. Strong and with other counsel - pursuant to joint defense arrangements - for other parties.

3. My firm's bills were paid by Salomon Brothers.

4. My clients' identities were known to me from the outset of this assignment.

I declare, under penalty of perjury, that the above statements are true and correct. This 23d day of February, 2005.

John P. Cooney, Jr.

Subscribed and sworn to me at the

City/County of New York, State of New York this 23d day of February, 2005.

Signature _____

My commission expires: _____

SARAH SUMSION
Notary Public, State of New York
No. 01SU6116600
Qualified in Queens County
Commission Expires Oct. 4, 2008

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

CASE NO: 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

DECLARATION OF CHARLES CHASIN, ESQ.

I, Charles Chasin, under penalty of perjury declare and state as follows:

1. I am a Managing Director in the Fixed Income division of Morgan Stanley Co., Inc. ("Morgan Stanley"). Prior to my present position, which I took in February 2001, I was a practicing in-house attorney in the litigation group of Morgan Stanley's legal department.

2. As an in-house attorney, my client was Morgan Stanley. I also counseled and advised Mr. William H. Strong in his capacity as a senior officer of Morgan Stanley, and in regard to the criminal charges against him in Italy .

3. I was retained by Morgan Stanley when they hired me as an attorney in the Law Department.

4. The scope of my representation of Morgan Stanley related to all litigation, regulatory and compliance matters involving the firm and its businesses from 1988 to 2001.

5. I was aware that Morgan Stanley was my client from the first day of my employment.

6. My representation of Mr. Strong began around the time of June 1999.

7. I considered myself to be counsel to both Morgan Stanley and Mr. Strong, so long as there was no conflict between their interests. Since Morgan Stanley and Mr. Strong shared the same interest in regard to seeing him acquitted of criminal charges in Italy, it was in Morgan Stanley's interest for me to represent Mr. Strong's interests in regard to his criminal defense.

8. At all relevant times, I was paid by Morgan Stanley.

9. Intermittently during the time frame from approximately June 1999 through February 2001, I worked with Mr. Strong to complete regulatory filings to be submitted to the National Association of Securities Dealers. During the course of that work, I corresponded with Mr. Strong's counsel for the purposes of rendering legal advice to assist in the completion of regulatory filings. In addition, I communicated with Mr. Strong's counsel for the purpose of monitoring his defense and advising as to legal strategies in regard to the criminal charges brought against him in Italy.

10. I also assisted Mr. Strong by advocating for the timely payment of his legal fees by Salomon Brothers International Limited, which I understood to have indemnified Mr. Strong in regard to his legal proceedings in Italy.

UNDER PENALTY OF PERJURY, I HEREBY DECLARE THAT THE FOREGOING IS TRUE AND CORRECT.

Charles Chasin

Charles Chasin, Esq.

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

CASE NO: 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

DECLARATION OF JAMES MANGAN, ESQ.

1. I am a member of the Bar of New York. I joined Morgan Stanley & Co. Incorporated in June of 2001 and I am presently an Executive Director in the Law Division.

2. I represent Morgan Stanley & Co. Incorporated in the regular course of my duties.

3. In connection with Mr. William Strong, the primary scope of my representation of Morgan Stanley was to ensure that in June of 2001 and February of 2005, certain amendments to Mr. Strong's U4 were drafted accurately and filed. To achieve this common interest of Morgan Stanley and Mr. Strong, I communicated with Mr. Strong and/or his outside counsel. In addition, I reviewed and/or revised draft amendments.

4. I am paid by my employer, Morgan Stanley & Co. Incorporated.

5. I have known the identity of my client since 2001.

UNDER PENALTY OF PERJURY, I HEREBY DECLARE THAT THE FOREGOING IS TRUE AND CORRECT.

Jan J. Mangan 2.24.05
James Mangan, Esq.

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

CASE NO: 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

DECLARATION OF MICHAEL D. MONICO, ESQ.

1. I am an attorney and a member of the Monico, Pavich & Spevack firm in Chicago, Illinois.

2. In about 2000, Morgan Stanley retained me to represent it and William Strong.

3. As best I recall, Morgan Stanley retained me over the telephone.

4. The scope of my representation was to participate in teleconferences to discuss case strategy and status updates with Italian counsel for Mr. Strong and Morgan Stanley, in connection with the Italian proceedings against Mr. Strong.

5. Morgan Stanley paid my fees.

6. I learned my clients' identities when I was first retained.

UNDER PENALTY OF PERJURY, I HEREBY DECLARE THAT THE FOREGOING IS TRUE AND CORRECT.

Michael D. Monico, Esq.

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

CASE NO: 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).

_____/

DECLARATION OF ROBERT H. MUNDHEIM

I, Robert H. Mundheim, under penalty of perjury declare and state as follows:

1. I am an attorney presently of counsel with the law firm of Shearman & Sterling LLP ("Shearman"). Prior to joining Shearman in 1999, I was the Senior Executive Vice President and General Counsel of Salomon Smith Barney Holdings Inc. ("Salomon Smith Barney"). I joined Salomon Inc. ("Salomon") as its Executive Vice President and General Counsel and its wholly-owned subsidiary Salomon Brothers ("Salomon Brothers") as a Managing Director and member of the Executive Committee in September 1992. Salomon Brothers International Limited ("SBIL") is a wholly owned subsidiary of Salomon Brothers. I had supervisory responsibilities over the legal staffs of Salomon Brothers and SBIL. Salomon was acquired by Traveler's Group at the end of 1997, and Salomon Brothers largely became Salomon Smith Barney. I retired from Salomon Smith Barney in 1998.

2. While I was General Counsel of Salomon, the Italian government conducted an investigation of SBIL's involvement in a 1992 proposed business transaction with Ente Nazionale Idrocarbruri ("ENI") and Societa Assicuratrice Industriale SpA ("SAI").

3. At all relevant times, my clients were Salomon Inc., Salomon Brothers, and SBIL.

4. I was employed directly by Salomon and Salomon Brothers.

5. My authority as counsel included all legal issues confronting Salomon and Salomon Brothers.

6. I was paid by Salomon.

7. From the first day of my employment, I was aware that my clients were Salomon, Salomon Brothers, and SBIL.

8. Attached as Exhibit A is a true and correct copy of a letter, dated May 17, 1995, that I sent to Mr. William H. Strong.

UNDER PENALTY OF PERJURY, I HEREBY DECLARE THAT THE FOREGOING IS TRUE AND CORRECT.

ROBERT H. MUNDHEIM 2/24/05

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

NOTICE OF FILING PLEADING UNDER SEAL

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed Exhibits A to the Declaration of Robert H. Mundheim under seal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by fax and hand delivery facsimile and hand delivery on this 24th day of February, 2005.

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S RESPONSE TO PLAINTIFF'S MOTION TO COMPEL FURTHER DISCOVERY

Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby responds to the legal and procedural issues raised in Plaintiff's Motion To Compel Further Discovery and states that the Motion is legally deficient and cannot form the basis for application of the crime fraud exception to the attorney client privilege for the following reasons:

1. The Motion fails to sufficiently identify or specify what crime or fraud was committed by Morgan Stanley. *American Tobacco Co. v. State,* 697 So. 2d 1249 (Fla. 4th DCA 1997); *Butler, Pappas v Coral Reef of Key Biscayne Developers, Inc.*, 873 So. 2d 339 (Fla. 3d DCA 2004). A willful failure of Morgan Stanley to make full production of responsive e-mails, or even a false certification of it, does not by itself constitute a sufficient basis to invoke the crime fraud exception to attorney client privilege. Plaintiff is required to show "a pervasive and systematic scheme to destroy or alter subpoenaed evidence." *In re Sealed Case*, 754 F.2d 395 (D.C. Cir. 1985).

2. Prior to filing its First Amended Complaint, Plaintiff affirmatively represented to this Court that it was not pursuing any spoliation claim, and the privileged documents sought are not related to proof of any allegation in Plaintiff's First Amended Complaint. Plaintiff does not have any need to "inform" the jury about the "full magnitude of the email problem" and the email discovery issues raised do not relate to the liability or punitive damages issues in this case. This is not the *American Tobacco Co* case where the court noted: "For some time in this suit, the state had been seeking to establish the crime- fraud exception to the attorney-client privilege with respect to documents it sought to discover regarding the allegations of its complaint that the tobacco companies had engaged in fraud in covering up the significant health risks of its product." *American Tobacco Co.,* 697 So. 2d at 1251 (emphasis added).

3. The Motion fails to include specific allegations as to when Morgan Stanley employed or retained an attorney to commit or further the subject crime or fraud, who the attorneys were that were allegedly so employed, and what acts or communications were made in conjunction with the attorney that furthered the subject crime or fraud. *First Union Nat'l Bank v. Turney*, 824 So. 2d 172, 187, (Fla. 1st DCA 2001); *First Union Nat'l Bank v. Whitener*, 715 So. 2d 979, 982 (Fla. 5th DCA 1998).

ARGUMENT

Substantive Issues, Standards and Procedures Under American Tobacco and Related Cases.

1. **Prima Facie Case**

Under *American Tobacco*, the discoverer – here the Plaintiff – must first allege that the communication was made as part of an effort to perpetuate a crime or fraud, and must specify the crime or fraud. *See also*, *Florida Mining & Materials Corp. v.*

Continental Cas. Co., 556 So. 2d 518, 519 (Fla. 2d DCA 1990) (ruling that before the statutory crime-fraud exception could be applied to privileged communications, the discoverer had to "allege and produce prima facie evidence" that the client "affirmatively sought the advice of counsel to procure a fraud") (citing *Eastern Air Lines, Inc. v. Gellert*, 431 So. 2d 329 (Fla. 3d DCA 1983). Conclusory allegations of fraudulent conduct are insufficient. *Cigna Corp. v. Spears*, 838 S.W. 2d 561, 569 (Tex. App. 1992), *cited in* . *Turney*, 824 So. 2d at 187.

Next, the discoverer must establish a prima facie case "that the party asserting the attorney-client privilege employed counsel or sought a lawyer's advice in order to commit, or in an attempt to commit, some crime or fraud." *Turney*, 824 So. 2d at 183. *See also*, *Whitener*, 715 So. 2d at 982 ("The party seeking to invoke the fraud exception must present prima facie evidence that the client sought the advice of counsel to procure a fraud."); *Haines v. Liggett Group Inc.*, 975 F.2d 81, 95-96 (3d Cir. 1992) ("the party seeking discovery must present evidence which, if believed by the fact-finder, would be sufficient to support a finding that the elements of the crime-fraud exception were met").

2. **Opportunity to Explain or Rebut; Evidentiary Hearing**

If the discoverer produces evidence which, if unexplained, would be prima facia proof of the existence of the crime fraud exception to the privilege, the burden then shifts to the party asserting the privilege. The court must provide that party the opportunity to give a reasonable explanation of the conduct or communication at an evidentiary hearing. *American Tobacco Co.,* 697 So. 2d at 1256; *Turney*, 824 So. 2d at 183. *See also*, *Eight Hundred, Inc. v. Florida Department of Revenue,* 837 So. 2d 574 (1st DCA 2003) (granting petition and quashing discovery order where administrative law judge ruled that

accountant-client privilege had been waived without holding an evidentiary hearing); and, *Haines*, 975 F.2d at 97 ("The importance of the privilege . . . as well as fundamental concepts of due process require that the party defending the privilege be given the opportunity to be heard, by evidence and argument, at the hearing seeking an exception to the privilege.").

3. **Weighing of the Evidence and Disclosure - Only Communications made in the course of the crime or fraud or in furtherance of it**

The trial court must then consider the client's evidence and argument rebutting the existence of the crime-fraud exception. *American Tobacco*, 697 So. 2d at 1256. If after weighing the evidence, the trial court finds that the client has not rebutted the existence of the exception, it may disclose the privileged communications, but only if they were made in the course of the crime or fraud or in furtherance of it. *Triple Five Of Minn., Inc. v. Simon,* 213 F.R.D. 324 at 326 (stating that "it is not enough that a communication merely provides evidence of the fraud"); *In re Richard Roe, Inc.,* 68 F.3d 38, 40 (2d Cir. 1995) (holding that "the exception applies only when the court determines that the client communication . . . in question was ***itself*** in furtherance of the crime or fraud") (emphasis in original) (quoted in *Triple Five*, 213 F.R.D. at 326); *In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d 32, 34 (2d Cir. 1986) (stating that the "exception applies only when there is probable cause to believe that the communications with counsel were intended in some way to facilitate or to conceal the criminal activity") (citing E. Cleary, *McCormick on Evidence*, § 95 (3d ed. 1984)). The trial court must make a document-by-document inspection and determination. *See Caldwell v. District Court*, 644 P. 2d 26, 32 (Colo. 1982) (stating that "it must be demonstrated that the exception applies ***to each***

document before that document is stripped of its privilege") (emphasis added) (cited in *Turney*, 824 So.2d at 183).

4. **Plaintiff's Motion is Deficient**

Although Plaintiff's Motion to Compel Further Discovery generally refers to Morgan Stanley's willful failure to make full discovery, there is no real attempt to show what fraud is being perpetuated on the court, nor any scheme by Morgan Stanley to employ lawyers in furtherance of that scheme. The fact that the email discovery problem existed and that certain Morgan Stanley employees may have sought advice on how to deal with it, does not establish a fraud nor that attorneys were employed in furtherance of it. Plaintiff does not have a right to discover privileged documents so that it can find out "how they [Morgan Stanley] learned about the existence" of the problem and "how they responded to it." Plaintiff cannot use the privileged documents or information to make its prima facia case. *American Tobacco; Haines.* Plaintiff does not have a need for this information to prove its case nor to "inform" the jury about the magnitude of the email problem. These issues are not relevant to Morgan Stanley's alleged liability for conspiracy regarding Dunlap's fraud or punitive damages.

For all the forgoing reasons, the Plaintiff's Motion does not comply with the standards and the procedures to invoke the crime fraud exception to the attorney client privilege required by *American Tobacco*. Morgan Stanley respectfully requests that this Court deny Plaintiff's Motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 24th day of February, 2005.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO DETERMINE THE APPROPRIATE SCOPE OF DISCOVERY

THIS CAUSE came before the Court February 24, 2005 on Coleman (Parent) Holdings, Inc.'s Motion to Determine the Appropriate Scope of Discovery, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Coleman (Parent) Holdings, Inc.'s Motion to Determine the Appropriate Scope of Discovery is Denied. CPH shall produce the unredacted versions of the produced documents by 4:00 p.m. February 24, 2005. The redacted documents shall be treated strictly in conformity with the Confidentiality Order in place, as amended, and shall be hand delivered to Lawrence Bemis, Esq., who assumed personal responsibility to ensure that they are treated strictly in conformity with this Order.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 24 day of February, 2005.

_____
ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON PLAINTIFF'S ORE TENUS MOTION FOR CLARIFICATION

THIS CAUSE came before the Court February 23, 2005 on Plaintiff's ore tenus Motion for Clarification, with all counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Plaintiff's ore tenus Motion for Clarification is Granted. The Court's February 23, 2005 Order for In Camera Inspection is clarified to provide that the affidavit of domestic counsel to be provided by 12 noon February 24, 2005 shall be served on CPH.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 24 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION FOR ADDITIONAL DISCOVERY REGARDING MAFCO'S INTERNAL VALUATION OF SUNBEAM STOCK AND MORGAN STANLEY'S MOTION FOR SANCTIONS AND ADDITIONAL DISCOVERY CONCERNING PLAINTIFF'S IMPROPER CONCEALMENT OF THE VALUE OF THE SUNBEAM WARRANTS

THIS CAUSE came before the Court February 24, 2005 on Morgan Stanley's Motion for Additional Discovery Regarding MAFCO's Internal Valuation of Sunbeam Stock and Morgan Stanley's Motion for Sanctions and Additional Discovery Concerning Plaintiff's Improper Concealment of the Value of the Sunbeam Warrants, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motions are Granted. CPH shall produce its corporate representative with the most knowledge of the internal valuation of the Sunbeam stock and warrants for deposition on March 1, 2005. CPH shall produce such other witnesses for deposition on the limited subject of the internal valuation of the stock and warrants and the effect, if any, on CPH's expert testimony on damages as MS & Co. shall reasonably require. CPH shall pay MS & Co. its reasonable costs and fees for the Motions, including those fees incurred in connection with the depositions permitted herein, to be determined at an evidentiary hearing following trial.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 24 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

16div-011878

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON PLAINTIFF'S MOTION IN LIMINE (NO. 15) TO BAR EVIDENCE AND ARGUMENT THAT SUNBEAM ASSUMED DEBT OF THE COLEMAN COMPANY, INC. AS MERGER CONSIDERATION TO CPH

THIS CAUSE came before the Court February 23, 2005 on Plaintiff's Motion in Limine (No. 15) to Bar Evidence and Argument that Sunbeam Assumed Debt of the Coleman Company, Inc. as Merger Consideration to CPH, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part. When speaking of the corporate debt assumed by Sunbeam in the transaction, neither MS & Co.'s witnesses nor counsel shall aggregate or co-mingle that debt with debt owed by the Coleman Company. This ruling is without prejudice to CPH's right to argue at a later time that evidence of the assumed debt is not relevant to the determination of liability.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 24 day of February, 2005.

_____
ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION IN LIMINE (NO. 22) TO BAR IMPROPER PUNITIVE DAMAGES-RELATED EVIDENCE AND ARGUMENT

THIS CAUSE came before the Court February 23, 2005 on Coleman (Parent) Holdings, Inc.'s Motion in Limine (No. 22) to Bar Improper Punitive Damages-Related Evidence and Argument, with all counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part, and ruling deferred, in part. MS & Co. shall not argue to the jury that the ultimate beneficiary of any award of punitive damages should be considered in determining entitlement to punitive damages. It is further

ORDERED AND ADJUDGED that the Court's ruling on CPH's Motion in Limine No. 2 is reconfirmed. It is further

ORDERED AND ADJUDGED that all other issues raised by the Motion are deferred to stage II of the trial.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 24 day of February, 2005.

_____
ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION IN LIMINE NO. 4 TO EXCLUDE EVIDENCE AND TESTIMONY REGARDING EXTRA-CONTRACTUAL REPRESENTATIONS

THIS CAUSE came before the Court February 23, 2005 on Morgan Stanley's Motion in Limine No. 4 to Exclude Evidence and Testimony Regarding Extra-Contractual Representations, with all counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion in Limine No. 4 to Exclude Evidence and Testimony Regarding Extra-Contractual Representations is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 24 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION IN LIMINE NO. 10 TO EXCLUDE RESTATEMENT INTERVIEW NOTES OF NON-PARTY ARTHUR ANDERSEN AND NON-PARTY SKADDEN

THIS CAUSE came before the Court February 24, 2005 on Morgan Stanley's Motion in Limine No. 10 to Exclude Restatement Interview Notes of Non-Party Arthur Andersen and Non-Party Skadden, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion in Limine No. 10 to Exclude Restatement Interview Notes of Non-Party Arthur Andersen and Non-Party Skadden is Granted, in part. CPH shall not refer to, or attempt to place before the jury, evidence of the Arthur Andersen/Skadden interviews of Sunbeam employees without first laying a factual predicate to support a conclusion that the interviews qualify under the business records exception to the hearsay rule and without the Court's first ruling on, if the specific report(s) offered contain hearsay statements, that the hearsay statements are not sought to be introduced for the truth of the matter alleged, absent an independent exception to the hearsay rule.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 24 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

16div-011886

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COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

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

CASE NO: 2003 CA 005045 AI

PLAINTIFF'S SUPPLEMENTAL MEMORANDUM REGARDING PROCEDURES TO BE FOLLOWED IN ESTABLISHING THE CRIME/FRAUD EXCEPTION TO ATTORNEY-CLIENT PRIVILEGE

Coleman (Parent) Holdings Inc. ("CPH") respectfully submits this supplemental memorandum regarding the proper procedures to be followed in establishing the crime/fraud exception to attorney-client privilege. The mere fact that the Court has previously reviewed the documents in question in no way prevents the Court from ruling on CPH's motion to compel further discovery under the crime/fraud exception. Indeed, on-point authority from both the Fourth District Court of Appeal and the U.S. Supreme Court (*see infra* Point III) compels the rejection of any contrary assertion.

I. Defendant Is Incorrect in Asserting that an *In Camera* Review of the Documents Cannot Be a Part of the Court's Determination Whether the Crime/Fraud Exception Applies.

As indicated in our February 24, 2005 filing, Florida courts apply a two-step process when considering a motion asserting the crime/fraud exception to the attorney-client privilege. First, the party opposing the privilege "'must present evidence which, if believed by the fact-finder, would be sufficient to support a finding that the elements of the crime-fraud exception were met.'" *American Tobacco Co. v. State*, 697 So. 2d 1249, 1255 (Fla. 4th DCA 1997)

(citation omitted). Once this "prima facie" showing is made, the party asserting the privilege is then entitled to an evidentiary hearing at which it bears the burden of persuasion to rebut the prima facie showing. *Id.* at 1256.

Morgan Stanley errs in asserting that "Plaintiff cannot use the [allegedly] privileged documents or information to make its prima facie case." MS Br. at 5. To the contrary, the law is clear that the Court may consider the documents, after conducting an *in camera* review, in deciding whether the prima facie case has been made, if the party opposing the privilege has first made an even more lenient showing through extrinsic evidence establishing a "'factual basis adequate to support a good faith belief by a reasonable person, that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.'" *American Tobacco*, 697 So. 2d at 1255 (quoting *United States v. Zolin*, 491 U.S. 554, 572 (1989)); *see id.* ("the decision to engage in an *in camera* review of the documents involve[s] an even more lenient standard of proof"). Once that initial very low standard is met, the "trial court may review attorney-client communications *in camera* to determine the applicability of the crime-fraud exception, and its decision to conduct such a review lies entirely within its sound discretion." *Butler, Pappas, Weihmuller, Katz, Craig, LLP v. Coral Reef of Key Biscayne Developers, Inc.*, 873 So. 2d 339, 342 (Fla. 3d DCA 2003) (citing *Zolin*, 491 U.S. at 572). Moreover, this use of the *in camera* inspection is clearly a proper part of the determination whether the prima facie case has been made, since it precedes the evidentiary hearing where the party asserting the privilege has an opportunity to rebut the prima facie case. *See id.*

As another court put it: "Absent agreement otherwise, the trial judge should not examine written communications between attorney and client, unless the party seeking to establish the crime-fraud exception adduces competent evidence, apart from the disputed documents, that

would lead a reasonable person to believe that such an examination would reveal that the communications were part of an effort to perpetrate some crime or fraud." *First Union Nat'l Bank v. Turney*, 824 So. 2d 172, 183 (Fla. 1st DCA 2001) (citing *Zolin*, 491 U.S. at 572), *rev. denied*, 828 So. 2d 385 (Fla. 2002). But where that lenient standard is met, the *in camera* review is part of the prima facie case ruling, not some later stage. *See id.* ("Even if *in camera* inspection makes it appear that the crime-fraud exception applies, a full evidentiary hearing is necessary (unless waived by the proponent of the privilege), before confidential communications between attorney and client can be disclosed to another party.").

II. Although the Opponent of the Privilege Must Come Forward with Some Extrinsic Evidence Justifying a Reasonable Suspicion that the Crime/Fraud Standard May Apply Before the Court Undertakes an *In Camera* Inspection, That Standard Was Amply Met Here.

Here, there was an ample basis in the extrinsic evidence to justify an *in camera* review. The Court had found that Morgan Stanley had willfully violated a Court order requiring production of e-mails, that counsel had falsely reported that they were making a full production of e-mails on May 14, 2004, and that a Morgan Stanley employee had signed a false certification to that effect on June 23, 2004. One of the documents at issue was an e-mail from the signatory of the certification, dated June 7, 2004, seeking legal advice from senior in-house counsel about the recovery of e-mails from backup tapes. Other documents date from the period of October and November 2004, when counsel were discussing with Morgan Stanley employees the fact that there were a large number of backup tapes still not searched for responsive e-mails. This led to the production of 8,000 pages of e-mails, which Morgan Stanley falsely characterized as having been recovered from "newly discovered" backup tapes. These facts strongly suggest that Morgan Stanley was endeavoring to complete production of e-mails from the original set of 35,000 backup tapes without disclosing that it had failed to do so in May. It is hard to imagine

circumstances more strongly warranting an *in camera* inspection to see whether counsel were in fact conspiring with Morgan Stanley on these matters or being duped into making false representations.

III. The Fact That the Court Reviewed the Documents *in Camera* for Another Purpose Before the Crime/Fraud Issue Arose Does Not Preclude the Court from Considering the Motion.

The procedures followed by this Court and requested by CPH have been expressly approved by both the Fourth District Court of Appeal and the U.S. Supreme Court. At this Court's February 14, 2005 evidentiary hearing, when questions arose as to whether the documents fell within the scope of the attorney-client privilege, the Court — at CPH's request and without objection by Morgan Stanley — requested affidavits supporting Morgan Stanley's claims of privilege and then reviewed the documents and the affidavits *in camera* to determine whether the documents were privileged at all. That review does not preclude the Court from now ruling on whether CPH met the initial standard for undertaking an *in camera* inspection in the crime/fraud context — *i.e.*, whether extrinsic evidence justifies a reasonable suspicion that Morgan Stanley used its attorneys to commit what Morgan Stanley knew was a fraud on this Court and on CPH. As discussed above, the answer to that question is obviously "Yes."

Once a court has undertaken an *in camera* inspection for some other purpose, there is no reason for it to go through pointless formalities once a crime/fraud argument is raised. To the contrary, the court can then proceed to decide whether a prima facie case has been made out. Thus, for example, in *Ginsburg v. Pachter*, — So. 2d —, No. 4D03-2720, 29 Fla. L. Weekly D2178, 2004 WL 2173638, 2004 Fla. App. LEXIS 14289 (Fla. 4th DCA Sept. 29, 2004), the trial court reviewed two letters *in camera* for purposes of deciding whether they were privileged at all. It found the letters to be privileged, but then the opposing party raised the issue of the

crime/fraud exception, and the court relied on that exception to order production of the letters. 2004 Fla. App. LEXIS 14289, at *3-*5. The Fourth District affirmed. *Id.* at *6 ("[W]e cannot say the trial court deviated from the essential requirements of law when it determined that, while privileged, the letters were discoverable based upon the crime/fraud exception.").

The holding in *Ginsburg* comports with the U.S. Supreme Court's opinion in *United States v. Zolin*, 491 U.S. 554 (1989). The *Zolin* Court expressly rejected the argument that an allegedly privileged attorney-client communication must be treated as presumptively privileged "while the question of crime or fraud remains open." *Id.* at 568. If the trial court can determine whether the communications are privileged only by reviewing them *in camera*, it may conduct that review first and then decide whether the crime/fraud exception applies: "[T]he court is not required to avert its eyes (or close its ears) once it concludes that the communication would be privileged, if the court found the crime-fraud exception inapplicable. Rather, . . . the court may then consider the same communications to determine if the opponent of the privilege has established that the crime-fraud exception applies." *Id.* (citations and internal quotation marks omitted; emphasis added); *see also* 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 8.9 (2d ed. 2004) (explaining that once a trial court examines the contested documents to establish the privilege, "the trial judge would not have to ignore evidence within the document that the crime/fraud exception is applicable").

The outcome in this case is controlled by *Ginsburg* and *Zolin*. As argued in our original motion, the Court is now in a position to determine, based on the extrinsic evidence in the record and based on its review of the documents, whether the prima facie case has been made. If Morgan Stanley then requests an evidentiary hearing on the matter, it has that right.

IV. The Court's *in Camera* Review of the Documents Does Not Bar the Same Judge from Resolving the Crime/Fraud Issue.

Morgan Stanley's assertion that the applicability of the crime/fraud exception must be made by a different judge who is ignorant of the contents of the challenged documents finds no support in Florida's statutes or rules of judicial administration. Morgan Stanley cannot credibly argue that the Court's *in camera* inspection of documents has created "prejudice" or "bias" that threatens the fairness of the hearing on the crime/fraud exception's applicability, especially given the caselaw, cited above, inviting *in camera* inspections. Morgan Stanley's core argument — that exposure to inadmissible evidence infects the fact-finder and thus mandates the limited substitution of a different judge — would cripple the judiciary, as trial judges conducting bench trials would routinely be forced to recuse themselves anytime they ruled a piece of evidence inadmissible. That is not the law in Florida, or anywhere else.

CONCLUSION

For the foregoing reasons, this Court should reject Morgan Stanley's oral suggestion regarding the procedures for ruling on the crime/fraud exception.

Dated: February 25, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been served to all counsel on the attached Service List by the means indicated this 25th day of February 2005.

Dated: February 25, 2005

COLEMAN (PARENT) HOLDINGS INC.

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One of Its Attorneys

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

NOTICE OF FILING ORIGINAL RETURN OF SERVICE

Defendant, MORGAN STANLEY & CO. INCORPORATED, by and through its undersigned counsel, hereby gives notice that it has filed the original Return of Service and trial subpoena for Donald Denkhaus.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand-delivery on this 25th day of February, 2005.

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Suite 1200 – West Tower
West Palm Beach, FL 33401-6136

RETURN OF SERVICE

State of Florida **County of Palm Beach** **Circuit Court**

Case Number: CA 03-5045 AI Court Date: 2/22/2005

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

For: Joseph Ianno, Jr., Esq.
CARTLON, FIELDS P.A.,

Received by BLACKHAWK LEGAL SERVICE INC on the 7th day of January, 2005 at 8:00 am to be served on **DONALD DENKHAUS, 10225 S.W. 87th Court, Miami, FL 33176**. I, Manuel de Castes, do hereby affirm that on the 25 day of January, 2005 at 2:15p.m., executed service by delivering a true copy of the Subpoena for Trial/$12.68 Witness Fee Check in accordance with state statutes in the manner marked below:

( ) INDIVIDUAL SERVICE: Served the within-named person.

(X) SUBSTITUTE SERVICE: By serving Wendy as wife.

( ) POSTED SERVICE: After attempting service on ___/___ at _____ and on ___/___ at _____ to a conspicuous place on the property described herein.

( ) OTHER SERVICE: As described in the Comments below by serving _____ as _____.

( ) NON SERVICE: For the reason detailed in the Comments below.

COMMENTS: _____

I certify that I have no interest in the above action, am of legal age and have proper authority in the jurisdiction in which this service was made.

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Ret. Orig. to Client

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO: CA 03-5045 AI

SUBPOENA FOR TRIAL

THE STATE OF FLORIDA

TO: DONALD DENKHAUS
10225 S.W. 87th Court
Miami, Florida 33176

YOU ARE COMMANDED to appear before The Honorable Elizabeth Maass, Judge of the Circuit Court, at the Palm Beach County Courthouse, Courtroom 11A, 205 North Dixie Highway, West Palm Beach, Florida on February 22, 2005* at 9:30 a.m., to testify in this action. If you fail to appear, you may be in contempt of court.

You are subpoenaed to appear by the following attorneys, and unless excused form this subpoena by these attorneys or the Court, you shall respond to this Subpoena as directed.

Dated: January 4, 2005

BY: _____
Joseph Ianno, Jr.
For the Court

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Counsel for Defendant
Morgan Stanley & Co. Incorporated

***BEFORE YOU APPEAR**

PLEASE CALL JOYCE DILLARD, CLA AT (561) 659-7070 TO CONFIRM THE EXACT TIME AND DATE YOU WILL BE CALLED TO TESTIFY

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

NOTICE OF FILING PLEADING UNDER SEAL

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed the original of the following:

February 15, 2005 Affidavit of Soo-Mi Lee
February 15, 2005 Affidavit of James Doyle
February 15, 2005 Affidavit of James P. Cusick
February 15, 2005 Affidavit of Zacharcy Stern
February 15, 2005 Affidavit of Mariano Wolff
February 16, 2005 supplemental Affidavit of Soo-Mi Lee
Undated Declaration of William H. Strong

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and hand delivered on this 25th day of February, 2005.

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February 25, 2005

Via Facsimile

Michael T. Brody
c/o Mafco Holdings Inc.
777 S. Flagler Drive
Suite 1200 - West Tower
West Palm Beach, FL 33401-6136

Re: ***Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co. Incorporated***

Dear Mr. Brody:

This letter is to alert you to the potential necessity to take depositions in addition to your corporate representative next week. We understand, of course, that Mr. Slotkin is going to be your corporate representative. We are enclosing with this letter a copy of our Notice of Deposition, so please make sure he is the appropriate person to testify to ***all*** matters in the Notice of Deposition.

Further, without prejudging the issue, you should be aware that it is possible we will want to take the depositions of the following individuals: Ronald O. Perelman, Laurence Winoker, and Blaine Nye.

Best regards.

Sincerely,

Thomas A. Clare

Thomas A. Clare

Enclosure

cc: J. Scarola
J. Ianno
M. Hansen

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

NOTICE OF VIDEOTAPED DEPOSITION

PLEASE TAKE NOTICE that Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") will take the deposition of Coleman (Parent) Holdings Inc. ("CPH") through a CPH representative or representatives with knowledge on the topics listed below, pursuant to Florida Rules of Civil Procedure 1.280 and 1.310, and the Court's Order at the February 24, 2005 hearing. The deposition will be taken my means of video tape and the videographer will Visual Evidence, 601 N. Dixie Highway, West Palm Beach, Florida. The oral examination will take place on March 2, 2005, from 10:00 am until conclusion, at the offices of Carlton Fields, 222 Lakeview Avenue, Suite 1400, West Palm Beach, Florida 33401-6149.

CPH shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf on the following matters:

1. The accounting value, book value, balance sheet value, or internal valuation of the Sunbeam stock received by CPH as a result of Sunbeam's acquisition of The Coleman Company, Inc.

2. The accounting value, book value, balance sheet value, or internal valuation of the Sunbeam warrants received by CPH as a result of the Sunbeam settlement agreement.

3. The authenticity, source, use, creation, editing, access, maintenance and business purpose of the documents produced by CPH in response to the February 17, 2005 Order.

4. The native electronic versions of the documents produced by CPH in response to the February 17, 2005 Order, including without limitation all metadata, document histories, and document profiles.

5. The identity of all persons responsible for or involved with the creation, editing, review, or presentation of the documents produced by CPH in response to the February 17, 2005 Order.

6. The dates, context, circumstances, and meaning of the documents produced by CPH in response to the February 17, 2005 Order, including without limitation all line items, footnotes, abbreviations, codes, notations, and concepts.

7. The figures, calculations, buildups, backup data, and documents underlying each line item in the documents produced by CPH in response to the February 17, 2005 Order.

8. All communications between CPH, MAFCO, or any related or affiliated entity with any third party regarding the documents produced by CPH in response to the February 17, 2005 Order, including without limitation Sunbeam Corporation and Credit Suisse First Boston.

9. The preparation for and audit of MAFCO Holdings Inc. Consolidated Financial Statements For The Years Ended December 31, 1998, 1999, and 2000 produced by CPH in response to the February 17, 2005 Order.

10. The circumstances, timing, process and persons responsible for the search, collection, processing, redaction and review of the documents responsive to the February 17, 2005 Order and Morgan Stanley's First Request for Production of Documents Nos. 9 and 39, Third Request for Production of Documents No. 2, and Eighth Request for Production of Documents No. 4; the reasons for why the documents produced by CPH in response to the February 17, 2005 Order were not produced earlier or shown to CPH's experts; the reasons for the redaction of relevant information in the documents produced by CPH in response to the February 17, 2005 Order; the existence of any other documents responsive to the February 17, 2005 Order and Morgan Stanley's First Request for Production of Documents No. 9; and the failure to retain any other documents that would have been responsive to the February 17, 2005 Order and Morgan Stanley's First Request for Production of Documents No. 9.

The deposition will be recorded by stenographic and videographic means. The witness is instructed to bring all books, papers, and other things in his or her possession or under its control relevant to this lawsuit (and not previously produced in discovery) to the examination, including

all documents requested in the February 24, 2005 Letter from Lawrence P. Bemis to Michael Brody.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 25th day of February, 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

CASE NO: CA 03-5045 AI

COPY
RECEIVED FOR FILING
FEB 2 8 2005
SHARON R. BOCK
CLERK & COMPTROLLER
CIRCUIT CIVIL DIVISION

MORGAN STANLEY'S MOTION IN LIMINE NO. 23 TO EXCLUDE EVIDENCE REGARDING WILLIAM STRONG'S ITALIAN ACQUITTAL

Coleman (Parent) Holdings Inc. ("CPH") intends to introduce evidence at trial relating to criminal charges brought against William Strong in Italy in October 1998 — months after the Sunbeam transaction was over — relating to a 1992 transaction that Mr. Strong worked on in Italy before he joined Morgan Stanley. ***Mr. Strong was acquitted of the charges by every court that considered them — and absolved of all wrongdoing.*** This evidence has no possible relevance to any issue in this case. The Florida Evidence Code prohibits CPH from using the now-discredited charges to impeach Mr. Strong's credibility, as evidence of Mr. Strong's purported bad character, or to show his alleged propensity for bad acts. *See* Fla. Evid. Code §§ 90.404(2)(a), 90.609-610.

Nor are the Italian charges relevant to the even-more-attenuated issue of Morgan Stanley's "state of mind" in allowing Mr. Strong to work on the Sunbeam transaction or, as CPH has most recently suggested, to Mr. Strong's own motive to generate revenue. Under the most fundamental principles of the American and Italian criminal justice systems, Mr. Strong was innocent of any wrongdoing until proven guilty. CPH's suggestion that Morgan Stanley was

wrong to allow Mr. Strong to continue to perform his duties while an Italian magistrate conducted an investigation seeks to turn this basic principle on its head.

Most recently, CPH has argued that the possibility of criminal charges against Mr. Strong is relevant to his desire to generate revenue for Morgan Stanley. There is not a single fact in the record that would allow the Court or a reasonable juror to determine, as a matter of law or fact, that Mr. Strong was driven to generate revenue or commit fraud in connection with the Sunbeam transaction because an Italian magistrate was investigating a transaction that occurred six years earlier when he worked for a different employer. For these reasons as well, the admission of documents or testimony relating to the Italian legal proceedings would constitute reversible error.

STATEMENT OF FACTS

1. In 1992, while Mr. Strong was employed by Salomon Brothers Mr. Strong, and numerous other individuals, worked on a proposed joint venture in Italy, between Ente Nazionale Idrocarburi and Societa Assicuratrice Industriale. The transaction was never consummated.

2. Mr. Strong left Salomon Brothers (London) in January 1993 and came to work for Morgan Stanley. (Dec. 4, 2003 Strong Dep. at 12 (Ex. 1).)

3. In February and March 1998, six years after the Salomon Brothers transaction that was the subject of the Italian investigation, and five years after Mr. Strong became a Morgan Stanley employee, Mr. Strong participated in the Sunbeam/Coleman transaction. That transaction was completed by March 1998.

4. In October 1998, more than six months after the Sunbeam transaction closed, an Italian Magistrate Judge in Milan charged Mr. Strong with contributing toward causing the carrying out of the crime of corruption and committed him for trial. All of the charges related to

work performed by Mr. Strong at Solomon Brothers, before he joined Morgan Stanley. (*See* June 18, 2001 Form U-4 Disclosure Questions and Criminal DRP at MSC116158 (Ex. 2).)

5. The Italian charges against Mr. Strong were extinguished in a written judgment issued by the charging court on March 12, 2001. (Mar. 12, 2001 Judgment, Court of Milan Criminal Division No. 4 (Ex. 3).) The March 12, 2001 written judgment expressly states the Italian trial court's determination "[n]ot to bring actions against ... Mr. William Strong." (*Id.* at 16.) The trial court noted that, at the time of the transaction involved in the charge, Mr. Strong "was in charge of European Investment Banking and a member of the European Management Committee of Salomon Brothers." (*Id.* at 7.) The trial court found "[n]o evidence exists that Salomon executives were aware of the corruptive agreement." (*Id.* at 14.) With respect to Mr. Strong and Mr. Marocco, another Salomon executive, the Court concluded:

> For the foregoing reasons, therefore, it has to be stated not to go further against Mr. Marilo Marocco and Mr. William Strong, in connection with the criminal offence hereof provided that the latter is extinguished by means of prescription.

(*Id.* at 15.)

6. Even though the Italian trial court ruled that the criminal charges were "extinguished," Mr. Strong appealed the written judgment to the Milan Court of Appeal "to secure a ruling that [his] conduct was in no way improper." (Feb. 8, 2005 Form U4 Uniform Application for Securities Industry Registration or Transfer at 13 (Ex. 4).)

7. Mr. Strong prevailed in his appeal. On January 8, 2003, the Court of Appeal of Milan affirmed the dismissal of the charges. Indeed, the Court of Appeal expressly absolved Mr. Strong of any wrongdoing on the grounds that ***"he did not commit the act."*** (*See* Jan. 8, 2003 Sentence, Court of Appeals of Milan (Ex. 5) (emphasis added).)

ARGUMENT

8. Evidence regarding the Italian legal proceedings has no possible relevance to any issue in this case, and the admission of such evidence would constitute reversible error. Being wrongfully accused of a crime is not relevant for any purpose — not to Strong's character, and not to Morgan Stanley's assessment of his character.

9. The judicially-determined fact that William Strong "did not commit the crime for which he was charged" is the end of the story. Mr. Strong's acquittal on the merits means that the charge and the proceedings in Italy ***cannot*** prove or disprove any material fact in this case. *See* Fla. Evid. Code § 90.401. Florida law is clear: Evidence of a charge, arrest, indictment, or criminal complaint is not admissible in a subsequent trial. *See State v. Perkins*, 349 So. 2d 161, 164 (Fla. 1977) ("[E]vidence of crimes for which a defendant has been acquitted is not admissible in a subsequent trial."); *see also Metropolitan Dade County v. Wilkey*, 414 So. 2d 269, 271 (Fla. 3d DCA 1982) ("An indictment is an accusatory pleading; pleadings are not admissible in evidence to prove or disprove a fact in issue.") (internal citations omitted).

10. Similarly, evidence of the Italian criminal proceedings cannot be used to show Mr. Strong's "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," because the financial transaction and conduct at issue in those proceedings has nothing to do with the facts of this case, and long predate Mr. Strong's employment at Morgan Stanley. *See* Fla. Evid. Code § 90.404.

11. Since this kind of evidence cannot be used as ***direct*** evidence of Mr. Strong's character, it cannot be used ***indirectly*** to prove someone else's assessment of Mr. Strong's character.

12. CPH tries to make an end-run around the unequivocal Florida law barring such evidence by arguing that evidence of the now-discredited charge is relevant to Morgan Stanley's

"state of mind." However, CPH, in its oral and written representations to the Court, has never offered any coherent theory as to whose "minds" are at issue or ***how*** the Italian acquittal could be relevant to Morgan Stanley's "state of mind" or the so-called "big fraud."

13. CPH has made the general argument that "Morgan Stanley's knowledge of and response to those 1998 circumstances, regardless of the exoneration by the appellate court in 2003, are pertinent to Morgan Stanley's state of mind concerning Strong's conduct in the time period relevant to this litigation," including the attenuated hypothetical that "[i]f Morgan Stanley knew of the allegations and chose to ignore them, or investigated the allegations, concluded they were well-founded, and nevertheless continued to entrust Strong with important corporate responsibilities, such circumstances are clearly indicative of a reckless disregard for the interests of third parties relying on Morgan Stanley's corporate integrity." (Feb. 9, 2005 CPH's Motion to Compel Prod. of Docs. Re W. Strong at 3.)

14. To the extent that this argument even makes sense, CPH's theory sounds in negligent entrustment. But CPH has not pled negligent entrustment or vicarious liability, even in its new First Amended Complaint. Even if CPH's pleadings were not deficient as a matter of law, evidence of Mr. Strong's acquittal would nonetheless remain irrelevant to any material fact at issue in this case.

15. Under CPH's "state of mind" theory, Morgan Stanley had a duty to immediately remove Mr. Strong from his transactions for the years in which Morgan Stanley knew that the Italian courts were investigating the facts and deciding whether to charge Mr. Strong. The suggestion that Morgan Stanley was negligent in 1998 for allowing Mr. Strong to continue to work on matters for clients and that Morgan Stanley should have considered Mr. Strong guilty until proven innocent runs afoul of the Fifth and Fourteenth Amendment of the U.S. Constitution

as well as the constitutions of every state in the union. Indeed, the fact that Morgan Stanley did not automatically suspend Mr. Strong simply because he had been charged with a crime on which he would later be acquitted does not show that Morgan Stanley was negligent; it shows that Morgan Stanley was ***right***.

16. Even CPH seems to have acknowledged the untenable nature of its "state of mind" or "negligent entrustment" theory of relevance. At the February 23 Pretrial Conference, CPH receded from the arguments made in its Motion to Compel and moved on to an equally untenable position. CPH's most recent argument seems to be that ***Mr. Strong knew*** that ***Morgan Stanley knew*** that Italian officials were investigating a transaction he worked on six years earlier, and that this knowledge gave Mr. Strong an incentive to generate revenue for Morgan Stanley at any cost, including committing fraud. Even counsel for CPH had difficulty articulating this "double state of mind" theory. (*See* Feb. 23, 2005 Hrg. Tr. at 1333, J. Scarola ("It sure seems to me that it is relevant and material evidence that this employee knows that his employer is aware of the kind of information that might very well result in his termination.").)

17. There is not a single fact in the record that would allow the Court or a reasonable juror to determine, as a matter of law or fact, that Mr. Strong was driven to commit fraud in connection with the Sunbeam transaction because he was concerned that Morgan Stanley knew that an Italian magistrate was investigating a transaction that occurred six years earlier when he worked for a different overseas employer. Even if CPH's newfound relevance theory had some minimal probative value (and it does not) such probative value is far outweighed by the fact that the evidence is highly prejudicial and virtually certain to unfairly bias the jury Morgan Stanley and Mr. Strong. *See* Fla. Evid. Code § 90.403; *Morowitz v. Vistaview Apartments, Ltd.*, 613 So. 2d 493, 495 (Fla. 3d DCA 1993) (reversible error to admit highly prejudicial and minimally

probative testimony regarding plaintiff's mental state into evidence), *review denied,* 626 So. 2d 210 (Fla. 1993).

18. CPH clearly seeks this evidence for the sole improper purpose of misleading or prejudicing the jury by casting a cloud over Mr. Strong on the grounds of the false charge alone. This is precisely what the Florida legislature intended to prevent when it barred such evidence through section 90.403 of the Florida Evidence Code. *See Brown v. State*, 719 So. 2d 882, 885 (Fla. 1998) ("[U]nfair prejudice" as contemplated in the evidentiary rule excluding relevant evidence that is outweighed by danger of unfair prejudice, "means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.") (internal quotations omitted).

19. Even if Mr. Strong had been ***convicted*** of the charges (rather than exonerated), this Court would have an obligation to preclude CPH from making the conviction a central feature of the trial. *Turtle v. State*, 600 So. 2d 1214 (Fla. 1st DCA 1992) ("It is the obligation of the court to weigh the probative value of such evidence against undue prejudicial effect, and substantial undue prejudice under this latter section has been found when the evidence of collateral crimes has been allowed to become a feature of the trial instead of an incident.") (internal quotations omitted). CPH, by its own admission, intends to make Mr. Strong's motivation to generate revenue at any cost, including fraud, a "central theme of the Plaintiff's case." (Feb. 23, 2005 Hrg. at 1332-33). The fact that the CPH would not be able to make a ***conviction*** a "feature of the trial" certainly precludes CPH from doing so with respect to a charge for which Mr. Strong was exonerated.

20. The Court should not accept CPH's invitation to commit error by allowing the introduction of evidence, based on a tortured theory premised entirely on the sensational, ***highly***

prejudicial and now-discredited Italian charge. Florida law is clear that the introduction of evidence of charges or crimes for which an individual is later acquitted is reversible error. *See Perkins,* 349 So. 2d at 163 (reversible error to introduce evidence of stabbing charge when defendant was acquitted of the charge "because of the prejudicial effect the evidence of the acquitted crime will have in the minds of the jury"); *Hilaire v. State*, 799 So. 2d 403, 406 (Fla. 4th DCA 2001) (reversible error to introduce evidence of charge of battery of police officer when defendant was acquitted of the charge); *Perez v. State*, 801 So. 2d 276 (Fla. 4th DCA 2001) (reversible error to admit evidence of collateral crimes for which defendant was acquitted).

Implications For Discovery

Florida Rule of Civil Procedure 1.280(b)(1) entitles a party to "obtain discovery regarding any matter, not privileged, that is ***relevant*** ... to the claim or defense of any party ..." (emphasis added). Because, as set forth above, all evidence regarding the false charges brought against Mr. Strong in Italy after the Sunbeam transaction cannot possibly be relevant to any issue in the case, such evidence is not properly discoverable and Morgan Stanley should be relieved of any and all discovery regarding this issue.

WHEREFORE, any evidence of the charges against Mr. Strong are inadmissible under well-settled Florida law. Such evidence is highly prejudicial and utterly irrelevant to any issue the jury will be asked to decide in the case, and the evidence must be excluded to prevent reversible error. Morgan Stanley requests that the Court enter an Order excluding all testimony and evidence regarding the Italian charge and acquittal from trial, and that Morgan Stanley be relieved of any and all discovery regarding this issue.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 28th day of February 2005.

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Exhibit 1

Exhibit 3

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

NOTICE OF FILING PLEADING UNDER SEAL

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed its Response to Plaintiff's Motion for Order Declaring Attorney-Client Privilege Waived for Certain Documents Relating to William Strong.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and hand delivered on this 28th day of February, 2005.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

_____/

ORDER
(RELEASE OF EXHIBITS)

THIS CAUSE came before the Court, in Chambers, on MS & Co.'s affidavits and filings in support of its e-mail privilege logs dated February 8, 2005; February 10, 2005; and February 11, 2005.

On April 16, 2004, the Court entered its Agreed Order requiring MS & Co. to (1) search the oldest full back up tape for each of 36 MS & Co. employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all non-privileged e-mails responsive to CPH's document requests; (4) give CPH a privilege log; and (5) certify its full compliance with the Agreed Order.

As has become painfully clear to the Court, MS & Co. woefully failed to comply with the Agreed Order. In sum, despite MS & Co.'s affirmative duty arising out of the litigation to preserve[1] and produce[2] its e-mails, and contrary to federal law requiring it to preserve the e-

[1]See Hagopian v. Publix Supermarkets, Inc., 788 So. 2d 1088 (Fla. 4th DCA 2001), rev. den. 817 So. 2d 849 (Fla. 2000).

[2]See April 16, 2004 Agreed Order.

mails in an accessible place for two years[3], MS & Co. failed to preserve many e-mails and failed to produce all e-mails required by the Agreed Order. The failings include overwriting e-mails after 12 months; failing to conduct proper searches for tapes that may contain e-mails; providing a certificate of compliance known to be false when made and withdrawn only recently; failing to timely notify CPH when additional tapes were located; failing to use reasonable efforts to search the newly discovered tapes; failing to timely process and search data held in the staging area or notify CPH of the deficiency; failing to write software scripts consistent with the Agreed Order; and discovering the deficiencies only after CPH was given the opportunity to check MS & Co.'s work and the MS & Co.'s attorneys were required to certify the completeness of the prior searches. Many of these failings were done knowingly, deliberately, and in bad faith.

In connection with the Court's Order requiring MS & Co. to produce documents outlining its efforts to comply with the Agreed Order, MS & Co. produced the logs, affidavits, and documents under review here. In essence, the items fall into three groups. First, MS & Co. claims some of the items were produced in response to an informal SEC inquiry and are subject to a work-product privilege or represent communications with counsel concerning that inquiry, including direct communications with counsel and communications among staff or between staff and outside vendors. Second, some of the items deal with legal advice alleged to have been given in the summer of 1998. Finally, a single document concerns information sent to in-house counsel.

As to the first group, the Court finds that MS & Co. has failed to establish a work product privilege. The burden of establishing the privilege rests on MS & Co. See Southern Bell Telephone and Telegraph Co. v. Deason, 632 So. 2d 1377 (Fla. 1994). Despite two requests

[3]See E. 17 C.F.R. §240.17a-4 (1997).

from the Court, though, seeking specific information about the nature of the contemplated regulatory action or litigation, all MS & Co. has averred is that in October 2004 the SEC initiated an informal regulatory inquiry into "*inter alia*, Morgan Stanley's maintenance of pre-2003 e-mail on back up tapes. The SEC inquiry soon expanded to concern various issues relating to the migration of those e-mails from tape to Morgan Stanley's e-mail archive." MS & Co. has failed to establish (i) the specifics of the inquiries; (ii) whether they were written or oral; (iii) whether they threatened or implied enforcement action may be taken[4]; or (iv) any factual basis to support a good faith belief the threat of litigation or enforcement action existed. More fundamentally, though, work product implicates pending or threatened litigation over *past* events; it does not cover remedial measures taken to prevent future litigation. Presumably, if the remedial measures are taken, there will be no future litigation. See Hickman v. Taylor, 329 US. 495, 67 S. Ct. 385 (1947); Rule 1.280 (b) (3), Fla. R. Civ. P. Instead, it appears that MS & Co. has used some inquiry from the SEC to clothe what MS & Co. otherwise acknowledges was an on-going process unconnected with its legal department with the protective cloak of work-product privilege.[5] To the extent some communication took place between in-house counsel and staff in connection with the rendition of legal, but not business, advice, the Court concludes MS & Co.'s privilege claims are well founded.[6]

As to the second group, the Court finds that certain communications between counsel and staff concerning the rendition of legal advice is protected. However, not all portions

---

[4]In response to CPH's Motion in Limine No. 6, MS & Co. acknowledged that some SEC inquiries are routine, intended only to gather information and do not suggest enforcement action is imminent or even contemplated.

[5]MS & Co. has represented to the Court that certain e-mails found at Priv. 497-Priv. 510 have previously been produced to CPH. Those e-mails go back as far as June, 2003, and including e-mail exchanges with MS & Co.'s outside vendor between October and December, 2004. See Affidavit of Mariano Wolff dated February 15, 2005. MS & Co. has failed to make clear why no privilege was claimed as those items. Those e-mails are attached as Exhibit 2.

[6]However, some of the compilations of material are not "communications" subject to protection. See Southern Bell at 1384 (investigative audits are not communications).

of those exchanges can fairly be said to implicate attorney-client communications and, as to those portions, the privilege claims are not well founded.

Finally, the Court concludes that MS & Co. has established that the communication reflected in the single item included in group three was made to secure legal advice.

Based on a review of the contents of the documents, affidavits, and memoranda, the Court finds those documents attached hereto as Exhibit 1, in their redacted form, do not fall within the scope of the work product or attorney-client privilege. Based on the foregoing, it is

ORDERED AND ADJUDGED that the privilege claims are overruled, in part. CPH shall have access to those documents attached hereto as Exhibits 1 and 2, excluding those portions redacted by the Court. The affidavits and documents were previously filed with the Clerk under seal. The sealed items shall not be unsealed or removed from the Clerk's custody without further order of this or an appellate court. The undersigned's Judicial Assistant will provide all counsel with a conformed copy of this Order, excluding exhibits, and MS & Co.'s counsel with conformed copies of Exhibits 1 and 2 contemporareously with its entry. The undersigned's Judicial Assistant shall supply CPH's counsel with a conformed copies of Exhibits 1 and 2 on request made no earlier than 4:00 p.m. on March 1, 2005.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida, this 28 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO.: 502003CA005045XXOCAI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

ORDER ON CPH'S MOTION TO DEEM CERTAIN DOCUMENTS ADMISSIBLE AND FOR SANCTIONS DUE TO MORGAN STANLEY'S DISREGARD OF COURT ORDER

THIS CAUSE came before the Court February 22 and 23, 2005 on CPH's Motion to Deem Certain Documents Admissible and for Sanctions Due to Morgan Stanley's Disregard of Court Order, with both parties well represented by counsel.

Throughout this case, CPH has been trying to determine MS & Co.'s role in creating certain disputed documents. On January 8, 2004, Tyrone Chang was deposed and disclosed that in 1997 and 1998 MS & Co. had the ability to retrieve electronic data regarding authors and editors of documents stored on MS & Co.'s network. In response, on January 20, 2004, counsel for CPH wrote counsel for MS & Co. and stated:

> Third, Mr. Chang testified that in 1997 and 1998, Morgan Stanley's internal document network utilized a version of PC Docs. That program allows users to identify authors and editors of documents stored on the network. Please produce all information retained by this document management system pertaining to the documents concerning Morgan Stanley's work for Sunbeam.

Counsel for MS & Co. responded:

> Third, we utilized the PC Docs program, including its ability to identify authors of documents, to conduct our search for responsive documents by authors and keywords--a search which we described in our September 2, 2003 written response to the 1.310 topics. All responsive documents that were located using that program have already been produced. In addition, the time records you addressed in your January 23, 2004 letter to Tom Clare also have already been produced.

Thus, there seems to have been a basic miscommunication between counsel: CPH asked for information available from the PC Docs program; MS & Co. responded that it had used the information to locate requested documents, without providing the information.

On October 22, 2004, CPH served its Sixth Request for Admission, seeking predicate admissions to establish that certain documents were business records. In addition, CPH served its Rule 1.310 Notice of Deposition, seeking deposition of a corporate representative should MS & Co. deny any of the requests. MS & Co. sought a protective order, which was denied November 17, 2004. On November 22, 2004 MS & Co. served its responses to the requests. On December 3, 2004, the Court overruled MS & Co.'s objections and compelled both better answers and the deposition of the corporate representative. On January 12, 2005, MS & Co. produced its in-house counsel, James Doyle, as its 1.310 representative. Mr. Doyle was wholly unprepared to fulfill his duties. Consequently, on February 3, 2005, the Court ordered MS & Co. to provide a sworn statement averring to all information conveyed by or inferable from the word processing stamp or computer footer and, at CPH's election, for it to produce a 1.310 representative to be deposed. Mr. Doyle was again produced, on February 11, 2005. While Mr. Doyle provided some information at his second deposition, taken as a whole he once again failed to faithfully fulfill his duty to testify as to matters known or reasonably available to MS & Co..

Based on the foregoing and the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part. MS & Co. is hereby found to be the author of those documents designated as CPH 9 and 182 and the jury shall be so told, subject to MS & Co.'s right to present evidence that it relied on information supplied by a third party in authoring the documents. All information conveyed by the profile and profile histories provided as to all documents shall be admissible in evidence before the jury. See Rule 1.380 (b) (2) (A), Fla. R. Civ. P. CPH shall be entitled to recover 50% of its reasonable fees and costs incurred in taking Mr. Doyle's February 11, 2005 deposition, which the Court reserves jurisdiction to award after an evidentiary hearing following trial in this matter. See 1.380 (b) (2), Fla. R. Civ. P.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 28 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

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

CASE NO: CA 03-5045 AI

ORDER GRANTING VERIFIED MOTION TO ADMIT WALTER R. LANCASTER, PRO HAC VICE

THIS CAUSE came before the Court on Morgan Stanley & Co. Incorporated's Verified Motion to Admit Walter R. Lancaster, Pro Hac Vice. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Verified Motion to Admit Walter R. Lancaster, Pro Hac Vice is GRANTED, and Mr. Lancaster is admitted to practice in this case, provided he pays the fee.

DONE AND ORDERED in West Palm Beach County, Florida this 28 of December, 2005.

Elizabeth T. Maass
Circuit Court Judge

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

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

CASE NO: CA 03-5045 AI

ORDER GRANTING VERIFIED MOTION TO ADMIT JOHN T. HICKEY JR., P.C., PRO HAC VICE

THIS CAUSE came before the Court on Morgan Stanley & Co. Incorporated's Verified Motion to Admit John T. Hickey, Jr., P.C., Pro Hac Vice. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Verified Motion to Admit John T. Hickey, Jr., P.C., Pro Hac Vice is GRANTED, and Mr. Hickey is admitted to practice in this case, on pro hac vice.

DONE AND ORDERED in West Palm Beach County, Florida this 28 of February, 2005.

Elizabeth T. Maass
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION TO DISMISS, MOTION TO STRIKE, AND MOTION FOR MORE DEFINITE STATEMENT

THIS CAUSE came before the Court February 24, 2005 on Morgan Stanley's Motion to Dismiss, Motion to Strike, and Motion for More Definite Statement, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion to Dismiss is Denied. See Ft. Myers Development Corp. v. J.W. McWilliams Co., 122 So. 267, 97 Fla. 788 (1929); Freeman v. First Union National Bank, 865 So. 2d 1272 (Fla. 2004) (in answering certified question from 11th Circuit concerning whether "catch all" provision of Florida's Uniform Fraudulent Transfer Act permits claim for damages against aider or abettor to a fraudulent transfer, Court looked to whether Legislature intended to create statutory liability for aiders and abettors to fraudulent transfers; analysis assumes Florida common law recognizes aiding and abetting liability generally). It is further

ORDERED AND ADJUDGED that Morgan Stanley's Motion to Strike is Denied. It is further

ORDERED AND ADJUDGED that Morgan Stanley's Motion for More Definite Statement is Granted, in part. Paragraph 11, except for the first and last sentence; paragraph 12, except the first and last sentence; paragraph 55, the words "including investors in Florida"; paragraph 58, in the first sentence, the word "investors"; paragraph 67, the first word and all words after "disaster"; and paragraph 72, in the first sentence, the

words "and other investors," are hereby stricken from Plaintiff's First Amended Complaint.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 28 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER
(RELEASE OF EXHIBITS)

THIS CAUSE came before the Court, in Chambers, on MS & Co.'s affidavits and filings in support of its e-mail privilege logs dated February 8, 2005; February 10, 2005; and February 11, 2005.

On April 16, 2004, the Court entered its Agreed Order requiring MS & Co. to (1) search the oldest full back up tape for each of 36 MS & Co. employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all non-privileged e-mails responsive to CPH's document requests; (4) give CPH a privilege log; and (5) certify its full compliance with the Agreed Order.

As has become painfully clear to the Court, MS & Co. woefully failed to comply with the Agreed Order. In sum, despite MS & Co.'s affirmative duty arising out of the litigation to preserve[1] and produce[2] its e-mails, and contrary to federal law requiring it to preserve the e-

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[2]See April 16, 2004 Agreed Order.

mails in an accessible place for two years[3], MS & Co. failed to preserve many e-mails and failed to produce all e-mails required by the Agreed Order. The failings include overwriting e-mails after 12 months; failing to conduct proper searches for tapes that may contain e-mails; providing a certificate of compliance known to be false when made and withdrawn only recently; failing to timely notify CPH when additional tapes were located; failing to use reasonable efforts to search the newly discovered tapes; failing to timely process and search data held in the staging area or notify CPH of the deficiency; failing to write software scripts consistent with the Agreed Order; and discovering the deficiencies only after CPH was given the opportunity to check MS & Co.'s work and the MS & Co.'s attorneys were required to certify the completeness of the prior searches. Many of these failings were done knowingly, deliberately, and in bad faith.

In connection with the Court's Order requiring MS & Co. to produce documents outlining its efforts to comply with the Agreed Order, MS & Co. produced the logs, affidavits, and documents under review here. In essence, the items fall into three groups. First, MS & Co. claims some of the items were produced in response to an informal SEC inquiry and are subject to a work-product privilege or represent communications with counsel concerning that inquiry, including direct communications with counsel and communications among staff or between staff and outside vendors. Second, some of the items deal with legal advice alleged to have been given in the summer of 1998. Finally, a single document concerns information sent to in-house counsel.

As to the first group, the Court finds that MS & Co. has failed to establish a work product privilege. The burden of establishing the privilege rests on MS & Co. See Southern Bell Telephone and Telegraph Co. v. Deason, 632 So. 2d 1377 (Fla. 1994). Despite two requests

[3]See E. 17 C.F.R. §240.17a-4 (1997).

from the Court, though, seeking specific information about the nature of the contemplated regulatory action or litigation, all MS & Co. has averred is that in October 2004 the SEC initiated an informal regulatory inquiry into "*inter alia*, Morgan Stanley's maintenance of pre-2003 e-mail on back up tapes. The SEC inquiry soon expanded to concern various issues relating to the migration of those e-mails from tape to Morgan Stanley's e-mail archive." MS & Co. has failed to establish (i) the specifics of the inquiries; (ii) whether they were written or oral; (iii) whether they threatened or implied enforcement action may be taken[4]; or (iv) any factual basis to support a good faith belief the threat of litigation or enforcement action existed. More fundamentally, though, work product implicates pending or threatened litigation over *past* events; it does not cover remedial measures taken to prevent future litigation. Presumably, if the remedial measures are taken, there will be no future litigation. See Hickman v. Taylor, 329 US. 495, 67 S. Ct. 385 (1947); Rule 1.280 (b) (3), Fla. R. Civ. P. Instead, it appears that MS & Co. has used some inquiry from the SEC to clothe what MS & Co. otherwise acknowledges was an on-going process unconnected with its legal department with the protective cloak of work-product privilege.[5] To the extent some communication took place between in-house counsel and staff in connection with the rendition of legal, but not business, advice, the Court concludes MS & Co.'s privilege claims are well founded.[6]

As to the second group, the Court finds that certain communications between counsel and staff concerning the rendition of legal advice is protected. However, not all portions

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[4]In response to CPH's Motion in Limine No. 6, MS & Co. acknowledged that some SEC inquiries are routine, intended only to gather information and do not suggest enforcement action is imminent or even contemplated.

[5]MS & Co. has represented to the Court that certain e-mails found at Priv. 497-Priv. 510 have previously been produced to CPH. Those e-mails go back as far as June, 2003, and including e-mail exchanges with MS & Co.'s outside vendor between October and December, 2004. See Affidavit of Mariano Wolff dated February 15, 2005. MS & Co. has failed to make clear why no privilege was claimed as those items. Those e-mails are attached as Exhibit 2.

[6]However, some of the compilations of material are not "communications" subject to protection. See Southern Bell at 1384 (investigative audits are not communications).

of those exchanges can fairly be said to implicate attorney-client communications and, as to those portions, the privilege claims are not well founded.

Finally, the Court concludes that MS & Co. has established that the communication reflected in the single item included in group three was made to secure legal advice.

Based on a review of the contents of the documents, affidavits, and memoranda, the Court finds those documents attached hereto as Exhibit 1, in their redacted form, do not fall within the scope of the work product or attorney-client privilege. Based on the foregoing, it is

ORDERED AND ADJUDGED that the privilege claims are overruled, in part. CPH shall have access to those documents attached hereto as Exhibits 1 and 2, excluding those portions redacted by the Court. The affidavits and documents were previously filed with the Clerk under seal. The sealed items shall not be unsealed or removed from the Clerk's custody without further order of this or an appellate court. The undersigned's Judicial Assistant will provide all counsel with a conformed copy of this Order, excluding exhibits, and MS & Co.'s counsel with conformed copies of Exhibits 1 and 2 contemporareously with its entry. The undersigned's Judicial Assistant shall supply CPH's counsel with a conformed copies of Exhibits 1 and 2 on request made no earlier than 4:00 p.m. on March 1, 2005.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida, this 28 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished, without Exhibit:
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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

AMENDED ORDER ON MORGAN STANLEY'S MOTION TO DISMISS, MOTION TO STRIKE, AND MOTION FOR MORE DEFINITE STATEMENT

THIS CAUSE came before the Court, in Chambers, on the Court's own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Court's Order on Morgan Stanley's Motion to Dismiss, Motion to Strike, and Motion for More Definite Statement entered February 28, 2005 is vacated and the following entered in its place:

THIS CAUSE came before the Court February 24, 2005 on Morgan Stanley's Motion to Dismiss, Motion to Strike, and Motion for More Definite Statement, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion to Dismiss is Denied. See Ft. Myers Development Corp. v. J.W. McWilliams Co., 122 So. 267, 97 Fla. 788 (1929); Freeman v. First Union National Bank, 865 So. 2d 1272 (Fla. 2004) (in answering certified question from 11th Circuit concerning whether "catch all" provision of Florida's Uniform Fraudulent Transfer Act permits claim for damages against aider or abettor to a fraudulent transfer, Court looked to whether Legislature intended to create statutory liability for aiders and abettors to fraudulent transfers; analysis assumes Florida common law recognizes aiding and abetting liability generally). It is further

ORDERED AND ADJUDGED that Morgan Stanley's Motion for More Definite Statement is Denied. It is further

ORDERED AND ADJUDGED that Morgan Stanley's Motion to Strike is Granted, in part. Paragraph 11, except for the first and last sentence; paragraph 12, except the first and last sentence; paragraph 55, the words "including investors in Florida"; paragraph 58, in the first sentence, the word "investors"; paragraph 67, the first word and all words after "disaster"; and paragraph 72, in the first sentence, the words "and other investors," are hereby stricken from Plaintiff's First Amended Complaint.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 24 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER AND NOTICE OF HEARING

This cause having come before the Court, it is

ORDERED AND ADJUDGED that hearing on Plaintiff's Motion in Limine (No. 14) is hereby set for

March 8, 2005, at 9:30 a.m.

at the West Palm Beach Courthouse, Room 11A, 205 N Dixie Hwy, WPB, FL.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 17 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oir ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki Infim, ki bézwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontakté koôdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro téléfonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résévwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe accommodation pour pouvoir participer á ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER AND NOTICE OF HEARING

This case came before the Court March 1, 2005 on Coleman (Parent) Holdings Inc.'s Memorandum Regarding the Reliance Requirement in Fraud-Based Claims, which the Court elects to treat as including a Motion in Limine, with both counsel present. Based on the foregoing, it is

ORDERED AND ADJUDGED that hearing on Coleman (Parent) Holdings, Inc.'s Motion in Limine is hereby set for

March 8, 2005, at 9:30 a.m.

at the West Palm Beach Courthouse, Room 11A, 205 N Dixie Hwy, WPB, FL. Defendant shall serve its response to Plaintiff by 12 noon March 7, 2005.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 1 day of ~~February~~ March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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16div-011946

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FRENCH

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

CASE NO.: 502003CA005045XXOCAI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS, INC.'S MOTION FOR ADVERSE INFERENCE INSTRUCTION DUE TO MORGAN STANLEY'S DESTRUCTIONS OF E-MAILS AND MORGAN STANLEY'S NONCOMPLIANCE WITH THE COURT'S APRIL 16, 2004 AGREED ORDER, AND MOTION FOR ADDITIONAL RELIEF AND ORDER ON PLAINTIFF'S MOTION TO COMPEL FURTHER DISCOVERY REGARDING MORGAN STANLEY'S DESTRUCTION AND NON-PRODUCTION OF E-MAILS

THIS CAUSE came before the Court on February 14, 2005 on Coleman (Parent) Holdings, Inc.'s ("CPH's") Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, as modified by CPH's February 14, 2005 ore tenus motion for additional relief, and on February 28, 2005 on Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-Mails, with both counsel present. Based on evidence introduced, the Court finds:

1. CPH has sued Defendant, Morgan Stanley & Co., Inc. ("MS & Co."), for fraud in connection with CPH's sale of its stock in Coleman, Inc., to Sunbeam Corporation in return for Sunbeam stock. Whether MS & Co. had knowledge of the fraudulent scheme undertaken by Sunbeam in 1997 and early 1998 and, if so, the extent of that knowledge, is central to the case. CPH has sought access to MS & Co.'s internal files, including e-mails, since the case was filed.

2. Though MS & Co. instructed its investment bankers to preserve paper documents in their possession in connection with the Sunbeam transaction in February, 1999, it continued its practice of overwriting e-mails after 12 months, despite an SEC regulation requiring all e-mails be retained in readily accessible form for two years. *See* 17 C.F.R. §240.17a-4 (1997).

3. On April 16, 2004, the Court entered its Agreed Order requiring MS & Co. to (1) search the oldest full backup tape for each of 36 MS & Co. employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all nonprivileged e-mails responsive to CPH's document requests; (4) give CPH a privilege log; and (5) certify its full compliance with the Agreed Order.

4. On May 14, 2004, MS & Co. produced approximately 1,300 pages of e-mails but failed to provide the required certification. Finally, on June 23, 2004, after inquiries by CPH, MS & Co. provided CPH with a certificate of full compliance with the April 16 Agreed Order signed by Arthur Riel, the MS & Co. manager assigned this task.

5. As organized by MS & Co., the effort to recover e-mails from any remaining backup tapes had several stages. First, the relevant backup tapes (in various formats, such as "DLT" tapes and eight-millimeter tapes) had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc. ("NDC"), to be processed, and the data returned to MS & Co. in the form of "SDLT"tapes. Third, MS & Co. had to find a way to upload the contents of these SDLT tapes into its new e-mail archive. Fourth, MS & Co. would run "scripts" to transform this data into a searchable form, so that it could later be searched for responsive e-mails. MS & Co. personnel used the term "staging area" to describe the stage of the

process when SDLT tapes remained in limbo, waiting to be uploaded to the archive.

6. At some point prior to May 6, 2004, Arthur Riel and his team became aware that more than 1,000 backup tapes had been found at a MS & Co. facility in Brooklyn, New York. These 1,423 DLT tapes had not been processed by NDCI and thus had not been included in the archive or searched when MS & Co. made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification that it was false. He and others on MS & Co.'s e-mail archive team knew by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990's. MS & Co. neither withdrew its certification nor informed CPH about the potential for additional production of e-mails, however. During the summer of 2004, the Brooklyn tapes were processed and sent to the staging area, but they were not uploaded to the e-mail archive so as to be available to be searched until January 2004, at least eight months after they were found.

7. MS & Co. also failed to timely produce e-mails from 738 8-millimeter backup tapes found at a MS & Co. facility in Manhattan, in 2002. These 738 8-mm tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched when MS & Co. made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Mr. Riel and others were told by their vendor, NDCI, by July 2, 2004 that the 8-mm tapes contained e-mail dating back at least to 1998. MS & Co. neither withdrew its certification nor informed CPH about the potential for additional production of e-mails, though. During the summer of 2004, the 8-mm tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not uploaded

to MS & Co.'s e-mail archive.

8. In August 2004, Mr. Riel was relieved of his employment responsibilities. He and his team were replaced by a new team headed by Allison Gorman Nachtigal.

9. Ms. Gorman testified that she was instructed to describe the circumstances of Mr. Riel's replacement as his having been "placed on administrative leave." That same term appears by interlineation over the original typed description in MS & Co.'s memorandum addressing these issues. The typed language stated: "[Mr. Riel was] dismissed for integrity issues." MS & Co. presented no evidence to explain why Mr. Riel would have been placed on administrative leave rather than terminated. CPH argued that it may have been to deprive CPH of the ability to contact him directly.

10. Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area; indeed, she was not informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman met with a group of MS & Co. attorneys. Following that meeting, Ms. Gorman gave the project somewhat greater priority, although even then it clearly did not move as expeditiously as possible. For example, MS & Co. gave no thought to using an outside contractor to expedite the process of completing the discovery, though it had certified completion months earlier; it lacked the technological capacity to upload and search the data at that time, and would not attain that capacity for months; and it knew trial was scheduled to begin in February, 2005. Even at this point, no one from MS & Co. or its outside counsel, Kirkland & Ellis LLP, gave CPH or this Court any hint that the June certification was false.

11. On November 17, 2004, more than six months after the May 14, 2004 deadline for

16div-011951

producing e-mails in response to the Agreed Order, MS & Co. sent CPH a letter revealing that its June 23 certificate of compliance was incorrect. The letter stated:

> Morgan Stanley has discovered additional e-mail backup tapes since our e-mail production in May 2004. The data on some of [the] newly discovered tapes has been restored and, to ensure continued compliance with the agreed order, we have re-run the searches described in the order. Some responsive e-mails have been located as a result of that process. We will produce the responsive documents to you as soon as the production is finalized.

The letter also foreshadowed further delays: "(s)ome of the backup tapes are still being restored. To ensure continued compliance with the agreed order, we intend to re-run the searches again when the restoration process is complete and will produce any responsive documents that result."

12. The next day, November 18, 2004, MS & Co. produced an additional 8,000 pages of e-mails and attachments. MS & Co.'s November 2004 letter stated that the 8,000 pages came from "newly discovered" tapes; but the testimony now makes clear that this statement was false because Ms. Gorman's team did not figure out how to upload and make searchable the materials from the staging area until January, 2005.

13. MS & Co. has failed to offer any explanation to reconcile the obvious conflict between its assertions at the time of production that the 8,000 pages came from "newly discovered" tapes (*i.e.*, the "Brooklyn tapes") and the testimony of its own witness, Ms. Gorman, that data from those newly discovered tapes were not capable of being searched until two months later, in January.

14. After a follow-up inquiry by CPH, on December 17, 2004, MS & Co. produced a privilege log and told CPH that "[n]o additional responsive e-mails have been located since our November production." MS & Co. refused to answer CPH's questions about whether MS & Co.

had restored all the backup tapes described in its November 17 letter and why the tapes had not been located earlier, however.

15. On December 30, 2004, CPH sought confirmation that MS & Co. had reviewed all e-mail backup tapes and produced all responsive e-mails and, if not, asked when the review would be completed. On January 11, 2005, MS & Co. informed CPH that the "restoration of e-mail back tapes is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

16. On January 19, 2004, CPH wrote asking MS & Co. to explain the circumstances under which MS & Co. located the "newly discovered" backup tapes and to disclose when the tapes were located. CPH also asked MS & Co. to explain why the backup tapes could not be restored sooner.

17. On January 21, 2005, MS & Co. sent CPH a letter that failed to answer CPH's questions. Instead, MS & Co. described its efforts to restore the backup tapes as "ongoing"; informed CPH that "there is no way for MS & Co. to know or accurately predict the type or time period of data that might be recovered"; and stated that MS & Co. "cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes."

18. On January 26, 2005, CPH filed the Motion at issue here, asking the Court to instruct the jury that MS & Co.'s destruction of e-mails and other electronic documents and MS. & Co.'s noncompliance with the April 16, 2004 Agreed Order can give rise to an adverse inference that the contents of the missing e-mails would be harmful to MS & Co.'s defense in this case.

19. Meanwhile, MS & Co. found another 169 DLT tapes in January, 2005, that allegedly

had been misplaced by its New Jersey storage vendor, Recall. Again, MS & Co., chose to provide no specifics to CPH or to the Court.

20. At a February 2, 2005 hearing on CPH's Motion, Thomas A. Clare of Kirkland & Ellis, LLP, representing MS & Co., stated that "late October of 2004...[is] the date I represent to Court is the first time that anyone knew that there was recoverable e-mail data" on the Brooklyn tapes. Hr'g Tr. (2/2/05) at 133-34. The actual date, however, was at least three months earlier, by July 2, 2004. Furthermore, MS & Co. refused to provide the Court with definitive answers about when its e-mail production would be complete, merely stating that it would proceed with "all deliberate speed." *Id.* at 139. Also at the February 2 hearing, Mr. Clare neglected to inform the Court about the 8-mm tapes that had been located in 2002, and told the Court that the 1,423 DLT tapes had been found in Brooklyn "sometime during the summer" of 2004. The truth of this assertion is belied by the evidence showing that the tapes were found before May 6, 2004.

21. On February 3, 2005, the Court ordered further discovery and set an evidentiary hearing for February 14, 2005. The discovery took place on February 9 and 10, when CPH deposed the three e-mail witnesses identified by MS. & Co.

22. On Saturday afternoon, February 12, 2005, MS & Co. informed the Court that it had, in the previous 24 hours, discovered additional tapes. Also, MS & Co. stated that its recent production omitted certain "attachments" to e-mails. MS & Co. did not attempt to clarify or substantiate either of these statements to CPH or to the Court until the Monday, February 14, 2005 hearing.

23. At the February 14 hearing, none of the witnesses MS & Co. presented was involved in or familiar with the actual electronic searches conducted using the parameters specified in this

Court's April 16, 2004 Agreed Order, and none explained where the 8,000 pages produced in November, 2004 had come from. MS & Co.'s witnesses did, however, describe three new developments. First, Robert Saunders, a Morgan Stanley executive director in the Information Technology Division, testified that he returned to New York after his February 10 deposition and, concerned about his unqualified assertion that the was "confident" that a complete search for backup tapes had been conducted, decided finally to undertake a personal search of MS & Co.'s "communication rooms," going to the areas he thought most obvious first. By doing so, he and two contractors discovered more than 200 additional backup tapes openly stored in locations known to be used for tape storage. Those discoveries were made on Friday and Saturday, February 11 and 12, 2005. As of the February 14 hearing, NDCI had not yet determined which, if any, of these newly discovered backup tapes contained e-mails. Second, Ms. Gorman reported that on Friday, February 11, 2005 she and her team had discovered that a flaw in the software they had written had prevented MS & Co. from locating all responsive e-mail attachments. Third, Ms. Gorman reported that MS & Co. discovered on Sunday evening, February 13, 2005, that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so there were at least 7,000 additional e-mail messages that appeared to fall within the scope of the Agreed Order had yet to be fully reviewed by MS. & Co.'s outside counsel for responsiveness and privilege. As counsel for MS & Co. admitted, this problem "dwarf[s]" their previous problems. Hr'g Tr. (2/14/05) at 13. Ms. Gorman indicated she was "90 percent sure" that the problem infected MS & Co.'s original searches in May, which means that even they failed to timely produce relevant materials that had been uploaded into the archive by that point. *Id.* at 82-83. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the

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transaction under review here.

24. On February 19, 2005 MS & Co. informed counsel for CPH that "additional boxes of back up tapes" have been located "in a security room" and that, "(a)s of this morning, Morgan Stanley has identified four (unlabled) DLT tapes among the collection. Those four tapes will be sent to NDCI for further analysis." The disclosure did not state when the discovery was made. MS & Co.'s counsel represented to the Court that it was his understanding that about 73 bankers' boxes of tapes were discovered. No explanation for the late discovery was offered.

25. Throughout this entire process, MS & Co. and its counsels' lack of candor has frustrated the Court and opposing counsel's ability to be fully and timely informed.

26. MS & Co.'s failure during the summer and fall of 2004 to timely process a substantial amount of data that was languishing in the "staging area," rather than being put into searchable form and then searched, was willful and a gross abuse of its discovery obligations.

27. MS & Co.'s failure to time notify CPH of the existence of the DLT and 8-mm tapes, which it had located as early as 2002 and certainly prior to the June 23, 2004 certification, and its failure to timely process those raw backup tapes was willful and a gross abuse of its discovery obligations.

28. MS & Co.'s failure to produce all e-mail attachments was negligent, and it was discovered and revealed only as a result of CPH's hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check MS & Co.'s compliance with the April 16, 2004 Agreed Order.

29. MS & Co.'s failure to produce all of the Lotus Notes e-mails was negligent, and it was discovered and revealed only as result of CPH's hiring a third-party vendor, pursuant to the

Court's February 4, 2005 Order, to double-check MS & Co.'s compliance with the April 16, 2004 Agreed Order.

30. MS & Co.'s failure to locate other potentially responsive backup tapes before Saturday, February 12, 2005 was grossly negligent.

31. Given the history of the discovery, there is no way to know if all potentially responsive backup tapes have been located.

32. In sum, despite MS & Co.'s affirmative duty arising out of the litigation to produce its e-mails, and contrary to federal law requiring it to preserve the e-mails, MS & Co. failed to preserve many e-mails and failed to produce all e-mails required by the Agreed Order. The failings include overwriting e-mails after 12 months; failing to conduct proper searches for tapes that may contain e-mails; providing a certificate of compliance known to be false when made and only recently withdrawn; failing to timely notify CPH when additional tapes were located; failing to use reasonable efforts to search the newly discovered tapes; failing to timely process and search data held in the staging area or notify CPH of the deficiency; failing to write software scripts consistent with the Agreed Order; and discovering the deficiencies only after CPH was given the opportunity to check MS & Co.'s work and the MS & Co.'s attorneys were required to certify the completeness of the prior searches. Many of these failings were done knowingly, deliberately, and in bad faith.

It is clear that e-mails existed which were requested by CPH that have not been produced because of the deficiencies discussed above. Electronic data are the modern-day equivalent of the paper trail. Indeed, because of the informalities of e-mail, correspondents may be less guarded than with paper correspondence. In this case, the paper trail is critical to CPH's ability to make out its prima facie case. Thus, MS & Co.'s acts have severely hindered CPH's ability to

proceed. The only way to test the potentially self-serving testimony of MS & Co. personnel is with the written record of the events.

The failures outlined in this Order are of two types. First, by overwriting e-mails contrary to its legal obligation to maintain them in readily accessible form for two years and with knowledge that legal action was threatened, MS & Co. has spoiled evidence, justifying sanctions. See Martino v. Wal-Mart Stores, Inc., 835 So. 2d 1251 (Fla. 4th DCA 2003). "The appropriateness of sanctions for failing to preserve evidence depends on: (1) willfulness or bad faith of the responsible party, (2) the extent of prejudice suffered by the other party, and (3) what is required to cure the prejudice." Nationwide Lift Trucks, Inc. v. Smith, 832 So. 2d 824, 826 (Fla. 4th DCA 2002). Second, MS & Co.'s willfull disobedience of the Agreed Order justifies sanctions. See Rule 1.380 (b) (2), Fla. R. Civ. P. The conclusion is inescapable that MS & Co. sought to thwart discovery *in this specific case.*

Sanctions in this context are not meant to be punitive. They are intended, though, to level the playing field.

A reasonable juror could conclude that evidence of MS & Co.'s misconduct demonstrates its consciousness of guilty. It is relevant to the issues before the jury. Further, CPH should not be penalized by being forced to divert the jurors' attention away from the merits of its claim to focus on highly technical facts going to MS & Co.'s failures here, facts that are not reasonably disputed. Evidence of that failure, though, alone does not make CPH whole. Indeed, it can be said it is not a "sanction" at all, but merely a statement of unrefuted facts that the jury may find relevant. Shifting the burden of proof, though, forces MS & Co. to accept the practical consequence of its failures–that some information will never be known. Obviously, this sanction is of consequence only in the

marginal case. If there is overwhelming proof of MS & Co.'s knowledge of the fraud and collusion with Sunbeam, CPH would have prevailed on those elements in any event. And, to the contrary, if there is overwhelming evidence MS & Co. did not know of the fraud or conspire with or aid Sunbeam in its commission, it would have prevailed in any event. If the case is close on those issues, though, MS & Co., not CPH, should bear the burden of persuasion. Further, shifting the burden on the fraud issue does not relieve CPH of its obligation to establish the other elements of its claims, most notably reliance, proof of which is independent of the MS & Co. e-mails. Thus, the sanctions chosen are the most conservative available to the Court to address the spoilation of evidence and willfull violation of the Agreed Order.[1] [2]

Finally, the Court notes that CPH has requested the e-mails since May of 2003. MS & Co. was supposed to comply with the April 16, 2004 Order by May 14, 2004. Fact discovery in this case closed November 24, 2004. MS & Co.'s actions have resulted in the diversion of enormous amounts of resources, by both the parties and the Court, into a fact discovery dispute that should have never arisen and which would have long ago been put to bed had MS & Co. timely recognized its obligations to CPH and this Court. Opening argument in this complex case is set for March 21,

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[1]MS & Co.'s bad acts and pocket book may not be used to gain the continuance it has sought from the beginning. Further, the Court has no confidence that, even if a continuance were granted, MS & Co. would fully comply with discovery in this case.

[2]The undersigned notes that the sanctions imposed are not enumerated in Rule 1.380 (b) (2), and is aware of the concern expressed in the 2000 Handbook on Discovery Practice, Joint Committee of the Trial Lawyers Section of the Florida Bar and Conferences of Circuit and County Court Judges ("(f)or the trial court to be on solid footing, it is wise to stay within the enumerated orders" [Handbook at p. 4]). However, MS & Co.'s violations involve both the violation of a discovery order and the intentional spoiliation of evidence. The sanction imposed is *less* severe than that provided in Rule 1.380 (b) (2) (B), under which the Court could preclude MS & Co. from presenting evidence of its lack of knowledge of or collusion with the Sunbeam fraud, which the Court finds is the least severe enumerated sanction appropriate to place the parties on a level playing field.

2005. Preliminary jury selection has begun. MS & Co. has controlled the timetable of this portion of the litigation long enough. Consequently, CPH should have the ability to continue to require MS & Co. to attempt to comply with the Agreed Order and the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search, or to elect to terminate the e-mail discovery and concentrate on trial preparation.

Based on the foregoing, it is

ORDERED AND ADJUDGED that:

1. Plaintiff's Motion for Adverse Interference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Non-Compliance with the Court's April 16, 2004 Agreed Order and Motion for Additional Relief is GRANTED.

2. MS & Co. shall continue to use its best efforts to comply with the April 16, 2004 Agreed Order and shall continue to comply with the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search until March 21, 2005 or written notice from CPH, which ever first occurs. Either party shall notify the other in writing of its intention to offer into evidence e-mails actually produced to CPH prior to termination of e-mail discovery in conformity with this Order, within 72 hours of the e-mail's production to CPH. The Court shall hear and determine any objections to use of the e-mails.

3. The Court shall read to the jury the statement of facts attached as Exhibit A during whatever evidentiary phase of CPH's case that it requests. These findings of fact shall be conclusive. See Rule 1.380 (b) (2) (A). No instruction shall be given to the jury regarding inferences to be drawn from these facts. However, counsel may make such argument to the jury in favor of whatever inferences that evidence may support. No other evidence concerning the production of e-mails, or

lack thereof, shall be presented absent further Court order.

4. CPH will be allowed to argue that MS & Co.'s concealment of its role in the Sunbeam transaction is evidence of its malice or evil intent, going to the issue of punitive damages. See, e.g., General Motors Corp. v. McGee, 837 So.2d 10120.

5. MS & Co. shall bear the burden of proving to the jury, by the greater weight of the evidence, that it lacked knowledge of the Sunbeam fraud and did not aid and abet or conspire with Sunbeam to defraud MS & Co. The traditional order of proof shall remain unaffected, however.

6. MS & Co. shall compensate CPH for costs and fees associated with the Motion. The amount shall be determined at an evidentiary hearing to be held after the completion of the trial.

7. Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-Mails is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 1 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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EXHIBIT A

A federal regulation in effect in 1997 and all times since required Morgan Stanley to preserve e-mails for three years and to preserve them in a readily accessible place for two years. Beginning in no later than 1997, Morgan Stanley had a practice of overwriting e-mails after 12 months. E-mails could no longer be retrieved once they were overwritten. This practice was discontinued in January, 2001. CPH has sought access to Morgan Stanley's e-mails relating to this transaction since the case was filed in May, 2003.

Prior to 2003, Morgan Stanley recorded e-mails and other electronic data on back up tapes. On April 16, 2004, the Court ordered Morgan Stanley to (1) search the oldest full backup tape for each of 36 Morgan Stanley employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all e-mails relating to this case found by the search I have just described; and (4) certify its full compliance with the Court's order.

On May 14, 2004, Morgan Stanley produced approximately 1,300 pages of e-mails. It did not produce the required certification. On June 23, 2004, after inquiries by CPH, Morgan Stanley provided CPH with a certificate of full compliance with the April 16 Order signed by Arthur Riel, the Morgan Stanley manager assigned this task.

As organized by Morgan Stanley, the effort to recover e-mails from the backup tapes had several stages. First, the relevant backup tapes had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc., which I will call "NDCI", to be processed, and the data returned to Morgan Stanley. Third, Morgan Stanley had to upload the processed data into its e-mail archive. Fourth, Morgan Stanley had to run scripts, or pieces of computer code, to transform this data into a searchable form. Finally, Morgan Stanley had to search the data for e-mails related to this case. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when the processed data returned by NDCI remained in limbo, waiting to be uploaded to Morgan Stanley's archive.

At some point prior to May 6, 2004, Arthur Riel and his team became aware that 1,423 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423 tapes had not been processed by NDCI and thus had not been included in the archive or searched when Morgan Stanley made its production to CPH on May 14, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification of full compliance with the Court's April 16, 2004 Order that it was false. He and others on Morgan Stanley's e-mail archive team knew by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990's. During the summer of 2004, the Brooklyn tapes were processed and the data sent to the staging area. The scripts were not written and tested to permit the search for e-mails relating to this case to begin until the middle of January, 2004. Such a search, even if perfectly done, can take weeks.

Morgan Stanley also failed to timely produce e-mails from 738 backup tapes found at a Morgan Stanley facility in Manhattan in 2002. These 738 tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched by either on May 14, 2004 or June 23, 2004. Mr. Riel and others were told by NDCI by July 2, 2004 that these tapes contained e-mail dating back at least to 1998. During the summer of 2004, the these tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not searched.

In August 2004, Mr. Riel was relieved of his employment responsibilities. He and his team were replaced by a new team headed by Allison Gorman Nachtigal. At that time, the staging area contained about 600 gigabytes of e-mail data that had not yet been uploaded into the Morgan Stanley archive and had not been searched for e-mails relating to this case.

Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area. Indeed, she was not informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman gave the project somewhat greater priority, although even then it did not move as expeditiously as possible. Morgan Stanley did not consider using an outside contractor to expedite the process.

Morgan Stanley found another 169 DLT tapes in January, 2005, that had been misplaced

by its New Jersey storage vendor. Morgan Stanley discovered more than 200 additional backup tapes openly stored in locations known to be used for tape storage on February 11 and 12, 2005. On February 11, 2005 Morgan Stanley discovered that a flaw in the software it had written had prevented Morgan Stanley from locating all e-mail attachments about the Sunbeam transaction. Morgan Stanley discovered on February 13, 2005, that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so that additional e-mail messages that appeared to fall within the scope of the April 16, 2004 Order had not been given to CPH. Further, it appears that the problem infected Morgan Stanley's original searches in May of 2004. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the transaction under review here. On February 16, 2005, Morgan Stanley withdrew its certificate of compliance with the April 16, 2004 Order. On February 19, 2005 Morgan Stanley notified CPH that it had found boxes of additional tapes that have not been uploaded into its archive or searched for responsive e-mails. Morgan Stanley did not tell CPH it had found any tapes that it had not searched until November 17, 2004. Even then, it did not tell CPH how many tapes were found, when they were found, or when they would be searched. MS & Co. did not provide all of this information to CPH until February of 2005. The searches had not yet been completed when this trial was begun, when they were terminated without completion.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER AND NOTICE OF HEARING

This cause having come before the Court, it is

ORDERED AND ADJUDGED that hearing on Plaintiff's Motion for Order Declaring Attorney-Client Privilege Waived for Certain Documents Relating to William Strong is hereby set for

March 7, 2005, at 11:30 a.m.

at the West Palm Beach Courthouse, Room 11A, 205 N Dixie Hwy, WPB, FL.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 1 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oir ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki Infim, ki bézwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontakté koôdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro téléfonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résévwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe accommodation pour pouvoir participer á ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

AMENDED NOTICE OF VIDEOTAPED DEPOSITION

PLEASE TAKE NOTICE that Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") will take the deposition of Coleman (Parent) Holdings Inc. ("CPH") through a CPH representative or representatives with knowledge on the topics listed below, pursuant to Florida Rules of Civil Procedure 1.280 and 1.310, and the Court's Order at the February 24, 2005 hearing. The deposition will be taken by means of video tape and the videographer will be Visual Evidence, 601 N. Dixie Highway, West Palm Beach, Florida. The oral examination will take place on March 3, 2005, from 1:00 p.m. until conclusion, at the offices of Carlton Fields, 222 Lakeview Avenue, Suite 1400, West Palm Beach, Florida 33401-6149.

CPH shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf on the following matters:

1. The accounting value, book value, balance sheet value, or internal valuation of the Sunbeam stock received by CPH as a result of Sunbeam's acquisition of The Coleman Company, Inc.

2. The accounting value, book value, balance sheet value, or internal valuation of the Sunbeam warrants received by CPH as a result of the Sunbeam settlement agreement.

3. The authenticity, source, use, creation, editing, access, maintenance and business purpose of the documents produced by CPH in response to the February 17, 2005 Order.

4. The native electronic versions of the documents produced by CPH in response to the February 17, 2005 Order, including without limitation all metadata, document histories, and document profiles.

5. The identity of all persons responsible for or involved with the creation, editing, review, or presentation of the documents produced by CPH in response to the February 17, 2005 Order.

6. The dates, context, circumstances, and meaning of the documents produced by CPH in response to the February 17, 2005 Order, including without limitation all line items, footnotes, abbreviations, codes, notations, and concepts.

7. The figures, calculations, buildups, backup data, and documents underlying each line item in the documents produced by CPH in response to the February 17, 2005 Order.

8. All communications between CPH, MAFCO, or any related or affiliated entity with any third party regarding the documents produced by CPH in response to the February 17, 2005 Order, including without limitation Sunbeam Corporation and Credit Suisse First Boston.

9. The preparation for and audit of MAFCO Holdings Inc. Consolidated Financial Statements For The Years Ended December 31, 1998, 1999, and 2000 produced by CPH in response to the February 17, 2005 Order.

10. The circumstances, timing, process and persons responsible for the search, collection, processing, redaction and review of the documents responsive to the February 17, 2005 Order and Morgan Stanley's First Request for Production of Documents Nos. 9 and 39, Third Request for Production of Documents No. 2, and Eighth Request for Production of Documents No. 4; the reasons for why the documents produced by CPH in response to the February 17, 2005 Order were not produced earlier or shown to CPH's experts; the reasons for the redaction of relevant information in the documents produced by CPH in response to the February 17, 2005 Order; the existence of any other documents responsive to the February 17, 2005 Order and Morgan Stanley's First Request for Production of Documents No. 9; and the failure to retain any other documents that would have been responsive to the February 17, 2005 Order and Morgan Stanley's First Request for Production of Documents No. 9.

The deposition will be recorded by stenographic and videographic means. The witness is instructed to bring all books, papers, and other things in his or her possession or under its control relevant to this lawsuit (and not previously produced in discovery) to the examination, including

all documents requested in the February 24, 2005 letter from Lawrence P. Bemis to Michael Brody.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 1st day of March, 2005.

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COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

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

CASE NO: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.'S MEMORANDUM REGARDING THE RELIANCE REQUIREMENT IN FRAUD-BASED CLAIMS

Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, respectfully submits this memorandum addressing the scope of the reliance requirement for fraud-based claims under Florida law and how that impacts upon the admissibility of evidence at trial.

Introduction

This Court determined in its August 12, 2004 choice-of-law Order that, in contrast to New York law, Florida law provides that "a recipient of a fraudulent misrepresentation may rely on it unless he knows it is false or its falsity is obvious, even if it had the means to verify the representation's accuracy." *See* Ex. A at 5 (citing, among other cases, *Besett v. Basnett*, 389 So. 2d 995 (Fla. 1980)). That determination is dictated by long-standing Florida Supreme Court precedent, and memorialized in Florida's Standard Jury Instructions, which establish that the reasonableness of CPH's reliance on Morgan Stanley's and Sunbeam's misrepresentations must be determined, not by what CPH would have known had it conducted an independent investigation, but by what CPH actually knew or what would have been obvious to CPH. *See* Part 1 below.

During the February 17, 2005 hearing on CPH's motion in limine relating to the Panavision acquisition, Morgan Stanley argued that a fraud victim that is "on inquiry notice that there's a problem in a transaction" has an affirmative duty to investigate the truth of the alleged misrepresentations. *See* Ex. B, 2/17/05 Tr. at 1134. Morgan Stanley's argument is incorrect for two reasons: (1) under long-standing Florida precedent, the reasonableness of CPH's reliance must be tested by what CPH actually knew or what would have been obvious based on the facts known to CPH, not on what CPH could have discovered upon further investigation; and (2) the case Morgan Stanley cited to the Court during the February 17 hearing, and others on which Morgan Stanley may seek to rely in support of its new contention, are inapposite and insufficient to trump binding Supreme Court precedent. *See* Part 2 below.

In light of this precedent, it is important for this Court to ensure that Morgan Stanley does not attempt *sub silentio* to try this case under New York law even though Florida law indisputably governs. In this connection, CPH suggests that some basic safeguards need to be in place. First, Morgan Stanley should not be allowed to ask questions about CPH's access to sources of information about Sunbeam unless Morgan Stanley has a good faith basis to believe that the answer will be that CPH did have the knowledge in question. In addition, as necessary, the Court should stand ready to give a cautionary instruction when questioning might mislead the jury into thinking that due diligence is required of a plaintiff in this kind of case. Finally, Morgan Stanley should be required to live consistently by whatever theory of its case it uses to argue for the admissibility of evidence. *See* Part 3 below.

1. Under *Besett*, Which Is Controlling Here, A Fraud Victim Is Charged With Knowing Only What Is Obvious From The Facts Actually Before It, Not What The Victim Might Know Had It Conducted An Independent Investigation.

In *Besett v. Basnett*, the Supreme Court decision establishing the rule that has prevailed in Florida for the last quarter century, the Court adopted the principle that a fraud victim "'is not precluded from recovery simply because he failed to make an independent investigation of the veracity of the [fraudulent] statement.'" 389 So. 2d at 997 (citation omitted). In *Besett*, the plaintiffs alleged that the defendants made fraudulent misrepresentations about the size of the land defendants were selling as well as the availability of additional land for purchase. The trial court, relying on a case which held that a person to whom false representations have been made is not entitled to relief if he might readily have ascertained the truth by ordinary care and attention, dismissed plaintiffs' complaint. *Id.* at 996. The District Court of Appeal reversed, holding that "the representee is not precluded from recovery simply because he failed to make an independent investigation of the veracity of the statement," and the Supreme Court approved the District Court's decision. *Id.* at 997. The Supreme Court reasoned (*id.* at 998):

> A person guilty of fraud should not be permitted to use the law as his shield. Nor should the law encourage negligence. However, when the choice is between the two — fraud and negligence — negligence is less objectionable than fraud. Though one should not be inattentive to one's business affairs, the law should not permit an inattentive person to suffer loss at the hands of a misrepresenter.

Thus, in *Besett*, the Supreme Court held "that a recipient may rely on the truth of a representation, even though its falsity could have been ascertained had he made an investigation, unless he knows the representation to be false or its falsity is obvious to him." *Id.*; *accord Johnson v. Davis*, 480 So. 2d 625, 628 (Fla. 1986) (citing *Besett*). Moreover, the Supreme Court recently reaffirmed that principle in *M/I Schottenstein Homes, Inc. v. Azam*, stating that "'the recipient of a fraudulent misrepresentation of fact is justified in relying upon

its truth, although he might have ascertained the falsity of the representation had he made an investigation.'" 813 So. 2d 91, 93 (Fla. 2002) (quoting *Besett*, 389 So. 2d at 997).

Florida cases following the principle adopted in *Besett* and reaffirmed by the Supreme Court in more recent decisions are numerous. For example, in *Ton-Will Enterprises, Inc. v. T & J Losurdo, Inc.*, the appellants claimed that they were fraudulently induced into purchasing an ongoing business, and the trial court granted appellee's motion for summary judgment. *See* 440 So. 2d 621-22 (Fla. 2d DCA 1993). On appeal, the Second District reversed, rejecting appellee's argument "that appellants as purchasers of a business had a duty to make some reasonable inquiry or investigation of the seller's operating expenses and cannot defend or recover damages for alleged misrepresentations concerning such representations where they fail to ask for and inspect the books and records of the business." 440 So. 2d 621, 622 (Fla. 2d DCA 1983). The Second District explained that in *Besett*, "the Supreme Court held that the purchaser of an ongoing business may rely on the truth of a representation of past profitability, even though its falsity could have been ascertained had an investigation been made, unless the purchaser knows the representation to be false or its falsity is obvious to him." *Id.*

In another case involving the sale of an ongoing business, the Second District applied *Besett* in holding that the buyer was justified in relying on the seller's representations of the gross income of the business, despite the fact that the buyer's "limited investigation may have given him cause to question the gross-income figure." *Kalb v. Int'l Resorts, Inc.*, 396 So. 2d 199, 201 (Fla. 2d DCA 1981); *see also Cruise v. Graham*, 622 So. 2d 37, 40 (Fla. 4th DCA 1993) ("A recipient may rely on the truth of the representation, even though its falsity could have been ascertained had he made an investigation, unless he knows the representation to be false or its falsity is obvious to him.") (internal quotation marks and alteration omitted); *Gold*

v. Perry, 456 So. 2d 1197, 1201 (Fla. 4th DCA 1984) ("The rule of *Besett* [makes] it . . . improper to instruct the jury that one who has made an investigation is charged with knowing whatever a reasonably thorough investigation would have revealed, and that a party's business experience and success may be considered in determining whether reliance was justifiable"). (emphasis added)[1]

The settled nature of the principle articulated in *Besett* is confirmed not only by subsequent Supreme Court and District Court of Appeal decisions, but also by the Florida Standard Jury Instruction for fraudulent misrepresentation claims, which states that: "The plaintiff may rely on a false statement, even though its falsity could have been discovered if plaintiff had made an investigation. However, plaintiff may not rely on a false statement if it knew it was false or its falsity was obvious to it." *In re Standard Jury Instructions — Civil Cases*, 828 So. 2d 377, at MI 8.1(a) (Fla. 2002) (emphasis added, bracketed material omitted); *see also id.* at MI 8.1 cmt. 2 (citing *Besett*); *Sheen v. Jenkins*, 629 So. 2d 1033, 1035 (Fla. 4th DCA 1993) ("[a]t least since *Besett*," it has been improper for the trial court to instruct the jury that if plaintiffs "could have ascertained the truth of the matter by making a reasonable inquiry or investigation under the circumstances presented, but failed to do so, it cannot be said that they justifiably relied upon such misrepresentations") (internal quotation marks omitted).

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[1] *Accord Fry v. J.E. Jones Const. Co.*, 567 So. 2d 901, 903 (Fla. 5th DCA 1990); *Revitz v. Terrell*, 572 So. 2d 996, 998-99 (Fla. 3d DCA 1990); *Greene,* 549 So. 2d at 1152; *Bates v. Messerli*, 483 So. 2d 108, 109 (Fla. 2d DCA 1986); *H & W Enterprises*, 467 So. 2d at 792-93; *Cas-Kay Enterprises, Inc. v. Snapper Creek Trading Center, Inc.*, 453 So. 2d 1147, 1148 (Fla. 3d DCA 1984); *Gold v. Wolkowitz*, 430 So. 2d 556, 557 (Fla. 3d DCA 1983); *Held v. Trafford Realty Co.*, 414 So. 2d 631, 633 (Fla. 5th DCA 1982); *Chris Berg, Inc. v. Acme Min. Co.,* 893 F.2d 1235, 1238 (11th Cir. 1990) ("The prevailing rule, and the Florida law that governs this case, is that the recipient may rely on the misrepresentation unless its falsity is subjectively known or obvious to him."); *Arrieta-Gimenez v. Arrieta-Negron*, 859 F.2d 1033, 1038 (1st Cir. 1988) ("Florida law does not impose upon the victim of a fraudulent representation the duty to investigate the truth or falsity of that representation.").

Besett and many of the cases following it concern claims of direct fraud, but the same principles apply to secondary liability claims such as aiding and abetting and conspiracy. *See, e.g.*, *Nicholson v. Kellin*, 481 So. 2d 931, 935-36 (Fla. 5th DCA 1986) (finding that the "allegations of a fraudulent conspiracy . . . stat[e] a cause of action" and applying *Besett* to hold that "the fact that [plaintiffs] may have been negligent in investigating the [business's] operation does not bar their claim"). That conclusion follows here, of course, because Morgan Stanley is both a joint tortfeasor with and an agent of Sunbeam — subject to the same liability as Sunbeam.

In sum, the reasonableness of CPH's reliance must be measured solely by what CPH actually knew or what was obvious to CPH. "'[D]ue diligence' is irrelevant." *Choice Restaurant Acquisition Ltd. v. Whitley, Inc.*, 816 So. 2d 1165, 1168 (Fla. 4th DCA 2002) (Farmer, J., concurring specially) (citing *Besett*); *see also Eastern Cement v. Halliburton Co.*, 600 So. 2d 469, 471 (Fla. 4th DCA 1992) (under *Besett*, "there is no duty to investigate [a misrepresentation's] truth or falsity unless the recipient knows of its falsity, a situation not present here"); *Greene v. Kolpac Builders, Inc.*, 549 So. 2d 1150, 1151-52 (Fla. 3d DCA 1989) (rejecting the defendant's argument that plaintiff "should have performed independent investigations and cannot now claim it was mistaken or misled" because, under *Besett*, the plaintiff "was not under a duty to discover an affirmative misrepresentation by" defendant); *H&W Enterprises, Inc. v. Ellis*, 467 So. 2d 790, 793 (Fla. 1st DCA 1985) ("*Besett* . . . adopted a rule where the recipient of a misrepresentation is not required to make an investigation unless the falsity is known or obvious").

2. Morgan Stanley Has Urged The Court to Accept An Incorrect Reading of Florida Law.

A. Morgan Stanley's Assertion of A Due Diligence Requirement Contradicts *Besett*.

During the February 17, 2005 hearing on CPH's motion in limine relating to the Panavision acquisition, Morgan Stanley suggested that Florida law imposes a due diligence or notice inquiry obligation on fraud victims. *See* Ex. B, 2/17/05 Tr. at 1134. Morgan Stanley's suggestion is directly contrary to the governing principle in *Besett* — that a plaintiff's negligence is no defense to the defendant's intentional fraud. *See Besett*, 389 So. 2d at 998 (when the "choice is between the two — fraud and negligence — negligence is less objectionable than fraud"); *see also Gilchrist Timber Co. v. ITT Rayonier Inc.*, 696 So. 2d 334, 337 (Fla. 1997) (explaining that the liability for negligent misrepresentation "is more restricted than that for fraudulent misrepresentation," because "the fault of the maker of the [negligent] misrepresentation is sufficiently less to justify a narrower responsibility for its consequences") (internal quotation marks and alterations omitted); *Cruise*, 622 So. 2d at 40 ("Fraudulent misrepresentation is an intentional tort. Therefore, comparative negligence is not available as a defense") (citations omitted); *Bates v. Messerli*, 483 So. 2d 108, 109 (Fla. 2d DCA 1986) (same); Fla. Stat. § 768.81(4)(b) (comparative fault statute "does not apply to any action . . . based upon an intentional tort.").

This same principle applies even when a fraud victim, or its attorneys or other advisors, undertake an independent investigation that turns out to be negligently performed. *See, e.g., Stev-Mar, Inc. v. Matvejs*, 678 So. 2d 834, 836-37 (Fla. 3d DCA 1996) (rejecting defendant's argument that plaintiffs did not reasonably rely on defendants because plaintiffs retained an attorney who conducted a negligent investigation: "Under the views expressed in *Besett*, the seller and real estate agent cannot extricate themselves from their intentional fraud on the

theory that if only Buyer's attorney had done more work, Buyer's attorney would have discovered the fraud"); *Nicholson v. Kellin*, 481 So. 2d 931, 936 (Fla. 5th DCA 1986) ("the fact that [plaintiffs] may have been negligent in investigating the Polar Chips operation does not bar their claim" under *Besett*).

A necessary corollary to the rule that a fraud victim need not make an independent investigation of a representation is that the victim is not charged with knowing anything beyond what the victim would have understood from the facts of which the victim was actually aware. In this regard, the Supreme Court in *Besett* expressly adopted and quoted from Section 540 of *Restatement (Second) of Torts*, which confirms this conclusion. Indeed, the comment to *Restatement* Section 540 is directly on point: "'[I]t is no defense to one who has made a fraudulent statement about his financial position that his offer to submit his books to examination is rejected.'" *See Besett*, 389 So. 2d at 997 (quoting *Restatement (Second) of Torts* § 540 cmt. a).

B. The Case Previously Cited by Morgan Stanley Is Inapposite.

At the February 17 hearing, Morgan Stanley argued (Ex. B, 2/17/05 Tr. at 1136) that *L & L Doc's, LLC v. Florida Div. of Alcoholic Beverages & Tobacco* controls here and stands for the proposition that CPH was "not justified in relying upon a misrepresentation which [it] knew or should have known, with the exercise of some diligence, was false." 882 So. 2d 512, 515 (Fla. 4th DCA 2004). But as the Court correctly observed, *L & L Doc's* involved a situation where the plaintiff was on notice of the fraud because the plaintiff was charged with knowledge that it is illegal to operate slot machines in Florida. Specifically, in *L & L Doc's,* the plaintiffs claimed that their reliance on the seller's representations about the legality of the purchase and use of slot machines was justified because they were recent immigrants ignorant of the law. *Id.* at 514-15. The Fourth District rejected that argument, concluding that it was

appropriate to attribute knowledge of illegality to the plaintiffs by virtue of the rule that "ignorance of the law is no excuse." *Id.*; *see also State v. Beasley*, 580 So.2d 139, 142 (Fla. 1991) ("As to notice, publication in the Laws of Florida or the Florida Statutes gives all citizens constructive notice of the consequences of their actions."); *Shear v. Robinson* 1881 WL 3315, at *42 (Fla. 1881) (it is a "wise principle of policy that ignorance of the law, with knowledge of the facts, cannot generally be set up as a defense") (internal quotation marks omitted). *L & L Doc's* — which does not even cite *Besett* or the longstanding rule it established — obviously is inapposite here. *Besett* controls.

Morgan Stanley also may attempt to rely on the Supreme Court's 2002 decision in *Azam*, in which the Court stated in the context of a commercial real estate case that "where recorded information which is clearly contained in the chain of title of the parcel purchased is asserted as the basis for an action for misrepresentation by the purchaser, . . . [k]nowledge of clearly revealed information from recorded documents contained in the records constituting a parcel's chain of title is properly imputed to a purchasing party, based upon the fact that an examination of these documents prior to a transfer of the real property is entirely expected." *See* 813 So. 2d at 95. This "imputation" case, like the slot machine case relied on by Morgan Stanley, is based on principles of constructive knowledge of public information that do not apply here. *See Tri-County Produce Distribs. v. Northeast Prod. Credit Ass'n*, 160 So. 2d 46, 51 (Fla. 3d DCA 1963) (case cited in *Azam* explaining that "imputation" in this limited context is compelled by the Florida recording statute, which "has been construed to mean that the proper record of a conveyance affords constructive notice of its contents"); *see also Hagan v. Sabal Palms, Inc.*, 186 So.2d 302, 312 (Fla. 2d DCA 1966) (another case cited in *Azam* stating that "Florida has fully adopted the 'constructive notice' doctrine" in cases involving real estate

records). Moreover, in reaching its holding with respect to the real estate transaction at issue, the Court in *Azam* took pains to reaffirm the general principle articulated in *Besett* that "'the recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation.'" 813 So. 2d at 93 (quoting *Besett*, 389 So. 2d at 997). That principle applies with undiluted force here.

Morgan Stanley further may attempt to cite a handful of additional District Court of Appeal cases to suggest that Florida imposes a due diligence requirement on fraud victims. At the threshold, to the extent such cases contain language inconsistent with *Besett*, they fail in light of the Supreme Court's unequivocal holding in *Besett* — a holding that some of the cases fail to address or even cite. *Besett*, as demonstrated above, establishes that a fraud victim can rely upon the defendant's misrepresentations unless the victim has actual knowledge of the facts or unless the facts would have made the fraud obvious — and is not required to conduct an independent investigation. And to the extent some District Court of Appeal cases contain language arguably to the contrary, those cases are inapposite, and their language is not controlling. *See Belmac Hygiene, Inc. v. Belmac Corp.*, 121 F.3d 835, 841 (2d Cir. 1997) (holding that the trial court's reliance on Florida opinions in conflict with *Besett* was erroneous because "[u]nder the guise of 'clarification' the lower courts cited by the district court are in fact amending" the decision); *see also Hoffman v. Jones*, 280 So. 2d 431, 440 (Fla. 1973) (if a District Court of Appeal decision conflicts with a Supreme Court opinion, "the decision of [the Supreme Court] shall prevail until overruled").

For example, in *Wasser v. Sasoni*, the Third District stated that the "general rule" is that "a [fraudulent] misrepresentation is not actionable where its truth might have been discovered

by the exercise of ordinary diligence." 652 So. 2d 411, 412 (Fla. 3d DCA 1995). But the contract for the sale of apartment buildings at issue in *Wasser* expressly stated that the buildings were sold "as is," and in "their present condition," which the Third District held "are recognized as valid defenses to claims of fraud." *Id.* at 412-13; *see also David v. Davenport*, 656 So. 2d 952, 953 (Fla. 3d DCA 1995) (a similar case relying on *Wasser*, which fails to cite *Besett*, involving the sale of an automobile "as is"); *Adams v. Prestressed Systems Industries*, 625 So. 2d 895, 896-97 (Fla. 1st DCA 1993) (does not cite *Besett*); *Hillcrest Pacific Corp. v. Yamamura*, 727 So. 2d 1053, 1057-58 (Fla. 4th DCA 1999) (does not cite *Besett*).

In sum, the reasonableness of a fraud victim's reliance does not depend on whether it could have made an independent inquiry, or whether it did so, or whether it did so negligently. *See Besett*, 389 So. 2d at 998; *Stev-Mar*, 678 So. 2d at 836-37; *Eastern Cement*, 600 So. 2d at 471; *Greene*, 549 So. 2d at 1151-52; *Nicholson*, 481 So. 2d at 936; *H&W Enterprises*, 467 So. 2d at 793; *Ton-Wil Enterprises*, 440 So. 2d at 622. A fraud victim can rely on a misrepresentation unless the misrepresentation actually is known to the victim or would be obvious to the victim based on the facts presented to it.

3. CPH Requests That The Court Establish Safeguards To Minimize Jury Confusion About The Principles Of Law Governing This Case.

The Court has requested views from the parties concerning how to draw the line concerning what evidence properly can be admitted. In response to that request, CPH offers here suggestions both about what kinds of evidence should be excluded and about other ways to prevent juror confusion relating to the issue of reasonable reliance.

A. Evidence of Information CPH Did Not Acquire Must Be Excluded.

CPH is concerned that Morgan Stanley may seek to try this case, *sub silentio*, under New York law by presenting evidence concerning CPH's purported failure to conduct a

reasonable investigation and heed warnings and red flags. Morgan Stanley could do so, for example, if allowed to ask questions at trial designed to elicit information about the kinds of inquiries that CPH could have made relating to Sunbeam's financial condition and practices but that CPH did not make. Such questions would be improper because they would not produce any relevant evidence and would tend to mislead the jury into thinking that supposed deficiencies in CPH's "due diligence" are a defense to fraud. The significance of this concern is illustrated by the lengthy proposed findings of fact submitted by Morgan Stanley at the summary judgment stage, a document that includes dozens and dozens of assertions of fact that bear solely on the question whether CPH could have done more due diligence. A representative list of examples proves the point:

¶ 136 (failure to review financial statements)
¶¶ 138-45 (confusion about who at CPH was responsible for due diligence)
¶¶ 147-49 (materials Mr. Maher did not read)
¶ 150 (materials Mr. Nesbitt did not review)
¶¶ 153-55 (things CSFB did not do)
¶¶ 156-58 (things Wachtell did not do)
¶¶ 159-60 (things Ernst & Young did not do)
¶¶ 176-79 (questions not asked at the February 23 meeting)
¶¶ 214-15 (merger agreements gave right of access to materials)
¶¶ 219-35 (what CPH did not do between March 19 press release and closing)
¶¶ 242-44 (failure of CPH personnel to review the Sunbeam 10-K in March 1998)
¶¶ 256-75 (specific questions not asked after the March 19 press release)

As this listing shows, Morgan Stanley has long planned to try this case by pointing to supposed shortfalls in CPH's efforts to protect itself. But under Florida law, Morgan Stanley may not do so.

To prevent Morgan Stanley from attempting to nullify the Court's choice of Florida law by misleading the jury into focusing on these irrelevant factual disputes, the Court should enter an order making clear that no evidence may be introduced concerning supposed shortcomings in CPH's due diligence. Moreover, no question may be asked about CPH's

access to information unless Morgan Stanley has a good faith basis for believing that the answer will be that CPH did indeed access the information in question. That kind of question and answer could be permitted (1) only to show that CPH in fact received the information at issue and (2) only if CPH's receipt of that information could be viewed as evidence that CPH knew about the Sunbeam fraud and thus did not rely on statements by Sunbeam and Morgan Stanley about the Sunbeam turnaround. Precisely the same kind of question becomes impermissible if the anticipated answer is that CPH did not access the information.

Moreover, the Court should be prepared to issue cautionary instructions as necessary if and when Morgan Stanley seeks to inquire about areas that have the potential to mislead or confuse the jury. Thus, for example, if Morgan Stanley elicits testimony about the information CPH obtained about Sunbeam from CSFB or other third parties, depending on the context it may well be appropriate — right then and there — to instruct the jury about what the evidence is being admitted to prove and what the evidence is not being admitted to prove. For example, the Court might instruct the jury:

> You are about to hear testimony that is admissible for one purpose, but not for another purpose. That testimony should be considered by you only in determining whether CPH actually knew that the Sunbeam turnaround was false. I instruct you that you may consider this testimony only for that purpose. You may not consider this testimony for any other purpose. In particular, I instruct you that CPH may rely on a false statement, even though its falsity could have been discovered if CPH had made an investigation. CPH had no duty to investigate to determine whether the statement was false.

B. Morgan Stanley Should Be Required to Present to the Jury the Same Theory of Its Case that Morgan Stanley Argues to the Court When It Seeks to Admit Evidence.

An additional safeguard also is warranted. Morgan Stanley should be required to articulate and commit to a theory of the case that Morgan Stanley will present to the jury and the Court. If Morgan Stanley argues to the Court that evidence should be admitted to show

that CPH actually knew about the Sunbeam fraud or that the Sunbeam fraud was obvious, that is its right. But Morgan Stanley should say so — to both the Court and the jury. Having done so, Morgan Stanley can introduce evidence about particular information that was known to CPH and thus tends to show CPH's knowledge of the fraud. In practice, that would mean that Morgan Stanley would conceding that it too had knowledge of the fraud — since it is hard to see how CPH could have acquired knowledge but that knowledge would have eluded Morgan Stanley.

By contrast, if Morgan Stanley is going to rely on the theory that neither CPH nor Morgan Stanley had knowledge of the fraud, Morgan Stanley should be required to articulate that theory. That would mean that there no longer would be a justification for introducing evidence about the information known to CPH. The only relevant evidence would relate to facts not known to Morgan Stanley.

In either event, if Morgan Stanley seeks to introduce evidence based upon a theory of the case that Morgan Stanley claims it intends in good faith to pursue, then Morgan Stanley should be required to try the case based on the theories it has invoked for purposes of introducing evidence at trial. By making Morgan Stanley try the case on the same theory that Morgan Stanley espouses as its theory of admissibility, the Court can help guard against pretextual introduction of evidence designed to mislead the jury into assessing the sufficiency of CPH's due diligence.

CPH respectfully suggests that these approaches will help to keep the trial focused on the issues legitimately presented under Florida law.

Conclusion

Under Florida law, due diligence is irrelevant to the reliance inquiry, and the only issue is what CPH actually knew or was obvious — without regard to what any independent investigation would have revealed. To ensure that these settled principles of Florida law are applied to the facts by the jury, CPH requests that the safeguards articulated above be adopted by the Court.

Dated: March 1, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and hand delivery to all counsel on the attached list on this 1st day of March, 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

CASE NO. CA 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S MOTION FOR TEMPORARY RELIEF FROM PROVISION IN SEPTEMBER 15, 2004 ORDER

Coleman (Parent) Holdings Inc. ("CPH") respectfully requests that this Court grant CPH temporary relief from the provision in the Court's September 15, 2004 Order requiring the parties to simultaneously file redacted and unredacted versions of pleadings. In support of this motion, CPH states as follows:

1. On March 1, 2005, CPH is filing a response to the Court's request that CPH submit a chronology of the discovery abuses committed by defendant Morgan Stanley, accompanied by a multi-volume appendix. Because those filings contain documents that have been designated as confidential, CPH is filing those documents under seal.

2. Under this Court's September 15 Order, a redacted version of these filings also is to be filed. But given the vast amount of materials involved, and the short amount of time in which CPH has had to prepare its response to the Court's request, CPH respectfully requests that this Court temporarily relieve it of that obligation. CPH also requests this relief because many of the documents that are designated as confidential probably need not be, and thus, it would be more efficient to file the redacted version after this Court resolves any confidentiality disputes to which the parties cannot reach agreement.

For the foregoing reasons, CPH respectfully requests temporary relief from the provision

of the Court's September 15 Order requiring the filing of a redacted version of CPH's response to the Court's request for a chronology of the discovery abuses committed by defendant Morgan Stanley.

Dated: March 1, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 1st day of March, 2005.

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Honorable Elizabeth T. Maass
Palm Beach County Courthouse
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205 North Dixie Highway
West Palm Beach, FL 33401

Re: Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Matter No.: 029986-230580

Dear Judge Maass:

Enclosed please find a copy of the Notice of Hearing for 1:30 p.m. today. As you requested, all counsel have been notified.

Respectfully,

JACK SCAROLA
JS/mep
Enc.

cc: Joseph Ianno, Esq. (via fax)
Mark Hansen, Esq.
Thomas Clare, Esq.
Jerold S. Solovy, Esq.

#230580/mep

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO.: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

_____/

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: March 1, 2005

TIME: 1:30 p.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

Morgan Stanley's Objections to CPH's Notice to Produce

Coleman (Parent) Holdings Inc.'s Response to Notice of Videotaped Deposition and the objections contained within that document

Coleman (Parent) Holdings Inc.'s M/Limine 14 and 16

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Case No.: 2003 CA 005045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Hand Delivery to all Counsel on the attached list, this 1st. day of March, 2005.

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Case No.: 2003 CA 005045 AI
Notice of Hearing

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

COPY
RECEIVED FOR FILING
MAR 0 2 2005
SHARON R. BOCK
CLERK & COMPTROLLER
CIRCUIT CIVIL DIVISION

AMENDED NOTICE OF VIDEOTAPED DEPOSITION
(Changes Location Only)

PLEASE TAKE NOTICE that Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") will take the deposition of Coleman (Parent) Holdings Inc. ("CPH") through a CPH representative or representatives with knowledge on the topics listed below, pursuant to Florida Rules of Civil Procedure 1.280 and 1.310, and the Court's Order at the February 24, 2005 hearing. The deposition will be taken by means of video tape and the videographer will be Visual Evidence, 601 N. Dixie Highway, West Palm Beach, Florida. The oral examination will take place on March 3, 2005, from 1:00 p.m. until conclusion, at the Palm Beach County Courthouse, Jury Deliberation Room of Courtroom 11A, 205 North Dixie Highway, West Palm Beach, Florida 33401.

CPH shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf on the following matters:

1. The accounting value, book value, balance sheet value, or internal valuation of the Sunbeam stock received by CPH as a result of Sunbeam's acquisition of The Coleman Company, Inc.

2. The accounting value, book value, balance sheet value, or internal valuation of the Sunbeam warrants received by CPH as a result of the Sunbeam settlement agreement.

3. The authenticity, source, use, creation, editing, access, maintenance and business purpose of the documents produced by CPH in response to the February 17, 2005 Order.

4. The native electronic versions of the documents produced by CPH in response to the February 17, 2005 Order, including without limitation all metadata, document histories, and document profiles.

5. The identity of all persons responsible for or involved with the creation, editing, review, or presentation of the documents produced by CPH in response to the February 17, 2005 Order.

6. The dates, context, circumstances, and meaning of the documents produced by CPH in response to the February 17, 2005 Order, including without limitation all line items, footnotes, abbreviations, codes, notations, and concepts.

7. The figures, calculations, buildups, backup data, and documents underlying each line item in the documents produced by CPH in response to the February 17, 2005 Order.

8. All communications between CPH, MAFCO, or any related or affiliated entity with any third party regarding the documents produced by CPH in response to the February 17, 2005 Order, including without limitation Sunbeam Corporation and Credit Suisse First Boston.

9. The preparation for and audit of MAFCO Holdings Inc. Consolidated Financial Statements For The Years Ended December 31, 1998, 1999, and 2000 produced by CPH in response to the February 17, 2005 Order.

10. The circumstances, timing, process and persons responsible for the search, collection, processing, redaction and review of the documents responsive to the February 17, 2005 Order and Morgan Stanley's First Request for Production of Documents Nos. 9 and 39, Third Request for Production of Documents No. 2, and Eighth Request for Production of Documents No. 4; the reasons for why the documents produced by CPH in response to the February 17, 2005 Order were not produced earlier or shown to CPH's experts; the reasons for the redaction of relevant information in the documents produced by CPH in response to the February 17, 2005 Order; the existence of any other documents responsive to the February 17, 2005 Order and Morgan Stanley's First Request for Production of Documents No. 9; and the failure to retain any other documents that would have been responsive to the February 17, 2005 Order and Morgan Stanley's First Request for Production of Documents No. 9.

The deposition will be recorded by stenographic and videographic means. The witness is instructed to bring all books, papers, and other things in his or her possession or under its control relevant to this lawsuit (and not previously produced in discovery) to the examination, including

all documents requested in the February 24, 2005 Letter from Lawrence P. Bemis to Michael Brody.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 1st day of March, 2005.

Jeffrey S. Davidson
Lawrence P. Bemis (FL Bar No. 618349)
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BY: Joseph Ianno, Jr.

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West Palm Beach, FL 22401-6136

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

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

CASE NO: 2003 CA 005045 AI

NOTICE OF FILING PLEADING UNDER SEAL

COLEMAN (PARENT) HOLDINGS INC. ("CPH") hereby gives notice of the filing of Plaintiff's Motion to Reopen Deposition of Allison Gorman and for Related Discovery, and Exhibits A-H, Filed Under Seal on this date.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Hand Delivery to all counsel on the attached list on this 2nd day of March, 2005.

Jerold S. Solovy
Ronald L. Marmer
Jeffrey T. Shaw
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One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

John Scarola
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Attorneys for Plaintiff

COUNSEL LIST

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

NOTICE OF FILING PLEADING UNDER SEAL

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed the Transcript of March 1, 2005 2:30 p.m. Sealed Proceedings, out of the presence of Plaintiff's counsel, regarding in camera inspection before the Honorable Elizabeth T. Maass.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and hand delivered on this 2ND day of March, 2005.

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

NOTICE OF FILING PLEADING UNDER SEAL

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed under seal its Supplemental Brief in Response to Plaintiff's Motion for Order Declaring Attorney-Client Privilege Waived for Certain Documents Relating to William Strong.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and hand delivered on this 2nd day of March, 2005.

Jeffrey S. Davidson
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BY: Joseph Ianno Jr.
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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.

_____/

NOTICE OF FILING RETURN OF SERVICE

Defendant, MORGAN STANLEY & CO. INCORPORATED, by and through its undersigned counsel, hereby gives notice that it has filed the original Return of Service of trial subpoena upon William Pruitt.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand-delivery on this 2ND day of March, 2005.

Jeffrey S. Davidson
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Suite 1200 – West Tower
West Palm Beach, FL 22401-6136

RETURN OF SERVICE

State of Florida **County of Palm Beach** **Circuit Court**

Case Number: CA 03-5045 AI Court Date: 2/22/2005

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

For: Joseph Ianno, Jr., Esq.
CARTLON, FIELDS P.A.,

Received by BLACKHAWK LEGAL SERVICE INC on the 7th day of January, 2005 at 8:00 am to be served on **WILLIAM PRUITT, 274 Valeros Court, Coral Gables, FL 33143**. I, Joe Hunter, do hereby affirm that on the 7 day of February, 2005 at 8 :35A.m., executed service by delivering a true copy of the Subpoena for Trial/$13.28 Witness Fee/Check in accordance with state statutes in the manner marked below:

( ) INDIVIDUAL SERVICE: Served the within-named person.

(X) SUBSTITUTE SERVICE: By serving Iliana Pruitt as Wife.

( ) POSTED SERVICE: After attempting service on ___/___ at _____ and on ___/___ at _____ to a conspicuous place on the property described herein.

( ) OTHER SERVICE: As described in the Comments below by serving _____ as _____.

( ) NON SERVICE: For the reason detailed in the Comments below.

COMMENTS: _____

I certify that I have no interest in the above action, am of legal age and have proper authority in the jurisdiction in which this service was made.

PROCESS SERVER # 3060
Appointed in accordance
with State Statutes

BLACKHAWK LEGAL SERVICE INC
4521 P G A Boulevard, #210
Palm Beach Gardens, FL 33418
(561) 622-0711

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO: CA 03-5045 AI

SUBPOENA FOR TRIAL

THE STATE OF FLORIDA

TO: WILLIAM PRUITT
274 Valeros Court
Coral Gables, Florida 33143

YOU ARE COMMANDED to appear before The Honorable Elizabeth Maass, Judge of the Circuit Court, at the Palm Beach County Courthouse, Courtroom 11A, 205 North Dixie Highway, West Palm Beach, Florida on February 22, 2005* at 9:30 a.m., to testify in this action. If you fail to appear, you may be in contempt of court.

You are subpoenaed to appear by the following attorneys, and unless excused form this subpoena by these attorneys or the Court, you shall respond to this Subpoena as directed.

Dated: January 4, 2005

BY: Joseph Ianno Jr.
Joseph Ianno, Jr.
For the Court

Joseph Ianno, Jr.,
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Telephone: (202) 326-7999

Counsel for Defendant
Morgan Stanley & Co. Incorporated

***BEFORE YOU APPEAR**

PLEASE CALL JOYCE DILLARD, CLA AT (561) 659-7070 TO CONFIRM THE EXACT TIME AND DATE YOU WILL BE CALLED TO TESTIFY

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S RESPONSES AND OBJECTIONS TO COLEMAN (PARENT) HOLDINGS INC.'S NOTICE TO PRODUCE AT HEARING

THIS CAUSE came before the Court March 2, 2005 on Morgan Stanley's Responses and Objections to Coleman (Parent) Holdings, Inc.'s Notice to Produce at Hearing, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that MS & Co.'s objections to CPH's Notice to Produce at Hearing are sustained, in part, and overruled, in part. The Documents Requested are limited to those responsive items produced on or after May 1, 2002. MS & Co. shall produce all requested items, as so date-limited, within its care, custody, or control, within 12 hours of their review by counsel for responsiveness but, in any event within 10 days of the date hereof.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 2 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
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Rebecca Beynon, Esq.
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1615 M Street, NW, Suite 400
Washington, DC 20036

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S RESPONSES AND OBJECTIONS TO COLEMAN (PARENT) HOLDINGS INC.'S NOTICE TO PRODUCE AT HEARING

THIS CAUSE came before the Court March 2, 2005 on Morgan Stanley's Responses and Objections to Coleman (Parent) Holdings, Inc.'s Notice to Produce at Hearing, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that MS & Co.'s objections to CPH's Notice to Produce at Hearing are sustained, in part, and overruled, in part. The Documents Requested are limited to those responsive items produced on or after May 1, 2002. MS & Co. shall produce all requested items, as so date-limited, within its care, custody, or control, within 12 hours of their review by counsel for responsiveness but, in any event within 10 days of the date hereof.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 2 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
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THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

CASE NO. CA 03-5045 AI

NOTICE OF TAKING DEPOSITIONS

To:

Thomas A. Clare, Esq.
KIRKLAND & ELLIS, LLP
222 Lake View Avenue
Suite 260
West Palm Beach, FL 33401

Joseph Ianno, Jr., Esq.
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Kellogg, Huber, Hansen,
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Lee S. Richards
Neil S. Binder
RICHARDS, SPEARS,
KIBBE & ORBE LLP
One World Financial Center
New York, New York 10281

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings Inc. will take the deposition upon oral examination of Arthur J. Riel, pursuant to Florida Rule of Civil Procedure 1.310 on Tuesday, March 8, 2005, at 10 a.m.

The deposition will be conducted at Richards, Spears, Kibbe & Orbe LLP; One World Financial Center; New York, NY 10281. The deposition will be recorded by stenographic means. The depositions will be taken before a person authorized to administer oaths and will continue day to day until completed.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and hand delivery or mail to all counsel on the attached Service List this 3rd day of March 2005.

Dated: March 3, 2005

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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Todd, Evans & Figel, P.L.L.C.
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By Facsimile and Hand Delivery

Lee S. Richards
Neil S. Binder
RICHARDS, SPEARS, KIBBE & ORBE LLP
One World Financial Center
New York, NY 10281

By Facsimile and Mail

FAX TRANSMITTAL

JENNER&BLOCK

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date:	March 3, 2005		
TO:	Thomas A. Clare, Esq. Mark C. Hansen, Esq.	Fax:	(561) 651-1127
	Joseph Ianno, Jr., Esq.	Fax:	(561) 659-7368
	John Scarola, Esq.	Fax:	(561) 684-5816 (before 5 PM)
From:	Michael T. Brody (561) 352-2300		
Employee Number:		Client Number:	41198-10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential, and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message:

Total number of pages including this cover sheet: 4	Time Sent:
If you do not receive all pages, please call: 561-352-2300	Sent By:
Secretary:	Extension:

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

NOTICE OF FILING PLEADING UNDER SEAL

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed under seal the original Declarations of the following:

GianBattista Origoni, dated February 25, 2005;
David Mayhew, February 28, 2005;
Royce Miller, February 28, 2005;
Filippo Vassalli, February 28, 2005;
Sergio Erede, February 26, 2005;
John P. Cooney, Jr., Undated;
Monroe R. Sonnenborn, Undated;
James P. Cusick, Undated;
James Mangan, Undated; and
Charles Chasin, Undated

WPB#571261.32

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and hand delivered on this 3rd day of March, 2005.

Jeffrey S. Davidson
Lawrence P. Bemis (FL Bar No. 618349)
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Counsel for Morgan Stanley & Co. Incorporated

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BY: Joseph Ianno Jr.
Joseph Ianno, Jr.
Florida Bar No. 655351

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Jerold S. Solovy
Michael Brody
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c/o Mafco Holdings, Inc.
777 S. Flagler Drive
Suite 1200 – West Tower
West Palm Beach, FL 22401-6136

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER AND DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court, in Chambers, on its own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Clerk is directed to docket and file the letter from Dr. Buckman dated March 1, 2005 and the facsimile transmission from The Center for Inner Work dated March 2, 2005.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 3 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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West Palm Beach, FL 33401

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

AGREED ORDER GRANTING
VERIFIED MOTION TO ADMIT PETER DOYLE, *PRO HAC VICE*

THIS CAUSE having come before the Court upon the Verified Motion to Admit Peter Doyle, *Pro Hac Vice*, and the Court having been advised of the agreement of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Morgan Stanley's Verified Motion to Admit Peter Doyle, *Pro Hac Vice* is **GRANTED**. Mr. Doyle is admitted to practice in this case.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____ of March, 2005.

SIGNED & DATED
MAR 04 2005
JUDGE ELIZABETH T. MAASS

Elizabeth T. Maass
Circuit Court Judge

cc: Counsel of Record on attached Service List

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

AGREED ORDER

THIS CAUSE came before the Court March 5, 2005 on Robert O. Buckman, M.D.'s letter dated March 1, 2005, which the Court elects to treat as a Motion to be Excused, with both counsel present. Based on the foregoing and on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion to be Excused is Granted. James K. Brower, juror number 100909337, is hereby excused from further service in this cause.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 4th day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

AGREED ORDER

THIS CAUSE came before the Court March 5, 2005 on the facsimile transmission from The Center for Inner Work dated March 2, 2005, which the Court elects to treat as a Motion to be Excused, with both counsel present. Based on the foregoing and on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion to be Excused is Granted. Brian Rosenblum, juror number 101206747, is hereby excused from further service in this cause.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 4 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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March 4, 2005

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VIA HAND DELIVERY

Honorable Elizabeth T. Maass
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205 North Dixie Highway
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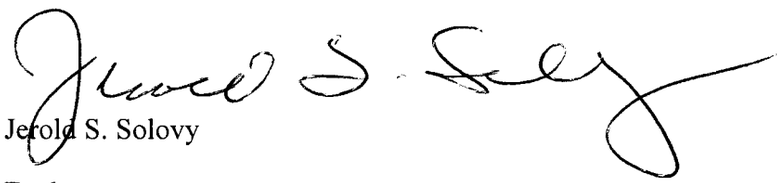
Re: Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.

Dear Judge Maass:

Enclosed please find a courtesy copy of CPH's Motion for Correction and Clarification of Order on CPH's Motion for Adverse Inference. This motion is scheduled to be heard by Your Honor at 1:00 p.m. on Monday, March 7, 2005.

Sincerely,



Jerold S. Solovy

Enclosure

cc: All Counsel of Record

9961

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: March 7, 2005

TIME: 1:00 p.m.

JUDGE: Honorable Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

Motion for Correction and Clarification of Order on CPH's Motion for Adverse Inference

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and hand delivery to all counsel on the attached list on this 4th day of March, 2005.

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9966

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

MOTION FOR CORRECTION AND CLARIFICATION OF ORDER ON CPH'S MOTION FOR ADVERSE INFERENCE

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") respectfully requests that the Court correct and clarify the form of its March 1, 2005 Amended Order On Coleman (Parent) Holdings, Inc.'s Motion For Adverse Inference Instruction Due To Morgan Stanley's Destructions of E-Mails And Morgan Stanley's Noncompliance With The Court's April 16, 2004 Agreed Order, And Motion For Additional Relief And Order On Plaintiff's Motion To Compel Further Discovery Regarding Morgan Stanley's Destruction And Non-Production of E-Mails (the "Order").

CPH requests entry of a revised form of the Order to correct a few typographical errors and to ensure that the language of the Order, including the attached statement of facts, is entirely clear. CPH attaches to this motion (1) a marked copy of the Order highlighting the insertions and deletions that CPH proposes, and (2) a clean copy of the revised form of the Order that CPH requests be entered. CPH also is providing a disk containing the clean copy of the proposed revised Order.

CPH does not seek any substantive changes to this Court's findings or to the relief that this Court has granted with respect to the specific misconduct addressed in the Court's order.

Rather, the language changes that CPH requests are designed solely to clarify specific parts of the Order and to ensure that the attached statement of facts clearly conveys to the jury the findings that this Court has made.

Dated: March 4, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and hand delivery to all counsel on the attached list on this 3rd day of March, 2005.

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CHANGES MARKED

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

CASE NO.: 502003CA005045XXOCAI

COLEMAN (PARENT) HOLDINGS INC.
Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

FURTHER AMENDED ORDER ON COLEMAN (PARENT) HOLDINGS, INC.'S MOTION FOR ADVERSE INFERENCE INSTRUCTION DUE TO MORGAN STANLEY'S DESTRUCTIONS OF E-MAILS AND MORGAN STANLEY'S NONCOMPLIANCE WITH THE COURT'S APRIL 16 2004 AGREED ORDER, AND MOTION FOR ADDITIONAL RELIEF AND ORDER ON PLAINTIFF'S MOTION TO COMPEL FURTHER DISCOVERY REGARDING MORGAN STANLEY'S DESTRUCTION AND NON-PRODUCTION OF E-MAILS

THIS CAUSE came before the Court on February 14, 2005 on Coleman (Parent) Holdings, Inc.'s ("CPH's") Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, as modified by CPH's February 14, 2005 ore tenus motion for additional relief, and on February 28, 2005 on Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-Mails, with both counsel present. Based on evidence introduced, the Court finds:

1. CPH has sued Defendant, Morgan Stanley & Co., Inc. ("MS & Co."), for fraud in connection with CPH's sale of its stock in Coleman, Inc., to Sunbeam Corporation in return for Sunbeam stock. Whether MS & Co. had knowledge of the fraudulent scheme undertaken by Sunbeam in 1997 and early 1998 and, if so, the extent of that knowledge, is central to the case. CPH has sought access to MS & Co.'s internal files, including e-mails, since the case was filed.

2. Though MS & Co. instructed its investment bankers to preserve paper documents in their possession in connection with the Sunbeam transaction in February, 1999, it continued its practice of overwriting e-mails after 12 months, despite an SEC regulationn requiring all e-mails be retained in readily accessible form for two years. *See* 17 C.F.R. §240.17a-4 (1997).

3. On April 16, 2004, the Court entered its Agreed Order requiring MS & Co. to (1) search the oldest full backup tape for each of 36 MS & Co. employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all nonprivileged e-mails responsive to CPH's document requests; (4) give CPH a privilege log; and (5) certify its full compliance with the Agreed Order.

4. On May 14, 2004, MS & Co. produced approximately 1,300 pages of e-mails but failed to provide the required certification. Finally, on June 23, 2004, after inquiries by CPH, MS & Co. provided CPH with a certificate of full compliance with the April 16 Agreed Order signed by Arthur Riel, the MS & Co. manager assigned this task.

5. As organized by MS & Co., the effort to recover e-mails from any remaining backup tapes had several stages. First, the relevant backup tapes (in various formats, such as "DLT" tapes and eight-millimeter tapes) had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc. ("NDC"), to be processed, and the data returned to MS & Co. in the form of "SDLT" tapes. Third, MS & Co. had to find a way to upload the contents of these SDLT tapes into its new e-mail archive. Fourth, MS & Co. would run "scripts" to transform this data into a searchable form, so that it could later be searched for responsive e-mails. MS & Co. personnel used the term "staging area" to describe the stage of the process when SDLT tapes remained in limbo, waiting to be uploaded to the archive.

6. At some point prior to May 6, 2004, Arthur Riel and his team became aware that more than 1,000 backup tapes had been found at a MS & Co. facility in Brooklyn, New York. These 1,423 DLT tapes had not been processed by NDCI and thus had not been included in the archive or searched when MS & Co. made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification that it was false. He and others on MS & Co.'s e-mail archive team knew by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990's. MS & Co. neither withdrew its certification nor informed CPH about the potential for additional production of e-mails, however. During the summer of 2004, the Brooklyn tapes were processed and sent to the staging area, but they were not uploaded to the e-mail archive so as to be available to be searched until January **2005**~~2004~~, at least eight months after they were found.

7. MS & Co. also failed to timely produce e-mails from 738 8-millimeter backup tapes found at a MS & Co. facility in Manhattan, in 2002. These 738 8-mm tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched when MS & Co. made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Mr. Riel and others were told by their vendor, NDCI, by July 2, 2004 that the 8-mm tapes contained e-mail dating back at least to 1998. MS & Co. neither withdrew its certification nor informed CPH about the potential for additional production of e-mails, though. During the summer of 2004, the 8-mm tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not uploaded to MS & Co.'s e-mail archive.

8. In August 2004, Mr. Riel was relieved of his employment responsibilities. He and his team were replaced by a new team headed by Allison Gorman Nachtigal.

9. Ms. Gorman testified that she was instructed to describe the circumstances of Mr. Riel's replacement as his having been "placed on administrative leave." That same term appears by interlineation over the original typed description in MS & Co.'s memorandum addressing these issues. The typed language stated: "[Mr. Riel was] dismissed for integrity issues." MS & Co. **represented that the reason for the adverse action taken against Mr. Riel was unrelated to any concern about the accuracy of his June 23, 2004 certification. However, MS & Co.** presented no evidence to explain why Mr. Riel would have been placed on administrative leave rather than terminated. CPH argued that it may have been to deprive CPH of the ability to contact him directly.

10. Upon taping over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area; indeed, she was not informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman met with a group of MS & Co. attorneys. Following that meeting, Ms. Gorman gave the project somewhat greater priority, although even then it clearly did not move as expeditiously as possible. For example, MS & Co. gave no thought to using an outside contractor to expedite the process of completing the discovery, though it had certified completion months earlier; it lacked the technological capacity to upload and search the data at that time, and would not attain that capacity for months; and it knew trial was scheduled to begin in February, 2005. Even at this point, no one from MS & Co. or its outside counsel, Kirkland & Ellis LLP, gave CPH or this Court any hint that the June certification was false.

11. On November 17, 2004, more than six months after the May 14, 2004 deadline for producing e-mails in response to the Agreed Order, MS & Co. sent CPH a letter revealing that its June 23 certificate of compliance was incorrect. The letter stated:

> Morgan Stanley has discovered additional e-mail backup tapes since our e-mail production in May 2004. The data on some of [the] newly discovered tapes has been restored and, to ensure continued compliance

> with the agreed order, we have re-run the searches described in the order. Some responsive e-mails have been located as a result of that process. We will produce the responsive documents to you as soon as the production is finalized.

The letter also foreshadowed further delays: "(s)ome of the backup tapes are still being restored. To ensure continued compliance with the agreed order, we intend to re-run the searches again when the restoration process is complete and will produce any responsive documents that result."

12. The next day, November 18, 2004, MS & Co. produced an additional 8,000 pages of e-mails and attachments. MS & Co.'s November 2004 letter stated that the 8,000 pagers came from "newly discovered" tapes; but the testimony now makes clear that this statement was false because Ms. Gorman's team did not figure out how to upload and make searchable the materials from the staging area until January, 2005.

13. MS & Co. has failed to offer any explanation to reconcile the obvious conflict between its assertions at the time of production that the 8,000 pages came from "newly discovered" tapes (*i.e.*, the "Brooklyn tapes") and the testimony of its own witness, Ms. Gorman, that data from those newly discovered tapes were not capable of being searched until two months later, in January.

14. After a follow-up inquiry by CPH, on December 17, 2004, MS & Co. produced a privilege log and told CPH that "[n]o additional responsive e-mails have been located since our November production." MS & Co. refused to answer CPH's questions about whether MS & Co. had restored all the backup tapes described in its November 17 letter and why the tapes had not been located earlier, however.

15. On December 30, 2004, CPH sought confirmation that MS & Co. had reviewed all e-mail backup tapes and produced all responsive e-mails and, if not, asked when the review would be completed. On January 11, 2005, MS & Co. informed CPH that the "restoration of e-mail backup tapes

is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

16. On January 19, 2004, CPH wrote asking MS & Co. to explain the circumstances under which MS & Co. located the "newly discovered" backup tapes and to disclose when the tapes were located. CPH also asked MS & Co. to explain why the backup tapes could not be restored sooner.

17. On January 21, 2005, MS & Co. sent CPH a letter that failed to answer CPH's questions. Instead, MS & Co. described its efforts to restore the backup tapes as "ongoing"; informed CPH that "there is no way for MS & Co. to know or accurately predict the type or time period of data that might be recovered"; and stated that MS & Co. "cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes."

18. On January 26, 2005, CPH filed the Motion at issue here, asking the Court to instruct the jury that MS & Co.'s destruction of e-mails and other electronic documents and MS. & Co.'s noncompliance with the April 16, 2004 Agreed Order can give rise to an adverse inference that the contents of the missing e-mails would be harmful to MS & Co.'s defense in this case.

19. Meanwhile, MS & Co. found another 169 DLT tapes in January, 2005, that allegedly had been misplaced by its New Jersey storage vendor, Recall. Again, MS & Co., chose to provide no specifics to CPH or to the Court.

20. At a February 2, 2005 hearing on CPH's Motion, Thomas A. Clare of Kirkland & Ellis, LLP, representing MS & Co., stated that "late October of 2004...[is] the date I'm representing to the Court is the first time that anyone knew that there was recoverable e-mail data" on the Brooklyn tapes. Hr'g Tr. (2/2/05) at 133-34. The actual date, however, was at least three months earlier, by July 2, 2004. Furthermore, MS & Co. refused to provide the Court with definitive answers about when its e-mail production would be complete, merely stating that it would proceed with "all deliberate speed." *Id.* at 139. Also at the February 2 hearing, Mr. Clare neglected to inform the Court about the 8-mm

tapes that had been located in 2002, and told the Court that the 1,423 DLT tapes had been found in Brooklyn "sometime during the summer" of 2004. The truth of this assertion is belied by the evidence showing that the tapes were found before May 6, 2004.

21. On February 3, 2005, the Court ordered further discovery and set an evidentiary hearing for February 14, 2005. The discovery took place on February 9 and 10, when CPH deposed the three e-mail witnesses identified by MS. & Co.

22. On Saturday afternoon, February 12, 2005, MS & Co. informed the Court that it had, in the previous 24 hours, discovered additional tapes. Also, MS & Co. stated that its recent production omitted certain "attachments" to e-mails. MS & Co. did not attempt to clarify or substantiate either of these statements to CPH or to the Court until the Monday, February 14, 2005 hearing.

23. At the February 14 hearing, none of the witnesses MS & Co. presented was involved in or familiar with the actual electronic searches conducted using the parameters specified in this Court's April 16, 2004 Agreed Order, and none explained where the 8,000 pages produced in November, 2004 had come from. MS & Co.'s witnesses did, however, describe three new developments. First, Robert Saunders, a Morgan Stanley executive director in the Information Technology Division, testified that he returned to New York after his February 10 deposition and, concerned about his unqualified **deposition** assertion that **he**~~the~~ was "confident" that a complete search for backup tapes had been conducted, decided finally to undertake a personal search of MS & Co.'s "communication rooms," going to the areas he thought most obvious first. By doing so, he and two contractors discovered more than 200 additional backup tapes openly stored in locations known to be used for tape storage. Those discoveries were made on Friday and Saturday, February 11 and 12, 2005. As of the February 14 hearing, NDCI had not yet determined which, if any, of these newly discovered backup tapes contained e-mails. Second, Ms. Gorman reported that on Friday, February 11, 2005 she and her team had discovered that a flaw in the software they had written had prevented MS & Co. from locating all

responsive e-mail attachments. Third, Ms. Gorman reported that MS & Co. discovered on Sunday evening, February 13, 2005, that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so there were at least 7,000 additional e-mail messages that appeared to fall within the scope of the Agreed Order had yet to be fully reviewed by MS. & Co.'s outside counsel for responsiveness and privilege. As counsel for MS & Co. admitted, this problem "dwarf[s]" their previous problems. Hr'g Tr. (2/14/05) at 13. Ms. Gorman indicated she was "90 percent sure" that the problem infected MS & Co.'s original searches in May, which means that **MS & Co.** even **then** ~~they~~ failed to timely produce relevant materials that had been uploaded into the archive by that point. *Id.* at 82-83. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the transaction under review here.

24. On February 19, 2045 MS & Co. informed counsel for CPH that "additional boxes of back up tapes" have been located "in a security room" and that, "(a)s of this morning, Morgan Stanley has identified four (unlabled) DLT tapes among the collection. Those four tapes will be sent to NDCI for further analysis." The disclosure did not state when the discovery was made. MS & Co.'s counsel represented to the Court that it was his understanding that about 73 bankers' boxes of tapes were discovered. No explanation for the late discovery was offered.

25. Throughout this entire process, MS & Co. and its counsels' lack of candor has frustrated the Court and opposing counsel's ability to be fully and timely informed.

26. MS & Co.'s failure during the summer and fall of 2004 to timely process a substantial amount of data that was languishing in the "staging area," rather than being put into searchable form and then searched, was willful and a gross abuse of its discovery obligations.

27. MS & Co.'s failure to timely notify CPH of the existence of the DLT and 8-mm tapes, which it had located as early as 2002 and certainly prior to the June 23, 2004 certification, and its

failure to timely process those raw backup tapes was willful and a gross abuse of its discovery obligations.

28. MS & Co.'s failure to produce all e-mail attachments was negligent, and it was discovered and revealed only as a result of CPH's hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check MS & Co.'s compliance with the April 16, 2004 Agreed Order.

29. MS & Co.'s failure to produce all of the Lotus Notes e-mails was negligent, and it was discovered and revealed only as result of CPH's hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check MS & Co.'s compliance with the April 16, 2004 Agreed Order.

30. MS & Co.'s failure to locate other potentially responsive backup tapes before Saturday, February 12, 2005 was grossly negligent.

31. Given the history of the discovery, there is no way to know if all potentially responsive backup tapes have been located.

32. In sum, despite MS & Co.'s affirmative duty arising out of the litigation to produce its e-mails, and contrary to federal law requiring it to preserve the e-mails, MS & Co. failed to preserve many e-mails and failed to produce all e-mails required by the Agreed Order. The failings include overwriting e-mails after 12 months; failing to conduct proper searches for tapes that may contain e-mails; providing a certificate of compliance known to be false when made and only recently withdrawn; failing to timely notify CPH when additional tapes were located; failing to use reasonable efforts to search the newly discovered tapes; failing to timely process and search data held in the staging area or notify CPH of the deficiency; failing to write software scripts consistent with the Agreed Order; and discovering the deficiencies only after CPH was given the opportunity to check MS & Co.'s work and

the MS & Co.'s attorneys were required to certify the completeness of the prior searches. Many of these failings were done knowingly, deliberately, and in bad faith.

It is clear that e-mails existed which were requested by CPH that have not been produced because of the deficiencies discussed above. Electronic data are the modern-day equivalent of the paper trail. Indeed, because of the informalities of e-mail, correspondents maybe less guarded than with paper correspondence. In this case, the paper trail is critical to CPH's ability to make out its prima facie case. Thus, MS & Co.'s acts have severely hindered CPH's ability to proceed. The only way to test the potentially self-serving testimony of MS & Co. personnel is with the written record of the events.

The failures outlined in this Order are of two types. First, by overwriting e-mails contrary to its legal obligation to maintain there in readily accessible form for two years and with knowledge that legal action was threatened, MS & Co. has spoiled evidence, justifying sanctions. See Martino v. Wal-Mart Stores Inc., 835 So. 2d 1251 (Fla. 4th DCA 2003). "The appropriateness of sanctions for failing to preserve evidence depends on: (1) willfulness or bad faith of the responsible party, (2) the extent of prejudice suffered by the other party, and (3) what is required to cure the prejudice." Nationwide Lift Trucks Inc. v. Smith, 832 So. 2d 824, 826 (Fla. 4th DCA 2002). Second, MS & Co,'s **willful**~~willfull~~ disobedience of the Agreed Order justifies sanctions. See Rule 1.380 (b) (2), Fla. R. Civ. P. The conclusion is inescapable that MS & Co. sought to thwart discovery *in this specific case.*

Sanctions in this context are not meant to be punitive. They are intended, though, to level the playing field.

A reasonable juror could conclude that evidence of MS & Co.'s misconduct demonstrates its consciousness of **guilt**~~guilty~~. It is relevant to the issues before the jury. Further, CPH should not be penalized by being forced to divert the jurors' attention away from the merits of its claim to focus on highly technical facts going to MS & Co.'s failures here, facts that are not reasonably disputed. Evidence of that failure, though, alone does not make CPH whole. Indeed, it can be said it is not a "sanction" at all, but

merely a statement of unrefuted facts that the jury may find relevant. Shifting the burden of proof, though, forces MS & Co. to accept the practical consequence of its failures-that some information will never be known. Obviously, this sanction is of consequence only in the marginal case. If there is overwhelming proof of MS & Co.'s knowledge of the fraud and collusion with Sunbeam, CPH would have prevailed on those elements in any event. And, to the contrary, if there is overwhelming evidence MS & Co. did not know of the fraud or conspire with or aid Sunbeam in its commission, it would have prevailed in any event. If the case is close on those issues, though, MS & Co., not CPH, should bear the burden of persuasion. Further, shifting the burden on the fraud issue does not relieve CPH of its obligation to establish the other elements of its claims, most notably reliance, proof of which is independent of the MS & Co. e-mails. Thus, the sanctions chosen are the most conservative available to the Court to address the **spoliation**~~spoilation~~ of evidence and **willful**~~willfull~~ violation of the Agreed Order.[1] [2]

Finally, the Court notes that CPH has requested the e-mails since May of 2003. MS & Co. was supposed to comply with the April 16, 2004 Order by May 14, 2064. Fact discovery in this case closed November 24, 2004. MS & Co.'s actions have resulted in the diversion of enormous amounts of resources, by both the parties and the Court, into a fact discovery dispute that should have never arisen and which would have long ago been put to bed had MS & Co. timely recognized its obligations to CPH and this Court. Opening argument in this complex case is set for March 21, 2005. Preliminary jury selection has

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[1] MS & Co.'s bad acts and pocket book may not be used to gain the continuance it has sought from the beginning. Further, the Court has no confidence that, even if a continuance were granted, MS & Co. would fully comply with discovery in this case.

[2] The undersigned notes that the sanctions imposed are not enumerated in Rule 1.380 (b) (2), and is aware of the concern expressed in the 2000 Handbook on Discovery Practice, Joint Committee of the Trial Lawyers Section of the Florida Bar and Conferences of Circuit and County Court Judges ("(f)or the trial court to be on solid footing, it is wise to stay within the enumerated orders" [Handbook at p. 4]). However, MS & Co.'s violations involve both the violation of a discovery order and the intentional **spoliation**~~spoiliation~~ of evidence. The sanction imposed is *less* severe than that provided in Rule 1.380 (b) (2) (B), under which the Court could preclude MS & Co. from presenting evidence of its lack of

begun. MS & Co. has controlled the timetable of this portion of the litigation long enough. Consequently, CPH should have the ability to continue to require MS & Co, to attempt to comply with the Agreed Order and the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search, or to elect to terminate the e-mail discovery and concentrate on trial preparation.

Based on the foregoing, it is

ORDERED AND ADJUDGED that:

1. Plaintiff's Motion for Adverse Interference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Non-Compliance with the Court's April 16, 2004 Agreed Order and Motion for Additional Relief is GRANTED.

2. MS & Co. shall continue to use its best efforts to comply with the April 16, 2004 Agreed Order and shall continue to comply with the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search until March 21, 2005 or written notice from CPH, which ever first occurs. Either party shall notify the other in writing of its intention to offer into evidence e-mails actually produced to CPH prior to termination of e-mail discovery in conformity with this Order, within 72 hours of the e-mail's production to CPH. The Court shall hear and determine any objections to use of the e-mails.

3. The Court shall read to the jury the statement of facts attached as Exhibit A during whatever evidentiary phase of CPH's case that it requests, These findings of fact shall be conclusive. See Rule 1.380 (b) (2) (A). No instruction shall be given to the jury regarding inferences to be drawn from these facts. However, counsel may make such argument to the jury in favor of whatever inferences

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knowledge of or collusion with the Sunbeam fraud, which the Court finds is the least severe enumerated sanction appropriate to place the parties on a level playing field.

that evidence may support. No other evidence concerning the production of e-mails, or lack thereof, shall be presented absent further Court order.

4. CPH will be allowed to argue that MS & Co.'s concealment of its role in the Sunbeam transaction is evidence of its malice or evil intent, going to the issue of punitive damages. See, e.g., General Motors Corp. v. McGee, 837 So.2d 10120.

5. MS & Co. shall bear the burden of proving to the jury, by the greater weight of the evidence, that it lacked knowledge of the Sunbeam fraud and did not aid and abet or conspire with Sunbeam to defraud CPH. The traditional order of proof shall remain unaffected, however.

6. MS & Co. shall compensate CPH for costs and fees associated with the Motion. The amount shall be determined at an evidentiary hearing to be held after the completion of the trial.

7. Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-Mails is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____day of March, 2005.

ELIZABETH T. MAAS
Circuit Court Judge

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EXHIBIT A

A federal regulation in effect in 1997 and all times since required Morgan Stanley to preserve e-mails for three years and to preserve them in a readily accessible place for two years. Beginning in no later than 1997, Morgan Stanley had a practice of overwriting e-mails after 12 months. E-mails could no longer be retrieved once they were overwritten. This practice was discontinued in January, 2001. CPH has sought access to Morgan Stanley's e-mails relating to this transaction since the case was filed in May, 2003.

Prior to 2003, Morgan Stanley recorded e-mails and other electronic data on back up tapes. On April 16, 2004, the Court ordered Morgan Stanley to (1) search the oldest full backup tape for each of 36 Morgan Stanley employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all e-mails relating to this case found by the search I have just described; and (4) certify its full compliance with the Court's order.

On May 14, 2004, Morgan Stanley produced approximately 1,300 pages of e-mails. It did not produce the required certification. On June 23, 2004, after inquiries by CPH, Morgan Stanley provided CPH with a certificate of full compliance with the April 16 Order signed by Arthur Riel, the Morgan Stanley manager assigned this task.

As organized by Morgan Stanley, the effort to recover e-mails from the backup tapes had several stages. First, the relevant backup tapes had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc., which I will call "NDCI", to be processed, and the data returned to Morgan Stanley. Third, Morgan Stanley had to upload the processed data into its e-mail archive. Fourth, Morgan Stanley had to run scripts, or pieces of computer code, to transform this data into a searchable form. Finally, Morgan Stanley had to search the data for e-mails related to this case. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when the processed data returned by NDCI remained in limbo, waiting to be uploaded to Morgan Stanley's archive.

At some point prior to May 6, 2004, Arthur Riel and his team became aware that 1,423 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423 tapes had not been processed by NDCI and thus had not been included in the archive or searched when Morgan Stanley made its production to CPH on May 14, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification of full compliance with the Court's April 16, 2004 Order that it was false. He and others on Morgan Stanley's e-mail archive team knew by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990's. During the summer of 2004, the Brooklyn tapes were processed and the data sent to the staging area. The scripts for e-mails **relating to this case** were not written and tested to permit the search ~~for e-mails relating to this case~~ to begin until the middle of January, 2004. Such a search, even if perfectly done, can take weeks.

Morgan Stanley also failed to timely produce e-mails from 738 backup tapes found at a Morgan Stanley facility in Manhattan in 2002. These 738 tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched by either ~~on~~ May 14, 2004**, when the Court's order required production,** or June 23, 2004**, when Morgan Stanley falsely certified that full production had been made**. Mr. Riel and others were told by NDCI by July 2, 2004 that these tapes contained e-mail dating back at least to 1998. During the summer of 2004, ~~the~~ these tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not searched.

In the course of these proceedings, Morgan Stanley represented to the Court that the first time anyone knew that there was recoverable e-mail data on the Brooklyn tapes was in October 2004. That statement was false. The actual date was at least three months earlier than that, no later than July 2, 2004.

In August 2004, Mr. Riel was relieved of his employment responsibilities **for reasons unrelated to Morgan Stanley's false certification**. He and his team were replaced by a new team headed by Allison Gorman Nachtigal. At that time, the staging area contained about 600 gigabytes of e-mail data that had not yet been uploaded into the Morgan Stanley archive and had not been searched for e-mails relating to this case. **600 gigabytes of data is the equivalent of approximately 30 million printed pages.**

Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts

to address the backlog of data in the staging area. Indeed, she was not informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman gave the project somewhat greater priority, although even then it did not move as expeditiously as possible. Morgan Stanley did not consider using an outside contractor to expedite the process.

In November 2004, Morgan Stanley produced additional e-mails and attachments to CPH. Morgan Stanley told CPH that those materials came from newly discovered tapes. That statement was false. In fact, Morgan Stanley did not begin searching the materials from the staging area until January 2005.

Morgan Stanley found another 169 DLT tapes in January, 2005, that **according to Morgan Stanley** had been misplaced by its New Jersey storage vendor. Morgan Stanley **later disclosed the existence of** ~~discovered~~ more than 200 additional **unsearched** backup tapes openly stored in locations known to be used for tape storage**, which Morgan Stanley claimed to have discovered** on February 11 and 12, 2005.

On February 11, 2005 Morgan Stanley discovered that a flaw in the software it had written had prevented Morgan Stanley from locating all e-mail attachments about the Sunbeam transaction. Morgan Stanley **also admits** ~~discovered on February 13, 2005,~~ that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so that additional e-mail messages that appeared to fall within the scope of the April 16, 2004 Order had not been given to CPH. Further, it appears that the problem infected Morgan Stanley's original searches in May of 2004. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the transaction under review here.

Morgan Stanley claims to have discovered defects in the searches on February 13, 2005. The defects in Morgan Stanley's searches were discovered and revealed only as a result of CPH's hiring of a third-party vendor, pursuant to the Court's Order on February 4, 2005, to double-check Morgan Stanley's compliance with the April 16, 2004 Order. On February 16, 2005, Morgan Stanley withdrew its certificate of compliance with the April 16, 2004 Order.

On February 19, 2005 Morgan Stanley notified CPH that it had found boxes of additional tapes that have not been uploaded into its archive or searched for responsive e-mails. Morgan Stanley did not tell CPH it had found any tapes that it had not searched until November 17, 2004. Even then, it did not

tell CPH how many tapes were found, when they were found, or when they would be searched. MS & Co. did not provide all of this information to CPH until February of 2005. The searches had not yet been completed when this trial was begun, when they were terminated without completion.

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

CASE NO.: 502003CA005045XXOCAI

COLEMAN (PARENT) HOLDINGS INC.
Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

FURTHER AMENDED ORDER ON COLEMAN (PARENT) HOLDINGS, INC.'S MOTION FOR ADVERSE INFERENCE INSTRUCTION DUE TO MORGAN STANLEY'S DESTRUCTIONS OF E-MAILS AND MORGAN STANLEY'S NONCOMPLIANCE WITH THE COURT'S APRIL 16 2004 AGREED ORDER, AND MOTION FOR ADDITIONAL RELIEF AND ORDER ON PLAINTIFF'S MOTION TO COMPEL FURTHER DISCOVERY REGARDING MORGAN STANLEY'S DESTRUCTION AND NON-PRODUCTION OF E-MAILS

THIS CAUSE came before the Court on February 14, 2005 on Coleman (Parent) Holdings, Inc.'s ("CPH's") Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, as modified by CPH's February 14, 2005 ore tenus motion for additional relief, and on February 28, 2005 on Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-Mails, with both counsel present. Based on evidence introduced, the Court finds:

1. CPH has sued Defendant, Morgan Stanley & Co., Inc. ("MS & Co."), for fraud in connection with CPH's sale of its stock in Coleman, Inc., to Sunbeam Corporation in return for Sunbeam stock. Whether MS & Co. had knowledge of the fraudulent scheme undertaken by Sunbeam in 1997 and early 1998 and, if so, the extent of that knowledge, is central to the case. CPH has sought access to MS & Co.'s internal files, including e-mails, since the case was filed.

2. Though MS & Co. instructed its investment bankers to preserve paper documents in their possession in connection with the Sunbeam transaction in February, 1999, it continued its practice of overwriting e-mails after 12 months, despite an SEC regulationn requiring all e-mails be retained in readily accessible form for two years. *See* 17 C.F.R. §240.17a-4 (1997).

3. On April 16, 2004, the Court entered its Agreed Order requiring MS & Co. to (1) search the oldest full backup tape for each of 36 MS & Co. employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all nonprivileged e-mails responsive to CPH's document requests; (4) give CPH a privilege log; and (5) certify its full compliance with the Agreed Order.

4. On May 14, 2004, MS & Co. produced approximately 1,300 pages of e-mails but failed to provide the required certification. Finally, on June 23, 2004, after inquiries by CPH, MS & Co. provided CPH with a certificate of full compliance with the April 16 Agreed Order signed by Arthur Riel, the MS & Co. manager assigned this task.

5. As organized by MS & Co., the effort to recover e-mails from any remaining backup tapes had several stages. First, the relevant backup tapes (in various formats, such as "DLT" tapes and eight-millimeter tapes) had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc. ("NDC"), to be processed, and the data returned to MS & Co. in the form of "SDLT" tapes. Third, MS & Co. had to find a way to upload the contents of these SDLT tapes into its new e-mail archive. Fourth, MS & Co. would run "scripts" to transform this data into a searchable form, so that it could later be searched for responsive e-mails. MS & Co. personnel used the term "staging area" to describe the stage of the process when SDLT tapes remained in limbo, waiting to be uploaded to the archive.

6. At some point prior to May 6, 2004, Arthur Riel and his team became aware that more than 1,000 backup tapes had been found at a MS & Co. facility in Brooklyn, New York. These 1,423 DLT tapes had not been processed by NDCI and thus had not been included in the archive or searched when MS & Co. made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification that it was false. He and others on MS & Co.'s e-mail archive team knew by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990's. MS & Co. neither withdrew its certification nor informed CPH about the potential for additional production of e-mails, however. During the summer of 2004, the Brooklyn tapes were processed and sent to the staging area, but they were not uploaded to the e-mail archive so as to be available to be searched until January2005, at least eight months after they were found.

7. MS & Co. also failed to timely produce e-mails from 738 8-millimeter backup tapes found at a MS & Co. facility in Manhattan, in 2002. These 738 8-mm tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched when MS & Co. made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Mr. Riel and others were told by their vendor, NDCI, by July 2, 2004 that the 8-mm tapes contained e-mail dating back at least to 1998. MS & Co. neither withdrew its certification nor informed CPH about the potential for additional production of e-mails, though. During the summer of 2004, the 8-mm tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not uploaded to MS & Co.'s e-mail archive.

8. In August 2004, Mr. Riel was relieved of his employment responsibilities. He and his team were replaced by a new team headed by Allison Gorman Nachtigal.

9. Ms. Gorman testified that she was instructed to describe the circumstances of Mr. Riel's replacement as his having been "placed on administrative leave." That same term appears by interlineation over the original typed description in MS & Co.'s memorandum addressing these issues. The typed language stated: "[Mr. Riel was] dismissed for integrity issues." MS & Co. represented that the reason for the adverse action taken against Mr. Riel was unrelated to any concern about the accuracy of his June 23, 2004 certification. However, MS & Co. presented no evidence to explain why Mr. Riel would have been placed on administrative leave rather than terminated. CPH argued that it may have been to deprive CPH of the ability to contact him directly.

10. Upon taping over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area; indeed, she was not informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman met with a group of MS & Co. attorneys. Following that meeting, Ms. Gorman gave the project somewhat greater priority, although even then it clearly did not move as expeditiously as possible. For example, MS & Co. gave no thought to using an outside contractor to expedite the process of completing the discovery, though it had certified completion months earlier; it lacked the technological capacity to upload and search the data at that time, and would not attain that capacity for months; and it knew trial was scheduled to begin in February, 2005. Even at this point, no one from MS & Co. or its outside counsel, Kirkland & Ellis LLP, gave CPH or this Court any hint that the June certification was false.

11. On November 17, 2004, more than six months after the May 14, 2004 deadline for producing e-mails in response to the Agreed Order, MS & Co. sent CPH a letter revealing that its June 23 certificate of compliance was incorrect. The letter stated:

> Morgan Stanley has discovered additional e-mail backup tapes since our e-mail production in May 2004. The data on some of [the] newly discovered tapes has been restored and, to ensure continued compliance

> with the agreed order, we have re-run the searches described in the order. Some responsive e-mails have been located as a result of that process. We will produce the responsive documents to you as soon as the production is finalized.

The letter also foreshadowed further delays: "(s)ome of the backup tapes are still being restored. To ensure continued compliance with the agreed order, we intend to re-run the searches again when the restoration process is complete and will produce any responsive documents that result."

12. The next day, November 18, 2004, MS & Co. produced an additional 8,000 pages of e-mails and attachments. MS & Co.'s November 2004 letter stated that the 8,000 pagers came from "newly discovered" tapes; but the testimony now makes clear that this statement was false because Ms. Gorman's team did not figure out how to upload and make searchable the materials from the staging area until January, 2005.

13. MS & Co. has failed to offer any explanation to reconcile the obvious conflict between its assertions at the time of production that the 8,000 pages came from "newly discovered" tapes (*i.e.*, the "Brooklyn tapes") and the testimony of its own witness, Ms. Gorman, that data from those newly discovered tapes were not capable of being searched until two months later, in January.

14. After a follow-up inquiry by CPH, on December 17, 2004, MS & Co. produced a privilege log and told CPH that "[n]o additional responsive e-mails have been located since our November production." MS & Co. refused to answer CPH's questions about whether MS & Co. had restored all the backup tapes described in its November 17 letter and why the tapes had not been located earlier, however.

15. On December 30, 2004, CPH sought confirmation that MS & Co. had reviewed all e-mail backup tapes and produced all responsive e-mails and, if not, asked when the review would be completed. On January 11, 2005, MS & Co. informed CPH that the "restoration of e-mail backup tapes

is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

16. On January 19, 2004, CPH wrote asking MS & Co. to explain the circumstances under which MS & Co. located the "newly discovered" backup tapes and to disclose when the tapes were located. CPH also asked MS & Co. to explain why the backup tapes could not be restored sooner.

17. On January 21, 2005, MS & Co. sent CPH a letter that failed to answer CPH's questions. Instead, MS & Co. described its efforts to restore the backup tapes as "ongoing"; informed CPH that "there is no way for MS & Co. to know or accurately predict the type or time period of data that might be recovered"; and stated that MS & Co. "cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes."

18. On January 26, 2005, CPH filed the Motion at issue here, asking the Court to instruct the jury that MS & Co.'s destruction of e-mails and other electronic documents and MS. & Co.'s noncompliance with the April 16, 2004 Agreed Order can give rise to an adverse inference that the contents of the missing e-mails would be harmful to MS & Co.'s defense in this case.

19. Meanwhile, MS & Co. found another 169 DLT tapes in January, 2005, that allegedly had been misplaced by its New Jersey storage vendor, Recall. Again, MS & Co., chose to provide no specifics to CPH or to the Court.

20. At a February 2, 2005 hearing on CPH's Motion, Thomas A. Clare of Kirkland & Ellis, LLP, representing MS & Co., stated that "late October of 2004...[is] the date I'm representing to the Court is the first time that anyone knew that there was recoverable e-mail data" on the Brooklyn tapes. Hr'g Tr. (2/2/05) at 133-34. The actual date, however, was at least three months earlier, by July 2, 2004. Furthermore, MS & Co. refused to provide the Court with definitive answers about when its e-mail production would be complete, merely stating that it would proceed with "all deliberate speed." *Id.* at 139. Also at the February 2 hearing, Mr. Clare neglected to inform the Court about the 8-mm

tapes that had been located in 2002, and told the Court that the 1,423 DLT tapes had been found in Brooklyn "sometime during the summer" of 2004. The truth of this assertion is belied by the evidence showing that the tapes were found before May 6, 2004.

21. On February 3, 2005, the Court ordered further discovery and set an evidentiary hearing for February 14, 2005. The discovery took place on February 9 and 10, when CPH deposed the three e-mail witnesses identified by MS. & Co.

22. On Saturday afternoon, February 12, 2005, MS & Co. informed the Court that it had, in the previous 24 hours, discovered additional tapes. Also, MS & Co. stated that its recent production omitted certain "attachments" to e-mails. MS & Co. did not attempt to clarify or substantiate either of these statements to CPH or to the Court until the Monday, February 14, 2005 hearing.

23. At the February 14 hearing, none of the witnesses MS & Co. presented was involved in or familiar with the actual electronic searches conducted using the parameters specified in this Court's April 16, 2004 Agreed Order, and none explained where the 8,000 pages produced in November, 2004 had come from. MS & Co.'s witnesses did, however, describe three new developments. First, Robert Saunders, a Morgan Stanley executive director in the Information Technology Division, testified that he returned to New York after his February 10 deposition and, concerned about his unqualified deposition assertion that he was "confident" that a complete search for backup tapes had been conducted, decided finally to undertake a personal search of MS & Co.'s "communication rooms," going to the areas he thought most obvious first. By doing so, he and two contractors discovered more than 200 additional backup tapes openly stored in locations known to be used for tape storage. Those discoveries were made on Friday and Saturday, February 11 and 12, 2005. As of the February 14 hearing, NDCI had not yet determined which, if any, of these newly discovered backup tapes contained e-mails. Second, Ms. Gorman reported that on Friday, February 11, 2005 she and her team had discovered that a flaw in the software they had written had prevented MS & Co. from locating all

responsive e-mail attachments. Third, Ms. Gorman reported that MS & Co. discovered on Sunday evening, February 13, 2005, that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so there were at least 7,000 additional e-mail messages that appeared to fall within the scope of the Agreed Order had yet to be fully reviewed by MS. & Co.'s outside counsel for responsiveness and privilege. As counsel for MS & Co. admitted, this problem "dwarf[s]" their previous problems. Hr'g Tr. (2/14/05) at 13. Ms. Gorman indicated she was "90 percent sure" that the problem infected MS & Co.'s original searches in May, which means that MS & Co. even then failed to timely produce relevant materials that had been uploaded into the archive by that point. *Id.* at 82-83. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the transaction under review here.

24. On February 19, 2045 MS & Co. informed counsel for CPH that "additional boxes of back up tapes" have been located "in a security room" and that, "(a)s of this morning, Morgan Stanley has identified four (unlabled) DLT tapes among the collection. Those four tapes will be sent to NDCI for further analysis." The disclosure did not state when the discovery was made. MS & Co.'s counsel represented to the Court that it was his understanding that about 73 bankers' boxes of tapes were discovered. No explanation for the late discovery was offered.

25. Throughout this entire process, MS & Co. and its counsels' lack of candor has frustrated the Court and opposing counsel's ability to be fully and timely informed.

26. MS & Co.'s failure during the summer and fall of 2004 to timely process a substantial amount of data that was languishing in the "staging area," rather than being put into searchable form and then searched, was willful and a gross abuse of its discovery obligations.

27. MS & Co.'s failure to timely notify CPH of the existence of the DLT and 8-mm tapes, which it had located as early as 2002 and certainly prior to the June 23, 2004 certification, and its

failure to timely process those raw backup tapes was willful and a gross abuse of its discovery obligations.

28. MS & Co.'s failure to produce all e-mail attachments was negligent, and it was discovered and revealed only as a result of CPH's hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check MS & Co.'s compliance with the April 16, 2004 Agreed Order.

29. MS & Co.'s failure to produce all of the Lotus Notes e-mails was negligent, and it was discovered and revealed only as result of CPH's hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check MS & Co.'s compliance with the April 16, 2004 Agreed Order.

30. MS & Co.'s failure to locate other potentially responsive backup tapes before Saturday, February 12, 2005 was grossly negligent.

31. Given the history of the discovery, there is no way to know if all potentially responsive backup tapes have been located.

32. In sum, despite MS & Co.'s affirmative duty arising out of the litigation to produce its e-mails, and contrary to federal law requiring it to preserve the e-mails, MS & Co. failed to preserve many e-mails and failed to produce all e-mails required by the Agreed Order. The failings include overwriting e-mails after 12 months; failing to conduct proper searches for tapes that may contain e-mails; providing a certificate of compliance known to be false when made and only recently withdrawn; failing to timely notify CPH when additional tapes were located; failing to use reasonable efforts to search the newly discovered tapes; failing to timely process and search data held in the staging area or notify CPH of the deficiency; failing to write software scripts consistent with the Agreed Order; and discovering the deficiencies only after CPH was given the opportunity to check MS & Co.'s work and

the MS & Co.'s attorneys were required to certify the completeness of the prior searches. Many of these failings were done knowingly, deliberately, and in bad faith.

It is clear that e-mails existed which were requested by CPH that have not been produced because of the deficiencies discussed above. Electronic data are the modern-day equivalent of the paper trail. Indeed, because of the informalities of e-mail, correspondents maybe less guarded than with paper correspondence. In this case, the paper trail is critical to CPH's ability to make out its prima facie case. Thus, MS & Co.'s acts have severely hindered CPH's ability to proceed. The only way to test the potentially self-serving testimony of MS & Co. personnel is with the written record of the events.

The failures outlined in this Order are of two types. First, by overwriting e-mails contrary to its legal obligation to maintain there in readily accessible form for two years and with knowledge that legal action was threatened, MS & Co. has spoiled evidence, justifying sanctions. See Martino v. Wal-Mart Stores Inc., 835 So. 2d 1251 (Fla. 4th DCA 2003). "The appropriateness of sanctions for failing to preserve evidence depends on: (1) willfulness or bad faith of the responsible party, (2) the extent of prejudice suffered by the other party, and (3) what is required to cure the prejudice." Nationwide Lift Trucks Inc. v. Smith, 832 So. 2d 824, 826 (Fla. 4th DCA 2002). Second, MS & Co,'s willful disobedience of the Agreed Order justifies sanctions. See Rule 1.380 (b) (2), Fla. R. Civ. P. The conclusion is inescapable that MS & Co. sought to thwart discovery *in this specific case*.

Sanctions in this context are not meant to be punitive. They are intended, though, to level the playing field.

A reasonable juror could conclude that evidence of MS & Co.'s misconduct demonstrates its consciousness of guilt. It is relevant to the issues before the jury. Further, CPH should not be penalized by being forced to divert the jurors' attention away from the merits of its claim to focus on highly technical facts going to MS & Co.'s failures here, facts that are not reasonably disputed. Evidence of that failure, though, alone does not make CPH whole. Indeed, it can be said it is not a "sanction" at all, but merely a

statement of unrefuted facts that the jury may find relevant. Shifting the burden of proof, though, forces MS & Co. to accept the practical consequence of its failures-that some information will never be known. Obviously, this sanction is of consequence only in the marginal case. If there is overwhelming proof of MS & Co.'s knowledge of the fraud and collusion with Sunbeam, CPH would have prevailed on those elements in any event. And, to the contrary, if there is overwhelming evidence MS & Co. did not know of the fraud or conspire with or aid Sunbeam in its commission, it would have prevailed in any event. If the case is close on those issues, though, MS & Co., not CPH, should bear the burden of persuasion. Further, shifting the burden on the fraud issue does not relieve CPH of its obligation to establish the other elements of its claims, most notably reliance, proof of which is independent of the MS & Co. e-mails. Thus, the sanctions chosen are the most conservative available to the Court to address the spoliation of evidence and willful violation of the Agreed Order.[1] [2]

Finally, the Court notes that CPH has requested the e-mails since May of 2003. MS & Co. was supposed to comply with the April 16, 2004 Order by May 14, 2064. Fact discovery in this case closed November 24, 2004. MS & Co.'s actions have resulted in the diversion of enormous amounts of resources, by both the parties and the Court, into a fact discovery dispute that should have never arisen and which would have long ago been put to bed had MS & Co. timely recognized its obligations to CPH and this Court. Opening argument in this complex case is set for March 21, 2005. Preliminary jury selection has

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[1] MS & Co.'s bad acts and pocket book may not be used to gain the continuance it has sought from the beginning. Further, the Court has no confidence that, even if a continuance were granted, MS & Co. would fully comply with discovery in this case.

[2] The undersigned notes that the sanctions imposed are not enumerated in Rule 1.380 (b) (2), and is aware of the concern expressed in the 2000 Handbook on Discovery Practice, Joint Committee of the Trial Lawyers Section of the Florida Bar and Conferences of Circuit and County Court Judges ("(f)or the trial court to be on solid footing, it is wise to stay within the enumerated orders" [Handbook at p. 4]). However, MS & Co.'s violations involve both the violation of a discovery order and the intentional spoliation-of evidence. The sanction imposed is *less* severe than that provided in Rule 1.380 (b) (2) (B), under which the Court could preclude MS & Co. from presenting evidence of its lack of knowledge of or

begun. MS & Co. has controlled the timetable of this portion of the litigation long enough. Consequently, CPH should have the ability to continue to require MS & Co, to attempt to comply with the Agreed Order and the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search, or to elect to terminate the e-mail discovery and concentrate on trial preparation.

Based on the foregoing, it is

ORDERED AND ADJUDGED that:

1. Plaintiff's Motion for Adverse Interference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Non-Compliance with the Court's April 16, 2004 Agreed Order and Motion for Additional Relief is GRANTED.

2. MS & Co. shall continue to use its best efforts to comply with the April 16, 2004 Agreed Order and shall continue to comply with the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search until March 21, 2005 or written notice from CPH, which ever first occurs. Either party shall notify the other in writing of its intention to offer into evidence e-mails actually produced to CPH prior to termination of e-mail discovery in conformity with this Order, within 72 hours of the e-mail's production to CPH. The Court shall hear and determine any objections to use of the e-mails.

3. The Court shall read to the jury the statement of facts attached as Exhibit A during whatever evidentiary phase of CPH's case that it requests, These findings of fact shall be conclusive. See Rule 1.380 (b) (2) (A). No instruction shall be given to the jury regarding inferences to be drawn from these facts. However, counsel may make such argument to the jury in favor of whatever inferences

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collusion with the Sunbeam fraud, which the Court finds is the least severe enumerated sanction appropriate to place the parties on a level playing field.

that evidence may support. No other evidence concerning the production of e-mails, or lack thereof, shall be presented absent further Court order.

4. CPH will be allowed to argue that MS & Co.'s concealment of its role in the Sunbeam transaction is evidence of its malice or evil intent, going to the issue of punitive damages. See, e.g., General Motors Corp. v. McGee, 837 So.2d 10120.

5. MS & Co. shall bear the burden of proving to the jury, by the greater weight of the evidence, that it lacked knowledge of the Sunbeam fraud and did not aid and abet or conspire with Sunbeam to defraud CPH. The traditional order of proof shall remain unaffected, however.

6. MS & Co. shall compensate CPH for costs and fees associated with the Motion. The amount shall be determined at an evidentiary hearing to be held after the completion of the trial.

7. Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-Mails is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____day of March, 2005.

ELIZABETH T. MAAS
Circuit Court Judge

copies furnished to:
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EXHIBIT A

A federal regulation in effect in 1997 and all times since required Morgan Stanley to preserve e-mails for three years and to preserve them in a readily accessible place for two years. Beginning in no later than 1997, Morgan Stanley had a practice of overwriting e-mails after 12 months. E-mails could no longer be retrieved once they were overwritten. This practice was discontinued in January, 2001. CPH has sought access to Morgan Stanley's e-mails relating to this transaction since the case was filed in May, 2003.

Prior to 2003, Morgan Stanley recorded e-mails and other electronic data on back up tapes. On April 16, 2004, the Court ordered Morgan Stanley to (1) search the oldest full backup tape for each of 36 Morgan Stanley employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all e-mails relating to this case found by the search I have just described; and (4) certify its full compliance with the Court's order.

On May 14, 2004, Morgan Stanley produced approximately 1,300 pages of e-mails. It did not produce the required certification. On June 23, 2004, after inquiries by CPH, Morgan Stanley provided CPH with a certificate of full compliance with the April 16 Order signed by Arthur Riel, the Morgan Stanley manager assigned this task.

As organized by Morgan Stanley, the effort to recover e-mails from the backup tapes had several stages. First, the relevant backup tapes had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc., which I will call "NDCI", to be processed, and the data returned to Morgan Stanley. Third, Morgan Stanley had to upload the processed data into its e-mail archive. Fourth, Morgan Stanley had to run scripts, or pieces of computer code, to transform this data into a searchable form. Finally, Morgan Stanley had to search the data for e-mails related to this case. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when the processed data returned by NDCI remained in limbo, waiting to be uploaded to Morgan Stanley's archive.

At some point prior to May 6, 2004, Arthur Riel and his team became aware that 1,423 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423 tapes had not been processed by NDCI and thus had not been included in the archive or searched when Morgan Stanley made its production to CPH on May 14, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification of full compliance with the Court's April 16, 2004 Order that it was false. He and others on Morgan Stanley's e-mail archive team knew by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990's. During the summer of 2004, the Brooklyn tapes were processed and the data sent to the staging area. The scripts for e-mails relating to this case were not written and tested to permit the search to begin until the middle of January, 2004. Such a search, even if perfectly done, can take weeks.

Morgan Stanley also failed to timely produce e-mails from 738 backup tapes found at a Morgan Stanley facility in Manhattan in 2002. These 738 tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched by either May 14, 2004, when the Court's order required production, or June 23, 2004, when Morgan Stanley falsely certified that full production had been made. Mr. Riel and others were told by NDCI by July 2, 2004 that these tapes contained e-mail dating back at least to 1998. During the summer of 2004, these tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not searched.

In the course of these proceedings, Morgan Stanley represented to the Court that the first time anyone knew that there was recoverable e-mail data on the Brooklyn tapes was in October 2004. That statement was false. The actual date was at least three months earlier than that, no later than July 2, 2004.

In August 2004, Mr. Riel was relieved of his employment responsibilities for reasons unrelated to Morgan Stanley's false certification. He and his team were replaced by a new team headed by Allison Gorman Nachtigal. At that time, the staging area contained about 600 gigabytes of e-mail data that had not yet been uploaded into the Morgan Stanley archive and had not been searched for e-mails relating to this case. 600 gigabytes of data is the equivalent of approximately 30 million printed pages.

Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area. Indeed, she was not informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman gave the project

somewhat greater priority, although even then it did not move as expeditiously as possible. Morgan Stanley did not consider using an outside contractor to expedite the process.

In November 2004, Morgan Stanley produced additional e-mails and attachments to CPH. Morgan Stanley told CPH that those materials came from newly discovered tapes. That statement was false. In fact, Morgan Stanley did not begin searching the materials from the staging area until January 2005.

Morgan Stanley found another 169 DLT tapes in January, 2005, that according to Morgan Stanley had been misplaced by its New Jersey storage vendor. Morgan Stanley later disclosed the existence of more than 200 additional unsearched backup tapes openly stored in locations known to be used for tape storage, which Morgan Stanley claimed to have discovered on February 11 and 12, 2005.

On February 11, 2005 Morgan Stanley discovered that a flaw in the software it had written had prevented Morgan Stanley from locating all e-mail attachments about the Sunbeam transaction. Morgan Stanley also admits that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so that additional e-mail messages that appeared to fall within the scope of the April 16, 2004 Order had not been given to CPH. Further, it appears that the problem infected Morgan Stanley's original searches in May of 2004. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the transaction under review here.

Morgan Stanley claims to have discovered defects in the searches on February 13, 2005. The defects in Morgan Stanley's searches were discovered and revealed only as a result of CPH's hiring of a third-party vendor, pursuant to the Court's Order on February 4, 2005, to double-check Morgan Stanley's compliance with the April 16, 2004 Order. On February 16, 2005, Morgan Stanley withdrew its certificate of compliance with the April 16, 2004 Order.

On February 19, 2005 Morgan Stanley notified CPH that it had found boxes of additional tapes that have not been uploaded into its archive or searched for responsive e-mails. Morgan Stanley did not tell CPH it had found any tapes that it had not searched until November 17, 2004. Even then, it did not tell CPH how many tapes were found, when they were found, or when they would be searched. MS & Co. did not provide all of this information to CPH until February of 2005. The searches had not yet been completed when this trial was begun, when they were terminated without completion.

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

NOTICE OF FILING PLEADING UNDER SEAL

COLEMAN (PARENT) HOLDINGS INC. ("CPH") hereby gives notice of the filing of Plaintiff's Reply To Defendant's Response And Defendant's Supplement Brief In Response to Plaintiff's Motion For Order Declaring Attorney-Client Privilege Waived For Certain Documents Relating To William Strong.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and hand delivery to all counsel on the attached list on this 4th day of March, 2005.

JEFFREY T. SHAW

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9967

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

CASE NO. CA 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

NOTICE OF TAKING VIDEOTAPED DEPOSITION

To: Thomas A. Clare, Esq.
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Kellogg, Huber, Hansen,
TODD, EVANS & FIGEL, P.L.L.C.
c/o Kirkland and Ellis
222 Lakeview Avenue, Suite 260
West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings Inc. will take the deposition upon oral examination of Allison Gorman Nachtigal, pursuant to Florida Rule of Civil Procedure 1.310 on Monday, March 7, 2005, at 3:30 p.m.

The deposition will be conducted at Kirkland & Ellis LLP; 153 East 53rd Street; New York, NY 10022. The deposition will be recorded by videotape and stenographic means. The videographer will be Esquire Deposition Services. The deposition will be taken before a person authorized to administer oaths and will continue day to day until completed.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and hand delivery or mail to all counsel on the attached Service List this 4th day of March 2005.

Dated: March 4, 2005

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

CASE NO. CA 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

AMENDED NOTICE OF TAKING VIDEOTAPED DEPOSITION

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Neil S. Binder
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KIBBE & ORBE LLP
One World Financial Center
New York, New York 10281

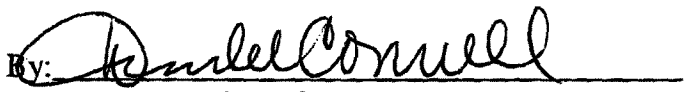
PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings Inc. will take the deposition upon oral examination of Arthur J. Riel, pursuant to Florida Rule of Civil Procedure 1.310 on Tuesday, March 8, 2005, at 10 a.m.

The deposition will be conducted at Richards, Spears, Kibbe & Orbe LLP; One World Financial Center; New York, NY 10281. The deposition will be recorded by videotape and stenographic means. The videographer will be Esquire Deposition Services. The deposition will be taken before a person authorized to administer oaths and will continue day to day until completed.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and hand delivery or mail to all counsel on the attached Service List this 4th day of March 2005.

Dated: March 4, 2005

COLEMAN (PARENT) HOLDINGS INC.

By: 

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From:	Michael T. Brody (561) 352-2300		
Employee Number:		Client Number:	41198-10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential, and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

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Secretary: Caryn Jo Geisler	Extension: 6490

March 4, 2005

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VIA HAND DELIVERY

Honorable Elizabeth T. Maass
Division A1
Courtroom 11B
Circuit Court of the 15th Judicial Circuit
205 North Dixie Highway
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Jerold S. Solovy
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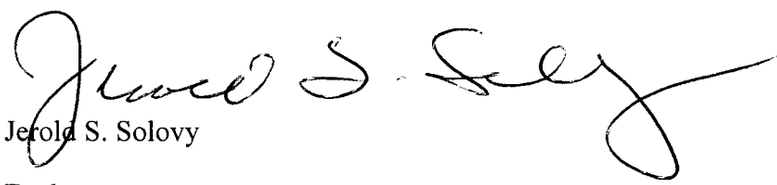
Re: Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.

Dear Judge Maass:

Enclosed please find a courtesy copy of CPH's Motion for Correction and Clarification of Order on CPH's Motion for Adverse Inference. This motion is scheduled to be heard by Your Honor at 1:00 p.m. on Monday, March 7, 2005.

Sincerely,



Jerold S. Solovy

Enclosure

cc: All Counsel of Record

9961

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: March 7, 2005

TIME: 1:00 p.m.

JUDGE: Honorable Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

Motion for Correction and Clarification of Order on CPH's Motion for Adverse Inference

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and hand delivery to all counsel on the attached list on this 4th day of March, 2005.

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9966

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

MOTION FOR CORRECTION AND CLARIFICATION OF ORDER ON CPH'S MOTION FOR ADVERSE INFERENCE

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") respectfully requests that the Court correct and clarify the form of its March 1, 2005 Amended Order On Coleman (Parent) Holdings, Inc.'s Motion For Adverse Inference Instruction Due To Morgan Stanley's Destructions of E-Mails And Morgan Stanley's Noncompliance With The Court's April 16, 2004 Agreed Order, And Motion For Additional Relief And Order On Plaintiff's Motion To Compel Further Discovery Regarding Morgan Stanley's Destruction And Non-Production of E-Mails (the "Order").

CPH requests entry of a revised form of the Order to correct a few typographical errors and to ensure that the language of the Order, including the attached statement of facts, is entirely clear. CPH attaches to this motion (1) a marked copy of the Order highlighting the insertions and deletions that CPH proposes, and (2) a clean copy of the revised form of the Order that CPH requests be entered. CPH also is providing a disk containing the clean copy of the proposed revised Order.

CPH does not seek any substantive changes to this Court's findings or to the relief that this Court has granted with respect to the specific misconduct addressed in the Court's order.

Rather, the language changes that CPH requests are designed solely to clarify specific parts of the Order and to ensure that the attached statement of facts clearly conveys to the jury the findings that this Court has made.

Dated: March 4, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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FLORIDA_9949_2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and hand delivery to all counsel on the attached list on this 3rd day of March, 2005.

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FLORIDA_9949_2

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CHANGES MARKED

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

CASE NO.: 502003CA005045XXOCAI

COLEMAN (PARENT) HOLDINGS INC.
Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

FURTHER AMENDED ORDER ON COLEMAN (PARENT) HOLDINGS, INC.'S MOTION FOR ADVERSE INFERENCE INSTRUCTION DUE TO MORGAN STANLEY'S DESTRUCTIONS OF E-MAILS AND MORGAN STANLEY'S NONCOMPLIANCE WITH THE COURT'S APRIL 16 2004 AGREED ORDER, AND MOTION FOR ADDITIONAL RELIEF AND ORDER ON PLAINTIFF'S MOTION TO COMPEL FURTHER DISCOVERY REGARDING MORGAN STANLEY'S DESTRUCTION AND NON-PRODUCTION OF E-MAILS

THIS CAUSE came before the Court on February 14, 2005 on Coleman (Parent) Holdings, Inc.'s ("CPH's") Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, as modified by CPH's February 14, 2005 ore tenus motion for additional relief, and on February 28, 2005 on Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-Mails, with both counsel present. Based on evidence introduced, the Court finds:

1. CPH has sued Defendant, Morgan Stanley & Co., Inc. ("MS & Co."), for fraud in connection with CPH's sale of its stock in Coleman, Inc., to Sunbeam Corporation in return for Sunbeam stock. Whether MS & Co. had knowledge of the fraudulent scheme undertaken by Sunbeam in 1997 and early 1998 and, if so, the extent of that knowledge, is central to the case. CPH has sought access to MS & Co.'s internal files, including e-mails, since the case was filed.

2. Though MS & Co. instructed its investment bankers to preserve paper documents in their possession in connection with the Sunbeam transaction in February, 1999, it continued its practice of overwriting e-mails after 12 months, despite an SEC regulationn requiring all e-mails be retained in readily accessible form for two years. *See* 17 C.F.R. §240.17a-4 (1997).

3. On April 16, 2004, the Court entered its Agreed Order requiring MS & Co. to (1) search the oldest full backup tape for each of 36 MS & Co. employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all nonprivileged e-mails responsive to CPH's document requests; (4) give CPH a privilege log; and (5) certify its full compliance with the Agreed Order.

4. On May 14, 2004, MS & Co. produced approximately 1,300 pages of e-mails but failed to provide the required certification. Finally, on June 23, 2004, after inquiries by CPH, MS & Co. provided CPH with a certificate of full compliance with the April 16 Agreed Order signed by Arthur Riel, the MS & Co. manager assigned this task.

5. As organized by MS & Co., the effort to recover e-mails from any remaining backup tapes had several stages. First, the relevant backup tapes (in various formats, such as "DLT" tapes and eight-millimeter tapes) had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc. ("NDC"), to be processed, and the data returned to MS & Co. in the form of "SDLT" tapes. Third, MS & Co. had to find a way to upload the contents of these SDLT tapes into its new e-mail archive. Fourth, MS & Co. would run "scripts" to transform this data into a searchable form, so that it could later be searched for responsive e-mails. MS & Co. personnel used the term "staging area" to describe the stage of the process when SDLT tapes remained in limbo, waiting to be uploaded to the archive.

6. At some point prior to May 6, 2004, Arthur Riel and his team became aware that more than 1,000 backup tapes had been found at a MS & Co. facility in Brooklyn, New York. These 1,423 DLT tapes had not been processed by NDCI and thus had not been included in the archive or searched when MS & Co. made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification that it was false. He and others on MS & Co.'s e-mail archive team knew by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990's. MS & Co. neither withdrew its certification nor informed CPH about the potential for additional production of e-mails, however. During the summer of 2004, the Brooklyn tapes were processed and sent to the staging area, but they were not uploaded to the e-mail archive so as to be available to be searched until January **2005**~~2004~~, at least eight months after they were found.

7. MS & Co. also failed to timely produce e-mails from 738 8-millimeter backup tapes found at a MS & Co. facility in Manhattan, in 2002. These 738 8-mm tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched when MS & Co. made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Mr. Riel and others were told by their vendor, NDCI, by July 2, 2004 that the 8-mm tapes contained e-mail dating back at least to 1998. MS & Co. neither withdrew its certification nor informed CPH about the potential for additional production of e-mails, though. During the summer of 2004, the 8-mm tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not uploaded to MS & Co.'s e-mail archive.

8. In August 2004, Mr. Riel was relieved of his employment responsibilities. He and his team were replaced by a new team headed by Allison Gorman Nachtigal.

9. Ms. Gorman testified that she was instructed to describe the circumstances of Mr. Riel's replacement as his having been "placed on administrative leave." That same term appears by interlineation over the original typed description in MS & Co.'s memorandum addressing these issues. The typed language stated: "[Mr. Riel was] dismissed for integrity issues." MS & Co. **represented that the reason for the adverse action taken against Mr. Riel was unrelated to any concern about the accuracy of his June 23, 2004 certification. However, MS & Co.** presented no evidence to explain why Mr. Riel would have been placed on administrative leave rather than terminated. CPH argued that it may have been to deprive CPH of the ability to contact him directly.

10. Upon taping over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area; indeed, she was not informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman met with a group of MS & Co. attorneys. Following that meeting, Ms. Gorman gave the project somewhat greater priority, although even then it clearly did not move as expeditiously as possible. For example, MS & Co. gave no thought to using an outside contractor to expedite the process of completing the discovery, though it had certified completion months earlier; it lacked the technological capacity to upload and search the data at that time, and would not attain that capacity for months; and it knew trial was scheduled to begin in February, 2005. Even at this point, no one from MS & Co. or its outside counsel, Kirkland & Ellis LLP, gave CPH or this Court any hint that the June certification was false.

11. On November 17, 2004, more than six months after the May 14, 2004 deadline for producing e-mails in response to the Agreed Order, MS & Co. sent CPH a letter revealing that its June 23 certificate of compliance was incorrect. The letter stated:

> Morgan Stanley has discovered additional e-mail backup tapes since our e-mail production in May 2004. The data on some of [the] newly discovered tapes has been restored and, to ensure continued compliance

> with the agreed order, we have re-run the searches described in the order. Some responsive e-mails have been located as a result of that process. We will produce the responsive documents to you as soon as the production is finalized.

The letter also foreshadowed further delays: "(s)ome of the backup tapes are still being restored. To ensure continued compliance with the agreed order, we intend to re-run the searches again when the restoration process is complete and will produce any responsive documents that result."

12. The next day, November 18, 2004, MS & Co. produced an additional 8,000 pages of e-mails and attachments. MS & Co.'s November 2004 letter stated that the 8,000 pagers came from "newly discovered" tapes; but the testimony now makes clear that this statement was false because Ms. Gorman's team did not figure out how to upload and make searchable the materials from the staging area until January, 2005.

13. MS & Co. has failed to offer any explanation to reconcile the obvious conflict between its assertions at the time of production that the 8,000 pages came from "newly discovered" tapes (*i.e.*, the "Brooklyn tapes") and the testimony of its own witness, Ms. Gorman, that data from those newly discovered tapes were not capable of being searched until two months later, in January.

14. After a follow-up inquiry by CPH, on December 17, 2004, MS & Co. produced a privilege log and told CPH that "[n]o additional responsive e-mails have been located since our November production." MS & Co. refused to answer CPH's questions about whether MS & Co. had restored all the backup tapes described in its November 17 letter and why the tapes had not been located earlier, however.

15. On December 30, 2004, CPH sought confirmation that MS & Co. had reviewed all e-mail backup tapes and produced all responsive e-mails and, if not, asked when the review would be completed. On January 11, 2005, MS & Co. informed CPH that the "restoration of e-mail backup tapes

is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

16. On January 19, 2004, CPH wrote asking MS & Co. to explain the circumstances under which MS & Co. located the "newly discovered" backup tapes and to disclose when the tapes were located. CPH also asked MS & Co. to explain why the backup tapes could not be restored sooner.

17. On January 21, 2005, MS & Co. sent CPH a letter that failed to answer CPH's questions. Instead, MS & Co. described its efforts to restore the backup tapes as "ongoing"; informed CPH that "there is no way for MS & Co. to know or accurately predict the type or time period of data that might be recovered"; and stated that MS & Co. "cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes."

18. On January 26, 2005, CPH filed the Motion at issue here, asking the Court to instruct the jury that MS & Co.'s destruction of e-mails and other electronic documents and MS. & Co.'s noncompliance with the April 16, 2004 Agreed Order can give rise to an adverse inference that the contents of the missing e-mails would be harmful to MS & Co.'s defense in this case.

19. Meanwhile, MS & Co. found another 169 DLT tapes in January, 2005, that allegedly had been misplaced by its New Jersey storage vendor, Recall. Again, MS & Co., chose to provide no specifics to CPH or to the Court.

20. At a February 2, 2005 hearing on CPH's Motion, Thomas A. Clare of Kirkland & Ellis, LLP, representing MS & Co., stated that "late October of 2004...[is] the date I'm representing to the Court is the first time that anyone knew that there was recoverable e-mail data" on the Brooklyn tapes. Hr'g Tr. (2/2/05) at 133-34. The actual date, however, was at least three months earlier, by July 2, 2004. Furthermore, MS & Co. refused to provide the Court with definitive answers about when its e-mail production would be complete, merely stating that it would proceed with "all deliberate speed." *Id.* at 139. Also at the February 2 hearing, Mr. Clare neglected to inform the Court about the 8-mm

tapes that had been located in 2002, and told the Court that the 1,423 DLT tapes had been found in Brooklyn "sometime during the summer" of 2004. The truth of this assertion is belied by the evidence showing that the tapes were found before May 6, 2004.

21. On February 3, 2005, the Court ordered further discovery and set an evidentiary hearing for February 14, 2005. The discovery took place on February 9 and 10, when CPH deposed the three e-mail witnesses identified by MS. & Co.

22. On Saturday afternoon, February 12, 2005, MS & Co. informed the Court that it had, in the previous 24 hours, discovered additional tapes. Also, MS & Co. stated that its recent production omitted certain "attachments" to e-mails. MS & Co. did not attempt to clarify or substantiate either of these statements to CPH or to the Court until the Monday, February 14, 2005 hearing.

23. At the February 14 hearing, none of the witnesses MS & Co. presented was involved in or familiar with the actual electronic searches conducted using the parameters specified in this Court's April 16, 2004 Agreed Order, and none explained where the 8,000 pages produced in November, 2004 had come from. MS & Co.'s witnesses did, however, describe three new developments. First, Robert Saunders, a Morgan Stanley executive director in the Information Technology Division, testified that he returned to New York after his February 10 deposition and, concerned about his unqualified **deposition** assertion that **he**~~the~~ was "confident" that a complete search for backup tapes had been conducted, decided finally to undertake a personal search of MS & Co.'s "communication rooms," going to the areas he thought most obvious first. By doing so, he and two contractors discovered more than 200 additional backup tapes openly stored in locations known to be used for tape storage. Those discoveries were made on Friday and Saturday, February 11 and 12, 2005. As of the February 14 hearing, NDCI had not yet determined which, if any, of these newly discovered backup tapes contained e-mails. Second, Ms. Gorman reported that on Friday, February 11, 2005 she and her team had discovered that a flaw in the software they had written had prevented MS & Co. from locating all

responsive e-mail attachments. Third, Ms. Gorman reported that MS & Co. discovered on Sunday evening, February 13, 2005, that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so there were at least 7,000 additional e-mail messages that appeared to fall within the scope of the Agreed Order had yet to be fully reviewed by MS. & Co.'s outside counsel for responsiveness and privilege. As counsel for MS & Co. admitted, this problem "dwarf[s]" their previous problems. Hr'g Tr. (2/14/05) at 13. Ms. Gorman indicated she was "90 percent sure" that the problem infected MS & Co.'s original searches in May, which means that **MS & Co.** even **then** ~~they~~ failed to timely produce relevant materials that had been uploaded into the archive by that point. *Id.* at 82-83. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the transaction under review here.

24. On February 19, 2045 MS & Co. informed counsel for CPH that "additional boxes of back up tapes" have been located "in a security room" and that, "(a)s of this morning, Morgan Stanley has identified four (unlabled) DLT tapes among the collection. Those four tapes will be sent to NDCI for further analysis." The disclosure did not state when the discovery was made. MS & Co.'s counsel represented to the Court that it was his understanding that about 73 bankers' boxes of tapes were discovered. No explanation for the late discovery was offered.

25. Throughout this entire process, MS & Co. and its counsels' lack of candor has frustrated the Court and opposing counsel's ability to be fully and timely informed.

26. MS & Co.'s failure during the summer and fall of 2004 to timely process a substantial amount of data that was languishing in the "staging area," rather than being put into searchable form and then searched, was willful and a gross abuse of its discovery obligations.

27. MS & Co.'s failure to timely notify CPH of the existence of the DLT and 8-mm tapes, which it had located as early as 2002 and certainly prior to the June 23, 2004 certification, and its

failure to timely process those raw backup tapes was willful and a gross abuse of its discovery obligations.

28. MS & Co.'s failure to produce all e-mail attachments was negligent, and it was discovered and revealed only as a result of CPH's hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check MS & Co.'s compliance with the April 16, 2004 Agreed Order.

29. MS & Co.'s failure to produce all of the Lotus Notes e-mails was negligent, and it was discovered and revealed only as result of CPH's hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check MS & Co.'s compliance with the April 16, 2004 Agreed Order.

30. MS & Co.'s failure to locate other potentially responsive backup tapes before Saturday, February 12, 2005 was grossly negligent.

31. Given the history of the discovery, there is no way to know if all potentially responsive backup tapes have been located.

32. In sum, despite MS & Co.'s affirmative duty arising out of the litigation to produce its e-mails, and contrary to federal law requiring it to preserve the e-mails, MS & Co. failed to preserve many e-mails and failed to produce all e-mails required by the Agreed Order. The failings include overwriting e-mails after 12 months; failing to conduct proper searches for tapes that may contain e-mails; providing a certificate of compliance known to be false when made and only recently withdrawn; failing to timely notify CPH when additional tapes were located; failing to use reasonable efforts to search the newly discovered tapes; failing to timely process and search data held in the staging area or notify CPH of the deficiency; failing to write software scripts consistent with the Agreed Order; and discovering the deficiencies only after CPH was given the opportunity to check MS & Co.'s work and

the MS & Co.'s attorneys were required to certify the completeness of the prior searches. Many of these failings were done knowingly, deliberately, and in bad faith.

It is clear that e-mails existed which were requested by CPH that have not been produced because of the deficiencies discussed above. Electronic data are the modern-day equivalent of the paper trail. Indeed, because of the informalities of e-mail, correspondents maybe less guarded than with paper correspondence. In this case, the paper trail is critical to CPH's ability to make out its prima facie case. Thus, MS & Co.'s acts have severely hindered CPH's ability to proceed. The only way to test the potentially self-serving testimony of MS & Co. personnel is with the written record of the events.

The failures outlined in this Order are of two types. First, by overwriting e-mails contrary to its legal obligation to maintain there in readily accessible form for two years and with knowledge that legal action was threatened, MS & Co. has spoiled evidence, justifying sanctions. See Martino v. Wal-Mart Stores Inc., 835 So. 2d 1251 (Fla. 4th DCA 2003). "The appropriateness of sanctions for failing to preserve evidence depends on: (1) willfulness or bad faith of the responsible party, (2) the extent of prejudice suffered by the other party, and (3) what is required to cure the prejudice." Nationwide Lift Trucks Inc. v. Smith, 832 So. 2d 824, 826 (Fla. 4th DCA 2002). Second, MS & Co,'s **willful**~~willfull~~ disobedience of the Agreed Order justifies sanctions. See Rule 1.380 (b) (2), Fla. R. Civ. P. The conclusion is inescapable that MS & Co. sought to thwart discovery *in this specific case.*

Sanctions in this context are not meant to be punitive. They are intended, though, to level the playing field.

A reasonable juror could conclude that evidence of MS & Co.'s misconduct demonstrates its consciousness of **guilt**~~guilty~~. It is relevant to the issues before the jury. Further, CPH should not be penalized by being forced to divert the jurors' attention away from the merits of its claim to focus on highly technical facts going to MS & Co.'s failures here, facts that are not reasonably disputed. Evidence of that failure, though, alone does not make CPH whole. Indeed, it can be said it is not a "sanction" at all, but

merely a statement of unrefuted facts that the jury may find relevant. Shifting the burden of proof, though, forces MS & Co. to accept the practical consequence of its failures-that some information will never be known. Obviously, this sanction is of consequence only in the marginal case. If there is overwhelming proof of MS & Co.'s knowledge of the fraud and collusion with Sunbeam, CPH would have prevailed on those elements in any event. And, to the contrary, if there is overwhelming evidence MS & Co. did not know of the fraud or conspire with or aid Sunbeam in its commission, it would have prevailed in any event. If the case is close on those issues, though, MS & Co., not CPH, should bear the burden of persuasion. Further, shifting the burden on the fraud issue does not relieve CPH of its obligation to establish the other elements of its claims, most notably reliance, proof of which is independent of the MS & Co. e-mails. Thus, the sanctions chosen are the most conservative available to the Court to address the **spoliation**~~spoilation~~ of evidence and **willful**~~willfull~~ violation of the Agreed Order.[1] [2]

Finally, the Court notes that CPH has requested the e-mails since May of 2003. MS & Co. was supposed to comply with the April 16, 2004 Order by May 14, 2064. Fact discovery in this case closed November 24, 2004. MS & Co.'s actions have resulted in the diversion of enormous amounts of resources, by both the parties and the Court, into a fact discovery dispute that should have never arisen and which would have long ago been put to bed had MS & Co. timely recognized its obligations to CPH and this Court. Opening argument in this complex case is set for March 21, 2005. Preliminary jury selection has

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[1] MS & Co.'s bad acts and pocket book may not be used to gain the continuance it has sought from the beginning. Further, the Court has no confidence that, even if a continuance were granted, MS & Co. would fully comply with discovery in this case.

[2] The undersigned notes that the sanctions imposed are not enumerated in Rule 1.380 (b) (2), and is aware of the concern expressed in the 2000 Handbook on Discovery Practice, Joint Committee of the Trial Lawyers Section of the Florida Bar and Conferences of Circuit and County Court Judges ("(f)or the trial court to be on solid footing, it is wise to stay within the enumerated orders" [Handbook at p. 4]). However, MS & Co.'s violations involve both the violation of a discovery order and the intentional **spoliation**~~spoiliation~~ of evidence. The sanction imposed is *less* severe than that provided in Rule 1.380 (b) (2) (B), under which the Court could preclude MS & Co. from presenting evidence of its lack of

begun. MS & Co. has controlled the timetable of this portion of the litigation long enough. Consequently, CPH should have the ability to continue to require MS & Co, to attempt to comply with the Agreed Order and the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search, or to elect to terminate the e-mail discovery and concentrate on trial preparation.

Based on the foregoing, it is

ORDERED AND ADJUDGED that:

1. Plaintiff's Motion for Adverse Interference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Non-Compliance with the Court's April 16, 2004 Agreed Order and Motion for Additional Relief is GRANTED.

2. MS & Co. shall continue to use its best efforts to comply with the April 16, 2004 Agreed Order and shall continue to comply with the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search until March 21, 2005 or written notice from CPH, which ever first occurs. Either party shall notify the other in writing of its intention to offer into evidence e-mails actually produced to CPH prior to termination of e-mail discovery in conformity with this Order, within 72 hours of the e-mail's production to CPH. The Court shall hear and determine any objections to use of the e-mails.

3. The Court shall read to the jury the statement of facts attached as Exhibit A during whatever evidentiary phase of CPH's case that it requests, These findings of fact shall be conclusive. See Rule 1.380 (b) (2) (A). No instruction shall be given to the jury regarding inferences to be drawn from these facts. However, counsel may make such argument to the jury in favor of whatever inferences

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knowledge of or collusion with the Sunbeam fraud, which the Court finds is the least severe enumerated sanction appropriate to place the parties on a level playing field.

that evidence may support. No other evidence concerning the production of e-mails, or lack thereof, shall be presented absent further Court order.

4. CPH will be allowed to argue that MS & Co.'s concealment of its role in the Sunbeam transaction is evidence of its malice or evil intent, going to the issue of punitive damages. See, e.g., General Motors Corp. v. McGee, 837 So.2d 10120.

5. MS & Co. shall bear the burden of proving to the jury, by the greater weight of the evidence, that it lacked knowledge of the Sunbeam fraud and did not aid and abet or conspire with Sunbeam to defraud CPH. The traditional order of proof shall remain unaffected, however.

6. MS & Co. shall compensate CPH for costs and fees associated with the Motion. The amount shall be determined at an evidentiary hearing to be held after the completion of the trial.

7. Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-Mails is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____day of March, 2005.

ELIZABETH T. MAAS
Circuit Court Judge

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EXHIBIT A

A federal regulation in effect in 1997 and all times since required Morgan Stanley to preserve e-mails for three years and to preserve them in a readily accessible place for two years. Beginning in no later than 1997, Morgan Stanley had a practice of overwriting e-mails after 12 months. E-mails could no longer be retrieved once they were overwritten. This practice was discontinued in January, 2001. CPH has sought access to Morgan Stanley's e-mails relating to this transaction since the case was filed in May, 2003.

Prior to 2003, Morgan Stanley recorded e-mails and other electronic data on back up tapes. On April 16, 2004, the Court ordered Morgan Stanley to (1) search the oldest full backup tape for each of 36 Morgan Stanley employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all e-mails relating to this case found by the search I have just described; and (4) certify its full compliance with the Court's order.

On May 14, 2004, Morgan Stanley produced approximately 1,300 pages of e-mails. It did not produce the required certification. On June 23, 2004, after inquiries by CPH, Morgan Stanley provided CPH with a certificate of full compliance with the April 16 Order signed by Arthur Riel, the Morgan Stanley manager assigned this task.

As organized by Morgan Stanley, the effort to recover e-mails from the backup tapes had several stages. First, the relevant backup tapes had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc., which I will call "NDCI", to be processed, and the data returned to Morgan Stanley. Third, Morgan Stanley had to upload the processed data into its e-mail archive. Fourth, Morgan Stanley had to run scripts, or pieces of computer code, to transform this data into a searchable form. Finally, Morgan Stanley had to search the data for e-mails related to this case. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when the processed data returned by NDCI remained in limbo, waiting to be uploaded to Morgan Stanley's archive.

At some point prior to May 6, 2004, Arthur Riel and his team became aware that 1,423 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423 tapes had not been processed by NDCI and thus had not been included in the archive or searched when Morgan Stanley made its production to CPH on May 14, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification of full compliance with the Court's April 16, 2004 Order that it was false. He and others on Morgan Stanley's e-mail archive team knew by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990's. During the summer of 2004, the Brooklyn tapes were processed and the data sent to the staging area. The scripts for e-mails **relating to this case** were not written and tested to permit the search ~~for e-mails relating to this case~~ to begin until the middle of January, 2004. Such a search, even if perfectly done, can take weeks.

Morgan Stanley also failed to timely produce e-mails from 738 backup tapes found at a Morgan Stanley facility in Manhattan in 2002. These 738 tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched by either ~~on~~ May 14, 2004**, when the Court's order required production,** or June 23, 2004**, when Morgan Stanley falsely certified that full production had been made**. Mr. Riel and others were told by NDCI by July 2, 2004 that these tapes contained e-mail dating back at least to 1998. During the summer of 2004, ~~the~~ these tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not searched.

In the course of these proceedings, Morgan Stanley represented to the Court that the first time anyone knew that there was recoverable e-mail data on the Brooklyn tapes was in October 2004. That statement was false. The actual date was at least three months earlier than that, no later than July 2, 2004.

In August 2004, Mr. Riel was relieved of his employment responsibilities **for reasons unrelated to Morgan Stanley's false certification**. He and his team were replaced by a new team headed by Allison Gorman Nachtigal. At that time, the staging area contained about 600 gigabytes of e-mail data that had not yet been uploaded into the Morgan Stanley archive and had not been searched for e-mails relating to this case. **600 gigabytes of data is the equivalent of approximately 30 million printed pages.**

Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts

to address the backlog of data in the staging area. Indeed, she was not informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman gave the project somewhat greater priority, although even then it did not move as expeditiously as possible. Morgan Stanley did not consider using an outside contractor to expedite the process.

In November 2004, Morgan Stanley produced additional e-mails and attachments to CPH. Morgan Stanley told CPH that those materials came from newly discovered tapes. That statement was false. In fact, Morgan Stanley did not begin searching the materials from the staging area until January 2005.

Morgan Stanley found another 169 DLT tapes in January, 2005, that **according to Morgan Stanley** had been misplaced by its New Jersey storage vendor. Morgan Stanley **later disclosed the existence of** ~~discovered~~ more than 200 additional **unsearched** backup tapes openly stored in locations known to be used for tape storage**, which Morgan Stanley claimed to have discovered** on February 11 and 12, 2005.

On February 11, 2005 Morgan Stanley discovered that a flaw in the software it had written had prevented Morgan Stanley from locating all e-mail attachments about the Sunbeam transaction. Morgan Stanley **also admits** ~~discovered on February 13, 2005,~~ that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so that additional e-mail messages that appeared to fall within the scope of the April 16, 2004 Order had not been given to CPH. Further, it appears that the problem infected Morgan Stanley's original searches in May of 2004. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the transaction under review here.

Morgan Stanley claims to have discovered defects in the searches on February 13, 2005. The defects in Morgan Stanley's searches were discovered and revealed only as a result of CPH's hiring of a third-party vendor, pursuant to the Court's Order on February 4, 2005, to double-check Morgan Stanley's compliance with the April 16, 2004 Order. On February 16, 2005, Morgan Stanley withdrew its certificate of compliance with the April 16, 2004 Order.

On February 19, 2005 Morgan Stanley notified CPH that it had found boxes of additional tapes that have not been uploaded into its archive or searched for responsive e-mails. Morgan Stanley did not tell CPH it had found any tapes that it had not searched until November 17, 2004. Even then, it did not

tell CPH how many tapes were found, when they were found, or when they would be searched. MS & Co. did not provide all of this information to CPH until February of 2005. The searches had not yet been completed when this trial was begun, when they were terminated without completion.

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

CASE NO.: 502003CA005045XXOCAI

COLEMAN (PARENT) HOLDINGS INC.
Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

FURTHER AMENDED ORDER ON COLEMAN (PARENT) HOLDINGS, INC.'S MOTION FOR ADVERSE INFERENCE INSTRUCTION DUE TO MORGAN STANLEY'S DESTRUCTIONS OF E-MAILS AND MORGAN STANLEY'S NONCOMPLIANCE WITH THE COURT'S APRIL 16 2004 AGREED ORDER, AND MOTION FOR ADDITIONAL RELIEF AND ORDER ON PLAINTIFF'S MOTION TO COMPEL FURTHER DISCOVERY REGARDING MORGAN STANLEY'S DESTRUCTION AND NON-PRODUCTION OF E-MAILS

THIS CAUSE came before the Court on February 14, 2005 on Coleman (Parent) Holdings, Inc.'s ("CPH's") Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, as modified by CPH's February 14, 2005 ore tenus motion for additional relief, and on February 28, 2005 on Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-Mails, with both counsel present. Based on evidence introduced, the Court finds:

1. CPH has sued Defendant, Morgan Stanley & Co., Inc. ("MS & Co."), for fraud in connection with CPH's sale of its stock in Coleman, Inc., to Sunbeam Corporation in return for Sunbeam stock. Whether MS & Co. had knowledge of the fraudulent scheme undertaken by Sunbeam in 1997 and early 1998 and, if so, the extent of that knowledge, is central to the case. CPH has sought access to MS & Co.'s internal files, including e-mails, since the case was filed.

2. Though MS & Co. instructed its investment bankers to preserve paper documents in their possession in connection with the Sunbeam transaction in February, 1999, it continued its practice of overwriting e-mails after 12 months, despite an SEC regulationn requiring all e-mails be retained in readily accessible form for two years. *See* 17 C.F.R. §240.17a-4 (1997).

3. On April 16, 2004, the Court entered its Agreed Order requiring MS & Co. to (1) search the oldest full backup tape for each of 36 MS & Co. employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all nonprivileged e-mails responsive to CPH's document requests; (4) give CPH a privilege log; and (5) certify its full compliance with the Agreed Order.

4. On May 14, 2004, MS & Co. produced approximately 1,300 pages of e-mails but failed to provide the required certification. Finally, on June 23, 2004, after inquiries by CPH, MS & Co. provided CPH with a certificate of full compliance with the April 16 Agreed Order signed by Arthur Riel, the MS & Co. manager assigned this task.

5. As organized by MS & Co., the effort to recover e-mails from any remaining backup tapes had several stages. First, the relevant backup tapes (in various formats, such as "DLT" tapes and eight-millimeter tapes) had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc. ("NDC"), to be processed, and the data returned to MS & Co. in the form of "SDLT" tapes. Third, MS & Co. had to find a way to upload the contents of these SDLT tapes into its new e-mail archive. Fourth, MS & Co. would run "scripts" to transform this data into a searchable form, so that it could later be searched for responsive e-mails. MS & Co. personnel used the term "staging area" to describe the stage of the process when SDLT tapes remained in limbo, waiting to be uploaded to the archive.

6. At some point prior to May 6, 2004, Arthur Riel and his team became aware that more than 1,000 backup tapes had been found at a MS & Co. facility in Brooklyn, New York. These 1,423 DLT tapes had not been processed by NDCI and thus had not been included in the archive or searched when MS & Co. made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification that it was false. He and others on MS & Co.'s e-mail archive team knew by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990's. MS & Co. neither withdrew its certification nor informed CPH about the potential for additional production of e-mails, however. During the summer of 2004, the Brooklyn tapes were processed and sent to the staging area, but they were not uploaded to the e-mail archive so as to be available to be searched until January2005, at least eight months after they were found.

7. MS & Co. also failed to timely produce e-mails from 738 8-millimeter backup tapes found at a MS & Co. facility in Manhattan, in 2002. These 738 8-mm tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched when MS & Co. made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Mr. Riel and others were told by their vendor, NDCI, by July 2, 2004 that the 8-mm tapes contained e-mail dating back at least to 1998. MS & Co. neither withdrew its certification nor informed CPH about the potential for additional production of e-mails, though. During the summer of 2004, the 8-mm tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not uploaded to MS & Co.'s e-mail archive.

8. In August 2004, Mr. Riel was relieved of his employment responsibilities. He and his team were replaced by a new team headed by Allison Gorman Nachtigal.

9. Ms. Gorman testified that she was instructed to describe the circumstances of Mr. Riel's replacement as his having been "placed on administrative leave." That same term appears by interlineation over the original typed description in MS & Co.'s memorandum addressing these issues. The typed language stated: "[Mr. Riel was] dismissed for integrity issues." MS & Co. represented that the reason for the adverse action taken against Mr. Riel was unrelated to any concern about the accuracy of his June 23, 2004 certification. However, MS & Co. presented no evidence to explain why Mr. Riel would have been placed on administrative leave rather than terminated. CPH argued that it may have been to deprive CPH of the ability to contact him directly.

10. Upon taping over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area; indeed, she was not informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman met with a group of MS & Co. attorneys. Following that meeting, Ms. Gorman gave the project somewhat greater priority, although even then it clearly did not move as expeditiously as possible. For example, MS & Co. gave no thought to using an outside contractor to expedite the process of completing the discovery, though it had certified completion months earlier; it lacked the technological capacity to upload and search the data at that time, and would not attain that capacity for months; and it knew trial was scheduled to begin in February, 2005. Even at this point, no one from MS & Co. or its outside counsel, Kirkland & Ellis LLP, gave CPH or this Court any hint that the June certification was false.

11. On November 17, 2004, more than six months after the May 14, 2004 deadline for producing e-mails in response to the Agreed Order, MS & Co. sent CPH a letter revealing that its June 23 certificate of compliance was incorrect. The letter stated:

> Morgan Stanley has discovered additional e-mail backup tapes since our e-mail production in May 2004. The data on some of [the] newly discovered tapes has been restored and, to ensure continued compliance

> with the agreed order, we have re-run the searches described in the order. Some responsive e-mails have been located as a result of that process. We will produce the responsive documents to you as soon as the production is finalized.

The letter also foreshadowed further delays: "(s)ome of the backup tapes are still being restored. To ensure continued compliance with the agreed order, we intend to re-run the searches again when the restoration process is complete and will produce any responsive documents that result."

12. The next day, November 18, 2004, MS & Co. produced an additional 8,000 pages of e-mails and attachments. MS & Co.'s November 2004 letter stated that the 8,000 pagers came from "newly discovered" tapes; but the testimony now makes clear that this statement was false because Ms. Gorman's team did not figure out how to upload and make searchable the materials from the staging area until January, 2005.

13. MS & Co. has failed to offer any explanation to reconcile the obvious conflict between its assertions at the time of production that the 8,000 pages came from "newly discovered" tapes (*i.e.*, the "Brooklyn tapes") and the testimony of its own witness, Ms. Gorman, that data from those newly discovered tapes were not capable of being searched until two months later, in January.

14. After a follow-up inquiry by CPH, on December 17, 2004, MS & Co. produced a privilege log and told CPH that "[n]o additional responsive e-mails have been located since our November production." MS & Co. refused to answer CPH's questions about whether MS & Co. had restored all the backup tapes described in its November 17 letter and why the tapes had not been located earlier, however.

15. On December 30, 2004, CPH sought confirmation that MS & Co. had reviewed all e-mail backup tapes and produced all responsive e-mails and, if not, asked when the review would be completed. On January 11, 2005, MS & Co. informed CPH that the "restoration of e-mail backup tapes

is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

16. On January 19, 2004, CPH wrote asking MS & Co. to explain the circumstances under which MS & Co. located the "newly discovered" backup tapes and to disclose when the tapes were located. CPH also asked MS & Co. to explain why the backup tapes could not be restored sooner.

17. On January 21, 2005, MS & Co. sent CPH a letter that failed to answer CPH's questions. Instead, MS & Co. described its efforts to restore the backup tapes as "ongoing"; informed CPH that "there is no way for MS & Co. to know or accurately predict the type or time period of data that might be recovered"; and stated that MS & Co. "cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes."

18. On January 26, 2005, CPH filed the Motion at issue here, asking the Court to instruct the jury that MS & Co.'s destruction of e-mails and other electronic documents and MS. & Co.'s noncompliance with the April 16, 2004 Agreed Order can give rise to an adverse inference that the contents of the missing e-mails would be harmful to MS & Co.'s defense in this case.

19. Meanwhile, MS & Co. found another 169 DLT tapes in January, 2005, that allegedly had been misplaced by its New Jersey storage vendor, Recall. Again, MS & Co., chose to provide no specifics to CPH or to the Court.

20. At a February 2, 2005 hearing on CPH's Motion, Thomas A. Clare of Kirkland & Ellis, LLP, representing MS & Co., stated that "late October of 2004...[is] the date I'm representing to the Court is the first time that anyone knew that there was recoverable e-mail data" on the Brooklyn tapes. Hr'g Tr. (2/2/05) at 133-34. The actual date, however, was at least three months earlier, by July 2, 2004. Furthermore, MS & Co. refused to provide the Court with definitive answers about when its e-mail production would be complete, merely stating that it would proceed with "all deliberate speed." *Id.* at 139. Also at the February 2 hearing, Mr. Clare neglected to inform the Court about the 8-mm

tapes that had been located in 2002, and told the Court that the 1,423 DLT tapes had been found in Brooklyn "sometime during the summer" of 2004. The truth of this assertion is belied by the evidence showing that the tapes were found before May 6, 2004.

21. On February 3, 2005, the Court ordered further discovery and set an evidentiary hearing for February 14, 2005. The discovery took place on February 9 and 10, when CPH deposed the three e-mail witnesses identified by MS. & Co.

22. On Saturday afternoon, February 12, 2005, MS & Co. informed the Court that it had, in the previous 24 hours, discovered additional tapes. Also, MS & Co. stated that its recent production omitted certain "attachments" to e-mails. MS & Co. did not attempt to clarify or substantiate either of these statements to CPH or to the Court until the Monday, February 14, 2005 hearing.

23. At the February 14 hearing, none of the witnesses MS & Co. presented was involved in or familiar with the actual electronic searches conducted using the parameters specified in this Court's April 16, 2004 Agreed Order, and none explained where the 8,000 pages produced in November, 2004 had come from. MS & Co.'s witnesses did, however, describe three new developments. First, Robert Saunders, a Morgan Stanley executive director in the Information Technology Division, testified that he returned to New York after his February 10 deposition and, concerned about his unqualified deposition assertion that he was "confident" that a complete search for backup tapes had been conducted, decided finally to undertake a personal search of MS & Co.'s "communication rooms," going to the areas he thought most obvious first. By doing so, he and two contractors discovered more than 200 additional backup tapes openly stored in locations known to be used for tape storage. Those discoveries were made on Friday and Saturday, February 11 and 12, 2005. As of the February 14 hearing, NDCI had not yet determined which, if any, of these newly discovered backup tapes contained e-mails. Second, Ms. Gorman reported that on Friday, February 11, 2005 she and her team had discovered that a flaw in the software they had written had prevented MS & Co. from locating all

responsive e-mail attachments. Third, Ms. Gorman reported that MS & Co. discovered on Sunday evening, February 13, 2005, that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so there were at least 7,000 additional e-mail messages that appeared to fall within the scope of the Agreed Order had yet to be fully reviewed by MS. & Co.'s outside counsel for responsiveness and privilege. As counsel for MS & Co. admitted, this problem "dwarf[s]" their previous problems. Hr'g Tr. (2/14/05) at 13. Ms. Gorman indicated she was "90 percent sure" that the problem infected MS & Co.'s original searches in May, which means that MS & Co. even then failed to timely produce relevant materials that had been uploaded into the archive by that point. *Id.* at 82-83. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the transaction under review here.

24. On February 19, 2045 MS & Co. informed counsel for CPH that "additional boxes of back up tapes" have been located "in a security room" and that, "(a)s of this morning, Morgan Stanley has identified four (unlabled) DLT tapes among the collection. Those four tapes will be sent to NDCI for further analysis." The disclosure did not state when the discovery was made. MS & Co.'s counsel represented to the Court that it was his understanding that about 73 bankers' boxes of tapes were discovered. No explanation for the late discovery was offered.

25. Throughout this entire process, MS & Co. and its counsels' lack of candor has frustrated the Court and opposing counsel's ability to be fully and timely informed.

26. MS & Co.'s failure during the summer and fall of 2004 to timely process a substantial amount of data that was languishing in the "staging area," rather than being put into searchable form and then searched, was willful and a gross abuse of its discovery obligations.

27. MS & Co.'s failure to timely notify CPH of the existence of the DLT and 8-mm tapes, which it had located as early as 2002 and certainly prior to the June 23, 2004 certification, and its

failure to timely process those raw backup tapes was willful and a gross abuse of its discovery obligations.

28. MS & Co.'s failure to produce all e-mail attachments was negligent, and it was discovered and revealed only as a result of CPH's hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check MS & Co.'s compliance with the April 16, 2004 Agreed Order.

29. MS & Co.'s failure to produce all of the Lotus Notes e-mails was negligent, and it was discovered and revealed only as result of CPH's hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check MS & Co.'s compliance with the April 16, 2004 Agreed Order.

30. MS & Co.'s failure to locate other potentially responsive backup tapes before Saturday, February 12, 2005 was grossly negligent.

31. Given the history of the discovery, there is no way to know if all potentially responsive backup tapes have been located.

32. In sum, despite MS & Co.'s affirmative duty arising out of the litigation to produce its e-mails, and contrary to federal law requiring it to preserve the e-mails, MS & Co. failed to preserve many e-mails and failed to produce all e-mails required by the Agreed Order. The failings include overwriting e-mails after 12 months; failing to conduct proper searches for tapes that may contain e-mails; providing a certificate of compliance known to be false when made and only recently withdrawn; failing to timely notify CPH when additional tapes were located; failing to use reasonable efforts to search the newly discovered tapes; failing to timely process and search data held in the staging area or notify CPH of the deficiency; failing to write software scripts consistent with the Agreed Order; and discovering the deficiencies only after CPH was given the opportunity to check MS & Co.'s work and

the MS & Co.'s attorneys were required to certify the completeness of the prior searches. Many of these failings were done knowingly, deliberately, and in bad faith.

It is clear that e-mails existed which were requested by CPH that have not been produced because of the deficiencies discussed above. Electronic data are the modern-day equivalent of the paper trail. Indeed, because of the informalities of e-mail, correspondents maybe less guarded than with paper correspondence. In this case, the paper trail is critical to CPH's ability to make out its prima facie case. Thus, MS & Co.'s acts have severely hindered CPH's ability to proceed. The only way to test the potentially self-serving testimony of MS & Co. personnel is with the written record of the events.

The failures outlined in this Order are of two types. First, by overwriting e-mails contrary to its legal obligation to maintain there in readily accessible form for two years and with knowledge that legal action was threatened, MS & Co. has spoiled evidence, justifying sanctions. See Martino v. Wal-Mart Stores Inc., 835 So. 2d 1251 (Fla. 4th DCA 2003). "The appropriateness of sanctions for failing to preserve evidence depends on: (1) willfulness or bad faith of the responsible party, (2) the extent of prejudice suffered by the other party, and (3) what is required to cure the prejudice." Nationwide Lift Trucks Inc. v. Smith, 832 So. 2d 824, 826 (Fla. 4th DCA 2002). Second, MS & Co,'s willful disobedience of the Agreed Order justifies sanctions. See Rule 1.380 (b) (2), Fla. R. Civ. P. The conclusion is inescapable that MS & Co. sought to thwart discovery *in this specific case*.

Sanctions in this context are not meant to be punitive. They are intended, though, to level the playing field.

A reasonable juror could conclude that evidence of MS & Co.'s misconduct demonstrates its consciousness of guilt. It is relevant to the issues before the jury. Further, CPH should not be penalized by being forced to divert the jurors' attention away from the merits of its claim to focus on highly technical facts going to MS & Co.'s failures here, facts that are not reasonably disputed. Evidence of that failure, though, alone does not make CPH whole. Indeed, it can be said it is not a "sanction" at all, but merely a

statement of unrefuted facts that the jury may find relevant. Shifting the burden of proof, though, forces MS & Co. to accept the practical consequence of its failures-that some information will never be known. Obviously, this sanction is of consequence only in the marginal case. If there is overwhelming proof of MS & Co.'s knowledge of the fraud and collusion with Sunbeam, CPH would have prevailed on those elements in any event. And, to the contrary, if there is overwhelming evidence MS & Co. did not know of the fraud or conspire with or aid Sunbeam in its commission, it would have prevailed in any event. If the case is close on those issues, though, MS & Co., not CPH, should bear the burden of persuasion. Further, shifting the burden on the fraud issue does not relieve CPH of its obligation to establish the other elements of its claims, most notably reliance, proof of which is independent of the MS & Co. e-mails. Thus, the sanctions chosen are the most conservative available to the Court to address the spoliation of evidence and willful violation of the Agreed Order.[1] [2]

Finally, the Court notes that CPH has requested the e-mails since May of 2003. MS & Co. was supposed to comply with the April 16, 2004 Order by May 14, 2064. Fact discovery in this case closed November 24, 2004. MS & Co.'s actions have resulted in the diversion of enormous amounts of resources, by both the parties and the Court, into a fact discovery dispute that should have never arisen and which would have long ago been put to bed had MS & Co. timely recognized its obligations to CPH and this Court. Opening argument in this complex case is set for March 21, 2005. Preliminary jury selection has

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[1] MS & Co.'s bad acts and pocket book may not be used to gain the continuance it has sought from the beginning. Further, the Court has no confidence that, even if a continuance were granted, MS & Co. would fully comply with discovery in this case.

[2] The undersigned notes that the sanctions imposed are not enumerated in Rule 1.380 (b) (2), and is aware of the concern expressed in the 2000 Handbook on Discovery Practice, Joint Committee of the Trial Lawyers Section of the Florida Bar and Conferences of Circuit and County Court Judges ("(f)or the trial court to be on solid footing, it is wise to stay within the enumerated orders" [Handbook at p. 4]). However, MS & Co.'s violations involve both the violation of a discovery order and the intentional spoliation-of evidence. The sanction imposed is *less* severe than that provided in Rule 1.380 (b) (2) (B), under which the Court could preclude MS & Co. from presenting evidence of its lack of knowledge of or

begun. MS & Co. has controlled the timetable of this portion of the litigation long enough. Consequently, CPH should have the ability to continue to require MS & Co, to attempt to comply with the Agreed Order and the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search, or to elect to terminate the e-mail discovery and concentrate on trial preparation.

Based on the foregoing, it is

ORDERED AND ADJUDGED that:

1. Plaintiff's Motion for Adverse Interference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Non-Compliance with the Court's April 16, 2004 Agreed Order and Motion for Additional Relief is GRANTED.

2. MS & Co. shall continue to use its best efforts to comply with the April 16, 2004 Agreed Order and shall continue to comply with the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search until March 21, 2005 or written notice from CPH, which ever first occurs. Either party shall notify the other in writing of its intention to offer into evidence e-mails actually produced to CPH prior to termination of e-mail discovery in conformity with this Order, within 72 hours of the e-mail's production to CPH. The Court shall hear and determine any objections to use of the e-mails.

3. The Court shall read to the jury the statement of facts attached as Exhibit A during whatever evidentiary phase of CPH's case that it requests, These findings of fact shall be conclusive. See Rule 1.380 (b) (2) (A). No instruction shall be given to the jury regarding inferences to be drawn from these facts. However, counsel may make such argument to the jury in favor of whatever inferences

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collusion with the Sunbeam fraud, which the Court finds is the least severe enumerated sanction appropriate to place the parties on a level playing field.

that evidence may support. No other evidence concerning the production of e-mails, or lack thereof, shall be presented absent further Court order.

4. CPH will be allowed to argue that MS & Co.'s concealment of its role in the Sunbeam transaction is evidence of its malice or evil intent, going to the issue of punitive damages. See, e.g., General Motors Corp. v. McGee, 837 So.2d 10120.

5. MS & Co. shall bear the burden of proving to the jury, by the greater weight of the evidence, that it lacked knowledge of the Sunbeam fraud and did not aid and abet or conspire with Sunbeam to defraud CPH. The traditional order of proof shall remain unaffected, however.

6. MS & Co. shall compensate CPH for costs and fees associated with the Motion. The amount shall be determined at an evidentiary hearing to be held after the completion of the trial.

7. Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-Mails is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____day of March, 2005.

ELIZABETH T. MAAS
Circuit Court Judge

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EXHIBIT A

A federal regulation in effect in 1997 and all times since required Morgan Stanley to preserve e-mails for three years and to preserve them in a readily accessible place for two years. Beginning in no later than 1997, Morgan Stanley had a practice of overwriting e-mails after 12 months. E-mails could no longer be retrieved once they were overwritten. This practice was discontinued in January, 2001. CPH has sought access to Morgan Stanley's e-mails relating to this transaction since the case was filed in May, 2003.

Prior to 2003, Morgan Stanley recorded e-mails and other electronic data on back up tapes. On April 16, 2004, the Court ordered Morgan Stanley to (1) search the oldest full backup tape for each of 36 Morgan Stanley employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all e-mails relating to this case found by the search I have just described; and (4) certify its full compliance with the Court's order.

On May 14, 2004, Morgan Stanley produced approximately 1,300 pages of e-mails. It did not produce the required certification. On June 23, 2004, after inquiries by CPH, Morgan Stanley provided CPH with a certificate of full compliance with the April 16 Order signed by Arthur Riel, the Morgan Stanley manager assigned this task.

As organized by Morgan Stanley, the effort to recover e-mails from the backup tapes had several stages. First, the relevant backup tapes had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc., which I will call "NDCI", to be processed, and the data returned to Morgan Stanley. Third, Morgan Stanley had to upload the processed data into its e-mail archive. Fourth, Morgan Stanley had to run scripts, or pieces of computer code, to transform this data into a searchable form. Finally, Morgan Stanley had to search the data for e-mails related to this case. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when the processed data returned by NDCI remained in limbo, waiting to be uploaded to Morgan Stanley's archive.

At some point prior to May 6, 2004, Arthur Riel and his team became aware that 1,423 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423 tapes had not been processed by NDCI and thus had not been included in the archive or searched when Morgan Stanley made its production to CPH on May 14, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification of full compliance with the Court's April 16, 2004 Order that it was false. He and others on Morgan Stanley's e-mail archive team knew by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990's. During the summer of 2004, the Brooklyn tapes were processed and the data sent to the staging area. The scripts for e-mails relating to this case were not written and tested to permit the search to begin until the middle of January, 2004. Such a search, even if perfectly done, can take weeks.

Morgan Stanley also failed to timely produce e-mails from 738 backup tapes found at a Morgan Stanley facility in Manhattan in 2002. These 738 tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched by either May 14, 2004, when the Court's order required production, or June 23, 2004, when Morgan Stanley falsely certified that full production had been made. Mr. Riel and others were told by NDCI by July 2, 2004 that these tapes contained e-mail dating back at least to 1998. During the summer of 2004, these tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not searched.

In the course of these proceedings, Morgan Stanley represented to the Court that the first time anyone knew that there was recoverable e-mail data on the Brooklyn tapes was in October 2004. That statement was false. The actual date was at least three months earlier than that, no later than July 2, 2004.

In August 2004, Mr. Riel was relieved of his employment responsibilities for reasons unrelated to Morgan Stanley's false certification. He and his team were replaced by a new team headed by Allison Gorman Nachtigal. At that time, the staging area contained about 600 gigabytes of e-mail data that had not yet been uploaded into the Morgan Stanley archive and had not been searched for e-mails relating to this case. 600 gigabytes of data is the equivalent of approximately 30 million printed pages.

Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area. Indeed, she was not informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman gave the project

somewhat greater priority, although even then it did not move as expeditiously as possible. Morgan Stanley did not consider using an outside contractor to expedite the process.

In November 2004, Morgan Stanley produced additional e-mails and attachments to CPH. Morgan Stanley told CPH that those materials came from newly discovered tapes. That statement was false. In fact, Morgan Stanley did not begin searching the materials from the staging area until January 2005.

Morgan Stanley found another 169 DLT tapes in January, 2005, that according to Morgan Stanley had been misplaced by its New Jersey storage vendor. Morgan Stanley later disclosed the existence of more than 200 additional unsearched backup tapes openly stored in locations known to be used for tape storage, which Morgan Stanley claimed to have discovered on February 11 and 12, 2005.

On February 11, 2005 Morgan Stanley discovered that a flaw in the software it had written had prevented Morgan Stanley from locating all e-mail attachments about the Sunbeam transaction. Morgan Stanley also admits that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so that additional e-mail messages that appeared to fall within the scope of the April 16, 2004 Order had not been given to CPH. Further, it appears that the problem infected Morgan Stanley's original searches in May of 2004. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the transaction under review here.

Morgan Stanley claims to have discovered defects in the searches on February 13, 2005. The defects in Morgan Stanley's searches were discovered and revealed only as a result of CPH's hiring of a third-party vendor, pursuant to the Court's Order on February 4, 2005, to double-check Morgan Stanley's compliance with the April 16, 2004 Order. On February 16, 2005, Morgan Stanley withdrew its certificate of compliance with the April 16, 2004 Order.

On February 19, 2005 Morgan Stanley notified CPH that it had found boxes of additional tapes that have not been uploaded into its archive or searched for responsive e-mails. Morgan Stanley did not tell CPH it had found any tapes that it had not searched until November 17, 2004. Even then, it did not tell CPH how many tapes were found, when they were found, or when they would be searched. MS & Co. did not provide all of this information to CPH until February of 2005. The searches had not yet been completed when this trial was begun, when they were terminated without completion.

March 4, 2005

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VIA HAND DELIVERY

Honorable Elizabeth T. Maass
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Re: Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.

Dear Judge Maass:

Enclosed please find a courtesy copy of Plaintiff's Reply To Defendant's Response And Defendant's Supplement Brief In Response to Plaintiff's Motion For Order Declaring Attorney-Client Privilege Waived For Certain Documents Relating To William Strong. Also enclosed are the authorities cited in the reply.

Sincerely,

Jerold S. Solovy

Enclosure

cc: Joseph Ianno, Jr.

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

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED.,

Defendant.
_____/

VERIFIED MOTION TO ADMIT
PETER D. DOYLE, PRO HAC VICE

Defendant, Morgan Stanley & Co. Incorporated, pursuant Fla. R. Jud. Adm. 2.061, requests this Court to admit attorney Peter D. Doyle, *pro hac vice*, and in support of this Motion, states the following:

1. Defendant requests that this Court permit Peter D. Doyle, an attorney with the law firm of Kirkland & Ellis LLP whose address is 153 E. 53rd Street, New York, NY 10022 to appear pro hac vice and participate fully in this action as additional counsel on behalf of Defendant.

2. Mr. Doyle is a partner at the firm of Kirkland & Ellis in New York, New York. He has been admitted to practice before the State Bar of New York, since 1994. He has also been admitted to practice before the State Bar of Illinois since November 7, 1996 and the District of Colorado since 2003 and the U.S. Court of Appeals, 7th Circuit since 2004. He is a member in good standing of the Bars of the States of Illinois, Colorado and New York. He is also admitted to the United States District Court for the Southern District since 1995 and in the United States

District Court for the Eastern District since 1995. In 2001 he was admitted to practice before the United States Supreme Court. Mr. Doyle has not been disciplined in any jurisdiction.

3. Mr. Doyle has read all the applicable provisions of The Rules of Judicial Administration and the Rules Regulating The Florida Bar.

4. This verified motion complies with the Rules of Judicial Administration.

5. The undersigned will remain associated with this matter at all stages as required by local rules. Mr. Doyle has not in the past five years sought *pro hac* admission in any other matter before this or any other Florida State Court. The representation of Defendant in this matter commenced May 8, 2003.

6. Mr. Doyle will be associated with Joseph Ianno, Jr. for purposes of this representation. Mr. Ianno is a member in good standing of the Florida Bar.

7. A proposed order granting this Motion is attached hereto.

8. Counsel for Plaintiff has been consulted regarding this motion and has no objection.

WHEREFORE, Defendant respectfully requests that this Court enter an order admitting Peter D. Doyle, *pro hac vice* for the purpose of representing Defendant as counsel in connection with this action pending before this Court together with such other and further relief as the Court deems just and proper.

The undersigned verifies that he has knowledge of the facts stated herein, and that the statements in the foregoing motion are true and correct.

Peter D. Doyle

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and hand-delivery to all counsel of record on the attached service list on this 4th day of March, 2005.

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BY: Joseph Ianno, Jr.
Florida Bar No. 655351

Counsel for Morgan Stanley & Co. Incorporated

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

AGREED ORDER GRANTING
VERIFIED MOTION TO ADMIT PETER DOYLE, *PRO HAC VICE*

THIS CAUSE having come before the Court upon the Verified Motion to Admit Peter Doyle, *Pro Hac Vice*, and the Court having been advised of the agreement of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Morgan Stanley's Verified Motion to Admit Peter Doyle, *Pro Hac Vice* is **GRANTED**. Mr. Doyle is admitted to practice in this case.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____ of March, 2005.

Elizabeth T. Maass
Circuit Court Judge

cc: Counsel of Record on attached Service List

WPB#590562.1

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON CPH'S MOTION TO COMPEL PRODUCTION OF JOINT-DEFENSE AGREEMENTS RELATING TO THE STRONG DOCUMENTS

THIS CAUSE came before the Court March 4, 2005 on CPH's Motion to Compel Production of Joint-Defense Agreements Relating to the Strong Documents, with all counsel present or participating by speaker telephone. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted. MS & Co. shall produce for inspection and copying by CPH those items designated as Priv. 911 (e), Priv. 1006 (b), and Priv. 1007 in its privilege log, by 3:00 p.m. March 4, 2005.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 4 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON PLAINTIFF'S ORE TENUS MOTION FOR CLARIFICATION

THIS CAUSE came before the Court March 4, 2005, on Plaintiff's ore tenus Motion for Clarification, with all counsel present or participating by speaker telephone. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Plaintiff's ore tenus Motion for Clarification is Granted. By 5:00 p.m. March 4, 2005 MS & Co. shall provide CPH with the affidavits, or portions of affidavits, by foreign counsel containing the information required by paragraphs one through five of the Court's February 23, 2005 Order for In Camera Inspection.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 4 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON PLAINTIFF'S ORE TENUS MOTION TO COMPEL ADDITIONAL PRODUCTION

THIS CAUSE came before the Court March 4, 2005 on Plaintiff's ore tenus Motion to Compel Additional Production, with all counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Plaintiff's ore tenus Motion to Compel Additional Production is Granted. By 3:00 p.m. March 7, 2005, MS & Co. shall produce for inspection and copying all items within its care, custody, or control dealing with the Riel/SEC investigation, other than documents representing communications between or among MS & Co. inside counsel, or any one of them, and MS & Co. outside counsel, or any on of them, not copied to any one other than counsel, together with its privilege log for any items withheld on grounds for privilege. All items produced in response to this Order shall be subject to the Stipulated Confidentiality Order, as amended.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ___ day of March, 2005.

SIGNED & DATED
MAR 04 2005
JUDGE ELIZABETH T. MAASS

ELIZABETH T. MAASS
Circuit Court Judge

16div-012134

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

NOTICE OF FILING PLEADING UNDER SEAL

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed under seal its *in camera* submission of documents from Morgan Stanley's Privilege Log dated March 2, 2005 and Morgan Stanley's March 2005 Privilege Log (Revised 3/4/2005).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and hand delivered on this 7th day of March, 2005.

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BY: [signature] 0096105
Joseph Ianno, Jr.
Florida Bar No. 655351

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

CASE NO: CA 03-5045 AI

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

AMENDED NOTICE OF VIDEOTAPED DEPOSITION

PLEASE TAKE NOTICE that Morgan Stanley & Co. Incorporated and will take the videotaped deposition of Ronald O. Perelman, pursuant to Florida Rules of Civil Procedure 1.280 and 1.310. The oral examination will take place on March 10, 2005 at 2:00 p.m. and continue from day to day until completed at the Palm Beach County Courthouse, 205 North Dixie Highway, West Palm Beach, Florida 33401. The deposition will be taken before a person authorized to administer oaths and recorded by stenographic and videographic means. The video operator will be Visual Evidence, 601 North Dixie Highway, West Palm Beach, Florida 33401.

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IN THE FIFTEENTH JUDICIAL CIRCUIT
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COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

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PLEASE TAKE NOTICE that Morgan Stanley & Co. Incorporated and will take the videotaped deposition of Lawrence Winoker, pursuant to Florida Rules of Civil Procedure 1.280 and 1.310. The oral examination will take place on March 8, 2005 at 9:30 a.m. and continue from day to day until completed at the Palm Beach County Courthouse, 205 North Dixie Highway, West Palm Beach, Florida 33401. The deposition will be taken before a person authorized to administer oaths and recorded by stenographic and videographic means. The video operator will be Visual Evidence, 601 North Dixie Highway, West Palm Beach, Florida 33401.

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IN THE FIFTEENTH JUDICIAL CIRCUIT
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COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

NOTICE OF VIDEOTAPED DEPOSITION

PLEASE TAKE NOTICE that Morgan Stanley & Co. Incorporated and will take the videotaped deposition of Dr. Blaine F. Nye, pursuant to Florida Rules of Civil Procedure 1.280 and 1.310. The oral examination will take place on March 10, 2005 at 9:30 a.m. and continue from day to day until completed at the Palm Beach County Courthouse, 205 North Dixie Highway, West Palm Beach, Florida 33401. The deposition will be taken before a person authorized to administer oaths and recorded by stenographic and videographic means. The video operator will be Visual Evidence, 601 North Dixie Highway, West Palm Beach, Florida 33401.

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COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

MORGAN STANLEY'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S FIRST AMENDED COMPLAINT

Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") answers and affirmatively defends Plaintiff Coleman (Parent) Holdings Inc.'s ("CPH's") First Amended Complaint by denying generally that Morgan Stanley engaged in any conspiracy to defraud, that Morgan Stanley assisted Sunbeam Corporation ("Sunbeam") or any employee, director or agent of Sunbeam in the commission of a fraudulent scheme, or that Morgan Stanley otherwise defrauded CPH in any manner. Specifically, Morgan Stanley responds to CPH's allegations as follows:

Nature of the Action

1. Morgan Stanley denies the allegations in Paragraph 1.

2. Morgan Stanley admits that, beginning in mid-1997, Morgan Stanley served as an investment banker for Sunbeam. Morgan Stanley admits that it attempted to identify a party interested in purchasing Sunbeam, and that those efforts were ultimately unsuccessful. Morgan Stanley admits that it recommended that Sunbeam's management consider acquiring other companies instead and suggested, as is common in corporate mergers and acquisitions, that Sunbeam consider, among other options, using Sunbeam stock as part of the consideration for such an acquisition. Morgan Stanley admits that it facilitated communications between Sunbeam

and Coleman, but denies that Morgan Stanley in any way "persuaded" CPH to sell its interest in Coleman to Sunbeam. Morgan Stanley denies the remaining allegations in Paragraph 2.

3. Morgan Stanley admits that it agreed to serve as underwriter of a $750 million debenture offering for Sunbeam. Morgan Stanley admits that, as an advisor to Sunbeam, Morgan Stanley had access to certain financial documents, and further states that those same documents were available to CPH during the acquisition negotiations and thereafter. Further, Morgan Stanley specifically disclaimed any independent evaluation of Sunbeam's financial records, and expressly stated that it relied solely on documentation and information provided by Sunbeam and Sunbeam's audited financial statements. Morgan Stanley admits that late on March 18, 1998, it learned that Sunbeam's first quarter 1998 sales were below the same period in 1997. Sunbeam insisted that its sales would meet expectations, but Morgan Stanley insisted that Sunbeam issue a press release. Morgan Stanley admits that it received two "Comfort Letters" from Sunbeam's auditors, Arthur Andersen dated March 19, and March 25, 1998. Morgan Stanley performed all of its obligations as an underwriter of Sunbeam securities. Morgan Stanley denies that it had any role in the accounting judgments described in the complaint, or any obligations to audit or independently examine Sunbeam's accounting records. Morgan Stanley denies that it owed any duties to CPH. Morgan Stanley denies that it had any independent knowledge as to the reasons behind Sunbeam's first quarter sales, that Sunbeam had a "practice of accelerating sales," or that it "materially misrepresent[ed]" information to CPH. Further, Morgan Stanley specifically denies that it in any manner assisted Sunbeam in concealing its 1998 first quarter sales numbers in order to close the transaction. Morgan Stanley denies the remaining allegations in Paragraph 3.

4. Morgan Stanley admits that CPH has brought this action against Morgan Stanley alleging aiding and abetting fraud and conspiracy, but denies that there is any merit to the suit. Morgan Stanley specifically denies that it made any fraudulent or negligent representations to CPH, that it in any way aided or abetted a fraudulent scheme against CPH, or that it participated in a conspiracy to defraud CPH. Morgan Stanley denies that any losses that CPH suffered resulted from fraud or any wrongful conduct on the part of Morgan Stanley. Morgan Stanley denies the remaining allegations in Paragraph 4.

5. Morgan Stanley admits that CPH purports to seek compensatory damages against Morgan Stanley, but denies that such claim is valid, for Morgan Stanley denies that it was engaged in any wrongful conduct. Morgan Stanley acknowledges that the Court has granted CPH permission to seek punitive damages, but denies that punitive damages are recoverable in this action. Morgan Stanley denies the remaining allegations in Paragraph 5.

Jurisdiction and Venue

6. Morgan Stanley admits the allegations in Paragraph 6.

7. Morgan Stanley denies that venue is proper in this circuit.

Parties and Other Key Participants

8. Morgan Stanley admits that CPH represented, in negotiations with Sunbeam, that it owned, directly or indirectly, approximately 82% of Coleman prior to March 30, 1998. Morgan Stanley admits that on March 30, 1998, Sunbeam acquired CPH's interest in Coleman by paying CPH with 14.1 million shares of Sunbeam common stock and other consideration, including a cash payment by Sunbeam to CPH in the amount of $159,956,756.00. (*See* Feb. 27, 1998 Merger Agmt. § 3.1(a)(i) (Ex. 1).) Morgan Stanley denies any remaining allegations in Paragraph 8.

9. Morgan Stanley admits that it is an investment banking firm providing financial and securities services. Morgan Stanley admits that, as part of its business operations, it at times provides advice on mergers and acquisitions, and raises capital in equity and debt markets, depending on the needs of its clients. Morgan Stanley admits that it served as Sunbeam's investment banker for certain aspects of Sunbeam's acquisition of Coleman, and served as underwriter of certain securities issued by Sunbeam in connection with the acquisitions of Coleman, First Alert and Signature Brands. Morgan Stanley denies the remaining allegations in Paragraph 9.

10. Morgan Stanley admits that Sunbeam was a publicly-traded company that manufactures and markets household and specialty consumer products, including outdoor cooking products. Morgan Stanley admits that Sunbeam marketed these products under several brand names, including Sunbeam and Oster. Morgan Stanley admits that Sunbeam filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code in February 2001. Morgan denies the remaining allegations in Paragraph 10.

11. On February 28, 2005, the Court entered an Amended Order striking paragraph 11 except for the first and last sentences; therefore, Morgan Stanley's response is only to the remaining portions of paragraph 11. Morgan Stanley admits that Albert Dunlap was the Chief Executive Officer of Sunbeam from July 1996 to June 1998. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 11 and therefore denies them.

12. On February 28, 2005, the Court entered an Amended Order striking paragraph 12 except for the first and last sentences; therefore, Morgan Stanley's response is only to the remaining portions of paragraph 12. Morgan Stanley admits that Russell Kersh was the

Executive Vice President of Sunbeam from July 1996 to June 1998. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 12 and therefore denies them.

13. Morgan Stanley admits that Arthur Andersen LLP served as Sunbeam's auditors and provided independent accounting services to Sunbeam. Morgan Stanley further admits that, during the performance of its engagement, it received two Comfort Letters from Arthur Andersen. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 13 and therefore denies them.

Factual Background

14. Morgan Stanley admits the allegations in Paragraph 14.

15. Morgan Stanley responds that the allegations in Paragraph 15 pertain to publicly available information, and refers to such information for the truth or falsity of such allegations. To the extent that further response is required, Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 15 and therefore denies them.

16. Morgan Stanley responds that the allegations in Paragraph 16 pertain to publicly available information, and refers to such information for the truth or falsity of such allegations. To the extent that further response is required, Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 16 and therefore denies them.

17. Morgan Stanley admits that Albert Dunlap was hired as Sunbeam's Chief Executive Officer on or about July 18, 1996. Morgan Stanley admits that Mr. Dunlap was viewed as a "turnaround specialist." Morgan Stanley lacks sufficient knowledge or information

to form a belief as to the truth of the remaining allegations in Paragraph 17 and therefore denies them.

18. Morgan Stanley admits that Russell Kersh was hired as Sunbeam's Chief Financial Officer. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 18 and therefore denies them.

19. Morgan Stanley admits that Albert Dunlap and members of his senior management team entered into employment agreements with Sunbeam. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 19 and therefore denies them.

20. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 20 and therefore denies them.

21. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 21 and therefore denies them.

22. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 22 and therefore denies them.

23. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 23 and therefore denies them.

24. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 24 and therefore denies them.

25. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 25 and therefore denies them.

26. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 26 and therefore denies them.

27. Morgan Stanley admits, on information and belief, that Sunbeam reported a loss of $18.1 million in the third quarter of 1996, and that it had a $34.5 million gain in the third quarter 1997. Morgan Stanley further admits, on information and belief, that Sunbeam reported an increase in profits from $6.5 million in 1996 to $67.7 million in 1997. Morgan Stanley responds that the allegations in Paragraph 27 regarding stock prices pertain to publicly available information and Morgan Stanley refers to such information for the truth or falsity of such allegations. To the extent that further response is required, Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 27 and therefore denies them.

28. Morgan Stanley admits that it was engaged by Sunbeam to explore a possible sale of Sunbeam's core business or the initiation of one or more acquisitions. Morgan Stanley denies the remaining allegations in Paragraph 28.

29. Morgan Stanley admits that William Strong and other Morgan Stanley employees met with Sunbeam in the spring of 1997 to discuss Sunbeam's investment banking requirements. Further, Morgan Stanley admits that, although it was not engaged in a previous relationship with Sunbeam, William Strong had worked with Dunlap before, during Strong's previous employment with Salomon Brothers. Morgan Stanley denies the remaining allegations in Paragraph 29.

30. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 30 and therefore denies them.

31. Morgan Stanley admits that William Strong and other Morgan Stanley employees met with Sunbeam in the spring of 1997 to discuss Sunbeam's investment banking requirements. Morgan Stanley admits that it was engaged by Sunbeam to explore a possible sale of Sunbeam's

core business or the initiation of one or more acquisitions. Morgan Stanley admits that it initially sought a buyer for Sunbeam. To the extent this Paragraph alleges that Morgan Stanley was motivated to participate in a fraud to retain a single client and receive a customary fee, that allegation is foreclosed, among other reasons, by the fact that Morgan Stanley's own affiliate lent hundreds of millions of dollars to Sunbeam two days after the Coleman acquisition closed. (June 1998 Credit Facilities Mem. (Ex. 2).) Morgan Stanley denies any remaining allegations in Paragraph 31.

32. Morgan Stanley admits that it sought a buyer for Sunbeam. Morgan Stanley further admits that it assembled marketing materials for use in meetings with potential acquirers based on financial information and audited financial statements provided to Morgan Stanley by Sunbeam, Arthur Andersen, or available in the public domain. Morgan Stanley admits that it was unable to find a buyer for Sunbeam. Morgan Stanley denies the remaining allegations in Paragraph 32.

33. Morgan Stanley denies that it provided the "solution" to any "problem" alleged in Paragraph 33. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 33 and therefore denies them.

34. Morgan Stanley admits after its unsuccessful attempts to locate a purchaser for Sunbeam, Morgan Stanley suggested that Sunbeam acquire one or more other companies instead. Morgan Stanley admits that it proposed to Sunbeam, among other options, the possibility of paying for any such acquisition in part with Sunbeam's stock. Morgan Stanley denies the remaining allegations in Paragraph 34.

35. Morgan Stanley denies the allegations in Paragraph 35.

36. Morgan Stanley admits that, in its capacity as advisor to Sunbeam, Morgan Stanley identified Coleman as a potential acquisition candidate. Morgan Stanley admits that it communicated with representatives of Coleman to discuss a potential acquisition, but denies that it "persuade[d] CPH to sell its interest in Coleman to Sunbeam." Morgan Stanley admits that CPH represented, in negotiations with Sunbeam, that CPH owned, directly or indirectly, approximately 82% of Coleman prior to March 30, 1998. Morgan Stanley denies the remaining allegations in Paragraph 36.

37. Morgan Stanley admits that it did assist Sunbeam in preparing for the meeting, but denies it "laid the groundwork" for the meeting. Morgan Stanley denies the allegations in Paragraph 37.

38. Morgan Stanley admits that discussions among Sunbeam, MAFCO and CPH resumed in early 1998. Morgan Stanley further admits that its Managing Directors James Stynes and Robert Kitts worked on Morgan Stanley's engagement for Sunbeam. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations in Paragraph 38 and therefore denies them.

39. Morgan Stanley denies the allegations in Paragraph 39.

40. Morgan Stanley admits that CPH agreed to sell its shares in Coleman to Sunbeam, but denies that Morgan Stanley "persuaded" CPH to make the deal. To the extent that further response is required, Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 40 and therefore denies them.

41. Morgan Stanley admits that on February 27, 1998, Sunbeam's Board of Directors met at Morgan Stanley's New York offices to discuss Sunbeam's possible purchase of Coleman. Morgan Stanley denies the remaining allegations in Paragraph 41.

42. Morgan Stanley admits it made a presentation during the February 27, 1998 Sunbeam Board of Directors Meeting. Morgan Stanley further admits that Morgan Stanley representatives, including William Strong, Robert Kitts, James Stynes and Ruth Porat, were present at this meeting. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations in Paragraph 42 and therefore denies them.

43. Morgan Stanley admits that at that February 27, 1998 New York meeting, it provided Sunbeam with a written "fairness opinion" regarding the fair acquisition price of Coleman. This opinion was based on financial information provided to Morgan Stanley by Sunbeam, Coleman, and Arthur Andersen. The written fairness opinion explicitly stated that Morgan Stanley "[has] not made any independent valuation or appraisal of the assets or liabilities of [Sunbeam]." (Feb. 27, 1998 Fairness Op. at 3 (Ex. 3).) Morgan Stanley denies any remaining allegations in Paragraph 43.

44. Morgan Stanley admits that the Sunbeam Board of Directors approved the Coleman acquisition at the February 27, 1998 meeting in New York. Morgan Stanley denies the remaining allegations in Paragraph 44.

45. Morgan Stanley admits that it continued to provide investment banking services to Sunbeam after the Coleman acquisition was approved. Morgan Stanley denies the remaining allegations in Paragraph 45.

46. Morgan Stanley admits that the Coleman acquisition was announced on March 2, 1998. Morgan Stanley responds that the allegations in Paragraph 46 regarding stock prices pertain to publicly available information, and refers to such information for the truth or falsity of such allegations. To the extent that further response is required, Morgan Stanley lacks sufficient

knowledge or information to form a belief as to the truth of the allegations in Paragraph 46 and therefore denies them.

47. Morgan Stanley admits that it agreed to serve as underwriter for Sunbeam's subordinated debentures. The "cash portion" of the consideration set forth in the Merger Agreement was also financed in part through a $680 million loan made by MSSF, an affiliate of Morgan Stanley (*See* Credit Facilities Mem.) Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations in Paragraph 47 and therefore denies them.

48. Morgan Stanley admits that the money raised from the sale of the debentures was used in part to finance Sunbeam's acquisition of Coleman, First Alert, and Signature Brands.

49. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 49 and therefore denies them.

50. Morgan Stanley admits that the convertible debentures were presented to potential investors at a series of "road show" meetings and conference calls. Morgan Stanley admits that it reviewed and commented on Sunbeam's offering memorandum and other materials used to present the debentures to potential qualified investors, under Rule 144A which did not include CPH. Morgan Stanley denies that it "misrepresented Sunbeam's financial performance" or "emphasized Dunlap's purported 'turnaround' accomplishments." To the contrary, the offering memorandum expressly stated that Morgan Stanley assumed no responsibility for the accuracy or completeness of Sunbeam's audited financial information and warned investors not to rely on any projections of future performance. (March 19, 1998 Note Offering Mem. at 2-3, 12-17, 72 (Ex. 4).) Morgan Stanley denies any remaining allegations in Paragraph 50.

51. Morgan Stanley admits that it launched the debenture offering with a presentation to the Morgan Stanley sales force, but denies the remaining allegations in Paragraph 51.

52. Morgan Stanley admits that the debenture offering was increased from $500 million to $750 million. Morgan Stanley admits that the debentures were offered to investors, not including CPH, nationwide. Morgan Stanley denies any remaining allegations in Paragraph 52.

53. Morgan Stanley admits that its employees traveled on one occasion to Sunbeam's Florida offices. Morgan Stanley denies the remaining allegations in Paragraph 53, except to the extent that they constitute legal conclusions to which no response is required.

54. Morgan Stanley admits that William Strong worked on Morgan Stanley's engagement for Sunbeam. Morgan Stanley also admits that Strong had conversations with Sunbeam officials. Morgan Stanley denies that Strong or any other Morgan Stanley employee was accurately apprised of Sunbeam's financial condition because Morgan Stanley at all times relied on information provided by Sunbeam management and Arthur Andersen, including Sunbeam's audited and unaudited interim financial statements. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations in Paragraph 54 and therefore denies them.

55. On February 28, 2005, the Court entered an Amended Order striking portions of paragraph 55; therefore, Morgan Stanley's response is only to the remaining portions of paragraph 55. Morgan Stanley denies CPH's allegation that Morgan Stanley was "telling CPH and the investing public ... that Sunbeam's turnaround was a success, that Sunbeam's sales for the first quarter of 1998 were ahead of expectations of outside analysts, and that Sunbeam was poised for record sales." Furthermore, any information communicated by Morgan Stanley was

based on financial data and information provided to it by Sunbeam and Arthur Andersen — a fact that Morgan Stanley regularly publicized through disclaimer statements. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations in Paragraph 55 and therefore denies them.

56. Morgan Stanley denies the allegations in Paragraph 56.

57. Morgan Stanley denies the allegations in Paragraph 57.

58. On February 28, 2005, the Court entered an Amended Order striking portions of paragraph 58; therefore, Morgan Stanley's response is only to the remaining portions of paragraph 58. Morgan Stanley admits that on or about March 18, 1998, it received a draft of a Comfort Letter from Arthur Andersen that Sunbeam's interim financial statements reflected that Sunbeam's January and February 1998 sales were below those for the same period in 1997. Morgan Stanley denies that it made assertions or otherwise disseminated information to CPH or others that it knew to be false. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations in Paragraph 58 and therefore denies them.

59. Morgan Stanley admits that on March 18, 1998, it learned that Sunbeam's first quarter 1998 sales were below those of the same period in 1997. Sunbeam's management insisted that its sales would meet expectations, but Morgan Stanley insisted that Sunbeam issue a press release. Morgan Stanley denies all remaining allegations in Paragraph 59.

60. Morgan Stanley admits that Sunbeam issued a press release on March 19, 1998 that included language selectively quoted in Paragraph 60. Morgan Stanley further states that the March 19, 1998 press release contained the following additional statement, omitted in the Complaint:

> **Cautionary Statements** - Statements in this press release, including statements relating to the Company's expectations regarding anticipated performance in the future, are "forward looking statements," as such term is defined in the Private Securities Litigation Reform act of 1995. Actual results could differ materially from the Company's statements in this release regarding its expectations, goals or projected results, due to various factors, including those set forth in the Company's Cautionary Statements contains in its Annual Report on Form 10-K for its fiscal year ended December 31, 1997 filed with the Securities and Exchange Commission.

(March 19, 1998 Press Release (Ex. 5).) Morgan Stanley denies the remaining allegations in Paragraph 60.

61. Morgan Stanley admits that Sunbeam issued a press release on March 19, 1998 that included language selectively quoted in Paragraph 61. Morgan Stanley further states that the March 19, 1998 press release contained the following additional statement, omitted in the Complaint:

> **Cautionary Statements** - Statements in this press release, including statements relating to the Company's expectations regarding anticipated performance in the future, are "forward looking statements," as such term is defined in the Private Securities Litigation Reform act of 1995. Actual results could differ materially from the Company's statements in this release regarding its expectations, goals or projected results, due to various factors, including those set forth in the Company's Cautionary Statements contains in its Annual Report on Form 10-K for its fiscal year ended December 31, 1997 filed with the Securities and Exchange Commission.

(*Id.*) Morgan Stanley denies all remaining allegations in Paragraph 61.

62. Morgan Stanley denies the allegation that it knew that the "shortfall from analysts' estimates was ... caused by Sunbeam's acceleration of 1998 sales into the fourth quarter of 1997." Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations in Paragraph 62 and therefore denies them.

63. Morgan Stanley denies the allegations in Paragraph 63.

64. Morgan Stanley denies the allegations in Paragraph 64.

65. Morgan Stanley denies the allegations in Paragraph 65. To the extent that this Paragraph quotes the Merger Agreement, that document speaks for itself and contradicts the allegations in the Complaint.

66. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 66 and therefore denies them.

67. On February 28, 2005, the Court entered an Amended Order striking portions of paragraph 67; therefore, Morgan Stanley's response is only to the remaining portions of paragraph 67. Morgan Stanley denies the allegations in Paragraph 67.

68. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 68 and therefore denies them.

69. Morgan Stanley admits that it continued to serve as Sunbeam's investment banker, and continued to prepare to close the debenture offering and the acquisition of Coleman, but denies any knowledge as to the alleged falsity of the March 19, 1998 press release. Morgan Stanley denies the remaining allegations in Paragraph 69.

70. Morgan Stanley admits that throughout its service to Sunbeam, Morgan Stanley employees, including Tyree, spoke via telephone with representatives of Sunbeam. Morgan Stanley denies any knowledge that the press release was untruthful or otherwise misleading. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 70 and therefore denies them.

71. Morgan Stanley admits that it received Comfort Letters from Arthur Andersen. Morgan Stanley denies the allegation that it knew that "Sunbeam's earnings for the first quarter of 1998 were going to miss Wall Street analysts' earning expectations." Morgan Stanley lacks

sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 71 and therefore denies them.

72. On February 28, 2005, the Court entered an Amended Order striking portions of paragraph 72; therefore, Morgan Stanley's response is only to the remaining portions of paragraph 72. Morgan Stanley admits that it continued to prepare to close both the debenture offering and the acquisition of Coleman. Morgan Stanley denies any allegation of its "having directly participated in misleading CPH." Morgan Stanley responds that the allegation that Morgan Stanley "had a duty to disclose the true facts" to CPH is a legal conclusion to which no response is required. Morgan Stanley denies the remaining allegations in Paragraph 72.

73. Morgan Stanley admits that it received compensation for investment banking work performed by Morgan Stanley for Sunbeam. Morgan Stanley denies the allegation that it facilitated Sunbeam's alleged fraud. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations in Paragraph 73 and therefore denies them.

74. Morgan Stanley admits that on April 3, 1998, Sunbeam issued a press release, the contents of which speaks for itself. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 74 and therefore denies them.

75. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 75 and therefore denies them.

76. Morgan Stanley denies the allegations in Paragraph 76.

77. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 77 and therefore denies them.

78. No response is necessary to paragraph 78 as it was deleted in the First Amended Complaint.

79. Morgan Stanley denies the allegations in Paragraph 79.

80. Morgan Stanley denies the allegations in Paragraph 80.

81. Morgan Stanley denies the allegations in Paragraph 81.

82. Morgan Stanley denies the allegation in Paragraph 82.

83. Morgan Stanley denies the allegation in Paragraph 83.

Count I -- Aiding and Abetting Fraud

84. Morgan Stanley repeats and realleges its responses to Paragraphs 1 through 83 as if set forth herein in response to the allegations of paragraph 84.

85. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 85 and therefore denies them.

86. Morgan Stanley denies the allegation in Paragraph 86.

87. Morgan Stanley denies the allegations in Paragraph 87.

88. Morgan Stanley denies the allegations in Paragraph 88. Morgan Stanley denies that CPH is entitled to the relief requested.

Count II -- Conspiracy

89. Morgan Stanley repeats and realleges its responses to Paragraphs 1 through 77 and 79 through 83 as if set forth herein in response to the allegations of paragraph 89.

90. Morgan Stanley denies the allegations in Paragraph 90.

91. Morgan Stanley admits that it underwrote the $750 million convertible debenture offering. Morgan Stanley denies the remaining allegations in Paragraph 91.

92. Morgan Stanley denies the allegations in Paragraph 92.

93. Morgan Stanley denies that CPH is entitled to the relief requested.

DEFENSES AND AFFIRMATIVE DEFENSES

In addition to the foregoing responses, Morgan Stanley asserts the following defenses and affirmative defenses to the claims stated in CPH's Complaint. Morgan Stanley does not assume the burden of proof on these defenses when the substantive law provides otherwise.

First Defense

CPH's alleged claims must be dismissed on *forum non conveniens* grounds pursuant to Florida Rule of Civil Procedure 1.061(a).

Second Defense

CPH's alleged claims are barred, in whole or in part, for failure to state a cause of action.

Third Defense

Count I of CPH's First Amended Complaint must be dismissed because aiding and abetting, as plead by CPH and as defined in the *Restatement (Second) of Torts II,* Section 876, does not exist as a civil tort under the common law of Florida. Since neither this Court nor the District Court of Appeal has the authority to create or recognize a new cause of action in the common law, CPH cannot pursue this claim. *Hoffman v. Jones,* 280 So. 2d 431 (Fla. 1973); *Conley v. Boyle Drug Co.,* 477 So. 2d 600 (Fla. 4th DCA 1985).

Fourth Defense

New York law applies to CPH's claims. Neither party to this action is a citizen of Florida. This case involves a New York corporate plaintiffs against New York corporate defendants involving statements allegedly made and relied upon in New York in connection with financial transactions negotiated and consummated in New York. New York therefore has a paramount sovereign interest in having its law applied to its citizens in controversies arising out of the transactions at issue in this case, and its law should apply to each and every cause of action.

First Affirmative Defense

CPH's alleged claims are barred, in whole or in part, by the doctrine of waiver. In particular, CPH contractually waived its alleged claims when it agreed in Section 12.5 of the Merger Agreement and Section 10.4 of the Company Merger Agreement that the Agreements contained the entire agreement and understanding between CPH and Sunbeam and that the provisions of the Agreements superseded "all prior agreements and understandings, oral or written" with respect to the subject of the Agreements. (Merger Agmt. § 12.5; *see* Company Merger Agmt. § 10.4 (Ex. 6).)

Additionally, CPH waived its alleged claims when CPH failed to exercise its contractual rights under the Merger Agreement and Company Merger Agreement to examine Sunbeam's books, records, and facilities and then failed to invoke the "material adverse effect" clause of the Merger Agreement. CPH failed to make a reasonable inquiry into information concerning Sunbeam's financial statements, results of operations, projections, facilities, and business plans (hereinafter "Sunbeam Information") after signing the Merger Agreement and Company Merger Agreement, after Sunbeam issued its March 19, 1998 press release, and before CPH accepted over 14 million shares of Sunbeam common stock as partial consideration for the sale of its interest in Coleman. CPH then failed to invoke Section 8.2(c) of the Merger Agreement, a remedy available solely to CPH, thereby permitting the transaction to close and waiving its alleged claims.

Second Affirmative Defense

CPH's alleged claims are barred, in whole or in part, by the doctrine of estoppel. In particular, CPH, is estopped from asserting its claim for the following reasons.

(a) By virtue of the customs and practices in the New York financial markets observed in connection with the negotiation of mergers and acquisitions among sophisticated

parties, CPH as an affiliate of MAFCO, understood and agreed that Morgan Stanley, as Sunbeam's investment banker, did not make any representations or warranties to CPH about the accuracy or completeness of the Sunbeam Information supplied to CPH. CPH further understood and agreed Morgan Stanley would not have any liability to CPH by reason of CPH's use of the Sunbeam Information that Morgan Stanley provided to CPH. Morgan Stanley relied upon CPH's understanding and agreement to the customs and practices in the New York financial markets when MS &Co. provided Sunbeam Information to CPH. CPH is now estopped from claiming to have relied upon Sunbeam Information that Morgan Stanley supplied to CPH.

(b) By virtue of a letter agreement with Sunbeam dated February 23, 1998, and acknowledged in the Merger and Company Merger Agreements (Merger Agmt. §§ 6.7, 11.2 12.5; Company Merger Agmt. §§ 7.2, 9.2 10.4), CPH, as an affiliate of Coleman, agreed that Sunbeam and its representatives, including Morgan Stanley, did not make any representations or warranties about the accuracy or completeness of the information that they supplied to CPH. CPH further agreed that Sunbeam and its representatives, including Morgan Stanley, would not have any liability to CPH by virtue of CPH's use of the information that they provided to CPH. Morgan Stanley relied upon CPH's agreement when it provided Sunbeam Information to CPH, and CPH is estopped from now claiming to have relied upon information supplied to CPH outside of Merger Agreement or the Company Merger Agreement.

(c) By virtue of Section 12.5 of the Merger Agreement and Section 10.4 of the Company Merger Agreement, CPH agreed that the Merger Agreement and the Company Merger Agreement contained the entire agreement and understanding between CPH and Sunbeam and that the provisions of the Agreements superseded "all prior agreements and understandings, oral or written" with respect to the subject of the Agreements. (Merger Agmt. § 12.5; *see* Company

Merger Agmt. § 10.4.) Morgan Stanley relied upon CPH's agreement when Morgan Stanley provided Sunbeam Information to CPH, and CPH is estopped from now claiming to have relied upon information supplied to CPH outside of the Agreements.

(d) CPH bargained for and received access to Sunbeam Information pursuant to Section 6.7 of the Merger Agreement and to Sections 7.2 and 7.3 of the Company Merger Agreement. When Morgan Stanley provided Sunbeam Information to CPH, Morgan Stanley relied upon CPH's contractual undertaking and ability to verify independently all statements that Morgan Stanley or Sunbeam made to CPH. CPH is estopped from now claiming to have relied upon information supplied to CPH by Morgan Stanley or Sunbeam when CPH, a sophisticated party, had equal access to Sunbeam Information and equal ability to evaluate Sunbeam Information.

(e) CPH held itself out to be and is a commercially and financially sophisticated party, capable of protecting its own interests. Morgan Stanley relied upon these representations when it provided Sunbeam Information to CPH, and CPH is estopped from now disclaiming these representations.

(f) CPH represented to Sunbeam and Morgan Stanley that it had retained and would rely upon its own sophisticated advisors, including an investment banker and a law firm capable of protecting CPH's interests. CPH and its advisors represented that they were doing their own due diligence on CPH's behalf through the meetings and information that they requested from Sunbeam and its advisors. Morgan Stanley relied upon these representations when it provided Sunbeam Information to CPH, and CPH is estopped from now disclaiming these representations.

Third Affirmative Defense

To the extent that CPH sustained any cognizable damages, the damages claimed by CPH were the result, in whole or in part, of CPH's failure to mitigate its damages. In particular, CPH

investigated but failed to pursue reasonable available measures to hedge its position with regard to its ownership of Sunbeam stock. Had CPH implemented the potential hedges available, CPH would not have suffered the loss of the value of Sunbeam stock that occurred during and after June of 1998. In addition, CPH failed to mitigate its damages when it chose to install its own executives at Sunbeam, enter into a management agreement with Sunbeam, and to accept warrants from Sunbeam to settle its alleged claims against Sunbeam. CPH chose to keep and indeed increase its holdings in Sunbeam, taking its chances that Sunbeam stock would increase in value, rather than selling its Sunbeam stock and reasonably limiting its losses.

Fourth Affirmative Defense

Any future claim by CPH for punitive damages is barred, in whole or in part, because (i) Morgan Stanley did not engage in intentional misconduct; (ii) the allegedly tortuous conduct is not gross, wanton, willful, reckless or otherwise morally culpable; and (iii) the alleged conduct was not part of a pattern directed at the public generally.

Fifth Affirmative Defense

Morgan Stanley is entitled to a set-off for any settlement by any party or non-party to CPH for any claim arising out of the transactions that are the subject of the Complaint pursuant to N.Y. Gen. Oblig. § 15-108 or Florida Statutes § 46.015, 768.31 and 768.041. The basis for such set-off is set forth fully in these Affirmative Defenses. In particular, Morgan Stanley is entitled to a set-off as a result of the settlement between CPH and Sunbeam dated August 12, 1998 (Ex. 7) and the settlement between CPH and Arthur Andersen dated October 10, 2002 (Ex. 8).)

Sixth Affirmative Defense

CPH's claims are barred because, to the extent Morgan Stanley is liable for all or part of CPH's claimed damages, CPH was in *pari delicto* in the Sunbeam/Coleman merger transaction.

To the extent that CPH sustained any cognizable damages, CPH is equally at fault — or more at fault — for such damages than Morgan Stanley. The damages claimed by CPH were the result of its own actions. Among other things, CPH failed to make a reasonable independent inquiry into Sunbeam Information, failed to request access to Sunbeam's books and records *before* agreeing to accept over 14 million shares of Sunbeam common stock as partial consideration for the sale of its interest in Coleman and signing the Merger Agreement, failed to make a reasonable inquiry into the Sunbeam Information available to CPH *after* signing the Merger Agreement and Company Merger Agreement, failed to make a reasonable inquiry into Sunbeam Information after Sunbeam issued its March 19, 1998 press release, failed to make a reasonable inquiry concerning the existence or absence of a "material adverse effect" as defined in the Merger Agreement and the Company Merger Agreement, failed to make use of its available means to investigate or confirm statements about Sunbeam Information made to CPH by Sunbeam or Morgan Stanley during late 1997 and the first quarter of 1998 before CPH accepted over 14 million shares of Sunbeam common stock as partial consideration for the sale of its interest in Coleman. Because CPH is at least equally at fault for any damages, its claims are barred by the doctrine of *pari delicto.*

WHEREFORE, Morgan Stanley denies that CPH is entitled to any relief whatsoever, and to the extent that CPH should recover any damage award, that award should be offset by CPH's failure to take appropriate steps to mitigate its damages, CPH's own equal fault, the comparative fault of third parties, and the settlements that CPH has already received. Morgan Stanley respectfully requests that the Court enter judgment for Morgan Stanley dismissing the complaint with prejudice, and grant such other and further relief as may be just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile on this 7th day of March 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

MORGAN STANLEY'S MOTION
TO APPLY NEW YORK LAW TO CPH'S
AIDING AND ABETTING AND CONSPIRACY CLAIMS

Based upon the findings of fact and conclusions of law set forth in this Court's previous August 11, 2004 Order on Application of New York Law ("Aug. 11 Order"), and the allegations in the First Amended Complaint, Morgan Stanley & Co. Incorporated ("Morgan Stanley") submits that New York law controls Plaintiff's claims for aiding and abetting and conspiracy and moves the Court for an order determining that New York law applies to Plaintiff Coleman (Parent) Holdings Inc.'s ("CPH") causes of action.

As grounds therefor, Morgan Stanley states:

1. This Court previously determined that the alleged misrepresentations by Morgan Stanley were made and received in New York, and relied upon by CPH in New York. (*See* Aug. 11 Order.) Based upon these findings and the Court's choice-of-law analysis under Section 148 of the *Restatement (Second) of the Conflicts of Laws* ("Restatement"), the Court determined that New York law applied to the causes of action for fraudulent misrepresentation and negligent misrepresentation set forth in Counts I and IV of the Complaint. (*See Id.* at 10-11.) This determination was necessarily based upon the Court's further finding that Florida did not have a

more significant relationship than New York to these causes of action, and that there were potential outcome determinative differences in New York versus Florida law. (*Id.*)

2. As the Aug. 11 Order makes clear, the Court's choice-of-law analysis was very precise, involving as it did the application of "the appropriate conflicts principles to determine the controlling substantive law ***on each contested issue***." (Aug. 11 Order at 3 (emphasis added).) Morgan Stanley would submit that the Court should employ the same "issue-by-issue" approach in determining which law to apply to CPH's remaining claims. There can be no dispute that such an approach is warranted, given that it was CPH that first urged the Court to adopt the "issue-by-issue" approach. (*See* June 28, 2004 Hrg. at 49:24-51:16 (counsel for CPH noting that "the issue-by-issue analysis makes sense").)

3. Although CPH has amended its complaint and dropped Counts I and IV, the factual allegations set forth to support the remaining claims for aiding and abetting and conspiracy are unchanged. For example, CPH's allegations regarding Morgan Stanley's "misrepresentations," which previously were set forth in Count I of the Complaint, paragraphs 78 through 83, are now set forth in paragraphs 79 through 83 of the First Amended Complaint. Counsel for CPH expressly "represent[ed] to the court" that the First Amended Complaint is "***identical***" to the original Complaint, "differ[ing] only in that [the First Amended Complaint] eliminates counts one and four." (Feb. 17, 2005 Hrg. at 918:2-24.)

4. The allegations which previously supported CPH's claim against Morgan Stanley for "Fraudulent Misrepresentation" are now clearly pled as the culmination of the "underlying fraud" described in detail and set forth in paragraph's 1 thru 83 of the First Amended Complaint. The objective of this alleged underlying fraud was the closing of the transaction in New York and the transfer of Coleman Company stock by CPH in return for 14.1 million shares of

Sunbeam stock, $160 million in cash, and the assumption of hundreds of millions of dollars in debt — events which indisputably took place in New York. Even more important, the damages CPH alleges in paragraph 83 were suffered in New York.

5. In Count I of the First Amended Complaint, paragraphs 84 through 88, CPH sets forth its claim for aiding and abetting fraud. CPH's allegations of substantial assistance — an essential element of its aiding and abetting claim — are set forth in paragraph 87 and all concern actions taken by Morgan Stanley in New York:

- The alleged concealment of Sunbeam's first quarter 1998 sales shortfall;
- Morgan Stanley's review of a draft of the March 19, 1998 press release;
- The preparation and dissemination of materials for the subordinated debenture offering;
- The provision of financial and business information concerning Sunbeam to CPH;
- The "scripting" of public statements by Sunbeam executives regarding the acquisition of Coleman;
- Morgan Stanley's alleged inducement of CPH to sell its interest in Coleman in exchange for 14.1 million shares of Sunbeam stock; and
- Morgan Stanley's decision to go forward with its underwriting of the debenture offering.

6. Count II of the First Amended Complaint, paragraphs 89 through 92, relies on these same New York-centered allegations to support CPH's claim for conspiracy.

7. This Court has already decided that the substantive law of fraud differs in New York and Florida, and that this difference is potentially outcome determinative here. (*See* Aug. 11 Order at 5 ("Clearly, there is a fundamental distinction on this point between New York and Florida [law] which could be outcome determinative.").) "Under New York law, reliance on a fraudulent misrepresentation is not reasonable if the recipient has the means available to him of

knowing, by the exercise of ordinary intelligence, the truth," whereas "in Florida a recipient of a fraudulent misrepresentation may rely on it unless he knows it is false or its falsity is obvious, even if it had the means to verify the representation's accuracy." (*Id.* (citations & internal quotations omitted).)

8. That ruling necessarily establishes that there is a potentially outcome determinative difference with respect to CPH's claims for aiding and abetting fraud and conspiracy to commit fraud. The first element of each of these claims, under both New York and Florida law, is the existence of an underlying fraud. (*See* Dec. 23, 2004 CPH Resp. in Opp. to Morgan Stanley's Mot. for Summ. J. at 68 (citing, *inter alia*, *UniCredito Italiano SPA v. JP Morgan Chase Bank*, 288 F. Supp. 2d 485, 502 (S.D.N.Y. 2003); *Tew v. Chase Manhattan Bank, N.A.*, 728 F. Supp. 1551, 1568 (S.D. Fla. 1990)).) Because the Court has already ruled that the legal standard for establishing the underlying fraud is different under New York and Florida law, it necessarily follows that the legal standards for establishing aiding and abetting and conspiracy to commit fraud are different under New York and Florida law. These claims and the alleged underlying fraud are based on the ***same facts*** — no more and no less — as the now-dismissed negligent and fraudulent misrepresentation claims.

9. CPH has not denied this point; to the contrary, CPH has expressly conceded it: "The factual underpinnings of all four claims are indeed ***identical.***" (Feb. 16, 2005 Hrg. at 697:15-698:16 (emphasis added).) And this Court itself recently underscored, in rejecting Morgan Stanley's request for a more definite statement, that CPH's failure to allege different conduct underlying its aiding and abetting and conspiracy claims is "***a pleading defect that's been inherent in this case from the get-go.***" (*Id.* at 690:21-692:6 (emphasis added).)

10. There is no basis, Morgan Stanley respectfully submits, to hold that the very same conduct is governed by a different law depending on whether that conduct is challenged as independently or derivatively tortious. The key point here, as this Court recognized in its choice-of-law ruling last fall, is that CPH is a New York entity that received alleged misrepresentations in New York and allegedly relied to its detriment in New York. That means that the underlying fraud claim (and the reasonableness of CPH's reliance) must be determined under New York law — ***regardless*** of whether Morgan Stanley is characterized as a primary tortfeasor or as an "aider and abettor" of Sunbeam's fraud. Under no circumstances is there any basis to assess ***CPH's reliance in New York*** under a substantive standard of Florida law. *See, e.g., Restatement (Second) of Conflicts of Law* § 148.

11. CPH has attempted to deflect attention from this point by arguing that Morgan Stanley's conduct must be governed by Florida law to the extent it is alleged to be connected to a Florida-based fraud. (*See, e.g.,* Dec. 23, 2004 CPH Resp. in Opp. to Morgan Stanley's Mot. for Summ. J. at 70-73.) But that argument misses the point: CPH is relying on the ***very same conduct*** that formed the basis for its independent tort claims against Morgan Stanley as the basis for its derivative tort claims against Morgan Stanley. The Court has already analyzed that conduct in detail and found it to be centered in New York. (*See* Aug. 11 Order at 6-9.) CPH's First Amended Complaint, then, is nothing more than an attempt to apply a different ***legal label*** to that same conduct. The upshot is that the facts are precisely the same as they were at the time of the Court's original choice-of-law ruling last fall, and just as New York had the most "significant relationship" to those facts then, it continues to have the most "significant relationship" to those facts now.

12. In addition to the "reliance" issue, there are potentially outcome determinative differences in New York versus Florida law on the requirements for entitlement to punitive damages and the measure of damages for fraud.

13. New York law — unlike Florida law — does not permit punitive damages in the "ordinary" case of fraud. *Compare Walker v. Sheldon*, 179 N.E.2d 497, 498 (N.Y. 1961) (recognizing that punitive damages "have been refused in the 'ordinary' fraud and deceit case") *and Kelly v. Defoe Corp.*, 636 N.Y.S.2d 123, 124 (App. Div. 1996) ("It is well settled that punitive damages may not be awarded to redress a private wrong, and, accordingly, that such damages are not available in the 'ordinary' fraud and deceit case.") (internal quotations & citation omitted) *with First Interstate Dev. Corp. v. Ablanedo*, 511 So. 2d 536, 539 (Fla. 5th DCA 1987) ("[P]roof of fraud sufficient to support compensatory damages necessarily is sufficient to create a jury question regarding punitive damages.").

14. The Court has determined that the appropriate measure of damages in this case is the benefit of the bargain damages. (*See* Feb. 15, 2005 Hrg. at 432:11-433:25.) In so doing, the Court relied upon the flexibility provided for under Florida law in measuring tort damages. *See, e.g., Gottfried v. Amster*, 511 So. 2d 595, 599 (Fla. 4th DCA 1987). Under New York law, however, there is no such flexibility. Indeed, there "is no question that in New York damages for fraud are limited to indemnity for the actual loss sustained and that loss of the benefit of the bargain as represented by the wrongdoer is not recoverable." *Cayuga Harvester, Inc. v. Allis-Chalmers Corp.*, 465 N.Y.S.2d 606, 618 (App. Div. 1983).

Conclusion

CPH's current argument that this Court should apply Florida law to the same New York-centered conduct — now that CPH has abandoned its negligent and fraudulent misrepresentation claims — boils down to ***the very same argument*** that this Court rejected in its original choice of

law ruling: that all of the challenged conduct here is part of a ***single*** overarching fraudulent scheme based in Florida and governed by Florida law. CPH has pleaded no new facts connecting Morgan Stanley to an alleged underlying Florida-based fraud. If CPH wanted to establish a basis for urging that Florida law should govern its aiding and abetting claim — in contrast to its negligent and fraudulent misrepresentation claims — then it should have pleaded additional facts rather than simply characterize the same conduct underlying its now-abandoned independent torts as the connection to a Florida fraud. But CPH has not only steadfastly refused to plead additional facts, it even opposed Morgan Stanley's motion to provide a more definite statement of the factual basis for its remaining claims. Based on the existing facts, this Court has already determined that the "significant relationship" test requires the application of New York law to the challenged conduct, and there is no reason for the Court now to reverse course.

To do so would allow CPH to circumvent this Court's Choice of Law Order through artful pleading. In that Order, the Court noted that, "[w]hile Florida's public policy provides broader protection for the recipients of false information in commercial transactions ... that interest is not paramount to New York's" public policy and, as a result, "certainty and predictability in commercial transactions" compelled the application of New York law. (Aug. 11 Order at 10.) CPH's last-minute attempt to re-label its claims cannot obscure New York's sovereign interest in the certainty and predictability of its highly evolved commercial law — and in the application of that law to a dispute between two New York parties over a transaction that was negotiated and executed in New York. New York's sovereign interest remains paramount. New York's law should apply.

WHEREFORE, Morgan Stanley respectfully submits that proper analysis under either subsection "a" or "b", Section 148, Restatement, Conflicts of Laws, and application of those choice of law rules to the facts of this case, clearly dictates that New York law must be applied to CPH's causes of action for Aiding and Abetting and Conspiracy. Morgan Stanley requests that this Court enter an Order finding that New York law controls CPH's claims in its First Amended Complaint and grant such other and further relief as is just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 7th day of March, 2004.

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BY: Thomas A. Clare
Thomas E. Warner
For Florida Bar No. 176725
Joseph Ianno, Jr.
Florida Bar No. 655351

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

NOTICE OF FILING DECLARATION

Defendant, MORGAN STANLEY & CO. INCORPORATED, by and through its undersigned counsel, hereby gives notice that it has filed the Declaration of Vittorio Grimaldi, dated March 4, 2005.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand-delivery on this 7th day of March, 2005.

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

CASE NO: 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

DECLARATION OF VITTORIO GRIMALDI

I, Vittorio Grimaldi, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct:

1. I am a partner with Grimaldi e Associati.

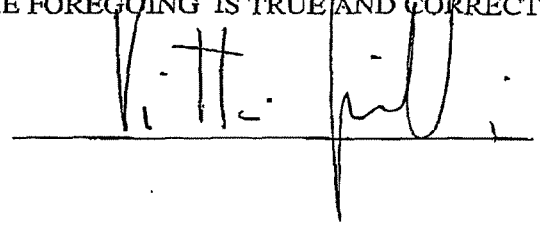
2. From approximately 1995 to 2000, I represented Salomon Brothers International Limited ("Salomon") in connection with a criminal investigation and legal proceedings in Italy arising from a proposed joint venture that Salomon considered entering into with Ente Nazionale Idrocarbruri ("ENI") and Societa Assicuratrice Industriale SpA ("SAI") in 1992. This proposed joint venture was never completed.

3. My representation of Salomon involved, *inter alia*, providing legal advice to Salomon pursuant to Italian law regarding these legal proceedings in Italy. I considered my communications with counsel for Salomon, Mr. William Strong, and counsel for Morgan Stanley to be privileged and confidential in nature.

4. Grimaldi e Associati Clifford Chance invoiced Salomon for all legal services rendered in relation to our representation.

5. I was aware that my client was Salomon from the start of my representation of it.

UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA, I HEREBY DECLARE THAT THE FOREGOING IS TRUE AND CORRECT. THIS 4TH DAY OF MARCH, 2005.



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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

NOTICE OF FILING ORIGINAL DECLARATION

Defendant, MORGAN STANLEY & CO. INCORPORATED, by and through its undersigned counsel, hereby gives notice that it has filed the attached original Declaration of GianBattista Origoni, dated February 28, 2005.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand-delivery on this 7th day of March, 2005.

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

NOTICE OF FILING

Defendant, MORGAN STANLEY & CO. INCORPORATED, by and through its undersigned counsel, hereby gives notice that it has filed the original verification page of its Verified Motion to Admit Peter D. Doyle, *Pro Hac Vice*, dated March 3, 2005.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand-delivery on this 7th day of March, 2005.

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For Joseph Ianno, Jr.
Florida Bar No. 655351

Counsel for Morgan Stanley & Co. Incorporated

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to the United States District Court for the Southern District since 1995 and in the United States District Court for the Eastern District since 1995. In 2001 he was admitted to practice before the United States Supreme Court.

3. Mr. Doyle has read all the applicable provisions of The Rules of Judicial Administration and the Rules Regulating The Florida Bar.

4. This verified motion complies with the Rules of Judicial Administration.

5. The undersigned will remain associated with this matter at all stages as required by local rules.

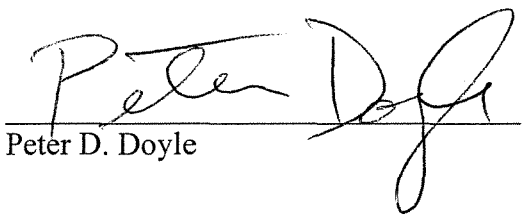
6. Mr. Doyle will be associated with Joseph Ianno, Jr. for purposes of this representation. Mr. Ianno is a member in good standing of the Florida Bar.

7. A proposed order granting this Motion is attached hereto.

8. Counsel for Plaintiff has been consulted regarding this motion and has no objection.

WHEREFORE, Defendant respectfully requests that this Court enter an order admitting Peter D. Doyle, *pro hac vice* for the purpose of representing Defendant as counsel in connection with this action pending before this Court together with such other and further relief as the Court deems just and proper.

The undersigned verifies that he has knowledge of the facts stated herein, and that the statements in the foregoing motion are true and correct.



Peter D. Doyle

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER
(RELEASE OF EXHIBITS)
(RIEL)

THIS CAUSE came before the Court, in Chambers, on Morgan Stanley & Co.'s filing of portions of Arthur Riel's personnel file under seal, as required by the Court's February 28, 2005 Order on Morgan Stanley's Objections to Coleman (Parent) Holdings, Inc.'s Notice to Produce at Hearing and Motion for Protective Order.

Based on a review of the contents of the filing, the Court finds those documents attached hereto as Exhibit 1 do not fall within the scope of the work product or attorney-client privilege. See Upjohn Co. v. United States, 449 U.S. 383, 101 S. Ct. 677 (1981). Based on the foregoing, it is

ORDERED AND ADJUDGED that MS & Co.'s Objections are overruled, in part. CPH shall have access to those documents attached hereto as Exhibit 1, excluding those portions redacted by the Court. The sealed filing by MS & Co. shall not be unsealed or removed from the Court file without further order of this or an appellate court. The undersigned's Judicial Assistant will provide MS & Co. with a conformed copy of this Order, including exhibits, and CPH a conformed copy, excluding exhibits, contemporareously with its entry. The undersigned's

Judicial Assistant shall supply CPH's counsel with a conformed copy of this Order, including Exhibit 1, on request made no earlier than 3:00 p.m. on March 7, 2005.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida, this 7 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished, without Exhibit:
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Rebecca Beynon, Esq.
Sumner Square
1615 M Street, NW, Suite 400
Washington, DC 20036

Priv. 2030

From: Gorman Nachtigal, Allison (IT)
Sent: Tuesday, August 31, 2004 8:22 AM
To: Favors, Tara (HR); Kilcoyne, Moira (Company IT); Vincent, Curt (IT); Sherman, George (IT)
Cc: Sequeira, Horace (IT); Madeo, David (IT)
Subject: Conversations

Quick level set and some questions. We met once each with Arthur and Chris and then had two conversations with Don. Don is by far the most critical person for us to have access to since he

Exhibit 1

wrote the majority of the Supervisory and archive system. We are finding that while we can get a lot from him in one session in terms of overview data, it becomes critical to ask him more detailed questions and fact check as we go to execute changes (such as monthend database rotation). Tara indicated that since he is a consultant and we still have him on contract we can call him as needed (Don also offered his help). Are there concerns or sensitivities we should keep in mind either with respect to how frequently we contact him or how we handle the conversation?? If we want something structured, we might want a daily or bi-weekly time we can contact him with new questions (as we move into the project work there will be more). If informal is OK, then the developers would call as needed while obviously respecting him time and the circumstances. It depends to some degree on how much you want someone from management, security or HR to listen in.Second item: In talking to Chris we found that talking to Galeon is critical as they really wrote and own the inquiry system. Chris noted two areas of importance:1. The source for inquiry is likely on servers in Galeon, since they had connectivity issues that made it hard for them to store code here. As such, unless we can secure the data on these we will not have reliable (if any) source for this system2. They were app 75% done with a rewrite, that was mainly a focus on clean up as the code had gotten messy over time. We would like to obtain this code as well.Chris gave us the name of the lead developer, is there any chance we could arrange to talk with him?Thanks

--

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Priv. 2040

Unknown

From: Gorman Nachtigal, Allison (IT)

Sent: Monday, December 20, 2004 8:17 AM

To: Jonas, Grant (IT); Greyez, Aldo (IT)

Subject: RE: Case # 2004120401 - riela

Additional notes:
- No apparent luck on looking at database transaction logs which could have told us more about the deletions, these are practically impossible to get at according to DBA
- We are restoring the June 2004 database (the oldest backup available) to see if the data was available then; this might give us a hint on when the deletions start

As for email in the file system:
- There is definitely a lot there as we have pulled back a good bit of mail while doing some other work
- We plan a comparison to the email retained from the firewalls though it's not as high on the list as some other work
- Comparisons to tape backups are likely not worth the efforts since he appeared to keep his email box very tidy so there is little on tape

The final option is to restore some dates from WORM copies for comparison. As this redefines "needle in a haystack" if we do want to proceed a few "interesting" dates from Legal would be helpful.

Priv. 2048

From: Favors, Tara (HR)
Sent: Tuesday, October 05, 2004 10:53 AM
To: Kilcoyne, Moira (Company IT)
Cc: Ceriello, Joanne (HR)
Subject: FW: organizational announcement

Hi Moira,We have made a few changes to the document. The changes are focused on emphasizing that these are interim changes, not permanent. Take a look below and please let me know your comment/thoughts.Tara ----------

---

While Arthur Riel remains on leave, Company IT is pleased announce the following changes to the organization. These changes are designed to allow us to operate the business in an effect manner, against an aggressive agenda while Arthur is away.

Randi Rosen , Executive Director, has taken on Leadership for the Legal & Compliance IT teams. Randi joins Morgan Stanley from IBM Global Services where she was responsible for managing all outsourced applications development work for a major telecommunications equipment maker.Prior to joining IBM, Randi was the Director of E-Commerce and Customer Relationship Management at Lucent Technologies.She has more than 20 years of experience managing all aspects of application design, development and testing.
Maureen Cozzi will be transfering from EI to join the Legal & Compliance IT team, focusing on the Law area.Maureen joined the firm in November 1999 as the global head of ECT Service.Since November 2002, she has been the CEAS Global Account Manager working with Investment Banking and subsequently focusing on Equity Research. Prior to Morgan Stanley, Maureen was with the Federal Reserve Bank of New York where she led application development for numerous areas covering trading, monetary projections, emerging markets and Treasury Auctions.

Reporting to Randion this interim basis will be: Imtiaz Kanji, Tim Hom, John Lamont, Erika Beumer, Andras Ferenczi, Peter Worcester and Maureen Cozzi.

Paul Tavernese will report to Maureen Cozzi as part of the Legal IT Team.

Responsibility for the Messaging Archive has been transitioned to EI/ECT. This is a re-alignment and expansion of ECT's existing archiving responsibilities which includes archiving web content, reports and other application based content. Allison Gorman will be managing a newly formed team, with Horace Sequeira as Development Manager and Tim Brown as Product Manager for the future development of the archive tools. In addition, we would like to acknowledge the efforts of Dave Madeo, Naray Palaniappan, and the members of their teams who have played a critical role in assisting with the transition period. Allison's team will continue to partner closely with the Mail Engineering and Support Teams.

The IT Security Team will now be responsible for any investigations requested through the Compliance and HR Teams, which also aligns the practices for this work with existing teams. Anush Danilyan will be seconded to the IT Security Investigations team, taking direction from Grant Jonas, where she will continue with her current investigation responsibilities while transitioning knowledge and assisting the Security Team to build operating practices around this important function.

These changes will allow us to successfully operate these functions in Arthur's absence and continue to deliver for the busines.

Please join me in wishing everyone the best of success in their new /additional roles and responsibilities.

--

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Priv. 2056

From: Ceriello, Joanne (HR)
Sent: Friday, December 17, 2004 4:29 PM
To: 'arthur@riel.com'
Cc: Ceriello, Joanne (HR)
Subject:

Hello Arthur,

Mark Greenfield asked that I get back to you on your inquiry about a discretionary bonus. Firm policy provides that bonuses are payable only to employees who are in good standing at year end. As you know, you have been placed on leave due to our ongoing review of issues including what appears to be your own serious misconduct. In light of this, a decision regarding your eligibility for an discretionary bonus has been deferred until the conclusion of our investigation. We hope to reach that point in the near future.
Regards,

Joanne Ceriello
Human Resources

Priv. 2057

From: Arthur Riel [mailto:arthur@riel.com]
Sent: Thursday, December 16, 2004 5:20 PM
To: Greenfield, Mark (LITIGATION)
Subject: Compensation Communication

Hi Mark,

Do you know by whom, and by what method, my compensation communication will be given this year? I have not had any communication as of this email.

Thank You,

Arthur Riel

Priv. 2079

Unknown

From: Kilcoyne, Moira (Company IT)
Sent: Tuesday, October 05, 2004 2:31 PM
To: Favors, Tara (HR)
Cc: Ceriello, Joanne (HR)
Subject: RE: organizational announcement

even better...ok, I want randi, maureen, curt and Allison to have one more chance to see the final version, then I'd like to get it out tonight/tomorrow.

Please speak now or forever hold your peace.....

and Thanks for the quick turn around....
mak

From: Favors, Tara (HR)
Sent: Tuesday, October 05, 2004 11:54 AM
To: Kilcoyne, Moira (Company IT)
Cc: Ceriello, Joanne (HR)
Subject: RE: organizational announcement

Looks good too.. I changed the first line, so Arthur's absences isn't the highlight of the opening paragraph. Feel free to change it back.

From: Kilcoyne, Moira (Company IT)
Sent: Tuesday, October 05, 2004 11:33 AM
To: Favors, Tara (HR)
Cc: Ceriello, Joanne (HR)
Subject: RE: organizational announcement

ok - one more change in the top line. I am happy to position this as something related to Arthur's absence and managment during his leave, but the word 'interim' is making me very uncomfortable. I really don't want to use it.

Hopefully this wording is a reasonable compromise.

mak

From: Favors, Tara (HR)
Sent: Tuesday, October 05, 2004 10:53 AM
To: Kilcoyne, Moira (Company IT)
Cc: Ceriello, Joanne (HR)
Subject: FW: organizational announcement

Hi Moira,

We have made a few changes to the document. The changes are focused on emphasizing that these are interim changes, not permanent. Take a look below and please let me know your comment/thoughts.

Tara

Company IT would like to announce the following organizational changes while Arthur Riel remains on a continued leave. These changes are designed to allow us to continue to operate the business in an effective manner, against an aggressive agenda while Arthur is away.

Randi Rosen , Executive Director, has taken on Leadership for the Legal & Compliance IT teams. Randi joins Morgan Stanley from IBM Global Services where she was responsible for managing all outsourced applications development work for a major telecommunications equipment maker. Prior to joining IBM, Randi was the Director of E-Commerce and Customer Relationship Management at Lucent Technologies. She has more than 20 years of experience managing all aspects of application design, development and testing.

Maureen Cozzi will be transfering from EI to join the Legal & Compliance IT team, focusing on the Law area. Maureen joined the firm in November 1999 as the global head of ECT Service. Since November 2002, she has been the CEAS Global Account Manager working with Investment Banking and subsequently focusing on Equity Research. Prior to Morgan Stanley, Maureen was with the Federal Reserve Bank of New York where she led application development for numerous areas covering trading, monetary projections, emerging markets and Treasury Auctions.

Reporting to Randi on this interim basis will be: Imtiaz Kanji, Tim Hom, John Lamont, Erika Beumer, Andras Ferenczi, Peter Worcester and Maureen Cozzi.

Paul Tavernese will report to Maureen Cozzi as part of the Legal IT Team.

Responsibility for the Messaging Archive has been transitioned to EI/ECT. This is a re-alignment and expansion of ECT's existing archiving responsibilities which includes archiving web content, reports and other application based content. Allison Gorman will be managing a newly formed team, with Horace Sequeira as Development Manager and Tim Brown as Product Manager for the future development of the archive tools. In addition, we would like to acknowledge the efforts of Dave Madeo, Naray Palaniappan, and the members of their teams who have played a critical role in assisting with the transition period. Allison's team will continue to partner closely with the Mail Engineering and Support Teams.

The IT Security Team will now be responsible for any investigations requested through the Compliance and HR Teams, which also aligns the practices for this work with existing teams. Anush Danilyan will be seconded to the IT Security Investigations team, taking direction from Grant Jonas, where she will continue with her current investigation responsibilities while transitioning knowledge and assisting the Security Team to build operating practices around this important function.

These changes will allow us to successfully operate these functions in Arthur's absence and continue to deliver for the busines.

Please join me in wishing everyone the best of success in their new /additional roles and responsibilities.

Priv. 2082

Unknown

From: Kilcoyne, Moira (Company IT)
Sent: Sunday, October 03, 2004 8:13 PM
To: Favors, Tara (HR);
Cc: Kilcoyne, Moira (Company IT)
Subject: organizational announcement

Tara - this is what I would like to send out as soon as possible.

The individuals in the mail have all been informed verbally about the alignment to Randi with Arthur's leave. But it needs to be communicated more broadly.

Please let me know if you are comfortable with the content.

mak

I am pleased to announce that Randi Rosen , ED - has taken on Leadership for the Legal & Compliance IT teams. Randi joins Morgan Stanley from IBM Global Services where she was responsible for managing all outsourced applications development work for a major telecommunications equipment maker. Prior to joining IBM, Randi was the Director of E-Commerce and Customer Relationship Management at Lucent Technologies. She has more than 20 years of experience managing all aspects of application design, development and testing.

Maureen Cozzi will be transfering from EI to join the Legal & Compliance IT team, focusing on the Law area. Maureen joined the firm in November 1999 as the global head of ECT Service. Since November 2002, she has been the CEAS Global Account Manager for the Investment Banking and Equity Research divisions. Prior to Morgan Stanley, Maureen was with the Federal Reserve Bank of New York where she led application development for numerous areas covering trading, monetary projections, emerging markets and Treasury Auctions. She also directed the advanced technology strategy and planning function.

Reporting to Randi will be: Imtiaz Kanji, Tim Hom, John Lamont, Erika Buemer, Andras Ferenczi and Maureen Cozzi.

Responsibility for the Messaging Archive has been transitioned to EI/ECT. This is a re-alignment and expansion of ECT's existing archiving responsibilities which includes archiving web content, reports and other application based content. Allison Gorman will be managing a newly formed team, with Horace Sequeira as Development Manager and Tim Brown as Product Manager for the future development of the archive tools. Allison's team will continue to partner closely with David Madeo and Andrew Brown from the Mail Engineering team.

The IT Security Team will now be responsible for any investigations requested through the Compliance and HR Teams, which also aligns the practices for this work with existing teams. Anush Danilyan will be seconded to the IT Security Investigations team where she will continue with her current investigation responsibilities while transitioning knowledge and assisting the Security Team to build operating practices around this important function.

Arthur Reil remains on an extended leave. These changes will allow us to successfully operate these

functions and continue on an aggressive development agenda.

Please join me in wishing everyone the best of success in their new roles and responsibilities.

Priv. 2099

Kilcoyne, Moira (Company IT)

From: Kilcoyne, Moira (Company IT)
Sent: Sunday, October 03, 2004 9:13 PM
To: Favors, Tara (HR);
Cc: Kilcoyne, Moira (Company IT)
Subject: organizational announcement

Tara - this is what I would like to send out as soon as possible.

The individuals in the mail have all been informed verbally about the alignment to Randi with Arthur's leave. But it needs to be communicated more broadly.

Please let me know if you are comfortable with the content.

mak

I am pleased to announce that Randi Rosen , ED - has taken on Leadership for the Legal & Compliance IT teams. Randi joins Morgan Stanley from IBM Global Services where she was responsible for managing all outsourced applications development work for a major telecommunications equipment maker. Prior to joining IBM, Randi was the Director of E-Commerce and Customer Relationship Management at Lucent Technologies. She has more than 20 years of experience managing all aspects of application design, development and testing.

Maureen Cozzi will be transfering from EI to join the Legal & Compliance IT team, focusing on the Law area. Maureen joined the firm in November 1999 as the global head of ECT Service. Since November 2002, she has been the CEAS Global Account Manager for the Investment Banking and Equity Research divisions. Prior to Morgan Stanley, Maureen was with the Federal Reserve Bank of New York where she led application development for numerous areas covering trading, monetary projections, emerging markets and Treasury Auctions. She also directed the advanced technology strategy and planning function.

Reporting to Randi will be: Imtiaz Kanji, Tim Hom, John Lamont, Erika Buemer, Andras Ferenczi and Maureen Cozzi.

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The IT Security Team will now be responsible for any investigations requested through the Compliance and HR Teams, which also aligns the practices for this work with existing teams. Anush Danilyan will be seconded to the IT Security Investigations team where she will continue with her current investigation responsibilities while transitioning knowledge and assisting the Security Team to build operating practices around this important function.

Arthur Reil remains on an extended leave. These changes will allow us to successfully operate these functions and continue on an aggressive development agenda.

Please join me in wishing everyone the best of success in their new roles and responsibilities.

Status re Arthur Riel

Priv. 2105

Arthur came in today to meet with Zack Stern and outside counsel for final clarification of issues. He brought some additional materials . Arthur still claims whistleblower status and indicated more than once that Elliot Spitzer will be very interested in his information. He still believes it was his fiduciary responsibility to review emails.

Hope this helps,
Jo

BODY1610174836.txt

Message-ID: <4120B6A1.10C963EE@morganstanley.com>
Date: Mon, 16 Aug 2004 09:29:05 -0400
From: Tara Favors <Tara.Favors@morganstanley.com>
Reply-To: Tara.Favors@morganstanley.com
Organization: Morgan Stanley
X-Mailer: Mozilla 4.76 [en]C-CCK-MCD MS4.76 V20010517.3 (Windows NT 5.0; U)
X-Accept-Language: en,pdf
MIME-Version: 1.0
To: Keisha Smith <Keisha.Smith@morganstanley.com>
Subject: [Fwd: RE: spoke with arthur about randy]
Content-Type: multipart/alternative;
 boundary="----------704AA985FACB0812ADD4FC3A"

Hey -- Lets talk about this today.. I don't think I have her comp notes, but can call her if we need to.

-------- Original Message --------
Subject: RE: spoke with arthur about randy
Date: Fri, 13 Aug 2004 07:51:46 -0400
From: <Moira.Kilcoyne@morganstanley.com>
To: <Tara.Favors@morganstanley.com>

ED - Yes. I would like to make her competitive to this market, not her current one, so we should talk about numbers. Please establish her currents and then we'll talk.
It would be bad to start her at a number that we know we will regret come comp time next year.
mak

From: Favors, Tara (HR)
Sent: Friday, August 13, 2004 7:50 AM
To: Kilcoyne, Moira (Company IT)
Subject: Re: spoke with arthur about randy

ok.... do you have an opinion on numbers? Should be an ED, right?

Moira.Kilcoyne@morganstanley.com wrote:

> we'd like to get that offer going....can you push him a bit, i would
> really like her to be on board by mid-sept....m

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

NOTICE OF FILING DECLARATION

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed the attached Declaration of Josanne Rikard, dated March 7, 2005, in support of Morgan Stanley's Strong privilege claims.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand-delivery on this 8th day of March, 2005.

Thomas D. Yannucci, P.C.
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Zhonette M. Brown
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Mark C. Hansen
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BY: Joseph Ianno Jr.

Counsel for Morgan Stanley & Co. Incorporated

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West Palm Beach, FL 33401-6136

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

CASE NO: 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff(s),

Vs

MORGAN STANLEY & CO., INC.,

Defendant(s).
_____/

DECLARATION OF JOSANNE RICKARD

I, Josanne Penelope Jeanne Rickard, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct:

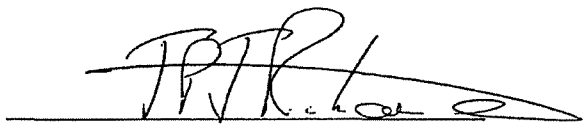
1. I am a partner of Freshfields Bruckhaus Deringer and work in the London Office.

2. As an attorney with Freshfields Bruckhaus Deringer, I was instructed by and represented Salomon Brothers International Limited ("Salomon") in connection with an investigation in Italy regarding a proposed joint venture that Salomon had considered entering into with Ente Nazionale Idrocarbruri ("ENI") and Societa Assicuratrice Industriale SpA ("SAI") in 1992 ("the Italian Investigation").

3. The scope of my firm's representation of Salomon regarding the Italian Investigation involved, among other things, providing legal advice to Salomon. I viewed my communications with Salomon employees and counsel in relation to the Italian Investigation to be confidential. Mr Strong was a director of Salomon at the time.

4. To the best of my recollection my firm's legal fees were paid by Salomon.

UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA, I HEREBY DECLARE THAT THE FOREGOING IS TRUE AND CORRECT. THIS 7TH DAY OF MARCH, 2005.



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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S EMERGENCY MOTION TO COMPEL PRODUCTION OF UNREDACTED COPIES OF DOCUMENTS EXCHANGED WITH THE SECURITIES AND EXCHANGE COMMISSION AND OTHER THIRD PARTIES

THIS CAUSE came before the Court March 8, 2005 on Coleman (Parent) Holdings Inc.'s Emergency Motion to Compel Production of Unredacted Copies of Documents Exchanged with the Securities and Exchange Commission and Other Third Parties, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted. MS & Co. shall immediately provide CPH with unredacted copies of all the SEC/Riel documents previously redacted or withheld as privileged.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 8 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Rebecca Beynon, Esq.
Sumner Square
1615 M Street, NW, Suite 400
Washington, DC 20036

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MOTION FOR REHEARING

THIS CAUSE came before the Court March 8, 2005 on Plaintiff CPH's ore tenus Motion for Rehearing, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Plaintiff CPH's ore tenus Motion for Rehearing is Granted. The Court's February 28, 2005 Order (Release of Exhibits) is amended by adding the copy of partially redacted Priv. 490, a copy of which is attached as Exhibit A, as an addition to Exhibit 1.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida, this 8 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Rebecca Beynon, Esq.
Sumner Square
1615 M Street, NW, Suite 400
Washington, DC 20036

-----Original Message-----
From: Arthur Riel [mailto:Arthur.Riel@morganstanley.com]
Sent: 06/07/04 08:09 AM
To: James Cusick; Soo-Mi Lee
Subject: Privileged and Confidential: Email Tape Restoration

Hi Jim/Soo-Mi,

As you may know we have been taking over inquiries for the pre-2003 email. The earliest backup tapes we had came from 1/2000. We have around 10,000,000 emails that predate 2000, which would mostly be emails that a user placed in one of their folders for safe keeping. The earliest emails seem to be from 1997.

The storage folks found an additional 1,600 backup tapes in a closet. We are not sure if they have email on them, but it is expected that they predate 1/2000. Unless you say otherwise, I have told the storage team to process them like the other backup tapes (i.e. dump them, screen for email, dedupe the email, and give it to us). I will inform you if any pre-2000 email tapes are found in this batch.

In terms of stats, of the 34,926 tapes we restored, 10,138 did not contain email (which implies they were recycled despite the order from compliance not to do so), and 1,925 had read errors. We will be doing forensics on those tapes and expect to restore a large percentage of them.

This project is well under our original budget so we can easily accommodate
the 1,600 tape work, and the forensics from a financial point of view.

Let me know if you disagree with anything here.

Thank You,

Arthur

--
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Exhibit A

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDING INC.'S MOTION TO STRIKE MORGAN STANLEY'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S FIRST AMENDED COMPLAINT

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") moves this Honorable Court pursuant to the provisions of FLA. R. JUD. ADMIN. 2.060(c) to strike Defendant Morgan Stanley & Co. Incorporated's ("Morgan Stanley") Answer and Affirmative Defenses to Plaintiff's First Amended Complaint ("answer") because counsel for Morgan Stanley filed the answer in contravention of 2.060(c)'s "good ground" requirement. Morgan Stanley's answer lacked good ground because Morgan Stanley pleaded lack of sufficient knowledge or information regarding the Sunbeam fraud, yet Morgan Stanley is currently litigating an action against Arthur Andersen ("Andersen") based on the existence of the same underlying Sunbeam fraud. Because Morgan Stanley filed a pleading without good ground, this Court should strike Morgan Stanley's answer to CPH's amended complaint.

ARGUMENT

Pursuant to FLA. R. JUD. ADMIN. 2.060(c), "[t]he signature of an attorney shall constitute a certificate by the attorney that the attorney has read the pleading or other paper; that to the best of the attorney's knowledge, information, and belief there is good ground to support it; and that it

is not interposed for delay." *See also* BRUCE J. BERMAN, FLORIDA CIVIL PROCEDURE ¶ 150.4, at 148 & n.20 (2005 ed.) (stating that Rule 2.060(c) "requires certification that the signing attorney has a reasonable belief that there is good ground to support [a pleading]"). In discussing an older, but substantially similar, version of Rule 2.060(c), one court opined "[t]his provision is declaratory of a standard of ethics imposed upon all attorneys . . . ." *Mobley v. State*, 215 So. 2d 90, 92 (Fla. 4th DCA 1968).

Rule 2.060(c) provides specific sanctions for signing a pleading without good ground: "If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken and the action may proceed as though the pleading or other paper had not been served." FLA. R. JUD. ADMIN. 2.060(c); *see also Patsy v. Patsy*, 666 So. 2d 1045, 1046-47 (Fla. 4th DCA 1996) ("Florida Rule of Judicial Administration 2.060 provides that a signature of an attorney constitutes a certificate that there is a 'good ground to support' a pleading or other paper; however, the only remedy provided in that rule is striking the pleading or paper."). As discussed below, Morgan Stanley's answer to CPH's complaint in this case was not filed with reasonable belief of good ground.

MORGAN STANLEY'S SUIT AGAINST ARTHUR ANDERSEN

In 2004, Morgan Stanley brought a separate legal action against Andersen, in Florida's Palm Beach County Circuit, alleging that Andersen was complicit in the Sunbeam fraud. *See* Ex. A, Morgan Stanley's Complaint, 3/01/2004; Ex. B, Morgan Stanley's First Amended Complaint, 8/06/2004. The law firm of Kellogg, Huber is counsel of record for Morgan Stanley in both the Andersen action and in Morgan Stanley's defense against CPH's suit. *See* Ex. A at 24; Ex. B at 57. Thus, counsel had a duty to comply with the mandates of Rule 2.060(c) in both cases. In its action against Andersen, Morgan Stanley demands hundreds of millions of dollars in

compensatory damages, and reserves the right to assert punitive damages "in excess of $1.2 billion," for Andersen's role in the Sunbeam fraud. *See* Ex. B at 56. Morgan Stanley alleges causes of action against Andersen for fraudulent misrepresentation, conspiracy to commit fraud, and aiding and abetting fraud. *Id.* at 47-56. Morgan Stanley's fundamental contention is that "[a]s a direct result of *Sunbeam's fraud*, aided and abetted by Andersen . . . Morgan Stanley [ ] suffered hundreds of millions of dollars in damages." *Id.* at 56 (emphasis added).

Without question, a necessary element of Morgan Stanley's complaint against Andersen — evinced, for example, by the aiding and abetting fraud charge — is the existence of the Sunbeam fraud. *See, e.g., id.* at 55 ("But for Sunbeam's fraudulent representations"); *id.* ("Andersen . . . knowingly and substantially assisted Sunbeam in its fraud."). Indeed, Morgan Stanley's complaint alleges, in detail, the basic chronology and facts of the Sunbeam fraud. Morgan Stanley alleges both the 1996 aspect of the Sunbeam fraud, *see id.* at 16-17 (arguing that Sunbeam "set an artificially bleak financial backdrop against which Sunbeam's 1997 performance would be judged"), and the 1997 aspect of the Sunbeam fraud. *See id.* at 22-23 (alleging that Sunbeam then used "accounting frauds" to "inflat[e] the company's earnings"). In its complaint against Andersen, Morgan Stanley alleges numerous other particulars of the Sunbeam fraud including: Dunlap's hiring and designing of the fraud (¶¶ 28-30); 1996's artificially inflated reserves (¶¶ 48-51); and 1997's "bill and hold" sales (¶ 63) and "sham sale of its warranty and spare parts business" (¶¶ 69-71). *See id.* at 10-26.

In its amended complaint against Morgan Stanley, CPH also alleges the chronology and facts of the Sunbeam fraud. *See* Ex. C, CPH's First Amended Complaint, 2/18/2005, at 6-9, ¶¶ 20-27. CPH alleges that in 1996 Sunbeam made its "financial condition appear worse than it really was, thus lowering the benchmark for measuring Sunbeam's performance in future years"

and in 1997 Sunbeam was made to "look more valuable than it really was by inflating Sunbeam's sales and engaging in other earnings manipulations." *Id.* at 7, ¶ 21.

MORGAN STANLEY'S ANSWER TO CPH'S AMENDED COMPLAINT

In Morgan Stanley's answer to CPH's complaint, Morgan Stanley answered CPH's allegations of the Sunbeam fraud with the following: "Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in [the] Paragraph [ ] and therefore denies them." Ex. D, Morgan Stanley's Answer and Affirmative Defenses to Plaintiff's First Amended Complaint, 3/07/2005, at 6-7, ¶¶ 20-26. In light of Morgan Stanley's extensive treatment of the Sunbeam fraud in its 58-page amended complaint against Andersen, Morgan Stanley's claimed lack of sufficient knowledge of the Sunbeam fraud in its answer to CPH's claim is demonstrably false.

For example, in its complaint against Morgan Stanley, CPH alleges that "[a]lthough Sunbeam recorded the 'bill and hold' sales as if they were current sales, they were, in reality simply sales stolen from future quarters. In 1997, phony 'bill and hold' sales added approximately $29 million in sales and $4.5 million in income." Ex. C at 8, ¶ 24. Morgan Stanley answered that allegation in the same manner it answered all of CPH's allegations of the Sunbeam fraud: "Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 24 and therefore denies them." Ex. D at 6, ¶ 24. Yet, in its complaint against Andersen, Morgan Stanley alleges:

> One of the revenue inflation tactics permitted by Andersen in 1997 was improper accounting for "bill-and-hold" sales . . . . During 1997, Dunlap's management team offered financial incentives to various customers to purchase products . . . . Sunbeam added more than $29 million to its 1997 sales and $4.5 million to income by improperly accounting for these transactions.

Ex. B at 23, ¶ 63.

Similarly, CPH alleges that the Sunbeam fraud included a "sham sale of its warranty and spare parts business" that created a false profit of $10 million. Ex. C at 8, ¶ 26. Morgan Stanley answered that it lacked sufficient knowledge or information of the truth of the allegations regarding the sham sale. Ex. D at 6, ¶ 26. But, in its complaint against Andersen, Morgan Stanley alleges the existence of Sunbeam's "sham sale of its warranty and spare parts business," which allowed for the improper reporting of "approximately $10 million." Ex. B at 25-26, ¶¶ 69-71.

The timing of Morgan Stanley's action against Andersen underscores the absence of good ground for Morgan Stanley's answer to CPH's amended complaint. Morgan Stanley's answer was filed on March 7, 2005 — over a year *after* Morgan Stanley filed its complaint against Andersen on March 1, 2004 and almost seven months to the day *after* Morgan Stanley filed its amended complaint against Andersen on August 6, 2004. The timing of Morgan Stanley's filing of its answer to CPH's complaint reveals *a fortiori* that Morgan Stanley had knowledge of the particulars of the Sunbeam fraud.

Finally, in its answer to CPH's first amended complaint, Morgan Stanley eliminated two affirmative defenses from its answer to CPH's initial complaint. *Compare* Ex. C at 19-23 (arguing five affirmative defenses, but no defense that CPH's harm was caused by Sunbeam and/or Andersen), *with* Ex. E, Restated and Amended Answer of Morgan Stanley & Co. Incorporated, 1/12/05, at 27-31 (arguing eight affirmative defense, two of which lay blame for CPH's damages on Sunbeam and Andersen, respectively). Morgan Stanley's abandonment of the affirmative defenses implicating Sunbeam and Andersen confirm that Morgan Stanley's contentions in its answer are mere litigation ploys lacking the "good ground" required by Rule 2.060(c).

CONCLUSION

For the foregoing reasons, this Court should enter an Order striking Morgan Stanley's Answer and Affirmative Defenses to Plaintiff's First Amended Complaint.

Dated: March 8, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

Jerold S. Solovy
Ronald L. Marmer
Jeffrey T. Shaw
JENNER & BLOCK LLP
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

John Scarola
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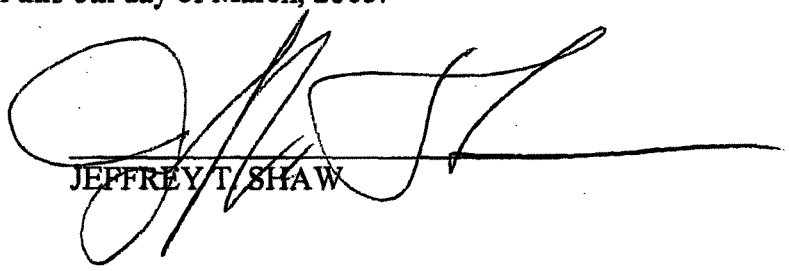
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax to all counsel on the attached list on this 8th day of March, 2005.



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10082

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

MORGAN STANLEY & CO. INCORPORATED, MORGAN STANLEY SENIOR FUNDING, INC., and MORGAN STANLEY,

Plaintiffs,

vs.

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

Defendants.

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A A

CASE NO.

Jury Trial Demanded

FILED
DOROTHY H. WIEKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION
MAR 1 2004
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COMPLAINT

In March 1998, Morgan Stanley & Co. Incorporated, Morgan Stanley Senior Funding, Inc., and Morgan Stanley (collectively, "Morgan Stanley") — in direct reliance on certified financial statements audited by the Arthur Andersen defendants ("Andersen")[1] — underwrote a multi-million dollar offering of convertible notes and provided a $680 million loan to Sunbeam

[1] Defendants Arthur Andersen LLP; Andersen Worldwide, Société Coopérative (a Swiss cooperative); Arthur Andersen & Co. (a Canadian company); Arthur Andersen & Co. (a Hong Kong company); Ruiz, Urquiza y Cia, S.C. (a Mexican Company); Piernavieja, Porta, Cachafeiro & Avocados (a Venezuela company); Arthur Andersen (a United Kingdom company), Phillip E. Harlow, William Pruitt, and Donald Denkhaus are hereinafter collectively referred to as "Andersen." Unless otherwise stated, allegations made against "Andersen" are made against each of these defendants jointly and severally.

EXHIBIT
A

Corporation, Inc., in connection with Sunbeam's acquisition of three companies. As Sunbeam's subsequent restatement of its financial results showed, the financial statements that Andersen certified grossly misrepresented Sunbeam's true financial condition. Andersen had full knowledge of these misstatements, and it intended that Morgan Stanley would rely on its unqualified audit opinions. Morgan Stanley — as a direct consequence of Andersen's deceit — has lost hundreds of millions of dollars. Accordingly, Morgan Stanley brings this action against Andersen and alleges the following:

Nature of Action

1. In March 1998, Sunbeam acquired The Coleman Company, Inc. ("Coleman") and two smaller companies. In order to finance this acquisition, Morgan Stanley underwrote a $750 million offering of convertible notes, and it also directly provided Sunbeam with an additional $680 million in secured financing.

2. In serving as an underwriter and in agreeing to extend the loan, Morgan Stanley relied on Sunbeam's financial statements, which had been audited and certified by Andersen, as well as Andersen's continued opinions about Sunbeam's financial condition. The Sunbeam financial statements painted a picture of Sunbeam as a company in the midst of an extraordinary financial turnaround.

3. In reality, unbeknownst to Morgan Stanley, Sunbeam's "turnaround" was an illusion. As became apparent in the summer of 1998 and as confirmed by Sunbeam's subsequent restatement of its financial results, the 1996 and 1997 statements that Andersen had certified — and upon which Morgan Stanley had relied — did not conform with generally accepted accounting principles ("GAAP"). Andersen, with full knowledge of the material misstatements

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contained in Sunbeam's financial reports, issued unqualified audit opinions for both 1996 and 1997. In so doing, it failed to perform its audit in accordance with generally accepted auditing standards ("GAAS").

4. As Andersen knew, the statements that it audited and certified were replete with accounting improprieties. As a consequence, Sunbeam's true financial condition was misstated by millions of dollars. In November 1998, when it restated its 1996 and 1997 financial results, Sunbeam revealed that, in 1996, it had overstated its operating losses by at least $40 million, thereby establishing an overly bleak financial backdrop against which the company's performance in 1997 would be measured. In 1997, by contrast, Sunbeam dramatically overstated its earnings. When 1997 operating earnings were eventually corrected and restated, they were $95 million less than the earnings originally reported — and approximately half of the figure that Andersen had previously certified.

5. Andersen's fraud ultimately forced Sunbeam and several of its subsidiaries to seek relief under Chapter 11 of the Bankruptcy Code in February 2001. As part of the bankruptcy court-approved reorganization plan, Morgan Stanley's $680 million loan to Sunbeam was discharged in full, and Morgan Stanley received Sunbeam stock valued at a small fraction of the original loan. In addition, as a result of Andersen's actions, the convertible notes issued by Sunbeam and held by Morgan Stanley had been rendered substantially less valuable.

6. As the Securities and Exchange Commission ("SEC") subsequently determined, in auditing and certifying Sunbeam's financial statements, Andersen completely disregarded its professional and legal obligations. It certified Sunbeam financial statements that it knew grossly mischaracterized the company's true financial condition. It ignored its duty to maintain

independence from its client, Sunbeam. It did so with full knowledge that Morgan Stanley would be harmed immensely by Andersen's deception.

7. By this complaint, Morgan Stanley seeks compensatory damages of several hundreds of millions of dollars. In addition, Morgan Stanley reserves the right to seek leave to amend its complaint pursuant to Fla. Stat. § 768.72 to assert claims for an additional recovery of punitive damages in excess of $1.2 billion as allowed by law.

THE PARTIES AND OTHER RELEVANT ENTITIES

8. Plaintiff Morgan Stanley & Co. Incorporated ("MS & Co.") is a financial services firm that engages in underwriting, investment banking, financial advisory services, securities sales and trading, and research. In late 1997 and early 1998, MS & Co. assisted Sunbeam in identifying potential acquisition targets and served as Sunbeam's financial advisor with respect to certain aspects of Sunbeam's acquisitions of Coleman, Signature Brands USA, Inc. and First Alert, Inc. MS & Co. also served as the underwriter of a $750 million offering of convertible notes that Sunbeam used to finance these acquisitions. MS & Co. is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York.

9. Plaintiff Morgan Stanley Senior Funding, Inc. ("MSSF") is a company that provides credit services to its clients. In 1998, MSSF entered into a credit agreement with Sunbeam under which MSSF agreed to provide a loan to Sunbeam in connection with Sunbeam's acquisition of Coleman and two smaller companies. Pursuant to the credit agreement, Sunbeam borrowed $680 million from MSSF, with the borrowings used by Sunbeam to fund certain costs relating to the acquisitions. MSSF is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York.

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10. Plaintiff Morgan Stanley is a financial services company. It owns 100 percent of the stock of both MS & Co. and MSSF. Morgan Stanley is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York. In this complaint, the term "Morgan Stanley" is used collectively to describe both Morgan Stanley and its two wholly-owned subsidiaries, MS & Co. and MSSF.

11. Defendant Andersen Worldwide, Société Coopérative Switzerland was a partnership organized under the Swiss Federal Code of Obligations. Its partners included more than 2,000 individuals from 390 offices in 84 countries. Various individuals who were partners of Andersen-Worldwide participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits. Andersen-Worldwide and Andersen-US dictated the policies and procedures to be used within Andersen throughout the world.

12. Defendant Arthur Andersen & Co. ("Andersen-Canada") was part of Andersen-Worldwide. Andersen-Canada participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits.

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

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

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

16. Defendant Arthur Andersen ("Andersen-UK") was part of Andersen-Worldwide. Andersen-UK participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits.

17. Defendant Arthur Andersen LLP ("Andersen-US") was part of Andersen-Worldwide. Andersen-US is a partnership formed under the laws of the State of Illinois. Once one of the world's largest accounting firms, almost all of its partners have left the firm. Andersen-US participated in and coordinated the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits. In addition, Andersen-US partners and employees provided consulting services to Sunbeam as part of due diligence work performed in conjunction with Sunbeam's acquisition of Coleman, as well as on other projects.

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

19. Defendant William Pruitt at all times material hereto was a partner of both Andersen-US and Andersen-Worldwide. He served as the concurring partner on the Sunbeam audits for at least 1996 and 1997.

20. Defendant Donald Denkhaus at all times material hereto was a partner of both Andersen-US and Andersen-Worldwide. Denkhaus served as the engagement partner on the

Sunbeam's ultimate restatement of its financial statements, as Audit Division Head and manager of Andersen's audit practice for the entire South Florida region.

21. The Coleman Company, Inc. was a leading manufacturer and marketer of consumer products for the worldwide outdoor recreation market. Coleman was a Delaware corporation, with its principal place of business in Kansas. Prior to March 30, 1998, Coleman (Parent) Holdings Inc. ("Coleman-Parent") owned 44,067,520 shares (or approximately 82 percent) of Coleman. Coleman-Parent is a Delaware corporation, with its principal place of business in New York and is a wholly-owned subsidiary of MacAndrews and Forbes Holdings, Inc. ("MAFCO"). MAFCO is a global investment firm owned and operated by financier Ronald O. Perelman. Through its various subsidiaries and affiliates, MAFCO owns and/or controls a number of multi-billion dollar global corporations, including Revlon, Inc., the international consumer cosmetics company. MAFCO is a Delaware corporation, with its principal place of business in New York.

22. Sunbeam Corporation through its operating subsidiaries and affiliates, manufactured, marketed, and distributed durable household and outdoor leisure consumer products through mass-market and other consumer channels. In 1998, Sunbeam purchased Coleman-Parent's controlling interest in Coleman for $2.2 billion. On February 6, 2001, Sunbeam and several of its affiliates filed a petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. Sunbeam has since emerged from bankruptcy and now operates under the name American Household.

JURISDICTION AND VENUE

23. This Court has jurisdiction over the subject matter of this action pursuant to Fla. Stat. § 26.012(2)(a) because Plaintiff seeks damages in excess of $15,000 exclusive of interest, costs and attorneys' fees. This Court has jurisdiction over Andersen-US, Andersen-Worldwide, Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela, and Andersen-UK pursuant to Fla. Stat. §§ 48.193(1)(a) and (f), (2) and/or (5).

24. This Court has personal jurisdiction over Andersen pursuant to Fla. Stat. § 48.193(2) because Andersen engaged in substantial business activities in the State of Florida. Additionally, this Court has personal jurisdiction over Andersen pursuant to Fla. Stat. § 48.193(1)(a) because the cause of action arises out of Andersen's activities in the State.

25. Venue is proper in this Court pursuant to Fla. Stat. §§ 47.011 and 47.021 because, when the actionable conduct described herein occurred, Andersen maintained an office with more than 30 employees and partners in West Palm Beach and therefore resided in Palm Beach County.

FACTUAL BACKGROUND

Andersen and Sunbeam's Fraudulent Scheme

26. In July 1996, to address its growing financial difficulties, Sunbeam hired Albert Dunlap as Chairman and Chief Executive Officer. Dunlap was a well-known "turnaround" specialist who had a history of brief tenures at other companies. He was nicknamed "Chainsaw Al" because of his practice of cutting staff and closing plants to achieve quick turnaround results.

27. Immediately after joining Sunbeam, Dunlap replaced almost all of top management with his own selections, hiring Russell A. Kersh (Chief Financial Officer); Donald R. Uzzi (Vice President, Marketing and Product Development, and later Executive Vice

President, Consumer Products Worldwide); Lee B. Griffith (Vice President, Sales); and Robert J. Gluck (Principal Accounting Officer).

28. Immediately after he was hired, Dunlap publicly predicted that, as a result of the Company's restructuring, Sunbeam would attain significant increases in its margins and sales.

29. Unbeknownst to the public and to Morgan Stanley, senior management established an overly dismal financial backdrop against which the company's performance in 1997 would be measured. Management decided to accomplish this task by recording improper expenses and taking unjustified accounting write-offs in their 1996 financial statements. In order to convince the public that their 1996 losses were real, however, Sunbeam needed an outside auditor to validate their financial reports.

30. Andersen stood ready to assist Sunbeam in its scheme. Andersen had a significant stake in retaining Sunbeam, a long-time major client. The company generated substantial income for Andersen, paying over $1 million in fees for its 1995 audit alone. Andersen also hoped to continue to receive lucrative consulting assignments from Sunbeam. Moreover, being dropped by a high-profile client such as Sunbeam would have been a severe blow to Andersen's reputation. Indeed, Andersen was so eager to keep Sunbeam as its client that it agreed to a 30 percent reduction in its 1996 audit fees.

31. After Dunlap assumed control of Sunbeam, Andersen had reason to fear that its relationship with Sunbeam was in jeopardy. Phillip Harlow, the Andersen engagement partner, knew that Dunlap had employed Coopers & Lybrand, one of Andersen's major competitors, as a financial consultant and independent auditor in past turnaround assignments. In fact, Dunlap had already engaged Coopers & Lybrand to assist in planning Sunbeam's massive restructuring.

32. Ultimately, Andersen's desire to retain a valuable client overrode any sense of duty or professionalism, and it capitulated to Sunbeam's demand that it sanction the improper accounting treatments used by the company's senior management.

Andersen's Worldwide Operations

33. Andersen operated through a global network of international offices, branches and subsidiaries of the U.S. partnership, a structure called the Andersen Worldwide Organization. The Andersen network worked as "one firm" and maintained this "one firm" identity through a variety of mechanisms. Partners (or equivalents) in its various branches were also partners of Andersen-Worldwide, resulting in a global partnership of more than 2,000 individuals from 390 offices in 84 different countries. In addition to overlapping partners, Andersen-Worldwide and Andersen-US shared officers in common. Moreover, Andersen-Worldwide set uniform professional standards for all its offices and required its international offices to agree to be bound by those professional standards and principles. Andersen-Worldwide coordinated the sharing of costs and allocation of revenues and profits among its partners and its offices around the world. Andersen-Worldwide operated under a worldwide tax structure. In addition, Andersen-Worldwide handled all borrowing on behalf of its international offices and maintained those offices' financial records, payroll, and employee health benefits plans. All of Andersen's offices also shared global computer operations and training facilities.

34. Andersen applied the "one firm" approach in its work with Sunbeam. Top partners responsible for the Sunbeam audits and restatement were partners of both Andersen-US and Andersen-Worldwide, including the engagement partner on the Sunbeam audits, Phillip Harlow; the concurring partner on those audits, William Pruitt; and the engagement partner on the Sunbeam restatement, Donald Denkhaus.

35. In addition, various international offices of Andersen-Worldwide did substantial work for Sunbeam. Sunbeam was a multinational corporation with operations in Canada, Mexico, Venezuela, Hong Kong, and Europe. The engagements required the participation of auditors from each of those countries and numerous American cities. Harlow, on behalf of both Andersen-US and Andersen-Worldwide, developed work plans that he circulated to Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela, and Andersen-UK. Those offices worked together with Harlow and others to complete the tasks outlined in the plan and sent their work product to Harlow for inclusion in an Andersen-Worldwide Management Letter.

The Fraudulent 1996 Financial Statements

36. In 1996, after Dunlap took control of Sunbeam, Andersen permitted Sunbeam management to employ numerous accounting practices that — as Sunbeam's restatement of its 1996 financial statements and an SEC investigation later showed — did not comply with GAAP.

37. Among other things, Sunbeam's 1996 financial statements, certified by Andersen, did not comply with the accounting principles of (1) reliability, Financial Accounting Standards Board ("FASB") Statement of Financial Accounting Concepts No. 2, §§ 58-97; Accounting Principles Board ("APB") Statement No. 4, §§ 109, 138, 189; (2) completeness, FASB Statement of Financial Accounting Concepts No. 2, §§ 79, 80; APB Statement No. 4, § 94; (3) conservatism, FASB Statement of Financial Accounting Concepts No. 2, §§ 91-97; APB Statements No. 9, §§ 35, 71; (4) neutrality, FASB Statement of Financial Accounting Concepts No. 2, §§ 98-110; or (5) relevance, FASB Statement of Financial Accounting Concepts No. 2, §§ 47, 48.

38. Among the accounting frauds that Andersen knowingly allowed was the artificial inflation of Sunbeam's reserves. Because the reserves were charged as an expense against income, this accounting practice allowed Sunbeam to overstate the 1996 loss against which its 1997 financial results would be compared.

39. For example, Sunbeam created a $338 million reserve for "restructuring" charges. As the November 1998 restatement made clear, included in these charges were costs of redesigning product packaging; costs of relocating employees and equipment; bonuses to be paid to employees who were told that they were being laid off but were asked to stay on temporarily; advertising expenses; and certain consulting fees. Because these items benefited future activities, GAAP did not permit them to be classified as restructuring charges. Andersen also permitted Sunbeam to violate GAAP by creating a $12 million reserve for a lawsuit alleging that Sunbeam was liable for cleanup costs associated with a hazardous waste site, even though Sunbeam's estimated liability was, at best, half that amount.

40. Andersen also permitted Sunbeam improperly to write down its household products inventory in 1996. In connection with the restructuring, Sunbeam had decided to eliminate half of Sunbeam's product lines and to liquidate its inventory of those product lines. Although only half of Sunbeam's product lines were eliminated, Andersen allowed Sunbeam to apply, at year-end 1996, the special accounting treatment that it had accorded the eliminated lines to its entire inventory of household products. As a result, as the November 1998 financial restatement later showed, Sunbeam understated the balance sheet value of its inventory at year-end 1996 by approximately $2 million and overstated its 1996 loss by the same amount.

41. Andersen also allowed management improperly to recognize, as a 1996 expense, $2.3 million in 1997 advertising expenses and related costs. In addition, Andersen permitted

Sunbeam to manipulate its 1996 liabilities for "cooperative advertising." It was Sunbeam's practice to fund a portion of its retailers' costs of running local promotions. As required by GAAP, Sunbeam accrued its estimated liabilities for this expense. At year-end 1996, Sunbeam set its cooperative advertising accrual at an inflated value of $21.8 million. According to the November 1998 restatement, this accrual was improper under GAAP because it was approximately 25 percent higher than the prior year's accrual amount, without a proportional increase in sales providing a basis for the increase. Ultimately, as the November 1998 restatement showed, $5.8 million of that excessive accrual was used (without disclosure) to inflate Sunbeam's 1997 income.

Andersen's 1996 Unqualified Audit Opinion

42. In the course of auditing Sunbeam's 1996 financial statements, Andersen became aware of these improper accounting practices. Indeed, it questioned a Sunbeam employee about the restructuring reserves and was told that the reserve included "everything but the kitchen sink." Harlow, the Andersen engagement partner, raised the issues with Kersh and Gluck and proposed that Sunbeam reverse certain of its improper entries. But when Kersh and Gluck rejected these proposals, Andersen backed down.

43. In March 1997, Andersen issued an unqualified audit opinion regarding Sunbeam's 1996 financial statements and authorized the inclusion of its audit opinion in Sunbeam's 1996 Form 10-K filed with the SEC. Despite its knowledge of the many improper accounting practices that Sunbeam's management had employed, Andersen's opinion stated:

> We conducted our audits in accordance with generally accepted auditing standards.
>
> Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements

> are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.
>
> In our opinion, the financial statements . . . present fairly, in all material respects, the financial position of Sunbeam Corporation and subsidiaries as of December 31, 1995 and December 29, 1996, and the results of their operations and their cash flows for each of the three fiscal years in the period ended December 29, 1996 in conformity with generally accepted accounting principles.

44. Andersen also knowingly provided false descriptions of certain of Sunbeam's specific accounting practices. For example, it characterized Sunbeam's treatment of its restructuring charges in Note 2 to the audited 1996 consolidated financial statements as follows:

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

In fact, however, Andersen knew that Sunbeam had improperly inflated its restructuring costs by millions of dollars.

45. Andersen's 1996 audit violated GAAS because, among other things, Andersen failed (1) to perform the audits with an attitude of professional skepticism as required by the Statement on Auditing Standards ("SAS") No. 53; (2) to conclude that there was a significant

risk that Sunbeam management would intentionally distort the company's financial statements, in violation of American Institute of Certified Public Accountants Professional Standards, AU §§ 316.10 and 316.12; (3) to recognize that the accounting policies employed by Sunbeam were not acceptable in the circumstances, in violation of AU § 316.19; (4) to obtain sufficient competent evidential matter through inspection, observation, inquiries, and confirmations to afford a reasonable basis for its opinions regarding Sunbeam's financial statements, in violation of AU § 150.02; (5) to exercise due professional care in the performance of the audit, in violation of AU § 150.02; (6) to plan the work adequately to uncover the errors and irregularities in Sunbeam's accounting information, in violation of AU § 150.02; and (7) to obtain a sufficient understanding of Sunbeam's internal control structure to plan the audits and to determine the nature, timing, and extent of tests to be performed, in violation of AU § 150.02.

46. In addition, in conducting the 1996 audit, Andersen (1) improperly relied on management representations rather than applying the auditing procedures necessary to afford a reasonable basis for an opinion on Sunbeam's financial statements, in violation of SAS No. 19 (AU § 333.02); (2) failed to recognize that misstatements resulting from misapplication of GAAP, departures from fact, and omissions of necessary information, in aggregate, caused Sunbeam's financial statements to be materially misstated, in violation of SAS No. 47 (AU § 312.04); (3) failed to issue a qualified or adverse opinion, in violation of SAS No. 47 (AU § 312.31); and (4) improperly concluded that the accounting principles applied by Sunbeam were appropriate in the circumstances and that Sunbeam's financial statements were informative of matters that could affect their use, understanding, and interpretation, in violation of SAS No. 69 (AU §§ 411.04(b) and (c)).

47. In all, the 1996 financial statements audited by Andersen were materially false and misleading and overstated Sunbeam's operating losses for 1996 by at least $40 million. Moreover, Andersen's unqualified audit opinion was false in at least two material respects. First, the financial statements that Andersen audited did not "fairly" present Sunbeam's financial

position in conformity with GAAP, as it represented. Second, Andersen had not, as it claimed, conducted its audit in accordance with GAAS.

The Fraudulent 1997 Financial Statements

48. The accounting frauds in which Andersen permitted Sunbeam to engage in 1997 were aimed at inflating the company's earnings. To accomplish this — as the November 1998 restatement and an SEC investigation subsequently showed — Andersen allowed Sunbeam to record fraudulent sales, to account improperly for one-time events, and improperly to use "cookie-jar" reserves, all in violation of GAAP.

49. Among other things, Sunbeam's 1997 financial statements, certified by Andersen, did not comply with the accounting principles of (1) reliability, FASB Statement of Financial Accounting Concepts No. 2, §§ 58-97; APB Statement No. 4, §§ 109, 138, 189; (2) completeness, FASB Statement of Financial Accounting Concepts No. 2, §§ 79, 80; APB Statement No. 4, § 94; (3) conservatism, FASB Statement of Financial Accounting Concepts No. 2, §§ 91-97; APB Statements No. 9, §§ 35, 71; (4) neutrality, FASB Statement of Financial Accounting Concepts No. 2, §§ 98-110; or (5) relevance, FASB Statement of Financial Accounting Concepts No. 2, §§ 47, 48.

50. According to the November 1998 restatement, one of the revenue inflation tactics permitted by Andersen in 1997 was Sunbeam's improper accounting for "bill-and-hold" sales. A bill-and-hold sale occurs when a seller bills a customer for a purchase while retaining the merchandise for later delivery. During 1997, Dunlap's management team offered financial incentives to various customers to purchase products. Under GAAP, revenue under bill-and-hold transactions may be recognized only if, among others things, the buyer — not the seller — requests a sale on that basis. As Andersen subsequently learned in the course of its 1997 audit, the purported bill-and-hold customers had not requested that treatment, and, in numerous cases, the risks of ownership and legal title were never passed to the customer. According to the

November 1998 restatement, Sunbeam added more than $29 million to Sunbeam's 1997 sales and $4.5 million to income by improperly accounting for these transactions.

51. Another income-boosting tactic that Andersen sanctioned was Sunbeam's improper use of its inflated 1996 reserves, which the November 1998 restatement later showed artificially increased the company's 1997 income by almost $5 million. Andersen also let Sunbeam improperly treat $19 million that it received from the sale of discounted and obsolete inventory as ordinary income. Although the recognition of that revenue was permitted under GAAP, Sunbeam was required to disclose that revenue as a non-recurring event. Sunbeam failed to do so, again with Andersen's blessing.

52. In addition, Andersen allowed Sunbeam's Hong Kong and Canadian subsidiaries to book sales that violated applicable accounting principles because they included an unlimited right to return unsold merchandise and because the amount of future returns on such sales could not reasonably be estimated. The November 1998 restatement showed that, on Andersen's watch, Sunbeam's Hong Kong subsidiary improperly recorded sales revenue of $8.6 million from various sales made during the fourth quarter of 1997.

53. Andersen also permitted Sunbeam to employ several improper accounting tricks with respect to its Mexican subsidiary. According to the November 1998 restatement, that subsidiary engaged in $900,000 in bill-and-hold transactions in 1997 that should not have been recognized as income until 1998. In addition, the subsidiary's inventory was overvalued by $2 million, and the financial statements for Sunbeam's Mexico operations failed to include $3 million expense for the profit sharing obligations of that business. According to the November 1998 restatement, Sunbeam's Venezuela subsidiary also improperly valued its inventory.

54. As a result of these and other improper accounting devices, in 1997, Sunbeam reported $186 million in income, much of which was, according to the November 1998 restatement, improper under GAAP. In all, the overstatements included over $90 million of

improper net income, including approximately $10 million from a sham sale of inventory to a contractor, approximately $4.5 million from non-GAAP bill-and-hold sales, approximately $35 million in income derived from the use of non-GAAP reserves and accruals taken at year-end 1996 and approximately $6 million from improper revenue recognition.

Sunbeam's Purchase of Coleman

55. Toward the end of 1997, Sunbeam's senior management initiated an effort to sell the company. Sunbeam engaged Morgan Stanley to advise it with respect to the possible sale of its core businesses and/or the initiation of one or more major acquisitions. Ultimately, Coleman, Signature Brands USA, Inc. and First Alert, Inc. were identified as three companies interested in being acquired by Sunbeam.

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

57. On February 3, 1998, Harlow met with key officers of Sunbeam to discuss the acquisition of Coleman and its financial impact on Sunbeam. By that time, as a result of reviewing Sunbeam's 1997 financial statements in the course of its audit, Andersen knew that Sunbeam's 1997 results were false.

58. On February 20, 1998, Andersen agreed to act as a Sunbeam financial advisor and perform financial due diligence in connection with Sunbeam's acquisition of Coleman, First Alert, and Signature Brands, further compromising its duty as an auditor to maintain its independence from its client. In agreeing to undertake that assignment, Andersen became an active member of the team working to assist Sunbeam in its acquisitions. Andersen employees who worked on Sunbeam's audit also served as members of Sunbeam's due diligence team in connection with Sunbeam's acquisition of Coleman.

59. On February 27, 1998, Sunbeam's Board of Directors met in New York to discuss Sunbeam's possible purchase of Coleman. During the February 27, 1998 meeting, Morgan Stanley provided Sunbeam's Board of Directors with a written "fairness" opinion regarding the fair acquisition price of Coleman. The opinion made clear that, even in the context of issuing a fairness opinion on the Coleman acquisition price, Morgan Stanley had relied upon Andersen's representations regarding Sunbeam's financial health. The fairness opinion explicitly stated that Morgan Stanley had reviewed "certain publicly available financial statements and other information" of Sunbeam. The opinion advised that Morgan Stanley had "assumed and relied upon without independent verification the accuracy and completeness of the information reviewed by us for the purposes of this opinion."

60. The Sunbeam Board of Directors approved the Coleman acquisition. That same day, Coleman-Parent — the 82 percent shareholder of Coleman — agreed to sell Coleman to Sunbeam for a purchase price of $2.2 billion. Sunbeam agreed to provide Coleman-Parent with $160 million in cash, to assume $584 million in Coleman-related debt, and to provide Coleman-Parent with 14,099,749 shares of Sunbeam stock. Sunbeam also agreed to purchase Signature Brands and First Alert for approximately $300 million.

Andersen's 1997 Unqualified Audit Opinion

61. In the first week of March 1998, shortly after the agreement for Sunbeam's purchase of Coleman was signed, but before the transaction closed, Andersen rendered an unqualified audit opinion for Sunbeam's 1997 financial statements. With Andersen's express consent, management included that opinion in Sunbeam's 1997 Form 10-K filed with the SEC on March 6, 1998.

62. Andersen was well aware of the potential for fraud in Sunbeam's 1997 books, including the risk that Sunbeam management would attempt to claim profits and revenue on transactions before the earnings process was completed. Harlow specifically advised Andersen's foreign offices (including Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico,

Andersen-Venezuela and Andersen-UK), for example, that Dunlap had made promises to the public regarding earnings-per-share to be attained in 1997, and that management had a vested interest in achieving the promised earnings levels because management's primary form of compensation was based on the company's stock price. Harlow also noted the presence of the possibility of a third-party purchase of the company's stock or assets.

63. In the course of its audit of Sunbeam's 1997 financial records, Andersen learned Harlow's concerns were well founded. It discovered that Sunbeam had improperly accounted for certain bill-and-hold sales, had misused its reserves, and had overvalued its inventories. Andersen discussed these problems with Sunbeam's senior management and proposed that Sunbeam reverse these improper entries. But Sunbeam's senior management refused to do so. Rather than insisting that the adjustments be made, Andersen permitted the entries.

64. Once again, Andersen gave Sunbeam a clean bill of financial health. In its opinion concerning Sunbeam's 1997 financial statements, Andersen stated:

> We conducted our audits in accordance with generally accepted auditing standards. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.
>
> In our opinion, the financial statements . . . , present fairly, in all material respects, the financial position of Sunbeam Corporation and subsidiaries as of December 29, 1996 and December 28, 1997, and the results of its operations and its cash flows for each of the three fiscal years in the period ended December 28, 1997 in conformity with generally accepted accounting principles.

65. In fact, Andersen's 1997 audit violated GAAS because, among other things, Andersen had failed (1) to perform the audits with an attitude of professional skepticism as

required by SAS No. 53; (2) to reach a conclusion that there existed a significant risk of intentional distortion of financial statements by Sunbeam management, in violation of AU §§ 316.10 and 316.12; (3) to recognize that the accounting policies employed by Sunbeam were not acceptable in the circumstances, in violation of AU § 316.19; (4) to obtain sufficient competent evidential matter through inspection, observation, inquiries, and confirmations to afford a reasonable basis for its opinions regarding Sunbeam's financial statements, in violation of AU § 150.02; (5) to exercise due professional care in the performance of the audit, in violation of AU § 150.02; (6) to plan the work adequately to uncover the errors and irregularities in Sunbeam's accounting information, in violation of AU § 150.02; and (7) to obtain a sufficient understanding of Sunbeam's internal control structure to plan the audits and to determine the nature, timing, and extent of tests to be performed, in violation of AU § 150.02.

66. In addition, in conducting the 1997 audit, Andersen (1) improperly relied on management representations rather than applying the auditing procedures necessary to afford a reasonable basis for an opinion on Sunbeam's financial statements, in violation of SAS No. 19 (AU § 333.02); (2) failed to recognize that misstatements resulting from misapplication of GAAP, departures from fact and omissions of necessary information, in aggregate, caused Sunbeam's financial statements to be materially misstated, in violation of SAS No. 47 (AU § 312.04); (3) failed to issue a qualified or adverse opinion, in violation of SAS No. 47 (AU § 312.31); (4) improperly concluded that the accounting principles applied by Sunbeam were appropriate in the circumstances and that Sunbeam's financial statements were informative of matters that could affect their use, understanding and interpretation, in violation of SAS No. 69 (AU §§ 411.04(b) and (c)); and (5) failed to report that a change in the application of accounting principles in Sunbeam's 1997 financial statements had materially affected their comparability with the financial statements for prior periods, especially 1996, due to a different treatment of sales and reserves in those periods, in violation of SAS Nos. 1 and 43 (AU § 420.02).

67. In all, the 1997 financial statements audited by Andersen reported operating income of $186 million — an overstatement of at least 50 percent. Like its 1996 unqualified audit opinion, Andersen's 1997 opinion was false in two material respects. First, the financial statements Andersen audited did not "fairly" present Sunbeam's financial position in conformity with GAAP, as it represented. Second, Andersen had not, as it claimed, conducted its audit in accordance with GAAS.

Morgan Stanley's Reliance on Andersen's Unqualified Audit Opinions

68. After it agreed to acquire Coleman, First Alert, and Signature Brands, Sunbeam needed to raise approximately $2.3 billion to refinance existing debt and to fund these acquisitions. To accomplish these financing objectives, Sunbeam's management elected to issue $500 million in subordinated convertible notes (an amount later increased to $750 million) (the "Convertible Note Offering") and enter into a new $2 billion senior credit agreement (later reduced to $1.7 billion) with secured lenders (the "Bank Facility"). Morgan Stanley served as the lead underwriter for the Convertible Note Offering and as the Syndication Agent for the Bank Facility. Morgan Stanley also coordinated the Bank Facility with First Union and Bank of America, Sunbeam's other secured lenders.

69. Andersen knew of these proposed financing arrangements. Specifically, Andersen knew that the Coleman and other acquisitions would not close unless Sunbeam secured the financing necessary to cover the acquisition prices. Moreover, Andersen knew that Morgan Stanley was a principal participant in the Bank Facility, and that Morgan Stanley would be relying on the representations Andersen made regarding Sunbeam's financial condition. Indeed, Andersen knew that documents issued in connection with the Convertible Note Offering clearly stated that "[Sunbeam] is currently negotiating the terms of the New Credit Facility with a group of banks which [Sunbeam] expects will provide for borrowings by [Sunbeam] or one or more of its subsidiaries in the aggregate principal amount of $2.0 billion. *The New Credit Facility is being arranged by an affiliate of [Morgan Stanley].*"

70. In addition to its knowledge of Morgan Stanley's role in Sunbeam's acquisitions, Andersen had many reasons to know that Morgan Stanley would rely on Sunbeam's audited financial statements. To begin with, Andersen, in its substantial experience working on multi-billion dollar mergers and acquisitions, understood that Sunbeam's lenders and underwriters would rely on an auditor's certification of Sunbeam's financial condition. As would any lender engaged in a deal of this scale, Morgan Stanley looked to the financial statements provided by Sunbeam and audited by Andersen to evaluate annual cash flow and to assess Sunbeam's ability, following the acquisition, to promptly and comfortably pay interest and ultimately pay back the loan. Indeed, reasonable and professional lenders such as Morgan Stanley, Bank of America, and First Union would not have loaned over $1 billion dollars to any person or entity without strong assurance that their money would be returned.

71. Not only was Andersen aware that any prudent business in Morgan Stanley's position *would* rely on Andersen's financial statements, but Andersen also knew that Morgan Stanley *was* specifically relying on Andersen's certifications. Indeed, Andersen *itself* had expressly represented to Morgan Stanley that Sunbeam's financial statements were truthful and that Andersen's unqualified audit opinions were reliable. On March 19, 1998, Andersen sent Morgan Stanley a "comfort" letter stating that, in Andersen's opinion, "the consolidated financial statements [for 1996 and 1997] audited by [Andersen] and included in the Offering Memorandum comply as to form in all material respects with the applicable accounting requirements of the [Securities Act of 1933] and the related published rules and regulations." In a follow-up letter dated March 25, 1998, Andersen reaffirmed its previous representation.

72. In addition, Andersen participated in meetings and telephone calls in which it represented to Morgan Stanley that Sunbeam's audited financial statements were accurate.

73. Andersen also knew that Morgan Stanley had stated in a February 27, 1998 "fairness" letter that Morgan Stanley presented to Sunbeam's Board of Directors that Morgan

Stanley had assumed and relied upon the accuracy and completeness of Sunbeam's audited financial statements.

74. In addition, Andersen knew that Sunbeam had expressly represented, in loan negotiations with Morgan Stanley, that Andersen's audit opinions were accurate. Specifically, Andersen knew that, in the Sunbeam-Morgan Stanley credit agreement, Sunbeam warranted that it had provided Morgan Stanley with accurate information regarding Sunbeam's consolidated statements of operations, stockholders' equity and cash flows, as well as its consolidated balance sheets. According to Sunbeam, its financial statements — certified by Andersen — "present[ed] fairly, in all material respects, the financial position and results of operations and cash flows . . . in accordance with GAAP."

75. Similarly, Andersen knew that, in connection with the Convertible Note Offering, Sunbeam had included its 1996 and 1997 audited financial statements in its March 19, 1998 offering memorandum and had represented to Morgan Stanley that its audited financial statements were reliable.

76. Andersen also knew that, as part of the Coleman merger agreement executed on February 27, 1998, Sunbeam had represented and warranted that all of its filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate and not misleading, and that they would continue to be accurate and not misleading as of the transaction's closing date. Sunbeam further represented that its audited financial statements were prepared in accordance with GAAP, and that at the time of the closing of the transaction, that representation would continue to be true and correct.

77. Significantly, although it knew that Morgan Stanley had based multi-million dollar financing decisions on its representations, Andersen did not tell Morgan Stanley of the accounting concerns that it had raised with Sunbeam management in the course of its 1996 and 1997 audits or that Sunbeam's financial statements had not been fairly stated in 1996 and 1997.

78. On March 25, 1998, the $750 million Convertible Note Offering closed.

79. Sunbeam closed its acquisition of Coleman on March 30, 1998. On that date, Sunbeam, through a wholly owned subsidiary, acquired approximately 81 percent of the then-outstanding shares of Coleman common stock. These shares were acquired by Sunbeam in exchange for 14,099,749 shares of Sunbeam's common stock and approximately $160,000,000 in cash. In addition, Sunbeam assumed or repaid approximately $1,016,000,000 in debt belonging to Coleman and Coleman-Parent. Included in the repaid debt portion of the transaction was an immediate cash payment by Sunbeam to Coleman-Parent of $590 million.

80. Morgan Stanley and Sunbeam closed the Bank Facility on March 31, 1998. In accordance with the terms of the Bank Facility, Morgan Stanley — unaware of the falsity of Sunbeam's financial statements and Andersen's audit reports — loaned Sunbeam $680 million in immediately available funds to be used for the acquisitions. First Union, which served as the Administrative Agent for the Bank Facility, loaned Sunbeam an additional $510 million. Bank of America, which served as the Documentation Agent for the Bank Facility, loaned Sunbeam an additional $510 million.

81. As Andersen knew, Morgan Stanley had relied on Sunbeam's report of $186 million in income in deciding to underwrite the Convertible Note Offering and to loan Sunbeam $680 million. Moreover, Andersen knew that the Sunbeam-Morgan Stanley credit agreement provided that a condition precedent to Morgan Stanley's obligations under the agreement was the absence of any event, change, or development that would have a material adverse effect on the business, results of operation, or financial condition of Sunbeam. Andersen knew that an additional condition precedent to Morgan Stanley's obligations was the absence of any material misrepresentation or omissions in Sunbeam's SEC filings, including Andersen's 1996 and 1997 audit reports in the Form 10-Ks.

82. But for Andersen's fraud and its failure to issue qualified or adverse reports exposing the falsity of Sunbeam's financial statements, Morgan Stanley would have had notice of an adverse material change affecting Sunbeam before funding, and of a material misstatement

in Sunbeam's SEC filings. Not only would Morgan Stanley never have agreed to underwrite the Convertible Note Offering, but Morgan Stanley's obligation to loan Sunbeam $680 million also would have been discharged by the failure of conditions precedent to its obligations under the credit agreement. Andersen's fraud directly caused the extensive losses that Morgan Stanley suffered.

Andersen's Improper Accounting and Misrepresentations Are Revealed

83. In an April 3, 1998 conference call with securities analysts, Sunbeam revealed that sales for the first quarter of 1998 were 5 percent below reported sales for the same period of the prior year.

84. On April 22, 1998, a class of Sunbeam shareholders sued Sunbeam and its senior officers in the United States District Court for the Southern District of Florida, alleging that the company had violated the securities laws by issuing materially false and misleading statements regarding Sunbeam's financial condition. Andersen was subsequently added as a defendant in this lawsuit.

85. On June 8, 1998, an article was published in Barron's that raised serious questions regarding Sunbeam's apparent success under Dunlap, suggesting that it was the result of "accounting gimmickry." On June 15, 1998, Sunbeam's Board announced that it had removed Dunlap as Chairman and CEO. On June 17, 1998, Sunbeam received a letter from the SEC informing it that the SEC had initiated an investigation into the company.

86. Andersen continued to stand behind its fraudulent audit opinions. On June 15, 1998, Andersen allowed Sunbeam's Board of Directors to assert that Andersen had "assured the Board that Sunbeam's audited financial statements [were] accurate in all material respects." It was not until June 25, 1998 — when Andersen withheld its consent for use of its 1997 audit opinion in a registration statement that was to have been filed with the SEC — that Andersen gave any hint that its unqualified audit opinions were unreliable.

16div-012258

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

88. On August 6, 1998, Sunbeam announced that its Audit Committee had determined that Sunbeam would be required to restate its audited financial statements for 1997 and possibly for 1996, as well as its unaudited financial statements for the first quarter of 1998. On October 20, 1998, Sunbeam and Andersen announced a restatement of its 1996 and 1997 financial statements.

89. Holders of the convertible notes sued Sunbeam on October 30, 1998, and Andersen was later named as a defendant in that suit.

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

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

Sunbeam Declares Bankruptcy

92. On February 6, 2001, as a direct result of the deceit that Andersen had facilitated, Sunbeam and several of its subsidiaries were forced to seek relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. As part of the bankruptcy court-approved reorganization plan, Morgan Stanley's $680 million loan to Sunbeam was discharged in full, and Morgan Stanley received Sunbeam stock valued at a fraction of the original loan. In addition, as a result of Andersen's actions, the convertible notes issued by Sunbeam and held by Morgan Stanley had been rendered substantially less valuable.

Subsequent Censure of Andersen's Conduct

93. Both courts and regulators have scrutinized Andersen's facilitation of Sunbeam's fraud. In their judgments against the firm and Harlow, they have denounced Andersen's conduct.

94. In December 1999, for example, the federal court presiding over the Sunbeam shareholders' class action lawsuit refused to dismiss the claims against Andersen. The court concluded that the class plaintiffs had alleged sufficient facts "to demonstrate that Arthur Andersen had acted with severe recklessness in issuing its misleading [1997] Unqualified Audit Opinion." *In re Sunbeam Sec. Litig.*, 89 F. Supp. 2d 1326, 1344 (S.D. Fla. 1999). Andersen subsequently settled this lawsuit in 2001 for $110 million.

95. On May 15, 2001, the SEC filed a civil action in the United States District Court for the Southern District of Florida against five former Sunbeam officers and Harlow, Andersen's engagement partner.

96. In January 2003, the SEC settled its charges with Harlow. In its settlement order, it made numerous factual findings regarding Harlow and Andersen's improper conduct. It concluded that Harlow had proposed, on many occasions, adjustments to rectify Sunbeam's false financial statements. After management refused to make these adjustments, Harlow improperly acceded to that decision. *In re Phillip E. Harlow*, Rel. No. 34-47261, 2003 WL 169818, at **1-3 (SEC Release Jan. 27, 2003).

97. The SEC's assessment of Harlow's conduct was damning. Among many other things, it concluded that Harlow (1) "failed to exercise professional skepticism when performing audit procedures and gathering and analyzing audit evidence"; (2) "accepted uncorroborated representations of Sunbeam's management in lieu of performing appropriate audit procedures"; (3) "failed to exercise due professional care in performing the audit and preparing the audit report"; (4) "failed to perform sufficient audit procedures to determine whether the financial statements were in conformity with GAAP," even after he had "identified a number of audit risks and accounting issues associated with the Sunbeam engagement"; and (5) "failed to obtain sufficient competent evidential matters through inspection, observation, inquiries, and confirmation to afford a reasonable basis for an audit opinion." *Id.* at *4. Based on these factual findings, the Commission concluded that the 1996 and 1997 financial statements that Harlow had audited were not in conformity with GAAP, and the audit was not performed in accordance with GAAS. *Id.* (citing AU §§ 410, 411, 508.07).

98. Other participants in the Coleman acquisition have also sued Andersen for its fraudulent conduct. On July 1, 2001, Coleman-Parent sued Andersen for fraudulent misrepresentation, fraudulent inducement to contract, and negligent misrepresentation. Andersen subsequently agreed to settle that dispute for an undisclosed amount.

COUNT I

Fraudulent Misrepresentation

99. Paragraphs 1 through 98 are repeated and realleged as if set forth herein.

100. Andersen consented to the publication of its audit reports to the public and business world by permitting Sunbeam to include them in Sunbeam's SEC filings. Given that publication, Andersen knew and intended that the public — including Morgan Stanley — would rely on Andersen's representations.

101. Andersen knew of Morgan Stanley's role in Sunbeam's acquisitions. Andersen also knew that Morgan Stanley would rely and had relied upon Andersen's 1996 and 1997

16div-012261

unqualified audit opinions for the particular purpose of determining whether to underwrite the Convertible Note Offering and to provide Sunbeam with a loan for $680 million. Andersen itself invited Morgan Stanley to rely on its unqualified audit opinions, expressly representing to Morgan Stanley, in letters dated March 19, 1998, and March 25, 1998, that Sunbeam's financial statements were truthful and that Andersen's unqualified audit opinions were reliable. Moreover, Andersen knew that Morgan Stanley had provided Sunbeam's Board of Directors with a "fairness" letter expressly stating that Morgan Stanley had assumed and relied upon the accuracy and completeness of Sunbeam's audited financial statements.

102. Andersen also knew of Sunbeam's proposed financing arrangements, and it participated in meetings and telephone calls in which it represented to Morgan Stanley that Sunbeam's audited financial statements were accurate.

103. In addition, Andersen knew that Sunbeam had expressly represented, in loan negotiations with Morgan Stanley, that Andersen's audit opinions were accurate and that, in the Sunbeam-Morgan Stanley credit agreement, Sunbeam had warranted that it had provided Morgan Stanley with accurate information regarding its consolidated statements of operations, stockholders' equity and cash flows, as well as its consolidated balance sheets. Similarly, Andersen knew that, in connection with the Convertible Note Offering, Sunbeam had included its 1996 and 1997 audited financial statements in its March 19, 1998 offering memorandum and had represented to Morgan Stanley that its audited financial statements were reliable.

104. Andersen also knew that, as part of the Coleman merger agreement executed on February 27, 1998, Sunbeam had represented and warranted that all of its filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate, not misleading, and prepared in accordance with GAAP, and that they would continue to be accurate and not misleading as of the transaction's closing date.

105. Andersen knew that Sunbeam's financial statements were replete with accounting irregularities and that the information in Sunbeam's 1996 and 1997 financial statements was

materially false and misleading. Those material misrepresentations included, among other things, overstatements of (a) Sunbeam's 1996 operating losses by approximately $40 million; (b) its 1996 losses from continuing operations by approximately $26 million; (c) its 1996 net losses by approximately $20 million; (d) its 1997 operating earnings by approximately $95 million; (e) its 1997 earnings from continuing operations by over $70 million; (f) its 1997 net earnings by approximately $70 million; and (g) its 1997 operating income figure by approximately 50 percent.

106. In addition, Andersen knew that its 1996 and 1997 unqualified audit opinions were materially false and misleading. Andersen knew that it had falsely stated, among other things, that (a) Sunbeam's financial statements fairly presented the financial position of Sunbeam during 1996 and 1997; (b) Sunbeam's financial statements fairly presented the results of Sunbeam's operations and cash flows during 1996 and 1997; (c) Sunbeam's financial statements conformed with GAAP; and (d) its audits of Sunbeam were conducted in accordance with GAAS.

107. Although Andersen knew that Morgan Stanley would rely and had relied on its false statements, it did not inform Morgan Stanley that the unqualified audit opinions it had provided were materially false or that Sunbeam's financial statements contained numerous misstatements of material facts.

108. Andersen made its materially false representations regarding its unqualified audit opinions and the accuracy of Sunbeam's financial statements with the intent to deceive Morgan Stanley.

109. Andersen knew that the false information that it had provided to Morgan Stanley, and its intentional failure to correct the misrepresentations contained in Sunbeam's financial statements, would be critical to Morgan Stanley's decision to participate in the financing of Sunbeam's acquisitions. But for Andersen's fraudulent representations, Morgan Stanley would

not have underwritten the Convertible Note Offering, nor would it have loaned Sunbeam $680 million.

110. As a direct result of Andersen's fraud, Morgan Stanley has suffered hundreds of millions of dollars in damages.

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

111. Paragraphs 1 through 110 are repeated and realleged as if set forth herein.

112. Sunbeam's 1996 and 1997 financial statements contained false statements of material fact. Those material misrepresentations included, among other things, overstatements of (a) Sunbeam's 1996 operating losses by approximately $40 million; (b) its 1996 losses from continuing operations by approximately $26 million; (c) its 1996 net losses by approximately $20 million; (d) its 1997 operating earnings by approximately $95 million; (e) its 1997 earnings from continuing operations by over $70 million; (f) its 1997 net earnings by approximately $70 million; and (g) its 1997 operating income figure by approximately 50 percent.

113. Andersen knew that its 1996 and 1997 unqualified audit opinions were materially false and misleading. Andersen knew that it had falsely stated, among other things, that (a) Sunbeam's financial statements fairly presented the financial position of Sunbeam during 1996 and 1997; (b) Sunbeam's financial statements fairly presented the results of Sunbeam's operations and cash flows during 1996 and 1997; (c) Sunbeam's financial statements conformed with GAAP; and (d) its audits of Sunbeam were conducted in accordance with GAAS.

114. Both Sunbeam and Andersen knew that their representations regarding Sunbeam's 1996 and 1997 financial statements were false when made and/or made these representations with reckless disregard as to their truth.

115. Andersen, Harlow, Dunlap, Kersh, and other senior Sunbeam executives acted in concert and wrongfully conspired to create the appearance that Sunbeam was performing at a high level in order artificially to inflate the stock price of Sunbeam and make it attractive for a

16div-012264

sale to another company. Andersen explicitly or implicitly by acquiescence agreed to become part of that conspiracy and committed overt acts in furtherance of its fraudulent scheme in order to retain Sunbeam as a client.

116. In furtherance of that conspiracy, Dunlap and the other Sunbeam executives decided to acquire Coleman, First Alert, and Signature Brands. In furtherance of that scheme, in March 1998, Andersen committed the overt acts of issuing Andersen's false and misleading unqualified audit opinion with respect to Sunbeam's 1997 financial statements and of consenting to its publication to the SEC as part of Sunbeam's Form 10-K filing on March 6, 1998.

117. To induce Morgan Stanley into underwriting the Convertible Note Offering and to loan Sunbeam $680 million to finance its acquisition of Coleman, First Alert, and Signature Brands, Andersen and Sunbeam represented to Morgan Stanley that Sunbeam's audited financial statements and Andersen's audit opinions were accurate and not misleading. Andersen invited Morgan Stanley to rely on its unqualified audit opinions, expressly representing to Morgan Stanley, in letters dated March 19, 1998, and March 25, 1998, that Sunbeam's financial statements were truthful and that Andersen's unqualified audit opinions were reliable. Both Andersen and Sunbeam management knew that Morgan Stanley had provided Sunbeam's Board of Directors with a "fairness" letter expressly stating that Morgan Stanley had assumed and relied upon the accuracy and completeness of Sunbeam's audited financial statements.

118. In connection with the Convertible Note Offering and the Bank Facility, Andersen and Sunbeam participated in meetings and telephone calls in which they represented to Morgan Stanley that Sunbeam's audited financial statements were accurate.

119. In addition, Sunbeam expressly represented, in loan negotiations with Morgan Stanley, that Andersen's audit opinions were accurate. It further warranted, in the Sunbeam-Morgan Stanley credit agreement, that it had provided Morgan Stanley with accurate information regarding its consolidated statements of operations, stockholders' equity and cash flows, as well as its consolidated balance sheets. Likewise, in connection with the Convertible Note Offering,

Sunbeam included its 1996 and 1997 audited financial statements in its March 19, 1998 offering memorandum and represented to Morgan Stanley that its audited financial statements were reliable.

120. Also, as part of the Coleman merger agreement executed on February 27, 1998, Sunbeam represented and warranted that all of its filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate, not misleading, and prepared in accordance with GAAP, and that they would continue to be accurate and not misleading as of the transaction's closing date.

121. Andersen knew that its audit opinion would be used by Sunbeam to induce Morgan Stanley to underwrite the Convertible Note Offering and to induce Morgan Stanley to loan Sunbeam $680 million to finance Sunbeam's acquisition of a controlling stake in Coleman. Andersen's audit report furthered the conspiracy between Andersen and Sunbeam by actively perpetuating the illusion that Sunbeam was a financially healthy company, which helped to support the company's artificially inflated stock price. In doing so, Andersen committed the tortious act of fraudulent inducement in concert with Dunlap and the other Sunbeam executives pursuant to a common design.

122. In reasonable and justifiable reliance on Andersen's and Sunbeam's representations that Sunbeam's financial statements and Andersen's audit reports were accurate and truthful, Morgan Stanley agreed to underwrite the Convertible Note Offering, and Morgan Stanley agreed to loan Sunbeam $680 million to finance Sunbeam's acquisition of Coleman.

123. As a direct result of this conspiracy of fraudulent inducement, Morgan Stanley has suffered hundreds of millions of dollars in damages.

COUNT III

Aiding and Abetting Fraud

124. Paragraphs 1 through 123 are repeated and alleged as if set forth herein.

125. Sunbeam's 1996 and 1997 financial statements contained false statements of material fact. Those material misrepresentations included, among other things, overstatements of (a) Sunbeam's 1996 operating losses by approximately $40 million; (b) its 1996 losses from continuing operations by approximately $26 million; (c) its 1996 net losses by approximately $20 million; (d) its 1997 operating earnings by approximately $95 million; (e) its 1997 earnings from continuing operations by over $70 million; (f) its 1997 net earnings by approximately $70 million; and (g) its 1997 operating income figure by approximately 50 percent.

126. Andersen's 1996 and 1997 unqualified audit opinions were materially false and misleading. Andersen falsely stated, among other things, that (a) Sunbeam's financial statements fairly presented the financial position of Sunbeam during 1996 and 1997; (b) Sunbeam's financial statements fairly presented the results of Sunbeam's operations and cash flows during 1996 and 1997; (c) Sunbeam's financial statements conformed with GAAP; and (d) its audits of Sunbeam were conducted in accordance with GAAS.

127. To induce Morgan Stanley into underwriting the Convertible Note Offering and to loan Sunbeam $680 million to finance its acquisition of Coleman, First Alert, and Signature Brands, Sunbeam represented to Morgan Stanley in loan negotiations that Sunbeam's audited financial statements were accurate and not misleading. In addition, in the Sunbeam-Morgan Stanley credit agreement, Sunbeam warranted that it had provided Morgan Stanley with accurate information regarding its consolidated statements of operations, stockholders' equity and cash flows, as well as its consolidated balance sheets. Likewise, in connection with the Convertible Note Offering, Sunbeam included its 1996 and 1997 audited financial statements in its March 19, 1998 offering memorandum and represented to Morgan Stanley that its audited financial statements were reliable.

128. Also, as part of the Coleman merger agreement executed on February 27, 1998, Sunbeam expressly represented and warranted that all of its filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate, not misleading, and prepared

16div-012267

in accordance with GAAP, and that they would continue to be accurate and not misleading as of the transaction's closing date.

129. Sunbeam knew that its representations regarding its 1996 and 1997 financial statements were materially false when made and/or made these representations with reckless disregard as to their truth. In addition, Sunbeam knew that Andersen's 1996 and 1997 unqualified audit opinions were materially false and misleading.

130. Sunbeam knew that Morgan Stanley would rely on its representations in determining whether to act as Sunbeam's underwriter and to loan Sunbeam $680 million to finance its acquisitions. Although Sunbeam knew that Morgan Stanley would rely and had relied on its false statements, it did not inform Morgan Stanley that the unqualified audit opinions it had provided were materially false or that Sunbeam's financial statements contained numerous misstatements of material facts.

131. Sunbeam made its materially false representations regarding its financial statements and Andersen's unqualified audit opinions with the intent to deceive Morgan Stanley and to induce Morgan Stanley to participate in the financing of Sunbeam's acquisitions.

132. Sunbeam knew that the false information that it had provided to Morgan Stanley, and its intentional failure to correct the misrepresentations contained in Sunbeam's financial statements, would be critical to Morgan Stanley's decision to participate in the financing of Sunbeam's acquisitions. But for Sunbeam's fraudulent representations, Morgan Stanley would not have underwritten the Convertible Note Offering, nor would it have loaned Sunbeam $680 million.

133. Andersen knowingly and substantially assisted Sunbeam in its fraud. Andersen itself expressly represented to Morgan Stanley, in letters dated March 19, 1998, and March 25, 1998, that Sunbeam's financial statements were truthful and that Andersen's unqualified audit opinions were reliable. In addition, Andersen participated in meetings and telephone calls in which it represented to Morgan Stanley that Sunbeam's audited financial statements were

16div-012268

accurate. Moreover, Andersen knew that Morgan Stanley had provided Sunbeam's Board of Directors with a "fairness" letter expressly stating that Morgan Stanley had assumed and relied upon the accuracy and completeness of Sunbeam's audited financial statements. Andersen did not tell Morgan Stanley of the accounting concerns that it had raised with Sunbeam management in the course of its 1996 and 1997 audits.

134. As a direct result of Sunbeam's fraud, aided and abetted by Andersen, Morgan Stanley has suffered hundreds of millions of dollars in damages.

WHEREFORE, plaintiffs Morgan Stanley demand judgment against Andersen-Worldwide, Andersen-US, Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela, Andersen-UK, Harlow, Pruitt, and Denkhaus, jointly and severally, as follows:

A. Compensatory damages in an amount to be determined at trial;

B. Attorneys' fees and costs incurred in this and related litigation;

C. Pre-judgment interest; and

D. All other relief this Court may deem just and appropriate.

Plaintiffs expressly reserve the right to seek leave to amend its complaint pursuant to Fla. Stat. § 768.72 to assert claims for punitive damages in excess of $1.2 billion as allowed by law.

JURY DEMAND

Plaintiffs request a trial by jury on any and all issues raised by this Complaint that are triable of right by a jury.

March 1, 2004

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

MORGAN STANLEY & CO. INCORPORATED, MORGAN STANLEY SENIOR FUNDING, INC., and MORGAN STANLEY,

Plaintiffs,

v.

ARTHUR ANDERSEN LLP (an Illinois limited liability partnership), AWSC SOCIÉTÉ COOPÉRATIVE, *en liquidation* (a Swiss cooperative corporation), ARTHUR ANDERSEN LLP (an Ontario limited liability partnership), ARTHUR ANDERSEN & CO. (a Hong Kong partnership), RUIZ, URQUIZA Y CIA, S.C. (a Mexico partnership), PORTA CACHAFEIRO, LARIA & ASOCIADOS (a Venezuela partnership), PHILLIP E. HARLOW, WILLIAM PRUITT, and DONALD DENKHAUS,

Defendants.

CASE NO. 502004CA002257XXXXMB
Division AA

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CRIMINAL DIVISION
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FIRST AMENDED COMPLAINT

In March 1998, Morgan Stanley & Co. Incorporated ("MS & Co."), Morgan Stanley Senior Funding, Inc. ("MSSF"), and Morgan Stanley — in direct reliance on certified financial statements that were audited by Defendant Arthur Andersen LLP (an Illinois limited-liability partnership) ("Andersen") with the assistance of and in coordination with the other Defendants named in this Complaint[1] — underwrote a multi-million dollar offering of convertible notes and

[1] AWSC, Société Coopérative, *en liquidation*, a Swiss cooperative corporation ("Andersen-Worldwide") (formerly known as Andersen Worldwide, Société Coopérative), Arthur Andersen LLP (an Ontario limited liability partnership) ("Andersen-Canada"), Arthur Andersen & Co. (a

EXHIBIT
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provided a $680 million loan to Sunbeam Corporation, Inc., in connection with Sunbeam's acquisition of three companies. As Sunbeam's subsequent restatement of its financial results showed, these certified financial statements grossly misrepresented Sunbeam's true financial condition. Andersen and the other Defendants had full knowledge of these misstatements, and they intended that MS & Co. and MSSF would rely on these unqualified audit opinions. Plaintiffs — as a direct consequence of this deceit — have lost hundreds of millions of dollars. Accordingly, Plaintiffs bring this action and allege the following:

Nature of Action

1. In March 1998, Sunbeam announced the acquisition of The Coleman Company, Inc., Signature Brands USA, Inc., and First Alert, Inc. In order to finance these acquisitions, Sunbeam issued $750 million of convertible notes, which MS & Co. underwrote, and borrowed $1.2 billion in secured financing, including a loan of $680 million from MSSF.

2. In serving as an underwriter (which required MS & Co. to act as the initial purchaser of the convertible notes) and in agreeing to extend the loan, MS & Co. and MSSF relied on the accuracy of Sunbeam's financial statements, including its 1996 and 1997 financial statements that had been audited and certified by Andersen, as well as other representations made to them by Andersen. The Andersen-certified Sunbeam financial statements portrayed Sunbeam as a financially sound company in the midst of an extraordinary financial turnaround.

Hong Kong partnership) ("Andersen-Hong Kong"), Ruiz, Urquiza y Cia, S.C. (a Mexico partnership) ("Andersen-Mexico"), Porta Cachafeiro, Laria & Asociados (a Venezuela partnership) ("Andersen-Venezuela"), Phillip E. Harlow, William Pruitt, and Donald Denkhaus.

16div-012272

3. In reality, unbeknownst to Plaintiffs, Sunbeam's "turnaround" was an illusion facilitated by the Defendants. As became apparent in the summer of 1998 and as confirmed by Sunbeam's subsequent restatement of its financial results, the 1996 and 1997 statements that Andersen had certified — and upon which MS & Co. and MSSF had relied — did not, contrary to the representations that Andersen made to MS & Co. and MSSF, conform with generally accepted accounting principles ("GAAP"). Andersen, with full knowledge of the material misstatements contained in Sunbeam's financial reports, issued unqualified audit opinions for both 1996 and 1997. In so doing, it failed to perform its audit in accordance with generally accepted auditing standards ("GAAS").

4. In fact, the statements that Andersen audited and certified as in compliance with GAAP and as representing Sunbeam's true financial condition, were replete with accounting improprieties. As a consequence, and contrary to the representations that Andersen made to MS & Co. and MSSF, Sunbeam's true financial condition was misstated by millions of dollars.

5. Andersen's fraud was knowingly caused by Harlow, Pruitt, and Denkhaus. Harlow (the Sunbeam engagement partner) and Pruitt (the Sunbeam concurring partner) were senior partners of Andersen and members of Andersen-Worldwide and undertook direct responsibility for directing, managing, and approving the work that was done on the Sunbeam audits. Denkhaus, who also was a senior partner of Andersen and a member of Andersen-Worldwide, was the Audit Division Head and manager of Andersen's audit practice for the entire South Florida region and in this role undertook responsibility for supervising and monitoring the work performed at Harlow's and Pruitt's direction. Harlow, Pruitt, and Denkhaus each knew or recklessly disregarded the accounting violations contained in Sunbeam's 1996 and 1997 financial statements. Harlow, Pruitt, and Denkhaus also knew or recklessly disregarded that the

16div-012273

erroneous financial statements that they had caused Andersen to certify would be relied upon by MS & Co. in deciding to underwrite the convertible notes and by MSSF in deciding to loan Sunbeam hundreds of millions of dollars.

6. This fraud was also knowingly perpetrated by the foreign Andersen branches named in this complaint, Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, and Andersen-Venezuela (collectively, the "Foreign Andersen Branches"). Each of the Foreign Andersen Branches reviewed and audited financial statements prepared for Sunbeam's foreign subsidiaries for 1997, all of which contained significant accounting violations. Each of the Foreign Andersen Branches knew of or recklessly disregarded the fact that the financial statements that they had reviewed and audited were not prepared in accordance with GAAP or reviewed in accordance with GAAS. Each of the Foreign Andersen Branches also knew that the financial statements that they had audited would be incorporated into Sunbeam's consolidated financial statements and that lenders, such as MSSF, and underwriters, such as MS & Co., would rely on these financial statements.

7. The fraud was also knowingly perpetrated by Andersen-Worldwide through the actions of its members, including Harlow, Pruitt, and Denkhaus, and its member firms, including Andersen and the Foreign Andersen Branches.

8. This fraud ultimately forced Sunbeam and several of its subsidiaries to seek relief under Chapter 11 of the Bankruptcy Code, in February 2001. As part of the bankruptcy court-approved reorganization plan, MSSF's $680 million loan to Sunbeam was discharged in full, and MSSF received Sunbeam stock valued at a fraction of the original loan. In addition, the convertible notes issued by Sunbeam and held by MS & Co. had been rendered substantially less valuable.

9. By this complaint, Plaintiffs seek compensatory damages of several hundreds of millions of dollars.

THE PARTIES AND OTHER RELEVANT ENTITIES

10. MS & Co. is a financial services firm that engages in underwriting, investment banking, financial advisory services, securities sales and trading, and research. In late 1997 and early 1998, MS & Co. assisted Sunbeam in identifying potential acquisition targets and served as Sunbeam's financial advisor with respect to certain aspects of Sunbeam's acquisitions of Coleman, Signature Brands, and First Alert. MS & Co. also served as the underwriter of a $750 million offering of convertible notes that Sunbeam used to finance these acquisitions. MS & Co. is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York.

11. MSSF is a company that provides credit services to its clients. In 1998, MSSF entered into a credit agreement with Sunbeam under which MSSF agreed to provide a loan to Sunbeam in connection with Sunbeam's acquisition of Coleman, Signature Brands, and First Alert. Pursuant to the credit agreement, Sunbeam borrowed $680 million from MSSF, with the borrowings used by Sunbeam to fund certain costs relating to the acquisitions. MSSF is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York.

12. Morgan Stanley is a financial services company. It owns 100 percent of the stock of both MS & Co. and MSSF. Morgan Stanley is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York.

16div-012275

13. Andersen was a member in or business unit of Andersen-Worldwide. Andersen is a partnership formed under the laws of the State of Illinois. Once one of the world's largest accounting firms, almost all of its partners have left the firm. Andersen participated in and coordinated the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits. In addition, Andersen's partners and employees provided consulting services to Sunbeam as part of due diligence work performed in conjunction with Sunbeam's acquisition of Coleman, as well as on other projects.

14. Andersen-Worldwide is a cooperative corporation organized under the laws of Switzerland. Its members included more than 2,000 individuals from 390 offices in 84 countries. Various individuals who were members of Andersen-Worldwide participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits. Andersen-Worldwide and Andersen dictated the policies and procedures to be used by Andersen members and affiliates throughout the world. Andersen and Andersen-Worldwide at all relevant times (a) held themselves out to the public as a single, integrated, full-service, professional business enterprise comprising "one firm" with "one voice" and "common values and vision," (b) completely dominated and controlled each other's assets, operations, policies, procedures, strategies, and tactics, (c) failed to observe corporate formalities, and (d) used and commingled the assets, facilities, employees, and business opportunities of each other, as if those assets, facilities, employees, and business opportunities were their own.

15. Andersen-Canada was a member in or part of Andersen-Worldwide. Andersen-Canada is a partnership organized under the laws of the province of Ontario, Canada. Andersen-Canada audited the 1996 and 1997 audits of Sunbeam's Canadian subsidiary for inclusion in

Andersen's 1996 and 1997 audits of Sunbeam's consolidated financial statements. It also participated in the 1998 restatement of the reports of those audits.

16. Andersen-Hong-Kong was a member in or part of Andersen-Worldwide. Andersen-Hong Kong is a partnership organized under the laws of Hong Kong. Andersen-Hong Kong audited the 1996 and 1997 audits of Sunbeam's Hong Kong subsidiary for inclusion in Andersen's 1996 and 1997 audits of Sunbeam's consolidated financial statements. It also participated in the 1998 restatement of the reports of those audits.

17. Andersen-Mexico was a member in or part of Andersen-Worldwide. Andersen-Mexico is a partnership organized under the laws of Mexico. Andersen-Mexico audited the 1996 and 1997 audits of Sunbeam's Mexican subsidiary for inclusion in Andersen's 1996 and 1997 audits of Sunbeam's consolidated financial statements. It also participated in the 1998 restatement of the reports of those audits.

18. Andersen-Venezuela was a member in or part of Andersen-Worldwide. Andersen-Venezuela is a partnership organized under the laws of Venezuela. Andersen-Venezuela audited the 1996 and 1997 audits of Sunbeam's Venezuelan subsidiary for inclusion in Andersen's 1996 and 1997 audits of Sunbeam's consolidated financial statements. It also participated in the 1998 restatement of the reports of those audits.

19. Defendant Harlow is a resident of Florida and at all times material hereto was a partner in Andersen and a member in Andersen-Worldwide. He served as the engagement partner on the audits of Sunbeam's financial statements from 1993 to 1998. As engagement partner, Harlow undertook the primary responsibility for supervising the 1996 and 1997 audits of Sunbeam, including directing and overseeing the activities with respect to the Sunbeam work

performed by numerous persons at Andersen. Harlow also participated as a member of Sunbeam's due diligence team in connection with Sunbeam's acquisition of Coleman.

20. Defendant Pruitt is a resident of Florida and at all times material hereto was a partner in Andersen and a member of Andersen-Worldwide. He served as the concurring partner on the Sunbeam audits for at least 1996 and 1997. As such, he undertook responsibility for independently reviewing the Sunbeam audit work that had been conducted under Harlow's supervision and ensuring that it complied with GAAP and GAAS.

21. Defendant Denkhaus is a resident of Florida and at all times material hereto was a partner in Andersen and a member of Andersen-Worldwide. Denkhaus was Audit Division Head and manager of Andersen's audit practice for the entire South Florida region. As such, Denkhaus undertook responsibility for ensuring that the audit work performed by Andersen in the South Florida region was conducted in accordance with GAAP and GAAS. Denkhaus also served as the engagement partner on Sunbeam's ultimate restatement of its financial statements.

22. At all times material hereto, Sunbeam Corporation was headquartered in Palm Beach County, Florida. Sunbeam Corporation, through its operating subsidiaries and affiliates, manufactured, marketed, and distributed durable household and outdoor leisure consumer products through mass-market and other consumer channels. On February 6, 2001, Sunbeam and several of its affiliates filed a petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. Sunbeam has since emerged from bankruptcy and now operates under the name American Household.

23. The Coleman Company, Inc. was a leading manufacturer and marketer of consumer products for the worldwide outdoor recreation market. Coleman was a Delaware corporation, with its principal place of business in Kansas. Prior to March 30, 1998, Coleman (Parent)

16div-012278

Holdings Inc. ("Coleman-Parent") owned 44,067,520 shares (or approximately 82 percent) of Coleman. Coleman-Parent is a Delaware corporation, with its principal place of business in New York and is a wholly-owned subsidiary of MacAndrews and Forbes Holdings, Inc. ("MAFCO"). MAFCO is a global investment firm owned and operated by financier Ronald O. Perelman. Through its various subsidiaries and affiliates, MAFCO owns and/or controls a number of multi-billion dollar global corporations, including Revlon, Inc., the international consumer cosmetics company. MAFCO is a Delaware corporation, with its principal place of business in New York.

JURISDICTION AND VENUE

24. This Court has jurisdiction over the subject matter of this action pursuant to section 26.012(2)(a), Florida Statutes, because Plaintiff seeks damages in excess of $15,000 exclusive of interest, costs, and attorneys' fees.

25. This Court has personal jurisdiction over Andersen, Andersen-Worldwide, Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, and Andersen-Venezuela pursuant to section 48.193(1)(a), (b), and (f), Florida Statutes, because each of them, directly or through its partners, members, agents, or employees, (1) operated, conducted, engaged in, or carried on a business or business venture in Florida from which the acts and injuries complained of in this action arose, (2) committed within Florida the tortious acts complained of in this action, or (3) by an act or omission outside of Florida, caused the complained-of injuries to Plaintiffs to occur within Florida at or about the time that it was engaged in service activities in Florida or that its services were used or consumed within Florida in the ordinary course of commerce, trade, or use.

26. This Court has personal jurisdiction over Defendants Harlow, Pruitt, and Denkhaus, because each of them is a resident of Florida.

16div-012279

27. Venue is proper in this Court pursuant to section 47.011, Florida Statutes, because Andersen maintained an office with more than 30 employees and partners in Palm Beach County, and the cause of action accrued in Palm Beach County.

FACTUAL BACKGROUND

Andersen's and Sunbeam's Fraudulent Scheme

28. In July 1996, to address its growing financial difficulties, Sunbeam hired Albert Dunlap as Chairman and Chief Executive Officer. Dunlap was a well-known "turnaround" specialist who had a history of apparent success at other companies. He was nicknamed "Chainsaw Al" because of his practice of cutting staff and closing plants to achieve quick turnaround results.

29. Immediately after he was hired, Dunlap publicly predicted that, as a result of the Company's restructuring, Sunbeam would attain significant increases in its margins and sales. Dunlap replaced almost all of top management with his own selections, hiring Russell A. Kersh (Chief Financial Officer); Donald R. Uzzi (Vice President, Marketing and Product Development, and later Executive Vice President, Consumer Products Worldwide); Lee B. Griffith (Vice President, Sales); and Robert J. Gluck (Principal Accounting Officer).

30. Unbeknownst to the public and to Plaintiffs, Sunbeam's new senior management embarked upon a scheme designed to misrepresent Sunbeam's financial condition. Sunbeam's subsequent November 1998 restatement of its 1996 and 1997 financial statements revealed the plan that Sunbeam's management had adopted and Andersen facilitated. In 1996, Sunbeam's management, with Andersen's knowing assistance, caused Sunbeam to overstate its operating losses by at least $40 million, thereby establishing an overly bleak financial backdrop against

16div-012280

which the company's performance in 1997 would be measured. In 1997, by contrast, management caused Sunbeam dramatically to overstate its earnings. When 1997 operating earnings were eventually corrected and restated, they were $95 million less than the earnings originally reported — and approximately half of the figure that Andersen had previously certified.

31. In order to convince the public that Sunbeam's turnaround was real, Sunbeam needed an outside auditor to validate its financial reports. Andersen — desperate to retain a valuable client — stood ready to assist Sunbeam in its scheme.

32. After Dunlap assumed control of Sunbeam, Andersen had reason to fear that its relationship with Sunbeam was in jeopardy. Harlow, Pruitt, and Denkhaus knew that Dunlap had employed Coopers & Lybrand, one of Andersen's major competitors, as a financial consultant and independent auditor in past turnaround assignments. In fact, Dunlap had already engaged Coopers & Lybrand to assist in planning Sunbeam's massive restructuring.

33. Andersen had a significant stake in retaining Sunbeam, a long-time major client. Being dropped by a high-profile client such as Sunbeam would have been a severe blow to Andersen's reputation. The company generated substantial income for Andersen's Florida office, paying over $1 million in fees for its 1995 audit alone and providing it with substantial income from lucrative consulting assignments. Indeed, Andersen was so eager to keep Sunbeam as its client that it agreed to a 30-percent reduction in its 1996 audit fees.

34. Andersen's fees were particularly important to Andersen's partners, whose incomes were dependent on the continued business from Sunbeam. Andersen tied part of its audit partners' compensation to the solicitation and marketing of non-audit consulting services, and created other revenue-sharing arrangements between audit and consulting partner groups.

35. Andersen put tremendous pressure on partners to generate more fees. A "depth chart" was developed for each audit client based upon the level of services provided to that client. Partner compensation was determined based on the additional services sold, and the ability of an Andersen partner to increase his income depended directly upon the level of fees that the partner "controlled" or sold to his or her assigned clients. These pressures led directly to a conflict of interest for the auditors on the Sunbeam engagement and were a significant factor that caused Andersen, Harlow, Pruitt, and Denkhaus, as well as the Foreign Andersen Branches, to abandon their independence, objectivity, and integrity on the Sunbeam financial statement audits and reviews.

Andersen's Worldwide Operations

36. Andersen was formed in Illinois in 1913 as an accounting and consulting partnership under the name "Arthur Andersen & Co." In 1977, as Andersen increased its global presence, it created a new structure called the "Andersen Worldwide Organization." The Andersen Worldwide Organization was overseen by Andersen-Worldwide, which acted as an umbrella organization for the Andersen, the other Andersen Worldwide Organization member firms, the members and contract partners of Andersen-Worldwide, and the individual members and partners of the Andersen Worldwide Organization member firms. The model adopted by the Andersen Worldwide Organization was intended to preserve "The Heart of Partnership Culture," including income sharing among the member firms of the Andersen Worldwide Organization and a common governance model. Thus, partners (or equivalents) in the various branches of the Andersen Worldwide Organization were also members of Andersen-Worldwide, resulting in a global partnership of more than 2,000 individuals from 390 offices in 84 different countries. In

addition to overlapping partners and members, Andersen-Worldwide and Andersen shared officers in common. For example, the former CEO and Managing Partner of Andersen-Worldwide, Joseph Berardino, was also the CEO and Managing Partner of Andersen.

37. Andersen-Worldwide and Andersen also shared the same address. In its promotional literature, Andersen-Worldwide stated that its headquarters were located at 33 West Monroe Street, Chicago, Illinois 60603. That is the same address as the headquarters of Andersen.

38. Andersen-Worldwide set uniform professional standards for all its offices and required the members and partners in its international offices to agree to be bound by those professional standards and principles. Andersen-Worldwide coordinated the sharing of costs and allocation of revenues and profits among its members and partners and its offices around the world. Andersen-Worldwide operated under a worldwide tax structure. In addition, Andersen-Worldwide handled all borrowing on behalf of its international offices and maintained those offices' financial records, payroll, and employee health-benefits plans. All of Andersen's offices also shared global computer operations and training facilities.

39. The components of the Andersen Worldwide Organization ignored corporate formalities in referring to themselves and each other. For example, personnel affiliated with Andersen and Andersen-Worldwide regularly exchanged correspondence and e-mails that were labeled "Andersenwo" — short for "Andersen World Organization." Documents prepared by Andersen often bore the insignia and logos of Andersen-Worldwide, including "Andersen-Worldwide," "Andersen," and "Arthur Andersen." In its promotional literature, Andersen used the names "Andersen Worldwide," "Andersen," and "Arthur Andersen" interchangeably. In addition, Andersen sometimes used only the name "Andersen" when referring to all or part of the

Andersen Worldwide Organization and did not differentiate between Andersen-Worldwide and its offices around the globe.

40. In promotional literature, Andersen, Andersen-Worldwide, and the member firms of the Andersen Worldwide Organization marketed themselves as "one firm," "a single worldwide operating structure," that "think[s] and act[s] as one."

41. News releases issued by Andersen, Andersen-Worldwide, and other member firms confirmed that the Andersen Worldwide Organization and Andersen operated as a single worldwide organization:

- Andersen referred to the brand identity adopted by the member firms of the Andersen "global client service network."
- "With world-class skills in assurance, tax, consulting and corporate finance, Arthur Andersen has more than 77,000 people in 84 countries who are united by a single worldwide operating structure that fosters inventiveness, knowledge sharing, and a focus on client success."
- "Arthur Andersen is significantly different from the other firms in structure, governance and culture — differences which can be pivotal in terms of the quality of service a client company receives. Important distinctions mark our firm from the rest. We have evolved a unique organizational culture that today unites the people of Andersen Worldwide. We are the only true global firm, sharing knowledge and doing business across borders, sharing costs which fund methodologies, research and development, lines and industry groups."
- Andersen spokesman David Tabolt stated: "We conduct more than 30,000 audits around the world every year."
- "AA is already much more integrated globally than the rest of the Big Five. As Mr. Berardino [Andersen-Worldwide's former CEO, who resigned in March 2002] points out, 'there is one name over the door. We're not an alphabet soup.' The cohesiveness of AA's culture has been a source of humor to outsiders, who have labeled its bean counters 'Androids.' While some rivals are still struggling with a complicated array of national partnerships, and thus different systems for sharing pay, AA partners enjoy a single, and possibly unique, system of remuneration: they receive a list of what each of them has earned in the past year."

16div-012284

- "Arthur Andersen is a global professional services organization consisting of over 100 member firms and more than 61,000 people united by a single worldwide operating structure and a common culture of innovation and knowledge sharing. This unique 'one-firm' approach qualifies the people of Arthur Andersen to serve clients by bringing together any of more than 40 competencies in a way that transcends geographic borders and organizational lines. Arthur Andersen's people provide effective business solutions to over 100,000 clients in 81 countries around the world. Since its beginning in 1913, Arthur Andersen has realized 85 years of uninterrupted growth. With revenues of more than US $6 billion, it stands today as a world leader in professional services. Arthur Andersen is a business unit of Andersen Worldwide."

The Andersen-Worldwide website (Andersen.com) confirmed that there was a single worldwide organization:

- "Our 390 offices may be scattered amid 84 different countries, but our voice is the same. No matter where you go, or who you talk to, we act with one vision. Without boundaries."
- "One world. One organization."

Andersen's recruiting brochures reflected that it was a single worldwide organization:

- "We will, in Arthur Andersen's own words, 'act as one firm and speak with one voice. It is a united family that operates across hierarchies, geographical boundaries, client groupings, service lines and competencies and feels the kinship of understanding and shared responsibility."

42. Andersen-Worldwide managed its operations by practice groups, as well as by geographical region. Each practice group was headed by a global practice director who oversaw, directed, and controlled the operations of each practice group worldwide. Regional practice directors (*e.g.*, Denkhaus was the director of Andersen-Worldwide's audit practice in South Florida) reported to the global practice director and managed the practice group within their regions.

43. As a result of the "one firm" approach, all actions taken by members of Andersen-Worldwide, as well as all actions taken by member firms of Andersen-Worldwide, may be attributed to Andersen-Worldwide.

44. Andersen applied the "one firm" approach in its work with Sunbeam. Top partners responsible for the Sunbeam audits and restatement were partners of Andersen and members of Andersen-Worldwide, including the engagement partner on the Sunbeam audits, Harlow, the concurring partner on those audits, Pruitt, and the Audit Division Head and manager of Andersen's audit practice for the entire South Florida region, Denkhaus.

45. In addition, various international offices of Andersen-Worldwide did substantial work for Sunbeam. Sunbeam was a multinational corporation with operations in Canada, Mexico, Venezuela, and Hong Kong. The Sunbeam engagement required the participation of auditors from each of those countries and numerous American cities. Harlow, on behalf of both Andersen and Andersen-Worldwide, developed work plans that he circulated to Andersen's branches in other countries, including the Foreign Andersen Branches. Those offices worked closely with Harlow and others within Andersen and Andersen-Worldwide to complete the tasks outlined in the plans. They sent their work product to Harlow for inclusion in an Andersen-Worldwide Management Letter, as well as for incorporation in Andersen's audit work.

The Fraudulent 1996 Financial Statements

46. In 1996, after Dunlap took control of Sunbeam, Andersen permitted Sunbeam management to employ numerous accounting practices that — as Sunbeam's November 1998 restatement of its 1996 financial statements and an SEC investigation later showed — did not

16div-012286

comply with GAAP. The objective of these accounting violations was to set an artificially bleak financial backdrop against which Sunbeam's 1997 performance would be judged.

47. Among other things, Sunbeam's 1996 financial statements, certified by Andersen, did not comply with the accounting principles of (1) reliability, Financial Accounting Standards Board ("FASB") Statement of Financial Accounting Concepts No. 2, §§ 58-97; Accounting Principles Board ("APB") Statement No. 4, §§ 109, 138, 189; (2) completeness, FASB Statement of Financial Accounting Concepts No. 2, §§ 79, 80; APB Statement No. 4, § 94; (3) conservatism, FASB Statement of Financial Accounting Concepts No. 2, §§ 91-97; APB Statements No. 9, §§ 35, 71; (4) neutrality, FASB Statement of Financial Accounting Concepts No. 2, §§ 98-110; or (5) relevance, FASB Statement of Financial Accounting Concepts No. 2, §§ 47, 48.

48. Among the accounting frauds that Andersen knowingly allowed was the artificial inflation of Sunbeam's reserves. Because the reserves were charged as an expense against income, this accounting practice allowed Sunbeam to overstate the 1996 loss against which its 1997 financial results would be compared.

49. For example, Sunbeam created a $338 million reserve for "restructuring" charges. As the November 1998 restatement made clear, included in these charges were costs of redesigning product packaging; costs of relocating employees and equipment; bonuses to be paid to employees who were told that they were being laid off but were asked to stay on temporarily; advertising expenses; and certain consulting fees. Because these items benefited future activities, GAAP did not permit them to be classified as restructuring charges. Andersen also permitted Sunbeam to violate GAAP by creating a $12 million reserve for a lawsuit alleging that

16div-012287

Sunbeam was liable for cleanup costs associated with a hazardous waste site, even though Sunbeam's estimated liability was, at best, half that amount.

50. Andersen also permitted Sunbeam improperly to write down its household products inventory in 1996. In connection with the restructuring, Sunbeam had decided to eliminate half of Sunbeam's product lines and to liquidate its inventory of those product lines. Although only half of Sunbeam's product lines were eliminated, Andersen allowed Sunbeam to apply, at year-end 1996, the special accounting treatment that it had accorded the eliminated lines to its entire inventory of household products. As a result, as the November 1998 financial restatement later showed, Sunbeam understated the balance sheet value of its inventory at year-end 1996 by approximately $2 million and overstated its 1996 loss by the same amount.

51. Andersen also allowed management improperly to recognize, as a 1996 expense, $2.3 million in 1997 advertising expenses and related costs. In addition, Andersen permitted Sunbeam to manipulate its 1996 liabilities for "cooperative advertising." It was Sunbeam's practice to fund a portion of its retailers' costs of running local promotions. As required by GAAP, Sunbeam accrued its estimated liabilities for this expense. At year-end 1996, Sunbeam set its cooperative advertising accrual at an inflated value of $21.8 million. According to the November 1998 restatement, this accrual was improper under GAAP because it was approximately 25 percent higher than the prior year's accrual amount, without a proportional increase in sales providing a basis for the increase. Ultimately, as the November 1998 restatement showed, $5.8 million of that excessive accrual was used (without disclosure) to inflate Sunbeam's 1997 income.

16div-012288

Andersen's 1996 Unqualified Audit Opinion

52. In the course of auditing Sunbeam's 1996 financial statements, Andersen became aware of these and other improper accounting practices. Indeed, an Andersen employee questioned a Sunbeam employee about the restructuring reserves and was told that the reserve included "everything but the kitchen sink." Harlow, the Andersen engagement partner, knew of this statement.

53. Harlow informed Kersh and Gluck, who were part of Sunbeam's senior management, that certain of the restructuring reserves that Sunbeam had established were not properly accounted for as restructuring costs under GAAP because they benefited Sunbeam's future operations. He proposed that Sunbeam reverse the accounting entries on its books and records reflecting the establishment of these reserves. However, when Kersh and Gluck refused to reverse these items, Harlow caused Andersen to acquiesce to Sunbeam's fraudulent accounting for the reserves.

54. In March 1997, Andersen issued an unqualified audit opinion regarding Sunbeam's 1996 financial statements and authorized the inclusion of its audit opinion in Sunbeam's 1996 Form 10-K filed with the SEC. A copy of the 1996 Audit Opinion is exhibit "A" attached hereto. Consistent with Andersen's internal procedures, the Audit Opinion was issued at the direction of Harlow and Pruitt. Denkhaus, as Audit Division Head and manager of Andersen's audit practice for the entire South Florida region, had undertaken responsibility for supervising the audit work performed in Andersen's South Florida region and thus also bore responsibility for the issuance of this opinion.

55. Despite its knowledge of the many improper accounting practices that Sunbeam's management had employed, Andersen's opinion stated:

16div-012289

> We conducted our audits in accordance with generally accepted auditing standards.
>
> Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.
>
> In our opinion, the financial statements . . . present fairly, in all material respects, the financial position of Sunbeam Corporation and subsidiaries as of December 31, 1995 and December 29, 1996, and the results of their operations and their cash flows for each of the three fiscal years in the period ended December 29, 1996 in conformity with generally accepted accounting principles.

56. Andersen also knowingly provided false descriptions of certain of Sunbeam's specific accounting practices. For example, it characterized Sunbeam's treatment of its restructuring charges in Note 2 to the audited 1996 consolidated financial statements as follows:

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

In fact, however, Andersen knew that Sunbeam had improperly inflated its restructuring costs by millions of dollars.

57. Andersen's 1996 audit violated GAAS because, among other things, Andersen failed (1) to perform the audits with an attitude of professional skepticism as required by the Statement on Auditing Standards ("SAS") No. 53; (2) to conclude that there was a significant risk that Sunbeam management would intentionally distort the company's financial statements, in violation of American Institute of Certified Public Accountants Professional Standards, AU §§ 316.10 and 316.12; (3) to recognize that the accounting policies employed by Sunbeam were not acceptable in the circumstances, in violation of AU § 316.19; (4) to obtain sufficient competent evidential matter through inspection, observation, inquiries, and confirmations to afford a reasonable basis for its opinions regarding Sunbeam's financial statements, in violation of AU § 150.02; (5) to exercise due professional care in the performance of the audit, in violation of AU § 150.02; (6) to plan the work adequately to uncover the errors and irregularities in Sunbeam's accounting information, in violation of AU § 150.02; and (7) to obtain a sufficient understanding of Sunbeam's internal control structure to plan the audits and to determine the nature, timing, and extent of tests to be performed, in violation of AU § 150.02.

58. In addition, in conducting the 1996 audit, Andersen (1) improperly relied on management representations rather than applying the auditing procedures necessary to afford a reasonable basis for an opinion on Sunbeam's financial statements, in violation of SAS No. 19 (AU § 333.02); (2) failed to recognize that misstatements resulting from misapplication of GAAP, departures from fact, and omissions of necessary information, in aggregate, caused Sunbeam's financial statements to be materially misstated, in violation of SAS No. 47 (AU § 312.04); (3) failed to issue a qualified or adverse opinion, in violation of SAS No. 47 (AU § 312.31); and (4) improperly concluded that the accounting principles applied by Sunbeam were appropriate in the circumstances and that Sunbeam's financial statements were informative

16div-012291

of matters that could affect their use, understanding, and interpretation, in violation of SAS No. 69 (AU § 411.04(b) and (c)).

59. Harlow, Pruitt, and Denkhaus knew of or recklessly disregarded numerous red flags that should have caused them to prevent Andersen from certifying Sunbeam's 1996 financial statements. However, they did nothing to stop Andersen's unqualified 1996 audit opinion from being included in Sunbeam's Form 10-K filing with the SEC, despite the fact that they knew or were reckless in not knowing that the financial statements that Andersen had certified were materially misleading. Harlow, Pruitt, and Denkhaus also knew that the false financial statements that they had caused Andersen to issue would be incorporated into Sunbeam's consolidated financial statements and that lenders, such as MSSF, and underwriters, such as MS & Co., would rely on these financial statements.

60. In all, the 1996 financial statements audited by Andersen were materially false and misleading and overstated Sunbeam's operating losses for 1996 by at least $40 million. Moreover, Andersen's unqualified audit opinion was false in at least two material respects. First, the financial statements that Andersen audited did not "fairly" present Sunbeam's financial position in conformity with GAAP, as it represented. Second, Andersen had not, as it claimed, conducted its audit in accordance with GAAS.

The Fraudulent 1997 Financial Statements

61. The accounting frauds in which Andersen permitted Sunbeam to engage in 1997 were aimed at inflating the company's earnings. To accomplish this — as the November 1998 restatement and an SEC investigation subsequently showed — Andersen allowed Sunbeam to

16div-012292

record fraudulent sales, to account improperly for one-time events, and improperly to use "cookie-jar" reserves, all in violation of GAAP.

62. Among other things, Sunbeam's 1997 financial statements, certified by Andersen, did not comply with the accounting principles of (1) reliability, FASB Statement of Financial Accounting Concepts No. 2, §§ 58-97; APB Statement No. 4, §§ 109, 138, 189; (2) completeness, FASB Statement of Financial Accounting Concepts No. 2, §§ 79, 80; APB Statement No. 4, § 94; (3) conservatism, FASB Statement of Financial Accounting Concepts No. 2, §§ 91-97; APB Statements No. 9, §§ 35, 71; (4) neutrality, FASB Statement of Financial Accounting Concepts No. 2, §§ 98-110; or (5) relevance, FASB Statement of Financial Accounting Concepts No. 2, §§ 47, 48.

63. One of the revenue inflation tactics permitted by Andersen in 1997 was improper accounting for "bill-and-hold" sales. A bill-and-hold sale occurs when a seller bills a customer for a purchase while retaining the merchandise for later delivery. During 1997, Dunlap's management team offered financial incentives to various customers to purchase products. Under GAAP, revenue under bill-and-hold transactions may be recognized only if, among other things, the buyer — not the seller — requests a sale on that basis. As Andersen subsequently learned in the course of its 1997 audit, the purported bill-and-hold customers had not requested that treatment, and, in numerous cases, the risks of ownership and legal title were never passed to the customer. Sunbeam added more than $29 million to its 1997 sales and $4.5 million to income by improperly accounting for these transactions.

64. Another income-boosting tactic that Andersen sanctioned was Sunbeam's improper use of its inflated 1996 reserves, which artificially increased the company's 1997 income by almost $5 million. Andersen also let Sunbeam improperly treat $19 million that it received from

the sale of discounted and obsolete inventory as ordinary income. Although the recognition of that revenue was permitted under GAAP, Sunbeam was required to disclose that revenue as a non-recurring event. Sunbeam failed to do so, again with Andersen's blessing.

65. In addition, Andersen and Andersen-Hong Kong allowed Sunbeam's Hong Kong subsidiary to book sales that violated applicable accounting principles because they included an unlimited right to return unsold merchandise and because the amount of future returns on such sales could not reasonably be estimated. On Andersen's and Andersen-Hong Kong's watch, Sunbeam's Hong Kong subsidiary improperly recorded sales revenue of $8.6 million from various sales made during the fourth quarter of 1997. Andersen and Andersen-Hong Kong also permitted Sunbeam's Hong Kong subsidiary to under-provide for warranty and product liability expenses; improperly to include in 1997 net sales of $0.5 million of goods that were not shipped until 1998; and improperly to defer 1997 advertising costs to future periods.

66. Andersen and Andersen-Canada also permitted Sunbeam's Canadian subsidiary improperly to book sales that did not meet the applicable sales recognition criteria because they included an unlimited right to return unsold merchandise and because the amount of future returns on such sales could not reasonably be estimated.

67. Andersen and Andersen-Mexico also permitted Sunbeam to employ several improper accounting tricks with respect to its Mexican subsidiary. Sunbeam's Mexican subsidiary engaged in $900,000 in bill-and-hold transactions in 1997 that should not have been recognized as income until 1998. In addition, the subsidiary's inventory was overvalued by $2 million, and the financial statements for Sunbeam's Mexico operations failed to include a $3 million expense for the profit-sharing obligations of that business.

68. Andersen and Andersen-Venezuela also permitted Sunbeam's Venezuela subsidiary improperly to value its inventory of raw materials. Its books reflected purchases of raw materials that were held at various suppliers. Andersen failed to confirm that the booked amounts represented materials that were actually in the possession of suppliers. Had it done so, it would have discovered that the materials did not exist.

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

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

16div-012295

71. As a result of these and other violations of accounting standards, in 1997, Sunbeam reported $186 million in income, much of which was, according to the November 1998 restatement, improper under GAAP. In all, the overstatements included over $90 million of improper net income, including approximately $10 million from a sham sale of inventory to a contractor, approximately $4.5 million from non-GAAP bill-and-hold sales, approximately $35 million in income derived from the use of non-GAAP reserves and accruals taken at year-end 1996, and approximately $6 million from improper revenue recognition.

Sunbeam's Purchase of Coleman

72. Toward the end of 1997, Sunbeam engaged MS & Co. to advise it with respect to the possible sale of its core businesses and/or the initiation of one or more major acquisitions. Ultimately, Coleman, Signature Brands, and First Alert were identified as three companies interested in being acquired by Sunbeam.

73. On January 28, 1998, Sunbeam announced its financial results for 1997, reporting total revenues of $1.168 billion, and total earnings from continuing operations of $189 million (or $1.41 per share).

74. On February 3, 1998, Harlow met with key officers of Sunbeam to discuss the acquisition of Coleman and its financial impact on Sunbeam. By that time, as a result of reviewing Sunbeam's 1997 financial statements in the course of its audit, Harlow and Andersen knew that Sunbeam's 1997 results were false.

75. On February 20, 1998, Andersen agreed to act as a Sunbeam financial advisor and perform financial due diligence in connection with Sunbeam's acquisition of Coleman, First Alert, and Signature Brands, further compromising Andersen's duty as an auditor to maintain its

16div-012296

independence from its client. In agreeing to undertake that assignment, Andersen became an active member of the team working to assist Sunbeam in its acquisitions. Harlow and other Andersen employees who worked on Sunbeam's audit also served as members of Sunbeam's due diligence team.

76. On February 27, 1998, Sunbeam's Board of Directors met in New York to discuss Sunbeam's possible purchase of Coleman. During the February 27, 1998 meeting, MS & Co. provided Sunbeam's Board of Directors with a written "fairness" opinion regarding the fair acquisition price of Coleman. The opinion made clear that, even in the context of issuing a fairness opinion on the Coleman acquisition price, MS & Co. had relied upon Andersen's representations regarding Sunbeam's financial health. The fairness opinion explicitly stated that MS & Co. had reviewed "certain publicly available financial statements and other information" of Sunbeam. The opinion advised that MS & Co. had "assumed and relied upon without independent verification the accuracy and completeness of the information reviewed by us for the purposes of this opinion."

77. The Sunbeam Board of Directors approved the Coleman acquisition. That same day, Coleman-Parent — the 82-percent shareholder of Coleman — agreed to sell Coleman to Sunbeam for a purchase price of $2.2 billion. Sunbeam agreed to provide Coleman-Parent with $160 million in cash, to assume $584 million in Coleman-related debt, and to provide Coleman-Parent with 14,099,749 shares of Sunbeam stock. Sunbeam also agreed to purchase Signature Brands and First Alert for approximately $300 million.

Andersen's 1997 Unqualified Audit Opinion

78. In the first week of March 1998, shortly after the agreement for Sunbeam's purchase of Coleman was signed, but before the transaction closed, Andersen rendered an unqualified audit opinion for Sunbeam's 1997 financial statements. With Andersen's express consent, management included that opinion in Sunbeam's 1997 Form 10-K filed with the SEC on March 6, 1998.

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

80. In the course of its audit of Sunbeam's 1997 financial records, Andersen learned that Harlow's concerns were well-founded. It discovered that Sunbeam had improperly accounted for certain bill-and-hold sales, had misused its reserves, and had overvalued its inventories. Harlow discussed these problems with Sunbeam's senior management and proposed that Sunbeam reverse these improper entries.

81. For example, as part of Andersen's 1997 year-end audit, Harlow raised with Sunbeam's management the improper accounting treatment accorded to the EPI transaction. He proposed that Sunbeam reverse the accounting entries reflecting the revenue recognition for that

16div-012298

transaction, pointing out that the profit guarantee and the indeterminate value of the contract rendered revenue recognition inconsistent with GAAP. Kersh and Gluck refused to reverse the transaction. Harlow caused Andersen to acquiesce in management's actions. As a result, Sunbeam's 1997 audited financial statements reflect almost $10 million of false profit on the sham EPI transaction.

82. Harlow also raised with Kersh and Gluck Sunbeam's inappropriate use of reserves and recorded the full $4.9 million of costs that Sunbeam had improperly offset against reserves on the list of proposed audit adjustments. Kersh and Gluck, however, refused to make the proposed adjustments. Harlow again failed to insist on honest, accurate accounting. Instead, he caused Andersen to acquiesce in Sunbeam's refusal to reverse these improper reductions in current-period costs, although he knew or recklessly disregarded facts indicating that this improper accounting would materially distort Sunbeam's reported results of operations. In fact, this use of reserves increased 1997 fourth-quarter income by almost 8 percent.

83. Harlow also proposed adjustments to reverse $2.9 million related to Sunbeam's inventory overvaluation by its Mexican subsidiary and $563,000 related to various miscellaneous items. Kersh and Gluck refused to make appropriate adjustments, and Harlow again caused Andersen to acquiesce in their refusal to reverse these errors — despite the fact that these items added over 5.4 percent to Sunbeam's reported earnings for the fourth quarter and contributed to the larger misstatement of Sunbeam's reported results of operations stemming from the fraudulent conduct of Sunbeam's management.

84. These improper accounting techniques raised clear red flags that should have — and must have — alerted Andersen to the need for greater scrutiny regarding all of Sunbeam's revenue recognition decisions. At a minimum, Andersen should have been on guard as to all of

the proposed audit adjustments that Harlow initially proposed but later rejected, and any previously recognized improper items that were ultimately dismissed as "immaterial."

85. Despite these clear red flags, Andersen once again gave Sunbeam a clean bill of financial health, issuing an unqualified audit opinion regarding Sunbeam's 1997 financial statements and authorized the inclusion of its audit opinion in Sunbeam's 1997 Form 10-K filed with the SEC. A copy of the 1997 Audit Opinion is exhibit "B" attached hereto. The Audit Opinion is signed by Andersen. Consistent with Andersen's internal procedures, the Audit Opinion was issued at the direction of Harlow and Pruitt. Denkhaus, as Audit Division Head and manager of Andersen's audit practice for the entire South Florida region, had undertaken responsibility for supervising the audit work performed in Andersen's South Florida region and thus also bore responsibility for the issuance of this opinion.

86. In this opinion, Andersen stated:

> We conducted our audits in accordance with generally accepted auditing standards. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.
>
> In our opinion, the financial statements . . . , present fairly, in all material respects, the financial position of Sunbeam Corporation and subsidiaries as of December 29, 1996 and December 28, 1997, and the results of its operations and its cash flows for each of the three fiscal years in the period ended December 28, 1997 in conformity with generally accepted accounting principles.

87. In fact, Andersen's 1997 audit violated GAAS because, among other things, Andersen had failed (1) to perform the audits with an attitude of professional skepticism as

required by SAS No. 53; (2) to reach a conclusion that there existed a significant risk of intentional distortion of financial statements by Sunbeam management, in violation of AU §§ 316.10 and 316.12; (3) to recognize that the accounting policies employed by Sunbeam were not acceptable in the circumstances, in violation of AU § 316.19; (4) to obtain sufficient competent evidential matter through inspection, observation, inquiries, and confirmations to afford a reasonable basis for its opinions regarding Sunbeam's financial statements, in violation of AU § 150.02; (5) to exercise due professional care in the performance of the audit, in violation of AU § 150.02; (6) to plan the work adequately to uncover the errors and irregularities in Sunbeam's accounting information, in violation of AU § 150.02; and (7) to obtain a sufficient understanding of Sunbeam's internal control structure to plan the audits and to determine the nature, timing, and extent of tests to be performed, in violation of AU § 150.02.

88. In addition, in conducting the 1997 audit, Andersen (1) improperly relied on management representations rather than applying the auditing procedures necessary to afford a reasonable basis for an opinion on Sunbeam's financial statements, in violation of SAS No. 19 (AU § 333.02); (2) failed to recognize that misstatements resulting from misapplication of GAAP, departures from fact and omissions of necessary information, in aggregate, caused Sunbeam's financial statements to be materially misstated, in violation of SAS No. 47 (AU § 312.04); (3) failed to issue a qualified or adverse opinion, in violation of SAS No. 47 (AU § 312.31); (4) improperly concluded that the accounting principles applied by Sunbeam were appropriate in the circumstances and that Sunbeam's financial statements were informative of matters that could affect their use, understanding and interpretation, in violation of SAS No. 69 (AU § 411.04(b) and (c)); and (5) failed to report that a change in the application of accounting principles in Sunbeam's 1997 financial statements had materially affected their

16div-012301

comparability with the financial statements for prior periods, especially 1996, due to a different treatment of sales and reserves in those periods, in violation of SAS Nos. 1 and 43 (AU § 420.02).

89. Harlow, Pruitt, and Denkhaus knew of or recklessly disregarded numerous red flags that should have caused them to withhold Andersen's unqualified certification of Sunbeam's 1997 financial statements. However, Harlow, Pruitt, and Denkhaus did nothing to stop Andersen's unqualified 1997 audit opinion from being included in Sunbeam's Form 10-K filing with the SEC, despite the fact that they knew or were reckless in not knowing that the financial statements that Andersen had certified were materially misleading. Harlow, Pruitt, and Denkhaus also knew that the false financial statements that they had caused Andersen to issue would be incorporated into Sunbeam's consolidated financial statements and that MSSF, as a lender, and MS & Co., as an underwriter, would rely on these financial statements.

90. The Foreign Andersen Branches also knew of or recklessly disregarded the fact that the financial statements of Sunbeam's foreign subsidiaries, which they had reviewed and audited, were not prepared in accordance with GAAP or reviewed in accordance with GAAS. The Foreign Andersen Branches nevertheless certified that their audit work complied with GAAP and GAAS. Each of the Foreign Andersen Branches also knew that the false financial statements that they had audited would be incorporated into Sunbeam's consolidated financial statements and that lenders, such as MSSF, and underwriters, such as MS & Co., would rely on these financial statements.

91. In all, the 1997 financial statements audited by Andersen reported operating income of $186 million — an overstatement of at least 50 percent. Like its 1996 unqualified audit opinion, Andersen's 1997 opinion was false in two material respects. First, the financial

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

Reliance by Plaintiffs on Andersen's Unqualified Audit Opinions

92. After it agreed to acquire Coleman, First Alert, and Signature Brands, Sunbeam needed to raise approximately $2.3 billion to refinance existing debt and to fund these acquisitions. To accomplish these financing objectives, Sunbeam's management elected to issue $500 million in subordinated convertible notes (an amount later increased to $750 million) (the "Convertible Note Offering") and to enter into a new $2 billion senior credit agreement (later reduced to $1.7 billion) with secured lenders (the "Bank Facility"). MS & Co. served as the lead underwriter for the Convertible Note Offering. MSSF served as the Syndication Agent for the Bank Facility and coordinated the Bank Facility with First Union and Bank of America, Sunbeam's other secured lenders.

93. Andersen, Harlow, Pruitt, and Denkhaus knew of these proposed financing arrangements. Specifically, they knew that the Coleman and other acquisitions would not close unless Sunbeam secured the financing necessary to cover the acquisition prices. They knew that MS & Co. would underwrite a notes offering that Sunbeam would use to finance the transaction. Moreover, they knew that MSSF was a principal participant in the Bank Facility, and that MSSF would be relying on the representations Andersen made regarding Sunbeam's financial condition.

94. In addition, Andersen, Harlow, Pruitt, and Denkhaus knew that documents issued in connection with the Convertible Note Offering clearly stated that "[Sunbeam] is currently

negotiating the terms of the New Credit Facility with a group of banks which [Sunbeam] expects will provide for borrowings by [Sunbeam] or one or more of its subsidiaries in the aggregate principal amount of $2.0 billion. *The New Credit Facility is being arranged by an affiliate of [Morgan Stanley].*" Andersen, Harlow, Pruitt, and Denkhaus knew that the affiliate referred to in this document was MSSF.

95. In addition to their knowledge of MS & Co.'s and MSSF's roles in Sunbeam's acquisitions, Andersen, Harlow, Pruitt, and Denkhaus had many reasons to know that MS & Co. and MSSF would rely on Sunbeam's audited financial statements. To begin with, Andersen, Harlow, Pruitt, and Denkhaus, in their substantial experience working on multi-billion dollar mergers and acquisitions, understood that Sunbeam's lenders and underwriters would rely on an auditor's certification of Sunbeam's financial condition. As would any lender engaged in a deal of this scale, MSSF looked to the financial statements provided by Sunbeam and audited by Andersen to evaluate annual cash flow and to assess Sunbeam's ability, following the acquisition, to promptly and comfortably pay interest and, ultimately, pay back the loan. Indeed, reasonable and professional lenders such as MSSF, Bank of America, and First Union would not have loaned over $1 billion dollars to any person or entity without strong assurance that their money would be returned. Andersen, Harlow, Pruitt, and Denkhaus knew that MS & Co., the underwriter of the Convertible Note Offering, would similarly refuse to underwrite a $750 million offering without strong assurance that Sunbeam's financial condition was sound.

96. Not only were Andersen, Harlow, Pruitt, and Denkhaus aware that any prudent business in MS & Co.'s or MSSF's position *would* rely on Andersen's financial statements, but they also knew that MS & Co. and MSSF *were* specifically relying on Andersen's certifications. In a letter dated March 11, 1998, MS & Co. wrote a letter to Andersen — to the attention of

Harlow — notifying Andersen that MS & Co. would be "reviewing certain information relating to Sunbeam that will be included in the Offering Memorandum." MS & Co. requested that Andersen deliver to it a "'comfort' letter concerning the financial statements" of Sunbeam.

97. In response to this request, Andersen expressly represented to MS & Co. that Sunbeam's financial statements were truthful and that Andersen's unqualified audit opinions were reliable. On March 19, 1998, Andersen sent MS & Co. a "comfort" letter stating that, in Andersen's opinion, "the consolidated financial statements [for 1996 and 1997] audited by [Andersen] and included in the Offering Memorandum comply as to form in all material respects with the applicable accounting requirements of the [Securities Act of 1933] and the related published rules and regulations." Andersen knew that MS & Co. would rely on the comfort letters in deciding to underwrite the Convertible Note Offering. Andersen also knew that Sunbeam's acquisitions were contingent on Sunbeam's obtaining the necessary financing for the transactions, including the underwriting of the convertible notes. Andersen knew that, absent its representations, MS & Co. would not have underwritten the notes, and therefore the financing, including MSSF's loan to Sunbeam, would not have gone forward. A copy of the March 19, 1998 letter is exhibit "C" attached hereto.

98. Harlow and Pruitt authorized the issuance of the March 19, 1998 comfort letter, which was signed by Andersen. Upon information and belief, Denkhaus knew of this letter and did nothing to stop its issuance.

99. In a follow-up letter to MS & Co. dated March 25, 1998, Andersen reaffirmed its previous representation, stating that it "reaffirm[ed] as of the date hereof (and as though made on the date hereof) all statements made in that letter." Again, Andersen knew that MS & Co. would rely on the comfort letters in deciding to underwrite the Convertible Note Offering and that,

absent its representations, the financing, including MSSF's loan to Sunbeam, would not have gone forward. A copy of the March 25, 1998 letter is exhibit "D" attached hereto.

100. Again, Harlow and Pruitt authorized the issuance of this letter, which was likewise signed by Andersen. Upon information and belief, Denkhaus also knew of this letter and did nothing to stop its issuance.

101. In addition to Andersen's written representations regarding Sunbeam's financial condition, Andersen partners and employees, including Harlow, participated in meetings and telephone calls in which they represented to MS & Co. and MSSF that Sunbeam's audited financial statements were accurate. For example, on March 12, 1998, representatives of MS & Co. participated in a conference call with Harlow and another Andersen employee to discuss Sunbeam's financial statements. In this call, Harlow assured MS & Co.'s representatives that there were no material inaccuracies in Sunbeam's financial statements. Upon information and belief, Harlow made these statements with the knowledge and approval of Pruitt and Denkhaus.

102. Andersen, Harlow, Pruitt, and Denkhaus also knew that MS & Co. had stated in a February 27, 1998 "fairness" opinion that MS & Co. had presented to Sunbeam's Board of Directors that MS & Co. had assumed and relied upon the accuracy and completeness of Sunbeam's audited financial statements that were available at that time.

103. In addition, Andersen, Harlow, Pruitt, and Denkhaus knew that Sunbeam had expressly represented, in loan negotiations with MSSF, that Andersen's audit opinions were accurate. Specifically, Andersen knew that, in the Sunbeam-MSSF credit agreement, Sunbeam had warranted that it had provided MSSF with accurate information regarding Sunbeam's consolidated statements of operations, stockholders' equity and cash flows, as well as its consolidated balance sheets. According to Sunbeam, its financial statements — certified by

Andersen — "present[ed] fairly, in all material respects, the financial position and results of operations and cash flows . . . in accordance with GAAP."

104. Similarly, Andersen, Harlow, Pruitt, and Denkhaus knew that, in connection with the Convertible Note Offering, Sunbeam had included its 1996 and 1997 audited financial statements in its March 19, 1998, offering memorandum and had represented to MS & Co. that its audited financial statements were reliable.

105. Andersen, Harlow, Pruitt, and Denkhaus also knew that, as part of the Coleman merger agreement executed on February 27, 1998, Sunbeam had represented and warranted that all of its filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate and not misleading, and that they would continue to be accurate and not misleading as of the transaction's closing date. Sunbeam further represented that its audited financial statements were prepared in accordance with GAAP, and that at the time of the closing of the transaction, that representation would continue to be true and correct.

106. Although it knew that MS & Co. and MSSF had based multi-million dollar financing decisions on its representations, Andersen did not tell Plaintiffs' of the accounting concerns that it had raised with Sunbeam management in the course of its 1996 and 1997 audits or that Sunbeam's financial statements had not been fairly stated in 1996 and 1997.

107. On March 25, 1998, the $750 million Convertible Note Offering closed. In justifiable reliance on Andersen's 1996 and 1997 unqualified audit opinions, on Andersen's March 19, 1998, and March 25, 1998, "comfort" letters, and on the oral representations made by Harlow and other partners, members or employees of Andersen and Andersen-Worldwide, MS & Co. underwrote this offering to finance Sunbeam's acquisitions of Coleman, Signature Brands, and First Alert.

108. Sunbeam closed its acquisition of Coleman on March 30, 1998. On that date, Sunbeam, through a wholly owned subsidiary, acquired approximately 81 percent of the then-outstanding shares of Coleman common stock. These shares were acquired by Sunbeam in exchange for 14,099,749 shares of Sunbeam's common stock and approximately $160,000,000 in cash. In addition, Sunbeam assumed or repaid approximately $1,016,000,000 in debt belonging to Coleman and Coleman-Parent. Included in the repaid debt portion of the transaction was an immediate cash payment by Sunbeam to Coleman-Parent of $590 million.

109. MSSF and Sunbeam closed the Bank Facility on March 31, 1998. In accordance with the terms of the Bank Facility, MSSF — unaware of the falsity of Sunbeam's financial statements and Andersen's audit reports and in justifiable reliance on Andersen's representations — loaned Sunbeam $680 million in immediately available funds to be used for the acquisitions. First Union, which served as the Administrative Agent for the Bank Facility, loaned Sunbeam an additional $510 million. Bank of America, which served as the Documentation Agent for the Bank Facility, loaned Sunbeam an additional $510 million.

110. As Andersen, Harlow, Pruitt, and Denkhaus knew, MS & Co. had relied on Sunbeam's 1996 and 1997 financial statements in deciding to underwrite the Convertible Note Offering. Andersen, Harlow, Pruitt, and Denkhaus further knew that MSSF had relied on Sunbeam's 1996 and 1997 financial statements in deciding to loan Sunbeam $680 million. Moreover, they knew that the Sunbeam-MSSF credit agreement provided that a condition precedent to MSSF's obligations under the agreement was the absence of any event, change, or development that would have a material adverse effect on the business, results of operation, or financial condition of Sunbeam. Andersen knew that an additional condition precedent to

MSSF's obligations was the absence of any material misrepresentation or omissions in Sunbeam's SEC filings, including Andersen's 1996 and 1997 audit reports in the Form 10-Ks.

111. But for Andersen's fraud and its failure to issue qualified or adverse reports exposing the falsity of Sunbeam's financial statements, MS & Co. and MSSF would have had notice of an adverse material change affecting Sunbeam before funding, and of a material misstatement in Sunbeam's SEC filings. Not only would MS & Co. never have agreed to underwrite the Convertible Note Offering, but MSSF's obligation to loan Sunbeam $680 million also would have been discharged by the failure of conditions precedent to its obligations under the credit agreement. Andersen's fraud directly caused the extensive losses that Plaintiffs suffered.

112. Andersen's fraud was knowingly caused by Harlow, Pruitt, and Denkhaus. Harlow, as engagement partner, and Pruitt, as concurring partner, had direct responsibility for directing, managing, and approving of the work that was done on the Sunbeam audits. They caused Andersen to represent to MS & Co. and MSSF that Sunbeam's financial statements were reliable. Denkhaus, who was a senior partner of Andersen and a member of Andersen-Worldwide, as well as the Audit Division Head and manager of Andersen's audit practice for the entire South Florida region, had undertaken responsibility for supervising and monitoring the work that was performed at Harlow's and Pruitt's direction. Harlow, Pruitt, and Denkhaus each knew of or recklessly disregarded the accounting violations contained in Sunbeam's 1996 and 1997 financial statements. They each also knew that the financial statements that they had caused Andersen to certify would be relied upon by MS & Co. in deciding to underwrite the Convertible Note Offering and by MSSF in deciding to loan Sunbeam hundreds of millions of dollars.

113. This fraud was also knowingly perpetrated by the Foreign Andersen Branches. Each of the Foreign Andersen Branches reviewed and audited financial statements prepared for Sunbeam's foreign subsidiaries for 1997, all of which contained significant accounting violations. Each of the Foreign Andersen Branches knew of or recklessly disregarded the fact that the financial statements that they had reviewed and audited were not prepared in accordance with GAAP or reviewed in accordance with GAAS, but nevertheless certified that their audit work complied with these standards. Each of the Foreign Andersen Branches also knew that the financial statements that they had audited would be incorporated into Sunbeam's consolidated financial statements and that lenders, such as MSSF, and underwriters, such as MS & Co., would rely on these financial statements.

114. The fraud was also knowingly perpetrated by Andersen-Worldwide through the actions of its members, including Harlow, Pruitt, and Denkhaus, and its member firms, including Andersen and the Foreign Andersen Branches.

Andersen's Improper Accounting and Misrepresentations Are Revealed

115. In an April 3, 1998 conference call with securities analysts, Sunbeam revealed that sales for the first quarter of 1998 were 5 percent below reported sales for the same period of the prior year.

116. On April 22, 1998, a class of Sunbeam shareholders sued Sunbeam and its senior officers in the United States District Court for the Southern District of Florida, alleging that the company had violated the securities laws by issuing materially false and misleading statements regarding Sunbeam's financial condition. Andersen was subsequently added as a defendant in that lawsuit.

117. On June 8, 1998, an article was published in Barron's that raised serious questions regarding Sunbeam's apparent success under Dunlap, suggesting that it was the result of "accounting gimmickry." On June 15, 1998, Sunbeam's Board announced that it had removed Dunlap as Chairman and CEO. On June 17, 1998, Sunbeam received a letter from the SEC informing it that the SEC had initiated an investigation into the company.

118. Andersen continued to stand behind its fraudulent audit opinions. On June 15, 1998, Andersen allowed Sunbeam's Board of Directors to assert that Andersen had "assured the Board that Sunbeam's audited financial statements [were] accurate in all material respects." Andersen made this statement knowing that it was false. Harlow, Pruitt, and Denkhaus likewise knew the statement was false, but caused Andersen to make this statement. It was not until June 25, 1998 — when Andersen withheld its consent for use of its 1997 audit opinion in a registration statement that was to have been filed with the SEC — that Andersen gave any hint that its unqualified audit opinions were unreliable.

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

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

October 20, 1998, Sunbeam and Andersen announced a restatement of its 1996 and 1997 financial statements.

121. Holders of the convertible notes sued Sunbeam on October 30, 1998, and Andersen was later named as a defendant in that suit.

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

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

Sunbeam Declares Bankruptcy

124. On February 6, 2001, as a direct result of the deceit that Andersen had committed, with the knowledge and assistance of the other Defendants named in this Complaint, Sunbeam and several of its subsidiaries were forced to seek relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. As part of the bankruptcy court-approved reorganization plan, MSSF's $680 million loan to Sunbeam was discharged in full, and MSSF received Sunbeam stock valued at a fraction of the original loan. In addition, as a result of Andersen's actions, the convertible notes issued by Sunbeam and held

by MS & Co. had been rendered substantially less valuable. The shareholders of Sunbeam saw the value of their stock decline by over $5 billion from its peak in early March 1998 to February 5, 2001.

Subsequent Censure of Andersen's Conduct

125. Both courts and regulators have scrutinized Andersen's facilitation of Sunbeam's fraud. In their judgments against the firm and Harlow, they have denounced Andersen's conduct.

126. In December 1999, for example, the United States District Court for the Southern District of Florida, which presided over the Sunbeam shareholders' class action securities fraud lawsuit, refused to dismiss any claims against Andersen. The court found that the plaintiff class had, by alleging the material misstatements made by Andersen in its unqualified audit opinions, describing the violations of GAAP and GAAS that had occurred, and setting forth why the statements in the audit opinions were false and misleading, pled fraud against Andersen with sufficient particularity to satisfy Federal Rule of Civil Procedure 9(b)'s pleading requirements. *See In re Sunbeam Sec. Litig.*, 89 F. Supp. 2d 1326, 1344 n.11 (S.D. Fla. 1999).

127. The *In re Sunbeam* court also rejected Andersen's argument that the plaintiffs had merely alleged that Andersen violated GAAP and GAAS and had not set forth facts sufficient to show that it acted with knowing fraudulent intent or recklessness. The court ruled that Andersen's arguments "fail[ed] to appreciate the breadth" of the plaintiffs' allegations, which described much more than "innocent auditing and accounting slip-ups." *In re Sunbeam Sec. Litig.*, 89 F. Supp. 2d at 1344. The court concluded (*id.* at 1344-45) that the following facts established that Andersen had acted with requisite scienter:

- Andersen violated a GAAS requirement that it have a sufficient understanding of Sunbeam's internal control structure;

- Andersen failed to adhere to GAAS by not identifying numerous fraud risk factors suggesting that there was a significant risk that Sunbeam had fraudulently misstated its financials;

- Andersen was alerted by Sunbeam employees to material misstatements in Sunbeam's financial statements;

- Andersen failed to stop Sunbeam from recognizing, in violation of GAAP, revenues from guaranteed sales and consignment transactions, with the result that its sales were substantially overstated;

- Andersen ignored a June 8, 1998, Barron's article that accused Sunbeam of accounting improprieties, continued to stand behind its audit opinions, and did not given any hint that its unqualified audit opinions were unreliable until June 25, 1998, when it withheld consent to the use of its audit opinion in an SEC registration statement; and

- The sheer magnitude of the restatements of Sunbeam's financial statements indicated that Andersen was at least severely reckless not to know that its unqualified audit opinions were misleading.

128. The United States District Court for the Southern District of Florida concluded that these facts were sufficient to "demonstrate that Arthur Andersen acted with severe recklessness in issuing its misleading Unqualified Audit Opinion," and therefore supported a valid federal securities law fraud claim. *In re Sunbeam Sec. Litig.*, 89 F. Supp. 2d at 1344. Andersen subsequently settled this lawsuit in 2001 for $110 million.

129. On May 15, 2001, the SEC filed a civil action in the United States District Court for the Southern District of Florida against five former Sunbeam officers and Harlow, Andersen's engagement partner. The SEC alleged that Harlow, by causing Andersen to issue materially incorrect audit opinions, had engaged in fraud in violation of the federal securities laws.

130. In January 2003, Harlow consented to an injunction and agreed not to contest the SEC's charges against him. In the SEC's consent order, it made numerous factual findings

regarding Harlow's improper conduct. It concluded that Harlow had proposed, on many occasions, adjustments to rectify Sunbeam's false financial statements. After management refused to make these adjustments, Harlow improperly acceded to that decision. *In re Phillip E. Harlow*, Rel. No. 34-47261, 2003 WL 169818, at *1-*3 (SEC Rel. Jan. 27, 2003).

131. The SEC's assessment of Harlow's conduct was damning. Among many other things, it concluded that Harlow (1) "failed to exercise professional skepticism when performing audit procedures and gathering and analyzing audit evidence," (2) "accepted uncorroborated representations of Sunbeam's management in lieu of performing appropriate audit procedures," (3) "failed to exercise due professional care in performing the audit and preparing the audit report," (4) "failed to perform sufficient audit procedures to determine whether the financial statements were in conformity with GAAP," even after he had "identified a number of audit risks and accounting issues associated with the Sunbeam engagement," and (5) "failed to obtain sufficient competent evidential matters through inspection, observation, inquiries, and confirmation to afford a reasonable basis for an audit opinion." *Id.* at *4. Based on these factual findings, the Commission concluded that the 1996 and 1997 financial statements that Harlow had audited were not in conformity with GAAP, and the audit was not performed in accordance with GAAS. *Id.* (citing AU §§ 410, 411, 508.07).

132. Other participants in the Coleman acquisition have also sued Andersen for its fraudulent conduct. On June 8, 2001, Coleman-Parent sued Andersen and Harlow for fraudulent misrepresentation, fraudulent inducement to contract (conspiracy and concerted action), and negligent misrepresentation. *See Coleman (Parent) Holdings, Inc. v. Arthur Andersen LLP*, No. 502001CA006062XXOCAN (Fla. 15th Cir. Ct., filed June 8, 2001). That case was assigned to Judge Stephen A. Rapp. Andersen and Harlow moved to dismiss. However, after an

October 29, 2001, hearing on their motion, Andersen and Harlow answered Coleman-Parent's complaint. On March 15, 2002, the complaint in this matter was amended to add Andersen-Worldwide, Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela, and Andersen's United Kingdom branch as defendants. *See* Amended Complaint, *CPH v. Andersen* (filed Mar. 15, 2002). The Court denied Andersen-Worldwide's Motion To Dismiss on June 19, 2002, and the matter was voluntarily dismissed on January 28, 2003, after the parties had settled for an undisclosed amount.

Tolling Agreements

133. On March 8, 2001, Morgan Stanley, MSSF, and all of "their respective successors, predecessors, subsidiaries, affiliates, and assigns" executed the first of a series of tolling agreements with the Defendants. Additional tolling agreements were executed on April 4, 2001, April 19, 2001, April 24, 2001, April 23, 2002, October 16, 2002, April 10, 2003, and October 21, 2003. Copies of these Tolling Agreements are exhibits "E" through "L" attached hereto.

134. These agreements were signed by Andersen. The individuals that signed the agreements on behalf of Andersen represented that they had the "authority to bind and act on behalf of" Andersen and all of its "successors, predecessors, subsidiaries, affiliates, assigns, partners, employees, agents, officers, or directors."

135. Taken together, these agreements show that, in consideration for forbearance from commencing an action against the Defendants, Andersen agreed to toll from March 8, 2001, to March 1, 2004, the statute of limitations on all Morgan Stanley entities' claims against Andersen, its partners and agents (including Harlow, Pruitt, and Denkhaus), and its affiliates (including

Andersen-Worldwide and the Foreign Andersen Branches) that arose out of Andersen's audits of Sunbeam's financial statements.

COUNT I

Fraudulent Misrepresentation

136. Paragraphs 1 through 135 are repeated and realleged as if set forth herein.

137. Andersen consented to the publication of its audit reports to the public and business world by permitting Sunbeam to include them in Sunbeam's SEC filings. Given that publication, Andersen knew and intended that the public — including MS & Co. and MSSF — would rely on Andersen's representations.

138. Andersen knew of Sunbeam's proposed financing arrangements and of MS & Co.'s and MSSF's roles in Sunbeam's acquisitions. Andersen also knew that MS & Co. and MSSF would rely and had relied upon Andersen's 1996 and 1997 unqualified audit opinions for the particular purpose of determining whether to underwrite the Convertible Note Offering and to provide Sunbeam with a loan for $680 million.

139. Andersen itself invited MS & Co to rely on its unqualified audit opinions, expressly representing to MS & Co., in letters dated March 19, 1998, and March 25, 1998, that Sunbeam's financial statements were truthful and that Andersen's unqualified audit opinions were reliable. Andersen knew that, absent its representations, MS & Co. would not have underwritten the notes, and therefore the financing, including MSSF's loan to Sunbeam, would not have gone forward. In addition, Andersen's and Andersen-Worldwide's members, partners, and employees, including Harlow, participated in meetings and telephone calls in which they represented to MS & Co. and MSSF that Sunbeam's audited financial statements were accurate.

140. Andersen knew that Sunbeam's financial statements were replete with accounting irregularities and that the information in Sunbeam's 1996 and 1997 financial statements and in Andersen's 1996 and 1997 unqualified audit opinions was materially false and misleading.

141. Although Andersen knew that MS & Co. and MSSF would rely and had relied on its false statements, it did not inform MS & Co. or MSSF that the unqualified audit opinions it had provided were materially false or that Sunbeam's financial statements contained numerous misstatements of material facts.

142. Andersen made its materially false representations regarding its unqualified audit opinions and the accuracy of Sunbeam's financial statements with the intent to deceive Plaintiffs.

143. Andersen knew that the false information that had been provided to Plaintiffs would be critical to Plaintiffs' decisions to participate in the financing of Sunbeam's acquisitions. But for Andersen's fraudulent representations, MS & Co. would not have underwritten the Convertible Note Offering, nor would MSSF have loaned Sunbeam $680 million.

144. Andersen's fraud was knowingly caused by Harlow, Pruitt, and Denkhaus. Harlow, as engagement partner, and Pruitt, as concurring partner had direct responsibility for directing, managing, and approving of the work that was done on the Sunbeam audits. Denkhaus, who was a senior partner of Andersen and a member of Andersen-Worldwide, as well as the Audit Division Head and manager of Andersen's audit practice for the entire South Florida region, had undertaken responsibility for supervising and monitoring the work performed at Harlow's and Pruitt's direction. Harlow, Pruitt, and Denkhaus each knew of or recklessly disregarded the accounting violations contained in Sunbeam's 1996 and 1997 financial statements. They each also knew that the financial statements that they had caused Andersen to certify would be relied

upon by MS & Co. in deciding to underwrite the Convertible Note Offering and by MSSF in deciding to loan Sunbeam hundreds of millions of dollars.

145. This fraud was also knowingly perpetrated by the Foreign Andersen Branches. Each of the Foreign Andersen Branches reviewed and audited financial statements prepared for Sunbeam's foreign subsidiaries for 1997, all of which contained significant accounting violations. Each of the Foreign Andersen Branches knew or recklessly disregarded the fact that the financial statements that they had reviewed and audited were not prepared in accordance with GAAP or reviewed in accordance with GAAS, but nevertheless certified their audit work as in compliance with these standards. Each of the Foreign Andersen Branches also knew that the financial statements that they had audited would be incorporated into Sunbeam's consolidated financial statements and that lenders, such as MSSF, and underwriters, such as MS & Co., would rely on these financial statements.

146. The fraud was also knowingly perpetrated by Andersen-Worldwide through the actions of its members, including Harlow, Pruitt, and Denkhaus, and its member firms, including Andersen and the Foreign Andersen Branches.

147. As a direct result of this fraud, MS & Co., MSSF, and Morgan Stanley have collectively suffered hundreds of millions of dollars in damages.

COUNT II

(Conspiracy to Defraud)

148. Paragraphs 1 through 135 are repeated and realleged as if set forth herein.

149. Andersen, Andersen-Worldwide, the Foreign Andersen Branches, Harlow, Pruitt, and Denkhaus acted in concert and wrongfully conspired with Dunlap, Kersh, Gluck, and other

senior Sunbeam executives to create the appearance that Sunbeam was performing at a high level. The purpose of this conspiracy was artificially to inflate the stock price of Sunbeam and thereby to induce MS & Co. to underwrite the Convertible Note Offering and MSSF into loaning Sunbeam $680 million to finance Sunbeam's acquisition of Coleman, First Alert, and Signature Brands. Andersen, Andersen-Worldwide, the Foreign Andersen Branches, Harlow, Pruitt, and Denkhaus agreed to become part of the conspiracy to defraud Plaintiffs and committed overt acts in furtherance of this fraudulent scheme.

150. In furtherance of the conspiracy, Dunlap, Kersh, Gluck, and the other Sunbeam executives agreed to misstate Sunbeam's true financial condition by millions of dollars in order to create the illusion that Sunbeam had undergone a radical financial turnaround. Pursuant to this scheme, Dunlap, Kersh, Gluck, and other Sunbeam executives caused Sunbeam, in 1996, to overstate its operating losses by at least $40 million, thereby establishing an overly bleak financial backdrop against which the company's performance in 1997 would be measured. In 1997, by contrast, Dunlap, Kersh, Gluck, and the other Sunbeam executives caused Sunbeam dramatically to overstate its earnings.

151. In late 1997 to early 1998, in furtherance of the conspiracy, Dunlap, Kersh, Gluck, and the other Sunbeam executives decided to acquire Coleman, First Alert, and Signature Brands. They communicated this decision to Andersen and Harlow. Thereafter, Andersen, Andersen-Worldwide, the Foreign Andersen Branches, Harlow, Pruitt, and Denkhaus agreed to become part of the conspiracy to defraud Plaintiffs.

152. In March 1998, in furtherance of the conspiracy, Andersen and Andersen-Worldwide, through their partners/members Harlow, Pruitt, and Denkhaus, committed overt acts in furtherance of the conspiracy, including, but not limited to, issuing Andersen's false and

misleading 1997 unqualified audit opinion with respect to Sunbeam's 1997 financial statements and consenting to its publication to the SEC as part of Sunbeam's Form 10-K filing on March 6, 1998.

153. The members of the conspiracy all knew or recklessly disregarded the fact that Sunbeam's 1996 and 1997 financial statements and Andersen's audit opinions concerning those financial statements contained false statements of material fact. All of the co-conspirators that the representations regarding Sunbeam's 1996 and 1997 financial statements were false when made and/or made these representations with reckless disregard as to their truth.

154. In furtherance of the conspiracy, and to induce MS & Co. into underwriting the Convertible Note Offering and MSSF into loaning Sunbeam $680 million, Andersen and Sunbeam represented to MS & Co. and MSSF that Sunbeam's audited financial statements and Andersen's audit opinions were accurate and not misleading. The co-conspirators invited MS & Co. and MSSF to rely on Andersen's unqualified audit opinions. In furtherance of the conspiracy, Andersen expressly represented to MS & Co., in letters dated March 19, 1998, and March 25, 1998, that Sunbeam's financial statements were truthful and that Andersen's unqualified audit opinions were reliable.

155. In furtherance of the conspiracy, Andersen, Harlow, other Andersen-Worldwide members and employees, and Sunbeam employees participated in meetings and telephone calls in which they represented to employees of MS & Co. and MSSF that Sunbeam's audited financial statements were accurate.

156. In furtherance of the conspiracy, Sunbeam's senior management caused Sunbeam expressly to represent, in loan negotiations with MSSF, that Andersen's audit opinions were accurate. They caused Sunbeam to warrant, in the Sunbeam-MSSF credit agreement, that it had

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provided MSSF with accurate information regarding its consolidated statements of operations, stockholders' equity and cash flows, as well as its consolidated balance sheets. They caused Sunbeam to include its 1996 and 1997 audited financial statements in its March 19, 1998, offering memorandum and to represent to MS & Co. that its audited financial statements were reliable. As part of the Coleman merger agreement executed on February 27, 1998, they caused Sunbeam to represent and warrant that all of Sunbeam's filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate, not misleading, and prepared in accordance with GAAP, and that they would continue to be accurate and not misleading as of the transaction's closing date. Andersen and the other Defendants named in this Complaint had full knowledge and approved of these false representations.

157. In reasonable and justifiable reliance on the co-conspirators' representations that Sunbeam's financial statements and Andersen's audit reports were accurate and truthful, MS & Co. agreed to underwrite the Convertible Note Offering, and MSSF agreed to loan Sunbeam $680 million to finance Sunbeam's acquisition of Coleman. But for the co-conspirators' fraudulent representations, MS & Co. would not have underwritten the Convertible Note Offering, nor would MSSF have loaned Sunbeam $680 million.

158. Harlow, Pruitt, and Denkhaus had full knowledge of and participated in this conspiracy. Harlow, as engagement partner, and Pruitt, as concurring partner, had direct responsibility for directing, managing, and approving of the work that was done on the Sunbeam audits. Denkhaus, who was a senior partner of Andersen and a member of Andersen-Worldwide, as well as the Audit Division Head and manager of Andersen's audit practice for the entire South Florida region, had undertaken responsibility for supervising and monitoring the work performed at Harlow's and Pruitt's direction. Harlow, Pruitt, and Denkhaus each knew of or recklessly

disregarded the accounting violations contained in Sunbeam's 1996 and 1997 financial statements. They each also knew that the financial statements that they had caused Andersen to certify would be relied upon by MS & Co. in deciding to underwrite the Convertible Note Offering and by MSSF in deciding to loan Sunbeam hundreds of millions of dollars.

159. The Foreign Andersen Branches also knowingly participated in this scheme. Each of the Foreign Andersen Branches reviewed and audited financial statements prepared for Sunbeam's foreign subsidiaries for 1997, all of which contained significant accounting violations. Each of the Foreign Andersen Branches knew or recklessly disregarded the fact that the financial statements that they had reviewed and audited were not prepared in accordance with GAAP or reviewed in accordance with GAAS, but nevertheless certified their audit work as in compliance with these standards. Each of the Foreign Andersen Branches also knew that the financial statements that they had audited would be incorporated into Sunbeam's consolidated financial statements and that lenders, such as MSSF, and underwriters, such as MS & Co., would rely on these financial statements.

160. Andersen-Worldwide also participated in this conspiracy through the actions of its members, including Harlow, Pruitt, and Denkhaus, and its member firms, including Andersen and the Foreign Andersen Branches.

161. As a direct result of this conspiracy of fraudulent inducement, Plaintiffs have collectively suffered hundreds of millions of dollars in damages.

COUNT III

Aiding and Abetting Fraud

162. Paragraphs 1 through 135 are repeated and alleged as if set forth herein.

163. To induce MSSF into loaning Sunbeam $680 million to finance its acquisition of Coleman, First Alert, and Signature Brands, Sunbeam represented to MSSF in loan negotiations that Sunbeam's audited financial statements were accurate and not misleading. In the Sunbeam-MSSF credit agreement, Sunbeam warranted that it had provided MSSF with accurate information regarding its consolidated statements of operations, stockholders' equity and cash flows, as well as its consolidated balance sheets. Sunbeam included its 1996 and 1997 audited financial statements in its March 19, 1998, offering memorandum and represented to MS & Co. and MSSF that its audited financial statements were reliable.

164. As part of the Coleman merger agreement executed on February 27, 1998, Sunbeam expressly represented and warranted that all of its filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate, not misleading, and prepared in accordance with GAAP, and that they would continue to be accurate and not misleading as of the transaction's closing date. Sunbeam knew that its many representations regarding its 1996 and 1997 financial statements were materially false when made and/or made these representations with reckless disregard as to their truth. It also knew that Andersen's 1996 and 1997 unqualified audit opinions were materially false and misleading.

165. Sunbeam knew that MS & Co. would rely on Sunbeam's representations in determining whether to act as Sunbeam's underwriter and that MSSF would rely on its representations in deciding to loan Sunbeam $680 million to finance its acquisitions. Although Sunbeam knew that MS & Co. and MSSF would rely and had relied on its false statements, it did not inform them that the unqualified audit opinions it had provided were materially false or that Sunbeam's financial statements contained numerous misstatements of material facts.

166. Sunbeam made its materially false representations regarding its financial statements and Andersen's unqualified audit opinions with the intent to deceive MS & Co. and MSSF and to induce them to participate in the financing of Sunbeam's acquisitions.

167. Sunbeam knew that the false information that it had provided to MS & Co. and MSSF, and its intentional failure to correct the misrepresentations contained in Sunbeam's financial statements, would be critical to their decision to participate in the financing of Sunbeam's acquisitions. But for Sunbeam's fraudulent representations, MS & Co. would not have underwritten the Convertible Note Offering, nor would MSSF have loaned Sunbeam $680 million.

168. Andersen and Andersen-Worldwide, through their partners/members Harlow, Pruitt, and Denkhaus, knowingly and substantially assisted Sunbeam in its fraud. Andersen itself expressly represented to MS & Co., in letters dated March 19, 1998, and March 25, 1998, that Sunbeam's financial statements were truthful and that Andersen's unqualified audit opinions were reliable. In addition, employees, partners, and members of Andersen and Andersen-Worldwide, including Harlow, participated in meetings and telephone calls in which they represented to MS & Co. and MSSF that Sunbeam's audited financial statements were accurate.

169. Harlow, Pruitt, and Denkhaus substantially and knowingly assisted Sunbeam's fraud. They each knew of or recklessly disregarded the accounting violations contained in Sunbeam's 1996 and 1997 financial statements. They each also knew that the financial statements that they had caused Andersen to certify would be relied upon by MS & Co. in deciding to underwrite the Convertible Note Offering and by MSSF in deciding to loan Sunbeam hundreds of millions of dollars.

170. The Foreign Andersen Branches substantially and knowingly assisted Sunbeam's fraud. They each reviewed and audited financial statements prepared for Sunbeam's foreign subsidiaries for 1997, all of which contained significant accounting violations. Each of the Foreign Andersen Branches knew of or recklessly disregarded the fact that the financial statements that they had reviewed and audited were not prepared in accordance with GAAP or reviewed in accordance with GAAS, but nevertheless certified their audit work as in compliance with these standards. Each of the Foreign Andersen Branches also knew that the financial statements that they had audited would be incorporated into Sunbeam's consolidated financial statements and that lenders, such as MSSF, and underwriters, such as MS & Co., would rely on these financial statements.

171. As a direct result of Sunbeam's fraud, aided and abetted by Andersen, Andersen-Worldwide, the Foreign Andersen Branches, Harlow, Pruitt, and Denkhaus, MS & Co., MSSF, and Morgan Stanley collectively have suffered hundreds of millions of dollars in damages.

WHEREFORE, Plaintiffs, MS & Co., MSSF, and Morgan Stanley, demand judgment against Andersen, Andersen-Worldwide, Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela, Harlow, Pruitt, and Denkhaus, jointly and severally, for:

(A) compensatory damages;

(B) prejudgment interest;

(C) attorneys' fees and costs; and

(D) such other relief as may be just and appropriate.

Plaintiffs reserve the right to amend their complaint pursuant to section 768.72, Florida Statutes, to assert claims for punitive damages in excess of $1.2 billion as allowed by law.

DEMAND FOR JURY TRIAL

Plaintiffs request a trial by jury on any and all issues raised by this complaint that are triable of right by a jury.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy hereof was furnished by regular U.S. Mail to counsel on the attached list on August 6, 2004.

D. Culver Smith III

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(Service of pleadings, etc.)

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[4] Andersen Worldwide, Societé Cooperative (a Swiss cooperative)

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

MORGAN STANLEY'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S FIRST AMENDED COMPLAINT

Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") answers and affirmatively defends Plaintiff Coleman (Parent) Holdings Inc.'s ("CPH's") First Amended Complaint by denying generally that Morgan Stanley engaged in any conspiracy to defraud, that Morgan Stanley assisted Sunbeam Corporation ("Sunbeam") or any employee, director or agent of Sunbeam in the commission of a fraudulent scheme, or that Morgan Stanley otherwise defrauded CPH in any manner. Specifically, Morgan Stanley responds to CPH's allegations as follows:

Nature of the Action

1. Morgan Stanley denies the allegations in Paragraph 1.

2. Morgan Stanley admits that, beginning in mid-1997, Morgan Stanley served as an investment banker for Sunbeam. Morgan Stanley admits that it attempted to identify a party interested in purchasing Sunbeam, and that those efforts were ultimately unsuccessful. Morgan Stanley admits that it recommended that Sunbeam's management consider acquiring other companies instead and suggested, as is common in corporate mergers and acquisitions, that Sunbeam consider, among other options, using Sunbeam stock as part of the consideration for such an acquisition. Morgan Stanley admits that it facilitated communications between Sunbeam

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and Coleman, but denies that Morgan Stanley in any way "persuaded" CPH to sell its interest in Coleman to Sunbeam. Morgan Stanley denies the remaining allegations in Paragraph 2.

3. Morgan Stanley admits that it agreed to serve as underwriter of a $750 million debenture offering for Sunbeam. Morgan Stanley admits that, as an advisor to Sunbeam, Morgan Stanley had access to certain financial documents, and further states that those same documents were available to CPH during the acquisition negotiations and thereafter. Further, Morgan Stanley specifically disclaimed any independent evaluation of Sunbeam's financial records, and expressly stated that it relied solely on documentation and information provided by Sunbeam and Sunbeam's audited financial statements. Morgan Stanley admits that late on March 18, 1998, it learned that Sunbeam's first quarter 1998 sales were below the same period in 1997. Sunbeam insisted that its sales would meet expectations, but Morgan Stanley insisted that Sunbeam issue a press release. Morgan Stanley admits that it received two "Comfort Letters" from Sunbeam's auditors, Arthur Andersen dated March 19, and March 25, 1998. Morgan Stanley performed all of its obligations as an underwriter of Sunbeam securities. Morgan Stanley denies that it had any role in the accounting judgments described in the complaint, or any obligations to audit or independently examine Sunbeam's accounting records. Morgan Stanley denies that it owed any duties to CPH. Morgan Stanley denies that it had any independent knowledge as to the reasons behind Sunbeam's first quarter sales, that Sunbeam had a "practice of accelerating sales," or that it "materially misrepresent[ed]" information to CPH. Further, Morgan Stanley specifically denies that it in any manner assisted Sunbeam in concealing its 1998 first quarter sales numbers in order to close the transaction. Morgan Stanley denies the remaining allegations in Paragraph 3.

4. Morgan Stanley admits that CPH has brought this action against Morgan Stanley alleging aiding and abetting fraud and conspiracy, but denies that there is any merit to the suit. Morgan Stanley specifically denies that it made any fraudulent or negligent representations to CPH, that it in any way aided or abetted a fraudulent scheme against CPH, or that it participated in a conspiracy to defraud CPH. Morgan Stanley denies that any losses that CPH suffered resulted from fraud or any wrongful conduct on the part of Morgan Stanley. Morgan Stanley denies the remaining allegations in Paragraph 4.

5. Morgan Stanley admits that CPH purports to seek compensatory damages against Morgan Stanley, but denies that such claim is valid, for Morgan Stanley denies that it was engaged in any wrongful conduct. Morgan Stanley acknowledges that the Court has granted CPH permission to seek punitive damages, but denies that punitive damages are recoverable in this action. Morgan Stanley denies the remaining allegations in Paragraph 5.

Jurisdiction and Venue

6. Morgan Stanley admits the allegations in Paragraph 6.

7. Morgan Stanley denies that venue is proper in this circuit.

Parties and Other Key Participants

8. Morgan Stanley admits that CPH represented, in negotiations with Sunbeam, that it owned, directly or indirectly, approximately 82% of Coleman prior to March 30, 1998. Morgan Stanley admits that on March 30, 1998, Sunbeam acquired CPH's interest in Coleman by paying CPH with 14.1 million shares of Sunbeam common stock and other consideration, including a cash payment by Sunbeam to CPH in the amount of $159,956,756.00. (*See* Feb. 27, 1998 Merger Agmt. § 3.1(a)(i) (Ex. 1).) Morgan Stanley denies any remaining allegations in Paragraph 8.

9. Morgan Stanley admits that it is an investment banking firm providing financial and securities services. Morgan Stanley admits that, as part of its business operations, it at times provides advice on mergers and acquisitions, and raises capital in equity and debt markets, depending on the needs of its clients. Morgan Stanley admits that it served as Sunbeam's investment banker for certain aspects of Sunbeam's acquisition of Coleman, and served as underwriter of certain securities issued by Sunbeam in connection with the acquisitions of Coleman, First Alert and Signature Brands. Morgan Stanley denies the remaining allegations in Paragraph 9.

10. Morgan Stanley admits that Sunbeam was a publicly-traded company that manufactures and markets household and specialty consumer products, including outdoor cooking products. Morgan Stanley admits that Sunbeam marketed these products under several brand names, including Sunbeam and Oster. Morgan Stanley admits that Sunbeam filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code in February 2001. Morgan denies the remaining allegations in Paragraph 10.

11. On February 28, 2005, the Court entered an Amended Order striking paragraph 11 except for the first and last sentences; therefore, Morgan Stanley's response is only to the remaining portions of paragraph 11. Morgan Stanley admits that Albert Dunlap was the Chief Executive Officer of Sunbeam from July 1996 to June 1998. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 11 and therefore denies them.

12. On February 28, 2005, the Court entered an Amended Order striking paragraph 12 except for the first and last sentences; therefore, Morgan Stanley's response is only to the remaining portions of paragraph 12. Morgan Stanley admits that Russell Kersh was the

Executive Vice President of Sunbeam from July 1996 to June 1998. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 12 and therefore denies them.

13. Morgan Stanley admits that Arthur Andersen LLP served as Sunbeam's auditors and provided independent accounting services to Sunbeam. Morgan Stanley further admits that, during the performance of its engagement, it received two Comfort Letters from Arthur Andersen. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 13 and therefore denies them.

Factual Background

14. Morgan Stanley admits the allegations in Paragraph 14.

15. Morgan Stanley responds that the allegations in Paragraph 15 pertain to publicly available information, and refers to such information for the truth or falsity of such allegations. To the extent that further response is required, Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 15 and therefore denies them.

16. Morgan Stanley responds that the allegations in Paragraph 16 pertain to publicly available information, and refers to such information for the truth or falsity of such allegations. To the extent that further response is required, Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 16 and therefore denies them.

17. Morgan Stanley admits that Albert Dunlap was hired as Sunbeam's Chief Executive Officer on or about July 18, 1996. Morgan Stanley admits that Mr. Dunlap was viewed as a "turnaround specialist." Morgan Stanley lacks sufficient knowledge or information

to form a belief as to the truth of the remaining allegations in Paragraph 17 and therefore denies them.

18. Morgan Stanley admits that Russell Kersh was hired as Sunbeam's Chief Financial Officer. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 18 and therefore denies them.

19. Morgan Stanley admits that Albert Dunlap and members of his senior management team entered into employment agreements with Sunbeam. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 19 and therefore denies them.

20. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 20 and therefore denies them.

21. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 21 and therefore denies them.

22. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 22 and therefore denies them.

23. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 23 and therefore denies them.

24. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 24 and therefore denies them.

25. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 25 and therefore denies them.

26. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 26 and therefore denies them.

27. Morgan Stanley admits, on information and belief, that Sunbeam reported a loss of $18.1 million in the third quarter of 1996, and that it had a $34.5 million gain in the third quarter 1997. Morgan Stanley further admits, on information and belief, that Sunbeam reported an increase in profits from $6.5 million in 1996 to $67.7 million in 1997. Morgan Stanley responds that the allegations in Paragraph 27 regarding stock prices pertain to publicly available information and Morgan Stanley refers to such information for the truth or falsity of such allegations. To the extent that further response is required, Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 27 and therefore denies them.

28. Morgan Stanley admits that it was engaged by Sunbeam to explore a possible sale of Sunbeam's core business or the initiation of one or more acquisitions. Morgan Stanley denies the remaining allegations in Paragraph 28.

29. Morgan Stanley admits that William Strong and other Morgan Stanley employees met with Sunbeam in the spring of 1997 to discuss Sunbeam's investment banking requirements. Further, Morgan Stanley admits that, although it was not engaged in a previous relationship with Sunbeam, William Strong had worked with Dunlap before, during Strong's previous employment with Salomon Brothers. Morgan Stanley denies the remaining allegations in Paragraph 29.

30. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 30 and therefore denies them.

31. Morgan Stanley admits that William Strong and other Morgan Stanley employees met with Sunbeam in the spring of 1997 to discuss Sunbeam's investment banking requirements. Morgan Stanley admits that it was engaged by Sunbeam to explore a possible sale of Sunbeam's

core business or the initiation of one or more acquisitions. Morgan Stanley admits that it initially sought a buyer for Sunbeam. To the extent this Paragraph alleges that Morgan Stanley was motivated to participate in a fraud to retain a single client and receive a customary fee, that allegation is foreclosed, among other reasons, by the fact that Morgan Stanley's own affiliate lent hundreds of millions of dollars to Sunbeam two days after the Coleman acquisition closed. (June 1998 Credit Facilities Mem. (Ex. 2).) Morgan Stanley denies any remaining allegations in Paragraph 31.

32. Morgan Stanley admits that it sought a buyer for Sunbeam. Morgan Stanley further admits that it assembled marketing materials for use in meetings with potential acquirers based on financial information and audited financial statements provided to Morgan Stanley by Sunbeam, Arthur Andersen, or available in the public domain. Morgan Stanley admits that it was unable to find a buyer for Sunbeam. Morgan Stanley denies the remaining allegations in Paragraph 32.

33. Morgan Stanley denies that it provided the "solution" to any "problem" alleged in Paragraph 33. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 33 and therefore denies them.

34. Morgan Stanley admits after its unsuccessful attempts to locate a purchaser for Sunbeam, Morgan Stanley suggested that Sunbeam acquire one or more other companies instead. Morgan Stanley admits that it proposed to Sunbeam, among other options, the possibility of paying for any such acquisition in part with Sunbeam's stock. Morgan Stanley denies the remaining allegations in Paragraph 34.

35. Morgan Stanley denies the allegations in Paragraph 35.

36. Morgan Stanley admits that, in its capacity as advisor to Sunbeam, Morgan Stanley identified Coleman as a potential acquisition candidate. Morgan Stanley admits that it communicated with representatives of Coleman to discuss a potential acquisition, but denies that it "persuade[d] CPH to sell its interest in Coleman to Sunbeam." Morgan Stanley admits that CPH represented, in negotiations with Sunbeam, that CPH owned, directly or indirectly, approximately 82% of Coleman prior to March 30, 1998. Morgan Stanley denies the remaining allegations in Paragraph 36.

37. Morgan Stanley admits that it did assist Sunbeam in preparing for the meeting, but denies it "laid the groundwork" for the meeting. Morgan Stanley denies the allegations in Paragraph 37.

38. Morgan Stanley admits that discussions among Sunbeam, MAFCO and CPH resumed in early 1998. Morgan Stanley further admits that its Managing Directors James Stynes and Robert Kitts worked on Morgan Stanley's engagement for Sunbeam. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations in Paragraph 38 and therefore denies them.

39. Morgan Stanley denies the allegations in Paragraph 39.

40. Morgan Stanley admits that CPH agreed to sell its shares in Coleman to Sunbeam, but denies that Morgan Stanley "persuaded" CPH to make the deal. To the extent that further response is required, Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 40 and therefore denies them.

41. Morgan Stanley admits that on February 27, 1998, Sunbeam's Board of Directors met at Morgan Stanley's New York offices to discuss Sunbeam's possible purchase of Coleman. Morgan Stanley denies the remaining allegations in Paragraph 41.

42. Morgan Stanley admits it made a presentation during the February 27, 1998 Sunbeam Board of Directors Meeting. Morgan Stanley further admits that Morgan Stanley representatives, including William Strong, Robert Kitts, James Stynes and Ruth Porat, were present at this meeting. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations in Paragraph 42 and therefore denies them.

43. Morgan Stanley admits that at that February 27, 1998 New York meeting, it provided Sunbeam with a written "fairness opinion" regarding the fair acquisition price of Coleman. This opinion was based on financial information provided to Morgan Stanley by Sunbeam, Coleman, and Arthur Andersen. The written fairness opinion explicitly stated that Morgan Stanley "[has] not made any independent valuation or appraisal of the assets or liabilities of [Sunbeam]." (Feb. 27, 1998 Fairness Op. at 3 (Ex. 3).) Morgan Stanley denies any remaining allegations in Paragraph 43.

44. Morgan Stanley admits that the Sunbeam Board of Directors approved the Coleman acquisition at the February 27, 1998 meeting in New York. Morgan Stanley denies the remaining allegations in Paragraph 44.

45. Morgan Stanley admits that it continued to provide investment banking services to Sunbeam after the Coleman acquisition was approved. Morgan Stanley denies the remaining allegations in Paragraph 45.

46. Morgan Stanley admits that the Coleman acquisition was announced on March 2, 1998. Morgan Stanley responds that the allegations in Paragraph 46 regarding stock prices pertain to publicly available information, and refers to such information for the truth or falsity of such allegations. To the extent that further response is required, Morgan Stanley lacks sufficient

knowledge or information to form a belief as to the truth of the allegations in Paragraph 46 and therefore denies them.

47. Morgan Stanley admits that it agreed to serve as underwriter for Sunbeam's subordinated debentures. The "cash portion" of the consideration set forth in the Merger Agreement was also financed in part through a $680 million loan made by MSSF, an affiliate of Morgan Stanley (*See* Credit Facilities Mem.) Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations in Paragraph 47 and therefore denies them.

48. Morgan Stanley admits that the money raised from the sale of the debentures was used in part to finance Sunbeam's acquisition of Coleman, First Alert, and Signature Brands.

49. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 49 and therefore denies them.

50. Morgan Stanley admits that the convertible debentures were presented to potential investors at a series of "road show" meetings and conference calls. Morgan Stanley admits that it reviewed and commented on Sunbeam's offering memorandum and other materials used to present the debentures to potential qualified investors, under Rule 144A which did not include CPH. Morgan Stanley denies that it "misrepresented Sunbeam's financial performance" or "emphasized Dunlap's purported 'turnaround' accomplishments." To the contrary, the offering memorandum expressly stated that Morgan Stanley assumed no responsibility for the accuracy or completeness of Sunbeam's audited financial information and warned investors not to rely on any projections of future performance. (March 19, 1998 Note Offering Mem. at 2-3, 12-17, 72 (Ex. 4).) Morgan Stanley denies any remaining allegations in Paragraph 50.

51. Morgan Stanley admits that it launched the debenture offering with a presentation to the Morgan Stanley sales force, but denies the remaining allegations in Paragraph 51.

52. Morgan Stanley admits that the debenture offering was increased from $500 million to $750 million. Morgan Stanley admits that the debentures were offered to investors, not including CPH, nationwide. Morgan Stanley denies any remaining allegations in Paragraph 52.

53. Morgan Stanley admits that its employees traveled on one occasion to Sunbeam's Florida offices. Morgan Stanley denies the remaining allegations in Paragraph 53, except to the extent that they constitute legal conclusions to which no response is required.

54. Morgan Stanley admits that William Strong worked on Morgan Stanley's engagement for Sunbeam. Morgan Stanley also admits that Strong had conversations with Sunbeam officials. Morgan Stanley denies that Strong or any other Morgan Stanley employee was accurately apprised of Sunbeam's financial condition because Morgan Stanley at all times relied on information provided by Sunbeam management and Arthur Andersen, including Sunbeam's audited and unaudited interim financial statements. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations in Paragraph 54 and therefore denies them.

55. On February 28, 2005, the Court entered an Amended Order striking portions of paragraph 55; therefore, Morgan Stanley's response is only to the remaining portions of paragraph 55. Morgan Stanley denies CPH's allegation that Morgan Stanley was "telling CPH and the investing public ... that Sunbeam's turnaround was a success, that Sunbeam's sales for the first quarter of 1998 were ahead of expectations of outside analysts, and that Sunbeam was poised for record sales." Furthermore, any information communicated by Morgan Stanley was

based on financial data and information provided to it by Sunbeam and Arthur Andersen — a fact that Morgan Stanley regularly publicized through disclaimer statements. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations in Paragraph 55 and therefore denies them.

56. Morgan Stanley denies the allegations in Paragraph 56.

57. Morgan Stanley denies the allegations in Paragraph 57.

58. On February 28, 2005, the Court entered an Amended Order striking portions of paragraph 58; therefore, Morgan Stanley's response is only to the remaining portions of paragraph 58. Morgan Stanley admits that on or about March 18, 1998, it received a draft of a Comfort Letter from Arthur Andersen that Sunbeam's interim financial statements reflected that Sunbeam's January and February 1998 sales were below those for the same period in 1997. Morgan Stanley denies that it made assertions or otherwise disseminated information to CPH or others that it knew to be false. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations in Paragraph 58 and therefore denies them.

59. Morgan Stanley admits that on March 18, 1998, it learned that Sunbeam's first quarter 1998 sales were below those of the same period in 1997. Sunbeam's management insisted that its sales would meet expectations, but Morgan Stanley insisted that Sunbeam issue a press release. Morgan Stanley denies all remaining allegations in Paragraph 59.

60. Morgan Stanley admits that Sunbeam issued a press release on March 19, 1998 that included language selectively quoted in Paragraph 60. Morgan Stanley further states that the March 19, 1998 press release contained the following additional statement, omitted in the Complaint:

> **Cautionary Statements** - Statements in this press release, including statements relating to the Company's expectations regarding anticipated performance in the future, are "forward looking statements," as such term is defined in the Private Securities Litigation Reform act of 1995. Actual results could differ materially from the Company's statements in this release regarding its expectations, goals or projected results, due to various factors, including those set forth in the Company's Cautionary Statements contains in its Annual Report on Form 10-K for its fiscal year ended December 31, 1997 filed with the Securities and Exchange Commission.

(March 19, 1998 Press Release (Ex. 5).) Morgan Stanley denies the remaining allegations in Paragraph 60.

61. Morgan Stanley admits that Sunbeam issued a press release on March 19, 1998 that included language selectively quoted in Paragraph 61. Morgan Stanley further states that the March 19, 1998 press release contained the following additional statement, omitted in the Complaint:

> **Cautionary Statements** - Statements in this press release, including statements relating to the Company's expectations regarding anticipated performance in the future, are "forward looking statements," as such term is defined in the Private Securities Litigation Reform act of 1995. Actual results could differ materially from the Company's statements in this release regarding its expectations, goals or projected results, due to various factors, including those set forth in the Company's Cautionary Statements contains in its Annual Report on Form 10-K for its fiscal year ended December 31, 1997 filed with the Securities and Exchange Commission.

(*Id.*) Morgan Stanley denies all remaining allegations in Paragraph 61.

62. Morgan Stanley denies the allegation that it knew that the "shortfall from analysts' estimates was ... caused by Sunbeam's acceleration of 1998 sales into the fourth quarter of 1997." Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations in Paragraph 62 and therefore denies them.

63. Morgan Stanley denies the allegations in Paragraph 63.

64. Morgan Stanley denies the allegations in Paragraph 64.

65. Morgan Stanley denies the allegations in Paragraph 65. To the extent that this Paragraph quotes the Merger Agreement, that document speaks for itself and contradicts the allegations in the Complaint.

66. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 66 and therefore denies them.

67. On February 28, 2005, the Court entered an Amended Order striking portions of paragraph 67; therefore, Morgan Stanley's response is only to the remaining portions of paragraph 67. Morgan Stanley denies the allegations in Paragraph 67.

68. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 68 and therefore denies them.

69. Morgan Stanley admits that it continued to serve as Sunbeam's investment banker, and continued to prepare to close the debenture offering and the acquisition of Coleman, but denies any knowledge as to the alleged falsity of the March 19, 1998 press release. Morgan Stanley denies the remaining allegations in Paragraph 69.

70. Morgan Stanley admits that throughout its service to Sunbeam, Morgan Stanley employees, including Tyree, spoke via telephone with representatives of Sunbeam. Morgan Stanley denies any knowledge that the press release was untruthful or otherwise misleading. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 70 and therefore denies them.

71. Morgan Stanley admits that it received Comfort Letters from Arthur Andersen. Morgan Stanley denies the allegation that it knew that "Sunbeam's earnings for the first quarter of 1998 were going to miss Wall Street analysts' earning expectations." Morgan Stanley lacks

sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 71 and therefore denies them.

72. On February 28, 2005, the Court entered an Amended Order striking portions of paragraph 72; therefore, Morgan Stanley's response is only to the remaining portions of paragraph 72. Morgan Stanley admits that it continued to prepare to close both the debenture offering and the acquisition of Coleman. Morgan Stanley denies any allegation of its "having directly participated in misleading CPH." Morgan Stanley responds that the allegation that Morgan Stanley "had a duty to disclose the true facts" to CPH is a legal conclusion to which no response is required. Morgan Stanley denies the remaining allegations in Paragraph 72.

73. Morgan Stanley admits that it received compensation for investment banking work performed by Morgan Stanley for Sunbeam. Morgan Stanley denies the allegation that it facilitated Sunbeam's alleged fraud. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations in Paragraph 73 and therefore denies them.

74. Morgan Stanley admits that on April 3, 1998, Sunbeam issued a press release, the contents of which speaks for itself. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 74 and therefore denies them.

75. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 75 and therefore denies them.

76. Morgan Stanley denies the allegations in Paragraph 76.

77. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 77 and therefore denies them.

78. No response is necessary to paragraph 78 as it was deleted in the First Amended Complaint.

79. Morgan Stanley denies the allegations in Paragraph 79.

80. Morgan Stanley denies the allegations in Paragraph 80.

81. Morgan Stanley denies the allegations in Paragraph 81.

82. Morgan Stanley denies the allegation in Paragraph 82.

83. Morgan Stanley denies the allegation in Paragraph 83.

Count I – Aiding and Abetting Fraud

84. Morgan Stanley repeats and realleges its responses to Paragraphs 1 through 83 as if set forth herein in response to the allegations of paragraph 84.

85. Morgan Stanley lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 85 and therefore denies them.

86. Morgan Stanley denies the allegation in Paragraph 86.

87. Morgan Stanley denies the allegations in Paragraph 87.

88. Morgan Stanley denies the allegations in Paragraph 88. Morgan Stanley denies that CPH is entitled to the relief requested.

Count II – Conspiracy

89. Morgan Stanley repeats and realleges its responses to Paragraphs 1 through 77 and 79 through 83 as if set forth herein in response to the allegations of paragraph 89.

90. Morgan Stanley denies the allegations in Paragraph 90.

91. Morgan Stanley admits that it underwrote the $750 million convertible debenture offering. Morgan Stanley denies the remaining allegations in Paragraph 91.

92. Morgan Stanley denies the allegations in Paragraph 92.

93. Morgan Stanley denies that CPH is entitled to the relief requested.

DEFENSES AND AFFIRMATIVE DEFENSES

In addition to the foregoing responses, Morgan Stanley asserts the following defenses and affirmative defenses to the claims stated in CPH's Complaint. Morgan Stanley does not assume the burden of proof on these defenses when the substantive law provides otherwise.

First Defense

CPH's alleged claims must be dismissed on *forum non conveniens* grounds pursuant to Florida Rule of Civil Procedure 1.061(a).

Second Defense

CPH's alleged claims are barred, in whole or in part, for failure to state a cause of action.

Third Defense

Count I of CPH's First Amended Complaint must be dismissed because aiding and abetting, as plead by CPH and as defined in the *Restatement (Second) of Torts II,* Section 876, does not exist as a civil tort under the common law of Florida. Since neither this Court nor the District Court of Appeal has the authority to create or recognize a new cause of action in the common law, CPH cannot pursue this claim. *Hoffman v. Jones,* 280 So. 2d 431 (Fla. 1973); *Conley v. Boyle Drug Co.,* 477 So. 2d 600 (Fla. 4th DCA 1985).

Fourth Defense

New York law applies to CPH's claims. Neither party to this action is a citizen of Florida. This case involves a New York corporate plaintiffs against New York corporate defendants involving statements allegedly made and relied upon in New York in connection with financial transactions negotiated and consummated in New York. New York therefore has a paramount sovereign interest in having its law applied to its citizens in controversies arising out of the transactions at issue in this case, and its law should apply to each and every cause of action.

First Affirmative Defense

CPH's alleged claims are barred, in whole or in part, by the doctrine of waiver. In particular, CPH contractually waived its alleged claims when it agreed in Section 12.5 of the Merger Agreement and Section 10.4 of the Company Merger Agreement that the Agreements contained the entire agreement and understanding between CPH and Sunbeam and that the provisions of the Agreements superseded "all prior agreements and understandings, oral or written" with respect to the subject of the Agreements. (Merger Agmt. § 12.5; *see* Company Merger Agmt. § 10.4 (Ex. 6).)

Additionally, CPH waived its alleged claims when CPH failed to exercise its contractual rights under the Merger Agreement and Company Merger Agreement to examine Sunbeam's books, records, and facilities and then failed to invoke the "material adverse effect" clause of the Merger Agreement. CPH failed to make a reasonable inquiry into information concerning Sunbeam's financial statements, results of operations, projections, facilities, and business plans (hereinafter "Sunbeam Information") after signing the Merger Agreement and Company Merger Agreement, after Sunbeam issued its March 19, 1998 press release, and before CPH accepted over 14 million shares of Sunbeam common stock as partial consideration for the sale of its interest in Coleman. CPH then failed to invoke Section 8.2(c) of the Merger Agreement, a remedy available solely to CPH, thereby permitting the transaction to close and waiving its alleged claims.

Second Affirmative Defense

CPH's alleged claims are barred, in whole or in part, by the doctrine of estoppel. In particular, CPH, is estopped from asserting its claim for the following reasons.

(a) By virtue of the customs and practices in the New York financial markets observed in connection with the negotiation of mergers and acquisitions among sophisticated

parties, CPH as an affiliate of MAFCO, understood and agreed that Morgan Stanley, as Sunbeam's investment banker, did not make any representations or warranties to CPH about the accuracy or completeness of the Sunbeam Information supplied to CPH. CPH further understood and agreed Morgan Stanley would not have any liability to CPH by reason of CPH's use of the Sunbeam Information that Morgan Stanley provided to CPH. Morgan Stanley relied upon CPH's understanding and agreement to the customs and practices in the New York financial markets when MS &Co. provided Sunbeam Information to CPH. CPH is now estopped from claiming to have relied upon Sunbeam Information that Morgan Stanley supplied to CPH.

(b) By virtue of a letter agreement with Sunbeam dated February 23, 1998, and acknowledged in the Merger and Company Merger Agreements (Merger Agmt. §§ 6.7, 11.2 12.5; Company Merger Agmt. §§ 7.2, 9.2 10.4), CPH, as an affiliate of Coleman, agreed that Sunbeam and its representatives, including Morgan Stanley, did not make any representations or warranties about the accuracy or completeness of the information that they supplied to CPH. CPH further agreed that Sunbeam and its representatives, including Morgan Stanley, would not have any liability to CPH by virtue of CPH's use of the information that they provided to CPH. Morgan Stanley relied upon CPH's agreement when it provided Sunbeam Information to CPH, and CPH is estopped from now claiming to have relied upon information supplied to CPH outside of Merger Agreement or the Company Merger Agreement.

(c) By virtue of Section 12.5 of the Merger Agreement and Section 10.4 of the Company Merger Agreement, CPH agreed that the Merger Agreement and the Company Merger Agreement contained the entire agreement and understanding between CPH and Sunbeam and that the provisions of the Agreements superseded "all prior agreements and understandings, oral or written" with respect to the subject of the Agreements. (Merger Agmt. § 12.5; *see* Company

Merger Agmt. § 10.4.) Morgan Stanley relied upon CPH's agreement when Morgan Stanley provided Sunbeam Information to CPH, and CPH is estopped from now claiming to have relied upon information supplied to CPH outside of the Agreements.

(d) CPH bargained for and received access to Sunbeam Information pursuant to Section 6.7 of the Merger Agreement and to Sections 7.2 and 7.3 of the Company Merger Agreement. When Morgan Stanley provided Sunbeam Information to CPH, Morgan Stanley relied upon CPH's contractual undertaking and ability to verify independently all statements that Morgan Stanley or Sunbeam made to CPH. CPH is estopped from now claiming to have relied upon information supplied to CPH by Morgan Stanley or Sunbeam when CPH, a sophisticated party, had equal access to Sunbeam Information and equal ability to evaluate Sunbeam Information.

(e) CPH held itself out to be and is a commercially and financially sophisticated party, capable of protecting its own interests. Morgan Stanley relied upon these representations when it provided Sunbeam Information to CPH, and CPH is estopped from now disclaiming these representations.

(f) CPH represented to Sunbeam and Morgan Stanley that it had retained and would rely upon its own sophisticated advisors, including an investment banker and a law firm capable of protecting CPH's interests. CPH and its advisors represented that they were doing their own due diligence on CPH's behalf through the meetings and information that they requested from Sunbeam and its advisors. Morgan Stanley relied upon these representations when it provided Sunbeam Information to CPH, and CPH is estopped from now disclaiming these representations.

Third Affirmative Defense

To the extent that CPH sustained any cognizable damages, the damages claimed by CPH were the result, in whole or in part, of CPH's failure to mitigate its damages. In particular, CPH

investigated but failed to pursue reasonable available measures to hedge its position with regard to its ownership of Sunbeam stock. Had CPH implemented the potential hedges available, CPH would not have suffered the loss of the value of Sunbeam stock that occurred during and after June of 1998. In addition, CPH failed to mitigate its damages when it chose to install its own executives at Sunbeam, enter into a management agreement with Sunbeam, and to accept warrants from Sunbeam to settle its alleged claims against Sunbeam. CPH chose to keep and indeed increase its holdings in Sunbeam, taking its chances that Sunbeam stock would increase in value, rather than selling its Sunbeam stock and reasonably limiting its losses.

Fourth Affirmative Defense

Any future claim by CPH for punitive damages is barred, in whole or in part, because (i) Morgan Stanley did not engage in intentional misconduct; (ii) the allegedly tortuous conduct is not gross, wanton, willful, reckless or otherwise morally culpable; and (iii) the alleged conduct was not part of a pattern directed at the public generally.

Fifth Affirmative Defense

Morgan Stanley is entitled to a set-off for any settlement by any party or non-party to CPH for any claim arising out of the transactions that are the subject of the Complaint pursuant to N.Y. Gen. Oblig. § 15-108 or Florida Statutes § 46.015, 768.31 and 768.041. The basis for such set-off is set forth fully in these Affirmative Defenses. In particular, Morgan Stanley is entitled to a set-off as a result of the settlement between CPH and Sunbeam dated August 12, 1998 (Ex. 7) and the settlement between CPH and Arthur Andersen dated October 10, 2002 (Ex. 8).)

Sixth Affirmative Defense

CPH's claims are barred because, to the extent Morgan Stanley is liable for all or part of CPH's claimed damages, CPH was in *pari delicto* in the Sunbeam/Coleman merger transaction.

To the extent that CPH sustained any cognizable damages, CPH is equally at fault — or more at fault — for such damages than Morgan Stanley. The damages claimed by CPH were the result of its own actions. Among other things, CPH failed to make a reasonable independent inquiry into Sunbeam Information, failed to request access to Sunbeam's books and records *before* agreeing to accept over 14 million shares of Sunbeam common stock as partial consideration for the sale of its interest in Coleman and signing the Merger Agreement, failed to make a reasonable inquiry into the Sunbeam Information available to CPH *after* signing the Merger Agreement and Company Merger Agreement, failed to make a reasonable inquiry into Sunbeam Information after Sunbeam issued its March 19, 1998 press release, failed to make a reasonable inquiry concerning the existence or absence of a "material adverse effect" as defined in the Merger Agreement and the Company Merger Agreement, failed to make use of its available means to investigate or confirm statements about Sunbeam Information made to CPH by Sunbeam or Morgan Stanley during late 1997 and the first quarter of 1998 before CPH accepted over 14 million shares of Sunbeam common stock as partial consideration for the sale of its interest in Coleman. Because CPH is at least equally at fault for any damages, its claims are barred by the doctrine of *pari delicto*.

WHEREFORE, Morgan Stanley denies that CPH is entitled to any relief whatsoever, and to the extent that CPH should recover any damage award, that award should be offset by CPH's failure to take appropriate steps to mitigate its damages, CPH's own equal fault, the comparative fault of third parties, and the settlements that CPH has already received. Morgan Stanley respectfully requests that the Court enter judgment for Morgan Stanley dismissing the complaint with prejudice, and grant such other and further relief as may be just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile on this 7th day of March 2005.

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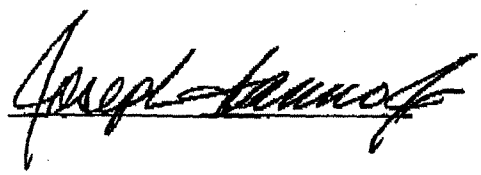
BY: 

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COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

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

CASE NO: 2003 CA 005045 AI

JURY TRIAL DEMANDED

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SHARON R. BOCK
CLERK & COMPTROLLER
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FIRST AMENDED COMPLAINT

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") hereby submits its First Amended Complaint and alleges the following against Morgan Stanley & Co., Inc. ("Morgan Stanley"):

NATURE OF THE ACTION

1. This action arises from Morgan Stanley's participation in a massive fraud centered on Florida-based Sunbeam Corporation ("Sunbeam"). As a direct result of that fraud, CPH was induced to accept 14.1 million shares of Sunbeam stock when CPH sold its 82% interest in The Coleman Company, Inc. ("Coleman") to Sunbeam on March 30, 1998. Morgan Stanley misrepresented Sunbeam's financial condition and assisted Sunbeam's CEO, Albert Dunlap, in concealing Sunbeam's true financial condition so that Sunbeam could complete the purchase of Coleman on March 30, 1998.

2. In April 1997, Morgan Stanley began serving as Sunbeam's investment banker. Morgan Stanley originally attempted to find someone to buy Sunbeam. When Morgan Stanley was unable to find a buyer, Morgan Stanley developed a strategy for Sunbeam to use its fraudulently-inflated stock to acquire a large company that Sunbeam would own and operate. Then, trading on Morgan Stanley's relationships with CPH's senior officers, Morgan Stanley found

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Coleman for Sunbeam. At the time of the sale to Sunbeam, Coleman was a leading manufacturer and marketer of consumer products for the worldwide outdoor recreation market, with annual revenues in excess of $1 billion. With Morgan Stanley's active and direct participation, CPH was persuaded to sell its interest in Coleman to Sunbeam in return for 14.1 million shares of Sunbeam stock and other consideration.

3. After Sunbeam announced plans to acquire Coleman, Morgan Stanley agreed to underwrite a $750 million debenture offering for Sunbeam. Sunbeam needed the proceeds of that debenture offering to complete the acquisition of Coleman. As Sunbeam's investment banker and as the sole underwriter for the $750 million debenture offering, Morgan Stanley received detailed and specific information concerning Sunbeam's financial condition and performance. Morgan Stanley received information that directly contradicted Sunbeam's and Morgan Stanley's assertions to CPH that Sunbeam had undergone a successful turnaround and that its financial performance had dramatically improved. By no later than March 18, 1998, Morgan Stanley knew that Sunbeam's January and February 1998 sales were only 50% of January and February 1997 sales, and Morgan Stanley also knew that the shortfall was caused by Sunbeam's practice of accelerating sales which otherwise would have occurred in 1998 in order to boost Sunbeam's income in 1997. Although Morgan Stanley and Sunbeam previously had advised CPH that Sunbeam's sales were running ahead of analysts' expectations for the first quarter, Morgan Stanley decided not to correct those material misrepresentations. Instead, in March 1998, Morgan Stanley assisted Sunbeam in concealing the problems with Sunbeam's first quarter 1998 sales in order to close transactions that should have been stopped before CPH and others were swindled.

4. CPH brings this action to recover for the losses it has suffered as a result of Morgan Stanley's active participation in successfully defrauding CPH. CPH's Complaint consists of two counts: Aiding and Abetting Fraud (Count I) and Conspiracy (Count II).

5. CPH seeks compensatory damages for Morgan Stanley's wrongful conduct. Using Morgan Stanley's own valuation of Coleman, CPH has lost at least $485 million. In addition, CPH has amended its complaint pursuant to Fla. Stat. §768.72 to assert claims for an additional recovery of punitive damages in excess of $1.5 billion.

JURISDICTION AND VENUE

6. This Court has jurisdiction over the subject matter of this action pursuant to Fla. Stat. § 26.012(2)(a). This Court has jurisdiction over Morgan Stanley pursuant to Fla. Stat. § 48.193.

7. Venue is proper in this district pursuant to Fla. Stat. § 47.051.

PARTIES AND OTHER KEY PARTICIPANTS

8. Plaintiff Coleman (Parent) Holdings Inc. ("CPH") directly or indirectly owned 44,067,520 shares — or approximately 82% — of Coleman prior to the transactions at issue. On March 30, 1998, Sunbeam acquired CPH's interest in Coleman. Sunbeam paid for the Coleman shares with 14.1 million shares of Sunbeam common stock and other consideration.

9. Defendant Morgan Stanley & Co., Inc. ("Morgan Stanley") is a highly sophisticated investment banking firm that provides a wide range of financial and securities services. Among other things, Morgan Stanley provides advice on mergers and acquisitions and raises capital in the equity and debt markets. Morgan Stanley served as Sunbeam's investment banker and as the underwriter of securities issued by Sunbeam in connection with the events at issue herein.

10. Sunbeam Corporation ("Sunbeam") was a publicly-traded company headquartered in Delray Beach, Florida. Sunbeam designed and manufactured small household appliances and outdoor consumer products, which it marketed under the Sunbeam and Oster brand names. Sunbeam filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code in February 2001.

11. Albert Dunlap ("Dunlap") was the Chief Executive Officer of Sunbeam from July 1996 until June 1998 when he was terminated by Sunbeam's Board of Directors. In May 2001, the United States Securities and Exchange Commission ("SEC") filed a civil injunctive suit in Miami, Florida against Dunlap based on Dunlap's fraudulent and illegal conduct at Sunbeam. In September 2002, Dunlap consented to the entry of a judgment against him in that action. The judgment, among other things, imposed a civil fine and permanently barred Dunlap from serving as an officer or director of a public company. Dunlap still resides in Boca Raton, Florida.

12. Russell Kersh ("Kersh") was the Executive Vice President of Sunbeam from July 1996 until June 1998 when he was terminated by Sunbeam's Board of Directors. In May 2001, the SEC filed a civil injunctive suit in Miami, Florida against Kersh based on Kersh's fraudulent and illegal conduct at Sunbeam. In September 2002, Kersh consented to the entry of a judgment against him in that action. The judgment, among other things, imposed a civil fine and permanently barred Kersh from serving as an officer or director of a public company. Upon information and belief, Kersh still resides in Boca Raton, Florida.

13. Arthur Andersen LLP ("Andersen") provided outside accounting services to Sunbeam through its West Palm Beach, Florida office. Andersen auditors provided information concerning Sunbeam's first quarter 1998 sales and earnings to Morgan Stanley. Upon information

and belief, several of the Andersen auditors who provided information to Morgan Stanley concerning Sunbeam, including Lawrence Bornstein, still reside in Florida.

FACTUAL BACKGROUND

A. Sunbeam's Lackluster Performance (1995-1996).

14. Sunbeam designed and manufactured outdoor and household consumer products, which it marketed under the Sunbeam and Oster brand names. Sunbeam's products included small kitchen appliances, humidifiers, electric blankets, and grills. Many of the country's leading retail stores, including Wal-Mart, Target, and Home Depot, were among Sunbeam's major customers.

15. Despite Sunbeam's well-known brands and strong customer base, its financial performance was disappointing. In 1994, Sunbeam earned $1.30 per share. In 1995, Sunbeam's earnings declined to $0.61 per share. In 1996, Sunbeam's earnings continued to suffer. On March 22, 1996, Sunbeam issued an early warning that its first quarter earnings would be well under analysts' expectations and down from first quarter 1995. Shortly after issuing the March 22 earnings warning, Sunbeam's Chief Executive Officer and two of Sunbeam's directors announced their resignations. Less than a week later, Sunbeam announced that its first quarter 1996 earnings had plunged 42% from first quarter 1995 levels. Sunbeam also announced that its second quarter 1996 earnings would be lower than its second quarter 1995 earnings.

16. Sunbeam's disappointing earnings caused its stock price to plummet. During 1995, the price at which Sunbeam's stock traded fell 40%, from a high of $25-1/2. In 1996, Sunbeam's stock price continued to decline until it reached a low of $12-1/4 in July.

B. Sunbeam Hires A New Management Team (July 1996).

17. On July 18, 1996, Sunbeam's board of directors hired Albert Dunlap as Sunbeam's new Chief Executive Officer. Based upon brief terms as Chief Executive Officer of other publicly traded companies, including Scott Paper Company ("Scott Paper"), Dunlap was viewed as a "turnaround specialist" — that is, someone who could take a poorly performing company and significantly increase its value by "turning around" its financial performance. Because Dunlap touted the benefits from firing large numbers of employees and closing large numbers of plants, Dunlap became widely known as "Chainsaw Al." Dunlap lived in Boca Raton, Florida, and one of his first tasks at Sunbeam was to consolidate the company's six headquarters into one located in Delray Beach, Florida.

18. Immediately after joining Sunbeam, Dunlap hired Kersh as Sunbeam's Chief Financial Officer. Kersh had teamed with Dunlap for over 15 years, serving as a senior executive with Dunlap at other companies, including Scott Paper. Dunlap also brought in several other hand-picked executives to make up his senior management team.

19. Dunlap and his senior management team entered into employment agreements with Sunbeam. Under those agreements, Dunlap and his senior management team stood to make tens of millions of dollars if they were able to boost Sunbeam's apparent value and then sell Sunbeam to another company at a premium.

C. Dunlap Cooks The Books At Sunbeam (1996-1997).

20. In order to convince other companies that they should want to purchase Sunbeam, Dunlap needed to improve Sunbeam's reported financial performance quickly and dramatically. It was, of course, no small task to transform Sunbeam from a poorly performing company, with weak sales and declining profits, into a strong company with growing sales and

soaring profits. In fact, as the world later learned, Dunlap did not achieve that change in Sunbeam's fortunes. Instead, Dunlap created the illusion of a dramatic turnaround at Sunbeam by engaging in what SEC officials subsequently described as a "case study" in financial fraud.

21. Dunlap had a three-step plan at Sunbeam. In the first step, Dunlap overstated Sunbeam's financial problems so that Sunbeam appeared to be in worse shape than it really was. After making Sunbeam look worse, Dunlap moved to step two, where he made Sunbeam look more valuable than it really was by inflating Sunbeam's sales and engaging in other earnings manipulations. In step three, Dunlap planned to sell Sunbeam to another company before it became apparent that the "improved" results were fictional. By doing so, Dunlap would make tens of millions of dollars and would be free to blame his successor for any subsequent problems.

1. Step One: Make Sunbeam Appear Worse Than It Really Was (1996).

22. Dunlap began implementing his strategy soon after his arrival at Sunbeam in 1996. Claiming to be engaged in a clean-up of Sunbeam's financial problems, Dunlap recorded artificially high reserves and booked expenses that should not have been recorded until later periods. Both of those actions made Sunbeam's financial condition appear worse than it really was, thus lowering the benchmark for measuring Sunbeam's performance in future years.

23. The overstated reserves also provided Dunlap a means by which he could inflate Sunbeam's future results during the second step of his plan. Dunlap later could "re-evaluate" and release millions of dollars from the overstated reserves to boost income in later periods. The income from released reserves contributed to the illusion of a rapid turnaround in Sunbeam's performance. Using inflated reserves to enhance income in future periods is a fraudulent practice and overstated reserves are commonly called "cookie jar" reserves.

2. Step Two: Create The False Appearance Of Dramatically Improved Performance (1997).

24. After making Sunbeam look worse than it really was in 1996, Dunlap manipulated Sunbeam's sales and expenses in 1997 to create the false appearance of quarter after quarter improvement in financial performance. For example, Dunlap caused Sunbeam to inflate its sales by engaging in phony "bill and hold" sales. Under this practice, Sunbeam recognized revenues from "sales," even though customers did not actually pay for or even take delivery of the products, which continued to sit in Sunbeam's own warehouses. Although Sunbeam recorded the "bill and hold" sales as if they were current sales, they were, in reality, simply sales stolen from future quarters. In 1997, phony "bill and hold" sales added approximately $29 million in sales and $4.5 million in income.

25. Throughout 1997, Sunbeam also engaged in a sales practice known as "channel stuffing" — accelerating sales that otherwise would occur in a later period, sometimes by offering steep discounts or other extraordinary customer inducements. On the grand scale employed by Sunbeam, channel stuffing inevitably leads to major sales shortfalls in later periods when "stuffed" customers simply stop buying. Sunbeam's senior sales officer referred to Sunbeam's unsustainable practice of inflating performance through accelerated sales as the "doom loop."

26. Dunlap further "enhanced" Sunbeam's income in 1997 by causing Sunbeam to record a "profit" of $10 million from a sham sale of its warranty and spare parts business. Dunlap also made Sunbeam appear to be more successful than it really was by reaching into the "cookie jar," reversing inflated reserves, and recording $35 million as income. Sunbeam's 1997 profit margins also looked better than they really were because Dunlap already had recorded millions of dollars of 1997 expenses in 1996.

27. In October 1997, Dunlap announced that Sunbeam's "turnaround" was complete. Compared to the third quarter of 1996, Sunbeam's third quarter 1997 performance was remarkable. In the third quarter of 1996, Sunbeam had reported a loss of $18.1 million. In the third quarter of 1997, however, Sunbeam reported earnings of $34.5 million — an extraordinary turnaround from substantial losses to hefty profits. Sunbeam's combined results for the first three quarters showed dramatic improvement as well. Sunbeam reported that its profits for the first nine months were up tenfold over the same period the year before — from $6.5 million in 1996 to $67.7 million in 1997. Sunbeam's reversal of fortune caused a spectacular increase in the price of its stock. In July 1996, when Dunlap was hired, Sunbeam's shares traded at $12-1/4. By October 1997, Sunbeam's shares had risen to $49-13/16.

3. Step Three: Cash In Before The Turnaround Fraud Is Discovered (1997-1998).

28. With steps one and two successfully completed, Dunlap was more than eager to complete the final step of his scheme: to sell Sunbeam to another company and collect tens of millions of dollars for himself before the outside world could learn the truth about Sunbeam's phony "turnaround." To accomplish that third and final step, Dunlap needed an investment banking firm to serve as his shill. Morgan Stanley was pleased to play that role.

D. Morgan Stanley Vies For A Spot On Dunlap's Team (April - September 1997).

29. When Dunlap announced in early 1997 that he would begin interviewing investment bankers, Morgan Stanley immediately began pursuing the job. Although Morgan Stanley had no previous relationship with Sunbeam, one of Morgan Stanley's senior executives, William Strong, had worked closely with Dunlap on other large transactions between 1986 and 1993, when Strong was employed by Salomon Brothers.

30. Morgan Stanley knew that it was competing with other investment bankers, including Mark Davis, for Dunlap's business. Davis was the head of the mergers and acquisitions department at Chase Securities and had worked previously with Strong at Salomon Brothers. Davis had a very strong relationship with Dunlap, and Davis had served as Dunlap's investment advisor on numerous transactions, including Dunlap's sale of Scott Paper. Shortly after arriving at Sunbeam, Dunlap hired Davis to handle the sale of Sunbeam's furniture business.

31. Morgan Stanley put together a team headed by its Vice Chairman, Bruce Fiedorek, and Strong. Beginning in April 1997, Morgan Stanley's personnel traveled to Sunbeam's offices in Delray Beach, Florida to study Sunbeam and woo Dunlap. After months of uncompensated work, in September 1997, Morgan Stanley finally persuaded Dunlap to name Morgan Stanley as Sunbeam's exclusive investment banker. Dunlap instructed Morgan Stanley to find a buyer for Sunbeam. Morgan Stanley knew that if it failed to deliver a major transaction, Morgan Stanley would not be compensated for the extensive work it had performed for Sunbeam. Morgan Stanley also knew that Davis and Chase Securities were standing by — ready and willing to reclaim their position as Dunlap's investment banker of choice.

E. Morgan Stanley Seeks A Buyer For Sunbeam (Fall 1997).

32. Throughout the fall of 1997, Morgan Stanley aggressively searched for a buyer for Sunbeam. Morgan Stanley put together extensive and detailed materials to use in marketing Sunbeam to potential buyers. Morgan Stanley pitched the transaction to more than 10 companies — including Gillette, Colgate, Sara Lee, Rubbermaid, Whirlpool, and Black & Decker — that Morgan Stanley hoped might have an interest in acquiring Sunbeam. Morgan Stanley, however, was not able to find a buyer.

33. As 1998 approached, the pressure on Dunlap increased. Dunlap was aware that Sunbeam would be unable to sustain the appearance of a successful turnaround in 1998 because Sunbeam had stolen sales from 1998 to boost 1997's numbers and the "cookie jar" reserves had been depleted. Dunlap needed a way to conceal Sunbeam's phony turnaround until a buyer could be found. Morgan Stanley provided the solution to Dunlap's problem.

F. Unable To Find A Buyer For Sunbeam, Morgan Stanley Looks For An Acquisition (December 1997).

34. Morgan Stanley knew that its failure to find a buyer for Sunbeam could prove fatal to the relationship it had worked so hard to establish with Dunlap. As the pressure on Dunlap increased, the pressure on Morgan Stanley increased as well. Although Morgan Stanley was not able to find a buyer for Sunbeam, Morgan Stanley responded with a plan that would allow Dunlap to conceal his fraud. Morgan Stanley recommended that Sunbeam acquire other companies, using Sunbeam's stock, which was fraudulently inflated, as the "currency" that would be used to pay for the acquisitions.

35. Morgan Stanley's strategy was doubly deceptive. First, Morgan Stanley's acquisition strategy would allow Dunlap to consolidate Sunbeam's results with those of the newly-acquired companies. That would help Dunlap camouflage Sunbeam's results and make it difficult to detect any shortfall in Sunbeam's performance. Dunlap simply could label any problems that were detected as attributable to the poor performance of the acquired companies or as a temporary "blip" caused by the distraction of integrating the acquired companies with Sunbeam. Second, Morgan Stanley's strategy would allow Dunlap to take new massive restructuring charges (purportedly relating to the acquisitions) and thus create more "cookie jar" reserves that could be tapped to bolster the future earnings of the combined companies.

36. Morgan Stanley identified Coleman as one of the key potential acquisition targets. CPH owned 82% of Coleman's stock. Morgan Stanley searched the ranks of its investment bankers to locate those with the best access to CPH. Drawing on relationships between some of Morgan Stanley's investment bankers and senior CPH officers, Morgan Stanley set about trying to persuade CPH to sell its interest in Coleman to Sunbeam — and, most importantly, to accept Sunbeam stock as consideration.

37. Morgan Stanley laid the groundwork for a meeting to take place in December 1997 in Palm Beach, Florida between Dunlap and Kersh and representatives of CPH. In advance of the Palm Beach meeting, Morgan Stanley provided materials to Sunbeam to prepare Sunbeam for the meeting. Morgan Stanley also met with Kersh and other Sunbeam personnel to prepare for the Palm Beach meeting. However, Dunlap nearly scuttled Morgan Stanley's carefully crafted plan at the outset. During the December 1997 Palm Beach meeting, when CPH rejected Dunlap's initial all-stock offer, Dunlap became so angry that he cursed and ranted at the CPH representatives and stormed out.

G. Morgan Stanley Revives The Deal And Negotiates With CPH (January-February 1998).

38. Dunlap's tantrum appeared to kill any chance that CPH would sell its interest in Coleman to Sunbeam. Morgan Stanley, however, worked to revive the discussions. Drawing again on Morgan Stanley's relationships with CPH officers, Morgan Stanley was able to restart the discussions with CPH with the promise that Dunlap would be kept away from the negotiating table. Thereafter, Morgan Stanley, through Managing Directors Strong, James Stynes, and Robert Kitts, led the discussions with CPH on Sunbeam's behalf.

39. Morgan Stanley knew that it had to persuade CPH not only to sell Coleman, but also to accept Sunbeam stock — ultimately, 14.1 million shares of Sunbeam stock — as a major part of the purchase price. During the course of negotiations, Morgan Stanley prepared and provided CPH with false financial and business information about Sunbeam designed to create the appearance that Sunbeam was prospering and that Sunbeam's stock had great value. For example, Morgan Stanley provided CPH with false 1996 and 1997 sales and revenue figures, as well as false projections that Sunbeam could not expect to achieve. Together, in face-to-face discussions, Morgan Stanley and Sunbeam assured CPH that (a) Sunbeam would meet or exceed its first quarter 1998 earnings estimates; (b) analysts' 1998 earnings estimates for Sunbeam were correct; and (c) Sunbeam's plan to earn $2.20 per share in 1998 was easily achievable and probably low. Morgan Stanley and Sunbeam also falsely assured CPH that Sunbeam's "early buy" sales program would not hurt Sunbeam's future revenues. However, the "early buy" program was one of Sunbeam's revenue acceleration programs — and the devastating effects of Sunbeam's revenue acceleration programs already had begun to materialize at Sunbeam. Sunbeam's January and February 1998 sales were down drastically, although those results were not disclosed to CPH or the public. To the contrary, Morgan Stanley and Sunbeam together specifically advised CPH that Sunbeam's first quarter 1998 sales were "tracking fine" and running ahead of analysts' estimates.

40. Before the truth was revealed, Morgan Stanley persuaded CPH to sell its shares in Coleman to Sunbeam and to accept 14.1 million shares of Sunbeam stock as part of the consideration. Based on the price at which Sunbeam's stock was trading, the 14.1 million shares of Sunbeam stock were worth approximately $600 million.

H. Morgan Stanley Advises Sunbeam's Board On The Acquisition (February 27, 1998).

41. On February 27, 1998, Sunbeam's Board of Directors met at Morgan Stanley's offices to consider the purchase of Coleman, as negotiated by Morgan Stanley.

42. At the February 27, 1998 meeting, Morgan Stanley made an extensive presentation to Sunbeam's Board concerning the proposed transaction. Numerous Morgan Stanley representatives, including Managing Directors Strong, Kitts, Stynes, Ruth Porat, and Vikram Pandit, attended the meeting.

43. Morgan Stanley presented Sunbeam's board with Morgan Stanley's opinion on the value of Coleman. Using a discounted cash flow analysis, which Morgan Stanley represented was the best gauge of stand-alone economic value and the best method of capturing the unique value of Coleman, Morgan Stanley valued CPH's Coleman stock at a range of $31.06 to $53.24 per Coleman share. CPH's 44,067,520 Coleman shares were worth, therefore, between $1.369 billion and $2.346 billion.

44. Following Morgan Stanley's presentation, Sunbeam's Board of Directors voted to acquire Coleman on the very favorable terms that Morgan Stanley had negotiated.

I. Morgan Stanley Develops Sunbeam's Public Announcement Of The Coleman Acquisition (February 28-March 1, 1998).

45. Morgan Stanley spent the following weekend developing Sunbeam's public relations strategy to announce the Coleman transaction. Morgan Stanley scripted the points for Dunlap to make in a conference call with analysts. Morgan Stanley also crafted a list of "key media messages" for Dunlap to use in his communications with the press. On Sunday, March 1, 1998, Morgan Stanley spoke with a reporter for the Wall Street Journal to inform him that Sunbeam would announce its acquisition of Coleman the following morning.

46. Sunbeam announced its acquisition of Coleman on Monday, March 2, 1998, prior to the opening of the financial markets. Consistent with Morgan Stanley's valuation, investors viewed Sunbeam's purchase of Coleman — and the price that Sunbeam had paid — very favorably. The day before the acquisition was announced, Sunbeam's stock closed at $41-3/4. In the days following Sunbeam's announcement of the transaction, Sunbeam's stock rose approximately 25%, to a high of $52.

J. Morgan Stanley Serves As The Underwriter For Sunbeam's $750 Million Convertible Debenture Offering (March 1998).

47. Dunlap knew that Sunbeam needed to raise funds to pay the cash portion of the acquisition consideration. Dunlap also knew that Sunbeam needed cash to purchase two other smaller companies in addition to Coleman. Morgan Stanley recommended that Sunbeam raise funds through a $500 million offering of convertible subordinated debentures. To assure the offering's success, Morgan Stanley lent its name to the offering. Indeed, Morgan Stanley agreed to serve as the sole underwriter for the offering.

48. The money raised from the sale of the debentures was used by Sunbeam to complete the acquisition of Coleman.

49. Unbeknownst to CPH or the public, Sunbeam's first quarter 1998 sales were a small fraction of the financial community's expectations for the quarter. If Dunlap could consolidate Sunbeam's sales with Coleman's sales, Dunlap knew that he could obscure Sunbeam's actual first quarter sales. As a result, Dunlap was especially anxious to complete the acquisition of Coleman before Sunbeam announced its first quarter 1998 sales. Indeed, the success of the scheme depended upon Sunbeam's ability to complete the Coleman acquisition before Sunbeam's first quarter results

were announced. To satisfy Dunlap's objectives, Morgan Stanley moved up the launch date of the offering.

50. The debentures were marketed to investors at a series of "road show" meetings and conference calls arranged by Morgan Stanley. Morgan Stanley prepared and distributed a memorandum for its sales force to use in marketing the debentures to investors. Morgan Stanley also developed the script for Dunlap and Kersh to deliver during the road show. In those materials, Morgan Stanley misrepresented Sunbeam's financial performance and emphasized Dunlap's purported "turnaround" accomplishments.

51. Morgan Stanley launched the debenture offering with a research analyst presentation to the Morgan Stanley sales force. As part of Morgan Stanley's growing relationship with Sunbeam, one of Morgan Stanley's top-rated research analysts planned to initiate equity coverage of Sunbeam. That Morgan Stanley analyst had modeled values for Sunbeam's acquisition of Coleman that were higher than even Sunbeam's management had predicted.

52. Although Morgan Stanley initially planned to sell $500 million worth of debentures, Morgan Stanley's efforts were so successful that the size of the offering was increased to $750 million on March 19, 1998 — the day of the last road show. The debentures were sold to investors nationwide, including investors based in Florida.

K. Morgan Stanley Is Told That Sunbeam's First Quarter Sales Are Down Dramatically (March 17 -18, 1998).

53. As Sunbeam's investment banker and the sole underwriter for the debenture offering, Morgan Stanley had a duty to investigate Sunbeam's finances and business operations. As a matter of law, that duty included an obligation to verify management's claims about Sunbeam's finances and business. Morgan Stanley, which had been working hand-in-hand with Sunbeam for

almost a year and had traveled to Sunbeam's Florida offices, repeatedly asserted that it had satisfied that duty.

54. Strong, who was one of the senior Morgan Stanley investment bankers involved, has admitted in sworn testimony that he may have had more than 100 telephone conversations with Dunlap and Kersh (whose offices were in Sunbeam's Delray Beach headquarters) and that Strong was "sure" that he would have been apprised of Sunbeam's financial performance during the first two months of 1998.

55. With the $750 million debenture offering and the Coleman transaction set to close at the end of March 1998, Sunbeam's Florida-based outside auditors were shocked that Morgan Stanley had not asked them about Sunbeam's financial performance for first quarter 1998. Sunbeam's auditors were alarmed because Sunbeam's first quarter results were a disaster, but Dunlap, Kersh, and Morgan Stanley were telling CPH and the investing public, including investors in Florida, that Sunbeam's turnaround was a success, that Sunbeam's sales for the first quarter of 1998 were ahead of the expectations of outside financial analysts, and that Sunbeam was poised for record sales.

56. On March 17, Sunbeam's auditors forced the issue. From their Florida offices, Sunbeam's auditors sent Morgan Stanley a letter reporting that Sunbeam's net sales through January 1998 were down 60% — $28 million in January 1998, as compared to $73 million in January 1997. The March 17 letter explained that the decline was "primarily due to the . . . new early buy program for grills which accelerated grill sales into the fourth quarter of fiscal 1997."

57. The next day, Morgan Stanley was faxed a schedule from Sunbeam's Florida office that showed that Sunbeam's January and February 1998 net sales totaled $72 million, an amount that was 50% lower than Sunbeam's January and February 1997 net sales of $143.5 million.

58. Based on information that Sunbeam and Morgan Stanley had disseminated, CPH, investors, and Wall Street analysts were anticipating that Sunbeam's first quarter 1998 net sales would be in the range of $285 million to $295 million. Sales in that range would have been approximately 15% higher than first quarter 1997 sales. Sunbeam's January and February 1998 sales, however, totaled barely 25% of $285 million. As Sunbeam's outside auditors advised Morgan Stanley in writing, the sales drop-off was caused by Sunbeam's sales acceleration program. The information put into Morgan Stanley's hands on March 17 and March 18 showed that Morgan Stanley's and Sunbeam's assertions to CPH and other investors were false. Contrary to what Morgan Stanley and Sunbeam had represented, Sunbeam had not undergone a successful turnaround, Sunbeam's financial performance had not dramatically improved, and Sunbeam's performance in 1998 was not better than Wall Street analysts' expectations. It was imperative, therefore, that the truth be kept from CPH until the Coleman transaction closed at the end of March 1998.

L. Morgan Stanley Assists Sunbeam In Concealing The Fraud: The False March 19, 1998 Press Release.

59. Morgan Stanley did not disclose Sunbeam's disastrous first quarter, Morgan Stanley did not insist that Sunbeam disclose its disastrous first quarter, Morgan Stanley did not correct any of the false and misleading statements it and Sunbeam had made to CPH about Sunbeam's business or performance, and Morgan Stanley did not suspend any of the critical transactions that were scheduled to close in the next two weeks. Instead, with Morgan Stanley's knowledge and assistance, Sunbeam prepared and issued a false press release on March 19, 1998 that affirmatively misstated and concealed Sunbeam's true condition.

60. The March 19, 1998 press release stated: "Sunbeam Corporation . . . said today that it is possible that its net sales for the first quarter of 1998 may be lower than the range of

Wall Street analysts' estimates for $285 million to $295 million, but net sales are expected to exceed 1997 first quarter net sales of $253.4 million. . . . The shortfall from analysts' estimates, if any, would be due to changes in inventory management and order patterns at certain of the Company's major retail customers. The Company further stated that based on the strength of its new product offerings and powerful brand names, it remains highly confident about the overall sales outlook for its products for the entire year."

61. As Morgan Stanley was fully aware, the March 19, 1998 press release was false, misleading, and failed to disclose material information. The March 19, 1998 press release failed to disclose Sunbeam's actual January and February 1998 sales or the true reasons for the poor results. Instead, the press release held out the false possibility that Sunbeam still could achieve sales of $285 million to $295 million and suggested that, if any shortfall occurred, that shortfall would be due to the fact that certain retailers had decided to defer first quarter purchases to the second quarter. The press release also assured that Sunbeam at least would exceed first quarter 1997 net sales of $253.4 million.62. Based on information that Morgan Stanley had in its hands on March 18, 1998, it was obvious that Sunbeam would not achieve sales of $285 million to $295 million and that Sunbeam's first quarter 1998 sales would be below its first quarter 1997 numbers. To simply meet 1997 first quarter sales, Sunbeam needed sales of $123.3 million over the 12 remaining days of the quarter — an average of $10.28 million per day. Sales of $10.28 million per day would be 306% more than the average per day sales in March 1997, and 281% more than the average per day sales for the first 17 days of March 1998. Furthermore, Morgan Stanley knew that the shortfall from analysts' estimates was not caused by retailers' deciding to defer purchases from the first quarter of 1998 to the second quarter, as the press release indicated. Rather, as Sunbeam's outside auditors had

advised Morgan Stanley in writing, the collapse in first quarter sales was caused by Sunbeam's acceleration of 1998 sales into the fourth quarter of 1997.

63. After Sunbeam's false press release was issued, Morgan Stanley stood arm-in-arm with Sunbeam while Dunlap and Kersh told CPH, analysts, and investors that the March 19, 1998 release was a purely cautionary statement because some first quarter 1998 sales might simply "spillover" into the second quarter and that Sunbeam still believed that it actually would meet analysts' estimates of $285 million to $295 million in first quarter 1998 sales.

64. Morgan Stanley knew that a full and truthful disclosure of Sunbeam's first quarter sales would doom the debenture offering, which was scheduled to close on March 25, 1998, and Sunbeam's purchase of Coleman, which was scheduled to close on March 30, 1998.

65. As Morgan Stanley was fully aware, the written contract between CPH and Sunbeam gave CPH the express legal right to refuse to close the sale if there was a material adverse change in Sunbeam's "business, results of operation or financial condition." Morgan Stanley knew that CPH would exercise its right and walk away from the transaction if CPH became aware of the extent and reasons for Sunbeam's disastrous first quarter results.

66. Furthermore, if the transactions did not close, Morgan Stanley would not be paid its $10.28 million fee for the Coleman acquisition or its $22.5 million fee for underwriting the subordinated debenture offering. Morgan Stanley also knew that Sunbeam would promptly replace Morgan Stanley with another investment banking firm – such as the Chase Securities team led by Mark Davis. Everything, therefore, depended on closing the Coleman acquisition before CPH learned the truth.

M. Sunbeam's Auditors Advise Morgan Stanley That The March 19, 1998 Release Is False.

67. Although Sunbeam's outside auditors already had made it perfectly clear to Morgan Stanley that Sunbeam's first quarter 1998 sales were a disaster, Morgan Stanley seemed intent on proceeding based upon the false March 19, 1998 press release.

68. One of Sunbeam's senior outside auditors, Lawrence Bornstein, has testified under oath that on March 19, 1998, he told Morgan Stanley's John Tyree that the statement in Sunbeam's March 19, 1998 press release — that Sunbeam would at least exceed first quarter 1997 sales of $253.4 million — was not credible: "Just do the math . . . they've done a million dollars in sales the first 70 days of the year and now they need to do $10 million worth of sales for the next . . . I think it was 11 days . . . I mean, something ridiculous." Bornstein also told Tyree: "I've been to every shipping dock domestically, I've been to Hattiesburg, I've been to Neosho, I've been to Mexico City, and I don't think these guys can physically ship this much stuff."

N. Morgan Stanley Marches Ahead With The Closings (March 19-March 30, 1998).

69. Morgan Stanley knew that the March 19 press release was false and misleading. Despite that knowledge and Bornstein's explicit statements, Morgan Stanley continued with its preparations to close the debenture offering on March 25, 1998 and the Coleman acquisition on March 30, 1998.

70. As part of those preparations, on March 24, 1998, Morgan Stanley's Tyree spoke by telephone with Sunbeam's Kersh, who was located in Sunbeam's Delray Beach offices, to obtain an updated report concerning Sunbeam's first quarter performance. By the time of that March 24, 1998 call, Sunbeam had fallen even further behind first quarter 1997 sales. As of March 18, 1998, Sunbeam needed to achieve average sales of $10.28 million per day, over 12 days, to reach

first quarter 1997 sales. Sunbeam's sales between March 18 and March 24, 1998 had averaged only $6.81 million per day — well short of the $10.28 million per day that Sunbeam needed to achieve. Sunbeam's March 18 through March 24, 1998 sales were further proof that Sunbeam's March 19, 1998 press release was false and that Sunbeam would not achieve first quarter 1998 sales in excess of first quarter 1997 sales.

71. Morgan Stanley also knew no later than March 25, 1998, if not much earlier, that Sunbeam's earnings for the first quarter of 1998 were going to miss Wall Street analysts' earnings expectations, which were in the range of $0.28 to $0.31 per share (excluding one-time charges). Sunbeam's outside auditors advised Morgan Stanley on March 25 that Sunbeam had suffered a $41.19 million loss during the first two months of 1998, including a one-time charge of $30.2 million. Even excluding that one-time charge, Sunbeam's loss for the first two months was $0.13 per share. To achieve first quarter 1998 operating earnings of $0.28 per share, which were at the low end of analyst expectations, Sunbeam needed to realize a profit of $35.5 million during March 1998 alone. A net profit of $35.5 million in March was 500% more than Sunbeam's net profit for the entire first quarter of 1997. In fact, Sunbeam's first quarter 1998 earnings fell far short of Wall Street's expectations. Although Sunbeam's first quarter earnings were material, that information was not disclosed to CPH or the public until after the closing of the Coleman transaction on March 30, 1998.

O. Morgan Stanley Allows The Debenture Offering And The Coleman Acquisition To Close (March 25-30, 1998).

72. Having directly participated in misleading CPH and other investors, Morgan Stanley had a duty to disclose the true facts before the closing of the debenture offering and the Coleman acquisition. Morgan Stanley also could have required Sunbeam to postpone the closings of

those transactions until the necessary disclosures were made. Morgan Stanley did neither. Instead, Morgan Stanley marched forward and closed the $750 million debenture offering on March 25, 1998, which was needed to close the Coleman transaction, and assisted Sunbeam in closing the acquisition of Coleman on March 30, 1998.

73. Morgan Stanley was richly rewarded for facilitating Sunbeam's fraud. Morgan Stanley received $22.5 million for the subordinated debenture offering and $10.28 million for the Coleman acquisition. Morgan Stanley would have received nothing if the transactions had failed to close.

P. Sunbeam's Fraud Is Revealed, Causing The Market Value Of Sunbeam's Stock To Plummet.

74. On April 3, 1998 — just four days after the Coleman transaction closed — Sunbeam announced that sales for the first quarter of 1998 would be approximately 5% below the $253.4 million in sales that Sunbeam reported in the first quarter of 1997. In other words, Sunbeam was expecting sales in the range of $240 million. That sales shortfall was shocking news, particularly in view of assurances provided by Sunbeam both in and after its March 19, 1998 press release that $285 million to $295 million of sales was still a real possibility. The April 3, 1998 press release also disclosed that Sunbeam expected to show a loss for the quarter, although the release did not disclose the magnitude of the loss or how much of the loss was attributable to operating earnings as opposed to one-time charges. Sunbeam's news stunned CPH and the market. On April 3rd, Sunbeam's stock price dropped 25% — from $45-9/16 to $34-3/8.

75. Sunbeam's actual first quarter 1998 performance was even worse than Sunbeam disclosed on April 3, 1998. The April 3, 1998 release indicated that Sunbeam's first quarter sales were in the range of $240 million. In fact, Sunbeam's first quarter sales were $224.5

million. Sunbeam obscured the true shortfall by extending its quarter from March 29 to March 31, 1998 — thereby adding two more days of Sunbeam sales. Sunbeam also failed to disclose that it had included two days of Coleman sales after the Coleman transaction closed on March 30. Further, Sunbeam inflated first quarter 1998 sales with $29 million of new phony "bill and hold" sales.

76. Just as Sunbeam's first quarter 1998 sales had been a disaster, so, too, were Sunbeam's first quarter 1998 earnings. Morgan Stanley and Sunbeam had represented to CPH that Sunbeam would achieve or exceed analyst first quarter 1998 earnings estimates. At the time of that representation, the consensus among analysts was that Sunbeam would enjoy first quarter 1998 earnings of $0.33 per share. However, on May 9, 1998, Sunbeam disclosed that it would record a first quarter loss of $0.09 per share (excluding one-time charges) — more than $0.40 per share lower than CPH had been told to expect.

77. Within weeks, Dunlap's fraudulent scheme began to unravel. In June 1998, after a number of news articles critical of Sunbeam's practices, Sunbeam's Board of Directors launched an internal investigation. That investigation led quickly to the firing of Dunlap and Kersh, and, subsequently, to a restatement of Sunbeam's financial statements for 1996, 1997, and the first quarter of 1998.

78. [Paragraph deleted pursuant to amendment of Complaint.]

79. As detailed above, Morgan Stanley participated in a scheme to mislead CPH and others and cover up the massive fraud at Sunbeam until Morgan Stanley and Sunbeam could close the purchase of Coleman. Morgan Stanley provided CPH with false information concerning Sunbeam's 1996 and 1997 financial performance, its business operations, and the value of Sunbeam's stock. Morgan Stanley also actively assisted Sunbeam in concealing Sunbeam's

disastrous first quarter 1998 sales and earnings and the true reasons for Sunbeam's poor performance.

80. Morgan Stanley knew that its statements to CPH were materially false and misleading and omitted the true facts.

81. Morgan Stanley intended that CPH rely on Morgan Stanley's representations concerning Sunbeam.

82. In agreeing to accept approximately 14.1 million shares of Sunbeam stock in connection with the sale of CPH's interest in Coleman, CPH reasonably and justifiably relied upon Morgan Stanley's representations concerning Sunbeam.

83. As a result of Morgan Stanley's misconduct, CPH has suffered damages in excess of $485 million.

COUNT I

Aiding And Abetting Fraud

84. CPH repeats and realleges the allegations of paragraphs 1 through 77 and 79 through 83 above as if set forth fully herein.

85. As detailed above, Dunlap engaged in a fraudulent scheme to inflate the price of Sunbeam's stock by improperly manipulating Sunbeam's 1996 and 1997 performance, by falsely asserting that Sunbeam had successfully "turned around," and by concealing the collapse of Sunbeam's first quarter 1998 sales and earnings and the reasons for Sunbeam's first quarter 1998 performance.

86. As detailed above, Morgan Stanley knew of Dunlap's fraudulent scheme and helped to conceal it until after Sunbeam could close the purchase of Coleman.

87. As detailed above, Morgan Stanley provided substantial assistance to Dunlap and Sunbeam, including: (a) concealing Sunbeam's first quarter 1998 sales collapse; (b) assisting with the false March 19, 1998 press release; (c) arranging road shows and meetings with prospective debenture purchasers at which Morgan Stanley, Dunlap, and others made false statements concerning Sunbeam's financial condition and business operations; (d) preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam's financial condition and business operations; (e) providing CPH with false financial and business information concerning Sunbeam; (f) scripting Dunlap's false public statements concerning Sunbeam's acquisition of Coleman; (g) persuading CPH to sell its interest in Coleman and to accept 14.1 million shares of Sunbeam stock and other consideration; and (h) underwriting the $750 million convertible debenture offering, proceeds from which were used to fund Sunbeam's purchase of Coleman.

88. As a result of Morgan Stanley's misconduct, CPH has suffered damages in excess of $485 million.

WHEREFORE, plaintiff Coleman (Parent) Holdings Inc. demands judgment against defendant Morgan Stanley & Co., Inc. as follows:

A. Compensatory damages to be determined at trial in an amount in excess of $485 million;

B. An award of costs and expenses incurred in this action, including reasonable attorneys' and experts' fees and expenses; and

C. Punitive damages; and

D. Any further relief as the Court may deem just and proper in light of all the circumstances of the case.

COUNT II

Conspiracy

89. CPH repeats and realleges the allegations of paragraphs 1 through 77 and 79 through 83 above as if set forth fully herein.

90. As detailed above, Morgan Stanley conspired with Dunlap and other senior Sunbeam executives to conceal the truth about Sunbeam's financial performance and business operations.

91. As detailed above, Morgan Stanley committed overt acts in furtherance of the conspiracy, including: (a) concealing Sunbeam's first quarter 1998 sales collapse; (b) assisting with the false March 19, 1998 press release; (c) arranging road shows and meetings with prospective debenture purchasers at which Morgan Stanley, Dunlap, and others made false statements concerning Sunbeam's financial condition and business operations; (d) preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam's financial condition and business operations; (e) providing CPH with false financial and business information concerning Sunbeam; (f) scripting Dunlap's false public statements concerning Sunbeam's acquisition of Coleman; (g) persuading CPH to sell its interest in Coleman and to accept 14.1 million shares of Sunbeam stock and other consideration; and (h) underwriting the $750 million convertible debenture offering, proceeds from which were used to fund Sunbeam's purchase of Coleman.

92. As a result of Morgan Stanley's misconduct, CPH has suffered damages in excess of $485 million.

WHEREFORE, plaintiff Coleman (Parent) Holdings Inc. demands judgment against defendant Morgan Stanley & Co., Inc. as follows:

A. Compensatory damages to be determined at trial in an amount in excess of $485 million;

B. An award of costs and expenses incurred in this action, including reasonable attorneys' and experts' fees and expenses; and

C. Punitive damages; and

D. Any further relief as the Court may deem just and proper in light of all the circumstances of the case

JURY DEMAND

Plaintiff demands a trial by jury on all claims.

Dated: February 17, 2005

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys
FLA BAR # 169440

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and hand delivery to all counsel on the attached list on this 17 day of Feb., 2005.

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

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

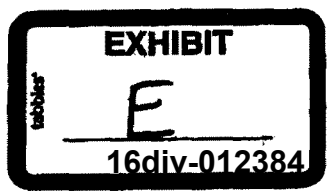
RESTATED AMENDED ANSWER OF MORGAN STANLEY & CO. INCORPORATED

Defendant Morgan Stanley & Co. Incorporated ("MS & Co.") responds to Plaintiff Coleman (Parent) Holdings, Inc.'s ("CPH") Complaint by denying generally that MS & Co. engaged in any fraudulent or negligent misrepresentations, any conspiracy to defraud, that MS & Co. assisted Sunbeam Corporation ("Sunbeam") or any employee, director or agent of Sunbeam in the commission of a fraudulent scheme, or that MS & Co. otherwise defrauded CPH in any manner. Specifically, MS & Co. responds to CPH's allegations as follows:

Nature of the Action

1. MS & Co. denies the allegations contained in Paragraph 1.

2. MS & Co. admits that, beginning in mid-1997, MS & Co. served as an investment banker for Sunbeam. MS & Co. admits that it attempted to identify a party interested in purchasing Sunbeam, and that those efforts were ultimately unsuccessful. MS & Co. admits that it recommended that Sunbeam's management consider acquiring other companies instead and suggested, as is common in corporate mergers and acquisitions, that Sunbeam consider, among other options, using Sunbeam stock as part of the consideration for such an acquisition. MS & Co. denies that it had any knowledge as to the accuracy of the value of Sunbeam's stock, or that MS & Co. knew (or even suspected) that the value of Sunbeam's stock had been "fraudulently



inflated." MS & Co. admits that it facilitated communications between Sunbeam and Coleman, but denies that it in any way "persuaded" CPH to sell its interest in Coleman. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 2 and consequently denies them.

3. MS & Co. admits that it agreed to serve as underwriter of a $750 million debenture offering for Sunbeam. MS & Co. admits that, as an advisor to Sunbeam, it had access to certain financial documents, and further states that those same documents were made available to CPH during the acquisition negotiations. Further, in that regard, MS & Co. specifically disclaimed any independent evaluation of Sunbeam's financial records, and expressly stated that it relied solely on documentation and information provided by Sunbeam and Sunbeam's audited financial statements. MS & Co. admits that on March 18, 1998, it learned that Sunbeam's first quarter 1998 sales were "soft." Sunbeam insisted that its sales would meet expectations, but MS & Co. insisted that Sunbeam issue a press release to warn the market of the softening sales. Additionally, MS & Co. received two "comfort letters" from Sunbeam's auditors, Arthur Andersen. MS & Co. performed all of its obligations as an underwriter of Sunbeam securities. MS & Co. denies that it had any role in the accounting judgments described in the complaint, or any obligations to audit or independently examine Sunbeam's accounting records. MS & Co. denies that it owed any duties to CPH. MS & Co. denies that it had any independent knowledge as to the reasons behind Sunbeam's soft sales, that Sunbeam had a "practice of accelerating sales," or that it "materially misrepresent[ed]" information to CPH. Further, MS & Co. specifically denies that it in any manner assisted Sunbeam in concealing its 1998 first quarter sales numbers in order to close the transaction. MS & Co. lacks sufficient knowledge or

information to form a belief as to the truth of any remaining allegations contained in Paragraph 3 and consequently denies them.

4. MS & Co. admits that CPH has brought this action against MS & Co. alleging fraudulent misrepresentation, aiding and abetting, conspiracy, and negligent misrepresentation, but denies that there is any merit to the suit. MS & Co. specifically denies that it made any fraudulent or negligent representations to CPH, that it in any way aided or abetted a fraudulent scheme against CPH, or that it participated in a conspiracy to defraud CPH. MS & Co. denies that any losses that CPH suffered resulted from fraud or any wrongful conduct on the part of MS & Co. MS & Co. denies the remaining allegations contained in Paragraph 4.

5. MS & Co. admits that CPH purports to seek compensatory damages against MS & Co., but denies that such claim is valid, for MS & Co. denies that it was engaged in any wrongful conduct. MS & Co. denies the remaining allegations contained in Paragraph 5.

Jurisdiction and Venue

6. MS & Co. admits the allegations contained in Paragraph 6. MS & Co. further admits that it is incorporated in Delaware and has its principal place of business in New York.

7. MS & Co. denies that venue is proper in this district.

Parties and Other Key Participants

8. MS & Co. admits that CPH represented, in negotiations with Sunbeam, that it owned, directly or indirectly, approximately 82% of Coleman prior to March 30, 1998. MS & Co. admits that on March 30, 1998, Sunbeam acquired CPH's interest in Coleman by paying CPH with 14.1 million shares of Sunbeam common stock and other consideration, including a cash payment by Sunbeam to CPH in the amount of $159,956,756.00. (*See* Feb. 27, 1998 Merger Agmt. § 3.1(a)(i) (Ex. 1).) MS & Co. lacks sufficient knowledge or information to form

a belief as to the truth of any remaining allegations contained in Paragraph 8 and consequently denies them.

9. MS & Co. admits that it is an investment banking firm providing financial and securities services. MS & Co. admits that, as part of its business operations, it at times provides advice on mergers and acquisitions, and raises capital in equity and debt markets, depending on the needs of its clients. MS & Co. admits that it served as Sunbeam's investment banker for certain aspects of Sunbeam's acquisition of Coleman, and served as underwriter of certain securities issued by Sunbeam in connection with the acquisition. MS & Co. denies any remaining allegations contained in Paragraph 9.

10. MS & Co. admits that Sunbeam was a publicly-traded company which manufactures and markets household and specialty consumer products, including outdoor cooking products. MS & Co. admits that Sunbeam marketed these products under several brand names, including Sunbeam and Oster. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 10 and consequently denies them.

11. MS & Co. admits that Albert Dunlap had served as the Chief Executive Officer of Sunbeam. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 11 and consequently denies them.

12. MS & Co. admits that Russell Kersh had served as the Executive Vice President of Sunbeam. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 12 and consequently denies them.

13. MS & Co. admits that Arthur Andersen LLP served as Sunbeam's auditors and provided independent/outside accounting services to Sunbeam. MS & Co. further admits that,

during the performance of its engagement, it received "comfort letters" from Arthur Andersen. MS & Co. never served as auditor for Sunbeam, and never provided Sunbeam with any accounting or accounting-related services. MS & Co. lacks sufficient knowledge or information to know the location of Lawrence Bornstein or to form a belief as to the truth of any allegations pertaining to him, and consequently denies them. MS & Co. denies any remaining allegations contained in Paragraph 13.

Factual Background

14. MS & Co. admits the allegations contained in Paragraph 14.

15. MS & Co. responds that the allegations contained in Paragraph 15 pertain to publicly available information, and refers to such information for the truth or falsity of such allegations. To the extent that further response is required, MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 15 and consequently denies them.

16. MS & Co. responds that the allegations contained in Paragraph 16 pertain to publicly available information, and refers to such information for the truth or falsity of such allegations. To the extent that further response is required, MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 16 and consequently denies them.

17. MS & Co. admits, on information and belief, that Albert Dunlap was hired as Sunbeam's Chief Executive Officer on or about July 18, 1996. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 17 and consequently denies them.

18. MS & Co. admits, on information and belief, that Russell Kersh was hired as Sunbeam's Chief Financial Officer. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 18 and consequently denies them.

19. MS & Co. admits, on information and belief, that Albert Dunlap and members of his senior management team entered into employment agreements with Sunbeam. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 19 and consequently denies them.

20. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 20 and consequently denies them.

21. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 21 and consequently denies them.

22. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 22 and consequently denies them.

23. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 23 and consequently denies them.

24. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 24 and consequently denies them.

25. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 25 and consequently denies them.

26. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 26 and consequently denies them.

27. MS & Co. admits, on information and belief, that Sunbeam reported a loss of $18.1 million in the third quarter of 1996, and that it had a $34.5 million gain in the third quarter 1997. MS & Co. further admits, on information and belief, that Sunbeam reported an increase in profits from $6.5 million in 1996 to $67.7 million in 1997. MS & Co. responds that the allegations contained in Paragraph 27 regarding stock prices pertain to publicly available information and MS & Co. refers to such information for the truth or falsity of such allegations. To the extent that further response is required, MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 27 and consequently denies them.

28. MS & Co. admits that it was engaged by Sunbeam to explore a possible sale of Sunbeam's core business or the initiation of one or more acquisitions. MS & Co. denies that it ever served as Dunlap's "shill." MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 28 and consequently denies them.

29. MS & Co. admits that William Strong and other MS & Co. employees met with Sunbeam in the spring of 1997 to discuss Sunbeam's investment banking requirements. Further, MS & Co. admits that, although it was not engaged in a previous relationship with Sunbeam, William Strong had worked with Dunlap before, during Strong's previous employment with Salomon Brothers. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 29 and consequently denies them.

30. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 30 and consequently denies them.

31. MS & Co. admits that William Strong and other MS & Co. employees met with Sunbeam in the spring of 1997 to discuss Sunbeam's investment banking requirements. MS & Co. admits that it was engaged by Sunbeam to explore a possible sale of Sunbeam's core business or the initiation of one or more acquisitions. MS & Co. admits that it initially sought a buyer for Sunbeam. To the extent this Paragraph alleges that MS & Co. was motivated to participate in a fraud in order to retain a single client and receive a customary fee, that allegation is foreclosed, among other reasons, by the fact that MS & Co.'s own affiliate lent hundreds of millions of dollars to Sunbeam two days after the Coleman acquisition closed. (June 1998 Credit Facilities Mem. (Ex. 2).) MS & Co. denies any remaining allegations contained in Paragraph 31.

32. MS & Co. admits that it searched for a buyer for Sunbeam. MS & Co. further admits that it assembled marketing materials based on financial documentation and audited financial statements provided to MS & Co. by Sunbeam and Arthur Andersen, for use in meetings with potential acquirers. MS & Co. admits that, despite contacting many companies, it was unable to find a buyer for Sunbeam. MS & Co. specifically denies CPH's allegation that MS & Co. knew that it would not be compensated if "it failed to deliver a major transaction," or that "Davis and Chase were standing by . . . to reclaim their position as Dunlap's investment banker of choice." MS & Co. denies any remaining allegations contained in Paragraph 32.

33. MS & Co. denies that it provided the "solution" to any "problem" alleged in Paragraph 33. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 33 and consequently denies them.

34. MS & Co. admits after its unsuccessful attempts to locate a purchaser for Sunbeam, it suggested that Sunbeam acquire one or more other companies instead. MS & Co. admits that it proposed to Sunbeam, among other options, the possibility of paying for any such

acquisition in part with Sunbeam's stock. MS & Co. specifically denies any knowledge to the effect that a "failure to find a buyer for Sunbeam could prove fatal to [their] relationship." MS & Co. further denies any involvement in or knowledge of fraudulently inflated Sunbeam stock or concealment of any fraud at Sunbeam. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 34 and consequently denies them.

35. MS & Co. admits that, beginning in mid-1997, MS & Co. served as an investment banker for Sunbeam. MS & Co. admits that it attempted to identify a party interested in purchasing Sunbeam, and that those efforts were ultimately unsuccessful. MS & Co. admits that it recommended that Sunbeam's management consider, among other options, acquiring other companies instead and suggested, as is common in corporate mergers and acquisitions, that Sunbeam consider using Sunbeam stock as part of the consideration for such an acquisition. MS & Co. denies that it developed "acquisition strategies" for Sunbeam or that the services or potential transactions it discussed with Sunbeam's management were deceptive or in any way designed to facilitate fraud. MS & Co. specifically denies that it in any way knew of or knowingly assisted Dunlap to "camouflage Sunbeam's results" thereby making it "difficult to detect any shortfall in Sunbeam's performance," or that it knew of or assisted Dunlap in taking "new massive restructuring charges," which thereby created increased "cookie jar reserves." MS & Co. denies any remaining allegations contained in Paragraph 35.

36. MS & Co. admits that, in its capacity as advisor to Sunbeam, it identified Coleman as a potential acquisition candidate. MS & Co. admits that it communicated with representatives of Coleman to discuss a potential acquisition, but denies that it "persuade[d] CPH to sell its interest in Coleman to Sunbeam." MS & Co. admits that CPH represented, in

negotiations with Sunbeam, that it owned, directly or indirectly, approximately 82% of Coleman prior to March 30, 1998. MS & Co. denies the remaining allegations contained in Paragraph 36.

37. MS & Co. admits that it facilitated a meeting between representatives from Sunbeam and MacAndrews & Forbes Holdings, Inc. ("MAFCO") in December 1997. MS & Co. admits that it prepared Sunbeam's representatives for that meeting. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 37 and consequently denies them.

38. MS & Co. admits that discussions between Sunbeam, MAFCO and CPH resumed in early 1998. MS & Co. further admits that its Managing Directors James Stynes and Robert Kitts worked on MS & Co.'s engagement for Sunbeam. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 38 and consequently denies them.

39. MS & Co. denies that it "persuade[d]" CPH to sell Coleman in exchange for Sunbeam stock. MS & Co. denies that it "prepared" financial information for CPH. There is, in any event, no factual allegation contained in Paragraph 39 or elsewhere that identifies such alleged information at all, let alone with particularity. MS & Co. further denies that it knowingly "provided" CPH with false financial and business information, or otherwise knowingly relayed false information to CPH which created an appearance that "Sunbeam was prospering and that Sunbeam's stock had great value." Specifically, MS & Co. denies that it knowingly provided CPH with false 1996 and 1997 sales and revenue figures or with false projections. MS & Co. denies that it "falsely assured CPH that Sunbeam's 'early buy' sales program would not hurt Sunbeam's future revenues," that "Sunbeam would meet or exceed" first quarter 1998 estimates, that 1998 earnings estimates were accurate, that a plan to earn $2.20/share was attainable or even

low, or that it "specifically advised CPH that Sunbeam's first quarter 1998 sales were 'tracking fine' and running ahead of analysts' estimates."

In any event CPH could not have relied on such alleged representations in light of (i) the Merger Agreement's representations and warranties (Merger Agmt. §§ 5.1-5.4), none of which refer to any alleged representation contained in this Paragraph, (ii) the representations and warranties in a separate agreement that was executed by Coleman and Sunbeam (Feb. 27, 1998 Company Merger Agmt. § 5.1-5.12 (Ex. 3)), which are expressly incorporated into the Merger Agreement and none of which refer to any alleged representation contained in this Paragraph, and (iii) the Merger Agreement's broad integration clause which forecloses reliance on any alleged representation contained in this Paragraph (Merger Agmt. § 12.5). MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 39 and consequently denies them.

40. MS & Co. admits that CPH agreed to sell its shares in Coleman to Sunbeam, and that CPH agreed to accept Sunbeam stock as partial payment for the sale, but denies that MS & Co. "persuaded" CPH to make the deal. CPH is a sophisticated party and was represented by its own expert advisors and attorneys. (*Id.* §§ 1.1; 4.11.) CPH and its advisors also enjoyed full access to Sunbeam's "books, records, properties, plants and personnel." (*Id.* § 6.7.) CPH also expressly disclaimed reliance on statements allegedly made during negotiations. (*Id.* § 12.5.) MS & Co. responds that the allegations contained in Paragraph 40 regarding stock value pertain to publicly available information, and refers to such information for the truth or falsity of such allegations. To the extent that further response is required, MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 40 and consequently denies them.

41. MS & Co. admits that on February 27, 1998, Sunbeam's Board of Directors met at Morgan Stanley's New York offices to discuss Sunbeam's possible purchase of Coleman. MS & Co. denies the remaining allegations contained in Paragraph 41.

42. MS & Co. admits it made a presentation during the February 27, 1998 Sunbeam Board of Directors Meeting. MS & Co. further admits that MS & Co. representatives, including William Strong, Robert Kitts, James Stynes and Ruth Porat, were present at this meeting. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 42 and consequently denies them.

43. MS & Co. admits that at that February 27, 1998 New York meeting, it provided Sunbeam with a written "fairness opinion" regarding the fair acquisition price of Coleman. This opinion was based on financial information provided to MS & Co. by Sunbeam, Coleman, and Arthur Andersen~~, and on synergy analyses which MS & Co. received from CPH~~. The written fairness opinion explicitly stated that MS & Co. "[has] not made any independent valuation or appraisal of the assets or liabilities of [Sunbeam]." (Feb. 27, 1998 Fairness Op. at 3 (Ex. 4).) MS & Co. denies any remaining allegations contained in Paragraph 43.

44. MS & Co. admits that the Sunbeam Board of Directors approved the Coleman acquisition at the February 27, 1998 meeting in New York. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 44 and consequently denies them.

45. MS & Co. admits that it continued to provide investment banking services to Sunbeam after the Coleman acquisition was approved. MS & Co. denies any remaining allegations contained in Paragraph 45.

46. MS & Co. admits that the Coleman acquisition was announced on March 2, 1998. MS & Co. responds that the allegations contained in Paragraph 46 regarding stock prices pertain to publicly available information, and refers to such information for the truth or falsity of such allegations. To the extent that further response is required, MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 46 and consequently denies them.

47. MS & Co. admits that it agreed to serve as underwriter for Sunbeam's subordinated debentures. The "cash portion" of the consideration set forth in the Merger Agreement was also financed in part through a $680 million loan made by Morgan Stanley Senior Funding, an affiliate of MS & Co. (*See* Credit Facilities Mem.) MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 47 and consequently denies them.

48. MS & Co. admits that the money raised from the sale of the debentures was used in part to finance Sunbeam's acquisition of Coleman.

49. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 49 and consequently denies them.

50. MS & Co. admits that the convertible debentures were presented to potential investors at a series of "road show" meetings and conference calls. MS & Co. admits that it reviewed and commented on the offering memorandum and other materials used to present the debentures to potential investors. MS & Co. denies that it "misrepresented Sunbeam's financial performance" or "emphasized Dunlap's purported 'turnaround' accomplishments." To the contrary, the offering memorandum expressly stated that MS & Co. assumed no responsibility for the accuracy or completeness of Sunbeam's audited financial information and warned

investors not to rely on any projections of future performance. (March 19, 1998 Note Offering Mem. at 2-3, 12-17, 72 (Ex. 5).) MS & Co. denies any remaining allegations contained in Paragraph 50.

51. MS & Co. admits that it launched the debenture offering with a presentation to the Morgan Stanley sales force, but denies the remaining allegations contained in Paragraph 51.

52. MS & Co. admits that the debenture offering was increased from $500 million to $750 million. MS & Co. admits that the debentures were offered to investors nationwide. MS & Co. denies any remaining allegations contained in Paragraph 52.

53. MS & Co. admits that its employees traveled on one occasion to Sunbeam's Florida offices. MS & Co. denies the remaining allegations contained in Paragraph 53, except to the extent that they constitute legal conclusions to which no response is required.

54. MS & Co. admits that William Strong worked on MS & Co.'s engagement for Sunbeam. MS & Co. also admits that Strong has provided deposition testimony discussing conversations with Sunbeam officials. MS & Co. denies that Strong or any other MS & Co. employee was accurately apprised of Sunbeam's financial condition because MS & Co. at all times relied on information provided by Sunbeam management and Arthur Andersen, including Sunbeam's audited financial statements. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 54 and consequently denies them.

55. MS & Co. denies CPH's allegation that it was "telling CPH and the investing public . . . that Sunbeam's turnaround was a success, that Sunbeam's sales for the first quarter of 1998 were ahead of expectations of outside analysts, and that Sunbeam was poised for record sales." Furthermore, any information communicated by MS & Co. was based on financial data

and information provided to it by Sunbeam and Arthur Andersen — a fact that MS & Co. regularly publicized through disclaimer statements. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 55 and consequently denies them.

56. MS & Co. denies the allegations contained in Paragraph 56.

57. MS & Co. admits that it received a facsimile schedule regarding Sunbeam's finances on or about March 18, 1998. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 57 and consequently denies them.

58. MS & Co. admits that on or about March 18, 1998, it received a faxed financial schedule which reflected that Sunbeam's January and February 1998 sales were below those of January and February 1997. MS & Co. denies that it made assertions or otherwise disseminated information to CPH or others that it knew to be false. MS & Co. denies any knowledge of the fact that Sunbeam had not undergone a successful turnaround, or that Sunbeam's financial performance had not improved in the manner presented by Sunbeam's management and audited financial statements. MS & Co. admits that on March 18, 1998, it learned that Sunbeam's first quarter 1998 sales were "soft." Sunbeam insisted that its sales would meet expectations, but MS & Co. insisted that Sunbeam issue a press release to warn the market of the softening sales. Additionally, MS & Co. received two "comfort letters" from Sunbeam's auditors, Arthur Andersen. MS & Co. performed all of its obligations as an underwriter of Sunbeam securities. MS & Co. denies that it had any role in the accounting judgments described in the complaint, or any obligations to audit or independently examine Sunbeam's accounting records. MS & Co. denies that it owed any duties to CPH. MS & Co. lacks sufficient knowledge or information to

form a belief as to the truth of any remaining allegations contained in Paragraph 58 and consequently denies them.

59. MS & Co. admits that on March 18, 1998, it learned that Sunbeam's first quarter 1998 sales were "soft." Sunbeam insisted that its sales would meet expectations, but MS & Co. insisted that Sunbeam issue a press release to warn the market of the softening sales. Additionally, MS & Co. received two "comfort letters" from Sunbeam's auditors, Arthur Andersen. MS & Co. performed all of its obligations as an underwriter of Sunbeam securities. MS & Co. denies that it had any role in the accounting judgments described in the Complaint, or any obligations to audit or independently examine Sunbeam's accounting records. MS & Co. denies that it owed any duties to CPH. MS & Co. denies all remaining allegations contained in Paragraph 59.

60. MS & Co. admits that Sunbeam issued a press release on March 19, 1998 that included language selectively quoted in Paragraph 60. MS & Co. further states that the March 19, 1998 press release contained the following additional statement, omitted in the Complaint:

> **Cautionary Statements** - Statements contained in this press release, including statements relating to the Company's expectations regarding anticipated performance in the future, are "forward looking statements," as such term is defined in the Private Securities Litigation Reform act of 1995. Actual results could differ materially from the Company's statements in this release regarding its expectations, goals or projected results, due to various factors, including those set forth in the Company's Cautionary Statements contains in its Annual Report on Form 10-K for its fiscal year ended December 31, 1997 filed with the Securities and Exchange Commission.

(March 19, 1998 Press Release (Ex. 6).)

61. MS & Co. admits that Sunbeam issued a press release on March 19, 1998 that included language selectively quoted in Paragraph 61. MS & Co. further states that the March 19, 1998 press release contained the following additional statement, omitted in the Complaint:

> **Cautionary Statements** - Statements contained in this press release, including statements relating to the Company's expectations regarding anticipated performance in the future, are "forward looking statements," as such term is defined in the Private Securities Litigation Reform act of 1995. Actual results could differ materially from the Company's statements in this release regarding its expectations, goals or projected results, due to various factors, including those set forth in the Company's Cautionary Statements contains in its Annual Report on Form 10-K for its fiscal year ended December 31, 1997 filed with the Securities and Exchange Commission.

(*Id.*) MS & Co. denies all remaining allegations contained in Paragraph 61.

62. MS & Co. denies the allegation that it knew that the "shortfall from analysts' estimates was . . . caused by Sunbeam's acceleration of 1998 sales into the fourth quarter of 1997." MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 62 and consequently denies them.

63. MS & Co. denies the allegations contained in Paragraph 63.

64. MS & Co. specifically denies that it "knew that a full and truthful disclosure . . . would doom the debenture offering," or that it had any knowledge that the press release was untruthful or otherwise misleading. MS & Co. denies the allegations contained in Paragraph 64.

65. MS & Co. denies the allegations contained in Paragraph 65. To the extent that this Paragraph quotes the Merger Agreement, that document speaks for itself and contradicts the allegations contained in the Complaint.

66. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 66 and consequently denies them.

67. MS & Co. denies the allegations contained in Paragraph 67.

68. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 68 and consequently denies them.

69. MS & Co. admits that it continued to serve as Sunbeam's investment banker, and continued to prepare to close the debenture offering and the acquisition of Coleman, but denies

any knowledge as to the alleged falsity of the March 19, 1998 press release. MS & Co. denies the remaining allegations contained in Paragraph 69.

70. MS & Co. admits that throughout its service to Sunbeam, MS & Co. employees, including Tyree, spoke via telephone with representatives of Sunbeam. MS & Co. denies any knowledge that the press release was untruthful or otherwise misleading. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 70 and consequently denies them.

71. MS & Co. admits that it received "comfort letters" from Arthur Andersen. MS & Co. denies the allegation that it knew that "Sunbeam's earnings for the first quarter of 1998 were going to miss Wall Street analysts' earning expectations." MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 71 and consequently denies them.

72. MS & Co. admits that it continued to prepare to close both the debenture offering and the acquisition of Coleman. MS & Co. denies any allegation of its "having directly participated in misleading CPH and other investors." MS & Co. responds that the allegation that MS & Co. "had a duty to disclose the true facts" to CPH is a legal conclusion to which no response is required. MS & Co. denies the remaining allegations contained in Paragraph 72.

73. MS & Co. admits that it received compensation for investment banking work performed by MS & Co. for Sunbeam. MS & Co. denies the allegation that it facilitated Sunbeam's fraud. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of any remaining allegations contained in Paragraph 73 and consequently denies them.

74. MS & Co. admits that on March 19, 1998, Sunbeam issued a press release which stated that "net sales for the first quarter of 1998 may be lower than the range of Wall Street

analysts' estimates of $285 million to $295 million." MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 74 and consequently denies them.

75. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 75 and consequently denies them.

76. MS & Co. admits that it advocated issuing a press release to warn the market of the softening sales, but denies that it represented that Sunbeam's sales would exceed analysts' projections. MS & Co. denies the remaining allegations contained in Paragraph 76.

77. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 77 and consequently denies them.

Count I -- Fraudulent Misrepresentation

78. MS & Co. repeats and realleges its responses to Paragraphs 1 through 77 as if set forth herein.

79. MS & Co. denies the allegations contained in Paragraph 79.

80. MS & Co. denies the allegations contained in Paragraph 80.

81. MS & Co. denies the allegations contained in Paragraph 81.

82. MS & Co. denies the allegation contained in Paragraph 82.

83. MS & Co. denies the allegation contained in Paragraph 83.

Count II -- Aiding and Abetting Fraud

84. MS & Co. repeats and realleges its responses to Paragraphs 1 through 77 as if set forth herein.

85. MS & Co. lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 85 and consequently denies them.

86. MS & Co. denies the allegation contained in Paragraph 86.

87. MS & Co. admits that, beginning in mid-1997, MS & Co. served as an investment banker and underwriter for Sunbeam. MS & Co. admits that it attempted to identify a party interested in purchasing Sunbeam, and that those efforts were ultimately unsuccessful. MS & Co. admits that it recommended that Sunbeam's management consider acquiring other companies instead and suggested, as is common in corporate mergers and acquisitions, that Sunbeam consider using Sunbeam stock as part of the consideration for such an acquisition. MS & Co. denies that it had any knowledge as to the accuracy of the value of Sunbeam's stock, or that MS & Co. knew (or even suspected) that the value of Sunbeam's stock had been "fraudulently inflated."

MS & Co. admits that it facilitated communications between Sunbeam and Coleman, but denies that it in any way "persuaded" CPH to sell its interest in Coleman.

MS & Co. admits that on March 18, 1998, it learned that Sunbeam's first quarter 1998 sales were "soft." Sunbeam insisted that its sales would meet expectations, but MS & Co. insisted that Sunbeam issue a press release to warn the market of the softening sales. Additionally, MS & Co. received two "comfort letters" from Sunbeam's auditors, Arthur Andersen. MS & Co. performed all of its obligations as an underwriter of Sunbeam securities.

MS & Co. admits that the convertible debentures were presented to potential investors at a series of "road show" meetings and conference calls. MS & Co. admits that it reviewed and commented on the offering memorandum and other materials used to present the debentures to potential investors. MS & Co. denies the remaining allegations contained in Paragraph 87.

88. MS & Co. denies the allegations contained in Paragraph 88.

Count III -- Conspiracy

89. MS & Co. repeats and realleges its responses to Paragraphs 1 through 77 as if set forth herein.

90. MS & Co. denies the allegations contained in Paragraph 90.

91. MS & Co. admits that it served as a financial advisor to Sunbeam and an underwriter of Sunbeam securities, but denies that it in any way committed "overt acts in furtherance of a conspiracy." MS & Co. denies that it performed an independent financial analysis of Sunbeam; to the contrary, MS & Co. informed CPH that it was relying solely on financial data and information provided to it by Sunbeam and Arthur Andersen. MS & Co. admits that it underwrote the $750 million convertible debenture offering. MS & Co. denies the remaining allegations contained in Paragraph 91.

92. MS & Co. denies the allegations contained in Paragraph 92.

Count IV -- Negligent Misrepresentation

93. MS & Co. repeats and realleges its responses to Paragraphs 1 through 77 as if set forth herein.

94. MS & Co. admits that it served as a financial advisor to Sunbeam and an underwriter of Sunbeam securities. MS & Co. responds that the allegations contained in Paragraph 94 constitute legal conclusions to which no response is required. Alternatively, MS & Co. denies the remaining allegations contained in Paragraph 94.

95. MS & Co. denies the allegations contained in Paragraph 95.

96. MS & Co. denies the allegations contained in Paragraph 96.

DEFENSES AND AFFIRMATIVE DEFENSES

In addition to the foregoing responses, MS & Co. asserts the following defenses and affirmative defenses to the claims stated in CPH's Complaint. MS & Co. does not assume the burden of proof on these defenses when the substantive law provides otherwise.

First Defense

CPH's alleged claims must be dismissed on *forum non conveniens* grounds pursuant to Florida Rule of Civil Procedure 1.061(a).

Second Defense

CPH's alleged claims are barred, in whole or in part, for failure to state a cause of action.

First Affirmative Defense

CPH's alleged claims are barred, in whole or in part, by the doctrine of waiver. In particular, CPH contractually waived its alleged claims when it agreed in Section 12.5 of the Merger Agreement and Section 10.4 of the Company Merger Agreement that the Agreements contained the entire agreement and understanding between CPH and Sunbeam and that the provisions of the Agreements superseded "all prior agreements and understandings, oral or written" with respect to the subject of the Agreements. (Merger Agmt. § 12.5; *see* Company Merger Agmt. § 10.4.)

Additionally, CPH waived its alleged claims when CPH failed to exercise its contractual rights under the Merger Agreement and Company Merger Agreement to examine Sunbeam's books, records, and facilities and then failed to invoke the "material adverse effect" clause of the Merger Agreement. CPH failed to make a reasonable inquiry into information concerning Sunbeam's financial statements, results of operations, projections, facilities, and business plans (hereinafter "Sunbeam Information") after signing the Merger Agreement and Company Merger

Agreement, after Sunbeam issued its March 19, 1998 press release, and before CPH accepted over 14 million shares of Sunbeam common stock as partial consideration for the sale of its interest in Coleman. CPH then failed to invoke Section 8.2(c) of the Merger Agreement, a remedy available solely to CPH, thereby permitting the transaction to close and waiving its alleged claims.

Second Affirmative Defense

CPH's alleged claims are barred, in whole or in part, by the doctrine of estoppel. In particular, CPH, is estopped from asserting its claim for the following reasons.

(a) By virtue of the customs and practices in the New York financial markets observed in connection with the negotiation of mergers and acquisitions among sophisticated parties, CPH as an affiliate of MAFCO, understood and agreed that MS & Co., as Sunbeam's investment banker, did not make any representations or warranties to CPH about the accuracy or completeness of the Sunbeam Information supplied to CPH. CPH further understood and agreed MS & Co. would not have any liability to CPH by reason of CPH's use of the Sunbeam Information that MS & Co. provided to CPH. MS & Co. relied upon CPH's understanding and agreement to the customs and practices in the New York financial markets when MS &Co. provided Sunbeam Information to CPH. CPH is now estopped from claiming to have relied upon Sunbeam Information that MS & Co. supplied to CPH.

(b) By virtue of a letter agreement with Sunbeam dated February 23, 1998, and acknowledged in the Merger and Company Merger Agreements (Merger Agmt. §§ 6.7, 11.2 12.5; Company Merger Agmt. §§ 7.2, 9.2 10.4), CPH, as an affiliate of Coleman, agreed that Sunbeam and its representatives, including MS & Co., did not make any representations or warranties about the accuracy or completeness of the information that they supplied to CPH. CPH further agreed that Sunbeam and its representatives, including MS & Co., would not have

any liability to CPH by virtue of CPH's use of the information that they provided to CPH. MS & Co. relied upon CPH's agreement when it provided Sunbeam Information to CPH, and CPH is estopped from now claiming to have relied upon information supplied to CPH outside of Merger Agreement or the Company Merger Agreement.

(c) By virtue of Section 12.5 of the Merger Agreement and Section 10.4 of the Company Merger Agreement, CPH agreed that the Merger Agreement and the Company Merger Agreement contained the entire agreement and understanding between CPH and Sunbeam and that the provisions of the Agreements superseded "all prior agreements and understandings, oral or written" with respect to the subject of the Agreements. (Merger Agmt. § 12.5; *see* Company Merger Agmt. § 10.4.) MS & Co. relied upon CPH's agreement when MS & Co. provided Sunbeam Information to CPH, and CPH is estopped from now claiming to have relied upon information supplied to CPH outside of the Agreements.

(d) CPH bargained for and received access to Sunbeam Information pursuant to Section 6.7 of the Merger Agreement and to Sections 7.2 and 7.3 of the Company Merger Agreement. When MS & Co. provided Sunbeam Information to CPH, MS & Co. relied upon CPH's contractual undertaking and ability to verify independently all statements that MS & Co. or Sunbeam made to CPH. CPH is estopped from now claiming to have relied upon information supplied to CPH by MS & Co. or Sunbeam when CPH, a sophisticated party, had equal access to Sunbeam Information and equal ability to evaluate Sunbeam Information.

(e) CPH held itself out to be and is a commercially and financially sophisticated party, capable of protecting its own interests. MS & Co. relied upon these representations when it provided Sunbeam Information to CPH, and CPH is estopped from now disclaiming these representations.

(f) CPH represented to Sunbeam and MS & Co. that it had retained and would rely upon its own sophisticated advisors, including an investment banker and a law firm capable of protecting CPH's interests. CPH and its advisors represented that they were doing their own due diligence on CPH's behalf through the meetings and information that they requested from Sunbeam and its advisors. MS & Co. relied upon these representations when it provided Sunbeam Information to CPH, and CPH is estopped from now disclaiming these representations.

Third Affirmative Defense

To the extent that CPH sustained any cognizable damages, the damages claimed by CPH were the result, in whole or in part, of CPH's failure to mitigate its damages. In particular, CPH investigated but failed to pursue reasonable available measures to hedge its position with regard to its ownership of Sunbeam stock. Had CPH implemented the potential hedges available, CPH would not have suffered the loss of the value of Sunbeam stock that occurred during and after June of 1998. In addition, CPH failed to mitigate its damages when it chose to install its own executives at Sunbeam and to accept warrants from Sunbeam to settle its alleged claims against Sunbeam. CPH chose to keep and indeed increase its holdings in Sunbeam, taking its chances that Sunbeam stock would increase in value, rather than selling its Sunbeam stock and reasonably limiting its losses.

Fourth Affirmative Defense

Any future claim by CPH for punitive damages is barred, in whole or in part, because (i) MS & Co. did not engage in intentional misconduct; (ii) the allegedly tortuous conduct is not gross, wanton, willful, reckless or otherwise morally culpable; and (iii) the alleged conduct was not part of a pattern directed at the public generally.

Fifth Affirmative Defense

To the extent that CPH sustained any cognizable damages, the damages claimed by CPH were the result, in whole or in part, of the comparative negligence, fault or culpable conduct of CPH (including its parent corporations and its direct or indirect wholly and majority owned subsidiaries) at the times and places set forth in the Complaint. As a result thereof, MS & Co. is entitled to have its liability to CPH, if any, reduced pursuant to N.Y. C.P.L.R. § 1411 and Florida Statute § 768.81. In particular, fault should be apportioned to CPH for its negligence or fault in failing to request, review or make use of available Sunbeam Information. The negligence of CPH, itself or by or through its agents and advisors, caused or contributed to CPH's damages in the following ways:

(a) CPH was negligent in failing to make a reasonable independent inquiry into Sunbeam Information including but not limited to failure to request access to Sunbeam's books and records, *before* agreeing to accept over 14 million shares of Sunbeam common stock as partial consideration for the sale of its interest in Coleman and signing the Merger Agreement, and directing the signing of the Company Merger Agreement.

(b) CPH was negligent in failing to make a reasonable inquiry into the Sunbeam Information available to CPH *after* signing the Merger Agreement and Company Merger Agreement, including but not limited to information available pursuant to Section 6.7 of the Merger Agreement and to Sections 7.2 and 7.3 of the Company Merger Agreement, and *before* CPH accepted over 14 million shares of Sunbeam common stock as partial consideration for the sale of its interest in Coleman.

(c) CPH was negligent in failing to make a reasonable inquiry into Sunbeam Information *after* Sunbeam issued its March 19, 1998 press release and *before* CPH accepted

over 14 million shares of Sunbeam common stock as partial consideration for the sale of its interest in Coleman.

(d) CPH was negligent in failing to make a reasonable inquiry concerning the existence or absence of a "material adverse effect" as defined in the Merger Agreement and the Company Merger Agreement *before* the closing of the Merger Agreement at which time CPH accepted over 14 million shares of Sunbeam common stock as partial consideration for the sale of its interest in Coleman.

(e) CPH was negligent in failing to make use of the means available to CPH to investigate or confirm statements about Sunbeam Information made to CPH by Sunbeam or MS & Co. during late 1997 and the first quarter of 1998 before CPH accepted over 14 million shares of Sunbeam common stock as partial consideration for the sale of its interest in Coleman.

Sixth Affirmative Defense

To the extent that CPH sustained any cognizable damages, the damages claimed by CPH were the result, in whole or in part, of the negligence or fault of one or more third parties for whom MS & Co. bears no responsibility and over whom MS & Co. had no dominion, authority, or control. As a result thereof, MS & Co. is entitled to have its liability to CPH, if any, reduced pursuant to N.Y. Gen. Oblig. § 15-108 or Florida Statute § 768.81. More specifically, fault should be apportioned to Sunbeam and its subsidiaries and successors in interest (collectively "Sunbeam") for its negligence or fault in preparing and providing Sunbeam Information to CPH, MS & Co. and third parties, and its negligence in making disclosures required by federal securities laws. Sunbeam's negligence caused or contributed to CPH's damages in the following ways:

(a) Federal laws and regulations imposed upon Sunbeam, a publicly held company, a duty to prepare and publicly file financial statements that present fairly, in all material respects,

the consolidated financial condition of Sunbeam. Sunbeam negligently breached that duty when it filed inaccurate or incomplete financial statements for 1996, 1997, and the first quarter of 1998.

(b) Beginning in the fall of 1997 Sunbeam engaged MS & Co. to serve as its investment banker. As a result of this engagement, MS & Co. acted as an advisor to Sunbeam in certain aspects of Sunbeam's acquisition of Coleman and two other companies. Sunbeam later engaged MS & Co. to purchase for resale ("underwrite") $2,014,000,000 face value of Sunbeam Zero Coupon Convertible Senior Subordinated Debentures, which were issued by Sunbeam in March of 1998. As part of its activities as an investment banker and an underwriter, MS & Co. made inquiries of Sunbeam concerning Sunbeam Information. Sunbeam had a duty to provide MS & Co. with true and accurate Sunbeam Information. In response to MS & Co.'s inquiries and on its own initiative, Sunbeam provided MS & Co. with Sunbeam Information that Sunbeam knew or should have known, in the exercise of reasonable care was inaccurate or incomplete. Sunbeam provided such Sunbeam Information, including but not limited to the publicly filed financial statements identified in subparagraph (a), to MS & Co. with the knowledge and understanding that MS & Co. would provide such Sunbeam Information to third parties, including CPH. Sunbeam failed to use reasonable care in providing MS & Co. with truthful and accurate Sunbeam Information.

(c) On March 18, 1998, MS & Co. made inquiries of Sunbeam concerning Sunbeam's sales to date and total projected sales for the first quarter of 1998. In response to MS & Co.'s inquires, Sunbeam provided Sunbeam Information concerning its first quarter 1998 sales which, in the exercise of reasonable care, Sunbeam knew or should have known was incorrect.

Sunbeam failed to use reasonable care in providing MS & Co. with truthful and accurate Sunbeam Information.

(d) During the course of Sunbeam's negotiations with CPH, Sunbeam provided CPH with Sunbeam Information, which, in the exercise of reasonable care, Sunbeam knew or should have known was incorrect. Sunbeam failed to use reasonable care in providing CPH with truthful and accurate Sunbeam Information.

(e) In June of 1998, a special committee of Sunbeam's board of directors engaged in an investigation of Sunbeam Information for 1996, 1997, and the first quarter of 1998. As a result of this investigation, Sunbeam determined and announced publicly that it would be required to amend its publicly filed financial statements for 1996, 1997 and the first quarter of 1998. Through these restatements Sunbeam acknowledged in October of 1998 that the Sunbeam Information that it had provided to MS & Co., to CPH, and to the public was inaccurate and incomplete.

(f) Sunbeam's negligence in preparing, filing, and providing inaccurate and incomplete Sunbeam Information as aforesaid is the sole proximate cause of CPH's damages.

Seventh Affirmative Defense

To the extent that CPH sustained any cognizable damages, the damages claimed by CPH were the result, in whole or in part, of the negligence or fault of one or more third parties for whom MS & Co. bears no responsibility and over whom MS & Co. had no dominion, authority, or control. As a result thereof, MS & Co. is entitled to have its liability to CPH, if any, reduced pursuant to N.Y. Gen. Oblig. § 15-108 or Florida Statute § 768.81. More specifically, fault should be apportioned to Arthur Andersen LLP, Andersen Worldwide, Société Coopérative, individual partners in Arthur Andersen LLP and members of Andersen Worldwide, Société Coopérative, and member firms in the Andersen Worldwide Organization (collectively

"Andersen"), for their negligence or fault in preparing Sunbeam's financial statements and providing information regarding those statements to CPH, MS & Co., and third parties. Andersen's negligence caused or contributed to CPH's damages in the following ways:

(a) In 1996 and 1997, Andersen was Sunbeam's auditor and issued unqualified audit opinions regarding Sunbeam's financial statements. These audit opinions were included, with Andersen's consent, in Sunbeam's filings with the Securities and Exchange Commission. As Sunbeam's auditor, Andersen knew or should have known that Sunbeam's financial statements were replete with accounting irregularities; that the information in Sunbeam's 1996 and 1997 financial statements was materially false and misleading; and that its 1996 and 1997 unqualified audit opinions were materially false and misleading. Andersen had a duty to those it knew or should have known would rely on the accuracy of its audit opinions.

(b) Andersen was aware that, in the course of Sunbeam's negotiations with CPH, Sunbeam provided CPH with information relating to Sunbeam's financial statements, including Andersen's unqualified opinions of Sunbeam's 1996 and 1997 financial statements. Andersen knew, or should have known in the exercise of reasonable care, that the information that Sunbeam provided CPH was incorrect. In particular, in March 1998 (when Andersen issued its opinion of Sunbeam's 1997 financial statements and consented to the publication of that opinion in Sunbeam's March 1998 10-K filing), Andersen knew that Sunbeam had warranted and represented to CPH that its filings with the Securities and Exchange Commission and audited financial statements, including Andersen's audit opinions, were accurate. Andersen expected that CPH would rely on Andersen's 1997 audit report. Andersen also knew and expected that CPH would rely on Andersen's previously issued 1996 audit report, which Andersen did not retract until long after Sunbeam's acquisition of Coleman closed. Andersen failed to exercise

reasonable care in obtaining or communicating the information contained in its audit reports regarding Sunbeam's 1996 and 1997 financial statements.

(c) Andersen participated in the investigation of Sunbeam Information undertaken by a special committee of Sunbeam's board of directors in June 1998. In October 1998, Andersen acknowledged that, among other things, a restatement of Sunbeam's financial statements for 1996 and 1997 was necessary, thereby acknowledging that Andersen's 1996 and 1997 audit opinions, which has been provided to and relied upon by CPH and MS & Co., were inaccurate, incomplete, and not in accordance with generally accepted accounting principles or generally accepted auditing principles.

(d) Andersen's negligence in preparing and providing accurate and truthful information regarding Sunbeam's 1996 and 1997 financial statements as aforesaid is the sole proximate cause of CPH's damages.

Eighth Affirmative Defense

MS & Co. is entitled to a set-off for any settlement by any party or non-party to CPH for any claim arising out of the transactions that are the subject of the Complaint pursuant to N.Y. Gen. Oblig. § 15-108 or Florida Statutes § 46.015, 768.31 and 768.041. The basis for such set-off is set forth fully in these Affirmative Defenses. In particular, MS & Co. is entitled to a set-off as a result of the settlement between CPH and Sunbeam dated August 12, 1998 (Ex. 7) and the settlement between CPH and Arthur Andersen dated October 10, 2002 (*see* Dec. 4, 2003 Order on Defendant's Motion to Compel Production of Settlement Agreement).

WHEREFORE, MS & Co. denies that CPH is entitled to any relief whatsoever, and to the extent that CPH should recover any damage award, that award should be offset by CPH's failure to take appropriate steps to mitigate its damages, CPH's own negligence, the comparative fault of third parties, and the settlements that CPH has already received. MS & Co.

respectfully requests that the Court enter judgment for MS & Co. dismissing the complaint with prejudice, and grant such other and further relief as may be just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this __ day of December, 2004.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

NOTICE OF VIDEOTAPED DEPOSITION
(Change of Date and Time)

PLEASE TAKE NOTICE that Morgan Stanley & Co. Incorporated and will take the videotaped deposition of Dr. Blaine F. Nye, pursuant to Florida Rules of Civil Procedure 1.280 and 1.310. The oral examination will take place on March 11, 2005 at 10 a.m. and continue from day to day until completed at the Palm Beach County Courthouse, 205 North Dixie Highway, West Palm Beach, Florida 33401. The deposition will be taken before a person authorized to administer oaths and recorded by stenographic and videographic means. The video operator will be Visual Evidence, 601 North Dixie Highway, West Palm Beach, Florida 33401.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 9th day of March 2005.

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TX/RX NO	0327
CONNECTION TEL	47877#14092#13128407711#
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PGS. SENT	4
RESULT	OK

KIRKLAND & ELLIS LLP

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777 South Figueroa Street
Los Angeles, California 90017
Phone: 213 680-8400
Fax: 213 680-8500

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To:	*Company:*	*Fax #:*	*Direct #:*
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From:	*Date:*	*Pages w/cover:*	*Fax #:*	*Direct #:*
Lawrence P. Bemis	March 9, 2005	4	213 680-8500	213 680-8413

Message:

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER AND NOTICE OF HEARING

This cause having come before the Court, it is

ORDERED AND ADJUDGED that hearing on Coleman (Parent) Holdings Inc.'s Renewed Motion for Entry of Default Judgment and Other Sanctions is hereby set for

March 14, 2005, at 9:30 a.m.

at the West Palm Beach Courthouse, Room 11A, 205 N Dixie Hwy, WPB, FL.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 9 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oir ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki Infim, ki bézwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontakté koôdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro téléfonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résévwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe accommodation pour pouvoir participer á ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER FOLLOWING IN CAMERA INSPECTION
(RIEL/SEC DOCUMENTS)

THIS CAUSE came before the Court for an in camera inspection on items produced to the Court pursuant to its March 4, 2005 Order on Plaintiff's ore tenus Motion to Compel Additional Production, with both parties well represented by counsel.

On April 16, 2004, the Court entered an Agreed Order requiring MS & Co. to produce e-mails to CPH within certain date and key word parameters for MS & Co. personnel involved in the transaction under review here. MS & Co. was required to certify compliance with the Agreed Order. Arthur Riel, on MS & Co.'s behalf, did, on June 23, 2004. Subsequently, it came to light that that certification was false: Riel knew some tapes had been found that had not been processed to allow email data to be stored in the staging area, and other email data remained in the staging area, unsearched. On February 14, 2005, the Court conducted a hearing on CPH's Motion for Adverse Interference Instruction, based on MS & Co.'s failure to comply with the Agreed Order. In preparation for that hearing, the Court, on February 3, 2005, ordered MS & Co. to produce to CPH

> all documents within its care, custody, or control addressing or related to the additional e-mail back up tapes, including matters relating to the time or manner in which they were discovered; by whom they were discovered; who else learned of their discovery and when; and the manner and timetable by which

> they were to be restored and made searchable, including any correspondence to or from outside or prospective vendors,

as well as any documents referred to or relied on by any MS & Co. witness expected to testify at the February 14, 2005 hearing.

CPH's Third Request for Production of Documents ("Request") sought:

> All materials and documents submitted to the United States Securities and Exchange Commission ("SEC"), received from the SEC, or reflecting communications with the SEC in connection with any investigation, inquiry, or examination concerning or relating to Morgan Stanley's policies and/or procedures with regard to the retention, storage, deletion, and/or back-up of electronic mail (emails), including but not limited to all documents and communications resulting in the Order, Findings, and Penalties entered by the SEC against Morgan Stanley on December 5, 2002 attached hereto as Exhibit A.

On January 26, 2004, MS & Co. certified that it had "produced all non-privileged documents that were submitted to the SEC or received from the SEC, and all documents reflecting communications with the SEC in connection with any investigation, inquiry, or examination concerning or relating to Morgan Stanley's policies and/or procedures with regard to the retention, storage, deletion, and/or back-up of electronic mail." On November 12, 2004, MS & Co. served its response to CPH's Request for Supplemental Documents ("Supplemental Request"), which certified that MS & Co. had not located any additional responsive, nonprivileged documents responsive to the Request. No privilege log was generated in connection with either certification.

On March 2, 2005, the Court heard MS & Co.'s Objections to CPH's Notice to Produce at Hearing and entered its Order requiring MS & Co. to produce to CPH within 12 hours of its review for responsiveness by counsel all documents requested in CPH's Notice to Produce at Hearing, as date-limited by the Court. The Notice requested, in essence, responses provided to third-parties in civil, criminal, or regulatory proceedings addressing

difficulties by MS & Co. in locating, accessing, or archiving emails.

On March 4, 2005, the Court ordered MS & Co. to produce by 3:00 p.m. March 7, 2005, those documents

> dealing with the Riel/SEC investigation, other than documents representing communications between or among MS & Co.'s inside counsel, or any of them, and MS & Co.'s outside counsel, or any of them, not copied to any one other than counsel, together with its privilege log . . .

At 3:00 p.m. on March 7, 2005, MS & Co. produced a privilege log, claiming privilege over many of the Riel/SEC documents. With Mr. Riel's deposition set to begin March 8, 2005 at 10:00 a.m., CPH challenged many of the assertions, contending that the items were not privileged or that the privilege had been waived either by failure to produce a log when the item was first required to be produced in response to the Request, the Supplemental Request, or the Court's Orders; by serving a defective log[1]; on their face; or by publication to third parties.[2] Following an in camera inspection and argument by counsel, the Court found those items listed on Exhibit A either were not privileged; that MS & Co. had failed to preserve the privilege; or that MS & Co. had waived the privilege.

Based on the foregoing, it is

ORDERED AND ADJUDGED that CPH shall have access to those items listed on Exhibit A, attached. The items found to have retained their privileged status have been placed in a sealed envelope marked "DO NOT OPEN PER MARCH 9, 2005 ORDER [SEC/RIEL DOCUMENTS] and tendered to the Clerk. The Clerk shall not unseal or release the sealed envelope from her custody absent further order of this or an appellate

---

[1]In at least one instance, MS & Co. failed to reflect on its privilege log that an item had been provided to the SEC, in an apparent attempt to prevent CPH from learning of the SEC's current informal inquiry into MS & Co.'s e-mail retention practices. See Riel in camera submission Priv. 490; cf. Rule 1.280 (b) (5), Fla. R. Civ. P. (log must include information that will "enable other parties to assess the applicability to the privilege or protection;" obviously, whether there has been voluntary disclosure to a third party is critical information for the party opposing the privilege).

[2]MS & Co. acknowledges voluntarily providing emails to the SEC in connection with its investigation, but was unable to identify for the Court which ones.

court.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 9 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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EXHIBIT A

All item designations refer to those used on the March 7, 2005 privilege logs.

3000-3010
3012-3025
3027-3033
3040
3042-3091
3093-3106
3110
3120
3120A
3120B
3120C

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

NOTICE OF FILING PLEADING UNDER SEAL

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed under seal Morgan Stanley's Motion for Sanctions for Discovery Abuses.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and hand delivered on this 10th day of March, 2005.

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

MORGAN STANLEY'S RESPONSE TO COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO STRIKE MORGAN STANLEY'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S FIRST AMENDED COMPLAINT

Plaintiff's motion to strike is not supported by the facts or the law and should be denied. The purpose of an attorney's signature on a pleading or motion is to authenticate the document; not to verify the truth of the allegations. Pleadings contain allegations as to what a party expects to prove by the evidence – not statements as to personal knowledge. "Under the form of pleading permitted by [our rules], the pleader may seek relief on causes of action asserted under any one or more different theories of law, each of which depend upon the establishment of facts which may be materially different from and inconsistent with those supporting the alternative claims based upon the other theories of law." *Hines v. Trager Construction Co.*, 188 So. 2d 826, 829 (Fla. 1st DCA 1966). Plaintiff has not, and cannot, cite to any authority supporting the unorthodox view that allegations pled in one case constitute binding admissions in another. In fact, *Hines* is directly contrary to Plaintiff's position. *Id.*

ARGUMENT

The purpose of Fla. R. Jud. Admin. 2.060 is "simply, but importantly, one of authentication" *Toca v. State*, 834 So. 2d 204, 207 (Fla. 2d DCA 2002). The rule was not enacted to impose a heightened pleading standard or facilitate the equivalent of motions to dismiss factually deficient pleadings. *Id.* (Explaining that "requiring signatures reduces the possibility that a court will act in reliance on allegations, representations, arguments, stipulations, or admission of a party who has not actually made them."). Furthermore, an attorney's "signature does not import, indeed it usually cannot import, truthfulness of the facts therein recited." *Metcalf v. Langston*, 296 So. 2d 81, 85 (Fla. 1st DCA 1974), *cert. dismissed*, 302 So. 2d 414 (Fla. 1974). For that reason, the court opined, an attorney "is not required to make oath that the pleadings are accurate." *Id.* Here, Plaintiff attempts to equate affirmative allegations of fraud in one case with personal knowledge of actual proven facts in another case. While Morgan Stanley has alleged in the Arthur Andersen litigation that Sunbeam committed fraud, these unproven allegations are not yet established fact. Counsel's signature on the complaint in the Arthur Andersen litigation does not "import...truthfulness of the facts therein recited." The allegations in that complaint, therefore, do not foreclose the belief that there are "good grounds" for Morgan Stanley's answer in this litigation.

Moreover, Florida Rule of Civil Procedure 1.110(b) states that a pleading setting out a claim for relief must contain a "short and plain statement of the ***ultimate facts*** showing that the pleader is entitled to relief." As the Fourth District has explained, "[u]ltimate facts are those found in that vaguely defined area lying between evidentiary facts on the one side and conclusions of law on the other and are the final resulting effects which are reached by the process of logical reasoning from the evidentiary facts." *Feldman v. Department of Transp.*, 389 So. 2d 692, 694 (Fla. 4th DCA 1980). Accordingly, the burden is on Plaintiff to prove that the

allegations set forth in its complaint are ultimately proven by the weight of the evidence. Plaintiff is not excused from carrying that burden here merely because Morgan Stanley has made certain similar allegations in a separate suit involving Arthur Andersen. To the contrary, it "has long been established in this state that inconsistent positions taken by a party through the pleadings he files in an action may ***not*** be used by an opposing party as proof of an issue." *Hines v. Trager Const. Co.*, 188 So. 2d 826, 829 (Fla. 1st DCA 1966) (emphasis added); *Vann v. Hobbs*, 197 So. 2d 43, 45 (Fla. 2d DCA 1967).

Similarly, Morgan Stanley is not "bound" by pleadings setting out what it expects to prove in a different litigation, and therefore required to "admit" Plaintiff allegations here. Under Florida law, the "pleadings in a cause ... are merely a tentative outline of the position which the pleader takes before the case is fully developed on the facts through discovery and evidence introduced at the trial." *Vann*, 197 So. 2d at 45. Accordingly, there was nothing inconsistent or improper with Morgan Stanley pleading in the Arthur Anderson litigation that it intends to prove Arthur Andersen's role in the Sunbeam fraud, while simultaneously stating that it lacked sufficient knowledge or information to form a belief as to the truth of Plaintiff's allegations.

Finally, the two cases cited by Plaintiff are factually inapposite and provide no more than convenient sound bites for Plaintiff's motion. For example, *Patsy v. Pasty*, 666 So. 2d 1045 (Fla. 4th DCA 1996), concerned the inherent power of a court to award of attorney's fees as a sanction for a motion filed in bad faith. Contrary to Plaintiff's implication that *Patsy* supports the position that the only remedy is striking Morgan Stanley's answer, Fla. R. Jud. Admin. 2.060 is simply cited among a litany of other statutes and rules as proof that there "is no specific statute or rule of civil procedure which authorizes attorney's fees to be assessed" as a sanction. Thus, the *Patsy* court's language that "the only remedy provided...is striking the pleading or paper"

refers explicitly to the court's search for a rule or provision authorizing attorney's fees. By the plain text of Fla. R. Jud. Admin. 2.060(c), the decision to strike a pleading is merely permissive. Fla. R. Jud. Admin. 2.060(c) (stating that a pleading that is not signed or is signed with the intent to defeat the purpose of the rule "may be stricken").

The only other case cited by Plaintiff is *Mobley v. State*, 215 So. 2d 90, 91 (Fla. 4th DCA 1968), but Plaintiff's reliance on this case is again unfounded. In *Mobley*, the Fourth District court dealt with a "frivolous and unjustified" criminal appeal take by an assistant public defender on behalf of his indigent client. *Id.* The court found that the assistant public defender knew from the facts introduced and established at trial that the factual basis for appeal was meritless, but filed an appeal in the face of this personal knowledge. *Id.* On the other hand, both Plaintiff and Morgan Stanley have made allegations of fraud that have yet to be established with any degree of certainty — indeed, in the current litigation, Plaintiff has deposed ***only one*** Sunbeam employee present at Sunbeam during the alleged fraud. *Mobley* certainly does not suggest that Plaintiff should be permitted to avoid its burden of proof by virtue of Morgan Stanley's mere allegations of unproven fact in the Arthur Andersen litigation.

CONCLUSION

For the foregoing reasons, PlaintiffH's motion to strike Morgan Stanley's Answer and Affirmative Defenses to Plaintiff's First Amended Complaint should be summarily denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 10th day of March, 2005.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION TO DEEM THE FEBRUARY 23 CONFIDENTIALITY AGREEMENT ADMISSIBLE

THIS CAUSE came before the Court March 9, 2005 on Morgan Stanley's Motion to Deem the February 23 Confidentiality Agreement Admissible, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Court reserves ruling pending establishment of the evidentiary predicate at trial.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 10 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER FOLLOWING IN CAMERA INSPECTION (STRONG)

THIS CAUSE came before the Court, in Chambers, on MS & Co.'s filings pursuant to the Court's February 23, 2005 Order for In Camera Inspection and on Plaintiff's Motion for Order Declaring Attorney-Client Privilege Waived for Certain Documents Relating to William Strong, and following hearing on March 7, 2005.

William H. Strong played an important role for MS & Co. in the transaction under review here. In 1992 he was employed by Soloman Brothers International Limited ("SBIL"). He left SBIL and moved to MS & Co. in 1993. By 1995 there were potential legal proceedings in Italy against both Mr. Strong and SBIL relating to a proposed life insurance joint venture between Ente Nazzionale Idrocarburi and Societa Assicurazioni Industriali Sp A. CPH seeks access to documents withheld by MS & Co. as privileged related to those proceedings, documents the Court has previously found should have been disclosed under its March, 2004 order requiring MS & Co. to produce documents containing references to Strong's, as well as other MS & Co. employees', truthfulness, veracity, and moral turpitude. MS & Co. contends that it received or prepared the documents in its possession as a result of its participation in a common defense with SBIL. CPH refutes that contention.

Communications between MS & Co. and its counsel are subject to an attorney-client

privilege, unless waived by publication to third parties or dissemination beyond those in the corporate structure with a need to know. See Southern Bell Telephone and Telegraph Co. v. Deasan, 632 So. 2d 1377 (Fla. 1994). Further, communications between counsel for SBIL or Strong and MS & Co. may be protected by a work-product privilege if part of a common defense or interest.

The relationships between SBIL, Strong, and MS & Co. are reflected in three letters. A review of those letters reveals that most information was shared with MS & Co. for MS & Co.'s business, not legal, purposes.

On April 20, 1995, Royce Miller, for SBIL, wrote Monroe Sonnenborn, for MS & Co., confirming that Soloman would indemnify Strong for his defense, within certain parameters. The letter specifically noted that "(i)f you believe that Morgan Stanley requires separate legal representation on this matter, we believe that it would be appropriate for Morgan Stanley to pay the expenses of such representation." Thus, SBIL knew that MS & Co. and Strong's interests were distinct. The letter closed,

> (f)inally, we believe that it is likely that [Mr. Strong's] and Morgan Stanley will have access to confidential information relating to Solomon Brothers' consideration of the proposed ENI/SAI joint venture and the defense strategies of other potential defendants and therefore believe that it would be appropriate to put a confidential agreement in place.

Thus, MS & Co. and SBIL *agreed* to confidentiality. The letter did not attempt to predicate the duty of confidentiality on a common defense theory; indeed, nowhere in the letter does it imply that SBIL believed it shared a common *litigation* interest with MS & Co.

On May 11, 1995, Monroe Sonneborn, for MS & Co., wrote SBIL. That letter acknowledges a common legal interest between Strong and SBIL; it does not reference any common legal interest between MS & Co. and either Strong or SBIL. The letter, which was counter-signed by Strong, includes MS & Co.'s agreement to hold information it receives

confidential. MS & Co.'s business, not legal, purpose in receiving confidential information is established by the letter's terms: MS &Co. was permitted to use the confidential information "to brief senior management concerning the Milan Proceedings;" Soloman agreed it would not make any disclosures for the purpose of harming Strong or MS & Co.'s reputation; and "Strong and Morgan Stanley may also discuss confidential information with Morgan Stanley public relations personnel, who shall not distribute, refer to or comment on such confidential information without the consent of both our legal departments."

Also on May 11, 1995, John P. Cooney, Jr., of Davis, Polk and Wardwell, as "Counsel for William H. Strong", wrote David W. Mayhew of Clifford Chance representing SBIL memorializing their agreement to exchange "confidential attorney client privileged and work product materials" and hold it in confidence "for the limited and restricted purpose of assisting Mr. Strong and SBIL in preparing for possible litigation." The letter agreement further required "Mr. Strong and SBIL . . . to return all documents, notes, memoranda or other records of this information . . ." Though Mr. Cooney by affidavit avers he was representing both Strong and MS & Co. in the matter, his legal bills were paid by SBIL. MS & Co. knew, however, by virtue of the April 20, 1995 Miller letter that SBIL expected MS & Co. to pay its own legal bills. Further, his May 11, 1995 letter to Mayhew confirms his belief that Strong, not MS & Co., was his client for purposes of a joint defense agreement with SBIL.

These letters reflect the obvious: MS & Co. had no common *legal* interest with Strong or SBIL in the *defense* of the Italian proceedings. Indeed, the proceedings could have no legal effect on MS & Co. until they were concluded. It did, however, have a *business* interest. MS & Co. did have a legal interest in *monitoring* and *understanding* the Italian proceedings, so that it could determine the timing and contents of regulatory filings. Obviously, though, that was not an interest shared by SBIL. Consequently, the Court has attempted, to the extent possible, to isolate work-product and attorney-client privileged communications created or made to advise MS & Co. of the status and timing of the Italian

proceedings, provided that information was not published outside the group of attorneys representing MS & Co. for this limited purpose.

Based on the foregoing, it is

ORDERED AND ADJUDGED that MS & Co.'s objections are sustained, in part, and overruled, in part. The Court concludes that those items attached as Exhibit 1are not privileged. The sealed items reviewed shall not be unsealed or released from the Clerk's custody absent further Order of this or an appellate court.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 10 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON CPH'S ORE TENUS MOTION TO COMPEL DISCLOSURE

THIS CAUSE came before the Court March 10, 2005 on CPH's ore tenus Motion to Compel Disclosure, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted. Each side shall serve on opposing counsel, within 4 hours of when each decision that a witness will testify at the hearing scheduled March 14, 2005 is made but, in any event, no later than 5:00 p.m. March 11, 2005, the witness's name, address, and title, together with a summary of his or her expected testimony. All documents that a witness will refer to, rely on, or review in preparation for his or her testimony shall be provided to opposing counsel by 8:00 p.m. Saturday, March 12, 2005. Each side shall make its witnesses available for deposition March 13, 2005.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 10 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON CPH'S ORE TENUS MOTION TO COMPEL DISCLOSURE

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ORDERED AND ADJUDGED that the Motion is Granted. Each side shall serve on opposing counsel, within 4 hours of when each decision that a witness will testify at the hearing scheduled March 14, 2005 is made but, in any event, no later than 5:00 p.m. March 11, 2005, the witness's name, address, and title, together with a summary of his or her expected testimony. All documents that a witness will refer to, rely on, or review in preparation for his or her testimony shall be provided to opposing counsel by 8:00 p.m. Saturday, March 12, 2005. Each side shall make its witnesses available for deposition March 13, 2005.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 10 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

AGREED ORDER GRANTING
VERIFIED MOTION TO ADMIT ALEXANDER DIMITRIEF, *PRO HAC VICE*

THIS CAUSE having come before the Court upon the Verified Motion to Admit Alexander Dimitrief, *Pro Hac Vice*, and the Court having been advised of the agreement of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Morgan Stanley's Verified Motion to Admit Alexander Dimitrief, *Pro Hac Vice* is **GRANTED**. Mr. Dimitrief is admitted to practice in this case.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____ of March, 2005.

Elizabeth T. Maass
Circuit Court Judge

cc: Counsel of Record on attached Service List

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiffs,

CASE NO: 2003 CA 005045 AI

vs.

MORGAN STANLEY & CO., INC.
Defendant.
_____/

NOTICE OF FILING PLEADING UNDER SEAL

Plaintiff COLEMAN (PARENT) HOLDINGS INC. hereby gives notice of the filing of Coleman (Parent) Holdings Inc.'s Motion To Take Judicial Notice Pursuant to F.S. § 90.202 and § 90.203 and attached exhibits 1-4, filed under seal on this date.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by fax and hand delivery to all counsel on the attached list on this 11th day of March, 2005.

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Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Notice Of Filing Pleading Under Seal
Case No.: 2003 CA 005045 AI

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

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED.,

Defendant.
_____/

VERIFIED MOTION TO ADMIT ALEXANDER DIMITRIEF, PRO HAC VICE

Defendant, Morgan Stanley & Co. Incorporated, pursuant Fla. R. Jud. Adm. 2.061, requests this Court admit attorney Alexander Dimitrief, *pro hac vice*, and in support of this Motion, states the following:

1. Defendant requests that this Court permit Alexander Dimitrief, an attorney with the law firm of Kirkland & Ellis LLP whose address is 200 East Randolph Drive, Chicago, Illinois 60601-6636 to appear *pro hac vice* and participate fully in this action as additional counsel on behalf of Defendant.

2. Mr. Dimitrief is a partner at the firm of Kirkland & Ellis in Chicago, Illinois. He has been admitted to practice before the State Bar of Illinois since 1985. He has also been admitted to practice before the State Bar of New York is since 2002. He is a member in good standing of the Bars of the States of Illinois and New York. He is also admitted to the United States District Court for the Northern District of Illinois since 1991. Mr. Dimitrief has not been disciplined in any jurisdiction.

3. Mr. Dimitrief has read all the applicable provisions of The Rules of Judicial Administration and the Rules Regulating The Florida Bar.

4. This verified motion complies with the Rules of Judicial Administration.

5. The undersigned will remain associated with this matter at all stages as required by local rules. Mr. Dimitrief has not in the past five years sought *pro hac* admission in any other matter before this or any other Florida State Court. The representation of Defendant in this matter commenced May 8, 2003.

6. Mr. Dimitrief will be associated with Joseph Ianno, Jr. for purposes of this representation. Mr. Ianno is a member in good standing of the Florida Bar.

7. A proposed order granting this Motion is attached hereto.

8. Counsel for Plaintiff has been consulted regarding this motion and has no objection.

WHEREFORE, Defendant respectfully requests that this Court enter an order admitting Alexander Dimitrief, *pro hac vice* for the purpose of representing Defendant as counsel in connection with this action pending before this Court together with such other and further relief as the Court deems just and proper.

The undersigned verifies that he has knowledge of the facts stated herein, and that the statements in the foregoing motion are true and correct.

ALEXANDER DIMITRIEF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and hand-delivery to all counsel of record on the attached service list on this 11th day of March, 2005.

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BY: Joseph Ianno, Jr.
Joseph Ianno, Jr.
Florida Bar No. 655351

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

AGREED ORDER GRANTING
VERIFIED MOTION TO ADMIT ALEXANDER DIMITRIEF, *PRO HAC VICE*

THIS CAUSE having come before the Court upon the Verified Motion to Admit Alexander Dimitrief, *Pro Hac Vice*, and the Court having been advised of the agreement of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Morgan Stanley's Verified Motion to Admit Alexander Dimitrief, *Pro Hac Vice* is **GRANTED**. Mr. Dimitrief is admitted to practice in this case.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____ of March, 2005.

Elizabeth T. Maass
Circuit Court Judge

cc: Counsel of Record on attached Service List

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

AMENDED NOTICE OF VIDEOTAPED DEPOSITION

PLEASE TAKE NOTICE that Morgan Stanley & Co. Incorporated and will take the videotaped deposition of Dr. Blaine F. Nye, pursuant to Florida Rules of Civil Procedure 1.280 and 1.310. The oral examination will take place on March 11, 2005 at 10:30 a.m. and continue from day to day until completed at the Carlton Fields, P.A., 222 Lakeview Avenue, Suite 1400, West Palm Beach, Florida 33401. The deposition will be taken before a person authorized to administer oaths and recorded by stenographic and videographic means. The video operator will be Visual Evidence, 601 North Dixie Highway, West Palm Beach, Florida 33401.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 11th day of March 2005.

Jeffrey S. Davidson
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Counsel for
Morgan Stanley & Co. Incorporated

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BY: Thomas A. Clare

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West Palm Beach, FL 22401-6136

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KIRKLAND & ELLIS LLP

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777 South Figueroa Street
Los Angeles, California 90017
Phone: 213 680-8400
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IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY AT: 213 680-8400.

To:	*Company:*	*Fax #:*	*Direct #:*
Michael T. Brody, Esq.	Jenner & Block LLC c/o Mafco Holdings Inc.	(312) 840-7711	(561) 352-2300
John Scarola, Esq.	Searcy, Denny, Scarola, Benerhardt & Shipley, PA	(561) 684-5816	(561) 686-6300

From:	*Date:*	*Pages w/cover:*	*Fax #:*	*Direct #:*
Lawrence P. Bemis	March 11, 2005	4	213 680-8500	213 680-8413

Message:

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*** TX REPORT ***
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RESULT	OK

KIRKLAND & ELLIS LLP

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Los Angeles, California 90017
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Fax: 213 680-8500

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From:	*Date:*	*Pages w/cover:*	*Fax #:*	*Direct #:*
Lawrence P. Bemis	March 11, 2005	4	213 680-8500	213 680-8413

Message:

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

MORGAN STANLEY'S MOTION IN LIMINE NO. 24
TO EXCLUDE THE TESTIMONY OF WILLIAM N. HORTON

Coleman (Parent) Holdings Inc. ("CPH") seeks to introduce the testimony of William N. Horton to explain to the jury why it would be usual and customary for CPH, as a sophisticated investor, to rely on statements made in the March 19, 1998 debenture offering memorandum prepared by Morgan Stanley. Mr. Horton intends to testify that "Morgan Stanley had a usual and customary responsibility as an investment banker, financial advisor and agent of Sunbeam in the negotiation of the acquisition of Coleman, to insist upon and/or alternatively disclose to Coleman [any] material adverse change in Sunbeam's business." (Dec. 7, 2004 Expert Report of W. H. Horton ("Horton Report") at 21 (Ex. 1).) For reasons set forth below, Mr. Horton's opinion is irrelevant and may not be used to support CPH's fraud-based claims.

Mr. Horton's opinion is irrelevant because the offering memorandum contains a clear and unambiguous disclaimer, which, as a matter of law, bars CPH from justifiably relying on statements made in connection with the debenture offering. Moreover, under Florida law, Morgan Stanley had no duty to disclose information concerning Sunbeam's business to parties, like CPH, who did not purchase Sunbeam debentures. Finally, CPH may not rely on the offering

memorandum to prove up its fraud-based claims, because it has not alleged that, notwithstanding clear and unambiguous disclaimers, Morgan Stanley knew that CPH was especially likely to rely, and was justified in relying, on the representations made in the memorandum.

Morgan Stanley respectfully requests that this Court prohibit Mr. Horton from opining on whether the debenture offering included information, or should have included information, on which CPH may have relied. The probative value (if any) of such legally irrelevant testimony, which may well confuse and/or mislead the jury, is substantially outweighed by the unfair prejudice to Morgan Stanley.

ARGUMENT

I. BECAUSE THE OFFERING MEMORANDUM CONTAINS EXPRESS DISCLAIMER PROVISIONS, CPH IS BARRED FROM RELYING ON REPRESENTATIONS MADE IN THE MEMORANDUM.

It is settled, under both New York and Florida law, that if a representation "is accompanied by a qualified statement" showing that "the person making it does not intend that it be relied on, and which is reasonably calculated to suggest independent inquiry on the part of the person to whom it is made, the latter has no right to rely on it, and, on being deceived, claim that it was fraud." *Columbus Hotel Corp. v. Hotel Mgmt. Co.*, 156 So. 893, 901 (Fla. 1934); *see also Velasquez v. College*, 738 So. 2d 1007, 1007 (Fla. 3d DCA 1999) (holding that "the plaintiff's reliance on allegedly false statements was unjustifiable in light of the clear and unambiguous disclaimer") (per curiam); *FDIC v. High Tech Med. Sys., Inc.*, 574 So. 2d 1121, 1123 (Fla. 4th DCA 1991) (affirming trial court's decision that, as a matter of law, there could be no justifiable reliance on an accounting report, given the report's "express and unambiguous" disclaimer); *see also Harsco Corp. v. Segui*, 91 F.3d 337, 345 (2d Cir. 1996). Accordingly, courts have held in numerous cases that the existence of "particularized disclaimers make it impossible" for a plaintiff to prove that it "reasonably relied on the representations that it alleges were made to

induce it to enter into" an agreement. *Dyncorp v. GTE Corp.*, 215 F. Supp. 2d 308, 319 (S.D.N.Y. 2002).

It is therefore dispositive for purposes of this motion that the debenture offering memorandum contains multiple, reinforcing provisions that unambiguously make clear that Morgan Stanley did not intend CPH, or any other person receiving the memorandum, to rely on the accuracy of the information contained therein. The second page of the offering memorandum prominently states that no person receiving the memorandum may rely either on Morgan Stanley's representations or on the accuracy of any information contained in the memorandum:

> Each person receiving this Offering Memorandum acknowledges that (i) such person has been afforded an opportunity to request from [Sunbeam] and to review all additional information considered by it to be necessary to verify the accuracy of or to supplement the information herein[;] (ii) it ***has not relied*** on [Morgan Stanley] or any person affiliated with [Morgan Stanley] in connection with its investigation of the accuracy of such information or its investment decision[;] and (iii) no person has been authorized to give any information or to make any representation concerning [Sunbeam] or the Debentures or the Common Stock issuable upon conversion of the Debentures offered hereby other than as contained or incorporated by reference herein and information given by duly authorized officers and employees of [Sunbeam] in connection with investors' examination of [Sunbeam] and the terms of the offering, and, if given or made, such other information or representation should not be relied upon as having been authorized by [Sunbeam] or [Morgan Stanley].

(MS 40 at 2 (Ex. 2) (emphasis added).)

To further underscore that investors and other interested parties were not expected, or entitled, to rely on representations made in the offering memorandum, the document provides that "***[n]o representation*** or warranty, express or implied, ***is made as to the accuracy or completeness of the information*** contained or incorporated by reference herein, and ***nothing***

contained in the Offering Memorandum, or incorporated by reference herein, is, or ***shall be relied upon as, a promise or representation***." (*Id.* (emphasis added).) The offering memorandum further cautions that "[i]n making an investment decision, investors must rely on their own examination of [Sunbeam] and the terms of the offering, including the merits and risks involved." (*Id.*) And it makes clear that information included in the memorandum should not be relied on for other purposes—the memorandum is "highly confidential" and was "prepared by [Sunbeam] ***solely*** for use in connection with the proposed private placement of the Debentures." (*Id.* (emphasis added).)

Given these multiple unambiguous disclaimers, CPH, as a matter of law, may not reasonably rely on alleged false statements made in the debenture offering memorandum or plausibly argue that Morgan Stanley intended CPH to rely on those statements. Testimony from Mr. Horton or other CPH witnesses concerning statements made in the offering memorandum should therefore be excluded.

II. BECAUSE MORGAN STANLEY HAD NO LEGAL DUTY TO DISCLOSE INFORMATION TO CPH THAT WAS NOT INCLUDED IN THE OFFERING MEMORANDUM, MR. HORTON'S TESTIMONY SHOULD BE EXCLUDED.

CPH further seeks to have Mr. Horton testify that, upon receiving additional information from Arthur Andersen, Morgan Stanley had an obligation, as a matter of industry custom and practice, to disclose information concerning changes in Sunbeam's business. (*See* Horton Report at 19.) Such testimony is also irrelevant and should be excluded.

A. As A Matter Of Law, Morgan Stanley Had No Obligation To Disclose Information To CPH In Connection With The Debenture Offering.

Under Florida law, a "defendant's knowing concealment or non-disclosure of a material fact may only support an action for fraud where there is a duty to disclose." *TransPetrol, Ltd. v. Radulovic*, 764 So. 2d 878, 879 (Fla. 4th DCA 2000) (holding that lawyers and accountants had

no duty to disclose to third party). Before presenting evidence suggesting that Morgan Stanley had an obligation to disclose material adverse information concerning Sunbeam's business in connection with the offering memorandum, CPH must specifically allege (and then prove) that there is a "confidential, contractual, or fiduciary relationship" between CPH and Morgan Stanley giving rise to an independent duty of disclosure. CPH has not made these essential allegations.

It bears remembering that CPH did not purchase Sunbeam debentures. To the contrary, CPH was a primary beneficiary and recipient of the proceeds of the debenture offering—Morgan Stanley and its affiliate made substantial loans to Sunbeam and initially purchased the debentures, while CPH and its affiliates received $160 million in cash and hundreds of millions of dollars in debt relief. In fact, as a participant in the offering, CPH had disclosure obligations to Sunbeam, Morgan Stanley, and the sophisticated, institutional investors who purchased the debentures.

The fact that CPH did not purchase Sunbeam debentures means that Morgan Stanley had no obligation under the federal securities laws to disclose information to CPH in connection with the debenture offering. *See Grace v. Rosenstock*, 228 F.3d 40, 46 (2d Cir. 2000) (noting that there is no private right of action available to persons "who [are] neither buyers nor sellers of the relevant securities"). It is elementary that "[o]nly an actual purchaser or seller of a security has standing to sue under section 10(b)" of the Securities Exchange Act. *In re Initial Public Offering Sec. Litig.*, 341 F. Supp. 2d 328, 343 (S.D.N.Y. 2004); *see also Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). Likewise, standing under section 11 is limited to "persons who purchased securities that are the direct subject of the prospectus and registration statement." *Wolfson v. Solomon*, 54 F.R.D. 584, 588 (S.D.N.Y. 1972); *In re Global Crossing Ltd. Sec. Litig.*, 313 F. Supp. 2d 189, 208 (S.D.N.Y. 2003).

Because Morgan Stanley had no obligation under federal law to disclose to CPH information relating to the debenture offering, it necessarily follows that in order to take its claims to the jury, CPH must identify some duty arising under the common law. But no such duty exists. Under Florida law, a sophisticated commercial entity, like CPH, which has an opportunity to exercise ordinary due diligence, is barred as a matter of law from bringing a cause of action sounding in fraud based on a failure to disclose material facts. *See Casey v. Cohan*, 740 So. 2d 59, 62 (Fla. 4th DCA 1999) ("nondisclosures of fact" "do not establish a ... cause of action for fraudulent misrepresentation in a commercial transaction"). As the Fourth District has recognized, "even intentional nondisclosure of known material facts" is not actionable in the commercial context. *Green Acres, Inc. v. First Union Nat'l Bank of Fla.*, 637 So. 2d 363, 364 (Fla. 4th DCA 1994). Accordingly, a sophisticated investor who agrees to a contract that contains specific representations and warranties, and has "ample opportunity" to conduct its own due diligence "may be disgruntled, but does not have a cause of action for fraud." *Agrobin, Inc. v. Botanica Dev. Assocs., Inc.*, 861 So. 2d 445, 446 (Fla. 3d DCA 2003).

B. Mr. Horton's Testimony Should Be Excluded Because CPH's Complaint Does Not Allege With Sufficient Particularity That CPH Would Likely Rely On The Offering Memorandum.

Even if CPH could overcome these steep hurdles and somehow establish that Morgan Stanley had a duty to disclose information to CPH in connection with the debenture offering, Mr. Horton's testimony still would be irrelevant and inadmissible for the separate reason that CPH's complaint does not allege that, notwithstanding the memorandum's express disclaimers, CPH's reliance on representations made in the offering memorandum was "especially likely and justifiable." Because these essential allegations are missing from the complaint, CPH cannot show that representations made in connection with the offering memorandum were intended to induce CPH's reliance.

Under the Restatement (Second) of Torts, a party who makes a "fraudulent misrepresentation is subject to liability" only to the "persons or class of persons who he intends or has reason to expect to act or refrain from action in reliance upon the misrepresentation." Restatement (Second) of Torts § 531. Because "[v]irtually any misrepresentation is capable of being transmitted or repeated to third persons," an "obvious risk that [third persons] may act in reliance upon it" is not enough to impose liability. *See id.* § 531 illustration d. Instead, the party alleging fraud must set out with particularity in its complaint that its reliance was "especially likely and justifiable." *See Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 323 (5th Cir. 2002) (internal quotations and citation omitted). Evidence of the "general industry practice or understanding" is not sufficient. *Id.* at 325 (citing *Ernst & Young LLP v. Pacific Mutual Life Ins. Co.,* 51 S.W.3d 573, 581 (Tex. 2001).

Great Plains Trust Company v. Morgan Stanley Dean Witter & Co. is analogous to the situation here. There, the United States Court of Appeals for the Fifth Circuit addressed whether Morgan Stanley could be held liable to third parties for a due diligence investigation that Morgan Stanley performed, and for a fairness opinion it provided, as a financial advisor to Allwaste, Inc. concerning the company's proposed merger with Philip Services Corporation. The plaintiffs were a class of Allwaste debenture holders, who sued Morgan Stanley when, following the merger, Philips announced that it had filed inaccurate financial statements and the debentures substantially lost value. There, as here, plaintiffs attempted to hold Morgan Stanley liable for allegedly fraudulent misrepresentations

The Fifth Circuit held that the fraud claims against Morgan Stanley were barred as a matter of law. Indeed, even though plaintiffs asserted that Morgan Stanley "knew, or should have known, that the information [it was] communicating directly or indirectly to the debenture

holders would be relied on in making decisions and determining how to act," the court held that such allegations were not specific enough. Noting that "evidence of the generalized industry practice or understanding" was insufficient, the court determined that the plaintiffs' allegations merely asserted what "was foreseeable," not that "reliance by the debenture holders was especially likely and justifiable." *Id.* at 324, 325.

The court further emphasized that the allegations in plaintiff's complaint were inadequate because the letter agreement and the fairness opinion provided by Morgan Stanley specifically "cabined the persons to whom the Fairness Opinion was directed—the Allwaste Board and shareholders." *Id.* at 326. "Faced with these limitations, plaintiffs were required to plead facts that, viewed favorably to them, permitted the conclusion that [Morgan Stanley] knew the Fairness Opinion was not in fact only for the information of Allwaste's Board, ***and*** that [Morgan Stanley] [was] aware of facts that would lead a reasonable person to conclude that there was an especial likelihood that the Fairness Opinion would reach the debenture holders and influence their conduct." *Id.* (emphasis added).

So too here. CPH was required to make specific allegations that Morgan Stanley knew that CPH, as a sophisticated investor, would ignore the clear and unambiguous disclaimers prominently displayed on the second page of the offering memorandum, and close a transaction worth hundreds of millions of dollars based on information that Morgan Stanley had explicitly stated could not be relied on as accurate. CPH's amended complaint does not include these essential allegations.

Having chosen to plead and present its case the way that it has, CPH is not entitled to rely on evidence relating to the debenture offering memorandum in order to prove up its fraud claims.

WHEREFORE, Morgan Stanley respectfully requests that this Court enter an order excluding or limiting the testimony of Mr. Horton.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 11th day of March, 2005.

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S MOTION TO DISQUALIFY PLAINTIFF'S COUNSEL SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. AND JENNER & BLOCK, LLC

Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby requests that the Court enter an order disqualifying Plaintiff's counsel Searcy, Denney, Scarola, Barnhardt & Shipley, P.A. and Jenner & Block, LLC (hereinafter collectively referred to as "Plaintiff's counsel"). In support, Morgan Stanley states as follows:

1. In this action, Plaintiff's counsel intentionally and unfairly used an obviously privileged document that was inadvertently produced to support their recently filed Renewed Motion for Default Judgment. Counsel's intentional use of this privileged document mandates their disqualification. See Abamar Housing and Development v. Lisa Daly Lady Decor, Inc., 724 So. 2d 572 (Fla. 3d DCA 1998) (granting certiorari and holding that trial court departed from the essential requirements of law by failing to disqualify counsel who had used inadvertently produced document to unfair advantage.)

2. On March 7, 2005, counsel for Morgan Stanley sent a letter to Michael T. Brody, Esq., an attorney with Jenner & Block, LLC, enclosing certain documents bates-numbered 3000001 – 3002412 that were required to be disclosed by this Court's March 4, 2005 Order on Plaintiff's Ore Tenus Motion to Compel Additional Production. A true and correct copy of that letter is attached as Exhibit "A." One document within that production was a fax from the Securities and Exchange Commission ("SEC") to counsel for Morgan Stanley. While that fax was intended to be produced, two pages produced within the fax clearly were not. These two pages were mistakenly included within the SEC fax during the document production and bates-numbering process.

3. The two page document that was inadvertently transmitted to Plaintiff's counsel was an e-mail from Paul V. Gerlach, outside counsel for Morgan Stanley and an attorney with Sidley, Austin Brown & Wood LLP, to Andrew Clubok, outside counsel for Morgan Stanley and an attorney with Kirkland & Ellis, and Donald G. Kempf, Executive Vice President and Chief Legal Officer for Morgan Stanley. The persons copied on the e-mail were all either in-house counsel for Morgan Stanley or outside counsel for Morgan Stanley. Each of the persons referenced in the e-mail are known to Plaintiff's counsel to be attorneys for Morgan Stanley. The e-mail is a clearly privileged communication between attorneys for Morgan Stanley relating to discussions with the SEC about a potential settlement.[1] It reveals counsel's mental impressions regarding material points raised in a conference call with the SEC. It is also readily apparent that the e-mail is not part of the surrounding document because it does not contain the

[1] This e-mail was not listed on a privilege log because this Court's March 4, 2005 Order stated that "documents representing communications between or among MS & Co. inside counsel, or any one of them, and MS & Co. outside counsel, or any one of them, not copied to any one other than counsel," did not need to be produced or placed on a privilege log. Further, the document was dated January 15, 2005.

same fax header as the SEC fax. A copy of the SEC fax as it was mistakenly produced (bates-numbered 3002035 – 3002048) is attached hereto as Exhibit "B." As the court noted in the prior appeal in Abamar, this type of mistake is "likely to occur in cases with voluminous discovery." Abamar Housing and Development v. Lisa Daily Lady Décor, Inc., 698 So. 2d 276, 279 (Fla. 3d DCA 1997) (internal quotation omitted).

4. Despite the obviously privileged nature of this correspondence, Plaintiff's counsel did not promptly return the e-mail, as they were ethically obligated to do to insulate themselves from potential disqualification. See Abamar, 724 So. 2d at 574 n.2. As the Third District stated in Abamar,

> An attorney who follows the dictates of the Ethics Opinion [93-3], and complies with the obligation to *promptly notify* and to *return immediately* the inadvertently produced documents without exercising any *unfair* advantage (such as photocopying the "confidential documents" prior to returning them), will not be subject to disqualification.

Id. (emphasis in original). Plaintiff's counsel not only photocopied the document numerous times, but even went so far as to use the e-mail to their unfair tactical advantage as a focal point of their "Renewed Motion for Entry of Default Judgment and Other Sanctions" served on March 9, 2005 (hereinafter "Motion for Default.") The inadvertently produced e-mail is not only block quoted on page 4 of Plaintiff's Motion for Default, but is attached to the Motion as Exhibit 39.

5. On March 9, 2005, after having learned of the mistaken production only via Plaintiff's counsel's use of the e-mail in their Motion for Default, counsel for Morgan Stanley faxed another letter to Michael T. Brody, counsel for Plaintiff, at 6:36 p.m. requesting the immediate return of the inadvertently produced document as well as all copies. A true and correct copy of that letter with fax confirmation is attached hereto as Exhibit "C." To date, no response to that letter has been received.

6. The Third District's decision in Abamar is directly on point. As that court stated, "[t]he receipt of privileged documents is grounds for disqualification of the attorney receiving the documents based upon the unfair tactical advantage such disclosure provides." Abamar, 724 So. 2d at 573. Tellingly, a party filing such a motion is "not required to demonstrate specific prejudice in order to justify disqualification." Id. (quoting Junger Utility & Paving Co., Inc. v. Myers, 578 So. 2d 1117, 1119 (Fla. 1st DCA 1989)).

7. Clearly, disqualification is an extraordinary remedy, but "the possibility that such an advantage [from the inadvertent disclosure] did accrue warrants resort to this drastic remedy for the sake of the appearance of justice, if not justice itself, and the public's interest in the integrity of the judicial process." Abamar, 724 So. 2d at 573-74 (quoting General Accident Ins. Co. v. Borg-Warner Acceptance Corp., 483 So. 2d 505 (Fla. 4th DCA 1986)). Like the defendants in Abamar, Morgan Stanley has filed a motion that demonstrates the effects of the inadvertent disclosure, the plaintiff's recalcitrance in rectifying the disclosure, and the unfair tactical advantage gained from such disclosure. Abamar, 724 So. 2d at 574. Those facts are self-evident from Plaintiff's Motion for Default alone.

8. While Morgan Stanley acknowledges case law requiring this Court to hear evidence before ruling on a motion to disqualify when the underlying facts *are disputed*, see e.g., Allstate Ins. Co. v. Bowne, 817 So. 2d 994, 998 (Fla. 4th DCA 2002), it is difficult to imagine how Plaintiff or its counsel could dispute the facts stated above. It is undeniable that there was an inadvertent production. It is likewise undeniable that there was recalcitrance on the part of Plaintiff's counsel in returning the document. Further, counsel for Morgan Stanley clearly requested return of the document. Lastly, Plaintiff's own Motion for Default shows the unfair

advantage not only gained, but also taken by Plaintiff's counsel based upon this document. Therefore, this Court should enter an order granting this motion to disqualify.

WHEREFORE, Morgan Stanley requests that this Court enter an order granting this Motion and disqualifying the law firms of Searcy, Denney, Scarola, Barnhardt & Shipley, P.A. and Jenner & Block, LLC from this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and hand delivery on this 11th day of March, 2005.

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Exhibit "A"

KIRKLAND & ELLIS LLP
AND AFFILIATED PARTNERSHIPS

655 Fifteenth Street, N.W.
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Thomas A. Clare
To Call Writer Directly:
(202) 879-5993
tclare@kirkland.com

202 879-5000

www.kirkland.com

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202 879-5200

March 7, 2005

VIA HAND DELIVERY

Michael T. Brody, Esq.
Jenner & Block, LLC
c/o Mafco Holdings, Inc.
777 S. Flagler Drive
Suite 1200 — West Tower
West Palm Beach, FL 33401

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co. Incorporated*

Dear Mike:

Pursuant to the Court's recent orders, I am enclosing documents and two CDs bearing bates numbers MORGAN STANLEY CONFIDENTIAL 3000001 - 3002412.

Sincerely,

Thomas A. Clare

Thomas A. Clare

Enclosures

cc: Joseph Ianno, Jr., Esq.
John Scarola, Esq.
Mark C. Hansen, Esq.

Morgan Stanley Proposal

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant. /

VERDICT FORM

WE, the jury, return the following verdict:

1. Do you find by the greater weight of the evidence that Plaintiff, Coleman (Parent) Holdings, Inc., relied on Morgan Stanley's or Sunbeam's false statements of fact?

_____ YES _____ NO

If your answer to Question 1 is "NO," your verdict is for Morgan Stanley and you should proceed no further except to sign and date this verdict form and return it to the courtroom. If your answer to question 1 is "YES," please proceed to question 2.

2. Do you find by clear and convincing evidence that Plaintiff, Coleman (Parent) Holdings, Inc., relied on Morgan Stanley's or Sunbeam's false statements of fact?

_____ YES _____ NO

3. Do you find by the greater weight of the evidence that the false statements of fact relied on by Plaintiff, Coleman (Parent) Holdings, Inc., if any, were a legal cause of damage Coleman (Parent) Holdings, Inc?

_____ YES _____ NO

If your answer to Question 3 is "NO," your verdict is for Morgan Stanley and you should proceed no further except to sign and date this verdict form and return it to the courtroom. If your answer to question 3 is "YES," please proceed to question 4.

4. Do you find by clear and convincing evidence that the false statements of fact relied on by Plaintiff, Coleman (Parent) Holdings, Inc., if any, were a legal cause of damage Coleman (Parent) Holdings, Inc?

_____ YES _____ NO

5. What is the amount, if any, of damages sustained by Plaintiff, Coleman (Parent) Holdings that was legally caused by its reliance on Morgan Stanley's or Sunbeam's false statements of fact?

$ _____

SO SAY WE ALL, this _____ day of _____, 2005.

_____
FOREPERSON

ATLANTA
MIAMI
ORLANDO
ST. PETERSBURG
TALLAHASSEE
TAMPA
WEST PALM BEACH

CARLTON FIELDS
ATTORNEYS AT LAW

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Shareholder
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March 11, 2005

VIA HAND-DELIVERY

Jack Scarola, Esq.
Searcy, Denney, et al.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33401

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co. Inc.*

Dear Jack:

Pursuant to the agreement in open court on Monday, March 7, 2005, that CPH would voluntarily produce Mr. Schwartz, enclosed please find a subpoena and witness fee for his attendance at trial.

Morgan Stanley agrees that both Mr. Fasman and Mr. Schwartz may be exempted from the rule of sequestration. However, Morgan Stanley reserves the right to request that either or both of these gentlemen be excused from limited portions of the trial. We understand that this agreement is reciprocal between the parties.

Please let me know if there are any objections to proceeding in this manner.

Sincerely,

Joseph Ianno, Jr.

Enclosures

cc: Jerold Solovy and Mike Brody (via hand-delivery)
Thomas Clare

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED.,

Defendant.
_____/

CASE NO: CA 03-5045 AI

SUBPOENA FOR TRIAL

THE STATE OF FLORIDA

TO: BARRY SCHWARTZ
16 Brookside Park
Greenwich, CT 06831

YOU ARE COMMANDED to appear before The Honorable Elizabeth Maass, Judge of the Circuit Court, at the Palm Beach County Courthouse, Courtroom 11A, 205 North Dixie Highway, West Palm Beach, Florida on March 21, 2005* at 9:30 a.m., to testify in this action. If you fail to appear, you may be in contempt of court.

You are subpoenaed to appear by the following attorneys, and unless excused form this subpoena by these attorneys or the Court, you shall respond to this Subpoena as directed.

Dated: March 30, 2005

BY: Joseph Ianno
Joseph Ianno, Jr.
For the Court

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Counsel for Defendant
Morgan Stanley & Co. Incorporated

***BEFORE YOU APPEAR**

PLEASE CALL JOYCE DILLARD, CLA AT (561) 659-7070 TO CONFIRM THE EXACT TIME AND DATE YOU WILL BE CALLED TO TESTIFY

CARLTON FIELDS
ATTORNEYS AT LAW

P.O. Box 150
West Palm Beach, Florida 33402-0150
Ph. 561.659.7070

11391

11391

PAY: ONE HUNDRED FIFTY FIVE DOLLARS AND NO CENTS

02/11/05 $155.00

CARLTON FIELDS, P.A.
General Account

TO THE ORDER OF BARRY SCHWARTZ

⑈011391⑈ ⑆067006432⑆ 216228598162⑈

16div-012486

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

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

CASE NO: CA 03-5045 AI

Per the Court's March 10, 2005 Order, Morgan Stanley intends to call the following individuals at the March 14, 2005 hearing regarding Coleman (Parent) Holding Inc.'s ("CPH") Renewed Motion for Entry of Default Judgment and Other Sanctions.

1. Richard Anfang. Mr. Anfang is a Managing Director in Morgan Stanley's Information Technology Department in New York, New York. His business address is 750 Seventh Avenue, New York, New York 10019. Mr. Anfang will generally describe the history of Morgan Stanley's e-mail backup and retrieval system, including its e-mail archive system, its purpose, function and use. Mr. Anfang will discuss the May and November Coleman queries that were run against the archive, and the results of those inquiries. Mr. Anfang will describe the efforts of Morgan Stanley to process additional tapes that have been located, and how none of the collections of found tapes that were the subject of CPH's adverse inference motion contained full e-mail backups that fell within the scope of the Court's April 16, 2004 Order. Mr. Anfang will also discuss the most recent set of tapes that were located by Morgan Stanley's vendor, Recall, and the information gained to date relative to those tapes. Mr. Anfang will testify about the circumstances surrounding the placing of Arthur Riel on administrative leave.

2. Allison Gorman Nachtigal. Allison Gorman Nachtigal. Ms. Gorman Nachtigal is an Executive Director in Morgan Stanley's Enterprise and Client Technology Group in New

York, New York. Her business address is 750 Seventh Avenue, 34th Floor, New York, New York 10019. Ms. Gorman will testify concerning the different problems encountered with the e-mail archive, specifically the problems explored at length during her deposition on March 7, 2005. She will explain to the Court each issue, approximately when it was encountered, the steps taken to correct it, and the status of corrective efforts. She will also testify concerning her understanding of the state of the archive at the end of October 2004.

3. Bruce Buchanan. Mr. Buchanan works for National Data Conversion Institute ("NDCI") in New York, New York. Mr. Buchanan is expected to testify concerning NDCI's work, the general type of work they undertake for clients, their work for Morgan Stanley as it relates to the e-mail archive. Mr. Buchanan will discuss his firm's efforts to process the Brooklyn found tapes, the 8 mm tapes as well as more recently gathered collections of tapes. Mr. Buchanan will explain the searches his team ran to locate e-mail on the Brooklyn found tapes. Mr. Buchanan may be asked to rebut any testimony of CPH's expert.

4. Arthur Riel. Mr. Riel is currently on administrative leave from Morgan Stanley. Morgan Stanley intends to offer into evidence portions of Mr. Riel's deposition taken on March 8, 2005, regarding the archive, his search of the archive, his certification, and the Brooklyn tapes.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and ~~Federal Express~~ hand delivery on this 11th day of March, 2005.

Thomas D. Yannucci, P.C.
Lawrence P. Bemis (FL Bar No. 618349)
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655 15th Street, N.W., Suite 1200
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Counsel for Morgan Stanley & Co. Incorporated

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BY: _____

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KIRKLAND & ELLIS LLP

Fax Transmittal

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John Scarola, Esq.	Searcy Denney Scarola Barnhart & Shipley P.A.		(561) 478-0754	(561) 686-6300
From:	***Date:***	***Pages w/cover:***	***Fax #:***	***Direct #:***
Thomas A. Clare	March 11, 2005	5	(202) 879-5200	(202) 879-5993

Message:

KIRKLAND & ELLIS LLP

Fax Transmittal

655 Fifteenth Street, N.W.
Washington, D.C. 20005
Phone: 202 879-5000
Fax: 202 879-5200

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Thomas A. Clare	March 11, 2005	5	(202) 879-5200	(202) 879-5993

Message:

Confirmation Report – Memory Send

Time	:	Mar-11-05 11:19am
Tel line	:	
Name	:	

Job number	:	739
Date	:	Mar-11 11:14am
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Document pages	:	05
Start time	:	Mar-11 11:15am
End time	:	Mar-11 11:19am
Pages sent	:	05
Status	:	OK
Job number	:	739

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Fax Transmittal

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Thomas A. Clare	March 11, 2005	5	(202) 879-5200	(202) 879-5993

Message:

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Name	:	

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Document pages	:	05
Start time	:	Mar-11 11:14am
End time	:	Mar-11 11:15am
Pages sent	:	05
Status	:	OK
Job number	:	738 *** SEND SUCCESSFUL ***

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

NOTICE OF FILING PLEADING UNDER SEAL

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed under seal Morgan Stanley's Motion for Leave to File Supplemental Grinblatt Report.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and hand delivered on this 11th day of March, 2005.

Jeffrey S. Davidson
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BY: Thom A. Clare

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Suite 1200 – West Tower
West Palm Beach, FL 22401-6136

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO STRIKE MORGAN STANLEY'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S FIRST AMENDED COMPLAINT

THIS CAUSE came before the Court March 10, 2005 on Coleman (Parent) Holdings, Inc.'s Motion to Strike Morgan Stanley's Answer and Affirmative Defenses to Plaintiff's First Amended Complaint, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Coleman (Parent) Holdings, Inc.'s Motion to Strike Morgan Stanley's Answer and Affirmative Defenses to Plaintiff's First Amended Complaint is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 11 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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West Palm Beach, FL 33401

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Rebecca Beynon, Esq.
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1615 M Street, NW, Suite 400
Washington, DC 20036

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

AGREED ORDER GRANTING
VERIFIED MOTION TO ADMIT ALEXANDER DIMITRIEF, *PRO HAC VICE*

THIS CAUSE having come before the Court upon the Verified Motion to Admit Alexander Dimitrief, *Pro Hac Vice*, and the Court having been advised of the agreement of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Morgan Stanley's Verified Motion to Admit Alexander Dimitrief, *Pro Hac Vice* is **GRANTED**. Mr. Dimitrief is admitted to practice in this case.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____ of March, 2005.

SIGNED & DATED
MAR 11 2005
JUDGE ELIZABETH T. MAASS

Elizabeth T. Maass
Circuit Court Judge

cc: Counsel of Record on attached Service List

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION TO COMPEL PRODUCTION OF ARCHIVED DOCUMENTS AND CORRESPONDENCE WITH BANKS

THIS CAUSE came before the Court March 11, 2005 on Morgan Stanley's Motion to Compel Production of Archived Documents and Correspondence with Banks, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted. By 2:00 p.m. March 14, 2005, CPH shall certify that it has completed a good faith search for all documents within its care, custody, or control responsive to the Court's February 17, 2005 Order on MS & Co.'s Motion to Compel Production of Documents, including its archives, and has produced all required documents.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 11 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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Jerold S. Solovy, Esq.
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Washington, DC 20036

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION TO COMPEL PRODUCTION OF ARCHIVED DOCUMENTS AND CORRESPONDENCE WITH BANKS

THIS CAUSE came before the Court March 11, 2005 on Morgan Stanley's Motion to Compel Production of Archived Documents and Correspondence with Banks, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted. By 2:00 p.m. March 14, 2005, CPH shall certify that it has completed a good faith search for all documents within its care, custody, or control responsive to the Court's February 17, 2005 Order on MS & Co.'s Motion to Compel Production of Documents, including its archives, and has produced all required documents.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 11 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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Jerold S. Solovy, Esq.
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Rebecca Beynon, Esq.
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1615 M Street, NW, Suite 400
Washington, DC 20036

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

AGREED ORDER

THIS CAUSE came before the Court March 14, 2005 on the facsimile transmission from Richard Reis, which the Court elects to treat as a Motion to be Excused, with both counsel present. Based on the foregoing and on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion to be Excused is Granted. Richard Reis, juror number 151 (101202494), is hereby excused from further service in this cause.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 14 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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Richard R. Reis
5441 Alta Way
Lake Worth, FL 33467-5501

Kimberly J. Collins, Supervisor
Jury Room
205 N. Dixie Hwy
West Palm Beach, FL 33401

JENNER&BLOCK

March 14, 2005

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Washington, DC

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mbrody@jenner.com

By Telecopy

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
222 Lakeview Avenue
Suite 260
West Palm Beach, FL 33401

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*

Dear Tom:

I enclose the certification of Steven L. Fasman pursuant to the Court's March 12 Order.

Very truly yours,

Michael T. Brody

MTB:cjg
cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Mark C. Hansen, Esq. (by telecopy)
Jerold S. Solovy, Esq.

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

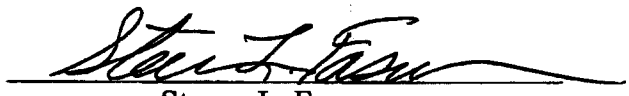
Defendant.
_____/

CERTIFICATION OF STEVEN L. FASMAN CONCERNING THE SEARCH OF CPH'S ARCHIVES

I, Steven L. Fasman, certify as follows:

1. I am Senior Vice President-Law of MacAndrews & Forbes Holdings Inc. I have personal knowledge of the facts contained herein.

2. CPH conducted and completed a good faith search for all documents within its care, custody, or control responsive to the Court's February 17, 2005 Order on MS & Co.'s Motion to Compel Documents, including its archives, and all responsive documents have been produced or identified on a privilege log.



Steven L. Fasman

FAX TRANSMITTAL

JENNER & BLOCK

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date:	March 14, 2005		
TO:	Thomas A. Clare, Esq. Mark C. Hansen, Esq.	Fax:	(561) 651-1127
	Joseph Ianno, Jr., Esq.	Fax:	(561) 659-7368
	John Scarola, Esq.	Fax:	(561) 684-5816 (before 5 PM)
From:	Michael T. Brody (561) 352-2300		
Employee Number:		Client Number:	41198-10003

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Secretary:	Extension:

JENNER&BLOCK

March 14, 2005

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Dallas
Washington, DC

Michael T. Brody
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Fax 312 840-7711
mbrody@jenner.com

By Telecopy

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
222 Lakeview Avenue
Suite 260
West Palm Beach, FL 33401

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*

Dear Tom:

I enclose the certification of Steven L. Fasman pursuant to the Court's March 12 Order.

Very truly yours,

Michael T. Brody

MTB:cjg
cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Mark C. Hansen, Esq. (by telecopy)
Jerold S. Solovy, Esq.

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CERTIFICATION OF STEVEN L. FASMAN CONCERNING THE SEARCH OF CPH'S ARCHIVES

I, Steven L. Fasman, certify as follows:

1. I am Senior Vice President-Law of MacAndrews & Forbes Holdings Inc. I have personal knowledge of the facts contained herein.

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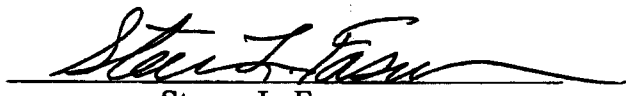

Steven L. Fasman

FAX TRANSMITTAL

JENNER&BLOCK

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One IBM Plaza
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Chicago
Dallas
Washington, DC

Date:	March 14, 2005		
TO:	Thomas A. Clare, Esq. Mark C. Hansen, Esq.	Fax:	(561) 651-1127
	Joseph Ianno, Jr., Esq.	Fax:	(561) 659-7368
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THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

MOTION FOR *IN CAMERA* INSPECTION OF DOCUMENTS LISTED ON SUPPLEMENTAL PRIVLEGE LOG

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") respectfully requests that the Court direct that defendant Morgan Stanley produce for *in camera* inspection the documents listed on the supplemental privilege log that Morgan provided to CPH on March 11, 2005. The descriptions in that privilege log do not support Morgan Stanley's blanket assertions of attorney-client and work-product privilege for those documents.

On March 11, 2005, Morgan Stanley provided CPH with a five-page privilege log. (Copies of the log and Mr. Clare's transmittal letter are attached hereto as Exhibit A.) That log asserts both attorney-client and work-product protections for every one of the 35 documents on the log. From the descriptions provided, the documents were created between October 2004 and February 2005 and relate to the SEC investigation concerning Morgan Stanley's e-mail practices.

As it has done throughout this case, Morgan Stanley once again is asserting privileges inappropriately. First, none of Morgan Stanley's work product claims are sustainable. All of the documents appear to relate to the SEC e-mail investigation, and this Court already has ruled that Morgan Stanley has failed to provide a basis for the application of the work-product doctrine to that investigation. *See, e.g.*, Mar. 4, 2005 Tr. at 2195-96.

Second, Morgan Stanley's assertion of attorney-client privilege also is overbroad or altogether baseless. Many of the logged documents appear to be simple summaries of conversations with the staff of the SEC, or of SEC witness interviews, none of which qualify for the attorney-client privilege. *See, e.g.*, Priv. Nos. 3121, 3122, Ex. A at 1. Others are timelines or chronologies of events, documents that may be useful to counsel but which do not convey legal advice and thus do not constitute privileged attorney-client communications. *See, e.g.*, Priv. Nos. 3124-3126, Ex. A at 1. Still other entries appear to be factual inquiries from counsel to Morgan Stanley's IT staff and responses to such inquiries, all relating to the status of Morgan Stanley's e-mail tapes. *See, e.g.*, Priv Nos. 3141, 3147-48, Ex. A at 3, 4. In short, Morgan Stanley appears once again to be asserting that every document from or to a lawyer is privileged. As this Court repeatedly has ruled in this case, that is not the law.

On March 12, 2005, CPH wrote to Morgan Stanley, pointing out the deficiencies in the March 11, 2005 supplemental privilege log and requesting production of the items listed on the log. (A copy of that letter is attached as Exhibit B.) To date, Morgan Stanley has not responded to that letter.

For the foregoing reasons, CPH respectfully requests that the Court direct that Morgan Stanley immediately produce the 35 documents listed in the supplement privilege log for *in camera* inspection by the Court.

Dated: March 14, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

Jerold S. Solovy
Ronald L. Marmer
Jeffrey T. Shaw
JENNER & BLOCK LLP
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 14th day of March, 2005.

JEFFREY T. SHAW

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March 11, 2005

VIA HAND DELIVERY

Michael T. Brody, Esq.
Jenner & Block, LLC
c/o Mafco Holdings, Inc.
777 S. Flagler Drive
Suite 1200 — West Tower
West Palm Beach, FL 33401

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co. Incorporated*

Dear Mike:

I am enclosing a supplemental privilege log identifying documents in the possession of Morgan Stanley & Co. in-house counsel. Please note that we have not searched files of outside counsel other than for those documents that would be otherwise responsive to the Court's Order of March 2, 2005.

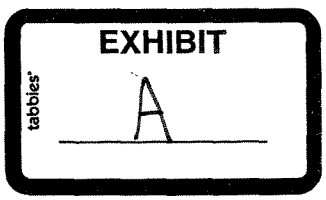
Sincerely,

Thomas A. Clare

Thomas A. Clare

Enclosures

cc: Joseph Ianno, Jr., Esq.
John Scarola, Esq.
Mark C. Hansen, Esq.



Coleman (Parent) Holdings, Inc. v. Morgan Stanley Co. Incorporated

March 11, 2005 Privilege Log

Priv No.	Date	Author(s)	Recipient(s)	Priv	Privilege Description	Redact Bates
3121	11/4/2004	Soo-Mi Lee (MS)	Wray Stewart (MS); Glenn Seickel (MS); Paul Gerlach (SABW); Andrew Clubok (K&E)	AC/WP	Email from in-house counsel to IT Professionals and outside counsel giving legal advice re email restoration process in connection with SEC inquiry including a reference to 8 mm tapes	
3122	11/23/2004	Paul Bohr (K&E)	James Cusick (MS); Zachary Stern (MS); Andrew Clubok (K&E)	AC/WP	Summary of teleconference with SEC regarding restoration of email tapes prepared by outside counsel that contains counsel's thought processes and mental impressions regarding the teleconference including references to found tapes	
3123	12/10/2004	Paul Bohr (K&E)	James Cusick (MS); Zachary Stern (MS); Andrew Clubok (K&E)	AC/WP	Summary of A. Gorman's interview with the SEC containing counsel's thoughts and mental impressions re SEC's investigation including a reference to found tapes	
3124	12/13/2004	James Cusick (MS)	Zachary Stern (MS)	AC/WP	Timeline created by in-house counsel during SEC investigation containing counsel's thought processes and mental impressions containing some references to found tapes	
3125	11/24/2004	James Cusick (MS)	Zachary Stern (MS)	AC/WP	Timeline created by in-house counsel during SEC investigation containing counsel's thought processes and mental impressions including a reference to Brooklyn tapes	
3126	Undated	Zachary Stern (MS)		AC/WP	Chronology created by in-house counsel used to give legal advice during SEC investigation including references to found tapes	
3127	1/12/2005	W. Harrington (Davis Polk & Wardwell)	Zachary Stern (MS)	AC/WP	Memo prepared by outside counsel re SEC interview of J. Cusick containing counsel's thought processes and mental impressions including references to found tapes	

16div-012519

March 11, 2005 Privilege Log

Priv No.	Date	Author(s)	Recipient(s)	Priv	Privilege Description	Redact Bates
3128	10/28/2004	James Cusick (MS)		AC/WP	Handwritten notes of in-house counsel re teleconference with SEC containing counsel's thought processes and mental impressions including a reference to found tapes	
3129	Undated	In-House Counsel		AC/WP	Handwritten notes of in-house counsel containing legal advice given re SEC investigation including a reference to found tapes	
3130	12/22/2004	James Cusick (MS)		AC/WP	Powerpoint of e-mail restoration process with in-house counsel's handwritten notes on it that reflect counsel's thought processes and mental impressions and mentions found tapes	
3131	2/2/2004	Zachary Stern (MS)	Horace Sequiera (MS); Allison Gorman (MS); James Cusick (MS); Soo-Mi Lee (MS)	AC/WP	Email chain between in-house counsel and IT professionals communicating legal advice re tape restoration process and mentioning 8 mm tapes	
3132	2/7/2005	Zachary Stern (MS)	Andrew Clubok (K&E); Scott Fowkes (K&E); David Petron; Griffith Green (SABW); Tom Clare (K&E)	AC/WP	Email chain between in-house and outside counsel re email restoration process containing legal advice re SEC investigation and forwarding messages to in-house counsel from IT professionals mentioning 169 Recall tapes	
3133	1/7/2005	Paul Gerlach (SABW); Griffith Green (SABW)	Zachary Stern (MS)	AC/WP	Draft memo prepared by outside counsel re SEC investigation containing legal advice re same including references to found tapes	
3134	12/21/2004	Paul Gerlach (SABW); Griffith Green (SABW)	Zachary Stern (MS)	AC/WP	Draft memo prepared by outside counsel re SEC investigation containing legal advice re same including references to found tapes	
3135	1/7/2004	James Cusick (MS)	Andrew Clubok (K&E); Donald Kempf (MS); Soo-Mi Lee (MS); Paul Gerlach (SABW); Zachary Stern (MS)	AC/WP	Email from in-house counsel to outside counsel and other members of Morgan Stanley's Law Division discussing legal advice re SEC investigation including issue of found tapes	

March 11, 2005 Privilege Log

Priv No.	Date	Author(s)	Recipient(s)	Priv	Privilege Description	Redact Bates
3136	11/24/2004	James Cusick (MS)		AC/WP	In-house counsel's handwritten notes re interview of A. Gorman containing counsel's thought processes and mental impressions re same including reference to found tapes	
3137	10/1/2004 (date of original document, but handwritten notes added at later point; date unknown)	Andrew Clubok (K&E)	James Cusick (MS)	AC/WP	Email from outside counsel to in-house counsel re update of SEC litigation that contains in-house counsel's handwritten notes which reflect counsel's thought processes and mental impressions and include reference to found tapes.	
3138	1/5/2005	Andrew Clubok (K&E)	Donald Kempf (MS); James Cusick (MS); Soo-Mi Lee (MS); Paul Gerlach (SABW); Zachary Stern (MS)	AC/WP	E-mail from outside counsel giving legal advice re status of SEC investigation with in-house counsel's handwritten notes on it containing in-house counsel's thought processes and mental impressions including reference to found tapes	
3139	12/7/2004	Paul Bohr (K&E)	James Cusick (MS); Zachary Stern (MS); Andrew Clubok (K&E)	AC/WP	Memo prepared by outside counsel re SEC interview of R. Saunders containing counsel's thought processes and mental impressions re same including references to found tapes	
3140	11/24/2004	Paul Bohr (K&E)	James Cusick (MS); Zachary Stern (MS); Andrew Clubok (K&E)	AC/WP	Memo prepared by outside counsel re SEC interview of A. Gorman containing counsel's thought processes and mental impressions re same including references to found tapes.	
3141	1/27/2005	Zachary Stern (MS)	Gerard Demarco (MS); Robert Saunders (MS); Glenn Seickel (MS); Wray Stewart (MS); Griffith Green (SABW); S. Lee (MS)	AC/WP	Email from in-house counsel to IT professionals and outside counsel discussing data needed for Wells Submission including reference to found tapes	

March 11, 2005 Privilege Log

Priv No.	Date	Author(s)	Recipient(s)	Priv	Privilege Description	Redact Bates
3142	12/17/2004	Glenn Seickel (MS)	Zachary Stern (MS); Robert Saunders (MS); S. Lee (MS); Gerard Demarco (MS); Wray Stewart (MS)	AC/WP	Email from IT professional to in-house counsel relaying facts gathered at the request of counsel for purposes of responding to SEC inquiry including reference to 112 tapes	
3143	12/7/2004	Zachary Stern (MS)	James Cusick (MS); S. Lee (MS)	AC/WP	Email between in-house counsel forwarding email from IT professionals who were gathering facts at the request of counsel in order to respond to SEC inquiry including data re 112 tapes	
3144	12/6/2004	In-House Counsel		AC/WP	Summary of points for meeting with SEC prepared by in-house counsel including reference to 8mm and 112 tapes	
3145	11/24/2004	Wray Stewart (MS)	Soo-Mi Lee (MS); Zachary Stern (MS); Robert Saunders (MS); Gerard Demarco (MS); Griffith Green (SABW); Paul Gerlach (SABW);	AC/WP	Email from IT professional to in-house counsel and other IT professionals discussing status of work done at the request of counsel to respond to SEC inquiry including reference to 112 tapes	
3146	11/24/2004	Andrew Clubok (K&E)	James Cusick (MS); Soo-Mi Lee (MS); Zachary Stern (MS); Paul Gerlach (SABW)	AC/WP	Email from outside counsel to in-house counsel re update of SEC litigation that contains outside counsel's legal advice re same	
3147	11/18/2004	Glenn Seickel (MS)	Soo-Mi Lee (MS); Zachary Stern (MS); Robert Saunders (MS); Gerard Demarco (MS); Wray Stewart (MS)	AC/WP	Email from IT professional to in-house counsel and other IT professionals discussing status of work done at the request of counsel to respond to SEC inquiry including reference to 112 tapes	
3148	11/17/2004	Glenn Seickel (MS)	Soo-Mi Lee (MS); Gerard Demarco (MS); Robert Saunders (MS); Wray Stewart (MS)	AC/WP	Email from IT professional to in-house counsel and other IT professionals discussing status of work done at the request of counsel to respond to SEC inquiry with in-house counsel's handwritten notes on it including reference to found tapes	

March 11, 2005 Privilege Log

Priv No.	Date	Author(s)	Recipient(s)	Priv	Privilege Description	Redact Bates
3149	11/23/2004	Soo-Mi Lee (MS)		AC/WP	Handwritten notes of in-house counsel reflecting attorney mental impressions and report of outside counsel, including referenct to 112 tapes and 8 mm tapes.	
3150	11/4/2004	Andrew Clubok (K&E)	Soo-Mi Lee (MS); Glenn Seickel (MS); Paul Gerlach (SABW); Robert Saunders (MS); Wray Stewart (MS)	AC/WP	Email chain between in-house counsel, outside counsel and IT professionals discussing SEC investigation including reference to 112 tapes	
3151	11/4/2004	Soo-Mi Lee (MS)	Wray Stewart (MS); Glenn Seickel (MS); Robert Saunders (MS)	AC/WP	Email from in-house counsel to IT professionals asking questions so that in-house counsel could give legal advice re found tapes.	
3152	11/3/2004	Wray Stewart (MS)	Soo-Mi Lee (MS); Robert Saunders (MS); Glenn Seickel (MS)	AC/WP	Email from IT professional to in-house counsel forwarding information re backup tapes with counsel's handwritten notes on it including reference to found tapes	
3153	12/23/2004	James Cusick (MS)	Andrew Clubok (K&E); Zachary Stern (MS); Paul Gerlach (SABW); Griffith Green (MS); Soo-Mi Lee (MS)	AC/WP	Email from in-house counsel to outside counsel and other members of the Law Division discussing SEC settlement demands and legal advice re same including reference to found tapes	
3154	2/16/2005	Zachary Stern (MS)	James Cusick, Soo-Mi Lee, James Doyle, James Manga, Ronald Columbo, Katherine Alprin, Eric Dinallo, Vincent LaGreca, David Elston, John Plotnick, Dana Balacek	AC/WP	Email from in-house counsel to other in-house counsel and support staff re legal advice with respect to pending litigation, including reference to "new tapes."	
3155	11/24/2004	James Cusick (MS)		AC/WP	In-house counsel's handwritten notes re a telephone conference with SEC re A. Gorman's interview containing counsel's thought processes and mental impressions including a reference to found tapes	

JENNER&BLOCK

March 12, 2005

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By Telecopy

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Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*

Dear Tom:

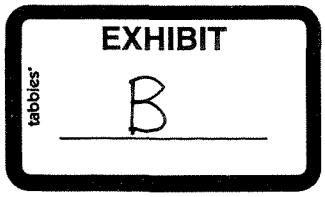
The supplemental privilege log that you provided to us yesterday asserts work product privilege as to every document listed. However, from the descriptions in the log, those documents appear to relate to SEC investigations as to which the Court has ruled that the work product privilege does not apply. *See, e.g.*, Mar. 4, 2005 Tr. at 2195-96.

Your March 11, 2005 supplemental privilege log also asserts attorney-client privilege as to every document listed. However, your attorney-client privilege claims are not supported by the descriptions that you have provided. For example, descriptions relating to summaries of telephone calls with the staff of the SEC or SEC interviews of witnesses, and timelines and chronologies of events, do not set out a sufficient basis for a claim of attorney-client privilege. Accordingly, please produce all of the materials listed on your supplemental privilege log to us by 5:00 p.m. today.

Very truly yours,

Michael T. Brody

Michael T. Brody



MTB:cjg
cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Mark C. Hansen, Esq. (by telecopy)
Jerold S. Solovy, Esq.

FLORIDA_10158_1

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

COLEMAN (PARENT) HOLDINGS, INC., CASE NO. 2003CA 005045 A1

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO REMOVE CONFIDENTIALITY DESIGNATIONS

Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, respectfully requests that this Court enter an Order removing the confidentiality designations from the following documents and directing the Clerk to place the pleadings in the public court file:

Morgan Stanley's Response to Plaintiff's Motion For Order Declaring Attorney-Client Privilege Waived for Certain Documents Relating to William Strong and supporting materials, filed 2/28/05 [docket entries 1431, 1434, 1436, 1438, 1439, 1440, 1441, 1442, 1443, 1444, 1445, 1446, 1447, 1448, 1449, 1450, 1451];

Chronology of Discovery Abuses by Defendant and supporting appendices, filed 3/1/05 [docket entries 1454, 1456, 1457, 1458];

CPH's Response to (1) Morgan Stanley's February 24, 2005 Submission of Record Materials Re William Strong and (2) Morgan Stanley's February 28, 2005 Submission of Record Citations Re William Strong, filed 3/1/05 [docket entry 1469];

Plaintiff's Motion to Reopen Deposition of Allison Gorman and for Related Discovery, filed 3/2/05 [docket entries 1482, 1484];

Morgan Stanley's Supplemental Brief in Response to Plaintiff's Motion for Order Declaring Attorney-Client Privilege Waived from Certain Documents Relating to William Strong, filed 3/2/05 [docket entry 1484C];

Coleman (Parent) Holdings Inc.'s Motion to Compel Production of Joint Defense Agreements Relating to the Strong Documents, filed March 3, 2005 [docket

entries 1484G, 1484H, 1484I, 1484J, 1484K, 1484L, 1484M, 1484N, 1484O, 1484P, 1484R];

Various declarations submitted by Morgan Stanley, filed 3/4/05 [docket entries 1496, 1498, 1499, 1501, 1502];

Plaintiff's Reply to Defendant's Response and Defendant's Supplemental Brief in Response to Plaintiff's Motion for Order Declaring Attorney-Client Privilege Waived for Certain Documents Relating to William Strong, filed 3/4/05 [docket entry 1504];

Coleman (Parent) Holdings Inc.'s Emergency Motion to Compel Production of Unredacted Copies of Documents Exchanged with the Securities and Exchange Commission and Other Third Parties, filed 3/8/05 [docket entry 1534];

Morgan Stanley's Response to CPH's Emergency Motion to Compel Production of Unredacted Copies of Documents Exchanged with the Securities and Exchange Commission and Other Third Parties, filed 3/8/05 [docket entry 1536].[1]

The above documents have been filed under seal because they contain information that Morgan Stanley contends is confidential or privileged. Under Paragraph 4 of the July 31, 2003 Stipulated Confidentiality Order (as modified), the only documents that can be designated as confidential are documents that the designating party "believes, in good faith, constitute, contain, reveal or reflect proprietary or confidential trade secrets or technical, business, financial or personnel information of a current nature." The Stipulated Confidentiality Order further states in Paragraph 15 that "the party making the designation shall bear the burden of proof" of establishing the documents' confidentiality. CPH does not believe that Morgan Stanley can

[1] Because the docket sheet identifies sealed documents by date, but not by name, it is not always easy to link docket numbers with particular documents. However, because the documents identified above are the only documents filed under seal on the days in question, this lack of precision would be immaterial if CPH's motion were granted in full.

carry that burden with regard to any of the above documents, and thus, respectfully requests that this Court enter an Order removing the confidentiality designations and directing the Clerk to place the documents in the public court file.

Dated: March 14, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By _____
One of Its Attorneys

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CERTIFICATE OF SERVICE

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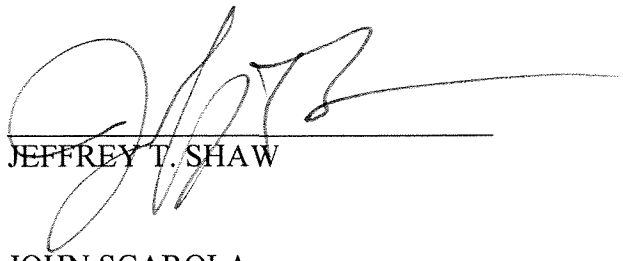

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10117

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: March 15, 2005

TIME: 9:30 a.m.

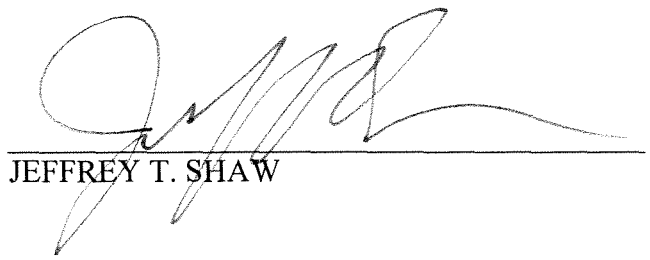
JUDGE: Honorable Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

Coleman (Parent) Holding Inc.'s Motion For *In Camera* Inspection Of Items Listed On Supplemental Privilege Log

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 14th day of March, 2005.



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Attorneys for Coleman(Parent)Holdings Inc.

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: March 15, 2005

TIME: 9:30 a.m.

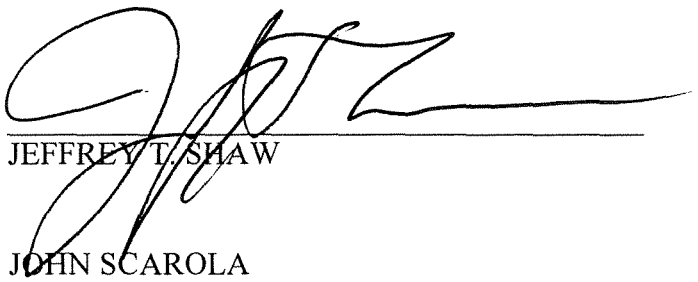
JUDGE: Honorable Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

Coleman (Parent) Holding Inc.'s Motion to Remove Confidentiality Designations

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 14th day of March, 2005.



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9966

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

_____/

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

CASE NO: 2003 CA 005045 AI

PLAINTIFF'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ITS RENEWED MOTION FOR ENTRY OF DEFAULT JUDGMENT AND OTHER SANCTIONS

Coleman (Parent) Holdings Inc. ("CPH") respectfully submits this supplemental memorandum of law in support of its renewed motion for entry of default and other sanctions against Morgan Stanley & Co. Incorporated ("Morgan Stanley"). CPH's previous filings have demonstrated that it is manifestly appropriate and within the Court's authority under Florida law to impose the severest of sanctions upon Morgan Stanley for its willful and prejudicial discovery misconduct involving e-mail and other matters. This memorandum discusses cases from other jurisdictions in which parties were sanctioned with default judgments based on misconduct similar to that of Morgan Stanley – namely, the destruction and failure to produce electronic documents, along with other discovery violations. As this memorandum confirms, courts do not hesitate to use default as a sanction where, as here, critical evidence has been destroyed and the defendant repeatedly refuses to make a basic good faith effort to remedy its failures.

Strikingly similar to this case in scope and substance is *In re Telxon Securities Litigation*, No. 5:98CV2876, 2004 WL 3192729 (N.D. Ohio July 16, 2004), which leveled the sanction of default against the accounting firm PricewaterhouseCoopers ("PwC") based on its myriad discovery failures in defending claims of fraud and misrepresentation by a corporation and its

shareholders. These failures track closely those committed by Morgan Stanley in this case. For example, as the court found, "PwC failed at the start of discovery to check thoroughly its local servers and its archives for relevant documents" and "failed to reproduce thoroughly and accurately all documents and their attachments," largely because "[p]rior to litigation PwC had permitted destruction of documents despite committing to their preservation." *Id.* at *33. Just as Morgan Stanley did here, and "[d]espite these failures, PwC time and time again told the court and the parties that it had made a complete disclosure of all relevant documents and attachments," leading the court to the "only conclusion" possible – "that PwC and/or its counsel engaged in deliberate fraud or was so recklessly indifferent to their responsibilities as a party to the litigation that they failed to take the most basic steps to fulfill those responsibilities." *Id.*

The more detailed aspects of PwC's conduct in *Telxon* are markedly similar to Morgan Stanley's conduct here: PwC's production to the Securities and Exchange Commission (ultimately produced to the plaintiffs) was not made in "good faith" due to PwC's failure to locate and systematically search all databases, *id.* at *24; PwC and plaintiffs eventually reached an agreement about the scope of PwC's production only because of PwC's misrepresentations about what documents existed, *id.*; PwC attempted to narrowly interpret the court's pertinent discovery order after previously reading the order broadly (and did not comply with that order read either way), *id.* at *31; and PwC never sought clarification of that order, instead withholding production of electronic documents, *id.* at *32. As here, "PwC assured plaintiffs, . . . and this court again and again that it had produced all relevant documents, and again and again that assurance proved worthless," *id.* at *24, particularly given that PwC withheld critical facts about its electronic documents and archives until after fact discovery closed. *Id.* at *24-*25. As the court explained, "[t]hat it took PwC until the day fact discovery closed to begin an investigation

that it should have made at the start of discovery cannot remotely be called responding to discovery requests in 'good faith.'" *Id.* And the court refused to "award PwC points" for eventually "exploring the possibility" that its electronic production had been insufficient" particularly given that "PwC's 'voluntary' production was far from graceful": "Faced with the reality of reckless bad faith behavior on its part, it sighed and acquiesced to plaintiffs' . . . 'needlessly time-consuming sideshow.'" *Id.* at *33. Similarly, Morgan Stanley continues to respond begrudgingly (at best) to CPH's discovery requests and this Court's orders, while attempting to shift the focus entirely from its transgressions to CPH's alleged discovery failures.

The court's conclusions in *Telxon* could not be more apt here: PwC's failure to produce electronic documents adversely affected plaintiffs' discovery efforts, including decisions concerning whom to depose and on what topics; prejudiced plaintiffs' ability to prove their underlying case, which depended on the "timing, nature, extent, and purpose" of PwC's actions in the critical time period; and greatly increased the cost of discovery to plaintiffs. *Id.* at *34. Given PwC's myriad failings, as well as its attitude toward remedying those failures, the court determined that default was the only appropriate sanction. Lesser sanctions would not have been effective or appropriate because, among other things, PwC's repeated assurances that production was complete followed by new revelations of documents "undercuts any belief that PwC has now or will ever produce all relevant material in its possession" and "there is strong evidence that documents have been destroyed, placing plaintiffs . . . in a situation which cannot be remedied." *Id.* at *35. Similarly, Morgan Stanley's repeated false assurances to this Court that it has found and produced all available electronic documents (as well as other documents, such as those related to William Strong) undercut any belief that Morgan Stanley will ever produce all relevant material in its possession. *See, e.g.*, 2/17/05 Tr. at 1161 (the Court discussing the

"problem that's permeated the case" – "Morgan Stanley wants to take the position, if we don't think it's relevant, we don't have to give it"). And there is strong evidence that Morgan Stanley has destroyed documents critical to CPH's case, which cannot be remedied by Morgan Stanley. Accordingly, as in *Telxon*, default is warranted.

In another case involving misconduct analogous to that of Morgan Stanley, the United States Court of Appeals for the Seventh Circuit affirmed the sanction of default judgment for electronic discovery misconduct in *Crown Life Insurance Co. v. Craig*, 995 F.2d 1376 (7th Cir. 1993). In that case, the trial court entered judgment for the defendant on its counter-claim against plaintiff insurer based on the insurer's refusal to produce electronic "raw data," even though such data was within the scope of defendant's discovery requests and defendant had repeatedly sought such information. *Id.* at 1382-83. Rather than making a good faith effort to produce the electronic discovery from the outset of the case, the insurer delayed responding to the defendant's requests, and then claimed that it was impossible to access the information. *See id.* at 1383. As the court explained in ordering default – in language directly pertinent to Morgan Stanley's months and months of foot-dragging with respect to searching and processing CPH's requests for archived email – "[w]hile it may be true that Crown Life could not access the data at the time of the request, that does not mean that the data did not exist or was not discoverable. Crown Life had a duty to make the data available to Craig. Well over a year was dedicated to discovery. Surely, Crown Life could have made the data available during that time." *Id.*

Other similarities between the insurer's conduct in *Crown Life* and that of Morgan Stanley are striking: the insurer's counsel falsely stated that "all documents responsive to the document requests had been produced," *id.*; the insurer attempted to defend its actions by an inappropriately narrow reading of the defendant's document requests, which were drafted based

on the insurer's false representations concerning what electronic documents existed, *id.*; and lesser sanctions (there, the award of attorneys' fees) still did not induce the insurer to comply with discovery orders, *id.* at 1383-84. As in *Crown Life*, the sanction of default is warranted, based on Morgan Stanley's suppression of and false statements concerning electronic discovery.

Many of Morgan Stanley's attempted defenses of its conduct are reminiscent of the excuses that the court found lacking in ordering default in *Metropolitan Opera Association, Inc. v. Local 100, Hotel Employees & Restaurant Employees International Union*, 212 F.R.D. 178 (S.D.N.Y. 2003). That case involved the defendant union's "patent lack of production of e-mails, computer files and drafts" and its "persist[ance] in ignoring, indeed belittling, the Met's inquiries" concerning this discovery failure. *Id.* at 223. In that case, as here, there was "an almost complete disconnect between counsel (who had the document requests but knew nothing about the documents in the Union's possession other than that the files were in disarray and there was no retention system) and defendants (who had the documents but were entirely ignorant of the requirements of the requests)," and there was thus "simply no way" that the discovery responses were "based on a reasonable inquiry under the circumstances." *Id.* at 222-23. As here, even after the court explicitly informed defendant and its counsel that "their failure to search for and to have instructed their clients to save computer-generated documents was inexcusable" and directed the defendant "to comply with their discovery obligations forthwith:

> [C]ounsel's disregard for their obligations continued, and no attorney performed any significant review of Union files until January 10, 2002 – after the close of discovery and then only in order to respond to discovery compliance interrogatories. Incredibly, that lawyer still failed to search numerous files, failed to interview several Union employees and conducted only the most superficial review of major files. In addition, counsel never inquired about the contents of the Union's document storage facility.

Id. at 223 (emphasis added).

The electronic discovery misconduct in *Metropolitan Opera* is similar to Morgan Stanley's misconduct in this case, and similarly justifies the entry of default. Notably, in *Metropolitan Opera*, the court rejected the defendant's continual references to "the large number of pages it *has* produced," finding this factor "irrelevant in the face of conclusive evidence that at least a year's worth of electronic documents from the time period most critical to the action have been destroyed." *Id.* at 229. And the Court refused to permit the defendant's complaints about the plaintiff's alleged (and relatively minor) discovery transgressions to distract attention from the defendant's patent and willful failings; as here, the conduct of defendant and its counsel transcended "the normal hurly-burly of the discovery process" into "gross negligence, recklessness, willfulness and lying." *Id.* at 182. Also important to the court's order of sanctions in *Metropolitan Opera* was – as here – "[u]nion counsel's repeated representations of full production," its "repeated demonstration of incomplete compliance and non-compliance with discovery requests," and that it had been "given numerous last clear chances to comply with their discovery obligations," but still insisted on "continually profess[ing] full compliance – falsely." *Id.* at 222. Because the Court has repeatedly given Morgan Stanley opportunities to comply with its discovery orders and CPH's discovery requests, and because no lesser sanction has motivated Morgan Stanley to full compliance concerning "untold numbers of documents from the time period most critical to the case," default is the only appropriate sanction. *Id.* at 230.

That Morgan Stanley's electronic discovery obligations should not have come as a surprise to Morgan Stanley and its counsel is demonstrated by *Wm. T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443 (C.D. Cal. 1984), one of the earliest and most oft-cited cases concerning the severe sanctions that may follow from a party's failure to respond properly to requests for electronic documents. That case involved the entry of a default judgment based on

defendant GNC's destruction of both hard copies and electronic backups of "critical documents" that plaintiff needed to build its antitrust case. *Id.* at 1456. Of notable relevance to CPH's fact-intensive claims against Morgan Stanley is the court's observation that "GNC's destruction of relevant records appears to have deprived Thompson of the best objective evidence on many central issues for presentation to an independent trier of fact," particularly "where issues of intent and conduct have been raised on both sides and where conflicting oral testimony may be offered by both parties." *Id.* at 1451. Not only had the defendant's destruction of electronic and other documents materially hampered the plaintiff's ability to present its best case, but the defendant had also directly violated the court's discovery orders. *Id.* at 1453. These discovery abuses led the court to make a detailed finding of bad faith, which was also supported by the defendant's "erroneous or negligent representations to the court and counsel," "its belated attempt to exonerate itself from its order violations by proffering a series of contradictory and factually unsupportable excuses," and "its attempts to obstruct or delay the court's inquiry into the scope and import" the underlying document destruction." *Id.* at 1454. The court concluded, in reasoning directly applicable to the failings of Morgan Stanley and its counsel, that the discovery abuses of defendant and its counsel, taken in tandem with their repeated lack of candor, justified "the 'ultimate' sanction of striking GNC's answer and entering default." *Id.* at 1456.

Additional cases from a wide range of federal and state courts confirm that default is the appropriate sanction where a party has failed to produce critical electronic evidence that is central to the case and refuses to (or cannot) cure its discovery transgressions. *See, e.g.*, *Cabinetware Inc. v. Sullivan*, No. Civ. S. 90-313, 1991 WL 327959 (E.D. Cal. July 15, 1991) (entering default against defendant for destroying the computer source code central to the parties' copyright dispute); *Computer Assoc. Int'l v. Am. Fundware, Inc.*, 133 F.R.D. 166, 170

(D. Colo. 1990) (striking answer and entering default judgment against defendant for destroying computer source code that it had a duty to preserve, and explaining that "[d]estroying the best evidence relating to the core issue in the case inflicts the ultimate prejudice upon the opposing party"); *Commissioner of Labor v. Ward*, No. COA02-838, 2003 N.C. App. LEXIS 1099, at *7-*8 (N.C. App. June 3, 2003) (affirming default judgment against defendants that "had intentionally and willfully refused to comply with the 11 May 2001 discovery order and the 13 February 2001 consent order by failing to provide plaintiff with copies of electronically stored information and by failing to answer deposition questions regarding the method of access to information stored on the DAT tapes," which were electronic backups that could not be searched without specialized knowledge that defendants repeatedly failed to provide); *American Bankers Ins. Co. of Fla. v. Caruth*, 786 S.W.2d 427, 429-30 (Tex. App. 1990) (affirming default judgment imposed against insurer for discovery violations, where the insurer first claimed that responding to document requests would be onerous, and it then "was discovered that [the insurer] has a sophisticated data base and computer which contained and could produce a great deal more information than was requested," but the insurer continued to withhold requested items and produce "'worthless' documents which amounted to no production at all"); *see also, e.g.*, *Century ML-Cable Corp. v. Carrillo*, 43 F. Supp. 2d 176 (D.P.R. 1998) (entering default judgment against defendant for willfully and intentionally violating the court's orders, as well as refusing to produce and destroying a computer with relevant evidence); *QZO, Inc. v. Moyer*, 594 S.E.2d 541 (S.C. App. 2004) (entering default judgment against defendant for the willful violation of the court's order, as well as its erasure of a critical computer hard drive).

CONCLUSION

Judicial decisions from other jurisdictions confirm that default against Morgan Stanley is warranted here. Indeed, where, as here, a party engages in multiple discovery abuses (including the suppression and destruction of critical electronic documents), repeatedly fails to make a good faith effort to remedy those abuses, and demonstrates a continual lack of candor and contrition for its actions, courts determine that the sanction of default is necessary. The Court should strike Morgan Stanley's pleadings, enter a default judgment, and impose such other sanctions as may be appropriate.

Dated: March 14, 2005

Respectfully submitted,

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One of Its Attorneys

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Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*

Dear Tom:

I enclose CPH's response to Morgan Stanley's Notice to Produce concerning the *Prescott Group* litigation. In light of the Court's rulings, I doubt that this notice is still relevant. If you wish to discuss our response, please contact me.

Very truly yours,

Michael T. Brody

MTB:cjg

Enclosure

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Mark C. Hansen, Esq. (by telecopy)
Jerold S. Solovy, Esq.

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CPH'S RESPONSE TO DEFENDANT'S
NOTICE TO PRODUCE *PRESCOTT GROUP* DOCUMENTS AT TRIAL

Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, hereby responds to defendant's Notice to Produce at Trial concerning, among other things, the *Prescott Group* litigation.

Introductory Statement

CPH objects to this Notice to the extent it requests CPH to produce documents that were obtained by its counsel. CPH will follow the practice of both parties in this litigation not to produce documents obtained through the efforts of counsel for the parties in the case.

CPH also objects to requests relating to the *Prescott Group* case and Dr. Kursh on the ground that those documents are no longer relevant. In light of the Court's rulings, CPH does not intend to call Dr. Kursh to testify. In the event CPH expects Dr. Kursh to testify, CPH will withdraw this objection.

Documents Requested

1. All documents involving, relating to, or referring to the value of the Sunbeam shares received by CPH as part of the Coleman Transaction, including without limitation all non-public financial statements, general ledger entries or other "accounting value" or "book value" documents relating to the value of the Sunbeam shares

RESPONSE: Pursuant to the Court's orders in this case, CPH already has produced documents responsive to paragraph 1.

2. All documents produced by MAFCO, Credit Suisse First Boston or Ernst & Young in *Prescott Group Small Cap, L.P. et al. v. The Coleman Company, Inc.*, C.A. No. 17802 NC (Del. Chan. Ct.).

RESPONSE: CPH and MAFCO were not parties to the *Prescott Group* litigation, and they did not produce documents in the *Prescott Group* case. CPH is not aware of any document production in the *Prescott Group* case by Credit Suisse First Boston or Ernst & Young LLP. Answering further, CPH states that Sunbeam and Morgan Stanley have produced in this litigation copies of documents that they produced in the *Prescott Group* litigation. CPH believes that Morgan Stanley received a copy of Sunbeam's document production.

3. All discovery requests and responses in *Prescott Group Small Cap, L.P. et al. v. The Coleman Company, Inc.*, C.A. No. 17802 NC (Del. Chan. Ct.).

RESPONSE: CPH has no responsive documents, other than documents that its counsel obtained from other sources.

4. All deposition transcripts and exhibits produced in *Prescott Group Small Cap, L.P. et al. v. The Coleman Company, Inc.*, CA. No. 17802 NC (Del. Chan. Ct.), including without limitation the trial transcripts and exhibits of Mr. Levin, Mr. Jenkins, Dr. Kursh, and Mr. Garvey.

RESPONSE: CPH has no responsive documents, other than documents that its counsel obtained from other sources.

5. All expert reports and supporting materials filed by Dr. Kursh and Mr. Garvey in *Prescott Group Small Cap, L.P. et al. v. The Coleman Company, Inc.*, C.A. No. 17802 NC (Del. Chan. Ct.).

RESPONSE: CPH has no responsive documents, other than documents that its counsel obtained from other sources.

6. All trial transcripts and exhibits from *Prescott Group Small Cap, L.P. et al. v. The Coleman Company, Inc.*, C.A. No. 17802 NC (Del. Chan. Ct.), including without limitation the trial transcripts and exhibits of Mr. Levin, Mr. Jenkins, Dr. Kursh, and Mr. Garvey.

RESPONSE: CPH has no responsive documents, other than documents that its counsel obtained from other sources.

Dated: March 14, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

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Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential, and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S MOTION IN LIMINE NO. 25
TO EXCLUDE EVIDENCE RELATING TO SEPARATE PROCEEDING

Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully requests that this Court enter an order excluding all references or other evidence relating to the case of *Morgan Stanley & Co. Incorporated v. Arthur Andersen LLP*, Case No. CA 04-2257 AA ("*Morgan Stanley v. Andersen*"), that is currently pending in Division AA of the Fifteenth Judicial Circuit Court, Civil Division.[1]

ARGUMENT

1. For decades, Florida law has prohibited a party from introducing into evidence pleadings that the adverse party has filed in separate proceedings. *See London Guarantee &*

[1] On March 1, 2004, Morgan Stanley sued Arthur Andersen LLP ("Andersen"). Morgan Stanley has claimed that Andersen fraudulently represented to Morgan Stanley that Sunbeam's 1996 and 1997 financial statements were reliable. It has also alleged conspiracy and aiding-and-abetting claims against Andersen. *See* Complaint, Case No. CA 04-2257 AA (filed Mar. 1, 2004). Judge Miller has recently denied Arthur Andersen's motion to dismiss, and discovery in the case is proceeding.

Accident Co. v. I.C. Helmly Furniture Co., 14 So. 2d 848, 849 (Fla. 1943) (acknowledging general rule of excluding unsworn common-law pleadings from evidence); *Brickley v. Atlantic Coast Line R.R. Co.*, 13 So. 2d 300, 302 (Fla. 1943) (adopting rule excluding from evidence pleadings that are not "signed" or "sworn to" by the party); *Smith v. Dowling*, 89 So. 315, 316 (Fla. 1921) ("If the pleas themselves were offered for the purpose of contradicting complainants, or to affect the credibility of the evidence offered by them because of the inconsistencies between such evidence and the contents of the pleas, they were inadmissible for the reason that the pleas were not signed or sworn to by complainants").

2. There are two narrow exceptions to this rule: (1) a verified pleading may be admissible, *see, e.g.*, *Brickley*, 13 So. 2d at 302, and (2) a pleading may be admissible against a party if it is shown that the party supplied the information in the pleading, *see, e.g.*, *State Farm Fire & Casualty Co. v. Higgins*, 788 So. 2d 992, 1007 (Fla. 4th DCA 2001), *aff'd*, Nos. SC01-291 & SC01-292, 2004 WL 2201474 (Fla. Sept. 30, 2004). Thus, in *Higgins*, the court admitted a complaint filed by the plaintiff in a separate action — as a statement "'of which the party has manifested an adoption or belief in its truth'" — because the plaintiff, "an experienced legal secretary, typed the original complaint for her employer, who filed it on her behalf." *Id.* (quoting Fla. Evid. Code § 90.803(18)(b)). Likewise applying this rule, the court in *Davidson v. Eddings*, 262 So. 2d 232, 235 (Fla. 1st DCA 1972), refused to admit an unsworn complaint filed by the plaintiff in a prior lawsuit, on the ground that there was no showing that the plaintiff had supplied the information contained in that pleading. *See also Adams v. Merrill Lynch, Pierce, Fenner & Smith*, 392 So. 2d 4, 5 (Fla. 4th DCA 1980) (refusing to admit prior pleading on the ground that "[i]t is well established Florida law that a complaint or a counterclaim which is but a

tentative outline of a pleader's position is inadmissible as evidence to prove a fact alleged therein"); *Hines v. Trager Constr. Co.*, 188 So. 2d 826, 831 (Fla. 1st DCA 1966) (same).

3. Neither exception applies here. Morgan Stanley's complaint in *Morgan Stanley v. Andersen* is not verified. Nor is there any record evidence that the complaint in *Morgan Stanley v. Andersen* was based upon information provided by Morgan Stanley. To the contrary, opposing counsel in this case has asserted in open court that the complaint is "cropped," "word for word almost," from the complaint filed by Coleman (Parent) Holdings Inc. ("CPH") against Andersen in *Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP*, CA 01-6062 AN (15th Jud. Cir. filed June 8, 2001). *See* Hearing Tr. 2961:7-10 (Mar. 10, 2005); *see also* Hearing Tr. 827:7-8 (Feb. 16, 2005) (assertion by counsel for CPH that Morgan Stanley has "copied our complaint" in outlining the Sunbeam accounting fraud).

WHEREFORE Morgan Stanley respectfully requests that this Court enter an Order excluding any reference or other evidence relating to the case of *Morgan Stanley & Co. Incorporated v. Arthur Andersen LLP*, Case No. CA 04-2257 AA.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 14th day of March 2005.

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

NOTICE OF FILING PLEADING UNDER SEAL

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed under seal Exhibit 3 and confidential Proposed Order on Morgan Stanley's Motion for an Adverse Inference Instruction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and hand delivered on this 14th day of March, 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

MORGAN STANLEY'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR AN ADVERSE INFERENCE INSTRUCTION

Plaintiff Coleman (Parent) Holdings Inc. seeks to hold Morgan Stanley to an adverse inference instruction because of discovery ***delays***, even though Coleman (Parent) Holdings and its affiliates (collectively "CPH") repeatedly and flagrantly breached their own duties by ***destroying*** e-mails and electronic documents relating to the Sunbeam transaction. Because CPH's own privilege log shows that it recognized the likelihood of Sunbeam litigation starting in the spring of 1998 -- thereby triggering its obligation to preserve evidence -- and because CPH proceeded to destroy evidence anyway throughout 1998, 1999, and 2000, Morgan Stanley respectfully submits this supplemental memorandum in support of its Motion for an Adverse Inference Instruction.

FACTUAL BACKGROUND

Although Morgan Stanley incorporates the Statement of Facts in its Motion, the following additional facts bear emphasis and further support an adverse inference against CPH:

First, CPH was fully aware of the potential for Sunbeam litigation, starting in 1998:

- On April 14 and 16, 1998, Skadden Arps drafted legal documents for CPH relating to the Sunbeam matter. ***CPH's privilege log admits that the April 14 and 16, 1998***

drafts were prepared "in anticipation of litigation." (July 15, 2004 CPH Privilege Log at Doc. Nos. 458, 460, 533 (Ex. 1).)

- On May 25, 1998, Adam Emmerich of Wachtell, Lipton, Rosen & Katz prepared a legal memorandum for Barry Schwartz and Howard Gittis of CPH, regarding the Sunbeam matter. ***CPH's privilege log admits that the May 25 memorandum was prepared in connection with "anticipated litigation."*** (*Id.* at Doc. Nos. 413, 415.)

- On June 19, 1998, Mr. Emmerich sent a document relating to the Sunbeam matter to Richard Easton of Skadden Arps. ***CPH's privilege log admits that the June 19 document was prepared in light of "anticipated litigation."*** (*Id.* at Doc. No. 489.)

- On June 23, 1998, Todd Freed of Skadden Arps sent a draft document relating to the Sunbeam matter to Mr. Emmerich. ***CPH's privilege log admits that the June 23 draft was prepared for "anticipated litigation."*** (*Id.* at Doc. No. 488.)

- On July 5 and 6, 1998, Wachtell Lipton drafted letters for CPH relating to the Sunbeam matter. ***CPH's privilege log admits that the July 5 and 6 drafts relate to "potential claims" in litigation.*** (*Id.* at Doc. Nos. 569, 570.)

- On July 20, 1998, Wachtell Lipton prepared a "[d]raft complaint re potential claims arising out of [the] Sunbeam acquisition." (*Id.* at Doc. No. 136.)

- On July 31, 1998, Blaine Fogg of Skadden Arps drafted letters for CPH to the New York Stock Exchange concerning the Sunbeam matter. ***CPH's privilege log admits that the July 31 drafts were prepared "in connection with [the] "Sunbeam/Coleman (Parent) settlement" of litigation.*** (*Id.* at Doc. No. 532.)

- On August 14, 1998, Skadden Arps drafted letters for review by Mr. Schwartz, Mr. Emmerich, and others. ***CPH's privilege log admits that the August 14 drafts were prepared in connection with "pending litigation."*** (*Id.* at Doc. No. 550.)

As these and other entries confirm, CPH expressly recognized the likelihood of Sunbeam litigation in the spring of 1998 -- even ***before*** the June 6, 1998 *Barron's* article detailing accounting and other problems at Sunbeam, and even ***before*** CPH entered into a settlement with Sunbeam that specifically reserved its right to bring future claims against "any financial advisor to Sunbeam." (Mar. 8, 2005 Morgan Stanley's Motion for an Adverse Inference Instruction at 2-3.)

Second, although CPH was fully aware of the likelihood of Sunbeam litigation, it deliberately and systematically destroyed e-mails in 1998, 1999, and 2000 -- stopping only in

2001, long after the events giving rise to this case. As Steven Fasman, an in-house lawyer whom CPH designated as its corporate representative on document retention issues, admitted during his January 21, 2004 deposition:

- CPH had a policy and practice of destroying e-mails after only 30 days and overwriting e-mail backup tapes after only 60 days (Jan. 21, 2004 Fasman Dep. at 37:5-8; 79:16-18 (Ex. 2)); *see also* (Apr. 21, 1997 Corporate E-Mail Policy at 3 (MS 62) (Ex. 3));

- CPH continued to purge e-mails from its servers from 1998 until 2001 (*id.* at 132:6-8 ("There was a progressive process which did involve in part the purging of old and unneeded e-mails, yes."));

- CPH failed to preserve any e-mail back-up tapes relating to the Sunbeam acquisition (*id.* at 132:19-21 ("There are no e-mail back-up tapes relating to the Sunbeam acquisition of Coleman.")); and

- CPH did not begin preserving e-mails and electronic documents until 2001, but "[b]ecause relevant events were in 1998," "***everything was long gone by then***" except to the extent that an employee might have archived a document by happenstance (*id.* at 156:19-25 (emphasis added)).

Under these circumstances, CPH's deliberate and systematic destruction of evidence warrants an adverse inference instruction against it that is at least as strong, if not stronger, than the one presently contemplated against Morgan Stanley. At the very least, we respectfully submit that CPH's spoliation of the evidence warrants lifting the adverse inference against Morgan Stanley and restoring the burden of proof in order to level the playing field.

ARGUMENT

MORGAN STANLEY IS ENTITLED TO AN ADVERSE INFERENCE INSTRUCTION

I. CPH's DELIBERATE AND SYSTEMATIC DESTRUCTION OF EVIDENCE CONSTITUTES SPOLIATION UNDER NEW YORK AND FLORIDA LAW.

As these additional facts make crystal clear, CPH recognized as early as the spring of 1998 that Sunbeam litigation was likely, but proceeded to destroy e-mails and electronic documents anyway until it became involved in a lawsuit with Arthur Andersen in 2001. It goes

without saying that the evidence which CPH destroyed must have included substantial information relating to the Sunbeam transaction, particularly given that CPH consisted of only fifteen or so individuals -- all of whom worked on the transaction -- and yet it has produced less than 60 pages of e-mails in this complex case, the overwhelming majority of which comes from the files of third parties, ***not*** CPH. This is not just a question of ***delays*** in locating and processing tapes; it is about CPH's admitted ***destruction*** of evidence that neither Morgan Stanley, nor the Court, nor the jury will ever have a chance to consider.

Although this Court is well versed in Florida law authorizing spoliation sanctions for this kind of misconduct, *Exotic Botanicals, Inc. v. EI DuPont de Nemours & Co.*, No. 99-12597 CA 23, 2000 WL 34016277, at *6 (Fla. 11th Jud. Dist. Jan. 21, 2000), it bears emphasis that New York law also compels the same result against CPH as a New York entity. "Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence ... before the adversary has an opportunity to inspect them." *Standard Fire Ins. Co. v. Federal Pac. Elec. Co.*, 786 N.Y.S.2d 41, 46 (App. 1st Div 2004). New York courts have adopted the "principle that negligent as well as intentional spoliation of a key piece of evidence may warrant dismissal." *Id.* at 45 (citing *Kirkland v. New York City Hous. Auth.*, 666 N.Y.S.2d 609, 611 (App. Div. 1997)); *see also DiDomenico v. C & S Aeromatik Supplies, Inc.*, 682 N.Y.S.2d 452, 459 (App. Div. 1998) ("This sanction has been applied even if the destruction occurred through negligence rather than willfulness...."). As the court observed in *Squitieri v. City of New York*, spoliation sanctions "are not limited to cases where the evidence was destroyed willfully or in bad faith, since a party's negligent loss of evidence can be just as fatal to the other party's ability to present a defense." 669 N.Y.S.2d 589, 590 (App. Div. 1998).

Of key significance here, courts in New York have long recognized that "the obligation to preserve evidence even arises prior to the filing of a complaint where a party is on notice that litigation is likely to be commenced." *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 73 (S.D.N.Y. 1991), *cited with approval in Fada Indus., Inc. v. Falchi Bldg. Co.*, 730 N.Y.S.2d 827, 842 (Sup. Ct. 2001). For this reason, the "sanction of striking a pleading has been applied even in instances where the destruction took place before litigation, provided the spoliator was on notice the evidence might be needed for future litigation." *Standard Fire Ins. Co.*, 786 N.Y.S.2d at 46. As the court observed in *DiDomenico*, striking a pleading may be warranted "even if the evidence was destroyed before the spoliator became a party, provided it was on notice that the evidence might be needed for future litigation." 682 N.Y.S.2d at 459; *see also Baglio v. St. John's Queens Hosp.*, 755 N.Y.S. 2d 427, 428 (App. Div. 2003) (quoting *DiDomenico*).

It is no answer for Coleman (Parent) Holdings to say that the evidence was under the control of MAFCO or some other affiliate. As an initial matter, all of those various entities are part of Ronald Perelman's financial empire, and Coleman (Parent) Holdings has readily been able to find documents from those other entities when beneficial to *its* case. In any event, New York courts have made clear that spoliation can occur even if the party did not own the evidence in question. *See Standard Fire Ins. Co.*, 786 N.Y.S.2d at 46 ("The sanction of dismissal is warranted even though Standard was not the owner of the missing evidence."); *Amaris v. Sharp Elecs. Co.*, 758 N.Y.S.2d 637, 638 (App. Div. 2003) (granting spoliation sanction for plaintiff's negligent failure to preserve television as evidence, "notwithstanding the fact that the television set was owned by plaintiff's employer, a nonparty").

In sum, CPH's deliberate and systematic destruction of e-mails and electronic documents, long after it expressly recognized that Sunbeam litigation was likely, constitutes spoliation of the

evidence regardless of whether Florida or New York law applies. In contrast, Morgan Stanley has made a considerable investment to create a more accessible and searchable Archive out of hundreds of millions of unique e-mails from tens of thousands cumbersome and unwieldy magnetic tapes. Those efforts have enabled Morgan Stanley, in this case, to search an Archive containing e-mails from tens of thousands of back-up tapes, rather than just the thirty-six tapes required by the Agreed Order. CPH cannot begin to defend its own discovery practices, when it expressly recognized the likelihood of Sunbeam litigation but then carried out a systematic campaign to "purge" its files of e-mails and electronic documents until "everything was long gone...." (Jan. 21, 2004 Fasman Dep. at 156:19-25.)

II. AN ADVERSE INFERENCE INSTRUCTION IS THE MILDEST OF SANCTIONS FOR CPH'S SPOLIATION OF THE EVIDENCE.

Because CPH has destroyed e-mails and electronic documents, it goes without saying that granting a continuance to allow more discovery, or barring the plaintiff from introducing the materials, are remedies that have no application here. Nothing can cure the prejudice caused to Morgan Stanley by its inability to test whether these materials contained information helpful to its case. Under these circumstances, the Court would be well within its discretion to dismiss CPH's complaint as a discovery sanction, which makes Morgan Stanley's request for an adverse inference instruction the mildest of possible sanctions.

CPH's actions are particularly egregious because it is not a large organization for which electronic discovery would be particularly burdensome. CPH employed only fifteen or so individuals at the time, all of whom worked on the Sunbeam transaction out of the same townhouse in Manhattan. Some of the senior-most officers of CPH, including Messrs. Gittis, Schwartz, and Fasman, are lawyers, which means that they were expected to understand the duty to preserve documents relevant to likely litigation. And all of them assuredly knew that

Sunbeam litigation was likely, particularly given that CPH, not Morgan Stanley, chose to bring this case in the first place. Under these circumstances, CPH's complaints about Morgan Stanley's delays in processing millions of e-mails from scores of different locations pale in comparison to CPH's destruction of evidence.

The upshot here is that far from representing an extraordinary remedy, the grant of an adverse inference is both necessary and proper given CPH's deliberate and systematic destruction of its e-mails and electronic documents over a three-year time frame -- especially when its own privilege log confirms that it recognized the likelihood of Sunbeam litigation in the spring of 1998.[1] *See, e.g.*, *Amlan, Inc. v. Detroit Diesel Corp.*, 651 So. 2d 701, 703 (Fla. 4th DCA 1995) (emphasizing that when a party destroys evidence that it reasonably should know to be relevant to a pending or potential case, "an instruction may be given concerning the inference that the withheld or missing evidence would be unfavorable to the party failing to produce"). To issue an adverse inference instruction against Morgan Stanley for its tardy productions, while sparing CPH from the consequences of destroying evidence, would be unprecedented.

CONCLUSION

For these reasons, Morgan Stanley requests an adverse inference instruction based on CPH's blatant and intentional spoliation of evidence. A proposed Order is attached.

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[1] Indeed, it is particularly remarkable that CPH's corporate representative on this topic, Steven Fasman, is a licensed attorney who was aware of CPH's document destruction policy, but failed to take any steps to stop CPH from "purging" e-mails and electronic documents in 1998, 1999, or 2000. *See* New York Attorney Disciplinary Rule DR 7-102 (stating a lawyer shall not "[c]ounsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent," or "[c]onceal or knowingly fail to disclose that which the lawyer is required by law to reveal").

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 14th day of March, 2005.

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Exhibit 1

JENNER&BLOCK

July 15, 2004

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Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Tom:

I enclose CPH's revised privilege log. As to entries involving a common interest, we are consulting with counsel to Sunbeam.

Very truly yours,

Michael T. Brody

MTB:cjg
Enclosure
cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
1		00/00/0000	Paul Rowe, Esq.		Attorney-Client	Draft Sunbean Form S-4 with P. Rowe's handwritten comments prepared for purposes of providing legal advice.
2		00/00/0000	Wachtell Lipton		Attorney-Client	Summary of Sunbeam corporate structure issues prepared for the purpose of providing legal advice.
3		11/05/1998	Michael Schwartz, Esq.	Adam O. Emmerich, Esq., Frank Miller, Esq., Rachelle Silverberg, Esq.	Attorney-Client, Work Product	Memorandum re In re Sunbeam securities litigation issues.
4		02/03/1999	Wachtell Lipton	Ernst & Young, Barry Schwartz, Esq. (cc), Mitchell Rosendorf (Ernst & Young LLP)	Attorney-Client, Work Product	Letter providing information re litigation.
5		01/14/1999	Barry F. Schwartz, Esq.	Martin Lipton, Esq.	Attorney-Client, Work Product	Letter requesting information re litigation.
6		03/01/1998	Adam O. Emmerich, Esq.	Steven Isko, Esq.	Attorney-Client	Memorandum re attached draft documents prepared for the purpose of providing legal advice.
6	A	03/01/1998	Adam O. Emmerich, Esq.		Attorney-Client	Draft Coleman press release with A. Emmerich's handwritten comments prepared for the purpose of providing legal advice.
6	B	03/01/1998	Adam O. Emmerich, Esq.		Attorney-Client	Draft Sunbeam press release with A. Emmerich's handwritten comments prepared for the purpose of providing legal advice.
7		03/03/1998	Deborah Paul, Esq.	Steven Isko, Esq.	Attorney-Client	Correspondence re attached draft document prepared for the purpose of providing legal advice.
7	A	03/03/1998	Wachtell Lipton		Attorney-Client	Draft Coleman employee disclosure re benefits prepared for the purpose of providing legal advice.
8		03/03/1998	Frank Miller, Esq.	Steven Isko, Esq., Adam O. Emmerich, Esq. (cc)	Attorney-Client	Memorandum re Coleman Form 8-K and attached draft document prepared for the purpose of providing legal advice.
8	A	03/03/1998	Wachtell Lipton		Attorney-Client	Draft Coleman Form 8-K/A prepared for the purpose of providing legal advice.
9		03/04/1998	Michael Katzke, Esq.	Steven Isko, Esq., Joram C. Salig, Esq. (cc), Robert Fleder, Esq. (cc), Adam O. Emmerich, Esq. (cc), Steven Cohen, Esq. (cc), Frank Miller, Esq. (cc)	Attorney-Client	Memorandum re attached draft corporate resolutions prepared for the purpose of providing legal advice.
9	A	03/04/1998	Wachtell Lipton		Attorney-Client	Draft resolution re employee benefit plans prepared for the purpose of providing legal advice.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
9	B	03/04/1998	Wachtell Lipton		Attorney-Client	Draft resolution re employee benefit plans prepared for the purpose of providing legal advice.
9	C	03/04/1998	Wachtell Lipton		Attorney-Client	Draft resolution re employee benefit plans prepared for the purpose of providing legal advice.
10		03/04/1998	Michael Jahnke, Esq.	Barry F. Schwartz, Esq., Paul Shapiro, Esq., Joram Salig, Esq., William Nesbitt, Steven Isko, Esq., Adam O. Emmerich, Esq. (cc), Ilene K. Gotts, Esq. (cc), Steven Cohen, Esq. (cc), Frank Miller, Esq. (cc)	Attorney-Client	Memorandum re Hart-Scott-Rodino issues prepared for the purpose of providing legal advice.
11		03/19/1998	Lynn Feldcamp	Steven Isko, Esq.	Attorney-Client	Memorandum re attached document prepared for the purpose of providing legal advice.
11	A	03/19/1998	Wachtell Lipton		Attorney-Client	Section of draft Coleman 10-K prepared for the purpose of providing legal advice.
11	B	03/18/1998	Wachtell Lipton		Attorney-Client	Draft Coleman 10-K prepared for the purpose of providing legal advice.
12		03/09/1998	Adam O. Emmerich, Esq., Steven Cohen, Esq., Frank Miller, Esq.	Steven Isko, Esq., Joram Salig, Esq.	Attorney-Client	Memorandum re application of federal securities laws.
13		03/10/1998	Michael Katzke, Esq.	Steven Isko, Esq., Joram Salig, Esq., Robert Fleder, Esq. (cc), Adam O. Emmerich, Esq. (cc), Steven Cohen, Esq. (cc), Frank Miller, Esq. (cc)	Attorney-Client	Memorandum re attached draft documents prepared for the purpose of providing legal advice.
13	A	03/10/1998	Wachtell Lipton		Attorney-Client	Draft resolution re employee benefit plans prepared for the purpose of providing legal advice.
13	B	03/10/1998	Wachtell Lipton		Attorney-Client	Draft resolution re employee benefit plans prepared for the purpose of providing legal advice.
13	C	03/10/1998	Wachtell Lipton		Attorney-Client	Draft resolution re employee benefit plans prepared for the purpose of providing legal advice.
14		03/11/1998	Frank Miller, Esq.	Barry F. Schwartz, Esq., Joram Salig, Esq., Steven Isko, Esq., Adam O. Emmerich, Esq. (cc)	Attorney-Client	Memorandum re attached draft document prepared for the purpose of providing legal advice.
14	A	03/11/1998	Wachtell Lipton		Attorney-Client	Draft Section 14(f) Notice prepared for the purpose of providing legal advice.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
15		03/12/1998	Steven Isko, Esq.	Barry F. Schwartz, Esq., Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Memorandum re attached draft letter regarding pending Coleman litigation.
15	A	03/12/1998	Steven Isko, Esq.		Attorney-Client, Work Product	Draft letter re pending Coleman litigation.
16		04/17/1998	Ilene K. Gotts, Esq.		Attorney-Client	Draft Sunbeam Form S-4 with I. Gotts' handwritten notes prepared in connection with providing legal advice.
17		04/22/1998	Cass G. Adelman, Esq.	Michael Katzke, Esq.	Attorney-Client	Letter re attached document prepared for the purpose of providing legal advice.
17	A	04/09/1998	Kyle Wendt	Cass G. Adelman, Esq., Lynn Feldcamp, Karen Clark, Esq. (cc)	Attorney-Client	Memorandum re employee benefit plans with attorney's handwritten notes provided for purpose of obtaining legal advice.
18		02/24/1998	Steven Isko, Esq.	Michael Katzke, Esq.	Attorney-Client	Correspondence re employee benefit issues provided for purpose of obtaining legal advice.
19		00/00/0000	Michael Katzke, Esq.		Attorney-Client	Handwritten notes re PBGC letter prepared for the purpose of providing legal advice. (Redacted from CP 012505-012506).
20		03/16/1998	Robert Fleder, Esq.	Barry F. Schwartz, Esq., Steven Fasman, Esq., Steven Isko, Esq., Michael Katzke, Esq.	Attorney-Client	Memorandum re attached draft letter prepared for the purpose of providing legal advice.
20	A	03/16/1998	Robert Fleder, Esq.		Attorney-Client	Draft letter to PBGC re Coleman pension plans prepared for the purpose of providing legal advice.
21		03/16/1998	Barbara Allen	Michael Katzke, Esq.	Attorney-Client	Memorandum re Coleman benefit plan information provided for purpose of obtaining legal advice.
22		03/19/1998	Michael Katzke, Esq.	Joram Salig, Esq., Steven Isko, Esq., Robert Fleder, Esq., Cass G. Adelman, Esq.	Attorney-Client	Draft benefit plan agreement with M. Katzke's notes prepared for the purpose of providing legal advice.
23		03/26/1998	Cass G. Adelman, Esq.	Michael Katzke, Esq.	Attorney-Client	Memorandum re attached document prepared for the purpose of providing legal advice.
23	A	03/26/1998	Steven Isko, Esq.	Cass G. Adelman, Esq., Joram Salig, Esq., Robert Fleder, Esq., Jim Rasmus (cc)	Attorney-Client	Memorandum re employee benefit plans with S. Isko's handwritten notes prepared for the purpose of providing legal advice.
24		00/00/0000	Frank Miller, Esq.		Attorney-Client	Handwritten notes re Sunbeam acquisition issues and communications with client re same prepared for the purpose of providing legal advice.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
25		03/12/1998	Frank Miller, Esq.	Barry F. Schwartz, Esq., Joram Salig, Esq., Steven Isko, Esq., Karen Clark, Lenny Ajzenman, Adam O. Emmerich, Esq. (cc)	Attorney-Client	Memorandum re attached draft document prepared for the purpose of providing legal advice.
25	A	03/12/1998	Wachtell Lipton		Attorney-Client	Draft section of Section 14(f) Notice prepared for the purpose of providing legal advice.
25	B	03/12/1998	Frank Miller, Esq.	Lenny Ajzenman	Attorney-Client	Correspondence re attached documents prepared for the purpose of providing legal advice.
26		04/01/1998	Wachtell Lipton		Attorney-Client	Draft Form 144 prepared for the purpose of providing legal advice.
27		00/00/0000	Steven Isko, Esq.		Attorney-Client	Draft minutes of 02/25/98 Board meeting reflecting information provided for purpose of enabling attorney to provide legal services.
28		00/00/0000	Steven Isko, Esq.		Attorney-Client	Draft minutes of 2/27/98 Board meeting reflecting information provided for purpose of enabling attorney to provide legal services.
29		00/00/0000	Wachtell Lipton		Attorney-Client	Draft resolutions re employee benefit plans prepared for the purpose of providing legal advice.
30		03/17/1998	Wachtell Lipton		Attorney-Client	Draft resolution re employee benefit plans prepared for the purpose of providing legal advice.
31		03/18/1998	Wachtell Lipton		Attorney-Client	Draft resolution re employee benefit plans prepared for the purpose of providing legal advice.
32		03/19/1998	Frank Miller, Esq.	Donna Egan	Attorney-Client	Memorandum re corporate resolutions prepared for the purpose of providing legal advice.
33		00/00/0000	Rachelle Silverberg, Esq.		Work Product	Notes re merger agreement prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP016791-016851).
34		00/00/0000	Rachelle Silverberg, Esq.		Work Product	Notes re merger agreement prepared in anticipation of litigation relating to Sunbeams' acquisition of CPH's interest in Coleman (Redacted from CP017279-017333).
35		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Draft response to SEC and NYSE requests for information prepared in anticipation of litigation relating to inquiry.
36		00/00/0000	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Notes re draft Sunbeam Form S-4 prepared in connection with pending Coleman shareholder litigation.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
37		00/00/0000	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Notes re draft Sunbeam Form S-4 prepared in connection with pending litigation.
38		00/00/0000	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Draft Sunbeam Form S-4 amendment with R. Silverberg's notes prepared in connection with pending litigation.
39		03/26/1998	Adam O. Emmerich, Esq.	Gary Leshko, Joram Salig, Esq., Barry F. Schwartz, Esq.	Attorney-Client	Memorandum re attached draft letter prepared for the purpose of providing legal advice.
39	A	03/25/1998	Wachtell Lipton		Attorney-Client	Draft letter to Sunbeam re cooperation and access prepared for the purpose of providing legal advice.
40		03/26/1998	Deborah Paul, Esq.	David Einhorn, Esq., Adam O. Emmerich, Esq., Steven Cohen, Esq., Frank Miller, Esq.	Attorney-Client	E-mail re transaction structure prepared for the purpose of providing legal advice.
41		03/30/1998	Frank Miller, Esq.	Adam O. Emmerich, Esq., Steven Cohen, Esq.	Attorney-Client	E-mail re post-closing SEC filings prepared for the purpose of providing legal advice.
42		03/30/1998	Frank Miller, Esq.	Glenn Dickes, Esq., Joram Salig, Esq.	Attorney-Client	Memorandum re post-closing SEC filings prepared for the purpose of providing legal advice.
43		04/19/1998	Adam O. Emmerich, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., Paul Shapiro, Esq.	Attorney-Client	Memorandum re attached draft document prepared in connection with providing legal advice.
43	A	04/19/1998	Wachtell Lipton		Attorney-Client	Draft memorandum re employee benefit issues prepared in connection with providing legal advice.
44		04/28/1998	Glenn Dickes, Esq.	Frank Miller, Esq., Joram C. Salig, Esq. (cc), Barry Schwartz, Esq. (cc)	Attorney-Client	Fax re Sunbeam letter re Coleman employee benefit issues prepared for the purpose of providing legal advice.
45		03/26/1998	Steven Isko, Esq.	Frank Miller, Esq., Glenn P. Dickes, Esq. (cc), Paul Shapiro, Esq. (cc)	Attorney-Client	Memorandum re attached draft document prepared for the purpose of providing legal advice.
45	A	03/26/1998	Steven Isko, Esq.		Attorney-Client	Draft letter re termination of intercompany agreements with S. Isko's handwritten notes prepared for the purpose of providing legal advice.
46		03/26/1998	Michelle Root	Adam O. Emmerich, Esq.	Attorney-Client	Response to request for information re closing provided for purpose of enabling attorney to provide legal services.
47		03/27/1998	Rachelle Silverberg, Esq.	Steven Isko, Esq., Jerry Levin, James Maher, William Nesbitt, Joram Salig, Esq., Marc Shiffman, Barry F. Schwartz, Esq., Paul Shapiro, Esq.	Attorney-Client, Work Product	Memorandum re attached draft document prepared in anticipation of litigation relating to SEC/NYSE inquiry.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
47	A	03/27/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft response to SEC and NYSE requests for information prepared in anticipation of litigation relating to inquiry.
48		03/27/1998	Valerie Radwaner, Esq., Deborah Reiss, Esq.	Steven Cohen, Esq., Adam O. Emmerich, Esq., Frank Miller, Esq.	Attorney-Client	Correspondence re stock certificate prepared for the purpose of providing legal advice.
49		06/14/1998	Adam O. Emmerich, Esq., Frank Miller, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., Paul Shapiro, Esq., James Conroy, Esq., Glenn Dickes, Esq., Steven Isko, Esq., Joram Salig, Esq., Steven Cohen, Esq. (cc), Michael Schwartz, Esq. (cc), Paul Rowe, Esq. (cc), Rachelle Silverberg, Esq. (cc), Peter Canellos, Esq. (cc), David Einhorn, Esq. (cc), Deborah Paul, Esq. (cc), Michael Katzke, Esq. (cc), Ilene K. Gotts, Esq. (cc), Michael Jahnke, Esq. (cc)	Attorney-Client, Work Product	Memorandum re attached draft document prepared in connection with providing legal advice and anticipated litigation.
49	A	06/14/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft Schedule 13D prepared in connection with providing legal advice and anticipated litigation.
50		07/07/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft chronology re potential claims arising out of Sunbeam acquisition prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.
51		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 018806-018807).
52		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 018808-018809).
53		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 018810-018811).
54		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 018812-018815).
55		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 018816-018819)

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56		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 018820-018821).
57		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 018838-018848).
58		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 018949-018950).
59		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 018951-018956).
60		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 018959-018960).
61		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 018961-018962).
62		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 018963-018964).
63		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 018965-018966).
64		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 018968-018974).
65		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 018975-018976).
66		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 018977-018981).
67		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 018982-018983).

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68		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 018984-018986).
69		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 018987).
70		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 018988-018989).
71		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 018990).
72		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 018991-018993).
73		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 018994-018995).
74		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 018996-018998).
75		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 018999).
76		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 019000-019002).
77		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 019003-019006).
78		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 019007-019008).
79		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 019835 and CP 019835).

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80		02/25/1998	Adam O. Emmerich, Esq.	Frank Miller, Esq., Steven Cohen, Esq.	Attorney-Client	E-mail re merger agreement disclosure schedules; S. Cohen's e-mail response prepared for the purpose of legal advice.
81		02/24/1998	Steven Isko, Esq.,	Steven Cohen, Esq.	Attorney-Client	Fax re merger agreement disclosure schedules provided for purpose of enabling attorney to provide legal services.
81	A	02/24/1998	Steven Isko, Esq.		Attorney-Client	Information re merger agreement disclosure schedules with S. Isko's handwritten notes provided for purpose of enabling attorney to provide legal services.
82		02/24/1998	Steven Isko, Esq.		Attorney-Client	Information re merger agreement disclosure schedules provided for purpose of enabling attorney to provide legal services.
83		02/25/1998	Frank Miller, Esq.		Attorney-Client	Notes re merger agreement provisions prepared for the purpose of providing legal advice.
84		02/26/1998	Steven Isko, Esq.	Frank Miller, Esq.	Attorney-Client	Information re merger agreement disclosure schedules with attorney's handwritten notes provided for purpose of enabling attorney to provide legal services.
85		02/27/1998	Steven Isko, Esq.	Frank Miller, Esq.	Attorney-Client	Information re merger agreement disclosure schedules with attorney's handwritten notes provided for purpose of enabling attorney to provide legal services.
86		03/01/1998	Michael Katzke, Esq.		Attorney-Client	Notes re Sunbeam's employee benefit plans prepared for the purpose of providing legal advice. (Redacted from CP 019825-019833).
86	A	03/01/1998	Steven Isko, Esq.	Michael Katzke, Esq.	Attorney-Client	Draft memorandum to J. Levin re employee benefits issues prepared for the purpose of providing legal advice. (Redacted from CP 019825-19833)
87		02/21/1998	Adam O. Emmerich, Esq.	Steven Cohen, Esq., Frank Miller, Esq., Paul Rowe, Esq., Peter Canellos, Esq., David Einhorn, Esq., Karen Krueger, Esq., Michael Byowitz, Esq., Ilene K. Gotts, Esq., Michael Jahnke, Esq.	Attorney-Client	Memorandum re attached draft document prepared for the purpose of providing legal advice.
87	A	02/21/1998	Adam O. Emmerich, Esq.		Attorney-Client	Draft memorandum in response to Sunbeam's proposed transaction terms prepared for the purpose of providing legal advice.
88		03/25/1998	Steven Isko, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product	Memorandum re attached draft document prepared in anticipation of litigation relating to SEC/NYSE inquiry.

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Dated 07/15/2004

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88	A	03/25/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft response to NYSE and SEC requests for information with S. Isko's handwritten notes prepared in anticipation of litigation relating to inquiry.
89		03/25/1998	Rachelle Silverberg, Esq.	Steven Isko, Esq., Jerry Levin, James Maher, William Nesbitt, Joram Salig, Esq., Barry F. Schwartz, Esq., Paul Shapiro, Esq.	Attorney-Client, Work Product	Memorandum re attached draft document prepared in anticipation of litigation relating to SEC/NYSE inquiry.
89	A	03/25/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft response to SEC and NYSE requests for information prepared in anticipation of litigation relating to inquiry.
90		03/05/1998	Adam O. Emmerich, Esq., Michael Katzke, Esq.		Attorney-Client	Draft memorandum regarding application of federal securities laws.
91		03/04/1998	Michael Katzke, Esq.	Steven Isko, Esq., Joram Salig, Esq. (cc), Robert Fleder, Esq. (cc), Adam O. Emmerich, Esq. (cc), Steven Cohen, Esq. (cc), Frank Miller, Esq. (cc)	Attorney-Client	Memorandum re attached draft documents prepared for the purpose of providing legal advice.
91	A	03/04/1998	Wachtell Lipton		Attorney-Client	Draft resolution re employee benefit plans with F. Miller's handwritten notes prepared for the purpose of providing legal advice.
91	B	03/04/1998	Wachtell Lipton		Attorney-Client	Draft resolution re employee benefit plans with F. Miller's handwritten notes prepared for the purpose of providing legal advice.
91	C	03/04/1998	Wachtell Lipton		Attorney-Client	Draft resolution re employee benefit plans with F. Miller's handwritten notes prepared for the purpose of providing legal advice.
92		03/17/1998	Ilene K. Gotts, Esq.	Paul Shapiro, Esq., Joram Salig, Esq., Steven Isko, Esq., Adam O. Emmerich, Esq., Steven Cohen, Esq., Frank Miller, Esq.	Attorney-Client	Memorandum re attached letters prepared for the purpose of providing legal advice.
92	A	03/17/1998	Brian Facey, Esq.	Sarah Strasser, Esq.	Attorney-Client	Letter re foreign antitrust issues prepared for the purpose of providing legal advice.
92	B	03/11/1998	Gabriel Castaneda, Esq.	Ilene K. Gotts, Esq., Sarah Strasser, Esq. (cc)	Attorney-Client	Letter re foreign antitrust issues prepared for the purpose of providing legal advice.
93		02/22/1998	Michael Jahnke, Esq.	Michael Byowitz, Esq., Ilene K. Gotts, Esq.	Attorney-Client	Memorandum re Sunbeam acquisition antitrust issues prepared for the purpose of providing legal advice.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
94		03/04/1998	Adam O. Emmerich, Esq.	Michael Jahnke, Esq., Ilene K. Gotts, Esq. (cc), Frank Miller, Esq. (cc)	Attorney-Client	E-mail re draft Hart-Scott-Rodino filing; e-mail response from M. Jahnke; and e-mail reply from A. Emmerich reflecting confidential communications with client.
95		03/04/1998	Michael Jahnke, Esq.	Barry F. Schwartz, Esq., Paul Shapiro, Esq., Joram Salig, Esq., Steven Isko, Esq.	Attorney-Client	Memorandum re draft Hart-Scott-Rodino filing prepared for the purpose of providing legal advice.
96		03/04/1998	Heather Van Dever	Steven Isko, Esq., Michael Jahnke, Esq.	Attorney-Client	Correspondence re attached document provided for purpose of enabling attorney to provide legal services.
96	A	03/04/1998	Heather Van Dever	Steven Isko, Esq.	Attorney-Client	Memorandum re Coleman subsidiaries with S. Isko's handwritten notes provided for purpose of enabling attorney to provide legal services.
97		03/06/1998	Sarah Strasser, Esq.	Ilene K. Gotts, Esq., Michael Jahnke, Esq.	Attorney-Client	E-mail re foreign antitrust issues prepared for the purpose of providing legal advice.
98		03/09/1998	Michael Jahnke, Esq.	Steven Isko, Esq., Karen Clark	Attorney-Client	Correspondence re attached article prepared for the purpose of providing legal advice.
98	A	03/03/1998	Michael Jahnke, Esq.		Attorney-Client	Notes re article prepared for the purpose of providing legal advice. (Redacted from CP 020876, CP 019834, and CP 012208).
99		03/24/1998	Ilene K. Gotts, Esq., Michael Jahnke, Esq.	Paul Shapiro, Esq., Steven Isko, Esq.	Attorney-Client	Memorandum re attached draft document prepared for the purpose of providing legal advice.
99	A	03/24/1998	Wachtell Lipton		Attorney-Client	Draft letter to FTC re Sunbeam acquisition antitrust issues prepared for the purpose of providing legal advice.
100		00/00/0000	Michael Jahnke, Esq.		Attorney-Client	Notes re Sunbeam acquisition antitrust issues reflecting information provided by client to attorney for purposes of enabling attorney to perform legal services.
101		03/03/1998	Michael Jahnke, Esq.	Lenny Ajzenman	Attorney-Client	Memorandum re draft Hart-Scott-Rodino filing prepared for the purpose of providing legal advice.
102		03/23/1998	Michael Jahnke, Esq.		Attorney-Client	Draft letter to FTC re Sunbeam acquisition antitrust issues with attorney's handwritten notes prepared for the purpose of providing legal advice.
103		00/00/0000	Michael Jahnke, Esq.		Attorney-Client	Notes re Sunbeam acquisition antitrust issues prepared for the purpose of providing legal advice.
104		03/03/1998	Michael Jahnke, Esq.	Lenny Ajzenman	Attorney-Client	Memorandum re attached draft document prepared for the purpose of providing legal advice.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

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104	A	03/03/1998	Michael Jahnke, Esq.		Attorney-Client	Draft Hart-Scott-Rodino filing with attorney's handwritten notes prepared for the purpose of providing legal advice.
105		03/04/1998	Michael Jahnke, Esq.	Paul Shapiro, Esq.	Attorney-Client	Memorandum re attached draft document prepared for the purpose of providing legal advice.
105	A	03/04/1998	Michael Jahnke, Esq.	Barry F. Schwartz, Esq.	Attorney-Client	Memorandum re attached draft document prepared for the purpose of providing legal advice.
105	B	03/04/1998	Michael Jahnke, Esq.		Attorney-Client	Draft Hart-Scott-Rodino filing prepared for the purpose of providing legal advice.
106		03/03/1998	Michael Jahnke, Esq.	Steven Isko, Esq.,	Attorney-Client	Memorandum re draft Hart-Scott-Rodino filing prepared for the purpose of providing legal advice.
107		03/04/1998	Michael Jahnke, Esq.		Attorney-Client	Portion of draft Hart-Scott-Rodino filing with attorney's handwritten notes prepared for the purpose of providing legal advice.
108		03/04/1998	Michael Jahnke, Esq.		Attorney-Client	Draft memorandum re draft Hart-Scott-Rodino filing prepared for the purpose of providing legal advice.
109		03/05/1998	Michael Jahnke, Esq.		Attorney-Client	Notes re foreign antitrust issues prepared for the purpose of providing legal advice.
110		00/00/0000	Paul Rowe, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 021580-21584).
111		00/00/0000	Paul Rowe, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 021585-021586).
112		00/00/0000	Paul Rowe, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 021587-021592).
113		07/07/1998	Adam O. Emmerich, Esq., Frank Miller, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., James Maher, William Nesbitt, Todd Slotkin, Irwin Engelman, Glenn Dickes, Esq., Joram Salig, Esq.	Attorney-Client, Work Product	Memorandum re attached draft documents prepared in connection with Sunbeam/Coleman (Parent) settlement.
113	A	07/07/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft warrant agreement prepared in connection with Sunbeam/Coleman (Parent) settlement.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

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113	B	07/07/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft settlement agreement.
114		03/03/1998	John Johnston, Esq.	Paul Rowe, Esq.	Attorney-Client	Letter and invoice for legal services re Sunbeam acquisition.
115		03/05/1998	Ilene K. Gotts, Esq., Sarah Strasser, Esq.	Steven Isko, Esq., Karen Clark	Attorney-Client	Memorandum requesting information re foreign antitrust issues prepared for the purpose of providing legal advice.
116		03/17/1998	Paul Shapiro, Esq.	Ilene K. Gotts, Esq.	Attorney-Client	Memorandum re attached draft document prepared for the purpose of providing legal advice.
116	A	03/17/1998	Paul Shapiro, Esq.		Attorney-Client	Draft letter re license agreement issues prepared for the purpose of providing legal advice.
117		03/26/1998	Adam O. Emmerich, Esq., Steven Cohen, Esq., Frank Miller, Esq.	Glenn Dickes, Esq., Anthony Ian, Steven Isko, Esq., Joseph Page, Joram Salig, Esq., Terry Schimek, Esq., Paul Shapiro, Esq., Laurence Winoker, Paul Rowe, Esq., Rachelle Silverberg, Esq., Peter Canellos, Esq., David Einhorn, Esq., Deborah Paul, Esq., Michael Katzke, Esq., Ilene K. Gotts, Esq., Michael Jahnke, Esq.	Attorney-Client	Memorandum re attached draft document prepared for the purpose of providing legal advice.
117	A	03/25/1998	Wachtell Lipton		Attorney-Client	Draft closing checklist prepared for the purpose of providing legal advice.
118		03/05/1998	Ilene K. Gotts, Esq., Sarah Strasser, Esq.	Steven Isko, Esq., Karen Clark	Attorney-Client	Memorandum re foreign antitrust issues prepared for the purpose of providing legal advice.
119		03/06/1998	Steven Isko, Esq.	Sarah Strasser, Esq., Karen Clark (cc)	Attorney-Client	Memorandum re foreign antitrust issues prepared in connection with obtaining legal advice.
119	A	03/06/1998	Dan Peterson	Steven Isko, Esq.	Attorney-Client	Memorandum re foreign antitrust filings providing information for purpose of obtaining legal services.
119	B	03/06/1998	Dan Peterson		Attorney-Client	Summary of information prepared for foreign antitrust filings with S. Strasser's handwritten notes provided for purposes of obtaining legal advice.
120		03/07/1998	Sarah Strasser, Esq.	Lenny Ajzenman	Attorney-Client	Memorandum re attached document requesting information in conection with providing legal advice.
120	A	03/07/1998	Sarah Strasser, Esq.	Steven Isko, Esq.	Attorney-Client	Memorandum re attached document prepared for the purpose of providing legal advice.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
120	B	03/06/1998	Lori Cornwall, Esq.	Sarah Strasser, Esq.	Attorney-Client	Memorandum re attached document prepared for the purpose of providing legal advice.
120	C	03/06/1998	Lori Cornwall, Esq.	Sarah Strasser, Esq.	Attorney-Client	Memorandum re foreign antitrust filings prepared for the purpose of providing legal advice.
121		00/00/0000	Wachtell Lipton		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 025560-025563).
122		04/27/1998	Adam O. Emmerich, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., Paul Shapiro, Esq.	Attorney-Client	Memorandum re Sunbeam acquisition prepared for the purpose of providing legal advice.
123		02/24/1998	Steven Cohen, Esq.		Attorney-Client	Notes re draft merger agreement prepared for the purpose of providing legal advice. (Redacted from CP 029890-029931).
124		02/24/1998	Michael Katzke, Esq.	Jerry Levin	Attorney-Client	Draft Coleman severance policy prepared for the purpose of providing legal advice.
125		02/26/1998	Steven Cohen, Esq.		Attorney-Client	Draft merger agreement with attorney's handwritten notes prepared for the purpose of providing legal advice.
126		02/26/1998	Steven Cohen, Esq.		Attorney-Client	Draft merger agreement with attorney's handwritten notes prepared for the purpose of providing legal advice.
127		02/25/1998	David Einhorn, Esq.		Attorney-Client	Draft merger agreement with attorney's handwritten notes prepared for the purpose of providing legal advice.
128		02/25/1998	Frank Miller, Esq.		Attorney-Client	Draft merger agreement with attorney's handwritten notes prepared for the purpose of providing legal advice.
129		02/25/1998	Steven Cohen, Esq.		Attorney-Client	Draft merger agreement with attorney's handwritten notes prepared for the purpose of providing legal advice.
130		02/25/1998	Steven Cohen, Esq.		Attorney-Client	Draft merger agreement with attorney's handwritten notes prepared for the purpose of providing legal advicce.
131		02/25/1998	David Einhorn, Esq.		Attorney-Client	Draft merger agreement with attorney's handwritten notes prepared for the purpose of providing legal advice.
132		02/26/1998	Adam O. Emmerich, Esq.	Howard Gittis, Esq., Donald Drapkin, James Maher, Barry F. Schwartz, Esq., Steven Cohen, Esq. (cc), Esq., Frank Miller, Esq. (cc), Paul Rowe, Esq. (cc), Peter Canellos, Esq. (cc), David Einhorn, Esq. (cc), Michael Katzke, Esq. (cc), Ilene K. Gotts,	Attorney-Client	Memorandum re negotiations with Sunbeam prepared for the purpose of providing legal advice.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
				Esq. (cc), Michael Jahnke, Esq. (cc)		
133		02/27/1998	Glenn Dickes, Esq.	Steven Cohen, Esq., Adam O. Emmerich, Esq., Frank Miller, Esq., Valerie Radwaner, Esq., Terry Schimek, Esq.	Attorney-Client	Excerpt of draft merger agreement with G. Dickes' handwritten notes prepared for the purpose of providing legal advice.
133	A	02/27/1998	Steven Cohen, Esq.		Attorney-Client	Handwritten notes re draft merger agreement prepared for the purpose of providing legal advice.
134		02/27/1998	Deborah Paul, Esq.	Norman Ginstling, Esq., Marvin Shaffer	Attorney-Client	Correspondence re tax issues in draft merger agreement prepared for the purpose of providing legal advice.
135		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re Klewin complaint (Redacted from CP 030106-030134).
136		07/20/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft complaint re potential claims arising out of Sunbeam acquisition.
137		00/00/0000	Rachelle Silverberg, Esq.		Work Product	Notes re Goldberg complaint (Redacted from CP 031261-031297).
138		00/00/0000	Rachelle Silverberg, Esq.		Work Product	Notes re Yassin complaint (Redacted from CP 030917-030930).
139		09/09/1998	Eric Golden, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product	Memorandum re Joerger, Ulfsson, and Goldstein litigation.
140		00/00/0000	Wachtell Lipton		Attorney-Client	Draft Hart-Scott-Rodino filing with J. Salig's and S. Strasser's handwritten notes prepared for the purpose of providing legal advice.
141		00/00/0000	Wachtell Lipton		Attorney-Client	Draft Hart-Scott-Rodino filing with J. Ladigoski's handwritten notes prepared for the purpose of providing legal advice.
142		03/04/1998	Wachtell Lipton		Attorney-Client	Draft Hart-Scott-Rodino filing with J. Ladigoski's handwritten notes prepared for the purpose of providing legal advice.
143		03/04/1998	Jackie Fortinash, Esq., Sarah Strasser, Esq.	Joram Salig, Esq.	Attorney-Client	Memorandum re attached documents prepared for the purpose of providing legal advice.
143	A	03/02/1998	Sarah Strasser, Esq.	Joram Salig, Esq.	Attorney-Client	Memorandum re attached draft document with J. Salig's handwritten notes prepared for the purpose of providing legal advice.
143	B	03/02/1998	Wachtell Lipton		Attorney-Client	Draft Hart-Scott-Rodino filing with J. Salig's handwritten notes prepared for the purpose of providing legal advice.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

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144		00/00/0000	Sarah Strasser, Esq.		Attorney-Client	Draft Hart-Scott-Rodino filing with S. Strasser's handwritten notes prepared for the purpose of providing legal advice.
145		02/25/1998	Adam O. Emmerich, Esq.		Attorney-Client	Draft presentation to Coleman Board of Directors re Sunbeam acquisition prepared for the purpose of providing legal advice.
146		03/01/1998	Michael Jahnke, Esq.	Sarah Strasser, Esq., Ilene K. Gotts, Esq. (cc)	Attorney-Client	E-mail re Sunbeam acquisition antitrust issues with S. Strasser's handwritten notes reflecting information provided by client to attorney for purpose of enabling attorney to provide legal services.
146	A	03/01/1998	Sarah Strasser, Esq.		Attorney-Client	Handwritten notes re Sunbeam acquisition antitrust issues reflecting information provided by client to attorney for purpose of enabling attorney to provide legal services.
147		03/02/1998	Sarah Strasser, Esq.	Gabriel Castaneda, Michael Jahnke, Esq. (cc)	Attorney-Client	Memorandum re foreign antitrust issues prepared for the purpose of obtaining legal advice.
148		03/02/1998	Ricardo Hernandez, Esq.	Sarah Strasser, Esq.	Attorney-Client	Letter re foreign antitrust issues with S. Strasser's handwritten notes prepared for the purpose of providing legal advice.
149		03/06/1998	Sarah Strasser, Esq.	Lori Cornwall, Esq.	Attorney-Client	Memorandum re foreign antitrust issues prepared for the purpose of obtaining legal advice.
150		03/09/1998	Sarah Strasser, Esq.	Karen Clark, Esq. (cc)	Attorney-Client	Memorandum re foreign antitrust legal opinion with S. Strasser's handwritten notes prepared for the purpose of providing legal advice.
151		03/09/1998	Melissa Orme	Steven Isko, Esq., Karen Clark (cc), Sarah Strasser, Esq. (cc)	Attorney-Client	Memorandum re foreign antitrust legal opinion prepared for counsel and reflecting client information provided for purpose of obtaining legal services.
152		03/10/1998	Sarah Strasser, Esq.	Ricardo Hernandez, Esq., Ilene K. Gotts, Esq. (cc)	Attorney-Client	Memorandum re foreign antitrust legal opinion prepared for purpose of obtaining legal advice.
153		02/23/1998	Adam O. Emmerich, Esq.		Attorney-Client	Notes re Sunbeam acquisition issues reflecting client information provided for purpose of obtaining legal advice.
154		02/24/1998	Adam O. Emmerich, Esq.	Barry F. Schwartz, Esq., Paul Shapiro, Esq.	Attorney-Client	Memorandum re attached draft document prepared for the purpose of providing legal advice.
154	A	02/24/1998	Adam O. Emmerich, Esq.		Attorney-Client	Draft agenda for Coleman Board meeting prepared for the purpose of providing legal advice.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
155		02/25/1998	Adam O. Emmerich, Esq., Frank Miller, Esq.	Glenn Dickes, Esq., Robert Duffy, Norman Gintsling, Esq., Steven Isko, Esq., William Nesbitt, Joram Salig, Esq., Barry F. Schwartz, Esq., Gordon Rich, Paul Shapiro, Esq.	Attorney-Client	Memorandum re attached draft documents prepared for the purpose of providing legal advice.
155	A	02/25/1998	Adam O. Emmerich, Esq., Frank Miller, Esq.		Attorney-Client	Draft materials for Coleman Board meeting prepared for the purpose of providing legal advice.
156		03/18/1998	Steven Isko, Esq.	Rachelle Silverberg, Esq., Paul Shapiro, Esq. (cc), Joram Salig, Esq. (cc)	Attorney-Client, Work Product	Memorandum re response to SEC and NYSE requests for information and attached draft document prepared in anticipation of litigation relating to inquiry.
156	A	03/16/1998	Rachelle Silverberg, Esq.	Steven Isko, Esq., Jerry Levin, James Maher, William Nesbitt, Joram Salig, Esq., Barry F. Schwartz, Esq., Paul Shapiro, Esq.	Attorney-Client, Work Product	Memorandum re attached draft document prepared in anticipation of litigation relating to inquiry.
156	B	03/16/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft response to SEC and NYSE requests for information with S. Isko's handwritten notes prepared in anticipation of litigation relating to inquiry.
156	C	03/18/1998	Steven Isko, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product	Memorandum re response to SEC and NYSE requests for information prepared in anticipation of litigation relating to inquiry.
157		03/18/1998	Glenn Dickes, Esq.	Adam O. Emmerich, Esq.	Attorney-Client	Memorandum re draft letter to LYONs trustee and draft notice of LYONs redemption prepared for the purpose of providing legal advice.
158		02/21/1998	Adam O. Emmerich, Esq.	Paul Rowe, Esq.	Attorney-Client	Correspondence re Sunbeam's proposed transaction terms prepared for the purpose of providing legal advice.
159		02/25/1998	Paul Rowe, Esq.		Attorney-Client	Notes re Coleman Board of Directors meeting prepared for the purpose of providing legal advice.
160		02/25/1998	Paul Rowe, Esq.		Attorney-Client	CSFB presentation to Coleman Board of Directors with P. Rowe's handwritten notes prepared for the purpose of providing legal advice.
161		02/26/1998	Paul Rowe, Esq.		Attorney-Client	Notes re Coleman Board meeting prepared for the purpose of providing legal advice.
162		00/00/0000	Paul Rowe, Esq.		Attorney-Client, Work Product	Notes re response to SEC and NYSE requests for information prepared in anticipation of litigation relating to inquiry.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
163		04/16/1998	Paul Rowe, Esq.		Attorney-Client, Work Product	Sunbeam draft response to SEC and NYSE requests for information with P. Rowe's handwritten notes prepared in anticipation of litigation relating to inquiry.
164		03/19/1998	Rachelle Silverberg, Esq.	Steven Isko, Esq., Jerry Levin, James Maher, William Nesbitt, Joram Salig, Esq., Barry F. Schwartz, Esq., Paul Shapiro, Esq.	Attorney-Client, Work Product	Memorandum re attached draft document prepared in anticipation of litigation relating to SEC/NYSE inquiry.
164	A	03/19/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft response to SEC and NYSE requests for information prepared in anticipation of litigation relating to inquiry.
165		03/30/1998	Paul Rowe, Esq.		Attorney-Client, Work Product	Notes re response to SEC and NYSE requests for information prepared in anticipation of litigation relating to inquiry.
166		06/15/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft Schedule 13D prepared in connection with providing legal advice and anticipated litigation.
167		07/15/1998	Frank Miller, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., Joram Salig, Esq., Glenn Dickes, Esq., William Nesbitt, James Maher	Attorney-Client, Work Product	Memorandum re SEC comments on draft Sunbeam Form S-4 prepared in connection with providing legal advice and anticipated litigation.
168		07/20/1998	Adam O. Emmerich, Esq., Frank Miller, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., James Maher, William Nesbitt, Todd Slotkin, Irwin Engelman, Glenn Dickes, Esq., Joram Salig, Esq., Steven Cohen, Esq. (cc), Michael Schwartz, Esq. (cc), Paul Rowe, Esq. (cc), Rachelle Silverberg, Esq. (cc), Alexander Shaknes, Esq. (cc), Harold Novikoff (cc), Peter Canellos, Esq. (cc), David Einhorn, Esq. (cc), Deborah Paul, Esq. (cc), Michael Katzke, Esq. (cc), Ilene K. Gotts, Esq. (cc), Michael Jahnke, Esq. (cc)	Attorney-Client, Work Product	Memorandum re attached draft document prepared in connection with Sunbeam / Coleman (Parent) settlement.
168	A	07/20/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft Registration Rights Agreement Amendment prepared in connection with Sunbeam / Coleman (Parent) settlement
169		04/19/1998	Frank Miller, Esq.	Barry F. Schwartz, Esq., Joram Salig, Esq., Adam O. Emmerich, Esq. (cc), Paul Rowe, Esq. (cc), Rachelle Silverberg, Esq. (cc)	Attorney-Client, Work Product	Memorandum re Sunbeam draft response to SEC and NYSE requests for information prepared in anticipation of litigation relating to inquiry.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
170		02/19/1998	Adam O. Emmerich, Esq., Steven Cohen, Esq.	Steven Cohen, Esq., Frank Miller, Esq., Paul Rowe, Esq., Peter Canellos, Esq., David Einhorn, Esq., Karen Krueger, Esq., Michael Byowitz, Esq., Ilene K. Gotts, Esq., Michael Jahnke, Esq.	Attorney-Client	Memorandum re transaction structure issues prepared for the purpose of providing legal advice.
171		03/02/1998	Frank Miller, Esq.	Barry F. Schwartz, Esq., Glenn Dickes, Esq., Joram Salig, Esq., Steven Isko, Esq., Adam O. Emmerich, Esq. (cc)	Attorney-Client	Memorandum re attached draft documents prepared for the purpose of providing legal advice.
171	A	03/02/1998	Wachtell Lipton		Attorney-Client	Draft Coleman Co. 8-K prepared for the purpose of providing legal advice.
171	B	03/02/1998	Wachtell Lipton		Attorney-Client	Draft Coleman Worldwide 8-K prepared for the purpose of providing legal advice.
171	C	03/02/1998	Wachtell Lipton		Attorney-Client	Draft CLN Holdings 8-K prepared for the purpose of providing legal advice.
172		03/26/1998	Adam O. Emmerich, Esq., Steven Cohen, Esq., Frank Miller, Esq.	Glenn Dickes, Esq., Norman Gintsling, Esq., Anthony Ian, Steven Isko, Esq., Joseph Page, Valerie Radwaner, Esq., Joram Salig, Esq., Marvin Shaffer, Terry Schimek, Esq., Barry F. Schwartz, Esq., Paul Shapiro, Esq., Laurence Winoker	Attorney-Client	Memorandum re attached draft documents prepared for the purpose of providing legal advice.
172	A	03/26/1998	Wachtell Lipton		Attorney-Client	Draft closing checklist prepared for the purpose of providing legal advice.
172	B	03/26/1998	Wachtell Lipton		Attorney-Client	Draft amendment to merger agreement prepared for the purpose of providing legal advice.
172	C	03/26/1998	Wachtell Lipton		Attorney-Client	Draft letter re termination of intercompany agreements prepared for the purpose of providing legal advice.
172	D	03/26/1998	Wachtell Lipton		Attorney-Client	Draft letter to Sunbeam re cooperation and access prepared for the purpose of providing legal advice.
173		03/26/1998	Valerie Radwaner, Esq., Deborah Reiss, Esq.	Steven Cohen, Esq., Adam O. Emmerich, Esq., Frank Miller, Esq.	Attorney-Client	Fax response to request for information re closing prepared for the purpose of providing legal advice.
174		02/27/1998	Valerie Radwaner, Esq.	Steven Cohen, Esq., Adam O. Emmerich, Esq., Frank Miller, Esq., Glenn Dickes, Esq. (cc)	Attorney-Client	Memorandum re attached documents prepared for the purpose of providing legal advice.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
174	A	02/27/1998	Valerie Radwaner, Esq.		Attorney-Client	Excerpt of draft merger agreement with attorney's handwritten notes prepared for the purpose of providing legal advice.
175		02/27/1998	Glenn Dickes, Esq.	Steven Cohen, Esq., Adam O. Emmerich, Esq., Frank Miller, Esq.	Attorney-Client	Excerpt of draft merger agreement with G. Dickes' handwriten notes prepared for the purpose of providing legal advice.
176		00/00/0000	Adam O. Emmerich, Esq.		Attorney-Client	Notes of communication with client re Sunbeam acquisition issues.
177		02/27/1998	Wachtell Lipton		Attorney-Client	Draft Registration Rights Agreement with attorney's handwritten notes prepared for the purpose of providing legal advice.
178		00/00/0000	Adam O. Emmerich, Esq.		Attorney-Client	Notes re Sunbeam acquisition issues prepared for the purpose of providing legal advice.
179		02/26/1998	Steven Cohen, Esq.	Michael Katzke, Esq., Adam O. Emmerich, Esq. (cc), Frank Miller, Esq. (cc)	Attorney-Client	E-mail re draft merger agreement prepared for the purpose of providing legal advice.
180		02/26/1998	Michael Katzke, Esq.	Adam O. Emmerich, Esq., Steven Cohen, Esq. (cc), Frank Miller, Esq. (cc)	Attorney-Client	E-mail re draft merger agreement prepared for the purpose of providing legal advice.
181		02/26/1998	Deborah Paul, Esq.	David Einhorn, Esq., Adam O. Emmerich, Esq., Steven Cohen, Esq., Frank Miller, Esq.	Attorney-Client	E-mail re client communication re draft merger agreement.
182		02/26/1998	Michael Katzke, Esq.	Adam O. Emmerich, Esq.	Attorney-Client	E-mail re draft merger agreement prepared for the purpose of providing legal advice.
183		02/26/1998	Wachtell Lipton		Attorney-Client	Draft summary of proposed Sunbeam acquisition prepared for the purpose of providing legal advice.
184		02/24/1998	Wachtell Lipton		Attorney-Client	Notes re draft merger agreement issues prepared for the purpose of providing legal advice.
185		02/24/1998	Michael Katzke, Esq.	Steven Cohen, Esq., Adam O. Emmerich, Esq., Frank Miller, Esq.	Attorney-Client	E-mail re employee benefit issues in draft merger agreement prepared for the purpose of providing legal advice.
186		02/24/1998	Adam O. Emmerich, Esq.	Michael Katzke, Esq., Steven Cohen, Esq. (cc), Frank Miller, Esq. (cc)	Attorney-Client	E-mail re employee benefit issues in merger agreement and e-mail response by M. Katzke prepared for the purpose of providing legal advice.
187		02/24/1998	Michael Katzke, Esq.	Adam O. Emmerich, Esq.	Attorney-Client	E-mail re employee benefit issues in merger agreement prepared for the purpose of providing legal advice.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
188		00/00/0000	Adam O. Emmerich, Esq.		Attorney-Client	Notes of client communication re draft merger agreement.
189		02/24/1998	Adam O. Emmerich, Esq.		Attorney-Client	Notes re draft merger agreement issues prepared for the purpose of providing legal advice.
190		00/00/0000	Paul Rowe, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 021577-021579).
191		03/06/1998	Steven Isko, Esq.	Sarah Strasser, Esq.	Attorney-Client	Draft foreign antitrust filing with S. Isko's handwritten notes prepared for the purpose of providing legal advice.
192		03/06/1998	Sarah Strasser, Esq.	Steven Isko, Esq.	Attorney-Client	Memorandum re draft foreign antitrust filing prepared for the purpose of providing legal advice.
193		02/27/1998	Sarah Strasser, Esq.	Lenny Ajzenman	Attorney-Client	Correspondence re attached draft document prepared for the purpose of providing legal advice.
193	A	02/27/1998	Wachtell Lipton		Attorney-Client	Section of draft Hart-Scott-Rodino filing with S. Strasser's handwritten notes prepared for the purpose of providing legal advice.
194		00/00/0000	Deborah Paul, Esq.		Attorney-Client	Notes re Sunbeam acquisition tax issues and confidential communications with client re same prepared in connection with providing legal advice.
195		00/00/0000	Deborah Paul, Esq.		Attorney-Client	Draft merger agreement with D. Paul's notes prepared for the purpose of providing legal advice.
196		03/03/1998	Michael Katzke, Esq.	Deborah Paul, Esq.	Attorney-Client	Memorandum re attached draft document prepared for the purpose of providing legal advice.
196	A	03/03/1998	Wachtell Lipton		Attorney-Client	Draft Coleman employee disclosure re employee benefits with M. Katzke's handwritten notes prepared for the purpose of providing legal advice.
197		07/30/1998	Adam O. Emmerich, Esq., Frank Miller, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., James Maher	Attorney-Client, Work Product	Memorandum re attached draft document prepared in connection with providing legal advice and anticipated litigation.
197	A	07/30/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft letter to NY Stock Exchange re application for exception prepared in connection with providing legal advice and anticipated litigation.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
198		07/30/1998	Adam O. Emmerich, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., James Maher, Steven Cohen, Esq. (cc), Frank Miller, Esq. (cc), Michael Schwartz, Esq. (cc), Paul Rowe, Esq. (cc), Rachelle Silverberg, Esq. (cc), Alexander Shaknes, Esq. (cc), Harold Novikoff (cc), Peter Canellos, Esq. (cc), David Einhorn, Esq. (cc), Deborah Paul, Esq., Esq. (cc), Michael Katzke, Esq. (cc), Ilene K. Gotts, Esq. (cc), Michael Jahnke, Esq. (cc)	Work Product	Memorandum re attached draft document prepared in connection with providing legal advice and anticipated litigation.
198	A	07/30/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft memorandum re potential claims arising from Sunbeam acquisition.
199		03/10/1998	Sarah Strasser, Esq.		Attorney-Client	Summary of foreign antitrust issues related to Sunbeam acquisition prepared for the purpose of providing legal advice.
200		00/00/0000	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Notes re Coleman shareholder litigation.
201		02/02/1999	Adam O. Emmerich, Esq.		Attorney-Client, Work Product	Draft letter to auditor re pending litigation.
202		10/30/1998	Eric Golden, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product	Fax re complaint (Redacted from CP 13843A).
203		00/00/0000	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Notes re shareholder litigation.
204		00/00/0000	Michael Katzke, Esq.		Attorney-Client	Notes re merger agreement issues with M. Katzke's handwritten notes prepared for the purpose of providing legal advice.
205		02/26/1998	Adam O. Emmerich, Esq., Frank Miller, Esq.	Paul Shapiro, Esq., Steven Isko, Esq., Glenn Dickes, Esq., Joram Salig, Esq., Barry F. Schwartz, Esq., Steven Cohen, Esq. (cc), Paul Rowe, Esq. (cc), Peter Canellos, Esq. (cc), David Einhorn, Esq. (cc), Michael Katzke, Esq. (cc), Ilene K. Gotts, Esq. (cc), Michael Jahnke, Esq. (cc)	Attorney-Client	Memorandum re attached draft documents prepared for the purpose of providing legal advice.
205	A	02/26/1998	Wachtell Lipton		Attorney-Client	Draft consents and resolutions re proposed Sunbeam acquisition prepared for the purpose of providing legal advice.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
205	B	02/26/1998	Wachtell Lipton		Attorney-Client	Draft Coleman 8-Ks prepared for the purpose of providing legal advice.
206		04/06/1998	Adam O. Emmerich, Esq., Michael Katzke, Esq.	Glenn Dickes, Esq., Joram Salig, Esq., Barry F. Schwartz, Esq., Paul Shapiro, Esq.	Attorney-Client	Memorandum re attached draft document prepared in connection with providing legal advice.
206	A	04/06/1998	Wachtell Lipton		Attorney-Client	Draft Sunbeam letter re Coleman employee benefits issues prepared in connection with providing legal advice.
207		03/27/1998	Wachtell Lipton		Attorney-Client	Draft letter re termination of intercompany agreements prepared for the purpose of providing legal advice.
208		02/25/1998	Michael Katzke, Esq.	Steven Isko, Esq.	Attorney-Client	Summary of Coleman severance policy prepared for the purpose of providing legal advice.
209		06/10/1998	Karen Krueger, Esq.	Barry F. Schwartz, Esq., Adam O. Emmerich, Esq. (cc), Michael Katzke, Esq. (cc), Frank Miller, Esq. (cc)	Attorney-Client, Work Product	Memorandum re attached draft document prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.
209	A	06/10/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment termination agreement prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.
210		06/11/1998	Karen Krueger, Esq.	Barry F. Schwartz, Esq., Steven Isko, Esq., Paul Shapiro, Esq., Adam O. Emmerich, Esq. (cc), Michael Katzke, Esq. (cc), Frank Miller, Esq. (cc)	Attorney-Client, Work Product	Memorandum re attached draft document prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.
210	A	06/11/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment termination agreement prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.
211		00/00/0000	Karen Krueger, Esq.		Attorney-Client, Work Product	Excerpt of draft employment termination agreement prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.
212		08/19/1998	Michael Schwartz, Esq.	Wachtell Lipton Sunbeam Team, Martin Lipton, Adam O. Emmerich, Esq., Steven Cohen, Esq., Frank Miller, Esq., Harold Novikoff, Esq., Peter Canellos, Esq., David Einhorn, Esq., Deborah Paul, Esq., Michael Katzke, Esq., Michael W. Schwartz, Esq., Paul Rowe, Esq., Rachelle	Attorney-Client, Work Product	Memorandum re Coleman shareholder litigation.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
				Silverberg, Esq., Ilene K. Gotts, Esq., Michael Jahnke, Esq.		
213		03/31/1998	Michael Katzke, Esq.	Adam O. Emmerich, Esq., Steven Cohen, Esq., Frank Miller, Esq.	Attorney-Client	E-mail re Form 4 filings prepared for the purpose of providing legal advice.
214		03/31/1998	Heidi Anne Hafeken	Adam O. Emmerich, Esq.	Attorney-Client	Transcribed voicemail message from A. Emmerich to F. Miller and S. Cohen re applicability of federal securities laws.
215		03/30/1998	Adam O. Emmerich, Esq.	Frank Miller, Esq., Steven Cohen, Esq.	Attorney-Client	E-mail re applicability of federal securities laws; F. Miller e-mail in response; S. Cohen further e-mail response.
216		03/30/1998	Adam O. Emmerich, Esq.	Steven Cohen, Esq., Frank Miller, Esq.	Attorney-Client	E-mail re applicability of federal securities laws; F. Miller e-mail response; S. Cohen e-mail response; F. Miller e-mail response; S. Cohen e-mail response; F. Miller e-mail response.
217		02/05/1998	Joram Salig, Esq.	Martin Lipton, Esq.	Attorney-Client	Correspondence re confidentiality agreement between Sunbeam and Coleman for purpose of obtaining legal advice.
218		07/17/1998	Richard Pacheco, Esq.	Paul Rowe, Esq., Adam O. Emmerich, Esq., Rachelle Silverberg, Esq.	Attorney-Client, Work Product	Memorandum re potential claims arising out of Sunbeam acquisition.
219		09/14/1998	Frank Miller, Esq.	Barry F. Schwartz, Esq., Michael Schwartz, Esq. (cc), Adam O. Emmerich, Esq. (cc)	Attorney-Client, Work Product	Memorandum re litigation arising out of Sunbeam's acquisition of CPH's interest in Coleman.
219	A	09/14/1998	Frank Miller, Esq.		Attorney-Client, Work Product	Analysis of litigation damages issues.
219	B	00/00/0000	Frank Miller, Esq.		Attorney-Client, Work Product	Notes re litigation damages issues.
220		11/06/1998	Adam O. Emmerich, Esq., Frank Miller, Esq.	Barry F. Schwartz, Esq., James Maher, William Nesbitt, Glenn Dickes, Esq., Joram Salig, Esq., James Conroy, Esq.	Attorney-Client, Work Product	Memorandum re attached draft document prepared in connection with Sunbeam/Coleman (Parent) settlement.
220	A	11/06/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft Schedule 13D Amendment prepared in connection with Sunbeam /Coleman (Parent) settlement.
221		04/07/1998	Frank Miller, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., Glenn Dickes, Esq., Paul Shapiro, Esq.	Attorney-Client	Memorandum re Sunbeam corporate structure prepared in connection with providing legal advice.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
222		04/10/1998	Frank Miller, Esq.	Joram Salig, Esq., Steven Isko, Esq., Adam O. Emmerich, Esq. (cc), Paul Rowe, Esq. (cc)	Attorney-Client	Memorandum re attached draft document.
222	A	04/10/1998	Wachtell Lipton		Attorney-Client	Draft of section of Sunbeam Form S-4 prepared in connection with providing legal advice.
223		03/29/1998	Adam O. Emmerich, Esq.	Frank Miller, Esq.	Attorney-Client	Memorandum re closing issues prepared for the purpose of providing legal advice.
223	A	03/29/1998	Wachtell Lipton		Attorney-Client	Draft closing checklist prepared for the purpose of providing legal advice.
224		03/28/1998	Adam O. Emmerich, Esq.	Glenn Dickes, Esq.	Attorney-Client	Memorandum re attached documents prepared for the purpose of providing legal advice.
224	A	03/28/1998	Wachtell Lipton		Attorney-Client	Draft amendment to merger agreement prepared for the purpose of providing legal advice.
224	B	03/28/1998	Wachtell Lipton		Attorney-Client	Draft letter re termination of intercompany agreements prepared for the purpose of providing legal advice.
224	C	03/28/1998	Wachtell Lipton		Attorney-Client	Draft letter to Sunbeam re cooperation and access prepared for the purpose of providing legal advice.
224	D	03/28/1998	Wachtell Lipton		Attorney-Client	Draft registration rights agreement prepared for the purpose of providing legal advice.
224	E	03/28/1998	Wachtell Lipton		Attorney-Client	Draft cross receipt prepared for the purpose of providing legal advice.
225		03/28/1998	Adam O. Emmerich, Esq.	Glenn Dickes, Esq.	Attorney-Client	Memorandum re closing prepared for the purpose of providing legal advice.
225	A	03/28/1998	Wachtell Lipton		Attorney-Client	Draft closing checklist prepared for the purpose of providing legal advice.
225	B	03/28/1998	Wachtell Lipton		Attorney-Client	Draft letter re termination of intercompany agreements prepared for the purpose of providing legal advice.
226		04/15/1998	Adam O. Emmerich, Esq.	Barry F. Schwartz, Esq.	Attorney-Client	Memorandum re attached draft document prepared in connection with providing legal advice.
226	A	04/15/1998	Adam O. Emmerich, Esq.		Attorney-Client	Draft Sunbeam letter re Coleman employee benefits issues prepared in connection with providing legal advice.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
227		04/12/1998	Michael Katzke, Esq.	Adam O. Emmerich, Esq., Frank Miller, Esq.	Attorney-Client	Correspondence re attached draft document prepared in connection with providing legal advice.
227	A	04/12/1998	Michael Katzke, Esq.		Attorney-Client	Draft Sunbeam Form S-4 with M. Katzke's handwritten notes prepared in connection with providing legal advice.
228		03/31/1998	Frank Miller, Esq.	Glenn Dickes, Esq., Joram Salig, Esq., Adam O. Emmerich, Esq. (cc)	Attorney-Client	Memorandum re attached draft documents prepared for the purpose of providing legal advice.
228	A	03/31/1998	Wachtell Lipton		Attorney-Client	Draft Coleman Schedule 13G prepared for the purpose of providing legal advice.
228	B	03/31/1998	Wachtell Lipton		Attorney-Client	Draft Form 4 prepared for the purpose of providing legal advice.
228	C	03/31/1998	Wachtell Lipton		Attorney-Client	Draft Sunbeam Schedule 13G prepared for the purpose of providing legal advice.
228	D	03/31/1998	Wachtell Lipton		Attorney-Client	Draft Joint Filing Agreement prepared for the purpose of providing legal advice.
228	E	03/31/1998	Wachtell Lipton		Attorney-Client	Draft Form 3 prepared for the purpose of providing legal advice.
228	F	03/31/1998	Wachtell Lipton		Attorney-Client	Draft Form 144 prepared for the purpose of providing legal advice.
229		04/01/1998	Frank Miller, Esq.	Barry F. Schwartz, Esq., Joram Salig, Esq.	Attorney-Client	Memorandum re SEC filings for Sunbeam acquisition prepared for the purpose of providing legal advice.
230		03/27/1998	Paul, Weiss, Rifkind, Wharton & Garrison		Attorney-Client	Draft benefit plan agreement prepared for the purpose of providing legal advice.
230	A	03/27/1998	Cass G. Adelman, Esq.	Joram Salig, Esq., Steven Isko, Esq., Laurence Winoker, Kyle Wendt, Michael Katzke, Esq., Tim Nelson, Neil Leff, Adam O. Emmerich, Esq.	Attorney-Client	Correspondence re attached draft document prepared for the purpose of providing legal advice.
231		04/08/1998	Frank Miller, Esq.	Joram Salig, Esq.	Attorney-Client	Memorandum re Schedule 13G prepared in connection with providing legal advice.
232		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Notes re Sunbeam Credit Agreement prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman (Redacted from CP 027993).

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
233		03/28/1998	Cass G. Adelman, Esq.	Joram Salig, Esq., Steven Isko, Esq., Lawrence Winoker, Kyle Wendt, Michael Katzke, Esq., Tim Nelson, Neil Leff, Barry F. Schwartz, Esq., Robert Fleder, Esq.	Attorney-Client	Correspondence re attached draft document prepared for the purpose of providing legal advice.
233	A	03/28/1998	Paul, Weiss, Rifkind, Wharton & Garrison		Attorney-Client	Draft benefit plan agreement prepared for the purpose of providing legal advice.
234		08/18/1998	Frank Miller, Esq.	Joram Salig, Esq., Adam O. Emmerich, Esq. (cc)	Attorney-Client, Work Product	Memorandum re Registration Rights Agreement prepared in connection with Sunbeam/Coleman (Parent) settlement.
235		09/02/1998	Eric Golden, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product	Memorandum re Coleman shareholder litigation.
236		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re Sunbeam's 1997 Form 10-K prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman (Redacted from CP 018831-018886).
237		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 018822-018830).
238		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re Sunbeam 1996 Form 10-K prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman (Redacted from CP 018888-018937).
239		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re Coleman response to SEC and NYSE requests for information prepared in anticipation of litigation relating to inquiry.
240		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re Mintz complaint (Redacted from CP 015305-015348).
241		08/12/1998	Adam O. Emmerich, Esq.	Glenn Dickes, Esq., Valerie Radwaner, Esq., Joram Salig, Esq.	Attorney-Client, Work Product	Draft warrant term sheet prepared in connection with Sunbeam/Coleman (Parent) settlement.
242		10/06/1998	Paul Crampton, Esq.	Sarah Strasser, Esq., Adam O. Emmerich, Esq. (cc)	Attorney-Client, Work Product	Letter re legal services performed relating to acquisition.
242	A	08/05/1998	Davies Ward & Beck	Sarah Strasser, Esq.	Attorney-Client, Work Product	Bill for legal services performed relating to acquisition.
243		07/13/1998	Barry F. Schwartz, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Draft press release re Sunbeam with attorney's handwritten notes prepared in connection with providing legal advice and pending litigation.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
244		07/20/1998	Barry F. Schwartz, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Notes re Stapleton complaint.
245		03/13/1998	Rachelle Silverberg, Esq.	Barry F. Schwartz, Esq., Joram Salig, Esq., Steven Isko, Esq., Adam O. Emmerich, Esq. (cc)	Attorney-Client, Work Product	Memorandum re response to NYSE request for information prepared in anticipation of litigation relating to inquiry.
246		03/23/1998	Adam O. Emmerich, Esq.	Joseph Page	Attorney-Client	Memorandum re legal services performed in connection with Sunbeam acquisition.
246	A	03/23/1998	Wachtell Lipton		Attorney-Client	Invoice for legal services performed in connection with Sunbeam acquisition.
247		00/00/0000	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Notes re Coleman shareholder litigation.
248		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Section of draft proxy statement prepared in connection with providing legal advice and pending litigation.
249		10/18/1999	Adam O. Emmerich, Esq.	Barry F. Schwartz, Esq., Michael Schwartz, Esq. (cc), Rachelle Silverberg, Esq. (cc)	Attorney-Client, Work Product	Memorandum re attached draft document prepared in connection with providing legal advice and pending litigation.
249	A	10/18/1999	Wachtell Lipton		Attorney-Client, Work Product	Section of draft proxy statement prepared in connection with providing legal advice and pending litigation.
250		11/03/1998	Adam O. Emmerich, Esq., Frank Miller, Esq.	Barry F. Schwartz, Esq., James Maher, William Nesbitt, Glenn Dickes, Esq., Joram Salig, Esq., James Conroy, Esq.	Attorney-Client, Work Product	Memorandum re attached draft document prepared in connection with providing legal advice and pending litigation.
250	A	11/03/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft amendment to Schedule 13D prepared in connection with providing legal advice and pending litigation.
251		11/03/1998	Megan McIntyre, Esq.	Barry F. Schwartz, Esq., Michael Schwartz, Esq. (cc)	Attorney-Client, Work Product	Letter re McCall and Coletta litigation.
252		09/30/1998	Cynthia Calder, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product	Letter re Joerger litigation. (Redacted from CP 044646.)
253		04/09/1998	Ilene K. Gotts, Esq.	Barry F. Schwartz, Esq.	Attorney-Client	Letter re letter to FTC re Coleman licensing issues prepared for the purpose of providing legal advice.
254		07/29/1998	Howard Gittis, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Note re Sunbeam management proposal prepared for purpose of obtaining legal advice (Redacted from CP 020187, CP 034332, and CP 013779).

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
255		00/00/0000	Karen Krueger, Esq.		Attorney-Client, Work Product	Notes re Kersh employment agreement prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman (Redacted from CP 013791-013808).
256		00/00/0000	Karen Krueger, Esq.		Attorney-Client, Work Product	Notes re Dunlap employment agreement prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman (Redacted from CP 012314-012333).
257		11/13/1998	Megan McIntyre, Esq.	Eric Golden, Esq., Michael Schwartz, Esq. (cc)	Attorney-Client, Work Product	Memorandum re Goldstein litigation.
258		12/01/1998	Megan McIntyre, Esq.	Michael Schwartz, Esq., Eric Golden, Esq.	Attorney-Client, Work Product	Correspondence re Goldstein litigation.
259		09/29/1999	Barry F. Schwartz, Esq.	Adam O. Emmerich, Esq., Michael Schwartz, Esq.	Attorney-Client, Work Product	Correspondence re Coleman shareholder litigation.
260		08/04/1998	Paul Rowe, Esq.	Michael Schwartz, Esq., Adam O. Emmerich, Esq., Rachelle Silverberg, Esq. (cc)	Attorney-Client, Work Product	Memorandum re draft settlement agreement provision.
261		11/19/1998	Eric Golden, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product	Letter re Shallal litigation.
262		04/20/1999	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Notes re Sunbeam stock trading history report prepared in conncetion with litigation (Redacted from CP 005283-005285).
263		08/14/1998	Frank Miller, Esq.	Barry F. Schwartz, Esq., Glenn Dickes, Esq., William Nesbitt, James Maher, Joram Salig, Esq., James Conroy, Esq., Valerie Radwaner, Esq.	Attorney-Client, Work Product	Memorandum re Schedule 13D Amendment prepared in connection with providing legal advice and pending litigation.
264		12/04/1998	Eric Golden, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product	Memorandum re Coletta litigation.
265		08/21/1998	Valerie Radwaner, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Correspondence re Sunbeam warrant prepared in connection with Sunbeam/Coleman (Parent) settlement.
266		08/23/1998	Adam O. Emmerich, Esq.	Glenn Dickes, Esq., Steven Cohen, Esq. (cc), Frank Miller, Esq. (cc)	Attorney-Client, Work Product	Memorandum re attached draft document prepared in connection with Sunbeam / Coleman (Parent) settlement.
266	A	08/23/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft receipt for warrant prepared in connection with Sunbeam/Coleman (Parent) settlement.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
267		08/23/1998	Adam O. Emmerich, Esq.	Valerie Radwaner, Esq.	Attorney-Client, Work Product	Correspondence re attached draft document prepared in connection with Sunbeam/Coleman (Parent) settlement.
267	A	08/23/1998	Adam O. Emmerich, Esq.		Attorney-Client, Work Product	Draft letter to Shearman & Sterling re Sunbeam warrant prepared in connection with Sunbeam / Coleman (Parent) settlement.
268		08/24/1998	Valerie Radwaner, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Correspondence re draft letter to Shearman & Sterling re Sunbeam warrant prepared in connection with Sunbeam / Coleman (Parent) settlement.
269		11/03/1998	Jay Eisenhofer, Esq., Megan McIntyre, Esq.	Barry F. Schwartz, Esq., Michael Schwartz, Esq. (cc)	Attorney-Client, Work Product	Memorandum re attached draft document.
269	A	11/03/1998	Jay Eisenhofer, Esq., Megan McIntyre, Esq.		Attorney-Client, Work Product	Draft motion for Joerger litigation.
270		01/25/1999	Jay Eisenhofer, Esq., Megan McIntyre, Esq.	Michael Schwartz, Esq., Rachelle Silverberg, Esq.	Attorney-Client, Work Product	Memorandum re attached draft documents.
270	A	01/25/1999	Grant & Eisenhofer		Attorney-Client, Work Product	Draft motion for Joerger litigation.
270	B	01/25/1999	Grant & Eisenhofer		Attorney-Client, Work Product	Draft motion for In re Sunbeam shareholder litigation.
271		12/16/1998	Megan McIntyre, Esq.	Eric Golden, Esq., Michael Schwartz, Esq. (cc)	Attorney-Client, Work Product	Memorandum re Goldstein litigation.
272		12/03/1998	Megan McIntyre, Esq.	Eric Golden, Esq., Michael Schwartz, Esq.	Attorney-Client, Work Product	Memorandum re motion in Coleman shareholder litigation.
273		01/08/1999	Jay Eisenhofer, Esq., Megan McIntyre, Esq.	Eric Golden, Esq., Michael Schwartz, Esq. (cc), Rachelle Silverberg, Esq. (cc)	Attorney-Client, Work Product	Memorandum re attached draft documents.
273	A	01/08/1999	Grant & Eisenhofer		Attorney-Client, Work Product	Draft motion for In re Sunbeam shareholder litigation.
273	B	01/08/1999	Grant & Eisenhofer		Attorney-Client, Work Product	Draft motion for Joerger litigation.
274		01/08/1999	Megan McIntyre, Esq.	Eric Golden, Esq., Michael Schwartz, Esq. (cc), Rachelle Silverberg, Esq. (cc)	Attorney-Client, Work Product	Memorandum re In re Sunbeam litigation.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
275		01/07/1999	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Draft motion for Joerger litigation with attorney's handwritten notes.
276		11/19/1998	Eric Golden, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product	Letter re Coletta litigation.
277		08/21/1998	Steven Cohen, Esq., Adam O. Emmerich, Esq.	Barry F. Schwartz, Esq., James Maher, William Nesbitt, Glenn Dickes, Esq., Joram Salig, Esq.	Attorney-Client, Work Product	Memorandum re attached draft document.
277	A	08/21/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft amendment to Schedule 13D prepared in connection with providing legal advice and pending litigation.
278		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Draft response to SEC and NYSE requests for information prepared in anticipation of litigation relating to inquiry.
279		00/00/0000	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Notes re Coleman shareholder litigation.
280		07/07/1998	Paul Rowe, Esq.		Attorney-Client, Work Product	Notes re potential claims arising out of Sunbeam acquisition.
281		07/07/1998	Wachtell Lipton		Attorney-Client, Work Product	Memorandum re potential claims arising out of Sunbeam acquisition.
282		07/08/1998	Adam O. Emmerich, Esq., Frank Miller, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., James Maher, William Nesbitt, Todd Slotkin, Irwin Engelman, Glenn Dickes, Esq., Joram Salig, Esq., Valerie Radwaner, Esq. (cc), Steven Cohen, Esq. (cc), Michael Schwartz, Esq. (cc), Paul Rowe, Esq. (cc), Rachelle Silverberg, Esq. (cc), Alexander Shaknes, Esq. (cc), Harold Novikoff, Esq. (cc), Peter Canellos, Esq. (cc), David Einhorn, Esq. (cc), Deborah Paul, Esq. (cc), Michael Katzke, Esq. (cc), Ilene K. Gotts, Esq. (cc), Michael Jahnke, Esq. (cc)	Attorney-Client, Work Product	Memorandum re attached draft documents.
282	A	07/08/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft warrant term sheet prepared in connection with Sunbeam/Coleman (Parent) settlement.
282	B	07/08/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft warrant prepared in connection with Sunbeam/Coleman (Parent) settlement.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
282	C	07/08/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft settlement agreement.
283		08/06/1998	Adam O. Emmerich, Esq., Frank Miller, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., James Maher, Irwin Engelman, William Nesbitt, Todd Slotkin, Glenn Dickes, Esq., Joram Salig, Esq., Valerie Radwaner, Esq. (cc)	Attorney-Client, Work Product	Memorandum re attached draft documents.
283	A	08/06/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft settlement agreement.
283	B	08/06/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft warrant.
284		07/30/1998	Adam O. Emmerich, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., James Maher	Attorney-Client, Work Product	Memorandum re attached draft document.
284	A	07/30/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft memorandum to Sunbeam re potential claims arising from Sunbeam acquisition.
285		07/31/1998	Michael Katzke, Esq.	Glenn Dickes, Esq., Adam O. Emmerich, Esq. (cc)	Attorney-Client, Work Product	Memorandum re attached draft documents.
285	A	07/30/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement term sheet for J. Levin prepared in connection with providing legal advice and anticipated litigation.
285	B	07/31/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for J. Levin prepared in connection with providing legal advice and anticipated litigation.
285	C	07/31/1998	Wachtell Lipton		Attorney-Client, Work Product	Black-lined version of draft employment agreement for J. Levin with providing legal advice and anticipated litigation.
285	D	07/30/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement term sheet for P. Shapiro prepared in connection with providing legal advice and anticipated litigation.
285	E	07/31/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for P. Shapiro preapred in connection with providing legal advice and anticipated litigation.
285	F	07/30/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement term sheet for B. Jenkins prepared in connection with providing legal advice and anticipated litigation.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
285	G	07/31/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for B. Jenkins prepared in connection with providing legal advice and anticipated litigation.
285	H	07/30/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement term sheet for G. Wisler prepared in connection with providing legal advice and anticipated litigation.
285	I	07/31/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for G. Wisler prepared in connection with providing legal advice and anticipated litigation.
285	J	07/30/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement term sheet for J. Nold prepared in connection with providing legal advice and anticipated litigation.
285	K	07/31/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for J. Nold prepared in connection with providing legal advice and anticipated litigation.
285	L	07/30/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement term sheet for F. Feraco prepared in connection with providing legal advice and anticipated litigation.
285	M	07/31/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for F. Feraco prepared in connection with providing legal advice and anticipated litigation.
285	N	07/30/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement term sheet for K. Clark prepared in connection with providing legal advice and anticipated litigation.
285	O	07/31/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for K. Clark prepared in connection with providing legal advice and anticipated litigation.
286		00/00/0000	Susan Powell, Esq.		Attorney-Client, Work Product	Notes re Sunbeam employment agreements prepared in connection with providing legal advice and anticipated litigation.
287		01/06/1999	Rachelle Silverberg, Esq.	Eric Golden, Esq.	Attorney-Client, Work Product	Memorandum re attached draft documents.
287	A	01/06/1999	Wachtell Lipton		Attorney-Client, Work Product	Draft pleading for Shallal litigation.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
287	B	01/06/1999	Wachtell Lipton		Attorney-Client, Work Product	Draft pleading for Shallal litigation.
288		01/06/1999	Wachtell Lipton		Attorney-Client, Work Product	Draft pleading for Shallal litigation with attorney notes.
289		01/06/1999	Wachtell Lipton		Attorney-Client, Work Product	Draft pleading for Shallal litigation with attorney notes.
290		01/06/1999	Wachtell Lipton		Attorney-Client, Work Product	Draft pleading for Shallal litigation.
291		01/05/1999	Wachtell Lipton		Attorney-Client, Work Product	Draft pleading for Shallal litigation.
292		01/05/1999	Wachtell Lipton		Attorney-Client, Work Product	Draft pleading for Shallal litigation.
293		01/05/1999	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Draft pleading for Shallal litigation with R. Silverberg's handwritten notes.
294		01/05/1999	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Draft pleading for Shallal litigation with R. Silverberg's handwritten notes.
295		12/28/1998	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Draft pleading for Shallal litigation with R. Silverberg's handwritten notes.
296		12/28/1998	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Draft pleading for Shallal litigation with R. Silverberg's handwritten notes.
297		00/00/0000	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Attorney notes re Shallal litigation.
298		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Draft motion for Shallal litigation with R. Silverberg's handwritten notes.
299		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Draft motion for Shallal litigation with R. Silverberg's handwritten notes.
300		01/25/1999	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Notes re Shallal case.
301		00/00/0000	Deborah Paul, Esq.		Attorney-Client	Draft materials for Coleman Board of Directors meeting with attorney's handwritten notes prepared for the purpose of providing legal advice.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
302		00/00/0000	Frank Miller, Esq.		Attorney-Client	Notes re CLN Holdings, Inc. Form 8-K dated 2/27/1998 prepared for the purpose of providing legal advice.
303		02/27/1998	Coleman Company, Inc.	Frank Miller, Esq.	Attorney-Client	Materials re merger agreement disclosure schedules prepared for the purpose of providing legal advice.
304		00/00/0000	Frank Miller, Esq.		Attorney-Client	Notes re Coleman Worldwide Corp. Form 8-K dated 2/27/1998 prepared for the purpose of providing legal advice.
305		00/00/0000	Frank Miller, Esq.		Attorney-Client	Notes re Coleman Company, Inc. Form 8-K dated 2/27/1998 prepared for the purpose of providing legal advice.
306		00/00/0000	Susan Powell, Esq.		Attorney-Client, Work Product	Draft employment agreement for J. Levin with S. Powell's handwritten notes prepared in connection with providing legal advice and anticipated litigation.
307		07/09/1998	Frank Miller, Esq.	Adam O. Emmerich, Esq., Paul Rowe, Esq., Rachelle Silverberg, Esq., Alexander Shaknes, Esq.	Attorney-Client, Work Product	E-mail re draft settlement agreement.
307	A	07/09/1998	Joram Salig, Esq.	Frank Miller, Esq.	Attorney-Client, Work Product	Facsimile re draft settlement agreement.
308		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Notes re Sunbeam / Coleman (Parent) settlement.
309		07/31/1998	Michael Katzke, Esq.		Attorney-Client, Work Product	Memorandum re Sunbeam employment agreements with M. Katzke's handwritten notes prepared in connection with providing legal advice and anticipated litigation.
310		08/07/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement prepared in connection with providing legal advice and anticipated litigation.
311		08/10/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft Sunbeam employment agreement with S. Powell's handwritten notes prepared in connection with providing legal advice and anticipated litigation.
312		07/31/1998	William Nesbitt	Adam O. Emmerich, Esq., Michael Schwartz, Esq.	Attorney-Client, Work Product	Correspondence re warrants and attached documents prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.
312	A	00/00/0000	William Nesbitt		Attorney-Client, Work Product	Excerpt of Schedule 14A with handwritten notes re warrants prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.
313		03/02/1998	Steven Isko, Esq.	Michael Katzke, Esq.	Attorney-Client	Memorandum re Coleman stock options information prepared for the purpose of providing legal advice.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
314		12/17/1998	Norman Ginstling, Esq.		Attorney-Client, Work Product	Memorandum re tax issues prepared in connection with Sunbeam/Coleman (Parent) settlement.
315		00/00/0000	Norman J. Ginstling, Esq.		Attorney-Client, Work Product	Excerpt of merger agreement with N. Ginstling's handwritten notes prepared in connection with Sunbeam/Coleman (Parent) settlement.
315	A	00/00/0000	Norman J. Ginstling, Esq.		Attorney-Client, Work Product	Excerpt of Sunbeam / Coleman (Parent) settlement agreement with N. Ginstling's handwritten notes.
316		00/00/0000	Norman Ginstling, Esq.		Attorney-Client, Work Product	Draft legal opinion re tax issues prepared in connection with Sunbeam/Coleman (Parent) settlement.
317		09/06/1998	Norman Ginstling, Esq.	Barry F. Schwartz, Esq., Irwin Engelman	Attorney-Client, Work Product	Fax re attached document prepared in connection with Sunbeam/Coleman (Parent) settlement.
317	A	00/00/0000	Norman Ginstling, Esq.		Attorney-Client, Work Product	Draft analysis re tax issues prepared in connection with Sunbeam/Coleman (Parent) settlement.
318		09/06/1998	Norman Ginstling, Esq.	Barry F. Schwartz, Esq., Irwin Engelman	Attorney-Client, Work Product	Fax re attached document prepared in connection with Sunbeam/Coleman (Parent) settlement.
318	A	00/00/0000	Norman Ginstling, Esq.		Attorney-Client, Work Product	Draft memorandum re tax issues prepared in connection with Sunbeam/Coleman (Parent) settlement.
318	B	00/00/0000	Norman Ginstling, Esq.		Attorney-Client, Work Product	Draft agreement re tax issues prepared in connection with Sunbeam/Coleman (Parent) settlement.
319		00/00/0000	Paul Rowe, Esq.		Attorney-Client, Work Product	Notes re potential claims arising from Sunbeam's acquisition.
320		00/00/0000	Paul Rowe, Esq.		Attorney-Client, Work Product	Handwritten notes re potential claims arising from Sunbeam's acquisition.
321		00/00/0000	Paul Rowe, Esq.		Attorney-Client, Work Product	Handwritten notes re potential claims arising from Sunbeam's acquisition.
322		00/00/0000	Paul Rowe, Esq.		Attorney-Client, Work Product	Handwritten notes re potential claims arising from Sunbeam's acquisition.
323		07/21/1998	Adam O. Emmerich, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., James Maher, William Nesbitt	Attorney-Client, Work Product	Memorandum re attached draft document.
323	A	07/21/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft letter to Sunbeam re claims arising out of Sunbeam acquisition.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
324		07/22/1998	Barry F. Schwartz, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Correspondence re attached draft letter.
324	A	07/22/1998	Barry F. Schwartz, Esq.		Attorney-Client, Work Product	Draft letter to Sunbeam re claims arising out of Sunbeam acquisition.
325		07/22/1998	Barry F. Schwartz, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Correspondence re H. Gittis' 7/22/98 letter to H. Kristol prepared in connection with providing legal advice and anticipated litigation.
326		08/10/1998	Adam O. Emmerich, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., James Maher, Irwin Engelman, William Nesbitt, Todd Slotkin, Glenn Dickes, Esq., Joram Salig, Esq., Valerie Radwaner, Esq.	Attorney-Client, Work Product	Memorandum re attached draft documents.
326	A	08/10/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft settlement agreement.
326	B	08/10/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft warrant prepared in connection with Sunbeam/Coleman (Parent) settlement.
326	C	08/10/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft Amendment to Registration Rights Agreement prepared in connection with Sunbeam/Coleman (Parent) settlement.
327		07/07/1998	Paul Rowe, Esq.		Attorney-Client, Work Product	Draft settlement agreement with P. Rowe's handwritten comments.
328		08/31/1998	Joram Salig, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Correspondence re attached draft document prepared in connection with Sunbeam/Coleman (Parent) settlement.
328	A	08/31/1998	Joram Salig, Esq.		Attorney-Client, Work Product	Draft Form 4 prepared in connection with Sunbeam/Coleman (Parent) settlement.
329		02/26/1998	Anthony Ian	Frank Miller, Esq.	Attorney-Client	Memorandum re Coleman insurance issues reflecting information provided by client for purpose of obtaining legal services.
329	A	02/27/1998	Wachtell Lipton		Attorney-Client	Draft provisions re insurance issues prepared for the purpose of providing legal advice.
330		03/20/1998	Robert Fleder, Esq., Cass G. Adelman, Esq.	Joram Salig, Esq., Steven Isko, Esq., John Winkel, Lawrence Winoker, Gerry Kessel, Michael Katzke, Esq., Karen Clark, Kyle Wendt	Attorney-Client	Correspondence re attached draft document prepared for purpoises of providing legal advice.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
330	A	03/20/1998	Robert Fleder, Esq., Cass G. Adelman, Esq.		Attorney-Client	Draft agreement re employee benefit plans prepared for the purpose of providing legal advice.
331		00/00/0000	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Handwritten notes re Shallal litigation.
332		00/00/0000	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Notes re Shallal litigation.
333		00/00/0000	Steven Cohen, Esq.		Attorney-Client, Work Product	Handwritten notes re tax issues prepared in connection with Sunbeam/Coleman (Parent) settlement.
334		08/12/1998	Adam O. Emmerich, Esq., Steven Cohen, Esq., Frank Miller, Esq.	Barry F. Schwartz, Esq., Glenn Dickes, Esq., William Nesbitt, James Maher, Joram Salig, Esq.	Attorney-Client, Work Product	Memorandum re attached draft documents.
334	A	08/12/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft consent of Coleman (Parent) Board of Directors re Sunbeam settlement.
334	B	08/12/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft Coleman (Parent) Board resolution re Sunbeam settlement.
335		08/11/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft warrant.
336		07/29/1998	Paul Rowe, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product	Memorandum re attached notes.
336	A	07/29/1998	Paul Rowe, Esq.		Attorney-Client, Work Product	Handwritten notes re claims arising from Sunbeam acquisition.
337		08/12/1998	Karen Krueger, Esq.		Attorney-Client, Work Product	Draft employment agreement for G. Wisler with attorney's handwritten notes prepared in connection with providing legal advice and anticipated litigation.
338		08/12/1998	Adam O. Emmerich, Esq., Steven Cohen, Esq., Frank Miller, Esq.	Barry F. Schwartz, Esq., Glenn Dickes, Esq., William Nesbitt, James Maher, Joram Salig, Esq.	Attorney-Client, Work Product	Memorandum re attached draft document.
338	A	08/12/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft Schedule 13D Amendment prepared in connection with Sunbeam/Coleman (Parent) settlement.
339		00/00/0000	Steven Cohen, Esq.		Attorney-Client, Work Product	Excerpt of draft settlement agreement with attorney's handwritten notes.
340		08/11/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft Amendment to Registration Rights Agreement prepared in connection with Sunbeam/Coleman (Parent) settlement.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
341		07/07/1998	Adam O. Emmerich, Esq., Frank Miller, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., James Maher, William Nesbitt, Todd Slotkin, Irwin Engelman, Glenn Dickes, Esq., Joram Salig, Esq.	Attorney-Client, Work Product	Memorandum re attached draft documents.
341	A	07/07/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft warrant term sheet prepared in connection with Sunbeam/Coleman (Parent) settlement.
341	B	07/07/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft warrant.
341	C	07/07/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft settlement agreement.
341	D	07/07/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft warrant.
341	E	07/07/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft settlement agreement.
342		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for G. Wisler prepared in connection with providing legal advice and anticipated litigation.
343		08/19/1998	Susan Powell, Esq.	Joram Salig, Esq.	Attorney-Client, Work Product	Correspondence re attached draft document.
343	A	08/14/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for J. Levin prepared in connection with providing legal advice and anticipated litigation.
344		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for G. Wisler with P. Shapiro's comments prepared in connection with providing legal advice and anticipated litigation.
345		07/30/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft settlement agreement with attorney's handwritten notes.
346		08/14/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for P. Shapiro prepared in connection with providing legal advice and anticipated litigation.
347		00/00/0000	Susan Powell, Esq.		Attorney-Client, Work Product	Handwritten notes re draft Sunbeam employment agreements prepared in connection with providing legal advice and anticipated litigation.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
348		08/06/1998	Michael Katzke, Esq.	Joram Salig, Esq., Susan Powell, Esq.	Attorney-Client, Work Product	Fax re attached draft document.
348	A	08/06/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement prepared in connection with providing legal advice and anticipated litigation.
349		08/12/1998	Adam O. Emmerich, Esq., Steven Cohen, Esq., Frank Miller, Esq.	Barry F. Schwartz, Esq., Glenn Dickes, Esq., William Nesbitt, James Maher, Joram Salig, Esq.	Attorney-Client, Work Product	Memorandum re attached draft document.
349	A	08/12/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft warrant term sheet prepared in connection with Sunbeam/Coleman (Parent) settlement.
350		02/18/1999	Glenn Dickes, Esq.	Todd Slotkin	Attorney-Client, Work Product	Memorandum re attached draft document.
350	A	02/18/1999	Glenn Dickes, Esq.		Attorney-Client, Work Product	Draft confidentiality agreement re Sunbeam prepared in connection with providing legal advice and pending litigation.
351		03/16/1998	Barry F. Schwartz, Esq.	James Conroy, Esq.	Attorney-Client, Work Product	Memorandum re attached draft document prepared in anticipation of litigation relating to SEC/NYSE inquiry.
351	A	03/16/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft response to SEC and NYSE requests for information prepared in anticipation of litigation relating to inquiry.
352		06/15/1998	Wachtell Lipton		Attorney-Client, Work Product	Excerpt of draft Schedule 13D with J. Conroy's handwritten notes prepared in connection with providing legal advice and anticipated litigation.
353		01/25/1999	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Notes re Coleman shareholder litigation.
354		00/00/0000	Paul Rowe, Esq.		Attorney-Client, Work Product	Draft analysis re Sunbeam acquisition prepared in connection with providing legal advice and anticipated litigation.
355		03/17/1998	Wachtell Lipton		Attorney-Client	Draft Section 14(f) notice prepared for the purpose of providing legal advice.
356		07/23/1998	William Nesbitt	Ronald Perelman	Attorney-Client, Work Product	Draft analysis re Sunbeam acquisition prepared in connection with potential litigation re same.
357		04/16/1998	Adam O. Emmerich, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., Paul Shapiro, Esq.	Attorney-Client	Memorandum re attached draft document.
357	A	04/16/1998	Wachtell Lipton		Attorney-Client	Draft memorandum re Coleman employee benefits issues prepared in connection with providing legal advice.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
358		03/24/1998	Gary Leshko	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Letter re attached document.
358	A	00/00/0000	Litigation Counsel to CLN Holdings		Attorney-Client, Work Product	Response to request for information re pending CLN Holdings litigation.
359		00/00/0000	Adam O. Emmerich, Esq.		Attorney-Client	Draft merger agreement with A. Emmerich's handwritten notes prepared for the purpose of providing legal advice.
360		00/00/0000	Wachtell Lipton		Attorney-Client	Summary re merger agreement issues prepared for the purpose of providing legal advice.
360	A	02/24/1998	Adam O. Emmerich, Esq.	Steven Cohen, Esq., Frank Miller, Esq., David Elnhorn, Esq. (cc), Michael Katzke, Esq. (cc)	Attorney-Client	E-mail re draft merger agreement prepared for the purpose of providing legal advice.
361		02/24/1998	Michael Katzke, Esq.	Steven Cohen, Esq., Adam O. Emmerich, Esq. (cc), Frank Miller, Esq. (cc)	Attorney-Client	E-mail re employee benefit issues in merger agreement prepared for the purpose of providing legal advice.
362		03/03/1998	Lenny Ajzenman	Sarah Strasser, Esq.	Attorney-Client	Portion of draft Hart-Scott-Rodino filing with client's handwritten notes provided for purpose of obtaining legal services.
363		00/00/0000	Deborah Paul, Esq.		Attorney-Client	Draft merger agreement disclosure schedules with D. Paul's handwritten notes prepared for the purpose of providing legal advice.
364		02/27/1998	Deborah Paul, Esq.		Attorney-Client	Excerpt of draft merger agreement with attorney's handwritten notes re tax issues prepared for the purpose of providing legal advice.
365		02/27/1998	Deborah Paul, Esq.	Norman Gintsling, Esq., Marvin Shaffer	Attorney-Client	Correspondence re attached draft document prepared for the purpose of providing legal advice.
365	A	02/27/1998	Deborah Paul, Esq.		Attorney-Client	Draft section of merger agreement with attorney's handwritten notes prepared for the purpose of providing legal advice.
366		02/27/1998	Deborah Paul, Esq.	Norman Gintsling, Esq.	Attorney-Client	Draft section of merger agreement prepared for the purpose of providing legal advice.
367		02/24/1998	Steven Isko, Esq.	Michael Katzke, Esq.	Attorney-Client	Materials re employee benefit issues provided for purpose of obtaining legal services.
368		02/24/1998	Steven Isko, Esq.	Michael Katzke, Esq.	Attorney-Client	Materials re employee benefit issues provided for purpose of obtaining legal services.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
369		02/26/1998	Wachtell Lipton		Attorney-Client	Draft Coleman severance policy prepared for the purpose of providing legal advice.
370		06/10/1998	Michael Katzke, Esq.	Karen Krueger, Esq.	Attorney-Client, Work Product	Memorandum re attached draft document with M. Katzke's handwritten notes prepared in connection with providing legal advice and anticipated litigation.
370	A	06/10/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment termination agreement with M. Katzke's handwritten notes prepared in connection with providing legal advice and anticipated litigation.
371		03/05/1998	Ilene K. Gotts, Esq., Sarah Strasser, Esq.	Steven Isko, Esq., Karen Clark	Attorney-Client	Memorandum re foreign antitrust issues prepared for the purpose of providing legal advice.
373		08/10/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft resolution re employment terms prepared in connection with providing legal advice and anticipated litigation.
374		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for J. Levin prepared in connection with providing legal advice and anticipated litigation.
375		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for P. Shapiro prepared in connection with providing legal advice and anticipated litigation.
376		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for B. Jenkins prepared in connection with providing legal advice and anticipated litigation.
377		08/12/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for G. Wisler prepared in connection with providing legal advice and anticipated litigation.
378		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for F. Feraco prepared in connection with providing legal advice and anticipated litigation.
379		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for K. Clark prepared in connection with providing legal advice and anticipated litigation.
380		08/12/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for F. Feraco prepared in connection with providing legal advice and anticipated litigation.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
381		08/12/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for K. Clark prepared in connection with providing legal advice and anticipated litigation.
382		05/17/1999	Wachtell Lipton	Rachelle Silverberg, Esq.	Attorney-Client, Work Product	Draft pleading for Coleman shareholder litigation with R. Silverberg's notes.
383		02/00/1999	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Notes re 2/27/98 Coleman Co., Inc. board meeting prepared in connection with providing legal advice and pending litigation.
384		05/26/1999	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Draft pleading for Coleman shareholder litigation with R. Silverberg's notes.
385		01/26/1999	Colleen Schmidt	Eric Golden, Esq.	Work Product	Memorandum re shareholder litigation.
386		01/19/2000	Eric Golden, Esq.	Barry F. Schwartz, Esq.	Work Product, Attorney-Client	Fax re attached document prepared in connection with providing legal advice and pending litigation (Redacted from CP 044434).
387		11/18/1998	Barry F. Schwartz, Esq.	Eric Golden, Esq.	Work Product, Attorney-Client	Note re attached document prepared in connection with providing legal advice and pending litigation (Redacted from CP 044435).
388		11/13/1998	Eric Golden, Esq.	Colleen Schmidt	Work Product, Attorney-Client	Notes re attached document prepared in connection with providing legal advice and pending litigation (Redacted from CP 044448).
389		11/02/1998	Barry F. Schwartz, Esq.	Ronald Perelman, Howard Gittis, Esq., James Maher, Irwin Engelman, Todd Slotkin, William Nesbitt	Attorney-Client, Work Product	Memorandum re attached document prepared in connection with providing legal advice and pending litigation(Redacted from CP 044451).
390		11/13/1998	Robert Saunders, Esq.	Janet Kelley, Esq., Barry F. Schwartz, Esq., Eric Golden, Esq., Michael Schwartz, Esq., Thomas Allingham II, Esq. (cc), Timothy Reynolds (cc), Robert Zimet (cc), Kevin Maloy, Esq. (cc)	Attorney-Client, Work Product, Common Interest	Correspondence re attached document.
390	A	11/13/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Summary of shareholder litigation status.
391		12/22/1998	Megan McIntyre, Esq.	Thomas Allingham II, Esq., Michael Schwartz, Esq., Rachelle Silverberg, Esq., Eric Golden, Esq.	Attorney-Client, Work Product, Common Interest	Letter re attached draft document.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
391	A	12/22/1998	Grant & Eisenhofer		Attorney-Client, Work Product, Common Interest	Draft motion for Joerger litigation.
392		10/21/1998	Janet Kelley, Esq.	Barry F. Schwartz, Esq., Paul Shapiro, Esq. (cc), Thomas Allingham II, Esq. (cc)	Attorney-Client, Work Product, Common Interest	Correspondence re Shallal litigation.
393		12/23/1998	Beth Jacobwitz, Esq.	Thomas Allingham II, Esq., Michael Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Correspondence re attached draft document.
393	A	12/23/1998	Beth Jacobwitz, Esq.		Attorney-Client, Work Product, Common Interest	Draft motion re Shallal litigation.
394		02/23/1998	Wachtell Lipton		Attorney-Client	Draft summary of proposed Sunbeam acquisition terms prepared for the purpose of providing legal advice.
395		11/10/1998	Glenn Dickes, Esq.	Todd Slotkin	Attorney-Client, Work Product	Correspondence re credit agreement prepared in connection with providing legal advice and pending litigation.
396		11/10/1998	Glenn Dickes, Esq.	Todd Slotkin	Attorney-Client, Work Product	Correspondence re credit agreement prepared in connection with providing legal advice and pending litigation.
397		00/00/0000	Michael Katzke, Esq.		Attorney-Client	Handwritten notes re Sunbeam's 401(K) and Profit Sharing plans prepared for the purpose of providing legal advice (Redacted from CP 12664-12672 and CP 27957-27965).
398		03/09/1998	Sarah Strasser, Esq.		Attorney-Client	Memorandum re foreign antitrust filings with S. Strasser's handwritten notes prepared for the purpose of providing legal advice.
398	A	03/09/1998	Coleman Company Inc.'s German Sales Office		Attorney-Client	Summary of foreign competition issues related to Sunbeam acquisition with S. Strasser's notes prepared for the purpose of providing legal advice.
398	B	00/00/0000	Sarah Strasser, Esq.		Attorney-Client	Handwritten notes re foreign competition filings prepared for the purpose of providing legal advice.
399		00/00/0000	Frank Miller, Esq.		Attorney-Client, Work Product	Notes re Sunbeam / Coleman (Parent) settlement issues prepared in connection with Sunbeam/Coleman (Parent) settlement.
400		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Analysis re Sunbeam acquisition issues prepared in connection with Coleman Shareholder litigation.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
401		02/26/1998	Adam O. Emmerich, Esq.		Attorney-Client	Draft letter re Sunbeam acquisition with attorney's handwritten notes prepared for the purpose of providing legal advice.
402		00/00/0000	Jenner & Block		Attorney-Client, Work Product	Notes re discovery response (Redacted from CP 030352).
403		08/27/1999	Steven Daniels, Esq.	Adam O. Emmerich, Esq., Michael Schwartz, Esq.	Attorney-Client, Work Product	Memorandum re attached draft document prepared in connection with providing legal advice and pending litigation.
403	A	08/27/1999	Skadden Arps		Attorney-Client, Work Product	Draft amendment to Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
404		01/31/1999	Irwin H. Warren, Esq.	Robert Saunders, Esq., Kevin Maloy, Esq., Rachelle Silverberg, Esq.	Attorney-Client, Work Product, Common Interest	Correspondence re attached draft document.
404	A	01/31/1999	Robert Saunders, Esq.		Attorney-Client, Work Product, Common Interest	Draft pleading for Shallal litigation with I. Warren's handwritten notes.
405		02/01/1999	Kevin Maloy, Esq.	Beth Jacobwitz, Esq., Tim Greensfelder, Esq., Rachelle Silverberg, Esq.	Attorney-Client, Work Product, Common Interest	Correspondence re attached draft documents.
405	A	02/01/1999	Robert Saunders, Esq.		Attorney-Client, Work Product, Common Interest	Draft memorandum re pleading for Shallal litigation with R. Silverberg's handwritten notes.
406		01/31/1999	Robert Saunders, Esq.	Beth Jacobwitz, Esq., Tim Greensfelder, Esq., Rachelle Silverberg, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re attached draft document.
406	A	01/31/1999	Robert Saunders, Esq.		Attorney-Client, Work Product, Common Interest	Draft pleading for Shallal litigation with R. Silverberg's handwritten notes.
407		12/22/1998	Richard Berman, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product, Common Interest	Draft affidavit for Shallal litigation.
408		01/06/1999	Beth Jacobwitz, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product, Common Interest	Correspondence re attached draft documents.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
408	A	01/06/1999	Weil Gotshal		Attorney-Client, Work Product, Common Interest	Draft pleading for Shallal litigation.
408	B	01/06/1999	Weil Gotshal		Attorney-Client, Work Product, Common Interest	Draft pleading for Shallal litigation.
409		12/23/1998	Wachtell Lipton	Beth Jacobwitz, Esq.	Attorney-Client, Work Product, Common Interest	Draft motion re Shallal litigation.
410		00/00/0000	Skadden Arps		Work Product, Common Interest	Report re pending litigation.
411		11/04/1998	Michael Schwartz, Esq.	Adam O. Emmerich, Esq., Rachelle Silverberg, Esq., Frank Miller, Esq.	Attorney-Client, Work Product	Memorandum re attached document.
411	A	10/29/1998	Thomas Allingham II, Esq., Robert Saunders, Esq., Kevin M. Maloy, Esq.	Janet Kelley, Esq., Barry F. Schwartz, Esq., Paul Shapiro, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re pending litigation.
412		02/26/1998	Adam O. Emmerich, Esq.		Attorney-Client	Letter re Sunbeam acquisition with attorney's notes prepared for the purpose of providing legal advice.
413		05/25/1998	Adam O. Emmerich, Esq., Michael Katzke, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq.	Attorney-Client, Work Product	Memorandum re Sunbeam prepared in connection with providing legal advice and anticipated litigation.
414		00/00/0000	Eric Golden, Esq.		Work Product	Notes re Ulfsson complaint. (Redacted form as CP 31013-31022).
415		05/25/1998	Adam O. Emmerich, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq.	Attorney-Client, Work Product	Memorandum re attached document prepared in connection with providing legal advice and anticipated litigation.
415	A	05/25/1998	Wachtell Lipton		Attorney-Client, Work Product	Memorandum re Sunbeam prepared in connection with providing legal advice and anticipated litigation.
416		00/00/0000	Larry Winoker		Attorney-Client, Work Product	Handwritten notes re article prepared in connection with preparation of Doc. No. 417 and at direction of counsel.
417		06/09/1998	William Nesbitt	Ronald Perelman, Donald Drapkin, Esq. (cc), Howard Gittis, Esq. (cc), Jerry Levin (cc), James Maher (cc), Barry F. Schwartz, Esq. (cc)	Attorney-Client, Work Product	Draft memorandum re article prepared at request of B. Schwartz, Esq. prepared in connection with providing legal advice and anticipated litigation.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
418		00/00/0000	Larry Winoker		Attorney-Client, Work Product	Handwritten notes re Sunbeam Form 10-Q for period ending 3/31/1998 prepared in connection with preparation of Doc. No. 419 and at direction of counsel.
419		00/00/0000	Eric Golden, Esq.		Work Product	Notes re Mintz complaint (Redacted from CP 039608-039652, CP 030969-031012).
420		03/11/1998	Steven Isko, Esq.	Barry F. Schwartz, Esq., Joram Salig, Esq., Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Correspondence re NYSE request for information prepared in anticipation of litigation relating to inquiry.
421		02/24/1998	William Nesbitt	Adam O. Emmerich, Esq.	Attorney-Client	Memorandum re attached document.
421	A	02/24/1998	William Nesbitt		Attorney-Client	Analysis of Sunbeam proposal prepared for the purpose of obtaining legal advice.
422		00/00/0000	Alexander Shaknes, Esq.		Attorney-Client, Work Product	Notes on draft Sunbeam submission to SEC prepared in anticipation of litigation relating to inquiry.
423		04/28/1998	Glenn Dickes, Esq.	Frank Miller, Esq., Joram Salig, Esq. (cc), Barry F. Schwartz, Esq. (cc)	Attorney-Client	Correspondence re Sunbeam letter re employee benefits prepared in connection with providing legal advice.
424		03/04/1998	Adam O. Emmerich, Esq., Michael Katzke, Esq.		Attorney-Client	Draft memorandum re applicability of federal securities laws.
425		03/05/1998	Michael Katzke, Esq.	Barry F. Schwartz, Esq., Steven Isko, Esq., Adam O. Emmerich, Esq. (cc)	Attorney-Client	Memorandum re applicability of federal securities laws.
426		10/28/1998	Barry F. Schwartz, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Correspondence re Coleman shareholder litigation.
427		05/17/1999	Thomas Allingham II, Esq., Robert Saunders, Esq., Kevin M. Maloy, Esq.	Janet Kelley, Esq., Steven Isko, Esq., Paul Shapiro, Esq., Barry F. Schwartz, Esq., Eric Golden, Esq., Michael Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re attached draft document.
427	A	05/17/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft pleading for Coleman shareholder litigation.
428		07/30/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft pleading for Coleman shareholder litigation.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
429		06/23/1999	Robert Saunders, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product, Common Interest	E-mail re draft pleading for Coleman shareholder litigation.
430		02/09/1999	Kevin M. Maloy, Esq.	Rachelle Silverberg, Esq.	Work Product, Common Interest	Fax re Coleman shareholder litigation.
430	A	00/00/0000	Skadden Arps		Work Product, Common Interest	Proposed document redactions for document production in Coleman shareholder litigation.
431		11/02/1999	Thomas Allingham II, Esq.	Michael Schwartz, Esq., Paul Shapiro, Esq., Steven Isko, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached draft letter.
431	A	11/02/1999	Thomas Allingham II, Esq.		Work Product, Common Interest	Draft letter to Court in Coleman shareholder litigation.
432		01/12/1999	Robert Saunders, Esq.	Michael Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached document.
432	A	01/12/1999	Robert Saunders, Esq.	Michael Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Report re pending litigation.
433		10/27/1998	Barry F. Schwartz, Esq., William Nesbitt		Attorney-Client, Work Product	Letter re Coleman shareholder litigation with B. Schwartz' and W. Nesbitt's handwritten notes.
434		04/00/1998	William Nesbitt		Attorney-Client	Notes re Sunbeam 1998 proxy materials prepared at the request of B. Schwartz, Esq. prepared in connection with providing legal advice.
434	A	04/29/1998	Barry F. Schwartz, Esq., Esq.	William Nesbitt	Attorney-Client	Memorandum re attached Sunbeam proxy materials prepared in connection with providing legal advice.
434	B	04/00/1998	William Nesbitt		Attorney-Client	Notes re Sunbeam's 1998 proxy statement prepared at the request of B. Schwartz, Esq. prepared in connection with providing legal advice. (Redacted from CP 041844-041860).
434	C	04/00/1998	William Nesbitt		Attorney-Client	Notes re Schedule 14A prepared at the request of B. Schwartz, Esq. prepared in connection with providing legal advice. (Redacted from CP 041861-041906).
435		00/00/0000	William Nesbitt		Attorney-Client, Work Product	Notes re Sunbeam stock options prepared at the request of B. Schwartz, Esq. in connection with potential litigation.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
436		00/00/0000	Rachelle Silverberg, Esq.		Work Product	Notes re Morgan Stanley materials prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 016766).
437		00/00/0000	Rachelle Silverberg, Esq.		Work Product	Notes re witness interview prepared in connection with response to SEC and NYSE's request for information prepared in anticipation of litigation relating to inquiry. (Redacted from CPH2011532).
438		00/00/0000	Paul Rowe, Esq.		Attorney-Client, Work Product	Handwritten notes re potential claims arising from Sunbeam's acquisition.
438	A	00/00/0000	William Nesbitt, Paul Rowe, Esq.		Attorney-Client, Work Product	Notes re Sunbeam transaction prepared in anticipation of litigation and at the direction of counsel with P. Rowe's handwritten notes.
439		03/29/1999	Eric Golden, Esq.	Michael Schwartz, Esq.	Attorney-Client, Work Product	Fax re Krim litigation.
440		04/19/1999	Eric Golden, Esq.	Michael Schwartz, Esq.	Attorney-Client, Work Product	Fax re Krim litigation.
441		11/02/1999	Eric Golden, Esq.	Barry F. Schwartz, Esq.	Attorney-Client, Work Product	Draft letter to court re Coleman shareholder litigation with E. Golden notes.
442		06/30/1998	Barry F. Schwartz, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Fax re attached document.
442	A	06/25/1998	Stacy J. Kanter	Michele Gartland, Esq., Leander Gray, Esq., Rosa Testani, Esq. (cc)	Attorney-Client, Work Product	Memorandum re LYONs issues with attorney's notes prepared in connection with providing legal advice and anticipated litigation.
442	B	06/25/1998	Rosa Testani, Esq.	Barry F. Schwartz, Esq., Glenn Dickes, Esq.	Attorney-Client, Work Product	Fax re attached document.
443		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Draft Sunbeam response to SEC and NYSE requests for information with attorney's handwritten notes prepared in anticipation of litigation relating to inquiry.
444		05/13/1999	Steven Daniels, Esq.	Paul Shapiro, Esq., Janet Kelley, Esq., Barry F. Schwartz, Esq., Steven Isko, Esq., Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Memorandum re attached draft document prepared in connection with providing legal advice and pending litigation.
444	A	05/00/1999	Adam O. Emmerich, Esq.		Attorney-Client, Work Product	Excerpt of draft Sunbeam Form S-4 with A. Emmerich's handwritten notes prepared in connection with providing legal advice and pending litigation.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
445		11/00/1999	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Excerpt of draft Sunbeam Form S-4 with R. Silverberg's handwritten notes prepared in connection with providing legal advice and pending litigation.
446		00/00/0000	Ilene K. Gotts, Esq.		Attorney-Client	Draft Sunbeam Form S-4 with I. Gott's handwritten comments prepared for the purpose of providing legal advice.
447		11/05/1999	Steven Isko, Esq.	Barry F. Schwartz, Esq., Adam O. Emmerich, Esq., Blaine Fogg, Esq., Richard Easton, Esq.	Attorney-Client, Work Product	Fax re attached document prepared in connection with providing legal advice and pending litigation.
447	A	11/00/1999	Steven Isko, Esq., Paul Shapiro, Esq.		Attorney-Client, Work Product	Section of draft Sunbeam Form S-4 with attorney's notes prepared in connection with providing legal advice and pending litigation.
448		11/04/1999	Rachelle Silverberg, Esq.	Steven Isko, Esq.	Attorney-Client, Work Product	Memorandum enclosing section of draft Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
448	A	10/18/1999	Wachtell Lipton		Attorney-Client, Work Product	Section of draft Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
449		10/06/1999	Steven Daniels, Esq.	Steven Isko, Esq., Paul Shapiro, Esq., Karen Clark, Esq., Blaine Fogg, Esq., Michael Schwartz, Esq., Steve Thibault, Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Memorandum re section of draft Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
449	A	10/00/1999	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Section of draft Sunbeam Form S-4 with R. Silverberg's handwritten notes prepared in connection with providing legal advice and pending litigation.
450		07/00/1998	Adam O. Emmerich, Esq.		Attorney-Client, Work Product	Draft Amendment to Credit Agreement with A. Emmerich's handwritten notes prepared in connection with providing legal advice and anticipated litigation.
451		06/29/1998	Adam O. Emmerich, Esq.		Attorney-Client, Work Product	Draft amendment to credit agreement with A. Emmerich's handwritten notes prepared in connection with providing legal advice and anticipated litigation.
455		03/27/1998	Adrian Deitz, Esq.	Adam O. Emmerich, Esq., Steven Cohen, Esq., Frank Miller, Esq.	Attorney-Client, Common Interest	Correspondence re attached draft document prepared for the purpose of providing legal advice.
455	A	03/27/1998	Skadden Arps		Attorney-Client, Common Interest	Draft CLN Holdings Officer's Certificate prepared for the purpose of providing legal advice.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
456		07/29/1998	Paul Rowe, Esq.		Attorney-Client, Work Product	Handwritten notes re potential claims against Sunbeam.
457		08/12/1998	Steven Cohen, Esq.		Attorney-Client, Work Product	Draft press release re Sunbeam settlement with S. Cohen's notes.
457	A	08/12/1998	Steven Cohen, Esq.		Attorney-Client, Work Product	Draft letter to Sunbeam's shareholders re Sunbeam settlement with S. Cohen's handwritten notes.
458		08/15/1998	Rita W. Gordon, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached document.
458	A	04/14/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft response to SEC's requests for information prepared in anticipation of litigation relating to inquiry.
459		04/17/1998	Frank Miller, Esq.	Richard Easton, Esq., Rita W. Gordon, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re attached draft document.
459	A	00/00/0000	Wachtell Lipton		Attorney-Client, Work Product, Common Interest	Draft response to SEC's requests for information with attorney's notes prepared in anticipation of litigation relating to inquiry.
460		04/16/1998	Rita W. Gordon, Esq.	Frank Miller, Esq., Adam O. Emmerich, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached document.
460	A	04/16/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft response to SEC's requests for information prepared in anticipation of litigation relating to inquiry.
461		03/06/1998	Wachtell Lipton	Ilene K. Gotts, Esq.	Attorney-Client	Fax re attached document prepared for the purpose of providing legal advice.
461	A	03/06/1998	Ioannis Zervas, Esq.	Ilene K. Gotts, Esq.	Attorney-Client, Common Interest	Fax re attached document prepared for the purpose of providing legal advice.
461	B	00/00/0000	Skadden Arps		Attorney-Client, Common Interest	Draft European pre-merger notification prepared for the purpose of providing legal advice.
461	C	03/13/1996	Skadden Arps		Attorney-Client, Common Interest	Draft European pre-merger notification prepared for the purpose of providing legal advice.
461	D	03/04/1996	Skadden Arps		Attorney-Client, Common Interest	Draft European pre-merger notification prepared for the purpose of providing legal advice.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
461	E	03/12/1996	Skadden Arps		Attorney-Client, Common Interest	Draft European pre-merger notification prepared for the purpose of providing legal advice.
462		11/17/1999	Blaine Fogg, Esq.	Thomas Allingham II, Esq., Richard Easton, Esq., Tom Balliett, Adam O. Emmerich, Esq., Steven Isko, Esq., Barry F. Schwartz, Esq., Paul Shapiro, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re attached document.
462	A	11/17/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Excerpts of draft Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
463		11/15/1999	Blaine Fogg, Esq.	Thomas Allingham II, Esq., Richard Easton, Esq., Adam O. Emmerich, Esq., Steven Isko, Esq., Barry F. Schwartz, Esq., Paul Shapiro, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re attached document.
463	A	11/15/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Excerpts of draft Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
464		11/12/1999	Steven Isko, Esq.	Richard Easton, Esq., Thomas Allingham II, Esq., Adam O. Emmerich, Esq., Barry F. Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached document.
464	A	00/00/0000	Paul Shapiro, Esq.		Attorney-Client, Work Product, Common Interest	Excerpt of draft Sunbeam Form S-4 with P. Shapiro's comments prepared in connection with providing legal advice and pending litigation.
465		11/12/1999	Blaine Fogg, Esq.	Richard Easton, Esq., Thomas Allingham II, Esq., Adrian Deitz, Esq., Steven Isko, Esq., Barry F. Schwartz, Esq., Paul Shapiro, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached document.
465	A	11/12/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Excerpt of draft Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
466		11/05/1999	Steven Isko, Esq.	Barry F. Schwartz, Esq., Adam O. Emmerich, Esq., Blaine Fogg, Esq., Richard Easton, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached document.
466	A	00/00/0000	Steven Isko, Esq.		Attorney-Client, Work Product, Common Interest	Excerpt of draft Sunbeam Form S-4 with attorney's notes prepared in connection with providing legal advice and pending litigation.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
467		11/05/1999	Blaine Fogg, Esq.	Richard Easton, Esq., Adam O. Emmerich, Esq., Steven Isko, Esq., Barry F. Schwartz, Esq., Paul Shapiro, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re attached draft document.
467	A	11/00/1999	Blaine Fogg, Esq.		Attorney-Client, Work Product, Common Interest	Excerpt of draft Sunbeam Form S-4 with attorney's notes prepared in connection with providing legal advice and pending litigation.
468		11/19/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft letter to SEC re Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
469		10/06/1999	Steven Daniels, Esq.	Blaine Fogg, Esq. (cc), Richard Easton, Esq. (cc), Paul Shapiro, Esq., Karen Clark, Esq., Steven Isko, Esq., Adam O. Emmerich, Esq., Michael Schwartz, Esq., Steve Thibault, Allison Amorison, Esq., Matthew Greenberg, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re attached draft document.
469	A	10/06/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Excerpt of draft Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
470		01/27/1999	Robert Saunders, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached document.
470	A	01/27/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Excerpt of draft Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
471		03/07/1998	Sarah Strasser, Esq.	Iaonnis Zervas, Esq.	Attorney-Client, Common Interest	Fax re attached draft document prepared for the purpose of providing legal advice.
471	A	03/06/1998	Sarah Strasser, Esq.		Attorney-Client, Common Interest	Draft European pre-merger notification containing S. Strasser notes prepared for the purpose of providing legal advice.
472		05/12/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft response to SEC comments on draft Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
474		04/17/1998	Frank Miller, Esq.	Richard Easton, Esq., Allison Amorison, Esq., Steven Daniels, Esq.	Attorney-Client, Common Interest	Memorandum re attached draft document.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
474	A	04/07/1998	Wachtell Lipton		Attorney-Client, Common Interest	Draft Sunbeam Form S-4 with attorney's notes prepared in connection with providing legal advice.
475		05/07/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft Sunbeam Form S-4 amendment prepared in connection with providing legal advice and pending litigation.
476		05/10/1999	Steven Daniels, Esq.	Adam O. Emmerich, Esq., Michael Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re Sunbeam Form S-4 amendment prepared in connection with providing legal advice and pending litigation.
476	A	05/10/1999	Allison Amorison, Esq., Steven Daniels, Esq., Matthew Greenberg, Esq.	Paul Shapiro, Esq., Janet Kelley, Esq., Bobby Jenkins, Karen Clark, Esq., John Frederick, Barry F. Schwartz, Esq., Steven Isko, Esq., Blaine Fogg, Esq., Richard Easton, Esq., Mitchell Solomon, Esq., Joseph Halliday, Larry Frishman, Esq., Robert Zimet, Esq., Thomas Allingham, Esq., Matthew Knopf, Esq., William Weiss, Esq., Thomas Gowan, Esq., Robert Saunders, Esq., Prabhat Mehta, Esq., Christopher Malloy, Esq., Kevin Maloy, Esq., Jeffrey Laska, Esq., Steve Thibault, Noel Spiegal, Adam O. Emmerich, Esq., Steven Cohen, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re attached draft document.
477		05/05/1999	Matthew Greenberg, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached draft document.
477	A	05/04/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Section of draft Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
478		03/20/1998	Ionnis Zervas, Esq.	Ilene K. Gotts, Esq., Michael Jahnke, Esq.	Attorney-Client, Common Interest	Fax re attached document prepared for the purpose of providing legal advice.
478	A	03/20/1998	Ionnis Zervas, Esq.	Janet Kelley, Esq., Allison Amorison, Esq., Michael Jahnke, Esq., Steven Isko, Esq., Robert Rozenzweig, Barry Hawk (cc), Henry Huser (cc), Joe Nisa (cc)	Attorney-Client, Common Interest	Memorandum re European antitrust issues prepared for the purpose of providing legal advice.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
479		03/03/1998	Ionnis Zervas, Esq.	Sarah Strasser, Esq.	Attorney-Client, Common Interest	Fax re attached documents prepared for the purpose of providing legal advice.
479	A	03/03/1998	Henry Huser, Esq., Ioannis Zervas, Esq.	Richard Easton, Esq. (cc), Joe Nisa (cc), Sarah Strasser, Esq.	Attorney-Client, Common Interest	Memorandum re European antitrust issues prepared for the purpose of providing legal advice.
479	B	03/03/1998	Skadden Arps		Attorney-Client, Common Interest	Outline re European antitrust opinion prepared for the purpose of providing legal advice.
480		03/06/1998	Ioannis Zervas, Esq.	Ilene K. Gotts, Esq., Sarah Strasser, Esq.	Attorney-Client, Common Interest	Fax re attached documents prepared for the purpose of providing legal advice.
480	A	03/29/1998	Skadden Arps		Attorney-Client, Common Interest	Outline of draft French submission prepared for the purpose of providing legal advice.
480	B	03/06/1998	Henry Huser, Esq.	Steven Isko, Esq.	Attorney-Client, Common Interest	Letter re European antitrust issues prepared for the purpose of providing legal advice.
481		05/05/1999	Matthew Greenberg, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached draft document prepared in connection with providing legal advice and pending litigation.
481	A	05/04/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Excerpt of draft Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
482		05/10/1999	Steven Daniels, Esq.	Adam O. Emmerich, Esq., Michael Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re draft Subbeam Form S-4 amendment prepared in connection with providing legal advice and pending litigation.
483		08/06/1998	Thomas Allingham II, Esq.	Barry F. Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached draft document.
483	A	08/06/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Memorandum re draft agreement with former Sunbeam management prepared in connection with Sunbeam/Coleman (Parent) settlement.
484		08/30/1999	Rachelle Silverberg, Esq.	Steven Daniels, Esq., Thomas Allingham, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re attached draft document prepared in connection with providing legal advice and pending litigation.
484	A	00/00/0000	Rachelle Silverberg, Esq.		Attorney-Client, Work Product, Common Interest	Excerpt of draft Sunbeam Form S-4 with R. Silverberg's notes prepared in connection with providing legal advice and pending litigation.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
485		08/24/1999	Blaine Fogg, Esq.	Thomas Allingham, Esq., Richard Easton, Esq., Robert Saunders, Esq., Karen Clark, Esq., Bobby Jenkins, Paul Shapiro, Esq., Steven Isko, Esq., Barry F. Schwartz, Esq., Adam O. Emmerich, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re draft Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
485	A	08/24/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft response to SEC comments on draft Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
487		05/12/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
488		06/23/1998	Todd E. Freed, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached draft document prepared in connection with providing legal advice and anticipated litigation.
488	A	06/23/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft Sunbeam Form S-3 pepared in connection with providing legal advice and anticipated litigation.
489		06/19/1998	Adam O. Emmerich, Esq.	Richard Easton, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached document prepared in connection with providing legal advice and anticipated litigation.
489	A	06/19/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft insert to Sunbeam Form S-3 prepared in connection with providing legal advice and anticipated litigation.
490		06/19/1998	Blaine Fogg, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached draft document.
490	A	06/19/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft press release re Sunbeam Form S-3 prepared in connection with providing legal advice and anticipated litigation.
491		06/23/1998	Todd E. Freed, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached draft document.
491	A	06/23/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft Sunbeam Form S-3 prepared in connection with providing legal advice and anticipated litigation.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
492		06/19/1998	Todd E. Freed, Esq.	Jerry Levin, Peter Langerman, Janet Kelley, Esq., Robert Gluck, Ron Richter, Blaine Fogg, Esq., Richard Easton, Esq., Gregory Fernicola, Esq., Mitchell Solomon, Esq., Peter Neckles, Esq., Michele Gartland, Esq., Allison Amorison, Esq., William Weiss, Esq., Adrian Deitz, Esq., Steven Daniels, Esq., Matthew Greenberg, Esq., Irwin Engelman, Howard Gittis, Esq., Paul Shapiro, Esq., Donald Drapkin, Barry F. Schwartz, Esq., Glenn Dickes, Esq., Adam O. Emmerich, Esq., Michael Schwartz, Esq., Harold Novikoff, Esq., Frank Miller, Esq., Steven Cohen, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum enclosing Draft Sunbeam Form S-3 prepared in connection with providing legal advice and anticipated litigation.
492	A	06/00/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft Press Release re Sunbeam Form S-3 prepared in connection with providing legal advice and anticipated litigation.
492	B	06/22/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft Sunbeam Form S-3 prepared in connection with providing legal advice and anticipated litigation.
493		06/00/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft Sunbeam Form S-3 prepared in connection with providing legal advice and anticipated litigation.
495		04/30/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft Sunbeam Form S-4 prepared in connection with providing legal advice and anticipated litigation.
496		05/12/1999	Adam O. Emmerich, Esq.	Richard Easton, Esq., Steven Isko, Esq., Barry F. Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re attached draft document prepared in connection with providing legal advice and pending litigation.
496	A	05/11/1999	Wachtell Lipton		Attorney-Client, Work Product, Common Interest	Draft Sunbeam Form S-4 amendment with A. Emmerich's notes prepared in connection with providing legal advice and pending litigation.
497		08/18/1999	Steven Isko, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Draft response to SEC comment on Sunbeam Form S-4 prepared in connection with Sunbeam/Coleman (Parent) settlement.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
498		03/19/1998	Steven Daniels, Esq.	Frank Miller, Esq.	Attorney-Client, Common Interest	Correspondence re attached draft document prepared for the purpose of providing legal advice.
498	A	03/19/1998	Skadden Arps		Attorney-Client, Common Interest	Draft outline for Sunbeam Form S-4 prepared for the purpose of providing legal advice.
499		05/07/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft letter to SEC responding to comments on Form S-4 prepared in connection with providing legal advice and pending litigation.
500		05/10/1999	Steven Daniels, Esq.	Adam O. Emmerich, Esq., Michael Schwartz, Esq., Richard Easton, Esq. (cc)	Attorney-Client, Work Product, Common Interest	Memorandum re draft amendment to Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation. (Redacted from CP 044459)
501		05/07/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft Sunbeam Form S-4 amendment prepared in connection with providing legal advice and pending litigation.
502		11/18/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft amendment to Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
503		04/17/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft Sunbeam Form S-4 prepared in connection with providing legal advice and anticipated litigation.
504		04/30/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft Sunbeam Form S-4 prepared in connection with providing legal advice and anticipated litigation.
505		04/24/1998	Frank Miller, Esq.	Barry F. Schwartz, Esq., James Maher, Esq., William Nesbitt, Joram Salig, Esq., Steve Isko, Esq., Adam O. Emmerich, Esq. (cc), Paul Rowe, Esq. (cc), Rachelle Silverberg, Esq. (cc)	Attorney-Client, Work Product	Memorandum re attached draft documents prepared in anticipation of litigation relating to SEC/NYSE inquiry.
505	A	04/23/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft response to SEC and NYSE requests for information prepared in anticipation of litigation relating to inquiry.
507		06/22/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft Sunbeam Form S-3 prepared in connection with providing legal advice and anticipated litigation.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
508		05/14/1999	Adam O. Emmerich, Esq.	Richard Easton, Esq., Steven Daniels, Esq.	Attorney-Client, Work Product, Common Interest	Draft section of Sunbeam Form S-4 with attorney's handwritten notes prepared in connection with providing legal advice and pending litigation.
509		03/13/1998	Allison Amorison, Esq.	Frank Miller, Esq.	Attorney-Client, Common Interest	Correspondence re attached draft document prepared for the purpose of providing legal advice.
509	A	03/13/1998	Skadden Arps		Attorney-Client, Common Interest	Section of draft Section 14(f) Notice with attorney's comments prepared for the purpose of providing legal advice.
510		03/16/1998	Allison Amorison, Esq., Steven Daniels, Esq.	Frank Miller, Esq.	Attorney-Client, Common Interest	Memorandum re attached draft document prepared for the purpose of providing legal advice.
510	A	03/16/1998	Skadden Arps		Attorney-Client, Common Interest	Draft Section 14(f) notice with Skadden comments prepared for the purpose of providing legal advice.
511		03/04/1998	Steven Daniels, Esq.	Frank Miller, Esq., Allison Amorison, Esq. (cc)	Attorney-Client, Common Interest	Memorandum re draft Section 14(f) notice prepared for the purpose of providing legal advice.
512		06/22/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft Sunbeam Form S-3 prepared in connection with providing legal advice and anticipated litigation.
513		06/24/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft insert for Sunbeam Form S-3 prepared in connection with providing legal advice and anticipated litigation.
514		03/20/1998	Ionnis Zervas, Esq.	Janet Kelley, Esq., Allison Amorison, Esq., Michael Jahnke, Esq., Steven Isko, Esq., Robert Rozenzweig, Barry Hawk (cc), Henry Huser (cc), Joe Nisa (cc)	Attorney-Client, Common Interest	Memorandum re German antitrust filing prepared for the purpose of providing legal advice. (Redacted from CP 044102).
515		03/08/1998	Sarah Strasser, Esq.	Dan Peterson, Steven Isko, Esq. (cc), Karen Clark (cc), Ilene K. Gotts, Esq. (cc)	Attorney-Client	Memorandum re foreign antitrust filings and attached document prepared for the purpose of providing legal advice.
515	A	03/06/1998	Sarah Strasser, Esq.		Attorney-Client	Excerpt of draft foreign antitrust filing prepared for the purpose of providing legal advice with S. Strasser's handwritten notes.
516		03/06/1998	Sarah Strasser, Esq.	Iaonnis Zervas, Esq.	Attorney-Client, Common Interest	Memorandum re attached draft document prepared for the purpose of obtaining legal advice.
516	A	03/06/1998	Sarah Strasser, Esq.		Attorney-Client, Common Interest	Draft foreign antitrust filing re Sunbeam acquisition with S. Strasser's handwritten notes prepared for the purpose of obtaining legal advice.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
517		03/05/1998	Michael Jahnke, Esq.	Craig Ronan, Esq.	Attorney-Client	Correspondence re attached draft document prepared for the purpose of providing legal advice.
517	A	03/05/1998	Wachtell Lipton		Attorney-Client	Portion of draft Hart-Scott-Rodino filing prepared for the purpose of providing legal advice.
520		03/05/1998	Michael Jahnke, Esq.	Craig Ronan, Esq.	Attorney-Client	Correspondence re attached draft documents prepared for the purpose of providing legal advice.
520	A	03/04/1998	Wachtell Lipton		Attorney-Client	Portion of draft Hart-Scott-Rodino filing prepared for the purpose of providing legal advice.
522		03/23/1998	Rosa Testani, Esq.	Glenn Dickes, Esq., Martha Sanders, Adam O. Emmerich, Esq. (cc), Blaine Fogg, Esq. (cc), Stacy J. Kanter	Attorney-Client, Common Interest	Memorandum re attached draft document prepared for the purpose of providing legal advice.
522	A	03/23/1998	Skadden Arps		Attorney-Client, Common Interest	Draft letter to LYONs trustees prepared for the purpose of providing legal advice.
522	B	03/23/1998	Skadden Arps		Attorney-Client	Draft notice of LYONs redemption prepared for the purpose of providing legal advice.
523		03/05/1998	Craig V. Ronan, Esq.	Michael Jahnke, Esq.	Attorney-Client	Correspondence re draft Hart-Scott-Rodino filing prepared for the purpose of providing legal advice.
524		08/14/1998	Richard Easton, Esq.	Adam O. Emmerich, Esq., Steven Jacobs, Esq. , Janet Kelley, Esq., Peter Langerman, Barry F. Schwartz, Esq., Paul Shapiro, Esq., Blaine Fogg, Esq. (cc), Allison Amorison, Esq. (cc)	Attorney-Client, Work Product, Common Interest	Memorandum re application for NYSE exception prepared in connection with Sunbeam/Coleman (Parent) settlement.
525		08/10/1998	Blaine Fogg, Esq.	Howard Kristol , Peter Langerman, Steven Jacobs, Esq. , Irwin Warren, Esq., Jerry Levin, Paul Shapiro, Esq., Barry F. Schwartz, Esq., Adam O. Emmerich, Esq., Michael Schwartz, Esq., Richard Easton, Esq., Allison Amorison, Esq.	Attorney-Client, Work Product, Common Interest	Fax re application to NYSE for exception prepared in connection with Sunbeam/Coleman (Parent) settlement.
526		08/12/1998	Marc Shiffman	Barry F. Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Draft exhibit to NYSE application for exception prepared in connection with Sunbeam/Coleman (Parent) settlement.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
527		08/07/1998	Blaine Fogg, Esq.	Adam O. Emmerich, Esq., David Fannin, Steven Jacobs, Esq. , Howard Kristol , Peter Langerman, Barry F. Schwartz, Esq., Paul Shapiro, Esq., Irwin Warren, Esq., Allison Amorison, Esq. (cc)	Attorney-Client, Work Product, Common Interest	Memorandum re attached draft documents prepared in connection with Sunbeam/Coleman (Parent) settlement.
527	A	08/07/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft exhibit to application for NYSE exception prepared in connection with Sunbeam/Coleman (Parent) settlement.
527	B	08/07/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft exhibit to application for NYSE exception with attorney's handwritten notes prepared in connection with Sunbeam/Coleman (Parent) settlement.
527	C	08/07/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft exhibit to application for NYSE exception prepared in connection with Sunbeam/Coleman (Parent) settlement.
528		08/10/1998	Beth Jacobwitz, Esq.	Michael Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Correspondence re attached draft documents prepared in connection with Sunbeam/Coleman (Parent) settlement.
528	A	08/09/1998	Irwin H. Warren, Esq.		Attorney-Client, Work Product, Common Interest	Draft letter to NYSE re application for exception with attorney's notes prepared in connection with Sunbeam/Coleman (Parent) settlement.
528	B	08/09/1998	Irwin H. Warren, Esq.		Attorney-Client, Work Product, Common Interest	Draft letter to NYSE re application for exception with attorney's notes prepared in connection with Sunbeam/Coleman (Parent) settlement.
529		08/03/1998	Blaine Fogg, Esq.	Adam O. Emmerich, Esq., David Fannin, Stephen Jacobs, Esq., Howard Kristol , Peter Langerman, Barry F. Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re attached draft documents prepared in connection with Sunbeam/Coleman (Parent) settlement.
529	A	08/03/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft letter to NYSE re application for exception prepared in connection with Sunbeam/Coleman (Parent) settlement.
529	B	08/03/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft letter to NYSE re application for exception prepared in connection with Sunbeam/Coleman (Parent) settlement.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
530		08/03/1998	Blaine Fogg, Esq.	Adam O. Emmerich, Esq., David Fannin, Stephen Jacobs, Esq., Howard Kristol , Peter Langerman, Barry F. Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Correspondence re attached draft documents prepared in connection with Sunbeam/Coleman (Parent) settlement.
530	A	08/03/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft exhibits to NYSE application for exception prepared in connection with Sunbeam/Coleman (Parent) settlement.
531		07/30/1998	Adam O. Emmerich, Esq.	Blaine Fogg, Esq.	Attorney-Client, Work Product, Common Interest	Draft letter to NYSE re application for exception prepared in connection with Sunbeam/Coleman (Parent) settlement.
532		07/31/1998	Blaine Fogg, Esq.	Adam O. Emmerich, Esq., David Fannin, Stephen Jacobs, Esq., Barry F. Schwartz, Esq., Allison Amorison, Esq.	Attorney-Client, Work Product, Common Interest	Correspondence re attached draft document prepared in connection with Sunbeam/Coleman (Parent) settlement.
532	A	07/31/1998	Blaine Fogg, Esq.		Attorney-Client, Work Product, Common Interest	Draft letter to NYSE re attached draft letter prepared in connection with Sunbeam/Coleman (Parent) settlement.
532	B	07/31/1998	Blaine Fogg, Esq.		Attorney-Client, Work Product, Common Interest	Draft letter to NYSE re application for exception prepared in connection with Sunbeam/Coleman (Parent) settlement.
533		04/16/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft response to SEC's request for information prepared in anticipation of litigation relating to inquiry.
534		03/09/1998	Sarah Strasser, Esq.		Attorney-Client	Draft European antitrust filing with S. Strasser's handwritten notes prepared for the purpose of providing legal advice.
535		04/15/1999	Eric Golden, Esq.	Michael Schwartz, Esq.	Attorney-Client, Work Product	Correspondence re attached draft document.
535	A	04/15/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft brief for Krim litigation.
536		11/05/1998	Eric Golden, Esq.	Michael Schwartz, Esq.	Attorney-Client, Work Product	Correspondence re attached document.
536	A	11/04/1998	Grace M. Aschenbrenner	Eric Golden, Esq., James P. S. Leeshaw (cc)	Attorney-Client, Work Product	Letter re Camden Asset litigation.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
537		04/16/1999	Christopher Malloy, Esq.	Mark Bideau, Esq., Eric Golden, Esq., Michael Mitchell, Esq., Barry F. Schwartz, Esq., Michael Schwartz, Esq., Thomas Allingham II, Esq.	Attorney-Client, Work Product, Common Interest	Correspondence re attached draft document.
537	A	04/16/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft brief for Krim litigation.
538		11/13/1998	William Sushon, Esq.	Barry F. Schwartz, Esq., Michael Schwartz, Esq. (cc)	Attorney-Client, Work Product	Memorandum re attached draft documents.
538	A	11/13/1998	Skadden Arps		Work Product, Common Interest	Draft motion to transfer Federal Insurance Co. litigation.
538	B	11/13/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft J. Kelley declaration in Federal Insurance Co. litigation.
538	C	11/13/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft notice of pendency of other actions in Camden Asset Management litigation.
539		12/23/1998	Richard Berman, Esq.		Attorney-Client, Work Product	Draft motion for Klewin litigation.
540		00/00/0000	Eric Golden, Esq.		Work Product	Notes re Cunningham complaint. (Redacted from CP 030931)
541		00/00/0000	Eric Golden, Esq.		Work Product	Notes re Shaev complaint (Redacted from CP 031023).
542		10/20/1998	Paul Shapiro, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Correspondence re attached draft document.
542	A	10/20/1998	Paul Shapiro, Esq.		Attorney-Client, Work Product	Draft letter to Sunbeam lenders re release of claims against Sunbeam.
543		04/29/1999	Allison Amorison, Esq., Steven Daniels, Esq., Matthew Greenberg, Esq.	Paul Shapiro, Esq., Janet Kelley, Esq., Bobby Jenkins, Karen Clark, Esq.J, John Frederick, Barry F. Schwartz, Esq., Steven Isko, Esq., Blaine Fogg, Esq., Richard Easton, Esq., Mitchell Solomon, Esq., Joseph Halliday, Gregory Fernicola, Esq., Larry Frishman, Esq., Robert Zimet, Esq., Thomas Allingham, Esq., Matthew Knopf, Esq., William Weiss, Esq., Tom Gowan, Esq.,	Attorney-Client, Work Product, Common Interest	Memorandum re attached document.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
				Robert Saunders, Esq., Prabhat Mehta, Esq., Christopher Malloy, Esq., Kevin Maloy, Esq., Jeffrey Laska, Esq., Steve Thibault, Noel Spiegal, Adam O. Emmerich, Esq., Steven Cohen, Esq.		
543	A	04/29/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft Sunbeam Form S-4 amendment prepared in connection with providing legal advice and pending litigation.
544		08/20/1998	Susan Powell, Esq.	Paul Shapiro, Esq.	Attorney-Client, Work Product	Memorandum re attached documents.
544	A	08/19/1998	Susan Powell, Esq.	Paul Shapiro, Esq.	Attorney-Client, Work Product	Memorandum re Sunbeam draft employment agreements prepared in connection with providing legal advice and pending litigation.
544	B	08/19/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for G. Wisler prepared in connection with providing legal advice and anticipated litigation.
544	C	08/19/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for K. Clark prepared in connection with providing legal advice and anticipated litigation.
544	D	08/19/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for F. Feraco prepared in connection with providing legal advice and anticipated litigation.
545		08/26/1999	Robert P. Totte	Marvin Shaffer, Michael Mullen (cc), Keith Brockman (cc), J. Van Gelder (cc)	Attorney-Client, Work Product	E-mail re tax issues prepared in connection with Sunbeam/Coleman (Parent) settlement.
546		07/19/2001	Robert P. Totte	Norman Ginstling, Esq.	Attorney-Client, Work Product	Letter re tax closing agreement.
550		08/14/1998	Skadden Arps	Peter Langerman, Howard Kristol , Barry F. Schwartz, Esq., Paul Shapiro, Esq., Stephen Jacobs, Esq., Irwin Warren, Esq., Adam O. Emmerich, Esq.	Attorney-Client, Work Product, Common Interest	Draft letter re pending litigation.
551		11/03/1998	Barry F. Schwartz, Esq.	Michael Schwartz, Esq.	Attorney-Client, Work Product	Fax re attached document

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
551	A	11/02/2000	Blaine Fogg, Esq.	Barry F. Schwartz, Esq., Paul Shapiro, Esq., Bobby Jenkins, Janet Kelley, Esq.	Attorney-Client, Work Product, Common Interest	Fax re correspondence concerning pending litigation.
552		01/23/1998	Paul Rowe, Esq.		Attorney-Client	Notes re Sunbeam proposal prepared for the purpose of providing legal advice. (Redacted CP 016751-58)
554		03/07/1998	Sarah Strasser, Esq.	Iaonnis Zervas, Esq.	Attorney-Client, Common Interest	Fax re attached document prepared for the purpose of providing legal advice.
554	A	03/07/1998	Sarah Strasser, Esq.		Attorney-Client, Common Interest	Draft European antitrust filing with S. Strasser's handwritten notes prepared for the purpose of providing legal advice.
555		04/24/1998	Frank Miller, Esq.	Barry F. Schwartz, Esq., James Maher, William Nesbitt, Joram Salig, Esq., Steven Isko, Esq., Adam O. Emmerich, Esq. (cc), Paul Rowe, Esq. (cc), Rachelle Silverberg, Esq. (cc)	Attorney-Client, Work Product	Memorandum re attached draft document.
555	A	04/23/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Excerpt of draft Sunbeam Form S-4 prepared in connection with providing legal advice and anticipated litigation.
556		03/23/1999	Brian M. Carolan	File	Attorney-Client, Work Product, Common Interest Accountant-Client	Memorandum regarding valuation of Sunbeam warrants for internal accounting purposes (Redacted from CP041767-CP041770).
556	A	08/14/1998	Ernst & Young, Brian M. Carolan		Accountant-Client	Excerpt of Sunbeam Form 8-K with handwritten marginalia.
556	B	00/00/0000	Ernst & Young, Brian M. Carolan		Accountant-Client Privilege	Summary of Ernst & Young valuation of Sunbeam Warrants.
556	C	08/12/1998	The Blackstone Group, LLP, Arthur Newman		Attorney-Client, Work Product, Common Interest, Accountant-Client	Excerpt from the report prepared by Blackstone Group, LLP for counsel to Sunbeam in connection with threatened litigation.
556	D	00/00/0000	Ernst & Young, Brian M. Carolan		Attorney-Client, Work Product, Common Interest, Accountant-Client	Summary of valuations of Sunbeam warrants performed by Ernst & Young and The Blackstone Group, LLP.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
557		08/12/1998	The Blackstone Group, LLP, Arthur Newman		Attorney-Client, Work Product, Common Interest	Report prepared by The Blackstone Group, LLP for counsel to Sunbeam in connection with threatened litigation; copy provided to B. Schwartz, Esq. on 11/16/1998 in connection with pending litigation.
558		10/30/1998	Adam O. Emmerich, Esq.	Barry F. Schwartz, Esq.	Attorney-Client, Work Product	Memorandum re shareholder litigation.
559		09/15/1998	Joram Salig, Esq.	Barry F. Schwartz, Esq.	Attorney-Client, Work Product	Memorandum re SEC reporting requirements prepared in connection with Sunbeam/Coleman (Parent) settlement.
560		09/04/1998	Barry F. Schwartz, Esq.	Herbert Mondros, Esq.	Attorney-Client, Work Product	Letter re Goldstein litigation.
561		01/19/2000	Eric Golden, Esq.	Barry F. Schwartz, Esq.	Attorney-Client, Work Product	Memorandum re attached document (Redacted from CP 45289).
562		10/14/1998	Cheryl Jackman	Anthony Ian, Barry F. Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Fax re McCall litigation (Redacted from CP 45458).
563		10/28/1998	Barry F. Schwartz, Esq.	James Maher, William Nesbitt	Attorney-Client, Work Product	Memorandum re attached letter (Redacted from CP 45695).
563	A	10/23/1998	Barry F. Schwartz, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Fax re attached letter (Redacted from CP 45698).
564		07/22/1998	Thomas Allingham II, Esq.	Barry F. Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Fax re In re Coleman Shareholders litigation (Redacted from CP 45720).
565		00/00/0000	Eric Golden, Esq.		Attorney-Client, Work Product	Memorandum re attached Yassin complaint (Redacted from CP 045784).
566		08/13/1998	Barry F. Schwartz, Esq.	Anthony Ian	Attorney-Client, Work Product	Fax message prepared for the purpose of providing legal advice (Redacted from CP 45519).
567		10/28/1998	Barry F. Schwartz, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Fax message re attached document (Redacted from CP 4032).
568		07/05/1998	Adam O. Emmerich, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq.	Attorney-Client, Work Product	Memorandum re attached draft letter.
568	A	07/05/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft letter re potential claims against Sunbeam.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
569		07/05/1998	Adam O. Emmerich, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq.	Attorney-Client, Work Product	Memorandum re attached draft letter.
569	A	07/06/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft letter re potential claims against Sunbeam.
570		07/05/1998	Adam O. Emmerich, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq.	Attorney-Client, Work Product	Memorandum re attached draft letter.
570	A	07/05/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft letter re potential claims against Sunbeam.
571		02/24/1998	Steven Cohen, Esq.	Steven Isko, Esq.	Attorney-Client	Memoranda re Coleman prepared for the purpose of providing legal advice.
572		09/14/1998	Frank Miller, Esq.	Barry F. Schwartz, Esq., (cc) Michael W. Schwartz, Esq., (cc) Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Memorandum re attached document.
572	A	09/14/1998	Wachtell Lipton		Attorney-Client, Work Product	Memorandum re Coleman merger.
573		00/00/0000	Wachtell Lipton		Attorney-Client	Summary of Sunbeam corporate structure issues prepared for the purpose of providing legal advice.
574		04/29/1999	Glenn P. Dickes, Esq.	Barry F. Schwartz, Esq.	Attorney-Client, Work Product	Fax discussing attached documents
574	A	00/00/1999	Glenn P. Dickes, Esq.	Barry F. Schwartz, Esq.	Attorney-Client, Work Product	Analysis of stock ownership prepared by in-house counsel for the purpose of providing legal advice.
575		04/29/1999	Barry F. Schwartz, Esq.	Glenn P. Dickes, Esq.	Attorney-Client, Work Product	Fax discussing attached document.
575	A	03/19/1999	Janet Kelley, Esq.	Barry F. Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Fax regarding disclosures in the Sunbeam Proxy Statement prepared in connection with providing legal advice and pending litigation.
576		11/06/1998	Adam O. Emmerich, Esq., Frank Miller, Esq.	Barry F. Schwartz, Esq. James R. Maher, William G. Nesbitt, Glenn P. Dickes, Esq., Joram Salig, Esq., James T. Conroy, Esq.	Attorney-Client, Work Product	Memorandum re attached document.
576	A	11/06/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft Schedule 13D prepared in connection with providing legal advice and pending litigation.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
577		10/20/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft letter relating to Sunbeam/Coleman (Parent) settlement.
578		03/30/1998	Deborah A. Reiss, Esq.	Glenn P. Dickes, Esq., Valerie Radwaner, Esq. (cc)	Attorney-Client	Fax regarding Sunbeam shares prepared to provide legal advice.
579		09/25/2000	Stephen R. Blacklocks, Esq.	Davis W. Duke, Esq.	Work Product	Letter regarding Sunbeam litigation.
579	A	09/25/2000	Wachtell Lipton		Work Product	Draft affidavit prepared in connection with pending litigation.
580		09/26/2000	Stephen R. Blacklocks, Esq.	Davis W. Duke, Esq.	Work Product	Letter regarding Sunbeam litigation.
581		09/21/2000	Stephen R. Blacklocks, Esq.	Davis W. Duke, Esq.	Work Product	Letter regarding Sunbeam litigation.
582		00/00/0000	Glenn P. Dickes, Esq.		Attorney-Client, Work Product	Handwritten notes regarding Sunbeam bonds prepared in connection with providing legal advice and pending litigation.
583		00/00/0000	William Nesbitt		Attorney-Client, Work Product	Handwritten notes reflecting communications with counsel prepared in anticipation of litigation arising out of Sunbeam's acquisition of CPH's interest in Coleman.
584		02/17/2000	Stephen R. Blacklocks, Esq.	Eric Golden, Esq., Michael W. Schwartz, Esq. (cc), Rachelle Silverberg, Esq. (cc)	Work Product	Letter re Sunbeam Securities Litigation (redacted from CPH2000365).
585		09/29/2000	Stephen R. Blacklocks, Esq.	Davis W. Duke, Esq.	Work Product	Letter re Sunbeam Securities Litigation (redacted from CPH2000631).
586		10/02/2000	David W. Duke, Jr., Esq.	Stephen R. Blacklocks, Esq.	Work Product	Letter re Sunbeam Securities Litigation (redacted from CPH2000674).
587		12/28/2000	Stephen Blacklocks, Esq.		Work Product	Stephen Blacklocks' handwritten notes prepared in connection with Sunbeam Securities Litigation (redacted from CPH2000744).
588		10/20/1998	Herbert Weiswasser Mondros, Esq.	Eric Golden, Esq., Rachelle Silverberg, Esq.	Work Product	Letter regarding Goldstein and Joerger litigation.
589		08/04/2000	Stephen R. Blacklocks, Esq.		Attorney-Client, Work Product	Draft letter regarding Sunbeam litigation.
590		08/04/2000	Stephen R. Blacklocks, Esq.		Attorney-Client, Work Product	Draft letter regarding Sunbeam litigation.
591		06/29/1999	Robert S. Saunders, Esq.	Michael Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Fax cover sheet regarding attached documents prepared in connection with pending litigation (redacted from CP42021).

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
592		06/30/1998	Howard Gittis, Esq.	Janet Kelley, Esq.; Charles Elson (cc); Howard Kristol (cc); Peter Langerman (cc); William Rutter (cc); Faith Whittlesey (cc)	Attorney-Client, Work Product	Memorandum relating to Sunbeam's restatement investigation prepared for counsel in connection with anticipated litigation.
593		07/24/1998	William Nesbitt	Ronald O. Perelman; Howard Gittis, Esq. (cc); Donald Drapkin, Esq. (cc); James Maher (cc); Barry Schwartz, Esq. (cc)	Attorney-Client, Work Product	Memorandum relating to rescission analysis prepared for counsel in connection with anticipated litigation and legal advice.
593	A	00/00/0000	William Nesbitt		Attorney-Client, Work Product	Document relating to rescission analysis prepared for counsel in connection with anticipated litigation and legal advice.
594		12/31/1998	Skadden, Arps, Slate, Meagher & Flom		Attorney-Client, Work Product, Common Interest	Draft Sunbeam 10-K.
595		12/31/1998	Skadden, Arps, Slate, Meagher & Flom		Attorney-Client, Work Product, Common Interest	Draft Sunbeam 10-K.
596		06/25/1998	Robin Esterson	Jerry Levin; Joe Nold; Paul Shapiro, Esq. (cc); Bobby Jenkins (cc); Ron Dunbar (cc); Bob Knibb (cc); Marc Shiffman (cc); Gwen Wisler (cc)	Attorney-Client, Common Interest	Memorandum seeking legal advice concerning Sunbeam operations.
597		07/10/1998	Robin Esterson	Joe Nold; Karen Clark (cc); Gwen Wisler (cc); Bobby Jenkins (cc); Marc Shiffman (cc); Paul Shapiro, Esq. (cc); Jerry Levin (cc)	Attorney-Client, Common Interest	Memorandum seeking legal advice concerning Sunbeam operations.
598		08/02/1998	Robin Esterson	Jerry Levin; Joe Nold; John McNaboe; Paul Shapiro, Esq. (cc); Ron Dunbar (cc)	Attorney-Client, Common Interest	Memorandum seeking legal advice concerning Sunbeam operations.
599		00/00/0000	MacAndrews & Forbes Holdings Inc.	Ernst & Young	Accountant-Client	Document relating to calculation of balance sheet items for internal accounting purposes.
600		00/00/0000	MacAndrews & Forbes Holdings Inc.	Ernst & Young	Accountant-Client	Document relating to calculation of balance sheet items for internal accounting purposes.
601		00/00/0000	MacAndrews & Forbes Holdings Inc.	Ernst & Young	Accountant-Client	Document relating to calculation of balance sheet items for internal accounting purposes.
602		00/00/0000	MacAndrews & Forbes Holdings Inc.	Ernst & Young	Accountant-Client	Document relating to calculation of balance sheet items for internal accounting purposes.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
603		00/00/0000	MacAndrews & Forbes Holdings Inc.	Ernst & Young	Accountant-Client	Document relating to calculation of balance sheet items for internal accounting purposes.
604		00/00/0000	Paul Shapiro, Esq.	MacAndrews & Forbes Holdings Inc.	Attorney-Client	Document prepared for purposes of providing legal advice relating to Sunbeam's acquisition of CPH's interest in Coleman.
605		00/00/0000	MacAndrews & Forbes Holdings Inc.	Wachtell, Lipton, Rosen & Katz	Attorney-Client, Work Product	Document prepared for counsel in connection with the Sunbeam/Coleman (Parent) Settlement.
606		07/23/1996	Glenn P. Dickes, Esq.	Valerie Radwaner, Esq., Gregory J. Woodland	Attorney-Client	Memorandum re letter agreement with First Trust.
607		00/00/0000	Glenn P. Dickes, Esq.		Attorney-Client	Handwritten notes reflecting legal advice re First Trust.
608		06/14/1996	Valerie E. Radwaner, Esq. (Paul, Weiss, Rifkind, Wharton & Garrison)	Glenn P. Dickes, Esq., Deborah Reiss, Esq.	Attorney-Client	Fax re draft outline concerning LYONs and Citibank.
608		06/13/1996	Paul, Weiss, Rifkind, Wharton & Garrison	Glenn P. Dickes, Esq., Deborah Reiss, Esq.	Attorney-Client	Draft outline re exchange of LYONs for cash and subsequent pledge to Citibank.
609		07/07/1997	Glenn P. Dickes, Esq.	Stacy J. Kanter, Esq. (Skadden, Arps, Slate, Meagher & Flom), Rosa A. Testani, Esq. (Skadden, Arps, Slate, Meagher & Flom), Michelle Root (cc)	Attorney-Client	Fax re Coleman Worldwide Corporation Share Lending.
610		11/20/1997	Glenn P. Dickes, Esq.		Attorney-Client	Handwritten notes reflecting legal advice re Coleman LYONs Purchase.
610	A	11/19/1997	Skadden, Arps, Slate, Meagher & Flom	Glenn P. Dickes, Esq.	Attorney-Client	Draft Exchange Notice re Liquid Yield Option Notes.
610	B	11/19/1997	Skadden, Arps, Slate, Meagher & Flom	Glenn P. Dickes, Esq.	Attorney-Client	Draft letter re Receipt of Exchange.
610	C	11/19/1997	Skadden, Arps, Slate, Meagher & Flom	Glenn P. Dickes, Esq.	Attorney-Client	Draft letter re Exchange and Exercise of Cash Payment Option.
610	D	11/19/1997	Skadden, Arps, Slate, Meagher & Flom	Glenn P. Dickes, Esq.	Attorney-Client	Draft Officer's Certificate of CLN Holdings Inc.
610	E	11/20/1997	Rosa A. Testani, Esq. (Skadden, Arps, Slate, Meagher & Flom)	Glenn P. Dickes, Esq.	Attorney-Client	Fax attaching draft Offer to Accept for Exchange of Cash Any and All Outstanding Liquid Yield Option Notes.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
611		05/09/1997	Stacy J. Kanter, Esq. (Skadden, Arps, Slate, Meagher & Flom), Alan C. Myers, Esq.	Howard Gittis, Esq., Irwin Engelman, Esq., Barry F. Schwartz, Esq., Glenn P. Dickes, Esq.	Attorney-Client	Memorandum re Coleman Refinancing.
612		05/08/1997	Glenn P. Dickes, Esq.	Lenny Ajzenman, Terry C. Bridges, Norman Ginstling, Esq., Stephen F. Kaplan, Gerry R. Kesel, Jerry Levin, Michelle Root, Martha L. Sanders, Marvin A. Schaffer, Ernest Toth, Laurence Winoker, Joram C. Salig, Esq. (cc), Barry Schwartz, Esq. (cc)	Attorney-Client	Memorandum re Coleman Holdings Refinancing.
612	A	00/00/0000	Glenn P. Dickes, Esq.	Lenny Ajzenman, Terry C. Bridges, Norman Ginstling, Esq., Stephen F. Kaplan, Gerry R. Kesel, Jerry Levin, Michelle Root, Martha L. Sanders, Marvin A. Schaffer, Ernest Toth, Laurence Winoker, Joram C. Salig, Esq. (cc), Barry Schwartz, Esq. (cc)	Attorney-Client	Chart re Coleman Holdings Refinancing.
613		01/17/1997	Rosa A. Testani, Esq. (Skadden, Arps, Slate, Meagher & Flom)	Glenn P. Dickes, Esq., Terry Schimek, Esq., Stacy J. Kanter, Esq. (Skadden, Arps, Slate, Meagher & Flom)	Attorney-Client	Fax re analysis of an equity investment in The Coleman Company.
613	A	01/17/1997	Stacy J. Kanter, Esq. (Skadden, Arps, Slate, Meagher & Flom), Rosa A. Testani, Esq. (Skadden, Arps, Slate, Meagher & Flom)	Glenn P. Dickes, Esq.	Attorney-Client	Draft memorandum re preliminary analysis of issues relating to an equity investment in The Coleman Company Inc.
614		05/18/1995	Stacy J. Kanter, Esq. (Skadden, Arps, Slate, Meagher & Flom)	Glenn P. Dickes, Esq.	Attorney-Client	Fax re Coleman Holdings indenture.
614	A	00/00/0000	Skadden, Arps, Slate, Meagher & Flom	Glenn P. Dickes, Esq.	Attorney-Client	Portion of draft document re Coleman Holdings indenture.
615		03/25/2000	Glenn P. Dickes, Esq.		Attorney-Client	Handwritten notes re telephone conference with S. Kanter, Esq.
616		00/00/1996	Glenn P. Dickes, Esq.		Attorney-Client	Handwritten notes reflecting confidential information re Coleman Worldwide share lending.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
617		00/00/0000	Glenn P. Dickes, Esq.		Attorney-Client	Handwritten notes reflecting confidential information re Coleman Worldwide share lending.
618		03/25/1996	Terry E. Schimek, Esq.	Glenn P. Dickes, Esq.	Attorney-Client	Memorandum re Securities Lending.
618	A	12/25/1995	Terry E. Schimek, Esq.	Glenn P. Dickes, Esq.	Attorney-Client	Draft Securities Lending Authorization Agreement with handwritten comments of counsel.
619		02/24/1997	Paul, Weiss, Rifkind, Wharton & Garrison	Glenn P. Dickes, Esq.	Attorney-Client	Draft Summary of Terms and Conditions for Citibank.
620		02/26/1997	Paul, Weiss, Rifkind, Wharton & Garrison	Glenn P. Dickes, Esq.	Attorney-Client	Draft Second Amendment to Revolving Credit Agreement.
621		04/23/1998	Glenn P. Dickes, Esq.	Barry F. Schwartz, Esq.	Attorney-Client	Memorandum re Sunbeam Equity Hedge.
621	A	04/22/1998	Paul, Weiss, Rifkind, Wharton & Garrison	Glenn P. Dickes, Esq., Barry F. Schwartz, Esq.	Attorney-Client	Draft section of guaranty re equity hedge agreements containing marginalia.
622		05/18/1998	Emmerich, Adam (Wachtell Lipton)	Glenn P. Dickes, Esq.	Attorney-Client	Memorandum re hedge.
623		00/00/0000	Glenn P. Dickes, Esq.		Attorney-Client	Handwritten notes re Sunbeam Equity Hedge and Citibank Issues reflecting legal advice.
624		00/00/0000	Glenn P. Dickes, Esq.		Attorney-Client	Handwritten notes reflecting legal advice re hedge.
625		05/18/1998	Glenn P. Dickes, Esq.	Adam O. Emmerich, Esq., Harold Novikoff, Esq.	Attorney-Client	Fax re Sunbeam equity hedge.
626		04/04/1998	Glenn P. Dickes, Esq.		Attorney-Client	Handwritten notes re Sunbeam hedge reflecting analysis of legal issues.

Exhibit 2

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

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

vs.

MacANDREWS & FORBES HOLDINGS, INC., and COLEMAN (PARENT) HOLDINGS, INC.,

Defendant.

VIDEOTAPED DEPOSITION OF
STEVEN L. FASMAN, ESQ.
New York, New York
Wednesday, January 21, 2004

Reported by:
ANDREA L. KINGSLEY, RPR
CSR NO. 001055
JOB NO. 156575

ORIGINAL

commodity and that e-mails should be stored, reviewed and dealt with with that thought in mind consistent with legal obligations and such. And says that it is normally the company's objective and its practice to try to remove e-mails that are unnecessary after 30 days.

MS. PAULE-CARRES: I would like to have that marked as Morgan Stanley 62.

(Morgan Stanley Exhibit 62, CPH 1433326 through 1433329, marked for identification, as of this date.)

Q. You've just been handed what's been marked as Morgan Stanley Exhibit 62. It's label Bates number CPH 1433326 and it should go through 1433329. Do you recognize this document?

A. Other than the document control labels, it appears to be an adequate but hardly perfect copy of the company's e-mail policy along with the covering memo when the policy was initially issued.

Q. When you say adequate but hardly

said. It's used on Tuesdays and Fridays so therefore Tuesday's data will be overwritten on Friday.

Q. And Wednesday will be overwritten the following Wednesday?

A. Yes.

Q. And Thursday the following Thursday?

A. Yes.

Q. That's just for the daily back-ups though; correct?

A. Yes.

Q. After a month, explain to me the monthly back-up procedure.

A. There are two monthly back-up tapes. So that a monthly back-up tape will be overwritten every second month.

Q. If the saved folder is on this Proliant server, how does it remain exempt from these back-ups and overwriting?

A. It doesn't.

Q. Than how is it that the saved folder could possibly still be in existence, an e-mail could be there six

from 1998 until the inception of the Andersen litigation in 2001; correct?

MR. BRODY: Objection to the form of the question.

A. There was a progressive process which did involve in part the purging of old and unneeded e-mails, yes.

Q. My question was did you from 1998 until the inception of the Andersen litigation on a monthly basis, I'm ignoring the daily stuff now, on a monthly basis overwrite e-mail back-up tapes?

A. I think it was every other month.

Q. From 1998 until the inception of the Andersen litigation, did MAFCO save any e-mail back-up tapes that related to the Sunbeam acquisition of Coleman?

A. There are no e-mail back-up tapes relating to the Sunbeam acquisition of Coleman.

Q. Did they save any back-up tapes which contained data which related to the Sunbeam acquisition of Coleman from 1998 until the inception of the Andersen

August and September of 2001; correct?

A. August or September.

Q. Assuming that Shallal was filed at some point in April of 2000 for the time being, those tapes from August and September of 2001 would not have the content that tapes from April of 2000 would have on them; is that correct?

MR. BRODY: Objection to the form.

A. Relevant to Sunbeam?

Q. Um-hmm.

A. I have no reason to think they wouldn't or, stated affirmatively, I have every reason to believe they would.

Q. Wouldn't the Sunbeam materials have been purged?

A. Correct. So that the tapes from 2000 would be identical to the tapes of 2001, that is neither would have anything. Because relevant events were in 1998 and everything was long gone by then unless somebody had saved it in which case it would still be there.

Exhibit 3

Confidential Exhibits

Filed Under Seal

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER AND DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court, in Chambers, on its own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Clerk is directed to docket and file the facsimile transmission from Richard Reis, juror number 151 (101202494)

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 17 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION TO DISQUALIFY PLAINTIFF'S COUNSEL SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A. AND JENNER & BLOCK, LLC

THIS CAUSE came before the Court March 11, 2005 on Morgan Stanley's Motion to Disqualify Plaintiff's Counsel Searcy, Denney, Scarola, Barnhardt & Shipley, P.A. and Jenner & Block, LLC, with both parties well represented by counsel.

On March 9, 2005 CPH served its Renewed Motion for Entry of Default Judgment and Other Sanctions ("Motion"). The Motion is set for hearing March 14, 2005. The Motion referenced and quoted from a January 14, 2005 email exchange between MS & Co.'s outside and in-house counsel which listed points made by the Securities and Exchange Commission in a conference call with MS & Co. On receipt and review of the Motion, MS & Co. contended that the email was privileged and had been inadvertently disclosed, and requested its return. CPH responded that it did not believe the assertion of privilege was well founded. Rather than ask the Court to decide the disputed privilege issue, though, MS & Co. took the extraordinary step of seeking disqualification of opposing counsel. The Motion is not well take, for several reasons:

1. Contrary to MS & Co.'s assertion at the March 11, 2005 hearing, it is clear the email should have been produced in response to the Court's February 3, 2005 Order Specially Setting Hearing, which required MS & Co. to produce by 12 noon February 8, 2005 "all documents within MS & Co.'s care, custody, or control addressing or related to the

additional email back up tapes, including matters related to the time or manner in which they were discovered; by whom they were discovered; who else learned of their discovery and when; and the manner and time table by which they were to be restored and made searchable, including any correspondence to or from outside or prospective outside vendors." MS & Co. appears to take the position that because the January 14, 2005 email does not specifically refer to the additional back-up tapes it was not required to be produced under the February 3, 2005 Order. That position is wrong. The email itself refers to the "document issue." The January 13, 2005 power point presentation by MS & Co. to the SEC[1] contains a whole section called "Found Tapes," referring to precisely the same issue as the February 3, 2005 Order. The email was not produced pursuant to that Order, nor was it placed on MS & Co.'s privilege log. Consequently, MS & Co. failed to preserve any privilege claim. See General Motors Corp. v. McGee, 837 So. 2d 1010 (Fla. 4th DCA 2002), rev. den. 851 So. 2d 728 (Fla. 2003).

2. Contrary to MS & Co.'s assertion, the item was not "obviously" privileged. In general, communication between an attorney and client is not privileged unless it is not intended to be disclosed to third parties. See Fla. Stat. §90.502 (1). Statements made by the SEC to MS & Co. are not privileged. The memorialization of those statements, whether in writing, by audiotape, or otherwise, is not privileged. Indeed, the Court previously ordered MS & Co. to produce the notes of an information technology professional that contain the same information as the email. MS & Co. takes the position, though, that because the memorialization was made by counsel and communicated to it, the communication is privileged. But, "communications that do not involve legal advice are not protected. For example, some courts have found that an attorney's communication to a client regarding the date of trial or the client's surrender date is not privileged." C. Ehrhardt, Florida Evidence, §502.5 (2004 Edition) (footnoted citations omitted). MS & Co. cannot reasonably argue that it was unanticipated that counsel would communicate to it the substance of the SEC

[1]The power point presentation itself should have been produced in response to the February 3, 2005 Order. It was not.

call.

3. Throughout this litigation the Court has repeated its belief that a privilege log only preserves, but does not establish, a privilege claim. Instead, the party claiming a privilege is required to submit the item alleged to be privileged for an in camera inspection, together with affidavits averring the specific facts upon which the privilege claim is based and detailing to whom the item has been published. MS & Co. did not tender to the Court the affidavits and was not otherwise prepared at the March 11, 2005 hearing to establish that the item was privileged and that the privilege had not been waived.

4. At a bare minimum, whether or not the email was privileged and whether any privilege had been waived was fairly debatable. Consequently, CPH's refusal to return the email did not evidence its "recalcitrance."[2] Cf. Abamar Housing v. Lisa Daly Lady Decor, 724 So. 2d 572, 574 (Fla. 2d DCA 1998).

5. The email conveyed no information not otherwise known to CPH. Consequently, it is impossible that it gave CPH an "unfair tactical advantage." Abamar at 574.

6. Without conceding the email is privileged or that any privilege has not been waived, CPH announced that it will not rely on the email at hearing on the Motion, to allow MS & Co. time to determine whether it wants to seek a judicial determination of privilege and waiver.

"Motions for disqualification are generally viewed with skepticism because disqualification of counsel infringes on a party's right to employ a lawyer of choice, and such motions are often interposed for tactical purposes." Alexander v. Tandem Staffing Solutions, Inc., 881 so. 2d 607 (Fla. 4th DCA 2004) (citations omitted). Because (i) MS & Co. failed to preserve its privilege claim by including the item on its privilege log in response to the February 3, 2005 Order; (ii) the privileged nature of the item is not readily apparent; (iii) MS & Co. failed to establish the item was privileged or that any privilege had not been waived; (iv) CPH was not recalcitrant; (v) CPH did not gain any unfair tactical

---

[2]It is unclear how MS & Co. expected CPH to "return" the email, which had already been filed as an exhibit to the Motion.

advantage; and (vi) CPH has agreed not to rely on the email at this juncture, it is,

ORDERED AND ADJUDGED that Morgan Stanley's Motion to Disqualify Plaintiff's Counsel Searcy, Denney, Scarola, Barnhardt & Shipley, P.A. and Jenner & Block, LLC is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 14th day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

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COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

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ORDERED AND ADJUDGED that Morgan Stanley's Motion to Disqualify Plaintiff's Counsel Searcy, Denney, Scarola, Barnhardt & Shipley, P.A. and Jenner & Block, LLC is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 14th day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

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ORDERED AND ADJUDGED that Morgan Stanley's Motion to Disqualify Plaintiff's Counsel Searcy, Denney, Scarola, Barnhardt & Shipley, P.A. and Jenner & Block, LLC is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 14th day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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JLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

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

CASE NO: 2003 CA 005045 AI

CPH'S ADDITIONAL SUBMISSION IN SUPPORT OF ITS MOTION FOR DEFAULT

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(561) 686-6300

Issue	Morgan Stanley Represents to CPH	Morgan Stanley Represents To The Court	Morgan Stanley Represents to the SEC	Bottom Line
Can we have any confidence that Morgan Stanley has located, much less searched and processed all relevant existing email?	**5/14/04** – Everything is produced. *Ex. 44, 5/14/04 Letter from K. DeBord to M. Brody*		Sometime between January 12 and March 1, 2005, Morgan Stanley informs the SEC that it had found "145 newly-discovered tapes containing e-mail from 2000." **[New Tapes # 1]** These are apparently different than the various new tape issues made known to CPH and the Court in this case, such as the 738 8mm tapes and 1423 DLT tapes described below. *Ex. 45, 3/1/05 letter from Michael S. Fuchs, SEC, to Scott W. Fowkes, Kirkland & Ellis, at 1 (MS 5000007).*	
	6/23/04 – Everything has been produced. *Ex. 46, 6/23/04 Cert. of Compl.*	**6/23/04** – Everything has been produced. *Ex. 46, 6/23/04 Cert. of Compl.*		*But Morgan Stanley admits it found 738 8mm tapes in 2002* **[New Tapes # 2]** *and 1423 DLT tapes sometime prior to May 6, 2004* **[New Tapes # 3]***; by July 2, it knows the tapes contain email dating back to 1998. Ex. 17, Seickel Dep. (2/10/05) at 74; Ex. 13, 7/2/04 email.*

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	11/17/04 – Morgan Stanley advises that it has recently found "additional" backup tapes containing email. *Ex. 47, 11/17/04 Letter from Clare to Brody*			*CPH tries to get clarification about the meaning of "additional" and "recently."*
		2/4/05 – Asked by the Court whether there might be "tapes out there that we still don't know about," Thomas A. Clare assures the Court, "No." *Ex. 48, 2/4/05 Hrg. at 6.*		*Mr. Clare's statement is untrue. More undisclosed tapes are still out there.*
	2/10/05 - Morgan Stanley advises CPH that it has discovered another 169 DLT backup tapes **[New Tapes # 4]**. *Ex. 17, Seickel Dep. (2/10/05) at 64-66.*			*But many more undisclosed tapes are still out there.*
	2/10/05 - Robert Saunders testifies that he is "confident" that his team has made "every effort" to locate every existing backup tape, and that he is confident that his efforts have been successful. *Ex. 49, Saunders Dep. (2/10/05) at 42.*			*Mr. Saunders' statement is untrue. More undisclosed tapes are still out there; every effort has not been made and Mr. Saunders' **lack** of confidence leads him – the next day – to perform an easy search that turns up another 243 tapes.*

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	2/11/05 - Morgan Stanley produces "the final installment of Morgan Stanley's supplemental production of email messages." *Ex. 50, 2/11/05 letter from Thomas A. Clare to Michael T. Brody.*	**2/11/05 -** On February 11, 2005, Morgan Stanley asserts that CPH's motion for an adverse inference "is moot because the tapes have now been processed and the responsive e-mails have now been produced." *Ex. 51, Morgan Stanley's Supp'l Opp'n to CPH's Motion for Adverse Inference Instructions at 1.*		*Morgan Stanley's statement is untrue. More undisclosed tapes are still out there.*
		2/12/05 - A day later, on February 12, 2005, Morgan Stanley informs the Court that it had discovered additional tapes in the last 24 hours. *Ex. 52, Morgan Stanley's 2/12/05 email Advisory to Court and Counsel.*		*Morgan Stanley's statement is woefully incomplete. Many more undisclosed tapes – more than 10,000 tapes – are still out there.*
		2/14/05 – Robert Saunders testifies that he has located another 243 tapes by going to likely places where such tapes might be **[New Tapes # 5]**. Now he is "[v]ery confident" that he has located all of the backup tapes that exist. *Ex. 3, 2/14/05 Hrg at 94.*		*Mr. Saunders' statement is untrue. More undisclosed tapes are still out there.*

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		2/18/05 –Morgan Stanley finds an additional 73 boxes of backup tapes. **[New Tapes # 6]** *Ex. 53, 2/23/05 Hrg at 1321.*		*Morgan Stanley later reveals that the 73 boxes contain a staggering 3,536 tapes. But still more undisclosed tapes are out there.*
	3/5/05 – Morgan Stanley advises that the 73 boxes contain 3,536 tapes. Also disclosed is an entirely new revelation – that "about two days ago" its vendor Recall located **another 134 Boxes of Morgan Stanley tapes. [New Tapes # 7]** *Ex. 54, 3/5/05 Letter from Lancaster to Byman.*			*Morgan Stanley finally discloses – at Mr. Anfang's 3/13/05 deposition – that the 134 boxes contain 2,718 tapes and contain email.* *Ex. 870, Tape Tracking Chart; Ex. 71, Anfang Dep. (3/13/05) at 43, 44.*
	3/13/05 – Mr. Anfang, at his 3/13/05 deposition, discloses yet another two sets of found tapes – 282 tapes found 2/23/05 and 2/25/05 and another 389 tapes found 3/2/05 and 3/3/05. **[New Tapes # 8 and 9]** *Ex. 870, Tape Tracking Chart; Ex. 71, Anfang Dep. (3/31/05) at 50, 53.*			*How can Morgan Stanley continue to state that it has confidence that its searches for backup tapes are complete, only to find more tapes? How can CPH have any confidence that Morgan Stanley has located everything? How can CPH and the Court have any confidence in anything Morgan Stanley says?*

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What do we know about Morgan Stanley's willful destruction of email? In violation of Federal law, Morgan Stanley overwrote – destroyed – emails after one year. Morgan Stanley supposedly put an end to that systematic destruction in January 2001. But did it?	"Every e-mail is saved. Even when the employee deletes it, it is backed up on the server" and saved for "[a]t least three years." This policy has been in place since January 2001. *Ex. 55, Plotnick Dep. (9/9/03) at 45-46.*	"The recycling of e-mail tapes at Morgan Stanley ended in January 2001." *Opp. to CPH's Request for Default Judgment (2/28/05) at 12 n.3.*	"In sum, the analysis requested by the staff shows that ***22 tapes*** out of the 199-tape sample were overwritten in violation of Morgan Stanley's January 2001 directive." *Ex. 14, 2/10/05 Wells Submission at 12 (emphasis in original).*	*Morgan Stanley has admitted to the SEC that more than 10% of its backup tapes* ***continued*** *to be overwritten despite Federal law and its own internal "directive."*
CPH moves to compel email production in October 2003. ***Was Morgan Stanley's response in good faith?***	Morgan Stanley objects based upon burden. Although the Request and Motion to Compel ask for email messages, not "backups," Morgan Stanley steers the discussion to backups and related problems.	Restoring and searching email backup tapes "would impose an extreme burden on MS&Co. and **would cost at least hundreds of thousands of dollars."** *Ex. 56, Opp. To Motion To Compel (11/4/03) at 2.* Searching for emails would be "improperly and unduly burdensome given the enormous costs that would be required, given the fact that the time period for which we have backup tapes postdates the events by several years." *Ex. 57, 3/19/04 Hrg at 22.*	"Morgan Stanley's pre-2003 email is now searchable by sender, recipient, date and keywords. . . . [T]he staff can now access this email much more quickly . . ." *Ex. 14, 2/10/05 Wells Submission at 8.*	*As it now admits, "Morgan Stanley, even before the CPH case was filed, undertook substantial, multi-million dollar efforts to upgrade and improve its e-mail retrieval capabilities." It had begun building an Archive in January 2003 but misled the Court and CPH by not disclosing that fact. Instead, Morgan Stanley misdirects the discussion to non-existent problems over locating and searching backup tapes.* *Opp. to Motion for Default Judg. (3/12/05) at 8.*

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How complete/reliable was the Archive when Morgan Stanley used it in May 2004 to produce documents and certify completeness?	Production is full and complete. *Ex. 46, 6/23/04 Cert. of Compl.*	Production is full and complete. *Ex. 46, 6/23/04 Cert. of Compl.*	As of June 7, 2004, "only 120 of the 143 SDLT output tapes produced by NDCI had been processed into the Archive System." *Ex. 14, 2/10/05 Wells Submission at 25.*	*The Archive as it existed in May 2004 was the result of processing approximately 35,000 tapes. Morgan Stanley has admitted to the SEC that the processing of the 35,000 tapes was incomplete; but it has never disclosed that fact to CPH or the Court. CPH learned this only when Morgan Stanley was ordered to produce the Wells submission.*
		"I am 90 percent sure that the Lotus content would not have been pulled back in that [May 2004] search." *Ex. 3, 2/14/05 Hrg. at 82-83.*		*Serious concerns were raised in testimony before the Court over whether the original 35,000 tapes were properly processed.*
				*But whatever Morgan Stanley did to search the Archive as it existed in May 2004, we know that the Archive did not then – and largely still does not – include the data contained on the **9 different sets of New Tapes**: 738 8mm tapes found in 2002, 1,423 DLT tapes found prior to May 2004, 169 DLT tapes*

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				found in January 2005, 243 tapes found on February 11-12, 2005, 3,536 tapes found on February 18, 2005, 2718 tapes found on March 3, 2005, 389 tapes found on March 2-3, 2005, or 282 tapes found February 23-25, 2005. In total, Morgan Stanley has now identified over 9,000 tapes that were not, still largely are not, part of the Archive.
How complete/reliable was the Archive at the time of the February 14 Hearing?	Robert Saunders testifies that he is "confident" that his team has made "every effort" to locate every existing backup tape, and that he is confident that his efforts have been successful. *Ex. 49, Saunders Dep. (2/10/05) at 42.*	Robert Saunders testifies that he is "[v]ery confident" that he has located all of the backup tapes that exist. *Ex. 3, 2/14/05 Hrg at 94.*	"The Migration Project . . . has been highly successful. . . . Morgan Stanley's pre-2003 email is now searchable by sender, recipient, date and keywords." "Morgan Stanley recently completed its migration of ***every*** pre-2003 e-mail that could be recovered from tape to its Archive System." *Ex. 14, 2/10/05 Wells Submission at 8, 31.*	*There are still huge amounts of data not migrated into the system. 5 days after Mr. Saunders expression of personal confidence to the Court, Morgan Stanley located 73* ***boxes*** *of previously unreviewed tapes. Two weeks later, another 134* ***boxes*** *of tapes were located.*

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What problems existed at the time the May search was made which affected the completeness of the search?	Ms. Gorman testified that 600 gigabytes of data were in staging and had not been processed; She identified an issue relating to email group membership and **one Lotus Notes issue**. *Ex. 4, Gorman Dep. (2/9/05) at 79.*	Three problems were identified to the Court: (1) 600 gigabytes of data were in staging and had not been processed; (2) a script error did not pick up all attachments; and (3) another script error did not pick up all Lotus Notes emails because of erroneous dates. [Ms. Gorman's trial testimony did not mention the email group membership issue she had disclosed in her deposition nor the Lotus Notes issue disclosed in her deposition, but CPH now knew about **two Lotus Notes issues**.] *Ex. 3, 2/14/05 Hrg. at 80-83.*	In a 2/24/05 letter to the SEC, Morgan Stanley identifies **three Lotus Notes issues**: (1) the date script issue identified to the Court on 2/14/05; (2) a script error discovered in November 2004 relating to user names (the issue alluded to in her 2/9/04 deposition); and (3) a script error supposedly discovered February 13, 2005 which resulted in truncated message retrieval ***– an issue not disclosed to CPH or the Court on 2/14/05.*** In addition, Morgan Stanley disclosed two other issues 9which were never disclosed to CPH or the Court): (1) a migration issue which may have resulted in failure to capture 5% of the email harvested by NDCI from backup tapes; and (2) a software issue which results in the failure to capture blind copies. *Ex. 78, 2/24/05 Letter from Gerlach to Conte.*	*Every time we ask, we get a different list of problems.*

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	At her second deposition, Ms. Gorman identifies another **newly disclosed Lotus Notes issue** [making a total of **five Lotus Notes issues**]: (5) a problem pulling group email. *Ex. 59, Gorman Dep. (3/7/05) at 76-77.*			
			"In order to make sure that no e-mail was missed, [Morgan Stanley] sent all of its Legato backup tapes to NDCI even though it expected, based on its experience, that as many as 30 percent of those tapes would not contain any e-mail data." *Ex. 14, 2/10/05 Wells Submission at 9.*	*Contrary to Morgan Stanley's representation that a third of the tapes would not contain email, Mr. Riel believes – and has so advised the SEC -- that these 10,138 tapes "had been recycled," that is, overwritten.* *Ex. 60, Riel Dep. (3/8/05) at 100-01, 111-12.*

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Why did Morgan Stanley create the email Archive?	When the April 2004 Order was entered, CPH was in the dark that an Archive existed, was expected to be complete within months. Unaware of the existence of an efficient search tool, CPH was forced to negotiate the terms of an agreed order to accommodate Morgan Stanley's professed concerns over the burden of searching backup tapes. But Morgan Stanley expected to – and did – rely upon the Archive to comply with the April Order. *Ex. 61, April 16, 2004 Agreed Order.*	When the Court entered the April 2004 Order, it was not informed that an Archive existed, was expected to be complete within months. But Morgan Stanley expected to – and did – rely upon the Archive to comply with the April Order. *Ex. 61, April 16, 2004 Agreed Order.*	"Morgan Stanley ***voluntarily*** undertook to overcome the limitations of its backup tapes by migrating all of its pre-2003 e-mail to a new archive system." *Ex. 14, 2/10/05 Wells Submission at 2 (emphasis in original).*	*Morgan Stanley attempted to curry favor with the SEC by claiming to have undertaken voluntary efforts to make its email easily searchable and accessible while at the same time telling CPH and this Court [and, presumably, other litigation adversaries] that it should not be required to make full production because of the burden of searching backup tapes.*
			"***Although it was under no legal obligation to do so, Morgan Stanley voluntarily undertook to migrate all of its pre-2003 e-mail from backup tapes to the Archive System.***" *Id. at 8 (emphasis in original).*	*Morgan Stanley never told the SEC that it had obligations under the April Order which it intended to meet by using the Archive.*

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Was there anything extraordinary about Morgan Stanley's decision to create an Archive?	No. It was what everyone in the industry was doing. "Everybody on the street was building an e-mail archive." *Ex. 4, Gorman Dep. (2/9/05) at 15.*		Yes. Morgan Stanley should be commended for taking this voluntary step. Morgan Stanley told the SEC that it was "[u]naware of any other firm taking similar steps." *Ex. 62, 1/13/05 Settlement Discussion Between Morgan Stanley and SEC Staff Presentation at 5.*	*Both statements cannot be true. One is false.*
Was the June 23, 2004 Completeness Certificate true or false?	"Morgan Stanley & Co. and Morgan Stanley Senior Funding, Inc. complied with Paragraphs 1 and 2 of the April 16 Agreed Order." *Ex. 46, 6/23/04 Cert. of Compl.*	"Morgan Stanley & Co. and Morgan Stanley Senior Funding, Inc. complied with Paragraphs 1 and 2 of the April 16 Agreed Order." *Ex. 46, 6/23/04 Cert. of Compl.*		***The Court has already found the Certificate to be false when made.*** ***Ex. 2, 3/1/05 Order on CPH's Motion for Adverse Inference at 10.*** *Mr. Riel, who signed the Certificate, acknowledged that he was aware of the discovery of 1,423 DLT and 738 8mm backup tapes that had not been processed into the archive at the time he signed. He signed because "I knew that the litigators – my*

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				internal clients – needed certification on our results and I wanted to satisfy that concern." *Ex. 60, Riel Dep. (3/8/05) at 49-50, 74-75, 78-79.*
	"The date of the backup utilized for each employee or former employee for whom e-mail was produced was January, 2000." *Ex. 46, 6/23/04 Cert. of Compl.*	"The date of the backup utilized for each employee or former employee for whom e-mail was produced was January, 2000." *Ex. 46, 6/23/04 Cert. of Compl.*		*Backup tapes were not utilized at all. "[T]he e-mail archive does not have the notion of a collection of dates and backup tapes."* *Ex. 60, Riel Dep. (3/8/05) at 53-54.*
				In fact, as of April 29, 2004, "a final sweep of the NY comm rooms to search for stray DLT tapes" was planned, but not completed. *Ex. 10, April 29, 2004 Email Archive Minutes at MS 3000210.*

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What is Arthur Riel's status?	He's a trusted employee; you can rely upon his Certification. *Ex. 46, 6/23/04 Cert. of Compl.*	He's a trusted employee; you can rely upon his Certification. *Ex. 46, 6/23/04 Cert. of Compl.*	He is not to be trusted. *Ex. 14, 2/10/05 Wells Submission at 25-26.*	
	He was placed on administrative leave because of concerns re both integrity and competence *Ex. 4, Gorman Dep. (2/9/05) at 12-13, 58-60.*	Morgan Stanley witnesses were "told to use" the term "administrative leave" for Mr. Riel's departure. *Ex. 3, 2/14/05 Hrg at 59.*		*Despite suspecting him of the commission of crimes (18 USC § 2701) and gross incompetence, despite having fired other persons it suspects of similar conduct, Morgan Stanley keeps him on leave, continues to pay his salary, and pays to retain counsel for his deposition.* *Ex. 60, Riel Dep. (3/8/05) at 39-41.*
Where did the 8,000 pages of production made in November 2004 come from?	**11/17/04** – From newly discovered tapes. *Ex. 47, 11/17/04 Letter from Clare to Brody.*	**2/2/05** - "Some portion of those 112 tapes [part of the 1,423 Brooklyn "found" tapes] had been restored and made searchable by the middle of November." *Ex. 63, 2/2/05 Hrg at 134.*		*Who knows what the truth is?*

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		2/11/05 - "There would have been no way for Ms. Gorman to migrate this data [from the found tapes] from the 'staging area' in August 2004." *Ex. 51, Supp. Opp. to Mot. for Adverse Inference (2/11/05) at 4.* **2/14/05** – Searches of the material in staging as of August 18, 2004 was not possible until mid-January. *Ex. 3, 2/14/05 Hrg at 65, 69.*		
	3/7/05 - From the November production, "[w]e mapped at least one set of messages back to at least one" of the Brooklyn found tapes. *Ex. 59, Gorman Dep. (3/7/05) at 103-04.*		Morgan Stanley informs the SEC "that the one terabyte [in staging] may include, among other things, at least 85 of the approximately 112 tapes" believed to contain email. *Ex. 64, 1/12/05 letter from Michael S. Fuchs, SEC, to Scott W. Fowkes, Kirkland & Ellis, at 4 n.6.*	

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When were the "newly discovered" tapes actually discovered? ***The 1423 Brooklyn "Found" Tapes***		"In the summer of 2004 – I do not have a precise date on that, but sometime during the summer, 1,400 DLT tapes were found in a closet, in a closet in an off-site storage facility in Brooklyn." *Ex. 63, 2/2/05 Hrg at 132.*		*Morgan Stanley had discovered the tapes sometime before May 6, 2004.* *Ex. 65, 5/6/04 Email Archive Minutes at MS 0112286.*
When were the "newly discovered" tapes actually discovered? ***The 738 8mm Tapes***	Morgan Stanley lumped the 8-mm tapes in with the other "found" tapes, informing CPH only on November 17, 2004 that it had "discovered additional e-mail backup tapes." *Ex. 47, 11/17/04 letter from Thomas A. Clare to Michael T. Brody.*	"On November 4th, 2004, additional tapes were located at not a central Morgan Stanley facility. . . . [I]t was found, again, at a place where e-mail tapes are not normally kept. These were 728 eight-millimeter tapes." *Ex. 63, 2/2/05 Hrg at 136.*	"We understand that NDCI now is attempting to restore e-mail from the 700 eight millimeter tapes that Morgan Stanley *recently found*." *Ex. 15, 11/8/04 letter from Ann Rosenfield, SEC, to Paul V. Gerlach, Sidley Austin Brown & Wood at 2 (emphasis added).*	*The 738 "[e]ight-millimeter tapes were discovered sometime in 2002."* *Ex. 17, Glenn Sieckel Dep. (2/10/05) at 74.* *By July 2, 2004, Morgan Stanley knew the 8mm tapes contained 1998 email.* *Ex. 13, 7/2/04 email from Buchanan to Riel, Pamula, Haight, & Stewart.*

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When did Morgan Stanley learn that the newly discovered tapes actually contained email?		"Late October of 2004 . . . [is] the date I am representing to the court is the first time that anyone knew that there was recoverable e-mail data" on the Brooklyn tapes. *Ex. 63, 2/2/05 Hrg at 133-34.*	"Mr. Riel was aware by no later than July 2004 that at least some of the 1,423 tapes contained e-mail." *Ex. 14, 2/10/05 Wells Submission at 25.*	*On July 2, 2004, NDCI informed several Morgan Stanley IT professionals, Arthur Riel, John Pamula, Donald Haight, & Wray Stewart, that "found" tapes contained email.* *Ex. 13, 7/2/04 email from Buchanan to Riel et al.*
When did Morgan Stanley learn that the newly discovered tapes actually contained 1998 email?	"[T]here is no way for Morgan Stanley to know or accurately predict the type or time period of data that might be recovered from tapes that have yet to be restored." *Ex. 66, 1/21/05 letter from Thomas A. Clare to Michael T. Brody.*	"There is no way for anyone to know . . . whether any of the information on the tape, these tapes that we're talking about comes from 1997, 1998, 1999, 2000, 2003. Nobody knows." *Ex. 63, 2/2/05 Hrg. at 120.*		*On July 2, 2004, NDCI informed several Morgan Stanley IT professionals, Arthur Riel, John Pamula, Donald Haight, & Wray Stewart, that "found" tapes contained 1998 and 1999 email.* *Ex. 13, 7/2/04 email from Buchanan to Riel et al.*

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Not that it matters, but when did Mr. Riel share with lawyers what Morgan Stanley knew, that the found tapes contained email?		"[I]t was only after his [Riel's] departure, and replacement by Ms. Gorman that legal staff learned of the existence of additional backup tapes that needed to be migrated onto the e-mail archive system." *Ex. 51, Morgan Stanley Supp. Opp. to Motion for Adverse Inference (2/11/05) at 6.*	"Mr. Riel never informed the Law Division that any e-mail had been discovered on the 'found' tapes, despite his previous commitment to do so." *Ex. 14, 2/10/05 Wells Submission at 25.*	*On June 7, 2004, Morgan Stanley lawyers Soo-Mi Lee and her boss, James P. Cusick, are told by Riel that "The storage folks found an additional 1,600 backup tapes in a closet." Riel stated he would inform them if the tapes were found to contain email. Although he doesn't recall whether or not he specifically did so, he recalls that he had a later conversation with Morgan Stanley lawyers on the subject of the June 7 email sometime before he was placed on administrative leave in August.* *Ex. 60, Riel Dep. (3/8/05) at 89-90.*
When did Morgan Stanley disclose the existence of the found tapes and the fact that they contained email?	November 17, 2004 *Ex. 47, 11/17/04 letter from Thomas A. Clare to Michael T. Brody.*		Late October, 2004 "Morgan Stanley's Law Division first learned that the found tapes contained e-mail at the end of October 2004, and informed the staff of this within days." *Ex. 14, 2/10/05 Wells Submission at 25.*	*The SEC was told within days – because the SEC was breathing down Morgan Stanley's neck. This Court and CPH were told nothing until recently, only after CPH was forced to move for sanctions.*

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When did Morgan Stanley counsel know that the Archive was not complete as of May 14, 2004?		"At the end of October 2004, I learned that additional e-mail backup tapes had been located within Morgan Stanley, and that the data on those tapes had not been restored or searched. . ." *Ex. 11, Decl. of James F. Doyle.* "[I]n late October the law division became aware that additional tapes had been located that were not covered by our prior search." *Ex, 63, 2/2/05 Hrg at 113.* "Late October of 2004 . . . [is] the date I am representing to the court is the first time that anyone knew that there was recoverable e-mail data" on the Brooklyn tapes. *Ex. 63, 2/2/05 Hrg at 133-34.*		*On June 7, 2004, Morgan Stanley lawyers Soo-Mi Lee and her boss, James P. Cusick, are told, "The storage folks found an additional 1,600 backup tapes in a closet."* *Ex. 12, 6/7/04 email from Arthur Riel to James Cusick & Soo-Mi Lee.*

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When – and why – did Morgan Stanley put any priority on getting the data in staging into the Archive?		"So in October it became clear that there were inquiries waiting on this data and that's why it got prioritized." *Ex. 3, 2/14/05 Hrg at 51.*		*In mid-October, the SEC initiated an investigation into Morgan Stanley's alleged destruction of email backup tapes.*
Why did it take so long to process the data in staging?		Morgan Stanley could not find the scripts; there were errors in the scripts. *Ex. 3, 2/14/05 Hrg at 51-52.*	"Because of Mr. Riel's unavailability, this was a painstaking process, but a necessary one to ensure that the terabyte in the staging area would be properly stored and accessible after it was loaded." *Ex. 14, 2/10/05 Wells Submission at 26.*	*Mr. Riel was not unavailable, and he "absolutely" would have assisted to ensure that the terabyte was properly stored and loaded.* *Ex. 60, Riel Dep. (3/8/05) at 133-34.*
		Mr. Clare testifies that Morgan Stanley did not "undertake an inquiry as to how quickly a vendor would be able to perform" the tasks necessary to search for responsive e-mails among the newly found backup tapes."		*CPH had proposed that the parties use a third-party vendor to process and search the backup tapes, but Mr. Clare himself rejected that idea.* *Ex. 67, 3/9/04 letter from Brody to Clare at 1-2; Ex.*

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		Ex. 3, 2/14/05 Hrg at 203-04.		*68, 3/11/04 letter from Clare to Brody at 1.*
How much data – how much potential email -- is on the "found" tapes?		"The quantity of information in staging was 600 gigabytes." *Ex. 3, 2/14/05 Hrg. at 77.*	"Morgan Stanley currently believes that the migration of the one terabyte of data from the staging area to the archive will be completed in the next few weeks." *Ex. 64, 1/12/05 letter from Michael S. Fuchs, SEC, to Scott W. Fowkes, Kirkland & Ellis, at 4 n.6.*	*It is a mystery why Morgan Stanley tells the SEC one thing, this Court another. But the difference of 400 gigabytes is significant – it is the equivalent of 200 million printed pages. The 9,000 tapes now disclosed which were not part of the Archive as it existed in May 2004, assuming an average storage capacity of 30 gigabytes, represent* ***13.5 billion printed pages.***

Issue	Morgan Stanley Represents to CPH	Morgan Stanley Represents To The Court	Morgan Stanley Represents to the SEC	Bottom Line
The Bottom Bottom-Line:	*At a time when Morgan Stanley generated 6 million email messages per week, Ex. 69, Saunders Dep. (2/10/04) at 47, and (according to Morgan Stanley's Project Laser Working Group List, Ex. 91) 22 professionals in two different offices were working on the transaction, it is inconceivable that there were not countless email messages sent among team members. Those messages likely would have addressed every possible aspect of this case, from the nature of the Sunbeam Fraud, to Morgan Stanley's knowledge of and complicity in that fraud, to the cover-up of the fraud, to CPH's damages from the fraud, and to whether Morgan Stanley's culpability on these email destruction issues justifies, indeed requires, the imposition of punitive damages.* *The document destruction issues here bear on:* • *The extent of Morgan Stanley's destruction of evidence likely to have been relevant to every element of proof at issue in this case* • *The willfulness of the destruction* • *The cover-up of the destruction* • *The availability of alternate sources of discovery* • *The legitimacy of Morgan Stanley's privilege assertions* *Morgan Stanley's willful destruction of likely email evidence in violation of Federal Law and internal policy has caused enormous harm to CPH, harm which is only partially addressed by the limited sanction imposed so far by the Court on the limited record available as of the time of the February 14, 2005 Hearing.* *Focusing only on the email issues, the additional record developed since February 14 shows an extensive and premeditated pattern of misdirection and deceit which is broader and substantially more egregious than was previously known, a pattern which demands additional corrective action and the imposition of the harshest of sanctions. Neither the Court nor CPH can ever again accept as true anything Morgan Stanley says:* *(1) because the nature of some of the problems Morgan Stanley has created is such that they can never be repaired;* *(2) because the magnitude of the known problems is so great that it would require nearly total repetition of the entire pre-trial discovery process to repair those problems that can be remedied;* *(3) because confidence in the accuracy and integrity of every Morgan Stanley discovery response is completely destroyed, thus requiring independent verification of every assertion Morgan Stanley has made;* *(4) because Morgan Stanley has resisted so hard and delayed so long giving complete and forthright*			

Issue	Morgan Stanley Represents to CPH	Morgan Stanley Represents To The Court	Morgan Stanley Represents to the SEC	Bottom Line
	answers on these email issues; *(5) because it is impossible to resolve any of these numerous issues before trial; and* *(6) because Morgan Stanley has, time and time again, made representations of fact which it was forced to admit were untrue, often the next day.* *The only corrective action adequate to address these circumstances and sufficient to respond to Morgan Stanley's assault on the basic integrity of the civil justice system is to strike its pleadings.* *Morgan Stanley has failed, time after time, to be forthcoming and honest. It says one thing to CPH, another to the Court, another to SEC; it makes outright false statements presents half-truths, and intentionally omits material facts; then it invents new lies to conceal its earlier ones. Morgan Stanley's ultimate disrespect for the truth and for this Court warrants the ultimate sanction.*			

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CPH EXHIBIT LIST

No.	Date	Description	Bates
1	3/8/05	Hr'g Transcript at 2408-2411	
2	3/1/05	Order on CPH's Motion for Adverse Inference Instruction	
3	2/14/05	Hr'g Transcript (entire)	
4	2/9/05	Deposition (2/9/05) of Allison Gorman Nachtigal (entire)	
5	10/12/04	CPH's Request for Production of Supplemental Documents to Morgan Stanley & Co., Inc.	
6	12/17/03	CPH's Third Request for Production of Documents	
7	11/12/04	Morgan Stanley & Co. Inc.'s Responses and Objections to CPH's Request for Supplemental Documents	
8	2/3/05	Order Specially Setting Hearing	
9	3/2/05	Order on Morgan Stanley's Responses and Objections to CPH's Notice to Produce at Hearing	
10	4/29/04	Email Archive Meeting Minutes 4/29/04	MSC 3000210-11
11	Undated	Declaration of James Doyle	
12	6/7/04	E-mail from Riel to Cusick & Lee	
13	7/2/04	E-mail from Buchanan to Riel et al.	MSC 0112327
14	2/10/05	Letter from Gerlach to Conte -- Wells Submission	MSC 3004564-595
15	11/8/04	Letter from Rosenfield to Gerlach	MSC 3001956-58
16	1/25/04	E-mail from Saunders to Riel et al.	MSC 3000455-56
17	2/10/05	Deposition (2/10/05) of Glenn Seickel (entire)	
18	3/3/04	Order Granting in Part and Denying in Part Plaintiff's Motion to Compel Production of Documents Relating to Employee Performance	
19	3/11/04	Fax from Mangan to Bayegan	MSC 116214
20	11/10/98	Italian Judge Orders Salomon Executives to Face Trial	
21	2/17/05	Hr'g Transcript at 1154-64	
22	2/17/05	Order on CPH's Motion to Compel Production of Documents Relating to William Strong	
23	2/18/05	Form U4	MSC 116176-89
24	2/28/05	Morgan Stanley's Response to Plaintiff's Motion for Order Declaring Attorney-Client Privilege Waived for Certain Documetns Relating to William Strong	

No.	Date	Description	Bates
25	3/4/05	Hr'g Transcript at 2137-50	
26	5/11/95	Letter from Cooney to Mayhew	MSC 119237-38
27	5/11/95	Letter from Sonnenborn to Salomon Bros.	MSC 119235-36
28	3/7/05	Hr'g Transcript at 2235-50	
29	3/8/05	Hr'g Transcript at 2462-68	
30	4/17/96	Notice of Strong Indictment	MSC 116522-
31	9/27/01	E-mail from Gans to Strong et al.	MSC 117822
32	9/28/04	Cusick Certification	MSC 3002377
33	11/4/04	Letter from Rosenfield to Gerlach	MSC 3001953-55
34	11/12/04	Letter from Green to Rosenfield	MSC 3000504-69
35	3/1/05	Chronology of Discovery Abuses by Defendant	
36	1/6/04	Letter from Brown to Brody	
37	10/29/04	Letter from Gerlach to Rosenfield	MSC 3000502-03
38	10/18/04	Letter from Parizek to Rosenfield	MSC 3000030-130
39	1/14/05	E-mail from Gerlach to Clubok, Kempf, et al.	MSC 3002046-47
40	1997	1997 Evaluations of William H. Strong	MSC 0085453-71
41	1998	1998 Evaluations of William H. Strong	MSC 0085472-93
42	12/8/04	Deposition of Joseph R. Perella at 98-101	
43	3/4/05	Hr'g Transcript at 2182-92	
44	5/14/04	Letter from DeBord to Brody	
45	3/1/05	Letter from Fuchs to Fowkes	MS 5000007-
46	6/23/04	Certificate of Compliance	
47	11/17/04	Letter from Clare to Brody	
48	2/4/05	Hr'g Transcript at 6	
49	2/10/05	Deposition (2/10/05) of Robert Saunders (entire)	
50	2/11/05	Letter from Clare to Brody	
51	2/11/05	Morgan Stanley's Supp. Opp. To CPH's Motion for Adverse Inference Instruction	
52	2/12/05	Morgan Stanley's Advisory to Court and Counsel	
53	2/23/05	Hr'g Transcript at 1321	
54	3/5/05	Letter from Lancaster to Byman	
55	9/9/03	Deposition of John Plotnick at 45-46	
56	11/4/03	Morgan Stanley's Opposition to Motion to Compel Concerning Emails	
57	3/19/04	Hr'g Transcript at 22	
58	2/24/05	Letter from Green to Rosenfield	MSC 3001883-87
59	3/7/05	Deposition of Allison Gorman Nachtigal (entire)	
60	3/8/05	Deposition of Arthur J. Riel (entire)	
61	4/16/04	Agreed Order	
62	1/13/05	Power Point Presentation: Settlement Discussion Between Morgan Stanley and SEC Staff Re: E-mail Tape Issues	MSC 5000011-27
63	2/2/05	Hr'g Transcript at 113, 120, 132-36	
64	1/12/05	Letter from Fuchs to Fowkes	MSC 5000002-06
65	Various	E-mail Archive Minutes	Various
66	1/21/05	Letter from Clare to Brody	
67	3/9/04	Letter from Brody to Clare	
68	3/11/04	Letter from Clare to Brody	
69	2/10/04	Deposition of Robert Saunders (entire)	
70	3/13/04	Deposition of Allison Gorman Nachtigal	
71	3/13/04	Deposition of Richard Anfang	
72	3/13/04	Deposition of Frederick L. Block	
73	3/13/04	Deposition of Bruce Buchanan	

No.	Date	Description	Bates
74	11/22/04	Notes of Allison Gorman	MSC 0117891
75	12/1/04	Notes of Allison Gorman	MSC 0117889
76	11/23/04	Notes of Allison Gorman	MSC 0117890
77	10/4/04	E-mail from Rockoff to Gorman	MSRIEL 0000217-18
78	2/24/05	E-mail from Gerlach to Conte	MSC 3001883
79	2/19/05	E-mail from Clare to Brody & Hirsch	
80	4/19/04	Resignation Letter of Riel	MSRIEL 0000091
81	8/19/04	Investigation Report of Tara Favors	MSRIEL 0000104-08
82	12/3/02	SEC E-mail Settlement Order	
83	7/16/04	E-mail from Buchanan to Stewart	MSC 0112889
84		E-mail from Jo re Riel	Riel Ex. 869
85	Undated	Handwritten Notes of Richard Anfang	MSC 3004300
86	3/7/05	Morgan Stanley Privilege Log	
87		Renew Data Electronic Evidence Reference Card	
88	3/10/05	Letter from Clare to Brody	
89	3/9/05	Letter from Brody to Clare	
90	3/10/05	Letter from Brody to Clare	
91	9/10/97	Project Laser Working Group List	MSC 0001923-31
92	3/9/05	Letter from Fowkes to Fuchs	MSC 2000760-76
93	3/12/05	Renew Data Corp. Media Processing Statistics	
94	5/10/04	Morgan Stanley Revised Privilege Log	
95	10/29/03	CPH's Motion to Compel Concerning E-mails	
96	4/9/04	CPH's Motion to Compel Concerning E-mails and Other Electronic Documents	
97	11/3/04	Letter from Clare to Brody	
98	3/15/04	Letter from Brody to Clare	
99	4/13/04	Letter from Clare to Brody	
100	5/11/95	Letter from Sonnenborn to Salomon Brothers	MSC
101	12/17/03	Order on Plaintiff's Ore Tenus Motion to Shorten Time	
102	3/4/05	Order on Plaintiff's Ore Tenus Motion to Compel Additional Production	
103	12/17/03	Hr'g Transcript	
104	3/7/05	Letter from Clare to Brody	
105	3/7/05	Letter from Clare to Brody	
106	3/9/05	Letter from Clare to Brody	
107	3/9/05	Letter from Clare to Brody	
108	3/9/05	Letter from Clare to Brody	
109	3/9/05	Letter from Clare to Brody	
110	3/11/05	Letter from Clare to Brody	
111	3/11/05	Letter from Clare to Brody	
112	5/21/02	Letter to NY AG re: backup tapes	MSC 2000661-62
113	5/22/02	Letter from SEC to Morgan Stanley inviting *Wells* submission	MSC 2000185-86
114	5/31/02	Letter to NY AG re: problems searching attachments and backup tapes	MSC 2000665
115	6/12/02	Summary of MS document preservation	MSC 2000287-88
116	6/17/02	Letter to SEC re: email production	MSC 2000667
117	11/04/02	Letter to SEC re: email production	MSC 2000670-72
118	11/20/02	Letter to SEC re: retention of email	MSC 2000059-60
119	11/20/02	Letter to SEC re: retention of email	MSC 2000351-56
120	12/19/02	Letter to S.D.N.Y. re: electronic preservation issues and backup tapes	MSC 2000289-302
121	3/3/03	Letter to opposing counsel re: email production and backup	MSC 2000303-10

No.	Date	Description	Bates
		tapes	
122	6/20/03	Letter to SEC re: email production	MSC 2000411-43
123	6/23/03	Letter to SEC re: email production	MSC 2000414-17
124	6/30/03	Letter to SEC re: email production	MSC 2000418-20
125	7/16/03	Letter to SEC re: email production	MSC 2000935-36
126	7/18/03	Letter to SEC re: ability to retrieve email	MSC 2000421-31
127	9/11/03	Letter to SEC re: email production	MSC 200432-38
128	9/18/03	Letter to SEC re: email production	MSC 2000937-38
129	10/17/03	Letter to SEC re: email production	MSC 2000439-44
130	1/16/04	Letter to SEC re: email production	MSC 2000451-53
131	1/23/04	Letter to SEC re: email production	MSC 2000454-55
132	2/6/04	Email from Riel to Lee and Cusick	MSC 3004045
133	2/20/04	Letter to SEC re: email production	MSC 2000456-59
134	3/3/04	Letter to S.D.N.Y. re: backup tapes	MSC 2000747-54
135	3/5/04	Letter to SEC re: email production	MSC 2000460-62
136	3/5/04	Letter to SEC re: email restoration process, including chart of progress	MSC 2000787-96
137	3/12/04	Letter to SEC re: email production	MSC 2000463-66
138	3/16/04	Letter to SEC re: email restoration process, including chart of progress	MSC 2000801-05
139	3/19/04	Letter to SEC re: email production	MSC 2000467-69
140	3/26/04	Letter to SEC re: email production	MSC 2000470-71
141	3/31/04	Letter to SEC re: email searches	MSC 2000689-91
142	4/2/04	Letter to SEC re: email production	MSC 2000472-73
143	4/9/04	Letter to S.D.N.Y. attaching Riel declaration re: email storage and backup tapes	MSC 2000755-59
144	4/9/04	Letter to SEC re: email production	MSC 2000474-80
145	4/13/04	Letter to SEC re: email searches	MSC 2000692-94
146	5/18/04	Letter to SEC re: email searches	MSC 2000695-97
147	6/7/04	Email from Riel to Cusick and Lee re: email	MSC 3004672
148	6/21/04	Letter to SEC re: email restoration process, including updated chart of progress	MSC 2000797-800
149	6/24/04	Letter to SEC re: email searches	MSC 2000698-700
150	6/28/04	Letter to SEC & NYSE re: instant messaging	MSC 2000673
151	8/9/04	Letter to SEC re: email searches	MSC 2000701-03
152	8/31/04	Letter to SEC re: email searches	MSC 2000931-34
153	10/15/04	Document request from SEC	MSC 3001893-902
154	10/18/04	Letter to SEC re: email tape restoration	MSC 3000030-130
155	10/21/04	Letter to SEC re: email tape restoration	MSC 3000148-244
156	10/22/04	Letter to SEC re: email tape restoration	MSC 3000245-303
157	10/26/04	Letter to SEC re: email tape restoration	MSC 3000304-446
158	10/27/04	Letter to SEC re: email tape restoration	MSC 3000447-489
159	10/27/04	Letter from SEC re: testing tapes	MSC 3001903-52
160	10/28/04	Letter to SEC re: email tape restoration	MSC 3000490-501
161	10/29/04	Letter to SEC re: Riel is unauthorized to produce documents	MSC 3000502-03
162	11/1/04	Letter to SEC re: email production	MSC 3002061-68
163	11/4/04	Letter from SEC re: email production	MSC 3001953-55
164	11/8/04	Letter to SEC re: email production	MSC 2000490-91
165	11/8/04	Letter from SEC re: email production	MSC 3001956-58
166	11/12/04	Letter to SEC re: email scripts	MSC 2000780-83
167	11/17/04	Letter to SEC re: NDCI email processing	MSC 2000784-86
168	11/18/04	Letter to SEC re: backup tapes	MSC 3000579-81

No.	Date	Description	Bates
169	11/22/04	Letter to SEC re: backup tapes	MSC 3001267-69
170	11/24/04	Letter to SEC re: backup tapes	MSC 3001760-71
171	12/13/04	Letter to SEC re: Riel investigation	MSC 3001808-28
172	12/15/04	Letter from SEC re: Riel email	MSC 3002168-69
173	12/15/04	Letter to SEC including Riel email	MSC 3004420
174	12/15/04	Letter from SEC re: Riel email	MSC 3002170-71
175	1/21/05	Letter to SEC re: email production and additional backup tapes	MSC 2000494-99
176	1/28/05	Letter from SEC re: email production	MSC 3002049-50
177	2/3/05	Letter to opposing counsel re: additional tapes	MSC 2000357
178	2/4/05	Letter to SEC re: vendor investigation	MSC 2000777-79
179	2/10/05	Letter to SEC re: *Wells* submission	MSC 3004357
180	2/10/05	*Wells* submission to SEC	MSC 3004564
181	2/11/05	Letter to SEC re: vendor investigation	MSC 2000371-84
182	2/24/05	Letter to SEC re: vendor investigation	MSC 3001880-87
183	2/24/05	Letter to SEC re: Riel and email archive system	MSC 2000366
184	2/25/05	Letter to SEC re: SEC email investigation	MSC 2000687-88
185	1/5/04	Letter from Brody to Clare	
186	12/17/03	Plaintiff's Third Request for Production of Documents	
187	1/2/04	MS & Co.'s Response and Objections to CPH's Third Request for Production of Documents	
188	1/6/04	Letter from Brown to Brody	
189	1/9/04	Letter from Brody to DeBord	
190	1/12/04	Letter from DeBord to Brody	
191	1/20/04	Letter from Brody to DeBord	
192	1/26/04	Letter from DeBord to Brody	
193	10/12/04	CPH's Request for Production of Supplemental Documents to MS & Co.	
194	11/12/04	MS & Co.'s Responses and Objections to CPH's Request for Production of Supplemental Documents	
195	3/11/05	Letter from Clare to Brody	
196	2/26/04	EEOC letter to Judge Ellis	
197	3/12/05	Letter from Brody to Clare	
198	3/13/05	Letter from Brody to Clare	
199	3/13/05	Letter from Clare to Brody	
200	3/3/04	Letter from Kirkland & Ellis to Judge Ellis	
870	3/12/05	Tape Tracking Chart	
201	2/10/05	Declaration of Allison Gorman Nachtigal	
202	2/11/05	Declaration of Allison Gorman Nachtigal	
203	3/15/05	Order	
204	10/27/95	1995 William Strong Personnel Evaluation	
205	2/6/05	Letter from Brody to Clare	
206	4/30/04	Letter from L. Paule-Carres	
207	12/1/1994	1994 Summary of William Strong Performance Evaluation	
208	12/9/04	R. Scott Deposition	
209	5/9/03	CPH's First Request for Production of Documents	
210	2/11/04	CPH's Motion to Compel Produciton of Documents	
211	4/23/04	Letter from Brody to Clare	
212	5/5/04	Letter from L. Paule-Carres	
213	3/12/05	Letter from Brody to Clare	
214	5/5/95	Fax from D. Mayhew to M. Sonnenborn	
215	7/6/99	Form U-4 Disclosure Occurrence Composite by William Strong	

No.	Date	Description	Bates
216	Undated	Handwritten notes re backup tapes	(MS 3004275-88)
217	Undated	Presentation re: email recovery despite tape overwrites	(MS 3004289-95)
218	Undated	Handwritten notes re: numbers of tapes	(MS 3004296-99)
219	Undated	Presentation re: duplication factor	(MS 3004302-36)
220	Undated	Tape backup history timeline	(MS 3003966-70)
221	Undated	Tape backup history timeline	(MS 3003985-88)
222	1/12/01	Email re: compliance with regulatory obligations on email backup	(MS 2000035)
223	2/11/01	Email re: long term procedures for compliance on email retention	(MS 2000036)
224	12/2/04	Ltr. to SEC re: IPO investigation	(MS 3002160)
225	11/6/03	Ltr. to SEC re: email production	(MS 2000445-50)
226	6/21/04	Email re: tape processing	(MS 3002140-144)
228	10/18/04	Email re: "Arthur Reil/SEC investigation"	(MS 3003904-11)
229	10/22/04	Summaries regarding Tape Restoration and Storage	(MS 3000013-29)
230	10/29/04	Email re: missing tapes	(MS 3002094-95)
231	11/1/04	Ltr. to SEC re: email production	(MS 2000481-89)
232	11/1/04	Ltr. to SEC re: Riel investigation	(MS 3004037-44)
233	11/2/04	Email re: duplicate tapes	(MS 3002081-93)
234	11/2/04	Email re: scripts	(MS 3002104)
236	11/9/04	Email re: tapes	(MS 3002099-100)
238	11/15/04	Email re: NDCI missing tapes	(MS 3002054)
239-247	11/12/04	Data provided to SEC re: tapes	(MS 2000806-882)
248	11/17/04	Ltr. to SEc re: NDCI Tape Processing	(MS 3000570-78)
249	11/19/04	Ltr. from SEC re: testing tapes in IPO investigation	(MS 3001959-2028)
251	11/29/04	Ltr. from SEC re: IPO investigation	(MS 3002161-62)
252	11/30/04	Ltr. from SEC re: IPO investigation	(MS 3002163-67)
253	12/1/04	Ltr. to SEC re: IPO investigation	(MS 3000131-147)
254	12/2/04	Ltr. from SEC re: email back up tapes found and not restored	(MS 3002166)
255	12/6/04	Ltr. to SEC re: IPO investigation	(MS 3001772)
256	12/6/04	Ltr. to SEC re: IPO investigation	(MS 3001773-1802)
257	12/7/04	Ltr. to SEC re: IPO investigation	(MS 3001803-07)
258	12/17/04	Ltr. to SEC re: IPO investigation	(MS 3002172)
259	12/30/04	Email re: error tapes	(MS 3002079)
260	1/3/05	Email from NDCI re: tape	(MS 3002069)
261	1/9/05	Email chain re: final script and "bad tape"	(MS 3004105-39)
262	1/13/05	Email re: tape creation time	(MS 3004225-29)
263	1/13/05	Email re: total amount of emails on backup tape	(MS 3004221-24)
264	1/13/05	Ltr. to SEC re: IPO investigation	(MS 300183250)
265	1/14/05	Email with handwritten notes re: control database	(MS 300421419)
266	1/14/05	Ltr. from SEC re: IPO investigation	(MS 3002035-45)
270	2/1/05	Ltr. to SEC re: IPO investigation	(MS 3001851)
271	2/4/05	Email re: tapes uploaded to staging area	(MS 3002078)
272	2/7/05	Email re: mail analysis	(MS 3004083)
273	2/7/05	Email re: June 2000 database	(MS 3004092-96)
274	2/8/05	Email re: purged trash study	(MS 3004081-82)
275	2/8/05	Email re: purged trash study	(MS 3004088-89)
277	10/30/04	Email re: NDCI results and missing data	(MS 3004631-32)
278	2/10/05	Exhibits to Wells submission to SEC	(MS 3004424-563)
279	11/18/04	Email re: creation date for 8 mm tapes	(MS 3004596-630)
280	11/8/04	Email re: "urgent project" on Unix email servers	(MS 3004340-41)

No.	Date	Description	Bates
281	1/9/05	Email re: tape processing	(MS 3003912)
282	10/28/04	Email re: DLT Tapes for NDCI	(MS 3004080)
283	11/11/04	Email chain re: SEC request	(MS 3004077-79)
284	1/9/05	Email re: timeline of tape backup history	(MS 3003913)
285	11/16/04	Email re: "significant number of additional emails"	(MS 3003917)
286	1/11/05	Email re: backup history	(MS 3003918)
287	2/2/05	Email re: validation of tape list	(MS 3003931)
288	1/10/05	Email re: NDCI	(MS 3003916)
289	11/14/04	Email re: 302 tapes from NDC	(MS 3004075)
290	11/12/04	Email re: "new script needed"	(MS 3004076)
291	11/15/04	Email re: detail on mail backups	(MS 3004073-74)
292	11/4/04	Email re: test procedures for SEC request	(MS 3004071-72)
293	11/15/04	Email re: "new script needed"	(MS 3004069-70)
294	12/21/04	Email re: SEC Tapes Backup Dates	(MS 3004066-68)
295	12/20/04	Email re: SEC Tapes Backup Dates	(MS 3004064-65)
296	12/21/04	Email re: SEC Tapes Backup Dates	(MS 3004061-63)
297	10/30/04	Email re: "missing tapes"	(MS 3003978-83)
298	11/1/04	Email re: DLT Tape Check	(MS 3004056-58)
299	12/10/04	Email re: "112 found tapes"	(MS 3004052-55)
301	11/4/04	Email re: procedure for tape analysis, SEC request	(MS 3004049-50)
303	1/10/05	Email re: script output	(MS 3003994-4036)
304	10/29/04	Email chain re: forensic tape analysis	(MS 3003992-93)
305	12/9/04	Email chain re: tape processing	(MS 3003989-91)
306	11/3/04	Email re: procedure for tape analysis	(MS 3004342)
307	11/16/04	Email re: list of tapes form NDCI and missing tapes	(MS 3004346)
309	5/8/03	Ltr. from SEC re: document request for email	(MS 2000939-46)
311	5/27/03	Ltr. from SEC re: document request for email	(MS 2000947-53)
312	1/13/04	Ltr. from SEC re: document request for email	(MS 2000954-63)
313	2/26/04	Ltr. from EEOC re: compelling MS to produce email	(MS 2000964-68)
314	7/1/04	Ltr. from SEC re: document request for email	(MS 2000969-83)
315	11/3/04	Ltr. from SEC re: additional email production	(MS 2000985-86)
316	5/6/04	E-mail Archive Meeting Minutes	MSC 3000216
317	11/4/04	Email re: test procedures for script	(MS 3004059-60)
318	11/8/04	Ltr. to SEC re: email production	(MS 2000490-91)
319	1/29/05	Email re: mailbox and trash sizes	(MS 3004099-100)

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CPH SUBMISSION REGARDING EMAIL-RELATED FACTS THE COURT AND CPH KNOW NOW, BUT DID NOT KNOW AS OF FEBRUARY 14

Pursuant to the Court's instruction on March 14, 2005, plaintiff Coleman (Parent) Holdings Inc. ("CPH") respectfully submits this statement of facts that are now known to CPH and the Court, but that were not known at the conclusion of the February 14, 2005 evidentiary hearing, along with a statement of when Morgan Stanley is understood to have known each fact.

New Facts Regarding Processing and Searching the Tapes for Production

- Once the email data has been migrated into Morgan Stanley's archive, the archive does not recognize the notion of individual "full backups" and "incremental backups." Morgan Stanley knew this before the February 14 hearing, and before it demanded the language in the April 16, 2004 Agreed Order requiring searches of the "oldest full backup that exists" for each employee. At least two months before the Agreed Order, Morgan Stanley's primary search capability for historical emails was based on its archive, not on backup tapes.

  3/14/05 Hrg (Anfang) at __; Ex. 60, Riel Dep. (3/8/05) at 53-54

- Because the search was actually performed on an archive, not on existing backup tapes, individual searches were very inexpensive. Thus, it was not necessary to restrict searches to a very narrow, 2-month date range, or to 29 unique search terms for 36 individuals.

  3/14/05 Hrg at __

- As of June 7, 2004 "only 120 of the 143 SDLT output tapes produced by NDCI had been processed into the Archive System" – a fact that makes clear that Morgan Stanley's May 14, 2004 production could not have been complete. Morgan Stanley told the SEC of this

before the February 14 hearing, but withheld the information from CPH and the Court.
Ex. 14, 2/10/05 Wells Submission at 25

- According to Ms. Gorman's most recent testimony, by the time of the November queries that led to the production of 8,000 pages, two of the Brooklyn found tapes had been completely inserted into the archive, and two had been partially inserted. None of the 8,000 pages came from the "Brooklyn found" tapes. Either Morgan Stanley did not know this at the time of the February 14 hearing, or misstated its knowledge, because this knowledge is not supported by any of the evidence previously submitted.
3/14/05 Hrg (Gorman) at 3499-500

- The scripts that Morgan Stanley used to process email into its Archive caused the bodies of some messages to be truncated, and thus missed. Morgan Stanley discovered this problem on February 13, 2005, but failed to tell CPH or the Court.
Ex. 78, 2/24/05 letter from Gerlach to Conte

- A migration issue may have resulted in the failure to capture 5% of the email harvested by NDCI from backup tapes. It is not known whether Morgan Stanley knew this before the February 14 hearing, but it informed the SEC of it on February 24 – but failed to inform CPH and the Court.
Ex. 78, 2/24/05 letter from Gerlach to Conte

- A software issue resulted in a failure to capture blind carbon copies (bcc's) in the archiving search process. It is not known whether Morgan Stanley knew this before the February 14 hearing, but Morgan Stanley informed the SEC of it on February 24 – and failed to inform CPH and the Court.
Ex. 78, 2/24/05 letter from Gerlach to Conte

- Another software issue resulted in the failure of the searches to capture emails typed using an unusual combination of upper and lower case letters. This failure was known to Morgan Stanley as of December 2004, but was not fully rectified until March 2005 and was not mentioned at the February 14, 2005 hearing.
3/14/05 Hrg (Gorman) at __

- A script error caused the archive to have problems pulling group email in Lotus Notes. Morgan Stanley did not know of these tapes before the February 14 hearing – or at least Allison Gorman says it didn't.
Ex. 59, Gorman Dep. (3/7/05) at 76-77

- Morgan Stanley could have avoided all of these problems by asking its usual outside vendor, NDCI, to perform the searches for a marginal cost of about $72,000. If Morgan Stanley did not know this before the February 14 hearing, it is only because it never asked.
3/14/05 Hrg (Buchanan) at __; Ex. 3, 2/14/05 Hrg (Clare) at 203-04

- The Court now knows that the Morgan Stanley IT department searches of the archive on at least two different occasions produced far more documents meeting the search criteria

than Morgan Stanley actually produced – on one of those occasions, the search turned up approximately 1,500 unique e-mails, but Morgan Stanley claims that it only produced 13 unique e-mails based on that search, while on the other known occasion, the search turned up more than 6,500 unique e-mails, but Morgan Stanley only produced hundreds of unique e-mails.

3/14/05 Hrg (Gorman) at __

- Morgan Stanley represented to this Court on two occasions – a sworn declaration from the week prior to the February 14, 2005 hearing, and at the hearing itself – that it had located 600 gigabytes of data, while contemporaneously telling the U.S. Securities and Exchange Commission in two different sworn declarations that it had located one terabyte (*i.e.*, more than 400,000,000,000 bytes more) of data. When confronted with the discrepancy, Morgan Stanley told this Court that the different numbers were just "labels" that Morgan Stanley used that had no intrinsic significance. Morgan Stanley, and Ms. Gorman, had to have been aware of this at the time.

  3/14/05 Hrg (Gorman) at __

- There is an SEC investigation into Morgan Stanley's email retention practices.

  Ex. 14, 2/10/05 Wells Submission at 25

- The third party vendor Morgan Stanley hired to extract email data for migrating to the archive never checked most of the Brooklyn found tapes for email. Although analysis of those tapes is still in progress, it is already apparent that some of the tapes that Morgan Stanley said do not contain email, in fact do contain email.

  3/14/05 Hrg (Buchanan) at __

New Facts Regarding Newly Found Tapes

- There was no basis for the "confidence" that Robert Saunders expressed in his conviction that all backup tapes had been located. In fact, his search had been inadequate and incomplete, because it did not search all possible locations and did not find tapes in locations supposedly included in the scope of his search. His search was so poor that his supervisor intends to make it a basis for negative action relating to his future career prospects at Morgan Stanley.

  3/1405 Hrg (Anfang) at __

- Sometime between January 12 and March 1, 2005, Morgan Stanley announced to the SEC that it had found "145 newly-discovered tapes containing e-mail from 2000." These are apparently different from the various new tapes made known to CPH and the Court in this case, such as the 738 8mm tapes and the 1,423 "Brooklyn found" tapes. Morgan Stanley had apparently informed the SEC of this before March 1, and perhaps before the February 14 hearing.

  Ex. 45, 3/1/05 letter from Fuchs, SEC, to Fowkes, Kirkland & Ellis

- On February 18, 2005, Morgan Stanley found an additional 73 boxes of backup tapes, containing, as Morgan Stanley revealed more than two weeks later, 3,536 tapes. Morgan Stanley did not know of these tapes before the February 14 hearing – or at least it says it

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didn't.

Ex. 53, 2/23/05 Hrg at 1321; Ex. 54 3/5/05 Letter from Lancaster to Byman

- On February 23 and 25, Morgan Stanley found another 278 tapes. On March 2 and 3, Morgan Stanley found another 389 tapes. CPH was not informed until March 13, when Mr. Anfang described them upon questioning at his deposition. Morgan Stanley did not know of these tapes before the February 14 hearing – or at least it says it didn't.

  Ex. 870, Tape Tracking Chart; Ex. 71, Anfang Dep. (3/31/05) at 50, 53

- And on March 3, 2,718 Morgan Stanley backup tapes were apparently found at Recall, Morgan Stanley's third-party storage vendor. Four hundred of those tapes contain email from before June of 2000. Morgan Stanley did not know of these tapes, or that hundreds of the tapes contain email from that time period, at the February 14 hearing – or at least it said it didn't.

  Morgan Stanley Ex. 21; 3/14/05 Hrg at __

New Facts Regarding the Certification of Compliance

- Arthur Riel was not a renegade, unreliable employee, as Morgan Stanley has sought to portray him. Rather, he was a $500,000-per-year executive director of technology, who was asked to sign the certification of compliance precisely because he was in a senior position. Morgan Stanley knew all of this information before it tried to portray Mr. Riel as incompetent in its February pleadings and hearing. Indeed, Mr. Riel had a conversation with the Morgan Stanley legal division to inform them that he, not someone more junior, would be signing the certification.

  Ex. 60, Riel Dep. (3/8/05) at 16-17, 46-47, 64

- Arthur Riel had communications with counsel in the weeks preceding his certification, telling counsel on June 7, 2004, that "the storage folks found an additional 1,600 backup tapes in a closet" – and then he nonetheless went ahead and signed the certification. Morgan Stanley clearly knew this before the February 14 hearing, because counsel was part of those conversations.

  Ex. 12, 6/7/04 email from Riel to Cusick & Lee

- Arthur Riel testified that he signed the certificate of compliance because, "I knew that the litigators – my internal clients – needed certification on our results and I wanted to satisfy that concern."

  Ex. 60, Riel Dep. (3/8/05) at 49-50

- Mr. Riel signed a certificate indicating that Morgan Stanley had searched full backup tapes from January 2000 for all 36 named individuals, even though Morgan Stanley had searched not particular backup tapes, but rather had searched its archive – and even though the searches in the archive covered email that originated from full backup tapes created in 1999, and may not have included tapes containing full backups for all 36 individuals from that date. The June 23, 2004 certificate was false in ways not known to

the Court on February 14, 2005, but known to Morgan Stanley long before.
3/14/05 Hrg at __

- Mr. Riel recalls having conversations with Morgan Stanley lawyers on the subject of whether there were emails on the backup tapes. Again, this information must have been known to Morgan Stanley before the February 14 hearing.
  Ex. 60, Riel Dep. (3/8/05) at 89

- Mr. Riel was told that he was being placed on administrative leave in August not because Morgan Stanley was disappointed in his management of the Archive, but because he had reviewed other employees' emails. He did this because he suspected that those employees were soliciting gifts from Information Technology vendors with whom Morgan Stanley did business, a violation of company policy. Mr. Riel ultimately passed this information on to his superiors (anonymously), and the SEC later (and without first having contact with Mr. Riel) opened an investigation into that very activity. Morgan Stanley knew all of this in February, when it painted Mr. Riel as unethical and incompetent.
  Ex. 60, Riel Dep. (3/8/05) at 29-33; Ex. 153, 10/15/04 Document Request from SEC to Morgan Stanley

Dated: March 15, 2005

Respectfully submitted,
COLEMAN (PARENT) HOLDINGS INC.

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16div-012699

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 15th day of March, 2005.

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JLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

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

CASE NO: 2003 CA 005045 AI

CPH'S ADDITIONAL SUBMISSION IN SUPPORT OF ITS MOTION FOR DEFAULT

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Issue	Morgan Stanley Represents to CPH	Morgan Stanley Represents To The Court	Morgan Stanley Represents to the SEC	Bottom Line
Can we have any confidence that Morgan Stanley has located, much less searched and processed all relevant existing email?	**5/14/04** – Everything is produced. *Ex. 44, 5/14/04 Letter from K. DeBord to M. Brody*		Sometime between January 12 and March 1, 2005, Morgan Stanley informs the SEC that it had found "145 newly-discovered tapes containing e-mail from 2000." **[New Tapes # 1]** These are apparently different than the various new tape issues made known to CPH and the Court in this case, such as the 738 8mm tapes and 1423 DLT tapes described below. *Ex. 45, 3/1/05 letter from Michael S. Fuchs, SEC, to Scott W. Fowkes, Kirkland & Ellis, at 1 (MS 5000007).*	
	6/23/04 – Everything has been produced. *Ex. 46, 6/23/04 Cert. of Compl.*	**6/23/04** – Everything has been produced. *Ex. 46, 6/23/04 Cert. of Compl.*		*But Morgan Stanley admits it found 738 8mm tapes in 2002* **[New Tapes # 2]** *and 1423 DLT tapes sometime prior to May 6, 2004* **[New Tapes # 3]***; by July 2, it knows the tapes contain email dating back to 1998. Ex. 17, Seickel Dep. (2/10/05) at 74; Ex. 13, 7/2/04 email.*

Issue	Morgan Stanley Represents to CPH	Morgan Stanley Represents To The Court	Morgan Stanley Represents to the SEC	Bottom Line
	11/17/04 – Morgan Stanley advises that it has recently found "additional" backup tapes containing email. *Ex. 47, 11/17/04 Letter from Clare to Brody*			*CPH tries to get clarification about the meaning of "additional" and "recently."*
		2/4/05 – Asked by the Court whether there might be "tapes out there that we still don't know about," Thomas A. Clare assures the Court, "No." *Ex. 48, 2/4/05 Hrg. at 6.*		*Mr. Clare's statement is untrue. More undisclosed tapes are still out there.*
	2/10/05 - Morgan Stanley advises CPH that it has discovered another 169 DLT backup tapes **[New Tapes # 4]**. *Ex. 17, Seickel Dep. (2/10/05) at 64-66.*			*But many more undisclosed tapes are still out there.*
	2/10/05 - Robert Saunders testifies that he is "confident" that his team has made "every effort" to locate every existing backup tape, and that he is confident that his efforts have been successful. *Ex. 49, Saunders Dep. (2/10/05) at 42.*			*Mr. Saunders' statement is untrue. More undisclosed tapes are still out there; every effort has not been made and Mr. Saunders' **lack** of confidence leads him – the next day – to perform an easy search that turns up another 243 tapes.*

Issue	Morgan Stanley Represents to CPH	Morgan Stanley Represents To The Court	Morgan Stanley Represents to the SEC	Bottom Line
	2/11/05 - Morgan Stanley produces "the final installment of Morgan Stanley's supplemental production of email messages." *Ex. 50, 2/11/05 letter from Thomas A. Clare to Michael T. Brody.*	**2/11/05 -** On February 11, 2005, Morgan Stanley asserts that CPH's motion for an adverse inference "is moot because the tapes have now been processed and the responsive e-mails have now been produced." *Ex. 51, Morgan Stanley's Supp'l Opp'n to CPH's Motion for Adverse Inference Instructions at 1.*		*Morgan Stanley's statement is untrue. More undisclosed tapes are still out there.*
		2/12/05 - A day later, on February 12, 2005, Morgan Stanley informs the Court that it had discovered additional tapes in the last 24 hours. *Ex. 52, Morgan Stanley's 2/12/05 email Advisory to Court and Counsel.*		*Morgan Stanley's statement is woefully incomplete. Many more undisclosed tapes – more than 10,000 tapes – are still out there.*
		2/14/05 – Robert Saunders testifies that he has located another 243 tapes by going to likely places where such tapes might be **[New Tapes # 5]**. Now he is "[v]ery confident" that he has located all of the backup tapes that exist. *Ex. 3, 2/14/05 Hrg at 94.*		*Mr. Saunders' statement is untrue. More undisclosed tapes are still out there.*

Issue	Morgan Stanley Represents to CPH	Morgan Stanley Represents To The Court	Morgan Stanley Represents to the SEC	Bottom Line
		2/18/05 –Morgan Stanley finds an additional 73 boxes of backup tapes. **[New Tapes # 6]** *Ex. 53, 2/23/05 Hrg at 1321.*		*Morgan Stanley later reveals that the 73 boxes contain a staggering 3,536 tapes. But still more undisclosed tapes are out there.*
	3/5/05 – Morgan Stanley advises that the 73 boxes contain 3,536 tapes. Also disclosed is an entirely new revelation – that "about two days ago" its vendor Recall located **another 134 Boxes of Morgan Stanley tapes. [New Tapes # 7]** *Ex. 54, 3/5/05 Letter from Lancaster to Byman.*			*Morgan Stanley finally discloses – at Mr. Anfang's 3/13/05 deposition – that the 134 boxes contain 2,718 tapes and contain email.* *Ex. 870, Tape Tracking Chart; Ex. 71, Anfang Dep. (3/13/05) at 43, 44.*
	3/13/05 – Mr. Anfang, at his 3/13/05 deposition, discloses yet another two sets of found tapes – 282 tapes found 2/23/05 and 2/25/05 and another 389 tapes found 3/2/05 and 3/3/05. **[New Tapes # 8 and 9]** *Ex. 870, Tape Tracking Chart; Ex. 71, Anfang Dep. (3/31/05) at 50, 53.*			*How can Morgan Stanley continue to state that it has confidence that its searches for backup tapes are complete, only to find more tapes? How can CPH have any confidence that Morgan Stanley has located everything? How can CPH and the Court have any confidence in anything Morgan Stanley says?*

Issue	Morgan Stanley Represents to CPH	Morgan Stanley Represents To The Court	Morgan Stanley Represents to the SEC	Bottom Line
What do we know about Morgan Stanley's willful destruction of email? ***In violation of Federal law, Morgan Stanley overwrote – destroyed – emails after one year. Morgan Stanley supposedly put an end to that systematic destruction in January 2001. But did it?***	"Every e-mail is saved. Even when the employee deletes it, it is backed up on the server" and saved for "[a]t least three years." This policy has been in place since January 2001. *Ex. 55, Plotnick Dep. (9/9/03) at 45-46.*	"The recycling of e-mail tapes at Morgan Stanley ended in January 2001." *Opp. to CPH's Request for Default Judgment (2/28/05) at 12 n.3.*	"In sum, the analysis requested by the staff shows that ***22 tapes*** out of the 199-tape sample were overwritten in violation of Morgan Stanley's January 2001 directive." *Ex. 14, 2/10/05 Wells Submission at 12 (emphasis in original).*	*Morgan Stanley has admitted to the SEC that more than 10% of its backup tapes* ***continued*** *to be overwritten despite Federal law and its own internal "directive."*
CPH moves to compel email production in October 2003. ***Was Morgan Stanley's response in good faith?***	Morgan Stanley objects based upon burden. Although the Request and Motion to Compel ask for email messages, not "backups," Morgan Stanley steers the discussion to backups and related problems.	Restoring and searching email backup tapes "would impose an extreme burden on MS&Co. and **would cost at least hundreds of thousands of dollars."** *Ex. 56, Opp. To Motion To Compel (11/4/03) at 2.* Searching for emails would be "improperly and unduly burdensome given the enormous costs that would be required, given the fact that the time period for which we have backup tapes postdates the events by several years." *Ex. 57, 3/19/04 Hrg at 22.*	"Morgan Stanley's pre-2003 email is now searchable by sender, recipient, date and keywords. . . . [T]he staff can now access this email much more quickly . . ." *Ex. 14, 2/10/05 Wells Submission at 8.*	*As it now admits, "Morgan Stanley, even before the CPH case was filed, undertook substantial, multi-million dollar efforts to upgrade and improve its e-mail retrieval capabilities." It had begun building an Archive in January 2003 but misled the Court and CPH by not disclosing that fact. Instead, Morgan Stanley misdirects the discussion to non-existent problems over locating and searching backup tapes.* *Opp. to Motion for Default Judg. (3/12/05) at 8.*

Issue	Morgan Stanley Represents to CPH	Morgan Stanley Represents To The Court	Morgan Stanley Represents to the SEC	Bottom Line
How complete/reliable was the Archive when Morgan Stanley used it in May 2004 to produce documents and certify completeness?	Production is full and complete. *Ex. 46, 6/23/04 Cert. of Compl.*	Production is full and complete. *Ex. 46, 6/23/04 Cert. of Compl.*	As of June 7, 2004, "only 120 of the 143 SDLT output tapes produced by NDCI had been processed into the Archive System." *Ex. 14, 2/10/05 Wells Submission at 25.*	*The Archive as it existed in May 2004 was the result of processing approximately 35,000 tapes. Morgan Stanley has admitted to the SEC that the processing of the 35,000 tapes was incomplete; but it has never disclosed that fact to CPH or the Court. CPH learned this only when Morgan Stanley was ordered to produce the Wells submission.*
		"I am 90 percent sure that the Lotus content would not have been pulled back in that [May 2004] search." *Ex. 3, 2/14/05 Hrg. at 82-83.*		*Serious concerns were raised in testimony before the Court over whether the original 35,000 tapes were properly processed.*
				*But whatever Morgan Stanley did to search the Archive as it existed in May 2004, we know that the Archive did not then – and largely still does not – include the data contained on the **9 different sets of New Tapes**: 738 8mm tapes found in 2002, 1,423 DLT tapes found prior to May 2004, 169 DLT tapes*

Issue	Morgan Stanley Represents to CPH	Morgan Stanley Represents To The Court	Morgan Stanley Represents to the SEC	Bottom Line
				found in January 2005, 243 tapes found on February 11-12, 2005, 3,536 tapes found on February 18, 2005, 2718 tapes found on March 3, 2005, 389 tapes found on March 2-3, 2005, or 282 tapes found February 23-25, 2005. In total, Morgan Stanley has now identified over 9,000 tapes that were not, still largely are not, part of the Archive.
How complete/reliable was the Archive at the time of the February 14 Hearing?	Robert Saunders testifies that he is "confident" that his team has made "every effort" to locate every existing backup tape, and that he is confident that his efforts have been successful. *Ex. 49, Saunders Dep. (2/10/05) at 42.*	Robert Saunders testifies that he is "[v]ery confident" that he has located all of the backup tapes that exist. *Ex. 3, 2/14/05 Hrg at 94.*	"The Migration Project . . . has been highly successful. . . . Morgan Stanley's pre-2003 email is now searchable by sender, recipient, date and keywords." "Morgan Stanley recently completed its migration of ***every*** pre-2003 e-mail that could be recovered from tape to its Archive System." *Ex. 14, 2/10/05 Wells Submission at 8, 31.*	*There are still huge amounts of data not migrated into the system. 5 days after Mr. Saunders expression of personal confidence to the Court, Morgan Stanley located 73* ***boxes*** *of previously unreviewed tapes. Two weeks later, another 134* ***boxes*** *of tapes were located.*

Issue	Morgan Stanley Represents to CPH	Morgan Stanley Represents To The Court	Morgan Stanley Represents to the SEC	Bottom Line
What problems existed at the time the May search was made which affected the completeness of the search?	Ms. Gorman testified that 600 gigabytes of data were in staging and had not been processed; She identified an issue relating to email group membership and **one Lotus Notes issue**. *Ex. 4, Gorman Dep. (2/9/05) at 79.*	Three problems were identified to the Court: (1) 600 gigabytes of data were in staging and had not been processed; (2) a script error did not pick up all attachments; and (3) another script error did not pick up all Lotus Notes emails because of erroneous dates. [Ms. Gorman's trial testimony did not mention the email group membership issue she had disclosed in her deposition nor the Lotus Notes issue disclosed in her deposition, but CPH now knew about **two Lotus Notes issues**.] *Ex. 3, 2/14/05 Hrg. at 80-83.*	In a 2/24/05 letter to the SEC, Morgan Stanley identifies **three Lotus Notes issues**: (1) the date script issue identified to the Court on 2/14/05; (2) a script error discovered in November 2004 relating to user names (the issue alluded to in her 2/9/04 deposition); and (3) a script error supposedly discovered February 13, 2005 which resulted in truncated message retrieval ***– an issue not disclosed to CPH or the Court on 2/14/05.*** In addition, Morgan Stanley disclosed two other issues 9which were never disclosed to CPH or the Court): (1) a migration issue which may have resulted in failure to capture 5% of the email harvested by NDCI from backup tapes; and (2) a software issue which results in the failure to capture blind copies. *Ex. 78, 2/24/05 Letter from Gerlach to Conte.*	*Every time we ask, we get a different list of problems.*

Issue	Morgan Stanley Represents to CPH	Morgan Stanley Represents To The Court	Morgan Stanley Represents to the SEC	Bottom Line
	At her second deposition, Ms. Gorman identifies another **newly disclosed Lotus Notes issue** [making a total of **five Lotus Notes issues**]: (5) a problem pulling group email. *Ex. 59, Gorman Dep. (3/7/05) at 76-77.*			
			"In order to make sure that no e-mail was missed, [Morgan Stanley] sent all of its Legato backup tapes to NDCI even though it expected, based on its experience, that as many as 30 percent of those tapes would not contain any e-mail data." *Ex. 14, 2/10/05 Wells Submission at 9.*	*Contrary to Morgan Stanley's representation that a third of the tapes would not contain email, Mr. Riel believes – and has so advised the SEC -- that these 10,138 tapes "had been recycled," that is, overwritten.* *Ex. 60, Riel Dep. (3/8/05) at 100-01, 111-12.*

Issue	Morgan Stanley Represents to CPH	Morgan Stanley Represents To The Court	Morgan Stanley Represents to the SEC	Bottom Line
Why did Morgan Stanley create the email Archive?	When the April 2004 Order was entered, CPH was in the dark that an Archive existed, was expected to be complete within months. Unaware of the existence of an efficient search tool, CPH was forced to negotiate the terms of an agreed order to accommodate Morgan Stanley's professed concerns over the burden of searching backup tapes. But Morgan Stanley expected to – and did – rely upon the Archive to comply with the April Order. *Ex. 61, April 16, 2004 Agreed Order.*	When the Court entered the April 2004 Order, it was not informed that an Archive existed, was expected to be complete within months. But Morgan Stanley expected to – and did – rely upon the Archive to comply with the April Order. *Ex. 61, April 16, 2004 Agreed Order.*	"Morgan Stanley ***voluntarily*** undertook to overcome the limitations of its backup tapes by migrating all of its pre-2003 e-mail to a new archive system." *Ex. 14, 2/10/05 Wells Submission at 2 (emphasis in original).*	*Morgan Stanley attempted to curry favor with the SEC by claiming to have undertaken voluntary efforts to make its email easily searchable and accessible while at the same time telling CPH and this Court [and, presumably, other litigation adversaries] that it should not be required to make full production because of the burden of searching backup tapes.*
			"***Although it was under no legal obligation to do so, Morgan Stanley voluntarily undertook to migrate all of its pre-2003 e-mail from backup tapes to the Archive System.***" *Id. at 8 (emphasis in original).*	*Morgan Stanley never told the SEC that it had obligations under the April Order which it intended to meet by using the Archive.*

Issue	Morgan Stanley Represents to CPH	Morgan Stanley Represents To The Court	Morgan Stanley Represents to the SEC	Bottom Line
Was there anything extraordinary about Morgan Stanley's decision to create an Archive?	No. It was what everyone in the industry was doing. "Everybody on the street was building an e-mail archive." *Ex. 4, Gorman Dep. (2/9/05) at 15.*		Yes. Morgan Stanley should be commended for taking this voluntary step. Morgan Stanley told the SEC that it was "[u]naware of any other firm taking similar steps." *Ex. 62, 1/13/05 Settlement Discussion Between Morgan Stanley and SEC Staff Presentation at 5.*	*Both statements cannot be true. One is false.*
Was the June 23, 2004 Completeness Certificate true or false?	"Morgan Stanley & Co. and Morgan Stanley Senior Funding, Inc. complied with Paragraphs 1 and 2 of the April 16 Agreed Order." *Ex. 46, 6/23/04 Cert. of Compl.*	"Morgan Stanley & Co. and Morgan Stanley Senior Funding, Inc. complied with Paragraphs 1 and 2 of the April 16 Agreed Order." *Ex. 46, 6/23/04 Cert. of Compl.*		***The Court has already found the Certificate to be false when made.*** ***Ex. 2, 3/1/05 Order on CPH's Motion for Adverse Inference at 10.*** *Mr. Riel, who signed the Certificate, acknowledged that he was aware of the discovery of 1,423 DLT and 738 8mm backup tapes that had not been processed into the archive at the time he signed. He signed because "I knew that the litigators – my*

Issue	Morgan Stanley Represents to CPH	Morgan Stanley Represents To The Court	Morgan Stanley Represents to the SEC	Bottom Line
				internal clients – needed certification on our results and I wanted to satisfy that concern." *Ex. 60, Riel Dep. (3/8/05) at 49-50, 74-75, 78-79.*
	"The date of the backup utilized for each employee or former employee for whom e-mail was produced was January, 2000." *Ex. 46, 6/23/04 Cert. of Compl.*	"The date of the backup utilized for each employee or former employee for whom e-mail was produced was January, 2000." *Ex. 46, 6/23/04 Cert. of Compl.*		*Backup tapes were not utilized at all. "[T]he e-mail archive does not have the notion of a collection of dates and backup tapes."* *Ex. 60, Riel Dep. (3/8/05) at 53-54.*
				In fact, as of April 29, 2004, "a final sweep of the NY comm rooms to search for stray DLT tapes" was planned, but not completed. *Ex. 10, April 29, 2004 Email Archive Minutes at MS 3000210.*

Issue	Morgan Stanley Represents to CPH	Morgan Stanley Represents To The Court	Morgan Stanley Represents to the SEC	Bottom Line
What is Arthur Riel's status?	He's a trusted employee; you can rely upon his Certification. *Ex. 46, 6/23/04 Cert. of Compl.*	He's a trusted employee; you can rely upon his Certification. *Ex. 46, 6/23/04 Cert. of Compl.*	He is not to be trusted. *Ex. 14, 2/10/05 Wells Submission at 25-26.*	
	He was placed on administrative leave because of concerns re both integrity and competence *Ex. 4, Gorman Dep. (2/9/05) at 12-13, 58-60.*	Morgan Stanley witnesses were "told to use" the term "administrative leave" for Mr. Riel's departure. *Ex. 3, 2/14/05 Hrg at 59.*		*Despite suspecting him of the commission of crimes (18 USC § 2701) and gross incompetence, despite having fired other persons it suspects of similar conduct, Morgan Stanley keeps him on leave, continues to pay his salary, and pays to retain counsel for his deposition.* *Ex. 60, Riel Dep. (3/8/05) at 39-41.*
Where did the 8,000 pages of production made in November 2004 come from?	**11/17/04** – From newly discovered tapes. *Ex. 47, 11/17/04 Letter from Clare to Brody.*	**2/2/05** - "Some portion of those 112 tapes [part of the 1,423 Brooklyn "found" tapes] had been restored and made searchable by the middle of November." *Ex. 63, 2/2/05 Hrg at 134.*		*Who knows what the truth is?*

Issue	Morgan Stanley Represents to CPH	Morgan Stanley Represents To The Court	Morgan Stanley Represents to the SEC	Bottom Line
		2/11/05 - "There would have been no way for Ms. Gorman to migrate this data [from the found tapes] from the 'staging area' in August 2004." *Ex. 51, Supp. Opp. to Mot. for Adverse Inference (2/11/05) at 4.* **2/14/05** – Searches of the material in staging as of August 18, 2004 was not possible until mid-January. *Ex. 3, 2/14/05 Hrg at 65, 69.*		
	3/7/05 - From the November production, "[w]e mapped at least one set of messages back to at least one" of the Brooklyn found tapes. *Ex. 59, Gorman Dep. (3/7/05) at 103-04.*		Morgan Stanley informs the SEC "that the one terabyte [in staging] may include, among other things, at least 85 of the approximately 112 tapes" believed to contain email. *Ex. 64, 1/12/05 letter from Michael S. Fuchs, SEC, to Scott W. Fowkes, Kirkland & Ellis, at 4 n.6.*	

Issue	Morgan Stanley Represents to CPH	Morgan Stanley Represents To The Court	Morgan Stanley Represents to the SEC	Bottom Line
When were the "newly discovered" tapes actually discovered? ***The 1423 Brooklyn "Found" Tapes***		"In the summer of 2004 – I do not have a precise date on that, but sometime during the summer, 1,400 DLT tapes were found in a closet, in a closet in an off-site storage facility in Brooklyn." *Ex. 63, 2/2/05 Hrg at 132.*		*Morgan Stanley had discovered the tapes sometime before May 6, 2004.* *Ex. 65, 5/6/04 Email Archive Minutes at MS 0112286.*
When were the "newly discovered" tapes actually discovered? ***The 738 8mm Tapes***	Morgan Stanley lumped the 8-mm tapes in with the other "found" tapes, informing CPH only on November 17, 2004 that it had "discovered additional e-mail backup tapes." *Ex. 47, 11/17/04 letter from Thomas A. Clare to Michael T. Brody.*	"On November 4th, 2004, additional tapes were located at not a central Morgan Stanley facility. . . . [I]t was found, again, at a place where e-mail tapes are not normally kept. These were 728 eight-millimeter tapes." *Ex. 63, 2/2/05 Hrg at 136.*	"We understand that NDCI now is attempting to restore e-mail from the 700 eight millimeter tapes that Morgan Stanley *recently found*." *Ex. 15, 11/8/04 letter from Ann Rosenfield, SEC, to Paul V. Gerlach, Sidley Austin Brown & Wood at 2 (emphasis added).*	*The 738 "[e]ight-millimeter tapes were discovered sometime in 2002."* *Ex. 17, Glenn Sieckel Dep. (2/10/05) at 74.* *By July 2, 2004, Morgan Stanley knew the 8mm tapes contained 1998 email.* *Ex. 13, 7/2/04 email from Buchanan to Riel, Pamula, Haight, & Stewart.*

Issue	Morgan Stanley Represents to CPH	Morgan Stanley Represents To The Court	Morgan Stanley Represents to the SEC	Bottom Line
When did Morgan Stanley learn that the newly discovered tapes actually contained email?		"Late October of 2004 . . . [is] the date I am representing to the court is the first time that anyone knew that there was recoverable e-mail data" on the Brooklyn tapes. *Ex. 63, 2/2/05 Hrg at 133-34.*	"Mr. Riel was aware by no later than July 2004 that at least some of the 1,423 tapes contained e-mail." *Ex. 14, 2/10/05 Wells Submission at 25.*	*On July 2, 2004, NDCI informed several Morgan Stanley IT professionals, Arthur Riel, John Pamula, Donald Haight, & Wray Stewart, that "found" tapes contained email.* *Ex. 13, 7/2/04 email from Buchanan to Riel et al.*
When did Morgan Stanley learn that the newly discovered tapes actually contained 1998 email?	"[T]here is no way for Morgan Stanley to know or accurately predict the type or time period of data that might be recovered from tapes that have yet to be restored." *Ex. 66, 1/21/05 letter from Thomas A. Clare to Michael T. Brody.*	"There is no way for anyone to know . . . whether any of the information on the tape, these tapes that we're talking about comes from 1997, 1998, 1999, 2000, 2003. Nobody knows." *Ex. 63, 2/2/05 Hrg. at 120.*		*On July 2, 2004, NDCI informed several Morgan Stanley IT professionals, Arthur Riel, John Pamula, Donald Haight, & Wray Stewart, that "found" tapes contained 1998 and 1999 email.* *Ex. 13, 7/2/04 email from Buchanan to Riel et al.*

Issue	Morgan Stanley Represents to CPH	Morgan Stanley Represents To The Court	Morgan Stanley Represents to the SEC	Bottom Line
Not that it matters, but when did Mr. Riel share with lawyers what Morgan Stanley knew, that the found tapes contained email?		"[I]t was only after his [Riel's] departure, and replacement by Ms. Gorman that legal staff learned of the existence of additional backup tapes that needed to be migrated onto the e-mail archive system." *Ex. 51, Morgan Stanley Supp. Opp. to Motion for Adverse Inference (2/11/05) at 6.*	"Mr. Riel never informed the Law Division that any e-mail had been discovered on the 'found' tapes, despite his previous commitment to do so." *Ex. 14, 2/10/05 Wells Submission at 25.*	*On June 7, 2004, Morgan Stanley lawyers Soo-Mi Lee and her boss, James P. Cusick, are told by Riel that "The storage folks found an additional 1,600 backup tapes in a closet." Riel stated he would inform them if the tapes were found to contain email. Although he doesn't recall whether or not he specifically did so, he recalls that he had a later conversation with Morgan Stanley lawyers on the subject of the June 7 email sometime before he was placed on administrative leave in August.* *Ex. 60, Riel Dep. (3/8/05) at 89-90.*
When did Morgan Stanley disclose the existence of the found tapes and the fact that they contained email?	November 17, 2004 *Ex. 47, 11/17/04 letter from Thomas A. Clare to Michael T. Brody.*		Late October, 2004 "Morgan Stanley's Law Division first learned that the found tapes contained e-mail at the end of October 2004, and informed the staff of this within days." *Ex. 14, 2/10/05 Wells Submission at 25.*	*The SEC was told within days – because the SEC was breathing down Morgan Stanley's neck. This Court and CPH were told nothing until recently, only after CPH was forced to move for sanctions.*

Issue	Morgan Stanley Represents to CPH	Morgan Stanley Represents To The Court	Morgan Stanley Represents to the SEC	Bottom Line
When did Morgan Stanley counsel know that the Archive was not complete as of May 14, 2004?		"At the end of October 2004, I learned that additional e-mail backup tapes had been located within Morgan Stanley, and that the data on those tapes had not been restored or searched. . ." *Ex. 11, Decl. of James F. Doyle.* "[I]n late October the law division became aware that additional tapes had been located that were not covered by our prior search." *Ex, 63, 2/2/05 Hrg at 113.* "Late October of 2004 . . . [is] the date I am representing to the court is the first time that anyone knew that there was recoverable e-mail data" on the Brooklyn tapes. *Ex. 63, 2/2/05 Hrg at 133-34.*		*On June 7, 2004, Morgan Stanley lawyers Soo-Mi Lee and her boss, James P. Cusick, are told, "The storage folks found an additional 1,600 backup tapes in a closet."* *Ex. 12, 6/7/04 email from Arthur Riel to James Cusick & Soo-Mi Lee.*

Issue	Morgan Stanley Represents to CPH	Morgan Stanley Represents To The Court	Morgan Stanley Represents to the SEC	Bottom Line
When – and why – did Morgan Stanley put any priority on getting the data in staging into the Archive?		"So in October it became clear that there were inquiries waiting on this data and that's why it got prioritized." *Ex. 3, 2/14/05 Hrg at 51.*		*In mid-October, the SEC initiated an investigation into Morgan Stanley's alleged destruction of email backup tapes.*
Why did it take so long to process the data in staging?		Morgan Stanley could not find the scripts; there were errors in the scripts. *Ex. 3, 2/14/05 Hrg at 51-52.*	"Because of Mr. Riel's unavailability, this was a painstaking process, but a necessary one to ensure that the terabyte in the staging area would be properly stored and accessible after it was loaded." *Ex. 14, 2/10/05 Wells Submission at 26.*	*Mr. Riel was not unavailable, and he "absolutely" would have assisted to ensure that the terabyte was properly stored and loaded.* *Ex. 60, Riel Dep. (3/8/05) at 133-34.*
		Mr. Clare testifies that Morgan Stanley did not "undertake an inquiry as to how quickly a vendor would be able to perform" the tasks necessary to search for responsive e-mails among the newly found backup tapes."		*CPH had proposed that the parties use a third-party vendor to process and search the backup tapes, but Mr. Clare himself rejected that idea.* *Ex. 67, 3/9/04 letter from Brody to Clare at 1-2; Ex.*

Issue	Morgan Stanley Represents to CPH	Morgan Stanley Represents To The Court	Morgan Stanley Represents to the SEC	Bottom Line
		Ex. 3, 2/14/05 Hrg at 203-04.		*68, 3/11/04 letter from Clare to Brody at 1.*
How much data – how much potential email -- is on the "found" tapes?		"The quantity of information in staging was 600 gigabytes." *Ex. 3, 2/14/05 Hrg. at 77.*	"Morgan Stanley currently believes that the migration of the one terabyte of data from the staging area to the archive will be completed in the next few weeks." *Ex. 64, 1/12/05 letter from Michael S. Fuchs, SEC, to Scott W. Fowkes, Kirkland & Ellis, at 4 n.6.*	*It is a mystery why Morgan Stanley tells the SEC one thing, this Court another. But the difference of 400 gigabytes is significant – it is the equivalent of 200 million printed pages. The 9,000 tapes now disclosed which were not part of the Archive as it existed in May 2004, assuming an average storage capacity of 30 gigabytes, represent* ***13.5 billion printed pages.***

Issue	Morgan Stanley Represents to CPH	Morgan Stanley Represents To The Court	Morgan Stanley Represents to the SEC	Bottom Line
The Bottom Bottom-Line:	*At a time when Morgan Stanley generated 6 million email messages per week, Ex. 69, Saunders Dep. (2/10/04) at 47, and (according to Morgan Stanley's Project Laser Working Group List, Ex. 91) 22 professionals in two different offices were working on the transaction, it is inconceivable that there were not countless email messages sent among team members. Those messages likely would have addressed every possible aspect of this case, from the nature of the Sunbeam Fraud, to Morgan Stanley's knowledge of and complicity in that fraud, to the cover-up of the fraud, to CPH's damages from the fraud, and to whether Morgan Stanley's culpability on these email destruction issues justifies, indeed requires, the imposition of punitive damages.* *The document destruction issues here bear on:* • *The extent of Morgan Stanley's destruction of evidence likely to have been relevant to every element of proof at issue in this case* • *The willfulness of the destruction* • *The cover-up of the destruction* • *The availability of alternate sources of discovery* • *The legitimacy of Morgan Stanley's privilege assertions* *Morgan Stanley's willful destruction of likely email evidence in violation of Federal Law and internal policy has caused enormous harm to CPH, harm which is only partially addressed by the limited sanction imposed so far by the Court on the limited record available as of the time of the February 14, 2005 Hearing.* *Focusing only on the email issues, the additional record developed since February 14 shows an extensive and premeditated pattern of misdirection and deceit which is broader and substantially more egregious than was previously known, a pattern which demands additional corrective action and the imposition of the harshest of sanctions. Neither the Court nor CPH can ever again accept as true anything Morgan Stanley says:* *(1) because the nature of some of the problems Morgan Stanley has created is such that they can never be repaired;* *(2) because the magnitude of the known problems is so great that it would require nearly total repetition of the entire pre-trial discovery process to repair those problems that can be remedied;* *(3) because confidence in the accuracy and integrity of every Morgan Stanley discovery response is completely destroyed, thus requiring independent verification of every assertion Morgan Stanley has made;* *(4) because Morgan Stanley has resisted so hard and delayed so long giving complete and forthright*			

Issue	Morgan Stanley Represents to CPH	Morgan Stanley Represents To The Court	Morgan Stanley Represents to the SEC	Bottom Line
	answers on these email issues; *(5) because it is impossible to resolve any of these numerous issues before trial; and* *(6) because Morgan Stanley has, time and time again, made representations of fact which it was forced to admit were untrue, often the next day.* *The only corrective action adequate to address these circumstances and sufficient to respond to Morgan Stanley's assault on the basic integrity of the civil justice system is to strike its pleadings.* *Morgan Stanley has failed, time after time, to be forthcoming and honest. It says one thing to CPH, another to the Court, another to SEC; it makes outright false statements presents half-truths, and intentionally omits material facts; then it invents new lies to conceal its earlier ones. Morgan Stanley's ultimate disrespect for the truth and for this Court warrants the ultimate sanction.*			

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

MORGAN STANLEY'S MOTION FOR TEMPORARY RELIEF FROM PROVISION IN SEPTEMBER 15, 2004 ORDER

Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully requests that this Court grant Morgan Stanley temporary relief from the provision in the Court's September 15, 2004 Order requiring the parties to simultaneously file redacted and unredacted versions of pleadings. In support of its motion, Morgan Stanley states as follows:

1. On March 15, 2005, Morgan Stanley is filing a Response to CPH's Chronology Of Purported Discovery Abuses that exceeds 70 pages. The supporting materials for that brief are contained in a multi-volume appendix. Because those filings contain documents that have been designated as confidential, Morgan Stanley is filing those documents under seal.

2. Under this Court's September 15, 2004 Order, a redacted version of these filings also is to be filed. But given the vast amount of materials involved, and the short amount of time in which Morgan Stanley had to prepare its pleading prior to the close of the hearing, Morgan Stanley respectfully requests that this Court temporarily relieve it of that obligation. Morgan Stanley also requests this relief because of the documents that are designated as confidential may or may not need to be after the hearing in this matter, and thus, it would be more efficient to file

the redacted version after this Court resolves any confidentiality disputes to which the parties cannot reach agreement.

For these reasons, Morgan Stanley respectfully requests temporary relief from the provision of the Court's September 15 Order requiring the filing of a redacted version of Morgan Stanley's Response to CPH's Chronology Of Purported Discovery Abuses until confidentiality disputes concerning those papers are resolved by the Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 15th day of March, 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.

Defendant.

MORGAN STANLEY & CO., INC.'S OVERNIGHT RESPONSE TO CPH'S ADDITIONAL SUBMISSION IN SUPPORT OF ITS MOTION FOR DEFAULT

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CPH's "Issue"	What CPH Represented to this Court	What CPH Misrepresented or Omitted
Can we have any confidence that Morgan Stanley has located, much less searched and processed all relevant existing email?	CPH correctly notes that Morgan Stanley has found a number of new tapes since May 14, 2004. CPH also claims that various statements of Mr. Clare, Mr. Saunders and Morgan Stanley in February 2005 that all back-up tapes had been found were untrue when made.	While subsequent events have shown that additional tapes existed, there is no evidence that these statements were known or suspected to be false when made.
What do we know about Morgan Stanley's willful destruction of email? In violation of Federal law, Morgan Stanley overwrote – destroyed – emails after one year. Morgan Stanley supposedly put an end to that systematic destruction in January 2001. But did it?	CPH contends that Morgan Stanley has admitted to the SEC that more than 10% of its back-up tapes continued to be overwritten despite Federal law and its own directive.	Morgan Stanley's analysis of 7,482 tapes for the SEC showed that 53, fewer than 1%, were overwritten. And, the substantial duplication inherent in the back-up tapes likely means that few unique emails were lost. (Feb. 10, 2005 Letter at 15-16.)
		SEC Rule 17a-4 only requires the retention of documents for three years, so that relevant 1997-1998 emails would have been recycled in any event before CPH filed suit.
CPH moves to compel email production in October 2003. *Was Morgan Stanley's response in good faith?*	CPH suggests Morgan Stanley has lied about the cost and extreme burden of restoring email, contrasting one statement that it is burdensome and expensive with a different statement that it is quickly accessible.	CPH's own chart belies its false comparison. One statement (cost and extreme burden) relates to restoring email off back-up tapes, while the other statement (quickly accessible) relates to restoring email off the Archive.
	CPH claims Morgan Stanley misled the Court and CPH by not disclosing that it had begun building an Archive in January 2003.	No good deed goes unpunished. In 2003, the Archive only captured and contained email ***from 2003 forward***, and, thus, could not be used to produce relevant *Coleman* email. (Feb. 10, 2005 Letter at 25.) It was only in 2004, when Morgan Stanley voluntarily migrated email from its old back-up tapes to the Archive, that the Archive became useful in this litigation -- at which time Morgan Stanley used it to produce emails to comply with (and go well beyond) the Agreed Order. (Feb. 10, 2005

CPH's "Issue"	What CPH Represented to this Court	What CPH Misrepresented or Omitted
		Letter at 7, 20; Riel Dep. at 50-56.)
How complete/reliable was the Archive when Morgan Stanley used it in May 2004 to produce documents and certify completeness?	CPH asserts that Morgan Stanley failed to disclose to CPH and the Court that, as of June 7, 2004, only 120 of the 143 SDLT output tapes produced by NDCI had been processed into the Archive. CPH suggests Mr. Riel's Certificate of Compliance was, therefore, false.	It is uncontroverted that Morgan Stanley understood that NDCI was processing, and the Archive was being loaded with, the ***oldest*** tapes first. (Riel Dep. at 67-68; 139-140.) The Agreed Order required Morgan Stanley to produce emails off the ***oldest*** full back-up tapes. Thus, when Mr. Riel searched the Archive for old emails in April-May 2004, he reasonably believed it contained the emails from the earliest full backup tape available for each person identified. (Riel Dep. at 57-58; 65-66.)
How complete/reliable was the Archive at the time of the February 14 Hearing?	CPH points out that Mr. Saunders was mistaken when he expressed confidence a month ago that all back-up tapes had been found, and that Morgan Stanley was likely mistaken when it told the SEC that all recoverable pre-2003 email had been migrated to the Archive.	There is no evidence that Mr. Saunders or Morgan Stanley knew or should have known that their statements were false when made. It is true that additional back-up tapes have been found since mid-February, which may contain recoverable email. But it is not known whether any of these tapes contain responsive email under the Agreed Order. (Mar. 14, 2005 Tr. at 258-263.) Previous new-found tapes have not resulted in many new, unique responsive emails because of the substantial redundancy inherent in Morgan Stanley's back-up tapes. (Mar. 14, 2005 Tr. at 255-256.)
What problems existed at the time the May search was made which affected the completeness of the search?	CPH claims every time it asks, it gets a different list of problems.	There is no questions that coding errors and other glitches existed in the Archive when searches were run in May 2004. (Feb. 14, 2005 Tr. at 41-42, 52.) As Microsoft Corporation's many product patches demonstrate, software

CPH's "Issue"	What CPH Represented to this Court	What CPH Misrepresented or Omitted
		glitches are common in large, complex IT projects. (Mar. 7, 2005 Gorman Dep. at 53.) Morgan Stanley has worked hard to identify and resolve these problems, and in any event, its Archive search was much more robust than the search required by the Agreed Order. (Mar. 14, 2005 Tr. at 256.)
	CPH cites Mr. Riel for the notion that 10,138 tapes that did not contain email had been recycled.	Morgan Stanley, in its SEC Wells submission, analyzed these 10,138 tapes and determined that only 31 were non-redundant back-ups of email servers that had been overwritten in violation of Morgan Stanley's January 2001 directive. And, even on those 31 tapes, statistical analysis indicates that it is likely that only a tiny fraction (around 1%) of unique emails were lost. (Feb. 10, 2005 Letter at 15-16.) There is no evidence that any of these emails related to this case, and it remains undisputed that none of Morgan Stanley's email retention or retrieval practices was driven by this case.
Why did Morgan Stanley create the email Archive?	CPH claims Morgan Stanley attempted to curry favor with the SEC by claiming voluntarily to have migrated old email to its Archive, while at the same time telling CPH and the Court that it should not be required to make full production because of the burden of searching back-up tapes.	Morgan Stanley did not simply ***claim*** voluntarily to have migrated old email to its Archive, it ***had*** voluntarily migrated old email to its Archive. (Mar. 13, 2005 Anfang Dep. at 74-75.) And, CPH's fiction that Morgan Stanley cried "burden" to limit its email production to a handful of tapes is remarkable given that it is undisputed that Morgan Stanley used its comprehensive Archive, not individual back-up tapes, to produce emails in this case. (Riel Dep. at 54, 67-68.)
	CPH claims "Morgan Stanley never told the SEC that it had obligations under the April Order which	Morgan Stanley has no obligation to inform the SEC how it intends to meet its discovery

CPH's "Issue"	What CPH Represented to this Court	What CPH Misrepresented or Omitted
	it intended to meet by using the Archive."	obligations in civil litigation. Also, the Archive was not created, updated or loaded with new tapes to satisfy Morgan Stanley's obligations in this case, although Morgan Stanley did choose to capitalize on this investment for plaintiff's benefit.
Was there anything extraordinary about Morgan Stanley's decision to create an Archive?	CPH claims that Morgan Stanley's statements that "everybody on the street was building an email archive" and that "no other firm [was] taking similar steps to migrate email" "cannot [both] be true. One is false."	CPH's statement is disingenuous. The simple truth is that everyone on the street was building an Archive for ***current/future*** email, but Morgan Stanley is the only firm (of which it is aware) that has voluntarily and at great expense elected to migrate its ***old*** emails from back-up tapes to its new Archive to make them more accessible. (Feb. 10, 2005 Letter at 8, 20.)
Was the June 23, 2004 Completeness Certificate true or false?	CPH contends that Mr. Riel's Certificate of Completeness was false when made because 1,423 DLT and 738 8mm tapes had not been processed. CPH goes so far as to suggest that Mr. Riel only signed the Certificate to keep Morgan Stanley's lawyers happy.	It is undisputed that Mr. Riel did not know or suspect that the Brooklyn and 8mm tapes contained email, much less responsive email, when he signed his Certificate (Riel Dep. at. 75-78), and that he believed then, and now, that his Certificate was accurate (Riel Dep. at 50-58; 64-68; 162).
	CPH suggests that Mr. Riel's deposition supports the notion that Mr. Riel's Certificate was false because he did not search back-up tapes, as required by the Agreed Order.	Another remarkable statement. Mr. Riel made clear at his deposition, over and over again, that he believed emails from Morgan Stanley's oldest back-up tapes were migrated to the Archive before he ran his search, so that his search picked up responsive emails from back-up tapes. (Riel Dep. at 53-54; 57-58; 67-68.)
What is Arthur Riel's status?	CPH suggests that Morgan Stanley changes its view of Mr. Riel from "trusted employee" to "untrustworthy" to suit its purposes.	Morgan Stanley trusted Mr. Riel when he signed the Certificate in June 2004, but lost faith in his trustworthiness when it learned

CPH's "Issue"	What CPH Represented to this Court	What CPH Misrepresented or Omitted
		months later that Mr. Riel had been secretly monitoring the emails of his supervisors, without authorization and in violation of Morgan Stanley's Code of Conduct. (Riel Dep. p. 16; 146-154.)
Where did the 8,000 pages of production made in November 2004 come from?	CPH correctly points out that Morgan Stanley's representations about the November 2004 production of 8,000 pages have been confused.	Morgan Stanley apologizes for unintentionally confusing CPH and the Court. Past misstatements have resulted from haste, honest misunderstandings, and the difficulty of determining which pages of the production came from which of the tapes whose email had been migrated into the Archive. As adduced at this week's hearing, the evidence is that, of the 8000 pages, most are duplicates of emails and attached reports, with only 13 unique emails (some with attachments) in the production. Of these 13 unique emails, three were inserted into the Archive in May-August 2004, nine were captured by the May 2004 search of the Archive but withheld as non-responsive by Kirkland & Ellis, and one was in the Archive in May 2004 but not captured by the query. (Mar. 14, 2005 Tr. at 174-75.)
When were the "newly discovered" tapes actually discovered? *The 1423 Brooklyn "Found" Tapes*	CPH claims that Morgan Stanley's representations about the timing of the discovery of the Brooklyn tapes vary slightly from internal IT meeting minutes.	The "discrepancy" between "sometime during the summer" and "May 6" is insignificant.
When were the "newly discovered" tapes actually	CPH highlights the difference between when Morgan Stanley's IT department learned of the	While the miscommunication is unfortunate, CPH has failed to supply any evidence that the

CPH's "Issue"	What CPH Represented to this Court	What CPH Misrepresented or Omitted
discovered? *The 738 8mm Tapes*	8mm tapes (2002) and when the Law Division did (2004).	Law Division knew about the 8mm tapes before November 2004.
When did Morgan Stanley learn that the newly discovered tapes actually contained email?	CPH correctly notes that the IT Department learned that a portion of the Brooklyn tapes contained some email in July 2004, while the Law Division only learned in October 2004.	Again, while the miscommunication is regrettable, CPH offers no evidence that IT told the Law Division before October 2004 that email existed on some Brooklyn tapes.
When did Morgan Stanley learn that the newly discovered tapes actually contained 1998 email?	CPH notes that IT determined in July 2004 that one or more Brooklyn tapes had some email from 1998 and 1999, and then purports to contrast that with statements in January and February 2005 that Morgan Stanley could not determine the type or time period of data that might be recovered from tapes that had yet to be restored.	The IT Department did not inform the lawyers that it had found pre-2000 email on the Brooklyn tapes until October 2004. (Feb. 10, 2005 Letter at 25.) And, knowledge that the Brooklyn tapes had some pre-2000 email is not inconsistent with the statements that only by restoring new-found tapes could Morgan Stanley determine what email, if any, was on them.
Not that it matters, but when did Mr. Riel share with lawyers what Morgan Stanley knew, that the found tapes contained email?	CPH cites Mr. Riel's deposition for the suggestion that Mr. Riel may have had a conversation with Morgan Stanley's lawyers after June 2004 in which he may have told them that the Brooklyn tapes contained email.	CPH's surmise is flatly contradicted by Mr. Riel's testimony. He does not recall telling Morgan Stanley's lawyers that the Brooklyn tapes had email (Riel Dep. 86-87; 142), and, indeed, he voluntarily retracted the testimony CPH cites later in his deposition and said he was not sure he had ***any*** conversation with Morgan Stanley's lawyers after June 2004 (Riel Dep. 123-124).
When did Morgan Stanley disclose the existence of the found tapes and the fact that they contained email?	CPH claims Morgan Stanley delayed telling CPH that the found tapes contained email.	The delay between when the Law Division learned (late October 2004) and when Kirkland & Ellis wrote CPH's counsel (November 17, 2004) was minor and did not prejudice CPH.

CPH's "Issue"	What CPH Represented to this Court	What CPH Misrepresented or Omitted
When did Morgan Stanley counsel know that the Archive was not complete as of May 14, 2004?	CPH suggests that Morgan Stanley's counsel knew the Archive was not complete in May 2004, rather than October 2004.	Morgan Stanley's counsel learned from Mr. Riel that "tapes" had been found in June 2004, but Mr. Riel specifically told them that he did not know whether the tapes were email tapes. It is uncontroverted that counsel did not learn that some of the found tapes contained email until late October 2004. (Feb. 10, 2005 Letter at 50.)
When – and why – did Morgan Stanley put any priority on getting the data in staging into the Archive?	CPH suggests that the only reason Morgan Stanley prioritized moving email data from "staging" into the Archive in October 2004 was because the SEC initiated an inquiry into Morgan Stanley's alleged destruction of email back-up tapes.	Ms. Gorman testified that the migration of email data from "staging" into the Archive stopped shortly after Mr. Riel was placed on administrative leave in late August 2004. (Feb. 14, 2005 Tr. at 50.) Morgan Stanley began to prioritize the process of migrating email data again in October 2004, after the Law Division was alerted. (Feb. 14, 2005 Tr. at 50, 61.)
Why did it take so long to process the data in staging?	CPH cites Mr. Riel's self-serving testimony for the notion that ***he*** could have speeded up the processing of the email data in "staging."	As noted above, Mr. Riel was placed on administrative leave in August 2004 for unauthorized monitoring of his superiors' emails in violation of Morgan Stanley's Code of Conduct. (Riel Dep. at 16.) The Firm's actions with regard to Mr. Riel may have slowed the migration process, but were an unfortunate and unavoidable consequence of his misconduct.
	CPH suggests that the processing of email data would have gone faster had Morgan Stanley simply accepted CPH's proposal to use a third-party vendor to process and search back-up tapes.	CPH's self-serving speculation, which parrots the bravado of its expert, Quintin Gregor from eMag Solutions, at the February 14, 2005 hearing, is belied by events of the last month. Mr. Gregor claimed that email data could be completely extracted from 2,160 back-up tapes within six weeks -- or four weeks, if expedited. (Feb. 14, 2005 Tr. at 229.) However, after having the tapes an entire month, Renew Data

CPH's "Issue"	What CPH Represented to this Court	What CPH Misrepresented or Omitted
		was able to process only 1-2% of the data. (Mar. 13, 2005 Wolfe Dep. at 50-54.) Morgan Stanley was quick by comparison, largely processing more than 35,000 tapes in about six months. (Feb. 10, 2005 Letter at 8, 25-26.)
How much data – how much potential email – is on the "found" tapes?	CPH tries to make much of Morgan Stanley's varying descriptions of the quantity of information in "staging."	Morgan Stanley regrets that it has given different estimates of the amount of email in "staging." Any miscommunication was unintentional and did not prejudice CPH. Moreover, regardless of the precise amount of email data in the staging area, all of the data that was in "staging" at the time Ms. Gorman assumed Mr. Riel's responsibilities was migrated to the Archive by early February 2005. (Mar. 14, 2005 Tr. at 197.)
The Bottom Bottom-Line	Morgan Stanley has made a considerable investment to create a more accessible and searchable Archive out of hundreds of millions of unique e-mails from tens of thousands of cumbersome and unwieldy magnetic tapes. Those efforts have enabled Morgan Stanley, in this case, to search an Archive containing emails from tens of thousands of back-up tapes rather than just the thirty-six tapes required by the Agreed Order. CPH cannot begin to defend its own discovery practices, when it expressly recognized the likelihood of Sunbeam litigation but then carried out a systematic campaign to "purge" its files of emails and electronic documents until "everything was long gone…" (Jan. 21, 2004 Fasman Dep. at 156.)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 15th day of March 2005.

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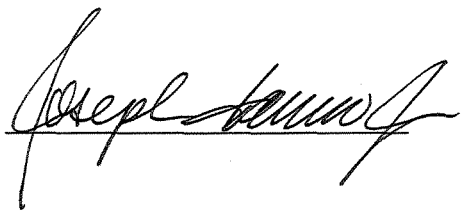
BY: 

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION TO RECONSIDER AND MODIFY SANCTIONS ORDER

THIS CAUSE came before the Court, in Chambers, on Morgan Stanley's Motion to Reconsider and Modify Sanctions Order, which the court elects to treat as a Motion for Rehearing. Based on a review of the Motion, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion for Rehearing is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 15 day of March, 2005.

_____
ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

AGREED ORDER

THIS CAUSE came before the Court March 14, 2005 on the facsimile transmission from Holly Asbury dated March 15, 2005, which the Court elects to treat as a Motion to be Excused, with both counsel present. Based on the foregoing and on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion to be Excused is Granted. Holly Asbury, juror #90, is hereby excused from further service in this cause.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 16 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

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

CASE NO: 2003 CA 005045 AI

PLAINTIFF'S MOTION IN LIMINE NO. 25 FOR A FINDING AS A MATTER OF LAW THAT THE EXCULPATORY AND INTEGRATION CLAUSES RAISED BY MORGAN STANLEY ARE INEFFECTIVE TO BAR INTENTIONAL-TORT CLAIMS

Coleman (Parent) Holdings Inc. ("CPH") respectfully requests that this Court enter an Order determining, as a matter of law, that the exculpatory and integration clauses raised by Morgan Stanley & Co. Incorporated ("Morgan Stanley") are ineffective to bar CPH's intentional-tort claims. As shown below, the law does not permit Morgan Stanley to invoke a contractual disclaimer of liability to defend against the intentional torts alleged in CPH's First Amended Complaint.

INTRODUCTION

In an effort to escape liability, Morgan Stanley has pointed to (1) certain exculpatory language in the unsigned February 23, 1998 Draft Confidentiality Agreement; (2) an integration clause in the CPH Merger Agreement, and (3) an exculpatory and "nonreliance" provision in the 1998 Sunbeam debenture Offering Memorandum. Before turning to the main point of this motion — that Morgan Stanley's arguments fail as a matter of law — it may be helpful to the Court briefly to review the factual flaws in Morgan Stanley's arguments, as well as the Court's relevant rulings to date.

Exculpatory Language in the February 23, 1998 Draft Confidentiality Agreement. The exculpatory language that Morgan Stanley cites in the February 23, 1998 Draft Confidentiality Agreement provided that, "except as may otherwise be agreed in writing, neither the Company [Sunbeam] nor its Representatives"

- were making "any representation or warranty as to the accuracy or completeness" of certain non-public materials provided confidentially to The Coleman Company, Inc. ("Coleman"); or
- would "have any liability to you [Coleman] or any of your Representatives resulting from the use of" those materials.

See Ex. A at 4; *see also* MS Mot. in Limine No. 4, at 2-3, 5; MS Opp'n to CPH Mot. in Limine No. 13, at 1; MS Mot. to Deem the February 23 Confidentiality Agreement Admissible, at 2 n.1. Morgan Stanley asserts that the exculpatory language in that draft agreement negates the element of justifiable reliance and thus bars the intentional-tort claims that CPH asserts here.

Morgan Stanley previously has raised the same issue in its Motion in Limine No. 4, which sought an Order excluding all evidence relating to any representations that Morgan Stanley made to CPH (or any of its corporate affiliates or agents) other than the representations and warranties contained in the February 4, 1998 Confidentiality Agreement, the unsigned February 23, 1998 Draft Confidentiality Agreement, and the merger agreements. This Court denied that motion on February 24, 2005, after hearing CPH's arguments, which focused largely on five factual flaws in Morgan Stanley's motion:

- There is no final or signed version of the February 23 Draft Confidentiality Agreement. *See* CPH 1/18/05 Opp'n to MS Mot. in Limine No. 4, at 3-4.

- CPH is not a party to the February 23 Draft Agreement, and Coleman could not have bound CPH by signing that agreement. *Id.* at 4.

- Contrary to Morgan Stanley's assertions, references to the February 23 Draft Agreement in the CPH Merger Agreement cannot render the February 23 Draft Agreement enforceable against CPH. *Id.* at 4-5.

- The exculpatory language in the February 23 Draft Agreement could not apply to information that became "generally available to the public" — such as the March 19, 1998 press release, information presented at road shows, and the debenture Offering Memorandum — because information "generally available to the public" is expressly excluded from the Draft Agreement's coverage. *Id.* at 5.

- The exculpatory language in the February 23 Draft Agreement is general, rather than specific, and thus does not track the substance of the misrepresentations at the core of CPH's claims against Morgan Stanley. *Id.* at 5-6.

In addition to denying Morgan Stanley's motion, on February 17, 2005, the Court granted in part CPH Motion in Limine No. 13, which sought an Order barring Morgan Stanley from introducing any evidence or argument at trial regarding the exculpatory language in the February 23 Draft Agreement. Specifically, the Court ordered that "[t]here shall be no evidence or argument offered about the terms of the February 23, 1998 purported letter agreement absent the Court's first finding that a sufficient evidentiary predicate has been laid that would allow a reasonable juror to conclude that CPH assented to its terms." On March 9, 2005, the Court reaffirmed that holding. The Court reserved a ruling on Morgan Stanley's Motion to Deem the February 23 Confidentiality Agreement Admissible pending the development of a factual predicate at trial. Among other things, the Court ruled that Morgan Stanley would have to show

that "the person who would have signed it on behalf of Coleman was the same one who could bind CPH." *See* Ex. B, 3/9/04 Tr. at 2769. But after years of informal searching and formal discovery, and multiple rounds of briefing and argument, Morgan Stanley still cannot show: (1) that anyone ever has located (or even seen) a signed copy of the February 23 Draft Agreement; (2) that anyone ever actually signed the February 23 Draft Agreement; (3) that anyone can identify who purportedly signed the February 23 Draft Agreement; (4) that anyone has an unsigned but final version of the February 23 Draft Agreement; or (5) that CPH assented to the terms of the February 23 Draft Agreement.

The Integration Clause in the CPH Merger Agreement. Morgan Stanley also has pointed to the integration clause in the CPH Merger Agreement. In Morgan Stanley's Motion in Limine No. 4, Morgan Stanley argued that the "integration clauses in the Merger Agreements . . . bar the introduction of evidence regarding the alleged misrepresentations at the core of CPH's claims against Morgan Stanley." MS Mot. in Limine No. 4, at 7. The integration clause provided that the merger agreement contained "the entire agreement among the parties hereto with respect to the subject matter hereof and supersedes all prior agreements and understandings, oral or written." *See* MS Mot. in Limine No. 4, at 4-5, 7; MS Opp'n to CPH Mot. in Limine No. 13, at 1. CPH has briefed that issue, too, explaining that Morgan Stanley's argument is marred by three factual flaws:

- Morgan Stanley was not a party to the CPH Merger Agreement. *See* CPH 1/18/05 Opp'n to MS Mot. in Limine No. 4, at 7.

- The integration clause predates, and thus could not possibly insulate Morgan Stanley from liability for, key misrepresentations for which Morgan Stanley is responsible,

including the March 19, 1998 press release, the road shows, and the debenture offering documents. *Id.* at 9.

- The integration clause cannot override or nullify the CPH Merger Agreement, which required notification of "material adverse changes" in Sunbeam's business, operations, or financial condition. *Id.* at 9.

The Exculpatory and "Nonreliance" language in the Debenture Offering Memorandum. Morgan Stanley recently has pointed to language in the debenture Offering Memorandum that purports to absolve Morgan Stanley (and Sunbeam, for that matter) from liability for anything in the Offering Memorandum. That language stated that "[e]ach person receiving this Offering Memorandum acknowledges" that (i) the offeree "has been afforded an opportunity" to request further information to "verify the accuracy of or to supplement the information herein"; (ii) the offeree "has not relied on the Initial Purchaser [Morgan Stanley] or any person affiliated with the Initial Purchaser in connection with its [the offeree's] investigation of the accuracy of such information or its investment decision"; and (iii) no one is "authorized to give any information" concerning the transaction "other than as contained . . . herein and information given by duly authorized officers and employees of the Company [Sunbeam] . . . and, if given or made, such other information or representation should not be relied upon as having been authorized by the Company or the Initial Purchaser." *See* MS 3/11/05 Mot. in Limine No. 24 at 2-3; Ex. C, CPH Trial Ex. 7, 3/19/98 Offering Mem. at 2. The Offering Memorandum further stated that "No representation or warranty, express or implied, is made as to the accuracy or completeness of the information" in the Offering Memorandum, that nothing in it "is, or shall be relied upon as, a promise or representation," and that Morgan Stanley in particular "assumes no responsibility for the accuracy or completeness of such information." *Id.*

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That argument by Morgan Stanley is subject to at least three factual flaws:

- CPH was not a party to the Offering Memorandum and did not otherwise agree to be bound by its terms. As Morgan Stanley repeatedly points out, "CPH did not purchase Sunbeam debentures." MS 3/11/05 Mot. in Limine No. 24 at 5.

- Even if CPH were an "Offeree" under the Offering Memorandum, the text of the Offering Memorandum is internally inconsistent as to whether "Offerees" may rely on it. On the same page stating that nothing "in this Offering Memorandum . . . is, or shall be relied upon as, a promise or representation," the Offering Memorandum further recited that "Offerees represent that they are basing their investment decision solely on this Offering Memorandum and their own examination of the Company." *See* Ex. C, CPH Trial Ex. 7, 3/19/98 Offering Mem. at 2 (emphasis added); *see also id.* (restricting reliance on information "other than as contained or incorporated by reference herein") (emphasis added).

- The Offering Memorandum expressly permitted, and indeed encouraged, reliance on other information when authorized by the Company — such as at the road shows and in the March 19, 1998 press release. *Id.* (providing that no one is "authorized to give any information" concerning the debentures or the common stock into which the debentures were convertible "other than . . . information given by duly authorized officers and employees of the Company").

The above-cited factual flaws regarding the exculpatory language in the February 23 Draft Agreement, the integration clause in the CPH Merger Agreement, and the exculpatory and "nonreliance" language in the debenture Offering Memorandum are fatal to Morgan Stanley's argument. In this brief, CPH demonstrates that Morgan Stanley's argument also fails as a matter of law. The law prohibits a party from disclaiming intentional torts, such as fraud, through the use of those types of mechanisms.

I. Exculpatory Clauses Are Ineffective to Bar Liability for Intentional Torts Such as Aiding and Abetting Fraud or Conspiracy to Commit Fraud.

Florida courts follow the blackletter principle expressed in the Restatement (Second) of Contracts: "A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy." RESTATEMENT (SECOND) OF CONTRACTS § 195(1) (1981). In *Oceanic Villas, Inc. v. Godson*, 4 So. 2d 689 (Fla. 1941), the Supreme Court held that "fundamental principles of law, equity, good morals, public policy, and fair dealing" prohibit a party from "contract[ing] against liability for his own fraud." *Id.* at 690 (citing, *inter alia*, *Stokes v. Victory Land Co.*, 128 So. 408 (Fla. 1930); *Braxton v. Liddon*, 38 So. 717 (Fla. 1905)).

In the 64 years since the Supreme Court decided *Oceanic Villas*, the District Courts of Appeal consistently have held that, although exculpatory clauses sometimes may bar claims of negligence, exculpatory clauses cannot bar intentional-tort claims, including fraud claims. *See, e.g., Horizons Rehabilitation, Inc. v. Health Care & Retirement Corp.*, 810 So. 2d 958, 962 n.3 (Fla. 5th DCA 2002) ("Florida courts will not enforce releases of intentional torts, as they violate public policy." (emphasis in the original)); *Kellums v. Freight Sales Centers, Inc.*, 467 So. 2d 816, 817 (Fla. 5th DCA 1985) ("A party may, by an exculpatory clause, absolve itself of liability for negligence, but an attempt to absolve itself from liability for an intentional tort is against public policy."); *L. Luria & Son, Inc. v. Honeywell, Inc.*, 460 So. 2d 521, 523 (Fla. 4th DCA 1984) ("Fraud is an intentional tort and thus not subject to the cathartic effect of the exculpatory clauses found in contracts . . . ."); *Mankap Enters., Inc. v. Wells Fargo Alarm Servs.*, 427 So. 2d 332, 333-34 (Fla. 3d DCA 1983) (where a buyer accused a seller of intentional misrepresentation, the seller could not "contract against liability for his own fraud in order to exempt him from liability for an intentional tort"); *Goyings v. Jack & Ruth Eckerd Found.*, 403

So. 2d 1144, 1146 (Fla. 2d DCA 1981) ("[A]n attempt by a defendant to exonerate himself from liability for an intentional tort is against public policy."); *Zuckerman-Vernon Corp. v. Rosen*, 361 So. 2d 804, 806 (Fla. 4th DCA 1978) (a contract's "exculpatory language, attempting to avoid liability for an intentional tort, is void"; "a party cannot contract against liability for his own fraud"); *Fuentes v. Owen*, 310 So. 2d 458, 460 (Fla. 3d DCA 1975) ("[A]n attempt to exempt one from liability for an intentional tort is generally declared void."); *id.* ("While the exculpatory clause would be effective to bar a count based on negligence, it would not so operate with respect to the claims asserted in the complaint based on allegations of intentional tort.").

In short, liability for intentional torts cannot be disclaimed through exculpatory clauses.

II. Integration Clauses Are Ineffective to Bar Liability for Intentional Torts Such as Aiding and Abetting Fraud or Conspiracy to Commit Fraud.

The same principle applies to integration clauses. An integration clause cannot cut off fraud claims for the same reasons that an exculpatory clause cannot do so. *See, e.g., Rodriguez v. Tombrink Enters., Inc.,* 870 So. 2d 117, 119 (Fla. 2d DCA 2003) ("The existence of an integration clause does not bar a claim for fraudulent misrepresentation. . . . We agree with the conclusion of the Third District Court of Appeal in the *Mejia* opinion that an integration clause 'does not affect oral representations which are alleged to have fraudulently induced a person to enter into the agreement.'") (citation omitted); *Mejia v. Jurich*, 781 So. 2d 1175, 1178 (Fla. 3d DCA 2001) ("The existence of a merger or integration clause, which purports to make oral agreements not incorporated into the written contract unenforceable, does not affect oral representations which are alleged to have fraudulently induced a person to enter into the agreement.") (citing cases); *Noack v. Blue Cross & Blue Shield of Fla., Inc.*, 742 So. 2d 433, 434-35 (Fla. 1st DCA 1999) (holding that an integration clause is not an "impediment to a cause of action for fraud in the inducement"); *Nobles v. Citizens Mortgage Corp.*, 479 So. 2d 822, 822

(Fla. 2d DCA 1985) ("[O]ral agreements or representations may be introduced into evidence to prove that a contract was procured by fraud notwithstanding . . . a merger clause.").

Treatises and the Restatement (Second) of Contracts agree. *See, e.g.*, 11 *Williston on Contracts* § 33:21 at 670-71 (4th ed. 1999) ("Just as is the case with the parol evidence rule itself, a merger or integration clause is ineffectual to exclude evidence of prior or contemporaneous extrinsic representations for the purpose of showing fraud or other invalidating cause by way of defense or in an action for rescission."); RESTATEMENT (SECOND) OF CONTRACTS § 214, comment c (1981) ("What appears to be a complete and binding integrated agreement . . . may be voidable for fraud, duress, mistake, or the like, or it may be illegal. Such invalidating causes need not and commonly do not appear on the face of the writing. They are not affected even by a 'merger' clause.").

III. The Exculpatory And "Nonreliance" Language In The Debenture Offering Memorandum Is Ineffective to Bar Liability for Intentional Torts Such as Aiding and Abetting Fraud or Conspiracy to Commit Fraud.

A. The Language Is Ineffective For The Same Reasons As Other Methods To Exempt Oneself From Liability For Intentional Torts.

The exculpatory and "nonreliance" provisions in the debenture Offering Memorandum are ineffective for the same reasons shown above: "Florida courts will not enforce releases of intentional torts, as they violate public policy." *Horizons Rehabilitation*, 810 So. 2d 958, 962 n.3 (Fla. 5th DCA 2002) (emphasis in the original). The exculpatory and "nonreliance" provisions of the Offering Memorandum are, in word and intent, "releases of intentional torts." *Id.* By its terms, the 71-page Offering Memorandum is just that — the definitive memorandum presented and designed for the purpose of offering securities to "PROSPECTIVE PURCHASERS." *See* Ex. C, CPH Trial Ex. 7, 3/19/98 Offering Mem. at 1. As such, the Offering Memorandum contains page after page of representations about the offering, the securities, and Sunbeam.

Indeed, the Offering Memorandum has 71 pages of detail about Sunbeam's "Business," "Historical Financial Data," "Analysis of Financial Condition and Results of Operations," "The Acquisitions" (including the Coleman acquisition), the "Financing Plan and Use of Proceeds," and so forth. *Id.* at 3 (Table of Contents).

Nevertheless, as Morgan Stanley points out, the Offering Memorandum also includes several exculpatory and "nonreliance" provisions. Those provisions state, in effect, that the countless representations in the Offering Memorandum are not really representations at all and that offerees should conduct their own investigation of Sunbeam's business. *Id.* at 2 ("nothing in this Offering Memorandum, or incorporated by reference herein, is, or shall be relied upon as, a promise or representation"). Indeed, because the Offering Memorandum explicitly incorporates by reference Sunbeam's public filings with the Securities and Exchange Commission (*id.* at 4), the Offering Memorandum's exculpatory and "nonreliance" provisions purport to disclaim responsibility even for Sunbeam's statements filed with the SEC.

Putting aside the invalidity of those provisions under the federal securities statutes (*see* Part III.B below), the provisions improperly attempt to implement a prospective release of liability for all the representations in the memorandum. There is no other way to describe the provisions. As all of the cases discussed above demonstrate, the effort to obtain a prospective release for fraudulent statements is invalid under Florida law. A seller simply cannot give a prospective purchaser 71 pages of written representations for the sole purpose of making a sale, and then exculpate himself by saying that all of the representations are not really representations: "Fraud is an intentional tort and thus not subject to the cathartic effect of the exculpatory clauses found in contracts . . . ." *L. Luria & Son*, 460 So. 2d 521 at 523 (Fla. 4th DCA 1984). If sellers

could do so, there would be nothing left of Florida's rule against disclaiming liability for intentional torts.

In support of its position, Morgan Stanley has cited a 1934 Florida Supreme Court case for the proposition that a person can escape liability for fraud by making a "qualified statement . . . which is reasonably calculated to suggest independent inquiry on the part of the person to whom it is made." *Columbus Hotel Corp. v. Hotel Mgmt. Co.*, 156 So. 893, 901 (Fla. 1934) (cited in MS 3/11/05 Mot. in Limine No. 24 at 2). But *Columbus* is unlike anything here, dealing instead with a court-approved settlement agreement among litigation opponents. The Supreme Court in *Columbus* held that "[c]ontracts of settlement of pending controversies are favored by the courts" (*id.*) and that the language of the court-approved settlement agreement was clear that the parties were not making representations on the key issue in dispute there — the priority of certain liens. *Id.* at 900 (emphasizing that the court-approved settlement agreement provided: "Nothing herein contained shall be deemed to constitute an admission, agreement or representation as to the validity or priority of such liens or title retention claims . . . ."). Here, in contrast, the Offering Memorandum made representation after representation entirely for the purpose of selling securities.

Furthermore, the *Columbus* case was issued in 1934, and thus it long pre-dated the Florida Supreme Court's establishment of a different framework for fraud cases in *Besett v. Basnett*, 389 So. 2d 995 (Fla. 1980). In *Besett*, the Florida Supreme Court eliminated "negligent investigation" as a defense to fraud, holding instead "that a recipient may rely on the truth of a representation, even though its falsity could have been ascertained had he made an investigation, unless he knows the representation to be false or its falsity is obvious to him." *Id.* at 998. Here, as CPH as shown at length in prior briefs, the reasonableness of CPH's reliance on Morgan

Stanley's and Sunbeam's misrepresentations must be determined by what CPH actually knew or what would have been obvious to CPH, not by what CPH would have known if it had conducted an independent investigation. *E.g.*, CPH 3/1/05 Mem.

Morgan Stanley also has cited two other Florida cases to support its position. *See Velasquez v. College*, 738 So. 2d 1007 (Fla. 3d DCA 1999) (per curiam); *FDIC v. High Tech Med. Sys., Inc.*, 574 So. 2d 1121 (Fla. 4th DCA 1991) (both cited in MS 3/11/05 Mot. in Limine No. 24 at 2). The *Velasquez* case is a one-sentence per curiam order that provides no hint of the underlying facts or the nature of the disclaimer there. The other case, *High-Tech*, did not involve anything like the exculpatory provisions in the debenture Offering Memorandum. *High-Tech* involved a bank's suit against an accountant charging that the accountant had promised to certify and guarantee a borrower's receivables and inventory before the loan was made, but did not do so. The court held that summary judgment was properly granted in favor of the accountant because (1) before the loan closed, the accountant had submitted a report stating point blank that "something less than the certification and guarantee that the bank required was being provided," and (2) correspondence from the bank demonstrated "that when the bank closed the loan it knew that [the accountant] had not provided an independent certification or guarantee." 574 So. 2d at 1123.

In sum, none of those cases overrides the established law of Florida that exculpatory and "nonreliance" provisions of the sort in the debenture Offering Memorandum are invalid "releases of intentional torts." *Horizons Rehabilitation*, 810 So. 2d at 962 n.3 (Fla. 5th DCA 2002).

B. The Language Is Ineffective Because It Is Void Under A Federal Statute.

The exculpatory and "nonreliance" provisions in the debenture Offering Memorandum also are ineffective for an additional reason: those provisions relate to the purchase or sale of

securities and thus are void under a federal statute. Section 29(a) of the Securities Exchange Act of 1934 invalidates any contractual provision under which "any person" attempts to waive compliance with the federal securities laws. Section 29 is entitled "Validity of Contracts." Section 29(a) provides (15 U.S.C. § 78cc(a)):

> Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

The Third Circuit has expressly held that exculpatory or "nonreliance" clauses in contracts in connection with the purchase or sale of securities are ineffective under Section 29(a). In *AES Corp. v. Dow Chemical Co.*, 325 F.3d 174, 180 (3d Cir. 2003), the Third Circuit emphasized that if the law were otherwise, then the duties imposed by federal statutes — duties that boil down to the responsibility not to mislead others in securities transactions — would be "eviscerated." In *AES*, the plaintiff, AES Corporation, purchased the stock of a subsidiary of Dow Chemical Company. AES alleged that "Dow and [another party] conspired to sell DEI at an artificially inflated price by making misrepresentations material to an evaluation of DEI." *AES*, 325 F.3d at 175. The district court held as a matter of law that AES's claims were barred by the sale agreement's nonreliance clause, in which AES stated that it had not relied on any express or implied representations or warranties as to the accuracy or completeness of the information given by the seller. *Id.* at 178.

The Third Circuit reversed. The Third Circuit analyzed the authorities concerning nonreliance provisions (stretching back to 1966), including cases that reached a contrary conclusion, and held that nonreliance provisions are inconsistent with the whole point of Section 29(a):

> We see no fundamental difference between saying, for example, "I waive any rights I might have because of your representations or obligations to make full

> disclosure" and "I am not relying on your representations or obligations to make full disclosure." Were we to hold that the existence of this provision constituted the basis (or a substantial part of the basis) for finding non-reliance as a matter of law, we would have gone far toward eviscerating Section 29(a).

AES, 325 F.3d at 180-81 (3d Cir. 2003) (quoting *Rogen v. Ilikon Corp.*, 361 F.2d 260, 268 (1st Cir. 1966)).

The Third Circuit emphasized that, under the federal securities laws, sellers of securities have duties — such as the duty under SEC Rule 10b-5 to refrain from making "any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5. Because a seller of securities is under a statutory duty not to, for example, "omit to state a material fact" necessary to prevent other statements from being misleading, the seller is forbidden by Section 29(a) from entering into "[a]ny condition, stipulation, or provision binding any person to waive compliance" with that duty. In other words, the seller cannot enter into a stipulation stating that the seller is free to omit material facts. As the Third Circuit concluded: "We believe the conclusion inescapable that enforcement of the non-reliance clauses to bar AES's fraud claims as a matter of law would be inconsistent with Section 29(a)." *AES*, 325 F.3d at 180 (3d Cir. 2003); *accord, e.g., Rogen v. Ilikon Corp.*, 361 F.2d 260, 268 (1st Cir. 1966) ("contractual acknowledgement of non-reliance" was invalid under Section 29(a)); *MBI Acquisition Partners, L.P. v. Chronicle Publishing Co.*, No. 01-C-177-C, 2001 WL 1478812, at *8-*9 (W.D. Wis. Sept. 6, 2001) ("In this case, plaintiff alleges that it attempted to confirm the truth of the purchase agreement representations but was assuaged with false answers. In short, plaintiff alleges it was duped. . . . I find that § 29(a) renders the 'survival' and 'representations and warranties' clauses void as to the federal securities claims."); *cf. Globus v. Law Research*

Service, Inc., 418 F.2d 1276, 1288 (2d Cir. 1969) (holding that underwriter could not obtain indemnification from an issuer under a contractual indemnification provision because the underwriter had knowledge of misstatements leading to Securities Act liability); *Marram v. Kobrick Offshore Fund*, 809 N.E.2d 1017, 1029 (Mass. 2004) ("to permit the seller of securities to discharge, or to defeat, his statutory obligation of truthfulness to the buyer merely by attaching an integration clause to [an] . . . agreement would enfeeble the [Uniform Securities Act]").

That principle applies all the more in this case because CPH was not a party to the debenture Offering Memorandum. Accordingly, even if Section 29(a) did not apply, which it does, CPH never agreed that Morgan Stanley, or Sunbeam for that matter, could escape their statutory duties to tell the truth and not to omit material facts in a securities transaction.

* * *

Here, CPH has amended its Complaint to eliminate any issue of negligence. Only claims for intentional torts remain — Morgan Stanley's aiding and abetting the Sunbeam fraud and Morgan Stanley's participation in a conspiracy with Sunbeam to commit fraud. Under established law, Morgan Stanley could not contractually disclaim liability for the intentional torts alleged in CPH's First Amended Complaint.

CONCLUSION

For the foregoing reasons, this Court should enter an Order determining, as a matter of law, that the exculpatory and integration clauses raised by Morgan Stanley are ineffective to bar CPH's intentional-tort claims.

Dated: March 16, 2005

Respectfully submitted,

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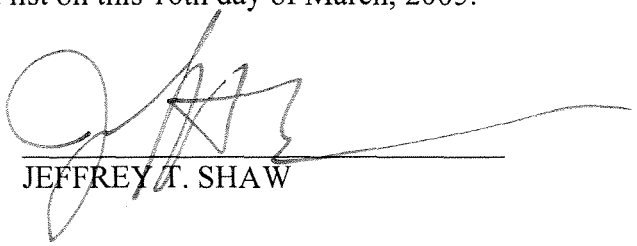
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 16th day of March, 2005.



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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

CASE NO. CA 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

PLAINTIFF'S MOTION IN LIMINE NO. 27 FOR A FINDING AS A MATTER OF LAW THAT THE FEDERAL SECURITIES LAWS PROHIBITED PLAINTIFF FROM SELLING UNREGISTERED SUNBEAM STOCK

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") respectfully requests that this Court enter an order determining, as a matter of law, that the federal securities laws precluded CPH from selling its Sunbeam stock because the shares were unregistered and were not subject to an exemption from registration and to preclude testimony or argument inconsistent with that finding. Although the merger agreement provided for registration, which was supposed to happen quickly, registration did not occur because Sunbeam's fraud came to light so soon after the closing.

This motion is brought because it affects the issue of damages. CPH maintains that its Sunbeam stock was worthless because CPH did not have any opportunity to sell its Sunbeam stock after the fraud was disclosed. *See, e.g.*, Ex. A, Nye Report at 10-14. Morgan Stanley's expert, however, states that CPH could have sold its Sunbeam shares at some point after the fraud was disclosed. *See* Ex. B, Grinblatt Report ¶ 87 n.58 (asserting that CPH could have sold its unregistered shares pursuant to Rule 144A). As shown below, Morgan Stanley should not be permitted to present evidence or argument suggesting that CPH could have sold its unregistered Sunbeam shares.

Section 5 of the Securities Act of 1933 expressly prohibits the sale of unregistered stock. 15 U.S.C. § 77e. Under Section 7.2 of the Private Merger Agreement, the Sunbeam shares that CPH received were unregistered. *See* Ex. C, § 7.2 (merger agreement). Therefore, until the Sunbeam shares were registered — which, it is undisputed, never occurred — CPH could not lawfully have sold the stock absent an express exemption from the registration requirement. *See* Part 1 below.

No valid exemption from the registration requirement existed for the Sunbeam stock. The only potential exemption that Morgan Stanley ever has raised is SEC Rule 144A, 17 C.F.R. § 230.144A. *See* Ex. D at 12-13 (MS 2/9/05 Br.). However, that Rule does not apply by its own terms. Rule 144A is a "safe harbor" that allows the private resale of unregistered securities to qualified institutional buyers in certain circumstances. Under its express terms, Rule 144A does not apply when there exist other securities that are "of the same class" as those to be sold and that already are trading "on a national securities exchange." 17 C.F.R. § 230.144A(d)(3). Here, the securities that CPH received were Sunbeam common stock — the same class of Sunbeam securities that were trading on the New York Stock Exchange. Thus, CPH was not eligible for an exemption under Rule 144A. *See* Part 2.A below.

Nor could CPH have availed itself of the only other arguable exemption from the registration requirement — SEC Rule 144 — which Morgan Stanley never has raised here. Rule 144 permits sales of unregistered securities, provided that they have been held for at least one year, that only a limited quantity of shares are sold during each three-month period thereafter, and that certain other conditions are met. 17 C.F.R. § 230.144. One critical condition is that, before any shares can be sold, the issuer (Sunbeam) must have filed with the Securities and Exchange Commission ("SEC") 12 months of financial statements. It is undisputed that, on

June 25, 1998, Sunbeam's outside auditor Arthur Andersen withdrew its consent for Sunbeam to use the prior financial statements. *See* Ex. E (withdrawal notice). Arthur Andersen did not provide restated financial statements until November 1998, and thus Sunbeam did not have 12 months of financial statements until a year later, November 1999. *See* Ex. F (restated financials). However, by November 1999, CPH had become an "insider" of Sunbeam. As a result, CPH was subject to the federal prohibitions on insider trading — prohibitions that impose both civil and criminal liability on persons who sell stock "while in possession of material, nonpublic information" about the issuer. 15 U.S.C. § 78t-1; *see also* § 78u-1 (establishing civil penalties); 15 U.S.C. § 78ff(a) (establishing criminal penalties). Under the law, CPH was not required to expose itself to the risk of civil and criminal liability in order to recover its damages for Morgan Stanley's fraud. *See* Part 2.B below.

Accordingly, this Court should find as a matter of law that the federal securities laws precluded CPH from selling its unregistered Sunbeam stock unless and until the stock was registered.

ARGUMENT

Questions of law are to be decided by the Court and are not within the province of the jury. Whether the federal securities laws precluded CPH from selling its unregistered Sunbeam stock is an issue of law properly decided by the Court. This Court should make the following findings as a matter of law:

1. CPH Could Not Have Sold Unregistered Sunbeam Stock Absent An Exemption From The Registration Requirement.

Section 5 of the Securities Act of 1933 expressly prohibits "any person" from offering to sell "any security" that has not been registered with the SEC. Section 5(c) provides (15 U.S.C. § 77e(c), emphasis added):

> It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title.

Section 5 further provides that unless a security is registered, it is unlawful even to transport it or communicate about its sale through any means of interstate commerce (15 U.S.C. § 77e(a), emphasis added):

> Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or
>
> (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

Under Section 7.2 of the Private Merger Agreement, the shares of Sunbeam stock that CPH received were unregistered. *See* Ex. C, § 7.2. Therefore, unless CPH could satisfy an express exemption from the registration requirement, there was no way that CPH could sell its Sunbeam shares until the shares were registered.

2. CPH Could Not Sell Its Sunbeam Common Stock Pursuant To An Exemption From The Registration Requirement.

A. Rule 144A did not permit the sale of CPH's unregistered Sunbeam common stock.

The only exemption from the registration requirement that Morgan Stanley has raised as a grounds for permitting CPH to sell its Sunbeam shares is SEC Rule 144A, 17 C.F.R. § 230.144A. According to Morgan Stanley, Rule 144A allowed CPH to sell its unregistered Sunbeam stock whenever CPH wanted to do so. *See* Ex D at 12 (MS 2/9/05 Br.); Ex. B,

Grinblatt Report ¶ 87 n.58 (asserting that "restrictions on unregistered stock only delay sale to the public" because "[a]n active Rule 144A market exists for such shares among qualified investors"). In reality, Rule 144A does not provide an exemption permitting the sale of CPH's Sunbeam stock, and thus CPH could not have sold the stock under that Rule.

Rule 144A is entitled "Private Resales of Securities to Institutions." 17 C.F.R. § 230.144A. The Rule provides an exemption from the registration requirements of Section 5 of the Securities Act of 1933 for the private resale of unregistered securities to a "qualified institutional buyer." The term "qualified institutional buyer" as used in the Rule includes various types of institutional investors that invest on a discretionary basis and own at least $100 million in other securities. 17 C.F.R. § 230.144A(a)(1)(i). Rule 144A permits the sale of unregistered securities to such institutional buyers so long as certain conditions are met. 17 C.F.R. § 230.144A(d).

One critical condition for the application of the exemption is that there not exist other securities that are "of the same class" as the securities to be sold and that already are trading "on a national securities exchange." 17 C.F.R. § 230.144A(d)(3). The Rule provides (*id.*, emphasis added):

> (d) *Conditions to Be Met.* To qualify for exemption under this section, an offer or sale must meet the following conditions: . . . .
>
> (3) The securities offered or sold:
>
> (i) Were not, when issued, of the same class as securities listed on a national securities exchange registered under section 6 of the Exchange Act or quoted in a U.S. automated inter-dealer quotation system . . . .

In other words, under the Rule, unregistered securities that are of the "same class" as securities that are listed on a national securities exchange are not eligible for resale to institutional buyers. That limitation in the Rule is designed to prevent the "development of side-by-side public and

private markets for the same class of securities." SEC Release No. 33-6839, 54 Fed. Reg. 30076, 30081 (July 18, 1989).

Here, the Sunbeam stock that CPH received was the "same class" as the Sunbeam stock that traded on the New York Stock Exchange — namely, common stock. Under Section 3.1(a) of the Private Merger Agreement, CPH received Sunbeam "common stock" in exchange for its interest in Coleman. *See* Ex. C, § 3.1(a). Sunbeam's securities filings before and after the transaction confirm that Sunbeam had only a single class of common stock. *See* Ex. G at 2 (1997 Form 10-K); Ex. H at 1 (1st Qtr. 1998 Form 10-Q). Accordingly, Rule 144A did not permit the sale of CPH's unregistered Sunbeam stock.

B. Rule 144 did not permit the sale of CPH's unregistered Sunbeam common stock.

Morgan Stanley never has raised any other possible exemption applicable to a sale of CPH's Sunbeam stock. To CPH's knowledge, the only other arguable exemption from the registration requirement is Rule 144. 17 C.F.R. § 230.144. Morgan Stanley has not raised Rule 144 as a potential exemption here, and with good reason. For one thing, in order for Rule 144 to apply, there must be "available adequate current public information with respect to the issuer of the securities." 17 C.F.R. § 230.144(c). Specifically, the Rule provides that the issuer must have "filed all the reports required to be filed [under the securities laws] during the 12 months preceding such sale." 17 C.F.R. § 230.144(c)(1).

On June 25, 1998, Sunbeam's outside auditor withdrew its consent to the inclusion of the company's audited financial statements in any public filing. (Ex. E.) As a result, Sunbeam did not include valid financial statements in its filings until November 1998, when Sunbeam restated its prior financial results and filed an amended Form 10-Q, dated November 25, 1998, with corrected results for the first quarter of 1998. (Ex. F.) Thus, under Rule 144, CPH could not

have sold any unregistered stock under the Rule's exemption until at least one year after the restated financial statements were filed — which would have been November 25, 1999. 17 C.F.R. § 230.144(c)(1).

However, by that date, November 25, 1999, CPH arguably had become an "insider" of Sunbeam because of CPH's right to appoint two directors to the board and obligation to provide management personnel. *See* Ex. I at 6-7 (proxy materials). As a result, there was a risk that CPH would be found to be subject to the federal prohibitions on insider trading — prohibitions that impose both civil and criminal liability on persons who sell stock "while in possession of material, nonpublic information." 15 U.S.C. § 78t-1; *see* 15 U.S.C. § 78u-1 (establishing civil penalties); 15 U.S.C. § 78ff(a) (establishing criminal penalties). Thus, CPH was at risk for any sale of Sunbeam stock that CPH made while arguably in possession of material inside information about Sunbeam's finances and prospects. *See, e.g.,* 15 U.S.C. § 78t-1 ("Any person who violates any provision of this Act or the rules or regulations thereunder by purchasing or selling a security while in possession of material, nonpublic information shall be liable in an action in any court of competent jurisdiction . . . ."); 15 U.S.C. § 78ff(a) (imposing criminal penalties, including imprisonment for "not more than 20 years," for "[a]ny person who willfully violates any provision of this Act . . . or any rule or regulation thereunder").

Under the law, CPH did not have a duty to sell its Sunbeam stock under circumstances in which it could face liability for trading on non-public information. *See, e.g., Bass v. Janney Montgomery Scott, Inc.,* 210 F.3d 577, 589 (6th Cir. 2000) (plaintiff did not have a duty to "mitigate his damages" by exercising stock warrants obtained in the transaction: "Warrants for the purchase of unregistered stock cannot be exercised on a moment's notice," and as an insider, plaintiff "was prevented by the securities laws from selling Technigen stock" without full

disclosure). CPH was not required to expose itself to the risk of civil and criminal liability in order to recover its damages for Morgan Stanley's fraud.

Furthermore, Rule 144 is subject to an express volume limitation, among other conditions (such as the prohibition on "solicit[ing] or arrang[ing] for the solicitation of orders to buy the securities, 17 C.F.R. § 230.144(f)(1)). Thus, even if there ever came a time when CPH could have sold any of its unregistered shares under Rule 144, the Rule severely restricted the quantity of shares that CPH could have sold in any three-month period. In particular, the Rule prohibited CPH from selling, in any three-month period, the greater of (i) "[o]ne percent of the shares or other units of the class outstanding" (which would have amounted to approximately one million Sunbeam shares per quarter, given that Sunbeam had about 100 million shares outstanding — *see* Ex. J at 2 (1999 Form 10-K)); or (ii) the "average weekly reported volume of trading in such securities on all national securities exchanges" (which generally would have amounted to even fewer Sunbeam shares being available for sale per quarter, given that Sunbeam's average weekly trading volume rarely exceeded one million shares in the period after November 1999 — *see* Ex. K (stock price and volume chart)). 17 C.F.R. § 230.144(e)(1). Therefore, even if no other restrictions existed, starting on November 25, 1999, it would take at least 14 quarters — 3 1/2 years — for CPH to have sold its Sunbeam shares under Rule 144, which is far beyond the date when Sunbeam declared bankruptcy in February 2001.

In short, because CPH's stock in Sunbeam was unregistered, the restrictions imposed by the federal securities laws prevented the stock's sale.

3. The Court Should Preclude Testimony And Argument Inconsistent With Its Findings.

Because no exemption from registration authorized CPH to sell the Sunbeam common stock, there is no basis for Morgan Stanley to argue that CPH could have sold its shares. The Court should prohibit testimony or argument inconsistent with its findings as a matter of law.

CONCLUSION

For the foregoing reasons, this Court should find as a matter of law that the securities laws precluded CPH from selling its unregistered Sunbeam common stock.

Dated: March 16, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

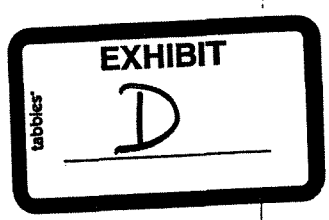
CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

MORGAN STANLEY'S RESPONSE TO CPH'S MOTION IN LIMINE (NO. 19) TO EXCLUDE PORTIONS OF EXPERT WITNESS MARK GRINBLATT'S TESTIMONY

CPH's Motion in Limine No. 19 is in essence a motion for reconsideration. CPH seeks to reverse the Court's earlier rulings that CPH's fraud and negligent misrepresentation claims arise under New York law. New York law explicitly rejects benefit-of-the-bargain damages, and Florida law only allows such damages in limited circumstances — circumstances that do not exist here. The out-of-pocket loss rule is the only applicable damages standard in this case. And Morgan Stanley's expert, Mark Grinblatt Ph.D., properly applies this standard.

Moreover, CPH, in purporting to "elect" benefit-of-the-bargain damages instead of out-of-pocket losses, is attempting to abrogate the Court's responsibility in deciding the appropriate damages measurement. The Court, not CPH, decides which measure of damages is proper under the evidence and instructs the jury accordingly. If CPH seeks any damages at all, then this so-called election provides no basis for excluding Dr. Grinblatt, as CPH is entitled, at most, to a jury instruction on the out-of-pocket loss rule. CPH's other objections go to the weight, not the admissibility, of Dr. Grinblatt's testimony. Dr. Grinblatt's opinions are relevant and should be admitted.



III. DR. GRINBLATT'S TESTIMONY REGARDING RULE 144A AND HEDGING TRANSACTIONS IS ADMISSIBLE FOR THE NARROW PURPOSE DISCLOSED IN HIS REPORT.

21. In its Motion in Limine No. 19, CPH baldly states, much like its expert Dr. Nye, that CPH could not sell its Sunbeam stock because the stock was unregistered and restricted. (CPH's MIL No. 19 at 11-15.) In responding to Dr. Nye's report, Dr. Grinblatt simply points out, as a practical matter and a general economic principle, that unregistered and restricted stock is sold all the time to institutional investors in private transactions, such as through an active Rule 144A market and other financial arrangements.[5] (Dec. 17, 2004 Grinblatt Report at 45 n.58, 98 (Ex. 4).) And when deposed, Dr. Grinblatt testified that, based on his review of the record, he "saw no evidence that [CPH] couldn't have captured this value or shorted Sunbeam stock or entered into a total return swap." (Jan. 7, 2005 Grinblatt Dep. at 264:7-23 (Ex. 5).)

22. Dr. Grinblatt is qualified to testify as an expert on selling securities in private transactions. He has a Ph.D. in Economics from Yale University. (Grinblatt Report App. A.) He is the author of a leading text on finance, as well as numerous other published works on securities. (*Id.*) For more than two decades, he has taught graduate students at Yale, The Wharton School, and UCLA in nearly every subject in finance, including hedging transactions and the sale of restricted and unregistered stock. (*Id.*; Grinblatt Dep. at 267:25-268:7.) His testimony is further backed up by his business experience, including structuring hedging transactions while a Vice President at Salomon Brothers, managing a hedge fund with two other

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[5] Rule 144A of the Securities Act, as explained by Dr. Grinblatt in his text on finance, "allows institutions with assets exceeding $100 million to trade privately placed financial claims among themselves without first registering them as securities." 1 Mark Grinblatt & Sheridan Titman, *Financial Markets and Corporate Strategy* 7 (2d ed. 2002) (Ex. 3).

partners, and running his own hedge fund. (Grinblatt Report App. A; Grinblatt Dep. at 43:13-44:12, 47:9-14, 50:6-9, 55:14-24, 251:16-252:13, 265:11-22.)[6]

23. At a minimum, Dr. Grinblatt certainly may testify as to the general economic principle that restricted and unregistered stock may still be sold in private Rule 144A and hedging transactions. *See* 1 Charles W. Ehrhardt, *Florida Evidence* § 702.2 (2004 ed.) ("[A]n expert may give a dissertation or draw an explanation of scientific principles relevant to the case, leaving the trier of fact to apply these principles to the facts of the case.").

24. Dr. Grinblatt also may testify that he "saw no evidence" that prevented CPH from selling its Sunbeam stock in a private market transaction. CPH may test this opinion on cross-examination. In sum, CPH's objections only go to the weight, not the admissibility, of Dr. Grinblatt's opinions. *See Island Hoppers, Ltd. v. Keith*, 820 So. 2d 967, 971 (Fla. 4th DCA 2002) ("[A]llegations that an expert witness lacked a sufficient factual predicate to form an opinion, go to the weight to be given to the evidence (the expert's opinion) rather than its admissibility.") (citation omitted), *disapproved on other grounds, Sarkis v. Allstate Ins. Co.*, 863 So. 2d 210, 223 (Fla. 2003).

IV. DR. GRINBLATT'S PRIOR RETENTION BY JENNER & BLOCK MAY BE INTRODUCED IF ELICITED ON CROSS-EXAMINATION.

25. On February 3, 2005, the Court granted ***without prejudice*** CPH's Motion in Limine No. 18 to Bar Evidence and Argument Concerning Plaintiff's Counsel's Retention of

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[6] At his deposition, Dr. Grinblatt answered questions about his hedge fund experience, but, due to a strict confidentiality agreement with regard to one hedge fund he was involved with, he declined to identify the fund, his investment return, and a valuation model trade secret. (Grinblatt Dep. at 47:9-51:25.) Even if the Court were to order that Dr. Grinblatt could not base his testimony on any non-disclosed hedge fund experience, he still has other sufficient hedge fund experience that qualifies him to provide the limited expert testimony in this instance.

Professor Mark Grinblatt as an Expert in Prior Unrelated Cases. Under the Court's Order, if CPH, on cross-examination, attacks Dr. Grinblatt's credibility — and CPH has indicated that it intends to do so — it is proper for Dr. Grinblatt to rehabilitate his credibility by testifying that he was retained in the past by CPH's law firm. (Feb. 3, 2005 Order on Pl.'s MIL No. 18.) *See Tomlian ex rel. Tomlian v. Grenitz*, 782 So. 2d 905, 907 (Fla. 4th DCA 2001) (holding that, in medical malpractice action in which defense expert's credibility was in issue, defense expert could testify that he had been retained in the past by plaintiffs' law firm).

WHEREFORE, Morgan Stanley respectfully requests that this Court deny CPH's Motion in Limine No. 19 to Exclude Portions of Expert Witness Mark Grinblatt's Testimony.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 9th day of February, 2005.

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Downloaded By: Mirta Adams

Company: SUNBEAM CORP/FL/
Form Type: 10-Q/A SEC File #: 001-00052
Description:
File Date: 11/25/98
State of Incorporation: DE
Fiscal Year End: 12/29
CIK: 0000003662
SIC: 2390
IRS Identifying Number: 251638266

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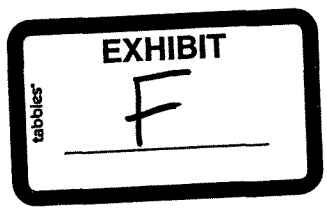

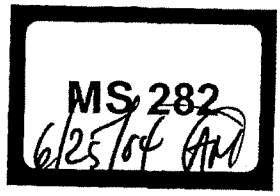

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

FORM 10-Q/A

[X] Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

For the period ended March 31, 1998

OR

[ ] Transition Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

For the transition period from _____ to _____

Commission File No. 1-52

SUNBEAM CORPORATION
(EXACT NAME OF REGISTRANT AS SPECIFIED IN ITS CHARTER)

DELAWARE (STATE OR OTHER JURISDICTION OF INCORPORATION OR ORGANIZATION)	25-1638266 (I.R.S. EMPLOYER IDENTIFICATION NUMBER)
1615 SOUTH CONGRESS AVENUE SUITE 200 DELRAY BEACH, FLORIDA (ADDRESS OF PRINCIPAL EXECUTIVE OFFICES)	33445 (ZIP CODE)

(561) 243-2100
(REGISTRANT'S TELEPHONE NUMBER, INCLUDING AREA CODE)

NOT APPLICABLE
(FORMER NAME, FORMER ADDRESS AND FORMER FISCAL YEAR, IF CHANGED SINCE LAST REPORT)

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days.

Yes [ ] No [X]

On November 4, 1998 there were 100,857,462 shares of the registrant's Common Stock ($.01 par value) outstanding.

SUNBEAM CORPORATION AND SUBSIDIARIES

QUARTERLY REPORT
ON FORM 10-Q/A

TABLE OF CONTENTS

		PAGE
PART I.	FINANCIAL INFORMATION	
	Item 1. Financial Statements	
	Condensed Consolidated Statements of Operations (Unaudited) for the three months ended March 30, 1997 and March 31, 1998	2
	Condensed Consolidated Balance Sheets as of December 28, 1997 and March 31, 1998 (Unaudited)	3
	Condensed Consolidated Statements of Cash Flows (Unaudited) for the three months ended March 30, 1997 and March 31, 1998	4
	Notes to Condensed Consolidated Financial Statements (Unaudited)	5
	Item 2. Management's Discussion and Analysis of Financial Condition and Results of Operations	10
PART II.	OTHER INFORMATION	
	Item 1. Legal Proceedings	14
	Item 6. Exhibits and Reports on Form 8-K	15
SIGNATURES		16

16div-012778

PART I. FINANCIAL INFORMATION

SUNBEAM CORPORATION AND SUBSIDIARIES

CONDENSED CONSOLIDATED STATEMENTS OF OPERATIONS
(IN THOUSANDS, EXCEPT PER SHARE AMOUNTS)

	THREE MONTHS ENDED	
	MARCH 31, 1998	MARCH 30, 1997
	As restated, see Note 8	As restated, see Note 8
	(Unaudited)	
Net sales	$ 247,601	$ 252,488
Cost of goods sold	213,828	194,237
Selling, general and administrative expense	71,139	41,195
Operating (loss) earnings	(37,366)	17,056
Interest expense	5,073	1,993
Other expense, net	3,165	77
(Loss) earnings from continuing operations before income taxes and extraordinary charge	(45,604)	14,986
Income tax (benefit) provision:		
Current	327	(1,052)
Deferred	(449)	7,011
	(122)	5,959
(Loss) earnings from continuing operations	(45,482)	9,027
Loss from discontinued operations, net of taxes	--	(13,713)
Extraordinary charge from early extinguishment of debt, net of taxes (Note 3)	(8,624)	--
Net loss	$ (54,106)	$ (4,686)
Earnings per share:		
(Loss) earnings from continuing operations:		
Basic	$ (0.53)	$ 0.11
Diluted	(0.53)	0.10
Loss from discontinued operations:		
Basic	--	(0.17)
Diluted	--	(0.15)
Extraordinary charge:		
Basic	(0.10)	--
Diluted	(0.10)	--
Net loss:		
Basic	$ (0.63)	$ (0.06)
Diluted	$ (0.63)	$ (0.05)
Weighted average common shares outstanding:		
Basic	86,390	84,187
Dilutive	86,390	86,135
Dividends declared per share of common stock	$ .01	$ .01

See Notes to Condensed Consolidated Financial Statements.

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SUNBEAM CORPORATION AND SUBSIDIARIES
CONDENSED CONSOLIDATED BALANCE SHEETS
(DOLLARS IN THOUSANDS)

	MARCH 31, 1998	DECEMBER 28, 1997
	As restated, see Note 8	As restated, see Note 8
	(Unaudited)	
ASSETS		
Current assets:		
Cash and cash equivalents	$ 193,543	$ 52,298
Receivables, net	500,671	228,460
Inventories	617,091	304,900
Prepaid expenses, deferred income taxes and other current assets	74,855	16,584
Total current assets	1,386,160	602,242
Property, plant and equipment, net	412,096	249,524
Trademarks, trade names, goodwill and other, net	1,556,909	207,162
	$ 3,355,165	$ 1,058,928
LIABILITIES AND SHAREHOLDERS' EQUITY		
Current liabilities:		
Short-term debt and current portion of long-term debt	$ 62,139	$ 668
Accounts payable	204,456	108,374
Other current liabilities	218,554	124,085
Total current liabilities	485,149	233,127
Long-term debt	1,637,820	194,580
Other long-term liabilities	216,240	159,142
Minority interest	55,191	--
Commitments and Contingencies (Note 10)		
Shareholders' equity:		
Preferred stock (2,000,000 shares authorized, none outstanding)	--	--
Common stock (issued 100,824,578 and 89,984,425 shares)	1,008	900
Additional paid-in capital	966,631	479,200
Retained earnings	34,829	89,801
Accumulated other comprehensive loss	(32,878)	(33,063)
Other shareholders' equity	(8,825)	(1,714)
	960,765	535,124
Treasury stock, at cost (4,454,394 shares in 1997)	--	(63,045)
Total shareholders' equity	960,765	472,079
	$ 3,355,165	$ 1,058,928

See Notes to Condensed Consolidated Financial Statements.

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SUNBEAM CORPORATION AND SUBSIDIARIES

CONDENSED CONSOLIDATED STATEMENTS OF CASH FLOWS
(IN THOUSANDS)

	THREE MONTHS ENDED	
	MARCH 31, 1998	MARCH 30, 1997
	As restated, see Note 8	As restated, see Note 8
	(Unaudited)	
OPERATING ACTIVITIES:		
Net loss	$ (54,106)	$ (4,686)
Adjustments to reconcile net loss to net cash used in operating activities:		
Depreciation and amortization	11,940	10,813
Deferred income taxes	(449)	7,011
Extraordinary charge from early extinguishment of debt	8,624	--
Non-cash compensation charges	24,290	--
Loss on sale of discontinued operations, net of taxes	--	13,713
Changes in working capital and other, net of acquisition	(125,025)	(49,449)
Net cash used in operating activities	(134,726)	(22,598)
INVESTING ACTIVITIES:		
Capital expenditures	(19,480)	(10,916)
Acquisition of Coleman, including acquisition costs, net of cash acquired	(160,612)	--
Proceeds from sale of divested operations and other assets	--	70,404
Net cash (used in) provided by investing activities	(180,092)	59,488
FINANCING ACTIVITIES:		
Issuance of convertible subordinated debentures, net of financing fees	729,622	--
Payments of debt obligations, including prepayment penalties	(266,672)	(26,322)
Other debt financing fees	(25,075)	--
Proceeds from exercise of stock options	19,045	8,866
Other, net	(857)	(545)
Net cash provided by (used in) financing activities	456,063	(18,001)
Net increase in cash and cash equivalents	141,245	18,889
Cash and cash equivalents at beginning of period	52,298	11,526
Cash and cash equivalents at end of period	$ 193,543	$ 30,415

See Notes to Condensed Consolidated Financial Statements.

16div-012781

SUNBEAM CORPORATION AND SUBSIDIARIES
NOTES TO CONDENSED CONSOLIDATED FINANCIAL STATEMENTS
(UNAUDITED)

1. OPERATIONS AND BASIS OF PRESENTATION

ORGANIZATION

Sunbeam Corporation ("Sunbeam" or the "Company") is a leading manufacturer and marketer of branded consumer products. The Sunbeam(R) and Oster(R) brands have been household names for generations, and the Company is a market share leader in many of its product categories.

The Company markets its products through virtually every category of retailer including mass merchandisers, catalog showrooms, warehouse clubs, department stores, catalogs, television shopping channels, Company-owned outlet stores, hardware stores, home centers, drug and grocery stores, pet supply retailers, as well as independent distributors and the military. The Company also sells its products to commercial end users such as hotels and other institutions.

As further described in Note 2, on March 30, 1998, the Company, through a wholly-owned subsidiary, acquired approximately 81% of the total number of then outstanding shares of common stock of The Coleman Company, Inc. ("Coleman"). Coleman is a leading manufacturer and marketer of consumer products for the worldwide outdoor recreation market. Its products have been sold domestically under the Coleman(R) brand name since the 1920's.

PRESENTATION OF FISCAL PERIODS

To standardize the fiscal period ends of the Company and its acquired entities, as further described in Notes 2 and 10, effective with its 1998 fiscal year, the Company has changed its fiscal year end from the Sunday nearest December 31 to a calendar year. Accordingly, quarterly reporting will follow the calendar quarters. Excluding the impact of the Coleman acquisition which occurred on March 30, 1998, the impact of this change in fiscal periods on net sales for the first quarter of 1998 was to increase sales by approximately $4 million and the impact on operating results for the quarter was to increase earnings by approximately $0.2 million.

BASIS OF PRESENTATION

The Condensed Consolidated Balance Sheet of the Company as of March 31, 1998 and the Condensed Consolidated Statements of Operations and Cash Flows for the three months ended March 31, 1998 and March 30, 1997 are unaudited. The unaudited condensed consolidated financial statements have been prepared in accordance with generally accepted accounting principles for interim financial information and with the instructions of Form 10-Q and Rule 10-01 of Regulation S-X. The December 28, 1997 Condensed Consolidated Balance Sheet was derived from the Company's Annual Report on Form 10-K/A for the year ended December 28, 1997. The condensed consolidated financial statements contained herein should be read in conjunction with the consolidated financial statements and related notes contained in the Company's 1997 Annual Report on Form 10-K/A. In the opinion of management, the unaudited condensed consolidated financial statements furnished herein include all adjustments (consisting of only recurring adjustments) necessary for a fair presentation of the results of operations for the interim periods presented. These interim results of operations are not necessarily indicative of results for the entire year.

RESTATEMENT

On June 30, 1998, the Company announced that the Audit Committee of the Board of Directors was initiating a review into the accuracy of prior financial statements. The Audit Committee's review has since been completed and, as a result of its findings, the Company has restated its previously issued financial statements for 1996, 1997 and the first quarter of 1998. (See Note 8).

16div-012782

1. OPERATIONS AND BASIS OF PRESENTATION - (CONTINUED)

BASIC AND DILUTED LOSS PER COMMON SHARE

In 1997, the Company adopted SFAS No. 128, EARNINGS PER SHARE. Basic earnings per common share calculations are determined by dividing earnings available to common shareholders by the weighted average number of shares of common stock outstanding. Diluted earnings per share are determined by dividing earnings available to common shareholders by the weighted average number of shares of common stock and dilutive common stock equivalents outstanding (all related to outstanding stock options, restricted stock and the Zero Coupon Convertible Senior Subordinated Debentures).

For the first quarter of 1998, 4,758,565 shares related to stock options, (58,065) shares related to restricted stock and 13,150,000 shares related to the conversion feature of the Zero Coupon Convertible Senior Subordinated Debentures were not included in the diluted average common shares outstanding, as the effect would have been antidilutive. For the first quarter of 1997, the dilutive effect of 2,174,154 equivalent shares and (225,915) equivalent shares related to restricted stock were used in determining the dilutive average shares outstanding. SFAS No. 128 requires the use of dilutive potential common shares in the determination of diluted earnings per share if an entity reports earnings from continuing operations. Given Sunbeam's Loss from Discontinued Operations in the first quarter of 1997, the use of dilutive potential common shares in the determination of the diluted per share loss from discontinued operations and net loss per share is antidilutive. (See Note 10.)

NEW ACCOUNTING STANDARDS

In June 1997, the Financial Accounting Standards Board ("FASB") issued Statement of Financial Accounting Standards ("SFAS") No. 131, DISCLOSURES ABOUT SEGMENTS OF AN ENTERPRISE AND RELATED INFORMATION. SFAS No. 131 establishes standards for the way that public business enterprises report information about operating segments in annual financial statements and requires that those enterprises report selected information about operating segments in interim financial reports issued to shareholders. It also establishes standards for related disclosures about products and services, geographic areas, and major customers. SFAS No. 131 is effective for financial statements for fiscal years beginning after December 15, 1997 and will be presented in the Company's Annual Report on Form 10-K for the year ending December 31, 1998. Financial statement disclosures for prior periods are required to be restated. The Company is in the process of evaluating the disclosure requirements. The adoption of SFAS No. 131 will have no impact on consolidated results of operations, financial position or cash flow.

In March 1998, the American Institute of Certified Public Accountants ("AICPA") issued Statement of Position 98-1, ACCOUNTING FOR THE COSTS OF COMPUTER SOFTWARE DEVELOPED OR OBTAINED FOR INTERNAL USE ("SOP 98-1"). SOP 98-1 requires computer software costs associated with internal use software to be expensed as incurred until certain capitalization criteria are met. The Company will adopt SOP 98-1 on January 1, 1999. Adoption of this Statement is not expected to have a material impact on the Company's consolidated financial position or results of operations, although actual charges incurred may be material due to Year 2000 issues.

See Note 10 for new accounting standards issued subsequent to March 31, 1998.

2. ACQUISITION

On March 30, 1998, the Company, through a wholly-owned subsidiary, acquired approximately 81% of the total number of then outstanding shares of common stock of Coleman from a subsidiary of MacAndrews & Forbes Holdings, Inc. ("M&F"), in exchange for 14,099,749 shares of the Company's common stock and approximately $160 million in cash as well as the assumption of $1,016 million in debt. The value of the common stock issued at the date of acquisition ($524 million) was derived by using the average ending stock price as reported by the New York Stock Exchange Composite Tape for the day before and day of the public announcement of the acquisition discounted by 15% due to the restrictive nature of the securities. (See Note 10.)

16div-012783

2. ACQUISITION - (CONTINUED)

The Coleman acquisition was accounted for under the purchase method of accounting; and accordingly, the results of operations of Coleman for March 30 and March 31, 1998 are included in the accompanying Condensed Consolidated Statement of Operations. The purchase price of Coleman has been allocated to individual assets acquired and liabilities assumed based on preliminary estimates of fair market value at the date of acquisition. The preliminary fair value of tangible assets acquired was approximately $747 million (of which $27 million was cash) and approximately $1,331 million of liabilities were assumed. The excess of purchase price over net tangible assets acquired of $1,270 million has been classified as goodwill and is being amortized on a straight-line basis over 40 years. The allocation of purchase price for the acquisition of Coleman will be revised when additional information concerning asset and liability valuations is obtained. Adjustments, which could be significant, will be made during the allocation period based on detailed reviews of the fair values of assets acquired and liabilities assumed and could result in a substantial change in goodwill and other intangible assets.

The Company expects to acquire the remaining equity interest in Coleman pursuant to a merger transaction in which the existing Coleman minority shareholders will receive .5677 shares of the Company's common stock and $6.44 in cash for each share of Coleman common stock outstanding. In addition, unexercised options under Coleman's stock option plans will be cashed out at a price per share equal to the difference between $27.50 and the exercise price of such options. The Company expects to issue approximately 6.7 million shares of common stock and expend approximately $87 million in cash to complete the Coleman acquisition. Although there can be no assurance, it is anticipated the Coleman merger will occur in the first quarter of fiscal 1999. The acquisition of the remaining outstanding shares of Coleman will be accounted for under the purchase method of accounting on the date of consummation. Minority interest in the results from Coleman's operations for March 30 and 31, 1998, is reflected in Other Expense, net in the Condensed Consolidated Statement of Operations for the three months ended March 31, 1998. (See Note 10.)

The following unaudited pro forma financial information for the Company gives effect to the Coleman acqulsition as if it had occurred at the beginning of 1998. These pro forma results have been prepared for informational purposes only and do not purport to be indicative of the results of operations which actually would have occurred had the acquisition been consummated on the date indicated, or which may result in the future. The unaudited pro forma results follow (in millions, except per share data):

	THREE MONTHS ENDED MARCH 31, 1998	MARCH 30, 1997
Net sales (a)	$ 477.3	$ 548.0
Loss before extraordinary charge (a), (b), (c)	(64.7)	(4.8)
Basic and diluted loss per share before extraordinary items (d)	(0.65)	(0.05)

(a) Adjusted to remove sales of $14.8 million and loss before extraordinary charge of $0.8 million from Coleman operations for March 30 and 31, 1998 included in Sunbeam's results.

(b) Coleman's loss before extraordinary items has been adjusted to exclude the following one time after tax benefits and charges: (i) a $15.8 million gain from the sale of Coleman Safety and Security Products, Inc., (ii) $7.1 million of costs incurred by Coleman associated with the Company's acquisition of Coleman, (iii) the write off of $2.1 million of capitalized costs associated with the installation of new software which will be abandoned as a result of the acquisition by the Company, (iv) $1.3 million of costs to terminate a license agreement with a former affiliate of Coleman, and (v) the write off of $1.7 million of unrealized deferred tax assets as a result of the change of control of Coleman.

(c) In 1998 and 1997, respectively, after tax interest expense was increased $13.5 million and $9.8 million, and goodwill amortization, after tax, was increased $5.5 million in each year to reflect the pro forma effect of the acquisition occurring at the beginning of the period. In addition, the minority shareholder percentage was adjusted to reflect the change in the portion of Coleman held by minority shareholders following the transaction. The minority interest in Coleman's losses from continuing operations was adjusted by $0.6 million in 1998 and $0.4 million in 1997 to reflect both the change in the proportion of the ownership of Coleman held by minority shareholders and the effects of the pro forma adjustments.

(d) The shares outstanding were adjusted in each period to reflect the pro forma effect of the shares issued in the Coleman acquisition being outstanding from the beginning of the period.

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3. CREDIT FACILITIES, LONG-TERM DEBT AND FINANCIAL INSTRUMENTS

In order to finance the acquisitions described in Notes 2 and 10, and refinance substantially all of the indebtedness of the Company and its acquired entities, the Company consummated: (i) an offering (the "Offering") of Zero Coupon Convertible Senior Subordinated Debentures due 2018 (the "Debentures") at a yield to maturity of 5% (approximately $2,014 million principal amount at maturity) in March 1998, which resulted in approximately $730 million of net proceeds and, (ii) entered into a revolving and term credit facility ("New Credit Facility"). (See Note 10.)

The Debentures are exchangeable for shares of the Company's common stock at an initial conversion rate of 6.575 shares for each $1,000 principal amount at maturity of the Debentures, subject to adjustment upon occurrence of certain events. (See Note 10.)

The New Credit Facility provided for an aggregate borrowings of up to $1.7 billion pursuant to: (i) a revolving credit facility in an aggregate principal amount of up to $400 million, maturing March 31, 2005; (ii) an $800 million term loan maturing on March 31, 2005, and (iii) a $500 million term loan maturing September 30, 2006. Interest accrues at a rate selected at the Company's option of: (i) the London Interbank Offered Rate ("LIBOR") plus an agreed upon interest margin which varies depending upon the Company's leverage ratio, as defined, and other items or, (ii) the base rate of the administrative agent (generally the higher of the prime commercial lending rate of the administrative agent or the Federal Funds Rate plus 1/2 of 1%), plus an agreed upon interest margin which varies depending upon the Company's leverage ratio, as defined, and other items. The New Credit Facility contains certain covenants, including limitations on the ability of the Company and its subsidiaries to engage in certain transactions and the requirement to maintain certain financial covenants and ratios. (See Note 10.)

The Company selectively uses derivatives to manage interest rate and foreign exchange exposures that arise in the normal course of business. No derivatives are entered into for trading or speculative purposes. Foreign exchange option and forward contracts are used to hedge a portion of the Company's underlying exposures denominated in foreign currency. Although the market value of derivative contracts at any single point in time will vary with changes in interest and/or foreign exchange rates, the differences between the carrying value and fair value of such contracts at March 31, 1998 and March 30, 1997 were not considered to be material, either individually or in the aggregate. The Company enters into derivative contracts with counterparties that it believes to be creditworthy. The Company does not enter into any leveraged derivative transactions. At March 31, 1998, the Company held an interest rate swap agreement with a notional value of $25.0 million to exchange floating rate interest for a fixed rate of 6.115%. (See Note 10.)

In March 1998, the Company prepaid a $75.0 million 7.85% industrial revenue bond related to its Hattiesburg facility originally due in 2009. In connection with the early extinguishment of this debt, the Company recognized an extraordinary charge of $8.6 million ($0.10 per share) in the first quarter of 1998.

In December 1997, the Company entered into a receivables securitization program under which the Company has received approximately $34.8 million from the sale of trade accounts receivable in the first quarter of 1998. Costs of the program, which primarily consist of the purchaser's financing cost of issuing commercial paper backed by the receivables, totaled $0.6 million during the first quarter of 1998. The Company, as agent for the purchaser of the receivables, retains collection and administrative responsibilities for the purchased receivables.

16div-012785

4. COMPREHENSIVE INCOME

The Company adopted SFAS No. 130, REPORTING COMPREHENSIVE INCOME, effective January 1, 1998. SFAS No. 130 establishes standards for reporting and display of comprehensive income and its components in financial statements. The components of the Company's comprehensive loss are as follows (in thousands):

	THREE MONTHS ENDED	
	MARCH 31, 1998	MARCH 30, 1997
Net loss	$(54,106)	$ (4,686)
Foreign currency translation adjustment, net of taxes	183	(186)
Comprehensive loss	$(53,923)	$ (4,872)

5. SUPPLEMENTAL FINANCIAL STATEMENT DATA

Supplementary Balance Sheet data at the end of each period is as follows (in thousands):

	MARCH 31, 1998	DECEMBER 28, 1997
Receivables:		
Trade	$ 521,755	$ 250,699
Sundry	17,134	7,794
	538,889	258,493
Valuation allowance	(38,218)	(30,033)
	$ 500,671	$ 228,460
Inventories:		
Finished goods	$ 426,590	$ 193,864
Work in process	52,728	25,679
Raw materials and supplies	137,773	85,357
	$ 617,091	$ 304,900

(See Note 10 regarding asset valuation/impairment in the remainder of 1998.)

The Supplementary Statement of Cash Flows data is as follows (in thousands):

	THREE MONTHS ENDED	
	MARCH 31, 1998	MARCH 30, 1997
Cash paid during the period for:		
Interest	$ 5,442	$ 1,103
Income taxes (refunds)	$ 381	$(11,920)

16div-012786

6. RESTRUCTURING AND ASSET IMPAIRMENT

At December 28, 1997, the Company, before consideration of the Coleman acquisition, had $5.2 million in liabilities accrued related to a 1996 restructuring plan. The majority of these liabilities related to facility closures and related exit costs. In the first quarter of 1998, this liability was reduced by $0.5 million as a result of cash expenditures.

The restated restructuring reserve details and activity as of and for the quarter ended March 30, 1997 are as follows (in millions):

	RESERVE BALANCE AT DECEMBER 29, 1996	CASH REDUCTIONS	NON-CASH REDUCTIONS	ACCRUAL BALANCE AT MARCH 30, 1997
Severance and other employee costs	$ 19.1	$ 3.2	$ --	$ 15.9
Closure and consolidation of facilities and related exit costs	32.6	1.4	1.3	29.9
Total	51.7	$ 4.6	$ 1.3	$ 45.8

7. DISCONTINUED OPERATIONS

The Company's discontinued furniture business, which was sold in March 1997, had revenues of $51.6 million in the first quarter of 1997 prior to the sale and nominal earnings. As a result of the sale of the Company's furniture business assets (primarily inventory, property, plant and equipment), the Company received $69.0 million in cash, retained approximately $50.0 million in accounts receivable and retained certain liabilities. The final purchase price for the furniture business was subject to a post-closing adjustment based on the terms of the Asset Purchase Agreement and in the first quarter of 1997, after completion of the sale, the Company recorded an additional loss on disposal of $22.5 million pre-tax.

16div-012787

8. RESTATEMENT

Subsequent to the issuance of the Company's condensed consolidated financial statements for the three months ended March 31, 1998, it was determined that for the years ended December 29, 1996 and December 28, 1997 and the three months ended March 31, 1998, certain revenue was improperly recognized (principally "bill and hold" and guaranteed sales transactions), certain costs and allowances were not accrued or were improperly recorded (principally allowances for returns, cooperative advertising, and customer charge-backs as well as deductions and reserves for product liability and warranty expense) and certain costs were inappropriately included in, and subsequently charged to, restructuring, asset impairment and other costs within the Consolidated Statements of Operations. As a result, the consolidated financial statements as of December 28, 1997 and December 29, 1996 and for the years then ended were restated and a Form 10-K/A was filed with the Securities and Exchange Commission on November 12, 1998. The accompanying condensed consolidated financial statements as of March 31, 1998 and March 30, 1997 and for the three months then ended, present restated results.

A summary of the effects of the restatement for the three months ended March 31, 1998 and March 30, 1997 follows (in thousands, except per share data):

Condensed Consolidated Statements of Operations

(Unaudited)

	THREE MONTHS ENDED			
	MARCH 31, 1998		MARCH 30, 1997	
	As Previously Reported	As Restated	As Previously Reported	As Restated
Net sales	$ 244,296	$ 247,601	$ 253,450	$ 252,488
Cost of goods sold	211,459	213,828	185,698	194,237
Selling, general and administrative expense	68,841	71,139	33,009	41,195
Operating (loss) earnings	(36,004)	(37,366)	34,743	17,056
Interest expense	5,072	5,073	1,993	1,993
Other expense, net	2,367	3,165	113	77
(Loss) earnings from continuing operations before income taxes and extraordinary charge	(43,443)	(45,604)	32,637	14,986
Income tax (benefit) provision	(4,458)	(122)	12,076	5,959
(Loss) earnings from continuing operations	(38,985)	(45,482)	20,561	9,027
Loss from discontinued operations, net of taxes	--	--	(13,713)	(13,713)
Extraordinary charge from early extinguishment of debt	(5,608)	(8,624)	--	--
Net (loss) earnings	$ (44,593)	$ (54,106)	$ 6,848	$ (4,686)
Earnings per share:				
(Loss) earnings from continuing operations:				
Basic	$ (0.45)	$ (0.53)	$ 0.24	$ 0.11
Diluted	(0.45)	(0.53)	0.24	0.10
Loss from discontinued operations:				
Basic	--	--	(0.16)	(0.17)
Diluted	--	--	(0.16)	(0.15)
Extraordinary item:				
Basic	(0.07)	(0.10)	--	--
Diluted	(0.07)	(0.10)	--	--
Net (loss) earning:				
Basic	$ (0.52)	$ (0.63)	$ 0.08	$ (0.06)
Diluted	$ (0.52)	$ (0.63)	$ 0.08	$ (0.05)

16div-012788

8. RESTATEMENT - (CONTINUED)

Condensed Consolidated Balance Sheets
(Unaudited)

	AS OF MARCH 31, 1998		AS OF MARCH 30, 1997	
	As Previously Reported	As Restated	As Previously Reported	As Restated
ASSETS				
Cash and cash equivalents	$ 193,543	$ 193,543	$ 30,415	$ 30,415
Receivables, net	562,294	500,671	296,716	289,509
Inventories	575,109	617,091	148,011	148,011
Prepaid expenses, deferred income taxes and other current assets	107,692	74,855	134,512	128,359
Total current assets	1,438,638	1,386,160	609,654	596,294
Property, plant and equipment, net	403,179	412,096	217,453	226,627
Trademarks, trade names, goodwill and other, net	1,601,605	1,556,909	226,048	226,048
Total assets	$ 3,443,422	$ 3,355,165	$ 1,053,155	$ 1,048,969
LIABILITIES AND SHAREHOLDERS' EQUITY				
Short-term debt and current portion of long-term debt	$ 62,139	$ 62,139	$ 848	$ 848
Accounts payable	205,217	204,456	100,648	98,262
Other current liabilities	179,373	218,554	158,658	145,614
Total current liabilities	446,729	485,149	260,154	244,724
Long-term debt	1,637,820	1,637,820	175,235	175,235
Other long-term liabilities	269,334	216,240	204,606	207,603
Minority interest	55,191	55,191	--	--
Shareholders' equity:				
Common stock	1,008	1,008	892	892
Additional paid-in capital	975,778	966,631	458,690	458,690
Retained earnings	95,675	34,829	41,125	49,372
Accumulated other comprehensive loss	(29,288)	(32,878)	(18,460)	(18,460)
Other shareholders' equity	(8,825)	(8,825)	(5,699)	(5,699)
Treasury stock	--	--	(63,388)	(63,388)
Total shareholders' equity	1,034,348	960,765	413,160	421,407
Total liabilities and shareholders' equity	$ 3,443,422	$ 3,355,165	$ 1,053,155	$ 1,048,969

16div-012789

9. NEW EMPLOYMENT AGREEMENTS

On February 20, 1998 the Company entered into new three-year employment agreements with its then Chairman and Chief Executive Officer and two other senior officers of the Company. These agreements replaced previous employment agreements entered into in July 1996 that were scheduled to expire in July 1999.

The new employment agreement for the Company's then Chairman provided for, among other items, the acceleration of vesting of 200,000 shares of restricted stock and the forfeiture of the remaining 133,333 shares of unvested restricted stock granted under the July 1996 agreement, a new equity grant of 300,000 shares of unrestricted stock, a new grant of a ten-year option to purchase 3,750,000 shares of the Company's common stock with an exercise price equal to the fair market value of the stock at the date of grant and exercisable in three equal annual installments beginning on the date of grant and the acceleration of vesting of 833,333 outstanding stock options granted under the July 1996 agreement. In addition, the new employment agreement with the then Chairman and Chief Executive Officer provided for income tax gross-ups with respect to any tax assessed on the equity grant and acceleration of vesting of restricted stock.

The new employment agreements with the two other then senior officers provided for, among other items, the grant of a total of 180,000 shares of restricted stock that vest in four equal annual installments beginning the date of grant, the acceleration of vesting of 44,000 shares of restricted stock and the forfeiture of the remaining 29,332 shares of unvested restricted stock granted under the July 1996 agreements, new grants of ten-year options to purchase a total of 1,875,000 shares of the Company's common stock with an exercise price equal to the fair market value of the stock at the date of grant and exercisable in four equal annual installments beginning on the date of grant and the acceleration of vesting of 383,334 outstanding stock options granted under the July 1996 agreements. In addition, the new employment agreements provided for income tax gross-ups with respect to any tax assessed on the restricted stock grants and acceleration of vesting of restricted stock.

Compensation expense attributed to the equity grant, the acceleration of vesting of restricted stock and the related income tax gross-ups was recognized in the first quarter of 1998 and compensation expense related to the new restricted stock grants and related tax gross-ups was amortized to expense beginning in the first quarter of 1998 with amortization to continue over the period in which the restrictions lapse. Total compensation expense recognized in the first quarter of 1998 related to these items was approximately $31 million. (See Note 10.)

10. SUBSEQUENT EVENTS

SENIOR MANAGEMENT CHANGES

On June 15, 1998, the Company's Board of Directors announced the removal of the then Chairman and Chief Executive Officer and subsequently announced the removal or resignation of other senior officers, including the Company's then Chief Financial Officer. In connection with the removal or resignation of the senior officers and the termination of their restricted stock grants, the unamortized portion of the deferred compensation expense attributable to the restricted stock grants will be reversed and compensation expense of approximately $0.9 million recognized in the first quarter of 1998 for unvested restricted stock grants will be reversed into income in the second and third quarters of 1998. Other costs related to the resignations and terminations will be recognized, as appropriate, in 1998. The Company and certain of its former officers are in disagreement as to the Company's obligations to these individuals under prior employment agreements and arising from their terminations. The Board of Directors has installed a new Chief Executive Officer and senior management team.

16div-012790

10. SUBSEQUENT EVENTS - (CONTINUED)

COLEMAN ACQUISITION

On August 12, 1998, the Company announced that, following investigation and negotiation conducted by a Special Committee of the Board consisting of four outside directors not affiliated with M&F, the Company had entered into a settlement agreement with a subsidiary of M&F pursuant to which the Company was released from certain threatened claims of M&F and its affiliates arising from the Coleman acquisition and M&F agreed to provide certain management personnel and assistance to the Company in exchange for the issuance to the M&F subsidiary of five-year warrants to purchase up to 23 million shares of the Company's common stock at an exercise price of $7.00 per share, subject to anti-dilution provisions. The financial statement impact of the settlement, which will be material in amount, will be recorded in the third quarter of 1998. (See Litigation, below.)

OTHER ACQUISITIONS

On April 6, 1998, the Company completed the cash acquisitions of First Alert, Inc. ("First Alert"), a leading manufacturer of smoke and carbon monoxide detectors, and Signature Brands USA, Inc. ("Signature Brands"), a leading manufacturer of a comprehensive line of consumer and professional products. The First Alert and the Signature Brands acquisitions were valued at approximately $178 million and $253 million, respectively, including the assumption of debt. These acquisitions will be accounted for by the purchase method of accounting and the results of operations of the acquired entities will be included in the Company's Consolidated Statement of Operations from the respective acquisition dates.

DEBENTURES, NEW CREDIT FACILITY AND FINANCIAL INSTRUMENTS

The Company was required to file a registration statement with the Securities and Exchange Commission to register the Debentures by June 23, 1998, which registration statement has not been filed. From June 23, 1998 until the day on which the registration statement is filed and declared effective, the Company is required to pay to the Debenture holders cash liquidated damages accruing, for each day during such period, at a rate per annum equal to 0.25% during the first 90 days and 0.50% thereafter multiplied by the total of the issue price of the Debentures plus the original issue discount thereon on such day. The Company made its first payment of approximately $525,000 to the Debenture holders on September 25, 1998.

At June 30, 1998, the Company was not in compliance with the financial covenants and ratios required under the New Credit Facility. The Company and its lenders entered into an agreement dated June 30, 1998, which provided that compliance with the covenants would be waived through December 31, 1998. Borrowings under the New Credit Facility are secured by certain of the Company's assets, including its stock interest in Coleman and certain other subsidiaries and certain of the Company's tangible and intangible personal property. Pursuant to an amendment dated October 19, 1998, the Company is not required to comply with the original financial covenants and ratios under the New Credit Facility until April 10, 1999, but will be required to comply with an earnings before interest, taxes, depreciation and amortization covenant, the amounts of which are to be determined, beginning February 1999. Concurrent with each of these amendments, interest margin was increased. The margin continues to increase monthly through March 1999 to a maximum of 400 basis points over LIBOR. At September 30, 1998, following the scheduled repayment of a portion of the term loan, the New Credit Facility was reduced to $1,698 million in total, of which approximately $1,453 million was outstanding and approximately $245 million was available. In addition, the Company's cash balance available for debt repayment at September 30, 1998 was approximately $43 million.

16div-012791

10. SUBSEQUENT EVENTS - (CONTINUED)

The Company is working closely with its bank lenders and hopes to reach agreement with the bank lenders on a further amendment to the New Credit Facility containing revised financial covenants which the bank lenders and the Company find mutually acceptable. There can be no assurance that such an amendment, or a further waiver of the existing financial covenants, will be entered into with the bank lenders by April 10, 1999. The failure to obtain such an amendment or further waiver would result in violation of the existing covenants, which would permit the bank lenders to accelerate the maturity of all outstanding borrowing under the New Credit Facility.

The Company selectively uses derivatives to manage interest rate and foreign exchange exposures that arise in the normal course of business. In the second quarter of 1998, the Company entered into two swap transactions in a notional amount of $150 million each, in connection with the New Credit Facility. The swap agreements are contracts to exchange floating rate for fixed interest payments periodically over the life of the agreements without the exchange of the underlying notional principal amounts. The swaps expire in June 2001 and 2003 and have strike rates of 5.75% and 5.58%, respectively. The notional amounts of the agreements do not represent the amount of exposure to credit loss.

As a result of repayment of certain indebtedness assumed in the Coleman acquisition, the Company will recognize an extraordinary charge of approximately $104 million in the second quarter of 1998.

SEC INVESTIGATION

By letter dated June 17, 1998, the staff of the Division of Enforcement of the SEC advised the Company that it was conducting an informal inquiry into the Company's accounting policies and procedures and requested that the Company produce certain documents. On July 2, 1998, the SEC issued a Formal Order of Private Investigation, designating officers to take testimony and pursuant to which a subpoena duces tecum was served on the Company requiring the production of certain documents. On November 4, 1998, another SEC subpoena duces tecum requiring the production of further documents was received by the Company. The Company has provided numerous documents to the SEC staff and continues to cooperate fully with the SEC staff. The Company cannot predict the term of such investigation or its potential outcome.

LITIGATION

On April 23, 1998, two class action lawsuits were filed on behalf of purchasers of the Company's common stock in the U. S. District Court for the Southern District of Florida against the Company and certain of its present and former officers and directors alleging violations of the federal securities laws as discussed below (the "Consolidated Federal Actions"). Since that date, approximately fifteen similar class actions have been filed in the same Court. One of the lawsuits also names as defendant Arthur Andersen LLP, the Company's independent accountants for the period covered by the lawsuit.

16div-012792

10. SUBSEQUENT EVENTS - (CONTINUED)

The complaints in the Consolidated Federal Actions allege to varying degrees that the defendants (i) failed to disclose that the Company pre-sold approximately $50 million of products pursuant to its "early buy" marketing program in an effort to boost its 1997 sales and net income figures and (ii) made material misrepresentations regarding the Company's business operations, future prospects and anticipated earnings per share, in an effort to artificially inflate the price of the Company stock long enough for the Company to complete a $2 billion debt financing (supported with stock incentives) necessary to complete the acquisitions of Coleman, Signature Brands and First Alert, and for the individual defendants to enter into lucrative long-term employment agreements with the Company. Each complaint alleges two counts of securities fraud; one count against all defendants and one count against the individual defendants.

On June 16, 1998, the Court entered an Order consolidating all such filed and all such subsequently filed class actions and providing time periods for the filing of a Consolidated Amended Complaint and defendants' response thereto. On June 22, 1998, two groups of plaintiffs made motions to be appointed lead plaintiffs and to have their selection of counsel approved as lead counsel. On July 20, 1998, the Court entered an Order appointing lead plaintiffs and lead counsel (the "Smith Plaintiffs' Group"). This Order also stated that it "shall apply to all subsequently filed actions which are consolidated herewith". On August 28, 1998, plaintiffs in one of the subsequently filed actions filed an objection to having their action consolidated pursuant to the June 16, 1998 Order, arguing that the class period in their action differs from the class periods in the originally filed consolidated actions. On September 29, 1998, the Smith Plaintiffs' Group filed its memorandum in opposition to this objection.

On April 7, 1998, a purported derivative action was filed in the Circuit Court for the Fifteenth Judicial Circuit in and for Palm Beach County, Florida against the Company and certain of its present and former officers and directors. The action alleged that the individual defendants breached their fiduciary duties and wasted corporate assets when the Company granted stock options to three of its officers and directors on or about February 2, 1998 at an exercise price of $36.85. On June 25, 1998, all defendants filed a motion to dismiss the complaint for failure to make a presuit demand on the board of directors of the Company. On October 22, 1998, the plaintiff amended the complaint against all but one of the defendants named in the original complaint. The amended complaint no longer challenges the stock options, but instead alleges that the individual defendants breached their fiduciary duties by failing to have in place adequate accounting and sales controls, which failure caused the inaccurate reporting of financial information to the public, thereby causing an artificial inflation of the Company's financial statements and stock price.

On June 25, 1998, four purported class actions were filed in the Court of Chancery of the State of Delaware in New Castle County by minority shareholders of Coleman against the Company and certain of the Company's present and former officers and directors. An additional class action was filed on August 10, 1998, against the same parties. All of the plaintiffs are represented by the same Delaware counsel and have agreed to consolidate the class actions. These actions allege, in essence, that the existing exchange ratio for the proposed merger between the Company and Coleman is no longer fair to Coleman shareholders as a result of the recent decline in the market value of the Company stock. On October 21, 1998, the Company announced that it had entered into a Memorandum of Understanding to settle, subject to court approval, certain class actions brought by shareholders of Coleman challenging the proposed Coleman Merger. Under the terms of the proposed settlement, the Company will issue to the Coleman public shareholders five-year warrants to purchase 4.98 million shares of the Company's common stock at $7.00 per share. These warrants will generally have the same terms as the warrants previously issued to a subsidiary of M&F and will be issued when the Coleman Merger is consummated, which is now expected to be in the first quarter of 1999. There can be no assurance that the Court will approve the settlement as proposed.

16div-012793

10. SUBSEQUENT EVENTS - (CONTINUED)

During the months of August and October 1998, purported class and derivative actions were filed in the Court of Chancery of the State of Delaware in New Castle County and in the U. S. District Court for the Southern District of Florida by shareholders of the Company against the Company, M&F and certain of the Company's present and former directors. These complaints allege that the defendants breached their fiduciary duties when the Company entered into a settlement agreement with M&F whereby M&F released the Company from any claims it may have had arising out of the Company's acquisition of its interest in Coleman and agreed to provide management support to the Company (the "Settlement Agreement"). Pursuant to the Settlement Agreement, M&F was granted five-year warrants to purchase an additional 23 million shares of the Company's common stock at an exercise price of $7.00 per share. These complaints also allege that the rights of the public shareholders have been compromised, as the settlement would normally require shareholder approval under the rules and regulations of the New York Stock Exchange ("NYSE"). The Audit Committee of the Company's board determined that obtaining such shareholder approval would have seriously jeopardized the financial viability of the Company which is an allowable exception to the NYSE shareholder approval requirements.

On September 16, 1998, an action was filed in the 56th Judicial District Court of Galveston County, Texas alleging various claims in violation of the Texas Securities Act and Texas Business and Commercial Code as well as common law fraud as a result of the Company's alleged misstatements and omissions regarding the Company's financial condition and prospects during a period beginning May 1, 1998 and ending June 16, 1998, in which the plaintiffs engaged in transactions in the Company's stock. The Company is the only named defendant in this action. The complaint requests recovery of compensatory damages, punitive damages and expenses in an unspecified amount. This action has been removed to the U.S. District Court for the Southern District of Texas and the Company has filed a motion to transfer this case to the Southern District of Florida, the forum for the Consolidated Federal Actions. Plaintiffs have moved to remand the case to Texas state court.

On October 30, 1998, a class action lawsuit was filed on behalf of certain purchasers of the Company's Debentures in the U.S. District Court of the Southern District of Florida against the Company and its prior Chief Executive Officer and Chief Financial Officer, alleging violations of the federal securities laws and common law fraud. The complaint alleges that the Company's offering memorandum used for the marketing of the Debentures contained false and misleading information regarding the Company's financial position and that the defendants engaged in a plan to inflate the Company's earnings for the purpose of defrauding the plaintiffs and others. The Company is seeking to consolidate this lawsuit with the other Consolidated Federal Actions.

The Company intends to vigorously defend each of the foregoing lawsuits, but cannot predict the outcome and is not currently able to evaluate the likelihood of the Company's success in each case or the range of potential loss. However, if the foregoing actions were determined adversely to the Company, such judgments would likely have a material adverse effect on the Company's financial position, results of operations and cash flows.

On July 2, 1998, the American Insurance Company ("American") filed suit against the Company in the U.S. District Court for the Southern District of New York requesting a declaratory judgment of the court that the directors' and officers' liability insurance policy for excess coverage issued by American was invalid and/or had been properly cancelled by American. The Company has moved to transfer such action to the federal district court in which the Consolidated Federal Actions are currently pending; American is opposing such motion. On October 20, 1998, an action was filed by Federal Insurance Company in the U.S. District Court for the Middle District of Florida requesting the same relief as that requested by American in the previously filed action as to additional coverage levels under the Company's directors' and officers' liability insurance policy. The Company intends to pursue recovery from all of its insurers if damages are awarded against the Company or its indemnified officers and/or directors under any of the foregoing actions. The Company's failure to obtain such insurance recoveries following an adverse judgement against the Company in any of the foregoing actions could have a material adverse impact on the Company's financial position, results of operations and cash flow.

16div-012794

10. SUBSEQUENT EVENTS - (CONTINUED)

The Company and its subsidiaries are also involved in various lawsuits arising from time to time which the Company considers to be ordinary routine litigation incidental to its business. In the opinion of the Company, the resolution of these routine matters, and of certain matters relating to prior operations of the Predecessor, individually or in the aggregate, will not have a material adverse effect upon the financial position or results of operations of the Company.

ASSET IMPAIRMENT, INVENTORY RESERVES AND RELATED LIABILITIES

In 1998, as a result of decisions to outsource a substantial number of products previously made by the Company, certain facilities and equipment will either no longer be used or will be used in a significantly different manner. Accordingly, certain assets recorded at March 31, 1998 will be written down in future periods to reflect the fair market value of items held for disposition or to reflect impairment for items where the future utility is altered by the spurcing change. Personnel at the Mexico City manufacturing plant were notified in the second quarter of 1998 that the plant is scheduled for closure at year-end 1998. Accordingly, a liability related to plant closure will be recorded in the second quarter. As certain inventories built in 1997 and the first quarter of 1998 in anticipation of 1998 sales volumes exceed the actual requirements, it will be necessary to dispose of some portions of excess inventories at amounts less than cost. The Company is also in the process of assessing the expected future performance of its business operations and the impact of this assessment on the valuation of assets in the business. This assessment is expected to be completed in the fourth quarter.

NEW ACCOUNTING STANDARDS

In April 1998, the AICPA issued Statement of Position 98-5, REPORTING ON THE COSTS OF START-UP ACTIVITIES ("SOP 98-5"). SOP 98-5 requires all costs associated with pre-opening, pre-operating and organization activities to be expensed as incurred. The Company will adopt SOP 98-5 beginning January 1, 1999. Adoption of the Statement is not expected to have a material impact on the Company's consolidated financial position or results of operations.

In June 1998, the FASB issued SFAS No. 133, ACCOUNTING FOR DERIVATIVE INSTRUMENTS AND HEDGING ACTIVITIES for fiscal years beginning after June 15, 1999. SFAS No. 133 requires the recognition of all derivatives in the Consolidated Balance Sheet as either assets or liabilities measured at fair value. The Company will adopt SFAS No. 133 effective for the 2000 calendar year end. The Company has not yet determined the impact SFAS No. 133 will have on its financial position or results of operations when such statement is adopted.

ITEM 2. MANAGEMENT'S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS

On June 30, 1998, the Company announced that the Audit Committee of the Board of Directors was initiating a review into the accuracy of prior financial statements. The Audit Committee's review has since been completed and, as a result of its findings, the Company has restated its previously issued consolidated financial statements for 1996 and 1997 and the first quarters of 1998 and 1997 (see Note 8 to the accompanying condensed consolidated financial statements and the Company's Annual Report on Form 10-K/A for the year ended December 28, 1997). The following discussion should be read in conjunction with the accompanying condensed consolidated financial statements as of and for the three months ended March 31, 1998 and March 30, 1997.

OVERVIEW

On March 30, 1998, the Company, through a wholly-owned subsidiary, acquired approximately 81% of the total number of then outstanding shares of common stock of The Coleman Company, Inc. ("Coleman"), in exchange for 14,099,749 shares of the Company's common stock and approximately $160 million in cash as well as the assumption of $1,016 million in debt. The Company expects to acquire the remaining equity interest in Coleman pursuant to a merger transaction in which the existing Coleman minority shareholders will receive approximately 6.7 million shares of common stock and approximately $87 million in cash. Although there can be no assurance, it is anticipated the Coleman merger will occur in the first quarter of fiscal 1999. (See Note 10 to the condensed consolidated financial statements and Part II, Item 1. "Legal Proceedings"). Coleman is a leading manufacturer and marketer of consumer products for the worldwide outdoor recreation market. Its products have been sold domestically under the Coleman /registered trademark/ brand name since the 1920's.

The Coleman acquisition was recorded under the purchase method of accounting; and accordingly, the results of operations of Coleman for March 30 and 31, 1998 are included in the accompanying Condensed Consolidated Statement of Operations. The purchase price of Coleman has been allocated to individual assets acquired and liabilities assumed based on preliminary estimates of fair market value at the date of acquisition. The allocation of purchase price for the acquisition of Coleman will be revised when additional information concerning asset and liability valuations is obtained. Adjustments, which could be significant, will be made during the allocation period based on detailed reviews of the fair values of assets acquired and liabilities assumed and could result in a substantial change in goodwill and other intangible assets.

To standardize the fiscal period ends of the Company, Coleman and two companies acquired after March 31, 1998, effective with its 1998 fiscal year, the Company has changed its fiscal year end from the Sunday nearest December 31 to a calendar year. (See Notes 1 and 10 to the condensed consolidated financial statements.)

THREE MONTHS ENDED MARCH 31, 1998 COMPARED TO THREE MONTHS ENDED MARCH 30, 1997

Net sales is comprised of gross sales less provisions for estimated customer returns, discounts, promotional allowances, cooperative advertising allowances and costs incurred by the Company to ship product to customers. Net sales for the three months ended March 31, 1998 were $247.6 million, a decrease of $4.9 million or 2% versus the three months ended March 30, 1997. After excluding: (i) $14.8 million of Coleman's sales for March 30 and 31, 1998, (ii) approximately $4 million in 1998 sales resulting from the change in year end described above, (iii) $4.2 million from 1997 sales relating to divested product lines which are not classified as discontinued operations (time and temperature products and Counselor /registered trademark/ and Borg /registered trademark/ branded scales), and (iv) $13.7 million from 1997 sales of discontinued inventory which resulted primarily from the reduction of SKU's as part of the 1996 restructuring plan and for which the inventory carrying value was substantially equivalent to the sales value, net sales on an adjusted basis ("Adjusted Sales") reflected a 2% decrease from the first quarter of 1997.

Overall, product sales were adversely impacted by price discounting and approximately $13 million of higher provisions for estimated returns, costs to ship products to customers, rebates and other customer allowances.

Domestic Adjusted Sales declined approximately $10 million from the first quarter of 1997. Outdoor Cooking category sales accounted for the majority of this decline. During 1997, the Company lost a significant portion of its Outdoor Cooking products distribution, including the majority of its grill accessory products distribution. As compared with the first quarter of 1997, the Outdoor Cooking products sales decline was also attributed to a lower than anticipated retail sell-through during the early stages of the 1998 retail selling season. Based on the sales levels achieved in the first quarter of 1998, distribution losses and retail inventory levels for Outdoor Cooking products, and a significant sales decline experienced subsequent to the first quarter as compared with the same period in the prior year, sales for the remainder of 1998 will be significantly lower as compared to the prior year. Adjusted Sales for Appliance category products increased approximately $7 million but were offset by declines in other product categories, primarily Away From Home products.

International sales, which represented 26% of Adjusted Sales in the first quarter of 1998, grew approximately 16% over the first quarter of 1997's Adjusted Sales. This sales growth was attributed to improved distribution, new product sales and increased retail inventory levels in Latin America, including Mexico and Venezuela, offset by declines in sales of Outdoor Cooking products in Europe and Canada.

Excluding $4.1 million of gross margin generated from the inclusion of the Coleman operations for two days in the first quarter of 1998 and approximately $0.6 million in gross margin from the change in the fiscal period, gross margin declined to $29.1 million, or 12.7% of Adjusted Sales in 1998 versus $58.3 million, or 24.8% of Adjusted Sales for the same period a year ago. The margin erosion was due to lower price realization and higher costs of customer allowances, rebates and similar incentives in 1998, coupled with a higher product return reserve and an adverse product sales mix in 1998. The adverse product sales mix was due in part to the loss of a majority of the grill accessory products distribution. Accessories generate significantly better margins than the average margins on sales of grills. During the first quarter of each year, grill and grill accessory sales are traditionally a higher portion of overall sales in the period than during other quarters of the year.

Due to the level of Outdoor Cooking products sales in the first quarter and the levels of retail inventories for these products, the Company began the season-end ramp down of production at the Neosho Outdoor Cooking products facility earlier than previously planned. As a result, operating results for the 1998 grill season will be adversely impacted due to unabsorbed fixed factory overhead during the second and third quarters and higher inventory carrying costs.

Excluding the effect of: (i) $3.7 million of selling, general and administrative ("SG&A") charges from Coleman, (ii) approximately $0.8 million of SG&A expenses in 1998 from the change in the fiscal period, (iii) a $3.0 million benefit in the first quarter of 1998 and a $0.5 million benefit in the first quarter of 1997 from the reversal of reserves no longer required, (iv) $31.2 million of charges recorded in 1998 related to compensation for former executives, and (v) $4.1 million of restructuring related charges recorded in 1997, SG&A expenses were 2% higher in 1998 than 1997. Higher distribution and warehousing costs due to increased levels of inventory were primarily responsible for the increase in costs between years.

Operating results for the first quarters of 1998 and 1997, on a comparable basis as described above, were a loss of $9.4 million in 1998 and a profit of $20.7 million in 1997. On the same basis, operating margins as a percent of Adjusted Sales decreased to a loss of 4.1% from a profit of 8.8% in the prior year. This change resulted from the factors discussed above.

Interest expense increased from $2.0 million in the first quarter of 1997 to $5.1 million in the first quarter of 1998 primarily related to higher borrowing levels in 1998 for the acquisitions and increased working capital. (See Note 3 to the condensed consolidated financial statements.)

Other expense, net of $3.2 million in 1998 and $0.1 million in 1997 primarily represents foreign exchange losses. Losses in both years arose from Sunbeam's operations in Mexico. In addition, the 1998 losses were impacted by Sunbeam's operations in Venezuela and Coleman's operations in Japan.

The effective income tax rate was 0.3% in the first quarter of 1998, as compared to 39.8% in the first quarter of 1997. The 1998 rate is lower than the statutory federal rate principally as a result of a valuation allowance for deferred tax assets provided in 1998. The 1997 rate was higher than the federal statutory income tax rate primarily due to state and local taxes plus the effect of foreign earnings taxed at other rates.

The Company's loss per share from continuing operations in the first quarter of 1998, excluding: (i) Coleman's results for March 30 and 31, 1998, (ii) the effect of the change in fiscal periods, (iii) the reversals of reserves no longer required in each year's first quarter, (iv) the restructuring related charges in 1997, and (v) the 1998 charge related to management compensation was a loss of $0.20 per share versus earnings per share from continuing operations in the first quarter of 1997 of $0.13 per share. Due to increased inventory positions at certain customers from sales in 1997 and the first quarter of 1998, as well as increased inventory positions at the Company, sales and operating income will be materially affected during the remainder of 1998. In addition, 1998 results will be impacted materially by charges related to, among other items, a change in management, changes in business operations resulting in part from acquisitions in 1998, interest costs associated with higher debt levels, costs associated with litigation and asset impairment costs, as well as costs related to Year 2000 issues. (See "Liquidity and Capital Resources", below, and Note 10 to the condensed consolidated financial statements.)

In March 1998, the Company prepaid a $75.0 million 7.85% industrial revenue bond related to its Hattiesburg facility originally due in 2009. In connection with the early extinguishment of this debt, the Company recognized an extraordinary charge of $8.6 million ($0.10 per share) in the first quarter of 1998.

The Company's discontinued furniture business, which was sold in March

1997, had revenues of $51.6 million in the first quarter of 1997 prior to the sale and nominal earnings. As a result of the sale of the Company's furniture business assets (primarily inventory, property, plant and equipment), the Company received $69.0 million in cash, retained approximately $50.0 million in accounts receivable and retained certain liabilities. The final purchase price for the furniture business was subject to a post-closing adjustment based on the terms of the Asset Purchase Agreement and in the first quarter of 1997, after completion of the sale, the Company recorded an additional loss on disposal of $22.5 million pre-tax.

FOREIGN OPERATIONS

Approximately 90% of the Company's business is conducted in U.S. dollars (including both domestic sales, U.S. dollar denominated export sales, primarily to certain Latin American markets, Asian sales and the majority of European sales). The Company's exposure to market risk from changes in foreign currency and interest rates is generally insignificant. The Company's non-U.S. dollar denominated sales are made principally by subsidiaries in Mexico, Venezuela and Canada. Venezuela is considered a hyperinflationary economy for accounting purposes for 1998 and 1997 and Mexico reverted to a hyperinflationary status for accounting purposes in 1997; therefore, translation adjustments related to Venezuelan and Mexican net monetary assets are included as a component of net earnings. Mexico is not expected to be hyperinflationary at some point in 1998.

While Sunbeam's revenues generated in Asia have traditionally not been significant, economic instability in this region is expected to have a negative effect on Coleman's earnings. It is anticipated that sales in and exports to this region will continue to decline so long as the economic environment remains unsettled. It is not anticipated that this impact will be materially adverse to the Company's results of operations taken as a whole.

On a limited basis, the Company selectively uses derivatives (foreign exchange option and forward contracts) to manage foreign exchange exposures that arise in the normal course of business. No derivative contracts are entered into for trading or speculative purposes. The use of derivatives did not have a material impact on the Company's financial results in 1998 and 1997. (See Note 3 to the condensed consolidated financial statements.)

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SEASONALITY

On a consolidated basis, the Company's sales have not traditionally exhibited substantial seasonality; however, sales have been strongest during the fourth quarter of the calendar year. Additionally, sales of Outdoor Cooking products are strongest in the first half of the year, while sales of Appliances and Personal Care and Comfort products are strongest in the second half of the year. Furthermore, sales of a number of the Company's traditional products, including warming blankets, vaporizers, humidifiers and grills may be impacted by unseasonable weather conditions. After considering the seasonality of the acquired entities, the Company's consolidated sales are not expected to exhibit substantial seasonality; however, sales are expected to be strongest during the second quarter of the calendar year. Additionally, sales of many products sold by Coleman may be impacted by unseasonable weather conditions.

LIQUIDITY AND CAPITAL RESOURCES

In order to finance the acquisition of Coleman in the first quarter of 1998 and the anticipated acquisitions of First Alert, Inc. ("First Alert") and Signature Brands USA, Inc. ("Signature Brands") and to refinance substantially all of the indebtedness of the Company and the acquired entities, the Company consummated: (i) an offering (the "Offering") of Zero Coupon Convertible Senior Subordinated Debentures due 2018 (the "Debentures") at a yield to maturity of 5% (approximately $2,014 million principal amount at maturity) in March 1998, which resulted in approximately $730 million of net proceeds and, (ii) entered into a revolving and term credit facility ("New Credit Facility"). (See Note 10.)

The New Credit Facility provided for an aggregate borrowings of up to $1.7 billion pursuant to: (i) a revolving credit facility in an aggregate principal amount of up to $400 million, maturing March 31, 2005; (ii) an $800 million term loan maturing on March 31, 2005, and (iii) a $500 million term loan maturing September 30, 2006. Interest accrues at a rate selected at the Company's option of: (i) the London Interbank Offered Rate ("LIBOR") plus an agreed upon interest margin which varies depending upon the Company's leverage ratio, as defined, and other items or, (ii) the base rate of the administrative agent (generally the higher of the prime commercial lending rate of the administrative agent or the Federal Funds Rate plus 1/2 of 1%), plus an agreed upon interest margin which varies depending upon the Company's leverage ratio, as defined, and other items. (See Notes 3 and 10 to the condensed consolidated financial statements.)

As of March 31, 1998, the Company had cash and cash equivalents of $193.5 million, working capital excluding cash and cash equivalents of $707.5 million and total debt of $1.7 billion. Cash used in operating activities during the first quarter of 1998 was $134.7 million compared to $22.6 million in the first quarter of 1997. This increase is primarily attributable to lower earnings before non-cash charges and an increased investment in working capital. The majority of the increase in working capital is a result of higher inventory and receivables levels in 1998. Inventories increased $312.2 million from December 28, 1997, of which $246.3 million related to Coleman and $65.9 million related to Sunbeam's household and grill products. Receivables increased $272.2 million from December 28, 1997, with $215.1 million due to the Coleman acquisition and $57.1 million from Sunbeam's historical operating units. Extended dating terms contributed to the increase in Sunbeam's receivables. Cash used in operating activities for the 1998 first quarter reflects proceeds of $34.8 million from the Company's revolving trade accounts receivable securitization program entered into in December 1997. The Company expects to continue to use the securitization program to finance a portion of its accounts receivable. The Company anticipates that cash used in operating activities will increase in the second and third quarters of 1998, principally from losses incurred in operations and increases in inventory. As certain inventories built in 1997 and the first quarter of 1998 in anticipation of 1998 sales volumes exceed the actual requirements, it will be necessary to dispose of some portions of excess inventories at amounts less than cost.

Cash used in investing activities in the first quarter of 1998 reflects $160.6 million for the acquisition of approximately 81% of Coleman. In the first quarter of 1997, cash provided by investing activities reflected $70.4 million

in proceeds from the sales of divested operations. Capital spending totaled $19.5 million in 1998 and was primarily for capacity expansion initiatives primarily at the Neosho grill manufacturing facility, and equipment and tooling for new products. Capital spending in 1997 was $10.9 million and was primarily attributable to manufacturing capacity expansion and equipment to manufacture new products. The new product capital spending in 1998 principally related to the Appliance category and included costs related to water and air filtration products, blenders, standmixers and irons. The Company anticipates 1998 capital spending to be approximately 5% of sales, primarily related to new product introductions, capacity additions and certain facility rationalization initiatives.

Cash provided by financing activities totaled $456.1 million in the first quarter of 1998 and reflects net proceeds from the Debentures of $729.6 million, the cancellation and repayment of all outstanding balances under the Company's $250 million September 1996 revolving credit facility, the repayment of certain Coleman debt and the early extinguishment of the $75.0 million Hattiesburg bond. In addition, cash provided by financing activities is net of $25.1 million of financing fees related to the Company's $1.7 billion New Credit Facility and $19.0 million of proceeds from the exercise of stock options. (See Note 3 to the condensed consolidated financial statements.)

In April 1998, the Company drew from the term loans under the New Credit Facility to fund the acquisitions of Signature Brands and First Alert as further described in Note 10 to the condensed consolidated financial statements and to refinance certain debt of the acquired companies. The Company drew an additional $550 million of term loans and $50 million of revolving loans in May 1998 to finance the prepayment of certain debt assumed in connection with the Coleman acquisition. In connection with these debt refinancings, the Company expects to record an extraordinary charge of approximately $104 million in the second quarter of 1998.

At June 30, 1998, the Company was not in compliance with the covenants and ratios under the New Credit Facility. The Company and its lenders entered into an agreement dated June 30, 1998, which provided that compliance with the covenants would be waived through December 31, 1998. Subsequently, pursuant to an amendment dated October 19, 1998, the Company is not required to comply with the original financial covenants and ratios under the New Credit Facility until April 10, 1999, but will be required to comply with an earnings before interest, taxes, depreciation and amortization covenant, the amounts of which are to be determined, beginning February 1999. At September 30, 1998, following the scheduled repayment of a portion of the term loan, the New Credit Facility was reduced to $1,698 million in total, of which approximately $1,453 million was outstanding and approximately $245 million was available. In addition, the Company's cash balance available for debt repayment at September 30, 1998 was approximately $43 million.

The Company is working closely with its bank lenders and hopes to reach agreement with the bank lenders on a further amendment to the New Credit Facility containing revised financial covenants which the bank lenders and the Company find mutually acceptable. There can be no assurance that such an amendment, or a further waiver of the existing financial covenants, will be entered into with the bank lenders by April 10, 1999. The failure to obtain such an amendment or further waiver would result in violation of the existing covenants, which would permit the bank lenders to accelerate the maturity of all outstanding borrowing under the New Credit Facility.

The Company expects to acquire the remaining equity interest in Coleman pursuant to a merger transaction in which the existing Coleman minority shareholders will receive approximately 6.7 million shares of common stock and approximately $87 million in cash. In addition, as a result of litigation related to the merger consideration, the Company has entered into a memorandum of understanding (subject to court approval) pursuant to which the holders of the remaining equity interest in Coleman will also receive five-year warrants to purchase 4.98 million shares of Sunbeam common stock at $7.00 per share. There can be no assurance that the court will approve the settlement as proposed. Although there can be no assurance, it is anticipated the Coleman merger will occur in the first quarter of fiscal 1999. (See Note 10 to the condensed consolidated financial statements.)

The Company believes its borrowing capacity under the New Credit Agreement, cash flow from the combined operations of the Company and its acquired companies, existing cash and cash equivalent balances, and its receivable securitization program will be sufficient to support working capital needs, capital spending, and debt service for the foreseeable future. However, if the Company is unable to satisfactorily amend the financial covenants and ratio requirements of the New Credit Facility or obtain a further waiver of the existing covenants and ratio requirements prior to April 10, 1999, the Company expects it would, at that time, be in default of the requirements under the New Credit Facility and, as noted above, the lenders could then require the repayment of all amounts then outstanding under the New Credit Facility.

NEW ACCOUNTING STANDARDS

See Notes 1 and 10 to the Company's condensed consolidated financial statements for a discussion of Statement of Financial Accounting Standards ("SFAS") No. 131, DISCLOSURES ABOUT SEGMENTS OF AN ENTERPRISE AND RELATED INFORMATION, SFAS No. 133, ACCOUNTING FOR DERIVATIVE INSTRUMENTS AND HEDGING ACTIVITIES, Statement of Position ("SOP") 98-1, ACCOUNTING FOR THE COSTS OF COMPUTER SOFTWARE DEVELOPED OR OBTAINED FOR INTERNAL USE and SOP 98-5, REPORTING ON THE COSTS OF START-UP ACTIVITIES, which are required to be adopted for periods beginning after December 15, 1997. The adoption of these standards is not expected to have a material effect on the Company's consolidated results of operations, financial position, or cash flows, although actual charges incurred may be material due to Year 2000 issues, as discussed below.

YEAR 2000

The Company is in the process of assessing the impact of the Year 2000 on its operations, including the Coleman, First Alert and Signature Brands companies which were acquired by the Company in the spring of 1998. The Company established a Year 2000 Program Management Office in the third quarter of 1998 to conduct such assessment with assistance from three consulting firms. The Company's assessment encompasses the Company's information technology functions along with the impact of the effects of noncompliance by its vendors, service providers, customers, and financial institutions. Additionally, the Company is assessing the impact of noncompliance of embedded microprocessors in its products as well as equipment, such as security and telephone systems and controls for lighting, heating/ventilation, and facility access.

The Company relies on its information technology functions to perform many tasks that are critical to its operations. Significant transactions that could be impacted by Year 2000 noncompliance include, among others, purchases of materials, production management, order entry and fulfillment, and payroll processing. Systems and applications that have been identified by the Company to date as not currently Year 2000 compliant and which are critical to the Company's operations include its financial software systems, which process the order entry, purchasing, production management, general ledger, accounts receivable, and accounts payable functions, and critical applications in the Company's manufacturing and distribution facilities, such as the warehouse management application. The Company plans to complete corrective work with respect to the Company's systems by the second quarter of 1999 with final testing and implementation of such systems occurring in the third quarter of 1999. Management believes that, although there are significant systems that will need to be modified or replaced, the Company's information systems environment will be made Year 2000 compliant prior to January 1, 2000. The Company's failure to timely complete such corrective work could have a material adverse impact on the Company. The Company is not able to estimate possible lost profits arising from such failure.

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The Company is in the process of contacting its vendors and suppliers of products and services to determine their Year 2000 readiness and plans. This review includes third party providers to whom the Company has outsourced the processing of its cash receipt and cash disbursement transactions. The Company plans to complete this review during the fourth quarter of 1998. The failure of certain of these third party suppliers to become Year 2000 compliant could have a material adverse impact on the Company.

The Company's preliminary assessment of the total costs to address and remedy Year 2000 issues, including costs for the acquired companies, is at least $50 million. This estimate includes the costs of software and hardware modifications and replacements and fees to third party consultants, but excludes internal resources. The Company expects these expenditures to be financed through operating cash flows or borrowings, as applicable. Through March 31, 1998, the Company had expended less than $1 million related to new systems and remediation to address Year 2000 issues, of which the majority was for software licenses and was therefore recorded as capital expenditures. Of the remaining estimated expenditures, it is anticipated that approximately 25% will be incurred by year-end 1998, with the remainder in 1999. A significant portion of these expenditures will enhance the Company's operating systems in addition to resolving the Year 2000 issues. As the Company completes its assessment of the Year 2000 issues, the actual expenditures incurred or to be incurred may differ materially from the amounts shown above.

After completing the assessment of the Year 2000 on its operations, the Company plans to establish a contingency plan for addressing any effects of the Year 2000 on its operations, whether due to noncompliance of the Company's systems or those of third parties. The Company expects to complete such contingency plan by September 30, 1999; such contingency plan will address alternative processes, such as manual procedures to replace those processed by noncompliant systems, potential alternative service providers, and plans to address compliance issues as they arise. Subject to the nature of the systems and applications which are not made Year 2000 compliant, the impact of such non-compliance on the Company's operations could be material if appropriate contingency plans cannot be developed prior to January 1, 2000.

SUBSEQUENT EVENTS

See Note 10 of Notes to the condensed consolidated financial statements for information relating to, among other matters, a change in management, litigation and anticipated asset impairment, inventory reserves and related liabilities.

RESTATEMENT OF RESULTS OF OPERATIONS FOR THE THREE MONTHS ENDED MARCH 30, 1997 COMPARED TO THE THREE MONTHS ENDED MARCH 31, 1996

The results of operations previously reported for the three months ended March 30, 1997 as compared with the three months ended March 31, 1996 generally understated the level of expenses incurred in 1997. Gross margin was previously reported to have improved 5.8 percentage points from the level achieved in 1996. After restatement, the gross margin improvement was 2.2 percentage points. Operating income was previously reported to have improved $19.2 million or 123.9% from 1996's first quarter to the first quarter of 1997. After reflecting the results of the restatement, operating earnings were $17.1 million for the first quarter of 1997, an improvement of $1.5 million or 9.9% from the prior year. On November 12, 1998, the Company filed a Form 10-K/A setting forth its restated financial statements for December 28, 1997 and December 29, 1996, and the fiscal years then ended. Management's Discussion and Analysis of Financial Condition and Results of Operations for the fiscal years 1997 and 1998 as well as 1996 and 1995 are contained therein. (See Note 8 to the condensed consolidated financial statements.)

16div-012803

CAUTIONARY STATEMENTS

Certain statements in this Quarterly Report on Form 10-Q/A may constitute "forward-looking" statements within the meaning of the Private Securities Litigation Reform Act of 1995, as the same may be amended from time to time (herein the "Act") and in releases made by the Securities and Exchange Commission ("SEC") from time to time. Such forward-looking statements involve known and unknown risks, uncertainties and other factors which may cause the actual results, performance, or achievements of the Company to be materially different from any future results, performance, or achievements expressed or implied by such forward-looking statements. When used in this Quarterly Report on Form 10-Q/A, the word "estimate," "project," "intend," "expect" and similar expressions, when used in connection with the Company, including its management, are intended to identify forward-looking statements. These forward-looking statements were based on various factors and were derived utilizing numerous important assumptions and other important factors that could cause actual results to differ materially from those in the forward-looking statements. These Cautionary Statements are being made pursuant to the Act, with the intention of obtaining the benefits of the "Safe Harbor" provisions of the Act. The Company cautions investors that any forward-looking statements made by the Company are not guarantees of future performance. Important assumptions and other important factors that could cause actual results to differ materially from those in the forward-looking statements with respect to the Company include, but are not limited to risks associated with (i) high leverage, (ii) Sunbeam's ability to enter into an amendment to its credit agreement containing financial covenants which it and its bank lenders find mutually acceptable, or to continue to obtain waivers from its bank lenders with respect to its compliance with the existing covenants contained in such agreement, and to continue to have access to its revolving credit facility, (iii) Sunbeam's ability to integrate the recently acquired Coleman, Signature Brands and First Alert companies and expenses associated with such integration, (iv) Sunbeam's sourcing of products from international vendors, including the ability to select reliable vendors and to avoid delays in shipments, (v) Sunbeam's ability to maintain and increase market share for its products at anticipated margins, (vi) Sunbeam's ability to successfully introduce new products and to provide on-time delivery and a satisfactory level of customer service, (vii) changes in laws and regulations, including changes in tax rates, accounting standards, environmental laws, occupational, health and safety laws, (viii) access to foreign markets together with foreign economic conditions, including currency fluctuations, (ix) uncertainty as to the effect of competition in existing and potential future lines of business, (x) fluctuations in the cost and availability of raw materials and/or products, (xi) changes in the availability and relative costs of labor, (xii) effectiveness of advertising and marketing programs, (xiii) economic uncertainty in Japan, Korea and other Asian countries, as well as in Mexico, Venezuela, and other Latin American countries, (xiv) product quality, including excess warranty costs, product liability expenses and costs of product recalls, (xv) weather conditions which can have an unfavorable impact upon sales of Sunbeam's products, (xvi) the numerous lawsuits against the Company and the SEC investigation into the Company's accounting practices and policies, and uncertainty regarding the Company's available coverage on its directors' and officers' liability insurance, (xvii) the possibility of a recession in the United States or other countries resulting in a decrease in consumer demands for the Company's products, and (xviii) failure of the Company and/or its suppliers of goods or services to timely complete the remediation of computer systems to effectively process Year 2000 information. Other factors and assumptions not included in the foregoing may cause the Company's actual results to materially differ from those projected. The Company assumes no obligation to update any forward-looking statements or these Cautionary Statements to reflect actual results or changes in other factors affecting such forward-looking statements.

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PART II - OTHER INFORMATION

ITEM 1. LEGAL PROCEEDINGS

On April 23, 1998, two class action lawsuits were filed on behalf of purchasers of the Company's common stock in the U. S. District Court for the Southern District of Florida against the Company and certain of its present and former officers and directors alleging violations of the federal securities laws as discussed below (the "Consolidated Federal Actions"). Since that date, approximately fifteen similar class actions have been filed in the same Court. One of the lawsuits also names as defendant Arthur Andersen LLP, the Company's independent accountants.

The complaints in the Consolidated Federal Actions allege to varying degrees that the defendants (i) failed to disclose that the Company pre-sold approximately $50 million of products pursuant to its "early buy" marketing program in an effort to boost its 1997 sales and net income figures and (ii) made material misrepresentations regarding the Company's business operations, future prospects and anticipated earnings per share, in an effort to artificially inflate the price of the Company stock long enough for the Company to complete a $2 billion debt financing (supported with stock incentives) necessary to complete the acquisitions of Coleman, Signature Brands and First Alert, and for the individual defendants to enter into lucrative long-term employment agreements with the Company. Each complaint alleges two counts of securities fraud; one count against all defendants and one count against the individual defendants.

On June 16, 1998, the Court entered an Order consolidating all such filed and all such subsequently filed class actions and providing time periods for the filing of a Consolidated Amended Complaint and defendants' response thereto. On June 22, 1998, two groups of plaintiffs made motions to be appointed lead plaintiffs and to have their selection of counsel approved as lead counsel. On July 20, 1998, the Court entered an Order appointing lead plaintiffs and lead counsel (the "Smith Plaintiffs' Group"). This Order also stated that it "shall apply to all subsequently filed actions which are consolidated herewith". On August 28, 1998, plaintiffs in one of the subsequently filed actions filed an objection to having their action consolidated pursuant to the June 16, 1998 Order, arguing that the class period in their action differs from the class periods in the originally filed consolidated actions. On September 29, 1998, the Smith Plaintiffs' Group filed its memorandum in opposition to this objection.

On April 7, 1998, a purported derivative action was filed in the Circuit Court for the Fifteenth Judicial Circuit in and for Palm Beach County, Florida against the Company and certain of its present and former officers and directors. The action alleged that the individual defendants breached their fiduciary duties and wasted corporate assets when the Company granted stock options to three of its officers and directors on or about February 2, 1998 at an exercise price of $36.85. On June 25, 1998, all defendants filed a motion to dismiss the complaint for failure to make a presuit demand on the board of directors of the Company. On October 22, 1998, plaintiff filed an amended complaint against all but one of the defendants named in the original complaint. The amended complaint no longer challenges the stock options, but instead alleges that the individual defendants breached their fiduciary duties by failing to have in place adequate accounting and sales controls, which failure caused the inaccurate reporting of financial information to the public, thereby causing an artificial inflation of the Company's financial statements and stock price.

On June 25, 1998, four purported class actions were filed in the Court of Chancery of the State of Delaware in New Castle County by minority shareholders of Coleman against the Company and certain of the Company's present and former officers and directors. An additional class action was filed on August 10, 1998, against the same parties. All of the plaintiffs are represented by the same Delaware counsel and have agreed to consolidate the class actions. These actions allege, in essence, that the existing exchange ratio for the proposed merger between the Company and Coleman is no longer fair to Coleman shareholders as a

result of the recent decline in the market value of the Company stock. On or about October 21, 1998, the parties signed a memorandum of understanding to settle these class actions, subject to court approval.

During the months of August and October 1998, purported class and derivative actions were filed in the Court of Chancery of the State of Delaware in New Castle County and in the U. S. District Court for the Southern District of Florida by shareholders of the Company against the Company, M&F and certain of the Company's present and former directors. These complaints allege that the defendants breached their fiduciary duties when the Company entered into a settlement agreement whereby M&F released the Company from any claims it may have had arising out of the Company's acquisition of its interest in Coleman and agreed to provide management support to the Company (the "Settlement Agreement"). Pursuant to the Settlement Agreement, a M&F subsidiary was granted five-year warrants to purchase up to an additional 23 million shares of the Company's common stock at an exercise price of $7.00 per share. These complaints also allege that the rights of the public shareholders have been compromised, as the settlement would normally require shareholder approval under the rules and regulations of the New York Stock Exchange ("NYSE"). The Audit Committee of the Company's board determined that obtaining such shareholder approval would have seriously jeopardized the financial viability of the Company which is an allowable exception to the NYSE shareholder approval requirement. An amended complaint has been filed on this action.

On September 16, 1998, an action was filed in the 56th Judicial District Court of Galveston County, Texas alleging various claims in violation of the Texas Securities Act and Texas Business and Commercial Code as well as common law fraud as a result of the Company's alleged misstatements and omissions regarding the Company's financial condition and prospects during a period beginning May 1, 1998 and ending June 16, 1998, in which the plaintiffs engaged in transactions in the Company's stock. The Company is the only named defendant in this action. The complaint requests recovery of compensatory damages, punitive damages and expenses in an unspecified amount. This action has been removed to the U.S. District Court for the Southern District of Texas and the Company has filed a motion to transfer this case to the Southern District of Florida, the forum for the Consolidated Federal Actions. Plaintiffs have moved to remand the case to Texas state court.

On October 30, 1998, a class action lawsuit was filed on behalf of certain purchasers of the Company's Debentures in the U.S. District Court of the Southern District of Florida against the Company and its prior Chief Executive Officer and Chief Financial Officer, alleging violations of the federal securities laws and common law fraud. The complaint alleges that the Company's offering memorandum used for the marketing of the Debentures

contained false and misleading information regarding the Company's financial position and that the defendants engaged in a plan to inflate the Company's earnings for the purpose of defrauding the plaintiffs and others. The Company is seeking to consolidate this lawsuit with the other Consolidated Federal Actions.

The Company intends to vigorously defend each of the foregoing lawsuits, but cannot predict the outcome and is not currently able to evaluate the likelihood of the Company's success in each case or the range of potential loss. However, if the foregoing actions were determined adversely to the Company, such judgments would likely have a material adverse effect on the Company's financial position, results of operations and cash flow.

On July 2, 1998, the American Insurance Company ("American") filed suit against the Company in the U.S. District Court for the Southern District of New York requesting a declaratory judgment of the court that the directors' and officers' liability insurance policy for excess coverage issued by American was invalid and/or had been properly cancelled by American. The Company has moved to transfer such action to the federal district court in which the Consolidated Federal Actions are currently pending; American is opposing such motion. On October 20, 1998, an action was filed by Federal Insurance Company in the U.S. District Court for the Middle District of Florida requesting the same relief as that requested by American in the previously filed action as to additional coverage levels under the Company's directors' and officers' liability insurance policy. The Company intends to pursue recovery from all of its insurers if damages are awarded against the Company or its indemnified officers and/or directors under any of the foregoing actions. The Company's failure to obtain such insurance recoveries following an adverse judgement against the Company in any of the lawsuits referred to above could have a material adverse effect on the Company's financial position, results of operations and cash flow.

The Company and its subsidiaries are also involved in various lawsuits arising from time to time which the Company considers to be ordinary routine litigation incidental to its business. In the opinion of the Company, the resolution of these routine matters, and of certain matters relating to prior operations of the Company's predecessor, individually or in the aggregate, will not have a material adverse effect upon the financial position or results of operations of the Company.

ITEM 6. EXHIBITS AND REPORTS ON FORM 8-K.

(a) Exhibits*

3	Bylaws of Sunbeam Corporation, as amended.
10.a	Credit Agreement dated as of March 30, 1998, among Sunbeam Corporation, the Subsidiary Borrowers referred to therein, the Lenders party thereto, Morgan Stanley Senior Funding, Inc., Bank America National Trust and Savings Association and First Union National Bank.
10.b	First Amendment to Credit Agreement dated as of May 8, 1998, among Sunbeam Corporation, the Subsidiary Borrowers referred to therein, the Lenders party thereto, Morgan Stanley Senior Funding, Inc., Bank America National Trust and Savings Association and First Union National Bank.
10.c	Indenture, dated as of March 25, 1998, by and among the Company and Bank of New York, as Trustee, with respect to the Zero Coupon Convertible Senior Subordinated Debentures due 2018.
10.d	Registration Rights Agreement dated March 25, 1998, by and among the Company and Morgan Stanley & Co., Inc., with respect to the Zero Coupon Convertible Senior Subordinated Debentures due 2018.
27	Financial Data Schedule, submitted electronically to the Securities and Exchange Commission for information only and not filed.
99.a	Press Release dated May 11, 1998, regarding first quarter 1998 earning and restructure of the Sunbeam acquired companies.

* All of the foregoing Exhibits were filed with the Company's report on Form 10-Q for the first quarter of 1998.

(b) Reports on Form 8-K

The Company filed Reports on Form 8-K on April 13, 1998 as amended by Form 8-K/A filed on May 11, 1998.

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SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned thereunto duly authorized.

SUNBEAM CORPORATION

BY: /S/ BOBBY G. JENKINS

Bobby G. Jenkins
Executive Vice President, and
Chief Financial Officer
(Principal Financial Officer)

Dated: November 25, 1998

EXHIBIT INDEX

EXHIBIT	DESCRIPTION
27	Financial Data Schedule

16div-012810

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Proc-Type: 2001,MIC-CLEAR
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CONFORMED SUBMISSION TYPE: 10-K405
PUBLIC DOCUMENT COUNT: 21
CONFORMED PERIOD OF REPORT: 19971228
FILED AS OF DATE: 19980306
SROS: NYSE

FILER:

COMPANY DATA:
COMPANY CONFORMED NAME: SUNBEAM CORP/FL/
CENTRAL INDEX KEY: 0000003662
STANDARD INDUSTRIAL CLASSIFICATION: ELECTRIC HOUSEWARES & FANS [3634]
IRS NUMBER: 251638266
STATE OF INCORPORATION: DE
FISCAL YEAR END: 1229

FILING VALUES:
FORM TYPE: 10-K405
SEC ACT:
SEC FILE NUMBER: 001-00052
FILM NUMBER: 98559620

BUSINESS ADDRESS:
STREET 1: 1615 SOUTH CONGRESS AVENUE
STREET 2: SUITE 200
CITY: DELRAY BEACH
STATE: FL
ZIP: 33445
BUSINESS PHONE: 3057672100

MAIL ADDRESS:
STREET 1: 1615 SOUTH CONGRESS AVENUE
STREET 2: SUITE 200
CITY: DELRAY BEACH
STATE: FL
ZIP: 33445

FORMER COMPANY:
FORMER CONFORMED NAME: SUNBEAM OSTER COMPANY INC /DE/
DATE OF NAME CHANGE: 19931210
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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

FORM 10-K

(Mark One)

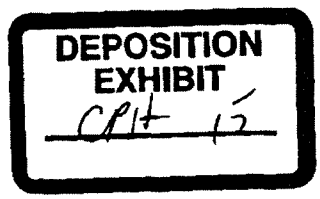
[x] ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934

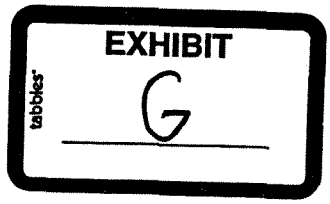
FOR THE FISCAL YEAR ENDED DECEMBER 28, 1997

OR

[ ] TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934 (NO FEE REQUIRED)

FOR THE TRANSITION PERIOD FROM_____TO_____.





COMMISSION FILE NUMBER 0001-000052

[SUNBEAM LOGO]

SUNBEAM CORPORATION
(EXACT NAME OF REGISTRANT AS SPECIFIED IN ITS CHARTER)

<TABLE>
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DELAWARE	25-1638266
(STATE OR OTHER JURISDICTION OF INCORPORATION OR ORGANIZATION)	(I.R.S. EMPLOYER IDENTIFICATION NUMBER)
1615 S. CONGRESS AVENUE, SUITE 200 DELRAY BEACH, FLORIDA (ADDRESS OF PRINCIPAL EXECUTIVE OFFICES)	33445 (ZIP CODE)

</TABLE>

(561) 243-2100
(REGISTRANT'S TELEPHONE NUMBER, INCLUDING AREA CODE)

SECURITIES REGISTERED PURSUANT TO SECTION 12(B) OF THE ACT:

TITLE OF EACH CLASS:	NAME OF EACH EXCHANGE ON WHICH REGISTERED:
COMMON STOCK, $0.01 PAR VALUE	NEW YORK STOCK EXCHANGE

SECURITIES REGISTERED PURSUANT TO SECTION 12(G) OF THE ACT: NONE

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes [x] No [ ]

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K (section 229.405 of this chapter) is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. [x]

The aggregate market value of all classes of the registrant's voting stock held by non-affiliates as of February 27, 1998 was approximately $2,801,018,606.

On February 27, 1998, there were 86,457,201 shares of the registrant's Common Stock outstanding.

DOCUMENTS INCORPORATED BY REFERENCE

Portions of the Proxy Statement for the 1998 Annual Meeting of Shareholders are incorporated by reference in Part III hereof.

<PAGE>

SUNBEAM CORPORATION AND SUBSIDIARIES

ANNUAL REPORT
ON FORM 10-K

TABLE OF CONTENTS

<TABLE>
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		PAGE
<S>	<C>	<C>
PART I		
ITEM 1.	BUSINESS	
	General.	1
	Restructuring and Growth Plan	1
	Pending Acquisitions	2
	Products	2
	Competitive Strengths	4
	Customers	5
	Patents and Trademarks	5
	Employees	6
	Seasonality	6
	Raw Materials	6
	Environmental Matters	6
	Cautionary Statements	7

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-Q

☒ **Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934**

For the period ended March 31, 1998

OR

☐ **Transition Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934**

For the transition period from _____ to _____.

Commission File Number 1-52

Sunbeam

Sunbeam Corporation
(Exact name of registrant as specified in its charter)

Delaware (State or other jurisdiction of incorporation or organization)	**25-1638266** (I.R.S. Employer Identification No.)
1615 South Congress Avenue Suite 200 Delray Beach, Florida (Address of principal executive offices)	**33445** (Zip Code)

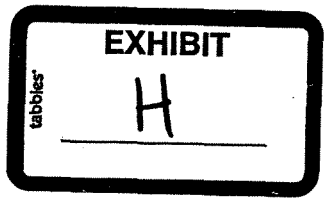
(561) 243-2100
(Registrant's telephone number, including area code)

Not Applicable
(Former name, former address and former fiscal year, if changed since last report)

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days.

X Yes ___ No

On May 11, 1998 there were 100,824,578 shares of the registrant's Common Stock ($.01 par value) outstanding.



CONFIDENTIAL

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CONFORMED SUBMISSION TYPE: 10-K
PUBLIC DOCUMENT COUNT: 7
CONFORMED PERIOD OF REPORT: 19991231
FILED AS OF DATE: 20000502

FILER:

COMPANY DATA:
COMPANY CONFORMED NAME: SUNBEAM CORP/FL/
CENTRAL INDEX KEY: 0000003662
STANDARD INDUSTRIAL CLASSIFICATION: ELECTRIC HOUSEWARES & FANS [
IRS NUMBER: 251638266
STATE OF INCORPORATION: DE
FISCAL YEAR END: 1229

FILING VALUES:
FORM TYPE: 10-K
SEC ACT:
SEC FILE NUMBER: 001-00052
FILM NUMBER: 617176

BUSINESS ADDRESS:
STREET 1: 2381 EXECUTIVE CENTER DR
STREET 2: SUITE 200
CITY: BOCA RATON
STATE: FL
ZIP: 33431
BUSINESS PHONE: 5619124100

MAIL ADDRESS:
STREET 1: 2381 EXECURIVE CENTER DR
STREET 2: SUITE 200
CITY: BOCA RATON
STATE: FL
ZIP: 33431

FORMER COMPANY:
FORMER CONFORMED NAME: SUNBEAM OSTER COMPANY INC /DE/
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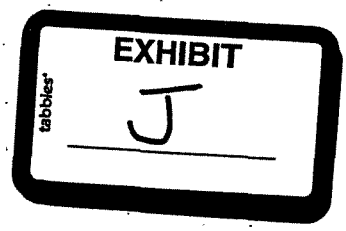
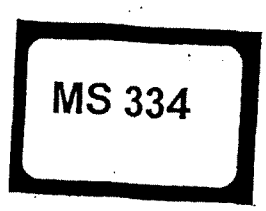


UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549



FORM 10-K

(Mark One)

[X] ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934

16div-012814

For The Fiscal Year Ended December 31, 1999

OR

[ ] TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934
(NO FEE REQUIRED)

For the transition period from _____ to _____.

Commission File Number 0001-000052

SUNBEAM CORPORATION
(Exact name of registrant as specified in its charter)

DELAWARE	25-1638266
(State or other jurisdiction of incorporation or organization)	(I.R.S. Employer Identification Number)

2381 Executive Center Drive Boca Raton, Florida	33431
(Address of principal executive offices)	(Zip Code)

(561) 912-4100
(REGISTRANT'S TELEPHONE NUMBER, INCLUDING AREA CODE)

SECURITIES REGISTERED PURSUANT TO SECTION 12(B) OF THE ACT:

Title of each class:	Name of exchange on which registered:
Common Stock, $0.01 Par Value	New York Stock Exchange

SECURITIES REGISTERED PURSUANT TO SECTION 12(G) OF THE ACT: NONE

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes [X] No [ ]

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K (section 229.405 of this chapter) is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. [ ]

The aggregate market value of all classes of the registrant's voting stock held by non-affiliates as of April 25, 2000 was approximately $279,782,089.

On April 25, 2000, there were 107,555,061 shares of the registrant's Common Stock outstanding.

<PAGE>

SUNBEAM CORPORATION AND SUBSIDIARIES
ANNUAL REPORT
ON FORM 10-K

TABLE OF CONTENTS

<TABLE>

16div-012815

Exhibit 6B

Sunbeam Corporation

Common Stock Daily Closing Price and Trading Volume

Source: Factset Research Systems, Inc.

Cash Dividends

2/26/97	$0.01
5/29/97	$0.01
8/27/97	$0.01
11/26/97	$0.01
2/26/98	$0.01
5/28/98	$0.01

Date	Volume	Closing Price
1/2/97	346,300	$25.250
1/3/97	207,200	$25.250
1/6/97	171,800	$25.375
1/7/97	253,300	$25.625
1/8/97	698,300	$26.375
1/9/97	650,500	$26.625
1/10/97	181,800	$26.625
1/13/97	218,400	$26.375
1/14/97	438,100	$26.500
1/15/97	574,300	$27.750
1/16/97	507,100	$28.375
1/17/97	1,078,000	$28.250
1/20/97	479,800	$28.250
1/21/97	508,000	$28.125
1/22/97	314,200	$28.250
1/23/97	342,000	$27.750
1/24/97	320,700	$27.125
1/27/97	286,100	$26.750
1/28/97	623,500	$27.125
1/29/97	484,200	$27.125
1/30/97	633,200	$26.750
1/31/97	728,400	$27.750
2/3/97	288,700	$27.000
2/4/97	264,600	$26.625
2/5/97	613,600	$26.125
2/6/97	571,500	$25.875
2/7/97	365,500	$25.625
2/10/97	429,100	$25.625
2/11/97	422,900	$24.750
2/12/97	888,000	$25.375
2/13/97	1,262,900	$25.750
2/14/97	963,100	$26.000
2/18/97	321,700	$26.250
2/19/97	294,700	$26.375
2/20/97	263,200	$26.500
2/21/97	372,800	$26.000
2/24/97	149,100	$25.750
2/25/97	392,500	$25.500

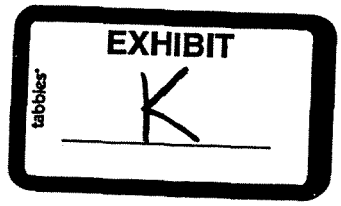


Exhibit 6B

Date	Volume	Closing Price
2/26/97	603,900	$26.750
2/27/97	197,700	$26.375
2/28/97	627,800	$27.375
3/3/97	867,500	$28.875
3/4/97	936,300	$29.000
3/5/97	1,291,900	$30.125
3/6/97	1,562,100	$30.000
3/7/97	451,600	$30.375
3/10/97	434,700	$30.125
3/11/97	1,181,200	$31.125
3/12/97	1,364,200	$32.625
3/13/97	712,100	$32.750
3/14/97	601,300	$32.500
3/17/97	516,900	$33.500
3/18/97	448,200	$32.375
3/19/97	267,100	$31.750
3/20/97	269,100	$32.125
3/21/97	956,000	$32.500
3/24/97	300,700	$32.875
3/25/97	369,600	$33.500
3/26/97	1,421,600	$34.125
3/27/97	493,800	$32.250
3/31/97	788,200	$30.000
4/1/97	650,900	$32.375
4/2/97	739,900	$31.875
4/3/97	429,800	$31.625
4/4/97	1,113,300	$32.875
4/7/97	749,200	$33.375
4/8/97	187,500	$32.750
4/9/97	614,300	$31.625
4/10/97	625,200	$32.125
4/11/97	621,700	$31.625
4/14/97	362,300	$32.375
4/15/97	277,700	$33.125
4/16/97	181,600	$32.625
4/17/97	228,600	$32.500
4/18/97	455,400	$32.125
4/21/97	389,400	$32.000
4/22/97	500,700	$31.625
4/23/97	1,509,800	$33.500
4/24/97	1,037,000	$32.125
4/25/97	157,700	$31.250
4/28/97	1,218,200	$31.000
4/29/97	756,400	$31.625
4/30/97	805,900	$31.875
5/1/97	439,200	$32.625
5/2/97	620,300	$33.125
5/5/97	783,000	$33.000
5/6/97	1,008,000	$31.875
5/7/97	369,800	$32.500
5/8/97	521,100	$31.750
5/9/97	289,500	$31.750
5/12/97	476,800	$31.375

Exhibit 6B

Date	Volume	Closing Price
5/13/97	312,400	$31.250
5/14/97	529,400	$32.250
5/15/97	499,900	$33.125
5/16/97	462,900	$32.625
5/19/97	154,600	$32.750
5/20/97	545,300	$33.750
5/21/97	546,300	$33.375
5/22/97	302,200	$33.625
5/23/97	179,200	$33.375
5/27/97	183,200	$33.500
5/28/97	298,000	$33.250
5/29/97	394,100	$33.625
5/30/97	200,400	$33.750
6/2/97	423,000	$34.250
6/3/97	702,400	$35.625
6/4/97	249,100	$34.750
6/5/97	312,200	$34.625
6/6/97	747,100	$35.500
6/9/97	822,900	$36.375
6/10/97	599,700	$36.500
6/11/97	650,700	$38.500
6/12/97	1,006,600	$37.750
6/13/97	707,900	$37.125
6/16/97	591,500	$37.625
6/17/97	842,800	$37.875
6/18/97	475,100	$38.375
6/19/97	527,600	$39.625
6/20/97	797,200	$40.750
6/23/97	1,135,100	$39.750
6/24/97	1,093,600	$39.500
6/25/97	429,800	$38.500
6/26/97	403,700	$38.750
6/27/97	240,900	$38.375
6/30/97	318,900	$38.125
7/1/97	324,700	$38.563
7/2/97	212,400	$38.813
7/3/97	103,600	$39.125
7/7/97	146,500	$39.063
7/8/97	442,900	$38.938
7/9/97	359,300	$38.688
7/10/97	308,500	$38.375
7/11/97	270,000	$37.813
7/14/97	895,000	$38.063
7/15/97	656,200	$39.250
7/16/97	274,700	$39.063
7/17/97	295,600	$39.000
7/18/97	314,100	$39.313
7/21/97	355,800	$39.000
7/22/97	612,300	$40.750
7/23/97	811,100	$39.313
7/24/97	439,200	$39.438
7/25/97	219,300	$38.438
7/28/97	132,300	$38.750

Exhibit 6B

Date	Volume	Closing Price
7/29/97	363,000	$38.688
7/30/97	317,500	$39.000
7/31/97	226,900	$39.125
8/1/97	189,200	$39.500
8/4/97	150,300	$39.625
8/5/97	132,725	$39.938
8/6/97	209,800	$41.250
8/7/97	247,200	$41.000
8/8/97	250,000	$40.313
8/11/97	137,900	$39.625
8/12/97	521,000	$39.500
8/13/97	561,700	$40.188
8/14/97	155,300	$40.750
8/15/97	693,200	$41.375
8/18/97	258,800	$40.625
8/19/97	325,100	$41.938
8/20/97	467,500	$43.375
8/21/97	909,500	$43.000
8/22/97	519,600	$43.313
8/25/97	625,200	$43.563
8/26/97	548,800	$43.375
8/27/97	587,800	$43.688
8/28/97	250,300	$44.063
8/29/97	224,700	$43.875
9/2/97	464,000	$45.000
9/3/97	548,200	$45.188
9/4/97	375,900	$45.375
9/5/97	224,800	$45.375
9/8/97	335,500	$45.000
9/9/97	367,000	$43.563
9/10/97	364,700	$43.000
9/11/97	355,400	$43.000
9/12/97	426,200	$43.875
9/15/97	574,200	$44.500
9/16/97	442,900	$44.313
9/17/97	406,000	$43.875
9/18/97	150,600	$43.813
9/19/97	362,200	$44.000
9/22/97	484,900	$43.500
9/23/97	426,400	$43.625
9/24/97	440,949	$44.250
9/25/97	355,200	$44.000
9/26/97	283,000	$44.313
9/29/97	229,000	$44.313
9/30/97	507,700	$44.375
10/1/97	414,400	$46.000
10/2/97	253,000	$46.125
10/3/97	158,500	$45.750
10/6/97	160,200	$46.000
10/7/97	246,300	$46.625
10/8/97	351,700	$48.250
10/9/97	456,100	$48.000
10/10/97	154,800	$47.500

Exhibit 6B

Date	Volume	Closing Price
10/13/97	475,900	$48.438
10/14/97	351,200	$49.375
10/15/97	302,600	$49.813
10/16/97	580,600	$48.000
10/17/97	680,500	$46.000
10/20/97	513,600	$46.625
10/21/97	507,500	$48.875
10/22/97	496,200	$48.375
10/23/97	624,400	$47.500
10/24/97	550,000	$48.063
10/27/97	497,600	$43.000
10/28/97	1,007,000	$45.688
10/29/97	556,600	$46.938
10/30/97	290,100	$45.000
10/31/97	293,300	$45.313
11/3/97	574,100	$45.875
11/4/97	198,600	$46.750
11/5/97	516,200	$48.063
11/6/97	308,200	$47.938
11/7/97	221,900	$46.438
11/10/97	596,100	$46.500
11/11/97	148,700	$46.000
11/12/97	162,300	$44.688
11/13/97	262,600	$44.375
11/14/97	261,900	$43.750
11/17/97	790,200	$43.625
11/18/97	223,100	$43.250
11/19/97	223,400	$43.000
11/20/97	415,500	$42.875
11/21/97	457,500	$42.438
11/24/97	271,800	$42.750
11/25/97	224,000	$42.750
11/26/97	194,200	$43.188
11/28/97	91,600	$44.063
12/1/97	160,800	$44.188
12/2/97	155,200	$44.125
12/3/97	226,200	$44.500
12/4/97	195,600	$44.938
12/5/97	342,100	$43.313
12/8/97	284,100	$43.375
12/9/97	939,000	$39.000
12/10/97	1,257,700	$40.438
12/11/97	742,600	$39.000
12/12/97	784,800	$39.813
12/15/97	626,200	$38.563
12/16/97	1,931,500	$42.000
12/17/97	816,600	$41.375
12/18/97	556,100	$39.813
12/19/97	764,700	$41.125
12/22/97	365,600	$40.563
12/23/97	475,000	$42.125
12/24/97	385,700	$42.500
12/26/97	123,700	$42.563

Exhibit 6B

Date	Volume	Closing Price
12/29/97	242,800	$42.000
12/30/97	393,100	$41.625
12/31/97	304,600	$42.250
1/2/98	229,200	$41.500
1/5/98	740,500	$41.375
1/6/98	555,000	$41.375
1/7/98	510,100	$40.188
1/8/98	698,800	$40.125
1/9/98	352,400	$39.813
1/12/98	437,800	$39.750
1/13/98	262,400	$40.375
1/14/98	579,500	$39.813
1/15/98	246,100	$40.125
1/16/98	176,800	$40.063
1/20/98	476,800	$41.500
1/21/98	439,700	$41.000
1/22/98	566,400	$41.063
1/23/98	573,500	$41.688
1/26/98	326,100	$41.250
1/27/98	528,400	$41.563
1/28/98	3,941,800	$37.625
1/29/98	2,659,600	$36.000
1/30/98	1,692,900	$38.125
2/2/98	1,035,000	$37.063
2/3/98	919,100	$37.688
2/4/98	467,600	$37.000
2/5/98	407,500	$36.563
2/6/98	447,400	$36.125
2/9/98	540,100	$36.313
2/10/98	604,400	$36.250
2/11/98	596,000	$36.000
2/12/98	524,500	$36.313
2/13/98	1,235,800	$37.625
2/17/98	888,200	$37.375
2/18/98	1,220,000	$37.875
2/19/98	1,062,600	$38.500
2/20/98	1,700,900	$39.625
2/23/98	1,137,000	$41.625
2/24/98	744,900	$40.625
2/25/98	1,281,200	$42.063
2/26/98	612,800	$41.875
2/27/98	437,200	$41.750
3/2/98	6,509,600	$45.625
3/3/98	3,610,300	$49.875
3/4/98	3,259,500	$52.000
3/5/98	1,715,200	$51.625
3/6/98	1,053,900	$51.500
3/9/98	1,342,900	$50.875
3/10/98	948,400	$50.313
3/11/98	934,800	$49.375
3/12/98	987,700	$50.000
3/13/98	1,784,400	$50.500
3/16/98	515,700	$50.250

Exhibit 6B

Date	Volume	Closing Price
3/17/98	381,400	$50.438
3/18/98	489,300	$50.063
3/19/98	5,516,900	$45.375
3/20/98	4,096,000	$46.000
3/23/98	1,046,500	$45.938
3/24/98	766,400	$45.500
3/25/98	448,600	$45.438
3/26/98	740,300	$44.375
3/27/98	737,300	$44.500
3/30/98	1,343,100	$43.938
3/31/98	838,100	$44.125
4/1/98	587,500	$44.000
4/2/98	2,309,400	$45.563
4/3/98	18,361,500	$34.375
4/6/98	8,117,800	$32.250
4/7/98	2,027,200	$31.438
4/8/98	3,678,100	$30.375
4/9/98	3,183,100	$30.000
4/13/98	2,836,900	$28.375
4/14/98	3,045,600	$30.000
4/15/98	2,947,900	$29.438
4/16/98	2,208,700	$28.125
4/17/98	1,896,100	$29.750
4/20/98	1,787,300	$30.563
4/21/98	1,491,000	$30.125
4/22/98	2,431,200	$29.000
4/23/98	4,539,700	$26.750
4/24/98	3,893,100	$25.875
4/27/98	3,092,500	$25.000
4/28/98	2,133,400	$25.938
4/29/98	2,321,400	$25.563
4/30/98	1,474,900	$25.125
5/1/98	1,519,400	$24.938
5/4/98	4,175,600	$25.125
5/5/98	4,610,000	$27.750
5/6/98	2,178,800	$27.125
5/7/98	1,310,700	$27.625
5/8/98	2,673,400	$27.813
5/11/98	3,656,300	$25.750
5/12/98	3,715,200	$25.250
5/13/98	1,456,800	$25.750
5/14/98	909,300	$25.313
5/15/98	967,800	$25.000
5/18/98	1,267,000	$24.625
5/19/98	1,821,000	$24.125
5/20/98	1,149,500	$23.688
5/21/98	804,400	$23.313
5/22/98	784,000	$23.500
5/26/98	665,600	$23.500
5/27/98	2,249,700	$22.500
5/28/98	2,603,600	$21.875
5/29/98	1,628,800	$22.938
6/1/98	889,400	$22.875

Exhibit 6B

Date	Volume	Closing Price
6/2/98	1,865,700	$22.375
6/3/98	490,900	$22.500
6/4/98	541,200	$22.688
6/5/98	1,287,000	$21.875
6/8/98	2,128,800	$20.625
6/9/98	2,718,100	$19.875
6/10/98	2,057,800	$19.000
6/11/98	1,464,900	$18.500
6/12/98	1,677,800	$18.063
6/15/98	4,070,100	$15.750
6/16/98	8,376,200	$13.875
6/17/98	4,126,000	$13.438
6/18/98	4,654,300	$13.063
6/19/98	9,101,500	$11.250
6/22/98	15,210,500	$8.813
6/23/98	12,547,200	$11.250
6/24/98	9,358,600	$12.000
6/25/98	6,338,800	$10.438
6/26/98	3,522,200	$10.063
6/29/98	2,292,800	$10.375
6/30/98	2,091,600	$10.438
7/1/98	1,947,600	$10.063
7/2/98	1,537,200	$9.875
7/6/98	1,352,400	$10.000
7/7/98	1,191,600	$9.938
7/8/98	1,169,400	$10.000
7/9/98	2,424,000	$9.875
7/10/98	1,302,300	$10.063
7/13/98	1,629,700	$9.938
7/14/98	1,067,200	$9.875
7/15/98	1,198,100	$9.813
7/16/98	1,056,600	$9.813
7/17/98	985,100	$10.063
7/20/98	965,200	$10.000
7/21/98	1,164,500	$9.938
7/22/98	1,329,000	$9.750
7/23/98	1,290,800	$9.375
7/24/98	757,200	$9.375
7/27/98	442,700	$9.375
7/28/98	679,100	$9.125
7/29/98	502,400	$9.250
7/30/98	1,004,300	$9.063
7/31/98	643,300	$8.875
8/3/98	531,800	$8.813
8/4/98	1,068,000	$8.250
8/5/98	1,190,600	$8.000
8/6/98	7,024,100	$7.000
8/7/98	4,690,900	$6.750
8/10/98	7,816,200	$5.875
8/11/98	4,340,000	$6.625
8/12/98	2,986,300	$6.875
8/13/98	6,378,600	$8.563
8/14/98	5,045,100	$9.000

Exhibit 6B

Date	Volume	Closing Price
8/17/98	2,156,000	$8.438
8/18/98	1,371,500	$8.875
8/19/98	1,632,000	$8.563
8/20/98	1,125,600	$8.938
8/21/98	1,251,900	$8.563
8/24/98	1,716,300	$8.813
8/25/98	3,937,200	$9.125
8/26/98	1,338,800	$9.438
8/27/98	1,718,800	$9.188
8/28/98	1,386,600	$8.813
8/31/98	1,870,800	$7.500
9/1/98	2,437,700	$7.875
9/2/98	1,158,600	$7.938
9/3/98	551,500	$7.938
9/4/98	413,500	$7.875
9/8/98	740,900	$8.125
9/9/98	694,500	$7.938
9/10/98	723,500	$7.625
9/11/98	544,600	$7.563
9/14/98	654,800	$7.625
9/15/98	898,900	$7.250
9/16/98	953,400	$7.125
9/17/98	501,900	$7.063
9/18/98	651,600	$6.875
9/21/98	699,300	$7.250
9/22/98	426,800	$7.000
9/23/98	651,600	$7.125
9/24/98	821,600	$7.313
9/25/98	317,200	$7.125
9/28/98	255,000	$7.125
9/29/98	374,100	$6.938
9/30/98	409,200	$7.000
10/1/98	441,300	$6.625
10/2/98	391,100	$6.750
10/5/98	808,700	$6.438
10/6/98	338,900	$6.063
10/7/98	927,400	$5.875
10/8/98	1,621,200	$5.250
10/9/98	946,800	$5.375
10/12/98	1,142,100	$5.000
10/13/98	799,400	$5.125
10/14/98	1,453,000	$4.750
10/15/98	985,100	$4.750
10/16/98	949,200	$4.875
10/19/98	2,400,700	$6.500
10/20/98	4,504,700	$7.688
10/21/98	1,718,100	$6.750
10/22/98	913,200	$6.500
10/23/98	646,200	$6.563
10/26/98	441,000	$6.313
10/27/98	593,300	$6.500
10/28/98	281,400	$6.438
10/29/98	555,600	$6.750

Exhibit 6B

Date	Volume	Closing Price
10/30/98	673,100	$6.688
11/2/98	1,048,600	$6.625
11/3/98	522,700	$6.688
11/4/98	709,300	$6.563
11/5/98	516,600	$6.625
11/6/98	2,275,400	$6.875
11/9/98	1,085,900	$7.188
11/10/98	668,900	$7.250
11/11/98	645,000	$7.313
11/12/98	855,000	$7.250
11/13/98	838,300	$6.750
11/16/98	609,400	$6.813
11/17/98	641,500	$6.938
11/18/98	505,400	$6.813
11/19/98	503,200	$6.938
11/20/98	450,500	$6.875
11/23/98	697,200	$6.625
11/24/98	1,027,200	$6.125
11/25/98	635,700	$6.188
11/27/98	268,000	$6.250
11/30/98	655,000	$6.125
12/1/98	758,500	$6.375
12/2/98	465,900	$6.125
12/3/98	563,900	$6.063
12/4/98	735,100	$6.063
12/7/98	653,000	$6.188
12/8/98	638,200	$6.063
12/9/98	815,100	$6.000
12/10/98	1,216,700	$6.125
12/11/98	887,600	$5.875
12/14/98	1,412,200	$5.500
12/15/98	637,000	$5.688
12/16/98	1,305,300	$5.938
12/17/98	1,092,900	$5.938
12/18/98	707,000	$5.813
12/21/98	1,126,200	$5.625
12/22/98	1,015,200	$5.625
12/23/98	938,000	$5.563
12/24/98	458,700	$5.563
12/28/98	1,189,500	$5.375
12/29/98	1,477,800	$5.188
12/30/98	1,757,000	$5.375
12/31/98	3,676,000	$6.875
1/4/99	3,453,600	$7.188
1/5/99	1,307,100	$7.250
1/6/99	1,023,300	$7.313
1/7/99	1,020,900	$7.438
1/8/99	688,300	$7.375
1/11/99	672,400	$7.125
1/12/99	1,065,300	$6.938
1/13/99	512,300	$6.813
1/14/99	410,000	$6.875
1/15/99	1,266,200	$7.500

Exhibit 6B

Date	Volume	Closing Price
1/19/99	718,300	$7.438
1/20/99	505,700	$7.250
1/21/99	367,000	$7.188
1/22/99	377,100	$7.000
1/25/99	287,600	$6.875
1/26/99	390,000	$6.938
1/27/99	450,000	$6.750
1/28/99	434,100	$6.500
1/29/99	495,100	$6.875
2/1/99	1,029,300	$6.938
2/2/99	367,000	$6.938
2/3/99	750,000	$6.688
2/4/99	400,200	$6.625
2/5/99	322,200	$6.625
2/8/99	513,600	$6.500
2/9/99	485,500	$6.500
2/10/99	260,400	$6.375
2/11/99	264,400	$6.313
2/12/99	284,900	$6.250
2/16/99	288,500	$6.063
2/17/99	440,700	$6.000
2/18/99	422,100	$6.000
2/19/99	285,100	$5.938
2/22/99	335,000	$5.875
2/23/99	314,000	$5.750
2/24/99	423,300	$5.563
2/25/99	382,200	$5.750
2/26/99	271,100	$5.813
3/1/99	244,900	$5.813
3/2/99	329,900	$5.938
3/3/99	198,300	$5.813
3/4/99	364,600	$5.688
3/5/99	308,500	$5.750
3/8/99	267,000	$5.500
3/9/99	336,700	$5.563
3/10/99	295,000	$5.625
3/11/99	293,000	$5.625
3/12/99	268,100	$5.688
3/15/99	272,200	$5.625
3/16/99	244,200	$5.688
3/17/99	299,900	$5.625
3/18/99	413,800	$5.813
3/19/99	687,400	$6.000
3/22/99	298,900	$5.938
3/23/99	206,200	$5.750
3/24/99	196,700	$5.625
3/25/99	198,600	$5.625
3/26/99	205,500	$5.688
3/29/99	343,000	$5.625
3/30/99	217,500	$5.625
3/31/99	412,000	$5.563
4/1/99	143,100	$5.625
4/5/99	417,800	$5.563

Exhibit 6B

Date	Volume	Closing Price
4/6/99	375,400	$5.438
4/7/99	409,200	$5.125
4/8/99	708,700	$5.563
4/9/99	376,300	$5.500
4/12/99	221,500	$5.500
4/13/99	580,400	$5.750
4/14/99	383,100	$5.625
4/15/99	289,600	$5.500
4/16/99	515,300	$5.750
4/19/99	387,300	$5.563
4/20/99	425,700	$5.563
4/21/99	560,100	$5.500
4/22/99	421,100	$5.375
4/23/99	415,500	$5.375
4/26/99	454,200	$5.375
4/27/99	385,300	$5.250
4/28/99	304,100	$5.250
4/29/99	413,300	$5.500
4/30/99	313,100	$5.375
5/3/99	770,500	$5.938
5/4/99	1,436,300	$6.563
5/5/99	894,600	$6.563
5/6/99	568,900	$6.375
5/7/99	642,500	$6.500
5/10/99	1,197,400	$7.500
5/11/99	3,704,500	$8.625
5/12/99	2,584,100	$8.688
5/13/99	1,640,800	$7.875
5/14/99	1,077,200	$7.813
5/17/99	682,500	$7.688
5/18/99	409,700	$8.000
5/19/99	802,900	$8.125
5/20/99	401,700	$8.000
5/21/99	404,500	$7.938
5/24/99	877,700	$7.250
5/25/99	784,000	$7.000
5/26/99	336,600	$7.063
5/27/99	295,700	$7.063
5/28/99	166,900	$7.063
6/1/99	232,400	$7.063
6/2/99	226,200	$7.000
6/3/99	277,700	$6.938
6/4/99	192,400	$7.000
6/7/99	758,100	$7.500
6/8/99	689,300	$7.188
6/9/99	753,200	$7.438
6/10/99	254,700	$7.375
6/11/99	175,500	$7.313
6/14/99	254,400	$7.188
6/15/99	607,900	$7.000
6/16/99	491,400	$7.000
6/17/99	329,900	$7.063
6/18/99	234,700	$7.000

Exhibit 6B

Date	Volume	Closing Price
6/21/99	379,400	$7.000
6/22/99	344,700	$7.000
6/23/99	218,000	$7.000
6/24/99	199,800	$7.063
6/25/99	166,400	$7.063
6/28/99	348,100	$7.000
6/29/99	733,900	$7.500
6/30/99	1,059,200	$7.938
7/1/99	377,100	$7.563
7/2/99	254,000	$7.625
7/6/99	340,200	$7.313
7/7/99	291,400	$7.188
7/8/99	215,700	$7.188
7/9/99	145,800	$7.188
7/12/99	217,200	$7.063
7/13/99	359,500	$7.313
7/14/99	193,800	$7.250
7/15/99	482,100	$7.375
7/16/99	272,000	$7.375
7/19/99	247,200	$7.125
7/20/99	755,300	$7.188
7/21/99	412,900	$7.063
7/22/99	237,800	$7.063
7/23/99	454,300	$6.688
7/26/99	300,100	$6.875
7/27/99	339,900	$6.625
7/28/99	582,100	$6.625
7/29/99	168,500	$6.438
7/30/99	259,000	$6.375
8/2/99	195,500	$6.250
8/3/99	347,000	$6.063
8/4/99	676,100	$5.813
8/5/99	440,300	$6.000
8/6/99	161,000	$5.938
8/9/99	307,100	$6.188
8/10/99	268,400	$5.938
8/11/99	757,900	$6.313
8/12/99	314,700	$6.250
8/13/99	270,400	$6.188
8/16/99	113,400	$6.000
8/17/99	285,900	$6.125
8/18/99	320,800	$6.188
8/19/99	287,200	$6.313
8/20/99	151,300	$6.188
8/23/99	236,500	$6.313
8/24/99	251,100	$6.500
8/25/99	204,100	$6.500
8/26/99	140,900	$6.313
8/27/99	164,600	$6.313
8/30/99	180,000	$6.125
8/31/99	191,800	$6.188
9/1/99	169,500	$6.125
9/2/99	237,400	$6.000

Exhibit 6B

Date	Volume	Closing Price
9/3/99	152,400	$6.063
9/7/99	199,100	$6.063
9/8/99	248,200	$6.000
9/9/99	206,800	$6.000
9/10/99	99,500	$6.000
9/13/99	612,800	$6.063
9/14/99	305,000	$6.063
9/15/99	249,900	$6.188
9/16/99	118,800	$6.000
9/17/99	135,900	$6.000
9/20/99	151,000	$6.000
9/21/99	204,200	$6.000
9/22/99	151,800	$5.875
9/23/99	130,800	$5.938
9/24/99	229,300	$5.750
9/27/99	200,000	$5.750
9/28/99	213,000	$5.750
9/29/99	218,400	$5.750
9/30/99	156,500	$5.688
10/1/99	186,400	$5.500
10/4/99	381,700	$5.375
10/5/99	320,800	$5.313
10/6/99	269,700	$5.313
10/7/99	191,400	$5.313
10/8/99	219,300	$5.375
10/11/99	192,900	$5.500
10/12/99	204,200	$5.438
10/13/99	271,500	$5.438
10/14/99	231,300	$5.375
10/15/99	264,500	$5.375
10/18/99	254,700	$5.188
10/19/99	254,300	$5.000
10/20/99	747,200	$4.750
10/21/99	355,800	$4.625
10/22/99	566,200	$4.375
10/25/99	496,500	$4.750
10/26/99	306,500	$4.938
10/27/99	251,900	$4.688
10/28/99	288,400	$4.813
10/29/99	279,800	$4.750
11/1/99	204,400	$4.813
11/2/99	263,200	$4.688
11/3/99	338,200	$4.563
11/4/99	376,600	$4.438
11/5/99	439,700	$4.250
11/8/99	446,200	$4.500
11/9/99	2,176,100	$5.813
11/10/99	958,200	$5.625
11/11/99	429,200	$5.125
11/12/99	352,300	$5.188
11/15/99	403,600	$5.188
11/16/99	427,200	$5.313
11/17/99	376,000	$5.125

Exhibit 6B

Date	Volume	Closing Price
11/18/99	517,100	$4.875
11/19/99	416,400	$4.750
11/22/99	1,100,600	$5.688
11/23/99	497,300	$5.313
11/24/99	262,500	$5.063
11/26/99	222,000	$5.000
11/29/99	431,600	$4.938
11/30/99	373,100	$4.938
12/1/99	444,500	$4.875
12/2/99	368,600	$4.813
12/3/99	373,600	$4.813
12/6/99	726,000	$4.563
12/7/99	374,700	$4.625
12/8/99	480,800	$4.500
12/9/99	652,900	$4.563
12/10/99	600,700	$4.625
12/13/99	708,200	$4.500
12/14/99	575,300	$4.438
12/15/99	579,300	$4.438
12/16/99	495,300	$4.375
12/17/99	562,200	$4.375
12/20/99	735,300	$4.125
12/21/99	840,300	$4.125
12/22/99	704,900	$4.125
12/23/99	777,600	$4.063
12/27/99	1,020,900	$4.000
12/28/99	1,149,300	$3.938
12/29/99	1,422,600	$4.625
12/30/99	1,033,400	$4.250
12/31/99	693,200	$4.188
01/03/00	286,200	$4.063
01/04/00	372,300	$4.250
01/05/00	345,400	$4.125
01/06/00	298,800	$4.125
01/07/00	418,500	$4.125
01/10/00	410,400	$4.125
01/11/00	1,849,800	$4.000
01/12/00	1,335,300	$4.125
01/13/00	844,000	$4.438
01/14/00	3,233,500	$5.125
01/18/00	3,368,700	$5.563
01/19/00	1,165,200	$5.375
01/20/00	1,000,700	$5.063
01/21/00	657,100	$5.000
01/24/00	922,300	$4.750
01/25/00	324,400	$4.813
01/26/00	304,900	$4.688
01/27/00	347,700	$4.688
01/28/00	662,900	$4.563
01/31/00	311,900	$4.625
02/01/00	210,100	$4.625
02/02/00	284,300	$4.625
02/03/00	270,700	$4.563

Exhibit 6B

Date	Volume	Closing Price
02/04/00	478,800	$4.563
02/07/00	250,800	$4.500
02/08/00	285,800	$4.500
02/09/00	622,300	$4.500
02/10/00	328,900	$4.375
02/11/00	323,000	$4.313
02/14/00	381,700	$4.188
02/15/00	304,200	$4.188
02/16/00	429,400	$4.063
02/17/00	355,700	$4.250
02/18/00	301,600	$4.188
02/22/00	1,002,900	$4.063
02/23/00	270,500	$4.125
02/24/00	415,600	$4.063
02/25/00	281,500	$4.125
02/28/00	201,000	$4.000
02/29/00	386,500	$4.125
03/01/00	349,200	$4.063
03/02/00	285,000	$4.063
03/03/00	226,800	$4.063
03/06/00	635,800	$4.063
03/07/00	485,600	$4.063
03/08/00	420,200	$4.813
03/09/00	988,000	$4.250
03/10/00	516,000	$4.063
03/13/00	451,400	$4.000
03/14/00	486,000	$4.000
03/15/00	515,100	$3.938
03/16/00	374,900	$4.125
03/17/00	321,000	$4.125
03/20/00	274,300	$4.000
03/21/00	336,500	$4.000
03/22/00	250,500	$4.063
03/23/00	1,022,200	$4.313
03/24/00	1,337,800	$5.000
03/27/00	496,500	$4.500
03/28/00	315,200	$4.188
03/29/00	294,200	$4.250
03/30/00	417,000	$4.188
03/31/00	152,800	$4.188
04/03/00	254,000	$4.063
04/04/00	532,800	$4.000
04/05/00	485,600	$4.063
04/06/00	226,800	$4.063
04/07/00	243,600	$4.125
04/10/00	212,100	$4.000
04/11/00	280,400	$4.063
04/12/00	429,100	$4.000
04/13/00	303,800	$3.875
04/14/00	1,825,900	$3.000
04/17/00	1,739,600	$3.438
04/18/00	468,300	$3.563
04/19/00	387,200	$3.438

Exhibit 6B

Date	Volume	Closing Price
04/20/00	380,200	$3.375
04/24/00	366,400	$3.500
04/25/00	219,600	$3.688
04/26/00	370,900	$3.688
04/27/00	194,500	$3.500
04/28/00	183,500	$3.500
05/01/00	173,600	$3.625
05/02/00	200,800	$3.563
05/03/00	141,300	$3.500
05/04/00	152,700	$3.500
05/05/00	137,800	$3.563
05/08/00	110,500	$3.563
05/09/00	200,200	$3.500
05/10/00	150,800	$3.375
05/11/00	934,200	$3.813
05/12/00	393,300	$3.500
05/15/00	115,400	$3.563
05/16/00	173,800	$3.625
05/17/00	222,400	$3.438
05/18/00	277,800	$3.375
05/19/00	205,200	$3.250
05/22/00	253,200	$3.250
05/23/00	280,400	$3.250
05/24/00	244,200	$3.313
05/25/00	366,600	$3.125
05/26/00	201,700	$3.000
05/30/00	276,600	$3.125
05/31/00	219,000	$3.125
06/01/00	314,000	$3.000
06/02/00	393,900	$3.063
06/05/00	276,000	$3.125
06/06/00	159,400	$3.188
06/07/00	200,600	$3.125
06/08/00	167,400	$3.063
06/09/00	264,400	$3.125
06/12/00	135,300	$3.188
06/13/00	119,200	$3.188
06/14/00	131,800	$3.125
06/15/00	116,800	$3.125
06/16/00	209,500	$3.063
06/19/00	304,300	$3.188
06/20/00	189,000	$3.063
06/21/00	297,100	$3.188
06/22/00	278,600	$3.188
06/23/00	173,700	$3.125
06/26/00	130,700	$3.125
06/27/00	254,300	$3.188
06/28/00	120,700	$3.188
06/29/00	317,900	$3.500
06/30/00	297,500	$3.438
07/03/00	105,500	$3.438
07/05/00	173,100	$3.188
07/06/00	99,900	$3.250

Exhibit 6B

Date	Volume	Closing Price
07/07/00	123,400	$3.125
07/10/00	216,700	$3.188
07/11/00	176,000	$3.125
07/12/00	174,700	$3.125
07/13/00	130,700	$3.125
07/14/00	143,900	$3.125
07/17/00	161,700	$3.125
07/18/00	275,300	$3.063
07/19/00	235,100	$3.000
07/20/00	167,900	$3.063
07/21/00	198,300	$3.000
07/24/00	231,400	$3.000
07/25/00	480,000	$2.875
07/26/00	326,900	$2.750
07/27/00	438,200	$2.625
07/28/00	659,000	$2.375
07/31/00	287,500	$2.750
08/01/00	209,400	$2.625
08/02/00	138,300	$2.563
08/03/00	156,700	$2.625
08/04/00	133,100	$2.875
08/07/00	167,900	$2.813
08/08/00	167,100	$2.875
08/09/00	119,200	$2.688
08/10/00	147,200	$2.500
08/11/00	190,500	$2.625
08/14/00	811,700	$2.188
08/15/00	471,900	$2.125
08/16/00	667,400	$2.063
08/17/00	982,900	$1.875
08/18/00	518,900	$1.813
08/21/00	352,200	$1.938
08/22/00	582,300	$2.000
08/23/00	360,500	$2.000
08/24/00	175,000	$2.000
08/25/00	204,100	$2.063
08/28/00	303,700	$1.938
08/29/00	253,000	$1.938
08/30/00	390,000	$2.000
08/31/00	228,300	$1.938
09/01/00	146,900	$2.000
09/05/00	820,700	$1.750
09/06/00	361,900	$1.875
09/07/00	228,500	$2.000
09/08/00	183,600	$1.938
09/11/00	158,300	$1.938
09/12/00	159,300	$1.938
09/13/00	180,000	$1.813
09/14/00	503,700	$1.813
09/15/00	290,600	$1.813
09/18/00	156,500	$1.750
09/19/00	254,500	$1.813
09/20/00	238,900	$1.688

Exhibit 6B

Date	Volume	Closing Price
09/21/00	273,300	$1.625
09/22/00	341,400	$1.563
09/25/00	217,700	$1.625
09/26/00	296,300	$1.563
09/27/00	640,400	$1.500
09/28/00	539,800	$1.313
09/29/00	322,900	$1.313
10/02/00	262,200	$1.438
10/03/00	200,800	$1.375
10/04/00	222,000	$1.500
10/05/00	524,700	$1.375
10/06/00	197,700	$1.375
10/09/00	472,500	$1.250
10/10/00	359,600	$1.250
10/11/00	290,200	$1.250
10/12/00	293,000	$1.188
10/13/00	1,469,400	$1.000
10/16/00	589,300	$0.938
10/17/00	298,200	$0.938
10/18/00	956,800	$1.000
10/19/00	389,900	$1.000
10/20/00	288,200	$1.000
10/23/00	312,100	$1.000
10/24/00	242,200	$1.000
10/25/00	345,200	$0.938
10/26/00	208,100	$0.938
10/27/00	270,300	$0.938
10/30/00	620,500	$0.875
10/31/00	395,700	$0.938
11/01/00	325,200	$0.938
11/02/00	242,400	$0.938
11/03/00	373,700	$0.938
11/06/00	281,600	$0.938
11/07/00	726,500	$0.813
11/08/00	1,134,700	$0.813
11/09/00	444,800	$0.750
11/10/00	227,100	$0.750
11/13/00	608,400	$0.750
11/14/00	548,900	$0.688
11/15/00	1,103,800	$0.625
11/16/00	724,600	$0.563
11/17/00	852,200	$0.688
11/20/00	640,600	$0.625
11/21/00	583,500	$0.625
11/22/00	419,600	$0.625
11/24/00	148,300	$0.625
11/27/00	793,600	$0.563
11/28/00	956,000	$0.438
11/29/00	734,700	$0.406
11/30/00	638,400	$0.375
12/01/00	911,200	$0.438
12/04/00	748,400	$0.375
12/05/00	933,800	$0.406

Exhibit 6B

Date	Volume	Closing Price
12/06/00	579,700	$0.375
12/07/00	682,800	$0.344
12/08/00	1,221,200	$0.313
12/11/00	1,167,100	$0.250
12/12/00	1,744,400	$0.438
12/13/00	787,700	$0.500
12/14/00	1,218,100	$0.688
12/15/00	1,052,400	$0.563
12/18/00	1,034,800	$0.500
12/19/00	1,132,200	$0.375
12/20/00	1,128,900	$0.375
12/21/00	1,384,100	$0.375
12/22/00	1,338,000	$0.344
12/26/00	1,286,200	$0.344
12/27/00	1,479,100	$0.375
12/28/00	1,259,300	$0.313
12/29/00	2,772,000	$0.313
01/02/01	665,300	$0.406
01/03/01	715,600	$0.563
01/04/01	512,700	$0.469
01/05/01	404,300	$0.469
01/08/01	545,900	$0.500
01/09/01	566,600	$0.625
01/10/01	798,500	$0.750
01/11/01	2,282,900	$0.750
01/12/01	926,500	$0.688
01/16/01	583,900	$0.750
01/17/01	797,900	$0.625
01/18/01	586,700	$0.625
01/19/01	959,000	$0.500
01/22/01	766,500	$0.625
01/23/01	599,800	$0.563
01/24/01	426,000	$0.563
01/25/01	619,500	$0.688
01/26/01	1,031,900	$0.563
01/29/01	539,800	$0.530
01/30/01	553,600	$0.520
01/31/01	447,400	$0.510
02/01/01	275,900	$0.520
02/02/01	344,100	$0.510
02/05/01	404,300	$0.510
02/06/01	0	$0.510
02/07/01	0	$0.510
02/08/01	0	$0.510
02/09/01	2,324,000	$0.185
02/12/01	1,230,500	$0.155
02/13/01	1,713,600	$0.140
02/14/01	781,200	$0.145
02/15/01	691,900	$0.153
02/16/01	623,100	$0.158
02/20/01	1,111,700	$0.156
02/21/01	417,800	$0.160
02/22/01	574,400	$0.150

Exhibit 6B

Date	Volume	Closing Price
02/23/01	982,900	$0.155
02/26/01	846,900	$0.155
02/27/01	2,360,000	$0.150
02/28/01	409,300	$0.152

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

NOTICE OF FILING PLEADING UNDER SEAL

Coleman (Parent) Holdings Inc. ("CPH") hereby gives notice of the filing of Plaintiff's Motion to Quash Morgan Stanley's Notice to Produce MAFCO Loan Agreements.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 16th day of March, 2005.

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9967

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO. 2003CA 005045 AI

NOTICE OF FILING PLEADING UNDER SEAL

Coleman (Parent) Holdings Inc. ("CPH") hereby gives notice of the filing of Plaintiff's Response to Morgan Stanley's Motion *in Limine* No. 23 to Exclude Evidence Regarding The Italian Criminal Proceedings.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 16th day of March, 2005.

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9967

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO. 2003CA 005045 AI

NOTICE OF FILING PLEADING UNDER SEAL

Coleman (Parent) Holdings Inc. ("CPH") hereby gives notice of the filing of Plaintiff's Response to Morgan Stanley's Motion for Sanctions for Alleged Discovery Abuses.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 16th day of March, 2005.

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9967

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S RESPONSE TO MORGAN STANLEY'S MOTION FOR AN ADVERSE INFERENCE INSTRUCTION

In a transparent response to the sanctions that have been imposed on Morgan Stanley for its willful destruction of e-mails and systematic misconduct in response to Court Orders, Morgan Stanley is seeking an adverse inference instruction stemming from CPH's internal policy of deleting e-mails and electronic documents after 30 days and overwriting backup tapes after 60 days. Morgan Stanley's motion is baseless and has long since been waived.

First, Morgan Stanley has known about CPH's internal e-mail policy since January 2004, but Morgan Stanley expressed no interest in recovering CPH's e-mails from backup tapes until now. Indeed, Morgan Stanley refused repeated efforts by CPH to reach a global resolution of the e-mail restoration issue.

On October 29, 2003, CPH filed a motion to compel concerning Morgan Stanley's e-mails. *See* 10/24/03 Mot. to Compel. Morgan Stanley opposed that motion, arguing that the relief CPH was requesting would be unduly burdensome and faulting CPH for failing to produce its own e-mails. *See* Ex. S, MS 11/5/03 Response. CPH's motion was resolved by an agreement, whereby the parties agreed to reciprocal corporate representative depositions on the

e-mail issue. *See* Ex. A at 3. Pursuant to that agreement, Morgan Stanley deposed CPH's corporate representative on January 21, 2004, and CPH deposed Morgan Stanley's corporate representative on February 10, 2004. At the January 21, 2004 deposition of CPH's corporate representative, Morgan Stanley inquired about CPH's e-mail policy. In fact, it is that testimony Morgan Stanley cites in its Motion for an Adverse Inference Instruction. *See* MS Mot. at 3 and Ex. 7 thereto. The whole point of the corporate representative depositions was to permit both sides to assess further the issue of obtaining e-mails and other electronic documents.

CPH thereafter attempted to secure Morgan Stanley's agreement to reach a protocol for the mutual restoration of e-mails — but Morgan Stanley repeatedly rejected CPH's efforts at compromise. *See, e.g.*, Ex. B (3/9/04 Letter from M. Brody to T. Clare); Ex. C (3/11/04 Letter from T. Clare to M. Brody); Ex. D (3/15/04 Letter from M. Brody to Clare); Ex. E (3/16/04 Letter from T. Clare to M. Brody); Ex. F (3/17/04 Letter from M. Brody to T. Clare).

Because CPH's efforts to reach agreement on the e-mail issue were going nowhere, on March 12, 2004, CPH filed a motion for permission to have a third party retrieve e-mails. *See* Ex. G. In that motion, CPH proposed that a third-party vendor be given access to both parties' e-mails, restore Morgan Stanley's e-mails at Morgan Stanley's expense, and restore CPH's e-mails at CPH's expense. *See id.* And at the hearing on CPH's motion, CPH's counsel attempted to address any concerns about the cost disparity between restoring CPH's e-mails and Morgan Stanley's e-mails by offering to split the cost down the middle. *See* Ex. H at 19-20. Morgan Stanley opposed all of CPH's proposals, and because the Court did not think it appropriate to impose such an arrangement on the parties without their consent, the Court denied CPH's motion. *See id.* at 18-26. As CPH has shown during the evidentiary hearings this week, Morgan Stanley opposed CPH's efforts to involve a third party because Morgan Stanley knew that a third

party would uncover at least some of Morgan Stanley's misrepresentations concerning its e-mails.

CPH thereafter continued its efforts to obtain e-mails, subpoenaing Bloomberg, Inc., Morgan Stanley's e-mail vendor, for relevant e-mails. *See* Ex. L. Bloomberg responded that it could not turn over Morgan Stanley e-mails without Morgan Stanley's permission. *See* Ex. M, (3/11/04 Letter from T. Golden to J. Scarola). When permission was sought, Morgan Stanley placed inappropriate limitations and date restrictions on the production. *See* Ex. N (3/17/04 Letter from M. Brody to T. Clare); Ex. O (4/1/04 Letter from T. Clare to T. Golden); Ex. P. (4/2/04 Letter from M. Brody to T. Clare); Ex. Q (4/7/04 Letter from T. Clare to M. Brody).

As a result of Morgan Stanley's continued stonewalling, on April 9, 2004, CPH filed additional e-mail-related motions to compel. *See* Exs. I, J. In response to those motions, this Court entered the April 16, 2004 Agreed Order concerning e-mail retrieval. *See* Ex. K. As CPH also has shown during the evidentiary hearings this week, Morgan Stanley's representations about the possibility of and difficulty involved with retrieving e-mails — representations on which this Court and CPH relied in attempting to resolve the e-mail controversy — were false.

In short, Morgan Stanley has known about CPH's e-mail policy since at least January 2004, when Morgan Stanley took the deposition of CPH's corporate representative on the topic, but Morgan Stanley did not file a motion seeking the restoration of CPH's e-mails, and as indicated above, Morgan Stanley opposed CPH's e-mail restoration proposal. Moreover, tellingly, the April 16, 2004 Agreed Order concerning e-mails addresses only the restoration of Morgan Stanley's e-mails. Morgan Stanley has shown no interest in CPH's e-mails — until Morgan Stanley was sanctioned for its misconduct regarding its own e-mails.

Second, in Morgan Stanley's Supplemental Memorandum in Support of Motion for an Adverse Inference Instruction, Morgan Stanley makes much of the fact that CPH's privilege log contains entries from April 14, 1998 through August 14, 1998, where CPH has stated that the documents were prepared "in anticipation of litigation." *See* MS Suppl. Mem. at 1-2. CPH first served the privilege log containing those entries on October 6, 2003. *See* Ex. R. CPH's privilege log contained entries asserting work product, and the log specifically included each of the twelve documents Morgan Stanley identifies on Page 2 of its Supplemental Memorandum. Thus, Morgan has known about the work product assertions on CPH's privilege log since October 6, 2003.

Indeed, not only has Morgan Stanley known about the privilege log assertions since October 2003, Morgan Stanley also made almost the same argument based on them in Morgan Stanley's November 4, 2003 opposition to CPH's first motion to compel relating to e-mails. *See* Ex. S. In its November 4, 2003 opposition, Morgan Stanley cited documents listed on the October 6 privilege log, arguing that "CPH was working with its outside counsel to evaluate its options for filing lawsuits against various parties, presumably including MS & Co., as early as July 1998" but did not retain any emails. *See id.* at 14. Nonetheless, as described above, Morgan expressed no interest in obtaining CPH's e-mails and rebuffed CPH's attempts to reach a mutual agreement on the restoration of e-mails.

Third, CPH is a private entity with no statutory obligation to preserve e-mails. In contrast, as the Court is aware, Morgan Stanley is subject to ongoing e-mail retention obligations under federal law. Thus, in attempting to equate CPH's circumstances with its own, Morgan Stanley equates apples with oranges.

Fourth, none of the adverse inference instruction cases cited by Morgan Stanley (at 8) remotely supports a sanction against CPH. *See Amalan, Inc. v. Detroit Diesel Corp.*, 651 So. 2d 701, 703 (Fla. 4th DCA 1995) (sanctions are appropriate when "a party has engaged in a pattern designed to thwart discovery evincing a 'continuous pattern of willful, contemptuous and contumacious disregard of lawful court orders concerning its obligation to comply with reasonable discovery requests.'"); *Martino v. Wal-Mart Stores, Inc.*, 835 So. 2d 1251, 1257 (Fla. 4th DCA 2003) (plaintiff was entitled to an adverse inference as a result of Wal-Mart's disposal of a defective shopping cart that injured the plaintiff, notwithstanding the fact that there was evidence that the plaintiff had identified the defective cart for an assistant manager after the accident and requested the assistant manager to preserve the shopping cart and a surveillance videotape that also was destroyed); *Nationwide Lift Trucks, Inc. v. Smith*, 832 So. 2d 824, 826 (Fla. 4th DCA 2002) (striking of the defenses in a case involving a forklift accident where the forklift mechanism that caused the accident was not preserved notwithstanding requests by plaintiffs two months after the accident).

Conclusion

Morgan Stanley's motion is nothing more than an attempt to distract attention from its own misconduct and to blunt the effects of this Court's March 1 sanctions Order. The motion should be denied.

Dated: March 16, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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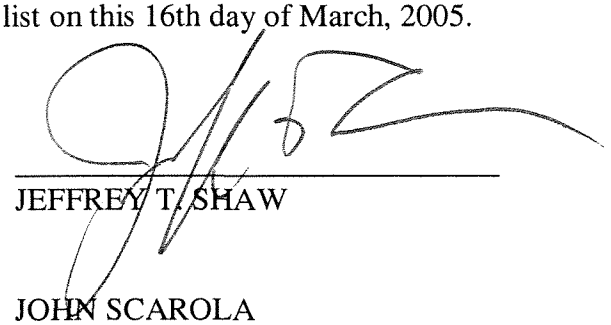
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 16th day of March, 2005.



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10126 v2

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.

Defendant.

NOTICE OF HEARING

YOU ARE HERBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: March 17, 2005

TIME: 9:30 a.m.

JUDGE: Honorable Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTER TO BE HEARD:

Morgan Stanley's Motion to Compel CPH to Provide Chronologically-Sorted Privilege Log

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 16th day of March 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

CASE NO: CA 03-5045 AI

MORGAN STANLEY'S MOTION TO COMPEL CPH TO PROVIDE CHRONOLOGICALLY-SORTED PRIVILEGE LOG

Morgan Stanley respectfully requests that the Court issue an order compelling CPH to provide Morgan Stanley with a privilege log sorted in chronological order.

CPH's Privilege Log is 72 pages long and contains well over 625 entries (Ex. 1). The Privilege Log is sorted by document number. Thus, to find a document by date, one must search, each time, the list of documents. Because CPH's privilege log is kept in electronic format, CPH is able simply to sort its spreadsheet by date and re-print it. Morgan Stanley, on the other hand, would have to manually retype CPH's privilege log in order to generate a chronologically-organized document. On March 15, 2005, Morgan Stanley made a reasonable request that CPH provide a copy of its privilege log sorted in chronological order. (3/15/05 L. Bemis Letter to M. Brody (Ex. 2).) CPH denied this request. (3/15/05 M. Brody Letter to L. Bemis (Ex. 3).)

WHEREFORE Morgan Stanley respectfully requests that this Court issue an Order compelling CPH to provide Morgan Stanley with a chronologically-sorted privilege log.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 16th day of March 2005.

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EXHIBIT 1

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
1		00/00/0000	Paul Rowe, Esq.		Attorney-Client	Draft Sunbean Form S-4 with P. Rowe's handwritten comments prepared for purposes of providing legal advice.
2		00/00/0000	Wachtell Lipton		Attorney-Client	Summary of Sunbeam corporate structure issues prepared for the purpose of providing legal advice.
3		11/05/1998	Michael Schwartz, Esq.	Adam O. Emmerich, Esq., Frank Miller, Esq., Rachelle Silverberg, Esq.	Attorney-Client, Work Product	Memorandum re In re Sunbeam securities litigation issues.
4		02/03/1999	Wachtell Lipton	Ernst & Young, Barry Schwartz, Esq. (cc), Mitchell Rosendorf (Ernst & Young LLP)	Attorney-Client, Work Product	Letter providing information re litigation.
5		01/14/1999	Barry F. Schwartz, Esq.	Martin Lipton, Esq.	Attorney-Client, Work Product	Letter requesting information re litigation.
6		03/01/1998	Adam O. Emmerich, Esq.	Steven Isko, Esq.	Attorney-Client	Memorandum re attached draft documents prepared for the purpose of providing legal advice.
6	A	03/01/1998	Adam O. Emmerich, Esq.		Attorney-Client	Draft Coleman press release with A. Emmerich's handwritten comments prepared for the purpose of providing legal advice.
6	B	03/01/1998	Adam O. Emmerich, Esq.		Attorney-Client	Draft Sunbeam press release with A. Emmerich's handwritten comments prepared for the purpose of providing legal advice.
7		03/03/1998	Deborah Paul, Esq.	Steven Isko, Esq.	Attorney-Client	Correspondence re attached draft document prepared for the purpose of providing legal advice.
7	A	03/03/1998	Wachtell Lipton		Attorney-Client	Draft Coleman employee disclosure re benefits prepared for the purpose of providing legal advice.
8		03/03/1998	Frank Miller, Esq.	Steven Isko, Esq., Adam O. Emmerich, Esq. (cc)	Attorney-Client	Memorandum re Coleman Form 8-K and attached draft document prepared for the purpose of providing legal advice.
8	A	03/03/1998	Wachtell Lipton		Attorney-Client	Draft Coleman Form 8-K/A prepared for the purpose of providing legal advice.
9		03/04/1998	Michael Katzke, Esq.	Steven Isko, Esq., Joram C. Salig, Esq. (cc), Robert Fleder, Esq. (cc), Adam O. Emmerich, Esq. (cc), Steven Cohen, Esq. (cc), Frank Miller, Esq. (cc)	Attorney-Client	Memorandum re attached draft corporate resolutions prepared for the purpose of providing legal advice.
9	A	03/04/1998	Wachtell Lipton		Attorney-Client	Draft resolution re employee benefit plans prepared for the purpose of providing legal advice.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
9	B	03/04/1998	Wachtell Lipton		Attorney-Client	Draft resolution re employee benefit plans prepared for the purpose of providing legal advice.
9	C	03/04/1998	Wachtell Lipton		Attorney-Client	Draft resolution re employee benefit plans prepared for the purpose of providing legal advice.
10		03/04/1998	Michael Jahnke, Esq.	Barry F. Schwartz, Esq., Paul Shapiro, Esq., Joram Salig, Esq., William Nesbitt, Steven Isko, Esq., Adam O. Emmerich, Esq. (cc), Ilene K. Gotts, Esq. (cc), Steven Cohen, Esq. (cc), Frank Miller, Esq. (cc)	Attorney-Client	Memorandum re Hart-Scott-Rodino issues prepared for the purpose of providing legal advice.
11		03/19/1998	Lynn Feldcamp	Steven Isko, Esq.	Attorney-Client	Memorandum re attached document prepared for the purpose of providing legal advice.
11	A	03/19/1998	Wachtell Lipton		Attorney-Client	Section of draft Coleman 10-K prepared for the purpose of providing legal advice.
11	B	03/18/1998	Wachtell Lipton		Attorney-Client	Draft Coleman 10-K prepared for the purpose of providing legal advice.
12		03/09/1998	Adam O. Emmerich, Esq., Steven Cohen, Esq., Frank Miller, Esq.	Steven Isko, Esq., Joram Salig, Esq.	Attorney-Client	Memorandum re application of federal securities laws.
13		03/10/1998	Michael Katzke, Esq.	Steven Isko, Esq., Joram Salig, Esq., Robert Fleder, Esq. (cc), Adam O. Emmerich, Esq. (cc), Steven Cohen, Esq. (cc), Frank Miller, Esq. (cc)	Attorney-Client	Memorandum re attached draft documents prepared for the purpose of providing legal advice.
13	A	03/10/1998	Wachtell Lipton		Attorney-Client	Draft resolution re employee benefit plans prepared for the purpose of providing legal advice.
13	B	03/10/1998	Wachtell Lipton		Attorney-Client	Draft resolution re employee benefit plans prepared for the purpose of providing legal advice.
13	C	03/10/1998	Wachtell Lipton		Attorney-Client	Draft resolution re employee benefit plans prepared for the purpose of providing legal advice.
14		03/11/1998	Frank Miller, Esq.	Barry F. Schwartz, Esq., Joram Salig, Esq., Steven Isko, Esq., Adam O. Emmerich, Esq. (cc)	Attorney-Client	Memorandum re attached draft document prepared for the purpose of providing legal advice.
14	A	03/11/1998	Wachtell Lipton		Attorney-Client	Draft Section 14(f) Notice prepared for the purpose of providing legal advice.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
15		03/12/1998	Steven Isko, Esq.	Barry F. Schwartz, Esq., Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Memorandum re attached draft letter regarding pending Coleman litigation.
15	A	03/12/1998	Steven Isko, Esq.		Attorney-Client, Work Product	Draft letter re pending Coleman litigation.
16		04/17/1998	Ilene K. Gotts, Esq.		Attorney-Client	Draft Sunbeam Form S-4 with I. Gotts' handwritten notes prepared in connection with providing legal advice.
17		04/22/1998	Cass G. Adelman, Esq.	Michael Katzke, Esq.	Attorney-Client	Letter re attached document prepared for the purpose of providing legal advice.
17	A	04/09/1998	Kyle Wendt	Cass G. Adelman, Esq., Lynn Feldcamp, Karen Clark, Esq. (cc)	Attorney-Client	Memorandum re employee benefit plans with attorney's handwritten notes provided for purpose of obtaining legal advice.
18		02/24/1998	Steven Isko, Esq.	Michael Katzke, Esq.	Attorney-Client	Correspondence re employee benefit issues provided for purpose of obtaining legal advice.
19		00/00/0000	Michael Katzke, Esq.		Attorney-Client	Handwritten notes re PBGC letter prepared for the purpose of providing legal advice. (Redacted from CP 012505-012506).
20		03/16/1998	Robert Fleder, Esq.	Barry F. Schwartz, Esq., Steven Fasman, Esq., Steven Isko, Esq., Michael Katzke, Esq.	Attorney-Client	Memorandum re attached draft letter prepared for the purpose of providing legal advice.
20	A	03/16/1998	Robert Fleder, Esq.		Attorney-Client	Draft letter to PBGC re Coleman pension plans prepared for the purpose of providing legal advice.
21		03/16/1998	Barbara Allen	Michael Katzke, Esq.	Attorney-Client	Memorandum re Coleman benefit plan information provided for purpose of obtaining legal advice.
22		03/19/1998	Michael Katzke, Esq.	Joram Salig, Esq., Steven Isko, Esq., Robert Fleder, Esq., Cass G. Adelman, Esq.	Attorney-Client	Draft benefit plan agreement with M. Katzke's notes prepared for the purpose of providing legal advice.
23		03/26/1998	Cass G. Adelman, Esq.	Michael Katzke, Esq.	Attorney-Client	Memorandum re attached document prepared for the purpose of providing legal advice.
23	A	03/26/1998	Steven Isko, Esq.	Cass G. Adelman, Esq., Joram Salig, Esq., Robert Fleder, Esq., Jim Rasmus (cc)	Attorney-Client	Memorandum re employee benefit plans with S. Isko's handwritten notes prepared for the purpose of providing legal advice.
24		00/00/0000	Frank Miller, Esq.		Attorney-Client	Handwritten notes re Sunbeam acquisition issues and communications with client re same prepared for the purpose of providing legal advice.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
25		03/12/1998	Frank Miller, Esq.	Barry F. Schwartz, Esq., Joram Salig, Esq., Steven Isko, Esq., Karen Clark, Lenny Ajzenman, Adam O. Emmerich, Esq. (cc)	Attorney-Client	Memorandum re attached draft document prepared for the purpose of providing legal advice.
25	A	03/12/1998	Wachtell Lipton		Attorney-Client	Draft section of Section 14(f) Notice prepared for the purpose of providing legal advice.
25	B	03/12/1998	Frank Miller, Esq.	Lenny Ajzenman	Attorney-Client	Correspondence re attached documents prepared for the purpose of providing legal advice.
26		04/01/1998	Wachtell Lipton		Attorney-Client	Draft Form 144 prepared for the purpose of providing legal advice.
27		00/00/0000	Steven Isko, Esq.		Attorney-Client	Draft minutes of 02/25/98 Board meeting reflecting information provided for purpose of enabling attorney to provide legal services.
28		00/00/0000	Steven Isko, Esq.		Attorney-Client	Draft minutes of 2/27/98 Board meeting reflecting information provided for purpose of enabling attorney to provide legal services.
29		00/00/0000	Wachtell Lipton		Attorney-Client	Draft resolutions re employee benefit plans prepared for the purpose of providing legal advice.
30		03/17/1998	Wachtell Lipton		Attorney-Client	Draft resolution re employee benefit plans prepared for the purpose of providing legal advice.
31		03/18/1998	Wachtell Lipton		Attorney-Client	Draft resolution re employee benefit plans prepared for the purpose of providing legal advice.
32		03/19/1998	Frank Miller, Esq.	Donna Egan	Attorney-Client	Memorandum re corporate resolutions prepared for the purpose of providing legal advice.
33		00/00/0000	Rachelle Silverberg, Esq.		Work Product	Notes re merger agreement prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP016791-016851).
34		00/00/0000	Rachelle Silverberg, Esq.		Work Product	Notes re merger agreement prepared in anticipation of litigation relating to Sunbeams' acquisition of CPH's interest in Coleman (Redacted from CP017279-017333).
35		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Draft response to SEC and NYSE requests for information prepared in anticipation of litigation relating to inquiry.
36		00/00/0000	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Notes re draft Sunbeam Form S-4 prepared in connection with pending Coleman shareholder litigation.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
37		00/00/0000	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Notes re draft Sunbeam Form S-4 prepared in connection with pending litigation.
38		00/00/0000	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Draft Sunbeam Form S-4 amendment with R. Silverberg's notes prepared in connection with pending litigation.
39		03/26/1998	Adam O. Emmerich, Esq.	Gary Leshko, Joram Salig, Esq., Barry F. Schwartz, Esq.	Attorney-Client	Memorandum re attached draft letter prepared for the purpose of providing legal advice.
39	A	03/25/1998	Wachtell Lipton		Attorney-Client	Draft letter to Sunbeam re cooperation and access prepared for the purpose of providing legal advice.
40		03/26/1998	Deborah Paul, Esq.	David Einhorn, Esq., Adam O. Emmerich, Esq., Steven Cohen, Esq., Frank Miller, Esq.	Attorney-Client	E-mail re transaction structure prepared for the purpose of providing legal advice.
41		03/30/1998	Frank Miller, Esq.	Adam O. Emmerich, Esq., Steven Cohen, Esq.	Attorney-Client	E-mail re post-closing SEC filings prepared for the purpose of providing legal advice.
42		03/30/1998	Frank Miller, Esq.	Glenn Dickes, Esq., Joram Salig, Esq.	Attorney-Client	Memorandum re post-closing SEC filings prepared for the purpose of providing legal advice.
43		04/19/1998	Adam O. Emmerich, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., Paul Shapiro, Esq.	Attorney-Client	Memorandum re attached draft document prepared in connection with providing legal advice.
43	A	04/19/1998	Wachtell Lipton		Attorney-Client	Draft memorandum re employee benefit issues prepared in connection with providing legal advice.
44		04/28/1998	Glenn Dickes, Esq.	Frank Miller, Esq., Joram C. Salig, Esq. (cc), Barry Schwartz, Esq. (cc)	Attorney-Client	Fax re Sunbeam letter re Coleman employee benefit issues prepared for the purpose of providing legal advice.
45		03/26/1998	Steven Isko, Esq.	Frank Miller, Esq., Glenn P. Dickes, Esq. (cc), Paul Shapiro, Esq. (cc)	Attorney-Client	Memorandum re attached draft document prepared for the purpose of providing legal advice.
45	A	03/26/1998	Steven Isko, Esq.		Attorney-Client	Draft letter re termination of intercompany agreements with S. Isko's handwritten notes prepared for the purpose of providing legal advice.
46		03/26/1998	Michelle Root	Adam O. Emmerich, Esq.	Attorney-Client	Response to request for information re closing provided for purpose of enabling attorney to provide legal services.
47		03/27/1998	Rachelle Silverberg, Esq.	Steven Isko, Esq., Jerry Levin, James Maher, William Nesbitt, Joram Salig, Esq., Marc Shiffman, Barry F. Schwartz, Esq., Paul Shapiro, Esq.	Attorney-Client, Work Product	Memorandum re attached draft document prepared in anticipation of litigation relating to SEC/NYSE inquiry.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
47	A	03/27/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft response to SEC and NYSE requests for information prepared in anticipation of litigation relating to inquiry.
48		03/27/1998	Valerie Radwaner, Esq., Deborah Reiss, Esq.	Steven Cohen, Esq., Adam O. Emmerich, Esq., Frank Miller, Esq.	Attorney-Client	Correspondence re stock certificate prepared for the purpose of providing legal advice.
49		06/14/1998	Adam O. Emmerich, Esq., Frank Miller, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., Paul Shapiro, Esq., James Conroy, Esq., Glenn Dickes, Esq., Steven Isko, Esq., Joram Salig, Esq., Steven Cohen, Esq. (cc), Michael Schwartz, Esq. (cc), Paul Rowe, Esq. (cc), Rachelle Silverberg, Esq. (cc), Peter Canellos, Esq. (cc), David Einhorn, Esq. (cc), Deborah Paul, Esq. (cc), Michael Katzke, Esq. (cc), Ilene K. Gotts, Esq. (cc), Michael Jahnke, Esq. (cc)	Attorney-Client, Work Product	Memorandum re attached draft document prepared in connection with providing legal advice and anticipated litigation.
49	A	06/14/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft Schedule 13D prepared in connection with providing legal advice and anticipated litigation.
50		07/07/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft chronology re potential claims arising out of Sunbeam acquisition prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.
51		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 018806-018807).
52		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 018808-018809).
53		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 018810-018811).
54		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 018812-018815).
55		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 018816-018819)

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
56		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 018820-018821).
57		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 018838-018848).
58		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 018949-018950).
59		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 018951-018956).
60		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 018959-018960).
61		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 018961-018962).
62		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 018963-018964).
63		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 018965-018966).
64		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 018968-018974).
65		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 018975-018976).
66		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 018977-018981).
67		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 018982-018983).

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
68		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 018984-018986).
69		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 018987).
70		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 018988-018989).
71		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 018990).
72		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 018991-018993).
73		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 018994-018995).
74		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 018996-018998).
75		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 018999).
76		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 019000-019002).
77		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 019003-019006).
78		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 019007-019008).
79		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.(Redacted from CP 019835 and CP 019835).

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
80		02/25/1998	Adam O. Emmerich, Esq.	Frank Miller, Esq., Steven Cohen, Esq.	Attorney-Client	E-mail re merger agreement disclosure schedules; S. Cohen's e-mail response prepared for the purpose of legal advice.
81		02/24/1998	Steven Isko, Esq.,	Steven Cohen, Esq.	Attorney-Client	Fax re merger agreement disclosure schedules provided for purpose of enabling attorney to provide legal services.
81	A	02/24/1998	Steven Isko, Esq.		Attorney-Client	Information re merger agreement disclosure schedules with S. Isko's handwritten notes provided for purpose of enabling attorney to provide legal services.
82		02/24/1998	Steven Isko, Esq.		Attorney-Client	Information re merger agreement disclosure schedules provided for purpose of enabling attorney to provide legal services.
83		02/25/1998	Frank Miller, Esq.		Attorney-Client	Notes re merger agreement provisions prepared for the purpose of providing legal advice.
84		02/26/1998	Steven Isko, Esq.	Frank Miller, Esq.	Attorney-Client	Information re merger agreement disclosure schedules with attorney's handwritten notes provided for purpose of enabling attorney to provide legal services.
85		02/27/1998	Steven Isko, Esq.	Frank Miller, Esq.	Attorney-Client	Information re merger agreement disclosure schedules with attorney's handwritten notes provided for purpose of enabling attorney to provide legal services.
86		03/01/1998	Michael Katzke, Esq.		Attorney-Client	Notes re Sunbeam's employee benefit plans prepared for the purpose of providing legal advice. (Redacted from CP 019825-019833).
86	A	03/01/1998	Steven Isko, Esq.	Michael Katzke, Esq.	Attorney-Client	Draft memorandum to J. Levin re employee benefits issues prepared for the purpose of providing legal advice. (Redacted from CP 019825-19833)
87		02/21/1998	Adam O. Emmerich, Esq.	Steven Cohen, Esq., Frank Miller, Esq., Paul Rowe, Esq., Peter Canellos, Esq., David Einhorn, Esq., Karen Krueger, Esq., Michael Byowitz, Esq., Ilene K. Gotts, Esq., Michael Jahnke, Esq.	Attorney-Client	Memorandum re attached draft document prepared for the purpose of providing legal advice.
87	A	02/21/1998	Adam O. Emmerich, Esq.		Attorney-Client	Draft memorandum in response to Sunbeam's proposed transaction terms prepared for the purpose of providing legal advice.
88		03/25/1998	Steven Isko, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product	Memorandum re attached draft document prepared in anticipation of litigation relating to SEC/NYSE inquiry.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
88	A	03/25/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft response to NYSE and SEC requests for information with S. Isko's handwritten notes prepared in anticipation of litigation relating to inquiry.
89		03/25/1998	Rachelle Silverberg, Esq.	Steven Isko, Esq., Jerry Levin, James Maher, William Nesbitt, Joram Salig, Esq., Barry F. Schwartz, Esq., Paul Shapiro, Esq.	Attorney-Client, Work Product	Memorandum re attached draft document prepared in anticipation of litigation relating to SEC/NYSE inquiry.
89	A	03/25/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft response to SEC and NYSE requests for information prepared in anticipation of litigation relating to inquiry.
90		03/05/1998	Adam O. Emmerich, Esq., Michael Katzke, Esq.		Attorney-Client	Draft memorandum regarding application of federal securities laws.
91		03/04/1998	Michael Katzke, Esq.	Steven Isko, Esq., Joram Salig, Esq. (cc), Robert Fleder, Esq. (cc), Adam O. Emmerich, Esq. (cc), Steven Cohen, Esq. (cc), Frank Miller, Esq. (cc)	Attorney-Client	Memorandum re attached draft documents prepared for the purpose of providing legal advice.
91	A	03/04/1998	Wachtell Lipton		Attorney-Client	Draft resolution re employee benefit plans with F. Miller's handwritten notes prepared for the purpose of providing legal advice.
91	B	03/04/1998	Wachtell Lipton		Attorney-Client	Draft resolution re employee benefit plans with F. Miller's handwritten notes prepared for the purpose of providing legal advice.
91	C	03/04/1998	Wachtell Lipton		Attorney-Client	Draft resolution re employee benefit plans with F. Miller's handwritten notes prepared for the purpose of providing legal advice.
92		03/17/1998	Ilene K. Gotts, Esq.	Paul Shapiro, Esq., Joram Salig, Esq., Steven Isko, Esq., Adam O. Emmerich, Esq., Steven Cohen, Esq., Frank Miller, Esq.	Attorney-Client	Memorandum re attached letters prepared for the purpose of providing legal advice.
92	A	03/17/1998	Brian Facey, Esq.	Sarah Strasser, Esq.	Attorney-Client	Letter re foreign antitrust issues prepared for the purpose of providing legal advice.
92	B	03/11/1998	Gabriel Castaneda, Esq.	Ilene K. Gotts, Esq., Sarah Strasser, Esq. (cc)	Attorney-Client	Letter re foreign antitrust issues prepared for the purpose of providing legal advice.
93		02/22/1998	Michael Jahnke, Esq.	Michael Byowitz, Esq., Ilene K. Gotts, Esq.	Attorney-Client	Memorandum re Sunbeam acquisition antitrust issues prepared for the purpose of providing legal advice.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
94		03/04/1998	Adam O. Emmerich, Esq.	Michael Jahnke, Esq., Ilene K. Gotts, Esq. (cc), Frank Miller, Esq. (cc)	Attorney-Client	E-mail re draft Hart-Scott-Rodino filing; e-mail response from M. Jahnke; and e-mail reply from A. Emmerich reflecting confidential communications with client.
95		03/04/1998	Michael Jahnke, Esq.	Barry F. Schwartz, Esq., Paul Shapiro, Esq., Joram Salig, Esq., Steven Isko, Esq.	Attorney-Client	Memorandum re draft Hart-Scott-Rodino filing prepared for the purpose of providing legal advice.
96		03/04/1998	Heather Van Dever	Steven Isko, Esq., Michael Jahnke, Esq.	Attorney-Client	Correspondence re attached document provided for purpose of enabling attorney to provide legal services.
96	A	03/04/1998	Heather Van Dever	Steven Isko, Esq.	Attorney-Client	Memorandum re Coleman subsidiaries with S. Isko's handwritten notes provided for purpose of enabling attorney to provide legal services.
97		03/06/1998	Sarah Strasser, Esq.	Ilene K. Gotts, Esq., Michael Jahnke, Esq.	Attorney-Client	E-mail re foreign antitrust issues prepared for the purpose of providing legal advice.
98		03/09/1998	Michael Jahnke, Esq.	Steven Isko, Esq., Karen Clark	Attorney-Client	Correspondence re attached article prepared for the purpose of providing legal advice.
98	A	03/03/1998	Michael Jahnke, Esq.		Attorney-Client	Notes re article prepared for the purpose of providing legal advice. (Redacted from CP 020876, CP 019834, and CP 012208).
99		03/24/1998	Ilene K. Gotts, Esq., Michael Jahnke, Esq.	Paul Shapiro, Esq., Steven Isko, Esq.	Attorney-Client	Memorandum re attached draft document prepared for the purpose of providing legal advice.
99	A	03/24/1998	Wachtell Lipton		Attorney-Client	Draft letter to FTC re Sunbeam acquisition antitrust issues prepared for the purpose of providing legal advice.
100		00/00/0000	Michael Jahnke, Esq.		Attorney-Client	Notes re Sunbeam acquisition antitrust issues reflecting information provided by client to attorney for purposes of enabling attorney to perform legal services.
101		03/03/1998	Michael Jahnke, Esq.	Lenny Ajzenman	Attorney-Client	Memorandum re draft Hart-Scott-Rodino filing prepared for the purpose of providing legal advice.
102		03/23/1998	Michael Jahnke, Esq.		Attorney-Client	Draft letter to FTC re Sunbeam acquisition antitrust issues with attorney's handwritten notes prepared for the purpose of providing legal advice.
103		00/00/0000	Michael Jahnke, Esq.		Attorney-Client	Notes re Sunbeam acquisition antitrust issues prepared for the purpose of providing legal advice.
104		03/03/1998	Michael Jahnke, Esq.	Lenny Ajzenman	Attorney-Client	Memorandum re attached draft document prepared for the purpose of providing legal advice.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
104	A	03/03/1998	Michael Jahnke, Esq.		Attorney-Client	Draft Hart-Scott-Rodino filing with attorney's handwritten notes prepared for the purpose of providing legal advice.
105		03/04/1998	Michael Jahnke, Esq.	Paul Shapiro, Esq.	Attorney-Client	Memorandum re attached draft document prepared for the purpose of providing legal advice.
105	A	03/04/1998	Michael Jahnke, Esq.	Barry F. Schwartz, Esq.	Attorney-Client	Memorandum re attached draft document prepared for the purpose of providing legal advice.
105	B	03/04/1998	Michael Jahnke, Esq.		Attorney-Client	Draft Hart-Scott-Rodino filing prepared for the purpose of providing legal advice.
106		03/03/1998	Michael Jahnke, Esq.	Steven Isko, Esq.,	Attorney-Client	Memorandum re draft Hart-Scott-Rodino filing prepared for the purpose of providing legal advice.
107		03/04/1998	Michael Jahnke, Esq.		Attorney-Client	Portion of draft Hart-Scott-Rodino filing with attorney's handwritten notes prepared for the purpose of providing legal advice.
108		03/04/1998	Michael Jahnke, Esq.		Attorney-Client	Draft memorandum re draft Hart-Scott-Rodino filing prepared for the purpose of providing legal advice.
109		03/05/1998	Michael Jahnke, Esq.		Attorney-Client	Notes re foreign antitrust issues prepared for the purpose of providing legal advice.
110		00/00/0000	Paul Rowe, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 021580-21584).
111		00/00/0000	Paul Rowe, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 021585-021586).
112		00/00/0000	Paul Rowe, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 021587-021592).
113		07/07/1998	Adam O. Emmerich, Esq., Frank Miller, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., James Maher, William Nesbitt, Todd Slotkin, Irwin Engelman, Glenn Dickes, Esq., Joram Salig, Esq.	Attorney-Client, Work Product	Memorandum re attached draft documents prepared in connection with Sunbeam/Coleman (Parent) settlement.
113	A	07/07/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft warrant agreement prepared in connection with Sunbeam/Coleman (Parent) settlement.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
113	B	07/07/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft settlement agreement.
114		03/03/1998	John Johnston, Esq.	Paul Rowe, Esq.	Attorney-Client	Letter and invoice for legal services re Sunbeam acquisition.
115		03/05/1998	Ilene K. Gotts, Esq., Sarah Strasser, Esq.	Steven Isko, Esq., Karen Clark	Attorney-Client	Memorandum requesting information re foreign antitrust issues prepared for the purpose of providing legal advice.
116		03/17/1998	Paul Shapiro, Esq.	Ilene K. Gotts, Esq.	Attorney-Client	Memorandum re attached draft document prepared for the purpose of providing legal advice.
116	A	03/17/1998	Paul Shapiro, Esq.		Attorney-Client	Draft letter re license agreement issues prepared for the purpose of providing legal advice.
117		03/26/1998	Adam O. Emmerich, Esq., Steven Cohen, Esq., Frank Miller, Esq.	Glenn Dickes, Esq., Anthony Ian, Steven Isko, Esq., Joseph Page, Joram Salig, Esq., Terry Schimek, Esq., Paul Shapiro, Esq., Laurence Winoker, Paul Rowe, Esq., Rachelle Silverberg, Esq., Peter Canellos, Esq., David Einhorn, Esq., Deborah Paul, Esq., Michael Katzke, Esq., Ilene K. Gotts, Esq., Michael Jahnke, Esq.	Attorney-Client	Memorandum re attached draft document prepared for the purpose of providing legal advice.
117	A	03/25/1998	Wachtell Lipton		Attorney-Client	Draft closing checklist prepared for the purpose of providing legal advice.
118		03/05/1998	Ilene K. Gotts, Esq., Sarah Strasser, Esq.	Steven Isko, Esq., Karen Clark	Attorney-Client	Memorandum re foreign antitrust issues prepared for the purpose of providing legal advice.
119		03/06/1998	Steven Isko, Esq.	Sarah Strasser, Esq., Karen Clark (cc)	Attorney-Client	Memorandum re foreign antitrust issues prepared in connection with obtaining legal advice.
119	A	03/06/1998	Dan Peterson	Steven Isko, Esq.	Attorney-Client	Memorandum re foreign antitrust filings providing information for purpose of obtaining legal services.
119	B	03/06/1998	Dan Peterson		Attorney-Client	Summary of information prepared for foreign antitrust filings with S. Strasser's handwritten notes provided for purposes of obtaining legal advice.
120		03/07/1998	Sarah Strasser, Esq.	Lenny Ajzenman	Attorney-Client	Memorandum re attached document requesting information in conection with providing legal advice.
120	A	03/07/1998	Sarah Strasser, Esq.	Steven Isko, Esq.	Attorney-Client	Memorandum re attached document prepared for the purpose of providing legal advice.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
120	B	03/06/1998	Lori Cornwall, Esq.	Sarah Strasser, Esq.	Attorney-Client	Memorandum re attached document prepared for the purpose of providing legal advice.
120	C	03/06/1998	Lori Cornwall, Esq.	Sarah Strasser, Esq.	Attorney-Client	Memorandum re foreign antitrust filings prepared for the purpose of providing legal advice.
121		00/00/0000	Wachtell Lipton		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 025560-025563).
122		04/27/1998	Adam O. Emmerich, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., Paul Shapiro, Esq.	Attorney-Client	Memorandum re Sunbeam acquisition prepared for the purpose of providing legal advice.
123		02/24/1998	Steven Cohen, Esq.		Attorney-Client	Notes re draft merger agreement prepared for the purpose of providing legal advice. (Redacted from CP 029890-029931).
124		02/24/1998	Michael Katzke, Esq.	Jerry Levin	Attorney-Client	Draft Coleman severance policy prepared for the purpose of providing legal advice.
125		02/26/1998	Steven Cohen, Esq.		Attorney-Client	Draft merger agreement with attorney's handwritten notes prepared for the purpose of providing legal advice.
126		02/26/1998	Steven Cohen, Esq.		Attorney-Client	Draft merger agreement with attorney's handwritten notes prepared for the purpose of providing legal advice.
127		02/25/1998	David Einhorn, Esq.		Attorney-Client	Draft merger agreement with attorney's handwritten notes prepared for the purpose of providing legal advice.
128		02/25/1998	Frank Miller, Esq.		Attorney-Client	Draft merger agreement with attorney's handwritten notes prepared for the purpose of providing legal advice.
129		02/25/1998	Steven Cohen, Esq.		Attorney-Client	Draft merger agreement with attorney's handwritten notes prepared for the purpose of providing legal advice.
130		02/25/1998	Steven Cohen, Esq.		Attorney-Client	Draft merger agreement with attorney's handwritten notes prepared for the purpose of providing legal advicce.
131		02/25/1998	David Einhorn, Esq.		Attorney-Client	Draft merger agreement with attorney's handwritten notes prepared for the purpose of providing legal advice.
132		02/26/1998	Adam O. Emmerich, Esq.	Howard Gittis, Esq., Donald Drapkin, James Maher, Barry F. Schwartz, Esq., Steven Cohen, Esq. (cc), Esq., Frank Miller, Esq. (cc), Paul Rowe, Esq. (cc), Peter Canellos, Esq. (cc), David Einhorn, Esq. (cc), Michael Katzke, Esq. (cc), Ilene K. Gotts,	Attorney-Client	Memorandum re negotiations with Sunbeam prepared for the purpose of providing legal advice.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
				Esq. (cc), Michael Jahnke, Esq. (cc)		
133		02/27/1998	Glenn Dickes, Esq.	Steven Cohen, Esq., Adam O. Emmerich, Esq., Frank Miller, Esq., Valerie Radwaner, Esq., Terry Schimek, Esq.	Attorney-Client	Excerpt of draft merger agreement with G. Dickes' handwritten notes prepared for the purpose of providing legal advice.
133	A	02/27/1998	Steven Cohen, Esq.		Attorney-Client	Handwritten notes re draft merger agreement prepared for the purpose of providing legal advice.
134		02/27/1998	Deborah Paul, Esq.	Norman Ginstling, Esq., Marvin Shaffer	Attorney-Client	Correspondence re tax issues in draft merger agreement prepared for the purpose of providing legal advice.
135		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re Klewin complaint (Redacted from CP 030106-030134).
136		07/20/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft complaint re potential claims arising out of Sunbeam acquisition.
137		00/00/0000	Rachelle Silverberg, Esq.		Work Product	Notes re Goldberg complaint (Redacted from CP 031261-031297).
138		00/00/0000	Rachelle Silverberg, Esq.		Work Product	Notes re Yassin complaint (Redacted from CP 030917-030930).
139		09/09/1998	Eric Golden, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product	Memorandum re Joerger, Ulfsson, and Goldstein litigation.
140		00/00/0000	Wachtell Lipton		Attorney-Client	Draft Hart-Scott-Rodino filing with J. Salig's and S. Strasser's handwritten notes prepared for the purpose of providing legal advice.
141		00/00/0000	Wachtell Lipton		Attorney-Client	Draft Hart-Scott-Rodino filing with J. Ladigoski's handwritten notes prepared for the purpose of providing legal advice.
142		03/04/1998	Wachtell Lipton		Attorney-Client	Draft Hart-Scott-Rodino filing with J. Ladigoski's handwritten notes prepared for the purpose of providing legal advice.
143		03/04/1998	Jackie Fortinash, Esq., Sarah Strasser, Esq.	Joram Salig, Esq.	Attorney-Client	Memorandum re attached documents prepared for the purpose of providing legal advice.
143	A	03/02/1998	Sarah Strasser, Esq.	Joram Salig, Esq.	Attorney-Client	Memorandum re attached draft document with J. Salig's handwritten notes prepared for the purpose of providing legal advice.
143	B	03/02/1998	Wachtell Lipton		Attorney-Client	Draft Hart-Scott-Rodino filing with J. Salig's handwritten notes prepared for the purpose of providing legal advice.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
144		00/00/0000	Sarah Strasser, Esq.		Attorney-Client	Draft Hart-Scott-Rodino filing with S. Strasser's handwritten notes prepared for the purpose of providing legal advice.
145		02/25/1998	Adam O. Emmerich, Esq.		Attorney-Client	Draft presentation to Coleman Board of Directors re Sunbeam acquisition prepared for the purpose of providing legal advice.
146		03/01/1998	Michael Jahnke, Esq.	Sarah Strasser, Esq., Ilene K. Gotts, Esq. (cc)	Attorney-Client	E-mail re Sunbeam acquisition antitrust issues with S. Strasser's handwritten notes reflecting information provided by client to attorney for purpose of enabling attorney to provide legal services.
146	A	03/01/1998	Sarah Strasser, Esq.		Attorney-Client	Handwritten notes re Sunbeam acquisition antitrust issues reflecting information provided by client to attorney for purpose of enabling attorney to provide legal services.
147		03/02/1998	Sarah Strasser, Esq.	Gabriel Castaneda, Michael Jahnke, Esq. (cc)	Attorney-Client	Memorandum re foreign antitrust issues prepared for the purpose of obtaining legal advice.
148		03/02/1998	Ricardo Hernandez, Esq.	Sarah Strasser, Esq.	Attorney-Client	Letter re foreign antitrust issues with S. Strasser's handwritten notes prepared for the purpose of providing legal advice.
149		03/06/1998	Sarah Strasser, Esq.	Lori Cornwall, Esq.	Attorney-Client	Memorandum re foreign antitrust issues prepared for the purpose of obtaining legal advice.
150		03/09/1998	Sarah Strasser, Esq.	Karen Clark, Esq. (cc)	Attorney-Client	Memorandum re foreign antitrust legal opinion with S. Strasser's handwritten notes prepared for the purpose of providing legal advice.
151		03/09/1998	Melissa Orme	Steven Isko, Esq., Karen Clark (cc), Sarah Strasser, Esq. (cc)	Attorney-Client	Memorandum re foreign antitrust legal opinion prepared for counsel and reflecting client information provided for purpose of obtaining legal services.
152		03/10/1998	Sarah Strasser, Esq.	Ricardo Hernandez, Esq., Ilene K. Gotts, Esq. (cc)	Attorney-Client	Memorandum re foreign antitrust legal opinion prepared for purpose of obtaining legal advice.
153		02/23/1998	Adam O. Emmerich, Esq.		Attorney-Client	Notes re Sunbeam acquisition issues reflecting client information provided for purpose of obtaining legal advice.
154		02/24/1998	Adam O. Emmerich, Esq.	Barry F. Schwartz, Esq., Paul Shapiro, Esq.	Attorney-Client	Memorandum re attached draft document prepared for the purpose of providing legal advice.
154	A	02/24/1998	Adam O. Emmerich, Esq.		Attorney-Client	Draft agenda for Coleman Board meeting prepared for the purpose of providing legal advice.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
155		02/25/1998	Adam O. Emmerich, Esq., Frank Miller, Esq.	Glenn Dickes, Esq., Robert Duffy, Norman Gintsling, Esq., Steven Isko, Esq., William Nesbitt, Joram Salig, Esq., Barry F. Schwartz, Esq., Gordon Rich, Paul Shapiro, Esq.	Attorney-Client	Memorandum re attached draft documents prepared for the purpose of providing legal advice.
155	A	02/25/1998	Adam O. Emmerich, Esq., Frank Miller, Esq.		Attorney-Client	Draft materials for Coleman Board meeting prepared for the purpose of providing legal advice.
156		03/18/1998	Steven Isko, Esq.	Rachelle Silverberg, Esq., Paul Shapiro, Esq. (cc), Joram Salig, Esq. (cc)	Attorney-Client, Work Product	Memorandum re response to SEC and NYSE requests for information and attached draft document prepared in anticipation of litigation relating to inquiry.
156	A	03/16/1998	Rachelle Silverberg, Esq.	Steven Isko, Esq., Jerry Levin, James Maher, William Nesbitt, Joram Salig, Esq., Barry F. Schwartz, Esq., Paul Shapiro, Esq.	Attorney-Client, Work Product	Memorandum re attached draft document prepared in anticipation of litigation relating to inquiry.
156	B	03/16/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft response to SEC and NYSE requests for information with S. Isko's handwritten notes prepared in anticipation of litigation relating to inquiry.
156	C	03/18/1998	Steven Isko, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product	Memorandum re response to SEC and NYSE requests for information prepared in anticipation of litigation relating to inquiry.
157		03/18/1998	Glenn Dickes, Esq.	Adam O. Emmerich, Esq.	Attorney-Client	Memorandum re draft letter to LYONs trustee and draft notice of LYONs redemption prepared for the purpose of providing legal advice.
158		02/21/1998	Adam O. Emmerich, Esq.	Paul Rowe, Esq.	Attorney-Client	Correspondence re Sunbeam's proposed transaction terms prepared for the purpose of providing legal advice.
159		02/25/1998	Paul Rowe, Esq.		Attorney-Client	Notes re Coleman Board of Directors meeting prepared for the purpose of providing legal advice.
160		02/25/1998	Paul Rowe, Esq.		Attorney-Client	CSFB presentation to Coleman Board of Directors with P. Rowe's handwritten notes prepared for the purpose of providing legal advice.
161		02/26/1998	Paul Rowe, Esq.		Attorney-Client	Notes re Coleman Board meeting prepared for the purpose of providing legal advice.
162		00/00/0000	Paul Rowe, Esq.		Attorney-Client, Work Product	Notes re response to SEC and NYSE requests for information prepared in anticipation of litigation relating to inquiry.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
163		04/16/1998	Paul Rowe, Esq.		Attorney-Client, Work Product	Sunbeam draft response to SEC and NYSE requests for information with P. Rowe's handwritten notes prepared in anticipation of litigation relating to inquiry.
164		03/19/1998	Rachelle Silverberg, Esq.	Steven Isko, Esq., Jerry Levin, James Maher, William Nesbitt, Joram Salig, Esq., Barry F. Schwartz, Esq., Paul Shapiro, Esq.	Attorney-Client, Work Product	Memorandum re attached draft document prepared in anticipation of litigation relating to SEC/NYSE inquiry.
164	A	03/19/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft response to SEC and NYSE requests for information prepared in anticipation of litigation relating to inquiry.
165		03/30/1998	Paul Rowe, Esq.		Attorney-Client, Work Product	Notes re response to SEC and NYSE requests for information prepared in anticipation of litigation relating to inquiry.
166		06/15/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft Schedule 13D prepared in connection with providing legal advice and anticipated litigation.
167		07/15/1998	Frank Miller, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., Joram Salig, Esq., Glenn Dickes, Esq., William Nesbitt, James Maher	Attorney-Client, Work Product	Memorandum re SEC comments on draft Sunbeam Form S-4 prepared in connection with providing legal advice and anticipated litigation.
168		07/20/1998	Adam O. Emmerich, Esq., Frank Miller, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., James Maher, William Nesbitt, Todd Slotkin, Irwin Engelman, Glenn Dickes, Esq., Joram Salig, Esq., Steven Cohen, Esq. (cc), Michael Schwartz, Esq. (cc), Paul Rowe, Esq. (cc), Rachelle Silverberg, Esq. (cc), Alexander Shaknes, Esq. (cc), Harold Novikoff (cc), Peter Canellos, Esq. (cc), David Einhorn, Esq. (cc), Deborah Paul, Esq. (cc), Michael Katzke, Esq. (cc), Ilene K. Gotts, Esq. (cc), Michael Jahnke, Esq. (cc)	Attorney-Client, Work Product	Memorandum re attached draft document prepared in connection with Sunbeam / Coleman (Parent) settlement.
168	A	07/20/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft Registration Rights Agreement Amendment prepared in connection with Sunbeam / Coleman (Parent) settlement
169		04/19/1998	Frank Miller, Esq.	Barry F. Schwartz, Esq., Joram Salig, Esq., Adam O. Emmerich, Esq. (cc), Paul Rowe, Esq. (cc), Rachelle Silverberg, Esq. (cc)	Attorney-Client, Work Product	Memorandum re Sunbeam draft response to SEC and NYSE requests for information prepared in anticipation of litigation relating to inquiry.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
170		02/19/1998	Adam O. Emmerich, Esq., Steven Cohen, Esq.	Steven Cohen, Esq., Frank Miller, Esq., Paul Rowe, Esq., Peter Canellos, Esq., David Einhorn, Esq., Karen Krueger, Esq., Michael Byowitz, Esq., Ilene K. Gotts, Esq., Michael Jahnke, Esq.	Attorney-Client	Memorandum re transaction structure issues prepared for the purpose of providing legal advice.
171		03/02/1998	Frank Miller, Esq.	Barry F. Schwartz, Esq., Glenn Dickes, Esq., Joram Salig, Esq., Steven Isko, Esq., Adam O. Emmerich, Esq. (cc)	Attorney-Client	Memorandum re attached draft documents prepared for the purpose of providing legal advice.
171	A	03/02/1998	Wachtell Lipton		Attorney-Client	Draft Coleman Co. 8-K prepared for the purpose of providing legal advice.
171	B	03/02/1998	Wachtell Lipton		Attorney-Client	Draft Coleman Worldwide 8-K prepared for the purpose of providing legal advice.
171	C	03/02/1998	Wachtell Lipton		Attorney-Client	Draft CLN Holdings 8-K prepared for the purpose of providing legal advice.
172		03/26/1998	Adam O. Emmerich, Esq., Steven Cohen, Esq., Frank Miller, Esq.	Glenn Dickes, Esq., Norman Gintsling, Esq., Anthony Ian, Steven Isko, Esq., Joseph Page, Valerie Radwaner, Esq., Joram Salig, Esq., Marvin Shaffer, Terry Schimek, Esq., Barry F. Schwartz, Esq., Paul Shapiro, Esq., Laurence Winoker	Attorney-Client	Memorandum re attached draft documents prepared for the purpose of providing legal advice.
172	A	03/26/1998	Wachtell Lipton		Attorney-Client	Draft closing checklist prepared for the purpose of providing legal advice.
172	B	03/26/1998	Wachtell Lipton		Attorney-Client	Draft amendment to merger agreement prepared for the purpose of providing legal advice.
172	C	03/26/1998	Wachtell Lipton		Attorney-Client	Draft letter re termination of intercompany agreements prepared for the purpose of providing legal advice.
172	D	03/26/1998	Wachtell Lipton		Attorney-Client	Draft letter to Sunbeam re cooperation and access prepared for the purpose of providing legal advice.
173		03/26/1998	Valerie Radwaner, Esq., Deborah Reiss, Esq.	Steven Cohen, Esq., Adam O. Emmerich, Esq., Frank Miller, Esq.	Attorney-Client	Fax response to request for information re closing prepared for the purpose of providing legal advice.
174		02/27/1998	Valerie Radwaner, Esq.	Steven Cohen, Esq., Adam O. Emmerich, Esq., Frank Miller, Esq., Glenn Dickes, Esq. (cc)	Attorney-Client	Memorandum re attached documents prepared for the purpose of providing legal advice.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
174	A	02/27/1998	Valerie Radwaner, Esq.		Attorney-Client	Excerpt of draft merger agreement with attorney's handwritten notes prepared for the purpose of providing legal advice.
175		02/27/1998	Glenn Dickes, Esq.	Steven Cohen, Esq., Adam O. Emmerich, Esq., Frank Miller, Esq.	Attorney-Client	Excerpt of draft merger agreement with G. Dickes' handwriten notes prepared for the purpose of providing legal advice.
176		00/00/0000	Adam O. Emmerich, Esq.		Attorney-Client	Notes of communication with client re Sunbeam acquisition issues.
177		02/27/1998	Wachtell Lipton		Attorney-Client	Draft Registration Rights Agreement with attorney's handwritten notes prepared for the purpose of providing legal advice.
178		00/00/0000	Adam O. Emmerich, Esq.		Attorney-Client	Notes re Sunbeam acquisition issues prepared for the purpose of providing legal advice.
179		02/26/1998	Steven Cohen, Esq.	Michael Katzke, Esq., Adam O. Emmerich, Esq. (cc), Frank Miller, Esq. (cc)	Attorney-Client	E-mail re draft merger agreement prepared for the purpose of providing legal advice.
180		02/26/1998	Michael Katzke, Esq.	Adam O. Emmerich, Esq., Steven Cohen, Esq. (cc), Frank Miller, Esq. (cc)	Attorney-Client	E-mail re draft merger agreement prepared for the purpose of providing legal advice.
181		02/26/1998	Deborah Paul, Esq.	David Einhorn, Esq., Adam O. Emmerich, Esq., Steven Cohen, Esq., Frank Miller, Esq.	Attorney-Client	E-mail re client communication re draft merger agreement.
182		02/26/1998	Michael Katzke, Esq.	Adam O. Emmerich, Esq.	Attorney-Client	E-mail re draft merger agreement prepared for the purpose of providing legal advice.
183		02/26/1998	Wachtell Lipton		Attorney-Client	Draft summary of proposed Sunbeam acquisition prepared for the purpose of providing legal advice.
184		02/24/1998	Wachtell Lipton		Attorney-Client	Notes re draft merger agreement issues prepared for the purpose of providing legal advice.
185		02/24/1998	Michael Katzke, Esq.	Steven Cohen, Esq., Adam O. Emmerich, Esq., Frank Miller, Esq.	Attorney-Client	E-mail re employee benefit issues in draft merger agreement prepared for the purpose of providing legal advice.
186		02/24/1998	Adam O. Emmerich, Esq.	Michael Katzke, Esq., Steven Cohen, Esq. (cc), Frank Miller, Esq. (cc)	Attorney-Client	E-mail re employee benefit issues in merger agreement and e-mail response by M. Katzke prepared for the purpose of providing legal advice.
187		02/24/1998	Michael Katzke, Esq.	Adam O. Emmerich, Esq.	Attorney-Client	E-mail re employee benefit issues in merger agreement prepared for the purpose of providing legal advice.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
188		00/00/0000	Adam O. Emmerich, Esq.		Attorney-Client	Notes of client communication re draft merger agreement.
189		02/24/1998	Adam O. Emmerich, Esq.		Attorney-Client	Notes re draft merger agreement issues prepared for the purpose of providing legal advice.
190		00/00/0000	Paul Rowe, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 021577-021579).
191		03/06/1998	Steven Isko, Esq.	Sarah Strasser, Esq.	Attorney-Client	Draft foreign antitrust filing with S. Isko's handwritten notes prepared for the purpose of providing legal advice.
192		03/06/1998	Sarah Strasser, Esq.	Steven Isko, Esq.	Attorney-Client	Memorandum re draft foreign antitrust filing prepared for the purpose of providing legal advice.
193		02/27/1998	Sarah Strasser, Esq.	Lenny Ajzenman	Attorney-Client	Correspondence re attached draft document prepared for the purpose of providing legal advice.
193	A	02/27/1998	Wachtell Lipton		Attorney-Client	Section of draft Hart-Scott-Rodino filing with S. Strasser's handwritten notes prepared for the purpose of providing legal advice.
194		00/00/0000	Deborah Paul, Esq.		Attorney-Client	Notes re Sunbeam acquisition tax issues and confidential communications with client re same prepared in connection with providing legal advice.
195		00/00/0000	Deborah Paul, Esq.		Attorney-Client	Draft merger agreement with D. Paul's notes prepared for the purpose of providing legal advice.
196		03/03/1998	Michael Katzke, Esq.	Deborah Paul, Esq.	Attorney-Client	Memorandum re attached draft document prepared for the purpose of providing legal advice.
196	A	03/03/1998	Wachtell Lipton		Attorney-Client	Draft Coleman employee disclosure re employee benefits with M. Katzke's handwritten notes prepared for the purpose of providing legal advice.
197		07/30/1998	Adam O. Emmerich, Esq., Frank Miller, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., James Maher	Attorney-Client, Work Product	Memorandum re attached draft document prepared in connection with providing legal advice and anticipated litigation.
197	A	07/30/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft letter to NY Stock Exchange re application for exception prepared in connection with providing legal advice and anticipated litigation.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
198		07/30/1998	Adam O. Emmerich, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., James Maher, Steven Cohen, Esq. (cc), Frank Miller, Esq. (cc), Michael Schwartz, Esq. (cc), Paul Rowe, Esq. (cc), Rachelle Silverberg, Esq. (cc), Alexander Shaknes, Esq. (cc), Harold Novikoff (cc), Peter Canellos, Esq. (cc), David Einhorn, Esq. (cc), Deborah Paul, Esq., Esq. (cc), Michael Katzke, Esq. (cc), Ilene K. Gotts, Esq. (cc), Michael Jahnke, Esq. (cc)	Work Product	Memorandum re attached draft document prepared in connection with providing legal advice and anticipated litigation.
198	A	07/30/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft memorandum re potential claims arising from Sunbeam acquisition.
199		03/10/1998	Sarah Strasser, Esq.		Attorney-Client	Summary of foreign antitrust issues related to Sunbeam acquisition prepared for the purpose of providing legal advice.
200		00/00/0000	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Notes re Coleman shareholder litigation.
201		02/02/1999	Adam O. Emmerich, Esq.		Attorney-Client, Work Product	Draft letter to auditor re pending litigation.
202		10/30/1998	Eric Golden, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product	Fax re complaint (Redacted from CP 13843A).
203		00/00/0000	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Notes re shareholder litigation.
204		00/00/0000	Michael Katzke, Esq.		Attorney-Client	Notes re merger agreement issues with M. Katzke's handwritten notes prepared for the purpose of providing legal advice.
205		02/26/1998	Adam O. Emmerich, Esq., Frank Miller, Esq.	Paul Shapiro, Esq., Steven Isko, Esq., Glenn Dickes, Esq., Joram Salig, Esq., Barry F. Schwartz, Esq., Steven Cohen, Esq. (cc), Paul Rowe, Esq. (cc), Peter Canellos, Esq. (cc), David Einhorn, Esq. (cc), Michael Katzke, Esq. (cc), Ilene K. Gotts, Esq. (cc), Michael Jahnke, Esq. (cc)	Attorney-Client	Memorandum re attached draft documents prepared for the purpose of providing legal advice.
205	A	02/26/1998	Wachtell Lipton		Attorney-Client	Draft consents and resolutions re proposed Sunbeam acquisition prepared for the purpose of providing legal advice.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
205	B	02/26/1998	Wachtell Lipton		Attorney-Client	Draft Coleman 8-Ks prepared for the purpose of providing legal advice.
206		04/06/1998	Adam O. Emmerich, Esq., Michael Katzke, Esq.	Glenn Dickes, Esq., Joram Salig, Esq., Barry F. Schwartz, Esq., Paul Shapiro, Esq.	Attorney-Client	Memorandum re attached draft document prepared in connection with providing legal advice.
206	A	04/06/1998	Wachtell Lipton		Attorney-Client	Draft Sunbeam letter re Coleman employee benefits issues prepared in connection with providing legal advice.
207		03/27/1998	Wachtell Lipton		Attorney-Client	Draft letter re termination of intercompany agreements prepared for the purpose of providing legal advice.
208		02/25/1998	Michael Katzke, Esq.	Steven Isko, Esq.	Attorney-Client	Summary of Coleman severance policy prepared for the purpose of providing legal advice.
209		06/10/1998	Karen Krueger, Esq.	Barry F. Schwartz, Esq., Adam O. Emmerich, Esq. (cc), Michael Katzke, Esq. (cc), Frank Miller, Esq. (cc)	Attorney-Client, Work Product	Memorandum re attached draft document prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.
209	A	06/10/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment termination agreement prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.
210		06/11/1998	Karen Krueger, Esq.	Barry F. Schwartz, Esq., Steven Isko, Esq., Paul Shapiro, Esq., Adam O. Emmerich, Esq. (cc), Michael Katzke, Esq. (cc), Frank Miller, Esq. (cc)	Attorney-Client, Work Product	Memorandum re attached draft document prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.
210	A	06/11/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment termination agreement prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.
211		00/00/0000	Karen Krueger, Esq.		Attorney-Client, Work Product	Excerpt of draft employment termination agreement prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.
212		08/19/1998	Michael Schwartz, Esq.	Wachtell Lipton Sunbeam Team, Martin Lipton, Adam O. Emmerich, Esq., Steven Cohen, Esq., Frank Miller, Esq., Harold Novikoff, Esq., Peter Canellos, Esq., David Einhorn, Esq., Deborah Paul, Esq., Michael Katzke, Esq., Michael W. Schwartz, Esq., Paul Rowe, Esq., Rachelle	Attorney-Client, Work Product	Memorandum re Coleman shareholder litigation.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
				Silverberg, Esq., Ilene K. Gotts, Esq., Michael Jahnke, Esq.		
213		03/31/1998	Michael Katzke, Esq.	Adam O. Emmerich, Esq., Steven Cohen, Esq., Frank Miller, Esq.	Attorney-Client	E-mail re Form 4 filings prepared for the purpose of providing legal advice.
214		03/31/1998	Heidi Anne Hafeken	Adam O. Emmerich, Esq.	Attorney-Client	Transcribed voicemail message from A. Emmerich to F. Miller and S. Cohen re applicability of federal securities laws.
215		03/30/1998	Adam O. Emmerich, Esq.	Frank Miller, Esq., Steven Cohen, Esq.	Attorney-Client	E-mail re applicability of federal securities laws; F. Miller e-mail in response; S. Cohen further e-mail response.
216		03/30/1998	Adam O. Emmerich, Esq.	Steven Cohen, Esq., Frank Miller, Esq.	Attorney-Client	E-mail re applicability of federal securities laws; F. Miller e-mail response; S. Cohen e-mail response; F. Miller e-mail response; S. Cohen e-mail response; F. Miller e-mail response.
217		02/05/1998	Joram Salig, Esq.	Martin Lipton, Esq.	Attorney-Client	Correspondence re confidentiality agreement between Sunbeam and Coleman for purpose of obtaining legal advice.
218		07/17/1998	Richard Pacheco, Esq.	Paul Rowe, Esq., Adam O. Emmerich, Esq., Rachelle Silverberg, Esq.	Attorney-Client, Work Product	Memorandum re potential claims arising out of Sunbeam acquisition.
219		09/14/1998	Frank Miller, Esq.	Barry F. Schwartz, Esq., Michael Schwartz, Esq. (cc), Adam O. Emmerich, Esq. (cc)	Attorney-Client, Work Product	Memorandum re litigation arising out of Sunbeam's acquisition of CPH's interest in Coleman.
219	A	09/14/1998	Frank Miller, Esq.		Attorney-Client, Work Product	Analysis of litigation damages issues.
219	B	00/00/0000	Frank Miller, Esq.		Attorney-Client, Work Product	Notes re litigation damages issues.
220		11/06/1998	Adam O. Emmerich, Esq., Frank Miller, Esq.	Barry F. Schwartz, Esq., James Maher, William Nesbitt, Glenn Dickes, Esq., Joram Salig, Esq., James Conroy, Esq.	Attorney-Client, Work Product	Memorandum re attached draft document prepared in connection with Sunbeam/Coleman (Parent) settlement.
220	A	11/06/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft Schedule 13D Amendment prepared in connection with Sunbeam /Coleman (Parent) settlement.
221		04/07/1998	Frank Miller, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., Glenn Dickes, Esq., Paul Shapiro, Esq.	Attorney-Client	Memorandum re Sunbeam corporate structure prepared in connection with providing legal advice.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
222		04/10/1998	Frank Miller, Esq.	Joram Salig, Esq., Steven Isko, Esq., Adam O. Emmerich, Esq. (cc), Paul Rowe, Esq. (cc)	Attorney-Client	Memorandum re attached draft document.
222	A	04/10/1998	Wachtell Lipton		Attorney-Client	Draft of section of Sunbeam Form S-4 prepared in connection with providing legal advice.
223		03/29/1998	Adam O. Emmerich, Esq.	Frank Miller, Esq.	Attorney-Client	Memorandum re closing issues prepared for the purpose of providing legal advice.
223	A	03/29/1998	Wachtell Lipton		Attorney-Client	Draft closing checklist prepared for the purpose of providing legal advice.
224		03/28/1998	Adam O. Emmerich, Esq.	Glenn Dickes, Esq.	Attorney-Client	Memorandum re attached documents prepared for the purpose of providing legal advice.
224	A	03/28/1998	Wachtell Lipton		Attorney-Client	Draft amendment to merger agreement prepared for the purpose of providing legal advice.
224	B	03/28/1998	Wachtell Lipton		Attorney-Client	Draft letter re termination of intercompany agreements prepared for the purpose of providing legal advice.
224	C	03/28/1998	Wachtell Lipton		Attorney-Client	Draft letter to Sunbeam re cooperation and access prepared for the purpose of providing legal advice.
224	D	03/28/1998	Wachtell Lipton		Attorney-Client	Draft registration rights agreement prepared for the purpose of providing legal advice.
224	E	03/28/1998	Wachtell Lipton		Attorney-Client	Draft cross receipt prepared for the purpose of providing legal advice.
225		03/28/1998	Adam O. Emmerich, Esq.	Glenn Dickes, Esq.	Attorney-Client	Memorandum re closing prepared for the purpose of providing legal advice.
225	A	03/28/1998	Wachtell Lipton		Attorney-Client	Draft closing checklist prepared for the purpose of providing legal advice.
225	B	03/28/1998	Wachtell Lipton		Attorney-Client	Draft letter re termination of intercompany agreements prepared for the purpose of providing legal advice.
226		04/15/1998	Adam O. Emmerich, Esq.	Barry F. Schwartz, Esq.	Attorney-Client	Memorandum re attached draft document prepared in connection with providing legal advice.
226	A	04/15/1998	Adam O. Emmerich, Esq.		Attorney-Client	Draft Sunbeam letter re Coleman employee benefits issues prepared in connection with providing legal advice.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
227		04/12/1998	Michael Katzke, Esq.	Adam O. Emmerich, Esq., Frank Miller, Esq.	Attorney-Client	Correspondence re attached draft document prepared in connection with providing legal advice.
227	A	04/12/1998	Michael Katzke, Esq.		Attorney-Client	Draft Sunbeam Form S-4 with M. Katzke's handwritten notes prepared in connection with providing legal advice.
228		03/31/1998	Frank Miller, Esq.	Glenn Dickes, Esq., Joram Salig, Esq., Adam O. Emmerich, Esq. (cc)	Attorney-Client	Memorandum re attached draft documents prepared for the purpose of providing legal advice.
228	A	03/31/1998	Wachtell Lipton		Attorney-Client	Draft Coleman Schedule 13G prepared for the purpose of providing legal advice.
228	B	03/31/1998	Wachtell Lipton		Attorney-Client	Draft Form 4 prepared for the purpose of providing legal advice.
228	C	03/31/1998	Wachtell Lipton		Attorney-Client	Draft Sunbeam Schedule 13G prepared for the purpose of providing legal advice.
228	D	03/31/1998	Wachtell Lipton		Attorney-Client	Draft Joint Filing Agreement prepared for the purpose of providing legal advice.
228	E	03/31/1998	Wachtell Lipton		Attorney-Client	Draft Form 3 prepared for the purpose of providing legal advice.
228	F	03/31/1998	Wachtell Lipton		Attorney-Client	Draft Form 144 prepared for the purpose of providing legal advice.
229		04/01/1998	Frank Miller, Esq.	Barry F. Schwartz, Esq., Joram Salig, Esq.	Attorney-Client	Memorandum re SEC filings for Sunbeam acquisition prepared for the purpose of providing legal advice.
230		03/27/1998	Paul, Weiss, Rifkind, Wharton & Garrison		Attorney-Client	Draft benefit plan agreement prepared for the purpose of providing legal advice.
230	A	03/27/1998	Cass G. Adelman, Esq.	Joram Salig, Esq., Steven Isko, Esq., Laurence Winoker, Kyle Wendt, Michael Katzke, Esq., Tim Nelson, Neil Leff, Adam O. Emmerich, Esq.	Attorney-Client	Correspondence re attached draft document prepared for the purpose of providing legal advice.
231		04/08/1998	Frank Miller, Esq.	Joram Salig, Esq.	Attorney-Client	Memorandum re Schedule 13G prepared in connection with providing legal advice.
232		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Notes re Sunbeam Credit Agreement prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman (Redacted from CP 027993).

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
233		03/28/1998	Cass G. Adelman, Esq.	Joram Salig, Esq., Steven Isko, Esq., Lawrence Winoker, Kyle Wendt, Michael Katzke, Esq., Tim Nelson, Neil Leff, Barry F. Schwartz, Esq., Robert Fleder, Esq.	Attorney-Client	Correspondence re attached draft document prepared for the purpose of providing legal advice.
233	A	03/28/1998	Paul, Weiss, Rifkind, Wharton & Garrison		Attorney-Client	Draft benefit plan agreement prepared for the purpose of providing legal advice.
234		08/18/1998	Frank Miller, Esq.	Joram Salig, Esq., Adam O. Emmerich, Esq. (cc)	Attorney-Client, Work Product	Memorandum re Registration Rights Agreement prepared in connection with Sunbeam/Coleman (Parent) settlement.
235		09/02/1998	Eric Golden, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product	Memorandum re Coleman shareholder litigation.
236		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re Sunbeam's 1997 Form 10-K prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman (Redacted from CP 018831-018886).
237		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re article prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 018822-018830).
238		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re Sunbeam 1996 Form 10-K prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman (Redacted from CP 018888-018937).
239		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re Coleman response to SEC and NYSE requests for information prepared in anticipation of litigation relating to inquiry.
240		00/00/0000	Alexander Shaknes, Esq.		Work Product	Notes re Mintz complaint (Redacted from CP 015305-015348).
241		08/12/1998	Adam O. Emmerich, Esq.	Glenn Dickes, Esq., Valerie Radwaner, Esq., Joram Salig, Esq.	Attorney-Client, Work Product	Draft warrant term sheet prepared in connection with Sunbeam/Coleman (Parent) settlement.
242		10/06/1998	Paul Crampton, Esq.	Sarah Strasser, Esq., Adam O. Emmerich, Esq. (cc)	Attorney-Client, Work Product	Letter re legal services performed relating to acquisition.
242	A	08/05/1998	Davies Ward & Beck	Sarah Strasser, Esq.	Attorney-Client, Work Product	Bill for legal services performed relating to acquisition.
243		07/13/1998	Barry F. Schwartz, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Draft press release re Sunbeam with attorney's handwritten notes prepared in connection with providing legal advice and pending litigation.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
244		07/20/1998	Barry F. Schwartz, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Notes re Stapleton complaint.
245		03/13/1998	Rachelle Silverberg, Esq.	Barry F. Schwartz, Esq., Joram Salig, Esq., Steven Isko, Esq., Adam O. Emmerich, Esq. (cc)	Attorney-Client, Work Product	Memorandum re response to NYSE request for information prepared in anticipation of litigation relating to inquiry.
246		03/23/1998	Adam O. Emmerich, Esq.	Joseph Page	Attorney-Client	Memorandum re legal services performed in connection with Sunbeam acquisition.
246	A	03/23/1998	Wachtell Lipton		Attorney-Client	Invoice for legal services performed in connection with Sunbeam acquisition.
247		00/00/0000	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Notes re Coleman shareholder litigation.
248		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Section of draft proxy statement prepared in connection with providing legal advice and pending litigation.
249		10/18/1999	Adam O. Emmerich, Esq.	Barry F. Schwartz, Esq., Michael Schwartz, Esq. (cc), Rachelle Silverberg, Esq. (cc)	Attorney-Client, Work Product	Memorandum re attached draft document prepared in connection with providing legal advice and pending litigation.
249	A	10/18/1999	Wachtell Lipton		Attorney-Client, Work Product	Section of draft proxy statement prepared in connection with providing legal advice and pending litigation.
250		11/03/1998	Adam O. Emmerich, Esq., Frank Miller, Esq.	Barry F. Schwartz, Esq., James Maher, William Nesbitt, Glenn Dickes, Esq., Joram Salig, Esq., James Conroy, Esq.	Attorney-Client, Work Product	Memorandum re attached draft document prepared in connection with providing legal advice and pending litigation.
250	A	11/03/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft amendment to Schedule 13D prepared in connection with providing legal advice and pending litigation.
251		11/03/1998	Megan McIntyre, Esq.	Barry F. Schwartz, Esq., Michael Schwartz, Esq. (cc)	Attorney-Client, Work Product	Letter re McCall and Coletta litigation.
252		09/30/1998	Cynthia Calder, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product	Letter re Joerger litigation. (Redacted from CP 044646.)
253		04/09/1998	Ilene K. Gotts, Esq.	Barry F. Schwartz, Esq.	Attorney-Client	Letter re letter to FTC re Coleman licensing issues prepared for the purpose of providing legal advice.
254		07/29/1998	Howard Gittis, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Note re Sunbeam management proposal prepared for purpose of obtaining legal advice (Redacted from CP 020187, CP 034332, and CP 013779).

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
255		00/00/0000	Karen Krueger, Esq.		Attorney-Client, Work Product	Notes re Kersh employment agreement prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman (Redacted from CP 013791-013808).
256		00/00/0000	Karen Krueger, Esq.		Attorney-Client, Work Product	Notes re Dunlap employment agreement prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman (Redacted from CP 012314-012333).
257		11/13/1998	Megan McIntyre, Esq.	Eric Golden, Esq., Michael Schwartz, Esq. (cc)	Attorney-Client, Work Product	Memorandum re Goldstein litigation.
258		12/01/1998	Megan McIntyre, Esq.	Michael Schwartz, Esq., Eric Golden, Esq.	Attorney-Client, Work Product	Correspondence re Goldstein litigation.
259		09/29/1999	Barry F. Schwartz, Esq.	Adam O. Emmerich, Esq., Michael Schwartz, Esq.	Attorney-Client, Work Product	Correspondence re Coleman shareholder litigation.
260		08/04/1998	Paul Rowe, Esq.	Michael Schwartz, Esq., Adam O. Emmerich, Esq., Rachelle Silverberg, Esq. (cc)	Attorney-Client, Work Product	Memorandum re draft settlement agreement provision.
261		11/19/1998	Eric Golden, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product	Letter re Shallal litigation.
262		04/20/1999	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Notes re Sunbeam stock trading history report prepared in conncetion with litigation (Redacted from CP 005283-005285).
263		08/14/1998	Frank Miller, Esq.	Barry F. Schwartz, Esq., Glenn Dickes, Esq., William Nesbitt, James Maher, Joram Salig, Esq., James Conroy, Esq., Valerie Radwaner, Esq.	Attorney-Client, Work Product	Memorandum re Schedule 13D Amendment prepared in connection with providing legal advice and pending litigation.
264		12/04/1998	Eric Golden, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product	Memorandum re Coletta litigation.
265		08/21/1998	Valerie Radwaner, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Correspondence re Sunbeam warrant prepared in connection with Sunbeam/Coleman (Parent) settlement.
266		08/23/1998	Adam O. Emmerich, Esq.	Glenn Dickes, Esq., Steven Cohen, Esq. (cc), Frank Miller, Esq. (cc)	Attorney-Client, Work Product	Memorandum re attached draft document prepared in connection with Sunbeam / Coleman (Parent) settlement.
266	A	08/23/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft receipt for warrant prepared in connection with Sunbeam/Coleman (Parent) settlement.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
267		08/23/1998	Adam O. Emmerich, Esq.	Valerie Radwaner, Esq.	Attorney-Client, Work Product	Correspondence re attached draft document prepared in connection with Sunbeam/Coleman (Parent) settlement.
267	A	08/23/1998	Adam O. Emmerich, Esq.		Attorney-Client, Work Product	Draft letter to Shearman & Sterling re Sunbeam warrant prepared in connection with Sunbeam / Coleman (Parent) settlement.
268		08/24/1998	Valerie Radwaner, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Correspondence re draft letter to Shearman & Sterling re Sunbeam warrant prepared in connection with Sunbeam / Coleman (Parent) settlement.
269		11/03/1998	Jay Eisenhofer, Esq., Megan McIntyre, Esq.	Barry F. Schwartz, Esq., Michael Schwartz, Esq. (cc)	Attorney-Client, Work Product	Memorandum re attached draft document.
269	A	11/03/1998	Jay Eisenhofer, Esq., Megan McIntyre, Esq.		Attorney-Client, Work Product	Draft motion for Joerger litigation.
270		01/25/1999	Jay Eisenhofer, Esq., Megan McIntyre, Esq.	Michael Schwartz, Esq., Rachelle Silverberg, Esq.	Attorney-Client, Work Product	Memorandum re attached draft documents.
270	A	01/25/1999	Grant & Eisenhofer		Attorney-Client, Work Product	Draft motion for Joerger litigation.
270	B	01/25/1999	Grant & Eisenhofer		Attorney-Client, Work Product	Draft motion for In re Sunbeam shareholder litigation.
271		12/16/1998	Megan McIntyre, Esq.	Eric Golden, Esq., Michael Schwartz, Esq. (cc)	Attorney-Client, Work Product	Memorandum re Goldstein litigation.
272		12/03/1998	Megan McIntyre, Esq.	Eric Golden, Esq., Michael Schwartz, Esq.	Attorney-Client, Work Product	Memorandum re motion in Coleman shareholder litigation.
273		01/08/1999	Jay Eisenhofer, Esq., Megan McIntyre, Esq.	Eric Golden, Esq., Michael Schwartz, Esq. (cc), Rachelle Silverberg, Esq. (cc)	Attorney-Client, Work Product	Memorandum re attached draft documents.
273	A	01/08/1999	Grant & Eisenhofer		Attorney-Client, Work Product	Draft motion for In re Sunbeam shareholder litigation.
273	B	01/08/1999	Grant & Eisenhofer		Attorney-Client, Work Product	Draft motion for Joerger litigation.
274		01/08/1999	Megan McIntyre, Esq.	Eric Golden, Esq., Michael Schwartz, Esq. (cc), Rachelle Silverberg, Esq. (cc)	Attorney-Client, Work Product	Memorandum re In re Sunbeam litigation.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
275		01/07/1999	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Draft motion for Joerger litigation with attorney's handwritten notes.
276		11/19/1998	Eric Golden, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product	Letter re Coletta litigation.
277		08/21/1998	Steven Cohen, Esq., Adam O. Emmerich, Esq.	Barry F. Schwartz, Esq., James Maher, William Nesbitt, Glenn Dickes, Esq., Joram Salig, Esq.	Attorney-Client, Work Product	Memorandum re attached draft document.
277	A	08/21/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft amendment to Schedule 13D prepared in connection with providing legal advice and pending litigation.
278		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Draft response to SEC and NYSE requests for information prepared in anticipation of litigation relating to inquiry.
279		00/00/0000	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Notes re Coleman shareholder litigation.
280		07/07/1998	Paul Rowe, Esq.		Attorney-Client, Work Product	Notes re potential claims arising out of Sunbeam acquisition.
281		07/07/1998	Wachtell Lipton		Attorney-Client, Work Product	Memorandum re potential claims arising out of Sunbeam acquisition.
282		07/08/1998	Adam O. Emmerich, Esq., Frank Miller, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., James Maher, William Nesbitt, Todd Slotkin, Irwin Engelman, Glenn Dickes, Esq., Joram Salig, Esq., Valerie Radwaner, Esq. (cc), Steven Cohen, Esq. (cc), Michael Schwartz, Esq. (cc), Paul Rowe, Esq. (cc), Rachelle Silverberg, Esq. (cc), Alexander Shaknes, Esq. (cc), Harold Novikoff, Esq. (cc), Peter Canellos, Esq. (cc), David Einhorn, Esq. (cc), Deborah Paul, Esq. (cc), Michael Katzke, Esq. (cc), Ilene K. Gotts, Esq. (cc), Michael Jahnke, Esq. (cc)	Attorney-Client, Work Product	Memorandum re attached draft documents.
282	A	07/08/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft warrant term sheet prepared in connection with Sunbeam/Coleman (Parent) settlement.
282	B	07/08/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft warrant prepared in connection with Sunbeam/Coleman (Parent) settlement.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
282	C	07/08/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft settlement agreement.
283		08/06/1998	Adam O. Emmerich, Esq., Frank Miller, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., James Maher, Irwin Engelman, William Nesbitt, Todd Slotkin, Glenn Dickes, Esq., Joram Salig, Esq., Valerie Radwaner, Esq. (cc)	Attorney-Client, Work Product	Memorandum re attached draft documents.
283	A	08/06/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft settlement agreement.
283	B	08/06/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft warrant.
284		07/30/1998	Adam O. Emmerich, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., James Maher	Attorney-Client, Work Product	Memorandum re attached draft document.
284	A	07/30/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft memorandum to Sunbeam re potential claims arising from Sunbeam acquisition.
285		07/31/1998	Michael Katzke, Esq.	Glenn Dickes, Esq., Adam O. Emmerich, Esq. (cc)	Attorney-Client, Work Product	Memorandum re attached draft documents.
285	A	07/30/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement term sheet for J. Levin prepared in connection with providing legal advice and anticipated litigation.
285	B	07/31/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for J. Levin prepared in connection with providing legal advice and anticipated litigation.
285	C	07/31/1998	Wachtell Lipton		Attorney-Client, Work Product	Black-lined version of draft employment agreement for J. Levin with providing legal advice and anticipated litigation.
285	D	07/30/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement term sheet for P. Shapiro prepared in connection with providing legal advice and anticipated litigation.
285	E	07/31/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for P. Shapiro preapred in connection with providing legal advice and anticipated litigation.
285	F	07/30/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement term sheet for B. Jenkins prepared in connection with providing legal advice and anticipated litigation.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
285	G	07/31/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for B. Jenkins prepared in connection with providing legal advice and anticipated litigation.
285	H	07/30/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement term sheet for G. Wisler prepared in connection with providing legal advice and anticipated litigation.
285	I	07/31/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for G. Wisler prepared in connection with providing legal advice and anticipated litigation.
285	J	07/30/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement term sheet for J. Nold prepared in connection with providing legal advice and anticipated litigation.
285	K	07/31/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for J. Nold prepared in connection with providing legal advice and anticipated litigation.
285	L	07/30/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement term sheet for F. Feraco prepared in connection with providing legal advice and anticipated litigation.
285	M	07/31/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for F. Feraco prepared in connection with providing legal advice and anticipated litigation.
285	N	07/30/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement term sheet for K. Clark prepared in connection with providing legal advice and anticipated litigation.
285	O	07/31/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for K. Clark prepared in connection with providing legal advice and anticipated litigation.
286		00/00/0000	Susan Powell, Esq.		Attorney-Client, Work Product	Notes re Sunbeam employment agreements prepared in connection with providing legal advice and anticipated litigation.
287		01/06/1999	Rachelle Silverberg, Esq.	Eric Golden, Esq.	Attorney-Client, Work Product	Memorandum re attached draft documents.
287	A	01/06/1999	Wachtell Lipton		Attorney-Client, Work Product	Draft pleading for Shallal litigation.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
287	B	01/06/1999	Wachtell Lipton		Attorney-Client, Work Product	Draft pleading for Shallal litigation.
288		01/06/1999	Wachtell Lipton		Attorney-Client, Work Product	Draft pleading for Shallal litigation with attorney notes.
289		01/06/1999	Wachtell Lipton		Attorney-Client, Work Product	Draft pleading for Shallal litigation with attorney notes.
290		01/06/1999	Wachtell Lipton		Attorney-Client, Work Product	Draft pleading for Shallal litigation.
291		01/05/1999	Wachtell Lipton		Attorney-Client, Work Product	Draft pleading for Shallal litigation.
292		01/05/1999	Wachtell Lipton		Attorney-Client, Work Product	Draft pleading for Shallal litigation.
293		01/05/1999	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Draft pleading for Shallal litigation with R. Silverberg's handwritten notes.
294		01/05/1999	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Draft pleading for Shallal litigation with R. Silverberg's handwritten notes.
295		12/28/1998	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Draft pleading for Shallal litigation with R. Silverberg's handwritten notes.
296		12/28/1998	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Draft pleading for Shallal litigation with R. Silverberg's handwritten notes.
297		00/00/0000	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Attorney notes re Shallal litigation.
298		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Draft motion for Shallal litigation with R. Silverberg's handwritten notes.
299		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Draft motion for Shallal litigation with R. Silverberg's handwritten notes.
300		01/25/1999	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Notes re Shallal case.
301		00/00/0000	Deborah Paul, Esq.		Attorney-Client	Draft materials for Coleman Board of Directors meeting with attorney's handwritten notes prepared for the purpose of providing legal advice.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
302		00/00/0000	Frank Miller, Esq.		Attorney-Client	Notes re CLN Holdings, Inc. Form 8-K dated 2/27/1998 prepared for the purpose of providing legal advice.
303		02/27/1998	Coleman Company, Inc.	Frank Miller, Esq.	Attorney-Client	Materials re merger agreement disclosure schedules prepared for the purpose of providing legal advice.
304		00/00/0000	Frank Miller, Esq.		Attorney-Client	Notes re Coleman Worldwide Corp. Form 8-K dated 2/27/1998 prepared for the purpose of providing legal advice.
305		00/00/0000	Frank Miller, Esq.		Attorney-Client	Notes re Coleman Company, Inc. Form 8-K dated 2/27/1998 prepared for the purpose of providing legal advice.
306		00/00/0000	Susan Powell, Esq.		Attorney-Client, Work Product	Draft employment agreement for J. Levin with S. Powell's handwritten notes prepared in connection with providing legal advice and anticipated litigation.
307		07/09/1998	Frank Miller, Esq.	Adam O. Emmerich, Esq., Paul Rowe, Esq., Rachelle Silverberg, Esq., Alexander Shaknes, Esq.	Attorney-Client, Work Product	E-mail re draft settlement agreement.
307	A	07/09/1998	Joram Salig, Esq.	Frank Miller, Esq.	Attorney-Client, Work Product	Facsimile re draft settlement agreement.
308		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Notes re Sunbeam / Coleman (Parent) settlement.
309		07/31/1998	Michael Katzke, Esq.		Attorney-Client, Work Product	Memorandum re Sunbeam employment agreements with M. Katzke's handwritten notes prepared in connection with providing legal advice and anticipated litigation.
310		08/07/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement prepared in connection with providing legal advice and anticipated litigation.
311		08/10/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft Sunbeam employment agreement with S. Powell's handwritten notes prepared in connection with providing legal advice and anticipated litigation.
312		07/31/1998	William Nesbitt	Adam O. Emmerich, Esq., Michael Schwartz, Esq.	Attorney-Client, Work Product	Correspondence re warrants and attached documents prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.
312	A	00/00/0000	William Nesbitt		Attorney-Client, Work Product	Excerpt of Schedule 14A with handwritten notes re warrants prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman.
313		03/02/1998	Steven Isko, Esq.	Michael Katzke, Esq.	Attorney-Client	Memorandum re Coleman stock options information prepared for the purpose of providing legal advice.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
314		12/17/1998	Norman Ginstling, Esq.		Attorney-Client, Work Product	Memorandum re tax issues prepared in connection with Sunbeam/Coleman (Parent) settlement.
315		00/00/0000	Norman J. Ginstling, Esq.		Attorney-Client, Work Product	Excerpt of merger agreement with N. Ginstling's handwritten notes prepared in connection with Sunbeam/Coleman (Parent) settlement.
315	A	00/00/0000	Norman J. Ginstling, Esq.		Attorney-Client, Work Product	Excerpt of Sunbeam / Coleman (Parent) settlement agreement with N. Ginstling's handwritten notes.
316		00/00/0000	Norman Ginstling, Esq.		Attorney-Client, Work Product	Draft legal opinion re tax issues prepared in connection with Sunbeam/Coleman (Parent) settlement.
317		09/06/1998	Norman Ginstling, Esq.	Barry F. Schwartz, Esq., Irwin Engelman	Attorney-Client, Work Product	Fax re attached document prepared in connection with Sunbeam/Coleman (Parent) settlement.
317	A	00/00/0000	Norman Ginstling, Esq.		Attorney-Client, Work Product	Draft analysis re tax issues prepared in connection with Sunbeam/Coleman (Parent) settlement.
318		09/06/1998	Norman Ginstling, Esq.	Barry F. Schwartz, Esq., Irwin Engelman	Attorney-Client, Work Product	Fax re attached document prepared in connection with Sunbeam/Coleman (Parent) settlement.
318	A	00/00/0000	Norman Ginstling, Esq.		Attorney-Client, Work Product	Draft memorandum re tax issues prepared in connection with Sunbeam/Coleman (Parent) settlement.
318	B	00/00/0000	Norman Ginstling, Esq.		Attorney-Client, Work Product	Draft agreement re tax issues prepared in connection with Sunbeam/Coleman (Parent) settlement.
319		00/00/0000	Paul Rowe, Esq.		Attorney-Client, Work Product	Notes re potential claims arising from Sunbeam's acquisition.
320		00/00/0000	Paul Rowe, Esq.		Attorney-Client, Work Product	Handwritten notes re potential claims arising from Sunbeam's acquisition.
321		00/00/0000	Paul Rowe, Esq.		Attorney-Client, Work Product	Handwritten notes re potential claims arising from Sunbeam's acquisition.
322		00/00/0000	Paul Rowe, Esq.		Attorney-Client, Work Product	Handwritten notes re potential claims arising from Sunbeam's acquisition.
323		07/21/1998	Adam O. Emmerich, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., James Maher, William Nesbitt	Attorney-Client, Work Product	Memorandum re attached draft document.
323	A	07/21/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft letter to Sunbeam re claims arising out of Sunbeam acquisition.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
324		07/22/1998	Barry F. Schwartz, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Correspondence re attached draft letter.
324	A	07/22/1998	Barry F. Schwartz, Esq.		Attorney-Client, Work Product	Draft letter to Sunbeam re claims arising out of Sunbeam acquisition.
325		07/22/1998	Barry F. Schwartz, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Correspondence re H. Gittis' 7/22/98 letter to H. Kristol prepared in connection with providing legal advice and anticipated litigation.
326		08/10/1998	Adam O. Emmerich, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., James Maher, Irwin Engelman, William Nesbitt, Todd Slotkin, Glenn Dickes, Esq., Joram Salig, Esq., Valerie Radwaner, Esq.	Attorney-Client, Work Product	Memorandum re attached draft documents.
326	A	08/10/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft settlement agreement.
326	B	08/10/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft warrant prepared in connection with Sunbeam/Coleman (Parent) settlement.
326	C	08/10/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft Amendment to Registration Rights Agreement prepared in connection with Sunbeam/Coleman (Parent) settlement.
327		07/07/1998	Paul Rowe, Esq.		Attorney-Client, Work Product	Draft settlement agreement with P. Rowe's handwritten comments.
328		08/31/1998	Joram Salig, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Correspondence re attached draft document prepared in connection with Sunbeam/Coleman (Parent) settlement.
328	A	08/31/1998	Joram Salig, Esq.		Attorney-Client, Work Product	Draft Form 4 prepared in connection with Sunbeam/Coleman (Parent) settlement.
329		02/26/1998	Anthony Ian	Frank Miller, Esq.	Attorney-Client	Memorandum re Coleman insurance issues reflecting information provided by client for purpose of obtaining legal services.
329	A	02/27/1998	Wachtell Lipton		Attorney-Client	Draft provisions re insurance issues prepared for the purpose of providing legal advice.
330		03/20/1998	Robert Fleder, Esq., Cass G. Adelman, Esq.	Joram Salig, Esq., Steven Isko, Esq., John Winkel, Lawrence Winoker, Gerry Kessel, Michael Katzke, Esq., Karen Clark, Kyle Wendt	Attorney-Client	Correspondence re attached draft document prepared for purpoises of providing legal advice.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
330	A	03/20/1998	Robert Fleder, Esq., Cass G. Adelman, Esq.		Attorney-Client	Draft agreement re employee benefit plans prepared for the purpose of providing legal advice.
331		00/00/0000	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Handwritten notes re Shallal litigation.
332		00/00/0000	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Notes re Shallal litigation.
333		00/00/0000	Steven Cohen, Esq.		Attorney-Client, Work Product	Handwritten notes re tax issues prepared in connection with Sunbeam/Coleman (Parent) settlement.
334		08/12/1998	Adam O. Emmerich, Esq., Steven Cohen, Esq., Frank Miller, Esq.	Barry F. Schwartz, Esq., Glenn Dickes, Esq., William Nesbitt, James Maher, Joram Salig, Esq.	Attorney-Client, Work Product	Memorandum re attached draft documents.
334	A	08/12/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft consent of Coleman (Parent) Board of Directors re Sunbeam settlement.
334	B	08/12/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft Coleman (Parent) Board resolution re Sunbeam settlement.
335		08/11/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft warrant.
336		07/29/1998	Paul Rowe, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product	Memorandum re attached notes.
336	A	07/29/1998	Paul Rowe, Esq.		Attorney-Client, Work Product	Handwritten notes re claims arising from Sunbeam acquisition.
337		08/12/1998	Karen Krueger, Esq.		Attorney-Client, Work Product	Draft employment agreement for G. Wisler with attorney's handwritten notes prepared in connection with providing legal advice and anticipated litigation.
338		08/12/1998	Adam O. Emmerich, Esq., Steven Cohen, Esq., Frank Miller, Esq.	Barry F. Schwartz, Esq., Glenn Dickes, Esq., William Nesbitt, James Maher, Joram Salig, Esq.	Attorney-Client, Work Product	Memorandum re attached draft document.
338	A	08/12/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft Schedule 13D Amendment prepared in connection with Sunbeam/Coleman (Parent) settlement.
339		00/00/0000	Steven Cohen, Esq.		Attorney-Client, Work Product	Excerpt of draft settlement agreement with attorney's handwritten notes.
340		08/11/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft Amendment to Registration Rights Agreement prepared in connection with Sunbeam/Coleman (Parent) settlement.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
341		07/07/1998	Adam O. Emmerich, Esq., Frank Miller, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., James Maher, William Nesbitt, Todd Slotkin, Irwin Engelman, Glenn Dickes, Esq., Joram Salig, Esq.	Attorney-Client, Work Product	Memorandum re attached draft documents.
341	A	07/07/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft warrant term sheet prepared in connection with Sunbeam/Coleman (Parent) settlement.
341	B	07/07/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft warrant.
341	C	07/07/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft settlement agreement.
341	D	07/07/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft warrant.
341	E	07/07/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft settlement agreement.
342		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for G. Wisler prepared in connection with providing legal advice and anticipated litigation.
343		08/19/1998	Susan Powell, Esq.	Joram Salig, Esq.	Attorney-Client, Work Product	Correspondence re attached draft document.
343	A	08/14/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for J. Levin prepared in connection with providing legal advice and anticipated litigation.
344		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for G. Wisler with P. Shapiro's comments prepared in connection with providing legal advice and anticipated litigation.
345		07/30/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft settlement agreement with attorney's handwritten notes.
346		08/14/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for P. Shapiro prepared in connection with providing legal advice and anticipated litigation.
347		00/00/0000	Susan Powell, Esq.		Attorney-Client, Work Product	Handwritten notes re draft Sunbeam employment agreements prepared in connection with providing legal advice and anticipated litigation.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
348		08/06/1998	Michael Katzke, Esq.	Joram Salig, Esq., Susan Powell, Esq.	Attorney-Client, Work Product	Fax re attached draft document.
348	A	08/06/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement prepared in connection with providing legal advice and anticipated litigation.
349		08/12/1998	Adam O. Emmerich, Esq., Steven Cohen, Esq., Frank Miller, Esq.	Barry F. Schwartz, Esq., Glenn Dickes, Esq., William Nesbitt, James Maher, Joram Salig, Esq.	Attorney-Client, Work Product	Memorandum re attached draft document.
349	A	08/12/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft warrant term sheet prepared in connection with Sunbeam/Coleman (Parent) settlement.
350		02/18/1999	Glenn Dickes, Esq.	Todd Slotkin	Attorney-Client, Work Product	Memorandum re attached draft document.
350	A	02/18/1999	Glenn Dickes, Esq.		Attorney-Client, Work Product	Draft confidentiality agreement re Sunbeam prepared in connection with providing legal advice and pending litigation.
351		03/16/1998	Barry F. Schwartz, Esq.	James Conroy, Esq.	Attorney-Client, Work Product	Memorandum re attached draft document prepared in anticipation of litigation relating to SEC/NYSE inquiry.
351	A	03/16/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft response to SEC and NYSE requests for information prepared in anticipation of litigation relating to inquiry.
352		06/15/1998	Wachtell Lipton		Attorney-Client, Work Product	Excerpt of draft Schedule 13D with J. Conroy's handwritten notes prepared in connection with providing legal advice and anticipated litigation.
353		01/25/1999	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Notes re Coleman shareholder litigation.
354		00/00/0000	Paul Rowe, Esq.		Attorney-Client, Work Product	Draft analysis re Sunbeam acquisition prepared in connection with providing legal advice and anticipated litigation.
355		03/17/1998	Wachtell Lipton		Attorney-Client	Draft Section 14(f) notice prepared for the purpose of providing legal advice.
356		07/23/1998	William Nesbitt	Ronald Perelman	Attorney-Client, Work Product	Draft analysis re Sunbeam acquisition prepared in connection with potential litigation re same.
357		04/16/1998	Adam O. Emmerich, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq., Paul Shapiro, Esq.	Attorney-Client	Memorandum re attached draft document.
357	A	04/16/1998	Wachtell Lipton		Attorney-Client	Draft memorandum re Coleman employee benefits issues prepared in connection with providing legal advice.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
358		03/24/1998	Gary Leshko	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Letter re attached document.
358	A	00/00/0000	Litigation Counsel to CLN Holdings		Attorney-Client, Work Product	Response to request for information re pending CLN Holdings litigation.
359		00/00/0000	Adam O. Emmerich, Esq.		Attorney-Client	Draft merger agreement with A. Emmerich's handwritten notes prepared for the purpose of providing legal advice.
360		00/00/0000	Wachtell Lipton		Attorney-Client	Summary re merger agreement issues prepared for the purpose of providing legal advice.
360	A	02/24/1998	Adam O. Emmerich, Esq.	Steven Cohen, Esq., Frank Miller, Esq., David Einhorn, Esq. (cc), Michael Katzke, Esq. (cc)	Attorney-Client	E-mail re draft merger agreement prepared for the purpose of providing legal advice.
361		02/24/1998	Michael Katzke, Esq.	Steven Cohen, Esq., Adam O. Emmerich, Esq. (cc), Frank Miller, Esq. (cc)	Attorney-Client	E-mail re employee benefit issues in merger agreement prepared for the purpose of providing legal advice.
362		03/03/1998	Lenny Ajzenman	Sarah Strasser, Esq.	Attorney-Client	Portion of draft Hart-Scott-Rodino filing with client's handwritten notes provided for purpose of obtaining legal services.
363		00/00/0000	Deborah Paul, Esq.		Attorney-Client	Draft merger agreement disclosure schedules with D. Paul's handwritten notes prepared for the purpose of providing legal advice.
364		02/27/1998	Deborah Paul, Esq.		Attorney-Client	Excerpt of draft merger agreement with attorney's handwritten notes re tax issues prepared for the purpose of providing legal advice.
365		02/27/1998	Deborah Paul, Esq.	Norman Gintsling, Esq., Marvin Shaffer	Attorney-Client	Correspondence re attached draft document prepared for the purpose of providing legal advice.
365	A	02/27/1998	Deborah Paul, Esq.		Attorney-Client	Draft section of merger agreement with attorney's handwritten notes prepared for the purpose of providing legal advice.
366		02/27/1998	Deborah Paul, Esq.	Norman Gintsling, Esq.	Attorney-Client	Draft section of merger agreement prepared for the purpose of providing legal advice.
367		02/24/1998	Steven Isko, Esq.	Michael Katzke, Esq.	Attorney-Client	Materials re employee benefit issues provided for purpose of obtaining legal services.
368		02/24/1998	Steven Isko, Esq.	Michael Katzke, Esq.	Attorney-Client	Materials re employee benefit issues provided for purpose of obtaining legal services.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
369		02/26/1998	Wachtell Lipton		Attorney-Client	Draft Coleman severance policy prepared for the purpose of providing legal advice.
370		06/10/1998	Michael Katzke, Esq.	Karen Krueger, Esq.	Attorney-Client, Work Product	Memorandum re attached draft document with M. Katzke's handwritten notes prepared in connection with providing legal advice and anticipated litigation.
370	A	06/10/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment termination agreement with M. Katzke's handwritten notes prepared in connection with providing legal advice and anticipated litigation.
371		03/05/1998	Ilene K. Gotts, Esq., Sarah Strasser, Esq.	Steven Isko, Esq., Karen Clark	Attorney-Client	Memorandum re foreign antitrust issues prepared for the purpose of providing legal advice.
373		08/10/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft resolution re employment terms prepared in connection with providing legal advice and anticipated litigation.
374		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for J. Levin prepared in connection with providing legal advice and anticipated litigation.
375		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for P. Shapiro prepared in connection with providing legal advice and anticipated litigation.
376		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for B. Jenkins prepared in connection with providing legal advice and anticipated litigation.
377		08/12/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for G. Wisler prepared in connection with providing legal advice and anticipated litigation.
378		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for F. Feraco prepared in connection with providing legal advice and anticipated litigation.
379		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for K. Clark prepared in connection with providing legal advice and anticipated litigation.
380		08/12/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for F. Feraco prepared in connection with providing legal advice and anticipated litigation.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
381		08/12/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for K. Clark prepared in connection with providing legal advice and anticipated litigation.
382		05/17/1999	Wachtell Lipton	Rachelle Silverberg, Esq.	Attorney-Client, Work Product	Draft pleading for Coleman shareholder litigation with R. Silverberg's notes.
383		02/00/1999	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Notes re 2/27/98 Coleman Co., Inc. board meeting prepared in connection with providing legal advice and pending litigation.
384		05/26/1999	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Draft pleading for Coleman shareholder litigation with R. Silverberg's notes.
385		01/26/1999	Colleen Schmidt	Eric Golden, Esq.	Work Product	Memorandum re shareholder litigation.
386		01/19/2000	Eric Golden, Esq.	Barry F. Schwartz, Esq.	Work Product, Attorney-Client	Fax re attached document prepared in connection with providing legal advice and pending litigation (Redacted from CP 044434).
387		11/18/1998	Barry F. Schwartz, Esq.	Eric Golden, Esq.	Work Product, Attorney-Client	Note re attached document prepared in connection with providing legal advice and pending litigation (Redacted from CP 044435).
388		11/13/1998	Eric Golden, Esq.	Colleen Schmidt	Work Product, Attorney-Client	Notes re attached document prepared in connection with providing legal advice and pending litigation (Redacted from CP 044448).
389		11/02/1998	Barry F. Schwartz, Esq.	Ronald Perelman, Howard Gittis, Esq., James Maher, Irwin Engelman, Todd Slotkin, William Nesbitt	Attorney-Client, Work Product	Memorandum re attached document prepared in connection with providing legal advice and pending litigation(Redacted from CP 044451).
390		11/13/1998	Robert Saunders, Esq.	Janet Kelley, Esq., Barry F. Schwartz, Esq., Eric Golden, Esq., Michael Schwartz, Esq., Thomas Allingham II, Esq. (cc), Timothy Reynolds (cc), Robert Zimet (cc), Kevin Maloy, Esq. (cc)	Attorney-Client, Work Product, Common Interest	Correspondence re attached document.
390	A	11/13/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Summary of shareholder litigation status.
391		12/22/1998	Megan McIntyre, Esq.	Thomas Allingham II, Esq., Michael Schwartz, Esq., Rachelle Silverberg, Esq., Eric Golden, Esq.	Attorney-Client, Work Product, Common Interest	Letter re attached draft document.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
391	A	12/22/1998	Grant & Eisenhofer		Attorney-Client, Work Product, Common Interest	Draft motion for Joerger litigation.
392		10/21/1998	Janet Kelley, Esq.	Barry F. Schwartz, Esq., Paul Shapiro, Esq. (cc), Thomas Allingham II, Esq. (cc)	Attorney-Client, Work Product, Common Interest	Correspondence re Shallal litigation.
393		12/23/1998	Beth Jacobwitz, Esq.	Thomas Allingham II, Esq., Michael Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Correspondence re attached draft document.
393	A	12/23/1998	Beth Jacobwitz, Esq.		Attorney-Client, Work Product, Common Interest	Draft motion re Shallal litigation.
394		02/23/1998	Wachtell Lipton		Attorney-Client	Draft summary of proposed Sunbeam acquisition terms prepared for the purpose of providing legal advice.
395		11/10/1998	Glenn Dickes, Esq.	Todd Slotkin	Attorney-Client, Work Product	Correspondence re credit agreement prepared in connection with providing legal advice and pending litigation.
396		11/10/1998	Glenn Dickes, Esq.	Todd Slotkin	Attorney-Client, Work Product	Correspondence re credit agreement prepared in connection with providing legal advice and pending litigation.
397		00/00/0000	Michael Katzke, Esq.		Attorney-Client	Handwritten notes re Sunbeam's 401(K) and Profit Sharing plans prepared for the purpose of providing legal advice (Redacted from CP 12664-12672 and CP 27957-27965).
398		03/09/1998	Sarah Strasser, Esq.		Attorney-Client	Memorandum re foreign antitrust filings with S. Strasser's handwritten notes prepared for the purpose of providing legal advice.
398	A	03/09/1998	Coleman Company Inc.'s German Sales Office		Attorney-Client	Summary of foreign competition issues related to Sunbeam acquisition with S. Strasser's notes prepared for the purpose of providing legal advice.
398	B	00/00/0000	Sarah Strasser, Esq.		Attorney-Client	Handwritten notes re foreign competition filings prepared for the purpose of providing legal advice.
399		00/00/0000	Frank Miller, Esq.		Attorney-Client, Work Product	Notes re Sunbeam / Coleman (Parent) settlement issues prepared in connection with Sunbeam/Coleman (Parent) settlement.
400		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Analysis re Sunbeam acquisition issues prepared in connection with Coleman Shareholder litigation.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
401		02/26/1998	Adam O. Emmerich, Esq.		Attorney-Client	Draft letter re Sunbeam acquisition with attorney's handwritten notes prepared for the purpose of providing legal advice.
402		00/00/0000	Jenner & Block		Attorney-Client, Work Product	Notes re discovery response (Redacted from CP 030352).
403		08/27/1999	Steven Daniels, Esq.	Adam O. Emmerich, Esq., Michael Schwartz, Esq.	Attorney-Client, Work Product	Memorandum re attached draft document prepared in connection with providing legal advice and pending litigation.
403	A	08/27/1999	Skadden Arps		Attorney-Client, Work Product	Draft amendment to Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
404		01/31/1999	Irwin H. Warren, Esq.	Robert Saunders, Esq., Kevin Maloy, Esq., Rachelle Silverberg, Esq.	Attorney-Client, Work Product, Common Interest	Correspondence re attached draft document.
404	A	01/31/1999	Robert Saunders, Esq.		Attorney-Client, Work Product, Common Interest	Draft pleading for Shallal litigation with I. Warren's handwritten notes.
405		02/01/1999	Kevin Maloy, Esq.	Beth Jacobwitz, Esq., Tim Greensfelder, Esq., Rachelle Silverberg, Esq.	Attorney-Client, Work Product, Common Interest	Correspondence re attached draft documents.
405	A	02/01/1999	Robert Saunders, Esq.		Attorney-Client, Work Product, Common Interest	Draft memorandum re pleading for Shallal litigation with R. Silverberg's handwritten notes.
406		01/31/1999	Robert Saunders, Esq.	Beth Jacobwitz, Esq., Tim Greensfelder, Esq., Rachelle Silverberg, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re attached draft document.
406	A	01/31/1999	Robert Saunders, Esq.		Attorney-Client, Work Product, Common Interest	Draft pleading for Shallal litigation with R. Silverberg's handwritten notes.
407		12/22/1998	Richard Berman, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product, Common Interest	Draft affidavit for Shallal litigation.
408		01/06/1999	Beth Jacobwitz, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product, Common Interest	Correspondence re attached draft documents.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
408	A	01/06/1999	Weil Gotshal		Attorney-Client, Work Product, Common Interest	Draft pleading for Shallal litigation.
408	B	01/06/1999	Weil Gotshal		Attorney-Client, Work Product, Common Interest	Draft pleading for Shallal litigation.
409		12/23/1998	Wachtell Lipton	Beth Jacobwitz, Esq.	Attorney-Client, Work Product, Common Interest	Draft motion re Shallal litigation.
410		00/00/0000	Skadden Arps		Work Product, Common Interest	Report re pending litigation.
411		11/04/1998	Michael Schwartz, Esq.	Adam O. Emmerich, Esq., Rachelle Silverberg, Esq., Frank Miller, Esq.	Attorney-Client, Work Product	Memorandum re attached document.
411	A	10/29/1998	Thomas Allingham II, Esq., Robert Saunders, Esq., Kevin M. Maloy, Esq.	Janet Kelley, Esq., Barry F. Schwartz, Esq., Paul Shapiro, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re pending litigation.
412		02/26/1998	Adam O. Emmerich, Esq.		Attorney-Client	Letter re Sunbeam acquisition with attorney's notes prepared for the purpose of providing legal advice.
413		05/25/1998	Adam O. Emmerich, Esq., Michael Katzke, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq.	Attorney-Client, Work Product	Memorandum re Sunbeam prepared in connection with providing legal advice and anticipated litigation.
414		00/00/0000	Eric Golden, Esq.		Work Product	Notes re Ulfsson complaint. (Redacted form as CP 31013-31022).
415		05/25/1998	Adam O. Emmerich, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq.	Attorney-Client, Work Product	Memorandum re attached document prepared in connection with providing legal advice and anticipated litigation.
415	A	05/25/1998	Wachtell Lipton		Attorney-Client, Work Product	Memorandum re Sunbeam prepared in connection with providing legal advice and anticipated litigation.
416		00/00/0000	Larry Winoker		Attorney-Client, Work Product	Handwritten notes re article prepared in connection with preparation of Doc. No. 417 and at direction of counsel.
417		06/09/1998	William Nesbitt	Ronald Perelman, Donald Drapkin, Esq. (cc), Howard Gittis, Esq. (cc), Jerry Levin (cc), James Maher (cc), Barry F. Schwartz, Esq. (cc)	Attorney-Client, Work Product	Draft memorandum re article prepared at request of B. Schwartz, Esq. prepared in connection with providing legal advice and anticipated litigation.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
418		00/00/0000	Larry Winoker		Attorney-Client, Work Product	Handwritten notes re Sunbeam Form 10-Q for period ending 3/31/1998 prepared in connection with preparation of Doc. No. 419 and at direction of counsel.
419		00/00/0000	Eric Golden, Esq.		Work Product	Notes re Mintz complaint (Redacted from CP 039608-039652, CP 030969-031012).
420		03/11/1998	Steven Isko, Esq.	Barry F. Schwartz, Esq., Joram Salig, Esq., Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Correspondence re NYSE request for information prepared in anticipation of litigation relating to inquiry.
421		02/24/1998	William Nesbitt	Adam O. Emmerich, Esq.	Attorney-Client	Memorandum re attached document.
421	A	02/24/1998	William Nesbitt		Attorney-Client	Analysis of Sunbeam proposal prepared for the purpose of obtaining legal advice.
422		00/00/0000	Alexander Shaknes, Esq.		Attorney-Client, Work Product	Notes on draft Sunbeam submission to SEC prepared in anticipation of litigation relating to inquiry.
423		04/28/1998	Glenn Dickes, Esq.	Frank Miller, Esq., Joram Salig, Esq. (cc), Barry F. Schwartz, Esq. (cc)	Attorney-Client	Correspondence re Sunbeam letter re employee benefits prepared in connection with providing legal advice.
424		03/04/1998	Adam O. Emmerich, Esq., Michael Katzke, Esq.		Attorney-Client	Draft memorandum re applicability of federal securities laws.
425		03/05/1998	Michael Katzke, Esq.	Barry F. Schwartz, Esq., Steven Isko, Esq., Adam O. Emmerich, Esq. (cc)	Attorney-Client	Memorandum re applicability of federal securities laws.
426		10/28/1998	Barry F. Schwartz, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Correspondence re Coleman shareholder litigation.
427		05/17/1999	Thomas Allingham II, Esq., Robert Saunders, Esq., Kevin M. Maloy, Esq.	Janet Kelley, Esq., Steven Isko, Esq., Paul Shapiro, Esq., Barry F. Schwartz, Esq., Eric Golden, Esq., Michael Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re attached draft document.
427	A	05/17/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft pleading for Coleman shareholder litigation.
428		07/30/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft pleading for Coleman shareholder litigation.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
429		06/23/1999	Robert Saunders, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product, Common Interest	E-mail re draft pleading for Coleman shareholder litigation.
430		02/09/1999	Kevin M. Maloy, Esq.	Rachelle Silverberg, Esq.	Work Product, Common Interest	Fax re Coleman shareholder litigation.
430	A	00/00/0000	Skadden Arps		Work Product, Common Interest	Proposed document redactions for document production in Coleman shareholder litigation.
431		11/02/1999	Thomas Allingham II, Esq.	Michael Schwartz, Esq., Paul Shapiro, Esq., Steven Isko, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached draft letter.
431	A	11/02/1999	Thomas Allingham II, Esq.		Work Product, Common Interest	Draft letter to Court in Coleman shareholder litigation.
432		01/12/1999	Robert Saunders, Esq.	Michael Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached document.
432	A	01/12/1999	Robert Saunders, Esq.	Michael Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Report re pending litigation.
433		10/27/1998	Barry F. Schwartz, Esq., William Nesbitt		Attorney-Client, Work Product	Letter re Coleman shareholder litigation with B. Schwartz' and W. Nesbitt's handwritten notes.
434		04/00/1998	William Nesbitt		Attorney-Client	Notes re Sunbeam 1998 proxy materials prepared at the request of B. Schwartz, Esq. prepared in connection with providing legal advice.
434	A	04/29/1998	Barry F. Schwartz, Esq., Esq.	William Nesbitt	Attorney-Client	Memorandum re attached Sunbeam proxy materials prepared in connection with providing legal advice.
434	B	04/00/1998	William Nesbitt		Attorney-Client	Notes re Sunbeam's 1998 proxy statement prepared at the request of B. Schwartz, Esq. prepared in connection with providing legal advice. (Redacted from CP 041844-041860).
434	C	04/00/1998	William Nesbitt		Attorney-Client	Notes re Schedule 14A prepared at the request of B. Schwartz, Esq. prepared in connection with providing legal advice. (Redacted from CP 041861-041906).
435		00/00/0000	William Nesbitt		Attorney-Client, Work Product	Notes re Sunbeam stock options prepared at the request of B. Schwartz, Esq. in connection with potential litigation.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
436		00/00/0000	Rachelle Silverberg, Esq.		Work Product	Notes re Morgan Stanley materials prepared in anticipation of litigation relating to Sunbeam's acquisition of CPH's interest in Coleman. (Redacted from CP 016766).
437		00/00/0000	Rachelle Silverberg, Esq.		Work Product	Notes re witness interview prepared in connection with response to SEC and NYSE's request for information prepared in anticipation of litigation relating to inquiry. (Redacted from CPH2011532).
438		00/00/0000	Paul Rowe, Esq.		Attorney-Client, Work Product	Handwritten notes re potential claims arising from Sunbeam's acquisition.
438	A	00/00/0000	William Nesbitt, Paul Rowe, Esq.		Attorney-Client, Work Product	Notes re Sunbeam transaction prepared in anticipation of litigation and at the direction of counsel with P. Rowe's handwritten notes.
439		03/29/1999	Eric Golden, Esq.	Michael Schwartz, Esq.	Attorney-Client, Work Product	Fax re Krim litigation.
440		04/19/1999	Eric Golden, Esq.	Michael Schwartz, Esq.	Attorney-Client, Work Product	Fax re Krim litigation.
441		11/02/1999	Eric Golden, Esq.	Barry F. Schwartz, Esq.	Attorney-Client, Work Product	Draft letter to court re Coleman shareholder litigation with E. Golden notes.
442		06/30/1998	Barry F. Schwartz, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Fax re attached document.
442	A	06/25/1998	Stacy J. Kanter	Michele Gartland, Esq., Leander Gray, Esq., Rosa Testani, Esq. (cc)	Attorney-Client, Work Product	Memorandum re LYONs issues with attorney's notes prepared in connection with providing legal advice and anticipated litigation.
442	B	06/25/1998	Rosa Testani, Esq.	Barry F. Schwartz, Esq., Glenn Dickes, Esq.	Attorney-Client, Work Product	Fax re attached document.
443		00/00/0000	Wachtell Lipton		Attorney-Client, Work Product	Draft Sunbeam response to SEC and NYSE requests for information with attorney's handwritten notes prepared in anticipation of litigation relating to inquiry.
444		05/13/1999	Steven Daniels, Esq.	Paul Shapiro, Esq., Janet Kelley, Esq., Barry F. Schwartz, Esq., Steven Isko, Esq., Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Memorandum re attached draft document prepared in connection with providing legal advice and pending litigation.
444	A	05/00/1999	Adam O. Emmerich, Esq.		Attorney-Client, Work Product	Excerpt of draft Sunbeam Form S-4 with A. Emmerich's handwritten notes prepared in connection with providing legal advice and pending litigation.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
445		11/00/1999	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Excerpt of draft Sunbeam Form S-4 with R. Silverberg's handwritten notes prepared in connection with providing legal advice and pending litigation.
446		00/00/0000	Ilene K. Gotts, Esq.		Attorney-Client	Draft Sunbeam Form S-4 with I. Gott's handwritten comments prepared for the purpose of providing legal advice.
447		11/05/1999	Steven Isko, Esq.	Barry F. Schwartz, Esq., Adam O. Emmerich, Esq., Blaine Fogg, Esq., Richard Easton, Esq.	Attorney-Client, Work Product	Fax re attached document prepared in connection with providing legal advice and pending litigation.
447	A	11/00/1999	Steven Isko, Esq., Paul Shapiro, Esq.		Attorney-Client, Work Product	Section of draft Sunbeam Form S-4 with attorney's notes prepared in connection with providing legal advice and pending litigation.
448		11/04/1999	Rachelle Silverberg, Esq.	Steven Isko, Esq.	Attorney-Client, Work Product	Memorandum enclosing section of draft Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
448	A	10/18/1999	Wachtell Lipton		Attorney-Client, Work Product	Section of draft Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
449		10/06/1999	Steven Daniels, Esq.	Steven Isko, Esq., Paul Shapiro, Esq., Karen Clark, Esq., Blaine Fogg, Esq., Michael Schwartz, Esq., Steve Thibault, Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Memorandum re section of draft Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
449	A	10/00/1999	Rachelle Silverberg, Esq.		Attorney-Client, Work Product	Section of draft Sunbeam Form S-4 with R. Silverberg's handwritten notes prepared in connection with providing legal advice and pending litigation.
450		07/00/1998	Adam O. Emmerich, Esq.		Attorney-Client, Work Product	Draft Amendment to Credit Agreement with A. Emmerich's handwritten notes prepared in connection with providing legal advice and anticipated litigation.
451		06/29/1998	Adam O. Emmerich, Esq.		Attorney-Client, Work Product	Draft amendment to credit agreement with A. Emmerich's handwritten notes prepared in connection with providing legal advice and anticipated litigation.
455		03/27/1998	Adrian Deitz, Esq.	Adam O. Emmerich, Esq., Steven Cohen, Esq., Frank Miller, Esq.	Attorney-Client, Common Interest	Correspondence re attached draft document prepared for the purpose of providing legal advice.
455	A	03/27/1998	Skadden Arps		Attorney-Client, Common Interest	Draft CLN Holdings Officer's Certificate prepared for the purpose of providing legal advice.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
456		07/29/1998	Paul Rowe, Esq.		Attorney-Client, Work Product	Handwritten notes re potential claims against Sunbeam.
457		08/12/1998	Steven Cohen, Esq.		Attorney-Client, Work Product	Draft press release re Sunbeam settlement with S. Cohen's notes.
457	A	08/12/1998	Steven Cohen, Esq.		Attorney-Client, Work Product	Draft letter to Sunbeam's shareholders re Sunbeam settlement with S. Cohen's handwritten notes.
458		08/15/1998	Rita W. Gordon, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached document.
458	A	04/14/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft response to SEC's requests for information prepared in anticipation of litigation relating to inquiry.
459		04/17/1998	Frank Miller, Esq.	Richard Easton, Esq., Rita W. Gordon, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re attached draft document.
459	A	00/00/0000	Wachtell Lipton		Attorney-Client, Work Product, Common Interest	Draft response to SEC's requests for information with attorney's notes prepared in anticipation of litigation relating to inquiry.
460		04/16/1998	Rita W. Gordon, Esq.	Frank Miller, Esq., Adam O. Emmerich, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached document.
460	A	04/16/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft response to SEC's requests for information prepared in anticipation of litigation relating to inquiry.
461		03/06/1998	Wachtell Lipton	Ilene K. Gotts, Esq.	Attorney-Client	Fax re attached document prepared for the purpose of providing legal advice.
461	A	03/06/1998	Ioannis Zervas, Esq.	Ilene K. Gotts, Esq.	Attorney-Client, Common Interest	Fax re attached document prepared for the purpose of providing legal advice.
461	B	00/00/0000	Skadden Arps		Attorney-Client, Common Interest	Draft European pre-merger notification prepared for the purpose of providing legal advice.
461	C	03/13/1996	Skadden Arps		Attorney-Client, Common Interest	Draft European pre-merger notification prepared for the purpose of providing legal advice.
461	D	03/04/1996	Skadden Arps		Attorney-Client, Common Interest	Draft European pre-merger notification prepared for the purpose of providing legal advice.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
461	E	03/12/1996	Skadden Arps		Attorney-Client, Common Interest	Draft European pre-merger notification prepared for the purpose of providing legal advice.
462		11/17/1999	Blaine Fogg, Esq.	Thomas Allingham II, Esq., Richard Easton, Esq., Tom Balliett, Adam O. Emmerich, Esq., Steven Isko, Esq., Barry F. Schwartz, Esq., Paul Shapiro, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re attached document.
462	A	11/17/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Excerpts of draft Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
463		11/15/1999	Blaine Fogg, Esq.	Thomas Allingham II, Esq., Richard Easton, Esq., Adam O. Emmerich, Esq., Steven Isko, Esq., Barry F. Schwartz, Esq., Paul Shapiro, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re attached document.
463	A	11/15/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Excerpts of draft Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
464		11/12/1999	Steven Isko, Esq.	Richard Easton, Esq., Thomas Allingham II, Esq., Adam O. Emmerich, Esq., Barry F. Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached document.
464	A	00/00/0000	Paul Shapiro, Esq.		Attorney-Client, Work Product, Common Interest	Excerpt of draft Sunbeam Form S-4 with P. Shapiro's comments prepared in connection with providing legal advice and pending litigation.
465		11/12/1999	Blaine Fogg, Esq.	Richard Easton, Esq., Thomas Allingham II, Esq., Adrian Deitz, Esq., Steven Isko, Esq., Barry F. Schwartz, Esq., Paul Shapiro, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached document.
465	A	11/12/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Excerpt of draft Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
466		11/05/1999	Steven Isko, Esq.	Barry F. Schwartz, Esq., Adam O. Emmerich, Esq., Blaine Fogg, Esq., Richard Easton, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached document.
466	A	00/00/0000	Steven Isko, Esq.		Attorney-Client, Work Product, Common Interest	Excerpt of draft Sunbeam Form S-4 with attorney's notes prepared in connection with providing legal advice and pending litigation.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
467		11/05/1999	Blaine Fogg, Esq.	Richard Easton, Esq., Adam O. Emmerich, Esq., Steven Isko, Esq., Barry F. Schwartz, Esq., Paul Shapiro, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re attached draft document.
467	A	11/00/1999	Blaine Fogg, Esq.		Attorney-Client, Work Product, Common Interest	Excerpt of draft Sunbeam Form S-4 with attorney's notes prepared in connection with providing legal advice and pending litigation.
468		11/19/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft letter to SEC re Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
469		10/06/1999	Steven Daniels, Esq.	Blaine Fogg, Esq. (cc), Richard Easton, Esq. (cc), Paul Shapiro, Esq., Karen Clark, Esq., Steven Isko, Esq., Adam O. Emmerich, Esq., Michael Schwartz, Esq., Steve Thibault, Allison Amorison, Esq., Matthew Greenberg, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re attached draft document.
469	A	10/06/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Excerpt of draft Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
470		01/27/1999	Robert Saunders, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached document.
470	A	01/27/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Excerpt of draft Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
471		03/07/1998	Sarah Strasser, Esq.	Iaonnis Zervas, Esq.	Attorney-Client, Common Interest	Fax re attached draft document prepared for the purpose of providing legal advice.
471	A	03/06/1998	Sarah Strasser, Esq.		Attorney-Client, Common Interest	Draft European pre-merger notification containing S. Strasser notes prepared for the purpose of providing legal advice.
472		05/12/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft response to SEC comments on draft Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
474		04/17/1998	Frank Miller, Esq.	Richard Easton, Esq., Allison Amorison, Esq., Steven Daniels, Esq.	Attorney-Client, Common Interest	Memorandum re attached draft document.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
474	A	04/07/1998	Wachtell Lipton		Attorney-Client, Common Interest	Draft Sunbeam Form S-4 with attorney's notes prepared in connection with providing legal advice.
475		05/07/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft Sunbeam Form S-4 amendment prepared in connection with providing legal advice and pending litigation.
476		05/10/1999	Steven Daniels, Esq.	Adam O. Emmerich, Esq., Michael Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re Sunbeam Form S-4 amendment prepared in connection with providing legal advice and pending litigation.
476	A	05/10/1999	Allison Amorison, Esq., Steven Daniels, Esq., Matthew Greenberg, Esq.	Paul Shapiro, Esq., Janet Kelley, Esq., Bobby Jenkins, Karen Clark, Esq., John Frederick, Barry F. Schwartz, Esq., Steven Isko, Esq., Blaine Fogg, Esq., Richard Easton, Esq., Mitchell Solomon, Esq., Joseph Halliday, Larry Frishman, Esq., Robert Zimet, Esq., Thomas Allingham, Esq., Matthew Knopf, Esq., William Weiss, Esq., Thomas Gowan, Esq., Robert Saunders, Esq., Prabhat Mehta, Esq., Christopher Malloy, Esq., Kevin Maloy, Esq., Jeffrey Laska, Esq., Steve Thibault, Noel Spiegal, Adam O. Emmerich, Esq., Steven Cohen, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re attached draft document.
477		05/05/1999	Matthew Greenberg, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached draft document.
477	A	05/04/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Section of draft Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
478		03/20/1998	Ionnis Zervas, Esq.	Ilene K. Gotts, Esq., Michael Jahnke, Esq.	Attorney-Client, Common Interest	Fax re attached document prepared for the purpose of providing legal advice.
478	A	03/20/1998	Ionnis Zervas, Esq.	Janet Kelley, Esq., Allison Amorison, Esq., Michael Jahnke, Esq., Steven Isko, Esq., Robert Rozenzweig, Barry Hawk (cc), Henry Huser (cc), Joe Nisa (cc)	Attorney-Client, Common Interest	Memorandum re European antitrust issues prepared for the purpose of providing legal advice.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
479		03/03/1998	Ionnis Zervas, Esq.	Sarah Strasser, Esq.	Attorney-Client, Common Interest	Fax re attached documents prepared for the purpose of providing legal advice.
479	A	03/03/1998	Henry Huser, Esq., Ioannis Zervas, Esq.	Richard Easton, Esq. (cc), Joe Nisa (cc), Sarah Strasser, Esq.	Attorney-Client, Common Interest	Memorandum re European antitrust issues prepared for the purpose of providing legal advice.
479	B	03/03/1998	Skadden Arps		Attorney-Client, Common Interest	Outline re European antitrust opinion prepared for the purpose of providing legal advice.
480		03/06/1998	Ioannis Zervas, Esq.	Ilene K. Gotts, Esq., Sarah Strasser, Esq.	Attorney-Client, Common Interest	Fax re attached documents prepared for the purpose of providing legal advice.
480	A	03/29/1998	Skadden Arps		Attorney-Client, Common Interest	Outline of draft French submission prepared for the purpose of providing legal advice.
480	B	03/06/1998	Henry Huser, Esq.	Steven Isko, Esq.	Attorney-Client, Common Interest	Letter re European antitrust issues prepared for the purpose of providing legal advice.
481		05/05/1999	Matthew Greenberg, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached draft document prepared in connection with providing legal advice and pending litigation.
481	A	05/04/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Excerpt of draft Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
482		05/10/1999	Steven Daniels, Esq.	Adam O. Emmerich, Esq., Michael Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re draft Subbeam Form S-4 amendment prepared in connection with providing legal advice and pending litigation.
483		08/06/1998	Thomas Allingham II, Esq.	Barry F. Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached draft document.
483	A	08/06/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Memorandum re draft agreement with former Sunbeam management prepared in connection with Sunbeam/Coleman (Parent) settlement.
484		08/30/1999	Rachelle Silverberg, Esq.	Steven Daniels, Esq., Thomas Allingham, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re attached draft document prepared in connection with providing legal advice and pending litigation.
484	A	00/00/0000	Rachelle Silverberg, Esq.		Attorney-Client, Work Product, Common Interest	Excerpt of draft Sunbeam Form S-4 with R. Silverberg's notes prepared in connection with providing legal advice and pending litigation.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
485		08/24/1999	Blaine Fogg, Esq.	Thomas Allingham, Esq., Richard Easton, Esq., Robert Saunders, Esq., Karen Clark, Esq., Bobby Jenkins, Paul Shapiro, Esq., Steven Isko, Esq., Barry F. Schwartz, Esq., Adam O. Emmerich, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re draft Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
485	A	08/24/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft response to SEC comments on draft Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
487		05/12/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
488		06/23/1998	Todd E. Freed, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached draft document prepared in connection with providing legal advice and anticipated litigation.
488	A	06/23/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft Sunbeam Form S-3 pepared in connection with providing legal advice and anticipated litigation.
489		06/19/1998	Adam O. Emmerich, Esq.	Richard Easton, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached document prepared in connection with providing legal advice and anticipated litigation.
489	A	06/19/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft insert to Sunbeam Form S-3 prepared in connection with providing legal advice and anticipated litigation.
490		06/19/1998	Blaine Fogg, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached draft document.
490	A	06/19/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft press release re Sunbeam Form S-3 prepared in connection with providing legal advice and anticipated litigation.
491		06/23/1998	Todd E. Freed, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached draft document.
491	A	06/23/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft Sunbeam Form S-3 prepared in connection with providing legal advice and anticipated litigation.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
492		06/19/1998	Todd E. Freed, Esq.	Jerry Levin, Peter Langerman, Janet Kelley, Esq., Robert Gluck, Ron Richter, Blaine Fogg, Esq., Richard Easton, Esq., Gregory Fernicola, Esq., Mitchell Solomon, Esq., Peter Neckles, Esq., Michele Gartland, Esq., Allison Amorison, Esq., William Weiss, Esq., Adrian Deitz, Esq., Steven Daniels, Esq., Matthew Greenberg, Esq., Irwin Engelman, Howard Gittis, Esq., Paul Shapiro, Esq., Donald Drapkin, Barry F. Schwartz, Esq., Glenn Dickes, Esq., Adam O. Emmerich, Esq., Michael Schwartz, Esq., Harold Novikoff, Esq., Frank Miller, Esq., Steven Cohen, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum enclosing Draft Sunbeam Form S-3 prepared in connection with providing legal advice and anticipated litigation.
492	A	06/00/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft Press Release re Sunbeam Form S-3 prepared in connection with providing legal advice and anticipated litigation.
492	B	06/22/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft Sunbeam Form S-3 prepared in connection with providing legal advice and anticipated litigation.
493		06/00/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft Sunbeam Form S-3 prepared in connection with providing legal advice and anticipated litigation.
495		04/30/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft Sunbeam Form S-4 prepared in connection with providing legal advice and anticipated litigation.
496		05/12/1999	Adam O. Emmerich, Esq.	Richard Easton, Esq., Steven Isko, Esq., Barry F. Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re attached draft document prepared in connection with providing legal advice and pending litigation.
496	A	05/11/1999	Wachtell Lipton		Attorney-Client, Work Product, Common Interest	Draft Sunbeam Form S-4 amendment with A. Emmerich's notes prepared in connection with providing legal advice and pending litigation.
497		08/18/1999	Steven Isko, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Draft response to SEC comment on Sunbeam Form S-4 prepared in connection with Sunbeam/Coleman (Parent) settlement.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
498		03/19/1998	Steven Daniels, Esq.	Frank Miller, Esq.	Attorney-Client, Common Interest	Correspondence re attached draft document prepared for the purpose of providing legal advice.
498	A	03/19/1998	Skadden Arps		Attorney-Client, Common Interest	Draft outline for Sunbeam Form S-4 prepared for the purpose of providing legal advice.
499		05/07/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft letter to SEC responding to comments on Form S-4 prepared in connection with providing legal advice and pending litigation.
500		05/10/1999	Steven Daniels, Esq.	Adam O. Emmerich, Esq., Michael Schwartz, Esq., Richard Easton, Esq. (cc)	Attorney-Client, Work Product, Common Interest	Memorandum re draft amendment to Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation. (Redacted from CP 044459)
501		05/07/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft Sunbeam Form S-4 amendment prepared in connection with providing legal advice and pending litigation.
502		11/18/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft amendment to Sunbeam Form S-4 prepared in connection with providing legal advice and pending litigation.
503		04/17/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft Sunbeam Form S-4 prepared in connection with providing legal advice and anticipated litigation.
504		04/30/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft Sunbeam Form S-4 prepared in connection with providing legal advice and anticipated litigation.
505		04/24/1998	Frank Miller, Esq.	Barry F. Schwartz, Esq., James Maher, Esq., William Nesbitt, Joram Salig, Esq., Steve Isko, Esq., Adam O. Emmerich, Esq. (cc), Paul Rowe, Esq. (cc), Rachelle Silverberg, Esq. (cc)	Attorney-Client, Work Product	Memorandum re attached draft documents prepared in anticipation of litigation relating to SEC/NYSE inquiry.
505	A	04/23/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft response to SEC and NYSE requests for information prepared in anticipation of litigation relating to inquiry.
507		06/22/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft Sunbeam Form S-3 prepared in connection with providing legal advice and anticipated litigation.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
508		05/14/1999	Adam O. Emmerich, Esq.	Richard Easton, Esq., Steven Daniels, Esq.	Attorney-Client, Work Product, Common Interest	Draft section of Sunbeam Form S-4 with attorney's handwritten notes prepared in connection with providing legal advice and pending litigation.
509		03/13/1998	Allison Amorison, Esq.	Frank Miller, Esq.	Attorney-Client, Common Interest	Correspondence re attached draft document prepared for the purpose of providing legal advice.
509	A	03/13/1998	Skadden Arps		Attorney-Client, Common Interest	Section of draft Section 14(f) Notice with attorney's comments prepared for the purpose of providing legal advice.
510		03/16/1998	Allison Amorison, Esq., Steven Daniels, Esq.	Frank Miller, Esq.	Attorney-Client, Common Interest	Memorandum re attached draft document prepared for the purpose of providing legal advice.
510	A	03/16/1998	Skadden Arps		Attorney-Client, Common Interest	Draft Section 14(f) notice with Skadden comments prepared for the purpose of providing legal advice.
511		03/04/1998	Steven Daniels, Esq.	Frank Miller, Esq., Allison Amorison, Esq. (cc)	Attorney-Client, Common Interest	Memorandum re draft Section 14(f) notice prepared for the purpose of providing legal advice.
512		06/22/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft Sunbeam Form S-3 prepared in connection with providing legal advice and anticipated litigation.
513		06/24/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft insert for Sunbeam Form S-3 prepared in connection with providing legal advice and anticipated litigation.
514		03/20/1998	Ionnis Zervas, Esq.	Janet Kelley, Esq., Allison Amorison, Esq., Michael Jahnke, Esq., Steven Isko, Esq., Robert Rozenzweig, Barry Hawk (cc), Henry Huser (cc), Joe Nisa (cc)	Attorney-Client, Common Interest	Memorandum re German antitrust filing prepared for the purpose of providing legal advice. (Redacted from CP 044102).
515		03/08/1998	Sarah Strasser, Esq.	Dan Peterson, Steven Isko, Esq. (cc), Karen Clark (cc), Ilene K. Gotts, Esq. (cc)	Attorney-Client	Memorandum re foreign antitrust filings and attached document prepared for the purpose of providing legal advice.
515	A	03/06/1998	Sarah Strasser, Esq.		Attorney-Client	Excerpt of draft foreign antitrust filing prepared for the purpose of providing legal advice with S. Strasser's handwritten notes.
516		03/06/1998	Sarah Strasser, Esq.	Iaonnis Zervas, Esq.	Attorney-Client, Common Interest	Memorandum re attached draft document prepared for the purpose of obtaining legal advice.
516	A	03/06/1998	Sarah Strasser, Esq.		Attorney-Client, Common Interest	Draft foreign antitrust filing re Sunbeam acquisition with S. Strasser's handwritten notes prepared for the purpose of obtaining legal advice.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
517		03/05/1998	Michael Jahnke, Esq.	Craig Ronan, Esq.	Attorney-Client	Correspondence re attached draft document prepared for the purpose of providing legal advice.
517	A	03/05/1998	Wachtell Lipton		Attorney-Client	Portion of draft Hart-Scott-Rodino filing prepared for the purpose of providing legal advice.
520		03/05/1998	Michael Jahnke, Esq.	Craig Ronan, Esq.	Attorney-Client	Correspondence re attached draft documents prepared for the purpose of providing legal advice.
520	A	03/04/1998	Wachtell Lipton		Attorney-Client	Portion of draft Hart-Scott-Rodino filing prepared for the purpose of providing legal advice.
522		03/23/1998	Rosa Testani, Esq.	Glenn Dickes, Esq., Martha Sanders, Adam O. Emmerich, Esq. (cc), Blaine Fogg, Esq. (cc), Stacy J. Kanter	Attorney-Client, Common Interest	Memorandum re attached draft document prepared for the purpose of providing legal advice.
522	A	03/23/1998	Skadden Arps		Attorney-Client, Common Interest	Draft letter to LYONs trustees prepared for the purpose of providing legal advice.
522	B	03/23/1998	Skadden Arps		Attorney-Client	Draft notice of LYONs redemption prepared for the purpose of providing legal advice.
523		03/05/1998	Craig V. Ronan, Esq.	Michael Jahnke, Esq.	Attorney-Client	Correspondence re draft Hart-Scott-Rodino filing prepared for the purpose of providing legal advice.
524		08/14/1998	Richard Easton, Esq.	Adam O. Emmerich, Esq., Steven Jacobs, Esq. , Janet Kelley, Esq., Peter Langerman, Barry F. Schwartz, Esq., Paul Shapiro, Esq., Blaine Fogg, Esq. (cc), Allison Amorison, Esq. (cc)	Attorney-Client, Work Product, Common Interest	Memorandum re application for NYSE exception prepared in connection with Sunbeam/Coleman (Parent) settlement.
525		08/10/1998	Blaine Fogg, Esq.	Howard Kristol , Peter Langerman, Steven Jacobs, Esq. , Irwin Warren, Esq., Jerry Levin, Paul Shapiro, Esq., Barry F. Schwartz, Esq., Adam O. Emmerich, Esq., Michael Schwartz, Esq., Richard Easton, Esq., Allison Amorison, Esq.	Attorney-Client, Work Product, Common Interest	Fax re application to NYSE for exception prepared in connection with Sunbeam/Coleman (Parent) settlement.
526		08/12/1998	Marc Shiffman	Barry F. Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Draft exhibit to NYSE application for exception prepared in connection with Sunbeam/Coleman (Parent) settlement.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
527		08/07/1998	Blaine Fogg, Esq.	Adam O. Emmerich, Esq., David Fannin, Steven Jacobs, Esq. , Howard Kristol , Peter Langerman, Barry F. Schwartz, Esq., Paul Shapiro, Esq., Irwin Warren, Esq., Allison Amorison, Esq. (cc)	Attorney-Client, Work Product, Common Interest	Memorandum re attached draft documents prepared in connection with Sunbeam/Coleman (Parent) settlement.
527	A	08/07/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft exhibit to application for NYSE exception prepared in connection with Sunbeam/Coleman (Parent) settlement.
527	B	08/07/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft exhibit to application for NYSE exception with attorney's handwritten notes prepared in connection with Sunbeam/Coleman (Parent) settlement.
527	C	08/07/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft exhibit to application for NYSE exception prepared in connection with Sunbeam/Coleman (Parent) settlement.
528		08/10/1998	Beth Jacobwitz, Esq.	Michael Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Correspondence re attached draft documents prepared in connection with Sunbeam/Coleman (Parent) settlement.
528	A	08/09/1998	Irwin H. Warren, Esq.		Attorney-Client, Work Product, Common Interest	Draft letter to NYSE re application for exception with attorney's notes prepared in connection with Sunbeam/Coleman (Parent) settlement.
528	B	08/09/1998	Irwin H. Warren, Esq.		Attorney-Client, Work Product, Common Interest	Draft letter to NYSE re application for exception with attorney's notes prepared in connection with Sunbeam/Coleman (Parent) settlement.
529		08/03/1998	Blaine Fogg, Esq.	Adam O. Emmerich, Esq., David Fannin, Stephen Jacobs, Esq., Howard Kristol , Peter Langerman, Barry F. Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re attached draft documents prepared in connection with Sunbeam/Coleman (Parent) settlement.
529	A	08/03/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft letter to NYSE re application for exception prepared in connection with Sunbeam/Coleman (Parent) settlement.
529	B	08/03/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft letter to NYSE re application for exception prepared in connection with Sunbeam/Coleman (Parent) settlement.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
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Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
530		08/03/1998	Blaine Fogg, Esq.	Adam O. Emmerich, Esq., David Fannin, Stephen Jacobs, Esq., Howard Kristol , Peter Langerman, Barry F. Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Correspondence re attached draft documents prepared in connection with Sunbeam/Coleman (Parent) settlement.
530	A	08/03/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft exhibits to NYSE application for exception prepared in connection with Sunbeam/Coleman (Parent) settlement.
531		07/30/1998	Adam O. Emmerich, Esq.	Blaine Fogg, Esq.	Attorney-Client, Work Product, Common Interest	Draft letter to NYSE re application for exception prepared in connection with Sunbeam/Coleman (Parent) settlement.
532		07/31/1998	Blaine Fogg, Esq.	Adam O. Emmerich, Esq., David Fannin, Stephen Jacobs, Esq., Barry F. Schwartz, Esq., Allison Amorison, Esq.	Attorney-Client, Work Product, Common Interest	Correspondence re attached draft document prepared in connection with Sunbeam/Coleman (Parent) settlement.
532	A	07/31/1998	Blaine Fogg, Esq.		Attorney-Client, Work Product, Common Interest	Draft letter to NYSE re attached draft letter prepared in connection with Sunbeam/Coleman (Parent) settlement.
532	B	07/31/1998	Blaine Fogg, Esq.		Attorney-Client, Work Product, Common Interest	Draft letter to NYSE re application for exception prepared in connection with Sunbeam/Coleman (Parent) settlement.
533		04/16/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft response to SEC's request for information prepared in anticipation of litigation relating to inquiry.
534		03/09/1998	Sarah Strasser, Esq.		Attorney-Client	Draft European antitrust filing with S. Strasser's handwritten notes prepared for the purpose of providing legal advice.
535		04/15/1999	Eric Golden, Esq.	Michael Schwartz, Esq.	Attorney-Client, Work Product	Correspondence re attached draft document.
535	A	04/15/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft brief for Krim litigation.
536		11/05/1998	Eric Golden, Esq.	Michael Schwartz, Esq.	Attorney-Client, Work Product	Correspondence re attached document.
536	A	11/04/1998	Grace M. Aschenbrenner	Eric Golden, Esq., James P. S. Leeshaw (cc)	Attorney-Client, Work Product	Letter re Camden Asset litigation.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
537		04/16/1999	Christopher Malloy, Esq.	Mark Bideau, Esq., Eric Golden, Esq., Michael Mitchell, Esq., Barry F. Schwartz, Esq., Michael Schwartz, Esq., Thomas Allingham II, Esq.	Attorney-Client, Work Product, Common Interest	Correspondence re attached draft document.
537	A	04/16/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft brief for Krim litigation.
538		11/13/1998	William Sushon, Esq.	Barry F. Schwartz, Esq., Michael Schwartz, Esq. (cc)	Attorney-Client, Work Product	Memorandum re attached draft documents.
538	A	11/13/1998	Skadden Arps		Work Product, Common Interest	Draft motion to transfer Federal Insurance Co. litigation.
538	B	11/13/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft J. Kelley declaration in Federal Insurance Co. litigation.
538	C	11/13/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft notice of pendency of other actions in Camden Asset Management litigation.
539		12/23/1998	Richard Berman, Esq.		Attorney-Client, Work Product	Draft motion for Klewin litigation.
540		00/00/0000	Eric Golden, Esq.		Work Product	Notes re Cunningham complaint. (Redacted from CP 030931)
541		00/00/0000	Eric Golden, Esq.		Work Product	Notes re Shaev complaint (Redacted from CP 031023).
542		10/20/1998	Paul Shapiro, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Correspondence re attached draft document.
542	A	10/20/1998	Paul Shapiro, Esq.		Attorney-Client, Work Product	Draft letter to Sunbeam lenders re release of claims against Sunbeam.
543		04/29/1999	Allison Amorison, Esq., Steven Daniels, Esq., Matthew Greenberg, Esq.	Paul Shapiro, Esq., Janet Kelley, Esq., Bobby Jenkins, Karen Clark, Esq.J, John Frederick, Barry F. Schwartz, Esq., Steven Isko, Esq., Blaine Fogg, Esq., Richard Easton, Esq., Mitchell Solomon, Esq., Joseph Halliday, Gregory Fernicola, Esq., Larry Frishman, Esq., Robert Zimet, Esq., Thomas Allingham, Esq., Matthew Knopf, Esq., William Weiss, Esq., Tom Gowan, Esq.,	Attorney-Client, Work Product, Common Interest	Memorandum re attached document.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
				Robert Saunders, Esq., Prabhat Mehta, Esq., Christopher Malloy, Esq., Kevin Maloy, Esq., Jeffrey Laska, Esq., Steve Thibault, Noel Spiegal, Adam O. Emmerich, Esq., Steven Cohen, Esq.		
543	A	04/29/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft Sunbeam Form S-4 amendment prepared in connection with providing legal advice and pending litigation.
544		08/20/1998	Susan Powell, Esq.	Paul Shapiro, Esq.	Attorney-Client, Work Product	Memorandum re attached documents.
544	A	08/19/1998	Susan Powell, Esq.	Paul Shapiro, Esq.	Attorney-Client, Work Product	Memorandum re Sunbeam draft employment agreements prepared in connection with providing legal advice and pending litigation.
544	B	08/19/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for G. Wisler prepared in connection with providing legal advice and anticipated litigation.
544	C	08/19/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for K. Clark prepared in connection with providing legal advice and anticipated litigation.
544	D	08/19/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft employment agreement for F. Feraco prepared in connection with providing legal advice and anticipated litigation.
545		08/26/1999	Robert P. Totte	Marvin Shaffer, Michael Mullen (cc), Keith Brockman (cc), J. Van Gelder (cc)	Attorney-Client, Work Product	E-mail re tax issues prepared in connection with Sunbeam/Coleman (Parent) settlement.
546		07/19/2001	Robert P. Totte	Norman Ginstling, Esq.	Attorney-Client, Work Product	Letter re tax closing agreement.
550		08/14/1998	Skadden Arps	Peter Langerman, Howard Kristol , Barry F. Schwartz, Esq., Paul Shapiro, Esq., Stephen Jacobs, Esq., Irwin Warren, Esq., Adam O. Emmerich, Esq.	Attorney-Client, Work Product, Common Interest	Draft letter re pending litigation.
551		11/03/1998	Barry F. Schwartz, Esq.	Michael Schwartz, Esq.	Attorney-Client, Work Product	Fax re attached document

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
551	A	11/02/2000	Blaine Fogg, Esq.	Barry F. Schwartz, Esq., Paul Shapiro, Esq., Bobby Jenkins, Janet Kelley, Esq.	Attorney-Client, Work Product, Common Interest	Fax re correspondence concerning pending litigation.
552		01/23/1998	Paul Rowe, Esq.		Attorney-Client	Notes re Sunbeam proposal prepared for the purpose of providing legal advice. (Redacted CP 016751-58)
554		03/07/1998	Sarah Strasser, Esq.	Iaonnis Zervas, Esq.	Attorney-Client, Common Interest	Fax re attached document prepared for the purpose of providing legal advice.
554	A	03/07/1998	Sarah Strasser, Esq.		Attorney-Client, Common Interest	Draft European antitrust filing with S. Strasser's handwritten notes prepared for the purpose of providing legal advice.
555		04/24/1998	Frank Miller, Esq.	Barry F. Schwartz, Esq., James Maher, William Nesbitt, Joram Salig, Esq., Steven Isko, Esq., Adam O. Emmerich, Esq. (cc), Paul Rowe, Esq. (cc), Rachelle Silverberg, Esq. (cc)	Attorney-Client, Work Product	Memorandum re attached draft document.
555	A	04/23/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Excerpt of draft Sunbeam Form S-4 prepared in connection with providing legal advice and anticipated litigation.
556		03/23/1999	Brian M. Carolan	File	Attorney-Client, Work Product, Common Interest Accountant-Client	Memorandum regarding valuation of Sunbeam warrants for internal accounting purposes (Redacted from CP041767-CP041770).
556	A	08/14/1998	Ernst & Young, Brian M. Carolan		Accountant-Client	Excerpt of Sunbeam Form 8-K with handwritten marginalia.
556	B	00/00/0000	Ernst & Young, Brian M. Carolan		Accountant-Client Privilege	Summary of Ernst & Young valuation of Sunbeam Warrants.
556	C	08/12/1998	The Blackstone Group, LLP, Arthur Newman		Attorney-Client, Work Product, Common Interest, Accountant-Client	Excerpt from the report prepared by Blackstone Group, LLP for counsel to Sunbeam in connection with threatened litigation.
556	D	00/00/0000	Ernst & Young, Brian M. Carolan		Attorney-Client, Work Product, Common Interest, Accountant-Client	Summary of valuations of Sunbeam warrants performed by Ernst & Young and The Blackstone Group, LLP.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
557		08/12/1998	The Blackstone Group, LLP, Arthur Newman		Attorney-Client, Work Product, Common Interest	Report prepared by The Blackstone Group, LLP for counsel to Sunbeam in connection with threatened litigation; copy provided to B. Schwartz, Esq. on 11/16/1998 in connection with pending litigation.
558		10/30/1998	Adam O. Emmerich, Esq.	Barry F. Schwartz, Esq.	Attorney-Client, Work Product	Memorandum re shareholder litigation.
559		09/15/1998	Joram Salig, Esq.	Barry F. Schwartz, Esq.	Attorney-Client, Work Product	Memorandum re SEC reporting requirements prepared in connection with Sunbeam/Coleman (Parent) settlement.
560		09/04/1998	Barry F. Schwartz, Esq.	Herbert Mondros, Esq.	Attorney-Client, Work Product	Letter re Goldstein litigation.
561		01/19/2000	Eric Golden, Esq.	Barry F. Schwartz, Esq.	Attorney-Client, Work Product	Memorandum re attached document (Redacted from CP 45289).
562		10/14/1998	Cheryl Jackman	Anthony Ian, Barry F. Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Fax re McCall litigation (Redacted from CP 45458).
563		10/28/1998	Barry F. Schwartz, Esq.	James Maher, William Nesbitt	Attorney-Client, Work Product	Memorandum re attached letter (Redacted from CP 45695).
563	A	10/23/1998	Barry F. Schwartz, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Fax re attached letter (Redacted from CP 45698).
564		07/22/1998	Thomas Allingham II, Esq.	Barry F. Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Fax re In re Coleman Shareholders litigation (Redacted from CP 45720).
565		00/00/0000	Eric Golden, Esq.		Attorney-Client, Work Product	Memorandum re attached Yassin complaint (Redacted from CP 045784).
566		08/13/1998	Barry F. Schwartz, Esq.	Anthony Ian	Attorney-Client, Work Product	Fax message prepared for the purpose of providing legal advice (Redacted from CP 45519).
567		10/28/1998	Barry F. Schwartz, Esq.	Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Fax message re attached document (Redacted from CP 4032).
568		07/05/1998	Adam O. Emmerich, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq.	Attorney-Client, Work Product	Memorandum re attached draft letter.
568	A	07/05/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft letter re potential claims against Sunbeam.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
569		07/05/1998	Adam O. Emmerich, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq.	Attorney-Client, Work Product	Memorandum re attached draft letter.
569	A	07/06/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft letter re potential claims against Sunbeam.
570		07/05/1998	Adam O. Emmerich, Esq.	Howard Gittis, Esq., Barry F. Schwartz, Esq.	Attorney-Client, Work Product	Memorandum re attached draft letter.
570	A	07/05/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft letter re potential claims against Sunbeam.
571		02/24/1998	Steven Cohen, Esq.	Steven Isko, Esq.	Attorney-Client	Memoranda re Coleman prepared for the purpose of providing legal advice.
572		09/14/1998	Frank Miller, Esq.	Barry F. Schwartz, Esq., (cc) Michael W. Schwartz, Esq., (cc) Adam O. Emmerich, Esq.	Attorney-Client, Work Product	Memorandum re attached document.
572	A	09/14/1998	Wachtell Lipton		Attorney-Client, Work Product	Memorandum re Coleman merger.
573		00/00/0000	Wachtell Lipton		Attorney-Client	Summary of Sunbeam corporate structure issues prepared for the purpose of providing legal advice.
574		04/29/1999	Glenn P. Dickes, Esq.	Barry F. Schwartz, Esq.	Attorney-Client, Work Product	Fax discussing attached documents
574	A	00/00/1999	Glenn P. Dickes, Esq.	Barry F. Schwartz, Esq.	Attorney-Client, Work Product	Analysis of stock ownership prepared by in-house counsel for the purpose of providing legal advice.
575		04/29/1999	Barry F. Schwartz, Esq.	Glenn P. Dickes, Esq.	Attorney-Client, Work Product	Fax discussing attached document.
575	A	03/19/1999	Janet Kelley, Esq.	Barry F. Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Fax regarding disclosures in the Sunbeam Proxy Statement prepared in connection with providing legal advice and pending litigation.
576		11/06/1998	Adam O. Emmerich, Esq., Frank Miller, Esq.	Barry F. Schwartz, Esq. James R. Maher, William G. Nesbitt, Glenn P. Dickes, Esq., Joram Salig, Esq., James T. Conroy, Esq.	Attorney-Client, Work Product	Memorandum re attached document.
576	A	11/06/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft Schedule 13D prepared in connection with providing legal advice and pending litigation.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
577		10/20/1998	Wachtell Lipton		Attorney-Client, Work Product	Draft letter relating to Sunbeam/Coleman (Parent) settlement.
578		03/30/1998	Deborah A. Reiss, Esq.	Glenn P. Dickes, Esq., Valerie Radwaner, Esq. (cc)	Attorney-Client	Fax regarding Sunbeam shares prepared to provide legal advice.
579		09/25/2000	Stephen R. Blacklocks, Esq.	Davis W. Duke, Esq.	Work Product	Letter regarding Sunbeam litigation.
579	A	09/25/2000	Wachtell Lipton		Work Product	Draft affidavit prepared in connection with pending litigation.
580		09/26/2000	Stephen R. Blacklocks, Esq.	Davis W. Duke, Esq.	Work Product	Letter regarding Sunbeam litigation.
581		09/21/2000	Stephen R. Blacklocks, Esq.	Davis W. Duke, Esq.	Work Product	Letter regarding Sunbeam litigation.
582		00/00/0000	Glenn P. Dickes, Esq.		Attorney-Client, Work Product	Handwritten notes regarding Sunbeam bonds prepared in connection with providing legal advice and pending litigation.
583		00/00/0000	William Nesbitt		Attorney-Client, Work Product	Handwritten notes reflecting communications with counsel prepared in anticipation of litigation arising out of Sunbeam's acquisition of CPH's interest in Coleman.
584		02/17/2000	Stephen R. Blacklocks, Esq.	Eric Golden, Esq., Michael W. Schwartz, Esq. (cc), Rachelle Silverberg, Esq. (cc)	Work Product	Letter re Sunbeam Securities Litigation (redacted from CPH2000365).
585		09/29/2000	Stephen R. Blacklocks, Esq.	Davis W. Duke, Esq.	Work Product	Letter re Sunbeam Securities Litigation (redacted from CPH2000631).
586		10/02/2000	David W. Duke, Jr., Esq.	Stephen R. Blacklocks, Esq.	Work Product	Letter re Sunbeam Securities Litigation (redacted from CPH2000674).
587		12/28/2000	Stephen Blacklocks, Esq.		Work Product	Stephen Blacklocks' handwritten notes prepared in connection with Sunbeam Securities Litigation (redacted from CPH2000744).
588		10/20/1998	Herbert Weiswasser Mondros, Esq.	Eric Golden, Esq., Rachelle Silverberg, Esq.	Work Product	Letter regarding Goldstein and Joerger litigation.
589		08/04/2000	Stephen R. Blacklocks, Esq.		Attorney-Client, Work Product	Draft letter regarding Sunbeam litigation.
590		08/04/2000	Stephen R. Blacklocks, Esq.		Attorney-Client, Work Product	Draft letter regarding Sunbeam litigation.
591		06/29/1999	Robert S. Saunders, Esq.	Michael Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Fax cover sheet regarding attached documents prepared in connection with pending litigation (redacted from CP42021).

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
592		06/30/1998	Howard Gittis, Esq.	Janet Kelley, Esq.; Charles Elson (cc); Howard Kristol (cc); Peter Langerman (cc); William Rutter (cc); Faith Whittlesey (cc)	Attorney-Client, Work Product	Memorandum relating to Sunbeam's restatement investigation prepared for counsel in connection with anticipated litigation.
593		07/24/1998	William Nesbitt	Ronald O. Perelman; Howard Gittis, Esq. (cc); Donald Drapkin, Esq. (cc); James Maher (cc); Barry Schwartz, Esq. (cc)	Attorney-Client, Work Product	Memorandum relating to rescission analysis prepared for counsel in connection with anticipated litigation and legal advice.
593	A	00/00/0000	William Nesbitt		Attorney-Client, Work Product	Document relating to rescission analysis prepared for counsel in connection with anticipated litigation and legal advice.
594		12/31/1998	Skadden, Arps, Slate, Meagher & Flom		Attorney-Client, Work Product, Common Interest	Draft Sunbeam 10-K.
595		12/31/1998	Skadden, Arps, Slate, Meagher & Flom		Attorney-Client, Work Product, Common Interest	Draft Sunbeam 10-K.
596		06/25/1998	Robin Esterson	Jerry Levin; Joe Nold; Paul Shapiro, Esq. (cc); Bobby Jenkins (cc); Ron Dunbar (cc); Bob Knibb (cc); Marc Shiffman (cc); Gwen Wisler (cc)	Attorney-Client, Common Interest	Memorandum seeking legal advice concerning Sunbeam operations.
597		07/10/1998	Robin Esterson	Joe Nold; Karen Clark (cc); Gwen Wisler (cc); Bobby Jenkins (cc); Marc Shiffman (cc); Paul Shapiro, Esq. (cc); Jerry Levin (cc)	Attorney-Client, Common Interest	Memorandum seeking legal advice concerning Sunbeam operations.
598		08/02/1998	Robin Esterson	Jerry Levin; Joe Nold; John McNaboe; Paul Shapiro, Esq. (cc); Ron Dunbar (cc)	Attorney-Client, Common Interest	Memorandum seeking legal advice concerning Sunbeam operations.
599		00/00/0000	MacAndrews & Forbes Holdings Inc.	Ernst & Young	Accountant-Client	Document relating to calculation of balance sheet items for internal accounting purposes.
600		00/00/0000	MacAndrews & Forbes Holdings Inc.	Ernst & Young	Accountant-Client	Document relating to calculation of balance sheet items for internal accounting purposes.
601		00/00/0000	MacAndrews & Forbes Holdings Inc.	Ernst & Young	Accountant-Client	Document relating to calculation of balance sheet items for internal accounting purposes.
602		00/00/0000	MacAndrews & Forbes Holdings Inc.	Ernst & Young	Accountant-Client	Document relating to calculation of balance sheet items for internal accounting purposes.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
603		00/00/0000	MacAndrews & Forbes Holdings Inc.	Ernst & Young	Accountant-Client	Document relating to calculation of balance sheet items for internal accounting purposes.
604		00/00/0000	Paul Shapiro, Esq.	MacAndrews & Forbes Holdings Inc.	Attorney-Client	Document prepared for purposes of providing legal advice relating to Sunbeam's acquisition of CPH's interest in Coleman.
605		00/00/0000	MacAndrews & Forbes Holdings Inc.	Wachtell, Lipton, Rosen & Katz	Attorney-Client, Work Product	Document prepared for counsel in connection with the Sunbeam/Coleman (Parent) Settlement.
606		07/23/1996	Glenn P. Dickes, Esq.	Valerie Radwaner, Esq., Gregory J. Woodland	Attorney-Client	Memorandum re letter agreement with First Trust.
607		00/00/0000	Glenn P. Dickes, Esq.		Attorney-Client	Handwritten notes reflecting legal advice re First Trust.
608		06/14/1996	Valerie E. Radwaner, Esq. (Paul, Weiss, Rifkind, Wharton & Garrison)	Glenn P. Dickes, Esq., Deborah Reiss, Esq.	Attorney-Client	Fax re draft outline concerning LYONs and Citibank.
608		06/13/1996	Paul, Weiss, Rifkind, Wharton & Garrison	Glenn P. Dickes, Esq., Deborah Reiss, Esq.	Attorney-Client	Draft outline re exchange of LYONs for cash and subsequent pledge to Citibank.
609		07/07/1997	Glenn P. Dickes, Esq.	Stacy J. Kanter, Esq. (Skadden, Arps, Slate, Meagher & Flom), Rosa A. Testani, Esq. (Skadden, Arps, Slate, Meagher & Flom), Michelle Root (cc)	Attorney-Client	Fax re Coleman Worldwide Corporation Share Lending.
610		11/20/1997	Glenn P. Dickes, Esq.		Attorney-Client	Handwritten notes reflecting legal advice re Coleman LYONs Purchase.
610	A	11/19/1997	Skadden, Arps, Slate, Meagher & Flom	Glenn P. Dickes, Esq.	Attorney-Client	Draft Exchange Notice re Liquid Yield Option Notes.
610	B	11/19/1997	Skadden, Arps, Slate, Meagher & Flom	Glenn P. Dickes, Esq.	Attorney-Client	Draft letter re Receipt of Exchange.
610	C	11/19/1997	Skadden, Arps, Slate, Meagher & Flom	Glenn P. Dickes, Esq.	Attorney-Client	Draft letter re Exchange and Exercise of Cash Payment Option.
610	D	11/19/1997	Skadden, Arps, Slate, Meagher & Flom	Glenn P. Dickes, Esq.	Attorney-Client	Draft Officer's Certificate of CLN Holdings Inc.
610	E	11/20/1997	Rosa A. Testani, Esq. (Skadden, Arps, Slate, Meagher & Flom)	Glenn P. Dickes, Esq.	Attorney-Client	Fax attaching draft Offer to Accept for Exchange of Cash Any and All Outstanding Liquid Yield Option Notes.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
611		05/09/1997	Stacy J. Kanter, Esq. (Skadden, Arps, Slate, Meagher & Flom), Alan C. Myers, Esq.	Howard Gittis, Esq., Irwin Engelman, Esq., Barry F. Schwartz, Esq., Glenn P. Dickes, Esq.	Attorney-Client	Memorandum re Coleman Refinancing.
612		05/08/1997	Glenn P. Dickes, Esq.	Lenny Ajzenman, Terry C. Bridges, Norman Ginstling, Esq., Stephen F. Kaplan, Gerry R. Kesel, Jerry Levin, Michelle Root, Martha L. Sanders, Marvin A. Schaffer, Ernest Toth, Laurence Winoker, Joram C. Salig, Esq. (cc), Barry Schwartz, Esq. (cc)	Attorney-Client	Memorandum re Coleman Holdings Refinancing.
612	A	00/00/0000	Glenn P. Dickes, Esq.	Lenny Ajzenman, Terry C. Bridges, Norman Ginstling, Esq., Stephen F. Kaplan, Gerry R. Kesel, Jerry Levin, Michelle Root, Martha L. Sanders, Marvin A. Schaffer, Ernest Toth, Laurence Winoker, Joram C. Salig, Esq. (cc), Barry Schwartz, Esq. (cc)	Attorney-Client	Chart re Coleman Holdings Refinancing.
613		01/17/1997	Rosa A. Testani, Esq. (Skadden, Arps, Slate, Meagher & Flom)	Glenn P. Dickes, Esq., Terry Schimek, Esq., Stacy J. Kanter, Esq. (Skadden, Arps, Slate, Meagher & Flom)	Attorney-Client	Fax re analysis of an equity investment in The Coleman Company.
613	A	01/17/1997	Stacy J. Kanter, Esq. (Skadden, Arps, Slate, Meagher & Flom), Rosa A. Testani, Esq. (Skadden, Arps, Slate, Meagher & Flom)	Glenn P. Dickes, Esq.	Attorney-Client	Draft memorandum re preliminary analysis of issues relating to an equity investment in The Coleman Company Inc.
614		05/18/1995	Stacy J. Kanter, Esq. (Skadden, Arps, Slate, Meagher & Flom)	Glenn P. Dickes, Esq.	Attorney-Client	Fax re Coleman Holdings indenture.
614	A	00/00/0000	Skadden, Arps, Slate, Meagher & Flom	Glenn P. Dickes, Esq.	Attorney-Client	Portion of draft document re Coleman Holdings indenture.
615		03/25/2000	Glenn P. Dickes, Esq.		Attorney-Client	Handwritten notes re telephone conference with S. Kanter, Esq.
616		00/00/1996	Glenn P. Dickes, Esq.		Attorney-Client	Handwritten notes reflecting confidential information re Coleman Worldwide share lending.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
617		00/00/0000	Glenn P. Dickes, Esq.		Attorney-Client	Handwritten notes reflecting confidential information re Coleman Worldwide share lending.
618		03/25/1996	Terry E. Schimek, Esq.	Glenn P. Dickes, Esq.	Attorney-Client	Memorandum re Securities Lending.
618	A	12/25/1995	Terry E. Schimek, Esq.	Glenn P. Dickes, Esq.	Attorney-Client	Draft Securities Lending Authorization Agreement with handwritten comments of counsel.
619		02/24/1997	Paul, Weiss, Rifkind, Wharton & Garrison	Glenn P. Dickes, Esq.	Attorney-Client	Draft Summary of Terms and Conditions for Citibank.
620		02/26/1997	Paul, Weiss, Rifkind, Wharton & Garrison	Glenn P. Dickes, Esq.	Attorney-Client	Draft Second Amendment to Revolving Credit Agreement.
621		04/23/1998	Glenn P. Dickes, Esq.	Barry F. Schwartz, Esq.	Attorney-Client	Memorandum re Sunbeam Equity Hedge.
621	A	04/22/1998	Paul, Weiss, Rifkind, Wharton & Garrison	Glenn P. Dickes, Esq., Barry F. Schwartz, Esq.	Attorney-Client	Draft section of guaranty re equity hedge agreements containing marginalia.
622		05/18/1998	Emmerich, Adam (Wachtell Lipton)	Glenn P. Dickes, Esq.	Attorney-Client	Memorandum re hedge.
623		00/00/0000	Glenn P. Dickes, Esq.		Attorney-Client	Handwritten notes re Sunbeam Equity Hedge and Citibank Issues reflecting legal advice.
624		00/00/0000	Glenn P. Dickes, Esq.		Attorney-Client	Handwritten notes reflecting legal advice re hedge.
625		05/18/1998	Glenn P. Dickes, Esq.	Adam O. Emmerich, Esq., Harold Novikoff, Esq.	Attorney-Client	Fax re Sunbeam equity hedge.
626		04/04/1998	Glenn P. Dickes, Esq.		Attorney-Client	Handwritten notes re Sunbeam hedge reflecting analysis of legal issues.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

CPH PRIVILEGE LOG
Dated 09/20/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
627		07/22/1998	William G. Nesbitt	Barry F. Schwartz, Esq., Ronald Perelman, Howard Gittis, Esq. (cc), Jim Maher, Esq. (cc)	Attorney-Client, Work Product	Document relating to rescission claim prepared under direction of counsel in connection with anticipated litigation and legal advice.
627	A	07/22/1998	William G. Nesbitt	Barry F. Schwartz, Esq., Ronald Perelman, Howard Gittis, Esq. (cc), Jim Maher, Esq. (cc)	Attorney-Client, Work Product	Document relating to rescission prepared under direction of counsel in connection with anticipated litigation and legal advice.
628		07/23/1998	William G. Nesbitt	Ronald O. Perelman, Howard Gittis, Esq. (cc), Donald Drapkin (cc), Jim Maher, Esq. (cc), Barry F. Schwartz, Esq. (cc)	Attorney-Client, Work Product	Document relating to rescission prepared under direction of counsel in connection with anticipated litigation and legal advice.
628	A	07/23/1998	William G. Nesbitt	Ronald O. Perelman, Howard Gittis, Esq. (cc), Donald Drapkin (cc), Jim Maher, Esq. (cc), Barry F. Schwartz, Esq. (cc)	Attorney-Client, Work Product	Document relating to rescission prepared under direction of counsel in connection with anticipated litigation and legal advice.
629		07/27/1998	William G. Nesbitt	Ronald O. Perelman, Howard Gittis, Esq. (cc), Donald Drapkin (cc), Jim Maher, Esq. (cc), Barry F. Schwartz, Esq. (cc)	Attorney-Client, Work Product	Document relating to rescission prepared under direction of counsel in connection with anticipated litigation and legal advice.
629	A	07/27/1998	William G. Nesbitt	Ronald O. Perelman, Howard Gittis, Esq. (cc), Donald Drapkin (cc), Jim Maher, Esq. (cc), Barry F. Schwartz, Esq. (cc)	Attorney-Client, Work Product	Document relating to rescission prepared under direction of counsel in connection with anticipated litigation and legal advice.
630		11/30/1998	Barry F. Schwartz, Esq.	Howard Gittis, Esq.	Attorney-Client, Work Product	Memorandum concerning attached document.
630	A	11/30/1998	Blackstone Group LLP		Work Product	Excerpt from report prepared by Blackstone Group LLP for counsel to Sunbeam in connection with threatened litigation.
631		05/18/1998	Glenn P. Dickes, Esq.	Adam O. Emmerich, Esq., Harold Novikoff, Esq.	Attorney-Client	Fax re potential Sunbeam hedging transaction.
631	A	05/18/1998			Attorney-Client	Excerpt of credit agreement provided to counsel for purpose of seeking legal advice.
632		06/14/1998	Glenn P. Dickes, Esq.		Attorney-Client	Handwritten notes re potential Sunbeam stock transaction reflecting legal advice.
632	A	06/14/1998	Deborah Paul, Esq.	Harold Novikoff, Esq., David Einhorn, Esq.	Attorney-Client	Memorandum re potential Sunbeam stock transaction.
633		00/00/0000	Deborah Paul, Esq.		Attorney-Client	Draft Lock-Up Agreement with handwritten notes.

SEP-20-2004 17:33 JENNER AND BLOCK LLP 312 527 0484 P.03/04

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

CPH PRIVILEGE LOG
Dated 09/20/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
634		05/19/1998	Deborah Paul, Esq.		Attorney-Client	Draft Schedule to the Master Agreement between Bear Stearns and MacAndrews & Forbes Holdings Inc. with handwritten notes.
635		05/21/1998	Deborah Paul, Esq.		Attorney-Client	Draft Schedule to the Master Agreement between Goldman, Sachs & Co. and Coleman (Parent) Holdings Inc. with handwritten notes.
636		02/26/1998	Valerie E. Radwaner, Esq.	Adam O. Emmerich, Esq.	Attorney-Client	Memorandum re Mafco credit agreement.

16div-012931

EXHIBIT 2

KIRKLAND & ELLIS LLP
AND AFFILIATED PARTNERSHIPS

777 South Figueroa Street
Los Angeles, California 90017

Lawrence P. Bemis
To Call Writer Directly:
213 680-8413
lbemis@kirkland.com

213 680-8400

www.kirkland.com

Facsimile:
213 680-8500
Dir. Fax: 213 680-8500

March 15, 2005

Via Facsimile

Michael T. Brody
c/o Mafco Holdings Inc.
777 S. Flagler Drive
Suite 1200 - West Tower
West Palm Beach, FL 33401-6136

Re: ***Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co. Incorporated***

Dear Mr. Brody:

Please send me a copy of your Revised Privilege Log dated July 15, 2004, and any supplements thereto, sorted in chronological order. Your log, as provided to us and sorted by document number, is virtually impossible to work with. If you are unwilling to provide us with such a copy, please let me know so we can bring the matter to the attention of the court.

Best regards.

Very truly yours,

Lawrence P. Bemis

Lawrence P. Bemis

LPB:te
cc: J. Scarola
J. Ianno
M. Hansen

EXHIBIT 3

JENNER&BLOCK

March 15, 2005

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312-222-9350
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Michael T. Brody
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mbrody@jenner.com

By Telecopy

Lawrence P. Bemis, Esq.
KIRKLAND & ELLIS LLP
222 Lakeview Avenue
Suite 260
West Palm Beach, FL 33401

Re: ***Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.***

Dear Larry:

I write in response to your letter of March 14, 2005 requesting a chronologically sorted privilege log. We decline to provide the sorted log you request. I note that Morgan Stanley has itself produced privilege logs that are not sorted by date and I am unaware of any precedent or basis for your request.

Very truly yours,

Michael T. Brody

MTB:cjg

cc: Thomas A. Clare, Esq. (by telecopy)
Joseph Ianno, Esq. (by telecopy)
Mark C. Hansen, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.
Defendant.

NOTICE OF HEARING

YOU ARE HERBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: March 21, 2005

TIME: 9:30 a.m.

JUDGE: Honorable Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTER TO BE HEARD:

Morgan Stanley & Co. Incorporated's Motion to Remove Confidentiality Designations

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 16th day of March 2005.

Jeffrey S. Davidson
Lawrence P. Bemis (FL Bar No. 618349)
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Counsel for
Morgan Stanley & Co. Incorporated

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BY: Thomas A. Clare

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED'S
MOTION TO REMOVE CONFIDENTIALITY DESIGNATIONS

Morgan Stanley respectfully requests that the Court enter an Order removing the confidentiality designations from certain seven-year-old valuation documents of the Plaintiff. These documents are not of a current nature and are therefore not entitled to confidentiality protection under the July 31, 2003 Stipulated Confidentiality Order ("Stipulated Order"). (*See* Stipulated Order ¶ 4 (Ex. 1).) These documents are highly relevant to this case, and Morgan Stanley has used them in motions, referred to them in open court, and intends to use them both at trial and in future motions. Retaining the confidentiality designation of the documents necessitates cumbersome filings under seal for any motion that cites the documents and thereby fills the Court's files with duplicative redacted versions of each motion.

Specifically, Morgan Stanley requests an Order removing the confidentiality designation from Morgan Stanley's Motion for Sanctions for Discovery Abuses and directing the Clerk to place that pleading and all exhibits thereto in the public court file, including:

> MS 454; MS 810; MS 811; MS 813; MS 814; MS 815; MS 816; MS 822; MS 857; Mar. 8, 2004 L. Winoker Dep.; Nov. 18, 2004 L. Winoker Dep.; Mar. 3-4, 2005 T. Slotkin Dep.

In addition to those documents, Morgan Stanley further respectfully requests that the Court enter an Order removing the confidentiality designations from the following related documents:

> MS 812; MS 830; MS 831; MS 832; MS 833; MS 834; MS 841; MS 849; MS 852; MS 853; MS 854; MS 855; MS 856; Mar. 10, 2005 R. Perelman Dep.; and Mar. 11, 2005 B. Nye Dep.

As required the by Stipulated Order, Morgan Stanley has attempted in good faith to resolve this issue directly with CPH. (*See* Stipulated Order ¶ 14.) Morgan Stanley's request to voluntarily remove the confidentiality designations was rejected by CPH, who attempted to put the burden on Morgan Stanley to establish the non-confidential nature of the documents. (*See* Mar. 14, 2004 L. Bemis Letter to M. Brody (Ex. 2); Mar. 15, 2005 M. Brody Response Letter to L. Bemis (Ex. 3).) Thus, Morgan Stanley is filing this Motion pursuant to the terms of the Stipulated Order. (*See* Stipulated Order ¶ 14 (stating that a party may move the Court to remove a confidentiality designation after first stating its objections in a letter to the other party and attempting to confer in good faith).)

As CPH argues in its Motion to Remove Confidentiality Designations dated March 14, 2005, under the Stipulated Order, "the only documents that can be designated as confidential are documents that the designating party 'believes, in good faith, constitute, contain, reveal or reflect proprietary or confidential trade secrets or technical, business, financial or personal information of a ***current nature***.'" (Mar. 14, 2005 CPH Mot. to Remove Confidentiality Designations (quoting Stipulated Order ¶ 4) (emphasis added).) As the party making the designation, CPH "bear[s] the burden of proof" of showing that the above requirement is met. (Stipulated Order ¶ 15.)

Morgan Stanley submits that CPH has not met the requirements of the Stipulated Order. The above documents generally consist of CPH's belated production of valuation-related

materials, all of which are from the 1998-99 time frame. And the deposition transcripts discussing these documents reveal no current financial information. Because those documents are not of a "***current nature***," they do not qualify to be designated as confidential. (*See* Stipulated Order ¶ 4.) Finally, the expert report of Blaine Nye (MS 454) contains nothing remotely confidential, as it does little more than parrot CPH's allegations in this case and report publicly-available market prices for Sunbeam stock.

In its letter declining to voluntarily remove the designations, CPH suggests "that the confidentiality of these documents has already been resolved by the Court." (Mar. 15, 2005 M. Brody Letter to L. Bemis.) The Court made no such determination. Rather, the Court rejected CPH's request to redact these documents or review them in camera. (Feb. 24, 2005 Hr'g at 1553-55.) The Court also rejected CPH's request to designate these documents as "counsel's eyes only," pointing out that the valuation documents could be designated pursuant to the Stipulated Order. (*Id.* at 1555-56.) Morgan Stanley agrees that the documents, as designated, are subject to the terms of the Stipulated Order, and Morgan Stanley has treated them as such. But pursuant to those terms, the documents do not qualify for designation as confidential because they are not of a "current nature." CPH quite simply has overstated the confidential nature of these old and dated financial documents.

As stated above, Morgan Stanley has used and intends to use the documents both at trial and in future motions. For example, the documents will certainly be used in open court during oral argument on Morgan Stanley's Motion for Sanctions for Discovery Abuses. And CPH will have to use the documents in arguing its announced motion in limine. Likewise, the documents will be used during the trial on the issue of damages.

The Florida Supreme Court has made clear that trials are "public events and adhere to the well established common law right of access to court proceedings and records." *Barron v.*

Florida Freedom Newspapers, Inc., 531 So. 2d 113, 116 (Fla. 1988); *see also Miami Herald Publ'g Co. v. Lewis*, 426 So. 2d 1, 8 (Fla. 1982) (holding that a trial is a public event and what transpires in the courtroom is "public property"). Furthermore, Florida public policy and the Florida Rules of Judicial Administration establish a presumption that "[t]he public shall have access to all records of the judicial breach of government" including "the contents of the court file." Fla. R. Jud. Admin. 2.051(a), 2.051(b)(1)(A); *see also Goldberg v. Johnson*, 485 So. 2d 1386, 1388 (Fla. 4th DCA 1986) (noting that "the public and press have a right to know what goes on in a courtroom). The Plaintiff made the decision to file this action, seeking billions of dollars from Morgan Stanley, in a Florida court and must accept that the consequences of that decision.

WHEREFORE, in accordance with the terms of the Stipulated Order, Morgan Stanley respectfully requests that the Court to remove the confidentiality designations from Morgan Stanley's Motion for Sanctions for Discovery Abuses and all exhibits thereto, including MS 454; MS 810; MS 811; MS 813; MS 814; MS 815; MS 816; MS 822; MS 857; Mar. 8, 2004 L. Winoker Dep.; Nov. 18, 2004 L. Winoker Dep.; Mar. 3-4, 2005 T. Slotkin Dep., as well as the following related documents: MS 812; MS 830; MS 831; MS 832; MS 833; MS 834; MS 841; MS 849; MS 852; MS 853; MS 854; MS 855; MS 856; Mar. 10, 2005 R. Perelman Dep.; and Mar. 11, 2005 B. Nye Dep.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 16th day of March 2005.

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Exhibit 1

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

COLEMAN (PARENT) HOLDINGS INC.,	)	
Plaintiff,	)	Case No.: 2003 CA 005045 AI
v.	)	
MORGAN STANLEY & CO., INC.,	)	Judge Elizabeth I. Maass
Defendant.	)	

STIPULATED CONFIDENTIALITY ORDER

The parties hereto hereby stipulate and agree to the following Confidentiality Order:

1. Scope of Order. This Order shall apply to all non-public and Confidential (as hereinafter defined) materials produced in this litigation and all testimony given in any deposition by any party to the litigation or by any person or entity that is not a party hereto (a "non-party"), to all non-public and Confidential information disclosed by any party hereto during the course of the captioned litigation and to all non-public information disclosed to any party hereto by any non-party in response to the service of a subpoena or notice of deposition on a non-party in connection with the captioned litigation ("Litigation Materials").

2. This Order shall not apply to any document, testimony or other information that (a) is already in a receiving party's possession at the time it is produced, (b) becomes generally available to the public other than as a result of disclosure in violation of this Order or in breach of any other legal obligation, or (c) becomes available to a party other than through voluntary or required production from a person or party who obtained the document, testimony or other information without any confidentiality restriction.

3. Litigation Materials and the information derived therefrom shall be used solely for the purpose of preparing for and conducting this litigation, and shall not be disclosed or used for any other purpose.

4. Any party or non-party may designate as "Confidential" any Litigation Materials or portions thereof which the party or non-party believes, in good faith, constitute, contain, reveal or reflect proprietary or confidential trade secrets or technical, business, financial or personnel information of a current nature. If a party or non-party produces Litigation Materials that have been produced in another litigation or to any government entity and such Litigation Materials have been designated confidential or were accompanied by a request that confidential treatment be accorded them, such Litigation Materials shall be deemed to have been designated "Confidential" for purposes of this Stipulation and Order.

5. Any documents or other tangible Litigation Materials may be designated as "Confidential" by marking every such page "Confidential" or by informing the other party in writing that such material is Confidential. Such markings will be made in a manner which does not obliterate or obscure the content of the document or other tangible Litigation Material. If Litigation Material is inspected at the choice of location of the party or non-party producing or disclosing Litigation Materials (a "producing party"), all such Litigation Material shall be presumed at such inspection to have been designated as Confidential by the producing party until such time as the producing party provides copies to the party that requested the Litigation Material. Production of Confidential Material for inspection and copying shall not constitute a waiver of confidentiality.

6. Depositions or other testimony may be designated "Confidential" by any one of the following means:

(a) stating orally on the record, with reasonable precision as to the affected testimony, on the day the testimony is given that this information is "Confidential"; or

(b) sending written notice designating, by page and line, the portions of the transcript of the deposition or other testimony to be treated as "Confidential" within 10 days after receipt of the transcripts.

7. The entire transcript of any deposition shall be treated as Confidential Material until thirty days after the conclusion of the deposition. Each page of deposition transcript designated as Confidential Material shall be stamped, as set forth in paragraph 5 above, by the court reporter or counsel.

8. In the event it becomes necessary at a deposition or hearing to show any Confidential Material to a witness, any testimony related to the Confidential Material shall be deemed to be Confidential Material, and the pages and lines of the transcript that set forth such testimony shall be stamped as set forth in paragraph 5 of this Stipulation.

9. Litigation Materials designated "Confidential" and any copies thereof, and the information contained therein, shall not be given, shown, made available or communicated in any way to anyone except:

(a) The Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida (the "Court") (including Clerks and other Court personnel). Litigation Materials designated "Confidential" and any copies thereof, and the information contained therein, that are filed with the Court or any pleadings, motions or other papers filed with the Court, shall be filed under seal in a separate sealed envelope conspicuously marked "Filed Under Seal – Subject to Confidentiality Order," or with such other markings as required by Court rules, and shall be kept under seal until further order of the

Court. Where possible, only those portions of filings with the Court that disclose matters designated "Confidential" shall be filed under seal;

(b) counsel to the parties, including co-counsel of record for the parties actually assisting in the prosecution or defense of this litigation, and the legal associates and clerical or other support staff who are employed by such counsel or attorneys and are working under the express direction of such counsel or attorneys;

(c) parties and current officers and employees of parties to the extent reasonably deemed necessary by counsel disclosing such information for the purpose of assisting in the prosecution or defense of this litigation;

(d) outside photocopying, graphic production services, litigation support services, or investigators employed by the parties or their counsel to assist in this litigation and computer personnel performing duties in relation to a computerized litigation system;

(e) any person who is a witness or deponent, and his or her counsel, during the course of a deposition of testimony in this litigation;

(f) any person who is a potential fact witness in the litigation, provided, however, that a person identified solely in this subparagraph shall not be permitted to retain copies of such Litigation Material;

(g) court reporters, stenographers, or videographers who record deposition or other testimony in the litigation;

(h) experts or consultants retained in connection with the litigation;

(i) any person who is indicated on the face of a document to have been an author, addressee or copy recipient thereof, provided, however, that a person identified

solely in this subparagraph shall not be permitted to retain copies of such Litigation Material; and

(j) any other person, upon written consent from the party or person who designated such Litigation Materials "Confidential."

10. Before any person included in paragraph 9(f) or (h) is given access to Litigation Materials designated "Confidential," and before any person included in subparagraph 9(e) is permitted to retain any copy of Litigation Materials designated Confidential, such person shall be provided with a copy of this Order and shall acknowledge in a written statement, in the form provided as Exhibit A hereto, that he or she read the Order and agrees to be bound by the terms thereof. Such executed forms shall be retained in the files of counsel for the party who gave access to Litigation Materials to the person who was provided such access. Such executed forms shall not be subject to disclosure under the Florida Rules of Civil Procedure unless a showing of good cause is made and the Court so orders.

11. The inadvertent production of privileged or arguably privileged materials shall not be determined to be either: (a) a general waiver of the attorney-client privilege, the work product doctrine or any other privilege; or (b) a specific waiver of any such privilege with respect to documents being produced or the testimony given. Notice of any claim of privilege as to any document claimed to have been produced inadvertently shall be given within a reasonable period of time after discovery of the inadvertent production, and, on request by the producing party, all inadvertently produced materials as to which a claim of privilege is properly asserted and any copies thereof shall be returned promptly.

12. Nothing in this Order shall prevent any producing party from disclosing or using its own "Confidential" Litigation Materials as it deems appropriate, and any such disclosure shall not be deemed a waiver of any party's right or obligations under this Order with

respect to any other information. If a party or non-party that designates information "Confidential" discloses or uses such "Confidential" Litigation Materials in a manner inconsistent with the claim that such information is confidential, any party may move the Court for an order removing such "Confidential" designation pursuant to paragraph 15 herein. Nothing in this Stipulation and Order shall impose any restrictions on the use or disclosure by any party of documents, materials, testimony or other information produced as Litigation Material obtained by such party independently of discovery in this litigation.

13. The parties do not waive any right to object to any discovery request, or to the admission of evidence on any ground, or seek any further protective order, or to seek relief from the Court from any provision of this Order by application on notice on any grounds.

14. If any party objects to the designation of any Litigation Materials as "Confidential," the party shall first state the objection by letter to the party that made such designations. The parties agree to confer in good faith by telephone or in person to attempt to resolve any dispute respecting the terms or operation of this Order. If the parties are unable to resolve such dispute within 5 days of such conference, any party may then move the Court to do so. Until the Court rules on such dispute, the Litigation Materials in question shall continue to be treated as "Confidential," as designated.

15. Upon motion, the Court may order the removal of the "Confidential" designation from any information so designated. In connection with any motion concerning the propriety of a "Confidential" designation, the party making the designation shall bear the burden of proof.

16. Within 60 days of the conclusion of this litigation as to all parties, all Litigation Materials designated "Confidential" and all copies or notes thereof shall be returned to counsel for the producing party who initially produced the Litigation Materials, or destroyed,

except that counsel may retain their work product and copies of court filings, transcripts, and exhibits, provided said retained documents will continue to be treated as provided in this Order, as modified by rulings of the Court. If a party chooses to destroy documents after the litigation has concluded, that party shall certify such destruction in writing to the producing party upon written request for such certification by the producing party.

17. The failure of any party to challenge the designation by another production party of Litigation Material as "Confidential" during the discovery period shall not be a waiver of that party's right to object to the designation of such material at trial.

18. This Stipulation applies to all non-parties that are served with subpoenas in connection with this litigation or who otherwise produce documents or are noticed for deposition in connection with this litigation, and all such non-parties are entitled to the protection afforded hereby upon signing a copy of this agreement and agreeing to be bound by its terms.

19. Any party may move to modify the provisions of this Order at any time or the parties may agree by written stipulation, subject to further order of the Court, to modify the provisions of the Order. Should any non-party seek access to the Confidential Material, by request, subpoena or otherwise, the party or recipient of the Confidential Material from whom such access is sought, as applicable, shall promptly notify the producing party who produced such Confidential Materials of such requested access and shall not provide such materials unless required by law or with the consent of the producing party.

20. This Order shall not apply to any Litigation Materials offered or otherwise used by any party at trial or at any hearing held in open court. Prior to the use of any Litigation Materials that have been designated Confidential at trial or any hearing to be held in open court, counsel who desires to so offer or use such Confidential Material shall take reasonable steps to afford opposing counsel and counsel for the producing party who produced such Confidential

Material a reasonable opportunity to object to the disclosure in open court of such Confidential Material, and nothing herein shall be construed a wavier of such right to object.

21. Written notice provided pursuant to this Order shall be made to counsel of record by facsimile.

22. The provisions of this Order shall survive the final termination of the case for any retained Confidential Litigation Material thereof.

COLEMAN (PARENT) HOLDINGS, INC.

By _____
John Scarola
SEARCY, DENNEY, SCAROLA,
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lake Boulevard
West Palm Beach, FL 33409

Jerold S. Solovy
Ronald L. Marmer
Robert T. Markowski
Deirdre E. Connell
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Chicago, IL 60611

MORGAN STANLEY & CO., INC.

By _____
Joseph Ianno, Jr.
CARLTON FIELDS, P.A.
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West Palm Beach, FL 33401

Thomas D. Yannucci, P.C.
Thomas A. Clare
Brett McGurk
KIRKLAND & ELLIS
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005

SO ORDERED;

This _____ day of _____, 2003

SIGNED AND DATED

JUL 31 2003

JUDGE ELIZABETH T. MAASS

CIRCUIT JUDGE

COPIES PROVIDED TO COUNSEL OF RECORD ON THE ATTACHED LIST

COUNSEL LIST

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COLEMAN (PARENT) HOLDINGS INC.

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

COLEMAN (PARENT) HOLDINGS INC., Plaintiff, v. MORGAN STANLEY & CO., INC., Defendant.	Case No.: 2003 CA 005045 AI Judge Elizabeth I. Maass

Exhibit A

DECLARATION OF ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND BY PROTECTIVE ORDER

I, _____, declare under penalty of perjury that:

1. My address is _____.

2. My present employer is _____.

3. My present occupation or job description is _____

_____.

4. I hereby certify and agree that I have read and understand the terms of the Confidentiality Order in the above-captioned actions. I further certify that I will not use "Confidential" information for any purpose other than this litigation among the parties, and will not disclose or cause "Confidential" information to be disclosed to anyone not expressly permitted by the Order to receive "Confidential" information. I agree to be bound by the terms and conditions of the Order.

5. I understand that I am to retain in confidence from all individuals not expressly permitted to receive information designated as "Confidential," whether at home or at

work, all copies of any materials I receive which have been designated as "Confidential," and that I will carefully maintain such materials in a container, drawer, room or other safe place in a manner consistent with the Order. I acknowledge that the return or destruction of "Confidential" material shall not relieve me from any other continuing obligations imposed upon me by the Order.

6. I stipulate to the jurisdiction of this Court.

Date: _____

_____
(Signature)

Document No. 945236

Exhibit 2

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

777 South Figueroa Street
Los Angeles, California 90017

Lawrence P. Bemis
To Call Writer Directly:
213 680-8413
lbemis@kirkland.com

213 680-8400

www.kirkland.com

Facsimile:
213 680-8500
Dir. Fax: 213 680-8500

March 14, 2005

Via Facsimile
Michael T. Brody
c/o Mafco Holdings Inc.
777 S. Flagler Drive
Suite 1200, West Tower
West Palm Beach, FL 33401-6136

Re: ***Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co. Incorporated***

Dear Mike:

I write pursuant to the requirements of paragraph 14 of the July 31, 2003 Stipulated Confidentiality Order (as modified). In accordance with the procedures set-forth in that paragraph, Morgan Stanley objects to Coleman (Parent) Holdings Inc.'s designation of the below materials as "Confidential" and requests that CPH remove such designation:

1. Morgan Stanley & Co. Incorporated's Motion for Sanctions for Discovery Abuses and all exhibits thereto, including: MS 810; MS 811; MS 813; MS 814; MS 815; MS 816; MS 822; MS 857; Dec. 7, 2004 Expert Report of B. Nye; Mar. 8, 2004 Winoker Dep.; Nov. 18, 2004 Winoker Dep.; Mar. 3-4, 2005 Slotkin Dep.; Nov. 17-18, 2005 Perelman Dep

2. MS 812; MS 830; MS 831; MS 832; MS 833; MS 834; MS 841; MS 849; MS 852; MS 853; MS 854; MS 855; MS 856; Mar. 10, 2005 Perelman Dep.; Mar. 11, 2005 Nye Dep.

Morgan Stanley objects to CPH's designation on the basis that these materials do not "constitute, contain, reveal or reflect proprietary or confidential trade secret or technical, business, financial or personnel information of a ***current nature***." Specifically, the financial information reported or discussed in the above documents relates to the period 1998-2000 and is therefore not "of a current nature."

As required by the Stipulated Order, Morgan Stanley is prepared to confer with CPH in good faith should CPH dispute Morgan Stanley's objections.

Sincerely,

Lawrence P. Bemis

Lawrence P. Bemis

cc: J. Scarola
J. Ianno
M. Hansen

Exhibit 3

JENNER&BLOCK

March 15, 2005

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312-222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Michael T. Brody
Tel 312 923-2711
Fax 312 840-7711
mbrody@jenner.com

By Telecopy

Lawrence P. Bemis, Esq.
KIRKLAND & ELLIS LLP
222 Lakeview Avenue
Suite 260
West Palm Beach, FL 33401

Re: ***Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.***

Dear Larry:

I write in response to your letter of March 14, 2005 concerning confidentiality designations.

Your letter requests that CPH remove its confidentiality designations on MacAndrews & Forbes' financial statements, other documents, and testimony that disclose the private financial position of the corporation. MacAndrews & Forbes maintains that the information contained in the financial statements and other documents is confidential and current. Thus, we decline your request to remove the confidentiality designations.

I note that the confidentiality of these documents has already been resolved by the Court. On February 24, 2005, when Judge Maass ordered that the documents be produced in unredacted form, she added "I would agree, however, that I would expect them to be subject to the confidentiality order in place. And I would strictly construe it." Judge Maass later noted that she was "very sensitive" to MacAndrews & Forbes' confidentiality concerns. She requested that Morgan Stanley provide "a heightened level of confidence" that the confidentiality of the documents would be protected. In response to Judge Maass's concern, you provided your "word as an officer of the court" that the documents would be treated confidentially. Judge Maass accepted your representation that she could hold you personally responsible and that the specific information contained in the financial documents would be held in confidence. (Tr. 1555-56.)

In light of the circumstances, we decline your request to remove the confidentiality designations we have placed on the financial documents and the recent depositions about those documents. As to the previous depositions, which did not focus solely on matters of heightened confidentiality, we are amenable to discussing whether the entire deposition must be kept in

confidence. Please advise me of the portions of those depositions that you believe are not subject to the confidentiality order.

Very truly yours,

Michael T. Brody

MTB:ty
cc: Thomas A. Clare, Esq. (by telecopy)
Joseph Ianno, Esq. (by telecopy)
Mark C. Hansen, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

CPH Should Not Submit Evidence or Make Arguments That Address the Following Points

1. Argument that the jury has a legal obligation to award punitive damages
2. Argument that there was any victim of MS's conduct other than CPH
3. Argument that punitive damages are necessary or justified to "protect the public"
4. Argument that CPH was not fully compensated by the jury's verdict in Phase I
5. Argument that litigation misconduct alone is grounds for punitive damages
6. Argument that punitive damages award will go to the State
7. Arguments that appeal to jurors' emotion, sympathy, passion, or prejudice
8. Argument that punitive damages are justified or should be increased because they were unavailable against Arthur Andersen and/or Sunbeam
9. Argument that punitive damages are justified or should be increased in order to punish conduct of Arthur Andersen or Sunbeam
10. Argument that the jury may draw an adverse inference from the absence of any witness called by Morgan Stanley in Phase II (contra CPH MIL 40)
11. Argument that the jury may draw an adverse inference from the absence of any witness called by Morgan Stanley to testify about the e-mail disclosure issues
12. Argument that the jury may draw an adverse inference from the absence of any witness called by Morgan Stanley to testify about the deemed facts in Exhibit A
13. Argument that the jury should "send a message" to corporate America by their verdict
14. Argument that the jury should act as the "conscience of the community"
15. Argument stating personal opinion of the credibility of any witness
16. Argument referring to Enron, WorldCom, or other securities or accounting "scandals"
17. Argument that corporate frauds have cost American shareholders billions of dollars
18. Argument that the "deemed facts" in Exhibit A are "agreed facts"
19. Attempt to read Exhibit A to the jury
20. Argument based on Morgan Stanley's failure to contest the deemed facts

21. Argument that Morgan Stanley has failed to apologize or shown no remorse for the wrongful acts that were "deemed" by the Court

22. Argument that Morgan Stanley's conduct in this case is part of a pattern of bad acts

23. Argument that Morgan Stanley profited from its actions

24. Argument that would inject geographic bias into the case, such as any argument of a need to send a message to New York or that the State of Florida does not tolerate such actions

25. Argument that CPH was vulnerable or that Morgan Stanley took advantage of CPH

26. Argument that Morgan Stanley developed the strategy for pulling off the fraud with Sunbeam (e.g., that Morgan Stanley was involved from the outset)

27. Arguments regarding the debenture offerings including, but not limited to, (a) discussions of actions taken by Morgan Stanley in connection with the debentures, and (b) arguments that the sale of the debentures harmed the public

28. Argument that Morgan Stanley occupied a position of trust because of its role in the financial community

29. Argument that any member of the jury could have been a Coleman shareholder or that any juror could have lost money in a similar corporate fraud

30. Argument that but for the resources of Mr. Perelman, Morgan Stanley and other corporations would continue to engage in litigation misconduct

31. Argument that Morgan Stanley's litigation misconduct was an affront to the judicial system (MS MIL 31)

32. Request for any specific amount of punitive damages, which would inappropriately distort the jury's consideration of the proper award

33. Arguments about the assets or financial wherewithal of Morgan Stanley's parent

34. Arguments about Morgan Stanley's failure to take corrective actions to avoid recurrence of the fraud or the litigation misconduct

35. Embellishment of litigation misconduct statement by highlighting it, underlining portions or it, or providing additional facts not in the record

36. Argument that punitive damages are appropriate because Morgan Stanley failed to comply with federal or state judicial requirements

37. Arguments concerning the litigation expenses incurred by CPH as a result of Morgan Stanley's litigation misconduct

38. Arguments concerning the conduct of Morgan Stanley employees at their depositions

39. Arguments concerning Mr. Strong, including: (1) the Italian prosecution and (2) his performance reviews

40. Arguments about other litigation involving Morgan Stanley

41. Argument that Morgan Stanley is likely to repeat its actions

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER AND DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court, in Chambers, on its own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Clerk is directed to docket and file Holly Asbury's facsimile transmission dated March 15, 2005.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 16th day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

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Washington, DC 20036

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

PLAINTIFF'S REQUESTED PRELIMINARY JURY INSTRUCTIONS

COMES NOW the Plaintiff, by and through its undersigned attorneys, and hereby requests that this Honorable Court give the following jury instructions.

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

Jerold S. Solovy
Ronald L. Marmer
Jeffrey T. Shaw
JENNER & BLOCK LLP
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

John Scarola
SEARCY DENNEY SCAROLA BARNHART &
SHIPLEY, P.A.
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Table of Contents

Responsibility of Jury and Judge 1
Steps in Trial 2
Bifurcated Proceedings 3
Things to be Avoided 4
Objections and Conferences 5
Recesses 6
Note-Taking By Jurors 7
Questions By Jurors 8
Introduction 9
Opening Statements 10

PLAINTIFF'S PROPOSED INSTRUCTION NO. 1
Instructions Before Trial
Responsibility of Jury and Judge

You have now been sworn as the jury to try this case. This is a civil case involving a disputed claim or claims between the parties. Those claims and other matters will be explained to you later. By your verdict, you will decide the disputed issues of fact. I will decide the questions of law that arise during the trial, and before you retire to deliberate at the close of the trial, I will instruct you on the law that you are to follow and apply in reaching your verdict. In other words, it is your responsibility to determine the facts and to apply the law to those facts. Thus, the function of the jury and the function of the judge are well defined, and they do not overlap. This is one of the fundamental principles of our system of justice.

Reaching a verdict is exclusively your job. I cannot participate in that decision in any way. You should not speculate about how I might evaluate the testimony of any witness or any other evidence in this case, and you should not think that I prefer one verdict over another. Therefore, in reaching your verdict, you should not consider anything that I say or do, except for my specific instructions to you.

Authority:
The Florida Bar, Florida Standard Jury Instructions In Civil Cases 1.1 (2003).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 2
Instructions Before Trial
Steps in Trial

Before proceeding further, it will be helpful for you to understand how a trial is conducted. In a few moments, the attorneys for the parties will have an opportunity to make opening statements, in which they may explain to you the issues in the case and summarize the facts that they expect the evidence will show. Following the opening statements, witnesses will be called to testify under oath. They will be examined and cross-examined by the attorneys. Documents and other exhibits also may be received as evidence.

After all the evidence has been received, the attorneys will again have an opportunity to address you and to make their final arguments. The statements that the attorneys now make and the arguments that they later make are not to be considered by you either as evidence in the case or as your instruction on the law. Nevertheless, these statements and arguments are intended to help you properly understand the issues, the evidence, and the applicable law, so you should give them your close attention.

Following the final arguments by the attorneys, I will instruct you on the law.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 1.1 (2003).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 3
Instructions Before Trial
Bifurcated Proceedings

The presentation of evidence and your deliberations may occur in two stages. The second stage, if necessary, will occur immediately after the first stage.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 1.1 (2003).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 4
Instructions Before Trial
Things to be Avoided

You should give careful attention to the testimony and other evidence as it is received and presented for your consideration, but you should not form or express any opinion about the case until you have received all the evidence, the arguments of the attorneys and the instructions on the law from me. In other words, you should not form or express any opinion about the case until you are retired to the jury room to consider your verdict, after having heard all of these matters.

The case must be tried or heard by you only on the evidence presented during the trial in your presence, and in the presence of the attorneys and myself. You must not conduct any investigation of your own, including any type of research relating to the case, the parties, possible witnesses or the attorneys. This includes but is not limited to internet searches. Also, you must avoid reading newspaper headlines and articles relating to this case and trial. You must also avoid seeing or hearing television and radio comments or accounts of this trial while it is in progress.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 1.1 (2003)
(modified to add instruction relating to independent research, and to remove instruction relating to visiting scene of occurrence).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 5
Instructions Before Trial
Objections and Conferences

Objections:

The attorneys are trained in the rules of evidence and trial procedure, and it is their duty to make all objections they feel are proper. When a lawyer makes an objection, I will either overrule or sustain the objection. If I overrule an objection to a question, the witness will answer the question. When I sustain, or uphold, an objection, the witness cannot answer the question. If I sustain an objection, you must not speculate on what might have happened, or what the witness might have said, had I permitted the witness to answer. You should not draw any inference from the question itself.

The Judge's conferences with attorneys:

During the trial, it may be necessary for me to confer with the attorneys out of your hearing, talking about matters of law and other matters that require consideration by me alone. It is impossible for me to predict when such a conference may be required or how long it will last. When such conferences occur, they will be conducted so as to consume as little of your time as necessary for a fair and orderly trial of the case.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 1.1 (2003).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 6
Instructions Before Trial
Recesses

During the trial we will take recesses. During these recesses you shall not discuss the case among yourselves or with anyone else, nor permit anyone to say anything to you or in your presence about the case. Further, you must not talk with the attorneys, the witnesses, or any of the parties about anything, until your deliberations are finished. In this way, any appearance of something improper can be avoided.

If during a recess you see one of the attorneys and he or she does not speak to you, or even seem to pay attention to you, please understand that the attorney is not being discourteous but is only avoiding the appearance of some improper contact with you. If anyone tries to say something to you or in your presence about this case, tell that person that you are on the jury trying this case, and ask that person to stop. If he or she keeps on, leave at once and immediately report this to the bailiff or court deputy, who will advise me.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 1.1 (2003).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 7
Instructions Before Trial
Note-Taking By Jurors

If you would like to take notes during the trial, you may do so. On the other hand, of course, you are not required to take notes if you do not want to. That will be left up to you individually.

You will be provided with a note pad and a pen for use if you wish to take notes. Any notes that you take will be for your personal use. However, you should not take them with you from the courtroom. During recesses, the bailiff will take possession of your notes and will return them to you when we reconvene. After you have completed your deliberations, the bailiff will deliver your notes to me. They will be destroyed. No one will ever read your notes.

If you take notes, do not get so involved in note-taking that you become distracted from the proceedings. Your notes should be used only as aids to your memory.

Whether or not you take notes, you should rely on your memory of the evidence and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than each juror's memory of the evidence.

Authority
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 1.8 (2003).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 8
Instructions Before Trial
Questions By Jurors

I allow jurors to ask questions during the trial under certain conditions. If you feel that the answer to your question would be helpful in understanding the issues in the case, please raise your hand after the lawyers have completed their examination but before I have excused the witness. You will then be allowed to write your question for the witness. I will then talk privately with the lawyers and decide whether the question is proper under the law. If the question is proper, I will ask the witness the question. Some questions may be rewritten or rejected. Do not be concerned or draw any implications if the question is not asked.

Authority:
Fla. Stat. § 40.50(3) (2005); O'MALLEY, GRENIG & LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS - CIVIL § 101.15 (5th ed. 2004) (modified).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 9
Instructions Before Trial
Introduction

This is a case brought by the plaintiff Coleman (Parent) Holdings Incorporated, known as "CPH," against the defendant Morgan Stanley & Company, Incorporated, known as "Morgan Stanley." CPH is a holding company, which is a company that invests in other businesses. Prior to March 30, 1998, CPH owned approximately 82% of the stock in The Coleman Company, Incorporated, known as "Coleman."

Morgan Stanley is an investment banking firm that provides financial and securities services, including advice on mergers and acquisitions. In 1997, Morgan Stanley was hired by Sunbeam Corporation as Sunbeam's financial adviser. As Sunbeam's adviser, Morgan Stanley participated in negotiations with CPH regarding the sale of CPH's stock holdings in Coleman to Sunbeam.

On March 30, 1998, CPH sold its Coleman stock to Sunbeam in exchange for Sunbeam stock, plus other consideration. Shortly after this transaction closed, the value of Sunbeam's stock plummeted. CPH claims that Sunbeam had committed fraudulent business practices and issued misleading financial statements. Eventually, Sunbeam went bankrupt. The shareholders of Sunbeam, including CPH, received nothing for their shares.

CPH claims that Morgan Stanley aided, abetted, and conspired in a scheme to mislead CPH and to conceal the Sunbeam fraud until Morgan Stanley and Sunbeam could close the purchase of Coleman. Morgan Stanley denies CPH's claim.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 10
Instructions Before Trial
Opening Statements

After all the evidence has been presented, I will give you complete instructions regarding the law governing your deliberations. At this time, the attorneys for the parties will have an opportunity to make their opening statements, in which they may explain to you the issues in the case and give you a summary of the facts they expect the evidence will show.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 1.1 (2003).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 18th day of March, 2005.

JEFFREY T. SHAW

JOHN SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
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2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
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Attorneys for Coleman (Parent) Holdings Inc.

COUNSEL LIST

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Thomas A. Clare, Esq.
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Kellogg, Huber, Hansen,
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222 Lakeview Avenue, Suite 260
West Palm Beach, FL 33401

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER AND DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court, in Chambers, on its own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Clerk is directed to docket and file the facsimile transmission from Richard Reis, juror number 151 (101202494)

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 17 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

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655 15th Street, NW, Suite 1200
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One IBM Plaza, Suite 4400
Chicago, Il 60611

Rebecca Beynon, Esq.
Sumner Square
1615 M Street, NW, Suite 400
Washington, DC 20036

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

MORGAN STANLEY'S NOTICE TO PRODUCE AT HEARING

Morgan Stanley requests, pursuant to Rule 1.350 of the Florida Rules of Civil Procedure, that Plaintiff Coleman (Parent) Holdings, Inc. ("CPH") produce and permit Morgan Stanley to inspect and copy each of the documents described below. It is requested that the aforesaid production be made at the hearing before the Court in this matter on March 21, 2005. Inspection will be made by visual observation, examination and copying.

DEFINITIONS

Morgan Stanley incorporates by reference the Definitions and Instructions set forth in Morgan Stanley's First Request for Production of Documents to Plaintiff served in this action in addition to the definitions below.

1. "Coleman" means The Coleman Company, Inc. and any of its officers, directors, former or present employees, representatives, or agents.

2. "CPH" means Coleman (Parent) Holdings, Inc. and any of its officers, directors, former or present employees, representatives, or agents.

3. "MAFCO" means McAndrews & Forbes Holdings, Inc. and any of its officers, directors, former or present employees, representatives, or agents, or affiliated holding and operating companies, including without limitation Mafco Holdings, Inc., Mafco

Consolidated Group, CPH, CLN Holdings Inc., New Coleman Holdings, Coleman Worldwide Corporation, and Coleman.

DOCUMENTS REQUESTED

1. All documents referring or relating to efforts made by CPH, Coleman, or MAFCO to collect or preserve electronic documents, including e-mail, for this litigation.

2. All documents referring or relating to efforts made by CPH, Coleman, or MAFCO to collect or preserve electronic documents, including e-mail, for any other arbitration or litigation relating to the Coleman Transaction.

3. All documents referring or relating to or reflecting the date CPH, Coleman, or MAFCO first anticipated litigation or arbitration in connection with the Coleman Transaction.

4. All statements made by CPH, Coleman, or MAFCO to third parties regarding the archival, retrieval, restoration or search of back-up tapes containing e-mail or electronic documents related to the Coleman Transaction.

5. All communications between CPH, Coleman, or MAFCO and Access Systems relating to archival, retrieval, restoration or search of back-up tapes containing e-mail or electronic documents.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 17th day of March 2005.

Jeffrey S. Davidson
Lawrence P. Bemis (FL Bar No. 618349)
Thomas A. Clare
Zhonette M. Brown
KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200

Joseph Ianno, Jr. (FL Bar No. 655351)
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
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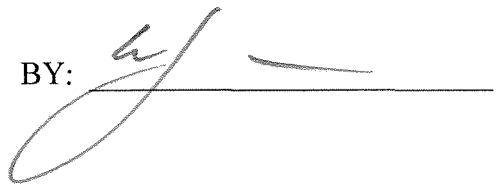
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

Washington, D.C. 20005
Telephone:(202) 879-5000
Facsimile:(202) 879-5200

BY: 

Mark C. Hansen
James M. Webster, III
Rebecca A. Beynon
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
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Counsel for
Morgan Stanley & Co. Incorporated

SERVICE LIST

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

NOTICE OF FILING
MORGAN STANLEY'S PRELIMINARY JURY INSTRUCTIONS

Defendant, Morgan Stanley & Co. Incorporated, by and through their undersigned attorneys, hereby gives notice that it has filed the attached Preliminary Jury Instructions with the Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and hand delivery on this 14th day of March, 2005.

Jeffrey S. Davidson
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Counsel for Morgan Stanley & Co. Incorporated

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BY: _____
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Joseph Ianno, Jr.
Florida Bar No. 655351

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1.1 PRELIMINARY INSTRUCTION

Responsibility of jury and judge.

You have now been sworn as the jury to try this case. This is a civil case involving a disputed claim or claims between the parties. Those claims and other matters will be explained to you later. By your verdict[s], you will decide the disputed issues of fact. I will decide the questions of law that arise during the trial, and before you retire to deliberate at the close of the trial, I will instruct you on the law that you are to follow and apply in reaching your verdict[s]. In other words, it is your responsibility to determine the facts and to apply the law to those facts. Thus, the function of the jury and the function of the judge are well defined, and they do not overlap. This is one of the fundamental principles of our system of justice.

Reaching a verdict is exclusively your job. I cannot participate in that decision in any way. You should not speculate about how I might evaluate the testimony of any witness or any other evidence in this case, and you should not think that I prefer one verdict over another. Therefore, in reaching your verdict, you should not consider anything that I say or do, except for my specific instructions to you.

Steps in trial.

Before proceeding further, it will be helpful for you to understand how a trial is conducted. In a few moments, the attorneys for the parties will have an opportunity to make opening statements, in which they may explain to you the issues in the case and summarize the facts that they expect the evidence will show. Following the opening statements, witnesses will be called to testify under oath. They will be examined and cross-examined by the attorneys. Documents and other exhibits also may be received as evidence.

After all the evidence has been received, the attorneys will again have an opportunity to address you and to make their final arguments. The statements that the attorneys now make and the arguments that they later make are not to be considered by you either as evidence in the case or as your instruction on the law. Nevertheless, these statements and arguments are intended to help you properly understand the issues, the evidence, and the applicable law, so you should give them your close attention.

Following the final arguments by the attorneys, I will instruct you on the law.

Things to be avoided.

You should give careful attention to the testimony and other evidence as it is received and presented for your consideration, but you should not form or express any opinion about the case until you have received all the evidence, the arguments of the attorneys and the instructions on the law from me. In other words, you should not form or express any opinion about the case until you are retired to the jury room to consider your verdict[s], after having heard all of these matters.

The case must be tried or heard by you only on the evidence presented during the trial in your presence, and in the presence of the attorneys and myself. You must not conduct any investigation of your own. Accordingly, you must not visit any of the places described in the evidence, or the scene of the occurrence that is the subject of the trial, unless I direct you to view the scene. Also, you must avoid reading newspaper headlines and articles relating to this case and trial. You must also avoid seeing or hearing television and radio comments or accounts of this trial while it is in progress.

Objections.

The attorneys are trained in the rules of evidence and trial procedure, and it is their duty to make all objections they feel are proper. When a lawyer makes an objection, I will either overrule or sustain the objection. If

I overrule an objection to a question, the witness will answer the question. When I sustain, or uphold, an objection, the witness cannot answer the question. If I sustain an objection, you must not speculate on what might have happened, or what the witness might have said, had I permitted the witness to answer. You should not draw any inference from the question itself.

The judge's conferences with attorneys.

During the trial, it may be necessary for me to confer with the attorneys out of your hearing, talking about matters of law and other matters that require consideration by me alone. It is impossible for me to predict when such a conference may be required or how long it will last. When such conferences occur, they will be conducted so as to consume as little of your time as necessary for a fair and orderly trial of the case.

Recesses.

During the trial we will take recesses. During these recesses you shall not discuss the case among yourselves or with anyone else, nor permit anyone to say anything to you or in your presence about the case. Further, you must not talk with the attorneys, the witnesses, or any of the parties about anything, until your deliberations are finished. In this way, any appearance of something improper can be avoided.

If during a recess you see one of the attorneys and he or she does not speak to you, or even seem to pay attention to you, please understand that the attorney is not being discourteous but is only avoiding the appearance of some improper contact with you. If anyone tries to say something to you or in your presence about this case, tell that person that you are on the jury trying this case, and ask that person to stop. If he or she keeps on, leave at once and immediately report this to the bailiff or court deputy, who will advise me.

(Explain to the jury the anticipated schedule of recesses and adjournments. The court at this point may, if appropriate, introduce the various court officials such as the clerk, bailiff or court deputy, and court reporter, explaining their duties.)

1.8 NOTE-TAKING BY JURORS

a. Note-taking permitted

If you would like to take notes during the trial, you may do so. On the other hand, of course, you are not required to take notes if you do not want to. That will be left up to you individually.

You will be provided with a note pad and a pen for use if you wish to take notes. Any notes that you take will be for your personal use. However, you should not take them with you from the courtroom. During recesses, the bailiff will take possession of your notes and will return them to you when

we reconvene. After you have completed your deliberations, the bailiff will deliver your notes to me. They will be destroyed. No one will ever read your notes.

If you take notes, do not get so involved in note-taking that you become distracted from the proceedings. Your notes should be used only as aids to your memory.

Whether or not you take notes, you should rely on your memory of the evidence and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than each juror's memory of the evidence.[1]

Sources:

Florida Standard Jury Instructions in Civil Cases §§ 1.1, 1.8 (2004).

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[1]It is within the court's discretion to allow the jurors to take notes. *Kelley v. State*, 486 So.2d 578 (Fla. 1986). If note-taking is allowed, the court should furnish all jurors with the necessary pads and pens for taking notes. Additionally, it may be desirable for jurors to be furnished with envelopes to place the notes in for additional privacy.

1.8a, should be given as part of preliminary instructions when the judge has decided to allow jurors to take notes.

Preliminary Instructions – Nature of the Case and Definitions of Issues.

After all the evidence has been presented, I will give you complete instructions regarding the law governing your deliberations. At this time, however, I will explain some principles of law to assist you in considering the evidence.

Nature Of The Case

This case involves a suit for aiding and abetting fraud and conspiracy to commit fraud filed by Plaintiff, Coleman (Parent) Holdings, Inc. ("CPH"), against Defendant, Morgan Stanley, arising out of two 1998 Merger Agreements between CPH, The Coleman Company, Inc., and the Sunbeam Corporation. Pursuant to the Agreement, CPH sold its 82% stock interest in Coleman (a manufacturer and marketer of outdoor recreation products) to Sunbeam in exchange for 14.1 million shares of Sunbeam Corporation, approximately $160 million dollars in cash, and Sunbeam's assumption of approximately one billion dollars in debt. Morgan Stanley provided investment banking and financial advisory services to Sunbeam in connection with the acquisition and merger.

CPH asserts that Albert Dunlap, the CEO of Sunbeam, manipulated the financial and business records of Sunbeam to make the company look

more successful than it was and to inflate the stock value. CPH further asserts that Morgan Stanley had actual knowledge of this scheme and aided and abetted or conspired with Albert Dunlap to misrepresent the value of Sunbeam and induce CPH to sell its interest in the Coleman Company. Morgan Stanley denies that it had knowledge of the alleged fraudulent scheme or that Morgan Stanley knowingly assisted Albert Dunlap in misrepresenting the value of Sunbeam.

Definitions of Issues – FRAUD.

PJI 3:20. INTENTIONAL TORTS--FRAUD AND DECEIT

In order to recover for fraud, a plaintiff must prove by clear and convincing evidence that another party made a representation of fact; that the representation was false; that the other party knew it was false or made the representation recklessly without regard to whether it was true or false; that the other party made the representation to induce plaintiff to rely upon it; and that the plaintiff did justifiably rely upon it and sustained damages.

AMENDED TO REFLECT THE FRAUD WAS NOT COMMITTED BY DEFENDANT IN THIS CASE.

Source:

New York Pattern Jury Instructions—Civil. PJI 3:20. INTENTIONAL TORTS--FRAUD AND DECEIT. Committee on Pattern Jury Instructions, Association of Supreme Court Justices. Database updated December 2004 (modified for presentation prior to evidence).

ALTERNATIVE Definition of Issues – FRAUD.

Fraud is defined as follows:

1) a false statement concerning a material fact;

2) the party making the false statement knew the representation was false or made the statement without knowledge of its truth or falsity;

3) the party made the false statement with the intent that the Plaintiff would rely upon it;

4) the plaintiff did justifiably rely upon the false statement; and

5) the plaintiff sustained damages as a result.

Source:

Adopted from Fla. Std Jury Instructions MI-8.1

Definitions of Issues – Justifiable Reliance.

Whether the person to whom a representation is made is justified in relying upon it generally depends upon whether the fact represented is one that a reasonable person would believe and consider important in deciding whether to go through with a merger and acquisition transaction. Whether a person is justified in relying on a representation also depends on whether a reasonable person would take such action or omission without independent investigation.

Source:

New York Pattern Jury Instructions—Civil. PJI 3:20. INTENTIONAL TORTS--FRAUD AND DECEIT. Committee on Pattern Jury Instructions, Association of Supreme Court Justices. Database updated December 2004. (Modified to include definition, only).

Fraudulent Misrepresentation – Sophisticated Investor; Justifiable Reliance.

The court has determined that Plaintiff, CPH, is a sophisticated investor who was aided by sophisticated advisors. As a result, CPH, had a duty to perform reasonable due diligence as to available information in order to prove that its reliance on a misrepresentation was reasonable. That is, CPH was required to use reasonable due diligence in investigating the transaction and may not recover for fraudulent misrepresentations the falsity of which would have been apparent had the proper investigation been completed.

Sources:

Order On Morgan Stanley & Co., Incorporated's Motion For Summary Judgment, February 1, 2005.

Rotterdam Ventures, Inc. v. Ernst & Young LLP, 752 N.Y.S.2d 746, 749 (N.Y. App. Div. 2002) (holding that where a sophisticated party "plainly had both access to the relevant Amnex financial statements and the wherewithal, through his own financial advisors, to ascertain the financial viability of that entity. Thus, as plaintiffs had the means to ascertain the truth of the alleged representations, they cannot prevail in an action for fraud" (citations omitted)).

UST Private Equity Fund, Inc. v. Salomon Smith Barney, 733 N.Y.S.2d 385, 386 (N.Y. App. Div. 2001) ("As a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on an alleged misrepresentation if that plaintiff failed to make use of

the means of verification that were available to it, such as reviewing the files of other parties.").

Abrahami v. UPC Const. Co., 638 N.Y.S.2d 11, 14 (N.Y. App. Div. 1996) (holding that sophisticated businessmen who were parties to a commercial transaction "had a duty to exercise ordinary diligence and conduct an independent appraisal of the risk they were assuming," and noting that "where a party had means available to him for discovering, by the use of ordinary intelligence, the true nature of a transaction he is about to enter into, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations") (internal quotation marks and citations omitted).

Schlaifer Nance & Co. v. Estate of Warhol, 119 F.3d 91, 101 (2d Cir. 1997) ("'Where sophisticated businessmen engaged in major transactions enjoy access to critical information but fail to take advantage of that access, New York courts are particularly disinclined to entertain claims of justifiable reliance.'" (quoting Grumman Allied Indus. v. Rohr Indus., Inc., 748 F.2d 729, 737 (2d Cir.1984)).

Consol. Edison, Inc. v. N.E. Utils., 249 F.Supp.2d 387, 402 (S.D.N.Y. 2003) (noting that where a merger agreement contains a integration clause and the parties are represented by sophisticated financial and legal advisors, a party's failure to make "oral representations and documents provided in due diligence . . . a basis for a specific representation and warranty in the Merger Agreement" generally will serve as bar to a claim of reasonable reliance).

Harsco Corp. v. Segui, 91 F.3d 337, 345 (2d Cir. 1996) (holding that under New York law, "where a party specifically disclaims reliance upon a particular representation in a contract, that party cannot, in a subsequent action for common law fraud, claim it was fraudulently induced to enter into the contract by the very representation it has disclaimed reliance upon" and noting the importance of "keeping in mind the arm's length nature of the negotiation and the sophistication of the parties.") (citing Danann Realty Corp. v. Harris, 157 N.E.2d 597 (N.Y. 1959).

Aiding and Abetting Fraud.

The elements of aiding and abetting fraud are as follows:

(1) Another party engaged in an actual fraud; and

(2) The Defendant had actual knowledge of the other party's fraud; and

(3) The Defendant provided substantial assistance to that other party in the commission of the fraud.

Sources:

To state a claim for aiding and abetting fraud, Plaintiff must prove the following elements: (1) the existence of primary fraud; (2) defendant's actual knowledge of the fraud; and (3) defendant's substantial assistance in the commission of the fraud. See, e.g., Cromer Fin. Ltd. v. Berger, 137 F. Supp. 2d 452, 470 (S.D.N.Y. 2001); Stolow v. Greg Manning Auctions, Inc., No. 02 Civ 2591 (SAS), 2003 WL 355447, at *10 (S.D.N.Y. Feb. 14, 2003) (citing Armstrong v. McAalpin, 699 F.2d 79, 91 (2d Cir. 1983)).

Restatement (First) of Torts s 876 (2004). Comment on Clause (b): "Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortuous, it has the same effect upon the liability of the adviser as participation or physical assistance. If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other's act."

In re Cascade International Securities Litigation, 840 F. Supp. 1558, 1565-66 (S.D. Fl. 1993). Attorneys did not give "substantial assistance" to corporate client's securities fraud and were not liable for aiding and abetting; they acted as scriveners of public documents, attempted to curb questions

about client's financial condition, and engaged in nothing more than activities making up "daily grist of the mill."

Rudolph v. Arthur Andersen & Co., 800 F.2d 1040, 1045-46 (11th Cir. 1986). Whether assistance alleged to have aided and abetted fraud was "substantial" depends on the totality of the circumstances.

Woods v. Barnett Bank of Ft. Lauderdale, 765 F.2d 1004, 1009 (11th Cir. 1985). Stronger evidence of complicity is required for an alleged aider and abettor who conducts what appears to be a transaction in the ordinary course of his business. The proof "must demonstrate actual awareness of the party's role in the fraudulent scheme" (citation omitted).

Conspiracy to Commit Fraud.

The elements of a conspiracy to commit fraud are as follows:

(1) an agreement between two or more parties;

(2) with a common objective to commit fraud; and

(3) acts in furtherance of the common objective to commit fraud; and

(4) actual knowledge of the underlying fraud; and

(5) damage to plaintiff as a result of the acts done under the conspiracy.

Source:

Diamond State Ins. Co. v. Worldwide Weather Trading LLC., No. 02 Civ. 2900 LMM GNG, 2002 WL 31819217, at *4 (S.D.N.Y. Dec. 16, 2002) ("the elements of a [civil] conspiracy claim are: (1) an agreement among two or more parties, (2) a common objective, (3) acts in furtherance of the objective and (4) knowledge.").

Snyder v. Puente De Brooklyn Realty Corp. 746 N.Y.S.2d 517, 521-22 (N.Y App. Div. 2002) ("Notably, conspiracy to commit a tort such as fraud is not an independent cause of action in this State but, rather, allegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort. The elements of fraud are misrepresentation or concealment of a material fact, falsity, scienter and deception. While plaintiff need not allege and prove that each defendant committed every element of fraud, plaintiff must establish facts which support an inference that defendants knowingly agreed to cooperate in a

fraudulent scheme, or shared a perfidious purpose and, when scienter is lacking, the mere fact that a defendant's otherwise lawful activities may have assisted another in pursuit of guileful objectives is not a sufficient basis for a finding that he or she conspired to defraud.") (internal quotations and citations omitted).

Hoch v. Rissman, Weisberg, Barrett, 742 So.2d 451, 460 (Fl. Dist. Ct. App. 1999) ("A conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose by unlawful means.").

Raimi v. Furlong, 702 So.2d 1273, 1284 (Fl. Dist. Ct. App. 1997) ("A civil conspiracy requires: (a) an agreement between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts done under the conspiracy.").

Donofrio v. Matassini, 503 So.2d 1278, 1281 (Fl. Dist. Ct. App. 1987) ("A conspirator need not take part in the planning, inception, or successful completion of a conspiracy. The conspirator need only know of the scheme and assist it in some way to be held responsible for all of the acts of his coconspirators."

Buckner v. Lower Florida Keys Hosp. Dist., 403 So.2d 1025, 1027 (Fla. 2d DCA 1981) ("gist of a civil conspiracy is not the conspiracy itself but the civil wrong which is done through the conspiracy which results in injury to the Plaintiff').

MORGAN STANLEY'S PRELIMINARY JURY INSTR. MS-P8

Believability Of Witnesses.

In determining the believability of any witness and the weight to be given the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

Expert witnesses.

You may hear opinion testimony on certain subjects from a person or persons referred to as expert witnesses. You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all the other evidence in the case.

Source: Fla. Std. Jury Instruction 2.2 (modified for pre-evidence).

Charts and Summaries.

Certain charts and summaries may be shown to you in order to help explain facts disclosed by books, records, and other documents that are in evidence in the case. These charts or summaries are not themselves evidence or proof of any facts. If the charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, you should disregard them.

In other words, the charts or summaries are used only as a matter of convenience. To the extent that you find they are not truthful summaries of facts or figures shown by the evidence in the case, you are to disregard them entirely.

Source: 3 Federal Jury Practice and Instructions § 104.50 (5th ed.) (Civil) (2004)

Conclusion of Preliminary Instructions Prior to Opening Statements.

At this time, the attorneys for the parties will have an opportunity to make their opening statements, in which they may explain to you the issues in the case and give you a summary of the facts they expect the evidence will show.

Source: Fla. Std Jury Instructions, 1.1 PRELIMINARY INSTRUCTION (end of 1.1).

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

NOTICE OF FILING TRIAL EXHIBIT LIST

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed the attached Morgan Stanley's Trial Exhibit List, dated March 17, 2005.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand-delivery on this 17th day of March, 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,
vs. **CASE NO: CA 03-5045 AI**
MORGAN STANLEY & CO. INCORPORATED,
Defendant.

Morgan Stanley's Trial Exhibit List

Morgan Stanley & Co. Incorporated ("Morgan Stanley") reserves the right to modify or supplement its list of trial exhibits consistent with the Florida Rules of Civil Procedure, the agreement of the parties, further orders of the Court, or any other applicable law or procedure. Morgan Stanley reserves the right to modify or supplement this list in response to unexpected trial allegations by Coleman (Parent) Holdings Inc. ("CPH") which require rebuttal, to cross-examine CPH witnesses, or in response to rulings by the Court on motions in limine. In addition, Morgan Stanley reserves the right to use as an exhibit documents relied upon by expert witnesses, exhibits listed by CPH on its exhibit list, and demonstrative exhibits.

Key to Objections:

(MIL) = Conditional Upon Rulings on Motions In Limine	NF = No Foundation
CUM = Cumulative	LE = Late Exhibit
H = Hearsay	NR= Not Relevant
I = Incomplete	P= Prejudicial (Rule 9.403)
IG = Improper Grouping	IO = Improper Opinion
NA = Authenticity Not Est.	

S = CPH Reserves the Right to Object to Summaries
# = In Addition to All Objections w/in CPH's Motions In Limine
90.706 = Improper Use of Literature

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
1	09/09/2003	Letter from M. Brody to Z. Brown re no written document retention policy ***Dep:*** MS 1 ***Bates:***	NR, P	
7	08/14/1997	Memo from V. Kistler to File re Sunbeam Neosho Inventory ***Dep:*** MS 7 ***Bates:*** CPH 0009020-0009021	NR, NF, H, NA	
8	11/21/1997	Memo from D. Pastrana to Sunbeam Inventory Observation Team re Sunbeam - Inventory Observations ***Dep:*** MS 8 ***Bates:*** CPH 0078581-0078585	NR, NA, NF, H	
9	03/19/1998	Comfort Letter from Arthur Andersen to Morgan Stanley ***Dep:*** MS 9 ***Bates:*** MSC 0000376-0000382	No Objection	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
10	03/25/1998	Second Comfort Letter from Arthur Andersen to Morgan Stanley ***Dep:*** MS 10 ***Bates:*** CPH 1084897-1084898	No Objection	
11	03/19/1998	R. Goudis, "Sunbeam States that First Quarter Revenues May Be Lower than Street Estimates" ***Dep:*** MS 11 ***Bates:*** MSC 0016944-0016945	No Objection	
12	03/06/1998	Form 10K Annual Report for the Fiscal Year Ended Dec. 28, 1997 for Sunbeam Corporation ***Dep:*** MS 12 ***Bates:*** CPH 1409062-1409117	No Objection	
14	00/00/1998	Special Audit Procedures ***Dep:*** MS 14 ***Bates:*** CPH 0090040-0090045	NR, NF, H, NA	
16	11/11/1998	Memo from D. Denkhaus to Distribution re Sunbeam Corporation Document Retention ***Dep:*** MS 16 ***Bates:*** CPH 0076949	P, NR, NF, H, NA	
20	12/28/1997	Work Program Sunbeam Corp. - Core Operations ***Dep:*** MS 20 ***Bates:*** CPH 0011408-0011468	NR, NA, NF, H	
21	12/28/1997	Work Program Sunbeam Corp. - Consolidation and Financial Reporting ***Dep:*** MS 21 ***Bates:*** CPH 0011752-0011754	NR, NA, NF, H	
22	01/30/1998	Memo from D. Pastrana to the Files re Sunbeam Corp. Audit 12/31/97 Residual Audit Risk Reduction Approach ***Dep:*** MS 22 ***Bates:*** CPH 0011144-0011152	NA, NF, H, NR	
23	12/28/1997	Sunbeam Preliminary Materiality Assessment ***Dep:*** MS 23 ***Bates:*** CPH 0010963-0010971	NA, NF, H, NR	
24	05/21/1998	Fax from D. Pastrana to R. Gluck with attached Sunbeam Corporation Blueback Clearance Form ***Dep:*** MS 24 ***Bates:*** CPH 0244904-0244915	NF, NA, H, NR	
25	03/05/1998	Postaudit Review for Subsequent Material Transactions and Events After the Date of the Auditors' Report, Sunbeam Corporation 10K for Dec. 28, 1997 ***Dep:*** MS 25 ***Bates:*** CPH 0130041-0130050	H, NF, NA	
26	03/05/1998	Sunbeam P&L, Actuals Comparison Reporting Period January 1998 with marginalia ***Dep:*** MS 26 ***Bates:*** CPH 0013023-0013027	NF, NA, H	
27	03/13/1998	Sunbeam P&L Variations through March 1, 1998 and Profit Loss Statement for Period February 1998 ***Dep:*** MS 27 ***Bates:*** CPH 0012963-0012967	NF, NA, H	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
28	03/16/1998	Postaudit Review for Subsequent Material Transactions and Events After the Date of the Auditors' Report, Sunbeam Corporation Sale of $2.014 Billion Zero Coupon Senior Subordinated Debentures due 2018 for Dec. 28, 1997 ***Dep:*** MS 28 ***Bates:*** CPH 0129926-0129936	NF, NA, H	
30	03/16/1998	Letter from A. Dunlap, R. Kersh, D. Fannin, R. Gluck to Arthur Andersen re Representations submitted with Offering Memorandum ***Dep:*** MS 30 ***Bates:*** CPH 0129687-0129689	H, NF, NA	
32	03/21/1998	Email from D. Pastrana to L. Bornstein, M. Brockelman with attached draft Sunbeam Comfort Letter and grl ***Dep:*** MS 32 ***Bates:*** CPH 0041650-0041661	H, NF, NA, IG (CPH 0041650-54)	
34	03/23/1998	Letter from A. Dunlap, R. Kersh, D. Fannin, and R. Gluck to Arthur Andersen re Representations submitted with Offering Memorandum ***Dep:*** MS 34 ***Bates:*** CPH 0129642-0129644	H, NF, NA	
35	03/13/1998	Postaudit Review for Subsequent Material Transactions and Events After the Date of the Auditors' Report, Sunbeam Corporation Registration Statement for Dec. 28, 1997 ***Dep:*** MS 35 ***Bates:*** CPH 0129979-0129988	H, NF, NA	
36	03/20/1998	D. Canedy, "Sunbeam Stock Falls 9.4% on Lower Projections for Revenue", New York Times"; from L. Bornstein to P. Harlow, D. Pruitt, D. Pastrana ***Dep:*** MS 36 ***Bates:*** CPH 0021819	H	
37	12/15/1998	Sunbeam Corporation Arthur Andersen Fees & Expenses Restatement and Other Accounting Services from July 1, 1998 through December 15, 1998 ***Dep:*** MS 37 ***Bates:*** CPH 0083764-0083765	H, NF, NA, NR, P	
39	03/19/1998	R. Goudis, "Sunbeam States that First Quarter Revenues May Be Lower than Street Estimates" ***Dep:*** MS 39 ***Bates:*** CPH 1075408	No Objection	
40	03/19/1998	Sunbeam Offering Memorandum $2,014,000,000 Zero Coupon Convertible Senior Subordinated Debentures Due 2018 ***Dep:*** MS 40 ***Bates:*** MSC 0000001-0000175	No Objection	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
41	03/18/1998	Sunbeam Sales Forecast, Jan. & Feb. Consolidated Net Sales Actual, March Net Sales through Mar. 17,1998 ***Dep:*** MS 41 ***Bates:*** MSC 0028858	No Objection	
42	00/00/1998	Form for Documentation of Referencing Procedures, Sunbeam Corporation Comfort letter dated March 19, 1998 ***Dep:*** MS 42 ***Bates:*** CPH 0129975-0129977	NF, NA	
43	03/16/1998	Postaudit Review for Subsequent Material Transactions and Events After the Date of the Auditors' Report, Sunbeam Corporation Sale of $2.014 Billion Zero Coupon Senior Subordinated Debentures due 2018 for Dec. 28, 1997 ***Dep:*** MS 43 ***Bates:*** CPH 0129927-0129936	NF, NA, H	
44	03/16/1998	Letter from A. Dunlap, R. Kersh, D. Fannin, R. Gluck to Arthur Andersen re Representations submitted with Offering Memorandum ***Dep:*** MS 44 ***Bates:*** CPH 0129687-0129689	H, NF, NA	
47	03/23/1998	Letter from A. Dunlap, R. Kersh, D. Fannin, and R. Gluck to Arthur Andersen re Representations submitted with Offering Memorandum ***Dep:*** MS 47 ***Bates:*** CPH 0129642-0129644	H, NF, NA	
56	03/10/1998	Fax from S. Boone to T. Freed with attached March 7, 1998 Memo from J. Tyree to Sunbeam Financing Team re Accounting Due Diligence Call ***Dep:*** MS 56 ***Bates:*** CPH 0635892-0635895	No Objection	
57	03/10/1998	Fax from S. Boone to T. Molitor with attached March 7, 1998 Memo from J. Tyree to Sunbeam Financing Team re Accounting Due Diligence Call ***Dep:*** MS 57 ***Bates:*** FUNB016564-016567	No Objection	
58	04/03/1998	Fax from D. Fannin to W. Strong, J. Stynes, R. Kitts, and J. Tyree with attached Apr. 3, 1997 [sic] "Sunbeam Corporation Lower First Quarter Sales and Earnings Expectations; Names Lee Griffith President of Household Products Business" ***Dep:*** MS 58 ***Bates:*** CPH 0639323-0639327	No Objection	
60	07/24/1998	Memo from D. Denkhaus to the Files re Sunbeam Corporation - Interview with Deborah McDonald ***Dep:*** MS 60 ***Bates:*** CPH 1071418-1071432	No Objection	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
61	10/16/1998	Management Letter from Arthur Andersen to Board of Directors and Management of Sunbeam Corporation ***Dep:*** MS 61 ***Bates:*** CPH 0084406-0084458	H, NF, NA	
62	04/21/1997	Memo from R. Cohen to All Employees re Corporate E-mail Policy ***Dep:*** MS 62 ***Bates:*** CPH 1433326-1433329	NR, P	
67	06/08/2001	Complaint, Coleman (Parent) Holdings v. Arthur Andersen and Phillip Harlow, No. CA 01-06062 (15th Jud. Dist Fla.) ***Dep:*** MS 67 ***Bates:***	No Objection	
68	09/02/2003	Coleman (Parent Holdings Inc.'s Response to Morgan Stanley & Co. Incorporated's First Set of Interrogatories ***Dep:*** MS 68 ***Bates:***	No Objection	
69	02/27/1998	MacAndrews & Forbes Project Laser Working Group List ***Dep:*** MS 69 ***Bates:*** CPH 1341551-1341574	NR, P	
70	05/21/1998	MacAndrews & Forbes Project Laser Working Group List ***Dep:*** MS 70 ***Bates:*** CPH 1399303-1399316	NR	
71	06/29/1998	Sunbeam Oster Co. / Coleman Acquisitions, Contact List ***Dep:*** MS 71 ***Bates:*** CPH 0024601-0024602	H, NA, NF, NR	
73	03/13/1998	Draft Information Statement Pursuant to Section 14(f), The Coleman Company, Inc. ***Dep:*** MS 73 ***Bates:*** CPH 1421226-1421248	H, NR, P, NF, NA	
75	03/30/1998	Letter from P. Rowe to S. Youn enclosing Wachtell Chronology ***Dep:*** MS 75 ***Bates:*** CPH 1401525-1401534	H, NF, P	
76	12/12/1997	Credit Suisse First Boston Material Prepared for Discussion Sunbeam ***Dep:*** MS 76 ***Bates:*** CPH 1407048-1407318	No Objection	
77	12/10/1997	Chase Securities Inc., Sunbeam Corp. / The Coleman Co., Inc. Pro Forma Combination Analysis ***Dep:*** MS 77 ***Bates:*** CPH 1425610-1425629	NA, NF, NR, H, P	
78	12/15/1997	Fax from D. Fannin to R. Kitts, W. Strong and J. Stynes with attached Schedule of Synergies ***Dep:*** MS 78 ***Bates:*** MSC 0026587-0026588	NR, P, NF, H, NA	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
79	11/06/1997	MacAndrews & Forbes, Sunbeam Transaction Rationale ***Dep:*** MS 79 ***Bates:*** CPH 0467007	No Objection	
80	01/21/1998	Laser Corporation, Key Assumptions with W. Nesbitt marginalia ***Dep:*** MS 80 ***Bates:*** CPH 1426289-01426296	I	
81	02/06/1998	Project Laser Proposed Summary Transaction Terms ***Dep:*** MS 81 ***Bates:*** CPH 1421814-1421817	No Objection	
82	02/12/1998	Project Laser, Laser Stand Alone Income Statement, I/B/E/S Case ***Dep:*** MS 82 ***Bates:*** CPH 1406962-1406964	No Objection	
83	02/20/1998	Draft Project Laser, Proposed Summary Transaction Terms with marginalia ***Dep:*** MS 83 ***Bates:*** CPH 1427250-1427253	No Objection	
84	02/23/1998	Sunbeam Long Range Strategic Plan with Levin marginalia ***Dep:*** MS 84 ***Bates:*** CPH 1324756-1324774	No Objection	
86	12/01/1997	James Maher Calendar, Dec. 1, 1997 - March 31, 1998 ***Dep:*** MS 86 ***Bates:*** CPH 2000687-2000707	NR (entries not relating to transaction)	
87	02/25/1998	Memo from A. Emmerich, F. Miler to G. Dickes, R. Duffy, N. Ginstling; S. Isko; W. Nesbitt, J. Salig, B. Schwartz, P. Shapiro, R. Gordon re Structure of Proposed Transactions ***Dep:*** MS 87 ***Bates:*** CPH 1422243-1422246	H, NF	
88	02/25/1998	Minutes of a Meeting of the Board of Directors of The Coleman Co, Inc. ***Dep:*** MS 88 ***Bates:*** CPH 0634056-0634064	No Objection	
92	04/25/2001	Affidavits & Declaration from Taxpayer Under Reg. Section 301.9100-3(e)(2) Mafco Holdings, Inc. ***Dep:*** MS 92 ***Bates:*** CPH 1429803-1429805	NR, P, NF	
93	02/27/1998	Agreement and Plan of Merger among Sunbeam Corporation, Laser Acquisition Corp., CLN Holdings, Inc. and Coleman (Parent) Holdings, Inc. ***Dep:*** MS 93 ***Bates:*** MSC 0007947-0008010	No Objection	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
96	08/12/1998	Settlement Agreement between Sunbeam and Coleman (Parent) Holdings Inc. ***Dep:*** MS 96 ***Bates:*** CPH 2000731-2000763	NR, P	
97	04/02/1999	Memo from S. Tripp to Sunbeam Audit Files re M&F Warrants Accounting and Valuation ***Dep:*** MS 97 ***Bates:*** CPH 1308865-1308870	IO, NR, NA, NF, P, H	
98	00/00/1998	Sunbeam Treasure Stock Calculation - Warrants ***Dep:*** MS 98 ***Bates:*** CPH 1428744	NR, P, NF, H, NA, IO	
99	05/14/1999	Sunbeam Annual Report 1998 and Form 10K ***Dep:*** MS 99 ***Bates:*** CPH 0639339-0639449	NR, P, H	
100	04/20/1998	CLN Holdings Inc. Consolidated Statement of Operations ***Dep:*** MS 100 ***Bates:*** CPH 0282212-0282227	NA, NF, NR, P	
101	02/23/1998	Draft Confidentiality Agreement from The Coleman Company, Inc. to Sunbeam Corporation ***Dep:*** MS 101 ***Bates:*** CPH 1421213-1421219	H, NA, NF, NR, P - (MIL)	
102	03/04/1998	The Coleman Company Organizational Chart ***Dep:*** MS 102 ***Bates:*** CPH 0171292-0171296	H, NA, NF, NR, P	
103	12/10/1997	Engagement Letter from R. Goudis (Credit Suisse First Boston) to R. Shapiro (Coleman Company) ***Dep:*** MS 103 ***Bates:*** CPH 1402232-1402234	No Objection	
104	12/08/1997	Sunbeam/Coleman Comparison with marginalia ***Dep:*** MS 104 ***Bates:*** CPH 2000144-2000149	IG	
105	12/10/1997	W. Nesbitt Sunbeam/Coleman Merger Consequences ***Dep:*** MS 105 ***Bates:*** CPH 1426299-1426303	No Objection	
106	01/26/1998	W. Nesbitt Sunbeam/Coleman Comparison re Merger Consequences Assuming Cost Savings of: 100,000 ***Dep:*** MS 106 ***Bates:*** CPH 1425922-1425931	No Objection	
107	01/26/1998	W. Nesbitt Sunbeam/Coleman Comparison re Merger Consequences Assuming Cost Savings of: 150,000 ***Dep:*** MS 107 ***Bates:*** CPH 2000086-2000095	No Objection	
108	02/06/1998	W. Nesbitt Sunbeam/Coleman Comparison re Merger Consequences Assuming Cost Savings of: 75,000 with marginalia ***Dep:*** MS 108 ***Bates:*** CPH 1120631-1120659	IG, NF, H, NA	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
109	04/28/1998	Letter from D. Kraus to M. MacPhair re Trading in Securities of The Coleman Co., Inc. Signature Brands USA, Inc. and First Alert, Inc., File No. MD-1200 with attached Skadden Chronology ***Dep:*** MS 109 ***Bates:*** CPH 1042288-1042317	H, NF, P	
110	00/00/0000	Business Cards Contact Information re R. Kersh, D. Fannin, R. Gluck, B. Totte, R. Goudis, G. Wilder, P. Harlow, A. Molenaar, K. Polak, and J. Lee ***Dep:*** MS 110 ***Bates:***	NR, NF, NA, H	
111	02/23/1998	Sunbeam Long Range Strategic Plan with marginalia ***Dep:*** MS 111 ***Bates:***	No Objection	
112	02/25/1998	Credit Suisse First Boston Draft Materials Prepared for the Board of Directors; The Coleman Company, Inc ***Dep:*** MS 112 ***Bates:*** CPH 1401219-1401238	No Objection	
113	02/27/1998	Minutes of a Meeting of The Board of Directors of The Coleman Company, Inc. ***Dep:*** MS 113 ***Bates:*** CPH 0634065-0634075	No Objection	
114	03/13/1998	Faxed Presentation to J. Page, The Coleman Company, Inc. ***Dep:*** MS 114 ***Bates:*** CPH 1344526-1344542	NR, P, NF	
115	05/11/1998	"Sunbeam Reports 1st Quarter Results; Expects 1998 EPS in $1.00 Range Before Charges, 1999 EPS in $2.00 Range ***Dep:*** MS 115 ***Bates:*** MSC 0063805-0063811	No Objection	
117 A	02/27/1998	Agreement and Plan of Merger among Sunbeam Corporation Camper Acquisition Corp. and The Coleman Company, Inc. ***Dep:*** MS 117 ***Bates:*** MSC 0008011-0008066	No Objection	
117 B	02/27/1998	Agreement and Plan of Merger among Sunbeam Corporation Camper Acquisition Corp. and The Coleman Company, Inc. ***Dep:*** MS 117 ***Bates:*** MSC 0008011-0008066	No Objection	
118 A	02/27/1998	Minutes of a Meeting of The Board of Directors of The Coleman Company, Inc. with attached Project Laser Proposed Transaction Structure ***Dep:*** MS 118 ***Bates:*** CPH 0634065-0634085	No Objection	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
118B	02/27/1998	Minutes of a Meeting of The Board of Directors of The Coleman Company, Inc. with attached Project Laser Proposed Transaction Structure ***Dep:*** MS 118 ***Bates:*** CPH 0634065-0634085	No Objection	
119	01/02/2002	Coleman (Parent) Holdings' Response to Andersen's Motion to Compel Production of Documents Related to the Coleman Company (Coleman (Parent) Holdings, Inc. v. Arthur Andersen LLP and Phillip E. Harlow, Case No.: CA 01-06062AN (15th Jud. Dist. Fla.) ***Dep:*** MS 119 ***Bates:*** CPH 1315399-1315409	NR, P	
120A	02/27/1998	Fairness Opinion Letter from G. Rich (Credit Suisse First Boston) to Board of Directors of The Coleman Company, Inc. ***Dep:*** MS 120 ***Bates:*** CPH 1400750-1400752	No Objection	
120B	02/27/1998	Fairness Opinion Letter from G. Rich (Credit Suisse First Boston) to Board of Directors of The Coleman Company, Inc. ***Dep:*** MS 120 ***Bates:*** CPH 1400750-1400752	No Objection	
121	12/09/1997	Bruce Slovin Day Planner Report Dec.1997 - Feb. 1998 ***Dep:*** MS 121 ***Bates:*** CPH 2005974-2005978	NR, CUM	
128	11/01/1996	Corporations Listed on Schedule 1; Unanimous Written Consent of the Board of Directors or the Executive Committee of the Board of Directors in Lieu of a Meeting ***Dep:*** MS 128 ***Bates:*** DPW 0014376-0014398	NR, P, NF	
129	00/00/0000	Resolution re Officer and Committee Member Appointments ***Dep:*** MS 129 ***Bates:*** DPW 0014143-0014144	I, NR, NF	
130A	03/18/1998	The Coleman Company, Inc. Information Statement Pursuant to Section 14(f) of the Securities Exchange Act of 1934, as amended, and Rule 14f-1 thereunder ***Dep:*** MS 130 ***Bates:*** CPH 1406746-1406765	NR, P, NF	
130B	03/18/1998	The Coleman Company, Inc. Information Statement Pursuant to Section 14(f) of the Securities Exchange Act of 1934, as amended, and Rule 14f-1 thereunder ***Dep:*** MS 130 ***Bates:*** CPH 1406746-1406765	NR, P, NF	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
131	04/10/1998	Bloomberg Headlines for Coleman Co. Inc. (CLN) ***Dep:*** ***Bates:*** CPH 1426091	NA, H, NR, P, NF	
132	03/04/1998	Notification and Report Form for Certain Mergers and Acquisitions, Ronald O. Perelman ***Dep:*** MS 132 ***Bates:*** CPH 1414669-1414713	H, NR, P, NF	
133	02/04/1998	Confidentiality Agreement from P. Shapiro (The Coleman Company, Inc.) to D. Fannin (Sunbeam Corporation) ***Dep:*** MS 133 ***Bates:*** CPH 0642925-0642932	NR, P, NF - (MIL)	
134 A	02/23/1998	Draft Confidentiality Agreement from Sunbeam Corporation to The Coleman Company, Inc. ***Dep:*** MS 134 ***Bates:*** CPH 1427533-1427539	H, NA, NF, NR, P- (MIL)	
134 B	02/23/1998	Draft Confidentiality Agreement from Sunbeam Corporation to The Coleman Company, Inc. ***Dep:*** MS 134 ***Bates:*** CPH 1427533-1427539	H, NA, NF, NR, P - (MIL)	
135	03/30/1998	R. Goudis, "Sunbeam Corporation Acquires Controlling Interest in the Coleman Company, Inc." ***Dep:*** MS 135 ***Bates:*** CPH 1325201-1325202	No Objection	
137	01/30/1998	Sunbeam EPS Estimates, Revised by Analyst on Jan. 29, 1998 ***Dep:*** MS 137 ***Bates:*** CPH 1393114; 1327092	No Objection	
138	02/06/1998	A. Shore, Did Al Show His Hand Too Soon?, PaineWebber ***Dep:*** MS 138 ***Bates:*** CPH 1327714-1327721	No Objection	
139	07/18/1996	Employment Agreement by and between Sunbeam Corporation and Albert J. Dunlap, Exhibit 10A to Form 10QA Quarterly Report for Sunbeam Corporation ***Dep:*** ***Bates:*** CPH 1402705-1402731	No Objection	
140	03/31/1997	Form 10K Annual Report for the fiscal Year Ended Dec. 29, 1996 for Sunbeam Corporation ***Dep:*** ***Bates:*** CPH 1402732-1402772	No Objection	
143	06/30/1997	Form 10K Annual Report for the Fiscal Year ended Dec. 31, 1996 for Sunbeam Corp. ***Dep:*** ***Bates:*** CPH 1402814-1402827	No Objection	
144	01/29/1998	Don't Miss Consensus, Merrill Lynch Research Bulletin ***Dep:*** MS 144 ***Bates:*** CPH 1392481-1392484	No Objection	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
146	03/12/1998	A. Shore, Al's Magical Mystery Tour, PaineWebber ***Dep:*** ***Bates:*** CPH 1393088-1393108	No Objection	
149	07/18/1996	"Al Dunlap Named Chairman and CEO of Sunbeam," Business Wire ***Dep:*** ***Bates:*** CPH 1392717	No Objection	
150	07/24/1996	"Sunbeam Corporation Announces Election of Russell Kersh as Executive Vice President, Finance and Administration," PRNewswire ***Dep:*** ***Bates:*** CPH 1392716	No Objection	
151	08/08/1996	"Sunbeam Adds Two To Board and Adopts Stock-Payment Plan," The Wall Street Journal B6 ***Dep:*** ***Bates:*** CPH 1408630	No Objection	
152	08/21/1996	"Sunbeam Corporation Announces Directors Purchase Stock 'B' With Their Own Funds," PR Newswire ***Dep:*** ***Bates:*** CPH 1408468	No Objection	
153	08/22/1996	"Sunbeam Corp.: Five Insiders Follow CEO In Buying Company Stock," The Wall Street Journal B6 ***Dep:*** ***Bates:*** CPH 1408627	No Objection	
154	02/13/1997	"CEO Al Dunlap Purchases Additional Shares In Sunbeam," PR Newswire ***Dep:*** ***Bates:*** CPH 1408561-1408562	No Objection	
155	02/14/1997	"Sunbeam Director Purchases Additional Shares," PR Newswire ***Dep:*** ***Bates:*** CPH 1408559-1408560	No Objection	
158	10/23/1996	"Sunbeam Corporation Reports Third Quarter 1996 Results," PR Newswire ***Dep:*** ***Bates:*** CPH 1408443-1408446	No Objection	
160	01/30/1997	"Sunbeam Attributes $234.7Million Loss to Its Restructuring," The Wall Street Journal B4 ***Dep:*** ***Bates:*** CPH 1408611	No Objection	
161	07/24/1997	"Sunbeam Corp.: Profit More Than Tripled to $26.2 Million in Quarter," The Wall Street Journal B4 ***Dep:*** ***Bates:*** CPH 1408599	No Objection	
162	10/23/1997	"Sunbeam Corp.: Loss is Reversed as profit of $34.5 Million Is Posted," The Wall Street Journal ***Dep:*** ***Bates:*** CPH 1408591	No Objection	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
163	01/28/1998	"Sunbeam Completes Record Year for Sales, Earnings & Global Expansion," Business Wire ***Dep:*** ***Bates:*** CPH 1409182-1409187	No Objection	
165	12/11/1997	W. Nesbitt Sunbeam Quarterly Earnings Comparison ***Dep:*** MS 165 ***Bates:*** CPH 1426297-1426303	No Objection	
166	03/19/1998	Sunbeam Offering Memorandum $2,014,000,000 Zero Coupon Convertible Senior Subordinated Debentures Due 2018 ***Dep:*** MS 166 ***Bates:*** CPH 1362487-1326662	No Objection	
167	05/20/1998	Memo from W. Nesbitt to R. Perelman, D. Drapkin, H. Gittis, J. Levin J. Maher re Review of Sunbeam Research with attached research materials ***Dep:*** MS 167 ***Bates:*** CPH 1011319-1011351	No Objection	
168	04/14/1998	SOC Acquisition Analysis Key Assumptions ***Dep:*** MS 168 ***Bates:*** CPH 1433889-1433890	I, NR, P, NF	
169 A	12/10/1997	Engagement Letter from G. Rich (Credit Suisse First Boston) to J. Levin (The Coleman Company, Inc.) ***Dep:*** MS 169 ***Bates:*** CPH 1402232-1402235	No Objection	
169 B	12/10/1997	Engagement Letter from G. Rich (Credit Suisse First Boston) to J. Levin (The Coleman Company, Inc.) ***Dep:*** MS 169 ***Bates:*** CPH 1402232-1402235	No Objection	
170	11/06/1997	MAFCO Calendar Nov. 6-9, 1997, Feb. 5-8, 1998, Feb. 23-25, 1998 ***Dep:*** ***Bates:*** CPH 1429981-1429983	No Objection	
171	11/19/1997	Ronald Perelman Calendar Nov. 19-20, Nov. 25, Dec. 8-20, Dec. 12, Dec. 18, 1997 ***Dep:*** MS 171 ***Bates:*** CPH 2000708-2000715	NR, P (entries not related to transaction)	
172	02/27/1998	Coleman (Parent) Holdings Inc. Consent of Directors in Lieu of Board of Directors' Meeting attaching Resolutions of the Board of Directors Coleman (Parent) Holdings Inc. Approving Proposed Merger Transactions and Related Agreements ***Dep:*** MS 172 ***Bates:*** CPH 1429974-1429977	No Objection	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
173	03/05/1998	Project Laser Chronology of Events ***Dep:*** MS 173 ***Bates:*** MSC 0033256-0033263	H, NF, P	
174	12/16/1997	Memo from A. Dunlap to R. Perelman re confirming meeting ***Dep:*** MS 174 ***Bates:*** CPH 1066774	NA, NF, H	
175	01/26/1998	Laser Corporation Key Assumptions ***Dep:*** MS 175 ***Bates:*** CPH 0482090-0482098	I	
177	01/29/1998	Handwritten Notes re Coleman Meeting, Jan 98, New York ***Dep:*** MS 177 ***Bates:*** CPH 0474014-0474024	H, NA, NF, NR, P	
178	02/06/1998	Project Laser Proposed Summary Transaction Terms ***Dep:*** ***Bates:*** CPH 1406943-1406946	I	
179	10/13/2003	Coleman (Parent) Holdings Inc.'s Response to Morgan Stanley & Co., Incorporated's Second Set of Interrogatories and Second Request for Production of Documents ***Dep:*** ***Bates:***	NR (Int Nos. 1,2,3,5,7)	
180	02/21/1998	Memo from A. Emmerich to R. Easton, A. Fuchs re Laser Term Sheet ***Dep:*** MS 180 ***Bates:*** CPH 1408948-1408949	H, NF, NA	
183	03/05/1998	Sunbeam Long Range Strategic Plan with handwritten fax cover sheet from I. Seth to K. Eltrich ***Dep:*** MS 183 ***Bates:*** CPH 1109095-1109115	No Objection	
186	02/22/1998	Sunbeam Corporation Presentation with marginalia ***Dep:*** MS 186 ***Bates:*** CPH 1324775-1324850	No Objection	
187	09/02/2003	Coleman (Parent) Holdings Inc.'s Response to Morgan Stanley & Co., Incorporated's First Set of Interrogatories ***Dep:*** ***Bates:***	No Objection	
188	02/26/1998	Fax from W. Nesbitt to A. Emmerich with attached Project Laser Exhibit A: Transaction Pricing Calculations ***Dep:*** MS 188 ***Bates:*** CPH 1316960-1316962	I	
190	02/27/1998	Project Laser Consideration Calculations with marginalia ***Dep:*** ***Bates:*** CPH 1406986	I	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
195	11/13/2001	W. Nesbitt Calendar Oct. 27-Dec. 31, 1997 ***Dep:*** MS 195 ***Bates:*** CPH 2000635-2000686	NR, P (entries not related to transaction)	
196	03/02/1998	"The Coleman Company Agrees to Acquisition by Sunbeam" ***Dep:*** MS 196 ***Bates:*** CPH 1393830-1393831	No Objection	
197	02/25/1998	Credit Suisse First Boston Backup Materials Prepared for the Board of Directors The Coleman Company, Inc. ***Dep:*** MS 197 ***Bates:*** CPH 1392397-1392444	No Objection	
198	06/16/1997	Jonathan R. Laing, "High Noon At Sunbeam: Does Chainsaw Al Have a Truly Revived Operation," Barron's, 29 ***Dep:*** MS 198 ***Bates:*** CPH 1429021-1429025	H, NF	
199	06/16/1997	Jonathan R. Laing, "High Noon At Sunbeam: Does Chainsaw Al Have a Truly Revived Operation," Barron's via Dow Jones ***Dep:*** MS 199 ***Bates:*** CPH 1409169-1409179	H, NF	
200	12/18/1997	"Kimberly-Clark's Cutbacks Should Ease Overcapacity," Wall Street Journal with marginalia and fax from J. Levin to R. Perelman ***Dep:*** ***Bates:*** CPH 2000103-2000105	NA, NF, H	
202	01/28/1998	Soc 4Q Comes Up Short; Reducing Ests.; But Maintain Strong Buy P1-2, CIBC Oppenheimer ***Dep:*** MS 202 ***Bates:*** CPH 0468457-0468462	No Objection	
203	01/29/1998	Soc 4Q 97 EPS in Line; Remaining Neutral, The Buckingham Research Group ***Dep:*** ***Bates:*** CPH 1415763-1415764	No Objection	
204	01/29/1998	A. Shore, "Sunbeam Solid Close to 1997; Encore in 1998?", PaineWebber ***Dep:*** MS 204 ***Bates:*** CPH 1393144-1393147	No Objection	
206	01/29/1998	J. Buenao, "Sunbeam Posts Profit Below Forecasts, A Stumble That Sends Stock Down 9.5%," Wall Street Journal, A6 ***Dep:*** MS 206 ***Bates:*** CPH 1327166-1327167	H, NF	
208	03/06/1998	Form 10K Annual Report for the Fiscal Year Ended December 28, 1997, Sunbeam Corporation ***Dep:*** MS 208 ***Bates:*** CPH 1428829-1428887	NA, NF (handwriting)	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
209	03/09/1998	"Into the Maw, Sunbeam's Chainsaw Al Goes on a Buying Binge," Barron's ***Dep:*** ***Bates:*** CPH 1409994-1409995	H, NF	
210	03/19/1998	R. Goudis, "Sunbeam States First Quarter Revenues May Be Lower Than Street Estimates", Business Wire ***Dep:*** MS 210 ***Bates:*** CPH 1395046	No Objection	
211	03/19/1998	S. Matthews, "Sunbeam Warns 1st-Qtr Sales May Be Below Estimates (Update5)," Bloomberg ***Dep:*** MS 211 ***Bates:*** CPH 1392706-1392707	No Objection	
212	03/19/1998	A. Shore, Sunbeam: Grilled!!!, PaineWebber ***Dep:*** MS 212 ***Bates:*** CPH 1393266-1393268	No Objection	
213	03/19/1998	D. Buck, SOC Pre-Announces 1Q Sales Shortfall Due to Timing of Customer Buying; Focus on Bigger Picture, Namely Pending Acquisitions, Price Weakness Represents Buying Opportunity, Sands Brothers & Co. Ltd. ***Dep:*** MS 213 ***Bates:*** CPH 1415534	No Objection	
214	03/19/1998	S. Graham, 1Q Sales May Fall Short; But for Reason We Can Live With; L-t View Unchanged, CIBC Oppenheimer ***Dep:*** MS 214 ***Bates:*** CPH 1393472-1393478	No Objection	
215	03/20/1998	G. Jaffe, "Sunbeam Shares Drop on Expected Shortfall in Sales," The Wall Street Journal ***Dep:*** MS 215 ***Bates:*** CPH 1409192-1409193	H	
216	03/20/1998	E. Fontenelli, Sunbeam Corporation: Trimmed Q1: 98E/1998E on Potential Q1 Sales Shortfall; RL, Goldman Sachs ***Dep:*** MS 216 ***Bates:*** CPH 1393262-1393263	No Objection	
217	03/20/1998	Sunbeam Corp. Full Action in the P.M., Goldman, Sachs & Co. Investment Research ***Dep:*** ***Bates:*** CPH 1415540-1415541	No Objection	
218	03/20/1998	Wall Street Consensus Analysts' Recommendations, Standard & Poor's ***Dep:*** MS 218 ***Bates:*** CPH 1397652	No Objection	
219	03/21/1998	Sunbeam Corp, Standard & Poor's Stock Reports ***Dep:*** MS 219 ***Bates:*** CPH 1401579-1401583	No Objection	
220	04/03/1998	A. Shore, Sunbeam: Downgrade to Neutral from Buy -- Apr. 3, 1998, with marginalia ***Dep:*** MS 220 ***Bates:*** CPH 1267964-1267969	No Objection	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
221	04/06/1998	Sunbeam Corp., Prudential Securities ***Dep:*** ***Bates:*** CPH 1424564-1424567	No Objection	
224	12/15/1997	Memo from W. Nesbitt to R. Perelman, H. Gittis, J. Maher re Dunlap Employment Contract ***Dep:*** MS 224 ***Bates:*** CPH 1427923-1427924	I	
227	03/09/1998	Sunbeam's Dunlap Gets Stock, Options Worth $68 Mln, Bloomberg L.P. ***Dep:*** ***Bates:*** CPH 1392708-1392709	H, NF	
228	12/12/1997	Schedule of Synergies with marginalia ***Dep:*** MS 228 ***Bates:*** CPH 1406941	NR, P, NF, H, NA	
229	12/12/1997	Schedule of Synergies with marginalia ***Dep:*** ***Bates:*** CPH 1426262	NR, P, NF, H, NA	
230	02/25/1998	Memo from G. Rich, R. Duffy, S. Geller, R. Chakrapani to Investment Banking Committee re Proposed Sale of The Coleman Company, Inc. to Sunbeam Corporation ***Dep:*** MS 230 ***Bates:*** CPH 1121260-1121271	No Objection	
231	12/12/1997	Schedule of Synergies with marginalia ***Dep:*** MS 231 ***Bates:*** CPH 1406939	NR, P, NF, H, NA	
232	07/06/1998	Letter from H. Gittis to D. Fannin re Amendment to the Credit Agreement ***Dep:*** MS 232 ***Bates:*** CPH 2000771	No Objection	
233	07/22/1998	Letter from H. Gittis to H. Kristol re Stock Proposal ***Dep:*** MS 233 ***Bates:*** CPH 1328300-1328301	No Objection	
234	08/24/1998	Letter from A. Emmerich to M. Cohen re Enclosed Warrant No. W-1 for Sunbeam Stock re Pledge ***Dep:*** MS 234 ***Bates:*** CPH 2000830	NR, H, NF, NA	
235	10/10/2002	Settlement Agreement between Arthur Andersen, Coleman (Parent) Holdings, Inc., New Coleman Holdings, Inc. MacAndrews & Forbes & Holdings, Inc. and Mafco Holdings, Inc. ***Dep:*** ***Bates:***	NR, P	
236	04/15/1999	Form 10K Annual Report for the Fiscal Year Ended Dec. 31, 1998 for Coleman ***Dep:*** MS 236 ***Bates:*** CPH 0627084-0627210	NR, P, NF	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
237	03/02/1998	R. Goudis, "Sunbeam Acquires Three Publicly Traded Consumer Products Companies: Coleman, Signature Brands And First Alert" ***Dep:*** MS 237 ***Bates:*** CPH 1325251-1325253	No Objection	
240	09/06/1993	C. Horowitz, "The Richest Guy In Town; The High Life and Times of Ron Perelman, Master of Revlon," New York ***Dep:*** MS 240 ***Bates:*** CPH 1144559-1144565	H, NR, P, NF	
241	05/15/1997	Coleman Escrow Corp. $732,035,000 Offering Memorandum ***Dep:*** MS 241 ***Bates:*** CPH 1107884-1108079	NR, P, NF, H, - (MIL)	
242	03/19/1998	$2,014,000,000 Sunbeam Corporation Zero Coupon Convertible Senior Subordinated Debentures Due 2018, Purchase Agreement ***Dep:*** MS 242 ***Bates:*** DPW 0023754-0023787	No Objection	
243	03/20/1998	Comfort Letter from Ernst & Young to CLN and Morgan Stanley re audited consolidated balance sheets ***Dep:*** MS 243 ***Bates:*** CPH 1084899-1084901	H, NF, NA, NR, P	
244	06/14/1998	Schedule 13D Under the Securities Exchange Act of 1934, Sunbeam Corp. ***Dep:*** MS 244 ***Bates:*** CPH 1403698-1403708	NF, NA, NR, P	
246	05/07/1997	Coleman Escrow Corp. Actions by the Board of Directors, Resolution Adopted in Lieu of Initial Meeting of the Board of Directors ***Dep:*** ***Bates:*** DPW 0011015-0011020	NF, NA, H, NR, P	
249	01/01/1998	Montgomery's Auditing, Section 30 Letters for Underwriters ***Dep:*** ***Bates:***	H, NF, I, 90..706	
250	05/31/1998	Shapiro Calendar May 31, 1998 - Nov. 6, 1998 ***Dep:*** ***Bates:*** CPH 0508863-0508898	NR, H, P, NF, NA	
251	03/23/1998	Form 10K Annual Report for the fiscal year ended Dec. 31, 1997, The Coleman Company, Inc. ***Dep:*** MS 251 ***Bates:*** CPH 0094469-0094547	NR, H, P, NF	
252	06/26/1998	Bio Paul E. Shapiro ***Dep:*** MS 252 ***Bates:*** CPH 1292877-1292878	NR, H, NF, NA	
253	09/14/1998	Sunbeam Organization Structure ***Dep:*** MS 253 ***Bates:*** CPH 2000472-2000480	NR, H, NF, NA	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
254	03/25/1998	Sunbeam Corporation Zero Coupon Debenture due 2018 Top Holders ***Dep:*** ***Bates:*** CPH 1429020	NR, H, P, NF, NA	
255	03/06/1998	Letter from J. Kroog to P. Shapiro re Acquisition of the Coleman Co, Inc. (CLN) by Sunbeam Co. (SOC) NYSE Investigation #98611 ***Dep:*** ***Bates:*** CPH 1421977-1421980	NR, P, NA, NF, H	
257	03/31/1998	Letter from P. Shapiro to the Coleman Company, Inc. re resignation from all position s as office or employee of The Coleman Company, Inc. ***Dep:*** MS 257 ***Bates:*** CPH 0505156	NR, NF	
258	08/12/1998	Letter from P. Langerman to Sunbeam Shareholders re settlement agreement with MacAndrews & Forbes, Inc. ***Dep:*** MS 258 ***Bates:*** CPH 1131177-1131178	NR, P, H, NF, NA	
260	12/14/1998	Memo from B. Jenkins to G. Kristol, C. Elson, F. Whittlesey, D. Denkhaus, N. Spiegel, S. Thibault, P. Shapiro, J. Kelley re Audit Committee Meeting ***Dep:*** MS 260 ***Bates:*** CPH 1039844-1039850	H, NF, NA, NR, P	
261	10/14/1998	Memo from M. Shiffman to P. Langerman, J. Levin, K. Clark, S. Dalberth, R. Dunbar, B. Jenkins, J. Kelley, P. Shapiro, H. Gittis, B. Schwartz, J. Conroy, F. Fogg, R. Zimet, R. Easton, M. Bailey, G. Sard, D. Denkhaus, N. Spiegel re Final Draft - Restatement Communications ***Dep:*** MS 261 ***Bates:*** CPH 0599715-0599741	H, NA, NF, NR, P	
272	08/14/1998	Memo from S. Ash to J. Levin, P. Shapiro, J. Kelly, M. Shiffman, B. Jenkins, K. Clark, G. Wisler, M. Evans, J. Rasmus, L. Feldkamp, S. Daniels, J. Harvel re The Coleman Company, Inc. - Form 10Q June 30, 1998 ***Dep:*** ***Bates:*** CPH 0642954-0642974	NR, H, NF, P	
273	02/27/1998	CLN Holdings, Inc. Unanimous Written Consent of the Board of Directors, Resolution of the Board of Directors CLN Holdings Inc. Approving Proposed Merger Transactions and Related Agreements ***Dep:*** MS 273 ***Bates:*** WLRK 0009189-0009195	No Objection	
274	02/27/1998	Resolutions of the Board of Directors Coleman Worldwide Corporation Approving Proposed Merger Transactions and Related Agreements ***Dep:*** MS 274 ***Bates:*** WLRK 0009197-0009199	No Objection	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
277	02/27/1998	Credit Suisse First Boston S. Acquires C: Assumptions of Zero Coupon ***Dep:*** MS 277 ***Bates:*** CPH 1433908-1433911	No Objection	
278	03/29/1998	Registration Rights Agreement between Sunbeam Corporation and Coleman (Parent) Holdings, Inc. ***Dep:*** MS 278 ***Bates:*** CPH 1094218-1094235	No Objection	
279	12/06/1999	The Coleman Company, Inc., Notice Of Merger And Appraisal Rights And Information Statement, Sunbeam Corporation Prospectus ***Dep:*** MS 279 ***Bates:*** CPH 1398266-1398537	No Objection	
280	03/25/1998	Registration Rights Agreement between Sunbeam Corporation and Morgan Stanley & Co., Incorporated ***Dep:*** MS 280 ***Bates:*** CPH 1085101-1085124	H, NR, P - (MIL)	
281	05/11/1998	Form 10Q Quarterly Report for the Period Ended March 31, 1998 for Sunbeam Corporation ***Dep:*** MS 281 ***Bates:*** DPW 0035621-0035636	No Objection	
282	11/25/1998	Form 10QA Quarterly Report for the Period Ended March 31, 1998 for Sunbeam Corporation ***Dep:*** MS 282 ***Bates:***	No Objection	
287	02/27/1998	Letter from D. Drapkin to the Coleman Company, Inc. re resignation from Board of Directors of CLN Holdings ***Dep:*** ***Bates:*** CPH 1408297	NR, NA, NF, P, H	
288	06/21/2004	"Ron Perelman," CigarAficianado.com ***Dep:*** MS 288 ***Bates:***	H, NF, NR, P	
289	02/06/2002	Voluntary Petition, In re Sunbeam, 01-40291 (Bankr. S.D.N.Y.) ***Dep:*** ***Bates:***	H, NF, NR, P	
291	02/12/1997	Memo from M. O'Sullivan to I. Engleman, T. Slotkin, G. Dickes, P. Savas, G. Woodland, V. Radwaner re Mafco Finance ***Dep:*** MS 291 ***Bates:*** CPH 2007915	H, NF, NA, NR, P	
295	03/30/1998	MAFCO Holdings Inc. Structured Equity Products Hedging Techniques ***Dep:*** MS 295 ***Bates:*** CPH 2010664-2010666	NF, NA, NR, P	
296	04/03/1998	Letter from W. Ortner to J. Maher re meeting with Citibank and price options ***Dep:*** ***Bates:*** CPH 2010681	H, NF, NA, NR, P	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
297	04/02/1998	Fax from K. Cook to T. Slotkin with attached Hedging and Monetization Strategies ***Dep:*** MS 297 ***Bates:*** CPH 2010676-2010679	H, NR, P, NF, NA	
298	04/23/1998	Fax from D. Kim to G. Dickes, T. Slotkin, P., Savas, G. Woodlan with attached Memo from M. O'Sullivan to the Mafco Finance Lenders re Mafco Finance Credit Facilities ***Dep:*** MS 298 ***Bates:*** CPH 2010668-2010675	H, NR, P, NF, NA	
299	03/20/1997	Fifth Amended and Restated MAFCO Guaranty from MAFCO Holdings Inc. as Guarantor in favor of the Lenders Referred to Herein and the Agents Referred to Herein ***Dep:*** MS 299 ***Bates:*** CPH 2007230-2007296	NR, P, NF	
300	03/20/1997	$250,000,000 Fifth Amended and Restated Revolving Credit Agreement among MAFCO, The Financial Institutions and the Initial Issuing Bank Named Herein, Citibank, N.A., The Bank of New York, and The First National Bank of Boston ***Dep:*** MS 300 ***Bates:*** CPH 2006250-2006413	NR, P, NF	
301	03/20/1997	$400,000,000 Amended and Restated Term Credit Agreement among MAFCO Finance Corp., The Financial Institutions and the Initial Issuing Bank Named Herein, Citibank, N.A., Credit Suisse First Boston, and Chase Securities Inc. ***Dep:*** MS 301 ***Bates:*** CPH 2006677-2006826	NR, P, NF	
302	03/30/1998	Third Amended and Restated Pledge Agreement from Coleman (Parent) Holdings Inc. as Pledgor to Citibank, N.A. as Collateral Agent ***Dep:*** MS 302 ***Bates:*** CPH 2006618-2006640	NR, P, NF	
307	02/23/1998	Fax from J. Salig to A. Emmerich with attached Letter from Sunbeam to Coleman re Evaluation Material for possible transaction ***Dep:*** MS 307 ***Bates:*** CPH 1421212-1421219	NR, P, NF, NA, H - (MIL)	
308	02/24/1997	MAFCO Finance Corp. Summary of Terms and Conditions, Draft ***Dep:*** MS 308 ***Bates:*** CPH 2006236-2006249	NR, P, NF, NA	
309	02/27/1998	Certain SEC Filings Relating to the Acquisition by Sunbeam Corporation of The Coleman Company, Inc. ***Dep:*** ***Bates:*** CPH 1410183-1410230	No Objection	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
310	05/15/1998	Fax from G. Dickes to P. Efron, D. Hiscano re Sunbeam Equity Hedge ***Dep:*** MS 310 ***Bates:*** CPH 2011528-2011531	NR, P, NF	
311	03/30/1998	Fifth Amended and Restated Coleman Guaranty from Coleman (Parent) Holdings Inc. as Guarantor in favor of the Lenders Referred to Herein and the Agents Referred to Herein ***Dep:*** MS 311 ***Bates:*** CPH 2006641-2006669	NR, P, NF	
315	03/30/1998	Letter from Credit Suisse Boston to Coleman re Amended and Restated Credit Agreement dated 8/3/1995 ***Dep:*** MS 315 ***Bates:*** CPH 0643329-0643338	NR, P, H, NF, NA	
316	11/25/1998	Form 10QA Quarterly Report for the Period ended March 31, 1998 for Sunbeam Corporation ***Dep:*** MS 316 ***Bates:***	No objection	
317	00/00/1997	CSFB Handwritten Notes re Major Risks ***Dep:*** MS 317 ***Bates:*** CPH 2011532-2011533	NF, H	
318	02/25/1998	Agenda for a Meeting of The Coleman Company, Inc. Board of Directors to be held on Feb. 25, 1998 ***Dep:*** MS 318 ***Bates:*** CPH 1408945-1408947	No Objection	
319	02/27/1998	Agenda for a Meeting of Coleman Company, Inc. Board of Directors ***Dep:*** ***Bates:*** CPH 1407858-1407866	No objection	
323	03/27/1998	Letter from W. Spoor to the Coleman Company, Inc. re resignation from Board of Directors of CLN Holdings ***Dep:*** ***Bates:*** CPH 1408270	NR, NF, NA, H	
325	12/09/1997	Minutes of a Meeting of the Board of Directors of the Coleman Company ***Dep:*** MS 325 ***Bates:*** CPH 1395054-1395058	NR, P, NF	
327	10/30/1997	Minutes of a Meeting of the Board of Directors of the Coleman Company, Inc. ***Dep:*** MS 327 ***Bates:*** DPW 0013825-0013827	NR, P, NF	
328	02/27/1998	Letter from F. Gifford to the Coleman Company, Inc. re resignation from Board of Directors of CLN Holdings ***Dep:*** MS 328 ***Bates:*** CPH 1408269	NR, NF, P	
329	02/23/1998	Sunbeam Long Range Strategic Plan with marginalia ***Dep:*** MS 329 ***Bates:*** CSFBC 0001623-0001641	No Objection	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
330	02/25/1998	Credit Suisse, Backup Materials Prepared for the Investment Banking Committee - The Coleman Company, Inc. ***Dep:*** MS 330 ***Bates:*** CPH 1121275-1121332	No Objection	
332	02/04/1999	Preliminary Form S1 Registration Statement for Sunbeam Corporation Debentures ***Dep:*** ***Bates:***	P, NF, NR	
333	11/04/1999	Form S1A Registration Statement for Sunbeam Corporation ***Dep:*** ***Bates:***	P, NF, NR	
334	04/25/2000	Form 10-K for the Fiscal Year Ended December 31, 1999 for Sunbeam Corporation ***Dep:*** ***Bates:***	NR, P, H, NF	
335	05/06/1998	Panavision Inc. Proxy Statement/Prospectus Combined Annual and Special Meeting of Stockholders to be Held on June 4, 1998 ***Dep:*** MS 335 ***Bates:***	NR, P, NF, H	
336	06/21/1998	Memo from D. Doyle to J. Shannahan re Sunbeam Corporation, Draft ***Dep:*** MS 336 ***Bates:*** CPH 1350190-1350194	H, NA, NF	
337	06/22/1998	Memo from T. Molitor to Distribution re Sunbeam Corporation ***Dep:*** MS 337 ***Bates:*** CPH 1258279-1258282	H, NA, NF	
338	06/26/1998	Email from C. Francavilla to M. Murray, J. Fair, J. Shannahan, D. Doyle, K. Barnish, S. Sterling, H. Husby, T. Biaggi, P. Wheelock, S. Swilt, J. O'Keane re Update on Sunbeam with marginalia ***Dep:*** MS 338 ***Bates:*** CPH 1350174-1350175	No Objection	
339	03/16/1998	"Sunbeam Reaches Out" National Law Journal ***Dep:*** ***Bates:*** DPW0004788	H, NF, NR, P	
340	02/20/1998	Fax from J. Webber to A. Emmerich with attached Project Laser Proposed Summary Transaction Terms ***Dep:*** MS 340 ***Bates:*** WLRK 0010284-0010288	I	
341	02/26/1998	Fax from R. Duffy to W. Nesbitt (c/o A. Emmerich) with Project Laser - Consideration Sensitivity ***Dep:*** ***Bates:*** CPH 1398246-1398249	NA, NF, H	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
342	02/20/1998	Memo from A. Amorison to A. Emmerich re Project Laser Legal Due Diligence Review ***Dep:*** MS 342 ***Bates:*** CPH 0642672-0642678	H, NF, NA	
344	03/27/1998	Memo from A. Emmerich, S. Cohen, F. Miller to A. Amorison re Project Laser Closing ***Dep:*** MS 344 ***Bates:*** WLRK 0007554-0007562	H, NF, NA	
345	08/12/1998	Memo from S. Cohen to H. Gittis, B. Schwartz, J. Maher, I. Engelman, W. Nesbitt, T. Slotkin, G. Dickes, J. Salig, V. Radwaner, S. Jacobs, I. Warren, B. Jacobwitz, A. Newman, B. Fogg, R. Easton, A. Amorison, P. Shapiro re Sunbeam Corporation with attached Settlement Agreement between Sunbeam and Coleman (Parent) Holdings, Inc. ***Dep:*** MS 345 ***Bates:*** CPH 1167570-1167612	NR, P	
351	02/26/1998	Fax from S. Cohen to A. Emmerich, D. Einhorn, D. Paul, M. Katzke, S. Cohen, F. Miller, G. Dickes, J. Salig, P. Shapiro, S. Isko with attached draft Agreement and Plan of Merger among Laser Corporation and Camper Holdings Inc. ***Dep:*** ***Bates:*** CPH 1411596-1411654	NF, NA, H	
352	03/24/1998	MacAndrews & Forbes/Project Laser Working Group List ***Dep:*** ***Bates:*** CPH 1411183-1411209	NR	
353	12/11/1997	Memo from W. Nesbitt to R. Perelman re Black & Decker Pooling ***Dep:*** MS 353 ***Bates:*** CPH 2005703	No Objection	
354	01/23/1998	Memo from W. Nesbitt to R. Perelman, H. Gittis, D. Drapkin, J. Maher re Sunbeam Meeting with Morgan Stanley (Jim Stynes, Alex Fuchs) ***Dep:*** MS 354 ***Bates:*** CPH 2005706	No Objection	
355	01/30/1998	Sunbeam Research (Estimates for Fourth Quarter Earnings; Goldman, Sachs Investment Research - Sunbeam Corporation) ***Dep:*** MS 355 ***Bates:*** CPH 1278481-1278484	IG	
356	02/12/1998	Fax from R. Duffy to W. Nesbitt with attachment Project Violet analyses ***Dep:*** MS 356 ***Bates:*** CPH 1120684-1120704	No Objection	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
358	03/11/1998	Memo from A. Emmerich to S. Cohen, F. Miller, P. Rowe, R. Silverberg, P. Canellos, D. Einhorn, D. Paul, M. Katzke, I. Gotts, M. Jahnke with attachment March 6, 1998 Letter from J. Kroog to P. Shapiro re Acquisition of the Coleman Co. by Sunbeam NYSE Investigation ***Dep:*** MS 358 ***Bates:*** WLRK 0020591-0020595	NR, P, H, NF, NA	
364	02/27/1998	Fax to W. Nesbitt with Credit Suisse First Boston Projections ***Dep:*** MS 364 ***Bates:*** CPH 1433908-1433912	H, NA, NF	
365	03/30/1998	W. Nesbitt handwritten notes re March 30, 1998 Closing ***Dep:*** MS 365 ***Bates:*** CPH 1433895	No Objection	
368	00/00/1995	Coleman Annual Report - 1995 ***Dep:*** MS 368 ***Bates:*** CPH 1272487-1272536	NR, P	
369	07/30/1996	Minutes of a Meeting of the Board of Directors of the Coleman Company, Inc., July 30 and 31, 1996 ***Dep:*** MS 369 ***Bates:*** DPW 0014073-0014074	NR, P	
370	10/29/1996	Minutes of a Teleconference Meeting of the Audit Committee of the Board of Directors of the Coleman Company, Inc. ***Dep:*** MS 370 ***Bates:*** DPW 0014028-0014029	NR, P, NF	
371	03/31/1997	Coleman Annual Report - 1996 ***Dep:*** MS 371 ***Bates:*** WLRK 0013747-0013790	NR, P	
372	05/13/1997	Minutes of a Meeting of the Board of Directors of the Coleman Company, Inc. ***Dep:*** MS 372 ***Bates:*** DPW 0013720-0013723	NR, P, NF	
375	05/31/1996	Action by Unanimous Written Consent of Executive Committee of the Board of Directors ***Dep:*** MS 375 ***Bates:*** DPW 0014137-0014140	NR, P, NF	
377	02/11/1997	Minutes of a Meeting of the Audit Committee of the Board of Directors of the Coleman Company ***Dep:*** MS 377 ***Bates:*** DPW 0013935-0013936	NR, P, NF	
388	08/24/1998	Warrant for the Purchase of Shares of Common Stock of Sunbeam Corporation ***Dep:*** ***Bates:*** WLRK 0008777-0008794	NR, H, NF, NA	
390	03/06/1998	Memo from J. Tyree, B. Derito to J. Levin, J. Page, K. Clark re Coleman Co. information books ***Dep:*** ***Bates:*** CPH 1413987	NF, NA, H, I	

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392	04/24/1998	Letter from J. Torraco to K. Clark re confirmation of her employment as VP Operations Finance at Sunbeam ***Dep:*** MS 392 ***Bates:*** CPH 0242977-0242978	NA, NR, H, NF	
395	00/00/1998	AICPA Codification of Statements on Auditing Standards (1998) ***Dep:*** MS 395 ***Bates:***	H, NF, I	
398	04/17/1998	"Coleman's Levin Profits by Selling Stock After Sale to Sunbeam" Bloomberg ***Dep:*** ***Bates:*** CPH 0475169-0475172	NR, H, NA, NF, P	
400	02/20/1998	Memo from R. Goudis to A. Fuchs re Questions for Camper with marginalia ***Dep:*** ***Bates:*** CPH 0501780	H, NF, NA	
401	12/31/1997	Sunbeam Management Letter Comments ***Dep:*** ***Bates:*** CPH 0031790-0031797	H, NF, NA	
403	03/19/1998	The Coleman Company, Inc. Consent of Directors in Lieu of Board of Directors' Meeting ***Dep:*** MS 403 ***Bates:*** CPH 0637558-0637570	NR, P, NF	
404	02/27/1998	Letter from A. Jordan to the Coleman Company, Inc. re resignation from Board of Directors of CLN Holdings ***Dep:*** ***Bates:*** CPH 1408276	NR, NA, NF, H, P	
408	05/08/2003	CPH Complaint ***Dep:*** MS 408 ***Bates:***	No Objection	
409	03/21/1998	Memo from A. Deitz to S. Cohen re Sunbeam Corporation ***Dep:*** ***Bates:*** CPH 1400754	No Objection	
410	03/31/1998	Form 10K for the Fiscal Year ended Dec. 31, 1997 for Revlon Holdings Inc. ***Dep:*** MS 410 ***Bates:***	H, NR, P, NF	
411	03/18/1998	Sunbeam Sales Forecast, Jan. & Feb. Consolidated Net Sales Actual, March Net Sales through Mar. 17,1998 ***Dep:*** MS 411 ***Bates:*** MSC 0028858	No Objection	
412	12/11/1997	Sunbeam Corporation Preliminary Due Diligence Issues ***Dep:*** ***Bates:*** CPH 1088622	No Objection	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
417	12/18/1997	Fax from B. Allen to R. Perelman, D. Drapkin, F. Gifford, L. Jones, A. Jordan, J. Levin, J. Moran, J. Robinson, B. Slovin, W. Spoor re Press Release ***Dep:*** MS 417 ***Bates:*** CPH 1425686	NA, I, NR, P, NF, H	
418	12/22/1997	"Sunbeam Corporation Announces Combination with Coleman; Chairman Al Dunlap Commits to Multi-Year Contract Extension" Draft ***Dep:*** MS 418 ***Bates:*** CPH 0091441-0091444	NA, H, NF, P, NR	
419	01/26/1998	"Silence is Golden; Intern's Job Offer Looks a Lot Like Hubbell's 'Hush Money'" New York Post ***Dep:*** MS 419 ***Bates:***	NR, P, H, NF, IO	
420	02/06/1998	B. Fromson, "The Loyal Director In Great Demand; Jordan's 10 Board Position Worth $1.1 Million," The Washington Post, G01 ***Dep:*** ***Bates:***	NR, P, H, NF	
421	02/06/1998	M. Powell, "The Plutocratic Party; To Ron Perelman, Politics Aren't Important. Just Good Business," The Washington Post, B01 ***Dep:*** ***Bates:***	H, NR, P, NF	
422	02/24/1998	Letter from J. Nisa to Federal Trade Commission and Department of Justice, Antitrust Division re Premerger Notification under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ***Dep:*** ***Bates:*** WLRK 0019442-0019443	H, NA, NF, NR, P	
423	02/27/1998	CLN Holdings Unanimous Written Consent of the Board of Directors; Resolutions of the Board of Directors CLN Holdings Inc. Approving Proposed Merger Transactions and Related Agreements ***Dep:*** MS 423 ***Bates:*** CPH 1402971-1402977	No Objection	
424	02/27/1998	Coleman Worldwide Corporation Consent of Directors in Lieu of Board of Directors' Meeting ***Dep:*** MS 424 ***Bates:*** CPH 1402978-1402982	No Objection	
425	02/27/1998	Letter from R. Perelman to the Coleman Company, Inc. re resignation from Board of Directors of CLN Holdings ***Dep:*** MS 425 ***Bates:*** WLRK 0007478	NF, NR, H, P	
426	03/04/1998	Notification and Report Form for Certain Mergers and Acquisitions, Sunbeam and R. Perelman ***Dep:*** MS 426 ***Bates:*** WLRK 0019387-0019440	H, NF, P, NR	
427	03/07/1998	Outstanding Debt Analysis, CLN Holdings ***Dep:*** MS 427 ***Bates:*** MSC 0028004-0028011	H, NF, NA, P, NR	

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428	07/21/1998	Letter from J. Levin to R. Perelman re misleading financial data ***Dep:*** MS 428 ***Bates:*** CPH 1425156-1425157	H, NA, NF, NR, P	
430	03/00/1998	Affidavit of J. Salig, In re Hart-Scott-Rodino Act of Notification and Report Form of Mafco Holdings Inc. ***Dep:*** MS 430 ***Bates:*** WLRK 0022784-0022786	H, NR, P, NF	
431 A	01/29/2001	J. Laing, "Party On, Ron: With his biggest holdings in tank, Perelman is squeezing fellow investors" Barrons ***Dep:*** MS 431 ***Bates:***	H, P, NF, NA, NR	
431 B	00/00/1996	Albert J. Dunlap, "Mean Business: How I Save Bad Companies and Make Good Companies Great" ***Dep:*** MS 431 ***Bates:*** CPH 1289142-1289145	H, NR, P, NF	
434	07/26/2000	Deposition Transcript of H. Gittis, In re Arbitration of Dunlap & Kersh, RE 32 160 00088 99 & 00091 99 (AAA) ***Dep:*** MS 434 ***Bates:*** CPH 1192425-1192453	H, P	
435	04/21/1999	Deposition Transcript of H. Gittis, In re The Coleman Company Inc. Shareholders Litig., No., 16486-NC (Chan. Ct. Del) ***Dep:*** MS 435 ***Bates:*** CPH 2008238-2008252	H, P	
440	03/03/1998	Fax from R. Easton to J. Tyree, A. Dean with attached Index of Information ***Dep:*** MS 440 ***Bates:*** DPW 0007049-0007069	H, NF, NA	
441	03/18/1998	Fax from H. Stack to T. Freed re Sunbeam documents for Due Diligence review ***Dep:*** MS 441 ***Bates:*** CPH 0632981	H, NA, NF	
442	08/02/2000	Deposition Transcript of J. Levin, In re Arbitration of Dunlap & Kersh, RE 32 160 00088 99 (AAA) ***Dep:*** MS 442 ***Bates:*** CPH 1012825-1012884	H, P	
443	06/20/2001	Deposition Transcript of J. Levin, In re Sunbeam Corporation, 01-1029 (Bankr. N.Y.) ***Dep:*** MS 443 ***Bates:*** WLRK 200008100 - 20000	H, P	
445	03/31/1998	Letter from J. Levin to The Coleman Company, Inc. resignation of all positions as officer or employee of The Coleman Company, Inc. ***Dep:*** MS 445 ***Bates:*** CPH 0505155	H, NF, NA, NR	
457	12/07/2004	Expert Report of George P. Fritz ***Dep:*** ***Bates:***	H - #	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
458	12/17/2004	Expert Report of Mark Grinblatt ***Dep:*** ***Bates:***	H - #	
459	12/17/2004	CD Backup to Expert Report of Mark Grinblatt ***Dep:*** ***Bates:***	H - #	
460	12/17/2004	Expert Report of Arthur Rosenbloom ***Dep:*** ***Bates:***	H - #	
466	01/04/2005	Rebuttal Report of George P. Fritz ***Dep:*** ***Bates:***	H - #	
502	02/26/1998	Draft Agreement and Plan of Merger with redlines ***Dep:*** ***Bates:*** CPH 1411598-1411654	NF, NA, H	
504	03/18/1998	Draft R. Goudis, "Sunbeam States that First Quarter Revenues May Be Lower than Street Estimates," March 19, 1998 ***Dep:*** MS 504 ***Bates:*** CPH 1008237-1008238	No Objection	
505	01/04/2005	William Horton Expert Witness Experience ***Dep:*** MS 505 ***Bates:***	No Objection	
506	00/00/1999	Edward Shea, "The McGraw Hill Guide to Acquiring and Investing Business" ***Dep:*** MS 506 ***Bates:***	LE, H, I, 90.706	
507	00/00/2000	Alexandra Reed Lajoux and Charles M. Elson "The Art of M&A Due Diligence" ***Dep:*** MS 507 ***Bates:***	LE, H, I, 90.706	
508	00/00/2001	Harvard Business Review on Mergers and Acquisitions ***Dep:*** MS 508 ***Bates:***	LE, H, I, 90.706	
509	09/19/1997	Letter from W. Strong to A. Dunlap re Sale Transaction fee ***Dep:*** ***Bates:*** MSC 0008966-0008967	No Objection	
510	05/11/1998	Sunbeam Audit Committee Meeting May 11, 1998 ***Dep:*** ***Bates:*** CPH 1266982-1266988	NF, NA, H	
511	06/30/1998	"Sunbeam Audit Committee to Conduct Review of Company's 1997 Financial Statements" ***Dep:*** ***Bates:*** CPH 0642892	No Objection	
512	08/06/1998	"Sunbeam to Restate Financial Results" ***Dep:*** ***Bates:*** CPH 1424083	No Objection	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
513	04/02/1999	Memo from S. Tripp to Sunbeam Audit Files re M&F Warrants Accounting and Valuation ***Dep:*** ***Bates:*** CPH 0647025-0647040	IO, NR, NA, NF, P, H	
514	10/10/2002	Settlement Agreement between Arthur Andersen, Coleman (Parent) Holdings, Inc., MacAndrews & Forbes Holdings, Inc., and Mafco ***Dep:*** ***Bates:***	NR, P	
515	12/11/2000	Wells Submission on behalf of D. Fannin in the matter of Sunbeam Corporation ***Dep:*** ***Bates:*** CPH 1084031-1084073	H, NA, NF, NR, P	
517	02/20/1998	Project Laser Items for Discussion with Marginalia ***Dep:*** ***Bates:*** CPH 1339685-1339686	H, NF, NA	
520	03/30/1998	Credit Agreement among Sunbeam Corporation, Morgan Stanley Senior Funding, Bank of America National Trust and Savings Association and First Union National Bank ***Dep:*** MS 520 ***Bates:*** MSC 0007544-0007773	No Objection	
521	04/06/1998	Schedule 14A Information Proxy Statement Pursuant to Section 14(a) of the Securities and Exchange Act of 1934, Sunbeam Corporation ***Dep:*** MS 521 ***Bates:***	NF, NR, P	
522	06/25/1998	"Sunbeam Delays SEC Filing Related to Debentures" ***Dep:*** MS 522 ***Bates:*** CPH 0642890-0642891	No Objection	
523	06/15/1998	"Sunbeam Board Terminates Al Dunlap as Chairman and CEO" ***Dep:*** MS 523 ***Bates:*** CPH 1039047-1039049	H, NF, NA	
525	04/00/1998	April and May 1998 Calendar with names Dunlap, Kersh, Fannin ***Dep:*** ***Bates:*** CLN 7518-7520	H, NA, NF, NR, P	
528	09/18/1997	Memo from Project Laser Team to A. Dunlap, R. Kersh, D. Fannin, R. Goudis (cc F. Fogg) re Further Revisions to Information Memorandum ***Dep:*** ***Bates:*** CPH 0467009	I, CUM	
529	06/16/2000	Deposition Transcript Finn Fogg ***Dep:*** MS 529 ***Bates:*** CPH 1059912-105997	H, P	
530	03/25/1998	Closing Binder, $2,014,000,000 Sunbeam Corporation Zero Coupon ***Dep:*** MS 530 ***Bates:***	NA, NF, H, I, P	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
531	02/04/1998	Fax from D. Fannin to P. Shapiro (cc J. Stynes, R. Kitts, F. Fogg) with attached executed CA letter ***Dep:*** ***Bates:*** CPH 0642484-0642492	NR, P, NF, H, NA	
532	07/16/1998	Fax (19 pages) from D. Fannin to P. Shapiro re executed CA letter ***Dep:*** ***Bates:*** COH 0467590	I, NR, P, NF, NA, H	
533	02/03/1998	Letter from D. Fannin to P. Shapiro (cc J. Stynes, F. Fogg, R. Kersh) re Confidentiality agreement ***Dep:*** MS 533 ***Bates:*** CPH 0467592	NR, P, NF, NA, H	
534	12/18/1997	Project Laser Proposed Summary Transaction Terms with marginalia ***Dep:*** ***Bates:*** CLN 33932-33933	No Objection	
536	00/00/1998	Email from B. Jenkins to B. Zimet, F. Fogg, N. Speigel, D. Denkhaus, P. Shapiro, J. Kelly, K. Clark re Conference Call with SEC ***Dep:*** ***Bates:*** CPH 0087973-0087979	NF, NA, H, NR, P	
539	02/27/1998	Minutes of a Special Meeting of the Board of Directors of the Sunbeam Corporation ***Dep:*** ***Bates:*** CPH 0142817-0142829	No Objection	
542	09/10/1997	Project Laser Working Group List ***Dep:*** ***Bates:*** CPH 1086363-1086372	NR, H, NF, NA	
543	07/25/1997	Memo from D. Fannin to B. Strong re Meeting with Skadden, Arps -- Project Laser ***Dep:*** MS 543 ***Bates:*** CPH 0467615	No Objection	
544	03/29/1998	Letter from G. Dickes to Sunbeam Corporation, D. Fannin re Feb. 27, 1998 Agreement and Plan of Merger with A. Dunlap Signature ***Dep:*** ***Bates:*** CPH 1094178-1094180	NF, NA, P, NR	
550	03/13/1998	Memo from J. Maher to H. Gittis, I. Engleman, W. Nesbitt re Hedging and Monetization Alternatives for Holdings in Sunbeam Corporation ***Dep:*** MS 550 ***Bates:*** CPH 2011547-2011584	NR, P, H, NA, NF	
551	03/30/1998	Citibank MAFCO Holdings Inc. Structured Equity Products Hedging Techniques Presentation ***Dep:*** MS 551 ***Bates:*** CPH 2011624-2011647	NR, P,H, NA, NF - (MIL)	
552	04/03/1998	Goldman Sachs Presentation to MacAndrews & Forbes Holdings regarding Single Stock Risk Management Strategies ***Dep:*** MS 552 ***Bates:*** CPH 2011585-2011623	NR, P, H, NA, NF	

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553	04/03/1998	Memo from D. Fleischman to G. Dickes re Rule 144 Hedging ***Dep:*** MS 553 ***Bates:*** CPH 2010695	NR, P, H, NF, NA, I - (MIL)	
558	04/15/1998	P. Beckett, "SEC May Rein in Lucrative Hedging of Restricted Stock," Wall Street Journal, B15 ***Dep:*** ***Bates:*** CPH 2010685	NR, P, H, NF - (MIL)	
559	04/03/1998	Letter from W. Ortner to J. Maher re meeting with Citibank and price options ***Dep:*** ***Bates:*** CPH 2010681	NR, P, H, NF,NA	
562	05/13/1998	Memo from P. Elron, M. Ryan, J. Zalkowski to J. Maher, G. Dickes re Indicative terms for a Costless Equity Collar on SOC Shares ***Dep:*** MS 562 ***Bates:*** WLRK 0028227	NR, P, H, NF, NA	
563	05/13/1998	Fax from D. Hiscano to J. Maher with attached Zero Cost Collar ***Dep:*** ***Bates:*** WLRK 0028222-0028224	NR, P, H, NF,NA	
564	05/15/1998	Fax from G. Dickes to D. Hiscano re Sunbeam Equity Hedge ***Dep:*** MS 564 ***Bates:*** WLRK 0028233-0028235	NF, NR, P - (MIL)	
565	05/15/1998	Fax from G. Dickes to P. Efron re Sunbeam Equity Hedge ***Dep:*** MS 565 ***Bates:*** WLRK 0028230-0028232	NR, P, NF - (MIL)	
573	05/28/1998	MAFCO Put/Call Analysis ***Dep:*** ***Bates:*** CPH 2011537-2011543	NR, P, NF	
576	06/09/1998	Memo from J. Didier to List re ISDA Master Agreement between Bear, Stearns International Limited and Coleman (Parent) Holdings Inc. ***Dep:*** MS 576 ***Bates:*** CPH 2011712	NR, P, H,NF, NA, I	
577	11/03/2004	Letter from M. Occhuizzo to M. Brody re Nov. 3, 2004 Amended Notice of Deposition ***Dep:*** MS 577 ***Bates:***	NR, P	
600	03/07/1998	Memo from J. Tyree to Sunbeam Financing Team re Accounting Due Diligence Call ***Dep:*** MS 600 ***Bates:*** CPH 0635893	No Objection	
602	03/18/1998	Sunbeam Sales Forecast, Jan. & Feb. Consolidated Net Sales Actual, March Net Sales through Mar. 17,1998 ***Dep:*** MS 602 ***Bates:*** CPH 1145796	No Objection	

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603	03/18/1998	Sunbeam Sales Forecast, Jan. & Feb. Consolidated Net Sales Actual, March Net Sales through Mar. 17,1998 ***Dep:*** MS 603 ***Bates:*** MSC 0028858	No Objection	
604	03/01/1998	Skadden Arps Time Records for Sunbeam Corporation March 1, 1998 - March 31, 1998 ***Dep:*** ***Bates:*** SASMF 19645-19687	No Objection	
605	06/09/1998	Minutes of a Special Meeting of the Board of Directors of Sunbeam Corporation ***Dep:*** MS 605 ***Bates:*** CPH 1060052-1060053	H, NF, NA	
606	06/13/1998	Minutes of a Special Meeting of the Board of Directors of Sunbeam Corporation ***Dep:*** ***Bates:*** CPH 0361136-0361137	No Objection	
608	09/19/1997	Fax from G. Yoo to D. Fannin, R. Goudis re Project Laser with attached Memo from Project Laser Team to D. Fannin, R. Goudis re Questions/Information Request List ***Dep:*** ***Bates:*** CPH 0467093-0467126	No Objection	
609	03/19/1998	Memo from J. Tyree, J. Groeller to B. Gluck, A. Dean, G. Fernicola re Bring-down due diligence ***Dep:*** ***Bates:*** MSC 0029176	No Objection	
610	03/20/1998	Memo from R. Porat, B. Harris, J. Tyree, J. Groeller to R. Kersh, D. Fannin, J. Kelly, D. Uzzi, B. Gluck, A. Dean, G. Fernicola re Bring-down due diligence ***Dep:*** ***Bates:*** CPH 0520973	No Objection	
611	03/23/1998	Memo from J. Tyree, J. Groeller, S. Boone to R. Kersh, D. Fannin, J. Kelly, D. Uzzi, B. Gluck, A. Dean, G. Fernicola re Sunbeam Bring-down due diligence ***Dep:*** MS 611 ***Bates:*** CPH 1257351	No Objection	
613	03/03/1998	Project Laser Organizational Conference Call Materials ***Dep:*** ***Bates:*** CPH 0636106-0636121	No Objection	
614	05/06/1999	Minutes of a Special Joint Meeting of the Boards of Directors of Sunbeam Corporation and the Coleman Company, Inc. ***Dep:*** MS 614 ***Bates:*** CPH 1001117-10011123	H, NF, NA	
615	12/31/1998	MacAndrews & Forbes Detail General Ledger for Periods 01/98 - 12/31/1998 ***Dep:*** ***Bates:*** CPH 2011835-2011836	NR, P	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
617	07/27/1998	Memo from D. Fannin to Skadden Arps Team, Arthur Andersen re March 18, 1998 Conference Call ***Dep:*** ***Bates:*** CPH 1048413-1048415	H, NA, NF	
628	11/19/2004	CPH Written Response re MAFCO Credit Balance and Related Correspondence ***Dep:*** ***Bates:***	LE, NR, P	
667		Damodaran on Valuation Security Analysis for Investment and Corporate Finance ***Dep:*** MS 667 ***Bates:***	LE, H, I, 90.706	
668		Shannon P. Pratt, "Business Valuation Discounts and Premiums" ***Dep:*** MS 668 ***Bates:***	LE, H, I, 90.706	
669	06/10/2004	Securities Act of 1933, Rule 144A - Private Resales of Securities to Institutions ***Dep:*** MS 669 ***Bates:***	LE, NR, IG, I, P	
670	00/00/2001	Business Valuation Discounts and Premiums ***Dep:*** MS 670 ***Bates:***	LE, H, I, 90.706	
676	00/00/1998	SEC Form 144, Notice of Proposed Sale of Securities Pursuant to Rule 144 Under the Securities Act of 1933 for The Coleman Company ***Dep:*** MS 676 ***Bates:***	LE, NR, P, NF	
678	00/00/2000	Shannon P. Pratt, Robert F. Reilly, Robert P. Schweihs, "Valuing a Business, The Analysis and Appraisal of Closely Held Companies" ***Dep:*** MS 678 ***Bates:***	LE, H, I, 90.706	
679	00/00/1995	Roman L .Weil, Michael J. Wagner, Peter B. Frank, "Litigation Services Handbook, The Role of the Accountant as Expert" ***Dep:*** MS 679 ***Bates:***	LE, H, I	
680	09/00/1993	Mryon B. Slovin, "Ownership Concentration, Corporate Control Activity, and Firm Value: Evidence from the Death of Inside Blockholders" ***Dep:*** MS 680 ***Bates:***	LE, H, 90.706	
681	00/00/2001	Paul Hanouna, Atulya Srin, Alan C. Shapiro, "Value of Corporate Control: Some International Evidence," USC Marshall School of Business Economics Working Paper Series ***Dep:*** MS 681 ***Bates:***	LE, H, I, 90.706	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
682	00/00/2001	Shannon P. Pratt, "Business Valuation Discounts and Premiums" ***Dep:*** MS 682 ***Bates:***	LE, H, I, 90.706	
683	02/00/1998	Coleman Daily and Weekly Volume for the Period 2/2/1998-2/27/1998 ***Dep:*** MS 683 ***Bates:***	LE, H, NF, NA, S	
684	08/27/2002	Jerry W. Levin Deposition, Prescott Group Small Cap. v. The Coleman Company ***Dep:*** MS 684 ***Bates:***	LE, H, P	
700	09/23/2003	Coleman (Parent) Holdings Inc.'s Supplemental Response to Interrogatory Number 5 of Morgan Stanley & Co. Incorporated's First Set of Interrogatories ***Dep:*** ***Bates:***	NR, P	
701	12/24/2004	Coleman (Parent) Holdings Inc.'s Supplemental Response to Interrogatory No. 3 and Second Supplemental Response to Interrogatory Number 5 of Morgan Stanley & Co., Inc.'s First Set of Interrogatories ***Dep:*** ***Bates:***	NR (Int No. 5)	
702	12/24/2004	Coleman (Parent) Holdings Inc.'s Supplemental Response to Interrogatory No. 4 and No. 6 of Morgan Stanley & Co., Inc.'s Second Set of Interrogatories ***Dep:*** ***Bates:***	NR, P	
703	03/01/2004	Coleman (Parent) Holdings Inc.'s Second Supplemental Response and Objections to Defendant Morgan Stanley & Co., Inc.'s Third Set of Interrogatories ***Dep:*** ***Bates:***	No Objection	
704	02/12/2004	Coleman (Parent) Holdings Inc.'s Amended Response to Interrogatory No. 1 of Morgan Stanley & Co., Inc.'s Third Set of Interrogatories ***Dep:*** ***Bates:***	NR, P	
705	01/22/2004	Coleman (Parent) Holdings Inc.'s Supplemental Response and Objections to Defendant Morgan Stanley & Co., Inc.'s Third Set of Interrogatories ***Dep:*** ***Bates:***	No Objection	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
706	11/12/2003	Coleman (Parent) Holdings Inc.'s Responses and Objections to Defendant Morgan Stanley & Co., Inc.'s Third Set of Interrogatories ***Dep:*** ***Bates:***	NR	
707	02/20/2004	Coleman (Parent) Holdings Inc.'s Response and Objections to Morgan Stanley & Co. Inc.'s Fourth Set of Interrogatories ***Dep:*** ***Bates:***	No Objection	
708	12/24/2002	Coleman (Parent) Holdings Inc.'s Supplemental Response to Morgan Stanley & Co., Inc.'s Fourth Set of Interrogatories ***Dep:*** ***Bates:***	No Objection	
709	04/21/2004	Coleman (Parent) Holdings Inc.'s Amended Response to Morgan Stanley & Co., Inc.'s Fourth Set of Interrogatories ***Dep:*** ***Bates:***	No Objection	
710	11/24/2004	Coleman (Parent) Holdings Inc.'s Responses and Objections to Morgan Stanley & Co., Inc.'s Fifth Set of Interrogatories ***Dep:*** ***Bates:***	NR (Int No. 5)	
711	12/22/2004	Coleman (Parent) Holdings Inc.'s Amended Supplemental Response to Morgan Stanley & Co. Inc.'s Fifth Set of Interrogatories ***Dep:*** ***Bates:***	No Objection	
712	09/24/2003	CPH's Response to Morgan Stanley & Co. Incorporated's First Set of Requests for Admission ***Dep:*** ***Bates:***	NR	
713	03/17/2004	CPH's Response to Morgan Stanley & Co., Inc.'s Second Set of Requests for Admission ***Dep:*** ***Bates:***	No Objection	
714	07/14/2004	Coleman (Parent) Holdings Inc.'s Response to Morgan Stanley & Co. Incorporated's Third Set of Requests for Admission ***Dep:*** ***Bates:***	NR, P	
715	11/24/2004	Coleman (Parent) Holdings Inc.'s Responses and Objections to Morgan Stanley & Co. Incorporated's Fourth Set of Requests for Admission ***Dep:*** ***Bates:***	No Objection	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
716	11/24/2004	Coleman (Parent) Holdings Inc.'s Amended Responses and Objections to Morgan Stanley & Co. Incorporated's Fourth Set of Requests for Admission Nos. 27 and 28 ***Dep:*** ***Bates:***	No Objection	
719	03/11/1998	Letter from J. Tyree to P. Harlow re MS opinion pursuant to comfort-letter request procedures ***Dep:*** CPH 12 ***Bates:*** CPH 0012526-0012527	No Objection	
724	04/01/1998	Memo from V. Kistler to the Files re Hattiesburg Sales Cutoff Testing (49 North and AMDC) ***Dep:*** CPH 20 ***Bates:*** CPH 0129292-0129296	No Objection	
725	00/00/1998	Sunbeam Corporation Interviews #2 conducted by Arthur Andersen ***Dep:*** CPH 21 ***Bates:*** CPH 0062489-0062733	No Objection	
726	10/16/1998	Sunbeam Corporation Report to Board of Directors Restatement Adjustments prepared by Arthur Andersen LLP ***Dep:*** CPH 22 ***Bates:*** CPH 0084462-0084532	No Objection	
727	08/00/2000	Davis Polk & Wardwell Chronology in Response to June 30, 2000 Subpoena Sunbeam Securities Litigation ***Dep:*** CPH 24 ***Bates:*** DPW000001-000002	No Objection	
728	00/00/0000	Sunbeam Due Diligence Review Agenda ***Dep:*** CPH 28 ***Bates:***	No Objection	
730	03/07/1998	Memo from J. Tyree to Sunbeam Financing Team re Accounting Due Diligence Call ***Dep:*** CPH 31 ***Bates:*** CPH 0635893	No Objection	
731	03/10/1998	Project Laser: Accounting Due Diligence ***Dep:*** CPH 32 ***Bates:*** CPH 0635894-0635895	No Objection	
732	03/20/1998	Memo from R. Porat, Harris, J. Tyree, J. Groeller to R. Kersh, D. Fannin, J. Kelly, D. Uzzi, R. Gluck, A. Dean, G. Fernicola re Bring-down due diligence with marginalia ***Dep:*** CPH 34 ***Bates:*** CPH 0520973-0520974	No Objection	
733	03/23/1998	Memo from J. Tyree, J. Groeller, S. Boone to R. Kersh, D. Fannin, J. Kelly, D. Uzzi, B. Gluck, A. Dean, G. Fernicola re Sunbeam Bring-down due diligence ***Dep:*** CPH 35 ***Bates:*** CPH 1257351	No Objection	

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735	08/04/1997	Memo from R. Goudis to D. Uzzi (cc R. Kersh) re 1998 Operating Plan Goals ***Dep:*** CPH 39 ***Bates:*** CPH 0322353-0322354	No Objection	
736	03/11/1998	Fax from T. Chang to D. MacDonald including Project Laser Financial Statements, Projections and Proformas ***Dep:*** CPH 61 ***Bates:*** CPH 0284977-0285008	No Objection	
737	03/18/1998	Sunbeam Sales Forecast, Jan. & Feb. Consolidated Net Sales Actual, March Net Sales through Mar. 17,1998 with marginalia ***Dep:*** CPH 64 ***Bates:*** MSC 0028423	No Objection	
738	03/26/1998	Sunbeam Sales Forecast, Jan. & Feb. Consolidated Net Sales Actual, March Net Sales through Mar. 17,1998 with marginalia faxed to Arthur Andersen ***Dep:*** CPH 66 ***Bates:*** CPH 0038717	No Objection	
741	09/05/1997	Engagement Letter from W. Strong to A. Dunlap ***Dep:*** CPH 70 ***Bates:*** SB 237825-237830	No Objection	
743	03/05/1998	Highly Confident Letter from R. Smith to R. Kersh ***Dep:*** CPH 74 ***Bates:*** MSC 0080356-0080358	No Objection	
745	04/04/1997	S. Matthews, "Sunbeam's Dunlap Says He's Considering Acquisitions or a Sale," Bloomberg ***Dep:*** CPH 77 ***Bates:*** CPH 1046497	No Objection	
749	03/05/1998	Project Laser: Chronology of Events (Analyzing Project Laser Chonology.doc) ***Dep:*** CPH 84 ***Bates:*** MSC 0033255-0033263	H, NF, P	
752	02/23/1998	Project Laser: Summary Financial Information Request List for Camper Company & Due Diligence (laser-due diligence.doc) ***Dep:*** CPH 88 ***Bates:*** MSC 0031791-0031799	No Objection	
754	01/24/1998	Memo from D. Pastrana to The Files re Review of Significant sales transactions near year-end ***Dep:*** CPH 10 ***Bates:*** CPH 1192163-1192164	No Objection	
755	03/05/1998	Sunbeam P&L, Actuals Comparison Jan. and Feb. 1998 ***Dep:*** CPH 10 ***Bates:*** CPH 0013023-0013027	NF, H, NA	
756	03/01/1998	Sunbeam P&L Variations ***Dep:*** CPH 10 ***Bates:*** CPH 1056006-1056010	NF, H, NA	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
760	04/02/1998	Memo from B. Holman to D. Pastrana re Aurora Shipping Cut-Off and Bill and Hold Inventory ***Dep:*** CPH 11 ***Bates:*** CPH 0129271-0129275	No Objection	
762	03/21/1998	Email from L. Bornstein to W. Biese re Sunbeam ***Dep:*** CPH 11 ***Bates:*** CPH 0041649	No Objection	
763	03/24/1998	Email from D. Pastrana to L. Bornstein re Cutoff testing with attached cutoff test.doc ***Dep:*** CPH 11 ***Bates:*** CPH 0021362; CPH 00151	No Objection	
764	03/19/1998	Draft insert to Offering Memorandum of Sunbeam Press Release with marginalia ***Dep:*** CPH 12 ***Bates:*** CPH 0039327; CPH 00387	No Objection	
765	07/02/1998	Memo from L. Bornstein to The Files re Due Diligence call with Morgan Stanley ***Dep:*** CPH 12 ***Bates:*** CPH 0021365-0021368	No Objection	
766	03/23/1998	Letter from A. Dunlap, R. Kersh, D. Fannin, R. Gluck to Arthur Andersen re Representations submitted with Offering Memorandum ***Dep:*** CPH 12 ***Bates:*** CPH 0012464-0012466	H, NF, NA	
769	03/20/1998	Memo from W. Strong, A. Savarie, R. Kitts, J. Stynes, A. Fuchs, G. Yoo, J. Webber, T. Chang, L. Radii, B. Smith, M. Hart, R. Gilbert, T. Burchill, I. Seth, R. Porat, W. Harris, J. Woodsworth, S. Prasad, A. Conway, J. Dormer, W. Wright, J. Tyree, J. Groeller, B. Derito, S. Boone, C. Whelan, J. Kunreuther, J. Foley, K. Eltrich to The Leveraged Finance Committee re Sunbeam Corp. - $2.0 Billion Senior Secured Credit Facilities with marginalia ***Dep:*** CPH 13 ***Bates:*** MSC 0059244-0059266	No Objection	
772	06/01/1998	Sunbeam $1,700,000,000 Senior Secured Credit Facilities Info Memo ***Dep:*** CPH 15 ***Bates:*** CPH 1346133-1346250	No Objection	
773	06/09/1998	Sunbeam $1.7 billion Senior Secured Credit Facilities Lender Meeting ***Dep:*** CPH 15 ***Bates:*** CPH 1346276-1346342	No Objection	
774	02/09/1998	Project Laser Potential Acquirors ***Dep:*** CPH 16 ***Bates:*** MSC 0044556-0044573	No Objection	
777	03/19/1998	Fax from H. Stack to T. Freed requesting documents for due diligence review. ***Dep:*** CPH 21 ***Bates:*** CPH 0632981	H, NF, NA	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
779	03/17/1998	Memo from J. Tyree, J. Groeller to B. Gluck, A. Dean, G. Fernicola re Bring-Down Due Diligence ***Dep:*** CPH 21 ***Bates:*** CPH 1257359	No Objection	
782	02/06/1998	Memo from A. Amorison to G. Yoo re Project Laser Due Diligence Review ***Dep:*** CPH 22 ***Bates:*** CPH 0639174-0639182	H, NA, NF	
783	12/17/1997	Materials Prepared by CSFB for Discussion - Project Violet ***Dep:*** CPH 23 ***Bates:*** CPH 1121203-1121259	No Objection	
784	02/25/1998	Draft Materials for the Board of Directors - The Coleman Company, Inc. ***Dep:*** CPH 23 ***Bates:*** CPH 1416194-1416213	No Objection	
785	03/30/1998	Daily Stock Price Record, New York Stock Exchange ***Dep:*** CPH 24 ***Bates:***	No Objection	
786	01/16/1998	Letter from J. Stynes to D. Fannin re Second amendment to the engagement letter dated as of September 5, 1997 ***Dep:*** CPH 24 ***Bates:*** CPH 0473192-0473193	No Objection	
787	03/05/1998	Fax from C. Whelan to K. Eltrich with attached Coleman Co. Due Diligence Review Agenda ***Dep:*** CPH 24 ***Bates:*** MSC 0036633-0036634	No Objection	
790	11/13/1997	Press Release: "Coleman Reports Third Quarter Results" ***Dep:*** CPH 27 ***Bates:*** MSC 0054921-0054925	H, NF, NR, P - (MIL)	
792	06/15/1998	Memo from T. Molitor, Leveraged Finance Group to M. Murray re Sunbeam Corporation Status Report ***Dep:*** CPH 28 ***Bates:*** CPH 1258269	H, NA, NF	
793	09/06/2001	Fax from R. Flores to C. Ullrich, D. Edwards, J. Thomas, S. Rankin, M. Petrick, M. McDermott, T. Doster, R. Felix, D. Ryan, S. Hannan, D. DeSantis, E. Sieke, P. Wheelock, T. Biaggi, E. Higgins, M. Policano, E. Ordway, N. Kleinschmidt, B. Frezza, C. Fortgang, S. Gardner with attached Sept. 6, 2001 Memo re Execution Copies of the Sixth and Seventh Amendments ***Dep:*** CPH 29 ***Bates:*** MSC 0069860-0069879	H, NA, NF, NR, P	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
794	03/09/1998	Memo from J. Tyree, J. Groeller, S. Boone to Sunbeam Financing Team re Coleman Due Diligence and Site Visit on March 12, 1998 ***Dep:*** CPH 30 ***Bates:*** MSC 0029198	H, NF, NR	
795	03/20/1998	Memo from R. Porat, B. Harris, J. Tyree, J. Groeller to R. Kersh, D. Fannin, J. Kelly, D. Uzzi, B. Gluck, A. Dean, G. Fernicola re Bring-down due diligence ***Dep:*** CPH 30 ***Bates:*** MSC 0028209	No Objection	
796	03/01/1998	Skadden Arps Time Records for Sunbeam Corporation March 1, 1998 - March 31, 1998 ***Dep:*** CPH 31 ***Bates:*** SASMF 19645-19687	No Objection	
797	02/26/1998	Memo from A. Amorison to A. Emmerich, P. Shapiro, B. Kitts, D. Fannin enclosing draft Agreement and Plan of Merger ***Dep:*** CPH 31 ***Bates:*** CPH 1340293-1340357	NF, NA, H	
798	04/06/2000	Memo from B. Jenkins to M. Petrick, P. Wheelock, T. Molitor, E. Ordway, S. Furhman, J. Halliday re Updated List of Bond Holders ***Dep:*** CPH 32 ***Bates:*** CPH 1349725-1349727	NR, P, H, NF, NA - (MIL)	
799	00/00/0000	Recovery Analysis for MS ***Dep:*** CPH 33 ***Bates:*** MSC 0111941-0111942	NR, P, H, NF - (MIL)	
800	09/19/2004	Securities Purchase Agreement among American Household Inc. and Jarden Corporation ***Dep:*** CPH 33 ***Bates:*** MSC 0111576-0111796	NR, P, H, NF - (MIL)	
801	00/00/0000	Schedule I, shareholder list for AHI ***Dep:*** CPH 34 ***Bates:*** MSC 0111943	NR, P, H, NF - (MIL)	
802	05/24/1995	Coleman Worldwide Corporation (Zero Coupon Senior Secured) Exchangeable for Shares of Common Stock of The Coleman Company, Inc. ***Dep:*** CPH 36 ***Bates:*** CPH 0632487-0632615	NR, P, NF, H - (MIL)	
803	03/25/1998	R. Goudis "Sunbeam Corporation Announces Successful Private Placement of $750 Million of Convertible Debentures" ***Dep:*** CPH 38 ***Bates:*** CPH 0485991-0485993	No Objection	
804	03/01/1998	Skadden Arps Time Records for Sunbeam Corporation March 1, 1998 - March 31, 1998 ***Dep:*** CPH 38 ***Bates:*** SASMF 19645-19687	No Objection	

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
805	04/27/1998	Skadden Arps Invoice 732137, Professional Services rendered through April 17, 1998 ***Dep:*** CPH 38 ***Bates:*** SASMF 19691-19692	No Objection	
806	02/01/1998	Employment Agreement by and between Sunbeam Corporation and Albert J. Dunlap ***Dep:*** CPH 38 ***Bates:*** CPH 0246430-0246450	No Objection	
807	04/05/1998	Sunbeam Corporation Closing Analysis Profit and Loss Statement, Period: February 1998 ***Dep:*** MS 807 ***Bates:*** CPH 1210285-1210317	H, NA, NF, P, NR	
808	02/16/1998	Sunbeam Corporation Closing Analysis Profit and Loss Statement, Period: January 1998 ***Dep:*** MS 808 ***Bates:*** CPH 1211211-1211233	NF, NA, H	
809	12/24/2004	Coleman (Parent) Holdings Inc.'s Written Statement Regarding Due Diligence Performed by Ernst & Young LLP with attached correspondence between T. Clare and M. Brody re extent of stipulation ***Dep:*** ***Bates:***		
810	03/30/1998	Compilation of book and accounting values ascribed to CPH's Sunbeam investment, MacAndrews & Forbes GL Accounting Distribution (Redacted, produced by CPH 2/18/2005) ***Dep:*** MS 810 ***Bates:*** CPH 2012092-2012111		
811	03/30/1998	Compilation of book and accounting values ascribed to CPH's Sunbeam investment, MacAndrews & Forbes GL Accounting Distribution (Redacted, produced by CPH 2/20/2005) ***Dep:*** MS 811 ***Bates:*** CPH 2012112-2012193		
812	03/30/1998	MAFCO Holdings, Inc. and Subsidiaries Notes to Consolidated Financial Statements (Redacted, produced by CPH 2/21/2005) ***Dep:*** MS 812 ***Bates:*** CPH 2012194-2012197		
813	03/30/1998	Compilation of book and accounting values ascribed to CPH's Sunbeam investment, MacAndrews & Forbes GL Accounting Distribution (Produced by CPH 2/24/2005) ***Dep:*** MS 813 ***Bates:*** CPH 2012198-2012218		

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
814	04/05/1999	MAFCO Holdings, Inc. Consolidated Financial Statements for the Year Ended December 31, 1998 with Report of Independent Auditors (produced by CPH 2/24/2005) ***Dep:*** MS 814 ***Bates:*** CPH2012219-2012306		
815	04/27/2000	MAFCO Holdings, Inc. Consolidated Financial Statements for the Year Ended December 31, 1999 with Report of Independent Auditors (produced by CPH 2/24/2005) ***Dep:*** MS 815 ***Bates:*** CPH2012307-2012368		
816	04/09/2001	MAFCO Holdings, Inc. Consolidated Financial Statements for the Year Ended December 31, 2000 with Report of Independent Auditors (produced by CPH 2/24/2005) ***Dep:*** MS 816 ***Bates:*** CPH2012369-2012424		
817	03/23/1998	Form 10-K for the Fiscal Year Ended December 31, 1997 for CLN Holdings Inc. ***Dep:*** ***Bates:*** CPH 0061885-0061976		
818	01/21/1999	Memo from B. McKillip to Distribution re MacAndrews & Forbes Supplemental Briefing Memo - January 25, 1999 ***Dep:*** ***Bates:*** CPH 1352834-135835		
822	12/31/1998	MAFCO Holdings Estimated Fair Value Calculations 12/31/1998 and 12/31/1999 (produced by CPH 2/24/2005) ***Dep:*** MS 822 ***Bates:*** CPH 2012216-2012217		
823	03/01/2005	MS Amended Notice of Deposition (Changes Location Only) for March 3, 2005 Rule 1.310 Deposition ***Dep:*** MS 823 ***Bates:***		
824	08/14/2003	CPH's Response to Morgan Stanley & Co. Incorporated's First Request for Production of Documents ***Dep:*** MS 824 ***Bates:***		
825	11/12/2003	Response of Plaintiff Coleman (Parent) Holdings Inc. to Defendant Morgan Stanley & Co. Inc.'s Third Request for Production of Documents ***Dep:*** MS 825 ***Bates:***		

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
826	11/24/2004	Coleman (Parent) Holdings Inc.'s Responses and Objections to Morgan Stanley & Co. Incorporated's Eighth [SIC] Request for Production ***Dep:*** ***Bates:***		
829	02/17/2005	CPH First Amended Complaint ***Dep:*** ***Bates:***		
830	04/29/1999	MAFCO Journal Reports 4Q 1998, 4Q 1999, 4Q 2000 (produced by CPH 2/28/2005) ***Dep:*** MS 830 ***Bates:*** CPH 2012431-2012467		
831	01/00/1998	Compilation of MAFCO General Ledger Report from January, 1998 through year end 2000 (produced by CPH 2/28/2005) ***Dep:*** MS 831 ***Bates:*** CPH 2012468-2012474		
832	12/31/1998	MAFCO Holdings worksheets re Estimated Fair Value Calculations 12/31/1998 and 12/31/1999 (produced by CPH 2/28/2005) ***Dep:*** MS 832 ***Bates:*** CPH 2012475-2012478		
833	09/30/1998	Sunbeam Impairment Worksheet (produced by CPH 2/28/2005) ***Dep:*** MS 833 ***Bates:*** CPH 2012487-2012490		
834	06/30/1998	Coleman Sale Gain Worksheets (produced by CPH 2/28/2005) ***Dep:*** MS 834 ***Bates:*** CPH 2012491-2012504		
838	02/28/2005	Letter from M. Brody to L. Bemis re CPH's production of documents in response to February 17, 2005 Order ***Dep:*** ***Bates:***		
839	02/28/2005	Letter from M. Brody to L. Bemis re Sunbeam Warrants ***Dep:*** ***Bates:***		
841	03/20/2000	MAFCO Holdings Estimated Fair Value Calculation (produced by CPH 2/28/2005) ***Dep:*** MS 841 ***Bates:*** CPH 2012481-2012482		
842	03/01/1971	The Equity Method of Accounting for Investments in Common Stock ***Dep:*** ***Bates:***		
843	07/07/1997	Third Amendment to the Fifth Amended and Restated Revolving Credit Agreement ***Dep:*** ***Bates:*** CPH 2006518-2006522		

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
844	03/20/1997	Fifth Amended and Restated Mafco Security Agreement Dated as of March 30, 1997 from MAFCO Holdings Inc. to Citibank, N.A. as Collateral Agent ***Dep:*** ***Bates:*** CPH 2006869-2006896		
845	02/24/2005	Letter from L. Bemis to M. Brody re CPH's production of documents in response to February 17, 2005 Order ***Dep:*** ***Bates:***		
849	03/07/2005	Production of additional documents related to MAFCO's estimated fair value calculation (produced by CPH 3/7/2005) ***Dep:*** MS 849 ***Bates:*** CPH 2012505-2012516		
852	04/29/1999	Transmittal letters accompanying Mafco financial statements (produced by CPH 3/8/2005) ***Dep:*** MS 852 ***Bates:*** CPH 2012517-2012576		
853	04/29/1999	Letter from L. Winoker to Corporate Finance and Negotiations Department re Mafco Holdings Inc. (produced by CPH 3/8/2005) ***Dep:*** MS 853 ***Bates:*** CPH 2012517-2012518		
854	04/29/1999	Letter from L. Winoker to Office of Thrift Supervision re Combined Annual Report re Mafco Holdings Inc. (produced by CPH 3/8/2005) ***Dep:*** MS 854 ***Bates:*** CPH 2012518-2012519		
855	04/27/2000	Letter from L. Ajzenman to Office of Thrift Supervision re Combined Annual Report re Mafco Holdings. Inc with attached Form Report H(b)11 ***Dep:*** MS 855 ***Bates:*** CPH 2012521-2012551		
856	04/27/2002	Letter from L. Ajzenman to Office of Thrift Supervision re Combined Annual Report re Mafco Holdings. Inc with attached Form Report H(b)11 (produced by CPH 3/8/2005) ***Dep:*** MS 856 ***Bates:*** CPH 2012554-2012576		
857	04/19/1999	Memo from L. Winoker to R. Perelman re Fair Value Disclosure (produced by CPH 3/8/2005) ***Dep:*** MS 857 ***Bates:*** CPH 2012512-2012513		
858	05/18/2001	Draft letter to T. Chambers (Vice President HSBC Bank USA) re Ronald O. Perelman 2000 Financial Statement with attached 3/12/2005 letter from M. Brody to L. Bemis ***Dep:*** ***Bates:***		

Ex. No.	*Date*	*Description*	*Objection*	*Admitted*
859	08/09/1996	Engagement letter between Coopers & Lyband and Sunbeam ***Dep:*** ***Bates:*** CPH 1069397-1069400		
860	12/28/1997	Sunbeam Cutoff Testing ***Dep:*** CPH 19 ***Bates:*** CPH 0125693-0125698		
861	05/08/1998	Amendment No. 1 to Credit Agreement (execution copy) ***Dep:*** ***Bates:*** MSC 0020157-0020167		

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 17th day of March 2005.

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

PLAINTIFF'S MOTION IN LIMINE NO. 28 TO CLARIFY WHEN EVIDENCE IS ADMISSIBLE TO SHOW PLAINTIFF'S ENTITLEMENT TO AND AMOUNT OF PUNITIVE DAMAGES

Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, respectfully submits this motion *in limine* seeking clarification of which categories of evidence and argument are permissible in phase one of the bifurcated trial to show CPH's entitlement to punitive damages and in phase two to show the amount of punitive damages. On February 24, 2005, the Court requested briefing on the question of the relevance of public harms to the issue of punitive damages on February 24, 2005, (*see* Ex. A, 2/24/05 Tr. at 1645-46) and CPH submits it would be helpful to resolve in advance not only that question, but also other basic ground rules for punitive damages evidence. *See* CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 104.5, at 30 (2004 ed.) (motions *in limine* may "be used by counsel seeking a pre-trial determination that evidence she intends to offer will be admissible at trial" so that "counsel will be provided a basis of planning her trial strategy").

In particular, CPH asks the Court to clarify that any and all evidence going to the harmful and wrongful nature of Morgan Stanley's conduct is admissible in phase one, and that the only evidence confined to phase two is evidence concerning Morgan Stanley's ability to pay and prior

punitive awards. Moreover, the Court should make clear that the evidence of harmfulness and wrongfulness admissible in phase one includes (1) the fact that the wrongful conduct of Morgan Stanley toward CPH also was injurious to the public, (2) the fact that Morgan Stanley has engaged in similar fraudulent conduct in the past, (3) the nature and extent of litigation misconduct in this case as evidence of consciousness of guilt, refusal to accept responsibility for wrongful conduct and lack of remorse, as well as ongoing efforts at concealment demonstrating a general and egregious lack of respect for the integrity of the judicial system.

Argument

By Order dated February 16, 2005, the Court granted CPH's motion to bifurcate the trial. Under the seminal case of *W.R. Grace & Co. v. Waters*, 638 So. 2d 502 (Fla. 1994), bifurcation results in a two-phase trial:

> At the first stage of a trial in which punitive damages are an issue, the jury should hear evidence regarding liability for actual damages, the amount of actual damages, and liability for punitive damages, and should make determinations on those issues. If, at the first stage, the jury determines that punitive damages are warranted, the same jury should then hear evidence relevant to the amount of punitive damages and should determine the amount for which the defendant is liable.

Id. at 506 (emphasis added). Thus, CPH's phase-one evidence will include all testimony and documents tending to show that Morgan Stanley should be held liable for punitive damages at all. CPH's phase-two evidence will include all phase-one evidence, plus evidence of Morgan Stanley's ability to pay a punitive damages award.

The Florida Supreme Court articulated several factors a jury should consider in making a punitive damages determination in *Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483, 484-85 (Fla. 1999). Relevant to a jury's determination of the amount of punitive damages are:

> (1) an amount reasonable in relation to the harm likely to result from defendant's conduct as well as the harm that actually has occurred;

(2) the degree of reprehensibility of defendant's conduct, the duration of that harmful conduct, defendant's awareness, any concealment and the existence and frequency of similar past conduct;

(3) the profitability to defendant of the wrongful conduct and the desirability of removing that profit and of having defendant also sustain a loss;

(4) the financial condition of defendant and the probable effect thereon of a particular judgment;

(5) all the costs of litigation to defendant and to the plaintiff;

(6) the total punishment defendant has or will probably receive from other sources, as a mitigating factor;

(7) the seriousness of the hazard to the public, the attitude and conduct of defendant upon discovery of the misconduct;

(8) the degree of defendant's awareness of the hazard and of its excessiveness;

(9) the number and level of employees involved in causing or covering up the misconduct;

(10) the duration of both the improper behavior and its cover-up; and

(11) the existence of other civil awards against defendant for the same conduct.

Owens-Corning, 749 So. 2d at 484-85 (describing trial court's jury instruction); *see id.* at 487 ("Initially, we note that before submitting the case to the jury, the trial court properly instructed the jury on a number of relevant factors it could consider in aggravation and mitigation in determining what, if any, amount of punitive damages to impose."); *see also Johns-Manville Sales Corp. v. Janssens*, 463 So. 2d 242, 248 (Fla. 1st DCA 1984) (discussing similar factors).

As this Court has recognized by deferring consideration of CPH's motion *in limine* no. 22 (to bar improper punitive-damages related argument) and Morgan Stanley's motion *in limine* no. 5 (to exclude references to net worth) until phase two of the trial, there is certain evidence that becomes relevant only in phase two of the trial. But that is a quite narrow category. Courts have

generally described these second-phase-only factors as those that concern the defendant's financial circumstances, including net worth and past awards of punitive damages. As the Fourth District has explained: "The bifurcation requirement [*W.R. Grace*] adopted was in response to the prejudicial effect of introducing evidence of other punitive damage awards when the defense is 'trying to convince a jury that its conduct is worthy of no punishment at all.'" *Dessanti v. Contreras*, 695 So. 2d 845, 846 (Fla. 4th DCA 1997) (quoting *W.R. Grace*, 638 So. 2d at 506). Thus, "[t]he purpose to be accomplished by a *W.R. Grace* bifurcation was to segregate financial issues from liability issues." *Dessanti*, 695 So. 2d at 847; *see also* 6 Thomas D. Sawaya, *Florida Practice (Personal Injury & Wrongful Death Actions)* § 15.9 (2005) ("The bifurcated procedure will allow liability for punitive damages to be established in the first stage of the trial and the amount, based on consideration of net worth and prior awards, in the second.").

While financial information comes in only during phase two of the trial, any and all evidence that goes to show the harmful and wrongful nature of Morgan Stanley's misconduct is relevant and admissible during both phases of the trial. This means that any evidence concerning the effect of the conduct and Morgan Stanley's state of mind may be presented in phase one to establish that Morgan Stanley is liable for some amount of punitive damages.

I. Morgan Stanley's Intentional Fraud Automatically Satisfies the Threshold Requirement for Consideration of Punitive Damages.

If CPH proves its case against Morgan Stanley, the question of whether Morgan Stanley should pay punitive damages automatically goes to the jury. Under Florida law, "proof of fraud sufficient to support compensatory damages necessarily is sufficient to create a jury question regarding punitive damages." *First Interstate Dev. Corp. v. Ablanedo*, 511 So. 2d 536, 539 (Fla. 1987) (citing *Winn & Lovett Grocery Co. v. Archer*, 171 So. 214, 221 (Fla. 1936), which held that punitive damages are permitted "where torts are committed with fraud, actual malice, or

deliberate violence or oppression"). As the Florida Supreme Court has explained, "[t]he intentional infliction of harm, or a recklessness which is the result of an intentional act, authorize punishment which may deter future harm to the public by the particular party involved and by others acting similarly." *Ingram v. Pettit*, 340 So. 2d 922, 924 (Fla. 1976); *see also Lou Bachrodt Chevrolet, Inc. v. Savage*, 570 So. 2d 306, 308 (Fla. 4th DCA 1990) ("A claim of fraud sufficient to support compensatory damages is sufficient to support a claim for punitive damages being presented to the jury."); *Rappaport v. Jimmy Bryan Toyota of Ft. Lauderdale, Inc.*, 522 So. 2d 1005, 1006 (Fla. 4th DCA 1988) (stating that "[t]he rule now seems clear in Florida that a claim of fraud sufficient to justify a compensatory damage award is also sufficient to support a claim for punitive damages," and thus "in all cases of fraud the jury is empowered to award punitive damages"). Thus, if CPH proves its fraud case, CPH is not required to "introduce any evidence that [Morgan Stanley's] conduct was outrageous or reprehensible" in order for the jury to be asked to decide whether punitive damages liability should attach. *Cruise v. Graham*, 622 So. 2d 37, 41 (Fla. 4th DCA 1993).

II. CPH May Also Offer Any Additional Evidence That Shows the Harmfulness and Wrongfulness of Morgan Stanley's Conduct in Phase One of the Trial.

Although CPH is not required to introduce any additional evidence of the reprehensibility of Morgan Stanley's conduct to show entitlement to punitive damages, CPH is permitted to introduce any evidence that goes to the harmful and wrongful nature of Morgan Stanley's conduct. This includes evidence showing (1) that Morgan Stanley's conduct harmed not only CPH, but also the investing public, (2) that Morgan Stanley has engaged in similar fraudulent conduct in the past, (3) the nature and extent of litigation misconduct in this case as evidence of consciousness of guilt, refusal to accept responsibility for wrongful conduct and lack of remorse,

as well as ongoing efforts at concealment demonstrating a general and egregious lack of respect for the integrity of the judicial system.

A. Evidence Showing Morgan Stanley's Disregard for the Welfare of the Public Is Admissible In Phase One.

On February 24, 2005, the Court held a hearing on Morgan Stanley's motion to strike certain paragraphs of CPH's first amended complaint. At that hearing, Morgan Stanley argued that certain references to harms to the investing public should be stricken from CPH's amended complaint because "we don't want to be trying this case on the basis that somehow this was a fraud on the public or investors in Florida. The question here is were we defrauding Coleman." Ex. A, 2/24/05 Tr. at 1629. The Court granted, in part, Morgan Stanley's motion, striking some but not all of the references to the investing public from CPH's amended complaint. *See* Ex. B, 2/28/05 Am. Order. At the hearing, CPH argued that the "magnitude of the wrong is a relevant consideration in making a determination as to whether and to what extent punitive damages are justified." Ex. A, 2/24/05 Tr. at 1629. Morgan Stanley agreed with that statement. *See id.* Nevertheless, there was some disagreement about whether Morgan Stanley's conduct constituted a public wrong and, if so, in which phase or phases of the trial evidence regarding the public nature of the harm would be admissible.

Under Florida law, the defendant's conduct toward the public is indeed a relevant consideration in awarding punitive damages. *See* Florida Standard Civil Jury Instruction PD-1(a)(2)(a)(3) (2003) (regarding liability for punitive damages for pre-October 1, 1999 causes of action, punitive damages are warranted if the jury finds by clear and convincing evidence that "the conduct showed such an entire lack of care that the defendant must have wantonly or recklessly disregarded the safety and welfare of the public"). "Because punitive damages are awarded to redress private injuries inflicted which partake of public wrongs, '[t]hey are to be

measured by the enormity of the offense, entirely aside from the measure of compensation for the injured plaintiff.'" *Wransky v. Dalfo*, 801 So. 2d 239, 242 (Fla. 4th DCA 2001) (emphasis added) (quoting *Arab Termite & Pest Control of Fla., Inc. v. Jenkins*, 409 So. 2d 1039, 1043 (Fla.1982)); *see also American Cyanamid Co. v. Roy*, 498 So. 2d 859, 861 (Fla. 1987) (punitive damages are "'reserved to those kinds of cases where private injuries partake of public wrongs'" (quoting *Ingram v. Pettit*, 340 So. 2d 922, 923-24 (Fla. 1976)); *Zuckerman v. Robinson*, 846 So. 2d 1257, 1258 (Fla. 4th DCA 2003) ("punitive damages are premised on the enormity of the act resulting in the injury to plaintiff").

The reasoning in *W.R. Grace* strongly supports the notion that one of many individuals harmed by a particular defendant's wrongful act is able to collect punitive damages based on the entire harm to the public caused by that defendant. In *W.R. Grace*, the Florida Supreme Court noted that courts generally permit "multiple punitive damage awards against a single defendant for the same course of conduct," and had "uniformly rejected" the notion that "the award of exemplary damages to one plaintiff would preclude the recovery of punitive damages for all subsequent plaintiffs." *W.R. Grace*, 638 So. 2d at 504. Critical here, the Court explained that limiting punitive damages to the first plaintiff would be particularly unfair under Florida law, which limits a plaintiff's punitive damages award based on that plaintiff's award of compensatory damages. *Id.* at 505 n.2. As the Court observed, "[i]f a slightly injured plaintiff were the first to recover punitive damages," then the punitive damages would be quite limited by statute, and such an "amount would not be nearly enough to punish a defendant whose egregious conduct had caused injury to many persons." *Id.* This reasoning makes clear that a single plaintiff may – though does not always – recover punitive damages based on all harm caused by a defendant's wrongful conduct. Moreover, under *W.R. Grace*, multiple plaintiffs would be

permitted to collect punitive damages based on the entire scope of the defendant's wrong; the only limit on recovery would be a defendant's ability to argue to the jury that prior punitive damages awards constituted mitigating evidence, or that the cumulative effect of such awards otherwise violated due process. *Id.* at 506.[1]

Here, Morgan Stanley aided, abetted, and conspired with Sunbeam in perpetrating on CPH and the investing public one of the biggest securities frauds of the twentieth century. Through a series of "road shows," in its debenture-offering documents, and in the press release that Morgan Stanley helped Sunbeam draft, Morgan Stanley told CPH and the investing public, including investors in Florida, that Sunbeam's turnaround was a success, that Sunbeam's sales for the first quarter of 1998 were ahead of the expectations of outside financial analysts, and that Sunbeam was poised for record sales. Morgan Stanley knew all of this to be false. One example of third parties injured by Morgan Stanley are the investors who held the remaining 18% of The Coleman Company's stock, who received the same deal as CPH under the terms of the transaction, and who were similarly defrauded by Morgan Stanley and Sunbeam. *See* Ex. C, CPH Tr. Ex. 342 (Credit Suisse First Boston fairness opinion).

Under the standards set forth above, such broad-based securities fraud constitutes a public wrong and the harm to the public should be considered in awarding punitive damages, even though the action was brought by a single victim. Because it is aimed at the public

[1] In 1999, Fla. Stat. Ann. § 768.73(2) was passed. Although this new statutory provision places limits on the ability of future plaintiffs to recover punitive damages, it also confirms CPH's contention that the first plaintiff to sue a defendant for particular conduct may recover punitive damages based on the entire scope of the harm – to the plaintiff and to other members of the public – caused by the defendant. Indeed, under the new Florida statute, it is now presumed that the first plaintiff to recover punitive damages has recovered such damages based on the entire scope of the underlying wrong, because it is only upon a subsequent plaintiff's clear and convincing showing that "the amount of prior punitive damages awarded was insufficient to punish that defendant's behavior" that a subsequent plaintiff may ask a jury to award additional punitive damages. Fla. Stat. Ann. § 768.73(2)(b). Thus, Florida's punitive damages statute – in addition to the reasoning of *W.R. Grace* and other cases – strongly supports CPH's position that the harm to others done by Morgan Stanley's role in the Sunbeam fraud is relevant to the jury's determination of both the appropriateness of punitive damages and the proper amount of such damages.

generally, thereby multiplying the "enormity of the offense," securities fraud is the quintessential public wrong. That is why Florida law recognizes that punitive damages are available to plaintiffs in common law fraud cases involving sale of securities, even though such damages are unavailable under federal securities laws. *See Stowell v. Ted S. Finkel Inv. Servs.*, 489 F. Supp. 1209, 1217 (S.D. Fla. 1980), *aff'd* 641 F.2d 323 (5th Cir. 1981) (declining to exercise pendent jurisdiction over plaintiff's common law securities fraud claim because punitive damages were available to plaintiff under Florida law but not federal law).

Under Florida law, even where the injury was inflicted only on the plaintiff, the jury is authorized to consider the fact that the defendant's conduct risked harm to others – *i.e.* that it exhibited "'wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public.'" *White Constr. Co. v. Dupont*, 455 So. 2d 1026, 1029 (Fla. 1984) (discussing standard for imposition of punitive damages) (quoting *Carraway v. Revell*, 116 So. 2d 16, 20 n.12 (Fla. 1959)) (emphasis added). *A fortiori*, actual harm to the public may be considered as well. That a plaintiff may recover punitive damages based on the entire scope of the defendant's harm – and not just the portion of harm done to plaintiff – makes eminent sense, because "[u]nder Florida law, the purpose of punitive damages is not to further compensate the plaintiff, but to punish the defendant for its wrongful conduct and to deter similar misconduct by it and other actors in the future." *Owens-Corning*, 749 So. 2d at 486. The concern is unfounded that in a case involving multiple victims, any reference to victims other than the plaintiff gives rise to the possibility that a defendant could be punished repeatedly and excessively for the same act. That very concern is the reason why a defendant is permitted to introduce evidence of prior punitive damage awards relating to the same transaction as mitigating evidence in the second phase of a bifurcated proceeding. *Dessanti*, 695 So. 2d at 846.

B. Evidence of Morgan Stanley's Similar Misconduct In Other Cases Is Admissible In Phase One.

The evidence admissible in phase one also would include evidence showing that Morgan Stanley has previously engaged in similar fraudulent conduct involving assisting clients to sell companies or securities in a fraudulent manner. *See Owens-Corning*, 749 So. 2d at 484-85 (noting that a factor for the jury's consideration is "the degree of reprehensibility of [defendant's] conduct, the duration of that harmful conduct, [defendant's] awareness, any concealment and the existence and frequency of similar past conduct") (emphasis added). To the extent CPH can establish such similar prior acts by competent evidence, that evidence is admissible to show that the events in this case were not a single deviation from lawfulness but that Morgan Stanley acted with full knowledge and intent to defraud CPH.

Under Florida law, Morgan Stanley's prior bad acts can come in during phase one because "[s]imilar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." FLA. STAT. § 90.404(2)(a); *see also Mitchell v. State*, 491 So. 2d 596, 598 (Fla. 1st DCA 1986) (noting that the statutory list is not exhaustive). Florida courts consistently have held that similar prior bad acts are admissible in phase one of the trial if those acts go to show that the defendant acted with the knowledge, intent, and malice that support imposition of punitive damages. *See, e.g., CSX Trans., Inc. v. Palank*, 743 So. 2d 556, 559-60 (Fla. 4th DCA 1999) (evidence regarding prior deficiencies in railroad's staffing and inspection practices was "sufficient to support a jury finding . . . for an award of punitive damages"); *Gulf Power Co. v. Kay*, 493 So. 2d 1067, 1075 (Fla. 1st DCA 1986) (evidence of previous accidents at the same location could be admissible to show "the gross and flagrant negligence required to support the award of punitive damages," if

the prior incidents were adequately similar); *Smith v. Telophase Nat. Cremation Soc., Inc.*, 471 So. 2d 163, 166 (Fla. 2d DCA 1985) (evidence of the past conduct, practices and policies on part of cremation society was relevant as bearing on whether conduct could be characterized by jury as extreme and outrageous warranting punitive damages); *Clooney v. Geeting*, 352 So. 2d 1216, 1220 (Fla. 2d DCA 1977) (defendant's past driving record would be admissible if plaintiff had submitted proper claim for punitive damages).

There are, however, constitutional limits on what the jury can consider. Under the United States Supreme Court's opinion in *State Farm Mutual Insurance Co. v. Campbell*, 538 U.S. 408, 418-19 (2003), evidence of a defendant's other bad acts may be considered by the jury because that evidence goes to show the degree of reprehensibility of the misconduct. The jury can consider Morgan Stanley's other bad acts as evidence of Morgan Stanley's recidivism or its intentional malice, trickery, or deceit. *See id.* Morgan Stanley's prior bad acts must be "similar," but "evidence of other acts need not be identical." *Id.* at 424. As the *State Farm* court made clear, evidence of the defendant's actions in other jurisdictions "may be probative" in assessing the degree of reprehensibility of the defendant's conduct. *Id.* at 422.

Here, Morgan Stanley's prior involvement in similar fraudulent dealings is directly relevant to showing Morgan Stanley's knowing participation in aiding-and-abetting and conspiring with Sunbeam and therefore relevant to a determination of entitlement to punitive damages. Morgan Stanley will surely argue that it is a reputable company and that any assistance in fraud it provided here was an isolated instance of overzealousness by particular individuals. CPH has every right to show otherwise.

C. Evidence of Litigation Misconduct Is Admissible In Phase One.

Also relevant to a determination of entitlement to punitive damages is the pattern of covering up fraud that Morgan Stanley has engaged in during this and other cases. As this Court's March 1, 2005 Order recognized, Morgan Stanley's concealment of its role in the Sunbeam transaction is "evidence of its malice or evil intent, going to the issue of punitive damages." *See* Ex. D, 3/1/05 Order at 14 (citing *General Motors Corp. v. McGee*, 837 So. 2d 1010, 1035 (Fla. 4th DCA 2003) ("[e]vidence of 'concealment of offensive conduct after it initially occurred is indicative of malice or evil intent sufficient to support punitive damages.'" (citation omitted))). Thus, as this Court noted, CPH will be allowed to introduce evidence of Morgan Stanley's discovery misconduct throughout this case to the extent that this conduct shows Morgan Stanley's attempts to conceal its actions in aiding-and-abetting and conspiring with Sunbeam. This evidence, for example, will include:

- Morgan Stanley's deliberate destruction of e-mails;
- its attempts to hide its archive system from CPH;
- its concealment of evidence concerning William Strong's criminal indictment;
- concealment of the role those circumstances played in motivating Strong's 1997 and 1998 conduct;
- their significance in contributing to negative assessments of Strong;
- the active concealment of electronic data confirming Morgan Stanley's involvement in the creation and revision of key pieces of documentary evidence from which Morgan Stanley sought to distance itself.

As has become clear through the evidentiary hearings this Court has held, Morgan Stanley's attempt to conceal its wrongdoing in this case is not an isolated incident, but a pattern

of conduct engaged in by Morgan Stanley. Because this evidence goes to show that Morgan Stanley did not accidentally or inadvertently destroy evidence in this case, it too is admissible to show Morgan Stanley's consciousness of guilt and the magnitude of its malice and evil intent.

III. All Phase One Evidence, Plus Financial Information, Is Then Considered In Phase Two to Determine Amount of Punitive Damages.

Once the jury has determined in the first phase that CPH has established Morgan Stanley's liability for punitive damages, the next question concerns the amount of punitive damages. At this phase, the jury considers "the degree of 'malice, wantonness, oppression, or outrage' demonstrated by the evidence in the case." *Humana Health Ins. Co. v. Chipps*, 802 So. 2d 492, 496 (Fla. 4th DCA 2001) (quoting *Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483, 486-87 (Fla. 1999)); *see also Wackenhut Corp. v. Canty*, 359 So. 2d 430, 436 (Fla. 1978) ("Punitive damages 'are peculiarly left to the discretion of the jury as the degree of punishment to be inflicted must always be dependent on the circumstances of each case, as well as upon the demonstrated degree of malice, wantonness, oppression, or outrage found by the jury from the evidence.'" (quoting *Winn & Lovett Grocery Co. v. Archer*, 171 So. 214, 221 (Fla. 1936))). As the Florida Supreme Court has characterized it:

> The jury's major duty in determining the amount of punitive damages is to assess the appropriate degree of punishment to be imposed on the defendant commensurate with the enormity of the offense; the defendant's financial position is only one factor to be considered by the jury. Other factors which the jury may consider include "the nature, extent and enormity of the wrong, the intent of the party committing it and all circumstances attending the particular incident, as well as any mitigating circumstances."

St. Regis Paper Co. v. Watson, 428 So. 2d 243, 246-47 (Fla. 1983) (internal citations omitted) (quoting *Rinaldi v. Aaron*, 314 So. 2d 762, 763 (Fla. 1975)).

It follows that the jury in phase two should give considerable weight to the evidence already in the trial record relating to the harmfulness and wrongfulness of the defendant's

conduct as it affected both the plaintiff and the public, taking into account other prior similar conduct by the defendant. But there are two additional issues that are properly presented only in phase two – the defendant's ability to pay, and prior punitive awards based on the same conduct, which may constitute a mitigating factor. *Dessanti*, 695 So. 2d at 847.

Morgan Stanley has argued, in its motion *in limine* no. 5 to bar evidence of net worth, that such information is not relevant to a determination of punitive damages. This is clearly false. As is more fully set out in CPH's response to Morgan Stanley's motion *in limine*, under Florida law, information about a defendant's financial condition is highly relevant to setting the appropriate level of punitive damages. *See, e.g., Liggett Group Inc. v. Engle*, 853 So. 2d 434, 457 n.28 (Fla. 3d DCA 2003) ("Florida courts routinely use net worth to determine whether a punitive award is bankrupting or excessive.") (citing cases dating from 1961 to 2002), *rev. granted*, 873 So. 2d 1222 (Fla. 2004). As the *Liggett Group* court explained: "A defendant's financial capacity is a crucial factor in determining the appropriateness of a punitive damages award. The amount awarded should be large enough to provide retribution and deterrence, but cannot be so great as to result in bankruptcy." *Id.* at 458.

Thus, in phase two of the trial, although Morgan Stanley has already conceded its ability to pay a punitive damages award three times as large as the compensatory damages CPH is seeking (*see* Ex. F, 12/3/04 Tr. at 74-75), CPH intends to introduce evidence of Morgan Stanley's net worth and ability to pay punitive damages (subject, of course, the Court's ruling on Morgan Stanley's motion *in limine* no. 5). This financial information, as well as any information relating to prior punitive awards, is the only evidence that CPH believes should be reserved until phase two of the trial. *See Dessanti*, 695 So. 2d at 845 (noting that the purpose of a two-phase trial is to reserve financial information until the second phase). Thus, any and all evidence that

goes to show the nature of Morgan Stanley's harmful conduct – including the harm Morgan Stanley caused to the investing public, Morgan Stanley's prior bad acts, and Morgan Stanley's concealment of its wrongdoing – should come in during both phases of the trial.

Conclusion

For the foregoing reasons, CPH respectfully requests that this Court issue an Order clarifying which categories of evidence and argument are permissible in phase one of the bifurcated trial to show CPH's entitlement to punitive damages and which categories are permissible in phase two to show the amount of punitive damages.

Dated: March 18, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by fax and hand delivery to all counsel on the attached list on this 18th day of March, 2005.

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IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

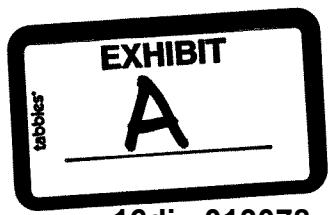
VOLUME 16

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Thursday, February 24, 2005
3:07 p.m. - 5:12 p.m.



and they expect to close on the bounce as I understand it.

MR. SCAROLA: That is correct, Your Honor.

MR. WARNER: Our --

THE COURT: 55.

MR. WARNER: Our objection to paragraph 55, Your Honor, is not the entire paragraph or even an entire sentence in that paragraph. Our objection has to do with the last four lines and not even all of that. Our objection has to do with the allegation that Dunlap, Kersh and Morgan Stanley were telling CPH and the investing public, including investors in Florida, that is the part that we don't want to be trying this case on the basis that somehow this was a fraud on the public or investors in Florida. The question here is were we defrauding Coleman.

MR. SCAROLA: The magnitude of the wrong is a relevant consideration in making a determination as to whether and to what extent punitive damages are justified.

MR. WARNER: I agree.

MR. SCAROLA: While we may not be obliged as we may have been pursuant to New York law to

prove a public wrong, we are permitted pursuant to Florida law to admit evidence concerning the magnitude of the wrong involved and the fact that this was a scheme to generally defraud all of the Coleman shareholders.

MR. WARNER: Your Honor, I'm not prepared to brief that today, but I'd be delighted to do it if you want me to.

THE COURT: My gut is that's not an accurate statement, because what that would suggest in this context is you get punitive damages for the members of the investing public who may have been misled. If they go sue somehow, their punitive damages have already been awarded. I agree it's a magnitude of a wrong, but it's a magnitude of a wrong sued on, not the entire magnitude of the wrong.

Quite honestly, the only -- I agree on punitive damages. The relevancy I see sort of to this statement, and, frankly, I don't think it matters if the investors were in Florida or elsewhere, is it's, I would imagine, some other evidence to show that Morgan Stanley had joined this alleged conspiracy that they just sort of did this stuff together.

MR. SCAROLA: Well, it also is indicative of the reasonableness of our reliance on the information that Morgan Stanley was providing. We were not alone in reasonably relying upon their representation. Others accepted them to be true and relied upon them as well.

THE COURT: I'm not sure it's going to come in for that because that's the whole thing, did somebody sue or not sue.

MR. WARNER: Exactly. And to address the point you apparently were making, Your Honor, we're not being sued for committing a fraud on the investing public. And to have that allegation in there assumes that they can prove that allegation and that they would submit evidence in this case that we were committing some sort of fraud on the investment public, meaning, again, that they're trying to inject in this case some liability to us that Coleman is going to collect on for some wrong that we did to somebody else. And I submit also that this argument that it has something to do with reliance is unsupported, let's put it that way in a kind manner.

So there are other instances where I have

seen this and I have objected and moved to strike. But it essentially is it's only the phrase "... and the investing public, including investors in Florida."

MR. SCAROLA: I believe it's relevant and material. It is descriptive of the fact that a press release was issued, a public statement was made. Clearly that is going to be part of the plaintiff's proof. And the fact that Morgan Stanley was making these statements in a public way was part of what induced our reliance upon them.

THE COURT: The only part of this I would strike is "...including investors in Florida." I think there is some relevancy to saying that Morgan Stanley, Dunlap and Kersh together made misrepresentations, including misrepresentations to the public.

55 -- no, we just did 55.

MR. WARNER: 58.

THE COURT: Yeah.

MR. WARNER: This is a similar -- we are not moving to strike the entire paragraph, Your Honor. We are moving only to strike a phrase --

THE COURT: Where is that phrase?

MR. SOLOVY: In the beginning, Your Honor.

MR. WARNER: I'm sorry. It is the first sentence. It says, "Based on information that Sunbeam and Morgan Stanley -- disseminated --

THE COURT: Investors.

MR. WARNER: And Wall Street -- you're right. There's only that phrase. It says CPH was -- were anticipated. I don't object to that. I object to, "...investors and Wall Street analysts were anticipating..."

MR. SOLOVY: Your Honor, that's the core of our case.

THE COURT: No, I would agree that that is material in determining whether Coleman should have expected the material adverse change clause to be triggered, so I think that stays in.

MR. WARNER: You're not going to get mad at our lawyers when we object to all these things when they come along in trial.

THE COURT: No, you're right.

MR. WARNER: Paragraph 61.

THE COURT: Where is the part? Instead the press release.

MR. WARNER: This is a conclusory allegation that the press release held out a false

possibility. The press release is either false or it's not false. It doesn't hold out a false possibility that it could achieve.

THE COURT: Well, didn't it say that they expected them to be on target?

MR. WARNER: Yeah. And that's either false or not false. Actually, Your Honor, the part of that paragraph that we were more concerned about, I think we may not have described it carefully, was the sentence down from that about the eighth or ninth line, couple of words in after the numbers there it says "Based on information that Morgan Stanley had in its hands on March 18th, it was obvious that Sunbeam would not achieve sales... " That's actually the sentence we would like stricken. It is -- since they have dropped the negligence count, any allegation that we should have known something is not material --

THE COURT: In saying it's obvious, I think it's another way of saying you knew it. You said something contrary when you knew it to be false. That's just another way of saying the same thing.

MR. WARNER: Is that the plaintiff's

position?

THE COURT: I would think so.

MR. SCAROLA: Yes, that's our position.

MR. WARNER: That obvious means we knew it?

THE COURT: I mean, if something is obvious...

MR. WARNER: I'd have to state for the record we don't agree that saying it should have been obvious means you should known. It doesn't mean you knew it. It's not an allegation that you knew it.

MR. SCAROLA: We didn't say it should have been obvious. We say it was obvious.

THE COURT: Where next? 62.

MR. WARNER: You know, I think that's a misstatement.

THE COURT: That was the part of 61 we were talking about.

MR. WARNER: Right. That's a part of 61. That's just misstated.

THE COURT: 63.

MR. WARNER: Our objection to 63, again, is the phrase in the second line, "...analysts and investors..." Again, what we may or may not have done wrong in regard to other analysts and

investors is not relevant to whether we committed a fraud or assisted in a fraud or conspired to commit a fraud in regard to Coleman.

MR. SOLOVY: I think, again, Your Honor, you put your finger on it, and that is we were relying upon the fact that there was no map because they were going out and selling instead of $500 million worth of debentures $750 million of debentures.

THE COURT: This is one of the allegations I don't think it's needed to state a claim, but I think it's relevant at trial if they can prove it.

MR. WARNER: We'll drop our objection to 66.

THE COURT: Okay. The objection here is to the last phrase of 67, "Morgan Stanley seemed intent on proceeding based on the false press release." That is a conclusory -- that's not a statement of fact. It's just a conclusion, an opinion that they've inserted in the complaint. And it's not material. They've already said that we intentionally issued a false press release.

MR. SCAROLA: I'm not aware of a prohibition

against stating conclusions in a complaint. I am aware that there's case law that says that conclusions alone under some circumstances may not be sufficient, but I'm not aware of anything that prohibits us from stating conclusions.

MR. WARNER: I think the answer to that --

MR. SCAROLA: And this happens to have been a conclusion based upon the observations of those who were present. For example, at the printers when an effort was made to cease reliance upon the press release and resisted by Morgan Stanley apparently intent on proceeding on the false press release.

MR. WARNER: The first part was a statement of fact. The second part is a conclusion and editorial comment on it. And I guess if you took Mr. Scarola's position, then when we write complaints we could make them as long as we want and have all sorts of editorial comments on what the facts mean and what conclusions you should draw from them. I don't think that's what pleadings are for. They're supposed to plead facts, not conclusions.

MR. SCAROLA: And they're subject to be stricken if they are immaterial or scandalous.

This is neither.

THE COURT: I would take out the first word and place a period after disaster.

MR. WARNER: I'm sorry. What did you do, Your Honor?

THE COURT: Took out the first word and placed a period after disaster.

MR. WARNER: Okay.

MR. SCAROLA: Does that mean the rest is coming out or we're just turning one sentence into two?

THE COURT: It means the rest is coming out.

MR. WARNER: The objection to -- let me take a look here. I think we may have misnumbered this.

It says we're objecting to paragraph 71, but -- oh, okay.

MR. SCAROLA: It's the last sentence.

THE COURT: Right. Oh, I'm sorry. I think that's essentially what we've already argued.

MR. WARNER: We have two objections. This one is that there -- we're not arguing a duty to disclose. What they're alleging in this case is active fraud on the part of Morgan Stanley, not some breach of a contractual duty or some

negligence count against them, so the fact that they did or did not disclose is not material to their -- and, of course, I also still object to the phrase in the middle there "... or the public..." You know, they've got an allegation essentially in this complaint that we breached a duty to the public, so I guess the question is how is that going to fit in the proof of the case and the way the case is going to be tried.

THE COURT: You want to respond?

MR. SCAROLA: Yes. We have alleged properly that these were public statements that were made. I think it's appropriate for us to also allege that Morgan Stanley when it clearly knew that the statements that it made were false, when it clearly knew that others continued to rely upon those false statements failed to take any action to correct the statements that it had publicly made and privately made and allowed those people to whom the statements were made to continue to rely upon them.

THE COURT: I'm sorry. Say that one more time.

MR. SCAROLA: Yes. Morgan Stanley made public statements concerning Sunbeam and its

economic financial circumstances. It knew that Coleman (Parent) and members of the public to whom those public and private statements were made continued to rely upon the statements that it made. Morgan Stanley not only did not retract the statements but continued to republish them.

THE COURT: What's the relevancy of the portion of that that alleges misstatements to the public?

MR. SCAROLA: Because it demonstrates that what was done was done willfully. This wasn't a circumstance where they made the statements and forgot to tell Coleman (Parent) Holding but told everybody else. This was a circumstance where no one was informed, when everyone was known by Morgan Stanley to be relying upon those statements.

THE COURT: Mr. Marmer.

MR. MARMER: There's another part in my corner of the world that matters, and that is because we're going to be talking a great deal about what happens when public statements are made and the stock price moves or not, the fact something is a public statement and then how the

market reacts to that is indeed part of the proofs of the case. Their own expert, Dr. Grinblatt, says this is an efficient market that, therefore, when something is said or not said, it will be reflected. Therefore, if there's a statement to the public, how the public perceives it or not is reflected in the stock price, and that's part of the elements of the proofs on damages that both the experts are going to address.

THE COURT: Yes.

MR. WARNER: That might be true, but this allegation has to do with what happened before the closing and before there was any dissemination of the information to the public about --

THE COURT: Their theory still has movement of the stock between the transaction, the contract and the closing as a component.

MR. WARNER: But just to make it clear, the reason I'm raising this point and making this point one way or the other here is that this allegation brings into whether or not we're being tried for liability for a wrong and a fraud committed on Coleman or on the public.

And that's -- right here it says they were material and we didn't disclose it not only to CPH but we didn't disclose it to the public. That's not the same thing as saying there was movement in the market based on something or another.

THE COURT: I mean, I'll leave it for now. At some point obviously we're going to have to vet this whole issue a little more thoroughly.

MR. SOLOVY: Your Honor, let me just leave you with this thought. Since you heard two you might as well hear three. This was not a private transaction. Where I think my learned colleague is going wrong here, this wasn't a transaction between Mr. Warner and ourselves and the public was, you know, just a bystander, they had no importance. This was a part of a public transaction in a public market, you see.

THE COURT: I understand that. But I think, as I understand at least one of the fears on behalf of Morgan Stanley, it's that while there may be some relevance to the fact, for instance, that Morgan Stanley owed a legal duty to public investors that presumably it had a great financial interest in making sure it didn't

violate, and that it, you know, made these misstatements may suggest they knew what it was doing. And I understand that argument. But I understand Morgan Stanley's concern that indiscriminate references to public investors may raise in the jury's mind some thought that somehow there is a public wrong here. And there's not a public wrong here being sued on. It's totally a private wrong.

MR. SOLOVY: It's part of whole mosaic. They take this fraud as they found it and made it, Your Honor. They made it in the public -- see, the currency they paid us with was a publicly traded stock. So to perpetrate the fraud they had to inflate the stock and they had to keep it up there.

THE COURT: I understand that. I'm not suggesting there's no relevancy to this evidence. But I am suggesting just like you are concerned that they may confuse in the juror's mind the holding company debt assumption and the Coleman debt, as that was already reflected in the value of the stock, this is a very sophisticated case, and no matter how sophisticated our jurors are, while you all are

intimately familiar with concepts that seem abundantly clear to you, they may not seem abundantly clear to the jurors. I understand Morgan Stanley is concerned that it not appear that they are trying to defend against a public wrong.

MR. SOLOVY: Well, Your Honor, I think it was a public wrong. Let's start with that, number one. The fraud was perpetrated on the public, and that's how it got perpetrated on us.

THE COURT: What's being sued on is a private wrong.

MR. SOLOVY: I agree with that, Your Honor. You know, they take the fabric of the story as they found it. They did not inflate chinese currency or something or create new currency which we bought. They were using the currency of the public market, and they were using the public market system.

THE COURT: I understand that.

MR. SOLOVY: And this is sort of, to me --

THE COURT: Just like I would be sorely disappointed if defendant tried to muddle the issues in front of the jurors as to the relevant materiality of debt, I would be sorely

disappointed if plaintiffs tried to muddle the issues in front of the jurors as to the public element of this.

MR. WARNER: We'll be on top of it.

THE COURT: I know you will. We'll leave it with the understanding I understand the motivating factor behind it.

MR. SCAROLA: I think I understand the court's concern, but I believe the court may be incorrect about the relevance of other victims even when only a single plaintiff is bringing the punitive damage claim, and that's an issue that we will address by way of separate memorandum for Your Honor, because I think that that may resolve some of the concerns that you have if, in fact, my understanding of the law in that regard is accurate. We'll address that by separate memo.

THE COURT: On issue of entitlement versus amount?

MR. SCAROLA: I'm sorry.

THE COURT: The issue of entitlement versus amount? When I made my comment about sort of the, you can't grab the punitive damages that allegedly would have been owed the public

investors, I was making a comment on amount of punitive damages. I wasn't necessarily commenting on entitlement to punitive damages. So if you do this memo, you're going to have to divide it between those two concepts.

MR. SCAROLA: We'll do that. We'll discuss in which phase of a bifurcated proceeding evidence with regard to the public nature as we're referring to it for shorthand purposes of the wrong would be admissible.

THE COURT: What paragraph are we on? 72.

MR. WARNER: I hate to be repetitious, but their allegations are repetitious at this point. The allegation in 72 is, "Having directly participated in misleading CPH and other investors Morgan Stanley had a duty to disclose true facts before closing." Again, it's the phrase "other investors" that we would like stricken from paragraph 72.

THE COURT: Do we agree that other investors is not relevant here in discussion of the duty owed to your client?

MR. SCAROLA: No, Your Honor, we don't, and we don't for this reason: It is because of Coleman's awareness of the duty that Morgan

Stanley owed to debenture investors that we felt doubly confident in relying upon their statements.

THE COURT: And I understand that argument, but that's not what's alleged here. What's alleged here is having participated in a misleading CPH and other investors. The implication is they owed a duty to CPH because of that. They only owed a duty to CPH allegedly because they mislead CPH. So take out "and other investors". I understand your argument.

MR. WARNER: Did I win that one?

THE COURT: You won that one.

MR. SCAROLA: Well, it's only a partial win, but who's keeping score.

MR. WARNER: For want of a horse.

THE COURT: Only "and other investors" is the only part we're taking out.

73.

MR. WARNER: I'll drop my objection to that. It's a conclusion, but let them say that if they want to.

THE COURT: 75.

MR. WARNER: Besides I'm getting tired. 75. I think the problem I have here is this is an

CERTIFICATE

STATE OF FLORIDA
COUNTY OF PALM BEACH

I, BARBARA GALLO, RMR-CRR, Notary Public in and for the State of Florida at Large, hereby certify that the foregoing pages are a true and correct transcription of my stenographic notes of the proceedings had and testimony taken in the foregoing case, at the time and place hereinabove set forth.

DATED this day of , 2005.

Barbara Gallo, RMR-CRR
Notary Public
State of Florida at Large

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

AMENDED ORDER ON MORGAN STANLEY'S MOTION TO DISMISS, MOTION TO STRIKE, AND MOTION FOR MORE DEFINITE STATEMENT

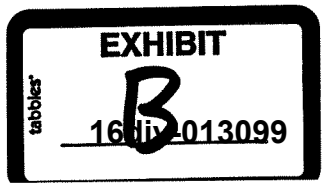
THIS CAUSE came before the Court, in Chambers, on the Court's own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Court's Order on Morgan Stanley's Motion to Dismiss, Motion to Strike, and Motion for More Definite Statement entered February 28, 2005 is vacated and the following entered in its place:

THIS CAUSE came before the Court February 24, 2005 on Morgan Stanley's Motion to Dismiss, Motion to Strike, and Motion for More Definite Statement, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion to Dismiss is Denied. See Ft. Myers Development Corp. v. J.W. McWilliams Co., 122 So. 267, 97 Fla. 788 (1929); Freeman v. First Union National Bank, 865 So. 2d 1272 (Fla. 2004) (in answering certified question from 11th Circuit concerning whether "catch all" provision of Florida's Uniform Fraudulent Transfer Act permits claim for damages against aider or abettor to a fraudulent transfer, Court looked to whether Legislature intended to create statutory liability for aiders and abettors to fraudulent transfers; analysis assumes Florida common law recognizes aiding and abetting liability generally). It is further

ORDERED AND ADJUDGED that Morgan Stanley's Motion for More Definite Statement is Denied. It is further



ORDERED AND ADJUDGED that Morgan Stanley's Motion to Strike is Granted, in part. Paragraph 11, except for the first and last sentence; paragraph 12, except the first and last sentence; paragraph 55, the words "including investors in Florida"; paragraph 58, in the first sentence, the word "investors"; paragraph 67, the first word and all words after "disaster"; and paragraph 72, in the first sentence, the words "and other investors," are hereby stricken from Plaintiff's First Amended Complaint.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 24 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO.: 502003CA005045XXOCAI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

AMENDED ORDER ON COLEMAN (PARENT) HOLDINGS, INC.'S MOTION FOR ADVERSE INFERENCE INSTRUCTION DUE TO MORGAN STANLEY'S DESTRUCTIONS OF E-MAILS AND MORGAN STANLEY'S NONCOMPLIANCE WITH THE COURT'S APRIL 16, 2004 AGREED ORDER, AND MOTION FOR ADDITIONAL RELIEF AND ORDER ON PLAINTIFF'S MOTION TO COMPEL FURTHER DISCOVERY REGARDING MORGAN STANLEY'S DESTRUCTION AND NON-PRODUCTION OF E-MAILS

THIS CAUSE came before the Court on February 14, 2005 on Coleman (Parent) Holdings, Inc.'s ("CPH's") Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, as modified by CPH's February 14, 2005 ore tenus motion for additional relief, and on February 28, 2005 on Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-Mails, with both counsel present. Based on evidence introduced, the Court finds:

1. CPH has sued Defendant, Morgan Stanley & Co., Inc. ("MS & Co."), for fraud in connection with CPH's sale of its stock in Coleman, Inc., to Sunbeam Corporation in return for Sunbeam stock. Whether MS & Co. had knowledge of the fraudulent scheme undertaken by Sunbeam in 1997 and early 1998 and, if so, the extent of that knowledge, is central to the case. CPH has sought access to MS & Co.'s internal files, including e-mails, since the case was filed.

MAR 2

EXHIBIT
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2. Though MS & Co. instructed its investment bankers to preserve paper documents in their possession in connection with the Sunbeam transaction in February, 1999, it continued its practice of overwriting e-mails after 12 months, despite an SEC regulation requiring all e-mails be retained in readily accessible form for two years. *See* 17 C.F.R. §240.17a-4 (1997).

3. On April 16, 2004, the Court entered its Agreed Order requiring MS & Co. to (1) search the oldest full backup tape for each of 36 MS & Co. employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all nonprivileged e-mails responsive to CPH's document requests; (4) give CPH a privilege log; and (5) certify its full compliance with the Agreed Order.

4. On May 14, 2004, MS & Co. produced approximately 1,300 pages of e-mails but failed to provide the required certification. Finally, on June 23, 2004, after inquiries by CPH, MS & Co. provided CPH with a certificate of full compliance with the April 16 Agreed Order signed by Arthur Riel, the MS & Co. manager assigned this task.

5. As organized by MS & Co., the effort to recover e-mails from any remaining backup tapes had several stages. First, the relevant backup tapes (in various formats, such as "DLT" tapes and eight-millimeter tapes) had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc. ("NDC"), to be processed, and the data returned to MS & Co. in the form of "SDLT"tapes. Third, MS & Co. had to find a way to upload the contents of these SDLT tapes into its new e-mail archive. Fourth, MS & Co. would run "scripts" to transform this data into a searchable form, so that it could later be searched for responsive e-mails. MS & Co. personnel used the term "staging area" to describe the stage of the

process when SDLT tapes remained in limbo, waiting to be uploaded to the archive.

6. At some point prior to May 6, 2004, Arthur Riel and his team became aware that more than 1,000 backup tapes had been found at a MS & Co. facility in Brooklyn, New York. These 1,423 DLT tapes had not been processed by NDCI and thus had not been included in the archive or searched when MS & Co. made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification that it was false. He and others on MS & Co.'s e-mail archive team knew by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990's. MS & Co. neither withdrew its certification nor informed CPH about the potential for additional production of e-mails, however. During the summer of 2004, the Brooklyn tapes were processed and sent to the staging area, but they were not uploaded to the e-mail archive so as to be available to be searched until January 2004, at least eight months after they were found.

7. MS & Co. also failed to timely produce e-mails from 738 8-millimeter backup tapes found at a MS & Co. facility in Manhattan, in 2002. These 738 8-mm tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched when MS & Co. made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Mr. Riel and others were told by their vendor, NDCI, by July 2, 2004 that the 8-mm tapes contained e-mail dating back at least to 1998. MS & Co. neither withdrew its certification nor informed CPH about the potential for additional production of e-mails, though. During the summer of 2004, the 8-mm tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not uploaded

to MS & Co.'s e-mail archive.

8. In August 2004, Mr. Riel was relieved of his employment responsibilities. He and his team were replaced by a new team headed by Allison Gorman Nachtigal.

9. Ms. Gorman testified that she was instructed to describe the circumstances of Mr. Riel's replacement as his having been "placed on administrative leave." That same term appears by interlineation over the original typed description in MS & Co.'s memorandum addressing these issues. The typed language stated: "[Mr. Riel was] dismissed for integrity issues." MS & Co. presented no evidence to explain why Mr. Riel would have been placed on administrative leave rather than terminated. CPH argued that it may have been to deprive CPH of the ability to contact him directly.

10. Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area; indeed, she was not informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman met with a group of MS & Co. attorneys. Following that meeting, Ms. Gorman gave the project somewhat greater priority, although even then it clearly did not move as expeditiously as possible. For example, MS & Co. gave no thought to using an outside contractor to expedite the process of completing the discovery, though it had certified completion months earlier; it lacked the technological capacity to upload and search the data at that time, and would not attain that capacity for months; and it knew trial was scheduled to begin in February, 2005. Even at this point, no one from MS & Co. or its outside counsel, Kirkland & Ellis LLP, gave CPH or this Court any hint that the June certification was false.

11. On November 17, 2004, more than six months after the May 14, 2004 deadline for

producing e-mails in response to the Agreed Order, MS & Co. sent CPH a letter revealing that its June 23 certificate of compliance was incorrect. The letter stated:

> Morgan Stanley has discovered additional e-mail backup tapes since our e-mail production in May 2004. The data on some of [the] newly discovered tapes has been restored and, to ensure continued compliance with the agreed order, we have re-run the searches described in the order. Some responsive e-mails have been located as a result of that process. We will produce the responsive documents to you as soon as the production is finalized.

The letter also foreshadowed further delays: "(s)ome of the backup tapes are still being restored. To ensure continued compliance with the agreed order, we intend to re-run the searches again when the restoration process is complete and will produce any responsive documents that result."

12. The next day, November 18, 2004, MS & Co. produced an additional 8,000 pages of e-mails and attachments. MS & Co.'s November 2004 letter stated that the 8,000 pages came from "newly discovered" tapes; but the testimony now makes clear that this statement was false because Ms. Gorman's team did not figure out how to upload and make searchable the materials from the staging area until January, 2005.

13. MS & Co. has failed to offer any explanation to reconcile the obvious conflict between its assertions at the time of production that the 8,000 pages came from "newly discovered" tapes (*i.e.*, the "Brooklyn tapes") and the testimony of its own witness, Ms. Gorman, that data from those newly discovered tapes were not capable of being searched until two months later, in January.

14. After a follow-up inquiry by CPH, on December 17, 2004, MS & Co. produced a privilege log and told CPH that "[n]o additional responsive e-mails have been located since our November production." MS & Co. refused to answer CPH's questions about whether MS & Co.

had restored all the backup tapes described in its November 17 letter and why the tapes had not been located earlier, however.

15. On December 30, 2004, CPH sought confirmation that MS & Co. had reviewed all e-mail backup tapes and produced all responsive e-mails and, if not, asked when the review would be completed. On January 11, 2005, MS & Co. informed CPH that the "restoration of e-mail back tapes is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

16. On January 19, 2004, CPH wrote asking MS & Co. to explain the circumstances under which MS & Co. located the "newly discovered" backup tapes and to disclose when the tapes were located. CPH also asked MS & Co. to explain why the backup tapes could not be restored sooner.

17. On January 21, 2005, MS & Co. sent CPH a letter that failed to answer CPH's questions. Instead, MS & Co. described its efforts to restore the backup tapes as "ongoing"; informed CPH that "there is no way for MS & Co. to know or accurately predict the type or time period of data that might be recovered"; and stated that MS & Co. "cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes."

18. On January 26, 2005, CPH filed the Motion at issue here, asking the Court to instruct the jury that MS & Co.'s destruction of e-mails and other electronic documents and MS. & Co.'s noncompliance with the April 16, 2004 Agreed Order can give rise to an adverse inference that the contents of the missing e-mails would be harmful to MS & Co.'s defense in this case.

19. Meanwhile, MS & Co. found another 169 DLT tapes in January, 2005, that allegedly

had been misplaced by its New Jersey storage vendor, Recall. Again, MS & Co., chose to provide no specifics to CPH or to the Court.

20. At a February 2, 2005 hearing on CPH's Motion, Thomas A. Clare of Kirkland & Ellis, LLP, representing MS & Co., stated that "late October of 2004...[is] the date I represent to Court is the first time that anyone knew that there was recoverable e-mail data" on the Brooklyn tapes. Hr'g Tr. (2/2/05) at 133-34. The actual date, however, was at least three months earlier, by July 2, 2004. Furthermore, MS & Co. refused to provide the Court with definitive answers about when its e-mail production would be complete, merely stating that it would proceed with "all deliberate speed." *Id.* at 139. Also at the February 2 hearing, Mr. Clare neglected to inform the Court about the 8-mm tapes that had been located in 2002, and told the Court that the 1,423 DLT tapes had been found in Brooklyn "sometime during the summer" of 2004. The truth of this assertion is belied by the evidence showing that the tapes were found before May 6, 2004.

21. On February 3, 2005, the Court ordered further discovery and set an evidentiary hearing for February 14, 2005. The discovery took place on February 9 and 10, when CPH deposed the three e-mail witnesses identified by MS. & Co.

22. On Saturday afternoon, February 12, 2005, MS & Co. informed the Court that it had, in the previous 24 hours, discovered additional tapes. Also, MS & Co. stated that its recent production omitted certain "attachments" to e-mails. MS & Co. did not attempt to clarify or substantiate either of these statements to CPH or to the Court until the Monday, February 14, 2005 hearing.

23. At the February 14 hearing, none of the witnesses MS & Co. presented was involved in or familiar with the actual electronic searches conducted using the parameters specified in this

Court's April 16, 2004 Agreed Order, and none explained where the 8,000 pages produced in November, 2004 had come from. MS & Co.'s witnesses did, however, describe three new developments. First, Robert Saunders, a Morgan Stanley executive director in the Information Technology Division, testified that he returned to New York after his February 10 deposition and, concerned about his unqualified assertion that the was "confident" that a complete search for backup tapes had been conducted, decided finally to undertake a personal search of MS & Co.'s "communication rooms," going to the areas he thought most obvious first. By doing so, he and two contractors discovered more than 200 additional backup tapes openly stored in locations known to be used for tape storage. Those discoveries were made on Friday and Saturday, February 11 and 12, 2005. As of the February 14 hearing, NDCI had not yet determined which, if any, of these newly discovered backup tapes contained e-mails. Second, Ms. Gorman reported that on Friday, February 11, 2005 she and her team had discovered that a flaw in the software they had written had prevented MS & Co. from locating all responsive e-mail attachments. Third, Ms. Gorman reported that MS & Co. discovered on Sunday evening, February 13, 2005, that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so there were at least 7,000 additional e-mail messages that appeared to fall within the scope of the Agreed Order had yet to be fully reviewed by MS. & Co.'s outside counsel for responsiveness and privilege. As counsel for MS & Co. admitted, this problem "dwarf[s]" their previous problems. Hr'g Tr. (2/14/05) at 13. Ms. Gorman indicated she was "90 percent sure" that the problem infected MS & Co.'s original searches in May, which means that even they failed to timely produce relevant materials that had been uploaded into the archive by that point. *Id.* at 82-83. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the

transaction under review here.

24. On February 19, 2005 MS & Co. informed counsel for CPH that "additional boxes of back up tapes" have been located "in a security room" and that, "(a)s of this morning, Morgan Stanley has identified four (unlabled) DLT tapes among the collection. Those four tapes will be sent to NDCI for further analysis." The disclosure did not state when the discovery was made. MS & Co.'s counsel represented to the Court that it was his understanding that about 73 bankers' boxes of tapes were discovered. No explanation for the late discovery was offered.

25. Throughout this entire process, MS & Co. and its counsels' lack of candor has frustrated the Court and opposing counsel's ability to be fully and timely informed.

26. MS & Co.'s failure during the summer and fall of 2004 to timely process a substantial amount of data that was languishing in the "staging area," rather than being put into searchable form and then searched, was willful and a gross abuse of its discovery obligations.

27. MS & Co.'s failure to time notify CPH of the existence of the DLT and 8-mm tapes, which it had located as early as 2002 and certainly prior to the June 23, 2004 certification, and its failure to timely process those raw backup tapes was willful and a gross abuse of its discovery obligations.

28. MS & Co.'s failure to produce all e-mail attachments was negligent, and it was discovered and revealed only as a result of CPH's hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check MS & Co.'s compliance with the April 16, 2004 Agreed Order.

29. MS & Co.'s failure to produce all of the Lotus Notes e-mails was negligent, and it was discovered and revealed only as result of CPH's hiring a third-party vendor, pursuant to the

Court's February 4, 2005 Order, to double-check MS & Co.'s compliance with the April 16, 2004 Agreed Order.

30. MS & Co.'s failure to locate other potentially responsive backup tapes before Saturday, February 12, 2005 was grossly negligent.

31. Given the history of the discovery, there is no way to know if all potentially responsive backup tapes have been located.

32. In sum, despite MS & Co.'s affirmative duty arising out of the litigation to produce its e-mails, and contrary to federal law requiring it to preserve the e-mails, MS & Co. failed to preserve many e-mails and failed to produce all e-mails required by the Agreed Order. The failings include overwriting e-mails after 12 months; failing to conduct proper searches for tapes that may contain e-mails; providing a certificate of compliance known to be false when made and only recently withdrawn; failing to timely notify CPH when additional tapes were located; failing to use reasonable efforts to search the newly discovered tapes; failing to timely process and search data held in the staging area or notify CPH of the deficiency; failing to write software scripts consistent with the Agreed Order; and discovering the deficiencies only after CPH was given the opportunity to check MS & Co.'s work and the MS & Co.'s attorneys were required to certify the completeness of the prior searches. Many of these failings were done knowingly, deliberately, and in bad faith.

It is clear that e-mails existed which were requested by CPH that have not been produced because of the deficiencies discussed above. Electronic data are the modern-day equivalent of the paper trail. Indeed, because of the informalities of e-mail, correspondents may be less guarded than with paper correspondence. In this case, the paper trail is critical to CPH's ability to make out its prima facie case. Thus, MS & Co.'s acts have severely hindered CPH's ability to

proceed. The only way to test the potentially self-serving testimony of MS & Co. personnel is with the written record of the events.

The failures outlined in this Order are of two types. First, by overwriting e-mails contrary to its legal obligation to maintain them in readily accessible form for two years and with knowledge that legal action was threatened, MS & Co. has spoiled evidence, justifying sanctions. See Martino v. Wal-Mart Stores, Inc., 835 So. 2d 1251 (Fla. 4th DCA 2003). "The appropriateness of sanctions for failing to preserve evidence depends on: (1) willfulness or bad faith of the responsible party, (2) the extent of prejudice suffered by the other party, and (3) what is required to cure the prejudice." Nationwide Lift Trucks, Inc. v. Smith, 832 So. 2d 824, 826 (Fla. 4th DCA 2002). Second, MS & Co.'s willfull disobedience of the Agreed Order justifies sanctions. See Rule 1.380 (b) (2), Fla. R. Civ. P. The conclusion is inescapable that MS & Co. sought to thwart discovery *in this specific case*.

Sanctions in this context are not meant to be punitive. They are intended, though, to level the playing field.

A reasonable juror could conclude that evidence of MS & Co.'s misconduct demonstrates its consciousness of guilty. It is relevant to the issues before the jury. Further, CPH should not be penalized by being forced to divert the jurors' attention away from the merits of its claim to focus on highly technical facts going to MS & Co.'s failures here, facts that are not reasonably disputed. Evidence of that failure, though, alone does not make CPH whole. Indeed, it can be said it is not a "sanction" at all, but merely a statement of unrefuted facts that the jury may find relevant. Shifting the burden of proof, though, forces MS & Co. to accept the practical consequence of its failures–that some information will never be known. Obviously, this sanction is of consequence only in the

marginal case. If there is overwhelming proof of MS & Co.'s knowledge of the fraud and collusion with Sunbeam, CPH would have prevailed on those elements in any event. And, to the contrary, if there is overwhelming evidence MS & Co. did not know of the fraud or conspire with or aid Sunbeam in its commission, it would have prevailed in any event. If the case is close on those issues, though, MS & Co., not CPH, should bear the burden of persuasion. Further, shifting the burden on the fraud issue does not relieve CPH of its obligation to establish the other elements of its claims, most notably reliance, proof of which is independent of the MS & Co. e-mails. Thus, the sanctions chosen are the most conservative available to the Court to address the spoilation of evidence and willfull violation of the Agreed Order.[1] [2]

Finally, the Court notes that CPH has requested the e-mails since May of 2003. MS & Co. was supposed to comply with the April 16, 2004 Order by May 14, 2004. Fact discovery in this case closed November 24, 2004. MS & Co.'s actions have resulted in the diversion of enormous amounts of resources, by both the parties and the Court, into a fact discovery dispute that should have never arisen and which would have long ago been put to bed had MS & Co. timely recognized its obligations to CPH and this Court. Opening argument in this complex case is set for March 21,

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[1]MS & Co.'s bad acts and pocket book may not be used to gain the continuance it has sought from the beginning. Further, the Court has no confidence that, even if a continuance were granted, MS & Co. would fully comply with discovery in this case.

[2]The undersigned notes that the sanctions imposed are not enumerated in Rule 1.380 (b) (2), and is aware of the concern expressed in the 2000 Handbook on Discovery Practice, Joint Committee of the Trial Lawyers Section of the Florida Bar and Conferences of Circuit and County Court Judges ("(f)or the trial court to be on solid footing, it is wise to stay within the enumerated orders" [Handbook at p. 4]). However, MS & Co.'s violations involve both the violation of a discovery order and the intentional spoiliation of evidence. The sanction imposed is *less* severe than that provided in Rule 1.380 (b) (2) (B), under which the Court could preclude MS & Co. from presenting evidence of its lack of knowledge of or collusion with the Sunbeam fraud, which the Court finds is the least severe enumerated sanction appropriate to place the parties on a level playing field.

2005. Preliminary jury selection has begun. MS & Co. has controlled the timetable of this portion of the litigation long enough. Consequently, CPH should have the ability to continue to require MS & Co. to attempt to comply with the Agreed Order and the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search, or to elect to terminate the e-mail discovery and concentrate on trial preparation.

Based on the foregoing, it is

ORDERED AND ADJUDGED that:

1. Plaintiff's Motion for Adverse Interference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Non-Compliance with the Court's April 16, 2004 Agreed Order and Motion for Additional Relief is GRANTED.

2. MS & Co. shall continue to use its best efforts to comply with the April 16, 2004 Agreed Order and shall continue to comply with the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search until March 21, 2005 or written notice from CPH, which ever first occurs. Either party shall notify the other in writing of its intention to offer into evidence e-mails actually produced to CPH prior to termination of e-mail discovery in conformity with this Order, within 72 hours of the e-mail's production to CPH. The Court shall hear and determine any objections to use of the e-mails.

3. The Court shall read to the jury the statement of facts attached as Exhibit A during whatever evidentiary phase of CPH's case that it requests. These findings of fact shall be conclusive. See Rule 1.380 (b) (2) (A). No instruction shall be given to the jury regarding inferences to be drawn from these facts. However, counsel may make such argument to the jury in favor of whatever inferences that evidence may support. No other evidence concerning the production of e-mails, or

lack thereof, shall be presented absent further Court order.

4. CPH will be allowed to argue that MS & Co.'s concealment of its role in the Sunbeam transaction is evidence of its malice or evil intent, going to the issue of punitive damages. See, e.g., General Motors Corp. v. McGee, 837 So.2d 10120.

5. MS & Co. shall bear the burden of proving to the jury, by the greater weight of the evidence, that it lacked knowledge of the Sunbeam fraud and did not aid and abet or conspire with Sunbeam to defraud CPH The traditional order of proof shall remain unaffected, however.

6. MS & Co. shall compensate CPH for costs and fees associated with the Motion. The amount shall be determined at an evidentiary hearing to be held after the completion of the trial.

7. Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-Mails is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 17 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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EXHIBIT A

A federal regulation in effect in 1997 and all times since required Morgan Stanley to preserve e-mails for three years and to preserve them in a readily accessible place for two years. Beginning in no later than 1997, Morgan Stanley had a practice of overwriting e-mails after 12 months. E-mails could no longer be retrieved once they were overwritten. This practice was discontinued in January, 2001. CPH has sought access to Morgan Stanley's e-mails relating to this transaction since the case was filed in May, 2003.

Prior to 2003, Morgan Stanley recorded e-mails and other electronic data on back up tapes. On April 16, 2004, the Court ordered Morgan Stanley to (1) search the oldest full backup tape for each of 36 Morgan Stanley employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all e-mails relating to this case found by the search I have just described; and (4) certify its full compliance with the Court's order.

On May 14, 2004, Morgan Stanley produced approximately 1,300 pages of e-mails. It did not produce the required certification. On June 23, 2004, after inquiries by CPH, Morgan Stanley provided CPH with a certificate of full compliance with the April 16 Order signed by Arthur Riel, the Morgan Stanley manager assigned this task.

As organized by Morgan Stanley, the effort to recover e-mails from the backup tapes had several stages. First, the relevant backup tapes had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc., which I will call "NDCI", to be processed, and the data returned to Morgan Stanley. Third, Morgan Stanley had to upload the processed data into its e-mail archive. Fourth, Morgan Stanley had to run scripts, or pieces of computer code, to transform this data into a searchable form. Finally, Morgan Stanley had to search the data for e-mails related to this case. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when the processed data returned by NDCI remained in limbo, waiting to be uploaded to Morgan Stanley's archive.

At some point prior to May 6, 2004, Arthur Riel and his team became aware that 1,423 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423 tapes had not been processed by NDCI and thus had not been included in the archive or searched when Morgan Stanley made its production to CPH on May 14, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification of full compliance with the Court's April 16, 2004 Order that it was false. He and others on Morgan Stanley's e-mail archive team knew by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990's. During the summer of 2004, the Brooklyn tapes were processed and the data sent to the staging area. The scripts were not written and tested to permit the search for e-mails relating to this case to begin until the middle of January, 2004. Such a search, even if perfectly done, can take weeks.

Morgan Stanley also failed to timely produce e-mails from 738 backup tapes found at a Morgan Stanley facility in Manhattan in 2002. These 738 tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched by either on May 14, 2004 or June 23, 2004. Mr. Riel and others were told by NDCI by July 2, 2004 that these tapes contained e-mail dating back at least to 1998. During the summer of 2004, the these tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not searched.

In August 2004, Mr. Riel was relieved of his employment responsibilities. He and his team were replaced by a new team headed by Allison Gorman Nachtigal. At that time, the staging area contained about 600 gigabytes of e-mail data that had not yet been uploaded into the Morgan Stanley archive and had not been searched for e-mails relating to this case.

Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area. Indeed, she was not informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman gave the project somewhat greater priority, although even then it did not move as expeditiously as possible. Morgan Stanley did not consider using an outside contractor to expedite the process.

Morgan Stanley found another 169 DLT tapes in January, 2005, that had been misplaced

by its New Jersey storage vendor. Morgan Stanley discovered more than 200 additional backup tapes openly stored in locations known to be used for tape storage on February 11 and 12, 2005. On February 11, 2005 Morgan Stanley discovered that a flaw in the software it had written had prevented Morgan Stanley from locating all e-mail attachments about the Sunbeam transaction. Morgan Stanley discovered on February 13, 2005, that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so that additional e-mail messages that appeared to fall within the scope of the April 16, 2004 Order had not been given to CPH. Further, it appears that the problem infected Morgan Stanley's original searches in May of 2004. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the transaction under review here. On February 16, 2005, Morgan Stanley withdrew its certificate of compliance with the April 16, 2004 Order. On February 19, 2005 Morgan Stanley notified CPH that it had found boxes of additional tapes that have not been uploaded into its archive or searched for responsive e-mails. Morgan Stanley did not tell CPH it had found any tapes that it had not searched until November 17, 2004. Even then, it did not tell CPH how many tapes were found, when they were found, or when they would be searched. MS & Co. did not provide all of this information to CPH until February of 2005. The searches had not yet been completed when this trial was begun, when they were terminated without completion.

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

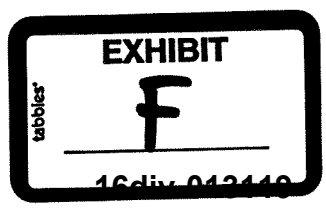
Defendant.
_____/

* * *

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH J. MAASS

* * *

West Palm Beach, Florida
December 3rd, 2004
8:00 a.m. - 9:39 a.m.



judge and tell her I want 1998. But 2003, 2004 that seems to be legitimate.

The second argument has a sort of legal issue, which is whether their financial worth is measured just by what their worth is in Florida or what their real financial total worth is. There we think the law is absolutely clear. Their cases really don't come to a different conclusion. They cite basically State Farm and then some other cases along the State Farm line that say, when you're looking at the question of what conduct can be deemed reprehensible by the jury, you concern yourself for the most part with conduct that occurs within the forum that's going to assess the punitive damages.

Now, there's a lot of case law on this and analysis on this that tries to refine that principle and work through it. I have a prediction that there will be motions in limine on this at some point, but I don't think that's before The Court at the moment.

THE COURT: You're saying that's not got nothing to do with --

MR. MARMER: The discovery we're asking now -- and I'm sure this is not a surprising

proposition. There are cases and experience everyone has had, I mean, if you think about it, a really rich person can't go into a state where they don't have much assets, commit some horrible tort, and then on the punitive damages say, you know, I've only got a Volkswagon from 1953 sitting here, you can't tag me. It's so preposterous, it almost defeats itself. That's really the gist of the two substantive arguments.

They had a thing about attorney/client privilege. I don't know what they're talking about there. The answer is, put it on a privilege log. If there is a document that's privileged, put it on a privilege log. I think that's the gist of the arguments.

THE COURT: What's the response?

MR. IANNO: In addition, Judge, right now, I don't know if The Court has had a chance to see the letter, we've asked The Court to rehear --

THE COURT: I did, and I denied it. You'll get a copy of the order.

MR. IANNO: So that takes care of my prematurity argument.

THE COURT: Yes, it does.

MR. IANNO: Then we get to the scope

argument. We believe that the scope is overbroad when they get into global holdings. Even if Mr. Marmer is correct, what Morgan Stanley's net worth is in Asia or Europe --

THE COURT: Why would that not be relevant?

MR. IANNO: Well, Your Honor, their net worth is their net worth. What their global holdings are, whether or not they have plants or interests in other countries, we think they could have limited it as to what is Morgan Stanley's net worth, period, not what are your global holdings, what are all your financial things. There's a limit on the punitive damages that can be awarded in this case of three times compensatory. We all know that, and they recognize that. Whether or not Morgan Stanley has any assets or holdings in any countries all over the world doesn't really affect that. The bottom line is the net worth, and we think that their scope is overbroad.

THE COURT: How would they challenge your statements of net worth then without information on the holdings?

MR. IANNO: That assumes that they want to. They may not challenge it, Judge. If there is follow up, they say we don't believe this, then

perhaps, but, you know --

THE COURT: Again, isn't that sort of, once again, trying to control the discovery?

MR. IANNO: Well, in this situation, the legislature is controlling the discovery to a great extent.

THE COURT: You're not suggesting that the net worth is not relevant because you guys are going to admit that you can answer to three times compensatory damages. We still agree the net worth, if the jury ever got to punitive damages, it would be relevant.

MR. IANNO: I think under your Court's order, I don't think there is a way around that, especially denying the rehearing motion, but because financial discovery is so sensitive, the legislature and the courts are really loathe to grant it to go into a fishing expedition on everything that a company, whether it's Morgan Stanley or any other company that comes before The Court that has a punitive damages claim against it, we need to start out small and then go big.

THE COURT: I understand. It still seems to me it's the same argument I seem to be hearing. It's, look, Judge, we think if we answered just

this part of what they've asked, the other stuff is not going to be relevant, so we want to do this piecemeal, even though, clearly, this is all discoverable. Again, it's sort of you're trying to usurp the function of The Court.

MR. IANNO: Or protect the client.

THE COURT: Sure. And I understand that.

MR. IANNO: That's really where we're coming from here, Judge. I hope The Court understands that we're not here trying to limit the discovery that is relevant to this case other than to protect the client from unreasonable intrusion into this financial discovery. If what they're trying to get really is really the net worth, then ask for the net worth, but don't go into every holding that Morgan Stanley has.

THE COURT: I assume this information is readily available?

MR. IANNO: I believe so. I mean, it's -- this is not -- punitive damages, well, obviously, we still haven't received The Court's order denying the motion for rehearing, so this is the first time The Court has heard this on this discovery.

THE COURT: I understand that. Just to back

up, the motion for rehearing, I understood what you were saying. It's all things I thought about when I wrote the order. I understand the point, and they are fairly debatable points.

Could it be subject -- I assume you would agree that it's subjected to the stipulated confidentiality order?

MR. MARMER: In the first instance.

THE COURT: Yes.

MR. IANNO: Absolutely.

THE COURT: I don't think they're going to go out and do anything with it other than for the purposes of this litigation, and I do think it's relevant. But we agree it needs to be limited to the documents dealing with 2003, 2004.

MR. MARMER: I would say it a little differently. If they were created in 2003, 2004. What I don't want to get is a redacted document. What I don't want is a 2003, 2004 financial statement that has as part of its discussion or historical treatment of an asset something redacted out of it.

THE COURT: So you're happy with any document created in 2003, 2004?

MR. MARMER: Correct. I will say, obviously,

C E R T I F I C A T E

THE STATE OF FLORIDA)
)
COUNTY OF PALM BEACH)

I, Cindy A. York, Registered Professional Reporter, do hereby certify that I was authorized to and did report the foregoing proceedings at the time and place herein stated, and that the foregoing is a true and correct transcription of my stenotype notes taken during said proceedings.

IN WITNESS WHEREOF, I have hereunto set my hand this 3rd day of December 2004.

_____

CINDY A. YORK
Registered Professional Reporter

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO TAKE JUDICIAL NOTICE OF CERTAIN STATEMENTS CONCERNING THE SUNBEAM FRAUD MADE BY MORGAN STANLEY AND TO ADMIT THOSE STATEMENTS INTO EVIDENCE AS ADMISSIONS OF MORGAN STANLEY

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") moves this Court pursuant to the provisions of FLA. STAT. §§ 90.202(6) and 90.202(12) (2005) to take judicial notice of certain statements, which are set forth in Exhibits C and D hereto, made by defendant Morgan Stanley & Co., Inc. ("Morgan Stanley") in both this case and in another case also presently pending in the Fifteenth Judicial Circuit, *Morgan Stanley & Co. Inc., et al. v. Arthur Andersen LLP, et al.*, Case No. 50 2004 CA 002257 XXXXMB (the "*Andersen* litigation"), and does hereby give notice of CPH's request in accordance with the provisions of FLA. STAT. § 90.203 (2005). CPH also moves this Court to admit into evidence the statements contained in Exhibits C and D as admissions pursuant to FLA. STAT. § 90.803(18).

Morgan Stanley has made numerous allegations and representations to this Court, and to another court in this Circuit, concerning the underlying fraud at Sunbeam. For example, in the *Andersen* litigation, Morgan Stanley stated in its brief opposing Arthur Andersen's motion to dismiss Morgan Stanley's amended complaint: "No one disputes that Sunbeam defrauded

countless shareholders, creditors, regulators, and others, based on materially false financial statements." *See* Ex. A at 1. And as recently as Thursday, March 17, 2005, Morgan Stanley's counsel told prospective jurors in this case: "You're going to hear in this case that Sunbeam's financial statements were false. . . . And you've heard the phrase already, I think it's been bandied about, cooked books. And you will hear that. And I don't think there's going to be any dispute amongst the parties, about the fact that that occurred." *See* Ex. B at 4478-79. There is no dispute that Morgan Stanley's counsel made those and similar statements in the *Andersen* litigation and in this case.

Morgan Stanley's statements in the *Andersen* litigation are attached as Exhibit C; Morgan Stanley's statements in the litigation before this Court are attached as Exhibit D. CPH also has attached, as Exhibits E through H, certified copies of the relevant pleadings and transcripts in the *Andersen* litigation, and as Exhibits I through L, copies of the relevant pleadings and transcripts from litigation before this Court. The fact that Morgan Stanley has made these statements about the fraudulent practices at Sunbeam is not subject to dispute, and the Court should take judicial notice of those statements. *See* Part I below. In addition, the Court should admit those portions attached in Exhibits C and D into evidence as admissions against Morgan Stanley. *See* Part II below.[1]

[1] CPH moves only with respect to the portions of the attached documents excerpted at Exhibits C and D. Other portions of Morgan Stanley's pleadings contain self-serving hearsay statements that are inadmissible. *See Stoll v. State*, 762 So. 2d 870, 876 (Fla. 2000) (error for court to take judicial notice of hearsay contained within court records); FLA. STAT. § 90.802 (2005).

ARGUMENT

I. The Court Should Take Judicial Notice Of Morgan Stanley's Statements Contained Within Court Records.

FLA. STAT. § 90.202(6) provides that the Court shall take judicial notice of "records of any court in this state," and under § 90.202(12), the Court shall take judicial notice of "facts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned." Morgan Stanley's allegations and representations regarding Sunbeam's fraudulent sales and accounting practices, which appear in the court records in this litigation and in the *Andersen* litigation, fall squarely within both § 90.202(6) and § 90.202(12). Morgan Stanley's statements are in filed pleadings, briefs, and court hearings, all of which are contained within the "records of any court in this state" (§ 90.202(6)), and the fact that Morgan Stanley made the statements is "not subject to dispute" because the accuracy of those records, copies of which are attached (and certified insofar as they originate in the separate *Andersen* litigation), "cannot be questioned" (§ 90.202(12)).

Under FLA. STAT. § 90.203 ("Compulsory Judicial Notice Upon Request"), the court "shall take judicial notice of any matter in § 90.202" when a party requests such notice, "gives each adverse party timely notice," and "[f]urnishes the Court with sufficient information to enable it to take judicial notice of the matter." *Id.* (emphasis added). CPH is therefore entitled, as a matter of right, to judicial notice of the fact that Morgan Stanley has made the representations and allegations contained in Exhibits C and D. *See also* FLA. STAT. ANN. § 90.202 (West 2005), Law Revision Council Note ("if a party requests that judicial notice be taken and satisfies the requirements of Section 90.203, then judicial notice of [matters covered

by § 90.202] is mandatory"). It bears emphasis that CPH is asking the Court to take judicial notice only of the fact that Morgan Stanley made the statements.

II. Morgan Stanley's Statements To The Court Are Admissible As Admissions Of A Party Opponent.

Section 90.803(18) codifies the admissions exception to the rule against hearsay. Section 90.803(18)(a) provides that a statement "offered against a party" is admissible if it is "[t]he party's own statement in either an individual or a representative capacity." *Id.* Thus, if the party makes the statement, it is an admission. But in addition, a statement is treated as an admission if the statement: (1) is one in which the party "has manifested an adoption or belief in its truth," § 90.803(18)(b); (2) is made "by a person specifically authorized by the party to make a statement concerning the subject," § 90.803(18)(c); or (3) is made by the party's "agent or servant concerning a matter within the scope of the agency or employment thereof," § 90.803(18)(d). Relevant Florida authorities confirm that all of those provisions apply to the statements from complaints, other pleadings, and hearing transcripts set forth in Exhibits C and D.

First, the Fourth District has ruled *en banc* that complaints in other litigation, such as the *Andersen* litigation, are admissions under section 90.803(18)(b) because they contain statements "of which the party has manifested an adoption or belief in the truth." *State Farm Fire and Casualty Co. v. Higgins*, 788 So. 2d 992, 1007 (Fla. 4th DCA 2001). In *Higgins*, State Farm brought an action for a declaratory judgment seeking a determination that the State Farm homeowner policy did not cover injuries suffered by Cheryl Ingalls because, State Farm contended, Ingalls herself had claimed that her injuries were caused by intentionally tortious conduct of Charles Higgins, who owned the homeowner policy. In a separate lawsuit between Ingalls and Higgins, Ingalls alleged that Higgins intentionally injured her. State Farm wanted to

use those allegations in the coverage litigation to show that Ingalls' injuries were caused by Higgins' intentional misconduct and, therefore, were excluded under the homeowner policy. The trial court admitted into evidence in the coverage litigation the allegations from Ingalls' complaint against Higgins in the other litigation. On appeal, the Fourth District, sitting *en banc*, ruled that the trial court was correct in admitting Ingalls' complaint. The Fourth District concluded that Ingalls had manifested an adoption or belief in the allegations of her complaint, and pointed to the fact that Ingalls had typed the complaint herself. Ingalls was a legal secretary and her employer filed the complaint against Higgins on her behalf. Thus, the Fourth District concluded that Ingalls' complaint satisfied the requirement of section 90.803(18)b) and therefore was an admission by a party opponent. 788 So. 2d at 1007 ("the original complaint . . . was admissible against [defendant] under section 90.803(18)(b), Florida Statutes (2000), as a statement offered against a party 'of which the party has manifested an adoption or belief in its truth'").

The Fourth District went on to distinguish two other cases: *Adams v. Merrill Lynch, Pierce, Fenner & Smith*, 392 So. 2d 4 (Fla. 4th DCA 1980) and *Hines v. Trager Construction Co.*, 188 So. 2d 826 (Fla. 1st DCA 1966). In discussing *Adams*, the Fourth District observed that the issue there was whether a party's original answer qualified as an admission under § 90.803(18)(c), which addresses admissions by "a person specifically authorized by the party to make a statement concerning the subject." The Fourth District distinguished *Adams* because the pleading in *Adams* was "unsworn and unauthorized." 780 So. 2d at 1007 (quoting *Adams* 392 So. 2d at 5.) Indeed, the facts in *Adams* confirm that result. In *Adams*, an attorney had filed a complaint jointly on behalf of a husband and wife, the attorney shortly thereafter withdrew his representation of the wife, and the wife repudiated the statements in the complaint and averred

that she "had no personal and direct knowledge as to the matters set forth in the pleadings." 392 So. 2d at 5. Thus, in *Adams*, the court held that the wife had not authorized the attorney to make those allegations and that the complaint should not have been deemed admissible by the trial court.

The Fourth District also distinguished *Hines* but with little comment. *See Higgins* 780 So. 2d 1007. That case not only is superseded by the 1979 enactment of the Evidence Code, but also is completely inapposite. In *Hines*, the facts were undisputed but the proponent wanted to use inconsistent legal arguments in the opponent's prior complaint in later litigation. *Id.* at 828. The court in *Hines* reasoned that pleadings were inadmissible "so long as the pleadings in a cause are merely a tentative outline of the position which the pleader takes before the case is fully developed on the facts." 188 So. 2d at 831. Here, in contrast, there is nothing "tentative" about Morgan Stanley's position in the *Andersen* litigation. Morgan Stanley has alleged the same theory: that Sunbeam committed fraud through a series of deceptive sales and accounting practices. *See* Ex. A, Morgan Stanley's January 28, 2005 Opposition to Motion to Dismiss First Amended Complaint at 1 ("[n]o one disputes that Sunbeam defrauded countless shareholders, creditors, regulators and others, based on materially false financial statements"). Even if Morgan Stanley's initial complaint were inadmissible on this theory, its later pleadings would be admissible.

Second, statements made by attorneys to courts constitute admissions under section 90.803(18)(c), where the attorney is authorized by the client to make the statements. *See* CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 803.18c (2004 ed.) (statements by attorney to court may be admitted "as an admission against his or her client if it is shown that the attorney had the authority to make the statement"); FLA. R. JUD. ADMIN. 2.060(k) (2005) ("[i]n all matters

concerning the prosecution or defense of any proceeding in the court, the attorney of record shall be the agent of the client"). The Second District in *Payton Health Care Facilities v. Campbell*, 497 So. 2d 1233, 1238 (Fla. 2d DCA 1986), although not relying explicitly on section 90.803(18)(c), embraces that provision's analysis on analogous facts. In *Campbell*, the plaintiff brought a wrongful death suit against both the company that operated a nursing home (the "Operator") and the company that owned it (the "Owner"). The plaintiff wanted to introduce as evidence a complaint from a separate lawsuit, where the Owner had sued the Operator. The complaint in that separate lawsuit alleged negligence in the treatment of the deceased, and the plaintiff in *Campbell* presumably wanted to use the Owner's allegations to prove that the deceased, in fact, had been treated negligently. The trial court agreed with plaintiff that the complaint was admissible, and the Second District affirmed. The Second District held that the complaint was "properly admitted by the trial court as an admission against interest." 497 So. 2d at 1238.

Third, for the same reasons that they are admissible under section 90.803(18)(c), statements made by attorneys "within the scope of their agency or employment'" are admissions under section 90.803(18)(d). *See Marine Insurance Co. v. Welsh*, 501 So. 2d 54, 57 (Fla. 4th DCA 1987) (statements by opposing party's counsel "are hearsay exceptions as defined in section 90.803(18)(d), Florida Statutes, and are therefore, not inadmissible on the grounds of hearsay."); FLA. R. JUD. ADMIN. 2.060(k).

The rules set forth in the foregoing cases and statutory provisions strike a proper and sensible balance. On the one hand, attorneys are agents of their clients and their statements normally ought to be binding upon their clients — whether those statements appear in a complaint, in other court documents, or in oral statements during court proceedings. On the

other hand, in those unusual circumstances where the client has not actually authorized the attorney to make the statements on the client's behalf, the client should be permitted to present evidence that the attorney's statements were neither authorized at the time nor adopted later. That kind of concern explains cases such as *Adams v. Merrill Lynch*, 392 So. 2d 4, 5 (Fla. 4th DCA 1980) (per curiam) (complaint filed jointly on behalf of husband and wife inadmissible against wife, where attorney shortly thereafter withdrew his representation of wife, and wife repudiated statements therein); and *Davidson v. Eddings*, 262 So. 2d 232, 233 (Fla. 1st DCA 1972) (plaintiff's unverified complaint from a separate lawsuit inadmissible where plaintiff testified she had never complained of injuries alleged therein).

There is no reason to depart from those rules here. Morgan Stanley's attorneys made the statements in Exhibits C and D on Morgan Stanley's behalf for the express purpose of defending against CPH's claims in this case and prosecuting Morgan Stanley's claims against Arthur Andersen in the *Andersen* litigation. Those statements are, therefore, admissions and CPH can use them as evidence against Morgan Stanley here. On the other hand, if Morgan Stanley seriously contends that its counsel have been running amok for the past year — filing two complaints and other pleadings alleging or admitting Sunbeam's fraud — all without authorization from Morgan Stanley — Morgan Stanley should come to this Court and say so under oath. *See Adams*, 392 So. 2d at 5 (wife testified that she "had no personal and direct knowledge as to the matters set forth in the pleadings"); *Davidson*, 262 S. 2d at 233 (plaintiff testified she had never complained of injuries her attorney had alleged in prior complaint); *cf. Campbell*, 497 So. 2d at 1238 (admitting complaint as admission, where party was business entity rather than individual plaintiff, without seeing the need to inquire into whether party had verified complaint or supplied information therein).

CONCLUSION

For the foregoing reasons, CPH respectfully requests (i) that this Court take judicial notice that the attached certified records from the Andersen litigation in Exhibits E through H are authentic; (ii) that this Court take judicial notice that Morgan Stanley made the statements attached as Exhibits C and D; and (iii) that this Court admit the statements on Exhibits C and D into evidence as admissions of Morgan Stanley.

Dated: March 18, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

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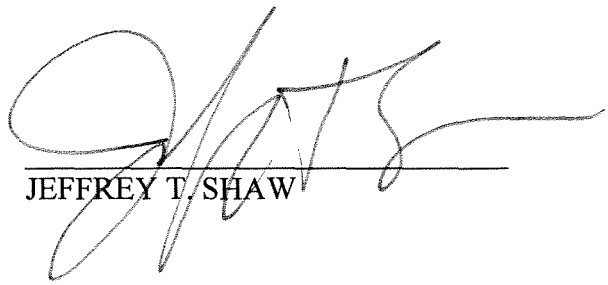
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 18th day of March, 2005.



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10285 v1

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

MORGAN STANLEY & CO. INCORPORATED, *et al.*, *Plaintiffs*, v. ARTHUR ANDERSEN LLP, *et al.*, *Defendants*.	CASE NO. 502004CA002257XXXXMB Division AA

CM

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS
Hearing: February 4, at 11:00 a.m.

Andersen[1] asks this Court to dismiss, on the pleadings, all claims of plaintiffs who lost hundreds of millions of dollars as a direct result of Andersen's knowing participation in the fraud that was Sunbeam Corporation. No one disputes that Sunbeam defrauded countless shareholders, creditors, regulators and others, based on materially false financial statements — overstating profits for one year by 65 percent, to cite one example — that were audited by Andersen, as well as related false Andersen representations. Morgan Stanley[2] has stated, specifically, what each defendant did to further that fraud, and how consequently Morgan Stanley was injured. Andersen wants to argue facts: no one should be able to rely on its representations except its client, Sunbeam; Morgan Stanley was unreasonable to believe what

[1] In this Opposition, "Andersen" refers to the defendants bringing this motion to dismiss: Arthur Andersen LLP ("Arthur Andersen"), Phillip E. Harlow, William D. Pruitt, Jr., and Donald Denkhaus. "Individual Defendants" refers to Harlow, Pruitt, and Denkhaus. The other defendants to this action (Andersen Worldwide Société Coopérative, and the former Canadian, Mexican, Venezuelan, and Hong Kong Andersen branches) are represented by different counsel.

[2] "Morgan Stanley" refers to plaintiffs Morgan Stanley & Co. Incorporated ("MS & Co."), Morgan Stanley Senior Funding, Inc. ("MSSF"), and Morgan Stanley ("MS").

EXHIBIT
A
16div-01 138

CERTIFICATE OF SERVICE

The undersigned certifies that a copy hereof was furnished by facsimile and overnight mail to counsel on the attached list on January 28, 2005.

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Counsel for Morgan Stanley & Co. Incorporated, Morgan Stanley Senior Funding, Inc., and Morgan Stanley

IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 41

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Thursday, March 17, 2005

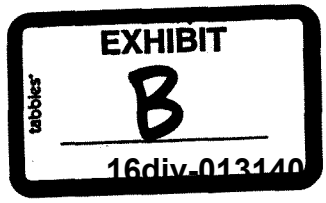
Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

1:30 p.m. to 4:55 p.m.



Mr. Perelman sells Coleman to Sunbeam, Sunbeam buys it for consideration that the jurors will hear. And this is a lawsuit resulting from that business deal.

In that context let me ask you if someone doesn't make as much money as they might want on a deal, does anyone think that by that fact alone there are damages that someone is liable for?

Do people disagree with that?

If someone buys some stock in a company, holds on to it for several years and eventually loses money on it, does anybody think that by that fact alone that there are damages for which someone else may be liable? Just from that fact?

You're going to hear in this case that Sunbeam's financial statements -- no one knows too much about it, although there's been a little bit of reading about it. You're going to hear in this case that Sunbeam's financial statements were false. And that's the problem that I was referring to earlier.

And you've heard the phrase already, I think it's been bandied about, cooked books. And you

will hear that. And I don't think there's going to be any dispute amongst the parties about the fact that that occurred.

Now, does anyone have a view right now as to whether outside advisors to Sunbeam such as auditors or such as an investment banker in a particular deal should necessarily know about that, at least prior to here?

Let me separate it into two. I saw a little bit of a frown there.

PROSPECTIVE JUROR #95: No, no, just getting tired.

PROSPECTIVE JUROR #105: Did you have auditors?

MR. DAVIDSON: Let me break it up into two questions, because I think, Mr. Lavender, you're focusing on a good point here.

Let me talk about the type of work that Morgan Stanley does as an investment banker. And you heard a pretty good description of that from Mr. Silverberg.

Does anyone believe -- do you believe, let me ask you directly, that an investment banker performing that kind of work would necessarily know that a company's financial statements were

MORGAN STANLEY'S ADMISSIONS REGARDING THE SUNBEAM FRAUD IN ITS SUIT AGAINST ARTHUR ANDERSEN

Morgan Stanley's Complaint, *MS&Co. v. AA*, (filed Mar. 1, 2004)

"As Sunbeam's subsequent restatement of its financial results showed, the financial statements that Andersen certified grossly misrepresented Sunbeam's true financial condition." (Complaint at Intro., MS&Co. v. AA).

"The Sunbeam financial statements painted a picture of Sunbeam as a company in the midst of an extraordinary financial turnaround." (Complaint ¶ 2, MS&CO. v. AA).

"Sunbeam's true financial condition was misstated by millions of dollars. In November 1998, when it restated its 1996 and 1997 financial results, Sunbeam revealed that, in 1996, it had overstated its operating losses by at lease $40 million, thereby establishing an overly bleak financial backdrop against which the company's performance in 1997 would be measured. In 1997, by contrast, Sunbeam dramatically overstated its earnings. When 1997 operating earnings were eventually corrected and restated, they were $95 million less than the earnings originally reported — and approximately half of the figure that Andersen had previously certified." (Complaint ¶ 4, MS&CO. v. AA).

"Unbeknownst to the public . . . senior management established an overly dismal financial backdrop against which the company's performance in 1997 would be measured. Management decided to accomplish this task by recording improper expenses and taking unjustified accounting write-offs in their 1996 financial statements." (Complaint ¶ 29, MS&CO. v. AA).

"In all, the 1996 financial statements audited by Andersen were materially false and misleading and overstated Sunbeam's operating losses for 1996 by at lease $40 million." (Complaint ¶ 47, MS&Co. v. AA).

"The accounting frauds in which Andersen permitted Sunbeam to engage in 1997 were aimed at inflating the company's earnings. To accomplish this — as the November 1998 restatement and an SEC investigation subsequently showed — Andersen allowed Sunbeam to record fraudulent sales, to account improperly for one-time events, and improperly to use 'cookie-jar' reserves, all in violation of GAAP." (Complaint ¶ 48, MS&Co. v. AA).

"According to the November 1998 restatement, one of the revenue inflation tactics permitted by Andersen in 1997 was Sunbeam's improper accounting for 'bill-and-hold' sales. A bill-and-hold sale occurs when a seller bills a customer for a purchase while retaining the merchandise for later delivery. During 1997, Dunlap's management team offered financial incentives to various customers to purchase products. Under GAAP, revenue under bill-and-hold transactions may be recognized only if, among other things, the buyer — not the seller — requests a sale on that basis. . . . [T]he purported bill-and-

hold customers had not requested that treatment . . . . According to the November 1998 restatement, Sunbeam added more than $29 million to Sunbeam's 1997 sales and $4. 5 million to income by improperly accounting for these transactions." (Complaint ¶ 50, MS&Co. v. AA).

"As a result of these and other improper accounting devices, in 1997, Sunbeam reported $186 million in income, much of which was, according to the November 1998 restatement, improper under GAAP. In all, the overstatements included over $90 million of improper net income, including approximately $10 million from a sham sale of inventory to a contractor, approximately $4. 5 million from non-GAAP bill-and-hold sales, approximately $35 million in income derived from the use of non-GAAP reserves and accruals taken at year-end 1996 and approximately $6 million from improper revenue recognition." (Complaint ¶ 54, MS&Co. v. AA).

"In all, the 1997 financial statements audited by Andersen reported operating income of $186 million — an overstatement of at least 50 percent." (Complaint ¶ 67, MS&Co. v. AA).

"On August 6, 1998, Sunbeam announced that its Audit Committee had determined that Sunbeam would be required to restate its audited financial statements for 1997 and possibly for 1996, as well as its unaudited financial statements for the first quarter of 1998. On October 20, 1998, Sunbeam and Andersen announced a restatement of its 1996 and 1997 financial statements." (Complaint ¶ 88, MS&Co. v. AA).

"On November 12, 1998, Sunbeam released its restated 1996 and 1997 financial results, again audited by Andersen. The restated 1996 financial statements reported operating losses for 1996 that were approximately $40 million less than originally reported, losses form continuing operations that were approximately $26 million less than previously reported and net losses that were approximately $20 million less than previously reported." (Complaint ¶ 90, MS&Co. v. AA).

"For 1997, the restated financial statements reported operating earnings that were approximately $95 million less than originally reported, earnings from continuing operations that were approximately $70 million less than previously reported and net earnings that were approximately $70 million less than previously reported. The new operating income figure for 1997 was approximately half the amount that Andersen had previously certified." (Complaint ¶ 91, MS&Co. v. AA).

"On February 6, 2001, as a direct result of the deceit that Andersen had facilitated, Sunbeam and several of its subsidiaries were forced to seek relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York." (Complaint ¶ 92, MS&Co. v. AA).

" . . . Sunbeam's 1996 and 1997 financial statements was materially false and misleading. Those material misrepresentations included, among other things, overstatements of (a) Sunbeam's 1996 operating losses by approximately $40 million; (b) its 1996 losses from continuing operations by approximately $26 million; (c) its 1996 net

losses by approximately $20 million; (d) its 1997 operating earnings by approximately $95 million; (e) its 1997 earnings from continuing operations by over $70 million; (f) its 1997 net earnings by approximately $70 million; and (g) its 1997 operating income figure by approximately 50 percent." (Complaint ¶ 105, MS&Co. v. AA).

"Both Sunbeam and Andersen knew that their representations regarding Sunbeam's 1996 and 1997 financial statements were false when made and/or made these representations with reckless disregard as to their truth." (Complaint ¶ 114, MS&Co. v. AA).

"Andersen . . . and . . . senior Sunbeam executives acted in concert and wrongfully conspired to create the appearance that Sunbeam was performing at a high level in order artificially to inflate the stock price of Sunbeam and make it attractive for a sale to another company." (Complaint ¶ 115, MS&Co. v. AA).

"In furtherance of that conspiracy, Dunlap and the other Sunbeam executives decided to acquire Coleman . . . . In furtherance of that scheme, in March 1998, Andersen committed the overt acts of issuing Andersen's false and misleading unqualified audit opinion with respect to Sunbeam's 1997 financial statements and of consenting to its publication to the SEC as part of Sunbeam's Form 10-K filing on March 6, 1998." (Complaint ¶ 116, MS&Co. v. AA).

"Also, as part of the Coleman merger agreement executed on February 27, 1998, Sunbeam represented and warranted that all of its filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate, not misleading, and prepared in accordance with GAAP, and that they would continue to be accurate and not misleading as of the transaction's closing date." (Complaint ¶ 120, MS&Co. v. AA).

"Andersen's audit report furthered the conspiracy between Andersen and Sunbeam by actively perpetuating the illusion that Sunbeam was a financially healthy company, which helped to support the company's artificially inflated stock price. . . ." (Complaint ¶ 121, MS&Co. v. AA).

"Also, as part of the Coleman merger agreement executed on February 27, 1998, Sunbeam expressly represented and warranted that all of its filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate, not misleading, and prepared in accordance with GAAP, and that they would continue to be accurate and not misleading as of the transaction's closing date." (Complaint ¶ 128, MS&Co. v. AA).

"Sunbeam knew that its representations regarding its 1996 and 1997 financial statements were materially false when made and/or made these representations with reckless disregard as to their truth. In addition, Sunbeam knew that Andersen's 1996 and 1997 unqualified audit opinions were materially false and misleading." (Complaint ¶ 129, MS&Co. v. AA).

July 16, 2004 Hearing on Arthur Andersen's Motion to Dismiss or for a More Definite Statement

"Coleman . . . also was a victim of relying on the Andersen audited financial statements, also lost money. . . ." (7/16/04 Tr. at 23, MS&Co. v. AA).

". . . Andersen aided and abetted Sunbeam, which was the company cooking its books to mislead the public and possible lenders about its financial picture. Remember, the whole idea here was to depress what your financial condition looks like in 1996 so that Mr. Dunlap in 1997 could say, voilà, I've executed a miracle turnaround. " (7/16/04 Tr. at 45, MS&Co. v. AA).

Morgan Stanley's First Amended Complaint (filed Aug. 6, 2004)

"In July 1996, to address its growing financial difficulties, Sunbeam hired Albert Dunlap as Chairman and Chief Executive Officer. Dunlap was a well-known 'turnaround' specialist who had a history of apparent success at other companies. He was nicknamed 'Chainsaw Al' because of his practice of cutting staff and closing plants to achieve quick turnaround results." (First Amended Complaint ¶ 28, MS&Co. v. AA).

"Immediately after he was hired, Dunlap publicly predicted that, as a result of the Company's restructuring, Sunbeam would attain significant increases in its margins and sales. Dunlap replaced almost all of top management with his own selections . . . ." (First Amended Complaint ¶ 29, MS&Co. v. AA).

"Unbeknownst to the public . . . Sunbeam's new senior management embarked upon a scheme designed to misrepresent Sunbeam's financial condition. Sunbeam's subsequent November 1998 restatement of its 1996 and 1997 financial statements revealed the plan that Sunbeam's management had adopted and Andersen facilitated. In 1996, Sunbeam's management, with Andersen's knowing assistance, caused Sunbeam to overstate its operating losses by at least $40 million, thereby establishing an overly bleak financial backdrop against which the company's performance in 1997 would be measured. In 1997, by contrast, management caused Sunbeam dramatically to overstate its earnings. When 1997 operating earnings were eventually corrected and restated, they were $95 million less than the earnings originally reported — and approximately half of the figure that Andersen had previously certified." (First Amended Complaint ¶ 30, MS&Co. v. AA).

"In order to convince the public that Sunbeam's turnaround was real, Sunbeam needed an outside auditor to validate its financial reports. Andersen — desperate to retain a valuable client — stood ready to assist Sunbeam in its scheme." (First Amended Complaint ¶ 31, MS&Co. v. AA).

"Andersen had a significant stake in retaining Sunbeam, a long-time major client. Being dropped by a high-profile client such as Sunbeam would have been a severe blow to Andersen's reputation. The company generated substantial income for Andersen's Florida office, paying over $1 million in fees for its 1995 audit alone and providing it

with substantial income from lucrative consulting assignments. Indeed, Andersen was so eager to keep Sunbeam as its client that it agreed to a 30-percent reduction in its 1996 audit fees." (First Amended Complaint ¶ 33, MS&Co. v. AA).

"Andersen's fees were particularly important to Andersen's partners, whose incomes were dependent on the continued business from Sunbeam." (First Amended Complaint ¶ 34, MS&Co. v. AA).

"Andersen put tremendous pressure on partners to generate more fees." (First Amended Complaint ¶ 35, MS&Co. v. AA).

"Harlow, the Andersen engagement partner . . . informed Kersh and Gluck, who were part of Sunbeam's senior management, that certain of the restructuring reserves that Sunbeam had established were not properly accounted for as restructuring costs under GAAP because they benefited Sunbeam's future operations. He proposed that Sunbeam reverse the accounting entries on its books and records reflecting the establishment of these reserves. However, when Kersh and Gluck refused to reverse these items, Harlow caused Andersen to acquiesce to Sunbeam's fraudulent accounting for the reserves." (First Amended Complaint ¶¶ 52, 53, MS&Co. v. AA).

"In all, the 1996 financial statements audited by Andersen were materially false and misleading and overstated Sunbeam's operating losses for 1996 by at least $40 million . . . . [T]he financial statements that Andersen audited did not 'fairly' present Sunbeam's financial position in conformity with GAAP, as it represented. . . ." (First Amended Complaint ¶ 60, MS&Co. v. AA).

"The accounting frauds in which Andersen permitted Sunbeam to engage in 1997 were aimed at inflating the company's earnings. To accomplish this — as the November 1998 restatement . . . subsequently showed — Andersen allowed Sunbeam to record fraudulent sales, to account improperly for one-time events, and improperly to use 'cookie jar' reserves, all in violation of GAAP." (First Amended Complaint ¶ 61, MS&Co. v. AA).

"One of the revenue inflation tactics permitted by Andersen in 1997 was improper accounting for 'bill-and-hold' sales. A bill-and-hold sale occurs when a seller bills a customer for a purchase while retaining the merchandise for later delivery. During 1997, Dunlap's management team offered financial incentives to various customers to purchase products. Under GAAP, revenue under bill-and-hold transactions may be recognized only if, among other things, the buyer — not the seller — requests a sale on that basis. . . . [T]he purported bill-and-hold customers had not requested that treatment . . . . Sunbeam added more than $29 million to its 1997 sales and $4.5 million to income by improperly accounting for these transactions." (First Amended Complaint ¶ 63, MS&Co. v. AA).

"As a result of these and other violations of accounting standards, in 1997, Sunbeam reported $186 million in income, much of which was, according to the November 1998 restatement, improper under GAAP. In all, the overstatements included over $90 million

of improper net income, including approximately $10 million from a sham sale of inventory to a contractor, approximately $4.5 million from non-GAAP bill-and-hold sales, approximately $35 million come on the use of non-GAAP reserves and accruals taken at year-end 1996, and approximately $6 million from improper revenue recognition." (First Amended Complaint ¶ 71, MS&Co. v. AA).

"On January 28, 1998, Sunbeam announced its financial results for 1997, reporting total revenues of $1.168 billion, and total earnings from continuing operations of $189 million (or $1.41 per share)." (First Amended Complaint ¶ 73, MS&Co. v. AA).

"In the first week of March 1998, shortly after the agreement for Sunbeam's purchase of Coleman was signed, but before the transaction closed, Andersen rendered an unqualified audit opinion for Sunbeam's 1997 financial statements. With Andersen' s express consent, management included that opinion in Sunbeam's 1997 Form l 0-K filed with the SEC on March 6, 1998." (First Amended Complaint ¶ 78, MS&Co. v. AA).

". . . [T]he 1997 financial statements audited by Andersen reported operating income of $186 million — an overstatement of at least 50 percent." (First Amended Complaint ¶ 91, MS&Co. v. AA).

". . . [A]s part of the Coleman merger agreement executed on February 27, 1998, Sunbeam had represented and warranted that all of its filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate and not misleading, and that they would continue to be accurate and not misleading as of the transaction's closing date. Sunbeam further represented that its audited financial statements were prepared in accordance with GAAP, and that at the time of the closing of the transaction, that representation would continue to be true and correct." (First Amended Complaint ¶ 105, MS&Co. v. AA).

"On August 6, 1998, Sunbeam announced that its Audit Committee had determined that Sunbeam would be required to restate its audited financial statements for 1997 and possibly for 1996, as well as its unaudited financial statements for the first quarter of 1998. On October 20, 1998, Sunbeam and Andersen announced a restatement of its 1996 and 1997 financial statements." (First Amended Complaint ¶ 120, MS&Co. v. AA).

"On November 12, 1998, Sunbeam released its restated 1996 and 1997 financial results, again audited by Andersen. The restated 1996 financial statements reported operating losses for 1996 that were approximately $40 million less than originally reported, losses from continuing operations that were approximately $26 million less than previously reported and net losses that were approximately $20 million less than previously reported." (First Amended Complaint ¶ 122, MS&Co. v. AA).

"For 1997, the restated financial statements reported operating earnings that were approximately $95 million less than originally reported, earnings from continuing operations that were approximately $70 million less than previously reported and net earnings that were approximately $70 million less than previously reported. The new

operating income figure for 1997 was approximately half the amount that Andersen had previously certified." (First Amended Complaint ¶ 123, MS&Co. v. AA).

"On February 6, 2001, . . . Sunbeam and several of its subsidiaries were forced to seek relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. . . . The shareholders of Sunbeam saw the value of their stock decline by over $5 billion from its peak in early March 1998 to February 5, 2001." (First Amended Complaint ¶ 124, MS&Co. v. AA).

"Andersen . . . acted in concert and wrongfully conspired with Dunlap . . . and other senior Sunbeam executives to create the appearance that Sunbeam was performing at a high level. The purpose of this conspiracy was artificially to inflate the stock price of Sunbeam . . . . " (First Amended Complaint ¶ 149, MS&Co. v. AA).

"In furtherance of the conspiracy, Dunlap, Kersh, Gluck, and the other Sunbeam executives agreed to misstate Sunbeam's true financial condition by millions of dollars in order to create the illusion that Sunbeam had undergone a radical financial turnaround. Pursuant to this scheme, Dunlap, Kersh, Gluck, and other Sunbeam executives caused Sunbeam, in 1996, to overstate its operating losses by at least $40 million, thereby establishing an overly bleak financial backdrop against which the company's performance in 1997 would be measured. In 1997, by contrast, Dunlap, Kersh, Gluck, and the other Sunbeam executives caused Sunbeam dramatically to overstate its earnings." (First Amended Complaint ¶ 150, MS&Co. v. AA).

"In late 1997 to early 1998, in furtherance of the conspiracy, Dunlap, Kersh, Gluck, and the other Sunbeam executives decided to acquire Coleman . . . ." (First Amended Complaint ¶ 151, MS&Co. v. AA).

"The members of the conspiracy all knew or recklessly disregarded the fact that Sunbeam's 1996 and 1997 financial statements and Andersen's audit opinions concerning those financial statements contained false statements of material fact. All of the co-conspirators knew that the representations regarding Sunbeam's 1996 and 1997 financial statements were false when made and/or made these representations with reckless disregard as to their truth." (First Amended Complaint ¶ 153, MS&Co. v. AA).

"As part of the Coleman merger agreement executed on February 27, 1998, they caused Sunbeam to represent and warrant that all of Sunbeam's filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate, not misleading, and prepared in accordance with GAAP, and that they would continue to be accurate and not misleading as of the transaction's closing date. . . ." (First Amended Complaint ¶ 156, MS&Co. v. AA).

"As part of the Coleman merger agreement executed on February 27, 1998, Sunbeam expressly represented and warranted that all of its filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate, not misleading, and prepared in accordance with GAAP, and that they would continue to be accurate and not misleading as of the transaction's closing date. Sunbeam knew that its many

representations regarding its 1996 and 1997 financial statements were materially false when made and/or made these representations with reckless disregard as to their truth. It also knew that Andersen's 1996 and 1997 unqualified audit opinions were materially false and misleading." (First Amended Complaint ¶ 164, MS&Co. v. AA).

Morgan Stanley's January 28, 2005 Opposition to Motion to Dismiss

". . . No one disputes that Sunbeam defrauded countless shareholders, creditors, regulators and others, based on materially false financial statements — overstating profits for one year by 65 percent, to cite one example — . . . . " (MS's Opposition to Motion to Dismiss at 1, MS&Co. v. AA (filed Jan. 28, 2005)).

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MORGAN STANLEY'S ADMISSIONS REGARDING THE SUNBEAM FRAUD IN THIS LITIGATION

December 12, 2003 Hearing on Morgan Stanley's Motion for Judgment on the Pleadings

"[I]t's not in dispute that Sunbeam had misstatements. . . . the financial statements were in fact misleading. So I don't think they need to prove that. . . . " (12/12/03 Tr. at 26-27, CPH v. MS&Co.).

February 16, 2005 Afternoon Hearing

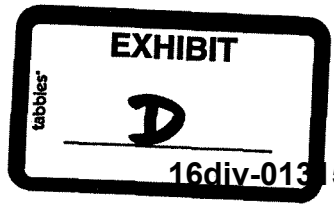
"We are going to argue that Sunbeam did engage in a fraud and Arthur Andersen engaged in that fraud." (2/16/05 P.M. Tr. (Vol. 7) at 811, CPH v. MS&Co.)

February 24, 2005 Afternoon Hearing

"Do we believe that Sunbeam did something wrong? Absolutely. Do we think that Arthur Andersen's false financial statements -- as they turned out to be clearly false -- contributed to that, enabled it, was really the core of it? Absolutely. Do we think that Arthur Andersen in several key points along the way, we think, had clear warning signs and looked the other way at times, clearly knew that things that were going into their audited financials were not correct? Absolutely." (2/24/05 P.M. Tr. (Vol. 9) at 1536, CPH v. MS&Co.).

March 17, 2005 Afternoon Hearing

"You're going to hear in this case that Sunbeam's financial statements were false. . . . And you've heard the phrase already, I think it's been bandied about, cooked books. And you will hear that. And I don't think there's going to be any dispute amongst the parties about the fact that that occurred." (3/17/05 Tr. (Vol. 41) at 4478-79, CPH v. MS&Co.)



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

50 2004 CA 002257 XXXX NB

MORGAN STANLEY & CO. INCORPORATED, MORGAN STANLEY SENIOR FUNDING, INC., and MORGAN STANLEY, Plaintiffs, vs. ARTHUR ANDERSEN LLP (a United States partnership); ANDERSEN WORLDWIDE, SOCIÉTÉ COOPÉRATIVE (a Swiss cooperative); ARTHUR ANDERSEN & CO. (a Canadian company); ARTHUR ANDERSEN & CO. (a Hong Kong company); RUIZ, URQUIZA Y CIA, S.C. (a Mexican company); PIERNAVIEJA, PORTA, CACHAFEIRO & AVOCADOS (a Venezuela company); ARTHUR ANDERSEN (a United Kingdom company); PHILLIP E. HARLOW; WILLIAM PRUITT; and DONALD DENKHAUS. Defendants.	CASE NO. Jury Trial Demanded

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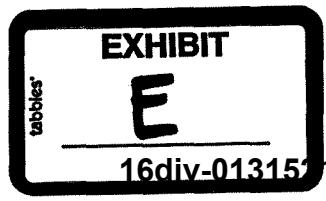
COMPLAINT

In March 1998, Morgan Stanley & Co. Incorporated, Morgan Stanley Senior Funding, Inc., and Morgan Stanley (collectively, "Morgan Stanley") — in direct reliance on certified financial statements audited by the Arthur Andersen defendants ("Andersen")[1] — underwrote a multi-million dollar offering of convertible notes and provided a $680 million loan to Sunbeam

[1] Defendants Arthur Andersen LLP; Andersen Worldwide, Société Coopérative (a Swiss cooperative); Arthur Andersen & Co. (a Canadian company); Arthur Andersen & Co. (a Hong Kong company); Ruiz, Urquiza y Cia, S.C. (a Mexican Company); Piernavieja, Porta, Cachafeiro & Avocados (a Venezuela company); Arthur Andersen (a United Kingdom company), Phillip E. Harlow, William Pruitt, and Donald Denkhaus are hereinafter collectively referred to as "Andersen." Unless otherwise stated, allegations made against "Andersen" are made against each of these defendants jointly and severally.



Corporation, Inc., in connection with Sunbeam's acquisition of three companies. As Sunbeam's subsequent restatement of its financial results showed, the financial statements that Andersen certified grossly misrepresented Sunbeam's true financial condition. Andersen had full knowledge of these misstatements, and it intended that Morgan Stanley would rely on its unqualified audit opinions. Morgan Stanley — as a direct consequence of Andersen's deceit — has lost hundreds of millions of dollars. Accordingly, Morgan Stanley brings this action against Andersen and alleges the following:

Nature of Action

1. In March 1998, Sunbeam acquired The Coleman Company, Inc. ("Coleman") and two smaller companies. In order to finance this acquisition, Morgan Stanley underwrote a $750 million offering of convertible notes, and it also directly provided Sunbeam with an additional $680 million in secured financing.

2. In serving as an underwriter and in agreeing to extend the loan, Morgan Stanley relied on Sunbeam's financial statements, which had been audited and certified by Andersen, as well as Andersen's continued opinions about Sunbeam's financial condition. The Sunbeam financial statements painted a picture of Sunbeam as a company in the midst of an extraordinary financial turnaround.

3. In reality, unbeknownst to Morgan Stanley, Sunbeam's "turnaround" was an illusion. As became apparent in the summer of 1998 and as confirmed by Sunbeam's subsequent restatement of its financial results, the 1996 and 1997 statements that Andersen had certified — and upon which Morgan Stanley had relied — did not conform with generally accepted accounting principles ("GAAP"). Andersen, with full knowledge of the material misstatements

contained in Sunbeam's financial reports, issued unqualified audit opinions for both 1996 and 1997. In so doing, it failed to perform its audit in accordance with generally accepted auditing standards ("GAAS").

4. As Andersen knew, the statements that it audited and certified were replete with accounting improprieties. As a consequence, Sunbeam's true financial condition was misstated by millions of dollars. In November 1998, when it restated its 1996 and 1997 financial results, Sunbeam revealed that, in 1996, it had overstated its operating losses by at least $40 million, thereby establishing an overly bleak financial backdrop against which the company's performance in 1997 would be measured. In 1997, by contrast, Sunbeam dramatically overstated its earnings. When 1997 operating earnings were eventually corrected and restated, they were $95 million less than the earnings originally reported — and approximately half of the figure that Andersen had previously certified.

5. Andersen's fraud ultimately forced Sunbeam and several of its subsidiaries to seek relief under Chapter 11 of the Bankruptcy Code in February 2001. As part of the bankruptcy court-approved reorganization plan, Morgan Stanley's $680 million loan to Sunbeam was discharged in full, and Morgan Stanley received Sunbeam stock valued at a small fraction of the original loan. In addition, as a result of Andersen's actions, the convertible notes issued by Sunbeam and held by Morgan Stanley had been rendered substantially less valuable.

6. As the Securities and Exchange Commission ("SEC") subsequently determined, in auditing and certifying Sunbeam's financial statements, Andersen completely disregarded its professional and legal obligations. It certified Sunbeam financial statements that it knew grossly mischaracterized the company's true financial condition. It ignored its duty to maintain

independence from its client, Sunbeam. It did so with full knowledge that Morgan Stanley would be harmed immensely by Andersen's deception.

7. By this complaint, Morgan Stanley seeks compensatory damages of several hundreds of millions of dollars. In addition, Morgan Stanley reserves the right to seek leave to amend its complaint pursuant to Fla. Stat. § 768.72 to assert claims for an additional recovery of punitive damages in excess of $1.2 billion as allowed by law.

THE PARTIES AND OTHER RELEVANT ENTITIES

8. Plaintiff Morgan Stanley & Co. Incorporated ("MS & Co.") is a financial services firm that engages in underwriting, investment banking, financial advisory services, securities sales and trading, and research. In late 1997 and early 1998, MS & Co. assisted Sunbeam in identifying potential acquisition targets and served as Sunbeam's financial advisor with respect to certain aspects of Sunbeam's acquisitions of Coleman, Signature Brands USA, Inc. and First Alert, Inc. MS & Co. also served as the underwriter of a $750 million offering of convertible notes that Sunbeam used to finance these acquisitions. MS & Co. is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York.

9. Plaintiff Morgan Stanley Senior Funding, Inc. ("MSSF") is a company that provides credit services to its clients. In 1998, MSSF entered into a credit agreement with Sunbeam under which MSSF agreed to provide a loan to Sunbeam in connection with Sunbeam's acquisition of Coleman and two smaller companies. Pursuant to the credit agreement, Sunbeam borrowed $680 million from MSSF, with the borrowings used by Sunbeam to fund certain costs relating to the acquisitions. MSSF is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York.

10. Plaintiff Morgan Stanley is a financial services company. It owns 100 percent of the stock of both MS & Co. and MSSF. Morgan Stanley is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York. In this complaint, the term "Morgan Stanley" is used collectively to describe both Morgan Stanley and its two wholly-owned subsidiaries, MS & Co. and MSSF.

11. Defendant Andersen Worldwide, Société Coopérative Switzerland was a partnership organized under the Swiss Federal Code of Obligations. Its partners included more than 2,000 individuals from 390 offices in 84 countries. Various individuals who were partners of Andersen-Worldwide participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits. Andersen-Worldwide and Andersen-US dictated the policies and procedures to be used within Andersen throughout the world.

12. Defendant Arthur Andersen & Co. ("Andersen-Canada") was part of Andersen-Worldwide. Andersen-Canada participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits.

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

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

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

16. Defendant Arthur Andersen ("Andersen-UK") was part of Andersen-Worldwide. Andersen-UK participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits.

17. Defendant Arthur Andersen LLP ("Andersen-US") was part of Andersen-Worldwide. Andersen-US is a partnership formed under the laws of the State of Illinois. Once one of the world's largest accounting firms, almost all of its partners have left the firm. Andersen-US participated in and coordinated the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits. In addition, Andersen-US partners and employees provided consulting services to Sunbeam as part of due diligence work performed in conjunction with Sunbeam's acquisition of Coleman, as well as on other projects.

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

19. Defendant William Pruitt at all times material hereto was a partner of both Andersen-US and Andersen-Worldwide. He served as the concurring partner on the Sunbeam audits for at least 1996 and 1997.

20. Defendant Donald Denkhaus at all times material hereto was a partner of both Andersen-US and Andersen-Worldwide. Denkhaus served as the engagement partner on the

Sunbeam's ultimate restatement of its financial statements, as Audit Division Head and manager of Andersen's audit practice for the entire South Florida region.

21. The Coleman Company, Inc. was a leading manufacturer and marketer of consumer products for the worldwide outdoor recreation market. Coleman was a Delaware corporation, with its principal place of business in Kansas. Prior to March 30, 1998, Coleman (Parent) Holdings Inc. ("Coleman-Parent") owned 44,067,520 shares (or approximately 82 percent) of Coleman. Coleman-Parent is a Delaware corporation, with its principal place of business in New York and is a wholly-owned subsidiary of MacAndrews and Forbes Holdings, Inc. ("MAFCO"). MAFCO is a global investment firm owned and operated by financier Ronald O. Perelman. Through its various subsidiaries and affiliates, MAFCO owns and/or controls a number of multi-billion dollar global corporations, including Revlon, Inc., the international consumer cosmetics company. MAFCO is a Delaware corporation, with its principal place of business in New York.

22. Sunbeam Corporation through its operating subsidiaries and affiliates, manufactured, marketed, and distributed durable household and outdoor leisure consumer products through mass-market and other consumer channels. In 1998, Sunbeam purchased Coleman-Parent's controlling interest in Coleman for $2.2 billion. On February 6, 2001, Sunbeam and several of its affiliates filed a petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. Sunbeam has since emerged from bankruptcy and now operates under the name American Household.

JURISDICTION AND VENUE

23. This Court has jurisdiction over the subject matter of this action pursuant to Fla. Stat. § 26.012(2)(a) because Plaintiff seeks damages in excess of $15,000 exclusive of interest, costs and attorneys' fees. This Court has jurisdiction over Andersen-US, Andersen-Worldwide, Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela, and Andersen-UK pursuant to Fla. Stat. §§ 48.193(1)(a) and (f), (2) and/or (5).

24. This Court has personal jurisdiction over Andersen pursuant to Fla. Stat. § 48.193(2) because Andersen engaged in substantial business activities in the State of Florida. Additionally, this Court has personal jurisdiction over Andersen pursuant to Fla. Stat. § 48.193(1)(a) because the cause of action arises out of Andersen's activities in the State.

25. Venue is proper in this Court pursuant to Fla. Stat. §§ 47.011 and 47.021 because, when the actionable conduct described herein occurred, Andersen maintained an office with more than 30 employees and partners in West Palm Beach and therefore resided in Palm Beach County.

FACTUAL BACKGROUND

Andersen and Sunbeam's Fraudulent Scheme

26. In July 1996, to address its growing financial difficulties, Sunbeam hired Albert Dunlap as Chairman and Chief Executive Officer. Dunlap was a well-known "turnaround" specialist who had a history of brief tenures at other companies. He was nicknamed "Chainsaw Al" because of his practice of cutting staff and closing plants to achieve quick turnaround results.

27. Immediately after joining Sunbeam, Dunlap replaced almost all of top management with his own selections, hiring Russell A. Kersh (Chief Financial Officer); Donald R. Uzzi (Vice President, Marketing and Product Development, and later Executive Vice

President, Consumer Products Worldwide); Lee B. Griffith (Vice President, Sales); and Robert J. Gluck (Principal Accounting Officer).

28. Immediately after he was hired, Dunlap publicly predicted that, as a result of the Company's restructuring, Sunbeam would attain significant increases in its margins and sales.

29. Unbeknownst to the public and to Morgan Stanley, senior management established an overly dismal financial backdrop against which the company's performance in 1997 would be measured. Management decided to accomplish this task by recording improper expenses and taking unjustified accounting write-offs in their 1996 financial statements. In order to convince the public that their 1996 losses were real, however, Sunbeam needed an outside auditor to validate their financial reports.

30. Andersen stood ready to assist Sunbeam in its scheme. Andersen had a significant stake in retaining Sunbeam, a long-time major client. The company generated substantial income for Andersen, paying over $1 million in fees for its 1995 audit alone. Andersen also hoped to continue to receive lucrative consulting assignments from Sunbeam. Moreover, being dropped by a high-profile client such as Sunbeam would have been a severe blow to Andersen's reputation. Indeed, Andersen was so eager to keep Sunbeam as its client that it agreed to a 30 percent reduction in its 1996 audit fees.

31. After Dunlap assumed control of Sunbeam, Andersen had reason to fear that its relationship with Sunbeam was in jeopardy. Phillip Harlow, the Andersen engagement partner, knew that Dunlap had employed Coopers & Lybrand, one of Andersen's major competitors, as a financial consultant and independent auditor in past turnaround assignments. In fact, Dunlap had already engaged Coopers & Lybrand to assist in planning Sunbeam's massive restructuring.

32. Ultimately, Andersen's desire to retain a valuable client overrode any sense of duty or professionalism, and it capitulated to Sunbeam's demand that it sanction the improper accounting treatments used by the company's senior management.

Andersen's Worldwide Operations

33. Andersen operated through a global network of international offices, branches and subsidiaries of the U.S. partnership, a structure called the Andersen Worldwide Organization. The Andersen network worked as "one firm" and maintained this "one firm" identity through a variety of mechanisms. Partners (or equivalents) in its various branches were also partners of Andersen-Worldwide, resulting in a global partnership of more than 2,000 individuals from 390 offices in 84 different countries. In addition to overlapping partners, Andersen-Worldwide and Andersen-US shared officers in common. Moreover, Andersen-Worldwide set uniform professional standards for all its offices and required its international offices to agree to be bound by those professional standards and principles. Andersen-Worldwide coordinated the sharing of costs and allocation of revenues and profits among its partners and its offices around the world. Andersen-Worldwide operated under a worldwide tax structure. In addition, Andersen-Worldwide handled all borrowing on behalf of its international offices and maintained those offices' financial records, payroll, and employee health benefits plans. All of Andersen's offices also shared global computer operations and training facilities.

34. Andersen applied the "one firm" approach in its work with Sunbeam. Top partners responsible for the Sunbeam audits and restatement were partners of both Andersen-US and Andersen-Worldwide, including the engagement partner on the Sunbeam audits, Phillip Harlow; the concurring partner on those audits, William Pruitt; and the engagement partner on the Sunbeam restatement, Donald Denkhaus.

35. In addition, various international offices of Andersen-Worldwide did substantial work for Sunbeam. Sunbeam was a multinational corporation with operations in Canada, Mexico, Venezuela, Hong Kong, and Europe. The engagements required the participation of auditors from each of those countries and numerous American cities. Harlow, on behalf of both Andersen-US and Andersen-Worldwide, developed work plans that he circulated to Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela, and Andersen-UK. Those offices worked together with Harlow and others to complete the tasks outlined in the plan and sent their work product to Harlow for inclusion in an Andersen-Worldwide Management Letter.

The Fraudulent 1996 Financial Statements

36. In 1996, after Dunlap took control of Sunbeam, Andersen permitted Sunbeam management to employ numerous accounting practices that — as Sunbeam's restatement of its 1996 financial statements and an SEC investigation later showed — did not comply with GAAP.

37. Among other things, Sunbeam's 1996 financial statements, certified by Andersen, did not comply with the accounting principles of (1) reliability, Financial Accounting Standards Board ("FASB") Statement of Financial Accounting Concepts No. 2, §§ 58-97; Accounting Principles Board ("APB") Statement No. 4, §§ 109, 138, 189; (2) completeness, FASB Statement of Financial Accounting Concepts No. 2, §§ 79, 80; APB Statement No. 4, § 94; (3) conservatism, FASB Statement of Financial Accounting Concepts No. 2, §§ 91-97; APB Statements No. 9, §§ 35, 71; (4) neutrality, FASB Statement of Financial Accounting Concepts No. 2, §§ 98-110; or (5) relevance, FASB Statement of Financial Accounting Concepts No. 2, §§ 47, 48.

38. Among the accounting frauds that Andersen knowingly allowed was the artificial inflation of Sunbeam's reserves. Because the reserves were charged as an expense against income, this accounting practice allowed Sunbeam to overstate the 1996 loss against which its 1997 financial results would be compared.

39. For example, Sunbeam created a $338 million reserve for "restructuring" charges. As the November 1998 restatement made clear, included in these charges were costs of redesigning product packaging; costs of relocating employees and equipment; bonuses to be paid to employees who were told that they were being laid off but were asked to stay on temporarily; advertising expenses; and certain consulting fees. Because these items benefited future activities, GAAP did not permit them to be classified as restructuring charges. Andersen also permitted Sunbeam to violate GAAP by creating a $12 million reserve for a lawsuit alleging that Sunbeam was liable for cleanup costs associated with a hazardous waste site, even though Sunbeam's estimated liability was, at best, half that amount.

40. Andersen also permitted Sunbeam improperly to write down its household products inventory in 1996. In connection with the restructuring, Sunbeam had decided to eliminate half of Sunbeam's product lines and to liquidate its inventory of those product lines. Although only half of Sunbeam's product lines were eliminated, Andersen allowed Sunbeam to apply, at year-end 1996, the special accounting treatment that it had accorded the eliminated lines to its entire inventory of household products. As a result, as the November 1998 financial restatement later showed, Sunbeam understated the balance sheet value of its inventory at year-end 1996 by approximately $2 million and overstated its 1996 loss by the same amount.

41. Andersen also allowed management improperly to recognize, as a 1996 expense, $2.3 million in 1997 advertising expenses and related costs. In addition, Andersen permitted

Sunbeam to manipulate its 1996 liabilities for "cooperative advertising." It was Sunbeam's practice to fund a portion of its retailers' costs of running local promotions. As required by GAAP, Sunbeam accrued its estimated liabilities for this expense. At year-end 1996, Sunbeam set its cooperative advertising accrual at an inflated value of $21.8 million. According to the November 1998 restatement, this accrual was improper under GAAP because it was approximately 25 percent higher than the prior year's accrual amount, without a proportional increase in sales providing a basis for the increase. Ultimately, as the November 1998 restatement showed, $5.8 million of that excessive accrual was used (without disclosure) to inflate Sunbeam's 1997 income.

Andersen's 1996 Unqualified Audit Opinion

42. In the course of auditing Sunbeam's 1996 financial statements, Andersen became aware of these improper accounting practices. Indeed, it questioned a Sunbeam employee about the restructuring reserves and was told that the reserve included "everything but the kitchen sink." Harlow, the Andersen engagement partner, raised the issues with Kersh and Gluck and proposed that Sunbeam reverse certain of its improper entries. But when Kersh and Gluck rejected these proposals, Andersen backed down.

43. In March 1997, Andersen issued an unqualified audit opinion regarding Sunbeam's 1996 financial statements and authorized the inclusion of its audit opinion in Sunbeam's 1996 Form 10-K filed with the SEC. Despite its knowledge of the many improper accounting practices that Sunbeam's management had employed, Andersen's opinion stated:

> We conducted our audits in accordance with generally accepted auditing standards.
>
> Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements

> are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.
>
> In our opinion, the financial statements . . . present fairly, in all material respects, the financial position of Sunbeam Corporation and subsidiaries as of December 31, 1995 and December 29, 1996, and the results of their operations and their cash flows for each of the three fiscal years in the period ended December 29, 1996 in conformity with generally accepted accounting principles.

44. Andersen also knowingly provided false descriptions of certain of Sunbeam's specific accounting practices. For example, it characterized Sunbeam's treatment of its restructuring charges in Note 2 to the audited 1996 consolidated financial statements as follows:

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

In fact, however, Andersen knew that Sunbeam had improperly inflated its restructuring costs by millions of dollars.

45. Andersen's 1996 audit violated GAAS because, among other things, Andersen failed (1) to perform the audits with an attitude of professional skepticism as required by the Statement on Auditing Standards ("SAS") No. 53; (2) to conclude that there was a significant

risk that Sunbeam management would intentionally distort the company's financial statements, in violation of American Institute of Certified Public Accountants Professional Standards, AU §§ 316.10 and 316.12; (3) to recognize that the accounting policies employed by Sunbeam were not acceptable in the circumstances, in violation of AU § 316.19; (4) to obtain sufficient competent evidential matter through inspection, observation, inquiries, and confirmations to afford a reasonable basis for its opinions regarding Sunbeam's financial statements, in violation of AU § 150.02; (5) to exercise due professional care in the performance of the audit, in violation of AU § 150.02; (6) to plan the work adequately to uncover the errors and irregularities in Sunbeam's accounting information, in violation of AU § 150.02; and (7) to obtain a sufficient understanding of Sunbeam's internal control structure to plan the audits and to determine the nature, timing, and extent of tests to be performed, in violation of AU § 150.02.

46. In addition, in conducting the 1996 audit, Andersen (1) improperly relied on management representations rather than applying the auditing procedures necessary to afford a reasonable basis for an opinion on Sunbeam's financial statements, in violation of SAS No. 19 (AU § 333.02); (2) failed to recognize that misstatements resulting from misapplication of GAAP, departures from fact, and omissions of necessary information, in aggregate, caused Sunbeam's financial statements to be materially misstated, in violation of SAS No. 47 (AU § 312.04); (3) failed to issue a qualified or adverse opinion, in violation of SAS No. 47 (AU § 312.31); and (4) improperly concluded that the accounting principles applied by Sunbeam were appropriate in the circumstances and that Sunbeam's financial statements were informative of matters that could affect their use, understanding, and interpretation, in violation of SAS No. 69 (AU §§ 411.04(b) and (c)).

47. In all, the 1996 financial statements audited by Andersen were materially false and misleading and overstated Sunbeam's operating losses for 1996 by at least $40 million. Moreover, Andersen's unqualified audit opinion was false in at least two material respects. First, the financial statements that Andersen audited did not "fairly" present Sunbeam's financial

position in conformity with GAAP, as it represented. Second, Andersen had not, as it claimed, conducted its audit in accordance with GAAS.

The Fraudulent 1997 Financial Statements

48. The accounting frauds in which Andersen permitted Sunbeam to engage in 1997 were aimed at inflating the company's earnings. To accomplish this — as the November 1998 restatement and an SEC investigation subsequently showed — Andersen allowed Sunbeam to record fraudulent sales, to account improperly for one-time events, and improperly to use "cookie-jar" reserves, all in violation of GAAP.

49. Among other things, Sunbeam's 1997 financial statements, certified by Andersen, did not comply with the accounting principles of (1) reliability, FASB Statement of Financial Accounting Concepts No. 2, §§ 58-97; APB Statement No. 4, §§ 109, 138, 189; (2) completeness, FASB Statement of Financial Accounting Concepts No. 2, §§ 79, 80; APB Statement No. 4, § 94; (3) conservatism, FASB Statement of Financial Accounting Concepts No. 2, §§ 91-97; APB Statements No. 9, §§ 35, 71; (4) neutrality, FASB Statement of Financial Accounting Concepts No. 2, §§ 98-110; or (5) relevance, FASB Statement of Financial Accounting Concepts No. 2, §§ 47, 48.

50. According to the November 1998 restatement, one of the revenue inflation tactics permitted by Andersen in 1997 was Sunbeam's improper accounting for "bill-and-hold" sales. A bill-and-hold sale occurs when a seller bills a customer for a purchase while retaining the merchandise for later delivery. During 1997, Dunlap's management team offered financial incentives to various customers to purchase products. Under GAAP, revenue under bill-and-hold transactions may be recognized only if, among others things, the buyer — not the seller — requests a sale on that basis. As Andersen subsequently learned in the course of its 1997 audit, the purported bill-and-hold customers had not requested that treatment, and, in numerous cases, the risks of ownership and legal title were never passed to the customer. According to the

November 1998 restatement, Sunbeam added more than $29 million to Sunbeam's 1997 sales and $4.5 million to income by improperly accounting for these transactions.

51. Another income-boosting tactic that Andersen sanctioned was Sunbeam's improper use of its inflated 1996 reserves, which the November 1998 restatement later showed artificially increased the company's 1997 income by almost $5 million. Andersen also let Sunbeam improperly treat $19 million that it received from the sale of discounted and obsolete inventory as ordinary income. Although the recognition of that revenue was permitted under GAAP, Sunbeam was required to disclose that revenue as a non-recurring event. Sunbeam failed to do so, again with Andersen's blessing.

52. In addition, Andersen allowed Sunbeam's Hong Kong and Canadian subsidiaries to book sales that violated applicable accounting principles because they included an unlimited right to return unsold merchandise and because the amount of future returns on such sales could not reasonably be estimated. The November 1998 restatement showed that, on Andersen's watch, Sunbeam's Hong Kong subsidiary improperly recorded sales revenue of $8.6 million from various sales made during the fourth quarter of 1997.

53. Andersen also permitted Sunbeam to employ several improper accounting tricks with respect to its Mexican subsidiary. According to the November 1998 restatement, that subsidiary engaged in $900,000 in bill-and-hold transactions in 1997 that should not have been recognized as income until 1998. In addition, the subsidiary's inventory was overvalued by $2 million, and the financial statements for Sunbeam's Mexico operations failed to include $3 million expense for the profit sharing obligations of that business. According to the November 1998 restatement, Sunbeam's Venezuela subsidiary also improperly valued its inventory.

54. As a result of these and other improper accounting devices, in 1997, Sunbeam reported $186 million in income, much of which was, according to the November 1998 restatement, improper under GAAP. In all, the overstatements included over $90 million of

improper net income, including approximately $10 million from a sham sale of inventory to a contractor, approximately $4.5 million from non-GAAP bill-and-hold sales, approximately $35 million in income derived from the use of non-GAAP reserves and accruals taken at year-end 1996 and approximately $6 million from improper revenue recognition.

Sunbeam's Purchase of Coleman

55. Toward the end of 1997, Sunbeam's senior management initiated an effort to sell the company. Sunbeam engaged Morgan Stanley to advise it with respect to the possible sale of its core businesses and/or the initiation of one or more major acquisitions. Ultimately, Coleman, Signature Brands USA, Inc. and First Alert, Inc. were identified as three companies interested in being acquired by Sunbeam.

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

57. On February 3, 1998, Harlow met with key officers of Sunbeam to discuss the acquisition of Coleman and its financial impact on Sunbeam. By that time, as a result of reviewing Sunbeam's 1997 financial statements in the course of its audit, Andersen knew that Sunbeam's 1997 results were false.

58. On February 20, 1998, Andersen agreed to act as a Sunbeam financial advisor and perform financial due diligence in connection with Sunbeam's acquisition of Coleman, First Alert, and Signature Brands, further compromising its duty as an auditor to maintain its independence from its client. In agreeing to undertake that assignment, Andersen became an active member of the team working to assist Sunbeam in its acquisitions. Andersen employees who worked on Sunbeam's audit also served as members of Sunbeam's due diligence team in connection with Sunbeam's acquisition of Coleman.

59. On February 27, 1998, Sunbeam's Board of Directors met in New York to discuss Sunbeam's possible purchase of Coleman. During the February 27, 1998 meeting, Morgan Stanley provided Sunbeam's Board of Directors with a written "fairness" opinion regarding the fair acquisition price of Coleman. The opinion made clear that, even in the context of issuing a fairness opinion on the Coleman acquisition price, Morgan Stanley had relied upon Andersen's representations regarding Sunbeam's financial health. The fairness opinion explicitly stated that Morgan Stanley had reviewed "certain publicly available financial statements and other information" of Sunbeam. The opinion advised that Morgan Stanley had "assumed and relied upon without independent verification the accuracy and completeness of the information reviewed by us for the purposes of this opinion."

60. The Sunbeam Board of Directors approved the Coleman acquisition. That same day, Coleman-Parent — the 82 percent shareholder of Coleman — agreed to sell Coleman to Sunbeam for a purchase price of $2.2 billion. Sunbeam agreed to provide Coleman-Parent with $160 million in cash, to assume $584 million in Coleman-related debt, and to provide Coleman-Parent with 14,099,749 shares of Sunbeam stock. Sunbeam also agreed to purchase Signature Brands and First Alert for approximately $300 million.

Andersen's 1997 Unqualified Audit Opinion

61. In the first week of March 1998, shortly after the agreement for Sunbeam's purchase of Coleman was signed, but before the transaction closed, Andersen rendered an unqualified audit opinion for Sunbeam's 1997 financial statements. With Andersen's express consent, management included that opinion in Sunbeam's 1997 Form 10-K filed with the SEC on March 6, 1998.

62. Andersen was well aware of the potential for fraud in Sunbeam's 1997 books, including the risk that Sunbeam management would attempt to claim profits and revenue on transactions before the earnings process was completed. Harlow specifically advised Andersen's foreign offices (including Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico,

Andersen-Venezuela and Andersen-UK), for example, that Dunlap had made promises to the public regarding earnings-per-share to be attained in 1997, and that management had a vested interest in achieving the promised earnings levels because management's primary form of compensation was based on the company's stock price. Harlow also noted the presence of the possibility of a third-party purchase of the company's stock or assets.

63. In the course of its audit of Sunbeam's 1997 financial records, Andersen learned Harlow's concerns were well founded. It discovered that Sunbeam had improperly accounted for certain bill-and-hold sales, had misused its reserves, and had overvalued its inventories. Andersen discussed these problems with Sunbeam's senior management and proposed that Sunbeam reverse these improper entries. But Sunbeam's senior management refused to do so. Rather than insisting that the adjustments be made, Andersen permitted the entries.

64. Once again, Andersen gave Sunbeam a clean bill of financial health. In its opinion concerning Sunbeam's 1997 financial statements, Andersen stated:

> We conducted our audits in accordance with generally accepted auditing standards. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.
>
> In our opinion, the financial statements . . . , present fairly, in all material respects, the financial position of Sunbeam Corporation and subsidiaries as of December 29, 1996 and December 28, 1997, and the results of its operations and its cash flows for each of the three fiscal years in the period ended December 28, 1997 in conformity with generally accepted accounting principles.

65. In fact, Andersen's 1997 audit violated GAAS because, among other things, Andersen had failed (1) to perform the audits with an attitude of professional skepticism as

required by SAS No. 53; (2) to reach a conclusion that there existed a significant risk of intentional distortion of financial statements by Sunbeam management, in violation of AU §§ 316.10 and 316.12; (3) to recognize that the accounting policies employed by Sunbeam were not acceptable in the circumstances, in violation of AU § 316.19; (4) to obtain sufficient competent evidential matter through inspection, observation, inquiries, and confirmations to afford a reasonable basis for its opinions regarding Sunbeam's financial statements, in violation of AU § 150.02; (5) to exercise due professional care in the performance of the audit, in violation of AU § 150.02; (6) to plan the work adequately to uncover the errors and irregularities in Sunbeam's accounting information, in violation of AU § 150.02; and (7) to obtain a sufficient understanding of Sunbeam's internal control structure to plan the audits and to determine the nature, timing, and extent of tests to be performed, in violation of AU § 150.02.

66. In addition, in conducting the 1997 audit, Andersen (1) improperly relied on management representations rather than applying the auditing procedures necessary to afford a reasonable basis for an opinion on Sunbeam's financial statements, in violation of SAS No. 19 (AU § 333.02); (2) failed to recognize that misstatements resulting from misapplication of GAAP, departures from fact and omissions of necessary information, in aggregate, caused Sunbeam's financial statements to be materially misstated, in violation of SAS No. 47 (AU § 312.04); (3) failed to issue a qualified or adverse opinion, in violation of SAS No. 47 (AU § 312.31); (4) improperly concluded that the accounting principles applied by Sunbeam were appropriate in the circumstances and that Sunbeam's financial statements were informative of matters that could affect their use, understanding and interpretation, in violation of SAS No. 69 (AU §§ 411.04(b) and (c)); and (5) failed to report that a change in the application of accounting principles in Sunbeam's 1997 financial statements had materially affected their comparability with the financial statements for prior periods, especially 1996, due to a different treatment of sales and reserves in those periods, in violation of SAS Nos. 1 and 43 (AU § 420.02).

67. In all, the 1997 financial statements audited by Andersen reported operating income of $186 million — an overstatement of at least 50 percent. Like its 1996 unqualified audit opinion, Andersen's 1997 opinion was false in two material respects. First, the financial statements Andersen audited did not "fairly" present Sunbeam's financial position in conformity with GAAP, as it represented. Second, Andersen had not, as it claimed, conducted its audit in accordance with GAAS.

Morgan Stanley's Reliance on Andersen's Unqualified Audit Opinions

68. After it agreed to acquire Coleman, First Alert, and Signature Brands, Sunbeam needed to raise approximately $2.3 billion to refinance existing debt and to fund these acquisitions. To accomplish these financing objectives, Sunbeam's management elected to issue $500 million in subordinated convertible notes (an amount later increased to $750 million) (the "Convertible Note Offering") and enter into a new $2 billion senior credit agreement (later reduced to $1.7 billion) with secured lenders (the "Bank Facility"). Morgan Stanley served as the lead underwriter for the Convertible Note Offering and as the Syndication Agent for the Bank Facility. Morgan Stanley also coordinated the Bank Facility with First Union and Bank of America, Sunbeam's other secured lenders.

69. Andersen knew of these proposed financing arrangements. Specifically, Andersen knew that the Coleman and other acquisitions would not close unless Sunbeam secured the financing necessary to cover the acquisition prices. Moreover, Andersen knew that Morgan Stanley was a principal participant in the Bank Facility, and that Morgan Stanley would be relying on the representations Andersen made regarding Sunbeam's financial condition. Indeed, Andersen knew that documents issued in connection with the Convertible Note Offering clearly stated that "[Sunbeam] is currently negotiating the terms of the New Credit Facility with a group of banks which [Sunbeam] expects will provide for borrowings by [Sunbeam] or one or more of its subsidiaries in the aggregate principal amount of $2.0 billion. *The New Credit Facility is being arranged by an affiliate of [Morgan Stanley].*"

70. In addition to its knowledge of Morgan Stanley's role in Sunbeam's acquisitions, Andersen had many reasons to know that Morgan Stanley would rely on Sunbeam's audited financial statements. To begin with, Andersen, in its substantial experience working on multi-billion dollar mergers and acquisitions, understood that Sunbeam's lenders and underwriters would rely on an auditor's certification of Sunbeam's financial condition. As would any lender engaged in a deal of this scale, Morgan Stanley looked to the financial statements provided by Sunbeam and audited by Andersen to evaluate annual cash flow and to assess Sunbeam's ability, following the acquisition, to promptly and comfortably pay interest and ultimately pay back the loan. Indeed, reasonable and professional lenders such as Morgan Stanley, Bank of America, and First Union would not have loaned over $1 billion dollars to any person or entity without strong assurance that their money would be returned.

71. Not only was Andersen aware that any prudent business in Morgan Stanley's position *would* rely on Andersen's financial statements, but Andersen also knew that Morgan Stanley *was* specifically relying on Andersen's certifications. Indeed, Andersen *itself* had expressly represented to Morgan Stanley that Sunbeam's financial statements were truthful and that Andersen's unqualified audit opinions were reliable. On March 19, 1998, Andersen sent Morgan Stanley a "comfort" letter stating that, in Andersen's opinion, "the consolidated financial statements [for 1996 and 1997] audited by [Andersen] and included in the Offering Memorandum comply as to form in all material respects with the applicable accounting requirements of the [Securities Act of 1933] and the related published rules and regulations." In a follow-up letter dated March 25, 1998, Andersen reaffirmed its previous representation.

72. In addition, Andersen participated in meetings and telephone calls in which it represented to Morgan Stanley that Sunbeam's audited financial statements were accurate.

73. Andersen also knew that Morgan Stanley had stated in a February 27, 1998 "fairness" letter that Morgan Stanley presented to Sunbeam's Board of Directors that Morgan

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Stanley had assumed and relied upon the accuracy and completeness of Sunbeam's audited financial statements.

74. In addition, Andersen knew that Sunbeam had expressly represented, in loan negotiations with Morgan Stanley, that Andersen's audit opinions were accurate. Specifically, Andersen knew that, in the Sunbeam-Morgan Stanley credit agreement, Sunbeam warranted that it had provided Morgan Stanley with accurate information regarding Sunbeam's consolidated statements of operations, stockholders' equity and cash flows, as well as its consolidated balance sheets. According to Sunbeam, its financial statements — certified by Andersen — "present[ed] fairly, in all material respects, the financial position and results of operations and cash flows . . . in accordance with GAAP."

75. Similarly, Andersen knew that, in connection with the Convertible Note Offering, Sunbeam had included its 1996 and 1997 audited financial statements in its March 19, 1998 offering memorandum and had represented to Morgan Stanley that its audited financial statements were reliable.

76. Andersen also knew that, as part of the Coleman merger agreement executed on February 27, 1998, Sunbeam had represented and warranted that all of its filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate and not misleading, and that they would continue to be accurate and not misleading as of the transaction's closing date. Sunbeam further represented that its audited financial statements were prepared in accordance with GAAP, and that at the time of the closing of the transaction, that representation would continue to be true and correct.

77. Significantly, although it knew that Morgan Stanley had based multi-million dollar financing decisions on its representations, Andersen did not tell Morgan Stanley of the accounting concerns that it had raised with Sunbeam management in the course of its 1996 and 1997 audits or that Sunbeam's financial statements had not been fairly stated in 1996 and 1997.

78. On March 25, 1998, the $750 million Convertible Note Offering closed.

79. Sunbeam closed its acquisition of Coleman on March 30, 1998. On that date, Sunbeam, through a wholly owned subsidiary, acquired approximately 81 percent of the then-outstanding shares of Coleman common stock. These shares were acquired by Sunbeam in exchange for 14,099,749 shares of Sunbeam's common stock and approximately $160,000,000 in cash. In addition, Sunbeam assumed or repaid approximately $1,016,000,000 in debt belonging to Coleman and Coleman-Parent. Included in the repaid debt portion of the transaction was an immediate cash payment by Sunbeam to Coleman-Parent of $590 million.

80. Morgan Stanley and Sunbeam closed the Bank Facility on March 31, 1998. In accordance with the terms of the Bank Facility, Morgan Stanley — unaware of the falsity of Sunbeam's financial statements and Andersen's audit reports — loaned Sunbeam $680 million in immediately available funds to be used for the acquisitions. First Union, which served as the Administrative Agent for the Bank Facility, loaned Sunbeam an additional $510 million. Bank of America, which served as the Documentation Agent for the Bank Facility, loaned Sunbeam an additional $510 million.

81. As Andersen knew, Morgan Stanley had relied on Sunbeam's report of $186 million in income in deciding to underwrite the Convertible Note Offering and to loan Sunbeam $680 million. Moreover, Andersen knew that the Sunbeam-Morgan Stanley credit agreement provided that a condition precedent to Morgan Stanley's obligations under the agreement was the absence of any event, change, or development that would have a material adverse effect on the business, results of operation, or financial condition of Sunbeam. Andersen knew that an additional condition precedent to Morgan Stanley's obligations was the absence of any material misrepresentation or omissions in Sunbeam's SEC filings, including Andersen's 1996 and 1997 audit reports in the Form 10-Ks.

82. But for Andersen's fraud and its failure to issue qualified or adverse reports exposing the falsity of Sunbeam's financial statements, Morgan Stanley would have had notice of an adverse material change affecting Sunbeam before funding, and of a material misstatement

in Sunbeam's SEC filings. Not only would Morgan Stanley never have agreed to underwrite the Convertible Note Offering, but Morgan Stanley's obligation to loan Sunbeam $680 million also would have been discharged by the failure of conditions precedent to its obligations under the credit agreement. Andersen's fraud directly caused the extensive losses that Morgan Stanley suffered.

Andersen's Improper Accounting and Misrepresentations Are Revealed

83. In an April 3, 1998 conference call with securities analysts, Sunbeam revealed that sales for the first quarter of 1998 were 5 percent below reported sales for the same period of the prior year.

84. On April 22, 1998, a class of Sunbeam shareholders sued Sunbeam and its senior officers in the United States District Court for the Southern District of Florida, alleging that the company had violated the securities laws by issuing materially false and misleading statements regarding Sunbeam's financial condition. Andersen was subsequently added as a defendant in this lawsuit.

85. On June 8, 1998, an article was published in Barron's that raised serious questions regarding Sunbeam's apparent success under Dunlap, suggesting that it was the result of "accounting gimmickry." On June 15, 1998, Sunbeam's Board announced that it had removed Dunlap as Chairman and CEO. On June 17, 1998, Sunbeam received a letter from the SEC informing it that the SEC had initiated an investigation into the company.

86. Andersen continued to stand behind its fraudulent audit opinions. On June 15, 1998, Andersen allowed Sunbeam's Board of Directors to assert that Andersen had "assured the Board that Sunbeam's audited financial statements [were] accurate in all material respects." It was not until June 25, 1998 — when Andersen withheld its consent for use of its 1997 audit opinion in a registration statement that was to have been filed with the SEC — that Andersen gave any hint that its unqualified audit opinions were unreliable.

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

88. On August 6, 1998, Sunbeam announced that its Audit Committee had determined that Sunbeam would be required to restate its audited financial statements for 1997 and possibly for 1996, as well as its unaudited financial statements for the first quarter of 1998. On October 20, 1998, Sunbeam and Andersen announced a restatement of its 1996 and 1997 financial statements.

89. Holders of the convertible notes sued Sunbeam on October 30, 1998, and Andersen was later named as a defendant in that suit.

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

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

Sunbeam Declares Bankruptcy

92. On February 6, 2001, as a direct result of the deceit that Andersen had facilitated, Sunbeam and several of its subsidiaries were forced to seek relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. As part of the bankruptcy court-approved reorganization plan, Morgan Stanley's $680 million loan to Sunbeam was discharged in full, and Morgan Stanley received Sunbeam stock valued at a fraction of the original loan. In addition, as a result of Andersen's actions, the convertible notes issued by Sunbeam and held by Morgan Stanley had been rendered substantially less valuable.

Subsequent Censure of Andersen's Conduct

93. Both courts and regulators have scrutinized Andersen's facilitation of Sunbeam's fraud. In their judgments against the firm and Harlow, they have denounced Andersen's conduct.

94. In December 1999, for example, the federal court presiding over the Sunbeam shareholders' class action lawsuit refused to dismiss the claims against Andersen. The court concluded that the class plaintiffs had alleged sufficient facts "to demonstrate that Arthur Andersen had acted with severe recklessness in issuing its misleading [1997] Unqualified Audit Opinion." *In re Sunbeam Sec. Litig.*, 89 F. Supp. 2d 1326, 1344 (S.D. Fla. 1999). Andersen subsequently settled this lawsuit in 2001 for $110 million.

95. On May 15, 2001, the SEC filed a civil action in the United States District Court for the Southern District of Florida against five former Sunbeam officers and Harlow, Andersen's engagement partner.

96. In January 2003, the SEC settled its charges with Harlow. In its settlement order, it made numerous factual findings regarding Harlow and Andersen's improper conduct. It concluded that Harlow had proposed, on many occasions, adjustments to rectify Sunbeam's false financial statements. After management refused to make these adjustments, Harlow improperly acceded to that decision. *In re Phillip E. Harlow*, Rel. No. 34-47261, 2003 WL 169818, at **1-3 (SEC Release Jan. 27, 2003).

97. The SEC's assessment of Harlow's conduct was damning. Among many other things, it concluded that Harlow (1) "failed to exercise professional skepticism when performing audit procedures and gathering and analyzing audit evidence"; (2) "accepted uncorroborated representations of Sunbeam's management in lieu of performing appropriate audit procedures"; (3) "failed to exercise due professional care in performing the audit and preparing the audit report"; (4) "failed to perform sufficient audit procedures to determine whether the financial statements were in conformity with GAAP," even after he had "identified a number of audit risks and accounting issues associated with the Sunbeam engagement"; and (5) "failed to obtain sufficient competent evidential matters through inspection, observation, inquiries, and confirmation to afford a reasonable basis for an audit opinion." *Id.* at *4. Based on these factual findings, the Commission concluded that the 1996 and 1997 financial statements that Harlow had audited were not in conformity with GAAP, and the audit was not performed in accordance with GAAS. *Id.* (citing AU §§ 410, 411, 508.07).

98. Other participants in the Coleman acquisition have also sued Andersen for its fraudulent conduct. On July 1, 2001, Coleman-Parent sued Andersen for fraudulent misrepresentation, fraudulent inducement to contract, and negligent misrepresentation. Andersen subsequently agreed to settle that dispute for an undisclosed amount.

COUNT I

Fraudulent Misrepresentation

99. Paragraphs 1 through 98 are repeated and realleged as if set forth herein.

100. Andersen consented to the publication of its audit reports to the public and business world by permitting Sunbeam to include them in Sunbeam's SEC filings. Given that publication, Andersen knew and intended that the public — including Morgan Stanley — would rely on Andersen's representations.

101. Andersen knew of Morgan Stanley's role in Sunbeam's acquisitions. Andersen also knew that Morgan Stanley would rely and had relied upon Andersen's 1996 and 1997

unqualified audit opinions for the particular purpose of determining whether to underwrite the Convertible Note Offering and to provide Sunbeam with a loan for $680 million. Andersen itself invited Morgan Stanley to rely on its unqualified audit opinions, expressly representing to Morgan Stanley, in letters dated March 19, 1998, and March 25, 1998, that Sunbeam's financial statements were truthful and that Andersen's unqualified audit opinions were reliable. Moreover, Andersen knew that Morgan Stanley had provided Sunbeam's Board of Directors with a "fairness" letter expressly stating that Morgan Stanley had assumed and relied upon the accuracy and completeness of Sunbeam's audited financial statements.

102. Andersen also knew of Sunbeam's proposed financing arrangements, and it participated in meetings and telephone calls in which it represented to Morgan Stanley that Sunbeam's audited financial statements were accurate.

103. In addition, Andersen knew that Sunbeam had expressly represented, in loan negotiations with Morgan Stanley, that Andersen's audit opinions were accurate and that, in the Sunbeam-Morgan Stanley credit agreement, Sunbeam had warranted that it had provided Morgan Stanley with accurate information regarding its consolidated statements of operations, stockholders' equity and cash flows, as well as its consolidated balance sheets. Similarly, Andersen knew that, in connection with the Convertible Note Offering, Sunbeam had included its 1996 and 1997 audited financial statements in its March 19, 1998 offering memorandum and had represented to Morgan Stanley that its audited financial statements were reliable.

104. Andersen also knew that, as part of the Coleman merger agreement executed on February 27, 1998, Sunbeam had represented and warranted that all of its filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate, not misleading, and prepared in accordance with GAAP, and that they would continue to be accurate and not misleading as of the transaction's closing date.

105. Andersen knew that Sunbeam's financial statements were replete with accounting irregularities and that the information in Sunbeam's 1996 and 1997 financial statements was

materially false and misleading. Those material misrepresentations included, among other things, overstatements of (a) Sunbeam's 1996 operating losses by approximately $40 million; (b) its 1996 losses from continuing operations by approximately $26 million; (c) its 1996 net losses by approximately $20 million; (d) its 1997 operating earnings by approximately $95 million; (e) its 1997 earnings from continuing operations by over $70 million; (f) its 1997 net earnings by approximately $70 million; and (g) its 1997 operating income figure by approximately 50 percent.

106. In addition, Andersen knew that its 1996 and 1997 unqualified audit opinions were materially false and misleading. Andersen knew that it had falsely stated, among other things, that (a) Sunbeam's financial statements fairly presented the financial position of Sunbeam during 1996 and 1997; (b) Sunbeam's financial statements fairly presented the results of Sunbeam's operations and cash flows during 1996 and 1997; (c) Sunbeam's financial statements conformed with GAAP; and (d) its audits of Sunbeam were conducted in accordance with GAAS.

107. Although Andersen knew that Morgan Stanley would rely and had relied on its false statements, it did not inform Morgan Stanley that the unqualified audit opinions it had provided were materially false or that Sunbeam's financial statements contained numerous misstatements of material facts.

108. Andersen made its materially false representations regarding its unqualified audit opinions and the accuracy of Sunbeam's financial statements with the intent to deceive Morgan Stanley.

109. Andersen knew that the false information that it had provided to Morgan Stanley, and its intentional failure to correct the misrepresentations contained in Sunbeam's financial statements, would be critical to Morgan Stanley's decision to participate in the financing of Sunbeam's acquisitions. But for Andersen's fraudulent representations, Morgan Stanley would

not have underwritten the Convertible Note Offering, nor would it have loaned Sunbeam $680 million.

110. As a direct result of Andersen's fraud, Morgan Stanley has suffered hundreds of millions of dollars in damages.

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

111. Paragraphs 1 through 110 are repeated and realleged as if set forth herein.

112. Sunbeam's 1996 and 1997 financial statements contained false statements of material fact. Those material misrepresentations included, among other things, overstatements of (a) Sunbeam's 1996 operating losses by approximately $40 million; (b) its 1996 losses from continuing operations by approximately $26 million; (c) its 1996 net losses by approximately $20 million; (d) its 1997 operating earnings by approximately $95 million; (e) its 1997 earnings from continuing operations by over $70 million; (f) its 1997 net earnings by approximately $70 million; and (g) its 1997 operating income figure by approximately 50 percent.

113. Andersen knew that its 1996 and 1997 unqualified audit opinions were materially false and misleading. Andersen knew that it had falsely stated, among other things, that (a) Sunbeam's financial statements fairly presented the financial position of Sunbeam during 1996 and 1997; (b) Sunbeam's financial statements fairly presented the results of Sunbeam's operations and cash flows during 1996 and 1997; (c) Sunbeam's financial statements conformed with GAAP; and (d) its audits of Sunbeam were conducted in accordance with GAAS.

114. Both Sunbeam and Andersen knew that their representations regarding Sunbeam's 1996 and 1997 financial statements were false when made and/or made these representations with reckless disregard as to their truth.

115. Andersen, Harlow, Dunlap, Kersh, and other senior Sunbeam executives acted in concert and wrongfully conspired to create the appearance that Sunbeam was performing at a high level in order artificially to inflate the stock price of Sunbeam and make it attractive for a

sale to another company. Andersen explicitly or implicitly by acquiescence agreed to become part of that conspiracy and committed overt acts in furtherance of its fraudulent scheme in order to retain Sunbeam as a client.

116. In furtherance of that conspiracy, Dunlap and the other Sunbeam executives decided to acquire Coleman, First Alert, and Signature Brands. In furtherance of that scheme, in March 1998, Andersen committed the overt acts of issuing Andersen's false and misleading unqualified audit opinion with respect to Sunbeam's 1997 financial statements and of consenting to its publication to the SEC as part of Sunbeam's Form 10-K filing on March 6, 1998.

117. To induce Morgan Stanley into underwriting the Convertible Note Offering and to loan Sunbeam $680 million to finance its acquisition of Coleman, First Alert, and Signature Brands, Andersen and Sunbeam represented to Morgan Stanley that Sunbeam's audited financial statements and Andersen's audit opinions were accurate and not misleading. Andersen invited Morgan Stanley to rely on its unqualified audit opinions, expressly representing to Morgan Stanley, in letters dated March 19, 1998, and March 25, 1998, that Sunbeam's financial statements were truthful and that Andersen's unqualified audit opinions were reliable. Both Andersen and Sunbeam management knew that Morgan Stanley had provided Sunbeam's Board of Directors with a "fairness" letter expressly stating that Morgan Stanley had assumed and relied upon the accuracy and completeness of Sunbeam's audited financial statements.

118. In connection with the Convertible Note Offering and the Bank Facility, Andersen and Sunbeam participated in meetings and telephone calls in which they represented to Morgan Stanley that Sunbeam's audited financial statements were accurate.

119. In addition, Sunbeam expressly represented, in loan negotiations with Morgan Stanley, that Andersen's audit opinions were accurate. It further warranted, in the Sunbeam-Morgan Stanley credit agreement, that it had provided Morgan Stanley with accurate information regarding its consolidated statements of operations, stockholders' equity and cash flows, as well as its consolidated balance sheets. Likewise, in connection with the Convertible Note Offering,

Sunbeam included its 1996 and 1997 audited financial statements in its March 19, 1998 offering memorandum and represented to Morgan Stanley that its audited financial statements were reliable.

120. Also, as part of the Coleman merger agreement executed on February 27, 1998, Sunbeam represented and warranted that all of its filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate, not misleading, and prepared in accordance with GAAP, and that they would continue to be accurate and not misleading as of the transaction's closing date.

121. Andersen knew that its audit opinion would be used by Sunbeam to induce Morgan Stanley to underwrite the Convertible Note Offering and to induce Morgan Stanley to loan Sunbeam $680 million to finance Sunbeam's acquisition of a controlling stake in Coleman. Andersen's audit report furthered the conspiracy between Andersen and Sunbeam by actively perpetuating the illusion that Sunbeam was a financially healthy company, which helped to support the company's artificially inflated stock price. In doing so, Andersen committed the tortious act of fraudulent inducement in concert with Dunlap and the other Sunbeam executives pursuant to a common design.

122. In reasonable and justifiable reliance on Andersen's and Sunbeam's representations that Sunbeam's financial statements and Andersen's audit reports were accurate and truthful, Morgan Stanley agreed to underwrite the Convertible Note Offering, and Morgan Stanley agreed to loan Sunbeam $680 million to finance Sunbeam's acquisition of Coleman.

123. As a direct result of this conspiracy of fraudulent inducement, Morgan Stanley has suffered hundreds of millions of dollars in damages.

COUNT III

Aiding and Abetting Fraud

124. Paragraphs 1 through 123 are repeated and alleged as if set forth herein.

125. Sunbeam's 1996 and 1997 financial statements contained false statements of material fact. Those material misrepresentations included, among other things, overstatements of (a) Sunbeam's 1996 operating losses by approximately $40 million; (b) its 1996 losses from continuing operations by approximately $26 million; (c) its 1996 net losses by approximately $20 million; (d) its 1997 operating earnings by approximately $95 million; (e) its 1997 earnings from continuing operations by over $70 million; (f) its 1997 net earnings by approximately $70 million; and (g) its 1997 operating income figure by approximately 50 percent.

126. Andersen's 1996 and 1997 unqualified audit opinions were materially false and misleading. Andersen falsely stated, among other things, that (a) Sunbeam's financial statements fairly presented the financial position of Sunbeam during 1996 and 1997; (b) Sunbeam's financial statements fairly presented the results of Sunbeam's operations and cash flows during 1996 and 1997; (c) Sunbeam's financial statements conformed with GAAP; and (d) its audits of Sunbeam were conducted in accordance with GAAS.

127. To induce Morgan Stanley into underwriting the Convertible Note Offering and to loan Sunbeam $680 million to finance its acquisition of Coleman, First Alert, and Signature Brands, Sunbeam represented to Morgan Stanley in loan negotiations that Sunbeam's audited financial statements were accurate and not misleading. In addition, in the Sunbeam-Morgan Stanley credit agreement, Sunbeam warranted that it had provided Morgan Stanley with accurate information regarding its consolidated statements of operations, stockholders' equity and cash flows, as well as its consolidated balance sheets. Likewise, in connection with the Convertible Note Offering, Sunbeam included its 1996 and 1997 audited financial statements in its March 19, 1998 offering memorandum and represented to Morgan Stanley that its audited financial statements were reliable.

128. Also, as part of the Coleman merger agreement executed on February 27, 1998, Sunbeam expressly represented and warranted that all of its filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate, not misleading, and prepared

in accordance with GAAP, and that they would continue to be accurate and not misleading as of the transaction's closing date.

129. Sunbeam knew that its representations regarding its 1996 and 1997 financial statements were materially false when made and/or made these representations with reckless disregard as to their truth. In addition, Sunbeam knew that Andersen's 1996 and 1997 unqualified audit opinions were materially false and misleading.

130. Sunbeam knew that Morgan Stanley would rely on its representations in determining whether to act as Sunbeam's underwriter and to loan Sunbeam $680 million to finance its acquisitions. Although Sunbeam knew that Morgan Stanley would rely and had relied on its false statements, it did not inform Morgan Stanley that the unqualified audit opinions it had provided were materially false or that Sunbeam's financial statements contained numerous misstatements of material facts.

131. Sunbeam made its materially false representations regarding its financial statements and Andersen's unqualified audit opinions with the intent to deceive Morgan Stanley and to induce Morgan Stanley to participate in the financing of Sunbeam's acquisitions.

132. Sunbeam knew that the false information that it had provided to Morgan Stanley, and its intentional failure to correct the misrepresentations contained in Sunbeam's financial statements, would be critical to Morgan Stanley's decision to participate in the financing of Sunbeam's acquisitions. But for Sunbeam's fraudulent representations, Morgan Stanley would not have underwritten the Convertible Note Offering, nor would it have loaned Sunbeam $680 million.

133. Andersen knowingly and substantially assisted Sunbeam in its fraud. Andersen itself expressly represented to Morgan Stanley, in letters dated March 19, 1998, and March 25, 1998, that Sunbeam's financial statements were truthful and that Andersen's unqualified audit opinions were reliable. In addition, Andersen participated in meetings and telephone calls in which it represented to Morgan Stanley that Sunbeam's audited financial statements were

accurate. Moreover, Andersen knew that Morgan Stanley had provided Sunbeam's Board of Directors with a "fairness" letter expressly stating that Morgan Stanley had assumed and relied upon the accuracy and completeness of Sunbeam's audited financial statements. Andersen did not tell Morgan Stanley of the accounting concerns that it had raised with Sunbeam management in the course of its 1996 and 1997 audits.

134. As a direct result of Sunbeam's fraud, aided and abetted by Andersen, Morgan Stanley has suffered hundreds of millions of dollars in damages.

WHEREFORE, plaintiffs Morgan Stanley demand judgment against Andersen-Worldwide, Andersen-US, Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela, Andersen-UK, Harlow, Pruitt, and Denkhaus, jointly and severally, as follows:

A. Compensatory damages in an amount to be determined at trial;

B. Attorneys' fees and costs incurred in this and related litigation;

C. Pre-judgment interest; and

D. All other relief this Court may deem just and appropriate.

Plaintiffs expressly reserve the right to seek leave to amend its complaint pursuant to Fla. Stat. § 768.72 to assert claims for punitive damages in excess of $1.2 billion as allowed by law.

JURY DEMAND

Plaintiffs request a trial by jury on any and all issues raised by this Complaint that are triable of right by a jury.

March 1, 2004

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STATE OF FLORIDA • PALM BEACH COUNTY
This copy is a true copy of the ORIGINAL on file in this office. WITNESS my hand and Official Seal
THIS 7TH DAY OF March, 20 05
SHARON R. BOCK
CLERK & COMPTROLLER
By _____ DEPUTY CLERK

16div-013189

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NUMBER: CL 04-2257 AA

MORGAN STANLEY & CO.
INCORPORATION, et al.,

Plaintiffs,

vs.

ARTHUR ANDERSEN LLP, et al.

Defendants.

_____/

PROCEEDINGS BEFORE THE HONORABLE KAREN M. MILLER

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Friday, July 16, 2004
PALM BEACH COUNTY COURTHOUSE
WEST PALM BEACH, FLORIDA

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P R O C E E D I N G S

- - -

THE COURT: Please be seated. Make yourselves comfortable. Are you ready?

MR. SCHWARZBERG: Yes, Your Honor. How are you? Good morning.

THE COURT: Good morning, sir.

MR. SCHWARZBERG: Steve Schwarzberg representing Arthur Andersen LLP. I'd like to introduce Michael Moscato and Scott Fischer, who's been admitted pro hoc by Your Honor. And Mr. Moscato will be presenting on behalf of Arthur Andersen this morning.

MR. HANSEN: Good morning, Your Honor. Culver Smith for the Plaintiffs, the Morgan Stanley Plaintiffs, and Mark Hansen my cocounsel from Washington D.C. and James Webster from D.C.

THE COURT: Okay.

MR. MOSCATO: Thank you, Your Honor. Just as a preliminary matter, if I could reserve five minutes of my time for rebuttal, if necessary.

THE COURT: Certainly.

MR. MOSCATO: Thank you.

This motion is made on behalf of four of the 10 defendants in this case, Philip Harlow, Bill Pruitt, Don Denkhouse and Arthur Andersen LLP. The remaining six corporate defendants on the caption of the complaint are represented by separate counsel and are not subject to this motion to dismiss.

On April 30, 2004, we filed, on behalf of Andersen LLP, Phil Harlow, Bill Pruitt and Don Denkhouse, a motion to dismiss the complaint, or in the alternative, for a more definite statement.

The motion is brought on seven separate grounds. The first ground is that the Statute of Limitations for each of the four causes of action in the complaint has expired as to the individual defendants. We are not making the Statute of Limitations argument on behalf of Andersen LLP. It's solely the three individual defendants, Harlow, Pruitt and Denkhouse.

The second ground for a motion to dismiss is that the Plaintiffs have failed to adequately plead their causes of action with particularity.

The third ground for the motion to dismiss

is that the Plaintiffs have failed to attach necessary documents to the complaint in violation of Florida Rules of Civil Procedure 1.130.

The fourth ground for the motion to dismiss is that the Plaintiffs have failed to state a cause of action for fraudulent misrepresentation, which is Count I of the complaint.

The fifth ground is that the Plaintiffs have failed to state a cause of action for fraudulent inducement to contract, which is the second count of the complaint.

The sixth ground is that Plaintiffs have failed to state a cause of action for conspiracy to fraudulently induce. Now that is also the second count of the complaint. So the second count of the complaint is a fraudulent inducement count, in addition with the conspiracy to fraudulently induce.

And our last ground for dismissal is that the Plaintiffs have failed to state a cause of action for aiding and abetting. And that cause of action is the third count of the complaint.

Your Honor, before I begin the actual

argument, I'd like to provide some background to the case. I don't know -- I've never appeared before Your Honor before, so I don't know how familiar you are with the factual background of this case. If you would indulge me just for a minute or two, I'd like to provide a brief background.

At the center of this case is Sunbeam Corporation. Sunbeam was a Florida corporation. During 1996 and 1997, Arthur Andersen LLP was Sunbeam's independent auditors. Andersen LLP is the United States arm of Arthur Andersen. It is one of the Defendants -- it is the only corporate defendant that is the subject of this motion today. Phil Harlow, one of the individual defendants, was an Andersen partner. Mr. Harlow was the engagement partner at Arthur Andersen responsible for the Sunbeam audits for the fiscal years 1996 and 1997. In other words, as engagement partner, Mr. Harlow was in charge of the audits.

Bill Pruitt, another one of the individual defendants, was also an Andersen partner. He, according to the complaint, and correctly so,

was the concurrent partner on the audits of Sunbeam's 1996 and 1997 financial statements. Now, the only mention in the complaint of Mr. Pruitt is just that, that he was a concurrent partner. There's no explanation of the role of a concurrent partner, but I will represent to Your Honor that the role of the concurrent partner in an audit is much -- much more limited than the role of an engagement partner.

The final individual defendant, whom we represent, is Donald Denkhouse. Mr. Denkhouse was also an Andersen partner. But Mr. Denkhouse -- and this is an important fact -- Mr. Denkhouse had no involvement whatsoever in the audits of Sunbeam's 1996 and 1997 financial statements. And there's no allegation in the complaint that he had any involvement whatsoever in those audits. Instead, Mr. Denkhouse was an engagement partner at Andersen who was responsible for auditing Andersen's restatement of the 1996 and 1997 financial statements. Now, I'll explain in a few minutes why that is, as far as Mr. Denkhouse is concerned, as far as the pleading style of this

complaint is concerned, is an essential fact.

Now, in September 1997, Sunbeam hired Morgan Stanley to find a company to buy Sunbeam. By the fall of 1997, Morgan Stanley and Sunbeam were unable to find a buyer for Sunbeam so they switched their strategy and they sought to find a company or companies which Sunbeam could acquire. In March 1998, based on Morgan Stanley's efforts, Sunbeam purchased three companies; the Coleman Company, First Alert and Signature Brands. This acquisition doubled the size of Sunbeam. And the complaint makes this clear, Morgan Stanley advised Sunbeam on these acquisitions. Sunbeam paid for these acquisitions in two ways. The first way is, Sunbeam issued $750 million of convertible bonds, which they sold to the public. The second way is, Sunbeam borrowed approximately $2 billion from three banks. The bank loans of $2 billion were made by Morgan Stanley Senior Funding, one of the plaintiffs in this case, and two other banks. Morgan Stanley Senior Funding allegedly loaned Sunbeam approximately $680 million.

Now, after the acquisition closed, about

two and a half months afterwards, in June 1998, an article was published in Baron's magazine concerning Sunbeam. The article contended that Sunbeam had engaged in accounting manipulations in order to achieve its financial results in 1996 and 1997. Shortly after the article appeared, Sunbeam's top management, including Al Dunlap, were fired by the board of directors and were replaced by executives from the Coleman Corporation, who Sunbeam had acquired. Arthur Andersen LLP and the new management of Sunbeam investigated the allegations in the Baron's article. On June 17, 1998, the SEC announced it was investigating Sunbeam. On June 25, 1998, Arthur Andersen, as a result of any investigation and new managements' investigation of the allegations in the Baron's article, Arthur Andersen announced that it was withdrawing its audit opinion on Sunbeam's 1997 financial statements. Now what that means, a withdrawal of the audit opinion is tantamount to Arthur Andersen telling the investing public, you can no longer rely on our audit opinion. We're pulling it. Don't rely on it. Then five days later, on June 30, 1998, Sunbeam

issued a press release itself stating that Sunbeam's 1997 financial statements should not be relied upon and would probably have to be restated. These facts are all in the complaint, Your Honor.

In the Fall of 1998, Sunbeam did in fact restate its financial statements for 1996 and 1997. Arthur Andersen audited Sunbeam's restated financial statements. And, as I explained earlier, Donald Denkhouse, one of the defendants who had no participation in the original 1996 and 1997 audits upon which Plaintiffs claimed to have relied in this case, Don Denkhouse audited the restated financial statements, which the Plaintiffs contend in their complaint were the correct financial statements and upon which they do not claim to have detrimentally relied.

I'd now like to address the various grounds upon which Andersen LLP, Mr. Harlow, Mr. Pruitt and Mr. Denkhouse have moved for dismissal or in the alternative, for a more definite statement. I'll address them in the order in which they're addressed in the memorandum of law.

First of all, it's the Statute of Limitations argument. Again, we're making this argument on behalf of the three individual defendants and not Arthur Andersen LLP. The Statute of Limitations under Florida Law for each of the causes of action alleged in the complaint is four years. On the face of the complaint, almost six years have elapsed from the accrual of the cause of the action until the filing of the complaint. In other words, we contend that the cause of action accrued no later than June 30, when Sunbeam unequivocally announced to the investing public, you can no longer rely on our 1997 financial statements. From that point until the filing of this complaint in March 2004, almost six years elapsed, well beyond the four years of Statute of Limitations. The standard for the Statute of Limitations for accrual of an action is set by Section 95.031(2)(A) of the Florida Statutes. And, Your Honor, I have to apologize, we neglected to cite this statute in our brief. I do have a copy for Your Honor and for opposing counsel, if I may approach.

THE COURT: Thank you, sir.

MR. MOSCATO: The standard set by this statute is that, with respect to fraud based claims, the Statute of Limitations clock starts running from, quote, the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence.

As I explained earlier, the complaint describes numerous events all occurring in or before June 1998 that gave Plaintiffs' notice of the facts giving rise to their causes of action. Paragraphs 84 to 87 of the complaint describe these facts. First, the Baron's article that came out on June 8, the SEC investigation -- the SEC began an investigation, a public investigation of Sunbeam, on June 17 -- Arthur Andersen's withholding of its consent to use its audit opinion, which occurred on June 25th, and Sunbeam's announcement on June 30 that the investing public should not and cannot rely on its 1997 financial statements. The Plaintiffs were clearly on notice of the facts underlying their claims by June 30, 1998. That's on the face of the complaint.

Now, Plaintiffs argue that the Statute of Limitations does not begin to run until they have actually suffered damages and that it's not apparent on the face of the complaint that in fact -- when in fact they suffered damages.

We contend Plaintiffs are wrong for two points -- for two reasons in this argument. Number 1, that's not the standard set forth in Section 95.031(2)(A).

Second, from a reading of the complaint it is clear, that to the extent Plaintiffs suffered damages. They suffered damages as of June 30, 1998. They alleged they underwrote the bonds by that time. They underwrote the bonds in April, and that's in the complaint. They allege they loaned Sunbeam $680 million by that time. That's in the complaint. And it was clear on June 30 that the audit opinions and the financial statements upon which they themselves claim to have relied could no longer be relied on. So we contend their interpretation of the law is wrong. But even assuming their interpretation of the law is correct, they did suffer damages, according to their complaint, by or before June 30, 1998.

The two other points they raise are the question of whether Florida Law applies or New York Law. Again, judging by the four corners of the complaint, there is no inkling what so ever that Florida -- that New York Law applies or that any law other than Florida Law applies. In paragraphs 7 and 23 to 25 of the complaint, the only law that's mentioned is Florida Law. They do that, I believe, in the context of jurisdiction and venue. But there's no -- there is no mention of New York Law. There's no mention of facts upon which to base the conclusion that New York Law applies. And even in Plaintiffs' responsive paper where they first raise the possibility that New York Law possibly applies they don't advance any arguments why New York Law may apply and why Florida Law does not apply.

The last argument Plaintiffs make relates to the tolling agreement, which they do not cite in the four corners of their complaint but which they attach to their moving -- to their responsive papers.

The point with the tolling agreement -- well, there's several points with the tolling

agreement. First, the tolling agreement is between Arthur Andersen LLP and the Morgan Stanley entities. We have not moved for dismissal on Statute of Limitations grounds with respect to Andersen LLP.

Second, as I said, the tolling agreement was never mentioned in the four corners of the complaint. And if Plaintiffs wish to rely on the tolling agreement, it's incumbent upon them, we contend, to attach it to the complaint so that it can be evaluated.

Third, there's nothing in the complaint or in the responsive papers that even tries to explain why the Statute of Limitations have not expired, as to the individual defendants, as a result of the tolling agreement. And the individual defendants are the only defendants who have moved to dismiss on Statute of Limitation grounds.

If you have no questions, Judge, I'd like to move on to the next ground for dismissal.

THE COURT: Okay.

MR. MOSCATO: The next ground, that the Plaintiffs failed to plead their claims with particularity. There are 10 defendants in this

case and there are three plaintiffs in this case. The complaint lumps the 10 defendants into one conglomerate, Arthur Andersen, and the complaint lumps the three plaintiffs into one conglomerate, Morgan Stanley. Each cause of action alleged in the complaint is based on fraud. And as a result, each must be plead with particularity. For example, Plaintiffs must particularize for each defendant what representation he made and what facts give rise to a finding of a fraudulent intent. And for each plaintiff the defendants -- I'm sorry -- for each plaintiff, the complaint must allege the facts upon -- the manner in which the plaintiff relied on the alleged fraudulent misrepresentations. Failure to do so, we contend, Your Honor, is a violation of due process. I'd like to give -- I don't have as much time, as I'd like to give all the examples, but let me give you one quick example, and it relates to Don Denkhouse. And it's one of the reasons I spent a little time with him earlier in this argument.

Mr. Denkhouse, if you read the complaint, there's no allegation he had anything to do

with the original 1996 and 1997 audits which Plaintiffs claim to have relied on. Mr. Denkhouse was the engagement partner, according to the complaint, for the restatement of the original 1996 and 1997 audit. The complaint -- the theory of the complaint is that the restated financial statements were correct; and that if you -- and that you should compare the restated financials with the original financials to see how incorrect the original financials were. It's clear that the Plaintiffs' position is that restated financials are the correct financials, and that those are the only financials which Mr. Denkhouse had anything to do with whatsoever, and yet he is dragged into this case as a defendant. And the way they do it, the way the Plaintiffs do it, is to say we're going to just identify them as being Andersen; so if we say Andersen did something, that means Denkhouse did something. But it's completely unfair. It's a complete violation of due process and Plaintiffs should be required to redraft their complaint and particularize what each of the Defendants allegedly did.

Now, the only argument I could see the Plaintiffs make to rebut -- to attempt to rebut this argument is the -- they argue that the group publication doctrine applies somehow in this case.

Our position, Your Honor, we did not submit a reply brief so we didn't address this on papers, but the group --

THE COURT: Wouldn't the group apply to Arthur Andersen LLP, then? You've got Arthur Andersen LLP as one defendant and then you've got 10 individual defendants.

MR. MOSCATO: Well you have Arthur Andersen LLP, you have three individuals who were partners of Andersen LLP. Those are the four entities I represent. Then you have six others.

What Plaintiffs are apparently saying is the group pleading doctrine applies to all 10. And if they say something about, quote, unquote, Andersen, it magically encompasses all 10 defendants. And the reason I'm pointing out the Denkhouse situation is to just show the absurdity of that and the unfairness of that, even with the group pleading doctrine, which,

by the way, we couldn't find any Florida case that applies it and we couldn't find any case nationwide that applies it to an auditor. The group pleading doctrine is usually used against corporate insiders when someone is trying to say the president of the corporation or the CEO, the CFO, were -- made a statement. It's never been applied to an outside auditor, to my knowledge. And the point is, even with the group pleading doctrine, how can you say -- how can they say that someone like Donald Denkhouse, who clearly was not involved in the original audits, is responsible for those audit opinions.

I'm sorry, Judge, I'm going much slower than I intended.

THE COURT: You need to go a little bit faster. It's only set for an hour.

MR. MOSCATO: The third ground is that Plaintiffs have failed to attach documents to their complaint. The complaint is premised on documents, which we contend on the face of the documents, preclude Plaintiffs' reliance. And we discussed this at some length in the briefs. The audit opinions were addressed to

the board of directors and the shareholders and the comfort letters were -- disclaimed Plaintiffs' reliance on the comfort letters for anything other than a due diligence defense. Now, due diligence defense is interpose -- the reason that people do comfort letters, the reason investment banks want comfort letters when they do a bond offering like this is, they can interpose a due diligence defense in the event a third party sues them. And that's what comfort letters are for and that's the only thing that they're for. They're not for the underwriter to rely on the comfort letter in order for the underwriter to make a particular investment decision. And, again, we talk about that in our brief.

The fourth ground for dismissal is that the fraudulent misrepresentations claim failed to state a cause of action. Now the issue here is whether the auditing and accounting judgments described in the complaint rise to the level of fraud instead of merely sounding in negligence. The Plaintiffs refer to and rely on the SEC settlement with Phil Harlow in this case, which we attached at the back of our

moving papers. Frankly, we're glad they did that. The document -- if you compare that SEC settlement with the complaint in this case, you'll see that the settlement mirrors all of the issues in the case. And at pages 18 and 19 of our brief, we set out how each of the items that are described in the complaint, and also described in the SEC settlement, show negligence and not fraud.

Your Honor, the point with the fifth ground for dismissal, the fraudulent inducement to contract claim, the Plaintiffs argue, that as a matter of, quote, unquote, Hornbook Law, Florida does not impose the privity of contract requirement for a claim of fraudulent inducement to contract.

We did not -- I'd like to hand to Your Honor one more document that we did not include. It is the Hornbook on the subject -- I'm sorry, Your Honor, I think I gave you the wrong --

THE COURT: You did. But we need to move a little bit faster.

MR. MOSCATO: That Hornbook says, no cause of action for fraudulent inducement will lie

where the party claiming such fraud is unable to support the existence of the contract where the party allegedly perpetrated the fraud.

Our position is, privity of the contract is required for a breach of -- for a fraudulent inducement claim. We think the law supports that.

As to the conspiracy to fraudulently induce, our basis for dismissing that claim is that the complaint does not set out an agreement to commit an unlawful act, which is one of the elements of a claim of conspiracy to fraudulently induce, or any conspiracy. For conspiracy, you need an agreement. The complaint failed to particularize that Andersen entered into an agreement with Sunbeam in order to defraud the Plaintiffs.

And the final -- I am finishing up, Judge. I'm sorry I've gone a little longer than I should have.

The third -- the last basis for dismissal is failure to plead aiding and abetting, which is the third count of the complaint. And the basis for this -- for dismissing this is that the Plaintiffs have not met their burden of

pleading that Andersen knew of some alleged plan by Sunbeam to defraud Morgan Stanley.

Your Honor, I'm sorry I went over my time.

THE COURT: That's no problem.

MR. MOSCATO: I'd like to have rebuttal, if I may.

THE COURT: Absolutely. No problem.

Response.

MR. HANSEN: Good morning. Mark Hansen for Plaintiff Morgan Stanley. And I'll try to give some time back because I know the Court is under some time pressure.

THE COURT: You're fine, gentlemen. Go ahead.

MR. HANSEN: I'm really trying to hurry up. I'm going to torture our court stenographer --

THE COURT: Well don't torture the court reporter. Just speak in a normal tone and let's just move forward.

MR. HANSEN: Thank you, Judge.

THE COURT: Okay.

MR. HANSEN: What I just heard Mr. Moscato say was a representation of the facts. I think, though, unfortunately for the Andersen

argument, they're his version of the facts, it's not the complaint. The arguments they're trying to make about extra pleading matters really is enough to dispose of this motion right there. Arthur Andersen doesn't get to put his version on the facts in at this stage and have an argument about it. We have a complaint -- and I'm going to go through what we have alleged and why it's more than sufficient. But before I do that, Your Honor, a parenthetical note. We are not writing on a blank slate here, in a sense. And what I mean by that is, these very allegations have been contingent and resolved in other courts, but these specific allegations about Andersen's conduct in connection with the Sunbeam audit were litigated in the following places. Let me provide the Court with some materials about that. Coleman, which -- as we described in the complaint, also essentially was a creditor of Sunbeam, also was a victim of relying on the Andersen audited financial statements, also lost money, brought the very same accounting fraud charges against Andersen. In this court before Judge Rapp, Andersen brought many of the

same arguments they're bringing to you, to Judge Miller to Judge Rapp. We had a hearing on them, and we have a hard time parsing through the court record, but thereafter Andersen answered and the case ultimately settled for an undisclosed amount. But it seems clear from the record that it was rejected, these very same arguments, in this courthouse in a complaint that's almost -- I wouldn't say almost identical, but the same allegations of accounting fraud.

Your Honor, in the middle district of Florida, the shareholders of Sunbeam brought the same allegations regarding Andersen's accounting frauds. Judge Middlebrooke (ph) addressed -- again, Arthur Andersen represented by capable counsel, made the same legal arguments to Judge Middlebrooke saying this isn't particularized enough, we don't have a duty to any of these people. Judge Middlebrooke wrote a long, and I would say, well-reasoned opinion refuting each of these arguments. I commend the Court's attention, Judge Middlebrooke's attention, which we provided the materials to Your Honor, because

it really is the best response to a lot of these Andersen arguments, better than I can do standing at the podium. He addresses them all in turn and concludes, that based on the allegations as we've alleged in our complaint -- if you look at the two complaints which we both provided, you won't see any material difference in what's been alleged. That's fraud Judge Middlebrooke said, at least as a matter of pleading. That states a claim and the case goes forward to be resolved on the merits. And at this stage, Your Honor, it's an obvious point, all we're asking is for the opportunity to pursue the case on the merits. We're not asking to have a final judgement here today. But we can't resolve these factual questions on the pleadings. Those have to be resolved down the road.

As Mr. Moscato said, in addition, the SEC has weighed in here and they have written a long and quite thorough complaint against Mr. Harlow, to which he consents or just agreed not to dispute, which, again, not just some miscounting judgement, but recklessness, accounting fraud, and we've provided that, Your

Honor.

So as I say, there's a lot of learning here, a lot of teaching here about this Andersen fraud in connection with this Sunbeam audit that I submit Andersen can't deal with and hasn't dealt with at all, that demonstrates this complaint is more than sufficient. This is a textbook complaint of an accounting fraud. And let me just go into what that fraud is as our complaint states, Your Honor, not as Mr. Moscato would like to recharacterize it.

THE COURT: Okay.

MR. HANSEN: First of all, these are the players, Your Honor, Morgan Stanley & Co. Incorporated, that's one of the subs of Morgan Stanley 100 percent owned that arranged the convertible notes offering, $750 million. They've been hurt because they took some of the notes themselves, which became worthless. And by the way, Your Honor, I disagree with Mr. Moscato, we don't know from the face of the complaint when those notes were damaged, when that entity suffered a loss. And until you have a loss, you don't have a cause of action under Florida law. And I'll get to that

specifically.

Secondly, Morgan Stanley Senior Funding -- that's the other Morgan Stanley entity at issue here today -- in expressed reliance on written representations from Arthur Andersen, both in the audit financial statements and the comfort letters, which really are, Your Honor, as we pleaded them, letters directly from Arthur Andersen to Morgan Stanley saying you can rely on the audit financial statements that we have audited and certified, Morgan Stanley Senior Funding loaned $680 million, which they have lost. And there's nothing on the face of the complaint that would suggest exactly when that loss occurred, because although there were shareholder suits and people were complaining about things, Sunbeam didn't go to bankruptcy until 2001. You can't tell from the face of the complaint when the loss occurred, which is why you can't resolve the Statute of Limitations issue, even as to the individual defenses.

Arthur Anderson -- but, again, Your Honor it's a partnership. These individuals are all partners of the partnership. Mr. Harlow, we

state exactly what he did. He's the guy who agreed to the SEC that he did terrible accounting at Sunbeam. And it's a litany of woes and it isn't just him making a good faith error in judgement.

THE COURT: Why wouldn't Morgan Stanley be on notice that there was a problem with these audit reports after at least one of the defendants in June of 1998 came outside and said, we have a problem with this audit, and then they did a restatement and then Sunbeam made a statement saying you can't rely on these audit reports because they're inaccurate and then the audits were redone?

MR. HANSEN: Several simple reasons, Judge.

First, you might be on notice that there was a problem with the accounting, but that doesn't mean you've lost money on your bonds or on your loan. In other words, I extend you the loan, I learned that you've had financial troubles. That doesn't tell me you won't be able to pay the loan back.

Under Florida Law -- and we've cited this section and I can go straight to it, frankly,

because it's -- we think it's dispositive here -- it's the -- the standard is 95.031 Section 1, you can't sue until you've suffered damages as a result of the fraud. A cause of action accrues when the last element constituting the cause of action occurs. And under the State Farm case and the Quorman case (ph) and the Elmore case, and I'm quoting from the Quorman case, all elements of action for fraud must exist before an action may be maintained. So to return to my loan, for example, damages is an element of the cause of action. The possibility of a loan not being repaid, Your Honor, is not damages. Damages occur when you don't get your money back, when you've lost your money on your loan. So in the case of $680 million for Morgan Stanley Structure -- or Senior Funding, we don't know when they weren't paid back, we don't know when that loan went bad. We certainly can't tell from the face of the complaint. I think Mr. Moscato is contemplating two things, Your Honor; the Federal securities fraud case and PSLRA Standard, which does say once there are storm warnings, once you know there's something

that might be a problem, you have to sue within a year. And that's for shareholders bringing a shareholder class action. Florida Law, though, Florida Fraud Law is expressly to the contrary. It says, don't go rushing off and file a lawsuit the first sign of trouble; you only have a cause of action that accrues when every element of the claim's occurred. And with all respect, Your Honor, reading this complaint as we believe the Court's decided to read the complaint in favor of the Plaintiff, one can't make a conclusion firmly unequivocally that Morgan Stanley clearly was damaged and suffered a loss at any time prior to the bankruptcy of Sunbeam in 2001.

And the second reason why that argument, with all respect, doesn't work, we have a tolling agreement in place and Arthur Andersen's a partnership. Now they have withdrawn their motion regarding Arthur Andersen getting out of the Statute of Limitations. These individuals were partners of Morgan Stanley. Morgan Stanley entered into that tolling agreement as a partnership -- assert in this claim as well, Your Honor, or at

least, Your Honor, at least that issue can't be resolved on a motion to dismiss. That's a factual issue that has to be resolved later on. And we submit, Your Honor -- and I'm telling you a little bit ahead of myself -- there's not a single case under Florida Law cited by Andersen or -- that has dismissed the complaint on the face of the pleading because of a statute issue like this. It always has to be resolved on the facts.

THE COURT: Is the tolling agreement, the other agreement that was just made, was the tolling agreement not mentioned in the complaint, it's not attached to the complaint?

MR. HANSEN: No, Your Honor, it shouldn't be, because it goes right to the point about pleading. That's why the courts have said you can't dismiss for Statute of Limitations grounds, because it's a fact specific inquiry. When people -- all the elements of the claim accrued, the circumstances, any agreements, tolling agreements, unless you can look at the complaint -- and we plead all elements of our cause of action accrued as of date "X", which is not in the complaint, you couldn't conclude

as to a matter of law the Statute of Limitations has run. So, Your Honor, we submit that Florida Law does not require us to plead all the facts and circumstances of everything. We just have to give notice as to our cause of action. But I submit, Your Honor, these additional further facts just further show that you can't wade in at this stage of the case and make a factual finding because it's not clear from the fact of the complaint. That issue will have to be resolved on the facts down the road. And we do believe that you do not have to plead, essentially, a trial record so that we could have a directed verdict here before the case even starts.

THE COURT: How about failing to file particularity, the second basis?

MR. HANSEN: Very easy, Your Honor.

We think Judge Middlebrooke probably has the best response to that. What could be more particular -- and I was going to take you through the complaint. Let me go right to that. Here's what we plead, Your Honor, we plead that in 1996, Mr. Al Dunlap came into Sunbeam telling the world he was going to turn

it around and he created all these expectations from Wall Street. And Arthur Andersen's the auditor and they were afraid of losing their lucrative engagement. And so in 1996 here's what happened, Sunbeam started to cook the books in the following way: They put up $338 million restructuring charge, which wasn't restructuring. It was to benefit future activities so it couldn't be charged to that year's earning. He created a $12 million reserve that wasn't a proper reserve for a litigation that didn't even estimate to be possibly exposing to half that much. They eliminated all inventory from certain product lines. Their own internal data showed half of those product lines would continue. They put in 1997 advertising expenses into a 1996 cost knowing that those weren't proper. They inflated their profit in advertising. And we described, Your Honor, in paragraphs 37 through 41 in excruciating detail exactly how that was done. And we described that Arthur Andersen knew it, saw it, and passed on it. They signed-off on it and certified it as accurate, when by any reasonable accountants' standards,

it was completely, flatly indispensable and improper. That's as particular as you can get.

Now let me go to the individuals. I think they really aren't arguing, Your Honor, lack of particularity with Andersen, because what Andersen did at the firm is microscopically described. What Mr. Moscato argues and with some -- and more force, frankly, and more bite, is what about these individuals, these poor humans? What do they do? And we know what Mr. Harlow did; read the SEC complaint. It's set out in hack verbiage, it's just detail. And we've pleaded that in our case. He's the guy who was signing off on these terrible accountings, Judge, knowing they were wrong. To give you an example, he's asking questions of the Sunbeam employees regarding the 1996 figures that they're trying to artificially suppress to make the '97 results look better and he asked the employee, what's in there, and you know what he's told, everything but the kitchen sink is in there, yet he signs off on it. We know what Mr. Harlow did. What about Mr. Pruitt? He, too, he is the concurring partner, he is responsible for those Andersen

representations by Andersen as we plead. He has to agree with those judgements, so we know what he did. And Mr. Denkhouse, I'd like to make a factual correction, we just don't say only that he came in in '98 to straighten out the problem, he was the head of the audit practice for the Southern Florida region. It's reasonable to believe that he was involved, too. But, Your Honor, the outset of the case and under the group pleading doctrine, which the District Court, Federal District Courts throughout Florida have adopted, which Judge Middlebrooke plainly adopted for the Sunbeam officers in respect to the group statements there, we can't be expected at this stage of the case to plead a full trial record as to who said what to who behind closed doors. That would be unfair to us. So under the cases that we've cited, and we don't believe there's been any contrary citation by Arthur Andersen, what we have to plead and what we believe we have pleaded, we set out the frauds, what was done, what statements were made by Andersen that were false representations, we've stated who we believed was involved in doing that, who had

roles in that conduct, and a basis for believing their involvement. At that point, under the group pleading doctrine, we've cited the cases -- and, again, I think Judge Middlebrooke lays out the rationale of the law, we then are allowed discovery to probe further into who did what when. But these people were not people in the Oregon office, having nothing to do with Sunbeam, they were people making the -- and that includes Mr. Denkhouse as the head of the southeast region practice. Sunbeam was a big client. It was a big high visibility matter. He's the one who comes in in '98 and it's reasonable to believe he had involvement before then. And all we're asking for is the opportunity to pursue the case on the merits. Judge, we do not believe we're at this point, Your Honor, to make the trial record as to who did what. We haven't had day one of discovery.

Your Honor, to continue with the story, though, in 1996, they try and make things look bad so they write $40 million into their costs to really make the company look terrible -- and, again, everything but the kitchen sink -- and Arthur Andersen let's them do it; they

don't want to lose the account. Then things get worse. Because in '97, Sunbeam goes on a "pump in the revenue" scheme and they do things like -- and this is all described and it's quite detailed what it looks like -- they have this improper "bill in the hole" gimmick, where they basically bill people for transactions they aren't in fact shipping the goods on and they may never ship the goods on. They do $29 million worth of that phony business. They sell obsolete inventory and claim that they're discontinuing operations sales when it's not. They book sales -- there's a kind of customer that has the right to return at any time print release sales. That's almost $9 million. They made write-ups in their foreign subsidiary and they refuse to recognize costs. They basically made a sham sale of -- and all of these are looked at by the Andersen people and they objected to them and then they just rolled over and said, okay, we'll sign off on it, because not only do they want to keep the account, but by this time, they've got consulting arrangements, including due diligence, on the Coleman acquisition.

They're fatally inflicted because they've taken on other responsibilities that make them too beholding to the client; they don't have independence. So at the end of the day, Your Honor, we've stated in minute detail, and several courts have found and the SEC has found, that Andersen perpetrated fraud here.

Now going to their arguments, I think I've dealt with their Statute of Limitations argument, only as to the individuals and as to the individual -- the tolling agreement issue, and just the fact that the face of the complaint doesn't tell us exactly when our claims accrued. When the last element of the claim has been made, that disposes of that argument.

As to their argument about particularity, I think -- you know, we couldn't be more particularized. And as to the individuals, we can't say anything more at this stage, nor are we required to; we have a good basis or a group pleading claim. And with respect to Harlow and the other guy who's actually working on the Sunbeam audit, his name is Pruitt, it's not really an issue. As to Denkhouse, we think he

falls within the group pleading document.

THE COURT: Can you just touch a little more briefly on the group pleading?

MR. HANSEN: Certainly, Your Honor.

When Andersen releases a certified financial statement that's full of fraudulent statements -- we can find out that that's false. We've got it based on that's false. But we're not privy to how Andersen did his business behind closed doors, and that's what courts have addressed in the group pleading documents, where a statement is a statement of a company or a firm and it's impossible to tell from the outset exactly who did what when. That involves the kind of detail you only get through discovery. It would be unfair to Plaintiffs to hold them to the standard of proof that says you have to say, for example, Person A saw thing "Y" and said thing "Z" to somebody, you can't -- no, you can't plead it. So what the courts have said, and I don't think there's any dispute about it, and Judge Middlebrooke wrote a very careful opinion about it, the courts have said, in those circumstances, where you're part of the group

and your role has been defined putting you in a group that was responsible for the statements, just the way the board of directors, for example, is responsible for a company's quarterly statements, you don't know what happened in the boardroom, you don't know who was doing what, but they're all --

THE COURT: Rely on the statements and then as discovery goes later, you can flush out who had the input into what basis the statements was.

MR. HANSEN: Exactly, because there's no other way. You wouldn't know going in. You know the statement, you have a basis for alleging it's fraudulent, but you can't know going in what happened in the boardroom. That's something you learn in discovery. We can't know going in what the interactions between Denkhouse and Harlow and Pruitt were between -- with Mr. Dunlap and company. We'll know once we get discovery. And that's why the courts have said as a pleading matter, as long as you've alleged the roles of the individuals in the fraud and the statements being a statement -- a group published statement,

that's the -- at least at this initial stage of the case, because we are at the very outset of the case, we're at the starting gate, we're not at the finish line.

As to the other arguments -- and I'll try to give back some time here -- but I'll be glad to answer any other questions.

The notion we have to attach documents, Judge, this is not a contract case where we fail to attach a contract. This is a fraud case, where there were multiple representations. We have incorporated those representations in our pleading and in a quite detailed way. They come from the audited financial statements, and we've met the Florida Rule 1.130 by incorporating that representation on which our case is based. We've incorporated the comfort letter, which were representations directed to us. That's sufficient, Your Honor. They make the arguments about how we have to put in a full trial record and attach it to our complaint. But I submit we were burdened with the clerk of courts beyond all reason. We had to put in everything that possibly could be touched on in this case as an

exhibit to the complaint. And I don't think a single case requires that. This is a common sense point. We have incorporated everything under we purport to base our case and that's sufficient. We base our case on what they represented to us, both in the audited financials and comfort letters, and, frankly, in face-to-face representations. They talked to us, they spoke to us, there was lots of interaction because we were a big -- a lender to Sunbeam and they needed to give us comfort.

Your Honor, as to -- and I won't even go into all the arguments about, well, we should have known and this should be this. That's fact stuff. That's not in the complaint. That's Mr. Moscato's view of the world. He'll have ample time to develop that and argue it at trial. But I can't argue today about facts -- in the pleading based on inferences that they're asking to draw from facts not before you that people should have known or shouldn't have relied. We were directly represented to by Andersen in these financials. We were asked by Andersen to give money to Sunbeam based on Andersen's work. And that's about as direct as

you can get. We don't need anything more than that for any of our claims, Your Honor.

As to the fraudulent misrepresentations claim, we have done far more than allege some accounting violations. Judge Middlebrooke's opinion I think is the best anecdote to that.

As to the fraudulent inducement claim, I don't know where they -- the Hornbook, they're not cases. We cited cases saying we don't have to show that there was a contract between us and Andersen. Forbes B Hourbrooks (ph) proves that, Ron V. Cohen (ph) proves that, Roswell V. Pain (ph) proves that. The fact is, Your Honor, it's a very straightforward and common sense principle. Sunbeam hires Andersen, not only to be its auditor, but it's working to do the Coleman acquisition. Andersen comes to Morgan Stanley as a major lender and says, we want you, working hand in glove with Sunbeam, we want you to loan $680 million to Sunbeam. We want you to syndicate $750 million worth of convertible notes. And, by the way, don't worry, because here are the financials on which you can base that and you know you can get repaid; and we'll update the financials and

we'll talk to you and walk you through it. That's inducement by any standard of law and there's no case that says otherwise.

As to the conspiracy claim we're ships passing in the night. Our conspiracy claim is subsumed within the fraudulent inducement. In other words, we're alleging, I think for far more particular than Hock V. Risman (ph), Seagle V. Lumbine (ph), Nicholson V. Kelum, (ph) the cases we cited, we say that the conspiracy here is between Sunbeam and Andersen and the object is to get Morgan Stanley to loan money and syndicate debt. And Andersen knows that Sunbeam has cooked its books and knows that the true facts will reveal Morgan Stanley won't give the money. So in conspiracy, in concerted action with Sunbeam, they worked together to present a false financial picture regarding Sunbeam so that Morgan Stanley will loan money, will syndicate debt offering, and it does so. That's a conspiracy claim. It validly states the claim and I can't imagine how you can state a more cohered conspiracy plan.

The same thing for aiding and abetting,

the same point. Morgan Stanley was the victim of this fraud and Andersen aided and abetted Sunbeam, which was the company cooking its books to mislead the public and possible lenders about its financial picture. Remember, the whole idea here was to depress what your financial condition looks like in 1996 so that Mr. Dunlap in 1997 could say, voila, I've executed a miracle turnaround. We were down in 1996. Now we got $200 million in close earnings. In fact, they didn't have half that and Andersen knew that. Yet Andersen propped up the illusion so that more people could be deluded into giving money to Sunbeam and financing their further acquisition scheme.

At the end of the day, Your Honor, all we submit is, that this case should move forward, should go into discovery, we should be permitted to get all the true facts and be particularized, they could put in the trial record. There's no case under Florida Law that they have cited that comes close to refuting the teaching of Judge Middlebrookes, what happened in the Coleman case before Judge Rapp, what the SEC concluded, and that is, that at

the very least, the very least as we sit here today, there is a valid good faith basis, the colorable claim for fraud and fraudulent inducement, conspiracy, aiding and abetting against Arthur Andersen on behalf of Morgan Stanley, which lost $700 million or at least close to $700 million as a result of what Plaintiff has alleged. And, again, the allegations are today, the facts, the purpose of this hearing is a highly particularized, highly fraudulent scheme.

I'll give him back a couple minutes, Your Honor, unless you have questions. I'll be glad to answer.

THE COURT: Thank you, sir.

MR. MOSCATO: I will be brief, Judge.

I would just like to address the other cases that my adversary has talked about. The Judge Rapp, the Coleman case they mentioned, several major differences between that case and this case. There wasn't a six-year lapse in that case between the accrual of the cause of action and the filing of the complaint. In that case, the Plaintiffs did not attempt to lump 10 defendants into one entity called

Andersen. In fact -- and this is something that wasn't -- was not adverted to, neither Mr. Pruitt nor Mr. Denkhouse were sued in the Coleman case. In fact, this is the first time that either Mr. Pruitt or Mr. Denkhouse have ever been sued in relation to the Sunbeam matter. So to say that there is this great body of cases that are identical or similar to this is just not true. Those defendants -- this is the first lawsuit where they have been named as defendants.

Judge Middlebrooke's cases, he presided over various Federal shareholder and bond holder securities class actions. Now, we would argue that those actions are completely dissimilar to this for purposes of the motion to dismiss for this reason. Under the Federal securities laws, and there's a concept of fraud on the market, which the Plaintiffs asserted in all of the Federal class action cases, and under the fraud on the market, the Plaintiff does not have to plead reliance. Reliance is presumed. A major difference between Judge Middlebrooke's cases and this case, the plaintiffs must allege reliance. The same

thing with Judge Middlebrooke, there was no individual defendant in any of the cases before Judge Middlebrooke, at least in any of the class actions. I think there was one bond holder case worth about $5 million towards the end of the process, where Mr. Harlow was named as a defendant. But, again, as to Judge Middlebrooke's cases, neither Mr. Denkhouse nor Mr. Pruitt were ever named as defendants. And, again, obviously with those cases, which were all brought years and years ago, there was no Statute of Limitation issue.

Just to correct one factual statement that was made, Mr. Harlow did not consent to the SEC complaint against them. I haven't seen what my opposing counsel gave you in the way of these other cases. I'm not criticizing for that. I think I know what they are. I just wasn't given a copy. If they gave you the complaint of the SEC against Dunlap and Harlow, you should know that the SEC voluntarily dismissed that complaint and the settlement agreement which Mr. Harlow entered into, which is referred to and relied by the Plaintiffs in their complaint --

THE COURT: The SEC voluntarily dismissed the complaint against --

MR. MOSCATO: Against Harlow. We were ready to go to trial before Judge Middlebrooke, he ordered us into mediation. We mediated. The SEC said, here, this is what -- if you want to settle, this is what you can settle to. And they laid out their then current thinking on what Mr. Harlow had allegedly done. And, again, I invite Your Honor to read the settlement agreement, which is appended, which contains all of the issues in this complaint. And the SEC concludes it is negligence; it's not fraud.

The last point, back to the Statute of Limitations point, the Plaintiffs have cited the Quorman case (ph). And in our bundle of cases which we gave you, I think the Quorman case is at Tab 30, but the Quorman case specifically describes the discovery rule relating to Statute of Limitations as such: Quote, the Statute of Limitations attaches when there has been notice of the invasion of the legal right of the plaintiff or he has been put on notice of his right to a cause of action.

The statute must be held to attached when the plaintiff was first put on notice or had reason to believe that her right of action had accrued.

Now, clearly under this standard, you don't have to be in a position where you can say, I know I lost "X" amount of dollars, I know I lost $700 million. If you know that you relied on something and it's false and it's a strong possibility that you will lose money as a result of it, the Statute of Limitation accrues. That's Quorman at Tab 30, it's at page 1014, which on my copy is page 5 and 9.

And one last thing, on the reliance part and this lumping of Plaintiffs together and not attaching documents to the complaint. You know, one thing I thought I heard counsel say was that Morgan Stanley Senior Funding, the entity that loaned $600 million to Sunbeam, relied on the comfort letter and that Andersen intended them. The comfort letter -- if you look at the comfort letter, which they don't attach to the complaint, the comfort letter never went to Morgan Stanley Senior Funding. The comfort letter was sent to the underwriter

of the bonds, Morgan Stanley & Co. One more example why you need these central documents attached to the complaint so that you can determine, you can evaluate the issues of reliance that affect all of the Morgan Stanley entities.

One more thing and then I'll go. Morgan Stanley the parent is the third plaintiff in this case. Look at the complaint, Your Honor, you will not see one allegation, you will not see one hint that Morgan Stanley's parent relied on anything, that Morgan Stanley's parent --

THE COURT: Is Morgan Stanley parent -- is it Morgan Stanley & Company Incorporated, is that the parent?

MR. MOSCATO: I think Morgan Stanley & Co. is the underwriter. Morgan Stanley Senior Funding is the lender. Morgan Stanley, which I call Morgan Stanley Parent, is the parent. And they say, well, we can't know what Denkhouse did, we can't know what Pruitt did because we haven't had discovery. Well, they can know what Morgan Stanley Parent did. And there is not a word in their complaint that Morgan

Stanley parent relied on anything, that they lost any money, that they made a loan, that they underwrote any bonds, nothing. Just another example of the deficient pleading in this case.

Thank you, Your Honor.

THE COURT: Thank you, sir.

Does anybody here have a proposed order? Could you hand me one?

MR. HANSEN: Your Honor, we have a carbon order blank of solid case envelopes. We can prepare one that's much more detailed and specific or we can present this as it's prepared.

THE COURT: If you want to submit proposed orders, detailed proposed orders, you may certainly do so. Today is Friday. Have them in by next Friday. You have to mail it, so mail them by Wednesday.

MR. HANSEN: We'll do that.

THE COURT: Anything anybody else wants me to look at, please submit it.

MR. HANSEN: We'll prepare one more in detail by Wednesday.

THE COURT: Thank you very much,

Gentlemen.

(At 10:25 a.m., the hearing was concluded.)

C E R T I F I C A T E

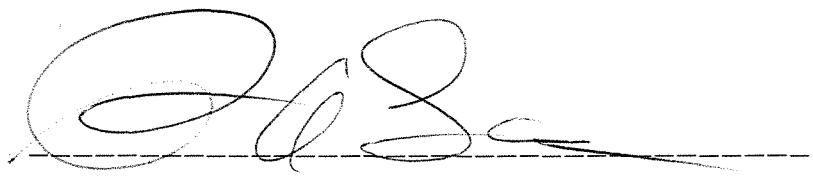
STATE OF FLORIDA

COUNTY OF PALM BEACH

I, PATRICIA A. LANOSA, Registered Professional Reporter, do hereby certify that I was authorized to and did stenographically report the foregoing hearing; and that the transcript is a true and correct transcription of the testimony given by the witness.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 19th day of July, 2004.



PATRICIA A. LANOSA

Registered Professional Reporter

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

MORGAN STANLEY & CO. INCORPORATED, MORGAN STANLEY SENIOR FUNDING, INC., and MORGAN STANLEY,

Plaintiffs,

v.

ARTHUR ANDERSEN LLP (an Illinois limited liability partnership), AWSC SOCIÉTÉ COOPÉRATIVE, *en liquidation* (a Swiss cooperative corporation), ARTHUR ANDERSEN LLP (an Ontario limited liability partnership), ARTHUR ANDERSEN & CO. (a Hong Kong partnership), RUIZ, URQUIZA Y CIA, S.C. (a Mexico partnership), PORTA CACHAFEIRO, LARIA & ASOCIADOS (a Venezuela partnership), PHILLIP E. HARLOW, WILLIAM PRUITT, and DONALD DENKHAUS,

Defendants.

CASE NO. 502004CA002257XXXXMB
Division AA

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FIRST AMENDED COMPLAINT

In March 1998, Morgan Stanley & Co. Incorporated ("MS & Co."), Morgan Stanley Senior Funding, Inc. ("MSSF"), and Morgan Stanley — in direct reliance on certified financial statements that were audited by Defendant Arthur Andersen LLP (an Illinois limited-liability partnership) ("Andersen") with the assistance of and in coordination with the other Defendants named in this Complaint[1] — underwrote a multi-million dollar offering of convertible notes and

[1] AWSC, Société Coopérative, *en liquidation*, a Swiss cooperative corporation ("Andersen-Worldwide") (formerly known as Andersen Worldwide, Société Coopérative), Arthur Andersen LLP (an Ontario limited liability partnership) ("Andersen-Canada"), Arthur Andersen & Co. (a

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EXHIBIT
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provided a $680 million loan to Sunbeam Corporation, Inc., in connection with Sunbeam's acquisition of three companies. As Sunbeam's subsequent restatement of its financial results showed, these certified financial statements grossly misrepresented Sunbeam's true financial condition. Andersen and the other Defendants had full knowledge of these misstatements, and they intended that MS & Co. and MSSF would rely on these unqualified audit opinions. Plaintiffs — as a direct consequence of this deceit — have lost hundreds of millions of dollars. Accordingly, Plaintiffs bring this action and allege the following:

Nature of Action

1. In March 1998, Sunbeam announced the acquisition of The Coleman Company, Inc., Signature Brands USA, Inc., and First Alert, Inc. In order to finance these acquisitions, Sunbeam issued $750 million of convertible notes, which MS & Co. underwrote, and borrowed $1.2 billion in secured financing, including a loan of $680 million from MSSF.

2. In serving as an underwriter (which required MS & Co. to act as the initial purchaser of the convertible notes) and in agreeing to extend the loan, MS & Co. and MSSF relied on the accuracy of Sunbeam's financial statements, including its 1996 and 1997 financial statements that had been audited and certified by Andersen, as well as other representations made to them by Andersen. The Andersen-certified Sunbeam financial statements portrayed Sunbeam as a financially sound company in the midst of an extraordinary financial turnaround.

Hong Kong partnership) ("Andersen-Hong Kong"), Ruiz, Urquiza y Cia, S.C. (a Mexico partnership) ("Andersen-Mexico"), Porta Cachafeiro, Laria & Asociados (a Venezuela partnership) ("Andersen-Venezuela"), Phillip E. Harlow, William Pruitt, and Donald Denkhaus.

3. In reality, unbeknownst to Plaintiffs, Sunbeam's "turnaround" was an illusion facilitated by the Defendants. As became apparent in the summer of 1998 and as confirmed by Sunbeam's subsequent restatement of its financial results, the 1996 and 1997 statements that Andersen had certified — and upon which MS & Co. and MSSF had relied — did not, contrary to the representations that Andersen made to MS & Co. and MSSF, conform with generally accepted accounting principles ("GAAP"). Andersen, with full knowledge of the material misstatements contained in Sunbeam's financial reports, issued unqualified audit opinions for both 1996 and 1997. In so doing, it failed to perform its audit in accordance with generally accepted auditing standards ("GAAS").

4. In fact, the statements that Andersen audited and certified as in compliance with GAAP and as representing Sunbeam's true financial condition, were replete with accounting improprieties. As a consequence, and contrary to the representations that Andersen made to MS & Co. and MSSF, Sunbeam's true financial condition was misstated by millions of dollars.

5. Andersen's fraud was knowingly caused by Harlow, Pruitt, and Denkhaus. Harlow (the Sunbeam engagement partner) and Pruitt (the Sunbeam concurring partner) were senior partners of Andersen and members of Andersen-Worldwide and undertook direct responsibility for directing, managing, and approving the work that was done on the Sunbeam audits. Denkhaus, who also was a senior partner of Andersen and a member of Andersen-Worldwide, was the Audit Division Head and manager of Andersen's audit practice for the entire South Florida region and in this role undertook responsibility for supervising and monitoring the work performed at Harlow's and Pruitt's direction. Harlow, Pruitt, and Denkhaus each knew or recklessly disregarded the accounting violations contained in Sunbeam's 1996 and 1997 financial statements. Harlow, Pruitt, and Denkhaus also knew or recklessly disregarded that the

erroneous financial statements that they had caused Andersen to certify would be relied upon by MS & Co. in deciding to underwrite the convertible notes and by MSSF in deciding to loan Sunbeam hundreds of millions of dollars.

6. This fraud was also knowingly perpetrated by the foreign Andersen branches named in this complaint, Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, and Andersen-Venezuela (collectively, the "Foreign Andersen Branches"). Each of the Foreign Andersen Branches reviewed and audited financial statements prepared for Sunbeam's foreign subsidiaries for 1997, all of which contained significant accounting violations. Each of the Foreign Andersen Branches knew of or recklessly disregarded the fact that the financial statements that they had reviewed and audited were not prepared in accordance with GAAP or reviewed in accordance with GAAS. Each of the Foreign Andersen Branches also knew that the financial statements that they had audited would be incorporated into Sunbeam's consolidated financial statements and that lenders, such as MSSF, and underwriters, such as MS & Co., would rely on these financial statements.

7. The fraud was also knowingly perpetrated by Andersen-Worldwide through the actions of its members, including Harlow, Pruitt, and Denkhaus, and its member firms, including Andersen and the Foreign Andersen Branches.

8. This fraud ultimately forced Sunbeam and several of its subsidiaries to seek relief under Chapter 11 of the Bankruptcy Code, in February 2001. As part of the bankruptcy court-approved reorganization plan, MSSF's $680 million loan to Sunbeam was discharged in full, and MSSF received Sunbeam stock valued at a fraction of the original loan. In addition, the convertible notes issued by Sunbeam and held by MS & Co. had been rendered substantially less valuable.

9. By this complaint, Plaintiffs seek compensatory damages of several hundreds of millions of dollars.

THE PARTIES AND OTHER RELEVANT ENTITIES

10. MS & Co. is a financial services firm that engages in underwriting, investment banking, financial advisory services, securities sales and trading, and research. In late 1997 and early 1998, MS & Co. assisted Sunbeam in identifying potential acquisition targets and served as Sunbeam's financial advisor with respect to certain aspects of Sunbeam's acquisitions of Coleman, Signature Brands, and First Alert. MS & Co. also served as the underwriter of a $750 million offering of convertible notes that Sunbeam used to finance these acquisitions. MS & Co. is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York.

11. MSSF is a company that provides credit services to its clients. In 1998, MSSF entered into a credit agreement with Sunbeam under which MSSF agreed to provide a loan to Sunbeam in connection with Sunbeam's acquisition of Coleman, Signature Brands, and First Alert. Pursuant to the credit agreement, Sunbeam borrowed $680 million from MSSF, with the borrowings used by Sunbeam to fund certain costs relating to the acquisitions. MSSF is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York.

12. Morgan Stanley is a financial services company. It owns 100 percent of the stock of both MS & Co. and MSSF. Morgan Stanley is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York.

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13. Andersen was a member in or business unit of Andersen-Worldwide. Andersen is a partnership formed under the laws of the State of Illinois. Once one of the world's largest accounting firms, almost all of its partners have left the firm. Andersen participated in and coordinated the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits. In addition, Andersen's partners and employees provided consulting services to Sunbeam as part of due diligence work performed in conjunction with Sunbeam's acquisition of Coleman, as well as on other projects.

14. Andersen-Worldwide is a cooperative corporation organized under the laws of Switzerland. Its members included more than 2,000 individuals from 390 offices in 84 countries. Various individuals who were members of Andersen-Worldwide participated in the 1996 and 1997 audits of Sunbeam and the 1998 restatement of the reports of those audits. Andersen-Worldwide and Andersen dictated the policies and procedures to be used by Andersen members and affiliates throughout the world. Andersen and Andersen-Worldwide at all relevant times (a) held themselves out to the public as a single, integrated, full-service, professional business enterprise comprising "one firm" with "one voice" and "common values and vision," (b) completely dominated and controlled each other's assets, operations, policies, procedures, strategies, and tactics, (c) failed to observe corporate formalities, and (d) used and commingled the assets, facilities, employees, and business opportunities of each other, as if those assets, facilities, employees, and business opportunities were their own.

15. Andersen-Canada was a member in or part of Andersen-Worldwide. Andersen-Canada is a partnership organized under the laws of the province of Ontario, Canada. Andersen-Canada audited the 1996 and 1997 audits of Sunbeam's Canadian subsidiary for inclusion in

Andersen's 1996 and 1997 audits of Sunbeam's consolidated financial statements. It also participated in the 1998 restatement of the reports of those audits.

16. Andersen-Hong-Kong was a member in or part of Andersen-Worldwide. Andersen-Hong Kong is a partnership organized under the laws of Hong Kong. Andersen-Hong Kong audited the 1996 and 1997 audits of Sunbeam's Hong Kong subsidiary for inclusion in Andersen's 1996 and 1997 audits of Sunbeam's consolidated financial statements. It also participated in the 1998 restatement of the reports of those audits.

17. Andersen-Mexico was a member in or part of Andersen-Worldwide. Andersen-Mexico is a partnership organized under the laws of Mexico. Andersen-Mexico audited the 1996 and 1997 audits of Sunbeam's Mexican subsidiary for inclusion in Andersen's 1996 and 1997 audits of Sunbeam's consolidated financial statements. It also participated in the 1998 restatement of the reports of those audits.

18. Andersen-Venezuela was a member in or part of Andersen-Worldwide. Andersen-Venezuela is a partnership organized under the laws of Venezuela. Andersen-Venezuela audited the 1996 and 1997 audits of Sunbeam's Venezuelan subsidiary for inclusion in Andersen's 1996 and 1997 audits of Sunbeam's consolidated financial statements. It also participated in the 1998 restatement of the reports of those audits.

19. Defendant Harlow is a resident of Florida and at all times material hereto was a partner in Andersen and a member in Andersen-Worldwide. He served as the engagement partner on the audits of Sunbeam's financial statements from 1993 to 1998. As engagement partner, Harlow undertook the primary responsibility for supervising the 1996 and 1997 audits of Sunbeam, including directing and overseeing the activities with respect to the Sunbeam work

performed by numerous persons at Andersen. Harlow also participated as a member of Sunbeam's due diligence team in connection with Sunbeam's acquisition of Coleman.

20. Defendant Pruitt is a resident of Florida and at all times material hereto was a partner in Andersen and a member of Andersen-Worldwide. He served as the concurring partner on the Sunbeam audits for at least 1996 and 1997. As such, he undertook responsibility for independently reviewing the Sunbeam audit work that had been conducted under Harlow's supervision and ensuring that it complied with GAAP and GAAS.

21. Defendant Denkhaus is a resident of Florida and at all times material hereto was a partner in Andersen and a member of Andersen-Worldwide. Denkhaus was Audit Division Head and manager of Andersen's audit practice for the entire South Florida region. As such, Denkhaus undertook responsibility for ensuring that the audit work performed by Andersen in the South Florida region was conducted in accordance with GAAP and GAAS. Denkhaus also served as the engagement partner on Sunbeam's ultimate restatement of its financial statements.

22. At all times material hereto, Sunbeam Corporation was headquartered in Palm Beach County, Florida. Sunbeam Corporation, through its operating subsidiaries and affiliates, manufactured, marketed, and distributed durable household and outdoor leisure consumer products through mass-market and other consumer channels. On February 6, 2001, Sunbeam and several of its affiliates filed a petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. Sunbeam has since emerged from bankruptcy and now operates under the name American Household.

23. The Coleman Company, Inc. was a leading manufacturer and marketer of consumer products for the worldwide outdoor recreation market. Coleman was a Delaware corporation, with its principal place of business in Kansas. Prior to March 30, 1998, Coleman (Parent)

Holdings Inc. ("Coleman-Parent") owned 44,067,520 shares (or approximately 82 percent) of Coleman. Coleman-Parent is a Delaware corporation, with its principal place of business in New York and is a wholly-owned subsidiary of MacAndrews and Forbes Holdings, Inc. ("MAFCO"). MAFCO is a global investment firm owned and operated by financier Ronald O. Perelman. Through its various subsidiaries and affiliates, MAFCO owns and/or controls a number of multi-billion dollar global corporations, including Revlon, Inc., the international consumer cosmetics company. MAFCO is a Delaware corporation, with its principal place of business in New York.

JURISDICTION AND VENUE

24. This Court has jurisdiction over the subject matter of this action pursuant to section 26.012(2)(a), Florida Statutes, because Plaintiff seeks damages in excess of $15,000 exclusive of interest, costs, and attorneys' fees.

25. This Court has personal jurisdiction over Andersen, Andersen-Worldwide, Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, and Andersen-Venezuela pursuant to section 48.193(1)(a), (b), and (f), Florida Statutes, because each of them, directly or through its partners, members, agents, or employees, (1) operated, conducted, engaged in, or carried on a business or business venture in Florida from which the acts and injuries complained of in this action arose, (2) committed within Florida the tortious acts complained of in this action, or (3) by an act or omission outside of Florida, caused the complained-of injuries to Plaintiffs to occur within Florida at or about the time that it was engaged in service activities in Florida or that its services were used or consumed within Florida in the ordinary course of commerce, trade, or use.

26. This Court has personal jurisdiction over Defendants Harlow, Pruitt, and Denkhaus, because each of them is a resident of Florida.

27. Venue is proper in this Court pursuant to section 47.011, Florida Statutes, because Andersen maintained an office with more than 30 employees and partners in Palm Beach County, and the cause of action accrued in Palm Beach County.

FACTUAL BACKGROUND

Andersen's and Sunbeam's Fraudulent Scheme

28. In July 1996, to address its growing financial difficulties, Sunbeam hired Albert Dunlap as Chairman and Chief Executive Officer. Dunlap was a well-known "turnaround" specialist who had a history of apparent success at other companies. He was nicknamed "Chainsaw Al" because of his practice of cutting staff and closing plants to achieve quick turnaround results.

29. Immediately after he was hired, Dunlap publicly predicted that, as a result of the Company's restructuring, Sunbeam would attain significant increases in its margins and sales. Dunlap replaced almost all of top management with his own selections, hiring Russell A. Kersh (Chief Financial Officer); Donald R. Uzzi (Vice President, Marketing and Product Development, and later Executive Vice President, Consumer Products Worldwide); Lee B. Griffith (Vice President, Sales); and Robert J. Gluck (Principal Accounting Officer).

30. Unbeknownst to the public and to Plaintiffs, Sunbeam's new senior management embarked upon a scheme designed to misrepresent Sunbeam's financial condition. Sunbeam's subsequent November 1998 restatement of its 1996 and 1997 financial statements revealed the plan that Sunbeam's management had adopted and Andersen facilitated. In 1996, Sunbeam's management, with Andersen's knowing assistance, caused Sunbeam to overstate its operating losses by at least $40 million, thereby establishing an overly bleak financial backdrop against

which the company's performance in 1997 would be measured. In 1997, by contrast, management caused Sunbeam dramatically to overstate its earnings. When 1997 operating earnings were eventually corrected and restated, they were $95 million less than the earnings originally reported — and approximately half of the figure that Andersen had previously certified.

31. In order to convince the public that Sunbeam's turnaround was real, Sunbeam needed an outside auditor to validate its financial reports. Andersen — desperate to retain a valuable client — stood ready to assist Sunbeam in its scheme.

32. After Dunlap assumed control of Sunbeam, Andersen had reason to fear that its relationship with Sunbeam was in jeopardy. Harlow, Pruitt, and Denkhaus knew that Dunlap had employed Coopers & Lybrand, one of Andersen's major competitors, as a financial consultant and independent auditor in past turnaround assignments. In fact, Dunlap had already engaged Coopers & Lybrand to assist in planning Sunbeam's massive restructuring.

33. Andersen had a significant stake in retaining Sunbeam, a long-time major client. Being dropped by a high-profile client such as Sunbeam would have been a severe blow to Andersen's reputation. The company generated substantial income for Andersen's Florida office, paying over $1 million in fees for its 1995 audit alone and providing it with substantial income from lucrative consulting assignments. Indeed, Andersen was so eager to keep Sunbeam as its client that it agreed to a 30-percent reduction in its 1996 audit fees.

34. Andersen's fees were particularly important to Andersen's partners, whose incomes were dependent on the continued business from Sunbeam. Andersen tied part of its audit partners' compensation to the solicitation and marketing of non-audit consulting services, and created other revenue-sharing arrangements between audit and consulting partner groups.

35. Andersen put tremendous pressure on partners to generate more fees. A "depth chart" was developed for each audit client based upon the level of services provided to that client. Partner compensation was determined based on the additional services sold, and the ability of an Andersen partner to increase his income depended directly upon the level of fees that the partner "controlled" or sold to his or her assigned clients. These pressures led directly to a conflict of interest for the auditors on the Sunbeam engagement and were a significant factor that caused Andersen, Harlow, Pruitt, and Denkhaus, as well as the Foreign Andersen Branches, to abandon their independence, objectivity, and integrity on the Sunbeam financial statement audits and reviews.

Andersen's Worldwide Operations

36. Andersen was formed in Illinois in 1913 as an accounting and consulting partnership under the name "Arthur Andersen & Co." In 1977, as Andersen increased its global presence, it created a new structure called the "Andersen Worldwide Organization." The Andersen Worldwide Organization was overseen by Andersen-Worldwide, which acted as an umbrella organization for the Andersen, the other Andersen Worldwide Organization member firms, the members and contract partners of Andersen-Worldwide, and the individual members and partners of the Andersen Worldwide Organization member firms. The model adopted by the Andersen Worldwide Organization was intended to preserve "The Heart of Partnership Culture," including income sharing among the member firms of the Andersen Worldwide Organization and a common governance model. Thus, partners (or equivalents) in the various branches of the Andersen Worldwide Organization were also members of Andersen-Worldwide, resulting in a global partnership of more than 2,000 individuals from 390 offices in 84 different countries. In

addition to overlapping partners and members, Andersen-Worldwide and Andersen shared officers in common. For example, the former CEO and Managing Partner of Andersen-Worldwide, Joseph Berardino, was also the CEO and Managing Partner of Andersen.

37. Andersen-Worldwide and Andersen also shared the same address. In its promotional literature, Andersen-Worldwide stated that its headquarters were located at 33 West Monroe Street, Chicago, Illinois 60603. That is the same address as the headquarters of Andersen.

38. Andersen-Worldwide set uniform professional standards for all its offices and required the members and partners in its international offices to agree to be bound by those professional standards and principles. Andersen-Worldwide coordinated the sharing of costs and allocation of revenues and profits among its members and partners and its offices around the world. Andersen-Worldwide operated under a worldwide tax structure. In addition, Andersen-Worldwide handled all borrowing on behalf of its international offices and maintained those offices' financial records, payroll, and employee health-benefits plans. All of Andersen's offices also shared global computer operations and training facilities.

39. The components of the Andersen Worldwide Organization ignored corporate formalities in referring to themselves and each other. For example, personnel affiliated with Andersen and Andersen-Worldwide regularly exchanged correspondence and e-mails that were labeled "Andersenwo" — short for "Andersen World Organization." Documents prepared by Andersen often bore the insignia and logos of Andersen-Worldwide, including "Andersen-Worldwide," "Andersen," and "Arthur Andersen." In its promotional literature, Andersen used the names "Andersen Worldwide," "Andersen," and "Arthur Andersen" interchangeably. In addition, Andersen sometimes used only the name "Andersen" when referring to all or part of the

Andersen Worldwide Organization and did not differentiate between Andersen-Worldwide and its offices around the globe.

40. In promotional literature, Andersen, Andersen-Worldwide, and the member firms of the Andersen Worldwide Organization marketed themselves as "one firm," "a single worldwide operating structure," that "think[s] and act[s] as one."

41. News releases issued by Andersen, Andersen-Worldwide, and other member firms confirmed that the Andersen Worldwide Organization and Andersen operated as a single worldwide organization:

- Andersen referred to the brand identity adopted by the member firms of the Andersen "global client service network."
- "With world-class skills in assurance, tax, consulting and corporate finance, Arthur Andersen has more than 77,000 people in 84 countries who are united by a single worldwide operating structure that fosters inventiveness, knowledge sharing, and a focus on client success."
- "Arthur Andersen is significantly different from the other firms in structure, governance and culture — differences which can be pivotal in terms of the quality of service a client company receives. Important distinctions mark our firm from the rest. We have evolved a unique organizational culture that today unites the people of Andersen Worldwide. We are the only true global firm, sharing knowledge and doing business across borders, sharing costs which fund methodologies, research and development, lines and industry groups."
- Andersen spokesman David Tabolt stated: "We conduct more than 30,000 audits around the world every year."
- "AA is already much more integrated globally than the rest of the Big Five. As Mr. Berardino [Andersen-Worldwide's former CEO, who resigned in March 2002] points out, 'there is one name over the door. We're not an alphabet soup.' The cohesiveness of AA's culture has been a source of humor to outsiders, who have labeled its bean counters 'Androids.' While some rivals are still struggling with a complicated array of national partnerships, and thus different systems for sharing pay, AA partners enjoy a single, and possibly unique, system of remuneration: they receive a list of what each of them has earned in the past year."

- "Arthur Andersen is a global professional services organization consisting of over 100 member firms and more than 61,000 people united by a single worldwide operating structure and a common culture of innovation and knowledge sharing. This unique 'one-firm' approach qualifies the people of Arthur Andersen to serve clients by bringing together any of more than 40 competencies in a way that transcends geographic borders and organizational lines. Arthur Andersen's people provide effective business solutions to over 100,000 clients in 81 countries around the world. Since its beginning in 1913, Arthur Andersen has realized 85 years of uninterrupted growth. With revenues of more than US $6 billion, it stands today as a world leader in professional services. Arthur Andersen is a business unit of Andersen Worldwide."

The Andersen-Worldwide website (Andersen.com) confirmed that there was a single worldwide organization:

- "Our 390 offices may be scattered amid 84 different countries, but our voice is the same. No matter where you go, or who you talk to, we act with one vision. Without boundaries."
- "One world. One organization."

Andersen's recruiting brochures reflected that it was a single worldwide organization:

- "We will, in Arthur Andersen's own words, 'act as one firm and speak with one voice. It is a united family that operates across hierarchies, geographical boundaries, client groupings, service lines and competencies and feels the kinship of understanding and shared responsibility."

42. Andersen-Worldwide managed its operations by practice groups, as well as by geographical region. Each practice group was headed by a global practice director who oversaw, directed, and controlled the operations of each practice group worldwide. Regional practice directors (*e.g.*, Denkhaus was the director of Andersen-Worldwide's audit practice in South Florida) reported to the global practice director and managed the practice group within their regions.

43. As a result of the "one firm" approach, all actions taken by members of Andersen-Worldwide, as well as all actions taken by member firms of Andersen-Worldwide, may be attributed to Andersen-Worldwide.

44. Andersen applied the "one firm" approach in its work with Sunbeam. Top partners responsible for the Sunbeam audits and restatement were partners of Andersen and members of Andersen-Worldwide, including the engagement partner on the Sunbeam audits, Harlow, the concurring partner on those audits, Pruitt, and the Audit Division Head and manager of Andersen's audit practice for the entire South Florida region, Denkhaus.

45. In addition, various international offices of Andersen-Worldwide did substantial work for Sunbeam. Sunbeam was a multinational corporation with operations in Canada, Mexico, Venezuela, and Hong Kong. The Sunbeam engagement required the participation of auditors from each of those countries and numerous American cities. Harlow, on behalf of both Andersen and Andersen-Worldwide, developed work plans that he circulated to Andersen's branches in other countries, including the Foreign Andersen Branches. Those offices worked closely with Harlow and others within Andersen and Andersen-Worldwide to complete the tasks outlined in the plans. They sent their work product to Harlow for inclusion in an Andersen-Worldwide Management Letter, as well as for incorporation in Andersen's audit work.

The Fraudulent 1996 Financial Statements

46. In 1996, after Dunlap took control of Sunbeam, Andersen permitted Sunbeam management to employ numerous accounting practices that — as Sunbeam's November 1998 restatement of its 1996 financial statements and an SEC investigation later showed — did not

comply with GAAP. The objective of these accounting violations was to set an artificially bleak financial backdrop against which Sunbeam's 1997 performance would be judged.

47. Among other things, Sunbeam's 1996 financial statements, certified by Andersen, did not comply with the accounting principles of (1) reliability, Financial Accounting Standards Board ("FASB") Statement of Financial Accounting Concepts No. 2, §§ 58-97; Accounting Principles Board ("APB") Statement No. 4, §§ 109, 138, 189; (2) completeness, FASB Statement of Financial Accounting Concepts No. 2, §§ 79, 80; APB Statement No. 4, § 94; (3) conservatism, FASB Statement of Financial Accounting Concepts No. 2, §§ 91-97; APB Statements No. 9, §§ 35, 71; (4) neutrality, FASB Statement of Financial Accounting Concepts No. 2, §§ 98-110; or (5) relevance, FASB Statement of Financial Accounting Concepts No. 2, §§ 47, 48.

48. Among the accounting frauds that Andersen knowingly allowed was the artificial inflation of Sunbeam's reserves. Because the reserves were charged as an expense against income, this accounting practice allowed Sunbeam to overstate the 1996 loss against which its 1997 financial results would be compared.

49. For example, Sunbeam created a $338 million reserve for "restructuring" charges. As the November 1998 restatement made clear, included in these charges were costs of redesigning product packaging; costs of relocating employees and equipment; bonuses to be paid to employees who were told that they were being laid off but were asked to stay on temporarily; advertising expenses; and certain consulting fees. Because these items benefited future activities, GAAP did not permit them to be classified as restructuring charges. Andersen also permitted Sunbeam to violate GAAP by creating a $12 million reserve for a lawsuit alleging that

Sunbeam was liable for cleanup costs associated with a hazardous waste site, even though Sunbeam's estimated liability was, at best, half that amount.

50. Andersen also permitted Sunbeam improperly to write down its household products inventory in 1996. In connection with the restructuring, Sunbeam had decided to eliminate half of Sunbeam's product lines and to liquidate its inventory of those product lines. Although only half of Sunbeam's product lines were eliminated, Andersen allowed Sunbeam to apply, at year-end 1996, the special accounting treatment that it had accorded the eliminated lines to its entire inventory of household products. As a result, as the November 1998 financial restatement later showed, Sunbeam understated the balance sheet value of its inventory at year-end 1996 by approximately $2 million and overstated its 1996 loss by the same amount.

51. Andersen also allowed management improperly to recognize, as a 1996 expense, $2.3 million in 1997 advertising expenses and related costs. In addition, Andersen permitted Sunbeam to manipulate its 1996 liabilities for "cooperative advertising." It was Sunbeam's practice to fund a portion of its retailers' costs of running local promotions. As required by GAAP, Sunbeam accrued its estimated liabilities for this expense. At year-end 1996, Sunbeam set its cooperative advertising accrual at an inflated value of $21.8 million. According to the November 1998 restatement, this accrual was improper under GAAP because it was approximately 25 percent higher than the prior year's accrual amount, without a proportional increase in sales providing a basis for the increase. Ultimately, as the November 1998 restatement showed, $5.8 million of that excessive accrual was used (without disclosure) to inflate Sunbeam's 1997 income.

Andersen's 1996 Unqualified Audit Opinion

52. In the course of auditing Sunbeam's 1996 financial statements, Andersen became aware of these and other improper accounting practices. Indeed, an Andersen employee questioned a Sunbeam employee about the restructuring reserves and was told that the reserve included "everything but the kitchen sink." Harlow, the Andersen engagement partner, knew of this statement.

53. Harlow informed Kersh and Gluck, who were part of Sunbeam's senior management, that certain of the restructuring reserves that Sunbeam had established were not properly accounted for as restructuring costs under GAAP because they benefited Sunbeam's future operations. He proposed that Sunbeam reverse the accounting entries on its books and records reflecting the establishment of these reserves. However, when Kersh and Gluck refused to reverse these items, Harlow caused Andersen to acquiesce to Sunbeam's fraudulent accounting for the reserves.

54. In March 1997, Andersen issued an unqualified audit opinion regarding Sunbeam's 1996 financial statements and authorized the inclusion of its audit opinion in Sunbeam's 1996 Form 10-K filed with the SEC. A copy of the 1996 Audit Opinion is exhibit "A" attached hereto. Consistent with Andersen's internal procedures, the Audit Opinion was issued at the direction of Harlow and Pruitt. Denkhaus, as Audit Division Head and manager of Andersen's audit practice for the entire South Florida region, had undertaken responsibility for supervising the audit work performed in Andersen's South Florida region and thus also bore responsibility for the issuance of this opinion.

55. Despite its knowledge of the many improper accounting practices that Sunbeam's management had employed, Andersen's opinion stated:

> We conducted our audits in accordance with generally accepted auditing standards.
>
> Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.
>
> In our opinion, the financial statements . . . present fairly, in all material respects, the financial position of Sunbeam Corporation and subsidiaries as of December 31, 1995 and December 29, 1996, and the results of their operations and their cash flows for each of the three fiscal years in the period ended December 29, 1996 in conformity with generally accepted accounting principles.

56. Andersen also knowingly provided false descriptions of certain of Sunbeam's specific accounting practices. For example, it characterized Sunbeam's treatment of its restructuring charges in Note 2 to the audited 1996 consolidated financial statements as follows:

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

In fact, however, Andersen knew that Sunbeam had improperly inflated its restructuring costs by millions of dollars.

57. Andersen's 1996 audit violated GAAS because, among other things, Andersen failed (1) to perform the audits with an attitude of professional skepticism as required by the Statement on Auditing Standards ("SAS") No. 53; (2) to conclude that there was a significant risk that Sunbeam management would intentionally distort the company's financial statements, in violation of American Institute of Certified Public Accountants Professional Standards, AU §§ 316.10 and 316.12; (3) to recognize that the accounting policies employed by Sunbeam were not acceptable in the circumstances, in violation of AU § 316.19; (4) to obtain sufficient competent evidential matter through inspection, observation, inquiries, and confirmations to afford a reasonable basis for its opinions regarding Sunbeam's financial statements, in violation of AU § 150.02; (5) to exercise due professional care in the performance of the audit, in violation of AU § 150.02; (6) to plan the work adequately to uncover the errors and irregularities in Sunbeam's accounting information, in violation of AU § 150.02; and (7) to obtain a sufficient understanding of Sunbeam's internal control structure to plan the audits and to determine the nature, timing, and extent of tests to be performed, in violation of AU § 150.02.

58. In addition, in conducting the 1996 audit, Andersen (1) improperly relied on management representations rather than applying the auditing procedures necessary to afford a reasonable basis for an opinion on Sunbeam's financial statements, in violation of SAS No. 19 (AU § 333.02); (2) failed to recognize that misstatements resulting from misapplication of GAAP, departures from fact, and omissions of necessary information, in aggregate, caused Sunbeam's financial statements to be materially misstated, in violation of SAS No. 47 (AU § 312.04); (3) failed to issue a qualified or adverse opinion, in violation of SAS No. 47 (AU § 312.31); and (4) improperly concluded that the accounting principles applied by Sunbeam were appropriate in the circumstances and that Sunbeam's financial statements were informative

of matters that could affect their use, understanding, and interpretation, in violation of SAS No. 69 (AU § 411.04(b) and (c)).

59. Harlow, Pruitt, and Denkhaus knew of or recklessly disregarded numerous red flags that should have caused them to prevent Andersen from certifying Sunbeam's 1996 financial statements. However, they did nothing to stop Andersen's unqualified 1996 audit opinion from being included in Sunbeam's Form 10-K filing with the SEC, despite the fact that they knew or were reckless in not knowing that the financial statements that Andersen had certified were materially misleading. Harlow, Pruitt, and Denkhaus also knew that the false financial statements that they had caused Andersen to issue would be incorporated into Sunbeam's consolidated financial statements and that lenders, such as MSSF, and underwriters, such as MS & Co., would rely on these financial statements.

60. In all, the 1996 financial statements audited by Andersen were materially false and misleading and overstated Sunbeam's operating losses for 1996 by at least $40 million. Moreover, Andersen's unqualified audit opinion was false in at least two material respects. First, the financial statements that Andersen audited did not "fairly" present Sunbeam's financial position in conformity with GAAP, as it represented. Second, Andersen had not, as it claimed, conducted its audit in accordance with GAAS.

The Fraudulent 1997 Financial Statements

61. The accounting frauds in which Andersen permitted Sunbeam to engage in 1997 were aimed at inflating the company's earnings. To accomplish this — as the November 1998 restatement and an SEC investigation subsequently showed — Andersen allowed Sunbeam to

record fraudulent sales, to account improperly for one-time events, and improperly to use "cookie-jar" reserves, all in violation of GAAP.

62. Among other things, Sunbeam's 1997 financial statements, certified by Andersen, did not comply with the accounting principles of (1) reliability, FASB Statement of Financial Accounting Concepts No. 2, §§ 58-97; APB Statement No. 4, §§ 109, 138, 189; (2) completeness, FASB Statement of Financial Accounting Concepts No. 2, §§ 79, 80; APB Statement No. 4, § 94; (3) conservatism, FASB Statement of Financial Accounting Concepts No. 2, §§ 91-97; APB Statements No. 9, §§ 35, 71; (4) neutrality, FASB Statement of Financial Accounting Concepts No. 2, §§ 98-110; or (5) relevance, FASB Statement of Financial Accounting Concepts No. 2, §§ 47, 48.

63. One of the revenue inflation tactics permitted by Andersen in 1997 was improper accounting for "bill-and-hold" sales. A bill-and-hold sale occurs when a seller bills a customer for a purchase while retaining the merchandise for later delivery. During 1997, Dunlap's management team offered financial incentives to various customers to purchase products. Under GAAP, revenue under bill-and-hold transactions may be recognized only if, among other things, the buyer — not the seller — requests a sale on that basis. As Andersen subsequently learned in the course of its 1997 audit, the purported bill-and-hold customers had not requested that treatment, and, in numerous cases, the risks of ownership and legal title were never passed to the customer. Sunbeam added more than $29 million to its 1997 sales and $4.5 million to income by improperly accounting for these transactions.

64. Another income-boosting tactic that Andersen sanctioned was Sunbeam's improper use of its inflated 1996 reserves, which artificially increased the company's 1997 income by almost $5 million. Andersen also let Sunbeam improperly treat $19 million that it received from

the sale of discounted and obsolete inventory as ordinary income. Although the recognition of that revenue was permitted under GAAP, Sunbeam was required to disclose that revenue as a non-recurring event. Sunbeam failed to do so, again with Andersen's blessing.

65. In addition, Andersen and Andersen-Hong Kong allowed Sunbeam's Hong Kong subsidiary to book sales that violated applicable accounting principles because they included an unlimited right to return unsold merchandise and because the amount of future returns on such sales could not reasonably be estimated. On Andersen's and Andersen-Hong Kong's watch, Sunbeam's Hong Kong subsidiary improperly recorded sales revenue of $8.6 million from various sales made during the fourth quarter of 1997. Andersen and Andersen-Hong Kong also permitted Sunbeam's Hong Kong subsidiary to under-provide for warranty and product liability expenses; improperly to include in 1997 net sales of $0.5 million of goods that were not shipped until 1998; and improperly to defer 1997 advertising costs to future periods.

66. Andersen and Andersen-Canada also permitted Sunbeam's Canadian subsidiary improperly to book sales that did not meet the applicable sales recognition criteria because they included an unlimited right to return unsold merchandise and because the amount of future returns on such sales could not reasonably be estimated.

67. Andersen and Andersen-Mexico also permitted Sunbeam to employ several improper accounting tricks with respect to its Mexican subsidiary. Sunbeam's Mexican subsidiary engaged in $900,000 in bill-and-hold transactions in 1997 that should not have been recognized as income until 1998. In addition, the subsidiary's inventory was overvalued by $2 million, and the financial statements for Sunbeam's Mexico operations failed to include a $3 million expense for the profit-sharing obligations of that business.

68. Andersen and Andersen-Venezuela also permitted Sunbeam's Venezuela subsidiary improperly to value its inventory of raw materials. Its books reflected purchases of raw materials that were held at various suppliers. Andersen failed to confirm that the booked amounts represented materials that were actually in the possession of suppliers. Had it done so, it would have discovered that the materials did not exist.

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

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

71. As a result of these and other violations of accounting standards, in 1997, Sunbeam reported $186 million in income, much of which was, according to the November 1998 restatement, improper under GAAP. In all, the overstatements included over $90 million of improper net income, including approximately $10 million from a sham sale of inventory to a contractor, approximately $4.5 million from non-GAAP bill-and-hold sales, approximately $35 million in income derived from the use of non-GAAP reserves and accruals taken at year-end 1996, and approximately $6 million from improper revenue recognition.

Sunbeam's Purchase of Coleman

72. Toward the end of 1997, Sunbeam engaged MS & Co. to advise it with respect to the possible sale of its core businesses and/or the initiation of one or more major acquisitions. Ultimately, Coleman, Signature Brands, and First Alert were identified as three companies interested in being acquired by Sunbeam.

73. On January 28, 1998, Sunbeam announced its financial results for 1997, reporting total revenues of $1.168 billion, and total earnings from continuing operations of $189 million (or $1.41 per share).

74. On February 3, 1998, Harlow met with key officers of Sunbeam to discuss the acquisition of Coleman and its financial impact on Sunbeam. By that time, as a result of reviewing Sunbeam's 1997 financial statements in the course of its audit, Harlow and Andersen knew that Sunbeam's 1997 results were false.

75. On February 20, 1998, Andersen agreed to act as a Sunbeam financial advisor and perform financial due diligence in connection with Sunbeam's acquisition of Coleman, First Alert, and Signature Brands, further compromising Andersen's duty as an auditor to maintain its

independence from its client. In agreeing to undertake that assignment, Andersen became an active member of the team working to assist Sunbeam in its acquisitions. Harlow and other Andersen employees who worked on Sunbeam's audit also served as members of Sunbeam's due diligence team.

76. On February 27, 1998, Sunbeam's Board of Directors met in New York to discuss Sunbeam's possible purchase of Coleman. During the February 27, 1998 meeting, MS & Co. provided Sunbeam's Board of Directors with a written "fairness" opinion regarding the fair acquisition price of Coleman. The opinion made clear that, even in the context of issuing a fairness opinion on the Coleman acquisition price, MS & Co. had relied upon Andersen's representations regarding Sunbeam's financial health. The fairness opinion explicitly stated that MS & Co. had reviewed "certain publicly available financial statements and other information" of Sunbeam. The opinion advised that MS & Co. had "assumed and relied upon without independent verification the accuracy and completeness of the information reviewed by us for the purposes of this opinion."

77. The Sunbeam Board of Directors approved the Coleman acquisition. That same day, Coleman-Parent — the 82-percent shareholder of Coleman — agreed to sell Coleman to Sunbeam for a purchase price of $2.2 billion. Sunbeam agreed to provide Coleman-Parent with $160 million in cash, to assume $584 million in Coleman-related debt, and to provide Coleman-Parent with 14,099,749 shares of Sunbeam stock. Sunbeam also agreed to purchase Signature Brands and First Alert for approximately $300 million.

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Andersen's 1997 Unqualified Audit Opinion

78. In the first week of March 1998, shortly after the agreement for Sunbeam's purchase of Coleman was signed, but before the transaction closed, Andersen rendered an unqualified audit opinion for Sunbeam's 1997 financial statements. With Andersen's express consent, management included that opinion in Sunbeam's 1997 Form 10-K filed with the SEC on March 6, 1998.

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

80. In the course of its audit of Sunbeam's 1997 financial records, Andersen learned that Harlow's concerns were well-founded. It discovered that Sunbeam had improperly accounted for certain bill-and-hold sales, had misused its reserves, and had overvalued its inventories. Harlow discussed these problems with Sunbeam's senior management and proposed that Sunbeam reverse these improper entries.

81. For example, as part of Andersen's 1997 year-end audit, Harlow raised with Sunbeam's management the improper accounting treatment accorded to the EPI transaction. He proposed that Sunbeam reverse the accounting entries reflecting the revenue recognition for that

transaction, pointing out that the profit guarantee and the indeterminate value of the contract rendered revenue recognition inconsistent with GAAP. Kersh and Gluck refused to reverse the transaction. Harlow caused Andersen to acquiesce in management's actions. As a result, Sunbeam's 1997 audited financial statements reflect almost $10 million of false profit on the sham EPI transaction.

82. Harlow also raised with Kersh and Gluck Sunbeam's inappropriate use of reserves and recorded the full $4.9 million of costs that Sunbeam had improperly offset against reserves on the list of proposed audit adjustments. Kersh and Gluck, however, refused to make the proposed adjustments. Harlow again failed to insist on honest, accurate accounting. Instead, he caused Andersen to acquiesce in Sunbeam's refusal to reverse these improper reductions in current-period costs, although he knew or recklessly disregarded facts indicating that this improper accounting would materially distort Sunbeam's reported results of operations. In fact, this use of reserves increased 1997 fourth-quarter income by almost 8 percent.

83. Harlow also proposed adjustments to reverse $2.9 million related to Sunbeam's inventory overvaluation by its Mexican subsidiary and $563,000 related to various miscellaneous terms. Kersh and Gluck refused to make appropriate adjustments, and Harlow again caused Andersen to acquiesce in their refusal to reverse these errors — despite the fact that these items added over 5.4 percent to Sunbeam's reported earnings for the fourth quarter and contributed to the larger misstatement of Sunbeam's reported results of operations stemming from the fraudulent conduct of Sunbeam's management.

84. These improper accounting techniques raised clear red flags that should have — and must have — alerted Andersen to the need for greater scrutiny regarding all of Sunbeam's revenue recognition decisions. At a minimum, Andersen should have been on guard as to all of

the proposed audit adjustments that Harlow initially proposed but later rejected, and any previously recognized improper items that were ultimately dismissed as "immaterial."

85. Despite these clear red flags, Andersen once again gave Sunbeam a clean bill of financial health, issuing an unqualified audit opinion regarding Sunbeam's 1997 financial statements and authorized the inclusion of its audit opinion in Sunbeam's 1997 Form 10-K filed with the SEC. A copy of the 1997 Audit Opinion is exhibit "B" attached hereto. The Audit Opinion is signed by Andersen. Consistent with Andersen's internal procedures, the Audit Opinion was issued at the direction of Harlow and Pruitt. Denkhaus, as Audit Division Head and manager of Andersen's audit practice for the entire South Florida region, had undertaken responsibility for supervising the audit work performed in Andersen's South Florida region and thus also bore responsibility for the issuance of this opinion.

86. In this opinion, Andersen stated:

> We conducted our audits in accordance with generally accepted auditing standards. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.
>
> In our opinion, the financial statements . . . , present fairly, in all material respects, the financial position of Sunbeam Corporation and subsidiaries as of December 29, 1996 and December 28, 1997, and the results of its operations and its cash flows for each of the three fiscal years in the period ended December 28, 1997 in conformity with generally accepted accounting principles.

87. In fact, Andersen's 1997 audit violated GAAS because, among other things, Andersen had failed (1) to perform the audits with an attitude of professional skepticism as

required by SAS No. 53; (2) to reach a conclusion that there existed a significant risk of intentional distortion of financial statements by Sunbeam management, in violation of AU §§ 316.10 and 316.12; (3) to recognize that the accounting policies employed by Sunbeam were not acceptable in the circumstances, in violation of AU § 316.19; (4) to obtain sufficient competent evidential matter through inspection, observation, inquiries, and confirmations to afford a reasonable basis for its opinions regarding Sunbeam's financial statements, in violation of AU § 150.02; (5) to exercise due professional care in the performance of the audit, in violation of AU § 150.02; (6) to plan the work adequately to uncover the errors and irregularities in Sunbeam's accounting information, in violation of AU § 150.02; and (7) to obtain a sufficient understanding of Sunbeam's internal control structure to plan the audits and to determine the nature, timing, and extent of tests to be performed, in violation of AU § 150.02.

88. In addition, in conducting the 1997 audit, Andersen (1) improperly relied on management representations rather than applying the auditing procedures necessary to afford a reasonable basis for an opinion on Sunbeam's financial statements, in violation of SAS No. 19 (AU § 333.02); (2) failed to recognize that misstatements resulting from misapplication of GAAP, departures from fact and omissions of necessary information, in aggregate, caused Sunbeam's financial statements to be materially misstated, in violation of SAS No. 47 (AU § 312.04); (3) failed to issue a qualified or adverse opinion, in violation of SAS No. 47 (AU § 312.31); (4) improperly concluded that the accounting principles applied by Sunbeam were appropriate in the circumstances and that Sunbeam's financial statements were informative of matters that could affect their use, understanding and interpretation, in violation of SAS No. 69 (AU § 411.04(b) and (c)); and (5) failed to report that a change in the application of accounting principles in Sunbeam's 1997 financial statements had materially affected their

comparability with the financial statements for prior periods, especially 1996, due to a different treatment of sales and reserves in those periods, in violation of SAS Nos. 1 and 43 (AU § 420.02).

89. Harlow, Pruitt, and Denkhaus knew of or recklessly disregarded numerous red flags that should have caused them to withhold Andersen's unqualified certification of Sunbeam's 1997 financial statements. However, Harlow, Pruitt, and Denkhaus did nothing to stop Andersen's unqualified 1997 audit opinion from being included in Sunbeam's Form 10-K filing with the SEC, despite the fact that they knew or were reckless in not knowing that the financial statements that Andersen had certified were materially misleading. Harlow, Pruitt, and Denkhaus also knew that the false financial statements that they had caused Andersen to issue would be incorporated into Sunbeam's consolidated financial statements and that MSSF, as a lender, and MS & Co., as an underwriter, would rely on these financial statements.

90. The Foreign Andersen Branches also knew of or recklessly disregarded the fact that the financial statements of Sunbeam's foreign subsidiaries, which they had reviewed and audited, were not prepared in accordance with GAAP or reviewed in accordance with GAAS. The Foreign Andersen Branches nevertheless certified that their audit work complied with GAAP and GAAS. Each of the Foreign Andersen Branches also knew that the false financial statements that they had audited would be incorporated into Sunbeam's consolidated financial statements and that lenders, such as MSSF, and underwriters, such as MS & Co., would rely on these financial statements.

91. In all, the 1997 financial statements audited by Andersen reported operating income of $186 million — an overstatement of at least 50 percent. Like its 1996 unqualified audit opinion, Andersen's 1997 opinion was false in two material respects. First, the financial

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

Reliance by Plaintiffs on Andersen's Unqualified Audit Opinions

92. After it agreed to acquire Coleman, First Alert, and Signature Brands, Sunbeam needed to raise approximately $2.3 billion to refinance existing debt and to fund these acquisitions. To accomplish these financing objectives, Sunbeam's management elected to issue $500 million in subordinated convertible notes (an amount later increased to $750 million) (the "Convertible Note Offering") and to enter into a new $2 billion senior credit agreement (later reduced to $1.7 billion) with secured lenders (the "Bank Facility"). MS & Co. served as the lead underwriter for the Convertible Note Offering. MSSF served as the Syndication Agent for the Bank Facility and coordinated the Bank Facility with First Union and Bank of America, Sunbeam's other secured lenders.

93. Andersen, Harlow, Pruitt, and Denkhaus knew of these proposed financing arrangements. Specifically, they knew that the Coleman and other acquisitions would not close unless Sunbeam secured the financing necessary to cover the acquisition prices. They knew that MS & Co. would underwrite a notes offering that Sunbeam would use to finance the transaction. Moreover, they knew that MSSF was a principal participant in the Bank Facility, and that MSSF would be relying on the representations Andersen made regarding Sunbeam's financial condition.

94. In addition, Andersen, Harlow, Pruitt, and Denkhaus knew that documents issued in connection with the Convertible Note Offering clearly stated that "[Sunbeam] is currently

negotiating the terms of the New Credit Facility with a group of banks which [Sunbeam] expects will provide for borrowings by [Sunbeam] or one or more of its subsidiaries in the aggregate principal amount of $2.0 billion. *The New Credit Facility is being arranged by an affiliate of [Morgan Stanley].*" Andersen, Harlow, Pruitt, and Denkhaus knew that the affiliate referred to in this document was MSSF.

95. In addition to their knowledge of MS & Co.'s and MSSF's roles in Sunbeam's acquisitions, Andersen, Harlow, Pruitt, and Denkhaus had many reasons to know that MS & Co. and MSSF would rely on Sunbeam's audited financial statements. To begin with, Andersen, Harlow, Pruitt, and Denkhaus, in their substantial experience working on multi-billion dollar mergers and acquisitions, understood that Sunbeam's lenders and underwriters would rely on an auditor's certification of Sunbeam's financial condition. As would any lender engaged in a deal of this scale, MSSF looked to the financial statements provided by Sunbeam and audited by Andersen to evaluate annual cash flow and to assess Sunbeam's ability, following the acquisition, to promptly and comfortably pay interest and, ultimately, pay back the loan. Indeed, reasonable and professional lenders such as MSSF, Bank of America, and First Union would not have loaned over $1 billion dollars to any person or entity without strong assurance that their money would be returned. Andersen, Harlow, Pruitt, and Denkhaus knew that MS & Co., the underwriter of the Convertible Note Offering, would similarly refuse to underwrite a $750 million offering without strong assurance that Sunbeam's financial condition was sound.

96. Not only were Andersen, Harlow, Pruitt, and Denkhaus aware that any prudent business in MS & Co.'s or MSSF's position *would* rely on Andersen's financial statements, but they also knew that MS & Co. and MSSF *were* specifically relying on Andersen's certifications. In a letter dated March 11, 1998, MS & Co. wrote a letter to Andersen — to the attention of

Harlow — notifying Andersen that MS & Co. would be "reviewing certain information relating to Sunbeam that will be included in the Offering Memorandum." MS & Co. requested that Andersen deliver to it a "'comfort' letter concerning the financial statements" of Sunbeam.

97. In response to this request, Andersen expressly represented to MS & Co. that Sunbeam's financial statements were truthful and that Andersen's unqualified audit opinions were reliable. On March 19, 1998, Andersen sent MS & Co. a "comfort" letter stating that, in Andersen's opinion, "the consolidated financial statements [for 1996 and 1997] audited by [Andersen] and included in the Offering Memorandum comply as to form in all material respects with the applicable accounting requirements of the [Securities Act of 1933] and the related published rules and regulations." Andersen knew that MS & Co. would rely on the comfort letters in deciding to underwrite the Convertible Note Offering. Andersen also knew that Sunbeam's acquisitions were contingent on Sunbeam's obtaining the necessary financing for the transactions, including the underwriting of the convertible notes. Andersen knew that, absent its representations, MS & Co. would not have underwritten the notes, and therefore the financing, including MSSF's loan to Sunbeam, would not have gone forward. A copy of the March 19, 1998 letter is exhibit "C" attached hereto.

98. Harlow and Pruitt authorized the issuance of the March 19, 1998 comfort letter, which was signed by Andersen. Upon information and belief, Denkhaus knew of this letter and did nothing to stop its issuance.

99. In a follow-up letter to MS & Co. dated March 25, 1998, Andersen reaffirmed its previous representation, stating that it "reaffirm[ed] as of the date hereof (and as though made on the date hereof) all statements made in that letter." Again, Andersen knew that MS & Co. would rely on the comfort letters in deciding to underwrite the Convertible Note Offering and that,

absent its representations, the financing, including MSSF's loan to Sunbeam, would not have gone forward. A copy of the March 25, 1998 letter is exhibit "D" attached hereto.

100. Again, Harlow and Pruitt authorized the issuance of this letter, which was likewise signed by Andersen. Upon information and belief, Denkhaus also knew of this letter and did nothing to stop its issuance.

101. In addition to Andersen's written representations regarding Sunbeam's financial condition, Andersen partners and employees, including Harlow, participated in meetings and telephone calls in which they represented to MS & Co. and MSSF that Sunbeam's audited financial statements were accurate. For example, on March 12, 1998, representatives of MS & Co. participated in a conference call with Harlow and another Andersen employee to discuss Sunbeam's financial statements. In this call, Harlow assured MS & Co.'s representatives that there were no material inaccuracies in Sunbeam's financial statements. Upon information and belief, Harlow made these statements with the knowledge and approval of Pruitt and Denkhaus.

102. Andersen, Harlow, Pruitt, and Denkhaus also knew that MS & Co. had stated in a February 27, 1998 "fairness" opinion that MS & Co. had presented to Sunbeam's Board of Directors that MS & Co. had assumed and relied upon the accuracy and completeness of Sunbeam's audited financial statements that were available at that time.

103. In addition, Andersen, Harlow, Pruitt, and Denkhaus knew that Sunbeam had expressly represented, in loan negotiations with MSSF, that Andersen's audit opinions were accurate. Specifically, Andersen knew that, in the Sunbeam-MSSF credit agreement, Sunbeam had warranted that it had provided MSSF with accurate information regarding Sunbeam's consolidated statements of operations, stockholders' equity and cash flows, as well as its consolidated balance sheets. According to Sunbeam, its financial statements — certified by

Andersen — "present[ed] fairly, in all material respects, the financial position and results of operations and cash flows . . . in accordance with GAAP."

104. Similarly, Andersen, Harlow, Pruitt, and Denkhaus knew that, in connection with the Convertible Note Offering, Sunbeam had included its 1996 and 1997 audited financial statements in its March 19, 1998, offering memorandum and had represented to MS & Co. that its audited financial statements were reliable.

105. Andersen, Harlow, Pruitt, and Denkhaus also knew that, as part of the Coleman merger agreement executed on February 27, 1998, Sunbeam had represented and warranted that all of its filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate and not misleading, and that they would continue to be accurate and not misleading as of the transaction's closing date. Sunbeam further represented that its audited financial statements were prepared in accordance with GAAP, and that at the time of the closing of the transaction, that representation would continue to be true and correct.

106. Although it knew that MS & Co. and MSSF had based multi-million dollar financing decisions on its representations, Andersen did not tell Plaintiffs' of the accounting concerns that it had raised with Sunbeam management in the course of its 1996 and 1997 audits or that Sunbeam's financial statements had not been fairly stated in 1996 and 1997.

107. On March 25, 1998, the $750 million Convertible Note Offering closed. In justifiable reliance on Andersen's 1996 and 1997 unqualified audit opinions, on Andersen's March 19, 1998, and March 25, 1998, "comfort" letters, and on the oral representations made by Harlow and other partners, members or employees of Andersen and Andersen-Worldwide, MS & Co. underwrote this offering to finance Sunbeam's acquisitions of Coleman, Signature Brands, and First Alert.

108. Sunbeam closed its acquisition of Coleman on March 30, 1998. On that date, Sunbeam, through a wholly owned subsidiary, acquired approximately 81 percent of the then-outstanding shares of Coleman common stock. These shares were acquired by Sunbeam in exchange for 14,099,749 shares of Sunbeam's common stock and approximately $160,000,000 in cash. In addition, Sunbeam assumed or repaid approximately $1,016,000,000 in debt belonging to Coleman and Coleman-Parent. Included in the repaid debt portion of the transaction was an immediate cash payment by Sunbeam to Coleman-Parent of $590 million.

109. MSSF and Sunbeam closed the Bank Facility on March 31, 1998. In accordance with the terms of the Bank Facility, MSSF — unaware of the falsity of Sunbeam's financial statements and Andersen's audit reports and in justifiable reliance on Andersen's representations — loaned Sunbeam $680 million in immediately available funds to be used for the acquisitions. First Union, which served as the Administrative Agent for the Bank Facility, loaned Sunbeam an additional $510 million. Bank of America, which served as the Documentation Agent for the Bank Facility, loaned Sunbeam an additional $510 million.

110. As Andersen, Harlow, Pruitt, and Denkhaus knew, MS & Co. had relied on Sunbeam's 1996 and 1997 financial statements in deciding to underwrite the Convertible Note Offering. Andersen, Harlow, Pruitt, and Denkhaus further knew that MSSF had relied on Sunbeam's 1996 and 1997 financial statements in deciding to loan Sunbeam $680 million. Moreover, they knew that the Sunbeam-MSSF credit agreement provided that a condition precedent to MSSF's obligations under the agreement was the absence of any event, change, or development that would have a material adverse effect on the business, results of operation, or financial condition of Sunbeam. Andersen knew that an additional condition precedent to

MSSF's obligations was the absence of any material misrepresentation or omissions in Sunbeam's SEC filings, including Andersen's 1996 and 1997 audit reports in the Form 10-Ks.

111. But for Andersen's fraud and its failure to issue qualified or adverse reports exposing the falsity of Sunbeam's financial statements, MS & Co. and MSSF would have had notice of an adverse material change affecting Sunbeam before funding, and of a material misstatement in Sunbeam's SEC filings. Not only would MS & Co. never have agreed to underwrite the Convertible Note Offering, but MSSF's obligation to loan Sunbeam $680 million also would have been discharged by the failure of conditions precedent to its obligations under the credit agreement. Andersen's fraud directly caused the extensive losses that Plaintiffs suffered.

112. Andersen's fraud was knowingly caused by Harlow, Pruitt, and Denkhaus. Harlow, as engagement partner, and Pruitt, as concurring partner, had direct responsibility for directing, managing, and approving of the work that was done on the Sunbeam audits. They caused Andersen to represent to MS & Co. and MSSF that Sunbeam's financial statements were reliable. Denkhaus, who was a senior partner of Andersen and a member of Andersen-Worldwide, as well as the Audit Division Head and manager of Andersen's audit practice for the entire South Florida region, had undertaken responsibility for supervising and monitoring the work that was performed at Harlow's and Pruitt's direction. Harlow, Pruitt, and Denkhaus each knew of or recklessly disregarded the accounting violations contained in Sunbeam's 1996 and 1997 financial statements. They each also knew that the financial statements that they had caused Andersen to certify would be relied upon by MS & Co. in deciding to underwrite the Convertible Note Offering and by MSSF in deciding to loan Sunbeam hundreds of millions of dollars.

113. This fraud was also knowingly perpetrated by the Foreign Andersen Branches. Each of the Foreign Andersen Branches reviewed and audited financial statements prepared for Sunbeam's foreign subsidiaries for 1997, all of which contained significant accounting violations. Each of the Foreign Andersen Branches knew of or recklessly disregarded the fact that the financial statements that they had reviewed and audited were not prepared in accordance with GAAP or reviewed in accordance with GAAS, but nevertheless certified that their audit work complied with these standards. Each of the Foreign Andersen Branches also knew that the financial statements that they had audited would be incorporated into Sunbeam's consolidated financial statements and that lenders, such as MSSF, and underwriters, such as MS & Co., would rely on these financial statements.

114. The fraud was also knowingly perpetrated by Andersen-Worldwide through the actions of its members, including Harlow, Pruitt, and Denkhaus, and its member firms, including Andersen and the Foreign Andersen Branches.

Andersen's Improper Accounting and Misrepresentations Are Revealed

115. In an April 3, 1998 conference call with securities analysts, Sunbeam revealed that sales for the first quarter of 1998 were 5 percent below reported sales for the same period of the prior year.

116. On April 22, 1998, a class of Sunbeam shareholders sued Sunbeam and its senior officers in the United States District Court for the Southern District of Florida, alleging that the company had violated the securities laws by issuing materially false and misleading statements regarding Sunbeam's financial condition. Andersen was subsequently added as a defendant in that lawsuit.

117. On June 8, 1998, an article was published in Barron's that raised serious questions regarding Sunbeam's apparent success under Dunlap, suggesting that it was the result of "accounting gimmickry." On June 15, 1998, Sunbeam's Board announced that it had removed Dunlap as Chairman and CEO. On June 17, 1998, Sunbeam received a letter from the SEC informing it that the SEC had initiated an investigation into the company.

118. Andersen continued to stand behind its fraudulent audit opinions. On June 15, 1998, Andersen allowed Sunbeam's Board of Directors to assert that Andersen had "assured the Board that Sunbeam's audited financial statements [were] accurate in all material respects." Andersen made this statement knowing that it was false. Harlow, Pruitt, and Denkhaus likewise knew the statement was false, but caused Andersen to make this statement. It was not until June 25, 1998 — when Andersen withheld its consent for use of its 1997 audit opinion in a registration statement that was to have been filed with the SEC — that Andersen gave any hint that its unqualified audit opinions were unreliable.

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

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

October 20, 1998, Sunbeam and Andersen announced a restatement of its 1996 and 1997 financial statements.

121. Holders of the convertible notes sued Sunbeam on October 30, 1998, and Andersen was later named as a defendant in that suit.

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

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

Sunbeam Declares Bankruptcy

124. On February 6, 2001, as a direct result of the deceit that Andersen had committed, with the knowledge and assistance of the other Defendants named in this Complaint, Sunbeam and several of its subsidiaries were forced to seek relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. As part of the bankruptcy court-approved reorganization plan, MSSF's $680 million loan to Sunbeam was discharged in full, and MSSF received Sunbeam stock valued at a fraction of the original loan. In addition, as a result of Andersen's actions, the convertible notes issued by Sunbeam and held

by MS & Co. had been rendered substantially less valuable. The shareholders of Sunbeam saw the value of their stock decline by over $5 billion from its peak in early March 1998 to February 5, 2001.

Subsequent Censure of Andersen's Conduct

125. Both courts and regulators have scrutinized Andersen's facilitation of Sunbeam's fraud. In their judgments against the firm and Harlow, they have denounced Andersen's conduct.

126. In December 1999, for example, the United States District Court for the Southern District of Florida, which presided over the Sunbeam shareholders' class action securities fraud lawsuit, refused to dismiss any claims against Andersen. The court found that the plaintiff class had, by alleging the material misstatements made by Andersen in its unqualified audit opinions, describing the violations of GAAP and GAAS that had occurred, and setting forth why the statements in the audit opinions were false and misleading, pled fraud against Andersen with sufficient particularity to satisfy Federal Rule of Civil Procedure 9(b)'s pleading requirements. *See In re Sunbeam Sec. Litig.*, 89 F. Supp. 2d 1326, 1344 n.11 (S.D. Fla. 1999).

127. The *In re Sunbeam* court also rejected Andersen's argument that the plaintiffs had merely alleged that Andersen violated GAAP and GAAS and had not set forth facts sufficient to show that it acted with knowing fraudulent intent or recklessness. The court ruled that Andersen's arguments "fail[ed] to appreciate the breadth" of the plaintiffs' allegations, which described much more than "innocent auditing and accounting slip-ups." *In re Sunbeam Sec. Litig.*, 89 F. Supp. 2d at 1344. The court concluded (*id.* at 1344-45) that the following facts established that Andersen had acted with requisite scienter:

- Andersen violated a GAAS requirement that it have a sufficient understanding of Sunbeam's internal control structure;

- Andersen failed to adhere to GAAS by not identifying numerous fraud risk factors suggesting that there was a significant risk that Sunbeam had fraudulently misstated its financials;

- Andersen was alerted by Sunbeam employees to material misstatements in Sunbeam's financial statements;

- Andersen failed to stop Sunbeam from recognizing, in violation of GAAP, revenues from guaranteed sales and consignment transactions, with the result that its sales were substantially overstated;

- Andersen ignored a June 8, 1998, Barron's article that accused Sunbeam of accounting improprieties, continued to stand behind its audit opinions, and did not given any hint that its unqualified audit opinions were unreliable until June 25, 1998, when it withheld consent to the use of its audit opinion in an SEC registration statement; and

- The sheer magnitude of the restatements of Sunbeam's financial statements indicated that Andersen was at least severely reckless not to know that its unqualified audit opinions were misleading.

128. The United States District Court for the Southern District of Florida concluded that these facts were sufficient to "demonstrate that Arthur Andersen acted with severe recklessness in issuing its misleading Unqualified Audit Opinion," and therefore supported a valid federal securities law fraud claim. *In re Sunbeam Sec. Litig.*, 89 F. Supp. 2d at 1344. Andersen subsequently settled this lawsuit in 2001 for $110 million.

129. On May 15, 2001, the SEC filed a civil action in the United States District Court for the Southern District of Florida against five former Sunbeam officers and Harlow, Andersen's engagement partner. The SEC alleged that Harlow, by causing Andersen to issue materially incorrect audit opinions, had engaged in fraud in violation of the federal securities laws.

130. In January 2003, Harlow consented to an injunction and agreed not to contest the SEC's charges against him. In the SEC's consent order, it made numerous factual findings

regarding Harlow's improper conduct. It concluded that Harlow had proposed, on many occasions, adjustments to rectify Sunbeam's false financial statements. After management refused to make these adjustments, Harlow improperly acceded to that decision. *In re Phillip E. Harlow*, Rel. No. 34-47261, 2003 WL 169818, at *1-*3 (SEC Rel. Jan. 27, 2003).

131. The SEC's assessment of Harlow's conduct was damning. Among many other things, it concluded that Harlow (1) "failed to exercise professional skepticism when performing audit procedures and gathering and analyzing audit evidence," (2) "accepted uncorroborated representations of Sunbeam's management in lieu of performing appropriate audit procedures," (3) "failed to exercise due professional care in performing the audit and preparing the audit report," (4) "failed to perform sufficient audit procedures to determine whether the financial statements were in conformity with GAAP," even after he had "identified a number of audit risks and accounting issues associated with the Sunbeam engagement," and (5) "failed to obtain sufficient competent evidential matters through inspection, observation, inquiries, and confirmation to afford a reasonable basis for an audit opinion." *Id.* at *4. Based on these factual findings, the Commission concluded that the 1996 and 1997 financial statements that Harlow had audited were not in conformity with GAAP, and the audit was not performed in accordance with GAAS. *Id.* (citing AU §§ 410, 411, 508.07).

132. Other participants in the Coleman acquisition have also sued Andersen for its fraudulent conduct. On June 8, 2001, Coleman-Parent sued Andersen and Harlow for fraudulent misrepresentation, fraudulent inducement to contract (conspiracy and concerted action), and negligent misrepresentation. *See Coleman (Parent) Holdings, Inc. v. Arthur Andersen LLP*, No. 502001CA006062XXOCAN (Fla. 15th Cir. Ct., filed June 8, 2001). That case was assigned to Judge Stephen A. Rapp. Andersen and Harlow moved to dismiss. However, after an

October 29, 2001, hearing on their motion, Andersen and Harlow answered Coleman-Parent's complaint. On March 15, 2002, the complaint in this matter was amended to add Andersen-Worldwide, Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela, and Andersen's United Kingdom branch as defendants. *See* Amended Complaint, *CPH v. Andersen* (filed Mar. 15, 2002). The Court denied Andersen-Worldwide's Motion To Dismiss on June 19, 2002, and the matter was voluntarily dismissed on January 28, 2003, after the parties had settled for an undisclosed amount.

Tolling Agreements

133. On March 8, 2001, Morgan Stanley, MSSF, and all of "their respective successors, predecessors, subsidiaries, affiliates, and assigns" executed the first of a series of tolling agreements with the Defendants. Additional tolling agreements were executed on April 4, 2001, April 19, 2001, April 24, 2001, April 23, 2002, October 16, 2002, April 10, 2003, and October 21, 2003. Copies of these Tolling Agreements are exhibits "E" through "L" attached hereto.

134. These agreements were signed by Andersen. The individuals that signed the agreements on behalf of Andersen represented that they had the "authority to bind and act on behalf of" Andersen and all of its "successors, predecessors, subsidiaries, affiliates, assigns, partners, employees, agents, officers, or directors."

135. Taken together, these agreements show that, in consideration for forbearance from commencing an action against the Defendants, Andersen agreed to toll from March 8, 2001, to March 1, 2004, the statute of limitations on all Morgan Stanley entities' claims against Andersen, its partners and agents (including Harlow, Pruitt, and Denkhaus), and its affiliates (including

Andersen-Worldwide and the Foreign Andersen Branches) that arose out of Andersen's audits of Sunbeam's financial statements.

COUNT I

Fraudulent Misrepresentation

136. Paragraphs 1 through 135 are repeated and realleged as if set forth herein.

137. Andersen consented to the publication of its audit reports to the public and business world by permitting Sunbeam to include them in Sunbeam's SEC filings. Given that publication, Andersen knew and intended that the public — including MS & Co. and MSSF — would rely on Andersen's representations.

138. Andersen knew of Sunbeam's proposed financing arrangements and of MS & Co.'s and MSSF's roles in Sunbeam's acquisitions. Andersen also knew that MS & Co. and MSSF would rely and had relied upon Andersen's 1996 and 1997 unqualified audit opinions for the particular purpose of determining whether to underwrite the Convertible Note Offering and to provide Sunbeam with a loan for $680 million.

139. Andersen itself invited MS & Co to rely on its unqualified audit opinions, expressly representing to MS & Co., in letters dated March 19, 1998, and March 25, 1998, that Sunbeam's financial statements were truthful and that Andersen's unqualified audit opinions were reliable. Andersen knew that, absent its representations, MS & Co. would not have underwritten the notes, and therefore the financing, including MSSF's loan to Sunbeam, would not have gone forward. In addition, Andersen's and Andersen-Worldwide's members, partners, and employees, including Harlow, participated in meetings and telephone calls in which they represented to MS & Co. and MSSF that Sunbeam's audited financial statements were accurate.

140. Andersen knew that Sunbeam's financial statements were replete with accounting irregularities and that the information in Sunbeam's 1996 and 1997 financial statements and in Andersen's 1996 and 1997 unqualified audit opinions was materially false and misleading.

141. Although Andersen knew that MS & Co. and MSSF would rely and had relied on its false statements, it did not inform MS & Co. or MSSF that the unqualified audit opinions it had provided were materially false or that Sunbeam's financial statements contained numerous misstatements of material facts.

142. Andersen made its materially false representations regarding its unqualified audit opinions and the accuracy of Sunbeam's financial statements with the intent to deceive Plaintiffs.

143. Andersen knew that the false information that had been provided to Plaintiffs would be critical to Plaintiffs' decisions to participate in the financing of Sunbeam's acquisitions. But for Andersen's fraudulent representations, MS & Co. would not have underwritten the Convertible Note Offering, nor would MSSF have loaned Sunbeam $680 million.

144. Andersen's fraud was knowingly caused by Harlow, Pruitt, and Denkhaus. Harlow, as engagement partner, and Pruitt, as concurring partner had direct responsibility for directing, managing, and approving of the work that was done on the Sunbeam audits. Denkhaus, who was a senior partner of Andersen and a member of Andersen-Worldwide, as well as the Audit Division Head and manager of Andersen's audit practice for the entire South Florida region, had undertaken responsibility for supervising and monitoring the work performed at Harlow's and Pruitt's direction. Harlow, Pruitt, and Denkhaus each knew of or recklessly disregarded the accounting violations contained in Sunbeam's 1996 and 1997 financial statements. They each also knew that the financial statements that they had caused Andersen to certify would be relied

upon by MS & Co. in deciding to underwrite the Convertible Note Offering and by MSSF in deciding to loan Sunbeam hundreds of millions of dollars.

145. This fraud was also knowingly perpetrated by the Foreign Andersen Branches. Each of the Foreign Andersen Branches reviewed and audited financial statements prepared for Sunbeam's foreign subsidiaries for 1997, all of which contained significant accounting violations. Each of the Foreign Andersen Branches knew or recklessly disregarded the fact that the financial statements that they had reviewed and audited were not prepared in accordance with GAAP or reviewed in accordance with GAAS, but nevertheless certified their audit work as in compliance with these standards. Each of the Foreign Andersen Branches also knew that the financial statements that they had audited would be incorporated into Sunbeam's consolidated financial statements and that lenders, such as MSSF, and underwriters, such as MS & Co., would rely on these financial statements.

146. The fraud was also knowingly perpetrated by Andersen-Worldwide through the actions of its members, including Harlow, Pruitt, and Denkhaus, and its member firms, including Andersen and the Foreign Andersen Branches.

147. As a direct result of this fraud, MS & Co., MSSF, and Morgan Stanley have collectively suffered hundreds of millions of dollars in damages.

COUNT II

(Conspiracy to Defraud)

148. Paragraphs 1 through 135 are repeated and realleged as if set forth herein.

149. Andersen, Andersen-Worldwide, the Foreign Andersen Branches, Harlow, Pruitt, and Denkhaus acted in concert and wrongfully conspired with Dunlap, Kersh, Gluck, and other

senior Sunbeam executives to create the appearance that Sunbeam was performing at a high level. The purpose of this conspiracy was artificially to inflate the stock price of Sunbeam and thereby to induce MS & Co. to underwrite the Convertible Note Offering and MSSF into loaning Sunbeam $680 million to finance Sunbeam's acquisition of Coleman, First Alert, and Signature Brands. Andersen, Andersen-Worldwide, the Foreign Andersen Branches, Harlow, Pruitt, and Denkhaus agreed to become part of the conspiracy to defraud Plaintiffs and committed overt acts in furtherance of this fraudulent scheme.

150. In furtherance of the conspiracy, Dunlap, Kersh, Gluck, and the other Sunbeam executives agreed to misstate Sunbeam's true financial condition by millions of dollars in order to create the illusion that Sunbeam had undergone a radical financial turnaround. Pursuant to this scheme, Dunlap, Kersh, Gluck, and other Sunbeam executives caused Sunbeam, in 1996, to overstate its operating losses by at least $40 million, thereby establishing an overly bleak financial backdrop against which the company's performance in 1997 would be measured. In 1997, by contrast, Dunlap, Kersh, Gluck, and the other Sunbeam executives caused Sunbeam dramatically to overstate its earnings.

151. In late 1997 to early 1998, in furtherance of the conspiracy, Dunlap, Kersh, Gluck, and the other Sunbeam executives decided to acquire Coleman, First Alert, and Signature Brands. They communicated this decision to Andersen and Harlow. Thereafter, Andersen, Andersen-Worldwide, the Foreign Andersen Branches, Harlow, Pruitt, and Denkhaus agreed to become part of the conspiracy to defraud Plaintiffs.

152. In March 1998, in furtherance of the conspiracy, Andersen and Andersen-Worldwide, through their partners/members Harlow, Pruitt, and Denkhaus, committed overt acts in furtherance of the conspiracy, including, but not limited to, issuing Andersen's false and

misleading 1997 unqualified audit opinion with respect to Sunbeam's 1997 financial statements and consenting to its publication to the SEC as part of Sunbeam's Form 10-K filing on March 6, 1998.

153. The members of the conspiracy all knew or recklessly disregarded the fact that Sunbeam's 1996 and 1997 financial statements and Andersen's audit opinions concerning those financial statements contained false statements of material fact. All of the co-conspirators that the representations regarding Sunbeam's 1996 and 1997 financial statements were false when made and/or made these representations with reckless disregard as to their truth.

154. In furtherance of the conspiracy, and to induce MS & Co. into underwriting the Convertible Note Offering and MSSF into loaning Sunbeam $680 million, Andersen and Sunbeam represented to MS & Co. and MSSF that Sunbeam's audited financial statements and Andersen's audit opinions were accurate and not misleading. The co-conspirators invited MS & Co. and MSSF to rely on Andersen's unqualified audit opinions. In furtherance of the conspiracy, Andersen expressly represented to MS & Co., in letters dated March 19, 1998, and March 25, 1998, that Sunbeam's financial statements were truthful and that Andersen's unqualified audit opinions were reliable.

155. In furtherance of the conspiracy, Andersen, Harlow, other Andersen-Worldwide members and employees, and Sunbeam employees participated in meetings and telephone calls in which they represented to employees of MS & Co. and MSSF that Sunbeam's audited financial statements were accurate.

156. In furtherance of the conspiracy, Sunbeam's senior management caused Sunbeam expressly to represent, in loan negotiations with MSSF, that Andersen's audit opinions were accurate. They caused Sunbeam to warrant, in the Sunbeam-MSSF credit agreement, that it had

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provided MSSF with accurate information regarding its consolidated statements of operations, stockholders' equity and cash flows, as well as its consolidated balance sheets. They caused Sunbeam to include its 1996 and 1997 audited financial statements in its March 19, 1998, offering memorandum and to represent to MS & Co. that its audited financial statements were reliable. As part of the Coleman merger agreement executed on February 27, 1998, they caused Sunbeam to represent and warrant that all of Sunbeam's filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate, not misleading, and prepared in accordance with GAAP, and that they would continue to be accurate and not misleading as of the transaction's closing date. Andersen and the other Defendants named in this Complaint had full knowledge and approved of these false representations.

157. In reasonable and justifiable reliance on the co-conspirators' representations that Sunbeam's financial statements and Andersen's audit reports were accurate and truthful, MS & Co. agreed to underwrite the Convertible Note Offering, and MSSF agreed to loan Sunbeam $680 million to finance Sunbeam's acquisition of Coleman. But for the co-conspirators' fraudulent representations, MS & Co. would not have underwritten the Convertible Note Offering, nor would MSSF have loaned Sunbeam $680 million.

158. Harlow, Pruitt, and Denkhaus had full knowledge of and participated in this conspiracy. Harlow, as engagement partner, and Pruitt, as concurring partner, had direct responsibility for directing, managing, and approving of the work that was done on the Sunbeam audits. Denkhaus, who was a senior partner of Andersen and a member of Andersen-Worldwide, as well as the Audit Division Head and manager of Andersen's audit practice for the entire South Florida region, had undertaken responsibility for supervising and monitoring the work performed at Harlow's and Pruitt's direction. Harlow, Pruitt, and Denkhaus each knew of or recklessly

163. To induce MSSF into loaning Sunbeam $680 million to finance its acquisition of Coleman, First Alert, and Signature Brands, Sunbeam represented to MSSF in loan negotiations that Sunbeam's audited financial statements were accurate and not misleading. In the Sunbeam-MSSF credit agreement, Sunbeam warranted that it had provided MSSF with accurate information regarding its consolidated statements of operations, stockholders' equity and cash flows, as well as its consolidated balance sheets. Sunbeam included its 1996 and 1997 audited financial statements in its March 19, 1998, offering memorandum and represented to MS & Co. and MSSF that its audited financial statements were reliable.

164. As part of the Coleman merger agreement executed on February 27, 1998, Sunbeam expressly represented and warranted that all of its filings with the SEC, which included the 1996 financial statements audited by Andersen, were accurate, not misleading, and prepared in accordance with GAAP, and that they would continue to be accurate and not misleading as of the transaction's closing date. Sunbeam knew that its many representations regarding its 1996 and 1997 financial statements were materially false when made and/or made these representations with reckless disregard as to their truth. It also knew that Andersen's 1996 and 1997 unqualified audit opinions were materially false and misleading.

165. Sunbeam knew that MS & Co. would rely on Sunbeam's representations in determining whether to act as Sunbeam's underwriter and that MSSF would rely on its representations in deciding to loan Sunbeam $680 million to finance its acquisitions. Although Sunbeam knew that MS & Co. and MSSF would rely and had relied on its false statements, it did not inform them that the unqualified audit opinions it had provided were materially false or that Sunbeam's financial statements contained numerous misstatements of material facts.

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166. Sunbeam made its materially false representations regarding its financial statements and Andersen's unqualified audit opinions with the intent to deceive MS & Co. and MSSF and to induce them to participate in the financing of Sunbeam's acquisitions.

167. Sunbeam knew that the false information that it had provided to MS & Co. and MSSF, and its intentional failure to correct the misrepresentations contained in Sunbeam's financial statements, would be critical to their decision to participate in the financing of Sunbeam's acquisitions. But for Sunbeam's fraudulent representations, MS & Co. would not have underwritten the Convertible Note Offering, nor would MSSF have loaned Sunbeam $680 million.

168. Andersen and Andersen-Worldwide, through their partners/members Harlow, Pruitt, and Denkhaus, knowingly and substantially assisted Sunbeam in its fraud. Andersen itself expressly represented to MS & Co., in letters dated March 19, 1998, and March 25, 1998, that Sunbeam's financial statements were truthful and that Andersen's unqualified audit opinions were reliable. In addition, employees, partners, and members of Andersen and Andersen-Worldwide, including Harlow, participated in meetings and telephone calls in which they represented to MS & Co. and MSSF that Sunbeam's audited financial statements were accurate.

169. Harlow, Pruitt, and Denkhaus substantially and knowingly assisted Sunbeam's fraud. They each knew of or recklessly disregarded the accounting violations contained in Sunbeam's 1996 and 1997 financial statements. They each also knew that the financial statements that they had caused Andersen to certify would be relied upon by MS & Co. in deciding to underwrite the Convertible Note Offering and by MSSF in deciding to loan Sunbeam hundreds of millions of dollars.

170. The Foreign Andersen Branches substantially and knowingly assisted Sunbeam's fraud. They each reviewed and audited financial statements prepared for Sunbeam's foreign subsidiaries for 1997, all of which contained significant accounting violations. Each of the Foreign Andersen Branches knew of or recklessly disregarded the fact that the financial statements that they had reviewed and audited were not prepared in accordance with GAAP or reviewed in accordance with GAAS, but nevertheless certified their audit work as in compliance with these standards. Each of the Foreign Andersen Branches also knew that the financial statements that they had audited would be incorporated into Sunbeam's consolidated financial statements and that lenders, such as MSSF, and underwriters, such as MS & Co., would rely on these financial statements.

171. As a direct result of Sunbeam's fraud, aided and abetted by Andersen, Andersen-Worldwide, the Foreign Andersen Branches, Harlow, Pruitt, and Denkhaus, MS & Co., MSSF, and Morgan Stanley collectively have suffered hundreds of millions of dollars in damages.

WHEREFORE, Plaintiffs, MS & Co., MSSF, and Morgan Stanley, demand judgment against Andersen, Andersen-Worldwide, Andersen-Canada, Andersen-Hong Kong, Andersen-Mexico, Andersen-Venezuela, Harlow, Pruitt, and Denkhaus, jointly and severally, for:

(A) compensatory damages;

(B) prejudgment interest;

(C) attorneys' fees and costs; and

(D) such other relief as may be just and appropriate.

Plaintiffs reserve the right to amend their complaint pursuant to section 768.72, Florida Statutes, to assert claims for punitive damages in excess of $1.2 billion as allowed by law.

DEMAND FOR JURY TRIAL

Plaintiffs request a trial by jury on any and all issues raised by this complaint that are triable of right by a jury.

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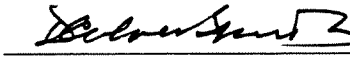
CERTIFICATE OF SERVICE

The undersigned certifies that a copy hereof was furnished by regular U.S. Mail to counsel on the attached list on August 6, 2004.



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[3] Arthur Andersen LLP (an Ontario limited-liability partnership), Arthur Andersen (a United Kingdom partnership), Arthur Andersen & Co. (a Hong Kong partnership), Ruiz, Urquiza Y Cia, S.C. (a Mexican partnership), and Porta Cachafeiro, Laria & Asociados (a Venezuelan partnership)

[4] Andersen Worldwide, Societé Cooperative (a Swiss cooperative)

ATTACHED EXHIBITS OMITTED

IN WITNESS WHEREOF, the undersigned have duly authorized and caused this Agreement to be executed as of this 21st day of October, 2003.

MORGAN STANLEY (F/K/A MORGAN STANLEY DEAN WITTER & CO.)

By:_____
Name: James P. Cusick
Title: Managing Director

MORGAN STANLEY SENIOR FUNDING, INC.

By:_____
Name: Michael Petrick
Title: Managing Director

BANK OF AMERICA, NA

By:_____
Name: Craig R. Baldauf
Title: Assistant General Counsel

WACHOVIA BANK, NATIONAL ASSOCIATION (F/K/A FIRST UNION NATIONAL BANK)

By:_____
Name: Douglas R. Edwards
Title: Senior Vice President

ARTHUR ANDERSEN LLP

By:_____
Name: Caroline Cheng
Title: Counsel

STATE OF FLORIDA • PALM BEACH COUNTY
This copy is a true copy of the ORIGINAL on file in this office. WITNESS my hand and Official Seal
THIS 7TH DAY OF March, 20 05
SHARON R. BOCK
CLERK & COMPTROLLER
By_____ DEPUTY CLERK

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

MORGAN STANLEY & CO. INCORPORATED, *et al.*, *Plaintiffs*, v. ARTHUR ANDERSEN LLP, *et al.*, *Defendants*.	CASE NO. 502004CA002257XXXXMB Division AA

CM

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS
Hearing: February 4, at 11:00 a.m.

Andersen[1] asks this Court to dismiss, on the pleadings, all claims of plaintiffs who lost hundreds of millions of dollars as a direct result of Andersen's knowing participation in the fraud that was Sunbeam Corporation. No one disputes that Sunbeam defrauded countless shareholders, creditors, regulators and others, based on materially false financial statements — overstating profits for one year by 65 percent, to cite one example — that were audited by Andersen, as well as related false Andersen representations. Morgan Stanley[2] has stated, specifically, what each defendant did to further that fraud, and how consequently Morgan Stanley was injured. Andersen wants to argue facts: no one should be able to rely on its representations except its client, Sunbeam; Morgan Stanley was unreasonable to believe what

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[1] In this Opposition, "Andersen" refers to the defendants bringing this motion to dismiss: Arthur Andersen LLP ("Arthur Andersen"), Phillip E. Harlow, William D. Pruitt, Jr., and Donald Denkhaus. "Individual Defendants" refers to Harlow, Pruitt, and Denkhaus. The other defendants to this action (Andersen Worldwide Société Coopérative, and the former Canadian, Mexican, Venezuelan, and Hong Kong Andersen branches) are represented by different counsel.

[2] "Morgan Stanley" refers to plaintiffs Morgan Stanley & Co. Incorporated ("MS & Co."), Morgan Stanley Senior Funding, Inc. ("MSSF"), and Morgan Stanley ("MS").

1 of 2

EXHIBIT H

Andersen told it; the gross accounting errors Andersen made were only "simple negligence" and not reckless enough to make out fraud.

Andersen will have its day in court to argue facts. But it cannot ask for dismissal on this basis. On a motion to dismiss, the Court must credit what *plaintiffs* have alleged, not defendants' counter-story. Defendants do not cite a single case in which a Florida court has dismissed allegations remotely similar to those here. And they *ignore* the decisions in which Florida courts have upheld the sufficiency of the claims of other victims — Sunbeam shareholders and others — against Andersen. Each of those claimants has made allegations that are nearly identical to the allegations made here. *See, e.g.*, Complaint, *Coleman (Parent) Holdings, Inc. v. Arthur Andersen LLP*, No. CA 00-6062 AN (filed June 8, 2001) ("*CPH v. Andersen*") (attached hereto as Exh. A);[3] *In re Sunbeam Sec. Litig.*, 89 F. Supp. 2d 1326 (S.D. Fla. 1999) (attached hereto as Exh. C).[4] This Court should follow these uniform decisions and permit the claims of Morgan Stanley to be resolved on the merits, as with the claims of the other victims.

ARGUMENT

On a motion to dismiss, the Court must "treat the factual allegations of the complaint as true and consider them in a light most favorable to the plaintiff." *Ingalsbe v. Stewart Agency,*

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[3] Judge Stephen A. Rapp presided over *CPH v. Andersen*. As here, Arthur Andersen and Harlow moved to dismiss, claiming that CPH had failed to plead its claims with sufficient particularity and had failed to state a cause of action for conspiracy. *See* Defendants' Motion To Dismiss, *CPH v. Andersen*, No. CA 00-6062 AN (filed July 23, 2001) (attached hereto as Exh. B). However, on November 20, 2001, conceding that the complaint was properly pled, Arthur Andersen and Harlow answered CPH's complaint. The matter was voluntarily dismissed on January 28, 2003, after Arthur Andersen and Harlow settled for $70 million.

[4] In addition, the Securities Exchange Commission ("SEC") brought securities fraud claims against Harlow (the Andersen accountant chiefly responsible for the Sunbeam account), and he consented to an injunction against him. *See In re Phillip E. Harlow*, SEC Rel. No. 34-47261, 2003 WL 169818 (SEC Jan. 27, 2003). In 2004, Arthur Andersen LLP was *convicted* of a federal felony charge, where significant portions of the evidence concerned Andersen's fraudulent Sunbeam work, *see United States v. Arthur Andersen LLP*, No. 02-21200, 2004 WL 1344957, at *1 (5th Cir. June 16, 2004).

Inc., 869 So. 2d 30, 34 (Fla. 4th DCA 2004) (citing *Seminole Tribe of Fla. v. Times Publ'g Co.*, 780 So. 2d 310, 311-12 (Fla. 4th DCA 2001)).[5] The Court cannot properly dismiss the Amended Complaint for failure to state a cause of action unless Andersen "can establish *beyond any doubt*" that Morgan Stanley "could prove *no set of facts whatever*" in support of its claim. *Id.* at 35 (emphases added; citation omitted).

Andersen's motion falls at the first hurdle: "[a] motion to dismiss for failure to state a cause of action may be granted only by looking exclusively at the pleading itself, without reference to any defensive pleadings or evidence in the case." *Id.* (citation omitted). Because defendants here "cannot prove their argument[s] without going beyond the four corners of the complaint," *Mancher v. Seminole Tribe of Fla., Inc.*, 708 So. 2d 327, 329 (Fla. 4th DCA 1998), it is axiomatic that their motion to dismiss must be denied.

I. MORGAN STANLEY'S CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS ARE NOT TIME-BARRED.

On identical facts, another court in this Circuit has rejected Andersen's argument that the statute of limitations bars Morgan Stanley's claims against the Individual Defendants. *See* Order, *Wachovia Bank v. Arthur Andersen LLP*, 502004CA002256XXXXMB (filed Sept. 20, 2004) ("*Wachovia v. Andersen*") (attached hereto as Exh. D).[6] Andersen offers no explanation

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[5] Andersen assumes that the Florida law applies to this dispute. For purposes of this motion, the Court need not resolve the choice-of-law question because Andersen's motion should be denied under the laws of any jurisdiction. Morgan Stanley does not, however, concede that Florida law governs this dispute, and it reserves its right later to seek resolution of this issue.

[6] Wachovia Bank was a co-lender with Morgan Stanley on the same credit facilities. Together, they loaned hundreds of millions of dollars to Sunbeam in reliance on Arthur Andersen's fraudulent certification of Sunbeam's financial statements. On March 1, 2004, Wachovia Bank sued all of the defendants in this case, as well as other individual defendants and member firms, based on factual allegations virtually identical to those in this case. *See* Complaint, *Wachovia v. Andersen*, 502004CA002256XXXXMB (filed Mar. 1, 2004) (attached hereto as Exh. E).

why this conclusion is wrong or why it should not apply equally here. Nor could it; the ruling is correct.

The statute of limitations is an *affirmative defense* and must be raised in a defendant's answer. *Wishnatzki v. Coffman Constr., Inc.*, 884 So. 2d 282, 285 (Fla. 2d DCA 2004). Thus, a motion to dismiss based on the expiration of the statute of limitations will "*only* be granted in *extraordinary circumstances* where the facts constituting the defense affirmatively appear on the face of the complaint." *Alexander v. Suncoast Builders, Inc.*, 837 So. 2d 1056, 1057 (Fla. 3d DCA 2002) (emphases added; internal quotation marks omitted); *see also Williams v. Bear Stearns & Co.*, 725 So. 2d 397, 401 (Fla. 5th DCA 1998) (same). Morgan Stanley has not pled any facts that show its complaint is time-barred, and this issue cannot be resolved at this stage of the case.

A. Tolling Agreements. Morgan Stanley's Amended Complaint attaches a series of agreements in which Arthur Andersen: (a) represented that it had the "authority to bind and act on behalf of" itself and all of its "partners, employees, agents, officers, or directors," and (b) agreed to toll the statute of limitations in this case from March 8, 2001, to March 1, 2004. Am. Compl. ¶¶ 134-35. Andersen's sole argument is that Morgan Stanley was additionally required to "allege that each Individual Defendant was a partner or employee of Andersen LLP at the time the Tolling Agreements were executed." Andersen's Amended Memorandum in Support of Motion To Dismiss First Amended Complaint at 4 ("Andersen Mem.") (Oct. 7, 2004).

Andersen cites not a single case in support of its position and cannot under Florida law. A plaintiff is *not* required to plead in its complaint all facts necessary to defeat a statute-of-limitations defense. On the contrary, it is only when the complaint itself establishes conclusively

that the statute has run that defendant can move to dismiss on this ground. *Simon v. Celebration Co.*, 883 So. 2d 826, 831 (Fla. 5th DCA 2004) ("Since the instant complaint fails to set forth with particularity the date when the matter was dismissed from federal court, it is impossible to determine from the four corners of the instant complaint the length of time during which the matter was tolled by reason of the fact that the matter was pending in federal court. As such, the trial court erred in ruling that the complaint conclusively established that the statute of limitations barred Count I."); *see also Wishnatzki*, 884 So. 2d at 285.

Where the introduction of additional facts would defeat a defendant's statute-of-limitations argument, dismissal is inappropriate. *Id.* Here, discovery may enable Morgan Stanley to introduce additional facts that would defeat Andersen's theory (*e.g.*, discovery may show that each of the Individual Defendants was a partner when each of the tolling agreements was executed). *See, e.g., Wishnatzki*, 884 So. 2d at 285.

B. The Amended Complaint Does Not "Affirmatively Allege" Facts Showing Morgan Stanley's Claims Are Time-Barred. Morgan Stanley's claims are not time-barred even without reference to a tolling agreement. A tort claim does not accrue until "the last element constituting the cause of action occur[red]," Fla. Stat. Ann. § 95.031(1) (West 2004), and the plaintiff has a legal right to bring a cause of action, *see State Farm Mut. Auto. Ins. Co. v. Lee*, 678 So. 2d 818, 821 (Fla. 1996); *Korman v. Iglesias*, 825 F. Supp. 1010, 1015 (S.D. Fla. 1993), *aff'd*, 43 F.3d 678 (11th Cir. 1994) ("[A]ll elements of an action for fraud must exist before an action may be maintained."). Thus, until it had suffered *damages* (an essential element of common-law fraud claims, *see Johnson v. Davis*, 480 So. 2d 625, 627 (Fla. 1985)), Morgan Stanley could not have sued Andersen as a result of its reliance on Andersen's

misrepresentations. *See Elmore v. Florida Power & Light Co.*, 760 So. 2d 968, 971 (Fla. 4th DCA 2000).

Andersen's assertion that Morgan Stanley's claims accrued no later than June 30, 1998 is simply wrong. *See* Andersen Mem. at 3. On this date, Sunbeam issued a press release announcing that its financial statements should not be relied upon. *See* Am. Compl. ¶ 119. But no allegations in the Amended Complaint state that Morgan Stanley, either in its capacity as a lender or as a holder of Sunbeam's convertible notes, suffered *damages* on June 30, 1998, or at any other time. Accordingly, Andersen's attempt to argue additional allegations, to pin down the date of plaintiffs' damages and create grounds for dismissal, is plainly improper on this motion to dismiss.

II. MORGAN STANLEY HAS ALLEGED FRAUD WITH SUFFICIENT PARTICULARITY.

Andersen does not contest that the Amended Complaint meets Rule 1.120(b)'s pleading requirements with respect to Arthur Andersen. That conclusion is mandated by overwhelming authority holding that, to state a fraud claim against an auditing firm, a plaintiff must simply identify the "material misstatements" made in the unqualified audit opinion, describe the violations of Generally Accepted Accounting Principles ("GAAP") and Generally Accepted Auditing Standards ("GAAS") that occurred, and "set[] forth why the statements in the audit opinion are allegedly false and misleading." *In re Sunterra Corp. Sec. Litig.*, 199 F. Supp. 2d 1308, 1332 (M.D. Fla. 2002).[7]

[7] *See also Holmes v. Baker*, 166 F. Supp. 2d 1362, 1375-76 (S.D. Fla. 2001); *In re Sunbeam Sec. Litig.*, 89 F. Supp. at 1344; *Carley Capital Group v. Deloitte & Touche, L.L.P.*, 27 F. Supp. 2d 1324, 1335 (N.D. Ga. 1998) (finding *prima facie* claim of accounting fraud where plaintiffs alleged specific violations of GAAP and alleged these violations resulted in financial statements that improperly overstated and recognized revenue); *In re Checkers Sec. Litig.*, 858 F. Supp.

Applying that rule to the facts at issue here, Judge Middlebrooks in the Sunbeam shareholder suit held that plaintiffs had sufficiently alleged a fraud claim against Arthur Andersen under Federal Rule 9(b), *see In re Sunbeam Securities Litigation*, 89 F. Supp. 2d at 1344, which Andersen admits is "nearly identical" to Florida Rule 1.120(b), *see* Andersen Mem. at 8. In *CPH v. Andersen*, likewise on these same facts, Arthur Andersen and Harlow conceded that CPH's claims against them were sufficiently particularized and answered the complaint. *See supra* n.3.

Here, as in each of the previous cases, the 171-paragraph Amended Complaint easily satisfies the pleading requirements of Florida Rule of Civil Procedure 1.120(b). Morgan Stanley has pled dozens of highly particularized facts showing that: (1) Arthur Andersen and the Individual Defendants made specific misrepresentations aimed at prompting Morgan Stanley to underwrite a securities offering and to loan Sunbeam money; (2) Arthur Andersen and the Individual Defendants knew these representations were false; and (3) Morgan Stanley relied to its detriment on these lies. *See* Am. Compl. ¶¶ 3-6, 8, 59-60, 76, 89-90, 92-114, 124, 137-46; *see also Arnold v. Weck*, 388 So. 2d 269, 270 (Fla. 4th DCA 1980). These allegations are sufficient to state a cause of action for fraud, and Florida law requires nothing more.

In response, Andersen makes three arguments:

First, Andersen asserts that the Amended Complaint does not sufficiently allege that plaintiff MS received or acted in reliance on Andersen's representations. *See* Andersen Mem. at 6. But in fact all plaintiffs have pleaded that Andersen misrepresented material facts, on which they relied to their detriment. *See* Am. Compl. ¶¶ 3-6, 8, 59-60, 76, 89-90, 92-114, 124. Andersen's claim that MS did not actually receive these misrepresentations or act in reliance

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1168, 1178 (M.D. Fla. 1994); *In re Colonial Ltd. P'ship Litig.*, 854 F. Supp. 64, 97-98, 101 (D. Conn. 1994).

thereon turn on fact-bound questions relating to the nature of the corporate relationships between MS, on the one hand, and MS & Co. and MSSF, on the other. Such an issue is uniquely a question of fact for the jury to decide, and not properly addressed on a motion to dismiss.

Second, Andersen claims that MS & Co. could not have relied on Andersen's misrepresentations because, according to "evidence" — a newspaper article not cited in the Amended Complaint — MS & Co. sold *all* $750 million of the convertible notes that it underwrote and must have purchased the notes it held on the "open market." *See* Andersen Mem. at 7. Andersen has its facts dead wrong, but that is beside the point. At this stage of the proceedings, Andersen simply cannot argue facts different from those in the Amended Complaint. That pleading clearly states that, following the initial offering, MS & Co. continued to hold some of the convertible notes, and the value of the notes that it held was substantially diminished by Andersen's fraud. *See* Am. Compl. ¶¶ 8, 124. Nothing more is required to allege MS & Co.'s reliance and damages. If Andersen wishes to contest these allegations with contrary evidence — as opposed to a newspaper clipping — it may do so *solely* "in summary judgment proceedings or at trial." *Pizzi v. Central Bank & Trust Co.*, 250 So. 2d 895, 897 (Fla. 1971); *Wausau Ins. Co. v. Haynes*, 683 So. 2d 1123, 1124-25 (Fla. 4th DCA 1996).

Third, Andersen asserts that the allegations against the Individual Defendants are not sufficiently particularized. But the Amended Complaint specifically describes the steps that each of the Individual Defendants took to perpetrate the fraud on Morgan Stanley. *See* Am. Compl. ¶¶ 5, 19, 32, 44-45, 52-54, 59, 74-75, 79-83, 85, 89, 93-96, 98, 100-05, 110, 112, 114, 118 (describing numerous steps Harlow, as engagement partner, took to perpetrate the fraud); *id.* ¶¶ 5, 20, 32, 44, 54, 59, 85, 89, 93-96, 98, 100-05, 110, 112, 114, 118 (describing numerous steps Pruitt, as concurring partner, took to perpetrate the fraud); *id.* ¶¶ 5, 21, 32, 42, 44, 54, 59,

85, 89, 93-96, 98, 100-05, 110, 112, 114, 118 (describing numerous steps Denkhaus, as manager of Andersen's Florida office, took to perpetrate the fraud). Nothing more is required under Florida law, and Andersen cites no authority in support of its claim that an impossible level of specificity must be provided.

Moreover, Andersen's argument ignores the well-settled principle — applied to these very facts by Judge Middlebrooks in *In re Sunbeam Securities Litigation*, 89 F. Supp. 2d at 1340-41 — that where defendants are all part of the same organization, the organization's written materials (such as the comfort letters and the certified financial statements identified in the Amended Complaint, *see* ¶¶ 54-60, 85-91, 97, 99) are, for pleading purposes, presumptively attributable to each defendant. *Id.*; *see also Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1440 (9th Cir. 1987) ("[W]here the false or misleading information is conveyed in prospectuses, registration statements, annual reports, press releases, or other 'group-published information,' it is reasonable to presume that these are the collective actions of the officers."). Under this "group publication" rule, the Amended Complaint satisfies the particularity requirements of Rule 1.120(b) simply by identifying the misrepresentations contained in Arthur Andersen's written materials and "where possible the roles of the individual defendants in the misrepresentations." *Wool*, 818 F.2d at 1440; *see also First Am. Bank & Trust v. Frogel*, 726 F. Supp. 1292, 1296 (S.D. Fla. 1989) ("The plaintiff has identified the individual defendants and their positions with the Bank. Hence, the plaintiff has stated the fraud with sufficient particularity."). Morgan Stanley has done that here. *See* Am. Compl. ¶¶ 46-71, 78-91 (describing the specific misrepresentations contained in the 1996 and 1997 audit opinions), *id.* ¶¶ 52-54, 59, 74-75, 79, 83, 85 (describing the roles of Denkhaus, Pruitt, and Harlow).

III. THE ATTACHMENTS TO THE AMENDED COMPLAINT SUPPORT MORGAN STANLEY'S CLAIMS.

Andersen argues that Morgan Stanley was not entitled to rely either on Andersen's certified audit opinions or on Andersen's "comfort letters" of March 19 and 25, 1998, which were addressed directly to Morgan Stanley and which falsely stated that Sunbeam's 1996 and 1997 audited financial statements complied with all applicable standards and fairly stated the company's financial condition. *See* Andersen Mem. at 10-12.[8]

Andersen's arguments turn the law of fraud on its head. No court, in any jurisdiction, has ever adopted the strange notion that an accountant — or any person — is in effect privileged to lie directly to another. Florida courts have rejected Andersen's theory of "accountant immunity." In *First Florida Bank, N.A. v. Max Mitchell & Co.*, recognizing the "heavy reliance upon audited financial statements in the contemporary financial world," the Florida Supreme Court ruled that an accountant is liable for its false audit opinion to those whom it "knows and intends will rely on [its] opinion, or whom [it] knows [its] client intends will so rely." 558 So. 2d 9, 15 (Fla. 1990) (internal citation omitted).[9] Andersen knew of Sunbeam's plan to acquire Coleman and to obtain financing, *see* Am. Compl. ¶¶ 92-93, 105, 107-08, and it specifically knew and intended that Morgan Stanley would rely on Andersen's false audit opinions in

[8] A "comfort letter" is a letter provided by a company's auditor to an underwriter containing, among other things, information about the company's financial condition since the last audited financial statements were issued.

[9] The issue in *Mitchell* was an accountant's liability for negligent misrepresentation, but the decision applies with even greater force to fraud claims. *See Restatement (Second) of Torts* § 531 (1977) (the maker of fraudulent misrepresentations is liable to those whom it "intends or *has reason to expect*" to act upon the misrepresentation) (emphasis added); *see also id.* § 531, cmt. e, illus. 4; *Forbes v. Auerbach*, 56 So. 2d 895, 900 (Fla. 1952) (a defendant is liable for misrepresentations as to a third party's financial condition "for the purpose of inducing [the plaintiff] to lend money"); *Reimsnyder v. Southtrust Bank*, 846 So. 2d 1264, 1268 (Fla. 4th DCA 2003) ("Where actual fraud is present, there is no policy reason to limit the liability of the maker of the statement, for no interest of society is served by promoting the flow of information not genuinely believed by its maker to be true.") (internal citation omitted).

deciding whether to extend financing to Sunbeam, *see* Am. Compl. ¶¶ 95, 104-07, 109-10, 112. Under Florida law, these allegations are sufficient to support the element of reliance.

Equally wrong is Andersen's assertion that Morgan Stanley could not rely on Andersen's false March 19 and March 25, 1998 comfort letters (in which Andersen *directly* represented to Morgan Stanley that Sunbeam's 1996 and 1997 financial statements were accurate) because those letters were intended only to "assist [Morgan Stanley] in . . . documenting [its] investigation of . . . Sunbeam." Andersen Mem. at 12. This position is fanciful, and Andersen cites not a single case in support of it. At most, the "disclaimers" that Andersen identifies go to the reasonableness of Morgan Stanley's reliance, which is a *factual* issue that cannot properly be resolved on a motion to dismiss.[10]

IV. THE AMENDED COMPLAINT PLEADS FACTS SHOWING THAT ANDERSEN ACTED KNOWINGLY.

Judge Middlebrooks has already considered — and rejected — *precisely* the same arguments that Andersen now seeks to re-litigate. In the Sunbeam shareholders case, as here, Andersen contended that the complaint (which alleged facts identical to those set forth in the Amended Complaint) identified only minor accounting violations and did not support an inference that Andersen acted knowingly. *Compare* Andersen Mem. at 12-13 with *In re Sunbeam Sec. Litig.*, 89 F. Supp. 2d at 1344-45. Judge Middlebrooks held that Andersen's arguments "failed to appreciate the breadth" of the allegations, which described much more than "innocent auditing and accounting slip-ups." *In re Sunbeam Sec. Litig.*, 89 F. Supp. 2d at 1344. The facts that Judge Middlebrooks identified as controlling (all of which are also alleged in the Amended Complaint) are as follows:

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[10] *See Thor Bear, Inc. v. Crocker Mizner Park, Inc.*, 648 So. 2d 168, 173 (Fla. 4th DCA 1994); *S&S Air Conditioning Co. v. Freire*, 555 So. 2d 387, 388 n.2 (Fla. 3d DCA 1989); *Pinzl v. Lapointe*, 426 So. 2d 65, 66 (Fla. 5th DCA 1983).

- Andersen violated a GAAS requirement that it have a sufficient understanding of Sunbeam's internal control structure, *see* Am. Compl. ¶¶ 57, 87;

- Andersen failed to adhere to GAAS by not identifying numerous fraud risk factors suggesting that there was a significant risk that Sunbeam had fraudulently misstated its financials, *see id.* ¶¶ 57, 87;

- Andersen was alerted by Sunbeam employees to material misstatements in Sunbeam's financial statements, *see id.* ¶¶ 52-53, 79-83;

- Andersen failed to stop Sunbeam from recognizing, in violation of GAAP, revenues from guaranteed sales and consignment transactions, with the result that its sales were substantially overstated, *see id.* ¶¶ 80-84, 88-90;

- Andersen ignored a June 8, 1998 Barron's article that accused Sunbeam of accounting improprieties, continued to stand behind its audit opinions, and did not give any hint that its unqualified audit opinions were unreliable until June 25, 1998, when it withheld consent to the use of its audit opinion in an SEC registration statement, *see id.* ¶¶ 117-19; and

- The sheer magnitude of the restatements of Sunbeam's financial statements indicates that Andersen was at least severely reckless not to know that its unqualified audit opinions were misleading, *see id.* ¶¶ 60, 71, 120, 122-23.

Judge Middlebrooks concluded that these *very facts* were sufficient to "demonstrate that Arthur Andersen acted with severe recklessness in issuing its misleading Unqualified Audit Opinion," and therefore supported a valid federal securities law fraud claim. *In re Sunbeam Sec. Litig.*, 89 F. Supp. at 1344.[11]

[11] Other cases are to the same effect. *See, e.g., Parker v. Florida Bd. of Regents*, 724 So. 2d 163, 168 (Fla. 1st DCA 1998) (noting that fraud may be established by either showing that a "representation was made with actual knowledge of its falsity . . . or . . . under circumstances in which the person making it ought to have known, if he did not know, of its falsity.") (quoting *Joiner v. McCullers*, 28 So. 2d 823, 824 (Fla. 1947)); *Great Neck Capital Appreciation Inv. P'ship v. PricewaterhouseCoopers, L.L.P.*, 137 F. Supp. 2d 1114, 1124 (E.D. Wis. 2001) (concluding that violations of professional standards, combined with "other circumstances suggesting severe recklessness" and "deliberately ignoring 'red flags'" constitute the sort of recklessness necessary to support fraud allegations); *Carley Capital Group*, 27 F. Supp. 2d at 1339 (alleging violations of GAAP "combined with a drastic overstatement of financial results can give rise to a strong inference of scienter"); *Van de Velde v. Coopers & Lybrand*, 899 F. Supp. 731, 735-36 (D. Mass. 1995) ("[A] complaint will usually survive a motion to dismiss if

Andersen acknowledges that the Court should look to federal securities cases to assess whether the Amended Complaint states facts that support the conclusion that Andersen acted with knowledge. *See* Andersen Mem. at 13 (citing *In re Med/Waste, Inc. Sec. Litig.*, No. 99-1684-CIV-GOLD, *et al.*, 2000 WL 34241099, at *8 (S.D. Fla. Aug. 20, 2000). But Andersen does not even address Judge Middlebrook's decision, or any other on-point authority. Instead, it simply contends that defendant Harlow's settlement of the SEC's fraud charges against him somehow supports dismissal.

Andersen's arguments are, again, arguments about the *facts* — not a colorable basis for dismissal. Whatever the terms of *settlement* between the SEC and Harlow, plaintiffs here allege that he and the other defendants acted not merely with negligence but with actual knowledge or recklessness, and it is those allegations that control. Moreover, the SEC found that Harlow had "engaged in improper professional conduct," *In re Phillip E. Harlow*, 2003 WL 169818, at *5, and it identified a number of extremely serious deficiencies in the audit work that Harlow had overseen, *see id.* at *4; *see also* Am. Compl. ¶¶ 130-31. These findings are consistent with the Amended Complaint's allegations that Andersen's wrongdoing went far deeper than minor accounting oversights, and will help Morgan Stanley establish at trial that Andersen knew of or recklessly disregarded "red flags" showing that Sunbeam's accounting system was a shambles.

V. MORGAN STANLEY HAS STATED A VALID CONSPIRACY CLAIM.

Morgan Stanley has alleged multiple specific facts from which a jury could conclude that Andersen and Sunbeam acted in concert to "accomplish an unlawful purpose." *Hoch v. Rissman, Weisberg, Barrett*, 742 So. 2d 451, 460 (Fla. 5th DCA 1999) (setting out standard). The Amended Complaint identifies, with specificity, scores of facts from which a jury could readily

---

plaintiffs have alleged the existence of 'red flags' sufficiently attention-grabbing to have alerted a reasonable auditor to the audited company's shenanigans.").

find a conspiracy, including: the dozens of misrepresentations in Sunbeam's financial statements that Andersen endorsed, *see* Am. Compl. ¶¶ 30, 47-51, 55, 61-71; the numerous contacts between Sunbeam and Andersen, all of which support an inference of an agreement and that Sunbeam and Andersen conspired together, *see id.* ¶¶ 52-53, 74-75, 79-83, the ways in which Andersen and Sunbeam together falsely represented to Morgan Stanley that Sunbeam was financially healthy, *see id.* ¶¶ 93, 96-106; when the conspiracy began, *see id.* ¶ 151; the participants in the conspiracy, *see id.*; the steps that Andersen and Sunbeam took to defraud Morgan Stanley, *see id.* ¶¶ 93, 96-106; and the overt acts that Andersen took in furtherance of the scheme, *see id.* ¶ 152.

Florida courts have routinely upheld civil conspiracy claims predicated on far less detailed allegations.[12] Moreover, on virtually identical allegations in *CPH v. Andersen*, Arthur Andersen and Harlow conceded that conspiracy was properly pled, and answered the complaint. Andersen identifies not a single case that would support dismissal here, and it ignores the actual allegations set forth in the Amended Complaint. The single (irrelevant) case that it cites concerned the well-settled rules that a conspiracy must be predicated on an underlying tort, and a single corporate entity cannot conspire with itself. *See Buckner v. Lower Fla. Keys Hosp. Dist.*, 403 So. 2d 1025, 1027-29 (Fla. 3d DCA 1981). Neither issue is disputed here.

[12] *See Hoch*, 742 So. 2d at 460 (plaintiff properly pled conspiracy by alleging that co-conspirators jointly planned seminars to solicit business at which defamatory statements were made, pursuant to a common plan or scheme to promote their own economic interest); *Segal v. Rhumbline Int'l, Inc.*, 688 So. 2d 397, 400 (Fla. 4th DCA 1997); *Nicholson v. Kellin*, 481 So. 2d 931, 935 (Fla. 5th DCA 1985) (plaintiff properly pled conspiracy by alleging that co-conspirators misrepresented company as a "viable, profitable corporation which it was not" and that they acted in concert with others to defraud potential investors).

VI. MORGAN STANLEY HAS STATED A VALID CLAIM FOR AIDING AND ABETTING.

Morgan Stanley has likewise alleged facts from which a jury could find the three elements of aiding and abetting fraud: (1) a fraud committed by Sunbeam, *see* Am. Compl. ¶¶ 46-51, 62-71, 103-05, 108-10; (2) Andersen's knowledge of that fraud, *see id.* ¶¶ 3, 5-7, 30, 48, 52, 55-56, 59, 65, 74, 82, 89-90, 95-97, 99, 102-06, 110, 112-14, 118; and (3) Andersen's knowing rendition of substantial assistance to Sunbeam, *see id.* ¶¶ 5, 46-51, 53-59, 66-69, 74, 82-83, 89, 96-101, 104-06, 112, 118. *See Tew v. Chase Manhattan Bank, N.A.*, 728 F. Supp. 1551, 1568 (S.D. Fla. 1990) (setting forth standard).

Andersen's "analysis" of the Amended Complaint is untethered to any of the facts that Morgan Stanley actually states. Contrary to Andersen's unsubstantiated assertions, the Amended Complaint alleges facts from which a jury could conclude that Andersen knew Sunbeam's financial statements were incorrect and misleading, *see* Am. Compl. ¶¶ 46-71, 78-91, and that Andersen was aware that Sunbeam intended to perpetrate a fraud on Morgan Stanley, *see id.* ¶¶ 28-35, 46-91. Andersen's theory that the Amended Complaint must allege that Andersen, when it issued its 1996 and 1997 audit opinions, also knew of the steps that Sunbeam would take in March 1998 has no basis in the law. *See* Andersen Mem. at 15. It is sufficient that the Amended Complaint states facts from which a jury could conclude that, in March 1998, when Sunbeam and Andersen defrauded Morgan Stanley, Andersen knew of that fraud and assisted in its execution.

CONCLUSION

For the foregoing reasons, Morgan Stanley respectfully requests that the Court deny Andersen's Motion to Dismiss.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy hereof was furnished by facsimile and overnight mail to counsel on the attached list on January 28, 2005.

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Fax: 202-326-7999

Counsel for Morgan Stanley & Co. Incorporated, Morgan Stanley Senior Funding, Inc., and Morgan Stanley

STATE OF FLORIDA - PALM BEACH COUNTY

This copy is a true copy of the ORIGINAL on file in this office. WITNESS my hand and Official Seal

THIS 7TH DAY OF March, 2005

SHARON R. BOCK
CLERK & COMPTROLLER

By _____
DEPUTY CLERK

16div-013319

0001

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CASE NO. 2003-CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,
vs.
MORGAN STANLEY & COMPANY, INC.
Defendant.
_____/

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE THE HONORABLE ELIZABETH MAASS

- - -

West Palm Beach, Florida
December 12, 2003
8:27 a.m. - 9:45 a.m.

0002

APPEARANCES:

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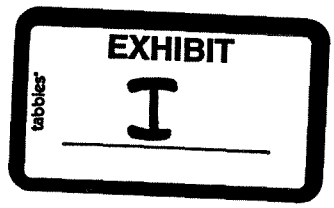
JEFFREY A. SHAW, ESQUIRE
RONALD L. MARMER, ESQUIRE



0003

BE IT REMEMBERED that the foregoing proceedings were had before the HONORABLE ELIZABETH MAASS, in the Palm Beach County Courthouse, West Palm Beach, Florida, on December 12, 2003, starting at 8:27 a.m., with appearances as hereinabove noted, to wit:

- - - -

THE COURT: This is Coleman and Morgan Stanley. It's really defendant's motion for judgment on the pleadings.

Where did we want to start? Do we want to do the forum non conveniens aspect first, or do we want to do motion for judgment on the pleadings?

MR. YANNUCCI: Your Honor, I'm Tom Yannucci representing Morgan Stanley, and I would like to start with the forum non conveniens motion.

THE COURT: That's fine.

The only other thing, in looking at the items yesterday, I got a wonderful notebook with all the cases cited in your reply attached to your response to the motion. I didn't get your reply. In calling down to the clerk's office this morning, they have just found it and are currently docketing it and are bringing it up.

Do you happen to have another copy of it?

0004

MR. IANNO: Judge, there should have been a separate notebook with the pleadings, the entire set of pleadings, the original motion to dismiss --

THE COURT: Oh, I'm sorry, it is in here. Great. Okay. I was thinking, because I had a whole different notebook, it's after all the letters. Okay. Fine.

MR. IANNO: It should be at tab 6.

THE COURT: Yep. Okay. Great. Thank you very much.

MR. YANNUCCI: Your Honor, it's so good, if you want to take a few minutes to read it, I'm happy to wait.

THE COURT: That's okay. I mean, I was happy to get through your initial one and Mr. Scarola's reply.

Go ahead. What did you want to say in support of the motion to dismiss for forum non conveniens?

MR. YANNUCCI: Good morning, Your Honor. First of all, I want to thank you for giving us this opportunity to burden you with all this paper. It's an important issue though to us.

What I'd like to do, Your Honor, is talk

0025

witnesses in New York they say in their answers to our interrogatories have knowledge.

THE COURT: What would be the response to sort of the argument that just listing the numbers of witnesses is really not determinative, that sort of the core of plaintiff's Complaint is an accounting scandal, and that's where most of the discovery is going to be directed, and that's based in Florida?

MR. YANNUCCI: Well, I think in this case, the core -- I don't know that they're going to allege that the core of the case against us is an accounting scam.

THE COURT: No, but that's sort of the genesis that there was this, you know, concerted attempt to overstate earnings and then to dump --

MR. YANNUCCI: But, Your Honor, one of the key issues in this case would be what do they know about that and what steps do they take in due diligence.

THE COURT: Sure.

MR. YANNUCCI: And that's in New York. They had their own accountants who were to review the books. What did they do? Those are in New York. Those are just as important. In fact, I would say

0026

they're more important, Your Honor, because it's not really --

THE COURT: Except they're parties.

MR. YANNUCCI: Well, no, not those third parties, not Ernst & Young, who were their advisors, and that's who advised them on looking at the financial statements that were in fact in error.

I would say they're more important, Your Honor, because it's not in dispute that Sunbeam had misstatements. That's now been determined as a matter of record through the bankruptcy and elsewhere. The SEC investigated that transaction and found that the financial statements were in fact misleading. So I don't think they need to prove that.

THE COURT: So you're willing to stipulate to that?

MR. YANNUCCI: Well, I think it's a matter of record.

THE COURT: That wasn't the question.

MR. YANNUCCI: Am I willing to stipulate? Well, I'd have to go back and see exactly what the findings are. I don't think that has anything to do with us.

0027

I would note for the record, because I do want to certainly state on the record before you that we vigorously contest the allegations against us. And I'll just state for the record, when the SEC closed its exhaustive investigation, it found that we were mislead by Mr. Oozy (phonetic) on the sales projections, the very sales projections we're --

THE COURT: That may be, but I don't know that that's an issue.

MR. YANNUCCI: What I'm saying, Your Honor, is --

THE COURT: There are bunches of allegations about things Sunbeam did. Are you willing to concede that Sunbeam did those things and that your defense is simply that you didn't know?

MR. YANNUCCI: I think I'd have to go back and see exactly which allegation you're talking about, but I don't think we're going to contest that there were determinations made that Sunbeam's financial statements had errors. And I think in fact we'll be pointing out that we didn't do the auditing and we're not responsible for that.

So going to your question, I don't think the availability of Arthur Andersen should drive or

0028

that Florida should host this case.

First of all, New York has the same provisions Florida does for out-of-state depositions. This man they're talking about, Bornstein, has been deposed in New York. He went to New York to be deposed, and he has New York counsel. And the statement he supposedly would testify to that he told Morgan Stanley at a printing press about the fact that these sales projections were off, that occurred in New York.

So I don't even think if you look at Mr. Bornstein that drives the analysis. So I think if you look at that, Your Honor, it's not just the numbers, you're right about that.

If you look at the core witnesses, they don't get to decide who are the key witnesses. There's several important witnesses in this case, and a lot of them we'll have with the parties, Coleman, and certainly from Morgan Stanley, but also these third parties like Wachtell. As you know, we do argue they had ample opportunity to verify or do due diligence, and that's one of the factors under New York law that's relevant to whether or not they were defrauded.

And so we want to talk to all those third

IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME VII

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Wednesday, February 16, 2005

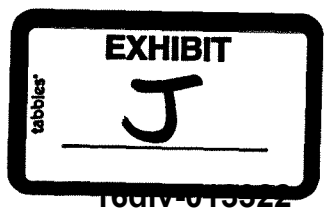
Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

1:30 p.m. to 4:50 p.m.



value of it would be only as an allegation, I mean, that's what a complaint is.

THE COURT: What you're saying to the Court is true to the best of your information and belief?

MR. WEBSTER: Yes, to the best of our information and belief, that is correct.

THE COURT: Okay.

MR. WEBSTER: We're arguing here that he shouldn't be able to give expert testimony on that fraud. And moreover --

THE COURT: Let me ask you this: Are you going to take the position Sunbeam did not engage in a fraud?

MR. WEBSTER: No, we are not going to take that position. We are going to argue that Sunbeam did engage in a fraud and Arthur Andersen engaged in that fraud.

THE COURT: But still the conclusion that Sunbeam --

MR. WEBSTER: The second part of the motion is Professor Emery is not qualified to give that opinion. He has no experience as a lawyer. He has no experience with corporate fraud. He does not teach about corporate fraud. He's not

IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME XV

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Thursday, February 24, 2005

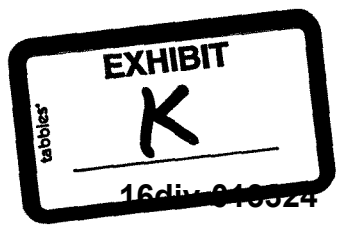
Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

9:30 a.m. to 11:00 a.m.



that.

Do we believe that Sunbeam did something wrong? Absolutely.

Do we think that Arthur Andersen's false financial statements -- as they turned out to be clearly false -- contributed to that, enabled it, was really the core of it? Absolutely.

Do we think that Arthur Andersen in several key points along the way, we think, had clear warning signs and looked the other way at times, clearly knew that things that were going into their audited financials were not correct? Absolutely.

But what we are continually asked to do is stipulate to, quote, the fraud, the Sunbeam fraud.

That's a little bit of a different situation. And I'm happy to do that as soon as the Plaintiffs tell me what that fraud is. Complete this sentence: The fraud we want you to stipulate to is blank. And in a clear, simple, and consistent way, tell us what that is. And we saw even last week where Mr. Scarola said one thing and Mr. Solovy jumped up and said another.

IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 41

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Thursday, March 17, 2005

Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

1:30 p.m. to 4:55 p.m.

Mr. Perelman sells Coleman to Sunbeam, Sunbeam buys it for consideration that the jurors will hear. And this is a lawsuit resulting from that business deal.

In that context let me ask you if someone doesn't make as much money as they might want on a deal, does anyone think that by that fact alone there are damages that someone is liable for?

Do people disagree with that?

If someone buys some stock in a company, holds on to it for several years and eventually loses money on it, does anybody think that by that fact alone that there are damages for which someone else may be liable? Just from that fact?

You're going to hear in this case that Sunbeam's financial statements -- no one knows too much about it, although there's been a little bit of reading about it. You're going to hear in this case that Sunbeam's financial statements were false. And that's the problem that I was referring to earlier.

And you've heard the phrase already, I think it's been bandied about, cooked books. And you

will hear that. And I don't think there's going to be any dispute amongst the parties about the fact that that occurred.

Now, does anyone have a view right now as to whether outside advisors to Sunbeam such as auditors or such as an investment banker in a particular deal should necessarily know about that, at least prior to here?

Let me separate it into two. I saw a little bit of a frown there.

PROSPECTIVE JUROR #95: No, no, just getting tired.

PROSPECTIVE JUROR #105: Did you have auditors?

MR. DAVIDSON: Let me break it up into two questions, because I think, Mr. Lavender, you're focusing on a good point here.

Let me talk about the type of work that Morgan Stanley does as an investment banker. And you heard a pretty good description of that from Mr. Silverberg.

Does anyone believe -- do you believe, let me ask you directly, that an investment banker performing that kind of work would necessarily know that a company's financial statements were

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

NOTICE OF FILING PLEADING UNDER SEAL

Coleman (Parent) Holdings Inc. ("CPH") hereby gives notice of the filing of Plaintiff's Opposition to Morgan Stanley's Motion for Leave to File Supplemental Grinblatt Report.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 18th day of March, 2005.

JEFFREY T. SHAW

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9967

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO. 2003CA 005045 AI

NOTICE OF FILING PLEADING UNDER SEAL

Coleman (Parent) Holdings Inc. ("CPH") hereby gives notice of the filing of Plaintiff's Response to Morgan Stanley's Motion *in Limine* No. 24 to Exclude The Testimony of William N. Horton.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 18th day of March, 2005.

JEFFREY T. SHAW

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West Palm Beach, FL 33401

9967

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.
_____/

PLAINTIFF'S NOTICE TO PRODUCE AT TRIAL

Coleman (Parent) Holdings Inc., by and through the undersigned counsel, requests, pursuant to Rule 1.350 of the Florida Rules of Civil Procedure, that Defendant, Morgan Stanley & Co., Inc., produce and permit Plaintiff to inspect and copy each of the documents described below. It is requested that the aforesaid production be made at the commencement of trial in this matter. Inspection will be made by visual observation, examination, and/or copying.

DEFINITIONS

CPH incorporates by reference the Definitions and Instructions set forth in Plaintiff's First Request for Production of Documents served in this action. In addition, CPH defines the following terms as follows:

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

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Plaintiff's Notice To Produce At Trial
Case No.: 2003 CA 005045 AI

DOCUMENTS REQUESTED

1. All agreements and documents that govern or set out terms for any of: (a) MS&Co.'s $5 billion credit line with its parent Morgan Stanley; (b) MS&Co.'s $1.8 billion secured line of credit; (c) MS&Co.'s $100 million unsecured line of credit; or (d) MS&Co.'s subordinated indenture.

2. All documents in the form of the document marked as MS Confidential 1112219 and prepared since November 30, 2004.

3. All documents involving, relating to, or referring to any calculations of MS&Co.'s minimum net worth, including any calculations relating to the requirements described in CPH deposition exhibit 415.

4. All documents involving, relating to, or referring to any borrowings by MS&Co. from its parent Morgan Stanley since January 1, 2004.

5. All documents involving, relating to, or referring to any apportionment or allocation of expenses, including expenses related to compensation of senior management, among MS&Co. and any of its affiliates.

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Plaintiff's Notice To Produce At Trial
Case No.: 2003 CA 005045 AI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served to all counsel on the attached Service List by the means indicated this 18th day of March 2005.

Dated: March 18, 2005

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Plaintiff's Notice To Produce At Trial
Case No.: 2003 CA 005045 AI

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Message:

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Secretary:	Extension:

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO. 2003CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.'S RESPONSE TO MORGAN STANLEY, INC.'S MOTION IN LIMINE NO. 25 TO EXCLUDE EVIDENCE RELATING TO SEPARATE PROCEEDING

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") respectfully requests that this Court deny Defendant Morgan Stanley, Inc.'s ("Morgan Stanley") Motion in Limine No. 25 to exclude evidence relating to the separate proceeding in *Morgan Stanley & Co. Inc., et al. v. Arthur Andersen LLP, et al.*, Case No. 50 2004 CA 002257 XXXXMB (the "*Andersen* litigation").

Morgan Stanley has sued Arthur Andersen alleging fraud by Sunbeam. Morgan Stanley's complaint and amended complaint allege the Sunbeam fraud in paragraph after paragraph. *See. e.g.,* Ex. A (Morgan Stanley's March 1, 2004 Complaint ¶ 115) ("Sunbeam . . . wrongfully conspired to create the appearance that Sunbeam was performing at a high level in order artificially to inflate the stock price of Sunbeam and make it attractive for a sale to another company"); Ex. B (Morgan Stanley's August 6, 2004 First Amended Complaint ¶ 63) ("One of the revenue inflation tactics . . . was improper accounting for 'bill-and-hold sales' . . . Sunbeam added more than $29 million to its 1997 sales and $4.5 million to income by improperly accounting for these transactions"). Morgan Stanley's other court filings likewise acknowledge in the starkest terms that Sunbeam committed a fraud. *See, e.g.,* Ex. C, Morgan Stanley's

January 28, 2005 Opposition to Motion to Dismiss First Amended Complaint at 1 ("No one disputes that Sunbeam defrauded countless shareholders, creditors, regulators and others, based on materially false financial statements"). And Morgan Stanley's counsel has made the same point, repeatedly, during court hearings. *See, e.g.*, Ex. D (March 17, 2005 Tr. at 4478-79) ("You're going to hear in this case that Sunbeam's financial statements were false . . . . And you've heard the phrase already, I think its been bandied about, cooked books. And you will hear that. And I don't think there's going to be any dispute amongst the parties that that occurred"). Those statements in the *Andersen* litigation are admissible as admissions of a party opponent pursuant to FLA. STAT. §§ 90.803(18)(b), (c), and (d) (2005).

ARGUMENT

Under the Florida Evidence Code, "[a]ll relevant evidence is admissible, except as provided by law." FLA. STAT. § 90.402 (2005) (emphasis added). Morgan Stanley's Motion nowhere cites a single provision of the Code to explain why evidence of the *Andersen* litigation is barred "by law." Instead, Morgan Stanley relies almost exclusively on common-law cases that precede the Evidence Code, which became effective July 1, 1979. *See* Mot. at 1-2; *In re Florida Evidence Code*, 372 So. 2d 1369, 1369 (Fla. 1979) (*per curiam*). The Evidence Code "replace[s] and supersede[s] existing statutory or common law in conflict with its provisions," FLA. STAT. § 90.102 (2005), and under the Evidence Code, "[a]ll relevant evidence is admissible, except as provided by law." FLA. STAT. § 90.402 (emphasis added).

The only conceivable basis for excluding Morgan Stanley's allegations and statements in the *Andersen* litigation is hearsay. *See* FLA. STAT. § 90.802. But the allegations and statements from the *Andersen* litigation fall squarely within the statutory exception for admissions by a party opponent. *Id.* § 90.803(18). If the party makes the statement, it is an admission. *Id.* § 90.803(18)(a). But in addition, a statement is treated as an admission if the statement (1) is one

in which the party "has manifested an adoption or belief in its truth" (§ 90.803(18)(b)); (2) is made "by a person specifically authorized by the party to make a statement concerning the subject" (§ 90.803(18)(c)); or (3) is made by the party's "agent or servant concerning a matter within the scope of the agency or employment thereof" (§ 90.803(18)(d)). Relevant Florida authorities confirm that all of those provisions apply to Morgan Stanley's statements in complaints, pleadings, and hearing transcripts from the *Andersen* litigation.

First, the Fourth District has ruled *en banc* that complaints in other litigation, such as the *Andersen* litigation, are admissions under section 90.803(18)(b) because they contain statements "of which the party has manifested an adoption or belief in the truth." *State Farm Fire and Casualty Co. v. Higgins*, 788 So. 2d 992, 1007 (Fla. 4th DCA 2001). In *Higgins*, State Farm brought an action for a declaratory judgment seeking a determination that the State Farm homeowner policy did not cover injuries suffered by Cheryl Ingalls because, State Farm contended, Ingalls herself had claimed that her injuries were caused by intentionally tortious conduct of Charles Higgins, who owned the homeowner policy. In a separate lawsuit between Ingalls and Higgins, Ingalls alleged that Higgins intentionally injured her. State Farm wanted to use those allegations in the coverage litigation to show that Ingalls' injuries were caused by Higgins' intentional misconduct and, therefore, were excluded under the homeowner policy. The trial court admitted into evidence in the coverage litigation the allegations from Ingalls' complaint against Higgins in the other litigation. On appeal, the Fourth District, sitting *en banc*, ruled that the trial court was correct in admitting Ingalls' complaint. The Fourth District concluded that Ingalls had manifested an adoption or belief in the allegations of her complaint, and pointed to the fact that Ingalls had typed the complaint herself. Ingalls was a legal secretary and her employer filed the complaint against Higgins on her behalf. Thus, the Fourth District

concluded that Ingalls' complaint satisfied the requirement of section 90.803(18)b) and therefore was an admission by a party opponent. 788 So. 2d at 1007 ("the original complaint . . . was admissible against [defendant] under section 90.803(18)(b), Florida Statutes (2000), as a statement offered against a party 'of which the party has manifested an adoption or belief in its truth'").

The Fourth District went on to distinguish two other cases: *Adams v. Merrill Lynch, Pierce, Fenner & Smith*, 392 So. 2d 4 (Fla. 4th DCA 1980) and *Hines v. Trager Construction Co.*, 188 So. 2d 826 (Fla. 1st DCA 1966). In discussing *Adams*, the Fourth District observed that the issue there was whether a party's original answer qualified as an admission under § 90.803(18)(c), which addresses admissions by "a person specifically authorized by the party to make a statement concerning the subject." The Fourth District distinguished *Adams* because the pleading in *Adams* was "unsworn and unauthorized." 780 So. 2d at 1007 (quoting *Adams* 392 So. 2d at 5.) Indeed, the facts in *Adams* confirm that result. In *Adams*, an attorney had filed a complaint jointly on behalf of a husband and wife, the attorney shortly thereafter withdrew his representation of the wife, and the wife repudiated the statements in the complaint and averred that she "had no personal and direct knowledge as to the matters set forth in the pleadings." 392 So. 2d at 5. Thus, in *Adams*, the court held that the wife had not authorized the attorney to make those allegations and that the complaint should not have been deemed admissible by the trial court.

The Fourth District also distinguished *Hines* but with little comment. *See Higgins* 780 So. 2d 1007. That case not only is superseded by the 1979 enactment of the Evidence Code, but also is completely inapposite. In *Hines*, the facts were undisputed but the proponent wanted to use inconsistent <u>legal</u> arguments in the opponent's prior complaint in later litigation. *Id.* at 828.

The court in *Hines* reasoned that pleadings were inadmissible "so long as the pleadings in a cause are merely a tentative outline of the position which the pleader takes before the case is fully developed on the facts." 188 So. 2d at 831. Here, in contrast, there is nothing "tentative" about Morgan Stanley's position in the *Andersen* litigation. Morgan Stanley has alleged the same theory: that Sunbeam committed fraud through a series of deceptive sales and accounting practices. *See* Ex. C, Morgan Stanley's January 28, 2005 Opposition to Motion to Dismiss First Amended Complaint at 1 ("[n]o one disputes that Sunbeam defrauded countless shareholders, creditors, regulators and others, based on materially false financial statements"). Even if Morgan Stanley's initial complaint were inadmissible on this theory, its later pleadings would be admissible.

Second, statements made by attorneys to courts constitute admissions under section 90.803(18)(c), where the attorney is authorized by the client to make the statements. *See* CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 803.18c (2004 ed.) (statements by attorney to court may be admitted "as an admission against his or her client if it is shown that the attorney had the authority to make the statement"); FLA. R. JUD. ADMIN. 2.060(k) (2005) ("[i]n all matters concerning the prosecution or defense of any proceeding in the court, the attorney of record shall be the agent of the client"). The Second District in *Payton Health Care Facilities v. Campbell*, 497 So. 2d 1233, 1238 (Fla. 2d DCA 1986), although not relying explicitly on section 90.803(18)(c), embraces that provision's analysis on analogous facts. In *Campbell*, the plaintiff brought a wrongful death suit against both the company that operated a nursing home (the "Operator") and the company that owned it (the "Owner"). The plaintiff wanted to introduce as evidence a complaint from a separate lawsuit, where the Owner had sued the Operator. The complaint in that separate lawsuit alleged negligence in the treatment of the deceased, and the

plaintiff in *Campbell* presumably wanted to use the Owner's allegations to prove that the deceased, in fact, had been treated negligently. The trial court agreed with plaintiff that the complaint was admissible, and the Second District affirmed. The Second District held that the complaint was "properly admitted by the trial court as an admission against interest." 497 So. 2d at 1238.[1]

Third, for the same reasons that they are admissible under section 90.803(18)(c), statements made by attorneys "within the scope of their agency or employment'" are admissions under section 90.803(18)(d). *See Marine Insurance Co. v. Welsh*, 501 So. 2d 54, 57 (Fla. 4th DCA 1987) (statements by opposing party's counsel "are hearsay exceptions as defined in section 90.803(18)(d), Florida Statutes, and are therefore, not inadmissible on the grounds of hearsay."); FLA. R. JUD. ADMIN. 2.060(k).

The rules set forth in the foregoing cases and statutory provisions strike a proper and sensible balance. On the one hand, attorneys are agents of their clients and their statements normally ought to be binding upon their clients — whether those statements appear in a complaint, in other court documents, or in oral statements during court proceedings. On the other hand, in those unusual circumstances where the client has not actually authorized the attorney to make the statements on the client's behalf, the client should be permitted to present evidence that the attorney's statements were neither authorized at the time nor adopted later.

The concern that clients should not be held to the unauthorized statements of their attorneys is in large part what animated the common-law distinction, now abandoned, between

[1] While the use of the term "admission against interest" in *Campbell* might suggest that the court was relying § 90.804(2)(c) ("Statements against interest"), the context makes clear that the court was deciding the issue under § 90.803(18). Section 90.804(2)(c) applies to statements of third parties unavailable to testify at trial, whereas the defendants in *Campbell* were parties to the litigation and present at trial.

verified and unverified complaints in the pre-Evidence-Code cases Morgan Stanley cites in its brief. *See Davidson v. Eddings*, 262 So. 2d 232, 233 (Fla. 1st DCA 1972) (plaintiff's unverified complaint from a separate lawsuit inadmissible where plaintiff testified, under oath, that she had never complained of injuries her attorney had alleged therein); cases cited at Mot. 1-2. In any event, the rule Morgan Stanley tries to craft from common-law cases — that pleadings must be "verified" or that the party must "suppl[y] the information in the pleading" — misses the forest for the trees. Mot. at 2. Under the Evidence Code, the standard is whether an attorney's statement is authorized or adopted by the client. *See* FLA. STAT. §§ 90.803(18)(b), (c), (d). A client's verification or supplying of information in a complaint is relevant because those facts tend to show that an attorney's statements were authorized or adopted — not because adoption or authorization is impossible without them. *See Campbell*, 497 So. 2d at 1238 (admitting complaint as admission, where party was business entity rather than individual plaintiff, without seeing the need to inquire into whether party had verified complaint or supplied information therein).

There is no reason to depart from the plain language of the Evidence Code. If Morgan Stanley's attorneys were authorized by Morgan Stanley to litigate a $1.2 billion case against Arthur Andersen premised on Sunbeam's fraud, then those statements are admissions and CPH can use them as evidence against Morgan Stanley. FLA. STAT. §§ 90.803(18)(c) & (d); *Campbell*, 497 So. 2d at 1238. And if Morgan Stanley did not authorize those statements, but became aware of them and allowed them to continue in its name, Morgan Stanley has adopted them. FLA. STAT. § 90.803(18)(b); *Higgins*, 788 So. 2d at 1007. On the other hand, if Morgan Stanley seriously contends that its counsel have been running amok for the past year — filing two complaints and other pleadings, and making representations to the court at hearings all

without authorization from Morgan Stanley — Morgan Stanley should come to this Court and say so under oath. *See Adams*, 392 So. 2d at 5 (wife averred that she "had no personal and direct knowledge as to the matters set forth in the pleadings"); *Davidson*, 262 So. 2d at 233 (plaintiff testified she had never complained of injuries her attorney had alleged in prior complaint).

CONCLUSION

For the foregoing reasons, CPH respectfully requests that this Court deny Morgan Stanley's Motion *in Limine* No. 25.

Dated: March 18, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 18th day of March, 2005.

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10291 v2

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

MORGAN STANLEY & CO. INCORPORATED, MORGAN STANLEY SENIOR FUNDING, INC., and MORGAN STANLEY,

Plaintiffs,

vs.

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

Defendants.

50 2004 CA 002257 XXXX MB
AA
CASE NO.

Jury Trial Demanded.

DOROTHY H. WIEKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION
MAR 1 2004
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COMPLAINT

In March 1998, Morgan Stanley & Co. Incorporated, Morgan Stanley Senior Funding, Inc., and Morgan Stanley (collectively, "Morgan Stanley") — in direct reliance on certified financial statements audited by the Arthur Andersen defendants ("Andersen")[1] — underwrote a multi-million dollar offering of convertible notes and provided a $680 million loan to Sunbeam

[1] Defendants Arthur Andersen LLP; Andersen Worldwide, Société Coopérative (a Swiss cooperative); Arthur Andersen & Co. (a Canadian company); Arthur Andersen & Co. (a Hong Kong company); Ruiz, Urquiza y Cia, S.C. (a Mexican Company); Piernavieja, Porta, Cachafeiro & Avocados (a Venezuela company); Arthur Andersen (a United Kingdom company), Phillip E. Harlow, William Pruitt, and Donald Denkhaus are hereinafter collectively referred to as "Andersen." Unless otherwise stated, allegations made against "Andersen" are made against each of these defendants jointly and severally.

EXHIBIT
A
tabbies

not have underwritten the Convertible Note Offering, nor would it have loaned Sunbeam $680 million.

110. As a direct result of Andersen's fraud, Morgan Stanley has suffered hundreds of millions of dollars in damages.

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

111. Paragraphs 1 through 110 are repeated and realleged as if set forth herein.

112. Sunbeam's 1996 and 1997 financial statements contained false statements of material fact. Those material misrepresentations included, among other things, overstatements of (a) Sunbeam's 1996 operating losses by approximately $40 million; (b) its 1996 losses from continuing operations by approximately $26 million; (c) its 1996 net losses by approximately $20 million; (d) its 1997 operating earnings by approximately $95 million; (e) its 1997 earnings from continuing operations by over $70 million; (f) its 1997 net earnings by approximately $70 million; and (g) its 1997 operating income figure by approximately 50 percent.

113. Andersen knew that its 1996 and 1997 unqualified audit opinions were materially false and misleading. Andersen knew that it had falsely stated, among other things, that (a) Sunbeam's financial statements fairly presented the financial position of Sunbeam during 1996 and 1997; (b) Sunbeam's financial statements fairly presented the results of Sunbeam's operations and cash flows during 1996 and 1997; (c) Sunbeam's financial statements conformed with GAAP; and (d) its audits of Sunbeam were conducted in accordance with GAAS.

114. Both Sunbeam and Andersen knew that their representations regarding Sunbeam's 1996 and 1997 financial statements were false when made and/or made these representations with reckless disregard as to their truth.

115. Andersen, Harlow, Dunlap, Kersh, and other senior Sunbeam executives acted in concert and wrongfully conspired to create the appearance that Sunbeam was performing at a high level in order artificially to inflate the stock price of Sunbeam and make it attractive for a

16div-013349

sale to another company. Andersen explicitly or implicitly by acquiescence agreed to become part of that conspiracy and committed overt acts in furtherance of its fraudulent scheme in order to retain Sunbeam as a client.

116. In furtherance of that conspiracy, Dunlap and the other Sunbeam executives decided to acquire Coleman, First Alert, and Signature Brands. In furtherance of that scheme, in March 1998, Andersen committed the overt acts of issuing Andersen's false and misleading unqualified audit opinion with respect to Sunbeam's 1997 financial statements and of consenting to its publication to the SEC as part of Sunbeam's Form 10-K filing on March 6, 1998.

117. To induce Morgan Stanley into underwriting the Convertible Note Offering and to loan Sunbeam $680 million to finance its acquisition of Coleman, First Alert, and Signature Brands, Andersen and Sunbeam represented to Morgan Stanley that Sunbeam's audited financial statements and Andersen's audit opinions were accurate and not misleading. Andersen invited Morgan Stanley to rely on its unqualified audit opinions, expressly representing to Morgan Stanley, in letters dated March 19, 1998, and March 25, 1998, that Sunbeam's financial statements were truthful and that Andersen's unqualified audit opinions were reliable. Both Andersen and Sunbeam management knew that Morgan Stanley had provided Sunbeam's Board of Directors with a "fairness" letter expressly stating that Morgan Stanley had assumed and relied upon the accuracy and completeness of Sunbeam's audited financial statements.

118. In connection with the Convertible Note Offering and the Bank Facility, Andersen and Sunbeam participated in meetings and telephone calls in which they represented to Morgan Stanley that Sunbeam's audited financial statements were accurate.

119. In addition, Sunbeam expressly represented, in loan negotiations with Morgan Stanley, that Andersen's audit opinions were accurate. It further warranted, in the Sunbeam-Morgan Stanley credit agreement, that it had provided Morgan Stanley with accurate information regarding its consolidated statements of operations, stockholders' equity and cash flows, as well as its consolidated balance sheets. Likewise, in connection with the Convertible Note Offering,

JURY DEMAND

Plaintiffs request a trial by jury on any and all issues raised by this Complaint that are triable of right by a jury.

March 1, 2004

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Counsel for Plaintiffs

16div-013351

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

MORGAN STANLEY & CO. INCORPORATED, MORGAN STANLEY SENIOR FUNDING, INC., and MORGAN STANLEY,

Plaintiffs,

v.

ARTHUR ANDERSEN LLP (an Illinois limited liability partnership), AWSC SOCIÉTÉ COOPÉRATIVE, *en liquidation* (a Swiss cooperative corporation), ARTHUR ANDERSEN LLP (an Ontario limited liability partnership), ARTHUR ANDERSEN & CO. (a Hong Kong partnership), RUIZ, URQUIZA Y CIA, S.C. (a Mexico partnership), PORTA CACHAFEIRO, LARIA & ASOCIADOS (a Venezuela partnership), PHILLIP E. HARLOW, WILLIAM PRUITT, and DONALD DENKHAUS,

Defendants.

CASE NO. 502004CA002257XXXXMB
Division AA

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION
AUG 06 2004
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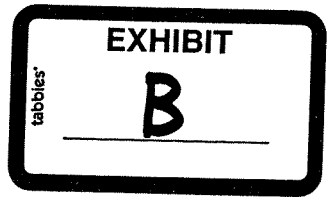
FIRST AMENDED COMPLAINT

In March 1998, Morgan Stanley & Co. Incorporated ("MS & Co."), Morgan Stanley Senior Funding, Inc. ("MSSF"), and Morgan Stanley — in direct reliance on certified financial statements that were audited by Defendant Arthur Andersen LLP (an Illinois limited-liability partnership) ("Andersen") with the assistance of and in coordination with the other Defendants named in this Complaint[1] — underwrote a multi-million dollar offering of convertible notes and

[1] AWSC, Société Coopérative, *en liquidation*, a Swiss cooperative corporation ("Andersen-Worldwide") (formerly known as Andersen Worldwide, Société Coopérative), Arthur Andersen LLP (an Ontario limited liability partnership) ("Andersen-Canada"), Arthur Andersen & Co. (a



record fraudulent sales, to account improperly for one-time events, and improperly to use "cookie-jar" reserves, all in violation of GAAP.

62. Among other things, Sunbeam's 1997 financial statements, certified by Andersen, did not comply with the accounting principles of (1) reliability, FASB Statement of Financial Accounting Concepts No. 2, §§ 58-97; APB Statement No. 4, §§ 109, 138, 189; (2) completeness, FASB Statement of Financial Accounting Concepts No. 2, §§ 79, 80; APB Statement No. 4, § 94; (3) conservatism, FASB Statement of Financial Accounting Concepts No. 2, §§ 91-97; APB Statements No. 9, §§ 35, 71; (4) neutrality, FASB Statement of Financial Accounting Concepts No. 2, §§ 98-110; or (5) relevance, FASB Statement of Financial Accounting Concepts No. 2, §§ 47, 48.

63. One of the revenue inflation tactics permitted by Andersen in 1997 was improper accounting for "bill-and-hold" sales. A bill-and-hold sale occurs when a seller bills a customer for a purchase while retaining the merchandise for later delivery. During 1997, Dunlap's management team offered financial incentives to various customers to purchase products. Under GAAP, revenue under bill-and-hold transactions may be recognized only if, among other things, the buyer — not the seller — requests a sale on that basis. As Andersen subsequently learned in the course of its 1997 audit, the purported bill-and-hold customers had not requested that treatment, and, in numerous cases, the risks of ownership and legal title were never passed to the customer. Sunbeam added more than $29 million to its 1997 sales and $4.5 million to income by improperly accounting for these transactions.

64. Another income-boosting tactic that Andersen sanctioned was Sunbeam's improper use of its inflated 1996 reserves, which artificially increased the company's 1997 income by almost $5 million. Andersen also let Sunbeam improperly treat $19 million that it received from

16div-013353

DEMAND FOR JURY TRIAL

Plaintiffs request a trial by jury on any and all issues raised by this complaint that are triable of right by a jury.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy hereof was furnished by regular U.S. Mail to counsel on the attached list on August 6, 2004.

D. Culver Smith III

16div-013354

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

MORGAN STANLEY & CO. INCORPORATED, *et al.*, *Plaintiffs*, v. ARTHUR ANDERSEN LLP, *et al.*, *Defendants*.	CASE NO. 502004CA002257XXXXMB Division AA

CM

FILED
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PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS
Hearing: February 4, at 11:00 a.m.

Andersen[1] asks this Court to dismiss, on the pleadings, all claims of plaintiffs who lost hundreds of millions of dollars as a direct result of Andersen's knowing participation in the fraud that was Sunbeam Corporation. No one disputes that Sunbeam defrauded countless shareholders, creditors, regulators and others, based on materially false financial statements — overstating profits for one year by 65 percent, to cite one example — that were audited by Andersen, as well as related false Andersen representations. Morgan Stanley[2] has stated, specifically, what each defendant did to further that fraud, and how consequently Morgan Stanley was injured. Andersen wants to argue facts: no one should be able to rely on its representations except its client, Sunbeam; Morgan Stanley was unreasonable to believe what

[1] In this Opposition, "Andersen" refers to the defendants bringing this motion to dismiss: Arthur Andersen LLP ("Arthur Andersen"), Phillip E. Harlow, William D. Pruitt, Jr., and Donald Denkhaus. "Individual Defendants" refers to Harlow, Pruitt, and Denkhaus. The other defendants to this action (Andersen Worldwide Société Coopérative, and the former Canadian, Mexican, Venezuelan, and Hong Kong Andersen branches) are represented by different counsel.

[2] "Morgan Stanley" refers to plaintiffs Morgan Stanley & Co. Incorporated ("MS & Co."), Morgan Stanley Senior Funding, Inc. ("MSSF"), and Morgan Stanley ("MS").

EXHIBIT
C

CERTIFICATE OF SERVICE

The undersigned certifies that a copy hereof was furnished by facsimile and overnight mail to counsel on the attached list on January 28, 2005.

J. Michael Burman, Esq.
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Counsel for Morgan Stanley & Co. Incorporated, Morgan Stanley Senior Funding, Inc., and Morgan Stanley

IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 41

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Thursday, March 17, 2005
Palm Beach County Courthouse
Courtroom 11-A
205 North Dixie Highway
West Palm Beach, Florida 33401
1:30 p.m. to 4:55 p.m.

Mr. Perelman sells Coleman to Sunbeam, Sunbeam buys it for consideration that the jurors will hear. And this is a lawsuit resulting from that business deal.

In that context let me ask you if someone doesn't make as much money as they might want on a deal, does anyone think that by that fact alone there are damages that someone is liable for?

Do people disagree with that?

If someone buys some stock in a company, holds on to it for several years and eventually loses money on it, does anybody think that by that fact alone that there are damages for which someone else may be liable? Just from that fact?

You're going to hear in this case that Sunbeam's financial statements -- no one knows too much about it, although there's been a little bit of reading about it. You're going to hear in this case that Sunbeam's financial statements were false. And that's the problem that I was referring to earlier.

And you've heard the phrase already, I think it's been bandied about, cooked books. And you

will hear that. And I don't think there's going to be any dispute amongst the parties about the fact that that occurred.

Now, does anyone have a view right now as to whether outside advisors to Sunbeam such as auditors or such as an investment banker in a particular deal should necessarily know about that, at least prior to here?

Let me separate it into two. I saw a little bit of a frown there.

PROSPECTIVE JUROR #95: No, no, just getting tired.

PROSPECTIVE JUROR #105: Did you have auditors?

MR. DAVIDSON: Let me break it up into two questions, because I think, Mr. Lavender, you're focusing on a good point here.

Let me talk about the type of work that Morgan Stanley does as an investment banker. And you heard a pretty good description of that from Mr. Silverberg.

Does anyone believe -- do you believe, let me ask you directly, that an investment banker performing that kind of work would necessarily know that a company's financial statements were

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

RESPONSE TO MORGAN STANLEY'S
MARCH 17, 2005 NOTICE TO PRODUCE AT HEARING

Coleman (Parent) Holdings Inc. ("CPH") responds to Morgan Stanley's Notice to Produce dated March 17, 2005 ("Notice"), which requests CPH to produce various documents at the hearing now scheduled before the Court on March 21, 2005.

Objections and Response

CPH objects to any obligation to produce documents of "Coleman," as defined in the Notice. During the relevant time period described in the Notice, Coleman was owned by Sunbeam, a separate entity.

CPH also objects to the definition of "Mafco" to the extent that the definition includes references to Coleman.

In response to the Notice, and subject to the foregoing objections, CPH states that it has already produced all non-privileged documents relevant to matters to be presented to the Court on March 21, 2005.

Dated: March 18, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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Ronald L. Marmer
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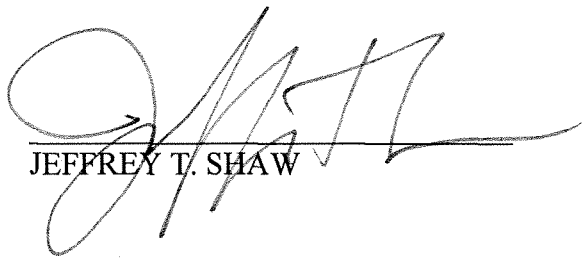
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 18th day of March, 2005.



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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO. 2003CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.'S RESPONSE TO MORGAN STANLEY'S MOTION TO REMOVE CONFIDENTIALITY DESIGNATIONS

Morgan Stanley is seeking to remove the confidentiality designations from sensitive internal financial documents that MAFCO disclosed recently — documents that pertain only in a small way to Sunbeam and focus mainly on MAFCO's many other holdings. Morgan Stanley seeks to remove the confidentiality designations from these documents, which disclose a major component of the personal wealth of Ronald Perelman, even though Morgan Stanley previously assured the Court that the information would be kept in confidence. According to Morgan Stanley, that relief is appropriate because the financial information does not qualify for protection under the Stipulated Confidentiality Order because it is not of a "current" nature, and because Morgan Stanley wants to use the documents in future pleadings and at trial. Morgan Stanley's arguments are baseless.[1]

[1] In addition to challenging the confidentiality designations of documents and deposition transcripts that disclose the recently produced MAFCO financial information, Morgan Stanley's motion also challenges the confidentiality of CPH expert Blain Nye's original report (MS 454) and the transcript of the November 18, 2004 deposition of Lawrence Winoker. Because the confidentiality designation in the original Nye report was lifted during summary judgment proceedings, and because the November 18, 2004 Winoker deposition never was confidential in the first place, the Court need not address those documents.

First, this Court already has determined that the financial information at issue should be kept confidential. Specifically, the Court found that the information contained in the MAFCO financial documents is subject to the Stipulated Confidentiality Order and extracted Mr. Bemis' personal assurance as an officer of the Court that the information would be treated as confidential (Ex. A, 2/24/05 Tr. 1555-57):

> THE COURT: I would agree, however, that I would expect them, [the financial documents] to be subject to the confidentiality order in place. And I would strictly construe it.
>
> MR. BEMIS: Understood.
>
> * * *
>
> MR. SOLOVY: That's fine. Counsel, experts, they don't need to send it to the client. Your, Honor, we are dealing with a protective order which has been, we think, violated in the crassest way —
>
> THE COURT: I am sensitive to that concern. I am very sensitive to that concern. Do you have anything you could tell me that would give me a heightened level of confidence?
>
> MR. BEMIS: You have my word as an officer of the Court.
>
> THE COURT: So I can hold you personally responsible to make sure this specific information —
>
> MR. BEMIS: Of course, Your Honor.
>
> THE COURT: — is treated under the confidentiality — in accordance with the confidentiality.
>
> MR. BEMIS: Of course.

This Court should not revisit its determination, especially given that the information at issue is indeed "financial information" of a "current nature" within the meaning of the Stipulated Confidentiality Order — because that MAFCO has many of the same holdings as it did in 1998.

Second, Morgan Stanley's motion is contrary to other prior rulings of this Court, which consistently have protected sensitive financial information such as that disclosed in the documents and depositions at issue. For example, on January 13, 2004, this Court entered an Order refusing to require CPH to provide information concerning personal finances. *See* Ex. B, 1/13/04 Order. And on February 17, 2005, this Court entered an Order granting in part CPH's Motion *in Limine* No. 2, ruling that "[n]either party may present evidence or argument [at trial] concerning the wealth, net worth, income, or financial status of any principal or employee of CPH or a related entity." See Ex. C, 2/17/05 Order. Morgan Stanley's attempt to make public MAFCO's financial information, which reveals Mr. Perelman's personal wealth and financial status, is inconsistent with those prior rulings.

Third, Morgan Stanley's request also is inconsistent with Florida law, which respects the privacy of financial information such as that contained in the documents and depositions at issue. *See, e.g., Berkeley v. Eisen*, 699 So. 2d 789, 790 (Fla. DCA 1997) ("the law in the state of Florida recognizes an individual's legitimate expectation of privacy in financial institution records") (citation omitted). "[F]inancial information of private persons is entitled to protection by this State's constitutional right of privacy, if there is no relevant or compelling reason to compel disclosure." *Mogul v. Mogul*, 730 So. 2d 1287, 1290 (Fla. 5th DCA 1999). Thus, as a matter of Florida law, the financial information in the documents and depositions in question should not be disclosed absent an exceedingly compelling reason — which does not exist here.

Fourth, although Morgan Stanley contends that it wants to use the financial information in future pleadings without being bothered with the cumbersome process of filing pleadings under seal, Morgan Stanley's complaint of inconvenience pales in comparison to the legitimate and constitutionally-recognized privacy interests at stake. And although Morgan Stanley argues

that it intends to use the financial information at trial, as shown in CPH motion *in limine* no. 24, the information is not relevant to any issue in dispute. In any event, even if some of the information were relevant, that certainly would not justify the relief Morgan Stanley seeks here: a license to disseminate MAFCO's (and Mr. Perelman's) sensitive financial information anytime and anywhere Morgan Stanley so desires.

For the foregoing reasons, Morgan Stanley's motion to lift confidentiality designations should be denied.

Dated: March 18, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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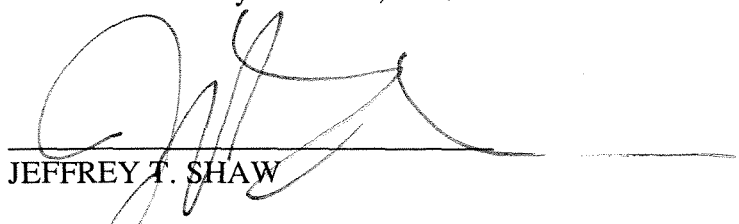

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10294 v1

IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME XV

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Thursday, February 24, 2005

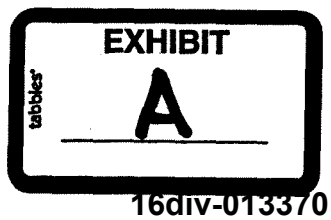
Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

9:30 a.m. to 11:00 a.m.



subject to a privilege because Mr. Perelman asked me to, which I think, in all honesty, I think what you're asking.

MR. SCAROLA: I understand.

THE COURT: I would agree, however, that I would expect them to be subject to the confidentiality order in place. And I would strictly construe it.

MR. BEMIS: Understood.

MR. SOLOVY: Let me just ask you this, Your Honor, just like you did with some of the privilege when we weren't present, I think we could walk you through these redactions in about ten minutes, and you would either say yea or nay.

THE COURT: In all honesty, it's not an accommodation I would afford any other litigant, and it's not an accommodation I would afford here.

MR. SOLOVY: Well, I think we just --

THE COURT: You go back and tell Mr. Perelman you tried real hard, but I wasn't willing to do it.

MR. SOLOVY: Normally, Your Honor -- and this is no aspersion on counsel -- but, A, I

think it should be for counsel's eyes only, and number two, highly sensitive material, because it's stuff that Your Honor has ruled is not pertinent --

THE COURT: I understand, but I assume they're going to have to show it to their experts.

MR. SOLOVY: That's fine. Counsel, experts, they don't need to send it to the client. Your Honor, we're dealing with a protective order which has been, we think, violated in the crassest way --

THE COURT: I'm sensitive to that concern. I am very sensitive to that concern.

Do you have anything you could tell me that would give me a heightened level of confidence?

MR. BEMIS: You have my word as an officer of the court.

THE COURT: So I can hold you personally responsible to make sure this specific information --

MR. BEMIS: Of course, Your Honor.

THE COURT: -- is treated under the confidentiality -- in accordance with the confidentiality.

MR. BEMIS: Of course.

MR. SCAROLA: The second issue I wish to comment on is the appropriate remedy under the circumstances. I wanted to point out first to Your Honor that we have offered a corporate representative to be deposed immediately. When I say immediately, we actually request that that deposition be taken on Tuesday, because inhouse counsel, who is most familiar with these matters and wishes to be present, is returning from Europe and will be available on Tuesday for purposes of having that deposition taken.

So we would request that the deposition occur on Tuesday.

In terms of other witnesses that they seek to depose, I would request that the corporate representative with the most knowledge be deposed first, and we would be happy to discuss with opposing counsel what need exists for further discovery after that. I suspect that once that witness has been deposed, there will be no further need.

But I will tell you that we will bend over backwards to make available any witnesses reasonably needing to be deposed. And I

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

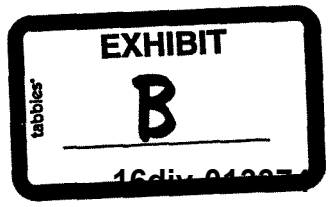
MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON DEFENDANT'S MOTION TO COMPEL DISCOVERY AND ORE TENUS MOTION TO CONTINUE AND ORDER SETTING CASE MANAGEMENT CONFERENCE

This case came before the Court January 12, 2004 on Defendant's Motion to Compel Discovery, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Defendant's Motion to Compel Discovery is Granted, in part, and Denied, in part. Interrogatory 1 of Defendant's Third Set of Interrogatories is amended by interlineation to request the information as to Global Holdings only, expressed as a percentage of net worth. As so modified, Plaintiff shall serve its answer to the Interrogatory for Plaintiff and MAFCO, within 30 days. The Court defers ruling on the portion of the interrogatory directed to Perelina, Gittis, and any other MAFCO or CPH employees who participated in the due diligence or financial review of Sunbeam's acquisition of Coleman Company, pending further hearing. It is further

ORDERED AND ADJUDGED that Defendant's ore tenus Motion to Continue is Granted. The Order Setting Jury Trial and Directing Pretrial and Mediation Procedures entered January 6, 2004 is stricken. It is further



ORDERED AND ADJUDGED that a case management conference shall be held

February 20, 2004, at 3:30 p.m., 1 hour reserved

at the West Palm Beach Courthouse, Room 11A, 205 N Dixie Hwy, WPB, FL. Counsel shall confer and file an agreed statement of the case's background and procedural history at least three business days prior to the scheduled hearing. A copy shall be delivered to the undersigned's office. In addition, each counsel shall file, serve, and deliver a copy to the undersigned a statement of unresolved legal issues remaining in the action, attaching copies of any unresolved motions or other requests for action. The purpose of the conference is to:

1. educate the Court on the action's procedural and legal posture;
2. discuss filing and setting hearing on pre-trial motions;
3. limit, schedule, or expedite discovery;
4. schedule exchange of witness lists and documents;
5. require filing of preliminary stipulations, if the issues can be narrowed;
6. discuss filing of deposition designations, cross-fairness designations, and objections thereto, and motions in limine;
7. schedule other conferences or determine other matters that may aid in the disposition of the case;
8. discuss time limits for the progress of the trial, including length of trial, voir dire, opening statements, and closing arguments;
9. discuss jury selection procedures;
10. identify unique questions of law;
11. identify the need for any special equipment, courtroom facilities, or interpretors; and
12. select the most appropriate docket for trial.

This hearing may be canceled only if the action is settled and a final order issued or the action dismissed. This hearing may be re-set only on Court order, and may not be canceled by the parties or their counsel.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 13th day of January, 2003.

ELIZABETH T. MAASS
Circuit Court Judge

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Jacksonville, FL 32202

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oir ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki Infim, ki bézwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontakté koôdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro téléfonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résévwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe accommodation pour pouvoir participer á ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

ORDER ON Plaintiff's **MOTION IN LIMINE NUMBER** 2

THIS CAUSE having come before this Court on February 17, 2005 upon Plaintiff's Motion in Limine Number 2, and the Court having reviewed the pleadings on file, heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is Granted.

Neither party may present evidence or argue concerning the wealth, net worth, income, or financial status of any ~~of~~ principal or employee of CPH or a related entity. This ruling is without prejudice to either party's right to present evidence or argue concerning an individual's business or financial sophistication.

WPB#589635.1

EXHIBIT
tabbies
C

16div-013378

"Granted" for purposes of the Motion in Limine addressed in this Order shall mean that the parties and their counsel shall not refer to or attempt to introduce into evidence, or otherwise place before the jury, the matter referred to without first proffering the good faith basis to believe that the matter is relevant and admissible outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 17 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

WPB#589635.1

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JENNER&BLOCK

March 18, 2005

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Washington, DC

Jerold S. Solovy
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Fax 312 840-7671
jsolovy@jenner.com

BY TELECOPY

Honorable Elizabeth T. Maass
Division A1
Courtroom 11B
Circuit Court of the 15th Judicial Circuit
205 North Dixie Highway
West Palm Beach, FL 33401

Re: Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.

Dear Judge Maass:

Attached is the parties' agreed-to order for presentation of motions on Monday.

Sincerely,

Jerold S. Solovy

Enclosure

cc: All Counsel of Record
(BY TELECOPY)

9961

LIST OF MOTIONS FOR MONDAY

1. Morgan Stanley's Motion for an Adverse Inference Concerning CPH's Destruction of E-mail;

2. Morgan Stanley's Motion for Sanctions for Discovery Abuses;

3. Morgan Stanley's Motion to File a Supplemental Grinblatt Report;

4. CPH's Motion *in Limine* No. 24 Concerning MAFCO Financial Information;

5. Morgan Stanley's Motion to Lift Confidentiality Designations from MAFCO Financial Papers;

6. Morgan Stanley's Motion *in Limine* No. 23 to Preclude Use of Strong's Criminal Proceedings;

7. CPH Motion for Judicial Notice of Strong's U-4 Forms;

8. Morgan Stanley's Motion in Limine No. 25 to Exclude Evidence in the *Morgan Stanley v. Arthur Andersen* Proceeding;

9. CPH's Motion to Quash Morgan Stanley's Motion to Produce Loan Documents;

10. CPH's Motion for Judicial Notice and Admissibility of Morgan Stanley's Court Documents and Statements Relating to the Sunbeam Fraud;

11. Morgan Stanley's Motion *in Limine* No. 24 Regarding Horton;

12. CPH's Motion *in Limine* No. 26 for a Finding that Morgan Stanley Owed a Duty to All Purchasers of Sunbeam Securities Including Plaintiff;

13. CPH's Motion *in Limine* No. 25 for a Finding of Exculpatory and Integration Clauses are Ineffective to Bar Intentional Tort Claims;

14. CPH's Motion *in Limine* No. 27 for a Finding as a Matter of Law that the Federal Securities Laws Prohibited Plaintiff from Selling Unregistered Securities;

15. CPH's Motion to Determine What Evidence Comes in in Phase One and What Evidence Comes in in Phase 2;

16. CPH's Motion to Deem Admissible Trial Exhibits to Which There is No Objection;

17. CPH Motion No. 14 *in Limine* re Comfort Letters;

18. CPH Motion to Deem Admissible Third-Party Documents [AA and Sunbeam certifications];

19. CPH's Motion to Lift Strong-And-E-Mail-Related Confidentiality Designations from Pleadings;

20. Morgan Stanley's Motion to compel CPH to Produce a Chronologically Sorted Privilege Log

10295 v2

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER AND DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court, in Chambers, on its own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Clerk is directed to docket and file the letter from Dr. Ulloa; Robert Wacker's letter dated March 14, 2005; and Loreen Francescani's letter dated March 16, 2005.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 15 day of March, 2005.

_____
ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER AND DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court, in Chambers, on its own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Clerk is directed to docket and file the facsimile transmission from Luis Tur dated March 17, 2005.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 18 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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March 20, 2005

VIA FACSIMILE

Michael T. Brody
Jenner & Block, LLC
c/o Mafco Holdings, Inc.
777 S. Flager Drive
Suite 1200 -- West Tower
West Palm Beach, FL 22401-6136

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co. Incorporated*

Dear Mike:

Enclosed please find the list of exhibits Morgan Stanley may use at the March 21, 2005 Hearing on Morgan Stanley's Motion for Sanctions for Discovery Abuses (re Valuation Documents.) It is my understanding that CPH is in possession of the documents on the list.

Sincerely,

Alexander Dimitrief, P.C.

Enclosures

cc: Joseph Ianno, Jr., Esq.
John Scarola, Esq.
Mark C. Hansen, Esq.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

CASE NO: CA 03-5045 AI

MORGAN STANLEY EXHIBIT LIST

Monday, March 21, 2005 Hearing

Morgan Stanley hereby submits the following exhibits that it may use at the March 21, 2005 Hearing on Morgan Stanley's Motion for Sanctions for Discovery Abuses (re Valuation Documents).

NO.	DATE	DESCRIPTION	BATES NOS./ BRIEF EX. NO./ TRIAL EX. NO.
1.	11/11/1998	B. Schwartz Memo re request for production of documents	CPH2000848 CPH Ex. 17 [MS 123]
2.	12/31/1998 12/31/1999	Mafco Holdings Estimated Fair Value Calculation of 12/31/1998; Mafco Holdings Estimated Fair Value Calculation of 12/31/1999	CPH2012216-17 [MS 822]
3.	4/5/1999	Mafco Holdings Inc. Consolidated Financial Statements for the Year Ended December 31, 1998 with Report of Independent Auditors	CPH2012219-306 [MS 814]
4.	4/19/1999	L. Winoker Memo to R. Perelman re Fair Value Disclosure - 1998	CPH2012512-13 [MS 857]
5.	4/27/2000	Mafco Holdings Inc. Consolidated Financial Statements for the Year Ended December 31, 1999 with Report of Independent Auditors	CPH2012307-68 [MS 815]

6.	4/9/2001	Mafco Holdings Inc. Consolidated Financial Statements for the Year Ended December 31, 2000 with Report of Independent Auditors	CPH2012369-424 [MS 816]
7.	6/19/2001	B. Schwartz Memo re Preservation of Documents	CPH2000037 CPH Ex. No. 18 [MS124]
8.	10/5/2001	E. Golden Memo re Document Production for *Coleman (Parent) v. Arthur Andersen*	CPH2000039-40 CPH Ex. 19
9.	11/6/2001	E. Golden e-mail re Arthur Andersen Document Requests	CPH2000041 CPH Ex. 21 [MS 125]
10.	11/8/2001	E. Golden Memo re More document Production for *Coleman (Parent) v. Arthur Andersen*	CPH2000044 CPH Ex. 20 [MS 126]
11.	7/14/2003	Morgan Stanley's First Request for Production of Documents	
12.	8/14/2003	CPH'S responses to Morgan Stanley's First Request for Production of Documents	
13.	8/27/2003	K. DeBord Letter to M. Brody	
14.	9/12/2003	M. Brody Letter to K. DeBord	
15.		Deloitte & Touche Memo of 4/2/1999 re M&F Warrants Accounting and Valuation (produced on 9/15/2003)	CPH1308865-70 [MS 97]
16.	9/15/2003	S. Fasman Deposition Excerpts at 12:15-13:9, 16:9-17, 25:22-26:9, 37:2-13, 41:3-14, 42:5-15, 43:2-44:10, 45:20-46:12, 47:18-22, 63:1-7, 89:17-90:3, 93:13-21, 96:13-19, 97:7-15, 98:5-7, 98:19-99:2, 102:2-8, 134:3-20, 138:19-22, 139:7-15, 140:2-8, 140:15-142:22, 144:5-9, 145:11-16, 145:21-22, 147:10-14, 147:18-19, 154:9-18, 159:7-160:4, 161:14-162:2, 165:2-12	
17.	10/8/2003	M. Brody Letter to K. DeBord	
18.	10/13/2003	Morgan Stanley's Third Request for Production of Documents	

19.	11/12/2003	CPH's Responses to Morgan Stanley's Third Request for Production of Documents	
20.	1/5/2004	M. Brody Letter to K. DeBord (re CPH's Responses and Objection to Morgan Stanley's 3rd Request for Production)	
21.	1/23/2004	K. DeBord Letter to M. Brody	
22.	1/29/2004	M. Brody Letter to K. DeBord (re CPH's production of documents in response to Morgan Stanley's 1st and 3rd Requests for Production)	
23.	4/6/2004	N. Gintsling Deposition Excerpts	CPH Ex. 10
24.	8/4/2004	I. Engelman Deposition Excerpts	CPH Ex. 14
25.	9/1/2004	W. Nesbitt Deposition Excerpts	CPH Ex. 15
26.	9/28/2004	A. Emmerich Deposition Excerpts	CPH Ex. 13
27.	10/8/2004	K. Clark Deposition Excerpts	CPH Ex. 12
28.	10/25/2004	Morgan Stanley's Eighth Request for Production of Documents	
29.	11/3/2004	Morgan Stanley's Amended Notice of Deposition (1.310(b)(6) deposition re warrant valuation)	
30.	11/18/2004	L. Winoker Deposition Excerpts at 6:2-10, 11:15-12:3, 19:22-21:14, 21:25-22:3, 23:20-24:7, 40:1-16, 51:2-22, 52:14-25, 54:20-56:12, 58:24-59:22, 60:19-61:1, 64:20-66:8, 68:21-69:2, 70:7-17, 71:8-72:9, 74:22-76:11, 77:4-17, 79:11-80:8, 80:16-81:11	
31.	11/18/2004	R. Perelman Deposition Excerpts at 539:20-540:7	
32.	11/22/2004	K. DeBord Letter to M. Brody	
33.	11/24/2004	CPH's Responses to Morgan Stanley's Eighth [sic] Request for Production of Documents	(attaching CPH2011835)
34.	12/7/2004	Report of Blaine F. Nye, Ph.D.	
35.	2/3/2005	L. Bemis Letter to M. Brody	

36.	2/11/2005	M. Brody Letter to L. Bemis	
37.	2/15/2005	Morgan Stanley's Motion to Compel Production of Documents	
38.	2/17/2005	Pretrial Conference Hearing Transcript (Vol. 8) at 966:9-1001:17	
39.	2/17/2005	Order on Morgan Stanley's Motion to Compel Production of Documents	
40.	2/18/2005	M. Brody Letter to T. Clare (attaching redacted valuation documents)	(attaching CPH2012092-111) [MS 810]
41.	2/18/2005	T. Clare Letter to M. Brody	
42.	2/18/2005	CPH's Motion to Determine the Appropriate Scope of Discovery	
43.	2/20/2005	J. Solovy Letter to T. Clare (attaching redacted valuation documents)	(attaching CPH2012112-193) [MS 811]
44.	2/21/2005	M. Brody Letter to T. Clare (attaching redacted valuation documents)	(attaching CPH2012194-97) [MS 812]
45.	2/22/2005	Morgan Stanley's Motion for Sanctions and Additional Discovery Concerning Plaintiff's Improper Concealment of the Value of the Sunbeam Warrants	
46.	2/22/2005	Morgan Stanley's Response to CPH's Motion to Determine the Appropriate Scope of Discovery	
47.	2/23/2005	Morgan Stanley's Motion for Additional Discovery Regarding MAFCO's Internal Valuation of Sunbeam Stock	
48.	2/24/2005	Pretrial Conference Hearing Transcript (Vol. 15) at 1543:7-1564:13	

49.	2/24/2005	Order on Morgan Stanley's Motion for Additional Discovery Regarding MAFCO's Internal Valuation of Sunbeam Stock and Morgan Stanley's Motion for Sanctions and Additional Discovery Concerning Plaintiff's Improper Concealment of the Value of the Sunbeam Warrants	
50.	2/24/2005	Order on CPH's Motion to Determine the Appropriate Scope of Discovery	
51.	2/24/2005	Compilation of ledger entries, journals reports, and other Sunbeam valuation documents (produced on 2/24/2005)	CPH2012198-218 [MS 813]
52.	2/24/2005	Cover letter for 2/24/2005 production of CPH2012198-424	
53.	2/24/2005	L. Bemis Letter to M. Brody (following up on Morgan Stanley's February 18, 2005 correspondence)	
54.	2/24/2005	L. Bemis Letter to M. Brody (regarding CPH's Response to Morgan Stanley's Motion for Sanctions)	
55.	2/28/2005	CPH's Response to Defendant's Notice of Videotaped Deposition	
56.	2/28/2005	T. Clare Letter to M. Brody	
57.	2/28/2005	M. Brody Letter to L. Bemis (re CPH's production of documents in response to 2/17/2005 Order)	
58.	2/28/2005	M. Brody Letter to L. Bemis (re Sunbeam warrants)	
59.	2/28/2005	M. Brody Letter to L. Bemis (re post-2000 MAFCO Consolidated Financial Statements)	
60.	2/28/2005	Production of additional valuation documents by CPH	CPH2012424-504 [selected portions marked as MS 830, MS 831, MS 832, MS 833, MS 834, MS 841]
61.	3/1/2005	Pretrial Conference Hearing Transcript (Vol. 18) at 1779:12-1800:6	

62.	3/1/2005	Amended Notice of Videotaped Deposition (1.310(b)(6) deposition re valuation documents)	
63.	3/2/2005	M. Brody Letter to L. Bemis (re omitted document)	(attaching CPH2012470A) [inserted in MS 831]
64.	3/2/2005	T. Clare Letter to M. Brody (re 1.310(b)(6) deposition)	
65.	3/2/2005	M. Brody Letter to T. Clare (re 1.310(b)(6) deposition)	
66.	3/3-4/2005	1.310(b)(6) Deposition Excerpts of T. Slotkin at 13:24-14:14, 25:17-27:2, 28:16-29:5, 29:13-30:17, 31:5-32:3, 33:23-34:7, 45:19-47:7, 47:15-48:5, 53:3-11, 55:7-56:21, 57:18-24, 58:12-60:7, 64:2-6, 70:7-75:18, 75:23-77:14, 105:18-22, 111:12-114:7, 116:12-15, 120:8-121:14, 125:7-18, 126:2-15, 127:5-8, 127:14-18, 129:19-130:11, 161:11-162:3, 188:24-189:5, 189:14-20, 279:17-23, 280:2-8, 280:10-16	
67.	3/4/2005	Pretrial Conference Hearing Transcript (Vol. 23) at 2208:18-2213:24	
68.	3/7/2005	Production of additional valuation documents by CPH	CPH2012505-16 [MS 849]
69.	3/8/2005	Production of transmittal letters of MAFCO financial statements to OTS and PBGC	CPH2012517-76 [MS 852]
70.	3/8/2005	Pretrial Conference Hearing Transcript (Vol. 25) at 2398:7-2399:3	
71.	3/8/2005	L. Winoker Deposition Excerpts at 2:17-19, 18:7-19:5, 20:1-5, 22:17-23:21, 24:8-19, 25:18-26:11, 27:9-28:9, 29:10-25, 33:23-34:11, 35:6-17, 37:5-38:15, 39:19-24, 40:16-19, 42:4-18, 43:7-44:13, 44:24-45:4, 45:22-47:21, 54:22-56:7, 57:8-17, 59:3-8, 60:12-61:9, 62:24-65:6, 65:10-14, 71:22-72:1, 72:11-22, 74:20-75:18, 76:12-19, 86:24-87:10, 90:4-13, 92:14-93:23, 95:10-97:2, 97:8-98:25, 101:19-102:5, 108:12-23, 109:3-10, 121:2-7, 139:23-140:7, 142:2-8, 143:16-144:21	

72.	3/10/2005	R. Perelman Deposition Excerpts at 13:20-25, 23:12-21, 26:16-18, 27:11-23, 29:12-17, 31:4-11, 33:1-15, 36:13-15, 38:14-20, 47:13-48:13, 56:18-57:13, 58:20-59:6, 59:23-60:10, 61:3-16, 74:22-75:15, 76:11-77:3, 81:16-82:4	
73.	3/11/2005	B. Nye Deposition Excerpts at 22:1-14; 42:13-18, 45:10-15; 67:9-16; 68:9-18, 69:23-70:1, 73:6-13, 84:2-12,	
74.	3/11/2005	Morgan Stanley's Motion to Compel Production of Archived Documents and Correspondence with Banks	
75.	3/11/2005	Pretrial Conference Hearing Transcript (Vol. 31) at 3072:13-3076:15	
76.	3/11/2005	Order on Morgan Stanley's Motion to Compel Production of Archived Documents and Correspondence with Banks	
77.	3/12/2005	M. Brody Letter to L. Bemis (re production of transmittal letters of MAFCO financial statements to bank)	(attaching CPH2012577)
78.	3/14/2005	M. Brody Letter to T. Clare (attaching Certification of Steven L. Fasman Concerning the Search of CPH's Archives)	
79.	3/14/2005	L. Bemis Letter to M. Brody (regarding inadequacy of Mr. Fasman's Certification)	
80.	3/15/2005	Pretrial Conference Hearing Transcript (Vol. 37) at 3784:1-3785:23, 3953:11-20	
81.	3/16/2005	L. Bemis Letter to M. Brody (requesting S. Fasman Deposition pursuant to Court's Orders of 2/24/2005 and 3/11/2005)	
82.	3/17/2005	A. Dimitrief Letter to M. Brody (requesting identification of witnesses for 3/21/2005 sanctions hearing, opportunity to depose, and related documents)	
83.	3/17/2005	Notice of Filing Trial Exhibit List (including CPH's Objections to MS 97)	

84.	3/18/2005	J. Ianno Letter to J. Scarola (confirming CPH intends to call S. Fasman at 3/21/2005 sanctions hearing)	
85.	3/18/2005	J. Scarola Letter to J. Ianno (confirming Mr. Fasman as a live witness for 3/21/2005 hearing)	
86.	3/18/2005	J. Ianno Letter to J. Scarola (requesting information re S. Fasman's testimony on search of R. Perelman's files)	
87.	3/18/2005	A. Dimitrief Letter to J. Scarola (re requests to depose 3/21/2005 hearing witnesses and request for documents pertinent to sanctions motion)	
88.	3/19/2005	M. Brody Letter to A. Dimitrief (refusing to produce S. Fasman for deposition)	
89.	3/19/2005	L. Bemis Letter to M. Brody (follow-up re no response to 3/14/2005 letter)	

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

MORGAN STANLEY'S MOTION TO COMPEL DISCLOSURE OF DEPOSITION VIDEOS PRIOR TO PRESENTATION TO JURY

Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully requests that Coleman (Parent) Holdings Inc. ("CPH") be ordered to disclose to Morgan Stanley the deposition designation videos before they are presented to the jury. Morgan Stanley further requests that CPH be required to provide, at a minimum, 48 hours notice before presenting a deposition designation to the jury (72 hours for depositions to be presented on Mondays). This is the same notice that the parties had agreed to provide for live witnesses. Morgan Stanley would provide the same opportunity and notice to CPH. In support of its motion, Morgan Stanley states as follows:

1. On January 17, 2005, when the parties exchanged counter-designations, Morgan Stanley requested the opportunity to review CPH's deposition designation videos before they are presented to the jury. (Jan. 17, 2005 Z. Brown Letter to M. Brody (Ex. 1).) One of the many purposes for reviewing the videos is to make certain that Morgan Stanley has no objections to the manner in which CPH has edited, processed, or presents the deposition designations. CPH did not respond to this request.

2. On March 17, 2005 Morgan Stanley again requested that it be permitted to review CPH's deposition designation videos before they are presented to the jury. (Mar. 16, 2005 Z. Brown Letter to S. Prysak (Ex. 2).) In addition to the above stated reasons, previewing the videos is necessary to be certain that there are no mistakes or misunderstandings concerning the Court's numerous rulings concerning the deposition designations. CPH has not responded to this request.

3. If either party has objections to the deposition designation videos, the parties must have adequate time to bring those objections to the Court and to re-edit and review the videos if necessary. In addition, in light of the manner in which the videos are going to be presented to the jury, with cross-examination played separately, the party presenting cross-examination must have advance notice of which deposition designation testimony will be presented each day so that the cross-examination is prepared and loaded in the trial presentation software. Morgan Stanley has therefore requested, at a minimum, that CPH provide the same notice for witnesses appearing by video as for witnesses appearing in person at trial. (Mar. 16, 2005 Z. Brown Letter to S. Prysak (Ex. 2), Jan. 26, 2005 J. Ianno Letter to J. Scarola (Ex. 3).) CPH has failed to acknowledge this request.

Wherefore, Morgan Stanley requests that the Court enter an order that CPH provide Morgan Stanley with notice and an opportunity to review deposition designation videos before they are presented to the jury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 30th day of March, 2005.

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Lawrence P. Bemis (FL Bar No. 618349)
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Counsel for Morgan Stanley & Co. Incorporated

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BY: Joseph Ianno, Jr.

SERVICE LIST

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Exhibit 1

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Zhonette M. Brown
To Call Writer Directly:
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January 17, 2005

VIA FEDERAL EXPRESS

Michael T. Brody, Esq.
Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611

Re: ***Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Incorporated***

Dear Mike:

Pursuant to the Order Concerning Pretrial Schedule and Following Case Management Conference, enclosed please find Morgan Stanley's counter-designations and objections to CPH's proposed deposition designations.

By making these counter-designations and objections, Morgan Stanley does not agree or admit that any of the designated testimony is relevant or admissible. Morgan Stanley reserves its right to use or not use any of the designated or counter-designated testimony.

In addition to the objections noted on the enclosed chart, Morgan Stanley objects to CPH's deposition designations for any witnesses that are within the subpoena power of the Court or an employee or agent of CPH or MAFCO. For instance, Morgan Stanley objects to CPH's designations for Mr. Bornstein, Mr. Brockelman, Mr. Denkhaus, Mr. Harlow, Mr. Moran, Mr. Pastrana, Mr. Pruitt and Mr. Yales.

Morgan Stanley has not noted in its objections all of the testimony designated by CPH which is subject to a motion in limine by Morgan Stanley. Morgan Stanley objects to all such designations and reserves its rights in this regard.

Morgan Stanley has not here noted its objections to the various documents which are quoted in or underlie certain testimony designated by CPH. Morgan Stanley reserves its right to make additional objections to any designations which refer to or relate to documents which are inadmissible or which are not trial exhibits.

Each of Morgan Stanley's objections and counter-designations were done individually by witness since Morgan Stanley is not aware of which designations and witnesses CPH intends to present at trial and in which order. Morgan Stanley reserves the right to make additional

objections, such as objections to cumulative evidence, based upon CPH's presentation of the evidence at trial.

In numerous instances the designations presented by CPH are illogical in that they start or stop in the middle of a question or answer or between a question and following answer. There are also various instances in which the hard copy designations provided by CPH do not conform to the chart of CPH designations that you provided, in some instances the absence of the designation from the chart precluded our entry of an objection. Examples of those mis-designations are attached. Once CPH corrects or clarifies its designations, Morgan Stanley reserves the right to add additional counter-designations or objections.

Morgan Stanley notes that in certain instances CPH has designated testimony that Morgan Stanley deems irrelevant such as witness addresses, information concerning witnesses' deposition preparation or information concerning the retention of Morgan Stanley counsel to represent the witness. If Morgan Stanley's objections to these designations are overruled Morgan Stanley reserves the right to add similar designations or counter-designations with respect to the witnesses represented by CPH's counsel.

Morgan Stanley objects to all opinion testimony designated by CPH that was not disclosed pursuant to the Court's December 15, 2004 Order on Coleman (Parent) Holdings Motion for Clarification of Obligation to Disclose Opinion Testimony of Fact Witnesses.

Morgan Stanley reserves and asserts all objections which were made during the course of the various depositions and which are on the record.

Morgan Stanley reserves the right to modify, supplement or withdraw counter-designations and objections consistent with the Florida Rules of Civil Procedure, the agreement of the parties, further orders of the Court, or any other applicable law or procedure. Morgan Stanley reserves the right to modify or supplement counter-designations and objections in response to unexpected trial allegations by CPH which require rebuttal or in response to rulings by the Court on motions in limine.

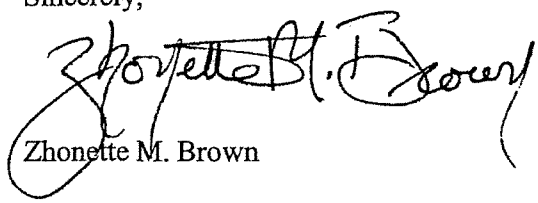
Morgan Stanley further reserves the right to correct any errors that may have occurred in the highlighting or processing of these documents or any inconsistencies between the documents provided and the chart of counter-designations and objections.

In addition to Morgan Stanley's objections to CPH's deposition designations, Morgan Stanley reserves the right to object to the manner in which CPH edits or processes the video through which they intend to present designated testimony. No such video shall be presented to the jury until Morgan Stanley has had the opportunity to review the video and make any objections.

Certain discovery remains to be completed and Morgan Stanley reserves all rights with regard to the depositions which have not yet taken place.

As with the exchange of the initial designations, Morgan Stanley stands ready to exchange electronic versions of the designation, counter-designation and objection charts. I will contact Suzanne to coordinate the exchange.

Sincerely,



Zhonette M. Brown

cc: Joseph Ianno, Esq. (by facsimile without enclosures)
John Scarola, Esq. (by facsimile without enclosures)
Mark C. Hansen, Esq. (by facsimile without enclosures)

Exhibit 2

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

Zhonette M. Brown
To Call Writer Directly:
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March 16, 2005

By Facsimile

Suzanne Prysak, Esq.
Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co. Incorporated*

Dear Suzanne:

Since January 17, 2005 Morgan Stanley has requested to review the deposition designation videos that you intend to present to the jury before they are shown to the jury. As I have previously stated, the review would allow us to determine if we have any objections to the manner in which the video editing has been performed. It would also allow the parties to be certain that there are no mistakes, miscommunications or misunderstandings following the Court's rulings on the designations.

If you intend to play any deposition designations on Monday, we should review them before Friday. This would allow any issues that may arise to be presented to the Court in a timely manner and permit further editing and review of the videos if needed. Any designations that you intend to play on Tuesday should be reviewed over the weekend. In light of these concerns, we expect that at a minimum the parties would provide the same sort of notice for witnesses that are to be presented by deposition as they are for witnesses that will be appearing in person. Please let me know today if you disagree with this approach.

Sincerely,

Zhonette M. Brown

cc: Joseph Ianno, Jr., Esq.
John Scarola, Esq.
Mark C. Hansen, Esq.
Michael Brody, Esq.

Exhibit 3

ATLANTA
MIAMI
ORLANDO
ST. PETERSBURG
TALLAHASSEE
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WEST PALM BEACH

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Shareholder
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January 26, 2005

Jack Scarola, Esq.
Searcy, Denney, et al.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33401

VIA FACSIMILE AND FEDERAL EXPRESS

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co. Inc.*

Dear Jack:

This letter will confirm the agreement we reached on the telephone Monday evening. The parties agree to provide each other 48 hours notice of the attendance and order of presentation of live witness testimony. Assuming the Court is dark on Friday, the parties will provide 72 hours notice be given for witnesses to be called on the following Monday.

Thank you.

Sincerely,

Joseph Ianno, Jr.

cc: Jerold Solovy and Mike Brody (via facsimile)
Thomas Clare (via facsimile)
Rebecca Beynon (via facsimile)

WPB#566938.15

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED

Defendant.

MORGAN STANLEY'S RESPONSE TO PLAINTIFF'S MOTION IN LIMINE NO. 26 FOR A FINDING AS A MATTER OF LAW THAT MORGAN STANLEY OWED A DUTY TO ALL PURCHASERS OF SUNBEAM SECURITIES INCLUDING PLAINTIFF

Until now, Coleman (Parent) Holdings Inc. ("CPH") has repeatedly argued that its two remaining claims — aiding-and-abetting and conspiracy — are governed by Florida law, and has sought to rely on Florida's more relaxed rules regarding a sophisticated entity's obligation to exercise reasonable due diligence. In a surprising maneuver, CPH has now filed a motion in limine that in substance relies entirely on cases from outside of Florida applying non-Florida law. The genesis of this maneuver is clear: CPH understands that under Florida law Morgan Stanley had no obligation to disclose information to CPH in connection with the Sunbeam transaction. *See Casey v. Cohan*, 740 So. 2d 59, 62 (Fla. 4th DCA 1999). If Florida law applies to the duty-to-disclose issue, CPH must prove its claims based solely on affirmative misrepresentations that Morgan Stanley is alleged to have made — not based on alleged nondisclosures. Under Florida law, "nondisclosures of fact do not establish a ... cause of action for fraudulent misrepresentation in a commercial transaction." *Id.* at 62.

In light of Morgan Stanley's properly filed, pending motion to apply New York law to the remaining counts of CPH's First Amended Complaint, the Court should not resolve these

issues in response to CPH's motion in limine. In any event, the motion should be denied, because CPH's First Amended Complaint does not specifically allege that Morgan Stanley had a fiduciary relationship with CPH giving rise to a duty of disclosure. *See TransPetrol, Ltd. v. Radulovic*, 764 So. 2d 878, 879-80 (Fla. 4th DCA 2000). Moreover, the motion also is procedurally improper on its face, for it does not purport to request the exclusion of evidence as inadmissable. *See Daily v. Multicon Development, Inc.*, 417 So. 2d 1106, 1107 (Fla. 4th DCA 1982); *Buy-Low Save Centers, Inc. v. Glinert*, 547 So. 2d 1283, 1284 (Fla. 4th DCA 1989). This Court should not allow motions in limine to be used as unnoticed, eve-of-trial, motions for summary judgment. CPH's Motion in Limine No. 26 should be denied.

ARGUMENT

CPH's motion should be denied because the First Amended Complaint does not contain the specific, separate allegations of the type of special relationship between Morgan Stanley and CPH needed to give rise to a duty to disclose. CPH's failure to make these essential allegations is not surprising, because it is undisputed that CPH did *not* purchase Sunbeam debentures from Morgan Stanley. Morgan Stanley's responsibilities and duties ran to Sunbeam, not to CPH, which hired its own team of sophisticated financial advisors (not Morgan Stanley) to assist it in evaluating the arms-length Sunbeam transaction. Under these circumstances, and for reasons set forth below, Morgan Stanley had no duty to disclose information to CPH.

I. THE MOTION IN LIMINE SHOULD BE DENIED BECAUSE IT IS UNSUPPORTED BY THE ALLEGATIONS IN CPH'S FIRST AMENDED COMPLAINT AND IS PROCEDURALLY IMPROPER.

CPH's Motion in Limine should be denied from the outset for two independent reasons.

A. CPH's Motion Should Be Denied Because CPH'S Complaint Does Not Allege A Special, Fiduciary Relationship Between CPH And Morgan Stanley Giving Rise To A Duty To Disclose.

It is bedrock Florida law that "[a] defendant's knowing concealment or non-disclosure of a material fact may only support an action for fraud where there is a duty to disclose." *TransPetrol*, 764 So. 2d at 879-80 A duty to disclose "arises when one party has information that the other party has a right to know because of a fiduciary or other relation of trust or confidence between them." *Id.* (quoting *State v. Mark Marks, P.A.*, 654 So. 2d 1184, 1189 (Fla. 4th DCA 1995)). In order to pursue a cause of action for fraud based on a duty to disclose, a plaintiff must specifically and separately allege the existence of a fiduciary relationship between the plaintiff and the defendant: "Allegations of fraudulent concealment by silence *must* be accompanied by allegations of a special relationship that gives rise to a duty to speak." *Greenberg v. Miami Children's Hosp. Research Inst.*, 264 F. Supp. 2d 1064, 1073 (S.D. Fla. 2003) (emphasis added) (plaintiffs' claims for fraudulent concealment dismissed under Florida law because they had "not sufficiently alleged that they had a fiduciary relationship" with defendants); *see also Abele v. Sawyer*, 747 So. 2d 415, 417 (Fla. 4th DCA 1999) (noting that a fiduciary relationship under Florida law is a legally imposed relationship that must be separately alleged). Absent specific and separate allegations that a special relationship between the parties exists giving rise to a duty to disclose, a defendant's non-disclosure of a material fact cannot support an action for fraud. *TransPetrol,* 764 So. 2d at 879-80; *Greenberg*, 264 F. Supp. 2d at 1071, 1073-74.

It is therefore dispositive for purposes of this motion that CPH's First Amended Complaint does *not* specifically and separately allege that a special, fiduciary relationship existed between CPH and Morgan Stanley. (*See* Feb. 17, 2005 First Amend. Compl.) The only counts now being asserted by CPH are for an alleged conspiracy in connection with, and allegedly

aiding and abetting, certain fraudulent misrepresentations made, not by Morgan Stanley, but by Sunbeam. But the pleading standards applicable to claims of primary fraud apply with even greater force to these questionable, secondary fraud claims. Even assuming arguendo that such causes of action state a claim under Florida law, and that Morgan Stanley had access to information that CPH lacked, Morgan Stanley still had no duty to disclose that information absent a special relationship with CPH. Because CPH has not pled that Morgan Stanley had such a relationship, Morgan Stanley had no disclosure duty under Florida law.

B. The Motion Should Be Denied Because It Is Not A Proper Motion In Limine Under Florida Law.

The purpose of a motion in limine "is generally to prevent the introduction of improper evidence, the mere mention of which at trial would be prejudicial." *Daily v. Multicon Dev., Inc.*, 417 So. 2d 1106, 1107 (Fla. 4th DCA 1982). Trial courts may not allow "motions in limine to be used as unwritten and unnoticed motions for partial summary judgment or motions to dismiss." *Buy-Low Save Ctrs., Inc. v. Glinert*, 547 So. 2d 1283, 1284 (Fla. 4th DCA 1989) (citations omitted); *see also* Fla. R. Civ. P. 1.500. The Fourth District has not hesitated to find reversible error when trial courts have granted improper motions in limine seeking not to exclude evidence, but to obtain improper declaratory rulings on issues as a matter of law. *See, e.g., Daily*, 417 So. 2d at 1107 (reversing trial court for granting motion in limine asking the court to "rule that as a matter of law appellee was not liable to appellant for damages").

It is therefore also dispositive for purposes of this motion that CPH is not seeking to exclude prejudicial evidence. Rather, it preemptively seeks a declaratory ruling on a hotly contested issue of law, without giving Morgan Stanley a proper opportunity to respond due to the abbreviated response times for motions in limine filed on the eve of trial. The motion should therefore be denied, as an improper bid for partial summary judgment.

II. MORGAN STANLEY HAD NO DUTY TO DISCLOSE MATERIAL INFORMATION TO CPH UNDER FLORIDA LAW.

Aside from the deficiencies in CPH's First Amended Complaint and in the procedural posture of CPH's motion, the motion fails on its merits. Assuming *arguendo* that Florida law applies (in fact, New York law applies) to the remaining counts in CPH's First Amended Complaint, Morgan Stanley still had no duty to disclose information to CPH about the Sunbeam transaction.

It is well settled under Florida law that a sophisticated commercial entity, like CPH, that has an opportunity to exercise ordinary due diligence, is barred from bringing a cause of action sounding in fraud based on a failure to disclose material facts. *See Casey v. Cohan*, 740 So. 2d 59, 62 (Fla. 4th DCA 1999) ("nondisclosures of fact do not establish a ... cause of action for fraudulent misrepresentation in a commercial transaction"). As the Fourth District has recognized, "even intentional nondisclosures of known material facts" are *not* actionable in the commercial context. *Green Acres, Inc. v. First Union Nat'l Bank of Fla.*, 637 So. 2d 363, 364 (Fla. 4th DCA 1994). A sophisticated investor that has agreed to a contract containing specific representations and warranties, and has an "ample opportunity" to conduct its own due diligence, "may be disgruntled, but does not have a cause of action for fraud." *Agrobin, Inc. v. Botanica Dev. Assocs., Inc.*, 861 So. 2d 445, 446 (Fla. 3d DCA 2003) (per curiam) (citation omitted).

Moreover, under Florida law, a fiduciary relationship giving rise to a duty to disclose can only be implied if the plaintiff comes forward with "substantial evidence showing some dependency by one party and some undertaking by the other party to advise, counsel, and protect the weaker party." *Lanz v. Resolution Trust Corp.*, 764 F. Supp. 176, 179 (S.D. Fla. 1991) (citing *Cripe v. Atlantic First Nat. Bank,* 422 So. 2d 820 (Fla. 1982)). In arms-length transactions, "*there is no duty* imposed on either party to act for the benefit or protection of the

other party, or to disclose facts that the other party could, by its own due diligence have discovered" *Id.* (emphasis added) (citing *Metcalf v. Leedy, Wheeler & Co.*, 191 So. 690, 691-92 (Fla. 1939); *see also Maxwell v. First United Bank,* 782 So. 2d 931, 934 (Fla. 4th DCA 2001) (holding that in an "arms length transaction" there is no duty to disclose). Where, as here, the parties deal at arm's length, "a fiduciary relationship does *not* exist because there is no duty imposed on either party to protect or benefit the other." *Taylor Woodrow Homes Fla., Inc. v. 4/46-A Corp.*, No. 5D01-1581, 2003 WL 158888, at *3 (Fla. 3d DCA 2003) (emphasis added).

Because there is no duty under Florida law for Morgan Stanley to disclose information to CPH, it necessarily follows that, contrary to CPH's assertions, there also is no independent "common law duty not to aid and abet or enter into a conspiracy regarding Sunbeam's fraud." (CPH Motion, at 11.) No Florida court has ever formally recognized the civil tort of aiding-and-abetting fraud, but other jurisdictions have made clear that "[a]bsent a confidential or fiduciary relationship between the plaintiff and the aider and abettor," there is no duty of disclosure and the defendant's failure to act "does not constitute substantial assistance warranting aider and abettor liability." *Ryan v. Hunton & Williams*, No. 99-CV-5938, 2000 WL 1375265, at *10 (E.D.N.Y. Sept. 20, 2000). As courts have held, "without an independent duty to disclose, mere inaction does not amount to substantial assistance for purposes of determining aiding and abettor liability." *Calcutti v. SBU, Inc.*, 273 F. Supp. 2d 488, 494 (S.D.N.Y. 2003).

Under these settled precedents, CPH is *barred* under Florida law from bringing any claim for fraud based on Morgan Stanley's purported failure to disclose material facts.

III. MORGAN STANLEY HAD NO DUTY TO DISCLOSE MATERIAL INFORMATION TO CPH UNDER THE FEDERAL SECURITIES LAWS.

CPH's First Amended Complaint does not allege violations of the federal securities law, because CPH has no standing to sue and could not possibly prevail on the merits of such claims.

In fact, were CPH to bring a fraud-on-the-market claim under section 10(b) of the federal securities laws, as CPH now appears to suggest, this Court would lack jurisdiction and would be duty bound to dismiss. *See Kahler v. E.F. Hutton & Co., Inc.*, 558 So. 2d 144, 145 (Fla. 3d DCA 1990) (jurisdiction to hear fraud-on-the-market action lies "exclusively in the United States District Courts"). Moreover, the federal securities laws do not give rise to an independent duty of disclosure, and CPH has not alleged any facts demonstrating that there existed a special, fiduciary relationship between Morgan Stanley and CPH.

CPH's motion begins with a lengthy, diversionary discussion of Morgan Stanley's obligations as an underwriter under section 11 of the Securities Act of 1933. (*See* CPH Motion, at 3-7.) But, as even CPH appears to concede (*see id.* at 4), Morgan Stanley had no duty to CPH under section 11 because CPH indisputably was not a "person[] who purchased securities" that were the "direct subject" of the debenture offering memorandum. *See Wolfson v. Solomon*, 54 F.R.D. 584, 588 (S.D.N.Y. 1972); *In re Global Crossing, Ltd. Sec. Litig.*, 313 F. Supp. 2d 189, 208 (S.D.N.Y. 2003).

CPH does contend that Morgan Stanley owed it a duty of disclosure arising under section 10(b) of the Federal Securities laws, because CPH purchased securities not from Morgan Stanley, but as part of the Sunbeam merger transaction. But, again, the law is clear: under section 10(b), a failure to disclose material information constitutes securities fraud only upon proof of a duty to disclose. *See Chiarella v. United States*, 445 U.S. 222, 228 (1980). It therefore bears heavy emphasis that the federal securities laws do *not* give rise to an independent duty of disclosure, as CPH suggests. *See Fortson v. Winstead, McGuire, Sechrest & Minick*, 961 F.2d 469, 472 (4th Cir. 1992) (citing cases). "Rather, the duty to disclose material facts arises only where there is some basis outside the securities laws, such as state law, for finding a

fiduciary or other confidential relationship." *Id*; *see also Congregation of the Passion, Holy Cross Province v. Kidder Peabody & Co., Inc.*, 800 F.2d 177, 182 (7th Cir. 1986) (duty to disclose will arise only when "the dealings between the customer and the dealer presuppose a special trust and confidence"). Indeed, contrary to CPH's assertions, Congress has not "impose[d] a *special duty of disclosure* on broker-dealers simply by virtue of their status as market professionals." *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 15 (2d Cir. 1983) (emphasis in original) (noting that a duty to disclose "arises from the relationship between parties ... and not merely from one's ability to acquire information because of his position in the market") (quotations omitted). Imposing such a broad disclosure obligation "could have an inhibiting influence on the role of market analysts, which the SEC itself recognizes is necessary to the preservation of a healthy market." *Id.* (internal quotations omitted).

Nor can CPH rely on an unpled section 10(b) theory to establish that Morgan Stanley had a duty to disclose information to CPH. CPH has not identified any Florida case applying a section 10(b) fraud-on-the-market theory to state-law fraud claims. *See Kahler v. E.F. Hutton & Co., Inc.*, 558 So. 2d 144, 145 (Fla. 3d DCA 1990) (per curiam) (dismissing plaintiffs' claims because they had failed to state "any common-law claim for fraud which is independent of a cause of action under § 10(b)," and noting that exclusive jurisdiction is vested in the district courts to hear fraud-on-the-market claims); *Keyser v. Commonwealth Nat'l Fin. Corp.*, 121 F.R.D. 642, 649 (M.D. Pa. 1988) (noting that fraud-on-the-market theories are unavailable to prove common law securities claims). Moreover, as courts have emphasized, "the fraud on the market theory has nothing to do with an affirmative duty to disclose material information." *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 27-28 (1st Cir. 1987). Rather, the fraud-on-the-market theory is only relevant to the plaintiffs' evidentiary burden in nondisclosure cases to prove

reliance. *See id.* Even in legitimate fraud-on-the-market cases brought under section 10(b), "silence absent a duty to disclose is not misleading." *Lasker v. New York State Elec. & Gas Corp.*, No. 94-CV-3781, 1995 WL 867881, at *8 (E.D.N.Y. Aug. 22, 1995) (internal citations omitted), *aff'd*, 85 F.3d 55 (2d Cir. 1996).

CONCLUSION

For the foregoing reasons, the Court should promptly resolve the outstanding choice of law issues, and deny CPH's Motion in Limine No. 26.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 21st day of March, 2005.

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

NOTICE OF FILING DOCUMENTS UNDER SEAL

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed under seal Morgan Stanley's Opposition to Coleman's Motion to Quash Morgan Stanley's Notice to Produce MAFCO Loan Agreements.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and hand-delivery on this 21st day of March, 2005.

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IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

CONFIDENTIAL – FILED UNDER SEAL

Morgan Stanley's Opposition to Coleman's Motion to Quash Morgan Stanley's Notice to Produce MAFCO Loan Agreements.

THIS ENVELOPE CONTAINS MATERIAL SUBJECT TO A PROTECTIVE ORDER ENTERED IN THIS ACTION. IT IS NOT TO BE OPENED NOR THE CONTENTS THEREOF DISPLAYED, REVEALED, OR MADE PUBLIC, EXCEPT BY WRITTEN ORDER OF THE COURT

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16div-013421

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

CASE NO: CA 03-5045 AI

MORGAN STANLEY'S RESPONSE TO CPH'S MOTION TO TAKE JUDICIAL NOTICE OF CERTAIN STATEMENTS CONCERNING THE SUNBEAM FRAUD MADE BY MORGAN STANLEY AND TO ADMIT THOSE STATEMENTS INTO EVIDENCE AS ADMISSIONS OF MORGAN STANLEY

CPH asks the Court to take judicial notice of and admit into evidence certain statements from pleadings filed in the case of *Morgan Stanley & Co. Incorporated v. Arthur Andersen LLP*, Case No. CA 04-2257 AA ("*Morgan Stanley v. Andersen*") (currently pending in Division AA of the Fifteenth Judicial Circuit Court, Civil Division),[1] as well as various statements made by counsel to Morgan Stanley & Co. Incorporated ("Morgan Stanley") in this litigation and in *Morgan Stanley v. Andersen*. CPH's arguments are contrary to well-settled law, and the statements that it has identified should not be admitted into evidence.

[1] On March 1, 2004, Morgan Stanley sued Arthur Andersen LLP ("Andersen"). Morgan Stanley has claimed that Andersen fraudulently represented to Morgan Stanley that Sunbeam's 1996 and 1997 financial statements were reliable. It has also alleged conspiracy and aiding-and-abetting claims against Andersen. *See* Complaint, Case No. CA 04-2257 AA (filed Mar. 1, 2004). Judge Miller has recently denied Arthur Andersen's motion to dismiss, and discovery in the case is proceeding.

ARGUMENT

I. The Court Should Not Take Judicial Notice of the Referenced Statements.

1. CPH asks the Court to take judicial notice of Morgan Stanley's statements as "[r]ecords of any court in this state," Florida Evidence Code § 90.202(6), as well as "[f]acts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned," *id.* § 90.202(12). CPH stresses that it is asking the Court to take judicial notice "only of the fact that Morgan Stanley made the statements." Mot. at 4 (underscore in original).

2. CPH implicitly (and correctly) concedes that Morgan Stanley's statements are not admissible evidence simply because they come from judicially noticed court records. "Although a trial court may take judicial notice of court records . . . it does not follow that this provision permits the wholesale admission of all hearsay statements contained within those court records." *Stoll v. State*, 762 So. 2d 870, 876 (Fla. 2000). To the contrary, "even if [an] entire court file is judicially noticed," any document or statement from that file is "still subject to the same rules of evidence to which all evidence must adhere." *Id.*, 762 So. 2d at 877; *see also Allstate Ins. Co. v Greyhound Rent-A-Car*, 586 So. 2d 482, 483 (Fla. 4th DCA 1991) ("[T]he fact that the deposition may be judicially noticed does not render all that is in it admissible."); *Milton v. State*, 429 So. 2d 804, 805 (Fla. 4th DCA 1983) (court erred in permitting use of information in judicially noticed court files where admission constituted a discovery violation and inappropriate surprise).

3. CPH suggests, without explanation, that the Court should admit the statements as non-hearsay — not for the truth of the matter asserted, but simply for the fact that Morgan Stanley "made" the statements. Yet that fact is not relevant to a single matter at issue in this case and is thus inadmissible. Fla. Evid. Code § 90.402. The six-week trial in this matter will

concern complex financial and accounting concepts. The jury will be asked to weigh the testimony of numerous fact and expert witnesses, consider complex damages calculations, and apply a highly unusual burden of proof. An instruction that the Court has taken judicial notice of the fact that Morgan Stanley "made" certain statements about Andersen's fraudulent accounting practices would not only confuse the jury with irrelevant evidence, but also would be a waste of time.

II. The Statements CPH Has Identified Are Inadmissible Hearsay.

A. The Statements Contain Multiple Hearsay.

4. CPH also asks the Court to admit the statements in Exhibits C and D to its Motion as "admissions" of Morgan Stanley. *See* Mot. at 2, 4. Each of those statements concerns allegations about conduct by individuals at Sunbeam Corporation ("Sunbeam") and Andersen. *See, e.g.,* Mot. Exh. C (referencing statements concerning Albert Dunlap's public predictions, Andersen's communications with Sunbeam, Sunbeam's representations in its financial statements, Andersen's audit report, Andersen's knowledge of accounting fraud at Sunbeam); Mot. Exh. D (referencing statements concerning Sunbeam's misstatements in its financial statements, Andersen's false financial statements).

5. Yet a cursory review of the *Morgan Stanley v. Andersen* complaint and the statements of counsel quoted in Exhibits C and D to CPH's motion makes plain that Morgan Stanley has not claimed *first-hand knowledge* of any of the allegations made therein. Thus, each of the statements that CPH seeks to admit contains *double* or even *triple* hearsay. Moreover, counsel for CPH added yet another level of complexity by acknowledging in open court that the *Morgan Stanley v. Andersen* complaint is "cropped," "word for word almost," from the complaint filed by Coleman (Parent) Holdings Inc. ("CPH") against Andersen in *Coleman*

(Parent) Holdings Inc. v. Arthur Andersen LLP, CA 01-6062 AN (15th Jud. Cir. filed June 8, 2001) ("*CPH v. Andersen*"). *See* Hearing Tr. 2961:7-10 (Mar. 10, 2005); *see also* Hearing Tr. 827:7-8 (Feb. 16, 2005) (assertion by counsel for CPH that Morgan Stanley has "copied our complaint" in outlining the Sunbeam accounting fraud). If CPH's complaint against Andersen is based on CPH's own first-hand knowledge of the Sunbeam and Andersen fraud, then there is plainly no need to introduce Morgan Stanley's statements — CPH's complaint against Andersen is better evidence of these matters. Or, if the allegations in CPH's complaint are themselves based upon hearsay, CPH effectively asks the Court to admit CPH's own hearsay allegations concerning Andersen and Sunbeam as "admissions" by Morgan Stanley. In this case, the double and triple hearsay statements in Exhibits C and D become triple and quadruple hearsay, and admitting them into evidence would be most improper.

B. The Statements Are Not "Admissions" Under Fla. Evid. Code § 90.803(18)(b)-(d).

6. CPH's argument that the referenced statements are "admissions" of Morgan Stanley under Florida Evidence Code § 90.803(18)(b)-(d) is not supported by the case law. Nor would admitting these statements be wise as a policy matter.

7. *First*, CPH claims that Morgan Stanley "has manifested an adoption or belief in [the] truth" of the statements that CPH has identified, and these statements are thus admissible under Florida Evidence Code § 90.803(18)(b). But for decades, Florida courts have (except in narrow circumstances) *prohibited* the introduction into evidence of pleadings that a party has filed in a separate proceeding. *See London Guarantee & Accident Co. v. I.C. Helmly Furniture Co.*, 14 So. 2d 848, 849 (Fla. 1943) (acknowledging general rule of excluding unsworn common-law pleadings from evidence); *Brickley v. Atlantic Coast Line R.R. Co.*, 13 So. 2d 300, 302 (Fla. 1943) (adopting rule excluding from evidence pleadings that are not "signed" or "sworn to" by

the party); *Smith v. Dowling*, 89 So. 315, 316 (Fla. 1921) ("If the pleas themselves were offered for the purpose of contradicting complainants, or to affect the credibility of the evidence offered by them because of the inconsistencies between such evidence and the contents of the pleas, they were inadmissible for the reason that the pleas were not signed or sworn to by complainants.").

8. CPH's argument (made in a related pleading) that these Florida Supreme Court decisions were somehow overruled in 1979 by the Florida Evidence Code and are no longer good law is without foundation. *See* CPH's Response to Morgan Stanley's Motion in Limine No. 25 at 2 (filed Mar. 18, 2005). Apart from its say-so, CPH offers no explanation how the rule set forth in these cases is "in conflict" with the Florida Evidence Code. *See* Fla. Evid. Code § 90.102. To the contrary, the Florida Evidence Code "simply codified the case law" in existence at the time of its enactment, *National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Underwood*, 502 So. 2d 1325, 1328 (Fla. 4th DCA 1987) — *including* these Florida Supreme Court holdings that excluded pleadings from separate cases. The Florida Supreme Court has not overruled these decisions, and no Florida court that has even questioned that they properly state the law.

9. There are two narrow exceptions to the rule barring from evidence pleadings from separate proceedings: (1) a verified pleading may be admissible, *see, e.g.*, *Brickley*, 13 So. 2d at 302, and (2) a pleading may be admissible against a party if it is shown that the party supplied the information in the pleading, *see, e.g.*, *State Farm Fire & Casualty Co. v. Higgins*, 788 So. 2d 992, 1007 (Fla. 4th DCA 2001), *aff'd*, Nos. SC01-291 & SC01-292, 2004 WL 2201474 (Fla. Sept. 30, 2004). Thus, in *Higgins*, the court admitted a complaint filed by the plaintiff in a separate action — as a statement "'of which the party has manifested an adoption or belief in its truth'" — because the plaintiff, "an experienced legal secretary, typed the original complaint for

her employer, who filed it on her behalf." *Id.* (quoting Fla. Evid. Code § 90.803(18)(b)); *see also* Mot. at 5 (admitting the plaintiff "had typed the complaint herself"). Applying this rule, the court in *Davidson v. Eddings*, 262 So. 2d 232, 235 (Fla. 1st DCA 1972), reached the opposite conclusion and refused to admit an unsworn complaint filed by the plaintiff in a prior lawsuit, on the ground that there was no showing that the plaintiff had supplied the information contained in that pleading. *See also Adams v. Merrill Lynch, Pierce, Fenner & Smith*, 392 So. 2d 4, 5 (Fla. 4th DCA 1980) (refusing to admit prior pleading on the ground that "[i]t is well established Florida law that a complaint or a counterclaim which is but a tentative outline of a pleader's position is inadmissible as evidence to prove a fact alleged therein"); *Hines v. Trager Constr. Co.*, 188 So. 2d 826, 831 (Fla. 1st DCA 1966) (same).

10. Neither exception applies here. Morgan Stanley's complaint in *Morgan Stanley v. Andersen* is not verified. Nor is there record evidence that the complaint in *Morgan Stanley v. Andersen* was based upon information provided by Morgan Stanley. Thus, contrary to CPH's claims, *Higgins* is inapplicable. *Higgins* concerned a situation in which the complaint at issue was based upon the *first-hand* knowledge of the plaintiff. Here, by contrast, Morgan Stanley's statements regarding Andersen's and Sunbeam's accounting fraud were taken from public records, including the complaint in *CPH v. Andersen.* Indeed, as noted above, opposing counsel in this case has taken credit for Morgan Stanley's statements, as he asserted in open court that the complaint is "cropped," "word for word almost," from CPH's complaint against Andersen. *See supra* ¶ 5.

11. *Second*, CPH's arguments that Morgan Stanley's attorneys' statements are admissions under either Florida Evidence Code § 90.803(18)(c) (as statements "by a person specifically authorized by the party to make a statement concerning the subject") or § 90.803(18)

(d) (as statements made by a party's "agent or servant concerning a matter within the scope of the agency or employment thereof") are equally without merit.[2]

12. As an initial matter, CPH cites to not a single case — nor can it — holding that representations made by counsel in argument during pretrial hearings are admissible under any hearsay exception or Fla. R. Jud. Admin. 2.060(k). Indeed, its position would eviscerate the Florida Supreme Court's holdings that preclude the introduction of a party's unsworn pleadings in a separate proceeding. *See, e.g., Brickley*, 13 So. 2d at 302. If statements made by counsel in a pleading are inadmissible under Florida Evidence Code § 90.803(18)(b) as statements "of which the party has manifested an adoption or belief in the truth," they certainly should not be admitted under § 90.803(18)(c) or (d).

13. In directly on-point precedent (which CPH ignores), the Fourth District Court of Appeal has recognized as much — ruling that argument by counsel is not admissible under *any* theory of admission by a party opponent. For example, in *Sea Cabin, Inc. v. Scott, Burk, Royce & Harris, P.A.*, 496 So. 2d 163, 163 (Fla. 4th DCA 1986), the court held inadmissible "portions of an appellate brief written by appellant's attorney in an unrelated appeal," in which the appellant contended that "the actions of another party, not the appellees here, caused the damages now claimed by appellants." The court "reject[ed] the proffered ground that the attorney's argument constituted an admission against interest by the individual appellant," and noted that there was "no other legal basis for admission of such evidence." *Id.* Likewise, in *Leon Shaffer Golnick Advertising, Inc. v. Cedar*, 423 So. 2d 1015, 1017 (Fla. 4th DCA 1982), the

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[2] CPH also cites Fla. R. Jud. Admin. 2.060(k) for the proposition that an "attorney of record" is the "agent of the client." Mot. at 6-7. But it identifies no cases in support of its suggestion that Rule 2.060(k) somehow renders hearsay statements by a party's counsel admissible at trial.

Fourth District made clear that an attorney's "unsworn statements" cannot establish facts in the absence of stipulation, and admonished that "[t]rial judges cannot rely upon these unsworn statements as the basis for making factual determinations." *Id.*

14. CPH points to no contrary authority. *Payton Health Care Facilities, Inc. v. Campbell*, 497 So. 2d 1233, 1238 (Fla. 2d DCA 1986), which CPH cites in support of its assertion that the statements in Exhibits C and D are admissible under Florida Evidence Code § 90.803(18)(c) as statements "by a person specifically authorized by the party to make a statement concerning the subject," makes absolutely no mention of § 90.803(18)(c) — a point CPH concedes. *See* Mot. at 7.[3]

15. Equally off-point is *St. Paul Fire and Marine Insurance Company v. Welsh*, 501 So.2d 54, 57 (Fla. 4th DCA 1987), which CPH cites – *see* Mot. at 7 – in support of its argument that the statements by Morgan Stanley's counsel are admissible under § 90.803(18)(d) as statements "by the party's agent or servant concerning a matter within the scope of the agency or employment thereof, made during the existence of the relationship." Fla. Evid. Code § 90.803(18)(d). *Welsh*, which concerned a claim that a defendant insurance company had acted in bad faith in settling the plaintiffs' claims, did not address the admissibility of statements made by a party's counsel in pleadings or court argument. Rather, it concerned statements made in letters from a defendant insurance company's attorney to the insurance company. These letters, which

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[3] The court in *Payton* admitted into evidence a complaint filed in a separate matter, relying on two chancery suits *Fisher v. Guidy*, 142 So. 818 (Fla. 1932) and *Booth v. Lenox*, 34 So. 566 (1903). *Fisher* and *Booth* stand for the proposition that pleadings verified or actually signed by a party may be admissible as a party admission. *See, e.g.*, *Brickley*, 13 So. 2d at 302. To the extent that *Payton* concerned an unverified complaint or one that was not based upon information provided by the plaintiff (the *Payton* court did not reference either issue), its holding is flatly in conflict with on-point Florida Supreme Court precedent.

"contained a very candid and critical appraisal" of the defendant's conduct in processing the plaintiff's claim, were produced (as part of the claim file) to the plaintiffs. *Welsh*, 501 So. 2d at 57. The court concluded that, by producing these documents, the defendant had waived privilege, and it held the statements admissible under Florida Evidence Code § 90.803(18)(d). *See id.* This decision — reached on utterly different facts — does not control here.

16. *Finally*, contrary to CPH's assertion that admitting statements made by Morgan Stanley's counsel in pleadings and oral argument "strike[s] a proper and sensible balance," Mot. at 7, the ruling that CPH seeks is unsound as a policy matter. The Florida Rules of Civil Procedure (like the Federal Rules) permit the assertion of numerous claims or defenses, "regardless of consistency." *Hines*, 188 So. 2d at 830 (citing Fla. R. Civ. Pro. 1.8(g)). Moreover, pleading are frequently filed "before the pleader knows with any degree of certainty what facts he will ultimately be able to prove, or what the real issues will be on which the case will be decided." *Id.* at 831. As the court recognized in *Hines*, permitting the use of pleadings filed in the same or separate cases as admissions or for impeachment would "emasculate[] if not completely destroy[]" the rule permitting alternative and inconsistent statements of a cause of action or defense. *Id.*; *see also* 30B Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 7026 ("Since the purpose of alternative pleadings is to enable a party to meet the uncertainties of proof, policy considerations demand that alternative pleadings not be admitted either as an admission of a party-opponent or for the purpose of impeachment.").

17. For this reason, the "modern trend" is that pleadings filed in separate actions are inadmissible, as the "primary purpose of pleadings is to give notice." *Svege v. Mercedes-Benz Credit Corp.*, 329 F. Supp. 2d 285, 287 (D. Conn. 2004) (citations omitted). Because the courts view claims and defenses as directed primarily to giving notice and "lack the essential character

of an admission," to "allow them to operate as admissions would frustrate their underlying purpose." McCormick on Evidence § 257 (5th ed. 2003).

WHEREFORE Morgan Stanley respectfully requests that the Court deny CPH's Motion To Take Judicial Notice of Certain Statements Concerning the Sunbeam Fraud Made by Morgan Stanley and To Admit those Statements into Evidence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 21st day of March 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiffs,

CASE NO: 2003 CA 005045 AI

vs.

MORGAN STANLEY & CO., INC.
Defendant.
_____/

NOTICE OF FILING DEPOSITION TRANSCRIPTS UNDER SEAL

Plaintiff COLEMAN (PARENT) HOLDINGS INC. hereby gives notice of the filing of the Transcripts of the Depositions of **Dr. Blaine Nye; Ronald O. Perelman; Todd J. Slotkin (2 vols.); and Laurence Winoker,** filed under seal on this date.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by fax and hand delivery to all counsel on the attached list on this 22nd day of March, 2005.

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Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Notice Of Filing Pleading Under Seal
Case No.: 2003 CA 005045 AI

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO.: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,
_____/

NOTICE OF INTENTION TO OFFER E-MAILS INTO EVIDENCE

YOU ARE HEREBY NOTIFIED that, pursuant to the Court's Order of March 1, 2005, plaintiff Coleman (Parent) Holdings Inc. intends to offer into evidence the following recently produced e-mails:

1. CPH Trial Ex. 1303: March 17, 1998 Email from D. Cernera with list of meetings and conference calls (MSE031905-0000007);

2. CPH Trial Ex. 1304: March 20, 1998 Email from J. Dormer with chronology and press release (MSE031905-0000010-0000012);

3. CPH Trial Ex. 1305: April 6, 1998 Email from D. Fannin to W. Wright re comments at ABA spring meeting (MSE031905-0000034);

4. CPH Trial Ex. 1306: March 20, 2005 Email from W. Kourakos re LFCC - Sunbeam (MSE031905-0000067); and

5. CPH Trial Ex. 1307: April 6, 1998 Email from R. Porat re conversation with J. Faulkner (MSE031905-0000065).

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Case No.: 2003 CA 005045 AI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax to all Counsel on the attached list, this 21st day of March, 2005.

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Case No.: 2003 CA 005045 AI

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

NOTICE OF FILING

Defendant, MORGAN STANLEY & CO. INCORPORATED, hereby gives notice that it has filed exhibit "B" to its Motion to Allow Substitution of Counsel and for Continuance, dated March 22, 2005.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand-delivery on this 22ND day of March, 2005.

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EXHIBIT "B"

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

AFFIDAVIT OF DONALD G. KEMPF, JR.

STATE OF FLORIDA

COUNTY OF PALM BEACH

BEFORE ME, the undersigned authority, duly authorized to administer oaths, personally appeared Donald G. Kempf, Jr., who being first duly sworn, deposes and says as follows:

1. I am over the age of 18 and fully competent to make this affidavit. I have personal knowledge of the matters contained in Morgan Stanley's Motion to Allow Substitution of Counsel and for Continuance.

2. I am the Executive Vice President, Chief Legal Officer and Secretary of Morgan Stanley, the parent company of Morgan Stanley & Co. Incorporated. I have over 30 years experience as a trial lawyer in complex civil cases.

3. I am aware that, on March 1, 2005, the Court entered an order on sanctions with detailed findings regarding problems with discovery and the failure to comply with the Court's

orders. I am also aware that, since March 1, 2005, additional problems have surfaced and the Court has taken under consideration Plaintiff's renewed motion for sanctions, which includes a request to strike Morgan Stanley's pleadings and enter default judgment.

4. There have been additional references in the record over the past week that the Court has lost confidence in statements and representations made by primary trial counsel for Morgan Stanley. I believe counsel have been compromised in their ability to represent Morgan Stanley before the Court.

5. Morgan Stanley has put Kirkland & Ellis LLP on notice of a potential malpractice claim arising out of Kirkland & Elllis's representation of Morgan Stanley in this case.

6. On March 21, 2005, Kirkland & Ellis LLP put Morgan Stanley on notice that it could not continue to represent Morgan Stanley in this case without written consent and waiver.

7. As a result of the above, Morgan Stanley is in a conflict situation with its primary trial counsel, Kirkland & Ellis LLP, regarding representation in this case and the current and pending sanctions, and affiant does not believe that Kirkland & Ellis LLP can effectively represent Morgan Stanley before the Court.

8. As of this date, Morgan Stanley has attempted, but has been unable, to secure a law firm that can be substituted in and act as primary trial counsel on short notice and without knowing whether the Court will grant a sufficient continuance. Due to the complexity of the legal and factual issues, as well as the magnitude of potential liability, a substitute firm will need to devote substantial resources, including the immediate, full-time efforts of numerous attorneys and paralegals to adequately prepare this case. In order to shift and dedicate those resources, and to review and prepare the case for trial, substitute counsel will need 180 days.

9. Morgan Stanley is prepared to pay the costs to the Court and the jury system, as well as the reasonable attorney's fees and costs of Plaintiff from November 17, 2004 to date.

10. On behalf of Morgan Stanley I consent to a continuance of this action.

FURTHER AFFIANT SAYETH NAUGHT.

DONALD G. KEMPF, JR.

SWORN TO AND SUBSCRIBED before me at the County and State last aforesaid on this 22nd day of March, 2005 by DONALD G. KEMPF, JR., who is personally know to me.

(NOTARY SEAL)

JOYCE E. DILLARD
MY COMMISSION # DD 121332
EXPIRES: September 9, 2006
Bonded Thru Notary Public Underwriters

Name of Notary
State of Florida at Large (Seal)
My Commission Expires _____

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

CASE NO: CA 03-5045 AI

KIRKLAND & ELLIS LLP'S MOTION TO WITHDRAW AS COUNSEL

Kirkland & Ellis LLP respectfully moves to withdraw as counsel of record for Morgan Stanley & Co. Incorporated. There is a conflict between Kirkland & Ellis LLP and Morgan Stanley with respect to this case. For this reason, Kirkland & Ellis LLP seeks to withdraw as counsel for Morgan Stanley in this proceeding.

Lawrence P. Bemis

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand deliver on this 22nd day of March, 2005.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON CPH'S RENEWED MOTION FOR ENTRY OF DEFAULT JUDGMENT

THIS CAUSE came before the Court March 14 and 15, 2005, on CPH's Renewed Motion for Entry of Default Judgment, with both parties well represented by counsel.

Coleman (Parent) Holdings, Inc. ("CPH"), has sued Morgan Stanley & Co., Inc. ("MS & Co."), for aiding and abetting and conspiring with Sunbeam to perpetrate a fraud. Early in the case, CPH was concerned that MS & Co. was not thoroughly looking for emails responsive to its discovery requests. On April 16, 2004, the Court entered an Agreed Order ("Agreed Order") that required MS & Co. to search its oldest full backup tapes for emails subject to certain parameters and certify compliance. MS & Co. certified compliance with the Agreed Order on June 23, 2004. On November 17, 2004, CPH learned that MS & Co. had found some backup tapes that had not been searched. On January 26, 2005 it served its Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order ("Adverse Inference Motion"), claiming that MS & Co.'s violation of the Agreed Order, coupled with its systemic overwriting of emails after 12 months, justified an adverse inference against it. The Court ordered certain limited discovery. Responses to that discovery prompted CPH to orally amend its Adverse Inference Motion to seek more severe sanctions.

The Court held an evidentiary hearing on the Adverse Inference Motion on February

14, 2005. On March 1, 2005 it issued its Amended Order on Coleman (Parent) Holdings Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order ("Adverse Inference Order"). In its current Motion, CPH argues that it has since learned that the discovery abuses addressed in the Adverse Inference Motion and Order represent only a sampling of discovery abuses perpetrated by MS & Co. and that the abuses have continued, unabated. It claims that these abuses, when taken as a whole, infect the entire case. To understand CPH's argument, it is necessary to go back to the beginning.

This case arises out of an acquisition transaction that was negotiated and consummated in late 1997 and early 1998, in which CPH sold its 82% interest in the Coleman Company, Inc., to Sunbeam Corporation. MS & Co. served as financial advisor to Sunbeam for parts of the acquisition transaction and served as the lead underwriter for a $750,000,000.00 debenture offering that Sunbeam used to finance the cash portion of the deal.

CPH's Complaint[1] alleged claims against MS & Co. arising from this transaction for fraudulent misrepresentation, negligent misrepresentation, aiding and abetting fraud, and conspiracy, and sought damages of at least $485 million.

On May 12, 2003, MS & Co. was served with the Complaint and CPH's First Request for Production of Documents ("Request"). The Request sought, in essence, all documents connected with the Sunbeam deal. "Documents" was broadly defined, and specifically included items electronically stored. Concerned that, out of more than 8,000 pages of documents produced, it had received only a handful of emails, CPH on October 29, 2003, served its Motion to Compel Concerning E-Mails. That motion sought an order requiring MS & Co. to make a full investigation for email messages, including a search of magnetic tapes and hard drives; produce within 10 days all emails located; and produce a Rule 1.310 witness

[1]On February 17, 2005, CPH served its First Amended Complaint, which dropped the claims against MS & Co. for fraudulent and negligent misrepresentation, leaving only the aiding and abetting and conspiracy claims.

16div-013452

within 20 days "to describe the search that was conducted, identify any gaps in Morgan Stanley's production, and explain the reasons for any gaps."

In its Opposition to Coleman (Parent) Holdings, Inc.'s Motion to Compel served November 4, 2003, MS & Co. argued that CPH wanted "this Court to order a massive safari into the remote corners of MS & Co.'s email backup systems" and represented that "(t)he restoration efforts demanded by CPH would *cost at least hundreds of thousands of dollars* and require several months to complete (emphasis in original). MS & Co. argued that CPH's "true" motive was to "harass and burden MS & Co. with unnecessary and costly discovery demands and attempt to smear MS & Co. with out-of-context recitations from other proceedings" because "CPH *concedes* that MS & Co. is only able to restore email from backup tapes from January 2000 and later - *more than a year and a half after the events that allegedly gave rise to CPH's claims*," (emphasis in original).

CPH's "concession" was based on representations like the kind made to it by MS & Co.'s counsel in a March 11, 2004 letter that suggested "(t)he burden on Morgan Stanley from . . . a wholesale restoration [of email back up tapes], both in terms of dollars and manpower would be enormous. Regardless of who performs the initial restoration, it would require hundreds (perhaps thousands) of attorney-hours to review millions of irrelevant and non-responsive e-mails . . ."[2]

In response to CPH's Motion to Compel, the parties agreed to reciprocal corporate

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[2]Complaints about MS & Co.'s tactics are not new. See Ex. 196 [February 26, 2004, letter from EEOC to Hon. Ronald L. Ellis in EEOC/Schieffelin v. Morgan Stanley & Co., Inc., et al., 01-CV-8421 (RMB) (RLE) (S.D.N.Y.): ("(w)hen EEOC received [Morgan Stanley's] January 27, 2004 Responses to EEOC's Fifth Requests for Production of Documents which did not contain any e-mails, the parties communicated further. At that time, Morgan Stanley took the position that searching for e-mails would be burdensome both in regards to expense and the time it would take to respond. While the parties were in the process of attempting to work out these disputes, EEOC for the first time learned that [Morgan Stanley has] an easy, systematic ability to search for relevant documents. In a February 16, 2004, conversation with an IT representative of [Morgan Stanley], EEOC learned that [Morgan Stanley has] an e-mail system, which, while not yet fully comprehensive, was easily searchable on February 18, 2004, the close of discovery . . . which is certain to produce discoverable information highly relevant to EEOC's and Plaintiff-Intervenor's claims . . . After disclosing their state-of-the-art system to EEOC, [Morgan Stanley] dropped [its] assertion that the process was too expensive, but maintained that they refuse to search for e-mails because it is burdensome for attorneys to review large numbers of documents prior to production.")

depositions on the email issue. CPH deposed Robert Saunders on February 10, 2004.[3] After completion of the corporate representative depositions, and unable to obtain MS & Co.'s agreement to a mutual email restoration protocol, CPH served its Motion for Permission to have Third Party Retrieve Morgan Stanley E-Mail and Other Responsive Documents, proposing that a third party vendor be given access to both parties' email systems for restoration at each party's expense. At the hearing on that Motion, CPH offered to split the expenses evenly. MS & Co. refused.

MS & Co.'s continued assertions that the email searches could be conducted only at enormous cost and would be fruitless because there were not backup tapes with email from 1997 and 1998 were confirmed to the Court by MS & Co.'s counsel, Thomas Clare of Kirkland & Ellis, at a hearing held March 19, 2004:

> Mr. Scarola: Electronic records of e-mails that have been exchanged.
> The Court: Do we agree that there has been such a request outstanding?
> Mr. Clare: There has been a request outstanding.
> The Court: And have you all objected?
> Mr. Clare: From the beginning.
> The Court: And what's the basis of the objection?
> Mr. Clare: We objected to the breadth of the request that they're making. And to answer Your Honor's question directly – and the burden that is associated with it – that given the particular e-mail back-up tapes that are in existence five, six years after the fact of these transactions, that the scope of the e-mail request that they are seeking is improperly and unduly burdensome given the enormous costs that would be required, given the fact that the time period for which we have back-up tapes post dates the events by several years.

Unable to resolve the email issue, on April 9, 2004, CPH served its Motion to Compel

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[3]Saunders provided misleading information in his deposition. See footnote 12, infra.

Concerning E-Mails and Other Electronic Documents. On the eve of the hearing on CPH's Motion to Compel, the parties reached an accommodation, and on April 16, 2004 the Court entered the Agreed Order. Under the Agreed Order, MS & Co. was required to (1) search the oldest full backup tape for each of 36 MS & Co. employees involved in the Sunbeam transaction; (2) review emails dated from February 15, 1998, through April 15, 1998, and emails containing any of 29 specified search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004, all nonprivileged emails responsive to CPH's document requests; (4) give CPH a privilege log; and (5) certify its full compliance with the Agreed Order.

As required by the Agreed Order, MS & Co. produced about 1,300 pages of emails on May 14, 2004. It did not, however, certify compliance with the Agreed Order. After prompting by CPH, on June 23, 2004, MS & Co. served a certificate of compliance signed by Arthur Riel, an Executive Director and manager of its Law/Compliance IT Group.[4]

CPH got its first indication that the Agreed Order may have been violated in the late fall of 2004.

On November 17, 2004, Clare wrote Michael Brody of Jenner & Block, CPH's outside counsel, that MS & Co. had "discovered additional e-mail backup tapes . . ."; that "(t)he data on some of [the] newly discovered tapes has been restored;" that "we have re-run the searches described in [the Agreed Order]"; that "some responsive e-mails have been located as a result of that process"; and that "(w)e will produce the responsive documents to you as soon as the production is finalized."

On December 14, 2004, Brody wrote Clare back:

> in [your November 17, 2004 letter], you state that Morgan Stanley located additional email backup tapes, and that you

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[4]Though CPH would not learn for months that the certificate was false, and even then the magnitude of MS & Co.'s misrepresentations would not be admitted, MS & Co. personnel, including in-house counsel, knew the certification of compliance was false when made.

> would be producing documents soon. Within two days of that letter, you produced some emails to us. In your November 17, 2004 letter, however, you also indicated that "some of the backup tapes are still being restored." Have those backup tapes been restored? Have you found additional responsive emails? If so, when will Morgan Stanley produce those emails? How is it that the tapes were only recently located?

On December 17, 2004, Clare wrote back, telling Brody "(n)o additional responsive e-mails have been located since our November production."[5]

Brody wrote back to Clare December 30, 2004, noting the deficiencies in Clare's correspondence:

> You do not inform us whether the review of the recently-located backup tapes still is ongoing. Please confirm that all email backup tapes from the relevant time period have been reviewed and all responsive emails have been produced. If the review still is proceeding, please let us know when the review will be completed.

Clare wrote back on January 11, 2005, telling Brody that the "restoration of e-mail backup tapes is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

Concerned about Clare's lack of candor, on January 19, 2005 Brody wrote again:

> I write in response to your January 11, 2005 letter concerning e-mails back-up tapes. Unfortunately, your letter raises more questions than it answers. As I requested in my December 14, 2004 letter, please explain the circumstances under which Morgan Stanley located these backup tapes and advise us of the date on which the tapes were located.

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[5]Not only does this letter fail to answer Brody's legitimate questions, it implies that MS &Co. was still processing and reviewing emails from the newly found tapes. As we now know, though, *no* additional information was migrated to the archives between approximately August 18, 2004 and January 15, 2005. *Of course* "no additional responsive e-mails [would have been] located."

> Further, please explain your statement that "the next set of backup tapes" is scheduled to be restored "at the end of January." How many tapes will be restored by the end of January? When exactly in January will Morgan Stanley complete the process of restoring and searching these tapes for responsive documents? Are there other backup tapes that are not yet in the process of being restored? If so, please advise us of (a) the number of tapes that are not yet in the process of being restored; (b) the time period of the data contained on those tapes; and (c) Morgan Stanley's timetable for restoring and searching those tapes. In addition, please explain why those tapes are not yet in the process of being restored. Please also explain why Morgan Stanley cannot complete the restoration and searching of all remaining backup tapes before "the end of January." As you know, our trial is scheduled to begin on February 22, 2005.
>
> We look forward your complete response to these questions no later than January 21, 2005 so that we can bring this matter to the Court's attention, if necessary.

Conforming to what was by now his usual stonewall tactic, Clare responded by letter dated January 21, 2005:

> I write in response to your January 19, 2005 letter regarding Morgan Stanley's production of e-mails restored from backup tapes.
>
> Morgan Stanley completed its initial production of restored e-mail messages on May 14, 2005. The May 2004 production was conducted in accordance with the agreed-upon order governing, and the searches that resulted in that production encompassed data from all of the backup tapes known to exist at the time. Subsequent to the May 2004 production, additional tapes were found in various locations at Morgan Stanley. The discovered tapes were not clearly labeled as to their contents, were not found in locations where e-mail backup tapes customarily were stored, and many of the tapes

were in a different format than other e-mail backup tapes. In November 2004, once it was determined at least some of the discovered tapes contained recoverable e-mail data, Morgan Stanley re-ran the searches described in the agreed-upon order. Those searches resulted in Morgan Stanley's November 2004 production.

Morgan Stanley's efforts to restore the backup tapes discovered after the May 2004 production are ongoing. It is a time-consuming and painstaking process and, given the absence of clear labels or other index information for the backup tapes, there is no way for Morgan Stanley to know or accurately predict the type or time period of data that might be recovered from tapes that have yet to be restored. While Morgan Stanley cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes, we understand from Morgan Stanley that, when the agreed-upon searches are run again at the end of January, those searches will include approximately one terabyte of additional data restored since the prior production.

On January 26, 2005, CPH served its Adverse Inference Motion, seeking sanctions based on MS & Co.'s disclosure of the newly found tapes. Hearing was scheduled for February 14, 2005. In preparation for that hearing, on February 3, 2005 the Court ordered MS & Co. to produce by noon on February 8, 2005 "(i) all documents to be referred to or relied on by any of the witnesses in his or her testimony; and (ii) all documents within MS & Co.'s care, custody, or control, addressing or related to the additional email backup tapes, including matters relating to the time or manner in which they were discovered; by whom they were discovered; who else learned of their discovery and when; and the manner and timetable by which they were be restored and made searchable, including any correspondence to or from outside or prospective outside vendors."

The Adverse Inference Order outlined the discovery abuses shown at the February 14, hearing. They included MS & Co.'s undisclosed discovery of the 1,423 "Brooklyn" tapes no

later than May of 2004; the undisclosed discovery of the 738 8-millimeter backup tapes in 2002; the presence of unsearched data in the staging area; the discovery of 169 DLT tapes in January 2005; the discovery of more than 200 additional tapes on February 11 and 12, 2005; the discovery of a script error that had prevented MS & Co. from locating responsive email attachments; and discovery of another script error that had infected the ability to gather emails from Lotus Notes platform users.

In response to these deficiencies, the Court issued the Adverse Inference Order. That Order reversed the burden of proof on the aiding and abetting and conspiracy elements and included a statement of evidence of MS & Co.'s efforts to hide its emails to be read to the jury, as relevant to both its consciousness of guilt and the appropriateness of punitive damages. It specifically provided that "MS & Co. shall continue to use its best efforts to comply with the April 16, 2004 Agreed Order and . . . February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search."[6]

It is now clear why MS & Co. was so unwilling to provide CPH with basic information about how and when the tapes were found or when production would be complete. First, candor would have required MS & Co. to admit that it had not done a good faith search for the oldest full backup tapes, and that Riel's certificate of compliance was false. Some unsearched tapes had been found by 2002; others had been found no later than May, 2004. Together, over 2,000 tapes had been found which were not searched prior to the May production. It is untrue that the tapes were "not in locations where e-mail backup tapes customarily were stored."

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[6]Concerned that MS & Co. had been less than candid with both CPH and the Court, on February 4, 2004, the Court entered its Order on Coleman (Parent) Holding's ore tenus Motion to Participate in Search of Additional E-Mail Backup Tapes or Appoint Third Party to Conduct Search, ordering MS & Co. to pay for a third party vendor to check its compliance with the Agreed Order. The Court previously found that the two scripts errors testified to by Allison Gorman at the February 14, 2005, hearing would not have been discovered or revealed without the threat that the third-party vendor would discover the errors. Given Ms. Gorman's testimony at the March 14, 2005, hearing, though, it now appears MS & Co. knew about the errors before the appointment of the third-party vendor. Consequently, the errors were only revealed, but not discovered, in response to the February 4, 2004, Order.

Second, MS & Co. desperately wanted to hide an active SEC inquiry into its email retention practices.[7] [8] [9] [10] Finally, MS & Co. did not want to admit the existence of the historical email archive, which would expose the false representations it had made to the Court and used to induce CPH to agree to entry of the Agreed Order.[11] [12]

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[7]On December 17, 2003, CPH served its Third Request for Production seeking "(a)ll materials and documents submitted to the United States Securities and Exchange Commission ("SEC"), received from the SEC, or reflecting communications with the SEC in connection with any investigation, inquiry, or examination concerning or relating to Morgan Stanley's policies and/or procedures with regard to the retention, storage, deletion, and/or back-up of electronic mail (emails) . . ." On October 12, 2004, CPH served its Request for Supplemental Documents seeking to bring MS & Co.'s document production current, requesting "(a)ll documents not previously provided by MS & Co. that are responsive to any Request for Production of Documents that CPH previously has served upon MS & Co. in the litigation, including documents obtained by MS & Co. or its counsel after the date of MS & Co.'s prior productions." No SEC documents were produced in response to either request; no privilege log was generated. On other privilege logs generated in response to court orders, MS & Co. did not show the SEC on the distribution portion of the log. See March 9, 2005 Order Following in Camera Inspection (Riel/SEC Documents) footnotes 1, 2. See, also, footnote 15, infra. Kirland & Ellis, outside counsel for MS & Co. in this litigation, represents MS & Co. in the SEC's inquiry into its email retention practices.

[8]MS & Co. manipulated the unhinging of the SEC's email investigation from the IPO litigation in January, 2005, to conceal the email issues as long as possible.

[9]It is now apparent that MS & Co. chose deliberately to keep its affidavits concerning the informal SEC inquiry submitted to support its privilege claims vague, despite two requests from the Court seeking specific information. See February 28, 2005 Order (Release of Exhibits).

[10]See February 25, 2005 Order on Morgan Stanley's Objections to Coleman (Parent) Holding Inc.'s Notice to Produce at Hearing and Motion for Protective Order and March 4, 2005 Order on Plaintiff's ore tenus Motion to Compel Additional Production.

[11]While MS & Co. contends that its representations to the Court that it would cost "hundreds of thousands of dollars" to search the backup tapes and that there was no pre-2000 backup tapes were not false, they were deliberately misleading: MS & Co. never had an intention to search the back up tapes to respond to the requests and some of the year 2000 backup tapes backed up email back to 1997.

In 2001, MS & Co. decided to create the email archive. By June,2003, it had decided that the archive should have two components. First, MS & Co. wanted to create an archive that captured and stored email as it was generated. Second, MS & Co. wanted to add historical data to the archive. That task involved searching for all email backup tapes containing historical emails; sending those tapes to an outside processor; loading the processed tapes into a staging area; and migrating the stored data from the staging area onto the archive. As we now know, archive searches are quick and inexpensive. They do not cost "hundred of thousands of dollars" or "take several months." The restrictions imposed by the Agreed Order were not needed.

[12]On February 10, 2004, Robert Saunders, an executive director of IT for MS & Co., was deposed. He testified that in January, 2003, MS & Co. had put into effect the email archive system. When specifically asked whether the new email archive system would include prior backups or only going forward backups, he testified that "(t)he way it was built was for going forward backup." He was next asked whether "(w)ith respect to backup dated January 2001 and previously, does Morgan Stanley have any new capabilities to restore and search e-mail?" After counsel interposed a vagueness objection, he answered "(t)here are no new capabilities to search that e-mail." That testimony was so misleading as to be false. As Sauders well knew, since he was on the team responsible, the "live" email capture portion of the archive was already operational. The migration of the historical data to the archive was expected to be completed by April of 2004, just two months after his deposition.

16div-013460

MS & Co.'s wrongful conduct has continued unabated.[13] Since the February 14, 2005, hearing, it has come to light that:

- Only two whole and four partial tapes from the Brooklyn tapes had been migrated to the archive and were thus searched for the November, 2004, production. MS & Co. sought to hide this information to create the impression that all the produced documents came from the Brooklyn tapes, rather than reveal that the production came from material that had migrated from the staging area to the archive since the May, 2004, production or some other, as yet undisclosed, source.[14]

- Contrary to MS & Co.'s counsel's November 17, 2004, letter to CPH, *none* of the November, 2004 production came from the "newly found" tapes. MS & Co. carefully crafted its responses to inquiries about the November, 2004, production to avoid both disclosure of the existence of the archive and outright lying.

- The scripts MS & Co. used to process emails into its archive caused the bodies of some messages to be truncated. MS & Co. discovered this problem on February 13, 2005, but did not tell the Court about it until March 14, 2005.

- A migration issue caused about 5% of email harvested by NDCI from the backup tapes not to be captured in the archive, based on testing of a representative sample of tapes. MS & Co. told the SEC about this problem on February 24, 2005, but failed to tell CPH or the Court.

- As of June 7, 2004, only 120 out of 143 SDLT tapes had been processed into the archive.

- An analysis requested by the SEC showed that, based on a representative sample, 10% of backup tapes were overwritten after January, 2001.

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[13]MS & Co. sought to use the entry of the Adverse Inference Order as a shield against further inquiry into its email abuses, arguing that the matter was closed by the Adverse Inference Order. It previously used this tactic with the SEC, arguing that the December 3, 2003 Cease and Desist Order shielded it from other sanctions for email retention failures. See Ex. 14 [February 10, 2005 letter from outside counsel for MS &Co. to SEC]

[14]MS & Co. argued at the March 14 and 15, 2005 hearing that there were only 13 unique, new emails contained in the November 2004 production when compared to the May 2004 production. Nine of those emails, however, were originally given to MS& Co.'s lawyers for responsiveness review by the IT staff for the May 2004 production. No explanation of why they were not produced in May was offered. This is particularly concerning given the large number of documents Ms. Gorman testified the search parameters found compared with the relatively small number found responsive and produced after review by counsel.

- A software error caused blind carbon copies not to be captured in the archive process. MS & Co. told the SEC about this problem on February 24, 2005. MS & Co. did not tell CPH or the Court.

- A software error caused the searches to be hyper case-sensitive, resulting in a failure to capture all emails. MS & Co. knew of the problem as of December, 2004, but did not tell CPH or the Court. The problem was not purportedly fixed until March, 2005.

- A script error caused the archive to have problems pulling group email in Lotus Notes.

- MS & Co. provided sworn testimony at the February 14, 2005, hearing that it had located 600 gigabytes of data, while contemporaneously telling the SEC it had located a terabyte of data. A gigabyte represents 20,000 to 100,000 pages. Incredibly, MS & Co.'s witness on this point, Allison Gorman, testified on March 14, 2005, that it was simply a "terminology" issue that she did not choose to correct because it could cause "confusion."

- CPH requested MS & Co. to produce responses it had made to third-parties in civil, criminal, or administrative proceedings describing limitations on MS & Co.'s ability to produce emails and all notices in such proceedings that MS & Co. had newly discovered backup tapes containing email. MS & Co. objected, arguing that there were over 300 separate proceedings, involving over 70 outside law firms, and that the cost of compliance would be too great. On March 2, 2005, the Court ordered the production, after shortening the time period involved, and required production within 12 hours after counsel's review of each item for responsiveness but, in any event, within 10 days. At the time MS & Co. objected to CPH's request as unduly burdensome, it knew of its Well submission to the SEC made on February 10, 2005. Kirkland and Ellis, co-counsel here, was co-counsel for MS & Co. in that SEC proceeding. Consequently, it appears MS & Co.'s real concern was not that expressed to the Court, but was based on its realization that compliance would reveal the existence of the SEC inquiry into its email retention policy and MS & Co.'s efforts to keep the existence of that investigation secret. MS & Co. violated the Court's March 2, 2005, Order on Morgan Stanley's Responses and Objections to Coleman (Parent) Holdings Inc.'s Notice to Produce at Hearing requiring it to disclose items responsive to CPH's Request for Production within 12 hours of review for responsiveness by waiting *days*, not hours, to produce the Wells submission.

- MS & Co.'s failure to produce or log the SEC documents violated the Court's February 3, 2005, Order.[15]

- James Doyle's, the Executive Director of MS & Co.'s Law Division, declaration that he did not learn of additional unsearched backup tapes until the end of October, 2004, was intended to mislead CPH and the Court. Obviously, MS & Co. sought to create the implication in the declaration that *no one* in the Law Division knew of the backup tapes before then. Instead, both Soo-Mi Lee, Doyle's associate, and James Cusick, Doyle's superior, knew of the tapes no later than June 7, 2004.

- In-house counsel for MS & Co. knew as of June 7, 2004, that nearly a third of the restored backup tapes did not contain email, implying they may have been recycled in violation of the December 3, 2002 Cease and Desist Order. They did not tell CPH or the Court.

- MS & Co.'s searches looked for only two types of emails. There are other types of emails that were not included in the searches. CPH did not learn of this deficiency until March 13, 2005.

- MS & Co. improperly failed to produce 125 documents required to be produced by the Court's February 3, 2005, Order Specially Setting Hearing which required limited discovery be made in connection with the February 14, 2005, hearing on the Adverse Inference Motion.

- MS & Co. improperly withheld 13 documents required to be produced by the Court's March 4, 2005, Order on Plaintiff's ore tenus Motion to Compel Additional Production.

- An additional 282 tapes were found on February 23 and 25, 2005; CPH was not told of the discovery until March 13, 2005.

- An additional 3,536 tapes were discovered on February 23, 2005, in a security room.

- An additional 2,718 tapes were found at Recall, MS & Co.'s third party off-site storage vendor, on March 3, 2005.

- An additional 389 tapes were found March 2 through March 5, 2005. CPH was not told

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[15]The Court previously rejected MS & Co.'s argument that the January 14, 2005, email exchange between its outside and in-house counsel was not required to be produced under the February 3, 2005, Order Specially Setting Hearing because it referred to the "documents issue" and not specifically to the backup tapes. See March 16, 2005 Order on Morgan Stanley's Motion to Disqualify Plaintiff's Counsel Searcy, Denney, Scarola, Barnhart & Shipley, P.A. and Jenner & Block, LLC. MS & Co.'s insistence on a narrow interpretation of the February 3, 2005, Order is not particularly sympathetic, when the only reason that Order confined production to the backup tape issue was because MS &Co. had failed to notify the Court of the other deficiencies in its certificate of compliance.

until March 13, 2005.

- On March 4, 2005, the Court entered its Order on Plaintiff's ore tenus Motion to Compel Additional Production, which ordered MS & Co. to produce by 3:00 p.m. on March 7, 2005, all items within its care, custody, or control dealing with the Riel/SEC investigation, other than documents representing communications between or among MS & Co. inside and outside counsel that were not copied to anyone other than counsel. MS & Co. sought to discredit Riel and thus distance itself from the false June 23, 2004 certificate of compliance; in doing so, it sought to hide Riel's whistle blower status and the existence of an SEC investigation into whether MS & Co. employees sought kick backs from third party vendors; whether MS & Co. employees were improperly pressured into dealing with third-party vendors who may provide business to MS & Co.; and whether MS & Co. continued to overwrite backup tapes contrary to the SEC's December 3, 2002, Cease and Desist Order.

- A script error prevented the insertion of some emails into the archive. MS & Co. produced over 4,600 pages of emails on March 21, 2005, some of which it suggested may have been located on correction of the error; alternatively, it suggested the emails may have been located by NDCI as part of its efforts to verify MS & Co.'s searches.

MS & Co.'s discovery abuses have not been confined to its email production.

William Strong is a MS & Co. managing director and was one of the principal players for it in the Sunbeam deal. He took credit for the fees generated. On May 9, 2003, CPH requested a copy of "(a)ll documents concerning employment contracts, performance evaluations, and/or personnel filed (including without limitation any documents that describe or discuss [his] training, experience, competence, and accomplishments) . . ." MS & Co. asserted that the requested documents were not relevant and that production "would unnecessarily infringe on the privacy interests of [Strong]." On March 15, 2004, the Court ordered MS & Co. to produce "(a)ll references (positive or negative) to [Strong's] truthfulness, veracity, or moral turpitude." Some portions of Strong's evaluations were produced in response to that order. Those evaluations noted Strong's colleagues' reservations about his candor and ethics. Two of his evaluators, Joseph Perella and Tarek Abdel-Meguid, were deposed, when some relatively vague testimony about the bases for those conclusions was offered. It now appears Strong was facing criminal prosecution in Italy for complicity in bribery while he was working on the Sunbeam transaction, which his evaluators knew, and that MS & Co. purposely

withheld that information from CPH and the Court.[16]

Even once CPH independently discovered evidence of Strong's indictment in Italy, MS & Co. sought to shield its files from discovery. It claimed that virtually *all* of the documents it had were privileged under joint defense agreements in place between it, Strong, and Saloman Brothers, Strong's employer at the time of the incident. As the Court's March 10, 2005 Order Following In Camera Inspection (Strong) details, the documents MS & Co. relied on to support that position, and sought to prevent CPH from obtaining, reflect no such agreement.

The other discovery abuses and misrepresentations by MS & Co. other than those involving its email production practices are outlined in CPH's Chronology of Discovery Abuses by Defendant served March 1, 2005, and would take a volume to recite. They include:

- failing to provide the information retained by MS & Co.'s internal document management system pertaining to MS & Co.'s work for Sunbeam; falsely representing to the Court that no useful information was contained in that information; and producing a Rule 1.310 representative who had made an insufficient inquiry into authenticity, business record status, and authorship of documents; see February 28, 2005 Order on CPH's Motion to Deem Certain Documents Admissible and for Sanctions due to Morgan Stanley's Disregard of Court Order;

- when faced with contempt proceedings for violating the Stipulated Confidentiality Order by providing a copy of a settlement agreement between CPH and Arthur Andersen to other counsel, representing to the Court that the law firm of Kellogg, Huber was retained to handle the "Andersen aspects" of this litigation because of a conflict between Andersen and Kirkland & Ellis; Mark Hansen, a partner at Kellog, Huber, testified that his firm was hired as co-counsel for all aspects of the case;

- providing answers to interrogatories signed by a corporate representative who performed insufficient verification of the responses;

[16]MS & Co. originally argued that documents concerning the Italian proceedings were not in Strong's "personnel file" and so were not required to be produced in response to CPH's initial request. MS & Co.'s practice of filing damaging information about an employee other than in his personnel file and then claiming it was not included in the request is about at convincing as its argument that, since it has a corporate directive not to keep drafts of documents once they are in final form, document drafts cannot be business records exempt from hearsay because they are not "kept in the course of a regularly conducted business activity." See Fla. Stat. §90.803 (6) (a). In any event, there was *no excuse* for not producing its records of the Italian proceedings once the Court's March 15, 2004 Order was entered.

- routinely asserting unfounded privilege claims;[17] and

- failing to timely comply with the Court's orders; for example, MS & Co. did not produce Strong's 1994 Performance Evaluation until the afternoon of March 15, 2005, though it was obviously included in the Court's March 15, 2004 Order. The failure cannot be excused as oversight since, when CPH specifically asked for the 1994 evaluation in the spring of 2004, MS & Co.'s counsel said it was withheld as non-responsive; see, also, Ex. 197, 198.

In sum, MS & Co. has deliberately and contumaciously violated numerous discovery orders, including the April 16, 2004 Agreed Order; February 3, 2005 Order Specially Setting Hearing; and the March 4, 2005 Order on Plaintiff's ore tenus Motion to Compel Additional Production. At the February 14, 2005, hearing on CPH's Adverse Inference Motion, it chose to hide information about its violations and coach witnesses to avoid any mention of additional, undisclosed problems with its compliance with the Agreed Order. Implicit in the requirement that MS & Co. certify compliance with the Agreed Order was the requirement to disclose impediments to its ability to so certify. As outlined in this Order, MS & Co. employees, and not just counsel, have participated in the discovery abuses. The prejudice to CPH from these failings cannot be cured. Even if all the script errors have been located and corrected, and MS & Co. has failed to show they have, and even if all of the email backup tapes have now been located, and MS & Co. has failed to show they have, the searches cannot be completed in time. The other discovery abuses outlined call into doubt all of MS & Co.'s discovery responses. *The judicial system cannot function this way.* Based on the foregoing and on the Court's March 1, 2005 Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, it is

ORDERED AND ADJUDGED that CPH's Renewed Motion for Entry of Default Judgment is Granted, in part. See Robinson v. Nationwide Mut. Fire Ins. Co., 887 So. 2d 328 (Fla. 2004); Mercer v. Raine, 443 So. 2d 944 (Fla. 1983); Precision Tune Auto Care, Inc. v.

[17]For example, MS & Co. produced over 260 documents dealing with the Strong investigation over which it had previously claimed privilege once the Court announced its intention to conduct an in camera review; the Court found another 200 documents were not privileged after conducting its review, by its March 10, 2005 Order.

Radcliffe, 804 So. 2d 1287 (Fla. 4th DCA 2002); Rule 1.380 (b) (2) (C), Fla. R. Civ. P. Paragraphs 2 (excluding the last sentence thereof); 3 (excluding the portion of the last sentence beginning with "in order to close . . ."); 8-10, 11 (excluding everything after the first sentence); 12 (excluding all parts following "June 1998"); 13 (excluding the last sentence thereof); 14-27; 28 (excluding everything after "firm" in the second to last sentence thereof); 29-39; 41-52; 53 (excluding the second sentence thereof); 54-57; 58 (excluding "CPH and" in the second line thereof); 59-63; 64 (excluding the third line thereof); 65 (excluding the last sentence thereof); 66 (excluding the last sentence thereof); 67-70; 71 (excluding the first word of the last sentence and the remainder of that sentence after "material"); 72; 73 (excluding the first sentence thereof); 74 (excluding the words "CPH and" in the second to last sentence thereof); 75-81; 85; 86; 87 (excluding (g)); 90, and 91 (excluding (g)) of Plaintiff's Amended Complaint, as amended by the Court's Amended Order on Morgan Stanley's Motion to Dismiss, Motion to Strike, and Motion for More Definite Statement, shall be read to the jury and the jury instructed that those facts are deemed established for all purposes in this action. A copy of a redacted Amended Complaint is attached as Exhibit A. It is further

ORDERED AND ADJUDGED that the Court shall read to the jury a Statement similar to that attached as Exhibit A to the Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, but incorporating the relevant additional findings of this Order, and the jury will be instructed that it may consider those facts in determining whether MS & Co. sought to conceal its offensive conduct when determining whether an award of punitive damages is appropriate. See General Motors Corp. v. McGee, 837 So. 2d 1010 (Fla. 4th DCA 2002), rev. den. 851 So. 2d 728 (Fla. 2003). Counsel are each invited to submit proposed Statements. It is further

ORDERED AND ADJUDGED that CPH shall be entitled to an award of reasonable fees and costs incurred as a result of the Renewed Motion for Entry of Default Judgment and the violations of Court orders recited herein. The amount shall be determined at an evidentiary hearing following trial. It is further

ORDERED AND ADJUDGED that MS & Co. is relieved of any future obligation to

comply with the April 16, 2004 Agreed Order and the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s Motion to Participate in Search of Additional E-Mail Back-Up Tapes or Appoint Third Party to Conduct Search. It is further

ORDERED AND ADJUDGED that the pro hac vice admission of Thomas Clare is revoked. It is further

ORDERED AND ADJUDGED that the portions of CPH's Motion for Correction and Clarification of Order on CPH's Motion for Adverse Inference that seek to amend the body of that Order to correct clerical and spelling errors, as agreed to by counsel, is Granted, and the corrections deemed made to the body of the Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, by interlineation. In all other respects the remainder of the Motion for Correction and Clarification is declared moot.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 23rd day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL GRINBLATT REPORT

THIS CAUSE came before the Court March 21, 2005 on Morgan Stanley's Motion for Leave to File Supplemental Grinblatt Report, with both parties well represented by counsel. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part, and Denied, in part. The portions of Dr. Grinblatt's Supplemental Expert Report that express benefit of the bargain damages based on the cell representing the intersection of the Normal Investor for the expected value component and the Full Restatement for the true value component are deemed properly filed. This ruling is without prejudice to CPH's right to present argument to the Court or request to conduct a voir dire examination of Dr. Grinblatt outside the jury's presence seeking to establish that other points in the Supplemental Expert Report are not proper.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ___ day of March, 2005.

SIGNED & DATED
MAR 23 2005

_____
ELIZABETH T. MAASS
Circuit Court Judge

JUDGE ELIZABETH T. MAASS

16div-013470

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION IN LIMINE NO. 23 TO EXCLUDE EVIDENCE REGARDING WILLIAM STRONG'S ITALIAN ACQUITTAL

THIS CAUSE came before the Court March 21, 2005 on Morgan Stanley's Motion in Limine No. 23 to Exclude Evidence Regarding William Strong's Italian Acquittal, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion in Limine No. 23 to Exclude Evidence Regarding William Strong's Italian Acquittal is Denied, without prejudice to MS & Co.'s right to (i) place before the jury that in 2003 the Milan Court of Appeals acquitted Mr. Strong; and (ii) seek an instruction to the jury that the evidence is being offered solely (a) on the issues of its effect, if any, on Mr. Strong's pressures and motivations in the transaction under review; and (b) to impeach the testimony of those evaluators who had knowledge of the proceedings; and that the evidence is not relevant to prove, and may not be considered as evidence, (1) that Strong engaged in similar conduct or (2) his character. See Fla. Stat. §§90.401, 90.402, 90.403, 90.107.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 23 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

16div-013472

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION FOR AN ADVERSE INFERENCE INSTRUCTION

THIS CAUSE came before the Court March 21, 2005 on Morgan Stanley's Motion for an Adverse Inference Instruction, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion for an Adverse Inference Instruction is Denied, without prejudice to MS & Co.'s right to present evidence about CPH's email retention practices and its failure to direct that emails related to the Sunbeam transaction be saved and CPH's right to present evidence of its offer to have a third-party vendor given access to retrieve emails from CPH's system, without reference to discovery requests or court orders, and for either counsel to argue in favor of whatever inferences that evidence may support. See Jordan v. Masters, 821 So. 2d 342 (Fla. 4th DCA 2002) cf.; Amlan, Inc. v. Detroit Diesel Corp., 651 So. 2d 701 (Fla. 4th DCA 1995). If either party intends to present evidence on the issue of CPH's email retention practices or third-party vendor offer it shall, within 5 business days, serve on opposing counsel (i) the name, address, and business title of any witness expected to testify, together with a fair summary of his or her expected testimony; (ii) a designation of any deposition testimony the designating party intends to offer on this issue; and (iii) copies of any documents to be referred to by a witness or offered into evidence on this issue.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 23 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

16div-013474

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY & CO. INCORPORATED'S MOTION FOR SANCTIONS FOR DISCOVERY ABUSES

THIS CAUSE came before the Court March 21, 2005 on Morgan Stanley & Co. Incorporated's Motion for Sanctions for Discovery Abuses, with both counsel present. Based on the proceedings before the Court and the Court's February 24, 2005 Order on Morgan Stanley's Motion for Additional Discovery Regarding MAFCO's Internal Valuation of Sunbeam Stock and Morgan Stanley's Motion for Sanctions and Additional Discovery Concerning Plaintiff's Improper Concealment of the Value of the Sunbeam Warrants, it is

ORDERED AND ADJUDGED that the Motion is Denied. See Amlan, Inc. v. Detroit Diesel Corp. 651 So. 2d 701 (Fla. 4th DCA 1995).

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 28 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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16div-013476

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON KIRKLAND & ELLIS LLP'S MOTION TO WITHDRAW AS COUNSEL AND MORGAN STANLEY'S MOTION TO ALLOW SUBSTITUTION OF COUNSEL AND FOR CONTINUANCE

THIS CAUSE came before the Court March 23, 2005 on Kirkland & Ellis LLP's Motion to Withdraw as Counsel and Morgan Stanley's Motion to Allow Substitution of Counsel and for Continuance, with all parties well represented by counsel. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Kirkland & Ellis LLP's Motion to Withdraw as Counsel for Morgan Stanley is Granted. Kirkland & Ellis, LLP is hereby relieved of any further obligation as record counsel for Morgan Stanley & Co., Inc. in this cause. Carlton Fields, P.A. and Kellogg, Huber, Hansen, Todd & Evans, & Figel P.L.L.C. remain as co-counsel of record for Morgan Stanley. It is further

ORDERED AND ADJUDGED that Morgan Stanley's Motion for Continuance is Granted, in part. Jury selection shall recommence on March 30, 2005 at 9:30 a.m. Motion practice shall not be affected by this continuance of trial except on a motion by motion basis. It is further

ORDERED AND ADJUDGED that Morgan Stanley's Motion to Allow Substitution of Counsel is deemed not ripe. No substitute counsel has been offered.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 23 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

16div-013478

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2005 WL 6399686 (Fla.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Florida.
Fifteenth Judicial Circuit
Palm Beach County

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

No. CA 03-5045 AI.
March 23, 2005.

Order on CPH's Renewed Motion for Entry of Default Judgment

THIS CAUSE came before the Court March 14 and 15, 2005, on CPH's Renewed Motion for Entry of Default Judgment, with both parties well represented by counsel.

Coleman (Parent) Holdings, Inc. ("CPH"), has sued Morgan Stanley & Co., Inc. ("MS & Co."), for aiding and abetting and conspiring with Sunbeam to perpetrate a fraud. Early in the case, CPH was concerned that MS & Co. was not thoroughly looking for emails responsive to its discovery requests. On April 16, 2004, the Court entered an Agreed Order ("Agreed Order") that required MS & Co. to search its oldest full backup tapes for emails subject to certain parameters and certify compliance. MS & Co. certified compliance with the Agreed Order on June 23, 2004. On November 17, 2004, CPH learned that MS & Co. had found some backup tapes that had not been searched. On January 26, 2005 it served its Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order ("Adverse Inference Motion"), claiming that MS & Co.'s violation of the Agreed Order, coupled with its systemic overwriting of emails after 12 months, justified an adverse inference against it. The Court ordered certain limited discovery. Responses to that discovery prompted CPH to orally amend its Adverse Inference Motion to seek more severe sanctions.

The Court held an evidentiary hearing on the Adverse Inference Motion on February 14, 2005. On March 1, 2005 it issued its Amended Order on Coleman (Parent) Holdings Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order ("Adverse Inference Order"). In its current Motion, CPH argues that it has since learned that the discovery abuses addressed in the Adverse Inference Motion and Order represent only a sampling of discovery abuses perpetrated by MS & Co. and that the abuses have continued, unabated. It claims that these abuses, when taken as a whole, infect the entire case. To understand CPH's argument, it is necessary to go back to the beginning.

This case arises out of an acquisition transaction that was negotiated and consummated in late 1997 and early 1998, in which CPH sold its 82% interest in the Coleman Company, Inc., to Sunbeam Corporation. MS & Co. served as financial advisor to Sunbeam for parts of the acquisition transaction and served as the lead underwriter for a $750,000,000.00 debenture offering that Sunbeam used to finance the cash portion of the deal.

CPH's Complaint [1] alleged claims against MS & Co. arising from this transaction for fraudulent misrepresentation, negligent misrepresentation, aiding and abetting fraud, and conspiracy, and sought damages of at least $485 million.

On May 12, 2003, MS & Co. was served with the Complaint and CPH's First Request for Production of Documents ("Request"). The Request sought, in essence, all documents connected with the Sunbeam deal. "Documents" was broadly

defined, and specifically included items electronically stored. Concerned that, out of more than 8,000 pages of documents produced, it had received only a handful of emails, CPH on October 29, 2003, served its Motion to Compel Concerning E-Mails. That motion sought an order requiring MS & Co. to make a full investigation for email messages, including a search of magnetic tapes and hard drives; produce within 10 days all emails located; and produce a Rule 1.310 witness within 20 days "to describe the search that was conducted, identify any gaps in Morgan Stanley's production, and explain the reasons for any gaps."

In its Opposition to Coleman (Parent) Holdings, Inc.'s Motion to Compel served November 4, 2003, MS & Co. argued that CPH wanted "this Court to order a massive safari into the remote comers of MS & Co.'s email backup systems" and represented that "(t)he restoration efforts demanded by CPH would *cost at least hundreds of thousands of dollars* and require several months to complete (emphasis in original). MS & Co. argued that CPH's "true" motive was to "harass and burden MS & Co. with unnecessary and costly discovery demands and attempt to smear MS & Co. with out-of-context recitations from other proceedings" because "CPH *concedes* that MS & Co. is only able to restore email from backup tapes from January 2000 and later - *more than a year and a half after the events that allegedly gave rise to CPH's claims*," (emphasis in original).

CPH's "concession" was based on representations like the kind made to it by MS & Co.'s counsel in a March 11, 2004 letter that suggested "(t)he burden on Morgan Stanley from . . . a wholesale restoration [of email back up tapes], both in terms of dollars and manpower would be enormous. Regardless of who performs the initial restoration, it would require hundreds (perhaps thousands) of attorney-hours to review millions of irrelevant and non-responsive e-mails. . ." [2]

In response to CPH's Motion to Compel, the parties agreed to reciprocal corporate depositions on the email issue. CPH deposed Robert Saunders on February 10, 2004. [3] After completion of the corporate representative depositions, and unable to obtain MS & Co.'s agreement to a mutual email restoration protocol, CPH served its Motion for Permission to have Third Party Retrieve Morgan Stanley E-Mail and Other Responsive Documents, proposing that a third party vendor be given access to both parties' email systems for restoration at each party's expense. At the hearing on that Motion, CPH offered to split the expenses evenly. MS & Co. refused.

MS & Co.'s continued assertions that the email searches could be conducted only at enormous cost and would be fruitless because there were not backup tapes with email from 1997 and 1998 were confirmed to the Court by MS & Co.'s counsel, Thomas Clare of Kirkland & Ellis, at a hearing held March 19, 2004:
Mr. Scarola: Electronic records of e-mails that have been exchanged.

The Court: Do we agree that there has been such a request outstanding?

Mr. Clare: There has been a request outstanding.

The Court: And have you all objected?

Mr. Clare: From the beginning.

The Court: And what's the basis of the objection?

Mr. Clare: We objected to the breadth of the request that they're making. And to answer Your Honor's question directly -- and the burden that is associated with it -- that given the particular e-mail back-up tapes that are in existence five, six years after the fact of these transactions, that the scope of the e-mail request that they are seeking is improperly and unduly burdensome given the enormous costs that would be required, given the fact that the time period for which we have back-up tapes post dates the events by several years.

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Unable to resolve the email issue, on April 9, 2004, CPH served its Motion to Compel Concerning E-Mails and Other Electronic Documents. On the eve of the hearing on CPH's Motion to Compel, the parties reached an accommodation, and on April 16, 2004 the Court entered the Agreed Order. Under the Agreed Order, MS & Co. was required to (1) search the oldest full backup tape for each of 36 MS & Co. employees involved in the Sunbeam transaction; (2) review emails dated from February 15, 1998, through April 15, 1998, and emails containing any of 29 specified search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004, all nonprivileged emails responsive to CPH's document requests; (4) give CPH a privilege log; and (5) certify its full compliance with the Agreed Order.

As required by the Agreed Order, MS & Co. produced about 1, 300 pages of emails on May 14, 2004. It did not, however, certify compliance with the Agreed Order. After prompting by CPH, on June 23, 2004, MS & Co. served a certificate of compliance signed by Arthur Riel, an Executive Director and manager of its Law/Compliance IT Group. [4]

CPH got its first indication that the Agreed Order may have been violated in the late fall of 2004.

On November 17, 2004, Clare wrote Michael Brody of Jenner & Block, CPH's outside counsel, that MS & Co. had "discovered additional e-mail backup tapes . . ."; that "(t)he data on some of [the] newly discovered tapes has been restored;" that "we have re-run the searches described in [the Agreed Order]"; that "some responsive e-mails have been located as a result of that process"; and that "(w)e will produce the responsive documents to you as soon as the production is finalized."

On December 14, 2004, Brody wrote Clare back:
in [your November 17, 2004 letter], you state that Morgan Stanley located additional email backup tapes, and that you would be producing documents soon. Within two days of that letter, you produced some emails to us. In your November 17, 2004 letter, however, you also indicated that "some of the backup tapes are still being restored." Have those backup tapes been restored? Have you found additional responsive emails? If so, when will Morgan Stanley produce those emails? How is it that the tapes were only recently located?

On December 17, 2004, Clare wrote back, telling Brody "(n)o additional responsive e-mails have been located since our November production." [5]

Brody wrote back to Clare December 30, 2004, noting the deficiencies in Clare's correspondence:

> You do not inform us whether the review of the recently-located backup tapes still is ongoing. Please confirm that all email backup tapes from the relevant time period have been reviewed and all responsive emails have been produced. If the review still is proceeding, please let us know when the review will be completed.

Clare wrote back on January 11, 2005, telling Brody that the "restoration of e-mail backup tapes is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

Concerned about Clare's lack of candor, on January 19, 2005 Brody wrote again:
I write in response to your January 11, 2005 letter concerning e-mails back-up tapes. Unfortunately, your letter raises more questions than it answers. As I requested in my December 14, 2004 letter, please explain the circumstances under which Morgan Stanley located these backup tapes and advise us of the date on which the tapes were located.

Furtlier, please explain your statement that "the next set of backup tapes" is scheduled to be restored "at the end of January." How many tapes will be restored by the end of January? When exactly in January will Morgan Stanley complete the process of restoring and searching these tapes for responsive documents? Are there other backup tapes that are not yet in the process of being restored? If so, please advise us of (a) the number of tapes that are not yet in the process of being restored; (b) the time period of the data contained on those tapes; and (c) Morgan Stanley's timetable for restoring and searching those tapes. In addition, please explain why those tapes are not yet in the process of being restored. Please also explain why Morgan Stanley cannot complete the restoration and searching of all remaining backup tapes before "the end of January." As you know, our trial is scheduled to begin on February 22, 2005.

We look forward your complete response to these questions no later than January 21, 2005 so that we can bring this matter to the Court's attention, if necessary.

Conforming to what was by now his usual stonewall tactic, Clare responded by letter dated January 21, 2005:
I write in response to your January 19, 2005 letter regarding Morgan Stanley's production of e-mails restored from backup tapes.

Morgan Stanley completed its initial production of restored e-mail messages on May 14, 2005. The May 2004 production was conducted in accordance with the agreed-upon order governing, and the searches that resulted in that production encompassed data from all of the backup tapes known to exist at the time. Subsequent to the May 2004 production, additional tapes were found in various locations at Morgan Stanley. The discovered tapes were not clearly labeled as to their contents, were not found in locations where e-mail backup tapes customarily were stored, and many of the tapes were in a different format than other e-mail backup tapes. In November 2004, once it was determined at least some of the discovered tapes contained recoverable e-mail data, Morgan Stanley re-ran the searches described in the agreed-upon order. Those searches resulted in Morgan Stanley's November 2004 production.

Morgan Stanley's efforts to restore the backup tapes discovered after the May 2004 production are ongoing. It is a time-consuming and painstaking process and, given the absence of clear labels or other index information for the backup tapes, there is no way for Morgan Stanley to know or accurately predict the type or time period of data that might be recovered from tapes that have yet to be restored. While Morgan Stanley cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes, we understand from Morgan Stanley that, when the agreed-upon searches are run again at the end of January, those searches will include approximately one terabyte of additional data restored since the prior production.

On January 26, 2005, CPH served its Adverse Inference Motion, seeking sanctions based on MS & Co.'s disclosure of the newly found tapes. Hearing was scheduled for February 14, 2005. In preparation for that hearing, on February 3, 2005 the Court ordered MS & Co. to produce by noon on February 8, 2005 "(i) all documents to be referred to or relied on by any of the witnesses in his or her testimony; and (ii) all documents within MS & Co.'s care, custody, or control, addressing or related to the additional email backup tapes, including matters relating to the time or manner in which they were discovered; by whom they were discovered; who else learned of their discovery and when; and the manner and timetable by which they were be restored and made searchable, including any correspondence to or frorn outside or prospective outside vendors."

The Adverse Inference Order outlined the discovery abuses shown at the February 14, hearing. They included MS & Co.'s undisclosed discovery of the 1,423 "Brooklyn" tapes no later than May of 2004; the undisclosed discovery of the 738 8-millimeter backup tapes in 2002; the presence of unsearched data in the staging area; the discovery of 169 DLT tapes in January 2005; the discovery of more than 200 additional tapes on February 11 and 12, 2005; the discovery of a

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script error that had prevented MS & Co. from locating responsive email attachments; and discovery of another script error that had infected the ability to gather emails from Lotus Notes platform users.

In response to these deficiencies, the Court issued the Adverse Inference Order. That Order reversed the burden of proof on the aiding and abetting and conspiracy elements and included a statement of evidence of MS & Co.'s efforts to hide its emails to be read to the jury, as relevant to both its consciousness of guilt and the appropriateness of punitive damages. It specifically provided that "MS & Co. shall continue to use its best efforts to comply with the April 16, 2004 Agreed Order and . . . February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s *ore tenus* Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search." [6]

It is now clear why MS & Co. was so unwilling to provide CPH with basic information about how and when the tapes were found or when production would be complete. First, candor would have required MS & Co. to admit that it had not done a good faith search for the oldest full backup tapes, and that Riel's certificate of compliance was false. Some unsearched tapes had been found by 2002; others had been found no later than May, 2004. Together, over 2,000 tapes had been found which were not searched prior to the May production. It is untrue that the tapes were "not in locations where e-mail backup tapes customarily were stored." Second, MS & Co. desperately wanted to hide an active SEC inquiry into its email retention practices. [7] [8] [9] [10] Finally, MS & Co. did not want to admit the existence of the historical email archive, which would expose the false representations it had made to the Court and used to induce CPH to agree to entry of the Agreed Order. [11] [12]

MS & Co.'s wrongful conduct has continued unabated. [13] Since the February 14, 2005, hearing, it has come to light that:

• Only two whole and four partial tapes from the Brooklyn tapes had been migrated to the archive and were thus searched for the November, 2004, production. MS & Co. sought to hide this information to create the impression that all the produced documents came from the Brooklyn tapes, rather than reveal that the production came from material that had migrated from the staging area to the archive since the May, 2004, production or some other, as yet undisclosed, source. [14]

• Contrary to MS & Co.'s counsel's November 17, 2004, letter to CPH, *none* of the November, 2004 production came from the "newly found" tapes. MS & Co. carefully crafted its responses to inquiries about the November, 2004, production to avoid both disclosure of the existence of the archive and outright lying.

• The scripts MS & Co. used to process emails into its archive caused the bodies of some messages to be truncated. MS & Co. discovered this problem on February 13, 2005, but did not tell the Court about it until March 14, 2005.

• A migration issue caused about 5% of email harvested by NDCI from the backup tapes not to be captured in the archive, based on testing of a representative sample of tapes. MS & Co. told the SEC about this problem on February 24, 2005, but failed to tell CPH or the Court.

• As of June 7, 2004, only 120 out of 143 SDLT tapes had been processed into the archive.

• An analysis requested by the SEC showed that, based on a representative sample, 10% of backup tapes were overwritten after January, 2001.

• A software error caused blind carbon copies not to be captured in the archive process. MS & Co. told the SEC about this problem on February 24, 2005. MS & Co. did not tell CPH or the Court.

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• A software error caused the searches to be hyper case-sensitive, resulting in a failure to capture all emails. MS & Co. knew of the problem as of December, 2004, but did not tell CPH or the Court. The problem was not purportedly fixed until March, 2005.

• A script error caused the archive to have problems pulling group email in Lotus Notes.

• MS & Co. provided sworn testimony at the February 14, 2005, hearing that it had located 600 gigabytes of data, while contemporaneously telling the SEC it had located a terabyte of data. A gigabyte represents 20,000 to 100,000 pages. Incredibly, MS & Co.'s witness on this point, Allison Gorman, testified on March 14, 2005, that it was simply a "terminology" issue that she did not choose to correct because it could cause "confusion."

• CPH requested MS & Co. to produce responses it had made to third-parties in civil, criminal, or administrative proceedings describing limitations on MS & Co.'s ability to produce emails and all notices in such proceedings that MS & Co. had newly discovered backup tapes containing email. MS & Co. objected, arguing that there were over 300 separate proceedings, involving over 70 outside law firms, and that the cost of compliance would be too great. On March 2, 2005, the Court ordered the production, after shortening the time period involved, and required production within 12 hours after counsel's review of each item for responsiveness but, in any event, within 10 days. At the time MS & Co. objected to CPH's request as unduly burdensome, it knew of its Well submission to the SEC made on February 10, 2005. Kirkland and Ellis, co-counsel here, was co-counsel for MS & Co. in that SEC proceeding. Consequently, it appears MS & Co.'s real concern was not that expressed to the Court, but was based on its realization that compliance would reveal the existence of the SEC inquiry into its email retention policy and MS & Co.'s efforts to keep the existence of that investigation secret. MS & Co. violated the Court's March 2, 2005, Order on Morgan Stanley's Responses and Objections to Coleman (Parent) Holdings Inc.'s Notice to Produce at Hearing requiring it to disclose items responsive to CPH's Request for Production. within 12 hours of review for responsiveness by waiting days, not hours, to produce the Wells submission.

• MS & Co.'s failure to produce or log the SEC documents violated the Court's February 3, 2005, Order. [15]

• James Doyle's, the Executive Director of MS & Co.'s Law Division, declaration that he did not learn of additional unsearched backup tapes until the end of October, 2004, was intended to mislead CPH and the Court. Obviously, MS & Co. sought to create the implication in the declaration that *no one* in the Law Division knew of the backup tapes before then. Instead, both Soo-Mi Lee, Doyle's associate, and James Cusick, Doyle's superior, knew of the tapes no later than June 7, 2004.

• In-house counsel for MS & Co. knew as of June 7, 2004, that nearly a third of the restored backup tapes did not contain email, implying they may have been recycled in violation of the December 3, 2002 Cease and Desist Order. They did not tell CPH or the Court.

• MS & Co.'s searches looked for only two types of emails. There are other types of emails that were not included in the searches. CPH did not learn of this deficiency until March 13, 2005.

• MS & Co. improperly failed to produce 125 documents required to be produced by the Court's February 3, 2005, Order Specially Setting Hearing which required limited discovery be made in connection with the February 14, 2005, hearing on the Adverse Inference Motion.

• MS & Co. improperly withheld 13 documents required to be produced by the Court's March 4, 2005, Order on Plaintiff's *ore tenus* Motion to Compel Additional Production.

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• An additional 282 tapes were found on February 23 and 25, 2005; CPH was not told of the discovery until March 13, 2005.

• An additional 3,536 tapes were discovered on February 23, 2005, in a security room.

• An additional 2,718 tapes were found at Recall, MS & Co.'s third party off-site storage vendor, on March 3, 2005.

• An additional 389 tapes were found March 2 through March 5, 2005. CPH was not told until March 13, 2005.

• On March 4, 2005, the Court entered its Order on Plaintiff's *ore tenus* Motion to Compel Additional Production, which ordered MS & Co. to produce by 3:00 p.m. on March 7, 2005, all items within its care, custody, or control dealing with the Riel/SEC investigation, other than documents representing communications between or among MS & Co. inside and outside counsel that were not copied to anyone other than counsel. MS & Co. sought to discredit Riel and thus distance itself from the false June 23, 2004 certificate of compliance; in doing so, it sought to hide Riel's whistle blower status and the existence of an SEC investigation into whether MS & Co. employees sought kick backs from third party vendors; whether MS & Co. employees were improperly pressured into dealing with third-party vendors who may provide business to MS & Co.; and whether MS & Co. continued to overwrite backup tapes contrary to the SEC's December 3, 2002, Cease and Desist Order.

• A script error prevented the insertion of some emails into the archive. MS & Co. produced over 4,600 pages of emails on March 21, 2005, some of which it suggested may have been located on correction of the error; alternatively, it suggested the emails may have been located by NDCI as part of its efforts to verify MS & Co.'s searches.
MS & Co.'s discovery abuses have not been confined to its email production.

William Strong is a MS & Co. managing director and was one of the principal players for it in the Sunbeam deal. He took credit for the fees generated. On May 9, 2003, CPH requested a copy of "(a)ll documents concerning employment contracts, performance evaluations, and/or personnel filed (including without limitation any documents that describe or discuss [his] training, experience, competence, and accomplishments) . . ." MS & Co. asserted that the requested documents were not relevant and that production "would unnecessarily infringe on the privacy interests of [Strong]." On March 15, 2004, the Court ordered MS & Co. to produce "(a)ll references (positive or negative) to [Strong's] truthfulness, veracity, or moral turpitude." Some portions of Strong's evaluations were produced in response to that order. Those evaluations noted Strong's colleagues' reservations about his candor and ethics. Two of his evaluators, Joseph Perella and Tarek Abdel-Meguid, were deposed, when some relatively vague testimony about the bases for those conclusions was offered. It now appears Strong was facing criminal prosecution in Italy for complicity in bribery while he was working on the Sunbeam transaction, which his evaluators knew, and that MS & Co. purposely withheld that information from CPH and the Court. [16]

Even once CPH independently discovered evidence of Strong's indictment in Italy, MS & Co. sought to shield its files from discovery. It claimed that virtually *all* of the documents it had were privileged under joint defense agreements in place between it, Strong, and Saloman Brothers, Strong's employer at the time of the incident. As the Court's March 10, 2005 Order Following In Camera Inspection (Strong) details, the documents MS & Co. relied on to support that position, and sought to prevent CPH from obtaining, reflect no such agreement.

The other discovery abuses and misrepresentations by MS & Co. other than those involving its email production practices are outlined in CPH's Chronology of Discovery Abuses by Defendant served March 1, 2005, and would take a volume to recite. They include:

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• failing to provide the information retained by MS & Co.'s internal document management system pertaining to MS & Co.'s work for Sunbeam; falsely representing to the Court that no useful information was contained in that information; and producing a Rule 1.310 representative who had made an insufficient inquiry into authenticity, business record status, and authorship of documents; *see* February 28, 2005 Order on CPH's Motion to Deem Certain Documents Admissible and for Sanctions due to Morgan Stanley's Disregard of Court Order;

• when faced with contempt proceedings for violating the Stipulated Confidentiality Order by providing a copy of a settlement agreement between CPH and Arthur Andersen to other counsel, representing to the Court that the law firm of Kellogg, Huber was retained to handle the "Andersen aspects" of this litigation because of a conflict between Andersen and Kirkland & Ellis; Mark Hansen, a partner at Kellog, Huber, testified that his firm was hired as co-counsel for all aspects of the case;

• providing answers to interrogatories signed by a corporate representative who performed insufficient verification of the responses;

• routinely asserting unfounded privilege claims; [17] and

• failing to timely comply with the Court's orders; for example, MS & Co. did not produce Strong's 1994 Performance Evaluation until the afternoon of March 15, 2005, though it was obviously included in the Court's March 15, 2004 Order. The failure cannot be excused as oversight since, when CPH specifically asked for the 1994 evaluation in the spring of 2004, MS & Co.'s counsel said it was withheld as non-responsive; *see*, also, Ex. 197, 198.

In sum, MS & Co. has deliberately and contumaciously violated numerous discovery orders, including the April 16, 2004 Agreed Order; February 3, 2005 Order Specially Setting Hearing; and the March 4, 2005 Order on Plaintiff's *ore tenus* Motion to Compel Additional Production. At the February 14, 2005, hearing on CPH's Adverse Inference Motion, it chose to hide information about its violations and coach witnesses to avoid any mention of additional, undisclosed problems with its compliance with the Agreed Order. Implicit in the requirement that MS & Co. certify compliance with the Agreed Order was the requirement to disclose impediments to its ability to so certify. As outlined in this Order, MS & Co. employees, and not just counsel, have participated in the discovery abuses. The prejudice to CPH from these failings cannot be cured. Even if all the script errors have been located and corrected, and MS & Co. has failed to show they have, and even if all of the email backup tapes have now been located, and MS & Co. has failed to show they have, the searches cannot be completed in time. The other discovery abuses outlined call into doubt all of MS & Co.'s discovery responses. *The judicial system cannot function this way*. Based on the foregoing and on the Court's March 1, 2005 Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, it is

ORDERED AND ADJUDGED that CPH's Renewed Motion for Entry of Default Judgment is Granted, in part. *See Robinson v. Nationwide Mut. Fire Ins. Co.*, 887 So. 2d 328 (Fla. 2004); *Mercer v. Raine*, 443 So. 2d 944 (Fla. 1983); *Precision Tune Auto Care. Inc. v. Radcliffe*, 804 So. 2d 1287 (Fla. 4th DCA 2002); Rule 1.380(b)(2)(C), Fla. R. Civ. P. Paragraphs 2 (excluding the last sentence thereof); 3 (excluding the portion of the last sentence beginning with "in order to close..."); 8-10, 11 (excluding everything after the first sentence); 12 (excluding all parts following "June 1998"); 13 (excluding the last sentence thereof); 14-27; 28 (excluding everything after "firm" in the second to last sentence thereof); 29-39; 41-52; 53 (excluding the second sentence thereof); 54-57; 58 (excluding "CPH and" in the second line thereof); 59-63; 64 (excluding the third line thereof); 65 (excluding the last sentence thereof); 66 (excluding the last sentence thereof); 67-70; 71 (excluding the first word of the last sentence and the remainder of that sentence after "material"); 72; 73 (excluding the first sentence thereof); 74 (excluding the words "CPH and" in the second to last sentence thereof); 75-81; 85; 86; 87 (excluding (g)); 90, and 91 (excluding (g)) of Plaintiff's Amended Complaint, as amended by the Court's Amended Order on Morgan Stanley's Motion to Dismiss, Motion to Strike, and Motion for More Definite Statement,

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shall be read to the jury and the jury instructed that those facts are deemed established for all purposes in this action. A copy of a redacted Amended Complaint is attached as Exhibit A. It is further

ORDERED AND ADJUDGED that the Court shall read to the jury a Statement similar to that attached as Exhibit A to the Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, but incorporating the relevant additional findings of this Order, and the jury will be instructed that it may consider those facts in determining whether MS & Co. sought to conceal its offensive conduct when determining whether an award of punitive damages is appropriate. *See General Motors Corp. v. McGee*, 837 So. 2d 1010 (Fla. 4th DCA 2002), *rev. den.* 851 So. 2d 728 (Fla. 2003). Counsel are each invited to submit proposed Statements. It is further

ORDERED AND ADJUDGED that CPH shall be entitled to an award of reasonable fees and costs incurred as a result of the Renewed Motion for Entry of Default Judgment and the violations of Court orders recited herein. The amount shall be determined at an evidentiary hearing following trial. It is further

ORDERED AND ADJUDGED that MS & Co. is relieved of any future obligation to comply with the April 16, 2004 Agreed Order and the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s Motion to Participate in Search of Additional E-Mail Back-Up Tapes or Appoint Third Party to Conduct Search. It is further

ORDERED AND ADJUDGED that the *pro hac vice* admission of Thomas Clare is revoked. It is further

ORDERED AND ADJUDGED that the portions of CPH's Motion for Correction and Clarification of Order on CPH's Motion for Adverse Inference that seek to amend the body of that Order to correct clerical and spelling errors, as agreed to by counsel, is Granted, and the corrections deemed made to the body of the Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, by interlineation. In all other respects the remainder of the Motion for Correction and Clarification is declared moot.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this *23rd* day of March, 2005.
<<signature>>

ELIZABETH T. MAASS

Circuit Court Judge

Footnotes

1 On February 17, 2005, CPH served its First Amended Complaint, which dropped the claims against MS & Co. for fraudulent and negligent misrepresentation, leaving only the aiding and abetting and conspiracy claims.

2 Complaints about MS & Co.'s tactics are not new. *See* Ex. 196 [February 26, 2004, letter from EEOC to Hon. Ronald L. Ellis in *EEOC/Schieffelin v. Morgan Stanley & Co., Inc., et al.*, 01-CV-8421 (RMB) (RLE) (S.D.N.Y.): ("(w)hen EEOC received [Morgan Stanley's] January 27, 2004 Responses to EEOC's Fifth Requests for Production of Documents which did not contain any e-mails, the parties communicated further. At that time, Morgan Stanley took the position that searching for e-mails would be burdensome both in regards to expense and the time it would take to respond. While the parties were in the process of attempting to work out these disputes, EEOC for the first time learned that [Morgan Stanley has] an easy, systematic ability to search for relevant documents. In a February 16, 2004, conversation with an IT representative of [Morgan Stanley], EEOC learned that [Morgan Stanley has] an e-mail system, which, while not yet fully comprehensive, was easily searchable on February 18, 2004, the close of discovery . . . which is certain to produce discoverable information highly relevant to EEOC's and Plaintiff-Intervenor's claims . . . After disclosing their state-of-the-art system to EEOC, [Morgan Stanley] dropped [its]

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assertion that the process was too expensive, but maintained that they refuse to search for e-mails because it is burdensome for attorneys to review large numbers of documents prior to production.")

3 Saunders provided misleading information in his deposition. *See* footnote 12, infra.

4 Though CPH would not learn for months that the certificate was false, and even then the magnitude of MS & Co.'s misrepresentations would not be admitted, MS & Co. personnel, including in-house counsel, knew the certification of compliance was false when made.

5 Not only does this letter fail to answer Brody's legitimate questions, it implies that MS & Co. was still processing and reviewing emails from the newly found tapes. As we now know, though, *no* additional information was migrated to the archives between approximately August 18, 2004 and January 15, 2008. *Of course* "no additional responsive e-mails [would have been] located."

6 Concerned that MS & Co. had been less than candid with both CPH and the Court, on February 4, 2004, the Court entered its Order on Coleman (Parent) Holding's *ore tenus* Motion to Participate in Search of Additional E-Mail Backup Tapes or Appoint Third Party to Conduct Search, ordering MS & Co. to pay for a third party vendor to check its compliance with the Agreed Order. The Court previously found that the two scripts errors testified to by Allison Gorman at the February 14, 2005, hearing would not have been discovered or revealed without the threat that the third-party vendor would discover the errors. Given Ms. Gorman's testimony at the March 14, 2005, hearing, though, it now appears MS & Co. knew about the errors before the appointment of the third-party vendor. Consequently, the errors were only revealed, but not discovered, in response to the February 4, 2004, Order.

7 On December 17, 2003, CPH served its Third Request for Production seeking "(a)ll materials and documents submitted to the United States Securities and Exchange Commission ("SEC"), received from the SEC, or reflecting communications with the SEC in connection with any investigation, inquiry, or examination concerning or relating to Morgan Stanley's policies and/or procedures with regard to the retention, storage, deletion, and/or back-up of electronic mail (emails) . . ." On October 12, 2004, CPH served its Request for Supplemental Documents seeking to bring MS & Co.'s document production current, requesting "(a)ll documents not previously provided by MS & Co. that are responsive to any Request for Production of Documents that CPH previously has served upon MS & Co. in the litigation, including documents obtained by MS & Co. or its counsel after the date of MS & Co.'s prior productions." No SEC documents were produced in response to either request; no privilege log was generated. On other privilege logs generated in response to court orders, MS & Co. did not show the SEC on the distribution portion of the log. *See* March 9, 2005 Order Following in Camera Inspection (Riel/SEC Documents) footnotes 1, 2. *See*, also, footnote 15, infra Kirland & Ellis, outside counsel for MS & Co. in this litigation, represents MS & Co. in the SEC's inquiry into its email retention practices.

8 MS & Co. manipulated the unhinging of the SEC's email investigation from the IPO litigation in January, 2005, to conceal the email issues as long as possible.

9 It is now apparent that MS & Co. chose deliberately to keep its affidavits concerning the informal SEC inquiry submitted to support its privilege claims vague, despite two requests from the Court seeking specific information. *See* February 28, 2005 Order (Release of Exhibits).

10 *See* February 25, 2005 Order on Morgan Stanley's Objections to Coleman (Parent) Holding Inc.'s Notice to Produce at Hearing and Motion for Protective Order and March 4, 2005 Order on Plaintiff's *ore terms* Motion to Compel Additional Production.

11 While MS & Co. contends that its representations to the Court that it would cost "hundreds of thousands of dollars" to search the backup tapes and that there was no pre-2000 backup tapes were not false, they were deliberately misleading: MS & Co. never had an intention to search the back up tapes to respond to the requests and some of the year 2000 backup tapes backed up email back to 1997.

In 2001, MS & Co. decided to create the email archive. By June, 2003, it had decided that the archive should have two components. First, MS & Co. wanted to create an archive that captured and stored email as it was generated. Second, MS & Co. wanted to add historical data to the archive. That task involved searching for all email backup tapes containing historical emails; sending those tapes to an outside processor, loading the processed tapes into a staging area; and migrating the stored data from the staging area onto the archive. As we now know, archive searches are quick and inexpensive. They do not cost "hundred of thousands of dollars" or "take several months." The restrictions imposed by the Agreed Order were not needed.

12 On February 10, 2004, Robert Saunders, an executive director of IT for MS & Co., was deposed. He testified that in January, 2003, MS & Co. had put into effect the email archive system. When specifically asked whether the new email archive system would include prior backups or only going forward backups, he testified that "(t)he way it was built was for going forward backup." He was next asked whether "(w)ith respect to backup dated January 2001 and previously, does Morgan Stanley have any new capabilities to restore and search e-mail?" After counsel interposed a vagueness objection, he answered "(t)here are no new capabilities to search that e-mail." That testimony was so misleading as to be false. As Sauders well knew, since

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he was on the team responsible, the "live" email capture portion of the archive was already operational. The migration of the historical data to the archive was expected to be completed by April of 2004, just two months after his deposition.

13 MS & Co. sought to use the entry of the Adverse Inference Order as a shield against further inquiry into its email abuses, arguing that the matter was closed by the Adverse Inference Order. It previously used this tactic with the SEC, arguing that the December 3, 2003 Cease and Desist Order shielded it from other sanctions for email retention failures. *See* Ex. 14 [February 10, 2005 letter from outside counsel for MS & Co. to SEC]

14 MS & Co. argued at the March 14 and 15, 2005 hearing that there were only 13 unique, new emails contained in the November 2004 production when compared to the May 2004 production. Nine of those emails, however, were originally given to MS& Co.'s lawyers for responsiveness review by the IT staff for the May 2004 production. No explanation of why they were not produced in May was offered. This is particularly concerning given the large number of documents Ms. Gorman testified the search parameters found compared with the relatively small number found responsive and produced after review by counsel.

15 The Court previously rejected MS & Co.'s argument that the January 14, 2005, email exchange between its outside and in-house counsel was not required to be produced under the February 3, 2005, Order Specially Setting Hearing because it referred to the "documents issue" and not specifically to the backup tapes. *See* March 16, 2005 Order on Morgan Stanley's Motion to Disqualify Plaintiff's Counsel Searcy, Denney, Scarola, Bamhart & Shipley, P.A. and Jenner & Block, LLC. MS & Co.'s insistence on a narrow interpretation of the February 3, 2005, Order is not particularly sympathetic, when the only reason that Order confined production to the backup tape issue was because MS & Co. had failed to notify the Court of the other deficiencies in its certificate of compliance.

16 MS & Co. originally argued that documents concerning the Italian proceedings were not in Strong's "personnel file" and so were not required to be produced in response to CPH's initial request. MS & Co.'s practice of filing damaging information about an employee other than in his personnel file and then claiming it was not included in the request is about at convincing as its argument that, since it has a corporate directive not to keep drafts of documents once they are in final form, document drafts cannot be business records exempt from hearsay because they are not "kept in the course of a regularly conducted business activity." *See* Fla. Stat. §90.803 (6) (a). In any event, there was no excuse for not producing its records of the Italian proceedings once the Court's March 15, 2004 Order was entered.

17 For example, MS & Co. produced over 260 documents dealing with the Strong investigation over which it had previously claimed privilege once the Court announced its intention to conduct an in camera review; the Court found another 200 documents were not privileged after conducting its review, by its March 10, 2005 Order.

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March 24, 2005

03-5045-AI

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BY
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The Honorable Elizabeth Maass
15th Judicial Court of Florida
205 North Dixie Highway
Room: 11.1208
Courtroom Number: 11A
West Palm Beach, Florida 33401

Dear Judge Maass:

I read with great interest in the March 24, 2005 issue of the Wall Street Journal of your desire to ensure justice for Mr. Perelman's lawsuit against Morgan Stanley. I applaud your efforts to get tough with the cast of characters involved in this debacle.

Mr. Perelman wasn't the only one to lose a significant amount of money - - I lost over $24,000 as I watched Sunbeam stock tank from $8 per share all the way down to the final bankruptcy. The outcome of this case will partially explain how management of the company was able to hide Sunbeam's true condition.

That was money that could've been better spent on college for my children. Please count me among those who are angered by the likelihood that Morgan Stanley received millions of dollars in fees for misleading investors and conspiring to line their own pockets. But, you can also count me among those who are delighted to read about the misery they are suffering when they fail to comply with a good judge's orders.

As Queen Latifa would say in the movie Chicago - - "you go girl!"

Sincerely,

Jay Sorensen

15850 Grey Friars Ct.
Ft. Myers, Fla. 33912
March 24, 2005

239-461-5255
airdoggie98@yahoo.com

Dear Judge Maass:

You will probably never see this letter, but your assistant will and maybe she will show it to you.

I have enclosed the recent WSJ article re: Perelman vs Morgan Stanley. Assum the article is correct, I'd like to make several points.

(i) Why have this Trial? Your rulings make it a <u>certainty</u> that Morgan will lose. If you believe otherwise, Someone is kidding themselve

16dv-013492

(2) When they lose, will you make Morgan pay all court costs, for a trial that is a foregone conclusion?

(3) Morgan may have screwed up discovery but I think I know that many of their E-Mails and backup documents were lost in 9/11 (stored in 2 WTC and there was chaos for awhile as to where to store other documents

(4) Mr. Perelman is a big boy used to the ups & downs of Wall Street. He had his own advisors (Credit Suisse, I believe) whom he

paid millions to watch out for him. Did they hint, in any way, that Sunbeam was not what it was purported to be?

(5) As the investment advisors to Sunbeam, if Morgan knew something was amiss (but didn't know exactly) what is their legal duty to Sunbeam & Perelman?

(6) Where was Perelman during the period 1998 – 2001? There were numerous warnings about Sunbeam; as a major shareholder, I'd have asked some tough questions of Sunbeam and

(4)

I think

believe me, a Perelman and his Advisors

can be tough as nails -- they've

done plenty of deals on Wall Stre

[redacted]

as far as I know.

[redacted]

(7) the legal system has be-

come one big crapshoot. It's Killin

our best corporations and investors.

I ask again, why have this

Trial & inconvenience a group of

jurors who probably don't under-

stand Wall Street and [redacted] Takeovers

Advisors etc.

Judge, it's clear you've made up

your mind -- Why have this Trial --

16div-013498

You've tried and convicted Morgan Stanley -- just set the dollar amount and have the parties go to appeal! (I'd love an answer to this question)

This is only the second letter I've ever sent to a Judge. The first involved the perjury trial of President Clinton and I made the case that Clinton shouldn't get any special favors because he was president. Lo and behold, her clerk wrote me back and said she (the judge) read my letter! As I stated earlier

I doubt that you will ever see this but I welcome any comment

Whenever I write a letter like th I always suggest what should ha been done or what I would ha done.

(1) I would have fined a admonished Morgan Stanley — making sure all discovery (that could be found) WAS given To Perelman.

(2) I would have given Morgan at least a month To replace Counse

(3) I would not have tilted the playing field so Spectra

16div-013497

in Perlman's favor -- otherwise, why have the Trial!!

(4) Lastly, if I had reached a conclusion about the case and felt I couldn't act w/ impartiality I would recuse myself. During Trial, you will make hundreds of rulings -- Since you are no longer important At in my opinion, how will you rule

Thank you for your time.

Your Truly,

Jack Kawa

P.S. the judiciary is totally out-of-control in my opinion. the courts have

16div-013498

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO REMOVE CONFIDENTIALITY DESIGNATIONS

THIS CAUSE came before the Court March 24, 2005 on Coleman (Parent) Holdings, Inc.'s Motion to Remove Confidentiality Designations, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part, and Denied, in part. The confidentiality designations are removed from all items listed in the Motion, other than those found at docket entry numbers 1496, 1498, 1499, 1501, and 1502.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 24 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON REVISED PRE-TRIAL SCHEDULE

THIS CAUSE came before the Court March 24, 2005, with both parties well represented by counsel. Based on the proceedings before the Court and on the Court's March 23, 2005, Order on CPH's Renewed Motion for Entry of Default Judgment, it is

ORDERED AND ADJUDGED that

1. By noon on March 26, 2005, Plaintiff shall serve on Defendant, by electronic transmission, its revised witness list (including witnesses to be presented by deposition testimony), together with a fair summary of each witness's expected testimony.
2. By March 27, 2005 at 5:00 p.m., Plaintiff shall serve on Defendant, by electronic transmission, its revised exhibit list. Plaintiff shall use its good faith efforts to notify Defendant of documents it has elected to remove from its current exhibit list as those decisions are made.
3. On March 28, 2005, at 9:30 a.m., each party shall submit its requested Statement to be read to the jury, if any, as provided by the Court's March 23, 2005, Order on CPH's Renewed Motion for Entry of Default Judgment and a proposed timetable for Defendant to provide its revised witness and exhibit lists.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 24 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

16div-013501

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO QUASH MORGAN STANLEY'S NOTICE TO PRODUCE MAFCO LOAN AGREEMENTS

THIS CAUSE came before the Court March 24, 2005 on Coleman (Parent) Holdings Inc.'s Motion to Quash Morgan Stanley's Notice to Produce MAFCO Loan Agreements, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Coleman (Parent) Holdings Inc.'s Motion to Quash Morgan Stanley's Notice to Produce MAFCO Loan Agreements is Granted. MS & Co.'s notice to produce at trial documents pertaining to loan agreements of MAFCO, served February 18, 2005, is quashed.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 24 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER AND DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court, in Chambers, on its own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Clerk is directed to docket and file Joseph Katz's facsimile transmission dated March 24, 2005.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 24 day of March, 2005.

_____
ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

CASE NO: CA 03-5045 AI

MORGAN STANLEY'S SUBMISSION OF PROPOSED STATEMENT TO BE READ TO THE JURY PURSUANT TO COURT'S MARCH 23, 2005 ORDER ON CPH'S RENEWED MOTION FOR ENTRY OF DEFAULT JUDGMENT

Pursuant to the Court's March 23, 2005 Order on Coleman (Parent) Holdings, Inc.'s ("CPH") Renewed Motion for Entry of Default Judgment ("Default Judgment Order"), Morgan Stanley & Co. Incorporated ("Morgan Stanley") hereby submits the following proposed statement to be read to the jury regarding the Court's findings.

Morgan Stanley asserts that, notwithstanding the Court's findings regarding Morgan Stanley's failure to comply with the Court's discovery orders, no such statement should be read to the jury. Such a statement unduly prejudices Morgan Stanley's right to a fair trial on the merits; it is irrelevant to facts at issue in this case; it is not an appropriate sanction under Florida law for Morgan Stanley's failures to comply with discovery; and it unconstitutionally deprives Morgan Stanley of its right to defend itself against CPH's claim for punitive damages. In addition, the Italian indictment and proceedings against William Strong (who is not a party to this case) and the SEC investigations are not related to disputed issues in this case, and any reference to these matters will, at a minimum, violate the rules of evidence as set forth in the Florida Statutes, sections 90.403; .404; .410; and .610. Thus, Morgan Stanley submits this statement without prejudice to its right to challenge, before this Court or on appeal, the Court's

decision to read any statement to the jury, as well as the Court's factual findings or legal conclusions set forth in the Default Judgment Order; the February 4, 2005 Order on CPH's Motion To Participate in Search of Additional E-Mail Back-Up Tapes or Appoint Third Party To Conduct Search; the March 1, 2005 Amended Order on CPH's Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order; and any other order in which the Court has made factual findings or legal conclusions regarding Morgan Stanley's compliance with the Court's April 16, 2004 Agreed Order.

Without waiving any of the foregoing arguments and upon the assumption that the Court will read a statement to the jury regarding its findings relating to electronic discovery in this case, Morgan Stanley respectfully submits the following statement:

Beginning in no later than 1997, Morgan Stanley had a practice of overwriting its e-mail back-up tapes after 12 months. E-mails could no longer be retrieved once they were overwritten. This practice was discontinued in January 2001. Later analysis of a sample of 199 back-up tapes showed that 10% of them were overwritten after January 2001.

Prior to 2003, Morgan Stanley recorded e-mails and other electronic data on back-up tapes. By June 2003, Morgan Stanley had decided to migrate all of its old e-mails from back-up tapes to a new e-mail archive. Morgan Stanley believed that searching the archive for e-mails was faster, cheaper, and more comprehensive than searching individual back-up tapes. On April 16, 2004, the Court ordered Morgan Stanley (1) to search the oldest full back-up tape for each of 36 Morgan Stanley employees involved in the Sunbeam transaction; (2) to review e-mails dated from February 15, 1998, through April 15, 1998, and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman," regardless of their date; (3) to produce by May

14, 2004 all e-mails relating to this case found by the search I have just described; and (4) to certify its full compliance with the Court's order.

As organized by Morgan Stanley, the effort to recover e-mails from the archive had several stages. First, all e-mail back-up tapes had to be located by searching a number of potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc., which I will call "NDCI," to be processed and the data returned to Morgan Stanley. Unbeknowst to Morgan Stanley in early 2004, a migration issue caused as much as 5% of the e-mail harvested by NDCI from the back-up tapes not to be captured in the archive. Third, Morgan Stanley had to upload the processed data into its e-mail archive. Fourth, Morgan Stanley had to run scripts, or pieces of e-mail computer code, to transform this data into a searchable form. Finally, Morgan Stanley had to search the data for e-mails related to this case. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when the processed data returned by NDCI remained in limbo, waiting to be uploaded to Morgan Stanley's archive.

On May 14, 2004, Morgan Stanley produced approximately 1,300 pages of e-mails, although it did not produce the required certification. As of June 7, 2004, only 120 out of the 143 SDLT tapes produced by NDCI had been processed into the archive. On June 23, 2004, after inquiries by CPH, Morgan Stanley provided CPH with a certificate of full compliance with the April 16 Order. It was signed by Arthur Riel, the Morgan Stanley manager who had been assigned the task of retrieving responsive e-mails. Morgan Stanley continued to find additional back-up tapes and retrieve and produce additional e-mails to CPH.

At some point prior to May 6, 2004, Arthur Riel and his team became aware that 1,423 additional back-up tapes had been found at a Morgan Stanley facility in Brooklyn, New York.

These 1,423 tapes had not been processed by NDCI and thus had not been included in the archive or searched when Morgan Stanley made its production to CPH on May 14, 2004. Aware of the tapes' discovery and of the possibility that the tapes might contain e-mails called for by the April 16, 2004 Order, Mr. Riel should have known when he executed the certificate of full compliance with the Court's April 16, 2004 Order that it might be false. By July 2, 2004, two weeks after he executed the certificate of full compliance, Mr. Riel and others on Morgan Stanley's e-mail archive team knew that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990's — although they did not know whether any of those e-mails were called for by the April 16, 2004 Order. During the summer of 2004, the Brooklyn tapes were processed and the data sent to the staging area. The scripts were not written and tested to permit the search for e-mails relating to this case to begin until the middle of January 2005. Such a search, even if perfectly done, can take weeks. Of the Brooklyn tapes, two whole and four partial tapes had been migrated to the archive and were searched for the November 2004 production.

Morgan Stanley also did not produce e-mails from 738 back-up tapes found at a Morgan Stanley facility in Manhattan in 2002. These 738 tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive or searched by May 14, 2004 or June 23, 2004. Mr. Riel and others were told by NDCI by July 2, 2004 that these tapes contained e-mail dating back to at least 1998 — although no one knew whether any of these e-mails were required to be produced by the April 16, 2004 Order. During the summer of 2004, these tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not searched. None of the November 2004 production came from these tapes.

In August 2004, Mr. Riel was relieved of his employment responsibilities for reviewing other employees' e-mail in violation of Morgan Stanley's Code of Conduct. He and his team

were replaced by a new team, which was headed by Allison Gorman Nachtigal. At that time, the staging area contained about 600 gigabytes of e-mail data that had not yet been uploaded into the Morgan Stanley archive and had not been searched for e-mails relating to this case.

Upon taking over Mr. Riel's responsibilities, Ms. Gorman focused on ensuring that the archive was capturing current e-mail and on responding to litigation and regulatory requests to restore e-mails, so she did not initially make significant efforts to address the backlog of data in the staging area. Indeed, she was not informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman gave the project somewhat greater priority, although even then it did not move as expeditiously as possible. Morgan Stanley did not consider using an outside contractor to expedite the process.

Morgan Stanley found another 169 DLT tapes in January 2005 that had been misplaced by its New Jersey storage vendor, a company called Recall. On February 11 and 12, 2005, Morgan Stanley discovered more than 200 additional back-up tapes openly stored in locations known to be used for tape storage. On February 11, 2005, Morgan Stanley discovered that a software flaw had prevented it from locating all attachments to responsive e-mails. Morgan Stanley discovered on February 13, 2005 that the date-range searches for e-mail users on the Lotus Notes platform were flawed, so that additional e-mail messages that appeared to fall within the scope of the April 16, 2004 Order had not been given to CPH. Further, it appears that the problem affected Morgan Stanley's original searches in May of 2004. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the transaction under review here.

Over time, Morgan Stanley discovered additional problems with its e-mail archive, which prevented it from doing a comprehensive search of the entire archive. The scripts that Morgan

Stanley used to process e-mails into the archive caused the bodies of some messages to be truncated. Software errors caused blind carbon copies not to be captured in the archive process and for searches to be hyper-case sensitive, so that they did not capture all e-mails. A script error caused the archive to have problems pulling group e-mail into Lotus Notes. A script error prevented the insertion of some e-mails into the archive. When NDIC processed Morgan Stanley's back-up tapes, it looked for only two types of e-mail, although some of Morgan Stanley's pre-2000 back-up tapes had another type of e-mail that was not looked for by NDCI.

Morgan Stanley provided testimony at a February 14, 2005 hearing before the Court that, in November 2004, it had located 600 gigabytes of data in the staging area waiting to be migrated onto the archive. However, it told the Securities and Exchange Commission, in November 2004, that it had located a terabyte of data. A gigabyte represents 20,000 to 100,000 pages. Ms. Gorman, who testified on this issue, stated that she did not correct this statement because she believed it would cause confusion.

Morgan Stanley did not tell CPH it had found any tapes that it had not searched until November 17, 2004. Even then, it did not tell CPH how many tapes were found, when they were found, or when they would be searched. Morgan Stanley did not provide all of this information to CPH until February of 2005. On February 16, 2005, Morgan Stanley withdrew its certificate of compliance with the April 16, 2004 Order. On February 19, 2005, Morgan Stanley notified CPH that it had found boxes of additional tapes that had not been uploaded into its archive or searched for responsive e-mails.

An additional 282 tapes were found on February 23 and 25, and an additional 289 tapes were found March 2 through March 5, 2005. Morgan Stanley notified CPH of these discoveries on March 13, 2005. An additional 2,536 tapes were discovered on February 23, 2005 in a

security room. An additional 2,718 tapes were found at Recall, Morgan Stanley's off-site storage vendor, on March 3, 2005. At the time these tapes were discovered, it was not known whether they contained e-mail responsive to the April 16, 2004 Order.

CPH requested Morgan Stanley to produce responses that Morgan Stanley had made to third parties in civil, criminal, or administrative proceedings describing limitations on Morgan Stanley's ability to produce e-mails. The Court ordered the production of such documents within 12 hours after counsel had reviewed the documents for responsiveness but, in any event, within 10 days. Morgan Stanley had sent a letter to the Securities and Exchange Commission with information regarding its ability to produce e-mail. Morgan Stanley did not disclose that it had this letter to the SEC within 12 hours of the Court's order. Nor did Morgan Stanley immediately produce or log this letter.

One of the attorneys in Morgan Stanley's Law Division stated in a declaration that he did not learn of additional back-up tapes with e-mail on them until October 2004. Other lawyers in the Law Division knew that new tapes had been found in June 2004 — although those lawyers did not know that the tapes contained e-mail until October 2004. As of June 7, 2004, attorneys in the Law Division knew that Mr. Riel was reporting that nearly one-third of the restored back-up tapes did not contain e-mail, which Mr. Riel thought suggested that tapes had been recycled contrary to a January 2001 Morgan Stanley directive to stop recycling back-up tapes. Subsequent analysis, however, showed that only a small number (less than one percent) of the tapes identified by Mr. Riel had, in fact, been recycled. In addition, Morgan Stanley did not produce other documents that it was required to produce under the February 3, 2005 and March 4, 2005 court orders.

William Strong is a Morgan Stanley employee who was one of the principal players in the Sunbeam transaction. In document requests served in May 2003, CPH requested all documents concerning "employment contracts, performance evaluations and/or personnel files (including without limitation any documents that describe or discuss [his] training, experience, competence, and accomplishments." From this set of materials, Morgan Stanley was ordered to produce the subset containing "all references (positive or negative) to Strong's truthfulness, veracity or moral turpitude." While he was working on the Sunbeam transaction, Strong was facing criminal prosecution in Italy for complicity in bribery arising out of his prior employment with a different firm. Ultimately, these charges were found by the Italian courts to be wholly without merit. Morgan Stanley failed to disclose documents relating to this issue. Morgan Stanley produced Mr. Strong's 1994 performance evaluation on March 15, 2004.

Morgan Stanley also did not provide information retained by its internal document management system pertaining to Morgan Stanley's work for Sunbeam. Its former attorneys narrowly described the scope of co-counsel's representation of Morgan Stanley. Morgan Stanley provided answers to interrogatories that were signed by a corporate representative who performed insufficient verification of the responses.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 28 day of March 2005.

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BY: Rebecca Beynon

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON PLAINTIFF'S MOTION IN LIMINE NO. 25 FOR A FINDING AS A MATTER OF LAW THAT THE EXCULPATORY AND INTEGRATION CLAUSES RAISED BY MORGAN STANLEY ARE INEFFECTIVE TO BAR INTENTIONAL-TORT CLAIMS

THIS CAUSE came before the Court March 24, 2005 on Plaintiff's Motion in Limine No. 25 for a Finding as a Matter of Law that the Exculpatory and Integration Clauses Raised by Morgan Stanley are Ineffective to Bar Intentional-Tort Claims, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted. The exculpatory language in the purported February 23, 1998 Confidentiality Agreement; the integration clause in the CPH Merger Agreement; and the exculpatory and nonreliance language of the Debenture Offering Memorandum do not bar CPH's claims for intentional torts, as a matter of law. This ruling is without prejudice to either party's right to argue that the clauses may be relevant for some other purpose.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 28 day of March, 2005.

_____
ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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West Palm Beach, FL 33401

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON PLAINTIFF'S MOTION IN LIMINE NO. 27 FOR A FINDING AS A MATTER OF LAW THAT THE FEDERAL SECURITIES LAWS PROHIBITED PLAINTIFF FROM SELLING UNREGISTERED SUNBEAM STOCK

THIS CAUSE came before the Court March 24, 2005 on Plaintiff's Motion in Limine No. 27 for a Finding as a Matter of Law that the Federal Securities Laws Prohibited Plaintiff from Selling Unregistered Sunbeam Stock, which the Court elects to treat as including a Motion to Compel Required Pre-Trial Disclosure, with both parties well represented by counsel. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Plaintiff's Motion in Limine No. 27 for a Finding as a Matter of Law that the Federal Securities Laws Prohibited Plaintiff from Selling Unregistered Sunbeam Stock is Granted, in part. The Court concludes that, as a matter of law, the restricted Sunbeam stock received by CPH in the transaction under review could not be sold by CPH under Rule 144A; and that, as a matter of law, under Rule 144, CPH could sell no more than one million shares per quarter, beginning November 25, 1999. It is further

ORDERED AND ADJUDGED that CPH's Motion to Compel is Granted. Within 5 business days, CPH shall serve its supplemental disclosure, detailing facts or opinions to be testified to or supported by documentary evidence to support its position that the Sunbeam shares could not have been sold by CPH, as a matter of fact and as a matter of law, prior to the shares' having become worthless in the market place. MS & Co. shall serve its

supplemental disclosure, detailing facts or opinions to be testified to or supported by documentary evidence to support its position that the Sunbeam shares could have been sold by CPH, as a matter of fact and as a matter of law, prior to the shares' having become worthless in the marketplace. These disclosures are without prejudice to either side's right to seek to have evidence excluded consistent with the disclosures at trial. No expert may testify as to damages based on the value of the Sunbeam stock as of a specific date without first seeking a ruling from the Court that a sufficient evidentiary predicate to support a conclusion that the stock could be sold as of the date to be used has been laid.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 28 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.
_____/

PLAINTIFF'S NOTICE TO PRODUCE AT TRIAL

Coleman (Parent) Holdings Inc. ("CPH"), by and through the undersigned counsel, requests, pursuant to Rule 1.350 of the Florida Rules of Civil Procedure, that Defendant, Morgan Stanley & Co., Inc. ("MS & Co."), produce and permit Plaintiff to inspect and copy each of the documents described below. It is requested that the aforesaid production be made at the commencement of trial in this matter. Inspection will be made by visual observation, examination, and/or copying.

DEFINITIONS

Except as otherwise provided below, CPH incorporates by reference the Definitions and Instructions set forth in Plaintiff's First Request for Production of Documents served in this action on May 9, 2003.

DOCUMENTS REQUESTED

1. All balance sheets, income statements, cash flow statements, and any other financial statements relating to MS & Co.'s net worth, revenues, profits, losses, borrowings, and global holdings for the most recently completed quarter.

Dated: March 29, 2005

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and hand delivery to all counsel on the attached list on this 29th day of March, 2005.

Deirdre E. Connell

FAX TRANSMITTAL

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Date:	March 29, 2005		
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	Joseph Ianno, Jr., Esq.	Fax:	(561) 659-7368
	John Scarola, Esq.	Fax:	(561) 684-5816 (before 5 PM)
From:	Michael T. Brody (561) 352-2300		
Employee Number:		Client Number:	41198-10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential, and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

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Total number of pages including this cover sheet: 5	Time Sent: 3:30 p.m.
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Secretary:	Extension:

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO STRIKE A PORTION OF ONE SENTENCE FROM EXHIBIT A TO THE COURT'S MARCH 23, 2005 ORDER

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") respectfully requests that this Court strike a portion of one sentence from Exhibit A to the Court's March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment because it refers to the SEC's investigation of the Sunbeam fraud that Morgan Stanley & Co. Incorporated ("Morgan Stanley") aided and abetted and conspired to commit. The portion of the sentence to be stricken from Exhibit A is found on lines 2 and 3 of page 7, after the word "Sunbeam." *See* Ex. A, 3/23/05 Order on CPH's Renewed Mot. for Entry of Default J. (Ex. A), at 7. The language to be stricken is: "by engaging in what SEC officials subsequently described as a 'case study' in financial fraud."

This portion of Exhibit A is inadmissible under this Court's previous Orders barring evidence or argument about the SEC's investigation and findings. *See* Ex. B, 2/17/05 Order on CPH Mot. in Limine No. 9 ("There shall be no evidence or argument at trial that the SEC

investigated MS & Co. or that MS & Co. was not ultimately charged."); Ex. C, 2/17/05 Order on MS Mot. in Limine No. 2 ("There will be no evidence or argument about the SEC findings.").

Dated: March 29, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 29th day of March, 2005.

Deirdre E. Connell

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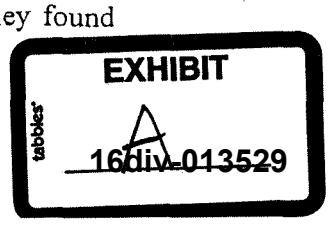
FLORIDA_10461_1

EXHIBIT

A

In April 1997, Morgan Stanley began serving as Sunbeam's investment banker. Morgan Stanley originally attempted to find someone to buy Sunbeam. When Morgan Stanley was unable to find a buyer, Morgan Stanley developed a strategy for Sunbeam to use its fraudulently-inflated stock to acquire a large company that Sunbeam would own and operate. Then, trading on Morgan Stanley's relationships with CPH's senior officers, Morgan Stanley found

Exhibit A



Coleman for Sunbeam. At the time of the sale to Sunbeam, Coleman was a leading manufacturer and marketer of consumer products for the worldwide outdoor recreation market, with annual revenues in excess of $1 billion.

After Sunbeam announced plans to acquire Coleman, Morgan Stanley agreed to underwrite a $750 million debenture offering for Sunbeam. Sunbeam needed the proceeds of that debenture offering to complete the acquisition of Coleman. As Sunbeam's investment banker and as the sole underwriter for the $750 million debenture offering, Morgan Stanley received detailed and specific information concerning Sunbeam's financial condition and performance. Morgan Stanley received information that directly contradicted Sunbeam's and Morgan Stanley's assertions to CPH that Sunbeam had undergone a successful turnaround and that its financial performance had dramatically improved. By no later than March 18, 1998, Morgan Stanley knew that Sunbeam's January and February 1998 sales were only 50% of January and February 1997 sales, and Morgan Stanley also knew that the shortfall was caused by Sunbeam's practice of accelerating sales which otherwise would have occurred in 1998 in order to boost Sunbeam's income in 1997. Although Morgan Stanley and Sunbeam previously had advised CPH that Sunbeam's sales were running ahead of analysts' expectations for the first quarter, Morgan Stanley decided not to correct those material misrepresentations. Instead, in March 1998, Morgan Stanley assisted Sunbeam in concealing the problems with Sunbeam's first quarter 1998 sales

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Plaintiff Coleman (Parent) Holdings Inc. ("CPH") directly or indirectly owned 44,067,520 shares — or approximately 82% — of Coleman prior to the transactions at issue. On March 30, 1998, Sunbeam acquired CPH's interest in Coleman. Sunbeam paid for the Coleman shares with 14.1 million shares of Sunbeam common stock and other consideration.

Defendant Morgan Stanley & Co., Inc. ("Morgan Stanley") is a highly sophisticated investment banking firm that provides a wide range of financial and securities services. Among other things, Morgan Stanley provides advice on mergers and acquisitions and raises capital in the equity and debt markets. Morgan Stanley served as Sunbeam's investment banker and as the underwriter of securities issued by Sunbeam in connection with the events at issue herein.

16div-013531

Sunbeam Corporation ("Sunbeam") was a publicly-traded company headquartered in Delray Beach, Florida. Sunbeam designed and manufactured small household appliances and outdoor consumer products, which it marketed under the Sunbeam and Oster brand names. Sunbeam filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code in February 2001.

Albert Dunlap ("Dunlap") was the Chief Executive Officer of Sunbeam from July 1996 until June 1998 when he was terminated by Sunbeam's Board of Directors.

Russell Kersh ("Kersh") was the Executive Vice President of Sunbeam from July 1996 until June 1998 when he was terminated by Sunbeam's Board of Directors.

Arthur Andersen LLP ("Andersen") provided outside accounting services to Sunbeam through its West Palm Beach, Florida office. Andersen auditors provided information concerning Sunbeam's first quarter 1998 sales and earnings to Morgan Stanley.

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Sunbeam designed and manufactured outdoor and household consumer products, which it marketed under the Sunbeam and Oster brand names. Sunbeam's products included small kitchen appliances, humidifiers, electric blankets, and grills. Many of the country's leading retail stores, including Wal-Mart, Target, and Home Depot, were among Sunbeam's major customers.

Despite Sunbeam's well-known brands and strong customer base, its financial performance was disappointing. In 1994, Sunbeam earned $1.30 per share. In 1995, Sunbeam's earnings declined to $0.61 per share. In 1996, Sunbeam's earnings continued to suffer. On March 22, 1996, Sunbeam issued an early warning that its first quarter earnings would be well under analysts' expectations and down from first quarter 1995. Shortly after issuing the March 22 earnings warning, Sunbeam's Chief Executive Officer and two of Sunbeam's directors announced their resignations. Less than a week later, Sunbeam announced that its first quarter 1996 earnings had plunged 42% from first quarter 1995 levels. Sunbeam also announced that its second quarter 1996 earnings would be lower than its second quarter 1995 earnings.

Sunbeam's disappointing earnings caused its stock price to plummet. During 1995, the price at which Sunbeam's stock traded fell 40%, from a high of $25-1/2. In 1996, Sunbeam's stock price continued to decline until it reached a low of $12-1/4 in July.

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On July 18, 1996, Sunbeam's board of directors hired Albert Dunlap as Sunbeam's new Chief Executive Officer. Based upon brief terms as Chief Executive Officer of other publicly traded companies, including Scott Paper Company ("Scott Paper"), Dunlap was viewed as a "turnaround specialist" — that is, someone who could take a poorly performing company and significantly increase its value by "turning around" its financial performance. Because Dunlap touted the benefits from firing large numbers of employees and closing large numbers of plants, Dunlap became widely known as "Chainsaw Al." Dunlap lived in Boca Raton, Florida, and one of his first tasks at Sunbeam was to consolidate the company's six headquarters into one located in Delray Beach, Florida.

Immediately after joining Sunbeam, Dunlap hired Kersh as Sunbeam's Chief Financial Officer. Kersh had teamed with Dunlap for over 15 years, serving as a senior executive with Dunlap at other companies, including Scott Paper. Dunlap also brought in several other hand-picked executives to make up his senior management team.

Dunlap and his senior management team entered into employment agreements with Sunbeam. Under those agreements, Dunlap and his senior management team stood to make tens of millions of dollars if they were able to boost Sunbeam's apparent value and then sell Sunbeam to another company at a premium.

In order to convince other companies that they should want to purchase Sunbeam, Dunlap needed to improve Sunbeam's reported financial performance quickly and dramatically. It was, of course, no small task to transform Sunbeam from a poorly performing company, with weak sales and declining profits, into a strong company with growing sales and

16div-013534

soaring profits. In fact, as the world later learned, Dunlap did not achieve that change in Sunbeam's fortunes. Instead, Dunlap created the illusion of a dramatic turnaround at Sunbeam by engaging in what SEC officials subsequently described as a "case study" in financial fraud.

Dunlap had a three-step plan at Sunbeam. In the first step, Dunlap overstated Sunbeam's financial problems so that Sunbeam appeared to be in worse shape than it really was. After making Sunbeam look worse, Dunlap moved to step two, where he made Sunbeam look more valuable than it really was by inflating Sunbeam's sales and engaging in other earnings manipulations. In step three, Dunlap planned to sell Sunbeam to another company before it became apparent that the "improved" results were fictional. By doing so, Dunlap would make tens of millions of dollars and would be free to blame his successor for any subsequent problems.

Dunlap began implementing his strategy soon after his arrival at Sunbeam in 1996. Claiming to be engaged in a clean-up of Sunbeam's financial problems, Dunlap recorded artificially high reserves and booked expenses that should not have been recorded until later periods. Both of those actions made Sunbeam's financial condition appear worse than it really was, thus lowering the benchmark for measuring Sunbeam's performance in future years.

The overstated reserves also provided Dunlap a means by which he could inflate Sunbeam's future results during the second step of his plan. Dunlap later could "re-evaluate" and release millions of dollars from the overstated reserves to boost income in later periods. The income from released reserves contributed to the illusion of a rapid turnaround in Sunbeam's performance. Using inflated reserves to enhance income in future periods is a fraudulent practice and overstated reserves are commonly called "cookie jar" reserves.

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After making Sunbeam look worse than it really was in 1996, Dunlap manipulated Sunbeam's sales and expenses in 1997 to create the false appearance of quarter after quarter improvement in financial performance. For example, Dunlap caused Sunbeam to inflate its sales by engaging in phony "bill and hold" sales. Under this practice, Sunbeam recognized revenues from "sales," even though customers did not actually pay for or even take delivery of the products, which continued to sit in Sunbeam's own warehouses. Although Sunbeam recorded the "bill and hold" sales as if they were current sales, they were, in reality, simply sales stolen from future quarters. In 1997, phony "bill and hold" sales added approximately $29 million in sales and $4.5 million in income.

Throughout 1997, Sunbeam also engaged in a sales practice known as "channel stuffing" — accelerating sales that otherwise would occur in a later period, sometimes by offering steep discounts or other extraordinary customer inducements. On the grand scale employed by Sunbeam, channel stuffing inevitably leads to major sales shortfalls in later periods when "stuffed" customers simply stop buying. Sunbeam's senior sales officer referred to Sunbeam's unsustainable practice of inflating performance through accelerated sales as the "doom loop."

Dunlap further "enhanced" Sunbeam's income in 1997 by causing Sunbeam to record a "profit" of $10 million from a sham sale of its warranty and spare parts business. Dunlap also made Sunbeam appear to be more successful than it really was by reaching into the "cookie jar," reversing inflated reserves, and recording $35 million as income. Sunbeam's 1997 profit margins also looked better than they really were because Dunlap already had recorded millions of dollars of 1997 expenses in 1996.

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In October 1997, Dunlap announced that Sunbeam's "turnaround" was complete. Compared to the third quarter of 1996, Sunbeam's third quarter 1997 performance was remarkable. In the third quarter of 1996, Sunbeam had reported a loss of $18.1 million. In the third quarter of 1997, however, Sunbeam reported earnings of $34.5 million — an extraordinary turnaround from substantial losses to hefty profits. Sunbeam's combined results for the first three quarters showed dramatic improvement as well. Sunbeam reported that its profits for the first nine months were up tenfold over the same period the year before — from $6.5 million in 1996 to $67.7 million in 1997. Sunbeam's reversal of fortune caused a spectacular increase in the price of its stock. In July 1996, when Dunlap was hired, Sunbeam's shares traded at $12-1/4. By October 1997, Sunbeam's shares had risen to $49-13/16.

With steps one and two successfully completed, Dunlap was more than eager to complete the final step of his scheme: to sell Sunbeam to another company and collect tens of millions of dollars for himself before the outside world could learn the truth about Sunbeam's phony "turnaround." To accomplish that third and final step, Dunlap needed an investment banking firm.

When Dunlap announced in early 1997 that he would begin interviewing investment bankers, Morgan Stanley immediately began pursuing the job. Although Morgan Stanley had no previous relationship with Sunbeam, one of Morgan Stanley's senior executives, William Strong, had worked closely with Dunlap on other large transactions between 1986 and 1993, when Strong was employed by Salomon Brothers.

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Morgan Stanley knew that it was competing with other investment bankers, including Mark Davis, for Dunlap's business. Davis was the head of the mergers and acquisitions department at Chase Securities and had worked previously with Strong at Salomon Brothers. Davis had a very strong relationship with Dunlap, and Davis had served as Dunlap's investment advisor on numerous transactions, including Dunlap's sale of Scott Paper. Shortly after arriving at Sunbeam, Dunlap hired Davis to handle the sale of Sunbeam's furniture business.

Morgan Stanley put together a team headed by its Vice Chairman, Bruce Fiedorek, and Strong. Beginning in April 1997, Morgan Stanley's personnel traveled to Sunbeam's offices in Delray Beach, Florida to study Sunbeam and woo Dunlap. After months of uncompensated work, in September 1997, Morgan Stanley finally persuaded Dunlap to name Morgan Stanley as Sunbeam's exclusive investment banker. Dunlap instructed Morgan Stanley to find a buyer for Sunbeam. Morgan Stanley knew that if it failed to deliver a major transaction, Morgan Stanley would not be compensated for the extensive work it had performed for Sunbeam. Morgan Stanley also knew that Davis and Chase Securities were standing by — ready and willing to reclaim their position as Dunlap's investment banker of choice.

Throughout the fall of 1997, Morgan Stanley aggressively searched for a buyer for Sunbeam. Morgan Stanley put together extensive and detailed materials to use in marketing Sunbeam to potential buyers. Morgan Stanley pitched the transaction to more than 10 companies — including Gillette, Colgate, Sara Lee, Rubbermaid, Whirlpool, and Black & Decker — that Morgan Stanley hoped might have an interest in acquiring Sunbeam. Morgan Stanley, however, was not able to find a buyer.

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As 1998 approached, the pressure on Dunlap increased. Dunlap was aware that Sunbeam would be unable to sustain the appearance of a successful turnaround in 1998 because Sunbeam had stolen sales from 1998 to boost 1997's numbers and the "cookie jar" reserves had been depleted. Dunlap needed a way to conceal Sunbeam's phony turnaround until a buyer could be found. Morgan Stanley provided the solution to Dunlap's problem.

Morgan Stanley knew that its failure to find a buyer for Sunbeam could prove fatal to the relationship it had worked so hard to establish with Dunlap. As the pressure on Dunlap increased, the pressure on Morgan Stanley increased as well. Although Morgan Stanley was not able to find a buyer for Sunbeam, Morgan Stanley responded with a plan that would allow Dunlap to conceal his fraud. Morgan Stanley recommended that Sunbeam acquire other companies, using Sunbeam's stock, which was fraudulently inflated, as the "currency" that would be used to pay for the acquisitions.

Morgan Stanley's strategy was doubly deceptive. First, Morgan Stanley's acquisition strategy would allow Dunlap to consolidate Sunbeam's results with those of the newly-acquired companies. That would help Dunlap camouflage Sunbeam's results and make it difficult to detect any shortfall in Sunbeam's performance. Dunlap simply could label any problems that were detected as attributable to the poor performance of the acquired companies or as a temporary "blip" caused by the distraction of integrating the acquired companies with Sunbeam. Second, Morgan Stanley's strategy would allow Dunlap to take new massive restructuring charges (purportedly relating to the acquisitions) and thus create more "cookie jar" reserves that could be tapped to bolster the future earnings of the combined companies.

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Morgan Stanley identified Coleman as one of the key potential acquisition targets. CPH owned 82% of Coleman's stock. Morgan Stanley searched the ranks of its investment bankers to locate those with the best access to CPH. Drawing on relationships between some of Morgan Stanley's investment bankers and senior CPH officers, Morgan Stanley set about trying to persuade CPH to sell its interest in Coleman to Sunbeam — and, most importantly, to accept Sunbeam stock as consideration.

Morgan Stanley laid the groundwork for a meeting to take place in December 1997 in Palm Beach, Florida between Dunlap and Kersh and representatives of CPH. In advance of the Palm Beach meeting, Morgan Stanley provided materials to Sunbeam to prepare Sunbeam for the meeting. Morgan Stanley also met with Kersh and other Sunbeam personnel to prepare for the Palm Beach meeting. However, Dunlap nearly scuttled Morgan Stanley's carefully crafted plan at the outset. During the December 1997 Palm Beach meeting, when CPH rejected Dunlap's initial all-stock offer, Dunlap became so angry that he cursed and ranted at the CPH representatives and stormed out.

Dunlap's tantrum appeared to kill any chance that CPH would sell its interest in Coleman to Sunbeam. Morgan Stanley, however, worked to revive the discussions. Drawing again on Morgan Stanley's relationships with CPH officers, Morgan Stanley was able to restart the discussions with CPH with the promise that Dunlap would be kept away from the negotiating table. Thereafter, Morgan Stanley, through Managing Directors Strong, James Stynes, and Robert Kitts, led the discussions with CPH on Sunbeam's behalf.

Morgan Stanley knew that it had to persuade CPH not only to sell Coleman, but also to accept Sunbeam stock — ultimately, 14.1 million shares of Sunbeam stock — as a major part of the purchase price. During the course of negotiations, Morgan Stanley prepared and provided CPH with false financial and business information about Sunbeam designed to create the appearance that Sunbeam was prospering and that Sunbeam's stock had great value. For example, Morgan Stanley provided CPH with false 1996 and 1997 sales and revenue figures, as well as false projections that Sunbeam could not expect to achieve. Together, in face-to-face discussions, Morgan Stanley and Sunbeam assured CPH that (a) Sunbeam would meet or exceed its first quarter 1998 earnings estimates; (b) analysts' 1998 earnings estimates for Sunbeam were correct; and (c) Sunbeam's plan to earn $2.20 per share in 1998 was easily achievable and probably low. Morgan Stanley and Sunbeam also falsely assured CPH that Sunbeam's "early buy" sales program would not hurt Sunbeam's future revenues. However, the "early buy" program was one of Sunbeam's revenue acceleration programs — and the devastating effects of Sunbeam's revenue acceleration programs already had begun to materialize at Sunbeam. Sunbeam's January and February 1998 sales were down drastically, although those results were not disclosed to CPH or the public. To the contrary, Morgan Stanley and Sunbeam together specifically advised CPH that Sunbeam's first quarter 1998 sales were "tracking fine" and running ahead of analysts' estimates.

On February 27, 1998, Sunbeam's Board of Directors met at Morgan Stanley's offices to consider the purchase of Coleman, as negotiated by Morgan Stanley.

At the February 27, 1998 meeting, Morgan Stanley made an extensive presentation to Sunbeam's Board concerning the proposed transaction. Numerous Morgan Stanley representatives, including Managing Directors Strong, Kitts, Stynes, Ruth Porat, and Vikram Pandit, attended the meeting.

Morgan Stanley presented Sunbeam's board with Morgan Stanley's opinion on the value of Coleman. Using a discounted cash flow analysis, which Morgan Stanley represented was the best gauge of stand-alone economic value and the best method of capturing the unique value of Coleman, Morgan Stanley valued CPH's Coleman stock at a range of $31.06 to $53.24 per Coleman share. CPH's 44,067,520 Coleman shares were worth, therefore, between $1.369 billion and $2.346 billion.

Following Morgan Stanley's presentation, Sunbeam's Board of Directors voted to acquire Coleman on the very favorable terms that Morgan Stanley had negotiated.

Morgan Stanley spent the following weekend developing Sunbeam's public relations strategy to announce the Coleman transaction. Morgan Stanley scripted the points for Dunlap to make in a conference call with analysts. Morgan Stanley also crafted a list of "key media messages" for Dunlap to use in his communications with the press. On Sunday, March 1, 1998, Morgan Stanley spoke with a reporter for the Wall Street Journal to inform him that Sunbeam would announce its acquisition of Coleman the following morning.

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Sunbeam announced its acquisition of Coleman on Monday, March 2, 1998, prior to the opening of the financial markets. Consistent with Morgan Stanley's valuation, investors viewed Sunbeam's purchase of Coleman — and the price that Sunbeam had paid — very favorably. The day before the acquisition was announced, Sunbeam's stock closed at $41-3/4. In the days following Sunbeam's announcement of the transaction, Sunbeam's stock rose approximately 25%, to a high of $52.

Dunlap knew that Sunbeam needed to raise funds to pay the cash portion of the acquisition consideration. Dunlap also knew that Sunbeam needed cash to purchase two other smaller companies in addition to Coleman. Morgan Stanley recommended that Sunbeam raise funds through a $500 million offering of convertible subordinated debentures. To assure the offering's success, Morgan Stanley lent its name to the offering. Indeed, Morgan Stanley agreed to serve as the sole underwriter for the offering.

The money raised from the sale of the debentures was used by Sunbeam to complete the acquisition of Coleman.

Unbeknownst to CPH or the public, Sunbeam's first quarter 1998 sales were a small fraction of the financial community's expectations for the quarter. If Dunlap could consolidate Sunbeam's sales with Coleman's sales, Dunlap knew that he could obscure Sunbeam's actual first quarter sales. As a result, Dunlap was especially anxious to complete the acquisition of Coleman before Sunbeam announced its first quarter 1998 sales. Indeed, the success of the scheme depended upon Sunbeam's ability to complete the Coleman acquisition before Sunbeam's first quarter results

were announced. To satisfy Dunlap's objectives, Morgan Stanley moved up the launch date of the offering.

The debentures were marketed to investors at a series of "road show" meetings and conference calls arranged by Morgan Stanley. Morgan Stanley prepared and distributed a memorandum for its sales force to use in marketing the debentures to investors. Morgan Stanley also developed the script for Dunlap and Kersh to deliver during the road show. In those materials, Morgan Stanley misrepresented Sunbeam's financial performance and emphasized Dunlap's purported "turnaround" accomplishments.

Morgan Stanley launched the debenture offering with a research analyst presentation to the Morgan Stanley sales force. As part of Morgan Stanley's growing relationship with Sunbeam, one of Morgan Stanley's top-rated research analysts planned to initiate equity coverage of Sunbeam. That Morgan Stanley analyst had modeled values for Sunbeam's acquisition of Coleman that were higher than even Sunbeam's management had predicted.

Although Morgan Stanley initially planned to sell $500 million worth of debentures, Morgan Stanley's efforts were so successful that the size of the offering was increased to $750 million on March 19, 1998 — the day of the last road show. The debentures were sold to investors nationwide, including investors based in Florida.

As Sunbeam's investment banker and the sole underwriter for the debenture offering, Morgan Stanley had a duty to investigate Sunbeam's finances and business operations.

Morgan Stanley, which had been working hand-in-hand with Sunbeam for

almost a year and had traveled to Sunbeam's Florida offices, repeatedly asserted that it had satisfied that duty.

Strong, who was one of the senior Morgan Stanley investment bankers involved, has admitted in sworn testimony that he may have had more than 100 telephone conversations with Dunlap and Kersh (whose offices were in Sunbeam's Delray Beach headquarters) and that Strong was "sure" that he would have been apprised of Sunbeam's financial performance during the first two months of 1998.

With the $750 million debenture offering and the Coleman transaction set to close at the end of March 1998, Sunbeam's Florida-based outside auditors were shocked that Morgan Stanley had not asked them about Sunbeam's financial performance for first quarter 1998. Sunbeam's auditors were alarmed because Sunbeam's first quarter results were a disaster, but Dunlap, Kersh, and Morgan Stanley were telling CPH and the investing public,

that Sunbeam's turnaround was a success, that Sunbeam's sales for the first quarter of 1998 were ahead of the expectations of outside financial analysts, and that Sunbeam was poised for record sales.

On March 17, Sunbeam's auditors forced the issue. From their Florida offices, Sunbeam's auditors sent Morgan Stanley a letter reporting that Sunbeam's net sales through January 1998 were down 60% — $28 million in January 1998, as compared to $73 million in January 1997. The March 17 letter explained that the decline was "primarily due to the . . . new early buy program for grills which accelerated grill sales into the fourth quarter of fiscal 1997."

The next day, Morgan Stanley was faxed a schedule from Sunbeam's Florida office that showed that Sunbeam's January and February 1998 net sales totaled $72 million, an amount that was 50% lower than Sunbeam's January and February 1997 net sales of $143.5 million.

Based on information that Sunbeam and Morgan Stanley had disseminated, Wall Street analysts were anticipating that Sunbeam's first quarter 1998 net sales would be in the range of $285 million to $295 million. Sales in that range would have been approximately 15% higher than first quarter 1997 sales. Sunbeam's January and February 1998 sales, however, totaled barely 25% of $285 million. As Sunbeam's outside auditors advised Morgan Stanley in writing, the sales drop-off was caused by Sunbeam's sales acceleration program. The information put into Morgan Stanley's hands on March 17 and March 18 showed that Morgan Stanley's and Sunbeam's assertions to CPH and other investors were false. Contrary to what Morgan Stanley and Sunbeam had represented, Sunbeam had not undergone a successful turnaround, Sunbeam's financial performance had not dramatically improved, and Sunbeam's performance in 1998 was not better than Wall Street analysts' expectations. It was imperative, therefore, that the truth be kept from CPH until the Coleman transaction closed at the end of March 1998.

Morgan Stanley did not disclose Sunbeam's disastrous first quarter, Morgan Stanley did not insist that Sunbeam disclose its disastrous first quarter, Morgan Stanley did not correct any of the false and misleading statements it and Sunbeam had made to CPH about Sunbeam's business or performance, and Morgan Stanley did not suspend any of the critical transactions that were scheduled to close in the next two weeks. Instead, with Morgan Stanley's knowledge and assistance, Sunbeam prepared and issued a false press release on March 19, 1998 that affirmatively misstated and concealed Sunbeam's true condition.

The March 19, 1998 press release stated: "Sunbeam Corporation . . . said today that it is possible that its net sales for the first quarter of 1998 may be lower than the range of

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Wall Street analysts' estimates for $285 million to $295 million, but net sales are expected to exceed 1997 first quarter net sales of $253.4 million. . . . The shortfall from analysts' estimates, if any, would be due to changes in inventory management and order patterns at certain of the Company's major retail customers. The Company further stated that based on the strength of its new product offerings and powerful brand names, it remains highly confident about the overall sales outlook for its products for the entire year."

As Morgan Stanley was fully aware, the March 19, 1998 press release was false, misleading, and failed to disclose material information. The March 19, 1998 press release failed to disclose Sunbeam's actual January and February 1998 sales or the true reasons for the poor results. Instead, the press release held out the false possibility that Sunbeam still could achieve sales of $285 million to $295 million and suggested that, if any shortfall occurred, that shortfall would be due to the fact that certain retailers had decided to defer first quarter purchases to the second quarter. The press release also assured that Sunbeam at least would exceed first quarter 1997 net sales of $253.4 million. Based on information that Morgan Stanley had in its hands on March 18, 1998, it was obvious that Sunbeam would not achieve sales of $285 million to $295 million and that Sunbeam's first quarter 1998 sales would be below its first quarter 1997 numbers. To simply meet 1997 first quarter sales, Sunbeam needed sales of $123.3 million over the 12 remaining days of the quarter — an average of $10.28 million per day. Sales of $10.28 million per day would be 306% more than the average per day sales in March 1997, and 281% more than the average per day sales for the first 17 days of March 1998. Furthermore, Morgan Stanley knew that the shortfall from analysts' estimates was not caused by retailers' deciding to defer purchases from the first quarter of 1998 to the second quarter, as the press release indicated. Rather, as Sunbeam's outside auditors had

advised Morgan Stanley in writing, the collapse in first quarter sales was caused by Sunbeam's acceleration of 1998 sales into the fourth quarter of 1997.

After Sunbeam's false press release was issued, Morgan Stanley stood arm-in-arm with Sunbeam while Dunlap and Kersh told CPH, analysts, and investors that the March 19, 1998 release was a purely cautionary statement because some first quarter 1998 sales might simply "spillover" into the second quarter and that Sunbeam still believed that it actually would meet analysts' estimates of $285 million to $295 million in first quarter 1998 sales.

Morgan Stanley knew that a full and truthful disclosure of Sunbeam's first quarter sales would doom the debenture offering, which was scheduled to close on March 25, 1998,

As Morgan Stanley was fully aware, the written contract between CPH and Sunbeam gave CPH the express legal right to refuse to close the sale if there was a material adverse change in Sunbeam's "business, results of operation or financial condition."

Furthermore, if the transactions did not close, Morgan Stanley would not be paid its $10.28 million fee for the Coleman acquisition or its $22.5 million fee for underwriting the subordinated debenture offering. Morgan Stanley also knew that Sunbeam would promptly replace Morgan Stanley with another investment banking firm – such as the Chase Securities team led by Mark Davis.

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Sunbeam's outside auditors already had made it perfectly clear to Morgan Stanley that Sunbeam's first quarter 1998 sales were a disaster,

One of Sunbeam's senior outside auditors, Lawrence Bornstein, has testified under oath that on March 19, 1998, he told Morgan Stanley's John Tyree that the statement in Sunbeam's March 19, 1998 press release — that Sunbeam would at least exceed first quarter 1997 sales of $253.4 million — was not credible: "Just do the math . . . they've done a million dollars in sales the first 70 days of the year and now they need to do $10 million worth of sales for the next . . . I think it was 11 days . . . I mean, something ridiculous." Bornstein also told Tyree: "I've been to every shipping dock domestically, I've been to Hattiesburg, I've been to Neosho, I've been to Mexico City, and I don't think these guys can physically ship this much stuff."

Morgan Stanley knew that the March 19 press release was false and misleading. Despite that knowledge and Bornstein's explicit statements, Morgan Stanley continued with its preparations to close the debenture offering on March 25, 1998 and the Coleman acquisition on March 30, 1998.

As part of those preparations, on March 24, 1998, Morgan Stanley's Tyree spoke by telephone with Sunbeam's Kersh, who was located in Sunbeam's Delray Beach offices, to obtain an updated report concerning Sunbeam's first quarter performance. By the time of that March 24, 1998 call, Sunbeam had fallen even further behind first quarter 1997 sales. As of March 18, 1998, Sunbeam needed to achieve average sales of $10.28 million per day, over 12 days, to reach

16div-013549

first quarter 1997 sales. Sunbeam's sales between March 18 and March 24, 1998 had averaged only $6.81 million per day — well short of the $10.28 million per day that Sunbeam needed to achieve. Sunbeam's March 18 through March 24, 1998 sales were further proof that Sunbeam's March 19, 1998 press release was false and that Sunbeam would not achieve first quarter 1998 sales in excess of first quarter 1997 sales.

Morgan Stanley also knew no later than March 25, 1998, if not much earlier, that Sunbeam's earnings for the first quarter of 1998 were going to miss Wall Street analysts' earnings expectations, which were in the range of $0.28 to $0.31 per share (excluding one-time charges). Sunbeam's outside auditors advised Morgan Stanley on March 25 that Sunbeam had suffered a $41.19 million loss during the first two months of 1998, including a one-time charge of $30.2 million. Even excluding that one-time charge, Sunbeam's loss for the first two months was $0.13 per share. To achieve first quarter 1998 operating earnings of $0.28 per share, which were at the low end of analyst expectations, Sunbeam needed to realize a profit of $35.5 million during March 1998 alone. A net profit of $35.5 million in March was 500% more than Sunbeam's net profit for the entire first quarter of 1997. In fact, Sunbeam's first quarter 1998 earnings fell far short of Wall Street's expectations. Sunbeam's first quarter earnings were material,

Having directly participated in misleading CPH Morgan Stanley had a duty to disclose the true facts before the closing of the debenture offering and the Coleman acquisition. Morgan Stanley also could have required Sunbeam to postpone the closings of

16div-013550

those transactions until the necessary disclosures were made. Morgan Stanley did neither. Instead, Morgan Stanley marched forward and closed the $750 million debenture offering on March 25, 1998, which was needed to close the Coleman transaction, and assisted Sunbeam in closing the acquisition of Coleman on March 30, 1998.

Morgan Stanley received $22.5 million for the subordinated debenture offering and $10.28 million for the Coleman acquisition. Morgan Stanley would have received nothing if the transactions had failed to close.

On April 3, 1998 — just four days after the Coleman transaction closed — Sunbeam announced that sales for the first quarter of 1998 would be approximately 5% below the $253.4 million in sales that Sunbeam reported in the first quarter of 1997. In other words, Sunbeam was expecting sales in the range of $240 million. That sales shortfall was shocking news, particularly in view of assurances provided by Sunbeam both in and after its March 19, 1998 press release that $285 million to $295 million of sales was still a real possibility. The April 3, 1998 press release also disclosed that Sunbeam expected to show a loss for the quarter, although the release did not disclose the magnitude of the loss or how much of the loss was attributable to operating earnings as opposed to one-time charges. Sunbeam's news stunned . . . the market. On April 3rd, Sunbeam's stock price dropped 25% — from $45-9/16 to $34-3/8.

. . . Sunbeam's actual first quarter 1998 performance was even worse than Sunbeam disclosed on April 3, 1998. The April 3, 1998 release indicated that Sunbeam's first quarter sales were in the range of $240 million. In fact, Sunbeam's first quarter sales were $224.5

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million. Sunbeam obscured the true shortfall by extending its quarter from March 29 to March 31, 1998 — thereby adding two more days of Sunbeam sales. Sunbeam also failed to disclose that it had included two days of Coleman sales after the Coleman transaction closed on March 30. Further, Sunbeam inflated first quarter 1998 sales with $29 million of new phony "bill and hold" sales.

75. Just as Sunbeam's first quarter 1998 sales had been a disaster, so, too, were Sunbeam's first quarter 1998 earnings. Morgan Stanley and Sunbeam had represented to CPH that Sunbeam would achieve or exceed analyst first quarter 1998 earnings estimates. At the time of that representation, the consensus among analysts was that Sunbeam would enjoy first quarter 1998 earnings of $0.33 per share. However, on May 9, 1998, Sunbeam disclosed that it would record a first quarter loss of $0.09 per share (excluding one-time charges) — more than $0.40 per share lower than CPH had been told to expect.

76. Within weeks, Dunlap's fraudulent scheme began to unravel. In June 1998, after a number of news articles critical of Sunbeam's practices, Sunbeam's Board of Directors launched an internal investigation. That investigation led quickly to the firing of Dunlap and Kersh, and, subsequently, to a restatement of Sunbeam's financial statements for 1996, 1997, and the first quarter of 1998.

[illegible]

77. As detailed above, Morgan Stanley participated in a scheme to mislead CPH and others and cover up the massive fraud at Sunbeam until Morgan Stanley and Sunbeam could close the purchase of Coleman. Morgan Stanley provided CPH with false information concerning Sunbeam's 1996 and 1997 financial performance, its business operations, and the value of Sunbeam's stock. Morgan Stanley also actively assisted Sunbeam in concealing Sunbeam's

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disastrous first quarter 1998 sales and earnings and the true reasons for Sunbeam's poor performance.

Morgan Stanley knew that its statements to CPH were materially false and misleading and omitted the true facts.

Morgan Stanley intended that CPH rely on Morgan Stanley's representations concerning Sunbeam.

As detailed above, Dunlap engaged in a fraudulent scheme to inflate the price of Sunbeam's stock by improperly manipulating Sunbeam's 1996 and 1997 performance, by falsely asserting that Sunbeam had successfully "turned around," and by concealing the collapse of Sunbeam's first quarter 1998 sales and earnings and the reasons for Sunbeam's first quarter 1998 performance.

86 As detailed above, Morgan Stanley knew of Dunlap's fraudulent scheme and helped to conceal it until after Sunbeam could close the purchase of Coleman.

16div-013553

As detailed above, Morgan Stanley provided substantial assistance to Dunlap and Sunbeam, including: concealing Sunbeam's first quarter 1998 sales collapse; assisting with the false March 19, 1998 press release; arranging road shows and meetings with prospective debenture purchasers at which Morgan Stanley, Dunlap, and others made false statements concerning Sunbeam's financial condition and business operations; preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam's financial condition and business operations; providing CPH with false financial and business information concerning Sunbeam; scripting Dunlap's false public statements concerning Sunbeam's acquisition of Coleman;

and underwriting the $750 million convertible debenture offering, proceeds from which were used to fund Sunbeam's purchase of Coleman.

16div-013554

As detailed above, Morgan Stanley conspired with Dunlap and other senior Sunbeam executives to conceal the truth about Sunbeam's financial performance and business operations.

As detailed above, Morgan Stanley committed overt acts in furtherance of the conspiracy, including: concealing Sunbeam's first quarter 1998 sales collapse; assisting with the false March 19, 1998 press release; arranging road shows and meetings with prospective debenture purchasers at which Morgan Stanley, Dunlap, and others made false statements concerning Sunbeam's financial condition and business operations; preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam's financial condition and business operations; providing CPH with false financial and business information concerning Sunbeam; scripting Dunlap's false public statements concerning Sunbeam's acquisition of Coleman;

and underwriting the $750 million convertible debenture offering, proceeds from which were used to fund Sunbeam's purchase of Coleman.

16div-013555

EXHIBIT

B

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

ORDER ON CPH's **MOTION IN LIMINE NUMBER** 9

THIS CAUSE having come before this Court on February 17, 2005 upon CPH's Motion in Limine Number 9, and the Court having reviewed the pleadings on file, heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is Granted. There shall be no argument evidence or trial that the SEC investigated MS & Co. or that MS & Co. was not ultimately charged.

WPB#589635.1

EXHIBIT
tabbies
B

16div-013557

"Granted" for purposes of the Motion in Limine addressed in this Order shall mean that the parties and their counsel shall not refer to or attempt to introduce into evidence, or otherwise place before the jury, the matter referred to without first proffering the good faith basis to believe that the matter is relevant and admissible outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 17 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

WPB#589635.1

Copies furnished to:

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222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Jack Scarola
SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Fl 33409

EXHIBIT

C

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

ORDER ON MS & Co.'s **MOTION IN LIMINE NUMBER** 2

THIS CAUSE having come before this Court on February 17, 2005 upon MS & Co.'s Motion in Limine Number 2, and the Court having reviewed the pleadings on file, heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is Grant. To all be no evidence or argument about the SEC finding.

WPB#589635.1

EXHIBIT
tabbies
C

16div-013561

"Granted" for purposes of the Motion in Limine addressed in this Order shall mean that the parties and their counsel shall not refer to or attempt to introduce into evidence, or otherwise place before the jury, the matter referred to without first proffering the good faith basis to believe that the matter is relevant and admissible outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 17 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

WPB#589635.1

Copies furnished to:

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West Palm Beach, Fl 33409

CPLT proposed ~~sta~~ voir dire Statement

THE COURT HAS DETERMINED THAT MS HAS ENGAGED IN SUBSTANTIAL LITIGATION MISCONDUCT RELATING TO ISSUES TO BE DECIDED IN THIS CASE. SOME OF THAT MISCONDUCT WILL BE DESCRIBED IN A STATEMENT WHICH THE COURT WILL READ TO THE JURY DURING THE TRIAL. AS A RESULT OF MS'S LITIGATION MISCONDUCT, MS HAS LOST ITS RIGHT TO CONTEST CERTAIN FACTS WHICH MUST NOW BE ACCEPTED AS TRUE. THOSE FACTS WILL ALSO BE DESCRIBED IN A STATEMENT TO BE READ BY THE COURT TO THE JURY.

THESE CIRCUMSTANCES LED TO A MUTUAL DECISION BY MS AND ONE OF THE LAW FIRMS REPRESENTING IT TO DISCONTINUE THEIR ATTORNEY-CLIENT RELATIONSHIP IN THIS CASE. THE FIRMS OF KELLOGG HUBER AND CARLTON FIELDS CONTINUE TO REPRESENT MS.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

STATEMENT

If you find for CPH and against Morgan Stanley on either, or both, of CPH's claims for aiding and abetting and conspiring to commit fraud, you will then have to consider whether, in addition to compensatory damages, punitive damages are warranted. Later in the trial, I will instruct you about factors to consider when determining whether an award of punitive damages is appropriate. In considering these factors, certain facts have already have been established and no longer are subject to dispute, which I shall now read to you. You are required to accept these facts as true.

This case arises out of a 1998 transaction in which Coleman (Parent) Holdings, Inc., which I will call "CPH," sold its 82% interest in The Coleman Company to Sunbeam Corporation. Morgan Stanley served as Sunbeam's financial advisor for the transaction and as the lead underwriter for a $750,000,000.00 debenture offering that Sunbeam used to finance the cash portion of the deal.

On May 12, 2003, CPH sued Morgan Stanley for aiding and abetting and conspiring with Sunbeam to commit fraud. Following established pretrial procedures, CPH formally requested that Morgan Stanley produce documents related to CPH's claims against Morgan Stanley. A request to produce documents is one of the ways a party can seek to discover additional facts about the claims in a lawsuit and to gather evidence to present at trial. CPH's document request sought, in essence, all Morgan Stanley documents connected with the Sunbeam deal. The work "documents" specifically included items stored electronically, such

as emails.

CPH was concerned that Morgan Stanley was not thoroughly looking for emails responsive to its discovery requests. In October 2003, CPH filed a motion, which is a written request to the Court, asking that Morgan Stanley be ordered to make a full investigation for email messages, including a search of magnetic backup tapes and computer hard drives.

Morgan Stanley opposed CPH's motion. It represented that it would cost at least hundreds of thousands of dollars and require several months to complete such an investigation and that no email data existed for any time period before January 2000 -- more than a year and a half after the Sunbeam transaction. However, Morgan Stanley never intended to search the backup tapes to respond to CPH's requests. Further, some of Morgan Stanley's backup tapes contained email dating back at least to 1997.

In 2001 Morgan Stanley decided to create an email "archive." Morgan Stanley's email archive was a centralized storage system for electronic data that could be quickly and inexpensively searched. By June, 2003, Morgan Stanley had decided that the archive would have two components. First, the archive would capture and store new email messages "live," as they were generated. Second, Morgan Stanley wanted to add to the archive historical data dating back to the late 1990's. That task involved gathering all email backup tapes containing historical emails and then transferring data from the backup tapes onto the archive.

In February 2004, Robert Saunders, an Executive Director of Information Technology for Morgan Stanley, testified under oath to CPH that Morgan Stanley's email archive system would capture and store new emails as they were generated, but could not be used to search old emails. At the time, Mr. Saunders knew that the old emails already were being added to the archive and that that process was expected to be completed by April, 2004.

CPH still was concerned that all the emails it had requested had not been produced. However, in light of Morgan Stanley's representation that it would cost hundreds of thousands of dollars to search its emails and that the process would take many months, it reached an agreement with Morgan Stanley On April 16, 2004, the Court entered an "Agreed Order." Under the Agreed Order, Morgan Stanley was required to (1) search the oldest full backup tape

for each of 36 Morgan Stanley employees involved in the Sunbeam transaction; (2) review emails dated from a key two-month period in early 1998, as well as emails containing any of 29 specific search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004, all privileged emails responsive to CPH's document requests; and (4) certify Morgan Stanley's full compliance with the Agreed Order. CPH reached this agreement without Morgan Stanley's disclosing the existence of the email archive or Morgan Stanley's belief that the archive would make searches for emails quick and inexpensive.

In response to the Agreed Order, Morgan Stanley produced about 1,300 pages of emails on May 14, 2004. Morgan Stanley did not, however, certify compliance with the Agreed Order. After prompting by CPH, on June 23, 2004, Morgan Stanley served a Certificate of Compliance signed by Mr. Arthur Riel, an Executive Director and manager of Morgan Stanley's Law/Compliance Information Technology Group.

As organized by Morgan Stanley, the effort to create the historical data archive had several stages. First, the relevant backup tapes had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc., which I will call "NDCI", to be processed, and the data returned to Morgan Stanley. Third, Morgan Stanley had to upload the processed data into its email archive. Fourth, Morgan Stanley had to run scripts, or pieces of computer code, to transform this data into a searchable form. Finally, Morgan Stanley had to search the data for emails related to this case. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when the processed data returned by NDCI remained in limbo, waiting to be uploaded to Morgan Stanley's archive.

At some point prior to May 6, 2004, Arthur Riel and his team became aware that 1,423 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423 tapes had not been processed by NDCI and thus had not been included in the archive or searched when Morgan Stanley made its production to CPH on May 14, 2004. Aware of the tapes' discovery, Mr. Riel and other Morgan Stanley personnel knew when Riel executed the certification of full compliance with the Court's Agreed Order that it was false. He and others

on Morgan Stanley's email archive team knew by July 2, 2004 that these "Brooklyn tapes" contained email dating back at least to the late 1990's. During the summer of 2004, the Brooklyn tapes were processed and the data sent to the staging area. The scripts were not written and tested to permit the search for emails relating to this case to begin until the middle of January, 2005. Such a search, even if perfectly done, can take weeks.

In the May, 2004, production of documents under the Agreed Order, Morgan Stanley also failed to produce emails from 738 backup tapes found at a Morgan Stanley facility in Manhattan in 2002. These 738 tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched by either May 14, 2004 or June 23, 2004, the date Morgan Stanley certified compliance. Mr. Riel and others were told by NDCI by July 2, 2004 that these tapes contained email dating back at least to 1998. During the summer of 2004, these tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not searched.

In August 2004, Mr. Riel was relieved of his employment responsibilities for reasons unrelated to Morgan Stanley's false certification. He and his team were replaced by a new team headed by Allison Gorman. At that time, the staging area contained about 600 gigabytes of email data that had not yet been uploaded into the Morgan Stanley archive and had not been searched for emails relating to this case. Six hundred gigabytes of data are the equivalent of approximately 12 million to 60 million printed pages.

On November 17, 2004, Morgan Stanley told CPH that Morgan Stanley had discovered additional email backup tapes. The next day, Morgan Stanley produced to CPH about 8,000 pages of emails. But in a series of letters back and forth from November, 2004, to January, 2005, Morgan Stanley refused to provide CPH with details about the backup tapes that allegedly had been "newly discovered" or about any ongoing efforts to restore emails from those backup tapes and to produce those emails to CPH. Morgan Stanley told CPH that the "newly discovered" tapes had not been found in locations where email backup tapes customarily were stored.

Only a handful of the Brooklyn tapes had been added to the archive and were thus

searched for the November, 2004 production. Morgan Stanley sought to create the impression that all the produced documents came from the Brooklyn tapes, though. However, none of the November, 2004 production came from "newly found" tapes. Morgan Stanley's responses to inquiries about the November, 2004, production did not disclose the existence of the archive.

Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area. She was not told of the existence of this litigation until five months later, in January 2005. In October, 2004, Ms. Gorman gave the project somewhat greater priority, although even then it did not move as expeditiously as possible. Morgan Stanley did not consider using an outside contractor to expedite the process.

Morgan Stanley found another 169 DLT tapes in January, 2005, that according to Morgan Stanley had been misplaced by its New Jersey storage vendor. Morgan Stanley discovered more than 200 additional unsearched backup tapes openly stored in locations known to be used for tape storage on February 11 and 12, 2005. Morgan Stanley did not voluntarily disclose this information to CPH.

Morgan Stanley claims to have discovered on February 11, 2005 that a flaw in the software it had written had prevented it from locating all email attachments about the Sunbeam transaction. Morgan Stanley also admits that the date-range searches for email users who had a Lotus Notes platform were flawed, so that additional email messages that appeared to fall within the scope of the Agreed Order had not been given to CPH. Further, it appears that the problem infected Morgan Stanley's original searches in May of 2004. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the transaction under review here.

On February 16, 2005, Morgan Stanley withdrew its certificate of compliance with the Agreed Order.

On February 19, 2005 Morgan Stanley notified CPH that it had found boxes of additional tapes that have not been uploaded into its archive or searched for responsive emails.

In addition, CPH has since found out that:

16div-013569

(1) A migration issue caused about 5% of email harvested by NDCI from the backup tapes not to be captured.

(2) The computer programs Morgan Stanley used to process emails into its archive caused the bodies of some messages to be truncated, or cut off.

(3) About five percent of email harvested from the backup tapes was not added to the archive.

(4) An analysis showed that, based on a representative sample, about ten percent of backup tapes were erased after January 2001.

(5) A computer programming error caused blind carbon copies not to be captured in the archive.

(6) Another computer programming error prevented the searches from turning up all responsive emails.

(7) Another computer programming error caused the archive to have problems pulling group email involving a set of email users that included Morgan Stanley employees involved in the Sunbeam transaction.

(8) Morgan Stanley's searches looked for only two types of emails. There are other types of emails that were not included in the searches.

(9) An additional 282 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found on February 23, and 25, 2005, and apparently were never searched.

(10) An additional 3,536 tapes that Morgan Stanley should have found and searched by May 14, 2004, were discovered on February 23, 2005, in a security room. These tapes apparently have not been searched.

(11) An additional 2,718 tapes that Morgan Stanley should have found and searched by May 14, 2005, were found on March 3, 2005, at Morgan Stanley's New Jersey off-site storage vendor. These tapes apparently have not been searched either.

(12) An additional 389 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found from March 2 through March 5, 2005. These tapes apparently also have not been searched.

Morgan Stanley did not voluntarily disclose any of these ten problems to CPH. The searches had not been completed when this trial was begun, when they were terminated without completion.

Mr. William Strong is the Morgan Stanley managing director who took credit for the fees Morgan Stanley generated from the Sunbeam deal. On March 15, 2004, Morgan Stanley was required to produce, "(a)ll references (positive or negative) to [Mr. Strong's] truthfulness, veracity, or moral turpitude." In response, Morgan Stanley produced some portions of Mr. Strong's annual employment evaluations. While he was working on the Sunbeam transaction, though, Mr. Strong was facing criminal prosecution in Italy for complicity in bribery. Mr. Strong's evaluators at Morgan Stanley knew that fact. Morgan Stanley failed to provide the documents about these proceedings to CPH, though, which in January, 2005, independently discovered evidence of the criminal proceedings in Italy.

It is important that you understand the limited relevance of Mr. Strong's situation. The fact that Mr. Strong was facing criminal prosecution in Italy for complicity in bribery while he was working on the Sunbeam transaction may be relevant to the extent that it created pressures on Mr. Strong and motivated him to push forward with the Sunbeam deal. That is for you to decide. But you must not consider that fact as evidence of Mr. Strong's character or as evidence that Mr. Strong actually engaged in bribery or any other illegal conduct in Italy. Indeed, in 2003, on appeal, an Italian court found Mr. Strong not guilty.

As I told you at the outset of this Statement, you are required to accept the factual finding that I have read to you as true.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

MORGAN STANLEY'S PROPOSED STATEMENT FOR VOIR DIRE EXAMINATION

Pursuant to the Court's instruction (issued orally in the hearing held in the above-captioned matter on March 29, 2005), Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully requests that the Court permit Mark Hansen, lead counsel to Morgan Stanley, to make the following statement, or to convey the substance of the following statement, to the prospective jurors who have been convened for voir dire examination in this case:

You will hear today that, since this panel was last convened, the Court has made certain rulings that are very adverse to Morgan Stanley. These rulings relate to the Court's findings regarding the provision of electronic documents and information by Morgan Stanley to CPH in this case. The Court has concluded that Morgan Stanley engaged in litigation misconduct. As a result of the Court's findings, the Court has decided that the jury will be instructed to accept as true certain conclusions the Court has found regarding Morgan Stanley's provision of documents and information. The Court has also decided to instruct the jury to accept as true a number of the allegations that CPH made against Morgan Stanley in its complaint without the necessity of proving those allegations with testimony and/or exhibits. Morgan Stanley will not be permitted to dispute or challenge these factual findings, and it will not be permitted to put on any evidence

regarding these matters. If you are selected as a juror in this matter, you will be told to accept these facts as true.

As a consequence of the Court's rulings, the lawyers who previously served as lead counsel to Morgan Stanley in this case have withdrawn as counsel. Thus, Mr. Davidson, whom you met when we were last together, will no longer participate in this case, and you will no longer see him. Instead, I, Mark Hansen, together with other lawyers in my firm and lawyers from Mr. Ianno's firm, will instead represent Morgan Stanley. Before the Court's rulings, we worked on this case in a less substantial capacity.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 29 day of March 2005.

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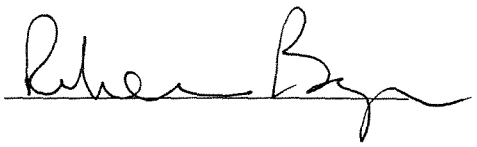
BY: 

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER AND DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court, in Chambers, on its own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Clerk is directed to docket and file CPH's proposed statement to the jury, attached hereto.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 29 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER AND DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court, in Chambers, on its own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Clerk is directed to docket and file the original of Jay Sorensen's letter dated March 24, 2005 and serve a copy upon all counsel, attaching a certificate of service.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 29 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION TO APPLY NEW YORK LAW TO CPH'S AIDING AND ABETTING AND CONSPIRACY CLAIMS

THIS CAUSE came before the Court March 10, 2005 on Morgan Stanley's Motion to Apply New York Law to CPH's Aiding and Abetting and Conspiracy Claims, with both parties well represented by counsel.

In its Amended Complaint[1], CPH alleges that:

1. Sunbeam was a publicly-traded company headquartered in Delray Beach, Florida (paragraph 10).

2. Because of its lackluster performance in 1995 and 1996, Sunbeam hired Albert Dunlap, a turnaround specialist, on July 18, 1996 (paragraph 17). Dunlap hired Kersh as Sunbeam's C.F.O., with whom he had previously worked, and several other hand-picked executives for his senior management team (paragraph 18).

3. Under their employment agreements, members of the senior management team stood to make a substantial amount of money if they increased Sunbeam's value (paragraph 19).

4. Dunlap and his team took three steps to accomplish the task of increasing Sunbeam's value. First, in 1996 they had Sunbeam record artificially high reserves and book expenses that should not have been recorded until later periods (paragraph 22). This resulted in Sunbeam's being artificially devalued. Second, in 1997, they had Sunbeam recognize revenues from purported sales that had not yet occurred, and might never occur (paragraph 24); they artificially accelerated sales by offering extraordinary customer inducements (paragraph 25); and they raided the 1996 cookie jar reserves (paragraph 26). These practices, coupled with the 1996 practice of booking expenses which should have been booked in 1997, artificially inflated Sunbeam's value (paragraph 26). The artificial devaluation followed by the artificial inflation made it

[1]Most of these facts have been established by virtue of the Court's March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment.

appear Sunbeam had been turned around. Third, they looked to sell Sunbeam to realize their incentive bonuses before the fraudulent practices were discovered (paragraph 3).

5. MS & Co. wanted Sunbeam's business. It approached more than ten companies it hoped may want to acquire Sunbeam (paragraph 32).

6. Unable to sell Sunbeam, and knowing that their scheme would be uncovered when first quarter results were reported in 1998, Dunlap and his team needed to come up with a plan (paragraph 34).

7. MS & Co. recommended that Sunbeam use its inflated stock to acquire other companies (paragraph 34).

8. MS & Co. identified Coleman, 82% of the stock of which was owned by CPH, as a possible acquisition target (paragraph 36).

9. MS & Co. was able to broker a deal where CPH sold its Coleman interest to Sunbeam in return for 14.1 million shares of the artificially inflated Sunbeam stock and other consideration, including cash, on March 30, 1998 (paragraphs 1, 40).

10. In the course of negotiating the transaction between CPH and Sunbeam, Sunbeam and MS & Co. made misrepresentations to CPH that reaffirmed the truth of the public information that had resulted in the artificial inflation of Sunbeam's stock price (paragraphs 39, 60).

11. After the contracts had been entered into but prior to closing, Sunbeam, with MS & Co.'s help, issued a press release in Florida that misrepresented its expected first quarter earnings (paragraphs 59-61).

12. MS & Co. either aided and abetted or conspired with Sunbeam in perpetuating the fraud, damaging CPH (paragraphs 87, 88, 91, 92).

In addition, there is evidence that Sunbeam failed to comply with the material adverse change provision of the merger agreement in Florida.

Condensing these facts down to their simplest form, CPH alleges that Sunbeam, a publicly traded company headquartered in Florida, published false information to the investing public to artificially inflate the value of its stock so it could foist that inflated stock on an unsuspecting third party to allow its executives to earn large incentive bonuses, and MS &Co. helped.

MS & Co. contends New York law governs CPH's claims for aiding and abetting or

conspiring with Sunbeam to perpetrate a fraud. CPH claims Florida law does. A conflict of laws analysis involves three steps. First, the Court must determine whether there are potentially outcome determinative differences in the conflicting laws. See Tune v. Philip Morris, Inc., 766 So. 2d 350 (Fla. 2d DCA 2000), rev. den. 786 So. 2d 1188 (Fla. 2001). The Court has already determined that under New York law, a sophisticated investor may not claim it was fraudulently induced to enter into a transaction if it failed to use the means available to test the representations; Florida law allows a recipient of a fraudulent misrepresentation to rely on it unless he knows it is false or its falsity is obvious. Compare UST Private Equity Investors Fund v. Salomon Smith Barney, 288 A.D. 2d 87, 733 N.Y.S. 2d 385 (N.Y. App. Div. 2001); Basett v. Basnett, 389 So. 2d 995 (Fla. 1980); see August 11, 2004 Order on Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc.'s Motion for Application of New York Law ("Order"). MS & Co. claims, too, that New York and Florida permit different damages: New York limits recipients of fraudulent misrepresentations to out-of-pocket losses -- a pure tort measure -- while Florida permits a choice between tort and contract-based measures. Compare Cayuga Harvester, Inc. v. Allis-Chambers Corp., 95 A.D. 5, 465 N.Y.S. 2d 606 (App. Div. 1983) and Gottfried v. Amster, 511 So. 2d 595 (Fla. 4th DCA 1987).[2] Second, the Court must determine the choice of law rule to be applied for the type of claim alleged. The Court has previously determined that Florida applies the *Restatement (Second) Conflict of Laws'* significant relationship test. See Bishop v. Florida Specialty Paint Co., 389 So. 2d 999 (Fla. 1980); Order. Section 148 of the *Restatement* applies here. See Trumpet Vine Investments, N.S. v. Union Capital Partners I, Inc., 92 F. 3d 1110 (11th Cir. 1996). Third, the Court must apply the appropriate rule to the specific facts.

Subsection (1) of Section 148 of the *Restatement* applies where the place where the misrepresentations were made, received, and relied on is the same. Subsection (2) applies where reliance occurs, in whole or in part, in a state other than where the false representations were made.

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[2]Though MS & Co. argues that New York and Florida have different requirements before punitive damages may be imposed, the Court has already found they do not under the fact pattern here. See November 19, 2004 Order on Coleman (Parent) Holding Inc.'s Motion to Amend its Complaint to Seek Punitive Damages. Even if they did, though, the analysis here would be equally applicable, and show that Florida law on punitive damages controls.

Subsection (2) applies here. The bulk of the misrepresentations and omissions forming the core of CPH's claim emanated from Florida: all of the misrepresentations that artificially inflated Sunbeam's share price were made in Florida;[3] the press release was published in Florida; and the written notice of changes in circumstances having a material adverse effect was to be delivered in Florida. Misrepresentations alleged to have been made in New York consisted, in large part, of reaffirmation of misrepresentations first made in Florida. Most of the acts in reliance, though, took place in New York.

Consistent with the general direction in Section 145 that the local law of the jurisdiction which has the more significant relationship to the issue controls, §148 (2) of the *Restatement* lists several contacts which may be of significance in determining the state with the more significant relationship. However, the choice of laws principles of Section 6 of the *Restatement* may suggest another state has a more significant relationship with respect to a particular issue. See *Restatement (Second) Conflict of Laws* §148, cmt. b. Emphasis should be placed on the purpose to be achieved by the relevant tort rules of the interested state, the particular issue, and the tort involved. *Restatement (Second) Conflict of Laws*, §148, cmt. e. In other words, as to each issue, the substantive law of the state with the more significant relationship controls, with due regard to the competing interests of other implicated states and concepts of federalism. *Restatement (Second) Conflict of Laws* §§148, 6.

Here, most, but not all, of the misrepresentations and omissions were made in Florida. CPH received most, but not all, of the misrepresentations and acted on most, but not all, of the misrepresentations and omissions in New York. CPH is domiciled in New York. Sunbeam was domiciled in Florida. The stock transfer was to be consummated in New York.

Applying these facts to the *Restatement* §148 (2) factors shows:

(a) Reliance took place in both New York, where CPH negotiated and closed the transaction, and Florida, where any notice of material adverse changes was to be delivered.[4]

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[3]CPH would have had the same claim even if Sunbeam had not specifically confirmed its prior misrepresentations. Virtually all of the misrepresentations that affected Sunbeam's apparent value were made in Florida.

[4]The *Restatement* notes that "because of the difficulties involved in its location, the place of loss does not play so important a role in the determination of the law governing actions for fraud and misrepresentation as does the place of injury in the case of injuries to person or to tangible things." *Restatement (Second) of Conflict of Laws* §148, cmt. c. Consequently, this factor is not particularly significant in the analysis.

(b) CPH received the misrepresentations and omissions in both New York and Florida.

(c) Most of the misrepresentations were made in Florida. Some were made in New York.[5]

(d) CPH's principal place of business of CPH is New York, though it is incorporated in Delaware. Sunbeam's principal place of business was Florida.

(e) CPH received stock in a Florida based company.

(f) Under the merger agreement, CPH as a Delaware corporation was merged into another Delaware corporation.

The reliance factors point primarily, but not exclusively, to New York. The misrepresentation factors point primarily, but not exclusively, to Florida. Given the difficulty of determining the location of reliance and injury in cases of pecunicy loss involving intangibles, the reliance factors are accorded less weight than the misrepresentation factors. *Restatement (Second) Conflict of Laws* §148, cmt. c. Consequently, the §148 (2) factors point to Florida as the state with the more significant relationship on this issue.

The choice of Florida is confirmed by the General Principle governing choice of law selection for torts. Where the primary purpose of a tort rule is to deter or punish misconduct, the place where the conduct took place is more important than the state where the injury may have occurred. *Restatement (Second) Conflict of Laws* §145, cmt. c. This is particularly true where the place of injury is fortuitous. *Restatement (Second) Conflict of Laws* §145, cmt. e. Florida's rule that a recipient of a fraudulent misrepresentation may rely on its truth, even if it has the means to verify it, is a strong statement of its policy of protecting the public from fraud, even if the public acts negligently. See HTP, Ltd. v. Lineas Aereas Costarricenses, 685 So. 2d 1238, 1240 (Fla. 1997) (quoting with approval Judge Altenbernd's dissent in Woodson v. Martin, 663 So. 2d 1327 (Fla. 2d DCA 1995): "the interest protected by fraud is society's need for true factual statements in important human relationships, primarily commercial or business relationships."); Mazzoni Farms, Inc. v. E.I. DuPont de Nemours, 761 So. 2d 306 (Fla. 2000); Basett. Florida's policy can be consistently furthered only if utterers of false misrepresentations in Florida are made to account, wherever the recipient is, particularly where, as here, the

[5]The *Restatement* emphasizes the relative importance of this factor, equating it in importance to the place of a defendant's conduct in the case of personal injury. *Restatement (Second) of Conflict of Laws* §148, cmt. c. at 445.

location of the ultimate victim was fortuitous.[6] Thus, Florida substantive law, which does not permit a plaintiff's negligent failure to investigate to defeat a claim for intentional misrepresentation, controls over New York law on this point.

Those same policy concerns control the choice of law on damages. Florida follows the *Restatement (Second) Torts'* measure of damages for fraudulent misrepresentations. See Totale, Inc. v. Smith, 877 So. 2d 813 (Fla. 4th DCA 2004); *Restatement (Second) Torts* §549 (2). New York follows the minority view, limiting recovery to a pure tort measure. See Cayuga Harvest, Inc. v. Allis Chambers Corp., 95 A.D. 5, 465 N.Y.S. 2d 606 (App. Div. 1983); 124 A.L.R. 37 (1940). However, as the *Restatement* notes, under the minority view a defrauding party may escape all liability if the value of what a plaintiff received is equal to the price he paid.[7] See *Restatement (Second) Torts* §549, cmt. g. Thus, in order to control a defendant's behavior, a defrauded plaintiff must be able to recover the benefit of his bargain:

> When the value of what the plaintiff has received under the transaction with the defendant is fully equal to the value of what he has parted with, he has suffered no out-of-pocket loss, and under the rule stated in Subsection (1), Clause (a), he could recover no damages. This would mean that the defrauding defendant has successfully accomplished his fraud and is still immune from an action in deceit. Even though the plaintiff may rescind the transaction and recover the price paid, the defendant is enabled to speculate on his fraud and still be assured that he can suffer no pecuniary loss. This is not justice between the parties. *The admonitory function of the law requires that the defendant not escape liability and justifies allowing the plaintiff the benefit of his bargain.*
>
> *Restatement (Second) Torts* §549, cmt i
> (emphasis supplied)

Because the primary purpose of the availability of benefit of the bargain measure of damages is to control a defendant's behavior, and not to compensate a plaintiff for the tort, under the same analysis as above, Florida law controls.

In sum, because Florida has an interest in controlling the behavior of its citizens; the rule

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[6]Sunbeam, through MS & Co., approached more than ten other companies before it approached CPH (Amended Complaint paragraph 32; March 23, 2005, Order on CPH's Renewed Motion for Entry of Default Judgment).

[7]Indeed, MS & Co. argues here that CPH had no damages under New York's out-of-pocket rule, and that MS & Co. should therefore escape liability altogether. See Professor Mark Grinblatt's December 17, 2004 Expert Report.

in Florida on both issues in which it differs from New York is intended to deter fraudulent misrepresentations; the bulk of the misrepresentations were made in Florida; the misrepresentations were dispersed nationwide[8]; the location of the alleged victim was fortuitous; and the loss pecuniary only, Florida law controls.

Based on the foregoing, it is

ORDERED AND ADJUDGED that the Motion is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 29 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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[8]Many investors purchased the inflated Sunbeam stock, not just CPH. MS & Co.'s analysis would require the law of the state of each purchaser to control, undermining "certainty, predictability, and uniformity of result . . ." *Restatement (Second) Conflict of Laws* §6 (2) (f).

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION FOR LEAVE TO TAKE THE DEPOSITION OF DONALD G. KEMPF, JR.

THIS CAUSE came before the Court march 29, 2005 on Coleman (Parent) Holdings Inc.'s Motion for Leave to Take the Deposition of Donald G. Kempf, Jr., with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part. Based on Defendant's representation that James Doyle is the person at MS & Co. responsible for compliance with the Court's March 2, 2005 Order, MS & Co. shall produce Mr. Doyle for deposition, which shall take no more than two hours, on either April 1, 2, 3, 8, 9, 10, or 15, 2005, at MS & Co.'s option, which shall be exercised by noon on April 1, 2005.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 29 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION TO DISCHARGE JURY PANELS

THIS CAUSE came before the Court March 29, 2005 on Morgan Stanley's Motion to Discharge Jury Panels, with all counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion to Discharge Jury Panels is Denied, without prejudice to renewal following additional voir dire.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 29 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON PLAINTIFF'S ORE TENUS MOTION TO COMPEL

THIS CAUSE came before the Court March 29, 2005 on Plaintiff's ore tenus Motion to Compel, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Plaintiff's ore tenus Motion to Compel is Granted. Dr. Grinblatt shall appear for deposition on or before April 5, 2005. If he appears by video conference, the costs shall be borne equally by the parties.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 29 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON PLAINTIFF'S ORE TENUS MOTION TO SET SCHEDULE

THIS CAUSE came before the Court March 29, 2005 on Plaintiff's ore tenus Motion to Set Schedule, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Plaintiff's ore tenus Motion to Set Schedule is Granted. MS & Co. shall serve any motion the granting of which would seek to modify or eliminate the bifurcation line previously drawn by the Court by noon March 31, 2005. Hearing on any such motion shall be held in conjunction with hearing on Plaintiff's motion seeking a determination of evidence relevant to Phase I and Phase II on

March 31, 2005, at 1:00 p.m.

at the West Palm Beach Courthouse, Room 11A, 205 N Dixie Hwy, WPB, FL. It is further

ORDERED AND ADJUDGED that counsel shall present their proposed jury instructions at 9:30 a.m. on April 4, 2005.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 29 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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1615 M Street, NW, Suite 400
Washington, DC 20036

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oir ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki Infim, ki bézwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontakté koôdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro téléfonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résévwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe accommodation pour pouvoir participer á ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER

THIS CAUSE came before the Court on Joseph Katz's facsimile transmission dated March 24, 2005, which the Court has elected to treat as including a Motion to Excuse Juror. Based on a review of the filing, it is

ORDERED AND ADJUDGED that the Motion to Excuse Juror is Denied. Juror Joseph Katz shall report for jury service March 30, 2005.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 29 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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Kimberly J. Collins, Supervisor
Jury Room

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

STATEMENT

If you find for CPH and against Morgan Stanley on either, or both, of CPH's claims for aiding and abetting and conspiring to commit fraud, you will then have to consider whether, in addition to compensatory damages, punitive damages are warranted. Later in the trial, I will instruct you about factors to consider when determining whether an award of punitive damages is appropriate. In considering these factors, certain facts have already have been established and no longer are subject to dispute, which I shall now read to you. You are required to accept these facts as true.

This case arises out of a 1998 transaction in which Coleman (Parent) Holdings, Inc., which I will call "CPH," sold its 82% interest in The Coleman Company to Sunbeam Corporation. Morgan Stanley served as Sunbeam's financial advisor for the transaction and as the lead underwriter for a $750,000,000.00 debenture offering that Sunbeam used to finance the cash portion of the deal.

On May 12, 2003, CPH sued Morgan Stanley for aiding and abetting and conspiring with Sunbeam to commit fraud. Following established pretrial procedures, CPH formally requested that Morgan Stanley produce documents related to CPH's claims against Morgan Stanley. A request to produce documents is one of the ways a party can seek to discover additional facts about the claims in a lawsuit and to gather evidence to present at trial. CPH's document request sought, in essence, all Morgan Stanley documents connected with the Sunbeam deal. The work "documents" specifically included items stored electronically, such

as emails.

CPH was concerned that Morgan Stanley was not thoroughly looking for emails responsive to its discovery requests. In October 2003, CPH filed a motion, which is a written request to the Court, asking that Morgan Stanley be ordered to make a full investigation for email messages, including a search of magnetic backup tapes and computer hard drives.

Morgan Stanley opposed CPH's motion. It represented that it would cost at least hundreds of thousands of dollars and require several months to complete such an investigation and that no email data existed for any time period before January 2000 -- more than a year and a half after the Sunbeam transaction. However, Morgan Stanley never intended to search the backup tapes to respond to CPH's requests. Further, some of Morgan Stanley's backup tapes contained email dating back at least to 1997.

In 2001 Morgan Stanley decided to create an email "archive." Morgan Stanley's email archive was a centralized storage system for electronic data that could be quickly and inexpensively searched. By June, 2003, Morgan Stanley had decided that the archive would have two components. First, the archive would capture and store new email messages "live," as they were generated. Second, Morgan Stanley wanted to add to the archive historical data dating back to the late 1990's. That task involved gathering all email backup tapes containing historical emails and then transferring data from the backup tapes onto the archive.

In February 2004, Robert Saunders, an Executive Director of Information Technology for Morgan Stanley, testified under oath to CPH that Morgan Stanley's email archive system would capture and store new emails as they were generated, but could not be used to search old emails. At the time, Mr. Saunders knew that the old emails already were being added to the archive and that that process was expected to be completed by April, 2004.

CPH still was concerned that all the emails it had requested had not been produced. However, in light of Morgan Stanley's representation that it would cost hundreds of thousands of dollars to search its emails and that the process would take many months, it reached an agreement with Morgan Stanley On April 16, 2004, the Court entered an "Agreed Order." Under the Agreed Order, Morgan Stanley was required to (1) search the oldest full backup tape

for each of 36 Morgan Stanley employees involved in the Sunbeam transaction; (2) review emails dated from a key two-month period in early 1998, as well as emails containing any of 29 specific search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004, all privileged emails responsive to CPH's document requests; and (4) certify Morgan Stanley's full compliance with the Agreed Order. CPH reached this agreement without Morgan Stanley's disclosing the existence of the email archive or Morgan Stanley's belief that the archive would make searches for emails quick and inexpensive.

In response to the Agreed Order, Morgan Stanley produced about 1,300 pages of emails on May 14, 2004. Morgan Stanley did not, however, certify compliance with the Agreed Order. After prompting by CPH, on June 23, 2004, Morgan Stanley served a Certificate of Compliance signed by Mr. Arthur Riel, an Executive Director and manager of Morgan Stanley's Law/Compliance Information Technology Group.

As organized by Morgan Stanley, the effort to create the historical data archive had several stages. First, the relevant backup tapes had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc., which I will call "NDCI", to be processed, and the data returned to Morgan Stanley. Third, Morgan Stanley had to upload the processed data into its email archive. Fourth, Morgan Stanley had to run scripts, or pieces of computer code, to transform this data into a searchable form. Finally, Morgan Stanley had to search the data for emails related to this case. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when the processed data returned by NDCI remained in limbo, waiting to be uploaded to Morgan Stanley's archive.

At some point prior to May 6, 2004, Arthur Riel and his team became aware that 1,423 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423 tapes had not been processed by NDCI and thus had not been included in the archive or searched when Morgan Stanley made its production to CPH on May 14, 2004. Aware of the tapes' discovery, Mr. Riel and other Morgan Stanley personnel knew when Riel executed the certification of full compliance with the Court's Agreed Order that it was false. He and others

on Morgan Stanley's email archive team knew by July 2, 2004 that these "Brooklyn tapes" contained email dating back at least to the late 1990's. During the summer of 2004, the Brooklyn tapes were processed and the data sent to the staging area. The scripts were not written and tested to permit the search for emails relating to this case to begin until the middle of January, 2005. Such a search, even if perfectly done, can take weeks.

In the May, 2004, production of documents under the Agreed Order, Morgan Stanley also failed to produce emails from 738 backup tapes found at a Morgan Stanley facility in Manhattan in 2002. These 738 tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched by either May 14, 2004 or June 23, 2004, the date Morgan Stanley certified compliance. Mr. Riel and others were told by NDCI by July 2, 2004 that these tapes contained email dating back at least to 1998. During the summer of 2004, these tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not searched.

In August 2004, Mr. Riel was relieved of his employment responsibilities for reasons unrelated to Morgan Stanley's false certification. He and his team were replaced by a new team headed by Allison Gorman. At that time, the staging area contained about 600 gigabytes of email data that had not yet been uploaded into the Morgan Stanley archive and had not been searched for emails relating to this case. Six hundred gigabytes of data are the equivalent of approximately 12 million to 60 million printed pages.

On November 17, 2004, Morgan Stanley told CPH that Morgan Stanley had discovered additional email backup tapes. The next day, Morgan Stanley produced to CPH about 8,000 pages of emails. But in a series of letters back and forth from November, 2004, to January, 2005, Morgan Stanley refused to provide CPH with details about the backup tapes that allegedly had been "newly discovered" or about any ongoing efforts to restore emails from those backup tapes and to produce those emails to CPH. Morgan Stanley told CPH that the "newly discovered" tapes had not been found in locations where email backup tapes customarily were stored.

Only a handful of the Brooklyn tapes had been added to the archive and were thus

searched for the November, 2004 production. Morgan Stanley sought to create the impression that all the produced documents came from the Brooklyn tapes, though. However, none of the November, 2004 production came from "newly found" tapes. Morgan Stanley's responses to inquiries about the November, 2004, production did not disclose the existence of the archive.

Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area. She was not told of the existence of this litigation until five months later, in January 2005. In October, 2004, Ms. Gorman gave the project somewhat greater priority, although even then it did not move as expeditiously as possible. Morgan Stanley did not consider using an outside contractor to expedite the process.

Morgan Stanley found another 169 DLT tapes in January, 2005, that according to Morgan Stanley had been misplaced by its New Jersey storage vendor. Morgan Stanley discovered more than 200 additional unsearched backup tapes openly stored in locations known to be used for tape storage on February 11 and 12, 2005. Morgan Stanley did not voluntarily disclose this information to CPH.

Morgan Stanley claims to have discovered on February 11, 2005 that a flaw in the software it had written had prevented it from locating all email attachments about the Sunbeam transaction. Morgan Stanley also admits that the date-range searches for email users who had a Lotus Notes platform were flawed, so that additional email messages that appeared to fall within the scope of the Agreed Order had not been given to CPH. Further, it appears that the problem infected Morgan Stanley's original searches in May of 2004. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the transaction under review here.

On February 16, 2005, Morgan Stanley withdrew its certificate of compliance with the Agreed Order.

On February 19, 2005 Morgan Stanley notified CPH that it had found boxes of additional tapes that have not been uploaded into its archive or searched for responsive emails.

In addition, CPH has since found out that:

(1) A migration issue caused about 5% of email harvested by NDCI from the backup tapes not to be captured.

(2) The computer programs Morgan Stanley used to process emails into its archive caused the bodies of some messages to be truncated, or cut off.

(3) About five percent of email harvested from the backup tapes was not added to the archive.

(4) An analysis showed that, based on a representative sample, about ten percent of backup tapes were erased after January 2001.

(5) A computer programming error caused blind carbon copies not to be captured in the archive.

(6) Another computer programming error prevented the searches from turning up all responsive emails.

(7) Another computer programming error caused the archive to have problems pulling group email involving a set of email users that included Morgan Stanley employees involved in the Sunbeam transaction.

(8) Morgan Stanley's searches looked for only two types of emails. There are other types of emails that were not included in the searches.

(9) An additional 282 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found on February 23, and 25, 2005, and apparently were never searched.

(10) An additional 3,536 tapes that Morgan Stanley should have found and searched by May 14, 2004, were discovered on February 23, 2005, in a security room. These tapes apparently have not been searched.

(11) An additional 2,718 tapes that Morgan Stanley should have found and searched by May 14, 2005, were found on March 3, 2005, at Morgan Stanley's New Jersey off-site storage vendor. These tapes apparently have not been searched either.

(12) An additional 389 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found from March 2 through March 5, 2005. These tapes apparently also have not been searched.

Morgan Stanley did not voluntarily disclose any of these ten problems to CPH. The searches had not been completed when this trial was begun, when they were terminated without completion.

Mr. William Strong is the Morgan Stanley managing director who took credit for the fees Morgan Stanley generated from the Sunbeam deal. On March 15, 2004, Morgan Stanley was required to produce, "(a)ll references (positive or negative) to [Mr. Strong's] truthfulness, veracity, or moral turpitude." In response, Morgan Stanley produced some portions of Mr. Strong's annual employment evaluations. While he was working on the Sunbeam transaction, though, Mr. Strong was facing criminal prosecution in Italy for complicity in bribery. Mr. Strong's evaluators at Morgan Stanley knew that fact. Morgan Stanley failed to provide the documents about these proceedings to CPH, though, which in January, 2005, independently discovered evidence of the criminal proceedings in Italy.

It is important that you understand the limited relevance of Mr. Strong's situation. The fact that Mr. Strong was facing criminal prosecution in Italy for complicity in bribery while he was working on the Sunbeam transaction may be relevant to the extent that it created pressures on Mr. Strong and motivated him to push forward with the Sunbeam deal. That is for you to decide. But you must not consider that fact as evidence of Mr. Strong's character or as evidence that Mr. Strong actually engaged in bribery or any other illegal conduct in Italy. Indeed, in 2003, on appeal, an Italian court found Mr. Strong not guilty.

As I told you at the outset of this Statement, you are required to accept the factual finding that I have read to you as true.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
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MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

AGREED ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO STRIKE A PORTION OF ONE SENTENCE FROM EXHIBIT A TO THE COURT'S MARCH 23, 2005 ORDER

THIS CAUSE came before the Court March 30, 2005 on Coleman (Parent) Holdings Inc.'s Motion to Strike a Portion of One Sentence from Exhibit A to the Court's March 23, 2005 Order, with both counsel present. Based on the agreement of counsel, it is

ORDERED AND ADJUDGED that the Motion is Granted. The remainder of the sentence found at lines 2 and 3 on page 7 of the redacted Amended Complaint attached to the Court's March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment beginning with "by engaging in" is stricken.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 30 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
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John Scarola, Esq.
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Jerold S. Solovy, Esq.
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Chicago, Il 60611

Rebecca Beynon, Esq.
Sumner Square
1615 M Street, NW, Suite 400
Washington, DC 20036

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

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

CASE NO: 2003 CA 005045 AI

PLAINTIFF'S DISCLOSURE PURSUANT TO MARCH 23, 2005 ORDER

Pursuant to the Court's March 23, 2005 Order, Coleman (Parent) Holdings Inc. ("CPH") hereby provides Morgan Stanley & Co., Inc. ("Morgan Stanley") with a list of the witnesses CPH currently expects to call at trial on the topic of CPH's offer to have a third-party vendor given access to retrieve e-mails from CPH's system, through live testimony, along with a summary of the currently anticipated testimony and documents to be referred to by the witness or offered into evidence on this issue. CPH reserves the right to call the witness identified herein, and reserves the right to withdraw the witness identified herein and supplement this disclosure.

1. Steven Fasman: Mr. Fasman is the Senior Vice President – Law of MacAndrews & Forbes Holdings Inc. Mr. Fasman is expected to testify regarding CPH's offer to Morgan Stanley to have a neutral, third-party vendor be given access to CPH's and Morgan Stanley's computer backup tapes or other storage media in order to retrieve e-mail, CPH's further offer to split the cost of retaining such a vendor, and Morgan Stanley's rejection of that offer. Mr. Fasman is also expected to testify regarding the limited use of e-mail at MacAndrews & Forbes in 1997-98.

CPH further submits the following documents, on which Mr. Fasman may rely in his testimony or which may be offered into evidence:

1. Hearing Transcript (3/19/04)
2. Letter from Michael T. Brody to Thomas A. Clare (3/9/04)
3. Letter from Thomas A. Clare to Michael T. Brody (3/11/04)
4. Letter from Michael T. Brody to Thomas A. Clare (3/15/04)
5. Letter from Thomas A. Clare to Michael T. Brody (3/16/04)
6. Letter from Michael T. Brody to Thomas A. Clare (3/17/04)
7. Printout from website of Kroll Ontrack
8. Printout from website of National Data Conversion

Dated: March 30, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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Ronald L. Marmer
Jeffrey T. Shaw
JENNER & BLOCK LLP
One IBM Plaza
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John Scarola
SEARCY DENNEY SCAROLA
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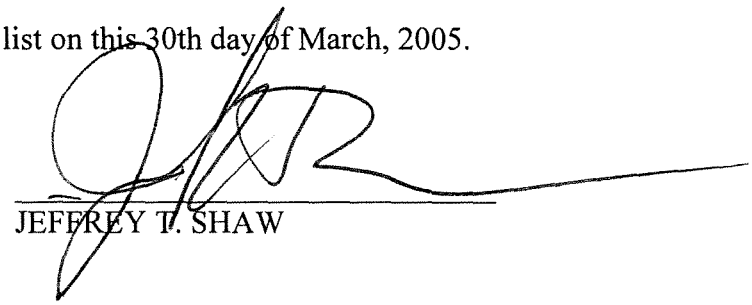
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 30th day of March, 2005.



JEFFREY T. SHAW

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Exhibit 1

0001

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CASE NO. 2003-CA-005045 AI

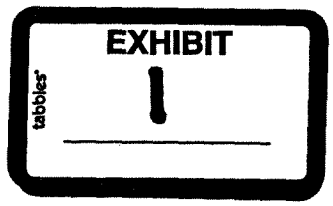
COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,
vs.
MORGAN STANLEY & COMPANY, INC.
Defendant.
_____/

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH MAASS

- - -

Palm Beach County Courthouse
West Palm Beach, Florida
March 19, 2004
3:27 p.m. - 4:33 p.m.
Reported by: Lisa D. Danforth



THE COURT: I appreciate that. Thank you very much.

MR. SCAROLA: The next is Coleman (Parent) Holdings' motion for permission to have third party retrieve Morgan Stanley e-mail --

THE COURT: Yes.

MR. SCAROLA: -- and other responsive documents, which I had spilled over to begin discussing with Your Honor.

THE COURT: Okay. Go ahead.

MR. SCAROLA: And let me tell Your Honor what the current proposal is that is on the table with regard to these issues, because obviously, there are going to be requests for electronic production and there are going to be arguments about the extent to which it is burdensome and how carefully parties did or did not review the electronic data available to them in order to make the production requested.

What we have proposed is that a third party, and we have identified one that we are familiar with and in whom we have confidence, although we are not wed to that particular third-party forensic firm, computer forensic firm, we're open to suggestions if there's somebody else, and

there's been some suggestion and discussion today that there may be somebody else in whom the defendants have greater confidence or who has greater familiarity with the defendant's computer systems, and as long as we're satisfied that they're an independent third party, we really don't care who it is.

Our suggestion is this. We both want and need electronic discovery. We think that a third party ought to be designated to conduct the review of the electronic records of both firms.

One of the issues of contention was who is going to bear the expense of having that third party come in to conduct the review, and to the extent that there is a disparity between the costs involved in conducting the electronic review of plaintiffs as compared to conducting the electronic review of defendants, the issue was will we bear our own burden initially or will we bear the burden of opposing parties initially.

What we suggest to the Court to resolve those concerns is that the third party perform the tasks for both parties, both plaintiff and defendants, a total bill will be presented for all of the work performed, the bill gets divided in the middle,

the cost of electronic discovery is divided without regard to how much was spent reviewing our records and how much was spent reviewing their records, and quite frankly, we have every reason to believe it's going to be far less costly to examine ours than to examine theirs.

THE COURT: Okay. Let me stop you, because I want to again make sure I understand where we are procedurally.

What you're talking about is sort of a global suggestion to deal with retrieval of electronic documents in this case.

MR. SCAROLA: That's correct.

THE COURT: Okay.

MR. SCAROLA: And there are outstanding requests.

THE COURT: That was what I was going to back into.

MR. SCAROLA: Yes.

THE COURT: Because to generate --

MR. SCAROLA: To place this in procedural context --

THE COURT: I'm not aware of a procedure that would allow me to force you guys into some sort of an accommodation like this, so really, I have two

questions, I guess one for each of you, and don't answer them quite yet.

First is, are defendants even amenable to something like this or not? I mean, are you amenable to a proposal and we're simply fighting over its terms, or are you guys simply not amenable to a proposal?

And then, Mr. Scarola, what I need to know from you is sort of have I jumped -- am I really looking at some sort of motion to compel them to respond to a production request for e-mails generated prior to 1997, or is there some specific discovery request I'm now looking at they have objected to, and you're saying, look, Judge, this information is available, and we're willing to bear the cost or at least a portion of it to retrieve it?

MR. SCAROLA: I think the latter is correct, Your Honor.

THE COURT: Okay.

MR. SCAROLA: There have been requests for the production of e-mails, and we'll focus specifically on them, because that's the primary concern.

THE COURT: Okay.

MR. SCAROLA: Electronic records of e-mails that have been exchanged.

THE COURT: Do we agree that there has been such a request outstanding?

MR. CLARE: There has been a request outstanding.

THE COURT: And have you-all objected?

MR. CLARE: From the very beginning.

THE COURT: And what's the basis of the objection?

MR. CLARE: We objected to the breadth of the request that they're making. And to answer Your Honor's question directly -- and the burden that is associated with it -- that given the particular e-mail back-up tapes that are in existence five, six years after the fact of these transactions, that the scope of the e-mail request that they are seeking is improperly and unduly burdensome given the enormous costs that would be required, given the fact that the time period for which we have back-up tapes postdates the events by several years.

And so what Your Honor will remember -- To put the e-mail dispute in broader procedural context, we've been arguing about this since

October. Mr. Scarola filed a motion to compel the production of e-mails, all of the e-mail backups, and we came in with an opposition that gave substantial figures about the cost and the burden to do this. There was an amended motion that was filed where Coleman requested discovery on the burden and the cost, and we had a round of depositions on this point. So now this is the third motion, and what I believe --

MR. SCAROLA: I don't mean to interrupt, but I do mean to interrupt.

THE COURT: I was going to say, I think you do, Mr. Scarola.

MR. SCAROLA: I do mean to interrupt, and the reason I mean to interrupt is because this is my motion, and I don't mind, obviously, Mr. Clare responding to the Court's question, but he's gone considerably beyond that and is now arguing his position --

MR. CLARE: Well, I'm --

MR. SCAROLA: -- and I'd like the Court to understand what ours is before we get the other side's argument.

THE COURT: Let me ask you this. Has there ever been a disposition of a motion to compel

where we have made a determination whether either the scope of the request is overbroad or compliance is unduly burdensome?

MR. CLARE: No, Your Honor.

THE COURT: Then I guess my question to you, Mr. Scarola, is, are we jumping ahead; do we first need to dispose of that motion absent some sort of agreement to them that, yeah, they're amenable to this type of procedure?

MR. SCAROLA: I don't believe so, Your Honor, for this reason. The procedural context is, we filed the motion, they filed their objection, we have made a proposal to meet that objection, and what we're --

THE COURT: I don't think I can make a -- I mean, essentially what you're trying to do is force them to mediate the issues raised by the motion, and I don't --

MR. SCAROLA: No. No. We've attempted -- We've attempted to resolve those issues between ourselves. We've been unsuccessful in doing that, and this is by way of a motion to compel compliance and a suggestion as to how compliance ought to be compelled.

THE COURT: Okay.

MR. SCAROLA: That's really where we are.

THE COURT: I can tell you, I can't do it in this context. I think what -- I'm not aware of any procedure that would allow me to short-circuit ruling on defendant's objections and require the parties to engage in this sort of shared enterprise.

I mean, at a bare minimum, this would have to be piggybacked onto any hearing calling up the objections, so this would be --

Oh, you gave me an order.

MR. SCAROLA: Yes, Your Honor, I did.

And I would --

THE COURT: Let me finish writing, and then we'll talk.

MR. SCAROLA: Yes, surely.

THE COURT: Okay. All this says is it's denied without prejudice for plaintiff's right to argue the propriety of the proposal in support of its motion to compel.

MR. SCAROLA: And the only thing I wanted to point out to Your Honor is that regardless of how this motion may be styled, it is clear from the motion itself that what we are addressing is the burdensome objection.

THE COURT: I understand that, but again, I'm not prepared for that today.

MR. SCAROLA: That's fine.

THE COURT: It's not like I've taken out your discovery request, I looked at their objections, I've reviewed the depositions you guys took on this point, and we can now argue it intelligently.

MR. SCAROLA: We'll present it to Your Honor in --

THE COURT: And please understand when I say without prejudice to their right to argue the propriety of the proposal, I'm not saying I think the proposal is proper; I'm just saying it's something I would really have to go back and think about, and I can't even put it into context until we do the other motion.

MR. CLARE: I understand your order to be saying that is step two of what will be a two-step process.

THE COURT: Right.

MR. SCAROLA: Although, I would hope that we can schedule both at the same time; that is --

THE COURT: We can try if my little brain will think that fast, Mr. Scarola.

MR. SCAROLA: Okay. Thank you.

Exhibit 2

JENNER&BLOCK

March 9, 2004

Jenner & Block LLP
One IBM Plaza
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www.jenner.com

Chicago
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By Telecopy

Michael T. Brody
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Fax 312 840-7711
mbrody@jenner.com

Thomas A. Clare, Esq.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Tom:

I write to propose a compromise to address Morgan Stanley's pending motion for production of electronic documents in electronic form, and CPH's need to retrieve responsive email and electronic documents from Morgan Stanley's computer backup.

In response to CPH's previous request that Morgan Stanley review backup for emails and other responsive information, Morgan Stanley has refused to do so, citing the purported burden that would be involved in that process. You contend that because of the burden involved, we are not entitled to obtain any of those materials, even if they exist and otherwise should be produced.

In sharp contrast, Morgan Stanley has insisted that CPH go back and retrieve duplicate copies of previously produced documents in electronic form. When we advised you that it would involve a significant burden to locate those documents in electronic form, you moved to compel and took the position that we should bear that burden on the chance that we would produce metadata for documents you already have in paper form.

To address both sides' concerns over burden, and at the same time accommodate our need to obtain information that we believe is discoverable, we propose that a third-party vendor, Kroll Ontrack, be allowed access to both of our systems to search for the materials that each of us has demanded. Having Kroll, a third-party vendor, conduct the search would prevent disputes concerning the thoroughness of the searches, the costs associated with them, and their timelines.

The protocol that we suggest is as follows:

(1) Kroll would agree in writing to be bound by the protective order in this case;

(2) Kroll would search Mafco's backup tapes for the electronic versions of email and documents at Mafco's expense, and Kroll would search Morgan Stanley's backup tapes for electronic versions of email and documents at Morgan Stanley's expense;

(3) Kroll would tender the results of its search of a party's files to that party;

(4) Each party would review the tendered materials for privilege and responsiveness to prior discovery requests;

(5) Responsive and nonprivileged materials would be produced to the other side; and

(6) Any materials withheld on privilege grounds would be listed on a supplemental privilege log and the log would be served on the other side.

Please consider my proposal and let me know whether it is acceptable to you by the close of business on Thursday, March 11, 2004.

Very truly yours,

Michael T. Brody

MTB:cjg
cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

Exhibit 3

KIRKLAND & ELLIS LLP
AND AFFILIATED PARTNERSHIPS

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March 11, 2004

VIA FACSIMILE

Michael Brody, Esq.
Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611-7603

Re: *Coleman (Parent) Holdings v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding v. MacAndrews & Forbes et al.

Dear Mike:

I write in response to your March 9, 2004 letter regarding (1) Morgan Stanley's pending motion for the production of electronic documents in electronic form; and (2) CPH's apparent desire to force a wasteful and costly restoration of Morgan Stanley's e-mail backup tapes. I will address each of these two issues in turn.

Electronic Documents

Morgan Stanley has consistently produced its electronic documents "in electronic form" in accordance with the parties' written agreement. We are not aware of any electronic server or backup media that might contain additional electronic documents responsive to CPH's document requests. Accordingly, at least as it applies to Morgan Stanley, your suggestion that the parties hire an outside vendor to search backup tapes for additional electronic documents would only result in additional and unnecessary costs.

As for CPH's documents that exist "in electronic form," we have examined the electronic documents that CPH produced in hard-copy form and have reviewed Mr. Fasman's deposition testimony on this point. All of the available evidence squarely rejects the notion that it would impose a "significant burden" on CPH to produce such documents "in electronic form" in accordance with the parties agreement. Specifically:

- We cannot square your "burden" argument with the time- and date-stamp information that appears on the documents. Virtually all of the electronic documents in CPH's latest production appear to have time- and date-stamps in the header or footer that show the date and time that they were printed for production. These time- and date-stamps show that these document were located and printed over the course of a ***few hours*** in the two days immediately prior to production. Thus, the burden cannot be as great as you claim.

- Similarly, many of those same hard-copy documents have unique electronic filenames identified in the header or footer of the document. With the assistance of these filenames, it should be relatively easy for CPH to locate and produce documents in electronic form.

- We cannot square your "burden" argument with your prior demands of Morgan Stanley. As you will recall, Morgan Stanley undertook — at your insistence — an ***even greater burden*** when, after producing several boxes of documents in hard-copy form, CPH made an identical demand that Morgan Stanley "go back and retrieve duplicate copies of previously produced documents in electronic form." Morgan Stanley did just that, and subsequently produced four CDs of electronic documents that had previously been produced in hard-copy form, representing 723 files and 117.5 MB of electronic data.

- We cannot square your "burden" argument with the parties' written agreement. The parties agreed — in a countersigned written agreement that your firm drafted — to produce electronic documents "in electronic form." To the extent there is an additional "burden" associated with re-producing electronic documents in electronic form, that "burden" is solely the result of CPH's failure to comply with the parties' agreement in the first instance. CPH cannot use its failure to comply with the parties' agreement (by producing documents in hard-copy form only) to manufacture an argument that it is now too burdensome to comply.

In short, the requirement that electronic documents be produced "in electronic form" is well-established by the prior course of discovery in this case, and separately is covered by a countersigned written agreement between the parties. Morgan Stanley is entitled to full compliance with the parties' agreement on this issue, and to the same form of production that CPH has previously demanded from Morgan Stanley.

E-Mail Backups

With regard to the restoration and search of e-mail backup tapes, your proposal to use a third-party vendor does not address — in any meaningful way — many of Morgan Stanley's legitimate objections to the wholesale restoration of e-mail backup tapes. Whether the restoration of e-mail backup tapes is performed by Morgan Stanley IT staff or an outside vendor, the burden on Morgan Stanley from such a wholesale restoration, both in terms of dollars and manpower, would be enormous. Regardless of who performs the initial restoration, it would require hundreds (perhaps thousands) of attorney-hours to review millions of irrelevant and non-responsive e-mails, all for the theoretical possibility that an e-mail drafted years after the underlying financial transactions would be discovered and responsive to CPH's requests. Your proposal to hire a third-party vendor does not address

that issue, and instead seeks to shift the financial costs for such a search to Morgan Stanley instead of CPH, the party insisting on such a fishing expedition.

As we have explained repeatedly in correspondence, depositions, and court filings, Morgan Stanley only has the ability to restore e-mail from backup tapes from January 2000 or later, which (even using the earliest point) is more than a year-and-a-half after the events that allegedly gave rise to CPH's claims and, in many cases, years after the Morgan Stanley employees who worked on Sunbeam-related engagements left the Company. Under these circumstances, there simply is no reason to believe that a wholesale restoration of e-mail backup tapes is reasonably likely to yield relevant and responsive e-mails — or that the theoretical possibility of finding relevant and responsive e-mails from several years after the fact would justify the enormous burden and cost of restoring, reviewing, and producing these backup tapes.

Any workable proposal regarding the restoration of e-mail backup tapes must (1) be narrowly tailored to include only those tapes that are most likely to contain potentially responsive documents; and (2) allocate the costs of the search in a manner that recognizes the enormous burden of the search compared to the theoretical possibility of finding potentially responsive documents. We offer the following proposal:

(1) Morgan Stanley will identify up to five (5) current or former MAFCO / CPH employees to be included in the e-mail backup search. MAFCO / CPH will search their backup tapes for electronic versions of e-mails from those five (5) individuals for the time period from December 1997 through June 1998. In addition, MAFCO / CPH will search for electronic versions of e-mails on the oldest e-mail backup tape that exists for each of those five (5) individuals (i.e. the backup tape that is closest in time to the December 1997 – June 1998 time period).

(2) CPH will identify up to five (5) current or former Morgan Stanley employees to be included in the e-mail backup search. Morgan Stanley will search its backup tapes for electronic versions of e-mail from those five (5) individuals for the time period from December 1997 through June 1998. In addition, Morgan Stanley will search for electronic versions of e-mails on the oldest monthly e-mail backup tape that exists for each of those five individuals (i.e. the January 2000 monthly backup tape).

(3) The parties will agree upon a reasonable set of search terms that will be used to narrow the universe of e-mails.

(4) Each party will review the resulting e-mails and produce responsive, non-privileged e-mails to the other side.

KIRKLAND & ELLIS LLP

(5) Any materials withheld on privilege grounds would be listed on a supplemental privilege log to be served on the other side. Depending on the volume of privileged materials on either side, an extension of the typical 30-day time period may be warranted.

(6) If either party wishes to identify additional employees (beyond the original five) whose e-mail backup tapes will be restored, searched, and produced in accordance with steps (1) - (5), the requesting party will thereafter bear all resulting fees and costs, including (without limitation) all fees and costs associated with restoring the e-mail backup tapes, all fees and costs associated with conducting the keyword search, all fees and costs associated with the privilege and responsiveness review (including reasonable attorneys fees), and all fees and costs associated with producing a privilege log (including reasonable attorneys fees).

I am prepared to discuss these issues at your convenience.

Sincerely,

Thomas A. Clare

Thomas A. Clare

cc: Joseph Ianno, Esq.
John Scarola, Esq.
Jerold S. Solovy, Esq.

Exhibit 4

JENNER&BLOCK

March 15, 2004

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BY TELECOPY

Thomas A. Clare, Esq.
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655 Fifteenth Street, N.W., Suite 1200
Washington, D.C. 20005

Re: Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Tom:

This letter concerns our ongoing discussions about your request that we search for documents, which we previously produced to you in paper form, and produce them again in electronic form. In your letter of March 11, you set forth a number of arguments concerning why you believe that we are required to undertake this task, and why you think that task is not very burdensome. We do not agree with your arguments, for reasons we have previously stated, and I do not intend to repeat our contentions in this letter. Instead, the purpose of this letter is to reiterate our desire to reach a compromise, one that accommodates your desire for discovery and our concerns over undue burden.

In your letter of March 11, you identified certain documents with unique codes and certain documents with print dates, from the 320 pages of documents that we previously produced from an electronic backup tape. We have undertaken to locate the documents that you have identified in electronic form, and we will endeavor to produce those documents in that form to you as soon as complete. Our undertaking is consistent with our prior invitation to you to identify the specific documents that you have received in paper form that you also would like to receive in electronic form.

We continue to be willing to entertain reasonable requests to conduct such searches, and alternatively, we reiterate our proposal that both sides retain Kroll for the purposes identified in our pending motion. If you would like to discuss any of these matters further, and thereby avoid having to burden Judge Maass with the motions that each of us have filed relating to this issue, please feel to contact me.

Very truly yours,

Michael T. Brody

Michael T. Brody

MTB:sd

EXHIBIT
4

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

#1058169

Exhibit 5

KIRKLAND & ELLIS LLP

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March 16, 2004

BY FACSIMILE

Michael Brody, Esq.
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Chicago, IL 60611-7603

Re: *Coleman (Parent) Holdings v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding v. MacAndrews & Forbes et al.

Dear Mike:

Thank you for your letter of March 15, 2004. We will consider your proposal.

Your letter does not address the proposal outlined in my March 11, 2004 letter for the mutual restoration and search of e-mails. What is your position on that issue?

Sincerely,

Thomas A. Clare

Thomas A. Clare

cc: Joseph Ianno, Esq. (by facsimile)
John Scarola, Esq. (by facsimile)
Jerold S. Solovy, Esq. (by facsimile)

EXHIBIT
5
tabbies

16div-013629

Exhibit 6

JENNER&BLOCK

March 17, 2004

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Suite 1200
Washington, D.C. 20005

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Tom:

As indicated in CPH's March 12, 2004 Motion for Permission to Have Third Party Retrieve Morgan Stanley E-mail, we do not accept your March 11 proposal that Morgan Stanley conduct searches for pre-January 2000 e-mail of five Morgan Stanley employees, with any additional searches to be conducted by Morgan Stanley at CPH's expense. Given the current circumstances, we believe your proposal invites further disputes as to the sufficiency of Morgan Stanley's searches and the reasonableness of any fees Morgan Stanley wishes to charge CPH. As indicated in the Motion and in our correspondence, having Kroll involved will be more efficient, and we will ask Judge Maass to order that procedure on Friday.

Your proposal requested that CPH search the e-mail archives of five of its employees. As Steven Fasman testified, CPH, unlike Morgan Stanley, already has searched its backup tapes for responsive e-mails.

Very truly yours,

Michael T. Brody

MTB:cjg
cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

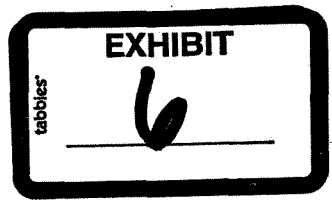

Exhibit 7

Kroll Ontrack™

Getting Started

Getting Started

When you need to determine the *who, what, when, where,* and *how* of computer-related conduct -- turn to Kroll Ontrack. Kroll Ontrack can help you uncover key pieces of digital evidence ... even if someone else has tried to hide, tamper, or destroy it.

Kroll Ontrack's computer forensic engineers can help you:

- Preserve the integrity of your evidence with best practices chain of custody protocols and mirror imaging technology;
- Retrieve email data;
- Access active and recover deleted data files or file fragments;
- Recreate time-critical computer events;
- Recover data that seems forever lost due to hardware or software malfunction or destruction; and,
- Crack password protected or encrypted files;

Project Assistance. To request information or to speak with a Kroll Ontrack representative in your area, please complete a project assistance form. If you'd prefer to speak with someone immediately, please call 800-347-6105.

ElectronicDataInvestigator™ is an easy to use software tool that allow you to view, search, sort, bookmark and report on the data important to your computer forensic investigations. The software allows you to conduct investigations on electronic files without the need for the native applications or additional software. The tool is offered free of charge and is available in English, French, German and Spanish.

Cyber Crime & Computer Forensics News. Learn more about cyber crime and computer forensics with this FREE monthly newsletter. This newsletter contains real-life stories about work done in the field of computer forensics, along with information on how computers work and how investigations are conducted.

Consulting – Kroll Ontrack begins with legal and technical consulting to ensure that we deliver the services most appropriate to your investigation or case.

Data Collection – You can send the targeted computer or media to any of Kroll Ontrack's lab facilities strategically located around the world. If the computer media cannot leave your premises, Kroll Ontrack can send trained data collection experts to your site to forensically copy the data and

y.

EXHIBIT 7 tabbies

transport it back to its state-of-the-art labs for further investigation.

Forensic Recovery and Analysis – Kroll Ontrack's computer forensic engineers have industry-leading data recovery technology at their disposal to help restore the data before it is investigated, if needed. Once the engineers begin analysis, they employ proprietary technology to uncover the data relating to your investigation.

Results and Reporting – Upon completion of the forensic analysis, Kroll Ontrack provides you with the results of the investigation along with a formal report. We will also provide you with a copy of ElectronicDataInvestigator™ software, so you can further parse the data we locate.

Affidavits & Testimony – Kroll Ontrack's computer forensic engineers are experienced and able to support your case by providing affidavits or expert testimony.

A proper and thorough computer forensics analysis could mean the difference between winning and losing a case. You can trust Kroll Ontrack – the recognized worldwide leader in the industry – for your most difficult, critical, and time-sensitive investigations.

To request information or to speak with a Kroll Ontrack representative in your area, please complete a project assistance form online and someone will contact you. Or, if you'd prefer to speak with someone immediately, please call 800-347-6105.

Printed from www.krollontrack.com,
http://www.krollontrack.com/computerforensics/gettingstarted.asp
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Exhibit 8

National Data Conversion 5 East 16th Street NYC 10003
1 877 777 6324 212 463 7511 Fax 212 645 9327 ndci.com

America's Leader in Electronic Data Conversion and Discovery

National Data Conversion

Litigation Support Service Provider Program

Gain A Competitive Edge In The Litigation Data Support Market

National Data Conversion provides an unprecedented technical infrastructure and high level of engineering competence that gives Litigation Support Service providers a greatly increased ability to respond to client needs.

Our Partner programs allow you to offer expanded services and high volume processing capabilities in a cost and time effective manner.

SERVICES

We convert more formats of data from more formats of magnetic and optical media than anyone.

- ### Email Conversion for Metadata Extraction

  Email server restoration (Exchange, Lotus Notes, GroupWise, cc: Mail, etc...)

  Email user mail box selection (by date range, user, from, to, etc...)

  Email de-duplication

  Keyword searching email body text, including attachments

  Email printing or conversion to other formats, including attachments

- ### Magnetic Tape Backup Restoration

  Every tape media format
  - DLT, AIT, 9-track,IBM 3480/3490/3590, 8MM, 4MM,QIC, LTO, etc...

  Every operating system
  - Windows, Unix, VAX/VMS, Novell, IBM, Wang, AS400 etc...

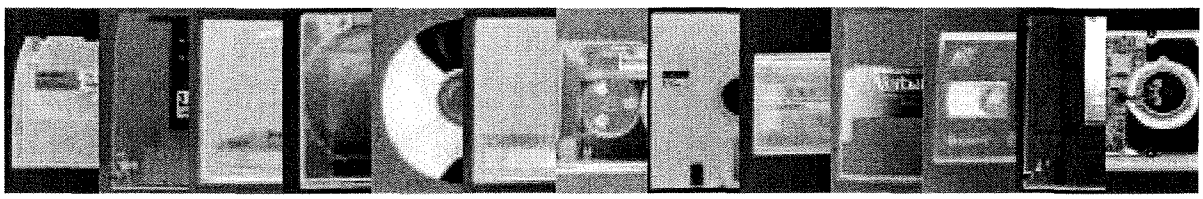
  All backup software
  - Legato, Veritas,ARCserve, Omniback, Backup Exec, Banyan, Tivoli etc...

  Large volumes, quick turnaround
  - Hundreds of tapes per 24 hrs possible
  - 24 / 7 Operation

(Continued)

EXHIBIT 8

tabbies



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America's Leader in Electronic Data Conversion and Discovery

National Data Conversion

Litigation Support Service Provider Program

Gain A Competitive Edge In The Litigation Data Support Market

SERVICES (continued)

- **Optical Disk Reading**

  Most every media format (14", 12", 5.25", 3.5")

  Most every logical format
  - Document imaging, medical imaging, plain file systems

- **Media Duplication** (Evidence preservation)

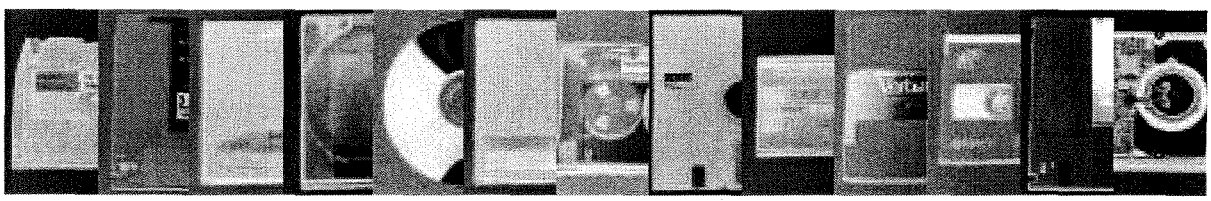
  Most media formats

- **Voice Mail and Call Logging System**

  Comverse, Lanier, Dictaphone etc.
  Duplication of voice call logging media (4MM, CD, optical disk)
  Conversion to other audio formats (audio CD, cassette tape, MP3, etc.)

- **Other Media Conversions**

  Multiple format and size Diskettes (8", 5.25", 3.5" from all operating systems)
  Removable disk packs (SyQuest, Jaz, Bernoulli, CDC, Wang, DEC etc.)



IN THE FIFTEENTH JUDICIAL CIRCUIT

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

CASE NO. CA 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.
Defendant.
_____/

SCHEDULE AS OF 3/30/05

Date	Time	Description
Wed., 3/30	8:00 AM	Hearing on:
		~~(1) CPH motion in limine #14 (comfort letters)~~
		~~(2) CPH motion for Judicial Notice of Strong U-4s.~~
	9:30 AM	Jury Selection ~ Voir Dire
	1:00 PM	Hearing on:
		(1) CPH motion to Deem Admissible 3rd Party Documents
		~~(2) Motion to strike SEC references in Jury Statement~~
	1:30 PM	Jury Selection ~ Voir Dire
	5:00 PM	Parties to Exchange Disclosures re CPH email retention.
	8:00 PM	CPH to provide revised deposition designations to MS

Date	Time	Description
Thurs., 3/31	8:00 AM	(1) Court to Review Deposition Clip of Smith
		(2) Parties to submit comments on Court's Jury Statement re MS litigation misconduct.
	9:30 AM	Jury Selection ~ Voir Dire
	12:00 PM	MS to file bifurcation motion
	1:00 PM	Hearing on:
		(1) MS bifurcation motion
		(2) CPH motion re Phase 1/Phase 2
	1:30 PM	Jury Selection ~ Voir Dire
Fri., 4/1	12:00 noon	On or before this date, MS to advise of date for Doyle deposition (MS to pick from April 1, 2, 3, 8, 9, 10, or 15)
Mon., 4/4	9:30 AM	(1) Parties to serve disclosures re CPH inability to sell Sunbeam stock (per 3/28/05 Order).
		(2) Parties to provide Updated Exhibit List to Clerk
		(3) Jury Instructions Due
		(4) Opening Statements
Tues., 4/5	9:30 AM	Trial
	5:00 PM	Deadline for completion of Grinblatt deposition.

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

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

CASE NO: 2003 CA 005045 AI

PLAINTIFF'S MOTION FOR CORRECTION AND CLARIFICATION OF THE STATEMENT TO BE READ TO THE JURY

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") respectfully requests that the Court correct and clarify the form of its March 29, 2005 Statement, which the Court will read to the jury. Attached to this motion as Exhibit 1 is a clean copy of the Statement that CPH asks the Court to read to the jury during the trial's first phase. Attached as Exhibit 2 is a clean copy of the Statement that CPH asks the Court to read to the jury during the trial's second phase. And attached as Exhibit 3 is a "black-line" comparing these two Statements to the Statement that the Court issued on Tuesday morning, March 29, 2005. The changes reflected in these exhibits

are designed to clarify specific parts of the Statement and to ensure that the Statement clearly conveys to the jury the findings that this Court has made.

Dated: March 30, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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(561) 686-6300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 30th day of March, 2005.

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Florida Bar No.: 169440
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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).
_____/

CASE NO. CA 03-5045 AI

STATEMENT

To Be Read to the Jury in the Trial's First Phase

If you find for CPH and against Morgan Stanley on CPH's claims for aiding and abetting and conspiring to commit fraud, you will then have to consider whether, in addition to compensatory damages, punitive damages are warranted. Later in the trial, I will instruct you about factors to consider when determining whether an award of punitive damages is appropriate. In considering these factors, certain facts already have been established and no longer are subject to dispute, which I shall now read to you. You are required to accept these facts as true.

This case arises out of a 1998 transaction in which Coleman (Parent) Holdings, Inc., which I will call "CPH," sold its 82% interest in The Coleman Company to Sunbeam Corporation. Morgan Stanley served as Sunbeam's financial advisor for the transaction and as the lead underwriter for a $750,000,000.00 debenture offering that Sunbeam used to finance the cash portion of the deal.

On May 12, 2003, CPH sued Morgan Stanley for aiding and abetting and conspiring with Sunbeam to commit fraud. Following established pretrial procedures, CPH formally

requested that Morgan Stanley produce documents related to CPH's claims against Morgan Stanley. A request to produce documents is one of the ways a party can seek to discover additional facts about the claims in a lawsuit and to gather evidence to present at trial. CPH's document request sought and Morgan Stanley was obliged to produce, in essence, all Morgan Stanley documents connected with the Sunbeam deal. The word "documents" specifically included items stored electronically, such as emails.

CPH was concerned that Morgan Stanley was not meeting its obligation to look thoroughly for emails responsive to its discovery requests. In October 2003, CPH filed a motion, which is a written request to the Court, asking that Morgan Stanley be ordered to make a full investigation for email messages, including a search of magnetic backup tapes and computer hard drives.

Morgan Stanley opposed CPH's motion. It represented that it would cost at least hundreds of thousands of dollars and require several months to complete such an investigation and that no email data existed for any time period before January 2000 -- more than a year and a half after the Sunbeam transaction. However, Morgan Stanley never intended to search the backup tapes to respond to CPH's requests. Further, Morgan Stanley knew that some backup tapes contained email dating back at least to 1997.

In 2001 Morgan Stanley decided to create an email "archive." Morgan Stanley's email archive was a centralized storage system for electronic data that could be quickly and inexpensively searched. By June, 2003, Morgan Stanley had decided that the archive would have two components. First, the archive would capture and store new email messages "live," as they were generated. Second, Morgan Stanley wanted to add to the archive historical data dating

back to the late 1990's. That task involved gathering all email backup tapes containing historical emails and then transferring data from the backup tapes onto the archive.

In February 2004, Robert Saunders, an Executive Director of Information Technology for Morgan Stanley, testified under oath to CPH that Morgan Stanley's email archive system would capture and store new emails as they were generated, but could not be used to search old emails. At the time, Mr. Saunders knew but did not disclose to CPH that the old emails already were being added to the archive and that that process was expected to be completed by April, 2004.

CPH still was concerned that all the emails it had requested had not been produced. However, relying on Morgan Stanley's representation that it would cost hundreds of thousands of dollars to search its emails and that the process would take many months, CPH reached an agreement with Morgan Stanley. On April 16, 2004, the Court entered an "Agreed Order." Under the Agreed Order, Morgan Stanley was required to (1) search the oldest full backup tape for each of 36 Morgan Stanley employees involved in the Sunbeam transaction; (2) review emails dated from a key two-month period in early 1998, as well as emails containing any of 29 specific search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004, all privileged emails responsive to CPH's document requests; and (4) certify Morgan Stanley's full compliance with the Agreed Order. CPH reached this agreement without knowing of the existence of the email archive and without knowing that the archive would make searches for emails quick and inexpensive.

In response to the Agreed Order, Morgan Stanley produced about 1,300 pages of emails on May 14, 2004. Morgan Stanley did not, however, certify compliance with the Agreed Order. After prompting by CPH, on June 23, 2004, Morgan Stanley served a Certificate of Compliance

signed by Mr. Arthur Riel, an Executive Director and manager of Morgan Stanley's Law/Compliance Information Technology Group.

As organized by Morgan Stanley, the effort to create the historical data archive had several stages. First, the relevant backup tapes had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor to be processed, and the data returned to Morgan Stanley. Third, Morgan Stanley had to upload the processed data into its email archive. Fourth, Morgan Stanley had to run scripts, or pieces of computer code, to transform this data into a searchable form. Finally, Morgan Stanley had to search the data for emails related to this case. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when the processed data remained in limbo, waiting to be uploaded to Morgan Stanley's archive.

At some point prior to May 6, 2004, Arthur Riel and his team became aware that 1,423 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423 tapes had not been processed and thus had not been included in the archive or searched when Morgan Stanley made its production to CPH on May 14, 2004. Aware of the tapes' discovery, Mr. Riel and other Morgan Stanley personnel knew when Riel executed the certification of full compliance with the Court's Agreed Order that it was false. He and others on Morgan Stanley's email archive team knew by July 2, 2004 that these "Brooklyn tapes" contained email dating back at least to the late 1990's. During the summer of 2004, the Brooklyn tapes were processed and the data sent to the staging area. The scripts were not written and tested to permit the search for emails relating to this case to begin until the middle of January, 2005. Such a search, even if perfectly done, can take weeks.

16div-013647

In the May, 2004, production of documents under the Agreed Order, Morgan Stanley also failed to produce emails from 738 backup tapes found at a Morgan Stanley facility in Manhattan in 2002. These 738 tapes, like the 1,423 Brooklyn tapes, had not been processed and thus had not been included in the archive and searched by either May 14, 2004 or June 23, 2004, the date Morgan Stanley certified that a full search of all tapes had been completed. Mr. Riel and others were told by July 2, 2004 that these tapes contained email dating back at least to 1998. During the summer of 2004, these tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not searched.

In August 2004, Mr. Riel was relieved of his employment responsibilities for reasons unrelated to Morgan Stanley's false certification. He and his team were replaced by a new team headed by Allison Gorman. At that time, the staging area contained about 600 gigabytes of email data that had not yet been uploaded into the Morgan Stanley archive and had not been searched for emails relating to this case. Six hundred gigabytes of data are the equivalent of approximately 12 million to 60 million printed pages.

On November 17, 2004, Morgan Stanley told CPH that Morgan Stanley had discovered additional email backup tapes. The next day, Morgan Stanley produced to CPH about 8,000 pages of emails. But in a series of letters back and forth from November, 2004, to January, 2005, Morgan Stanley refused to provide CPH with details about the backup tapes that allegedly had been "newly discovered" or about any ongoing efforts to restore emails from those backup tapes and to produce those emails to CPH. Morgan Stanley told CPH that the "newly discovered" tapes had not been found in locations where email backup tapes customarily were stored. In fact, the tapes were not "newly discovered" and had been found in locations where tapes customarily were stored.

Only a handful of the Brooklyn tapes had been added to the archive and were thus searched for the November, 2004 production. Morgan Stanley sought to create the impression that all the produced documents came from the Brooklyn tapes. However, none of the November, 2004 production came from "newly found" tapes. Morgan Stanley's responses to inquiries about the November, 2004, production did not disclose the existence of the archive.

Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area. She was not told of the existence of this litigation until five months later, in January 2005. In October, 2004, Ms. Gorman gave the project somewhat greater priority, although even then it did not move as expeditiously as possible. Morgan Stanley did not consider using an outside contractor to expedite the process.

Morgan Stanley found another 169 tapes in January, 2005, that according to Morgan Stanley had been misplaced by its New Jersey storage vendor. Morgan Stanley discovered more than 200 additional unsearched backup tapes openly stored in locations known to be used for tape storage on February 11 and 12, 2005. Morgan Stanley did not voluntarily disclose this information to CPH.

Morgan Stanley claims to have discovered on February 11, 2005 that a flaw in the software it had written had prevented it from locating all email attachments about the Sunbeam transaction. Morgan Stanley also admits that the date-range searches were flawed for many email users who worked in the Morgan Stanley division responsible for the Sunbeam transaction. As a result, additional email messages that appeared to fall within the scope of the Agreed Order had not been given to CPH. Further, it appears that the problem infected Morgan Stanley's original searches in May of 2004.

On February 16, 2005, Morgan Stanley withdrew its certificate of compliance with the Agreed Order.

On February 19, 2005 Morgan Stanley notified CPH that it had found boxes of additional tapes that have not been uploaded into its archive or searched for responsive emails.

In addition, CPH has since found out that:

(1) About 5% of email harvested from the backup tapes was not captured and produced due to an error in transferring data into the archive. The error was concealed from CPH.

(2) The computer programs Morgan Stanley used to process emails into its archive caused the bodies of some messages to be cut off.

(3) An analysis showed that, based on a representative sample, about ten percent of backup tapes were erased after January 2001, in violation of an obligation to preserve the data on the tapes.

(4) A computer programming error caused blind carbon copies not to be captured in the archive.

(5) Another computer programming error prevented the searches from turning up all responsive emails.

(6) Another computer programming error caused the archive to have problems pulling group email involving a set of email users that included Morgan Stanley employees involved in the Sunbeam transaction.

(7) Morgan Stanley's searches looked for only two types of emails. There are other types of emails that were not included in the searches.

(8) An additional 282 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found on February 23, and 25, 2005, and apparently were never searched.

(9) An additional 3,536 tapes that Morgan Stanley should have found and searched by May 14, 2004, were discovered on February 23, 2005, in a security room. These tapes apparently have not been searched.

(10) An additional 2,718 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found on March 3, 2005, at Morgan Stanley's New Jersey off-site storage vendor. These tapes apparently have not been searched either.

(11) An additional 389 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found from March 2 through March 5, 2005. These tapes apparently also have not been searched.

(12) Many of the documents that were eventually produced by Morgan Stanley were produced too late in the pretrial proceedings to be effectively investigated and used by CPH in the pretrial discovery process.

Morgan Stanley did not disclose any of these problems to CPH, as Morgan Stanley was obliged to do. Much of the information now known regarding defects in Morgan Stanley's compliance with the April 16, 2004 Agreed Order was revealed only as a result of Morgan Stanley knowing that an independent computer search expert had been hired to double-check Morgan Stanley's work and was in the process of performing its verification. The searches had not been completed when this trial was begun, and they were terminated without completion because they could not be completed without an unreasonably long delay in the trial. Even then there could be no assurance that Morgan Stanley would locate and produce all of the relevant evidence.

In addition to this misconduct, Morgan Stanley has committed other discovery abuses, including the following:

- An Executive Director of Morgan Stanley's Law Division filed a sworn declaration stating that he did not learn of additional unsearched backup tapes until the end of October, 2004. By filing the declaration, Morgan Stanley sought to imply that no one in Morgan Stanley's Law Division knew of the backup tapes before then. Instead, at least two Morgan Stanley in-house lawyers, including the Executive Director's superior, knew of the tapes no later than June 7, 2004.
- Morgan Stanley improperly failed to produce 138 documents that were required to be produced.
- Morgan Stanley sought to discredit Mr. Riel and thus distance itself from the false June 23, 2004 Certificate of Compliance that he had signed. In doing so, Morgan Stanley sought to hide other damaging information, including information about whether Morgan Stanley continued to erase backup tapes illegally.
- Morgan Stanley failed to provide computer information about the extent of the work it performed in generating Sunbeam-related documents. And then Morgan Stanley falsely represented that it had no such useful information.
- Morgan Stanley misrepresented other facts during the pretrial discovery process.
- Morgan Stanley repeatedly failed to fulfill its discovery obligations.

Because the judicial system cannot function properly when a litigant engages in conduct such as I have described, the law requires that facts which might otherwise be disputed may not be disputed and must be accepted as true. Morgan Stanley's misconduct has resulted in the loss of its right to dispute certain facts in this case.

As I told you at the outset of this Statement, you are required to accept the factual findings that I have read to you as true.

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

COLEMAN (PARENT) HOLDINGS, INC., CASE NO. CA 03-5045 AI

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

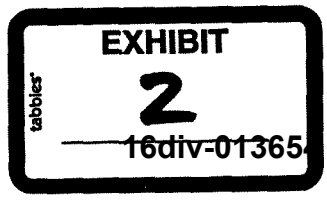
Defendant(s).
_____/

STATEMENT

To Be Read to the Jury in the Trial's Second Phase

In addition to the findings that I described at the beginning of the trial regarding events that occurred before trial, I also advise you of the following facts which you must accept as true and which you may consider in your evaluation of the appropriate amount of punitive damages to be assessed against Morgan Stanley.

Mr. William Strong is the Morgan Stanley managing director who took credit for the fees Morgan Stanley generated from the Sunbeam deal. On March 15, 2004, Morgan Stanley was required to produce, "(a)ll references (positive or negative) to [Mr. Strong's] truthfulness, veracity, or moral turpitude." In response, Morgan Stanley produced some portions of Mr. Strong's annual employment evaluations. While he was working on the Sunbeam transaction, though, Mr. Strong was facing criminal prosecution in Italy for complicity in bribery. Mr. Strong's evaluators at Morgan Stanley knew that fact. Morgan Stanley was obligated to provide the documents about these proceedings to CPH, but did not provide them. In January, 2005, CPH independently discovered evidence of the criminal proceedings in Italy.



It is important that you understand the limited relevance of Mr. Strong's situation. The fact that Mr. Strong was facing criminal prosecution in Italy for complicity in bribery while he was working on the Sunbeam transaction may be relevant to the extent that it created pressures on Mr. Strong and motivated him to push forward with the Sunbeam deal. That is for you to decide. But you must not consider that fact as evidence of Mr. Strong's character or as evidence that Mr. Strong actually engaged in bribery or any other illegal conduct in Italy. Indeed, in 2003, on appeal, an Italian court found Mr. Strong not guilty.

As I told you at the outset of this Statement, you are required to accept the factual findings that I have read to you as true.

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

COLEMAN (PARENT) HOLDINGS, INC., CASE NO. CA 03-5045 AI

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).
_____/

STATEMENT

To Be Read to the Jury in the Trial's First Phase

If you find for CPH and against Morgan Stanley on ~~either, or both, of~~ CPH's claims for aiding and abetting and conspiring to commit fraud, you will then have to consider whether, in addition to compensatory damages, punitive damages are warranted. Later in the trial, I will instruct you about factors to consider when determining whether an award of punitive damages is appropriate. In considering these factors, certain facts ~~have~~ already have been established and no longer are subject to dispute, which I shall now read to you. You are required to accept these facts as true.

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CPH was concerned that Morgan Stanley was not **meeting its obligation to look** thoroughly ~~looking~~ for emails responsive to its discovery requests. In October 2003, CPH filed a motion, which is a written request to the Court, asking that Morgan Stanley be ordered to make a full investigation for email messages, including a search of magnetic backup tapes and computer hard drives.

Morgan Stanley opposed CPH's motion. It represented that it would cost at least hundreds of thousands of dollars and require several months to complete such an investigation and that no email data existed for any time period before January 2000 -- more than a year and a half after the Sunbeam transaction. However, Morgan Stanley never intended to search the backup tapes to respond to CPH's requests. Further, ~~some of~~ Morgan Stanley~~'s~~ **knew that some** backup tapes contained email dating back at least to 1997.

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were generated. Second, Morgan Stanley wanted to add to the archive historical data dating back to the late 1990's. That task involved gathering all email backup tapes containing historical emails and then transferring data from the backup tapes onto the archive.

In February 2004, Robert Saunders, an Executive Director of Information Technology for Morgan Stanley, testified under oath to CPH that Morgan Stanley's email archive system would capture and store new emails as they were generated, but could not be used to search old emails. At the time, Mr. Saunders knew **but did not disclose to CPH** that the old emails already were being added to the archive and that that process was expected to be completed by April, 2004.

CPH still was concerned that all the emails it had requested had not been produced. However, ~~in light of~~**relying on** Morgan Stanley's representation that it would cost hundreds of thousands of dollars to search its emails and that the process would take many months, ~~it~~**CPH** reached an agreement with Morgan Stanley. On April 16, 2004, the Court entered an "Agreed Order." Under the Agreed Order, Morgan Stanley was required to (1) search the oldest full backup tape for each of 36 Morgan Stanley employees involved in the Sunbeam transaction; (2) review emails dated from a key two-month period in early 1998, as well as emails containing any of 29 specific search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004, all privileged emails responsive to CPH's document requests; and (4) certify Morgan Stanley's full compliance with the Agreed Order. CPH reached this agreement without ~~Morgan Stanley's disclosing~~**knowing of** the existence of the email archive ~~or Morgan Stanley's belief~~**and without knowing** that the archive would make searches for emails quick and inexpensive.

In response to the Agreed Order, Morgan Stanley produced about 1,300 pages of emails on May 14, 2004. Morgan Stanley did not, however, certify compliance with the Agreed Order.

After prompting by CPH, on June 23, 2004, Morgan Stanley served a Certificate of Compliance signed by Mr. Arthur Riel, an Executive Director and manager of Morgan Stanley's Law/Compliance Information Technology Group.

As organized by Morgan Stanley, the effort to create the historical data archive had several stages. First, the relevant backup tapes had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor~~, National Data Conversion, Inc., which I will call "NDCI",~~ to be processed, and the data returned to Morgan Stanley. Third, Morgan Stanley had to upload the processed data into its email archive. Fourth, Morgan Stanley had to run scripts, or pieces of computer code, to transform this data into a searchable form. Finally, Morgan Stanley had to search the data for emails related to this case. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when the processed data ~~returned by NDCI~~ remained in limbo, waiting to be uploaded to Morgan Stanley's archive.

At some point prior to May 6, 2004, Arthur Riel and his team became aware that 1,423 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423 tapes had not been processed ~~by NDCI~~ and thus had not been included in the archive or searched when Morgan Stanley made its production to CPH on May 14, 2004. Aware of the tapes' discovery, Mr. Riel and other Morgan Stanley personnel knew when Riel executed the certification of full compliance with the Court's Agreed Order that it was false. He and others on Morgan Stanley's email archive team knew by July 2, 2004 that these "Brooklyn tapes" contained email dating back at least to the late 1990's. During the summer of 2004, the Brooklyn tapes were processed and the data sent to the staging area. The scripts were not written and tested to permit the search for emails relating to this case to begin until the middle of January, 2005. Such a search, even if perfectly done, can take weeks.

In the May, 2004, production of documents under the Agreed Order, Morgan Stanley also failed to produce emails from 738 backup tapes found at a Morgan Stanley facility in Manhattan in 2002. These 738 tapes, like the 1,423 Brooklyn tapes, had not been processed ~~by NDCI~~ and thus had not been included in the archive and searched by either May 14, 2004 or June 23, 2004, the date Morgan Stanley certified ~~compliance.~~ **that a full search of all tapes had been completed.** Mr. Riel and others were told by ~~NDCI by~~ July 2, 2004 that these tapes contained email dating back at least to 1998. During the summer of 2004, these tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not searched.

In August 2004, Mr. Riel was relieved of his employment responsibilities for reasons unrelated to Morgan Stanley's false certification. He and his team were replaced by a new team headed by Allison Gorman. At that time, the staging area contained about 600 gigabytes of email data that had not yet been uploaded into the Morgan Stanley archive and had not been searched for emails relating to this case. Six hundred gigabytes of data are the equivalent of approximately 12 million to 60 million printed pages.

On November 17, 2004, Morgan Stanley told CPH that Morgan Stanley had discovered additional email backup tapes. The next day, Morgan Stanley produced to CPH about 8,000 pages of emails. But in a series of letters back and forth from November, 2004, to January, 2005, Morgan Stanley refused to provide CPH with details about the backup tapes that allegedly had been "newly discovered" or about any ongoing efforts to restore emails from those backup tapes and to produce those emails to CPH. Morgan Stanley told CPH that the "newly discovered" tapes had not been found in locations where email backup tapes customarily were stored. **In fact, the tapes were not "newly discovered" and had been found in locations where tapes customarily were stored.**

Only a handful of the Brooklyn tapes had been added to the archive and were thus searched for the November, 2004 production. Morgan Stanley sought to create the impression that all the produced documents came from the Brooklyn tapes~~, though~~. However, none of the November, 2004 production came from "newly found" tapes. Morgan Stanley's responses to inquiries about the November, 2004, production did not disclose the existence of the archive.

Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area. She was not told of the existence of this litigation until five months later, in January 2005. In October, 2004, Ms. Gorman gave the project somewhat greater priority, although even then it did not move as expeditiously as possible. Morgan Stanley did not consider using an outside contractor to expedite the process.

Morgan Stanley found another 169 ~~DLT~~ tapes in January, 2005, that according to Morgan Stanley had been misplaced by its New Jersey storage vendor. Morgan Stanley discovered more than 200 additional unsearched backup tapes openly stored in locations known to be used for tape storage on February 11 and 12, 2005. Morgan Stanley did not voluntarily disclose this information to CPH.

Morgan Stanley claims to have discovered on February 11, 2005 that a flaw in the software it had written had prevented it from locating all email attachments about the Sunbeam transaction. Morgan Stanley also admits that the date-range searches **were flawed** for **many** email users who ~~had a Lotus Notes platform were flawed, so that~~**worked in the Morgan Stanley division responsible for the Sunbeam transaction. As a result,** additional email messages that appeared to fall within the scope of the Agreed Order had not been given to CPH. Further, it appears that the problem infected Morgan Stanley's original searches in May of 2004. ~~The bulk~~

~~of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the transaction under review here.~~

On February 16, 2005, Morgan Stanley withdrew its certificate of compliance with the Agreed Order.

On February 19, 2005 Morgan Stanley notified CPH that it had found boxes of additional tapes that have not been uploaded into its archive or searched for responsive emails.

In addition, CPH has since found out that:

(1) ~~A migration issue caused about~~**About** 5% of email harvested ~~by NDCI~~ from the backup tapes **was** not ~~to be~~ captured **and produced due to an error in transferring data into the archive. The error was concealed from CPH**.

(2) The computer programs Morgan Stanley used to process emails into its archive caused the bodies of some messages to be ~~truncated, or~~ cut off.

~~(3) About five percent of email harvested from the backup tapes was not added to the archive.~~

(3) ~~(4)~~ An analysis showed that, based on a representative sample, about ten percent of backup tapes were erased after January ~~2001.~~**2001, in violation of an obligation to preserve the data on the tapes.**

(4) ~~(5)~~ A computer programming error caused blind carbon copies not to be captured in the archive.

(5) ~~(6)~~ Another computer programming error prevented the searches from turning up all responsive emails.

(6) ~~(7)~~ Another computer programming error caused the archive to have problems pulling group email involving a set of email users that included Morgan Stanley employees involved in the Sunbeam transaction.

(7) ~~(8)~~ Morgan Stanley's searches looked for only two types of emails. There are other types of emails that were not included in the searches.

(8) ~~(9)~~ An additional 282 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found on February 23, and 25, 2005, and apparently were never searched.

(9) ~~(10)~~ An additional 3,536 tapes that Morgan Stanley should have found and searched by May 14, 2004, were discovered on February 23, 2005, in a security room. These tapes apparently have not been searched.

(10) ~~(11)~~ An additional 2,718 tapes that Morgan Stanley should have found and searched by May 14, ~~2005,~~**2004,** were found on March 3, 2005, at Morgan Stanley's New Jersey off-site storage vendor. These tapes apparently have not been searched either.

(11) ~~(12)~~ An additional 389 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found from March 2 through March 5, 2005. These tapes apparently also have not been searched.

(12) **Many of the documents that were eventually produced by Morgan Stanley were produced too late in the pretrial proceedings to be effectively investigated and used by CPH in the pretrial discovery process.**

Morgan Stanley did not ~~voluntarily~~ disclose any of these ~~ten~~ problems to CPH**, as Morgan Stanley was obliged to do. Much of the information now known regarding defects in Morgan Stanley's compliance with the April 16, 2004 Agreed Order was revealed only as a result of Morgan Stanley knowing that an independent computer search expert had been**

hired to double-check Morgan Stanley's work and was in the process of performing its verification. The searches had not been completed when this trial was begun, ~~when~~and they were terminated without completion because they could not be completed without an unreasonably long delay in the trial. Even then there could be no assurance that Morgan Stanley would locate and produce all of the relevant evidence.

In addition to this misconduct, Morgan Stanley has committed other discovery abuses, including the following:

- An Executive Director of Morgan Stanley's Law Division filed a sworn declaration stating that he did not learn of additional unsearched backup tapes until the end of October, 2004. By filing the declaration, Morgan Stanley sought to imply that no one in Morgan Stanley's Law Division knew of the backup tapes before then. Instead, at least two Morgan Stanley in-house lawyers, including the Executive Director's superior, knew of the tapes no later than June 7, 2004.
- Morgan Stanley improperly failed to produce 138 documents that were required to be produced.
- Morgan Stanley sought to discredit Mr. Riel and thus distance itself from the false June 23, 2004 Certificate of Compliance that he had signed. In doing so, Morgan Stanley sought to hide other damaging information, including information about whether Morgan Stanley continued to erase backup tapes illegally.

- Morgan Stanley failed to provide computer information about the extent of the work it performed in generating Sunbeam-related documents. And then Morgan Stanley falsely represented that it had no such useful information.
- Morgan Stanley misrepresented other facts during the pretrial discovery process.
- Morgan Stanley repeatedly failed to fulfill its discovery obligations.

Because the judicial system cannot function properly when a litigant engages in conduct such as I have described, the law requires that facts which might otherwise be disputed may not be disputed and must be accepted as true. Morgan Stanley's misconduct has resulted in the loss of its right to dispute certain facts in this case.

As I told you at the outset of this Statement, you are required to accept the factual findings that I have read to you as true.

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

COLEMAN (PARENT) HOLDINGS, INC., CASE NO. CA 03-5045 AI

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).
_____/

STATEMENT

To Be Read to the Jury in the Trial's Second Phase

In addition to the findings that I described at the beginning of the trial regarding events that occurred before trial, I also advise you of the following facts which you must accept as true and which you may consider in your evaluation of the appropriate amount of punitive damages to be assessed against Morgan Stanley.

Mr. William Strong is the Morgan Stanley managing director who took credit for the fees Morgan Stanley generated from the Sunbeam deal. On March 15, 2004, Morgan Stanley was required to produce, "(a)ll references (positive or negative) to [Mr. Strong's] truthfulness, veracity, or moral turpitude." In response, Morgan Stanley produced some portions of Mr. Strong's annual employment evaluations. While he was working on the Sunbeam transaction, though, Mr. Strong was facing criminal prosecution in Italy for complicity in bribery. Mr. Strong's evaluators at Morgan Stanley knew that fact. Morgan Stanley ~~failed~~**was obligated** to provide the documents about these proceedings to CPH, ~~though, which in~~**but did not provide**

them. In January, 2005, CPH independently discovered evidence of the criminal proceedings in Italy.

It is important that you understand the limited relevance of Mr. Strong's situation. The fact that Mr. Strong was facing criminal prosecution in Italy for complicity in bribery while he was working on the Sunbeam transaction may be relevant to the extent that it created pressures on Mr. Strong and motivated him to push forward with the Sunbeam deal. That is for you to decide. But you must not consider that fact as evidence of Mr. Strong's character or as evidence that Mr. Strong actually engaged in bribery or any other illegal conduct in Italy. Indeed, in 2003, on appeal, an Italian court found Mr. Strong not guilty.

As I told you at the outset of this Statement, you are required to accept the factual ~~finding~~findings that I have read to you as true.

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S AMENDED NOTICE TO PRODUCE AT TRIAL

Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through the undersigned counsel, and pursuant to Fla. R. Civ. P. Rule 1.410, requests that Plaintiff, Coleman (Parent) Holdings Inc. ("CPH") produce and permit Defendant to inspect and copy each of the documents described below. Morgan Stanley requests that production be made at the commencement of trial in this matter.

DEFINITIONS AND INSTRUCTIONS

Morgan Stanley incorporates by reference the Definitions and Instructions set forth in Defendant's First Request for Production of Document served in this action. In addition, Morgan Stanley defines the following terms as follows:

1. "Dr. Nye" shall mean Blaine F. Nye, Ph.D.

2. "Stanford Consulting" shall mean Stanford Consulting Group, Inc., including any of its affiliates, subsidiaries, and divisions, including but not limited to any of its predecessors and successors, present and former employees, representatives, agents, attorneys, accountants, advisors, or all other persons acting or purporting to act on its behalf.

3. "CPH" shall mean Coleman (Parent) Holdings, Inc. and any of its officers, directors, former or present employees, representatives, or agents.

DOCUMENTS REQUESTED

1. Documents sufficient to establish the total number of hours Dr. Nye and Stanford Consulting have worked on the above-captioned matter to date.

2. Documents sufficient to establish the total fee for which Dr. Nye and Stanford Consulting have requested payment with respect to the provision of his services in the above-captioned matter to date.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this ____ day of March, 2005.

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Rebecca A. Beynon
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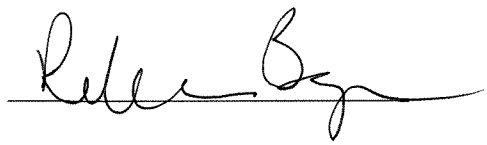
BY: 

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INC.

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF COMPLAINCE WITH COURT ORDER DATED MARCH 23, 2005

Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby gives notice of compliance with this Court's Order on Morgan Stanley's Motion for an Adverse Inference Instruction dated March 23, 2005 and discloses the following witnesses and documents:

WITNESSES

Steven L. Fasman

Defendant will question Mr. Fasman about email policies at MacAndrews & Forbes Holdings, Inc. and its affiliated subsidiaries (collectively "MAFCO"); the practices regarding preservation, deletion, purging, and destruction of email at MAFCO; the history of MAFCO's knowledge of potential and actual litigation involving the subject matter of this case (collectively "Sunbeam litigation"); the failure to preserve, recover, restore, or save MAFCO email in response to notice of Sunbeam litigation; the destruction, erasing, or overwriting of MAFCO

email after receiving notice of Sunbeam litigation; and Plaintiff's production or failure to produce email in response to discovery requests in this litigation.

John F. Ashley

Mr. Ashley is the Chief Technology Officer of CoreFacts, LLC, and an expert in computer forensics. His Curriculum Vitae is attached as Exhibit A to this Notice. Mr. Ashley will testify regarding the email software and backup systems in use at MAFCO since 1997; the ability to recover email from overwritten backup tapes; the email backup and destruction policies at MAFCO; and the impact of those policies on the ability/inability to recover MAFCO email from 1997 and 1998 from the existing MAFCO backup tapes.

EXHIBITS

Number	Date	Description	Exhibit Number (Bates Range)
1.	Various	E-mail Produced from CPH or MAFCO files	MS 880 (CPH 0204718; CPH 1058927-932; CPH 1082183; CPH 1222826-7; CPH 1223821; CPH 1365131; CPH 1365140; CPH 1365218; CPH 1365244-6; CPH 1365273; CPH 1365402; CPH 1365586; CPH 1365642-4; CPH 1366480-483; CPH 1375284; CPH 1381190; CPH 1383282; CPH 1383299-304; CPH 1383307; CPH 1383313; CPH 1383325-6; CPH 1383353; CPH 1383366-8; CPH 1383834-35; CPH 1434531; CPH 1435766-7; CPH 2000041; CPH 2001364; CPH 2005700-2; CPH 1423914)
2.	04/21/1997	Corporate E-Mail Policy	MS 62 (CPH 1433326-3329)
3.	03/30/1998	Letter from Counsel for Coleman to SEC re: Investigation into trading in the securities of Coleman & Co., Inc., Signature Brands USA, Inc., and First Alert Inc. by insiders	MS 75 (CPH 1401528-1534)

4.	07/15/2004	Revised CPH Privilege Log	MS 881
5.	06/06/1998	Barron's via Dow Jones, R. Laing, *Dangerous Games: Did "Chainsaw Al" Dunlap Manufacture Sunbeam's Earnings Last Year?*	MS 882
6.	06/30/1998	Press Release, Sunbeam Audit Committee to Conduct Review of Company's 1997 Financial Statements	MS 511 (CPH 0642892)
7.	08/12/1998	Settlement Agreement between Sunbeam and CPH	MS 96 (CPH 1409665-9704)
8.	08/12/1998	Warrant for the Purchase of Shares of Common Stock of Sunbeam Corporation	MS 96A (CPH 1167614-1167631)
9.	08/12/1998	Amendment to Registration Rights Agreement	MS 96B (CPH 1167632-1167641)
10.	10/20/1998	Verified Derivative Complaint against MAFCO, J. Levin and various other executives, *Shallal v. Charles M. Elson, et al.,* Civ. Action No. 00-8739 (S.D. Fla., Zloch)	MS 883
11.	11/02/1998	Formal Requests for Production of Documents, including electronic documents, to MAFCO, Howard Gittis and others relating to Sunbeam/Coleman Transaction in *Goldstein v. Langerman, et al.*, No. 16587-NC (Del. Ch. Ct.)	MS 884 (CPH 2000001-7)
12.	06/25/1999	Class Action Complaint against The Coleman Co., Sunbeam and various executives in Deutscher v. Dunlap, et al., C.A. No. 16486-NC (Del. Ch. Ct.)	MS 885
13.	01/28/2000, 02/14/2000	Subpoenas to MAFCO seeking electronic documents relating to Sunbeam in *In Re Sunbeam Securities Litig.*, 98-8258-CIV and 98-8773-CIV and 98-8275 (S.D. Fla.)	MS 886 (CPH 1011022-1086 and CPH 1010995-1021)

14.	02/28/2000	Responses and Objections of MacAndrews & Forbes Holdings, Inc. to Subpoenas in the U.S. District Court for the S.D.N.Y. in *In Re Sunbeam Securities Litig.*, 98-8258-CIV and 98-8773-CIV and 98-8275 (S.D. Fla.)	MS 887 (CPH 1011109-1154 and CPH 1011088-1105)
15.	04/14/2000	Verified Derivative Complaint in *Shallal v. Charles M. Elson*, Civ. Action No. 00-8297 (S.D. Fla., Ferguson)	MS 888
16.	06/08/2001	Complaint in *Coleman (Parent) Holdings, Inc. v. Arthur Andersen, LLP* (Fla. Cir. Ct., 15th Jud. Cir., Palm Beach Cty.)	MS 67
17.	10/05/2001	E. Golden Memo to MAFCO and CPH employees re: Document Production for *Coleman (Parent) v. Arthur Andersen*	MS 889 (CPH 2000039-40)
18.	07/14/2003	Morgan Stanley & Co., Inc., First Request for Production of Documents to Plaintiff	MS 890

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by facsimile and first-class mail to all counsel of record on the attached service list on this 30th day of March, 2005.

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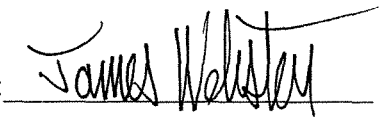
BY: 

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EXHIBIT A

COREFACTS

Curriculum Vitae
John F. Ashley

Name:	John F. Ashley
Address:	CoreFacts, LLC
	14030 Thunderbolt Place, Suite 700
	Chantilly, Virginia 20151
Telephone:	703.375.4345
E-mail	jashley@corefacts.net
D/O/B	December 18, 1951
Nationality:	British
Marital Status:	Married

Professional Experience

July 2000 to December 2000 - CoreFacts Resources, Director of Electronic Evidence Group

January 2001 to present – CoreFacts LLC, Chief Technology Officer

Responsible for designing, equipping and supervising one of the largest corporate computer forensics laboratories on the East Coast. Forensic computer hardware configured to optimize leading forensic software.

Case Studies

- Representation of plaintiff corporation in a contractual dispute with federal government requiring the restoration of 40 back-up tapes held on three different types of magnetic media, containing the Emails and user created data of a staff of 160 persons. The data had been created over a 30-month period and total data size was 183 gigabytes. Three Email packages, MS Outlook, Netscape and ccMail were successfully investigated.
- Defense representation in a software trade secrets dispute requiring the capture of 14 terabytes of data within a 45-day period, without interrupting client's workflow. Data from 320 NT workstations, 90 NT laptops and 15 servers was forensically captured. In excess of 300 search terms were run across the encapsulated data, all relevant Email folders and electronic documents were hosted on secure web servers and reviewed by more than 50 attorneys throughout the US.

- Plaintiff representation in a breach of fiduciary duty, contract, trade secret and misappropriation of confidential information case requiring the capture of data from five NT laptops and the restoration of six months backup of Email data for five former employees.
- Plaintiff representation in a financial mismanagement case requiring the imaging and investigation of 71 laptop drives.

1998 to July 2000 - Greater Manchester Police, Computer Examination Unit, Unit Head

- Responsible for forensic data retrieval from all computers used in crime, covering a population of 3.5 million people.
- Managed workload increase from 153 cases in 1997 to 263 cases in 1999.
- Designed and installed Microsoft NT4 networks of investigation machines.
- Given additional responsibility for the forensic examination of all computers seized in North Wales and the Isle of Man.
- Wide experience of covert intrusion investigations involving imaging, monitoring and surveillance techniques.
- Employed on a consultative basis to manage the establishment of a number of computer forensics units for a variety of UK police forces.
- Provided vulnerability advice to various public bodies.
- Considerable fraud investigation experience involving the majority of accountancy software packages.
- Advised and assisted in technical interviews of computer skilled offenders on many occasions.

1996 to 1998 - GMP Computer Examination Unit, Senior Forensic Investigator

- Managed the accreditation of the Unit to the internationally accepted ISO 9002 standard.
- Designed and Installed a Novell network of investigation machines.
- Interviewed, appointed and trained forensic investigation detectives.

1989-1996 - GMP Obscene Publications Unit, Supervisor / Investigator

- The first police officer in the UK to investigate computer pornography.
- Responsible for data retrieval from pornographers' and pedophiles' computer systems.
- Investigated all forms of technical crime involving computers: hacking, cracking, virus writing, phreaking, mobile phone cloning and credit card duplication.
- Lead investigator in a number of international obscenity and pedophile cases.

Expert Witness Testimony

- Expert witness in the investigation and prosecution of Dr. Harold Shipman for the murder of 15 patients. Testified in relation to 12 of the 15 victims regarding the forensic investigation of a complex computer network that revealed back dated and falsely inserted records leading to the identification of victims who were subsequently exhumed. Provided 500 exhibits and 120 witness statements relating to the suspicious deaths of patients. Shipman found guilty on all counts.
  Filmed and interviewed in the UK, by Ed Bradley, for CBS's 60 Minutes regarding the computer forensics skills deployed in this case. The program was screened in January and June 2001.
  Filmed and interviewed in the UK, by The Learning Channel regarding the computer forensics skills deployed in this case. The program was screened in the US in March 2001.
- Expert witness for the prosecution in a trial involving the large-scale theft of hard drives from Quantum. Performed a forensic financial analysis of the suspect's corporate server accounting packages. Investigation revealed a wide distribution network throughout Europe. Testified in Wolverhampton Crown Court over a five-day period. All five defendants found guilty.
- Expert witness for the prosecution in a trial involving the theft of corporate computers throughout the north of England. Conducted forensic analysis of residual data found on a large number of re-formatted stolen hard disk drives assisted in identifying the original owners of recovered computer equipment. Testified in Manchester Crown Court over a five-day period. Defendant found guilty.
- Expert witness for the prosecution in a trial involving the running of an electronic bulletin board system that was the UK gateway to an international network involved in the worldwide electronic distribution of obscene material. Testified in Maidstone Crown Court. Two defendants found guilty.
- Expert witness for the prosecution in a trial involving the blackmail of 17 individuals. Forensic examination of a word processing system revealed systematic threat letters held in hidden and limbo files. Testified at Manchester Crown Court. Two defendants found guilty.
- Expert witness for the prosecution in a trial involving international disk based distribution of obscene material. Testified at Swindon Crown Court. Defendant found guilty.
- Expert witness for the prosecution in a North Wales case involving distribution of pedophilic material via the Internet. Forensic examination of a computer hard drive refuted defense testimony that an unknown person had used Back Orifice 2000 and Netbus to gain control of the defendant's machine.

Notable Cases

- On behalf of the Securities and Futures Authority, assisted Guernsey Police and a team of forensic accountants, in the forensic on-site imaging and investigation of two computer networks comprising a total of 22 machines in relation to the Sumitomo Corporation $2.6 billion copper fraud.
- On behalf of the FBI, carried out UK Home Office authorized house searches relating to the recovery of computer related data from laptops and other storage media in the possession of two Libyan males suspected of involvement in the bombing of US Embassies in Africa.
- On behalf of the Isle of Man Police, investigated a laptop computer that had been surrendered by the user who had found that he was being anonymously blackmailed via Email. Forensic examination uncovered evidence that the user had gained employment within the IT section of a major offshore bank and had accessed customer's private identification information, which was then provided to a criminal group in Belgium. This group had subsequently blackmailed him via an Email service provider in Texas when he had refused to assist them further with their criminal activity.
- In conjunction with the US Customs and Postal Service, forensically investigated the electronic contents of 18 hard drives used in Denmark to run two pedophile electronic bulletin board systems. Recovered evidence led to the identification of individuals who had downloaded pedophilia in the US and the UK.
- Forensic examination of two encrypted hard drives found evidence that led to the simultaneous worldwide arrest of 120 pedophiles. Many of the individuals involved were exchanging digital images of their actual abuse of children via secure web servers, one of which was known as Wonderland and was located in Boston, Massachusetts.
- Forensic examination of a suspect's computer revealed 35 live viruses and plans to infect viruses in a number of UK corporations. Further analysis revealed the breach of a US based grocery company's customer credit card database, where customer credit card details had been posted on bulletin boards and used by group members for international communication. This led to the simultaneous arrest of five individuals who were collectively known as ArcV, a high profile virus-writing group.
- Forensic examination of a re-formatted hard drive revealed more than 100 fraudulent Internet credit card purchase transactions and the distribution network for the illegally purchased goods.
- On behalf of New Scotland Yard gained access to a number of electronic bulletin boards that were distributing pedophilia. Subsequently provided evidence and assistance to their technical experts and the Metropolitan Police Computer Crime Unit.

Speaking Engagements

- Appeared on a number of television and radio programs in the UK in relation to computer forensics and communications investigation work.
- Profiled on British weekly prime time show "The Cook Report" regarding techniques used in identifying English users of a Danish pedophile Internet bulletin board.
- Lectured on Computer Forensics at Merseyside Police Training College.
- Lectured on Computer Crime at Bramshill Police Staff College.
- Guest speaker at the British Computer Society.
- Lectured on Computer Pornography at the University of Central Lancashire.
- Lectured on Computer Crime at the University of Manchester Institute of Science and Technology.
- Consultant to the Association of Chief Police Officer's Working Group into Computer Pornography.
- Presentations given at the Houses of Parliament and in Manchester to the Home Affairs Select Committee that led to amendments to UK law in relation to the sentencing of child offenders and the creation of a new offence in relation to electronic pseudo photographs.
- Lectured on Computer Forensics to the F3 Forum, a group comprising the majority of UK law enforcement and corporate computer forensic experts.
- Lectured on Computer Forensics at the American University, Washington D.C.
- Lectured on Computer Fraud to the Virginia Society of Certified Public Accountants.

Education

- Educated at Sir John Deane's Grammar School, Northwich, Cheshire graduating in 1969 with Certificates in Mathematics, English Language, Geography and French.
- July 1969 Cheshire Constabulary Police Cadet graduate.
- January to April 1971 Police Training Center Constable graduate.
- October 1977 examination qualification to the rank of Sergeant.
- October 1980 examination qualification to the rank of Inspector.
- November 1989 to December 1993 in force computer investigation training with ongoing IS specialist support.
- 1990 to 1994 various UK based data retrieval and network training seminars.
- 1995 Computer Forensics software and hardware training provided by Computer Forensics Ltd.
- 1996 Advanced Computer Forensics software and hardware training provided by Computer Forensics Ltd.
- 1996 Computer Forensics software and hardware training provided by Authentec Data Recovery specialists.
- 1997 Advanced Computer Forensics techniques software and hardware training provided by Vogon International Ltd.
- 1998 Data Networks and Communications training seminars provided by CLC.
- Computer Forensics experiential learning throughout the period 1989 to 2003.

US Expert Deposition and Testimony

December 2000, selected as an independent computer forensics expert by the Court of Alexandria, Virginia, to assist in an intellectual property dispute that centered on verifying the electronic time and date stamp information of the plaintiff's software prototypes and supporting electronic presentations. Subsequently deposed at length by the plaintiff's attorney. Four days into trial, the case settled at the plaintiff's request, a day prior to my scheduled testimony.
Dr. Bradley S. Fordham v. OneSoft Corporation, et al.,
Civil Action No. 00-1078-A (Eastern District of Virginia)

June 2001, testified and cross-examined as the defendant's computer forensics expert, before the judicial court of Harris County, Texas, in support of a defendant corporation's motion to mirror image and investigate the plaintiff's electronic storage devices. Motion granted.
Gyrodata Inc. v. Baker Hughes Inc. and Baker Hughes Inteq.,
Cause No. 2000-40391 (Harris County, Texas 127th Judicial District)

August 2001, United States District Court for the Eastern District of Virginia, deposed as the plaintiff's computer forensics expert in a multi defendant unsolicited bulk email litigation. I provided expert opinion based on my analysis of more than 125,000 member complaints.
AOL v. Netvision Audiotext, dba Cyber Entertainment Network, et al.,
Civil Action No. 99-1186-A (Eastern District of Virginia)

September 2001, testified and cross-examined as the defendant's computer forensics expert, before the judicial court of Harris County, Texas, in support of a defendant corporation's rebuttal of a motion alleging spoliation of electronic evidence.
Gyrodata Inc. v. Baker Hughes Inc. and Baker Hughes Inteq.,
Cause No. 2000-40391 (Harris County, Texas 127th Judicial District)

October 2001, United States District Court for the Eastern District of Virginia, deposed as the defendants' and counter-plaintiffs' computer forensics expert in a breach of contract, breach of fiduciary duty, theft of trade secrets and violation of the Electronic Communications Privacy Act litigation.
Beyond Technology Corp. v. WebMethods, Inc., and K. Alyssa Berg,
Civil Action No. 01-655-A (Eastern District of Virginia)

October 2001, 53rd District Court of Travis County, Texas, deposed as the plaintiff's computer forensics expert in an employee solicitation and theft of trade secrets case.
Advanced Fibre Communications v. Calix Networks, Inc. and Tony Roach
Cause No.GN102712 (53rd District Court of Travis County, Texas)

June 2002, United States District Court for the Middle District of Florida, Fort Myers Division, deposed as the defendants' and counter-plaintiffs' computer forensics expert in a defamation and tortious interference with business relationships litigation.
Gary Van Meer, and Palm Harbor Medical, Inc. v. Stryker Sales Corp.,
Civil Action No. 2:00-CV-454-FTM-29D (Middle District of Florida)

June 2002, testified and cross-examined as a computer forensics expert, before the United States District Court for the Middle District of Florida, Fort Myers Division, in support of defendants' and counter-plaintiffs' motion alleging spoliation of electronic evidence.
Gary Van Meer, and Palm Harbor Medical, Inc. v. Stryker Sales Corp.,
Civil Action No. 2:00-CV-454-FTM-29D (Middle District of Florida)

September 2002, testified and cross-examined as the plaintiff's computer forensics expert, before the United States District Court for the Southern District of Florida, Miami Division, in support of plaintiff's motion for contempt alleging spoliation of electronic evidence and support of plaintiff's rebuttal of defendant's motion to dismiss preliminary injunction and temporary restraining order.
Plaintiff's motion for contempt upheld, with the defendant being ordered to pay all of the plaintiff's attorney's and expert's fees which were incurred during the investigation and presentation of the contempt motion.
Four Seasons Hotels and Resorts B.V., Four Seasons Hotels (Barbados) Limited,
Four Seasons Hotels Limited, and Four Seasons Caracas, C.A. v. Consorcio Barr, S.A.,
and Carlos L. Barrera,
Case No. 01-4572 CIV-MOORE

October 2002, United States District Court for the Eastern District of Virginia, deposed as the plaintiff's computer forensics expert in a litigation concerning unsolicited bulk email. I provided expert opinion concerning the persons responsible for the transmission of tens of millions of unsolicited bulk commercial emails.
Verizon Internet Services, Inc. v. Alan Ralsky, et al.,
Civil Action No. 01-0432-A (Eastern District of Virginia)

October 2002, testified as the defendant's computer forensics expert, before the United States District Court for the Middle District of Florida, Fort Myers Division, in response to plaintiffs' motion alleging spoliation of electronic evidence.
Gary Van Meer, and Palm Harbor Medical, Inc. v. Stryker Sales Corp.,
Civil Action No. 2:00-CV-454-FTM-29D (Middle District of Florida)

November 2002, testified and cross-examined as the defendant's computer forensics expert, before the United States District Court for the Middle District of Florida, Fort Myers Division, in rebuttal of plaintiffs' computer forensics expert's evidence supporting a motion alleging spoliation of electronic evidence.
Gary Van Meer, and Palm Harbor Medical, Inc. v. Stryker Sales Corp.,
Civil Action No. 2:00-CV-454-FTM-29D (Middle District of Florida)

January 2003, testified and cross-examined, at trial, as plaintiff's computer forensics expert, before the United States District Court for the Southern District of Florida, Miami Division. Testimony encompassed Computer Fraud and Abuse, Electronic Communication Interception, and Trade Secret Theft.
Four Seasons Hotels and Resorts B.V., Four Seasons Hotels (Barbados) Limited, Four Seasons Hotels Limited, and Four Seasons Caracas, C.A. v. Consorcio Barr, S.A., and Carlos L. Barrera,
Case No. 01-4572 CIV-MOORE

January 2003, rebuttal testimony and cross-examination, at trial, as plaintiff's computer forensics expert, before the United States District Court for the Southern District of Florida, Miami Division. Testimony encompassed Computer Fraud and Abuse, Electronic Communication Interception, and Trade Secret Theft.
Rebuttal testimony proved that one of the defendant's key electronic exhibits was not original, but had been fabricated in an attempt to deceive the court.
Final Judgement issued May 9, 2003 awarded plaintiffs $4,877,600.00 in damages.
Four Seasons Hotels and Resorts B.V., Four Seasons Hotels (Barbados) Limited, Four Seasons Hotels Limited, and Four Seasons Caracas, C.A. v. Consorcio Barr, S.A., and Carlos L. Barrera,
Case No. 01-4572 CIV-MOORE

May 2003, United States District Court for the District of Columbia, deposed as the defendant's computer forensics expert in a litigation alleging racial bias and discrimination.
Provided testimony in relation to the alteration, fabrication and authentication of email.
The plaintiff withdrew his allegations a short time later and the case settled.
Timothy Dean and Michelle Dean v. Starwood Hotels & Resorts Worldwide Inc., d/b/a The St. Regis Washington by Starwood Hotels and Resorts
Civil Action No. 1:02CV00867

July 2003, testified and cross-examined, at trial, as plaintiff's computer forensics expert, before the United States District Court for the Eastern District of Virginia, Alexandria Division. Testimony encompassed tortious interference with business relationships, breach of contract, civil conspiracy and spoliation of data.
Plaintiff's awarded in excess of $565,000 in damages.
CACI Dynamic Systems, Inc. v. Delphinus Engineering, Inc., and James R. Everitt, Jr.,
Civil Action No. 02-1454-A

January 2004, testified and cross-examined, in arbitration, as claimant's computer forensics expert, before an Arbitration Tribunal of the American Arbitration Association in Charleston, South Carolina. Testimony encompassed tortious interference with business relationships, breach of contract and spoliation of data. Arbitrator subsequently awarded claimant $10,567,478 and reimbursement of claimant's arbitration costs.
CACI Dynamic Systems, Inc. v. V. Allen Spicer
AAA Case No. 16 160 00725 02

March 2004, United States District Court for the Southern District of New York, deposed as the defendant's computer forensics expert in a litigation alleging unfair dismissal. Provided testimony in relation to the creation and authentication of a document produced in paper form by the plaintiff.
Michelle Bell v. Davis & Partners, LLC and Wolf Management & Leasing, LLC,
Civil Action No. 03CV4175

November 2004, testified and cross-examined as plaintiff's computer forensics expert, at a Preliminary Injunction Hearing, before the United States District Court for the District of Maryland, Northern Division. Testimony encompassed the defendants' co-ordinated use of data destruction utilities to prevent the discovery of the plaintiff's stolen source code and proprietary information.
Bowe Bell + Howell Company v. Document Services Inc., and Albert M. Harris et al,
Civil Action No. 043418

November 2004, testified and cross-examined as plaintiff's computer forensics expert, in rebuttal to counter defendants' testimony and provide pattern analysis to show the extent of defendants' data destruction efforts, at a Preliminary Injunction Hearing, before the United States District Court for the District of Maryland, Northern Division.
The Judge granted the plaintiff broad injunctive relief and found that the defendants had intentionally destroyed relevant documents and indicated that an adverse inference instruction will likely be given to the jury as a sanction.
Bowe Bell + Howell Company v. Document Services Inc., and Albert M. Harris et al,
Civil Action No. 043418

March 2005, provided testimony, in arbitration, as respondent's computer forensics expert, before an Arbitration Tribunal of the American Arbitration Association in Philadelphia, Pennsylvania. Testimony encompassed the restoration of Lotus Notes e-mail and attachments from multiple back-up tapes.
Boston Power Group v. Alstom Power, Inc.
AAA Case No. 14-Y-110-01410-03

March 2005, testified and cross-examined as plaintiff's computer forensics expert, at a Preliminary Injunction Hearing, before the United States District Court for the Eastern District of Michigan, Southern Division. Testimony encompassed the defendants' theft of trade secrets and proprietary information and the defendants' spoliation of evidence. The Judge granted the plaintiff broad injunctive relief and scheduled a spoliation hearing for April 2005.
Henkel Corporation v. Charles K. Cox and Chemtool Corporation,
Civil Action No. 050735

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE TO PRODUCE AT TRIAL

Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through the undersigned counsel, and pursuant to Fla. R. Civ. P. Rule 1.410, requests that Plaintiff, Coleman (Parent) Holdings Inc. ("CPH") produce and permit Defendant to inspect and copy each of the documents described below. Morgan Stanley requests that production be made at the commencement of trial in this matter.

DEFINITIONS AND INSTRUCTIONS

Morgan Stanley incorporates by reference the Definitions and Instructions set forth in Defendant's First Request for Production of Document served in this action.

"CPH" shall mean Coleman (Parent) Holdings, Inc. and any of its officers, directors, former or present employees, representatives, or agents.

DOCUMENTS REQUESTED

1. All documents that discuss or refer to a demand by CPH to Sunbeam Corporation pursuant to the Amended Registration Rights Agreement attached as Exhibit B to MS Exhibit 96,

to register any Sunbeam security, Sunbeam warrant or Sunbeam security issued pursuant to a warrant. (Attached).

2. All documents that discuss or refer to a demand by CPH to Sunbeam Corporation pursuant to the Registration Rights Agreement (MS 278) to register any Sunbeam security, Sunbeam warrant or Sunbeam security issued pursuant to a warrant. (Attached)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 30 day of March, 2005.

Mark C. Hansen
James M. Webster, III
Rebecca A. Beynon
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999

Counsel for Morgan Stanley & Co. Incorporated

Joseph Ianno, Jr. (FL Bar No. 655351)
CARLTON FIELDS, P.A.
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West Palm Beach, FL 33401
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BY:

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Jerold S. Solovy
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JENNER & BLOCK, LLC
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Suite 1200 – West Tower
West Palm Beach, FL 22401-6136

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE TO PRODUCE AT TRIAL

Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through the undersigned counsel, and pursuant to Fla. R. Civ. P. Rule 1.410, requests that Plaintiff, Coleman (Parent) Holdings Inc. ("CPH") produce and permit Defendant to inspect and copy each of the documents described below. Morgan Stanley requests that production be made at the commencement of trial in this matter.

DEFINITIONS AND INSTRUCTIONS

Morgan Stanley incorporates by reference the Definitions and Instructions set forth in Defendant's First Request for Production of Document served in this action. In addition, Morgan Stanley defines the following terms as follows:

1. "Dr. Nye" shall mean Blaine F. Nye, Ph.D.

2. "Stanford Consulting" shall mean Stanford Consulting Group, Inc., including any of its affiliates, subsidiaries, and divisions, including but not limited to any of its predecessors and successors, present and former employees, representatives, agents, attorneys, accountants, advisors, or all other persons acting or purporting to act on its behalf.

3. "CPH" shall mean Coleman (Parent) Holdings, Inc. and any of its officers, directors, former or present employees, representatives, or agents.

DOCUMENTS REQUESTED

1. Documents sufficient to establish the total number of hours Dr. Nye has worked on the above-captioned matter to date.

2. Documents sufficient to establish the total fee for which Dr. Nye has requested payment with respect to the provision of his services in the above-captioned matter to date.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 30 day of March, 2005.

Mark C. Hansen
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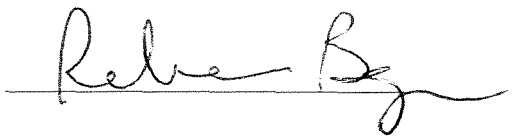
BY: 

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE TO PRODUCE AT TRIAL

Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through the undersigned counsel, and pursuant to Rule 1.350 of the Florida Rules of Civil Procedure, requests that Plaintiff, Coleman (Parent) Holdings Inc. ("CPH") produce and permit Morgan Stanley to inspect and copy each of the documents described below. Morgan Stanley requests that the production be made at the commencement of trial in this matter. Inspection will be made by visual observations, examination, or copying.

DEFINITIONS AND INSTRUCTIONS

Morgan Stanley incorporates by reference the Definitions and Instructions set forth in Defendant's First Request for Production of Documents served in this action. In addition, Morgan Stanley defines the following terms as follows:

1. "MAFCO" shall mean MAFCO Holdings Inc., and any of its officers, directors, former or present employees, representatives, or agents.

DOCUMENTS REQUESTED

1. Ronald O. Perelman's "personal balance sheet" for the years 1998, 1999, and 2000 and any related materials, including (but not limited to):

a. Back-up or support for each balance on the personal balance sheets that relate to Sunbeam, Sunbeam warrants, or MAFCO, including any balance that is a summation or aggregation of several balances one of which relates to Sunbeam or Sunbeam warrants;

b. All correspondence or other documents related to transmittal of the personal balance sheets to any bank or other financial institution.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 30 day of March, 2005.

Mark C. Hansen
James M. Webster, III
Rebecca A. Beynon
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Counsel for Morgan Stanley & Co. Incorporated

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Telephone: (561) 659-7070
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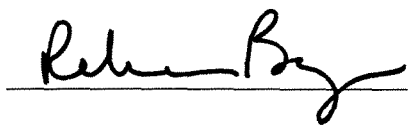
BY: 

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER AND DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court, in Chambers, on its own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Clerk is directed to docket and file the original of Jack Kawa's letter received by the undersigned March 30, 2005 and serve a copy upon all counsel, attaching a certificate of service.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 30 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO TAKE JUDICIAL NOTICE PURSUANT TO F.S. §90.202 AND §90.203

THIS CAUSE came before the Court March 30, 2005 on Coleman (Parent) Holdings Inc.'s Motion to Take Judicial Notice Pursuant to F.S. §90.202 and §90.203, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted. The Court takes judicial notice that the documents attached to the Motion were publicly filed with the appropriate regulatory authority on the dates indicated.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 30 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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1615 M Street, NW, Suite 400
Washington, DC 20036

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON PLAINTIFF'S MOTION IN LIMINE (NO. 14) TO BAR EVIDENCE AND ARGUMENT THAT THE "COMFORT LETTERS" REFERRED TO IN THE PUBLIC MERGER AGREEMENT OR THE HOLDINGS MERGER AGREEMENT INCLUDE THE MARCH 19, 1998 AND MARCH 25, 1998 COMFORT LETTERS

THIS CAUSE came before the Court March 30, 2005 on Plaintiff's Motion in Limine (No. 14) to Bar Evidence and Argument that the "Comfort Letters" Referred to in the Public Merger Agreement or the Holdings Merger Agreement Include the March 19, 1998 and March 25, 1998 Comfort Letters, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted. The parties and their counsel shall not refer to or attempt to introduce into evidence, argue, or otherwise place before the jury, that the "comfort letters" referred to in the Public Merger Agreement or the Holdings Merger Agreement include the March 19, 1998 and March 25, 1998 comfort letters, without first proffering the good faith basis to believe the matter is relevant and otherwise admissible outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 30th day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

16div-013700

copies furnished:
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Washington, DC 20036

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO DEEM CERTAIN THIRD-PARTY DOCUMENTS ADMISSIBLE AT TRIAL

THIS CAUSE came before the Court March 31, 2005 on Coleman (Parent) Holdings Inc.'s Motion to Deem Certain Third-Party Documents Admissible at Trial, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Coleman (Parent) Holdings Inc.'s Motion to Deem Certain Third-Party Documents Admissible at Trial is Granted, in part. The Court finds Sunbeam's certification under Florida Statute §90.803(b) sufficient for CPH Trial Exhibits 66, 72, 98, and 128.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 30 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Rebecca Beynon, Esq.
Sumner Square, 1615 M Street, NW, Suite 400
Washington, DC 20036

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO TAKE JUDICIAL NOTICE PURSUANT TO F.S. §90.202 AND §90.203

THIS CAUSE came before the Court March 30, 2005 on Coleman (Parent) Holdings Inc.'s Motion to Take Judicial Notice Pursuant to F.S. §90.202 and §90.203, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted. The Court takes judicial notice that the documents attached to the Motion were publicly filed with the appropriate regulatory authority on the dates indicated.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 30 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

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2139 Palm Beach Lakes Blvd.
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Rebecca Beynon, Esq.
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1615 M Street, NW, Suite 400
Washington, DC 20036

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER AND DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court, in Chambers, on its own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Clerk is directed to docket and file the letter from Roger Koch dated March 30, 2005.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 31 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
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Rebecca Beynon, Esq.
Sumner Square
1615 M Street, NW, Suite 400
Washington, DC 20036

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION TO CLARIFY THE PROPER SCOPE OF THE LIABILITY AND PUNITIVE PHASES OF TRIAL

THIS CAUSE came before the Court March 31, 2005 on Morgan Stanley's Motion to Clarify the Proper Scope of the Liability and Punitive Phases of Trial, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion to Clarify the Proper Scope of the Liability and Punitive Phases of Trial is Granted, in part. Phase I of the trial shall be limited to the liability, if any, of MS & Co. for compensatory damages. Phase II shall address entitlement and, if necessary, amount of punitive damages to be assessed if liability is determined in CPH's favor.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 31 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

John Scarola, Esq.
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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION TO CLARIFY THE PROPER SCOPE OF THE LIABILITY AND PUNITIVE PHASES OF TRIAL

THIS CAUSE came before the Court March 31, 2005 on Morgan Stanley's Motion to Clarify the Proper Scope of the Liability and Punitive Phases of Trial, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion to Clarify the Proper Scope of the Liability and Punitive Phases of Trial is Granted, in part. Phase I of the trial shall be limited to the liability, if any, of MS & Co. for compensatory damages. Phase II shall address entitlement and, if necessary, amount of punitive damages to be assessed if liability is determined in CPH's favor.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 31 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

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

CASE NO: 2003 CA 005045 AI

PLAINTIFF'S MOTION IN LIMINE NO. 29 TO BAR EVIDENCE AND ARGUMENT IDENTIFYING THE BENEFICIARY OF ANY PUNITIVE-DAMAGES AWARD

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") hereby moves for an Order barring Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") from introducing any evidence or argument at trial identifying CPH, Mr. Ronald O. Perelman, or any other person or entity as a potential beneficiary of a punitive-damages award. Allowing such evidence or argument would run afoul of the bedrock principle that identifying or highlighting the recipient of punitive damages confuses the issues, misleads the jury, and undermines the twin purposes of punitive damages — to punish wrongdoers and to deter others from similar misconduct.

Citing a century of Florida Supreme Court and appellate court precedents, the Fifth District has held that "a jury's evaluation whether to punish a [fraudfeasor] with an award of exemplary damages" must not be tainted by "evidence or commentary" about the fraud victim and his financial status, because such evidence is irrelevant, is highly prejudicial, is "calculated to unduly arouse jurors' sympathy," and can "improperly skew the jury's deliberations." *Batlemento v. Dove Fountain, Inc.*, 593 So. 2d 234, 241-42 & n.15 (Fla. 5th DCA 1991) (citing, *inter alia*, *Baggett v. Davis*, 169 So. 372 (Fla. 1936); *Seaboard Air Line Ry. v. Smith*, 43 So. 235 (Fla. 1907); *Rogers v. Myers*, 240 So. 2d 516 (Fla. 1st DCA 1970); *Deese v. White*

Belt Dairy Farms, Inc., 160 So. 2d 543 (Fla. 2d DCA 1964)), *rev. denied*, 601 So. 2d 551 (Fla. 1992); *see also Velilla v. VIP Care Pavilion Ltd.*, 861 So. 2d 69, 72-73 (Fla. 4th DCA 2003), *rev. denied*, 885 So. 2d 389 (Fla. 2004).

Indeed, in cases involving a potentially sizeable punitive-damages award, courts routinely bar any mention of who will be the recipient of such damages. *See, e.g., Burke v. Deere & Co.*, 6 F.3d 497, 512 (8th Cir. 1993) (reversing a punitive-damages award where counsel's closing argument noted that 75% of that award would be paid into a civil trust fund and thus the plaintiff would receive only 25%), *cert. denied*, 510 U.S. 1115 (1994); *Ford v. Uniroyal Goodrich Tire Co.*, 476 S.E.2d 565, 570-71 (Ga. 1996) (rejecting as improper the defendant's attempt to "shift[] the jury's focus from the critical question of the defendant's conduct to the inappropriate question of the plaintiff's compensation," and reaffirming that "it is irrelevant who will be compensated by the award or how much the plaintiff will ultimately receive"); *Honeywell v. Sterling Furniture Co.*, 797 P.2d 1019, 1020 (Or. 1990) (holding that "a jury should be told nothing concerning the distribution of an award of punitive damages").

The Ninth Circuit in *In re Exxon Valdez*, 229 F.3d 790 (9th Cir. 2000), surveyed these and other precedents from across the country, including analogous Florida authorities, and concluded: "It is uniformly held that absent exceptional circumstances, a jury deliberating on the amount of a [punitive] damages award is not to consider where the funds that constitute that award will come from, or where they will end up." *Id.* at 798-99 (citing, *inter alia*, FLA. STAT. ANN. § 768.041 (West 2000); *Builder's Square, Inc. v. Shaw*, 755 So. 2d 721, 725 (Fla. 4th DCA 1999), *rev. denied*, 751 So. 2d 1250 (Fla. 2000)). This Court should follow these precedents and prevent Morgan Stanley from highlighting whether any punitive damages assessed against Morgan Stanley "will end up" benefiting Mr. Perelman, CPH, or anyone else.

CONCLUSION

Accordingly, the Court should enter an Order barring Morgan Stanley from introducing any evidence or argument at trial identifying CPH, Mr. Ronald O. Perelman, or any other person or entity as a potential beneficiary of a punitive-damages award.

Dated: April 1, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

Jerold S. Solovy
Ronald L. Marmer
Jeffrey T. Shaw
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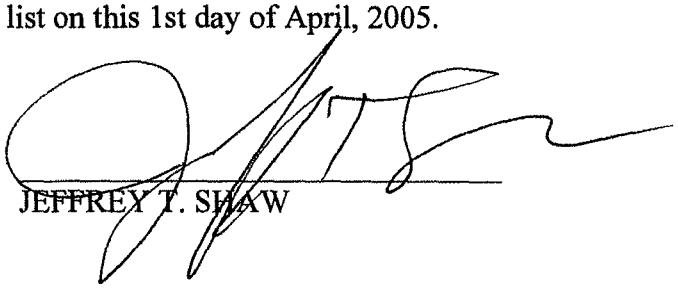
(561) 686-6300

16div-013713

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 1st day of April, 2005.



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Attorneys for Coleman (Parent) Holdings Inc.

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10450 v4

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

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

NOTICE OF TAKING VIDEOTAPED DEPOSITION

To: Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

Mark C. Hansen, Esq.
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
c/o Kirkland & Ellis LLP
222 Lakeview Avenue, Suite 260
West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings, Inc. ("CPH") will take the deposition upon oral examination of the following witnesses pursuant to the Florida Rules of Civil Procedure, on the date, time, and at the location set forth below:

DEPONENT	DATE AND TIME	LOCATION
Mark Grinblatt	April 4, 2005 at 9:30 a.m.	Searcy Denney Scarola Barnhart & Shipley P.A. 2139 Palm Beach Lakes Blvd. West Palm Beach, FL 33409
James Doyle	April 15, 2005 at 9:30 a.m.	Searcy Denney Scarola Barnhart & Shipley P.A. 2139 Palm Beach Lakes Blvd. West Palm Beach, FL 33409

The deposition will be recorded by stenographic and audio-visual means and will be taken before a person authorized to administer oaths and will continue day to day until completed. The videographer will be Visual Evidence, 601 N. Dixie Highway, West Palm Beach, Florida 33401. You may attend and cross-examine.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile and hand delivery to all counsel on the attached Service List, this 1st day of April, 2005.

Dated: April 1, 2005

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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Deirdre E. Connell
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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC., CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.
_____/

PLAINTIFF'S NOTICE TO PRODUCE AT TRIAL

Coleman (Parent) Holdings Inc. ("CPH"), by and through the undersigned counsel, requests, pursuant to Rule 1.350 of the Florida Rules of Civil Procedure, that Defendant, Morgan Stanley & Co., Inc. ("MS & Co."), produce and permit Plaintiff to inspect and copy each of the documents described below. It is requested that the aforesaid production be made at the commencement of trial in this matter. Inspection will be made by visual observation, examination, and/or copying.

DEFINITIONS

Except as otherwise provided below, CPH incorporates by reference the Definitions and Instructions set forth in Plaintiff's First Request for Production of Documents served in this action on May 9, 2003. In addition, CPH defines the following terms as follows:

1. "Dr. Grinblatt" shall mean Mark Grinblatt, Ph.D.

2. "Bates White" shall mean Bates White, LLC, including any of its affiliates, subsidiaries, and divisions, including but not limited to any of its predecessors and successors,

present and former employees, representatives, agents, attorneys, accountants, advisors, or all other persons acting or purporting to act on its behalf.

DOCUMENTS REQUESTED

1. Documents sufficient to establish the total number of hours Dr. Grinblatt has worked on the above-captioned matter to date.

2. Documents sufficient to establish the total fee for which Dr. Grinblatt has requested or will request payment with respect to the provision of his services in the above-captioned matter.

3. Documents sufficient to establish the total number of hours Bates White has worked on the above-captioned matter to date.

4. Documents sufficient to establish the total fee for which Bates White has requested or will request payment with respect to the provision of its services in the above-captioned matter.

Dated: April 1, 2005

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

Jerold S. Solovy
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777 South Flagler Drive
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West Palm Beach, Florida 33409
(561) 686-6300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and hand delivery to all counsel on the attached list on this 1st day of April, 2005.

Michael T. Brody

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JENNER&BLOCK

April 1, 2005

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Chicago
Dallas
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Jerold S. Solovy
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jsolovy@jenner.com

BY HAND DELIVERY

Honorable Elizabeth T. Maass
Division A1
Courtroom 11B
Circuit Court of the 15th Judicial Circuit
205 North Dixie Highway
West Palm Beach, FL 33401

Re: Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.

Dear Judge Maass:

Enclosed is CPH's motion *in limine* No. 29 to bar evidence and argument identifying the beneficiary of any punitive damages award. Also enclosed are the authorities cited in the motion. This motion is scheduled to be head by Your Honor on Monday, April 4, 2005.

Sincerely,

Jerold S. Solovy

Jerold S. Solovy
Enclosures

cc: All Counsel of Record

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: April 4, 2005

TIME: 9:30 a.m.

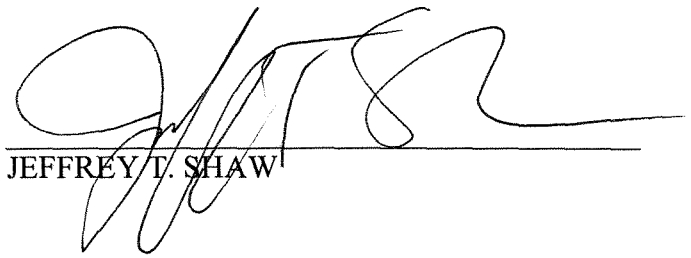
JUDGE: Honorable Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

Plaintiff's Motion In Limine No. 29 To Bar Evidence And Argument Identifying The Beneficiary Of Any Punitive-Damages Award

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 1st day of April, 2005.



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Attorneys for Coleman(Parent)Holdings Inc.

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9966

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO QUASH AMENDED TRIAL SUBPOENA AND NOTICE TO PRODUCE PERSONAL BALANCE SHEETS OF RONALD PERELMAN

Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, hereby requests that this Court enter an Order quashing the amended trial subpoena directed at Ronald Perelman, and the notice to produce requesting Mr. Perelman's personal balance sheets for 1998-2000 that Morgan Stanley faxed and hand delivered to CPH's counsel in Florida on March 30, 2005. *See* Exs. A-B. The subpoena and notice to produce are invalid for several reasons.

First, the amended trial subpoena is invalid because it was "served" by fax and hand delivery on CPH's counsel in Florida. That is not a proper mode of service. Morgan Stanley may point to the fact that CPH agreed to accept service of Mr. Perelman's initial trial subpoena, which is true, but CPH did not agree to accept fax service of any amended subpoenas.

Second, the amended subpoena and the notice to produce are improper because they are both directed at eliciting Mr. Perelman's personal financial information. This Court repeatedly has ruled that personal financial information is irrelevant and not to be mentioned at trial. In the February 17, 2005 ruling on CPH's motion *in limine* No. 2, for example, this Court directed that "[n]either party may present evidence or argument concerning the wealth, net worth, income, or

financial status of any principal or employee of CPH or a related entity." *See* Ex. C. During the Court hearing that day, this Court further cautioned Morgan Stanley's counsel to refrain from making references to the "worth or lifestyle" of CPH principals because such references are "totally inappropriate." *See* Ex. D, 2/17/05 Tr. 1025. The Court also observed at that hearing that the personal financial statements of individuals are irrelevant because they do not relate to business sophistication. *See id.* at 1028. And as Steven Fasman testified before this Court on March 21, 2005, Mr. Perelman's personal balance sheets are irrelevant, because there is nothing in them relating to Sunbeam (*see* Ex. E, 3/21/05 Tr. 4726):

> Q. Now when you did the search that you did in response to the Court's February 17th Order, did you expect to find documents contain the Sunbeam valuation numbers, the 450 number in any files relating to Mr. Perelman's personal balance sheet?
>
> A. No.
>
> Q. And why is that?
>
> A. I'm familiar with Mr. Perelman's personal balance sheet and with respect to the holdings of MacAndrews & Forbes, it just has a single line for those holdings and doesn't have any detail as to the holdings that MacAndrews itself has. It's just a single entry for the value of MacAndrews itself.

Third, Mr. Perelman's personal balance sheets contain the type of information that Florida courts routinely bar the jury from hearing. "The general rule is that during trial no reference should be made to the wealth or poverty of a party, nor should the financial status of one party be contrasted with the other's." *Batlemento v. Dove Fountain, Inc.*, 593 So. 2d 234, 241-42 (Fla. 5th DCA 1991); *see id.* (noting that "inherent in our system of trial by jury is always a danger the jury will be influenced by the wealth or power of one party or another"); *Silbergleit v. First Interstate Bank of Fargo*, 37 F.3d 394, 398 (8th Cir. 1994) (concluding that references to plaintiff's wealth were "highly prejudicial").

WHEREFORE, for the foregoing reasons, CPH respectfully requests that this Court enter an Order quashing the amended trial subpoena directed at Mr. Perelman and the notice to produce relating to Mr. Perelman's personal balance sheets.

Dated: April 2, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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Ronald L. Marmer
Jeffrey T. Shaw
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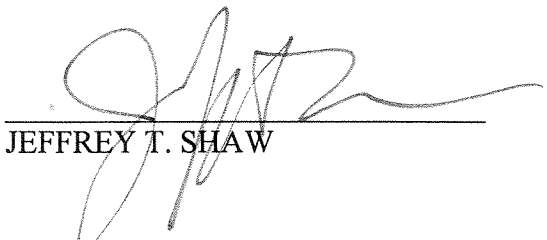
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 2nd day of April, 2005.



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10523 v1

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

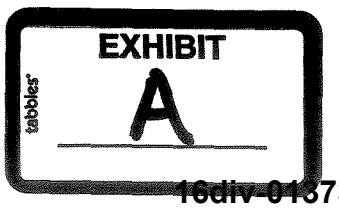
CASE NO: CA 03-5045 AI

AMENDED SUBPOENA FOR TRIAL

THE STATE OF FLORIDA

TO: **RONALD O. PERELMAN**
36 East 63rd Street
New York, NY 10021

YOU ARE COMMANDED to appear before The Honorable Elizabeth Maass, Judge of the Circuit Court, at the Palm Beach County Courthouse, Courtroom 11A, 205 North Dixie Highway, West Palm Beach, Florida on April 4, 2005* at 9:30 a.m., to testify in this action and to have with you your "personal balance sheet" for the years 1998, 1999, and 2000, all back-up or support for each balance on the personal balance sheets that relate to Sunbeam, Sunbeam warrants, or MAFCO Holdings Inc. ("MAFCO"), including any balance that is a summation or aggregation of several balances one of which relates to Sunbeam or Sunbeam warrants, and all correspondence or other documents related to transmittal of the personal balance sheets to any bank or other financial institution.



16div-013732

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.
Case No: CA 03-5045 AI
Subpoena for Trial

If you fail to appear, you may be in contempt of court. You are subpoenaed to appear by the following attorneys, and unless excused form this subpoena by these attorneys or the Court, you shall respond to this Subpoena as directed.

Dated: March 30, 2004

BY: _____
Rebecca A. Beynon
For the Court

Joseph Ianno, Jr.,
Florida Bar No: 655351
CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
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Telephone: (202) 326-7999

Counsel for Defendant
Morgan Stanley & Co. Incorporated

***BEFORE YOU APPEAR**

PLEASE CALL JOYCE DILLARD, CLA AT (561) 659-7070 TO CONFIRM THE EXACT TIME AND DATE YOU WILL BE CALLED TO TESTIFY

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

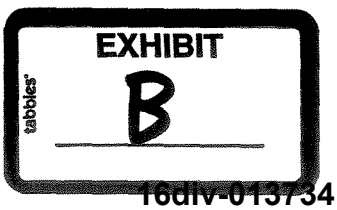
MORGAN STANLEY'S NOTICE TO PRODUCE AT TRIAL

Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through the undersigned counsel, and pursuant to Rule 1.350 of the Florida Rules of Civil Procedure, requests that Plaintiff, Coleman (Parent) Holdings Inc. ("CPH") produce and permit Morgan Stanley to inspect and copy each of the documents described below. Morgan Stanley requests that the production be made at the commencement of trial in this matter. Inspection will be made by visual observations, examination, or copying.

DEFINITIONS AND INSTRUCTIONS

Morgan Stanley incorporates by reference the Definitions and Instructions set forth in Defendant's First Request for Production of Documents served in this action. In addition, Morgan Stanley defines the following terms as follows:

1. "MAFCO" shall mean MAFCO Holdings Inc., and any of its officers, directors, former or present employees, representatives, or agents.



DOCUMENTS REQUESTED

1. Ronald O. Perelman's "personal balance sheet" for the years 1998, 1999, and 2000 and any related materials, including (but not limited to):

a. Back-up or support for each balance on the personal balance sheets that relate to Sunbeam, Sunbeam warrants, or MAFCO, including any balance that is a summation or aggregation of several balances one of which relates to Sunbeam or Sunbeam warrants;

b. All correspondence or other documents related to transmittal of the personal balance sheets to any bank or other financial institution.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 30 day of March, 2005.

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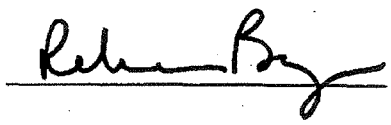
BY: 

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

ORDER ON Plaintiff's **MOTION IN LIMINE NUMBER** 2

THIS CAUSE having come before this Court on February 17, 2005 upon Plaintiff's Motion in Limine Number 2, and the Court having reviewed the pleadings on file, heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is Granted.

HH Neither party may present evidence or argue concerning the wealth, net worth, income, or financial status of any ~~of~~ principal or employee of CPH or a related entity. This ruling is without prejudice to either party's right to present evidence or argue concerning an individual's business or financial sophistication.

WPB#589635.1

EXHIBIT
C
16div-013708

"Granted" for purposes of the Motion in Limine addressed in this Order shall mean that the parties and their counsel shall not refer to or attempt to introduce into evidence, or otherwise place before the jury, the matter referred to without first proffering the good faith basis to believe that the matter is relevant and admissible outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 17 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

WPB#589635.1

Copies furnished to:

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West Palm Beach, FL 33401
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IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

VOLUME 8

- - -

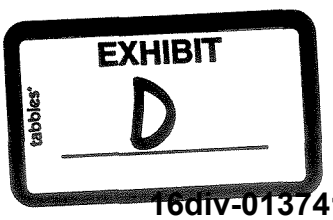
TRANSCRIPT OF PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida

Thursday, February 17, 2005

9:30 a.m. - 12:08 p.m.



MR. SOLOVY: I'm so offended, Your Honor.

MR. SCAROLA: I just want to make sure, Your Honor, because I understand that talking about the magnitude of various business transactions is relevant based upon Your Honor's view. But one of those business transactions ought not to be the sale of Mr. Perelman's Palm Beach home for $70 million. I don't want the defendants to take the ruling that Your Honor has made to the point of somehow believing that that could possibly be relevant or material.

THE COURT: The only thing I will warn you guys, and I see Mr. Davidson is going to sit down, is we don't want this -- I was taken aback by some of the references in some of the memos I had from Morgan Stanley at what I thought were gratuitous references at the worth or lifestyle of some of the principals of plaintiff. And I would assume at trial we would not have that because it's totally inappropriate.

MR. IANNO: Understood.

THE COURT: And please understand if it happens once, I may assume it was inadvertent. If it happens again, I don't have any compunction about admonishing attorneys in the presence of jurors. Okay. If I think an attorney understands something is not supposed to happen and it happens again, you know, you bear the consequences of it, which means be very careful before you talk houses or trips or anything to come up and say, hey, can I ask this question.

MR. DAVIDSON: You're just focusing on one point. Frankly, I don't think that kind of stuff in a jury helps you anyway. I think it boomerangs. I think I understand exactly what Your Honor is saying. And don't think it's an issue at all. We do know, though, that during --

THE COURT: This is the ski trips? Those are future motions. I know those are coming up.

MR. DAVIDSON: I don't think there are any motions on them.

THE COURT: I know I had read at one

point argument, and maybe it's in one of the arguments that Mr. Gittis was skiing during part of this transaction, and that may have a bearing on how involved he was in this transaction. I thought that was in one of these motions.

MR. BEMIS: I don't know if it's a motion. It's the deal.

THE COURT: I read it some place.

MR. BEMIS: There is some motions that touch upon that theory of deal distraction that the reason they didn't look was because they were distracted --

THE COURT: I know I remember specifically reading about he was the one, allegedly, skiing in Aspen.

MR. SOLOVY: There was a Mr. Maher.

THE COURT: I knew somebody was. Maybe somebody -- I know that's an issue we need to talk about. That's not what we're talking about here.

MR. DAVIDSON: No.

MR. SOLOVY: When you see Mr. Gittis, you'll know he doesn't ski, Your Honor.

MR. IANNO: The first part of what the

court announced is fine, the wealth, the net worth, the financial status.

THE COURT: I was just reading from the title.

MR. IANNO: I don't know if that impinges on what the court has ruled is admissible.

THE COURT: Talking about personal financial statements.

MR. SOLOVY: Talking about the financial status of the individuals.

THE COURT: Which I think is not really related to the business sophistication.

MR. IANNO: That's fine, Your Honor. I just wanted to -- that's fine, Your Honor. What it says is , "Granted in part and denied in part. Neither -- oh, no, it's granted. "Neither party may present evidence or argument concerning the wealth, net worth, income or financial status of any principal or employee of CPH or related entity. This ruling is without prejudice to either party's right to present evidence or argument concerning an individual's business or financial

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. VOLUME 43

MORGAN STANLEY & CO., INC.,

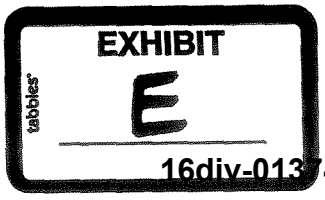
Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Monday, March 21, 2005
1:40 p.m. - 6:45 p.m.



A. For those documents that had not previously been collected through the efforts that are referenced in the Exhibit, I made sure that his entire department, including Miss Kessel, had given me all of the documents that were not previously called for in the prior productions that were responsive to the new requests.

Q. Now when you did the search that you did in response to the court's February 17th order, did you expect to find documents containing the Sunbeam valuation numbers, the 450 number in any files relating to Mr. Perelman's personal balance sheet?

A. No.

Q. And why is that?

A. I'm familiar with Mr. Perelman's personal balance sheet. And with respect to the holdings of MacAndrews & Forbes, it just has a single line for those holdings and doesn't have any detail as to the holdings that MacAndrews itself has. It's just a single entry for the value of MacAndrews itself.

Q. Now there's also been a question in this matter about -- let me withdraw that. Have Mr. Perelman's, have the files relating to Mr. Perelman's personal balance sheet now been searched?

Westlaw.

37 F.3d 394
37 F.3d 394, 63 USLW 2220, 65 Fair Empl.Prac.Cas. (BNA) 1718, 65 Empl. Prac. Dec. P 43,359
(Cite as: 37 F.3d 394)

▷

United States Court of Appeals,
Eighth Circuit.
David SILBERGLEIT, Plaintiff-Appellant,
v.
FIRST INTERSTATE BANK, OF FARGO, N.A.,
Defendant-Appellee.
No. 93-3327.

Submitted May 13, 1994.
Decided Oct. 5, 1994.

Former employee brought age discrimination claim against former employer. The United States District Court for the District of North Dakota, Karen K. Klein, United States Magistrate Judge, found for employer. Employee appealed. The Court of Appeals, Floyd R. Gibson, Senior Circuit Judge, held that employee was entitled to new trial based on opposing counsel's comments and questions which suggested to or informed jury that plaintiff was a millionaire, received unemployment benefits, and was Jewish.

Reversed and remanded.

West Headnotes

[1] Federal Courts ⚿905
170Bk905 Most Cited Cases
Question by counsel that places prejudicial information before jury may warrant new trial.

[2] Federal Courts ⚿823
170Bk823 Most Cited Cases
Court of Appeals gives great deference to ruling of trial judge on questions of evidence.

[3] Federal Courts ⚿628
170Bk628 Most Cited Cases

[3] Federal Courts ⚿635
170Bk635 Most Cited Cases
Where question by counsel places prejudicial information before jury, unless error is promptly and clearly preserved by objection, Court of Appeals does not reverse.

[4] Federal Courts ⚿825.1
170Bk825.1 Most Cited Cases
Trial judge has broad discretion in deciding whether question by counsel to witness is so prejudicial as to warrant new trial, and Court of Appeals reviews this ruling for abuse of discretion only.

[5] Federal Courts ⚿905
170Bk905 Most Cited Cases
Plaintiff in age discrimination suit was entitled to new trial based on opposing counsel's comments and questions which suggested to or informed jury that plaintiff was a millionaire, received unemployment benefits, and was Jewish; totality of such comments and questions emphasized irrelevant information and demonstrated persistent effort to get such information before jury, and opposing counsel could not escape responsibility for questions concerning plaintiff's religious beliefs by claiming he would not attempt to solicit antiSemitism from jury because opposing counsel himself was Jewish. Fed.Rules Evid.Rule 401, 28 U.S.C.A.

***395** Randolph E. Stefanson, Moorhead, MN (Todd W. Foss, on the brief), for appellant.

J. Philip Johnson, Fargo, ND (Robert A. Feder, on the brief), for appellee.

Before MAGILL, Circuit Judge, JOHN R. GIBSON , Senior Circuit Judge, and MAGNUSON [FN*], District Judge.

> FN* The HONORABLE PAUL A. MAGNUSON, United States District Judge for the District of Minnesota, sitting by designation.

JOHN R. GIBSON, Senior Circuit Judge.

Following an adverse jury verdict in his age discrimination suit, David Silbergleit appeals from an order of the magistrate judge [FN1] denying his motion for judgment notwithstanding the verdict or

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a new trial. He claims the magistrate judge should have granted his motion because: 1) counsel for First Interstate Bank of Fargo made several improper remarks; and 2) the verdict was contrary to the evidence. We conclude that several comments and questions by the bank's attorney constituted prejudicial error, and therefore, we reverse the magistrate judge's order and remand for a new trial.

> FN1. The case was tried by a United States Magistrate Judge, by consent of the parties.

Silbergleit argues counsel for the bank inquired about three irrelevant and prejudicial subjects. Because these are the only issues we reach, we need not recite the details underlying Silbergleit's discrimination claim.

First, Silbergleit complains about references to and questions about his personal wealth. Over Silbergleit's objection, the bank put into evidence Silbergleit's 1991 and 1992 personal income tax returns. While cross-examining Silbergleit, the bank's counsel asked Silbergleit about interest income he earned from his bond holdings, including the following:

> Q. So if--even if you had some investments that weren't quite as good and at 5 percent, you would own over a million dollars of municipal bonds?
> A. Oh, what I want to tell you is that--
> Q. Is that a yes or is that a no?
> A. Yes. But--
> Q. Okay.
> A. --I had a lot of 13 percenters in there from years ago so this wouldn't make your analogy all correct.
> Q. So it's not quite a million dollars?
> A. It wouldn't be anywhere near that.
> Q. Are you suggesting to me that you are not a millionaire?

Although the court sustained Silbergleit's objection to the bank's final question, and instructed the jury that the amount of holdings ***396** that Silbergleit has or had at the time he was employed was not relevant, the bank's counsel later obtained testimony from another witness about Silbergleit's assets. The bank's representative at trial, Beaton, who presumably was present at the court's earlier admonition, testified that Silbergleit made clients "fee conscious." When asked about the basis for his allegation, Beaton testified:

> Q. What other evidence do you have that you could share with us with respect to what this fee bias means?
> A. At one point in time, David [Silbergleit] approached me at a point in time when we were attempting to develop assets. We had made note of the fact that we were going to try and grow the asset bases of the department and he approached me individually and advised me that he would move his one million dollar personal trust account to us provided we waive the fees.

Silbergleit urges that the bank representative's answer was not responsive to the question, and was simply part of the bank's strategy to portray Silbergleit as rich. The magistrate judge agreed that the bank counsel's questions about Silbergleit's wealth were irrelevant and prejudicial. *Silbergleit v. First Interstate Bank,* No. A3-92-98, slip op. at 4 (D.N.D. Aug. 31, 1993). Nevertheless, the court decided that the statements were not sufficiently prejudicial to warrant a new trial, reasoning that the court mitigated the prejudice by instructing the jury to disregard the amount of Silbergleit's holdings. *Id.* It is highly significant that a bank officer made this latter statement as to Silbergleit's $1 million personal trust account after the court's first instruction that Silbergleit's wealth was not relevant.

Silbergleit also contends that prejudicial error occurred when the bank's counsel questioned him about unemployment compensation benefits. Although the magistrate judge ruled that unemployment compensation benefits were not deductible from damages, the court permitted counsel to delve into the fact that Silbergleit received unemployment benefits to show Silbergleit's lack of diligence in finding another job.

Silbergleit argues that such benefits are not deductible from a damage award, and thus, the magistrate judge erred in admitting this evidence. *See Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit* § 5.12, Committee Comments (1993). He contends the admission of this evidence was prejudicial, especially in light of questions about his personal wealth. Silbergleit also complains about the court's failure to instruct the jury that a damage award is

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not reduced by unemployment compensation benefits. In denying Silbergleit's new trial motion, the court acknowledged that it ruled that unemployment benefits are not deductible from damages, but also stated that the federal circuits are split on the issue. Slip op. at 5. It concluded that because of the conflict in the law, the bank's counsel did not act unconscionably in questioning Silbergleit. *Id.* The court also determined that the error was harmless because the jury never reached the issue of damages. *Id.* The magistrate judge stated that the subject of unemployment benefits would be commented upon in instructions at the end of the trial, yet she refused an instruction Silbergleit offered clearly informing the jury that unemployment benefits should not be deducted from an age discrimination award.

Finally, Silbergleit urges that reversible error occurred when the bank's counsel referred to Silbergleit's religion. During Silbergleit's cross-examination, the bank's counsel indicated to the jury that he was Jewish and that Silbergleit was also Jewish. For example, counsel stated that only he and Silbergleit would know what the Yiddish word, "nachos [sic]," [FN2] meant. Similarly, counsel referred to "what you and I call tachlos [sic]." [FN3] Counsel also asked Silbergleit whether he had filed any claim of discrimination on the basis of religion. When Silbergleit denied filing a claim on the basis of religion, counsel then asked why he did ***397** not file such a claim. Finally, counsel tried to impeach another witness [FN4] by asking: "And, of course, since 1985, you've had a rather strong dislike for me because of my response to your statement in the paper what the Waffen-SS did to the Jews in World War II." While acknowledging that the bank's counsel implied that Bonemeyer was anti-Semitic and perhaps a Nazi sympathizer, and that the bank's counsel "exceeded the bounds of appropriate impeachment," the court concluded the questioning did not reflect on Silbergleit, and therefore, did not prejudice him. Slip op. at 6.

> FN2. Condensing the somewhat fanciful definition given by the bank, the Yiddish word "naches" seems roughly equivalent to "pride."
>
> FN3. The bank defines "tachlis" as "down to brass tacks."
>
> FN4. Dr. Maurice Bonemeyer, one of Silbergleit's former customers, testified that Silbergleit provided "[a]bsolutely excellent" service. On cross-examination, the bank's counsel attempted to impeach Bonemeyer. First, he brought out the fact that Bonemeyer had sued a partner in the bank counsel's law firm. Second, he attempted to elicit that Bonemeyer's real reason for testifying was that he had a personal grudge against the bank's counsel because of a letter he had written in response to a quote made by Bonemeyer in the local newspaper.

The bank has explanations for each of Silbergleit's allegations of prejudice. It characterizes Silbergleit's allegation of prejudice stemming from the use of two Yiddish words in a week-long trial as "absurd and outrageous." It says the exchange occurred in the midst of a discussion designed to show that the term "shooting dogs" has a colloquial meaning in some circles not unlike Yiddish words in Jewish circles. The bank defends its interrogation of Bonemeyer as the proper subject of cross-examination. The bank argues that the court properly admitted Silbergleit's tax returns to compare Silbergleit's income before and after the termination, as well as to show the existence of substantial capital which Silbergleit could now reinvest free of restrictions imposed on him as a trust officer. Finally, the bank defends its inquiry into unemployment benefits on the ground that the magistrate judge did not decide admissibility issues until the fourth day of trial, and that the Eighth Circuit law on this question is unclear. The bank acknowledges the Eighth Circuit Model Jury Instructions that unemployment benefits are not deductible from a damages award, but argues that the authority for the instruction, *Doyne v. Union Electric Co.*, 953 F.2d 447 (8th Cir.1992), deals with a deduction for pension, not unemployment, benefits. [FN5]

> FN5. We note that the comment cites cases from other circuits holding that unemployment benefits are not deductible from a damage award. *See Manual of Model Civil Jury Instructions for the*

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> *District Courts for the Eighth Circuit* § 5.12, Committee Comments (1993). After trial, this court held that unemployment benefits should not be deducted from awards of backpay under the Age Discrimination in Employment Act. *Gaworski v. ITT Commercial Financial Corp.*, 17 F.3d 1104, 1114 (8th Cir.1994), *cert. denied,* 513 U.S. 946, 115 S.Ct. 355, 130 L.Ed.2d 310 (1994).

[1][2][3][4] A question by counsel that places prejudicial information before the jury may warrant a new trial. *Sanders-El v. Wencewicz,* 987 F.2d 483, 484 (8th Cir.1993); *McBryde v. Carey Lumber Co.,* 819 F.2d 185, 188 (8th Cir.1987). We give great deference to the ruling of the trial judge on questions of evidence. Unless the error is promptly and clearly preserved by objection, we do not reverse. The trial judge has broad discretion in deciding whether a question is so prejudicial as to warrant a new trial, and we review this ruling for abuse of discretion only. *McBryde,* 819 F.2d at 188.

[5] In the case before us, the magistrate judge instructed the jury to disregard the evidence of Silbergleit's wealth, but later allowed another question to be answered by a bank officer on this subject. The magistrate judge stated that she would instruct at the conclusion of the evidence on the receipt of unemployment benefits, but she denied a proposed instruction on this subject. Silbergleit failed to object to the several questions and comments relating to Silbergleit's religion. We believe, however, that the mix of religion, wealth and receipt of unemployment benefits presented a powerful combination of irrelevant evidence having no bearing on the merits of the case, that were designed to impassion and prejudice the jury against Silbergleit.

Under these circumstances, our recent decision in *Sanders-El* is instructive. In that case, after the trial court had sustained an objection to evidence about the plaintiff's arrest record, defense counsel dropped a lengthy computer printout in front of the ***398** jury. We began by recognizing that improper questioning by counsel generally entitles the aggrieved party to a new trial if it conveys improper information to the jury and prejudices the opposing litigant. *Sanders-El,* 987 F.2d at 484 (quoting *Williams v. Mensey,* 785 F.2d 631, 637 (8th Cir.1986)). *Sanders-El* pointed to the court's duty to prevent the jury from considering extraneous issues and to guard against the influences of passion and prejudice. *Id.* at 484. We said that the misconduct of counsel may be such that its effect cannot be overcome by admonishing the jury or rebuking counsel; in such case a court should grant a new trial. *Sanders-El* focused not only on counsel's conscious impropriety, but on the nature of the information that counsel attempted to bring before the jury. We said that whether errors had a significant prejudicial influence on the jury is "a fine question of judgment in which precedents give little guidance." *Id.* at 485. We also observed that the case was a close one, which increased the possibility that improper conduct could have influenced the jury's verdict. Moreover, the printout incident was neither isolated nor accidental, but counsel repeatedly attempted to use irrelevant and prejudicial evidence.

In the context of the entire trial, we are convinced that the magistrate judge abused her discretion in denying Silbergleit's new trial motion. [FN6] It is not necessary that we decide whether any one of these evidentiary issues would be a sufficient basis for the grant of the new trial, as that is not the issue before us. When all the objectionable episodes are viewed together, however, we conclude that evidence came before the jury that was improper and prejudicial. *See* Fed.R.Evid. 401. In so far as there is any doubt that portions of the evidence were not the subject of objection, the evidence, taken together, certainly is plain error. Silbergleit's religious beliefs have absolutely no relevance in this lawsuit. The bank's counsel cannot escape responsibility for these questions and comments by claiming that he would not attempt to elicit anti-Semitism from the jury because he himself is a Jew. References to Silbergleit as a millionaire and to his receipt of unemployment compensation benefits were also highly prejudicial. As Silbergleit suggests, the totality of the bank counsel's line of questions and comments emphasized irrelevant information having no bearing on the issues of the case, and demonstrated a persistent effort to get this information before the jury. The introduction of this evidence was such as to distract the jury from considering the evidence on the material issues before it. As a result, Silbergleit

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did not receive a fair trial. Therefore, the magistrate judge abused her discretion in denying his motion for new trial.

> FN6. Because we decide that a new trial was warranted because of the improper questions and answers, we do not reach the issue of whether the magistrate judge erred in refusing to order a new trial because the verdict was contrary to the weight of the evidence. In our earlier decisions we have expressed doubt as to whether we may consider such an argument. *See Lee v. Rapid City Area School Dist.,* 981 F.2d 316, 332 (8th Cir.1992) (en banc); *Green v. American Airlines, Inc.,* 804 F.2d 453, 455 (8th Cir.1986).

We reverse and remand for a new trial.

37 F.3d 394, 63 USLW 2220, 65 Fair Empl.Prac.Cas. (BNA) 1718, 65 Empl. Prac. Dec. P 43,359

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Westlaw.

593 So.2d 234
593 So.2d 234, 17 Fla. L. Weekly D83
(Cite as: 593 So.2d 234)

H

District Court of Appeal of Florida,
Fifth District.
Sam BATLEMENTO, et al., Appellants,
v.
DOVE FOUNTAIN, INC., et al., Appellees.
No. 89-2460.

Dec. 27, 1991.
Rehearing Denied Feb. 21, 1992.

Restaurant purchasers brought suit against vendors for fraud, breach of management contract, violation of Business Opportunities Act and for civil redress of criminal practices. The Circuit Court for Orange County, W. Rogers Turner, J., rendered judgment in favor of purchasers, and vendors appealed. The District Court of Appeal, Griffin, J., held that: (1) allegations were inadequate to state cause of action for fraud, but reversal was not required on this basis; (2) Business Opportunities Act did not apply to sale of ongoing restaurant business; (3) highly unusual verdict form, which did not distinguish between individual or corporate defendants as to any count and contained no method for jurors to apportion amount of compensatory or punitive damages attributable to any defendant, was not fundamental error; (4) any item proved only through written damage summary was improperly awarded as part of damages; (5) purchasers could recover damages for losses incurred after they discovered the fraud; and (6) evidence that fraud exhausted all purchasers' resources was not relevant to determination of award of punitive damages.

Affirmed in part, reversed in part and remanded.

West Headnotes

[1] Fraud ⚿43
184k43 Most Cited Cases

[1] Fraud ⚿45
184k45 Most Cited Cases
Fraud pleading must identify representation of fact and how that representation is false. West's F.S.A. RCP Rule 1.120(b).

[2] Pleading ⚿18
302k18 Most Cited Cases
Fraud pleading, which did no more than identify subject matter of alleged false representations of fact, lacked required particularity. West's F.S.A. RCP Rule 1.120(b).

[3] Appeal and Error ⚿1039(4)
30k1039(4) Most Cited Cases
After favorable verdict for plaintiff, judgment is subject to reversal for defect in pleading only if defendant has been prejudiced by the error.

[4] Appeal and Error ⚿1039(4)
30k1039(4) Most Cited Cases
Judgment for restaurant purchasers on fraud claim against vendors was not subject to reversal for lack of factual content in the pleading, where one purchaser had identified his claims in a deposition early in the case.

[5] Fraud ⚿27
184k27 Most Cited Cases
Restaurant purchasers failed to establish fraud based on vendors' representation that $13,000 monthly would cover all expenses of restaurant when, in fact, it took more than $17,000 monthly to pay expenses and debt of the business.

[6] Fraud ⚿64(1)
184k64(1) Most Cited Cases
There was sufficient evidence to create jury question on issue of whether circumstances leading up to purchase of restaurant constituted fraud on purchasers.

[7] Trade Regulation ⚿862.1
382k862.1 Most Cited Cases
Business Opportunities Act did not apply to sale of ongoing restaurant business, even with attendant management agreement, use of certain recipes, formulae and menu, and purchase of some supplies. West's F.S.A. § 559.80 et seq.

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[8] Appeal and Error ⚿218.1
30k218.1 Most Cited Cases
Highly unusual verdict form, which did not distinguish between individual or corporate defendants as to any count and contained no method for jurors to apportion amount of compensatory or punitive damages attributable to any defendant, was not fundamental error, where appellants were fully aware of this feature of the verdict form, and some trial strategy presumably motivated its use.

[9] Evidence ⚿186(1)
157k186(1) Most Cited Cases
Rule of evidence requiring "timely written notice" of intent to use summary must be strictly complied with, especially where record contains no evidence that underlying data from which summary was compiled was made available to complainant. West's F.S.A. § 90.956.

[10] Appeal and Error ⚿233(2)
30k233(2) Most Cited Cases
Renewed objection to written damage summary was not necessary when summary was admitted, where court had reserved ruling on issue when counsel had previously objected.

[11] Damages ⚿184
115k184 Most Cited Cases
Any item proved only through written damage summary was improperly awarded as part of damages. West's F.S.A. § 90.956.

[12] Appeal and Error ⚿882(14)
30k882(14) Most Cited Cases
Having chosen to submit damage issues to jury without differentiation among claims, appellants could not complain about it on appeal.

[13] Fraud ⚿60
184k60 Most Cited Cases
Defrauded restaurant purchasers could recover damages for losses incurred after they discovered the fraud, where operator of the chain, as part of the inducement to purchaser to buy the business, undertook continuing undefined contractual duty to manage the restaurant.

[14] Evidence ⚿103
157k103 Most Cited Cases
Generally, no reference should be made during trial to wealth or poverty of a party, nor should financial status of one party be contrasted with the other's.

[15] Damages ⚿94
115k94 Most Cited Cases
In determining amount of punitive damages, jury should examine enormity of the offense and finances of party against whom damages are assessed.

[16] Fraud ⚿57
184k57 Most Cited Cases
Evidence that fraud exhausted all plaintiffs' resources was not relevant to determination of award of punitive damages.
***236** Charles Evans Davis and Stephen P. Kanar, Orlando, for appellants.

Douglas C. Spears of Pleus, Adams & Spears, P.A., Orlando, for appellees.

GRIFFIN, Judge.

This is an appeal from a final judgment upon a jury verdict rendered in favor of plaintiffs/appellees Vito and Ida Maniaci (the "Maniacis") and Dove Fountain, Inc. (plaintiffs) for fraud, breach of contract, and violation of the Business Opportunities Act. [FN1]

> FN1. Appellees also sued for violation of section 772.102, Florida Statutes (1989), but the jury found in favor of the appellants on this claim.

This case arises from the Maniacis' purchase of a Casa Mia restaurant on Conway Road in Orlando, Florida in 1983. Casa Mia was a chain of primarily family-owned Italian restaurants which were located solely within the Orlando area. The chain was started by three brothers, Sam Batlemento, Luigi Badalamente and their brother Joe (now deceased). Many of the restaurants were operated by family members, but a small minority of the restaurants were operated by outsiders who frequently owned an equity interest. The remaining interests were owned by Casa Mia Pizzeria & Ristorante, Inc., a Florida corporation ("Casa Mia"), which in turn was owned by Florentes, Inc., a corporation owned in equal shares by the Badalamente brothers.

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Appellee Vito Maniaci, a postal worker, who resided in Michigan, was a lifelong friend of the Badalamentes. Over the years he had invested in a number of different business ventures with the Badalamentes on which he had always made money. Among these ventures was a Big Boy restaurant and a duplex in the Orlando area. Since 1976, he had frequently visited Sam Batlemento and Luigi Badalamente in Orlando and the parties had discussed the possibility of Vito's participation in the Casa Mia business.

In the late 1970's, Casa Mia underwent expansion and the brothers allegedly decided to franchise the restaurants. [FN2] Either in anticipation of the franchise or Maniaci's retirement in 1986, talks concerning the Maniacis' purchase of a restaurant began to accelerate in 1983. In August, 1983, the Maniacis decided to send their twenty-one year old son, Dan Maniaci, to Orlando to learn the business by working in the existing Casa Mia restaurants.

> FN2. According to the record, there were nine Casa Mia restaurants in existence in 1983. Only one was still in operation at the time of trial.

By November 1, 1983, Vito had completed his investigation of various locations and had decided to purchase Casa Mia's existing Conway Road location. The restaurant was owned by Buona Fortuna, a corporation owned in equal shares by Casa Mia and University, Inc. University in turn was owned in equal shares by Casa Mia and Franco Ferrari (a son-in-law of one of the Badalamentes). The purchase price was $99,000. At the closing, on November 29, 1983, the Maniacis paid $33,000 down in cash and assigned the company two promissory notes totalling $8,000. The remaining balance of $58,000 was to be paid at the rate of 12% under the terms of the purchase money note given Buona Fortuna.

At the time of the sale, the Maniacis entered into a Management Agreement with Casa Mia. Under the terms of the agreement, the Maniacis agreed to pay Casa Mia five percent of gross sales in exchange for Casa Mia's management expertise, although no specific management responsibilities were set forth in the agreement. [FN3]

> FN3. The pertinent provisions of the agreement were as follows:
> WHEREAS, Maniaci is engaged in the restaurant business; and
> WHEREAS, Casa Mia is an organization composed of skilled members and engaged in managing various business enterprises; and
> WHEREAS, Maniaci is in need of a skilled management organization to run its affairs; NOW, THEREFORE, in consideration of the mutual benefits to be derived, each from the other, the parties hereto agree as follows:
> Maniaci shall pay to Casa Mia five (5%) percent of gross sales; as hereinafter defined, realized from the store.

***237** The Maniacis took over the restaurant as of December 1, 1983 and operated it under the aegis of Dove Fountain, Inc., a corporate entity which controlled the restaurant until it closed in September of 1986. Although sales increased during the first year, the restaurant experienced financial problems from the first. The Maniacis made no provision for working capital, allegedly because this issue had never been raised by the Badalamentes. Also, the Maniacis had been told by appellants that operating expenses would approximate $13,000 per month but, in fact, they were $17,000 a month. Evidently, the Maniacis had not taken into account payment of the obligations under the purchase money note; also, it appears that Dan Maniaci was not an efficient manager. By April of 1984, the restaurant was in arrears over $12,000. Throughout 1984 and 1985, conditions in the restaurant continued to deteriorate. Appellees made sporadic payments under the note and for advertising, but eventually defaulted under their lease. The restaurant closed in September of 1986 and the equipment was sold in early 1987 for only $18,000.

In their Amended Complaint filed against appellants Sam Batlemento, Luigi Badalamente and Casa Mia, appellees sought damages for fraud, breach of the management contract, violation of Florida's Business Opportunities Act [FN4] and for civil redress of criminal practices. [FN5] Casa Mia counterclaimed for monies owed under the management agreement and Sam Batlemento

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counterclaimed for monies owed on various insurance policies he had carried for the Maniacis through Batlemento Insurance Co. Buona Fortuna also filed a third-party complaint to recover sums due under the purchase note and mortgage. The total amount allegedly due on the counterclaims and third-party complaint was in excess of $65,000.

FN4. § 559.80, *et seq.*, Fla.Stat. (1983).

FN5. § 772.11, Fla.Stat. (1989).

The case was tried to a jury, which found in favor of plaintiffs on their claims for fraud, breach of contract and violation of the Business Opportunities Act. The jury awarded appellees $147,000 in compensatory damages and an equal amount for punitive damages. Following denial of their post-trial motions, appellants have appealed the final judgment asserting multiple claims of error.

I. FRAUD

[1][2] Appellants argue that fraud was not properly pleaded, there was no evidence adduced at trial to support a judgment for fraud and that indeed, as a matter of law, the circumstances leading up to appellees' purchase of this business could not constitute fraud. We agree that the allegations contained in the amended complaint are completely inadequate to state a cause of action for fraud. The fraud allegations in the amended complaint were as follows:

> 8. Defendants, Sam Batlemento, Luigi Badalamente and Casa Mia made representations to Maniaci concerning the prior business history of the restaurant being offered, its prior income, its potential income, prospects, and the services that would be provided in support of the business by said Defendants.
> 9. Maniaci in reliance upon the representations of said Defendants entered into an agreement to purchase the Casa Mia Pizzeria and Ristorante....
> 10. The representations made by Sam Batlemento, Luigi Badalamente and Casa Mia were false and known by said Defendants to be false at the time they were made. Specifically, the representations ***238** as to the prior business history, potential income and services to be provided were false, contrived and without basis in fact.
> 11. Defendants, Sam Batlemento, Luigi Badalamente and Casa Mia made the aforesaid representations with specific intent that Maniaci rely on them to their detriment.
>
> * * * * * *
>
> 23. The representations made by Defendants to induce Plaintiffs to enter into the agreement to acquire the business opportunity were false and fraudulent and known to be false and fraudulent at the time they were made.
> 24. Defendants intended that Plaintiffs rely upon said representations to their detriment.
> 25. With respect to representations as to services and support to be provided, Defendants made said representations and promises with no present intent to perform.
> 26. Defendants have specific knowledge of Plaintiffs' limited financial ability and weak financial condition. Nevertheless, Defendants made the representations with the specific intent to defraud Plaintiffs of their money.
> 27. Defendants' actions were willful, wanton and in reckless disregard of the rights of Plaintiffs entitling Plaintiffs to an award of punitive damages.
> 28. As a result of Defendants' representations, Plaintiffs have been damaged including, but not limited to, the loss of their initial investment, their continuing capital contributions and investments, loss of capital and assets, interest, lost profits and other monetary damages.

Florida Rule of Civil Procedure 1.120(b) requires that claims of fraud be pleaded with particularity. Particularity requires identifying the representation of fact and how the representation is false. *Gordon v. Etue, Wardlaw & Co. P.A.*, 511 So.2d 384 (Fla. 1st DCA 1987). The fraud claim in the amended complaint does no more than identify the subject matter of the alleged false representations of fact. The trial court plainly erred in failing to require appellees' compliance with Florida Rule of Civil Procedure 1.120(b) by granting appellants' motion to dismiss. Nevertheless, we are unable to reverse on this basis.

[3][4][5][6] After a favorable verdict for the plaintiff, a judgment is subject to reversal for defect in pleading only if the defendant has been prejudiced by the error. *See Well-Bilt Products, Inc. v. Liechty*, 167 So.2d 84 (Fla. 2d DCA 1964). Although the appellants claim the lack of factual

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content in the fraud claim left them ill prepared to defend the claimed fraud, we disagree. Appellants took the deposition of Mr. Maniaci early in the case and he identified his claims at that time, although by the time he testified at trial, they were considerably embellished. Nevertheless, if appellees had pleaded what Mr. Maniaci said in his deposition, the complaint would have properly withstood appellants' motion to dismiss. Also, we note that appellees were given leave to amend late in the case to add allegations to the business opportunity and conspiracy counts. These allegations expanded somewhat on Mr. Maniaci's claim that he had been told falsely the Casa Mia restaurants were about to be franchised and that his restaurant would increase in value as a result, which induced him to buy the business. As for the contention that appellees did not *prove* fraud, while we agree that certain of the misrepresentations testified to by the Maniacis could not support a claim of fraud, [FN6] we have found sufficient evidence in this record to create a jury question on the fraud issue. [FN7]

FN6. We agree, for example, that appellees failed to establish fraud based on the representation that $13,000 monthly would cover all expenses of the restaurant because, in fact, it took plaintiffs more than $17,000 monthly to pay the expenses and the debt of the business.

FN7. For example, appellants represented to Mr. Maniaci that they had filed with the State of Florida the documents necessary to franchise the Casa Mia chain, that when this occurred, the value of the restaurants would immediately double in value and that he should act quickly to get in on the ground floor. At trial, appellants denied these representations and testified that franchise approval was ultimately obtained in May, 1984, but there was no documentary evidence introduced and the jury evidently did not believe them. Appellants complain that the franchise misrepresentation was not pleaded *at all* in the amended complaint. However, the complaint does refer obliquely to misrepresentations concerning the "future prospects" of the restaurant--which further illustrates why specificity in pleading fraud claims is essential.

***239** II. THE BUSINESS OPPORTUNITY CLAIM

[7] We reverse the final judgment on appellees' claim for violation of the Business Opportunities Act. Once again, as with the fraud claim, appellees failed to allege any facts that would give rise to violation of Chapter 559 of the Florida Statutes. Here, however, the defect is not merely a matter of pleading. We agree with appellants that the statute simply does not apply to the transaction in this case. The statute defines a "business opportunity" as the sale or lease of products, equipment, supplies or services sold to a purchaser to enable him to *start* a business under certain defined circumstances; however, the statute expressly *excludes* the sale of an ongoing business. [FN8] Appellees argue this exclusion for the sale of an ongoing business contemplated by the act does not encompass the situation involved here, where there is a continuing relationship between the parties, but we can find no basis to interpret the plain language of the statute as appellees suggest. It is also undisputed that Buona Fortuna, Inc. was the seller of this ongoing business to the Maniacis. Casa Mia simply contracted to provide management services. The prohibitions of the act apply to the *seller* of the opportunity, not the shareholders of the seller or individuals who act for the seller. [FN9] We conclude the Business Opportunities Act does not apply in the present case and, accordingly, reverse the judgment on this claim.

FN8. Unfortunately, there is virtually no case law on the act. The legislative history suggests sale of this single Casa Mia restaurant, even with the attendant management agreement, use of Casa Mia recipes, formulae and menu, and purchase of some supplies is not the type of business intended to be controlled by the statute. The definition of "Business Opportunity" includes those transactions where the seller represents to the buyer that the seller will provide either equipment, inventory, marketing locations or assistance, or that the buyer is "guaranteed" to derive a specified return over his initial investment in the opportunity. By example, such business opportunities include worm farms, chinchilla ranches, bubble gum

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> vending machines, vitamin sales and numerous other programs that offer the buyer the opportunity to own and operate his own business, often inserting the phrase "in your spare time."
> The definition specifically excludes marketing programs made in conjuction [sic] with the licensing of a registered trademark or service mark, or the sale of an ongoing business, as long as the seller does not sell more than five of the opportunities or businesses, or the not-for-profit sale of sales demonstration equipment or display samples for a total price of $500 or less. This "take out" provision excludes franchises and normal sales of marketing aids.
> Senate Bill 1205, Commerce Committee, Legislative History.

> FN9. To address this problem an amendment to the amended complaint was filed alleging Casa Mia and the individual defendants were liable under an alter ego theory. However, there was no competent substantial evidence advanced at trial on this issue.

III. BREACH OF CONTRACT

[8] Appellants also complain on appeal that judgment was entered jointly and severally against defendants Sam Batlemento and Luigi Badalamente, as well as Casa Mia on the breach of contract. From our review of the record, particularly appellants' motions for directed verdict at trial, we can find no mention of any lack of legal or evidentiary basis to hold the individuals liable for breach of contract. Moreover, counsel for both sides agreed to the form of the verdict used in this case. Surprisingly, the form did not distinguish between the individual or corporate defendants as to any count and contained no method for the jurors to apportion the amount of compensatory or punitive damages attributable to any defendant. Appellees contend the verdict form was actually prepared by appellants and that appellants' agreement to this verdict form waived any objection to a finding of joint and several liability of all "defendants" on the separate counts in accordance with the form. Appellants argue that a verdict against a party which is unsupported by evidence must be reversed even where there was no objection to its submission ***240** to the jury. [FN10] From comments made by counsel during closing, it appears appellants were fully aware of this feature of the verdict form. We can only assume some trial strategy motivated use of this highly unusual form. We are unwilling to find fundamental error.

> FN10. The few existing cases on this issue appear to turn on a fundamental error analysis. *See, e.g., Morrison v. Hansen,* 213 So.2d 306 (Fla. 1st DCA 1968) (the submission to the jury of a verdict that stated an incorrect principle of law constituted fundamental error). *See also* 55 Am.Jur.2d *Trial* § 213 (1984); *Papcun v. Piggy Bag Discount Souvenirs,* 472 So.2d 880 (Fla. 5th DCA 1985) (failure to object to verdict--on issues not of a constitutional or fundamental character--constituted a waiver of defects contained therein); *Gould v. National Bank of Florida,* 421 So.2d 798 (Fla. 3d DCA 1982) (same); *Robbins v. Graham,* 404 So.2d 769 (Fla. 4th DCA 1981) (same).

IV. EVIDENTIARY ISSUES

[9] Appellants also complain that the trial court, in violation of the requirements of section 90.956, Florida Statutes (1989), permitted appellees to introduce a written damage summary consisting of all sums spent by the Maniacis on the Casa Mia restaurant. These expenditures totaled $102,110.29. Florida courts require strict compliance with the "timely written notice" requirement contained in this rule of evidence, especially where the record contains no evidence that the underlying data from which the summary was compiled was made available to a complainant. *See Tallahassee Housing Authority v. Florida Unemployment Appeals Comm'n,* 483 So.2d 413 (Fla.1986). The failure to comply with the notice requirements of section 90.956 has been found to be a "technical" violation of the statute only where:

> the record reflects that the written summary to which the witness referred and the data underlying the summary were in fact made available to the appellant sufficiently in advance of the presentation of this testimony so as to enable the appellant to adequately prepare to voir dire and cross-examine the witness.

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Bowmar Instrument Corp. v. Fidelity Electronics, Ltd., Inc., 466 So.2d 344, 345 (Fla. 3d DCA), *rev. denied,* 476 So.2d 672 (Fla.1985).

[10][11] In this case, the summary was not provided to appellants prior to trial, which appellees admit. [FN11] Appellees contend that all underlying documentation was provided to appellants prior to trial and that the summary was "merely cumulative" because all items contained on the summary were otherwise in evidence. We cannot verify from the record whether all the underlying documentation was supplied before trial, but we have carefully reviewed the trial transcript and exhibits in an effort to confirm all the items on the summary were otherwise in evidence at trial. It appears that many items of claimed damage are not supported by evidence in the record other than the summary. The jury award was plainly based on this summary and any item proved only through the summary was improperly awarded as part of the damages. On remand, the compensatory damage award must be reduced by the damage summary amounts not otherwise proved by competent evidence. [FN12]

FN11. We reject appellees' further argument that appellants waived any objection to use of the summary by offering a summary themselves. Also, although no renewed objection was made when the summary was finally admitted, it was unnecessary since the court had reserved ruling on the issue when counsel had previously objected.

FN12. By way of information to the parties, our review has yielded a total of $18,150.91 in claimed expenditures on the summary for which we can find no documentation.

V. COMPENSATORY DAMAGES FOR FRAUD AND BREACH OF CONTRACT

[12] Turning to damages, in this case appellees were awarded $147,000 in compensatory damages, computed as follows: the $102,000 in damages outlined in the summary, $7,914.93 for management fees paid to Casa Mia, $22,573.13 paid to Buona Fortuna, Inc. on the note and mortgage, and $14,666.62 spent on advertising for the restaurant, for total damages of $147,266.97. ***241** As previously discussed, the verdict did not distinguish between damages assessed against any defendant for fraud, breach of contract or violation of the Business Opportunities Act. Having chosen to submit these damage issues to the jury without differentiation among the claims, appellants cannot now complain about it.

[13] The proper measure of damages for fraud in this case presents a hard issue. Appellants have strenuously argued here, as they argued to the jury below, that appellees' damage theory, which includes all out-of-pocket expenses for the entire three-year period they operated the restaurant until it was sold, was erroneous, especially because Maniaci testified that he had become aware of appellants' alleged misrepresentations shortly after purchasing the restaurant. We agree in principle with appellants that a defrauded party cannot continue with an enterprise after he has discovered the fraud and expect to recover as damages the additional losses he incurs. But we do not believe the general rule would apply in this case. As part of the inducement to Maniaci to buy the business, Casa Mia undertook a continuing, undefined contractual duty to manage this restaurant: "Don't worry about a thing, we are down here. We can overlook everything that happens." Under the circumstances, we cannot say as a matter of law that appellees' efforts to make a go of the business was unreasonable. [FN13] *See Thor Power Tool Co. v. Weintraub,* 791 F.2d 579, 585 (7th Cir.1986). The jury had a full and fair opportunity to consider these damage issues and found in favor of appellees.

FN13. There are some items of claimed damage that would not be recoverable even under this broad "out-of-pocket" approach, including any out-of-pocket expense not reasonably necessary to keep the business in operation, such as parking tickets. These items are not recoverable in any event due to lack of proof in light of our ruling that the undocumented damages are not recoverable.

VI. PUNITIVE DAMAGES

Although analysis of this case has been complicated by appellees' various failures of pleading and proof and appellants' failure to object

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below to many of the errors of which it now complains, it turns out that the only issue that requires a new trial was also the most hotly contested below. Mr. Maniaci was permitted, over objection, to testify at some length during appellees' case in chief about the sources of the funds he used to purchase the Casa Mia restaurant. He described using "all his savings", cashing out his treasury notes and borrowing from his credit union and life insurance policies. He further testified about borrowing money from his family and mortgaging his home to keep the restaurant afloat. When the business closed, their finances were "very bad"; they had lost "everything". [FN14] The relevancy of the testimony, according to appellees, was to show, in support of the claims of fraud and punitive damages, that appellants "knew the effect it [presumably, the investment] was having on him and what it left him in the end." Appellants objected to all this testimony and moved for a mistrial, asserting the source of the funds appellees invested in the restaurant and how little or much money appellees had left was irrelevant and was offered only to inflame the jury because of the impoverishment of appellees.

> FN14. Appellees' counsel also commented variously on appellees' finances: "[Mr. Maniaci] basically sacked his entire life savings to come up with the money for this investment."

[14] The general rule is that during trial no reference should be made to the wealth or poverty of a party, nor should the financial status of one party be contrasted with the other's. Annotation, *Counsel's Appeal in Civil Case to Wealth or Poverty of Litigants as Grounds for Mistrial, New Trial or Reversal,* 32 A.L.R.2d 9 § 2 at 17 (1956). Argument directly contrasting the poverty of one of the parties with the wealth of the other is especially apt to prejudice the jury. *Id.* at § 5. In Florida, the admission of such evidence or commentary has often been held to constitute reversible error. [FN15] Although ***242** in Florida the rule generally has been applied in personal injury actions, it has been applied in a wide variety of actions in other jurisdictions. *Vanarsdol v. Farlow,* 200 Iowa 495, 203 N.W. 794, 795 (Iowa 1925) (recognizing rule in context of fraud action); *El Paso Dev. Co. v. Ravel,* 339 S.W.2d 360 (Texas App.1960). *See generally* 32 A.L.R.2d, *supra* at § 3 (1956).

> FN15. *See, e.g., Seaboard Air Line Ry. v. Smith,* 53 Fla. 375, 43 So. 235 (Fla.1907) (reversal required because of plaintiff's argument in personal injury action that he was poor person who would be ward of county for the rest of his life if he did not recover damages, but damages would not be missed by defendant railroad); *Rogers v. Myers,* 240 So.2d 516 (Fla. 1st DCA 1970) (court reversed judgment for plaintiff in wrongful death action where counsel argued that action involved more than private dispute between parties; it also involved public's liability for welfare; amounted to improper appeal to jurors' self-interest and was highly prejudicial); *Baggett v. Davis,* 124 Fla. 701, 169 So. 372 (Fla.1936) (plaintiff's testimony that he had no means of support for family other than wages was held improperly admitted because irrelevant and calculated to unduly arouse jurors' sympathy for plaintiff); *Deese v. White Belt Dairy Farms, Inc.,* 160 So.2d 543 (Fla. 2d DCA 1964) (found trial court properly granted motion for new trial where improper testimony that plaintiff was compelled to work because she had no means of support for herself and infant child and was receiving no support from her former husband.)

[15][16] Appellees argue the evidence concerning their own financial hardships *was* relevant to the jury's consideration of *punitive damages.* [FN16] In Florida, in determining the amount of punitive damages, the jury should examine the enormity of the offense and the finances of the party against whom damages are assessed. *Horizon Leasing v. Leefmans,* 568 So.2d 73, 75 (Fla. 4th DCA 1990). Presumably, the fact that appellants' misrepresentations induced a middle class person, with limited resources, rather than a wealthy person (who might not be so inconvenienced by the loss of his investment) to invest in this restaurant goes to the "enormity of the offense" or the "outrageousness of the conduct." We cannot agree that the financial status of the victim of a fraud is a relevant consideration in a jury's evaluation whether to

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punish a defendant with an award of exemplary damages. Certainly, if the situation were reversed, *i.e.,* the appellees were enormously wealthy and the poverty-stricken appellants had sought to introduce this sort of "Robin Hood" defense in mitigation, the appellees would (properly) have objected with a vehemence comparable to the appellants' objections in this case.

> FN16. Many courts have held this error harmless where the record otherwise contained enough properly admitted evidence from which the jury could figure out the relative economic status of the parties. Our review of the record suggests no basis to apply such an analysis in the present case.

Unfortunately, inherent in our system of trial by jury is always a danger the jury will be influenced by the wealth or power of one party or another or sympathy for a party's weakness, poverty or misery. Insurance companies, banks and large corporations would no doubt attest that verdicts are unduly affected by which party has the "deep pocket." It is essential to avoid this risk.

Here, the evidence objected to by appellants makes clear that, after this transaction, the Maniacis were left in dire financial condition. Worse yet, because of the evidence adduced in support of the punitive damage claim, which automatically flows in Florida from *prima facie* proof of fraud, the jury was informed that appellants were living in big expensive houses and had large holdings ("two million dollars"). We cannot follow appellees' reasoning that the fact that this tort exhausted all their resources, rather than some of their resources, is relevant to determination of a punitive damage award. Due to the well-recognized potential for such evidence to improperly skew the jury's deliberations, we conclude the punitive damage award cannot stand. Because the liability of appellants for fraud was not unequivocally established in this trial and because of the difficulty of determining that the liability verdict on the fraud claim was not influenced by the improper evidence adduced by appellees on the damages issue, appellants are entitled to a new trial both on liability and damages awardable on the fraud count. [FN17] *See* ***243***Rivera v. Aldrich,* 538 So.2d 1390 (Fla. 3d DCA 1989); *Keith v. Russell T. Bundy & Assoc., Inc.,* 495 So.2d 1223 (Fla. 5th DCA 1986). We affirm the judgment against all defendants on breach of contract, but remand for recalculation of damages in accordance with section IV of this opinion. The judgment based on the violation of the Business Opportunity Act is reversed.

> FN17. Because the issues involved on the claim for breach of contract were entirely different and this evidence was never offered on the contract issue, we see no reason to disturb the verdict for breach of contract.

VII. COUNTERCLAIM

We see no error in the trial court's refusal to award damages on the counterclaim. In light of the parties' stipulation that the counterclaim damages would stand or fall with the liability and would be determined by the court and our ruling on the measure of damages on the fraud claim, as set forth above, the trial court correctly refused to award these damages to appellees.

AFFIRMED in part; REVERSED in part and REMANDED for new trial on fraud and punitive damages.

W. SHARP and COWART, JJ., concur.

593 So.2d 234, 17 Fla. L. Weekly D83

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO QUASH AMENDED TRIAL SUBPOENA AND NOTICE TO PRODUCE PERSONAL BALANCE SHEETS OF RONALD PERELMAN

Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, hereby requests that this Court enter an Order quashing the amended trial subpoena directed at Ronald Perelman, and the notice to produce requesting Mr. Perelman's personal balance sheets for 1998-2000 that Morgan Stanley faxed and hand delivered to CPH's counsel in Florida on March 30, 2005. *See* Exs. A-B. The subpoena and notice to produce are invalid for several reasons.

First, the amended trial subpoena is invalid because it was "served" by fax and hand delivery on CPH's counsel in Florida. That is not a proper mode of service. Morgan Stanley may point to the fact that CPH agreed to accept service of Mr. Perelman's initial trial subpoena, which is true, but CPH did not agree to accept fax service of any amended subpoenas.

Second, the amended subpoena and the notice to produce are improper because they are both directed at eliciting Mr. Perelman's personal financial information. This Court repeatedly has ruled that personal financial information is irrelevant and not to be mentioned at trial. In the February 17, 2005 ruling on CPH's motion *in limine* No. 2, for example, this Court directed that "[n]either party may present evidence or argument concerning the wealth, net worth, income, or

financial status of any principal or employee of CPH or a related entity." *See* Ex. C. During the Court hearing that day, this Court further cautioned Morgan Stanley's counsel to refrain from making references to the "worth or lifestyle" of CPH principals because such references are "totally inappropriate." *See* Ex. D, 2/17/05 Tr. 1025. The Court also observed at that hearing that the personal financial statements of individuals are irrelevant because they do not relate to business sophistication. *See id.* at 1028. And as Steven Fasman testified before this Court on March 21, 2005, Mr. Perelman's personal balance sheets are irrelevant, because there is nothing in them relating to Sunbeam (*see* Ex. E, 3/21/05 Tr. 4726):

> Q. Now when you did the search that you did in response to the Court's February 17th Order, did you expect to find documents contain the Sunbeam valuation numbers, the 450 number in any files relating to Mr. Perelman's personal balance sheet?
>
> A. No.
>
> Q. And why is that?
>
> A. I'm familiar with Mr. Perelman's personal balance sheet and with respect to the holdings of MacAndrews & Forbes, it just has a single line for those holdings and doesn't have any detail as to the holdings that MacAndrews itself has. It's just a single entry for the value of MacAndrews itself.

Third, Mr. Perelman's personal balance sheets contain the type of information that Florida courts routinely bar the jury from hearing. "The general rule is that during trial no reference should be made to the wealth or poverty of a party, nor should the financial status of one party be contrasted with the other's." *Batlemento v. Dove Fountain, Inc.*, 593 So. 2d 234, 241-42 (Fla. 5th DCA 1991); *see id.* (noting that "inherent in our system of trial by jury is always a danger the jury will be influenced by the wealth or power of one party or another"); *Silbergleit v. First Interstate Bank of Fargo*, 37 F.3d 394, 398 (8th Cir. 1994) (concluding that references to plaintiff's wealth were "highly prejudicial").

WHEREFORE, for the foregoing reasons, CPH respectfully requests that this Court enter an Order quashing the amended trial subpoena directed at Mr. Perelman and the notice to produce relating to Mr. Perelman's personal balance sheets.

Dated: April 2, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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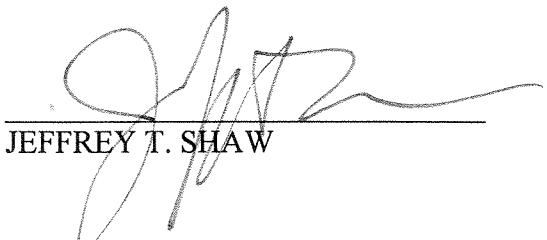
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 2nd day of April, 2005.



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10523 v1

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

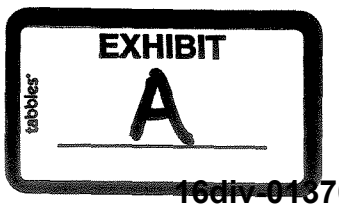
CASE NO: CA 03-5045 AI

AMENDED SUBPOENA FOR TRIAL

THE STATE OF FLORIDA

TO: **RONALD O. PERELMAN**
36 East 63rd Street
New York, NY 10021

YOU ARE COMMANDED to appear before The Honorable Elizabeth Maass, Judge of the Circuit Court, at the Palm Beach County Courthouse, Courtroom 11A, 205 North Dixie Highway, West Palm Beach, Florida on April 4, 2005* at 9:30 a.m., to testify in this action and to have with you your "personal balance sheet" for the years 1998, 1999, and 2000, all back-up or support for each balance on the personal balance sheets that relate to Sunbeam, Sunbeam warrants, or MAFCO Holdings Inc. ("MAFCO"), including any balance that is a summation or aggregation of several balances one of which relates to Sunbeam or Sunbeam warrants, and all correspondence or other documents related to transmittal of the personal balance sheets to any bank or other financial institution.



16div-013767

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.
Case No: CA 03-5045 AI
Subpoena for Trial

If you fail to appear, you may be in contempt of court. You are subpoenaed to appear by the following attorneys, and unless excused form this subpoena by these attorneys or the Court, you shall respond to this Subpoena as directed.

Dated: March 30, 2004

BY: _____
Rebecca A. Beynon
For the Court

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Telephone: (202) 326-7999

Counsel for Defendant
Morgan Stanley & Co. Incorporated

***BEFORE YOU APPEAR**

PLEASE CALL JOYCE DILLARD, CLA AT (561) 659-7070 TO CONFIRM THE EXACT TIME AND DATE YOU WILL BE CALLED TO TESTIFY

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

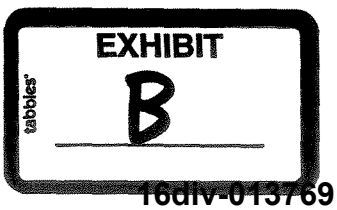
MORGAN STANLEY'S NOTICE TO PRODUCE AT TRIAL

Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through the undersigned counsel, and pursuant to Rule 1.350 of the Florida Rules of Civil Procedure, requests that Plaintiff, Coleman (Parent) Holdings Inc. ("CPH") produce and permit Morgan Stanley to inspect and copy each of the documents described below. Morgan Stanley requests that the production be made at the commencement of trial in this matter. Inspection will be made by visual observations, examination, or copying.

DEFINITIONS AND INSTRUCTIONS

Morgan Stanley incorporates by reference the Definitions and Instructions set forth in Defendant's First Request for Production of Documents served in this action. In addition, Morgan Stanley defines the following terms as follows:

1. "MAFCO" shall mean MAFCO Holdings Inc., and any of its officers, directors, former or present employees, representatives, or agents.



DOCUMENTS REQUESTED

1. Ronald O. Perelman's "personal balance sheet" for the years 1998, 1999, and 2000 and any related materials, including (but not limited to):

a. Back-up or support for each balance on the personal balance sheets that relate to Sunbeam, Sunbeam warrants, or MAFCO, including any balance that is a summation or aggregation of several balances one of which relates to Sunbeam or Sunbeam warrants;

b. All correspondence or other documents related to transmittal of the personal balance sheets to any bank or other financial institution.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 30 day of March, 2005.

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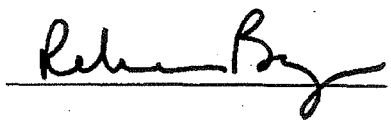
BY: 

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

ORDER ON Plaintiff's **MOTION IN LIMINE NUMBER** 2

THIS CAUSE having come before this Court on February 17, 2005 upon Plaintiff's Motion in Limine Number 2, and the Court having reviewed the pleadings on file, heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is Granted.

HH Neither party may present evidence or argue concerning the wealth, net worth, income, or financial status of any principal or employee of CPH or a related entity. This ruling is without prejudice to either party's right to present evidence or argue concerning an individual's business or financial sophistication.

WPB#589635.1

EXHIBIT
C
16div-013773

"Granted" for purposes of the Motion in Limine addressed in this Order shall mean that the parties and their counsel shall not refer to or attempt to introduce into evidence, or otherwise place before the jury, the matter referred to without first proffering the good faith basis to believe that the matter is relevant and admissible outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 17 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

WPB#589635.1

Copies furnished to:

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IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

VOLUME 8

- - -

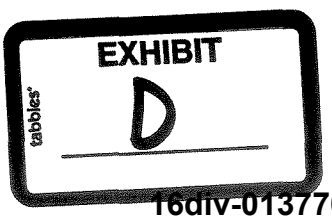
TRANSCRIPT OF PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida

Thursday, February 17, 2005

9:30 a.m. - 12:08 p.m.



MR. SOLOVY: I'm so offended, Your Honor.

MR. SCAROLA: I just want to make sure, Your Honor, because I understand that talking about the magnitude of various business transactions is relevant based upon Your Honor's view. But one of those business transactions ought not to be the sale of Mr. Perelman's Palm Beach home for $70 million. I don't want the defendants to take the ruling that Your Honor has made to the point of somehow believing that that could possibly be relevant or material.

THE COURT: The only thing I will warn you guys, and I see Mr. Davidson is going to sit down, is we don't want this -- I was taken aback by some of the references in some of the memos I had from Morgan Stanley at what I thought were gratuitous references at the worth or lifestyle of some of the principals of plaintiff. And I would assume at trial we would not have that because it's totally inappropriate.

MR. IANNO: Understood.

THE COURT: And please understand if it happens once, I may assume it was inadvertent. If it happens again, I don't have any compunction about admonishing attorneys in the presence of jurors. Okay. If I think an attorney understands something is not supposed to happen and it happens again, you know, you bear the consequences of it, which means be very careful before you talk houses or trips or anything to come up and say, hey, can I ask this question.

MR. DAVIDSON: You're just focusing on one point. Frankly, I don't think that kind of stuff in a jury helps you anyway. I think it boomerangs. I think I understand exactly what Your Honor is saying. And don't think it's an issue at all. We do know, though, that during --

THE COURT: This is the ski trips? Those are future motions. I know those are coming up.

MR. DAVIDSON: I don't think there are any motions on them.

THE COURT: I know I had read at one

point argument, and maybe it's in one of the arguments that Mr. Gittis was skiing during part of this transaction, and that may have a bearing on how involved he was in this transaction. I thought that was in one of these motions.

MR. BEMIS: I don't know if it's a motion. It's the deal.

THE COURT: I read it some place.

MR. BEMIS: There is some motions that touch upon that theory of deal distraction that the reason they didn't look was because they were distracted --

THE COURT: I know I remember specifically reading about he was the one, allegedly, skiing in Aspen.

MR. SOLOVY: There was a Mr. Maher.

THE COURT: I knew somebody was. Maybe somebody -- I know that's an issue we need to talk about. That's not what we're talking about here.

MR. DAVIDSON: No.

MR. SOLOVY: When you see Mr. Gittis, you'll know he doesn't ski, Your Honor.

MR. IANNO: The first part of what the

court announced is fine, the wealth, the net worth, the financial status.

THE COURT: I was just reading from the title.

MR. IANNO: I don't know if that impinges on what the court has ruled is admissible.

THE COURT: Talking about personal financial statements.

MR. SOLOVY: Talking about the financial status of the individuals.

THE COURT: Which I think is not really related to the business sophistication.

MR. IANNO: That's fine, Your Honor. I just wanted to -- that's fine, Your Honor. What it says is , "Granted in part and denied in part. Neither -- oh, no, it's granted. "Neither party may present evidence or argument concerning the wealth, net worth, income or financial status of any principal or employee of CPH or related entity. This ruling is without prejudice to either party's right to present evidence or argument concerning an individual's business or financial

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. VOLUME 43

MORGAN STANLEY & CO., INC.,

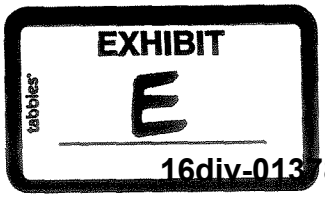
Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Monday, March 21, 2005
1:40 p.m. - 6:45 p.m.



A. For those documents that had not previously been collected through the efforts that are referenced in the Exhibit, I made sure that his entire department, including Miss Kessel, had given me all of the documents that were not previously called for in the prior productions that were responsive to the new requests.

Q. Now when you did the search that you did in response to the court's February 17th order, did you expect to find documents containing the Sunbeam valuation numbers, the 450 number in any files relating to Mr. Perelman's personal balance sheet?

A. No.

Q. And why is that?

A. I'm familiar with Mr. Perelman's personal balance sheet. And with respect to the holdings of MacAndrews & Forbes, it just has a single line for those holdings and doesn't have any detail as to the holdings that MacAndrews itself has. It's just a single entry for the value of MacAndrews itself.

Q. Now there's also been a question in this matter about -- let me withdraw that. Have Mr. Perelman's, have the files relating to Mr. Perelman's personal balance sheet now been searched?

Westlaw.

37 F.3d 394
37 F.3d 394, 63 USLW 2220, 65 Fair Empl.Prac.Cas. (BNA) 1718, 65 Empl. Prac. Dec. P 43,359
(Cite as: 37 F.3d 394)

United States Court of Appeals,
Eighth Circuit.
David SILBERGLEIT, Plaintiff-Appellant,
v.
FIRST INTERSTATE BANK, OF FARGO, N.A.,
Defendant-Appellee.
No. 93-3327.

Submitted May 13, 1994.
Decided Oct. 5, 1994.

Former employee brought age discrimination claim against former employer. The United States District Court for the District of North Dakota, Karen K. Klein, United States Magistrate Judge, found for employer. Employee appealed. The Court of Appeals, Floyd R. Gibson, Senior Circuit Judge, held that employee was entitled to new trial based on opposing counsel's comments and questions which suggested to or informed jury that plaintiff was a millionaire, received unemployment benefits, and was Jewish.

Reversed and remanded.

West Headnotes

[1] Federal Courts ⚿905
170Bk905 Most Cited Cases
Question by counsel that places prejudicial information before jury may warrant new trial.

[2] Federal Courts ⚿823
170Bk823 Most Cited Cases
Court of Appeals gives great deference to ruling of trial judge on questions of evidence.

[3] Federal Courts ⚿628
170Bk628 Most Cited Cases

[3] Federal Courts ⚿635
170Bk635 Most Cited Cases
Where question by counsel places prejudicial information before jury, unless error is promptly and clearly preserved by objection, Court of Appeals does not reverse.

[4] Federal Courts ⚿825.1
170Bk825.1 Most Cited Cases
Trial judge has broad discretion in deciding whether question by counsel to witness is so prejudicial as to warrant new trial, and Court of Appeals reviews this ruling for abuse of discretion only.

[5] Federal Courts ⚿905
170Bk905 Most Cited Cases
Plaintiff in age discrimination suit was entitled to new trial based on opposing counsel's comments and questions which suggested to or informed jury that plaintiff was a millionaire, received unemployment benefits, and was Jewish; totality of such comments and questions emphasized irrelevant information and demonstrated persistent effort to get such information before jury, and opposing counsel could not escape responsibility for questions concerning plaintiff's religious beliefs by claiming he would not attempt to solicit antiSemitism from jury because opposing counsel himself was Jewish. Fed.Rules Evid.Rule 401, 28 U.S.C.A.

***395** Randolph E. Stefanson, Moorhead, MN (Todd W. Foss, on the brief), for appellant.

J. Philip Johnson, Fargo, ND (Robert A. Feder, on the brief), for appellee.

Before MAGILL, Circuit Judge, JOHN R. GIBSON , Senior Circuit Judge, and MAGNUSON [FN*], District Judge.

FN* The HONORABLE PAUL A. MAGNUSON, United States District Judge for the District of Minnesota, sitting by designation.

JOHN R. GIBSON, Senior Circuit Judge.

Following an adverse jury verdict in his age discrimination suit, David Silbergleit appeals from an order of the magistrate judge [FN1] denying his motion for judgment notwithstanding the verdict or

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a new trial. He claims the magistrate judge should have granted his motion because: 1) counsel for First Interstate Bank of Fargo made several improper remarks; and 2) the verdict was contrary to the evidence. We conclude that several comments and questions by the bank's attorney constituted prejudicial error, and therefore, we reverse the magistrate judge's order and remand for a new trial.

> FN1. The case was tried by a United States Magistrate Judge, by consent of the parties.

Silbergleit argues counsel for the bank inquired about three irrelevant and prejudicial subjects. Because these are the only issues we reach, we need not recite the details underlying Silbergleit's discrimination claim.

First, Silbergleit complains about references to and questions about his personal wealth. Over Silbergleit's objection, the bank put into evidence Silbergleit's 1991 and 1992 personal income tax returns. While cross-examining Silbergleit, the bank's counsel asked Silbergleit about interest income he earned from his bond holdings, including the following:

> Q. So if--even if you had some investments that weren't quite as good and at 5 percent, you would own over a million dollars of municipal bonds?
> A. Oh, what I want to tell you is that--
> Q. Is that a yes or is that a no?
> A. Yes. But--
> Q. Okay.
> A. --I had a lot of 13 percenters in there from years ago so this wouldn't make your analogy all correct.
> Q. So it's not quite a million dollars?
> A. It wouldn't be anywhere near that.
> Q. Are you suggesting to me that you are not a millionaire?

Although the court sustained Silbergleit's objection to the bank's final question, and instructed the jury that the amount of holdings ***396** that Silbergleit has or had at the time he was employed was not relevant, the bank's counsel later obtained testimony from another witness about Silbergleit's assets. The bank's representative at trial, Beaton, who presumably was present at the court's earlier admonition, testified that Silbergleit made clients "fee conscious." When asked about the basis for his allegation, Beaton testified:

> Q. What other evidence do you have that you could share with us with respect to what this fee bias means?
> A. At one point in time, David [Silbergleit] approached me at a point in time when we were attempting to develop assets. We had made note of the fact that we were going to try and grow the asset bases of the department and he approached me individually and advised me that he would move his one million dollar personal trust account to us provided we waive the fees.

Silbergleit urges that the bank representative's answer was not responsive to the question, and was simply part of the bank's strategy to portray Silbergleit as rich. The magistrate judge agreed that the bank counsel's questions about Silbergleit's wealth were irrelevant and prejudicial. *Silbergleit v. First Interstate Bank,* No. A3-92-98, slip op. at 4 (D.N.D. Aug. 31, 1993). Nevertheless, the court decided that the statements were not sufficiently prejudicial to warrant a new trial, reasoning that the court mitigated the prejudice by instructing the jury to disregard the amount of Silbergleit's holdings. *Id.* It is highly significant that a bank officer made this latter statement as to Silbergleit's $1 million personal trust account after the court's first instruction that Silbergleit's wealth was not relevant.

Silbergleit also contends that prejudicial error occurred when the bank's counsel questioned him about unemployment compensation benefits. Although the magistrate judge ruled that unemployment compensation benefits were not deductible from damages, the court permitted counsel to delve into the fact that Silbergleit received unemployment benefits to show Silbergleit's lack of diligence in finding another job.

Silbergleit argues that such benefits are not deductible from a damage award, and thus, the magistrate judge erred in admitting this evidence. *See Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit* § 5.12, Committee Comments (1993). He contends the admission of this evidence was prejudicial, especially in light of questions about his personal wealth. Silbergleit also complains about the court's failure to instruct the jury that a damage award is

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not reduced by unemployment compensation benefits. In denying Silbergleit's new trial motion, the court acknowledged that it ruled that unemployment benefits are not deductible from damages, but also stated that the federal circuits are split on the issue. Slip op. at 5. It concluded that because of the conflict in the law, the bank's counsel did not act unconscionably in questioning Silbergleit. *Id.* The court also determined that the error was harmless because the jury never reached the issue of damages. *Id.* The magistrate judge stated that the subject of unemployment benefits would be commented upon in instructions at the end of the trial, yet she refused an instruction Silbergleit offered clearly informing the jury that unemployment benefits should not be deducted from an age discrimination award.

Finally, Silbergleit urges that reversible error occurred when the bank's counsel referred to Silbergleit's religion. During Silbergleit's cross-examination, the bank's counsel indicated to the jury that he was Jewish and that Silbergleit was also Jewish. For example, counsel stated that only he and Silbergleit would know what the Yiddish word, "nachos [sic]," [FN2] meant. Similarly, counsel referred to "what you and I call tachlos [sic]." [FN3] Counsel also asked Silbergleit whether he had filed any claim of discrimination on the basis of religion. When Silbergleit denied filing a claim on the basis of religion, counsel then asked why he did ***397** not file such a claim. Finally, counsel tried to impeach another witness [FN4] by asking: "And, of course, since 1985, you've had a rather strong dislike for me because of my response to your statement in the paper what the Waffen-SS did to the Jews in World War II." While acknowledging that the bank's counsel implied that Bonemeyer was anti-Semitic and perhaps a Nazi sympathizer, and that the bank's counsel "exceeded the bounds of appropriate impeachment," the court concluded the questioning did not reflect on Silbergleit, and therefore, did not prejudice him. Slip op. at 6.

> FN2. Condensing the somewhat fanciful definition given by the bank, the Yiddish word "naches" seems roughly equivalent to "pride."
>
> FN3. The bank defines "tachlis" as "down to brass tacks."
>
> FN4. Dr. Maurice Bonemeyer, one of Silbergleit's former customers, testified that Silbergleit provided "[a]bsolutely excellent" service. On cross-examination, the bank's counsel attempted to impeach Bonemeyer. First, he brought out the fact that Bonemeyer had sued a partner in the bank counsel's law firm. Second, he attempted to elicit that Bonemeyer's real reason for testifying was that he had a personal grudge against the bank's counsel because of a letter he had written in response to a quote made by Bonemeyer in the local newspaper.

The bank has explanations for each of Silbergleit's allegations of prejudice. It characterizes Silbergleit's allegation of prejudice stemming from the use of two Yiddish words in a week-long trial as "absurd and outrageous." It says the exchange occurred in the midst of a discussion designed to show that the term "shooting dogs" has a colloquial meaning in some circles not unlike Yiddish words in Jewish circles. The bank defends its interrogation of Bonemeyer as the proper subject of cross-examination. The bank argues that the court properly admitted Silbergleit's tax returns to compare Silbergleit's income before and after the termination, as well as to show the existence of substantial capital which Silbergleit could now reinvest free of restrictions imposed on him as a trust officer. Finally, the bank defends its inquiry into unemployment benefits on the ground that the magistrate judge did not decide admissibility issues until the fourth day of trial, and that the Eighth Circuit law on this question is unclear. The bank acknowledges the Eighth Circuit Model Jury Instructions that unemployment benefits are not deductible from a damages award, but argues that the authority for the instruction, *Doyne v. Union Electric Co.*, 953 F.2d 447 (8th Cir.1992), deals with a deduction for pension, not unemployment, benefits. [FN5]

> FN5. We note that the comment cites cases from other circuits holding that unemployment benefits are not deductible from a damage award. *See Manual of Model Civil Jury Instructions for the*

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> *District Courts for the Eighth Circuit* § 5.12, Committee Comments (1993). After trial, this court held that unemployment benefits should not be deducted from awards of backpay under the Age Discrimination in Employment Act. *Gaworski v. ITT Commercial Financial Corp.*, 17 F.3d 1104, 1114 (8th Cir.1994), *cert. denied,* 513 U.S. 946, 115 S.Ct. 355, 130 L.Ed.2d 310 (1994).

[1][2][3][4] A question by counsel that places prejudicial information before the jury may warrant a new trial. *Sanders-El v. Wencewicz,* 987 F.2d 483, 484 (8th Cir.1993); *McBryde v. Carey Lumber Co.,* 819 F.2d 185, 188 (8th Cir.1987). We give great deference to the ruling of the trial judge on questions of evidence. Unless the error is promptly and clearly preserved by objection, we do not reverse. The trial judge has broad discretion in deciding whether a question is so prejudicial as to warrant a new trial, and we review this ruling for abuse of discretion only. *McBryde,* 819 F.2d at 188.

[5] In the case before us, the magistrate judge instructed the jury to disregard the evidence of Silbergleit's wealth, but later allowed another question to be answered by a bank officer on this subject. The magistrate judge stated that she would instruct at the conclusion of the evidence on the receipt of unemployment benefits, but she denied a proposed instruction on this subject. Silbergleit failed to object to the several questions and comments relating to Silbergleit's religion. We believe, however, that the mix of religion, wealth and receipt of unemployment benefits presented a powerful combination of irrelevant evidence having no bearing on the merits of the case, that were designed to impassion and prejudice the jury against Silbergleit.

Under these circumstances, our recent decision in *Sanders-El* is instructive. In that case, after the trial court had sustained an objection to evidence about the plaintiff's arrest record, defense counsel dropped a lengthy computer printout in front of the ***398** jury. We began by recognizing that improper questioning by counsel generally entitles the aggrieved party to a new trial if it conveys improper information to the jury and prejudices the opposing litigant. *Sanders-El,* 987 F.2d at 484 (quoting *Williams v. Mensey,* 785 F.2d 631, 637 (8th Cir.1986)). *Sanders-El* pointed to the court's duty to prevent the jury from considering extraneous issues and to guard against the influences of passion and prejudice. *Id.* at 484. We said that the misconduct of counsel may be such that its effect cannot be overcome by admonishing the jury or rebuking counsel; in such case a court should grant a new trial. *Sanders-El* focused not only on counsel's conscious impropriety, but on the nature of the information that counsel attempted to bring before the jury. We said that whether errors had a significant prejudicial influence on the jury is "a fine question of judgment in which precedents give little guidance." *Id.* at 485. We also observed that the case was a close one, which increased the possibility that improper conduct could have influenced the jury's verdict. Moreover, the printout incident was neither isolated nor accidental, but counsel repeatedly attempted to use irrelevant and prejudicial evidence.

In the context of the entire trial, we are convinced that the magistrate judge abused her discretion in denying Silbergleit's new trial motion. [FN6] It is not necessary that we decide whether any one of these evidentiary issues would be a sufficient basis for the grant of the new trial, as that is not the issue before us. When all the objectionable episodes are viewed together, however, we conclude that evidence came before the jury that was improper and prejudicial. *See* Fed.R.Evid. 401. In so far as there is any doubt that portions of the evidence were not the subject of objection, the evidence, taken together, certainly is plain error. Silbergleit's religious beliefs have absolutely no relevance in this lawsuit. The bank's counsel cannot escape responsibility for these questions and comments by claiming that he would not attempt to elicit anti-Semitism from the jury because he himself is a Jew. References to Silbergleit as a millionaire and to his receipt of unemployment compensation benefits were also highly prejudicial. As Silbergleit suggests, the totality of the bank counsel's line of questions and comments emphasized irrelevant information having no bearing on the issues of the case, and demonstrated a persistent effort to get this information before the jury. The introduction of this evidence was such as to distract the jury from considering the evidence on the material issues before it. As a result, Silbergleit

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did not receive a fair trial. Therefore, the magistrate judge abused her discretion in denying his motion for new trial.

> FN6. Because we decide that a new trial was warranted because of the improper questions and answers, we do not reach the issue of whether the magistrate judge erred in refusing to order a new trial because the verdict was contrary to the weight of the evidence. In our earlier decisions we have expressed doubt as to whether we may consider such an argument. *See Lee v. Rapid City Area School Dist.,* 981 F.2d 316, 332 (8th Cir.1992) (en banc); *Green v. American Airlines, Inc.,* 804 F.2d 453, 455 (8th Cir.1986).

We reverse and remand for a new trial.

37 F.3d 394, 63 USLW 2220, 65 Fair Empl.Prac.Cas. (BNA) 1718, 65 Empl. Prac. Dec. P 43,359

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593 So.2d 234
593 So.2d 234, 17 Fla. L. Weekly D83
(Cite as: 593 So.2d 234)

H

District Court of Appeal of Florida,
Fifth District.
Sam BATLEMENTO, et al., Appellants,
v.
DOVE FOUNTAIN, INC., et al., Appellees.
No. 89-2460.

Dec. 27, 1991.
Rehearing Denied Feb. 21, 1992.

Restaurant purchasers brought suit against vendors for fraud, breach of management contract, violation of Business Opportunities Act and for civil redress of criminal practices. The Circuit Court for Orange County, W. Rogers Turner, J., rendered judgment in favor of purchasers, and vendors appealed. The District Court of Appeal, Griffin, J., held that: (1) allegations were inadequate to state cause of action for fraud, but reversal was not required on this basis; (2) Business Opportunities Act did not apply to sale of ongoing restaurant business; (3) highly unusual verdict form, which did not distinguish between individual or corporate defendants as to any count and contained no method for jurors to apportion amount of compensatory or punitive damages attributable to any defendant, was not fundamental error; (4) any item proved only through written damage summary was improperly awarded as part of damages; (5) purchasers could recover damages for losses incurred after they discovered the fraud; and (6) evidence that fraud exhausted all purchasers' resources was not relevant to determination of award of punitive damages.

Affirmed in part, reversed in part and remanded.

West Headnotes

[1] Fraud ⚿43
184k43 Most Cited Cases

[1] Fraud ⚿45
184k45 Most Cited Cases
Fraud pleading must identify representation of fact and how that representation is false. West's F.S.A. RCP Rule 1.120(b).

[2] Pleading ⚿18
302k18 Most Cited Cases
Fraud pleading, which did no more than identify subject matter of alleged false representations of fact, lacked required particularity. West's F.S.A. RCP Rule 1.120(b).

[3] Appeal and Error ⚿1039(4)
30k1039(4) Most Cited Cases
After favorable verdict for plaintiff, judgment is subject to reversal for defect in pleading only if defendant has been prejudiced by the error.

[4] Appeal and Error ⚿1039(4)
30k1039(4) Most Cited Cases
Judgment for restaurant purchasers on fraud claim against vendors was not subject to reversal for lack of factual content in the pleading, where one purchaser had identified his claims in a deposition early in the case.

[5] Fraud ⚿27
184k27 Most Cited Cases
Restaurant purchasers failed to establish fraud based on vendors' representation that $13,000 monthly would cover all expenses of restaurant when, in fact, it took more than $17,000 monthly to pay expenses and debt of the business.

[6] Fraud ⚿64(1)
184k64(1) Most Cited Cases
There was sufficient evidence to create jury question on issue of whether circumstances leading up to purchase of restaurant constituted fraud on purchasers.

[7] Trade Regulation ⚿862.1
382k862.1 Most Cited Cases
Business Opportunities Act did not apply to sale of ongoing restaurant business, even with attendant management agreement, use of certain recipes, formulae and menu, and purchase of some supplies. West's F.S.A. § 559.80 et seq.

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[8] Appeal and Error ⚿218.1
30k218.1 Most Cited Cases
Highly unusual verdict form, which did not distinguish between individual or corporate defendants as to any count and contained no method for jurors to apportion amount of compensatory or punitive damages attributable to any defendant, was not fundamental error, where appellants were fully aware of this feature of the verdict form, and some trial strategy presumably motivated its use.

[9] Evidence ⚿186(1)
157k186(1) Most Cited Cases
Rule of evidence requiring "timely written notice" of intent to use summary must be strictly complied with, especially where record contains no evidence that underlying data from which summary was compiled was made available to complainant. West's F.S.A. § 90.956.

[10] Appeal and Error ⚿233(2)
30k233(2) Most Cited Cases
Renewed objection to written damage summary was not necessary when summary was admitted, where court had reserved ruling on issue when counsel had previously objected.

[11] Damages ⚿184
115k184 Most Cited Cases
Any item proved only through written damage summary was improperly awarded as part of damages. West's F.S.A. § 90.956.

[12] Appeal and Error ⚿882(14)
30k882(14) Most Cited Cases
Having chosen to submit damage issues to jury without differentiation among claims, appellants could not complain about it on appeal.

[13] Fraud ⚿60
184k60 Most Cited Cases
Defrauded restaurant purchasers could recover damages for losses incurred after they discovered the fraud, where operator of the chain, as part of the inducement to purchaser to buy the business, undertook continuing undefined contractual duty to manage the restaurant.

[14] Evidence ⚿103
157k103 Most Cited Cases
Generally, no reference should be made during trial to wealth or poverty of a party, nor should financial status of one party be contrasted with the other's.

[15] Damages ⚿94
115k94 Most Cited Cases
In determining amount of punitive damages, jury should examine enormity of the offense and finances of party against whom damages are assessed.

[16] Fraud ⚿57
184k57 Most Cited Cases
Evidence that fraud exhausted all plaintiffs' resources was not relevant to determination of award of punitive damages.
***236** Charles Evans Davis and Stephen P. Kanar, Orlando, for appellants.

Douglas C. Spears of Pleus, Adams & Spears, P.A., Orlando, for appellees.

GRIFFIN, Judge.

This is an appeal from a final judgment upon a jury verdict rendered in favor of plaintiffs/appellees Vito and Ida Maniaci (the "Maniacis") and Dove Fountain, Inc. (plaintiffs) for fraud, breach of contract, and violation of the Business Opportunities Act. [FN1]

> FN1. Appellees also sued for violation of section 772.102, Florida Statutes (1989), but the jury found in favor of the appellants on this claim.

This case arises from the Maniacis' purchase of a Casa Mia restaurant on Conway Road in Orlando, Florida in 1983. Casa Mia was a chain of primarily family-owned Italian restaurants which were located solely within the Orlando area. The chain was started by three brothers, Sam Batlemento, Luigi Badalamente and their brother Joe (now deceased). Many of the restaurants were operated by family members, but a small minority of the restaurants were operated by outsiders who frequently owned an equity interest. The remaining interests were owned by Casa Mia Pizzeria & Ristorante, Inc., a Florida corporation ("Casa Mia"), which in turn was owned by Florentes, Inc., a corporation owned in equal shares by the Badalamente brothers.

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Appellee Vito Maniaci, a postal worker, who resided in Michigan, was a lifelong friend of the Badalamentes. Over the years he had invested in a number of different business ventures with the Badalamentes on which he had always made money. Among these ventures was a Big Boy restaurant and a duplex in the Orlando area. Since 1976, he had frequently visited Sam Batlemento and Luigi Badalamente in Orlando and the parties had discussed the possibility of Vito's participation in the Casa Mia business.

In the late 1970's, Casa Mia underwent expansion and the brothers allegedly decided to franchise the restaurants. [FN2] Either in anticipation of the franchise or Maniaci's retirement in 1986, talks concerning the Maniacis' purchase of a restaurant began to accelerate in 1983. In August, 1983, the Maniacis decided to send their twenty-one year old son, Dan Maniaci, to Orlando to learn the business by working in the existing Casa Mia restaurants.

> FN2. According to the record, there were nine Casa Mia restaurants in existence in 1983. Only one was still in operation at the time of trial.

By November 1, 1983, Vito had completed his investigation of various locations and had decided to purchase Casa Mia's existing Conway Road location. The restaurant was owned by Buona Fortuna, a corporation owned in equal shares by Casa Mia and University, Inc. University in turn was owned in equal shares by Casa Mia and Franco Ferrari (a son-in-law of one of the Badalamentes). The purchase price was $99,000. At the closing, on November 29, 1983, the Maniacis paid $33,000 down in cash and assigned the company two promissory notes totalling $8,000. The remaining balance of $58,000 was to be paid at the rate of 12% under the terms of the purchase money note given Buona Fortuna.

At the time of the sale, the Maniacis entered into a Management Agreement with Casa Mia. Under the terms of the agreement, the Maniacis agreed to pay Casa Mia five percent of gross sales in exchange for Casa Mia's management expertise, although no specific management responsibilities were set forth in the agreement. [FN3]

> FN3. The pertinent provisions of the agreement were as follows:
> WHEREAS, Maniaci is engaged in the restaurant business; and
> WHEREAS, Casa Mia is an organization composed of skilled members and engaged in managing various business enterprises; and
> WHEREAS, Maniaci is in need of a skilled management organization to run its affairs; NOW, THEREFORE, in consideration of the mutual benefits to be derived, each from the other, the parties hereto agree as follows:
> Maniaci shall pay to Casa Mia five (5%) percent of gross sales; as hereinafter defined, realized from the store.

***237** The Maniacis took over the restaurant as of December 1, 1983 and operated it under the aegis of Dove Fountain, Inc., a corporate entity which controlled the restaurant until it closed in September of 1986. Although sales increased during the first year, the restaurant experienced financial problems from the first. The Maniacis made no provision for working capital, allegedly because this issue had never been raised by the Badalamentes. Also, the Maniacis had been told by appellants that operating expenses would approximate $13,000 per month but, in fact, they were $17,000 a month. Evidently, the Maniacis had not taken into account payment of the obligations under the purchase money note; also, it appears that Dan Maniaci was not an efficient manager. By April of 1984, the restaurant was in arrears over $12,000. Throughout 1984 and 1985, conditions in the restaurant continued to deteriorate. Appellees made sporadic payments under the note and for advertising, but eventually defaulted under their lease. The restaurant closed in September of 1986 and the equipment was sold in early 1987 for only $18,000.

In their Amended Complaint filed against appellants Sam Batlemento, Luigi Badalamente and Casa Mia, appellees sought damages for fraud, breach of the management contract, violation of Florida's Business Opportunities Act [FN4] and for civil redress of criminal practices. [FN5] Casa Mia counterclaimed for monies owed under the management agreement and Sam Batlemento

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counterclaimed for monies owed on various insurance policies he had carried for the Maniacis through Batlemento Insurance Co. Buona Fortuna also filed a third-party complaint to recover sums due under the purchase note and mortgage. The total amount allegedly due on the counterclaims and third-party complaint was in excess of $65,000.

FN4. § 559.80, *et seq.*, Fla.Stat. (1983).

FN5. § 772.11, Fla.Stat. (1989).

The case was tried to a jury, which found in favor of plaintiffs on their claims for fraud, breach of contract and violation of the Business Opportunities Act. The jury awarded appellees $147,000 in compensatory damages and an equal amount for punitive damages. Following denial of their post-trial motions, appellants have appealed the final judgment asserting multiple claims of error.

I. FRAUD

[1][2] Appellants argue that fraud was not properly pleaded, there was no evidence adduced at trial to support a judgment for fraud and that indeed, as a matter of law, the circumstances leading up to appellees' purchase of this business could not constitute fraud. We agree that the allegations contained in the amended complaint are completely inadequate to state a cause of action for fraud. The fraud allegations in the amended complaint were as follows:

> 8. Defendants, Sam Batlemento, Luigi Badalamente and Casa Mia made representations to Maniaci concerning the prior business history of the restaurant being offered, its prior income, its potential income, prospects, and the services that would be provided in support of the business by said Defendants.
> 9. Maniaci in reliance upon the representations of said Defendants entered into an agreement to purchase the Casa Mia Pizzeria and Ristorante....
> 10. The representations made by Sam Batlemento, Luigi Badalamente and Casa Mia were false and known by said Defendants to be false at the time they were made. Specifically, the representations ***238** as to the prior business history, potential income and services to be provided were false, contrived and without basis in fact.
> 11. Defendants, Sam Batlemento, Luigi Badalamente and Casa Mia made the aforesaid representations with specific intent that Maniaci rely on them to their detriment.
>
> * * * * * *
>
> 23. The representations made by Defendants to induce Plaintiffs to enter into the agreement to acquire the business opportunity were false and fraudulent and known to be false and fraudulent at the time they were made.
> 24. Defendants intended that Plaintiffs rely upon said representations to their detriment.
> 25. With respect to representations as to services and support to be provided, Defendants made said representations and promises with no present intent to perform.
> 26. Defendants have specific knowledge of Plaintiffs' limited financial ability and weak financial condition. Nevertheless, Defendants made the representations with the specific intent to defraud Plaintiffs of their money.
> 27. Defendants' actions were willful, wanton and in reckless disregard of the rights of Plaintiffs entitling Plaintiffs to an award of punitive damages.
> 28. As a result of Defendants' representations, Plaintiffs have been damaged including, but not limited to, the loss of their initial investment, their continuing capital contributions and investments, loss of capital and assets, interest, lost profits and other monetary damages.

Florida Rule of Civil Procedure 1.120(b) requires that claims of fraud be pleaded with particularity. Particularity requires identifying the representation of fact and how the representation is false. *Gordon v. Etue, Wardlaw & Co. P.A.*, 511 So.2d 384 (Fla. 1st DCA 1987). The fraud claim in the amended complaint does no more than identify the subject matter of the alleged false representations of fact. The trial court plainly erred in failing to require appellees' compliance with Florida Rule of Civil Procedure 1.120(b) by granting appellants' motion to dismiss. Nevertheless, we are unable to reverse on this basis.

[3][4][5][6] After a favorable verdict for the plaintiff, a judgment is subject to reversal for defect in pleading only if the defendant has been prejudiced by the error. *See Well-Bilt Products, Inc. v. Liechty*, 167 So.2d 84 (Fla. 2d DCA 1964). Although the appellants claim the lack of factual

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content in the fraud claim left them ill prepared to defend the claimed fraud, we disagree. Appellants took the deposition of Mr. Maniaci early in the case and he identified his claims at that time, although by the time he testified at trial, they were considerably embellished. Nevertheless, if appellees had pleaded what Mr. Maniaci said in his deposition, the complaint would have properly withstood appellants' motion to dismiss. Also, we note that appellees were given leave to amend late in the case to add allegations to the business opportunity and conspiracy counts. These allegations expanded somewhat on Mr. Maniaci's claim that he had been told falsely the Casa Mia restaurants were about to be franchised and that his restaurant would increase in value as a result, which induced him to buy the business. As for the contention that appellees did not *prove* fraud, while we agree that certain of the misrepresentations testified to by the Maniacis could not support a claim of fraud, [FN6] we have found sufficient evidence in this record to create a jury question on the fraud issue. [FN7]

FN6. We agree, for example, that appellees failed to establish fraud based on the representation that $13,000 monthly would cover all expenses of the restaurant because, in fact, it took plaintiffs more than $17,000 monthly to pay the expenses and the debt of the business.

FN7. For example, appellants represented to Mr. Maniaci that they had filed with the State of Florida the documents necessary to franchise the Casa Mia chain, that when this occurred, the value of the restaurants would immediately double in value and that he should act quickly to get in on the ground floor. At trial, appellants denied these representations and testified that franchise approval was ultimately obtained in May, 1984, but there was no documentary evidence introduced and the jury evidently did not believe them. Appellants complain that the franchise misrepresentation was not pleaded *at all* in the amended complaint. However, the complaint does refer obliquely to misrepresentations concerning the "future prospects" of the restaurant--which further illustrates why specificity in pleading fraud claims is essential.

***239** II. THE BUSINESS OPPORTUNITY CLAIM

[7] We reverse the final judgment on appellees' claim for violation of the Business Opportunities Act. Once again, as with the fraud claim, appellees failed to allege any facts that would give rise to violation of Chapter 559 of the Florida Statutes. Here, however, the defect is not merely a matter of pleading. We agree with appellants that the statute simply does not apply to the transaction in this case. The statute defines a "business opportunity" as the sale or lease of products, equipment, supplies or services sold to a purchaser to enable him to *start* a business under certain defined circumstances; however, the statute expressly *excludes* the sale of an ongoing business. [FN8] Appellees argue this exclusion for the sale of an ongoing business contemplated by the act does not encompass the situation involved here, where there is a continuing relationship between the parties, but we can find no basis to interpret the plain language of the statute as appellees suggest. It is also undisputed that Buona Fortuna, Inc. was the seller of this ongoing business to the Maniacis. Casa Mia simply contracted to provide management services. The prohibitions of the act apply to the *seller* of the opportunity, not the shareholders of the seller or individuals who act for the seller. [FN9] We conclude the Business Opportunities Act does not apply in the present case and, accordingly, reverse the judgment on this claim.

FN8. Unfortunately, there is virtually no case law on the act. The legislative history suggests sale of this single Casa Mia restaurant, even with the attendant management agreement, use of Casa Mia recipes, formulae and menu, and purchase of some supplies is not the type of business intended to be controlled by the statute. The definition of "Business Opportunity" includes those transactions where the seller represents to the buyer that the seller will provide either equipment, inventory, marketing locations or assistance, or that the buyer is "guaranteed" to derive a specified return over his initial investment in the opportunity. By example, such business opportunities include worm farms, chinchilla ranches, bubble gum

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> vending machines, vitamin sales and numerous other programs that offer the buyer the opportunity to own and operate his own business, often inserting the phrase "in your spare time."
> The definition specifically excludes marketing programs made in conjuction [sic] with the licensing of a registered trademark or service mark, or the sale of an ongoing business, as long as the seller does not sell more than five of the opportunities or businesses, or the not-for-profit sale of sales demonstration equipment or display samples for a total price of $500 or less. This "take out" provision excludes franchises and normal sales of marketing aids.
> Senate Bill 1205, Commerce Committee, Legislative History.

> FN9. To address this problem an amendment to the amended complaint was filed alleging Casa Mia and the individual defendants were liable under an alter ego theory. However, there was no competent substantial evidence advanced at trial on this issue.

III. BREACH OF CONTRACT

[8] Appellants also complain on appeal that judgment was entered jointly and severally against defendants Sam Batlemento and Luigi Badalamente, as well as Casa Mia on the breach of contract. From our review of the record, particularly appellants' motions for directed verdict at trial, we can find no mention of any lack of legal or evidentiary basis to hold the individuals liable for breach of contract. Moreover, counsel for both sides agreed to the form of the verdict used in this case. Surprisingly, the form did not distinguish between the individual or corporate defendants as to any count and contained no method for the jurors to apportion the amount of compensatory or punitive damages attributable to any defendant. Appellees contend the verdict form was actually prepared by appellants and that appellants' agreement to this verdict form waived any objection to a finding of joint and several liability of all "defendants" on the separate counts in accordance with the form. Appellants argue that a verdict against a party which is unsupported by evidence must be reversed even where there was no objection to its submission ***240** to the jury. [FN10] From comments made by counsel during closing, it appears appellants were fully aware of this feature of the verdict form. We can only assume some trial strategy motivated use of this highly unusual form. We are unwilling to find fundamental error.

> FN10. The few existing cases on this issue appear to turn on a fundamental error analysis. *See, e.g., Morrison v. Hansen,* 213 So.2d 306 (Fla. 1st DCA 1968) (the submission to the jury of a verdict that stated an incorrect principle of law constituted fundamental error). *See also* 55 Am.Jur.2d *Trial* § 213 (1984); *Papcun v. Piggy Bag Discount Souvenirs,* 472 So.2d 880 (Fla. 5th DCA 1985) (failure to object to verdict--on issues not of a constitutional or fundamental character--constituted a waiver of defects contained therein); *Gould v. National Bank of Florida,* 421 So.2d 798 (Fla. 3d DCA 1982) (same); *Robbins v. Graham,* 404 So.2d 769 (Fla. 4th DCA 1981) (same).

IV. EVIDENTIARY ISSUES

[9] Appellants also complain that the trial court, in violation of the requirements of section 90.956, Florida Statutes (1989), permitted appellees to introduce a written damage summary consisting of all sums spent by the Maniacis on the Casa Mia restaurant. These expenditures totaled $102,110.29. Florida courts require strict compliance with the "timely written notice" requirement contained in this rule of evidence, especially where the record contains no evidence that the underlying data from which the summary was compiled was made available to a complainant. *See Tallahassee Housing Authority v. Florida Unemployment Appeals Comm'n,* 483 So.2d 413 (Fla.1986). The failure to comply with the notice requirements of section 90.956 has been found to be a "technical" violation of the statute only where:

> the record reflects that the written summary to which the witness referred and the data underlying the summary were in fact made available to the appellant sufficiently in advance of the presentation of this testimony so as to enable the appellant to adequately prepare to voir dire and cross-examine the witness.

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Bowmar Instrument Corp. v. Fidelity Electronics, Ltd., Inc., 466 So.2d 344, 345 (Fla. 3d DCA), *rev. denied,* 476 So.2d 672 (Fla.1985).

[10][11] In this case, the summary was not provided to appellants prior to trial, which appellees admit. [FN11] Appellees contend that all underlying documentation was provided to appellants prior to trial and that the summary was "merely cumulative" because all items contained on the summary were otherwise in evidence. We cannot verify from the record whether all the underlying documentation was supplied before trial, but we have carefully reviewed the trial transcript and exhibits in an effort to confirm all the items on the summary were otherwise in evidence at trial. It appears that many items of claimed damage are not supported by evidence in the record other than the summary. The jury award was plainly based on this summary and any item proved only through the summary was improperly awarded as part of the damages. On remand, the compensatory damage award must be reduced by the damage summary amounts not otherwise proved by competent evidence. [FN12]

FN11. We reject appellees' further argument that appellants waived any objection to use of the summary by offering a summary themselves. Also, although no renewed objection was made when the summary was finally admitted, it was unnecessary since the court had reserved ruling on the issue when counsel had previously objected.

FN12. By way of information to the parties, our review has yielded a total of $18,150.91 in claimed expenditures on the summary for which we can find no documentation.

V. COMPENSATORY DAMAGES FOR FRAUD AND BREACH OF CONTRACT

[12] Turning to damages, in this case appellees were awarded $147,000 in compensatory damages, computed as follows: the $102,000 in damages outlined in the summary, $7,914.93 for management fees paid to Casa Mia, $22,573.13 paid to Buona Fortuna, Inc. on the note and mortgage, and $14,666.62 spent on advertising for the restaurant, for total damages of $147,266.97. ***241** As previously discussed, the verdict did not distinguish between damages assessed against any defendant for fraud, breach of contract or violation of the Business Opportunities Act. Having chosen to submit these damage issues to the jury without differentiation among the claims, appellants cannot now complain about it.

[13] The proper measure of damages for fraud in this case presents a hard issue. Appellants have strenuously argued here, as they argued to the jury below, that appellees' damage theory, which includes all out-of-pocket expenses for the entire three-year period they operated the restaurant until it was sold, was erroneous, especially because Maniaci testified that he had become aware of appellants' alleged misrepresentations shortly after purchasing the restaurant. We agree in principle with appellants that a defrauded party cannot continue with an enterprise after he has discovered the fraud and expect to recover as damages the additional losses he incurs. But we do not believe the general rule would apply in this case. As part of the inducement to Maniaci to buy the business, Casa Mia undertook a continuing, undefined contractual duty to manage this restaurant: "Don't worry about a thing, we are down here. We can overlook everything that happens." Under the circumstances, we cannot say as a matter of law that appellees' efforts to make a go of the business was unreasonable. [FN13] *See Thor Power Tool Co. v. Weintraub,* 791 F.2d 579, 585 (7th Cir.1986). The jury had a full and fair opportunity to consider these damage issues and found in favor of appellees.

FN13. There are some items of claimed damage that would not be recoverable even under this broad "out-of-pocket" approach, including any out-of-pocket expense not reasonably necessary to keep the business in operation, such as parking tickets. These items are not recoverable in any event due to lack of proof in light of our ruling that the undocumented damages are not recoverable.

VI. PUNITIVE DAMAGES

Although analysis of this case has been complicated by appellees' various failures of pleading and proof and appellants' failure to object

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below to many of the errors of which it now complains, it turns out that the only issue that requires a new trial was also the most hotly contested below. Mr. Maniaci was permitted, over objection, to testify at some length during appellees' case in chief about the sources of the funds he used to purchase the Casa Mia restaurant. He described using "all his savings", cashing out his treasury notes and borrowing from his credit union and life insurance policies. He further testified about borrowing money from his family and mortgaging his home to keep the restaurant afloat. When the business closed, their finances were "very bad"; they had lost "everything". [FN14] The relevancy of the testimony, according to appellees, was to show, in support of the claims of fraud and punitive damages, that appellants "knew the effect it [presumably, the investment] was having on him and what it left him in the end." Appellants objected to all this testimony and moved for a mistrial, asserting the source of the funds appellees invested in the restaurant and how little or much money appellees had left was irrelevant and was offered only to inflame the jury because of the impoverishment of appellees.

> FN14. Appellees' counsel also commented variously on appellees' finances: "[Mr. Maniaci] basically sacked his entire life savings to come up with the money for this investment."

[14] The general rule is that during trial no reference should be made to the wealth or poverty of a party, nor should the financial status of one party be contrasted with the other's. Annotation, *Counsel's Appeal in Civil Case to Wealth or Poverty of Litigants as Grounds for Mistrial, New Trial or Reversal,* 32 A.L.R.2d 9 § 2 at 17 (1956). Argument directly contrasting the poverty of one of the parties with the wealth of the other is especially apt to prejudice the jury. *Id.* at § 5. In Florida, the admission of such evidence or commentary has often been held to constitute reversible error. [FN15] Although ***242** in Florida the rule generally has been applied in personal injury actions, it has been applied in a wide variety of actions in other jurisdictions. *Vanarsdol v. Farlow,* 200 Iowa 495, 203 N.W. 794, 795 (Iowa 1925) (recognizing rule in context of fraud action); *El Paso Dev. Co. v. Ravel,* 339 S.W.2d 360 (Texas App.1960). *See generally* 32 A.L.R.2d, *supra* at § 3 (1956).

> FN15. *See, e.g., Seaboard Air Line Ry. v. Smith,* 53 Fla. 375, 43 So. 235 (Fla.1907) (reversal required because of plaintiff's argument in personal injury action that he was poor person who would be ward of county for the rest of his life if he did not recover damages, but damages would not be missed by defendant railroad); *Rogers v. Myers,* 240 So.2d 516 (Fla. 1st DCA 1970) (court reversed judgment for plaintiff in wrongful death action where counsel argued that action involved more than private dispute between parties; it also involved public's liability for welfare; amounted to improper appeal to jurors' self-interest and was highly prejudicial); *Baggett v. Davis,* 124 Fla. 701, 169 So. 372 (Fla.1936) (plaintiff's testimony that he had no means of support for family other than wages was held improperly admitted because irrelevant and calculated to unduly arouse jurors' sympathy for plaintiff); *Deese v. White Belt Dairy Farms, Inc.,* 160 So.2d 543 (Fla. 2d DCA 1964) (found trial court properly granted motion for new trial where improper testimony that plaintiff was compelled to work because she had no means of support for herself and infant child and was receiving no support from her former husband.)

[15][16] Appellees argue the evidence concerning their own financial hardships *was* relevant to the jury's consideration of *punitive damages.* [FN16] In Florida, in determining the amount of punitive damages, the jury should examine the enormity of the offense and the finances of the party against whom damages are assessed. *Horizon Leasing v. Leefmans,* 568 So.2d 73, 75 (Fla. 4th DCA 1990). Presumably, the fact that appellants' misrepresentations induced a middle class person, with limited resources, rather than a wealthy person (who might not be so inconvenienced by the loss of his investment) to invest in this restaurant goes to the "enormity of the offense" or the "outrageousness of the conduct." We cannot agree that the financial status of the victim of a fraud is a relevant consideration in a jury's evaluation whether to

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punish a defendant with an award of exemplary damages. Certainly, if the situation were reversed, *i.e.,* the appellees were enormously wealthy and the poverty-stricken appellants had sought to introduce this sort of "Robin Hood" defense in mitigation, the appellees would (properly) have objected with a vehemence comparable to the appellants' objections in this case.

> FN16. Many courts have held this error harmless where the record otherwise contained enough properly admitted evidence from which the jury could figure out the relative economic status of the parties. Our review of the record suggests no basis to apply such an analysis in the present case.

Unfortunately, inherent in our system of trial by jury is always a danger the jury will be influenced by the wealth or power of one party or another or sympathy for a party's weakness, poverty or misery. Insurance companies, banks and large corporations would no doubt attest that verdicts are unduly affected by which party has the "deep pocket." It is essential to avoid this risk.

Here, the evidence objected to by appellants makes clear that, after this transaction, the Maniacis were left in dire financial condition. Worse yet, because of the evidence adduced in support of the punitive damage claim, which automatically flows in Florida from *prima facie* proof of fraud, the jury was informed that appellants were living in big expensive houses and had large holdings ("two million dollars"). We cannot follow appellees' reasoning that the fact that this tort exhausted all their resources, rather than some of their resources, is relevant to determination of a punitive damage award. Due to the well-recognized potential for such evidence to improperly skew the jury's deliberations, we conclude the punitive damage award cannot stand. Because the liability of appellants for fraud was not unequivocally established in this trial and because of the difficulty of determining that the liability verdict on the fraud claim was not influenced by the improper evidence adduced by appellees on the damages issue, appellants are entitled to a new trial both on liability and damages awardable on the fraud count. [FN17] *See* ***243***Rivera v. Aldrich,* 538 So.2d 1390 (Fla. 3d DCA 1989); *Keith v. Russell T. Bundy & Assoc., Inc.,* 495 So.2d 1223 (Fla. 5th DCA 1986). We affirm the judgment against all defendants on breach of contract, but remand for recalculation of damages in accordance with section IV of this opinion. The judgment based on the violation of the Business Opportunity Act is reversed.

> FN17. Because the issues involved on the claim for breach of contract were entirely different and this evidence was never offered on the contract issue, we see no reason to disturb the verdict for breach of contract.

VII. COUNTERCLAIM

We see no error in the trial court's refusal to award damages on the counterclaim. In light of the parties' stipulation that the counterclaim damages would stand or fall with the liability and would be determined by the court and our ruling on the measure of damages on the fraud claim, as set forth above, the trial court correctly refused to award these damages to appellees.

AFFIRMED in part; REVERSED in part and REMANDED for new trial on fraud and punitive damages.

W. SHARP and COWART, JJ., concur.

593 So.2d 234, 17 Fla. L. Weekly D83

END OF DOCUMENT

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: April 5, 2005

TIME: 9:30 a.m.

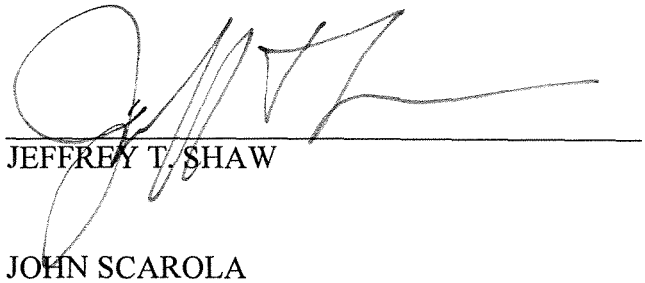
JUDGE: Honorable Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

Coleman (Parent) Holdings Inc.'s Motion To Quash Amended Trial Subpoena And Notice To Produce Personal Balance Sheets Of Ronald Perelman

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 2nd day of April, 2005.



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April 4, 2005

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BY HAND DELIVERY

Honorable Elizabeth T. Maass
Division A1
Courtroom 11B
Circuit Court of the 15th Judicial Circuit
205 North Dixie Highway
West Palm Beach, FL 33401

Re: Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.

Dear Judge Maass:

Enclosed is CPH's motion to quash amended trial subpoena and notice to produce personal balance sheets of Ronald Perelman. Also enclosed are the authorities cited in the motion. This motion is scheduled to be heard by Your Honor on Tuesday, April 5, 2005.

Sincerely,

Jerold S. Solovy
Enclosures

cc: All Counsel of Record

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S MOTION *IN LIMINE* NO. 30 TO BAR REFERENCES TO COLLATERAL BUSINESS AND PERSONAL MATTERS INVOLVING MAFCO-RELATED ENTITIES AND THEIR PRINCIPALS AND EMPLOYEES

Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, respectfully requests that this Court enter an Order barring Morgan Stanley from presenting any evidence or argument relating to collateral business and personal matters and lawsuits in which MAFCO-related entities and other principals and employees including CPH, Ronald Perelman and Howard Gittis have been involved. This motion arises because CPH expects that Morgan Stanley will attempt to inquire into unrelated personal and business matters, including unrelated lawsuits in which MAFCO-related entitled and their principals and employees have been involved. Morgan Stanley should be barred from doing so because any such evidence or argument would be irrelevant to any issue in dispute and would confuse the jury with collateral and unfairly prejudicial issues.

First, evidence and argument concerning collateral business and personal matters and lawsuits are irrelevant to this case. Indeed, in ruling on CPH's motion *in limine* No. 11 concerning Revlon, this Court concluded an unrelated lawsuit involving that company is off-limits at trial. *See* Ex. A. The same result is required here.

Second, evidence and argument concerning collateral business and personal matters are irrelevant because these individuals are not parties to this case. Florida law is clear that "evidence of wrongdoing on the part of a third party is inadmissible as irrelevant to a given case." *Jenkins v. State*, 533 So. 2d 297, 300 (Fla. 1st DCA 1988), *rev. denied*, 542 So. 2d 1334 (Fla. 1989); *see also Beckett v. State*, 730 So. 2d 809, 811 (Fla. 4th DCA 1999); *Denmark v. State*, 646 So. 2d 754, 757 (Fla. 2d DCA 1994); *Banks v. State*, 400 So. 2d 188, 189 (Fla. 1st DCA 1981); *Armstrong v. State*, 377 So. 2d 205, 206 (Fla. 2d DCA 1979); *Hirsch v. State*, 279 So. 2d 866, 869 (Fla. 1973); *Kellum v. State*, 103 So. 2d 99, 103 (Fla. 3d DCA 1958).

Third, the probative value of evidence and argument concerning collateral business and personal matters and lawsuits would be substantially outweighed by the danger of unfair prejudice, confusion of issues, and misleading the jury. Morgan Stanley hopes to divert attention from its own wrongdoing by focusing on controversies involving MAFCO-related entities and their principals and employees. But, as Florida courts recognize, evidence presenting "purely collateral issues which would only serve to confuse and mislead the jury is too remote and should be excluded." *Donahue v. Albertson, Inc.*, 472 So. 2d 482, 483 (Fla. 4th DCA 1985); *see also Atlanta Coastline R.R. Co. v. Campbell*, 139 So. 886, 890 (Fla. 1932).

Fourth, Morgan Stanley should be barred from presenting collateral business and personal matters and lawsuits in the guise of impeaching the credibility of CPH's witnesses. Florida law is clear that a witness's credibility generally may not be attacked by questioning the witness about allegations of past misconduct or unrelated lawsuits. *See, e.g., Fernandez v. State*, 730 So. 2d 277, 283 (Fla. 1999) (Florida law "prohibit[s] impeachment by reference to specific bad acts other than convictions for felonies or misdemeanors involving dishonesty"); *Farinas v. State*, 569 So. 2d 425, 429 (Fla. 1990) (explaining that "[e]vidence of particular acts of

misconduct cannot be introduced to impeach the credibility of a witness," and concluding that questioning of the defendant's expert concerning past allegations of unethical conduct "was improper impeachment of a witness"); *Weitz v. State*, 510 So. 2d 1060, 1061 (Fla. 4th DCA 1987) ("[T]he credibility of a witness may be impeached only by evidence of his general reputation, not by evidence of specific acts of misconduct"); CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 608.1 (2004 ed.) Morgan Stanley therefore cannot cross-examine CPH's witnesses concerning collateral and otherwise irrelevant business and personal matters and lawsuits under the pretext of "impeaching" their credibility.

WHEREFORE, for the foregoing reasons, this Court should enter an Order barring Morgan Stanley from introducing at trial any evidence or argument concerning collateral business and personal matters and lawsuits involving MAFCO-related entities and other principals and employees.

Dated: April 3, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

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One of Its Attorneys

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 3rd day of April, 2005.

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10524 v1

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

ORDER ON CPH's **MOTION IN LIMINE NUMBER** 11

THIS CAUSE having come before this Court on February 17, 2005 upon CPH's Motion in Limine Number 11, and the Court having reviewed the pleadings on file, heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is granted, in part. MS & Co. shall not make reference to the Revlon litigation before the jury. MS & Co. may not present evidence concerning Revlon's alleged business practices without first establishing, outside the jury's presence and (1) CPH + Revlon enjoyed common management at the relevant times; (2) the acts MS & Co. claims Revlon engaged in; & (3) that those acts are sufficiently similar to the acts CPH claims MS & Co. had knowledge of here. dfp

WPB#589635.1

EXHIBIT
tabbies
A

"Granted" for purposes of the Motion in Limine addressed in this Order shall mean that the parties and their counsel shall not refer to or attempt to introduce into evidence, or otherwise place before the jury, the matter referred to without first proffering the good faith basis to believe that the matter is relevant and admissible outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 17 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

WPB#589635.1

Copies furnished to:

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

PLAINTIFF'S MOTION IN LIMINE NO. 31 TO BAR EVIDENCE RENDERED IRRELEVANT BY THE COURT'S ORDER ON CPH'S RENEWED MOTION FOR ENTRY OF DEFAULT JUDGMENT

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") hereby moves for an Order barring Morgan Stanley & Co., Inc. ("Morgan Stanley") from introducing evidence and argument that have been rendered irrelevant by the Court's March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment ("March 23 Order") — specifically, evidence and argument relating to the $680 million loan that Morgan Stanley Senior Funding (not Morgan Stanley) extended to help fund the Sunbeam-Coleman transaction.

ARGUMENT

In the March 23 Order, the Court concluded that Morgan Stanley "deliberately and contumaciously violated numerous discovery orders" in this case. Ex. A, 3/23/05 Order, at 16. The Court sanctioned Morgan Stanley by, among other things, ordering that substantial portions of CPH's Amended Complaint, designated as Exhibit A, "be read to the jury and the jury instructed that those facts are deemed established for all purposes in this action." *Id.* at 17. As the Court has explained, the facts contained in Exhibit A and deemed established by the Court's March 23 Order go far toward establishing Morgan Stanley's liability for aiding and abetting and

conspiracy, leaving CPH with the burden of proving only reliance and damages. *See* Ex. B, 3/23/05 Tr. at 5144. That ruling has rendered irrelevant the fact that MSSF extended a loan to Sunbeam, which as Morgan Stanley has acknowledged in its summary judgment brief, was at most relevant only to the issue of Morgan Stanley's intent to defraud. *See, e.g.*, Ex. C, MS S.J. Mem. at 24 (arguing in intent/scienter section of brief that "the Court would have to ***abandon all economic reason*** to believe that Morgan Stanley risked its own professional reputation, [and] knowingly permitted its affiliate to loan and lose hundreds of millions of dollars") (emphasis in original). Because Morgan Stanley's intent no longer is at issue in this case, and because the $680 million loan extended by MSSF is not relevant to any remaining issue, evidence and argument relating to that loan should be barred.

Dated: April 3, 2005

Respectfully submitted,

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By: _____
One of Its Attorneys

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10570 v.1

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON CPH'S RENEWED MOTION FOR ENTRY OF DEFAULT JUDGMENT

THIS CAUSE came before the Court March 14 and 15, 2005, on CPH's Renewed Motion for Entry of Default Judgment, with both parties well represented by counsel.

Coleman (Parent) Holdings, Inc. ("CPH"), has sued Morgan Stanley & Co., Inc. ("MS & Co."), for aiding and abetting and conspiring with Sunbeam to perpetrate a fraud. Early in the case, CPH was concerned that MS & Co. was not thoroughly looking for emails responsive to its discovery requests. On April 16, 2004, the Court entered an Agreed Order ("Agreed Order") that required MS & Co. to search its oldest full backup tapes for emails subject to certain parameters and certify compliance. MS & Co. certified compliance with the Agreed Order on June 23, 2004. On November 17, 2004, CPH learned that MS & Co. had found some backup tapes that had not been searched. On January 26, 2005 it served its Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order ("Adverse Inference Motion"), claiming that MS & Co.'s violation of the Agreed Order, coupled with its systemic overwriting of emails after 12 months, justified an adverse inference against it. The Court ordered certain limited discovery. Responses to that discovery prompted CPH to orally amend its Adverse Inference Motion to seek more severe sanctions.

The Court held an evidentiary hearing on the Adverse Inference Motion on February

14, 2005. On March 1, 2005 it issued its Amended Order on Coleman (Parent) Holdings Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order ("Adverse Inference Order"). In its current Motion, CPH argues that it has since learned that the discovery abuses addressed in the Adverse Inference Motion and Order represent only a sampling of discovery abuses perpetrated by MS & Co. and that the abuses have continued, unabated. It claims that these abuses, when taken as a whole, infect the entire case. To understand CPH's argument, it is necessary to go back to the beginning.

This case arises out of an acquisition transaction that was negotiated and consummated in late 1997 and early 1998, in which CPH sold its 82% interest in the Coleman Company, Inc., to Sunbeam Corporation. MS & Co. served as financial advisor to Sunbeam for parts of the acquisition transaction and served as the lead underwriter for a $750,000,000.00 debenture offering that Sunbeam used to finance the cash portion of the deal.

CPH's Complaint[1] alleged claims against MS & Co. arising from this transaction for fraudulent misrepresentation, negligent misrepresentation, aiding and abetting fraud, and conspiracy, and sought damages of at least $485 million.

On May 12, 2003, MS & Co. was served with the Complaint and CPH's First Request for Production of Documents ("Request"). The Request sought, in essence, all documents connected with the Sunbeam deal. "Documents" was broadly defined, and specifically included items electronically stored. Concerned that, out of more than 8,000 pages of documents produced, it had received only a handful of emails, CPH on October 29, 2003, served its Motion to Compel Concerning E-Mails. That motion sought an order requiring MS & Co. to make a full investigation for email messages, including a search of magnetic tapes and hard drives; produce within 10 days all emails located; and produce a Rule 1.310 witness

[1]On February 17, 2005, CPH served its First Amended Complaint, which dropped the claims against MS & Co. for fraudulent and negligent misrepresentation, leaving only the aiding and abetting and conspiracy claims.

within 20 days "to describe the search that was conducted, identify any gaps in Morgan Stanley's production, and explain the reasons for any gaps."

In its Opposition to Coleman (Parent) Holdings, Inc.'s Motion to Compel served November 4, 2003, MS & Co. argued that CPH wanted "this Court to order a massive safari into the remote corners of MS & Co.'s email backup systems" and represented that "(t)he restoration efforts demanded by CPH would *cost at least hundreds of thousands of dollars* and require several months to complete (emphasis in original). MS & Co. argued that CPH's "true" motive was to "harass and burden MS & Co. with unnecessary and costly discovery demands and attempt to smear MS & Co. with out-of-context recitations from other proceedings" because "CPH *concedes* that MS & Co. is only able to restore email from backup tapes from January 2000 and later - *more than a year and a half after the events that allegedly gave rise to CPH's claims*," (emphasis in original).

CPH's "concession" was based on representations like the kind made to it by MS & Co.'s counsel in a March 11, 2004 letter that suggested "(t)he burden on Morgan Stanley from . . . a wholesale restoration [of email back up tapes], both in terms of dollars and manpower would be enormous. Regardless of who performs the initial restoration, it would require hundreds (perhaps thousands) of attorney-hours to review millions of irrelevant and non-responsive e-mails . . ."[2]

In response to CPH's Motion to Compel, the parties agreed to reciprocal corporate

[2]Complaints about MS & Co.'s tactics are not new. See Ex. 196 [February 26, 2004, letter from EEOC to Hon. Ronald L. Ellis in EEOC/Schieffelin v. Morgan Stanley & Co., Inc., et al., 01-CV-8421 (RMB) (RLE) (S.D.N.Y.): ("(w)hen EEOC received [Morgan Stanley's] January 27, 2004 Responses to EEOC's Fifth Requests for Production of Documents which did not contain any e-mails, the parties communicated further. At that time, Morgan Stanley took the position that searching for e-mails would be burdensome both in regards to expense and the time it would take to respond. While the parties were in the process of attempting to work out these disputes, EEOC for the first time learned that [Morgan Stanley has] an easy, systematic ability to search for relevant documents. In a February 16, 2004, conversation with an IT representative of [Morgan Stanley], EEOC learned that [Morgan Stanley has] an e-mail system, which, while not yet fully comprehensive, was easily searchable on February 18, 2004, the close of discovery . . . which is certain to produce discoverable information highly relevant to EEOC's and Plaintiff-Intervenor's claims . . . After disclosing their state-of-the-art system to EEOC, [Morgan Stanley] dropped [its] assertion that the process was too expensive, but maintained that they refuse to search for e-mails because it is burdensome for attorneys to review large numbers of documents prior to production.")

depositions on the email issue. CPH deposed Robert Saunders on February 10, 2004.[3] After completion of the corporate representative depositions, and unable to obtain MS & Co.'s agreement to a mutual email restoration protocol, CPH served its Motion for Permission to have Third Party Retrieve Morgan Stanley E-Mail and Other Responsive Documents, proposing that a third party vendor be given access to both parties' email systems for restoration at each party's expense. At the hearing on that Motion, CPH offered to split the expenses evenly. MS & Co. refused.

MS & Co.'s continued assertions that the email searches could be conducted only at enormous cost and would be fruitless because there were not backup tapes with email from 1997 and 1998 were confirmed to the Court by MS & Co.'s counsel, Thomas Clare of Kirkland & Ellis, at a hearing held March 19, 2004:

> Mr. Scarola: Electronic records of e-mails that have been exchanged.
> The Court: Do we agree that there has been such a request outstanding?
> Mr. Clare: There has been a request outstanding.
> The Court: And have you all objected?
> Mr. Clare: From the beginning.
> The Court: And what's the basis of the objection?
> Mr. Clare: We objected to the breadth of the request that they're making. And to answer Your Honor's question directly – and the burden that is associated with it – that given the particular e-mail back-up tapes that are in existence five, six years after the fact of these transactions, that the scope of the e-mail request that they are seeking is improperly and unduly burdensome given the enormous costs that would be required, given the fact that the time period for which we have back-up tapes post dates the events by several years.

Unable to resolve the email issue, on April 9, 2004, CPH served its Motion to Compel

[3]Saunders provided misleading information in his deposition. See footnote 12, infra.

Concerning E-Mails and Other Electronic Documents. On the eve of the hearing on CPH's Motion to Compel, the parties reached an accommodation, and on April 16, 2004 the Court entered the Agreed Order. Under the Agreed Order, MS & Co. was required to (1) search the oldest full backup tape for each of 36 MS & Co. employees involved in the Sunbeam transaction; (2) review emails dated from February 15, 1998, through April 15, 1998, and emails containing any of 29 specified search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004, all nonprivileged emails responsive to CPH's document requests; (4) give CPH a privilege log; and (5) certify its full compliance with the Agreed Order.

As required by the Agreed Order, MS & Co. produced about 1,300 pages of emails on May 14, 2004. It did not, however, certify compliance with the Agreed Order. After prompting by CPH, on June 23, 2004, MS & Co. served a certificate of compliance signed by Arthur Riel, an Executive Director and manager of its Law/Compliance IT Group.[4]

CPH got its first indication that the Agreed Order may have been violated in the late fall of 2004.

On November 17, 2004, Clare wrote Michael Brody of Jenner & Block, CPH's outside counsel, that MS & Co. had "discovered additional e-mail backup tapes . . ."; that "(t)he data on some of [the] newly discovered tapes has been restored;" that "we have re-run the searches described in [the Agreed Order]"; that "some responsive e-mails have been located as a result of that process"; and that "(w)e will produce the responsive documents to you as soon as the production is finalized."

On December 14, 2004, Brody wrote Clare back:

> in [your November 17, 2004 letter], you state that Morgan Stanley located additional email backup tapes, and that you

[4]Though CPH would not learn for months that the certificate was false, and even then the magnitude of MS & Co.'s misrepresentations would not be admitted, MS & Co. personnel, including in-house counsel, knew the certification of compliance was false when made.

> would be producing documents soon. Within two days of that letter, you produced some emails to us. In your November 17, 2004 letter, however, you also indicated that "some of the backup tapes are still being restored." Have those backup tapes been restored? Have you found additional responsive emails? If so, when will Morgan Stanley produce those emails? How is it that the tapes were only recently located?

On December 17, 2004, Clare wrote back, telling Brody "(n)o additional responsive e-mails have been located since our November production."[5]

Brody wrote back to Clare December 30, 2004, noting the deficiencies in Clare's correspondence:

> You do not inform us whether the review of the recently-located backup tapes still is ongoing. Please confirm that all email backup tapes from the relevant time period have been reviewed and all responsive emails have been produced. If the review still is proceeding, please let us know when the review will be completed.

Clare wrote back on January 11, 2005, telling Brody that the "restoration of e-mail backup tapes is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

Concerned about Clare's lack of candor, on January 19, 2005 Brody wrote again:

> I write in response to your January 11, 2005 letter concerning e-mails back-up tapes. Unfortunately, your letter raises more questions than it answers. As I requested in my December 14, 2004 letter, please explain the circumstances under which Morgan Stanley located these backup tapes and advise us of the date on which the tapes were located.

---

[5]Not only does this letter fail to answer Brody's legitimate questions, it implies that MS &Co. was still processing and reviewing emails from the newly found tapes. As we now know, though, *no* additional information was migrated to the archives between approximately August 18, 2004 and January 15, 2005. *Of course* "no additional responsive e-mails [would have been] located."

> Further, please explain your statement that "the next set of backup tapes" is scheduled to be restored "at the end of January." How many tapes will be restored by the end of January? When exactly in January will Morgan Stanley complete the process of restoring and searching these tapes for responsive documents? Are there other backup tapes that are not yet in the process of being restored? If so, please advise us of (a) the number of tapes that are not yet in the process of being restored; (b) the time period of the data contained on those tapes; and (c) Morgan Stanley's timetable for restoring and searching those tapes. In addition, please explain why those tapes are not yet in the process of being restored. Please also explain why Morgan Stanley cannot complete the restoration and searching of all remaining backup tapes before "the end of January." As you know, our trial is scheduled to begin on February 22, 2005.
>
> We look forward your complete response to these questions no later than January 21, 2005 so that we can bring this matter to the Court's attention, if necessary.

Conforming to what was by now his usual stonewall tactic, Clare responded by letter dated January 21, 2005:

> I write in response to your January 19, 2005 letter regarding Morgan Stanley's production of e-mails restored from backup tapes.
>
> Morgan Stanley completed its initial production of restored e-mail messages on May 14, 2005. The May 2004 production was conducted in accordance with the agreed-upon order governing, and the searches that resulted in that production encompassed data from all of the backup tapes known to exist at the time. Subsequent to the May 2004 production, additional tapes were found in various locations at Morgan Stanley. The discovered tapes were not clearly labeled as to their contents, were not found in locations where e-mail backup tapes customarily were stored, and many of the tapes

were in a different format than other e-mail backup tapes. In November 2004, once it was determined at least some of the discovered tapes contained recoverable e-mail data, Morgan Stanley re-ran the searches described in the agreed-upon order. Those searches resulted in Morgan Stanley's November 2004 production.

Morgan Stanley's efforts to restore the backup tapes discovered after the May 2004 production are ongoing. It is a time-consuming and painstaking process and, given the absence of clear labels or other index information for the backup tapes, there is no way for Morgan Stanley to know or accurately predict the type or time period of data that might be recovered from tapes that have yet to be restored. While Morgan Stanley cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes, we understand from Morgan Stanley that, when the agreed-upon searches are run again at the end of January, those searches will include approximately one terabyte of additional data restored since the prior production.

On January 26, 2005, CPH served its Adverse Inference Motion, seeking sanctions based on MS & Co.'s disclosure of the newly found tapes. Hearing was scheduled for February 14, 2005. In preparation for that hearing, on February 3, 2005 the Court ordered MS & Co. to produce by noon on February 8, 2005 "(i) all documents to be referred to or relied on by any of the witnesses in his or her testimony; and (ii) all documents within MS & Co.'s care, custody, or control, addressing or related to the additional email backup tapes, including matters relating to the time or manner in which they were discovered; by whom they were discovered; who else learned of their discovery and when; and the manner and timetable by which they were be restored and made searchable, including any correspondence to or from outside or prospective outside vendors."

The Adverse Inference Order outlined the discovery abuses shown at the February 14, hearing. They included MS & Co.'s undisclosed discovery of the 1,423 "Brooklyn" tapes no

later than May of 2004; the undisclosed discovery of the 738 8-millimeter backup tapes in 2002; the presence of unsearched data in the staging area; the discovery of 169 DLT tapes in January 2005; the discovery of more than 200 additional tapes on February 11 and 12, 2005; the discovery of a script error that had prevented MS & Co. from locating responsive email attachments; and discovery of another script error that had infected the ability to gather emails from Lotus Notes platform users.

In response to these deficiencies, the Court issued the Adverse Inference Order. That Order reversed the burden of proof on the aiding and abetting and conspiracy elements and included a statement of evidence of MS & Co.'s efforts to hide its emails to be read to the jury, as relevant to both its consciousness of guilt and the appropriateness of punitive damages. It specifically provided that "MS & Co. shall continue to use its best efforts to comply with the April 16, 2004 Agreed Order and . . . February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search."[6]

It is now clear why MS & Co. was so unwilling to provide CPH with basic information about how and when the tapes were found or when production would be complete. First, candor would have required MS & Co. to admit that it had not done a good faith search for the oldest full backup tapes, and that Riel's certificate of compliance was false. Some unsearched tapes had been found by 2002; others had been found no later than May, 2004. Together, over 2,000 tapes had been found which were not searched prior to the May production. It is untrue that the tapes were "not in locations where e-mail backup tapes customarily were stored."

[6]Concerned that MS & Co. had been less than candid with both CPH and the Court, on February 4, 2004, the Court entered its Order on Coleman (Parent) Holding's ore tenus Motion to Participate in Search of Additional E-Mail Backup Tapes or Appoint Third Party to Conduct Search, ordering MS & Co. to pay for a third party vendor to check its compliance with the Agreed Order. The Court previously found that the two scripts errors testified to by Allison Gorman at the February 14, 2005, hearing would not have been discovered or revealed without the threat that the third-party vendor would discover the errors. Given Ms. Gorman's testimony at the March 14, 2005, hearing, though, it now appears MS & Co. knew about the errors before the appointment of the third-party vendor. Consequently, the errors were only revealed, but not discovered, in response to the February 4, 2004, Order.

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Second, MS & Co. desperately wanted to hide an active SEC inquiry into its email retention practices.[7] [8] [9] [10] Finally, MS & Co. did not want to admit the existence of the historical email archive, which would expose the false representations it had made to the Court and used to induce CPH to agree to entry of the Agreed Order.[11] [12]

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[7]On December 17, 2003, CPH served its Third Request for Production seeking "(a)ll materials and documents submitted to the United States Securities and Exchange Commission ("SEC"), received from the SEC, or reflecting communications with the SEC in connection with any investigation, inquiry, or examination concerning or relating to Morgan Stanley's policies and/or procedures with regard to the retention, storage, deletion, and/or back-up of electronic mail (emails) . . ." On October 12, 2004, CPH served its Request for Supplemental Documents seeking to bring MS & Co.'s document production current, requesting "(a)ll documents not previously provided by MS & Co. that are responsive to any Request for Production of Documents that CPH previously has served upon MS & Co. in the litigation, including documents obtained by MS & Co. or its counsel after the date of MS & Co.'s prior productions." No SEC documents were produced in response to either request; no privilege log was generated. On other privilege logs generated in response to court orders, MS & Co. did not show the SEC on the distribution portion of the log. See March 9, 2005 Order Following in Camera Inspection (Riel/SEC Documents) footnotes 1, 2. See, also, footnote 15, infra. Kirland & Ellis, outside counsel for MS & Co. in this litigation, represents MS & Co. in the SEC's inquiry into its email retention practices.

[8]MS & Co. manipulated the unhinging of the SEC's email investigation from the IPO litigation in January, 2005, to conceal the email issues as long as possible.

[9]It is now apparent that MS & Co. chose deliberately to keep its affidavits concerning the informal SEC inquiry submitted to support its privilege claims vague, despite two requests from the Court seeking specific information. See February 28, 2005 Order (Release of Exhibits).

[10]See February 25, 2005 Order on Morgan Stanley's Objections to Coleman (Parent) Holding Inc.'s Notice to Produce at Hearing and Motion for Protective Order and March 4, 2005 Order on Plaintiff's ore tenus Motion to Compel Additional Production.

[11]While MS & Co. contends that its representations to the Court that it would cost "hundreds of thousands of dollars" to search the backup tapes and that there was no pre-2000 backup tapes were not false, they were deliberately misleading: MS & Co. never had an intention to search the back up tapes to respond to the requests and some of the year 2000 backup tapes backed up email back to 1997.

In 2001, MS & Co. decided to create the email archive. By June,2003, it had decided that the archive should have two components. First, MS & Co. wanted to create an archive that captured and stored email as it was generated. Second, MS & Co. wanted to add historical data to the archive. That task involved searching for all email backup tapes containing historical emails; sending those tapes to an outside processor; loading the processed tapes into a staging area; and migrating the stored data from the staging area onto the archive. As we now know, archive searches are quick and inexpensive. They do not cost "hundred of thousands of dollars" or "take several months." The restrictions imposed by the Agreed Order were not needed.

[12]On February 10, 2004, Robert Saunders, an executive director of IT for MS & Co., was deposed. He testified that in January, 2003, MS & Co. had put into effect the email archive system. When specifically asked whether the new email archive system would include prior backups or only going forward backups, he testified that "(t)he way it was built was for going forward backup." He was next asked whether "(w)ith respect to backup dated January 2001 and previously, does Morgan Stanley have any new capabilities to restore and search e-mail?" After counsel interposed a vagueness objection, he answered "(t)here are no new capabilities to search that e-mail." That testimony was so misleading as to be false. As Sauders well knew, since he was on the team responsible, the "live" email capture portion of the archive was already operational. The migration of the historical data to the archive was expected to be completed by April of 2004, just two months after his deposition.

MS & Co.'s wrongful conduct has continued unabated.[13] Since the February 14, 2005, hearing, it has come to light that:

- Only two whole and four partial tapes from the Brooklyn tapes had been migrated to the archive and were thus searched for the November, 2004, production. MS & Co. sought to hide this information to create the impression that all the produced documents came from the Brooklyn tapes, rather than reveal that the production came from material that had migrated from the staging area to the archive since the May, 2004, production or some other, as yet undisclosed, source.[14]

- Contrary to MS & Co.'s counsel's November 17, 2004, letter to CPH, *none* of the November, 2004 production came from the "newly found" tapes. MS & Co. carefully crafted its responses to inquiries about the November, 2004, production to avoid both disclosure of the existence of the archive and outright lying.

- The scripts MS & Co. used to process emails into its archive caused the bodies of some messages to be truncated. MS & Co. discovered this problem on February 13, 2005, but did not tell the Court about it until March 14, 2005.

- A migration issue caused about 5% of email harvested by NDCI from the backup tapes not to be captured in the archive, based on testing of a representative sample of tapes. MS & Co. told the SEC about this problem on February 24, 2005, but failed to tell CPH or the Court.

- As of June 7, 2004, only 120 out of 143 SDLT tapes had been processed into the archive.

- An analysis requested by the SEC showed that, based on a representative sample, 10% of backup tapes were overwritten after January, 2001.

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[13]MS & Co. sought to use the entry of the Adverse Inference Order as a shield against further inquiry into its email abuses, arguing that the matter was closed by the Adverse Inference Order. It previously used this tactic with the SEC, arguing that the December 3, 2003 Cease and Desist Order shielded it from other sanctions for email retention failures. See Ex. 14 [February 10, 2005 letter from outside counsel for MS &Co. to SEC]

[14]MS & Co. argued at the March 14 and 15, 2005 hearing that there were only 13 unique, new emails contained in the November 2004 production when compared to the May 2004 production. Nine of those emails, however, were originally given to MS& Co.'s lawyers for responsiveness review by the IT staff for the May 2004 production. No explanation of why they were not produced in May was offered. This is particularly concerning given the large number of documents Ms. Gorman testified the search parameters found compared with the relatively small number found responsive and produced after review by counsel.

16div-013823

- A software error caused blind carbon copies not to be captured in the archive process. MS & Co. told the SEC about this problem on February 24, 2005. MS & Co. did not tell CPH or the Court.

- A software error caused the searches to be hyper case-sensitive, resulting in a failure to capture all emails. MS & Co. knew of the problem as of December, 2004, but did not tell CPH or the Court. The problem was not purportedly fixed until March, 2005.

- A script error caused the archive to have problems pulling group email in Lotus Notes.

- MS & Co. provided sworn testimony at the February 14, 2005, hearing that it had located 600 gigabytes of data, while contemporaneously telling the SEC it had located a terabyte of data. A gigabyte represents 20,000 to 100,000 pages. Incredibly, MS & Co.'s witness on this point, Allison Gorman, testified on March 14, 2005, that it was simply a "terminology" issue that she did not choose to correct because it could cause "confusion."

- CPH requested MS & Co. to produce responses it had made to third-parties in civil, criminal, or administrative proceedings describing limitations on MS & Co.'s ability to produce emails and all notices in such proceedings that MS & Co. had newly discovered backup tapes containing email. MS & Co. objected, arguing that there were over 300 separate proceedings, involving over 70 outside law firms, and that the cost of compliance would be too great. On March 2, 2005, the Court ordered the production, after shortening the time period involved, and required production within 12 hours after counsel's review of each item for responsiveness but, in any event, within 10 days. At the time MS & Co. objected to CPH's request as unduly burdensome, it knew of its Well submission to the SEC made on February 10, 2005. Kirkland and Ellis, co-counsel here, was co-counsel for MS & Co. in that SEC proceeding. Consequently, it appears MS & Co.'s real concern was not that expressed to the Court, but was based on its realization that compliance would reveal the existence of the SEC inquiry into its email retention policy and MS & Co.'s efforts to keep the existence of that investigation secret. MS & Co. violated the Court's March 2, 2005, Order on Morgan Stanley's Responses and Objections to Coleman (Parent) Holdings Inc.'s Notice to Produce at Hearing requiring it to disclose items responsive to CPH's Request for Production within 12 hours of review for responsiveness by waiting *days*, not hours, to produce the Wells submission.

- MS & Co.'s failure to produce or log the SEC documents violated the Court's February 3, 2005, Order.[15]

- James Doyle's, the Executive Director of MS & Co.'s Law Division, declaration that he did not learn of additional unsearched backup tapes until the end of October, 2004, was intended to mislead CPH and the Court. Obviously, MS & Co. sought to create the implication in the declaration that *no one* in the Law Division knew of the backup tapes before then. Instead, both Soo-Mi Lee, Doyle's associate, and James Cusick, Doyle's superior, knew of the tapes no later than June 7, 2004.

- In-house counsel for MS & Co. knew as of June 7, 2004, that nearly a third of the restored backup tapes did not contain email, implying they may have been recycled in violation of the December 3, 2002 Cease and Desist Order. They did not tell CPH or the Court.

- MS & Co.'s searches looked for only two types of emails. There are other types of emails that were not included in the searches. CPH did not learn of this deficiency until March 13, 2005.

- MS & Co. improperly failed to produce 125 documents required to be produced by the Court's February 3, 2005, Order Specially Setting Hearing which required limited discovery be made in connection with the February 14, 2005, hearing on the Adverse Inference Motion.

- MS & Co. improperly withheld 13 documents required to be produced by the Court's March 4, 2005, Order on Plaintiff's ore tenus Motion to Compel Additional Production.

- An additional 282 tapes were found on February 23 and 25, 2005; CPH was not told of the discovery until March 13, 2005.

- An additional 3,536 tapes were discovered on February 23, 2005, in a security room.

- An additional 2,718 tapes were found at Recall, MS & Co.'s third party off-site storage vendor, on March 3, 2005.

- An additional 389 tapes were found March 2 through March 5, 2005. CPH was not told

[15]The Court previously rejected MS & Co.'s argument that the January 14, 2005, email exchange between its outside and in-house counsel was not required to be produced under the February 3, 2005, Order Specially Setting Hearing because it referred to the "documents issue" and not specifically to the backup tapes. See March 16, 2005 Order on Morgan Stanley's Motion to Disqualify Plaintiff's Counsel Searcy, Denney, Scarola, Barnhart & Shipley, P.A. and Jenner & Block, LLC. MS & Co.'s insistence on a narrow interpretation of the February 3, 2005, Order is not particularly sympathetic, when the only reason that Order confined production to the backup tape issue was because MS &Co. had failed to notify the Court of the other deficiencies in its certificate of compliance.

until March 13, 2005.

- On March 4, 2005, the Court entered its Order on Plaintiff's ore tenus Motion to Compel Additional Production, which ordered MS & Co. to produce by 3:00 p.m. on March 7, 2005, all items within its care, custody, or control dealing with the Riel/SEC investigation, other than documents representing communications between or among MS & Co. inside and outside counsel that were not copied to anyone other than counsel. MS & Co. sought to discredit Riel and thus distance itself from the false June 23, 2004 certificate of compliance; in doing so, it sought to hide Riel's whistle blower status and the existence of an SEC investigation into whether MS & Co. employees sought kick backs from third party vendors; whether MS & Co. employees were improperly pressured into dealing with third-party vendors who may provide business to MS & Co.; and whether MS & Co. continued to overwrite backup tapes contrary to the SEC's December 3, 2002, Cease and Desist Order.

- A script error prevented the insertion of some emails into the archive. MS & Co. produced over 4,600 pages of emails on March 21, 2005, some of which it suggested may have been located on correction of the error; alternatively, it suggested the emails may have been located by NDCI as part of its efforts to verify MS & Co.'s searches.

MS & Co.'s discovery abuses have not been confined to its email production.

William Strong is a MS & Co. managing director and was one of the principal players for it in the Sunbeam deal. He took credit for the fees generated. On May 9, 2003, CPH requested a copy of "(a)ll documents concerning employment contracts, performance evaluations, and/or personnel filed (including without limitation any documents that describe or discuss [his] training, experience, competence, and accomplishments) . . ." MS & Co. asserted that the requested documents were not relevant and that production "would unnecessarily infringe on the privacy interests of [Strong]." On March 15, 2004, the Court ordered MS & Co. to produce "(a)ll references (positive or negative) to [Strong's] truthfulness, veracity, or moral turpitude." Some portions of Strong's evaluations were produced in response to that order. Those evaluations noted Strong's colleagues' reservations about his candor and ethics. Two of his evaluators, Joseph Perella and Tarek Abdel-Meguid, were deposed, when some relatively vague testimony about the bases for those conclusions was offered. It now appears Strong was facing criminal prosecution in Italy for complicity in bribery while he was working on the Sunbeam transaction, which his evaluators knew, and that MS & Co. purposely

withheld that information from CPH and the Court.[16]

Even once CPH independently discovered evidence of Strong's indictment in Italy, MS & Co. sought to shield its files from discovery. It claimed that virtually *all* of the documents it had were privileged under joint defense agreements in place between it, Strong, and Saloman Brothers, Strong's employer at the time of the incident. As the Court's March 10, 2005 Order Following In Camera Inspection (Strong) details, the documents MS & Co. relied on to support that position, and sought to prevent CPH from obtaining, reflect no such agreement.

The other discovery abuses and misrepresentations by MS & Co. other than those involving its email production practices are outlined in CPH's Chronology of Discovery Abuses by Defendant served March 1, 2005, and would take a volume to recite. They include:

- failing to provide the information retained by MS & Co.'s internal document management system pertaining to MS & Co.'s work for Sunbeam; falsely representing to the Court that no useful information was contained in that information; and producing a Rule 1.310 representative who had made an insufficient inquiry into authenticity, business record status, and authorship of documents; see February 28, 2005 Order on CPH's Motion to Deem Certain Documents Admissible and for Sanctions due to Morgan Stanley's Disregard of Court Order;

- when faced with contempt proceedings for violating the Stipulated Confidentiality Order by providing a copy of a settlement agreement between CPH and Arthur Andersen to other counsel, representing to the Court that the law firm of Kellogg, Huber was retained to handle the "Andersen aspects" of this litigation because of a conflict between Andersen and Kirkland & Ellis; Mark Hansen, a partner at Kellog, Huber, testified that his firm was hired as co-counsel for all aspects of the case;

- providing answers to interrogatories signed by a corporate representative who performed insufficient verification of the responses;

[16]MS & Co. originally argued that documents concerning the Italian proceedings were not in Strong's "personnel file" and so were not required to be produced in response to CPH's initial request. MS & Co.'s practice of filing damaging information about an employee other than in his personnel file and then claiming it was not included in the request is about at convincing as its argument that, since it has a corporate directive not to keep drafts of documents once they are in final form, document drafts cannot be business records exempt from hearsay because they are not "kept in the course of a regularly conducted business activity." See Fla. Stat. §90.803 (6) (a). In any event, there was *no excuse* for not producing its records of the Italian proceedings once the Court's March 15, 2004 Order was entered.

- routinely asserting unfounded privilege claims;[17] and

- failing to timely comply with the Court's orders; for example, MS & Co. did not produce Strong's 1994 Performance Evaluation until the afternoon of March 15, 2005, though it was obviously included in the Court's March 15, 2004 Order. The failure cannot be excused as oversight since, when CPH specifically asked for the 1994 evaluation in the spring of 2004, MS & Co.'s counsel said it was withheld as non-responsive; see, also, Ex. 197, 198.

In sum, MS & Co. has deliberately and contumaciously violated numerous discovery orders, including the April 16, 2004 Agreed Order; February 3, 2005 Order Specially Setting Hearing; and the March 4, 2005 Order on Plaintiff's ore tenus Motion to Compel Additional Production. At the February 14, 2005, hearing on CPH's Adverse Inference Motion, it chose to hide information about its violations and coach witnesses to avoid any mention of additional, undisclosed problems with its compliance with the Agreed Order. Implicit in the requirement that MS & Co. certify compliance with the Agreed Order was the requirement to disclose impediments to its ability to so certify. As outlined in this Order, MS & Co. employees, and not just counsel, have participated in the discovery abuses. The prejudice to CPH from these failings cannot be cured. Even if all the script errors have been located and corrected, and MS & Co. has failed to show they have, and even if all of the email backup tapes have now been located, and MS & Co. has failed to show they have, the searches cannot be completed in time. The other discovery abuses outlined call into doubt all of MS & Co.'s discovery responses. *The judicial system cannot function this way.* Based on the foregoing and on the Court's March 1, 2005 Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, it is

ORDERED AND ADJUDGED that CPH's Renewed Motion for Entry of Default Judgment is Granted, in part. See Robinson v. Nationwide Mut. Fire Ins. Co., 887 So. 2d 328 (Fla. 2004); Mercer v. Raine, 443 So. 2d 944 (Fla. 1983); Precision Tune Auto Care, Inc. v.

[17]For example, MS & Co. produced over 260 documents dealing with the Strong investigation over which it had previously claimed privilege once the Court announced its intention to conduct an in camera review; the Court found another 200 documents were not privileged after conducting its review, by its March 10, 2005 Order.

Radcliffe, 804 So. 2d 1287 (Fla. 4th DCA 2002); Rule 1.380 (b) (2) (C), Fla. R. Civ. P. Paragraphs 2 (excluding the last sentence thereof); 3 (excluding the portion of the last sentence beginning with "in order to close . . ."); 8-10, 11 (excluding everything after the first sentence); 12 (excluding all parts following "June 1998"); 13 (excluding the last sentence thereof); 14-27; 28 (excluding everything after "firm" in the second to last sentence thereof); 29-39; 41-52; 53 (excluding the second sentence thereof); 54-57; 58 (excluding "CPH and" in the second line thereof); 59-63; 64 (excluding the third line thereof); 65 (excluding the last sentence thereof); 66 (excluding the last sentence thereof); 67-70; 71 (excluding the first word of the last sentence and the remainder of that sentence after "material"); 72; 73 (excluding the first sentence thereof); 74 (excluding the words "CPH and" in the second to last sentence thereof); 75-81; 85; 86; 87 (excluding (g)); 90, and 91 (excluding (g)) of Plaintiff's Amended Complaint, as amended by the Court's Amended Order on Morgan Stanley's Motion to Dismiss, Motion to Strike, and Motion for More Definite Statement, shall be read to the jury and the jury instructed that those facts are deemed established for all purposes in this action. A copy of a redacted Amended Complaint is attached as Exhibit A. It is further

ORDERED AND ADJUDGED that the Court shall read to the jury a Statement similar to that attached as Exhibit A to the Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, but incorporating the relevant additional findings of this Order, and the jury will be instructed that it may consider those facts in determining whether MS & Co. sought to conceal its offensive conduct when determining whether an award of punitive damages is appropriate. See General Motors Corp. v. McGee, 837 So. 2d 1010 (Fla. 4th DCA 2002), rev. den. 851 So. 2d 728 (Fla. 2003). Counsel are each invited to submit proposed Statements. It is further

ORDERED AND ADJUDGED that CPH shall be entitled to an award of reasonable fees and costs incurred as a result of the Renewed Motion for Entry of Default Judgment and the violations of Court orders recited herein. The amount shall be determined at an evidentiary hearing following trial. It is further

ORDERED AND ADJUDGED that MS & Co. is relieved of any future obligation to

comply with the April 16, 2004 Agreed Order and the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s Motion to Participate in Search of Additional E-Mail Back-Up Tapes or Appoint Third Party to Conduct Search. It is further

ORDERED AND ADJUDGED that the pro hac vice admission of Thomas Clare is revoked. It is further

ORDERED AND ADJUDGED that the portions of CPH's Motion for Correction and Clarification of Order on CPH's Motion for Adverse Inference that seek to amend the body of that Order to correct clerical and spelling errors, as agreed to by counsel, is Granted, and the corrections deemed made to the body of the Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, by interlineation. In all other respects the remainder of the Motion for Correction and Clarification is declared moot.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 23rd day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 46

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Wednesday, March 23, 2005

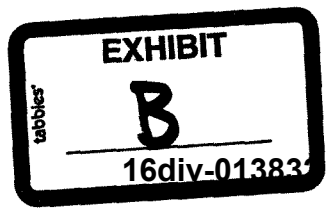
Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

9:45 a.m. to 2:00 p.m.



And in view of your order, which I perceived to be a default essentially against the client, I think it raises a lot of issues.

THE COURT: Please understand, because I understand you haven't had as long with that order as I had writing it. Essentially, it does a default on the aiding and abetting and conspiracy. It leaves them with the burden of proof of reliance and it leaves them with the burden of proof of damages. I mean, I'm just saying you haven't had --

MR. WARNER: Judge, I understand your view of it, but there isn't much left on liability as far as I can see. But the point would be, and I would like Mr. Ianno to address the fact that in view of your order, we think this panel needs to be stricken and start all over anyway, so I'd like Mr. Ianno to address that issue with you even though what we're here on is the motion for -- to allow Kirkland & Ellis to withdraw and substitution of counsel, but I think it's relevant to --

THE COURT: Are you asking to have the panel stricken even if I deny the motion to withdraw?

MR. IANNO: Yes.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

Filed Under Seal - Subject to Confidentiality Order

MEMORANDUM IN SUPPORT OF MORGAN STANLEY & CO. INCORPORATED'S MOTION FOR SUMMARY JUDGMENT

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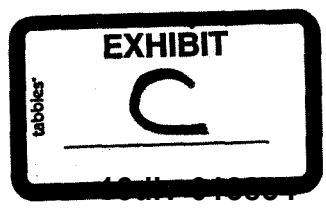
Dated: December 10, 2004



warranties." *Dyncorp*, 215 F. Supp. 2d at 322; *see also Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 195 F. Supp. 2d 551 (S.D.N.Y. 2002) ("Under New York law, where a party specifically disclaims reliance upon a particular representation in a contract, that party cannot, in a subsequent action for common law fraud, claim it was fraudulently induced to enter into the contract by the very representation it has disclaimed reliance upon.") (internal quotations omitted).

Accordingly, CPH cannot establish justifiable reliance, and therefore cannot establish fraudulent misrepresentation under New York law. Morgan Stanley is thus entitled to summary judgment on that claim.

B. CPH Has Not Presented Any Evidence Of Scienter Or Intent To Defraud As A Matter Of Law.

Finally, CPH's fraudulent misrepresentation also fails for the separate and independent reason that CPH has failed to establish any evidence of scienter, or intent to defraud Perelman. Because fraud is an intentional tort, a fraud plaintiff must establish that the defendant knew that the challenged statements were false, and made them with intent to deceive. *See, e.g.*, *Dyncorp*, 215 F. Supp. 2d at 318. Here, CPH has failed to present any evidence that Morgan Stanley made the challenged statements with scienter.

CPH tries to satisfy the scienter requirement by drawing the inference that Morgan Stanley had the intent to commit fraud because it had the motive to (i) retain Sunbeam as a client and (ii) collect roughly $30 million in investment banking and underwriting fees for this deal. Compl. ¶¶ 31, 66, 73. But if retention of a client and collection of normal fees were enough to satisfy the scienter requirement of a fraudulent misrepresentation claim as a matter of law, then that requirement would be rendered a nullity — and the floodgates would be opened to a wave of

frivolous fraud claims based on ordinary economic motive. That, however, is not the law of New York.

Under settled New York law generic allegations of motive are ***not*** enough to establish scienter. Recognizing the seriousness of fraud-based allegations, New York courts have been careful to require ***more*** than simply an ordinary economic interest: "In looking for a sufficient allegation of motive, [courts] assume that the defendant is acting in his or her informed economic self-interest." *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1130 (2d Cir. 1994).

Here the only allegations of scienter are the ordinary economic motives of ***any*** financial services firm. *See* Compl. ¶ 31 ("Morgan Stanley knew that if it failed to deliver a major transaction, Morgan Stanley would not be compensated for the extensive work it had performed for Sunbeam"); *Id.* ¶ 66 (alleging that "[e]verything ... depended on closing the Coleman acquisition" because "if the transaction did not close, Morgan Stanley would not be paid its $10.28 million fee for the Coleman acquisition or its $22.5 million fee for underwriting the [Note Offering]"). These allegations do not constitute scienter under New York law. *See, e.g., THC Holdings Corp. v. Chinn,* No. 95 Civ. 4422, 1998 WL 50202, at *9 (S.D.N.Y. Feb. 6, 1998) ("A mere allegation that defendant was in a position to receive normal compensation for professional services rendered is not sufficient to support a showing of motive in the fraud scienter analysis.") (citing *inter alia, Friedman v. Arizona World Nurseries Ltd. P'ship,* 730 F. Supp. 521, 532 (S.D.N.Y. 1990) (dismissing fraud-based claim on ground that incentive of receiving fee for professional services is insufficient to allege scienter), *aff'd,* 927 F.2d 595 (2d Cir. 1991)); *In re Philip Servs. Corp. Sec. Litig.,* No. 98 Civ. 0835, 2004 WL 1152501, at *5 (S.D.N.Y. May 24, 2004) ("[A] generalized economic interest in professional fees is insufficient to establish an accounting firm's motive to commit fraud.").

CPH's allegations of scienter are not merely legally deficient, however. For even if the Court were to accept all of the complaint's allegations as well-pleaded, it would ***defy economic reason*** for Morgan Stanley to have knowingly participated in Sunbeam's fraud. *First*, if Morgan Stanley was participating in the alleged fraud, why did Morgan Stanley insist that Sunbeam issue a press release on March 30? There is no issue of fact that but for Morgan Stanley, Sunbeam would not have issued any press release before the closing on March 30, 1998.

Second, the Court would have to ***abandon all economic reason*** to believe that Morgan Stanley risked its own professional reputation, knowingly permitted its affiliate to loan and lose hundreds of millions of dollars, knowingly ripped off its most valued clients and institutional investors, and exposed itself to massive civil liability, ***all*** for the supposed purpose of retaining a single client and collecting investment banking and underwriting fees for a single transaction.

The economic irrationality of CPH's scienter allegations provide an additional, independent ground for dismissing its fraud claim. *See, e.g.*, *Kalnit v. Eichler*, 99 F. Supp. 2d 327, 343 (S.D.N.Y. 2000) ("[W]here plaintiff's view of the facts defies economic reason ... it does not yield a reasonable inference of fraudulent intent.") (internal quotations & citation omitted), *aff'd*, 264 F.3d 131 (2d Cir. 2001); *see also Duncan v. Pencer*, No. 94 Civ. 0321, 1996 WL 19043, at *10 (S.D.N.Y. Jan 18, 1996) (dismissing fraud-based claim on grounds that it is "economically irrational" to assume that accounting firm "would knowingly condone a client's fraud in order to preserve a fee that, at best, is an infinitesimal percentage of its annual revenues") (citing *Shields*, 25 F.3d at 1130); *In re Philip*, 2004 WL 1152501, at *5 ("Notwithstanding the financial importance of the [relevant] account to [a particular] office, it strains reason that [the defendant] would jeopardize its reputation, subject itself to civil and/or

criminal liability, and risk substantial financial penalties simply because it wanted to keep [the entity that paid the fees] as a client.").

Indeed, CPH's far-fetched theory of scienter rings especially hollow given CPH's allegations that Morgan Stanley and Sunbeam ***knew*** the fraud would be revealed shortly after "the Coleman transaction closed at the end of March 1998." Compl. ¶ 58; *see id.* ¶ 65. Again the Court would have to abandon economic reason and common sense to believe that Morgan Stanley knowingly persuaded its clients to invest hundreds of millions of dollars in Sunbeam and allowed its affiliate to invest $680 million in Sunbeam the day after the Coleman acquisition closed, all the while purportedly knowing that the fraud would be revealed within days of the closing. *See, e.g., Shields*, 25 F.3d at 1130 (affirming dismissal of fraud-based claim for lack of scienter and noting that "[i]t is hard to see what benefits accrue from a short term respite from an inevitable day of reckoning"). In sum, while the Court can reasonably conclude that Morgan Stanley made a bad business decision loaning money to Sunbeam, a bad business decision is not fraud.

III. MORGAN STANLEY IS ENTITLED TO SUMMARY JUDGMENT ON COUNT II OF THE COMPLAINT (AIDING AND ABETTING FRAUD).

CPH alleges that Morgan Stanley is liable for "aiding and abetting" Sunbeam's fraud, but this claim fails too. To prevail on its aiding and abetting claim, CPH must demonstrate not only the existence of a primary fraud, but also (1) Morgan Stanley's ***actual knowledge*** of that underlying fraud; and (2) Morgan Stanley's ***substantial assistance*** in the commission of that fraud. *See, e.g., Stolow v. Greg Manning Auctions Inc.*, 258 F. Supp. 2d 236, 250 (S.D.N.Y. 2003) (citing *Armstrong v. McAlpin*, 699 F.2d 79, 91 (2d Cir. 1983)); *IIT v. Cornfeld*, 619 F.2d 909, 923 (2d Cir. 1980); *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 470 (S.D.N.Y. 2001),

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 10th day of December, 2004.

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IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

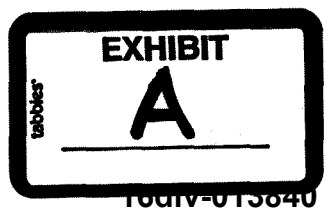
MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 54

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Thursday, March 31, 2005
Palm Beach County Courthouse
Courtroom 11-A
205 North Dixie Highway
West Palm Beach, Florida 33401
1:00 p.m. to 5:05 p.m.



But this jury is not being told, as Your Honor's statement presently stands, that Morgan Stanley repeatedly violated court orders. That is a fact. But nonetheless, Mr. Hansen has chosen to say, as a consequence of not following court orders, Morgan Stanley can't defend itself.

Well, once he presents that issue to the jury, in fairness to us, the jury is entitled to know that the punishment indeed fits the crime in both phases.

THE COURT: I don't need you to respond.

I can tell you, this is something I've thought about. And I understand the parties may have different opinions. My purpose here is to have a fair trial. And the only way I think we can protect Morgan Stanley against the inappropriate reference to litigation misconduct, that has nothing to do with liability. And I've already found that on the issues we have left is to segregate that and do both entitlement and amount of punitive damages as a phase two. What that means is I would not read a statement about litigation misconduct to the jury in phase one.

That said, I'm also sensitive to Plaintiff's position, because we spoke about that yesterday, that -- and we spoke about it in conjunction of having the statement of litigation misconduct read in phase one -- that the litigation misconduct that resulted in the order on the renewed motion for default judgment is much broader than the litigation misconduct that will be read to the jury at some point.

And I understand Plaintiff's concern that if jurors listen solely to the second statement they might tell themselves, that doesn't seem so bad, I think the Judge was unfair, and I'm going to somehow compensate in the case for it.

What we need to do is assure our service with both panels of jurors, that the jurors we select are able to take the statements of fact that I read them and not question them. And we still have both panels with us, and I'm sure we're able to do that.

And certainly, if I need to give some further instruction when we get to the statement of facts in phase one, we can certainly do it.

That said, Mr. Solovy, yes, sir?

MR. SOLOVY: Well, I think what I understood

Your Honor to say is then having followed that procedure for the entitlement and the amount stage we can revisit with Your Honor exactly what the misstatement is -- the statement is going to say that you read to the jury.

THE COURT: I understand there's some things you want to talk about too as far as what's appropriate, if any, on the issue of punitive damages.

MR. WARNER: First of all, you were supposed to let me say something brilliant for a minute or two.

THE COURT: I'm concerned, because we've been keeping that jury for so long.

MR. WARNER: I'm kidding. But I wanted to claim that I won something -- I'm just kidding. Thank you.

So to -- we are only part way through this. So what you are now ruling, and it was part of what we did want to discuss with you, is that the jury in phase one is not going to be specifically told or read something about the litigation misconduct? It will decide liability and amount of compensatory damages based on evidence submitted to them on reliance and

CERTIFICATE

STATE OF FLORIDA
COUNTY OF PALM BEACH

I, TRACEY L. SPATARA, RPR, Notary Public in and for the State of Florida at Large, hereby certify that the foregoing pages are a true and correct transcription of my stenographic notes of the proceedings had and testimony taken in the foregoing case, at the time and place hereinabove set forth.

DATED this day of , 2005.

Tracey L. Spatara, RPR
Notary Public
State of Florida at Large

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

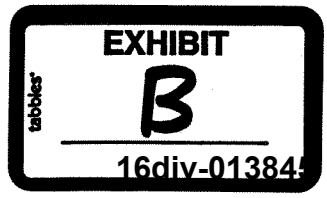
MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON CPH'S RENEWED MOTION FOR ENTRY OF DEFAULT JUDGMENT

THIS CAUSE came before the Court March 14 and 15, 2005, on CPH's Renewed Motion for Entry of Default Judgment, with both parties well represented by counsel.

Coleman (Parent) Holdings, Inc. ("CPH"), has sued Morgan Stanley & Co., Inc. ("MS & Co."), for aiding and abetting and conspiring with Sunbeam to perpetrate a fraud. Early in the case, CPH was concerned that MS & Co. was not thoroughly looking for emails responsive to its discovery requests. On April 16, 2004, the Court entered an Agreed Order ("Agreed Order") that required MS & Co. to search its oldest full backup tapes for emails subject to certain parameters and certify compliance. MS & Co. certified compliance with the Agreed Order on June 23, 2004. On November 17, 2004, CPH learned that MS & Co. had found some backup tapes that had not been searched. On January 26, 2005 it served its Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order ("Adverse Inference Motion"), claiming that MS & Co.'s violation of the Agreed Order, coupled with its systemic overwriting of emails after 12 months, justified an adverse inference against it. The Court ordered certain limited discovery. Responses to that discovery prompted CPH to orally amend its Adverse Inference Motion to seek more severe sanctions.

The Court held an evidentiary hearing on the Adverse Inference Motion on February



14, 2005. On March 1, 2005 it issued its Amended Order on Coleman (Parent) Holdings Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order ("Adverse Inference Order"). In its current Motion, CPH argues that it has since learned that the discovery abuses addressed in the Adverse Inference Motion and Order represent only a sampling of discovery abuses perpetrated by MS & Co. and that the abuses have continued, unabated. It claims that these abuses, when taken as a whole, infect the entire case. To understand CPH's argument, it is necessary to go back to the beginning.

This case arises out of an acquisition transaction that was negotiated and consummated in late 1997 and early 1998, in which CPH sold its 82% interest in the Coleman Company, Inc., to Sunbeam Corporation. MS & Co. served as financial advisor to Sunbeam for parts of the acquisition transaction and served as the lead underwriter for a $750,000,000.00 debenture offering that Sunbeam used to finance the cash portion of the deal.

CPH's Complaint[1] alleged claims against MS & Co. arising from this transaction for fraudulent misrepresentation, negligent misrepresentation, aiding and abetting fraud, and conspiracy, and sought damages of at least $485 million.

On May 12, 2003, MS & Co. was served with the Complaint and CPH's First Request for Production of Documents ("Request"). The Request sought, in essence, all documents connected with the Sunbeam deal. "Documents" was broadly defined, and specifically included items electronically stored. Concerned that, out of more than 8,000 pages of documents produced, it had received only a handful of emails, CPH on October 29, 2003, served its Motion to Compel Concerning E-Mails. That motion sought an order requiring MS & Co. to make a full investigation for email messages, including a search of magnetic tapes and hard drives; produce within 10 days all emails located; and produce a Rule 1.310 witness

[1]On February 17, 2005, CPH served its First Amended Complaint, which dropped the claims against MS & Co. for fraudulent and negligent misrepresentation, leaving only the aiding and abetting and conspiracy claims.

within 20 days "to describe the search that was conducted, identify any gaps in Morgan Stanley's production, and explain the reasons for any gaps."

In its Opposition to Coleman (Parent) Holdings, Inc.'s Motion to Compel served November 4, 2003, MS & Co. argued that CPH wanted "this Court to order a massive safari into the remote corners of MS & Co.'s email backup systems" and represented that "(t)he restoration efforts demanded by CPH would *cost at least hundreds of thousands of dollars* and require several months to complete (emphasis in original). MS & Co. argued that CPH's "true" motive was to "harass and burden MS & Co. with unnecessary and costly discovery demands and attempt to smear MS & Co. with out-of-context recitations from other proceedings" because "CPH *concedes* that MS & Co. is only able to restore email from backup tapes from January 2000 and later - *more than a year and a half after the events that allegedly gave rise to CPH's claims*," (emphasis in original).

CPH's "concession" was based on representations like the kind made to it by MS & Co.'s counsel in a March 11, 2004 letter that suggested "(t)he burden on Morgan Stanley from . . . a wholesale restoration [of email back up tapes], both in terms of dollars and manpower would be enormous. Regardless of who performs the initial restoration, it would require hundreds (perhaps thousands) of attorney-hours to review millions of irrelevant and non-responsive e-mails . . ."[2]

In response to CPH's Motion to Compel, the parties agreed to reciprocal corporate

[2]Complaints about MS & Co.'s tactics are not new. See Ex. 196 [February 26, 2004, letter from EEOC to Hon. Ronald L. Ellis in EEOC/Schieffelin v. Morgan Stanley & Co., Inc., et al., 01-CV-8421 (RMB) (RLE) (S.D.N.Y.): ("(w)hen EEOC received [Morgan Stanley's] January 27, 2004 Responses to EEOC's Fifth Requests for Production of Documents which did not contain any e-mails, the parties communicated further. At that time, Morgan Stanley took the position that searching for e-mails would be burdensome both in regards to expense and the time it would take to respond. While the parties were in the process of attempting to work out these disputes, EEOC for the first time learned that [Morgan Stanley has] an easy, systematic ability to search for relevant documents. In a February 16, 2004, conversation with an IT representative of [Morgan Stanley], EEOC learned that [Morgan Stanley has] an e-mail system, which, while not yet fully comprehensive, was easily searchable on February 18, 2004, the close of discovery . . . which is certain to produce discoverable information highly relevant to EEOC's and Plaintiff-Intervenor's claims . . . After disclosing their state-of-the-art system to EEOC, [Morgan Stanley] dropped [its] assertion that the process was too expensive, but maintained that they refuse to search for e-mails because it is burdensome for attorneys to review large numbers of documents prior to production.")

depositions on the email issue. CPH deposed Robert Saunders on February 10, 2004.[3] After completion of the corporate representative depositions, and unable to obtain MS & Co.'s agreement to a mutual email restoration protocol, CPH served its Motion for Permission to have Third Party Retrieve Morgan Stanley E-Mail and Other Responsive Documents, proposing that a third party vendor be given access to both parties' email systems for restoration at each party's expense. At the hearing on that Motion, CPH offered to split the expenses evenly. MS & Co. refused.

MS & Co.'s continued assertions that the email searches could be conducted only at enormous cost and would be fruitless because there were not backup tapes with email from 1997 and 1998 were confirmed to the Court by MS & Co.'s counsel, Thomas Clare of Kirkland & Ellis, at a hearing held March 19, 2004:

> Mr. Scarola: Electronic records of e-mails that have been exchanged.
> The Court: Do we agree that there has been such a request outstanding?
> Mr. Clare: There has been a request outstanding.
> The Court: And have you all objected?
> Mr. Clare: From the beginning.
> The Court: And what's the basis of the objection?
> Mr. Clare: We objected to the breadth of the request that they're making. And to answer Your Honor's question directly – and the burden that is associated with it – that given the particular e-mail back-up tapes that are in existence five, six years after the fact of these transactions, that the scope of the e-mail request that they are seeking is improperly and unduly burdensome given the enormous costs that would be required, given the fact that the time period for which we have back-up tapes post dates the events by several years.

Unable to resolve the email issue, on April 9, 2004, CPH served its Motion to Compel

[3]Saunders provided misleading information in his deposition. See footnote 12, infra.

Concerning E-Mails and Other Electronic Documents. On the eve of the hearing on CPH's Motion to Compel, the parties reached an accommodation, and on April 16, 2004 the Court entered the Agreed Order. Under the Agreed Order, MS & Co. was required to (1) search the oldest full backup tape for each of 36 MS & Co. employees involved in the Sunbeam transaction; (2) review emails dated from February 15, 1998, through April 15, 1998, and emails containing any of 29 specified search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004, all nonprivileged emails responsive to CPH's document requests; (4) give CPH a privilege log; and (5) certify its full compliance with the Agreed Order.

As required by the Agreed Order, MS & Co. produced about 1,300 pages of emails on May 14, 2004. It did not, however, certify compliance with the Agreed Order. After prompting by CPH, on June 23, 2004, MS & Co. served a certificate of compliance signed by Arthur Riel, an Executive Director and manager of its Law/Compliance IT Group.[4]

CPH got its first indication that the Agreed Order may have been violated in the late fall of 2004.

On November 17, 2004, Clare wrote Michael Brody of Jenner & Block, CPH's outside counsel, that MS & Co. had "discovered additional e-mail backup tapes . . ."; that "(t)he data on some of [the] newly discovered tapes has been restored;" that "we have re-run the searches described in [the Agreed Order]"; that "some responsive e-mails have been located as a result of that process"; and that "(w)e will produce the responsive documents to you as soon as the production is finalized."

On December 14, 2004, Brody wrote Clare back:

> in [your November 17, 2004 letter], you state that Morgan Stanley located additional email backup tapes, and that you

---

[4]Though CPH would not learn for months that the certificate was false, and even then the magnitude of MS & Co.'s misrepresentations would not be admitted, MS & Co. personnel, including in-house counsel, knew the certification of compliance was false when made.

> would be producing documents soon. Within two days of that letter, you produced some emails to us. In your November 17, 2004 letter, however, you also indicated that "some of the backup tapes are still being restored." Have those backup tapes been restored? Have you found additional responsive emails? If so, when will Morgan Stanley produce those emails? How is it that the tapes were only recently located?

On December 17, 2004, Clare wrote back, telling Brody "(n)o additional responsive e-mails have been located since our November production."[5]

Brody wrote back to Clare December 30, 2004, noting the deficiencies in Clare's correspondence:

> You do not inform us whether the review of the recently-located backup tapes still is ongoing. Please confirm that all email backup tapes from the relevant time period have been reviewed and all responsive emails have been produced. If the review still is proceeding, please let us know when the review will be completed.

Clare wrote back on January 11, 2005, telling Brody that the "restoration of e-mail backup tapes is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

Concerned about Clare's lack of candor, on January 19, 2005 Brody wrote again:

> I write in response to your January 11, 2005 letter concerning e-mails back-up tapes. Unfortunately, your letter raises more questions than it answers. As I requested in my December 14, 2004 letter, please explain the circumstances under which Morgan Stanley located these backup tapes and advise us of the date on which the tapes were located.

---

[5]Not only does this letter fail to answer Brody's legitimate questions, it implies that MS &Co. was still processing and reviewing emails from the newly found tapes. As we now know, though, *no* additional information was migrated to the archives between approximately August 18, 2004 and January 15, 2005. *Of course* "no additional responsive e-mails [would have been] located."

> Further, please explain your statement that "the next set of backup tapes" is scheduled to be restored "at the end of January." How many tapes will be restored by the end of January? When exactly in January will Morgan Stanley complete the process of restoring and searching these tapes for responsive documents? Are there other backup tapes that are not yet in the process of being restored? If so, please advise us of (a) the number of tapes that are not yet in the process of being restored; (b) the time period of the data contained on those tapes; and (c) Morgan Stanley's timetable for restoring and searching those tapes. In addition, please explain why those tapes are not yet in the process of being restored. Please also explain why Morgan Stanley cannot complete the restoration and searching of all remaining backup tapes before "the end of January." As you know, our trial is scheduled to begin on February 22, 2005.
>
> We look forward your complete response to these questions no later than January 21, 2005 so that we can bring this matter to the Court's attention, if necessary.

Conforming to what was by now his usual stonewall tactic, Clare responded by letter dated January 21, 2005:

> I write in response to your January 19, 2005 letter regarding Morgan Stanley's production of e-mails restored from backup tapes.
>
> Morgan Stanley completed its initial production of restored e-mail messages on May 14, 2005. The May 2004 production was conducted in accordance with the agreed-upon order governing, and the searches that resulted in that production encompassed data from all of the backup tapes known to exist at the time. Subsequent to the May 2004 production, additional tapes were found in various locations at Morgan Stanley. The discovered tapes were not clearly labeled as to their contents, were not found in locations where e-mail backup tapes customarily were stored, and many of the tapes

were in a different format than other e-mail backup tapes. In November 2004, once it was determined at least some of the discovered tapes contained recoverable e-mail data, Morgan Stanley re-ran the searches described in the agreed-upon order. Those searches resulted in Morgan Stanley's November 2004 production.

Morgan Stanley's efforts to restore the backup tapes discovered after the May 2004 production are ongoing. It is a time-consuming and painstaking process and, given the absence of clear labels or other index information for the backup tapes, there is no way for Morgan Stanley to know or accurately predict the type or time period of data that might be recovered from tapes that have yet to be restored. While Morgan Stanley cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes, we understand from Morgan Stanley that, when the agreed-upon searches are run again at the end of January, those searches will include approximately one terabyte of additional data restored since the prior production.

On January 26, 2005, CPH served its Adverse Inference Motion, seeking sanctions based on MS & Co.'s disclosure of the newly found tapes. Hearing was scheduled for February 14, 2005. In preparation for that hearing, on February 3, 2005 the Court ordered MS & Co. to produce by noon on February 8, 2005 "(i) all documents to be referred to or relied on by any of the witnesses in his or her testimony; and (ii) all documents within MS & Co.'s care, custody, or control, addressing or related to the additional email backup tapes, including matters relating to the time or manner in which they were discovered; by whom they were discovered; who else learned of their discovery and when; and the manner and timetable by which they were be restored and made searchable, including any correspondence to or from outside or prospective outside vendors."

The Adverse Inference Order outlined the discovery abuses shown at the February 14, hearing. They included MS & Co.'s undisclosed discovery of the 1,423 "Brooklyn" tapes no

later than May of 2004; the undisclosed discovery of the 738 8-millimeter backup tapes in 2002; the presence of unsearched data in the staging area; the discovery of 169 DLT tapes in January 2005; the discovery of more than 200 additional tapes on February 11 and 12, 2005; the discovery of a script error that had prevented MS & Co. from locating responsive email attachments; and discovery of another script error that had infected the ability to gather emails from Lotus Notes platform users.

In response to these deficiencies, the Court issued the Adverse Inference Order. That Order reversed the burden of proof on the aiding and abetting and conspiracy elements and included a statement of evidence of MS & Co.'s efforts to hide its emails to be read to the jury, as relevant to both its consciousness of guilt and the appropriateness of punitive damages. It specifically provided that "MS & Co. shall continue to use its best efforts to comply with the April 16, 2004 Agreed Order and . . . February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search."[6]

It is now clear why MS & Co. was so unwilling to provide CPH with basic information about how and when the tapes were found or when production would be complete. First, candor would have required MS & Co. to admit that it had not done a good faith search for the oldest full backup tapes, and that Riel's certificate of compliance was false. Some unsearched tapes had been found by 2002; others had been found no later than May, 2004. Together, over 2,000 tapes had been found which were not searched prior to the May production. It is untrue that the tapes were "not in locations where e-mail backup tapes customarily were stored."

[6]Concerned that MS & Co. had been less than candid with both CPH and the Court, on February 4, 2004, the Court entered its Order on Coleman (Parent) Holding's ore tenus Motion to Participate in Search of Additional E-Mail Backup Tapes or Appoint Third Party to Conduct Search, ordering MS & Co. to pay for a third party vendor to check its compliance with the Agreed Order. The Court previously found that the two scripts errors testified to by Allison Gorman at the February 14, 2005, hearing would not have been discovered or revealed without the threat that the third-party vendor would discover the errors. Given Ms. Gorman's testimony at the March 14, 2005, hearing, though, it now appears MS & Co. knew about the errors before the appointment of the third-party vendor. Consequently, the errors were only revealed, but not discovered, in response to the February 4, 2004, Order.

Second, MS & Co. desperately wanted to hide an active SEC inquiry into its email retention practices.[7] [8] [9] [10] Finally, MS & Co. did not want to admit the existence of the historical email archive, which would expose the false representations it had made to the Court and used to induce CPH to agree to entry of the Agreed Order.[11] [12]

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[7]On December 17, 2003, CPH served its Third Request for Production seeking "(a)ll materials and documents submitted to the United States Securities and Exchange Commission ("SEC"), received from the SEC, or reflecting communications with the SEC in connection with any investigation, inquiry, or examination concerning or relating to Morgan Stanley's policies and/or procedures with regard to the retention, storage, deletion, and/or back-up of electronic mail (emails) . . ." On October 12, 2004, CPH served its Request for Supplemental Documents seeking to bring MS & Co.'s document production current, requesting "(a)ll documents not previously provided by MS & Co. that are responsive to any Request for Production of Documents that CPH previously has served upon MS & Co. in the litigation, including documents obtained by MS & Co. or its counsel after the date of MS & Co.'s prior productions." No SEC documents were produced in response to either request; no privilege log was generated. On other privilege logs generated in response to court orders, MS & Co. did not show the SEC on the distribution portion of the log. See March 9, 2005 Order Following in Camera Inspection (Riel/SEC Documents) footnotes 1, 2. See, also, footnote 15, infra. Kirland & Ellis, outside counsel for MS & Co. in this litigation, represents MS & Co. in the SEC's inquiry into its email retention practices.

[8]MS & Co. manipulated the unhinging of the SEC's email investigation from the IPO litigation in January, 2005, to conceal the email issues as long as possible.

[9]It is now apparent that MS & Co. chose deliberately to keep its affidavits concerning the informal SEC inquiry submitted to support its privilege claims vague, despite two requests from the Court seeking specific information. See February 28, 2005 Order (Release of Exhibits).

[10]See February 25, 2005 Order on Morgan Stanley's Objections to Coleman (Parent) Holding Inc.'s Notice to Produce at Hearing and Motion for Protective Order and March 4, 2005 Order on Plaintiff's ore tenus Motion to Compel Additional Production.

[11]While MS & Co. contends that its representations to the Court that it would cost "hundreds of thousands of dollars" to search the backup tapes and that there was no pre-2000 backup tapes were not false, they were deliberately misleading: MS & Co. never had an intention to search the back up tapes to respond to the requests and some of the year 2000 backup tapes backed up email back to 1997.

In 2001, MS & Co. decided to create the email archive. By June,2003, it had decided that the archive should have two components. First, MS & Co. wanted to create an archive that captured and stored email as it was generated. Second, MS & Co. wanted to add historical data to the archive. That task involved searching for all email backup tapes containing historical emails; sending those tapes to an outside processor; loading the processed tapes into a staging area; and migrating the stored data from the staging area onto the archive. As we now know, archive searches are quick and inexpensive. They do not cost "hundred of thousands of dollars" or "take several months." The restrictions imposed by the Agreed Order were not needed.

[12]On February 10, 2004, Robert Saunders, an executive director of IT for MS & Co., was deposed. He testified that in January, 2003, MS & Co. had put into effect the email archive system. When specifically asked whether the new email archive system would include prior backups or only going forward backups, he testified that "(t)he way it was built was for going forward backup." He was next asked whether "(w)ith respect to backup dated January 2001 and previously, does Morgan Stanley have any new capabilities to restore and search e-mail?" After counsel interposed a vagueness objection, he answered "(t)here are no new capabilities to search that e-mail." That testimony was so misleading as to be false. As Sauders well knew, since he was on the team responsible, the "live" email capture portion of the archive was already operational. The migration of the historical data to the archive was expected to be completed by April of 2004, just two months after his deposition.

MS & Co.'s wrongful conduct has continued unabated.[13] Since the February 14, 2005, hearing, it has come to light that:

- Only two whole and four partial tapes from the Brooklyn tapes had been migrated to the archive and were thus searched for the November, 2004, production. MS & Co. sought to hide this information to create the impression that all the produced documents came from the Brooklyn tapes, rather than reveal that the production came from material that had migrated from the staging area to the archive since the May, 2004, production or some other, as yet undisclosed, source.[14]

- Contrary to MS & Co.'s counsel's November 17, 2004, letter to CPH, *none* of the November, 2004 production came from the "newly found" tapes. MS & Co. carefully crafted its responses to inquiries about the November, 2004, production to avoid both disclosure of the existence of the archive and outright lying.

- The scripts MS & Co. used to process emails into its archive caused the bodies of some messages to be truncated. MS & Co. discovered this problem on February 13, 2005, but did not tell the Court about it until March 14, 2005.

- A migration issue caused about 5% of email harvested by NDCI from the backup tapes not to be captured in the archive, based on testing of a representative sample of tapes. MS & Co. told the SEC about this problem on February 24, 2005, but failed to tell CPH or the Court.

- As of June 7, 2004, only 120 out of 143 SDLT tapes had been processed into the archive.

- An analysis requested by the SEC showed that, based on a representative sample, 10% of backup tapes were overwritten after January, 2001.

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[13]MS & Co. sought to use the entry of the Adverse Inference Order as a shield against further inquiry into its email abuses, arguing that the matter was closed by the Adverse Inference Order. It previously used this tactic with the SEC, arguing that the December 3, 2003 Cease and Desist Order shielded it from other sanctions for email retention failures. See Ex. 14 [February 10, 2005 letter from outside counsel for MS &Co. to SEC]

[14]MS & Co. argued at the March 14 and 15, 2005 hearing that there were only 13 unique, new emails contained in the November 2004 production when compared to the May 2004 production. Nine of those emails, however, were originally given to MS& Co.'s lawyers for responsiveness review by the IT staff for the May 2004 production. No explanation of why they were not produced in May was offered. This is particularly concerning given the large number of documents Ms. Gorman testified the search parameters found compared with the relatively small number found responsive and produced after review by counsel.

- A software error caused blind carbon copies not to be captured in the archive process. MS & Co. told the SEC about this problem on February 24, 2005. MS & Co. did not tell CPH or the Court.

- A software error caused the searches to be hyper case-sensitive, resulting in a failure to capture all emails. MS & Co. knew of the problem as of December, 2004, but did not tell CPH or the Court. The problem was not purportedly fixed until March, 2005.

- A script error caused the archive to have problems pulling group email in Lotus Notes.

- MS & Co. provided sworn testimony at the February 14, 2005, hearing that it had located 600 gigabytes of data, while contemporaneously telling the SEC it had located a terabyte of data. A gigabyte represents 20,000 to 100,000 pages. Incredibly, MS & Co.'s witness on this point, Allison Gorman, testified on March 14, 2005, that it was simply a "terminology" issue that she did not choose to correct because it could cause "confusion."

- CPH requested MS & Co. to produce responses it had made to third-parties in civil, criminal, or administrative proceedings describing limitations on MS & Co.'s ability to produce emails and all notices in such proceedings that MS & Co. had newly discovered backup tapes containing email. MS & Co. objected, arguing that there were over 300 separate proceedings, involving over 70 outside law firms, and that the cost of compliance would be too great. On March 2, 2005, the Court ordered the production, after shortening the time period involved, and required production within 12 hours after counsel's review of each item for responsiveness but, in any event, within 10 days. At the time MS & Co. objected to CPH's request as unduly burdensome, it knew of its Well submission to the SEC made on February 10, 2005. Kirkland and Ellis, co-counsel here, was co-counsel for MS & Co. in that SEC proceeding. Consequently, it appears MS & Co.'s real concern was not that expressed to the Court, but was based on its realization that compliance would reveal the existence of the SEC inquiry into its email retention policy and MS & Co.'s efforts to keep the existence of that investigation secret. MS & Co. violated the Court's March 2, 2005, Order on Morgan Stanley's Responses and Objections to Coleman (Parent) Holdings Inc.'s Notice to Produce at Hearing requiring it to disclose items responsive to CPH's Request for Production within 12 hours of review for responsiveness by waiting *days*, not hours, to produce the Wells submission.

- MS & Co.'s failure to produce or log the SEC documents violated the Court's February 3, 2005, Order.[15]

- James Doyle's, the Executive Director of MS & Co.'s Law Division, declaration that he did not learn of additional unsearched backup tapes until the end of October, 2004, was intended to mislead CPH and the Court. Obviously, MS & Co. sought to create the implication in the declaration that *no one* in the Law Division knew of the backup tapes before then. Instead, both Soo-Mi Lee, Doyle's associate, and James Cusick, Doyle's superior, knew of the tapes no later than June 7, 2004.

- In-house counsel for MS & Co. knew as of June 7, 2004, that nearly a third of the restored backup tapes did not contain email, implying they may have been recycled in violation of the December 3, 2002 Cease and Desist Order. They did not tell CPH or the Court.

- MS & Co.'s searches looked for only two types of emails. There are other types of emails that were not included in the searches. CPH did not learn of this deficiency until March 13, 2005.

- MS & Co. improperly failed to produce 125 documents required to be produced by the Court's February 3, 2005, Order Specially Setting Hearing which required limited discovery be made in connection with the February 14, 2005, hearing on the Adverse Inference Motion.

- MS & Co. improperly withheld 13 documents required to be produced by the Court's March 4, 2005, Order on Plaintiff's ore tenus Motion to Compel Additional Production.

- An additional 282 tapes were found on February 23 and 25, 2005; CPH was not told of the discovery until March 13, 2005.

- An additional 3,536 tapes were discovered on February 23, 2005, in a security room.

- An additional 2,718 tapes were found at Recall, MS & Co.'s third party off-site storage vendor, on March 3, 2005.

- An additional 389 tapes were found March 2 through March 5, 2005. CPH was not told

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[15]The Court previously rejected MS & Co.'s argument that the January 14, 2005, email exchange between its outside and in-house counsel was not required to be produced under the February 3, 2005, Order Specially Setting Hearing because it referred to the "documents issue" and not specifically to the backup tapes. See March 16, 2005 Order on Morgan Stanley's Motion to Disqualify Plaintiff's Counsel Searcy, Denney, Scarola, Barnhart & Shipley, P.A. and Jenner & Block, LLC. MS & Co.'s insistence on a narrow interpretation of the February 3, 2005, Order is not particularly sympathetic, when the only reason that Order confined production to the backup tape issue was because MS &Co. had failed to notify the Court of the other deficiencies in its certificate of compliance.

until March 13, 2005.

- On March 4, 2005, the Court entered its Order on Plaintiff's ore tenus Motion to Compel Additional Production, which ordered MS & Co. to produce by 3:00 p.m. on March 7, 2005, all items within its care, custody, or control dealing with the Riel/SEC investigation, other than documents representing communications between or among MS & Co. inside and outside counsel that were not copied to anyone other than counsel. MS & Co. sought to discredit Riel and thus distance itself from the false June 23, 2004 certificate of compliance; in doing so, it sought to hide Riel's whistle blower status and the existence of an SEC investigation into whether MS & Co. employees sought kick backs from third party vendors; whether MS & Co. employees were improperly pressured into dealing with third-party vendors who may provide business to MS & Co.; and whether MS & Co. continued to overwrite backup tapes contrary to the SEC's December 3, 2002, Cease and Desist Order.

- A script error prevented the insertion of some emails into the archive. MS & Co. produced over 4,600 pages of emails on March 21, 2005, some of which it suggested may have been located on correction of the error; alternatively, it suggested the emails may have been located by NDCI as part of its efforts to verify MS & Co.'s searches.

MS & Co.'s discovery abuses have not been confined to its email production.

William Strong is a MS & Co. managing director and was one of the principal players for it in the Sunbeam deal. He took credit for the fees generated. On May 9, 2003, CPH requested a copy of "(a)ll documents concerning employment contracts, performance evaluations, and/or personnel filed (including without limitation any documents that describe or discuss [his] training, experience, competence, and accomplishments) . . ." MS & Co. asserted that the requested documents were not relevant and that production "would unnecessarily infringe on the privacy interests of [Strong]." On March 15, 2004, the Court ordered MS & Co. to produce "(a)ll references (positive or negative) to [Strong's] truthfulness, veracity, or moral turpitude." Some portions of Strong's evaluations were produced in response to that order. Those evaluations noted Strong's colleagues' reservations about his candor and ethics. Two of his evaluators, Joseph Perella and Tarek Abdel-Meguid, were deposed, when some relatively vague testimony about the bases for those conclusions was offered. It now appears Strong was facing criminal prosecution in Italy for complicity in bribery while he was working on the Sunbeam transaction, which his evaluators knew, and that MS & Co. purposely

withheld that information from CPH and the Court.[16]

Even once CPH independently discovered evidence of Strong's indictment in Italy, MS & Co. sought to shield its files from discovery. It claimed that virtually *all* of the documents it had were privileged under joint defense agreements in place between it, Strong, and Saloman Brothers, Strong's employer at the time of the incident. As the Court's March 10, 2005 Order Following In Camera Inspection (Strong) details, the documents MS & Co. relied on to support that position, and sought to prevent CPH from obtaining, reflect no such agreement.

The other discovery abuses and misrepresentations by MS & Co. other than those involving its email production practices are outlined in CPH's Chronology of Discovery Abuses by Defendant served March 1, 2005, and would take a volume to recite. They include:

- failing to provide the information retained by MS & Co.'s internal document management system pertaining to MS & Co.'s work for Sunbeam; falsely representing to the Court that no useful information was contained in that information; and producing a Rule 1.310 representative who had made an insufficient inquiry into authenticity, business record status, and authorship of documents; see February 28, 2005 Order on CPH's Motion to Deem Certain Documents Admissible and for Sanctions due to Morgan Stanley's Disregard of Court Order;

- when faced with contempt proceedings for violating the Stipulated Confidentiality Order by providing a copy of a settlement agreement between CPH and Arthur Andersen to other counsel, representing to the Court that the law firm of Kellogg, Huber was retained to handle the "Andersen aspects" of this litigation because of a conflict between Andersen and Kirkland & Ellis; Mark Hansen, a partner at Kellog, Huber, testified that his firm was hired as co-counsel for all aspects of the case;

- providing answers to interrogatories signed by a corporate representative who performed insufficient verification of the responses;

[16]MS & Co. originally argued that documents concerning the Italian proceedings were not in Strong's "personnel file" and so were not required to be produced in response to CPH's initial request. MS & Co.'s practice of filing damaging information about an employee other than in his personnel file and then claiming it was not included in the request is about at convincing as its argument that, since it has a corporate directive not to keep drafts of documents once they are in final form, document drafts cannot be business records exempt from hearsay because they are not "kept in the course of a regularly conducted business activity." See Fla. Stat. §90.803 (6) (a). In any event, there was *no excuse* for not producing its records of the Italian proceedings once the Court's March 15, 2004 Order was entered.

- routinely asserting unfounded privilege claims;[17] and

- failing to timely comply with the Court's orders; for example, MS & Co. did not produce Strong's 1994 Performance Evaluation until the afternoon of March 15, 2005, though it was obviously included in the Court's March 15, 2004 Order. The failure cannot be excused as oversight since, when CPH specifically asked for the 1994 evaluation in the spring of 2004, MS & Co.'s counsel said it was withheld as non-responsive; see, also, Ex. 197, 198.

In sum, MS & Co. has deliberately and contumaciously violated numerous discovery orders, including the April 16, 2004 Agreed Order; February 3, 2005 Order Specially Setting Hearing; and the March 4, 2005 Order on Plaintiff's ore tenus Motion to Compel Additional Production. At the February 14, 2005, hearing on CPH's Adverse Inference Motion, it chose to hide information about its violations and coach witnesses to avoid any mention of additional, undisclosed problems with its compliance with the Agreed Order. Implicit in the requirement that MS & Co. certify compliance with the Agreed Order was the requirement to disclose impediments to its ability to so certify. As outlined in this Order, MS & Co. employees, and not just counsel, have participated in the discovery abuses. The prejudice to CPH from these failings cannot be cured. Even if all the script errors have been located and corrected, and MS & Co. has failed to show they have, and even if all of the email backup tapes have now been located, and MS & Co. has failed to show they have, the searches cannot be completed in time. The other discovery abuses outlined call into doubt all of MS & Co.'s discovery responses. *The judicial system cannot function this way.* Based on the foregoing and on the Court's March 1, 2005 Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, it is

ORDERED AND ADJUDGED that CPH's Renewed Motion for Entry of Default Judgment is Granted, in part. See Robinson v. Nationwide Mut. Fire Ins. Co., 887 So. 2d 328 (Fla. 2004); Mercer v. Raine, 443 So. 2d 944 (Fla. 1983); Precision Tune Auto Care, Inc. v.

[17]For example, MS & Co. produced over 260 documents dealing with the Strong investigation over which it had previously claimed privilege once the Court announced its intention to conduct an in camera review; the Court found another 200 documents were not privileged after conducting its review, by its March 10, 2005 Order.

Radcliffe, 804 So. 2d 1287 (Fla. 4th DCA 2002); Rule 1.380 (b) (2) (C), Fla. R. Civ. P. Paragraphs 2 (excluding the last sentence thereof); 3 (excluding the portion of the last sentence beginning with "in order to close . . ."); 8-10, 11 (excluding everything after the first sentence); 12 (excluding all parts following "June 1998"); 13 (excluding the last sentence thereof); 14-27; 28 (excluding everything after "firm" in the second to last sentence thereof); 29-39; 41-52; 53 (excluding the second sentence thereof); 54-57; 58 (excluding "CPH and" in the second line thereof); 59-63; 64 (excluding the third line thereof); 65 (excluding the last sentence thereof); 66 (excluding the last sentence thereof); 67-70; 71 (excluding the first word of the last sentence and the remainder of that sentence after "material"); 72; 73 (excluding the first sentence thereof); 74 (excluding the words "CPH and" in the second to last sentence thereof); 75-81; 85; 86; 87 (excluding (g)); 90, and 91 (excluding (g)) of Plaintiff's Amended Complaint, as amended by the Court's Amended Order on Morgan Stanley's Motion to Dismiss, Motion to Strike, and Motion for More Definite Statement, shall be read to the jury and the jury instructed that those facts are deemed established for all purposes in this action. A copy of a redacted Amended Complaint is attached as Exhibit A. It is further

ORDERED AND ADJUDGED that the Court shall read to the jury a Statement similar to that attached as Exhibit A to the Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, but incorporating the relevant additional findings of this Order, and the jury will be instructed that it may consider those facts in determining whether MS & Co. sought to conceal its offensive conduct when determining whether an award of punitive damages is appropriate. See General Motors Corp. v. McGee, 837 So. 2d 1010 (Fla. 4th DCA 2002), rev. den. 851 So. 2d 728 (Fla. 2003). Counsel are each invited to submit proposed Statements. It is further

ORDERED AND ADJUDGED that CPH shall be entitled to an award of reasonable fees and costs incurred as a result of the Renewed Motion for Entry of Default Judgment and the violations of Court orders recited herein. The amount shall be determined at an evidentiary hearing following trial. It is further

ORDERED AND ADJUDGED that MS & Co. is relieved of any future obligation to

comply with the April 16, 2004 Agreed Order and the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s Motion to Participate in Search of Additional E-Mail Back-Up Tapes or Appoint Third Party to Conduct Search. It is further

ORDERED AND ADJUDGED that the pro hac vice admission of Thomas Clare is revoked. It is further

ORDERED AND ADJUDGED that the portions of CPH's Motion for Correction and Clarification of Order on CPH's Motion for Adverse Inference that seek to amend the body of that Order to correct clerical and spelling errors, as agreed to by counsel, is Granted, and the corrections deemed made to the body of the Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, by interlineation. In all other respects the remainder of the Motion for Correction and Clarification is declared moot.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 23rd day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

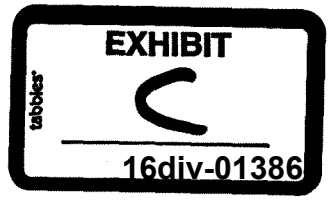
ORDER ON MORGAN STANLEY'S MOTION FOR AN ADVERSE INFERENCE INSTRUCTION

THIS CAUSE came before the Court March 21, 2005 on Morgan Stanley's Motion for an Adverse Inference Instruction, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion for an Adverse Inference Instruction is Denied, without prejudice to MS & Co.'s right to present evidence about CPH's email retention practices and its failure to direct that emails related to the Sunbeam transaction be saved and CPH's right to present evidence of its offer to have a third-party vendor given access to retrieve emails from CPH's system, without reference to discovery requests or court orders, and for either counsel to argue in favor of whatever inferences that evidence may support. See Jordan v. Masters, 821 So. 2d 342 (Fla. 4th DCA 2002) cf.; Amlan, Inc. v. Detroit Diesel Corp., 651 So. 2d 701 (Fla. 4th DCA 1995). If either party intends to present evidence on the issue of CPH's email retention practices or third-party vendor offer it shall, within 5 business days, serve on opposing counsel (i) the name, address, and business title of any witness expected to testify, together with a fair summary of his or her expected testimony; (ii) a designation of any deposition testimony the designating party intends to offer on this issue; and (iii) copies of any documents to be referred to by a witness or offered into evidence on this issue.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 25 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge



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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INC.

Defendant.
_____/

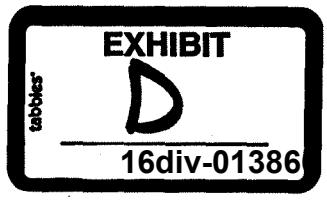
MORGAN STANLEY'S NOTICE OF COMPLAINCE WITH COURT ORDER DATED MARCH 23, 2005

Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby gives notice of compliance with this Court's Order on Morgan Stanley's Motion for an Adverse Inference Instruction dated March 23, 2005 and discloses the following witnesses and documents:

WITNESSES

Steven L. Fasman

Defendant will question Mr. Fasman about email policies at MacAndrews & Forbes Holdings, Inc. and its affiliated subsidiaries (collectively "MAFCO"); the practices regarding preservation, deletion, purging, and destruction of email at MAFCO; the history of MAFCO's knowledge of potential and actual litigation involving the subject matter of this case (collectively "Sunbeam litigation"); the failure to preserve, recover, restore, or save MAFCO email in response to notice of Sunbeam litigation; the destruction, erasing, or overwriting of MAFCO



email after receiving notice of Sunbeam litigation; and Plaintiff's production or failure to produce email in response to discovery requests in this litigation.

John F. Ashley

Mr. Ashley is the Chief Technology Officer of CoreFacts, LLC, and an expert in computer forensics. His Curriculum Vitae is attached as Exhibit A to this Notice. Mr. Ashley will testify regarding the email software and backup systems in use at MAFCO since 1997; the ability to recover email from overwritten backup tapes; the email backup and destruction policies at MAFCO; and the impact of those policies on the ability/inability to recover MAFCO email from 1997 and 1998 from the existing MAFCO backup tapes.

EXHIBITS

Number	Date	Description	Exhibit Number (Bates Range)
1.	Various	E-mail Produced from CPH or MAFCO files	MS 880 (CPH 0204718; CPH 1058927-932; CPH 1082183; CPH 1222826-7; CPH 1223821; CPH 1365131; CPH 1365140; CPH 1365218; CPH 1365244-6; CPH 1365273; CPH 1365402; CPH 1365586; CPH 1365642-4; CPH 1366480-483; CPH 1375284; CPH 1381190; CPH 1383282; CPH 1383299-304; CPH 1383307; CPH 1383313; CPH 1383325-6; CPH 1383353; CPH 1383366-8; CPH 1383834-35; CPH 1434531; CPH 1435766-7; CPH 2000041; CPH 2001364; CPH 2005700-2; CPH 1423914)
2.	04/21/1997	Corporate E-Mail Policy	MS 62 (CPH 1433326-3329)
3.	03/30/1998	Letter from Counsel for Coleman to SEC re: Investigation into trading in the securities of Coleman & Co., Inc., Signature Brands USA, Inc., and First Alert Inc. by insiders	MS 75 (CPH 1401528-1534)

4.	07/15/2004	Revised CPH Privilege Log	MS 881
5.	06/06/1998	Barron's via Dow Jones, R. Laing, *Dangerous Games: Did "Chainsaw Al" Dunlap Manufacture Sunbeam's Earnings Last Year?*	MS 882
6.	06/30/1998	Press Release, Sunbeam Audit Committee to Conduct Review of Company's 1997 Financial Statements	MS 511 (CPH 0642892)
7.	08/12/1998	Settlement Agreement between Sunbeam and CPH	MS 96 (CPH 1409665-9704)
8.	08/12/1998	Warrant for the Purchase of Shares of Common Stock of Sunbeam Corporation	MS 96A (CPH 1167614-1167631)
9.	08/12/1998	Amendment to Registration Rights Agreement	MS 96B (CPH 1167632-1167641)
10.	10/20/1998	Verified Derivative Complaint against MAFCO, J. Levin and various other executives, *Shallal v. Charles M. Elson, et al.*, Civ. Action No. 00-8739 (S.D. Fla., Zloch)	MS 883
11.	11/02/1998	Formal Requests for Production of Documents, including electronic documents, to MAFCO, Howard Gittis and others relating to Sunbeam/Coleman Transaction in *Goldstein v. Langerman, et al.*, No. 16587-NC (Del. Ch. Ct.)	MS 884 (CPH 2000001-7)
12.	06/25/1999	Class Action Complaint against The Coleman Co., Sunbeam and various executives in Deutscher v. Dunlap, et al., C.A. No. 16486-NC (Del. Ch. Ct.)	MS 885
13.	01/28/2000, 02/14/2000	Subpoenas to MAFCO seeking electronic documents relating to Sunbeam in *In Re Sunbeam Securities Litig.*, 98-8258-CIV and 98-8773-CIV and 98-8275 (S.D. Fla.)	MS 886 (CPH 1011022-1086 and CPH 1010995-1021)

14.	02/28/2000	Responses and Objections of MacAndrews & Forbes Holdings, Inc. to Subpoenas in the U.S. District Court for the S.D.N.Y. in *In Re Sunbeam Securities Litig.*, 98-8258-CIV and 98-8773-CIV and 98-8275 (S.D. Fla.)	MS 887 (CPH 1011109-1154 and CPH 1011088-1105)
15.	04/14/2000	Verified Derivative Complaint in *Shallal v. Charles M. Elson*, Civ. Action No. 00-8297 (S.D. Fla., Ferguson)	MS 888
16.	06/08/2001	Complaint in *Coleman (Parent) Holdings, Inc. v. Arthur Andersen, LLP* (Fla. Cir. Ct., 15th Jud. Cir., Palm Beach Cty.)	MS 67
17.	10/05/2001	E. Golden Memo to MAFCO and CPH employees re: Document Production for *Coleman (Parent) v. Arthur Andersen*	MS 889 (CPH 2000039-40)
18.	07/14/2003	Morgan Stanley & Co., Inc., First Request for Production of Documents to Plaintiff	MS 890

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by facsimile and first-class mail to all counsel of record on the attached service list on this 30th day of March, 2005.

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EXHIBIT A

COREFACTS

Curriculum Vitae
John F. Ashley

Name:	John F. Ashley
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	14030 Thunderbolt Place, Suite 700
	Chantilly, Virginia 20151
Telephone:	703.375.4345
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D/O/B	December 18, 1951
Nationality:	British
Marital Status:	Married

Professional Experience

July 2000 to December 2000 - CoreFacts Resources, Director of Electronic Evidence Group

January 2001 to present – CoreFacts LLC, Chief Technology Officer

Responsible for designing, equipping and supervising one of the largest corporate computer forensics laboratories on the East Coast. Forensic computer hardware configured to optimize leading forensic software.

Case Studies

- Representation of plaintiff corporation in a contractual dispute with federal government requiring the restoration of 40 back-up tapes held on three different types of magnetic media, containing the Emails and user created data of a staff of 160 persons. The data had been created over a 30-month period and total data size was 183 gigabytes. Three Email packages, MS Outlook, Netscape and ccMail were successfully investigated.
- Defense representation in a software trade secrets dispute requiring the capture of 14 terabytes of data within a 45-day period, without interrupting client's workflow. Data from 320 NT workstations, 90 NT laptops and 15 servers was forensically captured. In excess of 300 search terms were run across the encapsulated data, all relevant Email folders and electronic documents were hosted on secure web servers and reviewed by more than 50 attorneys throughout the US.

- Plaintiff representation in a breach of fiduciary duty, contract, trade secret and misappropriation of confidential information case requiring the capture of data from five NT laptops and the restoration of six months backup of Email data for five former employees.
- Plaintiff representation in a financial mismanagement case requiring the imaging and investigation of 71 laptop drives.

1998 to July 2000 - Greater Manchester Police, Computer Examination Unit, Unit Head

- Responsible for forensic data retrieval from all computers used in crime, covering a population of 3.5 million people.
- Managed workload increase from 153 cases in 1997 to 263 cases in 1999.
- Designed and installed Microsoft NT4 networks of investigation machines.
- Given additional responsibility for the forensic examination of all computers seized in North Wales and the Isle of Man.
- Wide experience of covert intrusion investigations involving imaging, monitoring and surveillance techniques.
- Employed on a consultative basis to manage the establishment of a number of computer forensics units for a variety of UK police forces.
- Provided vulnerability advice to various public bodies.
- Considerable fraud investigation experience involving the majority of accountancy software packages.
- Advised and assisted in technical interviews of computer skilled offenders on many occasions.

1996 to 1998 - GMP Computer Examination Unit, Senior Forensic Investigator

- Managed the accreditation of the Unit to the internationally accepted ISO 9002 standard.
- Designed and Installed a Novell network of investigation machines.
- Interviewed, appointed and trained forensic investigation detectives.

1989-1996 - GMP Obscene Publications Unit, Supervisor / Investigator

- The first police officer in the UK to investigate computer pornography.
- Responsible for data retrieval from pornographers' and pedophiles' computer systems.
- Investigated all forms of technical crime involving computers: hacking, cracking, virus writing, phreaking, mobile phone cloning and credit card duplication.
- Lead investigator in a number of international obscenity and pedophile cases.

Expert Witness Testimony

- Expert witness in the investigation and prosecution of Dr. Harold Shipman for the murder of 15 patients. Testified in relation to 12 of the 15 victims regarding the forensic investigation of a complex computer network that revealed back dated and falsely inserted records leading to the identification of victims who were subsequently exhumed. Provided 500 exhibits and 120 witness statements relating to the suspicious deaths of patients. Shipman found guilty on all counts.
  Filmed and interviewed in the UK, by Ed Bradley, for CBS's 60 Minutes regarding the computer forensics skills deployed in this case. The program was screened in January and June 2001.
  Filmed and interviewed in the UK, by The Learning Channel regarding the computer forensics skills deployed in this case. The program was screened in the US in March 2001.
- Expert witness for the prosecution in a trial involving the large-scale theft of hard drives from Quantum. Performed a forensic financial analysis of the suspect's corporate server accounting packages. Investigation revealed a wide distribution network throughout Europe. Testified in Wolverhampton Crown Court over a five-day period. All five defendants found guilty.
- Expert witness for the prosecution in a trial involving the theft of corporate computers throughout the north of England. Conducted forensic analysis of residual data found on a large number of re-formatted stolen hard disk drives assisted in identifying the original owners of recovered computer equipment. Testified in Manchester Crown Court over a five-day period. Defendant found guilty.
- Expert witness for the prosecution in a trial involving the running of an electronic bulletin board system that was the UK gateway to an international network involved in the worldwide electronic distribution of obscene material. Testified in Maidstone Crown Court. Two defendants found guilty.
- Expert witness for the prosecution in a trial involving the blackmail of 17 individuals. Forensic examination of a word processing system revealed systematic threat letters held in hidden and limbo files. Testified at Manchester Crown Court. Two defendants found guilty.
- Expert witness for the prosecution in a trial involving international disk based distribution of obscene material. Testified at Swindon Crown Court. Defendant found guilty.
- Expert witness for the prosecution in a North Wales case involving distribution of pedophilic material via the Internet. Forensic examination of a computer hard drive refuted defense testimony that an unknown person had used Back Orifice 2000 and Netbus to gain control of the defendant's machine.

Notable Cases

- On behalf of the Securities and Futures Authority, assisted Guernsey Police and a team of forensic accountants, in the forensic on-site imaging and investigation of two computer networks comprising a total of 22 machines in relation to the Sumitomo Corporation $2.6 billion copper fraud.
- On behalf of the FBI, carried out UK Home Office authorized house searches relating to the recovery of computer related data from laptops and other storage media in the possession of two Libyan males suspected of involvement in the bombing of US Embassies in Africa.
- On behalf of the Isle of Man Police, investigated a laptop computer that had been surrendered by the user who had found that he was being anonymously blackmailed via Email. Forensic examination uncovered evidence that the user had gained employment within the IT section of a major offshore bank and had accessed customer's private identification information, which was then provided to a criminal group in Belgium. This group had subsequently blackmailed him via an Email service provider in Texas when he had refused to assist them further with their criminal activity.
- In conjunction with the US Customs and Postal Service, forensically investigated the electronic contents of 18 hard drives used in Denmark to run two pedophile electronic bulletin board systems. Recovered evidence led to the identification of individuals who had downloaded pedophilia in the US and the UK.
- Forensic examination of two encrypted hard drives found evidence that led to the simultaneous worldwide arrest of 120 pedophiles. Many of the individuals involved were exchanging digital images of their actual abuse of children via secure web servers, one of which was known as Wonderland and was located in Boston, Massachusetts.
- Forensic examination of a suspect's computer revealed 35 live viruses and plans to infect viruses in a number of UK corporations. Further analysis revealed the breach of a US based grocery company's customer credit card database, where customer credit card details had been posted on bulletin boards and used by group members for international communication. This led to the simultaneous arrest of five individuals who were collectively known as ArcV, a high profile virus-writing group.
- Forensic examination of a re-formatted hard drive revealed more than 100 fraudulent Internet credit card purchase transactions and the distribution network for the illegally purchased goods.
- On behalf of New Scotland Yard gained access to a number of electronic bulletin boards that were distributing pedophilia. Subsequently provided evidence and assistance to their technical experts and the Metropolitan Police Computer Crime Unit.

Speaking Engagements

- Appeared on a number of television and radio programs in the UK in relation to computer forensics and communications investigation work.
- Profiled on British weekly prime time show "The Cook Report" regarding techniques used in identifying English users of a Danish pedophile Internet bulletin board.
- Lectured on Computer Forensics at Merseyside Police Training College.
- Lectured on Computer Crime at Bramshill Police Staff College.
- Guest speaker at the British Computer Society.
- Lectured on Computer Pornography at the University of Central Lancashire.
- Lectured on Computer Crime at the University of Manchester Institute of Science and Technology.
- Consultant to the Association of Chief Police Officer's Working Group into Computer Pornography.
- Presentations given at the Houses of Parliament and in Manchester to the Home Affairs Select Committee that led to amendments to UK law in relation to the sentencing of child offenders and the creation of a new offence in relation to electronic pseudo photographs.
- Lectured on Computer Forensics to the F3 Forum, a group comprising the majority of UK law enforcement and corporate computer forensic experts.
- Lectured on Computer Forensics at the American University, Washington D.C.
- Lectured on Computer Fraud to the Virginia Society of Certified Public Accountants.

Education

- Educated at Sir John Deane's Grammar School, Northwich, Cheshire graduating in 1969 with Certificates in Mathematics, English Language, Geography and French.
- July 1969 Cheshire Constabulary Police Cadet graduate.
- January to April 1971 Police Training Center Constable graduate.
- October 1977 examination qualification to the rank of Sergeant.
- October 1980 examination qualification to the rank of Inspector.
- November 1989 to December 1993 in force computer investigation training with ongoing IS specialist support.
- 1990 to 1994 various UK based data retrieval and network training seminars.
- 1995 Computer Forensics software and hardware training provided by Computer Forensics Ltd.
- 1996 Advanced Computer Forensics software and hardware training provided by Computer Forensics Ltd.
- 1996 Computer Forensics software and hardware training provided by Authentec Data Recovery specialists.
- 1997 Advanced Computer Forensics techniques software and hardware training provided by Vogon International Ltd.
- 1998 Data Networks and Communications training seminars provided by CLC.
- Computer Forensics experiential learning throughout the period 1989 to 2003.

US Expert Deposition and Testimony

December 2000, selected as an independent computer forensics expert by the Court of Alexandria, Virginia, to assist in an intellectual property dispute that centered on verifying the electronic time and date stamp information of the plaintiff's software prototypes and supporting electronic presentations. Subsequently deposed at length by the plaintiff's attorney. Four days into trial, the case settled at the plaintiff's request, a day prior to my scheduled testimony.
Dr. Bradley S. Fordham v. OneSoft Corporation, et al.,
Civil Action No. 00-1078-A (Eastern District of Virginia)

June 2001, testified and cross-examined as the defendant's computer forensics expert, before the judicial court of Harris County, Texas, in support of a defendant corporation's motion to mirror image and investigate the plaintiff's electronic storage devices. Motion granted.
Gyrodata Inc. v. Baker Hughes Inc. and Baker Hughes Inteq.,
Cause No. 2000-40391 (Harris County, Texas 127th Judicial District)

August 2001, United States District Court for the Eastern District of Virginia, deposed as the plaintiff's computer forensics expert in a multi defendant unsolicited bulk email litigation. I provided expert opinion based on my analysis of more than 125,000 member complaints.
AOL v. Netvision Audiotext, dba Cyber Entertainment Network, et al.,
Civil Action No. 99-1186-A (Eastern District of Virginia)

September 2001, testified and cross-examined as the defendant's computer forensics expert, before the judicial court of Harris County, Texas, in support of a defendant corporation's rebuttal of a motion alleging spoliation of electronic evidence.
Gyrodata Inc. v. Baker Hughes Inc. and Baker Hughes Inteq.,
Cause No. 2000-40391 (Harris County, Texas 127th Judicial District)

October 2001, United States District Court for the Eastern District of Virginia, deposed as the defendants' and counter-plaintiffs' computer forensics expert in a breach of contract, breach of fiduciary duty, theft of trade secrets and violation of the Electronic Communications Privacy Act litigation.
Beyond Technology Corp. v. WebMethods, Inc., and K. Alyssa Berg,
Civil Action No. 01-655-A (Eastern District of Virginia)

October 2001, 53rd District Court of Travis County, Texas, deposed as the plaintiff's computer forensics expert in an employee solicitation and theft of trade secrets case.
Advanced Fibre Communications v. Calix Networks, Inc. and Tony Roach
Cause No.GN102712 (53rd District Court of Travis County, Texas)

June 2002, United States District Court for the Middle District of Florida, Fort Myers Division, deposed as the defendants' and counter-plaintiffs' computer forensics expert in a defamation and tortious interference with business relationships litigation.
Gary Van Meer, and Palm Harbor Medical, Inc. v. Stryker Sales Corp.,
Civil Action No. 2:00-CV-454-FTM-29D (Middle District of Florida)

June 2002, testified and cross-examined as a computer forensics expert, before the United States District Court for the Middle District of Florida, Fort Myers Division, in support of defendants' and counter-plaintiffs' motion alleging spoliation of electronic evidence.
Gary Van Meer, and Palm Harbor Medical, Inc. v. Stryker Sales Corp.,
Civil Action No. 2:00-CV-454-FTM-29D (Middle District of Florida)

September 2002, testified and cross-examined as the plaintiff's computer forensics expert, before the United States District Court for the Southern District of Florida, Miami Division, in support of plaintiff's motion for contempt alleging spoliation of electronic evidence and support of plaintiff's rebuttal of defendant's motion to dismiss preliminary injunction and temporary restraining order.
Plaintiff's motion for contempt upheld, with the defendant being ordered to pay all of the plaintiff's attorney's and expert's fees which were incurred during the investigation and presentation of the contempt motion.
Four Seasons Hotels and Resorts B.V., Four Seasons Hotels (Barbados) Limited,
Four Seasons Hotels Limited, and Four Seasons Caracas, C.A. v. Consorcio Barr, S.A.,
and Carlos L. Barrera,
Case No. 01-4572 CIV-MOORE

October 2002, United States District Court for the Eastern District of Virginia, deposed as the plaintiff's computer forensics expert in a litigation concerning unsolicited bulk email. I provided expert opinion concerning the persons responsible for the transmission of tens of millions of unsolicited bulk commercial emails.
Verizon Internet Services, Inc. v. Alan Ralsky, et al.,
Civil Action No. 01-0432-A (Eastern District of Virginia)

October 2002, testified as the defendant's computer forensics expert, before the United States District Court for the Middle District of Florida, Fort Myers Division, in response to plaintiffs' motion alleging spoliation of electronic evidence.
Gary Van Meer, and Palm Harbor Medical, Inc. v. Stryker Sales Corp.,
Civil Action No. 2:00-CV-454-FTM-29D (Middle District of Florida)

November 2002, testified and cross-examined as the defendant's computer forensics expert, before the United States District Court for the Middle District of Florida, Fort Myers Division, in rebuttal of plaintiffs' computer forensics expert's evidence supporting a motion alleging spoliation of electronic evidence.
Gary Van Meer, and Palm Harbor Medical, Inc. v. Stryker Sales Corp.,
Civil Action No. 2:00-CV-454-FTM-29D (Middle District of Florida)

January 2003, testified and cross-examined, at trial, as plaintiff's computer forensics expert, before the United States District Court for the Southern District of Florida, Miami Division. Testimony encompassed Computer Fraud and Abuse, Electronic Communication Interception, and Trade Secret Theft.
Four Seasons Hotels and Resorts B.V., Four Seasons Hotels (Barbados) Limited, Four Seasons Hotels Limited, and Four Seasons Caracas, C.A. v. Consorcio Barr, S.A., and Carlos L. Barrera,
Case No. 01-4572 CIV-MOORE

January 2003, rebuttal testimony and cross-examination, at trial, as plaintiff's computer forensics expert, before the United States District Court for the Southern District of Florida, Miami Division. Testimony encompassed Computer Fraud and Abuse, Electronic Communication Interception, and Trade Secret Theft.
Rebuttal testimony proved that one of the defendant's key electronic exhibits was not original, but had been fabricated in an attempt to deceive the court.
Final Judgement issued May 9, 2003 awarded plaintiffs $4,877,600.00 in damages.
Four Seasons Hotels and Resorts B.V., Four Seasons Hotels (Barbados) Limited, Four Seasons Hotels Limited, and Four Seasons Caracas, C.A. v. Consorcio Barr, S.A., and Carlos L. Barrera,
Case No. 01-4572 CIV-MOORE

May 2003, United States District Court for the District of Columbia, deposed as the defendant's computer forensics expert in a litigation alleging racial bias and discrimination.
Provided testimony in relation to the alteration, fabrication and authentication of email.
The plaintiff withdrew his allegations a short time later and the case settled.
Timothy Dean and Michelle Dean v. Starwood Hotels & Resorts Worldwide Inc., d/b/a The St. Regis Washington by Starwood Hotels and Resorts
Civil Action No. 1:02CV00867

July 2003, testified and cross-examined, at trial, as plaintiff's computer forensics expert, before the United States District Court for the Eastern District of Virginia, Alexandria Division. Testimony encompassed tortious interference with business relationships, breach of contract, civil conspiracy and spoliation of data.
Plaintiff's awarded in excess of $565,000 in damages.
CACI Dynamic Systems, Inc. v. Delphinus Engineering, Inc., and James R. Everitt, Jr.,
Civil Action No. 02-1454-A

January 2004, testified and cross-examined, in arbitration, as claimant's computer forensics expert, before an Arbitration Tribunal of the American Arbitration Association in Charleston, South Carolina. Testimony encompassed tortious interference with business relationships, breach of contract and spoliation of data. Arbitrator subsequently awarded claimant $10,567,478 and reimbursement of claimant's arbitration costs.
CACI Dynamic Systems, Inc. v. V. Allen Spicer
AAA Case No. 16 160 00725 02

March 2004, United States District Court for the Southern District of New York, deposed as the defendant's computer forensics expert in a litigation alleging unfair dismissal. Provided testimony in relation to the creation and authentication of a document produced in paper form by the plaintiff.
Michelle Bell v. Davis & Partners, LLC and Wolf Management & Leasing, LLC,
Civil Action No. 03CV4175

November 2004, testified and cross-examined as plaintiff's computer forensics expert, at a Preliminary Injunction Hearing, before the United States District Court for the District of Maryland, Northern Division. Testimony encompassed the defendants' co-ordinated use of data destruction utilities to prevent the discovery of the plaintiff's stolen source code and proprietary information.
Bowe Bell + Howell Company v. Document Services Inc., and Albert M. Harris et al,
Civil Action No. 043418

November 2004, testified and cross-examined as plaintiff's computer forensics expert, in rebuttal to counter defendants' testimony and provide pattern analysis to show the extent of defendants' data destruction efforts, at a Preliminary Injunction Hearing, before the United States District Court for the District of Maryland, Northern Division.
The Judge granted the plaintiff broad injunctive relief and found that the defendants had intentionally destroyed relevant documents and indicated that an adverse inference instruction will likely be given to the jury as a sanction.
Bowe Bell + Howell Company v. Document Services Inc., and Albert M. Harris et al,
Civil Action No. 043418

March 2005, provided testimony, in arbitration, as respondent's computer forensics expert, before an Arbitration Tribunal of the American Arbitration Association in Philadelphia, Pennsylvania. Testimony encompassed the restoration of Lotus Notes e-mail and attachments from multiple back-up tapes.
Boston Power Group v. Alstom Power, Inc.
AAA Case No. 14-Y-110-01410-03

March 2005, testified and cross-examined as plaintiff's computer forensics expert, at a Preliminary Injunction Hearing, before the United States District Court for the Eastern District of Michigan, Southern Division. Testimony encompassed the defendants' theft of trade secrets and proprietary information and the defendants' spoliation of evidence.
The Judge granted the plaintiff broad injunctive relief and scheduled a spoliation hearing for April 2005.
Henkel Corporation v. Charles K. Cox and Chemtool Corporation,
Civil Action No. 050735

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

CASE NO: CA 03-5045 AI

MORGAN STANLEY'S MOTION TO CLARIFY THE PROPER SCOPE OF THE LIABILITY AND PUNITIVE PHASES OF TRIAL

Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully moves for an order clarifying the proper scope of the liability and punitive phases of trial in this case.[1] In light of the Court's March 23, 2005 Order (the "Default Order"), granting in part Coleman (Parent) Holdings Inc.'s ("CPH") motion for an entry of default judgment, only two discrete issues remain to be tried in the liability phase of this trial: (1) CPH's justifiable reliance on Dunlap/Sunbeam and/or Morgan Stanley's allegedly fraudulent statements, and (2) the extent of the actual damages suffered by CPH as a result of its purported reliance. *See* Order On CPH's Renewed Motion For Entry Of Default Judgment at 16–17 (Mar. 23, 2005). Accordingly, this Court should admit only evidence relevant to these issues in the liability phase, instruct the jury that the other necessary elements of CPH's claims have been resolved in favor of CPH, and proceed to the punitive phase if and only if the jury finds that CPH has prevailed on all of the elements of its claims, including reliance and damages, by clear and convincing evidence.

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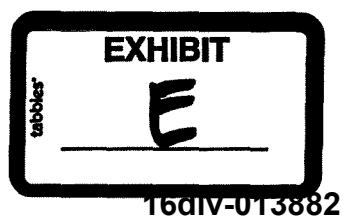
[1] This Motion also responds, in part, to Plaintiff's Motion In Limine No. 28 To Clarify When Evidence Is Admissible To Show Plaintiff's Entitlement To And Amount Of Punitive Damages (filed Mar. 18, 2005) ("CPH MIL No. 28"). Morgan Stanley was unable to fully respond to CPH MIL No. 28 due to time constraints and will instead respond by oral argument this afternoon.



The Court in turn should not read Attachment A to the Default Order ("Attachment A") or its statement of findings regarding Morgan Stanley's discovery conduct ("Discovery Statement") to the jury in the liability phase. Reading these documents to the jury would constitute an impermissible double sanction against Morgan Stanley for its discovery conduct. If these documents are read to the jury at all, the Court should only admit them at the punitive phase, during which Morgan Stanley has the right to present on its behalf evidence relevant to the jury's determination of the amount of punitive damages to award, if any.[2]

ARGUMENT

I. BECAUSE OF THE COURT'S DEFAULT ORDER, THE SOLE ISSUES FOR THE JURY IN THE LIABILITY PHASE ARE JUSTIFIABLE RELIANCE AND ACTUAL DAMAGES.

A. A Finding In Favor Of CPH, Based On Clear And Convincing Evidence, On Either One Of Its Claims Is Both Necessary And Sufficient To Trigger The Punitive Phase.

CPH's two claims are for intentional torts. Under Florida law, proof of an intentional tort by clear and convincing evidence is sufficient to allow the jury to consider whether to award punitive damages. Thus, in the liability phase of the trial—where the only issues are Morgan Stanley's liability and CPH's *entitlement* to punitive damages—there is no need to introduce evidence other than that necessary to prove the essential elements of the claims. Evidence of

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[2] Morgan Stanley vociferously objects to the sanctions imposed by the Court in its Default Order and its March 1, 2005 Order On Coleman (Parent) Holding, Inc.'s Motion For Adverse Inference Instruction Due To Morgan Stanley's Destructions Of E-Mails And Morgan Stanley's Noncompliance With The Court's April 16, 2004 Agreed Order, And Motion For Additional Relief And Order On Plaintiff's Motion To Compel Further Discovery Regarding Morgan Stanley's Destruction And Non-Production Of E-Mails ("Adverse Inference Order"). This Motion is submitted solely for the purpose of proposing a structure for the severely limited trial that will take place if the Court declines to reconsider its earlier orders. Morgan Stanley preserves all rights to appeal the Default Order and the Adverse Inference Order.

"aggravation," relating to the "badness" of Morgan Stanley's conduct and the appropriate amount of any award should be left to the punitive phase.

CPH appears to concede that because this case involves claims of intentional tort, rather than negligence, the only factual issues for the jury to decide in the liability phase are those relating to the elements of the underlying tort claims. *See* Plaintiff's Motion In Limine No. 28 To Clarify When Evidence Is Admissible To Show Plaintiff's Entitlement To And Amount Of Punitive Damages at 4 (filed Mar. 18, 2005) ("CPH MIL No. 28") ("If CPH proves its case against Morgan Stanley, the question of whether Morgan Stanley should pay punitive damages automatically goes to the jury."). As CPH's cited authorities note, "[a] claim of fraud sufficient to support compensatory damages is sufficient to support a claim for punitive damages being presented to the jury." *Lou Bachrodt Chevrolet, Inc. v. Savage*, 570 So. 2d 306, 308 (Fla. 4th DCA 1990); *see* CPH MIL No. 28 at 4–5 (citing *First Interstate Dev. Corp. v. Ablanedo*, 511 So. 2d 536, 539 (Fla. 1987); *Ingram v. Pettit*, 340 So. 2d 922, 924 (Fla. 1976)). Thus, only evidence directly relevant to the underlying elements of the claims may be admitted at the first phase of the trial; the Court may not admit any evidence that either party wishes to introduce relating to the factors bearing on the jury's determinations as to whether to award punitive damages and if so in what amount.

Moreover, this Court's Default Order purported to "establish[] for all purposes in this action" allegations putatively relevant to all essential elements of PHC's claims except two: (1) PHC's justifiable reliance on the alleged fraudulent statements of Dunlap/Sunbeam, and (2) the amount of actual damages suffered by CPH as a result of its purported reliance. Default Order at 16–17. Accordingly, these are the only issues with respect to Morgan Stanley's liability that remain to be tried in the liability phase of the trial in this case.

Florida law also expressly requires that the jury's findings on these issues be based on "clear and convincing evidence" to the extent they constitute the requisite finding of conduct that subjects a defendant to punitive damages. *See* Fla. Stat. § 768.72 ("A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence."). Accordingly, if the jury returns a liability verdict in favor of CPH, it should be required also to render a separate verdict stating whether its liability verdict was based on clear and convincing evidence. An answer in the affirmative would trigger the punitive phase; an answer in the negative would not.

B. Attachment A And The Discovery Statement Are Relevant—If At All—Only To The Jury's Punitive Phase Decision.

The liability phase in this case begins and ends with the two issues left untouched by this Court's Default Order: justifiable reliance and damages. In this regard, the Court should not read Attachment A to the jury in the liability phase. The Default Order plainly relieves CPH of its burden of proving all elements of its claims other than reliance and compensatory damages. Attachment A contains numerous inflammatory allegations that are completely irrelevant to what is left of the liability phase after the Default Order, and any conceivable probative value they might have is substantially outweighed by the unfair prejudice that will result. *See* Fla. Stat. § 90.403. Reading Exhibit A to the jury will prevent Morgan Stanley from obtaining a fair trial on the remaining elements of reliance and damages. For the same reasons, CPH should not be permitted to introduce any evidence in the liability phase except evidence directly bearing on reliance or damages.

The Discovery Statement also should not be admitted in the liability phase. The alleged discovery abuses have no bearing whatsoever on whether CPH justifiably relied on the purported

misrepresentations or on whether CPH can establish damages. Under Florida law evidence of discovery misconduct generally may not be presented to the jury, and this case does not fit under the exception created by *General Motors Corp. v. McGee*, 837 So. 2d 1010, 1036 (Fla. 4th DCA 2003). The Court has sanctioned Morgan Stanley for the alleged discovery abuses by entering the partial default judgment; reading the Discovery Statement to the jury or allowing CPH to introduce evidence about the discovery issues would constitute a second, impermissible sanction. Indeed, in analogous circumstances it has been impermissible to sanction a party twice for discovery abuses. *See Werbungs Und Commerz Union Austalt v. Collectors' Guild, Ltd.*, 930 F.2d 1021, 1027 (2d Cir. 1991) (finding trial court "abused its discretion and committed plain error when through its instruction it allowed the jury, in effect, to sanction [party] *again* for its late production of documents," where court had already sanctioned the party by excluded the belatedly-produced materials) (emphasis added).

Morgan Stanley continues vehemently to object to the Court's Adverse Inference Order; to its Default Order; and to the introduction of either Exhibit A or the Discovery Statement at either phase of the trial. However, if the Court declines to reconsider its Adverse Inference Order and its Default Order, Exhibit A and the Discovery Statement should be admitted, if at all, only in the punitive phase of the trial. During the liability phase, this Court simply should instruct the jury that the other necessary elements of CPH's claims have been resolved in favor of CPH and proceed to the punitive phase upon a jury finding that CPH has prevailed on these two issues by clear and convincing evidence.

II. MORGAN STANLEY IS ENTITLED TO PRESENT EVIDENCE ON ITS BEHALF RELEVANT TO THE JURY'S PUNITIVE PHASE DECISION.

It is well settled that a court may take away neither the jury's "discretion to decline to assess punitive damages or to award only a nominal amount," nor a defendant's right to

introduce "mitigating evidence" that "would have the effect of 'reducing or softening the moral or social culpability attaching to [the defendant's] act.'" *Humana Health Ins. Co. of Fla., Inc. v. Chipps*, 802 So. 2d 492, 496 (Fla. 4th DCA 2001) (quoting *McClelland v. Climax Hosiery Mills*, 169 N.E. 605, 608 (N.Y. 1930) (alteration in original)). Accordingly, in the event the jury returns a verdict on liability in favor of CPH on the basis of clear and convincing evidence and therefore triggers a punitive phase, controlling Florida authority requires this Court to allow Morgan Stanley to present mitigating evidence relevant to the jury's decision as to the appropriate amount of punitive damages to award, if any. A contrary ruling would in effect direct a verdict against Morgan Stanley on punitive damages—a result the Court has repeatedly forsworn.

* * *

WHEREFORE Morgan Stanley respectfully requests that this Court: (1) admit only evidence relevant to the issues of justifiable reliance and damages in the liability phase; (2) instruct the jury only that the other necessary elements of CPH's claims have been resolved in favor of CPH; and (3) proceed to the punitive phase if and only if the jury finds that CPH has prevailed on all of the elements of its claims, including reliance and damages, by clear and convincing evidence. The Court, moreover, should read to the jury Attachment A and/or the Discovery Statement—if at all—only in the punitive phase, during which it should respect Morgan Stanley's right to present on its behalf evidence relevant to the jury's determination of the amount of punitive damages to award, if any.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 31st day of March 2005.

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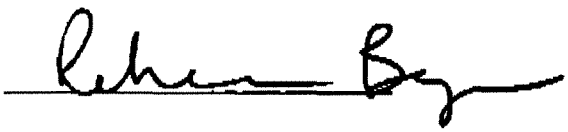
BY: 

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IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 42

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Monday, March 21, 2005

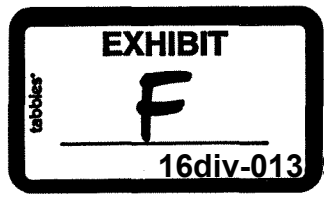
Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

9:30 a.m. to 12:25 p.m.



the jury the implications, the adverse inference --

THE COURT: You're not asking for an instruction? You're just saying you want to present evidence about the e-mail retention policy and the failure to deviate from it in this case, and then argue to the jury that they should draw an adverse inference from that evidence?

MR. LANCASTER: Yes, with a caveat; that is, we're not asking for an instruction. We believe that, the way we read this law, that would be viewed with close scrutiny, and it would be -- I'm not sure it would be viable.

But Your Honor has in its order, in the initial order that dealt with our e-mail destruction, indicated that the path that it intended to follow, which was to read a statement to the jury, that there would be no further instruction given, and no other evidence put out.

And we believe that if Your Honor is going to read such a statement to the jury, then under the facts of this case and the law, as Your Honor is applying to this case, that we feel

that Your Honor should read a similar statement of facts.

And we are going to tender to Your Honor, and we did a revised version of that that should also be read. Because when it is the issue of the loss of e-mails which Your Honor has already indicated supplies the essential element, it's critical, then the parties do stand in that respect on the same footing.

In fact, Your Honor, in all due respect, I would submit that we stand on better footing. Because while we have -- and perhaps we have not done a good job of it and perhaps there have been foot faults -- we have restored some quantum of e-mails.

And I know that this exasperates Your Honor, but it is --

THE COURT: No, I guess it goes back, quite honestly, to when one of Plaintiff's points in the motion for the default judgment is Morgan Stanley seems wholly unwilling to admit that it's committed egregious violations of the agreed order. And to me this is fundamentally different.

The e-mail issues here between Coleman and

Morgan Stanley are fundamentally different. And I have no problem at all with Morgan Stanley's arguing about how Coleman dealt with its e-mails in this case and what evidentiary value that may or may not have for the jury. But in all honesty, I'm offended that you would attempt to equate the two. Because I think they're totally unrelated.

MR. LANCASTER: And I accept that from Your Honor. And I'm not doing it from the standpoint of, necessarily, conduct, but I'm attempting to argue to Your Honor that if you're looking at sort of body of evidence, what is available for a jury to consider? There is e-mail as a result of both, I guess, discovery and discovery orders by this Court, and whatever else mix there is that brought these e-mails to potentially the jury.

But on the Coleman side, there is no e-mail off those backup tapes, because they brazenly walk into court and say, we just destroyed it all.

So in that respect we believe that given the Court's -- the way you're applying the law of the case, statement of facts you're going to

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

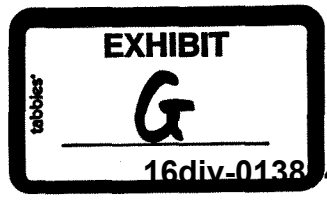
MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).
_____/

STIPULATION REGARDING DRAFT EXPERT REPORTS

Morgan Stanley & Co. Inc. and Morgan Stanley Senior Funding, Inc. (collectively "Morgan Stanley"), by and through their undersigned attorneys, and Coleman (Parent) Holdings Inc. and MacAndrews & Forbes Holdings, Inc. (collectively "CPH"), by and through their undersigned attorneys, stipulate as follows:

1. Both Morgan Stanley and CPH expect that their respective expert witnesses will prepare and produce expert reports in connection with this action.

2. Counsel for Morgan Stanley and CPH have conferred, and have agreed that the potential discovery of drafts of expert reports, and other documents and communications related to such reports, would add time and cost to the process of preparing such reports, and thus have determined that the parties have a mutual interest in ensuring that such drafts, related documents, or any communications between the parties, their respective counsel, and their respective



consulting and/or testifying expert regarding any such draft, are not subject to discovery in this action.

3. Consequently, the parties stipulate that:

a. The drafts of any report prepared in connection with this action, by any consulting and/or testifying expert retained by either party, or any employee or agent of any such expert, will not be discoverable or admissible in evidence in connection with this action. Such drafts will include any revisions to, or mark-ups of, any draft of any report prepared in connection with this action.

b. Any communications between the parties, their respective counsel, and their respective consulting and/or testifying experts in this action, insofar as that communication relates to any draft of any expert report, as discussed above, also will not be discoverable or admissible in evidence in connection with this action.

Dated: _____

BY: _____

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Counsel for Coleman (Parent) Holdings Inc. and MacAndrews & Forbes Holdings

Dated: Sept 16, 2004

BY: _____

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Counsel for Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding

ORDER APPROVING STIPULATION

THIS CAUSE, having come before the Court upon the foregoing stipulation, and after having reviewed the agreement of the parties, the Court approves the stipulation.

DONE AND ORDERED in chambers in West Palm Beach, Florida this _____ day of September, 2004.

SIGNED & DATED

SEP 2 1 2004

JUDGE ELIZABETH T. MAASS

Elizabeth T. Maass
Circuit Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),
vs.

MACANDREWS & FORBES HOLDINGS, INC..,
Defendant(s).
_____/

ORDER CONCERNING PRETRIAL SCHEDULE AND FOLLOWING CASE MANAGEMENT CONFERENCE

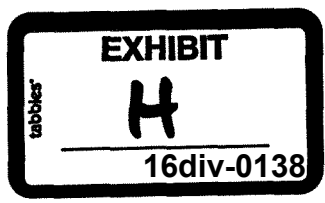
THIS CAUSE came before the Court October 14, 2004 for a case management conference, with all parties well represented by counsel. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that objections to all discovery served on or after October 14, 2004 shall be served within 14 days. It is further

ORDERED AND ADJUDGED that this action is specially set for jury trial commencing February 18, 2004. It is further

ORDERED AND ADJUDGED that the proceedings relating to summary judgment will take place on the following schedule:

Summary Judgment Briefs	December 6, 2004
Summary Judgment Response Briefs	December 17, 2004



Summary Judgment Replies	December 31, 2004
Summary Judgment Hearing	January 21, 2005

It is further

ORDERED AND ADJUDGED that the proceedings relating to mediation will take place on the following schedule:

Mediator Selected	December 1, 2004
Mediation	January 24, 2005

It is further

ORDERED AND ADJUDGED that the proceedings relating to expert discovery will take place on the following schedule:

Initial Expert Disclosures	December 1, 2004
Responsive Expert Disclosures	December 13, 2004
Rebuttal Expert Disclosures	December 20, 2004
Depositions of Experts	December 21, 2004 - January 7, 2005

The parties agree, and the Court orders, that expert witness disclosures shall include: (a) the name and business address of the witness; (b) the subject matter about which the expert will testify; (c) the substance of the facts and opinions to which the expert will testify; (d) a summary of the grounds for each opinion; (e) a copy of any written reports issued by the expert regarding this case; (f) a copy of the expert's curriculum vitae; (g) a list of all cases in which the expert has testified during the past five years; (h) a list of all produced documents relied on by the expert; and (i) copies of all non-produced documents relied on by the expert. Expert witnesses will not be permitted to testify as to opinions, or the bases therefore, unless the opinions or bases were disclosed with particularity in accordance with this Order. It is further

ORDERED AND ADJUDGED that the remaining pretrial proceedings will take place on the following schedule:

Supplemental Interrogatory Responses Due	December 24, 2004

Completion of Fact Discovery	November 24, 2004
Deposition Designations Exchanged-Fact Witnesses	December 20, 2004
Deposition Designations Exchanged-Expert Witnesses	January 14, 2004
Deposition Counter-Designations and Initial Objections Exchanged-Fact Witnesses	January 17, 2005
Deposition Counter-Designations and Initial Objections Exchanged-Expert Witness	January 21, 2005
Motions in Limine	January 10, 2005
Witness Lists and Trial Exhibits Exchanged	January 10, 2005
Motion in Limine Oppositions	January 18, 2005
Objections to Counter-Designations Exchanged-Fact Witnesses	January 24, 2005
Objections to Counter-Designations Exchanged-Expert Witnesses	January 28, 2005
Meet-and-Confer re: Deposition Designations	February 4, 2005
Joint Pretrial Stipulation (in the form directed by the Court's Uniform Pretrial Procedure)	February 9, 2005
Deposition Designations, Counter-Designations, and Objections to Designations and Counter-Designations Provided to the Court	February 11, 2005
Pretrial Conference (3 days)	February 14, 15, and 16, 2004
Final Pretrial Conference	February 17, 2005
Jury Instructions and Verdict Forms Exchanged	February 18, 2005
Initial Jury Screening	February 18, 2005
Jury Trial Begins (15 trial days)	February 22, 2005

The Court will receive objections to instructions and verdict forms, and the parties'

counter-instructions on a date to be determined during trial. It is further

ORDERED AND ADJUDGED that hearing on Motions in Limine and objections to deposition designations set December 20 - 22, 2004 is canceled, to be reset after the deadlines established by this Order.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 14 day of October, 2004.

ELIZABETH T. MAASS
Circuit Court Judge

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

AGREED ORDER GRANTING MORGAN STANLEY'S MOTION TO EXTEND EXPERT DISCOVERY AND SUMMARY JUDGMENT DEADLINES BY ONE WEEK

THIS CAUSE having come before the Court on November 23, 2004 upon Morgan Stanley's Motion to Extend Expert Discovery and Summary Judgment Deadlines by One Week, and the Court having been advised of the agreement between the parties, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

1. Morgan Stanley's Motion to Extend Expert Discovery and Summary Judgment Deadlines by One Week is GRANTED in part.

2. The Court's Order of October 14, 2004 shall be amended as follows:

Initial Expert Disclosures	December 7, 2004
Responsive Expert Disclosures	December 17, 2004
Rebuttal Expert Disclosures	December 28, 2004
Depositions of Experts	December 28, 2004-January 14, 2005
Summary Judgment Briefs	December 10, 2004
Summary Judgment Response Briefs	December 23, 2004

EXHIBIT
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Summary Judgment Reply Briefs	January 6, 2005

All documents listed above shall be served on or before 5:00 p.m. via facsimile except for responsive expert disclosures on December 17, 2004 which shall be served on or before 3:00 p.m. via facsimile.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 23 day of November, 2004.

ELIZABETH T. MAASS
Circuit Court Judge

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

CASE NO: CA 03-5045 AI

Material Redacted Without Prior Determination of Protectability by Court

MORGAN STANLEY'S MOTION IN LIMINE NO. 13
TO STRIKE THE EXPERT OPINION
OF SAMUEL J. KURSH AS UNTIMELY AND CUMULATIVE

As part of its ongoing expert "shell game," Coleman (Parent) Holdings Inc. ("CPH") has designated ***three*** experts on damages, including two experts devoted solely to the valuation of The Coleman Company, Inc. ("Coleman") as of March 1998: Samuel J. Kursh, D.B.A. and Michael J. Wagner. If the Court allows CPH to introduce both of these Coleman valuation experts, Morgan Stanley will be unduly prejudiced, most particularly by the delayed and incomplete disclosure of Mr. Kursh's opinions despite a trial that is only a few weeks away. Moreover, while CPH cumulatively offers two experts on the same, exact issue, the experts' methodologies are inconsistent and they arrive at wholly different per share values of Coleman. CPH should not be allowed to avoid disclosing the expert valuation on which it will rely at trial. It is time for CPH to show its cards.

To end these tactics, the Court should strike Mr. Kursh's opinions. Mr. Kursh has been unavailable to file a rebuttal report or sit for a deposition throughout most of December and January, thereby rendering it impossible for Morgan Stanley to depose Mr. Kursh, to begin the lengthy deposition designation process and to engage in extended briefing on the objectionable

EXHIBIT
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aspects of Mr. Kursh's expert opinion as of the date of this filing. Given the practical realities of Mr. Kursh's current health situation, the cumulative (but conflicting) nature of his testimony, the fact that CPH has another expert ready to testify on the same subject matter, and the rapidly approaching trial date, Morgan Stanley respectfully submits that Mr. Kursh's expert opinion should be stricken as a matter of law. *See* Fla. R. Civ. P. 1.200(b)(4) ("[T]he court itself may or shall on a timely motion of any party require ... the limitation of the number of expert witnesses ... .").

In support of its motion, Morgan Stanley states the following:

STATEMENT OF FACTS

1. On October 14, 2004, the Court entered an Order establishing the pretrial schedule for this case, including provisions for expert disclosures, expert depositions, and expert designations (the "Pretrial Schedule"). The Pretrial Schedule was subsequently amended by the November 23, 2004 Agreed Order.

2. The current Pretrial Schedule required the parties to serve their initial expert disclosures on December 7, 2004. The parties then filed responsive and rebuttal expert disclosures due on December 17, 2004, and December 28, 2004, respectively.

3. The parties took expert depositions between December 28, 2004 and January 14, 2005. Expert deposition designations were due on January 14, 2005, with expert counter-designations and objections to expert counter-designations due on January 21, 2005, and January 28, 2005, respectively.

4. The trial is set to begin February 18, 2005, following the pretrial conference starting on February 14.

5. On December 7, 2004, CPH served initial disclosures for ***six*** different experts, including ***three*** experts on damages. The sheer volume of paper associated with these initial

disclosures is staggering, with a total page count swelling to well ***over 1,000 pages***. Under the Pretrial Schedule, Morgan Stanley had less than ***10 days*** to respond.

6. CPH submitted two expert reports on the exact, same issue: the value of Coleman as of March 1998. *See* 12/7/04 Expert Report of S. Kursh at 3 ("Kursh Report") ("

") (Ex. 1); 12/7/04 Expert Report of M. Wagner at 1 ("Wagner Report") ("

") (Ex. 2).

7. The two expert reports are inconsistent with each other, employ differing methodologies, and arrive at different per share values of Coleman stock as of March 1998. Mr. Kursh

See Kursh Report at 15 (Ex. 1). Mr. Wagner, in contrast, uses

. *See* Wagner Report at 1 (Ex. 2). In addition, he opines that the "

. *Id.* Thus, CPH's proffered evidence regarding the value of Coleman as of March 1998 depends on which CPH expert you ask.

8. This disclosure problem has been compounded by Mr. Kursh's inability to file a rebuttal report within a reasonable amount of time and his unavailability for deposition

throughout December and January. Indeed, just two days after CPH's expert reports were served, CPH informed Morgan Stanley that Mr. Kursh was "expected to undergo heart surgery next week."[1] 12/9/04 Letter from M. Brody to T. Clare (Ex. 3). Two weeks later, and with trial rapidly approaching, CPH requested an open-ended extension for Mr. Kursh's rebuttal report and deposition until some unspecified time in the future. 12/21/04 Letter from M. Brody to R. Beynon (Ex. 4).

9. In response, Morgan Stanley agreed to make reasonable accommodations and offered a reasonable extension — indeed, the same extension CPH offered for Morgan Stanley's expert George Fritz — that would not compromise Morgan Stanley's ability to prepare for trial. Morgan Stanley noted that it believed that "this proposal [was] especially reasonable since, if Mr. Kursh's recovery does not permit him to participate in the pretrial disclosures and trial, CPH has at least two other damages experts who address precisely the same subject matter." 12/22/04 Letter from T. Clare to M. Brody (Ex. 5).

10. Another two weeks later, CPH counsel advised that "Mr. Kursh still is insufficiently recovered from his surgery to work" and again requested an open-ended extension because "it still is too early in his recovery for him to provide a firm date on which he will be able to submit his rebuttal report." 1/3/05 Letter from M. Brody to T. Clare (Ex. 6). Given the highly compressed pretrial schedule, and the limited time available to complete the expert disclosures, expert depositions, and expert designations before the trial date, however, Morgan

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[1] The timing of the disclosure is curious. Although CPH had initially contacted him in February 2004, Mr. Wagner testified that

. 1/13/05 M. Wagner Dep. Tr. at 21:6-23:8 (Ex. 7). He assumed that

Id. at 22:21-25. It was only in October 2004 — with less than two months to go before the expert reports were due to be filed in

(Continued...)

Stanley advised CPH that it could not agree to any further extension without substantially prejudicing the preparation of its case. *See* 1/4/05 Letter from T. Clare to M. Brody (Ex. 8). In addition, Morgan Stanley again noted that "CPH has at least two other experts who address precisely the same subject matter as Mr. Kursh." *Id.*

11. CPH then filed a motion to extend the deadline for Mr. Kursh to file a rebuttal report until January 24, 2004, almost a full month after the initial report was due. On January 12, 2005, the Court granted the motion in part "without prejudice to Defendant's right to seek to exclude all or part of Mr. Kursh's testimony if it is unduly prejudiced by the delay." The Court ordered that CPH file Mr. Kursh's report by 5 p.m. on January 24, 2005.

12. CPH served by e-mail attachment two Kursh reports of 97 pages at 4:53 p.m. EST on January 25, 2005. Later CPH served the reports by facsimile after 5 p.m..

ARGUMENT

13. CPH has played a shell game with its expert disclosures, keeping its options open as long as possible and forcing Morgan Stanley to guess which of its three "damages" experts it will call at trial, and which of their damages methodologies it will actually use. Moreover, given the highly compressed pretrial schedule, and the limited time remaining before trial to complete expert disclosures, expert depositions, and expert designations, Mr. Kursh's unavailability throughout December and January has exacerbated the prejudice and procedural unfairness created by CPH's litigation tactics.

14. With trial rapidly approaching, Morgan Stanley still does not have a deposition date for Mr. Kursh or even know whether he or Mr. Wagner will ultimately be called to testify as

---

this complex case — that CPH again contacted Mr. Wagner and asked him to prepare a damages analysis.

to the value of Coleman as of March 1998. Accordingly, pursuant to Fla. R. Civ. P. 1.200(b)(4), Morgan Stanley asks the Court to establish a "limitation of the number of expert witnesses" to be called at trial in this case and to strike the expert opinion of Mr. Kursh in its entirety, thereby leaving Mr. Wagner to testify as to Coleman's valuation at trial.

15. ***First***, Mr. Kursh's testimony should be stricken as untimely. Mr. Kursh's rebuttal report was due on December 28, 2004. Morgan Stanley did not receive it until 4:53 p.m. on January 24, 2005. Supra ¶ 10. Mr. Kursh was supposed to be made available for deposition before January 14, 2005. But Morgan Stanley still has not been able to obtain a deposition date. Designations of Mr. Kursh's depositions were due on January 14, 2005; counter-designations due on January 21, 2005; and objections to counter-designations due on January 28, 2005. Morgan Stanley cannot even begin the designation process until they get a deposition date, Mr. Kursh is deposed, and a transcript is received. All motions directed at experts were to have been filed on January 26, 2005, with oppositions due on February 4, 2005. Morgan Stanley should not be expected to file such a motion with less than two days to digest the 97-page rebuttal report and still no opportunity to depose Mr. Kursh.[2]

16. Indeed, the Court recognized that Morgan Stanley could be unduly prejudiced by CPH's delay in submitting Mr. Kursh's rebuttal report: "[T]he longer the time goes, the more likely it is that [Morgan Stanley] is going to be prejudiced, which means for whatever reason this evidence isn't going to come in." 1/12/05 Hr'g Tr. at 17:20-18:1. At this point, the Court is faced with a situation where all the dates laid out in the Pretrial Order have come and gone, and Mr. Kursh is almost a month behind a heavily compressed pretrial schedule with little room for

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[2] Morgan Stanley expressly reserves the right, subject to Court order, to file motions directed at Mr. Kursh's expert testimony after reviewing his rebuttal report.

error. With trial just a few weeks away, Morgan Stanley respectfully submits that there is simply no time left for Morgan Stanley to have its experts review Mr. Kursh's latest work, prepare for and depose Mr. Kursh, begin the designation process (on the assumption Mr. Kursh might not testify live), and engage in extended briefing on the objectionable aspects of Mr. Kursh's expert opinion.

17. ***Second,*** Mr. Kursh's testimony should be stricken in its entirety as a consequence of CPH's failure to comply with this Court's order compelling expert disclosures in this case. Indeed, despite the clear command of the pretrial order, CPH has failed not only to disclose which of its three damages experts it will call, but also which of its two damages experts on the value of Coleman as of March 1998 it will call and what CPH precisely contends is the specific per share value that CPH intends to assert at trial. In essence, CPH's "disclosure" on December 7, 2004 was no disclosure at all.

18. While Mr. Kursh and Mr. Wagner both opine on the same exact issue, they do not proffer the same conclusion. To the contrary, Mr. Kursh and Mr. Wagner utilize totally different methodologies to arrive at entirely different per share values of Coleman. The question then is: will CPH rely upon Mr. Kursh's methodology to assert that

? Or will CPH rely upon Mr. Wagner's methodology to assert that

? Both

cannot be correct. But CPH has so far failed to disclose — as required by the spirit, if not the pure letter, of the Pretrial Order — which of these two conflicting expert opinions they intend to rely upon. Again, CPH is playing a "shell game," keeping its options open as long as possible on this key issue and forcing Morgan Stanley to guess at what it intends to assert at trial.

19. This Court has repeatedly stated that it does not wish to preside over a trial by ambush. Indeed, it is precisely for this reason that the Pretrial Scheduling Order specified that neither side would be able to present expert testimony on a contested issue if it was not "disclosed with particularity in accordance with this Order." *See* 10/14/04 Pretrial Scheduling Order. The Court subsequently warned of the consequences for incomplete and untimely expert disclosure: "We are talking about what is the spirit of the order and the spirit of the order is we need all of the cards on the table and you can't be having somebody offering an expert opinion at trial that has not been disclosed." 12/15/04 Hr'g Tr. at 6:3-6:8. But CPH, preferring gamesmanship to disclosure, has steadfastly refused to show its cards for over a month now. Accordingly, pursuant to well-established Florida law, Mr. Kursh's expert opinion

. *See Binger v. King Pest Control*, 401 So. 2d 1310, 1314 (Fla. 1981) (affirming trial court's right to exclude expert testimony for failure to comply with pretrial order in order to help "eliminate surprise and avoid trial by 'ambush.'").

20. ***Finally,*** Mr. Kursh's testimony should be stricken on the independent ground that it is redundant, duplicative, and cumulative. "[A] trial judge has the discretion to limit the number of witnesses who the parties may call to testify at trial ...." *Gonzalez v. Martinez*, No. 3D03-918, 2004 WL 17771, at *1 (Fla. 3d DCA, Jan. 3, 2005); *see also Fogel v. Mirmelli*, 413 So. 2d 1204, 1207 (Fla. 3d DCA 1982) ("Without question, the trial court has discretion to limit the number of witnesses which may be called by the parties." (citation omitted)).

21. And Florida trial courts have not hesitated to limit the number of expert witnesses — even those properly disclosed — where, as here, a party seeks to present duplicative experts on precisely the same subject matter. *See Dones v. Moss*, 884 So.2d 230 (Fla. 2d DCA 2004) (affirming trial court's decision to limit the number of expert witnesses who presented redundant

testimony); *Dade County v. Midic Realty, Inc.*, 549 So. 2d 1207 (Fla. 3d DCA 1989) (same); *Stager v. Fla. E. Coast Ry. Co.*, 163 So. 2d 15, 17 (Fla. 3d DCA 1964) (same). *See also* Fla. Evid. Code. § 90.403 ("Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of ... needless presentation of cumulative evidence."). Mr. Kursh opines on the same subject matter as two other CPH experts and on precisely the same issue as Mr. Wagner. As such, the Court should exclude Mr. Kursh as an expert witness at trial.

WHEREFORE, Morgan Stanley respectfully requests that this Court enter an order striking the testimony and opinions of CPH expert Samuel J. Kursh.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 26th day of January, 2005.

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March 11, 2004

VIA FACSIMILE

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Re: *Coleman (Parent) Holdings v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding v. MacAndrews & Forbes et al.

Dear Mike:

I write in response to your March 9, 2004 letter regarding (1) Morgan Stanley's pending motion for the production of electronic documents in electronic form; and (2) CPH's apparent desire to force a wasteful and costly restoration of Morgan Stanley's e-mail backup tapes. I will address each of these two issues in turn.

Electronic Documents

Morgan Stanley has consistently produced its electronic documents "in electronic form" in accordance with the parties' written agreement. We are not aware of any electronic server or backup media that might contain additional electronic documents responsive to CPH's document requests. Accordingly, at least as it applies to Morgan Stanley, your suggestion that the parties hire an outside vendor to search backup tapes for additional electronic documents would only result in additional and unnecessary costs.

As for CPH's documents that exist "in electronic form," we have examined the electronic documents that CPH produced in hard-copy form and have reviewed Mr. Fasman's deposition testimony on this point. All of the available evidence squarely rejects the notion that it would impose a "significant burden" on CPH to produce such documents "in electronic form" in accordance with the parties agreement. Specifically:

- We cannot square your "burden" argument with the time- and date-stamp information that appears on the documents. Virtually all of the electronic documents in CPH's latest production appear to have time- and date-stamps in the header or footer that show the date and time that they were printed for production. These time- and date-stamps show that these document were located and printed over the course of a ***few hours*** in the two days immediately prior to production. Thus, the burden cannot be as great as you claim.

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- Similarly, many of those same hard-copy documents have unique electronic filenames identified in the header or footer of the document. With the assistance of these filenames, it should be relatively easy for CPH to locate and produce documents in electronic form.

- We cannot square your "burden" argument with your prior demands of Morgan Stanley. As you will recall, Morgan Stanley undertook — at your insistence — an ***even greater burden*** when, after producing several boxes of documents in hard-copy form, CPH made an identical demand that Morgan Stanley "go back and retrieve duplicate copies of previously produced documents in electronic form." Morgan Stanley did just that, and subsequently produced four CDs of electronic documents that had previously been produced in herd-copy form, representing 723 files and 117.5 MB of electronic data.

- We cannot square your "burden" argument with the parties' written agreement. The parties agreed — in a countersigned written agreement that your firm drafted — to produce electronic documents "in electronic form." To the extent there is an additional "burden" associated with re-producing electronic documents in electronic form, that "burden" is solely the result of CPH's failure to comply with the parties' agreement in the first instance. CPH cannot use its failure to comply with the parties' agreement (by producing documents in hard-copy form only) to manufacture an argument that it is now too burdensome to comply.

In short, the requirement that electronic documents be produced "in electronic form" is well-established by the prior course of discovery in this case, and separately is covered by a countersigned written agreement between the parties. Morgan Stanley is entitled to full compliance with the parties' agreement on this issue, and to the same form of production that CPH has previously demanded from Morgan Stanley.

E-Mail Backups

With regard to the restoration and search of e-mail backup tapes, your proposal to use a third-party vendor does not address — in any meaningful way — many of Morgan Stanley's legitimate objections to the wholesale restoration of e-mail backup tapes. Whether the restoration of e-mail backup tapes is performed by Morgan Stanley IT staff or an outside vendor, the burden on Morgan Stanley from such a wholesale restoration, both in terms of dollars and manpower, would be enormous. Regardless of who performs the initial restoration, it would require hundreds (perhaps thousands) of attorney-hours to review millions of irrelevant and non-responsive e-mails, all for the theoretical possibility that an e-mail drafted years after the underlying financial transactions would be discovered and responsive to CPH's requests. Your proposal to hire a third-party vendor does not address

that issue, and instead seeks to shift the financial costs for such a search to Morgan Stanley instead of CPH, the party insisting on such a fishing expedition.

As we have explained repeatedly in correspondence, depositions, and court filings, Morgan Stanley only has the ability to restore e-mail from backup tapes from January 2000 or later, which (even using the earliest point) is more than a year-and-a-half after the events that allegedly gave rise to CPH's claims and, in many cases, years after the Morgan Stanley employees who worked on Sunbeam-related engagements left the Company. Under these circumstances, there simply is no reason to believe that a wholesale restoration of e-mail backup tapes is reasonably likely to yield relevant and responsive e-mails — or that the theoretical possibility of finding relevant and responsive e-mails from several years after the fact would justify the enormous burden and cost of restoring, reviewing, and producing these backup tapes.

Any workable proposal regarding the restoration of e-mail backup tapes must (1) be narrowly tailored to include only those tapes that are most likely to contain potentially responsive documents; and (2) allocate the costs of the search in a manner that recognizes the enormous burden of the search compared to the theoretical possibility of finding potentially responsive documents. We offer the following proposal:

(1) Morgan Stanley will identify up to five (5) current or former MAFCO / CPH employees to be included in the e-mail backup search. MAFCO / CPH will search their backup tapes for electronic versions of e-mails from those five (5) individuals for the time period from December 1997 through June 1998. In addition, MAFCO / CPH will search for electronic versions of e-mails on the oldest e-mail backup tape that exists for each of those five (5) individuals (i.e. the backup tape that is closest in time to the December 1997 – June 1998 time period).

(2) CPH will identify up to five (5) current or former Morgan Stanley employees to be included in the e-mail backup search. Morgan Stanley will search its backup tapes for electronic versions of e-mail from those five (5) individuals for the time period from December 1997 through June 1998. In addition, Morgan Stanley will search for electronic versions of e-mails on the oldest monthly e-mail backup tape that exists for each of those five individuals (i.e. the January 2000 monthly backup tape).

(3) The parties will agree upon a reasonable set of search terms that will be used to narrow the universe of e-mails.

(4) Each party will review the resulting e-mails and produce responsive, non-privileged e-mails to the other side.

(5) Any materials withheld on privilege grounds would be listed on a supplemental privilege log to be served on the other side. Depending on the volume of privileged materials on either side, an extension of the typical 30-day time period may be warranted.

(6) If either party wishes to identify additional employees (beyond the original five) whose e-mail backup tapes will be restored, searched, and produced in accordance with steps (1) - (5), the requesting party will thereafter bear all resulting fees and costs, including (without limitation) all fees and costs associated with restoring the e-mail backup tapes, all fees and costs associated with conducting the keyword search, all fees and costs associated with the privilege and responsiveness review (including reasonable attorneys fees), and all fees and costs associated with producing a privilege log (including reasonable attorneys fees).

I am prepared to discuss these issues at your convenience.

Sincerely,

Thomas A. Clare

Thomas A. Clare

cc: Joseph Ianno, Esq.
John Scarola, Esq.
Jerold S. Solovy, Esq.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO. 2003CA 005045 AI

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COLEMAN (PARENT) HOLDINGS INC.'S RESPONSE TO MORGAN STANLEY'S MOTION FOR AN ADVERSE INFERENCE INSTRUCTION

In a transparent response to the sanctions that have been imposed on Morgan Stanley for its willful destruction of e-mails and systematic misconduct in response to Court Orders, Morgan Stanley is seeking an adverse inference instruction stemming from CPH's internal policy of deleting e-mails and electronic documents after 30 days and overwriting backup tapes after 60 days. Morgan Stanley's motion is baseless and has long since been waived.

First, Morgan Stanley has known about CPH's internal e-mail policy since January 2004, but Morgan Stanley expressed no interest in recovering CPH's e-mails from backup tapes until now. Indeed, Morgan Stanley refused repeated efforts by CPH to reach a global resolution of the e-mail restoration issue.

On October 29, 2003, CPH filed a motion to compel concerning Morgan Stanley's e-mails. *See* 10/24/03 Mot. to Compel. Morgan Stanley opposed that motion, arguing that the relief CPH was requesting would be unduly burdensome and faulting CPH for failing to produce its own e-mails. *See* Ex. S, MS 11/5/03 Response. CPH's motion was resolved by an agreement, whereby the parties agreed to reciprocal corporate representative depositions on the

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e-mail issue. *See* Ex. A at 3. Pursuant to that agreement, Morgan Stanley deposed CPH's corporate representative on January 21, 2004, and CPH deposed Morgan Stanley's corporate representative on February 10, 2004. At the January 21, 2004 deposition of CPH's corporate representative, Morgan Stanley inquired about CPH's e-mail policy. In fact, it is that testimony Morgan Stanley cites in its Motion for an Adverse Inference Instruction. *See* MS Mot. at 3 and Ex. 7 thereto. The whole point of the corporate representative depositions was to permit both sides to assess further the issue of obtaining e-mails and other electronic documents.

CPH thereafter attempted to secure Morgan Stanley's agreement to reach a protocol for the mutual restoration of e-mails — but Morgan Stanley repeatedly rejected CPH's efforts at compromise. *See, e.g.*, Ex. B (3/9/04 Letter from M. Brody to T. Clare); Ex. C (3/11/04 Letter from T. Clare to M. Brody); Ex. D (3/15/04 Letter from M. Brody to Clare); Ex. E (3/16/04 Letter from T. Clare to M. Brody); Ex. F (3/17/04 Letter from M. Brody to T. Clare).

Because CPH's efforts to reach agreement on the e-mail issue were going nowhere, on March 12, 2004, CPH filed a motion for permission to have a third party retrieve e-mails. *See* Ex. G. In that motion, CPH proposed that a third-party vendor be given access to both parties' e-mails, restore Morgan Stanley's e-mails at Morgan Stanley's expense, and restore CPH's e-mails at CPH's expense. *See id.* And at the hearing on CPH's motion, CPH's counsel attempted to address any concerns about the cost disparity between restoring CPH's e-mails and Morgan Stanley's e-mails by offering to split the cost down the middle. *See* Ex. H at 19-20. Morgan Stanley opposed all of CPH's proposals, and because the Court did not think it appropriate to impose such an arrangement on the parties without their consent, the Court denied CPH's motion. *See id.* at 18-26. As CPH has shown during the evidentiary hearings this week, Morgan Stanley opposed CPH's efforts to involve a third party because Morgan Stanley knew that a third

party would uncover at least some of Morgan Stanley's misrepresentations concerning its e-mails.

CPH thereafter continued its efforts to obtain e-mails, subpoenaing Bloomberg, Inc., Morgan Stanley's e-mail vendor, for relevant e-mails. *See* Ex. L. Bloomberg responded that it could not turn over Morgan Stanley e-mails without Morgan Stanley's permission. *See* Ex. M, (3/11/04 Letter from T. Golden to J. Scarola). When permission was sought, Morgan Stanley placed inappropriate limitations and date restrictions on the production. *See* Ex. N (3/17/04 Letter from M. Brody to T. Clare); Ex. O (4/1/04 Letter from T. Clare to T. Golden); Ex. P. (4/2/04 Letter from M. Brody to T. Clare); Ex. Q (4/7/04 Letter from T. Clare to M. Brody).

As a result of Morgan Stanley's continued stonewalling, on April 9, 2004, CPH filed additional e-mail-related motions to compel. *See* Exs. I, J. In response to those motions, this Court entered the April 16, 2004 Agreed Order concerning e-mail retrieval. *See* Ex. K. As CPH also has shown during the evidentiary hearings this week, Morgan Stanley's representations about the possibility of and difficulty involved with retrieving e-mails — representations on which this Court and CPH relied in attempting to resolve the e-mail controversy — were false.

In short, Morgan Stanley has known about CPH's e-mail policy since at least January 2004, when Morgan Stanley took the deposition of CPH's corporate representative on the topic, but Morgan Stanley did not file a motion seeking the restoration of CPH's e-mails, and as indicated above, Morgan Stanley opposed CPH's e-mail restoration proposal. Moreover, tellingly, the April 16, 2004 Agreed Order concerning e-mails addresses only the restoration of Morgan Stanley's e-mails. Morgan Stanley has shown no interest in CPH's e-mails — until Morgan Stanley was sanctioned for its misconduct regarding its own e-mails.

Second, in Morgan Stanley's Supplemental Memorandum in Support of Motion for an Adverse Inference Instruction, Morgan Stanley makes much of the fact that CPH's privilege log contains entries from April 14, 1998 through August 14, 1998, where CPH has stated that the documents were prepared "in anticipation of litigation." *See* MS Suppl. Mem. at 1-2. CPH first served the privilege log containing those entries on October 6, 2003. *See* Ex. R. CPH's privilege log contained entries asserting work product, and the log specifically included each of the twelve documents Morgan Stanley identifies on Page 2 of its Supplemental Memorandum. Thus, Morgan has known about the work product assertions on CPH's privilege log since October 6, 2003.

Indeed, not only has Morgan Stanley known about the privilege log assertions since October 2003, Morgan Stanley also made almost the same argument based on them in Morgan Stanley's November 4, 2003 opposition to CPH's first motion to compel relating to e-mails. *See* Ex. S. In its November 4, 2003 opposition, Morgan Stanley cited documents listed on the October 6 privilege log, arguing that "CPH was working with its outside counsel to evaluate its options for filing lawsuits against various parties, presumably including MS & Co., as early as July 1998" but did not retain any emails. *See id.* at 14. Nonetheless, as described above, Morgan expressed no interest in obtaining CPH's e-mails and rebuffed CPH's attempts to reach a mutual agreement on the restoration of e-mails.

Third, CPH is a private entity with no statutory obligation to preserve e-mails. In contrast, as the Court is aware, Morgan Stanley is subject to ongoing e-mail retention obligations under federal law. Thus, in attempting to equate CPH's circumstances with its own, Morgan Stanley equates apples with oranges.

Fourth, none of the adverse inference instruction cases cited by Morgan Stanley (at 8) remotely supports a sanction against CPH. *See Amalan, Inc. v. Detroit Diesel Corp.*, 651 So. 2d 701, 703 (Fla. 4th DCA 1995) (sanctions are appropriate when "a party has engaged in a pattern designed to thwart discovery evincing a 'continuous pattern of willful, contemptuous and contumacious disregard of lawful court orders concerning its obligation to comply with reasonable discovery requests.'"); *Martino v. Wal-Mart Stores, Inc.*, 835 So. 2d 1251, 1257 (Fla. 4th DCA 2003) (plaintiff was entitled to an adverse inference as a result of Wal-Mart's disposal of a defective shopping cart that injured the plaintiff, notwithstanding the fact that there was evidence that the plaintiff had identified the defective cart for an assistant manager after the accident and requested the assistant manager to preserve the shopping cart and a surveillance videotape that also was destroyed); *Nationwide Lift Trucks, Inc. v. Smith*, 832 So. 2d 824, 826 (Fla. 4th DCA 2002) (striking of the defenses in a case involving a forklift accident where the forklift mechanism that caused the accident was not preserved notwithstanding requests by plaintiffs two months after the accident).

Conclusion

Morgan Stanley's motion is nothing more than an attempt to distract attention from its own misconduct and to blunt the effects of this Court's March 1 sanctions Order. The motion should be denied.

Dated: March 16, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 16th day of March, 2005.

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COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

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

CASE NO: 2003 CA 005045 AI

PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S MARCH 23, 2005 ORDER ON MORGAN STANLEY'S MOTION FOR AN ADVERSE INFERENCE INSTRUCTION AND TO BAR THE EXPERT TESTIMONY OF JOHN F. ASHLEY

In light of the Court's March 31, 2005 ruling to redraw the bifurcation line and bar evidence of Morgan Stanley's litigation misconduct from Phase I of the trial (*see* Ex. A, 3/31/05 Tr. at 6274), Plaintiff Coleman (Parent) Holdings Inc. ("CPH") hereby moves this Court to reconsider its March 23, 2005 Order on Morgan Stanley's Motion for an Adverse Inference Instruction. It would be unfair to allow Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") to put on evidence during Phase I about CPH's alleged destruction of e-mails when CPH is prevented from telling the jury that Morgan Stanley "deliberately and contumaciously violated numerous discovery orders" involving e-mail and related issues (Ex. B, 3/23/05 Order, at 16). Accordingly, CPH asks this Court to bar Morgan Stanley from introducing any evidence related to CPH's e-mail retention policies or alleged destruction of e-mail. CPH also asks this Court to bar the expert testimony of John F. Ashley, the recent disclosure of which was inadequate and untimely.

I. Allowing Morgan Stanley To Present Evidence of CPH's Alleged Discovery Misconduct Would Be Unjust.

In its March 23, 2005 Order on Morgan Stanley's Motion for an Adverse Inference Instruction, the Court directed the parties to make certain disclosures "[i]f either party intends to present evidence on the issue of CPH's e-mail retention practices or third-party vendor offer." Ex. C, 3/23/05 Order. Pursuant to that Order, Morgan Stanley disclosed its intent to call Steven L. Fasman, a senior vice president at MacAndrews & Forbes Holdings Inc. ("MAFCO") to testify about "the practices regarding preservation, deletion, purging, and destruction of email at MAFCO; . . . the failure to preserve, recover, restore, or save MAFCO email . . .; the destruction, erasing, or overwriting of MAFCO email . . .; and Plaintiff's production or failure to produce email in response to discovery requests." Ex. D, MS Not. of Compliance with Ct. Order, at 1-2. Morgan Stanley also disclosed that it intends to call John F. Ashley, an expert in computer forensics, to testify to "the email software and backup systems in use at MAFCO since 1997; the ability to recover email from overwritten backup tapes; the email backup and destruction policies at MAFCO; and the impact of those policies on the ability/inability to recover MAFCO email from 1997 and 1998 from the existing MAFCO backup tapes." *Id.*

Because the Court's March 31, 2005 Order moves all evidence of litigation misconduct into Phase II of the trial and leaves only the issues of reliance and compensatory damages in Phase I, it appears that Morgan Stanley intends to turn Phase I into a "blame the victim" sideshow. By shining the spotlight on CPH's e-mail policies and practices, Morgan Stanley hopes to distract the jury from Morgan Stanley's own misconduct and to imply that it was CPH, and not Morgan Stanley, that was the culprit here.

As Morgan Stanley has recently argued: "Under Florida law, evidence of discovery misconduct generally may not be presented to the jury." Ex. E, MS 3/31/05 Mot. to Clarify, at 5. While evidence of Morgan Stanley's discovery misconduct is relevant to CPH's claim for punitive damages and thus will come in during Phase II of the trial, there is no basis for introducing evidence of CPH's e-mail policy during either phase of the trial. The only evidence relevant in Phase I, according to Morgan Stanley itself, is "evidence directly bearing on reliance or damages." *Id.* at 4. Any other evidence presenting "purely collateral issues which would serve only to confuse and mislead the jury is too remote and should be excluded" from Phase I. *Donahue v. Albertson's, Inc.*, 472 So. 2d 482, 483 (Fla. 4th DCA 1985). Evidence about CPH's alleged destruction of e-mail would be doubly confusing and misleading for the jury because CPH presently is precluded from rebutting Morgan Stanley's charges by showing that it was Morgan Stanley, and not CPH, that violated numerous Court orders, disregarded its discovery obligations, and concealed e-mail evidence.

As the Court is aware, Morgan Stanley raised the issue of CPH's e-mail policy for the first time only after the Court's March 1, 2005 Order imposed sanctions on Morgan Stanley for its own destruction and non-production of e-mails. In a transparent response to the Court's sanctions, Morgan Stanley went on the attack against CPH's e-mail policies, despite having known about those very same policies since at least November 5, 2003, when Morgan Stanley raised CPH's e-mail policy in response to a motion to compel, and despite having refused CPH's offer to have a third-party vendor restore its e-mails. On March 21, 2005, when Morgan Stanley attempted to equate CPH's e-mail practices with Morgan Stanley's deliberate, willful, and calculated discovery misconduct, the Court found that argument "offen[sive]." *See* Ex. F, 3/21/05 Tr. at 4540 ("[I]n all honesty, I'm offended that you would attempt to equate the

two."). It would be even more offensive now to allow Morgan Stanley to imply that CPH, and not Morgan Stanley, was the wrongdoer in destroying or hiding e-mails.

II. The Testimony of Expert John F. Ashley Should Be Barred.

Even if the Court determines that Morgan Stanley should be allowed to present evidence of CPH's e-mail policies, Morgan Stanley should be prohibited from presenting expert testimony on these issues. Mr. Ashley's testimony does not comply with the detailed stipulation reached by the parties regarding disclosure of expert testimony or with the schedule for expert discovery set forth in this Court's Orders; it is not contemplated by the Court's March 23, 2005 Order; and it is beyond the scope of his expertise.

First, the disclosure of an expert witness just days before trial is untimely and violates the parties' agreed Stipulation, filed with this Court, as well as this Court's Orders regarding the schedule for expert disclosures. In their September 16, 2004 Stipulation, the parties agreed that "their respective expert witnesses will prepare and produce expert reports." Ex. G, 9/16/04 Stipulation. Mr. Ashley has prepared no such report. And on October 14, 2004, the Court entered an Order establishing deadlines for initial, responsive, and rebuttal expert reports, as well as expert depositions. Under the Order, "[e]xpert witnesses will not be permitted to testify as to opinions, or the bases therefore, unless the opinions or bases were disclosed with particularity in accordance with this Order." *See* Ex. H, 10/14/04 Order (deadlines extended by Ex. I, 11/23/04 Agreed Order). Mr. Ashley's opinions have not been disclosed in accordance with the Court's Orders and the deadlines for expert discovery have long since passed. Morgan Stanley has known about CPH's e-mail retention policy since at least November 2003. Its attempt to present an expert on that topic now comes much too late.

Quoting from an argument Morgan Stanley made when one of CPH's experts was unable (due to significant health problems) to complete his deposition during the agreed-upon timeframe for expert discovery: "[G]iven the highly compressed pretrial schedule, and the limited time remaining before trial to complete expert disclosures, expert depositions, and expert designations," the expert testimony should be excluded to alleviate "prejudice and procedural unfairness." Ex. J, MS Mot. in Limine No. 13, at 5. Because Morgan Stanley has disclosed its expert in the middle of jury selection and only days before opening statements are scheduled, because Morgan Stanley has not followed the agreed-upon protocol in the parties' stipulation and agreed order regarding expert disclosures, and, finally, because CPH has not had the opportunity to depose the witness, Mr. Ashley's testimony should be barred.

Second, the subjects on which Mr. Ashley intends to testify are beyond the scope of the Court's March 23, 2005 Order. The Court's Order contemplates testimony on only two subjects: (1) CPH's e-mail retention policies; and (2) CPH's offer to have a third-party vendor retrieve e-mails from its system. When the Court heard argument on this motion, the Court clarified that Morgan Stanley's position was that it wanted to "present evidence about [CPH's] e-mail retention policy and the failure to deviate from it in this case, and then argue to the jury that they should draw an adverse inference from that evidence." Ex. F, 3/21/05 Tr. at 4538. Morgan Stanley cannot now go beyond the scope of what the Court ordered and demand the right to put on evidence through an expert about additional topics such as "the ability/inability to recover MAFCO e-mail from 1997 and 1998 from the existing MAFCO backup tapes." Ex. D. This testimony would be particularly inappropriate since Morgan Stanley rejected CPH's offer to retrieve e-mails out-of-hand without even considering issues such as CPH's ability or inability to retrieve e-mails. *See* Ex. K, 3/11/04 Ltr. from T. Clare to M. Brody.

As is more fully set out in CPH's Response to Morgan Stanley's Motion for an Adverse Inference Instruction, Morgan Stanley has long since waived its right to argue about these topics because Morgan Stanley opposed CPH's e-mail restoration proposal and failed to file a motion seeking the restoration of CPH's e-mails. *See* Ex. L, CPH Resp. to MS Mot., at 1-3. Morgan Stanley should not be allowed to circumvent its earlier discovery waivers by transforming the Court's Order into a license to put on previously undisclosed and inadequately detailed expert opinion testimony.

Third, Mr. Ashley is not qualified to opine on the subject of either CPH's e-mail retention policies or CPH's offer to have a third-party vendor retrieve e-mails from its system. Mr. Ashley has no background or experience related to either CPH or its policies, and Mr. Ashley was not the vendor that CPH offered to retrieve e-mails from CPH's system. Although Mr. Ashley may or may not be generally qualified as an expert in computer forensics, he certainly is not qualified as to the CPH-specific topics the Court has designated as proper subjects for testimony. *See Goodyear Tire & Rubber Co., Inc. v. Ross*, 660 So. 2d 1109, 1111 (Fla. 4th DCA 1995) ("[I]t is not enough that the witness be qualified to propound opinions on a general subject; rather [the witness] must be qualified as an expert on the discrete subject on which [the witness] is asked to opine."). Mr. Ashley is not a proper expert witness as to CPH's policies, procedures, or offers.

III. In The Alternative, If Morgan Stanley Is Permitted To Raise CPH's E-Mail Policy During Phase I, Then In Fairness CPH Must Be Allowed To Raise Morgan Stanley's Litigation Misconduct And This Court's Associated Findings.

Alternatively, if Morgan Stanley is permitted to introduce evidence of CPH's retention e-mail policy, then in fairness the jury should be allowed to hear about the circumstances leading to the April 16, 2004 Agreed Order, this Court should read its statement to the jury

regarding Morgan Stanley's litigation abuses, and CPH should be permitted to put on evidence regarding those abuses. In particular, the jury should learn in Phase I that:

- Morgan Stanley misrepresented to CPH and the Court that it would cost at least hundreds of thousands of dollars and require several months to search its e-mail from the relevant time period of the transaction all the while knowing that it could quickly and inexpensively search its e-mail archive;

- Morgan Stanley misrepresented to CPH and the Court that no e-mail data existed for any time period before January 2000 when it knew that some backup tapes contained e-mail dating back at least to 1997;

- A Morgan Stanley representative lied under oath about the capabilities of Morgan Stanley's e-mail archive, representing that it could not be used to search old e-mails;

- Morgan Stanley knowingly signed a false certificate of compliance representing that it had fully complied with the Court's Agreed Order to produce e-mails;

- Morgan Stanley continued to find thousands of additional tapes containing possibly relevant e-mail evidence and failed to timely notify CPH or the Court when the tapes were found and failed to timely search the tapes;

- Morgan Stanley ran flawed searches of its e-mail and failed to timely notify CPH or the Court of the problems with the searches and other technical issues;

- Morgan Stanley continued to erase back-up tapes after January 2001 in violation of an obligation to preserve e-mail on those tapes;

- Morgan Stanley failed to provide computer information about the extent of the work it performed in generating Sunbeam-related documents and then falsely represented that it had no such useful information;

- Morgan Stanley provided answers to interrogatories signed by a corporate representative who performed insufficient verification of the responses;

- Morgan Stanley routinely asserted unfounded privilege claims;

- Morgan Stanley failed to provide CPH with materials showing that an employee who played a major role in the Sunbeam transaction had been criminally indicted in Italy, despite the fact that such materials were clearly called for under the Court's Order.

If Morgan Stanley is allowed to present evidence of CPH's e-mail policy, and to attempt to cast CPH as having engaged in inappropriate activity, then CPH in fairness should be allowed to present evidence of the history of the April 16, 2004 Agreed Order and the myriad instances of litigation misconduct by Morgan Stanley.

Conclusion

For the foregoing reasons, CPH respectfully requests that this Court reconsider its March 23, 2005 Order on Morgan Stanley's Motion for an Adverse Inference Instruction and issue an Order precluding Morgan Stanley from offering any evidence regarding CPH's e-mail policies or alleged destruction of e-mail. CPH further requests that the testimony of John F. Ashley be barred.

Dated: April 3, 2005

Respectfully submitted,

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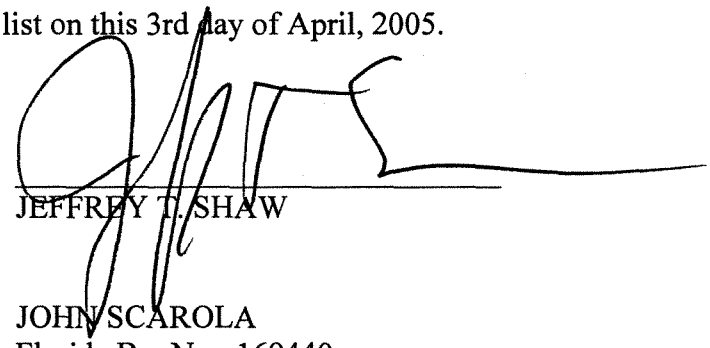
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 3rd day of April, 2005.



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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: April 5, 2005

TIME: 9:30 a.m.

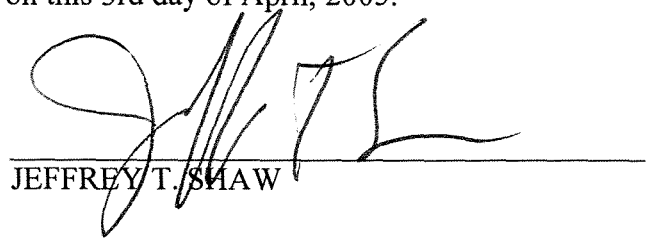
JUDGE: Honorable Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

Coleman (Parent) Holdings Inc.'s Motion *In Limine* No. 30 To Bar References To Collateral Business And Personal Matters Involving MAFCO-Related Entities And Their Principals And Employees

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 3rd day of April, 2005.



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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

NOTICE OF HEARING

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DATE: April 5, 2005

TIME: 9:30 a.m.

JUDGE: Honorable Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

Plaintiff's Motion *In Limine* No. 31 To Bar Evidence Rendered Irrelevant By The Court's Order On CPH's Renewed Motion For Entry Of Default Judgment

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: April 5, 2005

TIME: 9:30 a.m.

JUDGE: Honorable Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

Plaintiff's Motion For Reconsideration Of The Court's March 23, 2005 Order On Morgan Stanley's Motion For An Adverse Inference Instruction And To Bar The Expert Testimony Of John F. Ashley

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

CASE NO: CA 03-5045 AI

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: April 5, 2005

TIME: 9:30 am

JUDGE: Honorable Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD

Morgan Stanley's Motion in Limine No. 27 To Exclude the Testimony of Professor Douglas R. Emery or, in the Alternative, To Preclude Professor Emery From Making Any Comment on or Reference to Exhibit A

CERTIFICATE OF SERVICE

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

CASE NO: CA 03-5045 AI

MORGAN STANLEY'S MOTION IN LIMINE NO. 27 TO EXCLUDE THE TESTIMONY OF PROFESSOR DOUGLAS R. EMERY OR, IN THE ALTERNATIVE, TO PRECLUDE PROFESSOR EMERY FROM MAKING ANY COMMENT ON OR REFERENCE TO EXHIBIT A

Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully requests that the Court enter an order precluding Professor Douglas R. Emery ("Professor Emery") from testifying at trial. CPH claims, for the first time, that it wants to use Professor Emery as a "human glossary" to offer some vague testimony explaining certain "financial terms" to the jury. 3/29/05 Tr. at 5688:5-6; *see also* 3/31/05 Tr. at 6445:14-15. But CPH failed to designate Professor Emery on those topics as required by Rule 1.280(b)(4)(A)(i) and the Court's Scheduling Order. *See* Fla. R. Civ. P. 1.280(b)(4)(A)(i); Case Management Order (Feb. 24, 2004). Moreover, in light of the Court's March 31, 2005 Order granting Morgan Stanley's Motion to Clarify the Proper Scope of the Liability and Punitive Damages Phases of trial ("Clarification Order"), there is not a single disputed issue of fact to which Professor Emery could offer relevant testimony. His expert report –which simply summarizes newspaper articles, analysts reports, and SEC filings concerning Sunbeam, and which makes only passing reference to Morgan Stanley – has no relevance to either Coleman (Parent) Holdings Inc.'s ("CPH") reliance or the extent of any damages CPH claims to have suffered, the only factual issues that

remain to be tried in Phase I. To the extent that the jurors need help understanding any financial concepts related to the matters that remain ing dispute, CPH can elicit such testimony from several equally sophisticated fact witnesses from MacAndrews & Forbes Holdings, Inc. CPH's real motive – to reiterate Exhibit A and to give it the imprimatur of "expert" testimony – is manifestly improper. Because the prejudicial and cumulative nature of Professor Emery's proposed testimony far outweigh whatever limited probative value CPH may claim, the Florida Evidence Code requires its exclusion.

Should the Court nevertheless permit Professor Emery to "educate the jury" as to the meaning of financial terms, his testimony must be narrowly cabined. At a minimum, the Court should preclude Professor Emery from making any reference to or comment upon Exhibit A. Allowing Professor Emery to testify about the findings in Exhibit A, the allegations in which have been deemed admitted by the Court's March 23 Order on CPH's Renewed Motion for Entry of Default Judgment ("Sanctions Order"), could serve only to inflame the jury on matters that are no longer at issue in Phase I of the trial. Any attempt by counsel for CPH to put Exhibit A on display for Professor Emery would be even more prejudicial, and would contravene the Court's clear ruling that Exhibit A will only be read to the jury.

STATEMENT OF FACTS

1. On December 7, 2004, Professor Emery submitted a putative "expert report" that purports to "discuss the financial performance of Sunbeam Corporation ('Sunbeam') from a corporate finance perspective," Expert Report of Douglas R. Emery ¶ 1 (Dec. 7, 2004) ("Emery Report"), focusing in particular on "Sunbeam's "supposed 'turnaround' under the leadership of Albert Dunlap, and its subsequent collapse and later bankruptcy after fraud was discovered in 1998, *id.* ¶ 6. Although Professor Emery asserts that he drew "upon [his] years of experience

and corporate finance to assist [him] in reaching [the] conclusions" set forth in the report, the Emery Report makes few references to any principles or doctrines of corporate finance. *Id.* ¶ 8. Instead, the Emery Report primarily summarizes newspaper and magazine articles on and comments by industry analysts about Sunbeam, as well as Sunbeam press releases and filings with the Securities & Exchange Commission ("SEC"). Professor Emery mentions Morgan Stanley only in passing. *See id.* ¶¶ 7, 31, 67.

2. During his deposition, Professor Emery admitted that he had no knowledge about any of the various subjects for which CPH proposes to offer his testimony. As a lifelong academic, Professor Emery has never worked for an investment bank or any other business, and he is not a certified public accountant. *See* Deposition of Douglas R. Emery ("Emery Dep.") at 64:1-23, 227:20-22 (Jan. 14, 2005). He has never worked on a corporate transaction or financing, and he has never been consulted or provided advice on a potential merger or acquisition. *See id.* at 227:23 – 228:2; *see also id.* at 235:12-21. Professor Emery further admitted that he has no expertise concerning the customs or practices of investment banking or corporate acquisitions, and that his knowledge of accounting is both limited and based solely on a couple of courses that he took in graduate school more than thirty years ago. *See id.* at 64:14-18.

3. Likewise, Professor Emery testified that he has no familiarity with the specifics of this case. He knows nothing about either the functions performed by various Morgan Stanley investment bankers or the roles played by any of the CPH executives involved in Sunbeam's purchase of Coleman. As Professor Emery made clear, he "[is] not offering any opinion on" the issue of whether "Morgan Stanley . . . participated in Sunbeam's fraud." Emery Dep. at 107:22-25. Nor does Professor Emery offer any opinion as to CPH's reliance.

ARGUMENT

I. The Topics on Which Professor Emery Has Rendered an Opinion Are Irrelevant

4. Professor Emery's expert report concerns the financial performance of Sunbeam Corporation ('Sunbeam') from a corporate finance perspective." Emery Report ¶ 1. As this Court has made clear, however, only two factual issues remain to be litigated in Phase I of the trial – CPH's reliance and the extent of damages, if any, that CPH has suffered. Professor Emery's Expert Report does not remotely bear upon either issue. Accordingly, his testimony is not relevant to any disputed issue of fact and is therefore inadmissible. *See* Fla. Evid. Code § 90.402 ("All relevant evidence is admissible, except as provided by law."); *Stano v. State*, 473 So. 2d 1282, 1286 (Fla. 1985) ("Conversely, irrelevant evidence is inadmissible.").

II. Professor Emery Cannot Testify About Matters Outside the Scope of His Expert Report

5. Recognizing that the topics on which Professor Emery was designated as an expert are no longer relevant, CPH now seeks to call him as a witness in order to "place the default findings . . . in the context of an understanding of the business world in which those facts occurred, including definitions, descriptions and explanations of the roles and functions of the entities involved, general business concepts, and relevant terms." CPH's Trial Witness Disclosure at 2 (filed Mar. 26, 2005). But none of these subjects was in any way addressed in Professor Emery's Expert Report or in his deposition.

6. Because CPH failed to identify any of these matters as the potential subject of Professor Emery's expert testimony, CPH has waived the right to elicit any such testimony. Under Florida Rule of Civil Procedure 1.280(b)(4)(A)(i), "a party may require any other party to identify each person whom the other party expects to call as an expert witness at trial and to state the subject matter on which the expert is expected to testify, and to state the substance of the

facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." Rule 1.390, in turn, allows a party to depose a prospective expert witness at any time before trial. *See* Fla. R. Civ. P. 1.390(b). These discovery procedures and the Court's February 24, 2004 Case Management Order, which collectively serve both to avoid trial ambush and to provide an opportunity to challenge the qualifications of a putative expert, would be rendered meaningless if a party could use a designated expert to testify about matters wholly unrelated to the expert disclosure. Consistent with the Florida Rules, Professor Emery could only testify about the matters covered by his expert report and his deposition.

III. "Human Highlighter" Testimony Is Not the Proper Subject of Expert Testimony

7. Even if CPH had given adequate notice that he would testify about the subjects plaintiff recently identified, Professor Emery still would not be in a position to offer legitimate expert testimony as his role as a "human highlighter" involves neither "scientific, technical or other specialized knowledge." Fla. Evid. Code § 90.702.

8. Professor Emery has already admitted that he does not know anything about "the roles and functions of the entities involved." Not only was he unable to identify a single Morgan Stanley official that participated in any aspect of Sunbeam's acquisition of Coleman, but he testified that he was not familiar with the nuances of investment banking or M&A activity. Accordingly, whatever expertise he may have in corporate finance, he admittedly lacks the "knowledge, skill, experience, training, or education" to give expert testimony relating to the Coleman transaction. Fla. Evid. Code § 90.702.

IV. The Probative Value of Any Testimony Professor Emery Could Give Is Far Outweighed by Its Undue Prejudice

9. CPH's motivation in seeking to place Professor Emery on the witness stand to serve as a human highlighter is transparent – CPH wants Professor Emery to reiterate the

statements that the Court will read to the jury in the form of Exhibit A. But that testimony has *no* probative value whatsoever. Evidence is only relevant to the extent that it "tend[s] to prove or disprove a material fact." *Id.* § 90.401. Because the Court has deemed all of the statements in Exhibit A admitted by Morgan Stanley, Professor Emery's contemplated testimony about those statements cannot possibly tend to make them any more or less true. Except for the issues of reliance and damages, which Professor Emery does not touch upon, the Court's Sanctions Order has the effect of taking every other element of plaintiff's conspiracy and aiding and abetting claims away from the jury. Accordingly, any testimony about the specific statements in Exhibit A could only be cumulative.

10. Indeed, the only purpose that Professor Emery's testimony could serve would be to inflame the jury against Morgan Stanley. That is impermissible. *See id.* § 90.403 ("Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence."). Allowing Professor Emery to "explain" the statements contained in Exhibit A under the guise of defining "financial terms" would shift the focus from the remaining factual issues of reliance and damages to the conduct of Morgan Stanley already found by the Court and, by further biasing the jury against Morgan Stanley, would have an "undue tendency to suggest decision on an improper basis." *Brown v. State*, 719 So. 2d 882, 885 (Fla. 1998). That is precisely the type of undue prejudice contemplated by section 90.403. Ultimately, the Court's Order should speak for itself. To the extent that CPH believes that the Order needs to be explained to the jury, the answer lies in amending Exhibit A rather than using some feigned confusion as a justification to stoke juror bias.

11. At a minimum, CPH must be prohibited from blowing up or otherwise projecting Exhibit during the testimony of Professor Emery as an end-run around this Court's decision that Exhibit A would not be shown or given to the jury. In its Sanctions Order, the Court held that it would read Exhibit A and a statement concerning Morgan Stanley's "litigation misconduct" to the jury. As the Court recently made clear, however, the Sanctions Order does not contemplate that the jury will see or receive a copy of either order. *See* 3/28/05 Tr. at 5545:6 – 5547:15. If CPH were permitted to blow up a copy of Exhibit A for Professor Emery to "explain" to the jury, it would necessarily circumvent the limit imposed by the Court's Sanctions Order. By calling further attention to Exhibit A, CPH would simply stoke jury anger towards Morgan Stanley and invite a decision based on passion and anger instead of the facts.

CONCLUSION

WHEREFORE Morgan Stanley respectfully requests that this Court enter an Order precluding Professor Emery from testifying at any point in the trial. In the alternative, Morgan Stanley requests that the Court prohibit Professor Emery from testifying about Exhibit A and preclude plaintiff from using Professor Emery to try to show a copy of Exhibit A to the jury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 3rd day of April 2005.

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COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

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

CASE NO: 2003 CA 005045 AI

CPH'S MOTION TO AMEND THE COURT'S MARCH 23, 2005 ORDER ON CPH'S RENEWED MOTION FOR ENTRY OF DEFAULT JUDGMENT

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") hereby requests the Court to amend its March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment (the "March 23 Order"), as well as Exhibit A to the March 23 Order, to reflect prior assertions about facts that are not disputed in this case that were made by Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") in the context of seeking summary judgment. Those assertions relate to CPH's reliance on false statements by Morgan Stanley and its coconspirator Sunbeam Corporation. Morgan Stanley flatly asserted that it is undisputed CPH would not have gone forward with the transaction if the March 19 press release had accurately reflected the information in the Andersen comfort letters. As a result, under settled principles of Florida law, Morgan Stanley is now estopped from taking the inconsistent factual position that CPH did not rely on this and other misrepresentations made by Morgan Stanley and Sunbeam.

The Court's March 23 Order conclusively established all but two elements of CPH's claims against Morgan Stanley: reliance and damages. But because Morgan Stanley has previously asserted that undisputed facts of record established that CPH relied on Morgan Stanley's and Sunbeam's false statements, the Court should amend the March 23 Order to

establish conclusively that Morgan Stanley is liable to CPH on both counts of CPH's First Amended Complaint. Accordingly, the Court should limit the first phase of the trial to determining the proper amount of compensatory damages.

Background

At the January 21, 2005 hearing on Morgan Stanley's motion for summary judgment, Morgan Stanley repeatedly argued that the evidence was "undisputed" that CPH would not have closed the Sunbeam-Coleman transaction had it known of the content of the comfort letters. *See, e.g.*, Ex. A, 1/21/2005 Hr'g Tr. at 9 ("[T]he evidence is going to be undisputed that Mr. Perelman would not have proceeded with the Coleman transaction had he known of the information in the comfort letters."); *id.* at 63 ("[T]he information in the comfort letters, whether it was off by a million dollars or $2 million or $5 million, he said based on that information, even assuming it was false, I wouldn't have closed. . . . The fact is Mr. Perelman, confirmed by Mr. Gittis, said unequivocally, . . . we would not have closed this transaction had we seen the comfort letter."); *id.* at 77 ("[T]hey said very clearly we wouldn't have closed if we had seen [the information that was in the comfort letters]. That's the end of the story. . . . [I]t's undisputed that they wouldn't have closed. And they said they wouldn't have closed."); *id.* at 143 ("Mr. Perelman said unequivocally I would not have closed this transaction if I had known what was in the comfort letter.").

At the same hearing, counsel for Morgan Stanley repeatedly pointed to Findings 295 and 296 in the proposed findings of fact that Morgan Stanley's attorneys — including Mr. Ianno of Carlton Fields, P.A., and Mr. Hansen, Mr. Webster, and Ms. Beynon of Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C. — had filed on December 10, 2004, in support of

Morgan Stanley's summary-judgment motion. *See id.* at 12, 63, 77, 143. Those findings provide, in full:

> 295. "Q. What I understand you just to have said is if you had known what was in the comfort letters today you would not have done the transaction? A [by Mr. Perelman]. Absolutely not."
>
> a. Perelman Dep. at 291:10-14.
>
> b. *See* Gittis Dep. at 163:10-17 ("Q: Now, earlier you told me that had you known the information that was in the Arthur Andersen comfort letter that was issued to Morgan Stanley in connection with the issuance of the debentures, that had you known that information, you would not have proceeded with the transaction, correct? A. That is correct.").
>
> 296. "Q. ... If you had seen the comfort letter before March 30, 1998 it is your statement that you would have known what was happening at Sunbeam, is that right? A [by Mr. Perelman]. It is my statement that I would not have closed [the transaction]."
>
> a. Perelman Dep. at 517:21-518:1.

Ex. B, 12/10/2004 MS Proposed Findings, at 80-81.

Based on Morgan Stanley's proposed findings and argument, the Court reached the following conclusions in its February 1, 2005 Order on Morgan Stanley & Co., Incorporated's Motion for Summary Judgment:

> MS & Co. had distilled the material facts it believes are not disputed to three:
>
> 1. Ronald Perelman controls CPH and is a sophisticated investor who was aided by sophisticated advisors.
>
> 2. Perelman would not have proceeded with the transaction had he known of the content of the comfort letters; the comfort letters, in turn, merely restated information contained in the interim financial statements.
>
> 3. CPH and its advisors closed the transaction without looking at

> Sunbeam's interim financial statements, which they had a contractual right to inspect.

Ex. C, at 1-2 (emphasis added; footnote omitted); *see also id.* at 2 (citing Morgan Stanley's argument that, had CPH reviewed the financial information stated in the comfort letters, CPH "would not have closed the transaction").

Argument

Morgan Stanley is bound by its prior admission that the evidence was undisputed that CPH would not have closed the Sunbeam-Coleman transaction had CPH known of the content of the comfort letters and cannot take an inconsistent position at trial. "The general rule has long been established in Florida and other jurisdictions that litigants are not permitted to take inconsistent positions in judicial proceedings and that a party cannot allege one state of facts for one purpose and at the same action or proceeding deny such allegations and set up a new and different state of facts inconsistent thereto for another purpose." *Federated Mut. Implement & Hardware Ins. Co. v. Griffin*, 237 So. 2d 38, 41 (Fla. 1st DCA 1970); *Reserve Ins. Co. v. Pollock*, 270 So. 2d 469, 469 (Fla. 3d DCA 1972) (party that admitted liability under insurance policy was estopped from taking inconsistent position in later proceedings); *Keller v. Penovich*, 262 So. 2d 243, 244 (Fla. 4th DCA 1972) (party was estopped from amending factual averments in pleadings to allege a theory "inconsistent with the numerous sworn statements of both parties and their proponents"). That settled principle applies with full force when a party admits a factual position for purposes of a summary judgment motion and then attempts to contest that factual position at a later stage of the proceedings. *See, e.g. Wilson v. Milligan*, 147 So. 2d 618, 622 (Fla. 2d DCA 1962) (estoppel arises when a party "asserted that there was no genuine issue of fact on a specific question and then on appeal taken the contrary position that there was a material issue of fact on the same question"); *see*

also Harper v. Toler, 884 So. 2d 1124, 1136 (Fla. 2d DCA 2004) (same); *Elison v. Goodman*, 395 So. 2d 1201, 1202 (Fla. 3d DCA 1981) (striking summary judgment affidavit: "a party is not permitted to alter a previously asserted position simply to avert summary judgment"); *Geiser v. Permacrete*, 90 So. 2d 610, 613 (Fla. 1956) (rejecting party's contention that there were disputed issues of fact as to the validity of a mortgage where the party earlier asserted in connection with summary judgment proceedings that there was no genuine issue of fact on the issue of validity).

The fact that Morgan Stanley has taken the position that CPH would not have proceeded with the Sunbeam-Coleman transaction had it known about the comfort letters, and is foreclosed from taking an inconsistent position at trial, is dispositive of the issue of CPH's reliance. This Court has found, in Exhibit A to the March 23 Order, that the March 19, 1998 press release was false and misleading because it made statements that were grossly inconsistent with the comfort letters. *See* Ex. D, Exhibit A to the March 23 Order, at 18-21. Having undertaken to make representations in the press release, under Florida law, a duty existed to disclose the facts truthfully and fully — as Morgan Stanley's counsel acknowledged at an April 4, 2005 hearing before this Court. *See ZC Inc. Co. v. Brooks*, 847 So. 2d 547, 662 (Fla. 4th DCA 2003) ("Florida law recognizes that fraud can occur by omission, and places a duty on one who undertakes to disclose material information to disclose that information"); *Nicholson v. Kellin*, 481 So. 2d 931, 936 (Fla. 5th DCA 1986) (because the defendants "had disclosed some facts," they "were under a duty to do so in a non-negligent or non-fraudulent fashion"); *see also* Ex. E, 4/04/05 Tr. at 109 (Morgan Stanley's counsel conceding that "[i]f I say something I may have a duty to say more to make it accurate"). And as Morgan Stanley has asserted, if the press release had disclosed the financial information contained in the

comfort letters, CPH never would have closed the transaction. So no issue remains about whether CPH actually relied on Morgan Stanley's and Sunbeam's false statements, or about whether that reliance was justifiable under Florida law, because the very fact that CPH allowed the transaction to close demonstrates that the falsity of the statements (including the March 19 press release) was neither known to CPH nor obvious.

Conclusion

Morgan Stanley's prior factual position that CPH would not have closed the Sunbeam-Coleman transaction had it known that Morgan Stanley's and Sunbeam's statements were false (or had the statements' falsity been obvious to CPH) removes the issue of reliance from this case and mandates a finding of liability on both of CPH's claims against Morgan Stanley. Therefore, the Court should hold Morgan Stanley liable for aiding and abetting the Sunbeam fraud and for conspiring to commit the Sunbeam fraud, and should limit the first phase of the trial to the issue of the proper amount of compensatory damages. In the alternative, the Court should allow to read Morgan Stanley's prior admissions concerning the undisputed facts about CPH's reliance to the jury.

Dated: April 4, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

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One of Its Attorneys

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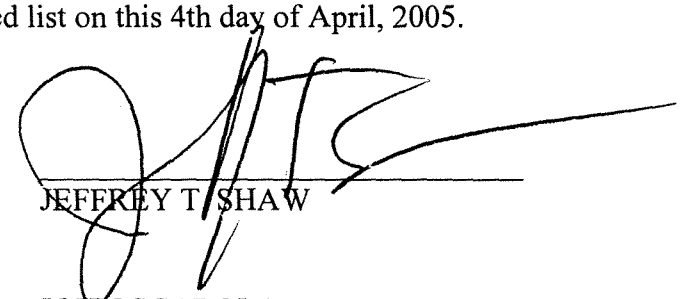
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 4th day of April, 2005.



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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CASE NO. 2003-CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & COMPANY, INC.

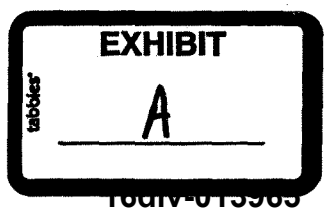
Defendant.
_____/

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Friday, January 21, 2005
8:04 a.m. - 12:04 p.m.
Reported by: Lisa D. Danforth



is now before the Court is the motion for summary judgment. As I said, I think both parties have agreed not to press the two motions to strike and the substantive issues with regard to whether facts are or are not disputed can be determined as you see fit based on the evidence.

There are three facts that I think for purposes of my argument are not only material, they're not generally disputed and they are going to be dispositive, and I've tried to narrow it down to the smallest number, because I think it's the focus of the case. The first is --

THE COURT: Mr. Scarola, you lost your name.

MR. SCAROLA: Thank you, Your Honor.

THE COURT: That's okay. It's going to bug me though.

Go ahead. Thanks.

MR. BEMIS: The first fact, Your Honor, is that the evidence is going to be undisputed that Mr. Perelman would not have proceeded with the Coleman transaction had he known of the information in the comfort letters. That's number one.

Number two, that Mr. Perelman is really the real party in interest here and that he is a

sophisticated investor himself, he was advised as well in the Coleman transaction by sophisticated investors, three different categories; investment bankers, respected lawyers, and nationally-known accountants.

The third point is that Mr. Perelman and his advisors entered into and closed the Coleman transaction without ever looking at Sunbeam's interim financial statements. Those interim financial statements, which we'll see here this morning in black and white, reported the exact same numbers and same information that was in the comfort letters supplemented by Sunbeam's 10-K which was filed on March 6th of 1998, almost three weeks before the closing of the transaction.

And as a subsidiary to that point, there's no dispute that Mr. Perelman and his advisors had negotiated and bargained for a right to inspect the interim financial statements as parts of the books and records of Sunbeam.

With those facts, Your Honor, there's one overriding principle that will tie together what I'm going to argue this morning and that is that Mr. Perelman cannot, as a sophisticated investor, claim reasonable reliance on representations of

Morgan Stanley when Mr. Perelman and his sophisticated advisors didn't look at Sunbeam's books and records, and in particular, the interim financial statements which contain the very information that he now claims would have caused him to terminate the transaction and never go forward in the first place.

In the Credit Suisse case which is cited in our brief, the district court in New York applied New York law, which Your Honor has said at least to the two principal claims we'll be addressing here, fraud and negligent misrepresentation, said -- and I'm going to quote it because I think it's a principle that's going to apply across my argument. Quote, the custom of unprotected trust surely exists in this financial community just as it exists in every day life. The standard for legal protection of reliance, however, is higher. Parties cannot demand judicial protection when they could have protected themselves with a reasonable inquiry into the misrepresented facts.

Now to the first core point. Is there any dispute in the facts that Mr. Perelman would have closed the transaction? And I direct Your Honor's attention to our findings. And I'm just going to

refer to the numbers for the record, and that's 295 and 296, which were not disputed, except on grounds of relevancy, what have you.

Mr. Perelman testified in response to my question.

"QUESTION: Would I understand you just to have said is if you had known what was in the comfort letters today, you would have not have done the transaction?

"ANSWER: Absolutely not."

Mr. Perelman was asked in a follow-up question, "If you had seen the comfort letter before March 30th, 1998, it is your statement that you would have known what was happening at Sunbeam; is that right?

"ANSWER: It is my statement I would not have closed the transaction."

Well, the figures were disclosed in black and white in the interim financial statements. They, to the dollar, that is in the interim financial statements, match the figures that appear in the comfort letter. And to the extent there is an argument over any additional material such as the explanation for the figures, primarily the early buy program, that information was in the comfort

He wouldn't have closed had he known that information.

That information --

THE COURT: Proximate cause isn't the closing. Proximate cause there is the failing to

give the information in the comfort letters.

MR. BEMIS: But the information in the comfort letters, whether it was off by a million dollars or $2 million or $5 million, he said based on that information, even assuming it was false, I wouldn't have closed. So we don't have to reach the issue of whether the number of sales was 72 million as of the end of February or whether it was 76 million or 67 million. The fact is Mr. Perelman, confirmed by Mr. Gittis, said unequivocally, findings on 295 and 296, we would not have closed this transaction had we seen the comfort letter.

If you assume that the information in the comfort letter was false, they still would not have closed and the falsity of the information doesn't change that fact, and as a matter of law, that defeats their claim under New York law, because they would not have closed, they would not have suffered any damage. You can't have it both

covered by the confidentiality agreements. After the period of talk, the parties entered into a contract, they integrated, they set forth one, two, three, four, five reps. None of the reps are at issue here that involve Morgan Stanley, anything about Morgan Stanley. And from that point forward, the obligation, that 30-day period,

if there was anything more that they wanted to do, that's why they negotiated books and records, go look at the books and records. The books and records were there, they were in black and white. That black and white Morgan Stanley saw as the debenture underwriter, it's the same information that's in the comfort letters. If they had looked, they would have seen it too, and they said very clearly we wouldn't have closed if we had seen it. That's the end of the story. It's the end of the story that they wouldn't have closed and they could have seen it and they chose not to see it, for whatever reasons. And you don't have to decide the reason. You only have to decide that it's undisputed that they wouldn't have closed. And they said they wouldn't have closed. Paragraphs 295 and 296.

THE COURT: Okay.

Nothing was done interparty due diligence.

Yes, there's no question Mr. Scarola's list of due diligence covers some things that they did.

They looked at a document, they did this, they did that, but interparty due diligence is what we're talking about, the parties coming together and exchanging information. Look at the data room.

The evidence is undisputed. Nobody went to the data room that Sunbeam set up with all of its financial information. Nobody looked. It just sat there at Skadden Arps. That's what I'm talking about. They did not do that and that is not disputed, and if it is, I'd like to hear what they did beyond February 23rd, and we've already dealt with that meeting.

It comes down to paragraphs 295 and 296 of our findings. Mr. Perelman said unequivocally I would not have closed this transaction if I had known what was in the comfort letter. He could have known what was in the comfort letter if he had simply looked at page 1 of the interim financial statements and read the 10-K, end of story, which raises, well, what about Mr. Bornstein. Mr. Bornstein is irrelevant at

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

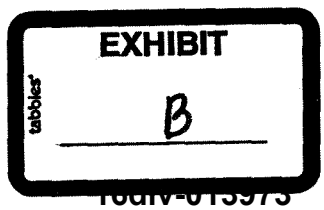
ORDER ON MORGAN STANLEY & CO., INCORPORATED'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court January 21, 2005 on Morgan Stanley & Co., Incorporated's Motion for Summary Judgment, with both parties well represented by counsel.

This case arises out of an acquisition transaction that was negotiated and consummated in late 1997 and early 1998, in which Coleman (Parent) Holdings, Inc. ("CPH"), sold its 82% interest in the Coleman Company, Inc. ("Coleman"), to Sunbeam Corporation ("Sunbeam"). Morgan Stanley & Co., Inc. ("MS & Co."), served as financial advisor to Sunbeam for parts of the acquisition transaction and served as the lead underwriter for a $750,000,000 debenture offering that Sunbeam used to finance the acquisition.

CPH's Complaint alleges claims against MS & Co. arising from this transaction for fraudulent misrepresentation, negligent misrepresentation, aiding and abetting fraud, and conspiracy, and seeks damages of at least $485 million.

By the time of the hearing, MS & Co. had distilled the material facts it believes are not disputed to three:



1. Ronald Perelman[1] controls CPH and is a sophisticated investor who was aided by sophisticated advisors.
2. Perelman would not have proceeded with the transaction had he known of the content of the comfort letters; the comfort letters, in turn, merely restated information contained in the interim financial statements.
3. CPH and its advisors closed the transaction without looking at Sunbeam's interim financial statements, which they had a contractual right to inspect.

From these facts MS & Co. argues that CPH is a sophisticated investor; that it had a right to review the interim financials, which it failed to exercise; that had it exercised that right it would have discovered the adverse performance reflected in the comfort letters; if it had, it would not have closed the transaction; and that its reliance on misstatements or omissions by MS & Co. cannot, as a matter of law, be reasonable "if it failed to avail itself of access to the very information that it accuses the defendant of misrepresenting or omitting." (MS & Co.'s Reply Memorandum, p.17).

CPH all but concedes it is a sophisticated investor aided by sophisticated advisors. It contends, though, that under New York law a claim for fraudulent misrepresentation by a sophisticated investor is precluded only if it failed to perform reasonable due diligence which, had it been completed, would have disclosed the discrepancy. It contends, further, that the Court should not grant summary judgment on isolated facts that could be presented to a jury out of context.

It is undisputed from the record that Perelman is a sophisticated investor under New York law, and that he controlled CPH. Consequently, CPH was required to use reasonable due diligence in investigating the transaction and may not recover for fraudulent misrepresentations the falsity of which would have been apparent had the proper investigation been completed. However, the Court has previously determined that New

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[1]MS & Co. attempts to substitute Perelman for CPH throughout the Motion. While Perlman may control CPH, he is not CPH.

York law "engraft(s) a requirement that a party perform reasonable due diligence as to available information in order to prove that its reliance on a misrepresentation was reasonable." August 11, 2004 Order on Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc.'s Motion for Application of New York Law, p. 12. CPH was not required to use every available means to test Sunbeam or MS & Co.'s assertions. Rather, it was required to be reasonably diligent in investigating the transaction; obviously, that diligence was confined to the means available, and is a fact-sensitive inquiry. The Court cannot find, as a matter of law, that a failure to review the interim financial statements shows a lack of due diligence. Instead, whether CPH was reasonably diligent is a jury issue.

Under New York law, to recover for a negligent misrepresentation, CPH must show that it occupied a "special relationship" with MS & Co. MS & Co. argues that the record is devoid of evidence that such a relationship existed. CPH argues that it and its affiliated entities had enjoyed a long-term relationship with MS & Co.; that they had done over two dozen deals together; and that, indeed, MS & Co. exploited that relationship to restart negotiations after the disastrous December 1997 meeting between Perelman and Dunlap and in promoting the transaction to CPH. The Court agrees that there are disputed issues of material fact precluding summary judgment on the nature of CPH and MS & Co.'s relationship.

Based on the foregoing, it is

ORDERED AND ADJUDGED that Morgan Stanley & Co., Incorporated's Motion for Summary Judgment is Granted, in part, and Denied, in part. CPH is determined to be a sophisticated investor under New York law. In all other respects, the Motion is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 1 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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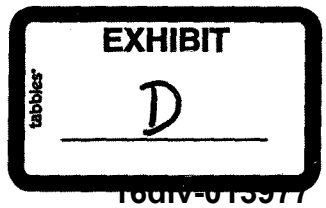
In April 1997, Morgan Stanley began serving as Sunbeam's investment banker. Morgan Stanley originally attempted to find someone to buy Sunbeam. When Morgan Stanley was unable to find a buyer, Morgan Stanley developed a strategy for Sunbeam to use its fraudulently-inflated stock to acquire a large company that Sunbeam would own and operate. Then, trading on Morgan Stanley's relationships with CPH's senior officers, Morgan Stanley found

Exhibit A



Based on information that Sunbeam and Morgan Stanley had disseminated, Wall Street analysts were anticipating that Sunbeam's first quarter 1998 net sales would be in the range of $285 million to $295 million. Sales in that range would have been approximately 15% higher than first quarter 1997 sales. Sunbeam's January and February 1998 sales, however, totaled barely 25% of $285 million. As Sunbeam's outside auditors advised Morgan Stanley in writing, the sales drop-off was caused by Sunbeam's sales acceleration program. The information put into Morgan Stanley's hands on March 17 and March 18 showed that Morgan Stanley's and Sunbeam's assertions to CPH and other investors were false. Contrary to what Morgan Stanley and Sunbeam had represented, Sunbeam had not undergone a successful turnaround, Sunbeam's financial performance had not dramatically improved, and Sunbeam's performance in 1998 was not better than Wall Street analysts' expectations. It was imperative, therefore, that the truth be kept from CPH until the Coleman transaction closed at the end of March 1998.

Morgan Stanley did not disclose Sunbeam's disastrous first quarter, Morgan Stanley did not insist that Sunbeam disclose its disastrous first quarter, Morgan Stanley did not correct any of the false and misleading statements it and Sunbeam had made to CPH about Sunbeam's business or performance, and Morgan Stanley did not suspend any of the critical transactions that were scheduled to close in the next two weeks. Instead, with Morgan Stanley's knowledge and assistance, Sunbeam prepared and issued a false press release on March 19, 1998 that affirmatively misstated and concealed Sunbeam's true condition.

The March 19, 1998 press release stated: "Sunbeam Corporation . . . said today that it is possible that its net sales for the first quarter of 1998 may be lower than the range of

Wall Street analysts' estimates for $285 million to $295 million, but net sales are expected to exceed 1997 first quarter net sales of $253.4 million. . . . The shortfall from analysts' estimates, if any, would be due to changes in inventory management and order patterns at certain of the Company's major retail customers. The Company further stated that based on the strength of its new product offerings and powerful brand names, it remains highly confident about the overall sales outlook for its products for the entire year."

As Morgan Stanley was fully aware, the March 19, 1998 press release was false, misleading, and failed to disclose material information. The March 19, 1998 press release failed to disclose Sunbeam's actual January and February 1998 sales or the true reasons for the poor results. Instead, the press release held out the false possibility that Sunbeam still could achieve sales of $285 million to $295 million and suggested that, if any shortfall occurred, that shortfall would be due to the fact that certain retailers had decided to defer first quarter purchases to the second quarter. The press release also assured that Sunbeam at least would exceed first quarter 1997 net sales of $253.4 million. Based on information that Morgan Stanley had in its hands on March 18, 1998, it was obvious that Sunbeam would not achieve sales of $285 million to $295 million and that Sunbeam's first quarter 1998 sales would be below its first quarter 1997 numbers. To simply meet 1997 first quarter sales, Sunbeam needed sales of $123.3 million over the 12 remaining days of the quarter — an average of $10.28 million per day. Sales of $10.28 million per day would be 306% more than the average per day sales in March 1997, and 281% more than the average per day sales for the first 17 days of March 1998. Furthermore, Morgan Stanley knew that the shortfall from analysts' estimates was not caused by retailers' deciding to defer purchases from the first quarter of 1998 to the second quarter, as the press release indicated. Rather, as Sunbeam's outside auditors had

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advised Morgan Stanley in writing, the collapse in first quarter sales was caused by Sunbeam's acceleration of 1998 sales into the fourth quarter of 1997.

After Sunbeam's false press release was issued, Morgan Stanley stood arm-in-arm with Sunbeam while Dunlap and Kersh told CPH, analysts, and investors that the March 19, 1998 release was a purely cautionary statement because some first quarter 1998 sales might simply "spillover" into the second quarter and that Sunbeam still believed that it actually would meet analysts' estimates of $285 million to $295 million in first quarter 1998 sales.

Morgan Stanley knew that a full and truthful disclosure of Sunbeam's first quarter sales would doom the debenture offering, which was scheduled to close on March 25, 1998,

As Morgan Stanley was fully aware, the written contract between CPH and Sunbeam gave CPH the express legal right to refuse to close the sale if there was a material adverse change in Sunbeam's "business, results of operation or financial condition."

Furthermore, if the transactions did not close, Morgan Stanley would not be paid its $10.28 million fee for the Coleman acquisition or its $22.5 million fee for underwriting the subordinated debenture offering. Morgan Stanley also knew that Sunbeam would promptly replace Morgan Stanley with another investment banking firm – such as the Chase Securities team led by Mark Davis.

16div-013980

Sunbeam's outside auditors already had made it perfectly clear to Morgan Stanley that Sunbeam's first quarter 1998 sales were a disaster,

One of Sunbeam's senior outside auditors, Lawrence Bornstein, has testified under oath that on March 19, 1998, he told Morgan Stanley's John Tyree that the statement in Sunbeam's March 19, 1998 press release — that Sunbeam would at least exceed first quarter 1997 sales of $253.4 million — was not credible: "Just do the math . . . they've done a million dollars in sales the first 70 days of the year and now they need to do $10 million worth of sales for the next . . . I think it was 11 days . . . I mean, something ridiculous." Bornstein also told Tyree: "I've been to every shipping dock domestically, I've been to Hattiesburg, I've been to Neosho, I've been to Mexico City, and I don't think these guys can physically ship this much stuff."

Morgan Stanley knew that the March 19 press release was false and misleading. Despite that knowledge and Bornstein's explicit statements, Morgan Stanley continued with its preparations to close the debenture offering on March 25, 1998 and the Coleman acquisition on March 30, 1998.

As part of those preparations, on March 24, 1998, Morgan Stanley's Tyree spoke by telephone with Sunbeam's Kersh, who was located in Sunbeam's Delray Beach offices, to obtain an updated report concerning Sunbeam's first quarter performance. By the time of that March 24, 1998 call, Sunbeam had fallen even further behind first quarter 1997 sales. As of March 18, 1998, Sunbeam needed to achieve average sales of $10.28 million per day, over 12 days, to reach

16div-013981

page 1

IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 55
PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

page 2

Monday, April 4, 2005
Palm Beach County Courthouse
Courtroom 11-A
205 North Dixie Highway
West Palm Beach, Florida 33401
9:30 a.m. to #* p.m.

APPEARANCES:

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page 3

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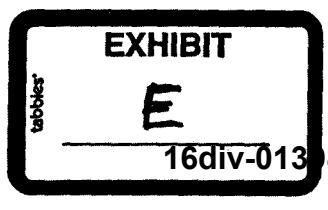

unless you point to a specific representation made by Sunbeam that you relied upon.

THE COURT: You're saying that Sunbeam can artificially inflate the value of its stock and if I buy the artificially un/TPHRAEUTed stock I cannot sue Sunbeam.

MR. HANSEN: Absolutely under Florida law. If I came in from the planet Mars, I've from a haste ship and I say Sunbeam I like the name, I'm going to buy a share of Sunbeam stock, I haven't listened to anything, there's no fraud claim. I haven't been induced to do something by /SREUR few of a statement. The failure to make a statement is what you're talking, have you to truthfully disclose to the marketplace. I'm pretty convinced having looked at the law on this that the Florida law does not permit Sunbeam under those circumstances to sue in

page 109

fraud against Morgan Stanley, what I believe has to be shown here is a statement that caused a person to rely and it has to be a statement. Your Honor, to be perfectly forth coming.

THE COURT: Let's stop. I'm throwing it out as something we need to talk about and I've got to go.

MR. HANSEN: If I say something I may have a duty to say more to make it accurate.

THE COURT: But it's your position that Sunbeam could engage in accounting fraud, cause the value you've of its stock to be arrest artificially inflated and a purchaser of that stock could not sue Sunbeam.

MR. HANSEN: Not unless they can point to a statement.

MR. IANNO: Define the law, Judge. I'll leave you with that statement. There's those four binders.

THE COURT: And we are back at 1:30.

(A recess was taken.) Lunch

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO. 2003CA 005045 AI

NOTICE OF FILING PLEADING UNDER SEAL

Coleman (Parent) Holdings Inc. ("CPH") hereby gives notice of the filing of Plaintiff's Supplemental Disclosure Concerning Plaintiff's Inability To Sell Its Unregistered Sunbeam Stock.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 4th day of April 2005.

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9967

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: April 5, 2005

TIME: 9:30 a.m.

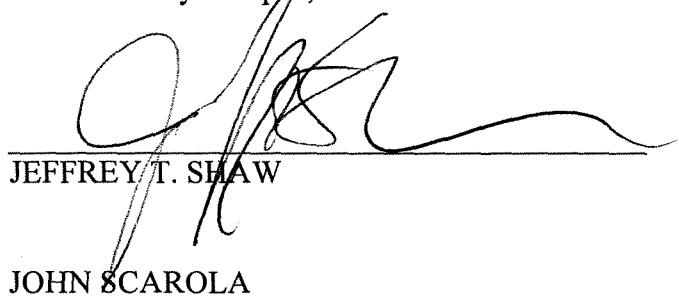
JUDGE: Honorable Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

CPH's Motion To Amend The Court's March 23, 2005 Order On CPH's Renewed Motion For Entry Of Default Judgment

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 4th day of April, 2005.



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9966

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

PLAINTIFF'S PROPOSED JURY INSTRUCTIONS

COMES NOW the Plaintiff, by and through its undersigned attorneys, and hereby requests that this Honorable Court give the following jury instructions.

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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Table of Contents

Instructions During Trial 1
Certain Facts Conclusively Established 1
Deposition Testimony 2
Bates Ranges 3
Introductory Instruction 4
Believability of Witnesses 5
Greater Weight (Preponderance) of the Evidence Defined; Certain Facts Conclusively Established 6
Elements of CPH's Claims 7
Element 1 — Reliance 9
Liability for Acts of Co-Conspirators 10
Element 2 — Causation of Damages 11
Amount of Damages — Compensatory 12
Benefit of the Bargain 13
No Reduction on Account of Uncertainty Caused by Defendant 15
Collateral-Source Rule for Tort Actions 16
Prejudice and Sympathy; Judge Not Involved 17
Closing Instruction, First Phase of Proceedings 18
VERDICT FORM (First Phase of Bifurcated Proceedings) 19
Instructions for Second Phase of Trial 20
Opening Instruction — Second Phase 20
Opening Statement Regarding Litigation Misconduct 21
Damages — Punitive — Entitlement 22
Damages — Punitive — Amount 23
Closing Instructions, Second Phase of Proceedings 25
VERDICT FORM (Second Phase of Bifurcated Proceedings) 26

PLAINTIFF'S PROPOSED INSTRUCTION NO. 1
Instructions During Trial
Certain Facts Conclusively Established

[To be read before statement of established facts is read]

In this case, certain facts have been conclusively established before trial, and you will be informed of these established facts in a statement which I will read to you. You are required to accept these facts as true for all purposes in your deliberations. Evidence will be presented to you concerning the issues in the case that remain to be decided by you, but you may not consider any evidence admitted during the trial as contradicting any of the established facts read to you in my statement.

Authority:
March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 2
Instructions During Trial
Deposition Testimony

Members of the jury, the sworn testimony of (name), given before trial, will now be shown to you. You are to consider and weigh this testimony as though the witness had testified here in person.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 1.3a (2003) (modified for videotaped testimony).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 3
Instructions During Trial
Bates Ranges

Many of the documents you will see in this trial have been marked during pretrial proceedings with numbers and other information, usually in the lower right corner. These pretrial markings which were not part of the original document will be identified when a document is admitted into evidence. This numbering system is merely used to keep track of documents during litigation; it does not represent who authored or created the documents. Therefore, you should not attempt to draw any conclusions about documents based on how they have been numbered or otherwise marked for trial.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 4
Introductory Instruction

Members of the jury, I shall now instruct you on the law that you must follow in reaching your verdict. It is your duty as jurors to decide the issues, and only those issues, that I submit for determination by your verdict. In reaching your verdict, you should consider and weigh the evidence, decide the disputed issues of fact, and apply the law on which I shall instruct you, to facts as you find them from the evidence.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in evidence, all facts that may be admitted or agreed to by the parties, any fact of which the Court has taken judicial notice, and all the established facts that I read to you at the beginning of the trial.

In determining the facts, you may draw reasonable inferences from the evidence. You may make deductions and reach conclusions which reason and common sense lead you to draw from the facts shown by the evidence in this case. But you should not speculate on any matters outside the evidence. And you may not draw inferences, make deductions, or reach conclusions which are contrary to or inconsistent with the established facts that I read to you at the beginning of the trial.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 2.1 (2003) (modified in light of March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 5
Believability of Witnesses

General Considerations

In determining the believability of any witness and the weight to be given the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

Expert Witnesses

You have heard opinion testimony on certain technical subjects from persons referred to as "expert witnesses." Some of the testimony before you was in the form of opinions about certain technical subjects.

You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness; the reasons given by the witness for the opinion expressed; and all the other evidence in the case.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 2.2a-b (2003).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 6
Greater Weight (Preponderance) of the Evidence Defined; Certain Facts Conclusively Established

CPH must prove certain matters that I will describe to you by the "greater weight of the evidence." "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. However, the facts that I read to you earlier were established before trial. As a result, you must accept them as true, and no further evidence is required to prove them.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 3.9 (2003) (modified in light of March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 7
Elements of CPH's Claims

I will now instruct you on CPH's claims. CPH claims that Morgan Stanley aided and abetted the Sunbeam fraud, and that Morgan Stanley conspired with Sunbeam to commit fraud. One aids and abets fraud if one knowingly provides substantial assistance to fraud committed by another. One conspires to commit fraud if one makes an agreement with someone else to commit fraud, takes overt action in furtherance of that agreement, and fraud results from one's own actions, the actions of the other party, or some combination of the two.

Several facts relating to both of CPH's claims against Morgan Stanley are already established, and certain findings or conclusions follow directly from those facts. I instruct you to accept that Sunbeam and Morgan Stanley made false statements of material fact with the intent that CPH would rely on them. I also instruct you to accept that Morgan Stanley knew of Sunbeam's fraud, substantially assisted it, conspired with Sunbeam to defraud CPH, and committed overt acts in furtherance of that agreement.

You must accept each and every one of these findings based on the facts established before trial. Like the established facts, these findings have been conclusively established for all purposes in your deliberations and you may not consider any other evidence admitted during the trial as contradicting any of these established findings.

These findings establish certain elements of CPH's claims, but they do not alone prove CPH's claims. To prove its claims for aiding and abetting fraud and conspiracy to commit fraud, CPH must show two things by the greater weight of the evidence:

First, that CPH relied on a false statement or false statements by Morgan Stanley or Sunbeam, and

Second, that the false statement or false statements by Morgan Stanley or Sunbeam caused CPH to suffer loss.

If you find both of these elements, you must find for CPH on both its aiding and abetting fraud claim and its conspiracy claim. If you find neither of these elements, or find one of these elements but not the other, you must find for Morgan Stanley on both claims. You may not find for CPH on one claim, but for Morgan Stanley on the other. I will now instruct you on these two elements in greater detail.

Authority:
Tew v. Chase Manhattan Bank, N.A., 728 F. Supp. 1551, 1568 (S.D. Fla. 1990) (stating that elements of aiding and abetting fraud under Florida law are (1) a fraud, (2) "knowledge of the fraud," and (3) "knowing rendition of substantial assistance"), *amended on reh'g*, 741 F. Supp. 220 (S.D. Fla. 1990); RESTATEMENT (SECOND) OF TORTS § 876 (1979); *Kent v. Kent*, 431 So. 2d 279, 281 (Fla. 5th DCA 1983) (stating that elements of civil conspiracy under Florida law are "(a) a conspiracy between two or more parties, (b) to do an unlawful act, or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts done under the conspiracy"); *Florida Fern Growers Ass'n v. Concerned Citizens of Putnam County*, 616 So. 2d 562, 565 (Fla. 5th DCA 1993) (same); *Hoch v. Rissman, Weisberg, Barrett*, 742 So. 2d 451, 460 (Fla. 5th DCA 1999) (conspiracy is a "vehicle for imputing the tortious actions of one co-conspirator to another to establish joint and several liability"); THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES MI 8.1 (2003) (elements of fraud); March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 8
Elements of CPH's Claims
Element 1 — Reliance

The first issue for your consideration is whether CPH relied on any false statement or false statements made by Morgan Stanley or Sunbeam. When you consider whether CPH relied on any false statement or false statements made by Sunbeam or Morgan Stanley, Morgan Stanley is not entitled to the defense that CPH, by exercising reasonable care, could have learned the facts and thereby prevented the loss. Under the law, CPH had no duty or obligation to attempt to obtain more information to determine whether any statement was false. CPH was entitled to rely on any statement made by Morgan Stanley or Sunbeam unless CPH knew that the statement was false or the falsity of the statement was obvious, even if CPH had the means to verify the accuracy of the statements and failed to use those means.

Authority:
Transcript of Proceedings, March 9, 2005, at 2664.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 9
Elements of CPH's Claims
Liability for Acts of Co-Conspirators

You must treat statements made by Sunbeam as if they had been made by Morgan Stanley, and vice versa. Based on the facts conclusively established before trial, Morgan Stanley and Sunbeam conspired to defraud CPH. Under the law, parties to a conspiracy are liable for each other's actions in the conspiracy, as if the actions had been their own. Any person or corporation that enters into a conspiracy after the wrongdoing begins is liable for the acts by other members both before and during the time that it is a member of the conspiracy.

Authority:
August 12, 2004 Order on Morgan Stanley's Motion for Application of New York Law, at 12 (citing *James v. Nationsbank Trust Co. (Florida), N.A.*, 639 So. 2d 1031, 1032 (Fla. 5th DCA 1994)); *Hoch v. Rissman, Weisberg, Barrett*, 742 So. 2d 451, 460 (Fla. 5th DCA 1999) (conspiracy is a "vehicle for imputing the tortious actions of one co-conspirator to another to establish joint and several liability").

PLAINTIFF'S PROPOSED INSTRUCTION NO. 10
Elements of CPH's Claims
Element 2 — Causation of Damages

The second issue for your consideration is whether the fraud Morgan Stanley aided, abetted, and conspired to commit caused CPH to suffer loss. The Sunbeam fraud was the legal cause of CPH's losses if the fraud committed against CPH directly and in natural and continuous sequence produced or contributed substantially to producing such losses, so that it can reasonably be said that, but for the fraud, the losses would not have occurred. To be regarded as a legal cause of CPH's losses, the fraud that Morgan Stanley helped and conspired to commit need not be the only cause of CPH's losses. The fraud may be a legal cause of CPH's losses even though the fraud operated in combination with the act of another or some other cause occurring after the fraud occurred, if such other cause was itself reasonably foreseeable and the fraud contributed substantially to producing CPH's losses.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 5.1 (2003) (modified for party names, nature of claims, and in light of March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 11
Amount of Damages — Compensatory

If you find for Morgan Stanley on both of CPH's claims — aiding and abetting fraud and conspiracy to commit fraud — you will not consider the matter of damages. But if you find for CPH, you should award CPH an amount of money that the greater weight of the evidence shows will fairly and adequately compensate CPH for its loss.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 6.1b (2003) (modified for party names and nature of claims).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 12
Amount of Damages — Compensatory
Benefit of the Bargain

To determine the amount of compensatory damages that will constitute fair and adequate compensation for any loss incurred by CPH, you must calculate the difference between:

(1) CPH's reasonable expectation of the fair market value of the Sunbeam stock that CPH received in the Coleman transaction, if the false statements concerning Sunbeam had actually been true; and

(2) the fair market value at which CPH reasonably could have sold its Sunbeam stock to a buyer who had full knowledge of the entire fraud. For purposes of this determination, I instruct you that because of certain legal prohibitions, CPH could not have sold its Sunbeam stock prior to _____. It is for you, the jury, to decide whether CPH could have sold its Sunbeam stock at any time after _____, and, if so, at what fair market value price. Also for purposes of this instruction, "fair market value" means the amount a purchaser who was willing but not obliged to buy would pay to someone willing but not obliged to sell.

In other words, CPH's damages are the difference between (1) the value of what CPH was supposed to receive, and (2) the value of what CPH actually did receive, at the point when CPH could sell the Sunbeam stock.

Authority:
Silverberg v. Paine, Webber, Jackson & Curtis, Inc., 710 F.2d 678, 686 (11th Cir. 1983) (applying Florida law and approving jury instruction stating in part that the "elements which you should consider in arriving at the amount of money damages which will constitute fair and adequate compensation for the loss or damages allegedly incurred include the difference between the purchase price paid for the Posi-Seal stock purchased by the plaintiff and the price at which such stock was or could have been sold by the plaintiff when he learned of the alleged fraud"); *Totale, Inc. v. Smith*, 877 So. 2d 813, 815 (Fla. 4th DCA 2004) (benefit of the bargain rule "awards as damages the difference between the actual value of the property and its value had the

alleged facts regarding it been true"); *see Nordyne, Inc. v. Florida Mobile Home Supply, Inc.*, 625 So. 2d 1283, 1286 (Fla. 1st DCA 1993); *Martin v. Brown*, 566 So. 2d 890, 891 (Fla. 4th DCA 1990); *DePuis v. 79th St. Hotel, Inc.*, 231 So. 2d 532 (Fla. 3d DCA), *cert denied*, 238 So. 2d 105 (Fla. 1970); *Strickland v. Muir*, 198 So. 2d 49, 51 (Fla. 4th DCA 1967). *See also Finkelstein v. Department of Trans.*, 656 So. 2d 921, 925 (Fla. 1995) (definition of fair market value); *Valencia Center, Inc. v. Bystrom*, 543 So. 2d 214, 216 (Fla. 1989) (same); *American Reliance Ins. Co. v. Perez*, 689 So. 2d 290, 291 (Fla. 3d DCA 1997) (same); February 15, 2005 Order on Morgan Stanley's Motion in Limine No. 16 to Strike the Expert Opinion of CPH Expert Blaine Nye; February 15, 2005 Order on CPH's Motion in Limine No. 19 to Exclude Portions of Expert Witness Mark Grinblatt's Testimony; March 28, 2005 Order on CPH's Motion in Limine No. 27 for a Finding as a Matter of Law that the Federal Securities Laws Prohibited Plaintiff from Selling Unregistered Sunbeam Stock.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 13
Amount of Damages — Compensatory
No Reduction on Account of Uncertainty Caused by Defendant

If CPH proves it suffered damage by the greater weight of the evidence, CPH is entitled to recover for that damage even though the exact amount of the damage cannot be determined. If you find by the greater weight of the evidence that damage did occur as a result of the Sunbeam fraud, CPH is entitled to recover for that damage as long as there is some reasonable yardstick by which it can be measured — that is, as long as there is some reasonable basis for estimating the amount of the damage, CPH may not be denied damages merely because the amount of the damage is uncertain or difficult to determine. If Morgan Stanley's and Sunbeam's wrongdoing has made CPH's damages more difficult to prove, you should not reduce the amount of damages because of that uncertainty. Morgan Stanley bears the risk of uncertainty caused by its own wrongful acts.

Authority:
Miller v. Allstate Ins. Co., 573 So. 2d 24, 27 (Fla. 3d DCA 1990) ("[w]here the defendant's wrong has caused the difficulty of proof of damages," the defendant "cannot complain of the resulting uncertainty"); *Linton v. Pension Services Corp.*, 389 So. 2d 247, 249 (Fla. 2d DCA 1980); *Adams v. Dreyfus Interstate Devel. Corp.*, 352 So. 2d 76, 78 (Fla. 4th DCA 1977); *John Hancock Life Ins. Co. v. Mark-A, Inc.*, 324 So. 2d 674, 674 (Fla. 2d DCA 1975); *Conner v. Atlas Aircraft Corp.*, 310 So. 2d 352, 354 (Fla. 3d DCA 1975); *Asgrow-Kilgore Co. v. Mulford Hickerson Corp.*, 301 So. 2d 441, 445 (Fla. 1974); *McCall v. Sherbill*, 68 So. 2d 362, 364 (Fla. 1954); *Twyman v. Roell*, 166 So. 215, 218 (Fla. 1936); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 250 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 569 (1931).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 14
Amount of Damages — Compensatory
Collateral-Source Rule for Tort Actions

You should not reduce the amount of compensation to which CPH is otherwise entitled on account of any benefits, recovery, or compensation CPH has received or may receive from Sunbeam, Arthur Andersen, or any other source. The Court will reduce as necessary the amount of compensation to which CPH is entitled on account of any such payments.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 6.13a & note 1 (2003) (modified to identify relevant parties).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 15
Prejudice and Sympathy; Judge Not Involved

In reaching your verdict, you are not to be swayed from the performance of your duty by prejudice, sympathy, or any other sentiment for or against any party. Your verdict must be based on the evidence that has been received and the law on which I have instructed you.

Reaching a verdict is exclusively your job. I cannot participate in that decision in any way. You should not speculate about how I might evaluate the testimony of any witness or any other evidence in this case, and you should not think that I prefer one verdict over another. Also, you should not think, based on the facts I have instructed you to accept as established, that I have a preference regarding how you should decide the matters submitted for your determination. Therefore, in reaching your verdict, you should not consider anything that I have said or done, except for my specific instructions to you.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 7.1 (2003) (modified in light of March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 16
Closing Instruction, First Phase of Proceedings

When you retire to the jury room, you should select one of your number to act as foreman or forewoman to preside over your deliberations and sign your verdict. Your verdict must be unanimous, that is, your verdict must be agreed to by each of you.

You will be given a form of verdict, which I shall now read to you:

[*read form of verdict*]

When you have agreed on your verdict, the foreman or forewoman, acting for the jury, should date and sign the appropriate form of verdict. You may now retire to consider your verdict.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 7.2 (2003).

VERDICT FORM (First Phase of Bifurcated Proceedings)

VERDICT

We, the jury, return the following verdict:

1. Did CPH rely on any false statement or false statements made by Morgan Stanley or Sunbeam?

YES _____ NO _____

If your answer to question 1 is NO, your verdict on each claim is for the defendant, Morgan Stanley, and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 1 is YES, your verdict is for CPH, and you should proceed to answer question 2.

2. What is the total amount of damages sustained by CPH and caused by the fraud in question?

Total compensatory damages: $ _____

In determining the total amount of CPH's damages, do not make any reduction because of CPH's negligence, if any, or because of any benefit, recovery, or compensation that CPH has received or may receive from Sunbeam, Arthur Andersen, or any other source.

Date and sign this form and return it to the courtroom.

SO SAY WE ALL, this _____ day of _____, 2005.

_____

FOREPERSON

PLAINTIFF'S PROPOSED INSTRUCTION NO. 17
Instructions for Second Phase of Trial
Opening Instruction — Second Phase

The parties may now present additional evidence related to whether punitive damages should be assessed, and, if so, in what amount. You should consider this additional evidence along with the evidence already presented, including those conclusively established facts that I read to you at the beginning of trial.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES PD-1b(1) (2003) (modified for in light of March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment); April 1, 2005 Order on Morgan Stanley's Motion to Clarify the Proper Scope of the Liability and Punitive Phases of Trial.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 18
Instructions for Second Phase of Trial
Opening Statement Regarding Litigation Misconduct

[Read Statement Regarding Litigation Misconduct]

Authority:
March 23, 2005 Order on CPH's Renewal Motion for Entry of Default Judgment.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 19
Instructions for Second Phase of Trial
Damages — Punitive — Entitlement

The issue for your determination in this phase of the trial is whether, in the circumstances of this case, it is appropriate to award punitive damages to punish Morgan Stanley and to serve as a deterrent to Morgan Stanley and others, and, if so, the appropriate amount of such damages.

Punitive damages are warranted if clear and convincing evidence establishes that:

(1) Morgan Stanley acted fraudulently;

(2) Morgan Stanley acted willfully;

(3) Morgan Stanley acted in reckless disregard for the rights of CPH; or

(4) Morgan Stanley acted in intentional violation of the rights of CPH.

The findings already made by the Court, which I read to you at the beginning of trial, satisfy CPH's burden of establishing by clear and convincing evidence that Morgan Stanley acted both fraudulently and willfully. Nevertheless, you may in your discretion decline to award punitive damages.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES PD-1(a) (modified for party names, for intentional tort of fraud, and in light of March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment and April 1, 2005 Order on Morgan Stanley's Motion to Clarify the Proper Scope of the Liability and Punitive Phases of Trial); *id.* Note 3 (noting that "certain types of intentional torts may require a punitive damage charge appropriate to the particular tort); *First Interstate Devel. Corp. v. Ablanedo*, 511 So. 2d 536, 539 (Fla. 1987).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 20
Instructions for Second Phase of Trial
Damages — Punitive — Amount

In determining the amount of punitive damages, if any, to be assessed as punishment and as a deterrent to others, you should decide any disputed factual issues by the greater weight of the evidence. "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. You should consider the following in determining the amount of punitive damages to be assessed:

(1) The nature, extent, and degree of misconduct, and the related circumstances, including the following:

- the reprehensibility of Morgan Stanley's misconduct, including the extent to which it involved malice, trickery, or deceit ("reprehensible" means "worthy of censure or rebuke");
- the degree of Morgan Stanley's awareness of the wrongfulness of the misconduct;
- the duration of the misconduct;
- whether offensive conduct was repeated on more than one occasion;
- the attitude and conduct of Morgan Stanley upon discovery of the misconduct;
- Morgan Stanley's concealment of its role in the Sunbeam transaction, including its litigation misconduct in this case, as evidence of Morgan Stanley's malice and evil intent; and

- the number and level of responsibility of corporate employees who knew of, participated in, subsequently approved of, or participated in concealing or covering up the misconduct.

(2) The enormity of the offense. Punitive damages should bear a reasonable relationship to the harmfulness of Morgan Stanley's conduct, and should not be out of proportion to the harm suffered as a consequence of the conduct. Accordingly, you may consider whether and the extent to which Morgan Stanley's conduct caused danger or harm to others besides CPH including harm or danger to the investing public; and

(3) Morgan Stanley's financial resources. An award of punitive damages must not be out of proportion to Morgan Stanley's financial resources. Punitive damages should be painful enough to punish and deter but should not be so great as to financially destroy or bankrupt Morgan Stanley.

You may in your discretion decline to assess punitive damages.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES PD-2d(1) (2003) (modified in light of April 1, 2005 Order on Morgan Stanley's Motion to Clarify the Proper Scope of the Liability and Punitive Phases of Trial) (first factor); March 1, 2005 Sanctions Order (sixth subfactor of first factor); *Owens-Corning Fiberglass Corp. v. Ballard*, 749 So. 2d 483, 484-85 (Fla. 1999) (first factor; approving factors for jury's consideration in determining nature, extent, and degree of misconduct); *BMW of North America v. Gore*, 517 U.S. 559, 575-83 (1996) (first and second factors); *Wransky v. Dalfo*, 801 So. 2d 239, 243 (Fla. 4th DCA 2001) (second and third factors); *Arab Termite & Pest Control of Fla. Inc. v. Jenkins*, 409 So. 2d 1039 (Fla. 1982) (third factor); WEBSTER'S II NEW COLLEGE DICTIONARY 941 (1999) (definition of "reprehensible").

PLAINTIFF'S PROPOSED INSTRUCTION NO. 21
Instructions for Second Phase of Trial
Closing Instructions, Second Phase of Proceedings

Your verdict on the issues raised by CPH's punitive damages claim against Morgan Stanley must be based on the law on which I have instructed you and on evidence that has been received during the entire trial of this action, including both phases of this case, the facts established before trial that I read to you at the beginning of the trial, and the additional facts concerning litigation misconduct that I read to you at the beginning of this second phase of the trial. In reaching your verdict, you are not to be swayed from the performance of your duty by prejudice or sympathy for or against any party.

Your verdict must be unanimous, that is, your verdict must be agreed to by each of you.

You will be given a form of verdict, which I shall now read to you:

[read form of verdict]

When you have agreed on your verdict, the foreman or forewoman, acting for the jury, should date and sign the verdict. You may now retire to consider your verdict.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES PD-1b(3) (2003) (modified in light of March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment).

VERDICT FORM (Second Phase of Bifurcated Proceedings)

We, the jury, return the following verdict:

1. Are punitive damages warranted against Morgan Stanley?

YES _____ NO _____

2. What is the total amount of punitive damages, if any, which you find should be assessed against Morgan Stanley?

Total punitive damages: $ _____

Date and sign this form and return it to the courtroom.

SO SAY WE ALL, this _____ day of _____, 2005.

_____
FOREPERSON

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list, this 4th day of April, 2005.

JEFFREY T. SHAW

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Fla. Bar No.: 169440
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April 4, 2005

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Re: ***Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.***

Dear Rebecca:

I enclose CPH's supplemental response to Interrogatory No. 1 of Morgan Stanley & Co.'s Fifth Set of Interrogatories to CPH. As you can see, the information presented in the supplemental interrogatory is information of which Morgan Stanley is fully aware.

Please be advised that for trial exhibit purposes, the enclosed supplemental interrogatory response replaces former CPH Trial Exhibit 600.

Very truly yours,

Michael T. Brody

Michael T. Brody

cc: Joseph Ianno, Jr., Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.'S SUPPLEMENTAL RESPONSE AND OBJECTION TO MORGAN STANLEY & CO. INC.'S FIFTH SET OF INTERROGATORIES, NO. 1

Plaintiff Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, and pursuant to Rules 1.280 and 1.340 of the Florida Rules of Civil Procedure supplements its response to Morgan Stanley & Co., Inc.'s ("MS & Co.'s") Fifth Set of Interrogatories ("Interrogatories") as follows:

INTERROGATORY 1: Identify every instance in which Mafco or CPH engaged or retained Morgan Stanley between January 1, 1993 and March 30, 1998. Your response should identify the nature, subject, and purpose of each such engagement, the transaction or proposed transaction contemplated by each such engagement, and the name(s) of any Morgan Stanley employee or agents retained or consulted by Mafco or CPH.

FURTHER OBJECTION AND RESPONSE: CPH objects to this interrogatory as unduly burdensome because it seeks information already in the possession of Morgan Stanley and details concerning "every instance" in which Morgan Stanley was engaged or retained. CPH also notes that Interrogatory No. 1 constitutes multiple separate interrogatories. Subject to and notwithstanding its Initial and Further Objections, CPH states that Morgan Stanley was involved in the following transactions with Mafco, CPH, or affiliated companies:

- In 1985, Morgan Stanley served as advisor to Pantry Pride, Inc. ("Pantry Pride"), a Mafco affiliate, in its acquisition of Revlon, Inc. ("Old Revlon").

- In 1986, Morgan Stanley served as an advisor to Pantry Pride in the sale of Old Revlon's pharmaceutical business to Rorer Group Inc.

- In 1989, Morgan Stanley served as an advisor to The Coleman Company, Inc. ("Old Coleman") during the acquisition by a Mafco affiliate of Old Coleman.

- In 1989, Morgan Stanley served as Old Coleman's financial advisor when Old Coleman reviewed the $460.5 million buyout proposal by former Old Coleman chairman Sheldon Coleman and other members of the Coleman family.

- In 1991, National Health Laboratories Incorporated ("NHL"), an affiliate of Mafco, completed a secondary public offering of its common stock, for which Morgan Stanley served as a co-manager.

- In 1992, National Health Care Group Inc. (an indirect Mafco subsidiary) sold 14 million shares of NHL in a registered offering through Morgan Stanley and other underwriters.

- In 1992, Morgan Stanley served as an underwriter for Old Coleman's February 1992 offering of $100 million in Guaranteed Pass Through Certificates due 2022.

- In 1992, Morgan Stanley served as a joint underwriting manager for the $83 million initial public offering by The Coleman Company, Inc. ("Coleman") of its common stock.

- In 1992, Revlon, Inc. ("Revlon") planned but did not complete a $120 million initial public offering of its common stock, which was to be co-managed by Morgan Stanley.

- In 1992, MacAndrews & Forbes Company ("Flavors"), a Mafco affiliate, retained Morgan Stanley and other underwriters in connection with a contemplated, but later withdrawn, initial public offering of its common stock.

- In 1992, Morgan Stanley co-managed an $85 million 12% senior debt offering for Flavors.

- In 1993, Morgan Stanley served as the financial advisor for NHL in connection with its proposed acquisition of Damon Corp.

- In 1993-94, Morgan Stanley served as one of the underwriters for a $125 million senior subordinated notes offering by Marvel III Holdings Inc., a Mafco affiliate.

- In 1994, Morgan Stanley served as the financial advisor and dealer manager for NHL's tender offer for the outstanding shares of Allied Clinical Laboratories Inc.

- In 1994, Morgan Stanley served as the financing agent for $200 million of senior notes issued by NHL Intermediate Holdings Corp. II, a unit of National Health Laboratories Holdings Inc., a Mafco affiliate.

- In 1994, New World Communications Group Incorporated, a Mafco affiliate, arranged for $200 million in financing using Morgan Stanley, as agent.

- In 1994, Morgan Stanley served as the lead underwriter in an offering by NWCG Holdings Corporation of $420 million face amount of Senior Secured Discount Notes.

- In 1995, Toy Biz, Inc. ("Toy Biz"), a Mafco affiliate, and one of its shareholders sold Toy Biz common stock in a $62 million initial public offering co-managed by Morgan Stanley.

- In 1995, a Mafco affiliate and Abex Inc. agreed to merge. Morgan Stanley served as a financial advisor to Mafco in this transaction.

- In 1996, Revlon completed a $180 million initial public offering of its common stock, which was co-managed by Morgan Stanley.

- In 1996, Morgan Stanley led an underwriting group in conjunction with the $48 million sale by Toy Biz and one of its shareholders of shares of Toy Biz common stock.

- In 1996, Consolidated Cigar Holdings Inc. ("Cigar"), a Mafco affiliate, completed a $124 million initial public offering of its common stock, which was co-managed by Morgan Stanley.

- In 1996, Morgan Stanley represented the special committee of the board of Mafco Consolidated Group, Inc. in that company's sale of Flavor Holdings Inc. to Power Technologies Inc.

- In 1997, Cigar completed a $118 million additional offering of its common stock, which was co-managed by Morgan Stanley.

- In 1997, Mafco Holdings Inc., a Mafco affiliate, completed a "going private" transaction with its affiliate, Mafco Consolidated Group Inc. ("Mafco Consolidated"). Mafco Consolidated retained Morgan Stanley as a financial advisor to represent the minority interest in evaluating and negotiating the Mafco Holdings proposal.

In addition to the transactions listed above,

- in late 1997 and early 1998, Morgan Stanley (including at least William Reid, Robert Kitts, and Matt Grogan) sought to interest Mafco in a transaction involving Gucci.

- In early 1998, Morgan Stanley (including at least Mark Perret and Edwin Datson) also sought to interest Mafco in possible European acquisition opportunities.

Dated: April 4, 2005

As to objections:

By: _____

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Attorneys for Coleman (Parent) Holdings Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax to all counsel on the attached list on this 4th day of April, 2005.

Deirdre E. Connell

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I, Steven L. Fasman, being duly sworn, depose and say that I am authorized on behalf of Coleman (Parent) Holdings Inc. and, on its behalf, I have read the foregoing COLEMAN (PARENT) HOLDINGS INC.'S SUPPLEMENTAL RESPONSE TO MORGAN STANLEY & CO., INC.'S FIFTH SET OF INTERROGATORIES, and to the best of my knowledge and belief the response contained therein is true and correct.

STEVEN L. FASMAN

Subscribed and sworn to before me
this 4th day of April, 2005

"OFFICIAL SEAL"
CARYN JO GEISLER
Notary Public, State of Illinois
My Commission Expires June 21, 2005

FAX TRANSMITTAL

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

NOTICE OF FILING DOCUMENTS UNDER SEAL

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed under seal Exhibit "B" and Exhibit "D" to Exhibit "A" of Morgan Stanley's Motion for Reconsideration of the Court's Sanction Orders and Memorandum of Law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and hand-delivery on this 4th day of April, 2005.

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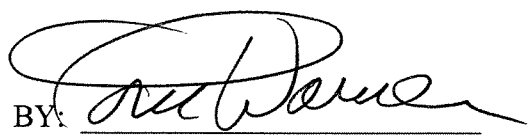
BY: 

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant. /

DEFENDANT'S MOTION FOR RECONSIDERATION OF THE COURT'S SANCTION ORDERS AND MEMORANDUM OF LAW

Morgan Stanley & Co. Incorporated ("Morgan Stanley") moves the Court for reconsideration and modification of its Sanctions Orders. In support of this motion, Morgan Stanley states:

1. Evidence of Morgan Stanley's litigation misconduct should not be introduced in either the liability or the punitive damages phase of the trial. To do so will essentially authorize the jury to punish Morgan Stanley for violations of this Court's orders instead of the wrongful conduct alleged by the Plaintiff in the First Amended Complaint, and prejudice the jury in regard to the compensatory damages claim. Because the litigation misconduct described by the Court is not related to the material issues of the underlying tort claim, nor has it been shown to conceal any smoking gun evidence relevant to Plaintiff's underlying tort claims, introduction of such evidence would violate Morgan Stanley's due process rights under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Sections 2 and 9 of the Florida Constitution. See State Farm Ins. Co. v. Campbell, 123 S. Ct. 1513, 1524 (2003) (the "reprehensibility guidepost [of BMW of N. Am. v. Gore, 517 U.S. 559 (1996)]

does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance"); see also Atkinson v. Orkin Exterminating Co., 604 S.E.2d 385, 392 (S.C. 2004) (Placing Morgan Stanley's litigation misconduct before the jury will permit CPH "to unfairly exaggerate the degree of reprehensibility" of Morgan Stanley's conduct with regard to the underlying tort claims).

2. The de facto default on liability for both compensatory and punitive damages directly flowing from the Court's orders is an unwarranted sanction and deprives Morgan Stanley of its statutory and constitutional rights to defend itself against CPH's underlying tort claim and its punitive damage claim. The purpose of Florida Rule of Civil Procedure 1.380(b) is to ensure compliance with the discovery rules and any order compelling discovery, not to punish or penalize the party in violation. The Court did not find that Morgan Stanley's litigation misconduct prevented CPH from prosecuting its claims for the underlying torts. Because punitive damages are by definition penal in nature, the Court's award of attorneys' fees and its virtual default constitutes **double punishment** against Morgan Stanley, see Smith v. Wade, 461 U.S. 30, 94 (1983) (O'Connor, J. dissenting) ("awards of compensatory damages and attorney's fees already provide significant deterrence"), and further deprives Morgan Stanley of:

a) its right to a trial by jury on punitive damages, see Orkin Exterminating Co. of S. Fla. v. Truly Nolen, Inc., 117 So. 2d 419, 422 (Fla. 3d DCA 1960) (equity court is not permitted to award punitive damages because "any different holding would deprive the defendant of his constitutional right of a jury trial before punishment");

b) due process and a fair trial before punishment in the form of punitive damages is imposed, including its right to confront witnesses in this quasi-criminal proceeding; see Campbell, 123 S. Ct. at 1520 (recognizing that punitive damages "serve the same purposes as criminal penalties"); Honda Motor Co. v. Oberg, 512 U.S. 415, 420 (1994) ("Our recent cases have

recognized that the Constitution imposes a substantive limit on the size of punitive damages awards"); id. ("the Due Process Clause imposes a limit on punitive damages awards") U.S. Const. Ameds. V, VI, XIV; Fla. Const. Art. 1 §§ 2, 9;

c) the right to contest the degree and nature of its alleged misconduct and offer evidence and circumstances in mitigation, see Humana Health Ins. Co. of Fla. v. Chipps, 802 So. 2d 492, 496 (Fla. 4th DCA 2001) (trial court "improperly prevented Humana from introducing mitigating evidence to rebut testimony that Humana's managed care practices violated industry standards"); id. (in assessing punitive damages, the jury should have been permitted to consider "evidence which would have had the effect of 'reducing or softening the moral or social culpability attaching to [the defendant's] act...'"); see also St. Regis Paper Co. v. Watson, 428 So. 2d 243, 246-47 (Fla. 1983) (in assessing punitive damages, a jury should consider 'the nature, extent, and enormity of the wrong, the intent of the party committing it and all circumstances attending the particular incident, as well as any mitigating circumstances'") (citation omitted); Owens-Corning Fiberglas Corp. v. Ballard, 749 So. 2d 483, 484-85 (Fla.1999);

d) Its due process right to present every available defense to this quasi-criminal proceeding. Lindsey v. Normet, 405 U.S. 56, 66 (1972) (Due Process requires that there be an opportunity to present every available defense), and US v. Armour, 402 U.S. 673, 682 (1971) (a defendant's "right to litigate the issues raised" is "a right guaranteed to him by the Due Process Clause");

e) its constitutional right to have a reviewing court determine the reprehensibility of its conduct, in that, unless Morgan Stanley is permitted to mount a meaningful defense to CPH's punitive damages claim, there is no way to assess how reprehensible Morgan Stanley actually was. See Gore, 517 U.S. at

575 (exemplary damages imposed on a defendant should reflect the enormity of his offense. This principle reflects the accepted view that some wrongs are more blameworthy than others); id. at 576 ("To be sure, infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, ... or when the target is financially vulnerable, can warrant a substantial penalty. But this observation does not convert all acts that cause economic harm into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages");

f) the right to force CPH to prove entitlement by **clear and convincing** evidence, see § 768.725, Fla. Stat.; and

g) the right to contest corporate liability for punitive damages, see Schropp v. Crown Eurocars, 654 So. 2d 1158, 1161 (Fla. 1995); Mercury Motors Express v. Smith, 393 So. 2d 545 (Fla. 1981).

3. The constitutional and statutory problems presented by the Court's Orders could be alleviated by the following corrective actions:

a) withdrawing the decision to read a statement to the jury concerning Morgan Stanley's litigation misconduct; and

b) rescinding that part of the Court's order which deems certain paragraphs of the First Amended Complaint "established".

4. Without waiving any of the foregoing, Morgan Stanley submits that in the punitive damages phase of this trial it should be allowed to contest all of the underlying facts supporting the claims for aiding and abetting and conspiracy to commit fraud, as well as issues regarding the corporate liability for punitive damages and the findings regarding litigation misconduct, both as to entitlement and in mitigation of the amount of punitive damages.

5. By the same token, the jury may not consider any evidence of Morgan Stanley's litigation misconduct to punish Morgan Stanley. See Jim Gash, Punitive

Damages, Other Acts Evidence, and the Constitution, 2004 Utah L. Rev. 1191, 1263 (2004) ("the jury ... may not use extraterritorial other acts evidence to punish a defendant, ... the trial court must be similarly required to instruct the jury that it may not use even local other acts to punish a defendant. Whereas the former instruction is mandated by federalism principles, the latter is required by due process") (emphasis added).

6. Morgan Stanley further contests the factual findings and conclusions set forth in the Court's order regarding litigation misconduct and that the failures to comply cannot be cured. See Affidavit of Richard Anfang attached hereto as Exhibit A.

WHEREFORE, Morgan Stanley respectively requests that this Court reconsider its March 1st and 23rd Orders.

In further support of this motion, Morgan Stanley submits the following memorandum of law to highlight particular issues raised in herein.

MEMORANDUM OF LAW

By imposing these drastic sanctions on Morgan Stanley, the Court exceeded its authority under Florida law and violated Morgan Stanley's constitutional rights. Moreover, the Court's Orders invest in the jury the authority to determine the amount in which Morgan Stanley should be punished for litigation misconduct – a power that the jury simply does not have under Florida law. This unprecedented shift of power from the bench (which has already punished Morgan Stanley with a virtual default) to the jury box (for a second punishment) violates Morgan Stanley's rights and precludes Morgan Stanley from obtaining a fair trial on Plaintiff's punitive damages claim. Stripped of its due process rights, Morgan Stanley will suffer irreparable harm if the trial proceeds on the uneven playing field set by the Sanctions Orders.

ARGUMENT

I. EVIDENCE OF MORGAN STANLEY'S LITIGATION MISCONDUCT SHOULD NOT BE INTRODUCED INTO EVIDENCE IN EITHER THE LIABILITY OR THE PUNITIVE DAMAGES PHASE OF THE TRIAL

A. Florida Law is Clear that Evidence Related to Pretrial Litigation Misconduct Generally Should Not be Submitted to the Jury.

This Court's Sanctions Orders must be reconsidered because they improperly allow the Courts findings in respect to pretrial litigation misconduct by Morgan Stanley to be introduced to the jury. Florida law grants only courts, not juries, the authority to sanction litigants for litigation misconduct. See Fla. R. Civ. P. 1.380; Emerson Elec. Co. v. Garcia, 623 So. 2d 523, 525 (Fla. 3d DCA 1993) ("an appropriate sanction was a matter for the court and not for the jury."). For precisely that reason, Florida courts have long held that "[e]vidence relating to the history of pretrial discovery should normally not be a matter submitted for the jury's consideration on the issues of liability." Amlan, Inc. v. Detroit Diesel Corp., 651 So. 2d 701, 703 (Fla. 4th DCA 1995) (citing Garcia).

The Fourth District recognized a limited exception to the rule that juries should not hear evidence regarding discovery misconduct in General Motors Corp. v. McGee, 837 So. 2d 1010, 1036 (Fla. 4th DCA 2003). That case is factually distinguishable, however, and the court's reliance on McGee in issuing its Sanctions Orders was misplaced. In McGee, the Fourth District recognized that evidence of pretrial discovery conduct normally should not be submitted to the jury. Nevertheless, under the facts and circumstances of that case, the Fourth District held that evidence of discovery abuse was properly admitted when the defendant intentionally withheld a highly relevant document that effectively established an element of the plaintiff's claim; to wit: that General Motors knew about the dangers associated with its product but did nothing

about it, and thus subordinated human life to corporate profit. Id. at 1035. Only in the face of all of this evidence about the substance of the withheld document did the Fourth District hold that it was proper to allow the jury to consider concealment of the document. See also Amlan, 651 So. 2d at 703 (distinguishing cases where "the misconduct alleged is the destruction or unexplained disappearance of crucial evidence" from the general rule that evidence of pretrial discovery conduct is not for the jury's consideration).

McGee did not hold that it is permissible to allow a party to present the jury with evidence of litigation misconduct whenever a plaintiff seeks punitive damages, and it does not support the Court's Sanctions Orders here – where there were no findings that Morgan Stanley intentionally withheld documents that it knew supported CPH's claims. To the contrary, "for all we know, any evidence [that was not produced] might be legally irrelevant to the issues framed in the pleadings." New Hampshire Ins. Co. v. Royal Ins. Co., 559 So. 2d 102, 103 (Fla. 4th DCA 1990). For this Court to allow CPH to ask the jury for punitive damages based on litigation misconduct, in the absence of a showing of a "concealment of offensive conduct," is tantamount to allowing the jury to award punitive damages as a sanction for litigation misconduct. Such a ruling allows the jury to usurp the role of the Court, in contravention of Florida law.

Allowing the jury to consider litigation misconduct is not only inappropriate; it is unquestionably prejudicial because of the obvious tendency of this sort of evidence to distract the jury from the underlying issues and taint the jury's perception of the litigants involved. See Emerson Electric Co. v. Garcia, 623 So. 2d 523, 525 (Fla. 3rd DCA 1993) (jury's verdict was tainted because the plaintiff's counsel was permitted to accuse the

defendant's counsel of discovery abuse); see also Werbungs Und Commerz Union Anstalt v. Collectors' Guild, 930 F.2d 1021, 1027 (2d Cir. 1991) (reversing jury verdict because court "permitted the jury to penalize [the defendant] for discovery abuse"); id., at 1028 (Mahoney, J., concurring in part and dissenting in part) ("the instruction regarding discovery abuse by [the defendant] improperly delegated to the jury the authority to participate, in effect, in the imposition of discovery sanctions that are the proper province of the district court"); Jim Gash, Punitive Damages, Other Acts Evidence, and the Constitution, 2004 Utah L. Rev. 1191, 1212 (2004) (introduction of evidence of a defendant's misconduct separate and apart from the allegations of the complaint "creates a real danger that it will be used improperly to punish the party against whom it is being offered. Consequently, whether or not the other acts evidence is relevant, it is almost always highly prejudicial, even devastating, to the party against whom it is offered. This naturally creates powerful incentives for parties to seek to introduce such evidence against their adversaries.").

B. Evidence Supporting Punitive Damages Must Relate to the Conduct That Provides the Basis for CPH's Claims.

The Court's Sanctions Orders allow the jury to consider the Court's findings of litigation misconduct when determining the propriety of punitive damages, in violation of the Due Process Clauses of the Fourteenth Amendment. See State Farm Mutual Auto Insurance v. Campbell, 538 U.S. 408 (2003). Campbell emphasizes the Supreme Court's concern that evidence used to justify punitive damage awards must be closely related to the conduct that gives rise to the plaintiff's claim for punitive damages. "A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be

punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." Id. at 422-23.

Here, the approach employed by the Court expressly authorizes the jury to award punitive damages based on litigation conduct, rather than the conduct that gives rise to CPH's claims (*i.e,.* Morgan Stanley's alleged participation in the Sunbeam fraud). Allowing the jury to consider litigation misconduct when deciding punitive damages creates the very real possibility that the jury will award punitive damages based on conduct wholly unrelated to CPH's claims. And, of course, once findings of litigation misconduct are submitted to the jury, it will be impossible for any reviewing court to determine the basis of any subsequent punitive damages award. See id. (rejecting argument that dissimilar evidence submitted to the jury did not form the basis of the punitive damages award.)

As such, it would violate Morgan Stanley's due process rights if the Court reads any statement concerning litigation misconduct to the jury, or if CPH is permitted to introduce any evidence of that litigation misconduct. Accordingly, the Court should reconsider and withdraw its decision to permit the jury to hear about and consider Morgan Stanley's litigation misconduct in any part of the trial.

II. THE COURT'S SANCTIONS ORDERS ARE IMPROPER, OVERBROAD, AND VIOLATE BOTH FLORIDA LAW AND MORGAN STANLEY'S CONSTITUTIONAL RIGHTS.

A. The Court's Sanctions Are Overly Harsh and Not Commensurate with the Litigation Misconduct Found.

It is well established that discovery sanctions must be commensurate with discovery misconduct. See Garden-Aire Vill. Sea Haven v. Decker, 433 So. 2d 676, 677 (Fla. 4th DCA 1983) (citing Hart v. Weaver, 364 So. 2d 524 (Fla. 2d DCA 1978),

and overturning entry of default judgment as a discovery sanction). There can be no question that the Court's Sanctions Orders impose drastic sanctions on Morgan Stanley. Indeed, the Court's sanctions deprive Morgan Stanley of any meaningful ability to defend against CPH's claims – including CPH's claim for punitive damages. By entering a de facto default on most of the elements of CPH's claims, the Court has so thoroughly stacked the deck that it would be impossible for Morgan Stanley to receive a fair and impartial trial. Put simply, the Court has imposed the harshest of sanctions.

The Court, however, never made any finding that Morgan Stanley's litigation misconduct actually affected CPH's ability to prosecute its claims for the underlying torts. It is axiomatic that Morgan Stanley's failure to produce documents could only have hindered CPH's prosecution if the documents that Morgan Stanley failed to produce were relevant to CPH's underlying tort claims.[1] For all anyone knows, the emails that have not been found – and that Morgan Stanley has requested additional time to retrieve and produce – may have nothing to do with any issue in this case and, for all anyone knows, might actually support Morgan Stanley's defense.

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[1] The Sanctions Orders are also overbroad in that they purport to punish Morgan Stanley for the alleged violation of SEC regulations. See March 23 Order at 10 ("MS & Co. desperately wanted to hide an active SEC inquiry into its email retention practices."). Any discovery misconduct as it relates to the SEC, including Morgan Stanley's violation of SEC regulations, is inadmissible under the preemption doctrine established by Buckman Co. v. Plaintiffs' Legal Commission, 531 U.S. 341, 350 (2001). The Buckman Court held that allegations of fraud on federal agencies "inevitably conflict" with the federal policy of giving federal agencies broad discretion to balance their objectives in regulating disclosures made to them. Thus, the Supreme Court held that state law fraud-on-the-agency claims conflict with, and are therefore preempted by, federal law, finding that "[s]tate-law fraud-on-the-FDA claims inevitably conflict with the FDA's responsibility to police fraud consistently with the Administration's judgment and objectives." Id. at 350.

Thus, the Court has improperly issued "death penalty" sanctions without anything more than the possibility that the withheld documents could have been relevant. See generally New Hampshire Ins. Co. v. Royal Ins. Co., 559 So. 2d 102, 103 (Fla. 4th DCA 1990) (reversing judgment entered as discovery sanction because party requesting discovery failed to show prejudice). The Court erred in taking such a leap, and the consequences of the Court's error are dire – Morgan Stanley's rights under Florida law, the Florida and United States Constitutions have been violated.[2]

The purpose of Florida Rule of Civil Procedure 1.380(b) is to ensure compliance with the discovery rules and any court orders compelling discovery, not to punish or penalize the party in violation. See Garden-Aire Vill. Sea Haven v. Decker, 433 So. 2d 676, 677 (Fla. 4th DCA 1983) (citing Allstate Ins. Co. v. Biddy, 392 So. 2d 938 (Fla. 2d DCA 1980) ("The purpose of reposing in the trial court the authority to enter a default is

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[2] The Court's Sanctions Orders deprive Morgan Stanley of its day in court and thus are excessive. See Baker v. General Motors Corp., 86 F.3d 811, 817 (8th Cir. 1996) (internal citations omitted), rev'd on other grounds, 522 U.S. 222 (1998) ("As this court has stated previously, '[t]here is a strong policy favoring a trial on the merits and against depriving a party of his day in court.' ... The sanction in this case failed to achieve a balance between the policies of preventing discovery delays and deciding cases on the merits. Such a balance recognizes that the opportunity to be heard is a litigant's 'most precious right and should be sparingly denied.' ... GM was not given the right to be heard. Instead, the jury was asked, essentially, to place a monetary value on the loss of human life. Before issuing such a sanction, fairness required the court to consider whether a more 'just and effective' sanction was available. ... In this situation, other, less severe sanctions (including monetary fines against GM and continuances for the plaintiffs) were both available and appropriate. While we do not condone GM's failure to meet its discovery obligations, we find that the sanction chosen by the district court was simply too severe for the facts presented and should have been drawn more narrowly. ... By providing that the fuel pump was defective and continued to operate here, the sanction forced the jury to find for the plaintiffs. Although the case ostensibly proceeded to trial on the issue whether the defect 'directly caused or directly contributed to cause' Garner's death, in effect, the jury instructions had already decided the matter for the jury. Because the district court abused its discretion in entering such a broad sanction, we reverse for imposition of a lesser sanction and for a new trial.").

to ensure compliance with its order, not to punish or penalize"); see also Carr v. Reese, 788 So. 2d 1067, 1072 (Fla. 2d DCA 2001) (reversing default judgment entered as discovery sanction); United Servs. Auto. Ass'n v. Strasser, 492 So. 2d 399, 402 (Fla. 4th DCA 1986) (same). Here, the Court issued sanctions that far exceed those required to ensure compliance with the Court's discovery orders and, by so doing, crossed the forbidden line into the realm of punishment.

B. The Sanctions Orders Impermissibly Instruct the Jury to Award Punitive Damages and Preclude Morgan Stanley from Introduction Mitigating Evidence.

The law is clear that the Court cannot instruct the jury to award punitive damages. See Humana Health Ins. Co. of Fla. v. Chipps, 802 So. 2d 492 (Fla. 4th DCA 2001); see also FSJI PD 1 a.(2)(a) ("Punitive damages are warranted if you find by clear and convincing evidence ...") (emphasis added). And although the Court may not be proposing to give that exact instruction, the Court's proposed instructions are different only in form, not in substance.[3] The Court has held that the jury will be instructed that it must take as true *for all purposes* the Court's findings that Morgan Stanley has engaged in the conduct alleged in the First Amended Complaint. In other words, the jury will effectively be instructed that the Court has all but found that punitive damages are

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[3] Although the Court has repeatedly stated that its orders were not defaults, the Court has on at least one occasion noted that its Order was effectively a default. Hrg. Tran. of March 31, 2005 at p 11 In any event, describing the effect of the Orders as anything other than a default clearly fails the "duck" test. See Florida Bar v. Neiman, 816 So. 2d 587, 599 (Fla. 2002) ("In common parlance, Neiman's activities fail the 'duck' test. That is, in common parlance, one would expect that if it looks like a duck, and walks, talks, and acts like a duck, one can usually safely assume it is a duck"); North Broward Hosp. Dist. v. Eldred, 466 So. 2d 1210, 1211 (Fla. 4th DCA 1985) ("we are convinced that if it looks, walks, quacks and swims like a duck, that is what it is").

appropriate[4], thus denying Morgan Stanley of any of the constitutional protections accorded a defendant in this quasi-criminal proceeding. See Campbell, 123 S. Ct. at 1520 (recognizing that punitive damages "serve the same purposes as criminal penalties"); Oberg, 512 U.S. at 420 (recognizing that the Court has strongly emphasized the importance of the procedural component of the Due Process Clause in dealing with punitive damages issues).

In Humana, the trial court struck the defendant's pleading as a sanction for discovery misconduct and entered a default judgment. 802 So. 2d at 494. At trial, the sole issue for the jury was damages. After the close of the evidence, the court instructed the jury "that all of the other factors in the standard jury instruction on punitive damages were established as a matter of law, and that [the plaintiff was] 'entitled' to recover both compensatory and punitive damages as a matter of law." Id. at 495. The court further instructed the jury that "Humana's conduct was 'so gross and flagrant as to show a reckless disregard of human life or the safety of person exposed to the effects of its conduct'" and that "Humana's conduct 'showed such an entire lack of care that Humana must have wantonly and recklessly disregarded the safety and welfare of the public.'" Id. at 496. The court did not instruct the jury that it had the discretion not to award punitive damages. Id. Not surprisingly, the jury awarded approximately $1.1 million in compensatory damages and $78.5 million in punitive damages against Humana. Id.

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[4] In order for the case to proceed to the punitive phase, the jury will also be required to find the elements of reliance and damages by clear and convincing evidence. See Defendant's Motion to Clarify the Proper Scope of the Liability and Punitive Phases of Trial.

On appeal, the Fourth District held that the trial court's instructions on punitive damages invaded the clear province of the jury by characterizing the conduct of Humana. Id. at 495-96 (court's instructions "interfered with the jury's fact-finding function by characterizing and summarizing the evidence"). In reaching this conclusion, the Fourth District emphasized that even though the trial court had entered a default judgment on the entitlement to punitive damages, "[t]he jury could have awarded no punitive damages if it had determined that Humana's conduct was not as egregious as the court's instruction made it out to be." Id. Thus, the court held that: "While there is overlap between the issues of entitlement to punitive damages and the amount of such damages to be awarded, care should have been taken to let the jury arrive at its own decision regarding the egregiousness of the defendant's conduct." Id. (citing Bankers Multiple Line Ins. Co. v. Farish, 464 So. 2d 530, 532 (Fla. 1985).

The Fourth District further held that the trial court "improperly prevented Humana from introducing mitigating evidence to rebut testimony that Humana's managed care practices violated industry standards." Humana, 802 So. 2d at 496. Evidence of this sort was relevant to the egregiousness of Humana's conduct and could have impacted the punitive damages award. Id. Thus, the Fourth District held that the jury should have been permitted to consider "evidence which would have had the effect of 'reducing or softening the moral or social culpability attaching to [the defendant's] act...' McClelland v. Climax Hosiery Mills, 252 N.Y. 347, 169 N.E. 605, 608 (1930) (Cardozo, C.J., concurring); see also St. Regis Paper Co. v. Watson, 428 So. 2d 243, 246-47 (Fla. 1983) (holding the jury, in assessing punitive damages should consider 'the nature, extent, and enormity of the wrong, the intent of the party committing it and all

circumstances attending the particular incident, as well as any mitigating circumstances') (citation omitted)." Id.

In sum, therefore, the Fourth District held that: (i) a trial court may not interfere with the jury's fact finding role with respect to punitive damages by characterizing the defendant's conduct and summarizing the evidence that would support an punitive damages award; and (ii) a defendant defending a punitive damages claim must be allowed to present mitigating evidence regarding reprehensibility. The Court's Sanctions Orders violate both of these principles. At a minimum, Humana mandates that this Court instruct the jury that the jury has the discretion not to award punitive damages and that the Court allow Morgan Stanley to put on evidence to rebut CPH's claim that punitive damages are warranted in the first instance, and further to put on evidence to defend against the amount of punitive damages, even if that evidence conflicts with the Court's default findings.

C. The Sanctions Orders Violate Morgan Stanley's Constitutional Rights.

This Court's decision on how it intends to conduct the trial of this case necessarily deprives Morgan Stanley of its right to a fair trial on the issue of punitive damages. As the United States Supreme Court has recognized, punitive damages are imposed to redress the state's interest in punishing and deterring unlawful conduct and therefore serve the same purposes as criminal penalties. State Farm Mut. Auto Ins. v Campbell, 538 U.S. 408, 416 (2003). Unlike criminal defendants, however, civil defendants "have not been accorded the protections applicable in a criminal proceeding." Id. at 417-18. As a result, the Supreme Court has expressed grave concern "over the imprecise manner in which punitive damages systems are

administered." Id. There is also concern for the potential of juries to "use their verdicts to express biases against big businesses, particularly those without strong local presences." Id. at 417 (quoting Honda Motor Co v. Oberg, 512 U.S. 415, (1994)). This danger is exacerbated by vague instructions and lack of appropriate guidance for juries in their duty of "assigning appropriate weight to evidence that is relevant and not evidence that is only tangential or only inflammatory." Id.

In this case, reading the Court's findings during trial and permitting Plaintiff to bolster those findings with (in accordance with the Court's statements during hearings) unrebuttable evidence, the Court's instructions will undoubtedly serve to inflame and unduly prejudice the jury in its consideration of whether to award punitive damages against Morgan Stanley. The Court has relieved CPH of any burden of proving serious misconduct and has indicated that it will instruct the jury that Morgan Stanley is guilty of numerous inflammatory charges made by CPH, including but not limited to the Court's findings that:

- Morgan Stanley developed a strategy for Sunbeam to use its "fraudulently-inflated" stock in the acquisition of Coleman.
- Morgan Stanley decided not to correct "material misrepresentations."
- Morgan Stanley assisted Sunbeam in "concealing" problems.
- Morgan Stanley provided Sunbeam with a "plan that would allow [it] to conceal [the] fraud."
- "Morgan Stanley's strategy was doubly deceptive."
- "Morgan Stanley prepared and provided CPH with false financial and business information."
- "Morgan Stanley misrepresented Sunbeam's financial performance."

- "Morgan Stanley did not correct any of the false and misleading statements it and Sunbeam had made."

- "[W]ith Morgan Stanley's knowledge and assistance, Sunbeam prepared and issued a false press release that affirmatively misstated and concealed Sunbeam's true condition."

- "As Morgan Stanley was fully aware, the March 19, 1998 press release was false, misleading, and failed to disclose material information."

- Morgan Stanley knew that if the transactions did not close, it "would not be paid its $10.28 million fee for the Coleman acquisition or its $22.5 million fee for underwriting the subordinated debenture offering."

- "Morgan Stanley received $22.5 million for the subordinated debenture offering and $10.28 million for the Coleman acquisition."

- "Morgan Stanley participated in a scheme to mislead CPH and others and cover up the massive fraud at Sunbeam until Morgan Stanley and Sunbeam could close the purchase of Coleman."

- "Morgan Stanley provided CPH with false information."

- "Morgan Stanley also actively assisted Sunbeam in concealing Sunbeam's disastrous first quarter ..."

- "Morgan Stanley knew that its statements to were materially false and misleading and omitted the true facts."

- "Morgan Stanley intended that CPH rely on Morgan Stanley's representations concerning Sunbeam."

- "Morgan Stanley knew of Dunlap's fraudulent scheme and helped to conceal it."

- "Morgan Stanley "script[ed] Dunlap's false public statements."

- "Morgan Stanley conspired with Dunlap and other senior Sunbeam executives to conceal the truth about Sunbeam's financial performance and business operations."

- "Morgan Stanley committed overt acts in furtherance of the conspiracy."

The Court has stated that it will instruct the jury that these unproven facts must be taken as true for all purposes and that the jury may consider these "facts" – as to which no witness will have testified and no documentary evidence submitted -- and other equally damning conclusions (such as the Court's findings of litigation misconduct) in assessing punitive damages. As if this were not enough, the Court stated that it will in effect tell the jury that Morgan Stanley has admitted these facts as true, when it most certainly has not. And further still, the Court has precluded Morgan Stanley from presenting any evidence or testimony to contradict the findings of the Court or the evidence adduced by CPH.

Thus, the Court has officially sanctioned a process in which CPH will be allowed to elicit additional testimony and evidence on these issues even though the jury will have already been instructed that the allegations are true. Again, the Court has forbidden Morgan Stanley to take issue with that evidence or challenge it in any way. In so doing, the Court has substituted its judgment for that of the jury on the essential elements of the case and has virtually preordained that the jury will have no choice but to render a verdict for the compensatory damages CPH seeks.[5]

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[5] Depriving Morgan Stanley of the right to put on evidence fails the three-part test established by the U.S. Supreme Court in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), and refined in Connecticut v. Doehr, 501 U.S. 1 (1991), and thus, violates the Due Process Clause. Under that test, the Court must consider (1) the private interest affected by the challenged procedures; (2) the risk of an erroneous deprivation of that interest presented by those procedures and the probable value of additional safeguards; and (3) the interest of the opposing party, with due regard for any interest the State may have in utilizing the challenged procedure or forgoing the burden associated with providing additional safeguards. Doehr, 501 U.S. at 11. Here, Morgan Stanley's interest in defending against the quasi-criminal punitive damages claim is substantial. In contrast, the only possible justification for conducting a one-sided punitive damages trial is to punish the defendant for its failure to properly respond to discovery. But that objective has already been satisfied by the imposition of other sanctions such as awarding CPH its attorneys fees and costs. Moreover, allowing a fair fight would impose no undue burden on the State since that is the way civil (and criminal) litigation customarily is conducted.

Moreover, in adopting the First Amended Complaint's highly prejudicial and inflammatory language, the Court in effect makes those words its own. The bias and passion of these inflammatory words will indisputably and profoundly affect a jury sitting within the boundaries of the Court's state-sanctioned authority. At best, the jury will be confused by its role in returning a verdict for compensatory or punitive damages, and at worst, the jury will believe that the Court is mandating a verdict that will punish conduct the Court has already judicially decreed as being fraudulent, misleading, deceptive, and motivated by monetary gain. The process put into place by the Court's Sanctions Orders dispenses with any pretense of conducting a fair trial and ignores the constitutional constraints on the imposition of punitive damages against civil defendants.

Pursuant to BMW of North America, Inc.. v. Gore, 517 U.S. 559, 574-75 (1996), reviewing courts must assess punitive damages in light of three guideposts: (i) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. Further, the failure to provide meaningful judicial review of the amount of punitive damage awards offends the due process right to be free of grossly excessive punitive damage awards. See Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415 (1994) (striking down provision in Oregon Constitution that prohibited judicial review where the sole challenge was excessiveness); Owens-Corning Fiberglass Corp. v. Ballard, 749 So. 2d 483 (Fla. 1999). As the U.S. Supreme Court explained, "In the case before us today, we are not directly concerned with the character of the standard that will identify unconstitutionally

excessive awards; rather we are confronted with the question of what procedures are necessary to ensure that punitive damages are not imposed in an arbitrary manner." Oberg, 512 U.S. at 420. The Court ultimately held that judicial review must be available as a procedural safeguard to violation of a defendant's due process rights.

If the Court follows the procedures outlined in its Sanctions Orders, it will be impossible to apply the Gore criteria post-verdict to any award of punitive damages. The Court has mandated that the jury determine whether punitive damages are appropriate without any defense by Morgan Stanley. And according to this Court's March 23 Order, the jury will be instructed that it can consider Morgan Stanley's actions, as enumerated by the Court, in "determining whether an award of punitive damages is appropriate." Therefore, if the jury returns a verdict for punitive damages, this Court (and later appellate courts) will be charged with reviewing the jury's verdict for reasonableness and in light of the Gore factors. The reviewing court will be severely hamstrung, however, because there will be no meaningful way to assess the Gore factors in the record when Morgan Stanley has been precluded from introducing evidence relevant to those factors.

Finally, the Court's sanctions Orders violate Morgan Stanley's due process rights to the extent that the Court has deemed admitted allegations of misconduct that may have been legal in the jurisdictions in which they took place. See State Farm Ins. Co. v. Campbell, 123 S. Ct. 1513, 1522 (2003)("A State cannot punish a defendant for conduct that may have been lawful where it occurred) (emphasis added); Id. at 1522-23 ("A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.");

BMW of N. Am. v. Gore, 517 U.S. 559, 672 (1996) ("[A] State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other states.")

The manner in which this Court has decreed that the trial of this case will be conducted thus violates the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States, as well Section 2 and 9 of Article 1 of the Florida Constitution. These constitutional infirmities require reconsideration of the Court's Sanctions Orders. At the very least, the Court should allow Morgan Stanley to cross-examine witnesses to establish their credibility, bias, and motive.

CONCLUSION

For all the foregoing reason, Defendant Morgan Stanley respectively requests that this Court reconsider its March 1st and 23rd Orders. Reconsideration of the Sanctions order, coupled with granting the previously requested continuance, would permit a fair trial on the merits and serve the interests of justice. The discovery problems could be addressed. (See Affidavit of Richard Anfang.) Both sides could fairly contest the issues on the merits. The cost to the CPH necessitated by the failures in discovery and any delay, and to the judicial system, would be borne by Morgan Stanley. That cost would be in addition to the monetary sanctions the Court has already imposed (and could additionally impose) on Morgan Stanley for violations of the Court's orders.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 4th day of April, 2004.

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EXHIBIT A

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

Affidavit of Richard Anfang

I, Richard Anfang, being first duly sworn under oath, and under penalty of perjury, declare and state as follows:

1. I am a Managing Director of Morgan Stanley & Co. Incorporated, working in Morgan Stanley's Information Technology Division. My business address is 750 7th Avenue, New York, NY 10020. I have personal knowledge of the facts stated herein unless otherwise indicated.

2. After the hearing held by the Court on February 14, 2005 in this matter, I became personally involved in overseeing Morgan Stanley's attempts to cure defects in its previous email productions to CPH and to provide as complete an email production as possible to CPH by no later than March 21, 2005.

3. In its March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment (the "Order", attached hereto as Exhibit A), the Court identified a number of issues of concern relating to Morgan Stanley's email productions in this matter. Specifically, the Court cited:

- The fact that the scripts Morgan Stanley used to process emails into the Archive caused the bodies of some messages to be truncated (see Order at 11);

- An error in the scripts used to migrate emails from SDLT onto the Archive, causing the loss of what was believed to be approximately 5% of the harvested emails, based on a sample (see id.);

- An analysis requested by the SEC showing that, of a sample of 199 (out of approximately 12,000) tapes, approximately 10% appear to have been overwritten after January 2001 (see id.);

- A software error that prevented the capture of blind carbon copies by the Archive (see id. at 12);

- Certain searches having been conducted using case-sensitive user names (see id.);

- For a time, email group membership for periods prior to early 2003 having been based on group membership as of early 2003, and therefore not reflecting changes to group membership prior to that time (see id.; see also Letter to the SEC, dated February 24, 2005 ("February 24 Letter"), attached hereto as Exhibit B);

- Notwithstanding Morgan Stanley's understanding to the contrary, (see Transcript of 3/14/05 Hearing at 3646-49, attached hereto as Exhibit C), our third-party vendor National Data Conversion Institute ("NDCI") not having searched all available tapes for emails from

certain legacy mail systems that had been in use at Morgan Stanley prior to 2000, including CCMail (see Order at 13); and

- Between approximately February 23 and March 5, 2005, Morgan Stanley's discovery of tapes that we do not believe previously had been processed by NDCI as part of the process of migrating pre-2003 emails onto the Archive. Specifically found were: 282 tapes in communications rooms in Morgan Stanley IT spaces across North America; 3,536 tapes found in a secure IT storage area in Morgan Stanley's IT facility in Brooklyn, NY; 389 tapes found as a result of physical searches of the workspaces of IT personnel in North America; and 2,718 tapes found by Recall, Morgan Stanley's off-site storage vendor, after Morgan Stanley insisted that Recall conduct a physical search of its facilities, see id.

4. It is my understanding and belief that a significant number of these issues have already been resolved, such that they would not affect a search conducted today for emails responsive to the search terms set forth in the April 16, 2004 Agreed Order (the "Agreed Order").

5. As the Court recognized in the Order, Morgan Stanley has remedied the issue relating to case-sensitivity in inquiries. See id. at 12. I understand that this issue was resolved in advance of Morgan Stanley's productions to CPH earlier in March 2005, and would not be an issue if Morgan Stanley were permitted to re-run searches for responsive emails in the future.

6. Similarly, the issue of group email membership was largely resolved in advance of Morgan Stanley's productions to CPH earlier in March 2005, see February 24 Letter at 1-2, and the resolution would be equally effective for subsequent searches Morgan Stanley undertook in connection with this litigation.

7. The issue of blind carbon copies has not affected searches for emails responsive to the Agreed Order. As the February 24 Letter makes clear, that issue affects users of Microsoft Exchange, the use of which began at Morgan Stanley no earlier than August 2003. See id. at 3.

8. While the Court expressed concern that 10% of the tapes in a sample requested by the SEC appear to have been overwritten after January 2001, this does not mean that Morgan Stanley lost 10% of the unique emails on those tapes. There was significant redundancy in the email backup systems Morgan Stanley utilized in the relevant periods; the preservation of tapes was a prophylactic measure that could preserve multiple copies of any particular email. In fact, in light of the system of multiple backups, and the fact that each email would have been backed up off of the systems of the sender and recipient(s), Morgan Stanley believes that, of the tapes about which the SEC inquired, as a statistical matter, it is likely that only 1.2% of the unique email on those overwritten tapes would have been lost. See February 10, 2005 letter to the SEC (the "Wells Response"), attached hereto as Exhibit D, at 15-20. Of course, if only 1.2% of the unique emails on the overwritten tapes were likely lost, it stands to reason that this overwriting resulted in a loss of far less than 1% of the overall quantum of unique emails that had been preserved on backup tapes.

9. Morgan Stanley also continues to make diligent and significant efforts to remediate those problems the Court identified in the Order that remain unresolved.

10. With regard to the tapes that were found in February and March 2005 and had not been processed previously by NDCI,[1] many of these tapes (starting with the tapes we believe are most likely to contain email from earlier time periods) have been processed by NDCI in the last few weeks. Morgan Stanley already has uploaded approximately 7 million unique emails from these tapes onto the Archive. NDCI is processing the remaining tapes (other than the 318 tapes that Renew Data has not yet returned to Morgan Stanley) on an expedited basis, and I understand that they currently expect to have completed processing the production email on the tapes within two months.

11. In processing these tapes, NDCI has been directed to look for, extract, and process CCMail and other legacy mail systems that might have been in use at Morgan Stanley prior to 2000. It is my understanding that NDCI has been seeking, finding, and extracting limited amounts of such production mail.

12. We currently are considering how best to resolve the message truncation issue that occurred in the course of the migration process, as well as the problem of emails lost in the migration from SDLT onto the Archive. For purposes of this litigation, I believe these issues should have been solved by two of the searches we directed to be conducted in March 2005: the search of the SDLTs NDCI had, and the search of the DLTs that contained the earliest known full backup, if any, for each of the 36 users identified in the Agreed Order. My understanding is that both these searches were

[1] In addition to the tapes the Court identified in the Order, Recall located 95 tapes on March 14, 2005, which have been sent to NDCI.

conducted, looking for emails responsive to the search terms of the Agreed Order, and that neither the truncated message nor migration loss issue would have affected these searches. Indeed, it is my understanding that these searches yielded additional emails, which were produced to CPH, that were not found on the Archive.

13. The search of SDLTs for emails responsive to the search terms of the Agreed Order could be run again once NDCI has completed processing the newly-found tapes, including extracting CCMail or other types of production email not previously extracted.

14. Based on my understanding that NDCI expects to complete processing the tapes within two months, I believe that a supplemental search of the SDLTs could likely be completed within three months from today. I further believe that this approach would yield responsive email, if any, found on the over 40,000 backup tapes, and over 8 billion emails, that NDCI will have processed by the time of such supplemental search.

I declare, under penalty of perjury, that the above statements are true and correct.

This 2nd day of April, 2005.

Richard Anfang

Sworn to and subscribed before me this 2nd day of April, 2005.

Claire N. Garrett
Notary Public
My Commission Expires:

11/1/08

CLAIRE N. GARRETT
Notary Public, State of New York
No. 01GA6117673
Qualified in Westchester County
Commission Expires November 01, 2008

EXHIBIT A

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON CPH'S RENEWED MOTION FOR ENTRY OF DEFAULT JUDGMENT

THIS CAUSE came before the Court March 14 and 15, 2005, on CPH's Renewed Motion for Entry of Default Judgment, with both parties well represented by counsel.

Coleman (Parent) Holdings, Inc. ("CPH"), has sued Morgan Stanley & Co., Inc. ("MS & Co."), for aiding and abetting and conspiring with Sunbeam to perpetrate a fraud. Early in the case, CPH was concerned that MS & Co. was not thoroughly looking for emails responsive to its discovery requests. On April 16, 2004, the Court entered an Agreed Order ("Agreed Order") that required MS & Co. to search its oldest full backup tapes for emails subject to certain parameters and certify compliance. MS & Co. certified compliance with the Agreed Order on June 23, 2004. On November 17, 2004, CPH learned that MS & Co. had found some backup tapes that had not been searched. On January 26, 2005 it served its Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order ("Adverse Inference Motion"), claiming that MS & Co.'s violation of the Agreed Order, coupled with its systemic overwriting of emails after 12 months, justified an adverse inference against it. The Court ordered certain limited discovery. Responses to that discovery prompted CPH to orally amend its Adverse Inference Motion to seek more severe sanctions.

The Court held an evidentiary hearing on the Adverse Inference Motion on February

14, 2005. On March 1, 2005 it issued its Amended Order on Coleman (Parent) Holdings Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order ("Adverse Inference Order"). In its current Motion, CPH argues that it has since learned that the discovery abuses addressed in the Adverse Inference Motion and Order represent only a sampling of discovery abuses perpetrated by MS & Co. and that the abuses have continued, unabated. It claims that these abuses, when taken as a whole, infect the entire case. To understand CPH's argument, it is necessary to go back to the beginning.

This case arises out of an acquisition transaction that was negotiated and consummated in late 1997 and early 1998, in which CPH sold its 82% interest in the Coleman Company, Inc., to Sunbeam Corporation. MS & Co. served as financial advisor to Sunbeam for parts of the acquisition transaction and served as the lead underwriter for a $750,000,000.00 debenture offering that Sunbeam used to finance the cash portion of the deal.

CPH's Complaint[1] alleged claims against MS & Co. arising from this transaction for fraudulent misrepresentation, negligent misrepresentation, aiding and abetting fraud, and conspiracy, and sought damages of at least $485 million.

On May 12, 2003, MS & Co. was served with the Complaint and CPH's First Request for Production of Documents ("Request"). The Request sought, in essence, all documents connected with the Sunbeam deal. "Documents" was broadly defined, and specifically included items electronically stored. Concerned that, out of more than 8,000 pages of documents produced, it had received only a handful of emails, CPH on October 29, 2003, served its Motion to Compel Concerning E-Mails. That motion sought an order requiring MS & Co. to make a full investigation for email messages, including a search of magnetic tapes and hard drives; produce within 10 days all emails located; and produce a Rule 1.310 witness

[1]On February 17, 2005, CPH served its First Amended Complaint, which dropped the claims against MS & Co. for fraudulent and negligent misrepresentation, leaving only the aiding and abetting and conspiracy claims.

within 20 days "to describe the search that was conducted, identify any gaps in Morgan Stanley's production, and explain the reasons for any gaps."

In its Opposition to Coleman (Parent) Holdings, Inc.'s Motion to Compel served November 4, 2003, MS & Co. argued that CPH wanted "this Court to order a massive safari into the remote corners of MS & Co.'s email backup systems" and represented that "(t)he restoration efforts demanded by CPH would *cost at least hundreds of thousands of dollars* and require several months to complete (emphasis in original). MS & Co. argued that CPH's "true" motive was to "harass and burden MS & Co. with unnecessary and costly discovery demands and attempt to smear MS & Co. with out-of-context recitations from other proceedings" because "CPH *concedes* that MS & Co. is only able to restore email from backup tapes from January 2000 and later - *more than a year and a half after the events that allegedly gave rise to CPH's claims*," (emphasis in original).

CPH's "concession" was based on representations like the kind made to it by MS & Co.'s counsel in a March 11, 2004 letter that suggested "(t)he burden on Morgan Stanley from . . . a wholesale restoration [of email back up tapes], both in terms of dollars and manpower would be enormous. Regardless of who performs the initial restoration, it would require hundreds (perhaps thousands) of attorney-hours to review millions of irrelevant and non-responsive e-mails . . ."[2]

In response to CPH's Motion to Compel, the parties agreed to reciprocal corporate

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[2]Complaints about MS & Co.'s tactics are not new. See Ex. 196 [February 26, 2004, letter from EEOC to Hon. Ronald L. Ellis in EEOC/Schieffelin v. Morgan Stanley & Co., Inc., et al., 01-CV-8421 (RMB) (RLE) (S.D.N.Y.): ("(w)hen EEOC received [Morgan Stanley's] January 27, 2004 Responses to EEOC's Fifth Requests for Production of Documents which did not contain any e-mails, the parties communicated further. At that time, Morgan Stanley took the position that searching for e-mails would be burdensome both in regards to expense and the time it would take to respond. While the parties were in the process of attempting to work out these disputes, EEOC for the first time learned that [Morgan Stanley has] an easy, systematic ability to search for relevant documents. In a February 16, 2004, conversation with an IT representative of [Morgan Stanley], EEOC learned that [Morgan Stanley has] an e-mail system, which, while not yet fully comprehensive, was easily searchable on February 18, 2004, the close of discovery . . . which is certain to produce discoverable information highly relevant to EEOC's and Plaintiff-Intervenor's claims . . . After disclosing their state-of-the-art system to EEOC, [Morgan Stanley] dropped [its] assertion that the process was too expensive, but maintained that they refuse to search for e-mails because it is burdensome for attorneys to review large numbers of documents prior to production.")

depositions on the email issue. CPH deposed Robert Saunders on February 10, 2004.[3] After completion of the corporate representative depositions, and unable to obtain MS & Co.'s agreement to a mutual email restoration protocol, CPH served its Motion for Permission to have Third Party Retrieve Morgan Stanley E-Mail and Other Responsive Documents, proposing that a third party vendor be given access to both parties' email systems for restoration at each party's expense. At the hearing on that Motion, CPH offered to split the expenses evenly. MS & Co. refused.

MS & Co.'s continued assertions that the email searches could be conducted only at enormous cost and would be fruitless because there were not backup tapes with email from 1997 and 1998 were confirmed to the Court by MS & Co.'s counsel, Thomas Clare of Kirkland & Ellis, at a hearing held March 19, 2004:

> Mr. Scarola: Electronic records of e-mails that have been exchanged.
> The Court: Do we agree that there has been such a request outstanding?
> Mr. Clare: There has been a request outstanding.
> The Court: And have you all objected?
> Mr. Clare: From the beginning.
> The Court: And what's the basis of the objection?
> Mr. Clare: We objected to the breadth of the request that they're making. And to answer Your Honor's question directly – and the burden that is associated with it – that given the particular e-mail back-up tapes that are in existence five, six years after the fact of these transactions, that the scope of the e-mail request that they are seeking is improperly and unduly burdensome given the enormous costs that would be required, given the fact that the time period for which we have back-up tapes post dates the events by several years.

Unable to resolve the email issue, on April 9, 2004, CPH served its Motion to Compel

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[3]Saunders provided misleading information in his deposition. See footnote 12, infra.

Concerning E-Mails and Other Electronic Documents. On the eve of the hearing on CPH's Motion to Compel, the parties reached an accommodation, and on April 16, 2004 the Court entered the Agreed Order. Under the Agreed Order, MS & Co. was required to (1) search the oldest full backup tape for each of 36 MS & Co. employees involved in the Sunbeam transaction; (2) review emails dated from February 15, 1998, through April 15, 1998, and emails containing any of 29 specified search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004, all nonprivileged emails responsive to CPH's document requests; (4) give CPH a privilege log; and (5) certify its full compliance with the Agreed Order.

As required by the Agreed Order, MS & Co. produced about 1,300 pages of emails on May 14, 2004. It did not, however, certify compliance with the Agreed Order. After prompting by CPH, on June 23, 2004, MS & Co. served a certificate of compliance signed by Arthur Riel, an Executive Director and manager of its Law/Compliance IT Group.[4]

CPH got its first indication that the Agreed Order may have been violated in the late fall of 2004.

On November 17, 2004, Clare wrote Michael Brody of Jenner & Block, CPH's outside counsel, that MS & Co. had "discovered additional e-mail backup tapes . . ."; that "(t)he data on some of [the] newly discovered tapes has been restored;" that "we have re-run the searches described in [the Agreed Order]"; that "some responsive e-mails have been located as a result of that process"; and that "(w)e will produce the responsive documents to you as soon as the production is finalized."

On December 14, 2004, Brody wrote Clare back:

> in [your November 17, 2004 letter], you state that Morgan Stanley located additional email backup tapes, and that you

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[4]Though CPH would not learn for months that the certificate was false, and even then the magnitude of MS & Co.'s misrepresentations would not be admitted, MS & Co. personnel, including in-house counsel, knew the certification of compliance was false when made.

> would be producing documents soon. Within two days of that letter, you produced some emails to us. In your November 17, 2004 letter, however, you also indicated that "some of the backup tapes are still being restored." Have those backup tapes been restored? Have you found additional responsive emails? If so, when will Morgan Stanley produce those emails? How is it that the tapes were only recently located?

On December 17, 2004, Clare wrote back, telling Brody "(n)o additional responsive e-mails have been located since our November production."[5]

Brody wrote back to Clare December 30, 2004, noting the deficiencies in Clare's correspondence:

> You do not inform us whether the review of the recently-located backup tapes still is ongoing. Please confirm that all email backup tapes from the relevant time period have been reviewed and all responsive emails have been produced. If the review still is proceeding, please let us know when the review will be completed.

Clare wrote back on January 11, 2005, telling Brody that the "restoration of e-mail backup tapes is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

Concerned about Clare's lack of candor, on January 19, 2005 Brody wrote again:

> I write in response to your January 11, 2005 letter concerning e-mails back-up tapes. Unfortunately, your letter raises more questions than it answers. As I requested in my December 14, 2004 letter, please explain the circumstances under which Morgan Stanley located these backup tapes and advise us of the date on which the tapes were located.

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[5]Not only does this letter fail to answer Brody's legitimate questions, it implies that MS &Co. was still processing and reviewing emails from the newly found tapes. As we now know, though, *no* additional information was migrated to the archives between approximately August 18, 2004 and January 15, 2005. *Of course* "no additional responsive e-mails [would have been] located."

> Further, please explain your statement that "the next set of backup tapes" is scheduled to be restored "at the end of January." How many tapes will be restored by the end of January? When exactly in January will Morgan Stanley complete the process of restoring and searching these tapes for responsive documents? Are there other backup tapes that are not yet in the process of being restored? If so, please advise us of (a) the number of tapes that are not yet in the process of being restored; (b) the time period of the data contained on those tapes; and (c) Morgan Stanley's timetable for restoring and searching those tapes. In addition, please explain why those tapes are not yet in the process of being restored. Please also explain why Morgan Stanley cannot complete the restoration and searching of all remaining backup tapes before "the end of January." As you know, our trial is scheduled to begin on February 22, 2005.
>
> We look forward your complete response to these questions no later than January 21, 2005 so that we can bring this matter to the Court's attention, if necessary.

Conforming to what was by now his usual stonewall tactic, Clare responded by letter dated January 21, 2005:

> I write in response to your January 19, 2005 letter regarding Morgan Stanley's production of e-mails restored from backup tapes.
>
> Morgan Stanley completed its initial production of restored e-mail messages on May 14, 2005. The May 2004 production was conducted in accordance with the agreed-upon order governing, and the searches that resulted in that production encompassed data from all of the backup tapes known to exist at the time. Subsequent to the May 2004 production, additional tapes were found in various locations at Morgan Stanley. The discovered tapes were not clearly labeled as to their contents, were not found in locations where e-mail backup tapes customarily were stored, and many of the tapes

were in a different format than other e-mail backup tapes. In November 2004, once it was determined at least some of the discovered tapes contained recoverable e-mail data, Morgan Stanley re-ran the searches described in the agreed-upon order. Those searches resulted in Morgan Stanley's November 2004 production.

Morgan Stanley's efforts to restore the backup tapes discovered after the May 2004 production are ongoing. It is a time-consuming and painstaking process and, given the absence of clear labels or other index information for the backup tapes, there is no way for Morgan Stanley to know or accurately predict the type or time period of data that might be recovered from tapes that have yet to be restored. While Morgan Stanley cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes, we understand from Morgan Stanley that, when the agreed-upon searches are run again at the end of January, those searches will include approximately one terabyte of additional data restored since the prior production.

On January 26, 2005, CPH served its Adverse Inference Motion, seeking sanctions based on MS & Co.'s disclosure of the newly found tapes. Hearing was scheduled for February 14, 2005. In preparation for that hearing, on February 3, 2005 the Court ordered MS & Co. to produce by noon on February 8, 2005 "(i) all documents to be referred to or relied on by any of the witnesses in his or her testimony; and (ii) all documents within MS & Co.'s care, custody, or control, addressing or related to the additional email backup tapes, including matters relating to the time or manner in which they were discovered; by whom they were discovered; who else learned of their discovery and when; and the manner and timetable by which they were be restored and made searchable, including any correspondence to or from outside or prospective outside vendors."

The Adverse Inference Order outlined the discovery abuses shown at the February 14, hearing. They included MS & Co.'s undisclosed discovery of the 1,423 "Brooklyn" tapes no

later than May of 2004; the undisclosed discovery of the 738 8-millimeter backup tapes in 2002; the presence of unsearched data in the staging area; the discovery of 169 DLT tapes in January 2005; the discovery of more than 200 additional tapes on February 11 and 12, 2005; the discovery of a script error that had prevented MS & Co. from locating responsive email attachments; and discovery of another script error that had infected the ability to gather emails from Lotus Notes platform users.

In response to these deficiencies, the Court issued the Adverse Inference Order. That Order reversed the burden of proof on the aiding and abetting and conspiracy elements and included a statement of evidence of MS & Co.'s efforts to hide its emails to be read to the jury, as relevant to both its consciousness of guilt and the appropriateness of punitive damages. It specifically provided that "MS & Co. shall continue to use its best efforts to comply with the April 16, 2004 Agreed Order and . . . February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search."[6]

It is now clear why MS & Co. was so unwilling to provide CPH with basic information about how and when the tapes were found or when production would be complete. First, candor would have required MS & Co. to admit that it had not done a good faith search for the oldest full backup tapes, and that Riel's certificate of compliance was false. Some unsearched tapes had been found by 2002; others had been found no later than May, 2004. Together, over 2,000 tapes had been found which were not searched prior to the May production. It is untrue that the tapes were "not in locations where e-mail backup tapes customarily were stored."

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[6]Concerned that MS & Co. had been less than candid with both CPH and the Court, on February 4, 2004, the Court entered its Order on Coleman (Parent) Holding's ore tenus Motion to Participate in Search of Additional E-Mail Backup Tapes or Appoint Third Party to Conduct Search, ordering MS & Co. to pay for a third party vendor to check its compliance with the Agreed Order. The Court previously found that the two scripts errors testified to by Allison Gorman at the February 14, 2005, hearing would not have been discovered or revealed without the threat that the third-party vendor would discover the errors. Given Ms. Gorman's testimony at the March 14, 2005, hearing, though, it now appears MS & Co. knew about the errors before the appointment of the third-party vendor. Consequently, the errors were only revealed, but not discovered, in response to the February 4, 2004, Order.

Second, MS & Co. desperately wanted to hide an active SEC inquiry into its email retention practices.[7] [8] [9] [10] Finally, MS & Co. did not want to admit the existence of the historical email archive, which would expose the false representations it had made to the Court and used to induce CPH to agree to entry of the Agreed Order.[11] [12]

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[7]On December 17, 2003, CPH served its Third Request for Production seeking "(a)ll materials and documents submitted to the United States Securities and Exchange Commission ("SEC"), received from the SEC, or reflecting communications with the SEC in connection with any investigation, inquiry, or examination concerning or relating to Morgan Stanley's policies and/or procedures with regard to the retention, storage, deletion, and/or back-up of electronic mail (emails) . . ." On October 12, 2004, CPH served its Request for Supplemental Documents seeking to bring MS & Co.'s document production current, requesting "(a)ll documents not previously provided by MS & Co. that are responsive to any Request for Production of Documents that CPH previously has served upon MS & Co. in the litigation, including documents obtained by MS & Co. or its counsel after the date of MS & Co.'s prior productions." No SEC documents were produced in response to either request; no privilege log was generated. On other privilege logs generated in response to court orders, MS & Co. did not show the SEC on the distribution portion of the log. See March 9, 2005 Order Following in Camera Inspection (Riel/SEC Documents) footnotes 1, 2. See, also, footnote 15, infra. Kirland & Ellis, outside counsel for MS & Co. in this litigation, represents MS & Co. in the SEC's inquiry into its email retention practices.

[8]MS & Co. manipulated the unhinging of the SEC's email investigation from the IPO litigation in January, 2005, to conceal the email issues as long as possible.

[9]It is now apparent that MS & Co. chose deliberately to keep its affidavits concerning the informal SEC inquiry submitted to support its privilege claims vague, despite two requests from the Court seeking specific information. See February 28, 2005 Order (Release of Exhibits).

[10]See February 25, 2005 Order on Morgan Stanley's Objections to Coleman (Parent) Holding Inc.'s Notice to Produce at Hearing and Motion for Protective Order and March 4, 2005 Order on Plaintiff's ore tenus Motion to Compel Additional Production.

[11]While MS & Co. contends that its representations to the Court that it would cost "hundreds of thousands of dollars" to search the backup tapes and that there was no pre-2000 backup tapes were not false, they were deliberately misleading: MS & Co. never had an intention to search the back up tapes to respond to the requests and some of the year 2000 backup tapes backed up email back to 1997.

In 2001, MS & Co. decided to create the email archive. By June,2003, it had decided that the archive should have two components. First, MS & Co. wanted to create an archive that captured and stored email as it was generated. Second, MS & Co. wanted to add historical data to the archive. That task involved searching for all email backup tapes containing historical emails; sending those tapes to an outside processor; loading the processed tapes into a staging area; and migrating the stored data from the staging area onto the archive. As we now know, archive searches are quick and inexpensive. They do not cost "hundred of thousands of dollars" or "take several months." The restrictions imposed by the Agreed Order were not needed.

[12]On February 10, 2004, Robert Saunders, an executive director of IT for MS & Co., was deposed. He testified that in January, 2003, MS & Co. had put into effect the email archive system. When specifically asked whether the new email archive system would include prior backups or only going forward backups, he testified that "(t)he way it was built was for going forward backup." He was next asked whether "(w)ith respect to backup dated January 2001 and previously, does Morgan Stanley have any new capabilities to restore and search e-mail?" After counsel interposed a vagueness objection, he answered "(t)here are no new capabilities to search that e-mail." That testimony was so misleading as to be false. As Sauders well knew, since he was on the team responsible, the "live" email capture portion of the archive was already operational. The migration of the historical data to the archive was expected to be completed by April of 2004, just two months after his deposition.

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MS & Co.'s wrongful conduct has continued unabated.[13] Since the February 14, 2005, hearing, it has come to light that:

- Only two whole and four partial tapes from the Brooklyn tapes had been migrated to the archive and were thus searched for the November, 2004, production. MS & Co. sought to hide this information to create the impression that all the produced documents came from the Brooklyn tapes, rather than reveal that the production came from material that had migrated from the staging area to the archive since the May, 2004, production or some other, as yet undisclosed, source.[14]

- Contrary to MS & Co.'s counsel's November 17, 2004, letter to CPH, *none* of the November, 2004 production came from the "newly found" tapes. MS & Co. carefully crafted its responses to inquiries about the November, 2004, production to avoid both disclosure of the existence of the archive and outright lying.

- The scripts MS & Co. used to process emails into its archive caused the bodies of some messages to be truncated. MS & Co. discovered this problem on February 13, 2005, but did not tell the Court about it until March 14, 2005.

- A migration issue caused about 5% of email harvested by NDCI from the backup tapes not to be captured in the archive, based on testing of a representative sample of tapes. MS & Co. told the SEC about this problem on February 24, 2005, but failed to tell CPH or the Court.

- As of June 7, 2004, only 120 out of 143 SDLT tapes had been processed into the archive.

- An analysis requested by the SEC showed that, based on a representative sample, 10% of backup tapes were overwritten after January, 2001.

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[13]MS & Co. sought to use the entry of the Adverse Inference Order as a shield against further inquiry into its email abuses, arguing that the matter was closed by the Adverse Inference Order. It previously used this tactic with the SEC, arguing that the December 3, 2003 Cease and Desist Order shielded it from other sanctions for email retention failures. See Ex. 14 [February 10, 2005 letter from outside counsel for MS &Co. to SEC]

[14]MS & Co. argued at the March 14 and 15, 2005 hearing that there were only 13 unique, new emails contained in the November 2004 production when compared to the May 2004 production. Nine of those emails, however, were originally given to MS& Co.'s lawyers for responsiveness review by the IT staff for the May 2004 production. No explanation of why they were not produced in May was offered. This is particularly concerning given the large number of documents Ms. Gorman testified the search parameters found compared with the relatively small number found responsive and produced after review by counsel.

16div-014071

- A software error caused blind carbon copies not to be captured in the archive process. MS & Co. told the SEC about this problem on February 24, 2005. MS & Co. did not tell CPH or the Court.

- A software error caused the searches to be hyper case-sensitive, resulting in a failure to capture all emails. MS & Co. knew of the problem as of December, 2004, but did not tell CPH or the Court. The problem was not purportedly fixed until March, 2005.

- A script error caused the archive to have problems pulling group email in Lotus Notes.

- MS & Co. provided sworn testimony at the February 14, 2005, hearing that it had located 600 gigabytes of data, while contemporaneously telling the SEC it had located a terabyte of data. A gigabyte represents 20,000 to 100,000 pages. Incredibly, MS & Co.'s witness on this point, Allison Gorman, testified on March 14, 2005, that it was simply a "terminology" issue that she did not choose to correct because it could cause "confusion."

- CPH requested MS & Co. to produce responses it had made to third-parties in civil, criminal, or administrative proceedings describing limitations on MS & Co.'s ability to produce emails and all notices in such proceedings that MS & Co. had newly discovered backup tapes containing email. MS & Co. objected, arguing that there were over 300 separate proceedings, involving over 70 outside law firms, and that the cost of compliance would be too great. On March 2, 2005, the Court ordered the production, after shortening the time period involved, and required production within 12 hours after counsel's review of each item for responsiveness but, in any event, within 10 days. At the time MS & Co. objected to CPH's request as unduly burdensome, it knew of its Well submission to the SEC made on February 10, 2005. Kirkland and Ellis, co-counsel here, was co-counsel for MS & Co. in that SEC proceeding. Consequently, it appears MS & Co.'s real concern was not that expressed to the Court, but was based on its realization that compliance would reveal the existence of the SEC inquiry into its email retention policy and MS & Co.'s efforts to keep the existence of that investigation secret. MS & Co. violated the Court's March 2, 2005, Order on Morgan Stanley's Responses and Objections to Coleman (Parent) Holdings Inc.'s Notice to Produce at Hearing requiring it to disclose items responsive to CPH's Request for Production within 12 hours of review for responsiveness by waiting *days*, not hours, to produce the Wells submission.

- MS & Co.'s failure to produce or log the SEC documents violated the Court's February 3, 2005, Order.[15]

- James Doyle's, the Executive Director of MS & Co.'s Law Division, declaration that he did not learn of additional unsearched backup tapes until the end of October, 2004, was intended to mislead CPH and the Court. Obviously, MS & Co. sought to create the implication in the declaration that *no one* in the Law Division knew of the backup tapes before then. Instead, both Soo-Mi Lee, Doyle's associate, and James Cusick, Doyle's superior, knew of the tapes no later than June 7, 2004.

- In-house counsel for MS & Co. knew as of June 7, 2004, that nearly a third of the restored backup tapes did not contain email, implying they may have been recycled in violation of the December 3, 2002 Cease and Desist Order. They did not tell CPH or the Court.

- MS & Co.'s searches looked for only two types of emails. There are other types of emails that were not included in the searches. CPH did not learn of this deficiency until March 13, 2005.

- MS & Co. improperly failed to produce 125 documents required to be produced by the Court's February 3, 2005, Order Specially Setting Hearing which required limited discovery be made in connection with the February 14, 2005, hearing on the Adverse Inference Motion.

- MS & Co. improperly withheld 13 documents required to be produced by the Court's March 4, 2005, Order on Plaintiff's ore tenus Motion to Compel Additional Production.

- An additional 282 tapes were found on February 23 and 25, 2005; CPH was not told of the discovery until March 13, 2005.

- An additional 3,536 tapes were discovered on February 23, 2005, in a security room.

- An additional 2,718 tapes were found at Recall, MS & Co.'s third party off-site storage vendor, on March 3, 2005.

- An additional 389 tapes were found March 2 through March 5, 2005. CPH was not told

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[15]The Court previously rejected MS & Co.'s argument that the January 14, 2005, email exchange between its outside and in-house counsel was not required to be produced under the February 3, 2005, Order Specially Setting Hearing because it referred to the "documents issue" and not specifically to the backup tapes. See March 16, 2005 Order on Morgan Stanley's Motion to Disqualify Plaintiff's Counsel Searcy, Denney, Scarola, Barnhart & Shipley, P.A. and Jenner & Block, LLC. MS & Co.'s insistence on a narrow interpretation of the February 3, 2005, Order is not particularly sympathetic, when the only reason that Order confined production to the backup tape issue was because MS &Co. had failed to notify the Court of the other deficiencies in its certificate of compliance.

until March 13, 2005.

- On March 4, 2005, the Court entered its Order on Plaintiff's ore tenus Motion to Compel Additional Production, which ordered MS & Co. to produce by 3:00 p.m. on March 7, 2005, all items within its care, custody, or control dealing with the Riel/SEC investigation, other than documents representing communications between or among MS & Co. inside and outside counsel that were not copied to anyone other than counsel. MS & Co. sought to discredit Riel and thus distance itself from the false June 23, 2004 certificate of compliance; in doing so, it sought to hide Riel's whistle blower status and the existence of an SEC investigation into whether MS & Co. employees sought kick backs from third party vendors; whether MS & Co. employees were improperly pressured into dealing with third-party vendors who may provide business to MS & Co.; and whether MS & Co. continued to overwrite backup tapes contrary to the SEC's December 3, 2002, Cease and Desist Order.

- A script error prevented the insertion of some emails into the archive. MS & Co. produced over 4,600 pages of emails on March 21, 2005, some of which it suggested may have been located on correction of the error; alternatively, it suggested the emails may have been located by NDCI as part of its efforts to verify MS & Co.'s searches.

MS & Co.'s discovery abuses have not been confined to its email production.

William Strong is a MS & Co. managing director and was one of the principal players for it in the Sunbeam deal. He took credit for the fees generated. On May 9, 2003, CPH requested a copy of "(a)ll documents concerning employment contracts, performance evaluations, and/or personnel filed (including without limitation any documents that describe or discuss [his] training, experience, competence, and accomplishments) . . ." MS & Co. asserted that the requested documents were not relevant and that production "would unnecessarily infringe on the privacy interests of [Strong]." On March 15, 2004, the Court ordered MS & Co. to produce "(a)ll references (positive or negative) to [Strong's] truthfulness, veracity, or moral turpitude." Some portions of Strong's evaluations were produced in response to that order. Those evaluations noted Strong's colleagues' reservations about his candor and ethics. Two of his evaluators, Joseph Perella and Tarek Abdel-Meguid, were deposed, when some relatively vague testimony about the bases for those conclusions was offered. It now appears Strong was facing criminal prosecution in Italy for complicity in bribery while he was working on the Sunbeam transaction, which his evaluators knew, and that MS & Co. purposely

withheld that information from CPH and the Court.[16]

Even once CPH independently discovered evidence of Strong's indictment in Italy, MS & Co. sought to shield its files from discovery. It claimed that virtually *all* of the documents it had were privileged under joint defense agreements in place between it, Strong, and Saloman Brothers, Strong's employer at the time of the incident. As the Court's March 10, 2005 Order Following In Camera Inspection (Strong) details, the documents MS & Co. relied on to support that position, and sought to prevent CPH from obtaining, reflect no such agreement.

The other discovery abuses and misrepresentations by MS & Co. other than those involving its email production practices are outlined in CPH's Chronology of Discovery Abuses by Defendant served March 1, 2005, and would take a volume to recite. They include:

- failing to provide the information retained by MS & Co.'s internal document management system pertaining to MS & Co.'s work for Sunbeam; falsely representing to the Court that no useful information was contained in that information; and producing a Rule 1.310 representative who had made an insufficient inquiry into authenticity, business record status, and authorship of documents; see February 28, 2005 Order on CPH's Motion to Deem Certain Documents Admissible and for Sanctions due to Morgan Stanley's Disregard of Court Order;

- when faced with contempt proceedings for violating the Stipulated Confidentiality Order by providing a copy of a settlement agreement between CPH and Arthur Andersen to other counsel, representing to the Court that the law firm of Kellogg, Huber was retained to handle the "Andersen aspects" of this litigation because of a conflict between Andersen and Kirkland & Ellis; Mark Hansen, a partner at Kellog, Huber, testified that his firm was hired as co-counsel for all aspects of the case;

- providing answers to interrogatories signed by a corporate representative who performed insufficient verification of the responses;

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[16]MS & Co. originally argued that documents concerning the Italian proceedings were not in Strong's "personnel file" and so were not required to be produced in response to CPH's initial request. MS & Co.'s practice of filing damaging information about an employee other than in his personnel file and then claiming it was not included in the request is about at convincing as its argument that, since it has a corporate directive not to keep drafts of documents once they are in final form, document drafts cannot be business records exempt from hearsay because they are not "kept in the course of a regularly conducted business activity." See Fla. Stat. §90.803 (6) (a). In any event, there was *no excuse* for not producing its records of the Italian proceedings once the Court's March 15, 2004 Order was entered.

- routinely asserting unfounded privilege claims;[17] and

- failing to timely comply with the Court's orders; for example, MS & Co. did not produce Strong's 1994 Performance Evaluation until the afternoon of March 15, 2005, though it was obviously included in the Court's March 15, 2004 Order. The failure cannot be excused as oversight since, when CPH specifically asked for the 1994 evaluation in the spring of 2004, MS & Co.'s counsel said it was withheld as non-responsive; see, also, Ex. 197, 198.

In sum, MS & Co. has deliberately and contumaciously violated numerous discovery orders, including the April 16, 2004 Agreed Order; February 3, 2005 Order Specially Setting Hearing; and the March 4, 2005 Order on Plaintiff's ore tenus Motion to Compel Additional Production. At the February 14, 2005, hearing on CPH's Adverse Inference Motion, it chose to hide information about its violations and coach witnesses to avoid any mention of additional, undisclosed problems with its compliance with the Agreed Order. Implicit in the requirement that MS & Co. certify compliance with the Agreed Order was the requirement to disclose impediments to its ability to so certify. As outlined in this Order, MS & Co. employees, and not just counsel, have participated in the discovery abuses. The prejudice to CPH from these failings cannot be cured. Even if all the script errors have been located and corrected, and MS & Co. has failed to show they have, and even if all of the email backup tapes have now been located, and MS & Co. has failed to show they have, the searches cannot be completed in time. The other discovery abuses outlined call into doubt all of MS & Co.'s discovery responses. *The judicial system cannot function this way.* Based on the foregoing and on the Court's March 1, 2005 Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, it is

ORDERED AND ADJUDGED that CPH's Renewed Motion for Entry of Default Judgment is Granted, in part. See Robinson v. Nationwide Mut. Fire Ins. Co., 887 So. 2d 328 (Fla. 2004); Mercer v. Raine, 443 So. 2d 944 (Fla. 1983); Precision Tune Auto Care, Inc. v.

[17]For example, MS & Co. produced over 260 documents dealing with the Strong investigation over which it had previously claimed privilege once the Court announced its intention to conduct an in camera review; the Court found another 200 documents were not privileged after conducting its review, by its March 10, 2005 Order.

Radcliffe, 804 So. 2d 1287 (Fla. 4th DCA 2002); Rule 1.380 (b) (2) (C), Fla. R. Civ. P. Paragraphs 2 (excluding the last sentence thereof); 3 (excluding the portion of the last sentence beginning with "in order to close . . ."); 8-10, 11 (excluding everything after the first sentence); 12 (excluding all parts following "June 1998"); 13 (excluding the last sentence thereof); 14-27; 28 (excluding everything after "firm" in the second to last sentence thereof); 29-39; 41-52; 53 (excluding the second sentence thereof); 54-57; 58 (excluding "CPH and" in the second line thereof); 59-63; 64 (excluding the third line thereof); 65 (excluding the last sentence thereof); 66 (excluding the last sentence thereof); 67-70; 71 (excluding the first word of the last sentence and the remainder of that sentence after "material"); 72; 73 (excluding the first sentence thereof); 74 (excluding the words "CPH and" in the second to last sentence thereof); 75-81; 85; 86; 87 (excluding (g)); 90, and 91 (excluding (g)) of Plaintiff's Amended Complaint, as amended by the Court's Amended Order on Morgan Stanley's Motion to Dismiss, Motion to Strike, and Motion for More Definite Statement, shall be read to the jury and the jury instructed that those facts are deemed established for all purposes in this action. A copy of a redacted Amended Complaint is attached as Exhibit A. It is further

ORDERED AND ADJUDGED that the Court shall read to the jury a Statement similar to that attached as Exhibit A to the Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, but incorporating the relevant additional findings of this Order, and the jury will be instructed that it may consider those facts in determining whether MS & Co. sought to conceal its offensive conduct when determining whether an award of punitive damages is appropriate. See General Motors Corp. v. McGee, 837 So. 2d 1010 (Fla. 4th DCA 2002), rev. den. 851 So. 2d 728 (Fla. 2003). Counsel are each invited to submit proposed Statements. It is further

ORDERED AND ADJUDGED that CPH shall be entitled to an award of reasonable fees and costs incurred as a result of the Renewed Motion for Entry of Default Judgment and the violations of Court orders recited herein. The amount shall be determined at an evidentiary hearing following trial. It is further

ORDERED AND ADJUDGED that MS & Co. is relieved of any future [illegible] 014077

comply with the April 16, 2004 Agreed Order and the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s Motion to Participate in Search of Additional E-Mail Back-Up Tapes or Appoint Third Party to Conduct Search. It is further

ORDERED AND ADJUDGED that the pro hac vice admission of Thomas Clare is revoked. It is further

ORDERED AND ADJUDGED that the portions of CPH's Motion for Correction and Clarification of Order on CPH's Motion for Adverse Inference that seek to amend the body of that Order to correct clerical and spelling errors, as agreed to by counsel, is Granted, and the corrections deemed made to the body of the Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, by interlineation. In all other respects the remainder of the Motion for Correction and Clarification is declared moot.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 23rd day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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In April 1997, Morgan Stanley began serving as Sunbeam's investment banker. Morgan Stanley originally attempted to find someone to buy Sunbeam. When Morgan Stanley was unable to find a buyer, Morgan Stanley developed a strategy for Sunbeam to use its fraudulently-inflated stock to acquire a large company that Sunbeam would own and operate. Then, trading on Morgan Stanley's relationships with CPH's senior officers, Morgan Stanley found

Coleman for Sunbeam. At the time of the sale to Sunbeam, Coleman was a leading manufacturer and marketer of consumer products for the worldwide outdoor recreation market, with annual revenues in excess of $1 billion.

ion shares

After Sunbeam announced plans to acquire Coleman, Morgan Stanley agreed to underwrite a $750 million debenture offering for Sunbeam. Sunbeam needed the proceeds of that debenture offering to complete the acquisition of Coleman. As Sunbeam's investment banker and as the sole underwriter for the $750 million debenture offering, Morgan Stanley received detailed and specific information concerning Sunbeam's financial condition and performance. Morgan Stanley received information that directly contradicted Sunbeam's and Morgan Stanley's assertions to CPH that Sunbeam had undergone a successful turnaround and that its financial performance had dramatically improved. By no later than March 18, 1998, Morgan Stanley knew that Sunbeam's January and February 1998 sales were only 50% of January and February 1997 sales, and Morgan Stanley also knew that the shortfall was caused by Sunbeam's practice of accelerating sales which otherwise would have occurred in 1998 in order to boost Sunbeam's income in 1997. Although Morgan Stanley and Sunbeam previously had advised CPH that Sunbeam's sales were running ahead of analysts' expectations for the first quarter, Morgan Stanley decided not to correct those material misrepresentations. Instead, in March 1998, Morgan Stanley assisted Sunbeam in concealing the problems with Sunbeam's first quarter 1998 sales

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") directly or indirectly owned 44,067,520 shares — or approximately 82% — of Coleman prior to the transactions at issue. On March 30, 1998, Sunbeam acquired CPH's interest in Coleman. Sunbeam paid for the Coleman shares with 14.1 million shares of Sunbeam common stock and other consideration.

Defendant Morgan Stanley & Co., Inc. ("Morgan Stanley") is a highly sophisticated investment banking firm that provides a wide range of financial and securities services. Among other things, Morgan Stanley provides advice on mergers and acquisitions and raises capital in the equity and debt markets. Morgan Stanley served as Sunbeam's investment banker and as the underwriter of securities issued by Sunbeam in connection with the events at issue herein.

Sunbeam Corporation ("Sunbeam") was a publicly-traded company headquartered in Delray Beach, Florida. Sunbeam designed and manufactured small household appliances and outdoor consumer products, which it marketed under the Sunbeam and Oster brand names. Sunbeam filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code in February 2001.

Albert Dunlap ("Dunlap") was the Chief Executive Officer of Sunbeam from July 1996 until June 1998 when he was terminated by Sunbeam's Board of Directors.

Russell Kersh ("Kersh") was the Executive Vice President of Sunbeam from July 1996 until June 1998 when he was terminated by Sunbeam's Board of Directors.

Arthur Andersen LLP ("Andersen") provided outside accounting services to Sunbeam through its West Palm Beach, Florida office. Andersen auditors provided information concerning Sunbeam's first quarter 1998 sales and earnings to Morgan Stanley.

Sunbeam designed and manufactured outdoor and household consumer products, which it marketed under the Sunbeam and Oster brand names. Sunbeam's products included small kitchen appliances, humidifiers, electric blankets, and grills. Many of the country's leading retail stores, including Wal-Mart, Target, and Home Depot, were among Sunbeam's major customers.

Despite Sunbeam's well-known brands and strong customer base, its financial performance was disappointing. In 1994, Sunbeam earned $1.30 per share. In 1995, Sunbeam's earnings declined to $0.61 per share. In 1996, Sunbeam's earnings continued to suffer. On March 22, 1996, Sunbeam issued an early warning that its first quarter earnings would be well under analysts' expectations and down from first quarter 1995. Shortly after issuing the March 22 earnings warning, Sunbeam's Chief Executive Officer and two of Sunbeam's directors announced their resignations. Less than a week later, Sunbeam announced that its first quarter 1996 earnings had plunged 42% from first quarter 1995 levels. Sunbeam also announced that its second quarter 1996 earnings would be lower than its second quarter 1995 earnings.

Sunbeam's disappointing earnings caused its stock price to plummet. During 1995, the price at which Sunbeam's stock traded fell 40%, from a high of $25-1/2. In 1996, Sunbeam's stock price continued to decline until it reached a low of $12-1/4 in July.

On July 18, 1996, Sunbeam's board of directors hired Albert Dunlap as Sunbeam's new Chief Executive Officer. Based upon brief terms as Chief Executive Officer of other publicly traded companies, including Scott Paper Company ("Scott Paper"), Dunlap was viewed as a "turnaround specialist" — that is, someone who could take a poorly performing company and significantly increase its value by "turning around" its financial performance. Because Dunlap touted the benefits from firing large numbers of employees and closing large numbers of plants, Dunlap became widely known as "Chainsaw Al.". Dunlap lived in Boca Raton, Florida, and one of his first tasks at Sunbeam was to consolidate the company's six headquarters into one located in Delray Beach, Florida.

Immediately after joining Sunbeam, Dunlap hired Kersh as Sunbeam's Chief Financial Officer. Kersh had teamed with Dunlap for over 15 years, serving as a senior executive with Dunlap at other companies, including Scott Paper. Dunlap also brought in several other hand-picked executives to make up his senior management team.

Dunlap and his senior management team entered into employment agreements with Sunbeam. Under those agreements, Dunlap and his senior management team stood to make tens of millions of dollars if they were able to boost Sunbeam's apparent value and then sell Sunbeam to another company at a premium.

In order to convince other companies that they should want to purchase Sunbeam, Dunlap needed to improve Sunbeam's reported financial performance quickly and dramatically. It was, of course, no small task to transform Sunbeam from a poorly performing company, with weak sales and declining profits, into a strong company with growing sales and

soaring profits. In fact, as the world later learned, Dunlap did not achieve that change in Sunbeam's fortunes. Instead, Dunlap created the illusion of a dramatic turnaround at Sunbeam by engaging in what SEC officials subsequently described as a "case study" in financial fraud.

Dunlap had a three-step plan at Sunbeam. In the first step, Dunlap overstated Sunbeam's financial problems so that Sunbeam appeared to be in worse shape than it really was. After making Sunbeam look worse, Dunlap moved to step two, where he made Sunbeam look more valuable than it really was by inflating Sunbeam's sales and engaging in other earnings manipulations. In step three, Dunlap planned to sell Sunbeam to another company before it became apparent that the "improved" results were fictional. By doing so, Dunlap would make tens of millions of dollars and would be free to blame his successor for any subsequent problems.

Dunlap began implementing his strategy soon after his arrival at Sunbeam in 1996. Claiming to be engaged in a clean-up of Sunbeam's financial problems, Dunlap recorded artificially high reserves and booked expenses that should not have been recorded until later periods. Both of those actions made Sunbeam's financial condition appear worse than it really was, thus lowering the benchmark for measuring Sunbeam's performance in future years.

The overstated reserves also provided Dunlap a means by which he could inflate Sunbeam's future results during the second step of his plan. Dunlap later could "re-evaluate" and release millions of dollars from the overstated reserves to boost income in later periods. The income from released reserves contributed to the illusion of a rapid turnaround in Sunbeam's performance. Using inflated reserves to enhance income in future periods is a fraudulent practice and overstated reserves are commonly called "cookie jar" reserves.

4. After making Sunbeam look worse than it really was in 1996, Dunlap manipulated Sunbeam's sales and expenses in 1997 to create the false appearance of quarter after quarter improvement in financial performance. For example, Dunlap caused Sunbeam to inflate its sales by engaging in phony "bill and hold" sales. Under this practice, Sunbeam recognized revenues from "sales," even though customers did not actually pay for or even take delivery of the products, which continued to sit in Sunbeam's own warehouses. Although Sunbeam recorded the "bill and hold" sales as if they were current sales, they were, in reality, simply sales stolen from future quarters. In 1997, phony "bill and hold" sales added approximately $29 million in sales and $4.5 million in income.

Throughout 1997, Sunbeam also engaged in a sales practice known as "channel stuffing" — accelerating sales that otherwise would occur in a later period, sometimes by offering steep discounts or other extraordinary customer inducements. On the grand scale employed by Sunbeam, channel stuffing inevitably leads to major sales shortfalls in later periods when "stuffed" customers simply stop buying. Sunbeam's senior sales officer referred to Sunbeam's unsustainable practice of inflating performance through accelerated sales as the "doom loop."

5. Dunlap further "enhanced" Sunbeam's income in 1997 by causing Sunbeam to record a "profit" of $10 million from a sham sale of its warranty and spare parts business. Dunlap also made Sunbeam appear to be more successful than it really was by reaching into the "cookie jar," reversing inflated reserves, and recording $35 million as income. Sunbeam's 1997 profit margins also looked better than they really were because Dunlap already had recorded millions of dollars of 1997 expenses in 1996.

In October 1997, Dunlap announced that Sunbeam's "turnaround" was complete. Compared to the third quarter of 1996, Sunbeam's third quarter 1997 performance was remarkable. In the third quarter of 1996, Sunbeam had reported a loss of $18.1 million. In the third quarter of 1997, however, Sunbeam reported earnings of $34.5 million — an extraordinary turnaround from substantial losses to hefty profits. Sunbeam's combined results for the first three quarters showed dramatic improvement as well. Sunbeam reported that its profits for the first nine months were up tenfold over the same period the year before — from $6.5 million in 1996 to $67.7 million in 1997. Sunbeam's reversal of fortune caused a spectacular increase in the price of its stock. In July 1996, when Dunlap was hired, Sunbeam's shares traded at $12-1/4. By October 1997, Sunbeam's shares had risen to $49-13/16.

With steps one and two successfully completed, Dunlap was more than eager to complete the final step of his scheme: to sell Sunbeam to another company and collect tens of millions of dollars for himself before the outside world could learn the truth about Sunbeam's phony "turnaround." To accomplish that third and final step, Dunlap needed an investment banking firm

When Dunlap announced in early 1997 that he would begin interviewing investment bankers, Morgan Stanley immediately began pursuing the job. Although Morgan Stanley had no previous relationship with Sunbeam, one of Morgan Stanley's senior executives, William Strong, had worked closely with Dunlap on other large transactions between 1986 and 1993, when Strong was employed by Salomon Brothers.

Morgan Stanley knew that it was competing with other investment bankers, including Mark Davis, for Dunlap's business. Davis was the head of the mergers and acquisitions department at Chase Securities and had worked previously with Strong at Salomon Brothers. Davis had a very strong relationship with Dunlap, and Davis had served as Dunlap's investment advisor on numerous transactions, including Dunlap's sale of Scott Paper. Shortly after arriving at Sunbeam, Dunlap hired Davis to handle the sale of Sunbeam's furniture business.

Morgan Stanley put together a team headed by its Vice Chairman, Bruce Fiedorek, and Strong. Beginning in April 1997, Morgan Stanley's personnel traveled to Sunbeam's offices in Delray Beach, Florida to study Sunbeam and woo Dunlap. After months of uncompensated work, in September 1997, Morgan Stanley finally persuaded Dunlap to name Morgan Stanley as Sunbeam's exclusive investment banker. Dunlap instructed Morgan Stanley to find a buyer for Sunbeam. Morgan Stanley knew that if it failed to deliver a major transaction, Morgan Stanley would not be compensated for the extensive work it had performed for Sunbeam. Morgan Stanley also knew that Davis and Chase Securities were standing by — ready and willing to reclaim their position as Dunlap's investment banker of choice.

Throughout the fall of 1997, Morgan Stanley aggressively searched for a buyer for Sunbeam. Morgan Stanley put together extensive and detailed materials to use in marketing Sunbeam to potential buyers. Morgan Stanley pitched the transaction to more than 10 companies — including Gillette, Colgate, Sara Lee, Rubbermaid, Whirlpool, and Black & Decker — that Morgan Stanley hoped might have an interest in acquiring Sunbeam. Morgan Stanley, however, was not able to find a buyer.

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As 1998 approached, the pressure on Dunlap increased. Dunlap was aware that Sunbeam would be unable to sustain the appearance of a successful turnaround in 1998 because Sunbeam had stolen sales from 1998 to boost 1997's numbers and the "cookie jar" reserves had been depleted. Dunlap needed a way to conceal Sunbeam's phony turnaround until a buyer could be found. Morgan Stanley provided the solution to Dunlap's problem.

Morgan Stanley knew that its failure to find a buyer for Sunbeam could prove fatal to the relationship it had worked so hard to establish with Dunlap. As the pressure on Dunlap increased, the pressure on Morgan Stanley increased as well. Although Morgan Stanley was not able to find a buyer for Sunbeam, Morgan Stanley responded with a plan that would allow Dunlap to conceal his fraud. Morgan Stanley recommended that Sunbeam acquire other companies, using Sunbeam's stock, which was fraudulently inflated, as the "currency" that would be used to pay for the acquisitions.

Morgan Stanley's strategy was doubly deceptive. First, Morgan Stanley's acquisition strategy would allow Dunlap to consolidate Sunbeam's results with those of the newly-acquired companies. That would help Dunlap camouflage Sunbeam's results and make it difficult to detect any shortfall in Sunbeam's performance. Dunlap simply could label any problems that were detected as attributable to the poor performance of the acquired companies or as a temporary "blip" caused by the distraction of integrating the acquired companies with Sunbeam. Second, Morgan Stanley's strategy would allow Dunlap to take new massive restructuring charges (purportedly relating to the acquisitions) and thus create more "cookie jar" reserves that could be tapped to bolster the future earnings of the combined companies.

Morgan Stanley identified Coleman as one of the key potential acquisition targets. CPH owned 82% of Coleman's stock. Morgan Stanley searched the ranks of its investment bankers to locate those with the best access to CPH. Drawing on relationships between some of Morgan Stanley's investment bankers and senior CPH officers, Morgan Stanley set about trying to persuade CPH to sell its interest in Coleman to Sunbeam — and, most importantly, to accept Sunbeam stock as consideration.

Morgan Stanley laid the groundwork for a meeting to take place in December 1997 in Palm Beach, Florida between Dunlap and Kersh and representatives of CPH. In advance of the Palm Beach meeting, Morgan Stanley provided materials to Sunbeam to prepare Sunbeam for the meeting. Morgan Stanley also met with Kersh and other Sunbeam personnel to prepare for the Palm Beach meeting. However, Dunlap nearly scuttled Morgan Stanley's carefully crafted plan at the outset. During the December 1997 Palm Beach meeting, when CPH rejected Dunlap's initial all-stock offer, Dunlap became so angry that he cursed and ranted at the CPH representatives and stormed out.

Dunlap's tantrum appeared to kill any chance that CPH would sell its interest in Coleman to Sunbeam. Morgan Stanley, however, worked to revive the discussions. Drawing again on Morgan Stanley's relationships with CPH officers, Morgan Stanley was able to restart the discussions with CPH with the promise that Dunlap would be kept away from the negotiating table. Thereafter, Morgan Stanley, through Managing Directors Strong, James Stynes, and Robert Kitts, led the discussions with CPH on Sunbeam's behalf.

Morgan Stanley knew that it had to persuade CPH not only to sell Coleman, but also to accept Sunbeam stock — ultimately, 14.1 million shares of Sunbeam stock — as a major part of the purchase price. During the course of negotiations, Morgan Stanley prepared and provided CPH with false financial and business information about Sunbeam designed to create the appearance that Sunbeam was prospering and that Sunbeam's stock had great value. For example, Morgan Stanley provided CPH with false 1996 and 1997 sales and revenue figures, as well as false projections that Sunbeam could not expect to achieve. Together, in face-to-face discussions, Morgan Stanley and Sunbeam assured CPH that (a) Sunbeam would meet or exceed its first quarter 1998 earnings estimates; (b) analysts' 1998 earnings estimates for Sunbeam were correct; and (c) Sunbeam's plan to earn $2.20 per share in 1998 was easily achievable and probably low. Morgan Stanley and Sunbeam also falsely assured CPH that Sunbeam's "early buy" sales program would not hurt Sunbeam's future revenues. However, the "early buy" program was one of Sunbeam's revenue acceleration programs — and the devastating effects of Sunbeam's revenue acceleration programs already had begun to materialize at Sunbeam. Sunbeam's January and February 1998 sales were down drastically, although those results were not disclosed to CPH or the public. To the contrary, Morgan Stanley and Sunbeam together specifically advised CPH that Sunbeam's first quarter 1998 sales were "tracking fine" and running ahead of analysts' estimates.

On February 27, 1998, Sunbeam's Board of Directors met at Morgan Stanley's offices to consider the purchase of Coleman, as negotiated by Morgan Stanley.

At the February 27, 1998 meeting, Morgan Stanley made an extensive presentation to Sunbeam's Board concerning the proposed transaction. Numerous Morgan Stanley representatives, including Managing Directors Strong, Kitts, Stynes, Ruth Porat, and Vikram Pandit, attended the meeting.

Morgan Stanley presented Sunbeam's board with Morgan Stanley's opinion on the value of Coleman. Using a discounted cash flow analysis, which Morgan Stanley represented was the best gauge of stand-alone economic value and the best method of capturing the unique value of Coleman, Morgan Stanley valued CPH's Coleman stock at a range of $31.06 to $53.24 per Coleman share. CPH's 44,067,520 Coleman shares were worth, therefore, between $1.369 billion and $2.346 billion.

Following Morgan Stanley's presentation, Sunbeam's Board of Directors voted to acquire Coleman on the very favorable terms that Morgan Stanley had negotiated.

Morgan Stanley spent the following weekend developing Sunbeam's public relations strategy to announce the Coleman transaction. Morgan Stanley scripted the points for Dunlap to make in a conference call with analysts. Morgan Stanley also crafted a list of "key media messages" for Dunlap to use in his communications with the press. On Sunday, March 1, 1998, Morgan Stanley spoke with a reporter for the Wall Street Journal to inform him that Sunbeam would announce its acquisition of Coleman the following morning.

Sunbeam announced its acquisition of Coleman on Monday, March 2, 1998, prior to the opening of the financial markets. Consistent with Morgan Stanley's valuation, investors viewed Sunbeam's purchase of Coleman — and the price that Sunbeam had paid — very favorably. The day before the acquisition was announced, Sunbeam's stock closed at $41-3/4. In the days following Sunbeam's announcement of the transaction, Sunbeam's stock rose approximately 25%, to a high of $52.

Dunlap knew that Sunbeam needed to raise funds to pay the cash portion of the acquisition consideration. Dunlap also knew that Sunbeam needed cash to purchase two other smaller companies in addition to Coleman. Morgan Stanley recommended that Sunbeam raise funds through a $500 million offering of convertible subordinated debentures. To assure the offering's success, Morgan Stanley lent its name to the offering. Indeed, Morgan Stanley agreed to serve as the sole underwriter for the offering.

The money raised from the sale of the debentures was used by Sunbeam to complete the acquisition of Coleman.

Unbeknownst to CPH or the public, Sunbeam's first quarter 1998 sales were a small fraction of the financial community's expectations for the quarter. If Dunlap could consolidate Sunbeam's sales with Coleman's sales, Dunlap knew that he could obscure Sunbeam's actual first quarter sales. As a result, Dunlap was especially anxious to complete the acquisition of Coleman before Sunbeam announced its first quarter 1998 sales. Indeed, the success of the scheme depended upon Sunbeam's ability to complete the Coleman acquisition before Sunbeam's first quarter results

were announced. To satisfy Dunlap's objectives, Morgan Stanley moved up the launch date of the offering.

The debentures were marketed to investors at a series of "road show" meetings and conference calls arranged by Morgan Stanley. Morgan Stanley prepared and distributed a memorandum for its sales force to use in marketing the debentures to investors. Morgan Stanley also developed the script for Dunlap and Kersh to deliver during the road show. In those materials, Morgan Stanley misrepresented Sunbeam's financial performance and emphasized Dunlap's purported "turnaround" accomplishments.

Morgan Stanley launched the debenture offering with a research analyst presentation to the Morgan Stanley sales force. As part of Morgan Stanley's growing relationship with Sunbeam, one of Morgan Stanley's top-rated research analysts planned to initiate equity coverage of Sunbeam. That Morgan Stanley analyst had modeled values for Sunbeam's acquisition of Coleman that were higher than even Sunbeam's management had predicted.

Although Morgan Stanley initially planned to sell $500 million worth of debentures, Morgan Stanley's efforts were so successful that the size of the offering was increased to $750 million on March 19, 1998 — the day of the last road show. The debentures were sold to investors nationwide, including investors based in Florida.

As Sunbeam's investment banker and the sole underwriter for the debenture offering, Morgan Stanley had a duty to investigate Sunbeam's finances and business operations.

Morgan Stanley, which had been working hand-in-hand with Sunbeam for

almost a year and had traveled to Sunbeam's Florida offices, repeatedly asserted that it had satisfied that duty.

Strong, who was one of the senior Morgan Stanley investment bankers involved, has admitted in sworn testimony that he may have had more than 100 telephone conversations with Dunlap and Kersh (whose offices were in Sunbeam's Delray Beach headquarters) and that Strong was "sure" that he would have been apprised of Sunbeam's financial performance during the first two months of 1998.

With the $750 million debenture offering and the Coleman transaction set to close at the end of March 1998, Sunbeam's Florida-based outside auditors were shocked that Morgan Stanley had not asked them about Sunbeam's financial performance for first quarter 1998. Sunbeam's auditors were alarmed because Sunbeam's first quarter results were a disaster, but Dunlap, Kersh, and Morgan Stanley were telling CPH and the investing public,

that Sunbeam's turnaround was a success, that Sunbeam's sales for the first quarter of 1998 were ahead of the expectations of outside financial analysts, and that Sunbeam was poised for record sales.

On March 17, Sunbeam's auditors forced the issue. From their Florida offices, Sunbeam's auditors sent Morgan Stanley a letter reporting that Sunbeam's net sales through January 1998 were down 60% — $28 million in January 1998, as compared to $73 million in January 1997. The March 17 letter explained that the decline was "primarily due to the . . . new early buy program for grills which accelerated grill sales into the fourth quarter of fiscal 1997."

The next day, Morgan Stanley was faxed a schedule from Sunbeam's Florida office that showed that Sunbeam's January and February 1998 net sales totaled $72 million, an amount that was 50% lower than Sunbeam's January and February 1997 net sales of $143.5 million.

Based on information that Sunbeam and Morgan Stanley had disseminated, Wall Street analysts were anticipating that Sunbeam's first quarter 1998 net sales would be in the range of $285 million to $295 million. Sales in that range would have been approximately 15% higher than first quarter 1997 sales. Sunbeam's January and February 1998 sales, however, totaled barely 25% of $285 million. As Sunbeam's outside auditors advised Morgan Stanley in writing, the sales drop-off was caused by Sunbeam's sales acceleration program. The information put into Morgan Stanley's hands on March 17 and March 18 showed that Morgan Stanley's and Sunbeam's assertions to CPH and other investors were false. Contrary to what Morgan Stanley and Sunbeam had represented, Sunbeam had not undergone a successful turnaround, Sunbeam's financial performance had not dramatically improved, and Sunbeam's performance in 1998 was not better than Wall Street analysts' expectations. It was imperative, therefore, that the truth be kept from CPH until the Coleman transaction closed at the end of March 1998.

Morgan Stanley did not disclose Sunbeam's disastrous first quarter; Morgan Stanley did not insist that Sunbeam disclose its disastrous first quarter, Morgan Stanley did not correct any of the false and misleading statements it and Sunbeam had made to CPH about Sunbeam's business or performance, and Morgan Stanley did not suspend any of the critical transactions that were scheduled to close in the next two weeks. Instead, with Morgan Stanley's knowledge and assistance, Sunbeam prepared and issued a false press release on March 19, 1998 that affirmatively misstated and concealed Sunbeam's true condition.

The March 19, 1998 press release stated: "Sunbeam Corporation . . . said today that it is possible that its net sales for the first quarter of 1998 may be lower than the range of

Wall Street analysts' estimates for $285 million to $295 million, but net sales are expected to exceed 1997 first quarter net sales of $253.4 million. . . . The shortfall from analysts' estimates, if any, would be due to changes in inventory management and order patterns at certain of the Company's major retail customers. The Company further stated that based on the strength of its new product offerings and powerful brand names, it remains highly confident about the overall sales outlook for its products for the entire year."

As Morgan Stanley was fully aware, the March 19, 1998 press release was false, misleading, and failed to disclose material information. The March 19, 1998 press release failed to disclose Sunbeam's actual January and February 1998 sales or the true reasons for the poor results. Instead, the press release held out the false possibility that Sunbeam still could achieve sales of $285 million to $295 million and suggested that, if any shortfall occurred, that shortfall would be due to the fact that certain retailers had decided to defer first quarter purchases to the second quarter. The press release also assured that Sunbeam at least would exceed first quarter 1997 net sales of $253.4 million. Based on information that Morgan Stanley had in its hands on March 18, 1998, it was obvious that Sunbeam would not achieve sales of $285 million to $295 million and that Sunbeam's first quarter 1998 sales would be below its first quarter 1997 numbers. To simply meet 1997 first quarter sales, Sunbeam needed sales of $123.3 million over the 12 remaining days of the quarter — an average of $10.28 million per day. Sales of $10.28 million per day would be 306% more than the average per day sales in March 1997, and 281% more than the average per day sales for the first 17 days of March 1998. Furthermore, Morgan Stanley knew that the shortfall from analysts' estimates was not caused by retailers' deciding to defer purchases from the first quarter of 1998 to the second quarter, as the press release indicated. Rather, as Sunbeam's outside auditors had

advised Morgan Stanley in writing, the collapse in first quarter sales was caused by Sunbeam's acceleration of 1998 sales into the fourth quarter of 1997.

After Sunbeam's false press release was issued, Morgan Stanley stood arm-in-arm with Sunbeam while Dunlap and Kersh told CPH, analysts, and investors that the March 19, 1998 release was a purely cautionary statement because some first quarter 1998 sales might simply "spillover" into the second quarter and that Sunbeam still believed that it actually would meet analysts' estimates of $285 million to $295 million in first quarter 1998 sales.

Morgan Stanley knew that a full and truthful disclosure of Sunbeam's first quarter sales would doom the debenture offering, which was scheduled to close on March 25, 1998,

As Morgan Stanley was fully aware, the written contract between CPH and Sunbeam gave CPH the express legal right to refuse to close the sale if there was a material adverse change in Sunbeam's "business, results of operation or financial condition."

Furthermore, if the transactions did not close, Morgan Stanley would not be paid its $10.28 million fee for the Coleman acquisition or its $22.5 million fee for underwriting the subordinated debenture offering. Morgan Stanley also knew that Sunbeam would promptly replace Morgan Stanley with another investment banking firm – such as the Chase Securities team led by Mark Davis.

Sunbeam's outside auditors already had made it perfectly clear to Morgan Stanley that Sunbeam's first quarter 1998 sales were a disaster,

One of Sunbeam's senior outside auditors, Lawrence Bornstein, has testified under oath that on March 19, 1998, he told Morgan Stanley's John Tyree that the statement in Sunbeam's March 19, 1998 press release — that Sunbeam would at least exceed first quarter 1997 sales of $253.4 million — was not credible: "Just do the math . . . they've done a million dollars in sales the first 70 days of the year and now they need to do $10 million worth of sales for the next . . . I think it was 11 days . . . . I mean, something ridiculous." Bornstein also told Tyree: "I've been to every shipping dock domestically, I've been to Hattiesburg, I've been to Neosho, I've been to Mexico City, and I don't think these guys can physically ship this much stuff."

Morgan Stanley knew that the March 19 press release was false and misleading. Despite that knowledge and Bornstein's explicit statements, Morgan Stanley continued with its preparations to close the debenture offering on March 25, 1998 and the Coleman acquisition on March 30, 1998.

As part of those preparations, on March 24, 1998, Morgan Stanley's Tyree spoke by telephone with Sunbeam's Kersh, who was located in Sunbeam's Delray Beach offices, to obtain an updated report concerning Sunbeam's first quarter performance. By the time of that March 24, 1998 call, Sunbeam had fallen even further behind first quarter 1997 sales. As of March 18, 1998, Sunbeam needed to achieve average sales of $10.28 million per day, over 12 days, to reach

first quarter 1997 sales. Sunbeam's sales between March 18 and March 24, 1998 had averaged only $6.81 million per day — well short of the $10.28 million per day that Sunbeam needed to achieve. Sunbeam's March 18 through March 24, 1998 sales were further proof that Sunbeam's March 19, 1998 press release was false and that Sunbeam would not achieve first quarter 1998 sales in excess of first quarter 1997 sales.

Morgan Stanley also knew no later than March 25, 1998, if not much earlier, that Sunbeam's earnings for the first quarter of 1998 were going to miss Wall Street analysts' earnings expectations, which were in the range of $0.28 to $0.31 per share (excluding one-time charges). Sunbeam's outside auditors advised Morgan Stanley on March 25 that Sunbeam had suffered a $41.19 million loss during the first two months of 1998, including a one-time charge of $30.2 million. Even excluding that one-time charge, Sunbeam's loss for the first two months was $0.13 per share. To achieve first quarter 1998 operating earnings of $0.28 per share, which were at the low end of analyst expectations, Sunbeam needed to realize a profit of $35.5 million during March 1998 alone. A net profit of $35.5 million in March was 500% more than Sunbeam's net profit for the entire first quarter of 1997. In fact, Sunbeam's first quarter 1998 earnings fell far short of Wall Street's expectations. Sunbeam's first quarter earnings were material,

Having directly participated in misleading CPH Morgan Stanley had a duty to disclose the true facts before the closing of the debenture offering and the Coleman acquisition. Morgan Stanley also could have required Sunbeam to postpone the closings of

those transactions until the necessary disclosures were made. Morgan Stanley did neither. Instead, Morgan Stanley marched forward and closed the $750 million debenture offering on March 25, 1998, which was needed to close the Coleman transaction, and assisted Sunbeam in closing the acquisition of Coleman on March 30, 1998.

Morgan Stanley received $22.5 million for the subordinated debenture offering and $10.28 million for the Coleman acquisition. Morgan Stanley would have received nothing if the transactions had failed to close.

On April 3, 1998 — just four days after the Coleman transaction closed — Sunbeam announced that sales for the first quarter of 1998 would be approximately 5% below the $253.4 million in sales that Sunbeam reported in the first quarter of 1997. In other words, Sunbeam was expecting sales in the range of $240 million. That sales shortfall was shocking news, particularly in view of assurances provided by Sunbeam both in and after its March 19, 1998 press release that $285 million to $295 million of sales was still a real possibility. The April 3, 1998 press release also disclosed that Sunbeam expected to show a loss for the quarter, although the release did not disclose the magnitude of the loss or how much of the loss was attributable to operating earnings as opposed to one-time charges. Sunbeam's news stunned . . . . the market. On April 3rd, Sunbeam's stock price dropped 25% — from $45-9/16 to $34-3/8.

Sunbeam's actual first quarter 1998 performance was even worse than Sunbeam disclosed on April 3, 1998. The April 3, 1998 release indicated that Sunbeam's first quarter sales were in the range of $240 million. In fact, Sunbeam's first quarter sales were $224.5

million. Sunbeam obscured the true shortfall by extending its quarter from March 29 to March 31, 1998 — thereby adding two more days of Sunbeam sales. Sunbeam also failed to disclose that it had included two days of Coleman sales after the Coleman transaction closed on March 30. Further, Sunbeam inflated first quarter 1998 sales with $29 million of new phony "bill and hold" sales.

75. Just as Sunbeam's first quarter 1998 sales had been a disaster, so, too, were Sunbeam's first quarter 1998 earnings. Morgan Stanley and Sunbeam had represented to CPH that Sunbeam would achieve or exceed analyst first quarter 1998 earnings estimates. At the time of that representation, the consensus among analysts was that Sunbeam would enjoy first quarter 1998 earnings of $0.33 per share. However, on May 9, 1998, Sunbeam disclosed that it would record a first quarter loss of $0.09 per share (excluding one-time charges) — more than $0.40 per share lower than CPH had been told to expect.

76. Within weeks, Dunlap's fraudulent scheme began to unravel. In June 1998, after a number of news articles critical of Sunbeam's practices, Sunbeam's Board of Directors launched an internal investigation. That investigation led quickly to the firing of Dunlap and Kersh, and, subsequently, to a restatement of Sunbeam's financial statements for 1996, 1997, and the first quarter of 1998.

77. As detailed above, Morgan Stanley participated in a scheme to mislead CPH and others and cover up the massive fraud at Sunbeam until Morgan Stanley and Sunbeam could close the purchase of Coleman. Morgan Stanley provided CPH with false information concerning Sunbeam's 1996 and 1997 financial performance, its business operations, and the value of Sunbeam's stock. Morgan Stanley also actively assisted Sunbeam in concealing Sunbeam's

disastrous first quarter 1998 sales and earnings and the true reasons for Sunbeam's poor performance.

Morgan Stanley knew that its statements to CPH were materially false and misleading and omitted the true facts.

Morgan Stanley intended that CPH rely on Morgan Stanley's representations concerning Sunbeam.

As detailed above, Dunlap engaged in a fraudulent scheme to inflate the price of Sunbeam's stock by improperly manipulating Sunbeam's 1996 and 1997 performance, by falsely asserting that Sunbeam had successfully "turned around," and by concealing the collapse of Sunbeam's first quarter 1998 sales and earnings and the reasons for Sunbeam's first quarter 1998 performance.

86. As detailed above, Morgan Stanley knew of Dunlap's fraudulent scheme and helped to conceal it until after Sunbeam could close the purchase of Coleman.

As detailed above, Morgan Stanley provided substantial assistance to Dunlap and Sunbeam, including: concealing Sunbeam's first quarter 1998 sales collapse; assisting with the false March 19, 1998 press release; arranging road shows and meetings with prospective debenture purchasers at which Morgan Stanley, Dunlap, and others made false statements concerning Sunbeam's financial condition and business operations; preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam's financial condition and business operations; providing CPH with false financial and business information concerning Sunbeam; scripting Dunlap's false public statements concerning Sunbeam's acquisition of Coleman;

and underwriting the $750 million convertible debenture offering, proceeds from which were used to fund Sunbeam's purchase of Coleman.

As detailed above, Morgan Stanley conspired with Dunlap and other senior Sunbeam executives to conceal the truth about Sunbeam's financial performance and business operations.

As detailed above, Morgan Stanley committed overt acts in furtherance of the conspiracy, including: concealing Sunbeam's first quarter 1998 sales collapse; assisting with the false March 19, 1998 press release; arranging road shows and meetings with prospective debenture purchasers at which Morgan Stanley, Dunlap, and others made false statements concerning Sunbeam's financial condition and business operations; preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam's financial condition and business operations; providing CPH with false financial and business information concerning Sunbeam; scripting Dunlap's false public statements concerning Sunbeam's acquisition of Coleman;

and underwriting the $750 million convertible debenture offering, proceeds from which were used to fund Sunbeam's purchase of Coleman.

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant. /

DEFENDANT'S MOTION REGARDING THE RELIANCE AND DAMAGES ISSUES TO BE DETERMINED AT PHASE I OF TRIAL

Morgan Stanley & Co. Incorporated ("Morgan Stanley") moves for an order providing that the issues of reliance and damages will be determined during Phase I of the trial under both relevant standards of proof – proof by the greater weight of the evidence, and proof by clear and convincing evidence.

In support of this motion, Morgan Stanley states:

1. In this Court's order of March 16, 2005, the Court granted Plaintiff Coleman (Parent) Holding, Inc.'s ("CPH's") motion for entry of default judgment in part, holding that CPH's claims that Morgan Stanley aided and abetted Sunbeam's fraud and conspired with Sunbeam to commit fraud would be deemed established, but that the other elements of CPH's claims, reliance and damages, would be fully litigated. See Tr. Hearing March 31, 2005, at 6276-77; id. at 6279. Following that Order, this Court ruled that it would bifurcate the case. Phase I of the trial is "limited to liability, if any, . . . for compensatory damages." In contrast, Phase II shall address the availability and, "if

necessary, amount of punitive damages." Order of March 31, 2005, at 1 ("Bifurcation Order").

2. To prove entitlement to compensatory damages, CPH must prove the elements of fraud – the undefaulted elements – by the greater weight of the evidence. By contrast, to establish that punitive damages are even available, CPH must prove fraud – once again, the undefaulted elements – by clear and convincing evidence. See Fla. Stat. § 768.72 ("A defendant may be held liable for punitive damages only if the trier of fact, based on *clear and convincing evidence*, finds that the defendant was personally guilty of intentional misconduct") (emphasis added).[1]

3. The Court's current orders appear to contemplate having the jury decide the first issue, namely whether reliance and damages were proved by the greater weight of the evidence, at Phase I of the trial and the second issue, whether the same elements were proved by clear and convincing evidence, at Phase II of the trial. That procedure is neither efficient nor just. Because the jury will be deliberating on whether there was proof of reliance and damages by the greater weight of the evidence in any event at Phase I, it imposes no additional burden to ask the jury at the same time to decide whether those elements have been proved by clear and convincing evidence. Indeed, the jury would merely complete one verdict form question inquiring whether the elements had been proved by a preponderance of the evidence (resolving whether compensatory damages are available), and a second inquiring whether they had been proved by clear and convincing evidence (resolving whether punitive damages are available). See Attachment 1 (sample excerpt verdict form). Upon a determination that

[1] We assume for present purposes that the Court's order deems the defaulted elements established for purposes of both compensatory and punitive damages. As we have advised the Court by separate motion, however, deeming those elements established and foreclosing Morgan Stanley from contesting them for purposes of punitive damages is itself an excessive and unfair addition to an already severe sanction, is unprecedented in Florida, and is inconsistent with constitutional standards and binding decisions of Florida's appellate courts.

the elements were all proved by clear and convincing evidence – thus establishing the availability of punitive damages – the case would proceed to Phase II so the jury could determine whether to award them and, if so, in what amount. Or, upon determining that some elements were not so proved, the trial would terminate without need for Phase II.

4. Deferring the determination whether there was clear and convincing proof of reliance and damages to Phase II, in contrast, would waste the Court's, the party's, and the jury's time and energy and would constitute an unnecessary distraction from the central focus of that proceeding. After having litigated reliance and damages in Phase I, the parties would be required to remind the jury of the same evidence, and present the same arguments, again in Phase II to resolve precisely the same issue – reliance and damages – but under a different standard of proof. The jury will be required to deliberate on the same issue again, and consider the same evidence again, again with no difference but the standard of proof. Further, the jury would be required to sit through evidence relating to the amount of punitive damages despite the possibility that, because of a failure to prove fraud by clear and convincing evidence, punitive damages may turn out to be legally unavailable in any event. There is no sensible reason to proceed in that fashion.

5. There is, moreover, a powerful reason for not proceeding in that fashion -- it introduces an unacceptable risk of undue prejudice. Under the Court's current orders, the evidence introduced during Phase II will include potentially inflammatory evidence relating to punitive damages. For example, the Court currently plans to read a statement to the jury setting forth its findings of litigation misconduct.[2] Such evidence has *no* bearing on whether CPH reasonably relied (or whether there was clear and convincing proof of reasonable reliance). But it has the undeniable potential to inflame the jury and taint that determination. Deferring resolution of whether there is clear and

[2] Morgan Stanley, as the Court understands, disputes the propriety of reading such a statement, as its other motions and papers in this case make clear.

convincing proof of reliance and damages to Phase II thus serves not only efficiency, but fairness as well.

6. Morgan Stanley is aware of the Court's considerable frustration (and more) with the way discovery and other matters were handled in this case. But that frustration should not cause the Court to lose sight of its duty to establish procedures that are both efficient and fair. Because the procedures currently contemplated by the Court's orders fall short on both accounts, they must be modified at least in this one respect.

CONCLUSION

For all the foregoing reasons, Defendant Morgan Stanley respectfully requests that this Court reconsider its order of March 31st.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 4th day of April, 2004.

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ATTACHMENT 1

[*SAMPLE FOR ILLUSTRATIVE PURPOSES ONLY*]

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

CASE NO: CA 03-5045 AI

VERDICT

We, the jury, return the following verdict:

COUNT I—AIDING AND ABETTING

1. **Did Defendant Coleman (Parent) Holdings, Inc. ("CPH") actually rely on Sunbeam's allegedly false statements?**

A. Was this proved by the greater weight of the evidence?

YES_____ NO_____

B. Was this proved by clear and convincing evidence?

YES_____ NO_____

If your answer to Question 1 is NO, your verdict on this count is for Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley"), and you should proceed to COUNT II—CONSPIRACY. If your answer to Question 1 is YES, please answer Question 2.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,
vs.
MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

CASE NO: CA 03-5045 AI

Morgan Stanley & Co. Incorporated's Objections to Plaintiff's Revised Trial Exhibit List (served on March 27, 2005)

Ex. No.	Objection
CPH 6	Hearsay, Foundation/Authenticity, Completeness
CPH 7/A	Completeness
CPH 8	Relevance, Prejudicial
CPH 11	
CPH 14	Relevance
CPH 19	Relevance
CPH 30	Relevance
CPH 33	Relevance (as to cover)
CPH 66	Hearsay, Relevance, Foundation/Authenticity, Completeness
CPH 67	Relevance
CPH 68	Relevance
CPH 71	Relevance
CPH 72	Relevance, Foundation/Authenticity, Hearsay, Completeness
CPH 73	Hearsay, Relevance
CPH 81	Relevance, Foundation/Authenticity (Metadata)
CPH 87	Relevance
CPH 88	Relevance
CPH 98	Hearsay, Relevance, Foundation/Authenticity
CPH 111	Relevance

16div-014114

CPH 128	Hearsay, Relevance
CPH 134	Hearsay, Foundation/Authenticity
CPH 142	Relevance
CPH 149	Misleading
CPH 150	Misleading, Completeness
CPH 151	Misleading, Prejudicial, Hearsay
CPH 155	Hearsay, Relevance, Misleading
CPH 158	Relevance
CPH 171	
CPH 209	Hearsay, Relevance
CPH 212	
CPH 226	Relevance
CPH 233	Hearsay, Relevance
CPH 234	Hearsay, Relevance
CPH 235	Hearsay, Relevance
CPH 236	Hearsay, Relevance
CPH 248	Hearsay, Relevance
CPH 258	Hearsay, Relevance
CPH 278	
CPH 289	Relevance, Prejudicial, Limited by Order on MS Mil # 1, Hearsay
CPH 290	Relevance, Prejudicial, Limited by Order on MS Mil # 1, Hearsay
CPH 291	Relevance, Prejudicial, Limited by Order on MS Mil # 1, Hearsay
CPH 292	Relevance, Prejudicial, Limited by Order on MS Mil # 1, Hearsay
CPH 293	Relevance, Prejudicial, Limited by Order on MS Mil # 1, Hearsay
CPH 294	Relevance, Prejudicial, Limited by Order on MS Mil # 1, Hearsay
CPH 297	Hearsay
CPH 298	Relevance

CPH 305	Hearsay, Relevance
CPH 309	
CPH 310	Hearsay, Relevance
CPH 320	Relevance (as to cover page)
CPH 322	Hearsay
CPH 323	Hearsay, Relevance, Foundation/Authenticity
CPH 325	Foundation/Authenticity
CPH 326	Foundation/Authenticity
CPH 328	Foundation/Authenticity
CPH 330	Hearsay
CPH 331	
CPH 337	Hearsay
CPH 338	Hearsay
CPH 342	Hearsay
CPH 345	Hearsay, Foundation/Authenticity
CPH 349	Hearsay
CPH 352	
CPH 354	Foundation/Authenticity
CPH 355	Foundation/Authenticity
CPH 356	Hearsay, Relevance, Foundation/Authenticity
CPH 357	Hearsay, Relevance, Foundation/Authenticity
CPH 358	
CPH 359	Hearsay, Foundation/Authenticity
CPH 360	Hearsay, Foundation/Authenticity
CPH 361	Hearsay, Foundation/Authenticity
CPH 362	Hearsay, Foundation/Authenticity
CPH 367	Hearsay
CPH 368	
CPH 371	
CPH 373	
CPH 378	Hearsay

CPH 380	Hearsay
CPH 381	Hearsay, Foundation/Authenticity
CPH 386	Hearsay
CPH 410	Hearsay, Relevance, Foundation/Authenticity
CPH 438	Hearsay, Relevance, Foundation/Authenticity
CPH 439	Hearsay, Relevance, Foundation/Authenticity
CPH 444	Hearsay
CPH 447	
CPH 448	
CPH 449	Hearsay, Completeness
CPH 450	Hearsay, Completeness
CPH 454	Hearsay, Relevance, Foundation/Authenticity
CPH 457	Hearsay, Relevance, Foundation/Authenticity
CPH 459	Hearsay, Relevance, Foundation/Authenticity
CPH 465	Relevance
CPH 466	Hearsay, Foundation/Authenticity
CPH 470	Hearsay, Foundation/Authenticity
CPH 471	Hearsay, Relevance, Foundation/Authenticity
CPH 482	Hearsay, Relevance, Foundation/Authenticity
CPH 485	Hearsay, Relevance, Foundation/Authenticity
CPH 487	Hearsay, Relevance, Foundation/Authenticity
CPH 493	Hearsay, Relevance, Foundation/Authenticity, Completeness
CPH 495	Hearsay, Foundation/Authenticity
CPH 496	Hearsay, Foundation/Authenticity
CPH 497	Hearsay
CPH 503	Hearsay, Relevance, Foundation/Authenticity
CPH 505	Hearsay, Relevance, Foundation/Authenticity
CPH 506	Hearsay, Relevance, Foundation/Authenticity
CPH 507	Hearsay, Relevance, Foundation/Authenticity
CPH 509	Hearsay, Relevance, Foundation/Authenticity
CPH 510	Hearsay, Relevance, Foundation/Authenticity

CPH 512	Relevance
CPH 568	Relevance
CPH 569	Relevance
CPH 591	Relevance
CPH 596	Relevance
CPH 597	Relevance
CPH 600	Hearsay
CPH 705	Hearsay, Relevance, Foundation/Authenticity
CPH 718	Hearsay, Relevance, Foundation/Authenticity
CPH 821	
CPH 824	
CPH 850	Relevance
CPH 941	Untimely
CPH 956	Hearsay, Relevance, Foundation/Authenticity, Completeness, Untimely
CPH 959	Hearsay, Relevance, Foundation/Authenticity, Untimely
CPH 960	Hearsay, Relevance, Foundation/Authenticity, Untimely
CPH 1147	Hearsay, Relevance, Foundation/Authenticity, Untimely
CPH 1155	Relevance, Untimely
CPH 1159	Hearsay, Relevance, Untimely
CPH 1165	Hearsay, Foundation/Authenticity, Untimely
CPH 1166	Hearsay, Relevance, Foundation/Authenticity, Untimely
CPH 1167	Hearsay, Relevance, Foundation/Authenticity, Untimely
CPH 1173	Hearsay, Relevance (as to MSC 0112250, 0112284-85)
CPH 1174	Hearsay (as to MSC 0112220), Relevance, Untimely
CPH 1175	Relevance
CPH 1176	Relevance, Untimely
CPH 1179	Relevance
CPH 1180	Hearsay (as to MSE21605-0000035-37), Relevance
CPH 1212	Incomplete, Relevance, Foundation/Authenticity
CPH 1221	Hearsay, Relevance, Foundation/Authenticity, Prejudicial
CPH 1226	Hearsay, Relevance, Foundation/Authenticity, Prejudicial

CPH 1228	Hearsay, Relevance, Foundation/Authenticity, Prejudicial
CPH 1229	Hearsay, Relevance, Foundation/Authenticity, Prejudicial
CPH 1230	Hearsay, Relevance, Foundation/Authenticity, Prejudicial
CPH 1236	Relevance, Prejudicial
CPH 1239	Relevance, Prejudicial
CPH 1240	Relevance, Prejudicial
CPH 1241	Hearsay, Relevance, Foundation/Authenticity, Untimely
CPH 1244	Hearsay, Relevance, Foundation/Authenticity, Completeness
CPH 1246	Hearsay, Relevance, Foundation/Authenticity, Completeness
CPH 1257	Hearsay, Foundation/Authenticity, Completeness
CPH 1258	
CPH 1259	Hearsay, Foundation/Authenticity
CPH 1261	Hearsay, Relevance, Foundation/Authenticity
CPH 1262	Hearsay, Relevance, Foundation/Authenticity, Opinion Evidence
CPH 1264	Hearsay, Relevance, Foundation/Authenticity, Prejudicial
CPH 1267	Relevance, Prejudicial
CPH 1268	Relevance, Prejudicial
CPH 1270	Relevance, Completeness, Prejudicial
CPH 1273	Relevance, Prejudicial
CPH 1283	Relevance, Prejudicial
CPH 1285	Relevance
CPH 1287	Relevance, Prejudicial
CPH 1288	
CPH 1295	Hearsay
CPH 1296	
CPH 1297	Relevance, Prejudicial
CPH 1300	Relevance
CPH 1301	Hearsay
CPH 1302	Relevance
CPH 1304	Relevance, Untimely
CPH 1305	Relevance, Untimely

CPH 1308	Untimely
CPH 1309	Untimely, Foundation/Authenticity, Hearsay
CPH 1310	Relevance, Foundation/Authenticity, Untimely
CPH 1311	Untimely, Foundation/Authenticity
CPH 1312	Hearsay, Untimely
CPH 1313	Hearsay, Untimely
CPH 1314	Relevance, Untimely
CPH 1315	Hearsay, Untimely
CPH 1316	Relevance, Untimely
CPH 1317	Hearsay, Untimely
CPH 1318	Relevance, Untimely
CPH 1319	Hearsay, Untimely
CPH 1320	Hearsay, Relevance, Foundation/Authenticity, Untimely
CPH 1321	Hearsay, Relevance, Foundation/Authenticity, Untimely
CPH 1322	Hearsay, Relevance, Foundation/Authenticity, Untimely
CPH 1323	Hearsay, Relevance, Foundation/Authenticity, Untimely
CPH 1324	Relevance, Untimely
CPH 1325	Illegible, Hearsay, Foundation/Authenticity, Untimely
CPH 1326	Hearsay, Foundation/Authenticity, Untimely
CPH 1327	Hearsay, Untimely
CPH 1328	Hearsay, Relevance, Foundation/Authenticity, Untimely
CPH 1329	Hearsay, Relevance, Foundation/Authenticity, Untimely
CPH 1330	Hearsay, Untimely
CPH 1331	Relevance, Prejudicial, Untimely
CPH 1332	Untimely
CPH 1333	Hearsay, Untimely

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 4th day of April 2005.

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

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

MORGAN STANLEY'S OPPOSITION TO CPH'S MOTION TO QUASH AMENDED TRIAL SUBPOENA AND NOTICE TO PRODUCE PERSONAL BALANCE SHEETS OF RONALD PERELMAN AND CROSS-MOTION TO COMPEL PRODUCTION OF FINANCIAL DOCUMENTS

Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley"), respectfully requests that the Court enter an order, pursuant to Fla. R. Civ. P. 1.350(b), (1) denying Coleman (Parent) Holdings Inc.'s ("CPH") Motion to Quash the Amended Trial Subpoena ("Motion") and (2) compelling CPH to produce Ronald O. Perelman's "personal balance sheet" for the years 1998, 1999, and 2000, and all related materials including (but not limited to):

- Back-up or support for each balance on the personal balance sheets that relate to Sunbeam, Sunbeam warrants, or MAFCO Holdings Inc. ("MAFCO"), including any balance that is a summation or aggregation of several balances one of which relates to Sunbeam or Sunbeam warrants, and

- All correspondence or other documents related to transmittal of the personal balance sheets to any bank or other financial institution.

ARGUMENT

1. These documents are subject to Morgan Stanley's request to CPH, served more than 18 months ago, to produce "[a]ll documents reflecting, referring, or relating to the value of Sunbeam securities" (July 14, 2003 Morgan Stanley's 1st Req. for Prod. of Docs. to Plf. (Ex.

A)).[1] The existence of Mr. Perelman's personal balance sheets were only recently disclosed when, on March 21, 2005, Stephen Fasman, Senior Vice-President, Law at MAFCO, testified regarding his familiarity with such balance sheets. (*See* Mar. 21, 2005 Hr'g 4726:8-20 (Ex. B)) Upon learning of these documents, Morgan Stanley immediately requested their production. (Mar. 22, 2005 L. Bemis Letter to M. Brody (Ex. C)) However, to date — despite the fact that the Court has ordered the production of ***all*** valuation documents — CPH has failed to produce the balance sheets. There is no justification for this lack of compliance. The Court should uphold the validity of the amended subpoena and notice to produce and compel CPH to produce the balance sheets for the reasons stated below.

2. *First*, CPH attempts to avoid its clear obligation to produce Mr. Perelman's highly relevant personal balance sheets at trial by asserting that fax service of the amended subpoena on CPH's counsel "was not a proper mode of service." This is simply incorrect. Fla. R. Civ. P. 1.1080(b)(5) allows for fax service, so long as (1) the cover sheet contains the "sender's name, firm, address, telephone number, and facsimile number, and the number of pages transmitted, and (2) a copy is also served by any other method permitted by the rule. By its own admission, CPH received the faxed amended subpoena, and in accordance with the rule, was also served by hand delivery. *See, e.g.*, Motion at 1 (stating that Morgan Stanley served the motion by fax and by hand delivery on March 30, 2005).

3. Even if this Court were to find that the amended subpoena was invalidly served as to Mr. Perelman in his individual capacity, it would not relieve CPH of its outstanding obligation to provide Morgan Stanley with the personal balance sheets and related materials pursuant to

---

[1] The history of Morgan Stanley's valuation related discovery requests is chronicled in Morgan Stanley's Motion to Compel Production of Documents dated February 15, 2005.

Morgan Stanley's Notice to Produce at Trial, dated March 30, 2005. Mr. Fasman's testimony revealed that the documents are retained at the MAFCO offices, and have been in the possession of at least two individuals, himself and Gerry Kessel, who works in the Accounting Department. (*See* Mar. 21, 2005 Hr'g 4726:8-20 (Ex. B)) As both this Court and CPH's counsel have indicated, CPH is essentially the alter-ego of MAFCO, and thus, for the purposes of locating and collecting documents reflecting the valuation of Sunbeam stock received by CPH in the transaction, the personal balance sheets, which are available at MAFCO, are responsive and must be produced. (*See* February 17, 2005 Hr'g. Trans. 999-1001 (Ex. D)).

4. Mr. Perelman's personal balance sheets are highly relevant to this case. These documents will demonstrate that CPH did not suffer any damages as a result of the alleged fraud by Morgan Stanley. Mr. Perelman's personal financial statements are likely to contain a valuation of CPH's holdings of Sunbeam stocks after the alleged fraud had been fully revealed. To the extent that his personal financial statements corroborate MAFCO's financial statements — which valued CPH's holdings in Sunbeam at $450 million as late as December 31, 1999, over a year after the alleged fraud was fully revealed — these documents will undermine CPH's assertion that the fraud caused it to suffer a complete loss on its Sunbeam holdings. And, to the extent that these documents have been provided to government entities or financial institutions or have been used to create documents that were provided to these entities, they possess strong indicia of reliability.

5. CPH, no doubt, opposes Morgan Stanley's attempt to obtain these documents not because they are irrelevant but instead because it recognizes the compelling impact these documents are likely to have in establishing the absence of damages in this case. To the extent that Mr. Perelman continued to place a high value on CPH's holdings in Sunbeam at the end of

the year 1998, 1999, or 2000 a jury will find it difficult to believe that CPH (and by extension Mr. Perelman) suffered a total loss on its holdings in Sunbeam as a result of the alleged fraud. These materials will also belie CPH's claim that bankruptcy was inevitable and not its fault — establishing definitively that CPH's holdings in Sunbeam dropped from $450 million to zero on CPH's watch, while Mr. Perelman and his colleagues managed Sunbeam's day-to-day operations.

6. CPH's claim that discovery of the requested documents is inconsistent with Florida law is belied by well established law, including a case cited by CPH in another motion. CPH has previously relied on *Mogul v. Mogul* for the proposition that "financial information of private persons is entitled to protection by this State's constitutional right of privacy, *if there is no relevant or compelling reason to compel disclosure*." (Mar. 18, 2005 Coleman (Parent) Holdings Inc.'s Response to Morgan Stanley's Motion to Remove Confidentiality Designations at 3 (citing *Mogul v. Mogul*, 730 So. 2d 1287, 1290 (Fla. 5th DCA 1999) (denying discovery of non-parties' financial information because it was irrelevant to any issue in case, but declining to bar discovery of personal financial information of party)) (emphasis added). In this case, however, the information contained in Mr. Perelman's personal balance sheet is directly relevant to determining the value of the Sunbeam stock, for the purpose of establishing damages.

7. Likewise, the Florida Supreme Court recently held that where the personal financial information "sought by a party would appear to be relevant to the subject matter of the pending action, the information is *fully discoverable*." *Friedman v. Heart Institute of Port St. Lucie, Inc.*, 863 So. 2d 189, 194 (Fla. 2003) ("A party's finances, if relevant to the disputed issues of the underlying action, are not excepted from discovery under this rule of relevancy, and courts will compel production of personal financial documents and information if shown to be

relevant by the requesting party.") (emphasis added); *see also Epstein v. Epstein*, 519 So. 2d 1042, 1043 (Fla. 3rd DCA 1988) (reversing the lower court for failure to allow discovery into financial records and stating that "[w]here materials sought by a party would appear to be relevant to the subject matter of the pending action, it is an abuse of discretion to deny discovery.") Because, as demonstrated above, Mr. Perelman's personal balance sheets are undoubtedly relevant to the issue of damages in this case, they must be produced.

8. CPH's protestation that the balance sheets reflect only aggregate figures for Mr. Perelman's holdings in MAFCO is simply irrelevant to the discoverability of the documents, the only question before the court. Though the Court need not reach the question, even in the aggregate, the value Mr. Perelman assigned to his holdings in MAFCO, which includes Sunbeam, is highly relevant and admissible evidence reflecting on his valuation of CPH after the fraud and confirming the absence of any damages in this case. To the extent that these balance sheets rely on, and thus, corroborate the values contained in MAFCO's financial statements, they will offer further proof that CPH's holdings in Sunbeam were not rendered valueless by the alleged fraud. To the extent that Mr. Perelman, the ultimate insider with substantial knowledge of CPH's business, relied upon the "estimated fair value" of MAFCO as disclosed in MAFCO's Consolidated Financial Statements, the jury will almost certainly give significant credence to MAFCO's financial statements, including their assertion that its holdings in Sunbeam were worth $450 million after all the alleged fraud had been disclosed.

9. In fact, this Court has already ruled (and CPH's counsel has agreed) that discovery of aggregate values that include the value of Sunbeam is relevant. (Mar. 1, 2005 Hr'g at 1794:15-1795:3 (Ex. E))

> THE COURT: But as I understand it, maybe I'm wrong, that part of [Morgan Stanley's] concern is to the extent that the Sunbeam, the value of the Sunbeam

> stock or warrants was consolidated with other assets and then representations were made to third parties concerning the value, the total value of those assets, you want to be able to ask about that.
>
> MR. DAVIDSON: Exactly right.
>
> THE COURT: Because in your opinion it would simply republish the belief of the Sunbeam value stock or warrants.
>
> MR. SOLOVY: We discussed that already. It's no problem [pursuing discovery into those issues].

10. Mr. Perelman ultimately owns 100% of CPH's interest in Sunbeam. This interest is certainly accounted for on his personal balance sheets. Thus, the personal balance sheets (and the related materials requested) would clearly reflect information within the scope of the document request necessary to analyzing CPH's claim for billions of dollars of damages against Morgan Stanley. Accordingly, Mr. Perelman's balance sheets, and any related documents, in MAFCO (and, as noted above, CPH's) possession, must be produced at trial.[2]

CONCLUSION

Morgan Stanley respectfully requests that the Court enter an order, pursuant to Fla. R. Civ. P. 1.350(b), denying CPH's motion to quash Mr. Perelman's amended subpoena and compelling CPH to produce Mr. Perelman's "personal balance sheet" for the years 1998, 1999, and 2000, all back-up or support for each balance on the personal balance sheets that relate to Sunbeam, Sunbeam warrants, or MAFCO, including any balance that is a summation or aggregation of several balances one of which relates to Sunbeam or Sunbeam warrants, and all

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[2] CPH's attempt to assert that the subpoena should be quashed on the ground that Morgan Stanley may not "present evidence or argument concerning the wealth, net worth, income, or financial status of any" party or individual misses the point. *See* Motion at 1-2. Morgan Stanley does not propose to argue about Mr. Perelman's wealth generally or to talk about his "lifestyle." In this application, Morgan Stanley only seeks discovery aimed to ascertain whether and to what extent CPH suffered damages in this case.

correspondence or other documents related to transmittal of the personal balance sheets to any bank or other financial institution. Moreover, as a result of CPH's failure to produce these documents for over a year and a half, Morgan Stanley should be awarded its attorney fees and costs, pursuant to Rules 1.350(b); 1.380(a)(1), (4), incurred in presenting this motion.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 4th day of April 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

MORGAN STANLEY'S OPPOSITION TO CPH'S MOTION IN LIMINE NO. 29 TO BAR EVIDENCE AND ARGUMENT IDENTIFYING THE BENEFICIARY OF ANY PUNITIVE-DAMAGES AWARD

Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully requests that this Court deny Coleman (Parent) Holdings Inc.'s (CPH) Motion In Limine No. 29 to Bar Evidence and Argument Identifying the Beneficiary of Any Punitive-Damages Award. Evidence of Perelman's financial interest in the outcome of the case, including any benefit deriving from a possible award of punitive damages, is admissible under Florida Evidence Code § 90.608(2) to impeach his testimony on the grounds of bias. It is also admissible in this case on the separate, independent basis that it is needed to correct the false information provided to the jury pool during voir dire.

ARGUMENT

1. Mr. Perelman owns through his holding companies 100 % of CPH. Thus, any award of damages to CPH will directly benefit Mr. Perelman, giving him a direct financial interest in the outcome in this case.

2. The Court has explicitly recognized that Morgan Stanley may offer evidence of Mr. Perelman's financial interest in the outcome of the case, including any potential punitive damages, as evidence relevant to his "credibility":

> Court: I would agree a reasonable juror may conclude that it could affect his credibility whether he stands to make 500 million or 2 billion. So I think it is fair to have the jury know[.] ... I think it's fair to ask that question as a method of testing his credibility.

(March 31, 2005 Transcript (Exhibit 1), 6136:25 – 6137:10.)

3. This Court's ruling comports with well-established Florida law. Under Section 90.608 of the Florida Evidence Code, a party "may attack the credibility of a witness [by] ... showing that the witness is biased." § 90.608, Fla. Stat. (2004). A demonstration of bias includes any "possible interest in the outcome of the case." *Steinhorst v. State*, 412 So. 2d 332, 337 (Fla. 1982). Florida courts routinely recognize that ***financial*** interest in the outcome of a case may be used to impeach a witness. *See, e.g., Allstate Ins. Co. v. Boecher*, 733 So. 2d 993, 997-98 (Fla. 1999), *Dosdourian v. Carsten*, 624 So. 2d 241, 243-44 (Fla. 1993); *Jacksonville, T & K. RY. Co. v. Wellman*, 7 So. 845, 846 (Fla. 1890); *Barrows v. State*, 805 So. 2d 120, 123 (Fla. 4th DCA 2002); *Payne v. State*, 541 So. 2d 699, 700 (Fla. 1st DCA 1989) ("the intent of a person to financially gain from an incident now subject to litigation ... shows an interest in the outcome of the dispute and therefore bias").

4. Further, as the Court pointed out, it is relevant to a jury's consideration of a witness's credibility not only whether he has a financial interest in the outcome of the case, but also ***the magnitude of that interest***. (March 31, 2005 Transcript (Exhibit 1), 6136:25 – 6137:3.) The Ninth Circuit Court of Appeals has explained the rationale for this result:

> [T]he jury may reasonably believe that the willingness of a witness to lie or shade testimony would be affected, not only by whether the result may benefit him, but

> also by how much. ***Some people would lie under oath for a lot of money but not for a little.***

United States v. Harris, 185 F.3d 999, 1008 (9th Cir. 1999) (emphasis added). Florida law is consistent. *See, e.g., State v. Johnson*, 285 So. 2d 53, 56 (Fla. 2d DCA 1973) (it "would surely be proper" to show the bias of a witness by inquiring as to "whether [the witness] has been paid by his employer to prosecute or give testimony against the defendant, the ***amount***, duration and ***contingency*** of any such payment") (emphasis added); *Allstate*, 733 So. 2d at 997-98; *Pomeranz v. State*, 634 So. 2d 1145, 1146 (Fla. 4th DCA 1994); *Flores v. Miami-Dade County*, 787 So. 2d 955 (Fla. 3d DCA 2001).

5. Finally, this Court's holding that Morgan Stanley is allowed to impeach Mr. Perelman's testimony by showing the total amount he stands to gain—including the very large amount of punitive damages requested—also comports with more basic precepts of Florida evidence law, allowing impeachment as to bias and interest. *Gibbons v. State*, 661 So. 2d 288, 291 (Fla. 1995) ("Our evidence code liberally permits the introduction of evidence to show the bias or motive of a witness."); *Blair v. State*, 371 So. 2d 224, 225 (Fla. 1st DCA 1979) ("A defendant should be afforded wide latitude to demonstrate bias or a possible motive of the witness to testify as he has.").

6. CPH cites cases that are inapposite to this issue. Every case cited by CPH addresses the wholly unrelated question of what evidence can be presented by the plaintiff in its ***case-in-chief*** on the issue of the defendant's liability for punitive damages. These cases have no bearing on what evidence can be introduced for ***impeachment*** purposes.

7. Thus, CPH cites numerous cases in which courts hold that a plaintiff cannot present evidence of his or her own impoverishment as a basis for awarding punitive damages. *See Batlemento v. Dove Fountain, Inc.*, 593 So. 2d 234, 241-42 (Fla. 5th DCA 1991) (plaintiff's

lifesavings lost); *Seaboard Air Line Ry v. Smith*, 32 So. 235, 239 (Fla. 1907) ("the plaintiff, a poor negro, who, if he did not get damages ... would be a ward on the county."); *Rogers v. Myers*, 240 So. 2d 516, 518 (Fla. 1st DCA 1970) (plaintiff may need welfare); *Deese v. White Belt Dairy Farms, Inc.*, 160 So. 2d 543, 545 (Fla. 2d DCA 1964), *rev. denied*, 601 So. 2d 551 (Fla. 1992) (plaintiff could not support herself or infant child without working); *Velilla v. VIP Care Pavilion Ltd.*, 861 So. 2d 69, 72-73 (Fla. 4th DCA 2003), *rev. denied*, 885 So. 2d 389 (Fla. 2004) (plaintiff could not afford private nursing).

8. Not only should Morgan Stanley be allowed to admit as credibility evidence the fact that Mr. Perelman is the beneficiary of any punitive damage award, but Morgan Stanley also must be allowed to correct a misleading impression to the jury pool.

9. During voir dire, a prospective juror described Mr. Perelman's possible receipt of punitive damages as being "like winning a lottery on top of [compensatory damages]. He gets found money basically." (March 16, 2005 Transcript (Exhibit --) 4039:16 – 22.) In response, Mr. Scarola stated:

> Mr. Patti, a very good point and a point that has not been overlooked by the legislature of the state of Florida. Because there have been times when our state laws have talked about the money not going to the plaintiff but going in other directions. Okay. ***The money goes to the state. It goes for particular purposes.***

(*Id.* at 4039:23 – 4040:07 (emphasis added).)

10. With respect to this case, Mr. Scarola's statement to the jury pool is obviously not correct. Florida law contains no provision for allocating punitive damage awards to the state. § 768.73, Fla. Stat. (2004). A statute to the contrary was repealed in 1997. Laws 1997, c. 97-94, § 16, eff. July 1, 1997.

11. Plaintiff's own case law makes clear the statement was improper. Indeed, CPH cites a long series of cases that hold it is improper for a plaintiff to present evidence that some or

all of any punitive damages award will go to someone other than the plaintiff, such as the state, a charity, or, in one case, the defendant. *See In re Exxon Valdez*, 229 F.3d 790, 798-99 (9th Cir 2000) ("cede back agreement" between plaintiff and defendant); *Burke v. Deere & Co.*, 6 F.3d 497, 512 (8th Cir. 1993) ("a portion of the punitive damage award ... will be paid into a civil trust fund."), *cert. denied*, 510 U.S. 1115 (1994); *Ford v. Uniroyal Goodrich Tire Co.*, 476 S.E.2d 565, 570 (Ga. 1996) ("distribution of [75% of] the punitive damages award" to the state treasury); *Honeywell v. Sterling Furniture Co.*, 797 P.2d 1019, 1021 (Or. 1990) ("portion of any punitive damage award will be used to pay the plaintiff's attorney or to contribute to a worthy cause, such as help for victims of crime.").

WHEREFORE, Morgan Stanley respectfully requests that the Court enter an order denying CPH's Motion in Limine No. 29 To Bar Evidence And Argument Identifying the Beneficiary of Any Punitive-Damages Award.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 4th day of April, 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

MORGAN STANLEY'S OPPOSITION TO PLAINTIFF'S MOTION TO BAR THE EXPERT TESTIMONY OF JOHN F. ASHLEY

Coleman (Parent) Holding Inc.'s ("CPH") Motion to Exclude Expert Witness John Ashley (the "Motion") should be denied. Morgan Stanley & Co. Incorporated's ("Morgan Stanley") designation of Mr. Ashley has not prejudiced CPH in any way and was made in good faith. This Motion is nothing more than an attempt by CPH to present evidence that directly contradicts a holding by this Court without affording Morgan Stanley the chance for rebuttal. There is no basis in the law for such an exclusion and it should therefore be denied.

ARGUMENT

1. On March 1, 2005, this Court entered the Order on CPH's Motion for Adverse Inference Instruction due to Morgan Stanley's Destructions of E-mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, and Motion for Additional Relief and Order on Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-mails (the "Adverse Inference Order"). In that Order, the Court found, in part, that Morgan Stanley's actions in overwriting backup tapes containing e-mails "justif[ied] sanctions." (Adverse Inference Order at 11.)

2. As a result of these and other actions, the Court ruled that it would read a statement of facts, attached as Exhibit A to the Adverse Inference Order, to the jury. The Court ruled that the findings in Exhibit A "shall be conclusive." (Id. at 13.) Exhibit A details the Court's findings concerning, among other things, Morgan Stanley's practice of overwriting emails. Most notably, the Court found that "**E-mails could no longer be retrieved once they were overwritten.**" (Emphasis added.) Given the twin rulings that overwritten e-mails were irretrievable and that this fact was a conclusive finding by the Court, Morgan Stanley was precluded from presenting a witness on this issue at trial. Indeed, as overwritten emails *are* irretrievable, as the Court correctly found, there would have been no reason to have expert testimony on this matter even if that testimony would have been proper.

3. On March 8, 2005, Morgan Stanley filed a Motion for an Adverse Inference Instruction. The basis for this Motion was CPH's systematic and extensive failure to preserve e-mails, including its failure to preserve backup tapes. The evidence presented in this Motion clearly showed that for three years after CPH anticipated litigation regarding the Sunbeam transaction, it continued to destroy e-mails after only 30 days and overwrite e-mail backup tapes after 60 days. (Morgan Stanley's Supplemental Memorandum in Support of Motion for an Adverse Inference Instruction at 3.) The Court denied this Motion on March 25, 2005, ordering that

> Morgan Stanley's Motion for an Adverse Inference Instruction is Denied, without prejudice to Morgan Stanley's right to present evidence about CPH's email retention practices and its failure to direct that emails related to the Sunbeam transaction be saved and CPH's right to present evidence of its offer to have a third-party vendor given access to retrieve emails from CPH's system. . . .

(Order on Morgan Stanley's Motion for an Adverse Inference Instruction dated March 25, 2005 at 1.)

4. This Order directly contradicts the Court's earlier finding of fact, as embodied in Exhibit A to the Adverse Inference Order. In those findings, deemed "conclusive" by the Court, the Court found that once e-mails are overwritten, they cannot be recovered. (Adverse Inference Order, Exhibit A at 1.) Now, in direct contravention of its conclusive finding that overwritten e-mails cannot be restored, the Court has ruled that CPH may present evidence concerning CPH's offer to have the e-mails restored. There would be no need to call Mr. Ashley if the Court were to instruct the jury, as the Court was prepared to do previously, that e-mails cannot be retrieved once they are overwritten. Given the Court's surprising and unexpected about-face, however, Morgan Stanley should otherwise be entitled to present evidence, including an expert on computer forensics, to (1) show that the Court's finding in Exhibit A that overwritten e-mails cannot be retrieved was correct, and (2) rebut CPH's argument concerning retrieving erased e-mail. Morgan Stanley believes (and the expert testimony will prove) that the Court's conclusion regarding e-mail retrieval was correct and that CPH should not be able to offer evidence to attempt to show otherwise. However, if CPH is entitled to offer such evidence, Morgan Stanley should clearly be allowed to rebut such evidence.

5. The case law supports Morgan Stanley's argument. "We recognize that excluding the testimony of a witness is one of the most drastic of remedies which should be invoked only under the most compelling of circumstances." *Department of Health and Rehabilitative Services v. J.B. By and Through Spivak*, 675 So.2d 241, 244 (Fla. 4th DCA 1996). Here, there is no legal or equitable basis for such an exclusion. The Florida Supreme Court has ruled that determinations as to the addition of witnesses is up to the discretion of the trial court. This determination is to be based on the extent of the prejudice of the opposing party, as well as the ability to cure any prejudice, the calling party's bad faith, and any possible disruption to the

proceedings. *Binger v. King Pest Control*, 401 So.2d 1310, 1313-14 (Fla. 1981); *Berlin v. Roldan*, 786 So.2d 649, 650 (Fla. 4th DCA 2001) (trial court erred in not allowing the testimony of an unlisted witness when doing so would "not be unfair to the objecting party").

6. All of the *Binger* factors favor denying CPH's Motion. CPH has not been prejudiced by the date of Morgan Stanley's designation of Mr. Ashley as an expert witness. CPH will have the opportunity, if it wishes, to depose Mr. Ashley, and to plan its litigation strategy based on that testimony. There was no bad faith on Morgan Stanley's part and there will be no disruption to the trial by the addition of Mr. Ashley to Morgan Stanley's witness list. Given the Court's March 1 Order, which correctly stated that overwritten e-mails are not recoverable, there was no reason to believe that Mr. Ashley's testimony would be necessary (or even permitted). With the March 25 Order in which the Court said it would allow CPH to present testimony that contradicts the Court's findings, Mr. Ashley's testimony became relevant, and Morgan Stanley subsequently designated him as an expert witness. Thus, there is simply no reason under principles of fairness or Florida law to exclude Mr. Ashley's testimony.

WHEREFORE, Morgan Stanley respectfully requests an order denying CPH's motion to exclude expert witness John Ashley. Alternatively, Morgan Stanley respectfully requests that the Court instruct the jury that e-mails cannot be retrieved once they are overwritten, in which case Morgan Stanley will have no need to call Mr. Ashley.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery facsimile and hand delivery on this 4th day of April, 2005.

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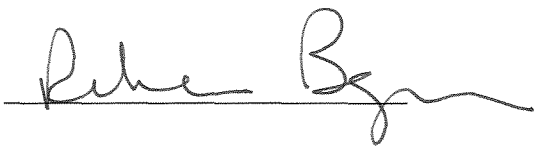
BY: 

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

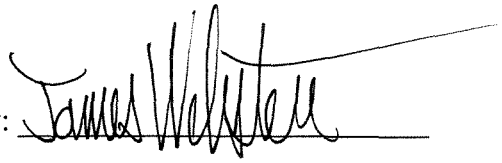
MORGAN STANLEY & CO., INC.,

Defendant.
_____/

DEFENDANT'S PROPOSED JURY INSTRUCTIONS

Defendant Morgan Stanley & Co. Incorporated ("MS & Co.") hereby requests that the Court give the following jury instructions.

In submitting these instructions, Morgan Stanley does not waive its objections to specific claims or damages. Defendant reserves the right to modify these instructions to be consistent with the Court's rulings and evidence at trial. Further, Morgan Stanley submits these proposed instructions as to punitive damages without prejudice to, or waiver of, its contentions that, among other things, Plaintiff is not entitled to punitive damages against Morgan Stanley as a matter of Florida law; that any verdict against Defendant, particularly one resulting from the Court's reliance solely upon the Florida Standard Jury Instructions (Civil) entitled, "PD, Punitive Damages," or the appended model verdict form, would violate Defendant's rights under the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution, and Defendant's rights under article 1, section 2 (Basic Rights) and article I, section 9 (Due Process) of the Florida Constitution.

By: 

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

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_____/

DEFENDANT'S PROPOSED PRELIMINARY INSTRUCTIONS (LIABILITY PHASE)

TABLE OF CONTENTS

Responsibility Of Jury And Judge 4

Steps In Trial 5

Bifurcated Proceedings 6

Things To Be Avoided 7

Objections 8

The Judge's Conferences With Attorneys 9

Recesses 10

Note-taking permitted 11

Juror Questions 12

Nature Of The Case And Legal Issues 13

DEFENDANT'S PROPOSED PRELIMINARY JURY INSTRUCTION NO. 1

Responsibility Of Jury And Judge

You have now been sworn as the jury to try this case. This is a civil case involving a disputed claim or claims between the parties. Those claims and other matters will be explained to you later. I will instruct you that certain facts are deemed established for purposes of this action. By your verdicts, you will decide certain other disputed issues of fact. I will decide the questions of law that arise during the trial, and before you retire to deliberate at the close of the trial, I will instruct you on the law that you are to follow and apply in reaching your verdicts. In other words, it is your responsibility to determine the facts and to apply the law to those facts. Thus, the function of the jury and the function of the judge are well defined, and they do not overlap. This is one of the fundamental principles of our system of justice.

Reaching a verdict is exclusively your job. I cannot participate in that decision in any way. You should not speculate about how I might evaluate the testimony of any witness or any other evidence in this case, and you should not think that I prefer one verdict over another. Therefore, in reaching your verdict, you should not consider anything that I say or do, except for my specific instructions to you.

Sources:

Order on CPH's Renewed Motion for Entry of Default Judgment at 17 (March 23, 2005).

Florida Standard Jury Instructions In Civil Cases § 1.1 (2004) (adapted).

DEFENDANT'S PROPOSED PRELIMINARY JURY INSTRUCTION NO. 2

Steps In Trial

Before proceeding further, it will be helpful for you to understand how a trial is conducted. In a few moments, the attorneys for the parties will have an opportunity to make opening statements, in which they may explain to you the issues in the case and summarize the facts that they expect the evidence will show. Following the opening statements, witnesses will be called to testify under oath. They will be examined and cross-examined by the attorneys. Documents and other exhibits also may be received as evidence.

After all the evidence has been received, the attorneys will again have an opportunity to address you and to make their final arguments. The statements that the attorneys now make and the arguments that they later make are not to be considered by you either as evidence in the case or as your instruction on the law. Nevertheless, these statements and arguments are intended to help you properly understand the issues, the evidence, and the applicable law, so you should give them your close attention.

Following the final arguments by the attorneys, I will instruct you on the law.

Sources:

Florida Standard Jury Instructions In Civil Cases § 1.1 (2004).

DEFENDANT'S PROPOSED PRELIMINARY JURY INSTRUCTION NO. 3

Bifurcated Proceedings

The presentation of evidence and your deliberations may occur in two stages.

Sources:

Florida Standard Jury Instructions In Civil Cases § 1.1 (2004) (adapted).

DEFENDANT'S PROPOSED PRELIMINARY JURY INSTRUCTION NO. 4

Things To Be Avoided

You should give careful attention to the testimony and other evidence as it is received and presented for your consideration, but you should not form or express any opinion about the case until you have received all the evidence, the arguments of the attorneys and the instructions on the law from me. In other words, you should not form or express any opinion about the case until you are retired to the jury room to consider your verdicts, after having heard all of these matters.

The case must be tried or heard by you only on the evidence presented during the trial in your presence, and in the presence of the attorneys and myself. You must not conduct any investigation of your own, including any type of research relating to this case, the parties, possible witnesses, or the attorneys. This includes but is not limited to Internet searches. Accordingly, you must avoid reading newspaper headlines and articles relating to this case and trial. You must also avoid seeing or hearing television and radio comments or accounts of this trial while it is in progress.

Sources:

Florida Standard Jury Instructions In Civil Cases § 1.1 (2004) (adapted).

DEFENDANT'S PROPOSED PRELIMINARY JURY INSTRUCTION NO. 5

Objections

The attorneys are trained in the rules of evidence and trial procedure, and it is their duty to make all objections they feel are proper. When a lawyer makes an objection, I will either overrule or sustain the objection. If I overrule an objection to a question, the witness will answer the question. When I sustain, or uphold, an objection, the witness cannot answer the question. If I sustain an objection, you must not speculate on what might have happened, or what the witness might have said, had I permitted the witness to answer. You should not draw any inference from the question itself.

Sources:

Florida Standard Jury Instructions In Civil Cases § 1.1 (2004).

DEFENDANT'S PROPOSED PRELIMINARY JURY INSTRUCTION NO. 6

The Judge's Conferences With Attorneys

During the trial, it may be necessary for me to confer with the attorneys out of your hearing, talking about matters of law and other matters that require consideration by me alone. It is impossible for me to predict when such a conference may be required or how long it will last. When such conferences occur, they will be conducted so as to consume as little of your time as necessary for a fair and orderly trial of the case.

Sources:

Florida Standard Jury Instructions In Civil Cases § 1.1 (2004).

DEFENDANT'S PROPOSED PRELIMINARY JURY INSTRUCTION NO. 7

Recesses

During the trial we will take recesses. During these recesses you shall not discuss the case among yourselves or with anyone else, nor permit anyone to say anything to you or in your presence about the case. Further, you must not talk with the attorneys, the witnesses, or any of the parties about anything, until your deliberations are finished. In this way, any appearance of something improper can be avoided.

If during a recess you see one of the attorneys and he or she does not speak to you, or even seem to pay attention to you, please understand that the attorney is not being discourteous but is only avoiding the appearance of some improper contact with you. If anyone tries to say something to you or in your presence about this case, tell that person that you are on the jury trying this case, and ask that person to stop. If he or she keeps on, leave at once and immediately report this to the bailiff or court deputy, who will advise me.

Sources:

Florida Standard Jury Instructions In Civil Cases § 1.1 (2004).

DEFENDANT'S PROPOSED PRELIMINARY JURY INSTRUCTION NO. 8

Note-taking permitted

If you would like to take notes during the trial, you may do so. On the other hand, of course, you are not required to take notes if you do not want to. That will be left up to you individually.

You will be provided with a note pad and a pen for use if you wish to take notes. Any notes that you take will be for your personal use. However, you should not take them with you from the courtroom. During recesses, the bailiff will take possession of your notes and will return them to you when we reconvene. After you have completed your deliberations, the bailiff will deliver your notes to me. They will be destroyed. No one will ever read your notes. If you take notes, do not get so involved in note-taking that you become distracted from the proceedings. Your notes should be used only as aids to your memory.

Whether or not you take notes, you should rely on your memory of the evidence and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than each juror's memory of the evidence.

Sources:

Florida Standard Jury Instructions In Civil Cases § 1.8 (2004).

DEFENDANT'S PROPOSED PRELIMINARY JURY INSTRUCTION NO. 9

Juror Questions

Jurors normally do not ask a witness questions. However, I allow jurors to ask important questions during the trial under certain conditions.

If you feel that the answer to your question would be helpful in understanding the issues in the case, please raise your hand after the lawyers have completed their examination but before I have excused the witness. You will then be given pen and paper with which to write your question for the witness.

I will then talk privately with the lawyers and decide whether the question is proper under the law. If the question is proper, I will ask the witness the question. Some questions may be rewritten or rejected. Do not be concerned or draw any implications if the question is not asked.

Do not discuss your question with anyone, including the marshal or clerk. Remember, you are not to discuss the case with the other jurors until it is submitted for your decision.

If you have difficulty hearing a witness or lawyer, please raise your hand immediately.

Sources:

K. Omalley et al., Federal Jury Practice And Instructions—Civil § 101.15 (5th ed. 2004)

DEFENDANT'S PROPOSED PRELIMINARY JURY INSTRUCTION NO. 10

Nature Of The Case And Legal Issues

After all the evidence has been presented, I will give you complete instructions regarding the law governing your deliberations. At this time, however, I will explain the nature of the case to assist you in considering the evidence.

This case involves claims made by a company called Coleman (Parent) Holdings, Inc. (which I shall call "CPH") against a company called Morgan Stanley & Co., Incorporated (which I shall call "Morgan Stanley") for aiding and abetting fraud and conspiracy to commit fraud. It arises out of two 1998 Merger Agreements between CPH, The Coleman Company, Inc., and the Sunbeam Corporation (which I shall call "Sunbeam"). Pursuant to the Agreement, CPH sold its 82% stock interest in Coleman (a manufacturer and marketer of outdoor recreation products) to Sunbeam in exchange for 14.1 million shares of Sunbeam, approximately $160 million dollars in cash, and Sunbeam's assumption of approximately one billion dollars in debt. Morgan Stanley provided investment banking and financial advisory services to Sunbeam in connection with the acquisition and merger.

CPH asserts that Albert Dunlap, the CEO of Sunbeam, manipulated the financial and business records of Sunbeam to make the company look more successful than it was and to inflate the stock value. CPH further asserts that Morgan Stanley had actual knowledge of this scheme and aided and abetted or conspired with Sunbeam to misrepresent the value of Sunbeam and induce CPH to sell its interest in the Coleman Company. CPH further asserts that it reasonably and justifiably relied on Sunbeam's misrepresentations and was damaged as a direct and foreseeable result of Sunbeam's false statements and Morgan Stanley's conduct.

I will instruct you that you are to take certain facts as established for purposes of phase one of this trial. You will therefore not have to decide in phase one whether or not you find that

Sunbeam misrepresented the value of Sunbeam and whether Morgan Stanley provided substantial assistance to Sunbeam.

After you have heard all of the evidence, and then received my instructions on the law, you will be asked whether you find for CPH or for Morgan Stanley, based on the facts you find to have been proved with respect to the issues of justifiable reliance and damages, and the application of the law to those facts.

Morgan Stanley denies that CPH reasonably and justifiably relied on Sunbeam's misrepresentations. Morgan Stanley also denies that CPH was damaged as a direct and foreseeable result of Sunbeam's false statements and Morgan Stanley's conduct.

At this time, the attorneys for the parties will have an opportunity to make their opening statements, in which they may explain to you the issues in the case and give you a summary of the facts they expect the evidence will show.

Sources:

Order on CPH's Renewed Motion for Entry of Default Judgment at 17 (March 23, 2005).

Florida Standard Jury Instructions In Civil Cases § 1.1 (2004) (adapted).

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

DEFENDANT'S PROPOSED JURY INSTRUCTIONS
FOLLOWING PRESENTATION OF EVIDENCE (LIABILITY PHASE)

TABLE OF CONTENTS

Introductory Instruction 17

Follow The Law As Instructed 18

Believability Of Witnesses 18

The Difference Between False Testimony And Mistaken Recollections 20

Expert Witnesses 21

Charts and Summaries 22

Aiding and Abetting Fraud 22

Greater Weight of the Evidence 25

Clear and Convincing Proof 26

Aiding and Abetting Fraud—Fraud by Third Party: Reliance 27

Aiding and Abetting Fraud—Fraud by Third Party: Justifiable Reliance 28

Aiding and Abetting Fraud—Fraud by Third Party: Injury Caused To CPH 30

Aiding and Abetting Fraud—Proximate Cause 31

Conspiracy to Commit Fraud....32

Conspiracy To Commit Fraud— Injury Caused To CPH....35

Conspiracy To Commit Fraud— Proximate Injury Caused To CPH....36

First Affirmative Defense—Doctrine of Waiver....37

Second Affirmative Defense—Doctrine of Estoppel....38

Third Affirmative Defenses—Unclean Hands; In Pari Delicto....40

Damages—Benefit Of Bargain....41

Damages—Out Of Pocket....44

Damages—Intervening Cause....45

Damages: Failure to Mitigate....46

Duty To Deliberate When Only The Plaintiff Claims Damages....47

Aiding and Abetting Fraud....48

Aiding and abetting Fraud—Fraud by Third Party....50

Aiding and Abetting Fraud—Fraud by Third Party: False statements of existing fact....52

Aiding and Abetting Fraud—Fraud by Third Party: Knowingly and intentionally made....53

Aiding and Abetting Fraud—Fraud by Third Party: Materiality....54

Aiding and Abetting Fraud—Actual Knowledge....55

Aiding and Abetting Fraud—Provision of Substantial Assistance....57

Conspiracy to Commit Fraud....59

Conspiracy To Commit Fraud An Agreement Between Two Or More Parties....61

Conspiracy To Commit Fraud—A Common Objective To Commit Fraud....63

Conspiracy to Commit Fraud—Commission of Overt Act in Furtherance of the Conspiracy....65

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 1

Introductory Instruction

Members of the jury, I shall now instruct you on the law that you must follow in reaching your verdicts. It is your duty as jurors to decide the issues, and only those issues, that I submit for your determination. In reaching your verdict, you should consider and weigh the evidence, decide the disputed issues of fact, and apply the law (as I shall instruct you) to the facts you find from the evidence.

The evidence in this case consists of the sworn testimony of the witness, all exhibits received in evidence, facts that may be admitted or agreed to by the parties, and facts that were established prior to trial.

In determining the facts, you may draw reasonable inferences from the evidence. You may make deductions and reach conclusions that reason and common sense lead you to draw from the facts shown by the evidence in this case. But you should not speculate on any matters outside the evidence in this case.

In the course of the trial it has been necessary for me to rule on the admission of evidence and on motions made with respect to the applicable law. You must not conclude from any such ruling I have made or from any questions I may have asked or from anything that I have said during the course of the trial or from these instructions or the manner in which they are given that I favor any party to this lawsuit. It is your recollection of evidence and your decision on the issues of fact that will decide this case.

Sources:

Florida Standard Jury Instructions in Civil Cases § 2.1 (2004) (adapted).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 2

Follow The Law As Instructed

In deciding the case you must follow and apply all of the law as I explain it to you, whether you agree with that law or not; and you must not let your decision be influenced in any way by sympathy, or by prejudice, for or against anyone.

The fact that corporations are involved as parties in this case must not affect your decision in any way. A corporation and all other persons stand equal before the law and must be dealt with as equals in a court of justice. When a corporation is involved, of course, it may act only through people as its employees; and, in general, a corporation is responsible under the law for any of the acts and statements of its employees that are made within the scope of their duties as employees of the company.

In your deliberations you should consider only the evidence—that is, the testimony of the witnesses and the exhibits I have admitted in the record – but as you consider the evidence, both direct and circumstantial, you may make deductions and reach conclusions that reason and common sense lead you to make. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness. "Circumstantial evidence" is proof of a chain of facts and circumstances tending to prove, or disprove, any fact in dispute. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

Remember that anything the lawyers say is not evidence in the case. And, except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your decision concerning the facts. It is your own recollection and interpretation of the evidence that controls.

Source:

Eleventh Circuit Pattern Jury Instructions (Civil)—Basic Instructions § 2.2 (2000).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 3

Believability Of Witnesses

Now, in saying that you must consider all of the evidence, I do not mean that you must accept all of the evidence as true or accurate. You must decide whether to believe what a particular witness had to say and how much importance to give to that testimony. In making that decision, you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling.

In deciding whether you believe or do not believe any witness, I suggest that you ask yourself a few questions: Did the witness impress you as one who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from other testimony or other evidence? You should consider these questions in light of your own experience and common sense.

Sources:

Florida Standard Jury Instructions in Civil Cases § 2.2 (2004) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil)—Basic Instructions § 3 (2000) (adapted).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 4

The Difference Between False Testimony And Mistaken Recollections

You should also ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact; or, whether there was evidence that at some other time the witness said or did something, or failed to say or do something, which was different from the testimony the witness gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things and remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

Source:

Eleventh Circuit Pattern Jury Instructions (Civil)—Basic Instructions § 4.1 (2000).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 5

Expert Witnesses

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field is permitted to state an opinion concerning those technical matters. These witnesses are called "expert" witnesses.

You have heard opinion testimony on various technical subjects from expert witnesses in this case. You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all the other evidence in the case. Merely because such a witness has been designated an "expert" and has expressed an opinion does not mean that you must accept that opinion. As with any other witness, it is up to you to decide whether to rely upon it.

Source:

Florida Standard Jury Instructions in Civil Cases § 2.2 (2004) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil) - Basic Instructions § 5.1 (2000) (adapted).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 6

Charts and Summaries

Certain charts and summaries have been shown to you in order to help explain facts disclosed by books, records, and other documents that are in evidence in the case. These charts or summaries are not themselves evidence or proof of any facts. If the charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, you should disregard them.

In other words, the charts or summaries are used only as a matter of convenience. To the extent that you find they are not truthful summaries of facts or figures shown by the evidence in the case, you are to disregard them entirely.

Source:

3 Federal Jury Practice and Instructions (Civil) § 104.50 (5th ed. 2004).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 7

Aiding and Abetting Fraud

In Count One of the Complaint, CPH alleges that Sunbeam engaged in a fraudulent scheme to inflate the price of Sunbeam's stock by making false financial statements and that Morgan Stanley aided and abetted this fraud.

There are four elements to CPH's aiding and abetting fraud count, each of which must be satisfied in order for Morgan Stanley to be liable on this count:

1) Sunbeam committed a *fraud against CPH* by knowingly making materially false statements and misrepresentations in Sunbeam's financial statements, and CPH reasonably and justifiably relied on these statements to its detriment;
2) Morgan Stanley had *actual knowledge* that Sunbeam was defrauding CPH;
3) With knowledge of Sunbeam's allegedly fraudulent scheme, Morgan Stanley provided *substantial assistance* in the commission of the fraud; and
4) CPH *suffered injury* as a proximate result of Morgan Stanley's conduct.

I have instructed you that certain facts are true for purposes of phase one of this trial. These facts establish for phase one that Sunbeam actually made one or more false statements or representations to CPH; that Sunbeam knew these statements were false; and that the statements were a material factor in Sunbeam's decision to go forward with the transaction.

For purposes of your deliberations in phase one, therefore, you are to accept all of the elements as having been established except for the following, each of which must be proved by the greater weight of the evidence:

1) CPH actually *relied* on Sunbeam's allegedly false statements, in that CPH believed the truthfulness of the statement and acted based upon its belief in the statement's truth;

2) CPH was *justified* in relying on these allegedly false statements, meaning that it neither knew nor should have discovered Sunbeam's false statements;

3) CPH *suffered injury* as a proximate result of justifiably relying on Sunbeam's false statements; and

4) CPH *suffered injury* as a proximate result of Morgan Stanley's conduct.

CPH has the burden of proving each of the four elements of the aiding and abetting count by the greater weight of the evidence

Sources:

Order on CPH's Renewed Motion for Entry of Default Judgment at 17 (March 23, 2005).

Eleventh Circuit Pattern Jury Instructions (Civil)—Basic Instructions § 2.2 (2000) (adapted).

Florida Standard Jury Instructions in Civil Cases § 3.9 (2004) (adapted).

Florida Standard Jury Instructions in Civil Cases—Miscellaneous § 8.1 (2004) (adapted).

Florida Standard Jury Instructions in Civil Cases—Punitive Damages § 1a (2004) (adapted).

37 Am. Jur. 2d *Fraud and Deceit* § 302 ("Persons who aid and abet another in the commission of a fraud may be liable for that fraud if the plaintiff alleges and proves in addition to the perpetration of the underlying fraud that there was knowledge of this fraud on the part of the aider and abettor, and substantial assistance by the aider and abettor in the achievement of the fraud, and that damages to the plaintiff were proximately caused thereby. To establish a common law cause of action for aiding and abetting fraud, plaintiffs must at least demonstrate some measure of 'active participation' and knowing provision of substantial assistance by the defendant to the principal's alleged fraud.").

Restatement (First) of Torts § 876 (2004). Comment on Clause (b) ("Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortuous, it has the same effect upon the liability of the adviser as participation or physical assistance. If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other's act.").

Woods v. Barnett Bank of Fort Lauderdale, 765 F.2d 1004, 1009 n.8 (11th Cir. 1985) (aiding-and-abetting securities fraud requires showing that (1) another party committed an independent violation of the securities laws; defendant knew that his role was part of

an overall activity that was improper or illegal; and defendant provided knowing and substantial assistance in the conduct that constituted the violation).

Schneberger v. Wheeler, 859 F.2d 1477, 1480 (11th Cir. 1988) ("Knowledge of both the fraudulent scheme and of one's own role in that scheme is required to satisfy the test for aider and abettor liability.").

In re Cascade Int'l Secs. Litig., 840 F. Supp. 1558, 1565-66 (S.D. Fl. 1993) (Attorneys did not give "substantial assistance" to corporate client's securities fraud and were not liable for aiding and abetting; they acted as scriveners of public documents, attempted to curb questions about client's financial condition, and engaged in nothing more than activities making up "daily grist of the mill.").

Rudolph v. Arthur Andersen & Co., 800 F.2d 1040, 1045-46 (11th Cir. 1986) (Whether assistance alleged to have aided and abetted fraud was "substantial" depends on the totality of the circumstances.).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 8

Greater Weight of the Evidence

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. That is, if you were to evaluate the entire evidence in the case, the greater weight would be the side that has the more persuasive and convincing force and effect.

The "greater weight" does not simply mean that more pieces of evidence are stacked up on one side rather than the other; in other words, you could find that one piece of critical evidence on one side outweighs many pieces of evidence on the other side.

Source:

Florida Standard Jury Instructions in Civil Cases § 3.9 (2004) (adapted).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 9

Clear and Convincing Proof

"Clear and convincing proof" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. In contrast, "clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

Source:

Florida Standard Jury Instructions in Civil Cases—Punitive Damages § 1a (2004).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 10

Aiding and Abetting Fraud—Fraud by Third Party: Reliance

CPH must establish by the greater weight of the evidence that it *relied upon* Sunbeam's allegedly fraudulent statements. In other words, if you find that CPH would have engaged in the transaction with Sunbeam anyway or that CPH did not act based on its belief in the statement's truth, then CPH did not *rely upon* Sunbeam's allegedly false statements and therefore Morgan Stanley could not have aided and abetted Sunbeam in committing fraud.

Sources:

Florida Standard Jury Instructions in Civil Cases - Miscellaneous §8.1 (2004) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), Federal Claims Instructions - Securities Fraud § 4.2 (2000) (adapted).

Simon v. Celebration Co., 883 So. 2d 826, 832 (Fla. 5th DCA 2004) ("In order to allege a viable cause of action for fraudulent inducement a plaintiff must allege that: (1) the defendant made a false statement regarding a material fact; (2) the defendant knew that the statement was false when he made it or made the statement knowing he was without knowledge of its truth or falsity; (3) the defendant intended that the plaintiff rely and act on the false statement; and (4) the plaintiff justifiably relied on the false statement to his detriment.").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 11

Aiding and Abetting Fraud—Fraud by Third Party: Justifiable Reliance

If you find that CPH established that it relied on Sunbeam's allegedly fraudulent statements, you must also find that CPH established by the greater weight of the evidence that its reliance was *justified*. In deciding whether CPH was justified in relying upon the truth of any particular representation, you must consider the totality of the circumstances, including, among other factors, the type of information at issue, the nature of the communication between the parties, the relative positions of the parties, and the extent of their knowledge of corporate affairs. For example, whether a party is a sophisticated investor who was aided by experienced business and legal advisors is relevant to what it actually knew or should have known. A sophisticated investor negotiating a significant deal would not reasonably rely on representations of the seller without performing reasonable due diligence as to available information. To determine whether CPH justifiably relied on a misrepresentation, you should consider whether the falsity of the statement would have been apparent had CPH done a proper investigation.

Accordingly, if you find that CPH, in the exercise of reasonable diligence, should have discovered that Sunbeam's statements were false, and thus was not justified in relying on them, then you should find that Sunbeam did not defraud CPH, and therefore Morgan Stanley did not aid and abet Sunbeam in committing fraud.

Sources:

Florida Standard Jury Instructions in Civil Cases - Miscellaneous §8.1 (2004) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), Federal Claims Instructions - Securities Fraud § 4.2 (2000) (adapted).

M/I Schottenstein Homes, Inc. v. Azam, 813 So. 2d 91, 94-95 (2002) (whether reliance is justified is determined "under the totality of the circumstances"; "if the recipient 'knows that it [the statement] is false or its falsity is obvious to him,' his reliance is improper, and there can be no cause of action for fraudulent misrepresentation") (brackets in original; citation omitted). *Id.* at 95 (in deciding whether the recipient of a misrepresentation is "justified in relying upon its truth," it is necessary to consider "the totality of the

circumstances surrounding the type of information, the nature of the communication between the parties, and the relative positions of the parties."). *Id.* at 93 ("[W]here one has an opportunity to make a cursory examination or investigation and does not do so, he cannot recover.").

Hillcrest Pac. Corp. v. Yamamura, 727 So. 2d 1053, 1057-58 (Fla. 4th DCA 1999) (holding that "sophisticated developer in the business of investing millions of dollars in commercial property" did not "reasonably rely upon any material misrepresentations" made by real estate consultants about value of golf course, where sales agreement provided inspection rights and ample opportunity for developer to visit proper and "audit the financial records").

Nicholson v. Ariko, 539 So. 2d 1141,1142 (Fla. 5th DCA 1989) (plaintiff did not reasonably rely on representations of his business partner concerning terms of partnership agreement, where there was "no basis" in the record "to explain why [the plaintiff], an experienced business man, did not insist on a copy of the [agreement] and read it for himself.").

L&L Doc's, LLC v. Florida Div. of Alcoholic Beverages & Tobacco, 882 So. 2d 512, 515 (Fla. 4th DCA 2004) (holding in light of circumstances that party was "not justified in relying upon [] misrepresentation[s] which they knew or should have known, with the exercise of some diligence, was false.").

Thor Bear, Inc. v. Crocker Mizner Park, Inc., 648 So. 2d 168, 172 (Fla. 4th DCA 1994) ("Participants in a normal business transaction are not entitled to rely upon such 'ephemeral matters' as opinions, judgments or legal views expressed by an opposing party.").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 12

Aiding and Abetting Fraud—Fraud by Third Party: Injury Caused To CPH

CPH must prove by the greater weight of the evidence that the allegedly fraudulent statements or misrepresentations that Morgan Stanley aided or abetted actually caused CPH injury. If CPH fails to prove that it suffered any loss as a result of its transaction with Sunbeam, then you must find that there was no fraud, and therefore Morgan Stanley is not liable to CPH. CPH must also prove that Sunbeam's alleged fraud was the cause of any loss it did suffer as result of the Coleman-Sunbeam transaction. CPH must first establish that but for Sunbeam's alleged fraud, CPH would not have been harmed. Moreover, CPH must also prove that its injury was a reasonably foreseeable result of Sunbeam's allegedly fraudulent conduct. If CPH has failed to show by the greater weight of the evidence both that Sunbeam's alleged false statements and misrepresentations were the actual cause of CPH's injury, and that this injury was reasonably foreseeable from Sunbeam's conduct, then you must find that Sunbeam did not defraud CPH, and thus Morgan Stanley is not liable for aiding and abetting a fraud.

Sources:

Florida Standard Jury Instructions in Civil Cases § 5.1 (2004) (adapted).

Florida Standard Jury Instructions in Civil Cases - Miscellaneous §8.1 (2004) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), State Claims Instructions - Fraud § 3.1 (2000) (adapted).

Simon v. Celebration Co., 883 So. 2d 826, 833 (Fla. 5th DCA 2004) ("[A]ctual damages is an element of an action for fraud. . . . Moreover, fraud cannot form the basis for recovery of damages unless the damages directly arise from the fraud and are causally connected to the fraud.").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 13

Aiding and Abetting Fraud—Proximate Cause

Finally, CPH bears the burden of proving by the greater weight of the evidence the fourth element of the aiding and abetting claim—that CPH suffered injury that was *proximately caused* by Morgan Stanley's conduct.

If the harm is caused by factors other than the alleged conspiracy to defraud, such as general changes in market conditions, or conduct by CPH that is not reasonably foreseeable or attributable to Defendant Morgan Stanley, proximate cause has not been shown.

In this regard, CPH must prove by the greater weight of the evidence (1) that CPH sustained injury relating to the Coleman-Sunbeam transaction; (2) that, but for Morgan Stanley's conduct, it would not have sustained those injuries; and (3) that those injuries were a reasonably foreseeable result of Morgan Stanley's conduct.

Sources:

K. O'Malley et al., Federal Jury Practice And Instructions—Civil § 120.60 (5th ed. 2000) (adapted).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 14

Conspiracy to Commit Fraud

In Count Two of its complaint, CPH claims that Morgan Stanley conspired with Sunbeam to conceal the truth about Sunbeam's financial condition. In order to establish CPH's conspiracy claim, the following elements must be satisfied:

1) Sunbeam defrauded CPH;
2) Morgan Stanley entered into an *agreement* with Sunbeam to defraud CPH;
3) Morgan Stanley had *actual knowledge* of the fraud, and shared with Sunbeam a *common objective to commit fraud*;
4) Morgan Stanley or Sunbeam engaged in at least *one act in furtherance of the conspiracy*; and
5) CPH *suffered injury* as a proximate result of the fraud.

As with the aiding and abetting count, moreover, in order to prevail on its conspiracy count, CPH must show by the greater weight of the evidence that a fraud was committed. In other words, in order for there to be a valid claim for conspiracy to commit fraud, the elements of fraud on which I previously instructed you must be proven. As with the aiding and abetting count, however, you are to accept all of the elements as having been established for purposes of your deliberations in phase one, **except** for the following, each of which must be proved by the greater weight of the evidence:

1) CPH actually *relied* on Sunbeam's allegedly false statements, in that CPH believed the truthfulness of the statement and acted based upon its belief in the statement's truth;
2) CPH was *justified* in relying on these allegedly false statements, meaning that it neither knew nor should have discovered Sunbeam's false statements;

3) CPH *suffered injury* as a proximate result of justifiably relying on Sunbeam's false statements.

CPH has the burden of proving all three elements by the greater weight of the evidence in order to prevail on its conspiracy claim. You must find in favor of CPH on each of these elements according to my previous instructions in order to find Morgan Stanley liable on CPH's conspiracy claim.

Sources:

Order on CPH's Renewed Motion for Entry of Default Judgment at 17 (March 23, 2005).

Eleventh Circuit Pattern Jury Instructions (Civil)—Basic Instructions § 2.2 (2000) (adapted).

Florida Standard Jury Instructions in Civil Cases—General § 3.9 (2004) (adapted).

Florida Standard Jury Instructions in Civil Cases—Miscellaneous § 8.1 (2004) (adapted).

27 Florida Jurisprudence 2d—Fraud and Deceit § 80 (2004) (adapted).

10 Florida Jurisprudence 2d—Conspiracy §§ 1, 2, 3, 9, 11 (2004)

15A Corpus Juris Secundum—Conspiracy §§ 46, 47, 48 (2004)

Loeb v. Geronemus, 66 So. 2d 241, 243 (Fla. 1953) (the gist of a civil action for conspiracy is not the conspiracy itself, but the civil wrong that is done pursuant to the conspiracy and which results in damage to the plaintiff).

Lipsig v. Ramlawi, 760 So. 2d 170, 180 (Fla. 3d DCA 2000) (To state a cause of action for conspiracy, a plaintiff must allege "(a) an agreement between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts done under the conspiracy.").

Hoch v. Rissman, Weisberg, Barrett, 742 So. 2d 451, 460 (Fla. 5th DCA 1999) ("A conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose by unlawful means. … Conspiracy is not a separate or independent tort but is a vehicle for imputing the tortuous actions of one co-conspirator to another to establish joint and several liability.").

Raimi v. Furlong, 702 So. 2d 1273, 1284 (Fla. 3d DCA 1997) ("A civil conspiracy requires: (a) an agreement between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the

conspiracy, and (d) damage to plaintiff as a result of the acts done under the conspiracy.").

Voto v. State, 509 So. 2d 1291 (Fla. 4th DCA 1987) (a conspiracy may not be inferred from aiding and abetting. Conspiracy requires evidence of both intent and an agreement. Here, although there was substantial proof of participation in the offense, there was insufficient evidence of participation in any underlying understanding or agreement).

Nicholson v. Kellin, 481 So. 2d 931, 935 (Fla. 5th DCA 1985) (a civil conspiracy has been defined as a combination of two or more persons to do an unlawful or criminal act or to do a lawful act by unlawful means or for an unlawful purpose).

A.S.J. Drugs, Inc. v. Berkowitz, 459 So. 2d 348, 350 (Fla. 4th DCA 1984) ("A mere opinion, of course, will not serve as a fraudulent representation, unless the party making it did so with the intent of preventing the other party from making an independent investigation of the facts.").

Buckner v. Lower Florida Keys Hosp. Dist., 403 So. 2d 1025, 1027 (Fla. 2d DCA 1981) ("gist of a civil conspiracy is not the conspiracy itself but the civil wrong which is done through the conspiracy which results in injury to the Plaintiff.").

Palmer v. Gotta Have it Golf Collectibles, Inc., 106 F. Supp. 2d 1289 (S.D. Fla. 2000) (under Florida law a claim that is found not to be actionable cannot serve as underlying basis for a conspiracy claim).

DEFENDANT'S JURY INSTRUCTION NO. 15

Conspiracy To Commit Fraud—Injury Caused To CPH

CPH must prove by the greater weight of the evidence the last element of its conspiracy claim—that the alleged conspiracy involving Morgan Stanley actually caused CPH harm.

CPH must prove by the greater weight of the evidence that it suffered a loss as a result of the alleged fraud or conspiracy to commit fraud. CPH must also prove that the alleged fraud or conspiracy was the cause of any loss it did suffer. Losses attributable to other factors not caused by or attributable to the alleged fraud or conspiracy are not included.

Sources:

Florida Standard Jury Instructions in Civil Cases § 5.1 (2004) (adapted).

Florida Standard Jury Instructions in Civil Cases - Miscellaneous § 8.1 (2004) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), State Claims Instructions - Fraud § 3.1 (2000) (adapted).

Lipsig v. Ramlawi, 760 So. 2d 170, 180 (Fla. 3d DCA 2000) (To state a cause of action for conspiracy, a plaintiff must allege "(a) an agreement between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts done under the conspiracy.").

Nerbonne, N.V. v. Lake Bryan Int'l Properties, 689 So. 2d 322, 325 (Fla. 5th DCA 1997) (if conspiracy is proven, plaintiff is entitled to recover only those damages that directly result from the wrongful acts).

Maliner v. Wachovia Bank, No. 04-60237CIV, 2005 WL 670293, at *7 (S.D. Fla. Mar. 1, 2005) ("Of course, if the loss is caused by an intervening event, like a general fall in the price of . . . stocks, the chain of causation will not have been established.") (quoting *Emergent Capital Inv. Management LLC v. Stonepath Group*, 343 F.3d 189, 197 (2d Cir. 2003)).

Cook v. Sheriff of Monroe County, No. 03-14784, 2005 WL 552483, at *20 (11th Cir. Mar. 10, 2005) ("self-inflicted injury . . . is treated as an independent, intervening cause, which may suffice to break the causal connection" if not "foreseeable or reasonable").

IMC Phosphates Co. v. Prater, No. 1D03-4954, 2005 WL 548232, at *6 (Fla. App. 1st Dist. Mar. 10, 2005) (employer not liable for injury that "is the result of an independent intervening cause attributable to claimant's own intentional conduct.").

DEFENDANT'S JURY INSTRUCTION NO. 16

Conspiracy To Commit Fraud—Proximate Injury Caused To CPH

Finally, CPH must also prove that the conspiracy was the proximate cause of any injury it suffered. To establish proximate cause, CPH must show that the injuries were a *reasonably foreseeable* result of the alleged conspiracy.

If the harm is caused by factors other than the alleged conspiracy to defraud, such as general changes in market conditions, or conduct by CPH that is not reasonably foreseeable or attributable to Defendant Morgan Stanley, proximate cause has not been shown.

If CPH does not show by the greater weight of the evidence *both* (1) that the alleged conspiracy was the actual cause of CPH's injury, and (2) that this injury was reasonably foreseeable from the alleged conspiracy, then you must find Morgan Stanley not liable on the conspiracy count.

Sources:

Nerbonne, N.V. v. Lake Bryan Int'l Properties, 689 So. 2d 322, 325 (Fla. 5th DCA 1997) (if conspiracy is proven, plaintiff is entitled to recover only those damages that directly result from the wrongful acts).

Maliner v. Wachovia Bank, No. 04-60237CIV, 2005 WL 670293, at *7 (S.D. Fla. Mar. 1, 2005) ("Of course, if the loss is caused by an intervening event, like a general fall in the price of . . . stocks, the chain of causation will not have been established.") (quoting *Emergent Capital Inv. Management LLC v. Stonepath Group*, 343 F.3d 189, 197 (2d Cir. 2003)).

Cook v. Sheriff of Monroe County, No. 03-14784, 2005 WL 552483, at *20 (11th Cir. Mar. 10, 2005) ("self-inflicted injury . . . is treated as an independent, intervening cause, which may suffice to break the causal connection" if not "foreseeable or reasonable").

IMC Phosphates Co. v. Prater, No. 1D03-4954, 2005 WL 548232, at *6 (Fla. App. 1st Dist. Mar. 10, 2005) (employer not liable for injury that "is the result of an independent intervening cause attributable to claimant's own intentional conduct.").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 17

First Affirmative Defense -- Doctrine of Waiver

Morgan Stanley raises as its first affirmative defense that CPH's claims against it are barred by the doctrine of waiver. A waiver is the intentional or voluntary relinquishment of a known right, or conduct which implies the relinquishment of a known right. In order to prevail in asserting the affirmative defense of waiver, Morgan Stanley must prove by the greater weight of the evidence the following elements:

1) the existence at the time of CPH's alleged waiver of a right, privilege, advantage, or benefit which may be waived;
2) CPH's actual or constructive knowledge of the right; and
3) CPH's intention to relinquish the right.

A waiver may be express or implied, and may be inferred from conduct or acts that warrant the inference that a known right has been relinquished.

If you find that Morgan Stanley has proven, by the greater weight of the evidence, that CPH waived its alleged claims, either expressly or impliedly, then you must find Morgan Stanley not liable to CPH for CPH's alleged injury. If, however, you find that CPH did not waive its alleged claims, then Morgan Stanley cannot assert this affirmative defense against CPH's claims.

Sources:

Bishop v. Bishop, 858 So. 2d 1234, 1237 (Fla. 5th DCA 2003)

Bush v. Ayer, 728 So. 2d 799, 801 (Fla. 4th DCA 1999) ("A waiver may be express or implied, and may be inferred from conduct or acts that warrant the inference that a known right has been relinquished.").

Leonardo v. State Farm Fire and Cas. Co., 675 So. 2d 176, 178 (Fla. 4th DCA 1996) (the requirements of the doctrine of waiver are (1) the existence at the time of the waiver of a right, privilege, advantage, or benefit which may be waived; (2) the actual or constructive knowledge of the right; and (3) the intention to relinquish the right).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 18

Second Affirmative Defense -- Doctrine of Estoppel

Morgan Stanley raises as its second affirmative defense that CPH's claims are barred by the doctrine of estoppel. For Morgan Stanley to successfully raise the defense of estoppel, you must find that it has proven by the greater weight of the evidence the following elements:

1) CPH made a representation as to a material fact to Morgan Stanley that is contrary to position that CPH asserted later;
2) Morgan Stanley relied on CPH's representation; and
3) Morgan Stanley changed its position to its detriment, caused by its reliance on CPH's representation.

The representation required to invoke estoppel principles is not limited to oral or written words. Conduct calculated to convey a misleading impression is sufficient to constitute misrepresentation. It is also not necessary that there has been an express statement. It is enough that a representation is implied, either from acts, silence or conduct.

If you find that Morgan Stanley has proven by the greater weight of the evidence that CPH had represented that it was not relying on Sunbeam and Morgan Stanley, but was instead conducting its own investigation as a sophisticated business party, and that Morgan Stanley relied on these representations by CPH to its detriment, you must find Morgan Stanley not liable to CPH. However, if you find that CPH did not make such representations, that Morgan Stanley did not rely on such representations, or that Morgan Stanley was not disadvantaged by relying on such representations, then Morgan Stanley cannot assert this affirmative defense against CPH's claims.

Sources:

State Dept. of Revenue v. Anderson, 403 So. 2d 397, 400 (Fla. 1981) (The elements of equitable estoppel are "(1) a representation as to a material fact that is contrary to a

later-asserted position; (2) reliance on that representation; and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon.").

Davis v. Evans, 132 So. 2d 476, 481 (Fla. 1st DCA 1961).

Francoeur v. Pipers, Inc., 560 So. 2d 244, 245 (Fla. 3d DCA 1990).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 19

Third Affirmative Defense – Unclean Hands; In Pari Delicto

Morgan Stanley raises as its third affirmative defense that CPH's claims are barred by the doctrine of unclean hands or *in pari delicto*. It is a rule that one coming into equity, must come with clean hands or all relief will be denied him regardless of the merit of his claim. Where both parties are at fault relief should be withheld from both. Unscrupulous practices, overreaching, concealment, trickery or other improper conduct are sufficient to bar relief. It is not essential that the act be a crime; it is enough that it be condemned by honest and reasonable people.

One who has acted in bad faith, resorted to trickery and deception, or been guilty of fraud, injustice, or unfairness will appeal in vain to a court of conscience, even though in his wrongdoing he may have kept himself strictly within the law. The law will not assist one in extricating himself from circumstances which he has created.

If you find that CPH knew that Coleman did not have the value that CPH claimed it had at the time of the Sunbeam-Coleman transaction, then you must find Morgan Stanly not liable to CPH.

Sources:

27 Florida Jurisprudence 2d Equity §§ 78, 80, 81, 85 (2004).

McMichael v. McMichael, 28 So. 2d 692 (Fla. 1947).

Hensel v. Aurilio, 417 So. 2d 1035 (Fla. 4th DCA 1982) (quoting 22 Fla. Jur. 2d Equity § 50).

Roberts v. Roberts, 84 So. 2d 717 (Fla. 1956).

Peninsula Land Co. v. Howard, 6 So. 2d 384 (Fla. 1941).

Hill v. Lummus, 123 So. 2d 365 (Fla. 3d DCA 1960).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 20

Damages—Benefit Of Bargain

If you find for Defendant, Morgan Stanley, you will not consider the matter of damages. Only if you find for CPH on the other elements must you address the issue of damages. But, if you find for CPH, you should award it an amount of money, if any, that the greater weight of the evidence shows will fairly and adequately compensate CPH for the damages caused by or resulting from the actions of Morgan Stanley, in aiding and abetting Sunbeam's fraud or conspiring with Sunbeam to commit fraud.

Damages in this case, if any, must be determined under the "benefit of the bargain" rule. The measure of damages is the difference between the value of what CPH would have received had Sunbeam's representations been accurate, and the value of what CPH actually received.

First, CPH must prove what the value of the stock would have been, on the date the transaction occurred, if Sunbeam's representations regarding Sunbeam's financial circumstances had been true.

Second, CPH must prove the actual value of the stock on the date of the transaction. The time for measurement is the date of the transaction.

Later appreciation or depreciation of the property that is subject of the false representation generally does not alter the computation.

The difference between the first and second numbers constitutes the damages to be awarded. If the value of what CPH received was equal to or greater than what it would have received had Sunbeam's representations been true, then CPH is not entitled to damages.

In calculating these damages, you are to keep in mind that damages must be supported by the greater weight of the evidence, and may not be unduly speculative. Finally, you are to award

damages only for losses that are attributable to Morgan Stanley, not for losses caused by other factors, such as general market conditions.

Sources:

Florida Standard Jury Instructions in Civil Cases—Miscellaneous § 8.1 (2004) (adapted).

Florida Standard Jury Instructions in Civil Cases—Miscellaneous § 12.1 (2004) (adapted).

Bidon v. Department of Professional Regulation, Florida Real Estate, 596 So. 2d 450, 452 (Fla. 1992) ("Actual or compensatory damages are those amounts necessary to compensate adequately an injured party for losses sustained as the result of a defendant's wrongful or negligent actions.").

Kind v. Gittman, 889 So. 2d 87, 90 (Fla. 4th DCA 2004) ("[T]he 'benefit of the bargain' [standard] ... awards as damages the difference between the actual value of the property and its value had the alleged facts regarding it been true." (quoting Martin v. Brown, 566 So. 2d 890, 891-92 (Fla. 4th DCA 1990)).

Totale, Inc. v. Smith, 877 So. 2d 813, 815 (Fla. 4th DCA 2004) ("In cases involving a fraudulent sale of stock, 'under either measure of damages, plaintiffs must prove the actual value of the stock at the time of purchase.'" (quoting S*trickland v. Muir*, 198 So. 2d 49, 51 (Fla. 4th DCA 1967), receded from on other grounds by *Teca, Inc. v. WM-TAB, Inc.*, 726 So. 2d 828 (Fla. 4th DCA 1999) (en banc)).

Id. at 816 (reversing benefit-of-the-bargain damages where evidence of damages was "too speculative").

Cook v. Sheriff of Monroe County, No. 03-14784, 2005 WL 552483, at *20 (11th Cir. Mar. 10, 2005) ("self-inflicted injury . . . is treated as an independent, intervening cause, which may suffice to break the causal connection" if not "foreseeable or reasonable").

IMC Phosphates Co. v. Prater, No. 1D03-4954, 2005 WL 548232 (Fla. App. 1st Dist. Mar. 10, 2005) (employer not liable for injury that "is the result of an independent intervening cause attributable to claimant's own intentional conduct.").

Nerbonne, N.V. v. Lake Bryan Int'l Properties, 689 So. 2d 322, 325 (Fla. 5th DCA 1997) (if conspiracy is proven, plaintiff is entitled to recover only those damages that directly result from the wrongful acts).

Maliner v. Wachovia Bank, No. 04-60237CIV, 2005 WL 670293, at *7 (S.D. Fla. Mar. 1, 2005) ("Of course, if the loss is caused by an intervening event, like a general fall in the price of . . . stocks, the chain of causation will not have been established.") (quoting *Emergent Capital Inv. Management LLC v. Stonepath Group*, 343 F.3d 189, 197 (2d Cir. 2003)).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 21

Damages—Out Of Pocket

If you find for Defendant, Morgan Stanley, you will not consider the matter of damages. Only if you find for CPH on the other elements must you address the issue of damages.

The purpose of the damages is to compensate CPH for what it lost as a result of Morgan Stanley's conduct, not to compensate it for what it might have gained had the representations been accurate. In determining damages, you must determine the difference between the actual value of what CPH received, as measured at the time the transaction occurred, and the price that CPH paid. Changes in the stock's value after the transaction occurred are generally irrelevant to this determination. In other words, if you find that Morgan Stanley is liable to CPH, the appropriate calculation of damages is the difference between what CPH contributed to the transaction and what it received from the transaction.

If you find that what CPH received in the transaction was greater in value than what it sold at the time of the transaction, then you must find CPH suffered no damages. If you find that CPH received from Sunbeam less than what it had paid to Sunbeam because of the alleged fraud, then you should award CPH the amount of damages representing that difference.

Sources:

Bidon v. Department of Professional Regulation, Florida Real Estate, 596 So. 2d 450, 452 (Fla. 1992) ("Actual or compensatory damages are those amounts necessary to compensate adequately an injured party for losses sustained as the result of a defendant's wrongful or negligent actions.").

Totale, Inc. v. Smith, 877 So. 2d 813, 815 (Fla. 4th DCA 2004) (explaining that out-of-pocket damages are determined by "the difference between the purchase price and the real or actual value of the property.").

Id. ("In cases involving a fraudulent sale of stock, 'under either measure of damages, plaintiffs must prove the actual value of the stock at the time of purchase.'") (quoting *Strickland v. Muir*, 198 So. 2d 49, 51 (Fla. 4th DCA 1967), *receded from on other grounds by Teca, Inc. v. WM-TAB, Inc.*, 726 So. 2d 828 (Fla. 4th DCA 1999) (*en banc*).

Id. ("[T]he crucial time for the measurement [of damages] is the time of the fraudulent representation. Later appreciation or depreciation of the property that is subject of the false representation generally does not alter the fraud damage computation.").

Nerbonne, N.V. v. Lake Bryan Int'l Properties, 689 So. 2d 322, 325 (Fla. 5th DCA 1997) (if conspiracy is proven, plaintiff is entitled to recover only those damages that directly result from the wrongful acts).

Maliner v. Wachovia Bank, No. 04-60237CIV, 2005 WL 670293, at *7 (S.D. Fla. Mar. 1, 2005) ("Of course, if the loss is caused by an intervening event, like a general fall in the price of . . . stocks, the chain of causation will not have been established.") (quoting *Emergent Capital Inv. Management LLC v. Stonepath Group*, 343 F.3d 189, 197 (2d Cir. 2003)).

Cook v. Sheriff of Monroe County, No. 03-14784, 2005 WL 552483, at *20 (11th Cir. Mar. 10, 2005) ("self-inflicted injury . . . is treated as an independent, intervening cause, which may suffice to break the causal connection" if not "foreseeable or reasonable").

IMC Phosphates Co. v. Prater, No. 1D03-4954, 2005 WL 548232, at *6 (Fla. App. 1st Dist. Mar. 10, 2005) (employer not liable for injury that "is the result of an independent intervening cause attributable to claimant's own intentional conduct.").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 22

Damages—Intervening Cause

When determining damages, you may only consider losses attributable to Morgan Stanley, not other factors. Damages should not include injury attributable to intervening causes or factors other than the alleged fraud, such as market conditions or conduct by CPH that was not a foreseeable consequence of the alleged fraud.

Sources:

Nerbonne, N.V. v. Lake Bryan Int'l Properties, 689 So. 2d 322, 325 (Fla. 5th DCA 1997) (if conspiracy is proven, plaintiff is entitled to recover only those damages that directly result from the wrongful acts).

Maliner v. Wachovia Bank, No. 04-60237CIV, 2005 WL 670293, at *7 (S.D. Fla. Mar. 1, 2005) ("Of course, if the loss is caused by an intervening event, like a general fall in the price of . . . stocks, the chain of causation will not have been established.") (quoting *Emergent Capital Inv. Management LLC v. Stonepath Group*, 343 F.3d 189, 197 (2d Cir. 2003)).

Cook v. Sheriff of Monroe County, No. 03-14784, 2005 WL 552483, at *20 (11th Cir. Mar. 10, 2005) ("self-inflicted injury . . . is treated as an independent, intervening cause, which may suffice to break the causal connection" if not "foreseeable or reasonable").

IMC Phosphates Co. v. Prater, No. 1D03-4954, 2005 WL 548232, at *6 (Fla. App. 1st Dist. Mar. 10, 2005) (employer not liable for injury that "is the result of an independent intervening cause attributable to claimant's own intentional conduct.").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 23

Damages: Failure to Mitigate

It is the duty of a plaintiff to use reasonable care to reduce as much as reasonably possible the loss or damage, if any, it sustains. A person may not recover for damages suffered as a result of fraud which it permitted to go on without using reasonable care to prevent or diminish it. CPH was required to act with reasonable promptness and in good faith and to do all that was reasonable under the circumstances to try to avoid or minimize the resulting loss or harm. If you find from the greater weight of the evidence that CPH, by using reasonable care could have lessened the loss or damage, if any, it suffered in its sale of its stake in Coleman to Sunbeam, then Morgan Stanley cannot be charged with liability for any such loss or damage resulting from CPH's failure, if any, to use such reasonable care.

Sources:

Eleventh Circuit Pattern Jury Instructions (Civil Cases), Supplemental Damages Instructions – Duty to Mitigate § 1.1 (2000) (adapted).

State ex rel. Dresskell v. City of Miami, 13 So. 2d 707, 709 (Fla. 1943) (holding that requirement to mitigate damages "finds its application in virtually every type of case in which the recovery of a money judgment or award is authorized. It addresses itself to the equity of the law that a plaintiff should not recover for those consequences of defendant's act which were readily avoidable by the plaintiff.") (internal citations omitted).

Hilsenroth v. Kessler, 446 So. 2d 147, 150 n.3 (Fla. 3d DCA 1984) (holding that a fraud victim is "not relieve[d] . . . of the duty to keep his damages as low as reasonably possible. Accordingly, . . . the trial court is free to apply the doctrine of mitigation of damages, if applicable.").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 24

Duty To Deliberate When Only The Plaintiff Claims Damages

Of course, the fact that I have given you instructions concerning the issue of Plaintiff's damages should not be interpreted in any way as an indication that I believe that CPH should, or should not, prevail in this case.

Any verdict you reach in the jury room must be unanimous. In other words, to return a verdict you must all agree. Your deliberations will be secret; you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case do not hesitate to re-examine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

Remember, that in a very real way you are judges--judges of the facts. Your only interest is to seek the truth from the evidence in the case.

Sources:

Eleventh Circuit Pattern Jury Instructions (Civil)—Basic Instructions § 7.1 (2000).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 25[1]

Aiding and Abetting Fraud

In Count One of the Complaint, CPH alleges that Sunbeam engaged in a fraudulent scheme to inflate the price of Sunbeam's stock by making false financial statements and that Morgan Stanley aided and abetted this fraud.

There are four elements to CPH's aiding and abetting fraud count, each of which must be satisfied in order for you to find Morgan Stanley liable on this count:

1) Sunbeam committed a *fraud against CPH by making false statements and misrepresentations in Sunbeam's financial statements*;

2) Morgan Stanley had *actual knowledge* that Sunbeam was defrauding CPH;

3) With knowledge of Sunbeam's allegedly fraudulent scheme, Morgan Stanley provided *substantial assistance* to Sunbeam in the commission of the fraud; and

4) CPH *suffered injury* as a proximate result of Morgan Stanley's conduct.

CPH has the burden of proving each of the four elements of the aiding and abetting count by the greater weight of the evidence.

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. That is, if you were to evaluate the entire evidence in the case, the greater weight would be the side that has the more persuasive and convincing force and effect.

The "greater weight" does not simply mean that more pieces of evidence are stacked up on one side rather than the other; in other words, you could find that one piece of critical evidence on one side outweighs many pieces of evidence on the other side.

Sources:

Eleventh Circuit Pattern Jury Instructions (Civil)—Basic Instructions § 2.2 (2000) (adapted).

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[1] To be given only if court instructs on all elements of each cause of action, in lieu of Proposed Jury Instruction No. __.

Florida Standard Jury Instructions in Civil Cases § 3.9 (2004) (adapted).

Florida Standard Jury Instructions in Civil Cases—Miscellaneous § 8.1 (2004) (adapted).

37 Am. Jur. 2d *Fraud and Deceit* § 302 ("Persons who aid and abet another in the commission of a fraud may be liable for that fraud if the plaintiff alleges and proves in addition to the perpetration of the underlying fraud that there was knowledge of this fraud on the part of the aider and abettor, and substantial assistance by the aider and abettor in the achievement of the fraud, and that damages to the plaintiff were proximately caused thereby. To establish a common law cause of action for aiding and abetting fraud, plaintiffs must at least demonstrate some measure of 'active participation' and knowing provision of substantial assistance by the defendant to the principal's alleged fraud.").

Restatement (First) of Torts § 876 (2004). Comment on Clause (b) ("Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortuous, it has the same effect upon the liability of the adviser as participation or physical assistance. If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other's act.")

Woods v. Barnett Bank of Fort Lauderdale, 765 F.2d 1004, 1009 n.8 (11th Cir. 1985) (aiding-and-abetting securities fraud requires showing that (1) another party committed an independent violation of the securities laws; defendant knew that his role was part of an overall activity that was improper or illegal; and defendant provided knowing and substantial assistance in the conduct that constituted the violation).

Schneberger v. Wheeler, 859 F.2d 1477, 1480-81 (11th Cir. 1988) ("Knowledge of both the fraudulent scheme and of one's own role in that scheme is required to satisfy the test for aider and abettor liability.")

In re Cascade Int'l Secs. Litig., 840 F. Supp. 1558, 1565-66 (S.D. Fl. 1993) (Attorneys did not give "substantial assistance" to corporate client's securities fraud and were not liable for aiding and abetting; they acted as scriveners of public documents, attempted to curb questions about client's financial condition, and engaged in nothing more than activities making up "daily grist of the mill.").

Rudolph v. Arthur Andersen & Co., 800 F.2d 1040, 1045-46 (11th Cir. 1986) (Whether assistance alleged to have aided and abetted fraud was "substantial" depends on the totality of the circumstances).

Woods v. Barnett Bank of Ft. Lauderdale, 765 F.2d 1004, 1009 (11th Cir. 1985) (Stronger evidence of complicity is required for an alleged aider and abettor who conducts what appears to be a transaction in the ordinary course of his business. The proof "must demonstrate actual awareness of the party's role in the fraudulent scheme.") (citation omitted).

National Westminster Bank USA v. Weksel, 511 N.Y.S.2d 626, 629-30 (N.Y. App. Div. 1987) (claim for aiding and abetting a fraud must satisfy same high evidentiary standard as predicate fraud itself).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 26[2]

Aiding and Abetting Fraud—Fraud by Third Party

CPH must prove by the greater weight of the evidence the first element of its aiding and abetting fraud—that a third party, Sunbeam, actually defrauded CPH. You cannot find in favor of CPH on the aiding and abetting count unless Sunbeam actually committed fraud against CPH. Fraud is never presumed, but always must be proven by the greater weight of the evidence. You should assume that persons are fair and honest in their dealings until the contrary is shown from the evidence. If the transaction that CPH calls into question is *equally* capable of two interpretations—one honest and the other fraudulent—it should be found to be honest.

In order to prove that Sunbeam acted fraudulently, CPH must show six things by the greater weight of the evidence:

1) Sunbeam actually made one or more *false statements or representations* to CPH concerning Sunbeam's financial affairs;

2) Sunbeam *knew* that the statements or representations were false;

3) Sunbeam's alleged false statements or misrepresentations were a *material factor* in CPH agreeing to sell its stake in Coleman to Sunbeam;

4) CPH actually *relied* on Sunbeam's allegedly false statements, in that CPH believed the truthfulness of the statement and acted based upon its belief in the statement's truth;

5) CPH was *justified* in relying on these allegedly false statements, meaning that it neither knew nor should have discovered Sunbeam's false statement; and

6) CPH *suffered injury* as a proximate result of justifiably relying on Sunbeam's false statements.

Sources:

Order on Morgan Stanley & Co., Inc.'s Motion for Summary Judgment, February 1, 2005.

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[2] To be given only if court instructs on all elements of each cause of action, in lieu of Proposed Jury Instruction No. __.

Florida Standard Jury Instructions in Civil Cases § 5.1 (2004) (adapted).

Florida Standard Jury Instructions in Civil Cases - Miscellaneous §8.1 (2004) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), Federal Claims Instructions - Securities Fraud § 4.2 (2000) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), State Claims Instructions - Fraud § 3.1 (2000) (adapted).

3 Federal Jury Practice and Instructions (Civil) § 123.10 (5th ed. 2004).

27 Florida Jurisprudence 2d Fraud and Deceit § 80 (2004) (adapted).

Simon v. Celebration Co., 883 So. 2d 826, 832 (Fla. 5th DCA 2004) ("In order to allege a viable cause of action for fraudulent inducement a plaintiff must allege that: (1) the defendant made a false statement regarding a material fact; (2) the defendant knew that the statement was false when he made it or made the statement knowing he was without knowledge of its truth or falsity; (3) the defendant intended that the plaintiff rely and act on the false statement; and (4) the plaintiff justifiably relied on the false statement to his detriment.").

Hillcrest Pac. Corp. v. Yamamura, 727 So. 2d 1053, 1057-59 (Fla. 4th DCA 1999) (setting forth elements of claim of fraud in the inducement).

Thor Bear, Inc. v. Crocker Mizner Park, Inc., 648 So. 2d 168 (Fla. 4th DCA 1994) (setting forth element of claim of fraudulent misrepresentation)

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 27[3]

Aiding and Abetting Fraud—Fraud by Third Party: False statements of existing fact

First, CPH must show that Sunbeam made a false statement or misrepresentation. This simply means to state as a fact something that is *false or untrue*. If you find that CPH fails to establish by the greater weight of the evidence that Sunbeam's alleged statements were false, then there was no fraud, and you must find in favor of Morgan Stanley on the aiding and abetting count. In addition, to constitute fraud, a statement that is allegedly false must relate to an *existing fact.* Therefore, statements that are mere opinions, promises of future conduct, and forward-looking statements are not grounds for a fraud claim as they are not false statements of existing fact, unless the party stating the opinion has exclusive or superior knowledge of existing facts that are inconsistent with such opinion.

Thus, if CPH fails to prove by the greater weight of the evidence that any allegedly false statements or representations Sunbeam made were related to existing facts concerning the company's financial circumstances, rather than mere opinions or predictions as to future events concerning its performance or prospects, you should find that Sunbeam did not defraud CPH, and therefore Morgan Stanley did not aid and abet Sunbeam in committing fraud.

Sources:

Florida Standard Jury Instructions in Civil Cases - Miscellaneous §8.1 (2004) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), State Claims Instructions - Fraud § 3.1 (2000) (adapted).

Thor Bear, Inc. v. Crocker Mizner Park, Inc., 648 So. 2d 168 (Fla. 4th DCA 1994) ("The general rule of law is that a false statement of fact must concern a past or existing fact in order to be actionable. A successful action for fraudulent misrepresentation may not ordinarily be premised upon a promise of future action.")

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[3] To be given only if court instructs on all elements of each cause of action.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 28[4]

Aiding and Abetting Fraud—Fraud by Third Party: Knowingly and intentionally made

Second, CPH must prove that Sunbeam made any false statements or representations *knowingly and intentionally*, rather than as a result of a mistake, misapprehension of facts, or accident. If you find that CPH has not shown by the greater weight of the evidence that Sunbeam knew that its statements were false, or that Sunbeam made the statements knowing it lacked knowledge of whether they were true or false, then you should find that Sunbeam did not defraud CPH, and therefore Morgan Stanley did not aid and abet Sunbeam in committing fraud.

Sources:

Florida Standard Jury Instructions in Civil Cases - Miscellaneous §8.1 (2004) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), State Claims Instructions - Fraud § 3.1 (2000) (adapted).

[4] To be given only if court instructs on all elements of each cause of action.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 29[5]

Aiding and Abetting Fraud—Fraud by Third Party: Materiality

It is also CPH's burden to establish by the greater weight of the evidence that Sunbeam's allegedly false statements were a *material* reason why CPH agreed to sell its stake in Coleman to Sunbeam. A statement is material if it is of such importance that CPH would not have entered into the transaction with Sunbeam, but for the false statement. If you find that CPH would have sold its stake in Coleman to Sunbeam even in the absence of Sunbeam's alleged false statements, then you should find that Sunbeam did not defraud CPH, and therefore Morgan Stanley did not aid and abet Sunbeam in committing fraud.

Sources:

Florida Standard Jury Instructions in Civil Cases - Miscellaneous §8.1 (2004) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), State Claims Instructions - Fraud § 3.1 (2000) (adapted).

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[5] To be given only if court instructs on all elements of each cause of action.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 30[6]

Aiding and Abetting Fraud—Actual Knowledge

On the second element of the aiding and abetting count, CPH has the burden of proving by the greater weight of the evidence that Morgan Stanley knew Sunbeam was defrauding CPH. Thus, in carrying its burden, CPH must show that Morgan Stanley was *actually aware* that Sunbeam made the statements that CPH alleges were fraudulent and that Morgan Stanley was aware that those statements were false.

Because an aiding and abetting claim requires that the defendant had actual knowledge of the underlying fraud, you cannot find against Morgan Stanley on this element merely because Morgan Stanley might have acted recklessly, imprudently, or even negligently in failing to know of Sunbeam's alleged fraud. In addition, an ordinary economic motive in advising Sunbeam in the acquisition of Coleman is not equivalent to Morgan Stanley having the actual knowledge of Sunbeam's fraud, as required in an aiding and abetting claim. Nor was Morgan Stanley under any duty to uncover Sunbeam's alleged fraudulent plan.

If you find that CPH has not shown that Morgan Stanley had actual knowledge of Sunbeam's purported fraud against CPH, then Morgan Stanley is not liable for aiding and abetting a fraud.

Sources:

Eleventh Circuit Pattern Jury Instructions (Civil Cases), Federal Claims Instructions - Securities Fraud § 4.2 (2000) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), State Claims Instructions - Fraud § 3.1 (2000) (adapted).

Fort Myers Dev. Corp. v. J.W. McWilliams Co., 122 So. 264 (Fla. 1929) (requiring "knowledge," "concurrence," and "participation" to prove a claim for aiding and abetting fraudulent promoters of corporations).

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[6] To be given only if court instructs on all elements of each cause of action.

Wassall v. Payne, 682 So. 2d 678, 680-81 (Fla. 1st DCA 1996) (recognizing the existence of an "actual knowledge" requirement in fraud claims).

Schneberger v. Wheeler, 859 F.2d 1477, 1480-81 (11th Cir. 1988) ("Knowledge of both the fraudulent scheme and of one's own role in that scheme is required to satisfy the test for aider and abettor liability.").

Woods v. Barnett Bank of Ft. Lauderdale, 765 F.2d 1004, 1010 (11th Cir. 1985) (concluding that stronger evidence of complicity is required for an alleged aider and abettor who conducts what appears to be a transaction in the ordinary course of his business. The claim requires "actual awareness of the party's role in the fraudulent scheme.") (citation omitted).

Official Cmte. of Unsecured Creditors of Toy King Distrib., Inc. v. Liberty Savings Bank, FSB (In re Toy King Distrib., Inc.), 256 B.R. 1, 179 (M.D. Fla. 2000) (holding that knowing participation in a fraud requires more than a defendant's mere recklessness, imprudence or negligence. Holding further, that where the primary breach was already a "historical fact" at the time of the defendant's alleged aiding and abetting of harm, defendant lacked actual knowledge).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 31[7]

Aiding and Abetting Fraud—Provision of Substantial Assistance

CPH also bears the burden of proving by the greater weight of the evidence the third element of the aiding and abetting claim—that Morgan Stanley *knowingly and substantially assisted* Sunbeam in carrying out its fraud.

CPH must show that Morgan Stanley affirmatively and knowingly assisted, participated in and furthered Sunbeam's alleged fraud against CPH. The mere failure to *expose* Sunbeam's allegedly fraudulent scheme is insufficient to impose liability on Morgan Stanley for aiding and abetting. Thus, it is not enough that Morgan Stanley's silence allowed Sunbeam's allegedly fraudulent scheme to succeed, or that it failed to announce the existence of Sunbeam's alleged false financial statements. Rather, Morgan Stanley must have *affirmatively assisted* Sunbeam in committing Sunbeam's alleged fraudulent plan, with knowledge of the plan's allegedly fraudulent nature, in order for Morgan Stanley to be liable.

Even if you find that Morgan Stanley assisted Sunbeam in committing fraud, you still cannot find Morgan Stanley liable unless you find that Morgan Stanley's assistance was *substantial*. Whether Morgan Stanley's assistance was substantial depends upon the totality of the circumstances. In other words, you must take all of the evidence into account before determining whether Morgan Stanley's participation in Sunbeam's alleged fraud was substantial. If you find that Morgan Stanley participated in Sunbeam's alleged fraud, but that Morgan Stanley's participation was not substantial, you must find Morgan Stanley not liable for aiding and abetting.

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[7] To be given only if court instructs on all elements of each cause of action.

If CPH has failed to prove that Morgan Stanley affirmatively and substantially assisted Sunbeam's allegedly fraudulent scheme, then you must find in favor of Morgan Stanley on the aiding and abetting count.

Sources:

Eleventh Circuit Pattern Jury Instructions (Civil Cases), Federal Claims Instructions - Securities Fraud § 4.2 (2000) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), State Claims Instructions - Fraud § 3.1 (2000) (adapted).

37 Am. Jur. 2d *Fraud and Deceit* § 302 ("To establish a common law cause of action for aiding and abetting fraud, plaintiffs must at least demonstrate some measure of 'active participation' and knowing provision of substantial assistance by the defendant to the principal's alleged fraud.").

Transpetrol Ltd. v. Radulovic, 764 So. 2d 878, 880-81 (Fla. 4th DCA 2000) (disallowing aiding and abetting theory of liability in fraud and RICO counts because plaintiffs did not rely on actions or words of alleged aiders and abettors).

Allerton v. State Dept. of Ins., 635 So. 2d 36, 38 (Fla. 1st DCA 1994) (recognizing that a claim for aiding and abetting a breach of fiduciary duty would be based on defendant's "substantially assisting, contributing to and furthering accomplishment of the breach[]").

Rudolph v. Arthur Andersen & Co., 800 F.2d 1040, 1045-46 (11th Cir. 1986) (holding that whether assistance alleged to have aided and abetted fraud was "substantial" depends on the totality of the circumstances).

In re Cascade International Securities Litigation, 840 F. Supp. 1558, 1565-66 (S.D. Fl. 1993) (Attorneys did not give "substantial assistance" to corporate client's securities fraud and were not liable for aiding and abetting; they acted as scriveners of public documents, attempted to curb questions about client's financial condition, and engaged in nothing more than activities making up "daily grist of the mill.").

Armco Industrial Credit Corp. v. SLT Warehouse Co., 782 F.2d 475, 486 (5th Cir. 1986) ("Even accepting the evidence in the record in the light most favorable to Armco, as we must with a jury verdict, we hold that Conklin's failure to expose the existence of the bogus invoices does not rise to the level of aiding and abetting. Although Conklin became aware of the bogus invoices and did nothing to reveal their existence, this awareness and inaction amounted at most to nothing more than 'mere negative acquiescence' . . . . it is not enough that Conklin's silence allowed the scheme to succeed. Conklin must have shared Pritchett's and Rigby's criminal intent if he is to be found liable as an aider and abettor."), cited by 3B Fed. Jury Prac. & Instr. Ch. 161 Overview (5th ed.), Part VII. Instructions For Civil Actions Governed By Federal Law Chapter 161. Racketeer Influenced And Corrupt Organizations Act (RICO).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 32[8]

Conspiracy to Commit Fraud

In Count Two of its complaint, CPH claims that Morgan Stanley conspired with Sunbeam to conceal the truth about Sunbeam's financial condition. As with the aiding and abetting count, in order to prevail on its conspiracy count, CPH must show by the greater weight of the evidence that a fraud was committed. In other words, in order for there to be a valid claim for conspiracy to commit fraud, there must be a valid underlying fraud claim.

However, for Morgan Stanley to be liable for conspiracy to commit fraud requires more than liability under CPH's aiding and abetting count. In addition to establishing the existence of an underlying fraud, for CPH to prevail on its conspiracy claim, you must find that the following elements are satisfied:

(1) Morgan Stanley entered into an *agreement* with Sunbeam to defraud CPH;

(2) Morgan Stanley had *actual knowledge* of the fraud, and shared with Sunbeam a *common objective to commit fraud*;

(3) Morgan Stanley or Sunbeam engaged in at least *one act in furtherance of the conspiracy*; and

(4) CPH *suffered injury* as a proximate result of the fraud.

Sources:

Florida Standard Jury Instructions in Civil Cases—General § 3.9 (2004) (adapted).

Florida Standard Jury Instructions in Civil Cases—Miscellaneous § 8.1 (2004) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil)—Basic Instructions § 2.2 (2000).

27 Florida Jurisprudence 2d—Fraud and Deceit § 80 (2004) (adapted).

10 Florida Jurisprudence 2d—Conspiracy §§ 1, 2, 3, 9, 11 (2004)

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[8] To be given only if court instructs on all elements of each cause of action, in lieu of Proposed Jury Instruction No. __.

15A Corpus Juris Secundum—Conspiracy §§ 46, 47, 48 (2004)

Loeb v. Geronemus, 66 So. 2d 241, 243 (Fla. 1953) (the gist of a civil action for conspiracy is not the conspiracy itself, but the civil wrong that is done pursuant to the conspiracy and which results in damage to the plaintiff).

Lipsig v. Ramlawi, 760 So. 2d 170, 180 (Fla. 3d DCA 2000) (To state a cause of action for conspiracy, a plaintiff must allege "(a) an agreement between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts done under the conspiracy.").

Hoch v. Rissman, Weisberg, Barrett, 742 So. 2d 451, 460 (Fla. 5th DCA 1999) ("A conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose by unlawful means. ... Conspiracy is not a separate or independent tort but is a vehicle for imputing the tortuous actions of one co-conspirator to another to establish joint and several liability.").

Raimi v. Furlong, 702 So. 2d 1273, 1284 (Fla. 3d DCA 1997) ("A civil conspiracy requires: (a) an agreement between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts done under the conspiracy.").

Voto v. State, 509 So. 2d 1291 (Fla. 4th DCA 1987) (a conspiracy may not be inferred from aiding and abetting. Conspiracy requires evidence of both intent and an agreement. Here, although there was substantial proof of participation in the offense, there was insufficient evidence of participation in any underlying understanding or agreement.).

Nicholson v. Kellin, 481 So. 2d 931, 935 (Fla. 5th DCA 1985) (a civil conspiracy has been defined as a combination of two or more persons to do an unlawful or criminal act or to do a lawful act by unlawful means or for an unlawful purpose.).

A.S.J. Drugs, Inc. v. Berkowitz, 459 So. 2d 348, 350 (Fla. 4th DCA 1984) ("A mere opinion, of course, will not serve as a fraudulent representation, unless the party making it did so with the intent of preventing the other party from making an independent investigation of the facts.").

Buckner v. Lower Florida Keys Hosp. Dist., 403 So. 2d 1025, 1027 (Fla. 2d DCA 1981) ("gist of a civil conspiracy is not the conspiracy itself but the civil wrong which is done through the conspiracy which results in injury to the Plaintiff.").

Palmer v. Gotta Have it Golf Collectibles, Inc., 106 F. Supp. 2d 1289 (S.D. Fla. 2000) (under Florida law a claim that is found not to be actionable cannot serve as underlying basis for a conspiracy claim).

DEFENDANT'S JURY INSTRUCTION NO. 33[9]

Conspiracy To Commit Fraud—
An Agreement Between Two Or More Parties

The first element of the conspiracy count requires that CPH prove by the greater weight of the evidence that Morgan Stanley entered into an agreement or understanding with someone else to cooperate in pursuit of a common objective. A conspiracy is formed whenever two or more persons or corporations knowingly join together to accomplish an unlawful purpose by concerted action. The essence of a conspiracy is an agreement to violate or disregard the law. CPH must prove by the greater weight of the evidence that Morgan Stanley and Sunbeam knowingly came to a common and mutual understanding to accomplish, or to attempt to accomplish, an unlawful purpose.

There is no requirement that the agreement be a formal contract; you may infer the existence of an agreement by finding that there exists a preponderance of circumstantial evidence to show, for example, that the parties conformed their conduct around a particular arrangement or understanding. However, in order to rely on such circumstantial evidence to infer the existence of an agreement, you must conclude that such an inference outweighs all other reasonable inferences to the contrary. In other words, if the circumstantial evidence points as easily to the existence of an agreement as it does to the absence of an agreement, you must find that such evidence fails to satisfy the requirement that an agreement be proven by the greater weight of the evidence.

Therefore, in order for you to find that there was an agreement between Morgan Stanley and Sunbeam, you must find by the greater weight of the evidence that Morgan Stanley's conduct can only be explained by the existence of a conspiracy to commit fraud. If you find that Morgan Stanley merely agreed to perform the financial services of any investment bank, and that

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[9] To be given only if court instructs on all elements of each cause of action.

it did not agree to engage in any actions beyond those that a typical investment bank performs, then you must find for Morgan Stanley. However, if you find that beyond agreeing to perform customary investment bank functions, Morgan Stanley agreed with Sunbeam to commit a fraud, then CPH has satisfied this element of its conspiracy claim.

Sources:

Eleventh Circuit Pattern Jury Instructions (Civil Cases), Federal Claims Instructions - Antitrust, Sherman Act Section 1, Per Se Violation, Conspiracy to Fix Prices § 3.1 (2000) (adapted).

10 Florida Jurisprudence 2d—Conspiracy §§ 1, 2, 3, 9, 11 (2004).

16 Am. Jur. 2d Conspiracy § 51 (2004).

Diamond v. Rosenfeld, 511 So. 2d 1031, 1034 (Fla. 4th DCA 1987) ("in a civil case, a fact may be established by circumstantial evidence alone only when the inference sought to be created by such circumstantial evidence outweighs all reasonable inferences to the contrary.").

Raimi v. Furlong, 702 So. 2d 1273, 1284 (Fla. 3d DCA 1998) (while a civil conspiracy may be proven by circumstantial evidence, this may be done only when the inference sought to be created by such circumstantial evidence outweighs all reasonable inferences to the contrary).

JES Properties, Inc. v. USA Equestrian, Inc., 253 F. Supp. 2d 1273, 1279 (M.D. Fla. 2003) (rejecting conspiracy allegation; to show that an agreement existed a plaintiff must present "evidence that tends to exclude the possibility that the parties were acting independently." The court held that there must be direct or circumstantial evidence that reasonably tends to prove that the parties had a conscious commitment to a common scheme designed to achieve an unlawful objective.)

DEFENDANT'S JURY INSTRUCTION NO. 34[10]

Conspiracy To Commit Fraud—
A Common Objective To Commit Fraud

On the second element of the conspiracy claim, CPH must prove by the greater weight of the evidence that Morgan Stanley had actual knowledge of the fraud *and* that Sunbeam and Morgan Stanley had a common objective to commit fraud.

Because a conspiracy claim requires that the defendant had actual knowledge of the underlying fraud, you cannot find against Morgan Stanley on this element merely because Morgan Stanley might have acted imprudently, negligently, or even recklessly, in failing to inform itself about Sunbeam's alleged fraud. As with the aiding and abetting claim, CPH must establish by the greater weight of the evidence (1) that Morgan Stanley was aware that Sunbeam made the statements that CPH alleges are false; (2) that Morgan Stanley was aware of the falsity of those statements; and (3) that Morgan Stanley believed that those statements were material and that CPH could justifiably rely upon those statements. If CPH has not established by the greater weight of the evidence that Morgan Stanley had direct knowledge of the fraud, then you must find Morgan Stanley not liable on the conspiracy count.

In addition to proving that Morgan Stanley had direct knowledge of the fraud, CPH must establish by the greater weight of the evidence that Morgan Stanley shared the objective of Sunbeam's alleged scheme. It is not enough, therefore, for you to find that Morgan Stanley engaged in otherwise lawful activities that may have furthered others in pursuit of their fraudulent objectives in order for CPH to prevail. If CPH failed to prove that Morgan Stanley pursued a common objective of committing fraud, then you must find Morgan Stanley not liable on the conspiracy count.

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[10] To be given only if court instructs on all elements of each cause of action.

Sources:

10 Florida Jurisprudence 2d Conspiracy—Civil Aspects § 1 (2004).

15A C.J.S. *Conspiracy* § 12 (2004).

v. Furlong, 702 So. 2d 1273, 1284 (Fla. 3rd DCA 1997) (citing *Trautz v. Weisman*, 809 F. Supp. 239, 246 (S.D.N.Y. 1992) ("[M]ere knowledge of the conspiracy is insufficient; there must be an actual knowing participation.).

Ginsberg v. Lennar Florida Holdings, Inc., 645 So. 2d 490, 502 (Fla. 3d DCA 1994) (holding that there can be no conspiracy without an intent to achieve an illegal goal).

Cedar Hills Properties Corp. v. Eastern Federal Corp., 575 So. 2d 673 (Fla. 1st DCA 1991) (holding that a conspiracy requires the combination of two or more persons, a meeting of two independent minds intent on one purpose).

Cummings v. State, 514 So. 2d 406 (Fla. 4th DCA 1987) (citing *United States v. Bascaro*, 742 F.2d 1335 (11th Cir. 1984)) (A defendant may be found guilty of conspiracy only if he had knowledge of its essential objective and voluntarily became a part of it.).

Buckner v. Lower Florida Keys Hospital Dist., 403 So. 2d 1025 (Fla. 3d DCA 1981) (Conspiracy to commit a tort requires that there has been a combination of two or more persons (or entities) seeking to accomplish an unlawful act or to accomplish a lawful act by unlawful means. The actors must have a common purpose.).

Renpak, Inc. v. Oppenheimer, 104 So. 2d 642 (Fla. 1st DCA 1958) ("[C]ivil conspiracy . . . is a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish some purpose not in itself unlawful by unlawful means." *Id.* at 646 (quoting 15 C.J.S. Conspiracy § 1, pp. 996-997)).

DEFENDANT'S JURY INSTRUCTION NO. 35[11]

Conspiracy to Commit Fraud—
Commission of Overt Act in Furtherance of the Conspiracy

The third element of CPH's conspiracy claim requires CPH to prove by the greater weight of the evidence that Morgan Stanley or Sunbeam committed some overt act in furtherance of the conspiracy, either through an unlawful act or through a lawful act performed by unlawful means.

An overt act is an action taken towards completion of the ends of the conspiracy. An overt act is a discrete act, distinct from the alleged agreement, and it need not be unlawful in and of itself. However, the overt act must be proven, by the greater weight of the evidence, to have moved the alleged conspiracy forward—that is, to have carried the conspiracy beyond mere preparation—while not itself necessarily accomplishing the conspiracy's ultimate goals.

Thus, if you find that neither Morgan Stanley nor Sunbeam committed an overt act that furthered the alleged conspiracy, you must find Morgan Stanley not liable of conspiracy to commit fraud.

Sources:

James v. Nationsbank Trust Co. (Florida) Nat'l Ass'n, 639 So. 2d 1031 (Fla. 5th DCA 1994) (must demonstrate that defendant actually took steps in furtherance of the conspiracy).

Lloyd v. Hines, 474 So. 2d 376 (Fla. 1st DCA 1985) (a conspiracy action is not maintainable of the allegations are not supported by a description of the particular overt acts of the accused).

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[11] To be given only if court instructs on all elements of each cause of action.

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

DEFENDANT'S PROPOSED PRELIMINARY INSTRUCTIONS (PUNITIVE PHASE)

TABLE OF CONTENTS

Punitive Damages—Introduction....69

Punitive Damages—Clear And Convincing Proof Of Intentional Misconduct Required....70

Punitive Damages—Liability For Punitive Damages: Aiding and Abetting Fraud—Fraud by Third Party: False statement of existing fact....72

Punitive Damages—Liability For Punitive Damages: Aiding and Abetting Fraud—Fraud by Third Party: Knowingly and intentionally made....73

Punitive Damages—Liability For Punitive Damages: Aiding and Abetting Fraud—Fraud by Third Party: Materiality....74

Punitive Damages—Liability For Punitive Damages: Aiding and Abetting Fraud—Provision of Substantial Assistance....75

Punitive Damages—Liability For Punitive Damages: Conspiracy To Commit Fraud—An Agreement Between Two or More Parties....77

Punitive Damages—Liability For Punitive Damages: Conspiracy To Commit Fraud—A Common Objective To Commit Fraud....79

Punitive Damages—Liability For Punitive Damages: Conspiracy To Commit Fraud—Commission of Overt Act in Furtherance of the Conspiracy....81

Punitive Damages—Corporate Liability for Punitive Damages....82

Punitive Damages—Clear and Convincing Evidence 83

Punitive Damages—Standard of Proof 84

Punitive Damages—Actual Knowledge Required 85

Punitive Damages—Plaintiff Has No Right To Recover Punitive Damages 86

Punitive Damages—Improper Considerations 87

Punitive Damages—Jury May Not Consider Litigation Misconduct 87

Punitive Damages—No Punishment For Out-Of-State Conduct 90

Punitive Damages—Determination Of Amount 93

Punitive Damages—Award No More Than Necessary To Accomplish Purposes 95

Punitive Damages—Punishment Only For Harms To CPH 96

Punitive Damages—Consider Nature Of Defendant's Misconduct 97

Punitive Damages—Do Not Consider Financial Condition 98

Punitive Damages—Relevance Of Financial Condition 100

Punitive Damages—Reasonable Relationship Required 101

Punitive Damages—Reasonable Relationship Required 102

Punitive Damages—Consider Effect Of Compensatory Damages 103

Punitive Damages—Award Limited To Earnings 104

Punitive Damages—Concluding Instruction 15

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 1

Punitive Damages—Introduction

You have found for CPH and against Morgan Stanley on CPH's [aiding and abetting] [and/or] [conspiracy] claim[s] and awarded CPH compensatory damages. You should now consider whether Morgan Stanley should be required to pay punitive damages to CPH, and if so in what amount.

Punitive damages and compensatory damages serve different purposes. You should presume that CPH has been made whole for its injuries by your award of compensatory damages. You should award punitive damages only if you find that Morgan Stanley's culpability, after having paid compensatory damages, is so reprehensible that it warrants the imposition of a further penalty to achieve just punishment and adequate deterrence.

Source:

Florida Standard Jury Instructions in Civil Cases—Punitive Damages § 2(a) (2004) (adapted).

State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 416, 419 (2003) ("[P]unitive damages serve a broader function; they are aimed at deterrence and retribution. . . . It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 2

Punitive Damages—Clear And Convincing Proof Of Intentional Misconduct Required

You may award punitive damages only if you find that CPH has proven that Morgan Stanley is guilty of the intentional misconduct on which you found it liable by clear and convincing proof.

"Clear and convincing proof" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. In contrast, "clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

In this case, there are two forms of intentional misconduct at issue: (1) aiding and abetting fraud; and (2) conspiracy to commit fraud. You may award punitive damages only if you find that CPH showed the elements of its claims for aiding and abetting and conspiracy by clear and convincing evidence.

For aiding and abetting, CPH must show by clear and convincing evidence:

1) That Sunbeam committed a fraud against CPH by making false statements and misrepresentations in Sunbeam's financial statements—that is:

   a) Sunbeam actually made one or more *false statements or representations* to CPH concerning Sunbeam's financial affairs;

   b) Sunbeam *knew* that the statements or representations were false;

   c) Sunbeam's alleged false statements or misrepresentations were a *material factor* in CPH agreeing to sell its stake in Coleman to Sunbeam;

CPH actually *relied* on Sunbeam's allegedly false statements, in that CPH believed the truthfulness of the statement and acted based upon its belief in the statement's truth;

d) CPH was *justified* in relying on these allegedly false statements, meaning that it neither knew nor should have discovered Sunbeam's false statements; and

e) CPH *suffered injury* as a proximate result of justifiably relying on Sunbeam's false statements;

2) That Morgan Stanley had *actual knowledge* that Sunbeam was defrauding CPH;

3) That with knowledge of Sunbeam's allegedly fraudulent scheme, Morgan Stanley provided *substantial assistance* to Sunbeam in the commission of the fraud;

4) That CPH *suffered injury* as a proximate result of Morgan Stanley's conduct.

For conspiracy to commit fraud, CPH must show by clear and convincing evidence:

1) That Sunbeam committed a fraud against CPH by making false statements and misrepresentations in Sunbeam's financial statements according to my previous instructions;

2) That Morgan Stanley entered into an *agreement* with Sunbeam to defraud CPH;

3) That Morgan Stanley had *actual knowledge* of the fraud, and shared with Sunbeam a *common objective to commit fraud*;

4) That Morgan Stanley or Sunbeam engaged in at least *one act in furtherance of the conspiracy*; and

5) That CPH *suffered injury* as a proximate result of the fraud.

If you find that CPH has not proven by clear and convincing evidence all of the facts necessary to establish the basis for an award of punitive damages, you must return a verdict for Morgan Stanley on punitive damages.

I have already instructed you in phase one of the trial on several elements of aiding and abetting liability and conspiracy to commit fraud. I will now provide instructions on the other elements described above.

Sources:

Florida Standard Jury Instructions in Civil Cases - Punitive Damages §§ 1 & 2 (2004) (adapted).

Florida Forms of Jury Instruction, § 60.73[1], Vol. 4, Matthew Bender & Co., Inc., approved by the Hon. Morton Abram (2004).

Fla. Stat. § 768.725.

See prior jury instructions on aiding and abetting and conspiracy to commit fraud.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 3

Punitive Damages—Liability for Punitive Damages:

Aiding and Abetting Fraud—Fraud by Third Party: False statements of existing fact

CPH must show that Sunbeam made a false statement or misrepresentation. This simply means to state as a fact something that is *false or untrue*. If you find that CPH fails to establish by the clear and convincing evidence that Sunbeam's alleged statements were false, then there was no fraud, and you must find in favor of Morgan Stanley on the aiding and abetting count. In addition, to constitute fraud, a statement that is allegedly false must relate to an *existing fact.* Therefore, statements that are mere opinions, promises of future conduct, and forward-looking statements are not grounds for a fraud claim as they are not false statements of existing fact, unless the party stating the opinion has exclusive or superior knowledge of existing facts that are inconsistent with such opinion.

Thus, if CPH fails to prove by the clear and convincing evidence that any allegedly false statements or representations Sunbeam made were related to existing facts concerning the company's financial circumstances, rather than mere opinions or predictions as to future events concerning its performance or prospects, you should find that Morgan Stanley is not liable for punitive damages for aiding and abetting.

Sources:

Florida Standard Jury Instructions in Civil Cases - Miscellaneous §8.1 (2004) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), State Claims Instructions - Fraud § 3.1 (2000) (adapted).

Thor Bear, Inc. v. Crocker Mizner Park, Inc., 648 So. 2d 168 (Fla. 4th DCA 1994) ("The general rule of law is that a false statement of fact must concern a past or existing fact in order to be actionable. A successful action for fraudulent misrepresentation may not ordinarily be premised upon a promise of future action.").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 4

Punitive Damages—Liability for Punitive Damages:

Aiding and Abetting Fraud—Fraud by Third Party: Knowingly and Intentionally Made

CPH must prove that Sunbeam made any false statements or representations *knowingly and intentionally*, rather than as a result of a mistake, misapprehension of facts, or accident. If you find that CPH has not shown by clear and convincing evidence that Sunbeam knew that its statements were false, or that Sunbeam made the statements knowing it lacked knowledge of whether they were true or false, then you should find that Morgan Stanley is not liable for punitive damages for aiding and abetting.

Sources:

Florida Standard Jury Instructions in Civil Cases - Miscellaneous §8.1 (2004) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), State Claims Instructions - Fraud § 3.1 (2000) (adapted).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 5

Punitive Damages—Liability for Punitive Damages:

Aiding and Abetting Fraud—Fraud by Third Party: Materiality

It is also CPH's burden to establish by clear and convincing evidence that Sunbeam's allegedly false statements were a *material* reason why CPH agreed to sell its stake in Coleman to Sunbeam. A statement is material if it is of such importance that CPH would not have entered into the transaction with Sunbeam, but for the false statement. If you find that CPH would have sold its stake in Coleman to Sunbeam even in the absence of Sunbeam's alleged false statements, then you should find that Sunbeam did not defraud CPH, and therefore Morgan Stanley is not liable for punitive damages for aiding and abetting.

Sources:

Florida Standard Jury Instructions in Civil Cases - Miscellaneous §8.1 (2004) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), State Claims Instructions - Fraud § 3.1 (2000) (adapted).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 6

Punitive Damages—Liability for Punitive Damages:

Aiding and Abetting Fraud—Provision of Substantial Assistance

CPH also bears the burden of proving by clear and convincing evidence the third element of the aiding and abetting claim—that Morgan Stanley *knowingly and substantially assisted* Sunbeam in carrying out its fraud.

CPH must show that Morgan Stanley affirmatively and knowingly assisted, participated in and furthered Sunbeam's alleged fraud against CPH. The mere failure to *expose* Sunbeam's allegedly fraudulent scheme is insufficient to impose liability on Morgan Stanley for aiding and abetting. Thus, it is not enough that Morgan Stanley's silence allowed Sunbeam's allegedly fraudulent scheme to succeed, or that it failed to announce the existence of Sunbeam's alleged false financial statements. Rather, Morgan Stanley must have *affirmatively assisted* Sunbeam in committing Sunbeam's alleged fraudulent plan, with knowledge of the plan's allegedly fraudulent nature, in order for Morgan Stanley to be liable.

Even if you find that Morgan Stanley assisted Sunbeam in committing fraud, you still cannot find Morgan Stanley liable unless you find that Morgan Stanley's assistance was *substantial*. Whether Morgan Stanley's assistance was substantial depends upon the totality of the circumstances. In other words, you must take all of the evidence into account before determining whether Morgan Stanley's participation in Sunbeam's alleged fraud was substantial. If you find that Morgan Stanley participated in Sunbeam's alleged fraud, but that Morgan Stanley's participation was not substantial, you must find Morgan Stanley not liable for aiding and abetting.

If CPH has failed to prove that Morgan Stanley affirmatively and substantially assisted Sunbeam's allegedly fraudulent scheme, then you must find that Morgan Stanley is not liable for punitive damages on aiding and abetting.

Sources:

Eleventh Circuit Pattern Jury Instructions (Civil Cases), Federal Claims Instructions - Securities Fraud § 4.2 (2000) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), State Claims Instructions - Fraud § 3.1 (2000) (adapted).

37 Am. Jur. 2d *Fraud and Deceit* § 302 ("To establish a common law cause of action for aiding and abetting fraud, plaintiffs must at least demonstrate some measure of 'active participation' and knowing provision of substantial assistance by the defendant to the principal's alleged fraud.").

TransPetrol Ltd. v. Radulovic, 764 So. 2d 878, 880-81 (Fla. 4th DCA 2000) (disallowing aiding and abetting theory of liability in fraud and RICO counts because plaintiffs did not rely on actions or words of alleged aiders and abettors).

Allerton v. State Dept. of Ins., 635 So. 2d 36, 38 (Fla. 1st DCA 1994) (recognizing that a claim for aiding and abetting a breach of fiduciary duty would be based on defendant's "substantially assisting, contributing to and furthering accomplishment of the breach[]").

Rudolph v. Arthur Andersen & Co., 800 F.2d 1040, 1045-46 (11th Cir. 1986) (holding that whether assistance alleged to have aided and abetted fraud was "substantial" depends on the totality of the circumstances).

In re Cascade International Securities Litigation, 840 F. Supp. 1558, 1565-66 (S.D. Fl. 1993) (Attorneys did not give "substantial assistance" to corporate client's securities fraud and were not liable for aiding and abetting; they acted as scriveners of public documents, attempted to curb questions about client's financial condition, and engaged in nothing more than activities making up "daily grist of the mill.").

Armco Industrial Credit Corp. v. SLT Warehouse Co., 782 F.2d 475, 486 (5th Cir. 1986) ("Even accepting the evidence in the record in the light most favorable to Armco, as we must with a jury verdict, we hold that Conklin's failure to expose the existence of the bogus invoices does not rise to the level of aiding and abetting. Although Conklin became aware of the bogus invoices and did nothing to reveal their existence, this awareness and inaction amounted at most to nothing more than 'mere negative acquiescence' . . . . it is not enough that Conklin's silence allowed the scheme to succeed. Conklin must have shared Pritchett's and Rigby's criminal intent if he is to be found liable as an aider and abettor."), cited by 3B Fed. Jury Prac. & Instr. Ch. 161 Overview (5th ed.), Part VII. Instructions For Civil Actions Governed By Federal Law Chapter 161. Racketeer Influenced And Corrupt Organizations Act (RICO).

DEFENDANT'S JURY INSTRUCTION NO. 7

Punitive Damages—Liability for Punitive Damages:

Conspiracy To Commit Fraud—
An Agreement Between Two Or More Parties

CPH must prove by clear and convincing evidence that Morgan Stanley entered into an agreement or understanding with someone else to cooperate in pursuit of a common objective. A conspiracy is formed whenever two or more persons or corporations knowingly join together to accomplish an unlawful purpose by concerted action. The essence of a conspiracy is an agreement to violate or disregard the law. CPH must prove by clear and convincing evidence that Morgan Stanley and Sunbeam knowingly came to a common and mutual understanding to accomplish, or to attempt to accomplish, an unlawful purpose.

There is no requirement that the agreement be a formal contract; you may infer the existence of an agreement by finding that there exists a preponderance of circumstantial evidence to show, for example, that the parties conformed their conduct around a particular arrangement or understanding. However, in order to rely on such circumstantial evidence to infer the existence of an agreement, you must conclude that such an inference outweighs all other reasonable inferences to the contrary. In other words, if the circumstantial evidence points as easily to the existence of an agreement as it does to the absence of an agreement, you must find that such evidence fails to satisfy the requirement that an agreement be proven by clear and convincing evidence.

Therefore, in order for you to find that there was an agreement between Morgan Stanley and Sunbeam, you must find by the clear and convincing evidence that Morgan Stanley's conduct can only be explained by the existence of a conspiracy to commit fraud. If you find that Morgan Stanley merely agreed to perform the financial services of any investment bank, and that

it did not agree to engage in any actions beyond those that a typical investment bank performs, then you must find for Morgan Stanley. However, if you find that beyond agreeing to perform customary investment bank functions, Morgan Stanley agreed with Sunbeam to commit a fraud, then CPH has satisfied this element of its conspiracy claim.

Sources:

Eleventh Circuit Pattern Jury Instructions (Civil Cases), Federal Claims Instructions - Antitrust, Sherman Act Section 1, Per Se Violation, Conspiracy to Fix Prices § 3.1 (2000) (adapted).

10 Florida Jurisprudence 2d—Conspiracy §§ 1, 2, 3, 9, 11 (2004)

16 Am. Jur. 2d *Conspiracy* § 51 (2004).

Diamond v. Rosenfeld, 511 So. 2d 1031, 1034 (Fla. 4th DCA 1987) ("in a civil case, a fact may be established by circumstantial evidence alone only when the inference sought to be created by such circumstantial evidence outweighs all reasonable inferences to the contrary.").

Raimi v. Furlong, 702 So. 2d 1273, 1284 (Fla. 3d DCA 1998) (while a civil conspiracy may be proven by circumstantial evidence, this may be done only when the inference sought to be created by such circumstantial evidence outweighs all reasonable inferences to the contrary).

JES Properties, Inc. v. USA Equestrian, Inc., 253 F. Supp. 2d 1273, 1279 (M.D. Fla. 2003) (rejecting conspiracy allegation; to show that an agreement existed a plaintiff must present "evidence that tends to exclude the possibility that the parties were acting independently." The court held that there must be direct or circumstantial evidence that reasonably tends to prove that the parties had a conscious commitment to a common scheme designed to achieve an unlawful objective.).

DEFENDANT'S JURY INSTRUCTION NO. 8

Punitive Damages—Liability for Punitive Damages:

Conspiracy To Commit Fraud—
A Common Objective To Commit Fraud

CPH must prove by clear and convincing evidence that Morgan Stanley had actual knowledge of the fraud *and* that Sunbeam and Morgan Stanley had a common objective to commit fraud.

Because a conspiracy claim requires that the defendant had actual knowledge of the underlying fraud, you cannot find against Morgan Stanley on this element merely because Morgan Stanley might have acted imprudently, negligently, or even recklessly, in failing to inform itself about Sunbeam's alleged fraud. As with the aiding and abetting claim, CPH must establish by clear and convincing evidence (1) that Morgan Stanley was aware that Sunbeam made the statements that CPH alleges are false; (2) that Morgan Stanley was aware of the falsity of those statements; and (3) that Morgan Stanley believed that those statements were material and that CPH could justifiably rely upon those statements. If CPH has not established by clear and convincing evidence that Morgan Stanley had direct knowledge of the fraud, then you must find Morgan Stanley not liable for punitive damages on the conspiracy count.

In addition to proving that Morgan Stanley had direct knowledge of the fraud, CPH must establish by clear and convincing evidence that Morgan Stanley shared the objective of Sunbeam's alleged scheme. It is not enough, therefore, for you to find that Morgan Stanley engaged in otherwise lawful activities that may have furthered others in pursuit of their fraudulent objectives in order for CPH to prevail. If CPH failed to prove that Morgan Stanley pursued a common objective of committing fraud, then you must find Morgan Stanley not liable for punitive damages on the conspiracy count.

Sources:

10 Florida Jurisprudence 2d Conspiracy—Civil Aspects § 1 (2004).

15A C.J.S. *Conspiracy* § 12 (2004).

Raimi v. Furlong, 702 So. 2d 1273, 1284 (Fla. 3rd DCA 1997) (citing *Trautz v. Weisman*, 809 F. Supp. 239, 246 (S.D.N.Y. 1992)) (Mere awareness of the conspiracy is insufficient; there must be an actual knowing participation.).

Ginsberg v. Lennar Florida Holdings, Inc., 645 So. 2d 490, 502 (Fla. 3d DCA 1994) (holding that there can be no conspiracy without an intent to achieve an illegal goal).

Cedar Hills Properties Corp. v. Eastern Federal Corp., 575 So. 2d 673 (Fla. 1st DCA 1991) (holding that a conspiracy requires the combination of two or more persons, a meeting of two independent minds intent on one purpose).

Cummings v. State, 514 So. 2d 406 (Fla. 4th DCA 1987) (citing *United States v. Bascaro*, 742 F.2d 1335 (11th Cir. 1984)) (A defendant may be found guilty of conspiracy only if he had knowledge of its essential objective and voluntarily became a part of it.).

Buckner v. Lower Florida Keys Hospital Dist., 403 So. 2d 1025, (Fla. 3rd DCA 1981) (Conspiracy to commit a tort requires that there has been a combination of two or more persons (or entities) seeking to accomplish an unlawful act or to accomplish a lawful act by unlawful means. The actors must have a common purpose.).

Renpak, Inc. v. Oppenheimer, 104 So. 2d 642 (Fla. 1st DCA 1958) ("[C]ivil conspiracy . . . is a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish some purpose not in itself unlawful by unlawful means." *Id.* at 646 (quoting 15 C.J.S. Conspiracy § 1, pp. 996-997)).

DEFENDANT'S JURY INSTRUCTION NO. 9

Punitive Damages—Liability for Punitive Damages:

Conspiracy to Commit Fraud—
Commission of Overt Act in Furtherance of the Conspiracy

You may not find Morgan Stanley liable for punitive damages unless you conclude that CPH has proven by clear and convincing evidence that Morgan Stanley or Sunbeam committed some overt act in furtherance of the conspiracy, either through an unlawful act or through a lawful act performed by unlawful means.

An overt act is an action taken towards completion of the ends of the conspiracy. An overt act is a discrete act, distinct from the alleged agreement, and it need not be unlawful in and of itself. However, the overt act must be proven, by clear and convincing evidence, to have moved the alleged conspiracy forward—that is, to have carried the conspiracy beyond mere preparation—while not itself necessarily accomplishing the conspiracy's ultimate goals.

Thus, if you find that neither Morgan Stanley nor Sunbeam committed an overt act that furthered the alleged conspiracy, you must find Morgan Stanley not liable of punitive damages for conspiracy to commit fraud.

Sources:

James v. Nationsbank Trust Co. (Florida) Nat'l Ass'n, 639 So. 2d 1031 (Fla. 5th DCA 1994) (must demonstrate that defendant actually took steps in furtherance of the conspiracy).

Lloyd v. Hines, 474 So. 2d 376 (Fla. 1st DCA 1985) (a conspiracy action is not maintainable of the allegations are not supported by a description of the particular overt acts of the accused).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 10

Punitive Damages – Corporate Liability for Punitive Damages

Punitive damages are only warranted if you find by clear and convincing evidence that Morgan Stanley was guilty of intentional misconduct.

Morgan Stanley is a corporation and, for purposes of deciding whether to impose punitive damages, Morgan Stanley can only act through its officers, directors or managing agents authorized to make corporate policies or it can act through its employees. Thus, in order to impose punitive liability on Morgan Stanley, you must find by clear and convincing evidence that:

A specific managing agent, director or officer of Morgan Stanley who has the power to make corporate policies, engaged in conduct that constituted intentional misconduct and that conduct contributed to the loss or damage suffered by Plaintiff.

If you find that clear and convincing evidence shows that the conduct of (name managing agent, primary owner, or other person whose conduct may warrant punitive damages without proof of a superior's fault) was a substantial cause of damage to CPH and that such conduct warrants punitive damages against Morgan Stanley in accordance with the standards I have mentioned, then in your discretion you may also determine that punitive damages are warranted against Morgan Stanley.

Source: Florida Standard Jury Instructions in Civil Cases – Punitive Damages § PD 2b(1)(2) (2004) (adapted).

Schropp v. Crown Eurocars, 654 So. 2d 1158, 1161 (Fla. 1995)

Bankers Multiple Line Ins. Co. v. Farish, 464 So. 2d 530, 533 (Fla. 1985).

DEFENDANT'S PROPOSED INSTRUCTION NO. 11

Punitive Damages – Clear and Convincing Evidence

"Clear and convincing evidence" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. In contrast, "clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

Source:

Florida Standard Jury Instructions in Civil Cases – Punitive Damages § PD 2a(1) (2004).

DEFENDANT'S PROPOSED INSTRUCTION NO. 12

Punitive Damages – Burden of Proof

If you find that Plaintiff has not proven by clear and convincing evidence all of the facts necessary to establish the basis for an award of punitive damages, you must return a verdict for Morgan Stanley on punitive damages.

Source: § 768.725, Fla. Stat.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 13

Punitive Damages—Actual Knowledge Required

To award punitive damages, it is not enough to establish that Morgan Stanley should have known it was conspiring with Sunbeam to defraud CPH, or that Morgan Stanley should have known it was aiding and abetting Sunbeam commit a fraud upon CPH. Rather, CPH must show that an individual at Morgan Stanley actually knew of the fraud complained of at the time it participated in the sale of Coleman to Sunbeam and knew of the high probability of harm to CPH and, despite that continued to participate in the transaction resulting in harm to Plaintiff. Mere failure to recognize the existence of a fraud or failure to exercise proper judgment in such a situation are not sufficient.

Sources:

Florida Standard Jury Instructions in Civil Cases – Punitive Damages § PD 2c(2) (2004) (adapted).

Chrysler Corp. v. Wolmer, 499 So. 2d 823, 824-25 (Fla. 1986).

White Constr. Co. v. Dupont, 455 So. 2d 1026, 1029 (Fla. 1984).

Carraway v. Revell, 116 So. 2d 16, 20 (Fla. 1959).

Vinci Dev. Co. v. Connell, 509 So. 2d 1128, 1133 (Fla. 2d DCA 1987) ("[e]ven a wrongful act committed by mistake in the good-faith assertion of a supposed right, but lacking malicious motive or wrong intention, will not support an award of punitive damages.").

Hemenway v. Peabody Coal Co., 159 F.3d 255, 262 (7th Cir. 1998) (the standard for punitive damages in Indiana is whether "the defendant acted with malice, fraud, gross negligence or oppressiveness which was not the result of a mistake of fact or law, honest error of judgment, over zealousness, mere negligence, or other human failing.").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 14

Punitive Damages—Plaintiff Has No Right To Recover Punitive Damages

CPH has no right to recover punitive damages, even though you have found it entitled to compensatory damages. Punitive damages are not intended to compensate a plaintiff for its actual injuries. You may in your discretion decline to award punitive damages even if you find that the evidence supports such an award.

Sources:

Chrysler Corp. v. Wolmer, 499 So. 2d 823, 825 (Fla. 1986) (punitive damages not intended as means by which a plaintiff can recover extra damages).

St. Regis Paper Co. v. Watson, 428 So. 2d 243, 247 (Fla. 1983) (recognizing distinct purposes for compensatory and punitive damages and noting that "a plaintiff has no right to punitive damages").

Carraway v. Revell, 116 So. 2d 16, 20 (Fla. 1959) (punitive damages are imposed "not as compensation … but as punishment").

BMW of North Am. v. Gore, 517 U.S. 559, 567 (1996).

Florida Standard Jury Instructions in Civil Cases – Punitive Damages § PD 2(d)(2) (2004) (adapted) ("[Y]ou may in your discretion decline to assess punitive damages").

Humana Health Ins. Co. of Fla. v. Chipps, 802 So. 2d 492 (Fla. 4th DCA 2001).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 15

Punitive Damages—Improper Considerations

You may not allow your decision regarding punitive damages to be affected by the fact that Morgan Stanley is a large business, or by the fact that its principal offices are outside of this State.

Source:

Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994) (noting the danger "that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 16

Punitive Damages—Jury May Not Consider Litigation Misconduct[12]

You have heard evidence about litigation misconduct by Morgan Stanley during the course of this case. Such evidence was admissible only to establish the fact that Morgan Stanley had knowledge that its conduct in connection with the Coleman/Sunbeam transaction was improper. You may not consider any evidence of Morgan Stanley's litigation misconduct in deciding whether to award punitive damages and, if so, the amount of punitive damages to award.

Sources:

> *Ostano Commerzanstalt v. Telewide Sys., Inc.*, 794 F.2d 763, 768 (2d Cir. 1986) ("While this conduct might well justify the imposition of sanctions, it alone does not justify the award of punitive damages.") (citation omitted).
>
> *Federal Deposit Ins. Corp. v. British-American Corp.*, 755 F.Supp. 1314, 1329 (E.D.N.C. 1991) ("Punitive damages are available when the underlying conduct on which the lawsuit is premised is willful, wanton, egregious, or the like. They are not intended to redress misconduct occurring during the litigation process. Such misconduct is properly redressed through the Federal Rules of Civil Procedure.") (citation omitted).
>
> *James v. Powell*, 225 N.E.2d 741, 747 (N.Y. 1967) (punitive damages not properly awarded where court levied them based on contempt citations in related proceedings rather than on account of the fraud at issue).
>
> Jim Gash, *Punitive Damages, Other Acts Evidence, and the Constitution*, 2004 Utah L. Rev. 1191, 1212 (2004) ("[I]t seems axiomatic that if the trial court is constitutionally required to instruct the jury that it may not use extraterritorial other acts evidence to punish a defendant, *the trial court must be similarly required to instruct the jury that it may not use even local other acts to punish a defendant. Whereas the former instruction*

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[12] Morgan Stanley submits this instruction to be used only in the event evidence of litigation misconduct is admitted during trial, or if the Court reads any statement to the jury concerning litigation misconduct, and does so without waiving its argument that no evidence or mention of litigation misconduct should be placed before the jury. Permitting the jury to hear evidence of "the nuances of discovery and the 'hardball' tactics employed by the lawyers may confuse the jury" and "rather than focus on the issues in the case, the jury may instead be misled by the irrelevant side issues of the discovery process." *Thompson v. Gleamed Trust Co.*, 1996 WL 529693, at *2 (E.D. Pa. Sept. 17, 1996). Juror prejudice results not only from the negative inferences a juror inevitably draws from a sanctions order, but also from the fact that juries are likely to give any court order "undue" and "exaggerated" weight. *Nipper v. Snipes*, 7 F.3d 415, 418 (4th Cir. 1993); *Greys, Inc. v. Proud*, 826 F.2d 1560, 1567 (7th Cir. 1987).

is mandated by federalism principles, the latter is required by due process.") (emphasis added).

State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1522-23 (2003) ("A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 17

Punitive Damages—No Punishment For Out-Of-State Conduct

You may not award any punitive damages (1) for any conduct occurring outside Florida; (2) for injuries that may have occurred outside of Florida; (3) on the basis of out-of-state conduct that was lawful where it occurred; or (4) for the purpose of changing Morgan Stanley's conduct outside of Florida.

For purposes of evaluating whether Morgan Stanley's conduct in New York was lawful, you must consider whether CPH has shown by clear and convincing evidence that, under New York law, CPH justifiably relied upon Sunbeam's allegedly fraudulent statements. I instruct you that under New York law CPH must establish that it *relied upon* Sunbeam's allegedly fraudulent statements, that CPH was *justified* in doing so, and that Sunbeam's allegedly fraudulent statements were a substantial factor in CPH's decision to engage in the transaction with Sunbeam. In other words, if you find that CPH did not believe the alleged misrepresentations, or that CPH would have engaged in the transaction with Sunbeam anyway and that the alleged misrepresentations had no effect upon CPH's decision, then there was no reliance and therefore no punitive damages should be awarded. Furthermore, if you find that it was unreasonable for CPH simply rely upon Sunbeam's representations without undertaking an independent investigation, then CPH's reliance was not justified and you should not award punitive damages.

Under New York law, a sophisticated investor has a duty to perform reasonable due diligence as to available information in order to prove that its reliance on a misrepresentation was justified. Sophisticated investors are required to use reasonable due diligence in investigating the transaction to discover misrepresentations, the falsity of which would have been apparent had a proper investigation been completed. A sophisticated investor may not disregard a risk that the investor actually knew about, or was so obvious that the investor should have

known of it. If you conclude that CPH was a sophisticated investor and that it failed to prove such justifiable reliance by clear and convincing evidence, you should not award punitive damages.

Source:

State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 421-23 (2003) ("A State cannot punish a defendant for conduct that may have been lawful where it occurred. . . . A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for conduct that was lawful in the jurisdiction where it occurred.").

BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572-73 (1996) ("[A] State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States.").

White v. Ford Motor Co., 312 F.3d 998 (9th Cir. 2002) ("The district court's refusal to limit the jury to consideration of Nevada's interests, combined with the plaintiffs' lawyers exhortations to let the decision resonate 'across the country,' compels us to conclude that the jury here was permitted to engage in 'a due process violation of the most basic sort' when it arrived at its punitive damages award.").

New York Pattern Jury Instructions – Civil §3.20 (2004) (adapted).

14 New York Practice - New York Law of Torts §§ 1:69, 1:70, 1:71, 1:73, 1:74.

Rotterdam Ventures, Inc. v. Ernst & Young LLP, 752 N.Y.S.2d 746, 749 (N.Y. App. Div. 2002) (holding that where a sophisticated party "plainly had both access to the relevant AMNEX financial statements and the wherewithal, through his own financial advisors, to ascertain the financial viability of that entity. Thus, as plaintiffs had the means to ascertain the truth of the alleged representations, they cannot prevail in an action for fraud") (citations omitted).

UST Private Equity Investors Fund, Inc. v. Salomon Smith Barney, 733 N.Y.S.2d 385, 386 (N.Y. App. Div. 2001) ("As a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on an alleged misrepresentation if that plaintiff failed to make use of the means of verification that were available to it, such as reviewing the files of other parties.").

Stuart Silver Assocs., Inc. v. Baco Dev. Corp., 665 N.Y.S.2d 415, 417 (N.Y. App. Div. 1997) ("Where a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on defendant's misrepresentations.").

Schlaifer Nance & Co. v. Estate of Warhol, 119 F.3d 91, 101 (2d Cir. 1997) ("'Where sophisticated businessmen engaged in major transactions enjoy access to critical information but fail to take advantage of that access, New York courts are particularly disinclined to entertain claims of justifiable reliance.'" (quoting *Grumman Allied Indus. v. Rohr Indus., Inc.*, 748 F.2d 729, 737 (2d Cir. 1984)).

Abrahami v. UPC Const. Co., 638 N.Y.S.2d 11, 14 (N.Y. App. Div. 1996) (holding that sophisticated businessmen who were parties to a commercial transaction "had a duty to exercise ordinary diligence and conduct an independent appraisal of the risk they were assuming," and noting that "where a party has means available to him for discovering, by the [use] of ordinary intelligence, the true nature of a transaction he is about to enter into, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations") (internal quotation marks and citations omitted).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 18

Punitive Damages—Determination Of Amount

In determining the amount of punitive damages, you should consider the following:

1. the nature, extent, and degree of misconduct and the related circumstances, including:
    - whether the harm caused was economic as opposed to physical;
    - whether the misconduct demonstrated an indifference to or a reckless disregard of the health or safety or others;
    - whether the target of the conduct was financially vulnerable;
    - whether, at the time of the injury, Morgan Stanley had a specific intent to harm CPH;
    - the financial condition of Morgan Stanley and the probable effect of a judgment thereon;[13] and
    - the degree of Morgan Stanley's awareness of the misconduct, including whether Morgan Stanley had other arguably legitimate grounds to conclude that its conduct was lawful; and
2. whether there is a reasonable relationship between the amount of punitive damages and CPH's harm.

Any punitive damages you assess would be in addition to any compensatory damages you award. Even if you find that Morgan Stanley engaged in conduct that makes it subject to punitive damages, it is entirely within your discretion whether or not to award punitive damages. You should award punitive damages only if you conclude that punitive damages are necessary to accomplish the goals of punishment and deterrence.

[13] Morgan Stanley submits this instruction to be used only in the event evidence of Morgan Stanley's wealth is admitted and does so without waiving its argument that no evidence of wealth should be admitted.

However, you may not award an amount of damages that would bankrupt or financially destroy Morgan Stanley.

Source:

Florida Standard Jury Instructions in Civil Cases—Punitive Damages § 2 (2004) (adapted).

State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 419-429 (2003).

BMW of N. Am. v. Gore, 517 U.S. 559, 577-80 (evaluating reprehensibility in light of compliance with state disclosure statutes, which provided a "good faith basis for believing that no duty to disclose exists.").

Langmead v. Admiral Cruises, 696 So. 2d 1189, 1192-94 (Fla. 3d DCA 1997) (assessing the degree of reprehensibility of the defendant's conduct and the actual harm caused by such conduct).

Owens-Corning Fiberglass Corp. v. Ballard, 749 So. 2d 483, 484-5 (Fla. 1999) (holding that lower court properly included in jury instructions on punitive damages additional factors relating to the circumstances of the case).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 19

Punitive Damages—Award No More Than Necessary To Accomplish Purposes

The primary purpose of imposing punitive damages against a corporation is to punish the wrongdoer and deter similar misconduct in the future by the defendant and others. You must not award punitive damages in any amount larger than what is needed to accomplish this purpose.

Source:

Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 17-18 (1991) ("We note again our concern about punitive damages that 'run wild,'" and analyzing necessity for adequate guidance to the jury, as well as judicial review, to ensure that punitive damage awards meet standards of reasonableness and deterrence).

State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1521 (2003) ("It should be presumed that a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.").

Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 434-36 (2001) (imposition of punitive damages reflects policy decisions more than actual findings and *de novo* appellate review is required to ensure fidelity to constitutional limits).

BMW of N. Am. v. Gore, 517 U.S. 559, 584 (1996) ("The [punitive damages] sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal.").

Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 307 (1986)("[d]eterrence ... operates through mechanism of damages that are compensatory").

Beliz v. W.H. McLeod & Sons Packing, 765 F.2d 1317, 1332 (5th Cir. 1985) ("[d]eterrent effect may be achieved without awarding exemplary damages").

Rosado v. Santiago, 562 F.2d 114, 121 (1st Cir. 1977) (reversing punitive damages where "[a]n award of actual damages coupled with reinstatement ... is ample relief ... and a sufficient deterrent to future wrongdoing").

Maiorino v. Schering-Plough Corp., 695 A.2d 353 (N.J. Super. 1997) (vacating punitive award in light of substantial deterrent of $435,000 compensatory award).

Chandler v. Denton, 741 P.2d 855, 868 (Okla. 1987) (total verdict "was so large that the addition of substantial punitive damages was 'not ... responsive to the purpose of civil punishment'").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 20

Punitive Damages—Punishment Only For Harms To CPH

You may not impose punishment for harms suffered by any persons or corporations other than CPH.

Source:

State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 422-23 (2003) ("A defendant should be punished for conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant . . . .").

Cooper Indus., Inc. v. Letherman Tool Group, Inc., 532 U.S. 424, 435 (2001) (characterizing second *BMW* guidepost as "the relationship between the penalty and the harm *to the victim* caused by the defendant's actions").

BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996) (looking into "the disparity between the harm or potential harm suffered *by Dr. Gore* and his punitive damages award") (emphasis added).

Owens-Corning Fiberglass Corp. v. Ballard, 749 So. 2d 483, 484-5 (Fla. 1999) (holding that lower court properly included in jury instructions on punitive damages additional factors relating to the circumstances of the case).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 21

Punitive Damages—Consider Nature Of Defendant's Misconduct

In deciding what level of punishment and deterrence, if any, is warranted in this case, the most important factor to consider is the nature, degree, and extent of the misconduct, if any, of Morgan Stanley's participation in the transaction. Not all conduct that is subject to punishment is equally wrongful or deserving of the same punishment. Thus, you should consider how blameworthy Morgan Stanley's conduct was in deciding what level or amount of punishment that conduct deserves, if any.

Source:

Florida Standard Jury Instructions in Civil Cases – Punitive Damages § PD 2d(2) (2004).

Langmead v. Admiral Cruises, 696 So. 2d 1189, 1192-94 (Fla. 3d DCA 1997) (assessing the degree of reprehensibility of the defendant's conduct and the actual harm caused by such conduct).

State Farm Mut. Auto. Ins. Co. v. Campbell, 123 U.S. 1513, 1521 (2003).

BMW of N. Am. v. Gore, 517 U.S. 559, 575-78 (1996) ("the most important indicum of the reasonableness of punitive damages award is the degree of reprehensibility of the conduct").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 22

Punitive Damages—Do Not Consider Financial Condition

In determining the proper amount of punitive damages, if any, you may not consider Morgan Stanley's size, wealth, overall profits and revenues, or profits.

Source:

State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1525 (2003) ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.").

BMW of N. Am. v. Gore, 517 U.S. 559, 574-85 (1996) (wealth of defendant not included in due process analysis; the "fact that [a] defendant is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several states impose on the conduct of its business.").

Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994) ("[T]he presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.").

Sand Hill Energy v. Smith, 142 S.W.3d 153, 167 (Ky. 2004) ("[I]n *State Farm*, the United States Supreme Court frowned upon 'the presentation of evidence of a defendant's net worth'").

Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793, 805 (Cal. Ct. App. 2003) ("the jury in this case was instructed that, in addition to other factors, it should consider in arriving at an award of punitive damages '[t]he amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition.' As we have discussed above, this view of 'actual' deterrence, while clearly supported by California law ..., fails to restrict the jury to punishment and deterrence based solely on the harm to the plaintiffs, as apparently required by federal due process").

Zazu Designs v. L'Oreal, S.A., 979 F.2d 499, 508 (7th Cir. 1992) ("[c]orporate assets finance ongoing operations and are unrelated to either the injury done to the victim or the size of the award needed to cause corporate managers to obey the law.").

Kemezy v. Peters, 79 F.3d 33, 35 (7th Cir. 1996) (the economics principal of "diminishing marginal utility" "does not apply to institutions as distinct from natural persons.").

Pivot Point Int'l v. Charlene Prods., 932 F. Supp. 220, 223 (N.D. Ill. 1996) (evidence of wealth inadmissible to establish the proper amount of punitive damages in part because, "even when considering punitive damages based on state law, the Supreme Court [in *BMW*] did not treat the defendant's wealth as relevant.").

Anthony J. Franze & Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After State Farm*, 6 U. Pa. J. Const. L. 423, 521 (2004) ("basing

an award on a defendant's financial condition or profits risks punishing a defendant for harm to nonparties, a practice barred by *State Farm*").

American Law Institute, *Reporters' Study: Enterprise Responsibility for Personal Injury*, Vol. II, at 253-55 (1991).

But see Rinaldi v. Aaron, 314 So. 2d 762 (Fla. 3d DCA 1975).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 23

Punitive Damages—Relevance Of Financial Condition[1]

You may not impose a larger punishment simply because a defendant is a large corporation with substantial net worth, income, or revenues. Regardless of the defendant's wealth, you should base the amount of your punitive award, if any, on the factors about which I have already instructed you.

Source:

> *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 427 (2003) ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.").

[1] Morgan Stanley submits this instruction to be used only in the event evidence of Morgan Stanley's wealth is admitted and does so without waiving its argument that no evidence of wealth should be admitted.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 24

Punitive Damages—Reasonable Relationship Required

Although evidence of Morgan Stanley's size and financial resources was introduced in this case, you should only consider such evidence for the limited purpose of ensuring that the award will not financially destroy Morgan Stanley. In determining the amount of punitive damages, you must focus on the nature, extent and degree of culpable misconduct, the relationship between punitive damages and the amount of compensatory damages awarded, and civil or criminal penalties for comparable misconduct.

Source:

Florida Standard Jury Instructions in Civil Cases – Punitive Damages § PD 2d(2) (2004) (adapted).

State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1525 (2003).

BMW of N. Am. v. Gore, 517 U.S. 559, 576 n.23 (1996).

St. Regis Paper Co. v. Watson, 428 So. 2d 243, 248 (Fla. 1983).

Anthony J. Franze and Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After State Farm*, 6 U. Pa. J. Const. L. 423, 520 (2004) (where net worth is admissible "[t]o avoid constitutional concerns, juries also should be told that a defendant's wealth should be used only as a limiting factor in setting the amount of an award").

But cf. Rinaldi v. Aaron, 314 So. 2d 762 (Fla. 3d DCA 1975).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 25

Punitive Damages—Reasonable Relationship Required

Any amount of punitive damages you award may not be disproportionate to the harm caused to CPH and to the compensatory damages you have awarded.

Source:

State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1524 (2003) ("the measure of punishment [must be] both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered," "when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages can reach the outermost limit of the due process guarantee.").

BMW of N. Am. v. Gore, 517 U.S. 559, 580 (1996) ("The principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree ...").

Owens-Corning Fiberglas v. Ballard, 749 So. 2d 483 (Fla. 1999) (an amount reasonable in relation to the harm likely to result from the conduct as well as the actual harm).

Langmead v. Admiral Cruises, 696 So. 2d 1189, 1192-94 (Fla. 3d DCA 1997) ("An enormous disparity between the actual damages awarded ... and the punitive damages awarded ... has most certainly raised the suspicious judicial eyebrow[s] of this Court").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 26

Punitive Damages—Consider Effect Of Compensatory Damages

Because the compensatory damages you have already awarded are substantial, a lesser amount of punitive damages may be appropriate based on other factors I have identified for you. You should consider that, because the compensatory damages are substantial, a punitive award equal to or less than the compensatory award may well be sufficient to achieve the State's interest in punishing and deterring the defendant, in which case you may not award more than that amount.

Source:

State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1524 (2003) ("the measure of punishment [must be] both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered," "when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages can reach the outermost limit of the due process guarantee.");

BMW of N. Am. v. Gore, 517 U.S. 559, 580 (1996) ("The principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree ...").

Owens-Corning Fiberglas v. Ballard, 749 So. 2d 483 (Fla. 1999) (an amount reasonable in relation to the harm likely to result from the conduct as well as the actual harm).

Langmead v. Admiral Cruises, 696 So. 2d 1189, 1192-94 (Fla. 3d DCA 1997) ("An enormous disparity between the actual damages awarded ... and the punitive damages awarded ... has most certainly raised the suspicious judicial eyebrow[s] of this Court").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 27

Punitive Damages—Award Limited To Earnings

Ordinarily, it constitutes sufficient punishment and deterrence to deprive a corporate defendant of the monetary benefit it gained from its wrongful conduct of its employees.

Therefore, if you decide to award punitive damages in this case, the maximum amount you may award is the amount, if any, earned by Morgan Stanley as a result of its participation in the transaction, less any compensatory damages you award. If, however, based on the other factors I have instructed you to consider, you conclude that a lesser amount will provide sufficient punishment and deterrence, you should award that lesser amount.

Source:

BMW of N. Am. v. Gore, 517 U.S. 559 (1996).

Uniform Law Commissioners' Model Punitive Damages Act § 6(c) ("liability of a legal entity or principal for punitive damages under this subsection is limited to an amount necessary to deprive the entity or principal of any profit or gain, obtained through the wrongful action of the director, officer, or agent, in excess of that likely to be divested by an action against the entity or principal for compensatory damages")

American Law Institute, *Reporters' Study: Enterprise Responsibility for Personal Injury*, Vol. II, at 254 (1991) ("[W]hat is relevant is not the defendant's *overall* wealth, but rather the profit it realized from the particular tortuous activity in question.")

Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424, 432 (2001) (holding that punitive damages must be linked to the profits generated by the alleged wrongdoing, and explaining that "it would be unrealistic to assume that all of [the defendant's] sales ... would have been attributable to its misconduct").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 29

Punitive Damages—Concluding Instruction

Your verdict must now be unanimous, that is, your verdict must be agreed to by each of you.

You will be given a form of verdict, which I shall now read to you:

[Insert jury form]

When you have agreed on your verdict, the foreman or forewoman, acting for the jury, should date and sign the verdict. You may now retire to consider your verdict.

Source:

Florida Standard Jury Instructions in Civil Cases - Punitive Damages § 1 (2004) (adapted).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 4 day of April, 2005.

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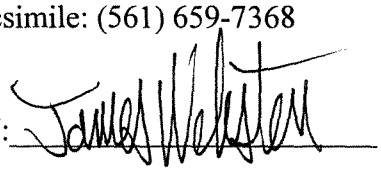
BY: 

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S REVISED TRIAL EXHIBIT DISCLOSURE

Pursuant to the Court's March 24, 2005 Order, Morgan Stanley & Co. Incorporated ("Morgan Stanley") hereby provides its list of trial exhibits that Morgan Stanley will or may use at trial. Morgan Stanley reserves the right to use any of the exhibits identified herein or on Coleman (Parent) Holdings, Inc.'s ("CPH") trial exhibit list during either phase of its case-in-chief. Morgan Stanley further reserves the right to withdraw any exhibit identified herein and to supplement this disclosure as Morgan Stanley continues to evaluate its case in light of the Court's rulings. Morgan Stanley also reserves the right to add or withdraw exhibits in response to changes in CPH's trial witness disclosure or exhibit list, new arguments advanced by CPH, the Court's future rulings, and documents produced pursuant to trial subpoenas and notices to produce at trial.

The Court's Order on CPH's Renewed Motion for Entry of Default Judgment (Mar. 23, 2005) ("Default Order") substantially narrowed the matters at issue in this case. Moreover, the Default Order prohibits Morgan Stanley from using exhibits that are relevant to certain elements of CPH's conspiracy and aiding-and-abetting claims (*i.e.*, exhibits that are relevant to matters other than reliance and damages). Accordingly, Morgan Stanley's new lead trial counsel has, in

the approximately 10 days since the assumption of his duties in this complex case, made good-faith efforts to identify the exhibits that bear on the matters that remain in dispute. However, in this extremely short time, new lead trial counsel has not had an adequate opportunity to familiarize himself with the more than 600 trial and/or deposition exhibits that Morgan Stanley has marked in this case, with the more than 1100 trial and/or deposition exhibits that CPH has marked, or with additional potential relevant documents. Morgan Stanley plans to amend this exhibit list to include financial documents related to Morgan Stanley's most recently completed quarter, and it will do so as soon as its counsel has obtained these documents.

Consistent with the foregoing, Morgan Stanley has identified with a "check mark" those exhibits on this list that it believes bear most directly on the matters in dispute and upon which, based upon the good-faith efforts of counsel to date, it believes it is mostly likely to rely at trial. As a result of its unfamiliarity with the record in this case, Morgan Stanley may have identified in this disclosure more exhibits than it will ultimately use at trial. It may also have omitted exhibits that it will need to use. Accordingly, Morgan Stanley reserves the right to use at trial all exhibits on this list, as well as others it may identify, as necessary to its defense. In addition, Morgan Stanley may use the exhibits identified in this list in proffers that it may make at trial.[1]

[1] Morgan Stanley adopts by reference the January 10, 2005 Exhibit Disclosure, which includes the exhibits that Morgan Stanley would call at trial if permitted to do so — as supplemented by certain additional exhibits disclosed in the instant submission. The Court's orders likewise prohibit Morgan Stanley from using documents with respect to Morgan Stanley's discovery conduct. *See* Order on CPH's Motion for Adverse Inference Instruction (Mar. 1, 2005) and its Default Order. Accordingly, Morgan Stanley also supplements its exhibits disclosure to include certain exhibits relied upon by Morgan Stanley during the February 14, March 14, and March 15, 2005 hearings, and, if permitted to do so, would use these exhibits at trial to address the matters addressed at the February 14, March 14, and March 15, 2005 hearings, as well as related matters. Morgan Stanley's disclosure of these trial exhibits is without prejudice to Morgan Stanley's right to continue to assert privilege over certain of these documents and to object to the admissibility of these documents.

Morgan Stanley Revised Exhibit List

Exhibit No.		*Date*	*Description*	*Bates*	*Trial Exhibit*
MS	1	09/09/2003	Letter from M. Brody to Z. Brown re no written document retention policy		☑
MS	2	11/02/1998	Memo from B. Schwartz to R. Perelman, H. Gittis, J. Maher, I. Engelman, T. Slotkin, W. Nesbitt re Document request in Goldstein v. Langerman	CPH 2000000-20000007	☑
MS	3	07/14/2003	Morgan Stanley & Co. Incorporated's First Request for Production of Documents to Plaintiff		☑
MS	4	07/14/2003	Morgan Stanley Senior Funding's First Request for Production of Documents to Defendants		☑
MS	5	10/05/2001	Memo from Golden to R. Perelman, H. Gittis, D. Drapkin, B. Schwartz, T. Slotkin, J. Conroy, G. Dickes, N. Ginstling, L. Ajzenman, F. Clarke, S. Fasman, W. Greene, A. Ian, G. Kessel, P. Savas, M. Schaffer re Document Production for Coleman (Parent) v. Arthur Andersen	CPH 2000039-20000040	☑
MS	6	11/08/2001	Memo from E. Golden to R. Perelman, H. Gittis, D. Drapkin, B. Schwartz, T. Slotkin re More document production for Coleman (Parent) v. Arthur Andersen	CPH 2000044	☑
MS	7	08/14/1997	Memo from V. Kistler to File re Sunbeam Neosho Inventory	CPH 0009020-0009021	☐
MS	8	11/21/1997	Memo from D. Pastrana to Sunbeam Inventory Observation Team re Sunbeam - Inventory Observations	CPH 0078581-0078585	☐
MS	9	03/19/1998	Comfort Letter from Arthur Andersen to Morgan Stanley	MSC 0000376-0000382	☑
MS	10	03/25/1998	Second Comfort Letter from Arthur Andersen to Morgan Stanley	CPH 1084897-1084898	☑
MS	11	03/19/1998	R. Goudis, "Sunbeam States that First Quarter Revenues May Be Lower than Street Estimates"	MSC 0016944-0016945	☑
MS	12	03/06/1998	Form 10K Annual Report for the Fiscal Year Ended Dec. 28, 1997 for Sunbeam Corporation	CPH 1409062-1409117	☑
MS	14	00/00/1998	Special Audit Procedures	CPH 0090040-0090045	☐
MS	16	11/11/1998	Memo from D. Denkhaus to Distribution re Sunbeam Corporation Document Retention	CPH 0076949	☐
MS	20	12/28/1997	Work Program Sunbeam Corp. - Core Operations	CPH 0011408-0011468	☐

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	21	12/28/1997	Work Program Sunbeam Corp. - Consolidation and Financial Reporting	CPH 0011752-0011754	☐
MS	22	01/30/1998	Memo from D. Pastrana to the Files re Sunbeam Corp. Audit 12/31/97 Residual Audit Risk Reduction Approach	CPH 0011144-0011152	☑
MS	23	12/28/1997	Sunbeam Preliminary Materiality Assessment	CPH 0010963-0010971	☐
MS	24	05/21/1998	Fax from D. Pastrana to R. Gluck with attached Sunbeam Corporation Blueback Clearance Form	CPH 0244904-0244915	☐
MS	25	03/05/1998	Postaudit Review for Subsequent Material Transactions and Events After the Date of the Auditors' Report, Sunbeam Corporation 10K for Dec. 28, 1997	CPH 0130041-0130050	☐
MS	26	03/05/1998	Sunbeam P&L, Actuals Comparison Reporting Period January 1998 with marginalia	CPH 0013023-0013027	☑
MS	27	03/13/1998	Sunbeam P&L Variations through March 1, 1998 and Profit Loss Statement for Period February 1998	CPH 0012963-0012967	☑
MS	28	03/16/1998	Postaudit Review for Subsequent Material Transactions and Events After the Date of the Auditors' Report, Sunbeam Corporation Sale of $2.014 Billion Zero Coupon Senior Subordinated Debentures due 2018 for Dec. 28, 1997	CPH 0129926-0129936	☐
MS	30	03/16/1998	Letter from A. Dunlap, R. Kersh, D. Fannin, R. Gluck to Arthur Andersen re Representations submitted with Offering Memorandum	CPH 0129687-0129689	☑
MS	32	03/21/1998	Email from D. Pastrana to L. Bornstein, M. Brockelman with attached draft Sunbeam Comfort Letter and grl	CPH 0041650-0041661	☐
MS	34	03/23/1998	Letter from A. Dunlap, R. Kersh, D. Fannin, and R. Gluck to Arthur Andersen re Representations submitted with Offering Memorandum	CPH 0129642-0129644	☑
MS	35	03/13/1998	Postaudit Review for Subsequent Material Transactions and Events After the Date of the Auditors' Report, Sunbeam Corporation Registration Statement for Dec. 28, 1997	CPH 0129979-0129988	☐
MS	36	03/20/1998	D. Canedy, "Sunbeam Stock Falls 9.4% on Lower Projections for Revenue", New York Times"; from L. Bornstein to P. Harlow, D. Pruitt, D. Pastrana	CPH 0021819	☑

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	37	12/15/1998	Sunbeam Corporation Arthur Andersen Fees & Expenses Restatement and Other Accounting Services from July 1, 1998 through December 15, 1998	CPH 0083764-0083765	☐
MS	39	03/19/1998	R. Goudis, "Sunbeam States that First Quarter Revenues May Be Lower than Street Estimates"	CPH 1075408	☑
MS	40	03/19/1998	Sunbeam Offering Memorandum $2,014,000,000 Zero Coupon Convertible Senior Subordinated Debentures Due 2018	MSC 0000001-0000175	☑
MS	41	03/18/1998	Sunbeam Sales Forecast, Jan. & Feb. Consolidated Net Sales Actual, March Net Sales through Mar. 17,1998	MSC 0028858	☑
MS	42	00/00/1998	Form for Documentation of Referencing Procedures, Sunbeam Corporation Comfort letter dated March 19, 1998	CPH 0129975-0129977	☐
MS	43	03/16/1998	Postaudit Review for Subsequent Material Transactions and Events After the Date of the Auditors' Report, Sunbeam Corporation Sale of $2.014 Billion Zero Coupon Senior Subordinated Debentures due 2018 for Dec. 28, 1997	CPH 0129927-0129936	☐
MS	44	03/16/1998	Letter from A. Dunlap, R. Kersh, D. Fannin, R. Gluck to Arthur Andersen re Representations submitted with Offering Memorandum	CPH 0129687-0129689	☑
MS	47	03/23/1998	Letter from A. Dunlap, R. Kersh, D. Fannin, and R. Gluck to Arthur Andersen re Representations submitted with Offering Memorandum	CPH 0129642-0129644	☐
MS	56	03/10/1998	Fax from S. Boone to T. Freed with attached March 7, 1998 Memo from J. Tyree to Sunbeam Financing Team re Accounting Due Diligence Call	CPH 0635892-0635895	☑
MS	57	03/10/1998	Fax from S. Boone to T. Molitor with attached March 7, 1998 Memo from J. Tyree to Sunbeam Financing Team re Accounting Due Diligence Call	FUNB016564-016567	☐
MS	58	04/03/1998	Fax from D. Fannin to W. Strong, J. Stynes, R. Kitts, and J. Tyree with attached Apr. 3, 1997 [sic] "Sunbeam Corporation Lower First Quarter Sales and Earnings Expectations; Names Lee Griffith President of Household Products Business"	CPH 0639323-0639327	☑
MS	60	07/24/1998	Memo from D. Denkhaus to the Files re Sunbeam Corporation - Interview with Deborah McDonald	CPH 1071418-1071432	☑

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	61	10/16/1998	Management Letter from Arthur Andersen to Board of Directors and Management of Sunbeam Corporation	CPH 0084406-0084458	☑
MS	62	04/21/1997	Memo from R. Cohen to All Employees re Corporate E-mail Policy	CPH 1433326-1433329	☑
MS	67	06/08/2001	Complaint, Coleman (Parent) Holdings v. Arthur Andersen and Phillip Harlow, No. CA 01-06062 (15th Jud. Dist Fla.)		☑
MS	68	09/02/2003	Coleman (Parent Holdings Inc.'s Response to Morgan Stanley & Co. Incorporated's First Set of Interrogatories		☑
MS	69	02/27/1998	MacAndrews & Forbes Project Laser Working Group List	CPH 1341551-1341574	☑
MS	70	05/21/1998	MacAndrews & Forbes Project Laser Working Group List	CPH 1399303-1399316	☐
MS	71	06/29/1998	Sunbeam Oster Co. / Coleman Acquisitions, Contact List	CPH 0024601-0024602	☐
MS	73	03/13/1998	Draft Information Statement Pursuant to Section 14(f), The Coleman Company, Inc.	CPH 1421226-1421248	☐
MS	74	06/06/1998	"Dangerous Games: Did 'Chainsaw Al' Dunlap manufacture Sunbeam's earnings last year?" Barrons	Ginstling	☑
MS	75	03/30/1998	Letter from P. Rowe to S. Youn enclosing Wachtell Chronology	CPH 1401525-1401534	☑
MS	76	12/12/1997	Credit Suisse First Boston Material Prepared for Discussion Sunbeam	CPH 1407048-1407318	☑
MS	77	12/10/1997	Chase Securities Inc., Sunbeam Corp. / The Coleman Co., Inc. Pro Forma Combination Analysis	CPH 1425610-1425629	☑
MS	78	12/15/1997	Fax from D. Fannin to R. Kitts, W. Strong and J. Stynes with attached Schedule of Synergies	MSC 0026587-0026588	☑
MS	79	11/06/1997	MacAndrews & Forbes, Sunbeam Transaction Rationale	CPH 0467007	☑
MS	80	01/21/1998	Laser Corporation, Key Assumptions with W. Nesbitt marginalia	CPH 1426289-01426296	☑
MS	81	02/06/1998	Project Laser Proposed Summary Transaction Terms	CPH 1421814-1421817	☑
MS	82	02/12/1998	Project Laser, Laser Stand Alone Income Statement, I/B/E/S Case	CPH 1406962-1406964	☐
MS	83	02/20/1998	Draft Project Laser, Proposed Summary Transaction Terms with marginalia	CPH 1427250-1427253	☑
MS	84	02/23/1998	Sunbeam Long Range Strategic Plan with Levin marginalia	CPH 1324756-1324774	☑

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	85	02/22/1998	Sunbeam Corporation Discussion Materials, February 1998	Ginstling	☑
MS	86	12/01/1997	James Maher Calendar, Dec. 1, 1997 - March 31, 1998	CPH 2000687-2000707	☑
MS	87	02/25/1998	Memo from A. Emmerich, F. Miler to G. Dickes, R. Duffy, N. Ginstling; S. Isko; W. Nesbitt, J. Salig, B. Schwartz, P. Shapiro, R. Gordon re Structure of Proposed Transactions	CPH 1422243-1422246	☑
MS	88	02/25/1998	Minutes of a Meeting of the Board of Directors of The Coleman Co, Inc.	CPH 0634056-0634064	☑
MS	92	04/25/2001	Affidavits & Declaration from Taxpayer Under Reg. Section 301.9100-3(e)(2) Mafco Holdings, Inc.	CPH 1429803-1429805	☐
MS	93	02/27/1998	Agreement and Plan of Merger among Sunbeam Corporation, Laser Acquisition Corp., CLN Holdings, Inc. and Coleman (Parent) Holdings, Inc.	MSC 0007947-0008010	☑
MS	96	08/12/1998	Settlement Agreement between Sunbeam and Coleman (Parent) Holdings Inc.	CPH 2000731-2000763	☑
MS	97	04/02/1999	Memo from S. Tripp to Sunbeam Audit Files re M&F Warrants Accounting and Valuation	CPH 1308865-1308870	☑
MS	98	00/00/1998	Sunbeam Treasure Stock Calculation - Warrants	CPH 1428744	☐
MS	99	05/14/1999	Sunbeam Annual Report 1998 and Form 10K	CPH 0639339-0639449	☑
MS	100	04/20/1998	CLN Holdings Inc. Consolidated Statement of Operations	CPH 0282212-0282227	☑
MS	101	02/23/1998	Draft Confidentiality Agreement from The Coleman Company, Inc. to Sunbeam Corporation	CPH 1421213-1421219	☑
MS	102	03/04/1998	The Coleman Company Organizational Chart	CPH 0171292-0171296	☐
MS	103	12/10/1997	Engagement Letter from R. Goudis (Credit Suisse First Boston) to R. Shapiro (Coleman Company)	CPH 1402232-1402234	☑
MS	104	12/08/1997	Sunbeam/Coleman Comparison with marginalia	CPH 2000144-2000149	☑
MS	105	12/10/1997	W. Nesbitt Sunbeam/Coleman Merger Consequences	CPH 1426299-1426303	☑
MS	106	01/26/1998	W. Nesbitt Sunbeam/Coleman Comparison re Merger Consequences Assuming Cost Savings of: 100,000	CPH 1425922-1425931	☑
MS	107	01/26/1998	W. Nesbitt Sunbeam/Coleman Comparison re Merger Consequences Assuming Cost Savings of: 150,000	CPH 2000086-2000095	☑

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	108	02/06/1998	W. Nesbitt Sunbeam/Coleman Comparison re Merger Consequences Assuming Cost Savings of: 75,000 with marginalia	CPH 1120631-1120659	☑
MS	109	04/28/1998	Letter from D. Kraus to M. MacPhair re Trading in Securities of The Coleman Co., Inc. Signature Brands USA, Inc. and First Alert, Inc., File No. MD-1200 with attached Skadden Chronology	CPH 1042288-1042317	☑
MS	110	00/00/0000	Business Cards Contact Information re R. Kersh, D. Fannin, R. Gluck, B. Totte, R. Goudis, G. Wilder, P. Harlow, A. Molenaar, K. Polak, and J. Lee		☑
MS	111	02/23/1998	Sunbeam Long Range Strategic Plan with marginalia		☑
MS	112	02/25/1998	Credit Suisse First Boston Draft Materials Prepared for the Board of Directors; The Coleman Company, Inc	CPH 1401219-1401238	☑
MS	113	02/27/1998	Minutes of a Meeting of The Board of Directors of The Coleman Company, Inc.	CPH 0634065-0634075	☑
MS	114	03/13/1998	Faxed Presentation to J. Page, The Coleman Company, Inc.	CPH 1344526-1344542	☑
MS	115	05/11/1998	"Sunbeam Reports 1st Quarter Results; Expects 1998 EPS in $1.00 Range Before Charges, 1999 EPS in $2.00 Range	MSC 0063805-0063811	☑
MS	117	02/27/1998	Agreement and Plan of Merger among Sunbeam Corporation Camper Acquisition Corp. and The Coleman Company, Inc.	MSC 0008011-0008066	☑
MS	117	02/27/1998	Agreement and Plan of Merger among Sunbeam Corporation Camper Acquisition Corp. and The Coleman Company, Inc.	MSC 0008011-0008066	☑
MS	118	02/27/1998	Minutes of a Meeting of The Board of Directors of The Coleman Company, Inc. with attached Project Laser Proposed Transaction Structure	CPH 0634065-0634085	☑
MS	118	02/27/1998	Minutes of a Meeting of The Board of Directors of The Coleman Company, Inc. with attached Project Laser Proposed Transaction Structure	CPH 0634065-0634085	☑
MS	119	01/02/2002	Coleman (Parent) Holdings' Response to Andersen's Motion to Compel Production of Documents Related to the Coleman Company (Coleman (Parent) Holdings, Inc. v. Arthur Andersen LLP and Phillip E. Harlow, Case No.: CA 01-06062AN (15th Jud. Dist. Fla.)	CPH 1315399-1315409	☑

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	120	02/27/1998	Fairness Opinion Letter from G. Rich (Credit Suisse First Boston) to Board of Directors of The Coleman Company, Inc.	CPH 1400750-1400752	☑
MS	120	02/27/1998	Fairness Opinion Letter from G. Rich (Credit Suisse First Boston) to Board of Directors of The Coleman Company, Inc.	CPH 1400750-1400752	☑
MS	121	12/09/1997	Bruce Slovin Day Planner Report Dec.1997 - Feb. 1998	CPH 2005974-2005978	☑
MS	128	11/01/1996	Corporations Listed on Schedule 1; Unanimous Written Consent of the Board of Directors or the Executive Committee of the Board of Directors in Lieu of a Meeting	DPW 0014376-0014398	☑
MS	129	00/00/0000	Resolution re Officer and Committee Member Appointments	DPW 0014143-0014144	☐
MS	130	03/18/1998	The Coleman Company, Inc. Information Statement Pursuant to Section 14(f) of the Securities Exchange Act of 1934, as amended, and Rule 14f-1 thereunder	CPH 1406746-1406765	☑
MS	130	03/18/1998	The Coleman Company, Inc. Information Statement Pursuant to Section 14(f) of the Securities Exchange Act of 1934, as amended, and Rule 14f-1 thereunder	CPH 1406746-1406765	☑
MS	131	04/10/1998	Bloomberg Headlines for Coleman Co. Inc. (CLN)	CPH 1426091	☑
MS	132	03/04/1998	Notification and Report Form for Certain Mergers and Acquisitions, Ronald O. Perelman	CPH 1414669-1414713	☑
MS	133	02/04/1998	Confidentiality Agreement from P. Shapiro (The Coleman Company, Inc.) to D. Fannin (Sunbeam Corporation)	CPH 0642925-0642932	☑
MS	134	02/23/1998	Draft Confidentiality Agreement from Sunbeam Corporation to The Coleman Company, Inc.	CPH 1427533-1427539	☑
MS	134	02/23/1998	Draft Confidentiality Agreement from Sunbeam Corporation to The Coleman Company, Inc.	CPH 1427533-1427539	☑
MS	135	03/30/1998	R. Goudis, "Sunbeam Corporation Acquires Controlling Interest in the Coleman Company, Inc."	CPH 1325201-1325202	☑
MS	137	01/30/1998	Sunbeam EPS Estimates, Revised by Analyst on Jan. 29, 1998	CPH 1393114; 1327092	☑
MS	138	02/06/1998	A. Shore, Did Al Show His Hand Too Soon?, PaineWebber	CPH 1327714-1327721	☑

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	139	07/18/1996	Employment Agreement by and between Sunbeam Corporation and Albert J. Dunlap, Exhibit 10A to Form 10QA Quarterly Report for Sunbeam Corporation	CPH 1402705-1402731	☑
MS	140	03/31/1997	Form 10K Annual Report for the fiscal Year Ended Dec. 29, 1996 for Sunbeam Corporation	CPH 1402732-1402772	☑
MS	143	06/30/1997	Form 10K Annual Report for the Fiscal Year ended Dec. 31, 1996 for Sunbeam Corp.	CPH 1402814-1402827	☑
MS	144	01/29/1998	Don't Miss Consensus, Merrill Lynch Research Bulletin	CPH 1392481-1392484	☑
MS	146	03/12/1998	A. Shore, Al's Magical Mystery Tour, PaineWebber	CPH 1393088-1393108	☑
MS	149	07/18/1996	"Al Dunlap Named Chairman and CEO of Sunbeam," Business Wire	CPH 1392717	☑
MS	150	07/24/1996	"Sunbeam Corporation Announces Election of Russell Kersh as Executive Vice President, Finance and Administration," PRNewswire	CPH 1392716	☑
MS	151	08/08/1996	"Sunbeam Adds Two To Board and Adopts Stock-Payment Plan," The Wall Street Journal B6	CPH 1408630	☑
MS	152	08/21/1996	"Sunbeam Corporation Announces Directors Purchase Stock 'B' With Their Own Funds," PR Newswire	CPH 1408468	☑
MS	153	08/22/1996	"Sunbeam Corp.: Five Insiders Follow CEO In Buying Company Stock," The Wall Street Journal B6	CPH 1408627	☑
MS	154	02/13/1997	"CEO Al Dunlap Purchases Additional Shares In Sunbeam," PR Newswire	CPH 1408561-1408562	☑
MS	155	02/14/1997	"Sunbeam Director Purchases Additional Shares," PR Newswire	CPH 1408559-1408560	☑
MS	158	10/23/1996	"Sunbeam Corporation Reports Third Quarter 1996 Results," PR Newswire	CPH 1408443-1408446	☑
MS	160	01/30/1997	"Sunbeam Attributes $234.7Million Loss to Its Restructuring," The Wall Street Journal B4	CPH 1408611	☑
MS	161	07/24/1997	"Sunbeam Corp.: Profit More Than Tripled to $26.2 Million in Quarter," The Wall Street Journal B4	CPH 1408599	☑
MS	162	10/23/1997	"Sunbeam Corp.: Loss is Reversed as profit of $34.5 Million Is Posted," The Wall Street Journal	CPH 1408591	☑
MS	163	01/28/1998	"Sunbeam Completes Record Year for Sales, Earnings & Global Expansion," Business Wire	CPH 1409182-1409187	☑

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	165	12/11/1997	W. Nesbitt Sunbeam Quarterly Earnings Comparison	CPH 1426297-1426303	☑
MS	166	03/19/1998	Sunbeam Offering Memorandum $2,014,000,000 Zero Coupon Convertible Senior Subordinated Debentures Due 2018	CPH 1362487-1326662	☑
MS	167	05/20/1998	Memo from W. Nesbitt to R. Perelman, D. Drapkin, H. Gittis, J. Levin J. Maher re Review of Sunbeam Research with attached research materials	CPH 1011319-1011351	☑
MS	168	04/14/1998	SOC Acquisition Analysis Key Assumptions	CPH 1433889-1433890	☑
MS	169	12/10/1997	Engagement Letter from G. Rich (Credit Suisse First Boston) to J. Levin (The Coleman Company, Inc.)	CPH 1402232-1402235	☑
MS	169	12/10/1997	Engagement Letter from G. Rich (Credit Suisse First Boston) to J. Levin (The Coleman Company, Inc.)	CPH 1402232-1402235	☑
MS	170	11/06/1997	MAFCO Calendar Nov. 6-9, 1997, Feb. 5-8, 1998, Feb. 23-25, 1998	CPH 1429981-1429983	☑
MS	171	11/19/1997	Ronald Perelman Calendar Nov. 19-20, Nov. 25, Dec. 8-20, Dec. 12, Dec. 18, 1997	CPH 2000708-2000715	☑
MS	172	02/27/1998	Coleman (Parent) Holdings Inc. Consent of Directors in Lieu of Board of Directors' Meeting attaching Resolutions of the Board of Directors Coleman (Parent) Holdings Inc. Approving Proposed Merger Transactions and Related Agreements	CPH 1429974-1429977	☑
MS	173	03/05/1998	Project Laser Chronology of Events	MSC 0033256-0033263	☑
MS	174	12/16/1997	Memo from A. Dunlap to R. Perelman re confirming meeting	CPH 1066774	☑
MS	175	01/26/1998	Laser Corporation Key Assumptions	CPH 0482090-0482098	☑
MS	177	01/29/1998	Handwritten Notes re Coleman Meeting, Jan 98, New York	CPH 0474014-0474024	☑
MS	178	02/06/1998	Project Laser Proposed Summary Transaction Terms	CPH 1406943-1406946	☑
MS	179	10/13/2003	Coleman (Parent) Holdings Inc.'s Response to Morgan Stanley & Co., Incorporated's Second Set of Interrogatories and Second Request for Production of Documents		☑
MS	180	02/21/1998	Memo from A. Emmerich to R. Easton, A. Fuchs re Laser Term Sheet	CPH 1408948-1408949	☐
MS	182	02/23/1998	Sunbeam Long Range Strategic Plan with marginalia (2/23)	CPH 1412533-1412551	☑

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	183	03/05/1998	Sunbeam Long Range Strategic Plan with handwritten fax cover sheet from I. Seth to K. Eltrich	CPH 1109095-1109115	☑
MS	186	02/22/1998	Sunbeam Corporation Presentation with marginalia	CPH 1324775-1324850	☑
MS	187	09/02/2003	Coleman (Parent) Holdings Inc.'s Response to Morgan Stanley & Co., Incorporated's First Set of Interrogatories		☑
MS	188	02/26/1998	Fax from W. Nesbitt to A. Emmerich with attached Project Laser Exhibit A: Transaction Pricing Calculations	CPH 1316960-1316962	☑
MS	190	02/27/1998	Project Laser Consideration Calculations with marginalia	CPH 1406986	☐
MS	194	03/15/1998	Draft Morgan Stanley Sunbeam Road Show Presentation Speaking Points	Slovin	☑
MS	195	11/13/2001	W. Nesbitt Calendar Oct. 27-Dec. 31, 1997	CPH 2000635-2000686	☑
MS	196	03/02/1998	"The Coleman Company Agrees to Acquisition by Sunbeam"	CPH 1393830-1393831	☑
MS	197	02/25/1998	Credit Suisse First Boston Backup Materials Prepared for the Board of Directors The Coleman Company, Inc.	CPH 1392397-1392444	☑
MS	198	06/16/1997	Jonathan R. Laing, "High Noon At Sunbeam: Does Chainsaw Al Have a Truly Revived Operation," Barron's, 29	CPH 1429021-1429025	☑
MS	199	06/16/1997	Jonathan R. Laing, "High Noon At Sunbeam: Does Chainsaw Al Have a Truly Revived Operation," Barron's via Dow Jones	CPH 1409169-1409179	☑
MS	200	12/18/1997	"Kimberly-Clark's Cutbacks Should Ease Overcapacity," Wall Street Journal with marginalia and fax from J. Levin to R. Perelman	CPH 2000103-2000105	☑
MS	202	01/28/1998	Soc 4Q Comes Up Short; Reducing Ests.; But Maintain Strong Buy P1-2, CIBC Oppenheimer	CPH 0468457-0468462	☑
MS	203	01/29/1998	Soc 4Q 97 EPS in Line; Remaining Neutral, The Buckingham Research Group	CPH 1415763-1415764	☑
MS	204	01/29/1998	A. Shore, "Sunbeam Solid Close to 1997; Encore in 1998?", PaineWebber	CPH 1393144-1393147	☑
MS	206	01/29/1998	J. Buenao, "Sunbeam Posts Profit Below Forecasts, A Stumble That Sends Stock Down 9.5%," Wall Street Journal, A6	CPH 1327166-1327167	☑
MS	208	03/06/1998	Form 10K Annual Report for the Fiscal Year Ended December 28, 1997, Sunbeam Corporation	CPH 1428829-1428887	☑

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	209	03/09/1998	"Into the Maw, Sunbeam's Chainsaw Al Goes on a Buying Binge," Barron's	CPH 1409994-1409995	☑
MS	210	03/19/1998	R. Goudis, "Sunbeam States First Quarter Revenues May Be Lower Than Street Estimates", Business Wire	CPH 1395046	☑
MS	211	03/19/1998	S. Matthews, "Sunbeam Warns 1st-Qtr Sales May Be Below Estimates (Update5)," Bloomberg	CPH 1392706-1392707	☑
MS	212	03/19/1998	A. Shore, Sunbeam: Grilled!!!, PaineWebber	CPH 1393266-1393268	☑
MS	213	03/19/1998	D. Buck, SOC Pre-Announces 1Q Sales Shortfall Due to Timing of Customer Buying; Focus on Bigger Picture, Namely Pending Acquisitions, Price Weakness Represents Buying Opportunity, Sands Brothers & Co. Ltd.	CPH 1415534	☑
MS	214	03/19/1998	S. Graham, 1Q Sales May Fall Short; But for Reason We Can Live With; L-t View Unchanged, CIBC Oppenheimer	CPH 1393472-1393478	☑
MS	215	03/20/1998	G. Jaffe, "Sunbeam Shares Drop on Expected Shortfall in Sales," The Wall Street Journal	CPH 1409192-1409193	☑
MS	216	03/20/1998	E. Fontenelli, Sunbeam Corporation: Trimmed Q1: 98E/1998E on Potential Q1 Sales Shortfall; RL, Goldman Sachs	CPH 1393262-1393263	☑
MS	217	03/20/1998	Sunbeam Corp. Full Action in the P.M., Goldman, Sachs & Co. Investment Research	CPH 1415540-1415541	☑
MS	218	03/20/1998	Wall Street Consensus Analysts' Recommendations, Standard & Poor's	CPH 1397652	☑
MS	219	03/21/1998	Sunbeam Corp, Standard & Poor's Stock Reports	CPH 1401579-1401583	☑
MS	220	04/03/1998	A. Shore, Sunbeam: Downgrade to Neutral from Buy -- Apr. 3, 1998, with marginalia	CPH 1267964-1267969	☑
MS	221	04/06/1998	Sunbeam Corp., Prudential Securities	CPH 1424564-1424567	☑
MS	224	12/15/1997	Memo from W. Nesbitt to R. Perelman, H. Gittis, J. Maher re Dunlap Employment Contract	CPH 1427923-1427924	☑
MS	227	03/09/1998	Sunbeam's Dunlap Gets Stock, Options Worth $68 Mln, Bloomberg L.P.	CPH 1392708-1392709	☑
MS	228	12/12/1997	Schedule of Synergies with marginalia	CPH 1406941	☐
MS	229	12/12/1997	Schedule of Synergies with marginalia	CPH 1426262	☐

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	230	02/25/1998	Memo from G. Rich, R. Duffy, S. Geller, R. Chakrapani to Investment Banking Committee re Proposed Sale of The Coleman Company, Inc. to Sunbeam Corporation	CPH 1121260-1121271	☑
MS	231	12/12/1997	Schedule of Synergies with marginalia	CPH 1406939	☐
MS	232	07/06/1998	Letter from H. Gittis to D. Fannin re Amendment to the Credit Agreement	CPH 2000771	☑
MS	233	07/22/1998	Letter from H. Gittis to H. Kristol re Stock Proposal	CPH 1328300-1328301	☑
MS	234	08/24/1998	Letter from A. Emmerich to M. Cohen re Enclosed Warrant No. W-1 for Sunbeam Stock re Pledge	CPH 2000830	☑
MS	235	10/10/2002	Settlement Agreement between Arthur Andersen, Coleman (Parent) Holdings, Inc., New Coleman Holdings, Inc. MacAndrews & Forbes & Holdings, Inc. and Mafco Holdings, Inc.		☑
MS	236	04/15/1999	Form 10K Annual Report for the Fiscal Year Ended Dec. 31, 1998 for Coleman	CPH 0627084-0627210	☑
MS	237	03/02/1998	R. Goudis, "Sunbeam Acquires Three Publicly Traded Consumer Products Companies: Coleman, Signature Brands And First Alert"	CPH 1325251-1325253	☑
MS	239	03/18/1998	Information Statement Pursuant to Section 14(f) of the Securities and Exchange Act of 1934 and Rule F-1 Thereunder for Coleman Company, Inc.		☑
MS	240	09/06/1993	C. Horowitz, "The Richest Guy In Town; The High Life and Times of Ron Perelman, Master of Revlon," New York	CPH 1144559-1144565	☑
MS	241	05/15/1997	Coleman Escrow Corp. $732,035,000 Offering Memorandum	CPH 1107884-1108079	☑
MS	242	03/19/1998	$2,014,000,000 Sunbeam Corporation Zero Coupon Convertible Senior Subordinated Debentures Due 2018, Purchase Agreement	DPW 0023754-0023787	☐
MS	243	03/20/1998	Comfort Letter from Ernst & Young to CLN and Morgan Stanley re audited consolidated balance sheets	CPH 1084899-1084901	☑
MS	244	06/14/1998	Schedule 13D Under the Securities Exchange Act of 1934, Sunbeam Corp.	CPH 1403698-1403708	☑
MS	246	05/07/1997	Coleman Escrow Corp. Actions by the Board of Directors, Resolution Adopted in Lieu of Initial Meeting of the Board of Directors	DPW 0011015-0011020	☐
MS	249	01/01/1998	Montgomery's Auditing, Section 30 Letters for Underwriters		☐

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	250	05/31/1998	Shapiro Calendar May 31, 1998 - Nov. 6, 1998	CPH 0508863-0508898	☐
MS	251	03/23/1998	Form 10K Annual Report for the fiscal year ended Dec. 31, 1997, The Coleman Company, Inc.	CPH 0094469-0094547	☑
MS	252	06/26/1998	Bio Paul E. Shapiro	CPH 1292877-1292878	☑
MS	253	09/14/1998	Sunbeam Organization Structure	CPH 2000472-2000480	☑
MS	254	03/25/1998	Sunbeam Corporation Zero Coupon Debenture due 2018 Top Holders	CPH 1429020	☑
MS	255	03/06/1998	Letter from J. Kroog to P. Shapiro re Acquisition of the Coleman Co, Inc. (CLN) by Sunbeam Co. (SOC) NYSE Investigation #98611	CPH 1421977-1421980	☐
MS	257	03/31/1998	Letter from P. Shapiro to the Coleman Company, Inc. re resignation from all position s as office or employee of The Coleman Company, Inc.	CPH 0505156	☑
MS	258	08/12/1998	Letter from P. Langerman to Sunbeam Shareholders re settlement agreement with MacAndrews & Forbes, Inc.	CPH 1131177-1131178	☑
MS	260	12/14/1998	Memo from B. Jenkins to G. Kristol, C. Elson, F. Whittlesey, D. Denkhaus, N. Spiegel, S. Thibault, P. Shapiro, J. Kelley re Audit Committee Meeting	CPH 1039844-1039850	☑
MS	261	10/14/1998	Memo from M. Shiffman to P. Langerman, J. Levin, K. Clark, S. Dalberth, R. Dunbar, B. Jenkins, J. Kelley, P. Shapiro, H. Gittis, B. Schwartz, J. Conroy, F. Fogg, R. Zimet, R. Easton, M. Bailey, G. Sard, D. Denkhaus, N. Spiegel re Final Draft - Restatement Communications	CPH 0599715-0599741	☐
MS	262	06/29/1998	Minutes of Special Meetings of the Executive Committee and of the Audit Committee of the Board of Directors of Sunbeam Corporation		☑
MS	272	08/14/1998	Memo from S. Ash to J. Levin, P. Shapiro, J. Kelly, M. Shiffman, B. Jenkins, K. Clark, G. Wisler, M. Evans, J. Rasmus, L. Feldkamp, S. Daniels, J. Harvel re The Coleman Company, Inc. - Form 10Q June 30, 1998	CPH 0642954-0642974	☐
MS	273	02/27/1998	CLN Holdings, Inc. Unanimous Written Consent of the Board of Directors, Resolution of the Board of Directors CLN Holdings Inc. Approving Proposed Merger Transactions and Related Agreements	WLRK 0009189-0009195	☑

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	274	02/27/1998	Resolutions of the Board of Directors Coleman Worldwide Corporation Approving Proposed Merger Transactions and Related Agreements	WLRK 0009197-0009199	☑
MS	277	02/27/1998	Credit Suisse First Boston S. Acquires C: Assumptions of Zero Coupon	CPH 1433908-1433911	☑
MS	278	03/29/1998	Registration Rights Agreement between Sunbeam Corporation and Coleman (Parent) Holdings, Inc.	CPH 1094218-1094235	☑
MS	279	12/06/1999	The Coleman Company, Inc., Notice Of Merger And Appraisal Rights And Information Statement, Sunbeam Corporation Prospectus	CPH 1398266-1398537	☑
MS	280	03/25/1998	Registration Rights Agreement between Sunbeam Corporation and Morgan Stanley & Co., Incorporated	CPH 1085101-1085124	☑
MS	281	05/11/1998	Form 10Q Quarterly Report for the Period Ended March 31, 1998 for Sunbeam Corporation	DPW 0035621-0035636	☑
MS	282	11/25/1998	Form 10QA Quarterly Report for the Period Ended March 31, 1998 for Sunbeam Corporation		☑
MS	287	02/27/1998	Letter from D. Drapkin to the Coleman Company, Inc. re resignation from Board of Directors of CLN Holdings	CPH 1408297	☐
MS	288	06/21/2004	"Ron Perelman," CigarAficianado.com		☑
MS	289	02/06/2002	Voluntary Petition, In re Sunbeam, 01-40291 (Bankr. S.D.N.Y.)		☑
MS	291	02/12/1997	Memo from M. O'Sullivan to I. Engleman, T. Slotkin, G. Dickes, P. Savas, G. Woodland, V. Radwaner re Mafco Finance	CPH 2007915	☑
MS	295	03/30/1998	MAFCO Holdings Inc. Structured Equity Products Hedging Techniques	CPH 2010664-2010666	☐
MS	296	04/03/1998	Letter from W. Ortner to J. Maher re meeting with Citibank and price options	CPH 2010681	☐
MS	297	04/02/1998	Fax from K. Cook to T. Slotkin with attached Hedging and Monetization Strategies	CPH 2010676-2010679	☑
MS	298	04/23/1998	Fax from D. Kim to G. Dickes, T. Slotkin, P., Savas, G. Woodlan with attached Memo from M. O'Sullivan to the Mafco Finance Lenders re Mafco Finance Credit Facilities	CPH 2010668-2010675	☑
MS	299	03/20/1997	Fifth Amended and Restated MAFCO Guaranty from MAFCO Holdings Inc. as Guarantor in favor of the Lenders Referred to Herein and the Agents Referred to Herein	CPH 2007230-2007296	☑

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	300	03/20/1997	$250,000,000 Fifth Amended and Restated Revolving Credit Agreement among MAFCO, The Financial Institutions and the Initial Issuing Bank Named Herein, Citibank, N.A., The Bank of New York, and The First National Bank of Boston	CPH 2006250-2006413	☑
MS	301	03/20/1997	$400,000,000 Amended and Restated Term Credit Agreement among MAFCO Finance Corp., The Financial Institutions and the Initial Issuing Bank Named Herein, Citibank, N.A., Credit Suisse First Boston, and Chase Securities Inc.	CPH 2006677-2006826	☑
MS	302	03/30/1998	Third Amended and Restated Pledge Agreement from Coleman (Parent) Holdings Inc. as Pledgor to Citibank, N.A. as Collateral Agent	CPH 2006618-2006640	☑
MS	307	02/23/1998	Fax from J. Salig to A. Emmerich with attached Letter from Sunbeam to Coleman re Evaluation Material for possible transaction	CPH 1421212-1421219	☑
MS	308	02/24/1997	MAFCO Finance Corp. Summary of Terms and Conditions, Draft	CPH 2006236-2006249	☑
MS	309	02/27/1998	Certain SEC Filings Relating to the Acquisition by Sunbeam Corporation of The Coleman Company, Inc.	CPH 1410183-1410230	☐
MS	310	05/15/1998	Fax from G. Dickes to P. Efron, D. Hiscano re Sunbeam Equity Hedge	CPH 2011528-2011531	☐
MS	311	03/30/1998	Fifth Amended and Restated Coleman Guaranty from Coleman (Parent) Holdings Inc. as Guarantor in favor of the Lenders Referred to Herein and the Agents Referred to Herein	CPH 2006641-2006669	☑
MS	315	03/30/1998	Letter from Credit Suisse Boston to Coleman re Amended and Restated Credit Agreement dated 8/3/1995	CPH 0643329-0643338	☑
MS	316	11/25/1998	Form 10QA Quarterly Report for the Period ended March 31, 1998 for Sunbeam Corporation		☐
MS	317	00/00/1997	CSFB Handwritten Notes re Major Risks	CPH 2011532-2011533	☑
MS	318	02/25/1998	Agenda for a Meeting of The Coleman Company, Inc. Board of Directors to be held on Feb. 25, 1998	CPH 1408945-1408947	☑
MS	319	02/27/1998	Agenda for a Meeting of Coleman Company, Inc. Board of Directors	CPH 1407858-1407866	☑
MS	323	03/27/1998	Letter from W. Spoor to the Coleman Company, Inc. re resignation from Board of Directors of CLN Holdings	CPH 1408270	☑

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	325	12/09/1997	Minutes of a Meeting of the Board of Directors of the Coleman Company	CPH 1395054-1395058	☐
MS	327	10/30/1997	Minutes of a Meeting of the Board of Directors of the Coleman Company, Inc.	DPW 0013825-0013827	☑
MS	328	02/27/1998	Letter from F. Gifford to the Coleman Company, Inc. re resignation from Board of Directors of CLN Holdings	CPH 1408269	☐
MS	329	02/23/1998	Sunbeam Long Range Strategic Plan with marginalia	CSFBC 0001623-000164	☑
MS	330	02/25/1998	Credit Suisse, Backup Materials Prepared for the Investment Banking Committee - The Coleman Company, Inc.	CPH 1121275-1121332	☑
MS	332	02/04/1999	Preliminary Form S1 Registration Statement for Sunbeam Corporation Debentures		☐
MS	333	11/04/1999	Form S1A Registration Statement for Sunbeam Corporation		☑
MS	334	04/25/2000	Form 10-K for the Fiscal Year Ended December 31, 1999 for Sunbeam Corporation		☑
MS	335	05/06/1998	Panavision Inc. Proxy Statement/Prospectus Combined Annual and Special Meeting of Stockholders to be Held on June 4, 1998		☑
MS	336	06/21/1998	Memo from D. Doyle to J. Shannahan re Sunbeam Corporation, Draft	CPH 1350190-1350194	☑
MS	337	06/22/1998	Memo from T. Molitor to Distribution re Sunbeam Corporation	CPH 1258279-1258282	☑
MS	338	06/26/1998	Email from C. Francavilla to M. Murray, J. Fair, J. Shannahan, D. Doyle, K. Barnish, S. Sterling, H. Husby, T. Biaggi, P. Wheelock, S. Swilt, J. O'Keane re Update on Sunbeam with marginalia	CPH 1350174-1350175	☑
MS	339	03/16/1998	"Sunbeam Reaches Out" National Law Journal	DPW0004788	☑
MS	340	02/20/1998	Fax from J. Webber to A. Emmerich with attached Project Laser Proposed Summary Transaction Terms	WLRK 0010284-0010288	☑
MS	341	02/26/1998	Fax from R. Duffy to W. Nesbitt (c/o A. Emmerich) with Project Laser - Consideration Sensitivity	CPH 1398246-1398249	☑
MS	342	02/20/1998	Memo from A. Amorison to A. Emmerich re Project Laser Legal Due Diligence Review	CPH 0642672-0642678	☑
MS	344	03/27/1998	Memo from A. Emmerich, S. Cohen, F. Miller to A. Amorison re Project Laser Closing	WLRK 0007554-0007562	☑

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	345	08/12/1998	Memo from S. Cohen to H. Gittis, B. Schwartz, J. Maher, I. Engelman, W. Nesbitt, T. Slotkin, G. Dickes, J. Salig, V. Radwaner, S. Jacobs, I. Warren, B. Jacobwitz, A. Newman, B. Fogg, R. Easton, A. Amorison, P. Shapiro re Sunbeam Corporation with attached Settlement Agreement between Sunbeam and Coleman (Parent) Holdings, Inc.	CPH 1167570-1167612	☑
MS	351	02/26/1998	Fax from S. Cohen to A. Emmerich, D. Einhorn, D. Paul, M. Katzke, S. Cohen, F. Miller, G. Dickes, J. Salig, P. Shapiro, S. Isko with attached draft Agreement and Plan of Merger among Laser Corporation and Camper Holdings Inc.	CPH 1411596-1411654	☑
MS	352	03/24/1998	MacAndrews & Forbes/Project Laser Working Group List	CPH 1411183-1411209	☑
MS	353	12/11/1997	Memo from W. Nesbitt to R. Perelman re Black & Decker Pooling	CPH 2005703	☑
MS	354	01/23/1998	Memo from W. Nesbitt to R. Perelman, H. Gittis, D. Drapkin, J. Maher re Sunbeam Meeting with Morgan Stanley (Jim Stynes, Alex Fuchs)	CPH 2005706	☑
MS	355	01/30/1998	Sunbeam Research (Estimates for Fourth Quarter Earnings; Goldman, Sachs Investment Research - Sunbeam Corporation)	CPH 1278481-1278484	☑
MS	356	02/12/1998	Fax from R. Duffy to W. Nesbitt with attachment Project Violet analyses	CPH 1120684-1120704	☑
MS	358	03/11/1998	Memo from A. Emmerich to S. Cohen, F. Miller, P. Rowe, R. Silverberg, P. Canellos, D. Einhorn, D. Paul, M. Katzke, I. Gotts, M. Jahnke with attachment March 6, 1998 Letter from J. Kroog to P. Shapiro re Acquisition of the Coleman Co. by Sunbeam NYSE Investigation	WLRK 0020591-0020595	☐
MS	359	07/09/1998	Letter from W. Nesbitt to S. Feuerabendt (Blackstone Group) with attachments Sunbeam financials	CPH 1010541-1010546	☑
MS	360	07/10/1998	Letter from W. Nesbitt to S. Feuerabendt (Blackstone Group) re Morgan Stanley presentations	CPH 1411943	☑
MS	364	02/27/1998	Fax to W. Nesbitt with Credit Suisse First Boston Projections	CPH 1433908-1433912	☑
MS	365	03/30/1998	W. Nesbitt handwritten notes re March 30, 1998 Closing	CPH 1433895	☑
MS	368	00/00/1995	Coleman Annual Report - 1995	CPH 1272487-1272536	☐

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	369	07/30/1996	Minutes of a Meeting of the Board of Directors of the Coleman Company, Inc., July 30 and 31, 1996	DPW 0014073-0014074	☑
MS	370	10/29/1996	Minutes of a Teleconference Meeting of the Audit Committee of the Board of Directors of the Coleman Company, Inc.	DPW 0014028-0014029	☑
MS	371	03/31/1997	Coleman Annual Report - 1996	WLRK 0013747-0013790	☑
MS	372	05/13/1997	Minutes of a Meeting of the Board of Directors of the Coleman Company, Inc.	DPW 0013720-0013723	☐
MS	374	05/07/1998	Letter from P. Rowe to S. Youn re Supplement to 3/30/1998 Wachtell Chronology	Maher	☑
MS	375	05/31/1996	Action by Unanimous Written Consent of Executive Committee of the Board of Directors	DPW 0014137-0014140	☐
MS	377	02/11/1997	Minutes of a Meeting of the Audit Committee of the Board of Directors of the Coleman Company	DPW 0013935-0013936	☐
MS	388	08/24/1998	Warrant for the Purchase of Shares of Common Stock of Sunbeam Corporation	WLRK 0008777-0008794	☑
MS	390	03/06/1998	Memo from J. Tyree, B. Derito to J. Levin, J. Page, K. Clark re Coleman Co. information books	CPH 1413987	☐
MS	392	04/24/1998	Letter from J. Torraco to K. Clark re confirmation of her employment as VP Operations Finance at Sunbeam	CPH 0242977-0242978	☐
MS	395	00/00/1998	AICPA Codification of Statements on Auditing Standards (1998)		☐
MS	398	04/17/1998	"Coleman's Levin Profits by Selling Stock After Sale to Sunbeam" Bloomberg	CPH 0475169-0475172	☑
MS	400	02/20/1998	Memo from R. Goudis to A. Fuchs re Questions for Camper with marginalia	CPH 0501780	☐
MS	401	12/31/1997	Sunbeam Management Letter Comments	CPH 0031790-0031797	☐
MS	403	03/19/1998	The Coleman Company, Inc. Consent of Directors in Lieu of Board of Directors' Meeting	CPH 0637558-0637570	☐
MS	404	02/27/1998	Letter from A. Jordan to the Coleman Company, Inc. re resignation from Board of Directors of CLN Holdings	CPH 1408276	☐
MS	408	05/08/2003	CPH Complaint		☑
MS	409	03/21/1998	Memo from A. Deitz to S. Cohen re Sunbeam Corporation	CPH 1400754	☑
MS	410	03/31/1998	Form 10K for the Fiscal Year ended Dec. 31, 1997 for Revlon Holdings Inc.		☑

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	411	03/18/1998	Sunbeam Sales Forecast, Jan. & Feb. Consolidated Net Sales Actual, March Net Sales through Mar. 17,1998	MSC 0028858	☑
MS	412	12/11/1997	Sunbeam Corporation Preliminary Due Diligence Issues	CPH 1088622	☐
MS	417	12/18/1997	Fax from B. Allen to R. Perelman, D. Drapkin, F. Gifford, L. Jones, A. Jordan, J. Levin, J. Moran, J. Robinson, B. Slovin, W. Spoor re Press Release	CPH 1425686	☑
MS	418	12/22/1997	"Sunbeam Corporation Announces Combination with Coleman; Chairman Al Dunlap Commits to Multi-Year Contract Extension" Draft	CPH 0091441-0091444	☑
MS	419	01/26/1998	"Silence is Golden; Intern's Job Offer Looks a Lot Like Hubbell's 'Hush Money'" New York Post		☑
MS	420	02/06/1998	B. Fromson, "The Loyal Director In Great Demand; Jordan's 10 Board Position Worth $1.1 Million," The Washington Post, G01		☑
MS	421	02/06/1998	M. Powell, "The Plutocratic Party; To Ron Perelman, Politics Aren't Important. Just Good Business," The Washington Post, B01		☑
MS	422	02/24/1998	Letter from J. Nisa to Federal Trade Commission and Department of Justice, Antitrust Division re Premerger Notification under the Hart-Scott-Rodino Antitrust Improvements Act of 1976	WLRK 0019442-0019443	☐
MS	423	02/27/1998	CLN Holdings Unanimous Written Consent of the Board of Directors; Resolutions of the Board of Directors CLN Holdings Inc. Approving Proposed Merger Transactions and Related Agreements	CPH 1402971-1402977	☑
MS	424	02/27/1998	Coleman Worldwide Corporation Consent of Directors in Lieu of Board of Directors' Meeting	CPH 1402978-1402982	☑
MS	425	02/27/1998	Letter from R. Perelman to the Coleman Company, Inc. re resignation from Board of Directors of CLN Holdings	WLRK 0007478	☑
MS	426	03/04/1998	Notification and Report Form for Certain Mergers and Acquisitions, Sunbeam and R. Perelman	WLRK 0019387-0019440	☑
MS	427	03/07/1998	Outstanding Debt Analysis, CLN Holdings	MSC 0028004-0028011	☑
MS	428	07/21/1998	Letter from J. Levin to R. Perelman re misleading financial data	CPH 1425156-1425157	☑
MS	430	03/00/1998	Affidavit of J. Salig, In re Hart-Scott-Rodino Act of Notification and Report Form of Mafco Holdings Inc.	WLRK 0022784-0022786	☑

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	431	00/00/1996	Albert J. Dunlap, "Mean Business: How I Save Bad Companies and Make Good Companies Great"	CPH 1289142-1289145	☑
MS	431	01/29/2001	J. Laing, "Party On, Ron: With his biggest holdings in tank, Perelman is squeezing fellow investors" Barrons		☑
MS	432	07/20/1998	Fax from R. Esterson to R. Perelman with attached Long Form P&Ls	CPH 1422443-1422471	☑
MS	432	07/20/1998	Memo from J. Levin to R. Perelman with attached Sunbeam financial spreadsheets	CPH 1422721-1422726	☑
MS	432	06/26/1998	Fax from K. Clark to R. Perelman re Sunbeam information with attached Sunbeam financial spreadsheets	CPH 1425676-1425680	☑
MS	432	06/25/1998	Memo from B. Knibb to J. Levin (bcc: R. Perelman, H. Gittis) re Notes from Sunbeam Operating Reviews	CPH 2005684	☑
MS	432	02/04/1999	Fax from R. Esterson to R. Perelman with attached daily sales and order writing	CPH 1428203-1428204	☑
MS	432	10/22/1998	Fax from R. Esterson to R. Perelman re Daily Sales & Order Writing with attached Sunbeam Scorecard Summary		☑
MS	432	07/27/1998	Memo from R. Esterson to R. Perelman re Sunbeam info with attached Sales by Customer and answers to follow up questions	CPH 1422714-1422720	☑
MS	432	07/15/1998	Fax from R. Esterson to R. Perelman with attached Sunbeam financial spreadsheets	CPH 1325460-1325467	☑
MS	432	07/26/1998	Fax from R. Esterson to R. Perelman, J. Levin with attached overview of Mr. Coffee business	CPH 1422476-1422483	☑
MS	432	07/22/1998	Sunbeam financial spreadsheet faxed to R. Esterson and R. Perelman	CPH 1423888	☑
MS	432	12/16/1998	Fax from J. Levin to R. Perelman with attached presentation slides Outdook Cooking Revised Agenda	CPH 1422793-1422825	☑
MS	432	06/24/1998	Fax from P. Langerman to R. Perelman with attached Sunbeam Outdoor Cooking Strategy/Business Objectives presentation slides with marginalia	CPH 1267678-1267702	☑
MS	432	09/18/1998	Fax from R. Esterson to R. Perelman		☑
MS	432	06/15/1998	Fax from J. Levin to R. Perelman with attached memo from F. Feraco, L. Griffith to A. Dunlap, R. Kersh re Q2 Projection Total 98 Projection Future Prospects [2 versions with different fax headers]	CPH 1192489-1192493,	☑

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	432	06/30/1998	Memo from R. Esterson to R. Perelman re Sunbeam Info Request with attached Sunbeam financial spreadsheets with marginalia	CPH 1422734-1422759	☑
MS	432	07/07/1998	Memo from B. Gitto to J. Levin forwarded to R. Perelman re product Line Review Revisions with attached average price slides	CPH 1425152-1425155	☑
MS	432	07/14/1998	Memo from R. Esterson to R. Perelman re Follow up items from yesterday's trip	CPH 1422488-1422489	☑
MS	432	07/14/1998	Memo from R. Esterson to R. Perelman re Neosho, MO Grille Manufacturing	CPH 1422490	☑
MS	432	07/14/1998	Memo from R. Esterson to R. Perelman re Sunbeam Finished Invetory with attached summary of finished goods	CPH 1422789-1422790	☑
MS	432	07/14/1998	Memo from R. Esterson to R. Perelman re Follow up items from yesterday's trip	CPH 1423877-1423878	☑
MS	432	07/21/1998	Memo from J. Levin to R. Perelman re financial data transmissions	CPH 1425156-1425157	☑
MS	432	12/10/1998	1999 Operating Plan Health Division presentation slides	CPH 1423121-1423177	☑
MS	432	07/20/1998	Fax from R. Esterson to R. Perelman with attached Sunbeam analysis by product category	CPH 1423951-1423955	☑
MS	432	07/17/1998	Memo from K. Huff, M. Ritter, J. Breslin, M. Boukelif, B. Womble to J. McNaboe copied to R. Perelman re Review of Supply Strategy with attached Product Transition Review Recommendations	CPH 1423945-1423950	☑
MS	432	08/26/1998	Memo from R. Esterson to R. Perelman re Follow Up to Today's Questions	CPH 2005651	☑
MS	432	12/15/1998	Fax from R. Esterson to R. Perelman with attached daily sales and order writing	CPH 1423178-1423179	☑
MS	432	11/04/1998	Memo from R. Esterson to R. Perelman re Strategic Plans/1999 Preliminary Budget Reviews with attached handouts from recent meetings	CPH 1423594-1423635	☑
MS	432	12/09/1998	Memo from R. Esterson to R. Perelman re Operating Reviews with attached 1999 Operating Plan Financials	CPH 1422913-1422973	☑
MS	432	12/08/1998	Appliance Division 1999 Plan with marginalia	CPH 1423075-1423120	☑
MS	432	11/19/1998	Memo from J. Levin to R. Perelman re Updae	CPH 1422792-1422793	☑
MS	432	11/11/1998	Memo from R. Esterson to R. Perelman re Eastpak Strategic Review with attached Eastpak presentation slides	CPH 1423025-1423074	☑

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	432	11/13/1998	Memo from R. Esterson to R. Perelman re Strategic Review with attached financial pages from Strategic Reviews [two versions with varying marginalia and pages included]	CPH 1425050-1425151,	☑
MS	432	07/17/1998	Fax from R. Esterson to R. Perelman re list of issues	CPH 1422727-1422733,	☑
MS	434	07/26/2000	Deposition Transcript of H. Gittis, In re Arbitration of Dunlap & Kersh, RE 32 160 00088 99 & 00091 99 (AAA)	CPH 1192425-1192453	☑
MS	435	04/21/1999	Deposition Transcript of H. Gittis, In re The Coleman Company Inc. Shareholders Litig., No., 16486-NC (Chan. Ct. Del)	CPH 2008238-2008252	☑
MS	440	03/03/1998	Fax from R. Easton to J. Tyree, A. Dean with attached Index of Information	DPW 0007049-0007069	☑
MS	441	03/18/1998	Fax from H. Stack to T. Freed re Sunbeam documents for Due Diligence review	CPH 0632981	☑
MS	442	08/02/2000	Deposition Transcript of J. Levin, In re Arbitration of Dunlap & Kersh, RE 32 160 00088 99 (AAA)	CPH 1012825-1012884	☑
MS	443	06/20/2001	Deposition Transcript of J. Levin, In re Sunbeam Corporation, 01-1029 (Bankr. N.Y.)	WLRK 200008100 - 2000	☑
MS	445	03/31/1998	Letter from J. Levin to The Coleman Company, Inc. resignation of all positions as officer or employee of The Coleman Company, Inc.	CPH 0505155	☑
MS	457	12/07/2004	Expert Report of George P. Fritz		☐
MS	458	12/17/2004	Expert Report of Mark Grinblatt		☐
MS	459	12/17/2004	CD Backup to Expert Report of Mark Grinblatt		☐
MS	460	12/17/2004	Expert Report of Arthur Rosenbloom		☑
MS	466	01/04/2005	Rebuttal Report of George P. Fritz		☐
MS	502	02/26/1998	Draft Agreement and Plan of Merger with redlines	CPH 1411598-1411654	☑
MS	504	03/18/1998	Draft R. Goudis, "Sunbeam States that First Quarter Revenues May Be Lower than Street Estimates," March 19, 1998	CPH 1008237-1008238	☑
MS	505	01/04/2005	William Horton Expert Witness Experience		☐
MS	506	00/00/1999	Edward Shea, "The McGraw Hill Guide to Acquiring and Investing Business"		☑
MS	507	00/00/2000	Alexandra Reed Lajoux and Charles M. Elson "The Art of M&A Due Diligence"		☑

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	508	00/00/2001	Harvard Business Review on Mergers and Acquisitions		☑
MS	509	09/19/1997	Letter from W. Strong to A. Dunlap re Sale Transaction fee	MSC 0008966-0008967	☐
MS	510	05/11/1998	Sunbeam Audit Committee Meeting May 11, 1998	CPH 1266982-1266988	☑
MS	511	06/30/1998	"Sunbeam Audit Committee to Conduct Review of Company's 1997 Financial Statements"	CPH 0642892	☑
MS	512	08/06/1998	"Sunbeam to Restate Financial Results"	CPH 1424083	☑
MS	513	04/02/1999	Memo from S. Tripp to Sunbeam Audit Files re M&F Warrants Accounting and Valuation	CPH 0647025-0647040	☑
MS	514	10/10/2002	Settlement Agreement between Arthur Andersen, Coleman (Parent) Holdings, Inc., MacAndrews & Forbes Holdings, Inc., and Mafco		☑
MS	515	12/11/2000	Wells Submission on behalf of D. Fannin in the matter of Sunbeam Corporation	CPH 1084031-1084073	☑
MS	517	02/20/1998	Project Laser Items for Discussion with Marginalia	CPH 1339685-1339686	☐
MS	520	03/30/1998	Credit Agreement among Sunbeam Corporation, Morgan Stanley Senior Funding, Bank of America National Trust and Savings Association and First Union National Bank	MSC 0007544-0007773	☑
MS	521	04/06/1998	Schedule 14A Information Proxy Statement Pursuant to Section 14(a) of the Securities and Exchange Act of 1934, Sunbeam Corporation		☑
MS	522	06/25/1998	"Sunbeam Delays SEC Filing Related to Debentures"	CPH 0642890-0642891	☐
MS	523	06/15/1998	"Sunbeam Board Terminates Al Dunlap as Chairman and CEO"	CPH 1039047-1039049	☑
MS	525	04/00/1998	April and May 1998 Calendar with names Dunlap, Kersh, Fannin	CLN 7518-7520	☐
MS	528	09/18/1997	Memo from Project Laser Team to A. Dunlap, R. Kersh, D. Fannin, R. Goudis (cc F. Fogg) re Further Revisions to Information Memorandum	CPH 0467009	☐
MS	529	06/16/2000	Deposition Transcript Finn Fogg	CPH 1059912-105997	☑
MS	530	03/25/1998	Closing Binder, $2,014,000,000 Sunbeam Corporation Zero Coupon		☐
MS	531	02/04/1998	Fax from D. Fannin to P. Shapiro (cc J. Stynes, R. Kitts, F. Fogg) with attached executed CA letter	CPH 0642484-0642492	☑

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	532	07/16/1998	Fax (19 pages) from D. Fannin to P. Shapiro re executed CA letter	COH 0467590	☑
MS	533	02/03/1998	Letter from D. Fannin to P. Shapiro (cc J. Stynes, F. Fogg, R. Kersh) re Confidentiality agreement	CPH 0467592	☑
MS	534	12/18/1997	Project Laser Proposed Summary Transaction Terms with marginalia	CLN 33932-33933	☑
MS	536	00/00/1998	Email from B. Jenkins to B. Zimet, F. Fogg, N. Speigel, D. Denkhaus, P. Shapiro, J. Kelly, K. Clark re Conference Call with SEC	CPH 0087973-0087979	☐
MS	539	02/27/1998	Minutes of a Special Meeting of the Board of Directors of the Sunbeam Corporation	CPH 0142817-0142829	☐
MS	542	09/10/1997	Project Laser Working Group List	CPH 1086363-1086372	☐
MS	543	07/25/1997	Memo from D. Fannin to B. Strong re Meeting with Skadden, Arps -- Project Laser	CPH 0467615	☑
MS	544	03/29/1998	Letter from G. Dickes to Sunbeam Corporation, D. Fannin re Feb. 27, 1998 Agreement and Plan of Merger with A. Dunlap Signature	CPH 1094178-1094180	☐
MS	550	03/13/1998	Memo from J. Maher to H. Gittis, I. Engleman, W. Nesbitt re Hedging and Monetization Alternatives for Holdings in Sunbeam Corporation	CPH 2011547-2011584	☑
MS	551	03/30/1998	Citibank MAFCO Holdings Inc. Structured Equity Products Hedging Techniques Presentation	CPH 2011624-2011647	☑
MS	552	04/03/1998	Goldman Sachs Presentation to MacAndrews & Forbes Holdings regarding Single Stock Risk Management Strategies	CPH 2011585-2011623	☑
MS	553	04/03/1998	Memo from D. Fleischman to G. Dickes re Rule 144 Hedging	CPH 2010695	☑
MS	558	04/15/1998	P. Beckett, "SEC May Rein in Lucrative Hedging of Restricted Stock," Wall Street Journal, B15	CPH 2010685	☐
MS	559	04/03/1998	Letter from W. Ortner to J. Maher re meeting with Citibank and price options	CPH 2010681	☐
MS	562	05/13/1998	Memo from P. Elron, M. Ryan, J. Zalkowski to J. Maher, G. Dickes re Indicative terms for a Costless Equity Collar on SOC Shares	WLRK 0028227	☑
MS	563	05/13/1998	Fax from D. Hiscano to J. Maher with attached Zero Cost Collar	WLRK 0028222-0028224	☐
MS	564	05/15/1998	Fax from G. Dickes to D. Hiscano re Sunbeam Equity Hedge	WLRK 0028233-0028235	☐

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	565	05/15/1998	Fax from G. Dickes to P. Efron re Sunbeam Equity Hedge	WLRK 0028230-0028232	☐
MS	573	05/28/1998	MAFCO Put/Call Analysis	CPH 2011537-2011543	☐
MS	576	06/09/1998	Memo from J. Didier to List re ISDA Master Agreement between Bear, Stearns International Limited and Coleman (Parent) Holdings Inc.	CPH 2011712	☑
MS	577	11/03/2004	Letter from M. Occhuizzo to M. Brody re Nov. 3, 2004 Amended Notice of Deposition		☑
MS	600	03/07/1998	Memo from J. Tyree to Sunbeam Financing Team re Accounting Due Diligence Call	CPH 0635893	☐
MS	602	03/18/1998	Sunbeam Sales Forecast, Jan. & Feb. Consolidated Net Sales Actual, March Net Sales through Mar. 17,1998	CPH 1145796	☐
MS	603	03/18/1998	Sunbeam Sales Forecast, Jan. & Feb. Consolidated Net Sales Actual, March Net Sales through Mar. 17,1998	MSC 0028858	☑
MS	604	03/01/1998	Skadden Arps Time Records for Sunbeam Corporation March 1, 1998 - March 31, 1998	SASMF 19645-19687	☑
MS	605	06/09/1998	Minutes of a Special Meeting of the Board of Directors of Sunbeam Corporation	CPH 1060052-1060053	☑
MS	606	06/13/1998	Minutes of a Special Meeting of the Board of Directors of Sunbeam Corporation	CPH 0361136-0361137	☐
MS	608	09/19/1997	Fax from G. Yoo to D. Fannin, R. Goudis re Project Laser with attached Memo from Project Laser Team to D. Fannin, R. Goudis re Questions/Information Request List	CPH 0467093-0467126	☑
MS	609	03/19/1998	Memo from J. Tyree, J. Groeller to B. Gluck, A. Dean, G. Fernicola re Bring-down due diligence	MSC 0029176	☐
MS	610	03/20/1998	Memo from R. Porat, B. Harris, J. Tyree, J. Groeller to R. Kersh, D. Fannin, J. Kelly, D. Uzzi, B. Gluck, A. Dean, G. Fernicola re Bring-down due diligence	CPH 0520973	☐
MS	611	03/23/1998	Memo from J. Tyree, J. Groeller, S. Boone to R. Kersh, D. Fannin, J. Kelly, D. Uzzi, B. Gluck, A. Dean, G. Fernicola re Sunbeam Bring-down due diligence	CPH 1257351	☑
MS	613	03/03/1998	Project Laser Organizational Conference Call Materials	CPH 0636106-0636121	☑

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	614	05/06/1999	Minutes of a Special Joint Meeting of the Boards of Directors of Sunbeam Corporation and the Coleman Company, Inc.	CPH 1001117-10011123	☑
MS	615	12/31/1998	MacAndrews & Forbes Detail General Ledger for Periods 01/98 - 12/31/1998	CPH 2011835-2011836	☑
MS	617	07/27/1998	Memo from D. Fannin to Skadden Arps Team, Arthur Andersen re March 18, 1998 Conference Call	CPH 1048413-1048415	☑
MS	619	01/22/1998	D. Willman, R. Ostrow, "Clinton Under Fire," Los Angeles Times		☑
MS	620	01/22/1998	J. Lawrence, "Clinton's Confidant in Unfamiliar Waters," USA Today		☑
MS	621	01/22/1998	S. Donaldson, J. Judd, P. Jennings, "Crisis in the White House," ABC News Special Report		☑
MS	622	02/05/1998	M. Tackett, "Starr Jury Subpoenas Corporate Job Records 3 Lewinsky Interviews May be Key to U.S. Probe," Chicago Tribune		☑
MS	623	02/17/1998	E. Pound, "Key Wuestions Locking in on Jordan's Role," USA Today		☑
MS	624	02/21/1998	J. Gerth, J. Broder, "Lawyer Says Ally Informed Clinton of Aid for Intern," New York Times		☑
MS	625	01/26/1998	R.Perelman testimony before the Office of the Independent Counsel		☑
MS	626	03/27/1998	R. Perelman testimony before the Office of the Independent Counsel		☑
MS	627	04/23/1998	R. Perelman Office of the Independent Counsel Deposition		☑
MS	628	11/19/2004	CPH Written Response re MAFCO Credit Balance and Related Correspondence		☑
MS	667		Damodaran on Valuation Security Analysis for Investment and Corporate Finance		☐
MS	668		Shannon P. Pratt, "Business Valuation Discounts and Premiums"		☐
MS	669	06/10/2004	Securities Act of 1933, Rule 144A - Private Resales of Securities to Institutions		☐
MS	670	00/00/2001	Business Valuation Discounts and Premiums		☐
MS	676	00/00/1998	SEC Form 144, Notice of Proposed Sale of Securities Pursuant to Rule 144 Under the Securities Act of 1933 for The Coleman Company		☐

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	678	00/00/2000	Shannon P. Pratt, Robert F. Reilly, Robert P. Schweihs, "Valuing a Business, The Analysis and Appraisal of Closely Held Companies"		☐
MS	679	00/00/1995	Roman L .Weil, Michael J. Wagner, Peter B. Frank, "Litigation Services Handbook, The Role of the Accountant as Expert"		☑
MS	680	09/00/1993	Mryon B. Slovin, "Ownership Concentration, Corporate Control Activity, and Firm Value: Evidence from the Death of Inside Blockholders"		☐
MS	681	00/00/2001	Paul Hanouna, Atulya Srin, Alan C. Shapiro, "Value of Corporate Control: Some International Evidence," USC Marshall School of Business Economics Working Paper Series		☐
MS	682	00/00/2001	Shannon P. Pratt, "Business Valuation Discounts and Premiums"		☐
MS	683	02/00/1998	Coleman Daily and Weekly Volume for the Period 2/2/1998-2/27/1998		☐
MS	684	08/27/2002	Jerry W. Levin Deposition, Prescott Group Small Cap. v. The Coleman Company		☑
MS	700	09/23/2003	Coleman (Parent) Holdings Inc.'s Supplemental Response to Interrogatory Number 5 of Morgan Stanley & Co. Incorporated's First Set of Interrogatories		☐
MS	701	12/24/2004	Coleman (Parent) Holdings Inc.'s Supplemental Response to Interrogatory No. 3 and Second Supplemental Response to Interrogatory Number 5 of Morgan Stanley & Co., Inc.'s First Set of Interrogatories		☐
MS	702	12/24/2004	Coleman (Parent) Holdings Inc.'s Supplemental Response to Interrogatory No. 4 and No. 6 of Morgan Stanley & Co., Inc.'s Second Set of Interrogatories		☐
MS	703	03/01/2004	Coleman (Parent) Holdings Inc.'s Second Supplemental Response and Objections to Defendant Morgan Stanley & Co., Inc.'s Third Set of Interrogatories		☐
MS	704	02/12/2004	Coleman (Parent) Holdings Inc.'s Amended Response to Interrogatory No. 1 of Morgan Stanley & Co., Inc.'s Third Set of Interrogatories		☐

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	705	01/22/2004	Coleman (Parent) Holdings Inc.'s Supplemental Response and Objections to Defendant Morgan Stanley & Co., Inc.'s Third Set of Interrogatories		☐
MS	706	11/12/2003	Coleman (Parent) Holdings Inc.'s Responses and Objections to Defendant Morgan Stanley & Co., Inc.'s Third Set of Interrogatories		☐
MS	707	02/20/2004	Coleman (Parent) Holdings Inc.'s Response and Objections to Morgan Stanley & Co. Inc.'s Fourth Set of Interrogatories		☐
MS	708	12/24/2004	Coleman (Parent) Holdings Inc.'s Supplemental Response to Morgan Stanley & Co., Inc.'s Fourth Set of Interrogatories		☐
MS	709	04/21/2004	Coleman (Parent) Holdings Inc.'s Amended Response to Morgan Stanley & Co., Inc.'s Fourth Set of Interrogatories		☐
MS	710	11/24/2004	Coleman (Parent) Holdings Inc.'s Responses and Objections to Morgan Stanley & Co., Inc.'s Fifth Set of Interrogatories		☐
MS	711	12/22/2004	Coleman (Parent) Holdings Inc.'s Amended Supplemental Response to Morgan Stanley & Co. Inc.'s Fifth Set of Interrogatories		☐
MS	712	09/24/2003	CPH's Response to Morgan Stanley & Co. Incorporated's First Set of Requests for Admission		☑
MS	713	03/17/2004	CPH's Response to Morgan Stanley & Co., Inc.'s Second Set of Requests for Admission		☑
MS	714	07/14/2004	Coleman (Parent) Holdings Inc.'s Response to Morgan Stanley & Co. Incorporated's Third Set of Requests for Admission		☑
MS	715	11/24/2004	Coleman (Parent) Holdings Inc.'s Responses and Objections to Morgan Stanley & Co. Incorporated's Fourth Set of Requests for Admission		☑
MS	716	11/24/2004	Coleman (Parent) Holdings Inc.'s Amended Responses and Objections to Morgan Stanley & Co. Incorporated's Fourth Set of Requests for Admission Nos. 27 and 28		☐
MS	719	03/11/1998	Letter from J. Tyree to P. Harlow re MS opinion pursuant to comfort-letter request procedures	CPH 0012526-0012527	☐

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	720	03/18/1998	Fax from T. Freed to J. Tyree re no release of press release without Dunlap or Fannin sign off	CPH 0635991-0635992	☑
MS	724	04/01/1998	Memo from V. Kistler to the Files re Hattiesburg Sales Cutoff Testing (49 North and AMDC)	CPH 0129292-0129296	☑
MS	725	00/00/1998	Sunbeam Corporation Interviews #2 conducted by Arthur Andersen	CPH 0062489-0062733	☐
MS	726	10/16/1998	Sunbeam Corporation Report to Board of Directors Restatement Adjustments prepared by Arthur Andersen LLP	CPH 0084462-0084532	☑
MS	727	08/00/2000	Davis Polk & Wardwell Chronology in Response to June 30, 2000 Subpoena Sunbeam Securities Litigation	DPW000001-000002	☐
MS	728	00/00/0000	Sunbeam Due Diligence Review Agenda		☐
MS	730	03/07/1998	Memo from J. Tyree to Sunbeam Financing Team re Accounting Due Diligence Call	CPH 0635893	☐
MS	731	03/10/1998	Project Laser: Accounting Due Diligence	CPH 0635894-0635895	☐
MS	732	03/20/1998	Memo from R. Porat, Harris, J. Tyree, J. Groeller to R. Kersh, D. Fannin, J. Kelly, D. Uzzi, R. Gluck, A. Dean, G. Fernicola re Bring-down due diligence with marginalia	CPH 0520973-0520974	☐
MS	733	03/23/1998	Memo from J. Tyree, J. Groeller, S. Boone to R. Kersh, D. Fannin, J. Kelly, D. Uzzi, B. Gluck, A. Dean, G. Fernicola re Sunbeam Bring-down due diligence	CPH 1257351	☑
MS	735	08/04/1997	Memo from R. Goudis to D. Uzzi (cc R. Kersh) re 1998 Operating Plan Goals	CPH 0322353-0322354	☑
MS	736	03/11/1998	Fax from T. Chang to D. MacDonald including Project Laser Financial Statements, Projections and Proformas	CPH 0284977-0285008	☐
MS	737	03/18/1998	Sunbeam Sales Forecast, Jan. & Feb. Consolidated Net Sales Actual, March Net Sales through Mar. 17,1998 with marginalia	MSC 0028423	☐
MS	738	03/26/1998	Sunbeam Sales Forecast, Jan. & Feb. Consolidated Net Sales Actual, March Net Sales through Mar. 17,1998 with marginalia faxed to Arthur Andersen	CPH 0038717	☐
MS	741	09/05/1997	Engagement Letter from W. Strong to A. Dunlap	SB 237825-237830	☐
MS	743	03/05/1998	Highly Confident Letter from R. Smith to R. Kersh	MSC 0080356-0080358	☐
MS	745	04/04/1997	S. Matthews, "Sunbeam's Dunlap Says He's Considering Acquisitions or a Sale," Bloomberg	CPH 1046497	☐

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	749	03/05/1998	Project Laser: Chronology of Events (Analyzing Project Laser Chonology.doc)	MSC 0033255-0033263	☐
MS	752	02/23/1998	Project Laser: Summary Financial Information Request List for Camper Company & Due Diligence (laser-due diligence.doc)	MSC 0031791-0031799	☐
MS	754	01/24/1998	Memo from D. Pastrana to The Files re Review of Significant sales transactions near year-end	CPH 1192163-1192164	☐
MS	755	03/05/1998	Sunbeam P&L, Actuals Comparison Jan. and Feb. 1998	CPH 0013023-0013027	☐
MS	756	03/01/1998	Sunbeam P&L Variations	CPH 1056006-1056010	☐
MS	760	04/02/1998	Memo from B. Holman to D. Pastrana re Aurora Shipping Cut-Off and Bill and Hold Inventory	CPH 0129271-0129275	☑
MS	762	03/21/1998	Email from L. Bornstein to W. Biese re Sunbeam	CPH 0041649	☑
MS	763	03/24/1998	Email from D. Pastrana to L. Bornstein re Cutoff testing with attached cutoff test.doc	CPH 0021362; CPH 001	☑
MS	764	03/19/1998	Draft insert to Offering Memorandum of Sunbeam Press Release with marginalia	CPH 0039327; CPH 003	☑
MS	765	07/02/1998	Memo from L. Bornstein to The Files re Due Diligence call with Morgan Stanley	CPH 0021365-0021368	☐
MS	766	03/23/1998	Letter from A. Dunlap, R. Kersh, D. Fannin, R. Gluck to Arthur Andersen re Representations submitted with Offering Memorandum	CPH 0012464-0012466	☐
MS	769	03/20/1998	Memo from W. Strong, A. Savarie, R. Kitts, J. Stynes, A. Fuchs, G. Yoo, J. Webber, T. Chang, L. Radii, B. Smith, M. Hart, R. Gilbert, T. Burchill, I. Seth, R. Porat, W. Harris, J. Woodsworth, S. Prasad, A. Conway, J. Dormer, W. Wright, J. Tyree, J. Groeller, B. Derito, S. Boone, C. Whelan, J. Kunreuther, J. Foley, K. Eltrich to The Leveraged Finance Committee re Sunbeam Corp. - $2.0 Billion Senior Secured Credit Facilities with marginalia	MSC 0025830-0025886	☑
MS	769	03/20/1998	Memo from W. Strong, A. Savarie, R. Kitts, J. Stynes, A. Fuchs, G. Yoo, J. Webber, T. Chang, L. Radii, B. Smith, M. Hart, R. Gilbert, T. Burchill, I. Seth, R. Porat, W. Harris, J. Woodsworth, S. Prasad, A. Conway, J. Dormer, W. Wright, J. Tyree, J. Groeller, B. Derito, S. Boone, C. Whelan, J. Kunreuther, J. Foley, K. Eltrich to The Leveraged Finance Committee re Sunbeam Corp. - $2.0 Billion Senior Secured Credit Facilities with marginalia	MSC 0059244-0059266	☑

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	772	06/01/1998	Sunbeam $1,700,000,000 Senior Secured Credit Facilities Info Memo	CPH 1346133-1346250	☑
MS	773	06/09/1998	Sunbeam $1.7 billion Senior Secured Credit Facilities Lender Meeting	CPH 1346276-1346342	☑
MS	774	02/09/1998	Project Laser Potential Acquirors	MSC 0044556-0044573	☐
MS	775	10/06/2003	Morgan Stanley Senior Funding, Inc.'s Responses and Objections to Defendant Coleman (Parent) Holding Inc.'s First Set of Interrogatories; Morgan Stanley Senior Funding, Inc. vs. MacAndrews & Forbes Holdings, Inc., and Coleman (Parent) Holdings, Inc.; Case		☐
MS	776	03/03/1998	Project Laser Organizational Conference Call Materials	CPH 0471614-0471629	☑
MS	777	03/19/1998	Fax from H. Stack to T. Freed requesting documents for due diligence review.	CPH 0632981	☐
MS	778	07/27/2000	Letter from R. Wise to E. Lauer, G. Cutler re Sunbeam Securities Litigation - DPW Subpoena	MSC 0029159-0029162	☑
MS	779	03/17/1998	Memo from J. Tyree, J. Groeller to B. Gluck, A. Dean, G. Fernicola re Bring-Down Due Diligence	CPH 1257359	☐
MS	782	02/06/1998	Memo from A. Amorison to G. Yoo re Project Laser Due Diligence Review	CPH 0639174-0639182	☐
MS	783	12/17/1997	Materials Prepared by CSFB for Discussion - Project Violet	CPH 1121203-1121259	☑
MS	784	02/25/1998	Draft Materials for the Board of Directors - The Coleman Company, Inc.	CPH 1416194-1416213	☑
MS	785	03/30/1998	Daily Stock Price Record, New York Stock Exchange		☑
MS	786	01/16/1998	Letter from J. Stynes to D. Fannin re Second amendment to the engagement letter dated as of September 5, 1997	CPH 0473192-0473193	☑
MS	787	03/05/1998	Fax from C. Whelan to K. Eltrich with attached Coleman Co. Due Diligence Review Agenda	MSC 0036633-0036634	☐
MS	790	11/13/1997	Press Release: "Coleman Reports Third Quarter Results"	MSC 0054921-0054925	☑
MS	792	06/15/1998	Memo from T. Molitor, Leveraged Finance Group to M. Murray re Sunbeam Corporation Status Report	CPH 1258269	☑

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	793	09/06/2001	Fax from R. Flores to C. Ullrich, D. Edwards, J. Thomas, S. Rankin, M. Petrick, M. McDermott, T. Doster, R. Felix, D. Ryan, S. Hannan, D. DeSantis, E. Sieke, P. Wheelock, T. Biaggi, E. Higgins, M. Policano, E. Ordway, N. Kleinschmidt, B. Frezza, C. Fortgang, S. Gardner with attached Sept. 6, 2001 Memo re Execution Copies of the Sixth and Seventh Amendments	MSC 0069860-0069879	☑
MS	794	03/09/1998	Memo from J. Tyree, J. Groeller, S. Boone to Sunbeam Financing Team re Coleman Due Diligence and Site Visit on March 12, 1998	MSC 0029198	☑
MS	795	03/20/1998	Memo from R. Porat, B. Harris, J. Tyree, J. Groeller to R. Kersh, D. Fannin, J. Kelly, D. Uzzi, B. Gluck, A. Dean, G. Fernicola re Bring-down due diligence	MSC 0028209	☐
MS	796	03/01/1998	Skadden Arps Time Records for Sunbeam Corporation March 1, 1998 - March 31, 1998	SASMF 19645-19687	☑
MS	797	02/26/1998	Memo from A. Amorison to A. Emmerich, P. Shapiro, B. Kitts, D. Fannin enclosing draft Agreement and Plan of Merger	CPH 1340293-1340357	☑
MS	798	04/06/2000	Memo from B. Jenkins to M. Petrick, P. Wheelock, T. Molitor, E. Ordway, S. Furhman, J. Halliday re Updated List of Bond Holders	CPH 1349725-1349727	☐
MS	799	00/00/0000	Recovery Analysis for MS	MSC 0111941-0111942	☑
MS	800	09/19/2004	Securities Purchase Agreement among American Household Inc. and Jarden Corporation	MSC 0111576-0111796	☑
MS	801	00/00/0000	Schedule I, shareholder list for AHI	MSC 0111943	☑
MS	802	05/24/1995	Coleman Worldwide Corporation (Zero Coupon Senior Secured) Exchangeable for Shares of Common Stock of The Coleman Company, Inc.	CPH 0632487-0632615	☑
MS	803	03/25/1998	R. Goudis "Sunbeam Corporation Announces Successful Private Placement of $750 Million of Convertible Debentures"	CPH 0485991-0485993	☐
MS	804	03/01/1998	Skadden Arps Time Records for Sunbeam Corporation March 1, 1998 - March 31, 1998	SASMF 19645-19687	☑
MS	805	04/27/1998	Skadden Arps Invoice 732137, Professional Services rendered through April 17, 1998	SASMF 19691-19692	☑
MS	806	02/01/1998	Employment Agreement by and between Sunbeam Corporation and Albert J. Dunlap	CPH 0246430-0246450	☑

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	807	04/05/1998	Sunbeam Corporation Closing Analysis Profit and Loss Statement, Period: February 1998	CPH 1210285-1210317	☑
MS	808	02/16/1998	Sunbeam Corporation Closing Analysis Profit and Loss Statement, Period: January 1998	CPH 1211211-1211233	☑
MS	809	12/24/2004	Coleman (Parent) Holdings Inc.'s Written Statement Regarding Due Diligence Performed by Ernst & Young LLP with attached correspondence between T. Clare and M. Brody re extent of stipulation		☐
MS	810	03/30/1998	Compilation of book and accounting values ascribed to CPH's Sunbeam investment, MacAndrews & Forbes GL Accounting Distribution (Redacted, produced by CPH 2/18/2005)	CPH 2012092-2012111	☑
MS	811	03/30/1998	Compilation of book and accounting values ascribed to CPH's Sunbeam investment, MacAndrews & Forbes GL Accounting Distribution (Redacted, produced by CPH 2/20/2005)	CPH 2012112-2012193	☑
MS	812	03/30/1998	MAFCO Holdings, Inc. and Subsidiaries Notes to Consolidated Financial Statements (Redacted, produced by CPH 2/21/2005)	CPH 2012194-2012197	☑
MS	813	03/30/1998	Compilation of book and accounting values ascribed to CPH's Sunbeam investment, MacAndrews & Forbes GL Accounting Distribution (Produced by CPH 2/24/2005)	CPH 2012198-2012218	☑
MS	814	04/05/1999	MAFCO Holdings, Inc. Consolidated Financial Statements for the Year Ended December 31, 1998 with Report of Independent Auditors (produced by CPH 2/24/2005)	CPH2012219-2012306	☑
MS	815	04/27/2000	MAFCO Holdings, Inc. Consolidated Financial Statements for the Year Ended December 31, 1999 with Report of Independent Auditors (produced by CPH 2/24/2005)	CPH2012307-2012368	☑
MS	816	04/09/2001	MAFCO Holdings, Inc. Consolidated Financial Statements for the Year Ended December 31, 2000 with Report of Independent Auditors (produced by CPH 2/24/2005)	CPH2012369-2012424	☑
MS	817	03/23/1998	Form 10-K for the Fiscal Year Ended December 31, 1997 for CLN Holdings Inc.	CPH 0061885-0061976	☑
MS	818	01/21/1999	Memo from B. McKillip to Distribution re MacAndrews & Forbes Supplemental Briefing Memo - January 25, 1999	CPH 1352834-135835	☑

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	822	12/31/1998	MAFCO Holdings Estimated Fair Value Calculations 12/31/1998 and 12/31/1999 (produced by CPH 2/24/2005)	CPH 2012216-2012217	☑
MS	823	03/01/2005	MS Amended Notice of Deposition (Changes Location Only) for March 3, 2005 Rule 1.310 Deposition		☑
MS	824	08/14/2003	CPH's Response to Morgan Stanley & Co. Incorporated's First Request for Production of Documents		☑
MS	825	11/12/2003	Response of Plaintiff Coleman (Parent) Holdings Inc. to Defendant Morgan Stanley & Co. Inc.'s Third Request for Production of Documents		☑
MS	826	11/24/2004	Coleman (Parent) Holdings Inc.'s Responses and Objections to Morgan Stanley & Co. Incorporated's Eighth [SIC] Request for Production		☑
MS	829	02/17/2005	CPH First Amended Complaint		☑
MS	830	04/29/1999	MAFCO Journal Reports 4Q 1998, 4Q 1999, 4Q 2000 (produced by CPH 2/28/2005)	CPH 2012431-2012467	☑
MS	831	01/00/1998	Compilation of MAFCO General Ledger Report from January, 1998 through year end 2000 (produced by CPH 2/28/2005)	CPH 2012468-2012474	☑
MS	832	12/31/1998	MAFCO Holdings worksheets re Estimated Fair Value Calculations 12/31/1998 and 12/31/1999 (produced by CPH 2/28/2005)	CPH 2012475-2012478	☑
MS	833	09/30/1998	Sunbeam Impairment Worksheet (produced by CPH 2/28/2005)	CPH 2012487-2012490	☑
MS	834	06/30/1998	Coleman Sale Gain Worksheets (produced by CPH 2/28/2005)	CPH 2012491-2012504	☐
MS	838	02/28/2005	Letter from M. Brody to L. Bemis re CPH's production of documents in response to February 17, 2005 Order		☐
MS	839	02/28/2005	Letter from M. Brody to L. Bemis re Sunbeam Warrants		☐
MS	841	03/20/2000	MAFCO Holdings Estimated Fair Value Calculation (produced by CPH 2/28/2005)	CPH 2012481-2012482	☑
MS	842	03/01/1971	The Equity Method of Accounting for Investments in Common Stock		☑
MS	843	07/07/1997	Third Amendment to the Fifth Amended and Restated Revolving Credit Agreement	CPH 2006518-2006522	☑

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	844	03/20/1997	Fifth Amended and Restated Mafco Security Agreement Dated as of March 30, 1997 from MAFCO Holdings Inc. to Citibank, N.A. as Collateral Agent	CPH 2006869-2006896	☐
MS	845	02/24/2005	Letter from L. Bemis to M. Brody re CPH's production of documents in response to February 17, 2005 Order		☐
MS	849	03/07/2005	Production of additional documents related to MAFCO's estimated fair value calculation (produced by CPH 3/7/2005)	CPH 2012505-2012516	☑
MS	850	03/03/2005	Todd Slotkin Deposition Transcript		☑
MS	852	04/29/1999	Transmittal letters accompanying Mafco financial statements (produced by CPH 3/8/2005)	CPH 2012517-2012576	☑
MS	853	04/29/1999	Letter from L. Winoker to Corporate Finance and Negotiations Department re Mafco Holdings Inc. (produced by CPH 3/8/2005)	CPH 2012517-2012518	☑
MS	854	04/29/1999	Letter from L. Winoker to Office of Thrift Supervision re Combined Annual Report re Mafco Holdings Inc. (produced by CPH 3/8/2005)	CPH 2012519-2012520	☑
MS	855	04/27/2000	Letter from L. Ajzenman to Office of Thrift Supervision re Combined Annual Report re Mafco Holdings. Inc with attached Form Report H(b)11	CPH 2012521-2012551	☑
MS	856	04/27/2002	Letter from L. Ajzenman to Office of Thrift Supervision re Combined Annual Report re Mafco Holdings. Inc with attached Form Report H(b)11 (produced by CPH 3/8/2005)	CPH 2012552-2012576	☑
MS	857	04/19/1999	Memo from L. Winoker to R. Perelman re Fair Value Disclosure (produced by CPH 3/8/2005)	CPH 2012512-2012513	☑
MS	858	05/18/2001	Draft letter to T. Chambers (Vice President HSBC Bank USA) re Ronald O. Perelman 2000 Financial Statement with attached 3/12/2005 letter from M. Brody to L. Bemis		☑
MS	859	08/09/1996	Engagement letter between Coopers & Lyband and Sunbeam	CPH 1069397-1069400	☐
MS	860	12/28/1997	Sunbeam Cutoff Testing	CPH 0125693-0125698	☐
MS	861	05/08/1998	Amendment No. 1 to Credit Agreement (execution copy)	MSC 0020157-0020167	☐
MS	862	01/20/2005	Coleman (Parent) Holdings Inc.'s Second Amended Supplemental Response to Morgan Stanley & Co. Inc.'s Fifth Set of Interrogatories		☐

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	863	03/10/2005	Supplemental Expert Report of Mark Grinblatt		☑
MS	864	05/31/1996	Schedule 14A Proxy Statement for the Sunbeam Corporation for the conformed period 7/2/1996		☑
MS	865	08/06/1996	Form 10-Q for the second quarter of 1996 for the Sunbeam Corporation		☑
MS	866	01/04/1993	Sunbeam Corp Stock Price Data January 1993-February 2001		☑
MS	867	01/04/1993	Coleman Company Stock Price Data January 1993-January 2000		☑
MS	880	00/00/0000	E-mail Produced from CPH or MAFCO files		☑
MS	881	07/15/2004	Revised CPH Privilege Log		☑
MS	883	10/20/1998	Verified Derivative Complaint against MAFCO, J. Levin and various other executives, Shallal v. Charles M. Elson, et al., Civ. Action No. 00-8739 (S.D. Fla., Zloch)		☑
MS	885	06/25/1999	Class Action Complaint against The Coleman Co., Sunbeam and various executives in Deutscher v. Dunlap, et al., C.A. No. 16486-NC (Del. Ch. Ct.)		☑
MS	886	01/28/2000	Subpoenas to MAFCO seeking electronic documents relating to Sunbeam in In Re Sunbeam Securities Litig., 98-8258-CIV and 98-8773-CIV and 98-8275 (S.D. Fla.)		☑
MS	887	02/28/2000	Responses and Objections of MacAndrews & Forbes Holdings, Inc. to Subpoenas in the U.S. District Court for the S.D.N.Y. in In Re Sunbeam Securities Litig., 98-8258-CIV and 98-8773-CIV and 98-8275 (S.D. Fla.)		☑
MS	888	04/14/2000	Verified Derivative Complaint in Shallal v. Charles M. Elson, Civ. Action No. 00-8297 (S.D. Fla., Ferguson)		☑
MS	889	10/05/2001	E. Golden Memo to MAFCO and CPH employees re: Document Production for Coleman (Parent) v. Arthur Andersen		☑
MS	890	07/14/2003	Morgan Stanley & Co., Inc., First Request for Production of Documents to Plaintiff		☑
MS	891	00/00/0000	Morgan Stanley Code of Ethics and Business Conduct		☑

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	892	08/07/1998	SOC Restate ITS 1997 and 1Q98 Financials; SOC's Tangible Negative Net Worth Continues to Rapidly Deteriorate; Is Chapter 11 Next? Rating Reduced to Sell	CPH 1392178-1392182	☑
MS	893	03/18/1998	Fax from T. Freed to J. Tyree re no release of press release without Dunlap or Fannin sign off	CPH 0635991-0635992	☑
MS	894	06/28/1999	"Coverage Initiated With Rating of HOLD; Shares Appear Fully Valued," Steele-William / Bank of America Securities; Cuneo-Stephen / Bank of America Securities	CPH 1352713-1352717	☑
MS	895	01/29/1998	"SOC SUNBEAM: SOLID CLOSE TO 1997; ENCORE IN 1998?" Shore-Andrew / PaineWebber Inc; First Call Corp	CPH 1415426-1415429	☑
MS	896	03/03/1998	"SUNBEAM: IT PAYS TO BE IN AL'S CAMP [568; 05/18/2000]," Shore-Andrew / Sunbeam Inc; Quinn / Sunbeam Inc; Chandra / Sunbeam Inc	CPH1028971-1028973	☑
MS	897	05/13/1998	"Sunbeam Corporation; New Plan Looks Good on Paper, But Begins on Even Lower Earnings Base; Investment Conclusion," Graham-Scott / CIBC Oppenheimer; Lee-George / CIBC Oppenheimer	CPH1351691-1351702	☑
MS	898	05/13/1998	"Sunbeam Corporation; Company Update," Heymann-Nicholas / Prudential Securities Inc; Feller-Lawrence / Prudential Securities Inc	CPH1351703-1350712	☑
MS	899	04/22/1998	"Sunbeam Corporation; Top Management Trying to Make the Sun Rise Again," Graham-Scott / CIBC World Markets Co	CPH1351727-1351731	☑
MS	900	01/29/1998	MERRILL LYNCH; Research Bulletin; Reference Number 10102946; Jan/29/98 8:43; (1) 212-449-8173; SOC; Household Products; United States; John Gibbons," Gibbons-John / Merrill Lynch Pierce Fenner & Smith	CPH1278466-CPH12784	☑
MS	901	03/13/1998	"Mafco Holdings Inc. Discussion of Hedging and Monetization Alternatives for Holdings in Sunbeam Corporation," Bear Stearns	CPH2011548-2011584	☑
MS	902	05/15/1998	Coleman 10Q Q1 1998	CPH 1106795-11068078	☑
MS	903	00/00/0000	IBD Law and Compliance Policies and Procedures	MSC 0031171-0031176	☑
MS	904	06/26/1998	Morgan Stanley Dean Witter Investment Banking Division, Compliance Reference Manual	MSC 0031177-0031220	☑

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	905	00/00/2001	Morgan Stanley Dean Witter Code of Conduct 2001; Securities and Asset Management Businesses		☑
MS	906	10/19/2001	Golden State Bancorp Inc. Prospectus Supplement to Prospectus Dates October 19, 2001		☑
MS	907	01/25/2002	Golden State Bancorp Inc. Schedule 13D (Amendment No. 19)		☑
MS	908	11/08/2001	Mafco Holdings Inc./GSB Private SAILS; Terms and Conditions for Private SAILS		☑
MS	909	01/31/2002	SAILS Madatorily Exchangeable Securities Contract		☑
MS	910	12/07/2004	Expert Report of Douglas R. Emery on behalf of CPH		☑
MS	910	12/07/2004	Exhibits to Expert Report of Douglas R. Emery on behalf of CPH		☑
MS	911	00/00/1997	Valuation of Securities Restricted from Immediate Resale, Rev. Rul. 77-287, 1997-2 C.B. 319		☑
MS	912	11/30/2004	Competitive Advance and Revolving Credit Agreement and Revolving Credit Facility Agreement Covenants		☑
MS	913	04/24/1990	Nikkal Industries, Ltd. V. Salton, Inc., 735 F.Supp. 1227		☑
MS	914	02/25/2004	Morgan Stanley Form 10K Annual Report for the Fiscal Year Ended November 30, 2003		☑
MS	915	02/23/1998	Sunbeam Long Range Strategic Plan with Marginalia	CPH 1412552-1412570	☑
MS	916	03/10/1998	Memo from W. Strong, A. Savarie, R. Kitts, J. Stynes, A. Fuchs, G. Yoo, J Webber, T. Chang, L. Rafii, W. Wright, J. Tyree, J. Groeller, B. Derito, S. Boone, R. Porat, W. Harris, J. Woodworth, S. Prasad, C. Whelan, J. Kunreuther, A. Conway, J. Dormer to the Equity Commitment Committee re Sunbeam Corp -- Rule 144A Zero Coupon Convertible Offering ($500MM)	MSC 0000513-0000541	☑
MS	917	02/14/2000	Dow Jones & Reuters Factiva, "HD Healtheon/WebMD Buy Includes CareInsite Inc."		☑
MS	918	05/20/2004	Dow Jones & Reuters Factiva, "HD Tellabs to Buy AFC for $1.9 in Cash and Stock"		☑
MS	919	07/16/2004	"PNC Financial to buy Riggs National" United Press International; The PNC FInancial Services Group, Inc. 8K		☑

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	920	10/04/2002	Bankruptcy Disclosure Statement - Sunbeam Second Amended Disclosure Statement		☑
MS	921	03/18/1998	Fax from T. Freed to J. Tyree re no release of press release without Dunlap or Fannin sign off	CPH 0635991-0635992	☑
MS	922	11/13/1997	CIBC Oppenhimer, Coleman Company, "Third Quarter EPS Well Below Expectations; Lowering 1997 & 1998 Estimates"	MSC 0058712-0058715	☑
MS	923	08/25/1998	Cox News Service, Sunbeam Redesigns Comeback		☑
MS	924	12/07/2004	Expert Report of Blaine Nye		☑
MS	925	08/05/2002	Expert Report of Blaine Nye, In re Oxford Securities Litigation (S.D.N.Y.)		☑
MS	926	08/14/2002	Expert Report, In re Obtek, L.P. v. Lucent Tech, Inc., No. 1-01-226 (Tex. Dist. Ct.)		☑
MS	927	12/22/1998	Sunbeam 1998 Form 10-Q for the period ended 09/30/98		☑
MS	928	00/00/1997	Arthur Andersen - Sunbeam Corporation Additional Procedures Relating to 1996 and 1997 Restatement - File 2A Interview Memoranda		☑
MS	931	03/14/2005	03/14/2005 Hearing Exhibit 01 - E-mail Archive Meeting Minutes, August 2003 through September 2004		☐
MS	932	03/14/2005	03/14/2005 Hearing Exhibit 02 - 8/9/04 Email form Morlaes to Gorman, eet al.		☐
MS	934	03/14/2005	03/14/2005 Hearing Exhibit 04 - 97 Message Insertions		☐
MS	935	03/14/2005	03/14/2005 Hearing Exhibit 05 - 21 emails from Brooklyn 112		☐
MS	936	03/14/2005	03/14/2005 Hearing Exhibit 06 - November Production of Emails		☐
MS	937	03/14/2005	03/14/2005 Hearing Exhibit 11 - 6/7/04 A. Riel to J. Cusick Email		☐
MS	938	03/14/2005	03/14/2005 Hearing Exhibit 12 - A. Riel Certification		☐
MS	939	03/14/2005	03/14/2005 Hearing Exhibit 13 - November Search Queries		☐
MS	940	03/14/2005	03/14/2005 Hearing Exhibit 15 - May Production Bates #94349 to #95651		☐
MS	941	03/14/2005	03/14/2005 Hearing Exhibit 16 - November Production Bates #103434 to #111575		☐

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	942	03/14/2005	03/14/2005 Hearing Exhibit 16A - Unique November Production		☐
MS	943	03/14/2005	03/14/2005 Hearing Exhibit 17 - Emails, Bates Nos. MS2-001-23217, 23215, 2011-2012, 23217, 005608		☐
MS	945	03/14/2005	03/14/2005 Hearing Exhibit 19 - 3/12/05 Email from T. Acerra to R. Saunders		☐
MS	946	03/14/2005	03/14/2005 Hearing Exhibit 20 - 6/15/04 Email from B. Buchanan to R. Piziak		☐
MS	947	03/14/2005	03/14/2005 Hearing Exhibit No. 25 - Wells Response		☐
MS	948	03/14/2005	03/14/2005 Hearing Exhibit 29 - March Production of Email information (MSE 030605-0000001 through 1821)		☐
MS	949	03/14/2005	03/14/2005 Hearing Exhibit 31 - Target List of Morgan Stanley Employees re Email Review		☐
MS	950	03/14/2005	03/14/2005 Hearing Exhibit No. 32 - S. Wolfe Deposition Ex. 5; 02/10/2005 from T. Clare to R. Byman re Renew Data Contract		☐
MS	951	03/14/2005	03/14/2005 Hearing Exhibit 33 - 3/12/05 Tape Tracking Sheet		☐
MS	952	04/16/2004	Agreed Order on Coleman (Parent) Holdings Inc.'s Motion to Compel Concerning E-mails and Other Electronic Documents		☐
MS	953	08/31/2003	Stewart E-mail to E-mailarchive_core re 1999-2002 E-mail Tape Restoration meeting minutes 8/2/03		☐
MS	954	11/18/2004	Occhuizzo Letter to Brody re E-mail production		☐
MS	955	02/10/2005	Wells Submission		☐
MS	956	05/14/2004	DeBord Letter to Brody re E-mail production		☐
MS	957	05/16/2004	Stewart E-mail to E-mailarchive_core re E-mail archive meeting minutes 5/6/04		☐
MS	958	03/26/1998	Wooten E-mail to Elwood re Comedy Show		☐
MS	959	02/08/2005	Block Letter to Brody re Bates 0112286-0113899		☐
MS	960	07/02/2004	Buchanan E-mail to Riel re Tape Dates		☐
MS	961	03/02/2005	Brody Letter to Clare re 1.310 Deposition		☐
MS	962	01/29/2004	Brody Letter to DeBord re CPH & Sunbeam settlement agreement		☐

Exhibit No.		Date	Description	Bates	Trial Exhibit
MS	963	02/28/2005	Brody Letter to Bemis re Sunbeam warrants		☐
MS	964	02/28/2005	Brody Letter to Bemis re Court's February 17th Order		☐
MS	965	12/03/2002	In re Deutsche Bank Securities, Inc., Goldman, Sachs & Co., Morgan Stanley & Co. Incorporated, Salomon Smith Barney Inc., and U.S. Bancorp Piper		☐
MS	966	01/24/2004	Saunders E-mail to Riel re Email archive meeting minutes 1/22/04		☐
MS	967	01/31/2005	Declaration of James Doyle		☐
MS	968	01/31/2005	Declaration of Grant Jonas		☐
MS	969	01/31/2005	Declaration of Thomas Clare		☐
MS	970	11/17/2004	Clare Letter to Brody re back-up tapes		☐
MS	973	05/09/2003	Plaintiff's First Request for Production of Documents		☐
MS	974	06/25/2003	Morgan Stanley's Objections to CPH's First Request for Production of Documents		☐
MS	975	03/31/2004	Clare Letter to Brody re employee evaluations		☐
MS	977	04/12/2004	Declaration of Bram Smith		☐
MS	978	07/07/2004	Clare Letter to Brody re availability of Smith for deposition		☐
MS	979	08/04/2004	Clare Letter to Brody re availability of Smith for deposition		☐
MS	980	09/01/2004	Clare Letter to Brody re availability of Smith for deposition		☐
MS	981	11/12/2004	Brody Letter to Clare re not re-open of Smith deposition		☐
MS	982	10/24/2003	Brown Letter to Clare re CPH privilege assertions		☐
MS	983	11/24/2004	Coleman (Parent) Holdings Inc.'s Responses and Objections to Morgan Stanley & Co. Incorporated's Eighth [sic] Request for Production of Documents		☐
MS	989	03/05/1998	Project Laser: Chronology of Events with metadata (Analyzing Project Laser Chonology.doc)		☑
MS	990	02/23/1998	Sunbeam Long Range Strategic Plan with Marginalia	CSFBC 0001623-000164	☑
MS	991	03/14/2005	03/14/2005 Hearing Exhibit No. 7 - Emails from November Production		☐

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 4th day of April 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

MORGAN STANLEY'S REVISED TRIAL WITNESS DISCLOSURE

Pursuant to the Court's March 24, 2005 Order, Morgan Stanley & Co. Incorporated ("Morgan Stanley") hereby provides its list of witnesses that Morgan Stanley will or may call at trial, either through live testimony or by deposition, as well as a summary of the anticipated testimony of each witness that it has designated. Morgan Stanley reserves the right to call any of the witnesses identified herein or on Coleman (Parent) Holdings, Inc.'s ("CPH") witness list during either phase of its case-in-chief. Morgan Stanley further reserves the right to withdraw any witness identified herein and to supplement this disclosure as Morgan Stanley continues to evaluate its case in light of the Court's rulings. Morgan Stanley also reserves the right to add or withdraw witnesses in response to changes in CPH's trial witness disclosure or exhibit list, new arguments advanced by CPH, or the Court's future rulings.

The Court's Order on CPH's Renewed Motion for Entry of Default Judgment (Mar. 23, 2005) ("Default Order") substantially narrowed the matters at issue in this case. Accordingly, Morgan Stanley's new lead trial counsel has, in the approximately 10 days since the assumption of his duties in this complex case, made good-faith efforts to identify the witnesses who will or may be called to testify on the matters that remain in dispute. However, in this extremely short

time, new lead trial counsel has not had an adequate opportunity to familiarize himself with the testimony of the more than 90 witnesses who have been deposed in this case, as well as the additional potential witnesses who have not been deposed. As a result, Morgan Stanley may have identified in this disclosure more witnesses than it will ultimately call at trial. It may also have omitted witnesses who will need to be called.

In addition, the Court's orders prohibit Morgan Stanley from calling witnesses with respect to certain elements of CPH's conspiracy and aiding-and-abetting claims (*i.e.*, witnesses who testify to matters other than reliance and damages). *See* Default Order; Order on CPH's Motion for Adverse Inference Instruction (Mar. 1, 2005). Morgan Stanley would have called numerous additional witnesses in its case, including some or all of the witnesses identified in its Trial Witness Disclosure served on January 10, 2005. Morgan Stanley may proffer the testimony of some or all of these additional witnesses during the defense case. The Court's orders likewise prohibit Morgan Stanley from calling witnesses with respect to Morgan Stanley's discovery conduct. Morgan Stanley may proffer the testimony of witnesses called during the hearings held on February 14, March 14, and March 15, 2005 hearings regarding these matters.[1]

I. Morgan Stanley Case-in-Chief (Phase I)

[1] Morgan Stanley adopts by reference the January 10, 2005 Witness Disclosure, which includes the witnesses Morgan Stanley would call at trial if permitted to do so — as supplemented by certain additional witnesses disclosed in the instant submission. Morgan Stanley also supplements its witness disclosure to include all witnesses called by Morgan Stanley during the February 14, March 14, and March 15, 2005 hearings, and would call these witnesses, William Hollister, and perhaps additional witnesses, if permitted to do so. These witnesses would testify on the matters addressed at the February 14, March 14, and March 15, 2005 hearings, and in the case of Mr. Hollister, matters covered by his November 2004 declaration, as well as related matters.

1. Allison Amorison (by deposition): Ms. Amorison was an associate at Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden"), which assisted in the preparation of the merger agreements relating to Sunbeam's acquisition of the Coleman Company ("Coleman"). Ms. Amorison may testify to the matters to which she testified in her deposition in this case, including her experience regarding the merger agreement drafting and negotiations, the confidentiality agreements, the due diligence done by Skadden for the transaction, and her contact with her counterpart at Wachtell, Lipton, Rosen & Katz ("Wachtell"), Adam Emmerich.

2. John Ashley (live): Mr. Ashley is the Chief Technical Officer of Corefacts, LLC. He is an expert in computer forensics and may testify to issues regarding electronic document retention, including the impossibility of recovering data from overwritten backup tapes.

3. Lawrence A. Bornstein (live): Mr. Bornstein is a certified public accountant who worked at Arthur Andersen LLP at the time of Sunbeam's acquisition of Coleman. Mr. Bornstein may testify to the matters to which he testified in his deposition in this case, including the steps that CPH and MAFCO took to obtain information regarding Sunbeam prior to Sunbeam's acquisition of Coleman.

4. Karen Clark (by deposition): Ms. Clark is a former Vice President of Operations and Finance at Coleman, and Senior Vice President of Finance at Sunbeam. Ms. Clark may testify to the matters to which she testified in her deposition in this case, including the financial condition of Coleman during the events at issue, her views regarding the purchase price paid by Sunbeam, the effect of the Coleman restructuring that was in progress at the time of the Sunbeam transaction, information regarding the post-transaction valuation of the Sunbeam warrants, due diligence conducted by MAFCO in anticipation of the Sunbeam transaction, and Sunbeam's

audited financial statements that were certified by Arthur Andersen and Coleman's reliance on such financial statements.

5. Scott Cook (live): Mr. Cook is Senior Managing Director, Equity Syndicate and Corporate Executive Services, at Raymond James & Associates. Mr. Cook will present his credentials, and he may testify as an expert regarding the valuation of securities, including valuation discounts attributable to resale restriction and large size.

6. Glen Dickes (by deposition): Mr. Dickes is CPH's designated 1.310 witness on MAFCO's consideration of hedging alternatives for its Sunbeam position. When the events relevant to this dispute occurred, he was MAFCO's chief corporate lawyer. Mr. Dickes may testify to the matters to which he testified in his deposition in this case, including his background and responsibilities within the MAFCO organization, CPH's consideration of hedging its stake in Sunbeam stock, various due-diligence issues, and the status of MAFCO's term loans at the time of the Sunbeam transaction.

7. Donald Drapkin (by deposition): Mr. Drapkin is currently Vice Chairman and Director of MAFCO and former Coleman and CPH Director. Mr. Drapkin may testify to the matters to which he testified in his deposition in this case, including his professional background and experience with mergers and acquisitions, MAFCO's history and experience conducting mergers and acquisitions, the Coleman board meeting at which the Coleman/Sunbeam merger was approved, and his participation in the Coleman/Sunbeam merger.

8. Robert Duffy (by deposition): At the time of the transaction, Mr. Duffy was a Vice President in the Mergers & Acquisitions Group at CFSB. Mr. Duffy may testify to the matters to which he testified in his deposition in this case, including his role as a financial

advisor to MAFCO, CSFB's role in performing due diligence on Sunbeam, and the fairness opinion CSFB rendered to Coleman.

9. Adam Emmerich (by deposition): Mr. Emmerich is a partner at Wachtell and was retained in late January 1998 to advise MAFCO, CPH, and Coleman in connection with Sunbeam's acquisition of Coleman. Mr. Emmerich may testify to the matters to which he testified in his deposition in this case, including discussions with Sunbeam, the preparation of confidentiality agreements, the merger agreement; and representations and warranties made by the parties.

10. Irwin Engelman (by deposition): Mr. Engelman was Executive Vice President and Chief Financial Officer of MAFCO at the time of the events relevant to this dispute. Mr. Engleman may testify to the matters to which he testified in his deposition in this case, including CPH's reliance on Arthur Andersen LLP, the negotiation of covenant relief with the banks after Dunlap was terminated, the negotiation of credit agreements, and the extent and nature of the indebtedness of Mr. Perelman's companies.

11. David Fannin (live): Mr. Fannin is the former Executive Vice President and General Counsel of Sunbeam Corporation. Mr. Fannin may testify concerning his involvement in the negotiation of Sunbeam's acquisition of Coleman, including the structure of the deal, the due diligence conducted by CPH, communications between Sunbeam and CPH, steps taken by MAFCO and CPH with respect to the registration of Sunbeam warrants or securities, and events that occurred following the closing of the Sunbeam/Coleman merger.

12. Steven Fasman (live and/or by deposition): Steven L. Fasman is Vice President, Law of MAFCO. Mr. Fasman may testify about email policies at MAFCO; the practices regarding preservation, deletion, purging, and destruction of email at MAFCO; the history of

MAFCO's knowledge of potential and actual litigation involving the subject matter of this case; the failure to preserve, recover, restore, or save MAFCO email in response to the notice of such potential and actual litigation; the destruction, erasing, or overwriting of MAFCO email after receiving notice of the Sunbeam litigation; and CPH's production or failure to produce email in response to discovery requests in this litigation.

13. Dan Fischel (live): Professor Fischel is a professor at the University of Chicago. Mr. Fischel may testify as an expert in regarding compensatory and/or punitive damages. Professor Fischel will present his credentials and provide his opinion as to the amount of damages, if any, that CPH sustained as a result of its sale of Coleman in exchange for Sunbeam securities. Professor Fischel may also testify regarding Morgan Stanley's liability for punitive damages, including the nature, extent, and degree of Morgan Stanley's alleged misconduct and the related circumstances; the relative experience, sophistication, and access to relevant information of the parties; the degree of CPH's alleged injury and the degree of CPH's reliance on Sunbeam, its auditors, and Morgan Stanley; whether Morgan Stanley is liable for punitive damages.

14. Blaine Fogg (by deposition): Mr. Fogg is a partner at Skadden. Mr. Fogg may testify to the matters to which he testified in his deposition in this case, including Skadden's representation of Sunbeam in the Coleman transaction and debenture offering and the events surrounding the March 19, 1998 press release.

15. Steven Geller (by deposition): Mr. Geller was an associate in the Mergers & Acquisitions Group at Credit Suisse First Boston ("CFSB") at the time of the events relevant to this dispute. Mr. Geller may testify to the matters to which he testified in his deposition in this

case, including CSFB's role in performing due diligence on Sunbeam, financial modeling and analysis conducted by CFSB regarding Sunbeam, and the fairness opinion CSFB prepared.

16. Frank Gifford (by deposition): Mr. Gifford was a member of the Coleman Board of Directors at the time of the events relevant to this dispute. Mr. Gifford may testify to the matters to which he testified in his deposition in this case, including his lack of reliance on Morgan Stanley in determining whether to vote to consummate the transaction.

17. Norman Ginstling (by deposition): Mr. Ginstling is a Senior Vice President of Taxation for MAFCO. Mr. Ginstling may testify to the matters to which he testified in his deposition in this case, including his professional background and experience with the tax consequences of differing types of mergers and acquisitions, MAFCO's history and experience conducting mergers and acquisitions, the tax consequences of the Sunbeam/Coleman merger, MAFCO's consideration of and decisions regarding hedging options for the Sunbeam stock, MAFCO's communications with Morgan Stanley in connection with the Sunbeam/Coleman merger, and the due diligence that MAFCO conducted in connection with the Sunbeam/Coleman merger.

18. Howard Gittis (live and/or by deposition): Mr. Gittis is a director and Vice Chairman and Chief Administrative Officer of MAFCO. Mr. Gittis also is a director and the Vice Chairman of CPH and a former director of Sunbeam. Mr. Gittis may testify to the matters to which he testified in his deposition in this case, including his background and experience, the background and history of Sunbeam's acquisition of Coleman, his involvement in that transaction, the negotiation of the transaction, the decision to enter into the transaction and factors influencing that decision, hedging, and the events leading up to the closing of the transaction.

19. Professor Mark Grinblatt (live): Professor Grinblatt may testify as an expert witness regarding compensatory damages. Professor Grinblatt will present his qualifications as an expert. Professor Grinblatt's opinions are disclosed in his report, supplemental report, and testimony in this matter.

20. Jeffrey Haas (live): Professor Haas is a professor at New York Law School. Professor Haas will testify regarding the ability of CPH to hedge the Sunbeam securities that it acquired as a result of the Sunbeam-Coleman merger, in light of the federal securities laws; the facts and circumstances of CPH's acquisition, including the lack of a right to name directors to the Sunbeam board under the acquisition agreement; and the Schedule 13G filing made by CPH, which reflects that, from the date of its acquisition of Sunbeam securities until June 16, 1998, CPH had no intention to control or influence the control of Sunbeam.

21. Lawrence Jones (by deposition): Mr. Jones is a former President and CEO of Coleman. In addition, he served as both a Director on Coleman's Board of Directors and a member of the Board's audit committee at the time of the events relevant to this dispute. Mr. Jones may testify to the matters to which he testified in his deposition, including his background and responsibilities at Coleman, the potential effects of the Sunbeam transaction on Coleman and its overall long-term success, the relationship between Coleman and MAFCO, the expertise of MAFCO senior management, the information that was provided to and reviewed by the Coleman Board of Directors prior to its approval of the Sunbeam transaction; and the information that the Board of Directors relied upon in deciding to approve the Sunbeam transaction.

22. Ann Jordan (by deposition): Ms. Jordan was a member of the Coleman Board of Directors at the time of the events relevant to this dispute. Ms. Jordan may testify to the matters to which she testified in her deposition, including meetings of the Coleman Board of Directors,

her role as a member of the Board of Directors, and her lack of reliance on Morgan Stanley in determining whether to vote for the transaction.

23. Jerry Levin (live): Mr. Levin is the former Chairman and Chief Executive Officer of Coleman and is currently Chairman and Chief Executive Officer of American Household, Inc. Mr. Levin may testify to the matters to which he testified in his deposition in this case, including his background and experience; the background and history of Sunbeam's acquisition of Coleman; the condition of Coleman during the time period relevant to the disputed issues in this case; the background and history of the transaction; his involvement in the transaction; the negotiation of the transaction; the decision to enter into the transaction and factors influencing that decision; his communications with Mr. Perelman, including communications concerning Sunbeam and about entering into the transaction; his interests in Coleman; the due diligence conducted by MAFCO; his interaction with Morgan Stanley in connection with the transaction; the events leading up to the closing of the transaction; post-closing events related to Sunbeam; and damages.

24. James Maher (live and/or by deposition): Mr. Maher is the former President of MAFCO Consolidated Group Inc. Mr. Maher may testify to the matters to which he testified in his deposition in this case, including his background and experience, MAFCO's history and experience conducting mergers and acquisitions and its use of advisors, the background and history of Sunbeam's acquisition of Coleman, his involvement in that transaction, the negotiation of the transaction, the decision to enter into the transaction and factors influencing that decision; due diligence conducted by MAFCO, his interaction with Morgan Stanley in connection with the transaction, the events leading up to the closing of the transaction, hedging, post-closing events related to Sunbeam, and damages.

25. John Moran (by deposition): At the time of the transaction, Mr. Moran was a member of the Coleman Board of Directors. Mr. Moran may testify to the matters to which he testified in his deposition in this case, including his business experience, his knowledge of Coleman's business, and factors influencing the Coleman Board of Directors' approval of the merger transaction between Sunbeam and Coleman.

26. William Nesbitt (live and/or by deposition): Mr. Nesbitt is a former Senior Vice President of MAFCO Consolidated Group Inc. Mr. Nesbitt may testify to the matters to which he testified in his deposition in this case, including his background and experience, the background and history of Coleman's acquisition of Sunbeam, his involvement in that transaction, MAFCO's history and experience conducting mergers and acquisitions and its use of advisors, due diligence conducted by MAFCO, the negotiation of the transaction, the decision to enter into the transaction and factors influencing that decision, the events leading up to the closing of the transaction, damages, and his interaction with analysts.

27. Joseph Page (by deposition): Mr. Page was Chief Financial Officer of Coleman at the time of the transaction. Mr. Page may testify to the matters to which he testified in his deposition in this case, including his background and experience in mergers and acquisitions and investment transactions, his role in the negotiations between the parties to the Sunbeam transaction, information presented during the negotiations, information considered by Coleman during the negotiations of the merger, matters relating to the March 19, 1998 Sunbeam press release, due diligence that was with respect to Sunbeam, and his knowledge of Morgan Stanley's participation in the Sunbeam transaction.

28. Ronald O. Perelman (live and/or by deposition): Mr. Perelman is the Chairman of the Board of Directors and Chief Executive Officer of MAFCO. He is also the Chairman of the

Board of Directors of CPH and a former director of Coleman. Mr. Perelman may testify to all issues that are disputed in this case, including the history, structure, and maintenance of his business empire, his acquisition and control of Coleman, the events leading up to the 1998 merger of Coleman and Sunbeam, the course of events at Sunbeam following the closing of the Coleman/Sunbeam merger, all facts relevant to his claim of reliance, and all facts relevant to his claim for damages and for punitive damages.

29. Arthur H. Rosenbloom (live): Mr. Rosenbloom may testify as an expert witness. Mr. Rosenbloom will present his qualifications as an expert. Mr. Rosenbloom's opinions are disclosed in his report, supplemental report, and testimony in this matter.

30. Joram Salig (by deposition): Mr. Salig was the Vice President of Law for MAFCO. Mr. Salig may testify to the matters to which he testified in his deposition in this case, including his professional background and experience with mergers and acquisitions. He may testify regarding MAFCO's history and experience conducting mergers and acquisitions. He may testify regarding MAFCO's historic due diligence practices and due diligence procedures in connection with the Sunbeam/Coleman merger. He may testify regarding the confidentiality agreements relating to the Sunbeam/Coleman merger. He may testify regarding his lack of interaction with Morgan Stanley in connection with the Sunbeam/Coleman merger.

31. Barry Schwartz (live): Mr. Schwartz is the Executive Vice President and General Counsel of MAFCO and the General Counsel of CPH. His testimony may include his background and experience in mergers and acquisitions and investment transactions, his background and responsibilities within the MAFCO organization, a description of board meetings in which the Sunbeam transaction was considered, his approval and signing of the merger agreements, descriptions of meetings and communications in connection with the

Sunbeam transaction, the hiring of advisors to assist in the transaction and the role of those advisors, communications with the advisors to Coleman and Sunbeam, information relied on by CPH in the course of the transaction, and damages.

32. Paul Shapiro (live): Mr. Shapiro was Vice President and General Counsel of Coleman Company from July 1, 1997 to March 31, 1998. From June 1998 to July 2001, Mr. Shapiro served as Executive Vice President and Chief Administrative Officer of Sunbeam. Mr Shapiro's testimony may include his role in the transaction, his participation in due diligence of Sunbeam, and the fairness opinion presented by CSFB.

33. Todd Slotkin (live and/or by deposition): Mr. Slotkin is the Chief Financial Officer and Executive Vice President of MAFCO. Mr. Slotkin may testify to the matters to which he testified in his deposition, including his professional background and experience with debt transactions and mergers and acquisitions; MAFCO's history and experience conducting mergers and acquisitions; MAFCO and/or Coleman's credit agreements and loan obligations existing in the 1997-1998 timeframe; MAFCO's finances and financial statements for fiscal years 1997 and 1998, including its accounting for its Sunbeam and Coleman holdings; MAFCO's process of establishing "estimated fair values" for its investments and its valuation of its Sunbeam holdings; pledging arrangements relating to MAFCO's Coleman and/or Sunbeam stock holdings; hedging options for Sunbeam stock, and decisions made regarding such hedging options; communications between MAFCO and Morgan Stanley in connection with the Sunbeam/Coleman merger; and damages.

34. Bruce Slovin (by deposition): Mr. Slovin was a member of Coleman board of directors at the time of the transaction. Mr. Slotkin may testify to the matters to which he testified in his deposition, including his background and experience in mergers and acquisitions

and investment transactions, his background and responsibilities within the MAFCO organization, the Coleman board meetings in which the Sunbeam transaction was discussed and approved, the information considered and relied upon by the Board in approving the transaction, and matters relating to the March 19, 1998 Sunbeam press release.

35. Laurence Winoker (live and/or by deposition): Mr. Winoker is Senior Vice President, Controller, and Treasurer of MAFCO. Mr. Winoker may testify to the matters to which he testified in his deposition, including MAFCO's internal valuation of its Sunbeam investment including the value CPH placed on the warrants, and the lack of contact between MAFCO and Morgan Stanley regarding this transaction.

36. Kevin G. Woodruff (live): Mr. Woodruff is a managing director at Morgan Stanley. He manages the equity derivatives business and works in the Global Capital Markets Division. Mr. Woodruff may testify concerning those financial transactions that would, at the time of the events relevant to this dispute, have allowed CPH to realize current value from its holdings of Sunbeam stock while still retaining ownership of the shares.

II. Morgan Stanley Punitive Damages Defense Case (Phase II)

Morgan Stanley may call any witness disclosed above to testify in Phase II regarding any matter relating to Morgan Stanley's liability for punitive damages, including the degree of Morgan Stanley's alleged misconduct and the related circumstances; the relative experience, sophistication, and access to relevant information of the parties; and the degree of CPH's alleged injury and the degree of CPH's reliance on Sunbeam, its auditors, and Morgan Stanley.

1. Joseph D'Auria (live and/or by deposition): Mr. D'Auria is an Executive Director at Morgan Stanley. Mr. D'Auria may testify to those matters to which he testified in his

deposition in this case, including the assets and resources available to Morgan Stanley to satisfy a judgment for punitive damages.

2. Donald Denkhaus (live and/or by deposition): Mr. Denkhaus was a partner at Arthur Anderson during the relevant time period. Mr. Denkhaus may testify to the matters to which he testified in his deposition in this case, and he may testify regarding the nature, extent, and degree of Morgan Stanley's alleged misconduct and the related circumstances; the relative experience, sophistication, and access to relevant information of the parties; the degree of CPH's alleged injury and the degree of CPH's reliance on Sunbeam, its auditors, and Morgan Stanley; and whether Morgan Stanley is liable for punitive damages

3. Rob Jones (live): Mr. Jones is the Corporate Representative of Morgan Stanley. Mr. Jones may testify to matters relating to Morgan Stanley's liability for punitive damages, including information about the defendant, factors in mitigation, and the affect of a punitive damages award on the defendant.

4. Tarek Abdel-Meguid (live and/or by deposition): Mr. Meguid is the Global Head of Investment Banking at Morgan Stanley. Mr. Meguid may testify to those matters to which he testified in his deposition in this case, and he may testify regarding the nature, extent, and degree of Morgan Stanley's alleged misconduct and the related circumstances; the relative experience, sophistication, and access to relevant information of the parties; the degree of CPH's alleged injury and the degree of CPH's reliance on Sunbeam, its auditors, and Morgan Stanley; whether Morgan Stanley is liable for punitive damages; and his evaluation(s) of William Strong and William Strong's performance at Morgan Stanley.

5. Joseph Perella (live and/or by deposition): Mr. Perella is the Vice Chairman of the parent holding company of Morgan Stanley and former Chairman Institutional Securities at

Morgan Stanley. Mr. Perella may testify to those matters to which he testified in his deposition in this case, and he may testify to the nature, extent, and degree of Morgan Stanley's alleged misconduct and the related circumstances; the relative experience, sophistication, and access to relevant information of the parties; the degree of CPH's alleged injury and the degree of CPH's reliance on Sunbeam, its auditors, and Morgan Stanley; whether Morgan Stanley is liable for punitive damages; and his evaluation(s) of William Strong and William Strong's performance at Morgan Stanley.

6. Ruth Porat (live and/or by deposition): Ms. Porat is a Managing Director in the Investment Banking Division at Morgan Stanley. Ms. Porat may testify to those matters to which she testified in her deposition in this case, and she may testify to the nature, extent, and degree of Morgan Stanley's alleged misconduct and the related circumstances; the relative experience, sophistication, and access to relevant information of the parties; the degree of CPH's alleged injury and the degree of CPH's reliance on Sunbeam, its auditors, and Morgan Stanley; whether Morgan Stanley is liable for punitive damages; and her evaluation(s) of William Strong and William Strong's performance at Morgan Stanley.

7. Robert Scott (by deposition): Mr. Scott is an advisory director at Morgan Stanley. Mr. Scott may testify to those matters to which he testified in his deposition in this case, and he may testify to the nature, extent, and degree of Morgan Stanley's alleged misconduct and the related circumstances; the relative experience, sophistication, and access to relevant information of the parties; the degree of CPH's alleged injury and the degree of CPH's reliance on Sunbeam, its auditors, and Morgan Stanley; whether Morgan Stanley is liable for punitive damages; and his evaluation(s) of William Strong and William Strong's performance at Morgan Stanley.

8. William Strong (live and/or by deposition): Mr. Strong is a Managing Director in Morgan Stanley's Investment Banking Division. Mr. Strong may testify on the matters to which he testified in his deposition, and he may testify regarding the nature, extent, and degree of Morgan Stanley's alleged misconduct and the related circumstances; the relative experience, sophistication, and access to relevant information of the parties; the degree of CPH's alleged injury and the degree of CPH's reliance on Sunbeam, its auditors, and Morgan Stanley; whether Morgan Stanley is liable for punitive damages; and his own employment evaluations.

9. John Tyree (live and/or by deposition): Mr. Tyree was a member of the Morgan Stanley Client Services Group during the relevant time period. Mr. Tyree may testify to the matters to which he testified in his deposition in this case, and he may testify regarding the nature, extent, and degree of Morgan Stanley's alleged misconduct and the related circumstances; the relative experience, sophistication, and access to relevant information of the parties; the degree of CPH's alleged injury and the degree of CPH's reliance on Sunbeam, its auditors, and Morgan Stanley; and whether Morgan Stanley is liable for punitive damages.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 4th day of April 2005.

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

OBJECTIONS TO MORGAN STANLEY'S PROPOSED SUPPLEMENTAL PHASE ONE JURY INSTRUCTIONS, REVISED PHASE I REQUESTED INSTRUCTIONS REGARDING NEW YORK LAW, AND PROPOSED VERDICT FORMS

Coleman (Parent) Holdings Inc. ("CPH") hereby submits the following objections to the Supplemental Phase One Proposed Phase One Jury Instructions, Revised Phase I Requested Instructions Regarding New York Law, and Requested Verdict Forms that Morgan Stanley Inc. ("Morgan Stanley") submitted on May 5, 2005.

OBJECTIONS TO MORGAN STANLEY'S REVISED PHASE I REQUESTED INSTRUCTIONS REGARDING NEW YORK LAW

Without waiving any other objections CPH may have to the proposed instructions, including any objections as to whether they state New York law properly, CPH objects to all proposed instructions as inconsistent with the Court's March 29, 1998 Order on Morgan Stanley's Motion to Apply New York Law to CPH's Aiding and Abetting and Conspiracy Claims.

OBJECTIONS TO MORGAN STANLEY'S PROPOSED SUPPLEMENTAL PHASE ONE JURY INSTRUCTIONS

Morgan Stanley's Proposed Supplemental Instruction No. 1: CPH objects to this instruction as incomplete insofar as it fails to clarify to the jury that they may not find facts that

contradict the facts established prior to trial. At the end of the third paragraph, a sentence should be added: "And you may not draw inferences, make deductions, or reach conclusions which are contrary to or inconsistent with the established facts that I read to you at the beginning of the trial." **CPH's Proposed Jury Instruction No. 4** contains appropriate language and should be given instead.

Morgan Stanley's Proposed Supplemental Instruction No. 2: No objection.

Morgan Stanley's Proposed Supplemental Instruction No. 3: CPH objects to this instruction as unnecessary. The Florida Standard Instruction on evaluating witness testimony is sufficient, and it is up to the jurors to apply their own common sense and judgment to decide which factors to weigh in deciding whether a witness' mistaken recollections affect their credibility.

Morgan Stanley's Proposed Supplemental Instruction No. 4: No objection.

Morgan Stanley's Proposed Supplemental Instruction No. 5: CPH objects to this instruction on several grounds.

1. *Unnecessary.* The jury is already aware of the general nature of the case, and the pattern instruction on which Morgan Stanley based this instruction is for cases where the jury must evaluate claims separately, which is not the case here. *See* Florida Standard Jury Instruction No. 2.4 note (2003).
2. *Insufficient predicate to instruct on affirmative defenses.* Morgan Stanley has failed to allege legally sufficient facts on either of its affirmative defenses. If the Court gives this instruction, it should terminate the last sentence after "Morgan Stanley denies these claims."

Morgan Stanley's Proposed Supplemental Instruction No. 6: No objection.

Morgan Stanley's Proposed Supplemental Instruction No. 7: CPH objects to this instruction on several grounds.

1. *Incomplete.* The instruction instructs the jurors on the remaining elements of CPH's claims in a vacuum, without any context about why the remaining elements matter or how they fit into CPH's claims. The jury should be instructed, as in CPH's Proposed Instruction No. 6, on the elements of CPH's claims already established.

2. *Misstates law on reliance with superfluous element.* The second element should be deleted, as it is not a correct statement of Florida law. The only circumstances under which a plaintiff may not rely on an intentionally fraudulent statement under Florida law are where the falsity of the statement is either obvious or actually known to plaintiff. *See* Ex. A, Court's April 5, 2005 Order on Limiting Instruction on Reliance. Naming this requirement "justifiable reliance" is confusing and is designed to mislead the jury into injecting a comparative-fault or contributive-negligence defense into the case. To avoid this confusion — which Morgan Stanley has repeatedly and intentionally sought to sow — it makes much more sense to instruct the jury on the "obviousness" and "actual knowledge" defenses to fraud as part of one reliance element, rather than under a separate, misleadingly named "justifiable reliance" element.

3. *Argumentative regarding burden of proof.* The instruction is improperly argumentative at two points. First, the word "actually" in element one suggests doubt as to CPH's reliance, and should be deleted. Second, for balance, so as not to suggest to the jury that the Court favors one side over the other, the final

sentence of the instruction should either be deleted or preceded by this sentence: "If CPH shows these elements by the greater weight of the evidence, your verdict should be for Plaintiff, CPH."

4. *Confusing switching of defendant's name.* In the final sentence, the Defendant should be referred to as "Morgan Stanley" as elsewhere in the instructions.

5. *Incomplete.* A final sentence, "I will now instruct you on these elements in greater detail" should be added at the end of the instruction to avoid any juror confusion that the instructions following this one are additional elements CPH must prove, as opposed to explanations of the elements listed.

Morgan Stanley's Proposed Supplemental Instruction No. 8: CPH objects to this instruction on several grounds.

1. *Misstates law on reliance with superfluous element.* The words "and justifiably" should be deleted from the first sentence, as this is not an element of fraud under Florida law. *See supra*, CPH's second objection to Morgan Stanley's Proposed Supplemental Instruction No. 7.

2. *Misleading as to causation.* As written, the second sentence of the proposed instruction, insofar as it states that CPH must show it entered the transaction "because of the statements," might mislead the jury into thinking that CPH must show that it relied exclusively on the false statements in deciding to enter the deal. To frame the issue more neutrally, **CPH's Proposed Instruction No. 8** should be given instead, or at least given instead of the second sentence of the instruction: "CPH relied upon a statement if CPH depended upon the accuracy and truthfulness of the statement in its decision-making process."

3. *Unnecessary modification of Court's reliance instruction.* Rather than modify the reliance limiting instruction the Court crafted on April 13, 2005, *see* Ex. B, 4/13/05 Tr. at 7941-53, the instruction should track that language as closely as possible. Other than add an introductory phrase and a final clarifying sentence, **CPH's Proposed Supplemental Instruction No. 3** tracks the language of the limiting instruction better and should be given instead.

Morgan Stanley's Proposed Supplemental Instruction No. 9: CPH objects to the instruction as an improper injection of New York law into the case, contrary to both Florida law and the Court's April 5, 2005 Order on Limiting Instruction on Reliance, Ex. A. *See supra*, CPH's second objection to Morgan Stanley's Proposed Supplemental Instruction No. 7. The "totality of the circumstances" authorities cited by Defendant pertain to whether the falsity of misstatements was obvious from the totality of the circumstances, not to a freestanding "justifiability" element. **CPH's Proposed Jury Instruction No. 8, CPH's Proposed Supplemental Instruction No. 3**, and the April 5, 2005 Order state the law correctly and should be given instead.

Morgan Stanley's Proposed Supplemental Instruction No. 10: CPH objects to the proposed instruction as an improper and argumentative commentary on the evidence.

Morgan Stanley's Proposed Supplemental Instruction No. 11: CPH objects to the proposed instruction as an improper and argumentative commentary on the evidence.

Morgan Stanley's Proposed Supplemental Instruction No. 12: CPH objects to the instruction as an improper injection of New York law into the case, contrary to both Florida law and the Court's April 5, 2005 Order on Limiting Instruction on Reliance, Ex. A. *See supra*, CPH's second objection to Morgan Stanley's Proposed Supplemental Instruction No. 7. **CPH's**

Proposed Jury Instruction No. 8, CPH's Proposed Supplemental Instruction No. 3, and the April 5, 2005 Order state the law correctly and should be given instead.

Morgan Stanley's Proposed Supplemental Instruction No. 13A: CPH objects to the proposed instruction on several grounds.

1. *Misstates law on reliance.* There is no special legal category of "sophisticated investor" under Florida law. CPH objects to the instruction as an improper injection of New York law into the case, contrary to both Florida law and the Court's April 5, 2005 Order on Limiting Instruction on Reliance, Ex. A. *See supra*, CPH's second objection to Morgan Stanley's Proposed Supplemental Instruction No. 7. **CPH's Proposed Jury Instruction No. 8, CPH's Proposed Supplemental Instruction No. 3**, and the April 5, 2005 Order state the law correctly and should be given instead.
2. *Misstates court's findings.* The Court has determined that CPH is a sophisticated investor for purposes of New York law only, not for purposes of Florida law. *See* Ex. C, Feb. 1, 2005 Order On Morgan Stanley's Motion for Summary Judgment, at 3 ("CPH is determined to be a sophisticated investor under New York law.") (emphasis added).
3. *Argumentative.* By stating that CPH "had a duty" and "was required" to perform due diligence, the proposed instruction improperly comments on the evidence by suggesting that CPH was remiss in its duties.

Morgan Stanley's Proposed Supplemental Instruction No. 13B: CPH objects to the proposed instruction on several grounds.

1. *Misstates law on reliance.* There is no special legal category of "sophisticated investor" under Florida law. CPH objects to the instruction as an improper injection of New York law into the case, contrary to both Florida law and the Court's April 5, 2005 Order on Limiting Instruction on Reliance, Ex. A. *See supra*, CPH's second objection to Morgan Stanley's Proposed Supplemental Instruction No. 7. **CPH's Proposed Jury Instruction No. 8, CPH's Proposed Supplemental Instruction No. 3**, and the April 5, 2005 Order state the law correctly and should be given instead.
2. *Argumentative.* By stating that CPH "was required" to perform due diligence, the proposed instruction improperly comments on the evidence by suggesting that CPH was remiss in its duties.

Morgan Stanley's Proposed Supplemental Instruction No. 14: CPH objects to the instruction as an improper injection of New York law into the case, contrary to both Florida law and the Court's April 5, 2005 Order on Limiting Instruction on Reliance, Ex. A. *See supra*, CPH's second objection to Morgan Stanley's Proposed Supplemental Instruction No. 7. **CPH's Proposed Jury Instruction No. 8, CPH's Proposed Supplemental Instruction No. 3**, and the April 5, 2005 Order state the law correctly and should be given instead.

Morgan Stanley's Proposed Supplemental Instruction No. 15: CPH objects to the proposed instruction on several grounds.

1. *Argumentative.* The first sentence should be deleted, as it argumentatively and prejudicially characterizes CPH's reliance as "blind" and improperly comments on the evidence.

2. *Misstates law on reliance.* The first sentence should be deleted, as it is an improper injection of New York law into the case, contrary to both Florida law and the Court's April 5, 2005 Order on Limiting Instruction on Reliance. *See* Ex. A. **CPH's Proposed Jury Instruction No. 8, CPH's Proposed Supplemental Instruction No. 3,** and the April 5, 2005 Order state the law correctly and should be given instead.

Morgan Stanley's Proposed Supplemental Instruction No. 16: CPH objects to the instruction as an improper injection of New York law into the case, contrary to both Florida law and the Court's April 5, 2005 Order on Limiting Instruction on Reliance, Ex. A. *See supra*, CPH's second objection to Morgan Stanley's Proposed Supplemental Instruction No. 7. **CPH's Proposed Jury Instruction No. 8, CPH's Proposed Supplemental Instruction No. 3,** and the April 5, 2005 Order state the law correctly and should be given instead.

Morgan Stanley's Proposed Supplemental Instruction No. 17: CPH objects to the proposed instruction on several grounds.

1. *Misstates the law on legal causation.* The instruction falsely states that CPH may not recover for damages caused by "other" factors, without differentiating between foreseeable and unforeseeable "other" causes. A jury hearing this proposed instruction is likely to be misled into believing that CPH may not recover for losses of which the fraud was one of several causes, where the causes other than the fraud were foreseeable. Under Florida law, a tort need not be the only cause of damages to be a legal cause thereof, so long as any other contributing causes are foreseeable. Only unforeseeable intervening causes will break the causal chain. FLORIDA STANDARD JURY INSTRUCTION IN CIVIL CASES 5.1 (2003), which the proposed instruction improperly truncates so as to eliminate

the instructions on contributing and intervening causes, correctly expresses this concept. **CPH's Proposed Instruction No. 10** tracks the relevant language from the standard instruction and should be given instead.

2. *Argumentative.* The phrase "such as changes in general market conditions, industry-specific or firm-specific conditions, or actions by other actors unrelated to the fraud" is not only an incorrect statement of the law (see first objection, above), it is also argumentative and improperly comments on the evidence. The phrase should be deleted, as it suggests to the jury that the Court believes CPH's damages were caused by those specific factors rather than the fraud.

Morgan Stanley's Proposed Supplemental Instruction No. 18: CPH objects to the proposed instruction as unnecessary. The jury should not be instructed on Morgan Stanley's waiver defense, as the facts it has alleged would be insufficient, even if proved at trial, to constitute waiver. *See* CPH's Objection to Morgan Stanley's Proposed Supplemental Instruction No. 19.

Morgan Stanley's Proposed Supplemental Instruction No. 19: CPH objects to the proposed instruction on several grounds.

1. *First factor legally insufficient.* Even if Morgan Stanley proves the facts alleged in its Answer to CPH's First Amended Complaint, those facts would be legally insufficient to constitute waiver. The Answer alleges that CPH waived reliance by (1) the integration clauses in the merger agreements, and (2) failing to exercise the right in the merger agreement to inspect Sunbeam's books and records. *See* Ex. D, MS Answer to CPH's First Amended Complaint at 19. The Court has already held, as a matter of Florida law, that the integration clause cannot bar

CPH's intentional-tort claims. *See* Ex. E, March 28, 2005 Order on Exculpatory and Integration Clauses. Failing to exercise any inspection rights under the agreement similarly cannot constitute waiver of reliance under Florida law because the recipient of a fraudulent misrepresentation is under no duty to conduct an investigation. *See* Ex. A, April 5, 2005 Order on Limiting Instruction on Reliance. Moreover, integration clauses cannot waive future claims for fraud, and as many of the intentionally false statements made by Sunbeam and Morgan Stanley with the intent to deceive CPH were made both in the merger agreement itself and after the merger agreement was signed.

2. *Second factor legally insufficient.* As a matter of law, CPH's settlement with Sunbeam waives only its claims against Sunbeam, not its claims against Morgan Stanley.
3. *Waived.* The second ground for waiver asserted in the proposed instruction was not asserted in Morgan Stanley's answer, and is therefore waived. *See* Ex. D, MS Answer to CPH's First Amended Complaint at 19.
4. *Confusing switching of defendant's name.* In the first and final sentences, the Defendant should be referred to as "Morgan Stanley" as elsewhere in the instructions.

Morgan Stanley's Proposed Supplemental Instruction No. 20: CPH objects to the proposed instruction as unnecessary. The jury should not be instructed on Morgan Stanley's waiver defense, as the facts it has alleged would be insufficient, even if proved at trial, to constitute waiver. *See* CPH's Objection to Morgan Stanley's Proposed Supplemental Instruction No. 19.

Morgan Stanley's Proposed Supplemental Instruction No. 21: CPH objects to the proposed instruction as unnecessary. The jury should not be instructed on Morgan Stanley's waiver defense, as the facts it has alleged would be insufficient, even if proved at trial, to constitute waiver. *See* CPH's Objection to Morgan Stanley's Proposed Supplemental Instruction No. 19.

Morgan Stanley's Proposed Supplemental Instruction No. 22: CPH objects to the instruction as misleading insofar as it refers to "damages legally caused by the actions of Morgan Stanley," which might confuse jurors absent an explanation of vicarious liability. "[T]he actions of Morgan Stanley in aiding and abetting Sunbeam's fraud or conspiring with Sunbeam to commit fraud" should either be replaced with "the Sunbeam fraud Morgan Stanley aided, abetted, and conspired to commit." Additionally, **CPH's Proposed Instruction No. 10** should be given insofar as it explains that that "[u]nder the law, parties to a conspiracy are liable for each other's actions in the conspiracy, as if the actions had been their own. Any person or corporation that enters into a conspiracy after the wrongdoing begins is liable for the acts by other members both before and during the time that it is a member of the conspiracy."

Morgan Stanley's Proposed Supplemental Instruction No. 23: CPH objects to the proposed instruction on several grounds.

1. *Misleading instruction concerning burden of proof.* By stating that CPH "must prove" the value of the Sunbeam stock on the front-end date (line 5), that CPH "must prove" the value of the stock on the "back-end" date (page 9), and that "if the greater weight of the evidence does not support CPH's proof of damages, you should not award any damages and your verdict must be for Morgan Stanley," (lines 13-14) the proposed instruction may mislead the jury into believing that CPH is not entitled to damages at all if the amount of

damages cannot be shown with precision and certainty. This is especially confusing in that the jury will likely be given an instruction modeled on Florida STANDARD JURY INSTRUCTION IN CIVIL CASES NO. 6.1 (2003) immediately prior to the damages instruction, such that repetition of the burden of proof, framed in a way more skewed toward Morgan Stanley, is likely to confuse the jury as the burden of proof on damages. The jury should award an amount of damages that the greater weight of the evidence shows will fairly and adequately compensate CPH for its losses, so long as there is some reasonable measure by which those losses can be estimated. **CPH's Proposed Instructions Nos. 12 and 13** contain appropriate language and should be given instead. But if the Court adopts Morgan Stanley's proposed instruction, CPH requests the following changes with respect to the burden of proof: Replace the sentence on line 5 with the following: "You must calculate the difference between:" On line 9, delete the phrase "CPH must prove by the greater weight of the evidence." On lines 13-14, replace the sentence with "You should award CPH an amount that the greater weight of the evidence shows will fairly and adequately compensate it for its losses under this calculation."

2. *Misleading as to "front-end" date for measuring damages.* The proposed instruction is misleading because it states (lines 6-7) that the expectation of damages must be measured from the "date the transaction occurred." The relevant front-end date is the expectation a reasonable investor would have of the value of the 14.1 million shares of Sunbeam stock in the combined Coleman and Sunbeam companies. On lines 6-7, the sentence should read "the expectation a reasonable investor would have of the fair market value of the Sunbeam stock that CPH received in the Sunbeam transaction, if . . ."

3. *Misstates law as to "back-end" date for measuring damages.* The proposed instruction falsely states (lines 9-10) that CPH's expectations of the stock's value must be measured against the "actual value of the stock on the same date - that is, the date of the transaction." CPH was legally barred from selling the stock on the "date of the transaction." As the Court held in the February 15, 2005 Order on Morgan Stanley's Motion *in Limine* No. 16, Ex. F; the February 15, 2005 Order on CPH's Motion *in Limine* No. 19, Ex. G; and the March 28, 2005 Order on CPH's Motion *in Limine* No. 27, Ex. H, the proper date on which to measure CPH's damages is the date on which it could have sold the Sunbeam stock. *See also Silverberg v. Paine, Webber, Jackson & Curtis, Inc.*, 710 F.2d 678, 686 (11th Cir. 1983) (applying Florida law and approving jury instruction stating in part that the "elements which you should consider in arriving at the amount of money damages which will constitute fair and adequate compensation for the loss or damages allegedly incurred include the difference between the purchase price paid for the Posi-Seal stock purchased by the plaintiff and the price at which such stock was or could have been sold by the plaintiff when he learned of the alleged fraud") (emphasis added). The sentence at lines 9-10 should be deleted and replaced with the second factor in **CPH's Proposed Instruction No. 12**. The sentence at lines 15-16 should be deleted as well.

CPH's Proposed Instructions Nos. 12 and 13 state the law correctly and should be given instead.

Morgan Stanley's Proposed Supplemental Instruction No. 24: CPH objects to the proposed instruction on several grounds.

1. *Misstates the law on legal causation.* The instruction falsely states that CPH may only recover for losses that "directly" resulted from the fraud, and not recover for damages caused by "other" factors, without differentiating between foreseeable and unforeseeable "other" causes. A jury hearing this proposed instruction is likely to be misled into believing that CPH may not recover for losses of which the fraud was one of several causes, where the causes other than the fraud were foreseeable. Under Florida law, a tort need not be the only cause of damages to be a legal cause thereof, so long as any other contributing causes are foreseeable. Only unforeseeable intervening causes will break the causal chain. FLORIDA STANDARD JURY INSTRUCTION IN CIVIL CASES 5.1 (2003) correctly expresses this concept. **CPH's Proposed Instruction No. 10** tracks the relevant language from the pattern and should be given instead.
2. *Argumentative.* The phrase "such as changes in general market conditions, industry-specific or firm-specific conditions, or actions by other actors unrelated to the fraud" is not only an incorrect statement of the law (see first objection, above), it is also argumentative and improperly comments on the evidence. The phrase should be deleted, as it suggests to the jury that the Court believes CPH's damages were caused by those specific factors rather than the fraud.

Morgan Stanley's Proposed Supplemental Instruction No. 25: CPH objects to the instruction as a misstatement of Florida law and contrary to the Court's prior orders. Where CPH was unable to sell its Sunbeam stock, the stock's subsequent slide into bankruptcy is relevant to determining the full amount of losses suffered by CPH and caused by the fraud. *See supra*, CPH's third objection to Morgan Stanley's Proposed Supplemental Instruction No. 23.

Morgan Stanley's Proposed Supplemental Instruction No. 26: CPH objects to the proposed instruction as misstating the burden of proof. The proposed instruction may mislead the jury into believing that CPH is not entitled to damages at all if the amount of damages cannot be shown with precision and certainty. This is especially confusing in that the jury will likely be given an instruction modeled on Florida STANDARD JURY INSTRUCTION IN CIVIL CASES NO. 6.1 (2003) immediately prior to the damages instruction, such that repetition of the burden of proof, framed in a way more skewed toward Morgan Stanley, is likely to confuse the jury as the burden of proof on damages. The jury should award an amount of damages that the greater weight of the evidence shows will fairly and adequately compensate CPH for its losses, so long as there is some reasonable measure by which those losses can be estimated. **CPH's Proposed Instruction No. 13** contains appropriate language and should be given instead.

Morgan Stanley's Proposed Supplemental Instruction No. 27: CPH objects to the proposed instruction on several grounds.

1. *Misstates the law on when duty to mitigate arises.* The proposed instruction, which states that a plaintiff has a duty not only to "reduce" the harm but also to "prevent" or "avoid" suffering loss from a fraud (lines 4, 5), is designed to mislead the jury into believing that CPH's recovery should be reduced if it failed to exercise due care that might have led to discovery of the fraud — a proposition that Florida law rejects, and that this Court has rejected in this case. *See* Ex. A, April 5, 2005 Order on Limiting Instruction on Reliance.
2. *Argumentative.* As written, the proposed instruction is highly argumentative. It fails to make clear that Morgan Stanley bears the burden of proof, and, by stating that CPH

"was required" (line 4) to mitigate its damages, suggests to the jury that CPH was remiss in some way.

3. *Unnecessary.* **CPH's Proposed Instruction No. 12**, by building the date at which CPH could have sold the Sunbeam stock into the benefit-of-the-bargain calculation, renders any separate instruction on the supposed duty to mitigate unnecessary.

4. *Contrary to Court's order on hedging.* The only evidence presented at trial so far on CPH's purported failure to mitigate its damages relates to the fact that CPH declined to "hedge" its investment in Sunbeam. As the Court has already ruled, there is no duty to mitigate damages by hedging. *See* Ex. I, April 15, 2005 Order on Morgan Stanley's Statement on the Relevance of Hedging to Mitigation; Ex. G, February 15, 2005 Order on CPH's Motion *in Limine* No. 19 to Exclude Portions of Mark Grinblatt's Expert Testimony. As Morgan Stanley has failed thus far to lay any other evidentiary predicate for a mitigation-of-damages instruction, no instruction on mitigation of damages should be given at all, and **CPH's Proposed Supplemental Instruction No. 5** should be given instead.

Morgan Stanley's Proposed Supplemental Instruction No. 28: CPH objects to this instruction as unnecessary. Under the Florida Standard Jury Instructions in Civil Cases, as well as **CPH's Proposed Instruction No. 11**, which should be given instead, the jury is already instructed before the damages instructions that it should not award any damages if it finds for Morgan Stanley.

Morgan Stanley's Proposed Supplemental Instruction No. 29: CPH objects to the proposed instruction as irrelevant and legally incorrect. Reliance and damages do not need to be

proved by clear and convincing evidence to establish an entitlement to punitive damages under Florida law.

Morgan Stanley's Proposed Supplemental Instruction No. 30: CPH objects to the proposed instruction as incomplete. In the second sentence, after "the evidence that has been received," the phrase, "the established facts that I read to you at the beginning of the trial, " should be added.

Morgan Stanley's Proposed Supplemental Instruction No. 31: No objection.

Morgan Stanley's Proposed Supplemental Instruction No. 32: CPH objects to the proposed instruction as unnecessary. To the extent the jury should be instructed that a corporation acts through its agents, the only relevance of that principle to Phase I of the trial relates to reliance by a corporation, and **CPH's Proposed Supplemental Instruction No. 2** better expresses that concept in context.

Morgan Stanley's Proposed Supplemental Instruction No. 33: CPH objects to the proposed instruction as unnecessary. Morgan Stanley's corporate liability is established, and there is no issue in this case of any defense by Morgan Stanley that its agents were acting ultra vires when they defrauded CPH.

Morgan Stanley's Proposed "Additional Instruction A1" and "Additional Instruction A2": Without waiving any other objections CPH may have to the proposed instructions, CPH objects to both instructions on the grounds that they submit to the jury's determination facts that have already been established in advance of trial.

OBJECTIONS TO MORGAN STANLEY'S PROPOSED VERDICT FORMS

Morgan Stanley's Proposed Verdict Form No. 1: CPH objects to the proposed verdict form on several grounds:

1. *Improper interrogatory on justifiable reliance.* Justifiable reliance is not an element of fraud under Florida law, and to the extent the jury is tasked with deciding that the falsity of Sunbeam's and Morgan Stanley's statements was not obvious or actually known to CPH, that question is better addressed through the reliance element, rather than artificially divided into a "justifiable reliance" element designed to confuse the jury into injecting a contributivey negligence defense into the case. *See supra* CPH's second objection to Morgan Stanley's Proposed Supplemental Instruction No. 7.

2. *Artificially creates multiple hurdles.* By having both a special interrogatory on loss causation and incorporating legal cause into the damages question, the verdict form asks the jury the same question twice — whether CPH suffered losses of which the fraud was the legal cause. This artificial division is designed to confuse the jury and imply that these questions are separate hurdles CPH must clear. The verdict form should simply ask once, as part of the damages question, what damages CPH suffered of which the Sunbeam/Morgan Stanley fraud was the legal cause.

3. *Improper interrogatory on waiver.* Morgan Stanley is not entitled to present to the jury an affirmative defense of waiver. The facts alleged by Morgan Stanley in its answer and in its proposed instructions are legally insufficient to constitute waiver, and it has not yet laid an evidentiary predicate on which a defense of waiver might be based. *See supra*, CPH's objections to Morgan Stanley's Proposed Supplemental Instruction No. 19.

Morgan Stanley's Proposed Verdict Form No. 2: CPH objects to the proposed verdict form on several grounds:

1. *Improper interrogatory on justifiable reliance.* Justifiable reliance is not an element of fraud under Florida law, and to the extent the jury is tasked with deciding that the falsity of Sunbeam's and Morgan Stanley's statements was not obvious or actually known to CPH, that question is better addressed through the reliance element, rather than artificially divided into a "justifiable reliance" element designed to confuse the jury into injecting a contributivey negligence defense into the case. *See supra* CPH's second objection to Morgan Stanley's Proposed Supplemental Instruction No. 7.
2. *Artificially creates multiple hurdles.* By having both a special interrogatory on loss causation and incorporating legal cause into the damages question, the verdict form asks the jury the same question twice — whether CPH suffered losses of which the fraud was the legal cause. This artificial division is designed to confuse the jury and imply that these questions are separate hurdles CPH must clear. The verdict form should simply ask once, as part of the damages question, what damages CPH suffered of which the Sunbeam / Morgan Stanley fraud was the legal cause.
3. *Improper interrogatory on waiver.* Morgan Stanley is not entitled to present to the jury an affirmative defense of waiver. The facts alleged by Morgan Stanley in its answer and in its proposed instructions are legally insufficient to constitute waiver, and it has not yet laid an evidentiary predicate on which a defense of

waiver might be based. *See supra*, CPH's objections to Morgan Stanley's Proposed Supplemental Instruction No. 19.

4. *Improper interrogatory on punitive damages issues.* Reliance and causation need not be proved by clear and convincing evidence to establish an entitlement to punitive damages, and even if they were, having the jury decide those issues without context in Phase One, before CPH has had an opportunity to present relevant Phase Two evidence, is improper.

5. *Unnecessary and repeated references to burden of proof.* The jury should be tasked with deciding all issues in Phase One by the greater weight of the evidence, which will already have been adequately explained to the jury through the jury instructions. No matters should be submitted to the jury in Phase One by any other standard of proof. Therefore, the repeated references to the greater weight of the evidence in the proposed verdict form are unnecessary.

Morgan Stanley's Proposed Verdict Form No. 3: CPH objects to the proposed verdict form on several grounds:

1. *Improper division of CPH's claims.* There are no grounds on which a reasonable jury could find that CPH has proved one of its claims but not the other, as the remaining elements are identical for each claim on the evidence presented, and both CPH's and Morgan Stanley's requested jury instructions ask the jury to decide both claims together. The jury should therefore not be tasked with reaching a separate verdict on each claim.

Improper interrogatory on waiver. Morgan Stanley is not entitled to present to the jury an affirmative defense of waiver. The facts alleged by Morgan Stanley in its answer and in its

proposed instructions are legally insufficient to constitute waiver, and it has not yet laid an evidentiary predicate on which a defense of waiver might be based. *See supra*, CPH's objections to Morgan Stanley's Proposed Supplemental Instruction No. 19.

Dated: May 7, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 7th day of May, 2005.

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11164 v1

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER
(LIMITING INSTRUCTION ON RELIANCE)

THIS CAUSE came before the Court April 4, 2005 on the proposed limiting instructions on the reliance issues, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Court shall read the attached instruction when testimony or evidence about CPH's due diligence, or lack thereof, is placed before the jury.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 5th day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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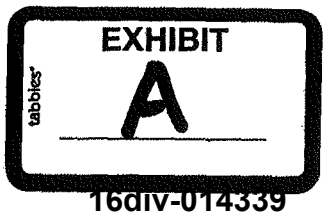


STATEMENT

Under Florida law, a recipient of a intentional misrepresentation may rely on it, without conducting any investigation of his own. A person who deliberately tells another something that is untrue should not be able to escape liability because the person he told believed him. Because of this rule, Morgan Stanley cannot claim that CPH could or should have investigated whether statements made to it were true. However, CPH may not recover for a misrepresentation if it actually knew that the misrepresentation was false or if its falsity was obvious, and it may not recover if it did not actually rely on the misrepresentation. Consequently, evidence about the investigation conducted by CPH may be relevant to your determination of whether CPH knew the statements by Sunbeam and Morgan Stanley were false or if their falsity was obvious, and whether CPH actually relied on any misrepresentation. Consequently, the evidence you are about to hear should be considered by you only for those issues.

IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 67

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Wednesday, April 13, 2005

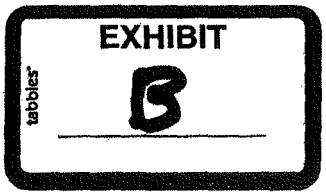
Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

8:00 a.m. to 12:00 p.m.



MR. HANSEN: Pardon me, Your Honor, was there another matter?

THE COURT: No, at some point, and I don't know if it's going to be implicated in today's testimony or not, two things and they're related. One is at some point I need to give some more thought, before it gets implicated, to the 450 million dollar valuation. And I don't know if we're going get to that or not.

Related to that, it struck me yesterday the Power Point presentation from yesterday morning I don't think got marked.

Did we want it marked or not for identification?

MR. HANSEN: We should mark it for identification.

THE COURT: I have my copy. We can make a photocopy of it.

Okay, back to where we were. Reliance.

MR. HANSEN: Your Honor, yesterday Plaintiffs handed up a proposed short form instruction.

THE COURT: This is your proposed?

MR. HANSEN: This would be ours.

Not to be a broken record, but we would want

to reserve all rights in terms of the prior instruction, but if there were to be a short form instruction, we would think this represents a more accurate statement of the law than what Plaintiffs proposed to Your Honor.

THE COURT: You shared a copy of this with Plaintiff?

MR. HANSEN: I put a copy on Mr. Scarola's table before he arrived.

MR. SCAROLA: I do.

MR. SOLOVY: I was inquiring if they had another copy.

MR. HANSEN: Your Honor, I apologize, I did not hear the request.

MR. SOLOVY: Thank you.

MR. HANSEN: You're welcome.

THE COURT: This is sort of -- I mean, maybe we should discuss this sort of structurally. The instructions I think each of you gave me originally had one for whether it was relevant to the information that was in front of Coleman when it made its decision to say it knew this stuff was false or it was obvious, or, two, the fact that it didn't do an investigation showed it didn't really care. What I did was a single

instruction covering both.

What this does, and I don't -- I don't know that I have a problem with it -- it says, that is, whether CPH made its decision based on the statements, CPH did not actually rely or knew the statements were false or falsity were obvious or the information was simply disregarded. It's merging all of those into reliance.

Do we agree that that's an accurate way to describe it?

MR. HANSEN: Can I address that, Your Honor?

THE COURT: Sure.

MR. HANSEN: The accurate way to describe it is there is the legal question, then there's the defense theory of the case.

As a legal matter, Your Honor, I think that's entirely accurate. I think if you do not use the information, you don't rely on it, regardless whether you know it's false or not. In other words, somebody tells me something, I disregard it, I'm not actually relying.

THE COURT: I agree with that. The question is: Are you not relying on it if you know it's false? It's sort of common sense.

MR. HANSEN: We believe that is entirely consistent with Florida law, Your Honor. Just so I stress the point a little bit. The proof in this case I believe will be a combination of those elements. In other words --

THE COURT: I'm trying to figure out what you're telling me.

MR. HANSEN: What I'm telling you is Mr. Perelman, who is the relier, knew some things to be false, disregarded other things. In other words, I don't believe the defense theory of the case will be that Mr. Perelman knew everything that was said was false, whatever information was provided to him is still unclear exactly what that was. We will argue and we believe the evidence will support a defense theory that says some of it he knew was false, the rest of it did not matter to him, it was not something he relied upon. So he didn't have to go through the exercise of deciding whether was it true or not.

THE COURT: So it's not Morgan Stanley's position it was all one or the other?

MR. HANSEN: Could have been one or the other or both.

THE COURT: Okay.

MR. HANSEN: Then going to the germane point in terms of when we have to give this instruction, Your Honor indicated that we were trying to make a New York defense. I do not believe we're trying to make a New York defense. What we're trying to establish, and I think we did establish, through Dr. Emery, people in these transactions typically do undertake the investigation of facts that matter to them.

THE COURT: I think that's a fair argument. I don't want the jurors confused about the meaning of that evidence.

MR. HANSEN: I understand, but I want to be very clear, we will not argue to the jury or suggest to the jury that there was a duty to do something here, we will suggest that the duty to do what was ordinarily accepted suggested Mr. Perelman either knew the information was false or it wasn't important enough to him to have it checked out.

THE COURT: I think that's fair. First of all, what's the response to the concept it is accurate to say that CPH didn't rely on the statement that they knew they were false or the

falsity was obvious or they simply didn't rely on it?

MR. SCAROLA: Mark this in the transcript. I agree.

THE COURT: Okay.

MR. SCAROLA: May I suggest that the Defendant's statement is acceptable to us with this modification, focusing on the last sentence, "Consequently, the evidence you are about to hear should be considered by you only in determining those issues and not in determining whether you think CPH should have investigated the statements."

THE COURT: Well, that's -- I think that has the potential of misdirecting the jury. Because I mean, I think that's susceptible the interpretation that at some point they will consider that issue, we're just not asking them to consider it now.

MR. HANSEN: I --

THE COURT: What if we say, "Consequently, the evidence you're about to hear should be considered by you only for" -- rather than saying "those issues," -- "only on the issue of reliance" or something that -- so we're not sort

of speaking too cryptically to them?

MR. HANSEN: That would be acceptable to Defendant, Your Honor. Or to use Mr. Scarola's formulation, "only in determining the issue of reliance."

MR. SOLOVY: Actually I think Mr. Hansen's is better.

THE COURT: "Consequently, the evidence you are about to hear should be considered by you only in determining the issue of reliance."

MR. SOLOVY: Yes.

MR. SCAROLA: May I suggest a final modifier, and that would be since the quality of any investigation is not relevant.

THE COURT: Again, we already say that in the first two sentences. And we can certainly talk about whether we need that in the instructions.

MR. HANSEN: I would object to that, Your Honor.

THE COURT: Okay.

MR. SCAROLA: As I began to explain when I proposed our earlier short form, because you will note that Defendant's short form is really not much shorter than the long form. It is a

different statement of the long form, but it is not much shorter.

THE COURT: I think it takes out the one sentence that he found objectionable. I don't really care that much.

MR. HANSEN: It's about four sentences total, Your Honor, it's not very long. The one we've done is --

THE COURT: You combined the reliance stuff into one. But I think the sentence you found most objectionable "Because of this rule, Morgan Stanley cannot claim," and I think that's a sentence you omitted.

MR. HANSEN: We did omit that, Your Honor.

MR. SCAROLA: My request is that we use the Defendant's statement from time to time, we use the Plaintiff's statement from time to time and include the last paragraph, actually, the last sentence since it's a one-sentence paragraph. And that would enable us, where a series of questions relate to the same subject matter that must be considered only for a limited purpose, of being able to tell the jury that "the limiting instruction on reliance that I have just given you applies to the response to this

question as well," without having to repeat it over and over again.

THE COURT: Hold on one second.

MR. HANSEN: I don't want to interrupt Your Honor, but I want to be heard on that.

THE COURT: Sure. Let me ask you this. What would be either side's objections if we take Defendant's proposed instruction with the addition we just spoke about, took that last part of Plaintiff's short form, added that on the end, just use this as the long instruction and then periodically just say: Remember that instruction on reliance we spoke about? It applies again.

MR. HANSEN: I don't believe we would have an objection to that, Your Honor.

THE COURT: Okay.

MR. SCAROLA: We still request that these instructions be alternated because I think that they --

THE COURT: The problem I have with Plaintiff's short is, again, that only talks to half of the equation. And I was trying to come up with one that addressed both.

MR. SCAROLA: I'm not sure which half, which

part we're missing.

THE COURT: Your proposed short form instruction only talks about sort of whether they knew they were false or the falsity was obvious. It doesn't talk about whether the failure to make an investigation shows they didn't rely.

MR. HANSEN: Also, Your Honor, I have a concern that if we use different formulations of this it will be very confusing to the jury. If we're wrong, it needs to be modified, obviously, it can be done. We need to hash it out.

THE COURT: I just have to remember where my instruction is.

MR. SCAROLA: Since Defendant has agreed to the inclusion of our last paragraph in their instruction, I would assume that it is necessary for me, with respect to every question that is going to elicit information which we believe implicates this reliance instruction, to request that the instruction be given each time that question is asked.

THE COURT: Could we not do it -- I mean, when we're talking about a single subject matter wouldn't it -- I mean, I --

MR. SCAROLA: I only want to abide by the Court's concern that I not request the instruction after the evidence is in.

THE COURT: I understand.

MR. HANSEN: I have a proposal, very practical way of doing this, which comports with the rules and our rights. First of all, I do want to make clear we proposed this instruction --

THE COURT: Because I asked you to.

MR. HANSEN: You asked us to and we're trying to be cooperative. But we don't believe -- in other words, we're not waiving any rights. Your Honor precisely said before by doing such we're not waiving any rights, and all our objections are preserved.

Second of all, the proper process is, the first time a question comes up that raises this subject, I would expect Mr. Scarola to raise his objection -- because only if it is objectionable would the instruction be called for -- the Court listen to the objection. If you believe that the question called this subject into issue, you would then in your discretion give either the proposed modified instruction or the long form.

I guess we would call this --

THE COURT: The short form is, remember that instruction on limiting reliance I gave you before.

MR. HANSEN: I would expect there would not have to be endless objections, because the instruction would cover the subject area, so I don't believe there has to be the same objection.

THE COURT: I think that's correct provided what we're talking about is a single set of facts being elicited by multiple questions. If there's a break and we move on to something else and we come back, I think you probably need to lodge the objection.

MR. SCAROLA: If that is to be the case -- and I have no problem with that -- we just need to rely upon opposing counsel to tell us when he's moving into a new area so that Your Honor is able to tell the jury, the instruction I am giving you applies to the subject matter that we are about to discuss and the questions and answers that will be given with regard to that subject matter. When we move into a new area where that instruction no longer applies, we

will let you know that the instruction no longer applies.

MR. HANSEN: I object to that, Your Honor. I think it calls undue attention to it.

THE COURT: I don't think it's their obligation to flag the testimony.

MR. SCAROLA: Well, then I'm not sure how the jury knows where they start to apply this instruction and where they stop applying it, unless the instruction is given with regard to each question and answer.

THE COURT: No, I don't think that's fair. These jurors are following the testimony. If you pose the question, it becomes -- it's reasonably apparent to me the instruction is implicated. You ask for the instruction. I give it. Then there's a series of questions. They're smart enough they're going to know it applies to -- all we're talking about is investigation that was or was not conducted by CPH.

MR. SCAROLA: As long as the defense is in agreement with that procedure, that's fine.

THE COURT: Okay. Well, I think we're going to have to try it and see how it goes.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

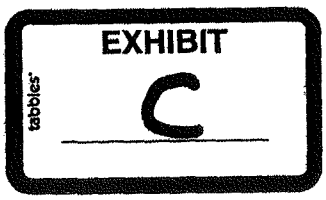
ORDER ON MORGAN STANLEY & CO., INCORPORATED'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court January 21, 2005 on Morgan Stanley & Co., Incorporated's Motion for Summary Judgment, with both parties well represented by counsel.

This case arises out of an acquisition transaction that was negotiated and consummated in late 1997 and early 1998, in which Coleman (Parent) Holdings, Inc. ("CPH"), sold its 82% interest in the Coleman Company, Inc. ("Coleman"), to Sunbeam Corporation ("Sunbeam"). Morgan Stanley & Co., Inc. ("MS & Co."), served as financial advisor to Sunbeam for parts of the acquisition transaction and served as the lead underwriter for a $750,000,000 debenture offering that Sunbeam used to finance the acquisition.

CPH's Complaint alleges claims against MS & Co. arising from this transaction for fraudulent misrepresentation, negligent misrepresentation, aiding and abetting fraud, and conspiracy, and seeks damages of at least $485 million.

By the time of the hearing, MS & Co. had distilled the material facts it believes are not disputed to three:



1. Ronald Perelman[1] controls CPH and is a sophisticated investor who was aided by sophisticated advisors.
2. Perelman would not have proceeded with the transaction had he known of the content of the comfort letters; the comfort letters, in turn, merely restated information contained in the interim financial statements.
3. CPH and its advisors closed the transaction without looking at Sunbeam's interim financial statements, which they had a contractual right to inspect.

From these facts MS & Co. argues that CPH is a sophisticated investor; that it had a right to review the interim financials, which it failed to exercise; that had it exercised that right it would have discovered the adverse performance reflected in the comfort letters; if it had, it would not have closed the transaction; and that its reliance on misstatements or omissions by MS & Co. cannot, as a matter of law, be reasonable "if it failed to avail itself of access to the very information that it accuses the defendant of misrepresenting or omitting." (MS & Co.'s Reply Memorandum, p.17).

CPH all but concedes it is a sophisticated investor aided by sophisticated advisors. It contends, though, that under New York law a claim for fraudulent misrepresentation by a sophisticated investor is precluded only if it failed to perform reasonable due diligence which, had it been completed, would have disclosed the discrepancy. It contends, further, that the Court should not grant summary judgment on isolated facts that could be presented to a jury out of context.

It is undisputed from the record that Perelman is a sophisticated investor under New York law, and that he controlled CPH. Consequently, CPH was required to use reasonable due diligence in investigating the transaction and may not recover for fraudulent misrepresentations the falsity of which would have been apparent had the proper investigation been completed. However, the Court has previously determined that New

---

[1]MS & Co. attempts to substitute Perelman for CPH throughout the Motion. While Perlman may control CPH, he is not CPH.

York law "engraft(s) a requirement that a party perform reasonable due diligence as to available information in order to prove that its reliance on a misrepresentation was reasonable." August 11, 2004 Order on Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc.'s Motion for Application of New York Law, p. 12. CPH was not required to use every available means to test Sunbeam or MS & Co.'s assertions. Rather, it was required to be reasonably diligent in investigating the transaction; obviously, that diligence was confined to the means available, and is a fact-sensitive inquiry. The Court cannot find, as a matter of law, that a failure to review the interim financial statements shows a lack of due diligence. Instead, whether CPH was reasonably diligent is a jury issue.

Under New York law, to recover for a negligent misrepresentation, CPH must show that it occupied a "special relationship" with MS & Co. MS & Co. argues that the record is devoid of evidence that such a relationship existed. CPH argues that it and its affiliated entities had enjoyed a long-term relationship with MS & Co.; that they had done over two dozen deals together; and that, indeed, MS & Co. exploited that relationship to restart negotiations after the disastrous December 1997 meeting between Perelman and Dunlap and in promoting the transaction to CPH. The Court agrees that there are disputed issues of material fact precluding summary judgment on the nature of CPH and MS & Co.'s relationship.

Based on the foregoing, it is

ORDERED AND ADJUDGED that Morgan Stanley & Co., Incorporated's Motion for Summary Judgment is Granted, in part, and Denied, in part. CPH is determined to be a sophisticated investor under New York law. In all other respects, the Motion is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 1 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

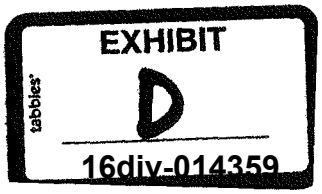
MORGAN STANLEY'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S FIRST AMENDED COMPLAINT

Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") answers and affirmatively defends Plaintiff Coleman (Parent) Holdings Inc.'s ("CPH's") First Amended Complaint by denying generally that Morgan Stanley engaged in any conspiracy to defraud, that Morgan Stanley assisted Sunbeam Corporation ("Sunbeam") or any employee, director or agent of Sunbeam in the commission of a fraudulent scheme, or that Morgan Stanley otherwise defrauded CPH in any manner. Specifically, Morgan Stanley responds to CPH's allegations as follows:

Nature of the Action

1. Morgan Stanley denies the allegations in Paragraph 1.

2. Morgan Stanley admits that, beginning in mid-1997, Morgan Stanley served as an investment banker for Sunbeam. Morgan Stanley admits that it attempted to identify a party interested in purchasing Sunbeam, and that those efforts were ultimately unsuccessful. Morgan Stanley admits that it recommended that Sunbeam's management consider acquiring other companies instead and suggested, as is common in corporate mergers and acquisitions, that Sunbeam consider, among other options, using Sunbeam stock as part of the consideration for such an acquisition. Morgan Stanley admits that it facilitated communications between Sunbeam



First Affirmative Defense

CPH's alleged claims are barred, in whole or in part, by the doctrine of waiver. In particular, CPH contractually waived its alleged claims when it agreed in Section 12.5 of the Merger Agreement and Section 10.4 of the Company Merger Agreement that the Agreements contained the entire agreement and understanding between CPH and Sunbeam and that the provisions of the Agreements superseded "all prior agreements and understandings, oral or written" with respect to the subject of the Agreements. (Merger Agmt. § 12.5; *see* Company Merger Agmt. § 10.4 (Ex. 6).)

Additionally, CPH waived its alleged claims when CPH failed to exercise its contractual rights under the Merger Agreement and Company Merger Agreement to examine Sunbeam's books, records, and facilities and then failed to invoke the "material adverse effect" clause of the Merger Agreement. CPH failed to make a reasonable inquiry into information concerning Sunbeam's financial statements, results of operations, projections, facilities, and business plans (hereinafter "Sunbeam Information") after signing the Merger Agreement and Company Merger Agreement, after Sunbeam issued its March 19, 1998 press release, and before CPH accepted over 14 million shares of Sunbeam common stock as partial consideration for the sale of its interest in Coleman. CPH then failed to invoke Section 8.2(c) of the Merger Agreement, a remedy available solely to CPH, thereby permitting the transaction to close and waiving its alleged claims.

Second Affirmative Defense

CPH's alleged claims are barred, in whole or in part, by the doctrine of estoppel. In particular, CPH, is estopped from asserting its claim for the following reasons.

(a) By virtue of the customs and practices in the New York financial markets observed in connection with the negotiation of mergers and acquisitions among sophisticated

WHEREFORE, Morgan Stanley denies that CPH is entitled to any relief whatsoever, and to the extent that CPH should recover any damage award, that award should be offset by CPH's failure to take appropriate steps to mitigate its damages, CPH's own equal fault, the comparative fault of third parties, and the settlements that CPH has already received. Morgan Stanley respectfully requests that the Court enter judgment for Morgan Stanley dismissing the complaint with prejudice, and grant such other and further relief as may be just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile on this 7th day of March 2005.

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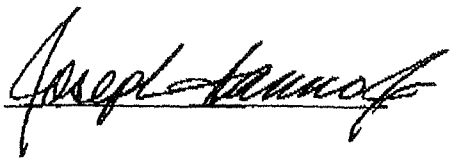
BY: 

Counsel for
Morgan Stanley & Co. Incorporated

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON PLAINTIFF'S MOTION IN LIMINE NO. 25 FOR A FINDING AS A MATTER OF LAW THAT THE EXCULPATORY AND INTEGRATION CLAUSES RAISED BY MORGAN STANLEY ARE INEFFECTIVE TO BAR INTENTIONAL-TORT CLAIMS

THIS CAUSE came before the Court March 24, 2005 on Plaintiff's Motion in Limine No. 25 for a Finding as a Matter of Law that the Exculpatory and Integration Clauses Raised by Morgan Stanley are Ineffective to Bar Intentional-Tort Claims, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted. The exculpatory language in the purported February 23, 1998 Confidentiality Agreement; the integration clause in the CPH Merger Agreement; and the exculpatory and nonreliance language of the Debenture Offering Memorandum do not bar CPH's claims for intentional torts, as a matter of law. This ruling is without prejudice to either party's right to argue that the clauses may be relevant for some other purpose.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 24 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

EXHIBIT
tabbies
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16div-014363

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

ORDER ON Defendant's **MOTION IN LIMINE NUMBER** 16

THIS CAUSE having come before this Court on February 15, 2005 upon Defendant's Motion in Limine Number 16, and the Court having reviewed the pleadings on file, heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is granted in part and denied in part. Dr. Nye may not testify that the value of the stock received by Plaintiff should be valued as of a date other than the close date without Plaintiff first establishing a predicate that would allow a reasonable juror to conclude that Plaintiff could not have disposed of its interest in the stock prior to that date, as a legal or practical matter.

WPB#589635.1

EXHIBIT
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"Granted" for purposes of the Motion in Limine addressed in this Order shall mean that the parties and their counsel shall not refer to or attempt to introduce into evidence, or otherwise place before the jury, the matter referred to without first proffering the good faith basis to believe that the matter is relevant and admissible outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 15 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

WPB#589635.1

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

/

ORDER ON Plaintiff's **MOTION IN LIMINE NUMBER** 19

THIS CAUSE having come before this Court on February 15, 2005 upon Plaintiff's Motion in Limine Number 19, and the Court having reviewed the pleadings on file, heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is granted, in part, and denied, in part. Pltf. Prof. Grinblatt may not testify concerning the value of the Coleman stock received by Sunbeam. He may testify to the value of the Sunbeam stock as of March 31, 1998, based on its value as of May 26, 1998, provided there is a sufficient evidentiary predicate laid that would allow a reasonable juror to conclude that the fraud MS&Co. conspired with or aided and abetted Sunbeam to commit was ~~only~~ limited to the interim 1998 financial statements, ~~and~~ Prof. Grinblatt shall

WPB#589635.1

EXHIBIT
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be examined outside the jury's presence prior to testifying as to the availability of a secondary market for the securities and the ability to hedge to establish ~~a~~ whether he had a sufficient basis to establish those predicate facts. See Fla. Stat. §90.705(2). If he is permitted to testify as to the effects of the ability to hedge on the value of the stock, he may not testify or imply to the jury that Plaintiff had the obligation to enter into such a transaction. Finally, Mr. Prof. Grinblatt may not testify that he was previously retained by Plaintiff's counsel.

"Granted" for purposes of the Motion in Limine addressed in this Order shall mean that the parties and their counsel shall not refer to or attempt to introduce into evidence, or otherwise place before the jury, the matter referred to without first proffering the good faith basis to believe that the matter is relevant and admissible outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 15 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

WPB#589635.1

Copies furnished to:

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

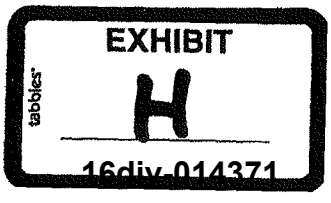
MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON PLAINTIFF'S MOTION IN LIMINE NO. 27 FOR A FINDING AS A MATTER OF LAW THAT THE FEDERAL SECURITIES LAWS PROHIBITED PLAINTIFF FROM SELLING UNREGISTERED SUNBEAM STOCK

THIS CAUSE came before the Court March 24, 2005 on Plaintiff's Motion in Limine No. 27 for a Finding as a Matter of Law that the Federal Securities Laws Prohibited Plaintiff from Selling Unregistered Sunbeam Stock, which the Court elects to treat as including a Motion to Compel Required Pre-Trial Disclosure, with both parties well represented by counsel. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Plaintiff's Motion in Limine No. 27 for a Finding as a Matter of Law that the Federal Securities Laws Prohibited Plaintiff from Selling Unregistered Sunbeam Stock is Granted, in part. The Court concludes that, as a matter of law, the restricted Sunbeam stock received by CPH in the transaction under review could not be sold by CPH under Rule 144A; and that, as a matter of law, under Rule 144, CPH could sell no more than one million shares per quarter, beginning November 25, 1999. It is further

ORDERED AND ADJUDGED that CPH's Motion to Compel is Granted. Within 5 business days, CPH shall serve its supplemental disclosure, detailing facts or opinions to be testified to or supported by documentary evidence to support its position that the Sunbeam shares could not have been sold by CPH, as a matter of fact and as a matter of law, prior to the shares' having become worthless in the market place. MS & Co. shall serve its



supplemental disclosure, detailing facts or opinions to be testified to or supported by documentary evidence to support its position that the Sunbeam shares could have been sold by CPH, as a matter of fact and as a matter of law, prior to the shares' having become worthless in the marketplace. These disclosures are without prejudice to either side's right to seek to have evidence excluded consistent with the disclosures at trial. No expert may testify as to damages based on the value of the Sunbeam stock as of a specific date without first seeking a ruling from the Court that a sufficient evidentiary predicate to support a conclusion that the stock could be sold as of the date to be used has been laid.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 28 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER

THIS CAUSE came before the Court April 15, 2005 on Morgan Stanley's Statement on the Relevance of Hedging to Mitigation, which the Court elects to treat as including a Motion for Rehearing on the Court's February 15, 2005 Order on Plaintiff's Motion in Limine Number 19, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion for Rehearing on the Court's February 15, 2005 Order on Plaintiff's Motion in Limine Number 19 is Denied. MS & Co. may not contend that CPH had a duty to hedge to attempt to mitigate its damages once the fraud was disclosed. First, the Court concludes that there is no legal obligation to enter into a hedging transaction to mitigation damages. Second, even if there were, such a defense would require expert opinion, and no such expert opinion was timely disclosed.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 15 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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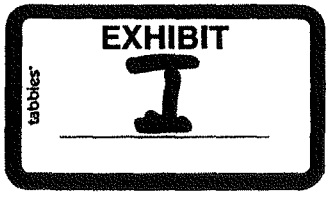

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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON PLAINTIFF'S ORE TENUS MOTION TO CLARIFY

THIS CAUSE came before the Court April 4, 2005 on Plaintiff's ore tenus Motion to Clarify, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Plaintiff's ore tenus Motion to Clarify is Granted. MS & Co. shall serve the disclosure required by the March 28, 2005 Order on Plaintiff's Motion in Limine No. 27 for a Finding as a Matter of Law that the Federal Securities Laws Prohibited Plaintiff from Selling Unregistered Sunbeam Stock, within 3 business days of service of CPH's disclosure upon it, unless MS & Co. makes reference during opening statement to damages based on a date by which the stock could be sold, in which ever the disclosure shall be made by 5:00 p.m. April 5, 2005.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 5 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: April 6, 2005

TIME: 8:00 a.m.

JUDGE: Honorable Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

Coleman (Parent) Holdings Inc.'s Motion To Strike Untimely Objections to CPH Exhibits

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 5th day of April, 2005.

JEFFREY T. SHAW

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9966

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: April 6, 2005

TIME: 8:00 a.m.

JUDGE: Honorable Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

CPH's Motion *In Limine* No. 32 To Bar References to Plaintiff's Failure To Retain E-Mails As "Litigation Misconduct"

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 5th day of April, 2005.

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CPH'S MOTION *IN LIMINE* NO. 32 TO BAR REFERENCES TO PLAINTIFF'S FAILURE TO RETAIN E-MAILS AS "LITIGATION MISCONDUCT"

CPH hereby moves for an order barring counsel from Morgan Stanley from using the term "litigation misconduct" in the presence of the jury to refer to CPH's failure to retain e-mails until 2001. That term was used extensively by counsel for both parties during voir dire in reference to the Court's summary of Morgan Stanley's widely varied forms of misconduct designed to conceal evidence of its involvement in a conspiracy with Sunbeam. Counsel for Morgan Stanley in particular anticipated in dramatic terms the "litigation misconduct" that would soon be attributed to Morgan Stanley. Use of the same term to describe CPH's failure to shut off a routine and perfectly lawful process of recycling back-up tapes would both confuse the jury and improperly compare two widely disparate patterns of conduct.

During voir dire on March 30 and 31, counsel for Morgan Stanley used the term "litigation misconduct" literally dozens of times, all in reference to the misconduct of Morgan Stanley and the upcoming statement summarizing misconduct that the Court will read to the jury. *See* Tr. 5883, 5884, 5885, 5886, 5887, 5888, 5889, 5890, 5892, 5893, 5899, 5900, 5901, 5902,

5908, 5909, 5910, 5913, 5983, 6014, 6015, 6020, 6243, 6244, 6253, 6254, 6257, 6258. The Court itself used the term in the same manner, in the summary of how matters had changed in the case since the withdrawal of Kirkland & Ellis. Tr. 5881, 6239. Clearly, the jury will by now have the impression that the term connotes very serious and intentional misconduct that can lead to serious consequences.

CPH is concerned that Morgan Stanley will now try to transfer the "sting" of this term to CPH's own substantially different conduct in failing stop a practice of routine reuse of back-up tapes. That concern is heightened because the Court has ruled that Morgan Stanley can present that evidence in phase I of the trial, while the Court's summary of Morgan Stanley's vastly more extensive misconduct will not be read until phase II. For that reason, the term should not be used in the presence of the jury to refer to CPH's conduct.

Conclusion

For the foregoing reasons, the Court should rule that counsel for Morgan Stanley may not use the term "litigation misconduct" in front of the jury except in reference to Morgan Stanley's own conduct.

Dated: April 5, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

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One of Its Attorneys

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CERTIFICATE OF SERVICE

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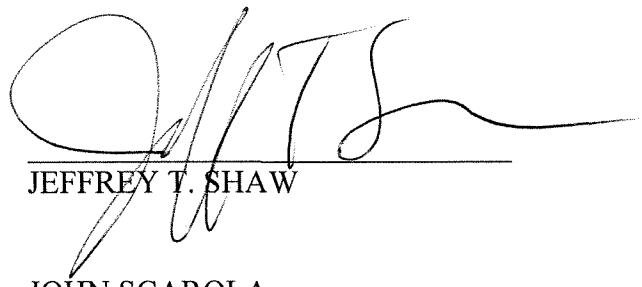

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THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: April 6, 2005

TIME: 8:00 a.m.

JUDGE: Honorable Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

Plaintiff's Motion To Define The Scope Of Notices To Produce Regarding Expert Billing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 5th day of April, 2005.

JEFFREY T. SHAW

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO. 2003CA 005045 AI

PLAINTIFF'S MOTION TO DEFINE THE SCOPE OF NOTICES TO PRODUCE REGARDING EXPERT BILLING

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") hereby moves to define the scope of the parties' mutual obligation to respond to notices to produce at trial relating to the hours worked and fees billed by damage experts. As shown in this motion, CPH requests that the Court direct the parties to produce documents showing the total number of hours worked and the fees and expenses billed by the damage experts and their supporting organizations. CPH contends that neither party should be required to produce detailed record showing the specific tasks performed by specific individuals.

Notices To Produce

1. Morgan Stanley served an amended notice to produce requesting CPH to produce documents sufficient to establish (1) "the total number of hours Dr. Nye and Stanford Consulting have worked" on this matter; and (2) "the total fee for which Dr. Nye and Stanford Consulting" have requested or will request payment. Dr. Nye is CPH's damage expert. Stanford Consulting is a company owned by Dr. Nye. Various employees of Stanford Consulting assisted Dr. Nye in

preparing his report in this matter. In addition, those individuals have answered questions raised by plaintiff's counsel.

2. CPH served a similar notice to produce requesting Morgan Stanley to produce documents sufficient to establish (1) "the total number of hours Dr. Grinblatt has worked" on this matter; and (2) "the total fee for which Dr. Grinblatt" has requested or will request payment. Dr. Grinblatt does not have any employees who have assisted him on this matter. Instead, as he states in his report and has testified, Dr. Grinblatt has been assisted in the preparation of his report and in preparing to testify by employees of Bates White LLC, an economic consulting firm. It is CPH's understanding that Bates White has assisted Dr. Grinblatt in much the same manner that employees of Stanford Consulting have assisted Dr. Nye. Thus, CPH requested Morgan Stanley to produce documents sufficient to establish about Bates White the same information that Morgan Stanley seeks about Stanford Consulting — "the total number of hours Bates White has worked" and "the total fee for which Bates White has requested or will request payment."

3. In an effort to avoid a dispute about the scope of these notices, on April 2, 2005, CPH wrote counsel for Morgan Stanley and suggested that the parties interpret the requests to require the parties to provide summary information that would show the hours worked and fees and expenses billed by Dr. Grinblatt, Dr. Nye, and their staffs (Stanford Consulting and Bates White). *See* Ex. A. CPH does not believe the parties should be required to produce billing information or other records that would identify specific tasks performed by individuals. Not only is this information not needed to assess the financial motivation of the testifying witnesses, but the information may, depending upon its content, reveal work product or the impressions of counsel.

4. Morgan Stanley did not respond to the April 2, 2005 letter.

The Court Should Require Each Party to Produce The Same Information in Response to the Notices to Produce

5. Both sides having requested the information, it is certainly relevant. The billings of each side's testifying expert may show a financial motivation. Also, the amount of money spent by the parties to develop the opinions they will present at trial is relevant to show the efforts to which each side has gone to obtain favorable testimony, which relates to the opinion's credibility.

6. CPH brings this motion to assure that its production of documents sufficient to show the work done by employees of Stanford Consulting — other than Dr. Nye, will be reciprocated. CPH does not want to produce its information, and later learn that Morgan Stanley has refused to provide the information. In light of Morgan Stanley's refusal to respond to CPH's inquiries about the notices to produce, CPH has filed this motion to seek the Court's assistance.

WHEREFORE, CPH respectfully requests the Court to direct the parties to produce documents sufficient to show the number of hours worked and fees charged by Dr. Nye, Dr. Grinblatt, Stanford Consulting, and Bates White.

Dated: April 5, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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CERTIFICATE OF SERVICE

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10625

JENNER&BLOCK

April 2, 2005

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Re: ***Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.***

Dear Mark:

Since the parties have exchanged similar notices to produce at trial the hours worked and fees and expenses requested to date by the damages experts and their supporting organizations, I write to see if we might clarify and agree in advance of trial what information the parties will exchange.

I can see at least two issues that could arise with respect to the notices: first, should the parties exchange summary information or the underlying documents and, second, should the parties include the total number of hours and fees worked and charged by Stanford Consulting Group staff and Bates White staff, or should the parties attempt to segregate the work performed by the support staff that was directed to producing reports or otherwise supporting trial testimony.

Our view is that the parties should agree to exchange summary information, and that the exchanged summaries should include all the hours worked and fees and expenses billed by Dr. Grinblatt or Dr. Nye and the staff of their respective supporting organizations on this matter. We are interested in your views on these issues. Please contact me at your earliest convenience so that we may resolve this in advance of trial.

Very truly yours,

Michael T. Brody

MTB:ty
cc: Joseph Ianno, Jr., Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

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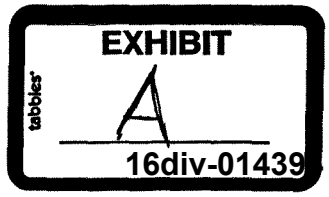

THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
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Plaintiff,

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NOTICE OF HEARING

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SPECIFIC MATTERS TO BE HEARD:

Plaintiff's Motion To Define The Scope Of Notices To Produce Regarding Expert Billing

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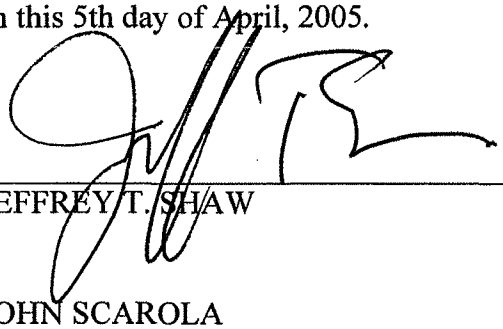

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THE FIFTEENTH JUDICIAL CIRCUIT
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COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

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TIME: 8:00 a.m.

JUDGE: Honorable Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

Coleman (Parent) Holdings Inc.'s Motion To Strike Untimely Objections to CPH Exhibits

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 5th day of April, 2005.

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO STRIKE UNTIMELY OBJECTIONS TO CPH EXHIBITS

Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, hereby requests that this Court enter an Order striking new and untimely objections to CPH trial exhibits that Morgan Stanley provided on Monday, April 4. In support of this motion, CPH states as follows:

1. This motion arises because Morgan Stanley has served untimely new objections to CPH trial exhibits that were identified long ago. In accordance with this Court's October 14, 2004 Scheduling Order, CPH identified its trial exhibits on January 10, 2005 and Morgan Stanley served its objections to those exhibits on February 10, 2005. Nonetheless, on April 4, 2005, Morgan Stanley served a new set of objections to CPH's previously disclosed exhibits — including a myriad of new objections that Morgan Stanley had not made before. *See* Ex. A (list of original exhibits listing February 10 objections and April 4 objections).

2. In light of this Court's recent sanctions rulings, certain "new" objections of relevance arguably may be appropriate or justified, but Morgan Stanley's new objections go far beyond that. Morgan Stanley's objections include new hearsay objections, fairness objections, and numerous other objections that should have been made months ago. Morgan Stanley's

failure to make those basic objections sooner has prejudiced CPH because CPH engaged in trial preparation in reliance on Morgan Stanley's prior objections. CPH is in no position at this late date to address the evidentiary issues raised by Morgan Stanley's tardy objections. All new objections to exhibits that were identified by CPH months ago — except for relevance objections that properly stem from this Court's recent sanctions rulings — therefore should be stricken.

Dated: April 5, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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10628 v1

CPH TRIAL EXHIBIT LIST
(Exhibit Order)

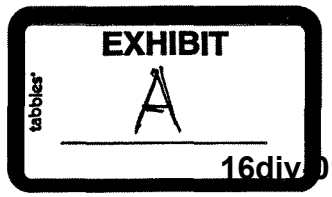
TRIAL EX #	BATES RANGE	DATE	ORIGINAL OBJECTIONS	REVISED OBJECTIONS
0006	CP 026286 - 026370	02/23/1998	HR, A, C	Hearsay, Foundation/Authenticity, Completeness
0007	CPH 1421272 - 1421343	03/19/1998	C	
0007A	CPH 1421272 - 1421443	03/19/1998		Completeness
0008	SASMF 10699 - 10705	03/09/1998	R	Relevance, Prejudicial
0011	MSC 0016944 - 0016945	03/19/1998	No Obj	
0014	MS 00375 - 00381	03/19/1998	No. Obj	Relevance
0019	CPH 0084462 - 0084532	10/16/1998	No. Obj	Relevance
0030	MSC 0029176	03/19/1998	No. Obj	Relevance
0033	CPH 0639323 - 0639327	04/03/1998	No Obj.	Relevance (as to cover)
0066	MSC 0003894 - 0003930	09/11/1997	A, C (added 03.02)	Hearsay, Relevance, Foundation/Authenticity, Completeness
0067	SB 237825 - 237830	09/05/1997	No Obj.	Relevance
0068	MSC 0005984 - 0005995	10/23/1997	No Obj.	Relevance
0071	MSC 0080356 - 0080358	03/05/1998	No Obj	Relevance
0072	SB 0018202 - 0018288	03/15/1998	HR, C	Relevance, Foundation/Authenticity, Hearsay, Completeness
0073	MSC 0025829 - 0025886	03/19/1998	No Obj	Hearsay, Relevance

R - Relevance and/or unduly burdensome HR - Hearsay A - Authenticity document A (HW) - Authenticity with respect to handwriting on

A (MD) - Authenticity with respect to metadata or print page included with document

C - Completeness - documents are either missing pages or have extra/improper pages included (see Completeness Problems column)

U - Untimely



CPH TRIAL EXHIBIT LIST
(Exhibit Order)

TRIAL EX #	BATES RANGE	DATE	ORIGINAL OBJECTIONS	REVISED OBJECTIONS
0081	MSC 0033255 - 033263	03/05/1998	A (MD)	Relevance, Foundation/Authenticity (Metadata)
0087	MSC 0083960 - 0084026	02/27/1998	No Obj	Relevance
0088	CPH 1332631 - 1335633	02/27/1998	No Obj.	Relevance
0098	MSC 0062860 - 0062896	03/12/1998	HR, R, A	Hearsay, Relevance, Foundation/Authenticity
0111	CPH 0129613 - 0129616	03/25/1998	No Obj	Relevance
0128	CPH 0251869 - 0251889	03/15/1998	HR	Hearsay, Relevance
0134	CPH 1411216 - 1411300	02/01/1998	HR, A	Hearsay, Foundation/Authenticity
0142	MSC 0080325 - 0080333	03/31/1998	No Obj	Relevance
0149	CPH 1346133 - 1346250	06/01/1998	No Obj	Misleading
0150	CPH 1346276 - - 1346342	06/09/1998	C	Misleading, Completeness
0151	MSC 0018702 - - 0018703	06/11/1998	HR	Misleading, Prejudicial, Hearsay
0155	MSC 0026888 - 0026891	06/21/1998	HR, R	Hearsay, Relevance, Misleading
0158	MSC 0044556 - 0044573	02/17/1998	No Obj	Relevance
0171	CP 0254621 - 0254640	02/23/1998	No Obj	
0209	CPH 1121203 - 1121259	12/17/1997	No Obj	Hearsay, Relevance
0212	CPH 1416194 - 1416213	02/25/1998	No Obj	

R - Relevance and/or unduly burdensome HR - Hearsay A - Authenticity document A (HW) - Authenticity with respect to handwriting on

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CPH TRIAL EXHIBIT LIST
(Exhibit Order)

TRIAL EX #	BATES RANGE	DATE	ORIGINAL OBJECTIONS	REVISED OBJECTIONS
0226	MSC 0024863	00/00/0000	R	Relevance
0233	CPH 0473148 - 0473165	10/09/1997	No Obj	Hearsay, Relevance
0234	MSC 0023225 - 0023229	08/07/1997	HR, R	Hearsay, Relevance
0235	MSC 0054921 - 0054925	11/13/1997	No Obj	Hearsay, Relevance
0236	MSC 0001575 - 0001579	01/26/1998	HR, R	Hearsay, Relevance
0248	MSC 0024863 - 24864	00/00/0000	HR, R, A	Hearsay, Relevance
0258	CPH 1352836 - 1352838	01/19/1999	HR, R	Hearsay, Relevance
0278	MSC 0096879 - 0096972	09/15/2004	R	
0289	MSC 0085403 - 85419	02/24/1994	Limited by Order on MS Mil # 1, HR, R	Hearsay, Prejudicial, Limited by Order on MS Mil # 1,Relevance
0290	MSC 0085420 - 85435	10/27/1995	Limited by Order on MS Mil # 1, HR, R	Relevance, Prejudicial, Limited by Order on MS Mil # 1, Hearsay
0291	MSC 0085436 - 85452	12/31/1996	Limited by Order on MS Mil # 1, HR, R	Relevance, Prejudicial, Limited by Order on MS Mil # 1, Hearsay
0292	MSC 0085453 - 85471	12/31/1997	Limited by Order on MS Mil # 1, HR, R	Relevance, Prejudicial, Limited by Order on MS Mil # 1, Hearsay
0293	MSC 0085472 - 85493	12/31/1998	Limited by Order on MS Mil # 1, HR, R	Relevance, Prejudicial, Limited by Order on MS Mil # 1, Hearsay
0294	MSC 0094016 - 94018	11/18/1998	Limited by Order on MS Mil # 1, HR, R	Relevance, Prejudicial, Limited by Order on MS Mil # 1, Hearsay

R - Relevance and/or unduly burdensome HR - Hearsay A - Authenticity document A (HW) - Authenticity with respect to handwriting on

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U - Untimely

CPH TRIAL EXHIBIT LIST
(Exhibit Order)

TRIAL EX #	BATES RANGE	DATE	ORIGINAL OBJECTIONS	REVISED OBJECTIONS
0297	CPH 1042288 - 1042317	04/28/1998	No Obj	Hearsay
0298	CPH 0485991 - 0485993	03/25/1998	No Obj	Relevance
0305	CPH 1241513 - 1241514	03/20/1998	HR	Hearsay, Relevance
0309	MSC 0008011 - 008066	02/27/1998	No Obj	
0310	MSC 0014766 - 0014775	07/30/1999	HR, R	Hearsay, Relevance
0320	CPH 0639323 - 0639327	04/03/1998	No Obj	Relevance (as to cover)
0322	CPH 1401525 - 1401534	03/30/1998	No Obj	Hearsay
0323	CPH 140748 - 1407318	12/01/1997	No Obj	Hearsay, Relevance, Foundation/Authenticity
0325	CPH 1426289 - 1426296	01/23/1998	No Obj	Foundation/Authenticity
0326	CPH 1421814 - 1421817	02/06/1998	No Obj	Foundation/Authenticity
0328	CPH 1427250 - 1427253	02/20/1998	No Obj	Foundation/Authenticity
0330	CPH 0634056 - 0634064	02/25/1998	No Obj	Hearsay
0331	MS 0007947 - 0008010	02/27/1998	No Obj	
0337	CPH 1401219 - 1401238	02/25/1998	No Obj	Hearsay
0338	CPH 0634065 - 0634075	02/27/1998	No Obj	Hearsay
0342	CPH 100750 - 1400752	02/27/1998	No Obj	Hearsay

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TRIAL EX #	BATES RANGE	DATE	ORIGINAL OBJECTIONS	REVISED OBJECTIONS
0345	CPH 1427533 - 142739	01/30/1998	No Obj	Hearsay, Foundation/Authenticity
0349	MSC 1402232 - 1402235	12/10/1997	No Obj	Hearsay
0352	CPH 1412533 - 1412551	02/23/1998		
0354	CPH 1316960 - 131962	02/26/1998	No Obj	Foundation/Authenticity
0355	CPH 1399821 - 1399822	02/27/1998	R	Foundation/Authenticity
0356	CPH 0468457 - 0468462	01/28/1998	No Obj	Hearsay, Relevance, Foundation/Authenticity
0357	CPH 1393144 - 1393147	01/29/1998	No Obj	Hearsay, Relevance, Foundation/Authenticity
0358	CPH 1395046	03/19/1998	No Obj	
0359	CPH 1393266 - 1393268	03/19/1998	No Obj	Hearsay, Foundation/Authenticity
0360	CPH 1415534	03/19/1998	No Obj	Hearsay, Foundation/Authenticity
0361	CPH 1393472 - 1393478	03/19/1998	No Obj	Hearsay, Foundation/Authenticity
0362	CPH 1393262 - 1393263	03/20/1998	No Obj	Hearsay, Foundation/Authenticity
0367	CPH 1328300 - 1328301	07/22/1998	No Obj	Hearsay
0368	CPH 1325251 - 1144565	03/02/1998	No Obj	
0371	CPH 1094218 - 1094235	03/29/1998	No Obj	
0373	DPW 0035621 - 0035636	05/11/1998	No Obj	

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TRIAL EX #	BATES RANGE	DATE	ORIGINAL OBJECTIONS	REVISED OBJECTIONS
0378	CPH 1350174 - 1350175	06/26/1998	No Obj	Hearsay
0380	CPH 2005706	01/23/1998	No Obj	Hearsay
0381	CPH 1278481 - 1278484	01/30/1998	No Obj	Hearsay, Foundation/Authenticity
0386	CPH 0642890 - 0642891	06/25/1998	No Obj	Hearsay
0410	BA 01210	01/05/2000	HR, R, A	Hearsay, Relevance, Foundation/Authenticity
0438	CPH 0038539 - 0038544	04/03/1998	HR, R, A	Hearsay, Relevance, Foundation/Authenticity
0439	CPH 0145503 - 0145505	03/24/1998	HR, R, A	Hearsay, Relevance, Foundation/Authenticity
0444	CPH 0291847 - 0291849	01/28/1998	No Obj	Hearsay
0447	CPH 0324549	12/08/1997	No Obj	
0448	CPH 0324558	12/08/1997	No Obj	
0449	CPH 0361142 - 0361148	06/29/1998	No Obj	Hearsay, Completeness
0450	CPH 0361149 - 0361155	07/06/1998	C	Hearsay, Completeness
0454	CPH 0466948 - 0466949	12/08/1997	HR, A	Hearsay, Relevance, Foundation/Authenticity
0457	CPH 0468652 - 0468653	01/30/1998	HR, A	Hearsay, Relevance, Foundation/Authenticity
0459	CPH 0472533 - 0472535	07/24/1997	HR, R, A	Hearsay, Relevance, Foundation/Authenticity
0465	CPH 0586586 - 0586587	12/08/1997	No Obj	Relevance
0466	CPH 0595107 - 0595109	10/23/1997	HR, A	Hearsay, Foundation/Authenticity

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TRIAL EX #	BATES RANGE	DATE	ORIGINAL OBJECTIONS	REVISED OBJECTIONS
0470	CPH 1039208	03/24/1998	HR, A	Hearsay, Foundation/Authenticity
0471	CPH 1059072 - 1059074	06/15/1998	No Obj	Hearsay, Relevance, Foundation/Authenticity
0482	CPH 1267992 - 1267993	04/06/1998	HR, R, A	Hearsay, Relevance, Foundation/Authenticity
0485	CPH 1279605 - 1279606	03/03/1998	HR, R, A	Hearsay, Relevance, Foundation/Authenticity
0487	CPH 1326304 - 1326476	03/16/1998	HR, R, A	Hearsay, Relevance, Foundation/Authenticity
0493	CPH 1392529	01/29/1998	HR, C	Hearsay, Relevance, Foundation/Authenticity
0495	CPH 1393269	03/19/1998	No Obj	Hearsay, Foundation/Authenticity
0496	CPH 1393270 - 1393271	03/20/1998	No Obj	Hearsay, Foundation/Authenticity
0497	CPH 1393699 - 1393700	07/22/1998	No Obj	Hearsay
0503	CPH 1415380 - 1415399	03/12/1998	No Obj	Hearsay, Relevance, Foundation/Authenticity
0505	CPH 1415568 - 1415573	02/02/1998	HR	Hearsay, Relevance, Foundation/Authenticity
0506	CPH 1415595 - 1415597	03/05/1998	HR, C	Hearsay, Relevance, Foundation/Authenticity
0507	CPH 1415600 - 1415605	03/12/1998	HR	Hearsay, Relevance, Foundation/Authenticity
0509	CPH 1417337 - 1317342	04/03/1998	HR	Hearsay, Relevance, Foundation/Authenticity
0510	CPH 1424595 - 1424598	04/06/1998	HR	Hearsay, Relevance, Foundation/Authenticity
0512	CPH 0075281 - 0075282	06/23/1998	R	Relevance

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TRIAL EX #	BATES RANGE	DATE	ORIGINAL OBJECTIONS	REVISED OBJECTIONS
0568	MSC 0112001 - 0112015	11/30/2002	R	Relevance
0569	MSC 0112016 - 0112032	11/30/2003	R	Relevance
0591	N/A	10/29/2004	R	Relevance
0596	N/A	11/16/2004	R	Relevance
0597	N/A	11/19/2004	R	Relevance
0600	N/A	11/24/2004	No Obj	Hearsay
0705	N/A	00/00/2002	HR, R, A	Hearsay, Relevance, Foundation/Authenticity
0718	N/A	03/13/2003	HR, R, A	Hearsay, Relevance, Foundation/Authenticity
0821	N/A	11/12/1998	No Obj	
0824	N/A	12/06/1999	No Obj	
0850	N/A	00/00/0000	R	Relevance

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COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

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

CASE NO: 2003 CA 005045 AI

PLAINTIFF'S DISCLOSURE OF DEMONSTRATIVE EXHIBITS FOR OPENING STATEMENT

Pursuant to the Court's April 4, 2005 direction, Coleman (Parent) Holdings Inc. ("CPH") hereby provides Morgan Stanley & Co., Inc. ("Morgan Stanley") with text and art that CPH may use during its opening statement. CPH reserves the right to reformat the accompanying material, and to make minor changes to correct errors or improve comprehension. In addition, CPH may or may not use any particular exhibit or textual slide and may use any exhibit in any order or sequence.

Dated: April 5, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by fax and hand delivery to all counsel on the attached list on this 5th day of April, 2005.

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In this case, certain facts have been conclusively established before trial, and you will be informed of these established facts in a statement which I will read to you. You are required to accept these facts as true for all purposes in your deliberations. Evidence will be presented to you concerning the issues in the case that remain to be decided by you, but you may not consider any evidence admitted during the trial as contradicting any of the established facts read to you in my statement.

In April 1997, Morgan Stanley began serving as Sunbeam's investment banker. Morgan Stanley originally attempted to find someone to buy Sunbeam. When Morgan Stanley was unable to find a buyer, Morgan Stanley developed a strategy for Sunbeam to use its fraudulently-inflated stock to acquire a large company that Sunbeam would own and operate. Then, trading on Morgan Stanley's relationships with CPH's senior officers, Morgan Stanley found Coleman for Sunbeam. At the time of the sale to Sunbeam, Coleman was a leading manufacturer and marketer of consumer products for the worldwide outdoor recreation market, with annual revenues in excess of $1 billion.

After Sunbeam announced plans to acquire Coleman, Morgan Stanley agreed to underwrite a $750 million debenture offering for Sunbeam. Sunbeam needed the proceeds of that debenture offering to complete the acquisition of Coleman. As Sunbeam's investment banker and as the sole underwriter for the $750 million debenture offering, Morgan Stanley received detailed and specific information concerning Sunbeam's financial condition and performance. Morgan Stanley received information that directly contradicted Sunbeam's and Morgan Stanley's assertions to CPH that Sunbeam had undergone a successful turnaround and that its financial performance had dramatically improved. By no later than March 18, 1998, Morgan Stanley knew that Sunbeam's January and February 1998 sales were only 50% of

January and February 1997 sales, and Morgan Stanley also knew that the shortfall was caused by Sunbeam's practice of accelerating sales which otherwise would have occurred in 1998 in order to boost Sunbeam's income in 1997. Although Morgan Stanley and Sunbeam previously had advised CPH that Sunbeam's sales were running ahead of analysts' expectations for the first quarter, Morgan Stanley decided not to correct those material misrepresentations. Instead, in March 1998, Morgan Stanley assisted Sunbeam in concealing the problems with Sunbeam's first quarter 1998 sales.

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") directly or indirectly owned 44,067,520 shares — or approximately 82% — of Coleman prior to the transactions at issue. On March 30, 1998, Sunbeam acquired CPH's interest in Coleman. Sunbeam paid for the Coleman shares with 14.1 million shares of Sunbeam common stock and other consideration.

Defendant Morgan Stanley & Co., Inc. ("Morgan Stanley") is a highly sophisticated investment banking firm that provides a wide range of financial and securities services. Among other things, Morgan Stanley provides advice on mergers and acquisitions and raises capital in the equity and debt markets. Morgan Stanley served as Sunbeam's investment banker and as the underwriter of securities issued by Sunbeam in connection with the events at issue herein.

Sunbeam Corporation ("Sunbeam") was a publicly-traded company headquartered in Delray Beach, Florida. Sunbeam designed and manufactured small household appliances and outdoor consumer products, which it marketed under the Sunbeam and Oster brand names. Sunbeam filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code in February 2001.

Albert Dunlap ("Dunlap") was the Chief Executive Officer of Sunbeam from July 1996 until June 1998 when he was terminated by Sunbeam's Board of Directors.

Russell Kersh ("Kersh") was the Executive Vice President of Sunbeam from July 1996 until June 1998 when he was terminated by Sunbeam's Board of Directors.

Arthur Andersen LLP ("Andersen") provided outside accounting services to Sunbeam through its West Palm Beach, Florida office. Andersen auditors provided information concerning Sunbeam's first quarter 1998 sales and earnings to Morgan Stanley.

Sunbeam designed and manufactured outdoor and household consumer products, which it marketed under the Sunbeam and Oster brand names. Sunbeam's products included small kitchen appliances, humidifiers, electric blankets, and grills. Many of the country's leading retail stores, including Wal-Mart, Target, and Home Depot, were among Sunbeam's major customers.

Despite Sunbeam's well-known brands and strong customer base, its financial performance was disappointing. In 1994, Sunbeam earned $1.30 per share. In 1995, Sunbeam's earnings declined to $0.61 per share. In 1996, Sunbeam's earnings continued to suffer. On March 22, 1996, Sunbeam issued an early warning that its first quarter earnings would be well under analysts' expectations and down from first quarter 1995. Shortly after issuing the March 22 earnings warning, Sunbeam's Chief Executive Officer and two of Sunbeam's directors announced their resignations. Less than a week later, Sunbeam announced that its first quarter 1996 earnings had plunged 42% from first quarter 1995 levels. Sunbeam also announced that its second quarter 1996 earnings would be lower than its second quarter 1995 earnings.

Sunbeam's disappointing earnings caused its stock price to plummet. During 1995, the price at which Sunbeam's stock traded fell 40%, from a high of $25-1/2. In 1996, Sunbeam's stock price continued to decline until it reached a low of $12-1/4 in July.

On July 18, 1996, Sunbeam's board of directors hired Albert Dunlap as Sunbeam's new Chief Executive Officer. Based upon brief terms as Chief Executive Officer of other publicly traded companies, including Scott Paper Company ("Scott Paper"), Dunlap was viewed as a "turnaround specialist" — that is, someone who could take a poorly performing company and significantly increase its value by "turning around" its financial performance. Because Dunlap touted the benefits from firing large numbers of employees and closing large numbers of plants, Dunlap became widely known as "Chainsaw Al." Dunlap lived in Boca Raton, Florida, and one of his first tasks at Sunbeam was to consolidate the company's six headquarters into one located in Delray Beach, Florida.

Immediately after joining Sunbeam, Dunlap hired Kersh as Sunbeam's Chief Financial Officer. Kersh had teamed with Dunlap for over 15 years, serving as a senior executive with Dunlap at other companies, including Scott Paper. Dunlap also brought in several other hand-picked executives to make up his senior management team.

Dunlap and his senior management team entered into employment agreements with Sunbeam. Under those agreements, Dunlap and his senior management team stood to make tens of millions of dollars if they were able to boost Sunbeam's apparent value and then sell Sunbeam to another company at a premium.

In order to convince other companies that they should want to purchase Sunbeam, Dunlap needed to improve Sunbeam's reported financial performance quickly and dramatically. It was, of course, no small task to transform Sunbeam from a poorly performing

company, with weak sales and declining profits, into a strong company with growing sales and soaring profits. In fact, as the world later learned, Dunlap did not achieve that change in Sunbeam's fortunes. Instead, Dunlap created the illusion of a dramatic turnaround at Sunbeam.

Dunlap had a three-step plan at Sunbeam. In the first step, Dunlap overstated Sunbeam's financial problems so that Sunbeam appeared to be in worse shape than it really was. After making Sunbeam look worse, Dunlap moved to step two, where he made Sunbeam look more valuable than it really was by inflating Sunbeam's sales and engaging in other earnings manipulations. In step three, Dunlap planned to sell Sunbeam to another company before it became apparent that the "improved" results were fictional. By doing so, Dunlap would make tens of millions of dollars and would be free to blame his successor for any subsequent problems.

Dunlap began implementing his strategy soon after his arrival at Sunbeam in 1996. Claiming to be engaged in a clean-up of Sunbeam's financial problems, Dunlap recorded artificially high reserves and booked expenses that should not have been recorded until later periods. Both of those actions made Sunbeam's financial condition appear worse than it really was, thus lowering the benchmark for measuring Sunbeam's performance in future years.

The overstated reserves also provided Dunlap a means by which he could inflate Sunbeam's future results during the second step of his plan. Dunlap later could "re-evaluate" and release millions of dollars from the overstated reserves to boost income in later periods. The income from released reserves contributed to the illusion of a rapid turnaround in

Sunbeam's performance. Using inflated reserves to enhance income in future periods is a fraudulent practice and overstated reserves are commonly called "cookie jar" reserves.

After making Sunbeam look worse than it really was in 1996, Dunlap manipulated Sunbeam's sales and expenses in 1997 to create the false appearance of quarter after quarter improvement in financial performance. For example, Dunlap caused Sunbeam to inflate its sales by engaging in phony "bill and hold" sales. Under this practice, Sunbeam recognized revenues from "sales," even though customers did not actually pay for or even take delivery of the products, which continued to sit in Sunbeam's own warehouses. Although Sunbeam recorded the "bill and hold" sales as if they were current sales, they were, in reality, simply sales stolen from future quarters. In 1997, phony "bill and hold" sales added approximately $29 million in sales and $4.5 million in income.

Throughout 1997, Sunbeam also engaged in a sales practice known as "channel stuffing" — accelerating sales that otherwise would occur in a later period, sometimes by offering steep discounts or other extraordinary customer inducements. On the grand scale employed by Sunbeam, channel stuffing inevitably leads to major sales shortfalls in later periods when "stuffed" customers simply stop buying. Sunbeam's senior sales officer referred to Sunbeam's unsustainable practice of inflating performance through accelerated sales as the "doom loop."

Dunlap further "enhanced" Sunbeam's income in 1997 by causing Sunbeam to record a "profit" of $10 million from a sham sale of its warranty and spare parts business. Dunlap also made Sunbeam appear to be more successful than it really was by reaching into the "cookie jar," reversing inflated reserves, and recording $35 million as income. Sunbeam's

1997 profit margins also looked better than they really were because Dunlap already had recorded millions of dollars of 1997 expenses in 1996.

In October 1997, Dunlap announced that Sunbeam's "turnaround" was complete. Compared to the third quarter of 1996, Sunbeam's third quarter 1997 performance was remarkable. In the third quarter of 1996, Sunbeam had reported a loss of $18.1 million. In the third quarter of 1997, however, Sunbeam reported earnings of $34.5 million — an extraordinary turnaround from substantial losses to hefty profits. Sunbeam's combined results for the first three quarters showed dramatic improvement as well. Sunbeam reported that its profits for the first nine months were up tenfold over the same period the year before — from $6.5 million in 1996 to $67.7 million in 1997. Sunbeam's reversal of fortune caused a spectacular increase in the price of its stock. In July 1996, when Dunlap was hired, Sunbeam's shares traded at $12-1/4. By October 1997, Sunbeam's shares had risen to $49-13/16.

With steps one and two successfully completed, Dunlap was more than eager to complete the final step of his scheme: to sell Sunbeam to another company and collect tens of millions of dollars for himself before the outside world could learn the truth about Sunbeam's phony "turnaround." To accomplish that third and final step, Dunlap needed an investment banking firm.

When Dunlap announced in early 1997 that he would begin interviewing investment bankers, Morgan Stanley immediately began pursuing the job. Although Morgan Stanley had no previous relationship with Sunbeam, one of Morgan Stanley's senior executives, William Strong, had worked closely with Dunlap on other large transactions between 1986 and 1993, when Strong was employed by Salomon Brothers.

Morgan Stanley knew that it was competing with other investment bankers, including Mark Davis, for Dunlap's business. Davis was the head of the mergers and acquisitions department at Chase Securities and had worked previously with Strong at Salomon Brothers. Davis had a very strong relationship with Dunlap, and Davis had served as Dunlap's investment advisor on numerous transactions, including Dunlap's sale of Scott Paper. Shortly after arriving at Sunbeam, Dunlap hired Davis to handle the sale of Sunbeam's furniture business.

Morgan Stanley put together a team headed by its Vice Chairman, Bruce Fiedorek, and Strong. Beginning in April 1997, Morgan Stanley's personnel traveled to Sunbeam's offices in Delray Beach, Florida to study Sunbeam and woo Dunlap. After months of uncompensated work, in September 1997, Morgan Stanley finally persuaded Dunlap to name Morgan Stanley as Sunbeam's exclusive investment banker. Dunlap instructed Morgan Stanley to find a buyer for Sunbeam. Morgan Stanley knew that if it failed to deliver a major transaction, Morgan Stanley would not be compensated for the extensive work it had performed for Sunbeam. Morgan Stanley also knew that Davis and Chase Securities were standing by — ready and willing to reclaim their position as Dunlap's investment banker of choice.

Throughout the fall of 1997, Morgan Stanley aggressively searched for a buyer for Sunbeam. Morgan Stanley put together extensive and detailed materials to use in marketing Sunbeam to potential buyers. Morgan Stanley pitched the transaction to more than 10 companies — including Gillette, Colgate, Sara Lee, Rubbermaid, Whirlpool, and Black & Decker — that Morgan Stanley hoped might have an interest in acquiring Sunbeam. Morgan Stanley, however, was not able to find a buyer.

As 1998 approached, the pressure on Dunlap increased. Dunlap was aware that Sunbeam would be unable to sustain the appearance of a successful turnaround in 1998 because Sunbeam had stolen sales from 1998 to boost 1997's numbers and the "cookie jar" reserves had been depleted. Dunlap needed a way to conceal Sunbeam's phony turnaround until a buyer could be found. Morgan Stanley provided the solution to Dunlap's problem.

Morgan Stanley knew that its failure to find a buyer for Sunbeam could prove fatal to the relationship it had worked so hard to establish with Dunlap. As the pressure on Dunlap increased, the pressure on Morgan Stanley increased as well. Although Morgan Stanley was not able to find a buyer for Sunbeam, Morgan Stanley responded with a plan that would allow Dunlap to conceal his fraud. Morgan Stanley recommended that Sunbeam acquire other companies, using Sunbeam's stock, which was fraudulently inflated, as the "currency" that would be used to pay for the acquisitions.

Morgan Stanley's strategy was doubly deceptive. First, Morgan Stanley's acquisition strategy would allow Dunlap to consolidate Sunbeam's results with those of the newly-acquired companies. That would help Dunlap camouflage Sunbeam's results and make it difficult to detect any shortfall in Sunbeam's performance. Dunlap simply could label any problems that were detected as attributable to the poor performance of the acquired companies or as a temporary "blip" caused by the distraction of integrating the acquired companies with Sunbeam. Second, Morgan Stanley's strategy would allow Dunlap to take new massive restructuring charges (purportedly relating to the acquisitions) and thus create more "cookie jar" reserves that could be tapped to bolster the future earnings of the combined companies.

Morgan Stanley identified Coleman as one of the key potential acquisition targets. CPH owned 82% of Coleman's stock. Morgan Stanley searched the ranks of its

investment bankers to locate those with the best access to CPH. Drawing on relationships between some of Morgan Stanley's investment bankers and senior CPH officers, Morgan Stanley set about trying to persuade CPH to sell its interest in Coleman to Sunbeam — and, most importantly, to accept Sunbeam stock as consideration.

Morgan Stanley laid the groundwork for a meeting to take place in December 1997 in Palm Beach, Florida between Dunlap and Kersh and representatives of CPH. In advance of the Palm Beach meeting, Morgan Stanley provided materials to Sunbeam to prepare Sunbeam for the meeting. Morgan Stanley also met with Kersh and other Sunbeam personnel to prepare for the Palm Beach meeting. However, Dunlap nearly scuttled Morgan Stanley's carefully crafted plan at the outset. During the December 1997 Palm Beach meeting, when CPH rejected Dunlap's initial all-stock offer, Dunlap became so angry that he cursed and ranted at the CPH representatives and stormed out.

Dunlap's tantrum appeared to kill any chance that CPH would sell its interest in Coleman to Sunbeam. Morgan Stanley, however, worked to revive the discussions. Drawing again on Morgan Stanley's relationships with CPH officers, Morgan Stanley was able to restart the discussions with CPH with the promise that Dunlap would be kept away from the negotiating table. Thereafter, Morgan Stanley, through Managing Directors Strong, James Stynes, and Robert Kitts, led the discussions with CPH on Sunbeam's behalf.

Morgan Stanley knew that it had to persuade CPH not only to sell Coleman, but also to accept Sunbeam stock — ultimately, 14.1 million shares of Sunbeam stock — as a major part of the purchase price. During the course of negotiations, Morgan Stanley prepared and provided CPH with false financial and business information about Sunbeam designed to create the appearance that Sunbeam was prospering and that Sunbeam's stock had great value.

For example, Morgan Stanley provided CPH with false 1996 and 1997 sales and revenue figures, as well as false projections that Sunbeam could not expect to achieve. Together, in face-to-face discussions, Morgan Stanley and Sunbeam assured CPH that (a) Sunbeam would meet or exceed its first quarter 1998 earnings estimates; (b) analysts' 1998 earnings estimates for Sunbeam were correct; and (c) Sunbeam's plan to earn $2.20 per share in 1998 was easily achievable and probably low. Morgan Stanley and Sunbeam also falsely assured CPH that Sunbeam's "early buy" sales program would not hurt Sunbeam's future revenues. However, the "early buy" program was one of Sunbeam's revenue acceleration programs — and the devastating effects of Sunbeam's revenue acceleration programs already had begun to materialize at Sunbeam. Sunbeam's January and February 1998 sales were down drastically, although those results were not disclosed to CPH or the public. To the contrary, Morgan Stanley and Sunbeam together specifically advised CPH that Sunbeam's first quarter 1998 sales were "tracking fine" and running ahead of analysts' estimates.

On February 27, 1998, Sunbeam's Board of Directors met at Morgan Stanley's offices to consider the purchase of Coleman, as negotiated by Morgan Stanley.

At the February 27, 1998 meeting, Morgan Stanley made an extensive presentation to Sunbeam's Board concerning the proposed transaction. Numerous Morgan Stanley representatives, including Managing Directors Strong, Kitts, Stynes, Ruth Porat, and Vikram Pandit, attended the meeting.

Morgan Stanley presented Sunbeam's board with Morgan Stanley's opinion on the value of Coleman. Using a discounted cash flow analysis, which Morgan Stanley represented was the best gauge of stand-alone economic value and the best method of capturing the unique value of Coleman, Morgan Stanley valued CPH's Coleman stock at a

range of $31.06 to $53.24 per Coleman share. CPH's 44,067,520 Coleman shares were worth, therefore, between $1.369 billion and $2.346 billion.

Following Morgan Stanley's presentation, Sunbeam's Board of Directors voted to acquire Coleman on the very favorable terms that Morgan Stanley had negotiated.

Morgan Stanley spent the following weekend developing Sunbeam's public relations strategy to announce the Coleman transaction. Morgan Stanley scripted the points for Dunlap to make in a conference call with analysts. Morgan Stanley also crafted a list of "key media messages" for Dunlap to use in his communications with the press. On Sunday, March 1, 1998, Morgan Stanley spoke with a reporter for the Wall Street Journal to inform him that Sunbeam would announce its acquisition of Coleman the following morning.

Sunbeam announced its acquisition of Coleman on Monday, March 2, 1998, prior to the opening of the financial markets. Consistent with Morgan Stanley's valuation, investors viewed Sunbeam's purchase of Coleman — and the price that Sunbeam had paid — very favorably. The day before the acquisition was announced, Sunbeam's stock closed at $41-3/4. In the days following Sunbeam's announcement of the transaction, Sunbeam's stock rose approximately 25%, to a high of $52.

Dunlap knew that Sunbeam needed to raise funds to pay the cash portion of the acquisition consideration. Dunlap also knew that Sunbeam needed cash to purchase two other smaller companies in addition to Coleman. Morgan Stanley recommended that Sunbeam raise funds through a $500 million offering of convertible subordinated debentures. To assure the offering's success, Morgan Stanley lent its name to the offering. Indeed, Morgan Stanley agreed to serve as the sole underwriter for the offering.

The money raised from the sale of the debentures was used by Sunbeam to complete the acquisition of Coleman.

Unbeknownst to CPH or the public, Sunbeam's first quarter 1998 sales were a small fraction of the financial community's expectations for the quarter. If Dunlap could consolidate Sunbeam's sales with Coleman's sales, Dunlap knew that he could obscure Sunbeam's actual first quarter sales. As a result, Dunlap was especially anxious to complete the acquisition of Coleman before Sunbeam announced its first quarter 1998 sales. Indeed, the success of the scheme depended upon Sunbeam's ability to complete the Coleman acquisition before Sunbeam's first quarter results were announced. To satisfy Dunlap's objectives, Morgan Stanley moved up the launch date of the offering.

The debentures were marketed to investors at a series of "road show" meetings and conference calls arranged by Morgan Stanley. Morgan Stanley prepared and distributed a memorandum for its sales force to use in marketing the debentures to investors. Morgan Stanley also developed the script for Dunlap and Kersh to deliver during the road show. In those materials, Morgan Stanley misrepresented Sunbeam's financial performance and emphasized Dunlap's purported "turnaround" accomplishments.

Morgan Stanley launched the debenture offering with a research analyst presentation to the Morgan Stanley sales force. As part of Morgan Stanley's growing relationship with Sunbeam, one of Morgan Stanley's top-rated research analysts planned to initiate equity coverage of Sunbeam. That Morgan Stanley analyst had modeled values for Sunbeam's acquisition of Coleman that were higher than even Sunbeam's management had predicted.

Although Morgan Stanley initially planned to sell $500 million worth of debentures, Morgan Stanley's efforts were so successful that the size of the offering was increased to $750 million on March 19, 1998 — the day of the last road show. The debentures were sold to investors nationwide, including investors based in Florida.

As Sunbeam's investment banker and the sole underwriter for the debenture offering, Morgan Stanley had a duty to investigate Sunbeam's finances and business operations.

Morgan Stanley, which had been working hand-in-hand with Sunbeam for almost a year and had traveled to Sunbeam's Florida offices, repeatedly asserted that it had satisfied that duty.

Strong, who was one of the senior Morgan Stanley investment bankers involved, has admitted in sworn testimony that he may have had more than 100 telephone conversations with Dunlap and Kersh (whose offices were in Sunbeam's Delray Beach headquarters) and that Strong was "sure" that he would have been apprised of Sunbeam's financial performance during the first two months of 1998.

With the $750 million debenture offering and the Coleman transaction set to close at the end of March 1998, Sunbeam's Florida-based outside auditors were shocked that Morgan Stanley had not asked them about Sunbeam's financial performance for first quarter 1998. Sunbeam's auditors were alarmed because Sunbeam's first quarter results were a disaster, but Dunlap, Kersh, and Morgan Stanley were telling CPH and the investing public that Sunbeam's turnaround was a success, that Sunbeam's sales for the first quarter of 1998 were ahead of the expectations of outside financial analysts, and that Sunbeam was poised for record sales.

On March 17, Sunbeam's auditors forced the issue. From their Florida offices, Sunbeam's auditors sent Morgan Stanley a letter reporting that Sunbeam's net sales through January 1998 were down 60% — $28 million in January 1998, as compared to $73 million in January 1997. The March 17 letter explained that the decline was "primarily due to the . . . new early buy program for grills which accelerated grill sales into the fourth quarter of fiscal 1997."

The next day, Morgan Stanley was faxed a schedule from Sunbeam's Florida office that showed that Sunbeam's January and February 1998 net sales totaled $72 million, an amount that was 50% lower than Sunbeam's January and February 1997 net sales of $143.5 million.

Based on information that Sunbeam and Morgan Stanley had disseminated, Wall Street analysts were anticipating that Sunbeam's first quarter 1998 net sales would be in the range of $285 million to $295 million. Sales in that range would have been approximately 15% higher than first quarter 1997 sales. Sunbeam's January and February 1998 sales, however, totaled barely 25% of $285 million. As Sunbeam's outside auditors advised Morgan Stanley in writing, the sales drop-off was caused by Sunbeam's sales acceleration program. The information put into Morgan Stanley's hands on March 17 and March 18 showed that Morgan Stanley's and Sunbeam's assertions to CPH and other investors were false. Contrary to what Morgan Stanley and Sunbeam had represented, Sunbeam had not undergone a successful turnaround, Sunbeam's financial performance had not dramatically improved, and Sunbeam's performance in 1998 was not better than Wall Street analysts' expectations. It was imperative, therefore, that the truth be kept from CPH until the Coleman transaction closed at the end of March 1998.

Morgan Stanley did not disclose Sunbeam's disastrous first quarter, Morgan Stanley did not insist that Sunbeam disclose its disastrous first quarter, Morgan Stanley did not correct any of the false and misleading statements it and Sunbeam had made to CPH about Sunbeam's business or performance, and Morgan Stanley did not suspend any of the critical transactions that were scheduled to close in the next two weeks. Instead, with Morgan Stanley's knowledge and assistance, Sunbeam prepared and issued a false press release on March 19, 1998 that affirmatively misstated and concealed Sunbeam's true condition.

The March 19, 1998 press release stated: "Sunbeam Corporation . . . said today that it is possible that its net sales for the first quarter of 1998 may be lower than the range of Wall Street analysts' estimates for $285 million to $295 million, but net sales are expected to exceed 1997 first quarter net sales of $253.4 million. . . . The shortfall from analysts' estimates, if any, would be due to changes in inventory management and order patterns at certain of the Company's major retail customers. The Company further stated that based on the strength of its new product offerings and powerful brand names, it remains highly confident about the overall sales outlook for its products for the entire year."

As Morgan Stanley was fully aware, the March 19, 1998 press release was false, misleading, and failed to disclose material information. The March 19, 1998 press release failed to disclose Sunbeam's actual January and February 1998 sales or the true reasons for the poor results. Instead, the press release held out the false possibility that Sunbeam still could achieve sales of $285 million to $295 million and suggested that, if any shortfall occurred, that shortfall would be due to the fact that certain retailers had decided to defer first quarter purchases to the second quarter. The press release also assured that Sunbeam at least would exceed first quarter 1997 net sales of $253.4 million. Based on information that Morgan

Stanley had in its hands on March 18, 1998, it was obvious that Sunbeam would not achieve sales of $285 million to $295 million and that Sunbeam's first quarter 1998 sales would be below its first quarter 1997 numbers. To simply meet 1997 first quarter sales, Sunbeam needed sales of $123.3 million over the 12 remaining days of the quarter — an average of $10.28 million per day. Sales of $10.28 million per day would be 306% more than the average per day sales in March 1997, and 281% more than the average per day sales for the first 17 days of March 1998. Furthermore, Morgan Stanley knew that the shortfall from analysts' estimates was not caused by retailers' deciding to defer purchases from the first quarter of 1998 to the second quarter, as the press release indicated. Rather, as Sunbeam's outside auditors had advised Morgan Stanley in writing, the collapse in first quarter sales was caused by Sunbeam's acceleration of 1998 sales into the fourth quarter of 1997.

After Sunbeam's false press release was issued, Morgan Stanley stood arm-in-arm with Sunbeam while Dunlap and Kersh told CPH, analysts, and investors that the March 19, 1998 release was a purely cautionary statement because some first quarter 1998 sales might simply "spillover" into the second quarter and that Sunbeam still believed that it actually would meet analysts' estimates of $285 million to $295 million in first quarter 1998 sales.

Morgan Stanley knew that a full and truthful disclosure of Sunbeam's first quarter sales would doom the debenture offering, which was scheduled to close on March 25, 1998.

As Morgan Stanley was fully aware, the written contract between CPH and Sunbeam gave CPH the express legal right to refuse to close the sale if there was a material adverse change in Sunbeam's "business, results of operation or financial condition."

Furthermore, if the transactions did not close, Morgan Stanley would not be paid its $10.28 million fee for the Coleman acquisition or its $22.5 million fee for underwriting the subordinated debenture offering. Morgan Stanley also knew that Sunbeam would promptly replace Morgan Stanley with another investment banking firm – such as the Chase Securities team led by Mark Davis.

Sunbeam's outside auditors already had made it perfectly clear to Morgan Stanley that Sunbeam's first quarter 1998 sales were a disaster.

One of Sunbeam's senior outside auditors, Lawrence Bornstein, has testified under oath that on March 19, 1998, he told Morgan Stanley's John Tyree that the statement in Sunbeam's March 19, 1998 press release — that Sunbeam would at least exceed first quarter 1997 sales of $253.4 million — was not credible: "Just do the math . . . they've done a million dollars in sales the first 70 days of the year and now they need to do $10 million worth of sales for the next . . . I think it was 11 days . . . I mean, something ridiculous." Bornstein also told Tyree: "I've been to every shipping dock domestically, I've been to Hattiesburg, I've been to Neosho, I've been to Mexico City, and I don't think these guys can physically ship this much stuff."

Morgan Stanley knew that the March 19 press release was false and misleading. Despite that knowledge and Bornstein's explicit statements, Morgan Stanley continued with its preparations to close the debenture offering on March 25, 1998 and the Coleman acquisition on March 30, 1998.

As part of those preparations, on March 24, 1998, Morgan Stanley's Tyree spoke by telephone with Sunbeam's Kersh, who was located in Sunbeam's Delray Beach offices, to obtain an updated report concerning Sunbeam's first quarter performance. By the

time of that March 24, 1998 call, Sunbeam had fallen even further behind first quarter 1997 sales. As of March 18, 1998, Sunbeam needed to achieve average sales of $10.28 million per day, over 12 days, to reach first quarter 1997 sales. Sunbeam's sales between March 18 and March 24, 1998 had averaged only $6.81 million per day — well short of the $10.28 million per day that Sunbeam needed to achieve. Sunbeam's March 18 through March 24, 1998 sales were further proof that Sunbeam's March 19, 1998 press release was false and that Sunbeam would not achieve first quarter 1998 sales in excess of first quarter 1997 sales.

Morgan Stanley also knew no later than March 25, 1998, if not much earlier, that Sunbeam's earnings for the first quarter of 1998 were going to miss Wall Street analysts' earnings expectations, which were in the range of $0.28 to $0.31 per share (excluding one-time charges). Sunbeam's outside auditors advised Morgan Stanley on March 25 that Sunbeam had suffered a $41.19 million loss during the first two months of 1998, including a one-time charge of $30.2 million. Even excluding that one-time charge, Sunbeam's loss for the first two months was $0.13 per share. To achieve first quarter 1998 operating earnings of $0.28 per share, which were at the low end of analyst expectations, Sunbeam needed to realize a profit of $35.5 million during March 1998 alone. A net profit of $35.5 million in March was 500% more than Sunbeam's net profit for the entire first quarter of 1997. In fact, Sunbeam's first quarter 1998 earnings fell far short of Wall Street's expectations. Sunbeam's first quarter earnings were material.

Having directly participated in misleading CPH, Morgan Stanley had a duty to disclose the true facts before the closing of the debenture offering and the Coleman acquisition. Morgan Stanley also could have required Sunbeam to postpone the closings of those transactions until the necessary disclosures were made. Morgan Stanley did neither. Instead,

Morgan Stanley marched forward and closed the $750 million debenture offering on March 25, 1998, which was needed to close the Coleman transaction, and assisted Sunbeam in closing the acquisition of Coleman on March 30, 1998. Morgan Stanley received $22.5 million for the subordinated debenture offering and $10.28 million for the Coleman acquisition. Morgan Stanley would have received nothing if the transactions had failed to close.

On April 3, 1998 — just four days after the Coleman transaction closed — Sunbeam announced that sales for the first quarter of 1998 would be approximately 5% below the $253.4 million in sales that Sunbeam reported in the first quarter of 1997. In other words, Sunbeam was expecting sales in the range of $240 million. That sales shortfall was shocking news, particularly in view of assurances provided by Sunbeam both in and after its March 19, 1998 press release that $285 million to $295 million of sales was still a real possibility. The April 3, 1998 press release also disclosed that Sunbeam expected to show a loss for the quarter, although the release did not disclose the magnitude of the loss or how much of the loss was attributable to operating earnings as opposed to one-time charges. Sunbeam's news stunned the market. On April 3rd, Sunbeam's stock price dropped 25% — from $45-9/16 to $34-3/8.

Sunbeam's actual first quarter 1998 performance was even worse than Sunbeam disclosed on April 3, 1998. The April 3, 1998 release indicated that Sunbeam's first quarter sales were in the range of $240 million. In fact, Sunbeam's first quarter sales were $224.5 million. Sunbeam obscured the true shortfall by extending its quarter from March 29 to March 31, 1998 — thereby adding two more days of Sunbeam sales. Sunbeam also failed to disclose that it had included two days of Coleman sales after the Coleman transaction closed on March 30. Further, Sunbeam inflated first quarter 1998 sales with $29 million of new phony "bill and hold" sales.

Just as Sunbeam's first quarter 1998 sales had been a disaster, so, too, were Sunbeam's first quarter 1998 earnings. Morgan Stanley and Sunbeam had represented to CPH that Sunbeam would achieve or exceed analyst first quarter 1998 earnings estimates. At the time of that representation, the consensus among analysts was that Sunbeam would enjoy first quarter 1998 earnings of $0.33 per share. However, on May 9, 1998, Sunbeam disclosed that it would record a first quarter loss of $0.09 per share (excluding one-time charges) — more than $0.40 per share lower than CPH had been told to expect.

Within weeks, Dunlap's fraudulent scheme began to unravel. In June 1998, after a number of news articles critical of Sunbeam's practices, Sunbeam's Board of Directors launched an internal investigation. That investigation led quickly to the firing of Dunlap and Kersh, and, subsequently, to a restatement of Sunbeam's financial statements for 1996, 1997, and the first quarter of 1998.

As detailed above, Morgan Stanley participated in a scheme to mislead CPH and others and cover up the massive fraud at Sunbeam until Morgan Stanley and Sunbeam could close the purchase of Coleman. Morgan Stanley provided CPH with false information concerning Sunbeam's 1996 and 1997 financial performance, its business operations, and the value of Sunbeam's stock. Morgan Stanley also actively assisted Sunbeam in concealing Sunbeam's disastrous first quarter 1998 sales and earnings and the true reasons for Sunbeam's poor performance.

Morgan Stanley knew that its statements to CPH were materially false and misleading and omitted the true facts.

Morgan Stanley intended that CPH rely on Morgan Stanley's representations concerning Sunbeam.

As detailed above, Dunlap engaged in a fraudulent scheme to inflate the price of Sunbeam's stock by improperly manipulating Sunbeam's 1996 and 1997 performance, by falsely asserting that Sunbeam had successfully "turned around," and by concealing the collapse of Sunbeam's first quarter 1998 sales and earnings and the reasons for Sunbeam's first quarter 1998 performance.

As detailed above, Morgan Stanley knew of Dunlap's fraudulent scheme and helped to conceal it until after Sunbeam could close the purchase of Coleman.

As detailed above, Morgan Stanley provided substantial assistance to Dunlap and Sunbeam, including: concealing Sunbeam's first quarter 1998 sales collapse; assisting with the false March 19, 1998 press release; arranging road shows and meetings with prospective debenture purchasers at which Morgan Stanley, Dunlap, and others made false statements concerning Sunbeam's financial condition and business operations; preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam's financial condition and business operations; providing CPH with false financial and business information concerning Sunbeam; scripting Dunlap's false public statements concerning Sunbeam's acquisition of Coleman; and underwriting the $750 million convertible debenture offering, proceeds from which were used to fund Sunbeam's purchase of Coleman; and underwriting the $750 million convertible debenture offering, proceeds from which were used to fund Sunbeam's purchase of Coleman.

As detailed above, Morgan Stanley conspired with Dunlap and other senior Sunbeam executives to conceal the truth about Sunbeam's financial performance and business operations.

As detailed above, Morgan Stanley committed overt acts in furtherance of the conspiracy, including: concealing Sunbeam's first quarter 1998 sales collapse; assisting with the false March 19, 1998 press release; arranging road shows and meetings with prospective debenture purchasers at which Morgan Stanley, Dunlap, and others made false statements concerning Sunbeam's financial condition and business operations; preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam's financial condition and business operations; providing CPH with false financial and business information concerning Sunbeam; scripting Dunlap's false public statements concerning Sunbeam's acquisition of Coleman; and underwriting the $750 million convertible debenture offering, proceeds from which were used to fund Sunbeam's purchases of Coleman.

OPENING STATEMENT

POWERPOINT SLIDES CONTAINING THE FOLLOWING TEXT:

- Opening Statement
- What is there to try?
- Testimony
- Display of 23-page Statement of Established Facts
- Damage
- A simple story:
    1) Sunbeam was a fraud
    2) Morgan Stanley knew Sunbeam was a fraud
    3) Morgan Stanley helped Sunbeam to perpetuate the fraud and hide the truth
    4) CPH relied on the Sunbeam/Morgan Stanley lies
    5) CPH was damaged in the amount of $680 million
- Outside Advisors:
    1) The Coleman Company; Coleman (Parent) Holdings; Investment Bank: Credit Suisse First Boston; Lawyers: Wachtell, Lipton;
    2) Investment Bank: Morgan Stanley; Lawyers: Skadden, Arps
- Two things to remember
- This case is about Morgan Stanley
- Morgan Stanley's Responsibility has already been determined
- You can fool some of the people all of the time. You can fool all of the people some of the time. But you can't fool all of the people all of the time.
- The Sunbeam/Morgan Stanley fraud occurred 7 years ago
- Merger
- What we bargained for

- What we actually got
- Why was CPH stuck with the Sunbeam stock as the price dropped to zero?
- Sunbeam After the Merger: CPH's 14.1 million shares (at $48.25/share - approximately $680 million)
- Sunbeam Before the Merger: Before merger (trading at approximately $41.75/share day before merger announcement) following announcement rises to high of $52/share)
- Coleman Before the Merger: 82% CPH (valued by Morgan Stanley at $1.369 billion to $2.346 billion); 18% public shareholders (valued by Morgan Stanley at $292 million to $501 million)
- Sunbeam was engaged in a fraud
- Morgan Stanley assisted that fraud
- Morgan Stanley knew the truth
- Morgan Stanley joined in the fraud
- $160 million cash
  $520 million debt relief
  $680 million stock
  $1.36 billion

  $680 million damages
- Two comments about the established facts
- First, you have the right to ask that evidence be read back to you from the trial record
- Second, be sure that we give you the information necessary to understand the evidence
- "The Turnaround Story"
- Actions speak louder than words
- CPH took actions to confirm its reliance in writing
- CPH relied on false statements
- CPH acted reasonably, but even if CPH had been careless -- negligence is no defense to fraud!
- CPH took action to try to undo the deal when the false illusion fell apart

- The second issue -- damages
- CPH relied on the false statements about Sunbeam
- Contract restrictions
- Arthur Andersen withdraws audit opinion
- MacAndrews & Forbes assists in Sunbeam's Management
- CPH's Damages: 14.1 Million Sunbeam Shares @ $48/share $680,000,000; Actual Value $0; Loss $680,000,000
- The simple facts
- CPH was damaged
- You have the right to ask questions
- The Parties: CPH vs. Morgan Stanley
- The Coleman Company
- Coleman Parent Holdings, CPH, owned approximately 82% of the common stock of Coleman
- 18% was owned by regular shareholders
- Corporate Ownership:

    1) Ronald Perelman (100%); MacAndrews & Forbes Holdings Inc. (100%); Coleman (Parent) Holdings (100%); CLN Holdings (82%); Public Shareholders (18%); The Coleman Company

    2) Coleman (Parent) Holdings; MacAndrews & Forbes Holdings Inc.; Ronald Perelman, Chairman; Howard Gittis, Vice Chairman; Jim Maher; Will Nesbitt

- Sunbeam: Al Dunlap, Sunbeam CEO; Russell Kersh, CFO; Arthur Andersen; Morgan Stanley

KEY PARTICIPANTS

COLEMAN (PARENT) HOLDINGS INC.

RONALD PERELMAN
Chairman

HOWARD GITTIS
Vice Chairman

JAMES MAHER
President
Mafco Holdings Inc.

BARRY SCHWARTZ
Executive Vice President
General Counsel

WILLIAM NESBITT
Senior Vice President
MacAndrews & Forbes Holdings Inc.

MORGAN STANLEY

BILL STRONG
Managing Director

JOSEPH R. PERELLA
Chairman,
Institutional Securities

WILLIAM REID
Former
Managing Director

JOHN TYREE
Associate

SUNBEAM

AL DUNLAP
Chief Executive Officer

RUSSELL KERSH
Executive Vice President

ARTHUR ANDERSEN

LARRY BORNSTEIN
Experienced Manager

CPH'S ADVISORS

WACHTELL, LIPTON, ROSEN & KATZ

WACHTELL LIPTON
Attorneys for CPH

CREDIT SUISSE | FIRST BOSTON

CREDIT SUISSE / FIRST BOSTON
Advisors to Coleman

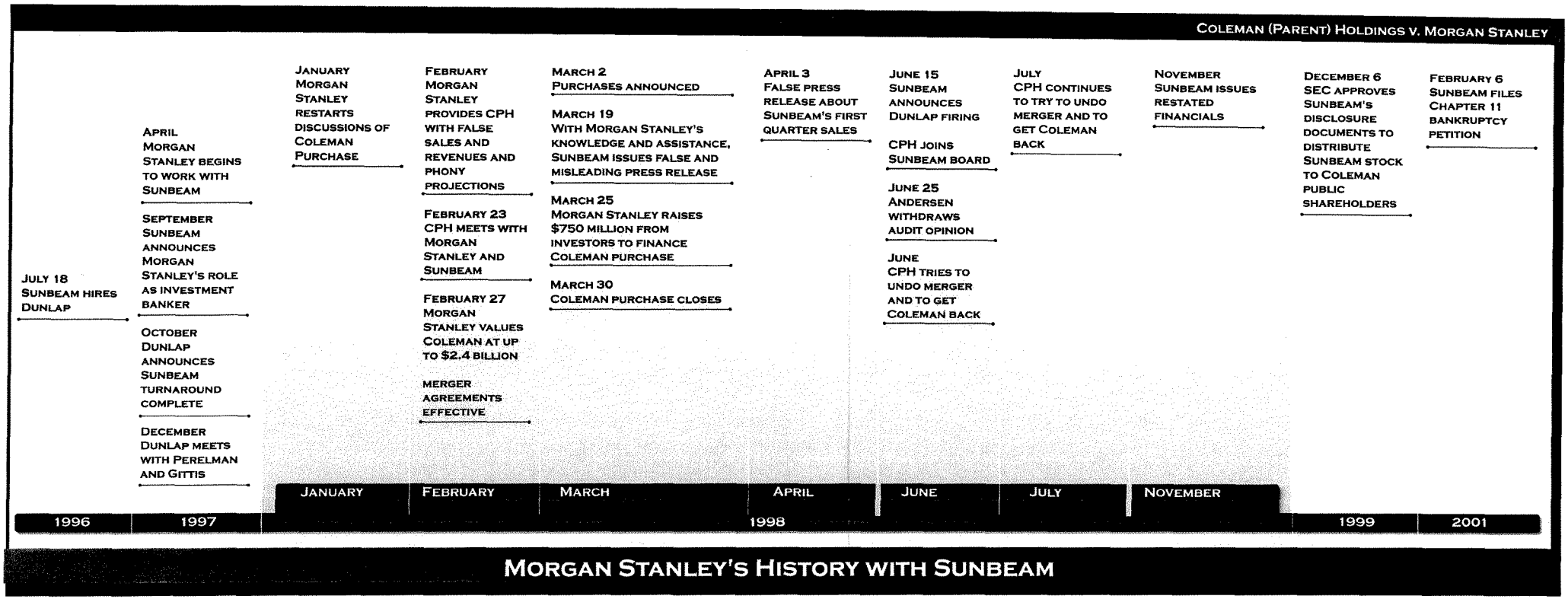
SUNBEAM'S COUNSEL

Skadden

SKADDEN ARPS
Attorneys for Sunbeam

BLAINE V. FOGG

MORGAN STANLEY'S HISTORY WITH SUNBEAM



The Parties

16div-014444

Ronald Perelman

100%

MacAndrews & Forbes Holdings Inc.

100%

Coleman (Parent) Holdings

100%

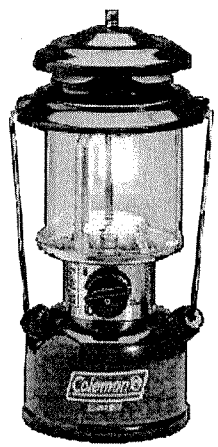
CLN Holdings

82%

Public Shareholders

18%

The Coleman Company



The Parties

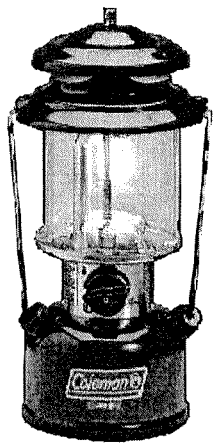
Coleman (Parent) Holdings
MacAndrews & Forbes Holdings Inc.

Ronald Perelman
Chairman

Howard Gittis
Vice Chairman

Jim Maher

Will Nesbitt



The Parties

Sunbeam

Al Dunlap
Sunbeam CEO

Russ Kersh
CFO

ANDERSEN
ACCOUNTING

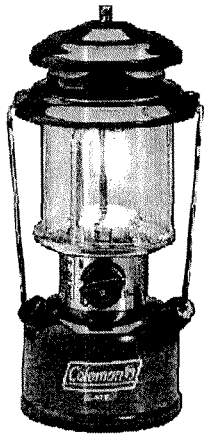
Stanley

Larry Bornstein
Auditor

16div-014446

Additional Advisors

The Coleman Company
Coleman (Parent) Holdings



Investment Bank:
Credit Suisse First Boston

Lawyers:
Wachtell, Lipton

Investment Bank:
Morgan Stanley

Lawyers:
Skadden, Arps

Morgan Stanley

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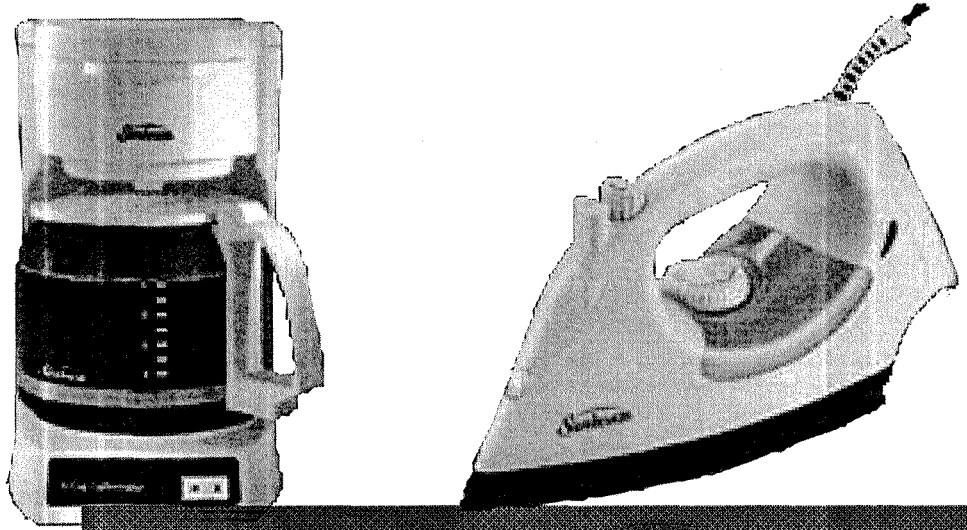
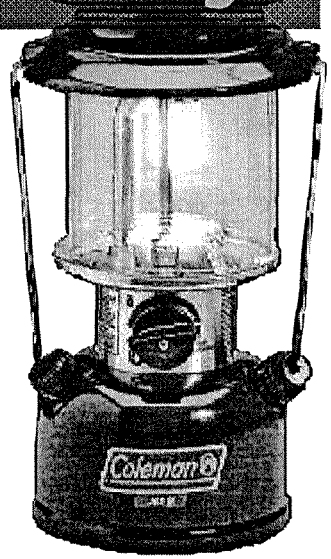


March 30, 1998

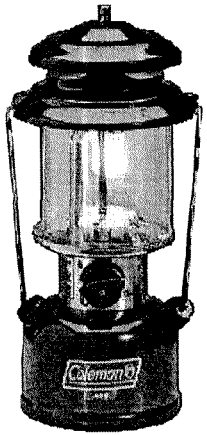
Morgan Stanley



Sunbeam and Coleman Merge

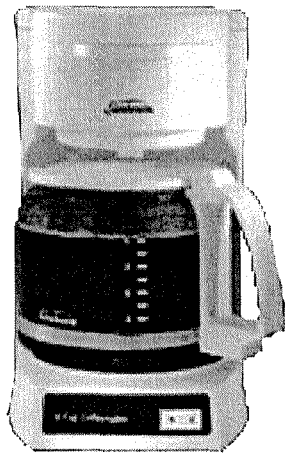
Outside Advisors

The Coleman Company
Coleman (Parent) Holdings



Investment Bank:
Credit Suisse First Boston

Lawyers:
Wachtell, Lipton



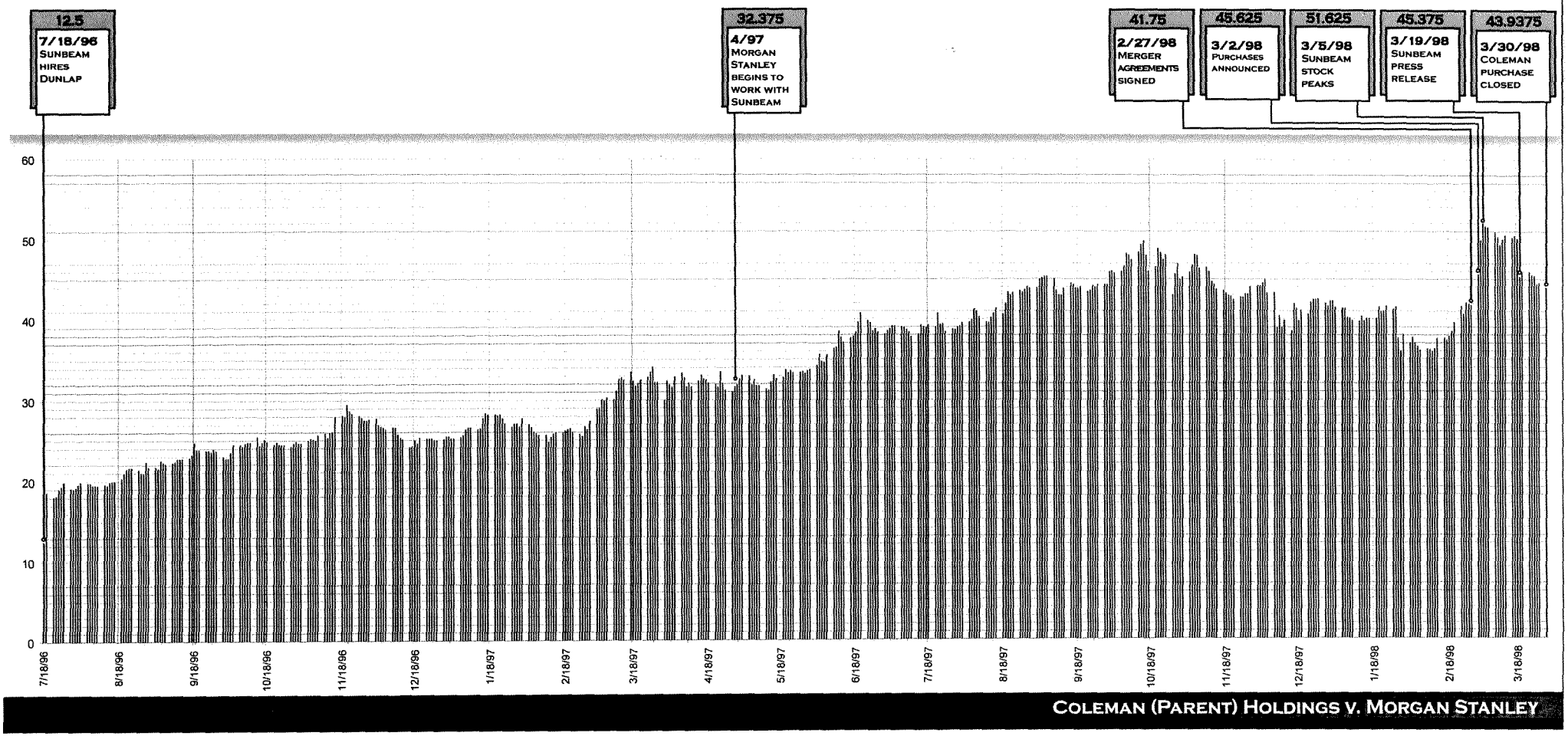
Investment Bank:
Morgan Stanley

Lawyers:
Skadden, Arps

Morgan Stanley

SUNBEAM STOCK PRICE

7/18/96 - 3/30/98 SOURCE: BLOOMBERG

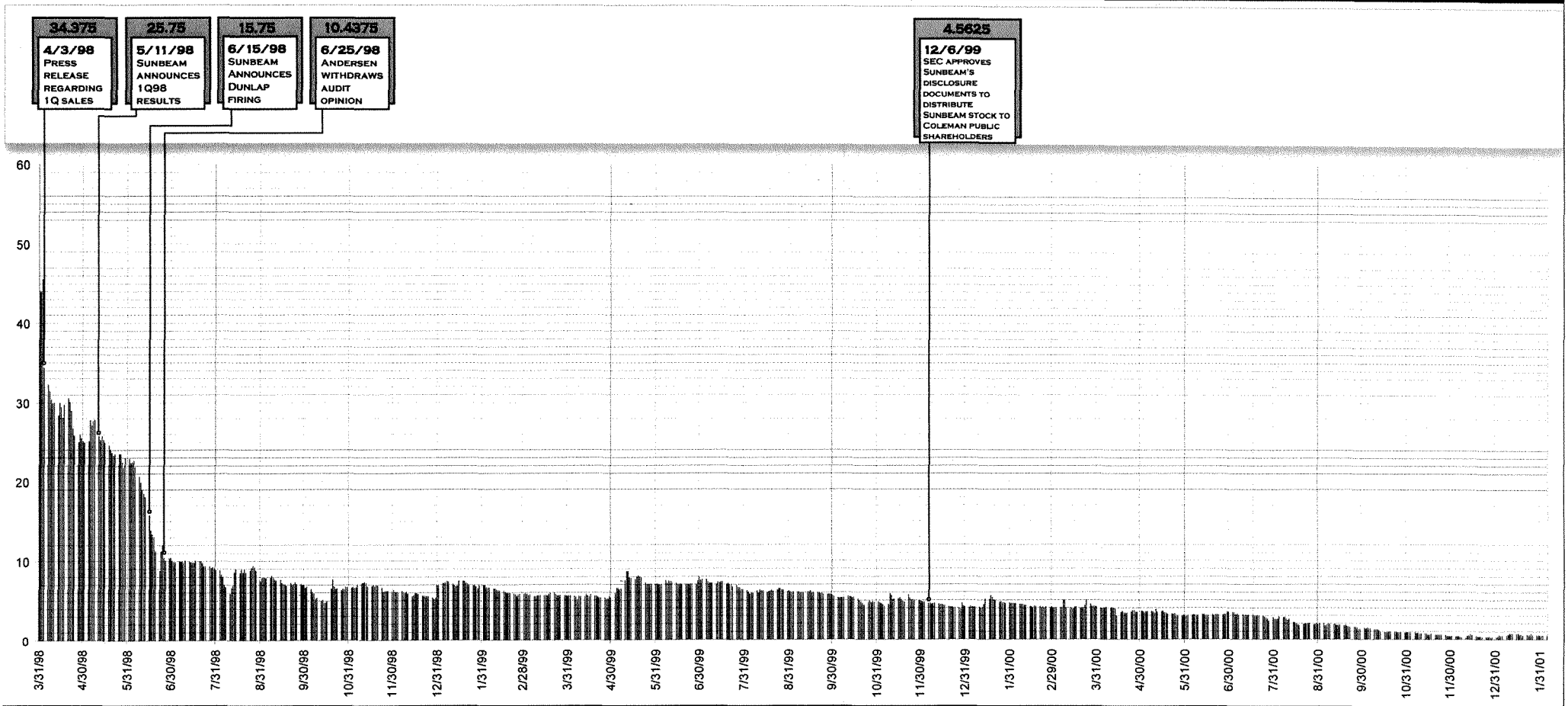


COLEMAN (PARENT) HOLDINGS V. MORGAN STANLEY

16div-014450

SUNBEAM STOCK PRICE

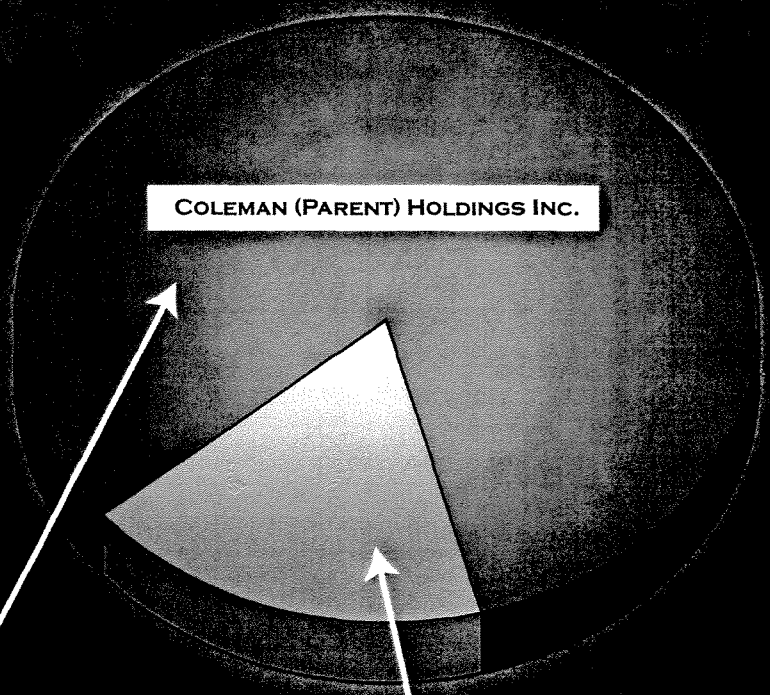
3/31/98 - 02/05/01 SOURCE: BLOOMBERG



COLEMAN (PARENT) HOLDINGS V. MORGAN STANLEY

16div-014451

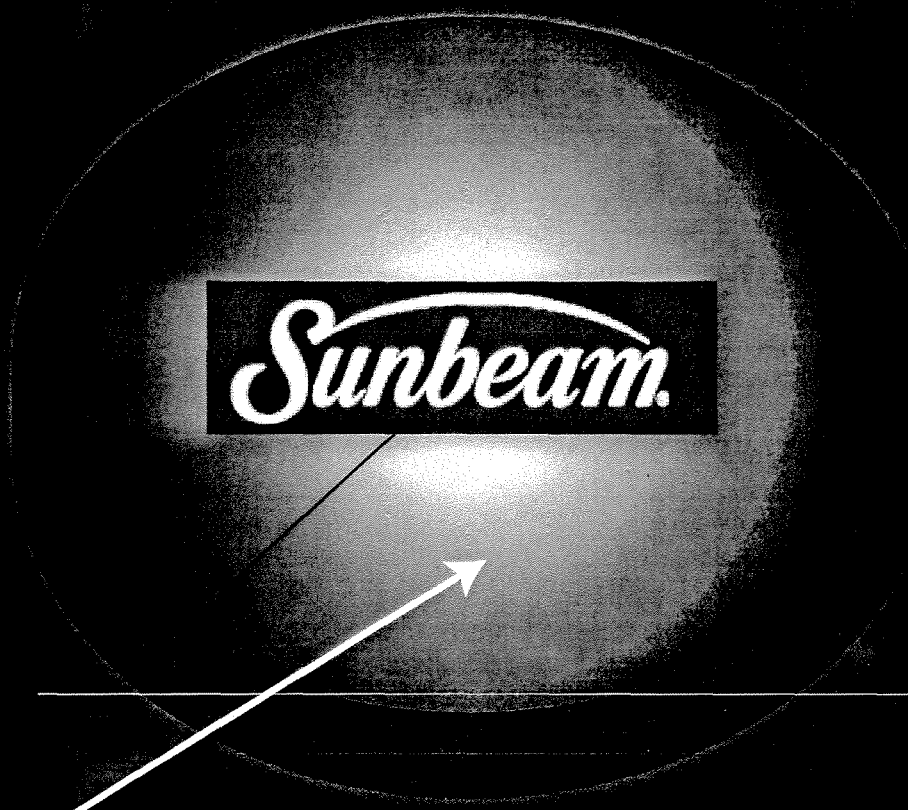
Coleman Before The Merger



82 % CPH (valued by Morgan Stanley at $1.369 Billion to $2.346 Billion)

18 % Public Shareholders (valued by Morgan Stanley at $292 Million to $501 Million)

Sunbeam Before Merger



Before Merger
(trading at approximately $41.75/ share day before merger announcement)
Following announcement rises to high of $52/ share

Coleman (Parent) Holdings v. Morgan Stanley

SUNBEAM AFTER THE MERGER

- CPH's 14.1 MILLION SHARES (AT $48.25/ SHARE = APPROXIMATELY $680 MILLION)

TAB 1

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

COLEMAN (PARENT) HOLDINGS, INC., CASE NO. CA 03-5045 AI

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

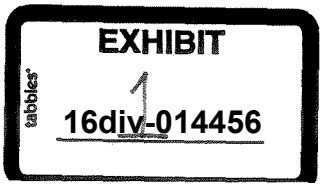
Defendant(s).
_____/

STATEMENT

If you find for CPH and against Morgan Stanley on CPH's claims for aiding and abetting and conspiring to commit fraud, you will then have to consider whether, in addition to compensatory damages, punitive damages are warranted. Later in the trial, I will instruct you about factors to consider when determining whether an award of punitive damages is appropriate. In considering these factors, certain facts already have been established and no longer are subject to dispute, which I shall now read to you. You are required to accept these facts as true.

This case arises out of a 1998 transaction in which Coleman (Parent) Holdings, Inc., which I will call "CPH," sold its 82% interest in The Coleman Company to Sunbeam Corporation. Morgan Stanley served as Sunbeam's financial advisor for the transaction and as the lead underwriter for a $750,000,000.00 debenture offering that Sunbeam used to finance the cash portion of the deal.

On May 12, 2003, CPH sued Morgan Stanley for aiding and abetting and conspiring with Sunbeam to commit fraud. Following established pretrial procedures, CPH formally requested that Morgan Stanley produce documents related to CPH's claims against Morgan



Stanley. A request to produce documents is one of the ways a party can seek to discover additional facts about the claims in a lawsuit and to gather evidence to present at trial. CPH's document request sought, in essence, all Morgan Stanley documents connected with the Sunbeam deal. The word "documents" specifically included items stored electronically, such as emails.

CPH was concerned that Morgan Stanley was not thoroughly looking for emails responsive to its discovery requests. In October 2003, CPH filed a motion, which is a written request to the Court, asking that Morgan Stanley be ordered to make a full investigation for email messages, including a search of magnetic backup tapes and computer hard drives.

Morgan Stanley opposed CPH's motion. It represented that it would cost at least hundreds of thousands of dollars and require several months to complete such an investigation and that no email data existed for any time period before January 2000 -- more than a year and a half after the Sunbeam transaction. However, Morgan Stanley never intended to search the backup tapes to respond to CPH's requests. Further, Morgan Stanley knew that some backup tapes contained email dating back at least to 1997.

In 2001 Morgan Stanley decided to create an email "archive." Morgan Stanley's email archive was a centralized storage system for electronic data that could be quickly and inexpensively searched. By June, 2003, Morgan Stanley had decided that the archive would have two components. First, the archive would capture and store new email messages "live," as they were generated. Second, Morgan Stanley wanted to add to the archive historical data dating back to the late 1990's. That task involved gathering all email backup tapes containing historical emails and then transferring data from the backup tapes onto the archive.

In February 2004, Robert Saunders, an Executive Director of Information Technology for Morgan Stanley, testified under oath to CPH that Morgan Stanley's email archive system would capture and store new emails as they were generated, but could not be used to search old emails. At the time, Mr. Saunders knew but did not disclose to CPH that the old emails already were being added to the archive and that that process was expected to be completed by April, 2004.

CPH still was concerned that all the emails it had requested had not been produced. However, in light of Morgan Stanley's representation that it would cost hundreds of thousands of dollars to search its emails and that the process would take many months, CPH reached an agreement with Morgan Stanley. On April 16, 2004, the Court entered an "Agreed Order." Under the Agreed Order, Morgan Stanley was required to (1) search the oldest full backup tape for each of 36 Morgan Stanley employees involved in the Sunbeam transaction; (2) review emails dated from a key two-month period in early 1998, as well as emails containing any of 29 specific search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004, all privileged emails responsive to CPH's document requests; and (4) certify Morgan Stanley's full compliance with the Agreed Order. CPH reached this agreement without knowing of the existence of the email archive and without knowing that the archive would make searches for emails quick and inexpensive.

In response to the Agreed Order, Morgan Stanley produced about 1,300 pages of emails on May 14, 2004. Morgan Stanley did not, however, certify compliance with the Agreed Order. After prompting by CPH, on June 23, 2004, Morgan Stanley served a Certificate of Compliance signed by Mr. Arthur Riel, an Executive Director and manager of Morgan Stanley's Law/Compliance Information Technology Group.

As organized by Morgan Stanley, the effort to create the historical data archive had several stages. First, the relevant backup tapes had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor to be processed, and the data returned to Morgan Stanley. Third, Morgan Stanley had to upload the processed data into its email archive. Fourth, Morgan Stanley had to run scripts, or pieces of computer code, to transform this data into a searchable form. Finally, Morgan Stanley had to search the data for emails related to this case. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when the processed data returned by the outside vendor remained in limbo, waiting to be uploaded to Morgan Stanley's archive.

At some point prior to May 6, 2004, Arthur Riel and his team became aware that 1,423 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423 tapes had not been processed by the outside vendor and thus had not been included in the archive or searched when Morgan Stanley made its production to CPH on May 14, 2004. Aware of the tapes' discovery, Mr. Riel and other Morgan Stanley personnel knew when Riel executed the certification of full compliance with the Court's Agreed Order that it was false. He and others on Morgan Stanley's email archive team knew by July 2, 2004 that these "Brooklyn tapes" contained email dating back at least to the late 1990's. During the summer of 2004, the Brooklyn tapes were processed and the data sent to the staging area. The scripts were not written and tested to permit the search for emails relating to this case to begin until the middle of January, 2005. Such a search, even if perfectly done, can take weeks.

In the May, 2004, production of documents under the Agreed Order, Morgan Stanley also failed to produce emails from 738 backup tapes found at a Morgan Stanley facility in Manhattan in 2002. These 738 tapes, like the 1,423 Brooklyn tapes, had not been processed by the outside

vendor and thus had not been included in the archive and searched by either May 14, 2004 or June 23, 2004, the date Morgan Stanley certified compliance with the Agreed Order. Mr. Riel and others were told by the outside vendor by July 2, 2004 that these tapes contained email dating back at least to 1998. During the summer of 2004, these tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not searched.

In August 2004, Mr. Riel was relieved of his employment responsibilities for reasons unrelated to Morgan Stanley's false certification. He and his team were replaced by a new team headed by Allison Gorman. At that time, the staging area contained about 600 gigabytes of email data that had not yet been uploaded into the Morgan Stanley archive and had not been searched for emails relating to this case. Six hundred gigabytes of data are the equivalent of approximately 12 million to 60 million printed pages.

On November 17, 2004, Morgan Stanley told CPH that Morgan Stanley had discovered additional email backup tapes. The next day, Morgan Stanley produced to CPH about 8,000 pages of emails. But in a series of letters back and forth from November, 2004, to January, 2005, Morgan Stanley refused to provide CPH with details about the backup tapes that allegedly had been "newly discovered" or about any ongoing efforts to restore emails from those backup tapes and to produce those emails to CPH. Morgan Stanley told CPH that the "newly discovered" tapes had not been found in locations where email backup tapes customarily were stored. In fact, the tapes were not "newly discovered" and had been found in locations where tapes customarily were stored.

Only a handful of the Brooklyn tapes had been added to the archive and were thus searched for the November, 2004 production. Morgan Stanley sought to create the impression that all the produced documents came from the Brooklyn tapes. However, none of the

November, 2004 production came from "newly found" tapes. Morgan Stanley's responses to inquiries about the November, 2004, production did not disclose the existence of the archive.

Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area. She was not told of the existence of this litigation until five months later, in January 2005. In October, 2004, Ms. Gorman gave the project somewhat greater priority, although even then it did not move as expeditiously as possible. Morgan Stanley did not consider using an outside contractor to expedite the process.

Morgan Stanley found another 169 tapes in January, 2005, that according to Morgan Stanley had been misplaced by its New Jersey storage vendor. Morgan Stanley discovered more than 200 additional unsearched backup tapes openly stored in locations known to be used for tape storage on February 11 and 12, 2005. Morgan Stanley did not voluntarily disclose this information to CPH.

Morgan Stanley claims to have discovered on February 11, 2005 that a flaw in the software it had written had prevented it from locating all email attachments about the Sunbeam transaction. Morgan Stanley also admits that the date-range searches were flawed for many email users who worked in the Morgan Stanley division responsible for the Sunbeam transaction. As a result, additional email messages that appeared to fall within the scope of the Agreed Order had not been given to CPH. Further, it appears that the problem infected Morgan Stanley's original searches in May of 2004.

On February 16, 2005, Morgan Stanley withdrew its certificate of compliance with the Agreed Order.

On February 19, 2005 Morgan Stanley notified CPH that it had found boxes of additional tapes that have not been uploaded into its archive or searched for responsive emails.

In addition, CPH has since found out that:

(1) About 5% of email harvested from the backup tapes was not captured and produced due to an error in transferring data into the archive.

(2) The computer programs Morgan Stanley used to process emails into its archive caused the bodies of some messages to be cut off.

(3) An analysis showed that, based on a representative sample, about ten percent of backup tapes were erased after January 2001, in violation of an obligation to preserve the data on the tapes.

(4) A computer programming error caused blind carbon copies not to be captured in the archive.

(5) Another computer programming error prevented the searches from turning up all responsive emails.

(6) Another computer programming error caused the archive to have problems pulling group email involving a set of email users that included Morgan Stanley employees involved in the Sunbeam transaction.

(7) Morgan Stanley's searches looked for only two types of emails. There are other types of emails that were not included in the searches.

(8) An additional 282 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found on February 23, and 25, 2005, and apparently were never searched.

(9) An additional 3,536 tapes that Morgan Stanley should have found and searched by May 14, 2004, were discovered on February 23, 2005, in a security room. These tapes apparently have not been searched.

(10) An additional 2,718 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found on March 3, 2005, at Morgan Stanley's New Jersey off-site storage vendor. These tapes apparently have not been searched either.

(11) An additional 389 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found from March 2 through March 5, 2005. These tapes apparently also have not been searched.

(12) Many of the documents that were eventually produced by Morgan Stanley were produced too late in the pretrial proceedings to be effectively investigated and used by CPH in the pretrial discovery process.

Morgan Stanley did not disclose any of these problems to CPH, as Morgan Stanley was obliged to do. The searches had not been completed when this trial was begun, when they were terminated without completion.

Mr. William Strong is the Morgan Stanley managing director who took credit for the fees Morgan Stanley generated from the Sunbeam deal. On March 15, 2004, Morgan Stanley was required to produce, "(a)ll references (positive or negative) to [Mr. Strong's] truthfulness, veracity, or moral turpitude." In response, Morgan Stanley produced some portions of Mr. Strong's annual employment evaluations. While he was working on the Sunbeam transaction, though, Mr. Strong was facing criminal prosecution in Italy for complicity in bribery. Mr. Strong's evaluators at Morgan Stanley knew that fact. Morgan Stanley failed to provide the

documents about these proceedings to CPH, though, which in January, 2005, independently discovered evidence of the criminal proceedings in Italy.

It is important that you understand the limited relevance of Mr. Strong's situation. The fact that Mr. Strong was facing criminal prosecution in Italy for complicity in bribery while he was working on the Sunbeam transaction may be relevant to the extent that it created pressures on Mr. Strong and motivated him to push forward with the Sunbeam deal. That is for you to decide. But you must not consider that fact as evidence of Mr. Strong's character or as evidence that Mr. Strong actually engaged in bribery or any other illegal conduct in Italy. Indeed, in 2003, on appeal, an Italian court found Mr. Strong not guilty.

As I told you at the outset of this Statement, you are required to accept the factual finding that I have read to you as true.

TAB 2

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).
_____/

CASE NO. CA 03-5045 AI

STATEMENT

If you find for CPH and against Morgan Stanley on[1] ~~either, or both, of~~ CPH's claims for aiding and abetting and conspiring to commit fraud, you will then have to consider whether, in addition to compensatory damages, punitive damages are warranted. Later in the trial, I will instruct you about factors to consider when determining whether an award of punitive damages is appropriate. In considering these factors, certain facts [2]~~have~~ already have been established and no longer are subject to dispute, which I shall now read to you. You are required to accept these facts as true.

This case arises out of a 1998 transaction in which Coleman (Parent) Holdings, Inc., which I will call "CPH," sold its 82% interest in The Coleman Company to Sunbeam Corporation. Morgan Stanley served as Sunbeam's financial advisor for the transaction and as the lead underwriter for a $750,000,000.00 debenture offering that Sunbeam used to finance the cash portion of the deal.

On May 12, 2003, CPH sued Morgan Stanley for aiding and abetting and conspiring with Sunbeam to commit fraud. Following established pretrial procedures, CPH formally requested that Morgan Stanley produce documents related to CPH's claims against Morgan

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Stanley. A request to produce documents is one of the ways a party can seek to discover additional facts about the claims in a lawsuit and to gather evidence to present at trial. CPH's document request sought, in essence, all Morgan Stanley documents connected with the Sunbeam deal. The [3]~~work~~[4]**word** "documents" specifically included items stored electronically, such as emails.

CPH was concerned that Morgan Stanley was not thoroughly looking for emails responsive to its discovery requests. In October 2003, CPH filed a motion, which is a written request to the Court, asking that Morgan Stanley be ordered to make a full investigation for email messages, including a search of magnetic backup tapes and computer hard drives.

Morgan Stanley opposed CPH's motion. It represented that it would cost at least hundreds of thousands of dollars and require several months to complete such an investigation and that no email data existed for any time period before January 2000 -- more than a year and a half after the Sunbeam transaction. However, Morgan Stanley never intended to search the backup tapes to respond to CPH's requests. Further, [5]~~some of~~ Morgan Stanley[6]~~'s~~[7] **knew that some** backup tapes contained email dating back at least to 1997.

In 2001 Morgan Stanley decided to create an email "archive." Morgan Stanley's email archive was a centralized storage system for electronic data that could be quickly and inexpensively searched. By June, 2003, Morgan Stanley had decided that the archive would have two components. First, the archive would capture and store new email messages "live," as they were generated. Second, Morgan Stanley wanted to add to the archive historical data dating back to the late 1990's. That task involved gathering all email backup tapes containing historical emails and then transferring data from the backup tapes onto the archive.

In February 2004, Robert Saunders, an Executive Director of Information Technology for Morgan Stanley, testified under oath to CPH that Morgan Stanley's email archive system would capture and store new emails as they were generated, but could not be used to search old emails. At the time, Mr. Saunders knew[8] **but did not disclose to CPH** that the old emails already were being added to the archive and that that process was expected to be completed by April, 2004.

CPH still was concerned that all the emails it had requested had not been produced. However, in light of Morgan Stanley's representation that it would cost hundreds of thousands of dollars to search its emails and that the process would take many months, [9]~~it~~[10]**CPH** reached an agreement with Morgan Stanley. On April 16, 2004, the Court entered an "Agreed Order." Under the Agreed Order, Morgan Stanley was required to (1) search the oldest full backup tape for each of 36 Morgan Stanley employees involved in the Sunbeam transaction; (2) review emails dated from a key two-month period in early 1998, as well as emails containing any of 29 specific search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004, all privileged emails responsive to CPH's document requests; and (4) certify Morgan Stanley's full compliance with the Agreed Order. CPH reached this agreement without [11]~~Morgan Stanley's disclosing~~[12]**knowing of** the existence of the email archive [13]~~or Morgan Stanley's belief~~[14]**and without knowing** that the archive would make searches for emails quick and inexpensive.

In response to the Agreed Order, Morgan Stanley produced about 1,300 pages of emails on May 14, 2004. Morgan Stanley did not, however, certify compliance with the Agreed Order. After prompting by CPH, on June 23, 2004, Morgan Stanley served a Certificate of Compliance signed by Mr. Arthur Riel, an Executive Director and manager of Morgan Stanley's Law/Compliance Information Technology Group.

As organized by Morgan Stanley, the effort to create the historical data archive had several stages. First, the relevant backup tapes had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor[15]~~, National Data Conversion, Inc., which I will call "NDCI",~~ to be processed, and the data returned to Morgan Stanley. Third, Morgan Stanley had to upload the processed data into its email archive. Fourth, Morgan Stanley had to run scripts, or pieces of computer code, to transform this data into a searchable form. Finally, Morgan Stanley had to search the data for emails related to this case. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when the processed data returned by [16]~~NDCI~~[17]**the outside vendor** remained in limbo, waiting to be uploaded to Morgan Stanley's archive.

At some point prior to May 6, 2004, Arthur Riel and his team became aware that 1,423 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423 tapes had not been processed by [18]~~NDCI~~[19]**the outside vendor** and thus had not been included in the archive or searched when Morgan Stanley made its production to CPH on May 14, 2004. Aware of the tapes' discovery, Mr. Riel and other Morgan Stanley personnel knew when Riel executed the certification of full compliance with the Court's Agreed Order that it was false. He and others on Morgan Stanley's email archive team knew by July 2, 2004 that these "Brooklyn tapes" contained email dating back at least to the late 1990's. During the summer of 2004, the Brooklyn tapes were processed and the data sent to the staging area. The scripts were not written and tested to permit the search for emails relating to this case to begin until the middle of January, 2005. Such a search, even if perfectly done, can take weeks.

In the May, 2004, production of documents under the Agreed Order, Morgan Stanley also failed to produce emails from 738 backup tapes found at a Morgan Stanley facility in Manhattan

in 2002. These 738 tapes, like the 1,423 Brooklyn tapes, had not been processed by [20]~~NDCI~~[21]**the outside vendor** and thus had not been included in the archive and searched by either May 14, 2004 or June 23, 2004, the date Morgan Stanley certified compliance[22] **with the Agreed Order**. Mr. Riel and others were told by [23]~~NDCI~~[24]**the outside vendor** by July 2, 2004 that these tapes contained email dating back at least to 1998. During the summer of 2004, these tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not searched.

In August 2004, Mr. Riel was relieved of his employment responsibilities for reasons unrelated to Morgan Stanley's false certification. He and his team were replaced by a new team headed by Allison Gorman. At that time, the staging area contained about 600 gigabytes of email data that had not yet been uploaded into the Morgan Stanley archive and had not been searched for emails relating to this case. Six hundred gigabytes of data are the equivalent of approximately 12 million to 60 million printed pages.

On November 17, 2004, Morgan Stanley told CPH that Morgan Stanley had discovered additional email backup tapes. The next day, Morgan Stanley produced to CPH about 8,000 pages of emails. But in a series of letters back and forth from November, 2004, to January, 2005, Morgan Stanley refused to provide CPH with details about the backup tapes that allegedly had been "newly discovered" or about any ongoing efforts to restore emails from those backup tapes and to produce those emails to CPH. Morgan Stanley told CPH that the "newly discovered" tapes had not been found in locations where email backup tapes customarily were stored.[25] **In fact, the tapes were not "newly discovered" and had been found in locations where tapes customarily were stored.**

Only a handful of the Brooklyn tapes had been added to the archive and were thus searched for the November, 2004 production. Morgan Stanley sought to create the impression that all the produced documents came from the Brooklyn tapes[26]~~, though~~. However, none of the November, 2004 production came from "newly found" tapes. Morgan Stanley's responses to inquiries about the November, 2004, production did not disclose the existence of the archive.

Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area. She was not told of the existence of this litigation until five months later, in January 2005. In October, 2004, Ms. Gorman gave the project somewhat greater priority, although even then it did not move as expeditiously as possible. Morgan Stanley did not consider using an outside contractor to expedite the process.

Morgan Stanley found another 169[27] ~~DLT~~ tapes in January, 2005, that according to Morgan Stanley had been misplaced by its New Jersey storage vendor. Morgan Stanley discovered more than 200 additional unsearched backup tapes openly stored in locations known to be used for tape storage on February 11 and 12, 2005. Morgan Stanley did not voluntarily disclose this information to CPH.

Morgan Stanley claims to have discovered on February 11, 2005 that a flaw in the software it had written had prevented it from locating all email attachments about the Sunbeam transaction. Morgan Stanley also admits that the date-range searches [28]**were flawed** for[29] **many** email users who [30]~~had a Lotus Notes platform were flawed, so that~~[31]**worked in the Morgan Stanley**[32] **division responsible for the**[33] **Sunbeam transaction. As a result,** additional email messages that appeared to fall within the scope of the Agreed Order had not been given to CPH. Further, it appears that the problem infected Morgan Stanley's original searches in May of

2004.[34] ~~The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the[35] division responsible for the[36] transaction under review here.~~

On February 16, 2005, Morgan Stanley withdrew its certificate of compliance with the Agreed Order.

On February 19, 2005 Morgan Stanley notified CPH that it had found boxes of additional tapes that have not been uploaded into its archive or searched for responsive emails.

In addition, CPH has since found out that:

(1) [37]~~A migration issue caused about~~[38]**About** 5% of email harvested [39]~~by NDCI~~ from the backup tapes [40]**was** not [41]~~to be~~ captured[42] **and produced due to an error in transferring data into the archive**.

(2) The computer programs Morgan Stanley used to process emails into its archive caused the bodies of some messages to be [43]~~truncated, or~~ cut off.

[44]~~(3) About five percent of email harvested from the backup tapes [45]was [46]not added to the archive.~~

(3) ~~(4)~~ [47]An analysis showed that, based on a representative sample, about ten percent of backup tapes were erased after January [48]~~2001.~~[49]**2001, in violation of an obligation to preserve the data on the tapes.**

(4) ~~(5)~~ [50]A computer programming error caused blind carbon copies not to be captured in the archive.

(5) ~~(6)~~ [51]Another computer programming error prevented the searches from turning up all responsive emails.

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(6) ~~(7)~~ [52]Another computer programming error caused the archive to have problems pulling group email involving a set of email users that included Morgan Stanley employees involved in the Sunbeam transaction.

(7) ~~(8)~~ [53]Morgan Stanley's searches looked for only two types of emails. There are other types of emails that were not included in the searches.

(8) ~~(9)~~ [54]An additional 282 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found on February 23, and 25, 2005, and apparently were never searched.

(9) ~~(10)~~ [55]An additional 3,536 tapes that Morgan Stanley should have found and searched by May 14, 2004, were discovered on February 23, 2005, in a security room. These tapes apparently have not been searched.

(10) ~~(11)~~ [56]An additional 2,718 tapes that Morgan Stanley should have found and searched by May 14, [57]~~2005,~~[58]**2004,** were found on March 3, 2005, at Morgan Stanley's New Jersey off-site storage vendor. These tapes apparently have not been searched either.

(11) ~~(12)~~ [59]An additional 389 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found from March 2 through March 5, 2005. These tapes apparently also have not been searched.

(12) [60] [61]**Many of the documents that were eventually produced by Morgan Stanley were produced too late in the pretrial proceedings to be effectively investigated and used by CPH in the pretrial discovery process.**

Morgan Stanley did not [62]~~voluntarily~~ disclose any of these [63]~~ten~~ problems to CPH[64]**, as Morgan Stanley was obliged to do**. The searches had not been completed when this trial was begun, when they were terminated without completion.

Mr. William Strong is the Morgan Stanley managing director who took credit for the fees Morgan Stanley generated from the Sunbeam deal. On March 15, 2004, Morgan Stanley was required to produce, "(a)ll references (positive or negative) to [Mr. Strong's] truthfulness, veracity, or moral turpitude." In response, Morgan Stanley produced some portions of Mr. Strong's annual employment evaluations. While he was working on the Sunbeam transaction, though, Mr. Strong was facing criminal prosecution in Italy for complicity in bribery. Mr. Strong's evaluators at Morgan Stanley knew that fact. Morgan Stanley failed to provide the documents about these proceedings to CPH, though, which in January, 2005, independently discovered evidence of the criminal proceedings in Italy.

It is important that you understand the limited relevance of Mr. Strong's situation. The fact that Mr. Strong was facing criminal prosecution in Italy for complicity in bribery while he was working on the Sunbeam transaction may be relevant to the extent that it created pressures on Mr. Strong and motivated him to push forward with the Sunbeam deal. That is for you to decide. But you must not consider that fact as evidence of Mr. Strong's character or as evidence that Mr. Strong actually engaged in bribery or any other illegal conduct in Italy. Indeed, in 2003, on appeal, an Italian court found Mr. Strong not guilty.

As I told you at the outset of this Statement, you are required to accept the factual finding that I have read to you as true.

TAB 3

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).
_____/

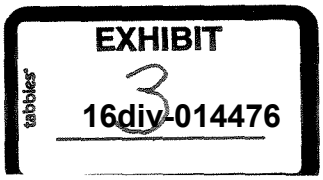
CASE NO. CA 03-5045 AI

STATEMENT

To Be Read to the Jury in the Trial's Second Phase

Having found for CPH and against Morgan Stanley on CPH's claims for aiding and abetting and conspiring to commit fraud, you now have to consider whether, in addition to compensatory damages, punitive damages are warranted and, if so, what is the proper amount of punitive damages. At the end of these proceedings, I will instruct you about factors to consider when determining whether an award of punitive damages is appropriate and, if so, the proper amount of those damages. In considering these factors, certain facts already have been established and no longer are subject to dispute. I shall now read these facts to you. You are required to accept these facts as true.

As you know, in May 2003, CPH sued Morgan Stanley for aiding and abetting and conspiring with Sunbeam to commit fraud. Following established pretrial procedures, CPH formally requested that Morgan Stanley produce documents related to CPH's claims against Morgan Stanley. A request to produce documents is one of the ways a party can seek to discover additional facts about the claims in a lawsuit and to gather evidence to present at trial. CPH's document request sought, in essence, all Morgan Stanley



documents connected with the Sunbeam deal. The word "documents" specifically included items stored electronically, such as emails.

CPH was concerned that Morgan Stanley was not thoroughly looking for emails responsive to its discovery requests. In October 2003, CPH filed a motion, which is a written request to the Court, asking that Morgan Stanley be ordered to make a full investigation for email messages, including a search of magnetic backup tapes and computer hard drives.

Morgan Stanley opposed CPH's motion. It represented that it would cost at least hundreds of thousands of dollars and require several months to complete such an investigation and that no email data existed for any time period before January 2000 -- more than a year and a half after the Sunbeam transaction. However, Morgan Stanley never intended to search the backup tapes to respond to CPH's requests. Further, Morgan Stanley knew that some backup tapes contained email dating back at least to 1997.

In 2001 Morgan Stanley decided to create an email "archive." Morgan Stanley's email archive was a centralized storage system for electronic data that could be quickly and inexpensively searched. By June, 2003, Morgan Stanley had decided that the archive would have two components. First, the archive would capture and store new email messages "live," as they were generated. Second, Morgan Stanley wanted to add to the archive historical data dating back to the late 1990's. That task involved gathering all email backup tapes containing historical emails and then transferring data from the backup tapes onto the archive.

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At the time, Mr. Saunders knew but did not disclose to CPH that the old emails already were being added to the archive and that that process was expected to be completed by April, 2004.

CPH still was concerned that all the emails it had requested had not been produced. However, in light of Morgan Stanley's representation that it would cost hundreds of thousands of dollars to search its emails and that the process would take many months, CPH reached an agreement with Morgan Stanley. On April 16, 2004, the Court entered an "Agreed Order." Under the Agreed Order, Morgan Stanley was required to (1) search the oldest full backup tape for each of 36 Morgan Stanley employees involved in the Sunbeam transaction; (2) review emails dated from a key two-month period in early 1998, as well as emails containing any of 29 specific search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004, all privileged emails responsive to CPH's document requests; and (4) certify Morgan Stanley's full compliance with the Agreed Order. CPH reached this agreement without knowing of the existence of the email archive and without knowing that the archive would make searches for emails quick and inexpensive.

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As organized by Morgan Stanley, the effort to create the historical data archive had several stages. First, the relevant backup tapes had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor to be processed, and the data returned to Morgan Stanley. Third, Morgan Stanley had to upload the processed data into its

email archive. Fourth, Morgan Stanley had to run scripts, or pieces of computer code, to transform this data into a searchable form. Finally, Morgan Stanley had to search the data for emails related to this case. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when the processed data returned by the outside vendor remained in limbo, waiting to be uploaded to Morgan Stanley's archive.

At some point prior to May 6, 2004, Arthur Riel and his team became aware that 1,423 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423 tapes had not been processed by the outside vendor and thus had not been included in the archive or searched when Morgan Stanley made its production to CPH on May 14, 2004. Aware of the tapes' discovery, Mr. Riel and other Morgan Stanley personnel knew when Riel executed the certification of full compliance with the Court's Agreed Order that it was false. He and others on Morgan Stanley's email archive team knew by July 2, 2004 that these "Brooklyn tapes" contained email dating back at least to the late 1990's. During the summer of 2004, the Brooklyn tapes were processed and the data sent to the staging area. The scripts were not written and tested to permit the search for emails relating to this case to begin until the middle of January, 2005. Such a search, even if perfectly done, can take weeks.

In the May, 2004, production of documents under the Agreed Order, Morgan Stanley also failed to produce emails from 738 backup tapes found at a Morgan Stanley facility in Manhattan in 2002. These 738 tapes, like the 1,423 Brooklyn tapes, had not been processed by the outside vendor and thus had not been included in the archive and searched by either May 14, 2004 or June 23, 2004, the date Morgan Stanley certified compliance with the Agreed Order. Mr. Riel and others were told by the outside vendor by July 2, 2004 that these tapes contained email

dating back at least to 1998. During the summer of 2004, these tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not searched.

In August 2004, Mr. Riel was relieved of his employment responsibilities for reasons unrelated to Morgan Stanley's false certification. He and his team were replaced by a new team headed by Allison Gorman. At that time, the staging area contained about 600 gigabytes of email data that had not yet been uploaded into the Morgan Stanley archive and had not been searched for emails relating to this case. Six hundred gigabytes of data are the equivalent of approximately 12 million to 60 million printed pages.

On November 17, 2004, Morgan Stanley told CPH that Morgan Stanley had discovered additional email backup tapes. The next day, Morgan Stanley produced to CPH about 8,000 pages of emails. But in a series of letters back and forth from November, 2004, to January, 2005, Morgan Stanley refused to provide CPH with details about the backup tapes that allegedly had been "newly discovered" or about any ongoing efforts to restore emails from those backup tapes and to produce those emails to CPH. Morgan Stanley told CPH that the "newly discovered" tapes had not been found in locations where email backup tapes customarily were stored. In fact, the tapes were not "newly discovered" and had been found in locations where tapes customarily were stored.

Only a handful of the Brooklyn tapes had been added to the archive and were thus searched for the November, 2004 production. Morgan Stanley sought to create the impression that all the produced documents came from the Brooklyn tapes. However, none of the November, 2004 production came from "newly found" tapes. Morgan Stanley's responses to inquiries about the November, 2004, production did not disclose the existence of the archive.

Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area. She was not told of the existence of this litigation until five months later, in January 2005. In October, 2004, Ms. Gorman gave the project somewhat greater priority, although even then it did not move as expeditiously as possible. Morgan Stanley did not consider using an outside contractor to expedite the process.

Morgan Stanley found another 169 tapes in January, 2005, that according to Morgan Stanley had been misplaced by its New Jersey storage vendor. Morgan Stanley discovered more than 200 additional unsearched backup tapes openly stored in locations known to be used for tape storage on February 11 and 12, 2005. Morgan Stanley did not voluntarily disclose this information to CPH.

Morgan Stanley claims to have discovered on February 11, 2005 that a flaw in the software it had written had prevented it from locating all email attachments about the Sunbeam transaction. Morgan Stanley also admits that the date-range searches were flawed for many email users who worked in the Morgan Stanley division responsible for the Sunbeam transaction. As a result, additional email messages that appeared to fall within the scope of the Agreed Order had not been given to CPH. Further, it appears that the problem infected Morgan Stanley's original searches in May of 2004.

These defects in Morgan Stanley's compliance with the April 16, 2004 Agreed Order were revealed only as a result of Morgan Stanley knowing that an independent computer search expert had been hired to double-check Morgan Stanley's work and was in the process of performing its verification.

On February 16, 2005, Morgan Stanley withdrew its certificate of compliance with the Agreed Order.

On February 19, 2005 Morgan Stanley notified CPH that it had found boxes of additional tapes that have not been uploaded into its archive or searched for responsive emails.

In addition, CPH has since found out the following facts about Morgan Stanley's email production:

(1) About 5% of email harvested from the backup tapes was not captured and produced due to an error in transferring data into the archive.

(2) The computer programs Morgan Stanley used to process emails into its archive caused the bodies of some messages to be cut off.

(3) An analysis showed that, based on a representative sample, about ten percent of backup tapes were erased after January 2001, in violation of an obligation to preserve the data on the tapes.

(4) A computer programming error caused blind carbon copies not to be captured in the archive.

(5) Another computer programming error prevented the searches from turning up all responsive emails.

(6) Another computer programming error caused the archive to have problems pulling group email involving a set of email users that included Morgan Stanley employees involved in the Sunbeam transaction.

(7) Morgan Stanley's searches looked for only two types of emails. There are other types of emails that were not included in the searches.

(8) An additional 282 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found on February 23, and 25, 2005, and apparently were never searched.

(9) An additional 3,536 tapes that Morgan Stanley should have found and searched by May 14, 2004, were discovered on February 23, 2005, in a security room. These tapes apparently have not been searched.

(10) An additional 2,718 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found on March 3, 2005, at Morgan Stanley's New Jersey off-site storage vendor. These tapes apparently have not been searched either.

(11) An additional 389 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found from March 2 through March 5, 2005. These tapes apparently also have not been searched.

(12) Many of the documents that were eventually produced by Morgan Stanley were produced too late in the pretrial proceedings to be effectively investigated and used by CPH in the pretrial discovery process.

Morgan Stanley did not disclose any of these problems to CPH, as Morgan Stanley was obliged to do. The searches for email evidence had not been completed when this trial was begun, and they were terminated without completion because they could not be completed without an unreasonably long delay in the trial. Even then there could be no assurance that Morgan Stanley would locate and produce all of the relevant evidence.

In addition to this misconduct, Morgan Stanley has committed other discovery abuses, including the following:

- An Executive Director of Morgan Stanley's Law Division filed a sworn declaration stating that he did not learn of additional unsearched backup tapes

until the end of October, 2004. By filing the declaration, Morgan Stanley sought to imply that no one in Morgan Stanley's Law Division knew of the backup tapes before then. Instead, at least two Morgan Stanley in-house lawyers, including the Executive Director's superior, knew of the tapes no later than June 7, 2004.

- Morgan Stanley improperly failed to produce 138 documents that were required to be produced.
- Morgan Stanley sought to discredit Mr. Riel and thus distance itself from the false June 23, 2004 Certificate of Compliance that he had signed. In doing so, Morgan Stanley sought to hide other damaging information, including information about whether Morgan Stanley continued to erase backup tapes illegally.
- Morgan Stanley failed to provide computer information about the extent of the work it performed in generating Sunbeam-related documents. And then Morgan Stanley falsely represented that it had no such useful information.

Finally, Mr. William Strong is the Morgan Stanley managing director who took credit for the fees Morgan Stanley generated from the Sunbeam deal. On March 15, 2004, Morgan Stanley was required to produce, "(a)ll references (positive or negative) to [Mr. Strong's] truthfulness, veracity, or moral turpitude." In response, Morgan Stanley produced some portions of Mr. Strong's annual employment evaluations. While he was working on the Sunbeam transaction, though, Mr. Strong was facing criminal prosecution in Italy for complicity in bribery. Mr. Strong's evaluators at Morgan Stanley knew that fact. Morgan Stanley was obligated to provide the documents about these proceedings to CPH, but did not provide them. In January, 2005, CPH independently discovered evidence of the criminal proceedings in Italy.

It is important that you understand the limited relevance of Mr. Strong's situation. The fact that Mr. Strong was facing criminal prosecution in Italy for complicity in bribery while he was working on the Sunbeam transaction may be relevant to the extent that it created pressures on Mr. Strong and motivated him to push forward with the Sunbeam deal. That is for you to decide. But you must not consider that fact as evidence of Mr. Strong's character or as evidence that Mr. Strong actually engaged in bribery or any other illegal conduct in Italy. Indeed, in 2003, on appeal, an Italian court found Mr. Strong not guilty.

In sum, throughout the pretrial discovery process, Morgan Stanley repeatedly misrepresented facts and failed to fulfill its discovery obligations. In determining whether and in what amount punitive damages should be assessed against Morgan Stanley, you should consider the extent to which the conduct of Morgan Stanley that I have described — and that you are required to accept as true — shows

— a consciousness of guilt;

— a corporate ratification of the wrongdoing;

— an effort to conceal the truth; and

— an unwillingness to accept responsibility for its wrongdoing.

TAB 4

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

COLEMAN (PARENT) HOLDINGS, INC., CASE NO. CA 03-5045 AI

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).
_____/

STATEMENT

[1]**To Be Read to the Jury in the Trial's Second Phase**

[2]~~If you find~~[3]**Having found** for CPH and against Morgan Stanley on CPH's claims for aiding and abetting and conspiring to commit fraud, you [4]~~will then~~[5]**now** have to consider whether, in addition to compensatory damages, punitive damages are warranted[6]~~. Later in the trial~~[7] **and, if so, what is the proper amount of punitive damages. At the end of these proceedings**, I will instruct you about factors to consider when determining whether an award of punitive damages is appropriate[8] **and, if so, the proper amount of those damages**. In considering these factors, certain facts already have been established and no longer are subject to dispute[9]~~, which~~[10]**,** I shall now read[11] **these facts** to you. You are required to accept these facts as true.

[12]~~This case arises out of a 1998 transaction in which Coleman (Parent) Holdings, Inc., which I will call "CPH," sold its 82% interest in The Coleman Company to Sunbeam Corporation. Morgan Stanley served as Sunbeam's financial advisor for the transaction and as~~

EXHIBIT
4
16div-014487

~~the lead underwriter for a $750,000,000.00 debenture offering that Sunbeam used to finance the cash portion of the deal.~~

[13]~~On~~[14]**As you know, in** May [15]~~12,~~ 2003, CPH sued Morgan Stanley for aiding and abetting and conspiring with Sunbeam to commit fraud. Following established pretrial procedures, CPH formally requested that Morgan Stanley produce documents related to CPH's claims against Morgan Stanley. A request to produce documents is one of the ways a party can seek to discover additional facts about the claims in a lawsuit and to gather evidence to present at trial. CPH's document request sought, in essence, all Morgan Stanley documents connected with the Sunbeam deal. The word "documents" specifically included items stored electronically, such as emails.

CPH was concerned that Morgan Stanley was not thoroughly looking for emails responsive to its discovery requests. In October 2003, CPH filed a motion, which is a written request to the Court, asking that Morgan Stanley be ordered to make a full investigation for email messages, including a search of magnetic backup tapes and computer hard drives.

Morgan Stanley opposed CPH's motion. It represented that it would cost at least hundreds of thousands of dollars and require several months to complete such an investigation and that no email data existed for any time period before January 2000 -- more than a year and a half after the Sunbeam transaction. However, Morgan Stanley never intended to search the backup tapes to respond to CPH's requests. Further, Morgan Stanley knew that some backup tapes contained email dating back at least to 1997.

In 2001 Morgan Stanley decided to create an email "archive." Morgan Stanley's email archive was a centralized storage system for electronic data that could be quickly and inexpensively searched. By June, 2003, Morgan Stanley had decided that the archive would have

two components. First, the archive would capture and store new email messages "live," as they were generated. Second, Morgan Stanley wanted to add to the archive historical data dating back to the late 1990's. That task involved gathering all email backup tapes containing historical emails and then transferring data from the backup tapes onto the archive.

In February 2004, Robert Saunders, an Executive Director of Information Technology for Morgan Stanley, testified under oath to CPH that Morgan Stanley's email archive system would capture and store new emails as they were generated, but could not be used to search old emails. At the time, Mr. Saunders knew but did not disclose to CPH that the old emails already were being added to the archive and that that process was expected to be completed by April, 2004.

CPH still was concerned that all the emails it had requested had not been produced. However, in light of Morgan Stanley's representation that it would cost hundreds of thousands of dollars to search its emails and that the process would take many months, CPH reached an agreement with Morgan Stanley. On April 16, 2004, the Court entered an "Agreed Order." Under the Agreed Order, Morgan Stanley was required to (1) search the oldest full backup tape for each of 36 Morgan Stanley employees involved in the Sunbeam transaction; (2) review emails dated from a key two-month period in early 1998, as well as emails containing any of 29 specific search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004, all privileged emails responsive to CPH's document requests; and (4) certify Morgan Stanley's full compliance with the Agreed Order. CPH reached this agreement without knowing of the existence of the email archive and without knowing that the archive would make searches for emails quick and inexpensive.

In response to the Agreed Order, Morgan Stanley produced about 1,300 pages of emails on May 14, 2004. Morgan Stanley did not, however, certify compliance with the Agreed Order.

After prompting by CPH, on June 23, 2004, Morgan Stanley served a Certificate of Compliance signed by Mr. Arthur Riel, an Executive Director and manager of Morgan Stanley's Law/Compliance Information Technology Group.

As organized by Morgan Stanley, the effort to create the historical data archive had several stages. First, the relevant backup tapes had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor to be processed, and the data returned to Morgan Stanley. Third, Morgan Stanley had to upload the processed data into its email archive. Fourth, Morgan Stanley had to run scripts, or pieces of computer code, to transform this data into a searchable form. Finally, Morgan Stanley had to search the data for emails related to this case. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when the processed data returned by the outside vendor remained in limbo, waiting to be uploaded to Morgan Stanley's archive.

At some point prior to May 6, 2004, Arthur Riel and his team became aware that 1,423 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423 tapes had not been processed by the outside vendor and thus had not been included in the archive or searched when Morgan Stanley made its production to CPH on May 14, 2004. Aware of the tapes' discovery, Mr. Riel and other Morgan Stanley personnel knew when Riel executed the certification of full compliance with the Court's Agreed Order that it was false. He and others on Morgan Stanley's email archive team knew by July 2, 2004 that these "Brooklyn tapes" contained email dating back at least to the late 1990's. During the summer of 2004, the Brooklyn tapes were processed and the data sent to the staging area. The scripts were not written and tested to permit the search for emails relating to this case to begin until the middle of January, 2005. Such a search, even if perfectly done, can take weeks.

In the May, 2004, production of documents under the Agreed Order, Morgan Stanley also failed to produce emails from 738 backup tapes found at a Morgan Stanley facility in Manhattan in 2002. These 738 tapes, like the 1,423 Brooklyn tapes, had not been processed by the outside vendor and thus had not been included in the archive and searched by either May 14, 2004 or June 23, 2004, the date Morgan Stanley certified compliance with the Agreed Order. Mr. Riel and others were told by the outside vendor by July 2, 2004 that these tapes contained email dating back at least to 1998. During the summer of 2004, these tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not searched.

In August 2004, Mr. Riel was relieved of his employment responsibilities for reasons unrelated to Morgan Stanley's false certification. He and his team were replaced by a new team headed by Allison Gorman. At that time, the staging area contained about 600 gigabytes of email data that had not yet been uploaded into the Morgan Stanley archive and had not been searched for emails relating to this case. Six hundred gigabytes of data are the equivalent of approximately 12 million to 60 million printed pages.

On November 17, 2004, Morgan Stanley told CPH that Morgan Stanley had discovered additional email backup tapes. The next day, Morgan Stanley produced to CPH about 8,000 pages of emails. But in a series of letters back and forth from November, 2004, to January, 2005, Morgan Stanley refused to provide CPH with details about the backup tapes that allegedly had been "newly discovered" or about any ongoing efforts to restore emails from those backup tapes and to produce those emails to CPH. Morgan Stanley told CPH that the "newly discovered" tapes had not been found in locations where email backup tapes customarily were stored. In fact, the tapes were not "newly discovered" and had been found in locations where tapes customarily were stored.

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Only a handful of the Brooklyn tapes had been added to the archive and were thus searched for the November, 2004 production. Morgan Stanley sought to create the impression that all the produced documents came from the Brooklyn tapes. However, none of the November, 2004 production came from "newly found" tapes. Morgan Stanley's responses to inquiries about the November, 2004, production did not disclose the existence of the archive.

Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area. She was not told of the existence of this litigation until five months later, in January 2005. In October, 2004, Ms. Gorman gave the project somewhat greater priority, although even then it did not move as expeditiously as possible. Morgan Stanley did not consider using an outside contractor to expedite the process.

Morgan Stanley found another 169 tapes in January, 2005, that according to Morgan Stanley had been misplaced by its New Jersey storage vendor. Morgan Stanley discovered more than 200 additional unsearched backup tapes openly stored in locations known to be used for tape storage on February 11 and 12, 2005. Morgan Stanley did not voluntarily disclose this information to CPH.

Morgan Stanley claims to have discovered on February 11, 2005 that a flaw in the software it had written had prevented it from locating all email attachments about the Sunbeam transaction. Morgan Stanley also admits that the date-range searches were flawed for many email users who worked in the Morgan Stanley division responsible for the Sunbeam transaction. As a result, additional email messages that appeared to fall within the scope of the Agreed Order had not been given to CPH. Further, it appears that the problem infected Morgan Stanley's original searches in May of 2004.

[16]**These defects in Morgan Stanley's compliance with the April 16, 2004 Agreed Order were revealed only as a result of Morgan Stanley knowing that an independent computer search expert had been hired to double-check Morgan Stanley's work and was in the process of performing its verification.**

On February 16, 2005, Morgan Stanley withdrew its certificate of compliance with the Agreed Order.

On February 19, 2005 Morgan Stanley notified CPH that it had found boxes of additional tapes that have not been uploaded into its archive or searched for responsive emails.

In addition, CPH has since found out [17]~~that~~[18]**the following facts about Morgan Stanley's email production**:

(1) About 5% of email harvested from the backup tapes was not captured and produced due to an error in transferring data into the archive.

(2) The computer programs Morgan Stanley used to process emails into its archive caused the bodies of some messages to be cut off.

(3) An analysis showed that, based on a representative sample, about ten percent of backup tapes were erased after January 2001, in violation of an obligation to preserve the data on the tapes.

(4) A computer programming error caused blind carbon copies not to be captured in the archive.

(5) Another computer programming error prevented the searches from turning up all responsive emails.

(6) Another computer programming error caused the archive to have problems pulling group email involving a set of email users that included Morgan Stanley employees involved in the Sunbeam transaction.

(7) Morgan Stanley's searches looked for only two types of emails. There are other types of emails that were not included in the searches.

(8) An additional 282 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found on February 23, and 25, 2005, and apparently were never searched.

(9) An additional 3,536 tapes that Morgan Stanley should have found and searched by May 14, 2004, were discovered on February 23, 2005, in a security room. These tapes apparently have not been searched.

(10) An additional 2,718 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found on March 3, 2005, at Morgan Stanley's New Jersey off-site storage vendor. These tapes apparently have not been searched either.

(11) An additional 389 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found from March 2 through March 5, 2005. These tapes apparently also have not been searched.

(12) Many of the documents that were eventually produced by Morgan Stanley were produced too late in the pretrial proceedings to be effectively investigated and used by CPH in the pretrial discovery process.

Morgan Stanley did not disclose any of these problems to CPH, as Morgan Stanley was obliged to do. The searches [19]**for email evidence** had not been completed when this trial was begun, [20]~~when~~[21]**and** they were terminated without completion[22].[23] **because they could not be**

completed without an unreasonably long delay in the trial. Even then there could be no assurance that Morgan Stanley would locate and produce all of the relevant evidence.

[24]In addition to this misconduct, Morgan Stanley has committed other discovery abuses, including the following:

- [25] [26]An Executive Director of Morgan Stanley's Law Division filed a sworn declaration stating that he did not learn of additional unsearched backup tapes until the end of October, 2004. By filing the declaration, Morgan Stanley sought to imply that no one in Morgan Stanley's Law Division knew of the backup tapes before then. Instead, at least two Morgan Stanley in-house lawyers, including the Executive Director's superior, knew of the tapes no later than June 7, 2004.
- [27] [28]Morgan Stanley improperly failed to produce 138 documents that were required to be produced.
- [29] [30]Morgan Stanley sought to discredit Mr. Riel and thus distance itself from the false June 23, 2004 Certificate of Compliance that he had signed. In doing so, Morgan Stanley sought to hide other damaging information, including information about whether Morgan Stanley continued to erase backup tapes illegally.
- [31] [32]Morgan Stanley failed to provide computer information about the extent of the work it performed in generating Sunbeam-related documents. And then Morgan Stanley falsely represented that it had no such useful information.

[33] **Finally,** Mr. William Strong is the Morgan Stanley managing director who took credit for the fees Morgan Stanley generated from the Sunbeam deal. On March 15, 2004, Morgan Stanley was required to produce, "(a)ll references (positive or negative) to [Mr. Strong's] truthfulness, veracity, or moral turpitude." In response, Morgan Stanley produced some portions of Mr. Strong's annual employment evaluations. While he was working on the Sunbeam transaction, though, Mr. Strong was facing criminal prosecution in Italy for complicity in bribery. Mr. Strong's evaluators at Morgan Stanley knew that fact. Morgan Stanley [34]~~failed~~[35]**was obligated** to provide the documents about these proceedings to CPH, [36]~~though, which in~~[37]**but did not provide them. In** January, 2005, [38]**CPH** independently discovered evidence of the criminal proceedings in Italy.

It is important that you understand the limited relevance of Mr. Strong's situation. The fact that Mr. Strong was facing criminal prosecution in Italy for complicity in bribery while he was working on the Sunbeam transaction may be relevant to the extent that it created pressures on Mr. Strong and motivated him to push forward with the Sunbeam deal. That is for you to decide. But you must not consider that fact as evidence of Mr. Strong's character or as evidence that Mr. Strong actually engaged in bribery or any other illegal conduct in Italy. Indeed, in 2003, on appeal, an Italian court found Mr. Strong not guilty.

~~[39]As I told you at the outset of this Statement, you are required to accept the factual finding that I have read to you as true.~~

[40]**In sum, throughout the pretrial discovery process, Morgan Stanley repeatedly misrepresented facts and failed to fulfill its discovery obligations. In determining whether and in what amount punitive damages should be assessed against Morgan Stanley, you**

should consider the extent to which the conduct of Morgan Stanley that I have described — and that you are required to accept as true — shows

41 — a consciousness of guilt;

42 — a corporate ratification of the wrongdoing;

43 — an effort to conceal the truth; and

44 — an unwillingness to accept responsibility for its wrongdoing.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

AGREED ORDER ON PLAINTIFF'S MOTION IN LIMINE NO. 31 TO BAR EVIDENCE RENDERED IRRELEVANT BY THE COURT'S ORDER ON CPH'S RENEWED MOTION FOR ENTRY OF DEFAULT JUDGMENT

THIS CAUSE came before the Court April 5, 2005 on Plaintiff's Motion in Limine No. 31 to Bar Evidence Rendered Irrelevant by the Court's Order on CPH's Renewed Motion for Entry of Default Judgment, with both counsel present. Based on the agreement of counsel, it is

ORDERED AND ADJUDGED that the Motion is Granted. The parties and their counsel shall not refer to or attempt to introduce into evidence, or otherwise place before the jury, the evidence referred to in the Motion, without first proffering the good faith basis to believe the matter is relevant and otherwise admissible outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 5 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

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

CASE NO: 2003 CA 005045 AI

PLAINTIFF'S RENEWED MOTION FOR CORRECTION AND CLARIFICATION OF THE LITIGATION-MISCONDUCT STATEMENT TO BE READ TO THE JURY

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") respectfully renews its March 30, 2005 request that the Court correct and clarify the form of its March 29, 2005 Statement about the litigation misconduct of Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley"), which the Court will read to the jury. At the 8:00 a.m. session on Thursday, March 31, 2005, the Court ruled on most, but not all, of CPH's proposed corrections and clarifications. This renewed motion is designed to trigger completion of that process and to modify the Statement in light of the Court's decision later on March 31 to "re-bifurcate" the case and therefore to read the litigation-misconduct Statement to the jury at the start of the second, rather than first, phase of the trial.

Attached to this motion as Exhibit 1 is a clean copy of the Statement that the Court issued on March 29, as amended by the Court's March 31 rulings (the "Court's most recent version of the Statement"). Attached to this motion as Exhibit 2 is a "black-line" comparing the Court's most recent version of the Statement to the Statement initially issued on March 29. Attached to this motion as Exhibit 3 is a clean copy of the Statement that CPH now asks the Court to read to the jury at the start of the trial's second phase ("CPH's proposed

clarification"). And attached as Exhibit 4 is a "black-line" comparing CPH's proposed clarification to the Court's most recent version of the Statement. The changes reflected in Exhibits 3 and 4 are designed to clarify specific parts of the Statement and to ensure that the Statement clearly conveys to the jury the findings that this Court has made.

Dated: April 5, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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10505 v3

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 5th day of April, 2005.

JEFFREY T. SHAW

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

MORGAN STANLEY'S MOTION TO ADD WITNESSES

Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully requests that it be permitted to add the five witnesses to its list of witnesses who may offer testimony at trial: John Ashley, Scott Cook, Jeffrey Haas, Rob Jones, Dan Fischel, and Kevin Woodruff. Morgan Stanley will make these witnesses available for deposition immediately, and permitting them to testify at trial will not prejudice Coleman (Parent) Holdings, Inc. ("CPH"). Moreover, new lead trial counsel to Morgan Stanley has, in the limited time it has had available to prepare this case for trial, determined that these new witnesses are critical to Morgan Stanley's defense. If they are not permitted to testify, Morgan Stanley will be greatly harmed.

ARGUMENT

1. "We recognize that excluding the testimony of a witness is one of the most drastic of remedies which should be invoked only under the most compelling of circumstances." *Department of Health and Rehabilitative Services v. J.B. By and Through Spivak*, 675 So.2d 241, 244 (Fla. 4th DCA 1996); *Walters v. Keebler Co.*, 652 So. 2d 976, 977 (Fla. 1st DCA 1995). Accordingly, a trial court must not "blindly" exercise its discretion to exclude the testimony of a witness whose name has not been disclosed in accordance with a pretrial order. *Binger v. King Pest Control*, 401 So.2d 1310, 1314 (Fla. 1981). Instead, the determination whether the

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2. *Binger* sets forth a three-part test to determine whether a party has been so egregiously prejudiced that it is necessary to prohibit late-disclosed admitted: (i) the objecting party's ability to cure the prejudice or, similarly, his independent knowledge of the existence of the witness; (ii) the calling party's possible intentional, or bad faith, noncompliance with the pretrial order; and (iii) the possible disruption of the orderly and efficient trial of the case (or other cases). If, after considering these factors, the trial court concludes that use of the undisclosed witness will not substantially endanger the fairness of the proceeding, the pretrial order mandating disclosure should be modified and the witness should be allowed to testify.

3. Applying *Binger*, Morgan Stanley should be permitted to call these new witnesses. *First*, Morgan Stanley has offered CPH the opportunity to cure any prejudice by deposing the newly disclosed witnesses. *In re Estate of Lochhead*, 443 So. 2d 283, 28 (Fla. 4th DCA 1983) ("One laudable purpose of disclosure is to eliminate surprise and trial by ambush . . . That purpose could have been achieved in this case by permitting appellees to depose the witness

or simply by granting a continuance (particularly is this so where appellees never sought to compel a more explicit answer than 'additional witnesses as needed.'").[1]

4. *Second*, there can be no claim of any intentional act or bad faith associated with the fact that Morgan Stanley did not previously list these witnesses. Morgan Stanley's new lead trial counsel — given this task only on March 23, 2005 and working under tremendous time pressure to prepare this complex case for trial — has determined that they are critical to Morgan Stanley's defense. Moreover, the need for these witnesses has become apparent as a result of the Court's recent rulings relating to CPH's destruction of e-mails and damages. *Finally*, because the newly disclosed witnesses will not be called to the stand for until at least the week of April 18, 2005, there can be no claim that permitting these witnesses to testify would be a disruption of the trial of this case. Indeed, the Court has already recognized that depositions can be conducted by trial counsel during trial; it has ruled that Morgan Stanley must make available witnesses to testify to matters that CPH has identified as critical. Plaintiff's position is inconsistent with its objection; it has listed previously undisclosed witnesses (*e.g.*, Donald Kempf) on its recent witness disclosure.

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5. Not only will CPH not be unfairly surprised by permitting these witnesses to testify, but also excluding their testimony will work a substantial injustice to Morgan Stanley. The matters to which these recently disclosed witnesses will testify are narrow ones, but their testimony is extremely important to Morgan Stanley's defense:

6. **John Ashley**. Mr. Ashley will testify that overwriting back-up tapes containing electronic data, such as e-mails, renders that electronic data irretrievable. Morgan Stanley did not know this was even an issue in the case until March 25, 2005. Indeed, on March 1, 2005, with regard to Morgan Stanley's e-mail production, the Court ruled (seemingly conclusively) that "*e-mails could not longer be retrieved once they were overwritten.*" Order on CPH's Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails (Mar. 1, 2005) (Attachment A) (emphasis added). On March 23, 2005, however, the Court took a different position in ruling on CPH's e-mail production. It held that CPH would be permitted to put on evidence "of its offer to have a third-party vendor given access to retrieve emails from CPH's system." Order on Morgan Stanley's Motion for an Adverse Inference Instruction. Mr. Ashley's testimony bears directly on the question of the ability to recover e-mails from overwritten back-up tapes — a question that Morgan Stanley did not even know was in dispute until March 23, 2005.

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of the testimony of Morgan Stanley's expert, Professor Mark Grinblatt), and No. 27 (which was issued March 28, 2005, and permitted the parties to make supplemental disclosures showing that CPH could have sold its Sunbeam shares prior to those shares becoming worthless in the marketplace) make clear that the parties must put on proof as to whether CPH could have avoided the harm it suffered in some way. Professor Fischel and Scott Cook will testify to the valuation of the securities that CPH held.[2] Professor Haas and Kevin Woodruff will testify to damages as well, including the extent to which CPH would have been able to hedge the Sunbeam securities that it took as part of the transaction. Indeed, Morgan Stanley could not have anticipated the need for Professor Haas and Kevin Woodruff until the Court's March 28, 2005 Order directing the parties to make supplemental disclosures regarding the valuation the Sunbeam shares held by CPH.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery facsimile and hand delivery on this 5 day of April, 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

CASE NO: CA 03-5045 AI

MORGAN STANLEY'S DISCLOSURE IN RESPONSE TO THE COURT'S ORDER OF THIS AFTERNOON

Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully responds as follows to the Court's orders at approximately 2:30 pm and 3:50 pm that it supply: (1) a written description of proof regarding its intended use of CPH's internal valuations that its holdings in Sunbeam were worth $450 million as of December 31, 1998 and December 31, 1999, and (2) information about the dates when CPH potentially could have sold stock. This filing is made in addition to Morgan Stanley's concurrent filing in response to the Court's ruling on CPH's MIL 27.

1. **The $450 Million Is Highly Probative Evidence**

The Court has ruled that damages in this case must be established by the benefit of the bargain rule. Under that rule, damages, if any, are measured by what plaintiff *expected* to receive minus what it *actually* received. At the time of the transaction, plaintiff elected to take restricted stock (rejecting a cash option). CPH valued that restricted stock initially at $619 million on its books. By the end of 1998, after the fraud was fully disclosed, plaintiff altered that valuation to $450 million. This evidence is highly probative of damages in this case and should be admitted. Plaintiff argues otherwise for various reasons, but none can withstand scrutiny.

A. Plaintiff first argues that the $450 million is irrelevant because it could not have sold at the time CPH entered that valuation on its books at the end of 1998 and 1999. But the question whether CPH could sell is irrelevant. Morgan Stanley should be entitled to argue that the $450 million figure represents the value of CPH's shares *taking account of the fact that they were illiquid.* CPH knew it had restricted shares. Its internal valuations necessarily *discounted the value of the shares to reflect the nature and duration of their restrictions.* Indeed, if CPH didn't account for the restrictions on its shares, its financial statements would have been materially misleading. And the financial statements CPH gave to the federal government and banks – all of which were premised on a valuation of the restricted shares at $450 million – would have been false when issued. CPH invites the Court to commit error in assuming that restricted shares are valueless until they can be sold – and doing so even in light of evidence showing that CPH simultaneously valued its shares at $450 million in full knowledge of their restrictions.

Besides, the second set of financial statement in which CPH valued its shares at $450 million were dated *December 31, 1999.* By that date, it is undisputed that CPH could have begun selling shares, as the Court has previously found. Order on CPH MIL 27. By then, the parties' contractual lock up had expired for 75 percent of CPH's shares, as CPH admits. (CPH Br. at 23). Indeed, CPH undermines its own argument by acknowledging that it could have begun selling stock under Rule 144 in November 1999 and could have realized a potential profit of $17.03 million before Sunbeam declared bankruptcy. (CPH Br. at 24). In addition to the $17.03 million that could have been realized under Rule 144 sales, CPH and its own expert witness, Dr. Blaine Nye, admit the possibility that it could have realized $46 million by registering the securities and selling 75% of the shares after December 6, 1999. (CPH Br. at 25).

Morgan Stanley is entitled to present such evidence at trial. And, as defendant explains in its simultaneous submission today on CPH MIL 27, even prior to November or December 1999, CPH *could have sold* pursuant to Rule 4(1-1/2) and Mr. Perelman was free to seek to renegotiate to have the lock-up provision removed.

B. Plaintiff makes much of the fact that the stock price of Sunbeam eventually went to $0. But this only underscores the critical relevance of the $450 million valuation. CPH valued its shares at $450 million *bearing in mind their restrictions after* the fraud was fully disclosed. The fact that the shares *only later* lost value and went to $0 demonstrates that *other causal factors besides the alleged fraud* caused CPH's claimed injuries. The fraud may have reduced the value of the restricted shares to $450 million, but this evidence tends to show that CPH's own mismanagement and market factors were responsible for the remainder of plaintiff's losses. There is no reason plaintiff should be free to argue that the only actual value the jury may hear is $0 when its *own conduct* may have caused that result. Put another way, defendant should be free to argue that the decline from $450 million after the disclosure of the fraud to zero was not inevitable and should be charged to Mr. Perelman's mismanagement, not the supposed Sunbeam fraud which was over, done, and completely disclosed.

C. Plaintiff argues that the fact that the $450 million figure incorporates the warrants it received from the Sunbeam renders its use inappropriate. But plaintiff has elected for benefit of the bargain damages – i.e., the difference between what Mr. Perelman expected and what he actually received. The Sunbeam settlement is part of what Mr. Perelman actually received as a result of his decision to sell CPH. Without the sale of Coleman, Mr. Perelman would never have received the warrants. The $450 million figure thus represents the total *actual value* of what Mr. Perelman received as the benefit of his bargain as of December 31, 1998 and December 31,

1999. And the damages Mr. Perelman suffered, if any, must be measured by the total actual value of what he received from his bargain ($450 million) against what he expected to receive.

D. Plaintiff next argues that the only date relevant for valuing the restricted stock is the date it could be sold. But that ignores the fact that value can be assigned even to things that cannot be immediately sold. Restricted stock *can* be valued during the pendency of its restrictions while accounting for its illiquidity – and exactly that is regularly done. To suggest otherwise is to invite error. Indeed, CPH assigned a value to its illiquid asset in this very case – as laid out above, determining that its restricted shares had a value of $450 even in light of their illiquidity.

Further and critically, if the assumption that stock cannot be valued except on a date it could have been sold, then CPH's own damages expert must be excluded. Dr. Nye seeks to measure plaintiff's expected value of the stock at the time of purchase. But under its lock up agreement, CPH plainly could not have sold its restricted shares on the date of their purchase. And it would be inappropriate under plaintiff's logic to determine plaintiff's expected value of the shares using a share price on a date when the stock could not be sold. Indeed, it would give plaintiff far more in damages than it deserves – essentially pretending that it struck a very different deal than it did and could have immediately cashed out. But CPH struck no such deal and accepted a certain degree of risk in taking restricted shares. To predicate damages on an entirely counter-factual assumption that Mr. Perelman could've immediately sold is incorrect as a matter of law.

II. Defendants' Evidence of When Stock Can Be Sold

Defendants reserve the right to present damages evidence regarding the actual or true value of CPH's restricted stock as of various dates, including without limitation: (1) the date of

transaction, as required by Florida law previously briefed to the Court; (2) dates after the fraud was exposed and CPH retained the restricted stock (e.g., December 31, 1998); (3) as of late 1999, the same time Dr. Nye uses in his analysis and CPH admits restrictions on sales were lifted. In support, defendant intends to rely on all depositions and exhibits in this matter, as well as all expert reports and depositions, including without limitation all materials referenced in defendant's in Morgan Stanley & Co. Incorporated's Proposed Findings of Fact And Conclusions Of Law In Support Of Its Motion For Summary Judgment. Nor is any of this a surprise to plaintiff. Throughout discovery in this case Morgan Stanley has repeatedly presented theories of damages predicated on all three dates outlined above.

By way of example only, Prof. Grinblatt's supplemental report explains a damages theory that compares the expected and actual value of the restricted stock on the date of purchase (point 1 above). Professor Grinblatt has also measured damages using an actual value date of late 1999 or bankruptcy just like Dr. Nye (see point 3 above). And Morgan Stanley has repeatedly sought to use evidence, including the $450 million figure, showing the true value of the restricted stock after the fraud was fully disclosed in 1998 (see points 2 above).[1]

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[1] Morgan Stanley would have liked to spend more time preparing this document, but has done the best it is able to do with new counsel and less than 2.5 hours. Accordingly, Morgan Stanley reserves the right to supplement this submission at a later time. And this submission is made without prejudice to Morgan Stanley's position that benefit of the bargain damages are inappropriate in this case due to, among other things, their necessarily speculative nature – a point this brief helps illustrate.

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BY: RB

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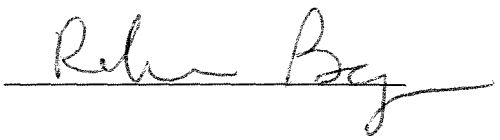
BY: 

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VOLUME 5

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TRANSCRIPT OF THE PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Tuesday, February 15, 2005
1:25 p.m. - 5:36 p.m.

Ex A
16div-014528

order entered April 16th of last year required Morgan Stanley to search the oldest full backup that exists for e-mails of certain -- I'm sorry -- for certain identified employees or former employees; required Morgan Stanley to provide its counsel the responses for responsiveness and privilege review all the e-mails that either were dated between February and April 15th of 1998 and all e-mails containing one of 29 keywords; all nonprivileged e-mails responsive to the request had to be produced by May 14th and a privilege log generated and a certificate of compliance completed. The SEC regulations required Morgan Stanley to maintain e-mails readily access -- in readily accessible form for three years. Morgan Stanley knew Sunbeam litigation was likely as of March of 1998. Despite the affirmative duty on Morgan Stanley's part arising out of the litigation to produce its e-mails and contrary to federal law requiring it to preserve the e-mails, Morgan Stanley failed to preserve some

JENNER&BLOCK

July 15, 2004

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By Federal Express and
By Telecopy (w/o enclosure)

Thomas A. Clare, Esq.
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Suite 1200
Washington, D.C. 20005

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings Inc., et al.

Dear Tom:

I enclose CPH's revised privilege log. As to entries involving a common interest, we are consulting with counsel to Sunbeam.

Very truly yours,

Michael T. Brody

MTB:cjg
Enclosure
cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

Ex. B
16div-014530

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
456		07/29/1998	Paul Rowe, Esq.		Attorney-Client, Work Product	Handwritten notes re potential claims against Sunbeam.
457		08/12/1998	Steven Cohen, Esq.		Attorney-Client, Work Product	Draft press release re Sunbeam settlement with S. Cohen's notes.
457	A	08/12/1998	Steven Cohen, Esq.		Attorney-Client, Work Product	Draft letter to Sunbeam's shareholders re Sunbeam settlement with S. Cohen's handwritten notes.
458		08/15/1998	Rita W. Gordon, Esq.	Rachelle Silverberg, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached document.
458	A	04/14/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft response to SEC's requests for information prepared in anticipation of litigation relating to inquiry.
459		04/17/1998	Frank Miller, Esq.	Richard Easton, Esq., Rita W. Gordon, Esq.	Attorney-Client, Work Product, Common Interest	Memorandum re attached draft document.
459	A	00/00/0000	Wachtell Lipton		Attorney-Client, Work Product, Common Interest	Draft response to SEC's requests for information with attorney's notes prepared in anticipation of litigation relating to inquiry.
460		04/16/1998	Rita W. Gordon, Esq.	Frank Miller, Esq., Adam O. Emmerich, Esq.	Attorney-Client, Work Product, Common Interest	Fax re attached document.
460	A	04/16/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft response to SEC's requests for information prepared in anticipation of litigation relating to inquiry.
461		03/06/1998	Wachtell Lipton	Ilene K. Gotts, Esq.	Attorney-Client	Fax re attached document prepared for the purpose of providing legal advice.
461	A	03/06/1998	Ioannis Zervas, Esq.	Ilene K. Gotts, Esq.	Attorney-Client, Common Interest	Fax re attached document prepared for the purpose of providing legal advice.
461	B	00/00/0000	Skadden Arps		Attorney-Client, Common Interest	Draft European pre-merger notification prepared for the purpose of providing legal advice.
461	C	03/13/1996	Skadden Arps		Attorney-Client, Common Interest	Draft European pre-merger notification prepared for the purpose of providing legal advice.
461	D	03/04/1996	Skadden Arps		Attorney-Client, Common Interest	Draft European pre-merger notification prepared for the purpose of providing legal advice.

Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
Morgan Stanley Senior Funding, Inc. v. Coleman (Parent) Holdings Inc., et. al.

REVISED CPH PRIVILEGE LOG
Dated 07/15/2004

Document No.	Attachment	Date	Author	Recipient	Privilege Asserted	Document Description
530		08/03/1998	Blaine Fogg, Esq.	Adam O. Emmerich, Esq., David Fannin, Stephen Jacobs, Esq., Howard Kristol , Peter Langerman, Barry F. Schwartz, Esq.	Attorney-Client, Work Product, Common Interest	Correspondence re attached draft documents prepared in connection with Sunbeam/Coleman (Parent) settlement.
530	A	08/03/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft exhibits to NYSE application for exception prepared in connection with Sunbeam/Coleman (Parent) settlement.
531		07/30/1998	Adam O. Emmerich, Esq.	Blaine Fogg, Esq.	Attorney-Client, Work Product, Common Interest	Draft letter to NYSE re application for exception prepared in connection with Sunbeam/Coleman (Parent) settlement.
532		07/31/1998	Blaine Fogg, Esq.	Adam O. Emmerich, Esq., David Fannin, Stephen Jacobs, Esq., Barry F. Schwartz, Esq., Allison Amorison, Esq.	Attorney-Client, Work Product, Common Interest	Correspondence re attached draft document prepared in connection with Sunbeam/Coleman (Parent) settlement.
532	A	07/31/1998	Blaine Fogg, Esq.		Attorney-Client, Work Product, Common Interest	Draft letter to NYSE re attached draft letter prepared in connection with Sunbeam/Coleman (Parent) settlement.
532	B	07/31/1998	Blaine Fogg, Esq.		Attorney-Client, Work Product, Common Interest	Draft letter to NYSE re application for exception prepared in connection with Sunbeam/Coleman (Parent) settlement.
533		04/16/1998	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft response to SEC's request for information prepared in anticipation of litigation relating to inquiry.
534		03/09/1998	Sarah Strasser, Esq.		Attorney-Client	Draft European antitrust filing with S. Strasser's handwritten notes prepared for the purpose of providing legal advice.
535		04/15/1999	Eric Golden, Esq.	Michael Schwartz, Esq.	Attorney-Client, Work Product	Correspondence re attached draft document.
535	A	04/15/1999	Skadden Arps		Attorney-Client, Work Product, Common Interest	Draft brief for Krim litigation.
536		11/05/1998	Eric Golden, Esq.	Michael Schwartz, Esq.	Attorney-Client, Work Product	Correspondence re attached document.
536	A	11/04/1998	Grace M. Aschenbrenner	Eric Golden, Esq., James P. S. Leeshaw (cc)	Attorney-Client, Work Product	Letter re Camden Asset litigation.

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

MORGAN STANLEY SENIOR FUNDING, INC.,

Plaintiff,

vs.

MacANDREWS & FORBES HOLDINGS, INC., and COLEMAN (PARENT) HOLDINGS, INC.,

Defendant.

VIDEOTAPED DEPOSITION OF
STEVEN L. FASMAN, ESQ.
New York, New York
Wednesday, January 21, 2004

Reported by:
ANDREA L. KINGSLEY, RPR
CSR NO. 001055
JOB NO. 156575

Ex. C

ORIGINAL

Fasman

from 1998 until the inception of the Andersen litigation in 2001; correct?

MR. BRODY: Objection to the form of the question.

A. There was a progressive process which did involve in part the purging of old and unneeded e-mails, yes.

Q. My question was did you from 1998 until the inception of the Andersen litigation on a monthly basis, I'm ignoring the daily stuff now, on a monthly basis overwrite e-mail back-up tapes?

A. I think it was every other month.

Q. From 1998 until the inception of the Andersen litigation, did MAFCO save any e-mail back-up tapes that related to the Sunbeam acquisition of Coleman?

A. There are no e-mail back-up tapes relating to the Sunbeam acquisition of Coleman.

Q. Did they save any back-up tapes which contained data which related to the Sunbeam acquisition of Coleman from 1998 until the inception of the Andersen

IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

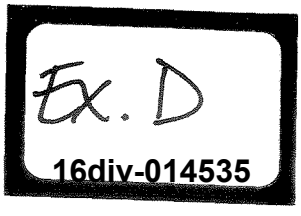
MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 42

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Monday, March 21, 2005
Palm Beach County Courthouse
Courtroom 11-A
205 North Dixie Highway
West Palm Beach, Florida 33401
9:30 a.m. to 12:25 p.m.



the jury the implications, the adverse inference --

THE COURT: You're not asking for an instruction? You're just saying you want to present evidence about the e-mail retention policy and the failure to deviate from it in this case, and then argue to the jury that they should draw an adverse inference from that evidence?

MR. LANCASTER: Yes, with a caveat; that is, we're not asking for an instruction. We believe that, the way we read this law, that would be viewed with close scrutiny, and it would be -- I'm not sure it would be viable.

But Your Honor has in its order, in the initial order that dealt with our e-mail destruction, indicated that the path that it intended to follow, which was to read a statement to the jury, that there would be no further instruction given, and no other evidence put out.

And we believe that if Your Honor is going to read such a statement to the jury, then under the facts of this case and the law, as Your Honor is applying to this case, that we feel

that Your Honor should read a similar statement of facts.

And we are going to tender to Your Honor, and we did a revised version of that that should also be read. Because when it is the issue of the loss of e-mails which Your Honor has already indicated supplies the essential element, it's critical, then the parties do stand in that respect on the same footing.

In fact, Your Honor, in all due respect, I would submit that we stand on better footing. Because while we have -- and perhaps we have not done a good job of it and perhaps there have been foot faults -- we have restored some quantum of e-mails.

And I know that this exasperates Your Honor, but it is --

THE COURT: No, I guess it goes back, quite honestly, to when one of Plaintiff's points in the motion for the default judgment is Morgan Stanley seems wholly unwilling to admit that it's committed egregious violations of the agreed order. And to me this is fundamentally different.

The e-mail issues here between Coleman and

Morgan Stanley are fundamentally different. And I have no problem at all with Morgan Stanley's arguing about how Coleman dealt with its e-mails in this case and what evidentiary value that may or may not have for the jury. But in all honesty, I'm offended that you would attempt to equate the two. Because I think they're totally unrelated.

MR. LANCASTER: And I accept that from Your Honor. And I'm not doing it from the standpoint of, necessarily, conduct, but I'm attempting to argue to Your Honor that if you're looking at sort of body of evidence, what is available for a jury to consider? There is e-mail as a result of both, I guess, discovery and discovery orders by this Court, and whatever else mix there is that brought these e-mails to potentially the jury.

But on the Coleman side, there is no e-mail off those backup tapes, because they brazenly walk into court and say, we just destroyed it all.

So in that respect we believe that given the Court's -- the way you're applying the law of the case, statement of facts you're going to

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

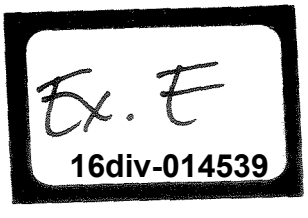
MORGAN STANLEY & CO. INCORPORATED,
Defendant.

MORGAN STANLEY'S OPPOSITION TO PLAINTIFF'S MOTION TO BAR THE EXPERT TESTIMONY OF JOHN F. ASHLEY

Coleman (Parent) Holding Inc.'s ("CPH") Motion to Exclude Expert Witness John Ashley (the "Motion") should be denied. Morgan Stanley & Co. Incorporated's ("Morgan Stanley") designation of Mr. Ashley has not prejudiced CPH in any way and was made in good faith. This Motion is nothing more than an attempt by CPH to present evidence that directly contradicts a holding by this Court without affording Morgan Stanley the chance for rebuttal. There is no basis in the law for such an exclusion and it should therefore be denied.

ARGUMENT

1. On March 1, 2005, this Court entered the Order on CPH's Motion for Adverse Inference Instruction due to Morgan Stanley's Destructions of E-mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, and Motion for Additional Relief and Order on Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-mails (the "Adverse Inference Order"). In that Order, the Court found, in part, that Morgan Stanley's actions in overwriting backup tapes containing e-mails "justif[ied] sanctions." (Adverse Inference Order at 11.)



2. As a result of these and other actions, the Court ruled that it would read a statement of facts, attached as Exhibit A to the Adverse Inference Order, to the jury. The Court ruled that the findings in Exhibit A "shall be conclusive." (Id. at 13.) Exhibit A details the Court's findings concerning, among other things, Morgan Stanley's practice of overwriting emails. Most notably, the Court found that "**E-mails could no longer be retrieved once they were overwritten.**" (Emphasis added.) Given the twin rulings that overwritten e-mails were irretrievable and that this fact was a conclusive finding by the Court, Morgan Stanley was precluded from presenting a witness on this issue at trial. Indeed, as overwritten emails *are* irretrievable, as the Court correctly found, there would have been no reason to have expert testimony on this matter even if that testimony would have been proper.

3. On March 8, 2005, Morgan Stanley filed a Motion for an Adverse Inference Instruction. The basis for this Motion was CPH's systematic and extensive failure to preserve e-mails, including its failure to preserve backup tapes. The evidence presented in this Motion clearly showed that for three years after CPH anticipated litigation regarding the Sunbeam transaction, it continued to destroy e-mails after only 30 days and overwrite e-mail backup tapes after 60 days. (Morgan Stanley's Supplemental Memorandum in Support of Motion for an Adverse Inference Instruction at 3.) The Court denied this Motion on March 25, 2005, ordering that

> Morgan Stanley's Motion for an Adverse Inference Instruction is Denied, without prejudice to Morgan Stanley's right to present evidence about CPH's email retention practices and its failure to direct that emails related to the Sunbeam transaction be saved and CPH's right to present evidence of its offer to have a third-party vendor given access to retrieve emails from CPH's system. . . .

(Order on Morgan Stanley's Motion for an Adverse Inference Instruction dated March 25, 2005 at 1.)

4. This Order directly contradicts the Court's earlier finding of fact, as embodied in Exhibit A to the Adverse Inference Order. In those findings, deemed "conclusive" by the Court, the Court found that once e-mails are overwritten, they cannot be recovered. (Adverse Inference Order, Exhibit A at 1.) Now, in direct contravention of its conclusive finding that overwritten e-mails cannot be restored, the Court has ruled that CPH may present evidence concerning CPH's offer to have the e-mails restored. There would be no need to call Mr. Ashley if the Court were to instruct the jury, as the Court was prepared to do previously, that e-mails cannot be retrieved once they are overwritten. Given the Court's surprising and unexpected about-face, however, Morgan Stanley should otherwise be entitled to present evidence, including an expert on computer forensics, to (1) show that the Court's finding in Exhibit A that overwritten e-mails cannot be retrieved was correct, and (2) rebut CPH's argument concerning retrieving erased e-mail. Morgan Stanley believes (and the expert testimony will prove) that the Court's conclusion regarding e-mail retrieval was correct and that CPH should not be able to offer evidence to attempt to show otherwise. However, if CPH is entitled to offer such evidence, Morgan Stanley should clearly be allowed to rebut such evidence.

5. The case law supports Morgan Stanley's argument. "We recognize that excluding the testimony of a witness is one of the most drastic of remedies which should be invoked only under the most compelling of circumstances." *Department of Health and Rehabilitative Services v. J.B. By and Through Spivak*, 675 So.2d 241, 244 (Fla. 4th DCA 1996). Here, there is no legal or equitable basis for such an exclusion. The Florida Supreme Court has ruled that determinations as to the addition of witnesses is up to the discretion of the trial court. This determination is to be based on the extent of the prejudice of the opposing party, as well as the ability to cure any prejudice, the calling party's bad faith, and any possible disruption to the

proceedings. *Binger v. King Pest Control*, 401 So.2d 1310, 1313-14 (Fla. 1981); *Berlin v. Roldan*, 786 So.2d 649, 650 (Fla. 4th DCA 2001) (trial court erred in not allowing the testimony of an unlisted witness when doing so would "not be unfair to the objecting party").

6. All of the *Binger* factors favor denying CPH's Motion. CPH has not been prejudiced by the date of Morgan Stanley's designation of Mr. Ashley as an expert witness. CPH will have the opportunity, if it wishes, to depose Mr. Ashley, and to plan its litigation strategy based on that testimony. There was no bad faith on Morgan Stanley's part and there will be no disruption to the trial by the addition of Mr. Ashley to Morgan Stanley's witness list. Given the Court's March 1 Order, which correctly stated that overwritten e-mails are not recoverable, there was no reason to believe that Mr. Ashley's testimony would be necessary (or even permitted). With the March 25 Order in which the Court said it would allow CPH to present testimony that contradicts the Court's findings, Mr. Ashley's testimony became relevant, and Morgan Stanley subsequently designated him as an expert witness. Thus, there is simply no reason under principles of fairness or Florida law to exclude Mr. Ashley's testimony.

WHEREFORE, Morgan Stanley respectfully requests an order denying CPH's motion to exclude expert witness John Ashley. Alternatively, Morgan Stanley respectfully requests that the Court instruct the jury that e-mails cannot be retrieved once they are overwritten, in which case Morgan Stanley will have no need to call Mr. Ashley.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery facsimile and hand delivery on this 4th day of April, 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

MORGAN STANLEY'S OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S MARCH 23, 2005 ORDER ON MORGAN STANLEY'S MOTION FOR AN ADVERSE INFERENCE INSTRUCTION

Coleman (Parent) Holding Inc.'s ("CPH") Motion for Reconsideration of the Court's March 23, 2005 Order on Morgan Stanley's Motion for an Adverse Inference Instruction (the "Motion") should be denied because there exists no basis to reconsider this ruling. CPH has deliberately destroyed e-mails, and Morgan Stanley & Co. Incorporated ("Morgan Stanley") is entitled – as this Court has previously ruled – to bring that issue to the attention of the jury in connection with the reliance and damage issues to be tried in Phase I.

A. The Evidence of CPH's Email Destruction is Relevant to the Issues of CPH's Reliance and Damages.

To prevail against Morgan Stanley, CPH must show both reliance and damages. Their destruction of contemporaneous e-mails on these subjects — which undoubtedly existed at the time — has rendered their burden immeasurably easier. Morgan Stanley (despite the problems for which the Court has sanctioned Morgan Stanley) has produced at least *19,000 e-mails* in this case. CPH has produced *fewer than 100.*

E-mails written by CPH as it considered whether to enter into the transaction are vital to Morgan Stanley's defense. These emails, if they still existed, could show that CPH did not rely

on Morgan Stanley and that CPH was not damaged (this evidence could have included, among other things, evidence concerning CPH's belief as to the benefit of the bargain and how CPH valued Sunbeam stock.) Indeed, there is perhaps no better evidence of the rationale for CPH's consummation of the transaction than the e-mails written as the decision was made. Unfortunately, when CPH destroyed these e-mails – at a time when ***it knew*** that litigation was likely – the ability to uncover that evidence was forever lost.

On March 8, 2005, Morgan Stanley filed a Motion for an Adverse Inference Instruction ("MS Adverse Inference Motion"). The basis for this Motion was CPH's systematic and extensive failure to preserve e-mails, including its failure to preserve backup tapes. CPH had an "affirmative duty" to preserve its documents as of the date it knew litigation to be likely. (Feb 15. 2005 Hrg. at 613 (Ex. A).) The evidence adduced through discovery and presented in the MS Adverse Inference Motion clearly shows that CPH knew in April 1998 that litigation would likely arise as a result of the transaction, and had Skadden Arps prepare legal documents that CPH admitted on its privilege log were prepared "in anticipation of litigation." (July 15, 2004 CPH Privilege Log at Doc. Nos. 458, 460, 533, (Ex. B)). For three years after CPH first anticipated litigation regarding the Sunbeam transaction, it continued to destroy e-mails after only 30 days and overwrite e-mail backup tapes after 60 days, as testified to by Steven L. Fasman, CPH's corporate representative. (Jan. 21, 2004 Fasman Dep. (Ex. C ("Q. From 1998 until the inception of the Andersen litigation, did MAFCO save any e-mail back-up tapes that related to the Sunbeam acquisition of Coleman? A. There are no e-mail backup tapes relating to the Sunbeam acquisition of Coleman.").) CPH's failure to preserve any backup tapes relating to the Sunbeam transaction insured that it was unable to produce ***any*** e-mails that could have been used by Morgan Stanley to rebut CPH's arguments on its reliance on Morgan Stanley and on

damages. (Morgan Stanley's Supplemental Memorandum in Support of Motion for an Adverse Inference Instruction at 3.) The Court's March 25, 2005 Order provides that

> Morgan Stanley's Motion for an Adverse Inference Instruction is Denied, without prejudice to ***Morgan Stanley's right to present evidence about CPH's email retention practices and its failure to direct that emails related to the Sunbeam transaction be saved*** and CPH's right to present evidence of its offer to have a third-party vendor given access to retrieve emails from CPH's system. . .

(Order on Morgan Stanley's Motion for an Adverse Inference Instruction dated March 25, 2005 at 1 ("MS Adverse Inference Order") (emphasis added).) During argument on the Motion, the Court stated: "You're just saying you want to present evidence about the e-mail retention policy and failure to deviate from it in this case, and then argue to the jury that they should draw an adverse inference from that evidence? . . . I have no problem at all with Morgan Stanley's arguing about how Coleman dealt with its e-mails in this case and what evidentiary value that may or may not have for the jury." (Mar. 21, 2005 Hrg. at 4538, 4540. (Ex. D).) Without offering any real basis – other than its belief that the March 25, 2005 order is "unjust" – CPH now seeks reconsideration of this Court's Order.

CPH's request for reconsideration is not supported by any law. CPH argues that, because it may not offer evidence of Morgan Stanley's discovery misconduct during Phase I of the trial, Morgan Stanley should be precluded from presenting evidence regarding "CPH's email retention practices and [CPH's] failure to direct that emails related to the Sunbeam transaction be saved." (Order on Morgan Stanley's Motion for an Adverse Inference Instruction dated March 25, 2005 at 1.) This argument makes no sense, contorts this Court's previous rulings, and ignores the current posture of the case.

The Court has ruled that Morgan Stanley has engaged in discovery misconduct, and, in order to "level the playing field" as a result of this misconduct, entered the default judgment.

(CPH Adverse Inference Order at 11.) As a result of the default judgment, CPH must prove only reliance and damages to prevail during Phase I. Since Morgan Stanley's misconduct does not affect CPH's ability to present its case on reliance and damages, the Court has correctly ruled that CPH can make "no inappropriate reference to litigation misconduct" during Phase I. (*See* 3/31/05 Tr. at 6274, filed as Ex. A to CPH's Motion.) CPH's argument that it is precluded from mentioning the misconduct conveniently ignores that fact that all Phase I determinations that could have been affected by the misconduct have already been decided in CPH's favor.

CPH's discovery misconduct, on the other hand, goes to the very issues still to be decided during Phase I: reliance and discovery. CPH produced less than 100 pages of emails ***total*** relating to the Sunbeam transaction.[1] CPH's emails, had they not been deleted, might well have enabled Morgan Stanley to show that CPH did not rely on Morgan Stanley and that CPH was not damaged as claimed. By deliberately overwriting its emails, CPH has deprived Morgan Stanley of this vital evidence, and CPH should be held accountable. While Morgan Stanley believes that this Court should grant an adverse inference instruction based on CPH's willful e-mail destruction, at the very least Morgan Stanley is entitled "to present evidence about CPH's email retention practices and its failure to direct that emails related to the Sunbeam transaction be saved," as the Court ordered. (Order on Morgan Stanley's Motion for an Adverse Inference Instruction dated March 25, 2005 at 1.)

B. John Ashley Should be Permitted to Testify Concerning E-mail Retention, Destruction and Retrieval

CPH, in its Motion, also argues that Morgan Stanley should be precluded from presenting evidence of CPH's e-mail retention and that expert witness John Ashley should not be permitted to testify. As detailed more fully in Morgan Stanley's Opposition To Plaintiff's Motion To Bar

[1] Morgan Stanley, in contrast, has produced over 19,000 pages of emails.

The Expert Testimony Of John F. Ashley, filed on April 4, 2005 and attached as Exhibit E, this argument lacks any legal support.

In response to Morgan Stanley's overwriting of backup tapes, the Court previously ruled that it would read a "conclusive" statement of facts, attached as Exhibit A to the Adverse Inference Order, to the jury. The Court found, in part, that "**E-mails could no longer be retrieved once they were overwritten.**" (Emphasis added.) Since the Court determined conclusively that overwritten e-mails were irretrievable, there was no need for Morgan Stanley to produce a witness to testify to this point (indeed, such testimony would not have been permitted under the Court's Order.)

The Court's March 25 Order quoted above (permitting CPH "to present evidence of its offer to have a third-party vendor given access to retrieve emails from CPH's system") contradicts its Adverse Inference Order, by allowing CPH to show evidence that overwritten e-mail actually is recoverable. As a result of this apparent reversal, Morgan Stanley designated John Ashley, an expert on computer forensics, to (1) show that the Court's finding in Exhibit A that overwritten e-mails cannot be retrieved was correct, and (2) rebut CPH's argument concerning retrieving erased e-mail. Mr. Ashley is the Chief Technical Officer of Corefacts, LLC, and is an expert on e-mail preservation, retention, and destruction.

There is no legal or equitable basis for excluding Mr. Ashley's testimony. The determinations as to the addition of witnesses is based on the extent of the prejudice of the opposing party, as well as the ability to cure any prejudice, the calling party's bad faith, and any possible disruption to the proceedings. *Binger v. King Pest Control*, 401 So.2d 1310, 1313-14 (Fla. 1981). These factors all favor denying CPH's Motion. CPH has not been prejudiced by the date of Morgan Stanley's designation of Mr. Ashley and, indeed, will have the opportunity to

depose Mr. Ashley. There was no bad faith on Morgan Stanley's part and there will be no disruption to the trial by the addition of Mr. Ashley to Morgan Stanley's witness list. Given the Court's determination to allow CPH to present testimony that contradicts the Court's earlier findings, Mr. Ashley's testimony is now relevant and show be permitted to testify.

WHEREFORE, Morgan Stanley respectfully requests an order denying CPH's motion for reconsideration and denying CPH's request to bar John Ashley's testimony.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 6th day of April 2005.

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BY: Rebecca Beynon / By JMB

Counsel for
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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

CASE NO: CA 03-5045 AI

MORGAN STANLEY'S RESPONSE TO CPH'S MOTION IN LIMINE NO. 30 TO BAR REFERENCES TO COLLATERAL BUSINESS AND PERSONAL MATTERS INVOLVING MAFCO-RELATED ENTITIES AND THEIR PRINCIPALS AND EMPLOYEES

Morgan Stanley respectfully submits this opposition to Coleman (Parent) Holdings Inc.'s ("CPH") motion to preclude Morgan Stanley from introducing evidence or argument at trial concerning "collateral business and personal matters and lawsuits in which MAFCO-related entitles and other principals and employees including CPH, Ronald Perelman, and Howard Gittis, have been involved." CPH's motion should be denied because it seeks exclusion of a broad and ill-defined category of material, some of which this Court has already deemed to be relevant.

ARGUMENT

CPH erroneously contends that Morgan Stanley intends to introduce evidence on "business and personal matters and lawsuits" in order to expose past misconduct, or to prejudice or mislead the jury. Morgan Stanley does not intend to do so. Morgan Stanley agrees that it will offer evidence falling into these categories only when the evidence is relevant to other issues in the case. There are many reasons why such evidence would be relevant, though an exhaustive list of possible grounds is impossible given the vagueness of the category of evidence that CPH seeks to exclude. To use just one example, this Court has already ruled that Morgan Stanley has

the "right to present evidence or argument concerning an individual's business or financial sophistication." Order on Plaintiff's Motion in Limine No. 2 (Feb. 17, 2005). Evidence regarding certain "personal or business matters" of CPH or its employees may be relevant to that entity or individual's "business or financial sophistication."

CPH's remaining argument in support of its motion is nothing more than the circular contention that "collateral" business and personal matters should be excluded on grounds of irrelevance. Of course, Morgan Stanley agrees that "[e]vidence which presents purely collateral issues which would only serve to confuse and mislead the jury is too remote and should be excluded." *Donahue v. Albertson's, Inc.*, 472 So. 2d 482, 483 (Fla. 4th DCA 1985) (citing *Atlantic Coast Line Railroad v. Campbell*, 139 So. 886 (Fla. 1932)). But "[t]he converse of this rule is embodied in the maxim that evidence which assists in making known the truth upon an issue in question should be admitted." *Id.* (citing *City of Miami Beach v. New Floridian Hotel, Inc.*, 324 So.2d 715 (Fla. 3d DCA 1976), and *Steiger v. Massachusetts Casualty Insurance Co.*, 273 So.2d 4 (Fla. 3d DCA 1973) (plaintiff is entitled to present evidence on the facts that are relevant to his theory of the case). The relevance of particular material should be decided in the normal course of trial in light of the parties' evidence and arguments. *See, e.g., Aetna Cas. & Sur. Co. v. Cooper*, 485 So. 2d 1364, 1365 (Fla. 2d DCA 1986) (admissibility "must be decided according to the particular circumstances in each case").

WHEREFORE, Morgan Stanley respectfully request that CPH's Motion In Limine No. 30 be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 5 day of April, 2005.

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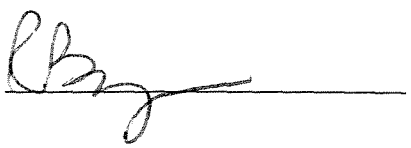
BY: 

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Plaintiff,
vs.
MORGAN STANLEY & CO. INCORPORATED,
Defendant.

CASE NO: CA 03-5045 AI

DEFENDANT'S RESPONSE TO PLAINTIFF'S SUPPLEMENTAL DISCLOSURE PURSUANT TO THE COURT'S ORDER

Pursuant to the Court's March 28, 2005 Order (CPH MIL No. 27), and without prejudice to amendment based on events as they develop at trial, Morgan Stanley respectfully states as follows in response to plaintiff's supplemental disclosure.

Introduction

Instead of complying with the Court's order compelling the parties to disclose evidence to be presented at trial, plaintiff submits yet another lengthy legal brief seeking to prevent the jury from considering facts and demands a response within 24 hours. This eleventh hour motion should be rejected because it is untimely, affords an insufficient opportunity to respond, and fails to comply with the Court's order. (Point I)

Even if the Court were to consider plaintiff's motion, it misses the point. Plaintiff labors to show that it could not have *sold* stock prior to November 1999 under the parties' contract and the securities laws. But CPH nowhere disputes that it was entirely free to *hedge* or minimize the risk associated with its position in Sunbeam *without selling stock.* Because none of these strategies involved a sale none would have violated the parties' contract or any provision of the securities laws. Morgan Stanley will demonstrate that CPH had ample opportunity to mitigate

16div-014557

any downside of its purchase of stock from Sunbeam through a variety of hedging strategies – and that it was free to employ these strategies as early as March 31, 1998. Morgan Stanley will further show that CPH actively considered hedging options with its investment advisers but rejected them simply because Mr. Perelman made the unilateral business decision to speculate entirely on the upside of Sunbeam stock. (Point II)

Finally, Morgan Stanley will show that CPH was free to *sell* shares of Sunbeam stock beginning on June 29, 1998, the expiration of the first phase of CPH's contractual lock-up obligations. (Point III)

Discussion

I. CPH'S "DISCLOSURE" DISREGARDED THE COURT'S DIRECTION

Plaintiff's supplemental disclosure filed yesterday ignores the Court's direction that the parties disclose the "facts or opinions to be testified to or supported by document evidence to support its position" on the question whether CPH could have sold Sunbeam shares after November 25, 1999. The Court left open the question of whether or not such evidence will be "excluded consistent with the disclosures at trial." *See* Order On Plaintiffs Motion *In Limine* 27 (March 28, 2005). Instead of providing the ordered evidentiary disclosures, however, plaintiff submitted a 25 page legal brief arguing that CPH could not, as a matter of law, have sold its stock until at least November 25, 1999.

CPH's legal brief should be disregarded. It seeks to enmesh the Court and the parties in yet another round of endless motions practice on the eve of trial. Knowing that it would be filing a motion rather than a disclosure, moreover, yesterday in open court CPH demanded a response to its 25 page brief in less than 24 hours. (CPH didn't deliver its brief until after 4:30 p.m.). This is unreasonable and unlawful under the rules governing motions practice in the best of

circumstances, much less given the handicaps under which Morgan Stanley and its new counsel labor and the unfair surprise with which CPH launched its motion.

CPH's decision to file another legal brief rather than simply disclose the facts and documents on which it intends to rely at trial also denies Morgan Stanley and its new counsel the disclosure to which the Court held them entitled. While characteristically eager to preclude the jury from hearing evidence, CPH's *legal* brief denies Morgan Stanley the basic *factual* disclosures to which the Court compelled them to provide.

II. CPH DOES NOT – AND CANNOT – DISPUTE THAT IT COULD HAVE LIMITED ITS DOWNSIDE RISK WITH RESPECT TO ITS SUNBEAM STOCK WITHOUT SELLING

In the event the Court decides to entertain CPH's brief, it should be rejected on the merits. CPH simply misses the point. While arguing at length that legal and practical reasons prevented it from *selling* stock prior to late 1999, CPH nowhere disputes that it was fully able and entirely free to *hedge* or minimize the risk associated with its position in Sunbeam *without* selling stock.

A. CPH Could Hedge Its Sunbeam Stock Without Breaching The 90-Day "Lock Up" Provision

Section 7.1 of the Agreement and Plan of Merger, dated as of February 27, 1998, among Sunbeam, CPH, CLN Holdings Inc. and Laser Acquisition Corp. (the "Merger Agreement") *did not* prohibit CPH from utilizing derivative instruments to eliminate the price risk associated with its Sunbeam stock holdings. To the contrary, Section 7.1 simply prohibited CPH from *selling* any of its Sunbeam shares until June 29, 1998:[1]

[1] The Certificate of Merger was filed on March 30, 1998 (the "Holdings Effective Time"). The lock up provision prevented CPH from selling its Sunbeam shares for ninety (90) days thereafter (i.e., June 29, 1998).

> SALES OF LASER SHARES. Parent Holdings agrees not to, directly or indirectly, *sell, transfer, pledge, assign or otherwise dispose of or otherwise transfer* (other than, in any such case, in connection with a pledge to secure BONA FIDE indebtedness or other obligations) (collectively, "TRANSFER"), any Laser Shares received pursuant to the terms hereof as consideration for the Holdings Merger, other than to one of its Affiliates who agrees in writing to be bound by the terms of this Section 7.1, for a period of nine (9) months from and after the Holdings Effective Time, except that Parent Holdings may Transfer (A) from and after the date that is three (3) months following the Holdings Effective Time, twenty-five percent (25%) of the total number of the Laser Shares, and (B) from and after the date that is six (6) months following the Holdings Effective Time, an additional twenty-five percent (25%) of the total number of the Laser Shares (such that a total of fifty percent (50%) of the total number of the Laser Shares shall be Transferable from and after the date that is six (6) months following the Holdings Effective Time) (emphasis added).

Because multiple hedging strategies were readily available to CPH that did not require it to "sell, transfer, pledge, assign or otherwise dispose of or otherwise transfer" its Sunbeam stock, Section 7.1 did not preclude CPH from protecting against downside risk and therefore CPH's reliance on this argument is misplaced.[2]

B. Federal Securities Law Did Not Prohibit CPH From Utilizing Certain Hedging Strategies.

CPH devotes seventeen pages of its Supplemental Disclosure to explaining all of the various federal securities laws that prevented it from *selling* its Sunbeam stock. But CPH's arguments are immaterial to the fact that derivative instruments permitted CPH to protect itself without selling Sunbeam shares. Hedging strategies not involving a sale of stock comply with

[2] The parties were fully capable of precluding the use of derivative instruments, but chose not to do so. Section 7.1 does not expressly prohibit the use of non-sale derivative instruments, despite the popularity of such hedging strategies during the mid-1990s. Moreover, one particular hedging strategy allows for CPH to borrow against its Sunbeam stock in order to monetize its Sunbeam holdings. In order to do so, CPH would have to pledge its Sunbeam stock in order to collateralize its obligations under the collar arrangement. Given that Section 7.1 expressly allows for a "pledge to secure BONA FIDE indebtedness or other obligations," the lock up provision unquestionably permits CPH engaging in hedging transactions. *See generally* MS 552.

Sections 4 and 5 of the Securities Act of 1933 (the "Securities Act"), Securities Act Rules 144 and 144A, Regulation S under the Securities Act and, absent inside information or manipulative intent, the antifraud provisions of the Securities Exchange Act of 1934 (the "Exchange Act"). At bottom, the short response to CPH's lengthy seventeen-page proffer is "So what?"[3]

C. As A Matter Of Fact, CPH Could Have Utilized Hedging Strategies To Limit Its Downside Risk

Not only was Mr. Perelman free as a matter of law to hedge, Morgan Stanley will show that he was free to do so as a matter of fact. Morgan Stanley will show that sophisticated investors, upon receiving securities worth hundreds of millions of dollars and subject to a one-year holding period, regularly seek to limit their financial exposure to market volatility through hedging strategies. Morgan Stanley will further show that Mr. Perelman failed to avail himself of the protections afforded by various hedging strategies as part of a speculative desire to maximize potential gain. Had CPH employed a prudent hedging strategy, it would have significantly mitigated its losses.

CPH designated Glenn P. Dickes as its Rule 1030 witness to address CPH's decision not to hedge its position in the Sunbeam stock. As Mr. Dickes candidly admitted, CPH could have reduced its exposure with a hedging strategy:

> Q: If MacAndrews & Forbes had entered into a hedging transaction in March or April and purchased a put, MacAndrews and Forbes would have been protected against the total decline in Sunbeam stock, correct?

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[3] CPH was in fact not prohibited from privately reselling its Sunbeam stock to institutional investors and other accredited investors beginning three months after the Holdings Effective Time (i.e., in accordance with Section 7.1 of the Merger Agreement), so long as CPH did so in accordance with the antifraud provisions of the federal securities laws. Indeed, CPH was able to make resales pursuant to the so-called Section 4(1-1/2) transactional exemption to the registration requirements of the Securities Act. Again, CPH's argument in this regard is seriously flawed. See discussion *infra* at Section III.

> MR. BRODY: Object to the form of the question. Incomplete hypothetical and beyond the scope. Go ahead.
>
> A: Had MacAndrews purchased a put at a given price on a given number of shares, Sunbeam stock or for that matter any other stock, that put would have protected MacAndrews from a diminution in value in the particular stock subject to the terms of the put relative to the price of the stock at the time the put was entered into. (Deposition of Glenn P. Dickes, Page 99, Line 15 to Page 100, Line 5)

In sum, CPH's own testimony requires that Morgan Stanley be permitted to introduce evidence of CPH's ability and subsequent refusal to protect itself.

D. CPH Could Have Utilized A Variety Of Hedging Strategies To Minimize Or Eliminate Completely Its Risk Exposure.

The crux of CPH's argument is that any sale of Sunbeam shares between March 30, 1998 and December 1999 would have constituted a violation of Section 5 of the Securities Act because the shares were not registered, and CPH was unable to rely upon a variety of transactional exemptions and safe harbor provisions that would have permitted it to sell shares of Sunbeam stock. These arguments are, once again, irrelevant. *Morgan Stanley has not contended and does not contend that CPH needed to sell its Sunbeam shares in order to avert the massive investment losses that it allegedly suffered.* First, CPH's argument ignores the fact that CPH voluntarily agreed to a contractual lock-up until June 29, 1998. This renders moot any discussion of whether CPH was prohibited by law from selling shares of Sunbeam stock during this time frame.

Second, Morgan Stanley will show that, as early as March 31, 1998, CPH could have implemented one or more risk-reducing strategies known as "hedging" without selling any shares of Sunbeam stock. None of these strategies would have violated either securities laws governing restricted securities or the lock-up in Section 7.1 of the Merger Agreement. Indeed, Morgan Stanley will show that CPH actively considered hedging its Sunbeam investment almost

immediately following the execution of the Merger Agreement. In the end, however, CPH decided to accept the risk of a "naked" stock position. Among other things, Mr. Perelman did not want to sacrifice the potential economic upside of his investment, which some of the hedging strategies required. He also may have been reluctant to pay the investment banking fees associated with several of the proposed hedging transactions. Regardless of the reason, CPH's choice to remain fully exposed in the market was not due to legal or contractual imposed by Morgan Stanley.

The late 1990's witnessed an unprecedented wave of merger activity, fed in large part by companies (like Sunbeam) using their valuable stock as currency to acquire businesses in privately negotiated transactions. Sellers in these transactions (like Mr. Perelman) who received "restricted" securities were anxious to monetize their investments and reduce market risk but were constrained by, among other things, contractual lock-ups and holding periods under Securities Act Rule 144. Precisely in response to these concerns, investment banks developed and sold a variety of viable investment strategies that offered risk management, investment diversification and quicker access to cash *without requiring any sale of the underlying restricted securities*.[4] A few of the more common risk-reducing strategies used to hedge restricted stock positions include:

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[4] Indeed, the competition between investment banks for lucrative hedging business was so fierce that several banks developed proprietary products in an attempt to distinguish their services from those of the other banks. For example, Goldman Sachs developed and offered a hedging service called "Stock Monetization Via Trust ACES" (a.k.a. "TRACES^{SM}"), a service that was pitched to CPH. See MS 552.

- Put Options:[5] Put options eliminate all downside risk below the strike price of the options. At the same time, the investor continues to fully participate in any potential upside increases in the market price of the stock. A put option strategy does not involve the sale of restricted stock, and the investor retains title and voting rights with respect to the stock during the term of the put option

- Call Options:[6] An investor engaging in a call option strategy seeks to monetize a portion of his or her restricted stock position without realizing a sale and to hedge the downside risk of his or her position. A call option strategy does not involve the sale of restricted stock, and the investor retains title and voting rights with respect to the stock during the term of the call option.

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[5] An investor who engages in a put option strategy (in this case, CPH) seeks to protect the value of his or her restricted stock from losses that would occur if the market price of publicly traded stock of the same class fell below a specified price (the "strike price") that is less than the current market price of that publicly traded stock. A put option strategy requires the investor to purchase put options from another investor (known as a counterparty). Put options provide the investor with the right, but not the obligation, to sell stock to the counterparty at the strike price of the put options. If, during the term of the put options, the market price of the stock falls below the strike price, the investor can sell or "put" the stock to the counterparty at the strike price. Put options can be structured to provide for physical settlement of the stock, and thus the investor would deliver the restricted shares after the expiration of the applicable holding period in exchange for the strike price. Alternatively, put options may be cash settled, with the counterparty making a cash payment to the investor based on the difference between the strike price and the stock's market price at the time the put options expire.

[6] He or she does so by selling a cash settled call option (referred to as a "deep-in-the-money" call option) to a counterparty with a strike price that is substantially below the current market price of publicly traded stock of the same class. The option will expire upon the expiration of the applicable holding period under Securities Act Rule 144 (one year, in the case of CPH) with respect to the restricted stock. If the option expires either "at-the-money" or "out-of-the-money," then the option expires worthless and the investor retains the proceeds from the original sale of the option and holds stock freely tradable under Securities Act Rule 144 at the current market price. If the option expires "in-the-money," then the investor must pay the counterparty the difference between the current market price of the stock upon expiration and the strike price of the option; however, the investor retains the proceeds from the option sale and holds stock tradeable under Securities Rule 144 at the current market price.

- Cash-Settled Collar:[7] An investor engaging in a cash-settled collar strategy seeks to protect the value of his or her restricted stock position from losses that would occur if the market price fell below a specified level that is less than the current market price while still participating in any appreciation in the stock price up to a specified price above such current market price of the stock. A cash-settled collar strategy does not involve the sale of restricted stock, and the investor retains title and voting rights with respect to the stock during the term of the collar.

- Equity Swap: In a typical equity swap arrangement, a holder of restricted securities will swap with a counterparty the "all-in return" on his or her issuer stock, consisting of the market appreciation or depreciation plus any dividends or distributions, for an agreed-upon period in exchange for the return of an alternative investment. At the end of the swap term, the parties also agree that a "balancing sum" must be paid by either the holder or the counterparty depending on whether the issuer stock has increased or decreased in value. Since a sale has not occurred, the holder retains title and voting rights with respect to the issuer stock.

None of the above hedging strategies involve the sale of unregistered securities and therefore do not violate Section 5 of the Securities Act. And, because the lock-up in the Merger Agreement restricted only sales or transfers of Sunbeam shares received in the merger (as opposed to derivative transactions in respect of those shares), CPH could have implemented one or a combination of hedging strategies beginning on the day after the closing date of the CPH-Sunbeam merger. Thus, CPH could have protected itself against a downturn in Sunbeam's stock price without actually selling any Sunbeam shares or violating the federal securities laws.

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[7] The investor implements this strategy by simultaneously (a) purchasing a cash settled put option from a counterparty with a strike price below such current market price and (b) selling a cash settled call option to that same counterparty with a strike price above such current market price. Often, the call price and the put price are set at levels that will cause the option premiums to be identical, and thus to cancel one another out, resulting in a "costless collar". If the call option expires in-the-money, the investor must pay the counterparty the difference between the current market price of the stock upon expiration and the strike price, but the investor still holds stock tradeable under Securities Act Rule 144 at such current market price. If the put option expires in-the-money, the counterparty must pay the investor the difference between the strike price and the current market price of the stock upon expiration. If neither option expires in-the-money, the investor merely retains his or her ownership of stock tradeable under Securities Act Rule 144 at the current market price of the stock upon expiration.

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E. CPH Was Actively Considering Hedging Its Sunbeam Position Both Before And After Completion Of The CPH-Sunbeam Merger.

CPH was a highly sophisticated investor and, like any sophisticated investor upon receiving a large block of restricted securities and subject to a one-year holding period, was concerned about limiting its financial exposure to market volatility.

Similarly, Wall Street investment banks were anxious to work with Mr. Perelman on this endeavor. On at least three occasions in March and April of 1998, executives of MacAndrews & Forbes Holdings, Inc. ("Mafco") [CPH's parent company], met with representatives of Wall Street's leading investment houses to discuss hedging Mafco's economic exposure to movements in Sunbeam's stock price. *See* MS 550, MS 551, and MS 552. These documents present an incredible array of investment strategies designed to minimize or eliminate completely CPH's exposure to a drop in Sunbeam's stock price.

Moreover, as the cover note to the Bear Stearns presentation demonstrates, these banking materials were being circulated among the most senior executives in the MacAndrews & Forbes organization. Despite the popularity of these transactions, CPH chose not to protect itself against declines in Sunbeam stock.

III. CPH COULD HAVE SOLD SHARES BEGINNING ON JUNE 29, 1998 WITHOUT CONTRACTUAL OR LEGAL RESTRICTIONS

Finally, CPH's assertion that it could not sell Sunbeam shares until December 6, 1999 is factually and legally incorrect. Pursuant to the terms of the Merger Agreement, CPH could resell 25%, 50% and 100% of its position three months, six months and nine months after the Holdings Effective Time, respectively. Therefore, CPH was contractually free to sell a significant portion of its Sunbeam position as early as June 29, 1998. Moreover, CPH was permitted under the federal securities laws to resell shares of Sunbeam stock privately to institutional investors and other accredited investors almost immediately upon receipt of such shares. In summary, CPH

could have effected private resales pursuant to the so-called Section 4 (1-1/2) transactional exemption to the registration requirements of the Securities Act. *See generally* Jay W. Hicks, *Resales of Restricted Securities* at 419-450 (2005) (Ex. A). This could be done whether or not CPH was an affiliate of Sunbeam at the time of the proposed resale. *Id.* at 443-44. Such private sales would have been possible so long as the restricted shares had originally come to rest with CPH (which they did), provided that CPH was in compliance with the antifraud provisions of the federal securities laws. Therefore, CPH's assertion that it could not have sold Sunbeam shares until late 1999 is patently wrong.

* * *

In explaining the foregoing facts to the jury, Morgan Stanley will rely on, without limitation, the following documents and witnesses: MS 297, MS 298, MS 310 MS 550, MS 551, MS 552, MS 559, MS 562, MS 563, MS 564, MS 565, MS 573, MS 901, Glen Dickes, Norman Ginstling, Professor Mark Grinblatt, Professor Jeffrey Haas, Jerry Levin, James Maher, Blaine Nye, Ronald Perelman, Todd Slotkin, and Lawrence Winoker, as well as all facts and documents set forth in Morgan Stanley & Co. Incorporated's Proposed Findings of Fact And Conclusions Of Law In Support Of Its Motion For Summary Judgment.[8]

[8] Morgan Stanley's proof will come as no surprise given that it asked witnesses about their deliberations on hedging and sales opportunities throughout discovery. *See, e.g.*, Deposition of Glen Dickes at 38:13-41:16, 60:20-61:13; 63:12-23; 82:5-83:5 (Nov. 18, 2004); Deposition of Norman Ginstling at 138:18-146:18 (Apr. 6, 2004); Deposition of Jerry Levin at 334:13-335:13 (Dec. 2, 2004); Deposition of James Maher at 418:10-423:21 (Nov. 3, 2004).

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 5th day of April 2005.

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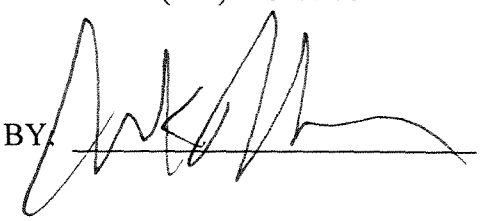
BY: 

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Chapter 6

Private Resales: "Section 4(1½)"

§ 6:1 Introduction
§ 6:2 Relationship between Sections 4(1) and 4(2)
§ 6:3 —*SEC v. Ralston Purina Co.* as a guideline for Section 4(1): *Gilligan, Will & Co.* and its progeny
§ 6:4 — —*Gilligan, Will & Co. v. SEC*
§ 6:5 — —Subsequent judicial decisions
§ 6:6 —Assessment
§ 6:7 — —*Ralston Purina*: Proper scope of holding
§ 6:8 — —*Gilligan Will & Co. v. SEC*: An appropriate case for *Ralston Purina* standards
§ 6:9 — — —*SEC v. Gilligan, Will & Co.*: Administrative decision
§ 6:10 — — —SEC brief in *Gilligan, Will & Co.* appeal
§ 6:11 — —Bottom line
§ 6:12 Section 4(1½): Its scope and prerequisites
§ 6:13 —Nonaffiliate selling restricted securities acquired from issuer
§ 6:14 — —Resales before securities come to rest
§ 6:15 — —Resales after securities come to rest
§ 6:16 —Affiliate selling restricted securities acquired from issuer
§ 6:17 — —Resales before securities come to rest
§ 6:18 — —Resales after securities come to rest
§ 6:19 —Affiliate selling unrestricted securities
§ 6:20 —Nonaffiliate selling restricted securities acquired from affiliate
§ 6:21 — —Resales before securities come to rest
§ 6:22 — —Resales after securities come to rest

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§ 6:1 Introduction

The registration and prospectus delivery requirements of the Act apply to secondary distributions.[1] Thus, resales by any security holder must be registered unless exempted. Section 4(1) provides such an exemption for resale transactions "by any person other than an issuer, underwriter or dealer." Assuming that a prospective seller is neither the issuer[2] nor a dealer,[3] his claim to a Section 4(1) exemption is assured so long as he falls outside the Section 2(a)(11) definition of "underwriter," and

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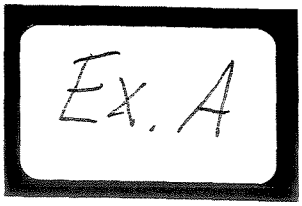
[Section 6:1]

[1]*See Hicks* §§ 9:69-9:92.

[2]*Id.* at §§ 9:2-9:19.

[3]*Id.* at § 9:19.



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is not a participant in a distribution.[4] The threat of underwriter status and the concomitant loss of the ordinary trading exemption of Section 4(1) that a security holder faces in certain resale transactions can be eliminated under Rule 144.[5] The Commission has determined that if a sale of securities is made in accordance with all of the provisions of the Rule, the seller "shall be deemed not to be engaged in a distribution of such securities and therefore not an underwriter thereof."[6]

Rule 144 offers protection to the following types of transactions:

(1) Resales by a nonaffiliate of securities acquired from the issuer in a nonpublic offering (i.e., "restricted securities");[7]

(2) Resales by an affiliate[8] of securities acquired from the issuer in a nonpublic offering ("restricted securities");[9]

(3) Resales by an affiliate of securities not acquired from an issuer or another affiliate in a nonpublic offering (i.e., "unrestricted securities"); and

(4) Resales by a nonaffiliate of securities acquired from an affiliate in a nonpublic transaction where the securities were unrestricted in the hands of the affiliate (i.e., "restricted securities").[10]

In each of these four types of resale transactions, the seller avoids underwriter status complying with all of the conditions of the Rule including the volume limitation of paragraph (e).[11] Rule 144, however, is not exclusive.[12] Indeed, Rule 144(e)(3)(vi) states, in part, that for purposes of determining the amount of securities that can be sold pursuant to subparagraphs (e)(1) and (e)(2), "[s]ecurities sold . . . in a transaction exempt pursuant to Section 4 of the Act and not involving any public offering need not be included in determining the amount of securities sold in reliance upon this rule."[13] The SEC staff has interpreted this quoted phrase in Rule 144(e)(3)(vi) to encompass "sales in private transactions which are effected in a manner similar to private placements by issuers under Section 4(2) of the Securities Act."[14]

The staff construction of Rule 144(e)(3)(vi) that contemplates private sales "similar to private placements by issuers under Section 4(2)" to be exempted "pursuant to Section 4 of the Act" has given birth to the phrase "Section 4(1½) exemption." As the Commission has noted: "This is a hybrid exemption not specifically provided for

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[4] *Id.* at §§ 9:47 and 9:77.

[5] *See* Ch 4.

[6] Preliminary Note to Rule 144, 17 C.F.R. § 230.144.

[7] *See* § 4:47.

[8] *See* § 4:33.

[9] Rule 144 is also available for resales by an affiliate of securities acquired from another affiliate in a nonpublic transaction.

[10] A nonaffiliate who acquires securities from an affiliate in a nonpublic transaction, where the securities were restricted in the hands of the affiliate, is holding restricted securities. Rule 144 is useful in this context as well. However, where the restricted nature of the securities is explained by the affiliate's acquisition of them in a nonpublic offering from the issuer, the problem for the nonaffiliate is similar to that presented in transaction (1) in the text. Where the affiliate's securities are restricted because he acquired them from another affiliate in a nonpublic transaction, the nonaffiliate who later acquires these securities indirectly faces the resale problem presented in transaction (4) in the text.

[11] *See* § 4:177.

[12] *See* § 4:257.

[13] *See* § 4:227.

[14] Harris, Beach & Wilcox, SEC No-Action Letter, [1971–1972 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,773, at 81,623 (Apr. 14, 1972). *Accord* Environmental Sciences Corp., SEC No-Action Letter, [1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,446, at 83,302 (June 28, 1973); Gadsby & Hannah, SEC No-Action Letter, [1972–1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,006 (Aug. 9, 1972); Lancer Homes, Inc., SEC No-Action Letter, 1972 WL 11154 (Apr. 11, 1972).

16div-014571

in the 1933 Act but clearly within its intended purpose."[15] Technically, the so-called "Section 4(1½) exemption" is based on Section 4(1).[16] It cannot be subsumed under Section 4(2) since, as the Commission has emphasized, "Section 4(2) provides an exemption only for the issuer."[17] The Commission's characterization of the exemption as a "hybrid" stems from the SEC's belief that the exemption applies only where "some of the established criteria for sales under both Section 4(1) and Section 4(2) of the Act are satisfied."[18] Or, to use the terminology of the SEC staff, it contemplates private resales that are effected "in a manner similar to" private placements by issuers under Section 4(2).

Because neither the Commission nor its staff has explained the dimensions or conditions of the Section 4(1½) exemption, many unanswered questions remain. From a practical point of view, the most important unresolved issue is which criteria and standards that have evolved under Section 4(2) are to be incorporated into Section 4(1). The Commission envisions "*some* of the established criteria" under Section 4(2) as becoming part of a valid Section 4(1½) exemption, but does not specify them. The staff contemplates a private resale that is "similar" to an issuer's Section 4(2) sale, but has not identified the areas of a traditional private placement to be used for comparison or announced the requisite degree of similarity that a Section 4(1½) resale must possess.[19]

The discussion that follows will focus on two major issues: (1) the relationship between Sections 4(1) and 4(2); and (2) the proper scope and prerequisites for a Section 4(1½) exemption.

§ 6:2 Relationship between Sections 4(1) and 4(2)

Section 4(2) exempts from the provisions of Section 5 "transactions by an issuer not involving any public offering."[1] The U.S. Supreme Court considered this exemption in *SEC v. Ralston Purina Co.*[2] and concluded that the applicability of Section 4(2) "should turn on whether the particular class of persons affected need the protection of the Act."[3] According to the Court, "[a]n offering to those who are shown

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[15]Sec. Act Release No. 6188, 1980 WL 29482, 1 Fed. Sec. L. Rep. (CCH) ¶ 1051, at 2073-28 n.178 (Feb. 1, 1980).

[16]*See, e.g.*, Ackerberg v. Johnson, 892 F.2d 1328, 1336, Fed. Sec. L. Rep. (CCH) ¶ 94850 (8th Cir. 1989); SEC v. Cavanagh, 2004 WL 1594818, at ** 21-23, Fed. Sec. L. Rep. (CCH) ¶ 92866, at 94,093-94,094 (S.D.N.Y. 2004).

[17]Sec. Act Release No. 5487, 1974 WL 14643, 1 Fed. Sec. L. Rep. (CCH) ¶ 2710, at 2907-2 (Apr. 23, 1974). Except for two staff no-action letters which suggest that Section 4(2) is available for sales by persons other than the issuer and which are clearly erroneous (Gralla Publications, Inc., SEC No-Action Letter, 1977 WL 13737 (Feb. 18, 1977); Colorado & W. Properties, SEC No-Action Letter, 1977 WL 10542 (July 14, 1977)), the staff has honored the Commission's view on the scope of Section 4(2). *See, e.g.*, Ehmer, Karl, SEC No-Action Letter, 1975 WL 8966 (May 9, 1975), where the staff stated that the "private placement exemption is available only to sales by issuers, and not to secondary offerings."

[18]Sec. Act Release No. 6188, 1980 WL 29482, 1 Fed. Sec. L. Rep. (CCH) ¶ 1051, at 2073-28 n.178, 2073-28 and 2073-29 (Feb. 1, 1980).

[19]In Cambridge Ltd. Partnership, SEC No-Action Letter, 1984 WL 45265 (Apr. 24, 1984), and Optelecom, Inc., SEC No-Action Letter, 1982 WL 30378 (Mar. 5, 1982), the staff stated that pursuant to its policy described in Securities Act Release No. 6253 (Oct. 28, 1980), it does not express any view on the availability of either the Section 4(1) or Section 4(2) exemptions "or by implication, the Section 4(1½) exemption."

[Section 6:2]

[1]15 U.S.C.A. § 77d(2). Section 4(2) is discussed in detail in *Hicks* Ch. 11.

[2]SEC v. Ralston Purina Co., 346 U.S. 119 (1953), discussed in *Hicks* §§ 11:13-11:25.

[3]346 U.S. at 125.

16div-014572

to be able to fend for themselves is a transaction 'not involving any public offering.' "[4]

Ostensibly, Section 4(2) has nothing in common with Section 4(1). The private placement exemption, as Section 4(2) is sometimes called, is available only to an issuer. Section 4(1) specifically excludes transactions by an issuer. The exemptions serve entirely different purposes. Nonetheless, a connection has been made between the two exemptive provisions. In addition to excluding transactions by an issuer, Section 4(1) excludes transactions by an underwriter. The term "underwriter" is defined in Section 2(a)(11) to include any person who has purchased from an issuer (or an affiliate of an issuer)[5] with a view to participating in or actually participating in "the distribution of any security."[6] The term "distribution" in Section 2(a)(11) is not defined, but is equated with the phrase "public offering."[7] As a result, a claim that Section 4(1) exempts a particular transaction by a person who is clearly not an issuer or dealer depends on whether his transaction, by itself or as part of a larger transaction, is or is not a "public offering." If the transaction is one "not involving any public offering," and it is not effected by the issuer or a dealer, it qualifies under Section 4(1). The practical problem is how to determine whether an offering by a person who insists that he is not an underwriter was in fact "public" or "private." Some courts have found the answer in the judicial construction of Section 4(2).

The analysis that follows will focus first on those judicial decisions that have interpreted Section 4(1) in the light of *Ralston Purina*. It will then assess these interpretations in terms of the purposes of Sections 4(1) and 4(2).

§ 6:3 Relationship between Sections 4(1) and 4(2)—*SEC v. Ralston Purina Co.* as a guideline for Section 4(1): *Gilligan, Will & Co.* and its progeny

A discussion follows.

§ 6:4 Relationship between Sections 4(1) and 4(2)—*SEC v. Ralston Purina Co.* as a guideline for Section 4(1): *Gilligan, Will & Co.* and its progeny—*Gilligan, Will & Co. v. SEC*

Shortly after the Supreme Court decision in the *Ralston Purina* case, the Second Circuit Court of Appeals, in *Gilligan, Will & Co. v. SEC*,[1] related the standards for a nonpublic offering under Section 4(2), as articulated by the Supreme Court, to the criteria for ordinary trading under Section 4(1). The occasion for the inquiry was an appeal by a registered broker-dealer and two of its partners from an administrative decision suspending them from the NASD for five days for a violation of the Securities Act. The following statement of facts, stipulated to by both sides, is taken from the Second Circuit's decision:[2]

On July 6, 1955, Elliott & Company agreed with Crowell-Collier to try to sell privately,

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[4] *Id.*

[5] *See Hicks* §§ 9:69-9:95.

[6] *See generally Hicks* § 9:18.

[7] *See Hicks* § 9:18.

[Section 6:4]

[1] Gilligan, Will & Co. v. SEC, 267 F.2d 461 (2d Cir. 1959). Although the Second Circuit's decision in *Gilligan, Will & Co.* is usually cited as the first major opinion that linked the criteria of SEC v. Ralston Purina Co., 346 U.S. 119 (1953), with Section 4(1), an earlier case had already made the connection. Collier v. Mikel Drilling Co., 183 F. Supp. 104, 110–12 (D. Minn. 1958) (the court concluded that secondary sales were not public offerings within the meaning of the Act).

[2] 267 F.2d at 464-66.

16div-014573

without registration, $3,000,000 of Crowell-Collier 5% debentures, convertible at any time into common stock at $5 a share, and the Elliott firm received an option on an additional $1,000,000 of debentures. Edward L. Elliott, a partner in Elliott & Company, advised Gilligan, one of the two partners of the registrant, Gilligan, Will & Co., of this agreement. He told Gilligan that Gilligan could purchase, but only for investment, as much of the $3,000,000 as he wished, with the exception of $500,000 which Elliott's wife was taking, and that the debentures not taken by Gilligan would be offered to certain friends of Elliott. Gilligan was told by Elliott that Crowell-Collier had "turned the corner" and was then operating on a profitable basis. Elliott also said that the attorneys for Crowell-Collier and his lawyers had stated that the placement was an exempt transaction. Gilligan agreed to purchase $100,000 of debentures for his own account. It does not appear that Gilligan had any information regarding Crowell-Collier and the debenture issue other than what Elliott told him as summarized above.

On August 10, 1955 the $100,000 debentures were delivered to Gilligan, Will & Co., which sent a letter to Crowell-Collier stating: "that said debentures are being purchased for investment and that the undersigned has no present intention of distributing the same."

Nevertheless, by August 10, 1955, almost half of the $100,000 of debentures had already been resold. Either on July 6 or 7, 1955, Louis Alter, a member of the American Stock Exchange, agreed to buy $45,000 of the debentures. Gilligan also offered $10,000 to a friend and when this was not accepted he sold $5,000 to Michael D. Mooney, who had previously requested that amount of debentures and had been told that none were available; the remaining $5,000 debentures were placed in the registrant's trading account. In early September, when the securities were distributed, Gilligan, Alter and Mooney each signed a statement reading: "I hereby confirm to you that said debentures are being purchased for investment and that I have no present intention of distributing the same."

In May 1956, after Gilligan noticed that the advertising in Crowell-Collier magazines was not increasing, he decided to convert his debentures into common stock and to sell the stock. He advised Alter of his plans and on May 15, 1956 the registrant, Gilligan and Alter converted their debentures into common stock. Later in May they sold the stock at a profit on the American Stock Exchange. The stock had been listed on that Exchange since October 1955, and Gilligan became the specialist in the stock.

In May 1956 Gilligan, Will & Co. also purchased and participated in the sale of additional debentures by Crowell-Collier. Elliott told Gilligan that he was surrendering to Crowell-Collier his option on the remaining $1,000,000 of debentures, and that these debentures were to be sold at 160% of par, based on the stock's price at that time of $8 per share. The proceeds of the sale, Elliott stated, were to be used by Crowell-Collier in the acquisition of certain television stations which would show a profit of $4,000,000 annually. Elliott also told Gilligan that Crowell-Collier would sell him, Elliott, 100,000 stock purchase warrants at 1¢ each, exercisable at $10 per share for five years. Gilligan agreed to take $150,000 face amount debentures and said he would see whether Alter was interested in taking any. After Alter indicated that he wanted $50,000 face amount, Gilligan advised Elliott that the total subscription would be $200,000. Gilligan did not inform Elliott of his and Alter's sales of stock obtained from the conversion of the debentures purchased in 1955.

On May 29, 1956 the registrant subscribed to $200,000 face amount debentures and issued to Alter a confirmation for $50,000 debentures which stated: "we have this day subscribed for your account and risk; over the counter as agents." Alter immediately converted his debentures into stock. On the same day the registrant similarly confirmed $150,000 face amount debentures to a joint specialist's account maintained by it and one Lloyd E. Howard, which debentures were immediately converted into common stock.

In addition, on May 29, the registrant sent Crowell-Collier a letter signed by Will, confirming that $200,000 of debentures were purchased for investment with no present intention to distribute. Howard and Alter made similar representations on copies of the confirmations issued to them by the registrant.

Late in May 1956, Elliott informed Gilligan that $200,000 of debentures were still unsold, that it was necessary to sell these debentures to one party, and that if Gilligan could find a purchaser, Elliott would sell him 50,000 stock warrants at 1¢ each. Gilligan contacted Harry Harris and told him that he would split his warrants with him if he,

16div-014574

Harris, could find a purchaser for the debentures. Harris interested Value Line Special Fund, Inc., and Gilligan told Harris to contact Elliott. On May 29, 1956, the Fund's representatives met, with Crowell-Collier's president, Paul Smith, and Harris and Elliott, and the Fund later agreed to purchase $200,000 face amount debentures and 15,000 warrants. To accommodate Elliott, Gilligan, Will & Co. as principal sent a confirmation, signed by Will, covering the sale of the debentures to the Fund.

Gilligan, Will & Co. received 50,000 warrants from Elliott, some of which were sold to the Fund and some of which were given to nominees of Harris and others, the 20,000 warrants given to others being subsequently returned to Elliott at his request.

Gilligan, Will & Co. sent Crowell-Collier two investment intention letters, in the usual form, one covering the Fund's purchase of debentures and the other covering the 50,000 warrants received by registrant. The Fund, at the request of Gilligan, Will & Co. signed letters of investment intent covering the debentures and the warrants.

Based on these facts, the Commission, in its administrative decision, found that petitioners were underwriters with respect to the 1955 and 1956 transactions in Crowell-Collier debentures and stock.[3] On appeal, petitioners asserted that they were not "underwriters," as defined in Section 2(a)(11) and, therefore, they were entitled to the ordinary trading exemption that was then located in the first clause of Section 4(1).[4] They disclaimed any reliance on the second clause of Section 4(1), i.e., the private placement exemption presently located in Section 4(2). Petitioners contended that their resale transactions were distinct and separate from the offering by the issuer, Crowell-Collier, and argued that whether there was a distribution "must be judged solely by their own acts and intention, and not by the acts or intention of the issuer or others."[5] According to the court, the petitioners' legal theory boiled down to this: "[W]hether the total offering was in fact public, their purchases and sales may be found to be exempt on the ground that they were not underwriters if their own resales did not amount to a public offering."[6] Because of the court's holding that the petitioners' offering was "public," it did not reach this question.[7] Instead, the Second Circuit reasoned "the resales contemplated and executed by petitioners were themselves a distribution or public offering as the latter term has been defined by the Supreme Court, and we therefore find that petitioners were underwriters and that their transactions were not exempt under § 4(1)."[8]

The analysis that led to the court's conclusion began with the following statement of what it considered to be the applicable law:[9]

In S.E.C. v. Ralston Purina Co., 1953, 346 U.S. 119, 73 S.Ct. 981, 97 L.Ed. 1494, the

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[3]In re Gilligan, Will & Co., Exchange Act Release No. 5689, 38 S.E.C. 388, [1957–1961 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 76,584 (May 7, 1958) (hereinafter Exchange Act Release No. 5689). The administrative action against *Gilligan, Will & Co.* was only one of three such actions against registered broker-dealers growing out of the Crowell-Collier offering. *See also* In re Elliott & Co., Exchange Act Release No. 5688, 38 S.E.C. 381, [1957–1961 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 76,583 (May 7, 1958) (hereinafter Exchange Act Release No. 5688); In re Dempsey & Co., Exchange Act Release No. 5690, 38 S.E.C. 371, [1957–1961 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 76,585 (May 7, 1958) (hereinafter Exchange Act Release No. 5690).

[4]In 1964 Congress renumbered the provisions of Section 4 and denominated what had been the first clause of Section 4(1) as Section 4(1) and the second clause of Section 4(1) as Section 4(2).

[5]267 F.2d at 466.

[6]*Id.*

[7]*Id.* "In the view we take of this case we need not decide whether, if the purchasers had purchased with a view to only such resales as would not amount to a distribution or public offering, their acts would be exempt even though the issue was in fact a public offering."

[8]*Id.*

[9]*Id.* The Court focused on the 1955 resales of debentures. It stated that it was "unnecessary, in the light of our decision sustaining the findings of the Commission as to violations with regard to the 1955 debentures, separately to consider the violations of § 5 found by the Commission as to the issue in 1956." *Id.* at 468.

16div-014575

Supreme Court considered the exemptions provided by § 4(1). Two of its holdings are significant here. First, it held that an issuer who claims the benefit of an exemption from § 5 for the sale of an unregistered security has the burden of proving entitlement to it. The rationale of this result applies as well to a broker-dealer who claims the benefit of a similar exemption. We therefore find that the burden was upon the petitioners to establish that they were not underwriters within the meaning of § 4(1).

The Court also defined the standard to be applied in determining whether an issue is a public offering. It held that the governing fact is whether the persons to whom the offering is made are in such a position with respect to the issuer that they either actually have such information as a registration would have disclosed, or have access to such information. 346 U.S. at pages 125–127, 73 S.Ct. at pages 984–985.

Turning to the facts as stipulated, the Court observed that:[10]

[T]he purchasers "were not supplied with material information of the scope and character contemplated by the Securities Act nor were the purchasers in such a relation to the issuer as to have access to such information concerning the company and its affairs." Such a stipulation, which from the additional stipulated facts, appears equally applicable to Gilligan, the registrant, Alter, Mooney and Mrs. Elliott, concedes the very proposition of which the petitioners had to establish the negative in order to prevail, and we therefore think it dispositive of the question whether petitioners "purchased . . . with a view to . . . distribution."

The petitioners did not accept the Second Circuit's characterization of the Supreme Court's decision. They argued that *Ralston Purina* did not establish an exclusive definition of nonpublic offering. According to them, the Supreme Court did not intend to exclude those offerings in which the number of offerees or purchasers is small. Using this theory for support, they claimed that the stipulation disclosed the existence of only four specific purchasers and, therefore, the Commission was bound to determine that the petitioners' transactions were exempt because the issue was not public. The Second Circuit disagreed and gave the following explanation:[11]

First, we think that the Ralston Purina case clearly rejected a quantity limit on the construction of the statutory term, and adopted instead the test set out above under which this issue was a public offering. It stated that "the statute would seem to apply to a 'public offering' whether to few or many," 346 U.S. at page 125, 73 S.Ct. at page 984, and cited with approval the dictum that "anything from two to infinity may serve: perhaps even one," 346 U.S. 125, 73 S.Ct. 985 and note 11. Second, even were this not the case, and if a numerical exemption existed despite an admitted violation of the Purina standard, the stipulation adequately discloses that Gilligan well knew that the sales to Elliott's wife and to and through the registrant were not the only sales that were contemplated. It is stipulated that "Elliott advised Gilligan that . . . Elliott was . . . going to sell as much as was left to certain of his friends" after Gilligan took what he wanted of the $2,500,000 remaining after Elliott's wife took $500,000.

Thus these petitioners, who now assert an exemption based on the small number of resales that they contemplated and made, were admittedly aware that the actual placement involved many others. At the least, to establish entitlement to any numerical exemption in such circumstances, the petitioners would have to establish a reasonable and bona fide belief that the total number involved in the placement would remain within the exemption. Otherwise although a general public placement could be effected by a series of transfers to small numbers of buyers, each distributor would be entitled to an exemption on the ground that it transferred to only a small number of buyers. The stipulation reveals that without any knowledge of the actual number of sales then consummated or contemplated the petitioners effected what they now claim to be a harmless number of resales. Such a record does not require and would not justify a find-

[10] *Id.* at 466-67.

[11] *Id.* at 467.

16div-014576

ing that the petitioners had sustained their burden of proving entitlement to an exemption based on the size of the contemplated distribution.

Finally,[12] petitioners challenged the Commission's finding: "The sales by Gilligan and registrant of the underlying common stock on the American Stock Exchange in May 1956, clearly constituted a public distribution."[13] They contended that since the conversion and sales occurred more than ten months after the purchase of the debentures, the Commission was required to find that the debentures had been held for investment and that therefore the sales of the underlying securities were exempt under the first clause of Section 4(1). They conceded that if the sales of the underlying stock had been intended at the time of purchase, the debentures would not have qualified as investment securities. In their opinion, however, the record demonstrated that the sales were undertaken only after a change of the issuer's circumstances—i.e., the failure of Crowell-Collier to increase its advertising space as reasonably anticipated—and that therefore, petitioners, acting as prudent investors, thought it wise to sell.[14] The Second Circuit rejected this claim as well:[15]

> We agree with the Commission that in the circumstances here presented the intention to retain the debentures only if Crowell-Collier continued to operate profitably was equivalent to a "purchased . . . with a view to . . . distribution" within the statutory definition of underwriters in § 2(11). To hold otherwise would be to permit a dealer who speculatively purchases an unregistered security in the hope that the financially weak issuer had, as is stipulated here, "turned the corner," to unload on the unadvised public what he later determines to be an unsound investment without the disclosure sought by the securities laws, although it is in precisely such circumstances that disclosure is most necessary and desirable. The Commission was within its discretion in finding on this stipulation that petitioners bought "with a view to distribution" despite the ten months of holding.

§ 6:5 Relationship between Sections 4(1) and 4(2)—*SEC v. Ralston Purina Co.* as a guideline for Section 4(1): *Gilligan, Will & Co.* and its progeny—Subsequent judicial decisions

The *Gilligan, Will & Co.* decision is not unique. Several courts have followed the Second Circuit lead and applied *Ralston Purina* criteria in determining whether an alleged Section 4(1) exemption should stand.

In *Fuller v. Dilbert*,[1] a guarantor under a stock purchase agreement sought to set aside his obligation to pay the sellers the balance of the purchase price owed by the purchaser by having the court declare the agreement void, including the guaranty agreement. The contract provided for the installment sale of certain unregistered securities by two corporate insiders who had acquired all of the stock from their

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[12]An effort to separate the registrant from the activity of its partners was also unsuccessful:

> The petitioners separately attack the finding that the registrant was an underwriter on the ground that the stipulation reveals that Gilligan agreed with Elliott that Gilligan would take the $100,000 for his own account and thus it requires the conclusion that the registrant did not participate. But the stipulation also reveals that Will received the debentures on behalf of the registrant and also on its behalf issued an investment intention letter, and that $5,000 were placed in the firm trading account. On such facts the Commission was justified in concluding that the registrant participated in the acquisition and distribution of the unregistered issue.

Id.

[13]Exchange Act Release No. 5689, at 80,262.

[14]For a discussion of the change of circumstances doctrine, *see Hicks* § 9:25.

[15]267 F.2d at 468.

[Section 6:5]

[1]Fuller v. Dilbert, 32 F.R.D. 60 (S.D.N.Y. 1962).

16div-014577

father, the chief executive officer of the company, prior to his death.[2] The purchaser, Abraham Dilbert, agreed to a provision in the contract stating that he was acquiring the securities for investment. In fact, he contemplated designating certain other investors to purchase portions of the block of stock being sold. When the purchaser defaulted under the agreement, the guarantor for his performance sued, claiming that the entire contract was void because, in part, the purchaser intended to make a public distribution in violation of Section 5 of the Act. The sellers under the stock purchase agreement moved for summary judgment, arguing that the guarantor's obligation was in no way impaired by any provision of the Act. After noting that not every violation of the Act rendered a contract void for all purposes, the District Court for the Southern District of New York turned to the question of whether one of the parties to the transaction was an underwriter under Section 2(a)(11):[3]

> Abraham Dilbert could designate others to take some of the stock contracted to be sold to him but he could comply with the contract and with the Securities Acts only if he did so in a manner which would not result in a "distribution." Accordingly he could offer for designation only such persons who would not have need of the protection afforded by the Securities Act of 1933 because they have intimate knowledge of the issuer and so would be in a position to hold the stock for investment. *See* Securities and Exchange Commission v. Ralston Purina Co., 346 U.S. 119, 73 S.Ct. 981, 97 L.Ed. 1494 (1954). . . .
>
> Abraham Dilbert, the purchaser, agreed that the shares purchased were being acquired for investment "so that the sale herein made shall be deemed to be exempt from the Securities Act of 1933." This was part of the agreement which was guaranteed by the plaintiffs in this action. Plaintiffs now allege in the complaint that Abraham Dilbert did not intend to purchase such shares for investment but intended to make a public distribution thereof. If so he was, of course, violating the agreement to which he was a party and the undertaking in the contract which was guaranteed by the very plaintiffs herein who now make this assertion. There is no argument advanced that the agreement would be void under Section 5 of the Securities Act of 1933 except this alleged intention on the part of Abraham Dilbert to violate his contract.

Whether the purchaser made a public distribution in violation of the contract was, the court decided, a question of fact that had to await trial.[4]

The court in *Hirtenstein v. Tenny*[5] was also unable to determine the availability of a Section 4(1) exemption until certain critical factual issues were resolved. The *Ralston Purina* criteria helped to shape those factual issues. The plaintiff sought rescission of a stock purchase agreement that he entered into in 1962 with defendant Shirley Tenny under which he had acquired 4,000 shares of Class A stock of Tenny Corporation. Shirley Tenny had acquired the 4,000 shares in 1960 in a registered exchange offer. Jerry Tenny, the husband of Shirley Tenny, was also named as a defendant. The court characterized plaintiff's arguments:[6]

> As appears from the foregoing, it is not disputed that defendant Jerry Tenney, a dominating stockholder and officer of Tenney Corporation, handled the sale of his wife's shares to plaintiff. Building upon this—and arguing alternatively that Mrs. Tenney was

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[2]There is no indication from the facts that the issuer had recently sold the securities to the father of the sellers.

[3]32 F.R.D. at 64.

[4]The court noted that "if Abraham Dilbert disposed of the securities in a manner to effect a 'distribution' the very fact that he did so was a violation of his contract and it may well be that the guarantors would be liable for this breach of contract." *Id.* It is possible that the court misunderstood the provision of Section 4(1) in dispute. Although the court discussed the underwriter concept, which is relevant to a claim to the ordinary trading exemption, it also cited what was then the second provision of Section 4(1) (i.e., "transactions by an issuer not involving any public offering") as the relevant law. *Id.* at n.1. The SEC's amicus curiae brief did not address this aspect of the litigation. For additional information regarding the litigation, *see* Fuller v. Dilbert, 244 F. Supp. 196, 212 (S.D.N.Y. 1965).

[5]Hirtenstein v. Tenny, 252 F. Supp. 827 (S.D.N.Y. 1966) (opinion written by Judge Frankel).

[6]*Id.* at 829.

16div-014578

herself a "controlling person"—plaintiff argues that the sale of these unregistered securities was in legal effect by the "issuer." As a further alternative, plaintiff argues that Mrs. Tenney should be viewed as an "underwriter" under the Act (*see* Section 2(11), 15 U.S.C.A. § 77b(11)), having acquired the shares "with a view to . . . distribution." In either event, plaintiff contends, the sale without registration was unlawful under Section 5 of the Act (15 U.S.C.A. § 77e), creating his right of rescission under Section 12 (15 U.S.C.A. § 77l).

The defendants opposed both of these theories by contending that there was no "public offering" requiring registration under the Act. In addressing plaintiff's motion for summary judgment, the court framed the legal issues in the following way:[7]

> The legal framework of this issue is familiar. Section 4(2) of the 1933 Act (15 U.S.C.A. § 77d(2)) exempts "transactions by an issuer not involving any public offering." Similarly, without a "public offering," there can be no liability as an "underwriter" (a "person who has purchased from an issuer with a view to . . . distribution"), "since a 'distribution' requires a 'public offering.' " Gilligan, Will & Co. v. Securities and Exchange Com'n, 267 F.2d 461, 466 (2d Cir.), cert. denied, 361 U.S. 896, 80 S.Ct. 200, 4 L.Ed.2d 152 (1959). Thus, on either of plaintiff's theories, he can prevail only if there was a "public offering" within that concept as it has developed under the Act.
>
> There is no need on this motion to decide, and we do not decide, whether a single sale like the one in this case may be—or be part of—a "public offering." It is enough for now to say that "a decision of this issue involves a thorough development of the factual situation surrounding" the transaction and the offeree now suing. Knapp v. Kinsey, 249 F.2d 797, 801 (6th Cir. 1957), cert. denied, 356 U.S. 936, 78 S.Ct. 778, 2 L.Ed.2d 812 (1958). As is commonly true of paper presentations, the affidavits before us give less than a richly detailed account of either the cast or the action. It is not possible to know, for example, whether plaintiff (or his father) should be deemed to be in the limited class of informed persons "able to fend for themselves"—i. e., outside the "public" or "publics" for which the safeguard of registration was designed. S. E. C. v. Ralston Purina Co., 346 U.S. 119, 125, 73 S.Ct. 981, 97 L.Ed. 1494 (1953). On the other side, we are not told whether plaintiff was a lone offeree or one of several who may have been solicited; and while numbers may not be decisive, *cf.* S. E. C. v. Ralston Purina Co., supra, 346 U.S. 119 at 125, 73 S.Ct. 981; Gilligan, Will & Co. v. Securities and Exchange Com'n, supra, 267 F.2d at 467, they are obviously relevant in applying the legislative purpose "to exempt isolated transactions from the onerous burdens of registration requirements." Woodward v. Wright, 266 F.2d 108, 115 (10th Cir. 1959).

A claim to an exemption under Section 4(1) was sustained in *Value Line Fund, Inc. v. Marcus*.[8] Nonetheless, the court's reasoning is still relevant to the propriety of using *Ralston Purina* as authority under the circumstances. The plaintiffs, a group of mutual funds (Value Line), sought, among other requests for relief, to rescind their purchase of certain unregistered shares of the common stock of United States Hoffman Machinery Corporation (Hoffman) from the defendants-sellers (Marcus and Vanco) pursuant to Section 12(1) of the Act. Marcus was the president, chairman of the board, and principal stockholder of Hoffman. The defendant Vanco, a partnership, was engaged in the securities business as a broker, an underwriter, and an investment banker. Vanco, along with an individual business broker, John Latimer (Latimer) served as agents for Marcus in the transaction with Value Line. The defendants argued that the sale of Hoffman stock to Value Line was a transaction by a person other than an issuer, underwriter, or dealer and, therefore it was exempt under Section 4(1). Value Line, on the other hand, claimed that Vanco was a

[7] *Id.* at 829-30 (footnotes omitted). It seems clear that counsel for plaintiff—and possibly the court—was confused as to the differences between an issuer for purposes of Section 4(1) and an issuer for purposes of Section 2(a)(11). "Section 4(1) (15 U.S.C.A. § 77d(1)) exempts 'transactions by any person other than an issuer, underwriter, or dealer.' As we have noted, plaintiff seeks to reach one or both defendants under the 'issuer' or 'underwriter' category. There is no claim that either may be viewed as having been a 'dealer.' " *Id.* at 830 n.2. *See generally Hicks* § 9:14.

[8] Value Line Fund, Inc. v. Marcus, [1964–1966 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,523 (S.D.N.Y. 1965).

16div-014579

statutory underwriter. The court examined the status of the defendants under Section 2(a)(11), then designated Section 2(11), and made the following determinations:[9]

> Marcus was the president, chairman of the board and principal stockholder of Hoffman. Marcus, therefore, controlled Hoffman and was an "issuer" for purposes of determining Vanco's status under § 2(11). Thus, Vanco did purchase from and sell for, an issuer, but before a purchaser from an issuer can be held as an underwriter under § 2(11), the purchaser must have purchased "with a view to" or sold "in connection with" a "distribution." We first explore whether Vanco's sale of Hoffman stock was "in connection with" a "distribution."

Having decided that the critical issue was whether Vanco's sale was "in connection with" a "distribution," the court reviewed what it considered was the applicable law:[10]

> The term "distribution" in § 2(11) is substantially equivalent to "public offering" in § 4(1). Gilligan, Will & Co. v. Securities & Exchange Comm'n, 267 F. 2d 461, 466–68 (2d Cir.), cert. denied, 361 U.S. 896 (1959). In *Securities & Exchange Comm'n v. Ralston Purina Co.*, at 124-25, the Supreme Court held:
>
> > "The natural way to interpret the private offering exemption is in light of the statutory purpose. Since exempt transactions are those as to which 'there is no practical need for [the bill's] application,' the applicability of § 4(1) should turn on whether the particular class of persons affected needs the protection of the Act. An offering to those who are able to fend for themselves is a transaction 'not involving any public offering.'"
>
> In *Ralston Purina*, the offerees were employees of the issuer, and the court held, at 127:
>
> > "The focus of inquiry should be on the need of the offerees for the protections afforded by registration. The employees here were not shown to have access to the kind of information which registration would disclose. The obvious opportunities for pressure and imposition make it advisable that they be entitled to compliance with § 5."
>
> A few years later, in *Gilligan, Will & Co. v. Securities & Exchange Comm'n*, at 466, the Court of Appeals for this circuit restated the definition of "public offering" as follows:
>
> > "It [Ralston Purina] held that the governing factor is whether the persons to whom the offering is made are in such a position with respect to the issuer that they either actually have such information as a registration would have disclosed, or have access to such information."

It then turned to the specific facts of the case and applied the *Ralston Purina* criteria:[11]

> The only offering of Marcus' Hoffman stock consisted of Latimer's approach to five mutual funds, and none of them, other than plaintiffs, showed any interest. There is no evidence that Latimer ever actually offered to sell Marcus' Hoffman stock to any of them. The evidence is clear that, except for Value Line, nothing happened beyond the most preliminary search for initial interest. The other funds, like plaintiffs, were sophisticated, knowledgeable, experienced institutional investors with great resources, and plainly were "able to fend for themselves." All of them, like plaintiffs, clearly would have had access to the kind of information which a registration statement would have

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[9] *Id.* at 94,969.

[10] *Id.* at 94,969-70.

[11] *Id.* at 94,970. The court added the following policy reasons to support its holding that Section 4(1) was applicable to the sellers:

> We hold, therefore, that the offering to Value Line and four other mutual funds together with the sale of Value Line, did not constitute a "distribution." A contrary holding in the circumstances portrayed here would bring into serious question whether any sale to an institutional investor could ever be private, and would thereby effectively confine the private placement exemption to key employees of the issuer who possess, or have access to, all relevant information about the issuer. Such a construction would have no basis in the Act or in its underlying purpose, and would be quite disruptive of current market practice for over 35% of the sales of new corporate securities are by private placement, and the "major part" of private placements are with institutional investors, such as mutual funds and insurance companies.

Id. at 94,970–94,971.

16div-014580

> disclosed, as well as the ability and opportunity to investigate Hoffman, interrogate Marcus, and analyse [sic] the securities. The offerees were few in number, and the negotiations were to be directly with Marcus, who was in control of Hoffman and in possession of, or able to obtain, all relevant information desired. Marcus clearly gave Value Line access to whatever information it wished, and it is plain that any of the other offerees would have been in a position to insist on complete access to information.
>
> These facts, we think, demonstrate that the offerees possessed enough sophistication to demand, and enough leverage at the bargaining table to receive, all information relevant to make a fully informed decision on whether or not to buy Hoffman stock. The fact that Bernhard & Co. [the sponsor, investment advisor, and manager of Value Line] failed in its plain duty to fend for the plaintiffs and make the thorough investigation it pretended to make, cannot be twisted into any valid claim that plaintiffs did not have access to information and were not in a position to fend for themselves. We think that if ever there were a private offering this is plainly such a case.

As the following quotation indicates, the court had an easier time with the plaintiff's claim against Marcus:[12]

> Marcus was not an issuer, underwriter, or dealer. He was not the "issuer" of the Hoffman stock, as that term is defined in § 2(4), because the stock was issued by Hoffman, not Marcus personally. He was not an underwriter because he did not purchase from an issuer "with a view to" a distribution, nor did he sell for an issuer "in connection with" a distribution. He was not a dealer because he does not engage "in the business of offering, buying, selling, or otherwise dealing of trading in securities" as required by § 2(12). Marcus, therefore is not liable under § 12(1) as the securities he sold were not required to be registered.

In *SEC v. National Bankers Life Insurance Co.*,[13] the Commission sought an injunction against several individuals who pledged their unregistered stock with certain banks as collateral for loans. Apparently, the pledgors, who were affiliates of the issuer, had acquired their stock other than from the issuer in a nonpublic offering. Upon default, the banks sold the stock in satisfaction for the debt. The Commission convinced the court to deny the pledgors an exemption under Section 4(1) and to issue an injunction. According to the court:[14]

> When a controlling person places securities of the controlled corporation with a person who disposes of the securities to the public or takes with a view to dispose to the public the disposition assumes the character of a distribution or "public offering." The person taking becomes an underwriter. The Securities Act contains no express definition of the terms "distribution" or "public offering." The Supreme Court, however, has delineated weight factors for determining whether a particular disposition is a distribution. It concluded that when securities come from a person into the hands of the public for whom Congress designed the securities laws to protect then those transactions constitute a public offering. Securities & Exch. Comm'n v. Ralston Purina Co., 346 U.S. 119, 124–125, 73 S.Ct. 981, 97 L.Ed. 1494 (1953).

Under the circumstances, the banks became underwriters in the distribution of the pledged stocks. The pledgors, as control persons, were participants in transactions by underwriters which are not within the Section 4(1) exemption.[15]

Finally, the relevance of *Ralston Purina* to Section 4(1) was considered in *Neuwirth Investment Fund, Ltd. v. Swanton*.[16] In September 1968 Dempsey-Tegeler (Dempsey), a broker-dealer, acquired a common stock purchase warrant from Amer-

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[12]*Id.* at 94,972. The court noted that "Section 2(11) allows a person controlling an issuer to be considered an issuer himself for the limited purpose of making the person who purchases from such a control person an underwriter. The concept of control, however, has nothing to do with 'issuer' as used in § 4(1)." *Id.* at n.19.

[13]SEC v. National Bankers Life Ins. Co., 334 F. Supp. 444 (N.D. Tex. 1971).

[14]*Id.* at 456.

[15]*See generally Hicks* §§ 9:69-9:92.

[16]Neuwirth Inv. Fund, Ltd. v. Swanton, 422 F. Supp. 1187, [1975–1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,372 (S.D.N.Y. 1975).

16div-014581

ican Bioculture, Inc. (ABI) at a price of $600 as part of its underwriters compensation. The warrant, which was legended, was exercised approximately one year later and Dempsey received 18,000 shares of restricted ABI stock. In August 1970 Dempsey was forced to cease business. At that time the N.Y. Stock Exchange appointed Swanton as a liquidator of Dempsey. It was in that capacity that Swanton, in January 1971, sold the 18,000 shares of ABI stock to two foreign investment companies (the plaintiffs). The plaintiffs sought rescission of that transaction under Section 12(1) of the Act and named both Dempsey and Swanton as defendants. The court began by narrowing the legal issue "to a single consideration—namely, do any or all of the defendants come within the Security Act's definition of 'underwriter' for purposes of denying them the Section 4(1) exemption from the registration requirements of Section 5?"[17] Noting that the term "underwriter" in Section 2(11) [now Section 2(a)(11)] includes the term "distribution" the court stated:[18]

> The word "distribution" as used in Section 2(11) has been held to mean the equivalent of a "public offering" and therefore the determination whether one is an "underwriter" under Section 2(11) requires an analysis of the same considerations relevant to the determination of whether a transaction involves a "public offering" within the meaning of Section 4(2). *Gilligan, Will & Co. v. S.E.C., The* Value Line Fund, Inc. v. Marcus, CCH Fed. Sec. L. Reg. [sic] ¶ 91,523 (S.D.N.Y. 1965).

The court concluded that any exposure of Swanton to Section 12(1) liability was derivative because of his role as an agent for Dempsey.[19] Therefore, the crucial issue was whether Dempsey could be deemed an "underwriter" for purposes of determining the applicability of the Section 4(1) exemption. More specifically, the court decided that the issue required answers to the following two queries: "1) Did Dempsey purchase the ABI shares with 'a view to' their distribution? and 2) Did the sale of these shares to plaintiffs itself constitute a 'distribution?' "[20]

Having carefully refined the legal issue to two specific questions, the court elaborated on its earlier statement of the governing law:[21]

> As noted earlier, the term "distribution" in this context has been construed to be the equivalent of "public offering." However, this definition may be somewhat misleading, since the term "public offering," as used in the present context, does not encompass a *registered* public offering within its scope. The Second Circuit, for example, has defined the standard to be applied in judging whether an offering is "public" for Section 4(1) purposes in this manner:
>
> > "[T]he governing fact is whether the persons to whom the offering is made are in such a position with respect to the issuer that they either actually have such information as a registration would have disclosed, or have access to such information. *Gilligan, Will & Co.*, at 466, citing SEC v. Ralston Purina Co., 346 U. S. 119, 125–27 (1953)."
>
> In other words, a registered public offering would not be a "public offering" under these criteria, since, *a priori,* offerees and purchasers in a registered public offering have available to them "such information as a registration would have disclosed." Consistent with this view is SEC Rule 152, 17 C.F.R. § 231.152, interpreting Section 4(2) of the Securities Act, and providing that a later registration or registered public offering does not affect the non-public nature of the original sale.
>
> Such a definition of "public offering" while on its face unconventional, is entirely consistent with the scheme of the Securities Act, which was promulgated to encourage the disclosure of relevant information concerning a stock issue by the registration procedure. It would indeed be anomalous, given this emphasis on registration and disclosure, if the

[17]Neuwirth Investment Fund, Ltd. v. Swanton, 422 F. Supp. 1187, 1194 (S.D.N.Y. 1975).

[18]Neuwirth Investment Fund, Ltd. v. Swanton, 422 F. Supp. 1187, 1194 (S.D.N.Y. 1975).

[19]The court rejected the plaintiffs' contention that Swanton had actually purchased the ABI shares. Neuwirth Investment Fund, Ltd. v. Swanton, 422 F. Supp. 1187, 1195 (S.D.N.Y. 1975).

[20]Neuwirth Investment Fund, Ltd. v. Swanton, 422 F. Supp. 1187, 1196 (S.D.N.Y. 1975).

[21]Neuwirth Investment Fund, Ltd. v. Swanton, 422 F. Supp. 1187, 1196-1198 (S.D.N.Y. 1975).

16div-014582

Act afforded the Section 4(1) exemption to a party who purchased stock with no intention of making a registered sale, while denying such exemption to a party who had the best intentions of carrying out such a registered sale, though prevented from doing so by circumstances beyond his control.

This gloss on the term "distribution" is important for present purposes in two respects. First, it is relevant to determining whether Dempsey purchased the ABI shares with a view to distribution. Secondly, it must be applied in determining whether the sale by Dempsey to plaintiffs in its own right constituted a distribution in that plaintiffs themselves purchased with a view to distribution rather than investment. If either a view to distribution or an actual distribution can be shown, Dempsey must be considered an underwriter incapable of invoking the Section 4(1) exemption. The court then applied these legal principles to the first of its two queries. Its conclusion that Dempsey did not purchase with any distributive intent was explained:

> As regards that first consideration, this court holds that Dempsey did not purchase the ABI shares with a view to distribution. Dempsey may be considered to have purchased the shares at the time when it exercised its option on them in September 1969. *See* I Loss, at 553. Plaintiffs' contention is that Dempsey's view to distribution is evident from the fact that Dempsey sought to have the shares registered for sale soon thereafter, in accordance with ABI's promises to register the stock upon demand. However, as noted above, the intent to register the shares or to sell them after registration is not sufficient to deprive defendants of the Section 4(1) exemption. Indeed, the fact that Dempsey acquired these shares with a legend restricting their transfer and held the right to require registration would seem to show that Dempsey had *no* intent to make an unregistered distribution.
>
> Dempsey acquired the ABI stock on September 26, 1969, after the exercise of a warrant to purchase common stock which had been issued to it on September 6, 1968. These shares were held by Dempsey in its investment account and were recorded on its books as being restricted. No attempts were made to sell these shares until late 1970, when Dempsey went into liquidation. The sale to plaintiffs did not occur until January 1971. Thus, Dempsey held the stock until forced to dispose of it by a drastic change in its financial position. Dempsey's investment intent is clearly indicated by its continued holding of the stock over a period of time until it was forced by its liquidation to raise cash to pay its public customers and creditors and by the fact, as will be shown below, that it *never* made a distribution or public offering of the shares. These facts negate any inference that Dempsey's original acquisition of the ABI stock was made with a view to an unregistered distribution. In an analogous case, the SEC recognized that a sale of unregistered securities made for the purpose of avoiding personal bankruptcy was not inconsistent with the requisite investment intent as of the time when the stock was purchased. American All-Servus Corporation, CCH Fed. Sec. L. Rep. ¶ 79,086 (Mar. 4, 1971).

It was in responding to the second query that the court demonstrated its commitment to *Ralston Purina* as an interpretative tool for deciding on the availability of a Section 4(1) exemption. In the following portion of its opinion the court relied on a two step process for determining whether Dempsey's sale to the plaintiffs was itself a distribution. First, it stated for the third time in the opinion that *Ralston Purina* was essential to the required determination. Second, it applied the criteria of the Supreme Court's decision to the facts before it:

> The final determination to be made by this court in deciding the applicability of the Section 4(1) exemption concerns the question of whether or not Dempsey's sales of the ABI shares to plaintiffs constituted a distribution in its own right. As noted earlier, in determining whether a sale of securities was part of a distribution rendering the seller an underwriter, the courts have consistently applied the criteria and standards that have evolved under Section 4(2), the "private placement" exemption. *See, e. g., The Value Line Fund, Inc. v. Marcus*; Fuller v. Dilbert, 244 F. Supp. 196 (S. D. N. Y. 1965), aff'd 358 F. 2d 305 (2d Cir. 1966). In *SEC v. Ralston Purina Co.*, the leading case on the meaning of a "public offering," the Supreme Court looked to the purpose of the Securities Act, which it declared was "to protect investors by promoting full disclosure of information thought necessary to informed investment decisions." 346 U. S. at 124. Interpreting the "private offering" exemption in light of this statutory purpose, the Court expressed the view that a transaction is exempt when the particular class of offerees had "access to the same kind of information that the Act would

16div-014583

make available in the form of a registration statement." 346 U. S. at 125–26. The courts, in attempting to construe this concept, have described many factors as relevant to a determination of whether or not a particular transaction is a public offering. Several such factors, which will be considered *seriatim* in regards to the instant transaction are: the number of offerees, the offerees' access to relevant information and the purchaser's intent at the time of purchase.

In the instant case, there were at most two offerees. All negotiations for the transaction were handled by Henry Neuwirth, a director and advisor of both plaintiffs, and the terms of sale arranged were identical as to all shares, though they were billed to two entities, the Neuwirth Investment Fund and Neuwirth International Fund. It is not even clear that Swanton knew that he was dealing with two entities, though for purposes of this motion we accept plaintiffs' contention that he was. Only two other persons—Glenn Mayer and John Hecht—were even contacted regarding the fact that Dempsey's ABI holdings might be available for sale, and those approaches had none of the earmarks of an offer. Hecht was asked for advice on how to arrange a private sale and Mayer was asked for advice on how to locate a potential buyer; neither was approached as a potential purchaser or authorized to offer the stock to anyone else. Indeed, according to the deposition of Henry Neuwirth, even *he* did not learn of the existence of the 18,000 unregistered shares from Dempsey, but from the president of ABI. In the view taken by the Supreme Court in *Ralston Purina*, the number of offerees is not a dispositive factor in establishing a public offering. 346 U. S. at 125. But the holding in that case was only that a large number of offerees was not conclusive proof that there was a public offering. The Court was not faced with the question and did not decide if a small enough number of offerees might conclusively determine that a transaction was private. *See* I Loss, at 661. Indeed, the Court quoted approvingly an English case stating that one offeree would not constitute "the public" unless "he is intended to be the first of a series of subscribers, but makes further proceedings needless by himself subscribing the whole." 346 U. S. at 125 (n. 11), quoting Nash v. Lynde, [1929] A. C. 158, 169. Such was not the case here; there is no showing that a series of transactions was contemplated or attempted. Besides, *Ralston Purina* notwithstanding, the courts have continued to refer to the number of offerees as a relevant factor in defining a public offering. *See, e.g., The Value Line Fund, Inc. v. Marcus*, at p. 94,970; I Loss, at 661-65.

As regards the plaintiffs' access to relevant information, here, as in the *Value Line* case,

"the offerees possessed enough sophistication to demand, and enough leverage at the bargaining table to receive, all information relevant to make a fully informed decision on whether or not to buy." CCH Fed. Sec. L. Rep. ¶ 91,523 at p. 94,970.

Plaintiffs were able to obtain all the information they desired directly from ABI, and were satisfied that they had obtained sufficient information before negotiating the purchase. Indeed, they had more information regarding ABI than did defendants. Swanton, unlike plaintiffs, never contacted the president of ABI to discuss financial matters, nor did he even correspond with ABI. Furthermore, plaintiffs were sophisticated and experienced investors with the expertise and financial acumen necessary for making investment analyses and decisions. In their own selling literature, plaintiffs assert that "Henry Neuwithr's [sic] succees [sic] is based on thorough study of marketing and sales policy of the companies whose shares he intends to acquire for the portfolio. By investing in shares of [plaintiffs] . . . you have the opportunity to benefit from the success of professional and sophisticated management."

Plaintiffs assert additionally that the information to which they had access was not accurate and complete. Even assuming such to be the case, a Section 12(a) action against the present defendants would not be the proper remedy for plaintiffs to seek; these defendants, who in no way are even claimed to have participated in such alleged deception, cannot be held liable. The test for a private offering is access to the type of information which would be available in a registration statement. As the Court in *Value Line* noted in rejecting a theory similar to that asserted by plaintiffs here:

"The fact that [the equivalents of Neuwirth and his agents] failed in [their] plain duty to fend for the plaintiffs and make the thorough investigation [they] pretended to make, cannot be twisted into any valid claim that plaintiffs did not have access to information and were not in a position to fend for themselves." CCH Fed. Sec. L. Rep. ¶ 91,523 at p. 94,970.

16div-014584

The court granted defendants' motion for summary judgment, holding that "application of the Section 4(1) exemption saves defendants from Section 12(1) liability."[22]

Two other judicial decisions are relevant to the discussion despite the fact that they are not concerned with the Section 4(1) exemption. In *SEC v. Computronic Industry Corp.*[23] and *SEC v. Dolnick*,[24] the courts relied on the *Ralston Purina* case in determining whether to allow the defendants to rely upon the dealers exemption under Section 4(3).[25] An exemption under Section 4(3) is unavailable for any transaction where the dealer functions as an underwriter. A dealer who purchases securities from a control person with a view towards a public offering is an underwriter.

In the first case, *SEC v. Computronic Industries Corp.*, the district court noted that the "test for determining 'public offering' is whether the offerees are able to fend for themselves without the statutory protection of the required prospectus. If they cannot protect themselves, the offering is public. *S.E.C. v. Ralston Purina Company*."[26] Because the dealer failed to present any evidence as to the identity of the ultimate recipients of the unregistered stock that it had acquired from a control person, the court held that it had functioned as a statutory underwriter and, thus, had violated Section 5.[27]

In *SEC v. Dolnick*, a securities salesman sold 500 shares of unregistered securities that he had acquired from the issuer in a nonpublic offering. In granting the Commission's request for a permanent injunction against Dolnick, the court rejected Dolnick's claim that he was not an underwriter, stating:[28]

> Registration is required for transactions which involve distribution of issues to the public. Section 5 of the Securities Act (15 U.S.C.A. § 77e). As noted, the term "underwriter" was broadly defined in Section 2(11) to include intermediaries such as Dolnick, and the exemptions provided in Section 4 (15 U.S.C.A. § 77d) do not fit his case. A sale of these 500 shares in the over-the-counter market by the issuer would have constituted a "public offering" within Section 4(2). This is so because whether an offering is public does not depend on how many shares are offered, but on whether the buyer has need for the protections of the Act. SEC v. Ralston-Purina Co., 346 U.S. 119, 73 S.Ct. 981, 97 L.Ed. 1494. By the same token, the sale of these shares by an intermediary like Dolnick was a 'distribution' within Section 2(11). Gilligan, Will & Co. v. SEC, 267 F.2d 461, 466 (2d Cir. 1959), certiorari denied, 361 U.S. 896, 80 S.Ct. 200, 4 L.Ed.2d 152.

§ 6:6 Relationship between Sections 4(1) and 4(2)—Assessment

Gilligan, Will & Co.[1] has had a significant impact on the construction of Section 4(1). As detailed above,[2] some courts have relied on the Second Circuit's opinion in that case as authority for requiring any person who claims a Section 4(1) exemption to prove that his allegedly nonpublic offering conformed to the standards outlined by the Supreme Court in *SEC v. Ralston Purina Co.* This line of judicial decisions raises several important questions:

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[22]Neuwirth Investment Fund, Ltd. v. Swanton, 422 F. Supp. 1187, 1199 (S.D.N.Y. 1975). *See also* Wheaton v. Matthews Holmquist & Assocs., Inc., 858 F. Supp. 753, 757-58 (N.D. Ill. 1994).

[23]SEC v. Computronic Indus. Corp., 294 F. Supp. 1136 (N.D. Tex. 1968).

[24]SEC v. Dolnick, 501 F.2d 1279 (7th Cir. 1974). It is unclear whether Dolnick was relying upon Section 4(1) or Section 4(3) for an exemption. The case indicates only that Dolnick denies he was an underwriter.

[25]15 U.S.C.A. § 77d(3). *See generally Hicks* Ch. 12.

[26]294 F. Supp. at 1139.

[27]*Id.* at 1139-140.

[28]501 F.2d at 1282.

[Section 6:6]

[1]Gilligan, Will & Co. v. SEC, 267 F.2d 461 (2d Cir.), cert. denied, 361 U.S. 896 (1959). *See* § 6:4.

[2]*See* § 6:5.

16div-014585

(1) Did the Second Circuit Court of Appeals in *Gilligan, Will & Co. v. SEC* correctly interpret the scope of the Supreme Court's holding in the *Ralston Purina* case?
(2) Was there a valid basis for the decision by the Second Circuit Court of Appeals in *Gilligan, Will & Co.* to apply the criteria for a private placement under Section 4(2) in determining whether the petitioners were underwriters and, therefore, unable to rely on Section 4(1)?
(3) What is the precedential value of the judicial decisions in *Gilligan, Will & Co. v. SEC* and its progeny?

The answers to each of these questions, which are developed below, will help to shape the proper limits of the so-called "Section 4(1½) exemption."

§ 6:7 Relationship between Sections 4(1) and 4(2)—Assessment—*Ralston Purina*: Proper scope of holding

In the amicus curiae brief that the Commission filed in *Fuller v. Dilbert*,[1] the SEC stated that the criteria for a private placement exemption were clearly established by the Supreme Court in the *Ralston Purina* case. It then made the following statement: "It has been held that the same criteria apply to determine what constitutes a 'distribution' for purposes of Section 2(11). Gilligan, Will & Co. v. SEC, 267 F.2d 461 (2d Cir. 1959)."[2] Whether the holding in *Gilligan, Will & Co.* is as broad as the quote from the SEC's brief indicates is a question that is discussed below.[3] What seems clear, however, is that the portion of the opinion referred to in the SEC's brief is susceptible to the inference that the Commission gave it.

As discussed above, the Second Circuit Court of Appeals, in *Gilligan, Will & Co. v. SEC*,[4] was asked to sustain petitioners' claim that their offering of unregistered debentures did not constitute a distribution (i.e., a public offering) and, therefore, they were not underwriters within the meaning of Section 2(a)(11). If the petitioners were not underwriters, they were entitled to rely on the ordinary trading exemption, then located in the first clause of Section 4(1). The legal issue, stated generally, was whether the petitioners' offering was public or private. The court of appeals turned to *Ralston Purina* for assistance in resolving that question. According to the Second Circuit, in the *Gilligan, Will & Co.* case, "[i]n *S.E.C. v. Ralston Purina Co.* . . ., the Supreme Court considered the *exemptions* provided by § 4(1). Two of its holdings are significant here."[5] The first important holding related to the burden of proof. The Supreme Court concluded that an issuer who claimed the benefit of an exemption from Section 5 had the burden of proving entitlement to it. The Second Circuit concluded that the rationale of that result applied as well to the petitioners who claimed the benefit of "a similar exemption."[6] The second holding by the Supreme Court in *Ralston Purina* that the Second Circuit found significant was substantive in nature:[7]

> The Court also defined the standard to be applied in determining whether an issue is a public offering. It held that the governing fact is whether the persons to whom the offering is made are in such a position with respect to the issuer that they either actually

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[Section 6:7]

[1]Fuller v. Dilbert, 32 F.R.D. 60 (S.D.N.Y. 1962), discussed in § 6:5.

[2]*Id.* at SEC Amicus Curiae brief at 7.

[3]*See* § 6:11.

[4]Gilligan, Will & Co. v. SEC, 267 F.2d 461 (2d Cir. 1959). *See* § 6:4.

[5]267 F.2d at 466 (emphasis added).

[6]*Id.*

[7]*Id.*

16div-014586

have such information as a registration would have disclosed, or have access to such information.

The problem with this portion of the *Gilligan, Will & Co.* opinion is not the Second Circuit's characterization of the Supreme Court's requirements for a nonpublic offering. The problem lies in the Second Circuit's rationale for applying the *Ralston Purina* standards to a different exemption. The petitioners in *Gilligan, Will & Co.* made it clear that they were relying on the first clause of Section 4(1)—i.e., the ordinary trading exemption—and not on the second clause of Section 4(1)—i.e., the private placement exemption.[8] Nonetheless, the Second Circuit concluded that the two exemptions were similar and decided that the Supreme Court's holdings in *Ralston Purina* were applicable to both exemptions.

A careful reading of *SEC v. Ralston Purina Co.* reveals that the Second Circuit was incorrect on this point. The second clause of Section 4(1) was the only exemption before the Supreme Court for judicial interpretation.[9] In construing that exemption, the Supreme Court stated:[10]

> The natural way to interpret the private offering exemption is in light of the statutory purpose. Since exempt transactions are those as to which "there is no practical need for [the bill's] application," the applicability of § 4(1) should turn on whether the particular class of persons affected needs the protection of the Act. An offering to those who are shown to be able to fend for themselves is, a transaction "not involving any public offering."

Presumably, it was this quoted passage from *Ralston Purina* that the Second Circuit relied on for its conclusion that the Supreme Court was interpreting all of the exemptions in Section 4(1).[11] In any event, the Second Circuit read into *Ralston Purina* more than the Supreme Court had specifically held. It is possible that the Supreme Court intended the statement "the applicability of § 4(1) should turn on whether the particular class of persons needs the protection of the Act," in its opinion to apply to all of the exemptions then subsumed under Section 4(1). In the context of the Supreme Court's reason for granting of certiorari, i.e., "an apparent need to define the scope of the private offering exemption,"[12] such a liberal construction of the Court's statement seems unintended and is certainly not part of the Court's holding.

The erroneous interpretation of *Ralston Purina* by the Second Circuit Court of Appeals does not mean that *Gilligan, Will & Co.* was improperly decided. As the discussion in § 6:8 indicates, despite the misreading of *Ralston Purina*, the court in *Gilligan, Will & Co.* properly applied the standards of *Ralston Purina* in reaching what it believed to be the correct result.

§ 6:8 Relationship between Sections 4(1) and 4(2)—Assessment—*Gilligan Will & Co. v. SEC*: An appropriate case for *Ralston Purina* standards

For the reasons set forth above,[1] the rationale used by the court in *Gilligan, Will & Co. v. SEC* to justify the use of *Ralston Purina* criteria in determining the avail-

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[8] *Id.*

[9] *See* SEC v. Ralston Purina Co., 346 U.S. 119, 120 (1953) (the Court framed the issue with respect to the second clause of Section 4(1)).

[10] *Id.* at 125.

[11] The Second Circuit did not cite any specific page in Ralston Purina as authority for its conclusion that "the Supreme Court considered the exemptions provided by § 4(1)."

[12] 346 U.S. at 120.

[Section 6:8]

[1] *See* § 6:7.

16div-014587

ability of an ordinary trading exemption seems indefensible. That is not to say, however, that the Second Circuit erred in applying those criteria. Although the court properly considered the *Ralston Purina* standards in the course of its analysis, it failed to provide a valid basis for doing so. For that, one can look to either the administrative decision in which Gilligan, Will & Co. was suspended from membership in the NASD for violating certain aspects of the federal securities laws, including Section 5 of the Act, or the SEC's brief that was filed in response to the appeal by Gilligan, Will & Co. before the Second Circuit Court of Appeals.

§ 6:9 Relationship between Sections 4(1) and 4(2)—Assessment—*Gilligan Will & Co. v. SEC*: An appropriate case for *Ralston Purina* standards—*SEC v. Gilligan, Will & Co.*: Administrative decision

In its administrative decision involving Gilligan, Will & Co. and two of its partners, on facts set forth above,[1] the Commission determined that the respondents had purchased unregistered securities from the issuer with a view to distribution and participated in a distribution. Therefore, the Commission decided, the respondents were underwriters under Section 2(a)(11).[2] With respect to the offers and sales of the 1955 debentures, respondents asserted that they understood that the offering of the debentures by Crowell-Collier—through its agent Elliott, a partner of Elliott & Co.—was a private placement not requiring registration. They assumed, allegedly in good faith, that the character of the financing as a private placement would not be changed by their own few further sales for investment. The Commission concluded otherwise, finding that at the time respondents purchased the debentures from the issuer, they intended to resell a substantial portion to certain of their friends and associates. Nonetheless, respondents urged the Commission to view their resales as distinct from the transactions of others. They claimed that "if there was a public offering of Crowell-Collier securities, this was only because of the concurrent acts of others for which respondents had no responsibility and of which they had no knowledge."[3]

It was in the context of this defense by respondents that the Commission discussed the Supreme Court's criteria for a valid private placement. The SEC determined that respondents were part of the primary offering, and that unless all of the purchasers of debentures from persons who were in the first level of the issuer's offering—including respondents and Elliott—qualified under the criteria or *Ralston Purina*, the issuer's claim to a private placement exemption had to fail and respondents would then become underwriters in a public distribution. According to the SEC, respondents' entitlement to the benefits of an exemption under the first clause of Section 4(1) depended on their ability to demonstrate the issuer's right to an exemption under the second clause of Section 4(1) as construed by the Supreme Court in *Ralston Purina*.[4] This relationship between the *Ralston Purina* standards and the ordinary trading exemption was articulated with much greater clarity in the Commission's brief that was filed in connection with the respondent's appeal to the Second Circuit.

[Section 6:9]

[1]*See* § 6:4.

[2]Exchange Act Release No. 5688.

[3]*Id.* at 80,262.

[4]*Id.* The following part of the SEC's opinion is relevant:

It is admitted, moreover, that the persons to whom debentures were sold did not receive and were not in a position to have access to information similar to that which would have been afforded had the securities been registered. The Supreme Court in the Ralston Purina case stated that the question of whether an offering is a public offering or is exempt from registration as a private offering turns "on the need of the offerees for the protections afforded by registration," and that where the offerees are not shown "to have access to the kind of information which registration would disclose," compliance with Section 5 of the Securities Act is required.

16div-014588

§ 6:10 Relationship between Sections 4(1) and 4(2)—Assessment—*Gilligan Will & Co. v. SEC*: An appropriate case for *Ralston Purina* standards—SEC brief in *Gilligan, Will & Co.* appeal

In its brief in response to Gilligan Will & Co.'s petition to the Second Circuit Court of Appeals for a reversal of the administrative decision,[1] the Commission offered two theories to support its finding that the petitioners were not entitled to an exemption. One theory was based on Section 2(a)(11) (then Section 2(11)), the statutory definition of underwriter, and the other was premised on a judicial construction of the trading exemption announced in *SEC v. Chinese Consolidated Benevolent Ass'n.*[2] In the course of developing each of the theories, the Commission referred to the Supreme Court's decision in the *Ralston Purina* case. The Commission's use of *Ralston Purina* was limited and suggests that the criteria for a valid private placement exemption are relevant to a determination of whether a valid ordinary trading exemption is available, but only where the claimant is a participant in an allegedly private sale by the issuer.

The first theory of the SEC was directed at the petitioners' claim that regardless of the character of the issuer's offering, their sales were nonpublic, thus, they were not effected by underwriters. In reaching its conclusion that petitioners were statutory underwriters, and thus disqualified under Section 4(1), the Commission took its analysis through three stages:

(1) It integrated petitioners into the issuer's offering.

(2) It examined petitioners' conduct and found that it had purchased with a view to distribution.

(3) It noted that petitioners as intermediaries in the issuer's offering were unable to prove that Crowell-Collier had met all of the requirements for a private placement exemption. With respect to the claim that petitioners'

Respondents seek to escape this conclusion by asserting that even after the Ralston Purina decision it was generally understood that any offering to a small group of 25 or less, not for resale, was presumptively not a public offering or a distribution, and that the Supreme Court's language must be read in the context of the fact that a much larger group was involved in that case. They further contend that the Court's emphasis was not so much on the knowledge of the offerees as on their ability "to fend for themselves." In addition, respondents urge that the issues now before us must be decided on the basis of their own transactions, apart from the transactions of others, and that if there was a public offering of Crowell-Collier securities, this was only because of the concurrent acts of others for which respondents had no responsibility and of which they had no knowledge. These contentions are not persuasive.

The Supreme Court's language does not support the view that the availability of an exemption depends on the sophistication of the offerees or buyers, rather than their possession of, or access to, information regarding the issuer, nor, as we have pointed out in the companion case of Dempsey & Company, does it support the view that an offering to a small group is without more a private offering.

Furthermore, while the record in this proceeding contains no evidence regarding transactions by other members of the original group to whom Elliott offered the debentures, it does show Gilligan's awareness of the fact that he was only one member of such a group. Thus, in any event, for respondents to sustain their contention that they were not involved in a public offering because there were only a few purchasers, it would be necessary to show that the original group to whom Elliott offered the debentures and the persons to whom Gilligan and registrant offered or sold debentures did not together exceed the limitation of 25 on which respondents seek to rely, and that showing has not been made. A seller, and particularly a registered broker-dealer, may not safely rely on a claim of a private offering exemption when he does not have knowledge of the identity and number of the original offerees and purchasers and whether such purchasers intend in turn to offer and sell to others.

Id. at 80,261–262 (footnotes omitted). *Cf.* Exchange Act Release No. 5690, at 80,268.

[Section 6:10]

[1]Brief for the SEC, 267 F.2d 461 (2d Cir.), cert. denied, 361 U.S. 896 (1959) (hereinafter SEC *Gilligan* Brief).

[2]SEC v. Chinese Consol. Benevolent Ass'n, 120 F.2d 738 (2d Cir.), cert. denied, 314 U.S. 618 (1941). This case is discussed in detail in *Hicks* §§ 9:39 and 9:52.

16div-014589

transactions were separable from the transactions of others, the Commission stated:[3]

> At the threshold petitioners' entire argument fails to recognize the basic pattern of the statute and the requirement imposed upon it in seeking an exemption. Petitioners thus, for example, argue (Br., p. 4) that *their* sales did not amount to a public distribution, and again (Br., p. 21) that "it was not necessary for them to show anything regarding the original group to whom Elliott offered the debentures." Consistent with this position, petitioners have made no effort either before the Commission or in this Court to show that there was no public offering of Crowell-Collier securities. Petitioners' argument resolves itself to the proposition that under the statute an offering may be fragmentized; that even if there was a public offering by Crowell-Collier petitioners could engage in the offering, with their participation viewed independently and without regard to the fact that it was but a part of the issuer's public offering. But this of course, flies in the face of the statutory pattern.
>
> The Commission has consistently held that an issuer or an underwriter may not separate parts of a series of related transactions making up an issue of securities and thereby seek to establish that a particular part is a non-public transaction if the whole involves a public offering of securities. As early as 1939, the Commission published an opinion of its then General Counsel, which pointed out that the second clause of Section 4 (1):
>
> > does not exempt every transaction which is not itself a public offering, but only transactions "not *involving* any public offering." Accordingly, the exemption is not available to securities privately offered if any other securities comprised within the same issue are made the subject of a public offering.
>
> And, as Professor Loss, upon whom petitioners rely so heavily (Br. p. 18), points out, the Commission has held that:
>
> > it is clear that the private offering exemption in Section 4 (1) cannot be available for a *portion* of a "single" offering.
>
> Petitioners misread (Br., pp. 12, 18) Professor Loss's statement that a person who buys securities from an issuer "with a view to reoffering them to a small number of persons for investment is not a statutory underwriter." This means only that if the *entire offering of the issuer* is taken by a person for resale to a few persons under circumstances where there would be an exemption had the issuer itself made the sales directly to the ultimate purchasers, the introduction of an intermediary does not bar the exemption, nor is the intermediary an underwriter. That, of course, is not the instant case. If petitioners' argument were accepted, it would produce the absurd result that an issuer could lawfully make a public offering of unregistered securities by merely selling to a few securities firms who in turn could resell to a few more persons, with this process continued *ad infinitum*, and each offering would be treated as separate and lawful unless the individual offering by each distributee itself amounted to a distribution or public offering.

In the following passage from the SEC's brief, the Commission related the *Ralston Purina* criteria for a private placement exemption to petitioners' claim for nonunderwriter status:[4]

> In determining whether an offering is public or non-public, it is, of course, necessary to consider whether the initial purchasers take for resale. Where they do, it is the factors concerning the *ultimate offerees* which is controlling. Otherwise an offering to two professional underwriters who in turn redistributed to the public would be an exempt transaction not subject to registration. To interpret the statute in this manner, as this Court pointed out in rejecting another unrealistic construction of Section 4(1), "would afford a ready method of thwarting the policy of the law and evading its provisions."
>
> Since an issuer undertaking a non-public offering has the burden of making sure that its immediate purchasers do not distribute the securities, and in this respect is acting at

[3]SEC *Gilligan* Brief at 22–24 (footnotes omitted).

[4]SEC *Gilligan* Brief at 19–22 (footnotes omitted).

16div-014590

its peril, the issuer will ordinairly [sic] require its immediate purchasers to furnish a written representation that they are taking the securities for investment and not for distribution. The mere giving of such a representation is, however, not conclusive. A representation by a purchaser that he is taking for "investment" when in fact, as happened here, he is concurrently dividing the participation among others or reselling a portion of his commitment to others is worthless. The representation must be a bona fide expression of an intent to hold the securities barring unusual circumstances. The representation is not a formal ritual or a mere "password," which once given provides unqualified entry and continuing access to an exemption haven. "[A]n issuer cannot take at face value the assurances of buyers that they buy only for investment purposes when circumstances would show to a reasonable person that these assurances are formal rather than real and when there are preponderant indications that the representations are made to avoid the requirements of law." *S.E.C. v. Mono-Kearsarge Consolidated Mining Co.*, — F. Supp. — (D. Utah, Oct. 8, 1958).

The concept of a public offering under the Securities Act was considered in S.E.C. v. Ralston Purina Co., 346 U.S. 119, 126–127 (1953). The Supreme Court there held that the availability of the non-public offering exemption depended upon whether the offering have access to information of a character similar in that disclosed in a registration statement. Thus, in concluding that the exemption was not available to a company offering treasury stock to its employees, the Court stated:

> But once it is seen that the exemption question turns on the knowledge of the offerees, the issuer's motives, laudable though they may be, fade into irrelevance. The focus of the inquiry should be on the need of the offerees for the protections afforded by registration. *The employees here were not shown to have access to the kind of information which registration would disclose.* [Emphasis added.]

It is indisputable that petitioners knew at the time that Crowell-Collier was making an offering, and not to them alone, of $3,000,000 face amount convertible debentures in 1955 and $1,000,000 face amount in 1956 (App. 10a, 14a). Likewise it is unquestionable that registrant took down Crowell-Collier debentures and resold them as well as common stock acquired on conversion, and that it was also the medium, for a consideration, in the sale of Crowell-Collier securities. For the reasons previously stated, if Crowell-Collier was making a public offering of its securities, registrant was an underwriter since it participated in that offering. The test, therefore, of whether an exemption was available in the instant case depends upon whether there was a public offering by Crowell-Collier. As previously stated, petitioners, as claimants of the exemption, must prove that there was no public offering by Crowell-Collier.

The Commission's second theory for concluding that petitioners had failed to prove that their transactions were exempt was based on one of the holdings in *SEC v. Chinese Consolidated Benevolent Ass'n*. In that case, the Second Circuit Court of Appeals found a patriotic association to have functioned as an underwriter of certain unregistered securities issued by the Chinese government. The court further held that irrespective of whether the association was an underwriter, as a matter of policy it could not claim the benefit of the ordinary trading exemption because it was participating in a transaction with an issuer that was distributing securities in violation of Section 5. The first clause of Section 4(1), in the opinion of the Second Circuit, "was intended to exempt only trading transactions between individual investors with relation to securities already issued and not to exempt distributions by issuers."[5] Consequently, the court determined that the ordinary trading exemption in Section 4(1) "does not in terms or by fair implication protect those who are engaged in steps necessary to the distribution of security issues."[6]

In its response to the claim by Gilligan Will & Co. that the ordinary trading exemption covered their resale transactions, the SEC relied on *Chinese Consolidated* and asserted that petitioners were participants in a public offering by Crowell-

[5]120 F.2d at 741.

[6]*Id.*

16div-014591

Collier that did not comply with Section 5.[7] According to the SEC, "if Crowell-Collier did otherwise have an exemption, petitioners' activities by themselves foreclosed the exemption."[8] With the loss of a private placement exemption for the issuer, the petitioners, who "were . . . clearly a primary channel for the distribution of Crowell-Collier securities to the public,"[9] were in the same position as the Association in *Chinese Consolidated*. As persons who were "engaged in steps necessary to the distribution of unregistered securities," they lost their right to an exemption under the first clause of Section 4(1). Under this theory, petitioners could have prevailed in their claim for an exemption had they been able to demonstrate that the entire offering, including their part, was nonpublic. Had they shown that the offering was nonpublic, in accordance with the criteria articulated by the Supreme Court, the petitioners would have established a valid private placement exemption for Crowell-Collier and thereby would have made it impossible for them to be deemed participants in a nonexempted and unregistered distribution. Petitioners, however, were unable to qualify the issuer's offering under the *Ralston Purina* standards. As the SEC noted:[10]

> In arguing that there was no distribution of public offering, petitioners misconstrue (Br. pp. 19–20) the *Ralston Purina* case, p. 21. As has already been stated, the Supreme Court there held that an offering is not public only if the offerees have access to information of a character similar to that disclosed in a registration statement. This information was not available to those who purchased debentures in 1955 and 1956 from registrant or through its efforts. The stipulation expressly states (App. 18a):
>
> > purchasers of Crowell-Collier 5% convertible debentures were not supplied with material information of the scope and character contemplated by the Securities Act nor were the purchasers in such a relation to the issuer as to have access to such information concerning the company and its affairs.
>
> With this admission by petitioners it is clear, under the specific holding of the *Ralston Purina* case, that in selling and participating in the sale of debentures in 1955 and 1956, registrant participated in a public offering or distribution within the meaning of the statute.

The Second Circuit Court of Appeals in *Gilligan, Will & Co. v. SEC* did not rely upon the *Chinese Consolidated* rationale for denying petitioners an exemption.[11] Despite that fact, the *Chinese Consolidated* participation theory is sound.[12] It is also consistent with the decision in *Gilligan, Will & Co.* since the court found that petitioners "participated in the acquisition and distribution of the unregistered issue."[13]

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[7]*See* SEC *Gilligan* Brief at 15–17. The SEC contended that the administrative decision was based on this theory, despite the fact that Chinese Consolidated was not discussed in Exchange Act Release Number 5688. In its brief, the Commission asserted: "But the Commission did not rest alone on petitioners' failure to meet its statutory burden [i.e., proving that they were not underwriters]. The Commission concluded from the incontrovertible facts in the stipulation that petitioners in their own activities participated in a distribution or a public offering." *Id.* at 25.

[8]*Id.* at 25.

[9]*Id.*

[10]*Id.* at 28.

[11]The court determined that petitioners were "statutory underwriters," a finding that was urged by the Commission in its first theory and that was also made by the Commission in Exchange Act Release Number 5688. 267 F.2d at 466. The Second Circuit did not cite its earlier opinion in Chinese Consolidated.

[12]*See generally Hicks* § 9:52. In its brief in opposition to Gilligan Will & Co.'s petition for a writ of certiorari, the Commission again advanced the Chinese Consolidated rationale. SEC *Gilligan* Brief at 8.

[13]267 F.2d at 467.

16div-014592

§ 6:11 Relationship between Sections 4(1) and 4(2)—Assessment—Bottom line

A careful reading of the judicial and administrative statements concerning the apparent relationship between the requirements for a nonpublic offering exemption under Section 4(2) and the requirements for a valid exemption under Section 4(1) produces the following observations.

First, Sections 4(1) and 4(2) are separate and distinct exemptions. It is true that they are similar in certain respects. Both exempt transactions as to which "there is no practical need for [the bill's] application."[1] Neither exempts a transaction that involves a distribution of securities. They are also quite different. Section 4(1) provides an exemption for transactions by certain persons, but not the issuer of the securities to be sold. Section 4(2) exempts certain nonpublic offerings, but only by an issuer. Because the exemptive provisions serve different purposes, judicial and administrative interpretations of the two exemptions are rarely interchangeable.

Second, the Supreme Court's holding in *Ralston Purina* was limited to the private placement exemption which is only available to issuers.[2] The Court did not hold that the prerequisites for a private placement exemption (offeree sophistication and access) were also the standards for determining the availability of Section 4(1) or, more specifically, what constitutes a "distribution" for purposes of Section 2(a)(11).[3]

Third, the Second Circuit Court of Appeals, in *Gilligan, Will & Co. v. SEC*, misinterpreted the scope of the Supreme Court's holding in *Ralston Purina* and used that erroneous interpretation as the rationale for applying the Supreme Court's criteria for a private placement exemption in determining whether a claimed trading exemption was available.[4] For reasons set forth above, however, the Second Circuit's use of the *Ralston Purina* criteria was entirely justified under either of the theories that the Commission advanced in its brief.[5] Unfortunately, neither of these theories was included in the court's opinion. As noted below, the absence of a proper legal basis for the court's use of the *Ralston Purina* criteria in the context of a claimed trading exemption has caused some courts to invoke the *Gilligan, Will & Co.* case as authority for the application of *Ralston Purina* standards where none is warranted.

Fourth, the SEC, in its brief in response to Gilligan, Will & Co.'s appeal to the Second Circuit Court of Appeals, announced two theories that properly explain the relationship between *Ralston Purina* and a Section 4(1) exemption.[6] The relationship can be stated as follows: The *Ralston Purina* standards are relevant to a determination of whether a transaction by a person other than an issuer or dealer is exempted by Section 4(1) only where the person claiming that exemption allegedly (1) purchased from the issuer with a view to distribution, (2) sold for the issuer in connection with a distribution, or (3) participated in a distribution by an issuer. In these situations, the person claiming an exemption under Section 4(1) must overcome the allegation that the issuer was engaged in an unregistered public offering and that he, the claimant, either functioned as a statutory underwriter for the

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[Section 6:11]

[1]SEC v. Ralston Purina Co., 346 U.S. 119, 125 (1953).

[2]*See* § 6:7.

[3]*Id. But see* Ackerberg v. Johnson, 892 F.2d 1328, 1336, Fed. Sec. L. Rep. (CCH) ¶ 94850 (8th Cir. 1989) (the court stressed the sophistication of the purchaser in holding than an affiliate's private sale was exempted by Section 4(1)); Hedden v. Marinelli, 796 F. Supp. 432, 437 (N.D. Cal. 1992).

[4]267 F.2d at 467.

[5]*See* § 6:8.

[6]*Id.*

16div-014593

issuer or participated with the issuer in a significant way. If the claimant can establish that the offering by the issuer was nonpublic (i.e., not a distribution) and was exempted by Section 4(2), he will be entitled to a Section 4(1) exemption. Where the claimant adopts this approach, it is appropriate for the SEC or a court to assess the entire transaction, including the offers and sales by the person seeking the protection of Section 4(1), in the light of the criteria and standards that have evolved under Section 4(2) and decide whether the issuer's offering was in fact exempted under the private placement exemption.[7]

Fifth, given the limited relationship between the requirements of Section 4(2) and an exemption under Section 4(1), the *Ralston Purina* criteria for a valid private placement have no relevance to a case where the claimant allegedly participated in a secondary distribution not involving the issuer. Consequently, the courts, in *Fuller v. Dilbert*, *Hirtenstein v. Tenny*, *Value Line Fund, Inc. v. Marcus*, *SEC v. National Bankers Life Insurance Co.*, *Neuwirth Investment Fund, Ltd. v. Swanton*, and *SEC v. Computronic Industries Corp.* had no basis for applying the *Ralston Purina* criteria.[8] In all of these cases, the person seeking to avoid underwriter status was allegedly participating in a secondary distribution. Since the cases did not involve an alleged distribution by the issuer, Section 4(2) was irrelevant. The claimant who allegedly (1) purchased from an affiliate with a view to distribution, (2) sold for the affiliate in connection with a distribution, or (3) participated in a distribution by an affiliate must establish that the affiliate's offering did not constitute a "distribution" for purposes of Section 2(a)(11). By showing that the affiliate's offering was exempted by Section 4(1), the claimant establishes his right to that same exemption. Since an affiliate cannot rely upon Section 4(2) to exempt a nonpublic offering, any application of the *Ralston Purina* criteria in determining the claimant's right to Section 4(1) is misplaced.[9]

§ 6:12 Section 4(1½): Its scope and prerequisites

In § 6:1, it was noted that a seller in the following four types of transactions is a candidate for underwriter status:

(1) Resales by a nonaffiliate of securities acquired from the issuer in a nonpublic offering;
(2) Resales by an affiliate of securities acquired from the issuer in a nonpublic offering;
(3) Resales by an affiliate of securities not acquired from an issuer or another affiliate in nonpublic offering; and
(4) Resales by a nonaffiliate of securities acquired from an affiliate in a nonpublic transaction where the securities were unrestricted in the hands of the affiliate.

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[7]For an example of a judicial opinion that properly invoked the *Ralston Purina* criteria, *see* the court of appeals opinion in Lively v. Hirschfeld, 308 F. Supp. 612 (D. Colo. 1970), 440 F.2d 631 (10th Cir. 1971).

[8]Fuller v. Dilbert, 32 F.R.D. 60 (S.D.N.Y. 1962); Hirtenstein v. Tenny, 252 F. Supp. 827 (S.D.N.Y. 1966); Value Line Fund, Inc. v. Marcus, [1964–1966 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,523 (S.D.N.Y. 1965); SEC v. National Bankers Life Ins. Co., 334 F. Supp. 444 (N.D. Tex. 1971); Neuwirth Inv. Fund, Ltd. v. Swanton, [1975–1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,372 (S.D.N.Y. 1975); SEC v. Computronic Indus. Corp., 294 F. Supp. 1136 (N.D. Tex. 1968). All of these cases are discussed in § 6:5. *See also* Ackerberg v. Johnson, 892 F.2d 1328, 1336, Fed. Sec. L. Rep. (CCH) ¶ 94850 (8th Cir. 1989); Wheaton v. Matthews Holmquist & Assocs., Inc., 858 F. Supp. 753, 757-58 (N.D. Ill. 1994); Bank of Bermuda Ltd. v. Rosenbloom, [1976–1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,820, at ¶ 90,952–953 (S.D.N.Y. 1976). SEC v. Dolnick, 501 F.2d 1279 (7th Cir. 1974), also discussed there, involved a primary distribution where the court was justified in considering *Ralston Purina*.

[9]The SEC has also misapplied *Ralston Purina* criteria to a secondary distribution. *See* Gearhart & Otis, Inc. v. SEC, 42 S.E.C. 1, 5–8 (1964), aff'd, 348 F.2d 798 (D.C. Cir. 1965).

16div-014594

A prospective seller in any of these transactions might seek to protect his claim to a Section 4(1) exemption by structuring his resales as private transactions. Whether a private transaction by any person other than an issuer or dealer will qualify under the so-called Section 4(1½) exemption is difficult to predict since the Commission has chosen not to provide any guidelines or instruction.[1] Given the absence of clear standards, it is prudent for a seller hoping to rely upon the Section 4(1 1/2) exemption to take the following precautions:

(1) Arrange to have a legend placed on the securities alerting the buyer to the restricted character of the securities. If the seller is an affiliate, the legend should make clear that the securities being sold are restricted securities within the meaning of Rule 144(a)(3) and may not be resold publicly under Rule 144 until the buyer meets the holding period requirement of Rule 144(d) which begins anew with the acquisition of those securities from an affiliate.

(2) Arrange to have the issuer issue a "stop transfer order" to the transfer agent for the securities. This precaution will prevent the buyer from reselling the securities purchased in the Section 4(1 1/2) transaction without obtaining an opinion by counsel as to the legality of the resale.

(3) Inquire into the identity of the buyer, who purports to take the securities for investment, and into that person's financial condition in order to determine whether it is likely that the person will be able to hold the securities for investment and not resell prematurely.

(4) Secure a written representation by the buyer that clearly indicates the buyer's awareness of the restrictive character of the securities being purchased and the need for the buyer to hold them for investment.[2]

In view of the limited relationship between Sections 4(1) and 4(2),[3] it is submitted that the hybrid exemption denominated Section 4(1½) is not needed in all private transactions. The transactions where it is useful and the prerequisites for its protection are set forth below in connection with each of the four basic transactions under review.

§ 6:13 Section 4(1½): Its scope and prerequisites—Nonaffiliate selling restricted securities acquired from issuer

A nonaffiliate who intends to sell securities acquired from the issuer in a nonpublic offering will be unable to claim Section 4(1) if he is deemed to have (1) purchased from the issuer with a view to distribution, (2) sold for the issuer in connection with

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[Section 6:12]

[1]*See* § 6:1. *Cf. Hicks* § 1:41 and the discussion of the negotiated transaction requirement of former Rule 237(a)(4).

[2]See, e.g., SEC v. Cavanagh, 1 F. Supp.2d 344, 371-372 (S.D.N.Y. 1998), where the court endorsed the use of the precautions, set forth in the text, in connection with an exemption under Section 4(1 1/2). The court also concluded that Section 4(1 1/2) did not apply to resales by one of the defendants, in part because he did not take any of precautions to prevent immediate resales and because he knew or had reason to know that the purchasers wanted to resell to the public. The court stated:

> In sum, the Court finds that the evidence concerning the 4(1) 1/2 exemption does not indicate that Chachas acted in good faith, even when viewed in the light most favorable to him. There simply is no evidence to support a finding that he either actually or reasonably believed that the Spanish Shares had been purchased with a view to long?term investment rather than with an intent to resell. Having rejected this argument as to why he should not be enjoined against future violations of Section 5, the Court concludes that the SEC has a strong likelihood of proving successfully at trial that Chachas, on behalf of the Management Shareholders, made an offer and a sale of affiliate shares in contravention of Section 5's requirements, and that he did so in knowing and intentional violation of the requirements of the law.

Id.

[3]*See* § 6:2.

16div-014595

a distribution, or (3) participated in a distribution by the issuer.[1] In order to avoid one or more of these inferences, a nonaffiliate holding restricted securities acquired from the issuer must be able to prove that his resales do not represent a further step in the issuer's distributive process. In other words, the person must establish that the restricted securities have come to rest in his hands and that, therefore, any resale constitutes a separate transaction from the issuer's offering.

Rule 144(d)(1) imposes a one-year holding requirement on holders of restricted securities "to assure that those persons who buy under a claim of a Section 4(2) exemption have assumed the economic risks of investment, and therefore are not acting as conduits for sale to the public of unregistered securities, directly or indirectly, on behalf of the issuer."[2] A longer holding period, two or three years, for example, may be necessary where the holder does not resell in accordance with all of the conditions of Rule 144.[3] Whether a Section 4(1½) exemption is available and, if so, what prerequisites exist, depends on the period of time the nonaffiliate has held his restricted securities.

§ 6:14 Section 4(1½): Its scope and prerequisites—Nonaffiliate selling restricted securities acquired from issuer—Resales before securities come to rest

A nonaffiliate who makes private sales of securities acquired from the issuer in a nonpublic offering will be denied an exemption under Section 4(1) if the resales are deemed part of the issuer's transaction. Where the securities sold have not been held for a sufficient period of time—that is, where they have not come to rest—the nonaffiliate-seller's private sales are likely to be viewed as part of the issuer's transaction.[1] Given that determination, the nonaffiliate will only be protected under Section 4(1) if he can prove that there was no public offering by the issuer.[2] If the nonaffiliate limits his private sales to persons who would have qualified for participa-

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[Section 6:13]

[1]*See Hicks* §§ 9:38-9:59.

[2]Preliminary Note to Rule 144.

[3]Professor Loss has suggested that a three-year holding period is "well-nigh conclusive" evidence of a holder's nondistributive intent and the lack of any connection between his resale and the original acquisition. 1 Loss, *Securities Regulation* 672. This position was affirmed in Report to the Committee on Federal Regulation of Securities of the ABA from the Study Group on Section "4(1½)" of the Subcommittee on 1933 Act—General, "The Section '4(1½)' Phenomenon: Private Resales of 'Restricted Securities,' " reprinted in 34 Bus. Law. 1961 n.69 (1979)(hereinafter cited as the *ABA Subcommittee Report*). *See also Hicks* § 9:28.

[Section 6:14]

[1]*See* § 6:10. The absence of a clear standard for determining when the issuer's transaction ends, i.e., when the securities sold have come to rest, makes risky any sale outside Rule 144.

[2]The *ABA Subcommittee Report* at 1976 draws a distinction between (1) resales of restricted securities that have not come to rest and are part of the original placement, and (2) resales of such securities that are not part of the original placement. The *Report*, which defines the term "Holder" to refer to a person who holds restricted securities and the term "Purchaser" to refer to a person who purchases restricted securities from a Holder (*id.* at 1961), states:

> In the case of restricted securities that have not "come to rest," the Holder may nevertheless sell them if the sale does not constitute a "distribution" (unless, as discussed below, the sale may be considered part of the original placement). In determining whether a "distribution" will result from the Holder's sale, we consider the better view to be that only the manner of sale and the number of purchasers are relevant. In short, only the quantitative aspects of the term "distribution" should be considered. We find no basis in the language or legislative history of the 1933 Act to impose the requirements that the Purchaser be sophisticated or have access to registration-type information. Accordingly, a Holder should be able to dispose of restricted securities provided there are few purchasers and the securities are not offered by means of mass communications. Nor, analytically, should there be any particular limit on the amount that may be sold. Obviously, some reasonable limitations must be observed on these points but there are no hard and fast rules. Similarly, the use of a broker to locate a few purchasers should not be ruled out, provided reasonable restrictions are placed on the breadth of

16div-014596

tion in the nonpublic offering had they been approached by the issuer, à la *Ralston Purina* and subsequent judicial construction of Section 4(2), and if he can establish the issuer's right to a private placement exemption for the other parts of the entire transaction, the nonaffiliate should receive the benefits of Section 4(1).[3] Because the nonaffiliate must take the same precautions in his offering that the issuer would take in a private placement, his resales might be described as exempt under the Section 4(1½) exemption. For example, in order to assure that his buyers do not transform the private offering into a public offering, the nonaffiliate should limit the transferability of the securities in the same manner as the issuer does under Section 4(2).

§ 6:15 Section 4(1½): Its scope and prerequisites—Nonaffiliate selling restricted securities acquired from issuer—Resales after securities come to rest

A nonaffiliate who has held securities for a sufficient period of time can resell them without fear of having his offering viewed as an integral part of the issuer's transaction. Where the restricted securities have come to rest, the nonaffiliate should be free to make public or private resales in reliance on Section 4(1).[1] If the resale is private, none of the criteria of a valid Section 4(2) exemption is relevant and any recourse to a Section 4(1½) exemption is unnecessary.[2] In arranging a private sale, a nonaffiliate may offer his securities to an unsophisticated investor who does not have access to the kind of information that a registration statement would contain and who is purchasing with a view towards possible resale. The ABA

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the broker's solicitation efforts. Thus, even if the restricted securities have not "come to rest" at the time of resale, if under this second step of the "underwriter" analysis, one determines that no "distribution" will result, section 4(1) will be available.

It is submitted that the alleged distinction does not exist. If the restricted securities have not come to rest, the issuer's offering cannot be said to have terminated. Consequently, any offers or sales by persons who purchased securities from the issuer are participating in the issuer's transaction. It is not sufficient for the holder to concern himself solely with the quantitative aspects of the "distribution," as recommended by the *Report*. For reasons discussed in §§ 6:8 and 6:11, a holder who resells securities that have not come to rest must prove that the *entire* offering by the issuer is not public.

[3]*See* § 6:11.

[Section 6:15]

[1]In making such sales outside Rule 144, a seller should avoid using agents who are to be paid unusually high compensation. According to the SEC staff, such "sales compensation may lead to undue selling pressure upon prospective purchasers." *See, e.g.*, Automated Data Assocs., Inc., SEC No-Action Letter, 1977 WL 10792 (July 25, 1977); National Communication Indus. Co., SEC No-Action Letter, 1977 WL 14273 (June 13, 1977). This warning is especially important where the number of securities to be sold is large in relation to the trading in those securities.

[2]The position urged in the text is consistent with that taken by the *ABA Subcommittee Report* at 1976. The *Report* also states that "a Holder who subjectively intended, when he acquired the Restricted Securities, to 'distribute' them, may nevertheless thereafter resell them in reliance on Section 4(1) if his actual retention of them has been consistent with the opposite intent." *Cf.* Darwin v. Jess Hickey Oil Corp., [1957–1961 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 90,826, at 92,596–92,597 (N.D. Tex. 1957).

The *ABA Subcommittee Report* at 1971-74 indicates the SEC staff has based favorable no-action rulings on the presence of elements of both the Section 4(1) and Section 4(2) theories. A review of the no-action letters cited by the *Report* reveals that in virtually all of the staff responses, the presence of traditional Section 4(2) criteria is due to the requesting party's need to comply with state law. In other words, a private sale that counsel seeks to exempt under Section 4(1) is required by state law to include a disclosure document and to be made to certain qualified purchasers. If counsel to the party seeking a no-action letter includes the state law restriction in his request, the SEC staff includes them in its response.

16div-014597

subcommittee report offered the following comments on the rights of a purchaser in such a private transaction:[3]

> One typical situation merits special mention. In considering generally the right of the Purchaser of Restricted Securities to resell, special considerations may arise if counsel concludes that the Holder has stock that, at the time of the Holder's sale to the Purchaser, is free to be sold publicly. For example, if the Holder is a noncontrolling person who purchased his stock in a private placement 20 years earlier, we think that most securities lawyers would agree that the Holder may resell the stock publicly, free of any 1933 Act limitations. But the Holder may decide to sell his shares in a directly negotiated private transaction (*e.g.*, because the amount he desires to sell may be more than the trading market would absorb in routine sales). In this situation, the Purchaser should not be in a worse position legally than his predecessor, the Holder. If the Holder has free stock, the Purchaser should have free stock as well, even if the transaction between them is structured as a private, negotiated transaction. We conclude, on these hypothetical facts, that the Purchaser received free stock because the Holder had free stock at the time of the Holder's sale to the Purchaser, even though the stock would be within the literal definition of "restricted securities" as defined in rule 144 because it can be traced back to the issuer 20 years ago through two private transactions.

§ 6:16 Section 4(1½): Its scope and prerequisites—Affiliate selling restricted securities acquired from issuer

The analysis set forth in § 6:13 is equally applicable for resales by an affiliate of securities acquired from the issuer in a nonpublic offering[1], provided that the affiliate does not own any other securities of the issuer. Where the affiliate also owns securities of the same class that are not restricted (i.e., not acquired from the issuer or another affiliate in a nonpublic offering), any resales of restricted or unrestricted securities may cause the affiliate to be deemed an underwriter or a participant in an unregistered distribution. Consequently, such an affiliate must be concerned with the quantity of all securities sold in private or public transactions.[2] The availability of an exemption for an affiliate who holds restricted and unrestricted securities is considered in terms of the length of time he has held the restricted securities.

§ 6:17 Section 4(1½): Its scope and prerequisites—Affiliate selling restricted securities acquired from issuer—Resales before securities come to rest

Assume first that the affiliate intends to sell some of his unrestricted securities and none of the restricted securities have yet come to rest. This type of transaction is subject to the risks and limitations that are discussed in § 6:19. Assume instead that the affiliate intends to sell his restricted securities and none of his unrestricted securities. As noted above, this form of resale transaction is no different from a resale by a nonaffiliate under identical circumstances and should be resolved in the manner set forth in § 6:14. Finally, assume that the affiliate intends to sell some of the restricted securities and some of the unrestricted securities in the same transaction. This type of transaction combines the problems of the first two options just discussed and thereby increases the chances that the affiliate will be deemed a statutory underwriter or, at a minimum, a participant in a distribution who is

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[3]*ABA Subcommittee Report* at 1977.

[Section 6:16]

[1]For an example of where Section 4(1½) exemption did not apply for resales by affiliates of restricted securities, see SEC v. Cavanaugh, 1 F. Supp. 2d 337, (S.D.N.Y.), affirmed by 155 F.3d 129 (2d. Cir. 1998).

[2]*Hicks* §§ 9:88-9:91; § 4:180.

16div-014598

denied Section 4(1) protection.[1] In order to avoid either of the pitfalls that this type of transaction creates, the affiliate must (1) structure his resales as private transactions in conformance with Section 4(2) so that he can demonstrate that the issuer's transaction, which includes his resales, is nonpublic; and (2) avoid any inference that his sales of the unrestricted securities were made to or by persons who were participating in a distribution by the affiliate. In other words, he must satisfy the requirements of a Section 4(1½) exemption as set forth in § 6:14 while at the same time meeting the limitations outlined in § 6:19.[2]

§ 6:18 Section 4(1½): Its scope and prerequisites—Affiliate selling restricted securities acquired from issuer—Resales after securities come to rest

Once an affiliate's restricted securities have come to rest in his hands, he is able to avoid having his resale transaction linked with the issuer's offering. Under such circumstances, his resales are subject to the limitations discussed in § 6:19 regardless of whether the securities involved are all unrestricted, all restricted, or partially unrestricted and partially restricted.

§ 6:19 Section 4(1½): Its scope and prerequisites—Affiliate selling unrestricted securities

An affiliate can acquire unrestricted securities in a variety of ways, including direct or indirect purchases of registered securities from the issuer, open market acquisitions, and gifts from nonaffiliates.An affiliate will be denied an exemption under Section 4(1) if he effects an unregistered distribution of restricted or unrestricted securities.[1] Rule 144 offers such a person a safe harbor.[2] Alternatively, private sales of unrestricted securities (and restricted securities that have come to rest) to a limited number of purchasers who do not take with a view towards distribution will also come within the ordinary trading exemption.[3]

While it is possible to characterize these private transactions as exempted by Section 4(1½), it is important to distinguish the reason for invoking this imaginary provision here from the reason behind its use in the type of transactions discussed in §§ 6:16 and 6:19. In the case of the latter transactions, the prospective seller intends to resell securities acquired from the issuer in a nonpublic offering. Until such securities come to rest in the hands of the holder, their resale might be viewed as a further step in the issuer's distribution. As noted in §§ 6:16 and 6:19, application of the *Ralston Purina* standards is appropriate in the event of resale transactions involv-

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[Section 6:17]

[1]The distinction referred to in the text involves the following possibilities: (1) If the affiliate sells restricted securities acquired from the issuer in a nonpublic offering before the securities have come to rest, he may be deemed a statutory underwriter under Section 2(a)(11) with respect to the issuer's distribution or, under the SEC v. Chinese Consol. Benevolent Ass'n, 120 F.2d 738 (2d Cir.), cert. denied, 314 U.S. 618 (1941), rationale (*see Hicks* §§ 9:46-9:55, he will be deemed a participant in the issuer's distribution and denied protection under Section 4(1). (2) If the affiliate sells his unrestricted securities in a public offering that involves an underwriter, he will be denied an exemption under Section 4(1) for reasons set forth in *Hicks* §§ 9:88-9:91.

[2]The *ABA Subcommittee Report* did not attempt "to resolve the various questions relating to private resales of securities held by controlling persons or to public resales of restricted securities outside of rule 144." *ABA Subcommittee Report* at 1961 n.1.

[Section 6:19]

[1]*See Hicks* §§ 9:69, 9:38-9:45, and 9:52-9:53.

[2]*See Hicks* § 10:1-10:2.

[3]The theory underlying Section 4(1)'s protection of private sales is discussed in *Hicks* § 9:90.

16div-014599

ing securities that have not come to rest since the seller thereby becomes a participant in the issuer's offering that may or may not qualify for a Section 4(2) exemption. The same rationale is not present where an affiliate intends to make a private sale of unrestricted securities. Since the issuer is not in any way connected with the affiliate's transaction, the criteria of Section 4(2) have no application. To the extent that the phrase "Section 4(1½) exemption" suggests the application of all the *Ralston Purina* standards in order to determine the nonpublic character of the affiliate's transaction, it is misleading and should be avoided in this context.[4]

§ 6:20 Section 4(1½): Its scope and prerequisites—Nonaffiliate selling restricted securities acquired from affiliate

A person who sells securities acquired from an affiliate in a nonpublic offering will be ineligible for an exemption under Section 4(1) if he is deemed to have (1) acquired them from an affiliate with a view to distribution, (2) sold them for the affiliate in connection with a distribution, or (3) participated in a distribution by the affiliate.[1] The fact that the securities held by the nonaffiliate were unrestricted in the hands of the affiliate is irrelevant.[2] Consequently, a nonaffiliate who acquires securities from an affiliate is deemed to hold restricted securities and must avoid any transfers of them that might transform him into a participant in a secondary distribution. As in the type of transaction discussed in § 6:13, it is incumbent upon the holder to determine that the securities so acquired have come to rest. The availability of an exemption under Section 4(1) for a nonaffiliate who sells such securities depends on whether his transaction will be considered part of the affiliate's earlier transaction.

§ 6:21 Section 4(1½): Its scope and prerequisites—Nonaffiliate selling restricted securities acquired from affiliate—Resales before securities come to rest

Where the nonaffiliate transfers securities acquired from an affiliate in a nonpublic offering and the securities have not been held for a lengthy period of time, the nonaffiliate will be denied a Section 4(1) exemption.[1] In order to rely upon Section 4(1) for such premature sales, the nonaffiliate must demonstrate that the affiliate's transaction, including the nonaffiliate's sales, does not constitute a distribution. If the transferees of the nonaffiliate are few in number and do not acquire the securi-

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[4]The SEC has indicated that affiliates making private sales of unrestricted securities acquired from the issuer in a registered offering pursuant to a pension or profit-sharing plan "presumably would rely on the so-called 'Section 4(1½) exemption.' " Release No. 6188, at 2073-28 n.178. The Commission also stated that such private sales were permissible "provided it is understood that the purchaser is acquiring restricted securities which are subject to the same limitations on resale that applied to the seller." *Id.* at 2073-28. This statement is at best confusing. A nonaffiliate who purchased such securities from an affiliate in a private transaction would acquire restricted securities (*see* § 4:47), but he would not be required to include sales of restricted and unrestricted securities in determining the volume of sales permitted under Rule 144(e). The affiliate, on the other hand, would be so limited. Furthermore, the nonaffiliate-purchaser who holds restricted securities is subject to Rule 144(d)(1), while the affiliate-seller who held unrestricted securities is not subject to a holding period requirement.

[Section 6:20]

[1]*See Hicks* §§ 9:69 and 9:74-9:87.

[2]*See* § 4:46.

[Section 6:21]

[1]*See Hicks* §§ 9:75-9:78.

16div-014600

ties with a view towards distribution, the entire offering by the affiliate might qualify as a nonpublic offering and the nonaffiliate will be protected by Section 4(1).[2]

The focus in this type of transaction is on Section 2(a)(11) and the issue is whether the nonaffiliate is participating in a secondary distribution. While the phrase "Section 4(1½) exemption" can be used to describe the theoretical basis for exempting the nonaffiliate's private sales, for reasons set forth in § 6:19, it should be used with caution.

§ 6:22 Section 4(1½): Its scope and prerequisites—Nonaffiliate selling restricted securities acquired from affiliate—Resales after securities come to rest

A nonaffiliate who intends to resell restricted securities that were acquired from an affiliate and that have come to rest is in the same position as the nonaffiliate discussed in § 6:15. Section 4(1½) has no application here and the nonaffiliate can resell such securities publicly or privately; his purchaser, assuming that he is not an affiliate, can freely resell the securities so acquired.

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[2]*See Hicks* § 9:90. *See* United States v. Lindo, 18 F.3d 353, 358 (6th Cir. 1994), where the Sixth Circuit affirmed the district court's denial of a Section 4(1½) exemption to pledgee banks that sold restricted securities for the benefit of an affiliate.

16div-014601

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER GOVERNING PRE-TRIAL PROCEDURE

THIS CAUSE came before the Court April 4, 2005, with both parties well represented by counsel. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that MS & Co. shall serve deposition designations for no fewer than three witnesses each day beginning noon on April 5, 2005 and shall serve all deposition designations by noon on April 8, 2005. MS & Co. shall serve its counterdesignations to CPH's designations by noon April 11, 2005. CPH shall serve its counterdesignations within 3 days (including Saturdays, Sundays, and legal holidays) of service of each of MS & Co.'s designations on it.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 5 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER
(LIMITING INSTRUCTION ON RELIANCE)

THIS CAUSE came before the Court April 4, 2005 on the proposed limiting instructions on the reliance issues, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Court shall read the attached instruction when testimony or evidence about CPH's due diligence, or lack thereof, is placed before the jury.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 5 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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STATEMENT

Under Florida law, a recipient of a intentional misrepresentation may rely on it, without conducting any investigation of his own. A person who deliberately tells another something that is untrue should not be able to escape liability because the person he told believed him. Because of this rule, Morgan Stanley cannot claim that CPH could or should have investigated whether statements made to it were true. However, CPH may not recover for a misrepresentation if it actually knew that the misrepresentation was false or if its falsity was obvious, and it may not recover if it did not actually rely on the misrepresentation. Consequently, evidence about the investigation conducted by CPH may be relevant to your determination of whether CPH knew the statements by Sunbeam and Morgan Stanley were false or if their falsity was obvious, and whether CPH actually relied on any misrepresentation. Consequently, the evidence you are about to hear should be considered by you only for those issues.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON PLAINTIFF'S MOTION IN LIMINE NO. 29 TO BAR EVIDENCE AND ARGUMENT IDENTIFYING THE BENEFICIARY OF ANY PUNITIVE-DAMAGES AWARD

THIS CAUSE came before the Court April 4, 2005 on Plaintiff's Motion in Limine No. 29 to Bar Evidence and Argument Identifying the Beneficiary of any Punitive-Damages Award, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Plaintiff's Motion in Limine No. 29 to Bar Evidence and Argument Identifying the Beneficiary of any Punitive-Damages Award is Granted, in part, and Denied, in part. MS &Co. may ask Mr. Perelman the amount of compensatory damages CPH seeks and whether CPH also seeks punitive damages, without suggesting the amount of punitive damages to be claimed, without prejudice to CPH's right to seek an appropriate instruction to the jury that the beneficiary of a punitive damages award is not relevant to the amount to be awarded.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 5 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION IN LIMINE NO. 30 TO BAR REFERENCES TO COLLATERAL BUSINESS AND PERSONAL MATTERS INVOLVING MAFCO-RELATED ENTITIES AND THEIR PRINCIPALS AND EMPLOYEES

THIS CAUSE came before the Court April 5, 2005 on Coleman (Parent) Holdings, Inc.'s Motion in Limine No. 30 to Bar References to Collateral Business and Personal Matters Involving MAFCO-Related Entities and their Principals and Employees, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Coleman (Parent) Holdings, Inc.'s Motion in Limine No. 30 to Bar References to Collateral Business and Personal Matters Involving MAFCO-Related Entities and their Principals and Employees is Granted, in part, and ruling reserved, in part. No attorney shall pose a question to a witness about litigation other than this case, without first seeking a ruling from the Court, outside the jury's presence, that the question is proper.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 5 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON CPH'S MOTION TO AMEND THE COURT'S MARCH 23, 2005 ORDER ON CPH'S RENEWED MOTION FOR ENTRY OF DEFAULT JUDGMENT

THIS CAUSE came before the Court April 5, 2005 on CPH's Motion to Amend the Court's March 23, 2005 Order on CPH's Renewed Motion for Entry of Default, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that CPH's Motion to Amend the Court's March 23, 2005 Order on CPH's Renewed Motion for Entry of Default is Denied. The Court finds that counsel's statements at hearing on the Motion for Summary Judgment implicitly sought to concede reliance for purposes of the Motion only.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 5th day of April, 2005.

_____
ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO QUASH AMENDED TRIAL SUBPOENA AND NOTICE TO PRODUCE PERSONAL BALANCE SHEETS OF RONALD PERELMAN

THIS CAUSE came before the Court April 5, 2005 on Coleman (Parent) Holdings, Inc.'s Motion to Quash Amended Trial Subpoena and Notice to Produce Personal Balance Sheets of Ronald Perelman, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Coleman (Parent) Holdings, Inc.'s Motion to Quash Amended Trial Subpoena and Notice to Produce Personal Balance Sheets of Ronald Perelman is Granted. The Amended Trial Subpoena and Notice to Produce Personal Balance Sheets of Ronald Perelman is quashed.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 5 day of April, 2005.

_____
ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON CPH'S ORE TENUS MOTION IN LIMINE

THIS CAUSE came before the Court April 5, 2005 on CPH's ore tenus Motion in Limine, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that CPH's ore tenus Motion in Limine, seeking to introduce into evidence the purchase of Sunbeam shares or debentures by third parties, is Denied, without prejudice to CPH's right to prove when evidence of the fraud first became public and the effect of that disclosure on the share price.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 5 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION IN LIMINE NO. 27 TO EXCLUDE TESTIMONY OF EMERY OR IN ALTERNATIVE, TO PRECLUDE EMERY FROM MAKING COMMENTS REGARDING EXHIBIT A

THIS CAUSE came before the Court April 4, 2005 on Morgan Stanley's Motion in Limine No. 27 to Exclude Testimony of Emery or in Alternative, to Preclude Emery from Making Comments Regarding Exhibit A, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion in Limine No. 27 to Exclude Testimony of Emery or in Alternative, to Preclude Emery from Making Comments Regarding Exhibit A is Granted, in part, and denied, in part. Exhibit A to the Court's Order on Renewed Motion for Entry of Default Judgment shall not be visually displayed to the jurors during Professor Emery's testimony. However, Professor Emery may testify about terms used in Exhibit A and place them in context such as which will aid the jury in (i) understanding the meaning of Exhibit A; and (ii) deciding the remaining disputed issues of fact.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 5 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

16div-014615

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Washington, DC 20036

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON DEFENDANT'S MOTION FOR RECONSIDERATION OF THE COURT'S SANCTION ORDERS

THIS CAUSE came before the Court April 5, 2005 on Defendant's Motion for Reconsideration of the Court's Sanction Orders, with both parties well represented by counsel. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part, and Denied, in part. The statement of litigation misconduct to be read to the jury shall be limited to those facts which would allow a reasonable juror to conclude that MS & Co. sought to hide direct evidence of either the Sunbeam fraud or Morgan Stanley's complicity with Sunbeam in perpetrating that fraud on CPH. The jury shall be instructed that the statement of litigation misconduct may be considered only for that purpose and may not be considered for any other purpose. Specifically, the jury will be instructed that a party's failure to comply fully with a discovery request or Court order, standing alone, is immaterial to the jury's determination of the entitlement to or, if entitlement is determined, the amount of punitive damages. In all other respects the Motion is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 5th day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

16div-014617

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER MORGAN STANLEY'S MOTION FOR REHEARING

THIS CAUSE came before the Court April 5, 2005 on Morgan Stanley's Motion to Modify or Redact the Proposed Statement to be Read to the Jury, which the Court elects to treat as including a Motion for Rehearing. Based on a review of the Motion, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion for Rehearing is Denied. See Local Rule 6.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 5th day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON DEFENDANT'S MOTION REGARDING THE RELIANCE AND DAMAGES ISSUES TO BE DETERMINED AT PHASE I OF TRIAL

THIS CAUSE came before the Court April 5, 2005 on Defendant's Motion Regarding the Reliance and Damages Issues to be Determined at Phase I of Trial, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Defendant's Motion Regarding the Reliance and Damages Issues to be Determined at Phase I of Trial is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 5 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION TO ADD WITNESSES

THIS CAUSE came before the Court April 5, 2005 on Morgan Stanley's Motion to Add Witnesses, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion to Add Witnesses is Granted, in part, and ruling reserved, in part. John Ashley, Scott Cook, Dan Fischel, Jeffrey Haas, and Kevin Woodruff shall not be permitted to testify at trial. MS & Co. shall, by noon on April 6, 2005, disclose each subject on which Mr. Jones will be offered together with a summary of his expected testimony on each point and shall produce him for deposition at a mutually convenient time within the next five calendar days in Palm Beach County, Florida

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 5 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S MOTION *IN LIMINE* NO. 32 TO BAR MORGAN STANLEY FROM CONTROVERTING THE FACTUAL FINDINGS ESTABLISHED BY EXHIBIT A TO THE MARCH 23, 2005 ORDER

Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, respectfully requests that this Court enter an Order barring Morgan Stanley from attempting to controvert the factual findings conclusively made by this Court in the statement attached as Exhibit A to the March 23, 2005 Order. Further relief should not be necessary given the directions of the March 23 Order itself, but in light of assertions made by Morgan Stanley's counsel during opening statement, this Court should again make clear that any attempts by Morgan Stanley, its counsel, or its witnesses to controvert the factual findings made in the Exhibit A statement will not be tolerated. In further support of this motion, CPH states as follows:

1. This motion arises because Morgan Stanley's counsel made assertions about what the evidence would show during opening statement that are directly contrary to the findings made by this Court in Exhibit A to the March 23, 2005 Order. Specifically, in referring to the February 23, 1998 meeting involving representatives of CPH, Sunbeam, and Morgan Stanley. Counsel for Morgan Stanley asserted to the jury that the evidence would show that

representatives of Sunbeam truthfully disclosed that Sunbeam was not meeting expectations in January and February 1998 (Ex. A, 4/6/05 Tr. 384-85):

> On February 23, 1998, third and the single most important meeting, something you didn't hear about in Mr. Scarola's opening, on February 23rd at this meeting Mr. Levin sitting there right at the meeting, because Mr. Perelman wasn't, Sunbeam came right out and told Mr. Levin and other representatives of the plaintiff that they weren't making their expectation, that their January and February sales were slow. They weren't going to make their numbers.

2. The assertions by Morgan Stanley's counsel about the February 23, 1998 meeting are directly contrary to the findings made in Exhibit A to the March 23, 2005 Order, which conclusively establishes for purposes of this litigation that during the course of that meeting, Morgan Stanley falsely advised CPH that "Sunbeam's first quarter 1998 sales were 'tracking' and running ahead of analysts' estimates" (Ex. B, 3/23/05 Order, Ex. A at 13):

> During the course of negotiations, Morgan Stanley prepared and provided CPH with false financial and business information about Sunbeam designed to create the appearance that Sunbeam was prospering and that Sunbeam's stock had great value. For example, Morgan Stanley provided CPH with false 1996 and 1997 sales and revenue figures, as well as false projections that Sunbeam could not expect to achieve. Together, in face-to-face discussions, Morgan Stanley and Sunbeam assured CPH that (a) Sunbeam would meet or exceed its first quarter 1998 earnings estimates; (b) analysts' 1998 earnings estimates for Sunbeam were correct; and (c) Sunbeam's plan to earn $2.20 per share in 1998 was easily achievable and probably low. Morgan Stanley and Sunbeam also falsely assured CPH that Sunbeam's "easy buy" sales program could not hurt Sunbeam's future revenues. However, the "early buy" program was one of Sunbeam's revenue acceleration programs — and the devastating effects of Sunbeam's revenue acceleration programs already had begun to materialize at Sunbeam. Sunbeam's January and February 1998 sales were down drastically, although those results were not disclosed to CPH or the public. To the contrary, Morgan Stanley and Sunbeam together specifically advised CPH that Sunbeam's first quarter 1998 sales were "tracking fine" and running ahead of analysts' estimates.

3. The assertions by Morgan Stanley's counsel during opening statement directly contradict the findings made in Exhibit A to the March 23, 2005 Order. Consequently, to ensure that further attempts to contradict the findings made by this Court do not occur, this Court should

expressly bar Morgan Stanley, its counsel, and its witnesses from directly or indirectly controverting any of the findings made in Exhibit A to this Court's March 23, 2005 Order.

Dated: April 6 , 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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Ronald L. Marmer
Jeffrey T. Shaw
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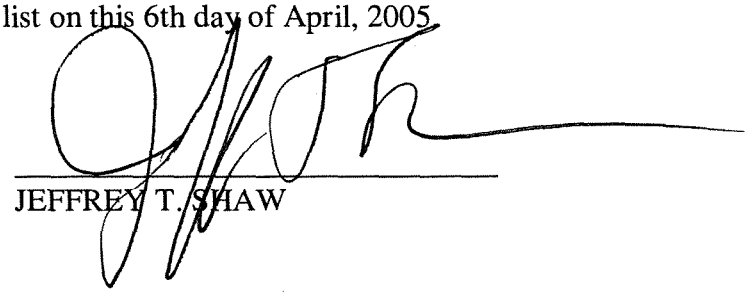
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 6th day of April, 2005.



JEFFREY T. SHAW

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10671

IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

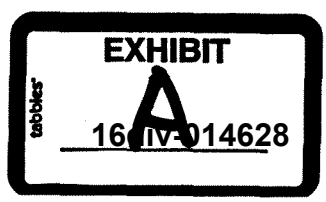
vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 59

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS



THAT WAS HYPE. BUT THE STOCK STILL HAD VALUE FOR HIM. IT WAS STILL A DEAL THAT MADE SENSE. SUNBEAM'S WORDS WERE NOT HIDDEN FROM MR. PERELMAN. HE KNEW AMONG OTHER RED FLAGS THAT FOR THE LAST THREE MONTHS OF 1997 RIGHT BEFORE THERE DEAL SUNBEAM HAD STUNNED WALL STREET BY MISSING PROJECTIONS FOR THE FOURTH QUARTER. THEY REPORTED THEY ACTUALLY SOLD LESS THAN WHAT WERE -- AS THEY TOLD THEY WERE GOING TO SELL. AND THAT CAUSED THE STOCK PRICE TO DROP ABOUT 10 PERCENT OR A 10TH OF THE TOTAL VALUE IN A SINGLE DAY ON JANUARY 28, 1998. THIS WAS JUST MR. PERELMAN THINKING ABOUT MAKING THIS DEAL. BIG PROBLEM. STOCK PRICE DIVES TEN PERCENT. SUNBEAM MISSED ITS EARNINGS PROJECTIONS. THAT'S BAD NEWS. SECOND, MR. LEVIN HAD EXAMINED SUNBEAM'S FINANCIAL STATEMENTS. HE TOLD MR. PERELMAN THAT THE CLAIMED RESULTS OF SUNBEAM WERE NOT /KREDABLE. HE WARNED MR. PERELMAN TO STAY AWAY, AND HE CERTAINLY WARRANT HIM NOT TO TAKE ANY SUNBEAM STOCK IF HE WAS WORRIED ABOUT SUNBEAM GOING DOWN.

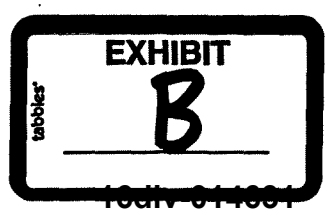
ON FEBRUARY 23, 1998, THIRD AND THE SINGLE MOST IMPORTANT MEETING, SOMETHING YOU DIDN'T HEAR ABOUT IN MR. SCAROLA'S OPENING, ON FEBRUARY

23RD, AT THIS MEETING MR. LEVIN SITTING THERE RIGHT AT THE MEETING, BECAUSE MR. PERELMAN WASN'T, SUNBEAM CAME RIGHT OUT AND TOLD MR. LEVIN AND OTHER REPRESENTATIVES OF THE PLAINTIFF THAT THEY WEREN'T MAKING THEIR EXPECTATION, THAT THEIR JANUARY AND FEBRUARY SALES WERE SLOW. THEY WEREN'T GOING TO MAKE THEIR NUMBERS. THEY WEREN'T GOING TO MAKE THEIR EARNINGS FIGURES EITHER THOUGHT MR. LEVIN. HE MADE LOTS OF MARKINGS. CAME RIGHT OUT AND SAID IT. THE STUFF WE'RE SAYING WE CAN DO WE CAN'T DO. AND MR. LEVIN, LADIES AND GENTLEMEN, THE EXPERIENCED TURN AROUND ARTIST FOR MR. PERELMAN HIS CHIEF OPERATING GUY, HE KNEW THE SUNBEAM STORY WAS A LOT OF SELLER'S TALK, AND THIS IS WHAT WE EXPECT YOU'LL HEAR HIM SAY IN THIS COURTROOM." WHAT DID YOU TELL THEM? THAT I THOUGHT THE SALES IN /T* AND THE INCOME EXPECTATION INGS OF THE LONG RANGE PLAN WERE QUITE A /STRAOEFP AND I DIDN'T THINK THEY WERE ACHIEVEABLE.

THIS IS MR. PERELMAN'S RIGHT HAND MAN TELLING HIM THE SUNBEAM NUMBERS AREN'T GOING TO HAPPEN, DON'T TRUST THEM. ON MARCH 19TH, 1998, THERE'S STILL TIME LEFT FOR MR. PERELMAN TO BACK OUT OF THIS DEAL IF HE THOUGHT THERE WAS A

In April 1997, Morgan Stanley began serving as Sunbeam's investment banker. Morgan Stanley originally attempted to find someone to buy Sunbeam. When Morgan Stanley was unable to find a buyer, Morgan Stanley developed a strategy for Sunbeam to use its fraudulently-inflated stock to acquire a large company that Sunbeam would own and operate. Then, trading on Morgan Stanley's relationships with CPH's senior officers, Morgan Stanley found

Exhibit A



Coleman for Sunbeam. At the time of the sale to Sunbeam, Coleman was a leading manufacturer and marketer of consumer products for the worldwide outdoor recreation market, with annual revenues in excess of $1 billion.

After Sunbeam announced plans to acquire Coleman, Morgan Stanley agreed to underwrite a $750 million debenture offering for Sunbeam. Sunbeam needed the proceeds of that debenture offering to complete the acquisition of Coleman. As Sunbeam's investment banker and as the sole underwriter for the $750 million debenture offering, Morgan Stanley received detailed and specific information concerning Sunbeam's financial condition and performance. Morgan Stanley received information that directly contradicted Sunbeam's and Morgan Stanley's assertions to CPH that Sunbeam had undergone a successful turnaround and that its financial performance had dramatically improved. By no later than March 18, 1998, Morgan Stanley knew that Sunbeam's January and February 1998 sales were only 50% of January and February 1997 sales, and Morgan Stanley also knew that the shortfall was caused by Sunbeam's practice of accelerating sales which otherwise would have occurred in 1998 in order to boost Sunbeam's income in 1997. Although Morgan Stanley and Sunbeam previously had advised CPH that Sunbeam's sales were running ahead of analysts' expectations for the first quarter, Morgan Stanley decided not to correct those material misrepresentations. Instead, in March 1998, Morgan Stanley assisted Sunbeam in concealing the problems with Sunbeam's first quarter 1998 sales

16div-014632

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") directly or indirectly owned 44,067,520 shares — or approximately 82% — of Coleman prior to the transactions at issue. On March 30, 1998, Sunbeam acquired CPH's interest in Coleman. Sunbeam paid for the Coleman shares with 14.1 million shares of Sunbeam common stock and other consideration.

Defendant Morgan Stanley & Co., Inc. ("Morgan Stanley") is a highly sophisticated investment banking firm that provides a wide range of financial and securities services. Among other things, Morgan Stanley provides advice on mergers and acquisitions and raises capital in the equity and debt markets. Morgan Stanley served as Sunbeam's investment banker and as the underwriter of securities issued by Sunbeam in connection with the events at issue herein.

16div-014633

Sunbeam Corporation ("Sunbeam") was a publicly-traded company headquartered in Delray Beach, Florida. Sunbeam designed and manufactured small household appliances and outdoor consumer products, which it marketed under the Sunbeam and Oster brand names. Sunbeam filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code in February 2001.

Albert Dunlap ("Dunlap") was the Chief Executive Officer of Sunbeam from July 1996 until June 1998 when he was terminated by Sunbeam's Board of Directors.

Russell Kersh ("Kersh") was the Executive Vice President of Sunbeam from July 1996 until June 1998 when he was terminated by Sunbeam's Board of Directors.

Arthur Andersen LLP ("Andersen") provided outside accounting services to Sunbeam through its West Palm Beach, Florida office. Andersen auditors provided information concerning Sunbeam's first quarter 1998 sales and earnings to Morgan Stanley.

16div-014634

Sunbeam designed and manufactured outdoor and household consumer products, which it marketed under the Sunbeam and Oster brand names. Sunbeam's products included small kitchen appliances, humidifiers, electric blankets, and grills. Many of the country's leading retail stores, including Wal-Mart, Target, and Home Depot, were among Sunbeam's major customers.

Despite Sunbeam's well-known brands and strong customer base, its financial performance was disappointing. In 1994, Sunbeam earned $1.30 per share. In 1995, Sunbeam's earnings declined to $0.61 per share. In 1996, Sunbeam's earnings continued to suffer. On March 22, 1996, Sunbeam issued an early warning that its first quarter earnings would be well under analysts' expectations and down from first quarter 1995. Shortly after issuing the March 22 earnings warning, Sunbeam's Chief Executive Officer and two of Sunbeam's directors announced their resignations. Less than a week later, Sunbeam announced that its first quarter 1996 earnings had plunged 42% from first quarter 1995 levels. Sunbeam also announced that its second quarter 1996 earnings would be lower than its second quarter 1995 earnings.

Sunbeam's disappointing earnings caused its stock price to plummet. During 1995, the price at which Sunbeam's stock traded fell 40%, from a high of $25-1/2. In 1996, Sunbeam's stock price continued to decline until it reached a low of $12-1/4 in July.

On July 18, 1996, Sunbeam's board of directors hired Albert Dunlap as Sunbeam's new Chief Executive Officer. Based upon brief terms as Chief Executive Officer of other publicly traded companies, including Scott Paper Company ("Scott Paper"), Dunlap was viewed as a "turnaround specialist" — that is, someone who could take a poorly performing company and significantly increase its value by "turning around" its financial performance. Because Dunlap touted the benefits from firing large numbers of employees and closing large numbers of plants, Dunlap became widely known as "Chainsaw Al." Dunlap lived in Boca Raton, Florida, and one of his first tasks at Sunbeam was to consolidate the company's six headquarters into one located in Delray Beach, Florida.

Immediately after joining Sunbeam, Dunlap hired Kersh as Sunbeam's Chief Financial Officer. Kersh had teamed with Dunlap for over 15 years, serving as a senior executive with Dunlap at other companies, including Scott Paper. Dunlap also brought in several other hand-picked executives to make up his senior management team.

Dunlap and his senior management team entered into employment agreements with Sunbeam. Under those agreements, Dunlap and his senior management team stood to make tens of millions of dollars if they were able to boost Sunbeam's apparent value and then sell Sunbeam to another company at a premium.

In order to convince other companies that they should want to purchase Sunbeam, Dunlap needed to improve Sunbeam's reported financial performance quickly and dramatically. It was, of course, no small task to transform Sunbeam from a poorly performing company, with weak sales and declining profits, into a strong company with growing sales and

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soaring profits. In fact, as the world later learned, Dunlap did not achieve that change in Sunbeam's fortunes. Instead, Dunlap created the illusion of a dramatic turnaround at Sunbeam by engaging in what SEC officials subsequently described as a "case study" in financial fraud.

Dunlap had a three-step plan at Sunbeam. In the first step, Dunlap overstated Sunbeam's financial problems so that Sunbeam appeared to be in worse shape than it really was. After making Sunbeam look worse, Dunlap moved to step two, where he made Sunbeam look more valuable than it really was by inflating Sunbeam's sales and engaging in other earnings manipulations. In step three, Dunlap planned to sell Sunbeam to another company before it became apparent that the "improved" results were fictional. By doing so, Dunlap would make tens of millions of dollars and would be free to blame his successor for any subsequent problems.

Dunlap began implementing his strategy soon after his arrival at Sunbeam in 1996. Claiming to be engaged in a clean-up of Sunbeam's financial problems, Dunlap recorded artificially high reserves and booked expenses that should not have been recorded until later periods. Both of those actions made Sunbeam's financial condition appear worse than it really was, thus lowering the benchmark for measuring Sunbeam's performance in future years.

The overstated reserves also provided Dunlap a means by which he could inflate Sunbeam's future results during the second step of his plan. Dunlap later could "re-evaluate" and release millions of dollars from the overstated reserves to boost income in later periods. The income from released reserves contributed to the illusion of a rapid turnaround in Sunbeam's performance. Using inflated reserves to enhance income in future periods is a fraudulent practice and overstated reserves are commonly called "cookie jar" reserves.

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After making Sunbeam look worse than it really was in 1996, Dunlap manipulated Sunbeam's sales and expenses in 1997 to create the false appearance of quarter after quarter improvement in financial performance. For example, Dunlap caused Sunbeam to inflate its sales by engaging in phony "bill and hold" sales. Under this practice, Sunbeam recognized revenues from "sales," even though customers did not actually pay for or even take delivery of the products, which continued to sit in Sunbeam's own warehouses. Although Sunbeam recorded the "bill and hold" sales as if they were current sales, they were, in reality, simply sales stolen from future quarters. In 1997, phony "bill and hold" sales added approximately $29 million in sales and $4.5 million in income.

Throughout 1997, Sunbeam also engaged in a sales practice known as "channel stuffing" — accelerating sales that otherwise would occur in a later period, sometimes by offering steep discounts or other extraordinary customer inducements. On the grand scale employed by Sunbeam, channel stuffing inevitably leads to major sales shortfalls in later periods when "stuffed" customers simply stop buying. Sunbeam's senior sales officer referred to Sunbeam's unsustainable practice of inflating performance through accelerated sales as the "doom loop."

Dunlap further "enhanced" Sunbeam's income in 1997 by causing Sunbeam to record a "profit" of $10 million from a sham sale of its warranty and spare parts business. Dunlap also made Sunbeam appear to be more successful than it really was by reaching into the "cookie jar," reversing inflated reserves, and recording $35 million as income. Sunbeam's 1997 profit margins also looked better than they really were because Dunlap already had recorded millions of dollars of 1997 expenses in 1996.

In October 1997, Dunlap announced that Sunbeam's "turnaround" was complete. Compared to the third quarter of 1996, Sunbeam's third quarter 1997 performance was remarkable. In the third quarter of 1996, Sunbeam had reported a loss of $18.1 million. In the third quarter of 1997, however, Sunbeam reported earnings of $34.5 million — an extraordinary turnaround from substantial losses to hefty profits. Sunbeam's combined results for the first three quarters showed dramatic improvement as well. Sunbeam reported that its profits for the first nine months were up tenfold over the same period the year before — from $6.5 million in 1996 to $67.7 million in 1997. Sunbeam's reversal of fortune caused a spectacular increase in the price of its stock. In July 1996, when Dunlap was hired, Sunbeam's shares traded at $12-1/4. By October 1997, Sunbeam's shares had risen to $49-13/16.

With steps one and two successfully completed, Dunlap was more than eager to complete the final step of his scheme: to sell Sunbeam to another company and collect tens of millions of dollars for himself before the outside world could learn the truth about Sunbeam's phony "turnaround." To accomplish that third and final step, Dunlap needed an investment banking firm

When Dunlap announced in early 1997 that he would begin interviewing investment bankers, Morgan Stanley immediately began pursuing the job. Although Morgan Stanley had no previous relationship with Sunbeam, one of Morgan Stanley's senior executives, William Strong, had worked closely with Dunlap on other large transactions between 1986 and 1993, when Strong was employed by Salomon Brothers.

Morgan Stanley knew that it was competing with other investment bankers, including Mark Davis, for Dunlap's business. Davis was the head of the mergers and acquisitions department at Chase Securities and had worked previously with Strong at Salomon Brothers. Davis had a very strong relationship with Dunlap, and Davis had served as Dunlap's investment advisor on numerous transactions, including Dunlap's sale of Scott Paper. Shortly after arriving at Sunbeam, Dunlap hired Davis to handle the sale of Sunbeam's furniture business.

Morgan Stanley put together a team headed by its Vice Chairman, Bruce Fiedorek, and Strong. Beginning in April 1997, Morgan Stanley's personnel traveled to Sunbeam's offices in Delray Beach, Florida to study Sunbeam and woo Dunlap. After months of uncompensated work, in September 1997, Morgan Stanley finally persuaded Dunlap to name Morgan Stanley as Sunbeam's exclusive investment banker. Dunlap instructed Morgan Stanley to find a buyer for Sunbeam. Morgan Stanley knew that if it failed to deliver a major transaction, Morgan Stanley would not be compensated for the extensive work it had performed for Sunbeam. Morgan Stanley also knew that Davis and Chase Securities were standing by — ready and willing to reclaim their position as Dunlap's investment banker of choice.

Throughout the fall of 1997, Morgan Stanley aggressively searched for a buyer for Sunbeam. Morgan Stanley put together extensive and detailed materials to use in marketing Sunbeam to potential buyers. Morgan Stanley pitched the transaction to more than 10 companies — including Gillette, Colgate, Sara Lee, Rubbermaid, Whirlpool, and Black & Decker — that Morgan Stanley hoped might have an interest in acquiring Sunbeam. Morgan Stanley, however, was not able to find a buyer.

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As 1998 approached, the pressure on Dunlap increased. Dunlap was aware that Sunbeam would be unable to sustain the appearance of a successful turnaround in 1998 because Sunbeam had stolen sales from 1998 to boost 1997's numbers and the "cookie jar" reserves had been depleted. Dunlap needed a way to conceal Sunbeam's phony turnaround until a buyer could be found. Morgan Stanley provided the solution to Dunlap's problem.

Morgan Stanley knew that its failure to find a buyer for Sunbeam could prove fatal to the relationship it had worked so hard to establish with Dunlap. As the pressure on Dunlap increased, the pressure on Morgan Stanley increased as well. Although Morgan Stanley was not able to find a buyer for Sunbeam, Morgan Stanley responded with a plan that would allow Dunlap to conceal his fraud. Morgan Stanley recommended that Sunbeam acquire other companies, using Sunbeam's stock, which was fraudulently inflated, as the "currency" that would be used to pay for the acquisitions.

Morgan Stanley's strategy was doubly deceptive. First, Morgan Stanley's acquisition strategy would allow Dunlap to consolidate Sunbeam's results with those of the newly-acquired companies. That would help Dunlap camouflage Sunbeam's results and make it difficult to detect any shortfall in Sunbeam's performance. Dunlap simply could label any problems that were detected as attributable to the poor performance of the acquired companies or as a temporary "blip" caused by the distraction of integrating the acquired companies with Sunbeam. Second, Morgan Stanley's strategy would allow Dunlap to take new massive restructuring charges (purportedly relating to the acquisitions) and thus create more "cookie jar" reserves that could be tapped to bolster the future earnings of the combined companies.

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Morgan Stanley identified Coleman as one of the key potential acquisition targets. CPH owned 82% of Coleman's stock. Morgan Stanley searched the ranks of its investment bankers to locate those with the best access to CPH. Drawing on relationships between some of Morgan Stanley's investment bankers and senior CPH officers, Morgan Stanley set about trying to persuade CPH to sell its interest in Coleman to Sunbeam — and, most importantly, to accept Sunbeam stock as consideration.

Morgan Stanley laid the groundwork for a meeting to take place in December 1997 in Palm Beach, Florida between Dunlap and Kersh and representatives of CPH. In advance of the Palm Beach meeting, Morgan Stanley provided materials to Sunbeam to prepare Sunbeam for the meeting. Morgan Stanley also met with Kersh and other Sunbeam personnel to prepare for the Palm Beach meeting. However, Dunlap nearly scuttled Morgan Stanley's carefully crafted plan at the outset. During the December 1997 Palm Beach meeting, when CPH rejected Dunlap's initial all-stock offer, Dunlap became so angry that he cursed and ranted at the CPH representatives and stormed out.

Dunlap's tantrum appeared to kill any chance that CPH would sell its interest in Coleman to Sunbeam. Morgan Stanley, however, worked to revive the discussions. Drawing again on Morgan Stanley's relationships with CPH officers, Morgan Stanley was able to restart the discussions with CPH with the promise that Dunlap would be kept away from the negotiating table. Thereafter, Morgan Stanley, through Managing Directors Strong, James Stynes, and Robert Kitts, led the discussions with CPH on Sunbeam's behalf.

Morgan Stanley knew that it had to persuade CPH not only to sell Coleman, but also to accept Sunbeam stock — ultimately, 14.1 million shares of Sunbeam stock — as a major part of the purchase price. During the course of negotiations, Morgan Stanley prepared and provided CPH with false financial and business information about Sunbeam designed to create the appearance that Sunbeam was prospering and that Sunbeam's stock had great value. For example, Morgan Stanley provided CPH with false 1996 and 1997 sales and revenue figures, as well as false projections that Sunbeam could not expect to achieve. Together, in face-to-face discussions, Morgan Stanley and Sunbeam assured CPH that (a) Sunbeam would meet or exceed its first quarter 1998 earnings estimates; (b) analysts' 1998 earnings estimates for Sunbeam were correct; and (c) Sunbeam's plan to earn $2.20 per share in 1998 was easily achievable and probably low. Morgan Stanley and Sunbeam also falsely assured CPH that Sunbeam's "early buy" sales program would not hurt Sunbeam's future revenues. However, the "early buy" program was one of Sunbeam's revenue acceleration programs — and the devastating effects of Sunbeam's revenue acceleration programs already had begun to materialize at Sunbeam. Sunbeam's January and February 1998 sales were down drastically, although those results were not disclosed to CPH or the public. To the contrary, Morgan Stanley and Sunbeam together specifically advised CPH that Sunbeam's first quarter 1998 sales were "tracking fine" and running ahead of analysts' estimates.

On February 27, 1998, Sunbeam's Board of Directors met at Morgan Stanley's offices to consider the purchase of Coleman, as negotiated by Morgan Stanley.

At the February 27, 1998 meeting, Morgan Stanley made an extensive presentation to Sunbeam's Board concerning the proposed transaction. Numerous Morgan Stanley representatives, including Managing Directors Strong, Kitts, Stynes, Ruth Porat, and Vikram Pandit, attended the meeting.

Morgan Stanley presented Sunbeam's board with Morgan Stanley's opinion on the value of Coleman. Using a discounted cash flow analysis, which Morgan Stanley represented was the best gauge of stand-alone economic value and the best method of capturing the unique value of Coleman, Morgan Stanley valued CPH's Coleman stock at a range of $31.06 to $53.24 per Coleman share. CPH's 44,067,520 Coleman shares were worth, therefore, between $1.369 billion and $2.346 billion.

Following Morgan Stanley's presentation, Sunbeam's Board of Directors voted to acquire Coleman on the very favorable terms that Morgan Stanley had negotiated.

Morgan Stanley spent the following weekend developing Sunbeam's public relations strategy to announce the Coleman transaction. Morgan Stanley scripted the points for Dunlap to make in a conference call with analysts. Morgan Stanley also crafted a list of "key media messages" for Dunlap tc use in his communications with the press. On Sunday, March 1, 1998, Morgan Stanley spoke with a reporter for the Wall Street Journal to inform him that Sunbeam would announce its acquisition of Coleman the following morning.

Sunbeam announced its acquisition of Coleman on Monday, March 2, 1998, prior to the opening of the financial markets. Consistent with Morgan Stanley's valuation, investors viewed Sunbeam's purchase of Coleman — and the price that Sunbeam had paid — very favorably. The day before the acquisition was announced, Sunbeam's stock closed at $41-3/4. In the days following Sunbeam's announcement of the transaction, Sunbeam's stock rose approximately 25%, to a high of $52.

Dunlap knew that Sunbeam needed to raise funds to pay the cash portion of the acquisition consideration. Dunlap also knew that Sunbeam needed cash to purchase two other smaller companies in addition to Coleman. Morgan Stanley recommended that Sunbeam raise funds through a $500 million offering of convertible subordinated debentures. To assure the offering's success, Morgan Stanley lent its name to the offering. Indeed, Morgan Stanley agreed to serve as the sole underwriter for the offering.

The money raised from the sale of the debentures was used by Sunbeam to complete the acquisition of Coleman.

Unbeknownst to CPH or the public, Sunbeam's first quarter 1998 sales were a small fraction of the financial community's expectations for the quarter. If Dunlap could consolidate Sunbeam's sales with Coleman's sales, Dunlap knew that he could obscure Sunbeam's actual first quarter sales. As a result, Dunlap was especially anxious to complete the acquisition of Coleman before Sunbeam announced its first quarter 1998 sales. Indeed, the success of the scheme depended upon Sunbeam's ability to complete the Coleman acquisition before Sunbeam's first quarter results

were announced. To satisfy Dunlap's objectives, Morgan Stanley moved up the launch date of the offering.

The debentures were marketed to investors at a series of "road show" meetings and conference calls arranged by Morgan Stanley. Morgan Stanley prepared and distributed a memorandum for its sales force to use in marketing the debentures to investors. Morgan Stanley also developed the script for Dunlap and Kersh to deliver during the road show. In those materials, Morgan Stanley misrepresented Sunbeam's financial performance and emphasized Dunlap's purported "turnaround" accomplishments.

Morgan Stanley launched the debenture offering with a research analyst presentation to the Morgan Stanley sales force. As part of Morgan Stanley's growing relationship with Sunbeam, one of Morgan Stanley's top-rated research analysts planned to initiate equity coverage of Sunbeam. That Morgan Stanley analyst had modeled values for Sunbeam's acquisition of Coleman that were higher than even Sunbeam's management had predicted.

Although Morgan Stanley initially planned to sell $500 million worth of debentures, Morgan Stanley's efforts were so successful that the size of the offering was increased to $750 million on March 19, 1998 — the day of the last road show. The debentures were sold to investors nationwide, including investors based in Florida.

As Sunbeam's investment banker and the sole underwriter for the debenture offering, Morgan Stanley had a duty to investigate Sunbeam's finances and business operations.

Morgan Stanley, which had been working hand-in-hand with Sunbeam for

16div-014646

almost a year and had traveled to Sunbeam's Florida offices, repeatedly asserted that it had satisfied that duty.

Strong, who was one of the senior Morgan Stanley investment bankers involved, has admitted in sworn testimony that he may have had more than 100 telephone conversations with Dunlap and Kersh (whose offices were in Sunbeam's Delray Beach headquarters) and that Strong was "sure" that he would have been apprised of Sunbeam's financial performance during the first two months of 1998.

With the $750 million debenture offering and the Coleman transaction set to close at the end of March 1998, Sunbeam's Florida-based outside auditors were shocked that Morgan Stanley had not asked them about Sunbeam's financial performance for first quarter 1998. Sunbeam's auditors were alarmed because Sunbeam's first quarter results were a disaster, but Dunlap, Kersh, and Morgan Stanley were telling CPH and the investing public,

that Sunbeam's turnaround was a success, that Sunbeam's sales for the first quarter of 1998 were ahead of the expectations of outside financial analysts, and that Sunbeam was poised for record sales.

On March 17, Sunbeam's auditors forced the issue. From their Florida offices, Sunbeam's auditors sent Morgan Stanley a letter reporting that Sunbeam's net sales through January 1998 were down 60% — $28 million in January 1998, as compared to $73 million in January 1997. The March 17 letter explained that the decline was "primarily due to the . . . new early buy program for grills which accelerated grill sales into the fourth quarter of fiscal 1997."

The next day, Morgan Stanley was faxed a schedule from Sunbeam's Florida office that showed that Sunbeam's January and February 1998 net sales totaled $72 million, an amount that was 50% lower than Sunbeam's January and February 1997 net sales of $143.5 million.

Based on information that Sunbeam and Morgan Stanley had disseminated, Wall Street analysts were anticipating that Sunbeam's first quarter 1998 net sales would be in the range of $285 million to $295 million. Sales in that range would have been approximately 15% higher than first quarter 1997 sales. Sunbeam's January and February 1998 sales, however, totaled barely 25% of $285 million. As Sunbeam's outside auditors advised Morgan Stanley in writing, the sales drop-off was caused by Sunbeam's sales acceleration program. The information put into Morgan Stanley's hands on March 17 and March 18 showed that Morgan Stanley's and Sunbeam's assertions to CPH and other investors were false. Contrary to what Morgan Stanley and Sunbeam had represented, Sunbeam had not undergone a successful turnaround, Sunbeam's financial performance had not dramatically improved, and Sunbeam's performance in 1998 was not better than Wall Street analysts' expectations. It was imperative, therefore, that the truth be kept from CPH until the Coleman transaction closed at the end of March 1998.

Morgan Stanley did not disclose Sunbeam's disastrous first quarter, Morgan Stanley did not insist that Sunbeam disclose its disastrous first quarter, Morgan Stanley did not correct any of the false and misleading statements it and Sunbeam had made to CPH about Sunbeam's business or performance, and Morgan Stanley did not suspend any of the critical transactions that were scheduled to close in the next two weeks. Instead, with Morgan Stanley's knowledge and assistance, Sunbeam prepared and issued a false press release on March 19, 1998 that affirmatively misstated and concealed Sunbeam's true condition.

The March 19, 1998 press release stated: "Sunbeam Corporation . . . said today that it is possible that its net sales for the first quarter of 1998 may be lower than the range of

Wall Street analysts' estimates for $285 million to $295 million, but net sales are expected to exceed 1997 first quarter net sales of $253.4 million. . . . The shortfall from analysts' estimates, if any, would be due to changes in inventory management and order patterns at certain of the Company's major retail customers. The Company further stated that based on the strength of its new product offerings and powerful brand names, it remains highly confident about the overall sales outlook for its products for the entire year."

As Morgan Stanley was fully aware, the March 19, 1998 press release was false, misleading, and failed to disclose material information. The March 19, 1998 press release failed to disclose Sunbeam's actual January and February 1998 sales or the true reasons for the poor results. Instead, the press release held out the false possibility that Sunbeam still could achieve sales of $285 million to $295 million and suggested that, if any shortfall occurred, that shortfall would be due to the fact that certain retailers had decided to defer first quarter purchases to the second quarter. The press release also assured that Sunbeam at least would exceed first quarter 1997 net sales of $253.4 million. Based on information that Morgan Stanley had in its hands on March 18, 1998, it was obvious that Sunbeam would not achieve sales of $285 million to $295 million and that Sunbeam's first quarter 1998 sales would be below its first quarter 1997 numbers. To simply meet 1997 first quarter sales, Sunbeam needed sales of $123.3 million over the 12 remaining days of the quarter — an average of $10.28 million per day. Sales of $10.28 million per day would be 306% more than the average per day sales in March 1997, and 281% more than the average per day sales for the first 17 days of March 1998. Furthermore, Morgan Stanley knew that the shortfall from analysts' estimates was not caused by retailers' deciding to defer purchases from the first quarter of 1998 to the second quarter, as the press release indicated. Rather, as Sunbeam's outside auditors had

advised Morgan Stanley in writing, the collapse in first quarter sales was caused by Sunbeam's acceleration of 1998 sales into the fourth quarter of 1997.

After Sunbeam's false press release was issued, Morgan Stanley stood arm-in-arm with Sunbeam while Dunlap and Kersh told CPH, analysts, and investors that the March 19, 1998 release was a purely cautionary statement because some first quarter 1998 sales might simply "spillover" into the second quarter and that Sunbeam still believed that it actually would meet analysts' estimates of $285 million to $295 million in first quarter 1998 sales.

Morgan Stanley knew that a full and truthful disclosure of Sunbeam's first quarter sales would doom the debenture offering, which was scheduled to close on March 25, 1998,

As Morgan Stanley was fully aware, the written contract between CPH and Sunbeam gave CPH the express legal right to refuse to close the sale if there was a material adverse change in Sunbeam's "business, results of operation or financial condition."

Furthermore, if the transactions did not close, Morgan Stanley would not be paid its $10.28 million fee for the Coleman acquisition or its $22.5 million fee for underwriting the subordinated debenture offering. Morgan Stanley also knew that Sunbeam would promptly replace Morgan Stanley with another investment banking firm – such as the Chase Securities team led by Mark Davis.

Sunbeam's outside auditors already had made it perfectly clear to Morgan Stanley that Sunbeam's first quarter 1998 sales were a disaster,

One of Sunbeam's senior outside auditors, Lawrence Bornstein, has testified under oath that on March 19, 1998, he told Morgan Stanley's John Tyree that the statement in Sunbeam's March 19, 1998 press release — that Sunbeam would at least exceed first quarter 1997 sales of $253.4 million — was not credible: "Just do the math . . . they've done a million dollars in sales the first 70 days of the year and now they need to do $10 million worth of sales for the next . . . I think it was 11 days . . . I mean, something ridiculous." Bornstein also told Tyree: "I've been to every shipping dock domestically, I've been to Hattiesburg, I've been to Neosho, I've been to Mexico City, and I don't think these guys can physically ship this much stuff."

Morgan Stanley knew that the March 19 press release was false and misleading. Despite that knowledge and Bornstein's explicit statements, Morgan Stanley continued with its preparations to close the debenture offering on March 25, 1998 and the Coleman acquisition on March 30, 1998.

As part of those preparations, on March 24, 1998, Morgan Stanley's Tyree spoke by telephone with Sunbeam's Kersh, who was located in Sunbeam's Delray Beach offices, to obtain an updated report concerning Sunbeam's first quarter performance. By the time of that March 24, 1998 call, Sunbeam had fallen even further behind first quarter 1997 sales. As of March 18, 1998, Sunbeam needed to achieve average sales of $10.28 million per day, over 12 days, to reach

16div-014651

first quarter 1997 sales. Sunbeam's sales between March 18 and March 24, 1998 had averaged only $6.81 million per day — well short of the $10.28 million per day that Sunbeam needed to achieve. Sunbeam's March 18 through March 24, 1998 sales were further proof that Sunbeam's March 19, 1998 press release was false and that Sunbeam would not achieve first quarter 1998 sales in excess of first quarter 1997 sales.

Morgan Stanley also knew no later than March 25, 1998, if not much earlier, that Sunbeam's earnings for the first quarter of 1998 were going to miss Wall Street analysts' earnings expectations, which were in the range of $0.28 to $0.31 per share (excluding one-time charges). Sunbeam's outside auditors advised Morgan Stanley on March 25 that Sunbeam had suffered a $41.19 million loss during the first two months of 1998, including a one-time charge of $30.2 million. Even excluding that one-time charge, Sunbeam's loss for the first two months was $0.13 per share. To achieve first quarter 1998 operating earnings of $0.28 per share, which were at the low end of analyst expectations, Sunbeam needed to realize a profit of $35.5 million during March 1998 alone. A net profit of $35.5 million in March was 500% more than Sunbeam's net profit for the entire first quarter of 1997. In fact, Sunbeam's first quarter 1998 earnings fell far short of Wall Street's expectations. Sunbeam's first quarter earnings were material,

Having directly participated in misleading CPH Morgan Stanley had a duty to disclose the true facts before the closing of the debenture offering and the Coleman acquisition. Morgan Stanley also could have required Sunbeam to postpone the closings of

those transactions until the necessary disclosures were made. Morgan Stanley did neither. Instead, Morgan Stanley marched forward and closed the $750 million debenture offering on March 25, 1998, which was needed to close the Coleman transaction, and assisted Sunbeam in closing the acquisition of Coleman on March 30, 1998.

Morgan Stanley received $22.5 million for the subordinated debenture offering and $10.28 million for the Coleman acquisition. Morgan Stanley would have received nothing if the transactions had failed to close.

On April 3, 1998 — just four days after the Coleman transaction closed — Sunbeam announced that sales for the first quarter of 1998 would be approximately 5% below the $253.4 million in sales that Sunbeam reported in the first quarter of 1997. In other words, Sunbeam was expecting sales in the range of $240 million. That sales shortfall was shocking news, particularly in view of assurances provided by Sunbeam both in and after its March 19, 1998 press release that $285 million to $295 million of sales was still a real possibility. The April 3, 1998 press release also disclosed that Sunbeam expected to show a loss for the quarter, although the release did not disclose the magnitude of the loss or how much of the loss was attributable to operating earnings as opposed to one-time charges. Sunbeam's news stunned . . . the market. On April 3rd, Sunbeam's stock price dropped 25% — from $45-9/16 to $34-3/8.

Sunbeam's actual first quarter 1998 performance was even worse than Sunbeam disclosed on April 3, 1998. The April 3, 1998 release indicated that Sunbeam's first quarter sales were in the range of $240 million. In fact, Sunbeam's first quarter sales were $224.5

million. Sunbeam obscured the true shortfall by extending its quarter from March 29 to March 31, 1998 — thereby adding two more days of Sunbeam sales. Sunbeam also failed to disclose that it had included two days of Coleman sales after the Coleman transaction closed on March 30. Further, Sunbeam inflated first quarter 1998 sales with $29 million of new phony "bill and hold" sales.

75. Just as Sunbeam's first quarter 1998 sales had been a disaster, so, too, were Sunbeam's first quarter 1998 earnings. Morgan Stanley and Sunbeam had represented to CPH that Sunbeam would achieve or exceed analyst first quarter 1998 earnings estimates. At the time of that representation, the consensus among analysts was that Sunbeam would enjoy first quarter 1998 earnings of $0.33 per share. However, on May 9, 1998, Sunbeam disclosed that it would record a first quarter loss of $0.09 per share (excluding one-time charges) — more than $0.40 per share lower than CPH had been told to expect.

76. Within weeks, Dunlap's fraudulent scheme began to unravel. In June 1998, after a number of news articles critical of Sunbeam's practices, Sunbeam's Board of Directors launched an internal investigation. That investigation led quickly to the firing of Dunlap and Kersh, and, subsequently, to a restatement of Sunbeam's financial statements for 1996, 1997, and the first quarter of 1998.

[illegible]

77. As detailed above, Morgan Stanley participated in a scheme to mislead CPH and others and cover up the massive fraud at Sunbeam until Morgan Stanley and Sunbeam could close the purchase of Coleman. Morgan Stanley provided CPH with false information concerning Sunbeam's 1996 and 1997 financial performance, its business operations, and the value of Sunbeam's stock. Morgan Stanley also actively assisted Sunbeam in concealing Sunbeam's

16div-014654

disastrous first quarter 1998 sales and earnings and the true reasons for Sunbeam's poor performance.

Morgan Stanley knew that its statements to CPH were materially false and misleading and omitted the true facts.

Morgan Stanley intended that CPH rely on Morgan Stanley's representations concerning Sunbeam.

As detailed above, Dunlap engaged in a fraudulent scheme to inflate the price of Sunbeam's stock by improperly manipulating Sunbeam's 1996 and 1997 performance, by falsely asserting that Sunbeam had successfully "turned around," and by concealing the collapse of Sunbeam's first quarter 1998 sales and earnings and the reasons for Sunbeam's first quarter 1998 performance.

86. As detailed above, Morgan Stanley knew of Dunlap's fraudulent scheme and helped to conceal it until after Sunbeam could close the purchase of Coleman.

16div-014655

As detailed above, Morgan Stanley provided substantial assistance to Dunlap and Sunbeam, including: concealing Sunbeam's first quarter 1998 sales collapse; assisting with the false March 19, 1998 press release; arranging road shows and meetings with prospective debenture purchasers at which Morgan Stanley, Dunlap, and others made false statements concerning Sunbeam's financial condition and business operations; preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam's financial condition and business operations; providing CPH with false financial and business information concerning Sunbeam; scripting Dunlap's false public statements concerning Sunbeam's acquisition of Coleman;

and underwriting the $750 million convertible debenture offering, proceeds from which were used to fund Sunbeam's purchase of Coleman.

16div-014656

As detailed above, Morgan Stanley conspired with Dunlap and other senior Sunbeam executives to conceal the truth about Sunbeam's financial performance and business operations.

As detailed above, Morgan Stanley committed overt acts in furtherance of the conspiracy, including: concealing Sunbeam's first quarter 1998 sales collapse; assisting with the false March 19, 1998 press release; arranging road shows and meetings with prospective debenture purchasers at which Morgan Stanley, Dunlap, and others made false statements concerning Sunbeam's financial condition and business operations; preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam's financial condition and business operations; providing CPH with false financial and business information concerning Sunbeam; scripting Dunlap's false public statements concerning Sunbeam's acquisition of Coleman;

and underwriting the $750 million convertible debenture offering, proceeds from which were used to fund Sunbeam's purchase of Coleman.

16div-014657

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

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,
_____/

COLEMAN (PARENT) HOLDINGS INC.'S
FURTHER REVISED TRIAL EXHIBIT LIST

Pursuant to the Court's March 24, 2005 Order, Coleman (Parent) Holdings Inc. ("CPH") hereby provides Morgan Stanley & Co. ("Morgan Stanley") with the attached revised list of the exhibits that CPH currently expects to use at trial. As a result of the Court's March 23, 2005 Order, CPH has endeavored to identify and disclose documents that it may use in direct examination, cross-examination, and to rebut arguments that it presently anticipates may be advanced at trial. CPH substantially has narrowed its original trial exhibit list of more than 1200 exhibits to approximately 200 exhibits. CPH reserves the right to use any of the exhibits identified on the attached list during either phase of its case in chief, in cross-examination, or in rebuttal. CPH further reserves the right to supplement this disclosure or to withdraw any exhibits identified herein as CPH continues to evaluate its proofs in light of the Court's recent rulings, anticipated rulings, default findings, expected findings regarding litigation misconduct, the trial witness disclosure or exhibit list to be provided by Morgan Stanley, or new arguments advanced by Morgan Stanley. CPH further reserves its rights as follows:

1. In addition to the documents set forth on the attached Revised Trial Exhibit List, CPH reserves its right to use additional exhibits that it identifies in connection with ongoing punitive damages and expert discovery.

2. CPH reserves its right to use at trial duplicate copies and/or original versions of any of the documents listed on the attached Revised Trial Exhibit List. Pursuant to an agreement with counsel for Morgan Stanley, more legible copies of these documents may be re-marked with the deposition and trial exhibit numbers and used in that form at trial.

3. CPH reserves its right to use the reports submitted and the documents relied upon by Morgan Stanley's experts as exhibits in cross examining Morgan Stanley's experts.

4. CPH reserves the right to use and/or introduce at trial any proposed trial exhibit identified by Morgan Stanley.

5. CPH reserves its right to submit and introduce summary documents based upon the information included in documents identified in the attached Revised Trial Exhibit List or in the documents identified as exhibits by Morgan Stanley, as well as demonstrative exhibits.

6. By listing documents on the attached Revised Trial Exhibit List, CPH is not conceding the relevance, foundation, and/or admissibility of any of those documents. Further, CPH listed certain of those documents for purposes of rebutting arguments that Morgan Stanley may raise in either phase of the trial. By listing those rebuttal documents, CPH is not conceding the admissibility or relevance of the potential Morgan Stanley arguments or documents in either phase of the trial.

7. In compiling the attached exhibit list, CPH identified documents that it may use to support its case for an award of punitive damages against Morgan Stanley. In identifying those

documents on the attached list, CPH is not conceding the admissibility or relevance of those documents for any purpose other than punitive damages.

I HEREBY CERTIFY that a true and correct copy of the foregoing and its attachment have been sent by facsimile and hand-delivered to the individuals of the attached service list on this 6th day of April, 2005.

Dated: April 6, 2005

COLEMAN (PARENT) HOLDINGS INC.

By: _____
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REVISED CPH TRIAL EXHIBIT LIST
Dated April 6, 2005

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
6	02/23/1998	CPH Ex. 009	CP 026286 - 026370	
7 / 7A	03/19/1998	CPH Ex. 010	CPH 1421272 - 1421343	
8	03/09/1998	CPH Ex. 011	SASMF 10699 - 10705	
11	03/19/1998	CPH Ex. 014	MSC 0016944 - 0016945	
14	03/19/1998	CPH Ex. 017	MS 00375 - 00381	
19	10/16/1998	CPH Ex. 022	CPH 0084462 - 0084532	
30	03/19/1998	CPH Ex. 033	MSC 0029176	
33	04/03/1998	CPH Ex. 036	CPH 0639323 - 0639327	
66	09/11/1997	CPH Ex. 069	MSC 0003894 - 0003930	
67	09/05/1997	CPH Ex. 070	SB 237825 - 237830	
68	10/23/1997	CPH Ex. 071	MSC 0005984 - 0005995	
71	03/05/1998	CPH Ex. 074	MSC 0080356 - 0080358	
72	03/15/1998	CPH Ex. 075	SB 0018202 - 0018288	
73	03/19/1998	CPH Ex. 076	MSC 0025829 - 0025886	
81	03/05/1998	CPH Ex. 084	MSC 0033255 - 033263	
87	02/27/1998	CPH Ex. 089	MSC 0083960 - 0084026	
88	02/27/1998	CPH Ex. 090	CPH 1332631 - 1335633	
98	03/12/1998	CPH Ex. 100	MSC 0062860 - 0062896	
111	03/25/1998	CPH Ex. 112	CPH 0129613 - 0129616	
128	03/15/1998	CPH Ex. 130	CPH 0251869 - 0251889	
134	02/23/1998	CPH Ex. 138	CPH 1411216 - 1411300	
142	03/31/1998	CPH Ex. 146	MSC 0080325 - 0080333	

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
149	06/01/1998	CPH Ex. 155	CPH 1346133 - 1346250	
150	06/09/1998	CPH Ex. 156	CPH 1346276-1346342	
151	06/11/1998	CPH Ex. 157	MSC 0018702-0018703	
155	06/21/1998	CPH Ex. 162	MSC 0026888 - 0026891	
158	02/17/1998	CPH Ex. 169	MSC 0044556 - 0044573	
171	02/23/1998	CPH Ex. 187-A	CP 0254621 - 0254640	
209	12/17/1997	CPH Ex. 236	CPH 1121203 - 1121259	
212	02/25/1998	CPH Ex. 239	CPH 1416194 - 1416213	
226	00/00/0000	CPH Ex. 264	MSC 0024863	
233	10/09/1997	CPH Ex. 272	CPH 0473148 - 0473165	
234	08/07/1997	CPH Ex. 273	MSC 0023225 - 0023229	
235	11/13/1997	CPH Ex. 274	MSC 0054921 - 0054925	
236	01/26/1998	CPH Ex. 275	MSC 0001575 - 0001579	
248	00/00/0000	CPH Ex. 300	MSC 0024863 - 24864	
258	01/19/1999	CPH Ex. 325	CPH 1352836 - 135283	
278	09/15/2004	CPH Ex. 360	MSC 0096879 - 0096972	
289	02/24/1994	CPH Ex. 371	MSC 0085403 - 85419	
290	10/27/1995	CPH Ex. 372	MSC 0085420 - 85435	
291	12/31/1996	CPH Ex. 373	MSC 0085436 - 85452	
292	12/31/1997	CPH Ex. 374	MSC 0085453 - 85471	
293	12/31/1998	CPH Ex. 375	MSC 0085472 - 85493	
294	11/18/1998	CPH Ex. 376	MSC 0094016 - 94018	
297	04/28/1998	CPH Ex. 379	CPH 1042288 - 1042317	
298	03/25/1998	CPH Ex. 380	CPH 0485991 - 0485993	

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
305	03/20/1998	CPH Ex. 388	CPH 1241513 - 1241514	
309	02/27/1998	CPH Ex. 392	MSC 0008011 - 008066	
310	07/30/1999	CPH Ex. 393	MSC 0014766 - 0014775	
320	04/03/1998	MS Ex. 058	CPH 0639323 - 0639327	
322	03/30/1998	MS Ex. 075	CPH 1401525 - 1401534	
323	12/01/1997	MS Ex. 076	CPH 140748 - 1407318	
325	01/23/1998	MS Ex. 080	CPH 1426289 - 1426296	
326	02/06/1998	MS Ex. 081	CPH 1421814 - 1421817	
328	02/20/1998	MS Ex. 083	CPH 1427250 - 1427253	
330	02/25/1998	MS Ex. 088	CPH 0634056 - 0634064	
331	02/27/1998	MS Ex. 093	MS 0007947 - 0008010	
337	02/25/1998	MS Ex. 112	CPH 1401219 - 1401238	
338	02/27/1998	MS Ex. 113	CPH 0634065 - 0634075	
342	02/27/1998	MS Ex. 120	CPH 1400750 - 1400752	
345	01/30/1998	MS Ex. 137	CPH 1427533 - 142739	
349	12/10/1997	MS Ex. 169	MSC 1402232 - 1402235	
352	02/23/1998	MS Ex. 182	CPH 1412533 - 1412551	
354	02/26/1998	MS Ex. 188	CPH 1316960 - 131962	
355	02/27/1998	MS Ex. 189	CPH 1399821 - 1399822	
356	01/28/1998	MS Ex. 202	CPH 0468457 - 0468462	
357	01/29/1998	MS Ex. 204	CPH 1393144 - 1393147	
358	03/19/1998	MS Ex. 210	CPH 1395046	
359	03/19/1998	MS Ex. 212	CPH 1393266 - 1393268	
360	03/19/1998	MS Ex. 213	CPH 1415534	

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
361	03/19/1998	MS Ex. 214	CPH 1393472 - 1393478	
362	03/20/1998	MS Ex. 216	CPH 1393262 - 1393263	
367	07/02/1998	MS Ex. 233	CPH 1328300 - 1328301	
368	03/02/1998	MS Ex. 237	CPH 1325251 - 1144565	
371	03/29/1998	MS Ex. 278	CPH 1094218 - 1094235	
373	05/11/1998	MS Ex. 281	DPW 0035621 - 0035636	
378	06/26/1998	MS Ex. 338	CPH 1350174 - 1350175	
380	01/23/1998	MS Ex. 354	CPH 2005706	
381	01/30/1998	MS Ex. 355	CPH 1278481 - 1278484	
386	06/25/1998	MS Ex. 522	CPH 0642890 - 0642891	
410	01/05/2000		BA 01210	Sunbeam Credit Approval Memorandum Modification (USCG)
438	04/03/1998		CPH 0038539 - 0038544	CIBC Oppenheimer analyst report
439	03/24/1998		CPH 0145503 - 0145505	Buckingham Research analyst report
444	01/28/1998		CPH 0291847 - 0291849	Sunbeam Press Release for Record Year
447	12/08/1997		CPH 0324549	Time Line for Transaction
448	12/08/1997		CPH 0324558	Aggressive Time Line for Transaction
449	06/29/1998		CPH 0361142 - 0361148	Minutes of Special Meetings of the Executive Committee and of the Audit Committee of the Board of Directors of Sunbeam
450	07/06/1998		CPH 0361149 - 0361155	Minutes of Special Meetings of the Executive Committee and of the Audit Committee of the Board of Directors of Sunbeam
454	12/08/1997		CPH 0466948 - 0466949	Key Points from Meeting
457	01/30/1998		CPH 0468652 - 0468653	McDonald & Co. analyst report

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
459	07/24/1997		CPH 0472533 - 0472535	Bear Stearns analyst report
465	12/08/1997		CPH 0586586 - 0586587	Fannin memo re Perelman key points
466	10/23/1997		CPH 0595107 - 0595109	Sunbeam Press Release: Morgan Stanley Retained
470	03/24/1998		CPH 1039208	Buckingham Research Group Research Notes
471	06/15/1998		CPH 1059072 - 1059074	Sunbeam press release: Dunlap fired
482	04/06/1998		CPH 1267992 - 1267993	Goldman Sachs report
485	03/03/1998		CPH 1279605 - 1279606	Merrill Lynch analyst report
487	03/16/1998		CPH 1326304 - 1326476	Sunbeam Corporation Offering Memorandum
493	01/29/1998		CPH 1392529-531	Prudential analyst report
495	03/19/1998		CPH 1393269	Sands Brothers analyst report
496	03/20/1998		CPH 1393270 - 1393271	Goldman Sachs analyst report
497	07/22/1998		CPH 1393699 - 1393700	Letter from H. Gittis to H. Kristol re Sunbeam
503	03/12/1998		CPH 1415380 - 1415399	Paine Webber analyst report
505	02/02/1998		CPH 1415568 - 1415573	Prudential analyst report
506	03/05/1998		CPH 1415595 - 1415597	CIBC Oppenheimer analyst report
507	03/12/1998		CPH 1415600 - 1415605	Prudential analyst report
509	04/03/1998		CPH 1417337 - 1317342	Paine Webber analyst report
510	04/06/1998		CPH 1424595 - 1424598	Merrill Lynch report
512	06/23/1998		CPH 0075281 - 0075282	Minutes of Special Meeting of the Board of Directors of Sunbeam Corporation
568	11/30/2002		MSC 0112001 - 0112015	MS & Co.'s Consolidated Statements of Financial Condition
569	11/30/2003		MSC 0112016 - 0112032	MS & Co.'s Consolidated Statements of Financial Condition

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
591	10/29/2004		None	MS & Co.'s Written Responses to Rule 1.310 Topics (re fees)
596	11/16/2004		None	MS & Co.'s Written Responses to Rule 1.310 Topics (re fees)
597	11/19/2004		None	MS & Co.'s Written Responses to Rule 1.310 Topics (re fees)
600	11/24/2004		None	CPH Response to MS's Fifth Set of Interrogatories -- list of transactions.
705	00/00/2002		None	Arthur Rosenbloom: *Due Diligence for Global Deal Making: The Definitive Guide to Cross-Border Mergers and Acquisitions, Joint Ventures, Financings, and Strategic Alliances* (Bloomberg Press 2002)
718	03/13/2003		None	Rosenbloom Expert Report from Gotham v. Hallwood
821	11/12/1998		None	Sunbeam 10-K/A for fiscal year ended 12/28/1997
824	12/06/1999		None	Sunbeam Form S-4/A
850	00/00/0000		None	Morgan Stanley Code of Ethics and Business Conduct
941	03/21/1998		CPH 1400753-926	Memo from A. Deitz to S. Cohen attaching Sunbeam Offering Memorandum
956	03/24/1998		CPH 1393468-69	Merrill Lynch research report re Sunbeam
959	11/30/2001		None	*Financial Markets and Corporate Strategy* (2nd Edition) by Mark Grinblatt and Sheridan Titman
960	11/30/1997		None	*Financial Markets and Corporate Strategy* (1st edition) by Mark Grinblatt and Sheridan Titman
1147	01/28/1998		CPH 0251123-72	Transcript of Sunbeam's conference call with analysts
1155	11/29/2002		None	Historical mark information for time period April 30, 1998 to November 29, 2002

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
1159	04/23/1998		CPH 0485964-65	Sunbeam Press Release, "Sunbeam Corporation Responds to Notices of Law Suits"
1165	05/12/1998		CPH 0468716-18	Bear Stearns & Co. analyst report re Sunbeam
1166	05/12/1998		CPH 0468719-22	Merrill Lynch analyst report re Sunbeam
1167	05/12/1998		CPH 0468723-27	Paine Webber analyst report re Sunbeam
1173	01/27/2005	CPH Dep. Ex. 414	MSC 0112250-0112285	
1174	01/24/2004	CPH Dep. Ex. 416	MSC 0112220-0112249	
1175	11/30/2004	CPH Dep. Ex. 417	MSC 1112219	
1176	11/30/2003	CPH Ex. 418	None	
1179	08/14/1998		MSE021405-0000001-0000023	Email from dunnp@ms.com attaching Global High Yield Capital Markets Weekly Activity Report, updated as of 8/14/98
1180	04/06/1998		MSE021405-0001525-0001547	Email from grays@ms.com forwarding message re MedSource Technologies IPO and attaching Global High Yield Capital Markets Weekly Activity Report, updated as of 4/3/98
1212	00/00/0000		MSE021605-0000134	Morgan Stanley Capital Partners Fund information re Mafco
1221	10/29/1993		MSC 114216-114225	Collection of Italian news articles with translations
1226	12/06/1994		MSC 114119-114121	Translation of Judgment in Italian criminal proceedings
1228	11/06/1995		MSC 116520-116522	Notice of Prosecution to William H. Strong and April 17, 1996 letter from U.S. DOJ to William Strong
1229	10/05/1998		MSC 114869-114874	Committal for Trial Order
1230	10/05/1998		MSC 114875-114888	Translation of Committal for Trial Order

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
1236	07/06/1999		MSC 115805-115806	Disclosure Occurrence Composite for William Strong
1239	02/18/2005		MSC 116176-116189	U-4 Amendment Filing
1240	00/00/0000		None	Declaration of Monroe R. Sonnenborn, Esq.
1241	05/07/1998		WLRK 0003019	Excerpt from May 7 Wachtell letter containing chronology corrections
1244	04/22/1997		MSC 117745	Letter from D. Mayhew to J. Cooney re documents produced to the SFO and a meeting on May 13, 1997 at Clifford Chance (London)
1246	10/29/1993		MSC 117611	Fax cover sheet from G. Curatolo to D. Decotis
1257	05/11/1998		CPH 1427304-1427307	Sunbeam press release re 1st quarter results
1258	03/25/1998		MSC 0016947-016949	Sunbeam press release re Successful Private Placement of $750 Million of Convertible Debentures
1259	03/19/1998		CPH 2008277-2008281	Bloomberg printout of press release re Sunbeam's 1st quarter earnings
1261	04/21/1994		MSC 0119768	Memo from M. Sonnenborn to R. Maschullat, D. DeCotis, G. Giraldi, W. Strong re Trial in Milan Relating to Proposed ENI-SAI Joint Venture
1262	01/26/1995		MSC 119823-119836	Overview of Italian Criminal Law System Preliminary Proceedings
1264	02/09/1999		MSC 119748-119759	Letter from J. Cooney to M. Sonnenborn enclosing statement for services re representation of Bill Strong in connection with DePasquale investigation
1267	11/10/1998		MSC 119849-850	Email from J. McFadden re Revised Final Press Statement on Bill Strong, Italy Indictment

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
1268	11/10/1998		MSC 119848	Email from S. Chapman re Draft Press Statement- Bill Strong Case
1270	02/14/1995		MSC 119241-245	Memo from W. Strong to R. Scott re ENI-SAI
1273	02/23/2005		None	Revised version of February 20, 1998 Privilege Log for documents produced by Morgan Stanley re Strong
1283	05/11/1995		MSC 119235-236	Joint Defense Agreement between Morgan Stanley Salomon Brothers International Limited
1285	00/00/0000		None	Form U-4: Uniform Application for Securities Industry Registration or Transfer
1287	00/00/1994		MSC 0120442-0120445	William Strong 1994 Evaluation Summary
1288	04/03/1998		MSC 0029168-169	Sunbeam press release "Sunbeam Corporation Lowers First Quarter Sales and Earnings Expectations; Names Lee Griffith President of Household Products Business"
1295	05/20/1998		CPH 1011319 - 1011351	Memo from W. Nesbitt to R. Perelman, D. Drapkin, H. Gittis, J. Levin, J. Maher re Review of Sunbeam Research
1296	02/05/2001		None	Sunbeam Stock Prices, 1993-2001
1297	07/08/1999		MSC 114867-114868	Amendment to Uniform Application for Securities Industry Registration or Transfer
1300	03/17/2005		None	Morgan Stanley 8-K
1301	03/02/1998	MS Ex. 196	CPH 1393830-31	
1302	03/17/2005		None	CD containing MS Earnings Call media file
1304	03/20/1998		MSE031905-0000010-0000012	Email from J. Dormer with chronology and press release

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
1305	04/06/1998		MSE031905-0000034	Email from D. Fannin to W. Wright re comments at ABA spring meeting
1308	03/19/1998		CPH 1395046-47	Press Release titled "Sunbeam states first quarter revenues may be lower than street estimates"
1309	00/00/0000		None	Comparable Company Stats 1998 Price and Volume
1310	00/00/0000		None	Grinblatt's S&P 500 Index
1311	12/18/1997		CPH 0325148	Project Laser proposed Summary Transaction Terms
1312	02/19/1998		CPH 0498962-0498965	Press release "Coleman Reports Fully Year and Fourth Quarter Results"
1313	10/20/1998		CPH 1325044-1325047	Sunbeam press release "Sunbeam to Restate Financial Results; Discloses Adjustments For 1996, 1997 and First Quarter of 1998"
1314	11/30/2004		None	Morgan Stanley 10-K for fiscal year ended November 30, 2004
1315	02/28/2005	Nye Ex. 1	CPH 20112470-2012472	
1316	03/23/2005		None	Morgan Stanley Form 8-K
1317	08/12/1998		CPH 2000731-746	Settlement agreement between CPH and Sunbeam Corporation
1318	12/21/2004	CPH Dep. Ex. 419	None	
1319	12/14/1998		CPH 1039842-850	Memo from L. Bornstein to The Files re Sunbeam Audit Committee meeting December 14, 1998
1320	05/26/1998		CPH 0021696	Press release "Michael Price Responds to Fortune Sunbeam Article"
1321	11/19/1998		CPH 0468925-29	Minutes of a Special Meeting of the Board of Directors of Sunbeam Corporation

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
1322	06/17/1998		CPH 1351588-89	Bank of America memorandum from D. Doyle to J. Fair, J. Shannahan (cc: M. Murray, J. Meyers) re Sunbeam Corporation
1323	07/23/1998		CPH 1351571-73	Email from C. Francavilla to K. Barnish, J. O'Keane, D. Doyle, S. Sterling re Sunbeam Update
1324	04/06/1998		CPH 1429924-70	Sunbeam Form Schedule 14A SEC Filing
1325	04/29/1998		CPH 1429908-23	ISS materials re Sunbeam 1998 Proxy
1326	04/21/1998		CPH 0484525-42	ISS materials re Sunbeam 1998 Proxy
1327	05/14/1998		CPH 0474917-18	Memo from J. Adams to A. Dunlap, R. Kersh, D. Fannin, R. Richter, J. Kelley re Record Proxy Vote
1328	04/30/1998		CPH 1408704-8722	Sunbeam Corp. Proxy Analysis by Institutional Shareholder Services
1329	05/10/1998		CPH 1268015-20	Report re Sunbeam Corp. from The Proxy Monitor
1330	06/25/1998		CPH 1392168-69	Sunbeam press release "Sunbeam Delays SEC Filing Relating to Debentures"
1331	12/19/1994		MSC 0120543-0120560	William Strong 1994 Evaluation
1332	04/03/1998		CPH 0639323 - 0639327	Fax from D. Fannin to W. Strong, J. Stynes, R. Kitts, and J. Tyree with attached Apr. 3, 1997 [sic] "Sunbeam Corporation Lower First Quarter Sales and Earnings Expectations; Names Lee Griffith President of Household Products Business"
1333	07/06/1998		CPH 2000771	Letter from H. Gittis to D. Fannin re Amendment to the Credit Agreement

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: April 7, 2005

TIME: 9:30 a.m.

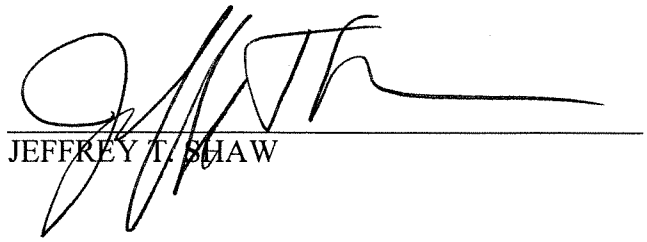
JUDGE: Honorable Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

Coleman (Parent) Holdings Inc.'s Motion *In Limine* No. 32 To Bar Morgan Stanley From Controverting The Factual Findings Established By Exhibit A To the March 23, 2005 Order

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 6th day of April, 2005.



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9966

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON CPH'S MOTION IN LIMINE NO. 32 TO BAR REFERENCES TO PLAINTIFF'S FAILURE TO RETAIN E-MAILS AS "LITIGATION MISCONDUCT"

THIS CAUSE came before the Court April 6, 2005 on CPH's Motion in Limine No. 32 to Bar References to Plaintiff's Failure to Retain E-Mails as "Litigation Misconduct", with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted. Neither party shall refer to CPH's overwriting of emails as "Litigation Misconduct," or by any other terms that could suggest that the overwriting occurred during the ambit of this litigation or was in violation of a court order or discovery request.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 6th day of April, 2005.

_____
ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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From: Michael T. Brody
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Employee Number: Client Number: 41198-10003

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.'S SECOND SUPPLEMENTAL RESPONSE AND OBJECTION TO MORGAN STANLEY & CO. INC.'S FIFTH SET OF INTERROGATORIES, NO. 1

Plaintiff Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, and pursuant to Rules 1.280 and 1.340 of the Florida Rules of Civil Procedure supplements its response to Morgan Stanley & Co., Inc.'s ("MS & Co.'s") Fifth Set of Interrogatories ("Interrogatories") as follows:

INTERROGATORY 1: Identify every instance in which Mafco or CPH engaged or retained Morgan Stanley between January 1, 1993 and March 30, 1998. Your response should identify the nature, subject, and purpose of each such engagement, the transaction or proposed transaction contemplated by each such engagement, and the name(s) of any Morgan Stanley employee or agents retained or consulted by Mafco or CPH.

FURTHER OBJECTION AND RESPONSE: CPH objects to this interrogatory as unduly burdensome because it seeks information already in the possession of Morgan Stanley and details concerning "every instance" in which Morgan Stanley was engaged or retained. CPH also notes that Interrogatory No. 1 constitutes multiple separate interrogatories. Subject to and notwithstanding its Initial and Further Objections, CPH states that Morgan Stanley was involved in the following transactions with Mafco, CPH, or affiliated companies:

- In 1985, Morgan Stanley served as advisor to Pantry Pride, Inc. ("Pantry Pride"), a Mafco affiliate, in its acquisition of Revlon, Inc. ("Old Revlon").

- In 1985, Morgan Stanley served as advisor to Pantry Pride in selling Norcliff Thayer Inc. to Beecham Group p.l.c.

- In 1986, Morgan Stanley served as an advisor to Pantry Pride in the sale of Old Revlon's pharmaceutical business to Rorer Group Inc.

- In 1989, Morgan Stanley served as an advisor to The Coleman Company, Inc. ("Old Coleman") during the acquisition by a Mafco affiliate of Old Coleman.

- In 1989, Morgan Stanley served as Old Coleman's financial advisor when Old Coleman reviewed the $460.5 million buyout proposal by former Old Coleman chairman Sheldon Coleman and other members of the Coleman family.

- In 1991, National Health Laboratories Incorporated ("NHL"), an affiliate of Mafco, completed a secondary public offering of its common stock, for which Morgan Stanley served as a co-manager.

- In 1992, National Health Care Group Inc. (an indirect Mafco subsidiary) sold 14 million shares of NHL in a registered offering through Morgan Stanley and other underwriters.

- In 1992, Morgan Stanley served as an underwriter for Old Coleman's February 1992 offering of $100 million in Guaranteed Pass Through Certificates due 2022.

- In 1992, Morgan Stanley served as a joint underwriting manager for the $83 million initial public offering by The Coleman Company, Inc. ("Coleman") of its common stock.

- In 1992, Revlon, Inc. ("Revlon") planned but did not complete a $120 million initial public offering of its common stock, which was to be co-managed by Morgan Stanley.

- In 1992, MacAndrews & Forbes Company ("Flavors"), a Mafco affiliate, retained Morgan Stanley and other underwriters in connection with a contemplated, but later withdrawn, initial public offering of its common stock.

- In 1992, Morgan Stanley co-managed an $85 million 12% senior debt offering for Flavors.

- In 1993, Morgan Stanley served as the financial advisor for NHL in connection with its proposed acquisition of Damon Corp.

- In March 1993, Morgan Stanley was the underwriter for the $90 million face amount of 10.5% Senior Subordinated Notes Due 2003 offered by Consolidated Cigar Corporation, an affiliate of Mafco.

- In 1993-94, Morgan Stanley served as one of the underwriters for a $125 million senior subordinated notes offering by Marvel III Holdings Inc., a Mafco affiliate.

- In 1994, Morgan Stanley served as the financial advisor and dealer manager for NHL's tender offer for the outstanding shares of Allied Clinical Laboratories Inc.

- In 1994, Morgan Stanley served as the financing agent for $200 million of senior notes issued by NHL Intermediate Holdings Corp. II, a unit of National Health Laboratories Holdings Inc., a Mafco affiliate.

- In 1994, New World Communications Group Incorporated, a Mafco affiliate, arranged for $200 million in financing using Morgan Stanley, as agent.

- In 1994, Morgan Stanley served as the lead underwriter in an offering by NWCG Holdings Corporation of $420 million face amount of Senior Secured Discount Notes.

- In 1995, Toy Biz, Inc. ("Toy Biz"), a Mafco affiliate, and one of its shareholders sold Toy Biz common stock in a $62 million initial public offering co-managed by Morgan Stanley.

- In 1995, a Mafco affiliate and Abex Inc. agreed to merge. Morgan Stanley served as a financial advisor to Mafco in this transaction.

- In 1996, Revlon completed a $180 million initial public offering of its common stock, which was co-managed by Morgan Stanley.

- In 1996, Morgan Stanley led an underwriting group in conjunction with the $48 million sale by Toy Biz and one of its shareholders of shares of Toy Biz common stock.

- In 1996, Consolidated Cigar Holdings Inc. ("Cigar"), a Mafco affiliate, completed a $124 million initial public offering of its common stock, which was co-managed by Morgan Stanley.

- In 1996, Morgan Stanley represented the special committee of the board of Mafco Consolidated Group, Inc. in that company's sale of Flavor Holdings Inc. to Power Technologies Inc.

- In 1997, Cigar completed a $118 million additional offering of its common stock, which was co-managed by Morgan Stanley.

- In 1997, Mafco Holdings Inc., a Mafco affiliate, completed a "going private" transaction with its affiliate, Mafco Consolidated Group Inc. ("Mafco Consolidated"). Mafco Consolidated retained Morgan Stanley as a financial

advisor to represent the minority interest in evaluating and negotiating the Mafco Holdings proposal.

In addition to the transactions listed above,

- In late 1997 and early 1998, Morgan Stanley (including at least William Reid, Robert Kitts, and Matt Grogan) sought to interest Mafco in a transaction involving Gucci.
- In late 1997 and early 1998, Morgan Stanley (including at least William Reid and Dwight Sipprelle) sought to interest Mafco in a Revlon financing transaction.
- In early 1998, Morgan Stanley (including at least Mark Perret and Edwin Datson) also sought to interest Mafco in possible European acquisition opportunities.

Dated: April 7, 2005

As to objections:

By:

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Attorneys for Coleman (Parent) Holdings Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax to all counsel on the attached list on this 7th day of April, 2005.

Deirdre E. Connell

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West Palm Beach, FL 33409

FLORIDA_10635_1

I, Steven L. Fasman, being duly sworn, depose and say that I am authorized on behalf of Coleman (Parent) Holdings Inc. and, on its behalf, I have read the foregoing COLEMAN (PARENT) HOLDINGS INC.'S SECOND SUPPLEMENTAL RESPONSE TO MORGAN STANLEY & CO., INC.'S FIFTH SET OF INTERROGATORIES, and to the best of my knowledge and belief the response contained therein is true and correct.

STEVEN L. FASMAN

Subscribed and sworn to before me
this 7th day of April, 2005

"OFFICIAL SEAL"
CARYN JO GEISLER
Notary Public, State of Illinois
My Commission Expires June 21, 2005

FAX TRANSMITTAL

JENNER&BLOCK

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Chicago
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Date:	April 7, 2005		
TO:	Mark C. Hansen, Esq. James M. Webster, III, Esq.	Fax:	(561) 651-1127
	Joseph Ianno, Jr., Esq.	Fax:	(561) 659-7368
	John Scarola, Esq.	Fax:	(561) 684-5816 (before 5 PM)
From:	Michael T. Brody (561) 352-2300		
Employee Number:		Client Number:	41198-10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential, and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

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

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

NOTICE OF TAKING VIDEOTAPED DEPOSITION

To: Joseph Ianno, Jr., Esq.
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West Palm Beach, FL 33401

Mark C. Hansen, Esq.
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
c/o Kirkland & Ellis LLP
222 Lakeview Avenue, Suite 260
West Palm Beach, FL 33401

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings, Inc. ("CPH") will take the deposition upon oral examination of the following witness pursuant to the Florida Rules of Civil Procedure, on the date, time, and at the location set forth below:

DEPONENT	DATE AND TIME	LOCATION
Rob Jones	April 10, 2005 at 1:00 p.m.	Searcy Denney Scarola Barnhart & Shipley P.A. 2139 Palm Beach Lakes Blvd. West Palm Beach, FL 33409

The deposition will be recorded by stenographic and audio-visual means and will be taken before a person authorized to administer oaths and will continue day to day until completed. The videographer will be Visual Evidence, 601 N. Dixie Highway, West Palm Beach, Florida 33401. You may attend and cross-examine.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile to all counsel on the attached Service List, this 7th day of April, 2005.

Dated: April 7, 2005

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant. /

DEFENDANT'S MORGAN STANLEY & CO'S OPPOSITION TO PLAINTIFF COLEMAN (PARENT) HOLDING, INC.'S *IN LIMINE* MOTION NO. 33 TO BAR MORGAN STANLEY FROM CONTROVERTING THE FACTUAL FINDINGS ESTABLISHED BY EXHIBIT A AND CORRESPONDING REQUEST FOR RECONSIDERATION

On March 23, 2005, this Court granted Plaintiff Coleman (Parent) Holding, Inc.'s ("CPH's") motion for entry of default judgment in part, holding that CPH's claims that Morgan Stanley aided and abetted Sunbeam's fraud and conspired with Sunbeam to commit fraud would be deemed established. The Court made clear, however, that the other elements of CPH's claims – reliance and damages – would be fully litigated. See 3/31/05 Tr. 6276-77, 6279; 4/6/05 Tr. 7076 ("Coleman needs to prove . . . reliance and damages"). The Court did *not* foreclose Morgan Stanley from litigating reliance and damages because the litigation misconduct addressed by that order could not have had any effect on CPH's ability to prove those elements. See Order on Coleman (Parent) Holdings, Inc's Motion for Adverse Inference Instruction 12 (March 2, 2005)

(declining to "relieve CPH of its obligation to establish the other elements of its claims, most notably reliance, proof of which is independent of the MS & Co. e-mails"). Since then, however, CPH has repeatedly attempted to expand this Court's sanctions to preclude Morgan Stanley from fully and fairly litigating the issue of reliance. See, e.g., Order Denying CPH's Motion to Amend the Court's March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment (April 5, 2005) (rejecting CPH's claim that the March 23 Order should be extended to the issue of reliance).

CPH's *In Limine* Motion No. 33 represents yet another effort to achieve that improper result. CPH complains that Morgan Stanley's opening statement mentions a February 23, 1995, meeting in which "Sunbeam came right out and told Mr. Levin and other representatives of the plaintiff that they weren't making their expectation, that their January and February sales were slow." 4/6/05 Tr. 7132-33. CPH does not dispute that counsel's statement is true (at least with respect to January). Instead CPH urges that it is inconsistent with Exhibit A, which the jury must take as true.

That contention is meritless. First, there is no inconsistency between the opening statement and Exhibit A, since Exhibit A does not mention the February 23 meeting or what was said about January and February sales during it. Second, the opening statement goes to *reliance* – an issue Morgan Stanley must be permitted to litigate – not the questions of misrepresentation and intent foreclosed by this Court. Third, and finally, CPH's motion underscores yet again that the Court's decision to read a statement to the jury and deem it true

(although some parts are false) is fundamentally inconsistent with Morgan Stanley's right to a fair trial on the non-defaulted issues.

ARGUMENT

CPH's Motion *In Limine* No. 33 should be denied.

1. *First*, there is no inconsistency between the opening statement and Exhibit A. One searches Exhibit A *in vain for any mention* of the February 23 meeting, or what was said at it. The paragraph CPH quotes (Motion at 2; Exh. A at 13) does not mention that meeting. Nor does it mention what was said at any meeting regarding January and February sales. The closest that paragraph comes is to declare that, at unspecified face-to-face discussions, "Morgan Stanley and Sunbeam assured that . . . Sunbeam would meet or its exceed its *first quarter* 1998 earnings estimates," which would include the then-upcoming month of March. *Id.* (emphasis added). The absence of contradiction alone is fatal to the Motion. Exhibit A is not preclusive as to issues it does not address.

2. *Second*, and more important, CPH utterly ignores the fact that the opening statement mentions that meeting to address *reasonable reliance*, something Morgan Stanley *can* dispute, *not the fraud* charge for which defense is foreclosed. The facts that Mr. Perelman's advisors knew that Sunbeam's representations were questionable, that they told Perelman not to accept stock, and that Perelman went ahead anyway, demonstrate that Perelman was *not relying* on Sunbeam's representations (and certainly was not reasonably relying). As counsel explained in the sentences *immediately following* the one of which

CPH complains – sentences CPH conveniently omits or ignores – the opening statement makes that clear:

> The experienced turn around artist for Mr. Perelman his chief operating guy, he knew that the Sunbeam story was a lot of seller's talk, and that is what we expect you'll hear him say in this courtroom. What did you tell [Perelman]? That I thought that the . . . income expectations were quite a stretch and I didn't think they were achievable.
>
> This is Mr. Perelman's right-hand man telling him the Sunbeam numbers aren't going to happen, don't trust them. On March 19th, 1998, there's still time left for Mr. Perelman to back out of this deal. . . . So did Mr. Perelman pause and ask to look at the financial? * * * No. *He plowed ahead because he didn't care.*

4/6/05 Tr. at 7133-34 (emphasis added). Even the limiting instruction this Court proposes to give on reliance – an instruction that in our view misstates Florida law and which should appear if ever only in the jury charge – recognizes that a plaintiff may not recover if "falsity was obvious" or if it did not "actually rely on the misrepresentation." That Perelman's advisors knew that the representations were hype; that they warned Perelman; and that Perelman went ahead anyway goes directly to whether there was reliance and whether it was justifiable.

3. Reading the Default Order to prevent Morgan Stanley from litigating *reliance*, based on facts squarely within CPH's knowledge – *its* employees were at the meeting – would improperly expand this Court's March 23, 2005, sanctions order. Morgan Stanley is entitled to litigate reliance. The Court specifically chose not to foreclose that issue because reliance "is independent of the MS & Co. e-mails" at issue in the litigation misconduct. Order on Coleman (Parent) Holdings, Inc's Motion for Adverse Inference Instruction 12. And CPH is fully

capable of contesting any disputed issue, because its own employee (Levin) attended the meeting in person.

4. *Third, and finally*, if CPH's motion demonstrates anything, it shows that the Court's unprecedented decision to read a statement of "facts" to the jury and deem them true, while purporting to allow Morgan Stanley to defend itself on reliance, is improper. Simply put, the "findings" this Court deems "true" for purposes of "fraud" in fact are often *untrue*. There is simply no way Morgan Stanley can have a "fair trial" on reliance when, as to important matters going to that issue, the jury is told to accept fiction as fact. Moreover, there will inevitably be further disputes about what Exhibit A says or means, since the chosen language (although often inflammatory) is often terribly vague. In contrast, the extraordinary (but not unprecedented) remedy of default on certain issues presents no such conundrum. Because this motion underscores the defects in the Court's chosen course – its unworkabability, its fundamental unfairness, and the fact that it disserves the justice system by misleading the jury – we respectfully request that the Court reconsider and declare a mistrial. Failing that, the Court should strike any disputed references to the February 23 meeting or any other facts bearing on reliance from Exhibit A. Failing that, the motion should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 7 day of April, 2004.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MS&CO.'S RESPONSES AND OBJECTIONS TO COLEMAN (PARENT) HOLDINGS INC.'S NOTICE TO PRODUCE AT TRIAL

Defendant, Morgan Stanley & Co. Incorporated ("MS&Co.") pursuant to Fla. R. Civ. P. Rules 1.280 and 1.350, provides the following Responses and Objections to Coleman (Parent) Holdings Inc.'s ("CPH") Notice to Produce at Trial ("Notice to Produce") served March 18, 2005.

GENERAL OBJECTIONS

The following general objections apply to the Notice to Produce in its entirety and apply to each and every request within the Notice to Produce as if fully set forth with respect to each request:

1. MS&Co. objects to the Notice to Produce to the extent that it is vague, ambiguous, overbroad, unduly burdensome, oppressive, seeks cumulative or duplicative information, and calls for the production of documents that are neither relevant to this action nor reasonably calculated to lead to the discovery of admissible evidence.

2. MS&Co. objects to the Notice to Produce in its entirety to the extent that it seeks materials protected from disclosure by the attorney-client privilege, the attorney-work-product doctrine, the common-interest doctrine, or any other applicable constitutional, statutory, or common-law privilege, doctrine, immunity, or rule. Pursuant to the Agreed Order Regarding Enlargement of Time to Prepare Privilege Log dated September 4, 2003, MS&Co. will exchange with CPH a categorization of documents not produced based on a claim of privilege or discovery immunity within 30 days after MS&Co.'s production of the documents from which the documents have been withheld on grounds of privilege or discovery immunity.

3. MS&Co. reserves the right to redact not only privileged information, but also, where appropriate, non-responsive, confidential, or otherwise irrelevant information. If requested and necessary, MS&Co. will produce a log of any such redactions at a mutually agreeable juncture.

4. MS&Co. objects to the Notice to Produce in its entirety to the extent that it seeks to impose obligations, including a continuing duty of supplementation, different from, or in addition to, those provided in the Florida Rules of Civil Procedure, discovery guidelines of this Court, and applicable case law.

5. MS&Co. objects to the Notice to Produce in its entirety to the extent that it seeks the production of documents in the possession of third parties and not within MS&Co.'s possession, custody, or control.

6. MS&Co. objects to the Notice to Produce to the extent that it calls for the production of documents that are already in CPH's possession, custody or control, or are otherwise publicly available.

7. MS&Co. objects to the Notice to Produce to the extent that it calls for "all" documents or is an all-inclusive request on the grounds that the request is overly broad and unduly burdensome. Unless otherwise noted, MS&Co. will produce any documents "sufficient to show" the responsive information, to the extent such documents can be located following a reasonable, good faith search of the relevant files in accordance with the applicable laws and rules.

8. It should not be inferred from the form or substance of any objection or response contained herein that documents responsive to any particular request exist, or are in the possession, custody, or control of MS&Co.

9. When MS&Co. responds to a specific request by stating that it will produce documents "subject to" its Specific or General Objections, "subject to" means that MS&Co. will produce documents responsive to the request as limited by its Specific and General objections.

10. MS&Co.'s responses to CPH's Notice to Produce shall not be construed in any way as an admission that any definition provided by CPH is either factually correct or legally binding upon MS&Co., or as a waiver of any of MS&Co.'s objections, including, but not limited to:

(i) any objections as to the competency, relevancy, materiality, privilege, or admissibility as evidence, for any purpose, of

any documents produced in response to the Notice to Produce or the subject matter thereof;

(ii) the right to object on any ground to the use of any of the documents produced or responses provided, or the subject matter thereof, at any trial or hearing in this matter or in any related or subsequent action or proceeding;

(iii) the right to object on any ground at any time to a demand for further response to the Notice to Produce; and/or

(iv) the right at any time to revise, supplement, correct, or add to these responses and objections.

11. MS&Co.'s objections are based on its good-faith investigations and discovery to date. MS&Co. expressly reserves the right to modify and supplement these objections.

OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS

OBJECTIONS: MS&Co. incorporates by reference its objections to the definitions as set forth in MS&Co.'s previous Objections to CPH's Requests for Production of Documents. In addition, MS&Co. has the following specific objections:

1. MS&Co. objects to the Definitions in the Notice to Produce to the extent they render any specific request objectionable on any of the grounds stated in the General Objections.

2. MS&Co. objects to the Notice to Produce's definition of "MS&Co." to the extent that it purports to include the documents of MS&Co.'s "affiliates, subsidiaries, divisions, predecessors, successors, present and former employees, representatives, agents, attorneys,

advisors, or all other persons," and on the grounds that it conflicts with previous definitions, and is overly broad. Subject to and without waiver of the foregoing General and Specific Objections, MS&Co. will only produce MS&Co. documents.

3. MS&Co. objects to the Notice to Produce's open-ended time period on the grounds that such unlimited period renders the Notice to Produce overly broad and unduly burdensome. Subject to and without waiver of the foregoing General and Specific Objections, MS&Co. will produce documents responsive to such requests, if any, in accordance with the parties' previous agreement to collect documents from the last six financial quarters from the years ending 2003 and 2004.

SPECIFIC OBJECTIONS AND RESPONSES

REQUEST NO. 1: All agreements and documents that govern or set out terms for any of (a) MS&Co.'s $5 billion credit line with its parent MS&Co.; (b) MS&Co.'s $1.8 billion secured line of credit; (c) MS&Co.'s $100 million unsecured line of credit; or (d) MS&Co.'s subordinated indenture.

OBJECTIONS TO REQUEST NO. 1: MS&Co. objects to this request on the grounds that it is overbroad, unduly burdensome and not calculated to lead to the discovery of admissible evidence. MS&Co. further objects to this request to the extent that it seeks privileged documents. Subject to and without waiver of the foregoing General and Specific objections, MS&Co. will produce documents sufficient to show the terms of MS&Co.'s credit agreements, which include its $250 million Subordinated Revolving Credit Agreement, dated April 15, 1986 and its related amendments, the $1.8 billion Competitive Advance and Revolving Credit

Agreement, dated May 20, 2004, the $100 million Revolving Credit Agreement dated September 28, 2001 and the Subordinated Indenture.

REQUEST NO. 2: All documents in the form of the document marked as MS Confidential 1112219 and prepared since November 30, 2004.

OBJECTIONS TO REQUEST NO. 2: MS&Co. objects to this request on the grounds that it is overbroad, unduly burdensome and not calculated to lead to the discovery of admissible evidence. MS&Co. further objects to this request to the extent that it seeks privileged documents. Subject to and without waiver of the foregoing General and Specific objections, MS&Co. has not identified any documents responsive to this Request.

REQUEST NO. 3: All documents involving, relating to, or referring to any calculations of MS&Co.'s minimum net worth, including any calculations relating to the requirements described in CPH deposition exhibit 415.

OBJECTIONS TO REQUEST NO. 3: MS&Co. objects to this request on the grounds that it is overbroad, unduly burdensome and not calculated to lead to the discovery of admissible evidence. MS&Co. further objects to this request to the extent that it seeks privileged documents. Subject to and without waiver of the foregoing General and Specific objections, MS&Co. will produce financial documents sufficient to calculate MS&Co.'s net worth. These include Sections 4.3, 4.2, and 4.1 of the Subordination Note – Covenants, Sections 6.1(a), and (b) of the Competitive Advance and Revolving Credit Agreement and Revolving Credit Facility Agreements, Section 6.01 of the Revolving Credit Facility, Computations of Consolidated Net

Capital, and Consolidated Statements of Financial Conditions and Income for the years ending November 2004 and 2003.

REQUEST NO. 4: All documents involving, relating to, or referring to any borrowings by MS&Co. from its parent Morgan Stanley since January 1, 2004.

OBJECTIONS TO REQUEST NO. 4: MS&Co. objects to this request on the grounds that it is overbroad, unduly burdensome and not calculated to lead to the discovery of admissible evidence. MS&Co. further objects to this request to the extent that it seeks privileged documents. Subject to and without waiver of the foregoing General and Specific objections, MS&Co. will produce financial schedules reflecting borrowings by MS&Co. from its parent Morgan Stanley since January 1, 2004.

REQUEST NO. 5: All documents involving, relating to, or referring to any apportionment or allocation of expenses, including expenses related to compensation of senior management, among MS&Co. and any of its affiliates.

OBJECTIONS TO REQUEST NO. 5: MS&Co. objects to this request on the grounds that it is overbroad, unduly burdensome and not calculated to lead to the discovery of admissible evidence. MS&Co. further objects to this request to the extent that it seeks privileged documents. Subject to and without waiver of the foregoing General and Specific objections, MS&Co. will produce documents sufficient to show the allocation of certain overhead expenses among MS&Co. and its affiliates, by category, from November 2003 through February 2005.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and hand delivered on this 7th day of April, 2005.

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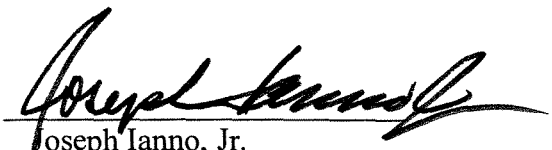
BY: 
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THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO. 2003CA 005045 AI

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO REMOVE CONFIDENTIALITY DESIGNATIONS

THIS CAUSE having come before the Court on April 7, 2005 on Coleman (Parent) Holdings Inc.'s Motion to Remove Confidentiality Designations, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted without objection. The confidentiality designations are removed from Exhibits B and D to Defendant's Motion for Reconsideration of Sanctions Order and Memorandum of Law, dated April 4, 2005.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 7th of April 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON CPH'S ORE TENUS MOTION TO COMPEL

THIS CAUSE came before the Court April 7, 2005 on CPH's ore tenus Motion to Compel, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that CPH's ore tenus Motion to Compel is Granted. MS & Co. shall serve a more complete disclosure of Mr. Jones' expected testimony by 3:00 p.m. April 8, 2005.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 7 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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April 7, 2005

Via Facsimile and First Class Mail

Michael Brody, Esq.
Jenner & Block LLP
c/o MAFCO Holdings Inc.
777 S. Flagler Drive
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West Palm Beach, FL 33401

Re: *Coleman (Parent) Holdings, Inc., v. Morgan Stanley & Co., Incorporated*, No. CA 03-5045 AI

Dear Mike:

Enclosed please find Morgan Stanley's Responses and Objections to CPH's March 29, 2005 Notice to Produce at Trial, which was inadvertently not included in the production that was made yesterday.

Very truly yours,

Rebecca A. Beynon

cc: Jack Scarola, Esq.
Joseph Ianno, Esq.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S RESPONSES AND OBJECTIONS TO COLEMAN (PARENT) HOLDINGS INC.'S MARCH 29, 3005 NOTICE TO PRODUCE AT TRIAL

Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley") pursuant to Fla. R. Civ. P. Rules 1.280 and 1.350, provides the following Responses and Objections to Coleman (Parent) Holdings Inc.'s ("CPH") Notice to Produce at Trial ("Notice to Produce") served March 29, 2005.

GENERAL OBJECTIONS

The following general objections apply to the Notice to Produce in its entirety and apply to each and every request within the Notice to Produce as if fully set forth with respect to each request:

1. Morgan Stanley objects to the Notice to Produce to the extent that it is vague, ambiguous, overbroad, unduly burdensome, oppressive, seeks cumulative or duplicative information, and calls for the production of documents that are neither

relevant to this action nor reasonably calculated to lead to the discovery of admissible evidence.

2. Morgan Stanley objects to the Notice to Produce in its entirety to the extent that it seeks materials protected from disclosure by the attorney-client privilege, the attorney-work-product doctrine, the common-interest doctrine, or any other applicable constitutional, statutory, or common-law privilege, doctrine, immunity, or rule. Pursuant to the Agreed Order Regarding Enlargement of Time to Prepare Privilege Log dated September 4, 2003, Morgan Stanley will exchange with CPH a categorization of documents not produced based on a claim of privilege or discovery immunity within 30 days after Morgan Stanley's production of the documents from which the documents have been withheld on grounds of privilege or discovery immunity.

3. Morgan Stanley reserves the right to redact not only privileged information, but also, where appropriate, non-responsive, confidential, or otherwise irrelevant information. If requested and necessary, Morgan Stanley will produce a log of any such redactions at a mutually agreeable juncture.

4. Morgan Stanley objects to the Notice to Produce in its entirety to the extent that it seeks to impose obligations, including a continuing duty of supplementation, different from, or in addition to, those provided in the Florida Rules of Civil Procedure, discovery guidelines of this Court, and applicable case law.

5. Morgan Stanley objects to the Notice to Produce in its entirety to the extent that it seeks the production of documents in the possession of third parties and not within Morgan Stanley's possession, custody, or control.

6. Morgan Stanley objects to the Notice to Produce to the extent that it calls for the production of documents that are already in CPH's possession, custody or control, or are otherwise publicly available.

7. Morgan Stanley objects to the Notice to Produce to the extent that it calls for "all" documents or is an all-inclusive request on the grounds that the request is overly broad and unduly burdensome. Unless otherwise noted, Morgan Stanley will produce any documents "sufficient to show" the responsive information, to the extent such documents can be located following a reasonable, good faith search of the relevant files in accordance with the applicable laws and rules.

8. It should not be inferred from the form or substance of any objection or response contained herein that documents responsive to any particular request exist, or are in the possession, custody, or control of Morgan Stanley

9. When Morgan Stanley responds to a specific request by stating that it will produce documents "subject to" its Specific or General Objections, "subject to" means that Morgan Stanley will produce documents responsive to the request as limited by its Specific and General objections.

10. Morgan Stanley's responses to CPH's Notice to Produce shall not be construed in any way as an admission that any definition provided by CPH is either factually correct or legally binding upon Morgan Stanley, or as a waiver of any of Morgan Stanley's objections, including, but not limited to:

(i) any objections as to the competency, relevancy, materiality, privilege, or admissibility as evidence, for any purpose, of any documents produced in response to the Notice to Produce or the subject matter thereof;

(ii) the right to object on any ground to the use of any of the documents produced or responses provided, or the subject matter thereof, at any trial or hearing in this matter or in any related or subsequent action or proceeding;

(iii) the right to object on any ground at any time to a demand for further response to the Notice to Produce; and/or

(iv) the right at any time to revise, supplement, correct, or add to these responses and objections.

11. Morgan Stanley's objections are based on its good-faith investigations and discovery to date. Morgan Stanley expressly reserves the right to modify and supplement these objections.

OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS

OBJECTIONS: Morgan Stanley incorporates by reference its objections to the definitions as set forth in Morgan Stanley's previous Objections to CPH's Requests for Production of Documents. In addition, Morgan Stanley has the following specific objections:

1. Morgan Stanley objects to the Definitions in the Notice to Produce to the extent they render any specific request objectionable on any of the grounds stated in the General Objections.

2. Morgan Stanley objects to the Notice to Produce's definition of "Morgan Stanley" to the extent that it purports to include the documents of Morgan Stanley's "affiliates, subsidiaries, divisions, predecessors, successors, present and former employees, representatives, agents, attorneys, advisors, or all other persons," and on the

grounds that it conflicts with previous definitions, and is overly broad. Subject to and without waiver of the foregoing General and Specific Objections, Morgan Stanley will only produce Morgan Stanley documents.

SPECIFIC OBJECTIONS AND RESPONSES

REQUEST NO. 1: All balance sheets, income statements, cash flow statements, and any other financial statements relating to MS & Co.'s net worth, revenues, profits, losses, borrowings, and global holdings for the most recently completed quarter.

OBJECTION TO REQUEST NO. 1: Morgan Stanley incorporates by reference its general objections. Subject to and without waiver of the foregoing General Objections, Morgan Stanley will produce financial documents for the most recently completed quarter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 8th day of April 2005.

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BY: _____

Counsel for
Morgan Stanley & Co. Incorporated

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO STRIKE UNTIMELY OBJECTIONS TO CPH EXHIBITS

THIS CAUSE came before the Court April 7, 2005 on Coleman (Parent) Holdings, Inc.'s Motion to Strike Untimely Objections to CPH Exhibits, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Coleman (Parent) Holdings, Inc.'s Motion to Strike Untimely Objections to CPH Exhibits is Granted, in part, Denied, in part, and ruling reserved, in part. Objections on hearsay, foundation, authentication, or any other basis which may have been cured had a timely objection been made are deemed waived. Objections on relevancy based on the Court's March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment are deemed preserved. Waiver of all other objections shall be determined on a case-by-case basis.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 8 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION IN LIMINE NO. 33 TO BAR MORGAN STANLEY FROM CONTROVERTING THE FACTUAL FINDINGS ESTABLISHED BY EXHIBIT A TO THE MARCH 23, 2005 ORDER

THIS CAUSE came before the Court April 7, 2005 on Coleman (Parent) Holdings, Inc.'s Motion in Limine No. 33 to Bar Morgan Stanley from Controverting the Factual Findings Established by Exhibit A to the March 23, 2005 Order, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Coleman (Parent) Holdings, Inc.'s Motion in Limine No. 33 to Bar Morgan Stanley from Controverting the Factual Findings Established by Exhibit A to the March 23, 2005 Order is Granted. Neither party may present evidence that contradicts the factual findings made in Exhibit A to the Court's March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 8 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: April 11, 2005

TIME: 9:30 a.m.

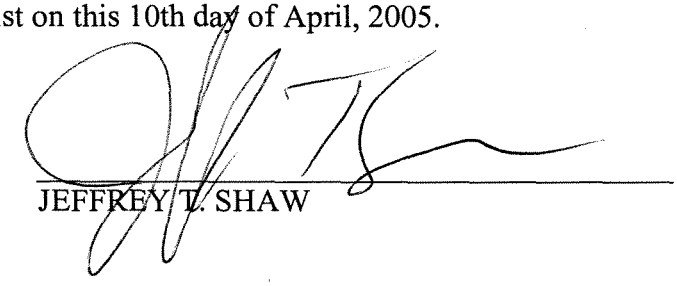
JUDGE: Honorable Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

Coleman (Parent) Holdings Inc.'s Motion To Compel Compliance With Notice To Produce

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 10th day of April, 2005.



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9966

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO. 2003CA 005045 AI

NOTICE OF FILING PLEADING UNDER SEAL

Coleman (Parent) Holdings Inc. ("CPH") hereby gives notice of the filing of Plaintiff's Motion to Compel Compliance With Notice To Produce.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 10th day of April 2005.

JEFFREY T. SHAW

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9967

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

AGREED ORDER ON SUBMISSION OF PROFFERED TESTIMONY

THIS CAUSE having come before the Court upon the request of Counsel for direction concerning the submission of proffered testimony, and the Court having been advised of the agreement of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Evidence that either party wishes to proffer to the Court may be submitted by way of a written submission. This order is without prejudice for either party to object to the proffer on any evidentiary or other ground.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 11 of April, 2005.

Elizabeth T. Maass
Circuit Court Judge

cc: Counsel of Record on attached Service List

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO BAR UNTIMELY DEPOSITION DESIGNATIONS

Colman (Parent) Holdings Inc. ("CPH"), by its attorneys, respectfully requests that (1) this Court enter an Order barring certain deposition designations set forth below that Morgan Stanley served on April 8, 2005; (2) requiring Morgan Stanley to disclose definitively which witnesses will be presented by deposition designations as opposed to as live witnesses; and (3) directing Morgan Stanley to disclose which deposition designations have been made solely for the purpose of making an offer of proof. In support of this motion, CPH states as follows:

1. Many Of The April 8 Designations Are Barred.

On April 8, 2005, two days after the trial commenced, Morgan Stanley served numerous deposition designations from 23 witnesses (*see* Exs. A-B), even though this Court's recent Orders have reduced the number of issues to be tried rather than increased them.[1] Many of the April 8 designations are untimely and improper for the reasons set forth below:

[1] In addition to the designations that Morgan Stanley tendered on Friday, earlier in the week, Morgan Stanley also tendered designations from 19 other witnesses, for a total of 39 witnesses.

Depositions of Steven Fasman (September 2003 and January 2004)

Mr. Fasman's depositions pertain to discovery compliance issues (September 2003) and e-mail retention issues (January 2004). In a pretextual response to the e-mail issues raised by CPH, Morgan Stanley designated testimony for the first time from Mr. Fasman's depositions on February 14-15, 2005, attempting to put CPH's own e-mail retention issues into play. However, under this Court's October 14, 2004 Scheduling Order, deposition designations were due on December 20, 2004. *See* Ex. C at 3. Accordingly, CPH promptly objected to those designations as untimely. *See* Exs. D-E. The April 8 designations of Mr. Fasman's deposition obviously are even more untimely.

Moreover, under this Court's March 23, 2005 Order, any deposition testimony pertaining to CPH's e-mail retention policy was to be identified by March 30, 2005. *See* Ex. F (requiring designations within five business days). Although Morgan Stanley listed topics on which Mr.. Fasman would be called to testify, they did not make any designations from his depositions. Morgan Stanley's April 8 designation of Mr. Fasman's testimony comes too late.

Depositions of Howard Gittis, Ronald Perelman (November 17-18, 2004), Tarek Abdel-Meguid, Robert Scott, William Strong, Joseph Perella, and John Tyree

Before April 8, Morgan Stanley's only designations for Messrs. Gittis, Perelman, Abdel-Meguid, Scott, Strong, Perella, and Tyree were counter-designations to the designations made by CPH on December 20, and all of those counter-designations were vetted by the Court last month. Morgan Stanley never designated from the depositions of the foregoing witnesses for its own case until April 8, 2005 — three and half months after the December 20, 2004 deadline. Morgan Stanley's new designations are barred.

Deposition of Jerry Levin

Morgan Stanley never designated from Mr. Levin's deposition until April 8, three and one-half months late. Moreover, Mr. Levin resides in Florida, and is subject of this Court's subpoena power. The designations are barred on both grounds.

Deposition of Paul Shapiro

Morgan Stanley originally designated from Mr. Shapiro's deposition on December 20, 2004, but during the mandatory meet-and-confer process, Morgan Stanley abandoned its designations presumably because Morgan Stanley had served a trial subpoena on Mr. Shapiro, who lives in Florida. Further, Morgan Stanley identified Mr. Shapiro as a "live" witness on its April 4, 2005 Revised Witness Disclosure. *See* Ex. I at 12. Morgan Stanley's April 8 designations therefore are untimely and improper in light of the fact that Mr. Shapiro is a Florida resident and has been served with a subpoena.

Depositions of Bruce Slovin and Robert Duffy

This Court already had ruled on all Morgan Stanley's designations and counter-designations for Messrs. Slovin and Duffy. Morgan Stanley's April 8 designations, however, seek to expand the designations to include extensive new testimony. Indeed, Morgan Stanley has gone so far as to designate testimony for Mr. Slovin that this Court specifically excluded at last month's deposition designation argument. *See, e.g.,* Ex. G at 91-93 (testifying about Mr. Perelman's wealth); *see also* Ex. H, Tr. 2858-60 (Court's exclusion of the testimony). This testimony, and all of the testimony newly designated on April 8, is barred.

Depositions of Karen Clark, Donald Drapkin, and Joseph Page

Although Morgan Stanley designated from these depositions in accordance with the Court's Scheduling Order, on April 8, Morgan Stanley added new designations. Those new designations are barred.

Depositions of James Maher and William Nesbitt

Morgan Stanley abandoned its designations for Messrs. Maher and Nesbitt during the meet-and-confer process that commenced in February because CPH advised Morgan Stanley that CPH would be calling these witnesses live. Morgan Stanley's April 8 designations are both inappropriate and untimely.

Deposition of Barry Schwartz

Morgan Stanley abandoned its designations for Mr. Schwartz last month when CPH accepted service of a trial subpoena on behalf of Mr. Schwartz. Moreover, in the witness disclosure that Morgan Stanley served on April 4, 2005, Morgan Stanley designated Mr. Schwartz as a live trial witness. *See* Ex. I at 11. Morgan Stanley's attempt to designate deposition testimony of Mr. Schwartz four days later on April 8 is improper.

Deposition of Donald Denkhaus

Morgan Stanley never designated from Mr. Denkhaus' deposition until April 8. He also is a Florida resident who has been served with a trial subpoena. The April 8 designations therefore are improper.

2. Morgan Stanley's Designations Of Witnesses As "Live And/Or By Deposition" Also Are Improper.

In its April 4 revised trial witness disclosures, Morgan Stanley in many instances refused to identify definitively whether its witnesses will be appearing live or appearing through deposition designations — instead asserting that the witnesses will appear "live and/or by

deposition." *See* Ex. I (disclosures for Howard Gittis, James Maher, William Nesbitt, Ronald Perelman, Barry Schwartz, Todd Slotkin, Lawrence Winoker, Joseph D'Auria, Donald Denkhaus, Tarek Abdel-Meguid, Joseph Perella, William Strong, and John Tyree). Morgan Stanley has made this noncommittal disclosure, even though one of the witnesses (Donald Denkhaus) is a Florida resident who is under subpoena to appear at trial, and even though a number of the witnesses (Messrs. Abdel-Meguid, Perella, Strong, and Tyree) are Morgan Stanley's own employees.

Morgan Stanley's fudging on this issue is improper. At this late stage of the litigation, CPH should not be burdened with the time-consuming process of counter-designating from depositions if it is Morgan Stanley's intent to call these witnesses live. Also, Morgan Stanley should not burden the Court with arguments about deposition designations that may never be used at the trial. Morgan Stanley therefore should be required to disclose definitively whether its witnesses will be appearing live or through their deposition testimony.

3. CPH Should Not Have To Counter-Designate With Respect To The Deposition Designations Made For Purposes Of Morgan Stanley's Offer Of Proof.

It would appear that some of Morgan Stanley's deposition designations may have been made solely for purposes of offers of proof. CPH has written Morgan Stanley asking whether that is the case and Morgan Stanley's response was unclear. Assuming that some designations are intended for offers of proof, at this late stage of the litigation, CPH should not be burdened with the time-consuming process of counter-designating from depositions where the only use of the depositions would be as part of an offer of proof. Morgan Stanley therefore should be required to identify which deposition it intends to utilize solely as part of its offer of proof.

Conclusion

CPH requests that the Court bar Morgan Stanley's April 8 designations. CPH further requests that Morgan Stanley be required to disclose which witnesses will be presented by deposition designations as opposed to live witnesses. Finally, CPH requests that Morgan Stanley be required to identify which of its deposition designations it intends to use solely as part of its offer of proof.

Dated: April 11, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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Ronald L. Marmer
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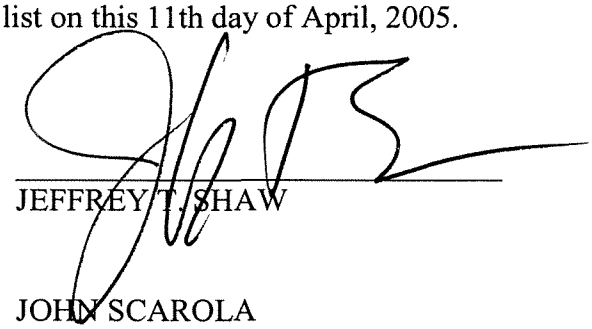
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 11th day of April, 2005.



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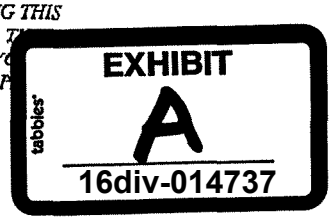

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April 8, 2005

Via Facsimile and Hand Delivery

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777 S. Flagler Drive
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West Palm Beach, FL 33401

Re: Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. Incorporated, Case No. CA 03-5045 AI

Dear Mike:

Attached are Morgan Stanley's designations for the depositions of Steven Fasman, Howard Gittis, James Maher, William Nesbitt, Ron Perelman, Todd Slotkin and Lawrence Winoker.

Very truly yours,

Rebecca Beynon /STMR

Rebecca Beynon

cc: Joseph Ianno, Esq.
Jack Scarola, Esq.
Jerold Solovy, Esq.

DEFENDANT'S DEPOSITION DESIGNATIONS OF STEVEN L. FASMAN
Date of deposition: January 21, 2004

Begin Page:Line	End Page:Line
4:08	4:12
26:06	26:07
26:12	27:03
35:22	36:13
37:15	37:24
38:08	38:11
41:20	41:22
42:03	42:21
48:19	48:24
49:03	51:02
60:09	60:25
61:21	62:06
62:21	62:25
63:06	63:09
68:08	68:10
68:12	69:19
71:08	71:20
72:02	73:03
74:09	74:14
74:20	76:17
76:20	76:22
77:15	77:22
78:08	79:18
80:20	81:17
81:19	81:23
82:09	82:12
93:20	94:15
98:06	98:16
99:03	99:04
99:07	99:09
99:23	100:11
100:22	101:07
105:12	105:16
108:13	108:15
108:19	108:25
112:06	112:07
112:10	112:11
112:13	113:05
114:06	114:10
114:16	114:25
115:05	115:05

DEFENDANT'S DEPOSITION DESIGNATIONS OF STEVEN L. FASMAN
Date of deposition: January 21, 2004

Begin Page:Line	End Page:Line
115:21	117:6
118:09	118:15
118:24	121:16
121:20	123:06
124:19	124:23
125:16	125:25
129:02	129:15
130:15	130:18
130:22	130:24
131:15	132:03
132:06	132:21
133:07	133:11
133:21	133:25
156:04	156:09
156:12	157:09
157:12	157:19
163:17	163:21
165:02	165:08
166:07	168:21
168:22	169:25

Dated: **April 8, 2005**

DEFENDANT'S DEPOSITION DESIGNATIONS OF STEVEN L. FASMAN
Date of deposition: September 15, 2003

Begin Page:Line	End Page:Line
5:08	5:08
7:06	7:08
12:15	13:20
21:04	21:10
21:21	22:06
25:22	26:09
26:15	26:18
32:17	33:16
36:07	36:11
36:15	36:16
36:19	37:01
39:17	39:20
48:21	50:04
52:09	52:11
54:04	54:08
54:11	54:18
55:19	56:09
60:09	60:16
60:21	61:05
62:13	62:18
63:08	64:10
68:20	69:07
70:13	71:01
84:12	84:18
85:02	85:14
96:05	96:12
99:05	99:08
102:2	102:13
107:3	107:18
108:6	108:10
108:15	109:4
125:19	126:09
126:20	127:01
127:19	127:22
130:15	131:3
138:15	138:18
139:1	140:18
142:17	143:15
145:17	146:02
147:10	147:14
153:14	154:04

DEFENDANT'S DEPOSITION DESIGNATIONS OF STEVEN L. FASMAN
Date of deposition: September 15, 2003

Begin Page:Line	End Page:Line
155:06	155:09
156:01	156:18
160:17	160:20
161:14	161:15
161:17	162:02
166:01	166:05
167:20	168:07
180:21	181:16

Dated: **April 8, 2005**

DEFENDANT'S DEPOSITION DESIGNATIONS OF HOWARD GITTIS
Date of deposition: November 19, 2004

Additions:

Begin Page:Line	End Page:Line
4:2	8
5:20	23
6:12	8
13:14	14:10
15:5	15:8
15:16	19:3
19:7	20:24
21:6	22:6
22:22	23:9
24:18	24:21
25:4	25:7
29:4	29:8
29:20	30:2
33:10	33:21
35:20	36:1
39:12	39:15
41:25	42:5
43:20	43:22
44:8	44:19
44:23	45:4
46:11	46:15
61:10	61:13
61:16	63:10
64:19	65:5
65:22	67:1
67:6	67:13
68:2	69:3
74:23	80:12
82:1	83:20
85:20	86:16
89:8	89:15
89:18	89:24
90:8	90:14
94:1	94:9
95:2	95:9
96:21	98:10
104:6	104:15
105:5	105:10
110:4	111:3

DEFENDANT'S DEPOSITION DESIGNATIONS OF HOWARD GITTIS
Date of deposition: November 19, 2004

Begin Page:Line	End Page:Line
116:2	116:14
124:23	125:16
125:25	126:6
127:20	127:22
127:25	128:4
128:11	128:14
131:21	132:1
159:15	159:19
162:10	163:6
170:12	170:21
191:3	191:19

Dated: **April 8, 2004**

DEFENDANT'S DEPOSITION DESIGNATIONS OF JAMES MAHER
Date of deposition: November 2, 2004

Begin Page:Line	End Page:Line
5:22	6:24
6:1	6:13
6:18	7:4
7:10	8:5
8:16	9:11
16:11	20:16
20:17	22:14
23:25	24:17
26:18	26:21
26:24	28:13
28:15	28:17
28:20	30:12
30:23	31:19
32:1	34:15
35:7	39:15
39:20	45:2
46:12	49:21
49:23	51:22
52:18	56:21
57:10	59:2
60:16	60:24
61:2	62:21
63:12	63:18
63:22	64:5
64:13	64:16
64:20	65:7
65:10	65:21
66:9	67:2
67:16	69:7
73:2	74:18
74:19	75:1
75:4	76:9
98:17	102:4
102:15	107:8
107:15	107:20
113:12	114:2
119:6	120:2
120:21	122:6
122:19	123:12
124:3	124:24
126:11	127:7
121:8	127:13

DEFENDANT'S DEPOSITION DESIGNATIONS OF JAMES MAHER
Date of deposition: November 2, 2004

Begin Page:Line	End Page:Line
127:19	129:6
129:15	130:11
137:2	137:20
137:23	139:21
139:23	140:12
141:7	144:2
150:2	151:3
151:12	151:19
160:12	161:1
161:10	161:23
162:1	162:13
163:13	164:20
164:24	165:20
166:25	168:17
169:4	169:25
171:4	171:20
171:23	173:8
187:18	188:16
189:1	189:6
189:8	189:25
191:11	191:16
192:11	193:7
193:9	193:15
194:6	195:5
195:10	196:10
196:25	197:19
197:25	198:22
199:4	200:3
200:22	201:12
203:20	204:25
207:5	208:3
211:24	212:8

Dated: **April 8, 2005**

DEFENDANT'S DEPOSITION DESIGNATIONS OF JAMES MAHER
Date of deposition: November 3, 2004

Begin Page:Line	End Page:Line
219:10	220:20
221:1	222:6
222:15	223:12
230:5	230:25
229:2	230:25
231:14	233:14
233:19	235:6
235:24	236:4
236:7	239:13
240:7	240:18
241:3	241:18
242:6	244:20
245:3	246:2
249:15	251:1
252:12	253:14
254:10	254:25
255:24	257:16
260:4	264:4
272:2	272:16
273:10	273:16
280:7	283:12
283:23	285:16
285:22	286:6
289:1	291:3
291:11	291:19
294:6	295:13
295:24	296:16
297:8	298:6
299:10	302:1
302:4	302:23
302:25	304:3
319:8	319:21
319:24	325:1
327:9	329:13
330:12	330:18
331:2	331:8
331:21	333:2
333:7	333:16
334:24	335:24
336:10	336:11
338:5	338:13
338:19	339:1

DEFENDANT'S DEPOSITION DESIGNATIONS OF JAMES MAHER
Date of deposition: November 3, 2004

Begin Page:Line	End Page:Line
341:2	341:8
341:16	343:11
343:16	344:16
345:18	346:5
346:14	348:16
348:20	349:9
349:22	351:2
356:20	360:7
366:23	368:14
368:25	369:21
370:9	371:13
372:7	373:15
374:19	375:2
375:5	375:12
378:6	378:17
380:10	381:13
382:22	383:1
383:19	385:18
387:3	387:9
387:15	388:4
389:18	390:4
390:11	390:11
391:17	393:23
394:3	394:7
400:15	400:24
401:12	402:18
403:10	406:20
407:11	408:20
416:5	416:13
418:10	420:10
420:13	420:23
421:9	421:14

Dated: **April 8, 2005**

DEFENDANT'S DEPOSITION DESIGNATIONS OF WILLIAM NESBITT
Date of deposition: August 31, 2004

Deletions:

Begin Page:Line	End Page:Line
9:9	9:16
9:23	10:7
20:12	20:19
20:24	22:24
23:7	23:23
25:6	26:2
30:5	30:19
30:23	31:1
31:15	31:20
34:18	35:7
40:12	40:24
46:18	48:12
51:17	51:20
69:17	70:11
72:13	73:7
75:19	76:2
76:22	77:18
78:4	78:22
87:8	88:17
90:19	90:25
108:1	108:24
123:6	123:12
124:3	124:11
131:2	131:16
132:4	132:11
132:22	134:4
140:12	141:2
151:2	152:9
153:6	153:11
163:6	163:18
164:5	166:3
179:12	180:19

Addition:

Begin Page:Line	End Page:Line
224:6	224:10

Dated: **April 8, 2005**

DEFENDANT'S DEPOSITION DESIGNATIONS OF WILLIAM NESBITT
Date of deposition: September 1, 2004

Deletions:

Begin Page:Line	End Page:Line
266:20	266:25
275:15	275:25
282:5	282:12
291:15	292:7
294:23	295:3
295:24	296:5
296:8	296:14
296:25	298:10
298:16	299:3
305:9	306:8
307:16	308:7
326:20	326:24
341:25	342:12
347:23	349:8
350:13	351:6
351:22	352:13
359:1	360:11
360:17	360:24
366:6	366:16
369:11	370:8
371:5	371:7
374:10	375:11
380:20	380:24
382:1	382:25
383:19	384:23
405:16	405:20
406:3	406:8
406:13	407:18
470:20	471:21
478:21	479:6
479:11	480:11
482:1	482:7

Dated: **April 8, 2005**

DEFENDANT'S DEPOSITION DESIGNATION OF RONALD O. PERELMAN
Date of deposition: November 17, 2004

Begin Page:Line	End Page:Line
6:10	6:20
6:23	7:5
7:16	7:24
8:14	9:11
10:11	10:19
10:24	11:1
12:14	12:24
15:16	16:9
16:19	17:7
21:9	22:3
22:21	23:1
23:21	23:25
24:20	24:22
25:5	25:7
25:12	25:14
25:22	25:23
26:3	26:8
26:13	27:2
27:15	28:10
28:15	28:18
28:25	29:12
31:11	31:12
32:11	32:13
32:21	32:23
34:25	35:19
36:6	36:12
36:23	37:2
37:16	37:18
37:23	38:12
38:18	39:21
41:6	41:18
42:19	43:12
45:24	46:2
46:16	47:6
47:9	47:13
47:21	48:1
48:4	48:8
48:18	48:21
49:2	49:10
49:15	49:20
49:25 (starting with "Have you")	50:17
50:21	51:5

DEFENDANT'S DEPOSITION DESIGNATIONS OF RONALD O. PERELMAN
Date of deposition: November 17, 2004

Begin Page:Line	End Page:Line
51:9	51:12
52:24	53:3
53:8	
53:13	53:19
55:16	55:20
56:3	56:8
57:4	57:22
59:9	59:21
60:6	60:9
62:23	63:5
68:7	68:18
68:22	69:1
74:8	74:16
75:19	75:25
77:7	77:10
78:3	79:1
80:4	80:9
80:24	81:8
82:10	83:23
88:22	89:6
89:12	89:17
93:5	93:8
93:19	94:3
94:8	94:15
95:3	95:15
96:15	97:18
98:3	98:8
102:20	102:25
103:21	104:15
108:5	108:21
114:3	114:19
115:1	115:13
116:11	116:19
119:16	119:22
121:4	121:8
123:1	124:4
124:12	126:1
128:9	128:11
128:22	129:3
130:15	131:10
134:16	135:7
139:15	139:24
140:2	140:3

DEFENDANT'S DEPOSITION DESIGNATIONS OF RONALD O. PERELMAN
Date of deposition: November 17, 2004

Begin Page:Line	End Page:Line
140:13 (starting at "tell")	140:16
141:4	141:16
155:5	155:12
155:19	155:25
156:3	156:16
168:17	168:23
177:8	177:14
181:8	181:15
181:21	181:23
182:10	182:11
182:16	182:23
183:9	183:13
183:23	184:7
184:10	184:16
184:21	184:23
185:14	185:24
192:4	192:9
193:10	193:19
194:8	194:13
199:10	199:23
201:1	201:11
206:9	206:25
224:20	224:23
227:8	227:18
229:1	229:5
229:18	230:3
230:16	231:15
232:2	232:11
233:3	233:12
233:18	234:1
234:23	235:2
235:5	235:11
235:21	236:6
236:11	236:17
236:21	237:3
237:9	237:18
238:1	238:8
238:14	
239:8	239:21
242:25	243:9
243:21	243:23
244:1	244:4
244:16	244:24

DEFENDANT'S DEPOSITION DESIGNATIONS OF RONALD O. PERELMAN
Date of deposition: November 17, 2004

Begin Page:Line	End Page:Line
245:7	245:25
246:20	247:9
247:19	247:23
248:6	248:15
249:15	250:4
253:7	254:6
259:9 (starting with "Let's go")	259:16
260:1	261:23
292:8	292:14
293:1	293:8
293:19	294:1
295:6	295:11
295:21	296:2
299:18	299:24
301:19	301:23
302:1	302:3
307:9	307:14
307:25	308:3
308:6	
308:8	308:14
311:13	311:19

Dated: **April 8, 2005**

DEFENDANT'S DEPOSITION DESIGNATIONS OF RONALD O. PERELMAN
Date of deposition: November 18, 2004

Begin Page:Line	End Page:Line
331:10	331:13
334:12	334:17
334:20	335:1
335:6	335:11
335:18	335:22
337:2	337:15
338:18	338:25
340:21	340:24
341:16	342:7
348:24	349:4
349:22	350:3
351:25	352:6
352:15	353:23
354:4	354:8
356:8	356:10
359:9	359:14
361:1	361:6
361:25	362:6
363:3	363:18
363:23	364:5
366:10	366:18
376:16	377:1
377:4	377:7
379:9	379:17
382:19	383:1
384:10	385:5
386:14	387:17
390:9	390:25
391:8	391:13
391:16	
391:19	392:11
393:13	393:21
393:24	394:8
395:17	395:25
396:14	396:24
401:12	401:19
404:25	405:7
405:14	406:9
408:22	409:8
412:15	412:20
422:9	422:14

DEFENDANT'S DEPOSITION DESIGNATIONS OF RONALD O. PERELMAN
Date of deposition: November 18, 2004

Begin Page:Line	End Page:Line
422:17	422:22
423:1	423:6
423:11	423:16
427:12	427:9
430:4	430:12
432:1	432:3
432:8	432:12
443:17	443:21
446:20	447:5
448:3	448:11
449:16	449:21
457:8	457:14
463:18	463:25
465:21	466:5
468:24	469:19
470:10	470:15
475:13	475:23
476:17	477:11
477:22	478:6
482:21	482:23
497:22	498:12
499:9	499:12
499:15	
499:17	500:1
500:5	501:2
501:4	501:18
504:20	505:8
505:17	506:1
508:23	508:1
513:7	513:9
514:9	515:5
518:24	519:22
519:25	520:16
521:24	522:5
524:21	525:3
526:8	527:14
529:11	529:18
530:7	530:12
531:1	531:19

Dated: **April 8, 2005**

DEFENDANT'S DEPOSITION DESIGNATION OF RONALD O. PERELMAN
Date of deposition: March 10, 2005

Begin Page:Line	End Page:Line
7:8	7:10
7:12	7:15
14:20	14:22
25:22 (starting at "did")	25:24
26:13	26:16
28:11	28:17
30:3 (starting at "What")	30:6
30:8	30:23
32:4 (starting at "The")	32:11
32;17	33:3
34:9 (starting at "Please")	34:15
37:13	37:19
41:3	42:3
43:5	43:7
44:9	44:11
44:18 (starting at "Is")	44:21
45:5	45:9
47:3	47:15
48:13	49:13
49:23 (starting at "When")	50:6
50:22	51:2
51:18	51:21
52:23	53:15
53:17	53:19
56:19 (starting at "Looking")	57:9
57:18	58:12
60:22	61:2
61:4	
61:6	61:14
61:21	62:2
62:12	62:20
63:7	63:13
63:22	64:6
77:11	77:14
77:16	77:17
77:19	78:3
81:11	81:21
82:17	82:20
83:4	

Dated: **April 8, 2005**

DEFENDANT'S DEPOSITION DESIGNATIONS OF TODD J. SLOTKIN
Date of deposition: July 7, 2004

Deletions:

Begin Page:Line	End Page:Line
14:9	14:13
29:5	29:11
152:21	155:15
157:5	158:13
174:16	175:8
182:3	183:8
184:4	184:11
185:20	185:25
186:20	187:7
188:1	188:3
188:10	188:12
188:19	189:5
189:24	190:16
190:20	191:21
192:8	192:11
192:25	193:2
193:11	193:15
193:24	194:7
194:14	194:19
197:20	198:16
199:9	200:4
206:15	206:23
208:18	208:21

Dated: **April 8, 2005**

DEFENDANT'S DEPOSITION DESIGNATION OF TODD SLOTKIN
Date of deposition: March 3, 2005

Begin Page:Line	End Page:Line
4:13 (starting with "This is"	4:16
5:16 (starting with "Has your")	6:7
6:20 (starting with "What were")	7:1
7:23	8:21
9:1	9:9
9:17	9:20
10:1	10:14
20:22	21:7
21:23	22:12
23:4	23:21
37:23 (starting with "You are")	38:8
45:19	46:25
47:2	47:20
58:3 (starting with "Before")	58:7
59:20	60:7
61:17	61:18
61:23	62:6
63:12	63:23
64:1	64:21
70:7	70:15
71:2	71:4
73:5	75:13
75:23	77:19
80:9	80:13
80:18	81:1
81:12	81:19
84:22	85:20
86:2	86:5
87:11	89:10
93:6 (starting with "But at least")	94:3
97:18	97:24
98:8	98:16
98:23	99:1
99:20	99:24
101:4 (starting with "Mr. Winoker,")	101:8
105:14 (starting with "Estimated")	105:25
106:2	106:4
108:20	109:23
110:19 (starting with "let me")	111:3
113:1	113:8

DEFENDANT'S DEPOSITION DESIGNATION OF TODD SLOTKIN
Date of deposition: March 3, 2005

Begin Page:Line	End Page:Line
113:18	116:2
116:12	117:20
120:20	121:14
123:13	124:17
124:22	125:6
127:5	127:8
129:21 (starting with "You gave")	130:2
134:5	134:19
135:10	135:15
138:20	139:9

Dated: **April 8, 2005**

DEFENDANT'S DEPOSITION DESIGNATIONS OF TODD SLOTKIN
Date of deposition: March 4, 2005

Begin Page:Line	End Page:Line
148:13	148:15
152:21	153:10
155:18	158:12
159:4	160:8
160:23	161:4
161:11	162:7
162:21	164:13
165:14	166:2
166:23	167:16
169:19	170:10
180:25	181:2
181:15	181:20
182:18	184:1
187:18	187:20
188:1 (starting with "About midway")	188:13
188:21	189:5
189:14	189:20
195:10	195:15
195:20	199:14
199:19	200:14
211:3	211:12
211:18	211:18
221:20	221:24
222:2	222:2
244:2	244:7
245:19	247:2
247:6	247:7
247:10	247:11
253:12	255:1
267:18	267:25
268:4	268:6
268:11	268:17
268:20	268:22
269:7	269:15
269:19	269:19
270:9	270:12
272:7	272:11
277:22	278:10
279:9	279:14

DEFENDANT'S DEPOSITION DESIGNATIONS OF TODD SLOTKIN
Date of deposition: March 4, 2005

Begin Page:Line	End Page:Line
279:16	279:20
279:22	279:23
280:2	280:16

Dated: **April 8, 2005**

DEFENDANT'S DEPOSITION DESIGNATIONS OF LAURENCE WINOKER
Date of deposition: November 18, 2004

Begin Page:Line	End Page:Line
5:7	5:10
5:13	5:20
6:2	6:10
11:9	11:11
11:14	11:24
14:12	14:23
15:5	18:3
18:6	18:20
19:2	19:5
19:8	21:14
21:25	22:22
25:18	25:21
25:23	27:4
27:6	27:20
28:23	29:22
39:14	39:21
44:9	44:16
45:22	45:23
45:25	46:5
46:11	47:10
49:9	50:16
51:2	51:17
51:20	52:4
54:10	54:19
55:5	55:25
73:18	73:21

Dated: **April 8, 2005**

DEFENDANT'S DEPOSITION DESIGNATIONS OF LAURENCE WINOKER
Date of deposition: March 8, 2005

Begin Page: Line	End Page: Line
4:14	4:16
5:22	6:7
39:19	39:24
40:11	41:10
65:1	65:6
74:20	75:4
85:16	85:19
87:11	88:15
89:12	90:13
92:14	92:25
96:15	97:17
98:11	98:25
100:15	101:12
101:20	102:9
109:3	109:23
111:16	111:22
120:3	120:14
120:16	120:20
120:22	121:7
121:10	121:14
122:6	122:15
123:21	124:24
125:25	
126:11	126:13
126:19	128:4
140:3	140:15
141:4	142:8
143:19	144:6
145:10	145:20
146:2	146:8

Dated: **April 8, 2005**

KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
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FACSIMILE TRANSMISSION

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FROM:	Rebecca Beynon	**CLIENT NO.:**	04123
PHONE:	561-651-1212		
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Very truly yours,

Rebecca Beynon

cc: Joseph Ianno, Esq.
Jack Scarola, Esq.
Jerold Solovy, Esq.

PHASE II DEPOSITION DESIGNATIONS OF TAREK ABDEL-MEGUID

Deposition Date: December 14, 2004

Defendant's Affirmative Designations Start	Defendant's Affirmative Designations End
5:20	6:9
7:16	9:24
11:6	11:14
12:12	12:25
14:5	14:9
18:22	21:5
22:2	22:21
22:24	23:20
24:14	24:22
32:24	34:8
34:20	35:4
35:6	35:11
41:10	41:13
42:6	42:16
43:23	45:15
46:4	46:9
51:17	51:19
51:22	52:3
53:12	53:20
57:16	58:20
61:5	63:20
63:23	64:10
65:12	66:7
69:3	70:8
71:10	72:16
75:21	75:24
76:23	79:5

Dated: **April 8, 2005**

PHASE II DEPOSITION DESIGNATIONS OF TAREK ABDEL-MEGUID
Deposition Date: December 14, 2004

Plaintiffs' Start – Page:Line	Plaintiffs' End – Page:Line	Defendant's Objections	Defendants Counter-designations Start – Page:Line	Defendants Counter-designations End – Page:Line
5:4	5:5			
5:20	5:25			
6:4	6:9		6:1	6:3
8:16	8:21		7:16	8:15
			8:22	9:24
12:12	13:1		11:6	11:14
13:11	13:14			
14:5	14:9			
18:22	18:25		19:1	21:5
24:14	25:6		22:2	23:20
28:12	29:4	Improper, calls for speculation, improper hypothetical to lay person		
			32:24	34:8
			34:20	35:4
36:4	36:12		35:6	35:11
36:24	37:6	37: 5-6: No foundation, no personal knowledge		
37:10	37:20	No foundation, no personal knowledge		
37:24	38:3	No foundation, no personal knowledge		
38:13	39:10	38:13- 39:7: No foundation, no personal knowledge		
39:12	39:21		39:22	40:3
40:4	40:24		41:10	41:13
			42:6	42:16
			43:23	45:15
			46:4	46:9
			51:17	51:19
			51:22	52:3

16div-014768

PHASE II DEPOSITION DESIGNATIONS OF TAREK ABDEL-MEGUID
Deposition Date: December 14, 2004

Plaintiffs' Start – Page:Line	Plaintiffs' End – Page:Line	Defendant's Objections	Defendants Counter-designations Start – Page:Line	Defendants Counter-designations End – Page:Line
			53:12	53:20
58:21	60:9	59:23-60:9: Hearsay; lack of personal knowledge; propensity; improper character evidence	57:16	58:20
60:22	61:17		61:18	61:21
61:22	62:3		62:4	63:20
			63:23	64:7
			64:9	64:10
			65:12	66:7
67:1	69:2		69:3	70:8
			71:10	72:16
			75:21	75:23
			76:23	79:5

Dated: **April 8, 2005**

PHASE II DEPOSITION DESIGNATIONS OF KAREN C. CLARK

Date of deposition: October 8, 2004

Defendant's Affirmative Begin Page:Line	Defendant's Affirmative End Page:Line
7:16	7:20
8:18	9:4
9:23	10:12
10:19	10:23
11:1	11:2
41:10	41:23
42:10	42:19
52:25	53:18
54:2	54:12
55:10	55:25
59:7	60:7
60:20	61:1
62:5	62:25
64:22	65:18
67:11	67:15
67:19	67:23
70:18	71:9
71:21	72:1
112:16	113:16
114:2	114:11

Dated: **April 8, 2005**

PHASE II DEPOSITION DESIGNATIONS OF JOSEPH D'AURIA

Date of deposition: February 7, 2005

Defendant's Affirmative Begin Page:Line	Defendant's Affirmative End Page:Line
5:20	6:6
43:17	45:19
53:13	53:21
54:14	55:6
61:7	61:24
62:11	62:23
63:9	63:16
64:4	64:21
64:25	66:19
72:25	73:6
73:22	74:6
98:17	98:24
99:16	100:1
103:6	104:9
104:12	105:8
105:13	109:9
109:23	111:2
112:21	115:9
116:6	116:12
116:15	117:15
148:9	152:9
155:15	155:25
156:8	156:15
157:16	157:20
158:8	159:14
159:17	159:24
160:23	161:5
161:8	162:5
162:9	162:18
162:21	163:12
163:16	164:5
178:15	179:3
179:15	179:17
180:5	181:7
181:9	181:25
182:6	182:19
182:24	183:7
183:20	183:21
184:3	184:11
184:19	184:23
184:25	184:25
185:11	185:15
185:21	186:2

Dated: **April 8, 2005**

PHASE II DEPOSITION DESIGNATIONS OF DONALD G. DRAPKIN
Date of deposition: June 24, 2004

Begin Page:Line	End Page:Line
5:18	5:22
7:17	8:2
16:19	17:22
22:4	23:2
32:12	33:12
34:18	35:9
40:18	40:19
40:23	43:5
51:9	51:25
53:15	54:15
59:7	60:4
62:10	63:23
96:1	98:11
102:11	103:23
105:1	106:2
112:3	113:3
115:21	122:2
123:7	125:5
127:15	132:19
134:14	135:17
136:21	137:8
171:2	171:18
176:24	177:6
181:13	184:2

Dated: **April 8, 2005**

PHASE II DEPOSITION DESIGNATIONS OF ROBERT DUFFY
Date of deposition: July 8, 2004

Defendant's Affirmative Begin Page:Line	Defendant's Affirmative End Page:Line
6:16	7:1
24:2	24:14
26:18	27:3
42:11	43:14
45:17	46:1
50:11	52:6
58:21	59:1
74:25	75:16
173:21	176:19
218:12	219:10
232:16	233:10
253:4	253:24

Dated: **April 8, 2005**

PHASE II DEPOSITION DESIGNATIONS OF ADAM O. EMMERICH
Date of deposition: September 28, 2004

Defendant's Affirmative Begin Page:Line	Defendant's Affirmative End Page:Line
7:21	7:24
30:17	31:4

Dated: **April 8, 2005**

PHASE II DEPOSITION DESIGNATIONS OF IRWIN ENGELMAN
Date of deposition: August 4, 2004

Defendant's Affirmative Begin Page:Line	Defendant's Affirmative End Page:Line
5:3	5:11
25:10	26:9
29:22	31:1
37:16	38:2
41:23	42:14
59:14	60:11
61:15	62:9
63:13	65:3
66:21	67:18
71:1	71:8
73:13	74:12
75:21	77:22
78:8	81:2
82:21	83:11
85:22	86:3
86:16	86:23
98:15	100:24
103:22	104:10

Dated: **April 8, 2005**

PHASE II DEPOSITION DESIGNATIONS OF HOWARD GITTIS
Date of deposition: November 19, 2004

Defendant's Affirmative Begin Page:Line	Defendant's Affirmative End Page:Line
5:20	5:23
6:5	6:6
6:14	7:21
14:8	15:8
15:16	16:3
18:11	18:23
25:1	25:12
111:7	111:21
114:7	114:15
115:1	115:12
196:25	197:9

Dated: **April 8, 2005**

PHASE II DEPOSITION DESIGNATIONS OF JERRY W. LEVIN
Date of deposition: December 1, 2004

Defendant's Affirmative Begin Page:Line	Defendant's Affirmative End Page:Line
5:10	5:23
7:12	7:24
8:4	8:16
9:2	9:6
17:23	18:9
19:21	20:22
24:3	24:23
131:16	133:2
133:21	134:21
135:1	135:24
136:15	137:7

Dated: **April 8, 2005**

PHASE II DEPOSITION DESIGNATIONS OF JERRY W. LEVIN
Date of deposition: December 2, 2004

Defendant's Affirmative Begin Page:Line	Defendant's Affirmative End Page:Line
389:17	391:12
393:5	394:10
396:25	397:13
398:11	398:20
399:3	399:7
399:16	400:12
402:1	402:5
404:10	405:8
405:11	406:2
406:12	406:25
408:18	410:13
411:2	411:7
411:10	

Dated: **April 8, 2005**

PHASE II DEPOSITION DESIGNATIONS OF JAMES MAHER
Date of deposition: November 2, 2004

Defendant's Affirmative Begin Page:Line	Defendant's Affirmative End Page:Line
6:2	6:5
18:5	19:5
21:5	21:8
23:11	23:14
23:22	24:9
32:1	38:17

Dated: **April 8, 2005**

PHASE II DEPOSITION DESIGNATIONS OF WILLIAM G. NESBITT
Date of deposition: August 31, 2004

Defendant's Affirmative Begin Page:Line	Defendant's Affirmative End Page:Line
6:13	6:15
11:12	12:5
13:8	13:25
49:12	49:21
50:9	50:19
50:23	
50:25	51:12
60:14	62:8
66:6	66:11
142:13	143:12

Dated: **April 8, 2005**

PHASE II DEPOSITION DESIGNATIONS OF WILLIAM G. NESBITT II
Date of deposition: September 1, 2004

Defendant's Affirmative Begin Page:Line	Defendant's Affirmative End Page:Line
438:20	439:4
440:19	441:8
443:13	444:3
470:20	471:1

Dated: **April 8, 2005**

PHASE II DEPOSITION DESIGNATIONS OF JOSEPH P. PAGE
Date of deposition: April 27, 2004

Defendant's Affirmative Begin Page:Line	Defendant's Affirmative End Page:Line
11:14	11:16
23:22	24:5
24:8	24:10
26:10	26:20
30:9	31:16
38:4	38:23
39:23	40:19
41:21	43:3
43:16	43:19
43:22	
48:7	48:13
50:10	51:6
51:14	51:16
55:10	56:11
70:22	71:10
98:24	101:17
116:6	116:10
116:21	117:17
117:22	118:1
121:9	121:21
123:1	123:6
123:8	123:11
125:21	125:24
127:9	127:12
127:14	
128:11	128:13
129:4	129:6
129:8	
129:15	129:16
130:1	130:14
130:18	130:20
130:23	
130:25	131:1
131:4	131:12
148:14	148:15
148:17	
149:23	150:6
150:13	150:17
153:8	153:20
160:23	162:6
197:17	192:19

PHASE II DEPOSITION DESIGNATIONS OF JOSEPH P. PAGE
Date of deposition: April 27, 2004

Defendant's Affirmative Begin Page:Line	Defendant's Affirmative End Page:Line
197:21	
197:23	198:1
198:3	
213:14	214:9
215:16	215:21
251:6	252:16
252:18	
252:20	252:21
252:23	
252:25	
253:4	253:19
254:7	254:17
264:23	264:25
265:2	
265:4	265:10
265:12	
265:14	265:20
265:22	
265:24	266:2

Dated: **April 8, 2005**

PHASE II DEPOSITION DESIGNATIONS OF JOSEPH R. PERELLA
Deposition Date: February 8, 2004

Defendant's Affirmative Designations

Defendant's Start Line:Page	Defendant's End Line:Page
5:25	6:6
6:10	6:23
7:5	7:7
8:8	9:17
12:14	12:21
14:6	14:11
21:3	22:8
24:13	25:16
26:23	26:25
27:6	27:25
28:9	30:5
33:10	33:20
34:7	34:25
35:10	36:13
37:20	38:9
49:9	50:1
50:12	50:17
50:21	
55:4	56:1
75:16	75:23
77:6	77:10
77:14	78:1
93:10	93:14
93:19	96:22
97:23	99:17
99:20	99:25

PHASE II DEPOSITION DESIGNATIONS OF JOSEPH R. PERELLA
Deposition Date: February 8, 2004

Plaintiff's Start – Page:Line	Plaintiff's End – Page:Line	Defendant's Objection	Defendant's Counter Start Page:Line	Defendant's Counter End Page:Line
5:25	6:05		6:13	6:14
6:10	6:12		8:8	9:17
6:15	6:23			
7:05	7:07			
12:14	12:21		14:6	14:11
			21:3	22:8
			24:13	25:16
			26:23	26:25
33:10	33:20		27:6	27:25
			28:9	30:5
			34:7	34:25
			35:10	36:13
37:20	38:09			
43:07	43:19			
50:12	50:17		49:9	50:1
50:21	50:21		55:4	56:1
62:15	63:16	Propensity; Improper Character evidence		
65:18	67:01			
67:22	68:08			
73:20	74:24		75:16	75:23
			77:6	77:10
			77:14	78:1
85:20	86:07	Hearsay; propensity; foundation; improper character evidence		
87:09	88:07	Improper character evidence; cumulative; propensity		
			93:10	93:14
			93:19	96:22
			97:23	99:17
			99:20	99:25
100:08	100:20			
101:03	101:03			
101:07	101:10			
101:18	101:23			

PHASE II DEPOSITION DESIGNATIONS OF JOSEPH R. PERELLA
Deposition Date: February 8, 2004

Plaintiff's Start – Page:Line	Plaintiff's End – Page:Line	Defendant's Objection	Defendant's Counter Start Page:Line	Defendant's Counter End Page:Line
102:1	102:13	Propensity; improper character evidence		
109:10	109:15	Relevance; hearsay; propensity; cumulative; improper character evid.		
110:17	112:10	Relevance; hearsay; propensity; cumulative; improper character evid.		
112:23	113:06			
117:01	117:08			
117:13	117:13			
125:11	125:14			
125:17	125:19			
126:10	126:17			

Dated: **April 8, 2005**

PHASE II DEPOSITION DESIGNATIONS OF RONALD O. PERELMAN
Date of deposition: November 17, 2004

Defendant's Affirmative Begin Page:Line	Defendant's Affirmative End Page:Line
6:17	7:5
7:10	7:21
9:1	9:3
9:15	9:17
10:11	10:19
10:24	11:1
11:3	11:6
11:16	11:18
11:23	12:4
12:14	12:24
15:16	16:4
16:19	16:25
17:15	18:5
19:1	19:11
21:9	21:23
25:22	25:23
26:3	26:8
26:13	27:2
27:15	27:20
28:22	29:10
29:13	29:22
31:11	31:15
35:11	35:19
36:6	36:12
37:16	37:18
37:23	38:6
38:21	39:10
41:11	41:18
46:16	48:8
49:2	49:6
49:15	49:20
49:25	51:8
55:2	55:20
58:11	58:24
74:24	75:25
77:7	77:10
115:15	116:2
116:11	116:19
116:21	116:24
123:1	124:2
126:5	126:9
127:1	127:7

DEFENDANT'S DEPOSITION DESIGNATIONS OF RONALD O. PERELMAN
Date of deposition: November 17, 2004

Defendant's Affirmative Begin Page:Line	Defendant's Affirmative End Page:Line
127:16	127:24
128:22	129:3
134:16	134:21
139:15	139:24
201:1	201:11
201:21	202:8
202:11	202:13
202:16	202:17
202:19	203:12
236:21	237:3
237:9	237:18
238:1	238:8
238:1	
239:2	240:2
242:25	243:9
247:24	248:1
248:4	
248:6	248:8
250:5	250:21
251:1	251:10

Dated: **April 8, 2005**

PHASE II DEPOSITION DESIGNATION OF RONALD O. PERELMAN
Date of deposition: March 10, 2005

Defendant's Affirmative Begin Page:Line	Defendant's Affirmative End Page:Line
6:8	6:15

Dated: **April 8, 2005**

PHASE II DEPOSITION DESIGNATIONS OF BARRY SCHWARTZ
Date of deposition: June 25, 2004

Defendant's Affirmative Begin Page:Line	Defendant's Affirmative End Page:Line
6:14	6:17
7:21	8:18
20:25	21:3
25:15	26:15
27:8	28:8
34:3	35:16
40:6	41:11
47:6	48:6
83:3	83:22
93:12	93:21
144:13	145:7
146:13	146:21
149:21	150:5
150:11	151:17
152:1	152:11
153:7	153:17
187:9	188:16
212:8	213:14
229:22	230:9
231:17	234:20
235:19	235:25

Dated: **April 8, 2005**

PHASE II DEPOSITION DESIGNATIONS OF ROBERT SCOTT

Date of deposition: December 9, 2004

Defendant's Affirmative Designations

Begin Page:Line	End Page:Line
5:4	5:5
5:12	5:19
6:22	7:6
8:7	9:10
13:16	14:4
17:2	17:4
17:7	17:14
21:23	22:24
25:10	25:17
26:17	26:18
26:21	27:22
29:21	29:25
32:2	32:11
32:16	33:22
36:15	37:5
37:18	38:8
39:12	39:16
39:18	41:8
63:3	63:11
64:10	65:3
72:21	73:4
86:9	87:13
88:8	88:14
89:5	89:11
97:25	98:14

Dated: **April 8, 2005**

PHASE II DEPOSITION DESIGNATIONS OF ROBERT SCOTT
Date of deposition: December 9, 2004

Plaintiffs' Begin – Page:Line	Plaintiffs' End – Page:Line	Defendant's Objections	Defendants Counter-Designations Begin – Page:Line	Defendants Counter-Designations Begin – Page:Line
5:4	5:5			
5:12	5:14			
5:18	5:19			
6:22	7:6			
8:7	9:10			
13:16	14:4			
17:2	17:4			
17:7	17:14			
			21:23	22:24
			25:10	25:17
			26:16	26:18
			26:21	27:22
			29:21	29:25
			32:16	33:22
			36:15	37:5
			37:18	38:8
			39:12	39:16
			39:18	41:8
43:11	43:25			
44:24	44:25			
45:2	45:3			
45:12	45:20	Foundation; relevance		
46:6	46:24	46:6-17: Foundation; relevance		
			63:3	63:11
			64:10	65:3
			72:21	73:4
78:6	78:9		78:10	79:11
80:23	80:25			
81:2	81:25			
82:2	82:24			
83:2	83:25	83:6-8: Foundation		
84:2	84:25	84:2-10: Improper character evidence; propensity		

PHASE II DEPOSITION DESIGNATIONS OF ROBERT SCOTT
Date of deposition: December 9, 2004

Plaintiffs' Begin – Page:Line	Plaintiffs' End – Page:Line	Defendant's Objections	Defendants Counter-Designations Begin – Page:Line	Defendants Counter-Designations Begin – Page:Line
85:2	85:11			
			86:9	87:13
			88:8	88:14
			89:5	89:11
90:24	90:25			
91:2	91:10	91:7-10: Form, relevance, foundation, facts not in evidence, calls for speculation		
91:14	91:16	Form, relevance, foundation, facts not in evidence, calls for speculation		
92:9	92:17	Relevance		
96:5	96:13			
97:14	97:16			
97:18	97:24		97:25	98:14

Dated: April 8, 2005

PHASE II DEPOSITION DESIGNATIONS OF PAUL E. SHAPIRO
Date of deposition: June 8, 2004

Begin Page:Line	End Page:Line
5:19	5:22
6:5	6:8
26:6	27:14
76:14	76:25
77:2	77:14
80:6	80:25
81:2	81:5
82:10	82:25
83:2	83:25
84:2	84:13
84:21	84:25
85:2	85:7
88:19	88:25
89:2	89:16
138:17	138:25
139:2	139:25
140:2	140:25
141:2	141:25
142:2	142:25
143:2	143:25
144:2	144:25

Dated: **April 8, 2005**

PHASE II DEPOSITION DESIGNATIONS OF BRUCE SLOVIN

Date of deposition: May 12, 2004

Begin Page:Line	End Page:Line
5:25	
6:2	6:4
7:11	7:15
12:8	12:13
18:22	18:25
19:2	19:21
21:13	21:25
22:2	22:25
23:2	23:11
23:21	23:25
24:2	24:25
25:2	25:4
35:9	35:25
36:2	36:25
37:2	37:25
38:2	28:3
39:4	39:25
40:2	40:25
41:2	41:25
42:2	42:15
43:18	43:25
44:2	44:25
45:2	45:25
46:21	46:25
47:2	47:25
48:2	48:10
78:17	78:25
79:2	
81:7	81:25
82:2	82:25
83:2	83:18
87:5	87:25
88:2	88:25
89:2	89:25
90:2	90:25
91:2	91:25
92:2	92:25
93:2	93:25
94:2	94:25
95:2	95:25
96:2	96:22
98:11	98:23
100:19	100:25

PHASE II DEPOSITION DESIGNATIONS OF BRUCE SLOVIN
Date of deposition: May 12, 2004

101:2	101:25
116:13	116:25
117:2	117:25
118:2	118:16
121:2	121:23
269:3	269:6
269:17	269:25
270:2	270:25
271:2	271:25
272:2	272:25
273:2	273:13

Dated: April 8, 2005

PHASE II DEPOSITION DESIGNATIONS OF BRUCE SLOVIN

Date of deposition: May 12, 2004

Begin Page:Line	End Page:Line
5:25	
6:2	6:4
7:11	7:15
12:8	12:13
18:22	18:25
19:2	19:21
21:13	21:25
22:2	22:25
23:2	23:11
23:21	23:25
24:2	24:25
25:2	25:4
35:9	35:25
36:2	36:25
37:2	37:25
38:2	28:3
39:4	39:25
40:2	40:25
41:2	41:25
42:2	42:15
43:18	43:25
44:2	44:25
45:2	45:25
46:21	46:25
47:2	47:25
48:2	48:10
78:17	78:25
79:2	
81:7	81:25
82:2	82:25
83:2	83:18
87:5	87:25
88:2	88:25
89:2	89:25
90:2	90:25
91:2	91:25
92:2	92:25
93:2	93:25
94:2	94:25
95:2	95:25
96:2	96:22
98:11	98:23
100:19	100:25

PHASE II DEPOSITION DESIGNATIONS OF BRUCE SLOVIN
Date of deposition: May 12, 2004

101:2	101:25
116:13	116:25
117:2	117:25
118:2	118:16
121:2	121:23
269:3	269:6
269:17	269:25
270:2	270:25
271:2	271:25
272:2	272:25
273:2	273:13

Dated: **April 8, 2005**

PHASE II DEPOSITION DESIGNATIONS OF WILLIAM STRONG

Deposition Date: December 4, 2004

Defendant's Affirmative Designations

Defendant's Start Line:Page	Defendant's End Line:Page
4:16	4:24
5:2	5:11
6:25	8:25
9:2	9:17
14:15	14:25
15:2	15:11
27:2	27:4
27:8	27:9
27:11	27:25
28:2	28:9
30:17	30:25
31:2	31:7
41:2	41:14
49:2	49:16
55:2	
55:10	55:11
55:14	
55:16	55:17
55:20	
55:22	55:24
56:3	
57:20	57:22
58:2	58:8
87:16	88:3
88:7	88:20
107:13	108:25
109:2	109:7
119:20	119:25
120:2	120:4
120:13	120:23
126:4	126:25
127:2	127:25
128:2	128:19
152:13	152:20
173:8	173:25
174:2	174:25
175:2	175:25
176:1	176:7
180:4	180:9
180:20	180:25
181:2	181:8

PHASE II DEPOSITION DESIGNATIONS OF WILLIAM STRONG
Deposition Date: December 4, 2004

190:6	190:25
191:2	191:19
199:24	199:25
200:2	200:4
229:11	230:2
230:6	230:13
233:19	233:25
234:2	234:11
238:13	238:25
239:2	239:25
240:2	240:11
249:10	249:15
249:18	250:15
258:12	258:22
259:3	259:5
259:23	259:25
260:2	260:13
260:18	260:25
261:2	261:25
262:2	262:5
264:7	264:13
285:17	285:19
285:22	285:23
285:25	
286:2	286:6
288:23	288:25
289:3	289:16
326:17	326:25
327:2	327:3
327:7	
327:9	327:10
327:14	
327:16	
327:19	327:21

PHASE II DEPOSITION DESIGNATIONS OF WILLIAM STRONG
Deposition Date: December 4, 2004

Plaintiff's Start – Page:Line	Plaintiff's End – Page:Line	Objections	Defendant's Start Counter Page:Line	Defendant's End Counter Page: Line
4:16	4:18		4:19	4:21
4:22	4:24			
5:5	5:11		5:2	5:4
			6:25	9:17
			14:15	15:11
			27:2	27:25
			28:2	28:9
			30:17	31:7
			41:2	41:14
			49:2	49:16
			55:2	
			55:10	55:11
			55:14	
			55:16	55:17
			55:20	
			55:22	55:24
			56:3	
			57:20	57:22
			58:2	58:8
			87:16	88:3
			88:7	88:20
			107:13	108:25
			109:2	109:7
117:20	117:25		119:20	119:25
118:2	118:10		120:2	120:4
118:13	118:17		120:13	120:23
			126:4	126:25
			127:2	127:25
			128:2	128:19
			152:13	152:20
156:22	156:25	Relevance; cumulative (given Court's order and established facts); foundation		
157:2	157:12	Same as for 156:22-25		
157:16	157:25	Same as for 156:22-25		
158:2	158:21	Same as for 156:22-25		
158:25		Same as for 156:22-25		
159:2	159:19	Same as for 156:22-25		
159:22	159:25	Same as for 156:22-25		

PHASE II DEPOSITION DESIGNATIONS OF WILLIAM STRONG
Deposition Date: December 4, 2004

Plaintiff's Start – Page:Line	Plaintiff's End – Page:Line	Objections	Defendant's Start Counter Page:Line	Defendant's End Counter Page: Line
160:2	160:25	Same as for 156:22-25		
161:1	163:22	Same as for 156:22-25; foundation		
164:2		Same as for 156:22-25; foundation		
165:2	165:9	Same as for 156:22-25; foundation		
165:12	165:25	Same as for 156:22-25; foundation		
166:2	166:3	Same as for 156:22-25; foundation		
166:6	166:14	Same as for 156:22-25; foundation		
166:17	166:25	Same as for 156:22-25; foundation		
167:2	167:7	Same as for 156:22-25; foundation; Objection to 167:4-7, argument, calls for legal conclusion		
167:10	167:20	Same as for 156:22-25; foundation; objection to 167:10-11, argument, calls for legal conclusion		
167:24	167:25	Same as for 156:22-25; foundation, calls for legal conclusion		
168:2	168:9	Same as for 156:22-25; foundation; objection to 168:5-9, argument; objection to 168:2-3, 168:5-9, calls for legal conclusion		
168:12	168:25	Same as for 156:22-25; foundation; objection to 168:12-15, argument, calls for legal conclusion; 168:20-25, calls for legal conclusion		
169:5	169:25	Same as for 156:22-25; foundation, calls for legal conclusion; 169:23-24 move to strike preamble		
170:2	170:6	Same as for 156:22-25; foundation; 170:2-16 calls for legal conclusion		

PHASE II DEPOSITION DESIGNATIONS OF WILLIAM STRONG
Deposition Date: December 4, 2004

Plaintiff's Start – Page:Line	Plaintiff's End – Page:Line	Objections	Defendant's Start Counter Page:Line	Defendant's End Counter Page: Line
170:14	170:21	Same as for 156:22-25; foundation		
171:2	171:25	Same as for 156:22-25; foundation, calls for legal conclusion, asked and answered		
172:2	172:4	Same as for 156:22-25; foundation	173:8	173:25
			174:2	174:25
			175:2	175:25
			176:1	176:7
172:6:	172:15	Same as for 156:22-25; foundation	180:4	180:9
			180:20	180:25
			181:2	181:8
			190:6	190:25
			191:2	191:19
			199:24	199:25
			200:2	200:4
220:17	220:25	Objection 220:17-20, relevance and cumulative given Court's sanction order		
221:2	221:22			
221:25		relevance and cumulative given Court's sanction order		
222:2	222:6	relevance and cumulative given Court's sanction order		
224:7	224:15	Relevance and cumulative given Court's sanction order		
224:18	224:25	relevance and cumulative given Court's sanction order		
225:2	225:25	relevance and cumulative given Court's sanction order		
226:2	226:10	relevance and cumulative given Court's sanction order		
230:19	230:25		229:11	230:2
231:2	231:5		230:6	230:13
231:8	231:9		233:19	233:25
			234:2	234:11
			238:13	238:25
			239:2	239:25

PHASE II DEPOSITION DESIGNATIONS OF WILLIAM STRONG
Deposition Date: December 4, 2004

Plaintiff's Start – Page:Line	Plaintiff's End – Page:Line	Objections	Defendant's Start Counter Page:Line	Defendant's End Counter Page: Line
			240:2	240:11
			249:10	249:15
			249:18	250:15
			258:12	258:22
			259:3	259:5
			259:23	259:25
			260:2	260:13
			260:18	260:25
			261:2	261:25
			262:2	262:5
			264:7	264:13
			285:17	285:19
			285:22	285:23
			285:25	
			286:2	286:6
			288:23	288:25
			289:2	289:15
			326:17	326:25
			327:2	327:3
			327:7	
			327:9	327:10
			327:14	
			327:16	
			327:19	327:21

PHASE II DEPOSITION DESIGNATIONS OF JOHN TYREE
Deposition Date: September 15, 2003

Defendant's Affirmative Designations

Begin Line:Page	End Line:Page
7:23	7:25
6:16	6:18
8:2	8:14
9:16	10:5
17:18	18:10
18:23	19:10
115:20	116:21
120:4	120:11
186:4	186:11
187:10	188:7
192:9	192:11
201:2	201:7
201:17	202:15
209:11	210:3
224:6	224:22
240:7	240:21
244:7	244:12
244:21	245:2
248:5	248:10
248:15	248:16
249:2	249:25

PHASE II DEPOSITION DESIGNATIONS OF JOHN TYREE

Deposition Date: September 15, 2003

Plaintiff's Designations		Defendant's Objections	Defendant's Counter-designations	
Start Line	**End Line**	**Objections**	**Start Line**	**End Line**
4:07	4:09			
75:14	75:16	Relevance		
78:16	78:20			
79:19	80:12			
81:19	81:24	Relevance		
150:10	150:13	Relevance		
150:16	150:18	Relevance		
153:19	153:25	Relevance		
158:17	158:25	Relevance		
163:08	170:7	Relevance	186:4	186:11
			187:10	188:7
			192:9	192:11
			201:2	201:7
			201:17	202:15
			209:11	210:3
			224:6	224:22
			240:7	240:21
			244:7	244:12
			244:21	245:2
			248:5	248:11
			248:15	248:16
			249:2	249:25
263:20	263:25			
264:2	264:4			
264:08	264:11			
264:14	264:25			
265:2	265:06			
265:08	265:09			
266:08	266:11			
266:14	266:15			

Dated: **April 8, 2005**

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),
vs.

MACANDREWS & FORBES HOLDINGS, INC..,
Defendant(s).
_____/

ORDER CONCERNING PRETRIAL SCHEDULE AND FOLLOWING CASE MANAGEMENT CONFERENCE

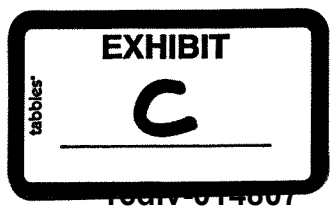
THIS CAUSE came before the Court October 14, 2004 for a case management conference, with all parties well represented by counsel. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that objections to all discovery served on or after October 14, 2004 shall be served within 14 days. It is further

ORDERED AND ADJUDGED that this action is specially set for jury trial commencing February 18, 2004. It is further

ORDERED AND ADJUDGED that the proceedings relating to summary judgment will take place on the following schedule:

Summary Judgment Briefs	December 6, 2004
Summary Judgment Response Briefs	December 17, 2004



Summary Judgment Replies	December 31, 2004
Summary Judgment Hearing	January 21, 2005

It is further

ORDERED AND ADJUDGED that the proceedings relating to mediation will take place on the following schedule:

Mediator Selected	December 1, 2004
Mediation	January 24, 2005

It is further

ORDERED AND ADJUDGED that the proceedings relating to expert discovery will take place on the following schedule:

Initial Expert Disclosures	December 1, 2004
Responsive Expert Disclosures	December 13, 2004
Rebuttal Expert Disclosures	December 20, 2004
Depositions of Experts	December 21, 2004 - January 7, 2005

The parties agree, and the Court orders, that expert witness disclosures shall include: (a) the name and business address of the witness; (b) the subject matter about which the expert will testify; (c) the substance of the facts and opinions to which the expert will testify; (d) a summary of the grounds for each opinion; (e) a copy of any written reports issued by the expert regarding this case; (f) a copy of the expert's curriculum vitae; (g) a list of all cases in which the expert has testified during the past five years; (h) a list of all produced documents relied on by the expert; and (i) copies of all non-produced documents relied on by the expert. Expert witnesses will not be permitted to testify as to opinions, or the bases therefore, unless the opinions or bases were disclosed with particularity in accordance with this Order. It is further

ORDERED AND ADJUDGED that the remaining pretrial proceedings will take place on the following schedule:

Supplemental Interrogatory Responses Due	December 24, 2004

Completion of Fact Discovery	November 24, 2004
Deposition Designations Exchanged-Fact Witnesses	December 20, 2004
Deposition Designations Exchanged-Expert Witnesses	January 14, 2004
Deposition Counter-Designations and Initial Objections Exchanged-Fact Witnesses	January 17, 2005
Deposition Counter-Designations and Initial Objections Exchanged-Expert Witness	January 21, 2005
Motions in Limine	January 10, 2005
Witness Lists and Trial Exhibits Exchanged	January 10, 2005
Motion in Limine Oppositions	January 18, 2005
Objections to Counter-Designations Exchanged-Fact Witnesses	January 24, 2005
Objections to Counter-Designations Exchanged-Expert Witnesses	January 28, 2005
Meet-and-Confer re: Deposition Designations	February 4, 2005
Joint Pretrial Stipulation (in the form directed by the Court's Uniform Pretrial Procedure)	February 9, 2005
Deposition Designations, Counter-Designations, and Objections to Designations and Counter-Designations Provided to the Court	February 11, 2005
Pretrial Conference (3 days)	February 14, 15, and 16, 2004
Final Pretrial Conference	February 17, 2005
Jury Instructions and Verdict Forms Exchanged	February 18, 2005
Initial Jury Screening	February 18, 2005
Jury Trial Begins (15 trial days)	February 22, 2005

The Court will receive objections to instructions and verdict forms, and the parties'

counter-instructions on a date to be determined during trial. It is further

ORDERED AND ADJUDGED that hearing on Motions in Limine and objections to deposition designations set December 20 - 22, 2004 is canceled, to be reset after the deadlines established by this Order.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 14 day of October, 2004.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
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West Palm Beach, FL 33401

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Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

February 15, 2005

By Facsimile

Michael T. Brody
Tel 312 923-2711
Fax 312 840-7315
mbrody@jenner.com

Zhonette M. Brown, Esq.
KIRKLAND & ELLIS LLP
222 Lakeview Avenue, Suite 260
West Palm Beach, Fl. 33401

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*

Dear Zhonette:

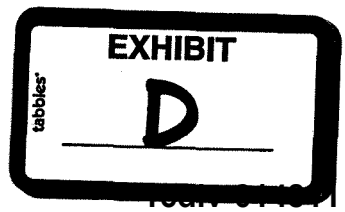
I write in response to your letter of this afternoon informing us for the first time that Morgan Stanley plans to designate from Mr. Fasman's depositions. Your attempt to designate from Mr. Fasman's depositions, however, is untimely and improper.

As you know, initial deposition designations were due on December 20, 2004. On that date, you chose not to designate any of Mr. Fasman's testimony. Now, almost two months later, you claim that it is appropriate for Morgan Stanley to submit designations from his depositions because CPH has removed Mr. Fasman from its trial witness list. Witness lists, however, were exchanged on January 10, 2005, and therefore, your failure to designate from Mr. Fasman's depositions on December 20, 2004 could not have been the result of any reliance on CPH's trial witness list. Accordingly, we do not agree that Morgan Stanley may designate testimony from Mr. Fasman's depositions.

Very truly yours,

Michael T. Brody

cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Mark C. Hansen, Esq. (by telecopy)
Jerold S. Solovy, Esq.



JENNER&BLOCK

March 16, 2005

Jenner & Block LLP
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www.jenner.com

Chicago
Dallas
Washington, DC

Suzanne J. Prysak
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sprysak@jenner.com

By Telecopy

Zhonette M. Brown, Esq.
KIRKLAND & ELLIS LLP
222 Lakeview Avenue, Suite 260
West Palm Beach, Fl. 33401

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*

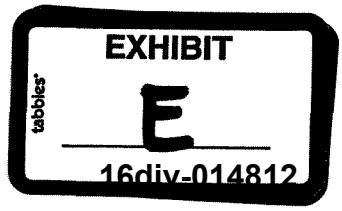
Dear Zhonette:

I write in response to your letter of yesterday asking us to submit counter-designations for Mr. Fasman's depositions. As we previously explained in a letter to you dated February 15, 2005, your attempt to designate from Mr. Fasman's depositions is untimely. Morgan Stanley did not provide any designations from Mr. Fasman's depositions until February 15, 2005, despite the fact that deposition designations were due on December 20, 2004. Further, you never responded to our letter of one month ago. Moreover, no newly discovered facts necessitate or explain Morgan Stanley's late designations.

Very truly yours,

Suzanne J. Prysak

SJP: mlo
cc: Joseph Ianno, Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Mark C. Hansen, Esq. (by telecopy)
Jerold S. Solovy, Esq.
Michael T. Brody, Esq.



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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION FOR AN ADVERSE INFERENCE INSTRUCTION

THIS CAUSE came before the Court March 21, 2005 on Morgan Stanley's Motion for an Adverse Inference Instruction, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion for an Adverse Inference Instruction is Denied, without prejudice to MS & Co.'s right to present evidence about CPH's email retention practices and its failure to direct that emails related to the Sunbeam transaction be saved and CPH's right to present evidence of its offer to have a third-party vendor given access to retrieve emails from CPH's system, without reference to discovery requests or court orders, and for either counsel to argue in favor of whatever inferences that evidence may support. See Jordan v. Masters, 821 So. 2d 342 (Fla. 4th DCA 2002) cf.; Amlan, Inc. v. Detroit Diesel Corp., 651 So. 2d 701 (Fla. 4th DCA 1995). If either party intends to present evidence on the issue of CPH's email retention practices or third-party vendor offer it shall, within 5 business days, serve on opposing counsel (i) the name, address, and business title of any witness expected to testify, together with a fair summary of his or her expected testimony; (ii) a designation of any deposition testimony the designating party intends to offer on this issue; and (iii) copies of any documents to be referred to by a witness or offered into evidence on this issue.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 23 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

EXHIBIT
F

16div-014813

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PHASE II DEPOSITION DESIGNATIONS OF BRUCE SLOVIN

Date of deposition: May 12, 2004

Begin Page:Line	End Page:Line
5:25	
6:2	6:4
7:11	7:15
12:8	12:13
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19:2	19:21
21:13	21:25
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23:2	23:11
23:21	23:25
24:2	24:25
25:2	25:4
35:9	35:25
36:2	36:25
37:2	37:25
38:2	28:3
39:4	39:25
40:2	40:25
41:2	41:25
42:2	42:15
43:18	43:25
44:2	44:25
45:2	45:25
46:21	46:25
47:2	47:25
48:2	48:10
78:17	78:25
79:2	
81:7	81:25
82:2	82:25
83:2	83:18
87:5	87:25
88:2	88:25
89:2	89:25
90:2	90:25
91:2	91:25
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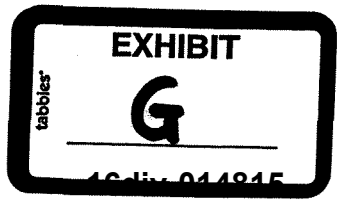
96:2	96:22
98:11	98:23
100:19	100:25



PHASE II DEPOSITION DESIGNATIONS OF BRUCE SLOVIN
Date of deposition: May 12, 2004

101:2	101:25
116:13	116:25
117:2	117:25
118:2	118:16
121:2	121:23
269:3	269:6
269:17	269:25
270:2	270:25
271:2	271:25
272:2	272:25
273:2	273:13

Dated: **April 8, 2005**

PHASE II DEPOSITION DESIGNATIONS OF BRUCE SLOVIN

Date of deposition: May 12, 2004

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35:9	35:25
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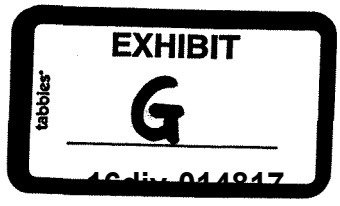

PHASE II DEPOSITION DESIGNATIONS OF BRUCE SLOVIN
Date of deposition: May 12, 2004

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269:17	269:25
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271:2	271:25
272:2	272:25
273:2	273:13

Dated: **April 8, 2005**

02780

IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA
CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

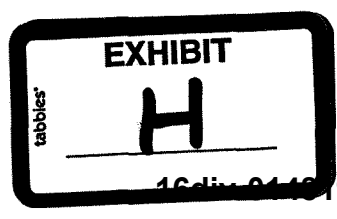
vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 29
PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Thursday, March 10, 2005
Palm Beach County Courthouse
Courtroom 11-A
205 North Dixie Highway
West Palm Beach, Florida 33401
9:30 a.m. to 12:15 p.m.



THE COURT: What lines are we looking at?
MS. PRYSAK: Lines 7 through 13 on page 51.
THE COURT: Okay.
Would they have the ability to get the comfort letter?
MS. BROWN: Certainly they could have requested the comfort letter.
MS. PRYSAK: We contend that --
MS. BROWN: That would have fallen within the books and records.
THE COURT: This is the same thing. If you had the ability and didn't do it, I think it's relevant.
Where next?
MS. PRYSAK: Pages 91 to 93 there's a string of testimony that we object to.
THE COURT: Just all the way through?
MS. PRYSAK: Yes.
THE COURT: To line 11 on 93?
MS. PRYSAK: Yes, line 11.
Okay.
That's our objection. We think that the article, to the extent it's quoted, is hearsay. We think it's prejudicial and irrelevant. Further, we think that this is -- this line of

testimony is in contravention of your ruling on our motion in limine, I believe it was number 2, relating to the wealth of Mr. Perelman.

THE COURT: What's the response?

MS. BROWN: Well, with regard to the last point, I don't understand how it's really related to the wealth of the party. But with regard to the hearsay, this is testimony that, first of all, it's an admission by a party. Mr. Drapkin's statement is an admission, and Mr. Slovin is simply being asked about it. This line of questioning is included within Mr. Drapkin's testimony. And now we're asking one Mafco employee about the in Court testimony about another Mafco employee.

Also, this goes to the sophistication rather than to the motion in limine.

THE COURT: If this is a way to get in sophistication testimony, its relevancy is dwarfed by its prejudice. I mean, there are lots of other ways, if this is the kind of information you're trying to elicit. And I do think it's contrary to motion in limine number 2. It's basically talking about how rich Mr. Perelman is. The richest guy in town. I

mean...

Where to next?

MS. BROWN: Your Honor, could we see if we could edit this.

THE COURT: No, I thought about it when I read it.

MS. PRYSAK: Further, Your Honor, there's plenty of testimony that we've not objected to in this deposition relating to the sophistication of the parties.

MS. BROWN: What about the statement on page 93?

THE COURT: At what line?

MS. BROWN: 93, 4 through 11.

THE COURT: No. Because, again, there's no -- that doesn't add anything to what a juror would understand. They wouldn't know what we're talking about, big deals and little deals.

MS. PRYSAK: Right. And --

THE COURT: What's next?

MS. PRYSAK: We also have a relevance objection to the testimony on page 99 through --

THE COURT: 99, 17?

MS. PRYSAK: Yes -- through 101, line 6.

THE COURT: Okay.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

MORGAN STANLEY'S REVISED TRIAL WITNESS DISCLOSURE

Pursuant to the Court's March 24, 2005 Order, Morgan Stanley & Co. Incorporated ("Morgan Stanley") hereby provides its list of witnesses that Morgan Stanley will or may call at trial, either through live testimony or by deposition, as well as a summary of the anticipated testimony of each witness that it has designated. Morgan Stanley reserves the right to call any of the witnesses identified herein or on Coleman (Parent) Holdings, Inc.'s ("CPH") witness list during either phase of its case-in-chief. Morgan Stanley further reserves the right to withdraw any witness identified herein and to supplement this disclosure as Morgan Stanley continues to evaluate its case in light of the Court's rulings. Morgan Stanley also reserves the right to add or withdraw witnesses in response to changes in CPH's trial witness disclosure or exhibit list, new arguments advanced by CPH, or the Court's future rulings.

The Court's Order on CPH's Renewed Motion for Entry of Default Judgment (Mar. 23, 2005) ("Default Order") substantially narrowed the matters at issue in this case. Accordingly, Morgan Stanley's new lead trial counsel has, in the approximately 10 days since the assumption of his duties in this complex case, made good-faith efforts to identify the witnesses who will or may be called to testify on the matters that remain in dispute. However, in this extremely short

time, new lead trial counsel has not had an adequate opportunity to familiarize himself with the testimony of the more than 90 witnesses who have been deposed in this case, as well as the additional potential witnesses who have not been deposed. As a result, Morgan Stanley may have identified in this disclosure more witnesses than it will ultimately call at trial. It may also have omitted witnesses who will need to be called.

In addition, the Court's orders prohibit Morgan Stanley from calling witnesses with respect to certain elements of CPH's conspiracy and aiding-and-abetting claims (*i.e.*, witnesses who testify to matters other than reliance and damages). *See* Default Order; Order on CPH's Motion for Adverse Inference Instruction (Mar. 1, 2005). Morgan Stanley would have called numerous additional witnesses in its case, including some or all of the witnesses identified in its Trial Witness Disclosure served on January 10, 2005. Morgan Stanley may proffer the testimony of some or all of these additional witnesses during the defense case. The Court's orders likewise prohibit Morgan Stanley from calling witnesses with respect to Morgan Stanley's discovery conduct. Morgan Stanley may proffer the testimony of witnesses called during the hearings held on February 14, March 14, and March 15, 2005 hearings regarding these matters.[1]

I. Morgan Stanley Case-in-Chief (Phase I)

[1] Morgan Stanley adopts by reference the January 10, 2005 Witness Disclosure, which includes the witnesses Morgan Stanley would call at trial if permitted to do so — as supplemented by certain additional witnesses disclosed in the instant submission. Morgan Stanley also supplements its witness disclosure to include all witnesses called by Morgan Stanley during the February 14, March 14, and March 15, 2005 hearings, and would call these witnesses, William Hollister, and perhaps additional witnesses, if permitted to do so. These witnesses would testify on the matters addressed at the February 14, March 14, and March 15, 2005 hearings, and in the case of Mr. Hollister, matters covered by his November 2004 declaration, as well as related matters.

1. Allison Amorison (by deposition): Ms. Amorison was an associate at Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden"), which assisted in the preparation of the merger agreements relating to Sunbeam's acquisition of the Coleman Company ("Coleman"). Ms. Amorison may testify to the matters to which she testified in her deposition in this case, including her experience regarding the merger agreement drafting and negotiations, the confidentiality agreements, the due diligence done by Skadden for the transaction, and her contact with her counterpart at Wachtell, Lipton, Rosen & Katz ("Wachtell"), Adam Emmerich.

2. John Ashley (live): Mr. Ashley is the Chief Technical Officer of Corefacts, LLC. He is an expert in computer forensics and may testify to issues regarding electronic document retention, including the impossibility of recovering data from overwritten backup tapes.

3. Lawrence A. Bornstein (live): Mr. Bornstein is a certified public accountant who worked at Arthur Andersen LLP at the time of Sunbeam's acquisition of Coleman. Mr. Bornstein may testify to the matters to which he testified in his deposition in this case, including the steps that CPH and MAFCO took to obtain information regarding Sunbeam prior to Sunbeam's acquisition of Coleman.

4. Karen Clark (by deposition): Ms. Clark is a former Vice President of Operations and Finance at Coleman, and Senior Vice President of Finance at Sunbeam. Ms. Clark may testify to the matters to which she testified in her deposition in this case, including the financial condition of Coleman during the events at issue, her views regarding the purchase price paid by Sunbeam, the effect of the Coleman restructuring that was in progress at the time of the Sunbeam transaction, information regarding the post-transaction valuation of the Sunbeam warrants, due diligence conducted by MAFCO in anticipation of the Sunbeam transaction, and Sunbeam's

audited financial statements that were certified by Arthur Andersen and Coleman's reliance on such financial statements.

5. Scott Cook (live): Mr. Cook is Senior Managing Director, Equity Syndicate and Corporate Executive Services, at Raymond James & Associates. Mr. Cook will present his credentials, and he may testify as an expert regarding the valuation of securities, including valuation discounts attributable to resale restriction and large size.

6. Glen Dickes (by deposition): Mr. Dickes is CPH's designated 1.310 witness on MAFCO's consideration of hedging alternatives for its Sunbeam position. When the events relevant to this dispute occurred, he was MAFCO's chief corporate lawyer. Mr. Dickes may testify to the matters to which he testified in his deposition in this case, including his background and responsibilities within the MAFCO organization, CPH's consideration of hedging its stake in Sunbeam stock, various due-diligence issues, and the status of MAFCO's term loans at the time of the Sunbeam transaction.

7. Donald Drapkin (by deposition): Mr. Drapkin is currently Vice Chairman and Director of MAFCO and former Coleman and CPH Director. Mr. Drapkin may testify to the matters to which he testified in his deposition in this case, including his professional background and experience with mergers and acquisitions, MAFCO's history and experience conducting mergers and acquisitions, the Coleman board meeting at which the Coleman/Sunbeam merger was approved, and his participation in the Coleman/Sunbeam merger.

8. Robert Duffy (by deposition): At the time of the transaction, Mr. Duffy was a Vice President in the Mergers & Acquisitions Group at CFSB. Mr. Duffy may testify to the matters to which he testified in his deposition in this case, including his role as a financial

advisor to MAFCO, CSFB's role in performing due diligence on Sunbeam, and the fairness opinion CSFB rendered to Coleman.

9. Adam Emmerich (by deposition): Mr. Emmerich is a partner at Wachtell and was retained in late January 1998 to advise MAFCO, CPH, and Coleman in connection with Sunbeam's acquisition of Coleman. Mr. Emmerich may testify to the matters to which he testified in his deposition in this case, including discussions with Sunbeam, the preparation of confidentiality agreements, the merger agreement; and representations and warranties made by the parties.

10. Irwin Engelman (by deposition): Mr. Engelman was Executive Vice President and Chief Financial Officer of MAFCO at the time of the events relevant to this dispute. Mr. Engleman may testify to the matters to which he testified in his deposition in this case, including CPH's reliance on Arthur Andersen LLP, the negotiation of covenant relief with the banks after Dunlap was terminated, the negotiation of credit agreements, and the extent and nature of the indebtedness of Mr. Perelman's companies.

11. David Fannin (live): Mr. Fannin is the former Executive Vice President and General Counsel of Sunbeam Corporation. Mr. Fannin may testify concerning his involvement in the negotiation of Sunbeam's acquisition of Coleman, including the structure of the deal, the due diligence conducted by CPH, communications between Sunbeam and CPH, steps taken by MAFCO and CPH with respect to the registration of Sunbeam warrants or securities, and events that occurred following the closing of the Sunbeam/Coleman merger.

12. Steven Fasman (live and/or by deposition): Steven L. Fasman is Vice President, Law of MAFCO. Mr. Fasman may testify about email policies at MAFCO; the practices regarding preservation, deletion, purging, and destruction of email at MAFCO; the history of

MAFCO's knowledge of potential and actual litigation involving the subject matter of this case; the failure to preserve, recover, restore, or save MAFCO email in response to the notice of such potential and actual litigation; the destruction, erasing, or overwriting of MAFCO email after receiving notice of the Sunbeam litigation; and CPH's production or failure to produce email in response to discovery requests in this litigation.

13. Dan Fischel (live): Professor Fischel is a professor at the University of Chicago. Mr. Fischel may testify as an expert in regarding compensatory and/or punitive damages. Professor Fischel will present his credentials and provide his opinion as to the amount of damages, if any, that CPH sustained as a result of its sale of Coleman in exchange for Sunbeam securities. Professor Fischel may also testify regarding Morgan Stanley's liability for punitive damages, including the nature, extent, and degree of Morgan Stanley's alleged misconduct and the related circumstances; the relative experience, sophistication, and access to relevant information of the parties; the degree of CPH's alleged injury and the degree of CPH's reliance on Sunbeam, its auditors, and Morgan Stanley; whether Morgan Stanley is liable for punitive damages.

14. Blaine Fogg (by deposition): Mr. Fogg is a partner at Skadden. Mr. Fogg may testify to the matters to which he testified in his deposition in this case, including Skadden's representation of Sunbeam in the Coleman transaction and debenture offering and the events surrounding the March 19, 1998 press release.

15. Steven Geller (by deposition): Mr. Geller was an associate in the Mergers & Acquisitions Group at Credit Suisse First Boston ("CFSB") at the time of the events relevant to this dispute. Mr. Geller may testify to the matters to which he testified in his deposition in this

case, including CSFB's role in performing due diligence on Sunbeam, financial modeling and analysis conducted by CFSB regarding Sunbeam, and the fairness opinion CSFB prepared.

16. Frank Gifford (by deposition): Mr. Gifford was a member of the Coleman Board of Directors at the time of the events relevant to this dispute. Mr. Gifford may testify to the matters to which he testified in his deposition in this case, including his lack of reliance on Morgan Stanley in determining whether to vote to consummate the transaction.

17. Norman Ginstling (by deposition): Mr. Ginstling is a Senior Vice President of Taxation for MAFCO. Mr. Ginstling may testify to the matters to which he testified in his deposition in this case, including his professional background and experience with the tax consequences of differing types of mergers and acquisitions, MAFCO's history and experience conducting mergers and acquisitions, the tax consequences of the Sunbeam/Coleman merger, MAFCO's consideration of and decisions regarding hedging options for the Sunbeam stock, MAFCO's communications with Morgan Stanley in connection with the Sunbeam/Coleman merger, and the due diligence that MAFCO conducted in connection with the Sunbeam/Coleman merger.

18. Howard Gittis (live and/or by deposition): Mr. Gittis is a director and Vice Chairman and Chief Administrative Officer of MAFCO. Mr. Gittis also is a director and the Vice Chairman of CPH and a former director of Sunbeam. Mr. Gittis may testify to the matters to which he testified in his deposition in this case, including his background and experience, the background and history of Sunbeam's acquisition of Coleman, his involvement in that transaction, the negotiation of the transaction, the decision to enter into the transaction and factors influencing that decision, hedging, and the events leading up to the closing of the transaction.

19. Professor Mark Grinblatt (live): Professor Grinblatt may testify as an expert witness regarding compensatory damages. Professor Grinblatt will present his qualifications as an expert. Professor Grinblatt's opinions are disclosed in his report, supplemental report, and testimony in this matter.

20. Jeffrey Haas (live): Professor Haas is a professor at New York Law School. Professor Haas will testify regarding the ability of CPH to hedge the Sunbeam securities that it acquired as a result of the Sunbeam-Coleman merger, in light of the federal securities laws; the facts and circumstances of CPH's acquisition, including the lack of a right to name directors to the Sunbeam board under the acquisition agreement; and the Schedule 13G filing made by CPH, which reflects that, from the date of its acquisition of Sunbeam securities until June 16, 1998, CPH had no intention to control or influence the control of Sunbeam.

21. Lawrence Jones (by deposition): Mr. Jones is a former President and CEO of Coleman. In addition, he served as both a Director on Coleman's Board of Directors and a member of the Board's audit committee at the time of the events relevant to this dispute. Mr. Jones may testify to the matters to which he testified in his deposition, including his background and responsibilities at Coleman, the potential effects of the Sunbeam transaction on Coleman and its overall long-term success, the relationship between Coleman and MAFCO, the expertise of MAFCO senior management, the information that was provided to and reviewed by the Coleman Board of Directors prior to its approval of the Sunbeam transaction; and the information that the Board of Directors relied upon in deciding to approve the Sunbeam transaction.

22. Ann Jordan (by deposition): Ms. Jordan was a member of the Coleman Board of Directors at the time of the events relevant to this dispute. Ms. Jordan may testify to the matters to which she testified in her deposition, including meetings of the Coleman Board of Directors,

her role as a member of the Board of Directors, and her lack of reliance on Morgan Stanley in determining whether to vote for the transaction.

23. Jerry Levin (live): Mr. Levin is the former Chairman and Chief Executive Officer of Coleman and is currently Chairman and Chief Executive Officer of American Household, Inc. Mr. Levin may testify to the matters to which he testified in his deposition in this case, including his background and experience; the background and history of Sunbeam's acquisition of Coleman; the condition of Coleman during the time period relevant to the disputed issues in this case; the background and history of the transaction; his involvement in the transaction; the negotiation of the transaction; the decision to enter into the transaction and factors influencing that decision; his communications with Mr. Perelman, including communications concerning Sunbeam and about entering into the transaction; his interests in Coleman; the due diligence conducted by MAFCO; his interaction with Morgan Stanley in connection with the transaction; the events leading up to the closing of the transaction; post-closing events related to Sunbeam; and damages.

24. James Maher (live and/or by deposition): Mr. Maher is the former President of MAFCO Consolidated Group Inc. Mr. Maher may testify to the matters to which he testified in his deposition in this case, including his background and experience, MAFCO's history and experience conducting mergers and acquisitions and its use of advisors, the background and history of Sunbeam's acquisition of Coleman, his involvement in that transaction, the negotiation of the transaction, the decision to enter into the transaction and factors influencing that decision; due diligence conducted by MAFCO, his interaction with Morgan Stanley in connection with the transaction, the events leading up to the closing of the transaction, hedging, post-closing events related to Sunbeam, and damages.

25. John Moran (by deposition): At the time of the transaction, Mr. Moran was a member of the Coleman Board of Directors. Mr. Moran may testify to the matters to which he testified in his deposition in this case, including his business experience, his knowledge of Coleman's business, and factors influencing the Coleman Board of Directors' approval of the merger transaction between Sunbeam and Coleman.

26. William Nesbitt (live and/or by deposition): Mr. Nesbitt is a former Senior Vice President of MAFCO Consolidated Group Inc. Mr. Nesbitt may testify to the matters to which he testified in his deposition in this case, including his background and experience, the background and history of Coleman's acquisition of Sunbeam, his involvement in that transaction, MAFCO's history and experience conducting mergers and acquisitions and its use of advisors, due diligence conducted by MAFCO, the negotiation of the transaction, the decision to enter into the transaction and factors influencing that decision, the events leading up to the closing of the transaction, damages, and his interaction with analysts.

27. Joseph Page (by deposition): Mr. Page was Chief Financial Officer of Coleman at the time of the transaction. Mr. Page may testify to the matters to which he testified in his deposition in this case, including his background and experience in mergers and acquisitions and investment transactions, his role in the negotiations between the parties to the Sunbeam transaction, information presented during the negotiations, information considered by Coleman during the negotiations of the merger, matters relating to the March 19, 1998 Sunbeam press release, due diligence that was with respect to Sunbeam, and his knowledge of Morgan Stanley's participation in the Sunbeam transaction.

28. Ronald O. Perelman (live and/or by deposition): Mr. Perelman is the Chairman of the Board of Directors and Chief Executive Officer of MAFCO. He is also the Chairman of the

Board of Directors of CPH and a former director of Coleman. Mr. Perelman may testify to all issues that are disputed in this case, including the history, structure, and maintenance of his business empire, his acquisition and control of Coleman, the events leading up to the 1998 merger of Coleman and Sunbeam, the course of events at Sunbeam following the closing of the Coleman/Sunbeam merger, all facts relevant to his claim of reliance, and all facts relevant to his claim for damages and for punitive damages.

29. Arthur H. Rosenbloom (live): Mr. Rosenbloom may testify as an expert witness. Mr. Rosenbloom will present his qualifications as an expert. Mr. Rosenbloom's opinions are disclosed in his report, supplemental report, and testimony in this matter.

30. Joram Salig (by deposition): Mr. Salig was the Vice President of Law for MAFCO. Mr. Salig may testify to the matters to which he testified in his deposition in this case, including his professional background and experience with mergers and acquisitions. He may testify regarding MAFCO's history and experience conducting mergers and acquisitions. He may testify regarding MAFCO's historic due diligence practices and due diligence procedures in connection with the Sunbeam/Coleman merger. He may testify regarding the confidentiality agreements relating to the Sunbeam/Coleman merger. He may testify regarding his lack of interaction with Morgan Stanley in connection with the Sunbeam/Coleman merger.

31. Barry Schwartz (live): Mr. Schwartz is the Executive Vice President and General Counsel of MAFCO and the General Counsel of CPH. His testimony may include his background and experience in mergers and acquisitions and investment transactions, his background and responsibilities within the MAFCO organization, a description of board meetings in which the Sunbeam transaction was considered, his approval and signing of the merger agreements, descriptions of meetings and communications in connection with the

Sunbeam transaction, the hiring of advisors to assist in the transaction and the role of those advisors, communications with the advisors to Coleman and Sunbeam, information relied on by CPH in the course of the transaction, and damages.

32. Paul Shapiro (live): Mr. Shapiro was Vice President and General Counsel of Coleman Company from July 1, 1997 to March 31, 1998. From June 1998 to July 2001, Mr. Shapiro served as Executive Vice President and Chief Administrative Officer of Sunbeam. Mr Shapiro's testimony may include his role in the transaction, his participation in due diligence of Sunbeam, and the fairness opinion presented by CSFB.

33. Todd Slotkin (live and/or by deposition): Mr. Slotkin is the Chief Financial Officer and Executive Vice President of MAFCO. Mr. Slotkin may testify to the matters to which he testified in his deposition, including his professional background and experience with debt transactions and mergers and acquisitions; MAFCO's history and experience conducting mergers and acquisitions; MAFCO and/or Coleman's credit agreements and loan obligations existing in the 1997-1998 timeframe; MAFCO's finances and financial statements for fiscal years 1997 and 1998, including its accounting for its Sunbeam and Coleman holdings; MAFCO's process of establishing "estimated fair values" for its investments and its valuation of its Sunbeam holdings; pledging arrangements relating to MAFCO's Coleman and/or Sunbeam stock holdings; hedging options for Sunbeam stock, and decisions made regarding such hedging options; communications between MAFCO and Morgan Stanley in connection with the Sunbeam/Coleman merger; and damages.

34. Bruce Slovin (by deposition): Mr. Slovin was a member of Coleman board of directors at the time of the transaction. Mr. Slotkin may testify to the matters to which he testified in his deposition, including his background and experience in mergers and acquisitions

and investment transactions, his background and responsibilities within the MAFCO organization, the Coleman board meetings in which the Sunbeam transaction was discussed and approved, the information considered and relied upon by the Board in approving the transaction, and matters relating to the March 19, 1998 Sunbeam press release.

35. Laurence Winoker (live and/or by deposition): Mr. Winoker is Senior Vice President, Controller, and Treasurer of MAFCO. Mr. Winoker may testify to the matters to which he testified in his deposition, including MAFCO's internal valuation of its Sunbeam investment including the value CPH placed on the warrants, and the lack of contact between MAFCO and Morgan Stanley regarding this transaction.

36. Kevin G. Woodruff (live): Mr. Woodruff is a managing director at Morgan Stanley. He manages the equity derivatives business and works in the Global Capital Markets Division. Mr. Woodruff may testify concerning those financial transactions that would, at the time of the events relevant to this dispute, have allowed CPH to realize current value from its holdings of Sunbeam stock while still retaining ownership of the shares.

II. Morgan Stanley Punitive Damages Defense Case (Phase II)

Morgan Stanley may call any witness disclosed above to testify in Phase II regarding any matter relating to Morgan Stanley's liability for punitive damages, including the degree of Morgan Stanley's alleged misconduct and the related circumstances; the relative experience, sophistication, and access to relevant information of the parties; and the degree of CPH's alleged injury and the degree of CPH's reliance on Sunbeam, its auditors, and Morgan Stanley.

1. Joseph D'Auria (live and/or by deposition): Mr. D'Auria is an Executive Director at Morgan Stanley. Mr. D'Auria may testify to those matters to which he testified in his

deposition in this case, including the assets and resources available to Morgan Stanley to satisfy a judgment for punitive damages.

2. Donald Denkhaus (live and/or by deposition): Mr. Denkhaus was a partner at Arthur Anderson during the relevant time period. Mr. Denkhaus may testify to the matters to which he testified in his deposition in this case, and he may testify regarding the nature, extent, and degree of Morgan Stanley's alleged misconduct and the related circumstances; the relative experience, sophistication, and access to relevant information of the parties; the degree of CPH's alleged injury and the degree of CPH's reliance on Sunbeam, its auditors, and Morgan Stanley; and whether Morgan Stanley is liable for punitive damages

3. Rob Jones (live): Mr. Jones is the Corporate Representative of Morgan Stanley. Mr. Jones may testify to matters relating to Morgan Stanley's liability for punitive damages, including information about the defendant, factors in mitigation, and the affect of a punitive damages award on the defendant.

4. Tarek Abdel-Meguid (live and/or by deposition): Mr. Meguid is the Global Head of Investment Banking at Morgan Stanley. Mr. Meguid may testify to those matters to which he testified in his deposition in this case, and he may testify regarding the nature, extent, and degree of Morgan Stanley's alleged misconduct and the related circumstances; the relative experience, sophistication, and access to relevant information of the parties; the degree of CPH's alleged injury and the degree of CPH's reliance on Sunbeam, its auditors, and Morgan Stanley; whether Morgan Stanley is liable for punitive damages; and his evaluation(s) of William Strong and William Strong's performance at Morgan Stanley.

5. Joseph Perella (live and/or by deposition): Mr. Perella is the Vice Chairman of the parent holding company of Morgan Stanley and former Chairman Institutional Securities at

Morgan Stanley. Mr. Perella may testify to those matters to which he testified in his deposition in this case, and he may testify to the nature, extent, and degree of Morgan Stanley's alleged misconduct and the related circumstances; the relative experience, sophistication, and access to relevant information of the parties; the degree of CPH's alleged injury and the degree of CPH's reliance on Sunbeam, its auditors, and Morgan Stanley; whether Morgan Stanley is liable for punitive damages; and his evaluation(s) of William Strong and William Strong's performance at Morgan Stanley.

6. Ruth Porat (live and/or by deposition): Ms. Porat is a Managing Director in the Investment Banking Division at Morgan Stanley. Ms. Porat may testify to those matters to which she testified in her deposition in this case, and she may testify to the nature, extent, and degree of Morgan Stanley's alleged misconduct and the related circumstances; the relative experience, sophistication, and access to relevant information of the parties; the degree of CPH's alleged injury and the degree of CPH's reliance on Sunbeam, its auditors, and Morgan Stanley; whether Morgan Stanley is liable for punitive damages; and her evaluation(s) of William Strong and William Strong's performance at Morgan Stanley.

7. Robert Scott (by deposition): Mr. Scott is an advisory director at Morgan Stanley. Mr. Scott may testify to those matters to which he testified in his deposition in this case, and he may testify to the nature, extent, and degree of Morgan Stanley's alleged misconduct and the related circumstances; the relative experience, sophistication, and access to relevant information of the parties; the degree of CPH's alleged injury and the degree of CPH's reliance on Sunbeam, its auditors, and Morgan Stanley; whether Morgan Stanley is liable for punitive damages; and his evaluation(s) of William Strong and William Strong's performance at Morgan Stanley.

8. William Strong (live and/or by deposition): Mr. Strong is a Managing Director in Morgan Stanley's Investment Banking Division. Mr. Strong may testify on the matters to which he testified in his deposition, and he may testify regarding the nature, extent, and degree of Morgan Stanley's alleged misconduct and the related circumstances; the relative experience, sophistication, and access to relevant information of the parties; the degree of CPH's alleged injury and the degree of CPH's reliance on Sunbeam, its auditors, and Morgan Stanley; whether Morgan Stanley is liable for punitive damages; and his own employment evaluations.

9. John Tyree (live and/or by deposition): Mr. Tyree was a member of the Morgan Stanley Client Services Group during the relevant time period. Mr. Tyree may testify to the matters to which he testified in his deposition in this case, and he may testify regarding the nature, extent, and degree of Morgan Stanley's alleged misconduct and the related circumstances; the relative experience, sophistication, and access to relevant information of the parties; the degree of CPH's alleged injury and the degree of CPH's reliance on Sunbeam, its auditors, and Morgan Stanley; and whether Morgan Stanley is liable for punitive damages.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 4th day of April 2005.

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

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

CASE NO: CA 03-5045 AI

vs.

MORGAN STANLEY & CO.
Defendant.
_____/

VERIFIED MOTION TO ADMIT
NEIL M. GORSUCH, PRO HAC VICE

Morgan Stanley & Co. Incorporated ("Morgan Stanley"), pursuant Fla. R. Jud. Adm. 2.061, requests this Court to admit attorney Neil M. Gorsuch, *pro hac vice*, and in support of this Motion, states the following:

1. Morgan Stanley requests that this Court permit Neil M. Gorsuch, an attorney with the law firm of Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., whose address is 1615 M Street, N.W., Suite 400, Washington, D.C. 20036, to appear *pro hac vice* and participate fully in this action as counsel on behalf of Morgan Stanley.

2. Mr. Gorsuch is a member in good standing of the Bar of the State of New York, where he was admitted in 1992, the Bar of the State of Colorado, where he was admitted in 1994 and the Bar of the District of Columbia, where he was admitted in 1997. He is also admitted to practice before the U.S. District Courts for the District of Columbia, Colorado, Southern and Eastern Districts of New York; the U.S. Courts of Appeals for the District of Columbia, Second, Third, Fourth, and Sixth Circuits, as well as the United States Supreme Court. Mr. Gorsuch has not been disciplined in any jurisdiction.

16div-014841

3. Mr. Gorsuch has read all the applicable provisions of The Rules of Judicial Administration and the Rules Regulating The Florida Bar.

4. This verified motion complies with the Rules of Judicial Administration.

5. The undersigned will remain associated with this matter at all stages as required by local rules. Mr. Gorsuch has not, in the past five years, sought *pro hac vice* admission in any other matter before this or any other Florida state court. The representation of Morgan Stanley in the matter commenced May 8, 2003.

6. Mr. Gorsuch will be associated with Joseph Ianno, Jr. for purposes of this representation. Mr. Ianno is a member in good standing of the Florida Bar.

7. A proposed order granting this Motion is attached hereto.

WHEREFORE, Morgan Stanley respectfully requests that Neil M. Gorsuch be authorized to appear *pro hac vice* for the purpose of representing Morgan Stanley as counsel in connection with the action pending before the Court together with such other and further relief as the Court deems just and proper.

The undersigned verifies that he has knowledge of the facts stated herein, and that the statements in the foregoing motion are true and correct.

Neil M. Gorsuch

Dated: April 11, 2005

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion To Admit Neil M. Gorsuch *Pro Hac Vice* has been furnished to all counsel of record listed below by facsimile and hand-delivery on this 11th day of April, 2005.

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BY: /s/
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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

CASE NO: CA 03-5045 AI

vs.

MORGAN STANLEY & CO, INCORPORATED

Defendant.
_____/

ORDER GRANTING VERIFIED MOTION TO ADMIT NEIL M. GORSUCH, PRO HAC VICE

THIS CAUSE came before the Court on Morgan Stanley & Co. Incorporated's ("Morgan Stanley") Verified Motion to Admit Neil M. Gorsuch, Pro Hac Vice. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Verified Motion to Admit Neil M. Gorsuch, Pro Hac Vice is GRANTED, and Mr. Gorsuch is admitted to practice in this case.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____ of April, 2005.

_____
Elizabeth T. Maass
Circuit Court Judge

Copies furnished to counsel of record on attached service list

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S MOTION TO RECONSIDER THE COURT'S APRIL 5, 2005 ORDER ON A LIMITING INSTRUCTION ON RELIANCE

On April 5, 2005, the Court entered an order setting forth a "limiting instruction on reliance" under which the jury will be told, among other things, that "Morgan Stanley cannot claim that CPH could or should have investigated whether statements made to it were true." That "limiting" instruction, however, is procedural improper and substantively incorrect.

First, it improperly instructs the jury, not on the purposes for which the jury may consider evidence, but on whether *one party*—Morgan Stanley—may make certain arguments based on the evidence. That is wholly unnecessary unduly *prejudicial.*

Second, it misstates Florida law in *three* respects. It contravenes *M/I Schottenstein Homes, Inc. v. Azam,* 813 So.2d 91 (Fla. 2002), by preventing the jury from considering whether CPH's reliance was reasonable under the "totality of the circumstances." It contravenes that decision's holding that, "where one has an opportunity to make a cursory examination and investigation and does not do so, he

cannot recover." *M/I Schottenstein Homes, Inc.*, 813 So.2d at 93. And it ignores binding decisions from the Fourth District holding that, particularly in cases with sophisticated plaintiffs, falsity is considered "obvious" if it would have been uncovered through the exercise of "some diligence."

In support of the motion, Morgan Stanley states as follows:

1. The Court's limiting instruction" on reliance is improper on its face. Limiting instructions typically direct the jury that it may consider evidence only for specified proper purposes (and perhaps not for identified improper purposes). The Court's proposed limiting instruction departs from that purpose. Instead, it prematurely seeks to instruct the jury on the definition of reasonable or justifiable reliance. There is no more reason to instruct the jury how to determine reasonable or justifiable reliance mid-trial, in advance of the charge conference, than there is for it to receive instructions on any other element. Doing so at this stage is reversible error, since it seeks to direct a verdict against Morgan Stanley and improperly comments on the evidence. *Fecke v. Florida*, 757 So. 2d 548, 549 (4th DCA 2000) (instruction limiting jury's consideration of key evidence "essentially directed a verdict . . . in favor of the [plaintiff]" and improperly commented on the evidence).

2. Worse, the proposed instruction in critical part is not directed to the purposes for which the *jury* may consider evidence, but to the *arguments* one party—Morgan Stanley—can made based on the evidence: "*Morgan Stanley cannot claim* that CPH could or should have investigated whether statements made to it were true." A "limiting instruction" that tells *the jury* what *one party* "cannot claim" is highly unusual. It is also is highly prejudicial. It preemptively singles out one party before the jury for

the Court's disfavor. And it signals to the jury, in an instruction to the jury, that the Court mistrusts Morgan Stanley and anticipates its making of improper argument. Particularly in the context of this case, where the Court has already read to the jury a highly inflammatory statement of facts, the prejudice will be palpable. The instruction cannot fail to prejudice Morgan Stanley in the jury's mind.

3. Most important, the April 5 Order is *misstates* Florida law in three different respects. First, in determining whether a plaintiff has established the reliance element of a fraud claim under Florida law, "[t]he question . . . is whether the recipient of the misrepresentation [was] 'justified in relying upon its truth.'" *M/I Schottenstein Homes, Inc. v. Azam*, 813 So.2d 91, 94 (Fla. 2002). "This factual examination is indeed a consideration of the *totality of the circumstances* surrounding the type of information, the nature of the communication between the parties, and the relative positions of the parties." *Id.* at 95 (emphasis added). The instruction does not mention the need to consider the totality of the circumstances.

4. Second, the Florida Supreme Court has squarely held that the "totality of the circumstances" encompasses whether a sophisticated plaintiff *could have and should have made an investigation* into the defendant's representations. "*[W]here one has an opportunity to make a cursory examination and investigation and does not do so, he cannot recover.*" *M/I Schottenstein Homes, Inc.*, 813 So.2d at 93 (emphasis added). This Court's proposed limiting instruction directly contradicts that holding, declaring that "Morgan Stanley *cannot claim* that CPH could or should have investigated whether statements made to it were true." Thus while the Florida Supreme Court has held that a fraud plaintiff often "cannot recover" unless he undertakes at least a cursory

investigation, the April 5 Order prevents Morgan Stanley from even *arguing* that CPH should have undertaken the required investigation.

5. Moreover, while the April 5 Order correctly acknowledges that "CPH may not recover for a misrepresentation if it *actually knew* that misrepresentation was false or its falsity *was obvious*," the Order fails to mention that Florida law deems a falsity "obvious" if it could have been uncovered by cursory investigation. *M/I Schottenstein Homes, Inc.*, 813 So.2d at 93 ("if a mere cursory glance would have disclosed the falsity of the representation, its falsity is regarded as obvious"). Thus, while the April 5 Order pays mentions the "obviousness" principle, it misleads the jury on Florida law by failing to reveal that the jury may consider whether a cursory investigation into Sunbeam's statements would have revealed them to be obviously false.

6. Barring that inquiry is particularly inappropriate in this case, which involves a highly sophisticated plaintiff. The jury not only should but must be allowed to consider whether CPH's failure to investigate prevented it from justifiably relying on Sunbeam's misrepresentations. It is only natural that the "totality of the circumstances" test, which takes into account the "relative positions of the parties," *Azam*, 813 So. 2d at 95, holds a sophisticated buyer to a higher standard than an unsophisticated one. The Fourth District has squarely held that a sophisticated party cannot succeed on a fraud claim if it could have uncovered the misrepresentation with the exercise of "some diligence." *See, e.g., L&L Doc's, LLC v. Florida Div. of Alcoholic Beverages & Tobacco*, 882 So. 2d 512, 515 (Fla. 4th DCA 2004) (holding in light of circumstances that party was "not justified in relying upo[n] misrepresentation[s] *which they knew or should have known, with the exercise of some diligence, was false*") (emphasis added);

Hillcrest Pac. Corp. v. Yamamura, 727 So. 2d 1053, 1057-58 (Fla. 4th DCA 1999) (holding that a "sophisticated developer in the business of investing millions of dollars in commercial property" did not "reasonably rely upon any material misrepresentations" made by real estate consultants about value of golf course, where sales agreement provided inspection rights and ample opportunity for developer to visit property and "audit the financial records"); *see also Nicholson v. Ariko*, 539 So. 2d 1141, 1142 (Fla. 5th DCA 1989) (plaintiff did not reasonably rely on representations of his business partner concerning terms of partnership agreement, where there was "no basis" in the record "to explain why [the plaintiff], an experienced business man, did not insist on a copy of the [agreement] and read it for himself"); *Azam*, 813 So. 2d at 93. ("[W]here one has an opportunity to make a cursory examination and investigation and does not do so, he cannot recover.").

8. The Court's proposed instruction cannot be squared with those precedents. Under Florida law, moreover, reasonableness of reliance is a quintessential fact question for the jury. It is not an issue appropriate for a mid-trial "limiting instruction" by the Court. *See Azam*, 813 So. 2d at 94-95 (remanding for trial regarding where plaintiff failed to investigate land records before purchasing land falsely represented as "natural preserve").

9. If, however, the Court persists in issuing a limiting instruction—which it should not—its instruction should conform to Florida law regarding justifiable reliance. To that end, Morgan Stanley conditionally proposes the following instruction:

> Under Florida law, CPH must prove that it was *justified* in relying on the allegedly false statements. CPH may not recover for a misrepresentation if it actually knew that the misrepresentation was false or if its falsity was obvious. In

> deciding whether CPH was justified in relying upon the truth of any particular representation, you must consider the totality of the circumstances, including, among other factors, the type of information at issue, the nature of the communication between the parties, the relative positions of the parties, the extent of their knowledge of corporate affairs, and level of sophistication. Whether a party is a sophisticated investor who was aided by experienced business and legal advisors is relevant to what it actually knew or should have known. To determine whether CPH justifiably relied on a misrepresentation, you may consider whether the falsity of the statement would have been apparent had CPH exercised some diligence. The evidence you are about to hear should be considered by you only for the purpose of determining whether CPH was justified in relying on the alleged misrepresentations.

For the reasons set forth above, Morgan Stanley respectfully requests that the Court reconsider its April 5, 2005 Order and, to the extent the Court determines that a limiting instruction on reliance is necessary, Morgan Stanley requests that the Court give the proposed limiting instruction set forth above.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 11 day of April 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

MORGAN STANLEY & CO. INCORPORATED'S OPPOSITION TO (I) PLAINTIFF'S MOTION TO DEFINE THE SCOPE OF NOTICES TO PRODUCE REGARDING EXPERT BILLING, AND (II) PLAINTIFF'S MOTION TO COMPEL COMPLIANCE WITH NOTICE TO PRODUCE

Defendant Morgan Stanley & Co. Incorporated ("Defendant") opposes Plaintiff Coleman (Parent) Holdings, Inc.'s ("CPH") (i) Motion to Compel Compliance with Notice to Produce, dated April 10, 2005, and (ii) Motion to Define the Scope of Notices to Produce Regarding Expert Billing, dated April 5, 2005. Morgan is plainly entitled to the documents sought in its Notice to Produce concerning expert billing, which relate directly to the amount of compensation received by their testifying expert Dr. Blaine Nye (including the compensation received by his wholly owned company, Stanford Consulting Group, Inc. ("Stanford")). Moreover, CPH may not condition its production of these documents on Morgan Stanley's production of documents concerning non-testifying consulting experts, as CPH is plainly not entitled to those documents.[1]

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[1] CPH served its motion to compel by hand on Sunday night at 9:00 p.m. (April 10, 2005) and noticed the motion for hearing at 9:30 a.m. on Monday morning (April 11, 2005).

ARGUMENT

1. Blaine F. Nye, Ph.D ("Dr. Nye") is CPH's damages expert. Stanford Consulting Group, Inc. is a company wholly-owned by Dr. Nye. (Tr. of Nye Dep. 6:10-14.) CPH acknowledges that "[v]arious employees of Stanford Consulting assisted Dr. Nye in preparing his report in this matter." (Motion to Define ¶ 1.)

2. On March 30, 2005, Defendant served an Amended Notice to Produce at Trial (Ex. A) requesting that CPH produce:

(i) Documents sufficient to show the total number of hours Dr. Nye and Stanford Consulting have worked on the above-captioned matter to date; and

(ii) Documents sufficient to establish the total fee for which Dr. Nye and Stanford Consulting have requested payment with respect to the provision of his services in the above-captioned matter to date.

3. By letter dated April 6, 2005 (Ex. B), CPH stated that it was "prepared to produce documents called for in Morgan Stanley's notice to produce concerning expert fees and hours." CPH's letter, however, stated that it would not produce these documents until it received "assurances" that Defendant not only would similarly produce documents concerning Professor Grinblatt (which Defendant previously stated it was ready to do) – but also would produce documents concerning Defendant's non-testifying ***consulting*** experts, Bates White LLC ("Bates White").

4. As set forth in Defendant's letter dated April 7, 2005 (Ex. C), CPH's position is not consistent with the Florida Rules of Civil Procedure. Under Florida Rule of Civil Procedure 1.280(b)(4)(A)(iii)(1), both parties are entitled to receive information relating to the compensation of experts who will testify at trial. Thus, Defendant is

entitled to receive all information relating to Dr. Nye's compensation and hours worked on this matter. Defendant is also plainly entitled to receive such information with respect to Stanford Consulting Group because Dr. Nye is the owner of Stanford Consulting Group, and any compensation that Stanford Consulting Group receives in connection with this matter is income to Dr. Nye and discoverable. Indeed, nowhere does CPH argue to the contrary.

5. CPH's attempt to condition its production of these documents on Defendant's production of documents concerning a non-testifying expert, Bates White, is impermissible. While Defendant will produce information relating to the compensation of its testifying expert Dr. Grinblatt, as well as the hours Dr. Grinblatt has worked, it need not produce such information with respect to Bates White. It is undisputed that Bates White has worked on this matter solely in a consulting and non-testifying capacity. No part of the Bates White's compensation is received by Dr. Grinblatt. Accordingly, information relating to Bates White's fees or hours is not discoverable under the Florida Rule of Civil Procedure. *See* FLA. R. CIV. P. 1.280(b)(4)(A)(iii)(i) (party may obtain discovery on the compensation of an expert who is expected "to be called as an expert witness at trial"); FLA. R. CIV. P. 1.280(b)(4)(B) (discovery of non-testifying consulting experts permitted only as provided in rule 1.360(b) or "upon a showing of ***exceptional circumstances*** under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means"). Far from showing any "exceptional circumstances," CPH makes no showing as to why it would be entitled to these documents. *See Edwards v. Humana of Florida, Inc.*, 569 So.2d 1315 (5th DCA 1990) ("It is clear that the intent of Rule 1.280(b)(4)(B) is to afford protection for the

discovery of a 'consulting expert.'") The only reason CPH offers (Motion to Define ¶ 5) – that it would like to know "the efforts to which each side has gone to obtain favorable testimony" – would apply equally in every case and hardly warrants the relief CPH seeks.[2]

6. The two new arguments CPH makes in its latest Sunday night missive of April 10, 2005 are also specious. First, the suggestion that Defendant's objection to CPH's Notice to Produce is untimely is disingenuous. CPH filed its "Motion to Define the Scope of Notices to Produce Regarding Expert Billing" on April 5, 2005, the day before trial started. That motion was itself a motion to compel production, seeking the same relief as CPH's (second) Sunday night motion. It, too, specifically asked "the Court to direct the parties to produce documents sufficient to show the number of hours worked and fees charged by . . . Bates White." (Mot. to Define p. 3.) The issue was joined by CPH's filing of its motion to compel. CPH's suggestion that Defendant was obligated to file a motion to quash, instead of simply opposing CPH's motion as it does here, is unsupported by any caselaw and would only serve to needlessly burden the Court with more filings.

7. Second, CPH's characterization of Bates White's role in the preparation of Dr. Grinblatt's report is inaccurate and, more importantly, irrelevant. CPH

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2 CPH's argument that it would risk revealing attorney work product if it produces records that "would identify specific tasks performed by individuals" is a red herring. Defendant's Amended Notice to Produce does not call for such documents. (*Compare* Motion to Define ¶ 3 *with* Ex. A.) Similarly, CPH's statement that Defendant "refuse[d]" to respond to its inquiries concerning the Notice to Produce is nonsense. (Motion to Define ¶ 6.) CPH sent a letter to Defendant on Saturday, April 2 asking for a response "at your earliest convenience." (Ex. A to CPH's Motion.) CPH then filed its motion on Tuesday, April 5, without waiting for a response.

characterization of Bates White's role is irrelevant because it is undisputed that no one at Bates White is a testifying expert in this matter. As noted above, Rule 1.280(b)(4)(A)(iii)(i) provides that a party may obtain discovery on the compensation of an expert who is expected "to be called as an expert witness at trial." Since Bates White is not being called at trial, the extent to which they assisted Dr. Grinblatt is not relevant, and discovery of Bates White's hours and fees is neither permitted nor relevant.

8. In any event, while consulting experts typically provide research assistance to testifying experts (and are not subject to discovery of their fees or otherwise), it is egregiously misleading for CPH to characterize Dr. Grinblatt's testimony as suggesting that Bates White acted as anything other than consultants here.[3] For example, CPH contends that Dr. Grinblatt "confirmed in his deposition" that Bates White "provided research assistance to Dr. Grinblatt that was essential to his ability to produce a report within the time frame allotted." (Mot. to Compel p. 2.) In fact, however, Dr. Grinblatt expressly rejected CPH's counsel suggestion that Bates White was involved in preparing Dr. Grinblatt's supplemental report: "I prepared my supplemental report as I stated in my last deposition. Bates White was valuable in providing research assistance at my direction. They processed the beautiful color and graphs, but how to do this, the organization, the original draft and the final draft, in fact, were all typed up by me." (Mot. to Compel Ex. D, 33:16-23). Dr. Grinblatt further testified, "I wouldn't characterize [Mr. Simpkins] as assisting. Again it's my report. What he did was he was

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[3] Indeed, CPH acknowledged in its questioning of Dr. Grinblatt that it considered Bates White a consulting firm. (Grinblatt Dep. 1/7/05 26:9-11; Motion to Compel Ex. C.)

what I would call the master typist. . . . I would call up Mr. Simpkins and, you know, ask for various research assistance on get me a document; can you get me all the news article associated with this date; is there an analyst report associated with this date, so he facilitated my report in the same sense perhaps that Mr. Sacks did. And he had this one additional role. I believe he is the person responsible for making the graphics and the outline of the report look as nice as it does." (Mot. to Compel Ex. D, 36:21-37:18.)

WHEREFORE, Defendant respectfully requests that the Court issue an order (i) denying CPH's Motion to Define the Scope of Notices to Produce Regarding Expert Billing, dated April 5, 2005, (ii) denying CPH's Motion to Compel Compliance with Notices to Produce, dated April 10, 2005, and (iii) requiring CPH forthwith to produce all documents called for in Defendant's Amended Notice to Produce at Trial dated March 30, 2005, together with such other and further relief as is just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 11th day of April, 2005.

Mark C. Hansen
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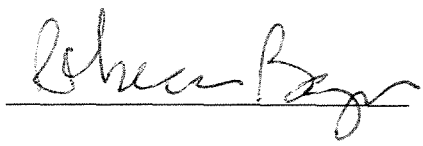
BY: 

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S AMENDED NOTICE TO PRODUCE AT TRIAL

Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through the undersigned counsel, and pursuant to Fla. R. Civ. P. Rule 1.410, requests that Plaintiff, Coleman (Parent) Holdings Inc. ("CPH") produce and permit Defendant to inspect and copy each of the documents described below. Morgan Stanley requests that production be made at the commencement of trial in this matter.

DEFINITIONS AND INSTRUCTIONS

Morgan Stanley incorporates by reference the Definitions and Instructions set forth in Defendant's First Request for Production of Document served in this action. In addition, Morgan Stanley defines the following terms as follows:

1. "Dr. Nye" shall mean Blaine F. Nye, Ph.D.

2. "Stanford Consulting" shall mean Stanford Consulting Group, Inc., including any of its affiliates, subsidiaries, and divisions, including but not limited to any of its predecessors and successors, present and former employees, representatives, agents, attorneys, accountants, advisors, or all other persons acting or purporting to act on its behalf.

Ex. A
16div-014863

3. "CPH" shall mean Coleman (Parent) Holdings, Inc. and any of its officers, directors, former or present employees, representatives, or agents.

DOCUMENTS REQUESTED

1. Documents sufficient to establish the total number of hours Dr. Nye and Stanford Consulting have worked on the above-captioned matter to date.

2. Documents sufficient to establish the total fee for which Dr. Nye and Stanford Consulting have requested payment with respect to the provision of his services in the above-captioned matter to date.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this ____ day of March, 2005.

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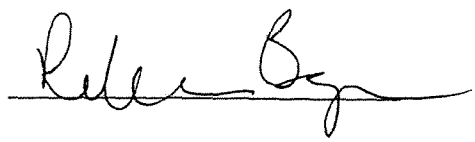
BY: 

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JENNER&BLOCK

April 6, 2005

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By Telecopy

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Kellogg, Huber, Hansen,
Todd, Evans & Figel, P.L.L.C.
c/o Kirkland & Ellis LLP
222 Lakeview Avenue, Suite 260
West Palm Beach, FL 33401

Re: ***Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.***

Dear Mark:

As I stated in my letter on April 3, 2005 and in our motion filed today, CPH is prepared to produce documents called for in Morgan Stanley's notice to produce concerning expert fees and hours. That is, we are ready to produce documents showing the hours, fees, and expenses of Dr. Nye and others at Stanford Consulting Group in connection with the CPH/Morgan Stanley litigation. As we explained in the motion, we have requested similar information from Morgan Stanley concerning the hours, fees, and expenses charged by Professor Grinblatt and Bates White. We do not believe either side needs to produce detailed time information from the bills.

Please confirm that you are willing to produce the information we have requested. Upon receipt of assurances that you will do so, we will exchange the information described in our motion.

Very truly yours,

Michael T. Brody

MTB:cjg

cc: Joseph Ianno, Jr., Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

Ex. B

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April 7, 2005

Via Facsimile and First Class Mail
Michael Brody, Esq.
Jenner & Block LLP
c/o MAFCO Holdings Inc.
777 S. Flagler Drive
Suite 1200 West Tower
West Palm Beach, FL 33401

Re: *Coleman (Parent) Holdings, Inc., v. Morgan Stanley & Co., Incorporated*, No. CA 03-5045 AI

Dear Mike:

I write in regard to your letter of April 6, 2005, in which you propose that the parties exchange documents relating to the hours and fees of their damages experts. Your proposal is not consistent with the Florida Rules of Civil Procedure.

Under Florida Rule of Civil Procedure 1.280(4)(A)(iii), both parties are entitled to receive information relating to the compensation of experts who will testify at trial. Thus, Morgan Stanley is entitled to receive all information relating to Dr. Nye's compensation and hours worked on this matter. It is also plainly entitled to receive such information with respect to Stanford Consulting Group. Dr. Nye is the president and owner of Stanford Consulting Group, and any compensation that Stanford Consulting Group is income to Dr. Nye and discoverable.

While Morgan Stanley is agreeable to producing information relating to the compensation of its testifying expert Dr. Grinblatt, as well as the hours Dr. Grinblatt has worked, it will not produce such information with respect to Bates White. Bates White has worked on this

Ex. C
16div-014867

matter solely in a consulting and nontestifying capacity. No part of the Bates White's compensation is received by Dr. Grinblatt, and, accordingly, information relating to Bates White's fees or hours is not discoverable under the Florida Rule of Civil Procedure.

Very truly yours,

Rebecca A. Beynon

cc: Jack Scarola, Esq.
Joseph Ianno, Esq.

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

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

CASE NO: CA 03-5045 AI

vs.

MORGAN STANLEY & CO, INCORPORATED

Defendant.
_____/

ORDER GRANTING VERIFIED MOTION TO ADMIT NEIL M. GORSUCH, PRO HAC VICE

THIS CAUSE came before the Court on Morgan Stanley & Co. Incorporated's ("Morgan Stanley") Verified Motion to Admit Neil M. Gorsuch, Pro Hac Vice. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Verified Motion to Admit Neil M. Gorsuch, Pro Hac Vice is GRANTED, and Mr. Gorsuch is admitted to practice in this case.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 11 of April, 2005.

Elizabeth T. Maass
Circuit Court Judge

Copies furnished to counsel of record on attached service list

16div-014869

SERVICE LIST

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION TO CLARIFY PROCEDURE-PHASE II

THIS CAUSE came before the Court April 11, 2005 on Morgan Stanley's Motion to Clarify Procedure-Phase II, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted. All motions directed to procedure and proof for Phase II of the trial shall be served by 5:00 p.m. April 15, 2005.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 11 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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Jerold S. Solovy, Esq.
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Rebecca Beynon, Esq.
Sumner Square
1615 M Street, NW, Suite 400
Washington, DC 20036

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INSC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY & CO. INCORPORATED'S MOTION TO REMOVE CONFIDENTIALITY DESIGNATIONS

THIS CAUSE came before the Court April 11, 2005 on Morgan Stanley &Co. Incorporated's Motion to Remove Confidentiality Designations, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley &Co. Incorporated's Motion to Remove Confidentiality Designations is Granted. The confidentiality designations on the documents listed in the Motion are lifted, subject to either party's right to object to their admissibility at trial.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 11 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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Washington, DC 20036

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S ORE TENUS MOTION TO CLARIFY PROCEDURE-DEMONSTRATIVE AIDS

THIS CAUSE came before the Court April 11, 2005 on Morgan Stanley's ore tenus Motion to Clarify Procedure-Demonstrative Aids, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted. By 5:00 p.m. on the day prior to a witness's testimony, each party shall provide opposing counsel a copy of any demonstrative aid expected to be used in a witness's direct testimony. Opposing counsel shall provide a copy of any demonstrative aid expected to be used in cross examination of the witness by 9:00 a.m. the following morning.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 11 day of April, 2005.

_____
ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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Washington, DC 20036

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S RESPONSES AND OBJECTIONS TO COLEMAN (PARENT) HOLDINGS INC.'S APRIL 1, 2005 NOTICE TO PRODUCE AT TRIAL

Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley") pursuant to Fla. R. Civ. P. Rules 1.280 and 1.350, provides the following Responses and Objections to Coleman (Parent) Holdings Inc.'s ("CPH") Notice to Produce at Trial ("Notice to Produce") dated April 1, 2005.

GENERAL OBJECTIONS

The following general objections apply to the Notice to Produce in its entirety and apply to each and every request within the Notice to Produce as if fully set forth with respect to each request:

1. Morgan Stanley objects to the Notice to Produce to the extent that it is vague, ambiguous, overbroad, unduly burdensome, oppressive, seeks cumulative or duplicative information, and calls for the production of documents that are neither

relevant to this action nor reasonably calculated to lead to the discovery of admissible evidence.

2. Morgan Stanley objects to the Notice to Produce in its entirety to the extent that it seeks materials protected from disclosure by the attorney-client privilege, the attorney-work-product doctrine, the common-interest doctrine, or any other applicable constitutional, statutory, or common-law privilege, doctrine, immunity, or rule. Pursuant to the Agreed Order Regarding Enlargement of Time to Prepare Privilege Log dated September 4, 2003, Morgan Stanley will exchange with CPH a categorization of documents not produced based on a claim of privilege or discovery immunity within 30 days after Morgan Stanley's production of the documents from which the documents have been withheld on grounds of privilege or discovery immunity.

3. Morgan Stanley reserves the right to redact not only privileged information, but also, where appropriate, non-responsive, confidential, or otherwise irrelevant information. If requested and necessary, Morgan Stanley will produce a log of any such redactions at a mutually agreeable juncture.

4. Morgan Stanley objects to the Notice to Produce in its entirety to the extent that it seeks to impose obligations, including a continuing duty of supplementation, different from, or in addition to, those provided in the Florida Rules of Civil Procedure, discovery guidelines of this Court, and applicable case law.

5. Morgan Stanley objects to the Notice to Produce in its entirety to the extent that it seeks the production of documents in the possession of third parties and not within Morgan Stanley's possession, custody, or control.

6. Morgan Stanley objects to the Notice to Produce to the extent that it calls for the production of documents that are already in CPH's possession, custody or control, or are otherwise publicly available.

7. Morgan Stanley objects to the Notice to Produce to the extent that it calls for "all" documents or is an all-inclusive request on the grounds that the request is overly broad and unduly burdensome. Unless otherwise noted, Morgan Stanley will produce any documents "sufficient to show" the responsive information, to the extent such documents can be located following a reasonable, good faith search of the relevant files in accordance with the applicable laws and rules.

8. It should not be inferred from the form or substance of any objection or response contained herein that documents responsive to any particular request exist, or are in the possession, custody, or control of Morgan Stanley

9. When Morgan Stanley responds to a specific request by stating that it will produce documents "subject to" its Specific or General Objections, "subject to" means that Morgan Stanley will produce documents responsive to the request as limited by its Specific and General objections.

10. Morgan Stanley's responses to CPH's Notice to Produce shall not be construed in any way as an admission that any definition provided by CPH is either factually correct or legally binding upon Morgan Stanley, or as a waiver of any of Morgan Stanley's objections, including, but not limited to:

(i) any objections as to the competency, relevancy, materiality, privilege, or admissibility as evidence, for any purpose, of any documents produced in response to the Notice to Produce or the subject matter thereof;

(ii) the right to object on any ground to the use of any of the documents produced or responses provided, or the subject matter thereof, at any trial or hearing in this matter or in any related or subsequent action or proceeding;

(iii) the right to object on any ground at any time to a demand for further response to the Notice to Produce; and/or

(iv) the right at any time to revise, supplement, correct, or add to these responses and objections.

11. Morgan Stanley's objections are based on its good-faith investigations and discovery to date. Morgan Stanley expressly reserves the right to modify and supplement these objections.

OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS

OBJECTIONS: Morgan Stanley incorporates by reference its objections to the definitions as set forth in Morgan Stanley's previous Objections to CPH's Requests for Production of Documents. In addition, Morgan Stanley has the following specific objections:

1. Morgan Stanley objects to the Definitions in the Notice to Produce to the extent they render any specific request objectionable on any of the grounds stated in the General Objections.

2. Morgan Stanley objects to the Notice to Produce's definition of "Morgan Stanley" to the extent that it purports to include the documents of Morgan Stanley's "affiliates, subsidiaries, divisions, predecessors, successors, present and former employees, representatives, agents, attorneys, advisors, or all other persons," and on the

grounds that it conflicts with previous definitions, and is overly broad. Subject to and without waiver of the foregoing General and Specific Objections, Morgan Stanley will only produce Morgan Stanley documents.

SPECIFIC OBJECTIONS AND RESPONSES

REQUEST NO. 1: Documents sufficient to establish the total number of hours Dr. Grinblatt has worked on the above-captioned matter to date.

OBJECTION TO REQUEST NO. 1: Morgan Stanley incorporates by reference its general objections. Subject to and without waiver of the foregoing General Objections, Morgan Stanley will produce documents sufficient to show the total number of hours Dr. Grinblatt has worked on the above-captioned matter to date.

REQUEST NO. 2: Documents sufficient to establish the total fee for which Dr. Grinblatt has requested or will request payment with respect to the provision of his services in the above-captioned matter.

OBJECTION TO REQUEST NO. 2: Morgan Stanley incorporates by reference its general objections. Subject to and without waiver of the foregoing General Objections, Morgan Stanley will produce documents sufficient to establish the total fee for which Dr. Grinblatt has requested or will request payment with respect to the provision of his services in the above-captioned matter.

REQUEST NO. 3: Documents sufficient to establish the total number of hours Bates White has worked on the above-captioned matter to date.

OBJECTION TO REQUEST NO. 3: Morgan Stanley incorporates by reference its general objections. Morgan Stanley specifically objects to this request on the ground that Bates White has worked on this matter solely in a consulting and non-testifying capacity. Subject to the foregoing General Objections, and without waiver of the foregoing General

and Specific Objections, Morgan Stanley will produce documents sufficient to establish the total number of hours Bates White has worked on the above-captioned matter to date.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 12th day of April 2005.

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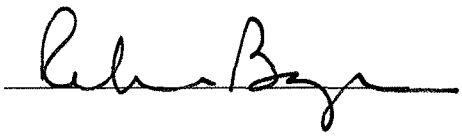
BY: 

Counsel for
Morgan Stanley & Co. Incorporated

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

CASE NO: CA 03-5045 AI

MORGAN STANLEY'S MOTION FOR CLARIFICATION OR RECONSIDERATION OF THE COURT'S ORDER ON PLAINTIFF'S MOTION IN LIMINE NO. 27 FOR A FINDING AS A MATTER OF LAW THAT THE FEDERAL SECURITIES LAWS PROHIBITED PLAINTIFF FROM SELLING UNREGISTERED SUNBEAM STOCK

This Court has entered an order preventing expert testimony concerning the value of the restricted Sunbeam stock Coleman (Parent) Holdings, Inc. ("CPH") received in the Coleman-Sunbeam transaction, unless it can be shown that the stock *could have been sold* on the date of the valuation. *See* Order on Plaintiff's Motion in Limine No. 27 For a Finding as a Matter of Law That the Federal Securities Law Prohibited Plaintiff From Selling Unregistered Sunbeam Stock at 2 (filed Mar. 28, 2005) ("No expert may testify as to damages based on the value of the Sunbeam stock as of a specific date without first seeking a ruling from the Court that a sufficient evidentiary predicate to support a conclusion that the stock could be sold as of the date to be used has been laid.") (hereinafter "Order on MIL 27"). That order:

- Contravenes controlling precedents of the court of appeals, because it *precludes* evidence about the stock's value on the *precise dates* where the value *must be determined under Florida law*;

- Conflicts with basic principles of economics and the commonplace reality of the marketplace, which provide established mechanisms for valuing restricted stock, even during times when it cannot be sold; and

- Contradicts *federal law*, including the positions of the Securities and Exchange Commission ("SEC"), the Financial Accounting Standards Board ("FASB"), and the

Internal Revenue Service ("IRS"), which require that such securities be valued (and explains how to value them) even when the securities cannot be sold.

Moreover, the order threatens to exclude highly probative evidence of the value of the Sunbeam stock CPH actually received, including how *CPH itself* valued that stock. *See, e.g.*, MS 822. Accordingly, Morgan Stanley respectfully requests that the Court reconsider or clarify its order. Alternatively, Morgan Stanley respectfully requests that the Court hold an evidentiary hearing limited to the question of how restricted stock positions are valued.

I. The Court's Ruling Contravenes The Requirement That Benefit-Of-The-Bargain Damages Be Calculated Using The Stock's Value On The Date Of The Transaction

This Court has ruled that CPH may elect benefit-of-the-bargain damages in this case.[1] Florida law is crystal clear about how benefit-of-the-bargain damages must be calculated: "[T]he benefit-of-the-bargain rule . . . awards as damages the difference between the actual value of the property and its value had the alleged facts regarding it been true." *Totale, Inc. v. Smith*, 877 So.2d 813, 815 (Fla. 4th DCA 2004) (internal quotation marks omitted). Florida law is equally clear about the relevant date for that calculation: The value of the stock must be determined "*at the time of purchase.*" *Id.* (emphasis added). *Accord Teca, Inc. v. WM-TAB, Inc.*, 726 So.2d 828, 829 (Fla. 4th DCA 1999) (en banc) (damages measured by the "difference between the value of the business as it would have been had it been as represented and warranted and the actual value of the business, *determined as of the date of the sale*") (emphasis added).

The essential elements of the damages calculation, therefore, are (1) the actual value of the Sunbeam restricted stock, and (2) the value that stock would have had if the misrepresentations had been true, *at the time of the Coleman-Sunbeam transaction*. Yet that is precisely what the Court's order *precludes* the parties from demonstrating. In particular, the

[1] Morgan Stanley preserves its objection that out-of-pocket damages is the correct measure.

Court has precluded the introduction of evidence regarding the stock's valuation on the date of the transaction because, on that date, the stock was restricted and could not be sold on the open market. Because that order is directly contrary to the Fourth District's controlling decision in *Totale*, the Court must reconsider it. Failure to do so is reversible error.

II. The Restricted Nature Of The Stock Provides No Basis For Departing From Settled Precedent For Determining Damages

A. Restricted Stock Has Measurable Value Even If It Cannot Be Transferred

The Court's ruling excluding such evidence appears to presuppose that restricted stock is either wholly valueless, or incapable of valuation, at times when it cannot be sold. To the extent it is the former, that is flatly incorrect. CPH itself ascribed value to its holding of restricted stock (*see infra* at 8-9). That makes sense. Simply because an asset has restrictions on alienability does not mean that it has no value. To the contrary, CPH bargained to receive restricted stock precisely because it had great value. That value can readily be calculated using settled economic principles and the methodologies established by FASB, the SEC, and the IRS.

Both sides' experts agree that restricted stock has value. The experts on *both* sides agree that the restricted Sunbeam stock *had* value on the date of the transaction. Professor Grinblatt and Mr. Nye reach differing conclusions about how the market might have valued the Sunbeam stock ($500 million versus $680 million), but they agree that the stock had substantial value, even though it was restricted. Similarly, at the time of the transaction, CPH valued the stock *in its own financial statements* at $619 million on March 30, 1998. Even *after* the fraud was disclosed, CPH in December 1998 and December 1999 placed a "fraud-free" value on the stock at somewhere in the range of $450 million. *See infra* at 8-10. The valuations of these sophisticated parties make clear that restricted stock has *substantial* present value even if it cannot be sold.

Expert federal agencies agree that restricted stock has measurable value. Like the experts in this case, two federal agencies and the private entity primarily responsible for setting accounting standards agree that restricted stock has value. The contrary view thus would contradict the considered judgment and standards of:

- The SEC;[2]
- FASB;[3] and
- the IRS.[4]

Those entities, moreover, agree on the basic methodology for determining the value of restricted stock — start with the value that stock would have if it were not restricted, and subtract a "liquidity" discount to account for the fact that the stock cannot be sold immediately. *See supra* notes 2, 3, & 4. Because there can be no disagreement that the restricted stock at issue here had measurable value on the date it was purchased, there are no grounds for departing from *Totale*'s unmistakable demand that value be determined on the date of the *transaction*.

---

[2] "As a general principle, the current fair value of restricted securities . . . depends upon their inherent worth, without regard to the restrictive feature, adjusted for any diminution in value resulting from the restrictive feature." Statement Regarding "Restricted Securities," *Accounting Series Investment Company Act of 1940*, Release Nos. AS-113 et al.: Statement Regarding Restricted Securities, 1969 WL 95335, at *3 (SEC Oct. 21, 1969) (Exh. A).

[3] FASB has declared that restricted stock should be valued based on the price of unrestricted stock, minus an "adjust[ment] for the effect of the restriction." *See* Proposed Statement of Financial Accounting Standards No. 1201-100: Fair Value Measurements, at iii, v (FASB June 23, 2004) *available at* http://www.fasb.org/draft/ed_fair_ value_ measurements.pdf (Exh. B). "[T]he fair value of restricted securities (securities for which sale is legally restricted by governmental or contractual requirements for a specified period)" may "be estimated using the quoted price of an otherwise identical unrestricted security, adjusted for the effect of the restriction." *Id.* at v, 23-24, 43-44.

[4] The IRS has explained that, when "unregistered shares are issued in exchange for assets or the stock of an acquired company," the "fair market value of stock that has not been registered for public trading" may be determined for tax purposes by examining the price of "stock of the same class that is actively traded in one or more securities markets," with an adjustment for "the difference in fair market value between the registered shares that are actively traded and the unregistered shares." Rev. Rul. 77-287, 1977-2 C.B. 319, § 2 (Exh. C).

Court decisions and economic literature recognize that restricted stock has measurable value. Finally, court decisions and the economic literature support the same conclusion. The courts have recognized that even where stock, like CPH's, is restricted on the date of the transaction, its value can be measured by determining the value of the unrestricted stock in the same class and applying a "liquidity discount" to account for lock-up and registration restrictions. *See Hagerman v. Yukon Energy*, 839 F.2d 407, 413 (8th Cir. 1988) (expert testimony valuing restricted stock by applying a liquidity discount to price of unrestricted stock on date of transaction); *Holmes v. Bateson*, 583 F.2d 542, 563 (1st Cir. 1978) (expert testimony that restricted stock can be valued by applying a 30% discount from the value of unrestricted stock).

A massive body of economic literature describes how to measure an appropriate "liquidity discount." *See* Grinblatt Supp. Report at 50 & n.53 (discussing economic literature). That body of literature strongly suggests that the actual value of CPH's stock on the day of purchase should be discounted by at least 15%. *See id. See also* William L. Silber, *Discounts on Restricted Stock: The Impact of Illiquidity on Stock Prices*, Financial Analysts Journal at 60-64 (July-August 1991) (finding that restricted stock sells for an average of 33.75% less than unrestricted stock); Robert P. Oliver & Roy H. Meyers, *Discounts Seen in Private Placements of Restricted Stock: The Management Planning, Inc. Long-Term Study* (1980-1996), in Robert F. Reilly & Robert P. Schweihs, Handbook of Advanced Business Valuation (2000) (finding that restricted stock sells for an average of 27% less than unrestricted stock). CPH effectively admits this. Sunbeam management led by Mr. Perelman's friends and employees themselves assigned a 15% liquidity discount to CPH's share holdings. *See* MS 282 at 6 (Sunbeam 10-Q filed with SEC on Nov. 25, 1998).

B. If Restricted Stock Does Not Have Measurable Value, The Court Must Direct A Verdict For Morgan Stanley

To the extent the Court adheres to the view that restricted stock is valueless or has no ascertainable value, the Court must direct a verdict for Morgan Stanley. CPH does *not* claim that it was entitled to receive unrestricted stock. It claims that it bargained for and was entitled to receive *restricted* stock. To the extent restricted stock, like the stock CPH agreed to and expected to receive, cannot be valued or has no value, then CPH cannot have suffered damages: It bargained for something that would have been valueless on the date of the transaction. *Totale*, 877 So.2d at 815 (value measured "at the time of purchase").

Alternatively, to the extent such stock lacks an ascertainable value during the restriction period, CPH cannot meet its burden of proving the reasonably expected value of the restricted Sunbeam stock on the date of the transaction – the value it would have had if Sunbeam's condition "had . . . been as represented," *Teca*, 726 So.2d at 829. The value of such restricted stock would be unascertainable and thus incapable of proof with "sufficient certainty." *Totale*, 877 So. 2d at 815. If CPH fails to provide evidence fixing the value "*on the date of the sale*, a *crucial element* in the damage[s] equation," Morgan Stanley is entitled to judgment as a matter of law. *See Teca*, 726 So. 2d at 829 (emphases added).

C. Valuing The Stock On A Different Date Is Inconsistent With Loss-Causation And Benefit-Of-The-Bargain Principles

The Court's order also conflicts with the principle underlying *Totale*, *Teca*, and the date-of-the-transaction test they impose. A plaintiff is entitled to recover damages caused *by the fraud*, but not damages *caused by other factors*, such as later market events or poor management. As *Totale* explains, "[l]ater appreciation or depreciation of the property" that is not a result of the fraud "generally does not alter the fraud damages computation." 877 So.2d at 815.

Likewise here, much of the diminution in the stock's value long after the fraud's revelation was from factors other than the fraud, including CPH's management decisions after taking control of the company and general market factors. "But in determining recoverable damages, these contributing forces must be isolated and removed." *Miller v. Asensio & Co.*, 364 F.3d 223, 233 (4th Cir. 2004); *see id.* (defendant not liable for portion of inflation in stock price attributable to other factors or losses from general market decline). Requiring the stock to be valued on a date other than the purchase date necessarily and erroneously incorporates such additional factors into the damages estimate. *Totale* and *Teca* preclude such a result.[5]

Valuing the stock at a point after the transaction date also violates the fundamental principle that benefit-of-the-bargain damages give the plaintiff the benefit of *his* bargain, not the benefit of a bargain *he never made*. Here, CPH elected to receive restricted stock that could not be sold until a certain time had passed. Consequently, even had there been *no* fraud here — and CPH had gotten *precisely what it bargained for* — CPH still would have incurred any non-fraud losses during the restricted period. If CPH claims the benefit of the bargain, it must also accept the bargain's burdens. That includes declines in value during the bargained-for restricted period so long as they stem from causes *other than* the fraud itself.[6]

---

[5] *Silverberg v. Paine, Webber, Jackson & Curtis, Inc.*, 710 F.2d 678 (11th Cir. 1983), has nothing to do with the valuation of restricted stock. It long predates *Totale*, and in any event recognizes that the "benefit of the bargain rule" under Florida law requires a plaintiff to show "the actual value [of the stock] *on the date of purchase*." *Id.* at 686 n.12 (emphasis added). In that case, moreover, the defendants' misrepresentations did not affect the market price. *See id.* at 686-87.

[6] CPH may contend that, as a result of the fraud, it was unable to register the Sunbeam stock for longer than the bargained-for restriction period. Even if that is true, that still does not excuse CPH from valuing the stock, as received, on the date of purchase. The only issue is whether, in calculating the actual value of the stock that CPH received, it is appropriate to apply a slightly larger liquidity discount to account for a longer restriction.

III. CPH's Financial Records Showing How It Valued Sunbeam Stock After All Of The Alleged Frauds Had Been Revealed Are Probative And Admissible Even Under The Terms Of Motion In Limine 27

The Court likewise should clarify that Morgan Stanley may introduce into evidence CPH financial records showing the value that CPH itself placed on the stock as of December 31, 1998 and December 31, 1999. By these dates, the alleged fraud had been exposed entirely. Likewise, by December 31, 1999, the restrictions prohibiting the sale of the Sunbeam stock had expired for most shares. At that point, CPH valued the Sunbeam stock, together with warrants to purchase more stock, on its books at $450 million. *See, e.g.*, MS 822. That proves beyond cavil that CPH placed a value well *above* zero on the stock even though the fraud had been revealed (indeed, as described below, it shows a minimum valuation of $162 million). CPH's valuation of the Sunbeam stock after it knew of the fraud is directly probative of the "actual value" of its Sunbeam stock on the date of transaction, and contradicts any claim that it was zero. The evidence is thus highly relevant, and the jury is entitled to hear it when determining damages under Florida law.

A. CPH's Records Admit That The Sunbeam Stock Had Substantial Value After Most Restrictions Had Expired By December 31, 1999

When CPH filed the second financial statement valuing its shares and warrants at $450 million (on December 31, 1999), at least 75% of the stock had become unrestricted. *See* Order on MIL 27 at 1; CPH Br. on MIL 27 at 23. Thus, it is indisputable that, as of that date, CPH was contractually and legally entitled to begin selling shares. CPH and its own expert witness, Dr. Blaine Nye, admit that CPH could have realized $46 million by registering the securities and selling 75% of the shares after December 6, 1999. *See* CPH Br. on MIL 27 at 25. Morgan Stanley is entitled to present such evidence and admissions at trial.

16div-014891

B. CPH's Internal Valuations Are Probative Admissions

That CPH carried the stock on its books with value on December 31, 1998, even though it could not be sold, shows that CPH itself believed the stock had value before the restrictions expired. Consistent with established economic principles, CPH's internal valuations necessarily discounted the value of those shares to reflect the nature and duration of the restrictions. Indeed, if CPH didn't discount the value of its shares in this fashion, its financial statements – provided to the federal government and banks – would have been materially misleading. Contradicting its own representations in financial statements, CPH now asks the Court to assume irrationally that the restricted shares were valueless throughout 1997 and 1998. CPH should be held to its prior valuation. At a minimum the jury should learn that CPH valued the stock at $450 million with full knowledge of the restrictions.

C. The Inclusion Of Warrants Is Beside The Point

CPH's objection that the $450 million figure includes *both* stock and warrants is meritless. First, CPH benefited from its bargain by getting the warrants in settlement. Accordingly, they are properly included in calculating the *actual value* CPH ultimately received from the bargain. We recognize the Court's concern that settlement should be calculated by the Court as an offset after trial. Here, however, CPH chose to consolidate the value of both in a single figure. Having done that, it is in no position to object if the two are treated in a consolidated fashion in court rather than in a bifurcated fashion (one part by the jury and one by the court) to avoid depriving the jury of highly probative evidence. CPH chose to treat the two items as a single consolidated figure on its books. The Court and the jury are entitled to treat them in a consolidated fashion as well.

Even if one must exclude the value of the warrants, the $450 million valuation is still highly probative, because any method for distinguishing between the value of the stock and the value of the warrants would show that the stock was worth at least $162 million, and certainly not zero. For example, there is no dispute that the warrants represented the opportunity to acquire another approximately 23 million shares on top of the 14 million shares CPH already held. *See* MS 822. If one were to assume for the sake of simplicity that the warrants could be exercised without any payment – an assumption that will tend to overstate the value of the warrants and understate the value of the stock – they would represent 63% of the value (23 million shares of stock with no further payment required), while the stock would represent 37% (14.1 million shares with no further payment required). As a matter of simple math, 37% of $450 million is about $162 million. That can be proved through CPH's or Morgan Stanley's witnesses. However you slice it, the number is not zero. And however you slice it, CPH would have had no business putting $450 million on its books if it thought the stock, after the fraud was revealed, in fact was worthless. Consequently, excluding this document – which shows the value that CPH itself placed on the stock – would not merely deprive jurors of probative evidence. It would leave them with a false impression of CPH's valuation.

CONCLUSION

The motion for reconsideration should be granted, and this Court should permit testimony regarding the value – and the proper means of valuing – the restricted stock CPH received at the time of the transaction. In the alternative, the Court should bar *both parties* from introducing evidence and testimony regarding the actual or reasonably expected value of the restricted stock at the time CPH received it. Finally, Morgan Stanley also requests that the Court clarify that its order does *not* bar evidence that CPH's financial statements valued the Sunbeam stock and

warrants at $450 million as of December 31, 1998 and December 31, 1999. At the very least, the Court should clarify that it will admit the December 31, 1999 financial statements; those statements are admissible even under the Court's order because it is undisputed that CPH could have sold 75% of its Sunbeam shares by that date.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 12 day of April 2005.

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Release No. AS- 113, Release No. IC - 5847, 1969 WL 95335 (S.E.C. Release No.)
(Cite as: 1969 WL 95335 (S.E.C. Release No.))

C

Securities and Exchange Commission (S.E.C.)
***1** Accounting Series
Investment Company Act of 1940

Statement Regarding 'Restricted Securities'
October 21, 1969

The Securities and Exchange Commission today made public the following statement.

'Restricted Securities'

The Commission is aware that many investment companies have been acquiring substantial quantities of securities that cannot be offered to the public for sale without first being registered under the Securities Act of 1933 ('restricted securities'). For the year 1968, annual reports filed by registered investment companies indicate that open-end and closed-end companies together held in excess of $4.2 billion of restricted equity securities. Open-end companies--excluding exchange funds--accounted for about $3.2 billion of these restricted securities which represented 4.4 per cent of their total net assets. The acquisition by investment companies of such securities raises certain problems under the securities laws of which shareholders, distributors, managements and directors of these companies should be aware. This statement discusses these problems. No inference should be drawn from publication of this statement, however, as to the desirability or merits of the acquisition of restricted securities by a registered investment company.

Problems for the Seller

Section 4(2) of the Securities Act of 1933 exempts from the registration requirements of that Act 'transactions by an issuer not involving any public offering.' This is the so-called 'private offering' provision in the Securities Act. The securities involved in transactions effected pursuant to this exemption are referred to as restricted securities because they cannot be resold to the public without prior registration. They are also sometimes referred to as 'investment letter securities' because of the practice frequently followed by the seller in such a transaction, in order to substantiate the claim that the transaction does not involve a public offering, of requiring that the buyer furnish a so-called 'investment letter' representing that the purchase is for investment and not for resale to the general public.

The private offering exemption of Section 4(2) of the Securities Act is available only where the offerees do not need the protections afforded by the registration procedure. As the Court of Appeals for the Second Circuit recently stated in Katz v. Amos Treat & Co. CCH Fed'l. Sec. Law Rep. ¶ 92,409 (1969):

'The Supreme Court has instructed that the applicability of the exemption should turn on whether the particular class of persons affected need the protection of the Act. SEC v. Ralston Purina Co., 346 U. S. 119, 125 (1953).'

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Ex. A
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The test of the availability of the Section 4(2) exemption is whether the offerees are in such a position with respect to the issuer as to have access to the kind of information that would be made available in a registration statement filed pursuant to the Securities Act. This test is no different when the offeree is an investment company.

Problems for the Buyer

1. The Problems of Valuation

***2** It is critically important that an investment company properly value its portfolio securities. It is obvious, for example, that any distortion in the valuation of a restricted security held by an investment company will distort the price at which the shares of the investment company are sold or redeemed. It is also clear that investment managers who are compensated on the basis of net asset value or performance may be unduly compensated if a restricted security, purchased at a discount from the market quotation for unrestricted securities of the same class, is overvalued. In such a case, investors may also be misled by the reported performance of the investment company.

The acquisition of restricted securities by both open-end and closed-end investment companies creates serious problems of valuation. Section 2(a)(39) of the Investment Company Act of 1940 and Rule 2a-4 thereunder requires that in determining net asset value, 'securities for which market quotations are readily available' must be valued at current market value while other securities and assets must be valued at 'fair value as determined in good faith by the board of directors.'

Readily available market quotations refers to reports of current public quotations for securities similar in all respects to the securities in question. No such current public quotations can exist in the case of restricted securities. For valuation purposes, therefore, restricted securities constitute securities for which market quotations are not readily available. Accordingly, their fair values must be determined in good faith by the board of directors and this obligation necessarily continues throughout the period these securities are retained in the company's portfolio.

Restricted securities should be included in the portfolio of a company and valued to determine current net asset value on the date that the investment company has an enforceable right to demand the securities from the seller.

Where the investment company negotiates the acquisition of the restricted securities directly with the owner of the securities, there are three significant dates. The first occurs when the investment company and the seller orally agree upon the price and the amount of the securities (the 'handshake date'). At this point, there would not seem to be any enforceable right of the investment company to demand the securities from the seller since, in most states, particularly those which have adopted the Uniform Commercial Code, there is no enforceable right unless there exists some writing 'sufficient to indicate that a contract has been made for sale of a stated quantity of described securities as a defined or stated price' (Section 8-319(a) of the Uniform Commercial Code). If the terms of the oral understanding do not contemplate compliance with any condition by the seller, it is

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suggested that the investment company procure, from the seller, a signed memorandum setting forth the price and quantity of securities to be sold. Upon receipt of that memorandum, an enforceable right would be obtained. The securities should be valued as of that date.

*3 In those situations where the oral understanding contemplates the execution of a formal contract of purchase and sale, no enforceable right exists until the time the formal contract is signed (the 'contract date'). If the formal contract does not require compliance with any conditions by the seller, an enforceable right is then obtained, and the securities should be valued as of that date.

Where the formal contract requires compliance with stated conditions which the investment company believes should not be waived, no enforceable right is obtained until the stated conditions are satisfied. In that situation, the valuation date should be the date upon which the conditions are satisfied (the 'closing date').

Restricted securities are often purchased at a discount, frequently substantial, from the market price of outstanding unrestricted securities of the same class. This reflects the fact that securities which cannot be readily sold in the public market place are less valuable than securities which can be sold, and also the fact that, by the direct sale of restricted securities, sellers avoid the expense, time and public disclosure which registration entails.

As a general principle, the current fair value of restricted securities would appear to be the amount which the owner might reasonably expect to receive for them upon their current sale. This depends upon their inherent worth, without regard to the restrictive feature, adjusted for any diminution in value resulting from the restrictive feature. Consequently, the valuation of restricted securities at the market quotations for unrestricted securities of the same class would, except for most unusual situations, be improper. [FN1] Further, the continued valuation of such securities at cost would be improper if, as a result of the operations of the issuer, change in general market conditions or otherwise, cost has ceased to represent fair value. In such circumstances, maintaining the value of the restricted securities at cost would mislead investors as to the value of the portfolio of the investment company which holds restricted securities.

Instead of valuing restricted securities at cost or at the market value of unrestricted securities of the same class, some investment companies value restricted securities held in their portfolio by applying either a constant percentage or an absolute dollar discount to the market quotation for unrestricted securities of the same class. The automatic valuation of restricted securities by such a method, however, would also not appear to satisfy the requirement of the Act that each security, for which a market quotation is not readily available, be valued at fair value as determined in good faith by the board of directors.

Thus, it would be improper in valuing restricted securities automatically to maintain the same percentage discount (from the market quotation for unrestricted securities of the same class) that was received when the restricted securities were purchased, without regard to other relevant factors such as, for example, the extent to which the inherent value of the securities may have changed.

*4 Furthermore, the valuation of restricted securities by reference to the market

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price for unrestricted securities of the same class assumes that the market price for unrestricted securities of the same class is representative of the fair value of the securities. This may not be the case when the market for the unrestricted securities is very thin, i.e., only a limited volume of shares are available for trading. With a thin market, the news of the investment company's purchase of the restricted securities may, be itself, have the effect of stimulating a public demand for the unrestricted securities, the supply of which has not been increased, and thus lead to a spiralling increase in the valuation of both the restricted and unrestricted securities.

Moreover, if in valuing restricted securities, the diminution in value attributable to the restrictive feature is itself affected by factors subject to change, such as the length of time which must elapse before the investment company may require the issuer to cause the securities to be registered for public sale, the valuation should reflect any such changes.

Some companies value restricted securities, acquired at prices below the market quotations for unrestricted securities of the same class, by automatically amortizing the difference over some chosen period on the assumption that it will be possible to sell them at the market price for unrestricted securities at the expiration of the time period. Under prevailing conditions, however, it cannot always be determined either that the securities will, in fact, be effectively registered at the expiration of that period or that their public sale will otherwise be possible. For example, the issuer may be unable or unwilling to register at the expiration of the estimated period, and public sale at the end of that period without registration may not be lawful. Consequently, the practice of automatically amortizing the discount over an arbitrarily chosen period creates the appearance of an appreciation in the value of the securities which has not, in fact, occurred, and, accordingly, is improper.

An undertaking by the issuer to register the securities within a specified time period would not dictate a different result. In view of the many factors that may alter the date of the proposed public offering, it is at best speculative to use such an undertaking alone as the basis for amortizing the discount.

Similarly, the possible adoption by the Commission of the more definite holding periods contained in proposed Rules 101, 160, 161, 162, 163, 164, and 180, Securities Act Release No. 4997 (dated September 15, 1969) would also not alter the conclusion that amortization of the discount may be improper. The more definite holding periods there proposed are available only if certain specified conditions are met.

In summary, there can be no automatic formula by which an investment company can value restricted securities in its portfolio to comply with Section 2(a)(39) and Rule 2a-4. It is the responsibility of the board of directors to determine the fair value of each issue of restricted securities in good faith; and the data and information considered and the analysis thereof should be retained for inspection by the company's independent auditors. While the board may, consistent with this responsibility, determine the method of valuing each issue of restricted security in the company's portfolio, it must continuously review the appropriateness of any method so determined. The actual calculations may be made by persons acting pursuant to the direction of the board.

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2. The Problems of Portfolio Management

*5 In addition to valuation, restricted securities present special problems of portfolio management.

The concept of the Securities Act exemption of a private placement of securities is premised on the belief that in such a situation the investor has such information concerning the issuer that he is able to fend for himself without need for the disclosures that would be provided by an effective registration statement. Correlatively, where the investor is a registered investment company, it would seem to be the fiduciary duty of the persons responsible for the investment decisions of the investment company to obtain, prior to purchase, the necessary information to make an independent analysis of the investment merits of the particular restricted securities. [FN2] Also, in order to enable the continuing valuation of such securities, the investment company should require the seller to undertake to provide, to the extent known to the seller, information on a continuing basis as to any subsequent private sales of the issuer's securities. The investment company should also assure itself that it is in the position to obtain the appropriate financial information at appropriate times. It is assumed that any public disclosures, such as that made in periodic reports filed pursuant to the Securities Exchange Act, are carefully considered by the investment company portfolio manager.

There is also the paradox of too much success to consider. For example, if restricted securities rapidly appreciate in value, perhaps because of an improvement in the business of the issuer, an investment company may find instead of having, for example, 5 per cent of its assets invested in a particular company, it has instead, 25 per cent of its assets in that company. The investment company to which this happends suffers a loss in diversification and may find that it has become overly sensitive to any adverse developments in the affairs of that particular portfolio company.

The foregoing factors in portfolio management relate to both open-end and closed-end management companies. There are additional special factors that relate only to open-end companies.

Section 2(a)(31), when read together with Section 5(a), of the Investment Company Act requires that the holders of redeemable shares issued by an open-end investment company be entitled to receive approximately their proportionate share of the issuer's current net assets, or the cash equivalent thereof, upon presentation of the security to the issuer or to a person designated by the issuer. Section 22(e) of the Act provides that, absent specified unusual conditions, payment of the redemption price must be made within seven days after the tender of a redeemable security to an investment company or its agent designated for that purpose.

It is desirable that an open-end company retain maximum flexibility in the choice of portfolio securities which, on the basis of their relative investment merits, could best be sold where necessary to meet redemptions. To the extent that the portfolio consists of restricted securities, this flexibility is reduced.

*6 Restricted securities may not be publicly sold--nor can they be distributed to redeeming shareholders as an in-kind redemption. While they may be sold privately,

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there may not be sufficient time to obtain the best price since the date of payment or satisfaction may not be postponed more than seven days after the tender of the company's redeemable securities for redemption. A private sale within that period may result in the investment company receiving less than its carrying value of the restricted securities. This would result in a preference in favor of the redeeming shareholders and a diminution of the net asset value per share of shareholders who have not redeemed. Therefore, instead of arranging a private sale of restricted securities, an open-end company that is faced with redemptions may decide to sell unrestricted securities which it would otherwise have retained on the basis of comparative investment merit.

Significant holdings of restricted securities not only magnify the valuation difficulties but may also present serious liquidity questions. Because open-end companies hold themselves out at all times as being prepared to meet redemptions within seven days, it is essential that such companies maintain a portfolio of investments that enable them to fulfill that obligation. This requires a high degree of liquidity in the assets of open-end companies because the extent of redemption demands or other exigencies are not always predictable. It has been with this in mind that the staff of the Commission has for several years taken the position that an open-end company should not acquire restricted securities when the securities to be acquired, together with other such assets already in the portfolio, would exceed 15 per cent of the company's net assets at the time of acquisition. The Commission, however, is of the view that a prudent limit on any open-end company's acquisition of restricted securities, or other assets not having readily available market quotations, would be 10 per cent. [FN3] When as a result of either the increase in the value of some or all of the restricted securities held, or the diminution in the value of unrestricted securities in the portfolios, the restricted securities come to represent a larger percentage of the value of the company's net assets, the same valuation and liquidity questions occur. Accordingly, if the fair value of restricted holdings increases beyond 10 per cent, it would be desirable for the open-end company to consider appropriate steps to protect maximum flexibility. The Commission will ex-examine appropriate limitations in this area in light of all the policy objectives of the Investment Company Act.

3. The Problem of Disclosure

Section 8(b)(1)(D) of the Investment Company Act requires that an investment company include, in its registration statement filed with the Commission under the Act, information as to its policy with respect to 'engaging in the business of underwriting securities issued by other persons.' Item 4(c) of Form N-8B-1 requires that a registrant under the Act describe its policy or proposed pulicy with respect to 'the underwriting of securities of other issuers.' In response to this item, registrant's policy with respect to the acquisition of restricted securities should be disclosed. [FN4] In view of the fact that policies listed under Item 4 are fundamental policies which cannot be changed without prior shareholder approval, the importance of adopting a clear policy with regard to such investments is apparent.

*7 The prospectus of a registered investment company should also fully disclose the company's policy which respect to restricted securities. [FN5] It is also clear that an investment company which has a policy of acquiring restricted

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securities is responsible for full and adequate disclosure with respect to all matters relating to the valuation of such securities. Specifically, there should be included, in a note to the financial statements, (1) identification of any restricted securities and the date of acquisition, (2) disclosure of the methods used in valuing such securities both at the date of acquisition and the date of the financial statements, (3) disclosure of the cost of such securities and the market quotation for unrestricted securities of the same class both on the day the purchase price was agreed to (the so-called 'handshake date'), and on the day the investment company first obtained an enforceable right to acquire such securities, and (4) a statement as to whether the issuer or the registrant will bear costs, including those involved in registration under the Securities Act, in connection with the disposition of such securities.

Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder makes it unlawful, among other things, for any person, in connection with the purchase or sale of securities, to employ any device, scheme, or artifice to defraud or to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made not misleading, or engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any persons.

The offering price of securities issued by a management investment company is premised upon the net asset value of such shares as determined pursuant to Section 2(a)(39) of the Act and Rule 2a-4 thereunder and is so represented in its prospectus. The improper valuation of restricted securities held by such a company would distort the net asset value of the shares being offered or, in the case of an open-end company, redeemed, and would therefore constitute a fraud and deceit within the meaning of Section 10(b) and Rule 10b-5.

An open-end company, of course, represents to investors, in its prospectus, that it will, as required by Section 22(e) of the Act, redeem its securities at approximate net asset value within seven days after tender. To the extent a material percentage of the assets of an open-end company consist of restricted securities which cannot publicly be sold without registration under the Securities Act, the ability of the company to comply with the provisions of the Investment Company Act relating to redemption, and to ful-fill the implicit representations made in its prospectus with respect thereto, may be adversely affected. [FN6] In any such situation, the investment company concerned and the persons responsible for the sale of its securities should give careful consideration to the possible application of the provisions of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

FN1 See Proposed Guidelines For the Preparation Of Form N-8B-1, Investment Company Act Release No. 5633, p. 21 (March 11, 1969). Note--The guidelines were subsequently adopted in Investment Company Act Release No. 7221 (June 9, 1972).

FN2 See The Value Line Fund v. Marcus ('64-'66 Transfer Binder) CCH Fed'l. Sec. Law Rep. ¶ 91,523 at p. 94,970 (S.D. N. Y. 1965).

FN3 The Commission is aware that certain open-end companies may have acquired restricted securities in excess of 10 per cent of net assets. It is assumed that such companies will not undertake commitments, beyond any obligation existing on

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this date, to acquire restricted securities until, in the normal course of business, such holdings are not in excess of 10 per cent of current net asset value.

FN4 See Proposed Guidelines For the Preparation of Form N-8B-1, Investment Company Act Release No. 5633, p. 7 (March 11, 1969). Note--See Note 1 regarding the adopted guidelines.

FN5 See Proposed Guidelines For The Preparation Of Forms S-4 and S-5, Investment Company Act Release No. 5634, pp. 11, 13 (March 11, 1969). Note-- The guidelines were subsequently adopted in Investment Company Act Release No. 7220 (June 9, 1972).

FN6 See Proposed Guidelines For The Preparation Of Form N-8B-1, Investment Company Act Release No. 5633, p. 7 (March 11, 1969). Note--See Note 1 regarding the adopted guidelines.

Release No. AS- 113, Release No. IC - 5847, 1969 WL 95335 (S.E.C. Release No.)

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NO. 1201-100 | JUNE 23, 2004

Financial Accounting Series

EXPOSURE DRAFT

Proposed Statement of Financial Accounting Standards

Fair Value Measurements

This Exposure Draft of a proposed Statement of Financial Accounting Standards is issued by the Board for public comment. Written comments should be addressed to:

Technical Director
File Reference No. 1201-100

Comment Deadline: September 7, 2004

Financial Accounting Standards Board
of the Financial Accounting Foundation

Ex. B
16div-014905

Responses from interested parties wishing to comment on the Exposure Draft must be *received* in writing by September 7, 2004. Interested parties should submit their comments by email to director@fasb.org, File Reference No. 1201-100. Those without email may send their comments to "Technical Director—File Reference No. 1201-100," at the address at the bottom of this page. Responses should *not* be sent by fax.

All comments received by the FASB are considered public information. Those comments will be posted to the FASB's website and will be included in the project's public record.

Any individual or organization may obtain one copy of this Exposure Draft without charge until September 7, 2004, on written request only. *Please ask for our Product Code No. E179.* For information on applicable prices for additional copies and copies requested after September 7, 2004, contact:

Order Department
Financial Accounting Standards Board
401 Merritt 7
P.O. Box 5116
Norwalk, CT 06856-5116

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Financial Accounting Standards Board
of the Financial Accounting Foundation
401 Merritt 7, P.O. Box 5116, Norwalk, Connecticut 06856-5116

Notice for Recipients of This Exposure Draft

This proposed Statement provides guidance for how to measure fair value. It would apply broadly to financial and nonfinancial assets and liabilities measured at fair value under other authoritative accounting pronouncements. The Board invites comments on all matters in this proposed Statement, particularly on the specific issues discussed below. Respondents need not comment on all of those issues and are encouraged to comment on additional issues. It would be helpful if comments explain the reasons for the positions taken and include any alternatives the Board should consider.

Definition of Fair Value

Issue 1: This proposed Statement would define fair value as "the price at which an asset or liability could be exchanged in a current transaction between knowledgeable, unrelated willing parties" (paragraph 4). The objective of the measurement is to estimate the price for an asset or liability in the absence of an actual exchange transaction for that asset or liability. Will entities be able to consistently apply the fair value measurement objective using the guidance provided by this proposed Statement together with other applicable valuation standards and generally accepted valuation practices? If not, what additional guidance is needed? (Specific aspects of the guidance provided by this proposed Statement are considered below.)

Valuation Techniques

Issue 2: This proposed Statement would clarify and incorporate the guidance in FASB Concepts Statement No. 7, *Using Cash Flow Information and Present Value in Accounting Measurements,* for using present value techniques to estimate fair value (Appendix A). Is that guidance sufficient? If not, what additional guidance is needed?

Active Markets

Issue 3: This proposed Statement would clarify that valuation techniques used to estimate fair value should emphasize market inputs, including those derived from active markets. In this proposed Statement, active markets are those in which quoted prices are readily and regularly available; *readily available* means that pricing information is currently accessible and *regularly available* means that transactions occur with sufficient frequency to provide pricing information on an ongoing basis. Is that guidance sufficient? If not, what additional guidance is needed?

Valuation Premise

Issue 4: This proposed Statement would provide general guidance for selecting the valuation premise that should be used for estimates of fair value. Appendix B illustrates the application of that guidance (Example 3). Is that guidance sufficient? If not, what additional guidance is needed?

16div-014907

Fair Value Hierarchy

Issue 5: This proposed Statement would establish a hierarchy for selecting the inputs that should be used in valuation techniques used to estimate fair value. Those inputs differ depending on whether assets and liabilities are identical, similar, or otherwise comparable. Appendix B provides general guidance for making those assessments (Example 4). Is that guidance sufficient? If not, what additional guidance is needed?

Level 1 Reference Market

Issue 6: In this proposed Statement, the Level 1 reference market is the active market to which an entity has immediate access or, if the entity has immediate access to multiple active markets, the most advantageous market. Appendix B provides general guidance for selecting the appropriate reference market (Example 5). Is that guidance sufficient? If not, what additional guidance is needed?

Pricing in Active Dealer Markets

Issue 7: This proposed Statement would require that the fair value of financial instruments traded in active dealer markets where bid and asked prices are more readily and regularly available than closing prices be estimated using bid prices for long positions (assets) and asked prices for short positions (liabilities), except as otherwise specified for offsetting positions. Do you agree? If not, what alternative approaches should the Board consider?

Measurement of Blocks

Issue 8: For unrestricted securities with quoted prices in active markets, many FASB pronouncements (including FASB Statement No. 107, *Disclosures about Fair Value of Financial Instruments*) require that fair value be estimated as the product of a quoted price for an individual trading unit times the quantity held. In all cases, the unit of account is the individual trading unit. For large positions of such securities (blocks) held by broker-dealers and certain investment companies, the AICPA Audit and Accounting Guides for those industries (the Guides) permit fair value to be estimated using blockage factors (adjustments to quoted prices) in limited circumstances. In those cases, the unit of account is a block.

The Board initially decided to address that inconsistency in this proposed Statement as it relates to broker-dealers and investment companies. The Board agreed that the threshold issue is one of determining the appropriate unit of account. However, the Board disagreed on whether the appropriate unit of account is the individual trading unit (requiring the use of quoted prices) or a block (permitting the use of blockage factors). The majority of the Board believes that the appropriate unit of account is a block. However, the Board was unable to define that unit or otherwise establish a threshold criterion for determining when a block exists as a basis for using a blockage factor. The Board subsequently decided that for measurement of blocks held by broker-dealers and certain investment companies, current practice as permitted under the Guides should remain unchanged until such time as the Board fully considers those issues.

16div-014908

For those measurements, do you agree with the Board's decision? If applicable, what approaches should the Board consider for defining a block? What, if any, additional guidance is needed for measuring a block?

Level 3 Estimates

Issue 9: This proposed Statement would require that in the absence of quoted prices for identical or similar assets or liabilities in active markets, fair value be estimated using multiple valuation techniques consistent with the market approach, income approach, and cost approach whenever the information necessary to apply those techniques is available without undue cost and effort (Level 3 estimates). Appendix B provides general guidance for applying multiple valuation techniques (Examples 6–8). Is that guidance sufficient? If not, what additional guidance is needed?

Restricted Securities

Issue 10: This proposed Statement would require that the fair value of restricted securities be estimated using the quoted price of an otherwise identical unrestricted security, adjusted for the effect of the restriction. Appendix B provides general guidance for developing those estimates, which incorporates the relevant guidance in SEC ASR No. 113, *Statement Regarding "Restricted Securities."* Is that guidance sufficient? If not, what additional guidance is needed?

Fair Value Disclosures

Issue 11: This proposed Statement would require expanded disclosures about the use of fair value to remeasure assets and liabilities recognized in the statement of financial position. Appendix B illustrates those disclosures. This proposed Statement also would encourage disclosures about other similar remeasurements that, like fair value, represent current amounts. The Board concluded that those disclosures would improve the quality of information provided to users of financial statements. Do you agree? If not, why not?

Effective Date

Issue 12: This proposed Statement would be effective for financial statements issued for fiscal years beginning after June 15, 2005, and interim periods within those fiscal years. The Board believes that the effective date provides sufficient time for entities to make the changes necessary to implement this proposed Statement. Do you agree? If not, please explain the types of changes that would be required and indicate the additional time that would be needed to make those changes.

Other Issues

Issue 13: This proposed Statement represents the completion of the initial phase of this project. In subsequent phases, the Board expects to address other issues, including issues relating to the relevance and reliability of fair value measurements and the unit of account that should be used for those measurements. What, if any, other issues should the Board address? How should the Board prioritize those issues?

16div-014909

Public Roundtable Meeting

Issue 14: The Board plans to hold a public roundtable meeting with respondents to the Exposure Draft on September 21, 2004, at the FASB offices in Norwalk. Please indicate whether you are interested in participating in the meeting. If so, comments should be submitted before that meeting.

16div-014910

Summary

This proposed Statement would provide guidance for how to measure fair value. It would apply broadly to financial and nonfinancial assets and liabilities that are measured at fair value under other authoritative accounting pronouncements. The Board expects that the guidance provided by this proposed Statement will be applied together with applicable valuation standards and generally accepted valuation practices, where appropriate.

Reason for Issuing This Proposed Statement

Prior to this proposed Statement, there was limited guidance for applying the fair value measurement objective in generally accepted accounting principles (GAAP). That guidance was dispersed among the many pronouncements that require fair value measurements. Differences in that guidance created inconsistencies which added to the complexity in GAAP. Also, many constituents have raised concerns about the ability to develop reliable estimates of fair value in certain circumstances, in particular, in the absence of quoted prices. In response, the Board decided to develop a framework clarifying the fair value measurement objective and its application under other pronouncements that require fair value measurements. In developing the framework, the Board also considered the need for increased consistency and comparability in fair value measurements and enhanced disclosures about fair value measurements.

Differences between This Proposed Statement and Current Practice

The changes to current practice resulting from the application of this proposed Statement relate principally to the methods for measuring fair value and expanded disclosure requirements. Those changes are summarized below.

This proposed Statement would require that the fair value of financial instruments traded in active dealer markets where bid and asked prices are more readily and regularly available than closing prices be estimated using bid prices for long positions (assets) and asked prices for short positions (liabilities), except as otherwise specified for offsetting positions. It would prohibit the use of the other methods currently allowed under SEC ASR No. 118, *Accounting for Investment Securities by Registered Investment Companies.*

This proposed Statement would require that the fair value of restricted securities (securities for which sale is legally restricted by governmental or contractual requirements for a specified period) be estimated using the quoted price of an otherwise identical unrestricted security, adjusted for the effect of the restriction. The guidance in this proposed Statement would apply to all restricted securities, including equity securities with restrictions that terminate within one year, which are included in the scope of FASB Statement No. 115, *Accounting for Certain Investments in Debt and Equity Securities.*

This proposed Statement would require that in the absence of quoted prices for identical or similar assets or liabilities, fair value be estimated using multiple valuation techniques consistent with the market approach, income approach, and cost approach whenever the information necessary to apply those techniques is available without undue cost and effort. In all cases, the valuation techniques used for those estimates would emphasize relevant market inputs, including those derived from active markets.

16div-014911

This proposed Statement would clarify and incorporate the guidance in FASB Concepts Statement No. 7, *Using Cash Flow Information and Present Value in Accounting Measurements,* for using present value techniques to estimate fair value, thereby elevating that guidance to Level A GAAP. Thus, that guidance would apply under all pronouncements in which present value is used to estimate fair value, including APB Opinion No. 21, *Interest on Receivables and Payables*. This proposed Statement would not amend Concepts Statement 7. The Board expects to consider the need for amendments to Concepts Statement 7 in a subsequent phase of this project.

This proposed Statement would require expanded disclosures about the use of fair value to remeasure assets and liabilities recognized in the statement of financial position, including information about the fair value amounts, how those fair value amounts were determined, and the effect of the remeasurements on earnings (including unrealized gains and losses). That information would be presented together with similar information disclosed under other pronouncements.

How the Changes in This Proposed Statement Would Improve Financial Reporting

This proposed Statement establishes a framework for applying the fair value measurement objective in GAAP. Improvements to financial reporting should result from increased consistency, reliability, and comparability. Related improvements should result from the expanded disclosures about the resulting fair value measurements, which should provide information that is useful to users of financial statements in assessing the effects of those measurements used in financial reporting. Also, the amendments made by this proposed Statement would advance the Board's initiatives to simplify and codify the accounting literature.

How the Conclusions in This Proposed Statement Relate to the FASB's Conceptual Framework

In developing the fair value framework, the Board considered the qualitative characteristics discussed in FASB Concepts Statement No. 2, *Qualitative Characteristics of Accounting Information*. Those characteristics emphasize that providing comparable information enables users to identify similarities in and differences between two sets of economic events. The fair value framework also clarifies and incorporates the guidance in Concepts Statement 7 for using present value techniques to estimate fair value.

The expanded disclosures about fair value remeasurements supplement the fair value framework, providing information that is useful to present and potential investors, creditors, and others in making rational investment, credit, and similar decisions—an objective of financial reporting in FASB Concepts Statement No. 1, *Objectives of Financial Reporting by Business Enterprises*.

The fair value framework should provide the Board with a foundation for making improvements to the measurement guidance in its conceptual framework in a subsequent phase of this project.

16div-014912

Costs and Benefits of Applying This Proposed Statement

Although the guidance in this proposed Statement builds on current practice and requirements, some entities will need to make changes to comply with the requirements of this proposed Statement, thereby incurring one-time costs. However, the benefits from more reliable, consistent, and comparable information about the fair value measurements used in financial reporting should be ongoing.

The Effective Date of This Proposed Statement

This proposed Statement would be effective for financial statements issued for fiscal years beginning after June 15, 2005, and interim periods within those fiscal years. Earlier application would be encouraged. The provisions of this proposed Statement are to be applied prospectively, except for the change in accounting principle relating to bid-asked spread measurements. For that change, this proposed Statement would require a retroactive transition approach applied by reporting a cumulative-effect adjustment.

16div-014913

B16. The valuer applies an income approach using a present value technique. The cash flows used in that technique reflect the incremental profits to the company expected to result from efficiencies resulting from the use of the software asset over its economic life. The income approach estimate is $3 million. In contrast, the cost approach estimate is $1.5 million. The valuer determines that the cost approach estimate considers all of the costs necessary to replace the software asset and, absent reliability concerns, is more relevant than the income approach estimate. A willing buyer that is able to replicate an identical software asset for $1.5 million would not pay $3 million to acquire it in an exchange transaction. Accordingly, the estimate of fair value is $1.5 million.

Restricted Securities

B17. Restricted securities are securities for which sale is legally restricted by governmental or contractual requirement for a specified period. Restricted securities are often purchased at a discount from the quoted price of otherwise identical unrestricted securities, reflecting the lack of liquidity relating to the inability to access that market for the specified period. Therefore, in estimating the fair value of restricted securities, the quoted price of an otherwise identical unrestricted security shall be adjusted for the effect of the restriction, considering factors such as the nature and duration of the restriction, the volatility of the unrestricted security, and the risk-free interest rate.[21]

B18. Determining the discount amount requires judgment. Related guidance in SEC ASR No. 113, *Statement Regarding "Restricted Securities,"* incorporated in this Statement, follows:

a. The valuation of restricted securities at the market quotations for unrestricted securities of the same class would, except for most unusual situations, be improper.
b. The continued valuation of restricted securities at cost would be improper if, as a result of the operations of the issuer or change in general market conditions or otherwise, cost has ceased to represent fair value.
c. The valuation of restricted securities by applying either a constant percentage or an absolute dollar discount to the market quotations for otherwise identical unrestricted securities would be improper. Thus, it would be improper to maintain the same percentage discount (from the market quotation for otherwise identical unrestricted securities) that was received when the restricted securities were purchased, without regard to other relevant factors such as, for example, the extent to which the inherent value of the securities may have changed.
d. The valuation of restricted securities by reference to the market price for otherwise identical unrestricted securities assumes that the market price for the unrestricted securities is representative of the fair value of the restricted securities. This may not be the case when the market for the unrestricted securities is very thin (that is, if only a limited volume of shares are available for trading). With a thin market, the news of the company's purchase of the restricted securities may, by itself, stimulate

[21]The guidance in this Statement applies to restricted securities covered under other pronouncements, including equity securities with restrictions that terminate within one year, which are included in the scope of FASB Statement No. 115, *Accounting for Certain Investments in Debt and Equity Securities*.

16div-014914

a public demand for the unrestricted securities, the supply of which has not been increased, and thus lead to an increase in the valuation of both the restricted securities and unrestricted securities.

e. If in valuing restricted securities, the diminution in value attributable to the restrictive feature is itself affected by factors subject to change, such as the length of time that must elapse before the company may require the issuer to cause the securities to be registered for public sale, the valuation should reflect any such changes.

f. Some companies value restricted securities, acquired at prices below the market quotations for otherwise identical unrestricted securities, by amortizing the difference over some chosen period on the assumption that it will be possible to sell them at the market price for unrestricted securities at the expiration of the time period. Under prevailing conditions, however, it cannot always be determined either that the securities will, in fact, be effectively registered at the expiration of that period or that their public sale will otherwise be possible. For example, the issuer may be unable or unwilling to register at the expiration of the estimated period, and public sale at the end of that period without registration may not be lawful. Consequently, the practice of amortizing the discount over an arbitrarily chosen period creates the appearance of an appreciation in the value of the securities which has not, in fact, occurred, and, accordingly, is improper.

B19. In summary, no automatic formula exists by which a company can estimate the fair value of restricted securities. A company shall determine the method for estimating the fair value of restricted securities and continually review the appropriateness of that method.

Fair Value Disclosures

B20. This Statement requires disclosures about the use of fair value to remeasure assets and liabilities recognized in the statement of financial position. The disclosures apply to assets and liabilities that are remeasured at fair value during the period, whether on a recurring (or ongoing) basis (for example, trading securities) or on a nonrecurring (or periodic) basis (for example, impaired long-lived assets). The objective of the disclosures is to provide, in one place, information about the extent to which fair value is used to remeasure assets and liabilities, incorporating the similar information disclosed under other pronouncements.

B21. Other assets and liabilities may be remeasured at amounts that are not fair value but that, like fair value, represent current amounts (for example, inventories that are written down to market value under ARB No. 43, Chapter 4, "Inventory Pricing"). This Statement encourages disclosures about those other remeasurements as part of the fair value disclosures required by this Statement.

16div-014915

C58. This Statement emphasizes the need to consider multiple valuation techniques for all estimates of fair value. However, the Board agreed that because Level 1 and Level 2 estimates are based on quoted prices in active markets, the results of other valuation techniques may not provide significant additional information about those estimates. Further, in some cases, the information necessary to apply valuation techniques consistent with all valuation approaches might not be available without undue cost and effort. The Board concluded that regardless of whether one or more valuation techniques (and approaches) are used, the objective is to select the valuation technique that best approximates what an exchange price would be in the circumstances.

C59. The reliability of Level 3 estimates depends on the reliability of the inputs used. Accordingly, an entity should use as many market inputs as are available and about which there is a consensus in order to replicate an exchange price for the asset or liability being measured. In that regard, the Board clarified that market inputs, including those derived from active markets, often are relevant for Level 3 estimates, even though the asset or liability being measured is not exchanged in such markets. If available, observable prices, adjusted as appropriate, should be used in developing those estimates.

C60. In this Statement, the Board acknowledged, as it did in Concepts Statement 7, that in some cases relevant market inputs for assets and liabilities that are not exchanged in active markets might not be available without undue cost and effort, requiring the use of significant entity inputs. Paragraph 38 of Concepts Statement 7 explains:

> . . . an entity that uses cash flows in accounting measurements often has little or no information about some or all of the assumptions that marketplace participants would use in assessing the fair value of an asset or liability. In those situations, the entity must necessarily use the information that is available without undue cost and effort in developing cash flow estimates. The use of an entity's own assumptions about future cash flows is compatible with an estimate of fair value, as long as there are no contrary data indicating that marketplace participants would use different assumptions. If such data exist, the entity must adjust its assumptions to incorporate that market information.

C61. The Board decided that valuation techniques that rely on significant entity inputs, requiring more subjective estimation methods and extrapolation, may be used for Level 3 estimates, but only as a practical expedient and to the extent that such estimates are not precluded under other applicable pronouncements (for example, as in EITF Issue 02-3). The Board clarified that regardless of whether market inputs or entity inputs are used for Level 3 estimates, the measurement objective remains the same—fair value.

Restricted Securities

C62. Some pronouncements within the Phase 1 scope require fair value estimates for restricted securities (that is, securities for which sale is legally restricted, by governmental or contractual requirement, for a specified period), but those pronouncements do not provide guidance for developing those estimates.

16div-014916

C63. The Board decided to address that issue in this Statement. Specifically, the Board decided that the fair value of restricted securities should be estimated using the quoted price for an otherwise identical unrestricted security, adjusted for the effect of the restriction, considering factors such as the nature and duration of the restriction, the volatility of that unrestricted security, and the risk-free interest rate. The Board agreed that because the resulting discount amount depends largely on facts and circumstances specific to the particular security and issuer, it would not be possible to identify all factors that should be considered in all cases. Instead, this Statement includes general guidance for determining the discount amount that incorporates the relevant guidance in SEC ASR No. 113, *Statement Regarding "Restricted Securities"* (refer to Appendix B). The Board clarified that the guidance in this Statement should apply regardless of the duration of the restriction. Accordingly, it applies in measuring equity securities with restrictions that terminate within one year, which are included in the scope of FASB Statement No. 115, *Accounting for Certain Investments in Debt and Equity Securities*. The Board believes that in applying that guidance, an entity should document the method used, but it concluded that an entity should have flexibility in selecting that method.

Disclosures

C64. In its discussions, the Board observed that some but not all of the pronouncements within the Phase 1 scope require disclosures about the use of fair value to measure the assets and liabilities covered under those pronouncements. Further, the required disclosures vary.

C65. The Board decided that having addressed the need for increased consistency and comparability in fair value measurements, this Statement should also address the need for enhanced disclosures about those measurements. The Board noted that at initial recognition (including in a business combination) many assets and liabilities are measured in the statement of financial position at amounts that approximate fair value. For practical reasons, the Board decided that the disclosures required by this Statement should be limited to situations in which fair value is used to remeasure those assets and liabilities in subsequent periods, whether on a recurring (or ongoing) basis or on a nonrecurring (or periodic) basis. Those disclosures would include, in one place, the similar disclosures required under other pronouncements. The Board is addressing reporting issues broadly in its project on financial performance reporting by business enterprises. However, based on input received from the UAC and others, the Board concluded that until such time as a final Statement in that project is issued, the disclosures required by this Statement would provide information that is useful to users of financial statements in assessing the effects of the fair value measurements used in financial reporting.

C66. The Board believes that because the disclosures required by this Statement rely largely on information used to develop the related fair value measurements, entities should have the information necessary to make the disclosures. In that regard, the Board observed that some entities (in particular, entities in the financial services industry) already are making similar disclosures in SEC filings as part of disclosures about critical accounting policies.

16div-014917

Internal Revenue Service (I.R.S.)

Revenue Ruling

VALUATION OF SECURITIES RESTRICTED FROM IMMEDIATE RESALE

Published: 1977

Section 2031.--Definition of Gross Estate, 26 CFR 20.2031-2: Valuation of stocks and bonds.

(Also Sections 170, 2032, 2512; 1.170A-1, 20.2032-1, 25.2512-2.)

Valuation of securities restricted from immediate resale. Guidelines are set forth for the valuation, for Federal tax purposes, of securities that cannot be immediately resold because they are restricted from resale pursuant to Federal securities laws; Rev. Rul. 59-60 amplified.

SECTION 1. PURPOSE.

The purpose of this Revenue Ruling is to amplify Rev. Rul. 59-60, 1959-1 C.B. 237, as modified by Rev. Rul. 65-193, 1965-2 C.B. 370, and to provide information and guidance to taxpayers, Internal Revenue Service personnel, and others concerned with the valuation, for Federal tax purposes, of securities that cannot be immediately resold because they are restricted from resale pursuant to Federal securities laws. This guidance is applicable only in cases where it is not inconsistent with valuation requirements of the Internal Revenue Code of 1954 or the regulations thereunder. Further, this ruling does not establish the time at which property shall be valued.

SEC. 2. NATURE OF THE PROBLEM.

It frequently becomes necessary to establish the fair market value of stock that has not been registered for public trading when the issuing company has stock of the same class that is actively traded in one or more securities markets. The problem is to determine the difference in fair market value between the registered shares that are actively traded and the unregistered shares. This problem is often encountered in estate and gift tax cases. However, it is sometimes encountered when unregistered shares are issued in exchange for assets or the stock of an acquired company.

SEC. 3. BACKGROUND AND DEFINITIONS.

.01 The Service outlined and reviewed in general the approach, methods, and factors to be considered in valuing shares of closely held corporate stock for estate and gift tax purposes in Rev. Rul. 59-60, as modified by Rev. Rul. 65-193. The provisions of Rev. Rul. 59-60, as modified, were extended to the valuation of corporate securities for income and other tax purposes by Rev. Rul. 68-609, 1968-2

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C.B. 327.

.02 There are several terms currently in use in the securities industry that denote restrictions imposed on the resale and transfer of certain securities. The term frequently used to describe these securities is 'restricted securities,' but they are sometimes referred to as 'unregistered securities,' 'investment letter stock,' 'control stock,' or 'private placement stock.' Frequently these terms are used interchangeably. They all indicate that these particular securities cannot lawfully be distributed to the general public until a registration statement relating to the corporation underlying the securities has been filed, and has also become effective under the rules promulgated and enforced by the United States Securities & Exchange Commission (SEC) pursuant to the Federal securities laws. The following represents a more refined definition of each of the following terms along with two other terms-- 'exempted securities' and 'exempted transactions.'

(a) The term 'restricted securities' is defined in Rule 144 adopted by the SEC as 'securities acquired directly or indirectly from the issuer thereof, or from an affiliate of such issuer, in a transaction or chain of transactions not involving any public offering.'

(b) The term 'unregistered securities' refers to those securities with respect to which a registration statement, providing full disclosure by the issuing corporation, has not been filed with the SEC pursuant to the Securities Act of 1933. The registration statement is a condition precedent to a public distribution of securities in interstate commerce and is aimed at providing the prospective investor with a factual basis for sound judgment in making investment decisions.

(c) The terms 'investment letter stock' and 'letter stock' denote shares of stock that have been issued by a corporation without the benefit of filing a registration statement with the SEC. Such stock is subject to resale and transfer restrictions set forth in a letter agreement requested by the issuer and signed by the buyer of the stock when the stock is delivered. Such stock may be found in the hands of either individual investors or institutional investors.

(d) The term 'control stock' indicates that the shares of stock have been held or are being held by an officer, director, or other person close to the management of the corporation. These persons are subject to certain requirements pursuant to SEC rules upon resale of shares they own in such corporations.

(e) The term 'private placement stock' indicates that the stock has been placed with an institution or other investor who will presumably hold it for a long period and ultimately arrange to have the stock registered if it is to be offered to the general public. Such stock may or may not be subject to a letter agreement. Private placements of stock are exempted from the registration and prospectus provisions of the Securities Act of 1933.

(f) The term 'exempted securities' refers to those classes of securities that are expressly excluded from the registration provisions of the Securities Act of 1933 and the distribution provisions of the Securities Exchange Act of 1934.

(g) The term 'exempted transactions' refers to certain sales or distributions of securities that do not involve a public offering and are excluded from the registration and prospectus provisions of the Securities Act of 1933 and distribution provisions of the Securities Exchange Act of 1934. The exempted status makes it unnecessary for issuers of securities to go through the registration process.

SEC. 4. SECURITIES INDUSTRY PRACTICE IN VALUING RESTRICTED SECURITIES.

.01 Investment Company Valuation Practices. The Investment Company Act of 1940

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requires open-end investment companies to publish the valuation of their portfolio securities daily. Some of these companies have portfolios containing restricted securities, but also have unrestricted securities of the same class traded on a securities exchange. In recent years the number of restricted securities in such portfolios has increased. The following methods have been used by investment companies in the valuation of such restricted securities:

(a) Current market price of the unrestricted stock less a constant percentage discount based on purchase discount;

(b) Current market price of unrestricted stock less a constant percentage discount different from purchase discount;

(c) Current market price of the unrestricted stock less a discount amortized over a fixed period;

(d) Current market price of the unrestricted stock; and

(e) Cost of the restricted stock until it is registered.

The SEC ruled in its Investment Company Act Release No. 5847, dated October 21, 1969, that there can be no automatic formula by which an investment company can value the restricted securities in its portfolios. Rather, the SEC has determined that it is the responsibility of the board of directors of the particular investment company to determine the 'fair value' of each issue of restricted securities in good faith.

.02 Institutional Investors Study. Pursuant to Congressional direction, the SEC undertook an analysis of the purchases, sales, and holding of securities by financial institutions, in order to determine the effect of institutional activity upon the securities market. The study report was published in eight volumes in March 1971. The fifth volume provides an analysis of restricted securities and deals with such items as the characteristics of the restricted securities purchasers and issuers, the size of transactions (dollars and shares), the marketability discounts on different trading markets, and the resale provisions. This research project provides some guidance for measuring the discount in that it contains information, based on the actual experience of the marketplace, showing that, during the period surveyed (January 1, 1966, through June 30, 1969), the amount of discount allowed for restricted securities from the trading price of the unrestricted securities was generally related to the following four factors.

(a) Earnings. Earnings and sales consistently have a significant influence on the size of restricted securities discounts according to the study. Earnings played the major part in establishing the ultimate discounts at which these stocks were sold from the current market price. Apparently earnings patterns, rather than sales patterns, determine the degree of risk of an investment.

(b) Sales. The dollar amount of sales of issuers' securities also has a major influence on the amount of discount at which restricted securities sell from the current market price. The results of the study generally indicate that the companies with the lowes dollar amount of sales during the test period accounted for most of the transactions involving the highest discount rates, while they accounted for only a small portion of all transactions involving the lowest discount rates.

(c) Trading Market. The market in which publicly held securities are traded also reflects variances in the amount of discount that is applied to restricted securities purchases. According to the study, discount rates were greatest on restricted stocks with unrestricted counterparts traded over-the-counter, followed by those with unrestricted counterparts listed on the American Stock Exchange, while the discount rates for those stocks with unrestricted counterparts listed on

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the New York Stock Exchange were the smallest.

(d) Resale Agreement Provisions. Resale agreement provisions often affect the size of the discount. The discount from the market price provides the main incentive for a potential buyer to acquire restricted securities. In judging the opportunity cost of freezing funds, the purchaser is analyzing two separate factors. The first factor is the risk that underlying value of the stock will change in a way that, absent the restrictive provisions, would have prompted a decision to sell. The second factor is the risk that the contemplated means of legally disposing of the stock may not materialize. From the seller's point of view, a discount is justified where the seller is relieved of the expenses of registration and public distribution, as well as of the risk that the market will adversely change before the offering is completed. The ultimate agreement between buyer and seller is a reflection of these and other considerations. Relative bargaining strengths of the parties to the agreement are major considerations that influence the resale terms and consequently the size of discounts in restricted securities transactions. Certain provisions are often found in agreements between buyers and sellers that affect the size of discounts at which restricted stocks are sold. Several such provisions follow, all of which, other than number (3), would tend to reduce the size of the discount:

(1) A provision giving the buyer an option to 'piggyback', that is, to register restricted stock with the next registration statement, if any, filed by the issuer with the SEC;

(2) A provision giving the buyer an option to require registration at the seller's expense;

(3) A provision giving the buyer an option to require registration, but only at the buyer's own expense;

(4) A provision giving the buyer a right to receive continuous disclosure of information about the issuer from the seller;

(5) A provision giving the buyer a right to select one or more directors of the issuer;

(6) A provision giving the buyer an option to purchase additional shares of the issuer's stock; and

(7) A provision giving the buyer the right to have a greater voice in operations of the issuer, if the issuer does not meet previously agreed upon operating standards.

Institutional buyers can and often do obtain many of these rights and options from the sellers of restricted securities, and naturally, the more rights the buyer can acquire, the lower the buyer's risk is going to be, thereby reducing the buyer's discount as well. Smaller buyers may not be able to negotiate the large discounts or the rights and options that volume buyers are able to negotiate.

.03 Summary. A variety of methods have been used by the securities industry to value restricted securities. The SEC rejects all automatic or mechanical solutions to the valuation of restricted securities, and prefers, in the case of the valuation of investment company portfolio stocks, to rely upon good faith valuations by the board of directors of each company. The study made by the SEC found that restricted securities generally are issued at a discount from the market value of freely tradable securities.

SEC. 5. FACTS AND CIRCUMSTANCES MATERIAL TO VALUATION OF RESTRICTED SECURITIES.

.01 Frequently, a company has a class of stock that cannot be traded publicly.

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The reason such stock cannot be traded may arise from the securities statutes, as in the case of an 'investment letter' restriction; it may arise from a corporate charter restriction, or perhaps from a trust agreement restriction. In such cases, certain documents and facts should be obtained for analysis.

.02 The following documents and facts, when used in conjunction with those discussed in Section 4 of Rev. Rul. 59-60, will be useful in the valuation of restricted securities:

(a) A copy of any declaration of trust, trust agreement, and any other agreements relating to the shares of restricted stock;

(b) A copy of any document showing any offers to buy or sell or indications of interest in buying or selling the restricted shares;

(c) The latest prospectus of the company;

(d) Annual reports of the company for 3 to 5 years preceding the valuation date;

(e) The trading prices and trading volume of the related class of traded securities 1 month preceding the valuation date, if they are traded on a stock exchange (if traded over-the-counter, prices may be obtained from the National Quotations Bureau, the National Association of Securities Dealers Automated Quotations (NASDAQ), or sometimes from broker-dealers making markets in the shares);

(f) The relationship of the parties to the agreements concerning the restricted stock, such as whether they are members of the immediate family or perhaps whether they are officers or directors of the company; and

(g) Whether the interest being valued represents a majority or minority ownership.

SEC. 6. WEIGHING FACTS AND CIRCUMSTANCES MATERIAL TO RESTRICTED STOCK VALUATION.

All relevant facts and circumstances that bear upon the worth of restricted stock, including those set forth above in the preceding Sections 4 and 5, and those set forth in Section 4 of Rev. Rul. 59-60, must be taken into account in arriving at the fair market value of such securities. Depending on the circumstances of each case, certain factors may carry more weight than others. To illustrate:

.01 Earnings, net assets, and net sales must be given primary consideration in arriving at an appropriate discount for restricted securities from the freely traded shares. These are the elements of value that are always used by investors in making investment decisions. In some cases, one element may be more important than in other cases. In the case of manufacturing, producing, or distributing companies, primary weight must be accorded earnings and net sales; but in the case of investment or holding companies, primary weight must be given to the net assets of the company underlying the stock. In the former type of companies, value is more closely linked to past, present, and future earnings while in the latter type of companies, value is more closely linked to the existing net assets of the company. See the discussion in Section 5 of Rev. Rul. 59-60.

.02 Resale provisions found in the restriction agreements must be scrutinized and weighed to determine the amount of discount to apply to the preliminary fair market value of the company. The two elements of time and expense bear upon this discount; the longer the buyer of the shares must wait to liquidate the shares, the greater the discount. Moreover, if the provisions make it necessary for the buyer to bear the expense of registration, the greater the discount. However, if the

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provisions of the restricted stock agreement make it possible for the buyer to 'piggyback' shares at the next offering, the discount would be smaller.

.03 The relative negotiation strengths of the buyer and seller of restricted stock may have a profound effect on the amount of discount. For example, a tight money situation may cause the buyer to have the greater balance of negotiation strength in a transaction. However, in some cases the relative strengths may tend to cancel each other out.

.04 The market experience of freely tradable securities of the same class as the restricted securities is also significant in determining the amount of discount. Whether the shares are privately held or publicly traded affects the worth of the shares to the holder. Securities traded on a public market generally are worth more to investors than those that are not traded on a public market. Moreover, the type of public market in which the unrestricted securities are traded is to be given consideration.

SEC. 7. EFFECT ON OTHER DOCUMENTS.

Rev. Rul. 59-60, as modified by Rev. Rul. 65-193, is amplified.

Rev. Rul. 77-287, 1977-2 C.B. 319, 1977 WL 43794 (IRS RRU)

END OF DOCUMENT

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S MOTION TO RECONSIDER
RULINGS ON CPH EXPERT BLAINE NYE

Introduction

Morgan Stanley respectfully moves the Court to reconsider the exclusion of the expert opinion of Dr. Blaine Nye, the damages expert proposed by Coleman (Parent) Holdings ("CPH"). Dr. Nye's methods conflict with Florida law governing damages. They ignore the requirements of federal securities and tax rules. And they grossly overstate CPH's damages.

Florida law is clear in requiring that, when calculating benefit of the bargain damages, the "actual value" of the stock received must be determined at the time of the transaction. Instead, however, Dr. Nye uses a date three years later. There is no excuse for Dr. Nye's departure from Florida law. There are standard and well-accepted methods for measuring the value of stock, *including* artificially inflated restricted stock, at the time of the transaction. Dr. Nye himself routinely employs these methodologies in other cases. In this case, however, Dr. Nye eschews those methodologies and employs an "actual value" methodology that flouts basic accounting valuation principles, ignores federal law concerning the valuation of restricted securities, and converts Morgan Stanley into an insurer against *any stock price drop*, no matter how

unconnected to the fraud and how unforeseeable as of March 30, 1998. Indeed, Dr. Nye's "actual value" assumption would hold Morgan Stanley liable even for stock price drops Mr. Perelman and his associates caused during their own management of Sunbeam! (Point I, infra.)

After attempting to drive the "actual value" of the stock CPH received down to zero by assessing its value on a day three years *after* the transaction, Dr. Nye next seeks to rewrite the parties' deal and artificially inflate the "expected value" of the transaction by using market prices *before* the deal was closed. Unsatisfied with a damages estimate based on Sunbeam's share price on the date of the deal, as required by Florida law and the parties' bargain, Dr. Nye "averages" the closing prices over a 30-day period before the deal was finalized. Dr. Nye concedes his "method" is arbitrary guesswork and he was unable to point to any authority for it in his report or deposition. Dr. Nye then proceeds to value the expected value of the Sunbeam stock *as if* the shares CPH received were freely tradable for $680 million in cash on the date of the transaction -- a radically different deal than the parties actually struck. By ignoring the differences between the value of registered shares and the unregistered securities CPH actually received, Dr. Nye again significantly and improperly alters the bargain to CPH's advantage. (Point II.).[1]

ARGUMENT

Under Florida law, "benefit-of-the bargain" damages entitle the plaintiff to the difference between what it expected to receive and what it actually received from the defendant. *See, e.g., Kind v. Gittman*, 889 So.2d 87, 90 (Fla. 4th DCA 2004). Like all forms of compensatory damages, the plaintiff is entitled to be made whole, but not to be made better off. *See Nordyne, Inc. v. Fla. Mobile Home Supply, Inc.*, 625 So.2d 1283, 1286 (Fla. 1st DCA 1993). Dr. Nye's calculation is a facially unreliable measure of "benefit-of-the-bargain" damages because, far

[1] Prior motions on Dr. Nye filed by predecessor counsel were MS MIL 16 and 17. The Court denied MIL 17 and granted in part and denied in part MIL 16. Morgan Stanley reserves and will not repeat its argument that out-of-pocket is the proper measure of damages.

from enforcing the parties' bargain, it fundamentally *rewrites* that bargain in an effort to award CPH *more* than what it actually bargained for.

I. DR. NYE'S "ACTUAL VALUE" ANALYSIS VIOLATES FLORIDA LAW

A. Dr. Nye Failed to Use the Proper Measure of Damages Under Florida Law

Florida law is crystal clear that, in "cases involving the fraudulent sale of stock," the defendant is responsible only for losses measured "*at the time of purchase.*" *Totale, Inc. v. Smith*, 877 So. 2d 813, 815 (Fla. 4th DCA 2004) (emphasis added); *accord Howard v. Metcalf*, 487 So. 2d 43, 46 (Fla. 2d DCA 1986) (damages are properly calculated using "the value of the property at the scheduled time of closing."). The purpose of this rule is to ensure that the plaintiff is fully compensated but the defendant is not forced to become an insurer against plaintiff's speculation; damages are awarded *only* for stock price drops proximately caused by the defendant -- and not for losses caused by other risk factors inherent in stock investment and speculation.

Accordingly, even if the defendant's fraud is a "but for" cause of those subsequent losses (in the sense that the plaintiff would not have lost any money at all *but for* being fraudulently induced into the transaction), that alone is not enough. A plaintiff must show not only *transaction causation* (that the defendant's fraud was the "but for" reason they entered into the money-losing transaction). It must also show *proximate -- or "loss" -- causation* (that the defendant's fraud was the proximate cause for the losses claimed). *See Totale*, 877 So. 2d at 815 ("[l]ater appreciation or depreciation of the property that is subject of the false representation generally does not alter the fraud damage computation").

Accordingly, in proving damages, other "contributing forces" to the investment's decline in value "must be isolated and removed." *Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1447 &

n.5 (11th Cir. 1997). *See also Bruschi v. Brown*, 876 F.2d 1526, 1530 (11th Cir. 1989) ("even though the defendant's misconduct induces the plaintiff to make the investment, if the particular loss complained of is caused by supervening general market forces or other factors unrelated to the defendant's misconduct that operate to reduce the value of the plaintiff's securities, the plaintiff is precluded from recovery"); *Bastian v. Petren Resources Corp.*, 892 F.2d 680, 684-685 (7th Cir. 1990); *Miller v. Asensio & Co.*, 364 F.3d 223, 233 (4th Cir. 2004); *Butterworth v. Quick & Reilly, Inc.*, 998 F.Supp. 1404, 1411 (M.D.Fla. 1998) ("It has been held that a 'cause of action under the F.S.I.P.A. or Florida common law fraud is virtually identical to stating a claim under Rule 10b-5 . . . . Therefore, a plaintiff in a fraud in the inducement claim, like a plaintiff in a 10(b) claim, must prove both actual causation ('transaction causation') and proximate causation ('loss causation'). . . .*Transaction causation is established by proof that the misrepresentation induced the plaintiff to invest, while loss causation requires the plaintiff to 'prove not only that, had he known the truth, he would not have acted, but in addition that the untruth was in some reasonably direct, or proximate, way responsible for his loss.*'") (emphasis added).

1. **Dr. Nye violates *Totale by using a later date to measure "actual value."*** CPH held stock in Sunbeam from March 30, 1998 through February 2001, when Sunbeam declared bankruptcy and the stock became worthless. Dr. Nye seeks to hold Morgan Stanley responsible for each and every single drop in the price of CPH's stock holdings over this entire period. Nye Report ¶¶ 17-18. Alternatively, Dr. Nye asserts Morgan Stanley should be responsible at least for all stock price drops through November 1999, when CPH could have begun registering and selling shares to the public. *Id.* ¶¶ 30-31.[2] Neither of Dr. Nye's damages opinions can be

[2] Dr. Nye does not explore whether plaintiff could've sold in a private transaction earlier and admits he is not a securities law expert.

squared *Totale*'s plain requirement that the actual value of stock be measured -- and losses calculated -- on the day of the allegedly fraudulent transaction. Dr. Nye offends not only the letter of the *Totale* rule, but also its purpose by charging defendant with every single price decline over months and years after the sale and thus effectively absolving plaintiff from any risk whatsoever associated with its decision to invest in Sunbeam stock.

2. **Dr. Nye improperly fails to conduct an "event study."** In fact, there is a long accepted and relatively simple way to measure the "actual value" of securities on the date of purchase, even if those securities are illiquid. CPH claims that fraud falsely inflated the price of Sunbeam's stock. All Dr. Nye had to do was to conduct an "event study" that correlated declines in the value of Sunbeam stock with the disclosure of Sunbeam's fraud. In doing so, Dr. Nye could have easily determined what Sunbeam's share price would have been on March 30, 1998 -- what its actual value would have been -- if the fraud had been disclosed. The difference between the market price at the time of the purchase (without disclosure of the fraud) and what the market price would have been at the time of purchase (with disclosure of the fraud) is the plaintiff's damages.

Experts have been using this methodology in securities fraud cases for *decades*. Professor Grinblatt employed it in his supplemental report, and Dr. Nye has offered not a single criticism of Professor Grinblatt's methods and results. In fact, Dr. Nye has regularly used this same methodology in many *other* cases. *E.g.*, *In re Obtek, L.P. v. Lucent Tech., Inc.*, No 1-01-226 (Tex. Dist. Ct.) (Nye Expert Report at 11) (plaintiff "suffers damages at acquisition equal to the amount of price inflation *at date of acquisition*") (emphasis added); *In re Oxford Securities Litigation*, MDL Dkt. No. 1222 (CLB) (S.D.N.Y.) (Nye Expert Report at 80) ("the cause of harm to an investor is the price inflation existing on the date of purchase").

Court after court has held that an event study is not only an acceptable way to measure damages in stock fraud cases, but also is even essential:

> Because of the need "to distinguish between the fraud-related and non-fraud related influences of the stock's price behavior," *In re Oracle Sec. Litig.*, 829 F.Supp. 1176, 1181 (N.D.Cal.1993), a number of courts have rejected or refused to admit into evidence damages reports or testimony by damages experts in securities cases which fail to include event studies or something similar. . . .
>
> The importance and centrality of the event study methodology in determining damages in securities cases -- and the propriety of rejecting expert damages reports which do not use such a methodology -- has been conceded by plaintiffs in other securities fraud cases: "[A]ccording to [plaintiffs], the methodology -- 'event study methodology' -- used to calculate shareholder damages during the class period 'has been used by financial economists since 1969 as a tool to measure the effect on market prices from all types of new information relevant to a company's equity valuation.' . . . . It is so accepted, plaintiffs add, that courts now reject expert damage estimates which do not use event study methodology to evaluate the impact on the market of a company's disclosures."

In re Imperial Credit Industries, Inc. Securities Litigation, 252 F. Supp. 2d 1005, 1014-16 (C.D. Cal. 2003).

A vast body of economic literature likewise explains how and why event studies should be used to measure damages for securities in fraud cases. *E.g.*, Grinblatt Supp. Report at 24 & note 27; Jay W. Eisenhofer, Geoffrey C. Jarvis & James R. Banko, *Securities Fraud, Stock Price Valuation, And Loss Causation: Toward A Corporate Finance-Based Theory Of Loss Causation*, 59 Bus. Law. 1419, 1426 (2004);[3] Daniel R. Fischel, *Use Of Modern Finance Theory In Securities Fraud Cases Involving Actively Traded Securities*, The Business Lawyer, Vol. 38 at 17-19 (1982); Stephen Mahle, The Impact of Daubert v. Merrill Dow Pharmaceuticals, Inc., on Expert Testimony, 73 Fla. B.J. 36, 39-40 (March 1999).

By way of example, in a typical event study the economist examines all statistically significant price movements between the date of the deal and the date the fraud was fully

[3] "Over time, the majority of courts have recognized the utility of the event study methodology in the securities context and begun to require experts to include an event study with their damage report because of the need to distinguish between the fraud-related and non-fraud related influences on the stock's price behavior. *Id.*

disclosed. Any price declines that can be linked to news about defendant's alleged malfeasance -- as opposed to other news or market conditions -- are then subtracted from the actual closing price as of the date of the deal. In this way, the true value of a security is measured as of the date of the deal. Thus, the analysis typically goes as follows:

Share Price on Deal Date

- Amount of Share Price Inflated Due to Fraud

= True Share Value as of Deal Date

Professor Grinblatt employed this standard methodology by beginning with the actual closing price on the date of the deal -- $43.94 per share. Next, recognizing that the share price was infected by the alleged fraud, Professor Grinblatt conducted an event study. That is, he identified every statistically significant price movement variation between Sunbeam stock and the overall market from the date of purchase until the date the fraud was fully revealed. In the next step, Professor Grinblatt examined each such identified movement to see if there was any contemporaneous news about the fraud, or if the move was induced by news unrelated to the fraud. He then compiled all statistically significant movements attributable to the fraud and found that collectively they inflated Sunbeam stock by $26.37.

Finally, having concluded that the stock price as of the date of the closing was artificially inflated by approximately $26.37, Professor Grinblatt determined that the actual value of the stock on the date of the deal but for fraud-induced price inflation would have been approximately $17.57. That is:

$43.94/share (Actual Price on 3/30)

- 26.37 (Inflation Due to Fraud)

= $17.57 (True Value as of 3/30)

Once the actual value of the security in question is established as of the date of the deal, it is possible to measure damages. This is done by subtracting the actual value per share received from the expected per share value of the deal and multiplying the result (the amount of the artificial price inflation per share) by the number of shares in the deal.

3. The allegedly illiquid nature of restricted stock does not justify departure from *Totale* and established methodologies. To be sure, plaintiff urges the Court to consider the fact that it couldn't immediately sell its restricted and unregistered stock and suggests that this necessitates looking to later dates in order to measure the "actual value" of its shares. But this simply isn't so.

The fact that CPH could not have sold its stock on the day it was purchased poses *no impediment* to measuring its value on the date of purchase as required by *Totale*. Indeed, "in order to value an asset that is not marketable, the usual approach is to value the asset as if it were marketable, then apply a marketability discount to this estimated value." Mukesh Bajaj, David J. Denis, Stephen P. Ferris & Atulya Sarin, *Firm Value and Marketability Discounts*, 27 Journal of Corporation Law 89, 90 (2001); *see also In re National Student Marketing Litig.*, 598 F. Supp. 575, 578 (D.D.C. 1984) ("discounting by one-third the quoted market price on the date of the acquisition to reflect the fact that the acquired NSM shares were 'lettered' or 'restricted,' not registered with the Securities and Exchange Commission, and thus could not be sold readily on the open market . . . was an acceptable and recognized procedure in the valuation process"); *Agranoff v. Miller*, 791 A.2d 880, 901 n.55 (Del. Ch. 2001) (rejecting valuation method because, *inter alia*, it "gives no weight to the lack of marketability of EMS shares" by failing to employ the "usual approach" of applying a marketability discount) (internal quotation marks omitted); *Hagerman v. Yukon Energy*, 839 F.2d 407, 412 (8th Cir. 1988) (expert testimony valuing

restricted stock by applying a liquidity discount to price of unrestricted stock on date of transaction); *Holmes v. Bateson*, 583 F.2d 542, 563 (1st Cir. 1978) (expert testimony that restricted stock can be valued by applying a 30% discount from the value of unrestricted stock).

Dr. Nye does not follow this usual approach, ignoring the massive body of empirical economic research showing that restricted and unregistered shares like CPH's stock are worth less than liquid securities at the time of purchase and measurably so.[4] Dr. Nye ignores, too, the record evidence that Sunbeam management, led by Mr. Perelman's friends and employees, *themselves assigned a 15% marketability discount* to CPH's share holdings. MS 282 at 6 (Sunbeam 10Q filed with SEC, Nov. 25, 1998).

CPH may try to argue that, as a result of the fraud, it was unable to register the Sunbeam stock for longer than the bargained-for restriction period. But even if that is true, that still does not excuse plaintiff from valuing the stock, as received, on the date of purchase. Instead, it would only raise the question whether, in calculating the "actual value" of the stock that CPH received as of the date of the bargain, plaintiff's expert might have reasonably considered applying a slightly larger liquidity discount to account for the fact that CPH was locked into the stock for longer than "expected" on the date of the bargain. That is, Dr. Nye could've assessed the appropriate liquidity discount for shares that could not be registered and sold publicly for 20

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[4] *See* Bajaj, et al., *Firm Value and Marketability Discounts* , 27 *Journal of Corporation Law at 97* (summarizes the results of several empirical studies that have estimated the overall discounts on restricted stocks. Average discounts on unregistered shares are sizable, ranging from 20% to 35%); William L. Silber, *Discounts on Restricted Stock: The Impact of Illiquidity on Stock Prices*, *Financial Analysts Journal* at 60-64 (July-August 1991) (finding that restricted stock sells for an average of 33.75% less than unrestricted stock); Robert P. Oliver & Roy H. Meyers, *Discounts Seen in Private Placements of Restricted Stock: The Management Planning, Inc. Long-Term Study (1980-1996)*, in Robert F. Reilly & Robert P. Schweihs, *Handbook of Advanced Business Valuation* (2000) (finding that restricted stock sells for an average of 27% less than unrestricted stock); Grinblatt Supp. Report at 50 & n.53 (discussing additional economic literature).

months (as it turned out) versus those that could have been registered and sold within 3, 6, or 9 months (as the parties had anticipated).[5]

4. Dr. Nye's "method" for valuing restricted shares would also violate federal rules. The propriety of marketability discounts is confirmed by federal securities regulations, as is the unreliability of Dr. Nye's assumption that CPH's stock had no measurable value until it could be sold in 1999 or 2001.

According to the Securities and Exchange Commission ("SEC") and the Financial Accounting Standards Board ("FASB"), the "fair value" restricted stock must be recorded *at the same prices as unrestricted stock, minus a discount to "adjust[] for the effects of the restriction.*" Financial Accounting Standards Board, Proposed Statement of Financial Accounting Standards No. 1201-100; Fair Value Measurements, at iii, v, 23-24, 43-44 (June 23, 2004) (*available at* http://www.fasb.org.draft/ed_fair_value_measurements.pdf). *See also* Securities and Exchange Commission, Release No. AS-13: Statement Regarding "Restricted Securities," 1969 WL 95335, at *3 (Oct. 21, 1969) ("As a general principle, the current fair value of restricted securities . . . depends on their inherent worth, *without regard to the restricted feature, adjusted for any diminution in value resulting from the restrictive feature.*"). As FASB explains: "[T]he fair value of restricted securities (securities for which sale is legally restricted by governmental or

[5] Professor Grinblatt's analysis recognizes that damages should be reduced by a further $45 million to reflect the sales that CPH could have made after November 1999 after 75% of the lock up expired and the stock was registerable. Dr. Nye's alternative damages calculation makes exactly the same discount. Nye Report ¶¶ 30-31. Professor Grinblatt further recognizes the possibility that plaintiff may have relied only in part on defendant and Sunbeam's alleged fraud. To allow the jury to calculate damages in such eventualities, he also calculates what the expected value to plaintiff would have been per share if plaintiff relied on some, but not all, of Morgan Stanley's alleged misrepresentations. Those detailed calculations are unnecessary here for purposes of demonstrating the legal inadequacy of Nye's analysis.

contractual requirements for a specified period)" must "be estimated using the quoted price of an otherwise identical unrestricted security, adjusted for the effect of the restriction." *Id.* [6]

Dr. Nye's treatment of CPH's shares as "worthless" until they could be sold because of the restrictions imposed on them is thus entirely contrary to established federal law. Indeed, if CPH had followed Dr. Nye's "methodology" in keeping its books and records, it would have invited a securities fraud enforcement action. If the Court permits CPH, under the guise of recovering damages from an accounting fraud, to communicate Dr. Nye's theory of damages to the jury, it would effectively be permitting CPH to perpetrate its own accounting fraud on the jury and this Court through phony (and alternatively inflated and deflated) valuation methods wholly at odds with incontrovertible principles of federal law.

5. Dr. Nye admits that his opinion violates these principles. There is no dispute that Dr. Nye *could have* performed a price inflation event study in this case to ascertain damages along the lines outlined above. He has routinely done exactly that to determine the true value of securities in other cases involving fraud as of the date of purchase.[7] *Yet Dr. Nye simply failed to do that work here.* Dr. Nye frankly conceded as much during his deposition:

> Q. Did you make any attempt to calculate what the value of Sunbeam stock would have been on that date had the Sunbeam fraud been disclosed?

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[6] The Internal Revenue Service requires a similar procedure. *See.* Rul. 77-287, 1977-2 C.B. 319, § 2 ("It frequently becomes necessary to establish the fair market value of stock that has not been registered for public trading when the issuing company has stock of the same class that is actively traded in one or more securities markets. The problem is to determine *the difference in fair market value between the registered shares that are actively traded and the unregistered shares.* This problem is often encountered in estate and gift tax cases. However, it is sometimes encountered when unregistered shares are issued in exchange for assets or the stock of an acquired company.") (emphasis added).

[7] Dr. Nye even performed a partial event study in this case, but stopped short of using it to determine actual value as of March 30, 1998 -- employing it only to test whether disclosures of the fraud in affected the stock price between March 30, 1998 and June 25, 1998. Yet Nye made no effort whatsoever to calculate damages based on an event study designed to identify the total price inflation attributable to the alleged fraud.

A. The whole thing?

Q. The whole thing on that date.

A. ***No, never -- never did isolate the fraud-free price*** **and, you know, do the** ***-- the standard security analysis to see what the value of the fraud would have been on that day.***

1/12/05 Nye Dep. at 239:17-25 (emphasis added).

Dr. Nye went on to concede that that he didn't even attempt to apply a marketability (or liquidity) discount anywhere in his report and to admit further that, prior to this case, he has never before sought to value restricted shares in his 25 years of expert consulting work. 1/12/05 Nye Dep. 47:1-7; 3/11/05 Nye Dep. 98:13-15. By his own admission, Dr. Nye failed to do the "standard security analysis" necessary to ascertain how much the stock was falsely inflated and the appropriate marketability discount -- and thus how much plaintiff overpaid -- on the date of the deal. That is fatal to his analysis under Florida law and *Totale*. It is fatal to his analysis under settled securities valuation principles. And it is fatal to his methodology as measured by comparison to FASB and SEC requirements.

B. Dr. Nye's Novel "Methodology" for Establishing Actual Value Improperly Assumes Facts

1. Dr. Nye assumes that the true value of CPH's shares should be measured at the date of bankruptcy in 2001 and is therefore zero. Nye Report ¶ 18. In his alternative scenario, Dr. Nye assumes that the true value of Sunbeam was $4.35 per share -- the market price for Sunbeam shares in late 1999. *Id.* ¶ 30. These assumptions, however, are directly contradicted by the record facts. The undisputed facts show that Sunbeam stock was worth approximately $7 per share after the fraud was fully disclosed and embedded in the market price and Sunbeam financials were restated on October 20, 1998 -- not zero or $4.35. *See* Nye Report Ex. 6 (listing

daily closing prices throughout 1998).[8] The record also shows that plaintiff itself valued its shares as being worth $12 1/8 as late as December 1999, a year after the fraud was fully disclosed and plaintiff had the right to register its shares for public sale. *See* MS 813, 830. Of course, even these share prices reflect not just the disclosure of the fraud but also *all other market factors at the time.* To determine which portion of that decline is properly attributable to the fraud versus other market forces, of course, one must conduct an event study.

Dr. Nye, however, not only eschews an event study analysis but makes an assumption about the post-fraud value of Sunbeam shares that is directly contradicted by the undisputed record. This Dr. Nye is not free to do. It is black letter law that an expert "may not simply assume the facts which form the basis of his opinion." *Brito v. County of Palm Beach*, 753 So.2d 109, 114 (Fla. 4th DCA 1998). *See also Ruth v. State of Florida*, 610 So.2d 9, 12 (Fla. 2d DCA 1992) ("An expert witness' opinion must be based on facts or inferences supported by the evidence."); *Monsalvatge and Co. of Miami, Inc. v. Ryder Leasing, Inc.*, 151 So.2d 453, 455 (Fla. 3d DCA 1963) (an expert may not testify based upon rank speculation, but must, instead, offer opinions based upon the facts in evidence); *cf. Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056 (8th Cir. 2000) (holding that an expert's opinion is in admissible if it "has not considered all of the relevant facts," and excluding opinion that "ignored inconvenient evidence"). Dr. Nye plainly violates this cardinal rule.

2. Dr. Nye's methodology is flawed in another, closely related respect. By assuming that Morgan Stanley's fraud caused every penny of loss after March 30, 1998 -- from $43.94 all

[8] Dr. Nye also ignored the fact that CPH itself placed an even higher valuation on its Sunbeam stock -- $450 million -- as late as December 31, 1999. *See* 03/11/2005 Nye Dep. at 68:9-18; 74:25-76:12. As Perelman himself acknowledged, this valuation was based on non-public information that put CPH in a better position to calculate the true value of Sunbeam shares than the actual market. Deposition of Ronald O. Perelman 81:11-21 (March 10, 2005). According to Nye's own "semi-strong" efficient market hypothesis, CPH's valuation is a more accurate reflection of true value than the market price. Nye Report ¶¶ 38-40.

16div-014936

the way to zero (or $4.35) -- Dr. Nye impermissibly ignores the possibility that *other causal factors* contributed to the drop in Sunbeam's share price and caused Sunbeam's share price to fall. That is, Dr. Nye does nothing to *identify* the causes of the stock price decline. *A fortiori* his methodology does nothing to weed out from observable stock declines those diminutions of value caused by other, unforeseeable factors like general market declines.

Dr. Nye's "methodology," such as it is, simply *assumes* that Morgan Stanley is responsible for every price decline after March 30, 1998 ***even if it did not cause that decline at the time of the deal.*** In essence, Dr. Nye seeks to have Morgan Stanley underwrite any and all risk Mr. Perelman assumed when he decided to accept (and, indeed, demanded) stock in this deal. ***This radically re-writes the bargain the parties struck, affording him a free insurance policy against price declines completely unrelated to the alleged fraud.*** [9]

By way of example only, Dr. Nye didn't consider whether or not some of the stock price decline he attributes to defendant could have been caused by:

- management decisions made by Mr. Perelman and his handpicked Sunbeam managers;
- the decision by Mr. Perelman's managers to lard additional debt and expenses onto Sunbeam, including $105 million in new expenses in 1998;
- a previous misstatement by Mr. Perelman and his managers about the true value of Coleman, requiring Sunbeam to write down $916M worth of *Coleman's* good will in *2000; and*

[9] *See* Restatement (Second) of Torts § 547 cmt. l ("The damages necessary to give the plaintiff the benefit of the bargain that he has made with the defendant will depend, first of all, upon *the nature of the bargain.* If the defendant has undertaken to convey property of a certain description to the plaintiff, the plaintiff is entitled to an amount sufficient to give him the value of property *of that description.*") (emphases added); *see also Formosa Plastics Corp. USA v. Presidio Engineers & Contractors Inc.*, 960 S.W.2d 41, 49 (Tex. 1997) (testimony was inadequate to prove "benefit-of-the-bargain" damages because it was "based on an entirely hypothetical, speculative bargain that was never struck"); *CitiBank, N.A. v. Julien J. Studley, Inc.*, 580 So.2d 784, 786 (Fla. 3d DCA 1991) (reversing damages award that granted realtor a higher percentage of rental revenues than was in the contract).

- a possible plan after acquisition by Mr. Perelman or his managers to drive Sunbeam into bankruptcy for their own ends.[10]

While Morgan Stanley is responsible for the consequences its conduct caused, it is not responsible for other consequences such as these. Yet, Dr. Nye makes no attempt to determine how much of Sunbeam's stock price decline after March 30, 1998 is chargeable to Morgan Stanley and how much of the decline is not. Dr. Nye's rule appears to be that, no matter how remote the loss, it must be left at Morgan Stanley's doorstep. Under that sort of analysis, Ms. Palsgraf could obtain damages from the railroad not just for the injury she suffered when a scale hit her head as she was standing on the station platform, but also for breaking her ankle three years later playing soccer.

That CPH suffered some of these other, unrelated losses at a time when its stock was restricted from sale is irrelevant. The sale restriction proves at most *transaction causation* by showing that Morgan Stanley's alleged fraud was the reason Coleman entered the deal and still held the stock. It does not prove *loss causation* -- proximate cause -- because it does not connect the subject matter of Morgan Stanley's alleged fraud to the reason the stock price went down. *See Robbins*, 116 F.3d at 1447 & n.5. In a securities case, *all* other "contributing forces" to the investment's decline in value "must be isolated and removed." *See id.* at 1447 n.5; *Bastian*, 892 F.2d at 684-685; *Miller v. Asensio & Co.*, 364 F.3d 223, 233 (4th Cir. 2004) ("in determining

[10] *See, e.g.*, 8/7/98 Prudential Securities (CPH 1392178): "Furthermore, we find it ironic that SOC's second largest shareholder, Ron Perelman, could end up financially better off if the SOC were to enter Chapter 11 than if he had been successful selling Coleman to SOC at a significantly lower, all cash price, as he originally attempted late last year. Were SOC to enter bankruptcy today, Mr. Perelman could recognize his presently large but unrecognizable paper (non-cash) loss in Sunbeam. Then he could potentially use this loss to offset his earnings and gains in his other profitable enterprises."

recoverable damages, these contributing forces must be isolated and removed"). This Dr. Nye did not even try to do.[11]

Nor is there any excuse for the incorporation of such an obvious defect. Dr. Nye ***could*** have identified all statistically significant stock price declines after March 30, 1998; he ***could*** have identified which ones are in some fashion attributable to defendant's conduct versus which ones were attributable to other causal factors, and he ***could*** have then come to some opinion about how much of the total stock price was decline was attributable to Morgan Stanley's alleged conduct. Dr. Nye had done just this in other cases. But he didn't even attempt to do so here. By contrast, Professor Grinblatt performed the necessary event study and found that, even assuming the broadest scope possible for the fraud, and full reliance by CPH, CPH's shares had a true value at the time of the transaction not of $43.94 (the closing price) but of approximately $17.57, with the remainder of its decline being caused by a variety of other factors completely unrelated to the fraud. *See* Grinblatt Supp. Report at 34-35. Dr. Nye has not sought to contest this finding.

This case does not represent the first time that Dr. Nye has sought to maximize damages by depending on untested causal assumptions. His testimony *has previously been excluded* for committing exactly the same error he commits here. *Nikkal Indus., Ltd. v. Salton, Inc.*, 735 F. Supp. 1227, 1233-34 (S.D.N.Y. 1990) (refusing to admit Dr. Nye's testimony "because [Dr. Nye's] assumption *did not provide for the impact of other significant factors*, such as the possible effects on sales of a declining trend in the popularity of freezer-type ice-cream makers,

[11] Coleman has suggested that *Silverberg v. Paine, Webber, Jackson & Curtis, Inc.*, 710 F.2d 678 (11th Cir. 1983), supports a contrary result. It does not. The Court there expressly applied *out of pocket damages* in allowing recovery for consequential injuries. *Id.* at 686 n. 12 Indeed, there wasn't even a contractual bargain between the plaintiff and defendant in that case that could supply the basis for a benefit of the bargain damages analysis. Further, in defining benefit of the bargain damages the Court expressly recognized that such damages are measured, just as *Totale* requires, by comparing the"amount paid for the stock and the *value on the date of purchase* absent the misrepresentation" *Id.*

the appearance of several competitors, vigorous price competition and, most importantly, [plaintiff's] poor marketing strategy") (emphasis added). No different result should follow here.

C. Dr. Nye's "Methodology" for Establishing Actual Value Is *Not* Generally Accepted

Dr. Nye's actual value analysis fails for still another reason. To be presented before the jury, an expert must employ generally accepted methods. *See Hadden v. State*, 690 So. 2d 573, 576 (Fla. 1997) (expert's opinion must rest on methods that are "generally accepted by the relevant members of [his] particular field"); *Brito*, 753 So.2d at 114 (rejecting expert testimony that "was not based on any methodology, literature, or studies, and the only record evidence to support his opinion is his testimony itself"); *Frye v. United States*, 298 F. 1013 (D.C. Cir. 1923).

Dr. Nye's methodology-by-blind-assumption is ***not*** generally accepted. To the contrary, it is exactly the sort of "methodology" that routinely results in exclusion. *See* Point I.B. It also runs contrary to a long accepted and standard way to measure true value of securities as of the date of the transaction. *See* Point I.A. Indeed, even by his own admission, Dr. Nye fails to employ what he terms the "standard security analysis" to measure damages in cases involving stock. Finally, Dr. Nye and plaintiff have not even attempted to show -- and cannot show -- that Dr. Nye's novel methodology has been properly admitted in any other case anywhere or employed in any academic research. It is, at bottom, wholly unreliable, misleading, and unsupported. It has no place in this courtroom.

II. DR. NYE'S "EXPECTED VALUE" ANALYSIS VIOLATES FLORIDA LAW

Dr. Nye's "expected value" analysis also violates *Totale* in at least two ways. First, instead of measuring the value plaintiff expected to receive at the time of the purchase, Dr. Nye "averages" certain closing day prices in a way that disregards the parties' bargain and arbitrarily exaggerates damages by at least $69.5 million beyond the closing day price. Second, Dr. Nye

again rewrites the parties' bargain by ignoring the restrictions on sale of the Sunbeam shares that CPH voluntarily accepted when he measures the expected value of that stock, treating them as if they were freely tradable and thus more valuable than they were. Far from enforcing the plaintiff's bargain, Dr. Nye would impermissibly have the jury award CPH *more* than what it actually bargained for.

A. Dr. Nye's "What the Heck" Averaging Decision When Calculating Expected Value Violates *Totale,* Is Methodologically Unsupported, And Assumes Facts Inconsistent With the Record

1. Under *Totale* only two plausible transaction dates exist for measuring damages -- either the date the merger was signed date (February 27, 1998), or the date the merger closed (March 30, 1998). Based on Sunbeam's ***$41.75*** stock price on February 27, 1998, the expected value of CPH's Sunbeam shares on the date of the signing at most would have been approximately $588 million before any discount for their illiquidity. Using Sunbeam's March 30, 1998 stock price of ***$43.94***, the expected value at most would be $619.5 million before a marketability discount.

In a ploy to boost damages, Dr. Nye chose to use *neither* date. Instead, Dr. Nye "average[d] the closing prices of Sunbeam stock from the date the agreement was announced, *i.e.*, March 2, 1998, to March 30, 1998." Nye Report ¶ 17. By averaging these days together, he produced a putative expected value of ***$48.26*** per share -- leading to a total expected value of $680 million. Nye Report ¶ 17 (14.1 million shares x $48.26). Nye concedes that, in adopting this method, he was "*not* trying to estimate what would be the market [price] *on a given day*." 1/12/05 Nye Dep. at 198:22 (emphasis added). Worse, Dr. Nye openly acknowledges that his use of the average stock price was essentially *arbitrary* -- based on a "***what the heck***" guess as to what CPH "figure[d] they'd get." 1/12/05 Nye Dep. at 199:8; 232:21-25. And it is clear Dr. Nye

cherry picked his dates -- using almost any different range of dates (such as from the date the deal was actually signed to the date of closing) reduces his per share calculation significantly.

Totale defined exactly when the benefit of the bargain is to be measured and the wisdom of doing so is confirmed by the sort of shenanigans so-called experts will employ when not tethered to such rules. As this Court made clear, an economic expert should not and cannot "come in and testify about things that are inconsistent with Florida law." 04/06/05 Morning Tr. 6900:7-9. Moreover, Dr. Nye's methodology violates the well-settled rule that benefit-of-the-bargain damages must be "proved with sufficient certainty." *Totale*, 877 So. 2d at 815. That Sunbeam stock traded at a particular average price over the month is not evidence that CPH expected it would receive that price as its benefit of the bargain when it agreed to the merger. And Dr. Nye's failure to offer any justification at all for using a 21-day average price shows that his selection was completely arbitrary, a far cry from the "certainty" Florida law requires.

2. Dr. Nye's expected value averaging calculation is also unsupported by any generally accepted methodology. Dr. Nye concedes the point -- admitting that it was based on only a "what the heck" guess. When pressed, Dr. Nye was unable to offer any economic journal, article, book, treatise, or other authority to support the use of average prices rather than the price on the date of the transaction. 1/12/05 Nye Dep. at 227:13-229:3; 231:11-232:7. Indeed, in *other* cases Dr. Nye himself in other cases has measured damages on the date of the transaction. *See supra* at 17.

Underscoring the fact his methodology is not generally accepted, Dr. Nye's opinion is at war with the long-accepted economic theory of market efficiency that Dr. Nye himself endorses. *See* 1/12/05 Nye Dep. at 197:16-18; *id.* at 172:1-19; Nye Report ¶ 12. By reflecting all available information about the deal itself, the closing date price fully reflects the parties expectations

about the benefit of the bargain struck -- quite unlike some hypothetical price conjured up by an expert after the fact.

3. Finally, Dr. Nye's expected value depends on an improper assumption of the facts that is inconsistent with the record in this case. CPH's own books -- books presumably kept consistent with SEC and FASB requirements -- routinely recorded the value of its Sunbeam shares at the closing day price, namely $619.5 million. *See* MS 813, MS 830. Nye concedes that he never even bothered to find out how CPH recorded the value of its shares in its financial records. 3/11/05 Nye Dep. 32:18-22. And CPH's own Chief Financial Officer testified that he could not think of *any* reason why the number should be $680 million, as Dr. Nye hypothesizes, rather than the $619.5 million recorded in company records. 3/11/05 Nye Dep. 86:2-5. At bottom, Dr. Nye's calculation is inconsistent with benefit-of-the-bargain law, scientifically unreliable, and it assumes facts directly contrary to those admitted by CPH itself.

B. Dr. Nye's Expected Value Analysis Ignores the Restrictions on CPH's Shares

Dr. Nye's expected value analysis depends on still another assumption that fundamentally alters the bargain CPH struck. The bargain the parties struck was for shares of restricted Sunbeam stock -- not cash or freely disposable securities. As Dr. Nye acknowledges, *all* of CPH's Sunbeam shares were unregistered and subject to a lockup agreement restricting CPH's ability to sell those shares for a period of up to nine months. *Id.* ¶ 22; 1/12/205 Nye Dep. at 208:11-23. Dr. Nye further concedes that in agreeing to accept restricted stock, CPH "assumed the risk" of at least some potential decline in value. *Id.* at 234:9-10; *see also, e.g.*, Deposition of Glenn P. Dickes 38:25-39:3 (Nov. 19, 2004).

Despite all of these record facts, non of which he contests, Dr. Nye values CPH's shares around (but not *on*) the date of purchase at $680 million *as if they were freely tradable without*

restriction on the date of the transaction. Dr. Nye expressly admits the point, conceding that he measured the value of "shares that could be freely traded." *See* 1/12/05 Nye Dep. at 205:17; *id.* at 12-25. By relieving CPH of the economic cost associated with the restrictions that CPH voluntarily accepted, Dr. Nye does not properly calculate the value of CPH's actual bargain; he alters the bargain to CPH's advantage, effectively assuming that CPH should be entitled to damages *as if* it could have sold its $680 million in Sunbeam shares on the date of the closing.

Dr. Nye's counterfactual assumption again, unsurprisingly, results in an overstatement of plaintiff's damages. As noted above, a considerable body of economics literature and plaintiff's own admission shows that a marketability discount of at least 15% is appropriate for restricted shares. Plaintiff's own public filings confirm this figure. Professor Grinblatt's report covers this subject as well and Dr. Nye has offered no criticisms of it. Even CPH's *other* expert, Professor Douglas Emery, acknowledges that illiquidity has a negative impact on the value of assets. *See* Douglas R. Emery et al., *Corporate Financial Management* 53-54 (2d ed. 2004). And, of course, federal standards provide for that sort of discounting. Once again, Dr. Nye has supplied -- and can supply -- no excuse for ignoring all of this.[12]

[12] Alternatively, if one could (somehow) permissibly employ Dr. Nye's own "ex post" approach toward measuring actual value (that is, in late 1999 or early 2001, rather than as of the date of the deal), the "expected value" of CPH's shares would have to be recalculated in light of the fact that CPH bargained for shares of *restricted stock*, not cash or other liquid assets. Given that the 14.1 million Sunbeam shares received by CPH did not satisfy CPH's expectation because the then-market value of Sunbeam shares was artificially inflated, CPH's remedy under a benefit-of-the-bargain measure in an "ex post" analysis would be the number of additional Sunbeam shares (at the actual, uninflated, "fraud-free" price) sufficient to raise the total value of the shares received to what CPH expected (under Dr. Nye's assumption, $680 million). Crucially, however, those shares would be restricted and could not be sold, as Dr. Nye admits, until late 1999. Nye Report ¶ 30. Even if CPH had received what Dr. Nye says it reasonably expected -- restricted stock worth $680 million at of 1998 -- under his own "ex post" approach it would have been left with nothing in February of 2001, when Sunbeam declared bankruptcy.

16div-014944

Conclusion

Dr. Nye's measure of damages is improper as a matter of law. It mixes apples with oranges by treating the expected value of restricted stock as if it were cash as of March 30, 1998 while treating the actual value of the stock as somehow "worthless" until it could have been sold in late 1999 or 2001 -- and even then forcing Morgan Stanley to act as an insurer against risks associated with any stock price decline at a time CPH itself managed Sunbeam. Only by artificially inflating the expected value and suppressing the true value is Dr. Nye able to reach his astronomical sum.

Morgan Stanley respectfully moves for an order excluding the testimony of Dr. Nye.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 12th day of April 2005.

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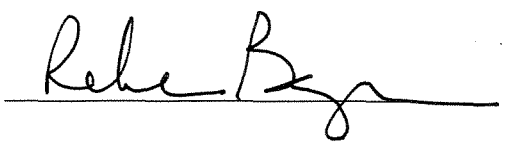
BY: 

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S VERIFIED MOTION TO DISQUALIFY

Pursuant to Florida Rule of Judicial Administration 2.160 and Section 38.10, Florida Statutes, Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully requests that Judge Elizabeth T. Maass disqualify herself from proceeding further in this case and that another judge of the Court be designated to preside over this cause. Judge Maass has ,for an extended period of time and on numerous occasions, exhibited her bias and prejudice against Morgan Stanley, has signaled a predisposition on the merits of this case and created the distinct and readily observable impression that she is an advisor on trial tactics to plaintiff. However, even if Judge Maass had not demonstrated actual bias, and does not consider herself biased, her comportment, before counsel and the jury, leaves Morgan Stanley with the well-founded fear that it is not receiving a fair and impartial trial.

While the circumstances providing the basis for this motion culminated this morning (April 12, 2005), they have roots that go much deeper. Ever since the Court concluded that there had been discovery misconduct that eventually led the Court to impose severe sanctions—

sanctions that Morgan Stanley puts aside for purposes of this motion—the Court has repeatedly demonstrated its prejudice towards Morgan Stanley and its counsel (new and old). The Court has stated that it will not trust Morgan Stanley's representations. Following opposing counsel's assertion that Morgan Stanley will not respond honestly unless it fears ambush by undisclosed documents, the Court has refused the ordinarily mandatory disclosure of documents to be used in a deposition. Responding to Morgan Stanley's objections to improper argument and innuendo in plaintiff's opening statement, the Court accused Morgan Stanley's counsel of "planting ideas [in the jurors minds] that simply shouldn't be there" even though Morgan Stanley's counsel had not yet given an opening statement. When Morgan Stanley's counsel pointed out that he could not have possibly engaged in such improper innuendo with the jury, the Court accused counsel of making improper and prejudicial remarks *before her*. The antagonism is evident to the jury and gallery as well. The Court has, through inappropriate humor, belittled Morgan Stanley's *sustained* objections before the jury. And it has, through its demeanor and conduct, evinced hostility toward Morgan Stanley.

In support of the motion, Morgan Stanley avers as follows:

I. THE COURT'S DISTRUST OF MORGAN STANLEY AND PRIOR COUNSEL

1. Ever since mid-March, the Court has made clear its distrust of, and unwillingness to believe, any statement by Morgan Stanley or its counsel. The Court made clear to prior counsel its view that Morgan Stanley and its counsel are untruthful:

> THE COURT: From now on, Mr. Davidson, in all honesty, I've had this problem throughout this case, *I am not relying on any assertion by Morgan Stanley* unless you cite me to the record that establishes it.

3/15/05 Tr. at 3840. This was an unequivocal statement that the Court would not believe any future representations by Morgan Stanley, whether from counsel or witness testimony during the trial. What is more, the contrast with the Court's treatment of CPH's counsel could not be starker. The Court has never questioned the veracity of CPH's counsel and indeed has gone out of her way to assure them that they have the trust of the Court.

> MR. SOLOVY: I'm 99% percent confident there is no written order.
>
> THE COURT: Okay, that's fine. *I trust you guys.*
>
> MR. SOLOVY: We appreciate that.

4/5/05 Tr. at 6872. The Court has thus plainly stated on the record that she will presumptively disbelieve anything said by Morgan Stanley, while she will presumptively trust anything said by CPH. Sadly, the Court has remained true to its word.

2. On March 23, 2005, Judge Maass entered an order on CPH's Renewed Motion for Default Judgment that evidences Judge Maass's distrust of Morgan Stanley on almost every page. It repeatedly states that Morgan Stanley and its counsel were "manipulative," provided "misleading information," "desperately wanted to hide" SEC inquiries from the Court, and "outright lie[d]" to CPH and the Court. The order is not a simple finding of discovery violations; or a rejection of Morgan Stanley's position or representations. It is instead a frontal attack on the credibility of a party appearing before the Court.

3. The Court has repeatedly signaled its propensity to presume that Morgan Stanley is not telling the truth. During voir dire, the Court effectively re-opened evidence on Plaintiff's Renewed Motion for Default Judgment and accepted a copy of a complaint filed in New York dealing with an insurance coverage dispute. Counsel for Morgan Stanley was not provided with

a copy of the complaint. The Court again indicated that she thought Morgan Stanley was unreliable, without further investigation, and made no further attempt to ascertain the truth. Instead, she declared dismissively, "Okay. I think it's fair that it's probably another example of saying something without knowing it to be true." 3/22/05 Tr. at 4970-4971.

II. THE COURT'S PRESUMPTION OF UNTRUTHFULNESS DESPITE NEW LEAD COUNSEL

4. In the wake of the Court's sanctions, Morgan Stanley served former counsel with notice of a potential malpractice claim and, ultimately, changed counsel of record. Despite that change, the Court continues to presume that *new* lead counsel for Morgan Stanley and Morgan Stanley's witnesses will lie, even before the Court knows who those witnesses will be.

5. For example, at the hearing on plaintiff's Motion for Leave to Take Deposition of Donald G. Kempf ("Kempf Motion"), on March 28-29, 2005, plaintiff submitted for *in camera* review documents that were neither privileged nor confidential to support their request to depose Morgan Stanley's in-house attorneys concerning alleged violations of the Court's March 2, 2005 discovery order. Refusing to provide Morgan Stanley with the documents it provided to the Court, plaintiff urged that "Morgan Stanley's responses are routinely unreliable"; compared Morgan Stanley to a "criminal defendant" who will not cooperate unless it is ignorant about what the prosecution knows; and maintained that "the well established pattern in this case" shows that plaintiff is "less likely to learn the whole truth" if the documents are disclosed in advance of the deposition as required by Florida law. 3/28/05 Tr. at 5551-5552.

6. Without even knowing the identity of the witness to be deposed, the Court agreed with plaintiff's counsel and, contrary to law, declined to reveal the documents to Morgan Stanley. 3/28/05 Tr. at 5551. The Court specifically rested its ruling on the presumption that

Morgan Stanley and (its yet unidentified) witness could not be trusted unless subjected to deposition by ambush with undisclosed documents:

> Morgan Stanley has been less than forthcoming in response to many discovery requests . . . . If [plaintiffs] choose to share with Morgan Stanley the proof they have of some violations of this court order, *it minimizes the chance that Morgan Stanley will be forthcoming* on everything it failed to produce in response to that March 2nd Order.

3/28/05 at 5565-66 (emphasis added). Given the Court's determination that Morgan Stanley is likely to lie unless it fears being surprised by documents, Morgan Stanley cannot help but fear the Court is predisposed against it.

7. After reviewing the documents, the Court granted plaintiff's motion to take the deposition. Morgan Stanley could only stand mute because it was not permitted to see the "evidence." The Court then accepted the documents in "evidence" and ordered the Court's clerk to file the documents under seal so that Morgan Stanley could not see them. This filing violated Fla. R. Jud. Admin. 2.051 concerning public access to judicial records. There is no provision for sealing public records because the Court believes that a party will not tell the "whole truth" if they review the documents. Quite the contrary, full disclosure of relevant documents is a fundamental principle of discovery. Discovery is not meant to be a game of "gotcha" in which the trial court and plaintiff manipulate the rules to trap witnesses.

8. In short, the Court has prejudged the credibility and truthfulness of Morgan Stanley's representatives and witnesses before receipt of any sworn testimony whatsoever. The Court's ruling came at a time when the identity of the potential deponent had not even been determined. Yet without even knowing who Morgan Stanley's witness might be, the Court presumed in advance that the witness would lie.

9. The next day, defense counsel objected to the Court's remarkable sealing of public, discoverable documents because it violated Fla. R. Jud. Admin. 2.051 and failed to provide Morgan Stanley with minimal due process protections such as notice and an opportunity to be heard. The Court rejected counsel's request, stating that based on the unique history of this case, she was comfortable with the facially unlawful and unfair procedure she employed. In an attempt to avoid the protections of Rule 2.051, to avoid the protections of Fla. R. Jud. Admin. 2.051, the Court offered to release the documents from "evidence" to plaintiff's counsel. The Court, however, still would not let Morgan Stanley see the "evidence."

10. On March 29, 2005, the Court again expressed its distrust of Morgan Stanley and its new lead counsel. Addressing Morgan Stanley's concern that its potential malpractice claim against its former counsel created a conflict of interest warranting withdrawal, the Court hinted that the claim "was simply a ruse to allow counsel to withdraw and potentially get a continuance." 3/29/05 Tr. at 5640-41. Similarly, the Court has repeatedly intimated that Morgan Stanley's new lead counsel was feigning unpreparedness despite having only 11 days to prepare for a massive trial. *See, e.g.*, 4/11/05 Tr. at 7505 (referring to Mr. Hansen's "supposed underpreparedness").

11. Another example of Judge Maass's bias exhibited on March 29, 2005, occurred during voir dire. The Court accepted CPH's suggestion and required *only* Mr. Hansen to conduct a "test" voir dire on one witness, to ensure that *he* would not exceed the Court's directions and taint the entire panel. Counsel to Morgan Stanley objected to the Court proceeding on a "suspicion about defense counsel doing something inappropriate that it doesn't share when it comes to plaintiff's counsel . . . ." 3/29/05 Tr. at 5745. This differential treatment

of Mr. Hansen and opposing counsel-in the presence of the jury-further manifests the Court's prejudice. 3/29/05 Tr. at 5743-46.

12. On April 11, 2005, the Court demonstrated its prejudice against Morgan Stanley through the wording of its limiting instruction on reliance. The instruction, rather than focusing on how the jury may consider the evidence, focuses on the *arguments* the Court anticipates *Morgan Stanley will make based on the evidence*. It declares: "*Morgan Stanley* cannot claim that CPH could or should have investigated whether statements made to it were true." 4/11/05 Tr. at 7604-05; see Order of April 5, 2005, on Limiting Instruction on Reliance. The highly unusual effort to foreclose Morgan Stanley from making a "claim" based on the evidence, rather than directing the jury about the proper purposes of the evidence, reveals the Court's bias against Morgan Stanley. It makes clear that the Court uses its role in providing instructions to preclude Morgan Stanley's anticipated legal arguments, not guiding the jury. And it suggests to the jury that the Court particularly distrusts Morgan Stanley because the Court must anticipate, and foreclose, Morgan Stanley's arguments, but not CPH's.

13. Worse, the Court did not give the limiting instruction until *after* counsel had completed his cross-examination *without objection.* Cross examination on that issue—whether in particular it was traditional for parties to these billion-dollar transactions like the one at issue here conduct some due diligence—had proceeded for 45 minutes without objection. The Court then instructed the jury that no diligence of any sort was required, strongly indicating that counsel's extensive cross-examination was improper and irrelevant.

14. Worse, rather than focusing on how the jury may consider the evidence, the instruction focuses on the *arguments* the Court anticipates *Morgan Stanley will make based on the evidence*. It declares: "*Morgan Stanley* cannot claim that CPH could or should have

investigated whether statements made to it were true." The highly unusual effort to foreclose Morgan Stanley from making a "claim" based on the evidence, rather than directing the jury about the proper purposes of the evidence, reveals the Court's bias against Morgan Stanley. It makes clear that the Court uses its role in providing instructions to preclude Morgan Stanley's anticipated legal arguments, not guiding the jury. And it suggests to the jury that the Court particularly distrusts Morgan Stanley because the Court must anticipate, and foreclose, Morgan Stanley's arguments, but not CPH's. That follows precisely the pattern the Court has established in the opening—when it accused Morgan Stanley's counsel of improperly "planting" ideas in the juror's minds *before* counsel had even given an opening statement.

15. This morning, on April 12, 2005, the Court accused Morgan Stanley's counsel of attempting to confuse the jurors:

> THE COURT: That's not fair in all honesty, it's not fair that Morgan Stanley attempts to confuse the jurors and allow them to consider a New York defense which I've already ruled won't fly. 4/12/05 Tr. at 59:25-60:4 (live feed transcript)

Once again, the Court has accused counsel of confusing the jury with improper argument before any *argument* has ever been made. There *is no dispute that the line of questioning is entirely* proper. It shows that there were particular issues about which plaintiff did not much care, because he did not bother conducting the due diligence that is traditional for anything a party to this sort of transaction cares about. Worse, the Court once again sought to use precise language (about what Morgan Stanley can and cannot do) that patently *signals to the jury* that the Court believes Morgan Stanley cannot be trusted.

16. The Court has similarly departed from the judicial role by offering tactical advice to plaintiff's counsel. On March 24, 2005, Judge Maass suggested that plaintiff should consider

enlarging as big as it could, for display to the jury on poster boards, the judicially admitted allegations against Morgan Stanley contained in the Court's Exhibit A. Judge Maass thereby abandoned her role as a neutral arbiter and became an advocate and advisor for CPH. In his opening statement, CPH's counsel followed the Court's advice, displayed Exhibit A on a large projection screen, and read the entire statement to the jury. The Court did its part by *rereading* Exhibit A in its entirety the following day.

III. THE COURT'S DISTRUST OF MORGAN STANLEY CONTINUES AT TRIAL

17. CPH's opening statement was rife with objectionable, inflammatory, and manifestly prejudicial statements, argument, and innuendo, forcing defense counsel to object on several occasions. During his *four-hour* statement, CPH's counsel characterized the fraud claims here as the first of the "major corporate frauds" that have been in the news of late, 4/6/05 Tr. at 6953, 6955; gratuitously employed September 11, 2001 as a demarcation point in the business world, *id.* at 6954; and invoked Arthur Anderson's well-publicized departure from the accounting business (after *criminal* convictions), *id.* at 6950, 7008, 7024-7026. See generally *id.* at 6972. None of these emotion-provoking arguments has anything to do with the issues to be tried and decided by the jury.

18. When Morgan Stanley's counsel sought a mistrial based on the cumulative effect of these prejudicial statements—and the negative effect that his repeated objections must have had on the jury's impression of Morgan Stanley—the Court declared that "*both* trial counsel" are "adept in planting ideas that simply shouldn't be there . . . . *Both of you need to stop it.*" 4/6/05 Tr. at 7027 (emphasis added). But counsel for Morgan Stanley had not yet made his opening statement to the jury. When he pointed that out, the Court responded that she was "talking about your argument to me." *Id.* The Court's willingness to fault Morgan Stanley's counsel for

improperly "planting" ideas in the jury's head before he even addressed the jury; the Court's refusal to recognize the error of having done so; and its defensive and incredible explanation—that counsel had been "planting ideas that simply shouldn't be there" in *the Court's* head through arguments *to the Court*—makes the Court's bias in favor of CPH clear.

19. Later that day, during his opening statement, plaintiff's counsel remarked that if the jurors had just a few cents in their pockets they had something worth more than the stock the CPH purchased in the Sunbeam transaction. After the Court sustained Morgan Stanley's "golden rule" objection, plaintiff's counsel mocked the objection by walking over to the gallery and making the very same argument: "Anyone out there who has a nickel in their pockets, any one of these folks who has five cents in their pockets . . . ." 4/6/05 Tr. at 7091. The Court again sustained the objection. But far from admonishing plaintiff's counsel for repeating his improper argument, the Court belittled Morgan Stanley's counsel for objecting: "I don't think there will be any evidence of what the spectators have in their pockets." *Id.* The Court's demeanor and the ensuing laughter made it clear that the Court, like plaintiff's counsel, was trivializing both the objection and Morgan Stanley's counsel.

20. Moreover, during plaintiff's more than four-hour opening statement, the Court paid close attention to plaintiff's counsel and made eye contact with the jurors while plaintiff's counsel was speaking. Yet, after requiring Morgan Stanley counsel to begin his opening statement at 4:00 p.m., the Court did not look at either defense counsel or the jury while defense counsel was speaking; rather, the Court had her back to the jury and focused her attention away from defense counsel. At certain times, the Court's attention was focused exclusively on her computer. The contrast between how the Court treated counsels' opening statements sent a clear signal to the jury that the Court had a negative attitude towards defense counsel. Specifically,

the Court's demeanor towards defense counsel told the jurors that if the judge did not need to listen to defense counsel, neither did they.

21. Morgan Stanley has a well-grounded basis for believing that it is not receiving a fair trial before Judge Maass, and that the jury has been incurably prejudiced by Judge Maass's bias. The Court has prejudged the credibility and truthfulness of Morgan Stanley's witnesses and believes that Morgan Stanley's in-house counsel will not provide the whole truth at a deposition. The Court's recent comments at trial are merely a culmination of its Court's visible hostility and distrust of Morgan Stanley. The Court has repeatedly expressed its belief that counsel for Morgan Stanley would use arguments before the current jury panels to achieve a delay in the trial. The Court's entire course of conduct shows that the Court has prejudged counsel and believes that counsel with act in an unethical manner.

22. For all these reasons, Morgan Stanley – as attested to and verified by its duly authorized representative Donald G. Kempf, Jr., and its counsel of record, Mark C. Hansen – has a well-grounded and substantial fear that it is not, will not, and cannot receive a fair trial or fair ruling on any pending or future matters in this case before the currently assigned judge on account of the bias and prejudice of Judge Elizabeth Maass against Morgan Stanley and its counsel. A copy of Mr. Kempf's affidavit is attached hereto as Exhibit A. The specific facts and legal authority supporting Morgan Stanley's belief are more fully set forth in the Memorandum of Law incorporated herein.

WHEREFORE, Morgan Stanley, having timely filed this motion within ten days of circumstances that give rise to this motion, requests that Judge Elizabeth T. Maass disqualify herself from proceeding further in this cause and that another judge of the Court be assigned to preside over and proceed further with this cause.

MEMORANDUM OF LAW

A. UNDER FLORIDA LAW, A JUDGE MUST IMMEDIATELY WITHDRAW IF A MOTION FOR DISQUALIFICATION ALLEGES FACTS THAT WOULD PROMPT A REASONABLY PRUDENT PARTY TO BELIEVE IT WILL NOT RECEIVE A FAIR TRIAL.

Section 38.10 of the Florida Statutes and Fla. R. Jud. Admin. 2.160 govern the disqualification of a judge. Section 38.10 creates a substantive right to disqualify a judge and provides, in pertinent part:

> Whenever a party to any action or proceeding makes and files an affidavit stating fear that he or she will not receive a fair trial in the court where the suit is pending on account of the prejudice of the judge of that court against the applicant or in favor of the adverse party, the judge shall proceed no further, but another judge shall be designated in the manner prescribed by the laws of this state for the substitution of judges for the trial of causes in which the presiding judge is disqualified. Every such affidavit shall state the facts and the reasons for the belief that any such bias or prejudice exists and shall be accompanied by a certificate of counsel of record that such affidavit and application are made in good faith.

In ruling on a motion for disqualification, the judge against whom the motion is directed

> . . . shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action.

Fla. R. Jud. Admin. 2.160(f); *see also* Fla. Code of Jud. Conduct, Canon 3E(1)(a).

The Florida Supreme Court has recognized the importance of recusal when the judge's "neutrality is shadowed or even questioned":

> Prejudice of a judge is a delicate question to raise, but when raised as a bar to the trial of a cause, if predicated on grounds with a modicum of reason, the judge against whom raised should be prompt to recuse himself. No judge under any circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned.
>
> . . . .
>
> . . . It is a matter of no concern what judge presides in a particular cause, but it is a matter of grave concern that justice be administered with dispatch,

> without fear or favor or the suspicion of such attributes. The outstanding big factor in every lawsuit is the truth of the controversy. Judges, counsel, and rules of procedure are secondary factors designed by the laws as instrumentalities to work out and arrive at the truth of the controversy.

Livingston v. State, 441 So. 2d 1083, 1085-86 (Fla. 1983) (citations omitted).

Consistent with those fundamental principles, Rule 2.160 sets forth the narrow responsibility of a judge when presented with a motion for disqualification. The facts and reasons for the belief of prejudice must be taken as true, and the judge may pass only on the legal sufficiency of the verified motion. *Brown v. St. George Island, Ltd.*, 561 So. 2d 253, 255 (Fla. 1990). A motion is legally sufficient if two conditions are met. First, it must meet the technical requirements of Rule 2.160 and Section 38.10. *Hayslip v. Douglas*, 400 So. 2d 553, 555 (Fla. 4th DCA 1981). There can be no dispute that this motion meets those requirements.[1]

Second, the moving party must demonstrate a well-grounded fear that it will not receive a fair and impartial trial or that the judge has prejudged the case. F.S.A. § 38.10; Fla. Jud. Admin. R. 2.160(d); *see also Williams v. Balch*, 2005 WL 416125 (Fla. 4th DCA Feb. 23, 2005). The standard is not demanding. Once prejudice is raised, "if [it is] predicated on grounds *with a modicum of reason*, the judge against whom raised should be prompt to recuse himself." *Hayslip v. Douglas*, 400 So.2d 553, 555 (Fla. 4th DCA 1981). "It is not a question of how the judge feels . . . ." *Wargo v. Wargo*, 669 So. 2d 1123 (Fla. 4th DCA 1996). Instead, "the standard is the reasonable effect on the party seeking disqualification." *Brofman v. Florida Hearing Care Center, Inc.*, 703 So.2d 1191, 1192 (4th DCA 1997). As explained in greater detail below, the

[1] The rule and statute require: (1) the submission of a motion that specifically alleges the facts and reasons relied upon to show the grounds for disqualification; (2) verification by the party filing the motion, by the party's signing of the motion under oath or by a separate affidavit; (3) a certificate of counsel that the motion is made in good faith; and (4) filing within a reasonable time after discovery of the grounds. This motion complies with all of these requirements.

facts here establish far more than a "modicum of reason" for Morgan Stanley to fear that it cannot receive a fair trial.

B. DISQUALIFICATION IS REQUIRED IN THIS CASE BECAUSE MORGAN STANLEY HAS A REASONABLE BELIEF THAT IT WILL NOT RECEIVE A FAIR TRIAL.

As detailed in the sworn affidavits of Mr. Donald G. Kempf, Jr., Chief Legal Officer of Morgan Stanley's parent company, and Morgan Stanley's trial counsel, Mark C. Hansen, Morgan Stanley reasonably believes that Judge Maass's statements and conduct demonstrate a bias and prejudice against Morgan Stanley. Indeed, this case is rife with precisely the sort of statements and conduct that, in case after case, have been held to require recusal. The Court has held that Morgan Stanley's former counsel lied; accused Morgan Stanley's lawyers of reprehensible conduct; indicated that it *will not believe* the representations of Morgan Stanley's witnesses as a result; and cast aspersions on the veracity of new lead counsel.

Critically, Judge Maass has now demonstrated her bias before the jury by giving a "limiting" instruction that effectively accuses counsel of improper argument—unmistakably conveying the Court's distrust of Morgan Stanley's counsel—rather than instructing the jury on the proper use of evidence. Judge Maass gave this instruction *after* counsel had elicited testimony on cross-examination, thereby communicating to the jury that it should discount Morgan Stanley's evidence. This was plain error. However, when counsel requested that she not repeat that error, the Court accused counsel of trying to confuse the jury.

1. *The Court Has Found That Morgan Stanley Lied And Displayed Its Unwillingness To Believe Morgan Stanley's New Lead Counsel*

Time and again, this state's Supreme Court and the Fourth District have held that a judge's statement that he or she does not believe the party, or that the party is lying, constitutes

sufficient evidence of bias or prejudice to disqualify a judge. *See, e.g., Brown v. St. George Island*, 561 So. 2d 253 (Fla. 1990); *Hollywood v. Witt*, 868 So. 2d 1214 (Fla. 4th DCA 2004); *Wargo v. Wargo*, 669 So. 2d 1123 (Fla. 4th DCA 1996). This rule has been applied in both jury and bench-trial cases, and in cases where the judge's biased statements were made in various stages of the case, and even in previous proceedings. In *Brown*, for example, the trial judge made derogatory comments concerning the party's veracity during an earlier, related case. Holding that those comments required disqualification, the Florida Supreme Court explained that "[a] statement by a trial judge that he feels a party has lied in a case is generally regarded as indicating a bias against such party." 561 So. 2d at 257. The Court cautioned that it was not holding that a judge is subject to disqualification "simply because of making an earlier ruling in the course of a proceeding which had the effect of rejecting the testimony of the moving party." *Id.* at 257 n.7. But the Court made clear that disqualification is *required* where there is a "clear implication that the judge will not believe the complaining party's testimony in the future." *Id.* *See also DeMetro v. Barad*, 576 So. 2d 1353, 1355 (Fla. 3d DCA 1991) (disqualification required where "the trial judge's denouncement of the petitioners' character and believability in the prior proceeding was a strong implication that he would not believe them in future proceedings"); *Campbell Soup Co. v. Roberts*, 676 So. 2d 435, 436 (Fla. 2d DCA 1991) (judge's statement that "I don't know how much credence I would give" an affidavit, and similar statements in pretrial hearings, required disqualification).

In this action, Judge Maass has not merely rejected certain statements by Morgan Stanley's counsel. Nor has she simply found that Morgan Stanley lied. Rather, she has made it increasingly clear by her statements and conduct that Morgan Stanley is not to be believed *in the future* (even though represented by new lead counsel).

Before Morgan Stanley switched counsel, Judge Maass made it clear that she would not believe Morgan Stanley or its counsel:

- The Court: "*From now on . . .* in all honesty, I've *had this problem throughout this case*, I am *not relying on any assertion by Morgan Stanley* unless you cite me to the record that establishes it." 3/15/05 Tr. at 3840 (emphasis added).

- The Court: Morgan Stanley and its counsel told "outright lies" and used "stonewall tactic[s]." Order of March 23, 2005.

The contrast with the Court's attitude toward opposing counsel could not be more stark. While the Court has said it is "not relying on any assertion by Morgan Stanley" absent a cite to the record, the Court has openly said to opening counsel "I trust you guys." *See* 4/5/05 Tr. at 6872 ("Mr. Solovy: I'm 99% percent confident there is no written order. The Court: Okay, that's fine. *I trust you guys*. Mr. Solovy: We appreciate that.") (emphasis added). It is not possible to obtain a fair trial under these circumstances.

Even after the appointment of new lead counsel, the Court has, without justification or experience with these attorneys, persisted in its presumptive disbelief of Morgan Stanley and its counsel. The Court regularly presumes that Morgan Stanley's witnesses will *lie* even before the Court knows who they are. For example, the Court accepted documents ("evidence") under seal and determined that plaintiff need not disclose those non-privileged documents before the deposition based on opposing counsel's representation that "Morgan Stanley's responses are routinely unreliable"; his comparison of Morgan Stanley to a "criminal defendant" who will not cooperate unless it is ignorant about what the prosecution knows; and his urging that "the well established pattern in this case" shows that plaintiff is "less likely to learn the whole truth" if the documents are disclosed before the deposition, as required under Florida law. 3/28/05 Tr. at 5551-52.

Accepting CPH's accusations, the Court held that deposition by ambush was justified by its distrust of Morgan Stanley:

> Morgan Stanley has been less than forthcoming in response to many discovery requests . . . . If [plaintiffs] choose to share with Morgan Stanley the proof they have of some violations of this court order, *it minimizes the chance that Morgan Stanley will be forthcoming* on everything it failed to produce in response to that March 2nd Order.

3/28/05 at 5565-66. It is one thing for opposing counsel to presume that a witness will lie unless he fears surprise. It is truly remarkable, indeed unlawful, for the Court to do so—particularly where the Court *does not even know the identity of the witness*. Having presumed that a Morgan Stanley witness is likely to lie unless he fears being surprised by documents simply because he is a Morgan Stanley witness, the Court cannot deny its predisposition to distrust Morgan Stanley.

Immediately after indulging the presumption that a Morgan Stanley witness would lie—even without knowing who would testify—the Court ruled that the documents proved Morgan Stanley's violation of the Court's March 2 Order without even giving Morgan Stanley a chance to review them or respond. "[T]hey've given me things that would allow a reasonable person to conclude that the March 2nd order was violated, and it is fair to figure it out." *Id.* The Court's decision, based on only half the story and before Morgan Stanley has a chance to substantively respond, repeats the Court's biased pattern with prior counsel. *See*, *e.g.*, 3/22/05 Tr. at 4971-72 ("Okay. I think it's fair that it's probably *another example* of [Morgan Stanley] saying something *without knowing it to be true*."). If the Court had even a scintilla of trust in Morgan Stanley's current counsel, the Court would have confronted him with the documents and permitted him to investigate and explain. The decision to withhold information from counsel on the presumption that Morgan Stanley would otherwise lie makes it impossible for Morgan Stanley to believe it can get a fair trial.

Time and again since then, the Court has expressed further distrust.

- The Court hinted that Morgan Stanley's concern about a conflict of interest "was simply a ruse to allow counsel to withdraw and potentially get a continuance." 3/29/05 Tr. at 5640-41.

- The Court has issued a limiting instruction on reliance that addresses not how the jury may use evidence but the legal arguments *Morgan Stanley can make*. It declares: "*Morgan Stanley* cannot claim that CPH could or should have investigated whether statements made to it were true." The purpose of a limiting instruction, however, is to tell the jury the purposes for which it may consider evidence. Converting the limiting instruction into a device for anticipating what *Morgan Stanley*, a party, might "claim" and instructing the jury that "Morgan Stanley" cannot make certain arguments, reveals the Court's tendency to place its mistrust of Morgan Stanley ahead of its duty to ensure a fair trial.

- The Court suggested trial tactics to plaintiff, suggesting that "either side" make an exhibit as large as it wanted, where the exhibit self-evidently favored plaintiff. 3/24 Tr.

2. *The Court's Distrust And Distaste For Morgan Stanley Is Evident At Trial*

Throughout these proceedings, Morgan Stanley has hoped that the Court would—with the change of counsel and the press of trial—be able to set aside its distrust and bias. Yet even in the context of trial, the Court treats Morgan Stanley as if it were the untruthful child that always misbehaves and must be chastised—even for the mistakes of plaintiff's counsel.

For example, counsel for Morgan Stanley repeatedly was forced to object to improper argument and innuendo during plaintiff's *four-hour* opening statement. Plaintiff's counsel characterized the fraud claims here as the first of the "major corporate frauds" that have been in the news of late, 4/6/05 Tr. at 6953, 6955; he employed September 11, 2001 as a demarcation point in the business world, *id.* at 6954; and referred to Arthur Anderson's well-publicized departure from the accounting business (after *criminal* convictions), *id.* at 6950, 7008, 7024-7026. *See generally id.* at 6972. When Morgan Stanley's counsel sought a mistrial based on the cumulative effect of these improper statements, the Court declared that "both trial counsel" are

"adept in planting ideas that simply shouldn't be there . . . . *Both of you need to stop it.*" 4/6/05 Tr. at 7027 (emphasis added).

Counsel for Morgan Stanley, however, had not yet even made a statement to the jury at that point. When he pointed that out, the Court responded that she was "talking about your argument to me." *Id.* The Court's willingness to find fault with Morgan Stanley's counsel improperly "planting" ideas in the jury's head before he made his opening statement; its refusal to recognize the error of having done so; and its defensive and incredible explanation (that counsel had been "planting ideas that simply shouldn't be there" in *the Court's* head through arguments *to the Court*) are more than enough to support a reasonable fear of partiality.

Later that day, during his opening statement, plaintiff's counsel remarked that if the jurors had just a few cents in their pockets they would have something worth more than the stock the plaintiff had purchased as part of the transaction underlying the lawsuit. After the Court sustained Morgan Stanley's "golden rule" objection, plaintiff's counsel mocked the objection by walking over to the gallery and making the very same argument: "Anyone out there who has a nickel in their pockets, any one of these folks who has five cents in their pockets . . . ." 4/6/05 Tr. at 7091. The Court again sustained the objection. But far from admonishing plaintiff's counsel for his repeating his improper argument, the Court belittled Morgan Stanley's counsel for objecting. "I don't think there will be any evidence of what the spectators have in their pockets." *Id.* The Court's demeanor and the ensuing laughter made it clear that the Court, like plaintiff's counsel, was trivializing both the objection and Morgan Stanley's counsel.

3. *The Court Has Impermissibly Signaled its Distrust For Morgan Stanley To The Jury And Persists In Doing So*

This necessity of this motion became most evident, however, when the Court communicated its consistent pattern of expressing distrust in Morgan Stanley's counsel found expression in front of the jury. In particular, on April 7, 2005, the Court demonstrated its prejudice against Morgan Stanley through the timing and wording of its "limiting" instruction on the issue of justifiable reliance. Cross examination on that issue —whether in particular it was traditional for parties to these billion-dollar transactions like the one at issue here conduct some due diligence—had proceeded for 45 minutes without objection. The Court then instructed the jury that no diligence of any sort was required, strongly indicating that counsel's extensive cross-examination was improper and irrelevant.

Worse, rather than focusing on how the jury may consider the evidence, the instruction focuses on the *arguments* the Court anticipates *Morgan Stanley will make based on the evidence*. It declares: "*Morgan Stanley* cannot claim that CPH could or should have investigated whether statements made to it were true." The highly unusual effort to foreclose Morgan Stanley from making a "claim" based on the evidence, rather than directing the jury about the proper purposes of the evidence, reveals the Court's bias against Morgan Stanley. It makes clear that the Court uses its role in providing instructions to preclude Morgan Stanley's anticipated legal arguments, not guiding the jury. And it suggests to the jury that the Court particularly distrusts Morgan Stanley because the Court must anticipate, and foreclose, Morgan Stanley's arguments, but not CPH's. That follows precisely the pattern the Court has established in the opening—when it accused Morgan Stanley's counsel of improperly "planting" ideas in the juror's minds *before* counsel had even given an opening statement.

The Court this morning again proposed to give precisely the same instruction. When counsel objected, the Court accused counsel of misleading the jury. "[I]t's not fair that Morgan Stanley attempts to *confuse the jurors* and allow them to consider a New York defense which I've [told] you doesn't [f]ly." Once again, the Court has accused counsel of confusing the jury with improper argument before any *argument* has ever been made. There *is no dispute that the line of questioning is entirely* proper. It shows that there were particular issues about which plaintiff did not much care, because he did not bother conducting the due diligence that is traditional for anything a party to this sort of transaction cares about. Worse, the Court once again sought to use precise language (about what Morgan Stanley can and cannot do) that patently *signals to the jury* that the Court believes Morgan Stanley cannot be trusted.

3. *Florida Law Requires Recusal Under These Circumstances*

a. "Under Florida law, a judge's statement that he feels a party has lied in a case before him generally indicates bias against the party." *DeMetro*, 576 So. 2d at 1354. Here, the Court has not merely accused Morgan Stanley of lying once, but has registered that accusation on repeated occasions. Worse, the Court has gotten to the point where it presumes a witness will lie before knowing the witness's identity simply because he is a witness for Morgan Stanley. A clearer example of bias is hard to imagine. Isolated comments, even jokes, have often been grounds for disqualification. Thus, in *Hollywood v. Witt*, 868 So. 2d 1214 (Fla. 4th DCA 2004), the trial judge who had presided over a jury trial was disqualified for having commented that "he did not believe any of the City's witnesses in the . . . trial and thought that they lied during the trial." *Id.* at 1216. *A fortiori*, disqualification is mandatory where, as here, the Court has repeatedly accused Morgan Stanley of lying and has expressed the view that it will tend to disbelieve Morgan Stanley's witnesses—even witnesses not yet disclosed—solely because they

are employed by Morgan Stanley. That problem is exacerbated by the Court's open expression of trust for the opposing part—"I trust you guys."

The predisposition to disbelieve Morgan Stanley strikes at the core of fundamental fairness. The Court on a daily basis is required to rule on motions, rule on objections, and make split-second judgments. Where the Court has a tendency to trust one side over the other, its rulings will inevitably be tainted. Particularly in a case like this one, with potentially more than a billion of dollars at stake, Morgan Stanley is entitled to have a judge "who has not evaluated petitioner's credibility and character in a negative fashion," just as plaintiff "should be free from a presiding judge who believes, as a result of a previous case, that [Morgan Stanley] is credible and worthy." *Holmes v. Goldstein*, 650 So. 2d 87 (Fla. 4th DCA), *rev. denied*, 659 So. 2d 1086 (Fla. 1995). Morgan Stanley has substantial grounds to believe that the Court is incapable of evaluating its credibility without prejudice.

That concern is particularly acute given the March 23 Order that demonstrates Judge Maass's distrust of Morgan Stanley on almost every page. Throughout the order, Judge Maass repeatedly states that Morgan Stanley and its counsel were "manipulative," provided "misleading information," "desperately wanted to hide" SEC inquiries, and "outright lie[d]" to CPH and the Court. This is exactly the type of characterization that required the disqualification of Judge Hurley after he accused Mr. Scarola and his partner of "sophistry," "greed, overreaching," and intentional misconduct. *Michaud-Berger v. Hurley*, 607 So. 2d 441, 446 (Fla. 4th DCA). Like Mr. Scarola's client in *Michaud-Berger,* the only reasonable conclusion Morgan Stanley can draw from the Judge's comments—in light of the conduct and comments that have followed—is that Judge Maass "dislikes and distrusts" Morgan Stanley and its lawyers to such an extent that a fair trial is impossible. Indeed, the court's comments and cross-examination of Morgan Stanley

before it can even present its position shows that the court had already prejudged Morgan Stanley in this action.

The court's hostility and anger towards Morgan Stanley and its in-house attorneys has, in Morgan Stanley's view, already colored the court's ruling on Morgan Stanley's motion for continuance after its lead counsel withdrew on the eve of trial. A continuance is ordinarily required under such circumstances. *See, e.g., Buscemi v. 6060 Realty Corp.*, 654 So. 2d 197, 198 (Fla. 3d DCA 1995). In denying a reasonable continuance, the court revealed that its ruling flowed from its findings of Morgan Stanley's alleged discovery misconduct, saying at one point that it was "so sad, too bad," but Morgan Stanley did it. Morgan Stanley quite naturally has a very real fear that the court's belief that Morgan Stanley, its inside attorneys, and its outside counsel intentionally misled the court will make it impossible for the court to rule fairly and impartially on other important issues that will be presented in this case, such as directed verdict and post-trial motions.

Now that the Court's distrust has been signaled that hostility and mistrust to the jurors, there can be no hope of a fair trial. Counsel cannot maintain any credibility with the jury if the Court, after a line of examination has concluded, comments on the evidence. Counsel cannot maintain any credibility with the jury if, before counsel has made any argument to the jury, the Judge signals to the jury that she *anticipates* improper argument by telling the jury what Morgan Stanley can and cannot argue. Counsel cannot maintain any credibility with the jury or the Court where the Court is predisposed against him and his client, accusing him of making improper argument in opening statement before he makes the statement, and improper argument based on cross-examination before he gives his summation.

b. Judge Maass, moreover, has become an advocate for the plaintiff in this case. Recommending that plaintiff's counsel may wish to enlarge an Exhibit that is damaging to Morgan Stanley "as big" as he wants, the Court attempted to disguise that one-sided advice by asserting that "either party" could do so. Such "even-handedness" is self-evidently feigned, for Morgan Stanley would never wish to enlarge Exhibit A, to which it repeatedly objected. In any event, it is the province of lawyers to advise with respect to trial tactics; the Court, needless to say, must confine itself to presiding *impartially* over the trial. Disqualification is plainly required, where as here, the judge strays beyond the judicial role for this reason as well. *See, e.g., Evans v. State*, 831 So. 2d 808 (Fla. 4th DCA 2002) (Florida law expressly prohibits a trial judge from stepping away from the appearance of neutrality to become an advocate for either party); *Shore Mariner Condo. Ass'n v. Antonious*, 722 So. 2d 247 (Fla. 2d DCA 1998) (judge suggested strategic course for party); *J.F. v. State*, 718 So. 2d 251, 252 (Fla. 4th DCA 1998). In sum, "[t]he trial judge serves as the neutral arbiter in the proceedings and must not enter the fray by giving 'tips' to either side." *Chastine v. Broome*, 629 So.2d 293, 295 (Fla. 4th DCA 1993). It was just such an impermissible tip that the Court offered here.

Finally, the Court's repeated comments cannot be dismissed as humor. There is nothing humorous about accusing counsel or a party of lying. There is nothing humorous about a Court suggesting that an undisclosed witness is likely to lie simply because he is an employee of Morgan Stanley. And there is nothing humorous about the Court belittling sustained objections in this sensitive matter. But even humor—and humor outside the jury's hearing—can be grounds for disqualification. *See Brofman v. Florida Hearing Care Center, Inc.*, 703 So.2d 1191, 1192 (Fla. 4th DCA 1997) (recusal was required even though trial judge may have meant the remark to be a joke, rather than a reflection on the merits of the claim); *accord Vivas v.*

Hartford Fire Insurance Company, 789 So.2d 1252, 1253 (Fla. 4th DCA 2001) (same). Here, the Court's effort at humor in at least one instance was within the jury's hearing and belittled Morgan Stanley's counsel. Moreover, Morgan Stanley is aware, and the Court should be painfully aware, that it has read portions of the complaint to the jury, complete with inflammatory characterizations, and "deemed" those facts established. Having already placed itself behind "factual findings" that cast Morgan Stanley in such a negative light, the Court has no business belittling Morgan Stanley's counsel as well.

C. MORGAN STANLEY'S MOTION IS NOT BASED ON AN ADVERSE RULING BY JUDGE MAASS

Morgan Stanley acknowledges that an adverse ruling is not a basis for disqualification, and it does not raise its disagreement with the court's sanctions order as a basis for disqualification.[2] It is instead the Court's comments in the course of proceedings, the content rather than the result of its rulings, and the Court's comportment that instill fear that Morgan Stanley will not receive a fair trial before this judge. Evidence of a well-grounded fear of bias or prejudice often arises in the context of some "adverse ruling." *See e.g., Brown*, 561 So. 2d at 257 (rejecting attempt to characterize judge's remarks as simply part of an adverse ruling where, in rejecting a party's affidavit submitted on a pending motion on which the court ruled against the party, the court said, "I wouldn't believe him anyway"); *DeMetro*, 576 So. 2d at 1354 (disqualifying judge based in part on language in final order describing party's conduct as immoral). Thus, the mere fact that *some* of the disqualifying conduct in this case arose in the context of adverse rulings—and some in the context of sustained objections—does not control the outcome.

[2] Morgan Stanley, of course, in no way concedes that the court's findings of fact or conclusions in the order are correct.

Judge Maass's comments, statements, and findings indicate that she believes that Morgan Stanley and its counsel are "outright" liars who intentionally misled the court. These comments give rise to Morgan Stanley's well-grounded fear that it is unable to receive a fair trial before Judge Maass. Judge Maass should therefore be disqualified under the controlling Florida law set forth above.

WHEREFORE, Morgan Stanley respectfully requests that Judge Elizabeth T. Maass disqualify herself from further proceedings in this action together with such other and further relief as is just and proper.

CERTIFICATE OF COUNSEL

Pursuant to Fla. R. Jud. Admin. 2.160(c), the undersigned counsel hereby certifies that this Motion and the statements of Morgan Stanley are made in good faith.

Thomas E. Warner

Mark C. Hansen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 24 day of April 2005.

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BY: _____
Mark C. Hansen (*Pro Hac Vice*)
James M. Webster, III (*Pro Hac Vice*)
Rebecca A. Beynon (*Pro Hac Vice*)

Counsel for Morgan Stanley & Co. Incorporated

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

AFFIDAVIT OF DONALD G. KEMPF, JR.

STATE OF FLORIDA

COUNTY OF PALM BEACH

BEFORE ME, the undersigned authority, duly authorized to administer oaths, personally appeared Donald G. Kempf, Jr., who being first duly sworn, deposes and says as follows:

1. I am over the age of 18 and fully competent to make this affidavit. I have personal knowledge of the matters contained in this affidavit.

2. I am the Executive Vice President, Chief Legal Officer, and Secretary of Morgan Stanley, the parent company of Morgan Stanley & Co. Incorporated.

3. As a duly authorized representative of Morgan Stanley & Co. Incorporated, I am authorized to state on behalf of Morgan Stanley that, for the reasons set forth in Morgan Stanley's Verified Motion to Disqualify, the accompanying Memorandum of Law, and the Affidavit of Mark Hansen filed in support thereof, Morgan Stanley has a well-grounded fear that

it will not receive a fair trial in the court where the suit is pending because of the specific prejudice of Judge Elizabeth Maass against Morgan Stanley and in favor of Coleman (Parent) Holdings.

FURTHER AFFIANT SAYETH NAUGHT.

Donald G. Kempf Jr.
DONALD G. KEMPF, JR.

SWORN TO AND SUBSCRIBED before me at the County and State last aforesaid on this 12th day of April, 2005 by DONALD G. KEMPF, JR., who is personally known to me.

(NOTARY SEAL)

Barbara J. Mojack
Name of Notary
State of Florida at Large (Seal)
My Commission Expires 8/18/06

Barbara J Mojack
My Commission DD143213
Expires August 18, 2006

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

AFFIDAVIT OF MARK C. HANSEN

STATE OF FLORIDA

COUNTY OF PALM BEACH

BEFORE ME, the undersigned authority, duly authorized to administer oaths, personally appeared Mark C. Hansen, who being first duly sworn, deposes and says as follows:

1. I am over the age of 18 and fully competent to make this affidavit. I have personal knowledge of the matters contained in this Affidavit.

2. I am a partner with the law firm of Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C, and am lead trial counsel for Morgan Stanley & Co. Incorporated ("Morgan Stanley") in this matter.

3. I was present in the courtroom on April 6-7 and April 11-12, 2005, and therefore have personal knowledge of the events described herein.

4. First, in response to my objections to CPH's counsel Jack Scarola's opening statement, the Court chastised *both* counsel for improperly planting ideas in the jurors' minds, despite the fact that I had yet to begin my opening statement on behalf of Morgan Stanley.

5. Second, in response to an objection I made that was sustained by the Court, the Court actually made it a joke that drew the laughter of the audience and the jurors. It was clear to me that the Court trivialized my proper objection before the jury, thereby diminishing my standing before the jury.

6. The Court's conduct conforms to a pattern I have witnessed in the case whereby the Court has exhibited signs of anger or irritation toward me since I have taken the lead role in presentation of Morgan Stanley's defense during the middle of voir dire after the withdrawal of Kirkland & Ellis.

7. Third, the Court accused me of attempting to confuse the jury and interject impermissible argument into the trial. The Court's accusation related to evidence placed before the jury yesterday without any objection by CPH on a line of questioning that was concededly relevant and proper.

8. Based on the events that have transpired in this action, I believe that the Court has determined that I cannot be relied upon to act appropriately and therefore has taken actions that prevent me from representing Morgan Stanley effectively. I believe that the Court's distrust of Morgan Stanley's former lead trial counsel has rendered it impossible for the Court to credit my representations even though I had no involvement in the matters that gave rise to the Court's March 2005 sanctions orders. Further, it appears to me that the Court's distrust of Morgan Stanley's former lead trial counsel has led the Court to assume that I will engage in inappropriate conduct before the jury.

9. The Court's comments about my supposed planting ideas in the jurors' minds and attempts to confuse the jury demonstrate that the Court has a predisposition to distrust me. This was not in any way necessary for a ruling by the Court on an objection to plaintiff's opening statement or as a response to my objection to the Court. The Court's accusations cause me to conclude that I will not be permitted to represent fully and effectively my client in this case.

10. At voir dire, the Court required me (but not opposing counsel) to conduct a sample voir dire of a single juror. This suggested to me that the Court believed I would try to conduct an improper voir dire. The Court has likewise refused to turn evidence over to me based on the concern that, if given the evidence in advance, Morgan Stanley's witness would lie – even though the Court did not know who the witness would be.

11. I believe that the pattern of conduct and comments of Judge Maass demonstrates bias against my client and its counsel. In my judgment, Morgan Stanley cannot receive a fair trial in front of Judge Maass.

12. Having practiced law for approximately 22 years, having litigated hundreds of cases, and having tried approximately 30 cases to verdict, I do not recall ever before moving as lead trial counsel to disqualify a judge for bias. In this case, I believe the instant motion is necessary to protect the interests of my client in a fair trial.

13. I am authorized to state on behalf of Morgan Stanley that due to these events set forth above, Morgan Stanley has a well-grounded fear that it will not receive a fair trial in the court where the suit is pending.

FURTHER AFFIANT SAYETH NAUGHT.

MARK C. HANSEN

SWORN TO AND SUBSCRIBED before me at the County and State last aforesaid on this 12th day of April, 2005 by MARK C. HANSEN, who is personally know to me.

(NOTARY SEAL)

Barbara J. Mojack
Name of Notary
State of Florida at Large (Seal)
My Commission Expires 8/18/06

Barbara J Mojack
My Commission DD143213
Expires August 18, 2006

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO COMPEL COMPLIANCE WITH NOTICE TO PRODUCE

THIS CAUSE came before the Court April 11, 2005 on Coleman (Parent) Holdings, Inc.'s Motion to Compel Compliance with Notice to Produce, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Coleman (Parent) Holdings, Inc.'s Motion to Compel Compliance with Notice to Produce is Granted, in part, and Denied, in part. Plaintiff's Notice to Produce at Trial served April 1, 2005 is amended by interlineation to delete paragraph 4 thereof. MS & Co. shall comply with the Notice, as so amended, by 3:00 p.m. April 12, 2005.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 12 day of April, 2005.

_____
ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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John Scarola, Esq.
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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON CPH'S ORE TENUS MOTION TO QUASH TRIAL SUBPOENAS ON MAHER, PERELMAN, AND NESBITT

THIS CAUSE came before the Court April 12, 2005 on CPH's ore tenus Motion to Quash Trial Subpoenas on Maher, Perelman, and Nesbitt, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that CPH's ore tenus Motion to Quash Trial Subpoenas on Maher, Perelman, and Nesbitt is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 12 day of April, 2005.

_____
ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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Washington, DC 20036

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S VERIFIED MOTION TO DISQUALIFY

THIS CAUSE came before the Court April 11, 2005 on Morgan Stanley's Verified Motion to Disqualify, with both counsel present. Based on a review of the Motion, it is

ORDERED AND ADJUDGED that Morgan Stanley's Verified Motion to Disqualify is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 12 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION TO RECONSIDER THE COURT'S APRIL 5, 2005 ORDER ON A LIMITING INSTRUCTION ON RELIANCE

THIS CAUSE came before the Court April 11, 2005 on Morgan Stanley's Motion to Reconsider the Court's April 5, 2005 Order on a Limiting Instruction on Reliance. Based on a review of the Motion, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion to Reconsider the Court's April 5, 2005 Order on a Limiting Instruction on Reliance is Denied. See Local Rule 6.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 11 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S ORE TENUS MOTION FOR STAY

THIS CAUSE came before the Court April 12, 2005 on Morgan Stanley's ore tenus Motion for Stay, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's ore tenus Motion for Stay is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 12 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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1615 M Street, NW, Suite 400
Washington, DC 20036

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

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

_____/

COLEMAN (PARENT) HOLDINGS INC.'S
FURTHER REVISED TRIAL EXHIBIT LIST

Pursuant to the Court's March 24, 2005 Order, Coleman (Parent) Holdings Inc. ("CPH") hereby provides Morgan Stanley & Co. ("Morgan Stanley") with the attached revised list of the exhibits that CPH currently expects to use at trial. As a result of the Court's March 23, 2005 Order, CPH has endeavored to identify and disclose documents that it may use in direct examination, cross-examination, and to rebut arguments that it presently anticipates may be advanced at trial. CPH substantially has narrowed its original trial exhibit list of more than 1200 exhibits to approximately 200 exhibits. CPH reserves the right to use any of the exhibits identified on the attached list during either phase of its case in chief, in cross-examination, or in rebuttal. CPH further reserves the right to supplement this disclosure or to withdraw any exhibits identified herein as CPH continues to evaluate its proofs in light of the Court's recent rulings, anticipated rulings, default findings, expected findings regarding litigation misconduct, the trial witness disclosure or exhibit list to be provided by Morgan Stanley, or new arguments advanced by Morgan Stanley. CPH further reserves its rights as follows:

16div-014990

1. In addition to the documents set forth on the attached Revised Trial Exhibit List, CPH reserves its right to use additional exhibits that it identifies in connection with ongoing punitive damages and expert discovery.

2. CPH reserves its right to use at trial duplicate copies and/or original versions of any of the documents listed on the attached Revised Trial Exhibit List. Pursuant to an agreement with counsel for Morgan Stanley, more legible copies of these documents may be re-marked with the deposition and trial exhibit numbers and used in that form at trial.

3. CPH reserves its right to use the reports submitted and the documents relied upon by Morgan Stanley's experts as exhibits in cross examining Morgan Stanley's experts.

4. CPH reserves the right to use and/or introduce at trial any proposed trial exhibit identified by Morgan Stanley.

5. CPH reserves its right to submit and introduce summary documents based upon the information included in documents identified in the attached Revised Trial Exhibit List or in the documents identified as exhibits by Morgan Stanley, as well as demonstrative exhibits.

6. By listing documents on the attached Revised Trial Exhibit List, CPH is not conceding the relevance, foundation, and/or admissibility of any of those documents. Further, CPH listed certain of those documents for purposes of rebutting arguments that Morgan Stanley may raise in either phase of the trial. By listing those rebuttal documents, CPH is not conceding the admissibility or relevance of the potential Morgan Stanley arguments or documents in either phase of the trial.

7. In compiling the attached exhibit list, CPH identified documents that it may use to support its case for an award of punitive damages against Morgan Stanley. In identifying those

documents on the attached list, CPH is not conceding the admissibility or relevance of those documents for any purpose other than punitive damages.

I HEREBY CERTIFY that a true and correct copy of the foregoing and its attachment have been sent by facsimile and hand-delivered to the individuals of the attached service list on this 13th day of April, 2005.

Dated: April 13, 2005

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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REVISED CPH TRIAL EXHIBIT LIST
Dated April 13, 2005

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
6	02/23/1998	CPH Ex. 009	CP 026286 - 026370	
7 / 7A	03/19/1998	CPH Ex. 010	CPH 1421272 - 1421343	
8	03/09/1998	CPH Ex. 011	SASMF 10699 - 10705	
11	03/19/1998	CPH Ex. 014	MSC 0016944 - 0016945	
14	03/19/1998	CPH Ex. 017	MS 00375 - 00381	
19	10/16/1998	CPH Ex. 022	CPH 0084462 - 0084532	
30	03/19/1998	CPH Ex. 033	MSC 0029176	
33	04/03/1998	CPH Ex. 036	CPH 0639323 - 0639327	
33 A	04/03/1998		CPH 0145589-0145592	Press release "Sunbeam Corporation Lowers First Quarter Sales and Earnings Expectations; Names Lee Griffith President of Household Products Business"
66	09/11/1997	CPH Ex. 069	MSC 0003894 - 0003930	
67	09/05/1997	CPH Ex. 070	SB 237825 - 237830	
68	10/23/1997	CPH Ex. 071	MSC 0005984 - 0005995	
71	03/05/1998	CPH Ex. 074	MSC 0080356 - 0080358	
72	03/15/1998	CPH Ex. 075	SB 0018202 - 0018288	
73	03/19/1998	CPH Ex. 076	MSC 0025829 - 0025886	
81	03/05/1998	CPH Ex. 084	MSC 0033255 - 033263	
87	02/27/1998	CPH Ex. 089	MSC 0083960 - 0084026	
88	02/27/1998	CPH Ex. 090	CPH 1332631 - 1335633	
98	03/12/1998	CPH Ex. 100	MSC 0004590-0004626	
111	03/25/1998	CPH Ex. 112	CPH 0129613 - 0129616	

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
128	03/15/1998	CPH Ex. 130	CPH 0251869 - 0251889	
134	02/23/1998	CPH Ex. 138	CPH 1411216 - 1411300	
142	03/31/1998	CPH Ex. 146	MSC 0080325 - 0080333	
149	06/01/1998	CPH Ex. 155	CPH 1346133 - 1346250	
150	06/09/1998	CPH Ex. 156	CPH 1346276-1346342	
151	06/11/1998	CPH Ex. 157	MSC 0018702-0018703	
155	06/21/1998	CPH Ex. 162	MSC 0026888 - 0026891	
158	02/17/1998	CPH Ex. 169	MSC 0044556 - 0044573	
168	03/11/1998	CPH Ex. 182	MSC 0004703 - 0004723	
168 A	03/11/1998		CLN 36147-36167	Sunbeam Management Presentation
171	02/23/1998	CPH Ex. 187-A	CP 0254621 - 0254640	
209	12/17/1997	CPH Ex. 236	CPH 1121203 - 1121259	
212	02/25/1998	CPH Ex. 239	CPH 1416194 - 1416213	
226	00/00/0000	CPH Ex. 264	MSC 0024863	
233	10/09/1997	CPH Ex. 272	CPH 0473148 - 0473165	
234	08/07/1997	CPH Ex. 273	MSC 0023225 - 0023229	
235	11/13/1997	CPH Ex. 274	MSC 0054921 - 0054925	
236	01/26/1998	CPH Ex. 275	MSC 0001575 - 0001579	
248	00/00/0000	CPH Ex. 300	MSC 0024863 - 24864	
258	01/19/1999	CPH Ex. 325	CPH 1352836 - 135283	
278	09/15/2004	CPH Ex. 360	MSC 0096879 - 0096972	
289	02/24/1994	CPH Ex. 371	MSC 0085403 - 85419	
290	10/27/1995	CPH Ex. 372	MSC 0085420 - 85435	
291	12/31/1996	CPH Ex. 373	MSC 0085436 - 85452	

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
292	12/31/1997	CPH Ex. 374	MSC 0085453 - 85471	
293	12/31/1998	CPH Ex. 375	MSC 0085472 - 85493	
294	11/18/1998	CPH Ex. 376	MSC 0094016 - 94018	
297	04/28/1998	CPH Ex. 379	CPH 1042288 - 1042317	
298	03/25/1998	CPH Ex. 380	CPH 0485991 - 0485993	
305	03/20/1998	CPH Ex. 388	CPH 1241513 - 1241514	
309	02/27/1998	CPH Ex. 392	MSC 0008011 - 008066	
310	07/30/1999	CPH Ex. 393	MSC 0014766 - 0014775	
320	04/03/1998	MS Ex. 058	CPH 0639323 - 0639327	
322	03/30/1998	MS Ex. 075	CPH 1401525 - 1401534	
323	12/01/1997	MS Ex. 076	CPH 140748 - 1407318	
325	01/23/1998	MS Ex. 080	CPH 1426289 - 1426296	
326	02/06/1998	MS Ex. 081	CPH 1421814 - 1421817	
328	02/20/1998	MS Ex. 083	CPH 1427250 - 1427253	
330	02/25/1998	MS Ex. 088	CPH 0634056 - 0634064	
331	02/27/1998	MS Ex. 093	MS 0007947 - 0008010	
337	02/25/1998	MS Ex. 112	CPH 1401219 - 1401238	
338	02/27/1998	MS Ex. 113	CPH 0634065 - 0634075	
342	02/27/1998	MS Ex. 120	CPH 1400750 - 1400752	
345	01/30/1998	MS Ex. 137	CPH 1427533 - 142739	
349	12/10/1997	MS Ex. 169	MSC 1402232 - 1402235	
352	02/23/1998	MS Ex. 182	CPH 1412533 - 1412551	
354	02/26/1998	MS Ex. 188	CPH 1316960 - 131962	
355	02/27/1998	MS Ex. 189	CPH 1399821 - 1399822	

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
356	01/28/1998	MS Ex. 202	CPH 0468457 - 0468462	
357	01/29/1998	MS Ex. 204	CPH 1393144 - 1393147	
358	03/19/1998	MS Ex. 210	CPH 1395046	
359	03/19/1998	MS Ex. 212	CPH 1393266 - 1393268	
360	03/19/1998	MS Ex. 213	CPH 1415534	
361	03/19/1998	MS Ex. 214	CPH 1393472 - 1393478	
362	03/20/1998	MS Ex. 216	CPH 1393262 - 1393263	
367	07/02/1998	MS Ex. 233	CPH 1328300 - 1328301	
368	03/02/1998	MS Ex. 237	CPH 1325251 - 1144565	
371	03/29/1998	MS Ex. 278	CPH 1094218 - 1094235	
373	05/11/1998	MS Ex. 281	DPW 0035621 - 0035636	
378	06/26/1998	MS Ex. 338	CPH 1350174 - 1350175	
380	01/23/1998	MS Ex. 354	CPH 2005706	
381	01/30/1998	MS Ex. 355	CPH 1278481 - 1278484	
386	06/25/1998	MS Ex. 522	CPH 0642890 - 0642891	
410	01/05/2000		BA 01210	Sunbeam Credit Approval Memorandum Modification (USCG)
438	04/03/1998		CPH 0038539 - 0038544	CIBC Oppenheimer analyst report
439	03/24/1998		CPH 0145503 - 0145505	Buckingham Research analyst report
444	01/28/1998		CPH 0291847 - 0291849	Sunbeam Press Release for Record Year
447	12/08/1997		CPH 0324549	Time Line for Transaction
448	12/08/1997		CPH 0324558	Aggressive Time Line for Transaction
449	06/29/1998		CPH 0361142 - 0361148	Minutes of Special Meetings of the Executive Committee and of the Audit Committee of the Board of Directors of Sunbeam

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
450	07/06/1998		CPH 0361149 - 0361155	Minutes of Special Meetings of the Executive Committee and of the Audit Committee of the Board of Directors of Sunbeam
454	12/08/1997		CPH 0466948 - 0466949	Key Points from Meeting
457	01/30/1998		CPH 0468652 - 0468653	McDonald & Co. analyst report
459	07/24/1997		CPH 0472533 - 0472535	Bear Stearns analyst report
465	12/08/1997		CPH 0586586 - 0586587	Fannin memo re Perelman key points
466	10/23/1997		CPH 0595107 - 0595109	Sunbeam Press Release: Morgan Stanley Retained
470	03/24/1998		CPH 1039208	Buckingham Research Group Research Notes
471	06/15/1998		CPH 1059072 - 1059074	Sunbeam press release: Dunlap fired
482	04/06/1998		CPH 1267992 - 1267993	Goldman Sachs report
485	03/03/1998		CPH 1279605 - 1279606	Merrill Lynch analyst report
487	03/16/1998		CPH 1326304 - 1326476	Sunbeam Corporation Offering Memorandum
493	01/29/1998		CPH 1392529-531	Prudential analyst report
495	03/19/1998		CPH 1393269	Sands Brothers analyst report
496	03/20/1998		CPH 1393270 - 1393271	Goldman Sachs analyst report
497	07/22/1998		CPH 1393699 - 1393700	Letter from H. Gittis to H. Kristol re Sunbeam
503	03/12/1998		CPH 1415380 - 1415399	Paine Webber analyst report
505	02/02/1998		CPH 1415568 - 1415573	Prudential analyst report
506	03/05/1998		CPH 1415595 - 1415597	CIBC Oppenheimer analyst report
507	03/12/1998		CPH 1415600 - 1415605	Prudential analyst report
509	04/03/1998		CPH 1417337 - 1317342	Paine Webber analyst report
510	04/06/1998		CPH 1424595 - 1424598	Merrill Lynch report

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
512	06/23/1998		CPH 0075281 - 0075282	Minutes of Special Meeting of the Board of Directors of Sunbeam Corporation
568	11/30/2002		MSC 0112001 - 0112015	MS & Co.'s Consolidated Statements of Financial Condition
569	11/30/2003		MSC 0112016 - 0112032	MS & Co.'s Consolidated Statements of Financial Condition
591	10/29/2004		None	MS & Co.'s Written Responses to Rule 1.310 Topics (re fees)
596	11/16/2004		None	MS & Co.'s Written Responses to Rule 1.310 Topics (re fees)
597	11/19/2004		None	MS & Co.'s Written Responses to Rule 1.310 Topics (re fees)
600	11/24/2004		None	CPH Response to MS's Fifth Set of Interrogatories -- list of transactions.
705	00/00/2002		None	Arthur Rosenbloom: *Due Diligence for Global Deal Making: The Definitive Guide to Cross-Border Mergers and Acquisitions, Joint Ventures, Financings, and Strategic Alliances* (Bloomberg Press 2002)
718	03/13/2003		None	Rosenbloom Expert Report from Gotham v. Hallwood
821	11/12/1998		None	Sunbeam 10-K/A for fiscal year ended 12/28/1997
824	12/06/1999		None	Sunbeam Form S-4/A
850	00/00/0000		None	Morgan Stanley Code of Ethics and Business Conduct
941	03/21/1998		CPH 1400753-926	Memo from A. Deitz to S. Cohen attaching Sunbeam Offering Memorandum
956	03/24/1998		CPH 1393468-69	Merrill Lynch research report re Sunbeam
959	11/30/2001		None	*Financial Markets and Corporate Strategy* (2nd Edition) by Mark Grinblatt and Sheridan Titman

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
960	11/30/1997		None	*Financial Markets and Corporate Strategy* (1st edition) by Mark Grinblatt and Sheridan Titman
1147	01/28/1998		CPH 0251123-72	Transcript of Sunbeam's conference call with analysts
1155	11/29/2002		None	Historical mark information for time period April 30, 1998 to November 29, 2002
1159	04/23/1998		CPH 0485964-65	Sunbeam Press Release, "Sunbeam Corporation Responds to Notices of Law Suits"
1165	05/12/1998		CPH 0468716-18	Bear Stearns & Co. analyst report re Sunbeam
1166	05/12/1998		CPH 0468719-22	Merrill Lynch analyst report re Sunbeam
1167	05/12/1998		CPH 0468723-27	Paine Webber analyst report re Sunbeam
1173	01/27/2005	CPH Dep. Ex. 414	MSC 0112250-0112285	
1174	01/24/2004	CPH Dep. Ex. 416	MSC 0112220-0112249	
1175	11/30/2004	CPH Dep. Ex. 417	MSC 1112219	
1176	11/30/2003	CPH Ex. 418	None	
1179	08/14/1998		MSE021405-0000001-0000023	Email from dunnp@ms.com attaching Global High Yield Capital Markets Weekly Activity Report, updated as of 8/14/98
1180	04/06/1998		MSE021405-0001525-0001547	Email from grays@ms.com forwarding message re MedSource Technologies IPO and attaching Global High Yield Capital Markets Weekly Activity Report, updated as of 4/3/98
1212	00/00/0000		MSE021605-0000134	Morgan Stanley Capital Partners Fund information re Mafco
1221	10/29/1993		MSC 114216-114225	Collection of Italian news articles with translations
1226	12/06/1994		MSC 114119-114121	Translation of Judgment in Italian criminal proceedings

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
1228	11/06/1995		MSC 116520-116522	Notice of Prosecution to William H. Strong and April 17, 1996 letter from U.S. DOJ to William Strong
1229	10/05/1998		MSC 114869-114874	Committal for Trial Order
1230	10/05/1998		MSC 114875-114888	Translation of Committal for Trial Order
1236	07/06/1999		MSC 115805-115806	Disclosure Occurrence Composite for William Strong
1239	02/18/2005		MSC 116176-116189	U-4 Amendment Filing
1240	00/00/0000		None	Declaration of Monroe R. Sonnenborn, Esq.
1241	05/07/1998		WLRK 0003019	Excerpt from May 7 Wachtell letter containing chronology corrections
1244	04/22/1997		MSC 117745	Letter from D. Mayhew to J. Cooney re documents produced to the SFO and a meeting on May 13, 1997 at Clifford Chance (London)
1246	10/29/1993		MSC 117611	Fax cover sheet from G. Curatolo to D. Decotis
1257	05/11/1998		CPH 1427304-1427307	Sunbeam press release re 1st quarter results
1258	03/25/1998		MSC 0016947-016949	Sunbeam press release re Successful Private Placement of $750 Million of Convertible Debentures
1259	03/19/1998		CPH 2008277-2008281	Bloomberg printout of press release re Sunbeam's 1st quarter earnings
1260	03/25/1998		MSC 0000454-0000455	Comfort Letter
1261	04/21/1994		MSC 0119768	Memo from M. Sonnenborn to R. Maschullat, D. DeCotis, G. Giraldi, W. Strong re Trial in Milan Relating to Proposed ENI-SAI Joint Venture
1262	01/26/1995		MSC 119823-119836	Overview of Italian Criminal Law System Preliminary Proceedings

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
1264	02/09/1999		MSC 119748-119759	Letter from J. Cooney to M. Sonnenborn enclosing statement for services re representation of Bill Strong in connection with DePasquale investigation
1267	11/10/1998		MSC 119849-850	Email from J. McFadden re Revised Final Press Statement on Bill Strong, Italy Indictment
1268	11/10/1998		MSC 119848	Email from S. Chapman re Draft Press Statement- Bill Strong Case
1270	02/14/1995		MSC 119241-245	Memo from W. Strong to R. Scott re ENI-SAI
1273	02/23/2005		None	Revised version of February 20, 1998 Privilege Log for documents produced by Morgan Stanley re Strong
1283	05/11/1995		MSC 119235-236	Joint Defense Agreement between Morgan Stanley Salomon Brothers International Limited
1285	00/00/0000		None	Form U-4: Uniform Application for Securities Industry Registration or Transfer
1287	00/00/1994		MSC 0120442-0120445	William Strong 1994 Evaluation Summary
1288	04/03/1998		MSC 0029168-169	Sunbeam press release "Sunbeam Corporation Lowers First Quarter Sales and Earnings Expectations; Names Lee Griffith President of Household Products Business"
1295	05/20/1998		CPH 1011319 - 1011351	Memo from W. Nesbitt to R. Perelman, D. Drapkin, H. Gittis, J. Levin, J. Maher re Review of Sunbeam Research
1296	02/05/2001		None	Sunbeam Stock Prices, 1993-2001

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
1297	07/08/1999		MSC 114867-114868	Amendment to Uniform Application for Securities Industry Registration or Transfer
1300	03/17/2005		None	Morgan Stanley 8-K
1301	03/02/1998	MS Ex. 196	CPH 1393830-31	
1302	03/17/2005		None	CD containing MS Earnings Call media file
1304	03/20/1998		MSE031905-0000010-0000012	Email from J. Dormer with chronology and press release
1305	04/06/1998		MSE031905-0000034	Email from D. Fannin to W. Wright re comments at ABA spring meeting
1308	03/19/1998		CPH 1395046-47	Press Release titled "Sunbeam states first quarter revenues may be lower than street estimates"
1309	00/00/0000		None	Comparable Company Stats 1998 Price and Volume
1310	00/00/0000		None	Grinblatt's S&P 500 Index
1311	12/18/1997		CPH 0325148	Project Laser proposed Summary Transaction Terms
1312	02/19/1998		CPH 0498962-0498965	Press release "Coleman Reports Fully Year and Fourth Quarter Results"
1313	10/20/1998		CPH 1325044-1325047	Sunbeam press release "Sunbeam to Restate Financial Results; Discloses Adjustments For 1996, 1997 and First Quarter of 1998"
1314	11/30/2004		None	Morgan Stanley 10-K for fiscal year ended November 30, 2004
1315	02/28/2005	Nye Ex. 1	CPH 20112470-2012472	
1316	03/23/2005		None	Morgan Stanley Form 8-K
1317	08/12/1998		CPH 2000731-746	Settlement agreement between CPH and Sunbeam Corporation
1318	12/21/2004	CPH Dep. Ex. 419	None	

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
1319	12/14/1998		CPH 1039842-850	Memo from L. Bornstein to The Files re Sunbeam Audit Committee meeting December 14, 1998
1320	05/26/1998		CPH 0021696	Press release "Michael Price Responds to Fortune Sunbeam Article"
1321	11/19/1998		CPH 0468925-29	Minutes of a Special Meeting of the Board of Directors of Sunbeam Corporation
1322	06/17/1998		CPH 1351588-89	Bank of America memorandum from D. Doyle to J. Fair, J. Shannahan (cc: M. Murray, J. Meyers) re Sunbeam Corporation
1323	07/23/1998		CPH 1351571-73	Email from C. Francavilla to K. Barnish, J. O'Keane, D. Doyle, S. Sterling re Sunbeam Update
1324	04/06/1998		CPH 1429924-70	Sunbeam Form Schedule 14A SEC Filing
1325	04/29/1998		CPH 1429908-23	ISS materials re Sunbeam 1998 Proxy
1326	04/21/1998		CPH 0484525-42	ISS materials re Sunbeam 1998 Proxy
1327	05/14/1998		CPH 0474917-18	Memo from J. Adams to A. Dunlap, R. Kersh, D. Fannin, R. Richter, J. Kelley re Record Proxy Vote
1328	04/30/1998		CPH 1408704-8722	Sunbeam Corp. Proxy Analysis by Institutional Shareholder Services
1329	05/10/1998		CPH 1268015-20	Report re Sunbeam Corp. from The Proxy Monitor
1330	06/25/1998		CPH 1392168-69	Sunbeam press release "Sunbeam Delays SEC Filing Relating to Debentures"
1331	12/19/1994		MSC 0120543-0120560	William Strong 1994 Evaluation

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
1332	04/03/1998		CPH 0639323 - 0639327	Fax from D. Fannin to W. Strong, J. Stynes, R. Kitts, and J. Tyree with attached Apr. 3, 1997 [sic] "Sunbeam Corporation Lower First Quarter Sales and Earnings Expectations; Names Lee Griffith President of Household Products Business"
1333	07/06/1998		CPH 2000771	Letter from H. Gittis to D. Fannin re Amendment to the Credit Agreement
1334	03/28/2005			Morgan Stanley 8K SEC Filing
1335 A	04/06/2005			Underlined Exhibit A used in CPH Opening Statements
1335 B	04/06/2005			List of Morgan Stanley/MAFCO Transactions used in CPH Opening Statements
1336	04/07/2005			Morgan Stanley Form 10-Q for quarterly period ended February 28, 2005
1337	03/06/1998		CPH 1422497-1422553	Sunbeam 10-K for fiscal year ended December 28, 1997
1339	00/00/0000			Binder of analyst reports used during Emery examination
1340	04/12/2005			MS production in response to Requests No. 1, 2, and 3 of CPH 4/1/05 Notice to Produce

KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
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FACSIMILE:
(202) 326-7999

April 12, 2005

Via Facsimile

Michael Brody
Jenner & Block
c/o MAFCO Holdings, Inc.
777 S. Flagler Drive
Suite 1200- West Tower
West Palm Beach, FL 33401

Re: Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. Incorporated, Case No. CA 03-5045 AI

Dear Mike:

Enclosed is Morgan Stanley's production in response to Requests No. 1 and 2 (Tab 1) and Request No. 3 (Tab 2) of CPH's Notice to Produce dated April 1, 2005.

Very truly yours,

Rebecca A. Beynon /DTH

Rebecca Beynon

cc: Joseph Ianno, Esq.
Jack Scarola, Esq.
Jerold Solovy, Esq.

CPH Trial Ex. 1340

TAB 1

Robert Klinck
Kellogg Huber Hansen Todd Evans & Figel, PLLC
1615 M St. NW
Washington, DC 20036-3206
April 7, 2005

Re: Morgan Stanley litigation billing

mail payments to:

Mark Grinblatt
1309 El Hito Circle
Pacific Palisades, CA 90272

Date	Hours	Details

Redacted

Redacted

Redacted

Redacted

Hours Grand Total through April 7 10:30AM 884.75 hrs

Redacted

TAB 2

Staff	Hours	Fees	Expense Amount	Total

Redacted

Redacted

Total	22,174.49

Staff	Hours	Fees	Expense Amount	Total

Redacted

Total	2011.70

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.
_____/

PLAINTIFF'S NOTICE TO PRODUCE AT TRIAL

Coleman (Parent) Holdings Inc. ("CPH"), by and through the undersigned counsel, requests, pursuant to Rule 1.350 of the Florida Rules of Civil Procedure, that Defendant, Morgan Stanley & Co., Inc. ("MS & Co."), produce and permit Plaintiff to inspect and copy each of the documents described below. It is requested that the aforesaid production be made at the commencement of trial in this matter. Inspection will be made by visual observation, examination, and/or copying.

DEFINITIONS

Except as otherwise provided below, CPH incorporates by reference the Definitions and Instructions set forth in Plaintiff's First Request for Production of Documents served in this action on May 9, 2003. In addition, CPH defines the following terms as follows:

1. "Dr. Grinblatt" shall mean Mark Grinblatt, Ph.D.

2. "Bates White" shall mean Bates White, LLC, including any of its affiliates, subsidiaries, and divisions, including but not limited to any of its predecessors and successors,

present and former employees, representatives, agents, attorneys, accountants, advisors, or all other persons acting or purporting to act on its behalf.

DOCUMENTS REQUESTED

1. Documents sufficient to establish the total number of hours Dr. Grinblatt has worked on the above-captioned matter to date.

2. Documents sufficient to establish the total fee for which Dr. Grinblatt has requested or will request payment with respect to the provision of his services in the above-captioned matter.

3. Documents sufficient to establish the total number of hours Bates White has worked on the above-captioned matter to date.

4. Documents sufficient to establish the total fee for which Bates White has requested or will request payment with respect to the provision of its services in the above-captioned matter.

Dated: April 1, 2005

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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JENNER & BLOCK LLP
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West Palm Beach, FL 33401
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SEARCY DENNEY SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(561) 686-6300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and hand delivery to all counsel on the attached list on this 1st day of April, 2005.

Michael T. Brody

COUNSEL LIST

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Todd, Evans & Figel, P.L.L.C.
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Searcy Denney Scarola
Barnhart & Shipley, P.A.
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West Palm Beach, FL 33409

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

CASE NO: CA 03-5045 AI

MORGAN STANLEY'S STATEMENT ON THE RELEVANCE OF HEDGING TO MITIGATION

Morgan Stanley & Co. Incorporated ("Morgan Stanley") hereby submits the following statement regarding questions raised by the Court regarding the relevant of hedging to mitigation on April 13, 2005.

STATEMENT

1. Once the plaintiff was on notice of the fraud, it had a duty to mitigate its losses. *Hilensroth v. Kessler*, 446 So. 2d 147, 150 n.3 (Fla. 3d DCA 1984). The duty to mitigate damages "finds its application in virtually every type of case in which the recovery of a money judgment or award is authorized. It addresses itself to the equity of the law that a plaintiff should not recover for those consequences of defendant's acts which were readily avoidable by the plaintiff." *State ex rel. Dresskell v. City of Miami*, 13 So.2d 707, 709 (Fla. 1943).

2. Hedging evidence is relevant not only to reliance, as the Court has recognized. It also goes directly to the question of mitigation. Mr. Perelman conceded in his deposition that he was aware he had been defrauded as of April 3, 20005. Thus, defendant is legally entitled to enquire what steps plaintiff took to mitigate its loss after that date.

3. Despite plaintiff's representations accepted by the Court yesterday, we are unable to locate any limine order precluding this line of inquiry with plaintiff's witnesses. The closest

we could locate last night was CPH's motion in limine 19 concerning the testimony of Professor Grinblatt. In its order on that motion, the Court ruled that "Prof Grinblatt shall be examined outside the jury's presence prior to testifying as to the availability of a secondary market for the securities and the ability to hedge to establish whether he has a sufficient basis to establish these predicate facts. See Fla Stat 90.705(2). If he is permitted to testify as to the effects of the ability to hedge on the value of the stock, he may not imply that Plaintiff had the obligation to enter into such a transaction."

4. The Court's order did ***not*** preclude defendants from inquiring of plaintiff's witnesses about mitigation. Even with respect to Professor Grinblatt, the Court did ***not*** rule that hedging is somehow out-of-bounds as plaintiff represented yesterday. Rather, the Court suggested only that Professor Grinblatt would have to establish a secondary market for Sunbeam securities – yet, both sides' experts agree that Sunbeam stock traded in an efficient, liquid market. Also, the Court stated that Professor Grinblatt would have to establish plaintiff's ability to hedge. Yet, it is ***exactly*** those predicate facts that defendant now seeks to establish through plaintiff's witnesses. Defendant seeks to establish, and is entitled to try to establish, hat CPH had every opportunity and incentive to mitigate its losses prudently but *chose not to do so*.

5. Though defendant is not legally required to reveal its cards and make any proffer its evidence before soliciting live testimony from plaintiff's own witnesses on the straightforward and long recognized defense of mitigation, there is a substantial body of documentary evidence in the discovery record to support defendant's line of questioning and argument. Plaintiff received and considered a proposal from Bear Stearns on hedging. MS 550. It received and considered another such proposal from Goldman Sachs. MS 552, 562. And it received and considered yet another such presentation from Citibank. MS 553. A host of

plaintiff's witnesses were also questioned about hedging in their deposition, many of whom explained their interest in the possibility. Yet, the record will show that plaintiff did nothing to staunch its losses. There is no basis for refusing to allow defendant to solicit evidence directly relevant to the mitigation of damages.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 14 day of April 2005.

Mark C. Hansen
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CARLTON FIELDS, P.A.
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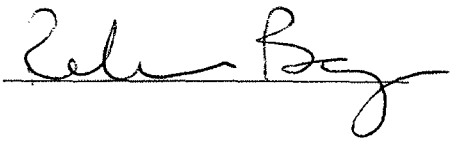
BY: 

Counsel for
Morgan Stanley & Co. Incorporated

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO BAR UNTIMELY DEPOSITION DESIGNATIONS

THIS CAUSE came before the Court April 13, 2005 on Coleman (Parent) Holdings, Inc.'s Motion to Bar Untimely Deposition Designations, with both parties well represented by counsel. In open Court counsel for MS & Co. withdrew MS & Co.'s designations for Gittis, Levin, Shapiro, and Denkhaus. Based on the foregoing and on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the designations of Gittis, Levin, Shapiro, and Denkhaus are hereby deemed withdrawn. It is further

ORDERED AND ADJUDGED that the designations of Fasman are limited to those relevant to CPH's policies involving overwriting emails and offer to allow a third party vendor to retrieve overwritten emails. Within one day MS & Co. shall revise its designations as so limited by this Order. CPH shall serve its counterdesignations and objections within three calendar days thereafter. MS & Co. shall serve its objections to the counterdesignations within two calendar days thereafter. It is further

ORDERED AND ADJUDGED that the deposition designations as to Perelman are stricken. It is further

ORDERED AND ADJUDGED that the designations for Abdel-Meguid, Scott, Strong, Perella, and Tyree shall be limited to Phase II. CPH shall serve its

counterdesignations and objections within three calendar days. MS & Co. shall serve its objections to the counterdesignations within two calendar days thereafter. It is further

ORDERED AND ADJUDGED that the April 8, 2005 designations which designate parts of the depositions of Slovin and Duffy not previously designated are stricken. It is further

ORDERED AND ADJUDGED that ruling on all deposition designations for persons not specifically mentioned herein is deferred, pending further hearing.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 14 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

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West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
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1615 M Street, NW, Suite 400
Washington, DC 20036

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION TO RECONSIDER RULINGS ON CPH EXPERT BLAINE NYE

THIS CAUSE came before the Court on Morgan Stanley's Motion to Reconsider Ruling on CPH Expert Blaine Nye. Based on a review of the Motion, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion to Reconsider Ruling on CPH Expert Blaine Nye is Denied. See Local Rule 6. The Motion is denied without prejudice to MS & Co.'s right to cross-examine Dr. Nye on the points raised, or argue that CPH failed to present sufficient evidence of compensable damages.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 14 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION FOR CLARIFICATION OR RECONSIDERATION OF THE COURT'S ORDER ON PLAINTIFF'S MOTION IN LIMINE NO. 27 FOR A FINDING AS A MATTER OF LAW THAT THE FEDERAL SECURITIES LAWS PROHIBITED PLAINTIFF FROM SELLING UNREGISTERED SUNBEAM STOCK

THIS CAUSE came before the Court on Morgan Stanley's Motion for Clarification or Reconsideration of the Court's Order on Plaintiff's Motion in Limine No. 27 for a Finding as a Matter of Law that the Federal Securities Laws Prohibited Plaintiff from Selling Unregistered Sunbeam Stock, with both counsel present. Based on a review of the Motion, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part. The Court shall rehear argument concerning whether its Order on Plaintiff's Motion in Limine No. 27 for a Finding as a Matter of Law that the Federal Securities Laws Prohibited Plaintiff from Selling Unregistered Sunbeam Stock should be amended to provide that no expert may testify as to damages based on the value of the Sunbeam stock as of a specific date without first seeking a ruling from the Court that a sufficient evidentiary predicate to support a conclusion that the stock could be sold as of the date to be used has been laid *or that an appropriate liquidity discount has been established* shall be held

April 15, 2005, at 9:30 a.m.

at the West Palm Beach Courthouse, Room 11A, 205 N Dixie Hwy, WPB, FL.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 14 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

16div-015028

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If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oir ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki Infim, ki bézwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontakté koôdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro téléfonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résévwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe accommodation pour pouvoir participer á ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

_____/

MORGAN STANLEY & CO. INCORPORATED'S OFFER OF PROOF WITH RESPECT TO CPH'S ABILITY TO MITIGATE ITS DAMAGES THROUGH HEDGING STRATEGIES

INTRODUCTION AND SUMMARY OF PROFFER

Defendant Morgan Stanley & Co. Incorporated ("MS & Co.") offers to prove, through an expert witness, Professor Jeffrey Haas, and cross-examination of Plaintiffs' witnesses, that Ronald Perelman and Plaintiff Coleman (Parent) Holdings, Inc. ("CPH") could have virtually eliminated or substantially minimized their exposure to Sunbeam stock volatility by engaging in one or more well-known risk mitigation investment strategies known as hedging, none of which involved a sale of any restricted securities.[1] [2]

MS & Co. will show that, where, as here, an investor obtains a large position in a single, undiversified investment and has negotiated a lock-up agreement with the issuer that enables the

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[1] The Order on Plaintiff's Motion in Limine No. 27 is not implicated by the proffer made herein because, notwithstanding CPH's arguments to the contrary, hedging strategies need not involve sales of securities, and, as described herein, do not in fact do so.

[2] The potential protection available to Mr. Perelman and CPH would have ranged from 81% of the investment in Sunbeam shares, or $498.8 million (by use of a three-year TRACES transaction) to 96% of the investment in Sunbeam, or $597.2 million (by use of a one-year forward contract), and at least two other variations with protection between the two examples cited, see *infra* at 25-28.

investor to hedge the risk, entering into hedging strategies is typical and prudent under such circumstances. MS & Co. will further show that Mr. Perelman and CPH planned that the carve-outs in the lock-up that they entered into expressly permitted pledging so as to facilitate CPH's ability to hedge CPH's risks.

MS & Co. will offer to prove that neither Mr. Perelman nor CPH had any legal or contractual restraints on their ability to engage in these hedging strategies. First — according to their own certifications in their filings with the Securities and Exchange Commission (the "Commission") — neither Mr. Perelman nor CPH was an "affiliate" or "control person" between March 30, 1998, when it acquired the restricted Sunbeam shares, and June 15, 1998, when Al Dunlap, Sunbeam's CEO, was ousted and Sunbeam granted Mr. Perelman the right to designate two directors to its board of directors. Second, during this entire period, neither CPH nor Mr. Perelman was constrained under the federal securities laws from engaging in a hedging strategy that did not involve the sale of Sunbeam shares. Third, the lock-up agreement with Sunbeam did not prohibit hedging, nor did it prevent certain transactions relating to the shares (such as pledging in connection with bona fide debts and "other obligations") that are sometimes conditions to entering to effective hedging strategies. Indeed, the strategies that CPH was contemplating were designed with the lock-up restrictions in mind.

It is undisputed that CPH actively considered such hedging strategies in March and April 1998. At least three major investment banks, Goldman, Sachs & Co. (MS 552), Bear Stearns (MS 550), and Citibank (MS 551), made presentations to Mr. Perelman regarding the Sunbeam positions that CPH was about to acquire, offering solutions to hedge CPH's substantial risk of

holding 14.1 million restricted Sunbeam shares without downside protection.[3] However, Mr. Perelman ultimately decided against securing downside protection for CPH's Sunbeam shares, even though he could have virtually eliminated or substantially minimized his risk of loss.

The only argument that CPH has made regarding hedging possibilities is that CPH could not sell any of its restricted Sunbeam shares.[4] This argument is beside the point. None of the hedging strategies proposed to Mr. Perelman and CPH in March and April 1998 required the sale of any Sunbeam shares.

The Court has ruled that MS & Co. may not introduce Professor Haas as a witness.[5] MS & Co. respectfully submits that the Court's decision constitutes substantial error and accordingly submits this offer as proof. If the Court had permitted, MS & Co. would have presented the following evidence as to CPH's ability and opportunity to mitigate its damages.

I. OFFER OF EVIDENCE PROVING THAT THE FEDERAL SECURITIES LAWS DID NOT PREVENT CPH FROM USING HEDGING STRATEGIES TO VIRTUALLY ELIMINATE OR SUBSTANTIALLY MINIMIZE THE LOST VALUE OF ITS SUNBEAM INVESTMENT

Initially, MS & Co. would introduce the testimony of Professor Jeffrey Haas, whose qualifications and experience as an expert in hedging strategies are set forth below.

Professor Haas is currently a professor at New York Law School specializing in corporate and securities law and derivative transactions. Since 1996, Professor Haas has taught a number of courses in the field of corporate and securities law including mergers and acquisitions,

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3 As discussed below, *see infra* note 46 and accompanying text, Mr. Perelman was familiar with the types of instruments used to hedge risk. In 1993, Mr. Perelman implemented a hedging strategy through Coleman Worldwide Corporation using a similar product, Liquid Yield Option Notes ("LYONS™"), developed by Merrill Lynch & Co., see Registration Statement of Coleman Worldwide Corporation (Nos. 33-60274/33-61346) (MS 992)

4 *See* Plaintiff's Motion in Limine No. 27.

5 *See* Order dated April 5, 2005, denying Defendant's Motion to Add Witnesses.

corporate finance, and securities regulation. In addition, Professor Haas is a member of the ABA Committee on the Federal Regulation of Securities and Subcommittee on the Securities Act of 1933, as amended (the "Securities Act"). As a member of the ABA, Professor Haas co-authored two comment letters in 1995 and 1997 to the Commission addressing separate rulemaking proposals published by the Commission to amend Rules 144 and 145 of the Securities Act. Professor Haas is also an author of a book on corporate finance which devotes a chapter to derivative instruments and a section on hedging concentrated equity positions.[6]

Prior to joining New York Law School, Professor Haas was in private practice specializing in corporate and securities law, including mergers and acquisitions, private and public securities offerings, and restricted stock monetizations and related hedging activities. Professor Haas has continued to counsel investment banks on hedging strategies even as a professor. His representative clients have included UBS PaineWebber Inc., CommerzBank AG, CIBC World Markets Corp. and Raymond James & Associates Inc.

Professor Haas earned his law degree, *cum laude*, from the University of Pennsylvania in 1988 and a bachelor of science degree, *summa cum laude*, with a double major in Finance and Classical Civilizations from Florida State University in 1984.

Professor Haas has testified as an expert witness in a number of matters dealing with a variety of topics, including public and private securities offerings, tracking stock equity structures, derivative instruments, broker-dealer regulation, mutual fund and investment adviser regulation, corporate law and contract law. A complete list of Professor Haas' testifying experience is attached hereto as Exhibit A.

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6 *See* Jeffrey J. Haas, Corporate Finance in a Nutshell (Thomson/West 2004).

Based upon his knowledge and experience in the field of corporate and securities law and his review of the underlying facts in this case, Professor Haas is qualified to testify as an expert on the hedging strategies in which Mr. Perelman and CPH could have engaged. He would have testified to the following:

A. Neither CPH Nor Mr. Perelman Was A "Control Person" Or An "Affiliate" Of Sunbeam During the Period Beginning on March 30, 1998 Through June 15, 1998.

If Professor Haas had been allowed to testify, he would have testified that the question whether CPH or Mr. Perelman was an "affiliate" or "control person" of Sunbeam is important because it affects their ability to engage in certain transactions involving Sunbeam stock. Professor Haas would have testified that neither CPH nor Mr. Perelman was a "control person" or an "affiliate" of Sunbeam during the period beginning March 30, 1998 through June 15, 1998, the date Sunbeam granted CPH the right to appoint two persons to the Sunbeam board of directors. Indeed, as discussed below, both CPH and Mr. Perelman certified in their filings with the Commission that they were *not* control persons of Sunbeam.[7]

Professor Haas would have initially identified the securities laws relevant to this issue. Section 4(1) of the Securities Act provides an important transactional exemption to the registration requirements of the Securities Act. Section 4(1) provides an exemption for resales of securities by most parties. Specifically, anyone other than an issuer, underwriter or dealer

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7 *See infra* notes 18-23 and accompanying text; *see also* Schedule 13G of Ronald O. Perelman and Coleman (Parent) Holdings Inc. (filed April 8, 1998), available at <http://www.sec.gov/Archives/edgar/data/3662/0000898822-98-000377.txt> (certifying that CPH and Mr. Perelman's Sunbeam shares "were not acquired and are not held for the purpose of or with the effect of changing or influencing the control or the issuer of the securities and were not acquired and are not held in connection with or as a participant in any transaction having that purpose or effect").

may use the exemption in Section 4(1) of the Securities Act to sell securities without registering the sale under Section 5 of the Securities Act.

Thus, that exemption cannot be used for resales by anyone considered to be an "issuer, underwriter or dealer."[8] Section 2(a)(11) of the Securities Act, which defines "underwriter," states that any person who directly or indirectly controls or is controlled by an actual issuer of securities, or any person who is under direct or indirect common control with such an issuer, is considered to be an issuer as well.[9] Hence, a "control person" is deemed to be an "issuer" for purposes of Section 2(a)(11).

Similarly, Securities Act Rule 144, a safe harbor provision for resales under Sections 4(1) and 4(3), places limitations on the ability of an "affiliate" of an issuer to effect resales under the Rule. Securities Act Rule 405 defines an "affiliate" as a person that directly, or indirectly through one or more intermediaries, "controls or is controlled by, or is under common control with," the person specified.[10] This Rule also defines the term "control" as the possession, direct or indirect, of the power to "direct or cause the direction of the management and policies of a person."[11] According to the legislative history of Section 2(a)(11), the concept of control "is not a narrow one, depending upon a mathematical formula of 51 percent of voting power, but is broadly defined to permit the provisions of the [Securities Act] to become effective wherever the fact of control actually exists."[12] Specifically, Congress intended the concept of "control" to

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8 15 U.S.C.A. § 77d(1).

9 *See* U.S.C.A. § 77b(a)(11).

10 17 C.F.R. § 230.405.

11 *Id.*

12 *See* H.R. Rep. No. 85, 73d Cong., 1st Sess. 13 – 14 (1933).

cover a person having the power to force an issuer to file a registration statement covering his or her shares.[13]

The approach to control taken by the courts and the Commission is broader than the legislative history. According to the Commission, control is "a factual question which must be determined by considering all the relevant facts in accordance with the test set forth in Rule 405."[14] Given Securities Act Rule 405's focus on the power to direct or cause the direction of the management and policies of the issuer, the Commission's approach can be summarized in a simple question: Who has the power to run the show?[15] The courts and the Commission have identified the following relevant factors:

1. Voting power generally and relative to that of other shareholders;
2. The power to force the registration of shares;
3. Offices/directorships held (or lack thereof);
4. Contractual management rights, such as the right to appoint directors;
5. Personally running the affairs of the business;
6. Conduct towards the issuer; and
7. Family ties

Voting power is one of the important factors in determining controlling person or affiliate status. In the case at hand, the documents show that Mr. Perelman, through CPH, held approximately 14% of the outstanding shares of Sunbeam. Professor Haas would testify that in his experience working on corporate and securities transactions involving issues of control, if an individual or

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13 *Id.* at 14 (quoting the Committee on Interstate and Foreign Commerce).

14 *First National Bank*, SEC No-Action Letter, 1976 WL 11611 (avail. Mar. 11, 1976).

15 *See* A.A. Sommer, Jr., "*Who's "In Control*"?—S.E.C., 21 Bus. Law. 559 (1966).

entity holds more than 10% of an issuer's voting securities, a careful analysis needs to be made to see if that person or entity is a controlling person or an affiliate. The Commission, however, has underscored that stock ownership is just "one fact which must be taken into consideration along with the other relevant circumstances."[16]

The facts in this case show that Mr. Perelman, while an indirect 14% shareholder (through his ownership of CPH), was not Sunbeam's largest shareholder. Franklin Mutual Advisors, Inc. ("FMA") owned 17.4% of Sunbeam's outstanding shares. As its largest shareholder, FMA also had a seat on Sunbeam's board of directors, which further minimized the relative control value of CPH's stock ownership, especially given that CPH was not represented on the Sunbeam board until several months later. Additionally, Sunbeam's three largest shareholders (other than CPH), together with its management team, owned 36.7% of Sunbeam's outstanding shares on March 30, 1998, the date that the CPH-Sunbeam transaction closed. Finally, Sunbeam's seven-member board of directors included two of its executive officers (Messrs. Dunlap and Kersh, who were Sunbeam's Chief Executive Officer and Chief Financial Officer, respectively) and the above-referenced representative of FMA.

Based on these facts, Professor Haas would have concluded that during the period from March 30, 1998 to June 15, 1998, CPH did not possess (and could not have used its 14% ownership interest to exert) control over or influence Sunbeam's management and policies. Professor Haas would have further concluded that the profiles of Sunbeam's shareholders and board members clearly indicate that CPH was not a controlling person of Sunbeam.[17]

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16 *American Standard*, SEC No-Action Letter, 1972 WL 19628 (avail. Oct. 4, 1972).

17 *Accord SEC v. Sherwood*, 175 F. Supp. 480 (S.D.N.Y. 1959) (where an 8% shareholder unable to secure representation on a company's board was held not to be a control person of that company).

Another important basis of Professor Haas's opinion that neither Mr. Perelman nor CPH were "control persons" or "affiliates" from March 30, 1998 through June 15, 1998 is their explicit concession of this point in public filings with the Commission. On March 30, 1998, CPH became the beneficial owner of more than 5% of Sunbeam's common stock. Within 10 days after the date of this acquisition, CPH and Mr. Perelman (as the sole beneficial owner of CPH) were required to publicly disclose the terms of this transaction with the Commission by filing a Schedule 13D or Schedule 13G. However, pursuant to Rule 13d-1(c)(1) under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), CPH was permitted to report the transaction on Schedule 13G instead of Schedule 13D *only* if the Sunbeam shares were *not* acquired with "any purpose, or with the effect of, changing or influencing the control of the issuer."[18]

It is therefore highly significant that Mr. Perelman and CPH filed a Schedule 13G with the Commission on April 8, 1998 which was within the ten day period after March 30, 1998. This demonstrates a conscious decision by CPH and Mr. Perelman that they qualified for the form that was available only if they individually *certified* that they were not "changing or influencing the control of the issuer."[19] Further, on June 16, 1998, Mr. Perelman updated the Schedule 13G by filing by a Schedule 13D on June 16, 1998, thus certifying for the first time a

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18 17 C.F.R. § 240.13d-1(c)(1) (see also Exchange Act Release No. 34-39538, 1998 WL 7449 (Jan. 12, 1998). Persons who cannot certify that they are not a control person and have no intention to control the issuer are considered to have a "disqualifying purpose or effect" for purposes of Schedule 13G eligibility and must report on Schedule 13D instead. Exchange Release No. 34-39538, *supra*, at footnote 10.

19 Schedule 13G of Ronald O. Perelman and Coleman (Parent) Holdings Inc. (filed April 8, 1998), available at <http://www.sec.gov/Archives/edgar/data/3662/0000898822-98-000377.txt> (certifying that "the securities referred to above [14,099,749 shares of Sunbeam common stock] were not acquired and are not held for the purpose of or with the effect of changing or influencing the control or the issuer of the securities and were not acquired and are not held in connection with or as a participant in any transaction having that purpose or effect").

controlling purpose or effect.[20] The filing occurred on the *same day* that Sunbeam expanded its board by three directors and granted to CPH the right to designate two such directors.[21] Thus, Professor Haas would testify that, in his opinion, CPH and Mr. Perelman's filing of the Schedule 13G was an admission that prior to June 15, 1998, neither CPH nor Mr. Perelman possessed the power to direct or cause the direction of the management and policies of Sunbeam.

From these facts and conclusions, Professor Haas would have further concluded that it would have been important for CPH to have a registration rights for the Sunbeam shares it was acquiring, thus allowing CPH to engage in public resales. Furthermore, the facts show that CPH knew that its stock position after the merger would not provide it with the power needed to force Sunbeam's board to register its restricted shares for public resale. Accordingly, CPH negotiated for and received registration rights for its shares as part of the agreement to sell Coleman to Sunbeam. Thus, CPH acquired registration rights at a point in time when it actually did have leverage with Sunbeam (in the form of its ability to approve or deny the sale of Coleman). Further, the fact that CPH required and ultimately received *contractual* registration rights

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20 Under Exchange Act Rule 13d-1(e)(1), a formerly passive investor who has filed a Schedule 13G and subsequently becomes a control person must file a Schedule 13D no later than 10 days after the investor's change in investment purpose. In addition, under Rule 13d-1(e)(2), such a person must refrain from exercising control for a ten-day "cooling-off" period from the time of the change in investment purpose until the tenth day after the filing of the Schedule 13D, during which time "the reporting person is prohibited from voting or directing the voting of the subject securities." *See* Exchange Act Release No. 34-39538, 1998 WL 7449 (Jan. 12, 1998).

21 According to the Schedule 13D filed on June 16, 1998 by CPH and Mr. Perelman, Sunbeam's appointment of Messrs. Levin and Kersh to its board of directors was part of a significant restructuring of Sunbeam's management and board composition, which included: (i) the termination of Mr. Dunlap as Chairman and Chief Executive Officer; (ii) the hiring of Mr. Levin as Chief Executive Officer; (iii) the appointment of Mr. Langerman, FMA's Chief Operating Officer, as Chairman and (iv) the appointment of one additional FMA designee to serve on the board. In connection with these announcements, CPH and Mr. Perelman had "discussions with representatives of Sunbeam and [FMA] with respect to Sunbeam and the matters described [in the previous sentence]." *Id.*

demonstrates that it was otherwise unable to force the Sunbeam board with respect to registration or any other matter through its mere stock ownership.

Professor Haas would also testify that, in his experience, another important factor in determining controlling person or affiliate status is contractual management rights. Based upon the documents in the case, Professor Haas would testify that CPH had no contractual right to control or influence the management and affairs of Sunbeam. Nor did Mr. Perelman have the contractual right to be elected to Sunbeam's board or to have nominees of CPH's choosing elected to Sunbeam's board. This contrasts starkly with the position of Sunbeam's largest shareholder, FMA. From March 30, 1998 through June 15, 1998, Mr. Perelman did not serve as a director or officer of Sunbeam. Nor during that time did anyone associated with CPH serve in either capacity.

Mr. Perelman's own deposition testimony confirms that, during that time period, he did not "run the show" at Sunbeam. When asked about his reaction to Sunbeam's April 3, 1998 press release concerning its disappointing financial results for the first quarter of 1998, Mr. Perelman testified that he did not personally take any steps to communicate directly with Sunbeam's CEO or any other member of Sunbeam's management to discuss the release or obtain additional financial information. He further stated he was not aware of anyone else at Coleman who attempted to contact Sunbeam.[22] By acting as a passive bystander, Mr. Perelman's own conduct towards Sunbeam is consistent with his not being a control person prior to June 15, 1998 and thus not an affiliate of Sunbeam. Finally, it is clear that Mr. Perelman did not have any family ties with anyone connected with Sunbeam.

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22 *See* Perelman November 18 deposition, p.57.

Professor Haas would also testify based on the facts of this case that CPH's sale of Coleman to Sunbeam was completely on an arm's-length basis. The transaction was heavily negotiated, and CPH was represented by a team of lawyers and financial advisers whose focus was to protect CPH's interests (and, by extension, Mr. Perelman's interests).

Finally, Professor Haas reviewed the Goldman Sachs' hedging presentation made to MacAndrews & Forbes Holdings on or about April 3, 1998. In its presentation to MacAndrews & Forbes Holdings, Goldman Sachs unequivocally states the following under the heading "Our Understanding of MacAndrews & Forbes' Objectives": "MacAndrews & Forbes is *not* an affiliate of Sunbeam, but the 14 million shares [of Sunbeam stock] are currently 'restricted' for securities law purposes."[23] As counsel to several investment banking firms during the 1990s (including during the time frame in question), it is Professor Haas' experience that firms like Goldman Sachs do not independently make such determinations. Therefore, it would be Professor Haas' opinion that Goldman Sachs' statement of CPH's non-affiliate status stemmed from representations made by Mr. Perelman, his counsel or another executive at CPH prior to the time Goldman Sachs prepared the presentation. Accordingly, it would be Professor Haas' opinion that neither CPH nor Mr. Perelman was a "control person" or an "affiliate" of Sunbeam during the period beginning March 30, 1998 through June 15, 1998.

B. CPH Was Not An "Insider" Of Sunbeam Until June 15, 1998 At The Earliest

A related issue is when CPH began to possess "insider" information regarding Sunbeam. As CPH correctly notes in its April 4, 2005 Supplemental Disclosure, the Exchange Act imposes both civil and criminal liability on persons who sell stock "while in possession of material,

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[23] Presentation to MacAndrews & Forbes Holdings Regarding Single Stock Risk Management Strategies, Goldman Sachs & Co., April 3, 1998 at CPH 2011588 (emphasis added).

nonpublic information."[24] Thus, if and when CPH acquired material nonpublic information regarding Sunbeam, it was prohibited from purchasing or selling Sunbeam securities on the basis of such information. Moreover, the Court should note that one can be an "insider" without possessing "material nonpublic information," in which case he or she would be free to continue trading activities. CPH disingenuously blurs these two concepts in its Supplemental Disclosure.

First, it is *undisputed* that Mr. Perelman was not an insider of Sunbeam and therefore did not possess material nonpublic information from March 30, 1998 until at least June 15, 1998, and perhaps longer. Mr. Perelman's own testimony regarding when he learned about certain Sunbeam events relative to when they were publicly announced proves his outsider status during this period. Similarly, CPH's filings with the Court and with the Commission *concede* that CPH was not an insider prior to June 15, 1998.[25] There is, therefore, no doubt that CPH could have entered into non-sale derivative transactions at any time from March 30, 1998 to June 15, 1998 in compliance with the federal securities laws.

Second, and contrary to what CPH argues, CPH's status as an insider is *not* dispositive of whether it could have sold Sunbeam shares after June 15, 1998. Rather, CPH would be prohibited from trading *only* if Mr. Perelman (as CPH's sole beneficial owner and ultimate decision-maker with respect to potential sales) actually possessed material nonpublic information.[26] Yet CPH has not alleged that CPH or Mr. Perelman actually possessed material nonpublic information about Sunbeam.

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24 15 U.S.C.A. § 78t-1.

25 *See* Plaintiff's Supplemental Disclosure, filed April 4, 2005, pp.18-21.

26 Nor can Perelman argue that Section 16(b) of the Exchange Act (referred to as the "short-swing profit rule") prevented him from selling his Sunbeam shares. Section 16(b) requires holders of more than 10% of a public company's equity securities to disgorge

Mr. Perelman was not a board member of Sunbeam and had no direct access to material nonpublic information. While it is true that Messrs. Levin and Gittis, who joined Sunbeam's board on June 15, 1998, were former executives of MacAndrews & Forbes, CPH does not allege that these individuals actually provided material nonpublic information to Mr. Perelman. Therefore, CPH has not demonstrated that was unable to sell Sunbeam shares without violating the federal insider trading laws.

C. CPH Could Hedge Its Sunbeam Stock Without Breaching The 90-Day "Lock-Up" Provision Contained In Section 7.1 Of The Merger Agreement

CPH negotiated (to its benefit) a merger agreement that allowed it to use derivative instruments to virtually eliminate the price risk associated with its Sunbeam stock holdings. Unlike more typical lock-up agreements, which ordinarily preclude hedging arrangements in respect of the locked up shares, the merger agreement between CPH and Sunbeam contained no such restriction. The language of Section 7.1 of the merger agreement is clear:

> SALES OF LASER SHARES. Parent Holdings agrees not to, directly or indirectly, ***sell, transfer, pledge, assign or otherwise dispose of or otherwise transfer*** (other than, in any such case, in connection with a pledge to secure BONA FIDE indebtedness or other obligations) (collectively, "TRANSFER"), any Laser Shares received pursuant to the terms hereof as consideration for the Holdings Merger, other than to one of its Affiliates who agrees in writing to be bound by the terms of this Section 7.1,

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any profit made by purchasing and selling, or by selling and purchasing, those securities during any six-month period. Perelman acquired Sunbeam stock in connection with the merger on March 30, 1998. Importantly, Section 16(b) excludes from the purview of the short-swing profit rule any transaction where the beneficial owner of the stock is not such both at the time of the purchase and sale, or the sale and purchase. *Foremost-McKesson, Inc. v. Provident Sec. Co.*, 423 U.S. 232, 250 & 250 n.25 (1976). Thus, Perelman's acquisition of Sunbeam stock on March 30, 1998 is excluded from the short-swing profit analysis. *See id.* at 250 (holding that a beneficial owner must account for short-swing profits under Section 16(b) "only if he was a beneficial owner 'before the purchase'").

> for a period of nine (9) months from and after the Holdings Effective Time, except that Parent Holdings may Transfer (A) from and after the date that is three (3) months following the Holdings Effective Time, twenty-five percent (25%) of the total number of the Laser Shares, and (B) from and after the date that is six (6) months following the Holdings Effective Time, an additional twenty-five percent (25%) of the total number of the Laser Shares (such that a total of fifty percent (50%) of the total number of the Laser Shares shall be Transferable from and after the date that is six (6) months following the Holdings Effective Time) (emphasis added).

Thus, nothing in Section 7.1 prohibited CPH from using hedging arrangements or non-sale derivative instruments. Section 7.1 prohibited only the sale, transfer, pledging (except in connection with the bona fide debts and "other obligations" carve-out), assignment or other disposition of Sunbeam shares until June 30, 1998.[27] However, as a sophisticated investor, CPH knew that it did not have to "sell, transfer, pledge, assign or otherwise dispose of or otherwise transfer" its Sunbeam stock in order to reduce its downside risk in such a significant un-hedged position. Indeed, each of Goldman, Sachs & Co., Citicorp Securities, Inc. and Bear, Stearns & Co. Inc. separately acknowledged the lock-up agreement in their risk management strategy presentations made to CPH in which each of these investment banks presented a variety of non-sale derivative instruments that would have enabled CPH to hedge its economic exposure.[28]

The fact that Section 7.1 did not restrict CPH's ability to hedge its risk by using non-sale derivative instruments is telling — particularly given the frequency with which investors with far less sophistication than Mr. Perelman implemented such hedging strategies during the late 1990s.

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[27] The Certificate of Merger was filed on March 30, 1998 (the "Holdings Effective Time"). The lock-up provision prevented CPH from selling its Sunbeam shares for ninety (90) days thereafter (June 30, 1998).

[28] *See* MS 550, 551, and 552.

Professor Haas would testify that most sophisticated companies and investors were using in 1998, and today are routinely using, lock-up agreements that expressly prohibited the use of derivative instruments. Professor Haas also would testify that CPH, as a sophisticated investor, should have known that the broadly drafted lock-up in Section 7.1 permitted the use of such instruments. In support of his position, Professor Haas would point to the following "lock-up" provisions that are contained in merger agreements that were executed in 1998:

AT&T CORP
8-K, EX-2 - AGREEMENT AND PLAN OF MERGER filed 01/16/98
(http://www.sec.gov/Archives/edgar/data/5907/0000005907-98-000002.txt)

> 7.9. Affiliates of Parent and the Company. Concurrently with the execution of this Agreement, each of the directors of the Company has executed an agreement to the effect set forth in this Section 7.9. Prior to the Effective Time, the Company shall deliver to Parent a letter identifying all other Persons who, to the Company's knowledge, at the time of the execution and delivery of the Stockholders Consent or at the Effective Time, may be deemed to be "affiliates" of the Company for purposes of Rule 145 under the Securities Act or who may otherwise be deemed to be Affiliates of the Company (the "Rule 145 Affiliates"). The Company shall use all reasonable efforts to cause each Person who is identified as a Rule 145 Affiliate in such list to deliver to Parent on or prior to the 30th day prior to the Effective Time, a written agreement, in the form attached hereto as Exhibit A, that such Rule 145 Affiliate will not (a) sell, pledge, transfer or otherwise dispose of any Parent Common Shares issued to such Rule 145 Affiliate pursuant to the Merger, except pursuant to an effective registration statement or in compliance with Rule 145 under the Securities Act or an exemption from the registration requirements of the Securities Act, or (b) sell, pledge, transfer or otherwise dispose of, ***or hedge or otherwise reduce its risk with respect to, any Shares or any Parent Common Shares***, . . . (emphasis added).

EXCEL COMMUNICATIONS INC.
8-K - EX-2, MERGER AGREEMENT filed 06/24/98
(http://www.sec.gov/Archives/edgar/data/1045538/0000909518-98-000438.txt)

> 5.11 Rule 145 Affiliates of Teleglobe and Excel; Pooling Letters. Concurrently with the execution of this Agreement, each of the directors of Excel and of Teleglobe has executed an agreement in

> the form attached hereto as Exhibit I or J or as applicable. No later than 30 days following the date of this Agreement, Excel shall deliver to Teleglobe a letter identifying all other Persons who, to Excel's knowledge, at the time of execution of the Excel Stockholders Consent, at any Excel Stockholders Meeting or at the Effective Time, may be deemed to be "affiliates" of Excel for purposes of Rule 145 under the Securities Act or who may otherwise be deemed to be Affiliates of Excel (the "Rule 145 Affiliates"). Excel shall use its best efforts to cause each Person who is identified as a Rule 145 Affiliate in such list to deliver to Teleglobe at or prior to the Effective Time a written agreement to the effect that such Rule 145 Affiliate will not (a) sell, pledge, transfer or otherwise dispose of any Teleglobe Common Shares issued to such Rule 145 Affiliate pursuant to the Merger, except pursuant to an effective registration statement or in compliance with Rule 145 under the Securities Act or an exemption from the registration requirements of the Securities Act, or (b) sell, pledge, transfer or otherwise dispose of, ***or hedge or otherwise reduce its risk with respect to, any common shares of Teleglobe capital stock or any shares of Excel Common Stock*** . . . . (emphasis added).

In sum, CPH's decision not to use the various non-sale derivative instruments that were available to it was not the result of any contractual prohibition. Contractually, CPH was free to do so, as no fewer than three major investment banks informed CPH.

C. CPH Was Permitted Under The Securities Act To Sell Sunbeam Shares At Any Time After The Expiration Of Its Contractual Lock-Up

Section 7.1 of the Merger Agreement specifically allows CPH to sell up to 3,524,937 shares of Sunbeam stock on June 30, 1998 (i.e., the three-month anniversary of the merger closing). In its Supplemental Disclosure, CPH wrongly asserts that the federal securities laws did not permit it to sell at this time. Professor Haas would testify that this assertion is both legally and factually incorrect.

Professor Haas would testify that CPH could have utilized the well-established resale exemption provided under Section 4(1) of the Securities Act.[29] CPH refers to this as an "implied 'hybrid' exemption that merges the concepts underlying Sections 4(1) and 4(2)", but its analysis is wrong. As Professor Haas would explain, the proposed transaction lies squarely within a long-standing and universally recognized resale provision consistent with the statutory provisions of Section 4(1).[30] In such a transaction, CPH would sell its restricted shares privately to institutional investors (typically investment banks) or other accredited investors. These investors acquire the shares for investment purposes only and not with a view to distribution. To ensure these restricted shares do not leak into the public market in violation of the Securities Act, they are subject to certain restrictions on transfer.

Professor Haas would testify that CPH could have resold up to 3,524,937 shares in a private transaction under Section 4(1) of the Securities Act, so long as it complied with the antifraud provisions of the federal securities laws. Professor Haas would further testify that such transactions are routinely entered into by holders of restricted securities who wish to monetize

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29 Section 4(1) states that any transaction "by any person other than an issuer, underwriter, or dealer" is exempt from registration. In this case, CPH is clearly not an issuer or a dealer. Moreover, CPH would not be an "underwriter" because the purchaser would be an institutional investor or other accredited investor who would purchase the securities subject to transfer restrictions and not with a view towards distribution.

30 CPH is correct that most practitioners refer to this resale as a "Section 4(1½)" transaction because its structure bears resemblance to the private placement resale exemption from registration under Section 4(2). However, CPH's suggestion that this is somehow a phantom exemption that exists in theory is wrong. *See* Securities Act Release No. 33-6188, 1980 WL 29482 at n.178 (Feb. 1, 1980) (finding that this proposed transaction is "clearly within [the] intended purpose" of the Securities Act.).

their investments and minimize their exposure to potential negative stock price changes during the terms of their applicable holding periods.[31]

II. OFFER OF EVIDENCE PROVING THAT CPH COULD HAVE UTILIZED A VARIETY OF HEDGING STRATEGIES TO VIRTUALLY ELIMINATE OR SUBSTANTIALLY MINIMIZE THE LOST VALUE OF ITS SUNBEAM INVESTMENT

If Professor Haas were permitted to testify, he would have described various hedging strategies that were independently presented by multiple investment banks to CPH in March and April, 1998.[32] *Each of these proposed hedging strategies was designed to be implemented without the sale of any Sunbeam shares.* Accordingly, CPH could have used any of these strategies as early as March 30, 1998 virtually eliminate or substantially minimize its downside investment risk without selling any Sunbeam shares.[33] For illustrative purposes, four of these strategies, each of which was actually proposed to CPH, are described below.

Forward Contract[34]

CPH could have executed a one-year forward contract with Bear Stearns in order to virtually eliminate the risk of a Sunbeam stock price decline. Pursuant to this hedging strategy, CPH would enter into a contract with Bear Stearns to sell all 14.1 million Sunbeam shares to Bear Stearns on some future date, at a price per share substantially equal to the market price as of the contract date. Thus, CPH would have locked in 96% of the market value of the Sunbeam stock on the contract date. Bear Stearns would likely require CPH to pledge its Sunbeam shares as

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31 Securities Act Rule 144 imposes a one-year holding period on any one acquiring unregistered securities from an issuer or an affiliate thereof. See 17 C.F.R. 230.144(d).

32 *See* MS 550, 551, and 552.

33 *See* MS 552 at CPH 2011589.

34 *See* MS 550 at CPH 2011566 – 567. Note that the hedging strategy offered by Bear Stearns is called a "synthetic forward," which utilizes a slightly different structure than a forward contract but has the same net effect.

collateral, which it is permitted to do under the lock-up agreement. The expiration date of the forward contract would be no earlier than the end of the applicable holding period under Securities Act Rule 144. Thus, because no Sunbeam shares were being sold or transferred, CPH could enter into this hedging strategy in compliance with the federal securities laws and the lock-up agreement.

Put Options[35]

CPH could have purchased put options from Goldman Sachs in order to substantially reduce the risk of a Sunbeam stock price decline. A put option eliminates an investor's risk that the stock price will fall below the exercise or "strike" price of the put option during the option's term. If, at the end of the option's term, the market price of the Sunbeam stock had fallen below the strike price of the put option, Goldman Sachs would have had to purchase CPH's Sunbeam shares for the strike price.[36] Moreover, if, during the term of the option, the market price of Sunbeam stock had risen rather than fallen, CPH would have benefited from the stock price appreciation less the cost of the put options. A put option strategy would not have required CPH

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35 *See* MS 552 at CPH 2011605 – 606.

36 An example will illustrate this transaction. Suppose an investor holds 100 shares of Sunbeam stock and desires to hedge any price decline over the next 12 months. Assuming the current market price of Sunbeam stock is $50 per share, the investor could purchase a 12-month put option with a $45 strike price from an investment bank covering his 100 shares. If, after the end of the 12-month period, Sunbeam's stock price has fallen to $30 per share, the investment bank must purchase all 100 shares for $45 per share. If, after the end of the 12-month period, Sunbeam's stock price has risen to $65 per share, the investor keeps all the price appreciation less the cost of the option, which expires worthless.

to sell or otherwise transfer any of its Sunbeam stock and would have been a viable hedging strategy for an investor holding restricted stock.[37]

OTC Equity Collar[38]

CPH could have also executed an OTC[39] equity collar to substantially reduce its risk relating to a Sunbeam stock price decline. To establish an equity collar, CPH would have purchased *put* options from Goldman Sachs while simultaneously selling *call* options to Goldman Sachs.40 The put options operate exactly as described above, and thus would have eliminated CPH's downside risk below the strike price of the put options.

Such put options, however, are not free. In order to offset this cost, CPH would have sold call options to Goldman Sachs. If the amount CPH received for selling the call options completely offsets the amount it paid for purchasing the put options, the collar is referred to as a "costless collar." While a call option allows an investor to participate in any stock price appreciation up to the strike price of the call option, it does not allow participation in any appreciation beyond the strike price. Thus, if at the end of the option's term the market price of

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37 Section III provides an example of CPH's ability to have mitigated its damages in this case had it used put options.

38 *See* MS 552 at CPH 2011597 – 603.

39 Because the collar is privately negotiated, it is referred to as an "over-the-counter" or "OTC" product.

40 Because the strike price of the put options establishes a stock price "floor," while the strike price of the call options establishes a stock price "ceiling," the strategy is referred to as a "collar." Indeed, the two strike prices "surround" the current market price of the stock at the time the options are written.

the Sunbeam stock had risen above the strike price of the call option, CPH would still have had to sell its Sunbeam shares to Goldman Sachs for the strike price.[41]

An OTC equity collar strategy would not have required Mr. Perelman to sell or otherwise transfer any of his Sunbeam stock. Thus, it is a viable hedging strategy for an investor holding restricted stock.[42] Moreover, this strategy could have been utilized at no cost to CPH.

Stock Monetization Via Trust ACES ("TRACES[SM]")[43]

CPH could have also utilized Goldman Sachs' proprietary product called Stock Monetization Via Trust ACES ("TRACES[SM]") to limit its downside exposure and thus mitigate its damages in this case. The TRACES strategy proposed by Goldman Sachs was familiar to Mr. Perelman, who in 1993 implemented a similar strategy through Coleman Worldwide Corporation ("Coleman Worldwide") using a similar product, Liquid Yield Option Notes ("LYONS[TM]"), developed by Merrill Lynch & Co.[44]

Had CPH utilized a TRACES strategy it would have (1) protected itself from a Sunbeam stock decline, (2) provided an immediate cash return and (3) shared in any stock price appreciation. A TRACES strategy is attractive to an investor holding restricted shares because the conversion process (described below) can easily be structured to occur after the expiration of the applicable

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41 An example will illustrate this transaction. Suppose an investor holding 100 shares of Sunbeam stock sells a call option covering those shares to an investment bank. He or she may do so in order to cover the cost of a put option covering those same shares he purchased from that same investment bank. Assuming the current market price of Sunbeam stock is $50 per share, the investor could sell a 12-month call option with a $55 strike price. If, after the end of the 12-month period, Sunbeam's stock price has risen to $65 per share, the investor must still sell the 100 shares at the strike price ($55).

42 Section III provides an example of CPH's ability to have mitigated its damages in this case had it used an equity collar.

43 *See* MS 552 at CPH 2011608 – 613.

44 *See* Registration Statement of Coleman Worldwide Corporation (Nos. 33-60274/33-61346) (MS 992).

holding period under Securities Act Rule 144. Thus, this strategy would not have required CPH to sell or otherwise transfer ownership of any of its restricted Sunbeam shares at the time it was implemented.[45]

A TRACES strategy involves three distinct steps. First, CPH would place its restricted Sunbeam shares into an escrow account for a period of time at least as long as the applicable holding period of the restricted shares. During this time, Mr. Perelman would retain ownership of the shares, including the right to vote the shares and receive any dividends and other distributions.

Second, a special purpose trust would simultaneously be established. This trust would raise an amount of money equal to the current market value of the Sunbeam shares placed into escrow by selling specialized equity securities (TRACES) that pay a fixed dividend for the duration of the strategy. CPH would be entitled to a substantial portion of the money raised by the sale of the TRACES. The trust would use the remaining money it raised to purchase U.S. treasury securities, the principal and interest of which would be used by the trust to pay the fixed dividends owed on the TRACES securities.

Third, at the end of the applicable holding period for the restricted shares (or perhaps longer, at the investor's discretion), holders of the TRACES securities would be contractually obligated to convert their securities into shares of Sunbeam stock in accordance with a predetermined formula. The Sunbeam stock being held in escrow (which is no longer restricted) would be used in connection with this conversion.[46]

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45 Section III provides an example of CPH's ability to have mitigated its damages in this case had it used a TRACES strategy.

46 Because of the conversion ratio, CPH would bear no investment risk related to declines in Sunbeam's stock price beyond 17% because CPH would have already received 83% of

III. ADDITIONAL EVIDENCE SUPPORTING MS & CO.'S ARGUMENT THAT CPH COULD HAVE SUBSTANTIALLY MITIGATED ITS DAMAGES

Morgan Stanley contends that CPH could have virtually eliminated or substantially minimized its investment losses in Sunbeam through one or more hedging strategies, none of which involved a prohibited transfer of Sunbeam shares. These strategies could have been implemented as early as March 30, 1998, the closing date of the CPH-Sunbeam transaction. If Professor Haas had been permitted to testify, he would have described the following transactions,[47] *each of which was proposed to CPH and Mr. Perelman* by various investment banks in March and April 1998:

1. One-Year Forward Contract: *This hedging strategy would have protected 96% of CPH's investment in Sunbeam without any upfront payment by CPH.* On March 30, 1998, CPH would have entered into a contract with a purchaser (typically an investment bank[48]) pursuant to which CPH would have agreed to sell 14.1 million Sunbeam shares on the future date of March 30, 1999 at a price of $42.36 per share (i.e., the share price on March 30, 1998, as adjusted for

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the proceeds generated from the sale of the TRACES securities. Accordingly, CPH would have guaranteed 83% of its investment and could have shared in any appreciation in the Sunbeam stock. If the Sunbeam stock price had increased during the strategy term, then the TRACES security holders would have received less than one share of Sunbeam stock for each TRACES security they held. This would have left some Sunbeam shares still in the escrow account to be returned to CPH. In other words, any appreciation in the Sunbeam stock price would have been shared between the TRACES security holders and CPH. Sharing would have occurred in accordance with a predetermined formula under which the shares held in escrow would be divided between the TRACES security holders and CPH. Note, however, that the TRACES holders would not acquire beneficial ownership of the Sunbeam shares until after the expiration of the applicable holding period under Securities Act Rule 144 and therefore the TRACES structure would have complied with both the federal securities laws and the contractual lock-up.

47 Professor Haas has reviewed supporting data for the transactions discussed herein, including the calculations set forth herein, which were performed by MS & Co. and with which Professor Haas concurs.

48 For purposes of simplicity, these examples assume that CPH transacted with only one investment bank. However, given that at least three investment banks met with CPH representatives around the time of the CPH-Sunbeam transaction, one could reasonably conclude that it could have hedged through multiple institutions.

applicable transaction fees). Thus, on March 30, 1999, when the market value of CPH's Sunbeam shares was only $79.2 million,[49] CPH would have sold its entire Sunbeam position for $42.36 per share and generated cash proceeds of $597.2 million.

CPH would have been required to provide collateral in connection with this transaction, either in the form of a pledge of Sunbeam shares (which it was permitted to do under the lock-up agreement) or cash. The parties would have negotiated and documented the transaction within one day. Because Sunbeam shares would not have been transferred until the expiration of the forward contract, this hedging arrangement would not have constituted a sale and therefore would not have violated the federal securities laws or breached the lock-up agreement. Moreover, CPH could have utilized this strategy regardless of whether or not it was an "affiliate" or "insider" of Sunbeam.

2. Three-Year TRACES: *This hedging strategy would have protected 81% of CPH's investment in Sunbeam, or $498.8 million.* Implementation of this strategy would not have constituted a sale or transfer of Sunbeam stock in violation of federal securities laws or the lock-up agreement. As evidence of its ongoing ownership of the shares, CPH would have retained the right to vote the shares and receive dividends or other distributions.

Pursuant to the TRACES strategy, CPH would have first placed its 14.1 million restricted Sunbeam shares into an escrow account for a period of three years, which is longer than any of the applicable holding periods under Securities Act Rule 144. Simultaneously, the investment bank would have established a special purpose trust to raise $601.0 million through a public offering of TRACES securities. Of this amount, CPH would have received $498.8 million and the remaining $102.2 million would have been used to purchase U.S. treasury securities, the

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[49] Based on a closing stock price of $5.62 per share on March 30, 1999.

principal and interest on which would pay fixed dividends owed to the TRACES holders during the life of the security. Implementation of this hedging strategy would have had the benefit of not requiring the short sale of Sunbeam shares, which would have placed downward pressure on the Sunbeam stock price. When the special purpose trust expired on March 30, 2001, the holders of TRACES would have received the Sunbeam shares held in the escrow account (now worthless) and CPH would have retained the $498.8 million that it received three years earlier.

3. One-Year OTC Equity "Costless" Collar: *This hedging strategy would have protected 88% of CPH's investment in Sunbeam, or $544.4 million.* CPH would have simultaneously done the following: (i) sold call options with respect to 14.1 million Sunbeam shares with a strike price of $46.74 (i.e., 115% of the presumed stock price on March 30, 1998 after implementation of the proposed strategy); and (ii) purchased put options with respect to 14.1 million Sunbeam shares with a strike price of $38.61 (i.e., 95% of the presumed stock price on March 30, 1998 after implementation of the proposed strategy). Thus, CPH would have realized up to 15% appreciation in its Sunbeam investment during the term of the options, while at the same time protected against any decline in its investment greater than 5%. Because the amount CPH would have received for selling the call options would have completely offset the amount CPH would have paid for purchasing the put options, this hedging strategy would have cost nothing to implement (hence, a "costless" collar). Since no Sunbeam shares would have been sold or transferred for one year, this hedging strategy would not have violated the federal securities laws or the lock-up agreement. Upon the expiration of both sets of options on March 30, 1999, when the market value of CPH's Sunbeam shares was only $79.2 million, CPH would have sold its entire Sunbeam position for $38.61 per share, or aggregate cash proceeds of $544.4 million.

4. One-Year Put Option: *This hedging strategy would have protected 82% of CPH's investment in Sunbeam, or $507.2 million.* CPH would have purchased put options with respect to 14.1 million Sunbeam shares with a strike price of $42.62 per share (i.e., the presumed stock market price on March 30, 1998 after implementation of the proposed strategy). The total cost of the put options would be approximately $93.8 million. Implementation of this strategy would have almost fully protected against any declines in its Sunbeam investment while still retaining unlimited upside potential. Since no Sunbeam shares would have been sold or traded for one year, this hedging strategy would not have violated the federal securities laws or the lock-up agreement. Upon the expiration of the put options on March 30, 1999, when the market value of CPH's Sunbeam shares was only $79.2 million, CPH would have sold its entire Sunbeam position for $42.62 per share, or aggregate net cash proceeds of $507.2 million.

CONCLUSION

MS & Co. respectfully requests that this proffer be entered into the trial record.

EXHIBIT A

Testifying Experience of Professor Jeffrey J. Haas

Spahn v. Federated Investors, Inc. (W.D. Pa. - continuing) (expert for plaintiffs in case involving mutual fund regulation)

Pinal Creek Group v. Newmont Mining Corp. (D. Ariz. - continuing) (expert for plaintiffs in case involving corporate successor liability)

In re AT&T Corp. Securities Litigation (D. N.J. 2003 - continuing) (expert for plaintiffs in case involving tracking stock capital structure)

May v. Prost (Del. Ch. 2003) (expert for defendant in case involving investment adviser regulation)

Reiner v. Wenig (N.Y. Sup. Ct. 2001) (expert for defendant in case involving option agreement, registration rights, and public offering of securities)

Day v. Meyer (S.D.N.Y. 2001) (expert for plaintiff in case involving option agreements)

Peters v. Smith (N.Y. Sup. Ct. 1999) (expert for plaintiff in casing involving investment adviser compensation)

Connell v. Spencer (D. Maine 1999) (expert for plaintiff in case involving breach of contract)

In addition to the foregoing, Professor Haas has served as an expert in numerous NASD securities arbitrations alleging broker-dealer conduct.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery this 15 day of April, 2005.

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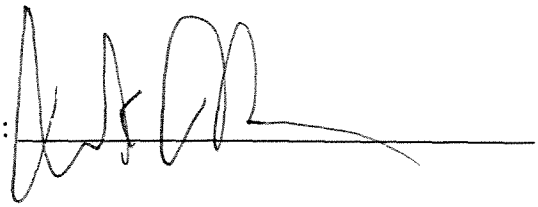
BY: 

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

MORGAN STANLEY'S PROFFER OF EVIDENCE AND ARGUMENT REGARDING CPH'S ABILITY TO SELL ITS SUNBEAM STOCK AS EARLY AS JUNE 30, 1998

Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully proffers the following evidence and argument to show that Plaintiff Coleman (Parent) Holdings, Inc. ("CPH") could have sold its Sunbeam stock ("Stock")[1] as early as June 30, 1998, and would present the same at trial if so permitted:

1. On March 30, 1998, Sunbeam Corporation purchased the 82% stake of CPH in The Coleman Company, Inc. for consideration comprising cash, assumption of debt, and some 14.1 million shares of Sunbeam common stock. Morgan Stanley & Co. Incorporated's Proposed Findings of Fact and Conclusions of Law in Support of Its Motion For Summary Judgment, December 10, 2004 ("Proposed Findings") ¶¶ 2, 134; Exhibit MS 96.

2. The initial agreement forbade CPH to sell any Sunbeam shares until June 30, 1998. CPH could sell 25% of its shares as of that date, an additional 25% (for a total of 50%)

3. After September 30, 1998, and the balance of its shares on December 30, 1998). Exhibit MS 93, § 7.1, pp. 19-20. Those restrictions were superseded by a settlement agreement

[1] For purposes of this motion, "Stock" shall refer either and interchangeably, unless otherwise indicated by context, to the Sunbeam common stock owned by CPH or the warrants CPH received pursuant to the August 12, 1998 settlement agreement with Sunbeam.

16div-015060

dated August 12, 1998, which authorized CPH to alienate up to 75% of its Sunbeam shares immediately, and the balance after three years. The settlement agreement also gave CPH 23 million warrants to purchase Sunbeam shares, and forbade Sunbeam to sell more than 50% of the warrants in less than three years. Exhibit MS 96, § 4, pp. 7-8. Concomitant to the initial agreement, a registration rights agreement obliged Sunbeam to register CPH's Stock with the Securities and Exchange Commission. Exhibit MS 93, Exhibit A, § 2.1. Concomitant to the settlement agreement, an amended registration rights agreement obliged Sunbeam to register CPH's Stock upon request by CPH. Exhibit MS 96-B, § 2.1.

4. Section 5 of the Securities Act of 1933, 15 U.S.C. § 77a et seq. (the "Act"), generally forbids the sale of a security unless a registration statement filed with the Securities and Exchange Commission ("SEC") is effective as to such security. 15 U.S.C. § 77e.

5. Even assuming, *arguendo*, that CPH could not have registered its shares before December 6, 1999, CPH could have sold the Stock without registration pursuant to Section 4(1) of Act, 15 U.S.C. § 77d(1), notwithstanding the general Section 5 proscription.[2]

6. Section 4(1) of the Act exempts from the customary Section 5 registration requirements securities transactions "by any person other than an issuer, underwriter, or dealer." 15 U.S.C. § 77d(1). CPH was manifestly not an issuer or dealer.[3] Thus, CPH could sell the Stock under Section 4(1) unless it was an underwriter.

7. Section § 2(a)(11) of the Act, 15 U.S.C. § 77b(11), defines "underwriter":

---

[2] Any such sales would have remained subject to the contractual restrictions on alienability mutually agreed to by CPH and Sunbeam.

[3] CPH does not contend that it was a dealer, and concedes that it was not an issuer, in Plaintiff's Supplemental Disclosure Concerning Plaintiff's Inability to Sell Its Unregistered Sunbeam Stock, at p. 12.

> The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

8. Thus, CPH was an underwriter only if it had purchased the Stock from Sunbeam "with a view to," or if it sold its Stock "in connection with," a distribution.

9. It is black-letter law that a "distribution," although not expressly defined by the Act, means a public offering. It is also black-letter law that a sale limited to a sophisticated investor or investors is not a public offering. *E.g.*, *Ackerburg v. Johnson*, 892 F.2d 1328, 1336-37 (8th Cir. 1989) ("[Plaintiff] is a sophisticated investor and not in need of the protections afforded by registration under the 1933 Act. Hence, this case involves no public offering, and thus no distribution. Absent a distribution, [Defendant] cannot be an underwriter within § 4(1), and is, therefore, entitled to that exemption."). Nor does a sale become a public offering simply because the securities are offered to multiple investors, provided they are sophisticated. *E.g.*, *Weprin v. Peterson*, 736 F. Supp. 1124, 1128-30 (N.D. Ga. 1988) (offering found exempt as private placement where fewer than 415 offers were made, each offeree had prior relationship with dealer, offerees had full access to financial information, and no solicitation was made to the general public); *In re Homestead Partners*, 197 B.R. 706, 718 (1996) ("transactions involving a finite group of sophisticated investors with independent access to the sort of financial information disclosed by registration do not involve any 'public offering' and should enjoy exemption from the 1993 Act's registration requirements.").

10. Thus, CPH could have sold its shares to a sophisticated investor or investors.[4] The touchstone of investor sophistication is the ability to fend for oneself in the marketplace, the know-how to seek relevant information about a security and to exercise independent judgment. *E.g.*, *Banca Cremi, S.A. v. Alex. Brown & Sons, Inc.*, 132 F.3d 1017, 1029 (4th Cir. 1997); *Bayoud v. Ballard*, 404 F. Supp. 417, 422-23 (N.D. Tex. 1975) (citing *Securities and Exchange Commission v. Ralston Purina Co.*, 346 U.S. 119, 124-25 (1953)). Courts have found a multitudinous variety of investors to be sophisticated, including institutional investors and wealthy persons versed in financial affairs. *E.g.*, *Banca Cremi*, 132 F.3d at 1029 ("the factors which are relevant to an institution strongly support the sophistication of the Bank. The Bank, with assets of $5 billion, is unquestionably wealthy. In addition, while the Bank's investment choices may have been unwise, its investment experience is extraordinary, and far surpasses most sophisticated individual investors. As a business entity, the Bank obviously has a business background, and its employees--hired for their business expertise--had extensive education and experience in economics and finance."); *Kennedy v. Josephthal & Co., Inc.*, 814 F.2d 798, 804 (1st Cir. 1987) ("A number of factors have been used by courts in examining whether reliance on misrepresentations is justified. These include (1) The sophistication and expertise of the plaintiff in financial and securities matters; (2) the existence of long standing business or personal relationships; (3) access to the relevant information; (4) the existence of a fiduciary relationship; (5) concealment of the fraud; (6) the opportunity to detect the fraud; (7) whether the plaintiff initiated the stock transaction or sought to expedite the transaction; and (8) the generality or specificity of the misrepresentations.") (holding that wealthy attorneys with considerable investment experience were sophisticated).

[4] The purchasing sophisticated investor would have to comply with the provisions of Section 4(1), as well.

11. CPH thus enjoyed a wide field of potential Stock purchasers. The record is replete with evidence that Ronald Perelman, through his wholly-owned holding company MAFCO the 100% owner of CPH, is one of America's greatest businessmen, with literally almost unsurpassed personal wealth. Proposed Findings ¶¶ 1, 3-9, 20-25; Exhibit MS 240. CPH, through Perelman's company MAFCO, boasts an impressive and sophisticated brain trust of former investment bankers, veterans of the financial services industry, and business attorneys with distinguished pedigrees, and is itself a highly sophisticated company. Proposed Findings ¶¶ 10-14, 26-33; Deposition of James R. Maher, November 2, 2004, at 33:18-34:15, 35:7-36:22; Deposition of Steven L. Fasman, January 21, 2004, at 60:11-25. Perelman has bought and sold as many as 50 companies since 1987, transactions involving billions of dollars. Proposed Findings ¶ 21, 22. In almost every such transaction, MAFCO has hired investment bankers to advise it, and employs leading lights of the financial and legal world as advisors. Proposed Findings ¶ 34-41. CPH therefore would have had no difficulty in finding sophisticated investors who would qualify to purchase the Stock under Section 4(1).

12. Indeed, MAFCO discussed with several sophisticated investment banks possible arrangements to monetize or "hedge" the risk associated with its Sunbeam purchase, both before and after the merger. Deposition of James R. Maher, November 3, 2004, at 418:10-420:23; Deposition of Glen Dickes, November 18, 2004, at 60:20-61:13, 63:12-64:6, 74:14-18; Deposition of Jerry Levin, December 2, 2004, at 334:13-335:13; Deposition of Norman Ginstling, April 6, 2004, at 138:18-146:18; Exhibit MS 297 ("Hedging and Monetization Strategies"); Exhibit MS 298; Exhibit MS 551 (Presentation by Citibank, "Mafco Holdings Inc. Structured Products Equity Hedging Techniques," March 30, 1998); Exhibit MS 552 (Presentation by Goldman Sachs, "Presentation to Macandrews & Forbes Holdings Regarding

Single Stock Risk Management Strategies," April 3, 1998); Exhibit MS 562 (Memorandum to Jim Maher and Glen Dickes from Goldman Sachs re hedging, May 13, 1998). A sale pursuant to Section 4(1) would have been one possible approach to monetizing CPH's Sunbeam investment, had CPH wished to pursue it.[5] Indeed, the well-known investment bank Bear Stearns gave a presentation explicitly contemplating an unregistered-share transcation. Exhibit MS 550 (Presentation by Bear Stearns, "Mafco Holdings Inc., Discussion of Hedging and Monetization Alternatives for Holdings in Sunbeam Corporation," March 13, 1998), at p. 21. CPH may not have wished to pursue such a sale for a variety of reasons, including its earnest belief that it could make Sunbeam profitable. Deposition of Todd Slotkin, March 3, 2005, at 71:9-73:4; Exhibit MS 428; Exhibit MS 432; Exhibit MS 822. But that does not negate the possibility of a Section 4(1) sale.[6]

---

[5] As CPH acknowledges, notwithstanding its fretting over the legal risks of unregistered sales, such Section 4(1) sales are so familiar that they have a colloquial nickname: the "Section 4(1½)" exemption, so called because of the similarity of such transactions to transactions exempt under Section 4(2) of the Act. Section 4(2) exempts from the Act's registration requirements "transactions by an issuer *not involving any public offering.*" 15 U.S.C. § 77d(2) (emphasis added). As noted above, transactions fashioned so as not to be a public offering enable persons who might otherwise be classified under Section 4(1) as underwriters to avoid such classification and take advantage of exemption under that Section.

[6] CPH's arguments to the contrary are unpersuasive. Plaintiff's Supplemental Disclosure Concerning Plaintiff's Inability to Sell Its Unregistered Sunbeam Stock, at 13-14. CPH cites no authority for the strange proposition that CPH could not make a private placement because Sunbeam was concurrently making a public distribution. Sunbeam's sales to the public have no apparent bearing on CPH's ability to sell in a private offering. It is no less a non-sequitur (and no more supported by authority) to contend that because CPH also enjoyed the option of registering its shares, it would be engaged in a public offering if it forbore that option and instead made a private sale. Finally, CPH's argument about incurring substantial legal risks fails because CPH has failed to show any such risks. Potential insider trading problems could have been resolved through full and fair disclosure of all material information--which, as a publicly traded company, Sunbeam was obliged to report in public filings. Fault for any deficiencies in such filings lies not with Morgan Stanley but with Sunbeam--controlled after June 15, 1998 by CPH. Moreover, CPH would be prohibited from selling only if Mr. Perelman (as CPH's sole beneficial owner and ultimate decision-maker with respect to potential sales) actually possessed material nonpublic information. Yet CPH has not alleged that CPH or Mr. Perelman actually possessed material nonpublic information about Sunbeam. Because CPH is the plaintiff, it bears the burden of showing that it could not sell the stock.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 15th day of April 2005.

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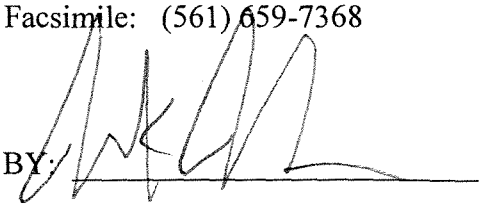
BY: 

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON PLAINTIFF'S ORE TENUS MOTION IN LIMINE

THIS CAUSE came before the Court April 15, 2005 on Plaintiff's ore tenus Motion in Limine, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Plaintiff's ore tenus Motion in Limine is Granted. The parties and their counsel shall not refer to or attempt to introduce into evidence, or otherwise place before the jury, that the purpose of CPH and its related entities' corporate structure was to avoid personal liability by Perelman for corporate obligations, without first proffering the good faith basis to believe the matter is relevant and otherwise admissible outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 15th day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON CPH'S ORE TENUS MOTION IN LIMINE

THIS CAUSE came before the Court April 15, 2005 on CPH's ore tenus Motion in Limine, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that CPH's ore tenus Motion in Limine is Granted. MS & Co. shall not argue, attempt to place before the jury, or attempt to imply to the jury that a statute or regulation required application of a liquidity discount to compute the value of CPH's Sunbeam stock, without first proffering the good faith basis to believe it did, outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 15 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON PLAINTIFF'S ORE TENUS MOTION IN LIMINE

THIS CAUSE came before the Court April 15, 2005 on Plaintiff's ore tenus Motion in Limine, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Plaintiff's ore tenus Motion in Limine is Granted, in part. MS & Co. may present evidence of the Sunbeam share price used on MAFCO Holdings, Inc., Consolidated Financial Statements and related documents and how that figure was used by MAFCO. If evidence of the existence of the Sunbeam warrants is placed before the jury, neither party may argue or attempt to place before the jury that CPH received the warrants in a settlement with Sunbeam, or that warrants or their acceptance by CPH are relevant for any purpose other than in connection with CPH's valuation of its Sunbeam stock. If either party intends to present documentary evidence of MAFCO's valuation of the Sunbeam shares, it shall supply a copy to opposing counsel within five calendar days but, in any event, at least one hour prior to its expected use. "Granted", for purpose of the Motion in Limine addressed in this Order, shall mean that the parties and their counsel shall not refer to or attempt to introduce into evidence, or otherwise place before the jury, the matter referred to without first proffering the good faith basis to believe

the matter is relevant and otherwise admissible outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 15 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MS & CO.'S ORE TENUS MOTION TO PRODUCE

THIS CAUSE came before the Court April 15, 2005 on MS & Co.'s ore tenus Motion to Produce, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that MS & Co.'s ore tenus Motion to Produce is Granted. CPH shall submit to the Court for in camera inspection those documents listed on Exhibit A, attached, by 5:00 p.m. April 19, 2005.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 15 day of April, 2005.

_____
ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

PARTIAL LIST OF DOCUMENTS FROM CPH 7/15/2004 PRIVILEGE LOG FOR WHICH IN CAMERA INSPECTION IS REQUESTED

Document Number	Document Number	Document Number
35	164A	505
47	165	524
47A	169	525
88	351	526
88A	351A	527, 527A-C
89	356	528, 528A-B
89A	420	529
156	422	529A
156A	437	529B
156B	443	530
156C	458	530A
162	458A	531
163	460	532, 532A-B
164	460A	533

16div-015074

Exhibit A

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION FOR CLARIFICATION OR RECONSIDERATION OF THE COURT'S ORDER ON PLAINTIFF'S MOTION IN LIMINE NO. 27 FOR A FINDING AS A MATTER OF LAW THAT THE FEDERAL SECURITIES LAWS PROHIBITED PLAINTIFF FROM SELLING UNREGISTERED SUNBEAM STOCK

THIS CAUSE came before the Court April 15, 2005 on Morgan Stanley's Motion for Clarification or Reconsideration of the Court's Order on Plaintiff's Motion in Limine No. 27 for a Finding as a Matter of Law that the Federal Securities Laws Prohibited Plaintiff from Selling Unregistered Sunbeam Stock, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part. The Court's Order on Plaintiff's Motion in Limine No. 27 for a Finding as a Matter of Law that the Federal Securities Laws Prohibited Plaintiff from Selling Unregistered Sunbeam Stock is amended to provide that no expert may testify as to damages based on the value of the Sunbeam stock as of a specific date without first seeking a ruling from the Court that a sufficient evidentiary predicate to support a conclusion that the stock could be sold as of the date to be used has been laid or that an appropriate liquidity discount has been established, is not required, or is implicit in the figure offered. This Order is without prejudice to CPH's right to claim that the stated value of the stock for one purpose is not relevant to determine its actual value for purposes of computing damages.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 15 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

16div-015075

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Washington, DC 20036

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oir ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki Infim, ki bézwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontakté koôdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro téléfonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résévwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe accommodation pour pouvoir participer á ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER

THIS CAUSE came before the Court April 15, 2005 on Morgan Stanley's Statement on the Relevance of Hedging to Mitigation, which the Court elects to treat as including a Motion for Rehearing on the Court's February 15, 2005 Order on Plaintiff's Motion in Limine Number 19, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion for Rehearing on the Court's February 15, 2005 Order on Plaintiff's Motion in Limine Number 19 is Denied. MS & Co. may not contend that CPH had a duty to hedge to attempt to mitigate its damages once the fraud was disclosed. First, the Court concludes that there is no legal obligation to enter into a hedging transaction to mitigation damages. Second, even if there were, such a defense would require expert opinion, and no such expert opinion was timely disclosed.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 15 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CPH'S MOTION IN LIMINE NO. 35 TO BAR INAPPROPRIATE OPINION TESTIMONY

CPH hereby moves for an order barring fact witnesses whom Morgan Stanley has indicated it may call to testify in Phase II of the trial from giving the kind of grossly improper opinion testimony that is anticipated in Morgan Stanley's Revised Trial Witness Disclosure. According to the Disclosure, seven named fact witnesses — Donald Denkhaus, Tarek Abdel-Meguid, Joseph Perella, Ruth Porat, Robert Scott, William Strong, and John Tyree – and possibly additional witnesses on the list for Phase I will not offer factual testimony in Phase II but will instead comment on such matters as the "nature, extent, and degree" of Morgan Stanley's misconduct, the "relative . . . sophistication" of Morgan Stanley and CPH, the "degree of CPH's alleged injury and the degree of CPH's reliance on Sunbeam," and "whether Morgan Stanley is liable for punitive damages." *See* Ex. A at 13-16. Not only is some of that proposed testimony inappropriate for any witness, including expert witnesses, but all of it is inappropriate for fact witnesses such as these. It constitutes precisely the kind of self-serving, ungrounded opinion testimony that the law is designed to keep out.

Six of the seven named Phase II witnesses at issue here work or formerly worked for Morgan Stanley. One (Denkhaus) was a partner at Arthur Andersen. They are listed as Phase II witnesses whose proposed testimony is described almost identically in every case. We are told all may testify concerning:

> the nature, extent, and degree of Morgan Stanley's alleged misconduct and the related circumstances; the relative experience, sophistication, and access to relevant information of the parties; the degree of CPH's alleged injury and the degree of CPH's reliance on Sunbeam, its auditors, and Morgan Stanley; and whether Morgan Stanley is liable for punitive damages.

Id. at 14-16. We are further told that "Morgan Stanley may call any witness disclosed above [for Phase I] to testify in Phase II regarding any matter relating to Morgan Stanley's liability for punitive damages, including" all of the issues identified for the other 7 named witnesses. *Id.* at 13.

The proposed testimony is improper primarily because it does not disclose facts but instead constitutes lay opinion testimony that violates FLA. STAT. ANN. § 90.604(1) and § 90.701(1). Unless the witness is designated as an expert (which is not the case here) or falls into the narrow lay witness opinions exception in FLA. STAT. ANN. § 90.701(1), lay witnesses may not testify in terms of opinions or inferences. CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 701.1, at 604 (2004 ed.). Thus, for example, a police officer may not describe the cost of the damage caused to his squad car without personal knowledge of that fact, *Wingfield v. State*, 751 So. 2d 134, 136 (Fla. 2d DCA 2000), but a witness may describe the general condition of the car he actually tried to drive, *Casa de Alabanza v. Bus Service, Inc.*, 669 So. 2d 338, 339 (Fla. 3d DCA 1996). As this Court recognized in the deposition designation process, "to the extent [a

witness] is not designated as an expert, [and] all we're talking about is his personal opinion . . . . that's not relevant." Ex. B, 3/10/05 Hr'g at 2805.

Florida evidentiary rules create only the narrowest of exceptions where lay opinion testimony is proper. Rule 701 permits a lay witness to offer an opinion only if two conditions are met:

> (1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he or she has perceived to the trier of fact without testifying in terms of inferences or opinions and the witness's use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and (2) The opinions and inferences do not require a special knowledge, skill, experience, or training.

FLA. STAT. ANN. § 90.701 (emphasis added). In other words, as long as the witness is able to communicate what he or she perceived without offering opinions, the witness cannot offer opinions. Lay opinions must be narrowly circumscribed: a lay witness may testify about what he or she observed leading up to an accident, including the speed of the respective vehicles, but the witness may not testify about what caused the accident. *Zwinge v. Hettinger*, 530 So. 2d 318, 323 (Fla. 2d DCA 1988). Similarly, a hotel auditor who monitored the hotel's possessions could not opine on the market value of a stolen television, because the auditor's file did not contain that information. *Jones v. State*, 408 So. 2d 690, 691-92 (Fla. 2d DCA 1982).

The testimony anticipated by Morgan Stanley for the seven witnesses at issue here plainly would contravene these principles. An assessment of the "the nature, extent, and degree" of Morgan Stanley's misconduct, or the parties' "relative experience, sophistication, and access to . . . information," or "the degree" of CPH's injury and reliance necessarily constitutes an expression of opinion. It constitutes commentary on the evidence, not merely a reporting of facts known to the witness from personal knowledge.

Thus, a lay witness might testify about the facts of Morgan Stanley's misconduct, but he or she cannot opine on the "nature, extent, and degree" of it. Such testimony goes beyond what the witnesses actually observed or have knowledge of, and directly impinges on issues the jury is to decide. Similarly, Morgan Stanley's lay witnesses could, without violating FLA. STAT. ANN. § 90.701, testify about facts within their knowledge regarding the parties' experience, sophistication, and access to information; however, not only are such facts irrelevant to Phase II (and, in large part, to Phase I under the Court's Order), but any testimony about the parties' "relative" positions on these matters goes well into the realm of inference and opinion. Clearly, a witness can testify to any of those issues without offering an opinion on whether the parties were similar or different in various of these respects.

With respect to CPH's injuries and reliance, it is extremely unlikely that any of the Morgan Stanley witnesses have sufficient knowledge to satisfy the requirements of § 604.1 and testify about those issues — to the extent they are relevant and not already established in Phase I. But even if the witnesses had knowledge of such facts, they cannot possibly satisfy the requirements of § 701.1 to testify about "the degree" of the injury and reliance. Once again, these are classically the kinds of issue on which jurors "could draw their own conclusions" based on the factual evidence submitted. *Szuba v. State*, 749 So. 2d 551, 553 (Fla. 2d DCA 2000).

As these examples well illustrate, the prohibition on lay opinions protects the trial process. That is why the rule permits lay opinions only to the extent necessary for the jury to understand what the witness perceived – and as the cases demonstrate, the only permissible lay opinions are those absolutely necessary to convey the perception. *See, e.g.*, *Duncan v. State*, 583 So. 2d 439, 440 (Fla. 4th DCA 1991) (permitting testimony on what person smelled like);

Mitchell v. State, 611 So. 2d 1269, 1269 (Fla. 3d DCA 1993) (permitting opinion testimony that car "would have" hit him if he had not moved out of the way). This line is perhaps most clearly delineated in *Hansen v. State*, 585 So. 2d 1056 (Fla. 1st DCA 1991), a criminal case involving an insanity defense. The Court of Appeals there ruled that lay witnesses could testify about whether they "observed anything" that suggested the defendant suffered from a mental condition. *Id.* at 1058. However, lay witnesses could not testify about the defendant's moral capacity, because such testimony was not "an appropriate means for a witness to convey 'what he has perceived' to the jury." *Id.* at 1058-59.

Finally, an additional problem arises with the prospect of testimony about "whether Morgan Stanley is liable for punitive damages." Ex. A at 14-16. This is an ultimate conclusion of law on which no testimony, lay or expert, can be given. *See Hansen*, 585 So. 2d at 1058-59 (prohibiting lay opinion on the case's "ultimate fact"); *Zwinge*, 530 So. 2d at 323 (prohibiting lay opinion "on the ultimate issue of causation"). Morgan Stanley's proposed testimony on this subject, and every other subjects described in the designation paragraph laid out above, is inappropriate for a lay witness, and must be barred.

Conclusion

For the foregoing reasons, Morgan Stanley witnesses Donald Denkhaus, Tarek Abdel-Meguid, Joseph Perella, Ruth Porat, Robert Scott, William Strong, and John Tyree, as well as any witness disclosed by Morgan Stanley to testify in Phase I, should be barred from offering any testimony regarding the nature, extent, and degree of Morgan Stanley's alleged misconduct and the related circumstances; the relative experience, sophistication, and access to relevant information of the parties; the degree of CPH's alleged injury and the degree of CPH's reliance

on Sunbeam, its auditors, and Morgan Stanley, and whether Morgan Stanley is liable for punitive damages.

Dated: April 18, 2005

Respectfully submitted,

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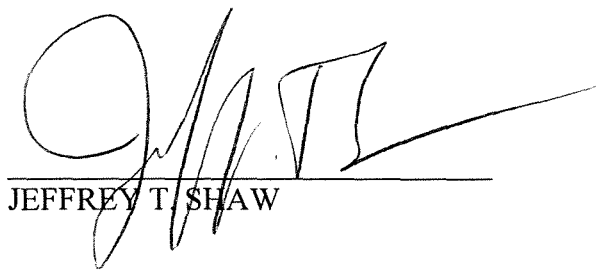
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 18th day of April, 2005.



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10808

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

vs.

MORGAN STANLEY & CO. INCORPORATED,

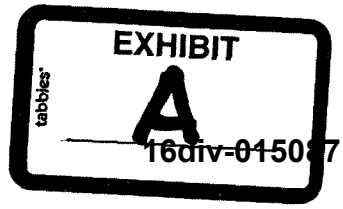
Defendant.

_____/

MORGAN STANLEY'S REVISED TRIAL WITNESS DISCLOSURE

Pursuant to the Court's March 24, 2005 Order, Morgan Stanley & Co. Incorporated ("Morgan Stanley") hereby provides its list of witnesses that Morgan Stanley will or may call at trial, either through live testimony or by deposition, as well as a summary of the anticipated testimony of each witness that it has designated. Morgan Stanley reserves the right to call any of the witnesses identified herein or on Coleman (Parent) Holdings, Inc.'s ("CPH") witness list during either phase of its case-in-chief. Morgan Stanley further reserves the right to withdraw any witness identified herein and to supplement this disclosure as Morgan Stanley continues to evaluate its case in light of the Court's rulings. Morgan Stanley also reserves the right to add or withdraw witnesses in response to changes in CPH's trial witness disclosure or exhibit list, new arguments advanced by CPH, or the Court's future rulings.

The Court's Order on CPH's Renewed Motion for Entry of Default Judgment (Mar. 23, 2005) ("Default Order") substantially narrowed the matters at issue in this case. Accordingly, Morgan Stanley's new lead trial counsel has, in the approximately 10 days since the assumption of his duties in this complex case, made good-faith efforts to identify the witnesses who will or may be called to testify on the matters that remain in dispute. However, in this extremely short



time, new lead trial counsel has not had an adequate opportunity to familiarize himself with the testimony of the more than 90 witnesses who have been deposed in this case, as well as the additional potential witnesses who have not been deposed. As a result, Morgan Stanley may have identified in this disclosure more witnesses than it will ultimately call at trial. It may also have omitted witnesses who will need to be called.

In addition, the Court's orders prohibit Morgan Stanley from calling witnesses with respect to certain elements of CPH's conspiracy and aiding-and-abetting claims (*i.e.*, witnesses who testify to matters other than reliance and damages). *See* Default Order; Order on CPH's Motion for Adverse Inference Instruction (Mar. 1, 2005). Morgan Stanley would have called numerous additional witnesses in its case, including some or all of the witnesses identified in its Trial Witness Disclosure served on January 10, 2005. Morgan Stanley may proffer the testimony of some or all of these additional witnesses during the defense case. The Court's orders likewise prohibit Morgan Stanley from calling witnesses with respect to Morgan Stanley's discovery conduct. Morgan Stanley may proffer the testimony of witnesses called during the hearings held on February 14, March 14, and March 15, 2005 hearings regarding these matters.[1]

I. Morgan Stanley Case-in-Chief (Phase I)

[1] Morgan Stanley adopts by reference the January 10, 2005 Witness Disclosure, which includes the witnesses Morgan Stanley would call at trial if permitted to do so — as supplemented by certain additional witnesses disclosed in the instant submission. Morgan Stanley also supplements its witness disclosure to include all witnesses called by Morgan Stanley during the February 14, March 14, and March 15, 2005 hearings, and would call these witnesses, William Hollister, and perhaps additional witnesses, if permitted to do so. These witnesses would testify on the matters addressed at the February 14, March 14, and March 15, 2005 hearings, and in the case of Mr. Hollister, matters covered by his November 2004 declaration, as well as related matters.

1. Allison Amorison (by deposition): Ms. Amorison was an associate at Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden"), which assisted in the preparation of the merger agreements relating to Sunbeam's acquisition of the Coleman Company ("Coleman"). Ms. Amorison may testify to the matters to which she testified in her deposition in this case, including her experience regarding the merger agreement drafting and negotiations, the confidentiality agreements, the due diligence done by Skadden for the transaction, and her contact with her counterpart at Wachtell, Lipton, Rosen & Katz ("Wachtell"), Adam Emmerich.

2. John Ashley (live): Mr. Ashley is the Chief Technical Officer of Corefacts, LLC. He is an expert in computer forensics and may testify to issues regarding electronic document retention, including the impossibility of recovering data from overwritten backup tapes.

3. Lawrence A. Bornstein (live): Mr. Bornstein is a certified public accountant who worked at Arthur Andersen LLP at the time of Sunbeam's acquisition of Coleman. Mr. Bornstein may testify to the matters to which he testified in his deposition in this case, including the steps that CPH and MAFCO took to obtain information regarding Sunbeam prior to Sunbeam's acquisition of Coleman.

4. Karen Clark (by deposition): Ms. Clark is a former Vice President of Operations and Finance at Coleman, and Senior Vice President of Finance at Sunbeam. Ms. Clark may testify to the matters to which she testified in her deposition in this case, including the financial condition of Coleman during the events at issue, her views regarding the purchase price paid by Sunbeam, the effect of the Coleman restructuring that was in progress at the time of the Sunbeam transaction, information regarding the post-transaction valuation of the Sunbeam warrants, due diligence conducted by MAFCO in anticipation of the Sunbeam transaction, and Sunbeam's

audited financial statements that were certified by Arthur Andersen and Coleman's reliance on such financial statements.

5. Scott Cook (live): Mr. Cook is Senior Managing Director, Equity Syndicate and Corporate Executive Services, at Raymond James & Associates. Mr. Cook will present his credentials, and he may testify as an expert regarding the valuation of securities, including valuation discounts attributable to resale restriction and large size.

6. Glen Dickes (by deposition): Mr. Dickes is CPH's designated 1.310 witness on MAFCO's consideration of hedging alternatives for its Sunbeam position. When the events relevant to this dispute occurred, he was MAFCO's chief corporate lawyer. Mr. Dickes may testify to the matters to which he testified in his deposition in this case, including his background and responsibilities within the MAFCO organization, CPH's consideration of hedging its stake in Sunbeam stock, various due-diligence issues, and the status of MAFCO's term loans at the time of the Sunbeam transaction.

7. Donald Drapkin (by deposition): Mr. Drapkin is currently Vice Chairman and Director of MAFCO and former Coleman and CPH Director. Mr. Drapkin may testify to the matters to which he testified in his deposition in this case, including his professional background and experience with mergers and acquisitions, MAFCO's history and experience conducting mergers and acquisitions, the Coleman board meeting at which the Coleman/Sunbeam merger was approved, and his participation in the Coleman/Sunbeam merger.

8. Robert Duffy (by deposition): At the time of the transaction, Mr. Duffy was a Vice President in the Mergers & Acquisitions Group at CFSB. Mr. Duffy may testify to the matters to which he testified in his deposition in this case, including his role as a financial

advisor to MAFCO, CSFB's role in performing due diligence on Sunbeam, and the fairness opinion CSFB rendered to Coleman.

9. Adam Emmerich (by deposition): Mr. Emmerich is a partner at Wachtell and was retained in late January 1998 to advise MAFCO, CPH, and Coleman in connection with Sunbeam's acquisition of Coleman. Mr. Emmerich may testify to the matters to which he testified in his deposition in this case, including discussions with Sunbeam, the preparation of confidentiality agreements, the merger agreement; and representations and warranties made by the parties.

10. Irwin Engelman (by deposition): Mr. Engelman was Executive Vice President and Chief Financial Officer of MAFCO at the time of the events relevant to this dispute. Mr. Engleman may testify to the matters to which he testified in his deposition in this case, including CPH's reliance on Arthur Andersen LLP, the negotiation of covenant relief with the banks after Dunlap was terminated, the negotiation of credit agreements, and the extent and nature of the indebtedness of Mr. Perelman's companies.

11. David Fannin (live): Mr. Fannin is the former Executive Vice President and General Counsel of Sunbeam Corporation. Mr. Fannin may testify concerning his involvement in the negotiation of Sunbeam's acquisition of Coleman, including the structure of the deal, the due diligence conducted by CPH, communications between Sunbeam and CPH, steps taken by MAFCO and CPH with respect to the registration of Sunbeam warrants or securities, and events that occurred following the closing of the Sunbeam/Coleman merger.

12. Steven Fasman (live and/or by deposition): Steven L. Fasman is Vice President, Law of MAFCO. Mr. Fasman may testify about email policies at MAFCO; the practices regarding preservation, deletion, purging, and destruction of email at MAFCO; the history of

MAFCO's knowledge of potential and actual litigation involving the subject matter of this case; the failure to preserve, recover, restore, or save MAFCO email in response to the notice of such potential and actual litigation; the destruction, erasing, or overwriting of MAFCO email after receiving notice of the Sunbeam litigation; and CPH's production or failure to produce email in response to discovery requests in this litigation.

13. Dan Fischel (live): Professor Fischel is a professor at the University of Chicago. Mr. Fischel may testify as an expert in regarding compensatory and/or punitive damages. Professor Fischel will present his credentials and provide his opinion as to the amount of damages, if any, that CPH sustained as a result of its sale of Coleman in exchange for Sunbeam securities. Professor Fischel may also testify regarding Morgan Stanley's liability for punitive damages, including the nature, extent, and degree of Morgan Stanley's alleged misconduct and the related circumstances; the relative experience, sophistication, and access to relevant information of the parties; the degree of CPH's alleged injury and the degree of CPH's reliance on Sunbeam, its auditors, and Morgan Stanley; whether Morgan Stanley is liable for punitive damages.

14. Blaine Fogg (by deposition): Mr. Fogg is a partner at Skadden. Mr. Fogg may testify to the matters to which he testified in his deposition in this case, including Skadden's representation of Sunbeam in the Coleman transaction and debenture offering and the events surrounding the March 19, 1998 press release.

15. Steven Geller (by deposition): Mr. Geller was an associate in the Mergers & Acquisitions Group at Credit Suisse First Boston ("CFSB") at the time of the events relevant to this dispute. Mr. Geller may testify to the matters to which he testified in his deposition in this

case, including CSFB's role in performing due diligence on Sunbeam, financial modeling and analysis conducted by CFSB regarding Sunbeam, and the fairness opinion CSFB prepared.

16. Frank Gifford (by deposition): Mr. Gifford was a member of the Coleman Board of Directors at the time of the events relevant to this dispute. Mr. Gifford may testify to the matters to which he testified in his deposition in this case, including his lack of reliance on Morgan Stanley in determining whether to vote to consummate the transaction.

17. Norman Ginstling (by deposition): Mr. Ginstling is a Senior Vice President of Taxation for MAFCO. Mr. Ginstling may testify to the matters to which he testified in his deposition in this case, including his professional background and experience with the tax consequences of differing types of mergers and acquisitions, MAFCO's history and experience conducting mergers and acquisitions, the tax consequences of the Sunbeam/Coleman merger, MAFCO's consideration of and decisions regarding hedging options for the Sunbeam stock, MAFCO's communications with Morgan Stanley in connection with the Sunbeam/Coleman merger, and the due diligence that MAFCO conducted in connection with the Sunbeam/Coleman merger.

18. Howard Gittis (live and/or by deposition): Mr. Gittis is a director and Vice Chairman and Chief Administrative Officer of MAFCO. Mr. Gittis also is a director and the Vice Chairman of CPH and a former director of Sunbeam. Mr. Gittis may testify to the matters to which he testified in his deposition in this case, including his background and experience, the background and history of Sunbeam's acquisition of Coleman, his involvement in that transaction, the negotiation of the transaction, the decision to enter into the transaction and factors influencing that decision, hedging, and the events leading up to the closing of the transaction.

19. Professor Mark Grinblatt (live): Professor Grinblatt may testify as an expert witness regarding compensatory damages. Professor Grinblatt will present his qualifications as an expert. Professor Grinblatt's opinions are disclosed in his report, supplemental report, and testimony in this matter.

20. Jeffrey Haas (live): Professor Haas is a professor at New York Law School. Professor Haas will testify regarding the ability of CPH to hedge the Sunbeam securities that it acquired as a result of the Sunbeam-Coleman merger, in light of the federal securities laws; the facts and circumstances of CPH's acquisition, including the lack of a right to name directors to the Sunbeam board under the acquisition agreement; and the Schedule 13G filing made by CPH, which reflects that, from the date of its acquisition of Sunbeam securities until June 16, 1998, CPH had no intention to control or influence the control of Sunbeam.

21. Lawrence Jones (by deposition): Mr. Jones is a former President and CEO of Coleman. In addition, he served as both a Director on Coleman's Board of Directors and a member of the Board's audit committee at the time of the events relevant to this dispute. Mr. Jones may testify to the matters to which he testified in his deposition, including his background and responsibilities at Coleman, the potential effects of the Sunbeam transaction on Coleman and its overall long-term success, the relationship between Coleman and MAFCO, the expertise of MAFCO senior management, the information that was provided to and reviewed by the Coleman Board of Directors prior to its approval of the Sunbeam transaction; and the information that the Board of Directors relied upon in deciding to approve the Sunbeam transaction.

22. Ann Jordan (by deposition): Ms. Jordan was a member of the Coleman Board of Directors at the time of the events relevant to this dispute. Ms. Jordan may testify to the matters to which she testified in her deposition, including meetings of the Coleman Board of Directors,

her role as a member of the Board of Directors, and her lack of reliance on Morgan Stanley in determining whether to vote for the transaction.

23. Jerry Levin (live): Mr. Levin is the former Chairman and Chief Executive Officer of Coleman and is currently Chairman and Chief Executive Officer of American Household, Inc. Mr. Levin may testify to the matters to which he testified in his deposition in this case, including his background and experience; the background and history of Sunbeam's acquisition of Coleman; the condition of Coleman during the time period relevant to the disputed issues in this case; the background and history of the transaction; his involvement in the transaction; the negotiation of the transaction; the decision to enter into the transaction and factors influencing that decision; his communications with Mr. Perelman, including communications concerning Sunbeam and about entering into the transaction; his interests in Coleman; the due diligence conducted by MAFCO; his interaction with Morgan Stanley in connection with the transaction; the events leading up to the closing of the transaction; post-closing events related to Sunbeam; and damages.

24. James Maher (live and/or by deposition): Mr. Maher is the former President of MAFCO Consolidated Group Inc. Mr. Maher may testify to the matters to which he testified in his deposition in this case, including his background and experience, MAFCO's history and experience conducting mergers and acquisitions and its use of advisors, the background and history of Sunbeam's acquisition of Coleman, his involvement in that transaction, the negotiation of the transaction, the decision to enter into the transaction and factors influencing that decision; due diligence conducted by MAFCO, his interaction with Morgan Stanley in connection with the transaction, the events leading up to the closing of the transaction, hedging, post-closing events related to Sunbeam, and damages.

25. John Moran (by deposition): At the time of the transaction, Mr. Moran was a member of the Coleman Board of Directors. Mr. Moran may testify to the matters to which he testified in his deposition in this case, including his business experience, his knowledge of Coleman's business, and factors influencing the Coleman Board of Directors' approval of the merger transaction between Sunbeam and Coleman.

26. William Nesbitt (live and/or by deposition): Mr. Nesbitt is a former Senior Vice President of MAFCO Consolidated Group Inc. Mr. Nesbitt may testify to the matters to which he testified in his deposition in this case, including his background and experience, the background and history of Coleman's acquisition of Sunbeam, his involvement in that transaction, MAFCO's history and experience conducting mergers and acquisitions and its use of advisors, due diligence conducted by MAFCO, the negotiation of the transaction, the decision to enter into the transaction and factors influencing that decision, the events leading up to the closing of the transaction, damages, and his interaction with analysts.

27. Joseph Page (by deposition): Mr. Page was Chief Financial Officer of Coleman at the time of the transaction. Mr. Page may testify to the matters to which he testified in his deposition in this case, including his background and experience in mergers and acquisitions and investment transactions, his role in the negotiations between the parties to the Sunbeam transaction, information presented during the negotiations, information considered by Coleman during the negotiations of the merger, matters relating to the March 19, 1998 Sunbeam press release, due diligence that was with respect to Sunbeam, and his knowledge of Morgan Stanley's participation in the Sunbeam transaction.

28. Ronald O. Perelman (live and/or by deposition): Mr. Perelman is the Chairman of the Board of Directors and Chief Executive Officer of MAFCO. He is also the Chairman of the

Board of Directors of CPH and a former director of Coleman. Mr. Perelman may testify to all issues that are disputed in this case, including the history, structure, and maintenance of his business empire, his acquisition and control of Coleman, the events leading up to the 1998 merger of Coleman and Sunbeam, the course of events at Sunbeam following the closing of the Coleman/Sunbeam merger, all facts relevant to his claim of reliance, and all facts relevant to his claim for damages and for punitive damages.

29. Arthur H. Rosenbloom (live): Mr. Rosenbloom may testify as an expert witness. Mr. Rosenbloom will present his qualifications as an expert. Mr. Rosenbloom's opinions are disclosed in his report, supplemental report, and testimony in this matter.

30. Joram Salig (by deposition): Mr. Salig was the Vice President of Law for MAFCO. Mr. Salig may testify to the matters to which he testified in his deposition in this case, including his professional background and experience with mergers and acquisitions. He may testify regarding MAFCO's history and experience conducting mergers and acquisitions. He may testify regarding MAFCO's historic due diligence practices and due diligence procedures in connection with the Sunbeam/Coleman merger. He may testify regarding the confidentiality agreements relating to the Sunbeam/Coleman merger. He may testify regarding his lack of interaction with Morgan Stanley in connection with the Sunbeam/Coleman merger.

31. Barry Schwartz (live): Mr. Schwartz is the Executive Vice President and General Counsel of MAFCO and the General Counsel of CPH. His testimony may include his background and experience in mergers and acquisitions and investment transactions, his background and responsibilities within the MAFCO organization, a description of board meetings in which the Sunbeam transaction was considered, his approval and signing of the merger agreements, descriptions of meetings and communications in connection with the

Sunbeam transaction, the hiring of advisors to assist in the transaction and the role of those advisors, communications with the advisors to Coleman and Sunbeam, information relied on by CPH in the course of the transaction, and damages.

32. Paul Shapiro (live): Mr. Shapiro was Vice President and General Counsel of Coleman Company from July 1, 1997 to March 31, 1998. From June 1998 to July 2001, Mr. Shapiro served as Executive Vice President and Chief Administrative Officer of Sunbeam. Mr Shapiro's testimony may include his role in the transaction, his participation in due diligence of Sunbeam, and the fairness opinion presented by CSFB.

33. Todd Slotkin (live and/or by deposition): Mr. Slotkin is the Chief Financial Officer and Executive Vice President of MAFCO. Mr. Slotkin may testify to the matters to which he testified in his deposition, including his professional background and experience with debt transactions and mergers and acquisitions; MAFCO's history and experience conducting mergers and acquisitions; MAFCO and/or Coleman's credit agreements and loan obligations existing in the 1997-1998 timeframe; MAFCO's finances and financial statements for fiscal years 1997 and 1998, including its accounting for its Sunbeam and Coleman holdings; MAFCO's process of establishing "estimated fair values" for its investments and its valuation of its Sunbeam holdings; pledging arrangements relating to MAFCO's Coleman and/or Sunbeam stock holdings; hedging options for Sunbeam stock, and decisions made regarding such hedging options; communications between MAFCO and Morgan Stanley in connection with the Sunbeam/Coleman merger; and damages.

34. Bruce Slovin (by deposition): Mr. Slovin was a member of Coleman board of directors at the time of the transaction. Mr. Slotkin may testify to the matters to which he testified in his deposition, including his background and experience in mergers and acquisitions

and investment transactions, his background and responsibilities within the MAFCO organization, the Coleman board meetings in which the Sunbeam transaction was discussed and approved, the information considered and relied upon by the Board in approving the transaction, and matters relating to the March 19, 1998 Sunbeam press release.

35. Laurence Winoker (live and/or by deposition): Mr. Winoker is Senior Vice President, Controller, and Treasurer of MAFCO. Mr. Winoker may testify to the matters to which he testified in his deposition, including MAFCO's internal valuation of its Sunbeam investment including the value CPH placed on the warrants, and the lack of contact between MAFCO and Morgan Stanley regarding this transaction.

36. Kevin G. Woodruff (live): Mr. Woodruff is a managing director at Morgan Stanley. He manages the equity derivatives business and works in the Global Capital Markets Division. Mr. Woodruff may testify concerning those financial transactions that would, at the time of the events relevant to this dispute, have allowed CPH to realize current value from its holdings of Sunbeam stock while still retaining ownership of the shares.

II. Morgan Stanley Punitive Damages Defense Case (Phase II)

Morgan Stanley may call any witness disclosed above to testify in Phase II regarding any matter relating to Morgan Stanley's liability for punitive damages, including the degree of Morgan Stanley's alleged misconduct and the related circumstances; the relative experience, sophistication, and access to relevant information of the parties; and the degree of CPH's alleged injury and the degree of CPH's reliance on Sunbeam, its auditors, and Morgan Stanley.

1. Joseph D'Auria (live and/or by deposition): Mr. D'Auria is an Executive Director at Morgan Stanley. Mr. D'Auria may testify to those matters to which he testified in his

deposition in this case, including the assets and resources available to Morgan Stanley to satisfy a judgment for punitive damages.

2. Donald Denkhaus (live and/or by deposition): Mr. Denkhaus was a partner at Arthur Anderson during the relevant time period. Mr. Denkhaus may testify to the matters to which he testified in his deposition in this case, and he may testify regarding the nature, extent, and degree of Morgan Stanley's alleged misconduct and the related circumstances; the relative experience, sophistication, and access to relevant information of the parties; the degree of CPH's alleged injury and the degree of CPH's reliance on Sunbeam, its auditors, and Morgan Stanley; and whether Morgan Stanley is liable for punitive damages

3. Rob Jones (live): Mr. Jones is the Corporate Representative of Morgan Stanley. Mr. Jones may testify to matters relating to Morgan Stanley's liability for punitive damages, including information about the defendant, factors in mitigation, and the affect of a punitive damages award on the defendant.

4. Tarek Abdel-Meguid (live and/or by deposition): Mr. Meguid is the Global Head of Investment Banking at Morgan Stanley. Mr. Meguid may testify to those matters to which he testified in his deposition in this case, and he may testify regarding the nature, extent, and degree of Morgan Stanley's alleged misconduct and the related circumstances; the relative experience, sophistication, and access to relevant information of the parties; the degree of CPH's alleged injury and the degree of CPH's reliance on Sunbeam, its auditors, and Morgan Stanley; whether Morgan Stanley is liable for punitive damages; and his evaluation(s) of William Strong and William Strong's performance at Morgan Stanley.

5. Joseph Perella (live and/or by deposition): Mr. Perella is the Vice Chairman of the parent holding company of Morgan Stanley and former Chairman Institutional Securities at

Morgan Stanley. Mr. Perella may testify to those matters to which he testified in his deposition in this case, and he may testify to the nature, extent, and degree of Morgan Stanley's alleged misconduct and the related circumstances; the relative experience, sophistication, and access to relevant information of the parties; the degree of CPH's alleged injury and the degree of CPH's reliance on Sunbeam, its auditors, and Morgan Stanley; whether Morgan Stanley is liable for punitive damages; and his evaluation(s) of William Strong and William Strong's performance at Morgan Stanley.

6. Ruth Porat (live and/or by deposition): Ms. Porat is a Managing Director in the Investment Banking Division at Morgan Stanley. Ms. Porat may testify to those matters to which she testified in her deposition in this case, and she may testify to the nature, extent, and degree of Morgan Stanley's alleged misconduct and the related circumstances; the relative experience, sophistication, and access to relevant information of the parties; the degree of CPH's alleged injury and the degree of CPH's reliance on Sunbeam, its auditors, and Morgan Stanley; whether Morgan Stanley is liable for punitive damages; and her evaluation(s) of William Strong and William Strong's performance at Morgan Stanley.

7. Robert Scott (by deposition): Mr. Scott is an advisory director at Morgan Stanley. Mr. Scott may testify to those matters to which he testified in his deposition in this case, and he may testify to the nature, extent, and degree of Morgan Stanley's alleged misconduct and the related circumstances; the relative experience, sophistication, and access to relevant information of the parties; the degree of CPH's alleged injury and the degree of CPH's reliance on Sunbeam, its auditors, and Morgan Stanley; whether Morgan Stanley is liable for punitive damages; and his evaluation(s) of William Strong and William Strong's performance at Morgan Stanley.

8. William Strong (live and/or by deposition): Mr. Strong is a Managing Director in Morgan Stanley's Investment Banking Division. Mr. Strong may testify on the matters to which he testified in his deposition, and he may testify regarding the nature, extent, and degree of Morgan Stanley's alleged misconduct and the related circumstances; the relative experience, sophistication, and access to relevant information of the parties; the degree of CPH's alleged injury and the degree of CPH's reliance on Sunbeam, its auditors, and Morgan Stanley; whether Morgan Stanley is liable for punitive damages; and his own employment evaluations.

9. John Tyree (live and/or by deposition): Mr. Tyree was a member of the Morgan Stanley Client Services Group during the relevant time period. Mr. Tyree may testify to the matters to which he testified in his deposition in this case, and he may testify regarding the nature, extent, and degree of Morgan Stanley's alleged misconduct and the related circumstances; the relative experience, sophistication, and access to relevant information of the parties; the degree of CPH's alleged injury and the degree of CPH's reliance on Sunbeam, its auditors, and Morgan Stanley; and whether Morgan Stanley is liable for punitive damages.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 4th day of April 2005.

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02780

IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA
CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

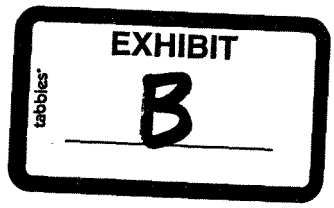
vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 29
PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Thursday, March 10, 2005
Palm Beach County Courthouse
Courtroom 11-A
205 North Dixie Highway
West Palm Beach, Florida 33401
9:30 a.m. to 12:15 p.m.



16div-015105

MS. BROWN: On 67 he also testifies that he did not visit any data rooms.

THE COURT: Does he ever opine that it's customary practice to visit data rooms?

MS. BROWN: I don't believe he was asked that question.

I think, Your Honor, that you have to take this testimony in context with what other people say. He's not the only one that will be testifying about what sort of due diligence CSFB or Coleman (Parent) Holdings had done in instances where they were accepting stock.

THE COURT: Sure. But to the extent he's not designated as an expert, all we're talking about is his personal opinion on what he generally does, what's customary to him. And, again, that's not relevant unless you can show he deviated from that practice here.

MS. BROWN: When he says that he would do due diligence to better understand the business of the company and that he thinks it's a good idea to conduct due diligence, when the jury looks at what due diligence was actually done or, more importantly in this case, not done, I think that they can find that that due diligence

THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
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PLAINTIFF'S MOTION *IN LIMINE* NO. 36 TO CLARIFY WHAT EVIDENCE IS ADMISSIBLE TO SHOW PLAINTIFF'S ENTITLEMENT TO AND AMOUNT OF PUNITIVE DAMAGES

Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, respectfully submits this motion seeking clarification of which categories of evidence and argument are permissible in Phase II of the bifurcated trial to show CPH's entitlement to punitive damages and to show the appropriate amount of punitive damages.[1] In particular, CPH asks the Court to clarify that the admissible evidence in Phase II includes: (1) the fact that the wrongful conduct of Morgan Stanley toward CPH also was injurious to the public, (2) the fact that Morgan Stanley has engaged in similar fraudulent conduct in the past, and (3) the fact that Morgan Stanley engaged in litigation misconduct, which in turn constitutes evidence of consciousness of guilt, refusal to accept responsibility for wrongful conduct and lack of remorse, ratification by management, the number and level of persons involved in the wrongdoing, the duration of the cover-up, as well as ongoing efforts at concealment. In addition, CPH respectfully submits that it should be allowed

[1] CPH previously filed its Motion in Limine No. 28 addressing many of these same issues in the context of a more traditional bifurcation with the determination of entitlement to punitive damages in Phase I. Because the bifurcation was later altered to move the entitlement issue to Phase II, the earlier motion was never answered by Morgan Stanley nor addressed by the Court.

to introduce evidence of defendant's ability to pay, including showing the net worth of both Morgan Stanley & Co. and its parent Morgan Stanley.

Argument

The Florida Supreme Court articulated several factors a jury should consider in making a punitive damages determination in *Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483, 484-85 (Fla. 1999). Relevant to a jury's determination of the amount of punitive damages are:

> (1) an amount reasonable in relation to the harm likely to result from defendant's conduct as well as the harm that actually has occurred;
>
> (2) the degree of reprehensibility of defendant's conduct, the duration of that harmful conduct, defendant's awareness, any concealment and the existence and frequency of similar past conduct;
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> (3) the profitability to defendant of the wrongful conduct and the desirability of removing that profit and of having defendant also sustain a loss;
>
> (4) the financial condition of defendant and the probable effect thereon of a particular judgment;
>
> (5) all the costs of litigation to defendant and to the plaintiff;
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> (6) the total punishment defendant has or will probably receive from other sources, as a mitigating factor;
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> (7) the seriousness of the hazard to the public, the attitude and conduct of defendant upon discovery of the misconduct;
>
> (8) the degree of defendant's awareness of the hazard and of its excessiveness;
>
> (9) the number and level of employees involved in causing or covering up the misconduct;
>
> (10) the duration of both the improper behavior and its cover-up; and
>
> (11) the existence of other civil awards against defendant for the same conduct.

Id. (describing trial court's jury instruction); *see also id.* at 487 ("Initially, we note that before submitting the case to the jury, the trial court properly instructed the jury on a number of relevant

factors it could consider in aggravation and mitigation in determining what, if any, amount of punitive damages to impose."); *see also Johns-Manville Sales Corp. v. Janssens*, 463 So. 2d 242, 248 (Fla. 1st DCA 1984) (discussing similar factors).

These factors should serve as a guide to determining what evidence is permissible in Phase II.

I. CPH Is Entitled To Offer Evidence That Shows the Harmfulness and Wrongfulness of Morgan Stanley's Conduct.

CPH is entitled to introduce any evidence that will assist the jury's assessment of the harmful and wrongful nature of Morgan Stanley's conduct. This includes evidence showing (1) that Morgan Stanley's conduct harmed not only CPH, but also the investing public, (2) that Morgan Stanley has engaged in similar fraudulent conduct in the past, (3) the nature and extent of litigation misconduct in this case as evidence of consciousness of guilt, refusal to accept responsibility for wrongful conduct and lack of remorse, ratification by management, the number and level of persons involved in the wrongdoing, the duration of the cover-up, as well as ongoing efforts at concealment.

A. Evidence Showing Morgan Stanley's Disregard for the Welfare of the Public Is Admissible.

On February 24, 2005, the Court held a hearing on Morgan Stanley's motion to strike certain paragraphs of CPH's first amended complaint. At that hearing, Morgan Stanley argued that certain references to harms to the investing public should be stricken from CPH's amended complaint because "we don't want to be trying this case on the basis that somehow this was a fraud on the public or investors in Florida. The question here is were we defrauding Coleman." Ex. A, 2/24/05 Tr. at 1629. The Court granted, in part, Morgan Stanley's motion, striking some but not all of the references to the investing public from CPH's amended complaint. *See* Ex. B,

2/28/05 Am. Order. At the hearing, CPH argued that the "magnitude of the wrong is a relevant consideration in making a determination as to whether and to what extent punitive damages are justified." Ex. A, 2/24/05 Tr. at 1629. Morgan Stanley agreed with that statement. *See id.* Nevertheless, there was some disagreement about whether Morgan Stanley's conduct constituted a public wrong and, if so, in which phase or phases of the trial evidence regarding the public nature of the harm would be admissible.[2]

Under Florida law, the defendant's conduct toward the public is indeed a relevant consideration in awarding punitive damages. *See* Florida Standard Civil Jury Instruction PD-1(a)(2)(a)(3) (2003) (regarding liability for punitive damages for pre-October 1, 1999 causes of action, punitive damages are warranted if the jury finds by clear and convincing evidence that "the conduct showed such an entire lack of care that the defendant must have wantonly or recklessly disregarded the safety and welfare of the public"). "Because punitive damages are awarded to redress private injuries inflicted which partake of public wrongs, '[t]hey are to be measured by the enormity of the offense, entirely aside from the measure of compensation for the injured plaintiff.'" *Wransky v. Dalfo*, 801 So. 2d 239, 242 (Fla. 4th DCA 2001) (emphasis added) (quoting *Arab Termite & Pest Control of Fla., Inc. v. Jenkins*, 409 So. 2d 1039, 1043 (Fla.1982)); *see also American Cyanamid Co. v. Roy*, 498 So. 2d 859, 861 (Fla. 1987) (punitive damages are "'reserved to those kinds of cases where private injuries partake of public wrongs'" (quoting *Ingram v. Pettit*, 340 So. 2d 922, 923-24 (Fla. 1976)); *Zuckerman v. Robinson*, 846 So. 2d 1257, 1258 (Fla. 4th DCA 2003) ("punitive damages are premised on the enormity of the act resulting in the injury to plaintiff").

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[2] On April 5, 2005, the Court denied CPH's *ore tenus* motion to allow introduction of evidence of third party purchases of Sunbeam shares or debentures to establish one of the reasons why CPH relied on fraudulent misrepresentations. *See* Ex. C. The Court's Order did not address the relevance of this evidence to show CPH's entitlement to punitive damages.

Here, Morgan Stanley aided, abetted, and conspired with Sunbeam in perpetrating on CPH and the investing public one of the biggest securities frauds of the twentieth century. Through a series of "road shows," in its debenture-offering documents, and in the press release that Morgan Stanley helped Sunbeam draft, Morgan Stanley told CPH and the investing public, including investors in Florida, that Sunbeam's turnaround was a success, that Sunbeam's sales for the first quarter of 1998 were ahead of the expectations of outside financial analysts, and that Sunbeam was poised for record sales. Morgan Stanley knew all of this to be false. One example of third parties injured by Morgan Stanley are the investors who held the remaining 18% of The Coleman Company's stock, who, like Coleman, received Sunbeam stock and were similarly defrauded by Morgan Stanley and Sunbeam. *See* Ex. D, CPH Tr. Ex. 342 (Credit Suisse First Boston fairness opinion).

Under the standards set forth above, such a broad-based securities fraud constitutes a public wrong and the harm to the public should be considered in awarding punitive damages, even though the action was brought by a single victim. Because it is aimed at the public generally, thereby multiplying the "enormity of the offense," securities fraud is the quintessential public wrong. That is why Florida law recognizes that punitive damages are available to plaintiffs in common law fraud cases involving sale of securities, even though such damages are unavailable under federal securities laws. *See Stowell v. Ted S. Finkel Inv. Servs.*, 489 F. Supp. 1209, 1217 (S.D. Fla. 1980), *aff'd* 641 F.2d 323 (5th Cir. 1981) (declining to exercise pendent jurisdiction over plaintiff's common law securities fraud claim because punitive damages were available to plaintiff under Florida law but not federal law).

Under Florida law, even where the injury was inflicted only on the plaintiff, the jury is authorized to consider the fact that the defendant's conduct risked harm to others – *i.e.* that it

exhibited "'wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public.'" *White Constr. Co. v. Dupont*, 455 So. 2d 1026, 1029 (Fla. 1984) (discussing standard for imposition of punitive damages) (quoting *Carraway v. Revell*, 116 So. 2d 16, 20 n.12 (Fla. 1959)) (emphasis added). *A fortiori*, actual harm to the public may be considered as well. That a plaintiff may recover punitive damages based on the entire scope of the defendant's harm – and not just the portion of harm done to plaintiff – makes eminent sense, because "[u]nder Florida law, the purpose of punitive damages is not to further compensate the plaintiff, but to punish the defendant for its wrongful conduct and to deter similar misconduct by it and other actors in the future." *Owens-Corning*, 749 So. 2d at 486. The concern is unfounded that in a case involving multiple victims, any reference to victims other than the plaintiff gives rise to the possibility that a defendant could be punished repeatedly and excessively for the same act. That very concern is the reason why a defendant is permitted to introduce evidence of prior punitive damage awards relating to the same transaction as mitigating evidence in the second phase of a bifurcated proceeding. *Dessanti*, 695 So. 2d at 846.

B. Evidence of Morgan Stanley's Similar Misconduct In Other Cases Is Admissible.

The evidence admissible in Phase II also would include evidence showing that Morgan Stanley has previously engaged in similar fraudulent conduct involving assisting clients to sell companies or securities in a fraudulent manner. *See Owens-Corning*, 749 So. 2d at 484-85 (noting that a factor for the jury's consideration is "the degree of reprehensibility of [defendant's] conduct, the duration of that harmful conduct, [defendant's] awareness, any concealment and the existence and frequency of similar past conduct") (emphasis added). To the extent CPH can establish such similar prior acts by competent evidence, that evidence is

admissible to show that the events in this case were not a single deviation from lawfulness but that Morgan Stanley acted with full knowledge and intent to defraud CPH.

Under Florida law, Morgan Stanley's prior bad acts can come in because "[s]imilar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." FLA. STAT. § 90.404(2)(a); *see also Mitchell v. State*, 491 So. 2d 596, 598 (Fla. 1st DCA 1986) (noting that the statutory list is not exhaustive). Florida courts consistently have held that similar prior bad acts are admissible if those acts go to show that the defendant acted with the knowledge, intent, and malice that support imposition of punitive damages. *See, e.g., CSX Trans., Inc. v. Palank*, 743 So. 2d 556, 559-60 (Fla. 4th DCA 1999) (evidence regarding prior deficiencies in railroad's staffing and inspection practices was "sufficient to support a jury finding . . . for an award of punitive damages"); *Gulf Power Co. v. Kay*, 493 So. 2d 1067, 1075 (Fla. 1st DCA 1986) (evidence of previous accidents at the same location could be admissible to show "the gross and flagrant negligence required to support the award of punitive damages," if the prior incidents were adequately similar); *Smith v. Telophase Nat. Cremation Soc., Inc.*, 471 So. 2d 163, 166 (Fla. 2d DCA 1985) (evidence of the past conduct, practices and policies on part of cremation society was relevant as bearing on whether conduct could be characterized by jury as extreme and outrageous warranting punitive damages); *Clooney v. Geeting*, 352 So. 2d 1216, 1220 (Fla. 2d DCA 1977) (defendant's past driving record would be admissible if plaintiff had submitted proper claim for punitive damages).

There are, however, constitutional limits on what the jury can consider. Under the United States Supreme Court's opinion in *State Farm Mutual Insurance Co. v. Campbell*, 538 U.S. 408,

418-19 (2003), evidence of a defendant's other bad acts may be considered by the jury because that evidence goes to show the degree of reprehensibility of the misconduct. The jury can consider Morgan Stanley's other bad acts as evidence of Morgan Stanley's recidivism or its intentional malice, trickery, or deceit. *See id.* Morgan Stanley's prior bad acts must be "similar," but "evidence of other acts need not be identical." *Id.* at 424. As the *State Farm* court made clear, evidence of the defendant's actions in other jurisdictions "may be probative" in assessing the degree of reprehensibility of the defendant's conduct. *Id.* at 422.

C. Evidence of Litigation Misconduct Is Admissible.

Also relevant to a determination of entitlement to punitive damages and the proper amount is the pattern of covering up fraud that Morgan Stanley has engaged in during this and other cases. As this Court's March 1, 2005 Order recognized, Morgan Stanley's concealment of its role in the Sunbeam transaction is "evidence of its malice or evil intent, going to the issue of punitive damages." *See* Ex. E, 3/1/05 Order at 14 (citing *General Motors Corp. v. McGee*, 837 So. 2d 1010, 1035 (Fla. 4th DCA 2003) ("[e]vidence of 'concealment of offensive conduct after it initially occurred is indicative of malice or evil intent sufficient to support punitive damages.'" (citation omitted))). Thus, as this Court noted, CPH will be allowed to introduce evidence of Morgan Stanley's discovery misconduct throughout this case to the extent that this conduct shows Morgan Stanley's attempts to conceal its actions in aiding-and-abetting and conspiring with Sunbeam. *Id.; see also* Ex. F (April 5, 2005 Order Partially Granting Reconsideration, which held that the litigation conduct statement read to the jury will be limited to evidence of concealment).

II. Financial Information Is Admissible to Determine Amount of Punitive Damages.

Once the jury has determined that CPH has established Morgan Stanley's entitlement for punitive damages, the next question concerns the amount of punitive damages. At that point, the jury considers "the degree of 'malice, wantonness, oppression, or outrage' demonstrated by the evidence in the case." *Humana Health Ins. Co. v. Chipps*, 802 So. 2d 492, 496 (Fla. 4th DCA 2001). As the Florida Supreme Court has characterized it:

> The jury's major duty in determining the amount of punitive damages is to assess the appropriate degree of punishment to be imposed on the defendant commensurate with the enormity of the offense; the defendant's financial position is only one factor to be considered by the jury. Other factors which the jury may consider include "the nature, extent and enormity of the wrong, the intent of the party committing it and all circumstances attending the particular incident, as well as any mitigating circumstances."

St. Regis Paper Co. v. Watson, 428 So. 2d 243, 246-47 (Fla. 1983) (internal citations omitted) (quoting *Rinaldi v. Aaron*, 314 So. 2d 762, 763 (Fla. 1975)).

It follows that the jury determining the amount of punitive damages should give considerable weight to the evidence already in the trial record relating to the harmfulness and wrongfulness of the defendant's conduct as it affected both the plaintiff and the public, taking into account other prior similar conduct by the defendant. But there are two additional issues that are properly considered — the defendant's ability to pay, and prior punitive awards based on the same conduct, which may constitute a mitigating factor. *Dessanti*, 695 So. 2d at 847.

Morgan Stanley has argued in its motion *in limine* no. 5 to bar evidence of net worth, which this Court deferred addressing on February 23, that financial information is not relevant to a determination of punitive damages. This is clearly false. As is more fully set out in CPH's response to Morgan Stanley's motion *in limine*, under Florida law, information about a defendant's financial condition is highly relevant to setting the appropriate level of punitive

damages. *See, e.g., Liggett Group Inc. v. Engle*, 853 So. 2d 434, 457 n.28 (Fla. 3d DCA 2003) ("Florida courts routinely use net worth to determine whether a punitive award is bankrupting or excessive.") (citing cases dating from 1961 to 2002), *rev. granted*, 873 So. 2d 1222 (Fla. 2004). As the *Liggett Group* court explained: "A defendant's financial capacity is a crucial factor in determining the appropriateness of a punitive damages award. The amount awarded should be large enough to provide retribution and deterrence, but cannot be so great as to result in bankruptcy." *Id.* at 458.

Thus, in Phase II of the trial, although Morgan Stanley has already conceded its ability to pay a punitive damages award three times as large as the compensatory damages CPH is seeking (*see* Ex. G, 12/3/04 Tr. at 74-75), CPH intends to introduce evidence of Morgan Stanley's net worth and ability to pay punitive damages (subject, of course, the Court's ruling on Morgan Stanley's motion *in limine* no. 5). That evidence will address the financial situation of both defendant Morgan Stanley & Co. and its parent Morgan Stanley.

Florida law is clear that when considering the defendant's ability to pay, "financial resources is a general term which includes, but is not limited to, net worth. It encompasses many capabilities and potentials other than naked assets and liabilities." *International Union of Operating Engineers, Local 675 v. Lassiter*, 295 So.2d 634, 644 (Fla. 4th DCA 1974) (emphasis added), *quashed on other grounds*, 314 So. 2d 761 (Fla.), *rev'd and remanded on other grounds*, 325 So. 2d 408 (Fla. 4th DCA 1975), *quashed and judgment entered by trial court reinstated*, 349 So. 2d 622 (Fla. 1976); *see also Donahue v. Herbert*, 355 So. 2d 1264, 1265-66 (Fla. 4th DCA 1978) (discussing breadth of discovery into a defendant's financial resources in punitive damages cases). That is why Florida courts routinely consider not only the assets of the defendant, but also the resources available to the defendant through its parent company. *See,*

e.g., Humana Health Ins. Co. v. Chipps, 802 So. 2d 492, 497 (Fla. 4th DCA 2001) (upholding the admission into evidence of defendant's $1.7 billion indemnity agreement with its parent company because "[t]he purpose of punitive damages are served by awarding a sum of money from the defendant which, according to the defendant's financial ability, will hurt but not bankrupt that defendant"); *Wynn Oil Co. v. Purolator Chemical Corp.*, 403 F. Supp. 226, 232 (M.D. Fla. 1974) (considering the parent company's resources in evaluating the reasonableness of a punitive damages award assessed against its subsidiary).

Consideration of the resources available to a defendant through its parent company makes eminent sense because "[i]f we did not allow trial judges in their sound discretion to admit evidence of the worth of parent corporations, corporations could escape liability simply by incorporating separate departments as a number of undercapitalized subsidiaries." *TXO Prod. Corp. v. Alliance Resources Corp.*, 419 S.E. 870, 890 (W. Va. 1992). Because it is clear that the resources of Morgan Stanley are available to Morgan Stanley & Co., Inc., these resources should be considered by they jury in determining an amount of damages that are "painful enough to provide some retribution and deterrence, but [do not] destroy the defendant." *Arab Termite & Pest Control of Fla., Inc. v. Jenkins*, 409 So. 2d 1039, 1043 (Fla. 1982).

Conclusion

For the foregoing reasons, CPH respectfully requests that this Court issue an Order clarifying which categories of evidence and argument are permissible in Phase I of the bifurcated

trial to show CPH's entitlement to punitive damages and which categories are permissible in Phase II to show the amount of punitive damages.

Dated: April 18, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 18th day of April, 2005.

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A. Evidence Showing Morgan Stanley's Disregard for the Welfare of the Public Is Admissible.

On February 24, 2005, the Court held a hearing on Morgan Stanley's motion to strike certain paragraphs of CPH's first amended complaint. At that hearing, Morgan Stanley argued that certain references to harms to the investing public should be stricken from CPH's amended complaint because "we don't want to be trying this case on the basis that somehow this was a fraud on the public or investors in Florida. The question here is were we defrauding Coleman." Ex. A, 2/24/05 Tr. at 1629. The Court granted, in part, Morgan Stanley's motion, striking some but not all of the references to the investing public from CPH's amended complaint. *See* Ex. B,

2/28/05 Am. Order. At the hearing, CPH argued that the "magnitude of the wrong is a relevant consideration in making a determination as to whether and to what extent punitive damages are justified." Ex. A, 2/24/05 Tr. at 1629. Morgan Stanley agreed with that statement. *See id.* Nevertheless, there was some disagreement about whether Morgan Stanley's conduct constituted a public wrong and, if so, in which phase or phases of the trial evidence regarding the public nature of the harm would be admissible.[2]

Under Florida law, the defendant's conduct toward the public is indeed a relevant consideration in awarding punitive damages. *See* Florida Standard Civil Jury Instruction PD-1(a)(2)(a)(3) (2003) (regarding liability for punitive damages for pre-October 1, 1999 causes of action, punitive damages are warranted if the jury finds by clear and convincing evidence that "the conduct showed such an entire lack of care that the defendant must have wantonly or recklessly disregarded the safety and welfare of the public"). "Because punitive damages are awarded to redress private injuries inflicted which partake of public wrongs, '[t]hey are to be measured by the enormity of the offense, entirely aside from the measure of compensation for the injured plaintiff.'" *Wransky v. Dalfo*, 801 So. 2d 239, 242 (Fla. 4th DCA 2001) (emphasis added) (quoting *Arab Termite & Pest Control of Fla., Inc. v. Jenkins*, 409 So. 2d 1039, 1043 (Fla.1982)); *see also American Cyanamid Co. v. Roy*, 498 So. 2d 859, 861 (Fla. 1987) (punitive damages are "'reserved to those kinds of cases where private injuries partake of public wrongs'" (quoting *Ingram v. Pettit*, 340 So. 2d 922, 923-24 (Fla. 1976)); *Zuckerman v. Robinson*, 846 So. 2d 1257, 1258 (Fla. 4th DCA 2003) ("punitive damages are premised on the enormity of the act resulting in the injury to plaintiff").

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[2] On April 5, 2005, the Court denied CPH's *ore tenus* motion to allow introduction of evidence of third party purchases of Sunbeam shares or debentures to establish one of the reasons why CPH relied on fraudulent misrepresentations. *See* Ex. C. The Court's Order did not address the relevance of this evidence to show CPH's entitlement to punitive damages.

Here, Morgan Stanley aided, abetted, and conspired with Sunbeam in perpetrating on CPH and the investing public one of the biggest securities frauds of the twentieth century. Through a series of "road shows," in its debenture-offering documents, and in the press release that Morgan Stanley helped Sunbeam draft, Morgan Stanley told CPH and the investing public, including investors in Florida, that Sunbeam's turnaround was a success, that Sunbeam's sales for the first quarter of 1998 were ahead of the expectations of outside financial analysts, and that Sunbeam was poised for record sales. Morgan Stanley knew all of this to be false. One example of third parties injured by Morgan Stanley are the investors who held the remaining 18% of The Coleman Company's stock, who, like Coleman, received Sunbeam stock and were similarly defrauded by Morgan Stanley and Sunbeam. *See* Ex. D, CPH Tr. Ex. 342 (Credit Suisse First Boston fairness opinion).

Under the standards set forth above, such a broad-based securities fraud constitutes a public wrong and the harm to the public should be considered in awarding punitive damages, even though the action was brought by a single victim. Because it is aimed at the public generally, thereby multiplying the "enormity of the offense," securities fraud is the quintessential public wrong. That is why Florida law recognizes that punitive damages are available to plaintiffs in common law fraud cases involving sale of securities, even though such damages are unavailable under federal securities laws. *See Stowell v. Ted S. Finkel Inv. Servs.*, 489 F. Supp. 1209, 1217 (S.D. Fla. 1980), *aff'd* 641 F.2d 323 (5th Cir. 1981) (declining to exercise pendent jurisdiction over plaintiff's common law securities fraud claim because punitive damages were available to plaintiff under Florida law but not federal law).

Under Florida law, even where the injury was inflicted only on the plaintiff, the jury is authorized to consider the fact that the defendant's conduct risked harm to others – *i.e.* that it

exhibited "'wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public.'" *White Constr. Co. v. Dupont*, 455 So. 2d 1026, 1029 (Fla. 1984) (discussing standard for imposition of punitive damages) (quoting *Carraway v. Revell*, 116 So. 2d 16, 20 n.12 (Fla. 1959)) (emphasis added). *A fortiori*, actual harm to the public may be considered as well. That a plaintiff may recover punitive damages based on the entire scope of the defendant's harm – and not just the portion of harm done to plaintiff – makes eminent sense, because "[u]nder Florida law, the purpose of punitive damages is not to further compensate the plaintiff, but to punish the defendant for its wrongful conduct and to deter similar misconduct by it and other actors in the future." *Owens-Corning*, 749 So. 2d at 486. The concern is unfounded that in a case involving multiple victims, any reference to victims other than the plaintiff gives rise to the possibility that a defendant could be punished repeatedly and excessively for the same act. That very concern is the reason why a defendant is permitted to introduce evidence of prior punitive damage awards relating to the same transaction as mitigating evidence in the second phase of a bifurcated proceeding. *Dessanti*, 695 So. 2d at 846.

B. Evidence of Morgan Stanley's Similar Misconduct In Other Cases Is Admissible.

The evidence admissible in Phase II also would include evidence showing that Morgan Stanley has previously engaged in similar fraudulent conduct involving assisting clients to sell companies or securities in a fraudulent manner. *See Owens-Corning*, 749 So. 2d at 484-85 (noting that a factor for the jury's consideration is "the degree of reprehensibility of [defendant's] conduct, the duration of that harmful conduct, [defendant's] awareness, any concealment and the existence and frequency of similar past conduct") (emphasis added). To the extent CPH can establish such similar prior acts by competent evidence, that evidence is

admissible to show that the events in this case were not a single deviation from lawfulness but that Morgan Stanley acted with full knowledge and intent to defraud CPH.

Under Florida law, Morgan Stanley's prior bad acts can come in because "[s]imilar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." FLA. STAT. § 90.404(2)(a); *see also Mitchell v. State*, 491 So. 2d 596, 598 (Fla. 1st DCA 1986) (noting that the statutory list is not exhaustive). Florida courts consistently have held that similar prior bad acts are admissible if those acts go to show that the defendant acted with the knowledge, intent, and malice that support imposition of punitive damages. *See, e.g., CSX Trans., Inc. v. Palank*, 743 So. 2d 556, 559-60 (Fla. 4th DCA 1999) (evidence regarding prior deficiencies in railroad's staffing and inspection practices was "sufficient to support a jury finding . . . for an award of punitive damages"); *Gulf Power Co. v. Kay*, 493 So. 2d 1067, 1075 (Fla. 1st DCA 1986) (evidence of previous accidents at the same location could be admissible to show "the gross and flagrant negligence required to support the award of punitive damages," if the prior incidents were adequately similar); *Smith v. Telophase Nat. Cremation Soc., Inc.*, 471 So. 2d 163, 166 (Fla. 2d DCA 1985) (evidence of the past conduct, practices and policies on part of cremation society was relevant as bearing on whether conduct could be characterized by jury as extreme and outrageous warranting punitive damages); *Clooney v. Geeting*, 352 So. 2d 1216, 1220 (Fla. 2d DCA 1977) (defendant's past driving record would be admissible if plaintiff had submitted proper claim for punitive damages).

There are, however, constitutional limits on what the jury can consider. Under the United States Supreme Court's opinion in *State Farm Mutual Insurance Co. v. Campbell*, 538 U.S. 408,

418-19 (2003), evidence of a defendant's other bad acts may be considered by the jury because that evidence goes to show the degree of reprehensibility of the misconduct. The jury can consider Morgan Stanley's other bad acts as evidence of Morgan Stanley's recidivism or its intentional malice, trickery, or deceit. *See id.* Morgan Stanley's prior bad acts must be "similar," but "evidence of other acts need not be identical." *Id.* at 424. As the *State Farm* court made clear, evidence of the defendant's actions in other jurisdictions "may be probative" in assessing the degree of reprehensibility of the defendant's conduct. *Id.* at 422.

C. Evidence of Litigation Misconduct Is Admissible.

Also relevant to a determination of entitlement to punitive damages and the proper amount is the pattern of covering up fraud that Morgan Stanley has engaged in during this and other cases. As this Court's March 1, 2005 Order recognized, Morgan Stanley's concealment of its role in the Sunbeam transaction is "evidence of its malice or evil intent, going to the issue of punitive damages." *See* Ex. E, 3/1/05 Order at 14 (citing *General Motors Corp. v. McGee*, 837 So. 2d 1010, 1035 (Fla. 4th DCA 2003) ("[e]vidence of 'concealment of offensive conduct after it initially occurred is indicative of malice or evil intent sufficient to support punitive damages.'" (citation omitted))). Thus, as this Court noted, CPH will be allowed to introduce evidence of Morgan Stanley's discovery misconduct throughout this case to the extent that this conduct shows Morgan Stanley's attempts to conceal its actions in aiding-and-abetting and conspiring with Sunbeam. *Id.; see also* Ex. F (April 5, 2005 Order Partially Granting Reconsideration, which held that the litigation conduct statement read to the jury will be limited to evidence of concealment).

II. Financial Information Is Admissible to Determine Amount of Punitive Damages.

Once the jury has determined that CPH has established Morgan Stanley's entitlement for punitive damages, the next question concerns the amount of punitive damages. At that point, the jury considers "the degree of 'malice, wantonness, oppression, or outrage' demonstrated by the evidence in the case." *Humana Health Ins. Co. v. Chipps*, 802 So. 2d 492, 496 (Fla. 4th DCA 2001). As the Florida Supreme Court has characterized it:

> The jury's major duty in determining the amount of punitive damages is to assess the appropriate degree of punishment to be imposed on the defendant commensurate with the enormity of the offense; the defendant's financial position is only one factor to be considered by the jury. Other factors which the jury may consider include "the nature, extent and enormity of the wrong, the intent of the party committing it and all circumstances attending the particular incident, as well as any mitigating circumstances."

St. Regis Paper Co. v. Watson, 428 So. 2d 243, 246-47 (Fla. 1983) (internal citations omitted) (quoting *Rinaldi v. Aaron*, 314 So. 2d 762, 763 (Fla. 1975)).

It follows that the jury determining the amount of punitive damages should give considerable weight to the evidence already in the trial record relating to the harmfulness and wrongfulness of the defendant's conduct as it affected both the plaintiff and the public, taking into account other prior similar conduct by the defendant. But there are two additional issues that are properly considered — the defendant's ability to pay, and prior punitive awards based on the same conduct, which may constitute a mitigating factor. *Dessanti*, 695 So. 2d at 847.

Morgan Stanley has argued in its motion *in limine* no. 5 to bar evidence of net worth, which this Court deferred addressing on February 23, that financial information is not relevant to a determination of punitive damages. This is clearly false. As is more fully set out in CPH's response to Morgan Stanley's motion *in limine*, under Florida law, information about a defendant's financial condition is highly relevant to setting the appropriate level of punitive

damages. *See, e.g., Liggett Group Inc. v. Engle*, 853 So. 2d 434, 457 n.28 (Fla. 3d DCA 2003) ("Florida courts routinely use net worth to determine whether a punitive award is bankrupting or excessive.") (citing cases dating from 1961 to 2002), *rev. granted*, 873 So. 2d 1222 (Fla. 2004). As the *Liggett Group* court explained: "A defendant's financial capacity is a crucial factor in determining the appropriateness of a punitive damages award. The amount awarded should be large enough to provide retribution and deterrence, but cannot be so great as to result in bankruptcy." *Id.* at 458.

Thus, in Phase II of the trial, although Morgan Stanley has already conceded its ability to pay a punitive damages award three times as large as the compensatory damages CPH is seeking (*see* Ex. G, 12/3/04 Tr. at 74-75), CPH intends to introduce evidence of Morgan Stanley's net worth and ability to pay punitive damages (subject, of course, the Court's ruling on Morgan Stanley's motion *in limine* no. 5). That evidence will address the financial situation of both defendant Morgan Stanley & Co. and its parent Morgan Stanley.

Florida law is clear that when considering the defendant's ability to pay, "financial resources is a general term which includes, but is not limited to, net worth. It encompasses many capabilities and potentials other than naked assets and liabilities." *International Union of Operating Engineers, Local 675 v. Lassiter*, 295 So.2d 634, 644 (Fla. 4th DCA 1974) (emphasis added), *quashed on other grounds*, 314 So. 2d 761 (Fla.), *rev'd and remanded on other grounds*, 325 So. 2d 408 (Fla. 4th DCA 1975), *quashed and judgment entered by trial court reinstated*, 349 So. 2d 622 (Fla. 1976); *see also Donahue v. Herbert*, 355 So. 2d 1264, 1265-66 (Fla. 4th DCA 1978) (discussing breadth of discovery into a defendant's financial resources in punitive damages cases). That is why Florida courts routinely consider not only the assets of the defendant, but also the resources available to the defendant through its parent company. *See,*

e.g., Humana Health Ins. Co. v. Chipps, 802 So. 2d 492, 497 (Fla. 4th DCA 2001) (upholding the admission into evidence of defendant's $1.7 billion indemnity agreement with its parent company because "[t]he purpose of punitive damages are served by awarding a sum of money from the defendant which, according to the defendant's financial ability, will hurt but not bankrupt that defendant"); *Wynn Oil Co. v. Purolator Chemical Corp.*, 403 F. Supp. 226, 232 (M.D. Fla. 1974) (considering the parent company's resources in evaluating the reasonableness of a punitive damages award assessed against its subsidiary).

Consideration of the resources available to a defendant through its parent company makes eminent sense because "[i]f we did not allow trial judges in their sound discretion to admit evidence of the worth of parent corporations, corporations could escape liability simply by incorporating separate departments as a number of undercapitalized subsidiaries." *TXO Prod. Corp. v. Alliance Resources Corp.*, 419 S.E. 870, 890 (W. Va. 1992). Because it is clear that the resources of Morgan Stanley are available to Morgan Stanley & Co., Inc., these resources should be considered by they jury in determining an amount of damages that are "painful enough to provide some retribution and deterrence, but [do not] destroy the defendant." *Arab Termite & Pest Control of Fla., Inc. v. Jenkins*, 409 So. 2d 1039, 1043 (Fla. 1982).

Conclusion

For the foregoing reasons, CPH respectfully requests that this Court issue an Order clarifying which categories of evidence and argument are permissible in Phase I of the bifurcated

trial to show CPH's entitlement to punitive damages and which categories are permissible in Phase II to show the amount of punitive damages.

Dated: April 18, 2005

Respectfully submitted,

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

CASE NO: CA 03-5045 AI

DEFENDANT MORGAN STANLEY & CO. INCORPORATED'S BRIEF ON MITIGATION OF DAMAGES

Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully submits this brief addressing plaintiff Coleman (Parent) Holdings ("CPH")'s duty to mitigate damages. Morgan Stanley seeks clarification that CPH had a duty to mitigate damages and cannot recover for losses it could have reasonably avoided by selling or hedging its position in Sunbeam stock after the alleged fraud was disclosed.

ARGUMENT

It is well settled under Florida law that plaintiffs have a duty to mitigate damages. "The principle of 'avoidable consequences' . . . finds its application in virtually every type of case in which the recovery of a money judgment or award is authorized." *State ex rel. Dresskell v. City of Miami*, 13 So. 2d 707, 709 (Fla. 1943). The rule reflects the common-sense proposition that "a plaintiff should not recover for those consequences of defendant's act which were readily avoidable by the plaintiff." *Id.* The rule applies in fraud cases as in any other: the fraud plaintiff has a "duty to keep his damages as low as reasonably possible." *Hilsenroth v. Kessler*, 446 So. 2d 147, 150 n.3 (Fla. 3d DCA 1983).

Under these principles, a securities-fraud plaintiff cannot sit idly by once a fraud has been revealed. "[O]rdinary causation and mitigation principles in [securities fraud] cases" limit damages by what plaintiffs "would have realized had they acted to preserve their assets or rights when they first learned of the fraud or had reason to know of it. They cannot recover that part of their loss caused by their own failure, once they had reason to know of the wrongdoing, to take reasonable steps to avoid further harm." *Arrington v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 651 F.2d 615, 620 (9th Cir. 1981). The duty to mitigate includes making reasonable efforts to sell the stock once the fraud is revealed. *See Messer v. E.F. Hutton & Co.*, 833 F.2d 909, 921-22 (11th Cir. 1987); *In re Fortune Sys. Sec. Litig.*, 680 F. Supp. 1360, 1370-71 (N.D. Cal. 1987); *Marbury Management, Inc. v. Kohn*, 470 F. Supp. 509, 516 n.13 (S.D.N.Y. 1979), *rev'd in part on other grounds*, 629 F.2d 705 (2d Cir. 1980). By "continu[ing] to hold the stock after the discovery of the fraud," the plaintiff is "deemed to have made a 'second investment decision'" and any subsequent losses are not compensable. *Marbury Management*, 470 F. Supp. at 516 n.13. As the Fourth District has made clear, "[l]ater appreciation or depreciation of the property that is subject of the false representation generally does not alter the fraud damage computation." *Totale, Inc. v. Smith*, 877 So. 2d 813, 815 (Fla. 4th DCA 2004).[1]

Here, the evidence is sufficient to permit a reasonable juror to conclude that CPH failed to mitigate damages. According to CPH's own testimony, Mr. Perelman became aware of the Sunbeam fraud on April 3, 1998. But in the weeks and months that followed, CPH made *no* reasonable efforts to hedge its stock in Sunbeam or otherwise stem its losses. It was not for lack

[1] Once the true facts are disclosed, further losses are also not recoverable because they are not proximately caused by the fraud. *See generally* Morgan Stanley Motion in Limine No. 28. In other words, principles of loss causation bar recovery.

of opportunity. In March and April 1998, CPH received multiple offers from investment banks willing to arrange hedging transactions, but forewent them. *See* MS 550, MS 551, MS 552. Indeed, the very day Mr. Perelman learned of the alleged fraud—April 3—CPH had received just such an offer from Goldman Sachs. *See* MS 550. Goldman Sachs reiterated its offer on May 13, 1998, nearly six weeks after the alleged fraud was revealed. *See* MS 662. Yet Morgan Stanley did nothing.

As Morgan Stanley explained in great detail in its Offer Of Proof With Respect to CPH's Ability to Mitigate Its Damages Through Hedging Strategies ("Offer of Proof"), CPH and Mr. Perelman were legally and contractually free to pursue hedging transactions all the way up until June 15, 1998. Offer of Proof 3-17, 19-27. Mr. Perelman's knowledge of the Sunbeam fraud was not based on inside information until at least June 15, 1998. Because he had the same information as the rest of the market on April 3, for example, he was legally free to hedge. *See* Offer of Proof 12-13; Plaintiff's Supplemental Disclosure 18-21 (4/4/05) (conceding that CPH was not an insider before June 15, 1998). Moreover, CPH could have sold its shares in a private transaction as early as June 30, 1998 and failed to do so. *See* Morgan Stanley's Proffer of Evidence And Argument Regarding CPH's Ability To Sell Its Sunbeam Stock As Early As June 30, 1998 3-5. [2] In sum, nothing prevented CPH from making reasonable efforts to hedge or sell its Sunbeam stock in the months after the alleged fraud was discovered.

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[2] This Court previously ruled that certain securities laws rendered CPH unable to sell its Sunbeam stock until November 25, 1999. *See* Order on CPH Motion in Limine No. 27. Morgan Stanley maintains its objection to that ruling. But even if that were true, CPH had a duty to mitigate damages by selling no later than when the sale restrictions first began to lapse. Furthermore, as discussed above, the sale restrictions did not prevent CPH from engaging in hedging transactions to limit its risk that did not involve sale of Sunbeam shares. *See* Offer of Proof 19, 24 (discussing various hedging strategies that did not involve sale).

Yet rather than pursuing these readily available alternatives that would have dramatically limited its losses, CPH rode Sunbeam's stock price all the way down to zero *years* later. It effectively speculated on Sunbeam stock and now seeks to hold Morgan Stanley liable as an insurer for its speculation. This it may not do. Even when determining out-of-pocket damages – which, unlike benefit-of-the-bargain damages, sometimes include consequential losses – the defendant is not liable for further losses when the plaintiff, "after the discovery of the fraud," makes what is in effect a "second investment decision" not to hedge or dispose of the stock. *Marbury Management*, 470 F. Supp. at 517 n.13. Such losses are precisely the sorts of "avoidable consequences" for which Florida law denies recovery. *See Dresskell*, 13 So. 2d at 709.

CPH errs in citing *Bass v. Janney Montgomery Scott, Inc.*, 210 F.3d 577, 589 (6th Cir. 2000), and *American General Corp. v. Continental Airlines Corp.*, 622 A.2d 1, 11 (Del Ch. 1992), for the contrary position. In *Bass*, the court affirmed a jury verdict for an investor over the defendant broker's objection – which had been presented to and rejected by the jury – that the investor had failed to mitigate by exercising warrants to sell unregistered stock. The court recognized the requirement to mitigate damages, but explained that the jury could reasonably have found that warrants for unregistered stock "cannot be exercised on a moment's notice," and more importantly, that plaintiff was an insider who "was prevented by the securities laws from selling [the] stock." 211 F.3d at 589. *Bass* supports *Morgan Stanley's* position on mitigation. First, the *jury* must decide whether mitigation was reasonably required under the circumstances. Moreover, unlike in *Bass*, CPH was *not* an insider at the relevant times, and it had ample opportunities to hedge its position over an extended period of time; it was not forced to hedge on a moment's notice. Yet CPH made no effort to mitigate. Similarly, in *American General Corp.*

v. Continental Airlines Corp., 622 A.2d 1, 11 (Del Ch. 1992), the court held that the plaintiff insurance company was not required to engage in "unreasonably speculative" hedging transactions that "appear[ed] to be contrary" to Texas regulations governing insurance companies. Unlike the plaintiff in *American General*, CPH did not have to break any laws or take unreasonably speculative risks to mitigate its damages. It was offered several perfectly legal and minimally risky hedging options by America's blue-chip investment firms, including one the day it purportedly learned of the fraud (through a public press release) and another 60 days later. Yet it willfully chose not to do what any reasonable investor who had just learned of a fraud, much less a sophisticated billionaire investor, would have done – hedge against further risk. The law does not require Morgan Stanley to pay for Mr. Perelman's strategic choices.

In summary, the law requires reasonable efforts to mitigate damages in this context just as it does in any other. Morgan Stanley should be permitted to introduce evidence regarding CPH's failure to hedge or sell Sunbeam stock as soon as reasonably possible after the fraud was disclosed. It is for the jury, not the court, to decide whether CPH's failure to mitigate was unreasonable under the circumstances, and whether that failure precludes CPH from recovering part of the damages it seeks.

CONCLUSION

WHEREFORE Defendant Morgan Stanley & Co. Incorporated respectfully requests that this Court rule that plaintiff Coleman (Parent) Holdings had a duty to mitigate damages, and that it cannot recover for any losses suffered after the alleged fraud was fully disclosed if it failed to take reasonable steps to avoid those losses, including by selling or hedging its position in Sunbeam stock.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 18 day of April 2005.

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant. /

MORGAN STANLEY'S MOTION IN LIMINE NO. 28 TO BAR COLEMAN (PARENT) HOLDINGS INC. FROM INTRODUCING EVIDENCE OF CPH'S ALLEGED EFFORT TO RESCIND THE COLEMAN-SUNBEAM TRANSACTION

Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully moves for an order in limine barring plaintiff Coleman (Parent) Holdings Inc. ("CPH") from introducing evidence of its alleged proposal to rescind the Coleman-Sunbeam transaction in June and July 1998. In the event that request is denied, Morgan Stanley requests that the Court allow it to rebut CPH's claims – to tell the jurors all of the relevant facts –by showing show that CPH's putative rescission efforts disappeared when it was given warrants to purchase *more* Sunbeam stock.

BACKGROUND

CPH's recent filings, together with counsel's opening statement, suggest that CPH intends to introduce evidence that CPH proposed a rescission of the Coleman-Sunbeam transaction in June and July of 1998. *See, e.g.*, 04/06/05 Tr. at 7089-90. That evidence has no probative value, since post-transaction conduct does not and cannot prove pre-transaction reliance on Sunbeam's representations. To the extent such evidence is relevant, then the fact that CPH accepted more stock in Sunbeam instead must be admitted as well. Further, to the extent that CPH is permitted to introduce such evidence, it should be barred from introducing evidence or arguing that MSSF – a Morgan-Stanley affiliated bank that loaned Sunbeam $680 million in connection with the transaction – had any involvement in the discussions surrounding CPH's alleged rescission proposal. *See* Deposition of Howard Gittis 179-85 (11/19/04). Such evidence would be irrelevant to the issues before the jury and unduly prejudicial to Morgan Stanley. Moreover, it would leave the jury with an incomplete and misleading view of the facts. The jury is entitled to know, and Morgan Stanley should have the opportunity to tell, the full story (without any need to contradict the Redacted Amended Complaint the Court has read to the jury).

ARGUMENT

I. Evidence or Argument Concerning Rescission of the Coleman-Sunbeam Transaction Is Irrelevant and, Absent The Complete Story, Unduly Prejudicial

A. CPH's Post-Transaction Conduct Is Not Relevant to Pre-Transaction Reliance

Evidence is relevant only if it "tend[s] to prove or disprove a material fact." F.S.A. § 90.401. In this case, the only issues left in dispute are reliance and damages (including causation). The Court's March 23, 2005 Sanctions Order effectively defaults Morgan Stanley on

the other issues (misrepresentation, intent, conspiracy, and aiding and abetting). CPH's alleged effort to rescind the Coleman-Sunbeam merger in June or July of 1998, *after* the deal was consummated, is irrelevant to whether CPH relied on Sunbeam's alleged misrepresentations *before* merger occurred.

B. Evidence of CPH's Rescission Proposal Is Prejudicial And Misleading Unless the Jury Also Hears That CPH Ultimately Accepted More Sunbeam Stock

Evidence that CPH proffered a rescission proposal in June and July 1998, moreover, is affirmatively misleading unless Morgan Stanley is allowed to show that CPH's proposal resulted in it accepting, just *one month later*, warrants to purchase more Sunbeam stock. Judging from counsel's opening statement, CPH intends to argue that CPH's rescission proposal is evidence that it relied on Sunbeam's representations in executing the Coleman-Sunbeam transaction. Morgan Stanley must be allowed to rebut this argument by showing that, far from seeking to extract itself from a fraudulently induced transaction, CPH instead agreed with Sunbeam to accept *more of the Sunbeam stock* it was supposedly duped into acquiring and which it now claims was valueless.

To the extent CPH argues that an after-the-fact rescission proposal proves reliance before the transaction, the abandonment of that proposal in exchange for the right to acquire more Sunbeam stock even after having learned of the alleged fraud rebuts CPH's contention that it would never have executed the initial transaction if it had known Sunbeam's representations were false. It also rebuts any claim that Sunbeam stock was valueless. **If CPH adduces evidence of what it proposed, it opens the door to evidence of what it actually did.** *See, e.g.*, *Bohack v. Keller Indus., Inc.*, No. 4D03-4611, 2005 WL 156775, at *1 (Fla. 4th DCA Jan. 26, 2005) (application of door-opening rule as "the only effective way to cure the damage") (unpublished); *Yates v. State Farm Mut. Automobile Ins. Co.*, 746 So.2d 1161, 1162 (Fla. 4th

DCA 1999) (testimony "opened the door to the cross-examination about" an issue that "the court had previously ruled was inadmissible."); *Hethcoat v. Chevron Oil Co.*, 383 So.2d 931, 933 (Fla. 1st DCA 1980) (per curiam) (defendant "opened the door" to otherwise inadmissible evidence of "postaccident remedial and precautionary measures" by suggesting "it had made no [such] changes . . . subsequent to accident"). **No less for CPH than Morgan Stanley, actions speak louder than words.**

This Court's prior rulings do not suggest a contrary result. The Court's ruling on CPH's Motion in Limine Number 8 precludes evidence of the *value* of the Sunbeam warrants that CPH received in its August 1998 settlement with Sunbeam, but does not bar evidence of the fact that CPH received Sunbeam warrants. Likewise, F.S.A. 46.015(3) ordinarily precludes the introduction of evidence "that a written release or covenant not to sue exists." But that merely bars the introduction of evidence that CPH settled legal claims with Sunbeam. It does not bar and cannot bar evidence that CPH received more Sunbeam stock as part of the "agreement" with Sunbeam that resulted from its supposed rescission proposal so long as no release or covenant not to sue is mentioned.[1]

Conversely, to the extent F.S.A. 46.015(3) bars the jury from learning of a release or settlement on a proposal, it likewise must preclude the introduction of evidence of the proposals leading up to such a settlement – particularly where, as here, telling the jury only half the story would be misleading. CPH cannot introduce evidence of its alleged rescission proposal while seeking to suppress evidence of that proposal's ultimate disposition. CPH has conceded as much. 2/2/05 Tr. at 195-97.

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[1] This Court has recognized that if CPH introduces evidence that goes beyond the deemed facts under this Court's March 23, 2005 Sanctions Order – such as CPH's alleged rescission proposal—Morgan Stanley may introduce opposing evidence. *See* 3/24/05 Tr. at 5270, 5284.

II. CPH's Attempt To Introduce Its Rescission Proposal Is Inconsistent With Its "Election" Of Benefit-Of-The-Bargain Damages.

Finally, CPH's attempt to introduce evidence of an effort to rescind is inconsistent with its "election" of benefit-of-the-bargain damages. To the extent CPH attempts to introduce evidence of an effort to rescind, Morgan Stanley should be permitted to argue for, and have the jury instructed on, a rescissionary measure of damages (*i.e.*, out-of-pocket loss).

CONCLUSION

CPH should be barred from introducing evidence regarding any MSSF role in discussions concerning CPH's alleged rescission proposal. Alternatively, the Court must permit Morgan Stanley to introduce evidence regarding MSSF's full role – including its losses – in the transaction at issue. Finally, if there is any mention of the rescission proposal, the Court must admit evidence that CPH gave up that proposal and accepted more Sunbeam stock instead.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 18th day of April 2005.

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I. CPH MAY NOT INTRODUCE EVIDENCE OF OTHER LITIGATION OR OTHER ALLEGED FRAUDS COMMITTED BY MORGAN STANLEY.

In its Motion in Limine No. 28, CPH indicated its intention to introduce evidence that "Morgan Stanley has previously engaged in" what CPH styled "similar fraudulent conduct." CPH Motion in Limine No. 28 at 10 (filed Mar. 18, 2005). CPH apparently would sweep under this heading of supposedly "similar" conduct a vast swath of outside evidence that is clearly no part of the allegations in this case. Specifically, CPH has indicated (in its April 10 deposition of Robert Jones ("Jones Dep.")) that it plans to explore before the jury "litigation between Morgan Stanley and parties to mergers and acquisitions" (Jones Dep. at 15:19-21), "litigation that has been filed against Morgan Stanley ***in general***," *id.* at 16:1-3 (emphasis added), and "settlements of other claims against Morgan Stanley that have been in the news of late," *id.* at 119:19-21. As *State Farm* makes clear, and as this Court has already indicated, any such evidence — of "general" litigation, unrelated to the present claims, is irrelevant to punitive damages and inadmissible in this case.[1]

In *State Farm*, the plaintiffs asked the jury to condemn the defendant not merely for what it had done to the plaintiffs, but rather for its nationwide policies and activities over a 20-year period — all of which was characterized as part of an overarching scheme to defraud policyholders. *See* 538 U.S. at 420-21. The Supreme Court held that the Utah courts had committed constitutional error in allowing plaintiffs to rely on such evidence, because it was too remote from the harm suffered by the plaintiff before the court:

> The [Utah] courts awarded punitive damages to punish and deter conduct that bore no relation to the Campbell's harm. ***A defendant's dissimilar acts, independent from the acts upon***

[1] In its initial disclosure regarding Mr. Jones's Phase II testimony, Morgan Stanley inadvertently stated that Mr. Jones might testify about the infrequency of litigation involving parties to merger and acquisition transactions. Morgan Stanley subsequently amended this disclosure to omit this sentence, and Mr. Jones will not to testify with respect to these matters.

> ***which liability was premised, may not serve as the basis for punitive damages.*** A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.

Id. at 423 (emphasis added). *See also Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001) (characterizing second *BMW* guidepost as "the relationship between the penalty and the harm ***to the victim*** caused by the defendant's actions") (emphasis added).

Accordingly, evidence of conduct and effects that are not part and parcel of or intimately related to the conduct that allegedly harmed CPH, including unrelated litigation or "settlements of other claims against Morgan Stanley," is irrelevant and inadmissible on any theory, and the plaintiff should be prohibited from introducing such evidence.

CPH's response, telegraphed in its Motion in Limine No. 28, is that the outside litigation it wishes to explore is evidence of what it claims to be Morgan Stanley's ***similar*** conduct, not dissimilar acts. We argue below that evidence of similar conduct must be tightly limited in circumstances such as these, and this Court should certainly exclude evidence of other litigation whose "similarity" is simply that some claim of fraud was made against Morgan Stanley. But the larger issue, as this Court has already recognized, is that the line between absolutely-impermissible dissimilar conduct and occasionally-admissible similar conduct is not always obvious. Before CPH may introduce evidence of other litigation, this Court must at the very least conduct an evidentiary hearing outside the presence of the jury to determine the degree of similarity between CPH's evidence and its allegations in this case. Indeed, this Court has already indicated that such an inquiry is required, stating that "if either side is going to ask a witness about litigation other than this litigation, you first come up and we talk about it." 4/5/05 Tr. at 6707:2-5.

We add that if CPH is allowed to adduce such evidence, which by its nature constitutes exceedingly unreliable hearsay and would not be permitted even for the limited purpose of impeachment, then Morgan Stanley must be permitted to refute it. (Nothing in the Court's sanctions order precludes addressing the merits of other litigation.) This would result in a massive trial of other cases, with incalculable expense and delay, not to mention confusion and distraction of the jury.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

_____/

MORGAN STANLEY'S MOTION IN LIMINE NO. 29 TO PRECLUDE THE USE OF CERTAIN PREJUDICIAL EVIDENCE

Under *State Farm* v. *Campbell*, 538 U.S. 408 (2003), Morgan Stanley & Co. Incorporated ("Morgan Stanley") may be punished only for the conduct that harmed the plaintiff. Evidence of dissimilar, unrelated misconduct is irrelevant and inadmissible for any purpose. In addition, even conduct that was part of or closely similar to the conduct that allegedly harmed plaintiff Coleman (Parent) Holdings, Inc. ("CPH") must be treated with great caution; to the extent that such "other acts" evidence is deemed probative of the proper punishment for plaintiff's injuries, it should be admitted only if its probative value outweighs any potential for unfair prejudice and if it is accompanied by the protections necessary to ensure that the jury does not seek to punish Morgan Stanley for its conduct toward persons not before the Court.

Morgan Stanley requests that the Court address three categories of evidence (upon which CPH has indicated that it intends to rely) that are in admissible during Phase II: (1) evidence of other litigation involving Morgan Stanley that is unrelated to this case but that also involved claims alleged to be generally similar to those here, (2) evidence of harm to non-parties, and (3) irrelevant and prejudicial character evidence about Morgan Stanley employees. As Morgan Stanley has already indicated to this Court, the first is barred by *State Farm*; the other two doubtful under *State Farm* and certainly far more prejudicial than probative.

I. CPH MAY NOT INTRODUCE EVIDENCE OF OTHER LITIGATION OR OTHER ALLEGED FRAUDS COMMITTED BY MORGAN STANLEY.

In its Motion in Limine No. 28, CPH indicated its intention to introduce evidence that "Morgan Stanley has previously engaged in" what CPH styled "similar fraudulent conduct." CPH Motion in Limine No. 28 at 10 (filed Mar. 18, 2005). CPH apparently would sweep under this heading of supposedly "similar" conduct a vast swath of outside evidence that is clearly no part of the allegations in this case. Specifically, CPH has indicated (in its April 10 deposition of Robert Jones ("Jones Dep.")) that it plans to explore before the jury "litigation between Morgan Stanley and parties to mergers and acquisitions" (Jones Dep. at 15:19-21), "litigation that has been filed against Morgan Stanley ***in general***," *id.* at 16:1-3 (emphasis added), and "settlements of other claims against Morgan Stanley that have been in the news of late," *id.* at 119:19-21. As *State Farm* makes clear, and as this Court has already indicated, any such evidence — of "general" litigation, unrelated to the present claims, is irrelevant to punitive damages and inadmissible in this case.[1]

In *State Farm*, the plaintiffs asked the jury to condemn the defendant not merely for what it had done to the plaintiffs, but rather for its nationwide policies and activities over a 20-year period — all of which was characterized as part of an overarching scheme to defraud policyholders. *See* 538 U.S. at 420-21. The Supreme Court held that the Utah courts had committed constitutional error in allowing plaintiffs to rely on such evidence, because it was too remote from the harm suffered by the plaintiff before the court:

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[1] In its initial disclosure regarding Mr. Jones's Phase II testimony, Morgan Stanley inadvertently stated that Mr. Jones might testify about the infrequency of litigation involving parties to merger and acquisition transactions. Morgan Stanley subsequently amended this disclosure to omit this sentence, and Mr. Jones will not to testify with respect to these matters.

> ***which liability was premised, may not serve as the basis for punitive damages.*** A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.

Id. at 423 (emphasis added). *See also Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001) (characterizing second *BMW* guidepost as "the relationship between the penalty and the harm ***to the victim*** caused by the defendant's actions") (emphasis added).

Accordingly, evidence of conduct and effects that are not part and parcel of or intimately related to the conduct that allegedly harmed CPH, including unrelated litigation or "settlements of other claims against Morgan Stanley," is irrelevant and inadmissible on any theory, and the plaintiff should be prohibited from introducing such evidence.

CPH's response, telegraphed in its Motion in Limine No. 28, is that the outside litigation it wishes to explore is evidence of what it claims to be Morgan Stanley's ***similar*** conduct, not dissimilar acts. We argue below that evidence of similar conduct must be tightly limited in circumstances such as these, and this Court should certainly exclude evidence of other litigation whose "similarity" is simply that some claim of fraud was made against Morgan Stanley. But the larger issue, as this Court has already recognized, is that the line between absolutely-impermissible dissimilar conduct and occasionally-admissible similar conduct is not always obvious. Before CPH may introduce evidence of other litigation, this Court must at the very least conduct an evidentiary hearing outside the presence of the jury to determine the degree of similarity between CPH's evidence and its allegations in this case. Indeed, this Court has already indicated that such an inquiry is required, stating that "if either side is going to ask a witness about litigation other than this litigation, you first come up and we talk about it." 4/5/05 Tr. at 6707:2-5.

We add that if CPH is allowed to adduce such evidence, which by its nature constitutes exceedingly unreliable hearsay and would not be permitted even for the limited purpose of impeachment, then Morgan Stanley must be permitted to refute it. (Nothing in the Court's sanctions order precludes addressing the merits of other litigation.) This would result in a massive trial of other cases, with incalculable expense and delay, not to mention confusion and distraction of the jury.

II. CPH SHOULD BE PRECLUDED FROM INTRODUCING EVIDENCE OF "HARM" TO THE PUBLIC

CPH has also indicated its intention to introduce evidence of alleged harm to individuals and entities not party to this lawsuit in order to bolster its claim that Morgan Stanley should pay a large punitive damages award. As this Court has recognized, and as *State Farm* counsels as well, such evidence is rarely, if ever, appropriate in a case such as this one.

CPH wishes to argue to the jury that Morgan Stanley's punishment should be enhanced because other parties allegedly lost money as a result of the conduct that allegedly harmed CPH. This Court has already opined that evidence of "generic harm to the investing public is not relevant" to CPH's claims, and should be barred. 4/5/05 Tr. at 6693:5-6. For the same reasons, evidence of ***all*** harm to non-parties should be barred, including evidence of harm to the 18% of Coleman shareholders not party to this litigation.

Simply put, inviting the jury to punish Morgan Stanley for harm it caused to entities not before the Court dramatically increases the risk of double punishment. As the Supreme Court pointed out in *State Farm*, if the jury were permitted to render an award designed to punish the defendant for its conduct toward non-parties, the defendant would have no assurance that those third parties will not themselves sue and recover punitive damages — resulting in multiple punishment for the ***exact same conduct causing the same harms***:

> Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis. . . . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.

Id. at 423. Accordingly, even where there is evidence that the defendant engaged in misconduct toward others that is very closely related to the conduct that harmed the plaintiff, that evidence

will generally be inadmissible under Fla. Stat. § 90.403, because its prejudicial impact outweighs its limited probative value. To the extent such evidence is admissible, it may be used only to demonstrate the reprehensibility of the defendant's conduct ***toward the plaintiff***. It must be made clear to the jury that it may not punish the defendant for injuries incurred by other parties.

We therefore request that counsel be barred from eliciting testimony about any losses suffered by third parties as a result of the actions that allegedly harmed CPH. Specifically, plaintiffs should be barred from urging the jury to enhance any punitive award based on losses suffered by debenture holders, the 18% of CPH stockholders not party to this action, and other (non-CPH) owners of Sunbeam stock. At a minimum, if this Court is not willing to bar CPH from introducing such evidence it should instruct the jury not to punish Morgan Stanley for harm incurred by non-parties, but merely to consider such evidence for purposes of determining the reprehensibility of Morgan Stanley's conduct toward the plaintiff.

In addition, if CPH is permitted to introduce evidence of harm to non-parties, Morgan Stanley must be permitted to inform the jury that none of these non-parties has chosen to sue and that the SEC, which closely investigated the Sunbeam affair and imposed significant penalties on top Sunbeam executives and on the Arthur Andersen LLP engagement partner, never found fault with Morgan Stanley's conduct. This Court recognized as much at oral argument, challenging CPH's counsel to explain how evidence of harm to non-parties "is . . . different than saying, hey, nobody sued, so there must not have been anything wrong here?" 4/5/05 Tr. at 6696. Finally, if CPH is permitted to introduce this prejudicial evidence, Morgan Stanley should be permitted to defend with comparable mitigating evidence.

III. CPH SHOULD NOT BE PERMITTED TO INTRODUCE WILLIAM STRONG'S PERFORMANCE EVALUATIONS

Plaintiff seeks to introduce portions of the performance evaluations of William Strong in Phase II of this trial. The evaluations in question contain comments on Mr. Strong's character. His supervisors describe him in these documents as "overly aggressive," lacking "judgment," and questionably honest. The introduction of this evidence is a transparent attempt by CPH to prejudice the jury by inviting them to dislike and distrust Morgan Stanley and its key personnel.

Moreover, this evidence has ***no*** probative value. At best, the performance evaluations ***might*** provide ***very*** weak evidence of Morgan Stanley's complicity in the Sunbeam fraud. However (unless this Court grants Morgan Stanley's motion to withdraw the sanctions order from Phase II) ***issues of liability will not be litigated*** during the punitive phase. The jury's only task will be to determine the reprehensibility of Morgan Stanley's conduct; it will already be established that Morgan Stanley was involved in the Sunbeam fraud. The evaluations are simply not material to the question of reprehensibility; they are barely relevant even to liability. They should be excluded under Fla. Stat. § 90.403 as substantially more prejudicial than probative.

IV. CPH SHOULD BE PRECLUDED FROM INTRODUCING CERTAIN HIGHLY PREJUDICAL DEPOSITION TESTIMONY OF BRAM SMITH AND JOHN TYREE

A. The Designated Testimony for Bram Smith Is Unduly Prejudicial and Unnecessarily Cumulative

Plaintiff has designated a highly prejudicial, but irrelevant, excerpt from the videotaped deposition of one of Morgan Stanley's former employees — Bram Smith. In the excerpt, Mr. Smith — who at the time was no longer employed by Morgan Stanley — becomes agitated, motions for the camera to be shut off, and leaves the room. The excerpt then continues on for approximately four more minutes to show Mr. Smith's absence. *See* Plaintiff's Page/Line Designations for Bram Smith at 183:07 through 185:22. The question by Plaintiff's counsel that led to the incident involved the March 19, 1998 press release, and in the excerpt Mr. Smith provides no meaningful testimony on the subject.

Earlier in this litigation, Mr. Smith submitted an affidavit explaining his conduct in this deposition. Mr. Smith explained that he "lost his composure and concentration" as a result of plaintiff's counsel's asking him "repeatedly and in several different variations" to express an opinion as to whether the March 19, 1998 press release adequately disclosed certain information regarding Sunbeam's first quarter performance. Declaration of Bram Smith ¶¶ 5-6 (Apr. 12, 2004) (attached as Exh. A) (this declaration was submitted in connection with Morgan Stanley's Opposition to CPH's Motion To Compel Answers to Deposition Questions (Apr. 14, 2004)). Mr. Smith averred that any suggestion that his "leaving the deposition is somehow 'evidence' that Morgan Stanley engaged in wrongdoing in connection with the work that it performed for Sunbeam in 1997 and 1998" is "false — and a mischaracterization of the events that occurred during [his] deposition." *Id.* ¶ 8. The Court should not permit CPH to use these snippets of

testimony from Mr. Smith's deposition when Morgan Stanley is unable to introduce evidence to refute that testimony.

Moreover, because the Court has already entered findings of fact regarding Morgan Stanley's purported role with regard to the March 19, 1998 press release, any testimony from Mr. Smith on this subject would be unnecessarily cumulative. Plaintiffs do not seek to introduce this testimony for any substantive purpose. Instead, the testimony is being offered to influence the jury against Mr. Smith and his former employer, Morgan Stanley. For this reason, the excerpt should not be admitted. *See* Fla. Stat. § 90.403; *see also Perper v. Edell*, 44 So. 2d 78 (Fla. 1950).

Allowing evidence of a witness's agitated, hostile behavior during a videotaped deposition is inflammatory and only serves to prejudice the jury against the witness,[2] especially where, as here, the testimony has no probative value in this phase of the trial. *See La Reina Pharmacy, Inc. v. Lopez*, 453 So. 2d 882 (Fla. 3d DCA 1984) (affirming granting of new trial to plaintiff where defense introduced deposition testimony in which plaintiff called certain persons "scum"). Evidence that merely creates an atmosphere in which the jury would dislike the defendant, but which has little probative value or is cumulative, should not be allowed. *Id.*

Additionally, a court should exclude inflammatory evidence that serves only to prove allegations that are either not at issue or have already proven by virtue of other evidence. In *Morowitz v. Vista View Apartments, Ltd.*, 613 So. 2d 493, 494 (Fla. 3d DCA 1993), the court held that it was error to admit videotaped deposition testimony regarding the plaintiff's pre-injury psychological problems where the existence of the plaintiff's physical injury had already

[2] At the time of Mr. Smith's deposition, he was no longer employed by Morgan Stanley. Therefore, allowing the jury to hold Mr. Smith's conduct against Morgan Stanley in analyzing Morgan Stanley's reprehensibility is particularly unfair.

been conclusively established. Similarly, in *Dabney v. Yapa*, 187 So. 2d 381 (Fla. 3d DCA 1966), the court found that evidence of insurance polices proffered by plaintiffs on the issue of ownership were properly excluded under Section 90.403 where ownership had already been conclusively proven because "[t]he introduction into evidence of the insurance policies could have had no effect except to prejudice the defendants in their defense." *See also Aetna Cas. & Surety Co. v. Cooper*, 485 So. 2d 1364 (Fla. 2d DCA 1986) (reversed and remanded for new trial based on improper admission of emotionally charged statements in videotape that were prejudicial, misleading, and merely cumulative of other evidence presented).

B. The Designated Testimony for John Tyree Is Unduly Prejudicial and Unnecessarily Cumulative

Plaintiff has also designated irrelevant and highly prejudicial portions of the testimony of John Tyree, a Morgan Stanley employee. Plaintiff seeks to introduce a large portion of testimony in which CPH's counsel asks Mr. Tyree numerous questions about the definition of a "rider," questions that are entirely irrelevant to any remaining issue for the jury to decide. *See* Plaintiff's Page/Line Designations for John Tyree at 163-170:08-07. By injecting a meaningless exchange in which Mr. Tyree refuses to agree with CPH's counsel's characterization of how riders are incorporated into an offering memorandum, CPH is obviously designating these deposition portions for the sole — and improper — purpose of attempting to inflame the passions of the jury. *See La Reina Pharmacy, Inc.*, 453 So. 2d at 884. Simply put, the deposition designations contain irrelevant and highly prejudicial materials and for those reasons should not be admitted into evidence.

Moreover, Mr. Tyree's testimony on this subject would be unnecessarily cumulative. This Court has already entered findings of fact with respect to Morgan Stanley's role in the Sunbeam offering memorandum. Plaintiff may not now attempt to introduce inflammatory

evidence on an issue that is no longer in dispute in this case. *See Morowitz v. Vista View Apartments, Ltd.*, 613 So. 2d 493, 494 (Fla. 3d DCA 1993). Accordingly, the testimony of Mr. Tyree should be excluded.

WHEREFORE Morgan Stanley respectfully requests that this Court enter an Order precluding CPH from introducing evidence of (1) other litigation or other alleged frauds engaged in by Morgan Stanley; (2) alleged "harm" to the public; (3) William Strong's performance evaluations; and (4) certain highly prejudicial deposition testimony of Bram Smith and John Tyree.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this ____ day of April 2005.

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

CASE NO: CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),

vs.

MACANDREWS & FORBES HOLDINGS, INC.,
Defendant(s).
_____/

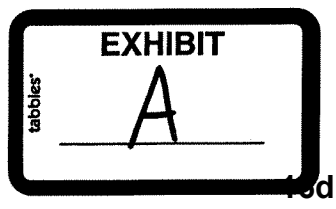
DECLARATION OF R. BRAM SMITH

I, R. Bram Smith, declare:

1. I submit this declaration in support of Morgan Stanley's Opposition to CPH's Motion To Compel Answers To Deposition Questions And For Other Relief. All facts set forth in this declaration are based upon my personal knowledge. If called as a witness, I could and would competently testify to all facts stated in this declaration.

2. I am currently employed as a Senior Managing Director at Bear Stearns & Co., Inc. Before joining Bear Stearns, I was a Managing Director in the Loan Products Group at Morgan Stanley.

3. In March 1998, I was President of Morgan Stanley Senior Funding ("MSSF") — and a member of the Morgan Stanley team that negotiated and entered into a credit agreement with Sunbeam. Pursuant to the credit agreement, Sunbeam borrowed $680 million



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from MSSF, with the borrowings used by Sunbeam to fund certain costs relating to the acquisitions.

4. On February 24, 2004, I provided a deposition in the above-referenced matters at the request of Coleman (Parent) Holdings ("CPH"). The deposition took one full day to complete. The deposition itself — and the half-day of preparation with counsel that preceded the deposition — took me away from my duties at Bear Stearns, my current employer. Accordingly, as the deposition wore on, I became increasingly frustrated with the length of the deposition, the amount of time spent on matters unrelated to my principal responsibilities involving the origination of the Sunbeam credit agreement, and the repetitive nature of much of the questioning.

5. At one point during the deposition, I was asked — repeatedly and in several different variations — to express an opinion whether a certain press release issued by Sunbeam on March 19, 1998 "adequately disclosed" certain information regarding Sunbeam's first quarter 1998 performance. I grew exasperated with this line of questioning, since I had previously testified (at some length) that I had not been involved in the discussions that lead to Sunbeam's issuance of the March 19, 1998 press release, had not been involved in the due diligence conducted by Morgan Stanley regarding Sunbeam's first quarter 1998 performance, and had not played any role in the preparation of the March 19, 1998 press release.

6. As a result of this repeated questioning, I lost my composure and concentration. I requested a break — but the questioner refused to allow one. I needed to take a break to compose myself before answering again, and so excused myself from the deposition. Tom Clare, counsel for Morgan Stanley and the attorney representing me during the deposition, followed me out into the hallway outside the deposition room.

7. During the short break, I did not discuss the substance of my testimony with Mr. Clare — and we did not discuss how I should respond to the pending question. Mr. Clare only instructed me to regain my composure, to return to the deposition room when I was ready, and to answer the pending question to the best of my ability. I followed Mr. Clare's instructions and returned to the deposition room several minutes later. When the deposition resumed, I truthfully stated —as I had previously stated on several occasions — that I do not have an opinion regarding the adequacy of Sunbeam's press release. As noted above, I was not directly involved in the events leading to the issuance of the Sunbeam press release.

8. I understand that counsel for CPH has argued that my leaving the deposition is somehow "evidence" that Morgan Stanley engaged in wrongdoing in connection the work that it performed for Sunbeam in 1997 and 1998. That suggestion is false — and a mischaracterization of the events that occurred during my deposition. The fact that I left the deposition had nothing to do with my view of the merits of CPH's contentions or the substance of any of the questions that were asked — but rather with the manner in which the deposition was being conducted.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of April 2004, in New York, New York.

s R. Bram Smith

State of NY
County of NY
Sworn to me before this 12th day of April 2004

LAURA L. TORRADO
Notary Public, State of New York
No. 31-5027975
Qualified in ~~New York County~~ Westchester County, Certificate filed in NY County
Commission Expires May 23rd 2006

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

DEFENDANT'S MOTION IN LIMINE NO. 30 TO EXCLUDE EVIDENCE OF LITIGATION MISCONDUCT FROM PHASE II

In response to Defendant's Motion for Reconsideration of the Court's Sanction Orders (Apr. 4, 2005), the Court issued an order limiting "[t]he statement of litigation misconduct * * * to those facts which would allow a reasonable juror to conclude that [Morgan Stanley] sought to hide direct evidence of either the Sunbeam fraud or Morgan Stanley's complicity with Sunbeam in perpetrating that fraud on CPH." Order on Defendant's Motion for Reconsideration of the Court's Sanctions Orders (Apr. 5, 2005) (the "Sanctions Reconsideration Order"). Only facts showing that Morgan Stanley hid "direct evidence" to avoid liability in this lawsuit would reflect consciousness of guilt (and thus be relevant to the jury's punitive damages determination), not actions reflecting carelessness, incompetence, or even a willful attempt to conceal or falsely exculpate discovery failures (which would be relevant to discovery sanctions, but not the jury's determination of punitive damages).

In its earlier Default Order, however, the Court found that Morgan Stanley engaged in litigation misconduct to hide its failure to retain and produce e-mail messages – *not* to hide direct evidence of the Sunbeam fraud or its complicity with Sunbeam in deceiving CPH. See Order on CPH's Renewed Motion for Entry of Default Judgment 9-10 (Mar. 23, 2005) (the "Default

Order"). It follows from the Court's finding that none of the deemed facts in the proposed Statement may properly be placed before the jury in the punitive damages phase of the trial.

Because the facts in the Statement (which the Court believed to be "not reasonably disputed"[1]) have been found to constitute actions motivated by considerations other than coverup of an underlying conspiracy to defraud, it follows *a fortiori* that any disputed evidence of litigation misconduct that CPH might want to introduce must likewise be excluded. Indeed, the Court already ruled in its Adverse Inference Orders that "[n]o other evidence concerning the production of e-mails, or lack thereof, shall be presented absent further Court order." Adverse Inference Order 13-14; Further Amended Adverse Inference Order 13. Nothing in this Motion provides any ground for altering that conclusion.

There is, moreover, no basis in the record for the Court to revise and expand its finding to include a finding of motivation to conceal evidence supporting the underlying fraud/conspiracy allegations. If, however, the Court decides to consider such action, considerations of fundamental fairness require that it afford Morgan Stanley a full and fair opportunity to litigate admissibility in an evidentiary hearing outside the presence of the jury, as provided in *Florida Statutes Annotated* § 90.105(1) & (3).

BRIEF HISTORY OF THE STATEMENT OF LITIGATION MISCONDUCT

On March 1, 2005, the Court ordered that it would read to the jury during any evidentiary phase of the case chosen by CPH a statement of facts concerning litigation misconduct by Morgan Stanley to be drafted by the Court, and that such facts would be deemed conclusive (the

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[1] Order of March 1, 2005 at 11 (the "Adverse Inference Order"); see also order of March 5, 2005 at 10 (the "Further Amended Adverse Inference Order"; together with the Adverse Inference Order, the "Adverse Inference Orders").

"Statement of Litigation Misconduct" or "Statement"). See Adverse Inference Order 13-14; Further Amended Adverse Inference Order 12-13. The Court amended that order on March 23, 2005, augmenting the Statement with additional findings and directing that it would read the Statement to the jury during the punitive damages phase of the trial. See Default Order 17.

On April 5, 2005, however, the Court reconsidered and modified its proposed course of action, ordering that "the statement of litigation misconduct to be read to the jury shall be limited to those facts which would allow a reasonable juror to conclude that [Morgan Stanley] sought to hide direct evidence of either the Sunbeam fraud or Morgan Stanley's complicity with Sunbeam in perpetrating that fraud on CPH." Sanctions Reconsideration Order. This modification reflected the Court's recognition that only evidence related to the underlying allegations is properly part of the punitive damages phase of the trial.

ARGUMENT

I. THE ISSUE OF LITIGATION MISCONDUCT IS NOT A PROPER PART OF THE JURY'S CONSIDERATION OF PUNITIVE DAMAGES

A. The Court Correctly Ruled that Evidence of Litigation Misconduct Has No Role in the Phase II Proceedings Unless It Shows that Morgan Stanley Engaged in Misconduct to Hide "Direct Evidence" of Its Complicity in the Sunbeam Fraud

In its Sanctions Reconsideration Order, the Court limited the Statement of Litigation Misconduct to facts showing that Morgan Stanley "sought to hide direct evidence of either the Sunbeam fraud or Morgan Stanley's complicity with Sunbeam in perpetrating that fraud on CPH." Sanctions Reconsideration Order. The Court's limitation is correct, for the reasons set forth in Morgan Stanley's Motion for Reconsideration of the Court's Sanction Orders at 6-9, which we will not further belabor here, beyond noting that the purpose of punitive damages is to punish for the underlying conduct alleged by a plaintiff to have caused it injury, whereas

litigation misconduct is to be dealt with separately by the court. While there may be a narrow exception where the misconduct can be shown to have been committed for the purpose of concealing or destroying evidence directly bearing on the plaintiff's underlying allegations, this is not such a case, as we next discuss.

B. The Court Found as a Fact that Morgan Stanley Engaged in Litigation Misconduct to Hide Its Discovery Derelictions; It Did not Find, and Had no Basis for Finding, that Morgan Stanley Sought to Hide "Direct Evidence" of the Sunbeam Fraud or Morgan Stanley's Complicity with Sunbeam in Deceiving CPH

1. In its Default Order (at 9), the Court found that "[i]t is now clear why" Morgan Stanley engaged in litigation misconduct – namely, to hide its failure to retain and produce e-mail messages. Specifically, on pages 9 and 10 of the Default Order, the Court made three findings why Morgan Stanley allegedly failed to provide discovery. "First, candor would have required [Morgan Stanley] to admit that it had not done a good faith search for the oldest full backup tapes, and that Riel's certificate of compliance was false." *Id.* at 9. "Second, [Morgan Stanley] desperately wanted to hide an active SEC inquiry into its email retention practices (footnotes omitted)." *Id.* at 10. "Finally, [Morgan Stanley] did not want to admit the existence of the historical email archive, which would expose the false representations it had made to the Court and used to induce CPH to agree to entry of the Agreed Order (footnotes omitted)." *Id.*

None of those findings shows that Morgan Stanley hid evidence of the Sunbeam fraud or its complicity with Sunbeam in deceiving CPH. To the contrary, the Court's findings suggest wholly independent reasons for Morgan Stanley's litigation misconduct – namely, to hide its failure to retain and produce e-mail messages. Neither in this order nor elsewhere has the Court found that Morgan Stanley failed to provide discovery in order to hide the Sunbeam fraud or Morgan Stanley's complicity with Sunbeam in perpetrating a fraud on CPH. As a result, the

Court's Sanctions Reconsideration Order eliminates any predicate for reading any form of the Statement of Litigation Misconduct to the jury in Phase II.

2. What is more, the information technology failures described in the Statement of Litigation Misconduct by their nature could not have been intended to hide direct evidence of fraud/conspiracy. For example, the newly found backup tapes and many of the belatedly discovered programming errors were system-wide information technology problems. There is no suggestion that the randomly affected e-mail messages "hidden" by those IT problems would provide "direct evidence" of the Sunbeam fraud or Morgan Stanley's complicity. To the contrary, before the court-imposed March 21, 2005 deadline to produce e-mail messages, *not a single e-mail message emerged from any of the newly found tapes or after correcting any of the belatedly discovered programming errors that is "direct evidence of either the Sunbeam fraud or Morgan Stanley's complicity with Sunbeam in perpetrating that fraud on CPH.*" Because of this, no reasonable juror could conclude that Morgan Stanley "sought to hide direct evidence" of a fraud. Indeed, Morgan Stanley's repeated requests that the Court continue the trial to allow it to retrieve and produce all responsive e-mail messages and try this case on the merits belie any notion that its IT problems were designed to thwart discovery of incriminating e-mail messages.

More fundamentally, there is no evidence that Morgan Stanley hid backup tapes or created computer bugs with the specific intent to avoid producing the randomly affected e-mail messages in this lawsuit, or that it knew the contents of any of the undisclosed material at the time of its production failures. The evidence instead suggests at most that Morgan Stanley did not volunteer information, or provided misleading certifications, bearing on its performance of its discovery practices. For instance, Morgan Stanley's voluntary decision to migrate e-mails from tapes to its archive was designed to *produce* evidence, not hide it. Morgan Stanley's

decision to search its archive (and its thousands of backup tapes) instead of simply searching 36 individual tapes could not possibly allow a reasonable juror to conclude that Morgan Stanley intended to hide "direct evidence" of the Sunbeam fraud or its complicity. The same is true of statements in former lead counsel's letters about the origin of Morgan Stanley's November 2004 document production.

Even if Morgan Stanley's litigation misconduct was part of a misguided effort to get a postponement of the trial by delaying production of e-mail messages (as the Court intimated, see Adverse Inference Order 12-13; Further Amended Adverse Inference Order 11-12), it was not an effort to hide "direct evidence" of the Sunbeam fraud or Morgan Stanley's complicity for the purpose of avoiding liability in this case. Because no facts in the Statement show that Morgan Stanley "sought to hide direct evidence of either the Sunbeam fraud or Morgan Stanley's complicity with Sunbeam in perpetrating that fraud on CPH" (Sanctions Reconsideration Order), no such facts are admissible for purposes of determining punitive damages and there is no occasion to broach the subject of litigation misconduct before the jury.[2]

II. CPH SHOULD BE PRECLUDED FROM INJECTING THE SUBJECT OF LITIGATION MISCONDUCT INTO PHASE II IN ANY OTHER FASHION

If the "not reasonably disputed" facts in the Statement of Litigation Misconduct cannot be read to the jury (see *supra* note 1), then neither may any speculative evidence of litigation misconduct that CPH might seek to introduce. In its Adverse Inference Orders, the Court ruled

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[2] The Court should in any event not use the version proposed in CPH's Renewed Motion for Correction and Clarification of the Statement of Litigation Misconduct to be Read to the Jury (Apr. 5, 2005). CPH's Statement does not conform to the Court's Sanctions Reconsideration Order, but instead seeks to present numerous new alleged facts that in no way tend to show that Morgan Stanley "sought to hide direct evidence of either the Sunbeam fraud or Morgan Stanley's complicity with Sunbeam in perpetrating that fraud on CPH." *Id.*

that "[n]o other evidence concerning the production of e-mails, or lack thereof, shall be presented absent further Court order." Adverse Inference Order 13-14 Further Amended Adverse Inference Order 13. The relief requested herein provides no grounds for altering that ruling.

It is well settled under Florida law that litigation-misconduct evidence, standing alone, may not be introduced in connection with the jury's consideration of punitive damages.[3] *First*, the Florida civil rules do not authorize imposition of punitive damages for litigation misconduct. Florida Rule of Civil Procedure 1.380(b)(2) lists the full range of sanctions a court may impose on a party that fails to provide discovery misconduct. Punitive damages is not one of them. In *Edwards v. Edwards*, 634 So. 2d 284 (Fla. 4th DCA 1994), the wife in a dissolution action appealed from a trial court order reducing temporary child support as a sanction for her failure to comply with a discovery order issued by that court. The Fourth District Court of Appeals observed that "[t]he trial court has discretion to sanction a party who refuses to comply with a discovery order," "but that discretion is limited by the provisions of rule 1.380(b), Florida Rules of Civil Procedure." *Id.* The Court noted that "[r]eduction of child support is not one of the authorized sanctions enumerated under rule 1.380(b)" and reversed the trial court's sanctions order. *Id.* Just last week, in *Khan v. Department of Revenue*, No. 4D03-2607, 2005 WL 840888, at *1 (Fla. 4th DCA Apr. 13, 2005), the Fourth District reaffirmed *Edwards*, again reversing a trial court's award of child support as a sanction for discovery misconduct. See *Florida Physicians Ins. Reciprocal v. Baliton*, 436 So. 2d 1110, 1112 (Fla. 4th DCA 1983) (vacating

[3] Consistent with Florida law, the Court ruled in its Sanctions Reconsideration Order that it would instruct the jury that a party's failure fully to comply with a discovery request, standing alone, "is immaterial to the jury's determination of the entitlement to or, if entitlement is determined, the amount of punitive damages." This instruction should be given even if litigation misconduct is excluded from Phase II, because the subject was broached in Phase I.

$150,000 fine because it was punitive and not an authorized sanction absent a finding of contempt).

Second, the Florida civil rules authorize trial courts to impose sanctions only "to effect compliance, not to punish." *Hanna v. Industrial Labor Service, Inc.*, 636 So. 2d 773, 776 (Fla. 1st DCA 1994); see, e.g., *Precision Tune Auto Care, Inc. v. Radcliffe*, 804 So. 2d 1287, 1290 (Fla. 4th DCA 2002) ("The purpose of reposing in the trial court the authority to enter a default is to ensure compliance with its order, not to punish or penalize") (quoting *Garden-Aire Village Sea Haven, Inc. v. Decker*, 433 So. 2d 676, 677 (Fla. 4th DCA 1983)); *United Services Automobile Ass'n v. Strasser*, 492 So. 2d 399, 403 (Fla. 4th DCA 1986) ("[T]he principles stated in *Decker* remain good law, particularly: * * * '[t]he purpose [of a default sanction] * * * is to ensure compliance with [the trial court's] order, not to punish or penalize.'") (citation omitted); *Leatherby Ins. Co. v. Jones*, 332 So. 2d 139, 141 (Fla. 3d DCA 1976) ("The sanctions under the discovery rules are neither punitive nor penal. Their objective is to compel compliance with discovery, and then only in flagrant or aggravated cases.") (citations omitted); see also JOINT COMMITTEE OF THE TRIAL LAWYERS SECTION OF THE FLORIDA BAR AND CONFERENCES OF CIRCUIT AND COUNTY COURT JUDGES, HANDBOOK ON DISCOVERY PRACTICE 4 (2003) ("Sanctions under the discovery rules are neither punitive nor penal, and their objective is to compel compliance with discovery.") (footnote omitted). Because Florida discovery sanctions may not be imposed to punish a party for litigation misconduct, placing evidence of such misconduct before the jury for purposes of assessing punitive damages is impermissible, apart from the narrow purpose identified in the Court's April 5 Order.

III. IF THE COURT IS INCLINED TO REVISIT THE QUESTION OF THE REASONS FOR MORGAN STANLEY'S LITIGATION MISCONDUCT, THEN IT MUST FIRST PERMIT MORGAN STANLEY TO LITIGATE THE QUESTION IN AN EVIDENTIARY HEARING OUTSIDE THE PRESENCE OF THE JURY

If the Court is inclined to reconsider its finding that Morgan Stanley engaged in litigation misconduct to hide its failure to retain and produce e-mail messages, then it must give Morgan Stanley a full and fair opportunity to litigate admissibility in an evidentiary hearing. Because of the inflammatory nature of litigation-misconduct evidence, admissibility should be determined outside the presence of the jury. See FLA. STAT. ANN. § 90.105(1), (3) (West 2004); see also *Werbungs & Commerz Union Austalt v. Collectors Guild, Ltd.*, 930 F.2d 1021, 1027 (2d Cir. 1991) (presenting discovery misconduct to the jury raises the impermissible prospect that the jury will "penalize [the defendant] for [those] discovery abuses" instead of "the evidence that was properly admitted.").

Moreover, if the Court admits litigation-misconduct evidence (either the Statement or other evidence), then it should permit Morgan Stanley to prove to the jury (if it so desires) (a) that it did not hide evidence of the Sunbeam fraud, (b) that no material evidence was lost, and (c) that the effective default in Phase I (from reading the redacted amended complaint) is more than ample punishment for any litigation misconduct in Phase II. As described in Tab A, a defendant is entitled under Florida law and the Due Process Clause to present any and all relevant, mitigating evidence before any punitive damages are awarded. Nothing changes because the evidence at issue is litigation misconduct. *See, e.g., Carr v. Reese*, 788 So. 2d 1067, 1072 (Fla. 2d DCA 2001) (distinguishing the culpability of "deliberately and willfully refus[ing] to comply with the court's [discovery] order[s]" from instances in which "the failure to comply is due to confusion or inability") (citing *Garden-Aire*, 433 So. 2d at 678). Morgan Stanley does

not believe that even this precaution will fully protect its constitutional and statutory rights because of the tremendous prejudice that would result from allowing the jury to consider evidence of discovery abuses in Phase II. But it will help mitigate some of the most prejudicial attributes likely to result from evidence of litigation misconduct and therefore is certainly appropriate here.

CONCLUSION

For the foregoing reasons, the Court should exclude all litigation-misconduct evidence from Phase II of the trial. In the alternative, the Court should give Morgan Stanley a full and fair opportunity to litigate admissibility in an evidentiary hearing outside the presence of the jury. If the Court admits litigation-misconduct evidence in Phase II, it should permit Morgan Stanley to introduce contrary evidence and argument before the jury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 18th day of April, 2005.

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant. /

MORGAN STANLEY'S MOTION IN LIMINE NO. 31 TO BAR COLEMAN (PARENT) HOLDINGS INC. FROM ARGUING, COMMENTING ON, SUGGESTING THAT LITIGATION MISCONDUCT INJURED, HAD THE POTENTIAL TO AFFECT, OR OTHERWISE REPRESENTED AN AFFRONT TO THE JUDICIAL SYSTEM

Morgan Stanley & Co. Inc. ("Morgan Stanley") respectfully moves for an order precluding Plaintiff Coleman (Parent) Holdings, Inc. ("CPH") and its counsel from arguing, commenting, suggesting, or otherwise implying that Morgan Stanley's litigation misconduct injured, had the potential to affect, or otherwise represented an affront to the judicial system. This Court's orders and settled law alike make clear that litigation misconduct is relevant to punitive damages at most insofar as it shows consciousness of guilt of the underlying tort. Correspondingly, it is improper to introduce litigation misconduct or to rely on it to inflame the jury's passions by suggesting that the conduct injures or represents an affront to the judicial system. Whether particular conduct offends the judicial system is for the Court to address, not the jury. Nonetheless CPH has repeatedly has sought to insert, into the statement of litigation misconduct the Court plans to read to the jury in Phase II of the trial, hyperbolic language implying or stating that Morgan Stanley's conduct represents an affront to the judicial system.

Just as the Court must reject those improper efforts to introduce inflammatory language into the statement of litigation misconduct, so too it must preclude CPH from making rank appeals to the raw emotions of the jury. Failure to do so threatens the introduction of reversible error.

1. This Court has recognized in no uncertain terms that the litigation misconduct is relevant to punitive damages *only* insofar as it suggests Morgan Stanley's consciousness of guilt. This Court's order of April 5, 2005 limits "the statement of litigation misconduct . . . to those facts which would allow a reasonable juror to conclude that [Morgan Stanley] *sought to hide direct evidence of either the Sunbeam fraud or Morgan Stanley's complicity with Sunbeam* in perpetrating that fraud on CPH." Order on Defendant's Motion for Reconsideration of the Court's Sanction Orders (Apr. 5, 2005) (emphasis added) (the "Sanction Reconsideration Order"). Likewise, the Court has determined that the statement of litigation misconduct "may be considered only for that purpose," *i.e.*, insofar as it suggests that Morgan Stanley "sought to hide direct evidence" implicating it in the alleged fraud. *Id.*

2. The Court may not lift that limit without violating the requirement that punitive damages redress the underlying tort and not punish the litigation misconduct itself. With respect to litigation misconduct, the imposition of a "sanction [is] a matter for the court and not for the jury," *Emerson Elec. Co. v. Garcia*, 623 So.2d 523, 525 (Fla. 3d DCA 1993); punitive damages are not among the authorized remedies for litigation misconduct.[1]

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[1] As explained in Morgan Stanley's Motion to Exclude Evidence of Litigation Misconduct at 7-8 (Tab C), Florida Rule of Civil Procedure 1.380(b)(2) lists the range of sanctions a court may impose on a party that fails to provide discovery misconduct. Allowing the jury to impose punitive damages for the misconduct is ***not*** among the listed sanctions. Florida's civil rules, moreover, do not authorize sanctions for the purpose of punishment. *Id.* (citing among other cases *Hanna v. Industrial Labor Service, Inc.*, 636 So.2d 773, 776 (Fla. 1st DCA 1994); *Precision Tune Auto Care, Inc. v. Radcliffe*, 804 So.2d 1287, 1290 (Fla. 4th DCA 2002) ("The purpose of reposing in the trial court the authority to enter a default is to ensure compliance with its order, not to punish or penalize." (internal quotation marks omitted)); *United Services Automobile Ass'n v. Strasser*, 492 So. 2d 399, 402 (Fla. 4th DCA 1986) ("[T]he principles stated in *Decker* remain good law, particularly: . . . '[t]he purpose [of a default sanction] . . . is to ensure compliance with [the trial court's] order, not to punish or penalize.'")). Punitive damages by definition are punishment.

3. More important, Morgan Stanley in this case has already been punished for the litigation conduct found by this Court, and severely so. It has lost its right to contest the claims of fraud, conspiracy, and aiding and abetting, the most critical issues in this lawsuit; it must endure the highly inflammatory accusations of the Redacted Amended Complaint being read to the jury and deemed beyond challenge; and it is reduced to defending merely the issues of reliance and damages – even though there has been no finding that its misconduct prevented CPH from proving any part of its case. Allowing the jury to base punitive damages on the litigation misconduct would represent the most extreme form of double punishment.

4. Nonetheless, CPH has *repeatedly* urged the Court to introduce, into the statement of litigation misconduct to be read to the jury, language with no purpose but to inflame the jury by emphasizing the effect of litigation misconduct on the judicial system, entirely apart from what it might show about Morgan Stanley's involvement in the underlying tort. For example, CPH has urged the Court to tell the jury that "Morgan Stanley has deliberately and contumaciously concealed evidence," and to declare: "The judicial system cannot function this way." CPH's Proposed Statement of Conclusive Findings of Fact Regarding Destruction of Evidence, Concealment of Evidence, and Litigation Misconduct at 16 (March 28, 2005). That alone in effect would be a judicial instruction that the jury should punish the litigation misconduct. CPH, further, urges that the jury may consider the litigation misconduct as "evidence of the seriousness of Morgan Stanley's wrongdoing" and "evidence of the degree of Morgan Stanley's malice and evil intent." *Id.*; *see also* Motion for Correction and Clarification of the Statement to be Read to the Jury, Proposed Statement at 10 (March 30, 2005) ("the judicial system cannot function properly when a litigant engages in conduct such as I have described").

5. Finally, CPH's fevered arguments to this Court were less restrained still. CPH has urged that Morgan Stanley "consistently, persistently, repeatedly, willfully, intentionally, maliciously failed to abide by the basic tenets that have been developed over hundreds of years to allow this process to be a truth-seeking process. They have corrupted the process at every turn." 3/15/05 Tr. at 3830-31. *See id.* at 3831 (referring to litigation misconduct as "the clearest proof that we are dealing with a corporate defendant that has no conscience" and urging the Court to "send a message"); *id.* at 3941 ("They have destroyed the sanctity of the system").

6. Whatever the merits of such argument in presentations to the Court, it has *no* place before the jury. Such argument does not merely contravene this Court's directive that litigation misconduct is relevant only insofar as it shows Morgan Stanley's consciousness of guilt for the underlying tort. It constitutes a direct appeal to the jury's passions, inciting jurors to punish the litigation misconduct itself as an offense against the judicial system – precisely the danger Florida and federal courts alike have warned about. Morgan Stanley's Motion to Exclude Evidence of Litigation Misconduct at 9 (Tab C); *Emerson Elec.*, 623 So. 2d at 525 (court has "ordered new trials and roundly condemned" such arguments); *Werbungs & Commerz Union Austalt v. Collectors' Guild, Ltd.*, 930 F.2d 1021, 1027 (2d Cir. 1991) (presenting discovery misconduct to the jury raises the impermissible prospect that the jury will "penalize [the defendant] for [those] discovery abuse[s]"); *Thompson v. Glenmede Trust Co.*, No. Civ. A. 92-5233, 1996 WL 529693, at *2 (E.D. Pa. Sept. 17, 1996) (permitting the jury to hear evidence of "the nuances of discovery and the 'hardball' tactics employed by the lawyers may confuse the jury" and distract it from the underlying merits); *cf. Nipper v. Snipes*, 7 F.3d 415, 418 (4th Cir. 1993) (juries likely to give any court order "undue" and "exaggerated" weight); *Greycas, Inc. v. Proud*, 826 F.2d 1560, 1567 (7th Cir. 1987) (similar).

7. This Court has already expressed concerns about counsel being "adept in planting ideas that simply shouldn't be there . . . . " 4/6/05 Tr. at 7026-27. The risk of that occurring here is so obvious, the potentially inflammatory consequences so extreme, and the likely impact so patently incapable of remedy after the fact, that such efforts must be foreclosed in advance. Accordingly, the Court should enter an order precluding CPH from arguing, suggesting, or implying that Morgan Stanley's litigation misconduct interfered with, intrudes on, injures, or represents an affront to the judicial system in any respect. The sole basis for which such litigation misconduct may be considered is that identified by the Court – whether Morgan Stanley evinced consciousness of guilt by seeking "to hide direct evidence of either the Sunbeam fraud or Morgan Stanley's complicity with Sunbeam in perpetrating that fraud on CPH."

WHEREFORE, Morgan Stanley respectfully requests that the Court grant this motion, together with such other and further relief as is just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 18th day of April, 2005.

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant. /

MORGAN STANLEY'S MOTION TO PREVENT EXTENSION OF DISCOVERY MISCONDUCT SANCTIONS TO PHASE II

This Court has previously stated that the "facts" of Morgan Stanley's complicity in the fraud, as reflected in Redacted Amended Complaint, will be presumed to be true for all purposes in this case, but that CPH might be permitted to embellish those "facts" in contending for a substantial punitive award. *E.g.*, 4/4/05 Tr. at 6537:21-22. We respectfully submit that this proposed course of action, which appears to be wholly unprecedented in Florida law, would be a clear violation of controlling Florida precedent and would raise serious state and federal constitutional problems.

I. IT WOULD VIOLATE CONTROLLING PRECEDENT TO PROHIBIT MORGAN STANLEY FROM CONTESTING IN PHASE II THE ALLEGATION THAT IT WAS COMPLICIT IN SUNBEAM'S FRAUD.

A. Governing Precedent Bars The Court's Proposed Course Of Action.

Because the sanction of barring a full defense against punitive damages is virtually unprecedented in Florida jurisprudence, case law addressing the subject is sparse. But such precedent as there is makes clear that, despite the existence of otherwise sanctionable discovery

violations, a defendant must be permitted to contest the existence, nature, and extent of its alleged wrongdoing in connection with punitive damages.

That principle is demonstrated by *Nordyne, Inc. v. Florida Mobile Home Supply, Inc.*, 625 So. 2d 1283 (Fla. 1st DCA 1993). In that case, it came out after trial that the defendant had "'intentionally and willfully' withheld documents harmful to its case, which . . . would have changed the amount of punitive damages awarded." *Id.* at 1285, 1288. As a sanction, the trial court awarded plaintiff a new trial on punitive damages. *Id.* The First District affirmed but emphasized that, despite the discovery misconduct, "the parties should be permitted to present at trial all evidence relevant to the factors which must be considered by the jury in arriving at a verdict, [including] all of the circumstances relevant to the [underlying tort] claims." *Id.*

Humana Health Insurance Co. of Florida v. Chipps, 802 So. 2d 492 (Fla. 4th DCA 2001), is also directly on point. In *Humana*, as this Court is aware, the trial court instructed the jury that it was to take as established that Humana's conduct was "so gross and flagrant" and "showed such an entire lack of care that Humana must have wantonly and recklessly disregarded the safety and welfare of the public." *Id.* at 495-96 (internal quotation marks omitted). In reversing, the Fourth District Court of Appeals held that the trial court's instructions on punitive damages "invaded the clear province of the jury by characterizing the conduct of the defendants" *id.* at 495-96, as it was up to the jury to reach "its own decision regarding the egregiousness of the defendant's conduct" on the basis of "the evidence in this case," *id.* at 496. The Fourth District further ruled that it was error for the trial court to "prevent Humana from introducing mitigating evidence to rebut testimony that Humana's managed care practices violated industry standards." *Id.* Evidence of this sort, the court explained, "reflected on the egregiousness of Humana's conduct, and, thus may have impacted the amount of damages the jury awarded." *Id.* That the "industry standards" evidence was merely illustrative of a broader principle is clear

from the Fourth District's conclusion that, despite the litigation misconduct, "[t]he jury should have been permitted to consider ***any evidence*** which would have had the effect of reducing or softening the moral or social culpability attaching to [the defendant's] act." *Id.* (emphasis added; internal quotation marks omitted). The fact that evidence tends to suggest that the defendant is not guilty of any wrongdoing does not make it any less relevant to mitigation; such evidence therefore fits comfortably within the *Humana* Court's "any [mitigating] evidence" category and must be allowed. *Id.*

B. Extending The Sanction To Phase II Is Inconsistent With The Justifications For Sanctions.

Under Florida law, sanctions are awarded to ensure compliance with the discovery rules and to "compensate for an advantage gained by a [discovery] violation," *Hanna v. Industrial Labor Serv., Inc.*, 636 So. 2d 773, 776 (Fla. 1st DCA 1994), "not to punish," *Carr v. Reese*, 788 So. 2d 1067, 1072 (Fla. 2d DCA 2001). But this justification for establishing certain facts as true in the liability phase — to "right the scales" between the litigants — does not make sense in the punitive damages context. Unlike full compensatory damages, to which "[a tortiously] injured person is entitled as a matter of right," a "plaintiff has ***no*** right to punitive damages." *St. Regis Paper Co. v. Watson*, 428 So. 2d 243, 247 (Fla. 1983). Rather, punitive damages are entirely a "windfall to the fully-compensated plaintiff," *City of Newport v. Fact Concerts, Inc.*, 452 U.S. 247, 267 (1981), to effectuate the ***State's*** interest "in bringing wrongdoers to account," *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 403 (5th Cir. 1986). *Cf. Estate of Despain v. Avante Group, Inc.*, No. 5D03-3383, 2005 WL 672090, at *1 (Fla. 5th DCA Mar. 24, 2005) ("Punishment of the wrongdoer and deterrence of similar wrongful conduct in the future, rather than compensation of the injured victim, are the primary policy objectives of punitive damages

awards."). The State has no interest whatever in punishing a defendant that is actually innocent of wrongful conduct.

Even if there might be some sufficiently egregious circumstances that would justify disabling a defendant from mounting a punitive damages defense, this is not such a case. There is no evidence here, for example, that Morgan Stanley deliberately destroyed crucial evidence from which its culpability might be ascertained — though, even then, it is difficult to see why the interests of justice require more than allowing an adverse inference to be drawn from the absence of the evidence. *See Martino v. Wal-Mart Stores, Inc.*, 835 So. 2d 1251, 1256 (Fla. 4th DCA 2003). Nor is this case one in which no other effective sanction is available to address the litigation misconduct. To the contrary, the sanctions in Phase I are already of an unprecedented magnitude, exposing Morgan Stanley to a greatly increased risk of liability in the hundreds of millions of dollars. It is unwarranted overkill to add incapacitation in the punitive phase onto the severe sanction already imposed in the compensatory liability phase. To do so invites reversal.

C. The *Robinson* Case Does Not Support Sanctions in Phase II.

During argument on the rehearing motion, the Court suggested that *Robinson v. Nationwide Mutual Fire Insurance Co.*, 887 So. 2d 328 (Fla. 2004), precludes any inquiry into Morgan Stanley's actual innocence in Phase II. 4/5/05 Tr. at 6668-69. This is incorrect. In *Robinson*, the trial court had struck an insurer's opposition to plaintiffs' claim for attorney's fees as a sanction for discovery violations. *See* 887 So. 2d at 329. The Fourth District Court of Appeals reversed. It first concluded that "the trial court did not abuse its discretion when it imposed sanctions against the respondent for the discovery violations"; it nonetheless set the sanction aside because the defendant was in fact correct that the plaintiffs' claim was untimely. *Id.* The Florida Supreme Court reversed, holding that that the "propriety of the sanctions imposed . . . would not ordinarily include a consideration of the merits of an issue raised in a

filing once there has been a determination that the trial court did not abuse its discretion in imposing the sanction of striking the filing." *Id.* at 329-30.

This uncontroversial general principle does not govern this case for two related reasons. First, *Robinson* did not concern sanctions in the punitive damages context. Second, the question before this Court is the ***propriety*** of the proposed sanction in the first place. Morgan Stanley's position does not depend in any way on whether it would ultimately prevail in the absence of the sanction. Thus, we are not asking the Court to do the thing the Florida Supreme Court disapproved in *Robinson* — withdraw an otherwise appropriate sanction because of the strength of Morgan Stanley's merits position. Rather, the lawfulness of any Phase II sanction is challenged because, under Florida law, a punitive damages defendant may not be deprived of its right to defend fully as a sanction for litigation misconduct — in other words, under *Humana* and *Nordyne*, all defendants, *including* those who actually engaged in tortious conduct have a right to contest their liability and present other mitigating evidence before punitive damages are imposed. *Robinson* says nothing going to that point.

II. SIGNIFICANT DUE PROCESS PROBLEMS WOULD ARISE IF MORGAN STANLEY WERE PRECLUDED FROM PRESENTING EVIDENCE OF ITS INNOCENCE.

The Court's proposed course of action also creates due process problems. The United States Supreme Court has recognized that certain procedural protections are constitutionally required in the punitive damages context that are unnecessary when only compensatory liability is at issue, because punitive awards are "quasi-criminal" in nature, *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (internal quotation marks and citation omitted), and thus generally stigmatizing, and because they pose a particularly "'acute danger of arbitrary deprivation of property'" due to how they are administered, *State Farm*, 538 U.S. at 417 (internal quotation marks omitted). Nothing could be more arbitrary than punishing a

defendant without regard to its actual guilt or innocence. Therefore, the Due Process Clause of the Fourteenth Amendment would be violated by prohibiting Morgan Stanley from mounting a full defense in Phase II. The unprecedented nature of the sanction reinforces this conclusion. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) (a "presumption" of a due process violation is raised when there is a deviation from a state's "well-established common-law protection against arbitrary deprivations of property").

III. ALLOWING CPH TO BOLSTER THE "FACTS" FROM THE REDACTED AMENDED COMPLAINT BUT NOT ALLOWING MORGAN STANLEY TO CONTEST THOSE SAME FACTS WOULD BE MANIFESTLY UNFAIR AND WOULD VIOLATE BOTH *HUMANA* AND THE DUE PROCESS CLAUSE.

If, notwithstanding the arguments above, the Court continues to preclude Morgan Stanley from contesting its complicity in the fraud in Phase II, it should not let CPH embellish the facts deemed established. Indeed, that precise situation was disapproved in *Humana*. *See* 802 So. 2d at 496 (trial court erred in allowing the plaintiff to present evidence of Humana's purported violations of industry standards without allowing Humana to rebut it).

Common sense confirms this outcome. It is severe enough to gag Morgan Stanley by prohibiting it from ever contesting its guilt; it is even worse to give CPH a stick. If CPH "embellishes" on the presumed facts in a way that is untrue, it may be that the only way to "rebut the embellishment" would be by contradicting some of the presumed facts. Precluding Morgan Stanley from doing this is antithetical to the principles of "fundamental fairness inherent in the concept of due process of law." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 455 (1993) (plurality op.; internal quotation marks omitted). If CPH opens the door and attempts to bolster any of the facts in the Redacted Amended Complaint, Morgan Stanley must have complete freedom to rebut it. Cf. *Yates* v. *State Farm Mut. Automobile Ins. Co.*, 746 So. 2d 1161, 1162 (Fla. 4th DCA 1999) (doctor's testimony about examining plaintiff while his license

was suspended "opened the door to the cross-examination about the suspension, which the court had previously ruled was inadmissible.").

WHEREFORE Morgan Stanley respectfully requests that this Court enter an Order permitting it, in Phase II of this proceeding, to address, on the merits, its knowledge of and complicity in the fraud that occurred with respect to Sunbeam Corporation, or, in the alternative, precluding CPH from supplementing or embellishing the facts that the Court deemed established in its March 23, 2005 Default Order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 18th day of April 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

NOTICE OF FILING RETURN OF SERVICE

Defendant, MORGAN STANLEY & CO. INCORPORATED, by and through its undersigned counsel, hereby gives notice that it has filed the original Return of Service of the trial subpoena of James R. Maher.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand-delivery on this 18th day of April, 2005.

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RETURN OF SERVICE

State of Florida **County of Palm Beach** **Circuit Court**

Case Number: CA 03-5045 AI Court Date: 4/11/2005

Plaintiff:
COLEMAN (PARENT) HOLDINGS, INC.

vs.

Defendant:
MORGAN STANLEY & CO., INC.

For:
Joseph Ianno, Jr., Esq.
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222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

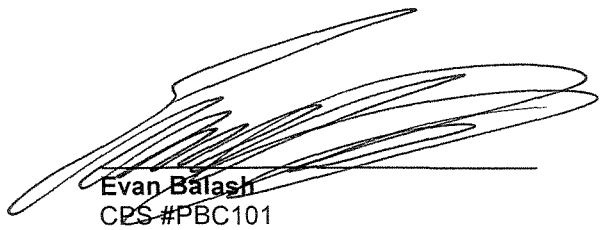
Received by BLACKHAWK LEGAL SERVICE INC on the 11th day of April, 2005 at 9:00 am to be served on **JAMES ROBERT MAHER, 775 Park Avenue, New York, NY 10021**.

I, Evan Balash, do hereby affirm that on the **11th day of April, 2005** at **2:30 pm, I:**

INDIVIDUALLY SERVED the within named person with a true copy of this Subpoena for Trial with the date and hour endorsed thereon by me, pursuant to F.S. 48.031(1).

Additional Information pertaining to this Service:
Served at: Palm Beach County Courthouse, 205 N. Dixie Highway, Room 11A, West Palm Beach, FL

Under penalty of perjury, I do hereby certify that I am not a party to the above captioned case and have no interest in the above action, that I am over the age of eighteen, that I have read the foregoing and that the facts stated in it are true, and that I am a **Certified Process Server** in good standing in the Fifteenth Judicial Circuit in and for Palm Beach County, Florida. Pursuant to F.S. 92.525(2) NO NOTARY IS REQUIRED.



Evan Balash
CPS #PBC101

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PRIORITY

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED.,

Defendant.

CASE NO: CA 03-5045 AI

* SERVED (P)
4/11/05 @ 2:30 PM
AT 2ND ADDRESS

SUBPOENA FOR TRIAL

THE STATE OF FLORIDA

TO: JAMES ROBERT MAHER
775 Park Avenue
New York, New York 10021

PALM BEACH COUNTY COURTHOUSE
ROOM 11.A
WEST PALM BEACH, FL.

YOU ARE COMMANDED to appear before The Honorable Elizabeth Maass, Judge of the Circuit Court, at the Palm Beach County Courthouse, Courtroom 11A, 205 North Dixie Highway, West Palm Beach, Florida on April 11, 2005* at 9:30 a.m., to testify in this action. If you fail to appear, you may be in contempt of court.

You are subpoenaed to appear by the following attorneys, and unless excused form this subpoena by these attorneys or the Court, you shall respond to this Subpoena as directed.

Dated: April 6th, 2005

BY: Joseph Ianno, Jr.
For the Court

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Counsel for Defendant
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***BEFORE YOU APPEAR**

PLEASE CALL JOYCE DILLARD, CLA AT (561) 659-7070 TO CONFIRM THE EXACT TIME AND DATE YOU WILL BE CALLED TO TESTIFY

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant. /

MORGAN STANLEY'S RENEWED MOTION IN LIMINE NO. 5 TO BAR CPH FROM ADDUCING EVIDENCE OF MORGAN STANLEY'S FINANCES OR ARGUING THAT PUNITIVE DAMAGES SHOULD BE PREDICATED ON OR ENHANCED ON ACCOUNT OF THOSE FINANCES

On February 23, 2005, this Court agreed to defer until Phase II consideration of the Defendant's Motion in Limine No. 5 to exclude irrelevant and prejudicial references to defendant Morgan Stanley & Co. Incorporated's ("Morgan Stanley") net worth. For the reasons asserted in that motion, Morgan Stanley now renews its request to exclude all evidence of its financial status (except insofar as it may elect to seek mitigation of punitive damages on that basis). For the convenience of the Court, this filing, which replaces and supercedes MIL 5, is included with Morgan Stanley's other Phase II motions.

If this Court is nevertheless inclined to admit some form of corporate financial information, Morgan Stanley moves in the alternative for an order (1) limiting such financial information to the net worth of Morgan Stanley & Company, the defendant in this action, and (2) barring the plaintiff from arguing that a greater punitive award is

necessary or appropriate because Morgan Stanley's parent company has substantial financial resources. Morgan Stanley further requests that the Court ensure that the jury instructions do not invite, and indeed warn against, enhanced punishment on the basis of Morgan Stanley's wealth.

I. RECENT SUPREME COURT DECISIONS HOLD THAT CORPORATE FINANCIAL STATUS IS AN UNACCEPTABLE BASIS FOR INCREASING PUNITIVE DAMAGES; EVIDENCE OF A CORPORATE DEFENDANT'S FINANCIAL CONDITION IS THEREFORE IRRELEVANT.

A. The United States Supreme Court Has Ruled That A Corporate Defendant's Wealth Is An Unconstitutional Basis For Enhancing Punitive Damages.

Morgan Stanley acknowledges that nothing in current Florida law precludes a jury's consideration of "the defendant's financial resources" when setting an amount of punitive damages. Fla. Std. Jury Instr. PD1; *Bould v. Touchette*, 349 So. 2d 1181 (Fla. 1977); *Rinaldi v. Aaron*, 314 So. 2d 762 (Fla. 1975). However, this principle appears to be derived first and foremost from the notion that financial evidence is admissible for purposes of ***mitigating*** a punitive damages award, not for purposes of ***enhancing*** such an award. Recent decisions of the U.S. Supreme Court establish this principle conclusively: the federal Constitution does not permit using financial evidence for purposes of enhancing punitive damages above what would otherwise be permissible.

In *BMW*, the Supreme Court identified three guideposts for evaluating the permissible size of a punitive award. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575-85 (1996) (listing the guideposts). Significantly, the Court did not include corporate financial status as a factor, even though the plaintiff had argued that the $2 million punishment in that case could be sustained on the basis of BMW's substantial corporate

wealth. See Brief of Respondent, *BMW of N. Am., Inc. v. Gore*, No. 94-896, 1995 WL 330613, at *39 (1996). To the contrary, the Court stated: "The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business." 517 U.S. at 585.

In *Cooper Industries* the Court again embraced the three *BMW* guideposts, 532 U.S. at 435, 440, 441-43, and again omitted the corporate defendant's financial status as a relevant justification for the size of the award, even though the courts below had relied on it to uphold the $4.5 million punitive award. *See* Brief of Respondent, *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, No. 99-2035, 2001 WL 43395, at *7, *9 (noting that the court of appeals had approved the district court finding that "the award is fairly proportional given . . . the size of an award necessary to deter future similar conduct given defendant's size and assets").

Most recently, in *State Farm*, the Court again omitted financial status from the permissible criteria that must govern punitive awards. This time the Court went further, affirmatively criticizing the lower court's reliance on State Farm's "enormous wealth" in gauging the excessiveness of a punitive damages award as "a departure from well-established constraints on punitive damages." 538 U.S. at 426-27. The Court then unequivocally declared that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *Id.* at 427; *see also Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153, 167 (Ky. 2004) (recognizing that *State* Farm so requires and supports exclusion of wealth evidence).

Thus, the Supreme Court has repeatedly, and with increasing emphasis and clarity, rejected exhortations to include a corporate defendant's financial status as a constitutionally permissible guidepost. Instead, it has recognized that the use of such evidence to justify a large punitive damages award would undermine application of the three guideposts that it has identified as the appropriate considerations in assessing punishment. With regard to the first guidepost, varying punishment with the defendant's wealth conflicts with the well-established, constitutionally-based principle that punishment should fit the "reprehensibility" of the ***offense***. *BMW*, 517 U.S. at 575. The fact that a corporation has substantial assets does not make its conduct more egregious. *See, e.g., Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992) (Easterbrook, J.) (criticizing calculation of punitive award "as a percentage of L'Oreal's (supposed) net worth—as if having a large net worth were the wrong to be deterred!"). As to the second guidepost, the Supreme Court has ruled that the defendant's financial condition "bear[s] no relation to the award's reasonableness or proportionality to the harm." *State Farm*, 538 U.S. at 427. Finally, consideration of the defendant's financial condition is even more inconsistent with the comparative fines guidepost, because neither the fines considered in *State Farm* and *BMW* nor most other criminal or administrative fines vary with the defendant's revenues, income, assets, cash, or net worth. *See Kemezy v. Peters*, 79 F.3d 33, 36 (7th Cir. 1996) ("The usual practice with respect to fines is not to proportion the fine to the defendant's wealth.").

B. The Defendant's Financial Status Is Irrelevant To The Deterrent Function Of Punitive Damages.

The Supreme Court's constitutional rule rests on sound economic principles, which belie the facile assumption that the "deterrent" purpose of punitive damages

justifies consideration of a corporate defendant's wealth. The practice of allowing juries to consider wealth is predicated on the supposition that the objective of deterrence requires that wealthier wrongdoers be punished more than those of lesser means. This assumption may be valid when applied to ***individuals*** who have committed ***non-economically-motivated*** wrongs — *e.g.*, assaults, defamations, hate crimes, or other torts of malice — but it is illogical when applied to corporations or other organizations accused of economically motivated wrongdoing. As the Seventh Circuit has explained:

> For natural persons the marginal utility of money decreases as wealth increases, so that higher fines may be needed to deter those possessing great wealth. . . . Corporate assets finance ongoing operations and are unrelated to either the injury done to the victim or the size of the award needed to cause corporate managers to obey the law. Net worth is a measure of profits that have not yet been distributed to investors. Why should damages increase because the firm reinvested its earnings?

Zazu Designs v. L'Oreal, S.A., 979 F.2d 499, 508 (7th Cir. 1992).

There is nearly universal agreement with this proposition by scholars who have considered the subject. As one article on the subject states:

> Deterrence theory is based on the (usually and to one or another extent plausible) assumption that actors weigh the expected costs and benefits of their future actions. Specifically, a potentially liable defendant will compare the benefits it will derive from an action that risks tort liability against the discounted present expected value of the liability that will be imposed if the risk occurs. Whether a defendant is wealthy or poor, this cost-benefit calculation is the same. If, as is likely, a wealthy defendant derives no greater benefit from a given action than a poor defendant, then both will be equally deterred (or equally undeterred) by the threat of tort liability. ***A defendant's existing assets do not increase the expected value of a given future action. Therefore they do not require any adjustment in the level of sanction needed to offset that expected value.*** The defendant's wealth or lack of it is thus irrelevant to the deterrence of socially undesirable conduct . . . .

Kenneth S. Abraham & John C. Jeffries, *Punitive Damages and the Rule of Law: The Role of the Defendant's Wealth*, 18 J. Legal Stud. 415, 417 (1989) (emphasis added).

Accord, 2 A.L.I., Reporters' Study, Enterprise Responsibility for Personal Injury 254–255 (1991); Bruce Chapman & Michael J. Trebilcock, *Punitive Damages: Deterrence in Search of a Rationale*, 40 Ala. L. Rev. 741, 824–826 (1989); Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 Ala. L. Rev. 1143, 1176–1177 (1989); Polinsky & Shavell, *supra*, at 910–914.

In sum, both as a constitutional matter and as a matter of fundamental deterrence principles, the financial condition of a corporate punitive damages defendant is not only irrelevant, but antithetical, to the proper setting of punitive damages.

II. EVEN IF WEALTH EVIDENCE WERE RELEVANT IN SOME RESPECT, THE PROBATIVE VALUE OF EVIDENCE CONCERNING MORGAN STANLEY'S FINANCIAL STATUS WOULD BE GREATLY OUTWEIGHED BY ITS CAPACITY TO PREJUDICE AND CONFUSE THE JURY.

Even if this Court were to conclude that evidence of Morgan Stanley's finances has some relevance to the process of setting punitive damages beyond mitigation, any such relevance is at most minimal, and the value of this evidence is substantially outweighed by its manifest prejudicial tendencies. As the Supreme Court decisions cited above make clear, the principal determinants of the amount of punitive damages are the degree of reprehensibility of the defendant's conduct and the amount of compensatory damages. The defendant's financial status plays at most a subsidiary role.

Moreover, as the Supreme Court repeatedly has admonished, evidence of a corporate defendant's financial status carries with it a significant risk of unfairly prejudicing the jury's determination of the amount of punitive damages. *See, e.g., State Farm*, 538 U.S. at 417 ("'the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses,

particularly those without strong local presences'") (quoting *Oberg*, 512 U.S. at 432); *TXO*, 509 U.S. at 464 (plurality op.) (agreeing with the petitioner that "the emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident").

The introduction of wealth evidence also has a strong tendency to confuse the jury. As the Seventh Circuit has explained:

> Corporations . . . are not wealthy in the sense that persons are. Corporations are abstractions; investors own the net worth of the business. These investors pay any punitive awards (the value of their shares decreases), and they may be of average wealth. Pension trusts and mutual funds, aggregating the investments of millions of average persons, own the bulk of many large corporations. ***Seeing the corporation as wealthy is an illusion, which like other mirages frequently leads people astray.***

Zazu Designs, 979 F.2d at 508 (emphasis added).

The threat that "irrelevant," "tangential," or "only inflammatory" evidence (*State Farm*, 538 U.S. at 418) of Morgan Stanley's financial status will confuse the jury and lead it to award unconstitutionally excessive damages is no less real here than it was in *State Farm*. (Indeed, Morgan Stanley's bottom-line "net worth" changes radically over time. If a punitive damages award is based on the financial condition of this defendant, the size of the award would vary greatly depending on the ever-fluctuating wealth of the company at the time of trial.) Accordingly, the Court should exclude the financial evidence under Fla. Stat. § 90.403 as being substantially more prejudicial than probative.

III. IF ANY EVIDENCE OF FINANCIAL STATUS IS ADMITTED, THAT EVIDENCE SHOULD BE LIMITED TO EVIDENCE OF THE NET WORTH OF MORGAN STANLEY & CO. IN FLORIDA.

Evidence of Morgan Stanley's overall wealth, whether presented as net worth, revenues, profits, cash on hand, or other measures, reflects the sum total of the company's activities in every place that it does business. Allowing a jury to increase the amount of punitive damages awarded based on the defendant's total corporate wealth improperly allows punishment of both lawful activities and extraterritorial activities that the State has no right to punish and that have no connection to this plaintiff.

If the jury is permitted to base its punitive damage award on Morgan Stanley's entire net worth, it would be punishing Morgan Stanley for both lawful and unrelated activities throughout the United States and other countries, in direct contravention of the Supreme Court's mandates in *State Farm* and *BMW*. At the very least, then, if any net worth information is admitted at all, such information should be limited to the defendant's assets and liabilities within the State of Florida.

In any case, regardless whether the Court chooses to limit admissible financial information to the State of Florida, it should certain limit such evidence to the ***net worth*** of the defendant, as opposed to any other measure of financial status. "Florida courts routinely use net worth to determine whether a punitive award is bankrupting or excessive." *Liggett Group Inc. v. Engle*, 853 So. 2d 434, 457 (Fla. 3d DCA 2003); *see also Lipsig v. Ramlawi*, 760 So. 2d 170, 189 (Fla. 3d DCA 2000) (punitive award held improper because it was 1.12 times defendant's net worth and thus would result in defendant's "financial demise"); *Turner v. Fitzsimmons*, 673 So. 2d 532, 536 (Fla. 1st DCA 1996) (net worth evidence critical to determination of excessiveness of punitive

award); *Hockensmith v. Waxler*, 524 So. 2d at 715 (net worth evidence used by the court to determine punitive award was excessive); *Brooks v. Rios*, 707 So. 2d 374, 376 (Fla. 3d DCA 1998) (evidence of net worth must be presented to preserve the defendant's right to argue economic castigation on appeal). Any other measure of financial resources would be potentially misleading and would needlessly protract and complicate the Phase II proceedings.

In addition, Florida law flatly prohibits references to the financial resources of non-party affiliates unless plaintiffs satisfy the strict criteria for "piercing the corporate veil." Florida law prohibits any piercing of the corporate veil unless the plaintiff proves that (1) the subsidiary is a "mere instrumentality" or "alter ego" of the parent company; and (2) the parent used the subsidiary to defraud creditors. Plaintiffs has made no such showing here, and accordingly, if this Court allows any reference to the defendant's financial status, those references should be limited to the financial status of Morgan Stanley & Company, and should not include any evidence of the financial condition of any parent or affiliate companies. *See, e.g., Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114, 1116-22 (Fla. 1984); *State ex rel. Continental Distilling Sales Co. v. Vocelle*, 27 So. 2d 728, 729 (Fla. 1946); *Lipsig*, 760 So. 2d at 187; *Ocala Breeders' Sales Co. v. Hialeah, Inc.*, 735 So. 2d 542, 543 (Fla. 3d DCA), *rev. denied*, 749 So. 2d 502 (Fla. 1999).

IV. COUNSEL'S RELIANCE UPON ANY FINANCIAL EVIDENCE SHOULD BE RESTRICTED, AND THE JURY SHOULD BE CAUTIONED AGAINST IMPROPER USE OF SUCH EVIDENCE.

If this Court allows plaintiff to adduce ***any*** evidence relating to Morgan Stanley's financial condition, it is essential to safeguard against improper use of such evidence.

Plaintiff's counsel should be ordered to refrain from arguing that the award should be enhanced on account of, or be in any way proportioned to, Morgan Stanley's financial condition. The jury should also be instructed, consistent with *State Farm*, that it may not increase the punitive award above an amount that is otherwise appropriate merely because the defendant has substantial financial resources. For example, plaintiff's counsel should be barred from asking the jury to award a percentage of Morgan Stanley's revenues, earnings, net worth, or any other financial measure. Failure to take these steps would countenance a punishment-setting exercise that is dominated and distorted by evidence and argument about Morgan Stanley's wealth, which is at best a peripheral consideration.

WHEREFORE Morgan Stanley respectfully requests that this Court enter an Order precluding plaintiff from adducing evidence of Morgan Stanley's finances or arguing that a punitive damages award should be predicated upon or enhanced on account of those finances.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 18th day of April 2005.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION IN LIMINE NO. 34 TO BAR EVIDENCE OR ARGUMENT CONCERNING PURPORTED INVESTMENT FAILURES OF RONALD PERELMAN

THIS CAUSE came before the Court April 18, 2005 on Coleman (Parent) Holdings Inc.'s Motion in Limine No. 34 to Bar Evidence or Argument Concerning Purported Investment Failures of Ronald Perelman, with both parties well represented by counsel. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part, and ruling deferred, in part. Neither counsel shall question Perelman about tax implications, tax strategies, the relative value of consideration received by a corporation related to CPH and public shareholders, or bankruptcy, in transactions or involving entities other than that or those at issue here. Neither counsel shall refer to "corporate raiders" or "junk bonds," without prejudice to any counsel's right to question the witness about the concepts intended to be conveyed by those words. Perelman may be questioned about his knowledge of corporate scandals involving misrepresentations by a corporation to the public revealed prior to the deal here. Ruling on any matter raised in the Motion not specifically addressed herein is deferred. "Granted", for purpose of the Motion in Limine addressed in this Order, shall mean that the parties and their counsel shall not refer to or attempt to introduce into evidence, or otherwise place before the jury, the matter referred to without first proffering the good faith basis to believe the matter is relevant and otherwise admissible outside the

jury's presence. This Order is without prejudice to either party's right to object on relevancy grounds to any particular question, or on any other proper grounds.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 18 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER

THIS CAUSE came before the Court April 18, 2005 on Defendant Morgan Stanley & Co., Incorporated's Brief on Mitigation of Damages, which the Court elects to treat as including a Motion for Rehearing. Based on a review of the Motion, it is

ORDERED AND ADJUDGED that Defendant Morgan Stanley & Co., Incorporated's Motion for Rehearing is Denied. See Local Rule 6.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 18 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiffs,

CASE NO: 2003 CA 005045 AI

vs.

MORGAN STANLEY & CO., INC.
Defendant.
_____/

NOTICE OF FILING UNDER SEAL

COLEMAN (PARENT) HOLDINGS INC. hereby gives notice of the filing of Privileged Documents Provided to Court by CPH on April 19, 2005 for *In Camera* Inspection Filed under Seal on this date.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Hand Delivery to all counsel on the attached list on this 19th day of April 2005.

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Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Notice Of Filing Pleading Under Seal
Case No.: 2003 CA 005045 AI

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant. /

MORGAN STANLEY'S MOTION REGARDING DEPOSITION DESIGNATION SCHEDULING

Morgan Stanley & Co. Incorporated ("Morgan Stanley") hereby proposes that the following schedule be adopted with respect to scheduling argument on the Court's review of Morgan Stanley's deposition designations. Morgan Stanley has designated testimony for 24 witnesses that it may present in its Phase I case-in-chief. It has designated testimony for eight additional Phase II witnesses. Of these, the Court has ruled upon only five witnesses — leaving the parties and the Court with 19 witnesses to address. In addition, plaintiff Coleman (Parent) Holdings, Inc. apparently wishes to conduct a rehearing on some or all of the designations of the five witnesses upon which the Court has already ruled, which would mean that the parties and the Court have even more work to do. So that Morgan Stanley's case may proceed in an efficient and organized manner, Morgan Stanley proposes as follows.

16div-015220

I. Phase II Designations

In a separate motion, CPH has asked the Court to address various issues relating to Morgan Stanley's Phase II designations. *See* CPH's Motion To Bar Improper Deposition Designations at 1, 4 (filed Apr. 18, 2005).

For two reasons, the Court should defer ruling upon any Phase II matters. *First*, the Court should address matters relating to Phase II witnesses only after it has ruled upon all outstanding Phase I matters. Morgan Stanley's Phase I case-in-chief is set to begin on Thursday, April 21, 2005. Yet it has finalized almost none of its designations for the Phase I witnesses that it wishes to present in its case. Any time the Court has available for deposition designation matters should be spent addressing issues relating to designations for Phase I witnesses.

Second, the propriety of the parties' Phase II designations will largely turn on the Court's rulings regarding the admissibility of evidence that have been separately briefed by the parties. Briefs on these issues were exchanged by the parties on April 18, 2005. Before the Court can decide many of the Phase II issues that CPH has raised, it must rule upon these overarching Phase II issues. The parties can then revise their designations in light of the Court's order, and (if necessary) the Court can then review the remaining unresolved issues.

II. Designations for Messrs. Emmerich, Ginstling, Duffy, Slovin, and Fogg

On March 10, 2005, the Court addressed the parties' deposition designations of Messrs. Emmerich, Ginstling, Duffy, Slovin, and Fogg. In its April 11, 2005 Motion To Bar Untimely Deposition Designation, CPH took the position that "all of [Morgan Stanley's] newly designated testimony on April 8, 2005" for Messrs. Slovin and Duffy was "barred." The Court granted this motion in an Order dated April 14, 2005.

CPH has, however, raised new objections to other of the witnesses upon which the Court has already ruled, and appears to have altered or added some of its designations, as well. Morgan Stanley has notified CPH that, as a result of the Court's April 14, 2005 ruling, both parties should simply *revert* to the deposition designations that were ruled upon by the Court on March 10, 2005. The only new objections that the parties should be permitted to raise with respect to these already-ruled upon deposition designations should be relevancy objections. Consistent with the Court's prior ruling barring Morgan Stanley's new designations for Messrs. Slovin and Duffy, neither party would not be permitted to raise new objections or add new testimony, unless it submitted a special motion requesting leave to do so. CPH has refused to consent to this proposal.

Morgan Stanley does not believe revisiting designations for these five witnesses is an efficient use of the Court's time — particularly when there are an additional 21 witnesses that need to be considered by the Court in the next week. Accordingly, Morgan Stanley respectfully requests that the Court instruct the parties to revert to the designations for Messrs. Emmerich, Ginstling, Slovin, Duffy, and Fogg that were in existence as a result of the Court's March 10, 2005 rulings on these witnesses.

III. Scheduling of Argument on Phase I Deposition Designations

Morgan Stanley respectfully requests that the Court schedule argument on Phase I witnesses in the order that follows. This schedule logically groups witnesses who will testify about similar matters into the same argument groups. This grouping will enable the Court and the parties to address similar issues at the same time, which will be an efficient manner in which to proceed.

Coleman Company Board Members
Jordan
Gifford
Moran

Coleman Company Officers & Employees
Jones
Clark
Page

MAFCO Officers & Employees
Engelman
Fasman
Salig
Dickes
Drapkin
Gittis
Schwartz
Maher
Nesbitt
Slotkin
Winoker

MAFCO Advisors
Geller
Amorison

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 19th day of April, 2005.

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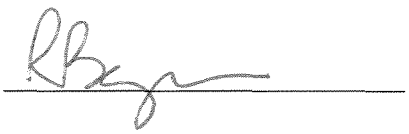
BY: 

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

MORGAN STANLEY & CO. INCORPORATED'S MOTION TO QUASH TRIAL SUBPOENA SERVED ON DONALD G. KEMPF, JR.

Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") moves this Court to quash the trial subpoena served on Donald G. Kempf, Jr., the Chief Legal Officer of Morgan Stanley's parent corporation.

INTRODUCTION

Time and again, Florida courts have recognized that calling opposing counsel to testify "is an extraordinary step which will rarely be justified." *State v. Donaldson*, 763 So. 2d 1252, 1254 (Fla. 3d DCA 2000). Nonetheless, months after the close of discovery, Coleman (Parent) Holdings Inc. ("CPH") served the Chief Legal Officer of Morgan Stanley's parent company – who is actively involved in Morgan Stanley's defense – with a subpoena duces tecum to appear at trial. That effort is untimely, procedurally improper, and substantively baseless. The subpoena improperly asks to add a witness two-and-a-half months after the date for designating witnesses. It improperly calls for Mr. Kempf to produce documents at trial, bypassing this Court's discovery cut-off without seeking the Court's prior leave. It demands testimony and documents that are privileged and confidential. It is enormously burdensome. And it seeks Mr. Kempf's testimony on matters that are not material and as to which Mr. Kempf has no relevant

personal knowledge. The subpoena served on Mr. Kempf and his last-minute placement on CPH's witness list thus must be seen for what they are: tactics to distract Mr. Kempf from his important duties in preparing Morgan Stanley's defense and to embarrass him and Morgan Stanley before the jury by forcing him repeatedly to invoke attorney-client privilege. This Court must not allow CPH to abuse the subpoena power in this manner.

BACKGROUND

Donald G. Kempf, Jr. is the Chief Legal Officer of Morgan Stanley's parent company. On March 23, 2005, two-and-a-half months after the date for designating witnesses had passed, CPH served a subpoena on Mr. Kempf demanding his appearance at trial. Despite the fact that discovery in this matter has been closed for more than four months, the subpoena also seeks production of documents. *See* Subpoena Duces Tecum for Trial (Mar. 25, 2005) ("Trial Subpoena") (Ex. A). The demanded documents consist largely if not entirely of privileged communications between Morgan Stanley and outside counsel (all communications "between Morgan Stanley and Kirkland and Ellis") and between Morgan Stanley employees and "Morgan Stanley's in-house counsel." *Id.*

Three days later, on March 26, 2005, CPH served a motion for leave to take Mr. Kempf's deposition regarding Morgan Stanley's compliance with the Court's Order of March 2, 2005. *See* Motion for Leave to Depose Donald G. Kempf, Jr. (Mar. 26, 2005) (Ex. B). On the same day, CPH submitted an updated witness list and, for the first time, identified Mr. Kempf as a potential witness in the punitive damages phase of the trial. CPH indicated that it would seek Mr. Kempf's testimony at trial on the following issues:

> Morgan Stanley's failure to comply with the Court's March 2, 2005 Order and Morgan Stanley's representations in other litigation concerning the existence and ability to search for and retrieve e-mail. Mr. Kempf also may testify concerning the

> criminal proceedings in Italy involving Mr. Strong. Mr. Kempf also may testify regarding efforts on the part of Morgan Stanley to blame falsely Morgan Stanley's outside counsel for Morgan Stanley's litigation misconduct.

CPH's Witness Disclosure List at 8 (Mar. 26, 2005) (Ex. C).

During argument on the Motion for Leave to Depose Mr. Kempf, the Court recognized that, to the extent CPH seeks evidence of alleged discovery violations beyond those reflected in this Court's Default Order of March 23, 2005, that evidence is not admissible at trial:

> I would consider what sanctions to impose based on what I considered as the body of evidence that was in front of me now. We wouldn't bootstrap the [March 23 Order] by developing other information. That wouldn't be appropriate.

3/28/2005 Tr. at 5556 (Ex. D); *see also id.* at 5567 ("We're not doing [discovery regarding Morgan Stanley's compliance with the March 2 Order] now. I understand we're going to go ahead and start with the trial.").

In response to inquiries at that hearing, counsel for Morgan Stanley repeatedly informed CPH and the Court that Morgan Stanley would not argue at trial that punitive damages should be mitigated because Morgan Stanley's outside counsel was responsible for the discovery problems. Morgan Stanley's counsel was asked directly if "there is going to be any effort to lay the blame of this off on Kirkland and Ellis?" 3/28/05 Tr. at 5572 (Ex. D). After promising an answer the next day, *id.*, Morgan Stanley's new counsel of record returned with an unequivocal answer: "Morgan Stanley does not . . . intend to offer evidence in the punitive damages phase, should we have one[,] regarding Kirkland & Ellis," 3/29/05 Tr. at 5593 (Ex. E). *See also id.* at 5594 (Morgan Stanley does "not intend as part of a mitigation argument" to "put on evidence or assign blame to Kirkland & Ellis").

ARGUMENT

Compelling testimony from opposing counsel, especially in the midst of trial, is an "extraordinary" and highly disfavored "step which will rarely be justified." *State v. Donaldson*, 763 So. 2d 1252, 1254 (Fla. 3d DCA 2000); *accord Scottsdale Ins. Co. v. Camara De Comercio Latino-Americana De Los Estados Unidos, Inc.*, 813 So. 2d 250, 252 (Fla. 3d DCA 2002).

That "extraordinary step" is particularly unjustified here. The subpoena served on Mr. Kempf is not merely an untimely and improper attempt to add witnesses and reopen discovery out of time and without the Court's prior approval. It also comes as Morgan Stanley and its attorneys are in the middle of a complex fraud case, that seeks billions of dollars, with new lead trial counsel. Mr. Kempf is assisting in the resulting scramble to defend Morgan Stanley at trial and should not be distracted from those efforts. That is especially true given that the evidence sought from him is not relevant to this matter; addresses issues foreclosed by this Court's rulings and Florida law; is clearly protected by privilege; imposes oppressive document production demands; and concerns issues about which Mr. Kempf has no personal knowledge. In short, none of CPH's reasons for serving a subpoena duces tecum on Mr. Kempf comes close to the "extraordinary showing" required.

I. The Trial Subpoena of Mr. Kempf Is Untimely and Procedurally Improper

CPH's attempt to subpoena Mr. Kempf is untimely and procedurally improper for two reasons. First, under this Court's scheduling order, CPH was required to designate all trial witnesses by January 10, 2005. *See* Order Concerning Pretrial Schedule & Following Case Mgmt. Conference (Oct. 14, 2004) (Ex. F). While CPH promised a "drastically reduced" witness list by March 26, the addition of Mr. Kempf in fact improperly attempts to expand it. 3/24/05 Tr. at 5273 (Ex. G). The Court has refused to allow Morgan Stanley to add new witnesses when amending its list on April 5, permitting only a change in the corporate

representative witness. *See* Order on Morgan Stanley's Motion to Add Witnesses (Apr. 5, 2005) (Ex. H). The same rule should apply to CPH. Because Mr. Kempf is not a properly added witness, the subpoena should be quashed.

Second, pursuant to this Court's pretrial order, discovery in this case closed on November 23, 2004. *See* 3/24/05 Tr. at 5277 (Ex. G). Yet Mr. Kempf's subpoena duces tecum demands an enormous document production from Morgan Stanley more than five months after that date. Worse, CPH has requested these documents without seeking the Court's prior approval. CPH itself has previously argued against the use of trial subpoenas to obtain widespread document production after the close of discovery. In moving to quash Morgan Stanley's notice to produce MAFCO loan agreements, CPH's counsel argued:

> The notice to produce at trial is generally used for purposes of having the originals of documents that have already been discovered present in the courtroom. . . . It is not a means by which to avoid the restrictions that are imposed on discovery in the Court's pretrial order.

Id. at 5351-52. The Court accepted CPH's argument and granted the motion to quash. *See* Order on CPH's Motion to Quash Morgan Stanley's Notice to Produce MAFCO Loan Agreements (Mar. 24, 2005) (Ex. I). Consistent with that ruling and CPH's prior argument, the Court should reject CPH's attempted end-run of the Court's discovery order and quash the subpoena.

II. CPH Provides No Compelling Basis for Seeking To Call a Party's Counsel – Who Is Actively Involved His Client's Defense – as a Witness in the Current Litigation

A. CPH's Purported Desire To Present Evidence Regarding Morgan Stanley's Non-Compliance with the Order of March 2, 2005 Cannot Justify Calling Mr. Kempf as a Witness.

CPH first urges that it wishes to obtain Mr. Kempf's testimony concerning Morgan Stanley's compliance with this Court's discovery order of March 2, 2005. That purported rationale, however, fails for three distinct reasons.

1. ***No Personal Knowledge.*** First, Mr. Kempf has no personal knowledge of that issue. As Morgan Stanley already has informed this Court, and as Mr. Kempf attested in his prior declaration, Mr. Kempf did not handle Morgan Stanley's production to CPH in response to the Court's March 2, 2005 Order. *See* Opposition to Motion for Leave to Depose Donald G. Kempf, Jr. at 4-5 (Mar. 28, 2005) (Ex. J); Declaration of Donald G. Kempf, Jr. ¶ 1 (Mar. 28, 2005) (Ex. K). That was recently confirmed by James Doyle, the lawyer who had primary in-house responsibility for productions responsive to the Court's March 2, 2005 Order, and whose deposition was recently conducted pursuant to this Court's ruling on CPH's Motion for Leave to Take the Deposition of Donald Kempf (March 29, 2005) (Ex. L). "Q: Did Mr. Kempf have any involvement whatsoever in the efforts to respond to the March 2 order? A: Not that I am aware of." Deposition of James Doyle at 35:5-35:8 (Apr. 17, 2005) (Ex. M). There thus is no basis for questioning Mr. Kempf about Morgan Stanley's compliance with the March 2, 2005 Order. As this Court has already recognized, such inquiries, to the extent permissible at all, must be directed to those "in Morgan Stanley . . . charged with compliance with that . . . order" – not Mr. Kempf. 3/28/05 Tr. at 5568 (Ex. D).

Because Mr. Kempf lacks personal knowledge of the events regarding which his testimony is supposedly being sought, there would be no grounds to compel Mr. Kempf's testimony even if he were an ordinary witness. Mr. Kempf, moreover, is no ordinary witness. He is chief counsel to Morgan Stanley's parent, an active participant in Morgan Stanley's defense and, consequently, a beneficiary of the heightened protection Florida law affords to counsel during pending proceedings. As a result, CPH's attempt to subpoena Mr. Kempf cannot be sustained.

2. ***Foreclosed by prior rulings.*** Second, the topic on which Mr. Kempf's testimony is sought is no longer material. This Court's March 1, 2005 Order declares that the Court will read a statement to the jury regarding Morgan Stanley's discovery conduct. Order on CPH's Motion for Adverse Inference at 13 (Mar. 1, 2005) (Ex. N). The Court's order specifies that the statement would be the *only* evidence presented to the jury on that issue, and that "no other evidence . . . concerning the production of e-mails or lack thereof shall be presented absent further Court order." *Id.* at 13-14 . On March 23, the Court imposed additional sanctions on Morgan Stanley by, *inter alia*, amending the statement to be read to the jury to include a description of additional discovery conduct by Morgan Stanley. *See* Order on CPH's Renewed Motion for Entry of Default Judgment at 17 (Mar. 23, 2005) (Ex. O). The Court did not, however, lift the prohibition against admitting additional evidence regarding the matters that would be contained in the statement.

The Court since has reiterated that there is no need to open a sideshow before the jury concerning compliance with the March 2, 2005 Order: "I would consider what sanctions to impose based on what I considered as the body of evidence that was in front of me now. *We wouldn't bootstrap the order by developing other information. That wouldn't be appropriate.*" 3/28/05 Tr. at 5555-56 (emphasis added) (Ex. D). Even leaving aside the fact that it "wouldn't be appropriate" to use the March 2 order to "bootstrap" Mr. Kempf into testifying, it is difficult to see what Mr. Kempf's testimony – testimony from someone who was not involved in those document productions – conceivably could add to the extensive findings regarding litigation misconduct in the Court's March 5th order.

3. ***Immaterial as a matter of law.*** Finally, calling Mr. Kempf to testify in the punitive damages phase regarding compliance with the March 2, 2005 discovery order cannot be

squared with Florida law. That law dictates that sanctions for litigation misconduct are "not punitive" in nature. *AllState Ins. Co. v. Biddy*, 392 So. 2d 938, 942 (Fla. 2d DCA 1981); *Carr v. Reese*, 788 So. 2d 1067, 1072 (Fla. 2d DCA 2001); Joint Committee of the Trial Lawyers Section of the Florida Bar and Conferences of Circuit and County Court Judges, *Handbook on Discovery Practice* at 4 (2003). *A fortiori*, the Court cannot allow the jury to punish litigation misconduct. Mr. Kempf's testimony would be impermissible as a matter of law for this purpose.

This Court has ruled that the statement of litigation misconduct it plans to read to the jury "shall be limited to those facts which would allow a reasonable juror to conclude that MS & Co. *sought to hide direct evidence* of the Sunbeam fraud or Morgan Stanley's complicity with Sunbeam." Order on Defendant's Motion for Reconsideration of the Court's Sanction Orders at 1 (Apr. 5, 2005) ("April 5 Order") (Ex. P) (emphasis added). Likewise, the Court has emphasized that the statement of litigation misconduct "may be considered *only* for that purpose," *i.e.*, to show Morgan Stanley's consciousness of guilt and intent to withhold direct evidence. *Id.* (emphasis added). Mr. Kempf's testimony would be immaterial as a matter of law for that purpose as well.

As discussed above, Mr. Kempf, the Chief Legal Officer of Morgan Stanley's parent corporation, played no role in the document productions at issue. His testimony thus could not show that Morgan Stanley sought to hide direct evidence. Accordingly, the subpoena served on Mr. Kempf provides no countervailing benefits, and certainly none that justifies such an intrusion on his efforts as an attorney to help his client prepare and present its case at trial

B. CPH's Claims About False Blame Are Wholly Irrelevant to Any Legitimate Issue in This Trial

CPH initially urged that, in the alternative, Mr. Kempf may be called to "testify regarding efforts . . . to blame falsely Morgan Stanley's outside counsel for Morgan Stanley's litigation

misconduct." Even accepting the incorrect premise that Mr. Kempf would testify that any such false-blame efforts occurred — and he would not — there is no longer any basis for seeking his testimony. Counsel for Morgan Stanley has informed the Court that Morgan Stanley would *not* argue in Phase II of this case that Morgan Stanley's outside counsel was responsible for the discovery problems. *See* 3/28/05 Tr. at 5572 (Ex. D); 3/29/05 Tr. at 5593-94 (Ex. E); *see also* p. 3, *supra*. Accordingly, there is simply no basis for the subpoena.

The Court's rulings, discussed pp. 6-7, *supra*, also bar the proposed testimony. First, Mr. Kempf's testimony is barred by the Court's March 5 Order (and statements during the March 28 hearing) foreclosing additional evidence concerning litigation misconduct. Second, the Court's April 5 order provides that litigation misconduct is relevant to punitive damages *only* insofar as it suggests an effort to "hide evidence of either the Sunbeam fraud or Morgan Stanley's complicity." April 5 Order at 1 (Ex. P). Because Mr. Kempf does not have either personal knowledge of the document production or that the discovery problems were designed to hide direct evidence of fraud, *see* pp. 7-8, *supra*, it is hard to see how alleged efforts to blame the discovery misconduct on former counsel would show an intent to hide evidence of the alleged fraud.

C. Evidence Regarding Morgan Stanley's Discovery Conduct in Other Cases Is Irrelevant and Improper

Similarly irrelevant and improper is CPH's effort to seek testimony from Mr. Kempf concerning "Morgan Stanley's representations in *other litigation* concerning the existence and ability to search for and retrieve e-mail." CPH's Witness Disclosure List at 8 (emphasis added) (Ex. C). Florida courts specifically have noted the impropriety of admitting evidence of *discovery abuse* that took place in other cases. *See General Motors Corp. v. McGee*, 837 So. 2d 1010, 1035 (Fla. 4th DCA 2002) (trial court erred by allowing testimony regarding "discovery

abuses" by GM in two other cases).[1] Consequently, Mr. Kempf cannot lawfully be called to testify regarding alleged discovery abuse by Morgan Stanley in other cases.

D. Mr. Kempf Did Not Supervise Morgan Stanley's Production of Documents Regarding Mr. Strong, and Any Testimony He Could Provide About the Underlying Proceedings Against Mr. Strong Is Privileged

CPH has no valid reason for seeking testimony from Mr. Kempf regarding Mr. Strong. The nature of the testimony that CPH seeks on this point is unclear. Mr. Kempf's subpoena, while not specifying the subject matter of testimony, asks for documents relating to "the *production* of documents relating to criminal proceedings against Mr. Strong." Trial Subpoena at 1 (emphasis added) (Ex. A). In contrast, CPH's trial disclosure list states that CPH will seek testimony from Mr. Kempf regarding the underlying proceedings themselves. *See* CPH's Witness Disclosure List at 8 ("Mr. Kempf also may testify concerning the criminal proceedings in Italy involving Mr. Strong") (Ex. C). CPH's inconsistency about the testimony and documents it seeks itself casts serious doubt on the propriety of the request.

In any event, Mr. Kempf did not supervise Morgan Stanley's production of documents regarding Mr. Strong. *See* Declaration of Donald G. Kempf, Jr. (Apr. 19, 2005) (Ex. Q). Accordingly, Mr. Kempf does not have the personal knowledge necessary to testify regarding

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[1] Similarly, the United States Supreme Court has made clear that "[d]ue process does not permit" the jury to consider evidence of unrelated misconduct in assessing punitive damages:

> A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422-23 (2003). *See also Humana Health Ins. Co. of Fla., Inc. v. Chipps*, 802 So. 2d 492 (Fla. 4th DCA 2001) ("To assess punitive damages, a jury must evaluate the degree of 'malice, wantonness, oppression, or outrage' demonstrated by *the evidence in the case*.") (emphasis added).

that issue. Similarly, this Court's March 5th Order precludes CPH from submitting evidence regarding Morgan Stanley's discovery conduct beyond that already included in the statement to be read to the jury. Because that statement already addresses Morgan Stanley's production of documents regarding Mr. Strong, CPH has no right to seek further evidence on that issue from Mr. Kempf. *See* pp. 6-7, *supra*.

Finally, to the extent that CPH seeks to question Mr. Kempf about conversations with Mr. Strong regarding the underlying Italian criminal proceedings, any such conversations would be irrelevant. As the Court ruled in its March 25 order on Morgan Stanley's Motion in Limine No. 23, evidence regarding Mr. Strong's criminal proceedings is relevant as direct proof only to show Mr. Strong's pressures and motivations during the 1998 Coleman-Sunbeam transaction. Mr. Kempf did not join Morgan Stanley until *December 1999*. Consequently, any such conversations with Mr. Strong cannot possibly be relevant to Mr. Strong's pressures and motivations in 1998. In any event, any such conversations between Mr. Kempf and Mr. Strong are plainly protected by the attorney-client privilege.

II. CPH's Trial Subpoena Seeks To Violate Attorney-Client Privilege and Work-Product Doctrine

CPH's subpoena of Mr. Kempf unapologetically seeks evidence that consists primarily, if not entirely, of documents that are unequivocally protected by the attorney-client privilege and the attorney work-product doctrine. The subpoena demands production of:

> Any and all documents, electronic data and other memorializations in any form constituting or referencing all communications *between and among Morgan Stanley employees and agents (including Morgan Stanley's in-house counsel)* and *communications between Morgan Stanley and Kirkland and Ellis* relating directly or indirectly to any and all issues raised in Plaintiff's motions seeking the imposition of sanctions based upon allegations of *litigation* misconduct . . . .

Trial Subpoena at 1 (emphasis added) (Ex. A). On its face, then, this request seeks communications between Morgan Stanley and its outside attorneys, and between Morgan Stanley's in-house attorneys and other employees of Morgan Stanley, relating to "litigation." The subpoena duces tecum is thus facially improper and must be quashed.

Even if some of the testimony sought from Mr. Kempf were not directly protected by the attorney-client privilege and the work-product doctrine, compelling such testimony nonetheless would strike at the heart of the policy underlying those crucial privileges:

> [I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference . . . . Were [work product] open to opposing counsel on mere demand . . . [a]n attorney's thoughts, heretofore inviolate, would not be his own. . . . The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Hickman v. Taylor, 329 U.S. 495, 510-11 (1947); *accord Atlantic Coast Line R. Co. v. Allen*, 40 So. 2d 115, 116 (Fla. 1949).

Calling counsel to testify at trial regarding pending litigation gravely threatens that privilege. Because issues of privilege and work product are pervasive, the witness would have to make split-second judgments about what is protected and what is not, before answering each question. These judgments often are nuanced and complex. Counsel's underinclusiveness in invoking privilege breaches the sanctity of the attorney-client relationship. Overinclusiveness only invites further litigation and depositions. Avoiding such dilemmas is a primary reason for the courts' disfavor of compelling counsel to testify at trial. Further, any invocation of the privilege might prejudice the jury against Morgan Stanley by suggesting that it has something to hide. Such improper prejudice should not be injected into this case.

Indeed, in related contexts, Florida courts have expressly held that it is error to allow a party to call a witness purely for the purpose of inducing him to invoke the privilege on the stand. *See, e.g., Maul v. State*, 528 So. 2d 1384, 1389 ("Clearly the case law prevents a party . . . from calling a witness '*for the purpose* of invoking the privilege in front of the jury' because of the impermissible inferences the jury may make. Thus when a witness invokes the privilege 'comprehensively,' he cannot be called because that obviously would be 'for the purpose' of invoking the privilege in front of the jury.") (quoting *Apfel v. State*, 429 So. 2d 85, 86 (Fla. 5th DCA 1983)). Compelling Mr. Kempf to testify to force him to invoke attorney-client privilege in this case would be improper as well.[2]

III. CPH's Subpoena of Mr. Kempf Is Unreasonable and Oppressive

A subpoena duces tecum may be quashed if it is "unreasonable and oppressive." Fla. R. Civ. P. 1.410(c)(1). Whether a subpoena is unreasonable and oppressive is determined by "balancing . . . the competing interests to be served by granting discovery or by denying it." *Dade County Med. Ass'n v. Hlis*, 372 So. 2d 117, 121 (Fla. 3d DCA 1979).

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[2] Federal law likewise provides that the jury may not draw an adverse inference from a witness's invocation of the attorney-client privilege. *See Knorr-Bremse Systeme Fuer Nutzfahrzeuge GMBH v. Dana Corp.*, 383 F.3d 1337, 1344 (Fed. Cir. 2004) ("Although the duty to respect the law is undiminished, no adverse inference shall arise from invocation of the attorney-client and/or work product privilege."); *Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208, 226 (2d Cir. 1999) ("If refusal to produce an attorney's opinion letter based on claim of the privilege supported an adverse inference, persons would be discouraged from seeking opinions, or lawyers would be discouraged from giving honest opinions. Such a penalty for invocation of the privilege would have seriously harmful consequences."), *abrogated on other grounds, Moseley v. Victoria's Secret Catalogue, Inc.*, 537 U.S. 418 (2003); *In re Tudor Assoc. Ltd.*, 20 F.3d 115, 120 (4th Cir. 1994) ("A negative inference should not be drawn from the proper invocation of the attorney-client privilege."); *In re Terazosin Hydrochloride Antitrust Litigation*, 335 F. Supp. 2d 1336, 1365 (S.D. Fla. 2004) ("no such negative inference can arise from the assertion of the privilege"). Although not binding on Florida state courts, federal decisions on evidentiary matters are considered persuasive with respect to Florida state law evidentiary issues. *See Rivers v. State*, 423 So. 2d 444 (Fla. 4th DCA 1982), *opinion quashed on other grounds*, 456 So. 2d 462 (Fla. 1984); *Dinter v. Brewer*, 420 So. 2d 932, 934 (Fla. 3d DCA 1982).

The balance here weighs strongly in favor of quashing the subpoena. To comply with the breathtakingly overbroad document request — which seeks an all-encompassing universe of facially privileged documents regarding Morgan Stanley's alleged litigation misconduct — would require Morgan Stanley to generate an enormous privilege log. And then this Court would have to rule on each and every privilege dispute in the middle of a complex and time-consuming trial. Needless to say, these burdens (and distractions from trial) overwhelm the nonexistent benefits to be gained from enforcing the subpoena. For these reasons, too, the subpoena should be quashed.

WHEREFORE, Morgan Stanley respectfully requests that the Court quash the trial subpoena duces tecum of Donald G. Kempf, Jr., together with such other and further relief as is just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 19th day of April, 2005.

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Rebecca A. Beynon
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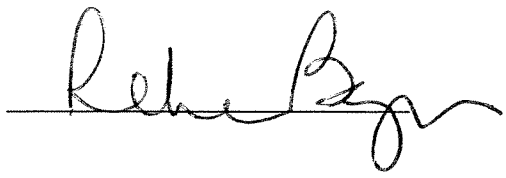
BY: 

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO: 2003 CA 005045 AI

SUBPOENA DUCES TECUM FOR TRIAL

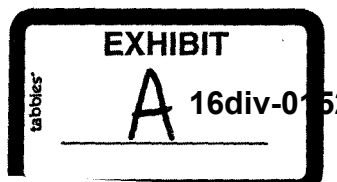
THE STATE OF FLORIDA

TO: Donald Kempf, Jr.

YOU ARE COMMANDED to appear before The Honorable Elizabeth T. Maass, Judge of the Circuit Court, at the Palm Beach County Courthouse, Courtroom 11A, 205 North Dixie Highway, West Palm Beach, Florida on March 29, 2005 at 9:30 a.m. to testify in this action and to have with you at that time and place:

Duces Tecum:
Any and all documents, electronic data and other memorializations in any form constituting or referencing all communications between and among Morgan Stanley employees and agents (including Morgan Stanley's in-house counsel) and communications between Morgan Stanley and Kirkland & Ellis relating directly or indirectly to any and all issues raised in Plaintiff's motions seeking the imposition of sanctions based upon allegations of litigation misconduct including specifically but not limited to:

- **the destruction of electronic data**
- **the failure to produce e-mail**
- **the production of e-mail**
- **the production of William Strong's 1994 personnel evaluation**
- **the production of documents relating to criminal proceedings against William Strong**



You are subpoenaed to appear by the following attorneys for Coleman (Parent) Holdings Inc., and unless excused from this subpoena by these attorneys or the Court, you shall respond to this Subpoena as directed.

Dated: March 23, 2005.

By: _____
JOHN SCAROLA
On Behalf of the Court

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Counsel for Coleman (Parent) Holdings, Inc.

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S MOTION FOR LEAVE TO TAKE THE DEPOSITION OF DONALD G. KEMPF, JR.

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") respectfully requests that this Court permit CPH to take the deposition of Donald G. Kempf, Jr. on issues relevant to punitive damages. In support of this motion, CPH states:

1. As a result of publicity concerning this litigation, regulators and private litigants have contacted counsel for CPH to request court documents and other information concerning Morgan Stanley's actual capacity to retrieve email. CPH is attempting to learn more about what appears to be a pervasive pattern of deception engaged in by Morgan Stanley in the discovery process and material inconsistencies between representations made by Morgan Stanley in this case and Morgan Stanley's representations in other proceedings where the same or similar discovery issues have arisen. CPH believes this information is directly relevant to the issue of punitive damages.

2. As has become increasingly apparent, Morgan Stanley failed to comply with this Court's March 2, 2005 Order. (Exhibit A hereto.) That Order required Morgan Stanley to produce — "within 12 hours of their review by counsel for responsiveness but, in any event

EXHIBIT
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within 10 days of the date hereof" — documents responsive to CPH's February 20, 2005 Notice to Produce, although the Court limited the date range "to those responsive items produced on or after May 1, 2002." (*Id.*)

3. CPH's Notice to Produce (Exhibit B hereto) sought:

- "All responses made by Morgan Stanley since 1999 in any civil, criminal, or administrative proceedings to any request for production of e-mail, which response describes any limitation on Morgan Stanley's ability to produce e-mail in response to the request;" and
- "All notices by Morgan Stanley in any civil, criminal, or administrative proceedings filed after 1998, whether pending or concluded, indicating that Morgan Stanley has newly discovered backup tapes containing e-mail." (*Id.*)

4. As the Court is aware, in response to the March 2 Order, Morgan Stanley eventually was compelled to provide some documents concerning Morgan Stanley's disputes with the Securities and Exchange Commission ("SEC") and the Equal Employment Opportunity Commission ("EEOC"). *See, e.g.*, Order on CPH's Renewed Motion for Entry of Default Judgment at 3 n.2 (EEOC) and 10 nn 7, 8, 9, 10 (SEC).

5. Although the Court's March 2 Order plainly required Morgan Stanley to do so, information recently obtained through independent sources indicates that Morgan Stanley did not produce readily available responsive documents showing that Morgan Stanley had deceived other litigation adversaries concerning Morgan Stanley's ability to retrieve emails. CPH is just now learning about some of those other instances, as counsel for those parties are learning about the proceedings here and are contacting CPH.

6. CPH is entitled to present evidence of Morgan Stanley's failure to comply with the March 2 Order to the jury on the issue of punitive damages. Indeed, the inference is inescapable that Morgan Stanley concealed documents responsive to the Court's March 2 Order both (i) to prevent CPH from pointing to such facts to demonstrate a pattern of willful and intentional litigation misconduct and (ii) to minimize the risk that Morgan Stanley's litigation adversaries would learn about Morgan Stanley's actual ability to retrieve emails — that is, so Morgan Stanley could continue its misrepresentations in those cases as well.

7. CPH did not take Mr. Kempf's deposition previously because CPH did not know about these facts. CPH therefore requests leave to depose Mr. Kempf now and to require Mr. Kempf to provide before his deposition the documents required by this Court's March 2 Order.

8. Statements made in Morgan Stanley's Motion for Continuance and Substitution of Counsel, Mr. Kempf's affidavit attached as an exhibit thereto, and by Mr. Kempf in open court indicate that Morgan Stanley may seek to distance itself from the litigation misconduct found to have occurred in this case by placing blame for some or all of that misconduct on outside counsel. To the extent that Morgan Stanley will defend against the imposition of punitive damages or seek to mitigate the severity of its punishment on the grounds that any litigation

misconduct was attributable to outside counsel rather than to Morgan Stanley itself, CPH is entitled to discovery on that issue.

Dated: March 26, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail and fax to all counsel on the attached list on this 26th day of March, 2005.

Deirdre E. Connell

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

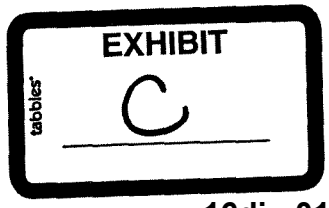
MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO. 2003CA 005045 AI

CPH'S TRIAL WITNESS DISCLOSURE

Pursuant to the Court's March 24, 2005 Order, Coleman (Parent) Holdings Inc. ("CPH") hereby provides Morgan Stanley & Co. ("Morgan Stanley") with a list of the witnesses CPH currently expects to call at trial, either through live testimony or by deposition, and a summary of the currently anticipated testimony of each witness. CPH reserves the right to call any of the witnesses identified herein during either phase of its case in chief or in rebuttal, although the designation of rebuttal and Phase II witnesses expressed in this submission accurately reflects CPH's present intentions. CPH further reserves the right to withdraw any witness identified herein or to supplement this disclosure as CPH continues to evaluate its proofs in light of the Court's recent rulings, anticipated rulings, default findings and expected findings regarding litigation misconduct. CPH also reserves the right to withdraw any witness identified below or supplement this disclosure in response to the trial witness disclosure or exhibit list to be provided by Morgan Stanley, new arguments advanced by Morgan Stanley, or the Court's actual future rulings.



The focus of all testimony will be in one or more of only three areas:

1) Reliance by CPH on the Sunbeam fraud.

2) Damages sustained by CPH as a consequence of the Sunbeam fraud.

3) Entitlement and amount of punitive damages.

I. CPH Case-in-Chief:

1. Douglas Emery (live): Dr. Emery is a Professor of Finance and Department Chair at the University of Miami. Dr. Emery will present his qualifications as an expert. Dr. Emery will place the default findings to be read to the jury in the context of an understanding of the business world in which those facts occurred, including definitions, descriptions and explanations of the roles and functions of the entities involved, general business concepts, and relevant terms.

2. Blaine Fogg (by deposition): At the time of the transaction, Mr. Fogg was a partner at Skadden, Arps, Slate, Meagher & Flom LLP and legal adviser to Sunbeam. Mr. Fogg may testify regarding his conversations with Howard Gittis and Peter Langerman regarding CPH's rescission demand. Additionally Mr. Fogg may testify regarding the delayed final approval of Sunbeam's Form S-4 registration statement and Skadden's efforts to expedite the close of the second step of the transaction.

3. Howard Gittis (live): Mr. Gittis is a director and a Vice Chairman and Chief Administrative Officer of MacAndrews & Forbes Holdings Inc. Mr. Gittis also is a director and the Vice Chairman of CPH and a former director of Sunbeam. Mr. Gittis' testimony may include: his involvement in the transaction; the background and history of the transaction; Morgan Stanley's prior business relationship with MacAndrews & Forbes and its affiliates; CPH's evaluation of Sunbeam stock; CPH's reliance on Sunbeam and Morgan Stanley; CSFB's

work on the Sunbeam transaction; the Coleman board meetings; CPH's decision and motivation in deciding to sell its interest in Coleman to Sunbeam; CPH's decision and motivation in deciding to accept Sunbeam stock as part of the consideration; matters relating to the March 19, 1998 press release and the convertible debenture offering; CPH's expectations for Sunbeam's stock; CPH's inability to sell its Sunbeam stock after the transaction closed; post-closing matters involving Sunbeam; CPH's demand for rescission and its rejection; CPH's damages; and CPH's lack of knowledge of the fraudulent conduct of Sunbeam and Morgan Stanley. If defendant is permitted to inquire into MacAndrews & Forbes internal financial and accounting documents, Mr. Gittis may testify concerning the internal valuation estimates that included an entry relating to the possible future value of Sunbeam if certain significant changes in its performance and capital structure were successfully accomplished, and the distribution and use of MacAndrews & Forbes' financial statements.

4. James Maher (live): Mr. Maher is the former President of Mafco Consolidated Group Inc. Mr. Maher may testify on the following issues: his background and experience in mergers and acquisitions and investment transactions; his role as negotiator for CPH; Morgan Stanley's prior business relationship with MacAndrews & Forbes and its affiliates; the evaluation of the merits of taking Sunbeam stock as consideration; the negotiation of the financial terms of the Coleman transaction; reliance on the information and materials provided to CPH by Sunbeam and Morgan Stanley; CSFB's opinions relating to the financial aspects of the transaction; matters relating to the March 19, 1998 Sunbeam press release; and CPH's lack of knowledge of the fraudulent conduct of Sunbeam and Morgan Stanley.

5. William Nesbitt (live): Mr. Nesbitt is a former Senior Vice President of Mafco Consolidated Group Inc. Mr. Nesbitt may testify on the following issues: his background and

experience in the financial analysis of mergers and acquisitions and investment transactions; his role on the Coleman transaction; the evaluation of the merits of taking Sunbeam stock as consideration; the negotiation of the financial terms of the Coleman transaction; reliance on the information and materials provided by Sunbeam and Morgan Stanley; CSFB's opinions relating to the financial analysis of the transaction; matters relating to the March 19, 1998 Sunbeam press release and Sunbeam's convertible debenture offering; and CPH's lack of knowledge of the fraudulent conduct of Sunbeam and Morgan Stanley.

6. Blaine F. Nye (live): Dr. Nye may testify as an expert witness as to the damages suffered by CPH as calculated under a benefit-of-the-bargain theory. Dr. Nye will present his qualifications as an expert. Dr. Nye's opinions are disclosed in his reports in this matter, as well as his two depositions.

7. Joseph Perella (by deposition): Mr. Perella is the Chairman of Institutional Securities at Morgan Stanley. Mr. Perella was Mr. Strong's performance evaluation director during the relevant time period. Mr. Perella may testify regarding his background and responsibilities at Morgan Stanley. He also may testify about the formal evaluation process at Morgan Stanley, his and others' roles in Mr. Strong's performance evaluations, and the bases of Mr. Strong's performance evaluations. Mr. Perella may testify about specific portions of the performance evaluations of Mr. Strong for 1993, 1995, 1996, 1997, and 1998, and Mr. Strong's value to Morgan Stanley in generating revenues. Finally, Mr. Perella may testify about Morgan Stanley's intention, understanding, and acknowledgement of what it means to investors when Morgan Stanley's name is associated with a transaction.

8. Ronald Perelman (live): Mr. Perelman is the Chairman of the Board of Directors and Chief Executive Officer of MacAndrews & Forbes Holdings Inc. Mr. Perelman also is the Chairman of the Board of Directors of CPH. Mr. Perelman also is a former director of Coleman. Mr. Perelman's testimony may include: his involvement in the transaction; the background and history of the transaction; Morgan Stanley's prior business relationship with MacAndrews & Forbes and its affiliates; CPH's evaluation of Sunbeam stock; CPH's reliance on Sunbeam and Morgan Stanley; the Coleman board meetings; CPH's decision and motivation in deciding to sell its interest in Coleman to Sunbeam; CPH's decision and motivation in deciding to accept Sunbeam stock as part of the consideration; matters relating to the March 19, 1998 press release and the convertible debenture offering; CPH's expectations for Sunbeam's stock; CPH's inability to sell its Sunbeam stock after the transaction closed; post-closing matters involving Sunbeam; CPH's demand for rescission and its rejection; CPH's damages; and CPH's lack of knowledge of the fraudulent conduct of Sunbeam and Morgan Stanley. If defendant is permitted to inquire into MacAndrews & Forbes internal financial and accounting documents, Mr. Perelman may testify as to internal valuation estimates that included an entry relating to the possible future value of Sunbeam if certain significant changes in its performance and capital structure were successfully accomplished.

9. R. Bram Smith (by deposition): Mr. Smith was a Managing Director of Morgan Stanley. Mr. Smith may testify about Mr. Strong's role in the Sunbeam relationship. CPH also may show the jury examples of Mr. Smith's evasiveness in responding to questions to demonstrate Morgan Stanley's attempts to conceal its involvement in the Sunbeam fraud. Mr. Smith was a Managing Director of Morgan Stanley. If the defendant is permitted to introduce evidence of MSSF's loan to Sunbeam during the punitive damages Phase II portion of

the trial, Mr. Smith may testify concerning matters related to Morgan Stanley's intention and efforts to syndicate the loan.

10. William Strong (by deposition): Mr. Strong is a Managing Director at Morgan Stanley who led the Morgan Stanley team on the Sunbeam engagement. Mr. Strong may testify regarding his background and responsibilities at Morgan Stanley. CPH may show the jury examples of Mr. Strong's evasiveness in responding to questions to demonstrate Morgan Stanley's attempts to conceal its involvement in the Sunbeam fraud.

11. John Tyree (by deposition): Mr. Tyree was an associate in the client services group at Morgan Stanley at the time of the transaction. Mr. Tyree may testify regarding his background, his preparation for the deposition, the scope of his responsibilities at Morgan Stanley, and his role in the Coleman transaction. Further, CPH may show the jury examples of Mr. Tyree's evasiveness in responding to questions to demonstrate Morgan Stanley's attempts to conceal its involvement in the Sunbeam fraud.

II. Potential Rebuttal Witnesses:

1. Andrew Conway (by deposition): Mr. Conway is a former Morgan Stanley analyst. Mr. Conway's testimony may include his background and his role in selling the debentures. Mr. Conway also may describe his reaction to Sunbeam's 1997 Form 10-K that was filed on March 6, 1998, Sunbeam's March 19, 1998 press release, and the comfort letters.

2. Robert Duffy (by deposition): Mr. Duffy was a Vice President at CSFB who performed a valuation of Coleman, performed due diligence on Sunbeam, and presented CSFB's fairness opinion to the Coleman board in connection with the transaction. Mr. Duffy may testify concerning the due diligence he performed, including his attendance at meetings with Sunbeam

and Morgan Stanley, and his review of public filings and research reports, and the opinions and conclusions he formed as a consequence of his work.

3. Karen Eltrich (by deposition): In 1997 and 1998, Ms. Eltrich was a research analyst at Morgan Stanley who issued reports on Coleman bonds. Ms. Eltrich's testimony will include her background and her job responsibilities as a research analyst at Morgan Stanley. Ms. Eltrich also may testify about two reports she wrote and published on the Coleman bonds, in which she recommended the bonds as a "strong buy," and the research she did to write the reports. Finally, Ms. Eltrich may testify that Morgan Stanley invested in the Coleman bonds, expecting that the bonds would increase in value, and ultimately Morgan Stanley made money on the bonds.

4. William Horton (live): Mr. Horton may testify in rebuttal as an expert witness concerning reliance. Mr. Horton's opinions are disclosed in his reports in this matter and in his depositions.

5. Joram Salig (by deposition): During the relevant time period, Mr. Salig was in-house counsel for MacAndrews & Forbes Holdings Inc. If defendant is permitted to inquire concerning the unexecuted draft February 23, 1998 confidentiality agreement, Mr. Salig may testify concerning that issue.

6. Barry F. Schwartz (live): Mr. Schwartz is the Executive Vice President and General Counsel of MacAndrews and Forbes Holdings Inc. and the General Counsel of CPH. If defendant is permitted to inquire concerning the unexecuted draft February 23, 1998 confidentiality agreement, Mr. Schwartz may testify concerning that issue.

7. Todd J. Slotkin (live): Mr. Slotkin is the Chief Financial Officer and Executive Vice President of MacAndrews & Forbes Holdings Inc. If defendant is permitted to inquire into the working of the Mafco Finance Corp. credit agreements, Mr. Slotkin may testify as to those agreements. If defendant is permitted to inquire into MacAndrews & Forbes internal financial and accounting documents, Mr. Slotkin may testify as to the internal valuation estimates that included an entry relating to the possible future value of Sunbeam if certain significant changes in its performance and capital structure were successfully accomplished, as well as the preparation of the audited financial statements of the corporation.

III. CPH Punitive Damages (Phase II):

1. Joseph D'Auria (by deposition): As the corporate representative of Morgan Stanley, Mr. D'Auria may testify concerning assets and resources available to Morgan Stanley to satisfy a judgment for punitive damages in this case.

2. Joseph Ferraro (by deposition): As the corporate representative of Morgan Stanley, Mr. Ferraro may testify concerning trading in Sunbeam's debentures and Coleman Holdings' notes.

3. Donald G. Kempf, Jr. (live or by deposition): Mr. Kempf is the Executive Vice President, Chief Legal Officer, and Secretary of Morgan Stanley. Mr. Kempf may testify concerning Morgan Stanley's failure to comply with the Court's March 2, 2005 Order and Morgan Stanley's representations in other litigation concerning the existence and ability to search for and retrieve e-mail. Mr. Kempf also may testify concerning the criminal proceedings in Italy involving Mr. Strong. Mr. Kempf also may testify regarding efforts on the part of

Morgan Stanley to blame falsely Morgan Stanley's outside counsel for Morgan Stanley's litigation misconduct.

4. Tarek Abdel-Meguid (by deposition): Mr. Meguid is the head of investment banking at Morgan Stanley. During the relevant time period, he was deputy head of the corporate finance department and head of the corporate finance department. During that time period, Mr. Meguid evaluated Mr. Strong's performance at Morgan Stanley. Mr. Meguid may testify regarding his background and responsibilities at Morgan Stanley. Mr. Meguid also may testify about Morgan Stanley's evaluation process, Mr. Strong's evaluations, the business goals Morgan Stanley set for Mr. Strong, and Mr. Strong's value to Morgan Stanley in generating revenues.

5. Robert Scott (by deposition): During the relevant time period, Mr. Scott was the head of investment banking and the Chief Financial Officer of Morgan Stanley. He was Mr. Strong's performance evaluation director in 1993 and co-director in 1995. Mr. Scott may testify regarding his background and responsibilities at Morgan Stanley, as well as his current consulting arrangement with Morgan Stanley. Mr. Scott also may testify about Morgan Stanley's evaluation process and Mr. Strong's evaluations specifically; Mr. Scott also may testify concerning Mr. Strong's desire for increased responsibility at Morgan Stanley. Finally, Mr. Scott may testify about Mr. Strong's value to Morgan Stanley in generating revenues and his compensation generally.

6. Michael Wagner (live): Mr. Wagner may testify as an expert witness in the punitive damages phase of the case. Mr. Wagner will present his qualifications as an expert. Mr.

Wagner's opinions are disclosed in his report in this matter, which will be supplemented before trial based on Morgan Stanley's recent financial disclosures.

IV. CPH Punitive Damages Phase II (Rebuttal):

1. Michael Hart (by deposition): Mr. Hart was the Vice President of Morgan Stanley Senior Funding and a Managing Director of Morgan Stanley. If the defendant is permitted to introduce evidence of MSSF's loan to Sunbeam during the punitive damages Phase II portion of the trial, Mr. Hart may testify concerning matters related to Morgan Stanley's intention and efforts to syndicate the loan.

2. William Kourakos (by deposition): Mr. Kourakos is a managing director at Morgan Stanley. If the defendant is permitted to introduce evidence of MSSF's loan to Sunbeam during the punitive damages Phase II portion of the trial, Mr. Kourakos may testify concerning matters related to Morgan Stanley's intention and efforts to syndicate the loan.

Dated: March 26, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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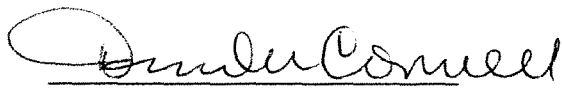
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and electronic transmission to all counsel on the attached list before 12:00 p.m. on March 26, 2005.



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IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

VOLUME 49

MORGAN STANLEY & CO., INC.,

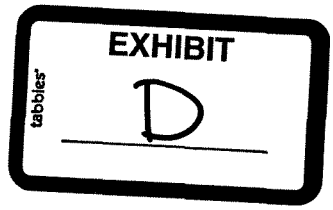
Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Monday, March 28, 2005
9:35 a.m. - 12:10 p.m.



we know is true.

If, however, this deposition is taken without knowledge of how much we know, we may learn things that we don't already know because of the fear that we do already know what we don't already know. And that's just a fact of life.

You know, I harken back to my days as a prosecutor, and the one way that you are more likely to get the truth from the criminal defendant is if the criminal defendant believes that you already know the truth and he has or she has no alternative but to acknowledge what he or she already believes to be known.

Now if Your Honor wants an in camera opportunity --

THE COURT: More what I was wondering is your client willing to make a filing under seal contemporaneous with the depositions being taken?

MR. SCAROLA: Absolutely. Absolutely. We're willing to make a filing under seal. We're willing to provide the documents to the court for review so that Your Honor can see we have a good faith basis for making this request

for additional discovery. We'd be happy to do that. What we don't believe we ought to be obliged to do, for the reasons that I've stated, is to tell them in advance with we know, because then all we'll get is what we already know.

THE COURT: Okay.

MR. SCAROLA: There's a second part to this motion, and I don't want to overlook that. The second part to this motion is that Mr. Kempf has made statements in open court indicating -- not indicating, stating flat out that the information he was getting from his counsel was different than what he read in the transcript and observed for himself. There also clearly in the motion for continuance and for substitution of counsel is an allegation of wrongdoing on the part of Kirkland & Ellis.

In spite of the findings that Your Honor has made, those indications suggest those statements in both the pleadings and in open court suggest that there may be some effort to try to mitigate the punitive damages against Morgan Stanley by suggesting that there was independent wrongdoing on the part of Kirkland & Ellis. If indeed any such effort to mitigate the punitive damages

assessed in this case is going to be made, we're entitled to discovery on that point.

The second part of our motion to depose Mr. Kempf is conditional. If they're going to raise those issues, we want discovery of those issues. If they stand up in open court and say we will not attempt to mitigate damages on the basis that Kirkland & Ellis was responsible for this wrongdoing in any way independent of Morgan Stanley, if they're not going to try to lay any portion of the blame off on their now terminated/withdrawn lawyers, then we don't need to ask Mr. Kempf about those matters.

THE COURT: Okay. A couple things. My recollection of the March 2nd order is it required Morgan Stanley to produce responses made to third parties that would have indicated a problem with its e-mail backup tapes or e-mail retention.

MR. SCAROLA: Yes.

THE COURT: Let's assume they did not produce all responsive documents. How would -- other than showing that perhaps they made misrepresentations to third parties in other litigation about their e-mail, how is that

relevant for the jury? I'm not talking about whether we don't need something else, but to get this case ready for the jury.

MR. SCAROLA: It is a further indication of Morgan Stanley's willingness to disregard court orders in this case. And their willingness to disregard court orders in this case is an appropriate factor to be taken into consideration with regard to the amount of punitive damages necessary to compel them to respect their legal obligations, including the obligation not to continue to hurt us. Beyond that, there is the additional concern that Morgan Stanley has clearly announced its intention to challenge this court's default orders. The magnitude of their wrongdoing in violating court orders, the number of separate orders that they have disregarded, the circumstances under which they have disregarded them, and the number of times that they have disregarded them is relevant and material in assessing the appropriateness of the sanctions that have been imposed.

THE COURT: I would consider what sanctions to impose based on what I considered as the body

of evidence that was in front of me now. We wouldn't bootstrap the order by developing other information. That wouldn't be appropriate.

MR. SCAROLA: I think it would be, Your Honor. I think that we would be able to state that there was clearly enough, unquestionably enough at the time the order was entered. But if you've got any reservations about that at all, Appellate Court, let's look at what the record revealed in addition to that. So even if you were to make the determination, and I can't imagine that any Appellate Court would, even if you were to make the determination that the order was not justified at point A, at point B with this additional information we certainly had ample justification for the sanctions that were imposed by the court that could have been imposed at point B even if they hadn't been imposed at point A. I do suggest it's relevant and material to continue to explore the magnitude of the defendant's wrongdoing, the number of times that they have violated the court's orders. I don't think that we need to ignore that ongoing misconduct on their part. I think that we should be entitled to supplement

the record to continue to provide as much evidence as we can of the nature and magnitude of the wrongdoing justifying the imposition of sanctions.

THE COURT: What's the response to the declaration that he had no personal participation in the response -- or compliance with that March 2nd order?

MR. SCAROLA: The response is that we're entitled to know why. Why if indeed you didn't know about these things that we are now going to confront you with, why didn't you? As head of the litigation department in a case of this magnitude, why was this not a matter that was capturing your personal attention? I think that the willingness of Mr. Kempf to disregard the serious matters that were going on in this courtroom, again, is an appropriate factor for the jury to take into consideration in deciding what amount of punitive damages is going to be necessary in order to deter this defendant. If there's a case going on in Palm Beach County, Florida in which extremely severe sanctions have already been entered against Morgan Stanley, if the case involves $680 million in compensatory

damages and a $2 billion punitive damage claim, if those sums in contention under these circumstances were not sufficient to command the attention of the head of the litigation department at Morgan Stanley and a member of the board of directors, what is it going to take to deter this defendant with these resources? What's it going to take to capture his attention and make a difference?

THE COURT: Okay. Mr. Hansen, the first question I have is does the defendant intend to try to argue or present evidence to the jury that anything that Morgan Stanley did in this case either was solely the product of its counsel or was not directed by people high enough within Morgan Stanley to have it have evidentiary value for the punitive damages entitlement?

MR. HANSEN: I guess I'll have to take those in two steps. As to Kirkland & Ellis, I'm not aware of any effort that we planned to blame Kirkland & Ellis.

THE COURT: Or any counsel. Any outside counsel.

MR. HANSEN: I'm not aware of any effort. I

would return to the court and correct my statement if that's wrong, but I'm not aware standing here today.

As to the degree of involvement of the employees, I actually don't know the answer to that, Your Honor, standing here right now. I don't know if that goes to this motion because I think that's -- that's a long ways away from this motion. This motion is about something else, as I understand it. So the second phase I believe I'll come back and give the court notice. If we intend to do that, I will put them on notice, and we can address that second part of their motion at that time. Standing here today, I don't know of any effort.

THE COURT: Okay.

MR. HANSEN: As to the motion, the principal part of the motion reminds me a little bit of Alice in Wonderland, punishment first, facts after. They say they have evidence, but we haven't seen it.

THE COURT: Is there any objection to me doing an in camera inspection?

MR. SOLOVY: Not at all.

THE COURT: I'm asking Mr. Hansen.

THE COURT: Okay.
MR. IANNO: Your Honor, if the request is the notice to produce, I have a copy of it.
THE COURT: Thank you. That is. Okay. Great. I appreciate it. Okay. Thanks. My concern is the same concern I've had for a while, which is we need to get this case tried, and we need to know the body of evidence we're looking at to get this case tried. Quite honestly, I was reluctant after I issued the March 1st order to have to go back and reopen that can of worms that I hoped had been emptied. And it was only reluctantly that I, in my mind, agreed to go down that road.
That said, I can tell you I am not inclined to go down that road any further than we already have for purposes of what's presented to the jury. I would agree that if a court order has been violated contempt may be appropriate, and I would agree that given Morgan Stanley's behavior in this case it is probably appropriate that somebody be deposed first before they're made to disclose to you the evidence they have that may show the court order was violated. So I think what I'm saying is we do need to take a

deposition. It doesn't need to be immediately because the results of it would not be placed in front of the jury. That said, I never take violation of any court order lightly, even if it's not going to lead to things that we present to the jury.
MR. SOLOVY: The only thing I would add is this, Your Honor. This is our frustration. You know, had we known this earlier, perhaps Your Honor would have sanctioned them even further.
THE COURT: I understand that concept completely, but in all honesty, you know, we need to say this is the body of evidence we're going to the jury and everything else, you know, we're sorry, it didn't get fully vetted. I'm sorry it didn't get fully vetted.
MR. HANSEN: Your Honor, from our standpoint I don't know what you saw. We didn't have a chance to review it. If they were to file a motion and attach, we could well have a perfectly good explanation.
THE COURT: Sure. But I'm sure you also appreciate their concern that Morgan Stanley has been less than forthcoming in response to many discovery requests and if what they do is choose

to share with Morgan Stanley the proof they have of some violations of this court order, it minimizes the chance that Morgan Stanley will be forthcoming on everything it failed to produce in response to that March 2nd order. So I think what we're suggesting is that if Morgan Stanley is confident it made its best faith effort to comply with that March 2nd order, you have nothing to worry about. If you're less than confident, I suspect you'll want to go back and make sure you fully complied with it.
MR. HANSEN: In the meantime, Mr. Kempf can assist in preparation for this trial. He's clearly not the right person in any event.
THE COURT: Mr. -- while you all were looking Mr. Ianno actually handed this to me, so we had that.
MR. SCAROLA: Oh.
THE COURT: Okay. Does it make sense if they are going to take the position that it was not Mr. Kempf who had anything to do with this, does it make sense to ask them to isolate who it was? Or do you still want to depose Mr. Kempf on there and have him direct you to the person responsible with compliance?

MR. SCAROLA: I think the answer is that we would want to do both. Under these circumstances I think that we would want to do both.
THE COURT: Okay.
MR. HANSEN: Judge, we were closing off the road. Now we're opening up several roads.
THE COURT: We're not doing it now. I understand we're going to go ahead and start with the trial. On the other hand, please understand they've given me things that would allow a reasonable person to conclude that the March 2nd order was violated, and it's fair to try to figure it out.
MR. HANSEN: When will the depositions begin, after we've done the trial?
THE COURT: We're talking about it.
MR. HANSEN: I would request they be done after the trial so we can devote our attentions to the trial.
MR. IANNO: If they're going to take Mr. Kempf's deposition, I'm sure the court is familiar with the apex questioning that says you don't start your way at the top and work your way down. In light of Mr. Kempf's declaration,

you start with the person that has the on-the-ground knowledge and go up. They're doing exactly what the line of cases, which I think is Baines (phonetic) versus General Motors or General Motors versus Baines that says you don't do that.

MR. SCAROLA: We'll be happy to start with whoever they wish to provide.

MR. IANNO: In that respect, we need to know at least the subject area of where they want to go.

THE COURT: The subject area is who was -- who in Morgan Stanley was charged with compliance with that March 2nd order.

MR. IANNO: Within Morgan Stanley itself?

THE COURT: Yes.

MR. IANNO: Okay.

THE COURT: So do you want to get a set name and we'll come back?

MR. HANSEN: Does that change the question of when, Your Honor?

THE COURT: No. I agree we still -- I'm not sure it's going to wait until after the trial is completely over, but I would agree it's not going to be tomorrow either. So we need to know

who it is, and then we can figure out how does it make best sense to approach it.

In the meantime, when the clerk gets here, I'm going to ask her to mark these as Plaintiff's Number 1 and seal them.

(Plaintiff's Exhibit No. 1)

MR. SOLOVY: Thank you.

THE COURT: Jeanette is next-door. She's in front of Judge Brunson, but she promised if we need her she would return.

MR. IANNO: It's five minutes to 12:00.

MR. HANSEN: We have a couple cleanup things. I thought we had a couple of cleanup matters if we could get Your Honor's guidance.

THE COURT: What are they? We can discuss where you want to go if you want to work the rest of the day or come back tomorrow.

MR. IANNO: I like that idea.

MR. HANSEN: That would be our preference.

THE COURT: I'm happy to work -- not that I don't love every one of you just like I love my jurors, but I am just as happy to go do some office work.

MR. HANSEN: I'm not sure these have to be decided today. But we wanted to raise the issue

about offers of proof.

THE COURT: We do. I think on that what we need to do is get the statement in place. Hopefully I can do that today, we come back tomorrow with more care, go through what plaintiff is suggesting needs to be proven and talk about defendant.

MR. IANNO: Maybe we can just get some guidance from the court on typically how the court would do that. Would you ask us to produce a witness? Or can we just --

THE COURT: You're talking about how to do the proffer? The proffers may be made by way of a written statement from counsel as to what they expect the proffered evidence would be. If we -- we're talking about two different things.

MR. IANNO: We're talking about the proffer, and the proffers may be made by way of a written statement from counsel as to what they expect the proffered evidence would be if we proffer. If the court has a preference to say we don't have to call 20 witnesses to the stand outside the presence of the jury and say this is what I would have said but for --

MR. SCAROLA: We will agree that as a

general matter proffers may be made by way of a written statement by counsel as to what they expect the proffered evidence would be. If we have a particular problem with any proffer, we will alert them to that and discuss what alternative might be necessary. It could just be a clarification of the written proffer or it may be it would be necessary to take the testimony outside the presence of the jury. I think it is highly unlikely that anything other than a written proffer would be necessary.

THE COURT: Okay.

MR. IANNO: Can we memorialize that in an order? And we'll be glad to draft it so the court doesn't have any more work on that and submit it.

THE COURT: The proffer or the order?

MR. SCAROLA: An agreed order.

MR. IANNO: An agreement that we can submit it by order.

THE COURT: Do you all want to come up with an agreed order on that?

MR. IANNO: Yes.

THE COURT: Did we find Jeanette?

THE BAILIFF: I left a message with the

16div-015266

manager, and the manager is going to get her.
THE COURT: When are you going to have the name of who is charged with Morgan Stanley in compliance with that March 2nd order?
MR. HANSEN: If we're going to return tomorrow morning --
MR. SCAROLA: And will we also know without any equivocation if there is going to be any effort to lay the blame of this off on Kirkland & Ellis?
MR. HANSEN: Your Honor, I said I wasn't aware. I'll go back and check and make a representation to the court.
THE COURT: Otherwise, they're going to come back and say we still need Mr. Kempf's deposition because this is a second reason we need it and we've not put that issue to bed.
MR. SCAROLA: And the fact that Mr. Hansen, who repeatedly tells us he doesn't know anything about this case, is telling us he isn't aware don't resolve our concerns. Our concerns are we need to know is that going to be a defense or isn't it.
MR. HANSEN: We'll provide that information tomorrow morning, Your Honor. Also -- there is

the issue of whether we could have a week to submit our Exhibit and witness lists.
THE COURT: I don't think -- I doubt a week. I think, in all honesty, though, that that's something we can talk about in context once we have the statement down and once we've gone through plaintiff's witness lists and Exhibit list. That said, I think you probably need to be working under a tighter time horizon than a week.
I mean, I understand the concerns. That's why I want to look at it all in context when we have all of plaintiff's stuff and everything I'm going to read in front of us, and then we can talk about what you all think you need to do to get ready.
MR. HANSEN: We have the issues of depo designations from them so we can respond.
THE COURT: I'm going to do the statement. They're going to know what they need for the depos. As I understand it, you don't anticipate offering any testimony, deposition testimony other than the folks you indicated on your witness list.
MR. SCAROLA: Correct.

THE COURT: How long do you think your case in chief would take?
MR. SCAROLA: Less than a week.
THE COURT: Meaning four days or five days?
MR. SCAROLA: I think we're going to get it done in four days of testimony.
MR. SOLOVY: Depending upon the cross.
THE COURT: Sure. No, I understand that.
MR. MARMER: Let me add one clarification. On the witness list we have submitted to Morgan Stanley and that Your Honor has seen, our punitive damages second phase case, I believe there are two witnesses where we have given Morgan Stanley deposition designations, but those have not yet been vetted with the court. So there may be two witnesses that would still need to have the back and forth that Your Honor has done.
MR. HANSEN: Also, Your Honor, I've only focused on their case in chief. I've barely paid any attention to the punitive damages case because I haven't had an opportunity to.
THE COURT: We need to mark this as Plaintiff's Number 1 in support of its motion --
THE CLERK: Okay.

THE COURT: That's Exhibit Number 1 from plaintiff in support of its motion for leave to take the deposition, motion for leave to take the deposition of Donald G Kempf, K-e-m-p-f, Jr., but we need to seal it.
THE CLERK: Okay.
THE COURT: Make sure it gets sealed. Thanks.
THE CLERK: And this is plaintiff or defendant?
THE COURT: Plaintiff's.
I'm sorry. Back to what we were talking about.
MR. HANSEN: Your Honor, I was saying I haven't focused on the punitive part of their disclosure. I think that depends a lot on what happens in the first phase.
THE COURT: No, I agree. And I guess the other question I have is -- well, how long do you think phase two of your case would take if you get to that?
MR. SCAROLA: Two days.
THE COURT: But you don't want to do them together?
MR. SCAROLA: No, Your Honor, we don't. And

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

VOLUME 50

MORGAN STANLEY & CO., INC.,

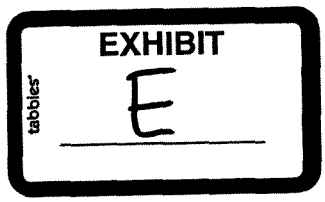
Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Tuesday, March 29, 2005
9:45 a.m. - 5:36 p.m.



advise Morgan Stanley that it might be in Morgan Stanley's interest to provide further evidence.

THE COURT: In all honesty, I have no idea if it would or not. I mean, it's just -- I think plaintiff's position is that sort of two things are happening here: One is that you're correcting what you believe to be a misstatement you made yesterday, and I truly appreciate that. The second thing that may be going on is you're trying to give me additional information to consider or reconsider in response to the motion for continuance. And I think that second half of the equation is what we're simply not doing today.

MR. HANSEN: Very well, Your Honor. I think I understand. We will take under, advisement then, whether we will provide further. I take it the court if we were to provide such materials would at least consider them.

THE COURT: I'm happy to look at any new material at all, obviously.

MR. HANSEN: Thank you, Your Honor. Further unfinished business, Your Honor -- I didn't mean to cut you off.

THE COURT: No. I was done.

MR. HANSEN: You ordered us yesterday to come to court this morning to disclose two things, I believe, Your Honor.

THE COURT: Yes, yes, yes. Let me find where I put them.

MR. HANSEN: I have a response.

THE COURT: Okay. Yes.

MR. HANSEN: First, Your Honor, Morgan Stanley does not, does not intend to offer evidence in the punitive damages phase, should we have one regarding Kirkland & Ellis.

THE COURT: Okay. Or for any purpose? There will be no -- just -- I don't know that there would be any other purpose, but Morgan Stanley does not intend to present evidence or imply that its counsel did things without its direction?

MR. HANSEN: Well, as I understood the request yesterday, Your Honor -- And, again, I tried to answer the court's specific request. I'm not trying to be evasive.

THE COURT: No, I understand.

MR. HANSEN: As I understood, it was would we in the mitigation phase, because I understand the court's statement to preclude litigation of

the issues, so we couldn't call them to talk about what happened, I understood the request was would you try in the punitive phase with some sort of mitigation theory to put on evidence or assign blame to Kirkland & Ellis, and that was the response I gave to the court. We do not intend as part of a mitigation argument to do that.

I have not thought through all the permutations about whether there's something we could say about Kirkland & Ellis other than that. I'm under a huge disadvantage, so I don't want to expand beyond the scope of what I was asked about yesterday. I'm not trying to be evasive. I'm just trying simply not to make a mistake.

THE COURT: Is that sufficient for your purposes on whether you need the deposition of Mr. Kempf on that point?

MR. SOLOVY: Yes and no. If Mr. Hansen clears his head and decides he wants to use Kirkland for another purpose, then he needs to advise us so we can discuss with the court whether the deposition is appropriate or not. I don't want to come in the middle of the trial

and he says I'm not using him for mitigation, but I'm using him for liability or some other purpose and be caught short. If he changes his decision as to the use of Kirkland, I think, Your Honor, he has to give us advanced notice, and we can discuss whether the deposition is necessary.

THE COURT: I mean, I'm trying to think how such evidence would even be placed before the jury given the witness lists and the document, Exhibit list.

MR. SOLOVY: I don't know either, Your Honor. But he was very circumspect in what he said.

THE COURT: In all honesty, I may be wrong, but I suspect it's just that he's being so careful to tell me things he believes to be true.

MR. HANSEN: That's it, Your Honor.

To be further forthcoming, Your Honor, I don't want there to be any misunderstanding. For example, tomorrow if we proceed with voir dire, I expect to examine the jurors about the disappeared counsel and see what effect -- and see what effect that has on their view of the

16div-015269

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

CASE NO. CA 03-5165 AI

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff(s),
vs.

MACANDREWS & FORBES HOLDINGS, INC..,
Defendant(s).
_____/

ORDER CONCERNING PRETRIAL SCHEDULE AND FOLLOWING CASE MANAGEMENT CONFERENCE

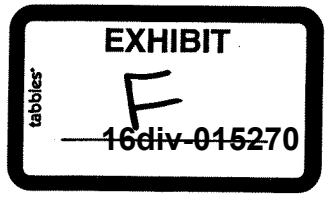
THIS CAUSE came before the Court October 14, 2004 for a case management conference, with all parties well represented by counsel. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that objections to all discovery served on or after October 14, 2004 shall be served within 14 days. It is further

ORDERED AND ADJUDGED that this action is specially set for jury trial commencing February 18, 2004. It is further

ORDERED AND ADJUDGED that the proceedings relating to summary judgment will take place on the following schedule:

Summary Judgment Briefs	December 6, 2004
Summary Judgment Response Briefs	December 17, 2004



Summary Judgment Replies	December 31, 2004
Summary Judgment Hearing	January 21, 2005

It is further

ORDERED AND ADJUDGED that the proceedings relating to mediation will take place on the following schedule:

Mediator Selected	December 1, 2004
Mediation	January 24, 2005

It is further

ORDERED AND ADJUDGED that the proceedings relating to expert discovery will take place on the following schedule:

Initial Expert Disclosures	December 1, 2004
Responsive Expert Disclosures	December 13, 2004
Rebuttal Expert Disclosures	December 20, 2004
Depositions of Experts	December 21, 2004 - January 7, 2005

The parties agree, and the Court orders, that expert witness disclosures shall include: (a) the name and business address of the witness; (b) the subject matter about which the expert will testify; (c) the substance of the facts and opinions to which the expert will testify; (d) a summary of the grounds for each opinion; (e) a copy of any written reports issued by the expert regarding this case; (f) a copy of the expert's curriculum vitae; (g) a list of all cases in which the expert has testified during the past five years; (h) a list of all produced documents relied on by the expert; and (i) copies of all non-produced documents relied on by the expert. Expert witnesses will not be permitted to testify as to opinions, or the bases therefore, unless the opinions or bases were disclosed with particularity in accordance with this Order. It is further

ORDERED AND ADJUDGED that the remaining pretrial proceedings will take place on the following schedule:

Supplemental Interrogatory Responses Due	December 24, 2004

Completion of Fact Discovery	November 24, 2004
Deposition Designations Exchanged-Fact Witnesses	December 20, 2004
Deposition Designations Exchanged-Expert Witnesses	January 14, 2004
Deposition Counter-Designations and Initial Objections Exchanged-Fact Witnesses	January 17, 2005
Deposition Counter-Designations and Initial Objections Exchanged-Expert Witness	January 21, 2005
Motions in Limine	January 10, 2005
Witness Lists and Trial Exhibits Exchanged	January 10, 2005
Motion in Limine Oppositions	January 18, 2005
Objections to Counter-Designations Exchanged-Fact Witnesses	January 24, 2005
Objections to Counter-Designations Exchanged-Expert Witnesses	January 28, 2005
Meet-and-Confer re: Deposition Designations	February 4, 2005
Joint Pretrial Stipulation (in the form directed by the Court's Uniform Pretrial Procedure)	February 9, 2005
Deposition Designations, Counter-Designations, and Objections to Designations and Counter-Designations Provided to the Court	February 11, 2005
Pretrial Conference (3 days)	February 14, 15, and 16, 2004
Final Pretrial Conference	February 17, 2005
Jury Instructions and Verdict Forms Exchanged	February 18, 2005
Initial Jury Screening	February 18, 2005
Jury Trial Begins (15 trial days)	February 22, 2005

The Court will receive objections to instructions and verdict forms, and the parties'

counter-instructions on a date to be determined during trial. It is further

ORDERED AND ADJUDGED that hearing on Motions in Limine and objections to deposition designations set December 20 - 22, 2004 is canceled, to be reset after the deadlines established by this Order.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 14 day of October, 2004.

ELIZABETH T. MAASS
Circuit Court Judge

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IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA
CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

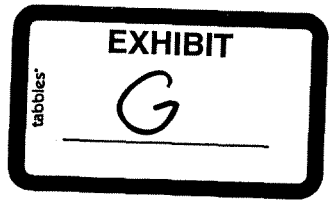
MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 47

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Thursday, March 24, 2005
Palm Beach County Courthouse
Courtroom 11-A
205 North Dixie Highway
West Palm Beach, Florida 33401
9:30 a.m. to 12:00 p.m.



Your Honor?

THE COURT: The sooner the better. But, you know...

But, yes, that's my understanding. Was that everybody else's understanding? We might fight about whether evidence is or is not relevant, but within those parameters that was my assumption.

MR. SCAROLA: That is certainly our understanding as well, Your Honor; that is, that neither party will be able to contradict or challenge the factual findings that the Court has made in its order. Although, either party may choose to supplement those facts, as long as the supplementary facts do not tend to contradict the factual findings.

THE COURT: Was that your understanding?

MR. HANSEN: Let's take an example that you've found as a fact -- as a result of the misconduct you found that -- for example, paragraph 2 of the complaint, Morgan Stanley conspired with Mr. Dunlap to come up with some phony scheme. If we understand your ruling and that's been found, there we are -- we obviously object.

But I don't believe -- or I can't understand how it could be that Mr. Scarola could come in and bolster that finding with proof about the supposed scheme.

THE COURT: At some point we're going to have to have a frank discussion about the evidence both sides believes still comes in at trial. Obviously, there's going to be punitive damages. There might be issues about whether this contradicts the findings or supplements the findings. Is it an issue from the complaint? I understand those are all things we're going to have to discuss.

MR. SOLOVY: I do think we have a basic understanding.

THE COURT: I know. And at some point we need to get down to nuts and bolts and say, okay, is either side now demanding or voluntarily withdrawing some of the deposition testimony that's been designated. What exhibits are now withdrawn? How do we limit the case given that?

MR. HANSEN: I'm sorry. To your point, Your Honor, obviously the points we made yesterday about us coming into the case at this basis, we

are at a terrible -- we, I mean myself and Mr. Ianno -- to try to ameliorate that terrible disadvantage, we are trying to get our hands around what is going to happen at this trial. If the trial is going to be limited to the issues of damages and outrageous misconduct, that's a trial I can prepare for. If it's going to be something else, that's harder. Any ambiguity on that point --

THE COURT: You need it clarified.

MR. HANSEN: Exactly. Who are the witnesses going to be? Can't be an exhibit list this thick. We have deposition designations that go to issues that are no longer in the case.

THE COURT: How long would it take both sides -- although, I had assumed Defendant's position is, look, we don't know what they're going to do to our case until Plaintiffs -- how long is it going to be to do supplemental disclosures under the pretrial disorder?

MR. SCAROLA: Your Honor, we anticipate that, at the latest, Monday morning we will have a drastically reduced exhibit list and a drastically reduced witness list.

Counsel can reasonably assume that almost

every deposition previously designated will not be used. We will advise them of the limited exceptions to that, if there are any at all, and there may be none. We will advise them of those limited exceptions just as quickly as we can. We will inform them on a rolling basis as decisions are made. But we will finalize those decisions no later than Monday morning.

THE COURT: Is there any way it can be done earlier so they get the benefit of some of the three-day weekend?

MR. SCAROLA: We're happy to share with them our preliminary thoughts. And those preliminary thoughts are probably pretty close to being finalized. We would be happy to do that, and we'll do that before the end of the day today.

MR. SOLOVY: I think a mutual dialogue would be helpful. The only thing I would add to what Mr. Hansen said -- we agree with what he said. And as you visualize doing this, it could be possible that a witness would somehow repeat something that was in the complaint, but that would really be sort of inadvertent or sort of a little background, because otherwise, I start somewhere in the middle.

THE COURT: Right. But I assume, Mr. Hansen, your response is, look, I've got to know. It's good you're telling me in good faith you're going to do this, but we need to tie it down.

MR. HANSEN: Exactly.

THE COURT: Let me jump ahead. The motion to strike the panel, where are we on that?

MR. SCAROLA: We have just received the written motion. I have begun to review it. I will take some time and finish reviewing it, and I think we'll be able to argue that a little bit later this morning.

THE COURT: This is the one thing I wanted to ask. I reviewed what I thought -- at least the motions I had copies of, heaven knows if they're complete -- that I thought were still pending. Would it make more sense today to argue the single motion, send everybody home, get you guys working today, and have a shorter deadline for paring your case down to give to them so when we come Monday morning we know what the case is, we know what the disputes are between the parties?

That still gives us Monday and Tuesday to

resolve those disputes, decide which motions are still needed, and get those heard.

MR. SOLOVY: I think it would be helpful to us, Your Honor, to hear some of these motions today.

THE COURT: Like what, though?

MR. SOLOVY: Well, Mr. Marmer is better able to speak.

MR. SCAROLA: We have come to significant agreement with regard to which motions can clearly be eliminated.

THE COURT: There's a couple that would go to reliance.

MR. HANSEN: I actually think it would be helpful --

THE COURT: I can listen to what Mr. Marmer has to say, but it strikes me the most immediate thing for Plaintiff to say, okay, in light of the order, this is now our case, give you guys time to retool. Have me say, this is the case. This is in. This is out. This is good for you.

Now, given that body of evidence, let's go back and consider the motions. Because it's not going to change your position. You're going to think some of this stuff comes in for reliance.

You're going to think it doesn't.

MR. SCAROLA: We're happy to proceed that way.

One thing that would help us in terms of making our decisions about who we will need to call and the extent of the case we need to present is an indication from the Court as to whether Your Honor intends to provide the factual findings to the jury in written form.

THE COURT: I can tell you my gut reaction to that, and then you guys can tell me right or wrong.

My gut reaction to that is that it's not the Court's job to highlight evidence or give it any more strength than it has of its own accord, which I believe would mean that I would read that.

Now, that, of course, does not prevent either side from blowing it up on opening statement or closing argument and saying, remember the Judge read you this. Just like you could blow up trial testimony and say, remember you heard this. But it would not normally be my practice to reduce that to written form.

MR. HANSEN: We certainly agree it shouldn't

be provided. Effectively, if you provided it, you'd be highlighting testimony.

THE COURT: Do we agree they can blow it up as big as they want?

MR. HANSEN: I'm not sure I agree to that.

THE COURT: Do you have any legal argument that would suggest they do not?

MR. HANSEN: Different discussion. I don't have any legal argument. I'd have to think about it.

THE COURT: To me it would be just like highlighting trial testimony.

MR. SCAROLA: I understand the Court's concern and your position, and that will have some bearing upon the length of our presentation; although, it's not going to change it significantly.

MR. HANSEN: Your Honor, could I make a suggestion? I hope it would be a helpful suggestion.

THE COURT: Mr. Ianno, you got my copy?

MR. IANNO: Yes.

MR. HANSEN: Obviously, very able counsel on the other side are going to have expansive views, proof they think comes in under different

at trial or a subpoena duces tecum for trial rests upon Your Honor's court order establishing pretrial procedures.

THE COURT: Unreasonable and oppressive, it's not oppressive other than you think it's unreasonable because it should have been listed?

MR. SCAROLA: Absolutely.

THE COURT: Wouldn't you say that any time there's a request for production at trial, wouldn't you be able to make the argument any time? Presumably these are all things you didn't have already, so they weren't listed.

MR. SCAROLA: Yes, I would say that any time you are attempting to obtain discovery through a notice to produce at trial it is indeed unreasonable, if it's outside the Court's pretrial order. And this is.

The notice to produce at trial is generally used for purposes of having the originals of documents that have already been discovered present in the courtroom. You want to have those original documents or that original piece of evidence there at the time of trial, and so you notice the production of the originals there at the time of trial. It is not a means by

which to avoid the restrictions that are imposed on discovery in the Court's pretrial order.

THE COURT: Okay.

What did you want to add, Mr. Marmer?

MR. MARMER: I think we've lost track in this, again, of the specific request that we're asked as well.

And that is that request 1 says: "All documents relating or referring to any use of Sunbeam shares as collateral or security for any indebtedness of MAFCO or any subsidiary or affiliate thereof, including but not limited to documents indicating the value assigned to Sunbeam shares."

And consider what we have produced. People have been talking about the exhibits, you know, we produced the term loan agreement. Remember, Your Honor, we went through this. Your Honor entered an order reflecting the parties agreed to produce certain things, we gave them the amended recent term agreement, and it was used in a deposition July 7th, 2004, not only did they get it, they asked about it.

We also produced to them a first amended and fifth amended and restated MAFCO guaranty. And

that's Morgan Stanley 299. Also asked about at the same deposition of July 7, 2004.

We gave them a first amended and restated revolving credit agreement that was Morgan Stanley 300, asked about at the same July 7 deposition.

We gave them a third amended and restated pledge agreement. That's Morgan Stanley 302. They've used that.

We've given the summary of terms and conditions MAFCO Finance Group. That was MS 308. Also marked and used at the deposition.

We've given them the fifth amended and restated Coleman Guaranty, that's Morgan Stanley 311, also asked about at deposition.

The point is that they had these documents -- they have asked about these documents. They have the basic materials that they need in order to make this argument, whether they should make the argument or not we'll deal with at a separate time. But they have those documents. Now for them to say they want something beyond that, what is the something beyond that that they're entitled to get? What more would they be entitled to get?

I think under number one if they have something in mind it's a general catchall and it certainly doesn't alert us to what else they want. If they want every document concerning these loans, that is indeed burdensome. They've got the operative agreements, they've asked witnesses about them, they can fashion whatever argument they want to make.

Request 2 through 5 they want all the amendments and so forth. You can look at these specific things here that they've got.

On 2 and 3 they're asking for documents dated on or after March 1, 1998. Request 2 it's dated on or after March 31, 1998. What possible reason is there to find out about our loan documents after March 31, 1998 if the purported theory is that you're looking to see whether we relied on something in closing this transaction? I mean, that on its face that argument is a disconnect.

With regard to their theories about structuring the deal to avoid paying cash to the banks, again, the argument here, it has a factual flaw as well as a logical inconsistency. They say it and it's almost hard to believe that

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION TO ADD WITNESSES

THIS CAUSE came before the Court April 5, 2005 on Morgan Stanley's Motion to Add Witnesses, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion to Add Witnesses is Granted, in part, and ruling reserved, in part. John Ashley, Scott Cook, Dan Fischel, Jeffrey Haas, and Kevin Woodruff shall not be permitted to testify at trial. MS & Co. shall, by noon on April 6, 2005, disclose each subject on which Mr. Jones will be offered together with a summary of his expected testimony on each point and shall produce him for deposition at a mutually convenient time within the next five calendar days in Palm Beach County, Florida

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 5 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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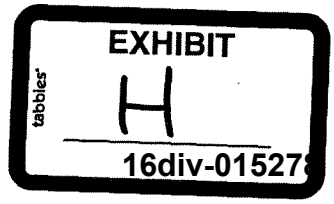

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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO QUASH MORGAN STANLEY'S NOTICE TO PRODUCE MAFCO LOAN AGREEMENTS

THIS CAUSE came before the Court March 24, 2005 on Coleman (Parent) Holdings Inc.'s Motion to Quash Morgan Stanley's Notice to Produce MAFCO Loan Agreements, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Coleman (Parent) Holdings Inc.'s Motion to Quash Morgan Stanley's Notice to Produce MAFCO Loan Agreements is Granted. MS & Co.'s notice to produce at trial documents pertaining to loan agreements of MAFCO, served February 18, 2005, is quashed.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 24 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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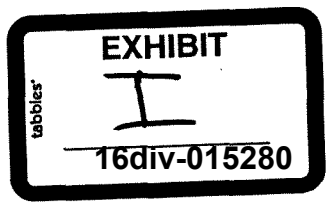

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Washington, DC 20036

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

MORGAN STANLEY& CO. INCORPORATED'S OPPOSITION TO CPH'S MOTION FOR LEAVE TO TAKE THE DEPOSITION OF DONALD G. KEMPF, JR.

Defendant Morgan Stanley & Co. Incorporated ("Defendant") opposes Plaintiff Coleman (Parent) Holdings, Inc.'s ("CPH") Motion for Leave to Take the Deposition of Donald G. Kempf, Jr.:

- Discovery is closed. The time for designating trial witnesses has passed. (CPH also proposes to add Mr. Kempf to their list of trial witnesses.)

- Plaintiff has not established the basis for the relief sought in its motion. There is no pending motion or other pleading alleging a violation of the March 2, 2005 Order, and the deposition of a senior executive is not a remedy for any such violation in any event.

- Mr. Kempf lacks knowledge of the issues on which Plaintiff seeks to depose him – document production pursuant to the order of March 2, 2005.

- The evidence sought through the deposition is irrelevant. There is no need for a deposition of Mr. Kempf on whether Defendant complied with the March 2, 2005 Order relating to Defendant notifying opposing counsel in ***other proceedings*** of limitations on its ability to produce email or that it had newly discovered back-up tapes containing email. The Court has already sanctioned Defendant regarding discovery abuses. Twice. Further, the Court has stated it will read a statement setting forth what Defendant has done regarding discovery abuse and "these findings of fact shall be conclusive."

- Mr. Kempf is in the midst of assisting the company in preparing for trial without the benefit of lead trial counsel that has represented Defendant since the outset of this case. An eleventh hour deposition while he is in the midst of this effort is intended to waste time and distract him from assisting his client.

Trial is impending. The time for taking depositions (and adding witnesses) is over, and the motion should be denied.

FACTS

On March 26, 2005 – five business days before the start of the trial – CPH served its motion for leave to take the deposition of Donald G. Kempf, Jr. – Executive Vice-President, Chief Legal Officer and Secretary of Morgan Stanley, the corporate parent of Defendant.[1] CPH asked that the deposition be "taken in the jury room adjoining Judge Maass' courtroom so that [we] would have the Court immediately available if any dispute arose as to the proper scope of the examination." (*See* March 26, 2005 letter from Jerold S. Solovy to Steven F. Molo (Ex. 1)). Plaintiff further asked that Mr. Kempf be "available for this deposition sometime this week." (*Id.*)

CPH does not allege that Mr. Kempf has any first-hand knowledge whatsoever of the events alleged in CPH's complaint. Indeed, the events alleged in the complaint took place before Mr. Kempf was even employed by Defendant. Instead, CPH's motion says – without citation to any document or source – that Defendant has failed to produce documents responsive to the Court's March 2, 2005 Order, which directed Defendant to produce certain documents sought in CPH's February 20, 2005 Notice to Produce. CPH

[1] However, Mr. Kempf is employed by Defendant and is a member of its Board.

clearly bases its request for Mr. Kempf's deposition on its assertion of non-compliance with the Court's March 2, 2005 Order. (*See* Motion ¶ 3, 7)

The March 2, 2005 Order relates to production requested in Plaintiff's February 20, 2005 Notice to Produce, which sought: "All responses made by [Defendant] since May 1, 2002[2] in any civil, criminal, or administrative proceedings to any request for the production of email, which response describes any limitation on [Defendant's] ability to produce email in response to the request;" and "All notices by [Defendant] in any civil, criminal, or administrative proceedings filed after May 1, 2002, whether pending or concluded, indicating [Defendant] has newly discovered back-up tapes containing email."

Upon receipt of Plaintiff's motion, Defendant requested that CPH provide Defendant with the supposed "information recently obtained through independent sources [that] indicates that [Defendant] did not produce readily available responsive documents" – *i.e.*, Defendant asked for the documents that CPH says would justify the extraordinary relief they seek. (*See* March 26 letter from Steven F. Molo to Jerold S. Solovy (Ex. 2)). Plaintiff refused to produce the documents. (*See* Second March 26 letter from Jerold S. Solovy to Steven F. Molo (Ex. 3)).

Plaintiff has no pending motion or pleading alleging a specific violation of the March 2, 2005 Order and seeking relief.

ARGUMENT

A. The Deposition of Mr. Kempf Is Not An Appropriate "Remedy" For An Alleged Violation of the March 2, 2005 Order

CPH purportedly "needs" to take the deposition of Mr. Kempf because it claims that Defendant failed to comply fully with this Court's March 2, 2005 order. Plaintiff has filed no pending pleading alleging a violation of that order. Further, despite a direct request from Defendant's counsel, it has offered no evidence of a violation of that order. (*See* Exhibit 3)

As a threshold matter, CPH should not be allowed to depose a senior executive of Morgan Stanley – who lacked any involvement in compliance with the March 2, 2005 Order. It must make some showing of a violation of that order. The remedy for a violation of a court order must be sought through enforcement of that order or a request for sanctions. *See* Rule 1.380; *Inapro Inc. v. Alex Hofirchter, P.A.*, 665 So.2d 279 (Fla. 3d DCA 1995) A motion requesting the deposition of an unknowledgeable senior executive is not an appropriate means of enforcing an order.

The deposition of Mr. Kempf is not an appropriate vehicle for enforcement of the Order and thus, the motion should be denied.

B. Mr. Kempf Lacks Any Knowledge Of The Specific Facts Regarding Compliance With The March 2, 2005 Order

Mr. Kempf is the Chief Legal Officer of Morgan Stanley, the corporate parent of Defendant. Morgan Stanley is the parent of numerous operating companies worldwide. His responsibilities extend far beyond this lawsuit. He did not participate in Defendant's

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2 The court modified the request in its March 2, 2005 to limit the timeframe to May

production to Plaintiff in response to the Court's March 2, 2005 Order. (*See* Kempf Affidavit) Thus, his testimony could not provide CPH with evidence relevant to their inquiry as to whether Defendant complied with the March 2, 2005 Order.

Further, Mr. Kempf cannot provide evidence to the core factual issues in the case. He was not even employed by Morgan Stanley until December 1999, well after the events forming the basis of the suit occurred.

C. The Evidence Sought To Be Developed Through The Deposition Is Irrelevant

On March 23, 2005 this Court entered an order granting Plaintiff's Renewed Motion for Entry of Default Judgment and holding, in effect, that Defendant would not be entitled to defend the allegations against it except as to reliance and damages. This order was the culmination of a series of disputes between the parties on discovery issues. The same order relieved Defendant of any further obligation to produce emails, stating Defendant no longer has to "comply with the April 16, 2004 Agreed Order and the February 4, 2005 Order on CPH's Motion to Participate in Search of Additional Email Back-up Tapes or Appoint Third Party to Conduct Search."

The Court has bifurcated the trial of this matter and the scope is set. The first phase of the trial is to address whether Defendant is liable to Plaintiff and, if so, what compensatory damages should be awarded. If Defendant loses at the first phase of trial, the second phase of the trial is to address what – if any – punitive damages should be awarded. (*See* February 16, 2005 Order on CPH's Motion to Bifurcate Trial)

CPH requested that the Court penalize Defendant for discovery abuse by, among other things, reading Exhibit A to the Court's March 1, 2005 Order, which is a three page

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1, 2002 from the request's original timeframe of 1999.

description of misconduct that the Court has found. The Court agreed to do so and the jury will hear this description of Defendant's misconduct. In its March 5, 2005 Order on CPH's Motion for Adverse Instruction, the Court stated "no other evidence [other than Exhibit A to the Court's March [1, 2005] Order concerning the production of emails or lack thereof shall be presented absent further Court order." In its March 23, 2005 Order on the Renewed Motion for Entry of Default, the Court ruled that it would modify Exhibit A to its March 1, 2005 Order to incorporate the relevant additional findings of the March 23, 2005 Order. Thus, the boundaries on the issue of what goes before the jury on the question of Defendant's discovery abuse have been set. Evidence of discovery conduct in other cases is far outside those boundaries.

What Defendant has or has not done in other litigation – wholly unrelated to this case – regarding the production of emails is irrelevant to either phase of this trial. Its compliance or non-compliance with requests for production and the nature of its representations concerning production of emails in other cases is a matter for the courts or agencies involved in those other cases. Moreover, should the Court allow inquiry into this area, the trial would be further prolonged and complicated unnecessarily. CPH inevitably would point to something Defendant did in another case and claim that conduct was somehow wrongful. Defendant would necessarily respond, challenging CPH's contention, and the Court would be forced to hold a series of mini-trials on each instance raised by CPH.

Finally, to the extent that Plaintiff claims that it needs to depose Mr. Kempf because Defendant may somehow be seeking to "distance itself from the litigation misconduct" in this case by blaming outside counsel, evidence of that nature is irrelevant

too. This Court has unequivocally stated that it has found such misconduct occurred and indeed, Defendant is being punished for it. The Court's March 1 and March 23, 2003 orders state that the Court will read to the jury a statement setting forth what Defendant has done regarding discover abuse and that "these finding of fact shall be conclusive."

D. CPH's Motion Is Purely For Purposes Of Harassment

Defendant – regardless of the reason – is now preparing for an impending trial in a complex fraud case without the benefit of its lead trial counsel since the beginning of this case. Mr. Kempf is now involved in assisting Defendant in this extremely difficult effort.

CPH has sought the deposition of Mr. Kempf with no time limitation, with no specific description of scope, and with the deposition to occur in this courthouse. Given that he can provide no relevant testimony, the clear purpose here is to harass Mr. Kempf and keep him away from his work in assisting Defendant prepare for trial.

WHEREFORE, Defendant respectfully requests that the Court issue an order denying CPH's Motion for Leave to Take the Deposition of Donald G. Kempf, Jr. together with such other and further relief as is just and proper.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by fax and email delivery on this 28th day of March, 2005.

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Exhibit 1

JENNER&BLOCK

JEROLD S. SOLOVY
Chairman of the Firm

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March 26, 2005

BY TELECOPY and E-MAIL

Steven F. Molo, Esq.
c/o KELLOGG, HUBER, HANSEN
TODD & EVANS, P.L.L.C.
222 Lakeview Avenue
Suite 260
West Palm Beach, FL 33401

Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*

Dear Steve:

As per our discussion, attached is our motion which we have noticed for Monday morning concerning the deposition of Mr. Kempf. If you are agreeable to our taking his deposition, we need not present this matter to the Court. We would suggest that Mr. Kempf's deposition be taken in the jury room adjoining Judge Maass' courtroom so that you would have the Court immediately available if any dispute arose as to the proper scope of the examination. Hopefully, Mr. Kempf will be available for this deposition sometime this coming week.

Best regards,

Jerold S. Solovy

Attachment
cc: Joseph Ianno, Jr., Esq.) (with copies of attachments)
Mark C. Hansen, Esq.) (**BY TELECOPY and E-MAIL**)
John Scarola, Esq.

Exhibit 2

SHEARMAN & STERLING LLP

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PARIS
ROME
SAN FRANCISCO
SÃO PAULO
SINGAPORE
TOKYO
TORONTO
WASHINGTON, D.C.

March 26, 2005

By Fax and Email

Jerold S. Solovy, Esq.
Jenner & Block
One IBM Plaza
Chicago, IL 60611-7603

Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. Incorporated

Dear Jerry

I write in response to your motion for leave to take the deposition of Don Kempf. Your motion is without merit, and we will be opposing it. Seeking to depose to Don, who has not appeared on your prior witness list, is wholly inappropriate and being done merely for purposes of harassment.

Your motion states at paragraph 5 that "information recently obtained through independent sources indicates that Morgan Stanley did not produce readily available responsive documents showing that Morgan Stanley had deceived other litigation adversaries concerning Morgan Stanley's ability to retrieve emails" and that "counsel for those parties . . . are contacting CPH." We request that you please provide to us a copy of the documents that you reference in paragraph 5. As your motion, which you served earlier today, is noticed for a hearing on Monday morning, please provide the documents by noon Sunday, so that we can prepare our opposition papers.

Very truly yours,

Steven F. Molo

Shearman & Sterling LLP is a limited liability partnership organized in the United States under the laws of the State of Delaware, which laws limit the personal liability of partners.

Exhibit 3

JENNER&BLOCK

JEROLD S. SOLOVY
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March 26, 2005

BY TELECOPY and E-MAIL

Steven F. Molo, Esq.
SHEARMAN & STERLING LLP
c/o Kirkland & Ellis LLP
222 Lakeview Avenue
Suite 260
West Palm Beach, FL 33401

Re: *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*

Dear Steve:

Thank you for your response to my earlier letter of this date. Under normal circumstances, I would accommodate your request, but these are far from normal circumstances.

There is a March 2 Order outstanding which has not been complied with by your client. If I provide Morgan Stanley with the information I have, this is all we will ever learn because the examples we have are glaring and so important that your client could not have overlooked them. One of the purposes of the deposition is to find out the extent to which Morgan Stanley violated the March 2 Order. These facts are well within your client's knowledge, but not ours. Accordingly, I must respectfully decline to honor your request.

We will proceed with presenting the motion to the Court on Monday morning as noticed.

Best regards,

Jerold S. Solovy

cc: Joseph Ianno, Jr., Esq.
Mark C. Hansen, Esq.
John Scarola, Esq.
(**BY TELECOPY and E-MAIL**)

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

DECLARATION OF DONALD G. KEMPF, JR.

I, Donald G. Kempf, Jr. being duly sworn under oath, and under penalty of perjury declare and state as follows:

1. I have not read the March 2, 2005 Order, and I had no personal participation in defendant Morgan Stanley & Co. Incorporated's efforts in complying with this Court's March 2, 2005 Order.

UNDER PENALTY OF PERJURY, I HEREBY DECLARE THAT THE FOREGOING IS TRUE AND CORRECT

Donald G. Kempf, Jr.

Dated: March 28, 2005

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

NOTICE OF FILING ORIGINAL DECLARATION OF DONALD G. KEMPF, JR.

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed the attached original Declaration of Donald G. Kempf, Jr., dated March 28, 2005.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand-delivery on this 28th day of March, 2005.

Mark C. Hansen
James M. Webster, III
Rebecca A. Beynon
KELLOGG, HUBER, ET AL.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999

Counsel for Morgan Stanley & Co. Incorporated

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Telephone: (561) 659-7070
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E-mail: jianno@carltonfields.com

BY: _____

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION FOR LEAVE TO TAKE THE DEPOSITION OF DONALD G. KEMPF, JR.

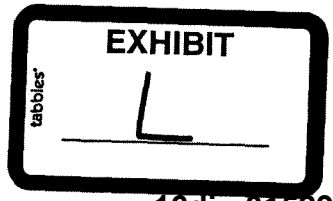
THIS CAUSE came before the Court march 29, 2005 on Coleman (Parent) Holdings Inc.'s Motion for Leave to Take the Deposition of Donald G. Kempf, Jr., with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part. Based on Defendant's representation that James Doyle is the person at MS & Co. responsible for compliance with the Court's March 2, 2005 Order, MS & Co. shall produce Mr. Doyle for deposition, which shall take no more than two hours, on either April 1, 2, 3, 8, 9, 10, or 15, 2005, at MS & Co.'s option, which shall be exercised by noon on April 1, 2005.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 29 day of March, 2005.

_____
ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401



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Rebecca Beynon, Esq.
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IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA
CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

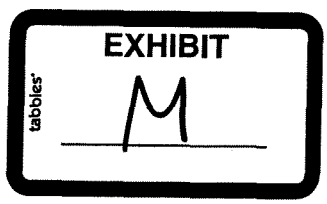
MORGAN STANLEY & CO., INC.,

Defendant.
/

VIDEOTAPED DEPOSITION OF JAMES DOYLE

Taken before Tracey S. LoCastro, Registered Professional Reporter, Notary Public in and for the State of Florida at Large, pursuant to Notice of Taking Deposition filed by the Plaintiff in the above cause.

Sunday, April 17, 2005
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida
10:10 a.m. to 11:30 a.m.



matters?

A. That list included litigation. I don't recall whether that list included arbitrations. It may have. It included regulatory matters.

Q. Did Mr. Kempf have any involvement whatsoever in efforts to respond to the March 2nd order?

A. Not that I'm aware of.

Q. In any of the instructions that you gave, either to the individuals that you identified as inhouse law division colleagues or in communications with any of the law firms with whom you communicated, did you place any limitations on the documents you sought to have produced?

MR. IANNO: Object to the form of the question. I think it calls for privileged information. Instruct the witness not to answer.

You can try to ask it another way that doesn't call for privileged information. But the way it's phrased...

BY MR. SCAROLA:

Q. Assuming that a written discovery response included general objections to production requests for e-mail, that such production would be overly

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

CASE NO.: 502003CA005045XXOCAI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS, INC.'S MOTION FOR ADVERSE INFERENCE INSTRUCTION DUE TO MORGAN STANLEY'S DESTRUCTIONS OF E-MAILS AND MORGAN STANLEY'S NONCOMPLIANCE WITH THE COURT'S APRIL 16, 2004 AGREED ORDER, AND MOTION FOR ADDITIONAL RELIEF AND ORDER ON PLAINTIFF'S MOTION TO COMPEL FURTHER DISCOVERY REGARDING MORGAN STANLEY'S DESTRUCTION AND NON-PRODUCTION OF E-MAILS

THIS CAUSE came before the Court on February 14, 2005 on Coleman (Parent) Holdings, Inc.'s ("CPH's") Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, as modified by CPH's February 14, 2005 ore tenus motion for additional relief, and on February 28, 2005 on Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-Mails, with both counsel present. Based on evidence introduced, the Court finds:

1. CPH has sued Defendant, Morgan Stanley & Co., Inc. ("MS & Co."), for fraud in connection with CPH's sale of its stock in Coleman, Inc., to Sunbeam Corporation in return for Sunbeam stock. Whether MS & Co. had knowledge of the fraudulent scheme undertaken by Sunbeam in 1997 and early 1998 and, if so, the extent of that knowledge, is central to the case. CPH has sought access to MS & Co.'s internal files, including e-mails, since the case was filed.

EXHIBIT
tabbies
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16div-015303

2. Though MS & Co. instructed its investment bankers to preserve paper documents in their possession in connection with the Sunbeam transaction in February, 1999, it continued its practice of overwriting e-mails after 12 months, despite an SEC regulation requiring all e-mails be retained in readily accessible form for two years. *See* 17 C.F.R. §240.17a-4 (1997).

3. On April 16, 2004, the Court entered its Agreed Order requiring MS & Co. to (1) search the oldest full backup tape for each of 36 MS & Co. employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all nonprivileged e-mails responsive to CPH's document requests; (4) give CPH a privilege log; and (5) certify its full compliance with the Agreed Order.

4. On May 14, 2004, MS & Co. produced approximately 1,300 pages of e-mails but failed to provide the required certification. Finally, on June 23, 2004, after inquiries by CPH, MS & Co. provided CPH with a certificate of full compliance with the April 16 Agreed Order signed by Arthur Riel, the MS & Co. manager assigned this task.

5. As organized by MS & Co., the effort to recover e-mails from any remaining backup tapes had several stages. First, the relevant backup tapes (in various formats, such as "DLT" tapes and eight-millimeter tapes) had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc. ("NDC"), to be processed, and the data returned to MS & Co. in the form of "SDLT" tapes. Third, MS & Co. had to find a way to upload the contents of these SDLT tapes into its new e-mail archive. Fourth, MS & Co. would run "scripts" to transform this data into a searchable form, so that it could later be searched for responsive e-mails. MS & Co. personnel used the term "staging area" to describe the stage of the

process when SDLT tapes remained in limbo, waiting to be uploaded to the archive.

6. At some point prior to May 6, 2004, Arthur Riel and his team became aware that more than 1,000 backup tapes had been found at a MS & Co. facility in Brooklyn, New York. These 1,423 DLT tapes had not been processed by NDCI and thus had not been included in the archive or searched when MS & Co. made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification that it was false. He and others on MS & Co.'s e-mail archive team knew by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990's. MS & Co. neither withdrew its certification nor informed CPH about the potential for additional production of e-mails, however. During the summer of 2004, the Brooklyn tapes were processed and sent to the staging area, but they were not uploaded to the e-mail archive so as to be available to be searched until January 2004, at least eight months after they were found.

7. MS & Co. also failed to timely produce e-mails from 738 8-millimeter backup tapes found at a MS & Co. facility in Manhattan, in 2002. These 738 8-mm tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched when MS & Co. made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Mr. Riel and others were told by their vendor, NDCI, by July 2, 2004 that the 8-mm tapes contained e-mail dating back at least to 1998. MS & Co. neither withdrew its certification nor informed CPH about the potential for additional production of e-mails, though. During the summer of 2004, the 8-mm tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not uploaded

to MS & Co.'s e-mail archive.

8. In August 2004, Mr. Riel was relieved of his employment responsibilities. He and his team were replaced by a new team headed by Allison Gorman Nachtigal.

9. Ms. Gorman testified that she was instructed to describe the circumstances of Mr. Riel's replacement as his having been "placed on administrative leave." That same term appears by interlineation over the original typed description in MS & Co.'s memorandum addressing these issues. The typed language stated: "[Mr. Riel was] dismissed for integrity issues." MS & Co. presented no evidence to explain why Mr. Riel would have been placed on administrative leave rather than terminated. CPH argued that it may have been to deprive CPH of the ability to contact him directly.

10. Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area; indeed, she was not informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman met with a group of MS & Co. attorneys. Following that meeting, Ms. Gorman gave the project somewhat greater priority, although even then it clearly did not move as expeditiously as possible. For example, MS & Co. gave no thought to using an outside contractor to expedite the process of completing the discovery, though it had certified completion months earlier; it lacked the technological capacity to upload and search the data at that time, and would not attain that capacity for months; and it knew trial was scheduled to begin in February, 2005. Even at this point, no one from MS & Co. or its outside counsel, Kirkland & Ellis LLP, gave CPH or this Court any hint that the June certification was false.

11. On November 17, 2004, more than six months after the May 14, 2004 deadline for

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producing e-mails in response to the Agreed Order, MS & Co. sent CPH a letter revealing that its June 23 certificate of compliance was incorrect. The letter stated:

> Morgan Stanley has discovered additional e-mail backup tapes since our e-mail production in May 2004. The data on some of [the] newly discovered tapes has been restored and, to ensure continued compliance with the agreed order, we have re-run the searches described in the order. Some responsive e-mails have been located as a result of that process. We will produce the responsive documents to you as soon as the production is finalized.

The letter also foreshadowed further delays: "(s)ome of the backup tapes are still being restored. To ensure continued compliance with the agreed order, we intend to re-run the searches again when the restoration process is complete and will produce any responsive documents that result."

12. The next day, November 18, 2004, MS & Co. produced an additional 8,000 pages of e-mails and attachments. MS & Co.'s November 2004 letter stated that the 8,000 pages came from "newly discovered" tapes; but the testimony now makes clear that this statement was false because Ms. Gorman's team did not figure out how to upload and make searchable the materials from the staging area until January, 2005.

13. MS & Co. has failed to offer any explanation to reconcile the obvious conflict between its assertions at the time of production that the 8,000 pages came from "newly discovered" tapes (*i.e.*, the "Brooklyn tapes") and the testimony of its own witness, Ms. Gorman, that data from those newly discovered tapes were not capable of being searched until two months later, in January.

14. After a follow-up inquiry by CPH, on December 17, 2004, MS & Co. produced a privilege log and told CPH that "[n]o additional responsive e-mails have been located since our November production." MS & Co. refused to answer CPH's questions about whether MS & Co.

had restored all the backup tapes described in its November 17 letter and why the tapes had not been located earlier, however.

15. On December 30, 2004, CPH sought confirmation that MS & Co. had reviewed all e-mail backup tapes and produced all responsive e-mails and, if not, asked when the review would be completed. On January 11, 2005, MS & Co. informed CPH that the "restoration of e-mail back tapes is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

16. On January 19, 2004, CPH wrote asking MS & Co. to explain the circumstances under which MS & Co. located the "newly discovered" backup tapes and to disclose when the tapes were located. CPH also asked MS & Co. to explain why the backup tapes could not be restored sooner.

17. On January 21, 2005, MS & Co. sent CPH a letter that failed to answer CPH's questions. Instead, MS & Co. described its efforts to restore the backup tapes as "ongoing"; informed CPH that "there is no way for MS & Co. to know or accurately predict the type or time period of data that might be recovered"; and stated that MS & Co. "cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes."

18. On January 26, 2005, CPH filed the Motion at issue here, asking the Court to instruct the jury that MS & Co.'s destruction of e-mails and other electronic documents and MS. & Co.'s noncompliance with the April 16, 2004 Agreed Order can give rise to an adverse inference that the contents of the missing e-mails would be harmful to MS & Co.'s defense in this case.

19. Meanwhile, MS & Co. found another 169 DLT tapes in January, 2005, that allegedly

had been misplaced by its New Jersey storage vendor, Recall. Again, MS & Co., chose to provide no specifics to CPH or to the Court.

20. At a February 2, 2005 hearing on CPH's Motion, Thomas A. Clare of Kirkland & Ellis, LLP, representing MS & Co., stated that "late October of 2004...[is] the date I represent to Court is the first time that anyone knew that there was recoverable e-mail data" on the Brooklyn tapes. Hr'g Tr. (2/2/05) at 133-34. The actual date, however, was at least three months earlier, by July 2, 2004. Furthermore, MS & Co. refused to provide the Court with definitive answers about when its e-mail production would be complete, merely stating that it would proceed with "all deliberate speed." *Id.* at 139. Also at the February 2 hearing, Mr. Clare neglected to inform the Court about the 8-mm tapes that had been located in 2002, and told the Court that the 1,423 DLT tapes had been found in Brooklyn "sometime during the summer" of 2004. The truth of this assertion is belied by the evidence showing that the tapes were found before May 6, 2004.

21. On February 3, 2005, the Court ordered further discovery and set an evidentiary hearing for February 14, 2005. The discovery took place on February 9 and 10, when CPH deposed the three e-mail witnesses identified by MS. & Co.

22. On Saturday afternoon, February 12, 2005, MS & Co. informed the Court that it had, in the previous 24 hours, discovered additional tapes. Also, MS & Co. stated that its recent production omitted certain "attachments" to e-mails. MS & Co. did not attempt to clarify or substantiate either of these statements to CPH or to the Court until the Monday, February 14, 2005 hearing.

23. At the February 14 hearing, none of the witnesses MS & Co. presented was involved in or familiar with the actual electronic searches conducted using the parameters specified in this

Court's April 16, 2004 Agreed Order, and none explained where the 8,000 pages produced in November, 2004 had come from. MS & Co.'s witnesses did, however, describe three new developments. First, Robert Saunders, a Morgan Stanley executive director in the Information Technology Division, testified that he returned to New York after his February 10 deposition and, concerned about his unqualified assertion that the was "confident" that a complete search for backup tapes had been conducted, decided finally to undertake a personal search of MS & Co.'s "communication rooms," going to the areas he thought most obvious first. By doing so, he and two contractors discovered more than 200 additional backup tapes openly stored in locations known to be used for tape storage. Those discoveries were made on Friday and Saturday, February 11 and 12, 2005. As of the February 14 hearing, NDCI had not yet determined which, if any, of these newly discovered backup tapes contained e-mails. Second, Ms. Gorman reported that on Friday, February 11, 2005 she and her team had discovered that a flaw in the software they had written had prevented MS & Co. from locating all responsive e-mail attachments. Third, Ms. Gorman reported that MS & Co. discovered on Sunday evening, February 13, 2005, that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so there were at least 7,000 additional e-mail messages that appeared to fall within the scope of the Agreed Order had yet to be fully reviewed by MS. & Co.'s outside counsel for responsiveness and privilege. As counsel for MS & Co. admitted, this problem "dwarf[s]" their previous problems. Hr'g Tr. (2/14/05) at 13. Ms. Gorman indicated she was "90 percent sure" that the problem infected MS & Co.'s original searches in May, which means that even they failed to timely produce relevant materials that had been uploaded into the archive by that point. *Id.* at 82-83. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the

16div-015310

transaction under review here.

24. On February 19, 2005 MS & Co. informed counsel for CPH that "additional boxes of back up tapes" have been located "in a security room" and that, "(a)s of this morning, Morgan Stanley has identified four (unlabled) DLT tapes among the collection. Those four tapes will be sent to NDCI for further analysis." The disclosure did not state when the discovery was made. MS & Co.'s counsel represented to the Court that it was his understanding that about 73 bankers' boxes of tapes were discovered. No explanation for the late discovery was offered.

25. Throughout this entire process, MS & Co. and its counsels' lack of candor has frustrated the Court and opposing counsel's ability to be fully and timely informed.

26. MS & Co.'s failure during the summer and fall of 2004 to timely process a substantial amount of data that was languishing in the "staging area," rather than being put into searchable form and then searched, was willful and a gross abuse of its discovery obligations.

27. MS & Co.'s failure to time notify CPH of the existence of the DLT and 8-mm tapes, which it had located as early as 2002 and certainly prior to the June 23, 2004 certification, and its failure to timely process those raw backup tapes was willful and a gross abuse of its discovery obligations.

28. MS & Co.'s failure to produce all e-mail attachments was negligent, and it was discovered and revealed only as a result of CPH's hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check MS & Co.'s compliance with the April 16, 2004 Agreed Order.

29. MS & Co.'s failure to produce all of the Lotus Notes e-mails was negligent, and it was discovered and revealed only as result of CPH's hiring a third-party vendor, pursuant to the

Court's February 4, 2005 Order, to double-check MS & Co.'s compliance with the April 16, 2004 Agreed Order.

30. MS & Co.'s failure to locate other potentially responsive backup tapes before Saturday, February 12, 2005 was grossly negligent.

31. Given the history of the discovery, there is no way to know if all potentially responsive backup tapes have been located.

32. In sum, despite MS & Co.'s affirmative duty arising out of the litigation to produce its e-mails, and contrary to federal law requiring it to preserve the e-mails, MS & Co. failed to preserve many e-mails and failed to produce all e-mails required by the Agreed Order. The failings include overwriting e-mails after 12 months; failing to conduct proper searches for tapes that may contain e-mails; providing a certificate of compliance known to be false when made and only recently withdrawn; failing to timely notify CPH when additional tapes were located; failing to use reasonable efforts to search the newly discovered tapes; failing to timely process and search data held in the staging area or notify CPH of the deficiency; failing to write software scripts consistent with the Agreed Order; and discovering the deficiencies only after CPH was given the opportunity to check MS & Co.'s work and the MS & Co.'s attorneys were required to certify the completeness of the prior searches. Many of these failings were done knowingly, deliberately, and in bad faith.

It is clear that e-mails existed which were requested by CPH that have not been produced because of the deficiencies discussed above. Electronic data are the modern-day equivalent of the paper trail. Indeed, because of the informalities of e-mail, correspondents may be less guarded than with paper correspondence. In this case, the paper trail is critical to CPH's ability to make out its prima facie case. Thus, MS & Co.'s acts have severely hindered CPH's ability to

proceed. The only way to test the potentially self-serving testimony of MS & Co. personnel is with the written record of the events.

The failures outlined in this Order are of two types. First, by overwriting e-mails contrary to its legal obligation to maintain them in readily accessible form for two years and with knowledge that legal action was threatened, MS & Co. has spoiled evidence, justifying sanctions. See Martino v. Wal-Mart Stores, Inc., 835 So. 2d 1251 (Fla. 4th DCA 2003). "The appropriateness of sanctions for failing to preserve evidence depends on: (1) willfulness or bad faith of the responsible party, (2) the extent of prejudice suffered by the other party, and (3) what is required to cure the prejudice." Nationwide Lift Trucks, Inc. v. Smith, 832 So. 2d 824, 826 (Fla. 4th DCA 2002). Second, MS & Co.'s willfull disobedience of the Agreed Order justifies sanctions. See Rule 1.380 (b) (2), Fla. R. Civ. P. The conclusion is inescapable that MS & Co. sought to thwart discovery *in this specific case.*

Sanctions in this context are not meant to be punitive. They are intended, though, to level the playing field.

A reasonable juror could conclude that evidence of MS & Co.'s misconduct demonstrates its consciousness of guilty. It is relevant to the issues before the jury. Further, CPH should not be penalized by being forced to divert the jurors' attention away from the merits of its claim to focus on highly technical facts going to MS & Co.'s failures here, facts that are not reasonably disputed. Evidence of that failure, though, alone does not make CPH whole. Indeed, it can be said it is not a "sanction" at all, but merely a statement of unrefuted facts that the jury may find relevant. Shifting the burden of proof, though, forces MS & Co. to accept the practical consequence of its failures–that some information will never be known. Obviously, this sanction is of consequence only in the

marginal case. If there is overwhelming proof of MS & Co.'s knowledge of the fraud and collusion with Sunbeam, CPH would have prevailed on those elements in any event. And, to the contrary, if there is overwhelming evidence MS & Co. did not know of the fraud or conspire with or aid Sunbeam in its commission, it would have prevailed in any event. If the case is close on those issues, though, MS & Co., not CPH, should bear the burden of persuasion. Further, shifting the burden on the fraud issue does not relieve CPH of its obligation to establish the other elements of its claims, most notably reliance, proof of which is independent of the MS & Co. e-mails. Thus, the sanctions chosen are the most conservative available to the Court to address the spoilation of evidence and willfull violation of the Agreed Order.[1] [2]

Finally, the Court notes that CPH has requested the e-mails since May of 2003. MS & Co. was supposed to comply with the April 16, 2004 Order by May 14, 2004. Fact discovery in this case closed November 24, 2004. MS & Co.'s actions have resulted in the diversion of enormous amounts of resources, by both the parties and the Court, into a fact discovery dispute that should have never arisen and which would have long ago been put to bed had MS & Co. timely recognized its obligations to CPH and this Court. Opening argument in this complex case is set for March 21,

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[1]MS & Co.'s bad acts and pocket book may not be used to gain the continuance it has sought from the beginning. Further, the Court has no confidence that, even if a continuance were granted, MS & Co. would fully comply with discovery in this case.

[2]The undersigned notes that the sanctions imposed are not enumerated in Rule 1.380 (b) (2), and is aware of the concern expressed in the 2000 Handbook on Discovery Practice, Joint Committee of the Trial Lawyers Section of the Florida Bar and Conferences of Circuit and County Court Judges ("(f)or the trial court to be on solid footing, it is wise to stay within the enumerated orders" [Handbook at p. 4]). However, MS & Co.'s violations involve both the violation of a discovery order and the intentional spoiliation of evidence. The sanction imposed is *less* severe than that provided in Rule 1.380 (b) (2) (B), under which the Court could preclude MS & Co. from presenting evidence of its lack of knowledge of or collusion with the Sunbeam fraud, which the Court finds is the least severe enumerated sanction appropriate to place the parties on a level playing field.

2005. Preliminary jury selection has begun. MS & Co. has controlled the timetable of this portion of the litigation long enough. Consequently, CPH should have the ability to continue to require MS & Co. to attempt to comply with the Agreed Order and the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search, or to elect to terminate the e-mail discovery and concentrate on trial preparation.

Based on the foregoing, it is

ORDERED AND ADJUDGED that:

1. Plaintiff's Motion for Adverse Interference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Non-Compliance with the Court's April 16, 2004 Agreed Order and Motion for Additional Relief is GRANTED.

2. MS & Co. shall continue to use its best efforts to comply with the April 16, 2004 Agreed Order and shall continue to comply with the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search until March 21, 2005 or written notice from CPH, which ever first occurs. Either party shall notify the other in writing of its intention to offer into evidence e-mails actually produced to CPH prior to termination of e-mail discovery in conformity with this Order, within 72 hours of the e-mail's production to CPH. The Court shall hear and determine any objections to use of the e-mails.

3. The Court shall read to the jury the statement of facts attached as Exhibit A during whatever evidentiary phase of CPH's case that it requests. These findings of fact shall be conclusive. See Rule 1.380 (b) (2) (A). No instruction shall be given to the jury regarding inferences to be drawn from these facts. However, counsel may make such argument to the jury in favor of whatever inferences that evidence may support. No other evidence concerning the production of e-mails, or

lack thereof, shall be presented absent further Court order.

4. CPH will be allowed to argue that MS & Co.'s concealment of its role in the Sunbeam transaction is evidence of its malice or evil intent, going to the issue of punitive damages. See, e.g., General Motors Corp. v. McGee, 837 So.2d 10120.

5. MS & Co. shall bear the burden of proving to the jury, by the greater weight of the evidence, that it lacked knowledge of the Sunbeam fraud and did not aid and abet or conspire with Sunbeam to defraud MS & Co. The traditional order of proof shall remain unaffected, however.

6. MS & Co. shall compensate CPH for costs and fees associated with the Motion. The amount shall be determined at an evidentiary hearing to be held after the completion of the trial.

7. Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-Mails is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 1 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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EXHIBIT A

A federal regulation in effect in 1997 and all times since required Morgan Stanley to preserve e-mails for three years and to preserve them in a readily accessible place for two years. Beginning in no later than 1997, Morgan Stanley had a practice of overwriting e-mails after 12 months. E-mails could no longer be retrieved once they were overwritten. This practice was discontinued in January, 2001. CPH has sought access to Morgan Stanley's e-mails relating to this transaction since the case was filed in May, 2003.

Prior to 2003, Morgan Stanley recorded e-mails and other electronic data on back up tapes. On April 16, 2004, the Court ordered Morgan Stanley to (1) search the oldest full backup tape for each of 36 Morgan Stanley employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all e-mails relating to this case found by the search I have just described; and (4) certify its full compliance with the Court's order.

On May 14, 2004, Morgan Stanley produced approximately 1,300 pages of e-mails. It did not produce the required certification. On June 23, 2004, after inquiries by CPH, Morgan Stanley provided CPH with a certificate of full compliance with the April 16 Order signed by Arthur Riel, the Morgan Stanley manager assigned this task.

As organized by Morgan Stanley, the effort to recover e-mails from the backup tapes had several stages. First, the relevant backup tapes had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc., which I will call "NDCI", to be processed, and the data returned to Morgan Stanley. Third, Morgan Stanley had to upload the processed data into its e-mail archive. Fourth, Morgan Stanley had to run scripts, or pieces of computer code, to transform this data into a searchable form. Finally, Morgan Stanley had to search the data for e-mails related to this case. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when the processed data returned by NDCI remained in limbo, waiting to be uploaded to Morgan Stanley's archive.

At some point prior to May 6, 2004, Arthur Riel and his team became aware that 1,423 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423 tapes had not been processed by NDCI and thus had not been included in the archive or searched when Morgan Stanley made its production to CPH on May 14, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification of full compliance with the Court's April 16, 2004 Order that it was false. He and others on Morgan Stanley's e-mail archive team knew by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990's. During the summer of 2004, the Brooklyn tapes were processed and the data sent to the staging area. The scripts were not written and tested to permit the search for e-mails relating to this case to begin until the middle of January, 2004. Such a search, even if perfectly done, can take weeks.

Morgan Stanley also failed to timely produce e-mails from 738 backup tapes found at a Morgan Stanley facility in Manhattan in 2002. These 738 tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched by either on May 14, 2004 or June 23, 2004. Mr. Riel and others were told by NDCI by July 2, 2004 that these tapes contained e-mail dating back at least to 1998. During the summer of 2004, the these tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not searched.

In August 2004, Mr. Riel was relieved of his employment responsibilities. He and his team were replaced by a new team headed by Allison Gorman Nachtigal. At that time, the staging area contained about 600 gigabytes of e-mail data that had not yet been uploaded into the Morgan Stanley archive and had not been searched for e-mails relating to this case.

Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area. Indeed, she was not informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman gave the project somewhat greater priority, although even then it did not move as expeditiously as possible. Morgan Stanley did not consider using an outside contractor to expedite the process.

Morgan Stanley found another 169 DLT tapes in January, 2005, that had been misplaced

by its New Jersey storage vendor. Morgan Stanley discovered more than 200 additional backup tapes openly stored in locations known to be used for tape storage on February 11 and 12, 2005. On February 11, 2005 Morgan Stanley discovered that a flaw in the software it had written had prevented Morgan Stanley from locating all e-mail attachments about the Sunbeam transaction. Morgan Stanley discovered on February 13, 2005, that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so that additional e-mail messages that appeared to fall within the scope of the April 16, 2004 Order had not been given to CPH. Further, it appears that the problem infected Morgan Stanley's original searches in May of 2004. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the transaction under review here. On February 16, 2005, Morgan Stanley withdrew its certificate of compliance with the April 16, 2004 Order. On February 19, 2005 Morgan Stanley notified CPH that it had found boxes of additional tapes that have not been uploaded into its archive or searched for responsive e-mails. Morgan Stanley did not tell CPH it had found any tapes that it had not searched until November 17, 2004. Even then, it did not tell CPH how many tapes were found, when they were found, or when they would be searched. MS & Co. did not provide all of this information to CPH until February of 2005. The searches had not yet been completed when this trial was begun, when they were terminated without completion.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

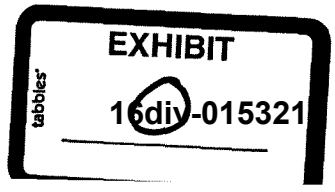
MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON CPH'S RENEWED MOTION FOR ENTRY OF DEFAULT JUDGMENT

THIS CAUSE came before the Court March 14 and 15, 2005, on CPH's Renewed Motion for Entry of Default Judgment, with both parties well represented by counsel.

Coleman (Parent) Holdings, Inc. ("CPH"), has sued Morgan Stanley & Co., Inc. ("MS & Co."), for aiding and abetting and conspiring with Sunbeam to perpetrate a fraud. Early in the case, CPH was concerned that MS & Co. was not thoroughly looking for emails responsive to its discovery requests. On April 16, 2004, the Court entered an Agreed Order ("Agreed Order") that required MS & Co. to search its oldest full backup tapes for emails subject to certain parameters and certify compliance. MS & Co. certified compliance with the Agreed Order on June 23, 2004. On November 17, 2004, CPH learned that MS & Co. had found some backup tapes that had not been searched. On January 26, 2005 it served its Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order ("Adverse Inference Motion"), claiming that MS & Co.'s violation of the Agreed Order, coupled with its systemic overwriting of emails after 12 months, justified an adverse inference against it. The Court ordered certain limited discovery. Responses to that discovery prompted CPH to orally amend its Adverse Inference Motion to seek more severe sanctions.

The Court held an evidentiary hearing on the Adverse Inference Motion on February



14, 2005. On March 1, 2005 it issued its Amended Order on Coleman (Parent) Holdings Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order ("Adverse Inference Order"). In its current Motion, CPH argues that it has since learned that the discovery abuses addressed in the Adverse Inference Motion and Order represent only a sampling of discovery abuses perpetrated by MS & Co. and that the abuses have continued, unabated. It claims that these abuses, when taken as a whole, infect the entire case. To understand CPH's argument, it is necessary to go back to the beginning.

This case arises out of an acquisition transaction that was negotiated and consummated in late 1997 and early 1998, in which CPH sold its 82% interest in the Coleman Company, Inc., to Sunbeam Corporation. MS & Co. served as financial advisor to Sunbeam for parts of the acquisition transaction and served as the lead underwriter for a $750,000,000.00 debenture offering that Sunbeam used to finance the cash portion of the deal.

CPH's Complaint[1] alleged claims against MS & Co. arising from this transaction for fraudulent misrepresentation, negligent misrepresentation, aiding and abetting fraud, and conspiracy, and sought damages of at least $485 million.

On May 12, 2003, MS & Co. was served with the Complaint and CPH's First Request for Production of Documents ("Request"). The Request sought, in essence, all documents connected with the Sunbeam deal. "Documents" was broadly defined, and specifically included items electronically stored. Concerned that, out of more than 8,000 pages of documents produced, it had received only a handful of emails, CPH on October 29, 2003, served its Motion to Compel Concerning E-Mails. That motion sought an order requiring MS & Co. to make a full investigation for email messages, including a search of magnetic tapes and hard drives; produce within 10 days all emails located; and produce a Rule 1.310 witness

[1]On February 17, 2005, CPH served its First Amended Complaint, which dropped the claims against MS & Co. for fraudulent and negligent misrepresentation, leaving only the aiding and abetting and conspiracy claims.

within 20 days "to describe the search that was conducted, identify any gaps in Morgan Stanley's production, and explain the reasons for any gaps."

In its Opposition to Coleman (Parent) Holdings, Inc.'s Motion to Compel served November 4, 2003, MS & Co. argued that CPH wanted "this Court to order a massive safari into the remote corners of MS & Co.'s email backup systems" and represented that "(t)he restoration efforts demanded by CPH would *cost at least hundreds of thousands of dollars* and require several months to complete (emphasis in original). MS & Co. argued that CPH's "true" motive was to "harass and burden MS & Co. with unnecessary and costly discovery demands and attempt to smear MS & Co. with out-of-context recitations from other proceedings" because "CPH *concedes* that MS & Co. is only able to restore email from backup tapes from January 2000 and later - *more than a year and a half after the events that allegedly gave rise to CPH's claims*," (emphasis in original).

CPH's "concession" was based on representations like the kind made to it by MS & Co.'s counsel in a March 11, 2004 letter that suggested "(t)he burden on Morgan Stanley from . . . a wholesale restoration [of email back up tapes], both in terms of dollars and manpower would be enormous. Regardless of who performs the initial restoration, it would require hundreds (perhaps thousands) of attorney-hours to review millions of irrelevant and non-responsive e-mails . . ."[2]

In response to CPH's Motion to Compel, the parties agreed to reciprocal corporate

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[2]Complaints about MS & Co.'s tactics are not new. See Ex. 196 [February 26, 2004, letter from EEOC to Hon. Ronald L. Ellis in EEOC/Schieffelin v. Morgan Stanley & Co., Inc., et al., 01-CV-8421 (RMB) (RLE) (S.D.N.Y.): ("(w)hen EEOC received [Morgan Stanley's] January 27, 2004 Responses to EEOC's Fifth Requests for Production of Documents which did not contain any e-mails, the parties communicated further. At that time, Morgan Stanley took the position that searching for e-mails would be burdensome both in regards to expense and the time it would take to respond. While the parties were in the process of attempting to work out these disputes, EEOC for the first time learned that [Morgan Stanley has] an easy, systematic ability to search for relevant documents. In a February 16, 2004, conversation with an IT representative of [Morgan Stanley], EEOC learned that [Morgan Stanley has] an e-mail system, which, while not yet fully comprehensive, was easily searchable on February 18, 2004, the close of discovery . . . which is certain to produce discoverable information highly relevant to EEOC's and Plaintiff-Intervenor's claims . . . After disclosing their state-of-the-art system to EEOC, [Morgan Stanley] dropped [its] assertion that the process was too expensive, but maintained that they refuse to search for e-mails because it is burdensome for attorneys to review large numbers of documents prior to production.")

depositions on the email issue. CPH deposed Robert Saunders on February 10, 2004.[3] After completion of the corporate representative depositions, and unable to obtain MS & Co.'s agreement to a mutual email restoration protocol, CPH served its Motion for Permission to have Third Party Retrieve Morgan Stanley E-Mail and Other Responsive Documents, proposing that a third party vendor be given access to both parties' email systems for restoration at each party's expense. At the hearing on that Motion, CPH offered to split the expenses evenly. MS & Co. refused.

MS & Co.'s continued assertions that the email searches could be conducted only at enormous cost and would be fruitless because there were not backup tapes with email from 1997 and 1998 were confirmed to the Court by MS & Co.'s counsel, Thomas Clare of Kirkland & Ellis, at a hearing held March 19, 2004:

> Mr. Scarola: Electronic records of e-mails that have been exchanged.
> The Court: Do we agree that there has been such a request outstanding?
> Mr. Clare: There has been a request outstanding.
> The Court: And have you all objected?
> Mr. Clare: From the beginning.
> The Court: And what's the basis of the objection?
> Mr. Clare: We objected to the breadth of the request that they're making. And to answer Your Honor's question directly – and the burden that is associated with it – that given the particular e-mail back-up tapes that are in existence five, six years after the fact of these transactions, that the scope of the e-mail request that they are seeking is improperly and unduly burdensome given the enormous costs that would be required, given the fact that the time period for which we have back-up tapes post dates the events by several years.

Unable to resolve the email issue, on April 9, 2004, CPH served its Motion to Compel

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[3]Saunders provided misleading information in his deposition. See footnote 12, infra.

Concerning E-Mails and Other Electronic Documents. On the eve of the hearing on CPH's Motion to Compel, the parties reached an accommodation, and on April 16, 2004 the Court entered the Agreed Order. Under the Agreed Order, MS & Co. was required to (1) search the oldest full backup tape for each of 36 MS & Co. employees involved in the Sunbeam transaction; (2) review emails dated from February 15, 1998, through April 15, 1998, and emails containing any of 29 specified search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004, all nonprivileged emails responsive to CPH's document requests; (4) give CPH a privilege log; and (5) certify its full compliance with the Agreed Order.

As required by the Agreed Order, MS & Co. produced about 1,300 pages of emails on May 14, 2004. It did not, however, certify compliance with the Agreed Order. After prompting by CPH, on June 23, 2004, MS & Co. served a certificate of compliance signed by Arthur Riel, an Executive Director and manager of its Law/Compliance IT Group.[4]

CPH got its first indication that the Agreed Order may have been violated in the late fall of 2004.

On November 17, 2004, Clare wrote Michael Brody of Jenner & Block, CPH's outside counsel, that MS & Co. had "discovered additional e-mail backup tapes . . ."; that "(t)he data on some of [the] newly discovered tapes has been restored;" that "we have re-run the searches described in [the Agreed Order]"; that "some responsive e-mails have been located as a result of that process"; and that "(w)e will produce the responsive documents to you as soon as the production is finalized."

On December 14, 2004, Brody wrote Clare back:

> in [your November 17, 2004 letter], you state that Morgan Stanley located additional email backup tapes, and that you

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[4]Though CPH would not learn for months that the certificate was false, and even then the magnitude of MS & Co.'s misrepresentations would not be admitted, MS & Co. personnel, including in-house counsel, knew the certification of compliance was false when made.

> would be producing documents soon. Within two days of that letter, you produced some emails to us. In your November 17, 2004 letter, however, you also indicated that "some of the backup tapes are still being restored." Have those backup tapes been restored? Have you found additional responsive emails? If so, when will Morgan Stanley produce those emails? How is it that the tapes were only recently located?

On December 17, 2004, Clare wrote back, telling Brody "(n)o additional responsive e-mails have been located since our November production."[5]

Brody wrote back to Clare December 30, 2004, noting the deficiencies in Clare's correspondence:

> You do not inform us whether the review of the recently-located backup tapes still is ongoing. Please confirm that all email backup tapes from the relevant time period have been reviewed and all responsive emails have been produced. If the review still is proceeding, please let us know when the review will be completed.

Clare wrote back on January 11, 2005, telling Brody that the "restoration of e-mail backup tapes is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

Concerned about Clare's lack of candor, on January 19, 2005 Brody wrote again:

> I write in response to your January 11, 2005 letter concerning e-mails back-up tapes. Unfortunately, your letter raises more questions than it answers. As I requested in my December 14, 2004 letter, please explain the circumstances under which Morgan Stanley located these backup tapes and advise us of the date on which the tapes were located.

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[5]Not only does this letter fail to answer Brody's legitimate questions, it implies that MS &Co. was still processing and reviewing emails from the newly found tapes. As we now know, though, *no* additional information was migrated to the archives between approximately August 18, 2004 and January 15, 2005. *Of course* "no additional responsive e-mails [would have been] located."

> Further, please explain your statement that "the next set of backup tapes" is scheduled to be restored "at the end of January." How many tapes will be restored by the end of January? When exactly in January will Morgan Stanley complete the process of restoring and searching these tapes for responsive documents? Are there other backup tapes that are not yet in the process of being restored? If so, please advise us of (a) the number of tapes that are not yet in the process of being restored; (b) the time period of the data contained on those tapes; and (c) Morgan Stanley's timetable for restoring and searching those tapes. In addition, please explain why those tapes are not yet in the process of being restored. Please also explain why Morgan Stanley cannot complete the restoration and searching of all remaining backup tapes before "the end of January." As you know, our trial is scheduled to begin on February 22, 2005.
>
> We look forward your complete response to these questions no later than January 21, 2005 so that we can bring this matter to the Court's attention, if necessary.

Conforming to what was by now his usual stonewall tactic, Clare responded by letter dated January 21, 2005:

> I write in response to your January 19, 2005 letter regarding Morgan Stanley's production of e-mails restored from backup tapes.
>
> Morgan Stanley completed its initial production of restored e-mail messages on May 14, 2005. The May 2004 production was conducted in accordance with the agreed-upon order governing, and the searches that resulted in that production encompassed data from all of the backup tapes known to exist at the time. Subsequent to the May 2004 production, additional tapes were found in various locations at Morgan Stanley. The discovered tapes were not clearly labeled as to their contents, were not found in locations where e-mail backup tapes customarily were stored, and many of the tapes

were in a different format than other e-mail backup tapes. In November 2004, once it was determined at least some of the discovered tapes contained recoverable e-mail data, Morgan Stanley re-ran the searches described in the agreed-upon order. Those searches resulted in Morgan Stanley's November 2004 production.

Morgan Stanley's efforts to restore the backup tapes discovered after the May 2004 production are ongoing. It is a time-consuming and painstaking process and, given the absence of clear labels or other index information for the backup tapes, there is no way for Morgan Stanley to know or accurately predict the type or time period of data that might be recovered from tapes that have yet to be restored. While Morgan Stanley cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes, we understand from Morgan Stanley that, when the agreed-upon searches are run again at the end of January, those searches will include approximately one terabyte of additional data restored since the prior production.

On January 26, 2005, CPH served its Adverse Inference Motion, seeking sanctions based on MS & Co.'s disclosure of the newly found tapes. Hearing was scheduled for February 14, 2005. In preparation for that hearing, on February 3, 2005 the Court ordered MS & Co. to produce by noon on February 8, 2005 "(i) all documents to be referred to or relied on by any of the witnesses in his or her testimony; and (ii) all documents within MS & Co.'s care, custody, or control, addressing or related to the additional email backup tapes, including matters relating to the time or manner in which they were discovered; by whom they were discovered; who else learned of their discovery and when; and the manner and timetable by which they were be restored and made searchable, including any correspondence to or from outside or prospective outside vendors."

The Adverse Inference Order outlined the discovery abuses shown at the February 14, hearing. They included MS & Co.'s undisclosed discovery of the 1,423 "Brooklyn" tapes no

later than May of 2004; the undisclosed discovery of the 738 8-millimeter backup tapes in 2002; the presence of unsearched data in the staging area; the discovery of 169 DLT tapes in January 2005; the discovery of more than 200 additional tapes on February 11 and 12, 2005; the discovery of a script error that had prevented MS & Co. from locating responsive email attachments; and discovery of another script error that had infected the ability to gather emails from Lotus Notes platform users.

In response to these deficiencies, the Court issued the Adverse Inference Order. That Order reversed the burden of proof on the aiding and abetting and conspiracy elements and included a statement of evidence of MS & Co.'s efforts to hide its emails to be read to the jury, as relevant to both its consciousness of guilt and the appropriateness of punitive damages. It specifically provided that "MS & Co. shall continue to use its best efforts to comply with the April 16, 2004 Agreed Order and . . . February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search."[6]

It is now clear why MS & Co. was so unwilling to provide CPH with basic information about how and when the tapes were found or when production would be complete. First, candor would have required MS & Co. to admit that it had not done a good faith search for the oldest full backup tapes, and that Riel's certificate of compliance was false. Some unsearched tapes had been found by 2002; others had been found no later than May, 2004. Together, over 2,000 tapes had been found which were not searched prior to the May production. It is untrue that the tapes were "not in locations where e-mail backup tapes customarily were stored."

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[6]Concerned that MS & Co. had been less than candid with both CPH and the Court, on February 4, 2004, the Court entered its Order on Coleman (Parent) Holding's ore tenus Motion to Participate in Search of Additional E-Mail Backup Tapes or Appoint Third Party to Conduct Search, ordering MS & Co. to pay for a third party vendor to check its compliance with the Agreed Order. The Court previously found that the two scripts errors testified to by Allison Gorman at the February 14, 2005, hearing would not have been discovered or revealed without the threat that the third-party vendor would discover the errors. Given Ms. Gorman's testimony at the March 14, 2005, hearing, though, it now appears MS & Co. knew about the errors before the appointment of the third-party vendor. Consequently, the errors were only revealed, but not discovered, in response to the February 4, 2004, Order.

Second, MS & Co. desperately wanted to hide an active SEC inquiry into its email retention practices.[7] [8] [9] [10] Finally, MS & Co. did not want to admit the existence of the historical email archive, which would expose the false representations it had made to the Court and used to induce CPH to agree to entry of the Agreed Order.[11] [12]

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[7]On December 17, 2003, CPH served its Third Request for Production seeking "(a)ll materials and documents submitted to the United States Securities and Exchange Commission ("SEC"), received from the SEC, or reflecting communications with the SEC in connection with any investigation, inquiry, or examination concerning or relating to Morgan Stanley's policies and/or procedures with regard to the retention, storage, deletion, and/or back-up of electronic mail (emails) . . ." On October 12, 2004, CPH served its Request for Supplemental Documents seeking to bring MS & Co.'s document production current, requesting "(a)ll documents not previously provided by MS & Co. that are responsive to any Request for Production of Documents that CPH previously has served upon MS & Co. in the litigation, including documents obtained by MS & Co. or its counsel after the date of MS & Co.'s prior productions." No SEC documents were produced in response to either request; no privilege log was generated. On other privilege logs generated in response to court orders, MS & Co. did not show the SEC on the distribution portion of the log. See March 9, 2005 Order Following in Camera Inspection (Riel/SEC Documents) footnotes 1, 2. See, also, footnote 15, infra. Kirland & Ellis, outside counsel for MS & Co. in this litigation, represents MS & Co. in the SEC's inquiry into its email retention practices.

[8]MS & Co. manipulated the unhinging of the SEC's email investigation from the IPO litigation in January, 2005, to conceal the email issues as long as possible.

[9]It is now apparent that MS & Co. chose deliberately to keep its affidavits concerning the informal SEC inquiry submitted to support its privilege claims vague, despite two requests from the Court seeking specific information. See February 28, 2005 Order (Release of Exhibits).

[10]See February 25, 2005 Order on Morgan Stanley's Objections to Coleman (Parent) Holding Inc.'s Notice to Produce at Hearing and Motion for Protective Order and March 4, 2005 Order on Plaintiff's ore tenus Motion to Compel Additional Production.

[11]While MS & Co. contends that its representations to the Court that it would cost "hundreds of thousands of dollars" to search the backup tapes and that there was no pre-2000 backup tapes were not false, they were deliberately misleading: MS & Co. never had an intention to search the back up tapes to respond to the requests and some of the year 2000 backup tapes backed up email back to 1997.

In 2001, MS & Co. decided to create the email archive. By June,2003, it had decided that the archive should have two components. First, MS & Co. wanted to create an archive that captured and stored email as it was generated. Second, MS & Co. wanted to add historical data to the archive. That task involved searching for all email backup tapes containing historical emails; sending those tapes to an outside processor; loading the processed tapes into a staging area; and migrating the stored data from the staging area onto the archive. As we now know, archive searches are quick and inexpensive. They do not cost "hundred of thousands of dollars" or "take several months." The restrictions imposed by the Agreed Order were not needed.

[12]On February 10, 2004, Robert Saunders, an executive director of IT for MS & Co., was deposed. He testified that in January, 2003, MS & Co. had put into effect the email archive system. When specifically asked whether the new email archive system would include prior backups or only going forward backups, he testified that "(t)he way it was built was for going forward backup." He was next asked whether "(w)ith respect to backup dated January 2001 and previously, does Morgan Stanley have any new capabilities to restore and search e-mail?" After counsel interposed a vagueness objection, he answered "(t)here are no new capabilities to search that e-mail." That testimony was so misleading as to be false. As Sauders well knew, since he was on the team responsible, the "live" email capture portion of the archive was already operational. The migration of the historical data to the archive was expected to be completed by April of 2004, just two months after his deposition.

16div-015330

MS & Co.'s wrongful conduct has continued unabated.[13] Since the February 14, 2005, hearing, it has come to light that:

- Only two whole and four partial tapes from the Brooklyn tapes had been migrated to the archive and were thus searched for the November, 2004, production. MS & Co. sought to hide this information to create the impression that all the produced documents came from the Brooklyn tapes, rather than reveal that the production came from material that had migrated from the staging area to the archive since the May, 2004, production or some other, as yet undisclosed, source.[14]

- Contrary to MS & Co.'s counsel's November 17, 2004, letter to CPH, *none* of the November, 2004 production came from the "newly found" tapes. MS & Co. carefully crafted its responses to inquiries about the November, 2004, production to avoid both disclosure of the existence of the archive and outright lying.

- The scripts MS & Co. used to process emails into its archive caused the bodies of some messages to be truncated. MS & Co. discovered this problem on February 13, 2005, but did not tell the Court about it until March 14, 2005.

- A migration issue caused about 5% of email harvested by NDCI from the backup tapes not to be captured in the archive, based on testing of a representative sample of tapes. MS & Co. told the SEC about this problem on February 24, 2005, but failed to tell CPH or the Court.

- As of June 7, 2004, only 120 out of 143 SDLT tapes had been processed into the archive.

- An analysis requested by the SEC showed that, based on a representative sample, 10% of backup tapes were overwritten after January, 2001.

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[13]MS & Co. sought to use the entry of the Adverse Inference Order as a shield against further inquiry into its email abuses, arguing that the matter was closed by the Adverse Inference Order. It previously used this tactic with the SEC, arguing that the December 3, 2003 Cease and Desist Order shielded it from other sanctions for email retention failures. See Ex. 14 [February 10, 2005 letter from outside counsel for MS &Co. to SEC]

[14]MS & Co. argued at the March 14 and 15, 2005 hearing that there were only 13 unique, new emails contained in the November 2004 production when compared to the May 2004 production. Nine of those emails, however, were originally given to MS& Co.'s lawyers for responsiveness review by the IT staff for the May 2004 production. No explanation of why they were not produced in May was offered. This is particularly concerning given the large number of documents Ms. Gorman testified the search parameters found compared with the relatively small number found responsive and produced after review by counsel.

16div-015331

- A software error caused blind carbon copies not to be captured in the archive process. MS & Co. told the SEC about this problem on February 24, 2005. MS & Co. did not tell CPH or the Court.

- A software error caused the searches to be hyper case-sensitive, resulting in a failure to capture all emails. MS & Co. knew of the problem as of December, 2004, but did not tell CPH or the Court. The problem was not purportedly fixed until March, 2005.

- A script error caused the archive to have problems pulling group email in Lotus Notes.

- MS & Co. provided sworn testimony at the February 14, 2005, hearing that it had located 600 gigabytes of data, while contemporaneously telling the SEC it had located a terabyte of data. A gigabyte represents 20,000 to 100,000 pages. Incredibly, MS & Co.'s witness on this point, Allison Gorman, testified on March 14, 2005, that it was simply a "terminology" issue that she did not choose to correct because it could cause "confusion."

- CPH requested MS & Co. to produce responses it had made to third-parties in civil, criminal, or administrative proceedings describing limitations on MS & Co.'s ability to produce emails and all notices in such proceedings that MS & Co. had newly discovered backup tapes containing email. MS & Co. objected, arguing that there were over 300 separate proceedings, involving over 70 outside law firms, and that the cost of compliance would be too great. On March 2, 2005, the Court ordered the production, after shortening the time period involved, and required production within 12 hours after counsel's review of each item for responsiveness but, in any event, within 10 days. At the time MS & Co. objected to CPH's request as unduly burdensome, it knew of its Well submission to the SEC made on February 10, 2005. Kirkland and Ellis, co-counsel here, was co-counsel for MS & Co. in that SEC proceeding. Consequently, it appears MS & Co.'s real concern was not that expressed to the Court, but was based on its realization that compliance would reveal the existence of the SEC inquiry into its email retention policy and MS & Co.'s efforts to keep the existence of that investigation secret. MS & Co. violated the Court's March 2, 2005, Order on Morgan Stanley's Responses and Objections to Coleman (Parent) Holdings Inc.'s Notice to Produce at Hearing requiring it to disclose items responsive to CPH's Request for Production within 12 hours of review for responsiveness by waiting *days*, not hours, to produce the Wells submission.

- MS & Co.'s failure to produce or log the SEC documents violated the Court's February 3, 2005, Order.[15]

- James Doyle's, the Executive Director of MS & Co.'s Law Division, declaration that he did not learn of additional unsearched backup tapes until the end of October, 2004, was intended to mislead CPH and the Court. Obviously, MS & Co. sought to create the implication in the declaration that *no one* in the Law Division knew of the backup tapes before then. Instead, both Soo-Mi Lee, Doyle's associate, and James Cusick, Doyle's superior, knew of the tapes no later than June 7, 2004.

- In-house counsel for MS & Co. knew as of June 7, 2004, that nearly a third of the restored backup tapes did not contain email, implying they may have been recycled in violation of the December 3, 2002 Cease and Desist Order. They did not tell CPH or the Court.

- MS & Co.'s searches looked for only two types of emails. There are other types of emails that were not included in the searches. CPH did not learn of this deficiency until March 13, 2005.

- MS & Co. improperly failed to produce 125 documents required to be produced by the Court's February 3, 2005, Order Specially Setting Hearing which required limited discovery be made in connection with the February 14, 2005, hearing on the Adverse Inference Motion.

- MS & Co. improperly withheld 13 documents required to be produced by the Court's March 4, 2005, Order on Plaintiff's ore tenus Motion to Compel Additional Production.

- An additional 282 tapes were found on February 23 and 25, 2005; CPH was not told of the discovery until March 13, 2005.

- An additional 3,536 tapes were discovered on February 23, 2005, in a security room.

- An additional 2,718 tapes were found at Recall, MS & Co.'s third party off-site storage vendor, on March 3, 2005.

- An additional 389 tapes were found March 2 through March 5, 2005. CPH was not told

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[15]The Court previously rejected MS & Co.'s argument that the January 14, 2005, email exchange between its outside and in-house counsel was not required to be produced under the February 3, 2005, Order Specially Setting Hearing because it referred to the "documents issue" and not specifically to the backup tapes. See March 16, 2005 Order on Morgan Stanley's Motion to Disqualify Plaintiff's Counsel Searcy, Denney, Scarola, Barnhart & Shipley, P.A. and Jenner & Block, LLC. MS & Co.'s insistence on a narrow interpretation of the February 3, 2005, Order is not particularly sympathetic, when the only reason that Order confined production to the backup tape issue was because MS &Co. had failed to notify the Court of the other deficiencies in its certificate of compliance.

until March 13, 2005.

- On March 4, 2005, the Court entered its Order on Plaintiff's ore tenus Motion to Compel Additional Production, which ordered MS & Co. to produce by 3:00 p.m. on March 7, 2005, all items within its care, custody, or control dealing with the Riel/SEC investigation, other than documents representing communications between or among MS & Co. inside and outside counsel that were not copied to anyone other than counsel. MS & Co. sought to discredit Riel and thus distance itself from the false June 23, 2004 certificate of compliance; in doing so, it sought to hide Riel's whistle blower status and the existence of an SEC investigation into whether MS & Co. employees sought kick backs from third party vendors; whether MS & Co. employees were improperly pressured into dealing with third-party vendors who may provide business to MS & Co.; and whether MS & Co. continued to overwrite backup tapes contrary to the SEC's December 3, 2002, Cease and Desist Order.

- A script error prevented the insertion of some emails into the archive. MS & Co. produced over 4,600 pages of emails on March 21, 2005, some of which it suggested may have been located on correction of the error; alternatively, it suggested the emails may have been located by NDCI as part of its efforts to verify MS & Co.'s searches.

MS & Co.'s discovery abuses have not been confined to its email production.

William Strong is a MS & Co. managing director and was one of the principal players for it in the Sunbeam deal. He took credit for the fees generated. On May 9, 2003, CPH requested a copy of "(a)ll documents concerning employment contracts, performance evaluations, and/or personnel filed (including without limitation any documents that describe or discuss [his] training, experience, competence, and accomplishments) . . ." MS & Co. asserted that the requested documents were not relevant and that production "would unnecessarily infringe on the privacy interests of [Strong]." On March 15, 2004, the Court ordered MS & Co. to produce "(a)ll references (positive or negative) to [Strong's] truthfulness, veracity, or moral turpitude." Some portions of Strong's evaluations were produced in response to that order. Those evaluations noted Strong's colleagues' reservations about his candor and ethics. Two of his evaluators, Joseph Perella and Tarek Abdel-Meguid, were deposed, when some relatively vague testimony about the bases for those conclusions was offered. It now appears Strong was facing criminal prosecution in Italy for complicity in bribery while he was working on the Sunbeam transaction, which his evaluators knew, and that MS & Co. purposely

withheld that information from CPH and the Court.[16]

Even once CPH independently discovered evidence of Strong's indictment in Italy, MS & Co. sought to shield its files from discovery. It claimed that virtually *all* of the documents it had were privileged under joint defense agreements in place between it, Strong, and Saloman Brothers, Strong's employer at the time of the incident. As the Court's March 10, 2005 Order Following In Camera Inspection (Strong) details, the documents MS & Co. relied on to support that position, and sought to prevent CPH from obtaining, reflect no such agreement.

The other discovery abuses and misrepresentations by MS & Co. other than those involving its email production practices are outlined in CPH's Chronology of Discovery Abuses by Defendant served March 1, 2005, and would take a volume to recite. They include:

- failing to provide the information retained by MS & Co.'s internal document management system pertaining to MS & Co.'s work for Sunbeam; falsely representing to the Court that no useful information was contained in that information; and producing a Rule 1.310 representative who had made an insufficient inquiry into authenticity, business record status, and authorship of documents; see February 28, 2005 Order on CPH's Motion to Deem Certain Documents Admissible and for Sanctions due to Morgan Stanley's Disregard of Court Order;

- when faced with contempt proceedings for violating the Stipulated Confidentiality Order by providing a copy of a settlement agreement between CPH and Arthur Andersen to other counsel, representing to the Court that the law firm of Kellogg, Huber was retained to handle the "Andersen aspects" of this litigation because of a conflict between Andersen and Kirkland & Ellis; Mark Hansen, a partner at Kellog, Huber, testified that his firm was hired as co-counsel for all aspects of the case;

- providing answers to interrogatories signed by a corporate representative who performed insufficient verification of the responses;

[16]MS & Co. originally argued that documents concerning the Italian proceedings were not in Strong's "personnel file" and so were not required to be produced in response to CPH's initial request. MS & Co.'s practice of filing damaging information about an employee other than in his personnel file and then claiming it was not included in the request is about at convincing as its argument that, since it has a corporate directive not to keep drafts of documents once they are in final form, document drafts cannot be business records exempt from hearsay because they are not "kept in the course of a regularly conducted business activity." See Fla. Stat. §90.803 (6) (a). In any event, there was *no excuse* for not producing its records of the Italian proceedings once the Court's March 15, 2004 Order was entered.

- routinely asserting unfounded privilege claims;[17] and

- failing to timely comply with the Court's orders; for example, MS & Co. did not produce Strong's 1994 Performance Evaluation until the afternoon of March 15, 2005, though it was obviously included in the Court's March 15, 2004 Order. The failure cannot be excused as oversight since, when CPH specifically asked for the 1994 evaluation in the spring of 2004, MS & Co.'s counsel said it was withheld as non-responsive; see, also, Ex. 197, 198.

In sum, MS & Co. has deliberately and contumaciously violated numerous discovery orders, including the April 16, 2004 Agreed Order; February 3, 2005 Order Specially Setting Hearing; and the March 4, 2005 Order on Plaintiff's ore tenus Motion to Compel Additional Production. At the February 14, 2005, hearing on CPH's Adverse Inference Motion, it chose to hide information about its violations and coach witnesses to avoid any mention of additional, undisclosed problems with its compliance with the Agreed Order. Implicit in the requirement that MS & Co. certify compliance with the Agreed Order was the requirement to disclose impediments to its ability to so certify. As outlined in this Order, MS & Co. employees, and not just counsel, have participated in the discovery abuses. The prejudice to CPH from these failings cannot be cured. Even if all the script errors have been located and corrected, and MS & Co. has failed to show they have, and even if all of the email backup tapes have now been located, and MS & Co. has failed to show they have, the searches cannot be completed in time. The other discovery abuses outlined call into doubt all of MS & Co.'s discovery responses. *The judicial system cannot function this way.* Based on the foregoing and on the Court's March 1, 2005 Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, it is

ORDERED AND ADJUDGED that CPH's Renewed Motion for Entry of Default Judgment is Granted, in part. See Robinson v. Nationwide Mut. Fire Ins. Co., 887 So. 2d 328 (Fla. 2004); Mercer v. Raine, 443 So. 2d 944 (Fla. 1983); Precision Tune Auto Care, Inc. v.

[17]For example, MS & Co. produced over 260 documents dealing with the Strong investigation over which it had previously claimed privilege once the Court announced its intention to conduct an in camera review; the Court found another 200 documents were not privileged after conducting its review, by its March 10, 2005 Order.

Radcliffe, 804 So. 2d 1287 (Fla. 4th DCA 2002); Rule 1.380 (b) (2) (C), Fla. R. Civ. P. Paragraphs 2 (excluding the last sentence thereof); 3 (excluding the portion of the last sentence beginning with "in order to close . . ."); 8-10, 11 (excluding everything after the first sentence); 12 (excluding all parts following "June 1998"); 13 (excluding the last sentence thereof); 14-27; 28 (excluding everything after "firm" in the second to last sentence thereof); 29-39; 41-52; 53 (excluding the second sentence thereof); 54-57; 58 (excluding "CPH and" in the second line thereof); 59-63; 64 (excluding the third line thereof); 65 (excluding the last sentence thereof); 66 (excluding the last sentence thereof); 67-70; 71 (excluding the first word of the last sentence and the remainder of that sentence after "material"); 72; 73 (excluding the first sentence thereof); 74 (excluding the words "CPH and" in the second to last sentence thereof); 75-81; 85; 86; 87 (excluding (g)); 90, and 91 (excluding (g)) of Plaintiff's Amended Complaint, as amended by the Court's Amended Order on Morgan Stanley's Motion to Dismiss, Motion to Strike, and Motion for More Definite Statement, shall be read to the jury and the jury instructed that those facts are deemed established for all purposes in this action. A copy of a redacted Amended Complaint is attached as Exhibit A. It is further

ORDERED AND ADJUDGED that the Court shall read to the jury a Statement similar to that attached as Exhibit A to the Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, but incorporating the relevant additional findings of this Order, and the jury will be instructed that it may consider those facts in determining whether MS & Co. sought to conceal its offensive conduct when determining whether an award of punitive damages is appropriate. See General Motors Corp. v. McGee, 837 So. 2d 1010 (Fla. 4th DCA 2002), rev. den. 851 So. 2d 728 (Fla. 2003). Counsel are each invited to submit proposed Statements. It is further

ORDERED AND ADJUDGED that CPH shall be entitled to an award of reasonable fees and costs incurred as a result of the Renewed Motion for Entry of Default Judgment and the violations of Court orders recited herein. The amount shall be determined at an evidentiary hearing following trial. It is further

ORDERED AND ADJUDGED that MS & Co. is relieved of any future obligation to

comply with the April 16, 2004 Agreed Order and the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s Motion to Participate in Search of Additional E-Mail Back-Up Tapes or Appoint Third Party to Conduct Search. It is further

ORDERED AND ADJUDGED that the pro hac vice admission of Thomas Clare is revoked. It is further

ORDERED AND ADJUDGED that the portions of CPH's Motion for Correction and Clarification of Order on CPH's Motion for Adverse Inference that seek to amend the body of that Order to correct clerical and spelling errors, as agreed to by counsel, is Granted, and the corrections deemed made to the body of the Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, by interlineation. In all other respects the remainder of the Motion for Correction and Clarification is declared moot.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 23rd day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

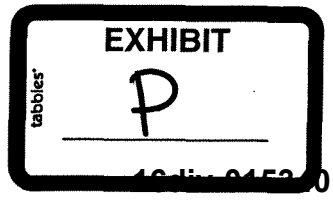
ORDER ON DEFENDANT'S MOTION FOR RECONSIDERATION OF THE COURT'S SANCTION ORDERS

THIS CAUSE came before the Court April 5, 2005 on Defendant's Motion for Reconsideration of the Court's Sanction Orders, with both parties well represented by counsel. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part, and Denied, in part. The statement of litigation misconduct to be read to the jury shall be limited to those facts which would allow a reasonable juror to conclude that MS & Co. sought to hide direct evidence of either the Sunbeam fraud or Morgan Stanley's complicity with Sunbeam in perpetrating that fraud on CPH. The jury shall be instructed that the statement of litigation misconduct may be considered only for that purpose and may not be considered for any other purpose. Specifically, the jury will be instructed that a party's failure to comply fully with a discovery request or Court order, standing alone, is immaterial to the jury's determination of the entitlement to or, if entitlement is determined, the amount of punitive damages. In all other respects the Motion is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 5th day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge



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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

DECLARATION OF DONALD G. KEMPF, JR.

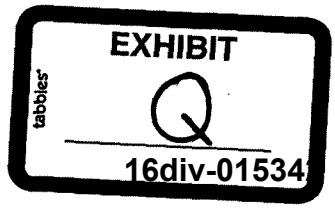
I, Donald G. Kempf, Jr., being duly sworn under oath, and under penalty of perjury declare and state as follows:

1. I did not oversee Morgan Stanley & Co. Incorporated's production of documents regarding Mr. Strong.

UNDER PENALTY OF PERJURY, I HEREBY DECLARE THAT THE FOREGOING IS TRUE AND CORRECT

DONALD G. KEMPF, JR.

Dated: April 19, 2005



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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiffs,

CASE NO: 2003 CA 005045 AI

vs.

MORGAN STANLEY & CO., INC.
Defendant.
_____/

NOTICE OF FILING UNDER SEAL

COLEMAN (PARENT) HOLDINGS INC. hereby gives notice of the filing of Privileged Documents Provided to Court by CPH on April 19, 2005 for *In Camera* Inspection Filed under Seal on this date.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Hand Delivery to all counsel on the attached list on this 19th day of April 2005.

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Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Notice Of Filing Pleading Under Seal
Case No.: 2003 CA 005045 AI

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From: Michael T. Brody
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Employee Number: Client Number: 41198-10003

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If you do not receive all pages, please call: 561-352-2300 Sent By: Michele Ortiz

Secretary: Extension:

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION IN LIMINE NO. 28 TO BAR COLEMAN (PARENT) HOLDINGS INC. FROM INTRODUCING EVIDENCE OF CPH'S ALLEGED EFFORT TO RESCIND THE COLEMAN-SUNBEAM TRANSACTION

THIS CAUSE came before the Court April 18, 2005 on Morgan Stanley's Motion in Limine No. 28 to Bar Coleman (Parent) Holdings, Inc., from Introducing Evidence of CPH's Alleged Effort to Rescind the Coleman-Sunbeam Transaction, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part. Either party may introduce evidence of demands made by CPH to resolve its claim against Sunbeam.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 19 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

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

CASE NO: 2003 CA 005045 AI

PLAINTIFF'S SECOND RENEWED MOTION FOR CORRECTION AND CLARIFICATION OF THE LITIGATION-MISCONDUCT STATEMENT TO BE READ TO THE JURY

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") respectfully renews its March 30, 2005 request that the Court correct and clarify the form of its March 29, 2005 Statement about the litigation misconduct of Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley"), which the Court will read to the jury. At the 8:00 a.m. session on Thursday, March 31, 2005, the Court ruled on most, but not all, of CPH's proposed corrections and clarifications. This renewed motion is designed to trigger completion of that process and to modify the Statement in light of (1) the Court's decision later on March 31 to "re-bifurcate" the case and therefore to read the litigation-misconduct Statement to the jury at the start of the second, rather than first, phase of the trial; and (2) the Court's April 5, 2005 Order on Defendant's Motion for Reconsideration of the Court's Sanction Orders, which mandated certain specific instructions to the jury.

Attached to this motion as Exhibit 1 is a clean copy of the Statement that the Court issued on March 29, as amended by the Court's March 31 rulings (the "Court's most recent version of the Statement"). Attached to this motion as Exhibit 2 is a "black-line" comparing the Court's most recent version of the Statement to the Statement initially issued on March 29.

Attached to this motion as Exhibit 3 is a clean copy of the Statement that CPH now asks the Court to read to the jury at the start of the trial's second phase ("CPH's proposed clarification"). And attached as Exhibit 4 is a "black-line" comparing CPH's proposed clarification to the Court's most recent version of the Statement. The changes reflected in Exhibits 3 and 4 are designed to clarify specific parts of the Statement and to ensure that the Statement clearly conveys to the jury the findings that this Court has made.

Dated: April 20, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 20th day of April, 2005.

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TAB 1

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).
_____/

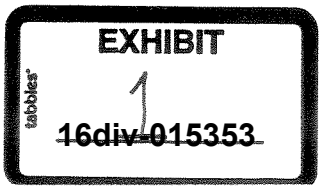
CASE NO. CA 03-5045 AI

STATEMENT

If you find for CPH and against Morgan Stanley on CPH's claims for aiding and abetting and conspiring to commit fraud, you will then have to consider whether, in addition to compensatory damages, punitive damages are warranted. Later in the trial, I will instruct you about factors to consider when determining whether an award of punitive damages is appropriate. In considering these factors, certain facts already have been established and no longer are subject to dispute, which I shall now read to you. You are required to accept these facts as true.

This case arises out of a 1998 transaction in which Coleman (Parent) Holdings, Inc., which I will call "CPH," sold its 82% interest in The Coleman Company to Sunbeam Corporation. Morgan Stanley served as Sunbeam's financial advisor for the transaction and as the lead underwriter for a $750,000,000.00 debenture offering that Sunbeam used to finance the cash portion of the deal.

On May 12, 2003, CPH sued Morgan Stanley for aiding and abetting and conspiring with Sunbeam to commit fraud. Following established pretrial procedures, CPH formally requested that Morgan Stanley produce documents related to CPH's claims against Morgan



Stanley. A request to produce documents is one of the ways a party can seek to discover additional facts about the claims in a lawsuit and to gather evidence to present at trial. CPH's document request sought, in essence, all Morgan Stanley documents connected with the Sunbeam deal. The word "documents" specifically included items stored electronically, such as emails.

CPH was concerned that Morgan Stanley was not thoroughly looking for emails responsive to its discovery requests. In October 2003, CPH filed a motion, which is a written request to the Court, asking that Morgan Stanley be ordered to make a full investigation for email messages, including a search of magnetic backup tapes and computer hard drives.

Morgan Stanley opposed CPH's motion. It represented that it would cost at least hundreds of thousands of dollars and require several months to complete such an investigation and that no email data existed for any time period before January 2000 -- more than a year and a half after the Sunbeam transaction. However, Morgan Stanley never intended to search the backup tapes to respond to CPH's requests. Further, Morgan Stanley knew that some backup tapes contained email dating back at least to 1997.

In 2001 Morgan Stanley decided to create an email "archive." Morgan Stanley's email archive was a centralized storage system for electronic data that could be quickly and inexpensively searched. By June, 2003, Morgan Stanley had decided that the archive would have two components. First, the archive would capture and store new email messages "live," as they were generated. Second, Morgan Stanley wanted to add to the archive historical data dating back to the late 1990's. That task involved gathering all email backup tapes containing historical emails and then transferring data from the backup tapes onto the archive.

In February 2004, Robert Saunders, an Executive Director of Information Technology for Morgan Stanley, testified under oath to CPH that Morgan Stanley's email archive system would capture and store new emails as they were generated, but could not be used to search old emails. At the time, Mr. Saunders knew but did not disclose to CPH that the old emails already were being added to the archive and that that process was expected to be completed by April, 2004.

CPH still was concerned that all the emails it had requested had not been produced. However, in light of Morgan Stanley's representation that it would cost hundreds of thousands of dollars to search its emails and that the process would take many months, CPH reached an agreement with Morgan Stanley. On April 16, 2004, the Court entered an "Agreed Order." Under the Agreed Order, Morgan Stanley was required to (1) search the oldest full backup tape for each of 36 Morgan Stanley employees involved in the Sunbeam transaction; (2) review emails dated from a key two-month period in early 1998, as well as emails containing any of 29 specific search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004, all privileged emails responsive to CPH's document requests; and (4) certify Morgan Stanley's full compliance with the Agreed Order. CPH reached this agreement without knowing of the existence of the email archive and without knowing that the archive would make searches for emails quick and inexpensive.

In response to the Agreed Order, Morgan Stanley produced about 1,300 pages of emails on May 14, 2004. Morgan Stanley did not, however, certify compliance with the Agreed Order. After prompting by CPH, on June 23, 2004, Morgan Stanley served a Certificate of Compliance signed by Mr. Arthur Riel, an Executive Director and manager of Morgan Stanley's Law/Compliance Information Technology Group.

16div-015355

As organized by Morgan Stanley, the effort to create the historical data archive had several stages. First, the relevant backup tapes had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor to be processed, and the data returned to Morgan Stanley. Third, Morgan Stanley had to upload the processed data into its email archive. Fourth, Morgan Stanley had to run scripts, or pieces of computer code, to transform this data into a searchable form. Finally, Morgan Stanley had to search the data for emails related to this case. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when the processed data returned by the outside vendor remained in limbo, waiting to be uploaded to Morgan Stanley's archive.

At some point prior to May 6, 2004, Arthur Riel and his team became aware that 1,423 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423 tapes had not been processed by the outside vendor and thus had not been included in the archive or searched when Morgan Stanley made its production to CPH on May 14, 2004. Aware of the tapes' discovery, Mr. Riel and other Morgan Stanley personnel knew when Riel executed the certification of full compliance with the Court's Agreed Order that it was false. He and others on Morgan Stanley's email archive team knew by July 2, 2004 that these "Brooklyn tapes" contained email dating back at least to the late 1990's. During the summer of 2004, the Brooklyn tapes were processed and the data sent to the staging area. The scripts were not written and tested to permit the search for emails relating to this case to begin until the middle of January, 2005. Such a search, even if perfectly done, can take weeks.

In the May, 2004, production of documents under the Agreed Order, Morgan Stanley also failed to produce emails from 738 backup tapes found at a Morgan Stanley facility in Manhattan in 2002. These 738 tapes, like the 1,423 Brooklyn tapes, had not been processed by the outside

16div-015356

vendor and thus had not been included in the archive and searched by either May 14, 2004 or June 23, 2004, the date Morgan Stanley certified compliance with the Agreed Order. Mr. Riel and others were told by the outside vendor by July 2, 2004 that these tapes contained email dating back at least to 1998. During the summer of 2004, these tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not searched.

In August 2004, Mr. Riel was relieved of his employment responsibilities for reasons unrelated to Morgan Stanley's false certification. He and his team were replaced by a new team headed by Allison Gorman. At that time, the staging area contained about 600 gigabytes of email data that had not yet been uploaded into the Morgan Stanley archive and had not been searched for emails relating to this case. Six hundred gigabytes of data are the equivalent of approximately 12 million to 60 million printed pages.

On November 17, 2004, Morgan Stanley told CPH that Morgan Stanley had discovered additional email backup tapes. The next day, Morgan Stanley produced to CPH about 8,000 pages of emails. But in a series of letters back and forth from November, 2004, to January, 2005, Morgan Stanley refused to provide CPH with details about the backup tapes that allegedly had been "newly discovered" or about any ongoing efforts to restore emails from those backup tapes and to produce those emails to CPH. Morgan Stanley told CPH that the "newly discovered" tapes had not been found in locations where email backup tapes customarily were stored. In fact, the tapes were not "newly discovered" and had been found in locations where tapes customarily were stored.

Only a handful of the Brooklyn tapes had been added to the archive and were thus searched for the November, 2004 production. Morgan Stanley sought to create the impression that all the produced documents came from the Brooklyn tapes. However, none of the

16div-015357

November, 2004 production came from "newly found" tapes. Morgan Stanley's responses to inquiries about the November, 2004, production did not disclose the existence of the archive.

Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area. She was not told of the existence of this litigation until five months later, in January 2005. In October, 2004, Ms. Gorman gave the project somewhat greater priority, although even then it did not move as expeditiously as possible. Morgan Stanley did not consider using an outside contractor to expedite the process.

Morgan Stanley found another 169 tapes in January, 2005, that according to Morgan Stanley had been misplaced by its New Jersey storage vendor. Morgan Stanley discovered more than 200 additional unsearched backup tapes openly stored in locations known to be used for tape storage on February 11 and 12, 2005. Morgan Stanley did not voluntarily disclose this information to CPH.

Morgan Stanley claims to have discovered on February 11, 2005 that a flaw in the software it had written had prevented it from locating all email attachments about the Sunbeam transaction. Morgan Stanley also admits that the date-range searches were flawed for many email users who worked in the Morgan Stanley division responsible for the Sunbeam transaction. As a result, additional email messages that appeared to fall within the scope of the Agreed Order had not been given to CPH. Further, it appears that the problem infected Morgan Stanley's original searches in May of 2004.

On February 16, 2005, Morgan Stanley withdrew its certificate of compliance with the Agreed Order.

16div-015358

On February 19, 2005 Morgan Stanley notified CPH that it had found boxes of additional tapes that have not been uploaded into its archive or searched for responsive emails.

In addition, CPH has since found out that:

(1) About 5% of email harvested from the backup tapes was not captured and produced due to an error in transferring data into the archive.

(2) The computer programs Morgan Stanley used to process emails into its archive caused the bodies of some messages to be cut off.

(3) An analysis showed that, based on a representative sample, about ten percent of backup tapes were erased after January 2001, in violation of an obligation to preserve the data on the tapes.

(4) A computer programming error caused blind carbon copies not to be captured in the archive.

(5) Another computer programming error prevented the searches from turning up all responsive emails.

(6) Another computer programming error caused the archive to have problems pulling group email involving a set of email users that included Morgan Stanley employees involved in the Sunbeam transaction.

(7) Morgan Stanley's searches looked for only two types of emails. There are other types of emails that were not included in the searches.

(8) An additional 282 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found on February 23, and 25, 2005, and apparently were never searched.

(9) An additional 3,536 tapes that Morgan Stanley should have found and searched by May 14, 2004, were discovered on February 23, 2005, in a security room. These tapes apparently have not been searched.

(10) An additional 2,718 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found on March 3, 2005, at Morgan Stanley's New Jersey off-site storage vendor. These tapes apparently have not been searched either.

(11) An additional 389 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found from March 2 through March 5, 2005. These tapes apparently also have not been searched.

(12) Many of the documents that were eventually produced by Morgan Stanley were produced too late in the pretrial proceedings to be effectively investigated and used by CPH in the pretrial discovery process.

Morgan Stanley did not disclose any of these problems to CPH, as Morgan Stanley was obliged to do. The searches had not been completed when this trial was begun, when they were terminated without completion.

Mr. William Strong is the Morgan Stanley managing director who took credit for the fees Morgan Stanley generated from the Sunbeam deal. On March 15, 2004, Morgan Stanley was required to produce, "(a)ll references (positive or negative) to [Mr. Strong's] truthfulness, veracity, or moral turpitude." In response, Morgan Stanley produced some portions of Mr. Strong's annual employment evaluations. While he was working on the Sunbeam transaction, though, Mr. Strong was facing criminal prosecution in Italy for complicity in bribery. Mr. Strong's evaluators at Morgan Stanley knew that fact. Morgan Stanley failed to provide the

documents about these proceedings to CPH, though, which in January, 2005, independently discovered evidence of the criminal proceedings in Italy.

It is important that you understand the limited relevance of Mr. Strong's situation. The fact that Mr. Strong was facing criminal prosecution in Italy for complicity in bribery while he was working on the Sunbeam transaction may be relevant to the extent that it created pressures on Mr. Strong and motivated him to push forward with the Sunbeam deal. That is for you to decide. But you must not consider that fact as evidence of Mr. Strong's character or as evidence that Mr. Strong actually engaged in bribery or any other illegal conduct in Italy. Indeed, in 2003, on appeal, an Italian court found Mr. Strong not guilty.

As I told you at the outset of this Statement, you are required to accept the factual finding that I have read to you as true.

TAB 2

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).
_____/

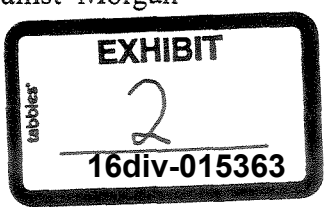
CASE NO. CA 03-5045 AI

STATEMENT

If you find for CPH and against Morgan Stanley on[1] ~~either, or both, of~~ CPH's claims for aiding and abetting and conspiring to commit fraud, you will then have to consider whether, in addition to compensatory damages, punitive damages are warranted. Later in the trial, I will instruct you about factors to consider when determining whether an award of punitive damages is appropriate. In considering these factors, certain facts [2]~~have~~ already have been established and no longer are subject to dispute, which I shall now read to you. You are required to accept these facts as true.

This case arises out of a 1998 transaction in which Coleman (Parent) Holdings, Inc., which I will call "CPH," sold its 82% interest in The Coleman Company to Sunbeam Corporation. Morgan Stanley served as Sunbeam's financial advisor for the transaction and as the lead underwriter for a $750,000,000.00 debenture offering that Sunbeam used to finance the cash portion of the deal.

On May 12, 2003, CPH sued Morgan Stanley for aiding and abetting and conspiring with Sunbeam to commit fraud. Following established pretrial procedures, CPH formally requested that Morgan Stanley produce documents related to CPH's claims against Morgan



Stanley. A request to produce documents is one of the ways a party can seek to discover additional facts about the claims in a lawsuit and to gather evidence to present at trial. CPH's document request sought, in essence, all Morgan Stanley documents connected with the Sunbeam deal. The [3]~~work~~[4]**word** "documents" specifically included items stored electronically, such as emails.

CPH was concerned that Morgan Stanley was not thoroughly looking for emails responsive to its discovery requests. In October 2003, CPH filed a motion, which is a written request to the Court, asking that Morgan Stanley be ordered to make a full investigation for email messages, including a search of magnetic backup tapes and computer hard drives.

Morgan Stanley opposed CPH's motion. It represented that it would cost at least hundreds of thousands of dollars and require several months to complete such an investigation and that no email data existed for any time period before January 2000 -- more than a year and a half after the Sunbeam transaction. However, Morgan Stanley never intended to search the backup tapes to respond to CPH's requests. Further, [5]~~some of~~ Morgan Stanley[6]~~'s~~[7] **knew that** **some** backup tapes contained email dating back at least to 1997.

In 2001 Morgan Stanley decided to create an email "archive." Morgan Stanley's email archive was a centralized storage system for electronic data that could be quickly and inexpensively searched. By June, 2003, Morgan Stanley had decided that the archive would have two components. First, the archive would capture and store new email messages "live," as they were generated. Second, Morgan Stanley wanted to add to the archive historical data dating back to the late 1990's. That task involved gathering all email backup tapes containing historical emails and then transferring data from the backup tapes onto the archive.

In February 2004, Robert Saunders, an Executive Director of Information Technology for Morgan Stanley, testified under oath to CPH that Morgan Stanley's email archive system would capture and store new emails as they were generated, but could not be used to search old emails. At the time, Mr. Saunders knew[8] **but did not disclose to CPH** that the old emails already were being added to the archive and that that process was expected to be completed by April, 2004.

CPH still was concerned that all the emails it had requested had not been produced. However, in light of Morgan Stanley's representation that it would cost hundreds of thousands of dollars to search its emails and that the process would take many months, [9]~~it~~[10]**CPH** reached an agreement with Morgan Stanley. On April 16, 2004, the Court entered an "Agreed Order." Under the Agreed Order, Morgan Stanley was required to (1) search the oldest full backup tape for each of 36 Morgan Stanley employees involved in the Sunbeam transaction; (2) review emails dated from a key two-month period in early 1998, as well as emails containing any of 29 specific search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004, all privileged emails responsive to CPH's document requests; and (4) certify Morgan Stanley's full compliance with the Agreed Order. CPH reached this agreement without [11]~~Morgan Stanley's disclosing~~[12]**knowing of** the existence of the email archive [13]~~or Morgan Stanley's belief~~[14]**and without knowing** that the archive would make searches for emails quick and inexpensive.

In response to the Agreed Order, Morgan Stanley produced about 1,300 pages of emails on May 14, 2004. Morgan Stanley did not, however, certify compliance with the Agreed Order. After prompting by CPH, on June 23, 2004, Morgan Stanley served a Certificate of Compliance signed by Mr. Arthur Riel, an Executive Director and manager of Morgan Stanley's Law/Compliance Information Technology Group.

As organized by Morgan Stanley, the effort to create the historical data archive had several stages. First, the relevant backup tapes had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor[15]~~, National Data Conversion, Inc., which I will call "NDCI",~~ to be processed, and the data returned to Morgan Stanley. Third, Morgan Stanley had to upload the processed data into its email archive. Fourth, Morgan Stanley had to run scripts, or pieces of computer code, to transform this data into a searchable form. Finally, Morgan Stanley had to search the data for emails related to this case. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when the processed data returned by [16]~~NDCI~~[17]**the outside vendor** remained in limbo, waiting to be uploaded to Morgan Stanley's archive.

At some point prior to May 6, 2004, Arthur Riel and his team became aware that 1,423 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423 tapes had not been processed by [18]~~NDCI~~[19]**the outside vendor** and thus had not been included in the archive or searched when Morgan Stanley made its production to CPH on May 14, 2004. Aware of the tapes' discovery, Mr. Riel and other Morgan Stanley personnel knew when Riel executed the certification of full compliance with the Court's Agreed Order that it was false. He and others on Morgan Stanley's email archive team knew by July 2, 2004 that these "Brooklyn tapes" contained email dating back at least to the late 1990's. During the summer of 2004, the Brooklyn tapes were processed and the data sent to the staging area. The scripts were not written and tested to permit the search for emails relating to this case to begin until the middle of January, 2005. Such a search, even if perfectly done, can take weeks.

In the May, 2004, production of documents under the Agreed Order, Morgan Stanley also failed to produce emails from 738 backup tapes found at a Morgan Stanley facility in Manhattan

in 2002. These 738 tapes, like the 1,423 Brooklyn tapes, had not been processed by [20]~~NDCI~~[21]**the outside vendor** and thus had not been included in the archive and searched by either May 14, 2004 or June 23, 2004, the date Morgan Stanley certified compliance[22] **with the Agreed Order**. Mr. Riel and others were told by [23]~~NDCI~~[24]**the outside vendor** by July 2, 2004 that these tapes contained email dating back at least to 1998. During the summer of 2004, these tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not searched.

In August 2004, Mr. Riel was relieved of his employment responsibilities for reasons unrelated to Morgan Stanley's false certification. He and his team were replaced by a new team headed by Allison Gorman. At that time, the staging area contained about 600 gigabytes of email data that had not yet been uploaded into the Morgan Stanley archive and had not been searched for emails relating to this case. Six hundred gigabytes of data are the equivalent of approximately 12 million to 60 million printed pages.

On November 17, 2004, Morgan Stanley told CPH that Morgan Stanley had discovered additional email backup tapes. The next day, Morgan Stanley produced to CPH about 8,000 pages of emails. But in a series of letters back and forth from November, 2004, to January, 2005, Morgan Stanley refused to provide CPH with details about the backup tapes that allegedly had been "newly discovered" or about any ongoing efforts to restore emails from those backup tapes and to produce those emails to CPH. Morgan Stanley told CPH that the "newly discovered" tapes had not been found in locations where email backup tapes customarily were stored.[25] **In fact, the tapes were not "newly discovered" and had been found in locations where tapes customarily were stored.**

Only a handful of the Brooklyn tapes had been added to the archive and were thus searched for the November, 2004 production. Morgan Stanley sought to create the impression that all the produced documents came from the Brooklyn tapes[26]~~, though~~. However, none of the November, 2004 production came from "newly found" tapes. Morgan Stanley's responses to inquiries about the November, 2004, production did not disclose the existence of the archive.

Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area. She was not told of the existence of this litigation until five months later, in January 2005. In October, 2004, Ms. Gorman gave the project somewhat greater priority, although even then it did not move as expeditiously as possible. Morgan Stanley did not consider using an outside contractor to expedite the process.

Morgan Stanley found another 169[27] ~~DLT~~ tapes in January, 2005, that according to Morgan Stanley had been misplaced by its New Jersey storage vendor. Morgan Stanley discovered more than 200 additional unsearched backup tapes openly stored in locations known to be used for tape storage on February 11 and 12, 2005. Morgan Stanley did not voluntarily disclose this information to CPH.

Morgan Stanley claims to have discovered on February 11, 2005 that a flaw in the software it had written had prevented it from locating all email attachments about the Sunbeam transaction. Morgan Stanley also admits that the date-range searches [28]**were flawed** for[29] **many** email users who [30]~~had a Lotus Notes platform were flawed, so that~~[31]**worked in the Morgan Stanley**[32] **division responsible for the**[33] **Sunbeam transaction. As a result,** additional email messages that appeared to fall within the scope of the Agreed Order had not been given to CPH. Further, it appears that the problem infected Morgan Stanley's original searches in May of

16div-015368

2004.[34] ~~The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the[35] division responsible for the[36] transaction under review here.~~

On February 16, 2005, Morgan Stanley withdrew its certificate of compliance with the Agreed Order.

On February 19, 2005 Morgan Stanley notified CPH that it had found boxes of additional tapes that have not been uploaded into its archive or searched for responsive emails.

In addition, CPH has since found out that:

(1) [37]~~A migration issue caused about~~[38]**About** 5% of email harvested [39]~~by NDCI~~ from the backup tapes [40]**was** not [41]~~to be~~ captured[42] **and produced due to an error in transferring data into the archive**.

(2) The computer programs Morgan Stanley used to process emails into its archive caused the bodies of some messages to be [43]~~truncated, or~~ cut off.

[44]~~(3) About five percent of email harvested from the backup tapes~~ [45]~~was~~ [46]~~not added to the archive.~~

(3) ~~(4)~~ [47]An analysis showed that, based on a representative sample, about ten percent of backup tapes were erased after January [48]~~2001.~~[49]**2001, in violation of an obligation to preserve the data on the tapes.**

(4) ~~(5)~~ [50]A computer programming error caused blind carbon copies not to be captured in the archive.

(5) ~~(6)~~ [51]Another computer programming error prevented the searches from turning up all responsive emails.

(6) ~~(7)~~ [52]Another computer programming error caused the archive to have problems pulling group email involving a set of email users that included Morgan Stanley employees involved in the Sunbeam transaction.

(7) ~~(8)~~ [53]Morgan Stanley's searches looked for only two types of emails. There are other types of emails that were not included in the searches.

(8) ~~(9)~~ [54]An additional 282 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found on February 23, and 25, 2005, and apparently were never searched.

(9) ~~(10)~~ [55]An additional 3,536 tapes that Morgan Stanley should have found and searched by May 14, 2004, were discovered on February 23, 2005, in a security room. These tapes apparently have not been searched.

(10) ~~(11)~~ [56]An additional 2,718 tapes that Morgan Stanley should have found and searched by May 14, [57]~~2005,~~[58]**2004,** were found on March 3, 2005, at Morgan Stanley's New Jersey off-site storage vendor. These tapes apparently have not been searched either.

(11) ~~(12)~~ [59]An additional 389 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found from March 2 through March 5, 2005. These tapes apparently also have not been searched.

(12) [60] [61]**Many of the documents that were eventually produced by Morgan Stanley were produced too late in the pretrial proceedings to be effectively investigated and used by CPH in the pretrial discovery process.**

Morgan Stanley did not [62]~~voluntarily~~ disclose any of these [63]~~ten~~ problems to CPH[64], **as Morgan Stanley was obliged to do**. The searches had not been completed when this trial was begun, when they were terminated without completion.

Mr. William Strong is the Morgan Stanley managing director who took credit for the fees Morgan Stanley generated from the Sunbeam deal. On March 15, 2004, Morgan Stanley was required to produce, "(a)ll references (positive or negative) to [Mr. Strong's] truthfulness, veracity, or moral turpitude." In response, Morgan Stanley produced some portions of Mr. Strong's annual employment evaluations. While he was working on the Sunbeam transaction, though, Mr. Strong was facing criminal prosecution in Italy for complicity in bribery. Mr. Strong's evaluators at Morgan Stanley knew that fact. Morgan Stanley failed to provide the documents about these proceedings to CPH, though, which in January, 2005, independently discovered evidence of the criminal proceedings in Italy.

It is important that you understand the limited relevance of Mr. Strong's situation. The fact that Mr. Strong was facing criminal prosecution in Italy for complicity in bribery while he was working on the Sunbeam transaction may be relevant to the extent that it created pressures on Mr. Strong and motivated him to push forward with the Sunbeam deal. That is for you to decide. But you must not consider that fact as evidence of Mr. Strong's character or as evidence that Mr. Strong actually engaged in bribery or any other illegal conduct in Italy. Indeed, in 2003, on appeal, an Italian court found Mr. Strong not guilty.

As I told you at the outset of this Statement, you are required to accept the factual finding that I have read to you as true.

TAB 3

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).
_____/

CASE NO. CA 03-5045 AI

STATEMENT

To Be Read to the Jury in the Trial's Second Phase

Having found for CPH and against Morgan Stanley on CPH's claims for aiding and abetting and conspiring to commit fraud, you now have to consider whether, in addition to compensatory damages, punitive damages are warranted and, if so, what is the proper amount of punitive damages. At the end of these proceedings, I will instruct you about factors to consider when determining whether an award of punitive damages is appropriate and, if so, the proper amount of those damages. In considering these factors, certain facts about Morgan Stanley's litigation misconduct already have been established and no longer are subject to dispute. I will read them to you in a moment.

But first, it is important that you understand the limited relevance of the litigation misconduct that I am about to describe to you. A party's failure to comply fully with a discovery request or Court order — standing alone — is immaterial to the punitive-damages issues that you have to decide in this phase of the trial. Therefore, you may consider the litigation misconduct that I am about to describe for only the following purposes:

(1) to show that Morgan Stanley sought to hide direct evidence of the Sunbeam fraud;

EXHIBIT
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16div-015373

(2) to show that Morgan Stanley sought to hide direct evidence of Morgan Stanley's complicity with Sunbeam in perpetrating that fraud on CPH;

(3) to show that Morgan Stanley attempted to frustrate the prosecution of CPH's claims through means other than hiding evidence; and

(4) to show that Morgan Stanley officers and employees who may not have been involved in the primary wrongdoing subsequently approved of the misconduct or participated in concealing or covering up the misconduct.

You may not consider Morgan Stanley's litigation misconduct for any other purpose.

Finally, please remember that you are required to accept as true all the litigation-misconduct facts that I am about to read to you.

* * *

As you know, in May 2003, CPH sued Morgan Stanley for aiding and abetting and conspiring with Sunbeam to commit fraud. Following established pretrial procedures, CPH formally requested that Morgan Stanley produce documents related to CPH's claims against Morgan Stanley. A request to produce documents is one of the ways a party can seek to discover additional facts about the claims in a lawsuit and to gather evidence to present at trial. CPH's document request sought, in essence, all Morgan Stanley documents connected with the Sunbeam deal. The word "documents" specifically included items stored electronically, such as emails.

CPH was concerned that Morgan Stanley was not thoroughly looking for emails responsive to its discovery requests. In October 2003, CPH filed a motion, which is a written request to the Court, asking that Morgan Stanley be ordered to make a full investigation for email messages, including a search of magnetic backup tapes and computer hard drives.

Morgan Stanley opposed CPH's motion. It represented that it would cost at least hundreds of thousands of dollars and require several months to complete such an investigation and that no email data existed for any time period before January 2000 -- more than a year and a half after the Sunbeam transaction. However, Morgan Stanley never intended to search the backup tapes to respond to CPH's requests. Further, Morgan Stanley knew that some backup tapes contained email dating back at least to 1997.

In 2001 Morgan Stanley decided to create an email "archive." Morgan Stanley's email archive was a centralized storage system for electronic data that could be quickly and inexpensively searched. By June, 2003, Morgan Stanley had decided that the archive would have two components. First, the archive would capture and store new email messages "live," as they were generated. Second, Morgan Stanley wanted to add to the archive historical data dating back to the late 1990's. That task involved gathering all email backup tapes containing historical emails and then transferring data from the backup tapes onto the archive.

In February 2004, Robert Saunders, an Executive Director of Information Technology for Morgan Stanley, testified under oath to CPH that Morgan Stanley's email archive system would capture and store new emails as they were generated, but could not be used to search old emails. At the time, Mr. Saunders knew but did not disclose to CPH that the old emails already were being added to the archive and that that process was expected to be completed by April, 2004.

CPH still was concerned that all the emails it had requested had not been produced. However, in light of Morgan Stanley's representation that it would cost hundreds of thousands of dollars to search its emails and that the process would take many months, CPH reached an agreement with Morgan Stanley. On April 16, 2004, the Court entered an "Agreed Order." Under the Agreed Order, Morgan Stanley was required to (1) search the oldest full backup tape

for each of 36 Morgan Stanley employees involved in the Sunbeam transaction; (2) review emails dated from a key two-month period in early 1998, as well as emails containing any of 29 specific search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004, all privileged emails responsive to CPH's document requests; and (4) certify Morgan Stanley's full compliance with the Agreed Order. CPH reached this agreement without knowing of the existence of the email archive and without knowing that the archive would make searches for emails quick and inexpensive.

In response to the Agreed Order, Morgan Stanley produced about 1,300 pages of emails on May 14, 2004. Morgan Stanley did not, however, certify compliance with the Agreed Order. After prompting by CPH, on June 23, 2004, Morgan Stanley served a Certificate of Compliance signed by Mr. Arthur Riel, an Executive Director and manager of Morgan Stanley's Law/Compliance Information Technology Group.

As organized by Morgan Stanley, the effort to create the historical data archive had several stages. First, the relevant backup tapes had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor to be processed, and the data returned to Morgan Stanley. Third, Morgan Stanley had to upload the processed data into its email archive. Fourth, Morgan Stanley had to run scripts, or pieces of computer code, to transform this data into a searchable form. Finally, Morgan Stanley had to search the data for emails related to this case. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when the processed data returned by the outside vendor remained in limbo, waiting to be uploaded to Morgan Stanley's archive.

At some point prior to May 6, 2004, Arthur Riel and his team became aware that 1,423 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423

16div-015376

tapes had not been processed by the outside vendor and thus had not been included in the archive or searched when Morgan Stanley made its production to CPH on May 14, 2004. Aware of the tapes' discovery, Mr. Riel and other Morgan Stanley personnel knew when Riel executed the certification of full compliance with the Court's Agreed Order that it was false. He and others on Morgan Stanley's email archive team knew by July 2, 2004 that these "Brooklyn tapes" contained email dating back at least to the late 1990's. During the summer of 2004, the Brooklyn tapes were processed and the data sent to the staging area. The scripts were not written and tested to permit the search for emails relating to this case to begin until the middle of January, 2005. Such a search, even if perfectly done, can take weeks.

In the May, 2004, production of documents under the Agreed Order, Morgan Stanley also failed to produce emails from 738 backup tapes found at a Morgan Stanley facility in Manhattan in 2002. These 738 tapes, like the 1,423 Brooklyn tapes, had not been processed by the outside vendor and thus had not been included in the archive and searched by either May 14, 2004 or June 23, 2004, the date Morgan Stanley certified compliance with the Agreed Order. Mr. Riel and others were told by the outside vendor by July 2, 2004 that these tapes contained email dating back at least to 1998. During the summer of 2004, these tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not searched.

In August 2004, Mr. Riel was relieved of his employment responsibilities for reasons unrelated to Morgan Stanley's false certification. He and his team were replaced by a new team headed by Allison Gorman. At that time, the staging area contained about 600 gigabytes of email data that had not yet been uploaded into the Morgan Stanley archive and had not been searched for emails relating to this case. Six hundred gigabytes of data are the equivalent of approximately 12 million to 60 million printed pages.

16div-015377

On November 17, 2004, Morgan Stanley told CPH that Morgan Stanley had discovered additional email backup tapes. The next day, Morgan Stanley produced to CPH about 8,000 pages of emails. But in a series of letters back and forth from November, 2004, to January, 2005, Morgan Stanley refused to provide CPH with details about the backup tapes that allegedly had been "newly discovered" or about any ongoing efforts to restore emails from those backup tapes and to produce those emails to CPH. Morgan Stanley told CPH that the "newly discovered" tapes had not been found in locations where email backup tapes customarily were stored. In fact, the tapes were not "newly discovered" and had been found in locations where tapes customarily were stored.

Only a handful of the Brooklyn tapes had been added to the archive and were thus searched for the November, 2004 production. Morgan Stanley sought to create the impression that all the produced documents came from the Brooklyn tapes. However, none of the November, 2004 production came from "newly found" tapes. Morgan Stanley's responses to inquiries about the November, 2004, production did not disclose the existence of the archive.

Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area. She was not told of the existence of this litigation until five months later, in January 2005. In October, 2004, Ms. Gorman gave the project somewhat greater priority, although even then it did not move as expeditiously as possible. Morgan Stanley did not consider using an outside contractor to expedite the process.

Morgan Stanley found another 169 tapes in January, 2005, that according to Morgan Stanley had been misplaced by its New Jersey storage vendor. Morgan Stanley discovered more than 200 additional unsearched backup tapes openly stored in locations known to be used for

16div-015378

tape storage on February 11 and 12, 2005. Morgan Stanley did not voluntarily disclose this information to CPH.

Morgan Stanley claims to have discovered on February 11, 2005 that a flaw in the software it had written had prevented it from locating all email attachments about the Sunbeam transaction. Morgan Stanley also admits that the date-range searches were flawed for many email users who worked in the Morgan Stanley division responsible for the Sunbeam transaction. As a result, additional email messages that appeared to fall within the scope of the Agreed Order had not been given to CPH. Further, it appears that the problem infected Morgan Stanley's original searches in May of 2004.

These defects in Morgan Stanley's compliance with the April 16, 2004 Agreed Order were revealed only as a result of Morgan Stanley knowing that an independent computer search expert had been hired to double-check Morgan Stanley's work and was in the process of performing its verification.

On February 16, 2005, Morgan Stanley withdrew its certificate of compliance with the Agreed Order.

On February 19, 2005 Morgan Stanley notified CPH that it had found boxes of additional tapes that have not been uploaded into its archive or searched for responsive emails.

In addition, CPH has since found out the following facts about Morgan Stanley's email production:

(1) About 5% of email harvested from the backup tapes was not captured and produced due to an error in transferring data into the archive.

(2) The computer programs Morgan Stanley used to process emails into its archive caused the bodies of some messages to be cut off.

(3) An analysis showed that, based on a representative sample, about ten percent of backup tapes were erased after January 2001, in violation of an obligation to preserve the data on the tapes.

(4) A computer programming error caused blind carbon copies not to be captured in the archive.

(5) Another computer programming error prevented the searches from turning up all responsive emails.

(6) Another computer programming error caused the archive to have problems pulling group email involving a set of email users that included Morgan Stanley employees involved in the Sunbeam transaction.

(7) Morgan Stanley's searches looked for only two types of emails. There are other types of emails that were not included in the searches.

(8) An additional 282 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found on February 23, and 25, 2005, and apparently were never searched.

(9) An additional 3,536 tapes that Morgan Stanley should have found and searched by May 14, 2004, were discovered on February 23, 2005, in a security room. These tapes apparently have not been searched.

(10) An additional 2,718 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found on March 3, 2005, at Morgan Stanley's New Jersey off-site storage vendor. These tapes apparently have not been searched either.

(11) An additional 389 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found from March 2 through March 5, 2005. These tapes apparently also have not been searched.

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(12) Many of the documents that were eventually produced by Morgan Stanley were produced too late in the pretrial proceedings to be effectively investigated and used by CPH in the pretrial discovery process.

Morgan Stanley did not disclose any of these problems to CPH, as Morgan Stanley was obliged to do. The searches for email evidence had not been completed when this trial was begun, and they were terminated without completion because they could not be completed without an unreasonably long delay in the trial. Even then there could be no assurance that Morgan Stanley would locate and produce all of the relevant evidence.

In addition to this misconduct, Morgan Stanley has committed other discovery abuses, including the following:

- An Executive Director of Morgan Stanley's Law Division filed a sworn declaration stating that he did not learn of additional unsearched backup tapes until the end of October, 2004. By filing the declaration, Morgan Stanley sought to imply that no one in Morgan Stanley's Law Division knew of the backup tapes before then. Instead, at least two Morgan Stanley in-house lawyers, including the Executive Director's superior, knew of the tapes no later than June 7, 2004.
- Morgan Stanley improperly failed to produce 138 documents that were required to be produced.
- Morgan Stanley sought to discredit Mr. Riel and thus distance itself from the false June 23, 2004 Certificate of Compliance that he had signed. In doing so, Morgan Stanley sought to hide other damaging information, including information about whether Morgan Stanley continued to erase backup tapes illegally.

- Morgan Stanley failed to provide computer information about the extent of the work it performed in generating Sunbeam-related documents. And then Morgan Stanley falsely represented that it had no such useful information.

Finally, Mr. William Strong is the Morgan Stanley managing director who took credit for the fees Morgan Stanley generated from the Sunbeam deal. On March 15, 2004, Morgan Stanley was required to produce, "(a)ll references (positive or negative) to [Mr. Strong's] truthfulness, veracity, or moral turpitude." In response, Morgan Stanley produced some portions of Mr. Strong's annual employment evaluations. While he was working on the Sunbeam transaction, though, Mr. Strong was facing criminal prosecution in Italy for complicity in bribery. Mr. Strong's evaluators at Morgan Stanley knew that fact. Morgan Stanley was obligated to provide the documents about these proceedings to CPH, but did not provide them. In January, 2005, CPH independently discovered evidence of the criminal proceedings in Italy.

It is important that you understand the limited relevance of Mr. Strong's situation. The fact that Mr. Strong was facing criminal prosecution in Italy for complicity in bribery while he was working on the Sunbeam transaction may be relevant to the extent that it created pressures on Mr. Strong and motivated him to push forward with the Sunbeam deal. That is for you to decide. But you must not consider that fact as evidence of Mr. Strong's character or as evidence that Mr. Strong actually engaged in bribery or any other illegal conduct in Italy. Indeed, in 2003, on appeal, an Italian court found Mr. Strong not guilty.

In sum, throughout the pretrial discovery process, Morgan Stanley repeatedly misrepresented facts and failed to fulfill its discovery obligations.

The litigation misconduct by Morgan Stanley that I have described — and that you are required to accept as true — may be relevant in determining whether and in what amount

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punitive damages should be assessed against Morgan Stanley. Specifically, Morgan Stanley's litigation misconduct may show:

(1) that Morgan Stanley sought to hide direct evidence of the Sunbeam fraud;

(2) that Morgan Stanley sought to hide direct evidence of Morgan Stanley's complicity with Sunbeam in perpetrating that fraud on CPH;

(3) that Morgan Stanley attempted to frustrate the prosecution of CPH's claims through means other than hiding evidence; and

(4) that Morgan Stanley officers and employees who may not have been involved in the primary wrongdoing subsequently approved of the misconduct or participated in concealing or covering up the misconduct.

TAB 4

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).
_____/

CASE NO. CA 03-5045 AI

STATEMENT

[1]**To Be Read to the Jury in the Trial's Second Phase**

[2]~~If you find~~[3]**Having found** for CPH and against Morgan Stanley on CPH's claims for aiding and abetting and conspiring to commit fraud, you [4]~~will then~~[5]**now** have to consider whether, in addition to compensatory damages, punitive damages are warranted[6]~~. Later in the trial~~[7] **and, if so, what is the proper amount of punitive damages. At the end of these proceedings**, I will instruct you about factors to consider when determining whether an award of punitive damages is appropriate[8] **and, if so, the proper amount of those damages**. In considering these factors, certain facts [9]**about Morgan Stanley's litigation misconduct** already have been established and no longer are subject to dispute[10]~~, which I shall now read to you. You are required to accept these facts as true.~~[11]**. I will read them to you in a moment.**

[12]~~This case arises out of a 1998 transaction in which Coleman (Parent) Holdings, Inc., which I will call "CPH," sold its 82% interest in The Coleman Company to Sunbeam Corporation. Morgan Stanley served as Sunbeam's financial advisor for the transaction and as~~

EXHIBIT
4

16div-015385

~~the lead underwriter for a $750,000,000.00 debenture offering that Sunbeam used to finance the cash portion of the deal.~~

[13]But first, it is important that you understand the limited relevance of the litigation misconduct that I am about to describe to you. A party's failure to comply fully with a discovery request or Court order — standing alone — is immaterial to the punitive-damages issues that you have to decide in this phase of the trial. Therefore, you may consider the litigation misconduct that I am about to describe for only the following purposes:

[14](1) to show that Morgan Stanley sought to hide direct evidence of the Sunbeam fraud;

[15](2) to show that Morgan Stanley sought to hide direct evidence of Morgan Stanley's complicity with Sunbeam in perpetrating that fraud on CPH;

[16](3) to show that Morgan Stanley attempted to frustrate the prosecution of CPH's claims through means other than hiding evidence; and

[17](4) to show that Morgan Stanley officers and employees who may not have been involved in the primary wrongdoing subsequently approved of the misconduct or participated in concealing or covering up the misconduct.

[18]You may not consider Morgan Stanley's litigation misconduct for any other purpose.

[19]Finally, please remember that you are required to accept as true all the litigation-misconduct facts that I am about to read to you.

[20]* * *

[21]~~On~~[22]As you know, in May [23]~~12,~~ 2003, CPH sued Morgan Stanley for aiding and abetting and conspiring with Sunbeam to commit fraud. Following established pretrial

procedures, CPH formally requested that Morgan Stanley produce documents related to CPH's claims against Morgan Stanley. A request to produce documents is one of the ways a party can seek to discover additional facts about the claims in a lawsuit and to gather evidence to present at trial. CPH's document request sought, in essence, all Morgan Stanley documents connected with the Sunbeam deal. The word "documents" specifically included items stored electronically, such as emails.

CPH was concerned that Morgan Stanley was not thoroughly looking for emails responsive to its discovery requests. In October 2003, CPH filed a motion, which is a written request to the Court, asking that Morgan Stanley be ordered to make a full investigation for email messages, including a search of magnetic backup tapes and computer hard drives.

Morgan Stanley opposed CPH's motion. It represented that it would cost at least hundreds of thousands of dollars and require several months to complete such an investigation and that no email data existed for any time period before January 2000 -- more than a year and a half after the Sunbeam transaction. However, Morgan Stanley never intended to search the backup tapes to respond to CPH's requests. Further, Morgan Stanley knew that some backup tapes contained email dating back at least to 1997.

In 2001 Morgan Stanley decided to create an email "archive." Morgan Stanley's email archive was a centralized storage system for electronic data that could be quickly and inexpensively searched. By June, 2003, Morgan Stanley had decided that the archive would have two components. First, the archive would capture and store new email messages "live," as they were generated. Second, Morgan Stanley wanted to add to the archive historical data dating back to the late 1990's. That task involved gathering all email backup tapes containing historical emails and then transferring data from the backup tapes onto the archive.

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In February 2004, Robert Saunders, an Executive Director of Information Technology for Morgan Stanley, testified under oath to CPH that Morgan Stanley's email archive system would capture and store new emails as they were generated, but could not be used to search old emails. At the time, Mr. Saunders knew but did not disclose to CPH that the old emails already were being added to the archive and that that process was expected to be completed by April, 2004.

CPH still was concerned that all the emails it had requested had not been produced. However, in light of Morgan Stanley's representation that it would cost hundreds of thousands of dollars to search its emails and that the process would take many months, CPH reached an agreement with Morgan Stanley. On April 16, 2004, the Court entered an "Agreed Order." Under the Agreed Order, Morgan Stanley was required to (1) search the oldest full backup tape for each of 36 Morgan Stanley employees involved in the Sunbeam transaction; (2) review emails dated from a key two-month period in early 1998, as well as emails containing any of 29 specific search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004, all privileged emails responsive to CPH's document requests; and (4) certify Morgan Stanley's full compliance with the Agreed Order. CPH reached this agreement without knowing of the existence of the email archive and without knowing that the archive would make searches for emails quick and inexpensive.

In response to the Agreed Order, Morgan Stanley produced about 1,300 pages of emails on May 14, 2004. Morgan Stanley did not, however, certify compliance with the Agreed Order. After prompting by CPH, on June 23, 2004, Morgan Stanley served a Certificate of Compliance signed by Mr. Arthur Riel, an Executive Director and manager of Morgan Stanley's Law/Compliance Information Technology Group.

As organized by Morgan Stanley, the effort to create the historical data archive had several stages. First, the relevant backup tapes had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor to be processed, and the data returned to Morgan Stanley. Third, Morgan Stanley had to upload the processed data into its email archive. Fourth, Morgan Stanley had to run scripts, or pieces of computer code, to transform this data into a searchable form. Finally, Morgan Stanley had to search the data for emails related to this case. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when the processed data returned by the outside vendor remained in limbo, waiting to be uploaded to Morgan Stanley's archive.

At some point prior to May 6, 2004, Arthur Riel and his team became aware that 1,423 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423 tapes had not been processed by the outside vendor and thus had not been included in the archive or searched when Morgan Stanley made its production to CPH on May 14, 2004. Aware of the tapes' discovery, Mr. Riel and other Morgan Stanley personnel knew when Riel executed the certification of full compliance with the Court's Agreed Order that it was false. He and others on Morgan Stanley's email archive team knew by July 2, 2004 that these "Brooklyn tapes" contained email dating back at least to the late 1990's. During the summer of 2004, the Brooklyn tapes were processed and the data sent to the staging area. The scripts were not written and tested to permit the search for emails relating to this case to begin until the middle of January, 2005. Such a search, even if perfectly done, can take weeks.

In the May, 2004, production of documents under the Agreed Order, Morgan Stanley also failed to produce emails from 738 backup tapes found at a Morgan Stanley facility in Manhattan in 2002. These 738 tapes, like the 1,423 Brooklyn tapes, had not been processed by the outside

16div-015389

vendor and thus had not been included in the archive and searched by either May 14, 2004 or June 23, 2004, the date Morgan Stanley certified compliance with the Agreed Order. Mr. Riel and others were told by the outside vendor by July 2, 2004 that these tapes contained email dating back at least to 1998. During the summer of 2004, these tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not searched.

In August 2004, Mr. Riel was relieved of his employment responsibilities for reasons unrelated to Morgan Stanley's false certification. He and his team were replaced by a new team headed by Allison Gorman. At that time, the staging area contained about 600 gigabytes of email data that had not yet been uploaded into the Morgan Stanley archive and had not been searched for emails relating to this case. Six hundred gigabytes of data are the equivalent of approximately 12 million to 60 million printed pages.

On November 17, 2004, Morgan Stanley told CPH that Morgan Stanley had discovered additional email backup tapes. The next day, Morgan Stanley produced to CPH about 8,000 pages of emails. But in a series of letters back and forth from November, 2004, to January, 2005, Morgan Stanley refused to provide CPH with details about the backup tapes that allegedly had been "newly discovered" or about any ongoing efforts to restore emails from those backup tapes and to produce those emails to CPH. Morgan Stanley told CPH that the "newly discovered" tapes had not been found in locations where email backup tapes customarily were stored. In fact, the tapes were not "newly discovered" and had been found in locations where tapes customarily were stored.

Only a handful of the Brooklyn tapes had been added to the archive and were thus searched for the November, 2004 production. Morgan Stanley sought to create the impression that all the produced documents came from the Brooklyn tapes. However, none of the

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November, 2004 production came from "newly found" tapes. Morgan Stanley's responses to inquiries about the November, 2004, production did not disclose the existence of the archive.

Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area. She was not told of the existence of this litigation until five months later, in January 2005. In October, 2004, Ms. Gorman gave the project somewhat greater priority, although even then it did not move as expeditiously as possible. Morgan Stanley did not consider using an outside contractor to expedite the process.

Morgan Stanley found another 169 tapes in January, 2005, that according to Morgan Stanley had been misplaced by its New Jersey storage vendor. Morgan Stanley discovered more than 200 additional unsearched backup tapes openly stored in locations known to be used for tape storage on February 11 and 12, 2005. Morgan Stanley did not voluntarily disclose this information to CPH.

Morgan Stanley claims to have discovered on February 11, 2005 that a flaw in the software it had written had prevented it from locating all email attachments about the Sunbeam transaction. Morgan Stanley also admits that the date-range searches were flawed for many email users who worked in the Morgan Stanley division responsible for the Sunbeam transaction. As a result, additional email messages that appeared to fall within the scope of the Agreed Order had not been given to CPH. Further, it appears that the problem infected Morgan Stanley's original searches in May of 2004.

[24]**These defects in Morgan Stanley's compliance with the April 16, 2004 Agreed Order were revealed only as a result of Morgan Stanley knowing that an independent**

16div-015391

computer search expert had been hired to double-check Morgan Stanley's work and was in the process of performing its verification.

On February 16, 2005, Morgan Stanley withdrew its certificate of compliance with the Agreed Order.

On February 19, 2005 Morgan Stanley notified CPH that it had found boxes of additional tapes that have not been uploaded into its archive or searched for responsive emails.

In addition, CPH has since found out [25]~~that~~[26]**the following facts about Morgan Stanley's email production**:

(1) About 5% of email harvested from the backup tapes was not captured and produced due to an error in transferring data into the archive.

(2) The computer programs Morgan Stanley used to process emails into its archive caused the bodies of some messages to be cut off.

(3) An analysis showed that, based on a representative sample, about ten percent of backup tapes were erased after January 2001, in violation of an obligation to preserve the data on the tapes.

(4) A computer programming error caused blind carbon copies not to be captured in the archive.

(5) Another computer programming error prevented the searches from turning up all responsive emails.

(6) Another computer programming error caused the archive to have problems pulling group email involving a set of email users that included Morgan Stanley employees involved in the Sunbeam transaction.

(7) Morgan Stanley's searches looked for only two types of emails. There are other types of emails that were not included in the searches.

(8) An additional 282 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found on February 23, and 25, 2005, and apparently were never searched.

(9) An additional 3,536 tapes that Morgan Stanley should have found and searched by May 14, 2004, were discovered on February 23, 2005, in a security room. These tapes apparently have not been searched.

(10) An additional 2,718 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found on March 3, 2005, at Morgan Stanley's New Jersey off-site storage vendor. These tapes apparently have not been searched either.

(11) An additional 389 tapes that Morgan Stanley should have found and searched by May 14, 2004, were found from March 2 through March 5, 2005. These tapes apparently also have not been searched.

(12) Many of the documents that were eventually produced by Morgan Stanley were produced too late in the pretrial proceedings to be effectively investigated and used by CPH in the pretrial discovery process.

Morgan Stanley did not disclose any of these problems to CPH, as Morgan Stanley was obliged to do. The searches [27]**for email evidence** had not been completed when this trial was begun, [28]~~when~~[29]**and** they were terminated without completion[30].[31] **because they could not be completed without an unreasonably long delay in the trial. Even then there could be no assurance that Morgan Stanley would locate and produce all of the relevant evidence.**

[32]**In addition to this misconduct, Morgan Stanley has committed other discovery abuses, including the following:**

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- [33] [34]An Executive Director of Morgan Stanley's Law Division filed a sworn declaration stating that he did not learn of additional unsearched backup tapes until the end of October, 2004. By filing the declaration, Morgan Stanley sought to imply that no one in Morgan Stanley's Law Division knew of the backup tapes before then. Instead, at least two Morgan Stanley in-house lawyers, including the Executive Director's superior, knew of the tapes no later than June 7, 2004.
- [35] [36]Morgan Stanley improperly failed to produce 138 documents that were required to be produced.
- [37] [38]Morgan Stanley sought to discredit Mr. Riel and thus distance itself from the false June 23, 2004 Certificate of Compliance that he had signed. In doing so, Morgan Stanley sought to hide other damaging information, including information about whether Morgan Stanley continued to erase backup tapes illegally.
- [39] [40]Morgan Stanley failed to provide computer information about the extent of the work it performed in generating Sunbeam-related documents. And then Morgan Stanley falsely represented that it had no such useful information.

[41] Finally, Mr. William Strong is the Morgan Stanley managing director who took credit for the fees Morgan Stanley generated from the Sunbeam deal. On March 15, 2004, Morgan Stanley was required to produce, "(a)ll references (positive or negative) to [Mr. Strong's] truthfulness, veracity, or moral turpitude." In response, Morgan Stanley produced some portions of Mr. Strong's annual employment evaluations. While he was working on the Sunbeam transaction,

though, Mr. Strong was facing criminal prosecution in Italy for complicity in bribery. Mr. Strong's evaluators at Morgan Stanley knew that fact. Morgan Stanley [42]~~failed~~[43]**was obligated** to provide the documents about these proceedings to CPH, [44]~~though, which in~~[45]**but did not provide them. In** January, 2005, [46]**CPH** independently discovered evidence of the criminal proceedings in Italy.

It is important that you understand the limited relevance of Mr. Strong's situation. The fact that Mr. Strong was facing criminal prosecution in Italy for complicity in bribery while he was working on the Sunbeam transaction may be relevant to the extent that it created pressures on Mr. Strong and motivated him to push forward with the Sunbeam deal. That is for you to decide. But you must not consider that fact as evidence of Mr. Strong's character or as evidence that Mr. Strong actually engaged in bribery or any other illegal conduct in Italy. Indeed, in 2003, on appeal, an Italian court found Mr. Strong not guilty.

[47]**In sum, throughout the pretrial discovery process, Morgan Stanley repeatedly misrepresented facts and failed to fulfill its discovery obligations.**

[48]~~As I told you at the outset of this Statement, you are required to accept the factual finding that I have read to you as true.~~[49]**The litigation misconduct by Morgan Stanley that I have described — and that you are required to accept as true — may be relevant in determining whether and in what amount punitive damages should be assessed against Morgan Stanley. Specifically, Morgan Stanley's litigation misconduct may show:**

[50]**(1) that Morgan Stanley sought to hide direct evidence of the Sunbeam fraud;**

[51]**(2) that Morgan Stanley sought to hide direct evidence of Morgan Stanley's complicity with Sunbeam in perpetrating that fraud on CPH;**

[52](3) that Morgan Stanley attempted to frustrate the prosecution of CPH's claims through means other than hiding evidence; and

[53](4) that Morgan Stanley officers and employees who may not have been involved in the primary wrongdoing subsequently approved of the misconduct or participated in concealing or covering up the misconduct.

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: April 21, 2005

TIME: 9:30 a.m.

JUDGE: Honorable Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

Plaintiff's Second Renewed Motion For Correction And Clarification Of The Litigation-Misconduct Statement To Be Read To The Jury

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 20th day of April, 2005.

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9966

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO BAR IMPROPER DEPOSITION DESIGNATIONS

THIS CAUSE came before the Court April 19, 2005 on Coleman (Parent) Holdings, Inc.'s Motion to Bar Improper Deposition Designations, with both parties well represented by counsel. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part, Denied, in part, and ruling deferred, in part. Within two calendar days, MS & Co. shall submit revised deposition designations for all listed witnesses to testify by deposition which do not contain testimony contradictory to the facts conclusively established in the Court's March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment. CPH shall serve its objections and counterdesignations within two calendar days thereafter. It is further

ORDERED AND ADJUDGED that by 5:00 p.m. April 20, 2005, MS & Co. shall provide to the Court a proffer of its evidentiary predicate to support its position that a reasonable juror could conclude that the terms of the February 23, 1998 purported letter agreement were assented to by CPH, and shall be prepared to argue CPH's relevancy objections to the other exculpatory and non-reliance clauses about which deposition testimony is designated. It is further

ORDERED AND ADJUDGED that by 5:00 p.m. April 20, 2005, MS & Co. shall be prepared to argue CPH's relevancy objection to deposition testimony concerning Sunbeam's

valuation of the warrants at the time of settlement with CPH. It is further

ORDERED AND ADJUDGED that within two business days, MS & Co. shall remove all deposition designations dealing with offers to hedge after June 25, 1998 and all designations going to MS & Co.'s mitigation of damages by hedging defense. CPH shall serve its counterdesignations and objections to the remaining designations within two calendar days thereafter. This ruling is without prejudice to CPH's right to object to the remaining designated testimony on the basis of relevancy.

In open Court counsel for MS & Co. withdrew all designations that commingle assumed debt with Coleman Company debt. Based on the foregoing, it is

ORDERED AND ADJUDGED that MS & Co.'s designations that commingle the assumed debt and Coleman Company debt are hereby deemed withdrawn. It is further

ORDERED AND ADJUDGED that the portion of the Motion seeking to strike deposition designations concerning the MAFCO credit agreements is Denied. However, MS & Co. shall be limited to argument about the relevancy of the agreements to its contention that they tend to show that CPH did not actually rely on the misrepresentations and omissions because it had a desire to unload its Coleman stock, and the agreements created a disincentive to accept cash. It is further

ORDERED AND ADJUDGED that by 8:00 a.m. April 22, 2005, counsel for MS & Co. shall confirm whether MS & Co. intends to offer deposition testimony of Maher, Nesbitt, and Schwartz; whether MS &Co. intends to call the witnesses, or any one of them, live; or whether it does not intend to offer the testimony, either live or by deposition, of the witnesses, or any one of them. Except as specifically provided herein, it is

ORDERED AND ADJUDGED that ruling on the portions of the Motion to Bar Improper Deposition Designations not specifically addressed herein is deferred, pending further heairng.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 20 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER

THIS CAUSE came before the on Defendant's Proffer and Renewed Motion with Respect to Hedging, which the Court elects to treat as including a Motion for Rehearing. Based on a review of the Motion, it is

ORDERED AND ADJUDGED that Defendant's Motion for Rehearing is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 19 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

MORGAN STANLEY'S MOTION TO QUASH COLEMAN (PARENT) HOLDINGS INC.'S NOTICE TO PRODUCE FOR *IN CAMERA* INSPECTION *INSTANTER*

Defendant Morgan Stanley & Co. Incorporated moves to quash Plaintiff Coleman (Parent) Holding, Inc.'s ("CPH's") Notice to Produce for *In Camera* Inspection *Instanter*, dated April 17, 2005 (attached as Exhibit A). The Notice demands the production at trial of (i) the responses of any Morgan Stanley entity to third-party requests for e-mails and (ii) notices by any Morgan Stanley entity indicating it had newly-discovered backup tapes containing e-mails. The Notice is improper for three reasons. First, it improperly seeks to raise through a second subpoena a dispute regarding the time period for production that this Court has already settled. As such, the Notice is nothing more than an unsupported Motion for Rehearing. Second, it improperly seeks to expand the identity of the parties from whom production is sought. In so doing, it demands that Morgan Stanley undertake a massive new search for additional documents that CPH claims were "withheld" from production, when the reality is that CPH did not ask for these additional (irrelevant) documents in the first place. And third, the Notice is not authorized by the Florida Rules of Civil Procedure.

1. On February 20, 2005, CPH served a Notice to Produce seeking the same documents (albeit from a more limited number of parties) covering the same time period as

covered by CPH's new Notice. This Court sustained Morgan Stanley & Co. Incorporated's ("Morgan Stanley") objections "in part." 3/2/05 Tr. Vol. 19, 1855:20-21. The Court ruled that it "would limit [CPH's document demand] to responses made on *or after* May 1st of 2002, which is a year before this litigation was started." *Id.* at 21-24 (emphasis added). A copy of the Order is attached as Exhibit B.

In the new trial notice at issue here, CPH seeks to obtain documents from the time period for which this Court previously declined to require production. Specifically, while the Court's prior order specifically limited production to responses "made on or *after* May 1st of 2002," the new trial notice demands "[a]ll documents, *generated on or before May 1, 2002*, withheld by Morgan Stanley as nonresponsive" to the notice served on February 20, 2005. That effort to end-run the Court's orders is wholly improper. A party may not use a trial subpoena "to avoid the orderly process of discovery and to relitigate the scope of documentary discovery." *Motiva Enterprises, Inc. v. Wyatt Energy, Inc.*, No. X01CV020172116s, 2002 WL 31462502, at *1 (Super. Ct. Conn. Oct. 16, 2002). In *Motiva Enterprises*, the court of appeals granted a protective order that relieved the plaintiffs of the burden of responding to a trial subpoena for documents the defendant had previously sought but that the court had ruled were not properly subject to discovery. *Id.* The court held that the defendant "may not use subpoenas to file what is actually a repetition of their fourth request for production of documents and seek to enforce such requests as part of a hearing" where the court had "sustain[ed] objections in part or in full" once before. *Id.* CPH may not use the current notice "to file what is actually a repetition of" a request it made and the Court rejected just 2 months ago.

CPH itself has recognized this point. In moving to quash Morgan Stanley's notice to produce MAFCO loan agreements, CPH's counsel argued:

> The notice to produce at trial is generally used for purposes of having the originals of documents that have already been discovered present in the courtroom....It is not a means by which to avoid the restrictions that are imposed on discovery in the Court's pretrial order.

See 3/24/05 Tr. at 5351-52. The Court accepted CPH's argument and granted the motion to quash. *See* Order on CPH's Motion to Quash Morgan Stanley's Notice to Produce MAFCO Loan Agreements (March 24, 2005). Consistent with that ruling and CPH's prior argument, the Court should reject CPH's attempted end-run of the Court's discovery order and quash the Notice.

2. CPH's new Notice appears to seek discovery from a different and significantly larger number of entities than its prior discovery request. The new Notice defines "MS&Co." to mean "Morgan Stanley & Co., Inc. or any of its affiliates, parents, subsidiaries, divisions, predecessors, successors, present and former employees, representatives, agents, attorneys, accountants, advisors, or all other persons acting or purporting to act on its behalf." By including "affiliates," this definition of "MS&Co." is substantially broader than the definition of "Morgan Stanley" in the notice of February 20, 2005, in which CPH did not seek documents from Morgan Stanley's affiliates.[1]

While read literally, CPH's new Notice does not accomplish CPH's apparent intention, because – although it defines "MS&Co." broadly – the new Notice requests the production of documents withheld by "Morgan Stanley," not by "MS&Co.," it is clear that it is CPH's intention to significantly widen the number of entities who must respond to the request.

---

[1] By incorporated reference to CPH's First Request for Production of Documents dated May 9, 2003, the notice of February 20, 2005, defined "Morgan Stanley" to mean the same entity presently defined as "MS&Co." and specifically did not include "affiliates" and "parents."

This is significant. By seeking production from a significantly wider group of entities than the earlier discovery request, the Notice has no relevance to any alleged litigation misconduct – CPH's purported basis for seeking the production. This wider group of entities was not previously requested to produce the now sought information. Thus, the new Notice's request for documents "withheld by Morgan Stanley as nonresponsive" mischaracterizes the state of the record.

3. The subpoena, in any event, is not authorized by Florida Rule of Civil Procedure 1.410(c). Rule 1.410(c) authorizes the issuance of a notice to obtain "*evidence at trial.*" (emphasis added); *cf., e.g., United States v. Noriega*, 764 F. Supp. 1480, 1492-1493 n.11 (S.D. Fla. 1991) ("the purpose of a trial subpoena is limited to obtaining admissible evidence relevant to specific offenses already identified"). The trial in this case is to a *jury*. CPH's notice, however, seeks documents for inspection *in camera* by *the court*. Because the judge is not the trier of fact, CPH's notice for *in camera* inspection does not seek "evidence at trial" and thus is not authorized by Rule 1.410(c). Further, because there is no present claim of privilege, the request for *in camera* review is improper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery facsimile and hand delivery on this 21st day of April, 2005.

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BY: Rebecca Beynon sme

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.
_____/

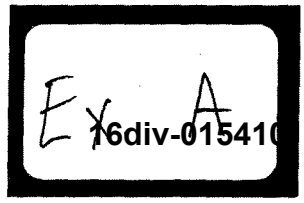
PLAINTIFF'S NOTICE TO PRODUCE AT TRIAL FOR *IN CAMERA* INSPECTION *INSTANTER*

Coleman (Parent) Holdings Inc., pursuant to Rule 1.410 of the Florida Rules of Civil Procedure, requests that Defendant Morgan Stanley & Co., Inc. produce each of the documents described below immediately for *in camera* inspection by the Court.

Definitions

CPH incorporates by reference the Definitions and Instructions set forth in Plaintiff's First Request for Production of Documents served in this action. In addition, CPH defines the following term as follows:

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



Documents Requested

1. All documents, generated on or before May 1, 2002, withheld by Morgan Stanley as nonresponsive with respect to the following request to produce addressed in the Court's March 2, 2005 Order: "All responses made by Morgan Stanley since 1999 in any civil, criminal or administrative proceedings to any request for production of e-mail, which response describes any limitation on Morgan Stanley's ability to produce e-mail in response to the request."

2. All documents generated on or before May 1, 2002, withheld by Morgan Stanley as nonresponsive with respect to the following request to produce addressed in the March 2, 2005 Order: "All notices by Morgan Stanley in any civil, criminal or administrative proceedings filed after 1998, whether pending or concluded, indicating that Morgan Stanley has newly-discovered backup tapes containing e-mail."

Dated: April 17, 2005

COLEMAN (PARENT) HOLDINGS INC.

By: Jerold S. Solovy JSB
One of Its Attorneys

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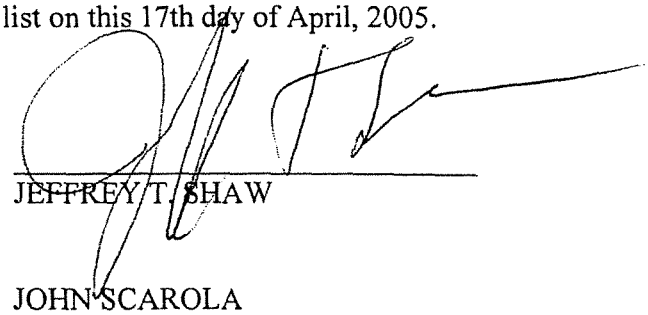
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 17th day of April, 2005.



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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S RESPONSES AND OBJECTIONS TO COLEMAN (PARENT) HOLDINGS INC.'S NOTICE TO PRODUCE AT HEARING

THIS CAUSE came before the Court March 2, 2005 on Morgan Stanley's Responses and Objections to Coleman (Parent) Holdings, Inc.'s Notice to Produce at Hearing, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that MS & Co.'s objections to CPH's Notice to Produce at Hearing are sustained, in part, and overruled, in part. The Documents Requested are limited to those responsive items produced on or after May 1, 2002. MS & Co. shall produce all requested items, as so date-limited, within its care, custody, or control, within 12 hours of their review by counsel for responsiveness but, in any event within 10 days of the date hereof.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 8 day of March, 2005.

_____
ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

MORGAN STANLEY'S MOTION TO QUASH COLEMAN (PARENT) HOLDINGS INC.'S NOTICE TO PRODUCE AT TRIAL *INSTANTER* ATTORNEY-CLIENT RECORDS AND DOCUMENTS

Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") moves to quash Plaintiff Coleman (Parent) Holding, Inc.'s ("CPH") Notice to Produce at Trial *Instanter* dated April 17, 2005 ("Notice to Produce") (attached as Exhibit A). The Notice to Produce demands attorney-client records and documents, including (i) all time records of Kirkland & Ellis LLP ("K&E") showing the number of individuals who rendered services to Morgan Stanley in this case since March 21, 2005, and all correspondence regarding the nature and scope of such services, (ii) all time records and other documents of Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C. and Shearman & Sterling LLP ("S&S") showing the number of individuals rendering legal and other services to Morgan Stanley in this litigation, (iii) all documents describing the nature and scope of S&S's responsibilities in this case; and (iv) all documents regarding claims or waiver of claims by Morgan Stanley against K&E.

The Court should quash CPH's Notice to Produce, for three reasons.

First, the Notice requests records and documents that cannot be evidence at trial. A party may "serv[e] a notice to produce" under Rule 1.410(c) of the Florida Rules of Civil Procedure only to obtain "production of *evidence at trial*" (emphasis added). Cf., e.g., U.S. v. Noriega, 764 F. Supp. 1480, 1492-1493 n.11 (S.D. Fla. 1991) ("the purpose of a trial subpoena is limited to obtaining admissible evidence relevant to specific offenses already identified"). The records and documents requested in the Notice cannot be evidence at trial, because the Court has already held them inadmissible. On April 18, 2005, CPH's counsel opaquely represented in open court that CPH sought these materials because they "relate[ ] to what we believe to be ongoing litigation misconduct." 4/18/05 Tr. 8741:18-20. CPH has provided no explanation as to how these materials relate to any alleged ongoing litigation misconduct. And when the Court said it would read to the jury a Statement of Litigation Misconduct, it also ordered that its Statement would be the only evidence admitted on the issue of litigation misconduct. *See* Adverse Inference Order 13-14 (Mar. 1, 2005) ("[n]o other evidence concerning the production of e-mails, or lack thereof, shall be presented absent further Court order."); Further Amended Adverse Inference Order 13 (Mar. 5, 2005) (same).

Second, the records and documents are protected by the attorney-client privilege and work product immunity. Attorney time and billing records and other attorney-client documents pertaining to the nature and scope of representation "contain privileged, attorney-client information," including the mental impressions and opinions of counsel, and, especially in contested litigation, these materials also "are to be treated as privileged work product." HCA Health Services of Florida, Inc. v. Hillman, 870 So. 2d 104, 107 (Fla. 2d DCA 2003). In Hillman the Second District Court of Appeal granted certiorari and quashed an order that defendant produce attorney time sheets and billing records because plaintiffs made no "special

showing" that these privileged records were "actually relevant to a disputed issue," such as the amount of recoverable attorneys' fees, or that they "could not obtain substantially equivalent information without undue hardship." Id. at 105, 107. CPH has made no showing at all that the attorney-client materials it demands are relevant to a disputed issue. Therefore, these materials are immune from production at trial. Id.; see, e.g., Old Holdings, Ltd. v. Taplin, Howard, Shaw & Miller, P.A., 584 So. 2d 1128 (Fla. 4th DCA 1991) (discovery order for attorney billing statements quashed on grounds of attorney-client and work product privileges).

Third, because CPH is not seeking the documents for use at trial, they must be sought for purposes of discovery. But the issuance of a naked notice to produce documents at trial, filed after the discovery cut off without prior leave of the Court, is not a proper means of obtaining discovery. See, e.g., Ghandi v. Police Dept. of City of Detroit, 747 F.2d 338, 354-355 (6th Cir. 1984) (trial subpoena used to seek discovery after the discovery deadline had passed properly quashed); Puritan Inv. Corp. v. ASLL Corp., 1997 WL 793569 at *1 (E.D. Pa. Dec. 9, 1997) ("[t]rial subpoenas may not be used ... as means to engage in discovery after the discovery deadline has passed"); Pitter v. American Express Co., 1984 WL 1272 at *6 (S.D.N.Y. Nov. 27, 1984) ("shotgun production demands in the midst of trial are an impermissible substitute for orderly pre-trial discovery").

* * * * *

For the foregoing reasons, the Court should quash CPH's Notice to Produce at Trial *Instanter*.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand-delivery on this 21st day of April, 2005.

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EXHIBIT A

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.
_____/

PLAINTIFF'S NOTICE TO PRODUCE AT TRIAL *INSTANTER*

Coleman (Parent) Holdings Inc., pursuant to Rule 1.410 of the Florida Rules of Civil Procedure, requests that Defendant Morgan Stanley & Co., Inc. produce and permit Plaintiff to inspect and copy each of the documents described below. It is requested that the aforesaid production be made immediately. Inspection will be made by visual observation, examination, and/or copying.

Definitions

CPH incorporates by reference the Definitions and Instructions set forth in Plaintiff's First Request for Production of Documents served in this action. In addition, CPH defines the following term as follows:

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

Documents Requested

1. All time records of Kirkland & Ellis LLP since March 21, 2005 reflecting the number of individuals associated with Kirkland & Ellis LLP who have rendered services related directly or indirectly to this litigation, including the dates and number of hours spent in rendering such services, and the capacity in which the individuals are associated with Kirkland & Ellis LLP (attorney, paralegal, secretary, clerical assistant, etc.).

2. All correspondence including e-mails and other documents of whatever description which define, describe, limit, expand, modify or otherwise relate directly or indirectly to the nature and scope of the responsibilities of Kirkland & Ellis LLP, in connection with this litigation, as such responsibilities have existed since March 21, 2005.

3. All monthly time records or other documents necessary and sufficient to determine with respect to Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C. and Sherman & Sterling LLP the number of individuals associated with each law firm who have rendered services related directly or indirectly to this litigation and to *Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings, Inc., et al.*, 2003 CA 005165 (Fla. 15th Jud. Cir.), including the dates and number of hours spent in rendering such services, and the capacity in which the individuals are associated with each law firm (attorney, paralegal, secretary, clerical assistant, etc.).

4. All documents and data compilations of whatever description including e-mails which define or describe the nature and scope of the responsibilities of Sherman & Sterling LLP, relating directly or indirectly to this litigation.

5. Any and all communications, documents, and data compilations of whatever description by or through which Morgan Stanley or any person or entity purporting to act on behalf of Morgan Stanley has placed Kirkland & Ellis LLP or any person or entity associated with or believed to have been acting on behalf of Kirkland & Ellis LLP on notice of any claim or potential claim or of any waiver of any claim or potential claim relating to, arising out of, or associated with this litigation.

Dated: April 17, 2005

COLEMAN (PARENT) HOLDINGS INC.

By: Jerold S. Solovy IJO
One of Its Attorneys

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 17th day of April, 2005.

JEFFREY T. SHAW

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10842 v1

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER FOLLOWING IN CAMERA INSPECTION

THIS CAUSE came before the Court, in Chambers, on CPH's in camera submission pursuant to the Court's April 15, 2005 Order on MS & Co.'s ore tenus Motion to Produce. Based on a review of the submitted items and a comparison with the privilege log prepared by CPH originally in October, 2003, and in consideration of the posture of the action both at the time of the original ore tenus Motion and at the time of the in camera inspection, it is

ORDERED AND ADJUDGED that the Court declines to conduct a further inquiry into CPH's claims of privilege. First, MS & Co. failed to timely request the inquiry. Second, none of the documents have been listed as exhibits by MS & Co. Third, a review of the documents does not dispute the privilege claims. The Court has sealed the documents tendered and placed them in the Court file in an envelope marked "DO NOT OPEN BY APRIL 21, 2005 COURT ORDER FOLLOWING IN CAMERA INSPECTION". The sealed envelope shall not be unsealed or removed from the court file except on further order of this or an appellate Court.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 21 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

16div-015427

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CPH'S AMENDED TRIAL WITNESS DISCLOSURE

Coleman (Parent) Holdings Inc. ("CPH") hereby provides Morgan Stanley & Co. ("Morgan Stanley") hereby amends the list of the witnesses CPH currently expects to call at trial, as follows:

I. CPH Case-in-Chief:

Donald J. Kempf, Jr. (live): Mr. Kempf is the Executive Vice President, Chief Legal Officer, and Secretary of Morgan Stanley. Mr. Kempf may testify about the extent and capacity of the representation of Kirkland & Ellis or Morgan Stanley since Kirkland & Ellis' withdrawal as counsel. Mr. Kempf also may testify about the extent and capacity of the representation of Shearman & Sterling or Morgan Stanley in this lawsuit.

II. CPH Punitive Damages (Phase II):

Donald G. Kempf, Jr. (live or by deposition): In addition to the topics previously identified, Mr. Kempf may testify about Kirkland & Ellis' true role in continuing to represent Morgan Stanley, contrary to its misrepresentations to the Court and jury that its new counsel is operating at a severe litigation disadvantage — which is another instance of litigation

misconduct. Mr. Kempf also may testify about the absence of meaningful remedial and punitive measures taken by Morgan Stanley to rectify the misconduct associated with the Sunbeam fraud and to ensure that Morgan Stanley does not repeat its discovery misconduct in the future. Mr. Kempf finally may testify about what measures Morgan Stanley has taken to rectify its litigation misconduct.

Dated: April 22, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

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One of Its Attorneys

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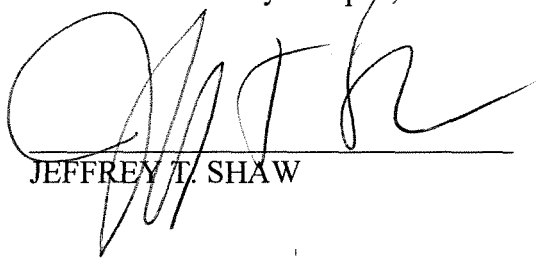
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 22nd day of April, 2005.



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10913 V2

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

PLAINTIFF'S MOTION IN LIMINE NO. 37 TO BAR EVIDENCE OR ARGUMENT REGARDING PLAINITFF'S ALLEGED FAILURE TO PRESERVE E-MAIL

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") respectfully requests that this Court bar Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") from questioning Steven Fasman or otherwise presenting evidence that CPH failed to preserve e-mail in order to form the basis for an adverse inference argument that the e-mail would have been harmful to CPH's case. CPH recognizes that the Court's March 23, 2005 Order on Morgan Stanley's Motion for an Adverse Inference Instruction ruled that Morgan Stanley could "present evidence about CPH's email retention practices and its failure to direct that emails related to the Sunbeam transaction be saved." Ex. A, 3/23/05 Order. But in the absence of a factual predicate in the form of evidence that the relevant executives involved in this transaction – particularly Mr. Perelman – used e-mail during the pendency of the transaction, proof of the non-preservation of e-mail back-up tapes is irrelevant and prejudicial, since there is no rational basis for concluding that the materials allegedly not preserved contained relevant and adverse information.

BACKGROUND

Morgan Stanley began its case by suggesting to the jury that critical evidence of Mr. Perelman's reliance on Morgan Stanley and Sunbeam had been destroyed by CPH. In it opening statement, Morgan Stanley told the jurors:

> We could know a lot more about Mr. Perelman's reasons for entering into this Sunbeam deal, for doing what he did in 1998, but the people who worked for him knowing fully that litigation was on the horizon erased the e-mail backup tapes that had all that evidence. So we have almost none of the CPH e-mail in evidence to show you. But that lack of evidence, our inability to get that e-mail evidence because it was wiped off the backup tapes by the Coleman employees shouldn't stop you for one minute. We think that you will conclude from the evidence you will see in here that Mr. Perelman can not establish that he entered into the Sunbeam deal because of what Sunbeam or Morgan Stanley said. And that means he can't prove reliance. And that should be the end of the case.

Ex. B, 4/6/05 Tr. at 7143. This argument reflected the Court's pretrial ruling that CPH's failure to preserve e-mail could be put in evidence as the basis for an argument to the jury for an inference that the e-mail would have shown the absence of reliance by CPH. So far in the trial, however, there has been no evidence presented suggesting that relevant e-mail ever existed. For example, Mr. Perelman testified as follows:

> Q. Did you use e-mails in 1997, 1998?
>
> A. No.
>
> Q. Did anybody in your organization use e-mails?
>
> A. I don't believe so.
>
> Q. So there was nobody within MacAndrews and Forbes as far as you knew who used a computer to send messages to other people?
>
> A. I don't believe so.
>
> Q. Not a single person?
>
> A. I don't believe so.
>
> . . .

Q. Are you sure that there were never e-mails at MacAndrews and Forbes?

A. I said I never used an e-mail.

. . .

Q. Is it your testimony, Mr. Perelman, that there could be no e-mails at MacAndrews and Forbes?

A. There could be no e-mails from me at MacAndrews and Forbes.

Ex. C, Perelman Testimony, 4/20/05 Tr. at 9599-601.

Similarly, Mr. Nesbitt testified:

Q. Mr. Nesbitt, did you ever use e-mail to communicate with Mr. Perelman in connection with the work on Sunbeam?

A. No, I did not.

Q. Did you ever use e-mail to communicate with Mr. Gittis in connection with your work on Sunbeam?

A. No, I did not.

Q. Did you ever use e-mail to communicate with Mr. Maher in connection with your work on Sunbeam?

A. I'm not sure.

Q. Did Mr. Maher personally use e-mail?

A. No, he did not. And I don't believe he does now."

Ex. D, Nesbitt Testimony, 4/18/05 Tr. at 8908-09

Without evidence to suggest that relevant e-mail ever existed, Morgan Stanley has no good faith basis to argue that e-mail evidence relevant to CPH's reliance on Morgan Stanley and Sunbeam was destroyed by CPH or MAFCO. Morgan Stanley should therefore be barred from presenting evidence or argument about CPH's e-mail retention practices and its alleged failure to direct that emails related to the Sunbeam transaction be saved. Such evidence is irrelevant and

any probative value that it might have is greatly outweighed by the danger of prejudicing CPH and confusing the jury.

ARGUMENT

No evidence is admissible at trial unless it is relevant — that is, it must be "evidence tending to prove or disprove a material fact." FLA. STAT. ANN. § 90.401 (West 2005); *see also* CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 401.1, at 116-23 (2004 ed.). Even relevant evidence is inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." FLA. STAT. ANN. § 90.403 (West 2005); *see also* EHRHARDT, FLORIDA EVIDENCE, *supra*, § 403.1, at 161-73. Under these standards evidence of CPH's e-mail retention practices and its alleged failure to direct that emails related to the Sunbeam transaction be saved should be excluded.

First, such evidence is not relevant to any issue in dispute. Testimony about a policy regarding the overwriting of e-mails is not admissible unless there is some reason to believe that the e-mails would be material to the matters in dispute. "The test of inadmissibility is lack of relevancy." *Dixie-Bell Oil Co., Inc. v. Gold*, 275 So. 2d 19, 20-21 (Fla. 3d DCA 1973) (letter from plaintiff's attorney advising doctor to destroy or hide medical reports on plaintiff was not relevant and material and was properly excluded, since the letter *per se* had no bearing on plaintiff's medical condition); *cf. State v. Westerman*, 688 So. 2d 979, 980 (Fla. 2d DCA 1997) ("courts must consider whether the destroyed evidence was material and whether the loss of the evidence was prejudicial to the defense"). Here, there is no evidentiary basis for concluding that relevant e-mails existed, and thus no basis for an adverse inference argument.

It is important, in this regard, to note that the Court's ruling allowing Morgan Stanley to argue for an adverse inference based on the alleged failure to preserve e-mails in 1998 was not a determination that the failure to stop over-writing back-up tapes was improper or illegal. Instead, an adverse inference argument is much like an argument to the jury about the inferences that might be drawn from the failure of a party to call a particular witness. Thus, there is no independent basis for presenting the fact of non-preservation of e-mail before the jury, absent a factual predicate showing that the e-mail created in 1998 involved people who might have been discussing their reliance in connection with the Sunbeam transaction.

Second, even if Morgan Stanley can articulate some argument that the jury might infer the existence in 1998 of some small number of pertinent e-mails, it still should not be allowed to present evidence to the jury that CPH destroyed relevant evidence because the probative value of such evidence would be substantially outweighed by prejudice to CPH. FLA. STAT. ANN. § 90.403 (2005). Evidence about CPH's destruction of e-mail would be confusing and misleading in this case because the jurors heard questioning during *voir dire* about destruction of e-mail. From such questioning, the jurors might infer that CPH was the culpable party and under the Court's orders, CPH is precluded from showing that it was Morgan Stanley, and not CPH, that destroyed and concealed relevant e-mail evidence. For that reason, if the Court does allow Morgan Stanley to call a witness to describe the non-preservation of CPH's e-mails and to argue for an adverse inference, the Court should also read portions of the Morgan Stanley Litigation Misconduct Statement related to e-mail destruction to level the playing field.

CONCLUSION

For the foregoing reasons, the Court should bar Morgan Stanley from presenting evidence or argument regarding CPH's e-mail retention policies or its alleged failure to direct that e-mails related to the Sunbeam transaction be saved.

Dated: April 21, 2005

Respectfully submitted,

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16div-015438

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10126 v1

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

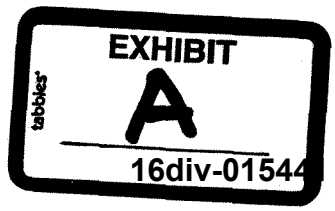
ORDER ON MORGAN STANLEY'S MOTION FOR AN ADVERSE INFERENCE INSTRUCTION

THIS CAUSE came before the Court March 21, 2005 on Morgan Stanley's Motion for an Adverse Inference Instruction, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion for an Adverse Inference Instruction is Denied, without prejudice to MS & Co.'s right to present evidence about CPH's email retention practices and its failure to direct that emails related to the Sunbeam transaction be saved and CPH's right to present evidence of its offer to have a third-party vendor given access to retrieve emails from CPH's system, without reference to discovery requests or court orders, and for either counsel to argue in favor of whatever inferences that evidence may support. See Jordan v. Masters, 821 So. 2d 342 (Fla. 4th DCA 2002) cf.; Amlan, Inc. v. Detroit Diesel Corp., 651 So. 2d 701 (Fla. 4th DCA 1995). If either party intends to present evidence on the issue of CPH's email retention practices or third-party vendor offer it shall, within 5 business days, serve on opposing counsel (i) the name, address, and business title of any witness expected to testify, together with a fair summary of his or her expected testimony; (ii) a designation of any deposition testimony the designating party intends to offer on this issue; and (iii) copies of any documents to be referred to by a witness or offered into evidence on this issue.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 23 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge



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IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

VOLUME 60

MORGAN STANLEY & CO., INC.,

Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Wednesday, April 6, 2005
1:20 p.m. - 5:27 p.m.

EXHIBIT
B
16div-015443

to get organized. Thanks.

(A recess was taken from 3:50 p.m. to. 4:01 p.m.)

THE COURT: Are you ready, Mr. Hansen?

MR. HANSEN: As I said this morning, I'm not ready, but I'm ready to proceed.

THE COURT: That's probably a better way to put it. Okay. We're ready to get the jurors.

(The jury entered the courtroom.)

THE COURT: Come on in and take your seats. Still no snacks. Okay. At least we got beverages. We're getting you guys comfortable. Go ahead and have a seat. Thank you very much. I know we're getting late in the day, but it's very important that you show Mr. Hansen as much attention as you did Mr. Scarola.

Go ahead, sir. Thank you.

MR. HANSEN: Your Honor, Judge Maas, ladies and gentlemen of the jury, good afternoon. This is what we think the case is about.

Ronald Perelman is one of America's most successful and sophisticated businessmen. He didn't rely on any statement made by Sunbeam or Morgan Stanley.

And in four plus hours of statement by

Mr. Scarola, did you hear a single reference to a specific statement made to Mr. Perelman by Sunbeam or Morgan Stanley that they relied on? That's what we think the case will be about.

Mr. Perelman's own advisors warned him that Sunbeam was a company he should stay away from and certainly he shouldn't take the stock of. But he ignored them. He had the opportunity, the right, the resources to check into the facts that were important to him before proceeding with the transaction. But he didn't even look. He made his own decision for his own reasons. He wanted stock. He wanted to have debt wiped away. And he wanted cash. He got the benefit of the bargain he actually made. And when he learned all the facts there were to learn about Sunbeam, he increased his involvement and his ownership of the company. He, in effect, with his companies took over Sunbeam, put in his hand-picked managers, a Sunbeam that included the Coleman company, and had those people run it for three years, and then it went into bankruptcy. He and the company he owned 100 percent of, Coleman (Parent) Holdings, didn't suffer any damages that Morgan Stanley should

have to pay. That's what we think this case should be about.

What is the case not about at this point Her Honor, Judge Maas, instructed you that Morgan Stanley engaged in litigation misconduct and as a result has lost its right to contest certain facts in this case. These facts will be read to the jury during the trial. Morgan Stanley will not be permitted to dispute or challenge these factual findings. And that's it in this trial as to what Morgan Stanley did. Those are the facts for this trial.

Now I expect that statement of facts will be argued to you early and often in this trial. Mr. Scarola in his opening spent more than three and a half hours going through them by my count. The judge may read those facts again at the start of the case before the first witness even testifies. And I suppose that's not surprising.

It's a pretty remarkable thing to have a court order holding that a jury must find that a reputable major investment firm like Morgan Stanley entered into a scheme with Sunbeam to defraud this company, CPH.

Conspiracy and fraud are ugly words. I

don't want any of you to think for one moment that Morgan Stanley or we condone those things or expect you to condone them. But the things about conspiracy, fraud, Sunbeam and us, all the stuff on that statement on the screen, that's over. Those facts are found. It's done.

If we go over to our side of the courtroom -- If it's about this side of the courtroom, we lose. We shouldn't be taking your time. But it isn't only about our side of the courtroom. It's not about us at this point. Now it's about them. Not whether they did anything wrong or bad but whether they can prove the rest of their case.

Remember, plaintiff must prove a number of things called elements. Elements A and B, fraud, conspiracy, aiding and abetting, we're done with those. They're out of the case.

Elements C and D, those we still have for your consideration, ladies and gentlemen. Those are the issues you'll have to decide. And, remember, C is the issue of CPH reliance. Did CPH, or more accurately based on the evidence you'll hear at trial, the 100-percent owner of CPH, Mr. Perelman, decide to make that deal with

Sunbeam because of what Sunbeam or Morgan Stanley said to Mr. Perelman, or were there other reasons?

D is the issue of damages. Did CPH, Mr. Perelman's company, suffer damages as a result of what Sunbeam and Morgan Stanley did, or did Mr. Perelman get exactly what he bargained for?

Each one of you promised that you would give Morgan Stanley a fair trial on these elements, C and D, and you promised you wouldn't be distracted from that job. What Morgan Stanley or Sunbeam did is no longer an issue. So talk about what Morgan Stanley or Sunbeam did can only be a distraction or, worse, an inflammation.

The issue is whether CPH, the company owned by this wealth -- the successful businessman, Mr. Perelman, is entitled to recover anything, let alone the hundreds of millions of dollars Mr. Scarola says they're going to ask you for.

This is based on an investment by Mr. Perelman, and Mr. Perelman alone decided to make it against the advice of his trusted expert advisors, based on little information, no check

or almost no check of any of that information. When the evidence is all before you, you'll see that Mr. Perelman went into this deal because it was a great deal for Mr. Perelman. It met his needs perfectly, and it guaranteed him a good return.

Now you may wonder sitting here how that's so. But in the world of high finance, ladies and gentlemen, sometimes there's more to it than meets the eye. The Sunbeam shares the plaintiff now complains about were gravy at the top of a rich meal, icing on the cake. Because even without them, the deal was too good for Mr. Perelman to pass up. He took stock in a company that wasn't doing all that well, Coleman, and he traded it for a lot of very valuable consideration.

In this trial you'll find that Sunbeam took $519 million worth of debt off the books, just wiped it clean as if someone's house payment was wiped out or car payment was wiped out. It's as good as getting money in the bank.

Two, Sunbeam took 619 million over on this side of the table and took 14.1 million shares of its stock for the bargain, which then -- and

one of the things you'll learn about this case, Mr. Perelman used the stock in a way you'll learn about in this case to do a very useful thing for him. He took that stock and went over to a lending institution and increased his line of credit from $250 million to $500 million and gave him that additional cushion of $250 million to use in his business ventures, right then and there, basically the day the stock came in.

Mr. Perelman made a great deal and got the very deal he bargained for. At this trial he's not offering to give any of those benefits back. Instead, he's asking you to give him more, a better deal than what he made. And we think the evidence will show you after it's all before you that that's not right, it's not fair.

When all the relevant issues are before you we believe that you will conclude on element C that Mr. Perelman made his own decision for lots of reasons. He didn't act because Sunbeam and its broker, Morgan Stanley, told him Sunbeam was such a great company any more than someone would buy a car because the owner said it was such a great car.

On elements D, Mr. Perelman made a good

decision, or put another way, Mr. Perelman got what he bargained for. He did not suffer damages that he can fairly blame on Morgan Stanley. He got a lot out of this deal and he doesn't deserve more. When he asks for 680 million more because his 14.1 million shares lost money over the three years that his associates ran the company, we think you will conclude he's reaching too far, he's overreaching.

As you know, my name is Mark Hansen. I represent Morgan Stanley in this case. As you know, I came into the case somewhat at the last minute, and I'm here to do the best I can to represent Morgan Stanley. With me on the defense side of the table, Mr. Rob Jones, Morgan Stanley; Mr. Joe Ianno, West Palm Beach; my colleagues, Mr. Webster, Miss Beynon and Mr. Cohen; also Rob Ortiz back at the console table is going to try to keep me out of technological trouble. Together we will represent Morgan Stanley and present Morgan Stanley's side of the case.

Now Coleman has told you it sounds like they're going to have a short case. They're

going to ask you for a lot of money, but they don't expect to give you a lot of evidence. They will ask you to take what Mr. Perelman says on faith, because he will undoubtedly testify, ladies and gentlemen, at this trial that he relied on Sunbeam and Morgan Stanley. And they will also ask you to accept on faith that the bargain was something other than what the parties put down in their agreement. But there's a lot more to that story. And we're going to give you more of the story in the defendant's case.

You're going to see how a brilliant entrepreneur like Mr. Perelman operates, how he relies on his own instincts and things other people overlook, how he is a contrarian sometimes, someone who goes against the grain, how he's not lead around by anyone, even the close advisors he trusts most. You will conclude, ladies and gentlemen, that no one got the better of Ronald Perelman in this deal.

We believe it will be important for you to learn a lot about Mr. Perelman and his way of doing business and hear from some of the people that worked for him on the Sunbeam deal. If CPH

doesn't place that evidence before you, we will. And that evidence will confirm that CPH's actions do speak louder than words. Actions speak louder than words. We agree with that. That's the key to this case.

Let's start with the central character in this story, Ronald O. Perelman, educated at the famous University of Pennsylvania Working School of Business. Mr. Perelman has established himself as one of America's most successful businessmen. Through his companies he's been involved in transactions buying and selling companies worth literally billions of dollars. His empire spreads so far that he doesn't even know what some of his companies do or make.

The top company in his holding company structure is MAFCO Holdings. Mr. Perelman owns all of it, 100 percent. He's the only shareholder. Below MAFCO Holdings is MacAndrews & Forbes holdings, Inc. Again, it's all Mr. Perelman. He owns 100 percent of it. Below that is Coleman (Parent) Holdings, Inc., the plaintiff in this case. Again, Mr. Perelman owns 100 percent of that. Below Coleman (Parent) Holdings, CLM Holdings, Inc. Below

that, Coleman Worldwide Corporation, which then owned about 81 percent of the Coleman Company. And that's the company whose shares got traded in the Sunbeam transaction.

Now MAFCO is a holding company, one of these things you're going to learn about in the trial. It doesn't make anything. It just holds the companies that Mr. Perelman buys and sells.

Since 1987 MAFCO has held scores of public and private companies. It currently owns at least seven operating companies, and these include Revlon, which makes famous cosmetics; Consolidated Cigar Company, a tobacco company, Panavision, which makes motion vision camera; Scientific Games, which is a well-known game company; California Federal Bank, financial services; Allied Security, protective services; M&F Worldwide, licorice and other flavor; and A&M General, auto products. MAFCO used to own Marvel Entertainment, the comic book company, New World, Technicolor, Meridian Sports.

And under MAFCO is a chain or, I should say, multiple chains of additional holding companies. In 1998, Coleman was at the bottom of one of those chains. Coleman, as Mr. Scarola told you,

makes camping equipment, sleeping bags, stoves, and Mr. Perelman through his companies own 82 percent of it. But, by the way, Coleman was only a small part of the Coleman empire. There are literally hundreds of companies owned by Mr. Perelman and held by his holding companies, so many, in fact, that Mr. Perelman can't keep them straight.

I'm not going to take your time going through each one of them and the names, but these are some of them and some of the names of companies Mr. Perelman has within his holding structure. So this particular group of companies that you see on the screen we won't talk about in any detail, but it gives you some sense of the overall scope of his enterprise.

Through MAFCO and the companies it controls Mr. Perelman has issued billions of dollars in securities, stocks, bonds and other instruments. He is a very successful and experienced entrepreneur with long experience in every phase of business. But he's not a loner. He's not by himself. Mr. Perelman has assembled a team of able lieutenants, each with special skills. These are some of the world's best and most

sophisticated businessmen. People who can operate his companies, lawyers to draft contracts and give legal advice, investment bankers to help put together the complex transactions and get financing for it or get the money to do the transactions, accountants to advise him on how to keep the records and the books. You name it, Mr. Perelman has got access to the best in the world.

The core group who would meet daily at Mr. Perelman's townhouse in New York included somebody Mr. Scarola didn't tell you about, interestingly, because he's somebody we're going to call in the case, Jerry Levin, a long-time highly skilled operating executive who is specialized in turn-around, who would go into companies at Mr. Perelman's request and help turn them around. He had been twice the CEO of Coleman. He was the CEO of Revlon. He's a specialist in consumer products companies.

Howard Gittis, a long-time trial lawyer, changed the focus of business when he joined his client, Mr. Perelman, for a long time. Prized for his business smarts, Mr. Gittis became one of his closest confidants.

Donald Drapkin served as Mr. Perelman's in-house strategic thinker, an in-house investment banker. A lawyer by training, Mr. Drapkin had a successful career advising clients to buy and sell companies before joining MAFCO in 1987.

James Maher, former president of MAFCO, was the head of investment banks at a major Wall Street investment bank, Credit Suisse First Boston. He served as a CEO of public company and joined Mr. Perelman in 1995.

Barry Schwartz, executive for both MAFCO and CPH, also practiced as a lawyer before going to work in-house for Mr. Perelman as an advisor.

William Nesbitt, a former senior vice-president of MAFCO, served as an in-house analyst for MAFCO, a financial analyst by training. After his degrees from Duke and the Harvard Business School Mr. Nesbitt went to work evaluating deals for Mr. Perelman. Crunching the numbers, if you will.

All these men had one job, to advise Mr. Perelman, to help him evaluate deals. And in the case of Mr. Levin, to actually go into companies and run them, to operate them to make

them work.

Mr. Perelman's circle of trusted advisors extended beyond this immediate group of employees. He regularly employed some of the most respected firms of lawyers, financial advisors and accountants. And these professional advisors, just like Mr. Perelman's own in-house team of experts, were there to provide advice to Mr. Perelman, to make sure he had input from many people, many sources for the purpose of making good decisions.

The names may not mean anything to you now, but during the trial, you will learn that Mr. Perelman had the best in the business at his beckon call. But make no mistake about it, when it came time to make a decision, there was one decision maker. That was Mr. Perelman. He owned the 100 percent. His employees, very successful employees, but they didn't get stock. They are employees. Mr. Perelman kept the stock. They never became owners. There was one stockholder, Mr. Perelman. There was one vote, his.

It probably won't surprise you to learn that, like a lot of very successful and creative

entrepreneurs, Mr. Perelman does things his own way. You'll learn that he's not somebody who operates in the details of businesses. He's not there designing lipstick for Revlon. He does a lot of things that might surprise you, in fact.

Like you'll hear at trial we predict he signs important legal documents without even reading them. He doesn't know very basic information about some of the companies he owns. But he does know how to make a good deal. It may be unconventional, but it works for Mr. Perelman. He's willing to do things that ordinary business people aren't willing to do. His willingness to take those risks has contributed to his enormous success. Sometimes he takes that risk against the advice of his more cautious advisors, more conventional people, but that's been one of the secrets of his success.

As you'll hear from Mr. Gittis, his long-time trusted advisor, Mr. Perelman doesn't always go for the safe choice. He's willing to take more risk than the people around him. This case we're involved in today involves just that kind of risk. Where his advisors saw problems

and risks, Mr. Perelman saw opportunity. When the proof is before you, you will conclude that, once again, Mr. Perelman is smarter than the experts.

To understand what made this deal so attractive to Mr. Perelman, why he was so eager to do it, you'll need to start by understanding how Mr. Perelman came to own Coleman. In 1989, he purchased through his holding companies 100 percent of the stock in Coleman. He then sold about 18 or 19 percent to other shareholders. He kept 81 or 82 percent.

By 1996, Coleman had some problems. By 1996 Coleman was $583 million in debt. And Mr. Perelman's holding -- Mr. Scarola talked about these billions of dollars worth of Coleman somebody talked about at the board meeting. Well, the way stock is really valued is what people buy and sell it for in the marketplace on the New York Stock Exchange. And in early February when Mr. Perelman was thinking about doing this deal, his holdings in Coleman had a market value, stock price value of about $600 million. So he's got a holding worth about $600 million in a company that has almost

$600 million of debt.

By the way, as the debt increased, Coleman's performance decreased. In 1995, Coleman made a profit, 35 million. By 1996, Coleman goes to a loss, goes to a loss of about $42 million. Mr. Perelman didn't sit still for that. Dissatisfied with Coleman's performance, he changed the management, brought back Mr. Levin, his turn-around expert in February 1997, with the objective of making Coleman profitable and sustainable.

But everybody at CPH knew it was going to be a long and uncertain road for Coleman. Its own executives predicted, and you'll hear this from testimony at trial that it might take five years or until 2002 to put the company back on its financial feet. The evidence will show you that Mr. Perelman wasn't interested in waiting that long. You'll see that he's a driven, high-energy guy, and he's not content just to go along.

By 1997, a few months later, Mr. Levin was under orders to see what could be done about selling Coleman or parts of Coleman.

Now let's be very clear about something.

Mr. Perelman may have been looking to sell Coleman, but he wasn't looking to go buy Sunbeam shares. He wasn't looking to become a Sunbeam shareholder.

Late 1997 Morgan Stanley acting as a financial advisor of Sunbeam approached Mr. Perelman' company, MAFCO, and tried to get them interested in an outright share purchase of the shares, to buy the company. MAFCO had no interest, and Morgan Stanley was told to go away.

Now you'll learn at this trial that companies and their advisors like Morgan Stanley regularly bring proposals to people like Mr. Perelman. There's a steady stream of salesmen waiting outside his door. Some he lets in the door to sit across the table in negotiation; some he never even opens the door to. Morgan Stanley was one of those salesmen. Mr. Perelman had done business with Morgan Stanley, just as he had done business with most of the established investment bankers. Sometimes they worked for his companies; sometimes they worked for the companies on the other side of the table. But for all the talk

about how Mr. Perelman respected and admired Morgan Stanley, he had no trouble telling them and anyone else if the deal wasn't to his liking. Mr. Perelman was not under some kind of spell cast by Morgan Stanley or any other investment firm. He was way too shrewd and too smart for that. He made his own decisions.

And one of those decision, ladies and gentlemen, was to look again at a Sunbeam deal. In December 1997, a large Sunbeam shareholder named Michael Krise (phonetic) made a call to Mr. Gittis. He wanted to suggest a different approach. This time they weren't asking Mr. Perelman for his companies to buy Sunbeam to spend money on it. He was asking Mr. Perelman to sell Coleman, the 82 percent stake in Sunbeam to Coleman. Different deal. It's important to remember the world looked different in 1997 than it looks today. Then Sunbeam was a high flier, by no means a blue chip firm.

Sunbeam had its admirers and Sunbeam had its detractors. The admirers said Al Dunlap was a tough decisive CEO unafraid to cut away corporate waste in order to trim companies down to their fighting weight benefit of

shareholders. There's a picture of Mr. Dunlap.

The detractors said that Mr. Dunlap was a cartoon and Sunbeam was a cartoon starring a character Chainsaw Al, a company whose financial results were assessed under a cloud.

You'll see Mr. Perelman had been curious about Mr. Dunlap. He had wondered how Chainsaw Al had managed to produce such great results. He asked Mr. Levin, his expert on consumer products like Sunbeam, to look at Sunbeam and report. So Mr. Levin did that. He looked at Sunbeam financial information that came straight from Mr. Dunlap. It didn't take long for Mr. Levin to see -- to hear the clock strike 13. The numbers didn't add up. What Sunbeam claimed didn't make sense to Mr. Levin. He told Mr. Perelman that he didn't understand what was going on at Sunbeam and that Chainsaw Al's way of doing business simply could not be successful over the long run.

So Mr. Perelman had done some homework even before he sat down to listen to what Sunbeam had to tell him. He had reason to be suspicious of any accelerated claims of Sunbeam turn-around. And what happened next gave him reason to be

even more suspicious. On December 18, 1997, after this call from Mr. Price to set up a meeting to talk about a possible purchase of Coleman by Sunbeam in return for Sunbeam shares, Mr. Dunlap and Mr. Perelman and some of their advisors met at Mr. Perelman's house in Palm Beach for the first time to discuss a potential deal. And ladies and gentlemen, you will see in the evidence at trial, this may be the only time Mr. Perelman had any direct contact with anybody from Morgan Stanley or Sunbeam between the time he thought about doing this deal and February 27, 1998 when he signed the deal.

They met at Mr. Perelman's house, and to put matters gently, things did not go well. They talked a little bit, and Mr. Dunlap became annoyed, became very volatile and explosive. He became so agitated, in fact, that Mr. Gittis was prompted to say, "Stop, Al. You're going to have a heart attack," or words to that effect, to which Mr. Dunlap replied, "I don't get heart attacks. I give heart attacks." And he laced into a stream of profanities that everybody in the room heard and burst out of the room.

It was not, ladies and gentlemen, I submit

to you, the kind of meeting that would have promoted trust and confidence between Mr. Perelman and Mr. Dunlap and his company. Still this wasn't about love. This was about money. More specifically, it was about stock.

You'll learn that Mr. Perelman was interested in getting some, and you'll learn why. You'll learn that Mr. Perelman wanted to get stock because, put simply, his very complex financial situation required it, because if he got a lot of cash, he had a whole series of deals with banks that might have required him to pay the cash that he got back to the banks. It might trigger tax liabilities. And so Mr. Perelman had a distinct preference to get shares, get stock which wouldn't cause those problems.

Stock was different. He could keep the shares, pay nothing to the banks, not create any tax liability or the extra tax liability cash would create and, again, the kind of transactions that have made him great, take that stock over the bank because it wasn't pledged, nobody got any interest in that stock except him, he took it over to the bank and said, I

have some fresh stock. The bank says, okay. The loan balance gets up to 500 million. He has $250 million in free cash for his use. Brilliant.

So January 23rd, 1998 a man named Bill Reid called to say Sunbeam was still interested in buying Coleman; was Mr. Perelman interested. That was even after this volatile explosive meeting that ended so badly. Is it going to be about business or emotion?

You'll learn, ladies and gentlemen, that this call from Mr. Reid, this was the only direct call made by Morgan Stanley to Mr. Perelman before Mr. Perelman signed the deal. And sure he was interested. He was interested in getting stock.

He instructed his negotiators, and you'll hear from some of them in the courtroom, to see what kind of deal they could make. The negotiators assembled an allstar team of advisors, investment bankers, let alone the Wall Street firm called First Credit Suisse, the very well-known firm, Wachtell Lipton. Have you ever heard the term lawyered up? He was lawyered up, bankered up, and he was accounted up if you can

call that a word. He had everybody. Sunbeam also fielded its own time.

So the negotiating table was set like this: You got these people across the table, their counterpart, they're opposed negotiators. On the Mr. Perelman side, he's got the principal of MAFCO with all his companies down below it, leading CPH, the plaintiffs in this case, and for purposes of this slide, his lawyer, Wachtell, his banker Credit Suisse, his accountants Ernst & Young. Their roles are on the table here.

On the Sunbeam side, you've got Sunbeam, Scadden -- that's another big law firm in New York -- Morgan Stanley, that's us, and Arthur Andersen. That's the accountants. So it's like the salt talks. You have these people there across the table and negotiating with one another. And from late January after this call on the 23rd until late February the two sides of the table hammered it out. They exchanged bargaining positions back and forth, back and forth across the negotiating table. And there were sessions where Sunbeam told the Perelman side what a great company Sunbeam was and what

great prospect it has.

But from the time negotiations started in late January of 1998 through February 27, 1998 when the deal was signed we expect that plaintiff will be unable able to point to any meaningful statement of either Sunbeam or Morgan Stanley that was made from the decision maker, Mr. Perelman, much less a statement of fact that caused him to do something he wasn't already going to do, in other words, something that he relied on.

Most important, no one on the Perelman side paid any attention to any statements about how great Sunbeam was, because they knew Sunbeam wasn't so great. What they cared about they checked into. And the rah-rah talk about Sunbeam's great turn-around, they ignored. You will know this because -- not because they say so but because actions speak louder than words.

You will learn in the ordinary course in these kind of transactions with people on each side of the table negotiating a deal, the parties get information, and if they care about that information, they do investigation of the things that matter to them. They don't have to.

There's no obligation for them to do so. But they typically go in and study the company from the inside. They kick the tires, if you will, on the company they're proposing to become an owner of. It's a little bit like taking a car to a mechanic before you buy it or having an inspection of a house before you buy it.

You will learn in this case there was no real effort whatsoever by Coleman (Parent) Holdings or its advisors to check into Sunbeam to see what was inside the company. There was a big room full of financial data about Sunbeam available at the office of Scadden, the law firm. Coleman was told to go look. Coleman (Parent) Holdings was told to go look. They didn't even bother to visit. CPH even told Sunbeam it didn't want or need to engage in the kind of due diligence the parties typically demand before signing a contract.

Now we get into late February. On February 23rd, in New York, the two sides had their most important meeting, the two sides of the table I just showed you. We expect you'll hear about that meeting. They hammered out the proposed deals. Sunbeam gave its pitch

regarding plans for the future. But the evidence will show you no one was paying attention. No one cared. Mr. Perelman wasn't even there. He's the one person who's making the decision. That's how interested he was in hearing a sales pitch by Sunbeam. On February 27, 1998, four days after the big meeting, CPH and Sunbeam made their deal. They signed a contract. And the contract contained the terms that the parties agreed to, including all these representations and warranties Mr. Scarola told you about.

But Mr. Perelman will testify, we submit, he doesn't even remember reading them. He's the one making the decision. And he'll also testify he didn't remember reading the SEC reports that supposedly were referenced in it. We submit you'll conclude whatever it was that was in that contract he can't have relied on it unless he read it, unless he cared enough to put his own eyes on it and consider it. None of the things Mr. Perelman now claims were so important, we submit the evidence will show, was even considered by the decision maker in making the decision to enter into this contract.

At the end of the day the evidence will show you that Mr. Perelman simply wasn't relying on anybody's sales talk. Now you may wonder, well, all these things were said; natural for people to rely. But you'll learn, ladies and gentlemen, in transactions like these there's more to it than meets the eye. Why didn't Mr. Perelman care? You will learn that the deal made sense for Mr. Perelman no matter what the true conditions of it was. And, two, he wanted to make a deal for this Coleman holding of his, and no one else was offering, there was no other deal to be had. It was a no-brainer.

Here's what you'll learn about that deal. Now you heard it before, this is a deal where for about $600 million worth of his Coleman stock market price in early February before the stock started to creep up on takeover, he was going to get almost $520 million of debt relief. Think about it right there. $519 million traded for $600 million of stock, not a bad deal on its own. But he also got 160 million in cash. That puts him over the top. Then he gets the shares. One thing you'll learn at this trial, those shares were not worthless. They were not

worthless. They were phenomenally valuable. First, to get this additional loan of $250 million, and, second, they had value on their own. This company continued to be a valid company for years after this transaction. And Mr. Perelman's team actually took over management of the company, and it included Coleman, this enormously valuable company that Mr. Scarola talked about so much in his opening. Coleman was merged totally into Sunbeam. There was value in that company.

The evidence will show you that this was the perfect deal for Mr. Perelman, as well as the only deal. He got as much cash as he could take without having to pay some banks. He got relief from a very large debt, took over a half billion of debt, wiped it clean, and he got the stock he wanted. Not because he was a believer in Sunbeam's turn-around story, because he wasn't. Mr. Levin knew that was hype. Mr. Gittis knew that was hype. Mr. Perelman, most of all, knew that was hype. But the stock still had value for him. It was still a deal that made sense. Sunbeam's words were not hidden from Mr. Perelman. He knew, among other red flags,

that for the last three months of 1997, right before this deal, Sunbeam had stunned Wall Street by missing projections for the fourth quarter. They reported they actually sold less than what were -- as they told they were going to sell. And that caused the stock price to drop about 10 percent or a tenth of the total value in a single day on January 28, 1998. This was just Mr. Perelman thinking about making this deal. Big problem. Stock price dives ten percent. Sunbeam missed its earnings projections. That's bad news.

Second, Mr. Levin had examined Sunbeam's financial statements. He told Mr. Perelman that the claimed results of Sunbeam were not credible. He warned Mr. Perelman to stay away, and he certainly warned him not to take any Sunbeam stock if he was worried about Sunbeam going down.

On February 23, 1998, the third and the single most important meeting, something you didn't hear about in Mr. Scarola's opening, on February 23rd, at this meeting Mr. Levin sitting there right at the meeting, because Mr. Perelman wasn't, Sunbeam came right out and told

Mr. Levin and other representatives of the plaintiff that they weren't making their expectation, that their January and February sales were slow; they weren't going to make their numbers; they weren't going to make their earnings figures either thought Mr. Levin. He made lots of remarks, came right out and said it. The stuff we're saying we can do we can't do. And Mr. Levin, ladies and gentlemen, the experienced turn-around artist for Mr. Perelman, his chief operating guy, he knew the Sunbeam story was a lot of seller's talk, and this is what we expect you'll hear him say in this courtroom.

What did you tell them? That I thought the sales and the income expectations of the long-range plan were quite a stretch, and I didn't think they were achievable.

This is Mr. Perelman's right-hand man telling him the Sunbeam numbers aren't going to happen, don't trust them. On March 19th, 1998, there's still time left for Mr. Perelman to back out of this deal if he thought there was a problem, having had warnings like this. Sunbeam came out and issued a press release. You'll

hear and see the press release at trial. That press release said, guess what? Just like the fourth quarter in '97, we're going to miss our targets again. We're going to sell less than we thought we were going to sell by a significant margin. The stock dropped another ten percent. More bad news in one day.

So did Mr. Perelman pause and ask to look at the financial? Did he ask to go look inside Sunbeam to see what was going on, which he had the right to do? No. He plowed ahead because he didn't care. You'll see, ladies and gentlemen, that the information you care about, when a person cares about it, that's information a person checks. And even though there was this bad news, Coleman doubted Sunbeam's results and representations, it wasn't important to Mr. Perelman because, again, like the financial mastermind he is, he had figured out a way to make money on this regardless of what was going on at Sunbeam. He didn't intend to rely on Sunbeam's talk and he didn't.

Mr. Gittis, ladies and gentlemen, we expect will testify in this courtroom he knew Sunbeam's stock price was inflated, meaning that there was

information out there that made the company look better than it was. It really wasn't worth as much as what the public shareholders thought. He and Mr. Perelman were also almost immediately aware of big problems at Sunbeam because in the weeks before the March 30 date when they actually made the sale final, they got reports from the field suggesting that when Sunbeam executives came to show up at the Coleman Company to talk about transition issues, they came with armed bodyguards. I mean, something strange was going on. They knew that, too.

Again, despite all these warnings, despite all this evidence that this is not something to be relied on, there was no effort to check to send any of those expensive, bankers' lawyers and accountants in to see what was going on. And that's because it didn't matter.

Mr. Perelman went forward and closed the deal on March 30 and took all those benefits of the deal because it was a good deal. And when the trial is over, we will ask you to consider the issue of personal responsibility and to ask whether Mr. Perelman should have the right to blame others for the decisions he and he alone

made. Mr. Perelman isn't someone who would, as you'll quickly confirm yourselves when you see him here in the courtroom. What he decided was based on the cold calculation of the benefits to be had in the deal, cash, debt relief shared -- we talked about how the shares had this particular value in terms of it being pledged and a vehicle for obtaining more cash from the bank. That's how he used them. He used those Sunbeam shares to get 250 million additional in cash. When you add it all up, then it winds up being a brilliant deal.

He took his Coleman shares, which were sort of languishing, and traded them for benefits close to a billion dollars even if the Sunbeam shares were worthless, and, of course, they were not worthless. But with the deal signed on February 27, there was still an obligation to do some checking. Now you'll hear Mr. Perelman had no obligation to investigate Sunbeam. But common sense will tell you if anything Sunbeam said had mattered to him, he would have checked it out. And if he checked and found a problem, he could back out of the deal.

Mr. Perelman wasn't interested in backing

out of the deal, and he wasn't interested in checking. From February 27 through March 30th, when the deal closed, he and his team, and that's a big extensive team of expert professionals, did virtually nothing to kick the Sunbeam tires. We submit that you will conclude, when all the evidence is before you, that Mr. Perelman went into the Sunbeam deal with his eyes wide open. He had knowledge of the facts from public and private information, resources and the right to get more. The contract provided it, and his team was ready and able to do it. He had control of the situation. If it was important to Mr. Perelman, he could make sure it was so before he signed anything or authorized somebody to sign something. But at this trial we expect Mr. Perelman to tell you he was powerless, deceived.

On April 3rd, just four days after the closing, four days after the shares are exchanged and the debt is wiped away and the cash goes, Mr. Perelman, we expect, will tell you he knew he'd been deceived.

Now consider that for a minute, ladies and gentlemen. Four days after closing, four days

after doing the deal Mr. Perelman knows he's been deceived. Why was he -- did he know he was deceived? Because on April 3rd 1998 Sunbeam issued yet another press release similar to the ones issued at the end of 1997 and for the March 19th basically saying they weren't going to make their results, they were going to be five percent lower on sales for the quarter, first quarter 1998 than they thought they were going to be. Mr. Perelman says now I know I'm deceived.

Mr. Perelman, unlike the similar information he ignored before closing, now he knows Sunbeam is lying to him and he's been a victim of a fraud. But you'll see that he didn't act like the victim of a fraud. Actions do speak louder than words. He didn't go back to Sunbeam four days later and say I want my shares back or I want to rescind this deal. He didn't give the cash back. He didn't ask for his half billion dollars in debt back. He didn't even try to get more information. Think of this. He thinks he's been deceived on April 3rd, and, yet, he doesn't even go and try to learn more from the company about what's going on.

In fact, what he did do, you'll learn from the evidence, is the following: In May, another month later, there's a Sunbeam shareholder's meeting. That's where the shareholders have to vote on things having to do with the company. And Mr. Perelman gives to Mr. Dunlap, the man who now has cheated him, his proxy or the right to vote his shares. Mr. Perelman entrusts Mr. Dunlap with the right to vote his 14.1 million shares. And that's almost 50 percent of the company. That's what you do with the person who's deceived you. Clearly, Mr. Perelman didn't think at the time he had been deceived by anybody. We submit you will conclude as well that's not a plausible story from Mr. Perelman when you hear it.

On June 15 after Mr. Dunlap was fired Mr. Perelman didn't go running from Sunbeam. On the contrary, he was instrumental in helping place Mr. Levin, his own trusted operating executive, back at the helm of Sunbeam as the chief executive officer. Within days Mr. Levin will tell you he and Mr. Perelman knew all there was to know about what was going on inside Sunbeam, all of the problems. No secrets. On

August 12, now firmly in control of Sunbeam, again, Sunbeam plus Coleman, the company transferred, with full knowledge of everything going on inside Sunbeam, through Mr. Levin, Mr. Perelman promised Sunbeam he would keep his shares an additional three years. He increased his position in Sunbeam, locked himself in with full knowledge that the company had previously falsified its financial records. And for the rest of that year and for almost three years afterwards Mr. Perelman's team, his hand-picked team made all the decisions for Sunbeam. It was their company to run and they ran it.

And over that three-year period as the largest shareholder of the combined Sunbeam/Coleman Company, Mr. Perelman and his team had the power to make every decision, he had many chances to extricate himself from Sunbeam if he chose. You'll learn about this at the trial. But he didn't drag it out. He got farther in.

Again, you'll see Mr. Perelman was in control. He was doing something he knew how to do. Sunbeam had the chance combined with Coleman to take a highly profitable company for

Mr. Perelman. That's what he and Mr. Levin thought. They used the scandal to their advantage to get control of the company, and that was all consistent with the bargain Mr. Perelman had made in February of 1998.

But after almost three years of the Perelman team in control, Sunbeam, which don't forget now includes this hugely valuable Coleman Company, wasn't a profitable company. We submit when you see the evidence, you won't find a basis for blaming anyone other than the people who ran it, Mr. Levin and the others on the hand-picked team. They had a chance to make a go of it, and they couldn't make a go of it after many years, after several years. And the result, Coleman filed for bankruptcy. I'm sorry. Sunbeam filed for bankruptcy in 2001.

The failure of Sunbeam, we submit to you, ladies and gentlemen, had nothing to do with what Mr. Scarola spent so much time talking about with you, but had to do with independent reasons, consequences of choices management made and just general market forces that made it tough for this kind of company to make a go of it.

Two years later, two years later after Sunbeam collapsed, after three years of management from the Perelman team Mr. Perelman started this lawsuit against Morgan Stanley. And that's what's lead us to this courtroom today.

This is what we think the evidence will prove. When you line it up against those elements C and D and the case is all over, we think you'll see it like this: Mr. Perelman did not rely. He wanted Sunbeam stock. He didn't rely on the sales pitch. He ignored his advisors who told him to avoid Sunbeam. He ignored the bad news that was out in the public about Sunbeam. He had the right to check if it was interesting to him or important. He didn't check. And when the problems became public and known, he knew all about it, he increased his Sunbeam holdings and dove in deeper. He had his own reasons for the deal, which had nothing to do with what Morgan Stanley and Sunbeam were pitching.

There was nothing about the seller's talk that he could have relied on. His trusted advisors looking conventionally said Sunbeam

looks like a problem. But, again, like the creative businessman he is, Mr. Perelman saw a lemon and saw lemonade. He saw a way to make Sunbeam into a vehicle for what he wanted to do.

We could know a lot more about Mr. Perelman's reasons for entering into this Sunbeam deal, for doing what he did in 1998, but the people who worked for him knowing fully that litigation was on the horizon erased the e-mail backup tapes that had all that evidence. So we have almost none of the CPH e-mail in evidence to show you. But that lack of evidence, our inability to get that e-mail evidence because it was wiped off the backup tapes by the Coleman employees shouldn't stop you for one minute. We think that you will conclude from the evidence you will see in here that Mr. Perelman can not establish that he entered into the Sunbeam deal because of what Sunbeam or Morgan Stanley said. And that means he can't prove reliance. And that should be the end of the case.

Here, as in many other deals, Mr. Perelman made his own decision for his own reasons. But even if you were to find that Mr. Perelman relied, he still won't be able to establish

damages resulting from his claimed reliance on Sunbeam or Morgan Stanley. The benefit of his bargain was exactly what he got. He asked for stock even when his own team told him to take cash instead. He bargained for 14.1 million shares of restricted stock that could not be sold right away. That locked him in for a period of time. If his bargain of the stock was worth a specific price, he had lots of ways to make that happen. You'll learn about them at trial.

There are things you can put in a contract to say, all right, if you want to make sure you get a $600 million value out there, things can be done in the contract to make sure you get that value out, like collars or puts. You'll learn about some of the puts or topping up provisions to give you more shares.
Mr. Perelman didn't do any of them. That was his decision. He chose to ride the stock up or down. The stock lost its value three years after Mr. Perelman knew everything about the problem, after his team had taken over management of the company, after his chosen managers had put the company into bankruptcy.

Morgan Stanley can't be blamed for that. When the evidence is all before you, we submit that you will conclude that no one got the better of this deal than Mr. Perelman. Mr. Perelman and the Sunbeam deal -- no one got the better of Mr. Perelman in the Sunbeam deal. Morgan Stanley was not some Pied Piper. Mr. Perelman wasn't one of the children of Hamlin being lead against his will out of town. He looked past the sales talk, paid no attention to it, didn't bother to check it because it didn't matter to him. He wasn't relying on it. He looked to where the value was and acted quickly and decisively, and in the process he made a good deal.

Now he comes to this court looking to you to give him a better deal, to add terms to the deal he could have negotiated for, could have insisted upon but probably at a price. Because there's always a price to more terms in a business deal.

Mr. Perelman, you will see, is a very good negotiator. We will ask you to conclude when the case ends that he doesn't need your help in making his negotiations. He chose this and he's

not saying he wants to get out of it. He's happy to take the benefits he got, maybe a billion dollars worth so long as he can get even more through this case.

We think you will find when Judge Maas instructs you and you apply the facts of the law that that's not right, not fair, and that's not permitted under the law as Judge Maas will give you. If you follow her instructions and look carefully to the facts, we submit that you will rule for Morgan Stanley.

Let me end where I started. This case is about elements C and D. You're going to hear a lot about A and B anyways. Don't let it distract you. Maybe you remember the questions I asked you during voir dire. Can you be fair in elements C and D? Will you let your minds be prejudiced by the bad facts Judge Maas will read to you? Each one of you looked me in the eye and said, yes, I can do that. Yes, Mr. Hansen, I believe your client should have a fair trial on those issues, even though I have to accept as true that Morgan Stanley and Sunbeam were lying to Coleman or were in a conspiracy to lie. We're not asking you to condone that. We don't

condone that.

By the same token, Mr. Perelman doesn't deserve a windfall. He can't prove he relied, suffered damages from those lies. So when the case is over we will submit to you, ladies and gentlemen, he will have no right to a verdict. That's a lot to ask of you, but we're counting on it. Thank you for your time and attention.

THE COURT: Thank you, Mr. Hansen.

MR. SCAROLA: May we approach the bench, Your Honor?

THE COURT: Yes.

SIDE BAR CONFERENCE:

THE COURT: Yes, sir.

MR. SCAROLA: There is one statement that I would like to address before the jury is allowed to go for the day. It is the statement which Mr. Hansen said, quote, "I came in at the last minute." That statement was, one, an appeal to sympathy that was entirely improper and, two, absolutely false.

I request that the court instruct the jury that the statement was not accurate and that

IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 79

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Wednesday, April 20, 2005

Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

1:25 p.m. to 5:00 p.m.

Sunbeam or Morgan Stanley how much they had actually sold in 1998?

A. We were told at that meeting on February 23rd --

Q. You weren't at the meeting, were you, Mr. Perelman?

A. We being the company.

Q. I'm asking you personally.

When did you pick up the phone to call Sunbeam or Morgan Stanley to ask for actual information about sales through February?

A. I did not.

Q. Mr. Perelman --

A. But I didn't talk to Sunbeam about anything.

Q. Did you use e-mails in 1997, 1998?

A. No.

Q. Did anybody in your organization use e-mails?

A. I don't believe so.

Q. So there was nobody within MacAndrews and Forbes as far as you knew who used a computer to send messages to other people?

A. I don't believe so.

Q. Not a single person?

A. I don't believe so.

Q. Are you aware that MacAndrews and Forbes had an e-mail backup system?

A. No.

Q. Do you know whether that backup system was maintained?

A. No.

Q. Do you know if there were tapes that contained e-mails that were erased?

A. Couldn't have been e-mails because we never used e-mail. I never used an e-mail.

Q. Are you sure that there were never e-mails at MacAndrews and Forbes?

A. I said I never used an e-mail.

MR. SCAROLA: Pardon me, Your Honor, beyond the scope of direct examination.

THE COURT: Overruled.

BY MR. HANSEN:

Q. Is it your testimony, Mr. Perelman, that there could be no e-mails at MacAndrews and Forbes?

A. There could be no e-mails from me at MacAndrews and Forbes.

Q. You're the boss, right?

A. Yes.

Q. Are you aware, Mr. Perelman, that at MacAndrews and Forbes at your offices in New York there

were e-mail backup tapes in 1998?

A. I don't know that.

Q. You're not aware there were any such thing?

A. No.

Q. It's never come to your attention that there were at one time backup tapes that contained e-mails?

A. No.

Q. You had no information about that whatsoever?

A. I don't know anybody in our organization that uses e-mail. I don't. I know Mr. Gittis doesn't.

Q. Would you be surprised to learn that there were such backup tapes that were erased?

A. I don't know who they could be for. No senior executive uses e-mail in our company.

Q. There would be no reason to erase backup tapes at MacAndrews and Forbes if there was no e-mail to erase, correct?

A. I don't know what they were for.

Q. Did you ever, as head of the organization, issue instructions to your organization that all records pertaining to something that might be a litigated matter would be maintained and preserved?

A. I made no such instructions about that to anybody, no.

Q. Mr. Perelman, let's go back to our calendar. The board meeting is the next day after you get the two documents you told us about. Who was on the Coleman board?

A. I can't recall specifically.

Q. It was the board of the company you owned 82 percent of, correct?

A. Yes.

Q. Do you remember some names?

A. I know Vernon Jordan was on.

Q. Vernon Jordan or his wife Ann?

A. Maybe Ann.

Q. As between the two of them, can you tell us which it was?

A. I think maybe Ann. If you'd give me a list of the board, it would make it much easier.

Q. Okay. Just off the top of your head, you couldn't tell us who is on the board of this company?

A. No.

Q. Even though you owned 82 percent of it?

A. That's correct.

Q. Is that because you had so many other things going on, it --

A. It's because at 62 years old your memory is not as good as it was 10 years ago.

IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 74

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Monday, April 18, 2005

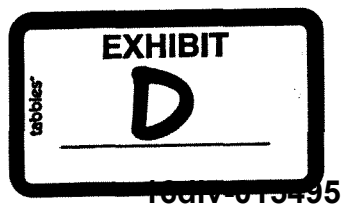
Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

1:25 p.m. to 5:35 p.m.



format to the other members of the team.

Q. You don't recall when you started using e-mail; is that correct?

A. No.

MR. WEBSTER: May have I a moment, Your Honor?

THE COURT: Uh-huh.

MR. WEBSTER: No further questions, Your Honor.

THE COURT: Thank you.

Mr. Markowski.

REDIRECT EXAMINATION

BY MR. MARKOWSKI:

Q. Mr. Nesbitt, did you ever use e-mail to communicate with Mr. Perelman on the Sunbeam transaction?

MR. WEBSTER: I'm sorry. I can't hear.

BY MR. MARKOWSKI:

Q. Mr. Nesbitt, did you ever use e-mail to communicate with Mr. Perelman in connection with the work on Sunbeam?

A. No, I did not.

Q. Did you ever use e-mail to communicate with Mr. Gittis in connection with your work on Sunbeam?

A. No, I did not.

Q. Did you ever use e-mail to communicate with Mr. Maher in connection with your work on Sunbeam?

A. I'm not sure.

Q. Did Mr. Maher personally use e-mail?

A. No, he did not. And I don't believe he does now.

Q. Mr. Webster asked you some questions about when the 10-K for 1997 was filed. Do you recall that?

A. Yes.

Q. He didn't show you a copy of the 10-K from 1997, did he?

A. No, he did not.

MR. MARKOWSKI: Your Honor, we move into evidence CPH Trial Exhibit number 1337. It's Sunbeam's 10-K for fiscal year 1997.

THE COURT: Any objection?

MR. WEBSTER: No objection.

THE COURT: So that item will be in evidence.

(Plaintiff's Exhibit 1337 was marked in evidence.)

MR. MARKOWSKI: I'm afraid we're short on copies, Your Honor.

THE COURT: In the meantime, I can work without it.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO. 2003CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.'S RESPONSE IN OPPOSITION TO MORGAN STANLEY'S MOTION TO QUASH CPH'S NOTICE TO PRODUCE FOR *IN CAMERA* INSPECTION *INSTANTER*

CPH's notice to produce is a result of testimony given by James Doyle at his recent deposition, during which he testified to various documents addressed in the Court's March 2, 2005 Order, which were reviewed by Kirkland & Ellis but withheld on responsiveness grounds. According to Mr. Doyle, somewhere between 3 and 100 documents were withheld as non-responsive. *See* Ex. A at 37-39. Because CPH has questions about Morgan Stanley's discovery compliance efforts, in its notice to produce, CPH sought to have the documents previously reviewed and withheld as non-responsive reviewed by this Court *in camera* to determine whether the documents were properly withheld. Morgan Stanley's objections to this notice to produce are without merit.

First, Morgan Stanley objects to the notice to produce on the ground that the notice seeks documents withheld on responsiveness grounds "generated on or before May 1, 2002" while the March 2 Order dealt with documents "made on or after May 1 of 2002." Morgan Stanley characterizes the notice as an attempt to engage in an end-run around the March 2 Order, but in fact, there was a simple mistake in the notice. The notice intended to track this Court's March 2,

2005 Order, and thus, CPH respectfully requests that the notice be deemed amended to request documents withheld on responsiveness grounds that were generated on or after May 1, 2002.

Second, Morgan Stanley's objection on the ground that the definition of Morgan Stanley is broader than it is in CPH's first request for production confirms the need for Morgan Stanley to produce further information for *in camera* review. Morgan Stanley obviously is narrowly construing the definition of the term "Morgan Stanley" in an effort to deprive CPH of relevant evidence. Morgan Stanley's tactics should not be countenanced by the Court.

Third, Morgan Stanley lastly contends that the notice to produce is improper because the notice does not seek evidence that is admissible at trial. That, however, remains to be seen following this Court's *in camera* inspection. Morgan Stanley should be required to produce the documents pursuant to CPH's notice to produce promptly so that this Court can determine whether there are responsive and admissible documents to be produced to CPH.

Dated: April 22 , 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 22nd day of April, 2005.

JEFFREY T. SHAW

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IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

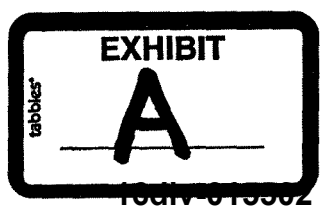
MORGAN STANLEY & CO., INC.,

Defendant.
/

VIDEOTAPED DEPOSITION OF JAMES DOYLE

Taken before Tracey S. LoCastro, Registered Professional Reporter, Notary Public in and for the State of Florida at Large, pursuant to Notice of Taking Deposition filed by the Plaintiff in the above cause.

Sunday, April 17, 2005
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida
10:10 a.m. to 11:30 a.m.



A. My recollection is that Wachtell Lipton was representing Morgan Stanley and Co. and Morgan Stanley Senior Funding in connection with the Sunbeam bankruptcy, including an adversary proceeding that was brought against Morgan Stanley and Co. and Morgan Stanley Senior Funding.

To the best of my recollection, Shearman & Sterling was assisting in responding to third-party subpoenas served upon Morgan Stanley in connection with certain bondholder litigation.

COURT REPORTER: Certain bond?

THE WITNESS: Bondholder litigation.

COURT REPORTER: Thank you.

BY MR. SCAROLA:

Q. When did you first become aware of the entry of the March 2nd, 2005 order?

A. March 2nd.

Q. I'm going to hand you a copy of that order, which we will mark as Exhibit number 1 to this deposition.

(Plaintiff's Exhibit 1 was marked for identification.)

BY MR. SCAROLA:

Q. When and under what circumstances did you first receive any assignment with respect to compliance

with this order?

A. On March 2nd.

Q. Who gave you the assignment?

MR. IANNO: Object to form.

THE WITNESS: I took it upon myself.

BY MR. SCAROLA:

Q. And what did you take it upon yourself to do?

A. After having conversations with Mr. Ianno of Carlton Fields, I contacted my inhouse colleagues in the law division, whom I understood were responsible for litigation subpoenas, regulatory matters involving Morgan Stanley and Co., Incorporated, to inform them of the order. In addition, I contacted law firms whom I understood represented Morgan Stanley and Co., Incorporated in connection with litigation and regulatory matters within the responsive time period.

Q. Which inhouse colleagues did you contact?

A. To the best of my recollection, James Cusick, Sumi Lee, James Mangan, M-A-N-G-A-N, Zachary Stern, Mark Greenfield, Katherine Alprin, Ron Columbo, Mary Lou Peters.

I also contacted Debra Roth, Ann Cooney. And I also spoke with a member of compliance, Lillian Tartamella.

Q. Spell that last name for us, please.

A. T-A-R-T-A-M-E-L-L-A.

Q. Were your communications with each of those individuals the same?

A. No.

Q. Were your communications the same with any groups of those individuals?

A. Just to amend my prior answer as well, I think I also spoke with John Plotnick and Dan Balacek, B-A-L-A-C-E-K.

Q. Could we go back to my question now, and tell us, if you would, please, whether your communications were the same with any groups of those individuals whom you've now identified?

A. Yes.

Q. Can you first identify the groups? And you needn't do it by name if it is easier to do it by some other common trait that they share.

A. Well, I sent an e-mail to the individuals who work in the group that handles litigation primarily for Morgan Stanley and Co., Incorporated. And then I had follow-up conversations with them and others.

Q. Were those communications, other than e-mail communications, face-to-face communications or telephone communications?

A. They were both.

Q. Did you have any form of communication apart from e-mail, face-to-face, and telephone?

A. Not that I recall.

Q. What was the message that you conveyed to those individuals whom you've identified?

A. To collect documents responsive to the notice to produce served on us by Coleman (Parent) Holdings subject to the time limitation I understood in the Court's March 2nd order.

Q. And that time limitation would be documents that were created on or after May 1, 2002; is that correct?

A. I believe the time limitation was May 1st, 2002; whereas, the original notice had a time period from 1999, to the best of my recollection.

Q. And what kind of documents did you instruct these individuals to collect?

A. I believe that the notice was for -- the notice to produce was for notices made by Morgan Stanley and Co., Incorporated that first -- forgive me, because this is by memory -- described any limitation on Morgan Stanley and Co.'s ability to produce e-mails, and the second was concerning any newly found e-mail backup tapes.

Q. Was the instruction to gather only those communications that originated with Morgan Stanley and Company, Incorporated?

A. I believe the instruction tracked the language in the notice to produce.

Q. What was your intent --

MR. IANNO: Object to form.

BY MR. SCAROLA:

Q. -- in terms of the nature of documents to be gathered?

A. My intent was to gather documents, to gather notices by Morgan Stanley and Co., Incorporated regarding those two subject matters.

Q. Your intent, therefore, was to gather communications that originated with Morgan Stanley and Co., Incorporated and not to include communications directed to Morgan Stanley and Co., Incorporated; is that correct?

A. That was my understanding of the scope of the notice.

Q. Did that understanding ever change?

A. No.

Q. Did your directions ever change?

A. No, except in one instance.

Q. And what is that one instance?

A. I do recall that counsel for the Plaintiff had requested certain documents that were referenced in documents that had been produced by Morgan Stanley. And so we gathered those documents that were specifically requested and produced them to Plaintiff.

Q. Those were communications that originated with the Securities and Exchange Commission directed to MS and Co., Inc.?

A. That's my recollection.

Q. So --

A. There may have been others, but that's what I recall.

Q. The production effort then was limited to documents that originated with MS and Co., Incorporated on or after May 1, 2002, and the single exception to that was communications that originated with the Securities and Exchange Commission?

MR. IANNO: Object to form. Misstates testimony.

BY MR. SCAROLA:

Q. Is that correct?

MR. IANNO: Misstates his testimony.

THE WITNESS: The collection was with respect to notices made by Morgan Stanley concerning the two topics referenced in notice

to produce, with the exception of when Plaintiff's counsel requested specific correspondence, we accommodated that request.

BY MR. SCAROLA:

Q. It appears to me that you have very carefully, except with respect to the last answer that you have given, referred to the entity on whose behalf you were collecting documents as Morgan Stanley and Co., Incorporated.

Were you, in fact, limiting your production efforts to documents that related with that Morgan Stanley subsidiary only?

MR. IANNO: Object to form.

You can answer.

THE WITNESS: My understanding from the definitions provided by Plaintiff with respect to the first request for documents in this case is that Morgan Stanley and Co., Incorporated, which was the entity listed in the notice to produce by Plaintiffs, was defined to include Morgan Stanley and Co. and its subsidiaries and divisions.

There may have been additional -- there may have been additions to that definition, but that's what I recall.

BY MR. SCAROLA:

Q. Okay. My question, however, did not relate to what your understanding was. My question related to what your actions were.

Did you limit your efforts to gather documents in response to the March 2nd, 2005 order to documents that originated with Morgan Stanley and Co., Incorporated?

MR. IANNO: Object to form.

THE WITNESS: Pursuant to the notice to produce and the Court's order, we collected documents or collected notices by Morgan Stanley and Co., Incorporated.

BY MR. SCAROLA:

Q. And how did you define Morgan Stanley and Co., Incorporated for purposes of your document gathering efforts?

MR. IANNO: Object to form.

THE WITNESS: With respect to the initial document collection efforts, we defined Morgan Stanley and Co., Incorporated to be Morgan Stanley and Co., Incorporated.

After Plaintiff's counsel had raised concerns that Morgan Stanley and Co. had not produced all documents responsive to the March

2nd order, we then went out again with both our inhouse colleagues as well as outside firms to have them recheck their files and reconfirm that they had produced everything that was responsive to the March 2nd order, or did not have any documents responsive to the March 2nd order. And in those communications we reiterated the definition of Morgan Stanley and Co., Incorporated that was reflected in the Plaintiff's first request for documents in this action.

BY MR. SCAROLA:

Q. As you understand that definition of Morgan Stanley and Co., Incorporated, did it include any parent or sister entities?

A. No.

Q. You told us earlier that you contacted law firms that represented MS and Co., Incorporated in your efforts to gather documents responsive to the March 2nd, 2005 order. Identify each of the law firms that you contacted, please.

A. I don't recall every one. I believe we contacted somewhere between 60 and 70 law firms. It could have been more. But to the best of my recollection, we contacted Kirkland & Ellis; Shearman &

Sterling; Wachtell, Lipton; Cravath, Swaine & Moore; Baker & Botts; Greenberg Traurig; Proskauer Rose; Davis, Polk, Wardell; Winston & Strawn; Sullivan & Cromwell; Straddling, Yocca; Richard Latenfinger. Actually I don't recall Richard Latenfinger. I recall one Delaware firm because I recall communications with Gil Sparks.

Robus and Gray. Clifford Chance. Sonnenschein, Nath & Rosenthal.

Gibson, Dunn & Crutcher. Christensen, Miller.

There were others, but those are the ones I recall off the top of my head.

Q. How did you go about identifying the law firms to be contacted?

A. I had asked my secretary and two legal assistants in our group to review the logs that are used to record and keep track of litigation for Morgan Stanley's institutional securities group, which is the group that covers predominantly litigation for Morgan Stanley and Co., Incorporated. I had asked them to go through those logs and identify the cases and the attorneys that represented Morgan Stanley and Co. during the original responsive time period in a simple list for Carlton Fields.

I do recall McDermott, Will and Emery as another firm that was contacted.

Q. Do those logs include matters other than pending civil litigation?

A. They do.

Q. What is the nature of the other matters included within the logs?

A. Regulatory investigations.

Sidley Austin was another firm that was contacted. I'll probably remember these as we go through the course of the deposition.

Q. How did you contact those firms?

A. By e-mail.

Q. Were the e-mails sent to each of the firms the same?

A. Yes, I sent one e-mail to all the firms that I identified.

There were follow-up e-mails when we received returns from wherever that said we had put in the wrong address or the address wasn't recognized. So then research was done as to the correct e-mail address of the attorneys, or if attorneys had moved firms, they were contacted as well. So they may not have received the original e-mail, but received a follow up e-mail.

Q. Did you forward a copy of the May -- excuse

me, the March 2 order along with your e-mail communication?

A. No.

Q. Did you forward a copy of the description in the request to produce of MS and Co., Inc. along with your e-mail communication?

MR. IANNO: Object to form.

THE WITNESS: My recollection is that the first e-mail that was sent out said Morgan Stanley and Co., Incorporated. Subsequent -- in a subsequent e-mail, we included the definition that was in the Plaintiff's first request for production of documents.

BY MR. SCAROLA:

Q. How did you request that those with whom you were communicating respond to you?

A. I asked that they respond directly to Kirkland & Ellis with a courtesy copy to me.

Q. Did your request include both a -- did your request include that you be notified both with regard to positive and negative responses?

A. I don't recall exactly what the e-mail said.

I requested -- I do recall requesting to be copied on all responses.

My understanding is that Kirkland & Ellis,

in follow-up, was that the firm obtained either a positive or negative response, if I understand what you mean by positive and negative correctly.

Q. By that I mean, did you ask these firms to notify you that, in fact, they had conducted a search of their files and that that search had either produced or failed to produce responsive documents?

MR. IANNO: Object to the form.

And ask the witness be careful and limit yourself to your understanding and not any communications you've had that are privileged.

THE WITNESS: My understanding was that Kirkland & Ellis was obtaining either a response that the firm had produced potentially responsive materials and all potentially responsive materials to Kirkland & Ellis or that they indeed had no responsive materials.

BY MR. SCAROLA:

Q. Who is the individual at Kirkland & Ellis who was designated to receive such responses?

A. The original e-mail I believe designated Michael Jones to receive the responses.

I understand that Paul Bohr, B-O-H-R, was designated as the individual who would follow up with the various law firms.

Q. Were responses received from all law firms with whom you communicated?

A. That was my understanding.

Q. And how did you get that understanding?

MR. IANNO: Object to form.

You can answer how you got it, but do not disclose any communications.

THE WITNESS: My understanding was based on communications with counsel.

BY MR. SCAROLA:

Q. With whom?

A. Kirkland & Ellis.

Q. Who in particular?

A. Paul Bohr.

Q. When did you receive confirmation that all those with whom you had communicated requesting a response had responded?

A. I don't recall the exact date, but it was on or prior to March 12th of 2005. But I don't recall the exact date.

Q. I want you to assume that in one or more cases document requests were made of Morgan Stanley as opposed to Morgan Stanley and Company, Incorporated and that Morgan Stanley was defined in those document requests to include all of its subsidiaries and that

Morgan Stanley answered such document requests on its own behalf and on behalf of its subsidiaries.

Would the efforts that you made to gather documents responsive to the March 2nd order have resulted in the production of any such response made by Morgan Stanley, but encompassing a response on behalf of Morgan Stanley and Company, Incorporated?

MR. IANNO: Objection to the question. Improper hypothetical. This witness is not an expert. And calls for speculation.

You can answer if you can.

THE WITNESS: Mr. Scarola, can you repeat the question?

MR. SCAROLA: Sure.

BY MR. SCAROLA:

Q. Assume that Morgan Stanley -- as opposed to Morgan Stanley and Company, Incorporated -- was the recipient of a document request and that in that document request Morgan Stanley was defined to include all of its subsidiary entities.

Assume that Morgan Stanley responded to that document request on its own behalf and on behalf of its subsidiaries and that the response would have fallen within the scope of the March 2nd order.

Would the request that you made to gather

responsive documents have resulted in the production of such a response made by Morgan Stanley, the parent corporation on behalf of Morgan Stanley and Company, Incorporated?

MR. IANNO: Same objection.

THE WITNESS: It may have. For example, based on the steps that we were taking to respond to the March 2nd order in the litigation that involves Morgan Stanley's institutional securities group, which primarily involves Morgan Stanley and Co., Incorporated, Morgan Stanley as an entity may have been named as a defendant as opposed to Morgan Stanley and Co., Incorporated, and the search was designed to gather those documents.

BY MR. SCAROLA:

Q. When you say that it may have, that would seem to indicate that it may not have. And under what circumstances do you believe that the production would not have included documents within the scope of a production request as I've described it?

MR. IANNO: Same objection.

THE WITNESS: Again, as I stated previously, the steps that we were taking in good faith to respond to the Court's order was to go out to

the attorneys who were handling litigation on behalf of Morgan Stanley and Co., Incorporated. I don't know if any documents that you're referring to that were not gathered that would be responsive, but those would be the steps that we took.

BY MR. SCAROLA:

Q. Would those steps have resulted in the production of otherwise responsive documents where the responding party was Morgan Stanley Dean Witter?

A. It would not have --

MR. IANNO: Object. I have an objection to form.

Go ahead and answer.

THE WITNESS: It would not have, unless it was a litigation involving Morgan Stanley and Co., Incorporated, but which had named Morgan Stanley Dean Witter, which I understand was the predecessor name of the parent company, or a variation of the predecessor name.

BY MR. SCAROLA:

Q. What did you do to prepare for this deposition today?

A. I met with counsel.

Q. Who?

A. Joe Ianno, Steve Molo, Brian Polovoy, Steve Cohen. Amy Newhart. Did I say Amy Newhart? Amy Newhart.

Q. Did you meet with any Kirkland & Ellis lawyers?

A. No.

Q. When is the last time you met with any Kirkland & Ellis lawyers in connection with this litigation?

A. Friday.

Q. With whom did you meet on Friday?

A. Thomas Clare.

Q. Where did you meet Mr. Clare?

A. In this building.

Q. Have you communicated with or met with other Kirkland & Ellis lawyers besides Mr. Clare over the course of the time period since March 2nd?

MR. IANNO: I'm going to object to the form as outside the scope of this deposition. You're limiting it to the compliance with the March 2nd order pursuant to your agreement in court.

MR. SCAROLA: Not yet.

BY MR. SCAROLA:

Q. Your response?

A. Can I hear the question again?

(A portion of the record was read by the reporter.)

THE WITNESS: Yes.

BY MR. SCAROLA:

Q. Have any of those communications related to e-mail production issues?

MR. IANNO: Object to form. Outside the scope. Instruct the witness not to answer.

BY MR. SCAROLA:

Q. Have any of those communications related to compliance with the March 2nd order?

A. Yes.

Q. With whom have you communicated -- with which Kirkland & Ellis lawyers have you communicated regarding compliance with the March 2nd order, besides Mr. Clare?

A. I don't recall speaking with Mr. Clare concerning compliance with the March 2nd order.

Q. Who are the Kirkland & Ellis lawyers that you have spoken to regarding compliance with the March 2nd order?

A. To the best of my recollection, Paul Bohr, Michael Jones, Alex Dimitrief. Andrew Klubach. I think that's all I can recall right now.

Q. When is the last time you communicated with

Mr. Klubach concerning matters relating to this litigation?

MR. IANNO: Litigation or the March 2nd order?

MR. SCAROLA: Matters related to this litigation.

MR. IANNO: Object. Outside the scope.

You can answer as limited to the March 2nd order if that's what Mr. Scarola wants, but otherwise it's outside the scope of this deposition.

MR. SCAROLA: So you're instructing him not to answer --

MR. IANNO: For the litigation, but not for the March 2nd order.

BY MR. SCAROLA:

Q. Okay. When is the last time that you spoke to Mr. Klubach with regard to the March 2nd order, considering that I am limiting the question only pursuant to Mr. Ianno's instruction?

A. I don't recall the exact date, but it was on or prior to March 12th.

Q. When is the last time you communicated with Mr. Dimitrief?

MR. IANNO: Same limitation.

THE WITNESS: With respect to the March 2nd order?

BY MR. SCAROLA:

Q. My question includes everything. Mr. Ianno's instruction limits you to the March 2nd order.

A. With respect to the March 2nd order, it -- again, I don't recall the exact date, but it was on or prior to March 12th.

Q. When is the last time you communicated with Mr. Jones?

MR. IANNO: Same limitation. Understanding Mr. Scarola's question is broader.

THE WITNESS: With respect to the March 2nd order, I don't recall the date, but it was Easter Sunday.

BY MR. SCAROLA:

Q. When is the last time you communicated with Paul Bohr?

MR. IANNO: Same limitation.

THE WITNESS: I don't recall, again, the exact date, but it was either the Monday or Tuesday after Easter.

BY MR. SCAROLA:

Q. Did you review any documents in connection

with your preparation for the deposition today?

A. No.

Q. Have all documents responsive to the March 2nd order known to exist been produced?

MR. IANNO: Object to the form of the question.

THE WITNESS: I don't know. Based on the steps that we took to collect documents responsive to the March 2nd order, it's my belief we collected documents responsive. They were turned over to counsel. Anything that was responsive was produced. But is it possible that there are others? Yes. I'm not aware of any.

BY MR. SCAROLA:

Q. How many matters did you identify in which communications may have occurred responsive to the March 2nd order?

A. I don't recall the exact number. I do recall that when we had reviewed our litigation logs to identify the law firms and the cases in which Morgan Stanley and Co. was a party, that number exceeded 300, but I don't recall the exact number.

Q. And did that include both civil litigation matters as well as arbitrations and administrative

matters?

A. That list included litigation. I don't recall whether that list included arbitrations. It may have. It included regulatory matters.

Q. Did Mr. Kempf have any involvement whatsoever in efforts to respond to the March 2nd order?

A. Not that I'm aware of.

Q. In any of the instructions that you gave, either to the individuals that you identified as inhouse law division colleagues or in communications with any of the law firms with whom you communicated, did you place any limitations on the documents you sought to have produced?

MR. IANNO: Object to the form of the question. I think it calls for privileged information. Instruct the witness not to answer.

You can try to ask it another way that doesn't call for privileged information. But the way it's phrased...

BY MR. SCAROLA:

Q. Assuming that a written discovery response included general objections to production requests for e-mail, that such production would be overly

burdensome, did the nature of the request that you made for the production of documents encompass the production of such generalized responses?

MR. IANNO: Object to form.

THE WITNESS: My understanding is that such generalized responses were gathered.

BY MR. SCAROLA:

Q. Were they also produced?

A. My understanding is that certain ones were produced.

Q. Does that mean that certain ones were not produced?

A. That's my understanding.

Q. And on what basis was a distinction drawn between those that were and those that were not produced?

MR. IANNO: Object to the form.

You can answer if you know.

THE WITNESS: I actually have a privileged question. May I consult?

MR. SCAROLA: You are certainly entitled to do that.

THE WITNESS: Thank you.

MR. SCAROLA: We'll go off the record.

VIDEOGRAPHER: Going off the record at four

minutes after 11:00.

(A recess was taken.)

VIDEOGRAPHER: Going back on the record at twelve minutes after 11:00.

MR. SCAROLA: Tracey, would you read back the question?

(A portion of the record was read by the reporter.)

THE WITNESS: I don't know.

BY MR. SCAROLA:

Q. Who made the determination as to what would and would not be produced?

A. Counsel.

Q. Which counsel?

A. My understanding was Kirkland & Ellis.

Q. When was that determination made?

A. I don't know.

Q. Was it made before or after March 12th?

A. My understanding is Kirkland & Ellis made responsiveness determinations prior to March 12th.

Q. Have those determinations ever subsequently been reviewed by anyone else outside of Kirkland & Ellis?

A. I don't know.

Q. How did you learn that there were documents

produced in response to your requests which Kirkland & Ellis excluded from production to Coleman (Parent) Holdings?

A. My understanding is that there was a letter exchange between Kirkland & Ellis and Jenner and Block concerning generalized objections. And I have an understanding based on communications with Kirkland & Ellis that --

MR. IANNO: Well, just don't get into any communications with Kirkland & Ellis. It's privileged.

THE WITNESS: Okay.

BY MR. SCAROLA:

Q. How many documents were excluded from production? That is, how many documents were produced in response to the request that you made but not turned over to Coleman (Parent) Holdings?

A. I don't know.

Q. Have you personally ever reviewed any of the documents that were excluded for production?

A. Yes.

Q. Which documents excluded from production did you review?

A. I reviewed generalized objections submitted by one of my colleagues in the law division.

Q. Which colleague?
A. Ron Columbo.
Q. And to what matter did those documents relate, or matters?
A. I don't recall.
Q. How many matters did those documents relate to?
A. I don't know.
Q. Was it more than one?
A. Yes.
Q. Do you have any recollection at all as to the number of different matters to which those documents related?
A. I don't. It was more than -- it was more than two or three, but I don't remember.
Q. Less than 100?
A. I think it was less than 100, but I didn't count.
Q. More than 20?
A. I don't even know if it was more than 20. It could have been less. I just don't remember.
Q. Can you do any better than somewhere between three and 100?
A. I'm sorry, Mr. Scarola, I didn't count. It was, I think, less than 100, but it could have been

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S RESPONSE IN OPPOSITION TO MORGAN STANLEY'S MOTION TO QUASH NOTICE TO PRODUCE

Morgan Stanley has moved to quash the notice to produce that CPH served to obtain the time records and related information of Kirkland & Ellis, Kellogg Huber, and Shearman & Sterling. Morgan Stanley's motion is unfounded.

1. The Notice Seeks Relevant Information.

The notice seeks relevant information necessary to rebut the contention made by Morgan Stanley's current counsel, repeatedly in hearings before this Court and in proceedings before the jury, that they are new to this case and overwhelmed by this litigation because they are so understaffed. For example, on March 23, Morgan Stanley's current counsel represented that Kirkland & Ellis ethically could no longer represent Morgan Stanley (Ex. A at 5245):

> I can't speak to Morgan Stanley's motivation, I can only tell you that Kirkland & Ellis is trying its best to adhere to the ethical obligations that it has in this courtroom and in practicing law. And in doing so, they believe that they cannot, in light of what has been said here today, in light of what has been said last week, they cannot proceed and represent Morgan Stanley.

And on March 28, Morgan Stanley's counsel insisted that Kirkland & Ellis was not serving as counsel for Morgan Stanley "whether back at the office or here," that Kirkland & Ellis

had been "discharged," and that Kirkland & Ellis was doing nothing more than telling Morgan Stanley's current counsel where the boxes are (Ex. B at 5492-93):

> They're no longer counsel of nonrecord [*sic*]. They're not serving as counsel, either back at the office or here. There are consequences to that as an ethical matter. I don't understand them all, but my bottom line understanding is that there's a range of transition assistance that Kirkland & Ellis can provide, and they can go so far and no farther. That does not allow them to participate fully in assisting to defend this case. That means that we are in a position where while they can, for example, help us find things, direct us to boxes, they can't be lawyers in the case. They're no longer counsel. They've been discharged. So what I'm representing to the Court is as counsel of record for the last few days, I've had cooperation from Kirkland & Ellis about finding things, about getting the information, about where I could look for witness information and so on. I have not had the kind of assistance I get from a co-counsel from one who is providing professional judgment and services. It is my understanding — and, again, Mr. Hill will correct me if I am wrong — that I cannot expect such assistance, that the assistance will be provided willingly and cooperatively, but it will be a limited kind of assistance. And it will be plainly insufficient for me to become as capable as I need to become to defend this case.

Morgan Stanley's current counsel also represented that Morgan Stanley requested that the Kirkland & Ellis trial team remain in West Palm Beach, but that Kirkland & Ellis refused, stating that the representation has "terminated" (Ex. B at 5588):

> . . . Morgan Stanley requested that the entire Kirkland & Ellis trial team remain in the Palm Beach area to provide full out of court assistance to me and others who will be appearing in Court. Kirkland & Ellis, according to what I'm informed, has declined to do so to date saying that their representation has terminated.

Morgan Stanley's current counsel further insisted at a hearing on March 29 that he was coming in at the "last minute" (Ex. C at 5649-50):

> They see me appear from the wings. Basically, I have taken over as lead counsel at the last minute, and I'm not going to be as prepared as the other side. Will you hold that against me? Will you hold that against my client? . . . I think the jury is entitled to the truth. I am emerging from the shadows. It's as a consequence of Mr. Davidson going. I am not fully up to speed. I was not in a position to where I could take this on.

In further proceedings before the Court on April 4, after CPH discovered that a number of Kirkland & Ellis attorneys continue to be working on this case and disclosed that fact to the Court, Morgan Stanley's current counsel continue to insist that Kirkland & Ellis was providing only limited assistance such as by helping find boxes (Ex. D at 6466-67):

> Let me be clear. I never told the Court that every Kirkland & Ellis employee had left town. I told the Court that Kirkland & Ellis had withdrawn from representing Morgan Stanley, and is providing a transitional, limited, very much, to what they can do, finding our way to boxes, letting us know of what facts are aware. There are a limited number of employees from Kirkland & Ellis. Some of them were here over the weekend. It's not a large number . . . [I]t's a skeleton crew, and the second, it's very limited; our dealings with them are very limited.

Indeed, even during opening statements before the jury, Morgan Stanley's counsel attempted to portray themselves as beleaguered and out-numbered by the legions of CPH attorneys (Ex. E at 7109):

> As you know, my name is Mark Hansen. I represent Morgan Stanley in this case. As you know, I came into the case somewhat at the last minute, and I'm here to do the best I can to represent Morgan Stanley. With me on the defense side of the table, Mr. Rob Jones, Morgan Stanley; Mr. Joe Ianno, West Palm Beach; my colleagues, Mr. Webster, Miss Beynon and Mr. Cohen; and also Rob Ortiz back at the console table is going to try to keep me out of technological trouble. Together we will represent Morgan Stanley's side of the case.

Despite these repeated representations to the Court and to the jury, CPH has every reason to believe that far from being out-manned and out-numbered, Morgan Stanley in fact is enjoying the full assistance and support of attorneys and support staff from Kirkland & Ellis — and, in addition, from the law firm of Shearman & Sterling. Given the representations that have been made to this Court to the contrary, and the representations that have been made to the jury as well, CPH at a minimum is entitled to explore the roles that Kirkland & Ellis and Shearman &

Sterling have played and continue to play in this litigation. Morgan Stanley's motion to quash therefore should be denied.

2. Morgan Stanley's Arguments To The Contrary Are Without Merit.

Morgan Stanley makes three arguments in its motion to quash, none of which has merit.

First, Morgan Stanley argues that the notice is defective because it does not seek documents that are admissible at trial. That argument, however, is premature. Until CPH has the documents in question, it cannot be determined whether the documents in fact are admissible.

Second, Morgan Stanley asserts that the documents all are protected by the attorney-client privilege and work product immunity. In fact, however, information concerning the hours Kirkland & Ellis and Shearman & Sterling have worked and the identity and title of the individuals rendering services is not privileged. *See Brown Distributors of West Palm Beach v. Marcel*, 866 So. 2d 160, 160-62 (Fla. 4th DCA 2004) (affirming trial court's order to produce information concerning amount of time attorneys billed and how time was spent); *Finol v. Finol*, 869 So. 2d 666, 666 (Fla. 4th DCA 2004) (attorney billing information that does not reveal the mental impressions and opinions of counsel is not privileged and is therefore discoverable). Morgan Stanley's blanket objection on privilege grounds, without any substantiation of its privilege claims, clearly is improper.

Third, Morgan Stanley's third argument is that because CPH supposedly is not seeking the documents for use at trial, CPH must be merely seeking discovery. But, as shown above, CPH in fact is seeking the documents for use at trial and the admissibility of the documents is a

matter to be determined after they are produced to CPH. That production should occur without further delay.

Dated: April 22, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 22nd day of April, 2005.

JEFFREY T. SHAW

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IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

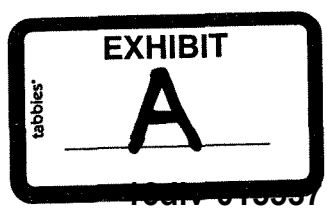
MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 46

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Wednesday, March 23, 2005
Palm Beach County Courthouse
Courtroom 11-A
205 North Dixie Highway
West Palm Beach, Florida 33401
9:45 a.m. to 2:00 p.m.



I can't speak to Morgan Stanley's motivation, I can only tell you that Kirkland & Ellis is trying its best to adhere to the ethical obligations that it has in this courtroom and in practicing law. And in doing so, they believe that they cannot, in light of what has been said here today, in light of what has been said last week, they cannot proceed and represent Morgan Stanley.

THE COURT: Thank you, sir. Mr. Warner, you get to go last.

MR. WARNER: On the theory that if you have a good point to make, you ought to be able to make it in five minutes or less and if you have no point at all you're going to speak for 30 or 35 minutes, I hope to be brief.

It seems to me Mr. Scarola made a lot of points, but the theme is: You've punished them already, these are bad people and we want you to punish them more.

It is clear they say they perceive no conflict and yet they were subpoenaing Mr. Davidson to testify at trial in regard to discovery, now they say, well, we're not going to do that now, but Mr. Kemp is still under

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

VOLUME 49

MORGAN STANLEY & CO., INC.,

Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Monday, March 28, 2005
9:35 a.m. - 12:10 p.m.

EXHIBIT
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16div-015539

MR. HANSEN: They're no longer counsel of nonrecord. They're not serving as counsel, whether back at the office or here. There are consequences to that as an ethical matter. I don't understand them all, but my bottom line understanding is that there's a range of transition assistance that Kirkland & Ellis can provide, and they can go so far and no farther. That does not allow them to participate fully in assisting to defend this case. That means that we are in a position where while they can, for example, help us find things, direct us to boxes, they can't be lawyers in the case. They're no longer counsel. They've been discharged.

So what I'm representing to the court is as counsel of record for the last few days I've had cooperation from Kirkland & Ellis about finding things, about getting me information, about where I could look for witness information and so on. I have not had the kind of assistance I get from a co-counsel from one who is providing professional judgment and services. It is my understanding -- and, again, Mr. Hill will correct me if I'm wrong -- that I can not expect

such assistance, that the assistance will be provided willingly and cooperatively, but it will be a limited kind of assistance. And it will be plainly insufficient for me to become as capable as I need to become to defend this case.

THE COURT: Mr. Warner, there was something you wanted to add.

MR. WARNER: Well, I think I'm required to point out to the court what I think is a mistake in assumption. Your question was or what you said was, well, I assume something to the effect that Morgan Stanley chose not to have Kirkland & Ellis proceed. I must point out to you that what was before you was a motion to withdraw on behalf of Kirkland & Ellis because of a conflict with their client. And I think we tried to do the best we could to explain to you and put on the record that that conflict required them to withdraw from the case. So it's not a matter of Morgan Stanley choosing whether they're going to still use Kirkland & Ellis or not. The matter was presented to you that there was a conflict. You granted the motion to withdraw by Kirkland & Ellis. They have withdrawn.

THE COURT: But the conflict -- you know, my

THE COURT: I appreciate that.

MR. HANSEN: I have some additional information pursuant to some of the things I said yesterday. Here's what I've now been told is the correct information.

THE COURT: Okay.

MR. HANSEN: As I said yesterday, I've had cooperation from Kirkland & Ellis about finding things, but I've not had the kind of assistance from co-counsel as one who is providing professional judgment services, and it will be plainly insufficient.

THE COURT: I don't know what it is. I can barely hear you. You might want to pull that podium forward. I guess there's no way to do it -- I want to make sure the court reporter hears you. Please try to speak up.

MR. HANSEN: I apologize. I can speak louder. However, as I also said yesterday, quote, "There are conversations that have occurred between Morgan Stanley and Kirkland & Ellis that I'm not privy to." That was the transcript, 5491. I have since been informed that Morgan Stanley's position is that it did not discharge Kirkland & Ellis, that Morgan

Stanley would give Kirkland & Ellis a waiver like the one that was requested by Kirkland & Ellis and that Morgan Stanley requested that the entire Kirkland & Ellis trial team remain in the Palm Beach area to provide full out of court assistance to me and others who will be appearing in court. Kirkland & Ellis, according to what I'm informed, has declined to do so to date saying that the representation has terminated. With that clarification, the result for me remains the same.

Just as I described yesterday and repeated a moment ago, the assistance that I'm receiving is not sufficient for me to become as capable as I need to become to defend the case.

THE COURT: Okay.

MR. HANSEN: That's the clarification.

MR. SOLOVY: Your Honor, I would just say we don't accept that representation. Even though Mr. Hansen -- we hear conflicting things. Unless we hear this directly from Morgan Stanley and Kirkland under oath, then there's no reason to accept this on the record.

THE COURT: I can appreciate that that would be plaintiff's position. As I understand what

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

VOLUME 50

MORGAN STANLEY & CO., INC.,

Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Tuesday, March 29, 2005
9:45 a.m. - 5:36 p.m.

EXHIBIT
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16div-01554

to go. We're rearguing things we don't need to.

MR. HANSEN: I was telling you why this is not a plea for sympathy. I'm trying to elicit biases and prejudices that will harm my client's interest. As I told Your Honor -- I won't give another long speech -- I am not going to be particularly effective in this trial. I'm going to be stumbling, not finding documents.

THE COURT: How is that different than saying to a jury, hey, I'm a really stupid lawyer; I hope you don't hold it against my client? Why does it matter?

MR. HANSEN: Lawyers often say things like that.

THE COURT: Do you think it's appropriate?

MR. HANSEN: Lawyers say please don't hold any mistakes I've made against my client. And right now we're in a situation extremely able adversaries who are going to be on top of everything. I'm not. I believe I'm entitled to explore whether the degree of my performance, and it's obvious --

THE COURT: That's different than planting in their minds why you may be unprepared.

MR. HANSEN: They see me appear from the

wings. Basically I've taken over at as lead counsel at the last minute, and I'm not going to be as prepared as the other side. Will you hold that against me? Will you hold that against my client?

THE COURT: Do we need to tell them you've taken over as lead counsel at the last minute or simply that you may not be as prepared as opposing counsel and are they going to hold that against you?

MR. HANSEN: I think the jury is entitled to the truth. I'm emerging from the shadows, and it's as a consequence of Mr. Davidson going. I am not fully up to speed. I was not in a position where I could take this on. Again, the voir dire privilege, I'm not trying to do anything -- you know, I'm not going to break down in tears, but I'm going to tell them or hope to elicit from them whether my stumbling around is going to make it hard for them to process the case.

Your Honor, I can tell you I've interviewed jurors after trials and asked the jurors what effect did it have, for example, when I didn't have as cool an Exhibit as the other guy and I

IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 55

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Monday, April 4, 2005

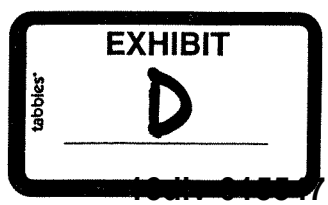
Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

9:30 a.m. to 12:10 p.m.



MR. HANSEN: As I advised the Court, his representation of what I told the Court and his representations of the facts. Let me be clear. I never told the Court that every Kirkland & Ellis employee had left town. I told the Court that Kirkland & Ellis had withdrawn from representing Morgan Stanley, and is providing a transitional, limited, very much, to what they can do, finding our way to boxes, letting us know of what facts are aware. There are a limited number of employees from Kirkland & Ellis. Some of them were here over the weekend. It's not a large number.

THE COURT: Do you want to make a proffer how many people remain here and what their capacity is?

MR. HANSEN: Your Honor, Mr. Clare is still here; although, over the weekend he was at a friend's wedding someplace.

Mr. Bemis has been here; although, his wife was in the town, and he was not in the office for a significant period.

Ms. Jeannette Brown has been in town.

Those are the people I'm most aware of.

Mr. Eric Pagan has been available to provide

this transitional assistance. We're in a period where we're sitting here with new lawyers working the case, and they're helping us find the stuff. Mr. Scarola's representation that first I told the Court that they had all left town, which is not true. First, it's a skeleton crew, and the second, it's very limited; our dealings with them are very limited. All they can do is provide the transition --

THE COURT: Please understand, I just permitted them to withdraw as counsel of record, and I tried to be very clear about that. They're not prohibited from continuing to help you with the case. Are you representing to me that they are not providing any legal services?

MR. HANSEN: Your Honor, here's what I understand. And, again, my understanding is -- it may be limited, but here's my good faith understanding.

I talked about this with the Court last week. Kirkland & Ellis does not represent Morgan Stanley in this case. They're not lawyers for Morgan Stanley. Not only is counsel not counsel of record, they're not counsel in the case, even behind the scenes.

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

VOLUME 60

MORGAN STANLEY & CO., INC.,

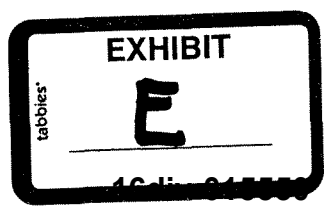
Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Wednesday, April 6, 2005
1:20 p.m. - 5:27 p.m.



decision, or put another way, Mr. Perelman got what he bargained for. He did not suffer damages that he can fairly blame on Morgan Stanley. He got a lot out of this deal and he doesn't deserve more. When he asks for 680 million more because his 14.1 million shares lost money over the three years that his associates ran the company, we think you will conclude he's reaching too far, he's overreaching.

As you know, my name is Mark Hansen. I represent Morgan Stanley in this case. As you know, I came into the case somewhat at the last minute, and I'm here to do the best I can to represent Morgan Stanley. With me on the defense side of the table, Mr. Rob Jones, Morgan Stanley; Mr. Joe Ianno, West Palm Beach; my colleagues, Mr. Webster, Miss Beynon and Mr. Cohen; also Rob Ortiz back at the console table is going to try to keep me out of technological trouble. Together we will represent Morgan Stanley and present Morgan Stanley's side of the case.

Now Coleman has told you it sounds like they're going to have a short case. They're

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S RESPONSE IN OPPOSITION TO MORGAN STANLEY'S MOTION TO QUASH TRIAL SUBPOENA SERVED ON DONALD J. KEMPF, JR.

Morgan Stanley has moved to quash the trial subpoena served on Morgan Stanley's chief in-house counsel — complaining that "Florida courts have recognized that calling opposing counsel to testify 'is an extraordinary step which will rarely be justified'" (Mot. at 1) — even though Morgan Stanley itself has listed two of CPH's in-house counsel (Barry Schwartz and Steven Fasman) on its trial witness list. In fact, Mr. Kempf is not actively involved in presenting Morgan Stanley's defense, nor has he been admitted *pro hac vice* in this case. Thus, requiring Mr. Kempf to honor CPH's trial subpoena would cause no undue prejudice or inconvenience to Morgan Stanley or Mr. Kempf — who is present in West Palm Beach and has been attending trial on a daily basis. Most important, contrary to Morgan Stanley's assertions, Mr. Kempf has direct personal knowledge of a number of relevant topics about which he should be required to testify at trial. *See* Ex. A (amended witness disclosure).

First, Mr. Kempf has relevant testimony to give during Phase I of the trial, relating to Morgan Stanley's repeated assertions both to the Court and the jury that Kirkland & Ellis no longer is actively assisting in Morgan Stanley's defense and its "new" counsel from Kellogg

Huber is operating at a severe disadvantage in trying the case. This is a theme to which Morgan Stanley's current counsel has returned over and over, both in hearings before this Court, and in proceedings before the jury. *See, e.g.* Ex. B at 5245 (counsel representing that Kirkland & Ellis "cannot, in light of what has been said here today, in light of what has been said last week, they cannot proceed and represent Morgan Stanley"); Ex. C at 5492-93 (counsel insisting that Kirkland & Ellis is not serving as counsel for Morgan Stanley "whether back at the office or here," that Kirkland & Ellis has been "discharged," and that Kirkland & Ellis is doing nothing more than telling Morgan Stanley's current counsel such things as where the boxes are); Ex. D at 5649-50 ("I have taken over as lead counsel at the last minute, and I'm not going to be as prepared as the other side"); Ex. E at 6466-67 (counsel continuing to insist that Kirkland & Ellis is providing only limited assistance with a "skeleton crew"); Ex. F at 7109 (counsel portraying himself to the jury as having come into the case "somewhat at the last minute").

Despite these repeated representations to the Court and to the jury, CPH has every reason to believe that far from being outmanned and out-numbered, Morgan Stanley in fact is enjoying the full assistance and support of attorneys and support staff from Kirkland & Ellis — and also from the law firm of Shearman & Sterling, whose attorneys attended the recent depositions of Messrs. Jones and Doyle. Mr. Kempf, as chief legal officer of Morgan Stanley, has direct personal knowledge of the degree to which Kirkland & Ellis and Shearman & Sterling have provided and continue to provide substantial assistance to Morgan Stanley's defense.

Second, Mr. Kempf has personal knowledge that is pertinent to the issues the jury will be considering during Phase II of the trial. Due to his knowledge of Kirkland & Ellis' true role in continuing to represent Morgan Stanley, Mr. Kempf has knowledge of facts that CPH can use to demonstrate yet another instance of litigation misconduct by Morgan Stanley — its improper and

untrue contention that its new counsel is operating at a severe disadvantage. Mr. Kempf, as observed above, has personal knowledge of the facts that rebut those improper appeals to sympathy by Morgan Stanley's counsel in hearings before this Court and in proceedings before the jury.

Third, other Phase II issues that Mr. Kempf has personal knowledge of are: (a) what, if anything, Morgan Stanley has done to rectify the misconduct associated with the Sunbeam fraud, (b) what steps Morgan Stanley has taken to ensure that Morgan Stanley does not repeat its misconduct in the future, and (c) what measures Morgan Stanley has taken to rectify its litigation misconduct. As chief legal officer of Morgan Stanley, Mr. Kempf has direct personal knowledge of these matters, which clearly relate to the punitive damages issues that the jury will consider in Phase II of the trial.

Fourth, as stated in CPH's original witness disclosure, Mr. Kempf also has knowledge of the following topics relevant to Phase II: Morgan Stanley's failure to comply with the Court's March 2, 2005 Order; Morgan Stanley's representations in other litigation concerning the existence and ability to search for and retrieve e-mail; the criminal proceedings in Italy involving William Strong; and the efforts on the part of Morgan Stanley to blame Morgan Stanley's outside counsel for Morgan Stanley's litigation misconduct. *See* Ex. G.

In sum, Mr. Kempf has direct personal knowledge of issues that are relevant to both Phase I and Phase II of the trial. Mr. Kempf is not actively involved as trial counsel for Morgan Stanley, and he is not immune from providing relevant testimony in this trial, just as the in-house

counsel from CPH that Morgan Stanley has subpoenaed are not immune from testifying. Morgan Stanley's motion to quash the trial subpoena served on Mr. Kempf therefore should be denied.

Dated: April 22, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

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One of Its Attorneys

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 22nd day of April, 2005.

JEFFREY T. SHAW

JOHN SCAROLA
Florida Bar No.: 169440
SEARCY DENNEY SCAROLA
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THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

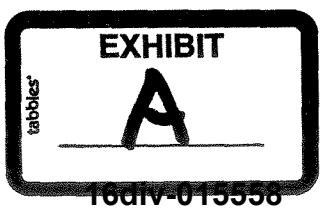
MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO. 2003CA 005045 AI

CPH'S TRIAL WITNESS DISCLOSURE

Pursuant to the Court's March 24, 2005 Order, Coleman (Parent) Holdings Inc. ("CPH") hereby provides Morgan Stanley & Co. ("Morgan Stanley") with a list of the witnesses CPH currently expects to call at trial, either through live testimony or by deposition, and a summary of the currently anticipated testimony of each witness. CPH reserves the right to call any of the witnesses identified herein during either phase of its case in chief or in rebuttal, although the designation of rebuttal and Phase II witnesses expressed in this submission accurately reflects CPH's present intentions. CPH further reserves the right to withdraw any witness identified herein or to supplement this disclosure as CPH continues to evaluate its proofs in light of the Court's recent rulings, anticipated rulings, default findings and expected findings regarding litigation misconduct. CPH also reserves the right to withdraw any witness identified below or supplement this disclosure in response to the trial witness disclosure or exhibit list to be provided by Morgan Stanley, new arguments advanced by Morgan Stanley, or the Court's actual future rulings.



The focus of all testimony will be in one or more of only three areas:

1) Reliance by CPH on the Sunbeam fraud.

2) Damages sustained by CPH as a consequence of the Sunbeam fraud.

3) Entitlement and amount of punitive damages.

I. CPH Case-in-Chief:

1. Douglas Emery (live): Dr. Emery is a Professor of Finance and Department Chair at the University of Miami. Dr. Emery will present his qualifications as an expert. Dr. Emery will place the default findings to be read to the jury in the context of an understanding of the business world in which those facts occurred, including definitions, descriptions and explanations of the roles and functions of the entities involved, general business concepts, and relevant terms.

2. Blaine Fogg (by deposition): At the time of the transaction, Mr. Fogg was a partner at Skadden, Arps, Slate, Meagher & Flom LLP and legal adviser to Sunbeam. Mr. Fogg may testify regarding his conversations with Howard Gittis and Peter Langerman regarding CPH's rescission demand. Additionally Mr. Fogg may testify regarding the delayed final approval of Sunbeam's Form S-4 registration statement and Skadden's efforts to expedite the close of the second step of the transaction.

3. Howard Gittis (live): Mr. Gittis is a director and a Vice Chairman and Chief Administrative Officer of MacAndrews & Forbes Holdings Inc. Mr. Gittis also is a director and the Vice Chairman of CPH and a former director of Sunbeam. Mr. Gittis' testimony may include: his involvement in the transaction; the background and history of the transaction; Morgan Stanley's prior business relationship with MacAndrews & Forbes and its affiliates; CPH's evaluation of Sunbeam stock; CPH's reliance on Sunbeam and Morgan Stanley; CSFB's

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work on the Sunbeam transaction; the Coleman board meetings; CPH's decision and motivation in deciding to sell its interest in Coleman to Sunbeam; CPH's decision and motivation in deciding to accept Sunbeam stock as part of the consideration; matters relating to the March 19, 1998 press release and the convertible debenture offering; CPH's expectations for Sunbeam's stock; CPH's inability to sell its Sunbeam stock after the transaction closed; post-closing matters involving Sunbeam; CPH's demand for rescission and its rejection; CPH's damages; and CPH's lack of knowledge of the fraudulent conduct of Sunbeam and Morgan Stanley. If defendant is permitted to inquire into MacAndrews & Forbes internal financial and accounting documents, Mr. Gittis may testify concerning the internal valuation estimates that included an entry relating to the possible future value of Sunbeam if certain significant changes in its performance and capital structure were successfully accomplished, and the distribution and use of MacAndrews & Forbes' financial statements.

4. James Maher (live): Mr. Maher is the former President of Mafco Consolidated Group Inc. Mr. Maher may testify on the following issues: his background and experience in mergers and acquisitions and investment transactions; his role as negotiator for CPH; Morgan Stanley's prior business relationship with MacAndrews & Forbes and its affiliates; the evaluation of the merits of taking Sunbeam stock as consideration; the negotiation of the financial terms of the Coleman transaction; reliance on the information and materials provided to CPH by Sunbeam and Morgan Stanley; CSFB's opinions relating to the financial aspects of the transaction; matters relating to the March 19, 1998 Sunbeam press release; and CPH's lack of knowledge of the fraudulent conduct of Sunbeam and Morgan Stanley.

5. William Nesbitt (live): Mr. Nesbitt is a former Senior Vice President of Mafco Consolidated Group Inc. Mr. Nesbitt may testify on the following issues: his background and

experience in the financial analysis of mergers and acquisitions and investment transactions; his role on the Coleman transaction; the evaluation of the merits of taking Sunbeam stock as consideration; the negotiation of the financial terms of the Coleman transaction; reliance on the information and materials provided by Sunbeam and Morgan Stanley; CSFB's opinions relating to the financial analysis of the transaction; matters relating to the March 19, 1998 Sunbeam press release and Sunbeam's convertible debenture offering; and CPH's lack of knowledge of the fraudulent conduct of Sunbeam and Morgan Stanley.

6. Blaine F. Nye (live): Dr. Nye may testify as an expert witness as to the damages suffered by CPH as calculated under a benefit-of-the-bargain theory. Dr. Nye will present his qualifications as an expert. Dr. Nye's opinions are disclosed in his reports in this matter, as well as his two depositions.

7. Joseph Perella (by deposition): Mr. Perella is the Chairman of Institutional Securities at Morgan Stanley. Mr. Perella was Mr. Strong's performance evaluation director during the relevant time period. Mr. Perella may testify regarding his background and responsibilities at Morgan Stanley. He also may testify about the formal evaluation process at Morgan Stanley, his and others' roles in Mr. Strong's performance evaluations, and the bases of Mr. Strong's performance evaluations. Mr. Perella may testify about specific portions of the performance evaluations of Mr. Strong for 1993, 1995, 1996, 1997, and 1998, and Mr. Strong's value to Morgan Stanley in generating revenues. Finally, Mr. Perella may testify about Morgan Stanley's intention, understanding, and acknowledgement of what it means to investors when Morgan Stanley's name is associated with a transaction.

8. Ronald Perelman (live): Mr. Perelman is the Chairman of the Board of Directors and Chief Executive Officer of MacAndrews & Forbes Holdings Inc. Mr. Perelman also is the Chairman of the Board of Directors of CPH. Mr. Perelman also is a former director of Coleman. Mr. Perelman's testimony may include: his involvement in the transaction; the background and history of the transaction; Morgan Stanley's prior business relationship with MacAndrews & Forbes and its affiliates; CPH's evaluation of Sunbeam stock; CPH's reliance on Sunbeam and Morgan Stanley; the Coleman board meetings; CPH's decision and motivation in deciding to sell its interest in Coleman to Sunbeam; CPH's decision and motivation in deciding to accept Sunbeam stock as part of the consideration; matters relating to the March 19, 1998 press release and the convertible debenture offering; CPH's expectations for Sunbeam's stock; CPH's inability to sell its Sunbeam stock after the transaction closed; post-closing matters involving Sunbeam; CPH's demand for rescission and its rejection; CPH's damages; and CPH's lack of knowledge of the fraudulent conduct of Sunbeam and Morgan Stanley. If defendant is permitted to inquire into MacAndrews & Forbes internal financial and accounting documents, Mr. Perelman may testify as to internal valuation estimates that included an entry relating to the possible future value of Sunbeam if certain significant changes in its performance and capital structure were successfully accomplished.

9. R. Bram Smith (by deposition): Mr. Smith was a Managing Director of Morgan Stanley. Mr. Smith may testify about Mr. Strong's role in the Sunbeam relationship. CPH also may show the jury examples of Mr. Smith's evasiveness in responding to questions to demonstrate Morgan Stanley's attempts to conceal its involvement in the Sunbeam fraud. Mr. Smith was a Managing Director of Morgan Stanley. If the defendant is permitted to introduce evidence of MSSF's loan to Sunbeam during the punitive damages Phase II portion of

the trial, Mr. Smith may testify concerning matters related to Morgan Stanley's intention and efforts to syndicate the loan.

10. William Strong (by deposition): Mr. Strong is a Managing Director at Morgan Stanley who led the Morgan Stanley team on the Sunbeam engagement. Mr. Strong may testify regarding his background and responsibilities at Morgan Stanley. CPH may show the jury examples of Mr. Strong's evasiveness in responding to questions to demonstrate Morgan Stanley's attempts to conceal its involvement in the Sunbeam fraud.

11. John Tyree (by deposition): Mr. Tyree was an associate in the client services group at Morgan Stanley at the time of the transaction. Mr. Tyree may testify regarding his background, his preparation for the deposition, the scope of his responsibilities at Morgan Stanley, and his role in the Coleman transaction. Further, CPH may show the jury examples of Mr. Tyree's evasiveness in responding to questions to demonstrate Morgan Stanley's attempts to conceal its involvement in the Sunbeam fraud.

II. Potential Rebuttal Witnesses:

1. Andrew Conway (by deposition): Mr. Conway is a former Morgan Stanley analyst. Mr. Conway's testimony may include his background and his role in selling the debentures. Mr. Conway also may describe his reaction to Sunbeam's 1997 Form 10-K that was filed on March 6, 1998, Sunbeam's March 19, 1998 press release, and the comfort letters.

2. Robert Duffy (by deposition): Mr. Duffy was a Vice President at CSFB who performed a valuation of Coleman, performed due diligence on Sunbeam, and presented CSFB's fairness opinion to the Coleman board in connection with the transaction. Mr. Duffy may testify concerning the due diligence he performed, including his attendance at meetings with Sunbeam

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and Morgan Stanley, and his review of public filings and research reports, and the opinions and conclusions he formed as a consequence of his work.

3. Karen Eltrich (by deposition): In 1997 and 1998, Ms. Eltrich was a research analyst at Morgan Stanley who issued reports on Coleman bonds. Ms. Eltrich's testimony will include her background and her job responsibilities as a research analyst at Morgan Stanley. Ms. Eltrich also may testify about two reports she wrote and published on the Coleman bonds, in which she recommended the bonds as a "strong buy," and the research she did to write the reports. Finally, Ms. Eltrich may testify that Morgan Stanley invested in the Coleman bonds, expecting that the bonds would increase in value, and ultimately Morgan Stanley made money on the bonds.

4. William Horton (live): Mr. Horton may testify in rebuttal as an expert witness concerning reliance. Mr. Horton's opinions are disclosed in his reports in this matter and in his depositions.

5. Joram Salig (by deposition): During the relevant time period, Mr. Salig was in-house counsel for MacAndrews & Forbes Holdings Inc. If defendant is permitted to inquire concerning the unexecuted draft February 23, 1998 confidentiality agreement, Mr. Salig may testify concerning that issue.

6. Barry F. Schwartz (live): Mr. Schwartz is the Executive Vice President and General Counsel of MacAndrews and Forbes Holdings Inc. and the General Counsel of CPH. If defendant is permitted to inquire concerning the unexecuted draft February 23, 1998 confidentiality agreement, Mr. Schwartz may testify concerning that issue.

7. Todd J. Slotkin (live): Mr. Slotkin is the Chief Financial Officer and Executive Vice President of MacAndrews & Forbes Holdings Inc. If defendant is permitted to inquire into the working of the Mafco Finance Corp. credit agreements, Mr. Slotkin may testify as to those agreements. If defendant is permitted to inquire into MacAndrews & Forbes internal financial and accounting documents, Mr. Slotkin may testify as to the internal valuation estimates that included an entry relating to the possible future value of Sunbeam if certain significant changes in its performance and capital structure were successfully accomplished, as well as the preparation of the audited financial statements of the corporation.

III. CPH Punitive Damages (Phase II):

1. Joseph D'Auria (by deposition): As the corporate representative of Morgan Stanley, Mr. D'Auria may testify concerning assets and resources available to Morgan Stanley to satisfy a judgment for punitive damages in this case.

2. Joseph Ferraro (by deposition): As the corporate representative of Morgan Stanley, Mr. Ferraro may testify concerning trading in Sunbeam's debentures and Coleman Holdings' notes.

3. Donald G. Kempf, Jr. (live or by deposition): Mr. Kempf is the Executive Vice President, Chief Legal Officer, and Secretary of Morgan Stanley. Mr. Kempf may testify concerning Morgan Stanley's failure to comply with the Court's March 2, 2005 Order and Morgan Stanley's representations in other litigation concerning the existence and ability to search for and retrieve e-mail. Mr. Kempf also may testify concerning the criminal proceedings in Italy involving Mr. Strong. Mr. Kempf also may testify regarding efforts on the part of

Morgan Stanley to blame falsely Morgan Stanley's outside counsel for Morgan Stanley's litigation misconduct.

4. Tarek Abdel-Meguid (by deposition): Mr. Meguid is the head of investment banking at Morgan Stanley. During the relevant time period, he was deputy head of the corporate finance department and head of the corporate finance department. During that time period, Mr. Meguid evaluated Mr. Strong's performance at Morgan Stanley. Mr. Meguid may testify regarding his background and responsibilities at Morgan Stanley. Mr. Meguid also may testify about Morgan Stanley's evaluation process, Mr. Strong's evaluations, the business goals Morgan Stanley set for Mr. Strong, and Mr. Strong's value to Morgan Stanley in generating revenues.

5. Robert Scott (by deposition): During the relevant time period, Mr. Scott was the head of investment banking and the Chief Financial Officer of Morgan Stanley. He was Mr. Strong's performance evaluation director in 1993 and co-director in 1995. Mr. Scott may testify regarding his background and responsibilities at Morgan Stanley, as well as his current consulting arrangement with Morgan Stanley. Mr. Scott also may testify about Morgan Stanley's evaluation process and Mr. Strong's evaluations specifically; Mr. Scott also may testify concerning Mr. Strong's desire for increased responsibility at Morgan Stanley. Finally, Mr. Scott may testify about Mr. Strong's value to Morgan Stanley in generating revenues and his compensation generally.

6. Michael Wagner (live): Mr. Wagner may testify as an expert witness in the punitive damages phase of the case. Mr. Wagner will present his qualifications as an expert. Mr.

Wagner's opinions are disclosed in his report in this matter, which will be supplemented before trial based on Morgan Stanley's recent financial disclosures.

IV. CPH Punitive Damages Phase II (Rebuttal):

1. Michael Hart (by deposition): Mr. Hart was the Vice President of Morgan Stanley Senior Funding and a Managing Director of Morgan Stanley. If the defendant is permitted to introduce evidence of MSSF's loan to Sunbeam during the punitive damages Phase II portion of the trial, Mr. Hart may testify concerning matters related to Morgan Stanley's intention and efforts to syndicate the loan.

2. William Kourakos (by deposition): Mr. Kourakos is a managing director at Morgan Stanley. If the defendant is permitted to introduce evidence of MSSF's loan to Sunbeam during the punitive damages Phase II portion of the trial, Mr. Kourakos may testify concerning matters related to Morgan Stanley's intention and efforts to syndicate the loan.

Dated: March 26, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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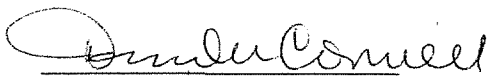
16div-015567

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and electronic transmission to all counsel on the attached list before 12:00 p.m. on March 26, 2005.



Deirdre E. Connell

16div-015568

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IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

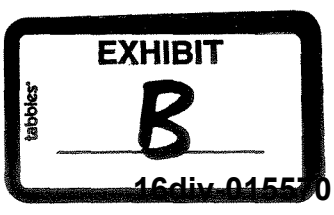
MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 46

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Wednesday, March 23, 2005
Palm Beach County Courthouse
Courtroom 11-A
205 North Dixie Highway
West Palm Beach, Florida 33401
9:45 a.m. to 2:00 p.m.



I can't speak to Morgan Stanley's motivation, I can only tell you that Kirkland & Ellis is trying its best to adhere to the ethical obligations that it has in this courtroom and in practicing law. And in doing so, they believe that they cannot, in light of what has been said here today, in light of what has been said last week, they cannot proceed and represent Morgan Stanley.

THE COURT: Thank you, sir. Mr. Warner, you get to go last.

MR. WARNER: On the theory that if you have a good point to make, you ought to be able to make it in five minutes or less and if you have no point at all you're going to speak for 30 or 35 minutes, I hope to be brief.

It seems to me Mr. Scarola made a lot of points, but the theme is: You've punished them already, these are bad people and we want you to punish them more.

It is clear they say they perceive no conflict and yet they were subpoenaing Mr. Davidson to testify at trial in regard to discovery, now they say, well, we're not going to do that now, but Mr. Kemp is still under

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. VOLUME 49

MORGAN STANLEY & CO., INC.,

Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Monday, March 28, 2005
9:35 a.m. - 12:10 p.m.

EXHIBIT
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MR. HANSEN: They're no longer counsel of nonrecord. They're not serving as counsel, whether back at the office or here. There are consequences to that as an ethical matter. I don't understand them all, but my bottom line understanding is that there's a range of transition assistance that Kirkland & Ellis can provide, and they can go so far and no farther. That does not allow them to participate fully in assisting to defend this case. That means that we are in a position where while they can, for example, help us find things, direct us to boxes, they can't be lawyers in the case. They're no longer counsel. They've been discharged.

So what I'm representing to the court is as counsel of record for the last few days I've had cooperation from Kirkland & Ellis about finding things, about getting me information, about where I could look for witness information and so on. I have not had the kind of assistance I get from a co-counsel from one who is providing professional judgment and services. It is my understanding -- and, again, Mr. Hill will correct me if I'm wrong -- that I can not expect

such assistance, that the assistance will be provided willingly and cooperatively, but it will be a limited kind of assistance. And it will be plainly insufficient for me to become as capable as I need to become to defend this case.

THE COURT: Mr. Warner, there was something you wanted to add.

MR. WARNER: Well, I think I'm required to point out to the court what I think is a mistake in assumption. Your question was or what you said was, well, I assume something to the effect that Morgan Stanley chose not to have Kirkland & Ellis proceed. I must point out to you that what was before you was a motion to withdraw on behalf of Kirkland & Ellis because of a conflict with their client. And I think we tried to do the best we could to explain to you and put on the record that that conflict required them to withdraw from the case. So it's not a matter of Morgan Stanley choosing whether they're going to still use Kirkland & Ellis or not. The matter was presented to you that there was a conflict. You granted the motion to withdraw by Kirkland & Ellis. They have withdrawn.

THE COURT: But the conflict -- you know, my

THE COURT: I appreciate that.

MR. HANSEN: I have some additional information pursuant to some of the things I said yesterday. Here's what I've now been told is the correct information.

THE COURT: Okay.

MR. HANSEN: As I said yesterday, I've had cooperation from Kirkland & Ellis about finding things, but I've not had the kind of assistance from co-counsel as one who is providing professional judgment services, and it will be plainly insufficient.

THE COURT: I don't know what it is. I can barely hear you. You might want to pull that podium forward. I guess there's no way to do it -- I want to make sure the court reporter hears you. Please try to speak up.

MR. HANSEN: I apologize. I can speak louder. However, as I also said yesterday, quote, "There are conversations that have occurred between Morgan Stanley and Kirkland & Ellis that I'm not privy to." That was the transcript, 5491. I have since been informed that Morgan Stanley's position is that it did not discharge Kirkland & Ellis, that Morgan

Stanley would give Kirkland & Ellis a waiver like the one that was requested by Kirkland & Ellis and that Morgan Stanley requested that the entire Kirkland & Ellis trial team remain in the Palm Beach area to provide full out of court assistance to me and others who will be appearing in court. Kirkland & Ellis, according to what I'm informed, has declined to do so to date saying that the representation has terminated. With that clarification, the result for me remains the same.

Just as I described yesterday and repeated a moment ago, the assistance that I'm receiving is not sufficient for me to become as capable as I need to become to defend the case.

THE COURT: Okay.

MR. HANSEN: That's the clarification.

MR. SOLOVY: Your Honor, I would just say we don't accept that representation. Even though Mr. Hansen -- we hear conflicting things. Unless we hear this directly from Morgan Stanley and Kirkland under oath, then there's no reason to accept this on the record.

THE COURT: I can appreciate that that would be plaintiff's position. As I understand what

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

VOLUME 50

MORGAN STANLEY & CO., INC.,

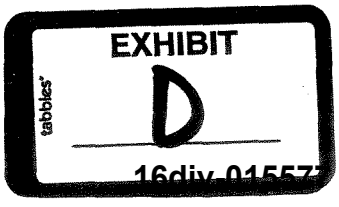
Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Tuesday, March 29, 2005
9:45 a.m. - 5:36 p.m.



to go. We're rearguing things we don't need to.

MR. HANSEN: I was telling you why this is not a plea for sympathy. I'm trying to elicit biases and prejudices that will harm my client's interest. As I told Your Honor -- I won't give another long speech -- I am not going to be particularly effective in this trial. I'm going to be stumbling, not finding documents.

THE COURT: How is that different than saying to a jury, hey, I'm a really stupid lawyer; I hope you don't hold it against my client? Why does it matter?

MR. HANSEN: Lawyers often say things like that.

THE COURT: Do you think it's appropriate?

MR. HANSEN: Lawyers say please don't hold any mistakes I've made against my client. And right now we're in a situation extremely able adversaries who are going to be on top of everything. I'm not. I believe I'm entitled to explore whether the degree of my performance, and it's obvious --

THE COURT: That's different than planting in their minds why you may be unprepared.

MR. HANSEN: They see me appear from the

wings. Basically I've taken over at as lead counsel at the last minute, and I'm not going to be as prepared as the other side. Will you hold that against me? Will you hold that against my client?

THE COURT: Do we need to tell them you've taken over as lead counsel at the last minute or simply that you may not be as prepared as opposing counsel and are they going to hold that against you?

MR. HANSEN: I think the jury is entitled to the truth. I'm emerging from the shadows, and it's as a consequence of Mr. Davidson going. I am not fully up to speed. I was not in a position where I could take this on. Again, the voir dire privilege, I'm not trying to do anything -- you know, I'm not going to break down in tears, but I'm going to tell them or hope to elicit from them whether my stumbling around is going to make it hard for them to process the case.

Your Honor, I can tell you I've interviewed jurors after trials and asked the jurors what effect did it have, for example, when I didn't have as cool an Exhibit as the other guy and I

IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 55

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Monday, April 4, 2005

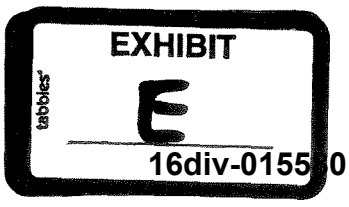
Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

9:30 a.m. to 12:10 p.m.



MR. HANSEN: As I advised the Court, his representation of what I told the Court and his representations of the facts. Let me be clear. I never told the Court that every Kirkland & Ellis employee had left town. I told the Court that Kirkland & Ellis had withdrawn from representing Morgan Stanley, and is providing a transitional, limited, very much, to what they can do, finding our way to boxes, letting us know of what facts are aware. There are a limited number of employees from Kirkland & Ellis. Some of them were here over the weekend. It's not a large number.

THE COURT: Do you want to make a proffer how many people remain here and what their capacity is?

MR. HANSEN: Your Honor, Mr. Clare is still here; although, over the weekend he was at a friend's wedding someplace.

Mr. Bemis has been here; although, his wife was in the town, and he was not in the office for a significant period.

Ms. Jeannette Brown has been in town.

Those are the people I'm most aware of.

Mr. Eric Pagan has been available to provide

this transitional assistance. We're in a period where we're sitting here with new lawyers working the case, and they're helping us find the stuff. Mr. Scarola's representation that first I told the Court that they had all left town, which is not true. First, it's a skeleton crew, and the second, it's very limited; our dealings with them are very limited. All they can do is provide the transition --

THE COURT: Please understand, I just permitted them to withdraw as counsel of record, and I tried to be very clear about that. They're not prohibited from continuing to help you with the case. Are you representing to me that they are not providing any legal services?

MR. HANSEN: Your Honor, here's what I understand. And, again, my understanding is -- it may be limited, but here's my good faith understanding.

I talked about this with the Court last week. Kirkland & Ellis does not represent Morgan Stanley in this case. They're not lawyers for Morgan Stanley. Not only is counsel not counsel of record, they're not counsel in the case, even behind the scenes.

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

VOLUME 60

MORGAN STANLEY & CO., INC.,

Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Wednesday, April 6, 2005
1:20 p.m. - 5:27 p.m.

decision, or put another way, Mr. Perelman got what he bargained for. He did not suffer damages that he can fairly blame on Morgan Stanley. He got a lot out of this deal and he doesn't deserve more. When he asks for 680 million more because his 14.1 million shares lost money over the three years that his associates ran the company, we think you will conclude he's reaching too far, he's overreaching.

As you know, my name is Mark Hansen. I represent Morgan Stanley in this case. As you know, I came into the case somewhat at the last minute, and I'm here to do the best I can to represent Morgan Stanley. With me on the defense side of the table, Mr. Rob Jones, Morgan Stanley; Mr. Joe Ianno, West Palm Beach; my colleagues, Mr. Webster, Miss Beynon and Mr. Cohen; also Rob Ortiz back at the console table is going to try to keep me out of technological trouble. Together we will represent Morgan Stanley and present Morgan Stanley's side of the case.

Now Coleman has told you it sounds like they're going to have a short case. They're

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO. 2003CA 005045 AI

CPH'S AMENDED TRIAL WITNESS DISCLOSURE

Coleman (Parent) Holdings Inc. ("CPH") hereby provides Morgan Stanley & Co. ("Morgan Stanley") hereby amends the list of the witnesses CPH currently expects to call at trial, as follows:

I. CPH Case-in-Chief:

Donald J. Kempf, Jr. (live): Mr. Kempf is the Executive Vice President, Chief Legal Officer, and Secretary of Morgan Stanley. Mr. Kempf may testify about the extent and capacity of the representation of Kirkland & Ellis or Morgan Stanley since Kirkland & Ellis' withdrawal as counsel. Mr. Kempf also may testify about the extent and capacity of the representation of Shearman & Sterling or Morgan Stanley in this lawsuit.

II. CPH Punitive Damages (Phase II):

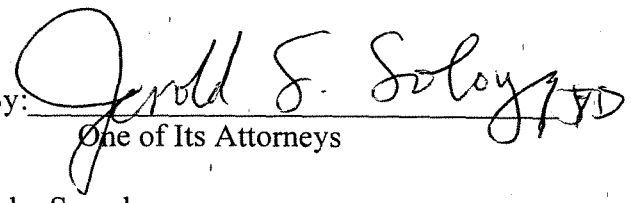
Donald G. Kempf, Jr. (live or by deposition): In addition to the topics previously identified, Mr. Kempf may testify about Kirkland & Ellis' true role in continuing to represent Morgan Stanley, contrary to its misrepresentations to the Court and jury that its new counsel is operating at a severe litigation disadvantage — which is another instance of litigation

misconduct. Mr. Kempf also may testify about the absence of meaningful remedial and punitive measures taken by Morgan Stanley to rectify the misconduct associated with the Sunbeam fraud and to ensure that Morgan Stanley does not repeat its discovery misconduct in the future. Mr. Kempf finally may testify about what measures Morgan Stanley has taken to rectify its litigation misconduct.

Dated: April 22, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: 
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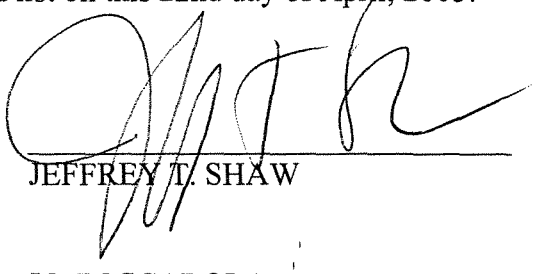
16div-015586

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 22nd day of April, 2005.



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10913 V2

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

MORGAN STANLEY'S SUBMISSION CONCERNING THE NEED FOR CLEAR AND CONVINCING PROOF OF ENTITLEMENT TO PUNITIVE DAMAGES

On April 19, 2005, the Court requested that Morgan Stanley & Co. Incorporated ("Morgan Stanley") submit additional Phase II briefing addressing the matters that must be proved by clear and convincing evidence under Florida law. *See* 4/19/05 Tr. at 9367-9368. Morgan Stanley is providing this submission in response.

As Coleman (Parent) Holdings Inc. ("CPH") and this Court have both acknowledged, the clear and convincing evidence requirement of Florida Statute § 768.725 applies in this case. *See* 4/05/05 at Tr. 6831; 4/19/05 at Tr. 9355. *Accord* Florida Standard Jury Instructions in Civil Cases PD 1, 2 (2004) (same). By its terms, Florida Statute Section 768.725 provides that a plaintiff seeking punitive damages "must establish at trial, by clear and convincing evidence, its entitlement to an award of punitive damages." Both the plain meaning of Section 768.725 and applicable precedent require that CPH bear the burden to prove each element of fraud — misrepresentation, materiality, reliance, causation and damages, *see Gandy v. Trans World Computer Tech. Group*, 787 So. 2d 116, 118 (Fla. 2d DCA 2001) — by clear and convincing evidence before punitive damages may be recovered.

Under the plain wording of Section 768.725, "entitlement" to an award of punitive damages must be proved by clear and convincing evidence. Entitlement is a well-defined common law concept that requires a plaintiff to establish certain legal prerequisites to be eligible to receive an award of punitive damages. *See, e.g., Winn & Lovett Grocery Co. v. Archer*, 171 So. 214, 219, 222-23 (Fla. 1936). Under current Florida law, these prerequisites include proving all of the elements of the underlying cause of action. *See Oliveira v. Ilion Taxi Aero Ltda*, 830 So. 2d 241, 242 (Fla. 4th DCA 2002) (punitive damages may not be awarded as a matter of law "where there is no finding of liability"); *Liggett Group Inc. v. Engle*, 853 So. 2d 434, 451 (Fla. 3d DCA 2003) ("'where actual damage is an element of the underlying cause of action,'" it — like all the other elements of liability — must be proved as "'a prerequisite to an award of punitive damages'") (quoting *Ault v. Lohr*, 538 So. 2d 454, 457 (Fla. 1989) (Ehrlich, C.J., concurring)). It thus logically follows from the Florida Legislature's choice of the term "entitlement to an award of punitive damages" in Section 768.725 that there can be no imposition of punitive damages unless the plaintiff adduces clear and convincing evidence of each element of the underlying cause of action.

It has long been the rule in Florida that proof of the underlying elements of common-law fraud suffices to establish liability for punitive damages. *E.g., First Interstate Dev. Corp. v. Ablanedo*, 511 So. 2d 536, 539 (Fla. 1987) ("proof of fraud sufficient to support compensatory damages necessarily is sufficient to create a jury question regarding punitive damages"); *Rappaport v. Jimmy Bryan Toyota of Ft. Lauderdale, Inc.*, 522 So. 2d 1005, 1006 (Fla. 4th DCA 1988) (same). Implicit in this holding is that proof that fails to establish the defendant's liability for fraud likewise defeats any claim of entitlement to punitive damages. What must be proved does not change because the tort reform statute subsequently raised the standard of proof to

"clear and convincing evidence"; rather, all that has changed is the level of confidence the jury must have that each element is satisfied.

Under prior practice, a plaintiff in a fraud case who failed to establish each element — misrepresentation, materiality, reliance, causation and damages — by the greater weight of the evidence, and therefore did not prevail with respect to compensatory liability, plainly could not establish entitlement to punitive damages by showing that it had proven some or most of the elements. When the Legislature tightened the burden of proof in Section 768.725, the logical consequence was that everything that previously had to be proven by "greater weight" thereafter had to be established by "clear and convincing evidence." Nothing in this change would have reduced the requirement to demonstrate ***all*** elements of the cause of action by the applicable standard. In this case — where the Court has found misrepresentation and materiality as a sanction pursuant it its March 23, 2005 Default Order (and assuming the Court does not grant Morgan Stanley's request to withdraw the sanction from the Phase II proceedings) — this means that the jury may not award punitive damages unless it finds that CPH has proved reliance, causation and damages by clear and convincing evidence.

While the Court has recognized that clear and convincing proof of the underlying tort is an essential part of a showing of punitive "entitlement," it has suggested that perhaps a sort of "sliding scale" among the elements might apply, such that only "the expected value of the whole thing" need be above a certain threshold before punitive damages may be awarded. 4/19/05 Tr. at 9370. With all respect, neither logic nor precedent supports the view that a tort may be clearly and convincingly proven despite the absence of such proof for each individual required element. Its illogic is shown by the following hypothetical: suppose a tort has three elements, A, B, and C, and suppose that the clear and convincing evidence standard requires an 75% level of

confidence. If A and B are established with absolute certainty but C is only 40% probable, averaging the three would yield 80%, yet not even the greater weight standard would be satisfied in such a case. Indeed, suppose instead that it was undisputed that C was not established; in that circumstance, the average would yield 66%, but it would be manifest that there could be no liability at all.[1]

Precedent confirms this result. Whether the standard at issue is beyond a reasonable doubt, clear and convincing evidence, or a preponderance of the evidence, Florida courts have held that the requisite level of certainty applies to ***each individual element***. *See, e.g.*, *Stanley v. State*, 560 So. 2d 1269, 1270 (Fla. 3d DCA 1990) (instruction violated defendant's due process rights because it "excuse[d] the state from its burden of proving beyond a reasonable doubt each element of the offense"); *Ritter v. Shamas*, 452 So. 2d 1057, 1058 (Fla. DCA 3d 1984) (validity of gift to attorney from client testator required clear and convincing evidence of "every requisite element"); *Sharp v. Long*, 283 So. 2d 567, 568 (Fla. 4th DCA 1973) ("No recitation of authority is necessary for the proposition that the burden of proof is on the plaintiff to establish by a preponderance of the evidence each element of his cause of action."). Nothing gives any indication the Florida Legislature intended to deviate from this widely-accepted method of applying a burden of proof when enacting Section 768.725. Likewise here, CPH must prove each individual element, including reliance, by clear and convincing evidence.

---

[1] In this regard assessment of the elements of a claim differs greatly from assessment of pieces of evidence. Obviously a claim can be proven by the aggregation of numerous pieces of evidence, regardless of how strong any single one might be on its own. The elements of a claim, however, must each be proven to the degree of certainty required by the applicable burden of proof, or the claim fails.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery facsimile and hand delivery on this 22 day of April, 2005.

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BY: _____

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

NOTICE OF FILING RETURN OF SERVICE

Defendant, MORGAN STANLEY & CO. INCORPORATED, by and through its undersigned counsel, hereby gives notice that it has filed the original Return of Service of the trial subpoena of William G. Nesbitt.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand-delivery on this 22ND day of April, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
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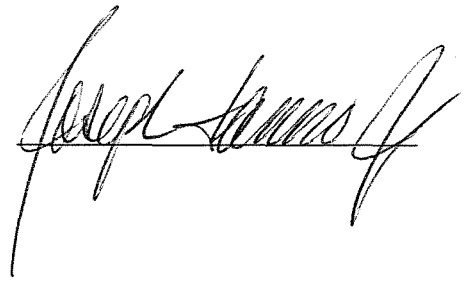
BY: 

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RETURN OF SERVICE

State of Florida **County of Palm Beach** **Circuit Court**

Case Number: CA 03-5045 AI Court Date: 4/11/2005

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

For:
Joseph Ianno, Jr., Esq.
CARTLON, FIELDS P.A.,
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

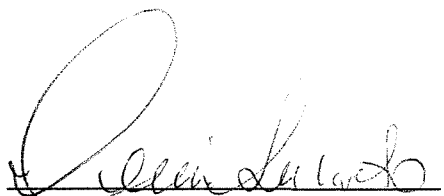
Received by BLACKHAWK LEGAL SERVICE INC on the 11th day of April, 2005 at 9:00 am to be served on **WILLIAM GOULD NESBITT, 390 Riverside Dr., New York, NY 10021**.

I, Denise Sucato, do hereby affirm that on the **13th day of April, 2005** at **5:15 pm, I:**

INDIVIDUALLY SERVED the within named person with a true copy of this Subpoena for Trial with the date and hour endorsed thereon by me, pursuant to F.S. 48.031(1).

Additional Information pertaining to this Service:
Served at 2nd address: Palm Beach County Courthouse, 205 N. Dixie Highway, Room 11A, West Palm Beach, FL.

Under penalty of perjury, I declare that I have read the foregoing and that the facts stated in it are true, that I am over the age of eighteen, that I am not a party to this case and have no interest in the above action, that I am a **Certified Process Server** in the circuit in which service was effected in accordance with Florida Statutes. Pursuant to F.S. 92.525(2) NO NOTARY IS REQUIRED.



Denise Sucato
CPS #PBC574

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED.,

Defendant.
_____/

CASE NO: CA 03-5045 AI

PRIORITY

SUBPOENA FOR TRIAL

THE STATE OF FLORIDA

TO: WILLIAM GOULD NESBITT
390 Riverside Dr.
New York, New York 10021

YOU ARE COMMANDED to appear before The Honorable Elizabeth Maass, Judge of the Circuit Court, at the Palm Beach County Courthouse, Courtroom 11A, 205 North Dixie Highway, West Palm Beach, Florida on April 11, 2005* at 9:30 a.m., to testify in this action. If you fail to appear, you may be in contempt of court.

You are subpoenaed to appear by the following attorneys, and unless excused form this subpoena by these attorneys or the Court, you shall respond to this Subpoena as directed.

Dated: April 6th, 2005

BY: Joseph Ianno Jr.
Joseph Ianno, Jr.
For the Court

Joseph Ianno, Jr.,
Florida Bar No: 655351
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Counsel for Defendant
Morgan Stanley & Co. Incorporated

***BEFORE YOU APPEAR**

PLEASE CALL JOYCE DILLARD, CLA AT (561) 659-7070 TO CONFIRM THE EXACT TIME AND DATE YOU WILL BE CALLED TO TESTIFY

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON CPH'S MOTION IN LIMINE RE: DEBENTURE OFFERING

THIS CAUSE came before the Court April 22, 2005 on CPH's ore tenus Motion in Limine Re: Debenture Offering, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that CPH's ore tenus Motion in Limine Re: Debenture Offering is Granted. CPH may present evidence of statements made in the debenture offering, provided it offers evidence that would allow a reasonable juror to conclude that MS & Co. or Sunbeam had a reason to expect that CPH would act in reliance upon its terms.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 22 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,

Defendant(s).
_____/

AFFIDAVIT

STATE OF FLORIDA)
) ss
COUNTY OF PALM BEACH)

BEFORE ME, the undersigned authority, personally appeared, JAMES COMYNS who being first duly sworn, deposes and says:

My name is Jim Comyns. My wife and I have a civil case coming up shortly. This case is about 7 years old. I have been working on this case preparation—hoping to help. My wife and I are terribly anxious to know when is trial. Mr. Scarola has been terribly busy 7 days a week and we can't get time with him. I went to the courtroom, I believe 3 times over about 3 or 4 weeks hoping there would be a break or it would finish early and I could get 5 or 10 minutes with Mr. Scarola. The first time I went there, Mr. Scarola was talking to a lot of potential jurors.

I saw this and after 5 minutes left. The second time there was a break Mr. Scarola was sitting down by himself. I went up to him but he apologized and said he had no time. Today, I went there to see if I could get 5 minutes, but Mr. Scarola was tied up and busy. I left after about 5-10 minutes and went to get a sandwich downstairs. I went out the door to the smoking area and saw 3-4 people smoking close to door. I asked them were they in court. They said no. I moved down to, I think, the next to last table to smoke. 3-4 people were at next table. I asked the woman on the right were they jurors in the Morgan case and was it over for the day. She said no, it was a short smoking break. I asked her did she know when there would be a break, she said no. I commented I've never been a juror and it looks like these cases take 10 years in jest. I left to go upstairs in courtroom (just starting). The officer leaned over my shoulder and said you should not talk to jurors. I said I didn't have conversation about case and was about to tell him why and what I asked but he had moved away from me. I waited about 3-5 minutes and left. I never heard the judge or anybody talking to jury. No one ever said don't say any words to jury. I never talked to Mr. Scarola about his case, only when did he think he would finish and I never talked to any jurors about anything.

FURTHER AFFIANT SAYETH NOT.

JAMES COMYNS

The foregoing instrument was acknowledged before me this 25th day of April, 2005 by JAMES COMYNS, who is personally known to me ~~or who has produced as identification~~ and who did/~~did not~~ take an oath.

Mary Pirrotta
Notary Signature

MARY PIRROTTA
Notary name - print

NOTARY PUBLIC, State of Florida

(Serial number, if any)

MARY PIRROTTA
MY COMMISSION # DD347345
EXPIRES: November 04, 2008
1-800-3-NOTARY Fl. Notary Discount Assoc. Co.

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I HAVE BEEN WORKING ON THIS case preparation. HOPING TO HELP.

My wife and I are terribly anxious to KNOW WHEN IS TRIAL.

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S BRIEF CONCERNING THE LEGAL PROHIBITION AGAINST USING TWO JURIES IN A BIFURCATED PUNITIVE-DAMAGES TRIAL

Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, respectfully submits this brief summarizing the caselaw that generally prohibits a second jury from hearing Phase Two of a bifurcated punitive-damages trial. On April 21, 2005, the Court requested research on whether the current jury could be discharged after Phase One of the trial, and whether a different jury could hear Phase Two. *See* Ex. A, 4/21/2005 Tr. at 10,008-11; *see also* Ex. B, 3/31/2005 Order (limiting Phase One to liability for compensatory damages, and thus postponing until Phase Two all punitive-damages issues).

Under Florida law, "if punitive damages are to be awarded, it must be by the same jury that awards the compensatory damages." *Touchette v. Bould*, 324 So. 2d 707, 713 (Fla. 4th DCA 1975) (emphasis added), *quashed on other grounds*, 349 So. 2d 1181 (Fla. 1977); *see also Gillette v. Stapleton*, 336 So. 2d 1226, 1227 (Fla. 2d DCA 1976) ("The general rule is that better

practice and procedure requires that 'if punitive damages are to be awarded, it must be by the same jury that awards the compensatory damages.'") (quoting *Touchette*, 324 So. 2d at 713).[1]

Indeed, the Fourth District Court of Appeal, relying on Florida Supreme Court precedent, has recently reaffirmed this rule. In *Woltin v. Richter*, 761 So. 2d 459 (Fla. 4th DCA 2000), the trial court had bifurcated a slander trial "in such a way that the issue of liability would be tried before one jury and damages would be tried before another jury." *Id.* at 460. A panel of the Fourth District unanimously granted the plaintiff's petition for a writ of certiorari, quashed the trial court's order, and remanded the case for further proceedings consistent with the Florida Supreme Court's seminal punitive-damages bifurcation decision in *W.R. Grace & Co.–Conn. v. Waters*, 638 So. 2d 502 (Fla. 1994). The Fourth District quoted from *W.R. Grace*'s holding: "'If, at the first stage, the jury determines that punitive damages are warranted, the same jury should then hear evidence relevant to the amount of punitive damages and should determine the amount for which the defendant is liable.'" *Woltin*, 761 So. 2d at 460 (quoting *W.R. Grace*, 638 So. 2d at 506) (emphasis added by the Fourth District). The Fourth District concluded that *W.R. Grace* "requires that 'the same jury' that determines liability also hear evidence on the amount of punitive damages." *Id.*

Caselaw from other jurisdictions comports with Florida's approach. In the federal context, the Seventh Amendment generally demands that a bifurcated trial be heard by a single jury: "[T]he judge must not divide issues between separate trials in such a way that the same issue is reexamined by different juries. The problem is not inherent in bifurcation. It does not

---

[1] The exception to this general rule arises when an appellate court vacates an award of punitive damages but upholds the accompanying award of compensatory damages. In those limited circumstances, rather than forcing the parties to retry the entire case before a new jury, it is appropriate on remand for a second jury to determine only the punitive-damages issues that must be retried. That exception to the general rule obviously does not apply here.

arise when the same jury is to try the successive phases of the litigation. . . . The right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have juriable issues determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial), and not reexamined by another finder of fact." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1303 (7th Cir.) (Posner, C.J.) (emphasis added), *cert. denied*, 516 U.S. 867 (1995).

Use of a single jury in a bifurcated trial is mandated in other States, too — not only in those States that follow the typical bifurcation used in Florida (with only the amount of punitive damages reserved for Phase Two), but also in those States that follow the bifurcation applicable in this case (with both entitlement to and amount of punitive damages reserved for Phase Two). For example, North Carolina and Mississippi have statutes expressly requiring that the same jury decide both the compensatory phase and the punitive phase. *See* N.C. Gen. Stat. 1D-30 ("The same trier of fact that tried the issues relating to compensatory damages shall try the issues relating to punitive damages."); Miss. Code Ann. 11-1-65(1)(c) ("If, but only if, an award of compensatory damages has been made against a party, the court shall promptly commence an evidentiary hearing to determine whether punitive damages may be considered by the same trier of fact.").

The same result is reached in States whose statutes are silent on this issue. For example, in New Jersey, where the statute requires the same type of bifurcation as in this case (and as in North Carolina and Mississippi) but does not expressly state whether the trier of fact must be the same in both phases, state courts consistently have required that the same jury must hear both phases of the case. *See, e.g., Jadlowski v. Owens-Corning Fiberglas Corp.*, 661 A.2d 814, 817-18 (N.J. Super. Ct. App. Div. 1995) (calling for "a single jury to hear both compensatory and punitive damages phases of a case"); *Ripa v. Owens-Corning Fiberglas Corp.*, 660 A.2d 521,

534 (N.J. Super. Ct. App. Div. 1995) ("The punitive damage phase of the trial is bifurcated but is held before the same jury as determined compensatory damages.").

CONCLUSION

Accordingly, if CPH prevails in Phase One of this trial, the Court should promptly hold Phase Two of the trial before the same jury.

Dated: April 25, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 25th day of April, 2005.

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IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 81

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Thursday, April 21, 2005

Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

1:20 p.m. to 5:00 p.m.

EXHIBIT
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decision on this, so I'm going to do it. But sitting here right now I couldn't tell you off the top of my head who the witnesses are.

THE COURT: That's fine. Once you've made those decisions, if you let them know, that would be wonderful. With the understanding that if you let them know a list at 10 and, quite honestly, it changes before 8 in the morning, I think we're honoring the list that gets produced at 8. But we'll all be in a better mood the more information everybody has.

MR. SOLOVY: I also think, Your Honor, when we get a better idea as to the shape of their case we ought to scratch our heads as to what we should be telling the jurors.

THE COURT: I've written that as one of the things we need to discuss tomorrow.

MR. SOLOVY: We've been deferring all week the admission of these exhibits. We hope we can get that early on.

MR. HANSEN: Actually, one point that might be helpful --

THE COURT: I was going to say. One other thing, at some point we may need research on, and it may be something you all have anticipated

and researched -- and that is this: Do we have any ability, once we're done with phase one, to discharge this jury and come back on phase two at a later date?

MR. SOLOVY: I don't think so.

THE COURT: I don't know.

MR. HANSEN: We could research that.

THE COURT: That's one issue, depending what goes on with the schedule, that may be an issue that presents itself. I want to throw it out as something we should not be thinking about for 30 seconds.

MR. HANSEN: It might be helpful for timing is to know whether their plan is to call Mr. Gittis or not.

MR. SOLOVY: We're calling Mr. Gittis. I can tell them as I stand here. I don't have to go and scratch my head.

MR. MARMER: Just as a heads up, we're done with redirect, the loan issue didn't come up with Mr. Perelman's redirect. But I expect it will come up with Mr. Gittis, so we might take a minute tomorrow.

THE COURT: Credit agreement.

MR. IANNO: Can we hold Mr. Marmer to that

minute that he just stated?

THE COURT: I think that's a metaphysical minute.

The ones I have on my list, and we can go over it tomorrow morning. We've taken off jury instructions.

The depo designations, which basically include the contours of Defendant's case in phase one.

MR. IANNO: Would that be the first thing, Judge, that you take up, the depo designations?

MR. SOLOVY: I would say not, that would not be my choice.

THE COURT: That's part of sort the contours of Defendant's case. First we've got to understand the contours, then we have to figure out how many depos, how voluminous are the objections.

The other things are the confidentiality agreement predicate.

Discovery issue, I think you all had mentioned, I don't even remember.

MR. IANNO: I have -- I've had these for a couple of hours here -- our motions to quash, Judge, on the notices to produce.

THE COURT: The juror schedule.

The demonstrative aids on cross examination for Dr. Nye.

Plaintiff's exhibits.

The debenture offering.

And credit agreement.

Those are the things I have listed that I thought we wanted to make sure we got covered tomorrow.

MR. SOLOVY: I think that's it, Your Honor.

THE COURT: Okay. And now, obviously, if we have time tomorrow, Mr. Perelman's questions.

MR. SOLOVY: Yes.

THE COURT: Okay.

MR. SOLOVY: Deadlines are good, Your Honor. When would you like an answer on this phase one/phase two jury issue?

THE COURT: I'm not sure we'll ever have to talk about it. If we do have to talk about it, I just want -- you know, you don't have to do any research and I'll decide off the top of my head, but that's not the best way to decide.

MR. SOLOVY: No. And I think also --

THE COURT: Quite honestly, I doubt it's an issue we'll be faced with tomorrow. I'm

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
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MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION TO CLARIFY THE PROPER SCOPE OF THE LIABILITY AND PUNITIVE PHASES OF TRIAL

THIS CAUSE came before the Court March 31, 2005 on Morgan Stanley's Motion to Clarify the Proper Scope of the Liability and Punitive Phases of Trial, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion to Clarify the Proper Scope of the Liability and Punitive Phases of Trial is Granted, in part. Phase I of the trial shall be limited to the liability, if any, of MS & Co. for compensatory damages. Phase II shall address entitlement and, if necessary, amount of punitive damages to be assessed if liability is determined in CPH's favor.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 31 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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APR 01 2005

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

PLAINTIFF'S BRIEF REGARDING THE LIMITED APPLICABILITY OF THE "CLEAR AND CONVINCING" STANDARD OF PROOF IN PHASE TWO OF TRIAL

Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, respectfully submits this brief regarding the limited applicability of the "clear and convincing" standard of proof in Phase Two of this bifurcated trial, in response to Defendant Morgan Stanley & Co. Incorporated's ("Morgan Stanley's") April 22, 2005 submission on this topic.[1]

The "clear and convincing" standard of proof applies to only one issue in this case: whether Morgan Stanley violated CPH's rights in a manner warranting the imposition of punitive damages. All other issues — including the remaining elements of CPH's claims (*i.e.*, reliance and causation of damages) — are to be decided by the "greater weight of the evidence." In other words, the fact of the violation of CPH's rights is subject to the "greater weight" standard;

[1] The Court has previously rejected Morgan Stanley's argument that the "clear and convincing" standard applies to every element of CPH's underlying claims, explaining that the standard applies only to CPH's overall entitlement to punitive damages. *See* Ex. A, MS Mot. Regarding the Reliance and Damages Issues to be Determined at Phase I of Trial, at 2 (filed April 4, 2005) (claiming that "to establish that punitive damages are even available, CPH must prove fraud — once again, the undefaulted elements — by clear and convincing evidence"); Ex. B, 4/5/05 Order Denying MS Mot.; Ex. C, 4/5/05 Tr. at 6828-35; Ex. D, 4/19/05 Tr. at 9367.

Morgan Stanley's conscious awareness of or reckless indifference to the fact that it was violating CPH's rights must be proved by clear and convincing evidence.

The first issue that the jury must decide in Phase Two of this trial (which will take place only if the jury has already found each element of one or both of CPH's claims by the "greater weight of the evidence" standard) is whether Morgan Stanley's misconduct warrants punitive damages because it either was intentional or was so wanton and reckless as to serve as the legal equivalent of an intentional violation of CPH's rights. Specifically, in the present intentional-tort context, punitive damages are warranted if the jury finds by clear and convincing evidence that Morgan Stanley intentionally violated CPH's rights.

As Florida's Standard Jury Instructions make clear, what must be proved by clear and convincing evidence is the defendant's wrongful intent or reckless indifference — not all the elements of the underlying tort. For example, for pre-October 1, 1999 negligence actions, the instructions provide: "Punitive damages are warranted if you find by clear and convincing evidence that: (1) the conduct causing [loss] [injury] [or] [damage] to (claimant) was so gross and flagrant as to show a reckless disregard of human life or of the safety of persons exposed to the effects of such conduct; or (2) the conduct showed such an entire lack of care that the defendant must have been consciously indifferent to the consequences; or (3) the conduct showed such an entire lack of care that the defendant must have wantonly or recklessly disregarded the safety and welfare of the public; or (4) the conduct showed such reckless indifference to the rights of others as to be equivalent to an intentional violation of those rights." Florida Standard Civil Jury Instructions PD 1a(2)(a) (2003) (emphasis added); *accord id.* PD

2a(1).[2] Similarly, for post-October 1, 1999 torts, the instructions provide: "Punitive damages are warranted if you find by clear and convincing evidence that (name person whose conduct may warrant punitive damages) was personally guilty of intentional misconduct or gross negligence." *Id.* PD 1a(2)(b) (emphasis added); *accord id.* PD 2a(2).

Thus, the jury's assessment of the quantum of proof for any element of a plaintiff's intentional-tort claim — other than intent — is irrelevant when determining punitive damages. So long as the jury has found each element of at least one claim by the "greater weight of the evidence," that is enough to find liability for compensatory damages and to propel the jury to address the next issue, entitlement to punitive damages. Entitlement to punitive damages, in turn, hinges on clear and convincing evidence that the defendant acted with wrongful intent. Then, once the jury finds that the plaintiff is indeed entitled to an award of punitive damages, all disputed factual issues going to the proper amount of those damages must be decided using the "greater weight of the evidence" standard. *See* Florida Standard Civil Jury Instruction PD 1b(1) (2003) (for amount of punitive damages, "you should decide any disputed factual issues by the greater weight of the evidence"); *accord id.* PD 2d(1).

Morgan Stanley has provided no relevant authority contradicting plaintiff's straightforward reading of the Florida Standard Jury Instructions and Florida caselaw. Rather, Morgan Stanley has cited a slew of inapposite cases, none of which holds or even suggests that a plaintiff must prove each element of the underlying tort by clear and convincing evidence to be

[2] The Standard Jury Instructions applicable to pre-October 1, 1999 causes of action are designed primarily for use in negligence cases, but the notes for those instructions expressly state that the instructions may be modified for particular intentional torts. *See* Florida Standard Civil Jury Instructions PD 1 n.3 & PD 2 n.2 (2003) (citing *First Interstate Dev. Corp. v. Ablanedo*, 511 So. 2d 536 (Fla. 1987); *Metropolitan Life Ins. Co. v. McCarson*, 467 So. 2d 277 (Fla. 1985)). In any event, these instructions make clear that what must be proved by "clear and convincing" evidence is a sufficiently egregious mental state — not each element of the tort cause of action.

entitled to punitive damages. In particular, Morgan Stanley incorrectly claims that *First Interstate Development Corp. v. Ablanedo*, 511 So. 2d 536 (Fla. 1987), supports its argument. Although *First Interstate* does hold, as Morgan Stanley concedes, that "proof of fraud sufficient to support compensatory damages necessarily is sufficient to create a jury question regarding punitive damages," *id.* at 539, Morgan Stanley entirely omits the relevant reasoning from *First Interstate*: "This is so because intentional misconduct is a necessary element of fraud." *Id.* (emphasis added). As this and other caselaw,[3] as well as the Standard Jury Instructions, makes clear, the touchstone for entitlement to punitive damages is the defendant's egregious mental state; it is thus only to that mental state that the clear-and-convincing standard applies.

Finally, the Court should expressly instruct the jury that it has the discretion to decline to award punitive damages. *See, e.g.*, Ex. E, Plaintiff's Proposed Instruction No. 20 ("You may in your discretion decline to assess punitive damages."). At the same time, however, the Court should expressly acknowledge that the facts set forth in "Exhibit A" — including, for example, the fact that "Morgan Stanley knew of [Sunbeam CEO Al] Dunlap's fraudulent scheme and helped to conceal it until after Sunbeam could close the purchase of Coleman," Ex. F, Exhibit A to 3/23/05 Order, at 25 — have been deemed established for all purposes in this action, including with respect to the jury's decision whether to impose punitive damages, and if so, in what amount. Expressly instructing the jury to that effect in no way challenges its discretion to

[3] *See, e.g.*, *First Interstate*, 511 So. 2d at 539 (allowing punitive damages "'where torts are committed with fraud, actual malice or deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others'" (quoting *Winn & Lovett Grocery Co. v. Archer*, 171 So. 214, 221-22 (Fla. 1936)) (emphasis in original)); *Ingram v. Pettit*, 340 So. 2d 922, 924 (Fla. 1976) ("The intentional infliction of harm, or a recklessness which is the result of an intentional act, authorize[s] punishment which may deter future harm to the public by the particular party involved and by others acting similarly.").

decline to award any punitive damages; rather, it merely states the obvious fact that the "conclusively established" facts easily satisfy the "clear and convincing" standard of proof.

CONCLUSION

Accordingly, the Court should reject Defendant's repeated contention that elements of CPH's claims must be proved by clear and convincing evidence for CPH to prove entitlement to punitive damages.

Dated: April 25, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 25th day of April, 2005.

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JEFFREY T. SHAW

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

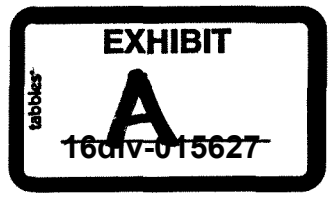
Defendant. /

DEFENDANT'S MOTION REGARDING THE RELIANCE AND DAMAGES ISSUES TO BE DETERMINED AT PHASE I OF TRIAL

Morgan Stanley & Co. Incorporated ("Morgan Stanley") moves for an order providing that the issues of reliance and damages will be determined during Phase I of the trial under both relevant standards of proof – proof by the greater weight of the evidence, and proof by clear and convincing evidence.

In support of this motion, Morgan Stanley states:

1. In this Court's order of March 16, 2005, the Court granted Plaintiff Coleman (Parent) Holding, Inc.'s ("CPH's") motion for entry of default judgment in part, holding that CPH's claims that Morgan Stanley aided and abetted Sunbeam's fraud and conspired with Sunbeam to commit fraud would be deemed established, but that the other elements of CPH's claims, reliance and damages, would be fully litigated. See Tr. Hearing March 31, 2005, at 6276-77; id. at 6279. Following that Order, this Court ruled that it would bifurcate the case. Phase I of the trial is "limited to liability, if any, . . . for compensatory damages." In contrast, Phase II shall address the availability and, "if



necessary, amount of punitive damages." Order of March 31, 2005, at 1 ("Bifurcation Order").

2. To prove entitlement to compensatory damages, CPH must prove the elements of fraud – the undefaulted elements – by the greater weight of the evidence. By contrast, to establish that punitive damages are even available, CPH must prove fraud – once again, the undefaulted elements – by clear and convincing evidence. See Fla. Stat. § 768.72 ("A defendant may be held liable for punitive damages only if the trier of fact, based on *clear and convincing evidence*, finds that the defendant was personally guilty of intentional misconduct") (emphasis added).[1]

3. The Court's current orders appear to contemplate having the jury decide the first issue, namely whether reliance and damages were proved by the greater weight of the evidence, at Phase I of the trial and the second issue, whether the same elements were proved by clear and convincing evidence, at Phase II of the trial. That procedure is neither efficient nor just. Because the jury will be deliberating on whether there was proof of reliance and damages by the greater weight of the evidence in any event at Phase I, it imposes no additional burden to ask the jury at the same time to decide whether those elements have been proved by clear and convincing evidence. Indeed, the jury would merely complete one verdict form question inquiring whether the elements had been proved by a preponderance of the evidence (resolving whether compensatory damages are available), and a second inquiring whether they had been proved by clear and convincing evidence (resolving whether punitive damages are available). See Attachment 1 (sample excerpt verdict form). Upon a determination that

[1] We assume for present purposes that the Court's order deems the defaulted elements established for purposes of both compensatory and punitive damages. As we have advised the Court by separate motion, however, deeming those elements established and foreclosing Morgan Stanley from contesting them for purposes of punitive damages is itself an excessive and unfair addition to an already severe sanction, is unprecedented in Florida, and is inconsistent with constitutional standards and binding decisions of Florida's appellate courts.

the elements were all proved by clear and convincing evidence – thus establishing the availability of punitive damages – the case would proceed to Phase II so the jury could determine whether to award them and, if so, in what amount. Or, upon determining that some elements were not so proved, the trial would terminate without need for Phase II.

4. Deferring the determination whether there was clear and convincing proof of reliance and damages to Phase II, in contrast, would waste the Court's, the party's, and the jury's time and energy and would constitute an unnecessary distraction from the central focus of that proceeding. After having litigated reliance and damages in Phase I, the parties would be required to remind the jury of the same evidence, and present the same arguments, again in Phase II to resolve precisely the same issue – reliance and damages – but under a different standard of proof. The jury will be required to deliberate on the same issue again, and consider the same evidence again, again with no difference but the standard of proof. Further, the jury would be required to sit through evidence relating to the amount of punitive damages despite the possibility that, because of a failure to prove fraud by clear and convincing evidence, punitive damages may turn out to be legally unavailable in any event. There is no sensible reason to proceed in that fashion.

5. There is, moreover, a powerful reason for not proceeding in that fashion -- it introduces an unacceptable risk of undue prejudice. Under the Court's current orders, the evidence introduced during Phase II will include potentially inflammatory evidence relating to punitive damages. For example, the Court currently plans to read a statement to the jury setting forth its findings of litigation misconduct.[2] Such evidence has *no* bearing on whether CPH reasonably relied (or whether there was clear and convincing proof of reasonable reliance). But it has the undeniable potential to inflame the jury and taint that determination. Deferring resolution of whether there is clear and

[2] Morgan Stanley, as the Court understands, disputes the propriety of reading such a statement, as its other motions and papers in this case make clear.

convincing proof of reliance and damages to Phase II thus serves not only efficiency, but fairness as well.

6. Morgan Stanley is aware of the Court's considerable frustration (and more) with the way discovery and other matters were handled in this case. But that frustration should not cause the Court to lose sight of its duty to establish procedures that are both efficient and fair. Because the procedures currently contemplated by the Court's orders fall short on both accounts, they must be modified at least in this one respect.

CONCLUSION

For all the foregoing reasons, Defendant Morgan Stanley respectfully requests that this Court reconsider its order of March 31st.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 4th day of April, 2004.

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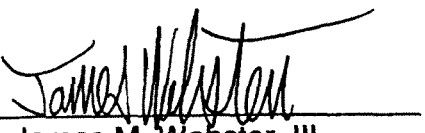
BY: 
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ATTACHMENT 1

[*SAMPLE FOR ILLUSTRATIVE PURPOSES ONLY*]

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

VERDICT

We, the jury, return the following verdict:

COUNT I—AIDING AND ABETTING

1. Did Defendant Coleman (Parent) Holdings, Inc. ("CPH") actually rely on Sunbeam's allegedly false statements?

A. Was this proved by the greater weight of the evidence?

YES_____ NO_____

B. Was this proved by clear and convincing evidence?

YES_____ NO_____

If your answer to Question 1 is NO, your verdict on this count is for Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley"), and you should proceed to COUNT II—CONSPIRACY. If your answer to Question 1 is YES, please answer Question 2.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON DEFENDANT'S MOTION REGARDING THE RELIANCE AND DAMAGES ISSUES TO BE DETERMINED AT PHASE I OF TRIAL

THIS CAUSE came before the Court April 5, 2005 on Defendant's Motion Regarding the Reliance and Damages Issues to be Determined at Phase I of Trial, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Defendant's Motion Regarding the Reliance and Damages Issues to be Determined at Phase I of Trial is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 5 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 58

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Tuesday, April 5, 2005

Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

1:30 p.m. to 4:00 p.m.

was.

MR. HANSEN: It's this one, Your Honor.

THE COURT: What's it called?

MR. HANSEN: Defendant's motion regarding the reliance and damage issues to be determined at phase one.

THE COURT: Did Plaintiff have a written response or not?

MR. SCAROLA: No, Your Honor. We are prepared to respond verbally, but we have not had an opportunity to prepare a written response for the Court.

THE COURT: Okay. What did you want to say in support of it?

MR. HANSEN: Your Honor asked this morning for support for that motion. And I think the support is in the statute.

THE COURT: Which statute?

MR. HANSEN: 768.72 and 768.25.

THE COURT: Let me look.

Court approval of settlements?

MR. HANSEN: 768.72.

THE COURT: I have that. Pleading in civil actions.

MR. HANSEN: Yes, number 2: "A defendant

may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds the defendant was personally guilty of intentional misconduct or gross negligence."

And I want to hand up to the Court, I've got a copy of something from the Florida forms of jury instruction from Lexus Nexus which seems to have an instruction that tracks what we're talking about. And here's the copy of the statute.

THE COURT: Well, except -- okay. But isn't there a big difference between saying they were intentionally guilty -- or guilty of intentional misconduct and saying that they have to prove, for instance, damages by clear and convincing evidence?

MR. HANSEN: Could be, Your Honor, but the way we read the statute is the claim has to be established by clear and convincing evidence and that would include its elements.

At least one authority we've come up with, obviously, since the short time this morning seems to view it that way as well. It's jury instructions from I think it's a panel including

a retired judge. It's available on Lexus Nexus.

THE COURT: Sure, but this is the same thing that sort of the statute suggests, that they have to show elements of fraud.

MR. HANSEN: Goes through the elements of fraud, each element, reliance, clear and convincing, preponderance you can win, but you don't get punitive damages.

THE COURT: So it's your position that although there can be, frankly, absolute evidence of intentional misconduct, if there's, for instance, not clear and convincing evidence of damages, punitive damages can't be awarded?

MR. HANSEN: Your Honor, we do for the following reason. You need an underlying claim. For example, say you fail on your reliance element.

THE COURT: When you say fail you mean make it by a preponderance of the evidence but less than clear and convincing?

MR. HANSEN: Let's say you fail all together. Let's say the jury rules for defendant on reliance, even though the jury finds the most outrageous conduct. No punitive damages. All of the elements of the claim have

to be established in order to reach the punitive damages stage.

Our position is each of the elements has to be shown by clear and convincing evidence. That would include the reliance and damages evidence not just the bad conduct aspect.

THE COURT: You don't have any case law that addresses this?

MR. HANSEN: The only authority I could come up with was this suggested instruction from the panel that I've got. But I haven't found a case that goes either way.

THE COURT: I appreciate that.

What did you want to respond?

MR. SCAROLA: Your Honor, the clear and convincing evidence standard is a creature of statute. At common law, until October of 1999, punitive damages could be recovered based upon a showing by a preponderance of the evidence that the conduct was of a nature as to warrant the imposition of punitive damages. Following October of 1999, the legislature imposed a new requirement that they increased the burden of proof and they specifically described the scope of that increase of burden of proof.

It clearly does not indicate that the increased burden of proof applies to the elements of the underlying claim, but rather only to proof that the circumstances under which the fraudulent or intentional or grossly, willful, wanton and reckless act that was performed was such as to warrant the imposition of punitive damages.

Entitlement to punitive damages meeting that threshold must be proved now by clear and convincing evidence.

We acknowledge for purposes of this proceeding that although this statute became effective in October of 1999, which clearly was subsequent to the conduct at issue here, this has been found by the courts to be procedural in nature and, therefore, relates back to the time of the transaction that is under question.

Nonetheless, it is a statute in derogation of the common law. It must be strictly construed and narrowly construed so as to impose the least limitation on the common law right of recovery. And the only reasonable construction is therefore one that applies the higher standard not to the elements of the underlying

claim, but only to the additional threshold burden for the recovery of punitive damages itself.

That position is clearly corroborated by the standard jury instructions.

I have handed Your Honor a copy of Florida jury instructions in civil cases on damages. And if Your Honor will take a look at those instructions, you will see that the instruction scheme that is set up here applies the clear and convincing standard only to those additional factors that must be proved in order to recover punitive damages. And, indeed, even the amount of punitive damages must only be proved by the greater weight of the evidence and not by clear and convincing evidence.

So the limitations of the statute I think are apparent from the approved jury instructions themselves. If the position espoused by the Defendant were to be accepted in every single punitive damage case, we would have a two-step jury finding, which simply never occurs.

So I don't think there's any support for the imaginative position that the Defendant has taken. I credit them for their degree of

imagination, but it is strictly a figment of their imagination. The motion should be denied.

THE COURT: Did you want to respond?

MR. HANSEN: Yes, Your Honor, very briefly. I actually garbled my words. There's another statutory, 768.725. I think it goes directly to what Your Honor was saying a minute ago.

THE COURT: Burden of proof?

MR. HANSEN: In all civil actions the plaintiff must establish at trial by clear and convincing evidence its entitlement to punitive damages. The greater weight burden of proof applies to a determination of the amount of damages.

As we read that, Your Honor, that goes precisely to the issue.

THE COURT: But why is that not just talking about --

MR. HANSEN: Burden of proof for the elements other than damages, Your Honor. Since damages are given the lessor burden, necessarily that implies that the other elements of the claim would have to be proved by clear and convincing evidence according to the legislature. Otherwise, that would make no

sense. So reliance would have to be proved by clear and convincing.

And I would take the position fact of injury would have to be proved that way, amount, quantum could be proved by the preponderance. Unless that statute is not to be read strictly, and I agree with Mr. Scarola, it should be read strictly. That requirement should be made. And we would save a great deal of inconvenience if we were to simply put on the jury form both standards of proof and ask the jury to conclude on both. That way we would know whether there was a need for a second phase.

I mean, they might find liability, but not clear and convincing. They might find both, then we clearly -- but the proof on these elements won't be any different. That will all be --

THE COURT: I understand the argument. But I would deny the motion.

MR. SOLOVY: Your Honor, we were going to do the litigation misconduct statement, but now I think we have to try and revamp it in light of your order.

THE COURT: That's something that we don't

IN THE CIRCUIT COURT FOR THE

15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 77

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Tuesday, April 19, 2005

Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

1:30 p.m. to 6:10 p.m.

one on entitlement.

That said, the first ruling we did on this, which is we need to cut out all the stuff that's inconsistent with Exhibit A, controls the phase two.

MS. BEYNON: Yes, Your Honor. This addresses a different issue. This goes to the testimony of the MAFCO witnesses.

MR. SHAW: Quite frankly, Judge, I don't see how the due diligence conducted by CPH or the sophistication of Mr. Perelman has anything to do with either the entitlement to or amount of punitive damages that we have requested in this case.

THE COURT: What's the response that the level of due diligence has nothing to do with this?

MS. BEYNON: I think Your Honor said that the jury has to establish reliance by clear and convincing evidence.

THE COURT: No, entitlement to punitive damages by clear and convincing evidence. Which is why we didn't do the separate interrogatory in phase one.

MS. BEYNON: Doesn't that mean that the

elements that are left --

THE COURT: I don't know that it does. I mean, that's maybe something we need to argue further, but, no, in my mind I don't know that that means that every element of the claim has to be established by clear and convincing evidence as opposed to the jury just having clear and convincing evidence that punitive damages are appropriate.

MS. BEYNON: This is obviously an issue that we do need to brief, Your Honor. I think we've been proceeding under the assumption that reliance needs to be proved by clear and convincing evidence. We can provide followup.

THE COURT: You better do it pretty quick.

MS. BEYNON: Yes, Your Honor.

MR. SHAW: We obviously disagree with that, Your Honor.

THE COURT: I know. And this is something we talked about some when we did the rebifurcation, but if you guys are going to argue that, you need to come back and do it really quick.

MS. BEYNON: Can we submit that as part of the phase two briefing that we're doing, because

these are not urgent, Your Honor --

THE COURT: Except they're getting -- are you going to have any live witnesses in your case and if so, whom?

MS. BEYNON: We will have Mr. Levin as a live witness in our case and we will probably have other live witnesses. Again, this is something we're still considering.

THE COURT: I need an answer. I can tell you by Friday we need a position where we know everything we're doing. And we're doing the depo designation objections on Friday. So you know, my gut is that your case may not be that long and we may get to phase two pretty quick depending what the jury does. And I don't want us to think, oh, we have a whole Friday after this to vet these issues.

MS. BEYNON: We would ask that the phase two issues be vetted.

THE COURT: They obviously have to be vetted quickly, but like Friday.

MS. BEYNON: Yes, Your Honor, we will get these in quickly. We will be briefing what it means to prove entitlement and --

THE COURT: You're taking the position that

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

PLAINTIFF'S PROPOSED JURY INSTRUCTIONS

COMES NOW the Plaintiff, by and through its undersigned attorneys, and hereby requests that this Honorable Court give the following jury instructions.

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

Jerold S. Solovy
Ronald L. Marmer
Jeffrey T. Shaw
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EXHIBIT
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~~03-015648~~

Table of Contents

Instructions During Trial 1
Certain Facts Conclusively Established 1
Deposition Testimony 2
Bates Ranges 3
Introductory Instruction 4
Believability of Witnesses 5
Greater Weight (Preponderance) of the Evidence Defined; Certain Facts Conclusively Established 6
Elements of CPH's Claims 7
Element 1 — Reliance 9
Liability for Acts of Co-Conspirators 10
Element 2 — Causation of Damages 11
Amount of Damages — Compensatory 12
Benefit of the Bargain 13
No Reduction on Account of Uncertainty Caused by Defendant 15
Collateral-Source Rule for Tort Actions 16
Prejudice and Sympathy; Judge Not Involved 17
Closing Instruction, First Phase of Proceedings 18
VERDICT FORM (First Phase of Bifurcated Proceedings) 19
Instructions for Second Phase of Trial 20
Opening Instruction — Second Phase 20
Opening Statement Regarding Litigation Misconduct 21
Damages — Punitive — Entitlement 22
Damages — Punitive — Amount 23
Closing Instructions, Second Phase of Proceedings 25
VERDICT FORM (Second Phase of Bifurcated Proceedings) 26

PLAINTIFF'S PROPOSED INSTRUCTION NO. 1
Instructions During Trial
Certain Facts Conclusively Established

[To be read before statement of established facts is read]

In this case, certain facts have been conclusively established before trial, and you will be informed of these established facts in a statement which I will read to you. You are required to accept these facts as true for all purposes in your deliberations. Evidence will be presented to you concerning the issues in the case that remain to be decided by you, but you may not consider any evidence admitted during the trial as contradicting any of the established facts read to you in my statement.

Authority:
March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 2
Instructions During Trial
Deposition Testimony

Members of the jury, the sworn testimony of (name), given before trial, will now be shown to you. You are to consider and weigh this testimony as though the witness had testified here in person.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 1.3a (2003) (modified for videotaped testimony).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 3
Instructions During Trial
Bates Ranges

Many of the documents you will see in this trial have been marked during pretrial proceedings with numbers and other information, usually in the lower right corner. These pretrial markings which were not part of the original document will be identified when a document is admitted into evidence. This numbering system is merely used to keep track of documents during litigation; it does not represent who authored or created the documents. Therefore, you should not attempt to draw any conclusions about documents based on how they have been numbered or otherwise marked for trial.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 4
Introductory Instruction

Members of the jury, I shall now instruct you on the law that you must follow in reaching your verdict. It is your duty as jurors to decide the issues, and only those issues, that I submit for determination by your verdict. In reaching your verdict, you should consider and weigh the evidence, decide the disputed issues of fact, and apply the law on which I shall instruct you, to facts as you find them from the evidence.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in evidence, all facts that may be admitted or agreed to by the parties, any fact of which the Court has taken judicial notice, and all the established facts that I read to you at the beginning of the trial.

In determining the facts, you may draw reasonable inferences from the evidence. You may make deductions and reach conclusions which reason and common sense lead you to draw from the facts shown by the evidence in this case. But you should not speculate on any matters outside the evidence. And you may not draw inferences, make deductions, or reach conclusions which are contrary to or inconsistent with the established facts that I read to you at the beginning of the trial.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 2.1 (2003) (modified in light of March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 5
Believability of Witnesses

General Considerations

In determining the believability of any witness and the weight to be given the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

Expert Witnesses

You have heard opinion testimony on certain technical subjects from persons referred to as "expert witnesses." Some of the testimony before you was in the form of opinions about certain technical subjects.

You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness; the reasons given by the witness for the opinion expressed; and all the other evidence in the case.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 2.2a-b (2003).

16div-015654

PLAINTIFF'S PROPOSED INSTRUCTION NO. 6
Greater Weight (Preponderance) of the Evidence Defined; Certain Facts Conclusively Established

CPH must prove certain matters that I will describe to you by the "greater weight of the evidence." "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. However, the facts that I read to you earlier were established before trial. As a result, you must accept them as true, and no further evidence is required to prove them.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 3.9 (2003) (modified in light of March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 7
Elements of CPH's Claims

I will now instruct you on CPH's claims. CPH claims that Morgan Stanley aided and abetted the Sunbeam fraud, and that Morgan Stanley conspired with Sunbeam to commit fraud. One aids and abets fraud if one knowingly provides substantial assistance to fraud committed by another. One conspires to commit fraud if one makes an agreement with someone else to commit fraud, takes overt action in furtherance of that agreement, and fraud results from one's own actions, the actions of the other party, or some combination of the two.

Several facts relating to both of CPH's claims against Morgan Stanley are already established, and certain findings or conclusions follow directly from those facts. I instruct you to accept that Sunbeam and Morgan Stanley made false statements of material fact with the intent that CPH would rely on them. I also instruct you to accept that Morgan Stanley knew of Sunbeam's fraud, substantially assisted it, conspired with Sunbeam to defraud CPH, and committed overt acts in furtherance of that agreement.

You must accept each and every one of these findings based on the facts established before trial. Like the established facts, these findings have been conclusively established for all purposes in your deliberations and you may not consider any other evidence admitted during the trial as contradicting any of these established findings.

These findings establish certain elements of CPH's claims, but they do not alone prove CPH's claims. To prove its claims for aiding and abetting fraud and conspiracy to commit fraud, CPH must show two things by the greater weight of the evidence:

First, that CPH relied on a false statement or false statements by Morgan Stanley or Sunbeam, and

Second, that the false statement or false statements by Morgan Stanley or Sunbeam caused CPH to suffer loss.

If you find both of these elements, you must find for CPH on both its aiding and abetting fraud claim and its conspiracy claim. If you find neither of these elements, or find one of these elements but not the other, you must find for Morgan Stanley on both claims. You may not find for CPH on one claim, but for Morgan Stanley on the other. I will now instruct you on these two elements in greater detail.

Authority:
Tew v. Chase Manhattan Bank, N.A., 728 F. Supp. 1551, 1568 (S.D. Fla. 1990) (stating that elements of aiding and abetting fraud under Florida law are (1) a fraud, (2) "knowledge of the fraud," and (3) "knowing rendition of substantial assistance"), *amended on reh'g*, 741 F. Supp. 220 (S.D. Fla. 1990); RESTATEMENT (SECOND) OF TORTS § 876 (1979); *Kent v. Kent*, 431 So. 2d 279, 281 (Fla. 5th DCA 1983) (stating that elements of civil conspiracy under Florida law are "(a) a conspiracy between two or more parties, (b) to do an unlawful act, or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts done under the conspiracy"); *Florida Fern Growers Ass'n v. Concerned Citizens of Putnam County*, 616 So. 2d 562, 565 (Fla. 5th DCA 1993) (same); *Hoch v. Rissman, Weisberg, Barrett*, 742 So. 2d 451, 460 (Fla. 5th DCA 1999) (conspiracy is a "vehicle for imputing the tortious actions of one co-conspirator to another to establish joint and several liability"); THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES MI 8.1 (2003) (elements of fraud); March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 8
Elements of CPH's Claims
Element 1 — Reliance

The first issue for your consideration is whether CPH relied on any false statement or false statements made by Morgan Stanley or Sunbeam. When you consider whether CPH relied on any false statement or false statements made by Sunbeam or Morgan Stanley, Morgan Stanley is not entitled to the defense that CPH, by exercising reasonable care, could have learned the facts and thereby prevented the loss. Under the law, CPH had no duty or obligation to attempt to obtain more information to determine whether any statement was false. CPH was entitled to rely on any statement made by Morgan Stanley or Sunbeam unless CPH knew that the statement was false or the falsity of the statement was obvious, even if CPH had the means to verify the accuracy of the statements and failed to use those means.

Authority:
Transcript of Proceedings, March 9, 2005, at 2664.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 9
Elements of CPH's Claims
Liability for Acts of Co-Conspirators

You must treat statements made by Sunbeam as if they had been made by Morgan Stanley, and vice versa. Based on the facts conclusively established before trial, Morgan Stanley and Sunbeam conspired to defraud CPH. Under the law, parties to a conspiracy are liable for each other's actions in the conspiracy, as if the actions had been their own. Any person or corporation that enters into a conspiracy after the wrongdoing begins is liable for the acts by other members both before and during the time that it is a member of the conspiracy.

Authority:
August 12, 2004 Order on Morgan Stanley's Motion for Application of New York Law, at 12 (citing *James v. Nationsbank Trust Co. (Florida), N.A.*, 639 So. 2d 1031, 1032 (Fla. 5th DCA 1994)); *Hoch v. Rissman, Weisberg, Barrett*, 742 So. 2d 451, 460 (Fla. 5th DCA 1999) (conspiracy is a "vehicle for imputing the tortious actions of one co-conspirator to another to establish joint and several liability").

PLAINTIFF'S PROPOSED INSTRUCTION NO. 10
Elements of CPH's Claims
Element 2 — Causation of Damages

The second issue for your consideration is whether the fraud Morgan Stanley aided, abetted, and conspired to commit caused CPH to suffer loss. The Sunbeam fraud was the legal cause of CPH's losses if the fraud committed against CPH directly and in natural and continuous sequence produced or contributed substantially to producing such losses, so that it can reasonably be said that, but for the fraud, the losses would not have occurred. To be regarded as a legal cause of CPH's losses, the fraud that Morgan Stanley helped and conspired to commit need not be the only cause of CPH's losses. The fraud may be a legal cause of CPH's losses even though the fraud operated in combination with the act of another or some other cause occurring after the fraud occurred, if such other cause was itself reasonably foreseeable and the fraud contributed substantially to producing CPH's losses.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 5.1 (2003) (modified for party names, nature of claims, and in light of March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 11
Amount of Damages — Compensatory

If you find for Morgan Stanley on both of CPH's claims — aiding and abetting fraud and conspiracy to commit fraud — you will not consider the matter of damages. But if you find for CPH, you should award CPH an amount of money that the greater weight of the evidence shows will fairly and adequately compensate CPH for its loss.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 6.1b (2003) (modified for party names and nature of claims).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 12
Amount of Damages — Compensatory
Benefit of the Bargain

To determine the amount of compensatory damages that will constitute fair and adequate compensation for any loss incurred by CPH, you must calculate the difference between:

(1) CPH's reasonable expectation of the fair market value of the Sunbeam stock that CPH received in the Coleman transaction, if the false statements concerning Sunbeam had actually been true; and

(2) the fair market value at which CPH reasonably could have sold its Sunbeam stock to a buyer who had full knowledge of the entire fraud. For purposes of this determination, I instruct you that because of certain legal prohibitions, CPH could not have sold its Sunbeam stock prior to _____. It is for you, the jury, to decide whether CPH could have sold its Sunbeam stock at any time after _____, and, if so, at what fair market value price. Also for purposes of this instruction, "fair market value" means the amount a purchaser who was willing but not obliged to buy would pay to someone willing but not obliged to sell.

In other words, CPH's damages are the difference between (1) the value of what CPH was supposed to receive, and (2) the value of what CPH actually did receive, at the point when CPH could sell the Sunbeam stock.

Authority:
Silverberg v. Paine, Webber, Jackson & Curtis, Inc., 710 F.2d 678, 686 (11th Cir. 1983) (applying Florida law and approving jury instruction stating in part that the "elements which you should consider in arriving at the amount of money damages which will constitute fair and adequate compensation for the loss or damages allegedly incurred include the difference between the purchase price paid for the Posi-Seal stock purchased by the plaintiff and the price at which such stock was or could have been sold by the plaintiff when he learned of the alleged fraud"); *Totale, Inc. v. Smith*, 877 So. 2d 813, 815 (Fla. 4th DCA 2004) (benefit of the bargain rule "awards as damages the difference between the actual value of the property and its value had the

alleged facts regarding it been true"); *see Nordyne, Inc. v. Florida Mobile Home Supply, Inc.*, 625 So. 2d 1283, 1286 (Fla. 1st DCA 1993); *Martin v. Brown*, 566 So. 2d 890, 891 (Fla. 4th DCA 1990); *DePuis v. 79th St. Hotel, Inc.*, 231 So. 2d 532 (Fla. 3d DCA), *cert denied*, 238 So. 2d 105 (Fla. 1970); *Strickland v. Muir*, 198 So. 2d 49, 51 (Fla. 4th DCA 1967). *See also Finkelstein v. Department of Trans.*, 656 So. 2d 921, 925 (Fla. 1995) (definition of fair market value); *Valencia Center, Inc. v. Bystrom*, 543 So. 2d 214, 216 (Fla. 1989) (same); *American Reliance Ins. Co. v. Perez*, 689 So. 2d 290, 291 (Fla. 3d DCA 1997) (same); February 15, 2005 Order on Morgan Stanley's Motion in Limine No. 16 to Strike the Expert Opinion of CPH Expert Blaine Nye; February 15, 2005 Order on CPH's Motion in Limine No. 19 to Exclude Portions of Expert Witness Mark Grinblatt's Testimony; March 28, 2005 Order on CPH's Motion in Limine No. 27 for a Finding as a Matter of Law that the Federal Securities Laws Prohibited Plaintiff from Selling Unregistered Sunbeam Stock.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 13
Amount of Damages — Compensatory
No Reduction on Account of Uncertainty Caused by Defendant

If CPH proves it suffered damage by the greater weight of the evidence, CPH is entitled to recover for that damage even though the exact amount of the damage cannot be determined. If you find by the greater weight of the evidence that damage did occur as a result of the Sunbeam fraud, CPH is entitled to recover for that damage as long as there is some reasonable yardstick by which it can be measured — that is, as long as there is some reasonable basis for estimating the amount of the damage, CPH may not be denied damages merely because the amount of the damage is uncertain or difficult to determine. If Morgan Stanley's and Sunbeam's wrongdoing has made CPH's damages more difficult to prove, you should not reduce the amount of damages because of that uncertainty. Morgan Stanley bears the risk of uncertainty caused by its own wrongful acts.

Authority:
Miller v. Allstate Ins. Co., 573 So. 2d 24, 27 (Fla. 3d DCA 1990) ("[w]here the defendant's wrong has caused the difficulty of proof of damages," the defendant "cannot complain of the resulting uncertainty"); *Linton v. Pension Services Corp.*, 389 So. 2d 247, 249 (Fla. 2d DCA 1980); *Adams v. Dreyfus Interstate Devel. Corp.*, 352 So. 2d 76, 78 (Fla. 4th DCA 1977); *John Hancock Life Ins. Co. v. Mark-A, Inc.*, 324 So. 2d 674, 674 (Fla. 2d DCA 1975); *Conner v. Atlas Aircraft Corp.*, 310 So. 2d 352, 354 (Fla. 3d DCA 1975); *Asgrow-Kilgore Co. v. Mulford Hickerson Corp.*, 301 So. 2d 441, 445 (Fla. 1974); *McCall v. Sherbill*, 68 So. 2d 362, 364 (Fla. 1954); *Twyman v. Roell*, 166 So. 215, 218 (Fla. 1936); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 250 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 569 (1931).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 14
Amount of Damages — Compensatory
Collateral-Source Rule for Tort Actions

You should not reduce the amount of compensation to which CPH is otherwise entitled on account of any benefits, recovery, or compensation CPH has received or may receive from Sunbeam, Arthur Andersen, or any other source. The Court will reduce as necessary the amount of compensation to which CPH is entitled on account of any such payments.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 6.13a & note 1 (2003) (modified to identify relevant parties).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 15
Prejudice and Sympathy; Judge Not Involved

In reaching your verdict, you are not to be swayed from the performance of your duty by prejudice, sympathy, or any other sentiment for or against any party. Your verdict must be based on the evidence that has been received and the law on which I have instructed you.

Reaching a verdict is exclusively your job. I cannot participate in that decision in any way. You should not speculate about how I might evaluate the testimony of any witness or any other evidence in this case, and you should not think that I prefer one verdict over another. Also, you should not think, based on the facts I have instructed you to accept as established, that I have a preference regarding how you should decide the matters submitted for your determination. Therefore, in reaching your verdict, you should not consider anything that I have said or done, except for my specific instructions to you.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 7.1 (2003) (modified in light of March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 16
Closing Instruction, First Phase of Proceedings

When you retire to the jury room, you should select one of your number to act as foreman or forewoman to preside over your deliberations and sign your verdict. Your verdict must be unanimous, that is, your verdict must be agreed to by each of you.

You will be given a form of verdict, which I shall now read to you:

[*read form of verdict*]

When you have agreed on your verdict, the foreman or forewoman, acting for the jury, should date and sign the appropriate form of verdict. You may now retire to consider your verdict.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 7.2 (2003).

VERDICT FORM (First Phase of Bifurcated Proceedings)

VERDICT

We, the jury, return the following verdict:

1. Did CPH rely on any false statement or false statements made by Morgan Stanley or Sunbeam?

YES _____ NO _____

If your answer to question 1 is NO, your verdict on each claim is for the defendant, Morgan Stanley, and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 1 is YES, your verdict is for CPH, and you should proceed to answer question 2.

2. What is the total amount of damages sustained by CPH and caused by the fraud in question?

Total compensatory damages: $ _____

In determining the total amount of CPH's damages, do not make any reduction because of CPH's negligence, if any, or because of any benefit, recovery, or compensation that CPH has received or may receive from Sunbeam, Arthur Andersen, or any other source.

Date and sign this form and return it to the courtroom.

SO SAY WE ALL, this _____ day of _____, 2005.

_____
FOREPERSON

PLAINTIFF'S PROPOSED INSTRUCTION NO. 17
Instructions for Second Phase of Trial
Opening Instruction — Second Phase

The parties may now present additional evidence related to whether punitive damages should be assessed, and, if so, in what amount. You should consider this additional evidence along with the evidence already presented, including those conclusively established facts that I read to you at the beginning of trial.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES PD-1b(1) (2003) (modified for in light of March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment); April 1, 2005 Order on Morgan Stanley's Motion to Clarify the Proper Scope of the Liability and Punitive Phases of Trial.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 18
Instructions for Second Phase of Trial
Opening Statement Regarding Litigation Misconduct

[Read Statement Regarding Litigation Misconduct]

Authority:
March 23, 2005 Order on CPH's Renewal Motion for Entry of Default Judgment.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 19
Instructions for Second Phase of Trial
Damages — Punitive — Entitlement

The issue for your determination in this phase of the trial is whether, in the circumstances of this case, it is appropriate to award punitive damages to punish Morgan Stanley and to serve as a deterrent to Morgan Stanley and others, and, if so, the appropriate amount of such damages.

Punitive damages are warranted if clear and convincing evidence establishes that:

(1) Morgan Stanley acted fraudulently;

(2) Morgan Stanley acted willfully;

(3) Morgan Stanley acted in reckless disregard for the rights of CPH; or

(4) Morgan Stanley acted in intentional violation of the rights of CPH.

The findings already made by the Court, which I read to you at the beginning of trial, satisfy CPH's burden of establishing by clear and convincing evidence that Morgan Stanley acted both fraudulently and willfully. Nevertheless, you may in your discretion decline to award punitive damages.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES PD-1(a) (modified for party names, for intentional tort of fraud, and in light of March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment and April 1, 2005 Order on Morgan Stanley's Motion to Clarify the Proper Scope of the Liability and Punitive Phases of Trial); *id.* Note 3 (noting that "certain types of intentional torts may require a punitive damage charge appropriate to the particular tort); *First Interstate Devel. Corp. v. Ablanedo*, 511 So. 2d 536, 539 (Fla. 1987).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 20
Instructions for Second Phase of Trial
Damages — Punitive — Amount

In determining the amount of punitive damages, if any, to be assessed as punishment and as a deterrent to others, you should decide any disputed factual issues by the greater weight of the evidence. "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. You should consider the following in determining the amount of punitive damages to be assessed:

(1) The nature, extent, and degree of misconduct, and the related circumstances, including the following:

- the reprehensibility of Morgan Stanley's misconduct, including the extent to which it involved malice, trickery, or deceit ("reprehensible" means "worthy of censure or rebuke");
- the degree of Morgan Stanley's awareness of the wrongfulness of the misconduct;
- the duration of the misconduct;
- whether offensive conduct was repeated on more than one occasion;
- the attitude and conduct of Morgan Stanley upon discovery of the misconduct;
- Morgan Stanley's concealment of its role in the Sunbeam transaction, including its litigation misconduct in this case, as evidence of Morgan Stanley's malice and evil intent; and

- the number and level of responsibility of corporate employees who knew of, participated in, subsequently approved of, or participated in concealing or covering up the misconduct.

(2) The enormity of the offense. Punitive damages should bear a reasonable relationship to the harmfulness of Morgan Stanley's conduct, and should not be out of proportion to the harm suffered as a consequence of the conduct. Accordingly, you may consider whether and the extent to which Morgan Stanley's conduct caused danger or harm to others besides CPH including harm or danger to the investing public; and

(3) Morgan Stanley's financial resources. An award of punitive damages must not be out of proportion to Morgan Stanley's financial resources. Punitive damages should be painful enough to punish and deter but should not be so great as to financially destroy or bankrupt Morgan Stanley.

You may in your discretion decline to assess punitive damages.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES PD-2d(1) (2003) (modified in light of April 1, 2005 Order on Morgan Stanley's Motion to Clarify the Proper Scope of the Liability and Punitive Phases of Trial) (first factor); March 1, 2005 Sanctions Order (sixth subfactor of first factor); *Owens-Corning Fiberglass Corp. v. Ballard*, 749 So. 2d 483, 484-85 (Fla. 1999) (first factor; approving factors for jury's consideration in determining nature, extent, and degree of misconduct); *BMW of North America v. Gore*, 517 U.S. 559, 575-83 (1996) (first and second factors); *Wransky v. Dalfo*, 801 So. 2d 239, 243 (Fla. 4th DCA 2001) (second and third factors); *Arab Termite & Pest Control of Fla. Inc. v. Jenkins*, 409 So. 2d 1039 (Fla. 1982) (third factor); WEBSTER'S II NEW COLLEGE DICTIONARY 941 (1999) (definition of "reprehensible").

PLAINTIFF'S PROPOSED INSTRUCTION NO. 21
Instructions for Second Phase of Trial
Closing Instructions, Second Phase of Proceedings

Your verdict on the issues raised by CPH's punitive damages claim against Morgan Stanley must be based on the law on which I have instructed you and on evidence that has been received during the entire trial of this action, including both phases of this case, the facts established before trial that I read to you at the beginning of the trial, and the additional facts concerning litigation misconduct that I read to you at the beginning of this second phase of the trial. In reaching your verdict, you are not to be swayed from the performance of your duty by prejudice or sympathy for or against any party.

Your verdict must be unanimous, that is, your verdict must be agreed to by each of you.

You will be given a form of verdict, which I shall now read to you:

[read form of verdict]

When you have agreed on your verdict, the foreman or forewoman, acting for the jury, should date and sign the verdict. You may now retire to consider your verdict.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES PD-1b(3) (2003) (modified in light of March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment).

VERDICT FORM (Second Phase of Bifurcated Proceedings)

We, the jury, return the following verdict:

1. Are punitive damages warranted against Morgan Stanley?

YES _____ NO _____

2. What is the total amount of punitive damages, if any, which you find should be assessed against Morgan Stanley?

Total punitive damages: $ _____

Date and sign this form and return it to the courtroom.

SO SAY WE ALL, this _____ day of _____, 2005.

_____
FOREPERSON

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list, this 4th day of April, 2005.

JEFFREY T. SHAW

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON CPH'S RENEWED MOTION FOR ENTRY OF DEFAULT JUDGMENT

THIS CAUSE came before the Court March 14 and 15, 2005, on CPH's Renewed Motion for Entry of Default Judgment, with both parties well represented by counsel.

Coleman (Parent) Holdings, Inc. ("CPH"), has sued Morgan Stanley & Co., Inc. ("MS & Co."), for aiding and abetting and conspiring with Sunbeam to perpetrate a fraud. Early in the case, CPH was concerned that MS & Co. was not thoroughly looking for emails responsive to its discovery requests. On April 16, 2004, the Court entered an Agreed Order ("Agreed Order") that required MS & Co. to search its oldest full backup tapes for emails subject to certain parameters and certify compliance. MS & Co. certified compliance with the Agreed Order on June 23, 2004. On November 17, 2004, CPH learned that MS & Co. had found some backup tapes that had not been searched. On January 26, 2005 it served its Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order ("Adverse Inference Motion"), claiming that MS & Co.'s violation of the Agreed Order, coupled with its systemic overwriting of emails after 12 months, justified an adverse inference against it. The Court ordered certain limited discovery. Responses to that discovery prompted CPH to orally amend its Adverse Inference Motion to seek more severe sanctions.

The Court held an evidentiary hearing on the Adverse Inference Motion on February

14, 2005. On March 1, 2005 it issued its Amended Order on Coleman (Parent) Holdings Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order ("Adverse Inference Order"). In its current Motion, CPH argues that it has since learned that the discovery abuses addressed in the Adverse Inference Motion and Order represent only a sampling of discovery abuses perpetrated by MS & Co. and that the abuses have continued, unabated. It claims that these abuses, when taken as a whole, infect the entire case. To understand CPH's argument, it is necessary to go back to the beginning.

This case arises out of an acquisition transaction that was negotiated and consummated in late 1997 and early 1998, in which CPH sold its 82% interest in the Coleman Company, Inc., to Sunbeam Corporation. MS & Co. served as financial advisor to Sunbeam for parts of the acquisition transaction and served as the lead underwriter for a $750,000,000.00 debenture offering that Sunbeam used to finance the cash portion of the deal.

CPH's Complaint[1] alleged claims against MS & Co. arising from this transaction for fraudulent misrepresentation, negligent misrepresentation, aiding and abetting fraud, and conspiracy, and sought damages of at least $485 million.

On May 12, 2003, MS & Co. was served with the Complaint and CPH's First Request for Production of Documents ("Request"). The Request sought, in essence, all documents connected with the Sunbeam deal. "Documents" was broadly defined, and specifically included items electronically stored. Concerned that, out of more than 8,000 pages of documents produced, it had received only a handful of emails, CPH on October 29, 2003, served its Motion to Compel Concerning E-Mails. That motion sought an order requiring MS & Co. to make a full investigation for email messages, including a search of magnetic tapes and hard drives; produce within 10 days all emails located; and produce a Rule 1.310 witness

[1]On February 17, 2005, CPH served its First Amended Complaint, which dropped the claims against MS & Co. for fraudulent and negligent misrepresentation, leaving only the aiding and abetting and conspiracy claims.

within 20 days "to describe the search that was conducted, identify any gaps in Morgan Stanley's production, and explain the reasons for any gaps."

In its Opposition to Coleman (Parent) Holdings, Inc.'s Motion to Compel served November 4, 2003, MS & Co. argued that CPH wanted "this Court to order a massive safari into the remote corners of MS & Co.'s email backup systems" and represented that "(t)he restoration efforts demanded by CPH would *cost at least hundreds of thousands of dollars* and require several months to complete (emphasis in original). MS & Co. argued that CPH's "true" motive was to "harass and burden MS & Co. with unnecessary and costly discovery demands and attempt to smear MS & Co. with out-of-context recitations from other proceedings" because "CPH *concedes* that MS & Co. is only able to restore email from backup tapes from January 2000 and later - *more than a year and a half after the events that allegedly gave rise to CPH's claims*," (emphasis in original).

CPH's "concession" was based on representations like the kind made to it by MS & Co.'s counsel in a March 11, 2004 letter that suggested "(t)he burden on Morgan Stanley from . . . a wholesale restoration [of email back up tapes], both in terms of dollars and manpower would be enormous. Regardless of who performs the initial restoration, it would require hundreds (perhaps thousands) of attorney-hours to review millions of irrelevant and non-responsive e-mails . . ."[2]

In response to CPH's Motion to Compel, the parties agreed to reciprocal corporate

[2]Complaints about MS & Co.'s tactics are not new. See Ex. 196 [February 26, 2004, letter from EEOC to Hon. Ronald L. Ellis in EEOC/Schieffelin v. Morgan Stanley & Co., Inc., et al., 01-CV-8421 (RMB) (RLE) (S.D.N.Y.): ("(w)hen EEOC received [Morgan Stanley's] January 27, 2004 Responses to EEOC's Fifth Requests for Production of Documents which did not contain any e-mails, the parties communicated further. At that time, Morgan Stanley took the position that searching for e-mails would be burdensome both in regards to expense and the time it would take to respond. While the parties were in the process of attempting to work out these disputes, EEOC for the first time learned that [Morgan Stanley has] an easy, systematic ability to search for relevant documents. In a February 16, 2004, conversation with an IT representative of [Morgan Stanley], EEOC learned that [Morgan Stanley has] an e-mail system, which, while not yet fully comprehensive, was easily searchable on February 18, 2004, the close of discovery . . . which is certain to produce discoverable information highly relevant to EEOC's and Plaintiff-Intervenor's claims . . . After disclosing their state-of-the-art system to EEOC, [Morgan Stanley] dropped [its] assertion that the process was too expensive, but maintained that they refuse to search for e-mails because it is burdensome for attorneys to review large numbers of documents prior to production.")

depositions on the email issue. CPH deposed Robert Saunders on February 10, 2004.[3] After completion of the corporate representative depositions, and unable to obtain MS & Co.'s agreement to a mutual email restoration protocol, CPH served its Motion for Permission to have Third Party Retrieve Morgan Stanley E-Mail and Other Responsive Documents, proposing that a third party vendor be given access to both parties' email systems for restoration at each party's expense. At the hearing on that Motion, CPH offered to split the expenses evenly. MS & Co. refused.

MS & Co.'s continued assertions that the email searches could be conducted only at enormous cost and would be fruitless because there were not backup tapes with email from 1997 and 1998 were confirmed to the Court by MS & Co.'s counsel, Thomas Clare of Kirkland & Ellis, at a hearing held March 19, 2004:

> Mr. Scarola: Electronic records of e-mails that have been exchanged.
> The Court: Do we agree that there has been such a request outstanding?
> Mr. Clare: There has been a request outstanding.
> The Court: And have you all objected?
> Mr. Clare: From the beginning.
> The Court: And what's the basis of the objection?
> Mr. Clare: We objected to the breadth of the request that they're making. And to answer Your Honor's question directly – and the burden that is associated with it – that given the particular e-mail back-up tapes that are in existence five, six years after the fact of these transactions, that the scope of the e-mail request that they are seeking is improperly and unduly burdensome given the enormous costs that would be required, given the fact that the time period for which we have back-up tapes post dates the events by several years.

Unable to resolve the email issue, on April 9, 2004, CPH served its Motion to Compel

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[3]Saunders provided misleading information in his deposition. See footnote 12, infra.

Concerning E-Mails and Other Electronic Documents. On the eve of the hearing on CPH's Motion to Compel, the parties reached an accommodation, and on April 16, 2004 the Court entered the Agreed Order. Under the Agreed Order, MS & Co. was required to (1) search the oldest full backup tape for each of 36 MS & Co. employees involved in the Sunbeam transaction; (2) review emails dated from February 15, 1998, through April 15, 1998, and emails containing any of 29 specified search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004, all nonprivileged emails responsive to CPH's document requests; (4) give CPH a privilege log; and (5) certify its full compliance with the Agreed Order.

As required by the Agreed Order, MS & Co. produced about 1,300 pages of emails on May 14, 2004. It did not, however, certify compliance with the Agreed Order. After prompting by CPH, on June 23, 2004, MS & Co. served a certificate of compliance signed by Arthur Riel, an Executive Director and manager of its Law/Compliance IT Group.[4]

CPH got its first indication that the Agreed Order may have been violated in the late fall of 2004.

On November 17, 2004, Clare wrote Michael Brody of Jenner & Block, CPH's outside counsel, that MS & Co. had "discovered additional e-mail backup tapes . . ."; that "(t)he data on some of [the] newly discovered tapes has been restored;" that "we have re-run the searches described in [the Agreed Order]"; that "some responsive e-mails have been located as a result of that process"; and that "(w)e will produce the responsive documents to you as soon as the production is finalized."

On December 14, 2004, Brody wrote Clare back:

> in [your November 17, 2004 letter], you state that Morgan Stanley located additional email backup tapes, and that you

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[4]Though CPH would not learn for months that the certificate was false, and even then the magnitude of MS & Co.'s misrepresentations would not be admitted, MS & Co. personnel, including in-house counsel, knew the certification of compliance was false when made.

> would be producing documents soon. Within two days of that letter, you produced some emails to us. In your November 17, 2004 letter, however, you also indicated that "some of the backup tapes are still being restored." Have those backup tapes been restored? Have you found additional responsive emails? If so, when will Morgan Stanley produce those emails? How is it that the tapes were only recently located?

On December 17, 2004, Clare wrote back, telling Brody "(n)o additional responsive e-mails have been located since our November production."[5]

Brody wrote back to Clare December 30, 2004, noting the deficiencies in Clare's correspondence:

> You do not inform us whether the review of the recently-located backup tapes still is ongoing. Please confirm that all email backup tapes from the relevant time period have been reviewed and all responsive emails have been produced. If the review still is proceeding, please let us know when the review will be completed.

Clare wrote back on January 11, 2005, telling Brody that the "restoration of e-mail backup tapes is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

Concerned about Clare's lack of candor, on January 19, 2005 Brody wrote again:

> I write in response to your January 11, 2005 letter concerning e-mails back-up tapes. Unfortunately, your letter raises more questions than it answers. As I requested in my December 14, 2004 letter, please explain the circumstances under which Morgan Stanley located these backup tapes and advise us of the date on which the tapes were located.

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[5]Not only does this letter fail to answer Brody's legitimate questions, it implies that MS &Co. was still processing and reviewing emails from the newly found tapes. As we now know, though, *no* additional information was migrated to the archives between approximately August 18, 2004 and January 15, 2005. *Of course* "no additional responsive e-mails [would have been] located."

> Further, please explain your statement that "the next set of backup tapes" is scheduled to be restored "at the end of January." How many tapes will be restored by the end of January? When exactly in January will Morgan Stanley complete the process of restoring and searching these tapes for responsive documents? Are there other backup tapes that are not yet in the process of being restored? If so, please advise us of (a) the number of tapes that are not yet in the process of being restored; (b) the time period of the data contained on those tapes; and (c) Morgan Stanley's timetable for restoring and searching those tapes. In addition, please explain why those tapes are not yet in the process of being restored. Please also explain why Morgan Stanley cannot complete the restoration and searching of all remaining backup tapes before "the end of January." As you know, our trial is scheduled to begin on February 22, 2005.
>
> We look forward your complete response to these questions no later than January 21, 2005 so that we can bring this matter to the Court's attention, if necessary.

Conforming to what was by now his usual stonewall tactic, Clare responded by letter dated January 21, 2005:

> I write in response to your January 19, 2005 letter regarding Morgan Stanley's production of e-mails restored from backup tapes.
>
> Morgan Stanley completed its initial production of restored e-mail messages on May 14, 2005. The May 2004 production was conducted in accordance with the agreed-upon order governing, and the searches that resulted in that production encompassed data from all of the backup tapes known to exist at the time. Subsequent to the May 2004 production, additional tapes were found in various locations at Morgan Stanley. The discovered tapes were not clearly labeled as to their contents, were not found in locations where e-mail backup tapes customarily were stored, and many of the tapes

were in a different format than other e-mail backup tapes. In November 2004, once it was determined at least some of the discovered tapes contained recoverable e-mail data, Morgan Stanley re-ran the searches described in the agreed-upon order. Those searches resulted in Morgan Stanley's November 2004 production.

Morgan Stanley's efforts to restore the backup tapes discovered after the May 2004 production are ongoing. It is a time-consuming and painstaking process and, given the absence of clear labels or other index information for the backup tapes, there is no way for Morgan Stanley to know or accurately predict the type or time period of data that might be recovered from tapes that have yet to be restored. While Morgan Stanley cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes, we understand from Morgan Stanley that, when the agreed-upon searches are run again at the end of January, those searches will include approximately one terabyte of additional data restored since the prior production.

On January 26, 2005, CPH served its Adverse Inference Motion, seeking sanctions based on MS & Co.'s disclosure of the newly found tapes. Hearing was scheduled for February 14, 2005. In preparation for that hearing, on February 3, 2005 the Court ordered MS & Co. to produce by noon on February 8, 2005 "(i) all documents to be referred to or relied on by any of the witnesses in his or her testimony; and (ii) all documents within MS & Co.'s care, custody, or control, addressing or related to the additional email backup tapes, including matters relating to the time or manner in which they were discovered; by whom they were discovered; who else learned of their discovery and when; and the manner and timetable by which they were be restored and made searchable, including any correspondence to or from outside or prospective outside vendors."

The Adverse Inference Order outlined the discovery abuses shown at the February 14, hearing. They included MS & Co.'s undisclosed discovery of the 1,423 "Brooklyn" tapes no

later than May of 2004; the undisclosed discovery of the 738 8-millimeter backup tapes in 2002; the presence of unsearched data in the staging area; the discovery of 169 DLT tapes in January 2005; the discovery of more than 200 additional tapes on February 11 and 12, 2005; the discovery of a script error that had prevented MS & Co. from locating responsive email attachments; and discovery of another script error that had infected the ability to gather emails from Lotus Notes platform users.

In response to these deficiencies, the Court issued the Adverse Inference Order. That Order reversed the burden of proof on the aiding and abetting and conspiracy elements and included a statement of evidence of MS & Co.'s efforts to hide its emails to be read to the jury, as relevant to both its consciousness of guilt and the appropriateness of punitive damages. It specifically provided that "MS & Co. shall continue to use its best efforts to comply with the April 16, 2004 Agreed Order and . . . February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search."[6]

It is now clear why MS & Co. was so unwilling to provide CPH with basic information about how and when the tapes were found or when production would be complete. First, candor would have required MS & Co. to admit that it had not done a good faith search for the oldest full backup tapes, and that Riel's certificate of compliance was false. Some unsearched tapes had been found by 2002; others had been found no later than May, 2004. Together, over 2,000 tapes had been found which were not searched prior to the May production. It is untrue that the tapes were "not in locations where e-mail backup tapes customarily were stored."

[6]Concerned that MS & Co. had been less than candid with both CPH and the Court, on February 4, 2004, the Court entered its Order on Coleman (Parent) Holding's ore tenus Motion to Participate in Search of Additional E-Mail Backup Tapes or Appoint Third Party to Conduct Search, ordering MS & Co. to pay for a third party vendor to check its compliance with the Agreed Order. The Court previously found that the two scripts errors testified to by Allison Gorman at the February 14, 2005, hearing would not have been discovered or revealed without the threat that the third-party vendor would discover the errors. Given Ms. Gorman's testimony at the March 14, 2005, hearing, though, it now appears MS & Co. knew about the errors before the appointment of the third-party vendor. Consequently, the errors were only revealed, but not discovered, in response to the February 4, 2004, Order.

16div-015686

Second, MS & Co. desperately wanted to hide an active SEC inquiry into its email retention practices.[7] [8] [9] [10] Finally, MS & Co. did not want to admit the existence of the historical email archive, which would expose the false representations it had made to the Court and used to induce CPH to agree to entry of the Agreed Order.[11] [12]

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[7]On December 17, 2003, CPH served its Third Request for Production seeking "(a)ll materials and documents submitted to the United States Securities and Exchange Commission ("SEC"), received from the SEC, or reflecting communications with the SEC in connection with any investigation, inquiry, or examination concerning or relating to Morgan Stanley's policies and/or procedures with regard to the retention, storage, deletion, and/or back-up of electronic mail (emails) . . ." On October 12, 2004, CPH served its Request for Supplemental Documents seeking to bring MS & Co.'s document production current, requesting "(a)ll documents not previously provided by MS & Co. that are responsive to any Request for Production of Documents that CPH previously has served upon MS & Co. in the litigation, including documents obtained by MS & Co. or its counsel after the date of MS & Co.'s prior productions." No SEC documents were produced in response to either request; no privilege log was generated. On other privilege logs generated in response to court orders, MS & Co. did not show the SEC on the distribution portion of the log. See March 9, 2005 Order Following in Camera Inspection (Riel/SEC Documents) footnotes 1, 2. See, also, footnote 15, infra. Kirland & Ellis, outside counsel for MS & Co. in this litigation, represents MS & Co. in the SEC's inquiry into its email retention practices.

[8]MS & Co. manipulated the unhinging of the SEC's email investigation from the IPO litigation in January, 2005, to conceal the email issues as long as possible.

[9]It is now apparent that MS & Co. chose deliberately to keep its affidavits concerning the informal SEC inquiry submitted to support its privilege claims vague, despite two requests from the Court seeking specific information. See February 28, 2005 Order (Release of Exhibits).

[10]See February 25, 2005 Order on Morgan Stanley's Objections to Coleman (Parent) Holding Inc.'s Notice to Produce at Hearing and Motion for Protective Order and March 4, 2005 Order on Plaintiff's ore tenus Motion to Compel Additional Production.

[11]While MS & Co. contends that its representations to the Court that it would cost "hundreds of thousands of dollars" to search the backup tapes and that there was no pre-2000 backup tapes were not false, they were deliberately misleading: MS & Co. never had an intention to search the back up tapes to respond to the requests and some of the year 2000 backup tapes backed up email back to 1997.

In 2001, MS & Co. decided to create the email archive. By June,2003, it had decided that the archive should have two components. First, MS & Co. wanted to create an archive that captured and stored email as it was generated. Second, MS & Co. wanted to add historical data to the archive. That task involved searching for all email backup tapes containing historical emails; sending those tapes to an outside processor; loading the processed tapes into a staging area; and migrating the stored data from the staging area onto the archive. As we now know, archive searches are quick and inexpensive. They do not cost "hundred of thousands of dollars" or "take several months." The restrictions imposed by the Agreed Order were not needed.

[12]On February 10, 2004, Robert Saunders, an executive director of IT for MS & Co., was deposed. He testified that in January, 2003, MS & Co. had put into effect the email archive system. When specifically asked whether the new email archive system would include prior backups or only going forward backups, he testified that "(t)he way it was built was for going forward backup." He was next asked whether "(w)ith respect to backup dated January 2001 and previously, does Morgan Stanley have any new capabilities to restore and search e-mail?" After counsel interposed a vagueness objection, he answered "(t)here are no new capabilities to search that e-mail." That testimony was so misleading as to be false. As Sauders well knew, since he was on the team responsible, the "live" email capture portion of the archive was already operational. The migration of the historical data to the archive was expected to be completed by April of 2004, just two months after his deposition.

16div-015687

MS & Co.'s wrongful conduct has continued unabated.[13] Since the February 14, 2005, hearing, it has come to light that:

- Only two whole and four partial tapes from the Brooklyn tapes had been migrated to the archive and were thus searched for the November, 2004, production. MS & Co. sought to hide this information to create the impression that all the produced documents came from the Brooklyn tapes, rather than reveal that the production came from material that had migrated from the staging area to the archive since the May, 2004, production or some other, as yet undisclosed, source.[14]

- Contrary to MS & Co.'s counsel's November 17, 2004, letter to CPH, *none* of the November, 2004 production came from the "newly found" tapes. MS & Co. carefully crafted its responses to inquiries about the November, 2004, production to avoid both disclosure of the existence of the archive and outright lying.

- The scripts MS & Co. used to process emails into its archive caused the bodies of some messages to be truncated. MS & Co. discovered this problem on February 13, 2005, but did not tell the Court about it until March 14, 2005.

- A migration issue caused about 5% of email harvested by NDCI from the backup tapes not to be captured in the archive, based on testing of a representative sample of tapes. MS & Co. told the SEC about this problem on February 24, 2005, but failed to tell CPH or the Court.

- As of June 7, 2004, only 120 out of 143 SDLT tapes had been processed into the archive.

- An analysis requested by the SEC showed that, based on a representative sample, 10% of backup tapes were overwritten after January, 2001.

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[13]MS & Co. sought to use the entry of the Adverse Inference Order as a shield against further inquiry into its email abuses, arguing that the matter was closed by the Adverse Inference Order. It previously used this tactic with the SEC, arguing that the December 3, 2003 Cease and Desist Order shielded it from other sanctions for email retention failures. See Ex. 14 [February 10, 2005 letter from outside counsel for MS &Co. to SEC]

[14]MS & Co. argued at the March 14 and 15, 2005 hearing that there were only 13 unique, new emails contained in the November 2004 production when compared to the May 2004 production. Nine of those emails, however, were originally given to MS& Co.'s lawyers for responsiveness review by the IT staff for the May 2004 production. No explanation of why they were not produced in May was offered. This is particularly concerning given the large number of documents Ms. Gorman testified the search parameters found compared with the relatively small number found responsive and produced after review by counsel.

- A software error caused blind carbon copies not to be captured in the archive process. MS & Co. told the SEC about this problem on February 24, 2005. MS & Co. did not tell CPH or the Court.

- A software error caused the searches to be hyper case-sensitive, resulting in a failure to capture all emails. MS & Co. knew of the problem as of December, 2004, but did not tell CPH or the Court. The problem was not purportedly fixed until March, 2005.

- A script error caused the archive to have problems pulling group email in Lotus Notes.

- MS & Co. provided sworn testimony at the February 14, 2005, hearing that it had located 600 gigabytes of data, while contemporaneously telling the SEC it had located a terabyte of data. A gigabyte represents 20,000 to 100,000 pages. Incredibly, MS & Co.'s witness on this point, Allison Gorman, testified on March 14, 2005, that it was simply a "terminology" issue that she did not choose to correct because it could cause "confusion."

- CPH requested MS & Co. to produce responses it had made to third-parties in civil, criminal, or administrative proceedings describing limitations on MS & Co.'s ability to produce emails and all notices in such proceedings that MS & Co. had newly discovered backup tapes containing email. MS & Co. objected, arguing that there were over 300 separate proceedings, involving over 70 outside law firms, and that the cost of compliance would be too great. On March 2, 2005, the Court ordered the production, after shortening the time period involved, and required production within 12 hours after counsel's review of each item for responsiveness but, in any event, within 10 days. At the time MS & Co. objected to CPH's request as unduly burdensome, it knew of its Well submission to the SEC made on February 10, 2005. Kirkland and Ellis, co-counsel here, was co-counsel for MS & Co. in that SEC proceeding. Consequently, it appears MS & Co.'s real concern was not that expressed to the Court, but was based on its realization that compliance would reveal the existence of the SEC inquiry into its email retention policy and MS & Co.'s efforts to keep the existence of that investigation secret. MS & Co. violated the Court's March 2, 2005, Order on Morgan Stanley's Responses and Objections to Coleman (Parent) Holdings Inc.'s Notice to Produce at Hearing requiring it to disclose items responsive to CPH's Request for Production within 12 hours of review for responsiveness by waiting *days*, not hours, to produce the Wells submission.

- MS & Co.'s failure to produce or log the SEC documents violated the Court's February 3, 2005, Order.[15]

- James Doyle's, the Executive Director of MS & Co.'s Law Division, declaration that he did not learn of additional unsearched backup tapes until the end of October, 2004, was intended to mislead CPH and the Court. Obviously, MS & Co. sought to create the implication in the declaration that *no one* in the Law Division knew of the backup tapes before then. Instead, both Soo-Mi Lee, Doyle's associate, and James Cusick, Doyle's superior, knew of the tapes no later than June 7, 2004.

- In-house counsel for MS & Co. knew as of June 7, 2004, that nearly a third of the restored backup tapes did not contain email, implying they may have been recycled in violation of the December 3, 2002 Cease and Desist Order. They did not tell CPH or the Court.

- MS & Co.'s searches looked for only two types of emails. There are other types of emails that were not included in the searches. CPH did not learn of this deficiency until March 13, 2005.

- MS & Co. improperly failed to produce 125 documents required to be produced by the Court's February 3, 2005, Order Specially Setting Hearing which required limited discovery be made in connection with the February 14, 2005, hearing on the Adverse Inference Motion.

- MS & Co. improperly withheld 13 documents required to be produced by the Court's March 4, 2005, Order on Plaintiff's ore tenus Motion to Compel Additional Production.

- An additional 282 tapes were found on February 23 and 25, 2005; CPH was not told of the discovery until March 13, 2005.

- An additional 3,536 tapes were discovered on February 23, 2005, in a security room.

- An additional 2,718 tapes were found at Recall, MS & Co.'s third party off-site storage vendor, on March 3, 2005.

- An additional 389 tapes were found March 2 through March 5, 2005. CPH was not told

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[15]The Court previously rejected MS & Co.'s argument that the January 14, 2005, email exchange between its outside and in-house counsel was not required to be produced under the February 3, 2005, Order Specially Setting Hearing because it referred to the "documents issue" and not specifically to the backup tapes. See March 16, 2005 Order on Morgan Stanley's Motion to Disqualify Plaintiff's Counsel Searcy, Denney, Scarola, Barnhart & Shipley, P.A. and Jenner & Block, LLC. MS & Co.'s insistence on a narrow interpretation of the February 3, 2005, Order is not particularly sympathetic, when the only reason that Order confined production to the backup tape issue was because MS &Co. had failed to notify the Court of the other deficiencies in its certificate of compliance.

until March 13, 2005.

- On March 4, 2005, the Court entered its Order on Plaintiff's ore tenus Motion to Compel Additional Production, which ordered MS & Co. to produce by 3:00 p.m. on March 7, 2005, all items within its care, custody, or control dealing with the Riel/SEC investigation, other than documents representing communications between or among MS & Co. inside and outside counsel that were not copied to anyone other than counsel. MS & Co. sought to discredit Riel and thus distance itself from the false June 23, 2004 certificate of compliance; in doing so, it sought to hide Riel's whistle blower status and the existence of an SEC investigation into whether MS & Co. employees sought kick backs from third party vendors; whether MS & Co. employees were improperly pressured into dealing with third-party vendors who may provide business to MS & Co.; and whether MS & Co. continued to overwrite backup tapes contrary to the SEC's December 3, 2002, Cease and Desist Order.

- A script error prevented the insertion of some emails into the archive. MS & Co. produced over 4,600 pages of emails on March 21, 2005, some of which it suggested may have been located on correction of the error; alternatively, it suggested the emails may have been located by NDCI as part of its efforts to verify MS & Co.'s searches.

MS & Co.'s discovery abuses have not been confined to its email production.

William Strong is a MS & Co. managing director and was one of the principal players for it in the Sunbeam deal. He took credit for the fees generated. On May 9, 2003, CPH requested a copy of "(a)ll documents concerning employment contracts, performance evaluations, and/or personnel filed (including without limitation any documents that describe or discuss [his] training, experience, competence, and accomplishments) . . ." MS & Co. asserted that the requested documents were not relevant and that production "would unnecessarily infringe on the privacy interests of [Strong]." On March 15, 2004, the Court ordered MS & Co. to produce "(a)ll references (positive or negative) to [Strong's] truthfulness, veracity, or moral turpitude." Some portions of Strong's evaluations were produced in response to that order. Those evaluations noted Strong's colleagues' reservations about his candor and ethics. Two of his evaluators, Joseph Perella and Tarek Abdel-Meguid, were deposed, when some relatively vague testimony about the bases for those conclusions was offered. It now appears Strong was facing criminal prosecution in Italy for complicity in bribery while he was working on the Sunbeam transaction, which his evaluators knew, and that MS & Co. purposely

withheld that information from CPH and the Court.[16]

Even once CPH independently discovered evidence of Strong's indictment in Italy, MS & Co. sought to shield its files from discovery. It claimed that virtually *all* of the documents it had were privileged under joint defense agreements in place between it, Strong, and Saloman Brothers, Strong's employer at the time of the incident. As the Court's March 10, 2005 Order Following In Camera Inspection (Strong) details, the documents MS & Co. relied on to support that position, and sought to prevent CPH from obtaining, reflect no such agreement.

The other discovery abuses and misrepresentations by MS & Co. other than those involving its email production practices are outlined in CPH's Chronology of Discovery Abuses by Defendant served March 1, 2005, and would take a volume to recite. They include:

- failing to provide the information retained by MS & Co.'s internal document management system pertaining to MS & Co.'s work for Sunbeam; falsely representing to the Court that no useful information was contained in that information; and producing a Rule 1.310 representative who had made an insufficient inquiry into authenticity, business record status, and authorship of documents; see February 28, 2005 Order on CPH's Motion to Deem Certain Documents Admissible and for Sanctions due to Morgan Stanley's Disregard of Court Order;

- when faced with contempt proceedings for violating the Stipulated Confidentiality Order by providing a copy of a settlement agreement between CPH and Arthur Andersen to other counsel, representing to the Court that the law firm of Kellogg, Huber was retained to handle the "Andersen aspects" of this litigation because of a conflict between Andersen and Kirkland & Ellis; Mark Hansen, a partner at Kellog, Huber, testified that his firm was hired as co-counsel for all aspects of the case;

- providing answers to interrogatories signed by a corporate representative who performed insufficient verification of the responses;

[16]MS & Co. originally argued that documents concerning the Italian proceedings were not in Strong's "personnel file" and so were not required to be produced in response to CPH's initial request. MS & Co.'s practice of filing damaging information about an employee other than in his personnel file and then claiming it was not included in the request is about at convincing as its argument that, since it has a corporate directive not to keep drafts of documents once they are in final form, document drafts cannot be business records exempt from hearsay because they are not "kept in the course of a regularly conducted business activity." See Fla. Stat. §90.803 (6) (a). In any event, there was *no excuse* for not producing its records of the Italian proceedings once the Court's March 15, 2004 Order was entered.

- routinely asserting unfounded privilege claims;[17] and

- failing to timely comply with the Court's orders; for example, MS & Co. did not produce Strong's 1994 Performance Evaluation until the afternoon of March 15, 2005, though it was obviously included in the Court's March 15, 2004 Order. The failure cannot be excused as oversight since, when CPH specifically asked for the 1994 evaluation in the spring of 2004, MS & Co.'s counsel said it was withheld as non-responsive; see, also, Ex. 197, 198.

In sum, MS & Co. has deliberately and contumaciously violated numerous discovery orders, including the April 16, 2004 Agreed Order; February 3, 2005 Order Specially Setting Hearing; and the March 4, 2005 Order on Plaintiff's ore tenus Motion to Compel Additional Production. At the February 14, 2005, hearing on CPH's Adverse Inference Motion, it chose to hide information about its violations and coach witnesses to avoid any mention of additional, undisclosed problems with its compliance with the Agreed Order. Implicit in the requirement that MS & Co. certify compliance with the Agreed Order was the requirement to disclose impediments to its ability to so certify. As outlined in this Order, MS & Co. employees, and not just counsel, have participated in the discovery abuses. The prejudice to CPH from these failings cannot be cured. Even if all the script errors have been located and corrected, and MS & Co. has failed to show they have, and even if all of the email backup tapes have now been located, and MS & Co. has failed to show they have, the searches cannot be completed in time. The other discovery abuses outlined call into doubt all of MS & Co.'s discovery responses. *The judicial system cannot function this way.* Based on the foregoing and on the Court's March 1, 2005 Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, it is

ORDERED AND ADJUDGED that CPH's Renewed Motion for Entry of Default Judgment is Granted, in part. See Robinson v. Nationwide Mut. Fire Ins. Co., 887 So. 2d 328 (Fla. 2004); Mercer v. Raine, 443 So. 2d 944 (Fla. 1983); Precision Tune Auto Care, Inc. v.

[17]For example, MS & Co. produced over 260 documents dealing with the Strong investigation over which it had previously claimed privilege once the Court announced its intention to conduct an in camera review; the Court found another 200 documents were not privileged after conducting its review, by its March 10, 2005 Order.

Radcliffe, 804 So. 2d 1287 (Fla. 4th DCA 2002); Rule 1.380 (b) (2) (C), Fla. R. Civ. P. Paragraphs 2 (excluding the last sentence thereof); 3 (excluding the portion of the last sentence beginning with "in order to close . . ."); 8-10, 11 (excluding everything after the first sentence); 12 (excluding all parts following "June 1998"); 13 (excluding the last sentence thereof); 14-27; 28 (excluding everything after "firm" in the second to last sentence thereof); 29-39; 41-52; 53 (excluding the second sentence thereof); 54-57; 58 (excluding "CPH and" in the second line thereof); 59-63; 64 (excluding the third line thereof); 65 (excluding the last sentence thereof); 66 (excluding the last sentence thereof); 67-70; 71 (excluding the first word of the last sentence and the remainder of that sentence after "material"); 72; 73 (excluding the first sentence thereof); 74 (excluding the words "CPH and" in the second to last sentence thereof); 75-81; 85; 86; 87 (excluding (g)); 90, and 91 (excluding (g)) of Plaintiff's Amended Complaint, as amended by the Court's Amended Order on Morgan Stanley's Motion to Dismiss, Motion to Strike, and Motion for More Definite Statement, shall be read to the jury and the jury instructed that those facts are deemed established for all purposes in this action. A copy of a redacted Amended Complaint is attached as Exhibit A. It is further

ORDERED AND ADJUDGED that the Court shall read to the jury a Statement similar to that attached as Exhibit A to the Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, but incorporating the relevant additional findings of this Order, and the jury will be instructed that it may consider those facts in determining whether MS & Co. sought to conceal its offensive conduct when determining whether an award of punitive damages is appropriate. See General Motors Corp. v. McGee, 837 So. 2d 1010 (Fla. 4th DCA 2002), rev. den. 851 So. 2d 728 (Fla. 2003). Counsel are each invited to submit proposed Statements. It is further

ORDERED AND ADJUDGED that CPH shall be entitled to an award of reasonable fees and costs incurred as a result of the Renewed Motion for Entry of Default Judgment and the violations of Court orders recited herein. The amount shall be determined at an evidentiary hearing following trial. It is further

ORDERED AND ADJUDGED that MS & Co. is relieved of any future obligation to

comply with the April 16, 2004 Agreed Order and the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s Motion to Participate in Search of Additional E-Mail Back-Up Tapes or Appoint Third Party to Conduct Search. It is further

ORDERED AND ADJUDGED that the pro hac vice admission of Thomas Clare is revoked. It is further

ORDERED AND ADJUDGED that the portions of CPH's Motion for Correction and Clarification of Order on CPH's Motion for Adverse Inference that seek to amend the body of that Order to correct clerical and spelling errors, as agreed to by counsel, is Granted, and the corrections deemed made to the body of the Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, by interlineation. In all other respects the remainder of the Motion for Correction and Clarification is declared moot.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 23rd day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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In April 1997, Morgan Stanley began serving as Sunbeam's investment banker. Morgan Stanley originally attempted to find someone to buy Sunbeam. When Morgan Stanley was unable to find a buyer, Morgan Stanley developed a strategy for Sunbeam to use its fraudulently-inflated stock to acquire a large company that Sunbeam would own and operate. Then, trading on Morgan Stanley's relationships with CPH's senior officers, Morgan Stanley found

Exhibit A

Coleman for Sunbeam. At the time of the sale to Sunbeam, Coleman was a leading manufacturer and marketer of consumer products for the worldwide outdoor recreation market, with annual revenues in excess of $1 billion.

After Sunbeam announced plans to acquire Coleman, Morgan Stanley agreed to underwrite a $750 million debenture offering for Sunbeam. Sunbeam needed the proceeds of that debenture offering to complete the acquisition of Coleman. As Sunbeam's investment banker and as the sole underwriter for the $750 million debenture offering, Morgan Stanley received detailed and specific information concerning Sunbeam's financial condition and performance. Morgan Stanley received information that directly contradicted Sunbeam's and Morgan Stanley's assertions to CPH that Sunbeam had undergone a successful turnaround and that its financial performance had dramatically improved. By no later than March 18, 1998, Morgan Stanley knew that Sunbeam's January and February 1998 sales were only 50% of January and February 1997 sales, and Morgan Stanley also knew that the shortfall was caused by Sunbeam's practice of accelerating sales which otherwise would have occurred in 1998 in order to boost Sunbeam's income in 1997. Although Morgan Stanley and Sunbeam previously had advised CPH that Sunbeam's sales were running ahead of analysts' expectations for the first quarter, Morgan Stanley decided not to correct those material misrepresentations. Instead, in March 1998, Morgan Stanley assisted Sunbeam in concealing the problems with Sunbeam's first quarter 1998 sales

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") directly or indirectly owned 44,067,520 shares — or approximately 82% — of Coleman prior to the transactions at issue. On March 30, 1998, Sunbeam acquired CPH's interest in Coleman. Sunbeam paid for the Coleman shares with 14.1 million shares of Sunbeam common stock and other consideration.

Defendant Morgan Stanley & Co., Inc. ("Morgan Stanley") is a highly sophisticated investment banking firm that provides a wide range of financial and securities services. Among other things, Morgan Stanley provides advice on mergers and acquisitions and raises capital in the equity and debt markets. Morgan Stanley served as Sunbeam's investment banker and as the underwriter of securities issued by Sunbeam in connection with the events at issue herein.

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Sunbeam Corporation ("Sunbeam") was a publicly-traded company headquartered in Delray Beach, Florida. Sunbeam designed and manufactured small household appliances and outdoor consumer products, which it marketed under the Sunbeam and Oster brand names. Sunbeam filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code in February 2001.

Albert Dunlap ("Dunlap") was the Chief Executive Officer of Sunbeam from July 1996 until June 1998 when he was terminated by Sunbeam's Board of Directors.

Russell Kersh ("Kersh") was the Executive Vice President of Sunbeam from July 1996 until June 1998 when he was terminated by Sunbeam's Board of Directors.

Arthur Andersen LLP ("Andersen") provided outside accounting services to Sunbeam through its West Palm Beach, Florida office. Andersen auditors provided information concerning Sunbeam's first quarter 1998 sales and earnings to Morgan Stanley.

Sunbeam designed and manufactured outdoor and household consumer products, which it marketed under the Sunbeam and Oster brand names. Sunbeam's products included small kitchen appliances, humidifiers, electric blankets, and grills. Many of the country's leading retail stores, including Wal-Mart, Target, and Home Depot, were among Sunbeam's major customers.

Despite Sunbeam's well-known brands and strong customer base, its financial performance was disappointing. In 1994, Sunbeam earned $1.30 per share. In 1995, Sunbeam's earnings declined to $0.61 per share. In 1996, Sunbeam's earnings continued to suffer. On March 22, 1996, Sunbeam issued an early warning that its first quarter earnings would be well under analysts' expectations and down from first quarter 1995. Shortly after issuing the March 22 earnings warning, Sunbeam's Chief Executive Officer and two of Sunbeam's directors announced their resignations. Less than a week later, Sunbeam announced that its first quarter 1996 earnings had plunged 42% from first quarter 1995 levels. Sunbeam also announced that its second quarter 1996 earnings would be lower than its second quarter 1995 earnings.

Sunbeam's disappointing earnings caused its stock price to plummet. During 1995, the price at which Sunbeam's stock traded fell 40%, from a high of $25-1/2. In 1996, Sunbeam's stock price continued to decline until it reached a low of $12-1/4 in July.

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On July 18, 1996, Sunbeam's board of directors hired Albert Dunlap as Sunbeam's new Chief Executive Officer. Based upon brief terms as Chief Executive Officer of other publicly traded companies, including Scott Paper Company ("Scott Paper"), Dunlap was viewed as a "turnaround specialist" — that is, someone who could take a poorly performing company and significantly increase its value by "turning around" its financial performance. Because Dunlap touted the benefits from firing large numbers of employees and closing large numbers of plants, Dunlap became widely known as "Chainsaw Al." Dunlap lived in Boca Raton, Florida, and one of his first tasks at Sunbeam was to consolidate the company's six headquarters into one located in Delray Beach, Florida.

Immediately after joining Sunbeam, Dunlap hired Kersh as Sunbeam's Chief Financial Officer. Kersh had teamed with Dunlap for over 15 years, serving as a senior executive with Dunlap at other companies, including Scott Paper. Dunlap also brought in several other hand-picked executives to make up his senior management team.

Dunlap and his senior management team entered into employment agreements with Sunbeam. Under those agreements, Dunlap and his senior management team stood to make tens of millions of dollars if they were able to boost Sunbeam's apparent value and then sell Sunbeam to another company at a premium.

In order to convince other companies that they should want to purchase Sunbeam, Dunlap needed to improve Sunbeam's reported financial performance quickly and dramatically. It was, of course, no small task to transform Sunbeam from a poorly performing company, with weak sales and declining profits, into a strong company with growing sales and

soaring profits. In fact, as the world later learned, Dunlap did not achieve that change in Sunbeam's fortunes. Instead, Dunlap created the illusion of a dramatic turnaround at Sunbeam by engaging in what SEC officials subsequently described as a "case study" in financial fraud.

Dunlap had a three-step plan at Sunbeam. In the first step, Dunlap overstated Sunbeam's financial problems so that Sunbeam appeared to be in worse shape than it really was. After making Sunbeam look worse, Dunlap moved to step two, where he made Sunbeam look more valuable than it really was by inflating Sunbeam's sales and engaging in other earnings manipulations. In step three, Dunlap planned to sell Sunbeam to another company before it became apparent that the "improved" results were fictional. By doing so, Dunlap would make tens of millions of dollars and would be free to blame his successor for any subsequent problems.

Dunlap began implementing his strategy soon after his arrival at Sunbeam in 1996. Claiming to be engaged in a clean-up of Sunbeam's financial problems, Dunlap recorded artificially high reserves and booked expenses that should not have been recorded until later periods. Both of those actions made Sunbeam's financial condition appear worse than it really was, thus lowering the benchmark for measuring Sunbeam's performance in future years.

The overstated reserves also provided Dunlap a means by which he could inflate Sunbeam's future results during the second step of his plan. Dunlap later could "re-evaluate" and release millions of dollars from the overstated reserves to boost income in later periods. The income from released reserves contributed to the illusion of a rapid turnaround in Sunbeam's performance. Using inflated reserves to enhance income in future periods is a fraudulent practice and overstated reserves are commonly called "cookie jar" reserves.

16div-015703

After making Sunbeam look worse than it really was in 1996, Dunlap manipulated Sunbeam's sales and expenses in 1997 to create the false appearance of quarter after quarter improvement in financial performance. For example, Dunlap caused Sunbeam to inflate its sales by engaging in phony "bill and hold" sales. Under this practice, Sunbeam recognized revenues from "sales," even though customers did not actually pay for or even take delivery of the products, which continued to sit in Sunbeam's own warehouses. Although Sunbeam recorded the "bill and hold" sales as if they were current sales, they were, in reality, simply sales stolen from future quarters. In 1997, phony "bill and hold" sales added approximately $29 million in sales and $4.5 million in income.

Throughout 1997, Sunbeam also engaged in a sales practice known as "channel stuffing" — accelerating sales that otherwise would occur in a later period, sometimes by offering steep discounts or other extraordinary customer inducements. On the grand scale employed by Sunbeam, channel stuffing inevitably leads to major sales shortfalls in later periods when "stuffed" customers simply stop buying. Sunbeam's senior sales officer referred to Sunbeam's unsustainable practice of inflating performance through accelerated sales as the "doom loop."

Dunlap further "enhanced" Sunbeam's income in 1997 by causing Sunbeam to record a "profit" of $10 million from a sham sale of its warranty and spare parts business. Dunlap also made Sunbeam appear to be more successful than it really was by reaching into the "cookie jar," reversing inflated reserves, and recording $35 million as income. Sunbeam's 1997 profit margins also looked better than they really were because Dunlap already had recorded millions of dollars of 1997 expenses in 1996.

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In October 1997, Dunlap announced that Sunbeam's "turnaround" was complete. Compared to the third quarter of 1996, Sunbeam's third quarter 1997 performance was remarkable. In the third quarter of 1996, Sunbeam had reported a loss of $18.1 million. In the third quarter of 1997, however, Sunbeam reported earnings of $34.5 million — an extraordinary turnaround from substantial losses to hefty profits. Sunbeam's combined results for the first three quarters showed dramatic improvement as well. Sunbeam reported that its profits for the first nine months were up tenfold over the same period the year before — from $6.5 million in 1996 to $67.7 million in 1997. Sunbeam's reversal of fortune caused a spectacular increase in the price of its stock. In July 1996, when Dunlap was hired, Sunbeam's shares traded at $12-1/4. By October 1997, Sunbeam's shares had risen to $49-13/16.

With steps one and two successfully completed, Dunlap was more than eager to complete the final step of his scheme: to sell Sunbeam to another company and collect tens of millions of dollars for himself before the outside world could learn the truth about Sunbeam's phony "turnaround." To accomplish that third and final step, Dunlap needed an investment banking firm

When Dunlap announced in early 1997 that he would begin interviewing investment bankers, Morgan Stanley immediately began pursuing the job. Although Morgan Stanley had no previous relationship with Sunbeam, one of Morgan Stanley's senior executives, William Strong, had worked closely with Dunlap on other large transactions between 1986 and 1993, when Strong was employed by Salomon Brothers.

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Morgan Stanley knew that it was competing with other investment bankers, including Mark Davis, for Dunlap's business. Davis was the head of the mergers and acquisitions department at Chase Securities and had worked previously with Strong at Salomon Brothers. Davis had a very strong relationship with Dunlap, and Davis had served as Dunlap's investment advisor on numerous transactions, including Dunlap's sale of Scott Paper. Shortly after arriving at Sunbeam, Dunlap hired Davis to handle the sale of Sunbeam's furniture business.

Morgan Stanley put together a team headed by its Vice Chairman, Bruce Fiedorek, and Strong. Beginning in April 1997, Morgan Stanley's personnel traveled to Sunbeam's offices in Delray Beach, Florida to study Sunbeam and woo Dunlap. After months of uncompensated work, in September 1997, Morgan Stanley finally persuaded Dunlap to name Morgan Stanley as Sunbeam's exclusive investment banker. Dunlap instructed Morgan Stanley to find a buyer for Sunbeam. Morgan Stanley knew that if it failed to deliver a major transaction, Morgan Stanley would not be compensated for the extensive work it had performed for Sunbeam. Morgan Stanley also knew that Davis and Chase Securities were standing by — ready and willing to reclaim their position as Dunlap's investment banker of choice.

Throughout the fall of 1997, Morgan Stanley aggressively searched for a buyer for Sunbeam. Morgan Stanley put together extensive and detailed materials to use in marketing Sunbeam to potential buyers. Morgan Stanley pitched the transaction to more than 10 companies — including Gillette, Colgate, Sara Lee, Rubbermaid, Whirlpool, and Black & Decker — that Morgan Stanley hoped might have an interest in acquiring Sunbeam. Morgan Stanley, however, was not able to find a buyer.

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As 1998 approached, the pressure on Dunlap increased. Dunlap was aware that Sunbeam would be unable to sustain the appearance of a successful turnaround in 1998 because Sunbeam had stolen sales from 1998 to boost 1997's numbers and the "cookie jar" reserves had been depleted. Dunlap needed a way to conceal Sunbeam's phony turnaround until a buyer could be found. Morgan Stanley provided the solution to Dunlap's problem.

Morgan Stanley knew that its failure to find a buyer for Sunbeam could prove fatal to the relationship it had worked so hard to establish with Dunlap. As the pressure on Dunlap increased, the pressure on Morgan Stanley increased as well. Although Morgan Stanley was not able to find a buyer for Sunbeam, Morgan Stanley responded with a plan that would allow Dunlap to conceal his fraud. Morgan Stanley recommended that Sunbeam acquire other companies, using Sunbeam's stock, which was fraudulently inflated, as the "currency" that would be used to pay for the acquisitions.

Morgan Stanley's strategy was doubly deceptive. First, Morgan Stanley's acquisition strategy would allow Dunlap to consolidate Sunbeam's results with those of the newly-acquired companies. That would help Dunlap camouflage Sunbeam's results and make it difficult to detect any shortfall in Sunbeam's performance. Dunlap simply could label any problems that were detected as attributable to the poor performance of the acquired companies or as a temporary "blip" caused by the distraction of integrating the acquired companies with Sunbeam. Second, Morgan Stanley's strategy would allow Dunlap to take new massive restructuring charges (purportedly relating to the acquisitions) and thus create more "cookie jar" reserves that could be tapped to bolster the future earnings of the combined companies.

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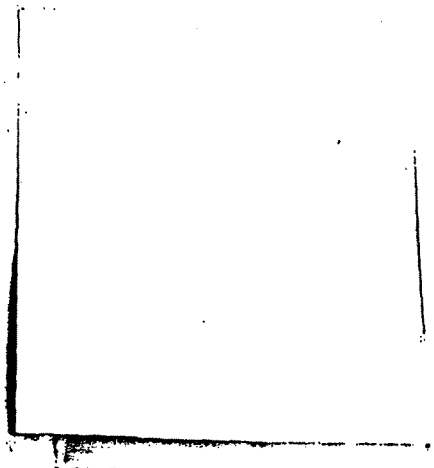
Morgan Stanley identified Coleman as one of the key potential acquisition targets. CPH owned 82% of Coleman's stock. Morgan Stanley searched the ranks of its investment bankers to locate those with the best access to CPH. Drawing on relationships between some of Morgan Stanley's investment bankers and senior CPH officers, Morgan Stanley set about trying to persuade CPH to sell its interest in Coleman to Sunbeam — and, most importantly, to accept Sunbeam stock as consideration.

Morgan Stanley laid the groundwork for a meeting to take place in December 1997 in Palm Beach, Florida between Dunlap and Kersh and representatives of CPH. In advance of the Palm Beach meeting, Morgan Stanley provided materials to Sunbeam to prepare Sunbeam for the meeting. Morgan Stanley also met with Kersh and other Sunbeam personnel to prepare for the Palm Beach meeting. However, Dunlap nearly scuttled Morgan Stanley's carefully crafted plan at the outset. During the December 1997 Palm Beach meeting, when CPH rejected Dunlap's initial all-stock offer, Dunlap became so angry that he cursed and ranted at the CPH representatives and stormed out.

Dunlap's tantrum appeared to kill any chance that CPH would sell its interest in Coleman to Sunbeam. Morgan Stanley, however, worked to revive the discussions. Drawing again on Morgan Stanley's relationships with CPH officers, Morgan Stanley was able to restart the discussions with CPH with the promise that Dunlap would be kept away from the negotiating table. Thereafter, Morgan Stanley, through Managing Directors Strong, James Stynes, and Robert Kitts, led the discussions with CPH on Sunbeam's behalf.

Morgan Stanley knew that it had to persuade CPH not only to sell Coleman, but also to accept Sunbeam stock — ultimately, 14.1 million shares of Sunbeam stock — as a major part of the purchase price. During the course of negotiations, Morgan Stanley prepared and provided CPH with false financial and business information about Sunbeam designed to create the appearance that Sunbeam was prospering and that Sunbeam's stock had great value. For example, Morgan Stanley provided CPH with false 1996 and 1997 sales and revenue figures, as well as false projections that Sunbeam could not expect to achieve. Together, in face-to-face discussions, Morgan Stanley and Sunbeam assured CPH that (a) Sunbeam would meet or exceed its first quarter 1998 earnings estimates; (b) analysts' 1998 earnings estimates for Sunbeam were correct; and (c) Sunbeam's plan to earn $2.20 per share in 1998 was easily achievable and probably low. Morgan Stanley and Sunbeam also falsely assured CPH that Sunbeam's "early buy" sales program would not hurt Sunbeam's future revenues. However, the "early buy" program was one of Sunbeam's revenue acceleration programs — and the devastating effects of Sunbeam's revenue acceleration programs already had begun to materialize at Sunbeam. Sunbeam's January and February 1998 sales were down drastically, although those results were not disclosed to CPH or the public. To the contrary, Morgan Stanley and Sunbeam together specifically advised CPH that Sunbeam's first quarter 1998 sales were "tracking fine" and running ahead of analysts' estimates.



On February 27, 1998, Sunbeam's Board of Directors met at Morgan Stanley's offices to consider the purchase of Coleman, as negotiated by Morgan Stanley.

At the February 27, 1998 meeting, Morgan Stanley made an extensive presentation to Sunbeam's Board concerning the proposed transaction. Numerous Morgan Stanley representatives, including Managing Directors Strong, Kitts, Stynes, Ruth Porat, and Vikram Pandit, attended the meeting.

Morgan Stanley presented Sunbeam's board with Morgan Stanley's opinion on the value of Coleman. Using a discounted cash flow analysis, which Morgan Stanley represented was the best gauge of stand-alone economic value and the best method of capturing the unique value of Coleman, Morgan Stanley valued CPH's Coleman stock at a range of $31.06 to $53.24 per Coleman share. CPH's 44,067,520 Coleman shares were worth, therefore, between $1.369 billion and $2.346 billion.

Following Morgan Stanley's presentation, Sunbeam's Board of Directors voted to acquire Coleman on the very favorable terms that Morgan Stanley had negotiated.

Morgan Stanley spent the following weekend developing Sunbeam's public relations strategy to announce the Coleman transaction. Morgan Stanley scripted the points for Dunlap to make in a conference call with analysts. Morgan Stanley also crafted a list of "key media messages" for Dunlap tc use in his communications with the press. On Sunday, March 1, 1998, Morgan Stanley spoke with a reporter for the Wall Street Journal to inform him that Sunbeam would announce its acquisition of Coleman the following morning.

Sunbeam announced its acquisition of Coleman on Monday, March 2, 1998, prior to the opening of the financial markets. Consistent with Morgan Stanley's valuation, investors viewed Sunbeam's purchase of Coleman — and the price that Sunbeam had paid — very favorably. The day before the acquisition was announced, Sunbeam's stock closed at $41-3/4. In the days following Sunbeam's announcement of the transaction, Sunbeam's stock rose approximately 25%, to a high of $52.

Dunlap knew that Sunbeam needed to raise funds to pay the cash portion of the acquisition consideration. Dunlap also knew that Sunbeam needed cash to purchase two other smaller companies in addition to Coleman. Morgan Stanley recommended that Sunbeam raise funds through a $500 million offering of convertible subordinated debentures. To assure the offering's success, Morgan Stanley lent its name to the offering. Indeed, Morgan Stanley agreed to serve as the sole underwriter for the offering.

The money raised from the sale of the debentures was used by Sunbeam to complete the acquisition of Coleman.

Unbeknownst to CPH or the public, Sunbeam's first quarter 1998 sales were a small fraction of the financial community's expectations for the quarter. If Dunlap could consolidate Sunbeam's sales with Coleman's sales, Dunlap knew that he could obscure Sunbeam's actual first quarter sales. As a result, Dunlap was especially anxious to complete the acquisition of Coleman before Sunbeam announced its first quarter 1998 sales. Indeed, the success of the scheme depended upon Sunbeam's ability to complete the Coleman acquisition before Sunbeam's first quarter results

were announced. To satisfy Dunlap's objectives, Morgan Stanley moved up the launch date of the offering.

The debentures were marketed to investors at a series of "road show" meetings and conference calls arranged by Morgan Stanley. Morgan Stanley prepared and distributed a memorandum for its sales force to use in marketing the debentures to investors. Morgan Stanley also developed the script for Dunlap and Kersh to deliver during the road show. In those materials, Morgan Stanley misrepresented Sunbeam's financial performance and emphasized Dunlap's purported "turnaround" accomplishments.

Morgan Stanley launched the debenture offering with a research analyst presentation to the Morgan Stanley sales force. As part of Morgan Stanley's growing relationship with Sunbeam, one of Morgan Stanley's top-rated research analysts planned to initiate equity coverage of Sunbeam. That Morgan Stanley analyst had modeled values for Sunbeam's acquisition of Coleman that were higher than even Sunbeam's management had predicted.

Although Morgan Stanley initially planned to sell $500 million worth of debentures, Morgan Stanley's efforts were so successful that the size of the offering was increased to $750 million on March 19, 1998 — the day of the last road show. The debentures were sold to investors nationwide, including investors based in Florida.

As Sunbeam's investment banker and the sole underwriter for the debenture offering, Morgan Stanley had a duty to investigate Sunbeam's finances and business operations.

Morgan Stanley, which had been working hand-in-hand with Sunbeam for

almost a year and had traveled to Sunbeam's Florida offices, repeatedly asserted that it had satisfied that duty.

Strong, who was one of the senior Morgan Stanley investment bankers involved, has admitted in sworn testimony that he may have had more than 100 telephone conversations with Dunlap and Kersh (whose offices were in Sunbeam's Delray Beach headquarters) and that Strong was "sure" that he would have been apprised of Sunbeam's financial performance during the first two months of 1998.

With the $750 million debenture offering and the Coleman transaction set to close at the end of March 1998, Sunbeam's Florida-based outside auditors were shocked that Morgan Stanley had not asked them about Sunbeam's financial performance for first quarter 1998. Sunbeam's auditors were alarmed because Sunbeam's first quarter results were a disaster, but Dunlap, Kersh, and Morgan Stanley were telling CPH and the investing public,

that Sunbeam's turnaround was a success, that Sunbeam's sales for the first quarter of 1998 were ahead of the expectations of outside financial analysts, and that Sunbeam was poised for record sales.

On March 17, Sunbeam's auditors forced the issue. From their Florida offices, Sunbeam's auditors sent Morgan Stanley a letter reporting that Sunbeam's net sales through January 1998 were down 60% — $28 million in January 1998, as compared to $73 million in January 1997. The March 17 letter explained that the decline was "primarily due to the . . . new early buy program for grills which accelerated grill sales into the fourth quarter of fiscal 1997."

The next day, Morgan Stanley was faxed a schedule from Sunbeam's Florida office that showed that Sunbeam's January and February 1998 net sales totaled $72 million, an amount that was 50% lower than Sunbeam's January and February 1997 net sales of $143.5 million.

Based on information that Sunbeam and Morgan Stanley had disseminated, Wall Street analysts were anticipating that Sunbeam's first quarter 1998 net sales would be in the range of $285 million to $295 million. Sales in that range would have been approximately 15% higher than first quarter 1997 sales. Sunbeam's January and February 1998 sales, however, totaled barely 25% of $285 million. As Sunbeam's outside auditors advised Morgan Stanley in writing, the sales drop-off was caused by Sunbeam's sales acceleration program. The information put into Morgan Stanley's hands on March 17 and March 18 showed that Morgan Stanley's and Sunbeam's assertions to CPH and other investors were false. Contrary to what Morgan Stanley and Sunbeam had represented, Sunbeam had not undergone a successful turnaround, Sunbeam's financial performance had not dramatically improved, and Sunbeam's performance in 1998 was not better than Wall Street analysts' expectations. It was imperative, therefore, that the truth be kept from CPH until the Coleman transaction closed at the end of March 1998.

Morgan Stanley did not disclose Sunbeam's disastrous first quarter, Morgan Stanley did not insist that Sunbeam disclose its disastrous first quarter, Morgan Stanley did not correct any of the false and misleading statements it and Sunbeam had made to CPH about Sunbeam's business or performance, and Morgan Stanley did not suspend any of the critical transactions that were scheduled to close in the next two weeks. Instead, with Morgan Stanley's knowledge and assistance, Sunbeam prepared and issued a false press release on March 19, 1998 that affirmatively misstated and concealed Sunbeam's true condition.

The March 19, 1998 press release stated: "Sunbeam Corporation . . . said today that it is possible that its net sales for the first quarter of 1998 may be lower than the range of

Wall Street analysts' estimates for $285 million to $295 million, but net sales are expected to exceed 1997 first quarter net sales of $253.4 million. . . . The shortfall from analysts' estimates, if any, would be due to changes in inventory management and order patterns at certain of the Company's major retail customers. The Company further stated that based on the strength of its new product offerings and powerful brand names, it remains highly confident about the overall sales outlook for its products for the entire year."

As Morgan Stanley was fully aware, the March 19, 1998 press release was false, misleading, and failed to disclose material information. The March 19, 1998 press release failed to disclose Sunbeam's actual January and February 1998 sales or the true reasons for the poor results. Instead, the press release held out the false possibility that Sunbeam still could achieve sales of $285 million to $295 million and suggested that, if any shortfall occurred, that shortfall would be due to the fact that certain retailers had decided to defer first quarter purchases to the second quarter. The press release also assured that Sunbeam at least would exceed first quarter 1997 net sales of $253.4 million. Based on information that Morgan Stanley had in its hands on March 18, 1998, it was obvious that Sunbeam would not achieve sales of $285 million to $295 million and that Sunbeam's first quarter 1998 sales would be below its first quarter 1997 numbers. To simply meet 1997 first quarter sales, Sunbeam needed sales of $123.3 million over the 12 remaining days of the quarter — an average of $10.28 million per day. Sales of $10.28 million per day would be 306% more than the average per day sales in March 1997, and 281% more than the average per day sales for the first 17 days of March 1998. Furthermore, Morgan Stanley knew that the shortfall from analysts' estimates was not caused by retailers' deciding to defer purchases from the first quarter of 1998 to the second quarter, as the press release indicated. Rather, as Sunbeam's outside auditors had

16div-015715

advised Morgan Stanley in writing, the collapse in first quarter sales was caused by Sunbeam's acceleration of 1998 sales into the fourth quarter of 1997.

After Sunbeam's false press release was issued, Morgan Stanley stood arm-in-arm with Sunbeam while Dunlap and Kersh told CPH, analysts, and investors that the March 19, 1998 release was a purely cautionary statement because some first quarter 1998 sales might simply "spillover" into the second quarter and that Sunbeam still believed that it actually would meet analysts' estimates of $285 million to $295 million in first quarter 1998 sales.

Morgan Stanley knew that a full and truthful disclosure of Sunbeam's first quarter sales would doom the debenture offering, which was scheduled to close on March 25, 1998,

As Morgan Stanley was fully aware, the written contract between CPH and Sunbeam gave CPH the express legal right to refuse to close the sale if there was a material adverse change in Sunbeam's "business, results of operation or financial condition."

Furthermore, if the transactions did not close, Morgan Stanley would not be paid its $10.28 million fee for the Coleman acquisition or its $22.5 million fee for underwriting the subordinated debenture offering. Morgan Stanley also knew that Sunbeam would promptly replace Morgan Stanley with another investment banking firm – such as the Chase Securities team led by Mark Davis.

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Sunbeam's outside auditors already had made it perfectly clear to Morgan Stanley that Sunbeam's first quarter 1998 sales were a disaster,

One of Sunbeam's senior outside auditors, Lawrence Bornstein, has testified under oath that on March 19, 1998, he told Morgan Stanley's John Tyree that the statement in Sunbeam's March 19, 1998 press release — that Sunbeam would at least exceed first quarter 1997 sales of $253.4 million — was not credible: "Just do the math . . . they've done a million dollars in sales the first 70 days of the year and now they need to do $10 million worth of sales for the next . . . I think it was 11 days . . . . I mean, something ridiculous." Bornstein also told Tyree: "I've been to every shipping dock domestically, I've been to Hattiesburg, I've been to Neosho, I've been to Mexico City, and I don't think these guys can physically ship this much stuff."

Morgan Stanley knew that the March 19 press release was false and misleading. Despite that knowledge and Bornstein's explicit statements, Morgan Stanley continued with its preparations to close the debenture offering on March 25, 1998 and the Coleman acquisition on March 30, 1998.

As part of those preparations, on March 24, 1998, Morgan Stanley's Tyree spoke by telephone with Sunbeam's Kersh, who was located in Sunbeam's Delray Beach offices, to obtain an updated report concerning Sunbeam's first quarter performance. By the time of that March 24, 1998 call, Sunbeam had fallen even further behind first quarter 1997 sales. As of March 18, 1998, Sunbeam needed to achieve average sales of $10.28 million per day, over 12 days, to reach

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first quarter 1997 sales. Sunbeam's sales between March 18 and March 24, 1998 had averaged only $6.81 million per day — well short of the $10.28 million per day that Sunbeam needed to achieve. Sunbeam's March 18 through March 24, 1998 sales were further proof that Sunbeam's March 19, 1998 press release was false and that Sunbeam would not achieve first quarter 1998 sales in excess of first quarter 1997 sales.

Morgan Stanley also knew no later than March 25, 1998, if not much earlier, that Sunbeam's earnings for the first quarter of 1998 were going to miss Wall Street analysts' earnings expectations, which were in the range of $0.28 to $0.31 per share (excluding one-time charges). Sunbeam's outside auditors advised Morgan Stanley on March 25 that Sunbeam had suffered a $41.19 million loss during the first two months of 1998, including a one-time charge of $30.2 million. Even excluding that one-time charge, Sunbeam's loss for the first two months was $0.13 per share. To achieve first quarter 1998 operating earnings of $0.28 per share, which were at the low end of analyst expectations, Sunbeam needed to realize a profit of $35.5 million during March 1998 alone. A net profit of $35.5 million in March was 500% more than Sunbeam's net profit for the entire first quarter of 1997. In fact, Sunbeam's first quarter 1998 earnings fell far short of Wall Street's expectations. Sunbeam's first quarter earnings were material,

Having directly participated in misleading CPH Morgan Stanley had a duty to disclose the true facts before the closing of the debenture offering and the Coleman acquisition. Morgan Stanley also could have required Sunbeam to postpone the closings of

16div-015718

those transactions until the necessary disclosures were made. Morgan Stanley did neither. Instead, Morgan Stanley marched forward and closed the $750 million debenture offering on March 25, 1998, which was needed to close the Coleman transaction, and assisted Sunbeam in closing the acquisition of Coleman on March 30, 1998.

Morgan Stanley received $22.5 million for the subordinated debenture offering and $10.28 million for the Coleman acquisition. Morgan Stanley would have received nothing if the transactions had failed to close.

On April 3, 1998 — just four days after the Coleman transaction closed — Sunbeam announced that sales for the first quarter of 1998 would be approximately 5% below the $253.4 million in sales that Sunbeam reported in the first quarter of 1997. In other words, Sunbeam was expecting sales in the range of $240 million. That sales shortfall was shocking news, particularly in view of assurances provided by Sunbeam both in and after its March 19, 1998 press release that $285 million to $295 million of sales was still a real possibility. The April 3, 1998 press release also disclosed that Sunbeam expected to show a loss for the quarter, although the release did not disclose the magnitude of the loss or how much of the loss was attributable to operating earnings as opposed to one-time charges. Sunbeam's news stunned . . . the market. On April 3rd, Sunbeam's stock price dropped 25% — from $45-9/16 to $34-3/8.

. . . Sunbeam's actual first quarter 1998 performance was even worse than Sunbeam disclosed on April 3, 1998. The April 3, 1998 release indicated that Sunbeam's first quarter sales were in the range of $240 million. In fact, Sunbeam's first quarter sales were $224.5

million. Sunbeam obscured the true shortfall by extending its quarter from March 29 to March 31, 1998 — thereby adding two more days of Sunbeam sales. Sunbeam also failed to disclose that it had included two days of Coleman sales after the Coleman transaction closed on March 30. Further, Sunbeam inflated first quarter 1998 sales with $29 million of new phony "bill and hold" sales.

75. Just as Sunbeam's first quarter 1998 sales had been a disaster, so, too, were Sunbeam's first quarter 1998 earnings. Morgan Stanley and Sunbeam had represented to CPH that Sunbeam would achieve or exceed analyst first quarter 1998 earnings estimates. At the time of that representation, the consensus among analysts was that Sunbeam would enjoy first quarter 1998 earnings of $0.33 per share. However, on May 9, 1998, Sunbeam disclosed that it would record a first quarter loss of $0.09 per share (excluding one-time charges) — more than $0.40 per share lower than CPH had been told to expect.

Within weeks, Dunlap's fraudulent scheme began to unravel. In June 1998, after a number of news articles critical of Sunbeam's practices, Sunbeam's Board of Directors launched an internal investigation. That investigation led quickly to the firing of Dunlap and Kersh, and, subsequently, to a restatement of Sunbeam's financial statements for 1996, 1997, and the first quarter of 1998.

[redacted]

77. As detailed above, Morgan Stanley participated in a scheme to mislead CPH and others and cover up the massive fraud at Sunbeam until Morgan Stanley and Sunbeam could close the purchase of Coleman. Morgan Stanley provided CPH with false information concerning Sunbeam's 1996 and 1997 financial performance, its business operations, and the value of Sunbeam's stock. Morgan Stanley also actively assisted Sunbeam in concealing Sunbeam's

16div-015720

disastrous first quarter 1998 sales and earnings and the true reasons for Sunbeam's poor performance.

Morgan Stanley knew that its statements to CPH were materially false and misleading and omitted the true facts.

Morgan Stanley intended that CPH rely on Morgan Stanley's representations concerning Sunbeam.

As detailed above, Dunlap engaged in a fraudulent scheme to inflate the price of Sunbeam's stock by improperly manipulating Sunbeam's 1996 and 1997 performance, by falsely asserting that Sunbeam had successfully "turned around," and by concealing the collapse of Sunbeam's first quarter 1998 sales and earnings and the reasons for Sunbeam's first quarter 1998 performance.

86. As detailed above, Morgan Stanley knew of Dunlap's fraudulent scheme and helped to conceal it until after Sunbeam could close the purchase of Coleman.

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As detailed above, Morgan Stanley provided substantial assistance to Dunlap and Sunbeam, including: concealing Sunbeam's first quarter 1998 sales collapse; assisting with the false March 19, 1998 press release; arranging road shows and meetings with prospective debenture purchasers at which Morgan Stanley, Dunlap, and others made false statements concerning Sunbeam's financial condition and business operations; preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam's financial condition and business operations; providing CPH with false financial and business information concerning Sunbeam; scripting Dunlap's false public statements concerning Sunbeam's acquisition of Coleman;

and underwriting the $750 million convertible debenture offering, proceeds from which were used to fund Sunbeam's purchase of Coleman.

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As detailed above, Morgan Stanley conspired with Dunlap and other senior Sunbeam executives to conceal the truth about Sunbeam's financial performance and business operations.

As detailed above, Morgan Stanley committed overt acts in furtherance of the conspiracy, including: concealing Sunbeam's first quarter 1998 sales collapse; assisting with the false March 19, 1998 press release; arranging road shows and meetings with prospective debenture purchasers at which Morgan Stanley, Dunlap, and others made false statements concerning Sunbeam's financial condition and business operations; preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam's financial condition and business operations; providing CPH with false financial and business information concerning Sunbeam; scripting Dunlap's false public statements concerning Sunbeam's acquisition of Coleman;

and underwriting the $750 million convertible debenture offering, proceeds from which were used to fund Sunbeam's purchase of Coleman.

16div-015723

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10380 v3

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO MORGAN STANLEY'S MOTION TO QUASH NOTICE TO PRODUCE

Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, respectfully submits this supplemental memorandum in response to this Court's directions at the hearing on this matter on April 22, 2005. During the hearing, the Court instructed CPH to isolate the statements made to the jury by Morgan Stanley's counsel about being "new" to the case and to identify what if anything was done in response (Ex. A at 10075):

> This needs to be limited to statements made in front of the jury. And you need to isolate only those statements made in front of the jury that you're relying on.

Morgan Stanley's counsel made several such references in front of the jury, during his opening statement, during voir dire, and during the evidentiary portion of the trial.

First, as discussed in CPH's original response, Morgan Stanley's counsel referred to the purported fact that he is new to the case during his opening statement (Ex. B at 7109):

> As you know, my name is Mark Hansen. I represent Morgan Stanley in this case. As you know, I came into the case somewhat at the last minute, and I'm here to do the best I can to represent Morgan Stanley. With me on the defense side of the table, Mr. Rob Jones, Morgan Stanley; Mr. Joe Ianno, West Palm Beach; my colleagues, Mr. Webster, Miss Beynon and Mr. Cohen; and also Rob Ortiz back

at the console table is going to try to keep me out of technological trouble. Together we will represent Morgan Stanley's side of the case.

The following discussion of counsel's statement occurred immediately after the conclusion of the opening statement (*id.* at 7147-50):

> THE COURT: Yes, sir.
>
> MR. SCAROLA: There is one statement that I would like to address before the jury is allowed to go for the day. It is the statement which Mr. Hansen said, quote, "I came in at the last minute." That statement was, one, an appeal to sympathy that was entirely improper and, two, absolutely false.
>
> I request that the court instruct the jury that the statement was not accurate and that they should disregard it or that Mr. Hansen get up and say, I told you I came in at the last minute. That was false. You should disregard that statement.
>
> MR. HANSEN: That's not true. Your Honor has already referred to the very fact I referred to. Your Honor previously said in the statement that I believe I was accurately paraphrasing, I did come in at the last minute as lead trial counsel in this role. I have previously been involved in a less substantial capacity. I don't think that's a matter of substance at all.
>
> THE COURT: I think what's unfair is to unreasonably expect the jurors that they can disregard an irrelevant fact. And what you chose to do then was take an irrelevant fact and insert it into your opening statement to elicit sympathy from the jury. That's wholly inappropriate.
>
> MR. HANSEN: Well, Your Honor, I didn't even consider it a particularly significant matter. The jury knows that's the status of my entry in the case. They know I replaced Mr. Davidson in the middle of voir dire.
>
> THE COURT: I would agree it was an inappropriate play to sympathy. Obviously, what — I'm trying to think what the cure is because the obvious cure is the relevant performance of the attorney simply doesn't matter. What matters is the evidence in the case.
>
> MR. SCAROLA: I believe more specifically the appropriate cure is to instruct the jury that the statement was false and should be disregarded. Mr. Hansen did not come into this case at the last minute.
>
> MR. HANSEN: That's an overreaction by Mr. Scarola. I consider there to be gross misconduct in his opening statement. I made a remark that was innocuous. I did come into the case as lead counsel at the last minute. Your Honor already told each of these people exactly what happened.

THE COURT: In all honesty, I think you've been here full time since February 14th. I can go back and do the math when Mr. Davidson came in and how much before the original trial date he came in, and I would suspect it may be less than the time you've been in full time.

MR. HANSEN: No, Your Honor. I was here starting February 14th. I went back to Washington.

THE COURT: You were back February 18th when we did the massive voir dire.

MR. HANSEN: I was back and forth several times. Mr. Davidson was on the case full time, and he was the lead trial lawyer.

THE COURT: I don't know that he came in more than two weeks before trial was originally set.

MR. HANSEN: I met with Mr. Davidson over Christmastime, and it was already decided that he was lead trial counsel.

THE COURT: Then you were in there, too. In any event —

MR. IANNO. Technicality, no contemporaneous objection.

THE COURT: I'm just going to tell them that trial counsel is prepared, what matters is the evidence in the case and not the statements of the attorneys.

Second, during voir dire, Morgan Stanley's counsel repeatedly referred to himself as "new" counsel before the jury, and no action was taken in these instances. Specifically, Morgan Stanley's counsel referred to himself as "new" counsel on several occasions during the voir dire that took place on March 30, 2005 (Ex. C at 5834, 5890, 5891-92, 6240-41):

MR. HANSEN: And just — if I could summarize here just to make sure I understand. You're aware of the Court instructing you about somebody doing something bad as part of this litigation, but that wouldn't cause you to think bad of Morgan Stanley, its lawyer, or its new lawyer?

* * * *

MR. HANSEN: I had been sitting over in the peanut gallery sometimes in the third string chair, but I am new as lead counsel. Previously it had been — anybody got a memory.

* * * *

PROSPECTIVE JUROR #105: In a case that's going on in front of my eyes and the Judge says that there is — Judge Maass had made us aware that there is a motion that there is litigation misconduct and there's new representation, then a substitution was made.

MR. HANSEN: Mr. Chestnut, what's your view on that? Might I ask you, have you got a view on that?

* * * *

Much has changed since we were last together, hasn't it?

For one thing, it's a new lawyer talking to you. Just the other lawyer is gone, is that the subject of curiosity for the ladies and gentlemen of the jury?

When did you first notice that there was somebody new sitting there?

PROSPECTIVE JUROR: When we first walked in.

MR. HANSEN: It's not the kind of thing, where did the lawyer go? Trap door somewhere? What did you think about that?

Morgan Stanley's counsel also referred to himself as "new" counsel on two additional occasions during the voir dire that took place on March 31, 2005 (Ex. D at 6186, 6201):

Q. Morning, Ms. Dellenback. I'm Mark Hansen. I'm the new lead lawyer for Morgan Stanley.

* * * *

Q. Morning, Mr. Patti. I'm the new lawyer for Morgan Stanley. Mark Hansen. I was in the court before.

Third and finally, during Morgan Stanley's cross-examination of Mr. Perelman, Mr. Hansen highlighted the fact that Mr. Perelman's deposition had been taken not by Mr. Hansen, but rather by an attorney with Kirkland & Ellis LLP (Ex. E at 9415):

MR. HANSEN: By the way, Mr. Perelman, I wasn't present at your deposition last year, was I?

MR. PERELMAN: No.

MR. HANSEN: That was one of the Kirkland & Ellis lawyers?

MR. PERELMAN: Yes.

That exchange drew an objection from CPH's counsel (*id.* at 9428):

> MR. SOLOVY: . . . Mr. Hansen referred to the fact that he was not the one who took this deposition. He could have stopped there if that was proper, which it wasn't. Then he said it was a Kirkland & Ellis lawyer. That had no place in this business.

Dated: April 25, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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16div-015729

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 25th day of April, 2005.

/SH
JEFFREY T. SHAW

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Florida Bar No.: 169440
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10939 v1

THE COURT: Is there any other representation in this opposition that was made in front of the jury other than what's quoted on page 3, the second quote?

MR. SCAROLA: My recollection is that there were additional statements made during the course of voir dire examination of the jurors as well.

THE COURT: To the extent that -- let me back up.

This needs to be limited to statements made in front of the jury. And you need to isolate only those statements made in front of the jury that you're relying on.

You also -- to the extent that they are representations we've previously discussed, I need the transcript of the discussion and what, if anything, I did in response to it.

This is not something that needs to be done today.

10075

So Mr. Ianno, you're excused.

MR. GORSUCH: Your Honor, just for the record. Only for the record -- you can put that away -- I don't mean to suggest you need to look at that further.

We believe, again, that we put in the sufficient evidentiary predicate about our level of preparation when Mr. Hansen took the stand on this matter. I understand the Plaintiffs disagree, but I want the record very clear on

EXHIBIT
tabbies
A
16div-015732

Opening Statement Reference and Objection at end of opening statement

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. VOLUME 60

MORGAN STANLEY & CO., INC.,

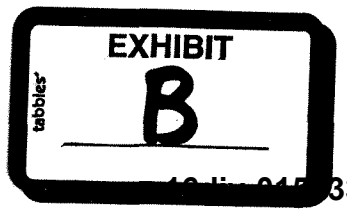
Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Wednesday, April 6, 2005
1:20 p.m. - 5:27 p.m.



decision, or put another way, Mr. Perelman got what he bargained for. He did not suffer damages that he can fairly blame on Morgan Stanley. He got a lot out of this deal and he doesn't deserve more. When he asks for 680 million more because his 14.1 million shares lost money over the three years that his associates ran the company, we think you will conclude he's reaching too far, he's overreaching.

As you know, my name is Mark Hansen. I represent Morgan Stanley in this case. As you know, I came into the case somewhat at the last minute, and I'm here to do the best I can to represent Morgan Stanley. With me on the defense side of the table, Mr. Rob Jones, Morgan Stanley; Mr. Joe Ianno, West Palm Beach; my colleagues, Mr. Webster, Miss Beynon and Mr. Cohen; also Rob Ortiz back at the console table is going to try to keep me out of technological trouble. Together we will represent Morgan Stanley and present Morgan Stanley's side of the case.

Now Coleman has told you it sounds like they're going to have a short case. They're

condone that.

By the same token, Mr. Perelman doesn't deserve a windfall. He can't prove he relied, suffered damages from those lies. So when the case is over we will submit to you, ladies and gentlemen, he will have no right to a verdict. That's a lot to ask of you, but we're counting on it. Thank you for your time and attention.

THE COURT: Thank you, Mr. Hansen.

MR. SCAROLA: May we approach the bench, Your Honor?

THE COURT: Yes.

SIDE BAR CONFERENCE:

THE COURT: Yes, sir.

MR. SCAROLA: There is one statement that I would like to address before the jury is allowed to go for the day. It is the statement which Mr. Hansen said, quote, "I came in at the last minute." That statement was, one, an appeal to sympathy that was entirely improper and, two, absolutely false.

I request that the court instruct the jury that the statement was not accurate and that

they should disregard it or that Mr. Hansen get up and say, I told you I came in at the last minute. That was false. You should disregard that statement.

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THE COURT: I think what's unfair is to unreasonably expect the jurors that they can disregard an irrelevant fact. And what you chose to do then was take an irrelevant fact and insert it into your opening statement to elicit sympathy from the jury. That's wholly inappropriate.

MR. HANSEN: Well, Your Honor, I didn't even consider it a particularly significant matter. The jury knows that's the status of my entry in the case. They know I replaced Mr. Davidson in the middle of voir dire.

THE COURT: I would agree it was an

inappropriate play to sympathy. Obviously, what -- I'm trying to think what the cure is because the obvious cure is the relevant performance of the attorney simply doesn't matter. What matters is the evidence in the case.

MR. SCAROLA: I believe more specifically the appropriate cure is to instruct the jury that the statement was false and should be disregarded. Mr. Hansen did not come into this case at the last minute.

MR. HANSEN: That's an overreaction by Mr. Scarola. I consider there to be gross misconduct in his opening statement. I made a remark that was innocuous. I did come into the case as lead counsel at the last minute. Your Honor already told each of these people exactly what happened.

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MR. HANSEN: No, Your Honor. I was here

starting February 14th. I went back to Washington.

THE COURT: You were back February 18th when we did the massive voir dire.

MR. HANSEN: I was back and forth several times. Mr. Davidson was on the case full time, and he was the lead trial lawyer.

THE COURT: I don't know that he came in more than two weeks before trial was originally set.

MR. HANSEN: I met with Mr. Davidson over Christmastime, and it was already decided that he was lead trial counsel.

THE COURT: Then you were in there, too. In any event --

MR. IANNO: Technicality, no contemporaneous objection.

THE COURT: I'm just going to tell them that trial counsel is prepared, what matters is the evidence in the case and not the statements of the attorneys.

END OF BENCH CONFERENCE.

THE COURT: Okay. A long discussion for

Voir Dire
3/30/05
5765

IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 51

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Wednesday, March 30, 2005

Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

8:00 a.m. to 12:00 p.m.

begin with. So that's -- I mean, on my part it really didn't have any -- you know, I knew the change happened, but it doesn't affect my -- you know, how I would go forward with it.

MR. HANSEN: And just -- if I could summarize here just to make sure I understand. You're aware of the Court instructing you about somebody doing something bad as part of this litigation, but that wouldn't cause you to think bad of Morgan Stanley, its lawyer, or its new lawyer?

PROSPECTIVE JUROR: (Nods head.)

THE COURT: You need to answer out loud because she takes it down.

PROSPECTIVE JUROR: No.

MR. HANSEN: Who would have done the bad thing that led to the litigation misconduct in your mind?

PROSPECTIVE JUROR: In my mind, I wouldn't know who, whether it was Mr. Davidson's firm or -- I don't know. They just -- if it's -- you know, if it's something that both parties didn't agree with, then, I mean, it doesn't necessarily -- I mean, to me it wouldn't affect the way that I see the case, because, one, I

on that? Might I ask you, have you got a view on that?

PROSPECTIVE JUROR #100: No.

MR. HANSEN: You're waiting to hear more evidence.

How many of you fall in Mr. Chestnut's category, you don't know what this is about, you want to hear more?

Can I ask some questions now that will focus it a little bit on the more specifics? Would you be interested in going down the road a little bit so I can hear more about your views, if I gave you some more facts that you may hear about from the Judge?

PROSPECTIVE JUROR #102: Sure.

MR. HANSEN: Ms. Moeller, would that be -- I don't mean to pick on you.

My next questions are going to go into the subject about the litigation misconduct that Judge Maass will instruct you. And we all agree that litigation misconduct is a bad thing. Nobody is going to say, we're for litigation misconduct.

Assume for my question that Judge Maass will instruct you that during the process that

Hansen, Todd, Evans & Figel, including Mr. Hansen, and Carlton Fields, including Mr. Ianno, together with other lawyers in their firms will represent Morgan Stanley.

Before the Court's ruling they worked on this case in a less substantial capacity.

Okay. And one thing I meant to reinforce with you and I forgot to and I apologize. Remember what we talked about the very first day, we need complete, truthful answers. There are complete, truthful answers and ones that aren't. And we need the complete, truthful answers, but there are not right answers and wrong answers. There are not answers we're looking for and ones that are going to get us upset. We just need the truthful answers.

Mr. Hansen, did you have some questions?

MR. HANSEN: Thank you, Your Honor.

Morning, ladies and gentlemen.

Much has changed since we were last together, hasn't it?

For one thing, it's a new lawyer talking to you. Just the other lawyer is gone, is that the subject of curiosity for the ladies and gentlemen of the jury?

When did you first notice that there was somebody new sitting there?

PROSPECTIVE JUROR: When we first walked in.

MR. HANSEN: It's not the kind of thing, where did the lawyer go? Trap door somewhere? What did you think about that?

Can I get a volunteer to tell me what was in your mind?

THE COURT: Mr. Hansen, while we're pondering that, let me remind the panel how important it is that you identify yourself for the Court Reporter by your name or jury number.

Go ahead.

MR. HANSEN: Who can tell me a reaction you had when you came into the courtroom, said where is Mr. Davidson?

PROSPECTIVE JUROR: I know what my reaction was. We've had different lawyers show up different days and we thought maybe he was being gone for the day.

MR. HANSEN: He just might have something else to do that day?

Mr. Kunz.

PROSPECTIVE JUROR: Brian Kunz. I was wondering what he did.

Voir Dire
3/31/05

IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

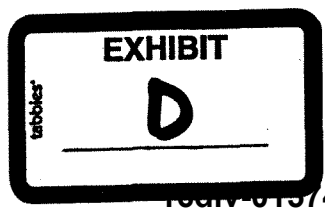
MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 53

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Thursday, March 31, 2005
Palm Beach County Courthouse
Courtroom 11-A
205 North Dixie Highway
West Palm Beach, Florida 33401
8:00 a.m. to 12:00 p.m.



Q. How did you hear that?
A. The office.
Q. Just people talking?
A. Yes.
Q. Did you participate in the cordial conversations at all?
A. No.
Q. What else have you heard, if anything?
A. That's it.
Q. These have been all conversations you're reporting?
A. No.
Q. Did you see anything on TV or in print?
A. I don't watch the news.
THE COURT: Do you have questions?
BY MR. HANSEN:
Q. Morning, Ms. Dellenback. I'm Mark Hansen. I'm the new lead lawyer for Morgan Stanley.
These conversations, you didn't initiate them, did you?
A. No, I did not.
Q. You weren't trying to listen to them?
A. No, I was not.
Q. Let's start with the first one or the first topic. Anything you heard in the first topic about

over yesterday.

Q. Anything else you've heard or seen or learned about either the case or the parties?

A. No. No more than that.

THE COURT: Thank you, sir.

Do you have questions?

BY MR. HANSEN:

Q. Morning, Mr. Patti. I'm the new lawyer for Morgan Stanley. Mark Hansen. I was in the court before.

A. I remember you. That's right.

Q. Sitting in the peanut gallery.

A. Are you the same one that's in the Republican party? That's a different Hansen.

MR. IANNO: Local lawyer.

BY MR. HANSEN:

Q. I couldn't get elected to anything.

The information you saw related only to the question of changing counsel for Morgan Stanley, not to any of the merits of the claims?

A. That's right. It was just change in counsel. That's right.

Q. Morgan Stanley as a result of changing counsel wanted more time to prepare?

A. True.

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

VOLUME 78

MORGAN STANLEY & CO., INC.,

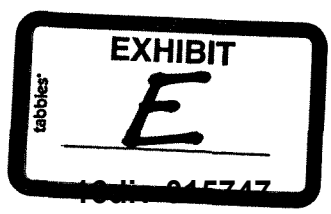
Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Wednesday, April 20, 2005
9:30 a.m. - 12:06 p.m.



MR. HANSEN: We offer 251, Your Honor.

THE COURT: Any objection?

MR. SCAROLA: No, Your Honor.

THE COURT: So that item will be in evidence.

(Defendant's Exhibit No. 251 in evidence.)

BY MR. HANSEN:

Q. By the way, Mr. Perelman, I wasn't present at your deposition last year, was I?

A. No.

Q. That was one of the Kirkland & Ellis lawyers?

A. Yes.

MR. HANSEN: Could we put page 12 of 251 in evidence up on the screen?

BY MR. HANSEN:

Q. Do you recall we were talking yesterday about the stock prices, right, Mr. Perelman?

A. Yes.

Q. And what had happened at least to the market price of Coleman stock from 1996 to 1997, correct?

A. Yes.

Q. It's true -- this, by the way, is Coleman Company's form 10-K filed with the Securities & Exchange Commission for the year 1997?

expressly we couldn't have a fair trial, and it was Morgan Stanley's fault.

THE COURT: I said because of Morgan Stanley's action, unfortunately, we will never have a trial on the merits.

MR. SOLOVY: We're getting a fair trial. Your Honor has been more than liberal certainly. And I want to raise another point, Your Honor. Mr. Hansen referred to the fact that he was not the one who took this deposition. He could have stopped there if that was proper, which it wasn't. Then he said it was a Kirkland & Ellis lawyer. That had no place in this business.

MR. HANSEN: The witness made a big point yesterday --

THE COURT: I understand the concern. I also understand Mr. Hansen's concern that to the extent there may have been an implication that somehow Mr. Hansen was trying to pull a fast one, he was simply trying to confirm that -- that it wasn't he or his firm.

MR. SOLOVY: He was the one who chose, Your Honor, to use a different Exhibit than the Exhibit used at the deposition.

THE COURT: Unless we're going to stop right

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

MORGAN STANLEY & CO. INCORPORATED'S MOTION TO COMPEL COLEMAN PARENT HOLDINGS, INCORPORATED TO PRODUCE DOCUMENTS REFLECTING LEGAL ADVICE

Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") moves to compel Plaintiff Coleman (Parent) Holdings, Incorporated ("CPH") to produce documents reflecting legal advice given to CPH on or before May 11, 1998, in connection with its transaction with Sunbeam, Incorporated ("Sunbeam"). In open court last Thursday, April 21, 2005, Ronald Perelman volunteered the advice of CPH's counsel to justify CPH's inaction in the weeks following the Sunbeam-Coleman merger. Fundamental fairness requires that the remaining advice of CPH's counsel now be disclosed to Morgan Stanley. Florida law does not permit a party to use the attorney-client privilege simultaneously as a sword and a shield. CPH may not selectively disclose the communications that help its cause and withhold the ones that hurt it.

1. There can be no dispute that Ronald Perelman, when testifying, volunteered the advice of CPH's counsel in an effort to justify CPH's inaction for weeks and months following the Sunbeam-Coleman merger despite Mr. Perelman's supposed realization that Sunbeam and Morgan Stanley had lied to him. The relevant exchange begins as follows:

> Q. The fact that they lied to you about important things like the first quarter sales wasn't, in your mind, sufficient to try and rescind the deal?

A. It wasn't in the mind of my lawyers, sir.

4/21/05 Tr. at 9866-67. CPH's counsel made no objection or other effort to prevent the attorney-client privilege from being waived. *See id.*

As a result, the examination continued, still without objection:

> Q. Oh, you got an opinion from your lawyers that you hadn't been wronged enough to try and rescind the deal?
>
> A. The lawyers were working at this right at this moment. I told you that already, sir.
>
> * * * * *
>
> Q. I'm just asking you, you volunteered an answer a minute ago. Did the lawyers tell you before May 11th that you couldn't get out of this transaction based on having been lied to and deceived?
>
> A. On the first quarter sales, there was not enough for us to get out of the transaction at that point in time.
>
> Q. And that's what the lawyers told you?
>
> A. Yes.

Id. At no point did CPH's trial counsel object. *See id.*

2. Under Florida Rule of Civil Procedure 1.410(c), a "party seeking production of evidence at trial which would be subject to a subpoena may compel such production by serving a notice to produce such evidence on an adverse party as provided in rule 1.080(b)." That provision is applicable here. The alleged advice from CPH's lawyers that their client had no claims arising out of the Sunbeam transaction is highly probative evidence for trial. For one thing, it may cast significant doubt on Mr. Perelman's veracity; that advice may not exist. Further, to the extent the advice does exist, CPH's lawyers may well have advised CPH on the issues of reliance and damages, because those elements are essential components of a claim of fraud.

3. Of course, legal advice is ordinarily privileged. But Mr. Perelman waived the attorney-client privilege by volunteering the advice of CPH's counsel in open court. Florida law expressly states that a person "waives the privilege" if he "*voluntarily discloses . . . or consents to disclosure of, any significant part of the matter or communication.*" § 90.507, FLA. STAT. ANN. (1995) (emphasis added); *see Estate of Tobias v. Barnaby*, 804 So. 2d 553, 555 (Fla. 3d DCA 2002) ("The more important point is that the personal representative had already waived the privilege as a matter of law by making the assertion that her counsel had settled the case without authority" in testimony at an evidentiary hearing.); *Andrade v. State*, 773 So. 2d 1238, 1239 (Fla. 3d DCA 2000) (per curiam) ("[T]he defendant had waived the attorney-client privilege on this particular issue when she testified that her failure to appear was based on the advice of her previous counsel."); *Hoyas v. State*, 456 So. 2d 1225, 1228 (Fla. 3d DCA 1984) ("[T]he attorney-client privilege, if applicable, was waived by appellant's voluntary disclosure, during his testimony at trial, of a significant part of the communication wherein he told his attorney he 'didn't do it.'"); *cf. Tibado v. Brees*, 212 So. 2d 61, 63 (Fla. 2d DCA 1968) ("It is clear under the law of Florida that a personal privilege may be waived and when Mr. Tibado voluntarily and without objection testified on deposition to the privileged [marital] communications they lost their confidential character.").

4. There can be no doubt that Mr. Perelman waived the privilege. He did not assert his own opinion to justify CPH's responses. He attempted to justify CPH's actions based on the advice of counsel. It would be fundamentally unfair to allow Mr. Perelman to volunteer the advice of CPH's counsel that helps its case and withhold the advice that hurts it. The court's holding in *International Telephone & Telegraph Corp. v. United Telephone Co. of Florida*, 60 F.R.D. 177, 185-86 (M.D. Fla. 1973), applies with equal force here:

> [T]he privilege was intended as a shield, not a sword. Consequently, a party may not insist upon the protection of the privilege for damaging communications while disclosing other selected communications because they are self-serving.
>
> If the client chooses to disclose secrets within the privilege, then he waives it and cannot later insist upon his or his attorney's silence based upon the privilege. . . . [I]f the client . . . takes the stand and testifies to privileged communications in part this is a waiver as to the remainder of the privileged consultation or consultations about the same subject.

(Citation omitted). Simply put, "[w]hen a party himself ceases to treat a matter as confidential, it loses its confidential character." *Savino v. Luciano*, 92 So. 2d 817, 819 (Fla. 1957).[1]

* * * * *

For the foregoing reasons, the Court should compel CPH to produce documents reflecting legal advice given to CPH on or before May 11, 1998, regarding CPH's claims arising out of the Sunbeam transaction.

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[1] The Florida Supreme Court's heavily criticized 1913 decision in *Seaboard Air Line Railway v. Parker*, 62 So. 589, 590 (Fla. 1913) is not to the contrary. In *Parker*, the court asserted (without explanation or citation) that a party's testimony on cross-examination that he did *not* tell his attorney something did not waive the privilege. *See id.* Although *Parker* has been criticized as "hardly supportable," John W. Strong, MCCORMICK ON EVIDENCE § 93 & n.25 (5th ed. 1999), it has no application here in any event. Unlike the witness in *Parker*, Mr. Perelman testified *affirmatively* as to CPH's *counsel*'s advice *to him*, not that he *omitted* to tell something *to CPH's counsel*. *See Hoyas*, 456 So. 2d at 1229 (criticizing *Parker* court's "bare conclusion of non-waiver" and distinguishing situation in which client made "an affirmative statement" on direct examination).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 25th day of April 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

MORGAN STANLEY'S MOTION TO ALLOW EXPERT TESTIMONY OF PROF. FISCHEL TO REBUT UNDISCLOSED TESTIMONY BY DR. EMERY

Morgan Stanley & Co. Incorporated ("Morgan Stanley") hereby moves for an order allowing it to call as an expert witness at trial Prof. Daniel R. Fischel to rebut the undisclosed, surprise and prejudicial testimony of Dr. Emery.

Without mentioning the topic in his written report, Dr. Emory testified at trial about his hunches that a supposedly less scandal-ridden Wall Street in 1997 and 1998 generated lower levels of skepticism and diligence. This surprise testimony is not only unsupportable (high-profile scandals were nothing new to Wall Street, nor were sophisticated investors more gullible in 1997 and 1998), but it cuts at the heart of Morgan Stanley's argument that Coleman (Parent) Holdings Inc. ("CPH") did not reasonably rely on Sunbeam or Morgan Stanley statements. To rebut this damaging undisclosed testimony Morgan Stanley must be permitted to introduce its own, rebuttal testimony. Prof. Fischel is prepared and qualified to do that.

I. Dr. Emery Testified Repeatedly About Undisclosed Matters

After several days of oral argument, the Court gave CPH permission to have Dr. Emery testify on certain previously undisclosed matters. It gave this permission on the express understanding that, on these new matters, Dr. Emory would act essentially as a "human glossary," merely explaining terms that were contained within Exhibit A to be read to the jury.

4/4/05 Tr. at 6538:5-7. The Court agreed with Morgan Stanley that Dr. Emery must "be confined to opinions previously expressed." *See* 4/6/05 Tr. at 7190:13-15. After probing Mr. Scarola, the Court felt comfortable that the definitional matters about which Mr. Scarola intended to ask Dr. Emery were likely related to Dr. Emery's report. (Tr. 7243:21-7247:13.) To give the Court assurances that he did not intend to stray from Dr. Emery's report, Mr. Scarola catalogued precisely and in detail what he would ask Dr. Emery.[1] Mr. Scarola failed to inform the Court and Morgan Stanley that Dr. Emery would expound his personal theory of Wall Street's evolving levels of skepticism and diligence. Not only did Mr. Scarola not disclose this new opinion when probed by the Court on the eve of Dr. Emery's testimony, more importantly

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[1] Mr. Scarola said:

"Dr. Emery is going to describe what a public company is, what a stock is, what a shareholder is, what a bond is, bond holder, officer, director, distinguish between public companies and private companies, talk about what common stock is, talk about what capital is, equity market, debt market, stock exchange, power equity and debt markets used to raise money for corporation, what are 10-Ks, 10-Qs, with whom would such reports be filed, what is an investment banker and what role do investment bankers play in the business world? Is there anything unusual about a corporation like Sunbeam, a public corporation, seeking to sell itself? If a corporation does get sold, what happens to the shareholders? How does the value of a company's stock get set? How is it decided how many shares of stock a company will have? Do those numbers ever change? How and why? What does it mean for a stock's value to be fraudulently inflated? How can stock be used by one company to buy another company? Is there anything unusual about a company buying another company? What are annual revenues? How are they calculated? How significant are reports with regard to annual revenues in terms of impacting upon a stock's price? Why do companies — why do public companies make public announcements with regard to anticipated financial changes? What are mergers and acquisitions? What is an offering? What is the significance of a particular company being a sole underwriter with regard to a debenture offer? What is a convertible debenture? That's going to take us probably through lunch. I can keep going, but these are the nature of the questions that I intend to ask, Your Honor." 4/7/05 Tr. at 7243:22-7245:8.

Dr. Emery's written report — served on December 7, 2004, when Morgan Stanley still had an opportunity to obtain rebuttal opinions — said nothing of this theory.

CPH even conceded at trial that Dr. Emery never previously disclosed his theory of evolving Wall Street attitudes, *see* 4/7/05 Tr. at 7358:2-3, but CPH still managed, after two initial failures, to elicit the testimony. Its first unsuccessful attempt occurred when Mr. Scarola asked Dr. Emery if Dr. Emery would place the relevant events "in the context of the business world as it existed at that time." *Id.* at 7267:21-22. Mr. Hanson objected that this subject was both undisclosed and inconsistent with Mr. Scarola's earlier proffer. *See id.* at 7268:5-20. The Court asked Mr. Scarola for proof that Dr. Emery had, in fact, included in his report opinions about changes in the corporate world. *See id.* at 7268:21-7269:25. Mr. Scarola dropped the matter for the time being. *See id.* at 7269:23-25. Later, in his second attempt, Mr. Scarola proposed in his written outline to ask a similar question: "Has the investing community's degree of confidence in the honesty and accuracy of publicly filed information changed significantly since 1997?" *Id.* at 7357:3-6. Morgan Stanley objected, Mr. Scarola *conceded that this topic was not included in Dr. Emery's report*, and the Court *sustained Morgan Stanley's objection*. *See id.* at 7357:19-7358:4.

That should have ended the matter, but it was just the beginning. Mr. Scarola said he would rephrase the question (over Morgan Stanley's objections) so that the question no longer called explicitly for Dr. Emery to contrast attitudes in 1997/1998 with later periods. *See id.* at 7358:5-7359:15. The new question, although itself objectionable, purported to comply with the Court's desire to avoid contrasts between current and prior attitudes: "In the 1997, early 1998 time frame in particular, to what extent did analysts place confidence in the honesty and integrity of public corporations' public financial filings, the documents the SEC requires public

corporations to file?" *Id.* at 7424:25-7425:4. The answer, however, contained precisely the comparison in attitudes that the Court had just said was prohibited because it was undisclosed:

> THE WITNESS: ***The general environment has had a significant change since that time period.*** This is over the last eight or so years.

Id. at 7425:7-9.

The floodgate of undisclosed opinions then opened. Despite CPH's earlier concession that the opinions were never previously disclosed, and despite the Court's initial ruling excluding the testimony for that reason, Dr. Emery expounded on his views, again and again. First, he opined that in 1997/1998 financial statements "were generally well thought of" and "accepted as being generally true." *Id.* at 7426:4-5. This was because, he asserted, [i]f you go back several decades, there might have been one or two notable scandals per decade, but there was a general acceptance of them as being valid and representative." *Id.* at 7426:6-9. Then, opining again about changing attitudes, he added that "there's been an evolution of increasing doubt." *Id.* at 7426:9-10.

Dr. Emery was not finished. On redirect Mr. Scarola again asked about changing attitudes -- this time concerning due diligence. He asked: "Is there a difference between what would be typical with respect to due diligence today and what would have been typical with respect to due diligence as it relates to a transaction involving publicly traded corporations, public corporations back in 1997 and early 1998?" 4/11/05 Tr. at 7738:15-20. Dr. Emery took the ball and ran: "If you think back to what we — what I had said on Thursday about the environment changing and the fact that within the last several years we've had a dramatic number of fraudulent situations and scandals, and so I think that people are much more attune[d] today to being exceptionally skeptical, exceptionally leery of people, of all of the aspects of it,

but certainly accounting statements have become much more suspect in the last few years." *Id.* at 7738:21-7739:4.

Again later, in response to a wholly unrelated juror question about whether "unaudited receipts" were "reliable," Dr. Emery launched into another explanation about changing Wall Street attitudes. "[I]f you think of what's happened in the last five years, eight years, ten years," he said, and "you think about the scandals that have happened, audited statements have become less reliable. So people have been fooled." 4/13/05 Tr. at 7987:18-21. Moments later, responding to yet another unrelated juror question — this time about First Boston's knowledge — Dr. Emery returned to his undisclosed opinions: "As a general course, I think, again, if I go back to what's happened in the last few years, people who are a lot smarter than I am, people who are more knowledgeable, were more knowledgeable in the situation than I have been fooled." *Id.* at 7988:10-14.

None of this was previously disclosed. All of it is unfairly prejudicial. And none of it satisfied even the basic requirements for expert testimony. *See Cerna v. South Fla. Bioavailability Clinic, Inc.*, 815 So. 2d 652, 655 (Fla. 3d DCA 2002) (expert's underlying principles and the methodology must be tested and approved); *Brito v. County of Palm Beach*, 753 So. 2d 109, 114 (Fla. 4th DCA 1998) (opinion must be based on "methodology, literature, or studies," not just the expert's assumptions). Dr. Emery had no personal experience in the marketplace; he conducted no opinion surveys about changing attitudes; he performed no studies of the number and nature of "scandals" or how they were publicized; and he reviewed no data about the manner in which investors performed due diligence in different years or decades. His "opinions," in other words, were nothing more than the unfounded impressions of a finance professor.

Morgan Stanley renewed its mistrial motion, but it was denied. 4/11/05 Tr. at 7755:8-7756-5.

II. Professor Fischel Will Contradict Dr. Emery's New Opinions

Not only were Dr. Emery's opinions undisclosed, they do not withstand scrutiny. The jury needs to hear why. Prof. Fischel is well-versed in the history of corporate scandals and the market's knowledge of them. He holds an endowed chair as a Professor of Law and Business at the University of Chicago. Unlike Dr. Emery, Professor Fischel has studied and written extensively on corporate scandals and fraud, including publication of a book about Michael Milken and the corporate scandals of the 1980s and early 1990s. *See* Prof. Fischel's curriculum vitae (attached as Ex. 1). He is certainly far more qualified than Dr. Emery, who has no similar experience in his capacity as a finance professor, to discuss these matters.

Professor Fischel is prepared to tell the jury that the corporate world and Wall Street had experienced well-publicized frauds and scandals for many years before 1998 and that no basis exists to support Dr. Emery's assertions that investors and other market participants were any more trusting or less careful or skeptical in their due diligence activities then than now. Disputing Dr. Emery's assertion that there were only "one or two notable scandals per decade," Dr. Fischel will explain that high-profile scandals riddled the press in the years preceding 1998 and that one cannot say that investors were more trusting or naïve in 1997 and 1998 than they are today.

Professor Fischel's opinions, unlike Dr. Emery's, are well-supported. Just a few examples make the point. In the 1980s, he will say, Wall Street was bombarded with publicity about the hundreds of savings & loan associations failures that caused billions of dollars in losses. The largest single failure, the Lincoln Savings & Loan collapse, alone was said to cost

$3.4 billion. This and other major failures were highly publicized. In another well-publicized scandal, Michael Milken pled guilty in 1990 to six felony counts and agreed to pay $600 million in fines for securities law violations. In 1992, Phar-Mor filed for bankruptcy after a $500 million fraud was discovered. Also in 1992, Ernst & Young agreed to pay the federal government $400 million to settle claims that the company's auditors failed to warn of financial problems that caused some of the biggest S&L failures. In 1993, Leslie Fay Companies filed for bankruptcy after disclosing that it had overstated profits by $81 million from 1990 through 1992 through fraudulent accounting. The *Wall Street Journal* reported in 1995 that the accounting fraud at Leslie Fay "was far more pervasive than previously revealed." Lee Berton, *Accounting Audit Report Details Fraud at Leslie Fay*, Wall St. J., Mar. 28, 1995, at B1. That same year the *Wall Street Journal* reported "extensive accounting fraud" at Structural Dynamic Research Corp. Business Brief, *Structural Dynamics Research Corp.: Class Action Suit Accord Spurs $22.6 Million Charge*, Wall St. J., Dec. 22, 1995, at B4.

In 1996 alone, major accounting frauds were reported at, among other corporations, Kendall Square Research Corp., and Kurzweil Applied Intelligence Inc. One publication in early 1996 described the "tsunami of lawsuits" against the accounting profession. Robert Sidorsky, *Auditor's Duty to Blow the Whistle Under the Litigation Reform Act*, New York L. J., Feb. 9, 1996, at 1. In 1997, the number of highly publicized frauds did not abate, including Centennial Technologies, T2 Medical Inc., Cambridge Biotech Corp., Columbia/HCA, and Future Healthcare.

Professor Fischel will testify that these and other events disprove Dr. Emery's assertions. On the contrary, in Professor Fischel's opinion, market participants were, and should have been, no less careful, skeptical or diligent in 1997 and 1998 than they are today. Publicized scandals

occurred repeatedly in the 1980s and 1990s that would have led a prudent and sophisticated investor to exercise care and caution in reviewing financial disclosures in connection with any major transaction.

III. Dr. Emery's Undisclosed Testimony Allows a Rebuttal by Morgan Stanley.

"A party can hardly prepare for an opinion that it doesn't know about." *Office Depot, Inc. v. Miller*, 584 So.2d 587, 590 (Fla. 4th DCA 1991). Having denied Morgan Stanley's mistrial motion despite Dr. Emery's admitted testimony about undisclosed matters, the Court should at a minimum allow Morgan Stanley to offer its own expert testimony to counter Dr. Emery's surprise testimony.

Hartstone Concrete Products Co. v Ivancevich, 200 So. 2d 234 (Fla. 2d DCA 1967), is directly on point. The Court of Appeal reversed for abuse of discretion the trial court's refusal to allow the defendants to call a previously undisclosed expert witness. That testimony was needed to rebut new opinions expressed at trial by the plaintiff's expert. At trial, plaintiff's expert stated for the first time that he believed the defendant's vehicle was stationary at time of impact. *Hartstone*, 200 So. 2d at 235-36. The defendant proposed to offer an expert with a contrary view, but the trial court refused. The Court of Appeal reversed, stating that "[w]hen an opposing party doesn't know in advance the nature of the adverse expert's opinion that will be given at the time of trial he cannot accurately predict as to whether or not he will require the use of an expert." *Id.* at 237. "Furthermore," the Court explained, the opposing party "may well not know the type of expert he will need and he shouldn't be required to speculate in this respect." *Id.*

As the Supreme Court stated several years later in *Binger v. King Pest Control*, 401 So. 2d 1310 (Fla. 1981), a trial court should exclude a previously undisclosed witness only where "use of the undisclosed witness will prejudice the objecting party." *Id.* at 1314. Here, no

prejudice to CPH can possibly exist because it only just now introduced the new opinion of Dr. Emery. "Prejudice," the *Binger* court explained, is "surprise in fact of the objecting party, and it is not dependent on the adverse nature of the testimony." *Id.* CPH can claim no surprise to learn that Morgan Stanley wishes to rebut Dr. Emery's own surprise testimony. Other factors cited by *Binger* also dictate that Morgan Stanley should be permitted to call Dr. Fischel: Morgan Stanley has not delayed offering this new testimony intentionally, in bad faith, or in deliberate noncompliance with the pretrial order, and no disruption will occur in the orderly and efficient trial of the case. *Id.* Indeed, but for the surprise testimony of Dr. Emery, Morgan Stanley would have had no need to call an expert on these points.

As Morgan Stanley contended at the conclusion of Dr. Emery's testimony, in light of his surprise opinions, never before disclosed and in defiance of the Court's repeated rulings prohibiting such testimony, a mistrial is warranted. If the Court does not grant this relief, at a minimum, the fair and proper remedy for Dr. Emery's expression of undisclosed opinions is to allow the jury to hear Professor Fischel's contrary opinions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery facsimile and hand delivery on this 25th day of April, 2005.

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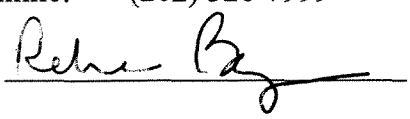
BY: 

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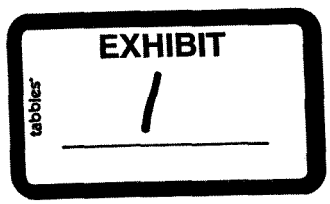

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Comment, The Use of Government Judgments in Private Antitrust Litigation: Clayton Act Section 5(a), Collateral Estoppel, and Jury Trial, 43 U. Chi. L. Rev. 338 (1976).

EDUCATION

University of Chicago Law School, Chicago, Illinois; J.D. 1977, cum laude; Order of the Coif; Comment Editor, Vol. 44, University of Chicago Law Review; Approximately top 1% of the Class. Awarded Casper Platt Award for best paper written by a student of the University of Chicago Law School; awarded Jerome N. Frank Prize for excellence in legal writing while a member of the University of Chicago Law Review, 1975 - 1977. Studied law and economics with Richard Posner and other members of the faculty.

Brown University, Providence, Rhode Island; M.A. 1974 in American History.

Cornell University, Ithaca, New York; major-American History; minor-Economics; B.A. 1972.

TESTIMONY

Testimony of Daniel R. Fischel in re: Drury Industries, Inc. v. Drury Properties, Inc., in the First Judicial District Court of the State of Nevada in and for Carson City, Nevada (April 6 and 7, 2005).

Deposition of Daniel R. Fischel in re: Jerry R. Summers and George T. Lenormand, et al v. UAL Corporation ESOP Committee, Marty Torres, Barry Wilson, Doug Walsh, Ira Levy, Don Clements, Craig Musa, and State Street Bank and Trust Company, in the United States District Court for the North District of Illinois, Eastern Division, No. 03 C 1537 (March 9, 2005).

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Deposition of Daniel R. Fischel In the Matter of the Arbitration between The Canada Life Assurance Company and The Guardian Life Insurance Company of America (January 12, 2005).

Deposition of Daniel R. Fischel In Re: IDT Corporation vs. Telefonica, S.A., et al, in the United States District Court, District of New Jersey, Civil Action No. 01-CV 471 (December 14, 2004).

Deposition of Daniel R. Fischel In Re: DQE, Inc. Securities Litigation, in the United States District Court, Western District of Pennsylvania, Master File No. 01-1851 (December 7, 2004)

Testimony of Daniel R. Fischel In Re United States of America v. Daniel Bayly, James A Brown, Robert S. Furst, Daniel O. Boyle, William R. Fuhs and Sheila K. Kahanek, in the United States District Court of Southern Texas, Houston Division, Case No. H-CR-03-363 (November 4, 2004).

Testimony of Daniel R. Fischel In the Matter of the Arbitration Between The Canada Life Assurance Company, Petitioner v. Caisse Centrale De Reassurance, Respondent, November 2, 2004.

Testimony of Daniel R. Fischel In Re Yankee Atomic Electric Company, Connecticut Yankee Atomic Power Company, and Maine Yankee Atomic Power Company v. The United States, in the United States Court of Federal Claims, Case Nos. 98-126C, 98-154C and 98-474C (August 9, 2004).

Affidavit of Daniel R. Fischel In Re Oracle Corp. Derivative Litigation, in the Court of the Chancery of the State of Delaware In and For New Castle County, Consolidated Civil Action No. 18751 (June 8, 2004).

Deposition of Daniel R. Fischel in re: Reading International, Inc., et al v. Regal Entertainment Group, et al, (Delaware Chancery Court) (May 30, 2004) .

Affidavit of Daniel R. Fischel in re: Reading International, Inc., et al v. Regal Entertainment Group, et al, (Delaware Chancery Court) (May 28, 2004) .

Deposition of Daniel R. Fischel in re: Northeast Savings, F.A. v. United States of America, in the United States Claims Court, Case No. 92-550-C (May 4, 5 and 6, 2004).

Deposition of Daniel R. Fischel in re: Tyson Foods, Inc. Securities Litigation, in the United States District Court for the District of Delaware, Civil Action No. 01-425-SLR (March 18, 2004).

Testimony of Daniel R. Fischel Re: In the Matter of Coram Healthcare Corp. and Coram, Inc., Debtors, In the United States Bankruptcy Court for the District of Delaware, Case No. 00-3299 Through 00-3300 (MFW) (March 4, 2004).

Testimony of Daniel R. Fischel in Tracinda Corporation v. DaimlerChrysler AG, et al, in the United States District Court for the District of Delaware, Civil Action No. 00-984 (February 11, 2004).

Deposition of Daniel R. Fischel in Gerald K. Smith, as Plan Trustee for and on behalf of the Estates of Boston Chicken, Inc., et al. v. Arthur Anderson LLP, et al., in the United States District Court for the Northern District of Illinois, Case Nos. CIV-01-218-PHX-PGR, CIV-01-246-PHX-EHC, CIV-02-1162-PHX-PGR, CIV-02-1248-PHX-PGR (Consolidated) (October 29 and 30, 2003).

Deposition of Daniel R. Fischel in Irene Abrams, on behalf of herself and all others similarly situated v. Van Kampen Funds, Inc., Van Kampen Investment Advisory Corp., Van Kampen Prime Rate Income Trust, Howard Tiffen, Richard F. Powers III, Stephen L. Boyd, Dennis J. McDonnell and Jeffrey W. Maillet, in the United States District Court for the Northern District of Illinois, Eastern Division, Case No. 01-C-7538 (October 21, 2003).

Deposition of Daniel R. Fischel Re: In the Matter of Coram Healthcare Corp. and Coram, Inc., Debtors, In the United States Bankruptcy Court for the District of Delaware, Case No. 00-3299 Through 00-3300 (MFW) (October 13, 2003).

Testimony of Daniel R. Fischel in Transcore Holdings, Inc. v. Rocky Mountain Mezzanine Fund II, LP; Hanifen Imhoff Mezzanine Fund, LP; Moramerica Capital Corporation; and NDSBIC, LP and W. Trent Ates and Fred H. Rayner, In Re: Jams Arbitration, Case No. 1410003193 (September 24, 2003).

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Deposition of Daniel R. Fischel in AT&T Broadband Management Corporation v. CSG Systems, Inc., American Arbitration Association No. 77 181 00159 02 VSS (April 9, 2003).

Deposition of Daniel R. Fischel In Re: DaimlerChrysler AG Securities Litigation, in the United States District Court for the District of Delaware, Civil Action No. 00-993-JJF (February 11 and 12, 2003).

Deposition of Daniel R. Fischel in David T. Bard, Commissioner of Banking and Insurance for the State of Vermont, as Receiver for Ambassador Insurance Company v. Arnold Chait, et al, in the United States District Court for the District of New Jersey, Civil Action No. 85-2441 (December 12, 2002).

Testimony of Daniel R. Fischel in MHC Financing Limited Partnership, et al vs. City of San Rafael, et al, in the United States District Court, Northern District of California, Case No. C 00-3785 VRW (November 6, 2002).

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Deposition of Daniel R. Fischel in Maine Yankee Atomic Power Company v. United States of America, In the United States Court of Federal Claims, Case No. 98-474 C (October 8 and 9, 2002).

Testimony of Daniel R. Fischel in California Federal Bank, FSB v. The United States of America, In the United States Court of Federal Claims, Case No. 92-138C (September 20 and 23, 2002).

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Deposition of Daniel R. Fischel In the Matter of RDM Sports Group, Inc., et al v. Smith, Gambrell, Russell, L.L.P.; et al, In the United States Bankruptcy Court for the Northern District of Georgia, Newnan Division, Case No. 00-1065 (May 14 and 15, 2002).

Deposition of Daniel R. Fischel in Walter B. Hewlett, individually and as Trustee of the William R. Hewlett Revocable Trust, and Edwin E. van Bronkhorst as Co-Trustee of the William R. Hewlett Revocable Trust v. Hewlett-Packard Company, in the Court of the Chancery of the State of Delaware in and for New Castle County (April 24, 2002).

Deposition of Daniel R. Fischel in California Federal Bank, FSB, v. The United States of America, in the United States District Court of Federal Claims, Case No. 92-138C (April 16 and 17, 2002).

Deposition of Daniel R. Fischel In Re: Computer Associates Class Action Securities Litigation, in the United States District Court, Eastern District of New York, File No. 98-CV-4839 (TPC) (MLO) (March 19 and 20, 2002).

Deposition of Daniel R. Fischel in United States of America v. David Blech, In the United States District Court, Southern District of New York, Case No. S1 97 Cr. 402 (KTD) (February 13, 2002).

Testimony of Daniel R. Fischel Re: In the Matter of Coram Healthcare Corp. and Coram, Inc., Debtors, In the United States Bankruptcy Court for the District of Delaware, Case No. 00-3299 Through 00-3300 (MFW) (December 14, 2001).

Deposition of Daniel R. Fischel in Re: Sunbeam Securities Litigation, In the United States District Court, Southern District of Florida, Miami Division, Case No. 98-8258-CIV – Middlebrooks (December 4, 5 and 6, 2001).

Affidavit of Daniel R. Fischel in Re: Jack M. Webb, Special Deputy Receiver For American Eagle Insurance Company v. Elvis Mason, Mason Best Company, L.P., Don D. Hutson, American Eagle Group, Inc., Marion Phillip Guthrie, Frederick G. Anderson, George F. Cass, Richard M. Kurz, Patricia S. Pickard, Arthur Andersen & Co., L.L.P., and Towers, Perrin Forester & Crosby, Inc., D/B/A Tillinghast, In the District Court of Travis County, Texas, 201st Judicial District, Cause No. 99-08253 (September 7, 2001).

Declaration of Daniel R. Fischel Re: In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities: Before the Federal Communications Commission, Washington DC, GN Docket No. 00-185, (Declaration with K. Arrow, G. Becker, D. Carlton, R. Gertner, J. Kalt, H. Sider, and Gustavo Bamberger) (July 24, 2001).

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Testimony of Daniel R. Fischel in Re:Tyson Foods, Inc. and Lasso Acquisition Corporation v. IBP, Inc., Delaware Chancery Court, (May 25, 2001).

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Deposition of Daniel R. Fischel in Re: Myron Weiner, Nicholas Sitnycky, Ronald Anderson and Robert Furman on behalf of themselves and all others similarly situated v. The Quaker Oats Company and William D. Smithburg, United States District Court, Northern District of Illinois, Case No. 98 C 3123, (January 24, 2001).

Deposition of Daniel R. Fischel in Re: Retsky Family Limited Partnership v. Price Waterhouse, LLP, United States District Court, Northern District of Illinois, Eastern Division, No. 97 C 7694, (October 31, 2000).

Joint Affidavit of Daniel R. Fischel and David J. Ross in Re: Floyd D. Wilson, for himself and all others similarly situated v. Massachusetts Mutual Life Insurance Company, in the First Judicial District Court, County of Santa Fe, State of New Mexico, No. D0101 CV-98-02814 (August 4, 2000).

Affidavit of Daniel R. Fischel in Re: T. Rowe Price Recovery Fund, L.P., and Carl Marks Management Co., L.P., individually and derivatively on behalf of Seaman Furniture Co., Inc. v. James Rubin, M.D. Sass Associates, Inc., Resurgence Asset Management, L.L.C., M.D. Sass Corporation Resurgence Partners, L.P., M.D. Sass Corporate Resurgence International, Ltd., Robert Symington, Byron Haney, Alan Rosenberg, Steven H. Halper, and Peter McGeough and Seaman Furniture Co., Inc., In the Court of Chancery of the State of Delaware in and for New Castle County, C.A. No. 18013, (June 7, 2000).

Testimony of Daniel R. Fischel in Re: Bank United of Texas, FSB, et al., v. United States of America, United States Court of Federal Claims, Case Number 95-437C, (October 12 and 14, 1999).

Deposition of Daniel R. Fischel in Re: Bank United of Texas, FSB, et al., v. United States of America, United States Court of Federal Claims, Case Number 95-437C, (September, 26, 1999; July 10, 1999; and June 16, 17, 1999),

Testimony of Daniel R. Fischel in Re: C. Robert Suess, et al., v. The United States, United States Court of Federal Claims, No. 90- 981C (May 17, 1999).

Testimony of Daniel R. Fischel in Re: California Federal Bank v. United States, in the United States Court of Federal Claims, Case Number 92-138C, (February 4 and 11, 1999).

Deposition of Daniel R. Fischel in Re: California Federal Bank v. United States, in the United States Court of Federal Claims, Case Number 92-138C, (February 6, 1999; January 27 and 30, 1999).

Deposition of Daniel R. Fischel in Re: C. Robert Suess, et al., v. The United States, United States Court of Federal Claims, No. 90- 981C (October 27 and 28, 1998).

Deposition of Daniel R. Fischel in Re: Connector Service Corporation v. Jeffrey Briggs, United States District Court, Northern District of Illinois, Eastern Division, No. 97-C-7088 (August 28, 1998).

Deposition of Daniel R. Fischel in Re: Statesman Savings Holding Corp., et al. v. United States of America, United States Court of Federal Claims, Case No. 90-773C, (May 4, 1998 and February 12, 1998).

Testimony of Daniel R. Fischel in Re: Glendale Federal Bank FSB v. United States of America, United States Court of Federal Claims, No. 90-772C, (March 24, 25 and 26, 1998; September 2, 3, 4, 5, 8, 9, 10, 11, 12, 24, 25, 26 and 27, 1997; October 7, 9, 16, 17, 30 and 31, 1997; December 8, 9 and 10, 1997).

Affidavit of Daniel R. Fischel and David J. Ross in Re: Publicis Communication v. True North Communications Inc., et al., United States District Court, Northern District of Illinois, Eastern Division, Case No. 97-C-8263, (December 7, 1997).

Deposition of Daniel R. Fischel in Re: Glendale Federal Bank FSB v. United States of America, United States Court of Federal Claims, No. 90-772C, (August 27 and 28, 1997).

Testimony of Daniel R. Fischel in Re: AUSA Life Insurance Company, et al. v. Ernst & Young, in the United States District Court, Southern District of New York, Master File No. 94 CIV. 3116 (CLB) (July 7 and 8, 1997).

Deposition of Daniel R. Fischel in Re: Santa's Best, f/k/a National Rennoc, an Illinois general partnership, and Tinsel/Ruff Group Limited Partnership, an Illinois limited partnership v. Rennoc Limited Partnership, a New Jersey limited parternship, v. Tinsel/Ruff Group Limited Parternship, an Illinois limited partnership, in the Circuit Court of Cook, Illinois County Department - Chancery Division, No. 95 CH 12160, (June 17, 1997).

Arbitration of Daniel R. Fischel in Re: Lerner v. Goldman Sachs, et. al., Before the American Arbitration Association, 75-136-00090-94 (April 10, 1997).

Affidavit of Daniel R. Fischel in Re: Hilton Hotels Corporation and HLT Corporation v. ITT Corporation, United States District Court, District of Nevada, CV-S-97-00095-PMP (RLH) (March 24, 1997).

Deposition of Daniel R. Fischel in Re: Glendale Federal Bank, FSB v. United States of America, Washington, D.C., Case No. 90-772C, (March 19, 1997; January 30 and 31, 1997).

Deposition of Daniel R. Fischel in Re: Statesman Savings Holding Corporation v. United States of America, Washington, D.C., Case No. 90-773-C, (February 19 and 20, 1997).

Testimony of Daniel R. Fischel in Re: Westcap Enterprises, Inc. and Westcap Corporation, Debtor; in the United States Bankruptcy Court, for the Southern District of Texas, Houston Division, Houston, Texas; Case No. 96-43191-H2-11, (November 1996).

Testimony of Daniel R. Fischel in Re: United States of America v. Robert R. Krilich, in the United States District Court, Northern District of Illinois, Eastern Division, No. 94 CR 419, (August 20, 1996 and July 15, 1996)

Deposition of Daniel R. Fischel in Re: McMahan & Company, Froley, Revy Investment Co., Inc. and Wechsler & Krumholz, Inc. v. Wherehouse Entertainment, Inc., Louis A. Kwiker, George A. Smith, Michael T. O'Kane, Lawrence K. Harris, et al., United States District Court, Southern District of New York, Index No. 88 Civ. 0321 (SS) (AJP), (July 16, 1996 and June 10, 1996).

Deposition of Daniel R. Fischel in Re: Joseph W. and Helen B. Teague, Steven Allen Barker, Rita Strahowski, Swannee Beck, and Lifetime Partners of PTL, as representatives of a nationwide class consisting of 150,129 Lifetime Partners and of 27,839 persons who have partially paid for Lifetime Partnerships v. James O. Bakker, in the United States District Court for the Western District of North Carolina, Civil Action No. 3:87CV514, (June 28, 1996).

Deposition of Daniel R. Fischel in Re: Snapple Beverage Corporation Securities Litigation, in the United States District Court, Eastern District of New York, Master File No. CV 94-3647 (May 30, 1996).

Testimony of Daniel R. Fischel in Re: Chuck Quackenbush, Insurance commissioner of the State of California, in his capacity as Trustee of Mission Insurance Company Trust, et al. v. Borg-Warner Corporation, Borg Warner Equities Corporation, Bord-Warner Insurance Service, Inc., et al., for the Superior Court of the State of California, for the County of Los Angeles, No. C688487 (April 18, 1996).

Deposition of Daniel R. Fischel in Re: Chuck Quackenbush, Insurance commissioner of the State of California, in his capacity as Trustee of Mission Insurance Company Trust, et al. v. Borg-Warner Corporation, Borg Warner Equities Corporation, Borg-Warner Insurance Service, Inc., et al., for the Superior Court of the State of California, for the County of Los Angeles, No. C688487 (April 17, 1996).

Deposition of Daniel R. Fischel in Re: Household Commercial Financial Services, Inc. a citizen of the states of Delaware and Illinois v. Julius Trump, a citizen of the State of Florida, Edmond Trump, a citizen of the state of Florida, James M. Jacobson, a citizen of the State of New York, and Parker, Chapin, Flattau & Klimpl, a citizen of the states of New York and New Jersey, in the United States District Court, for the Northern District of Illinois Eastern Division, 92 C 5010 (February 1, 1996).

Deposition of Daniel R. Fischel in Re: JWP, Inc. Securities Litigation, in the United States District Court, Southern District of New York, Master File No. 92 Civ. 5815 (CLB); AUSA Life Insurance Company, et al. v. Ernst & Young, in the United States District Court, Southern District of New York, Master File No. 94 Civ. 3116 (CLB) (November 30, 1995; November 9, 1995; October 18 and 19, 1995; September 28, 1995).

Deposition of Daniel R. Fischel in Re: City of Houston Municipal Employees Pension System, a Texas association v. PaineWebber Group Inc., et al., in the United States District Court, Eastern District of Missouri, Eastern Division, No. 4:94CV0073CAS (November 15 and 16, 1995).

Testimony of Daniel R. Fischel In Re: American Continental Corporation/Lincoln Savings & Loan Securities Litigation - Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach and Kevin P. Roddy, in the United States District Court , District of Arizona, Civ-93-1087-PHX-JMR (July 25 and 26, 1995).

Deposition of Daniel R. Fischel in Re: Keith C. Bogard, et al., v. National Community Bank Inc., et al., in the United States District Court, District of New Jersey, No. 90-5-32 (HAA) (December 20, 1994).

Deposition of Daniel R. Fischel in Re: Harvey Rosen, Ben Rogers and Julie Rogers v. Deloitte & Touche, Elias Zinn, Julius Zinn, Dennis Lamm, and Ronald Begnaud, in the 268th Judicial District Court, of Fort Bend County, Texas, Cause No. 84-482 (November 9, 1994).

Testimony of Daniel R. Fischel in Re: PPM America, Inc., et al. v. Marriott Corporation et al., in the United States District Court, for the District of Maryland, Civil Docket No. H-92-3068 (October 12, 1994).

Deposition of Daniel R. Fischel in Re: Browning-Ferris Industries, Inc., Securities Litigation, United States District Court, for the Southern District of Texas, Houston Division, Civil Action H-903477 (September 1, 1994).

Testimony of Daniel R. Fischel in Re: Computer Associates International Inc. Securities Litigation, United States District Court, Eastern District of New York, CV-90-2398 (JBW) (May 26 and 27, 1994).

Deposition of Daniel R. Fischel in Re: PPM America, Inc., et al. v. Marriott Corporation et al., United States District, for the District of Maryland, H-92-3068 (May 10, 1994 and March 8, 1994).

Deposition of Daniel R. Fischel in Re: Securities and Exchange Commission v. Shared Medical Systems Corporation, R. James Macaleer, James C. Kelly and Clyde M. Hyde, United

States District Court, for the Eastern District of Pennsylvania, Civil Action - Law: No. 91-CV-6549 (February 22, 1994).

Testimony of Daniel R. Fischel in Re: Peter M. Schultz and Pamela A. Schultz v. Rhode Island Hospital Trust National Bank, N.A., et al., United States District Court, District of Massachusetts, Civil Action No. 88-2870-T (February 16, 1994).

Deposition of Daniel R. Fischel in Re: Henry T. Endo, et al. v. John M. Albertine, et al., United States District Court, Northern District of Illinois, Eastern Division, No. 88 C 1815 (November 11 and 12, 1993; October 28, 1993).

Deposition of Daniel R. Fischel in Re: Computer Associates International Inc. Securities Litigation, United States District Court, Eastern District of New York, CV 90-2398 (JBW) (November 2, 1993 and February 4, 1993).

Affidavit of Daniel R. Fischel in Re: Peter M. Schultz and Pamela A. Schultz v. Rhode Island Hospital Trust National Bank, N.A. et al., United States District Court, District of Massachusetts, Civil Action No. SS-2870-T (October 28, 1993).

Deposition of Daniel R. Fischel in Re: Alpheus John Goddard, III, etc. v. Continental Bank N.A., etc., State of Illinois, County of Cook, Circuit Court of Cook County, County Department-Chancery Division, No. 89 CH 1081 (September 10, 1993).

Deposition of Daniel R. Fischel in Re: Taxable Municipal Bond Section "G" Securities Litigation, United States District Court, Eastern District of Louisiana, MDL No. 863 (September 2, 1993).

Reply Affidavit of Daniel R. Fischel in Re: Columbia Securities Litigation, United States District Court Southern District of New York, 89 Civ. 6821 (LBS) (August 30, 1993).

Affidavit of Daniel R. Fischel in Re: Consumers Gas & Oil, Inc. v. Farmland Industries, Inc., et al., United States District Court, for the District of Colorado, Civil Action No. 92-F-1394 (August 26, 1993).

Declaration of Daniel R. Fischel in Re. Equitec Rollup Litigation, United States District Court for the Northern District of California, Master file No. C90 2064 CAL (July 28, 1993).

Deposition of Daniel R. Fischel in Re: United Telecommunications, Inc. Securities Litigation, United States District Court for the District of Kansas, No. 90-2251-0 (July 22, 1993, April 21 and 22, 1993).

Deposition of Daniel R. Fischel in Re: Consumers Gas & Oil, Inc., a Colorado farm cooperative in liquidation, on behalf of itself and others similarly situated v. Farmland Industries, Inc., a Kansas farm cooperative, et al., United States District Court, District of Colorado, 92-F-1394 (June 18, 1993).

Deposition of Daniel R. Fischel in Re. Rosalind Wells v. HBO & Company, United States District Court, Northern District of Georgia, Atlanta Division, 8-87-CV-657A (JTC) (June 10, 1993 and May 24, 1993).

Deposition of Daniel R. Fischel in Re: Equitec Rollup Litigation, United States District Court, Northern District of California, No. C-90-2064 CAL (June 2 and 3, 1993).

Supplemental Declaration of Daniel R. Fischel in Re: Oracle Securities Litigation, United States District Court, Northern District of California, Master File No. C 90 0931 VRW (May 20, 1993).

Affidavit of Daniel R. Fischel and Kenneth R. Cone in Re: Raymond P. Hayden, et al. v. Jeffrey L. Feldman, et al., United States District Court, Southern District of New York No. 88 Civ. 8048 (JES) (May 12, 1993).

Testimony of Daniel R. Fischel in Re: Melridge, Inc., Securities Litigation, United States District Court for the District of Oregon, CV No. 87-1426-FR (May 4 and 5, 1993).

Declaration of Daniel R. Fischel in Re: Oracle Securities Litigation, United States District Court, Northern District of California, Master File No. C 90 0931 VRW (April 20, 1993).

Deposition of Daniel R. Fischel in Re: Gillette Securities Litigation, United States District Court, District of Massachusetts, No. 88-1858-K (April 1, 1993).

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Deposition of Daniel R. Fischel in Re: Westinghouse Securities Litigation, United States District Court, Western District of Pennsylvania, CV No. 91 354 (March 23, 1993).

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Deposition of Daniel R. Fischel in Re: Kroy, Inc., a Minnesota corporation et al. v. Bankers Trust New York Corporation, et al., Superior Court of the State of Arizona in and for the County of Maricopa, No. CV 89-35680 (March 18, 1993).

Deposition of Daniel R. Fischel in Re: Amos M. Ames, Helen M. Ames, Robert F. Bourke, Louise L. Bourke, Leo E. Corr, April C. Corr, Wence M. Horak, Ruth Horak, Robert T. Freas, Maurita Freas, Bruce Fink, Jr., William H. Jones, Candace A. Jones, Richard Paul, William L. Paul, Carole Paul, Steven J. Paul, Best Power Technology, Incorporated, and Best Power Technology Sales Corporation, in the State of Wisconsin, Circuit Court, Juneau County, Consolidated Case Nos. 92-CV-31, 92-CV-32 (January 26, 1993).

Deposition of Daniel R. Fischel in Re: Federal Express Corporation Shareholder Litigation, in the United States District Court, Western District of Tennessee, Master File No. 90-2359-4B (December 3, 1992).

Deposition of Daniel R. Fischel in Re: Raymond Snyder, Individually and on behalf of all those similarly situated v. Oneok, Inc., et al., in the United States District Court, Northern District of Oklahoma, Civil Action No. 88 C 1500 E (October 15 and 16, 1992).

Deposition of Daniel R. Fischel in Re: Melridge, Inc. Securities Litigation, Consolidated Actions, United States District Court, District of Oregon, Master File No. CV87-1426-JU and Nos. 387-06589-P11, 88-05-JU, 88-221-JU, 88-0699-PA, 88-1266-JU (September 17, 1992; July 25 and 26, 1991).

Deposition of Daniel R. Fischel in Re: Maxus Corporate Company v. Kidder, Peabody & Co. Incorporated, Martin A. Siegel and Ivan F. Boesky, in the District Court Dallas County, Texas, 298th Judicial District, No. 87-15583-M (September 11, 1992; August 18 and 19, 1992).

Deposition of Daniel R. Fischel in Re: Jennifer A. Florin and Alan L. Mundt, on behalf of themselves and all others similarly situated v. Wesray Capital Corp., Citizens and Southern Trust Company, a subsidiary of Citizens and Southern Corporation, Robert K. Barton, Leonard S. Gaby, Allen G. Lacoe, Robert A. Magnusson, Anthony A. Saliture, Harlan B. Smith, Thomas F. Stutzman, Raymond G. Chambers, Frank E. Richardson, E. Burke Ross, Jr., William E. Simon and Frank W. Walsh, Jr., in the United States District Court, Western District of Wisconsin, Civil Action No. 91C-0948 (August 12, 1992).

Deposition of Daniel R. Fischel in Re: Pearl Newman, Shanna Lehmann & Athanasios Tsivelekidis, on their own behalf and on behalf of all other persons similarly situated v. On-Line Software International, Inc. Jack M. Berdy, John C. Crocker, Richard A. Granger, Richard R. Holtmeier, Michael S. Juceam, Edward J. Siegel, Howard P. Sorgen and Richard Ward, United States District Court, District of New Jersey, Consolidated Civil Action Nos. 88-3247, 88-3411 (July 28 and 29, 1992).

Deposition of Daniel R. Fischel in Re: Crazy Eddie Securities Litigation, Oppenheimer-Palmieri Fund, I.P., et al. v. Peat Marwick Main & Co., et al., United States District Court for the Eastern District of New York, 87 Civ. 0033 (EHN), 88 Civ. 3481 (EHN) (June 11, 1992; March 26 and 27, 1992).

Testimony of Daniel R. Fischel in Re: American Continental Corporation/Lincoln Savings and Loan Securities Litigation, in the United States District Court, for the District of Arizona MDL Docket No. 834 (June 4, 1992; May 26, 27 and 28, 1992).

Testimony of Daniel R. Fischel in Re: State of West Virginia v. Morgan Stanley & Co. Incorporated, in the Circuit Court of Kanawha County, State of West Virginia, Civil Action No. 89-C-3700 (April 27, 1992).

Affidavit of Daniel R. Fischel in Re: William Steiner, on behalf of himself and all others similarly situated v. Tektronix, Inc., et al., in the United States District Court, District Court of Oregon, Civil No. 90-587-JO (March 23, 1992).

Deposition of Daniel R. Fischel in Re: Martin Kaplan and Selma Kaplan, on Behalf of Themselves and All Others Similarly Situated v. VICORP Restaurants, Inc., Charles R. Frederickson, Robert S. Benson, Emerson B. Kendall, Robert T. Marto and Johyn C. Hoyt, United States District Court, District of Colorado, Civil Action No. 90-C-2182 (February 11, 1992).

Deposition of Daniel R. Fischel in Re: Interco Incorporated v. Wasserstein, Perella & Co., Inc., United States District Court, Eastern District of Missouri, Eastern Division, No. 91-0151-C-6 (February 3, 1992 and December 12, 1991).

Statement of Daniel R. Fischel in Re: Far West Federal Bank, S.B., et al. v. Director, Office of Thrift Supervision, et al., United States District Court for the District of Oregon, Civil Action No. 90-103 PA (February 3, 1992).

Deposition of Daniel R. Fischel in Re: Capital Bank of California v. Morgan Stanley & Co., Incorporated, United States District Court, Central District of California, No. 91-1650-R (January 24, 1992).

Deposition of Daniel R. Fischel in Re: Trinity Ventures, et al. v. Federal Deposit Insurance Corporation, in its own capacity and as successor to the Federal Savings and Loan Insurance Corporation, United States District Court, for the District of Oregon, No. 90-103-PA (January 6, 1992).

Deposition of Daniel R. Fischel in Re: First Republicbank Securities Litigation, United States District Court, Northern District of Texas, Dallas Division, Civil Action No. 3-88-0641-H (January 2, and 3, 1992; November 26, 1991).

Deposition of Daniel R. Fischel in Re: State of West Virginia v. Morgan Stanley & Co. Incorporated; Salomon Brothers Inc.; and Goldman Sachs & Co., in the Circuit Court of Kanawha County, State of West Virginia, Civil Action No. 89-C-3700 (December 19 and 20, 1991).

Deposition of Daniel R. Fischel in Re: The Regina Company, Inc. Securities Litigation, United States District Court, District of New Jersey, Civil Action No. 88-4149 (HAA) (October 31, 1991).

Affidavit of Daniel R. Fischel in Re: Gillette Securities Litigation, United States District Court, District of Massachusetts, Civil Action No. 88-1858-K (October 7 1991).

Deposition of Daniel R. Fischel in Re: Capital Maritime Corporation v. Amfels, Inc., Far East Levingston Shipbuilding Ltd., John B. Allison and Patrick A. McDermid, United States District Court for the Southern District of Texas Houston Division, C.A. No. H-90-3417 (September 12, 1991).

Deposition of Daniel R. Fischel in Re: Thomas J. Caldarone, Jr. v. Isidore Brown, et al., and John E. Washburn, et al. v. Isidore Brown, et al., United States District Court, Northern District of Illinois, Eastern Division, Docket Nos. 80 C 6251 and 81 C 1475 (August 28, 29, and 30, 1991).

Testimony of Daniel R. Fischel in Re: Apple Securities Litigation, United States District Court, Northern District of California, Northern Division, Docket No. C-84-20148 (May 20 and 21, 1991).

Testimony of Daniel R. Fischel in Re: The Stuart-James Co., Inc., et al. Litigation, United States of America before the Securities & Exchange Commission, in Denver, Colorado, Administrative Proceeding File No. 3-7164 (May 6, 1991).

Deposition of Daniel R. Fischel in Re: Jennie Farber on behalf of herself and all others similarily situated v. Public Service Company of New Mexico; Jerry D. Geist; John P. Bundrant and Albert J. Robison, United States District Court for the District of New Mexico, CIV 89-456 JB WWD (April 17 and 18, 1991).

Affidavit of Daniel R. Fischel in Re: Moise Katz, Frederick Rand, Elias Weissman, Richard D. Morgan, Marion R. Morgan and Mortimer Schulman v. Raymond A. Hay, United States District Court, Southern District of New York, No. 86 Civ. 5640 (JES) (March 29, 1991).

Deposition of Daniel R. Fischel in Re: Standard Chartered PLC., a United Kingdom corporation, et al. v. Price Waterhouse, a general partnership, Superior Court of the State of Arizona, in and for the County of Maricopa, CV 88-34414 (March 13 and 14, 1991).

Affidavit of Daniel R. Fischel in Re: United States of America v. AVX Corporation, and Commonwealth of Massachusetts v. AVX Corporation, United States District Court, District of Massachusetts, Civil Action Nos. 83-3882-Y and 83-3899-Y (January 29, 1991).

Deposition of Daniel R. Fischel in Re: Apple Computer Securities, United States District Court Northern District of California, San Jose Division, No. C-84-20148 (a) JW (December 13 and 14, 1990).

Deposition of Daniel R. Fischel in Re: Polycast Technology Corporation, and Uniroyal Plastics Acquisition Corp. v. Uniroyal, Inc., et al., United States District Court Southern District of New York, No. 87 Civ. 3297 (December 6, 1990 and November 28, 1990).

Deposition of Daniel R. Fischel in Re: Ellen Rudd, on behalf of herself and all others similarly situated, and Mayer Corporation on behalf of themselves, and all others similarly situated, and Louis Brandt, and Israel Baker, Jay R. Kuhne, Pininfarina Corp., and American Transfer Co., on behalf of themselves and all others similarly situated v. Kirk Kerkorian, et al., Superior Court of the State of California, County of Los Angeles, Nos. CA 000980, CA 000981, CA 001017, CA 620279 (June 21, 1990).

Testimony of Daniel R. Fischel in Re: City of San Jose v. Paine, Webber, Jackson & Curtis, Incorporated, et al., and related counter- and Third-Party Claims, United States District Court, Northern District, No. C-84-20601 RPA (May 23 and 24, 1990).

Deposition of Daniel R. Fischel in Re: City of San Jose v. Paine, Webber, Jackson & Curtis, Incorporated, et al., and related counter- and Third-Party Claims, United States District Court, Northern District, No. C-84-20601 RPA (May 22, 1990), No. RPA 84-20601 (November 16, 1989 and September 8, 1989).

Testimony of Daniel R. Fischel in Re: Kulicke and Soffa Industries, Inc. Securities Litigation, United States District Court for the Eastern District of Pennsylvania, No. 86-1656 (March 20 and 21, 1990).

Deposition of Daniel R. Fischel in Re: Kulicke and Soffa Industries, Inc. Securities Litigation, United States District Court for the Eastern District of Pennsylvania, No. 86-1656 (March 9, 1990; December 19 and 21, 1989).

Affidavit of Daniel R. Fischel in Re: Viacom International Inc. v. Carl C. Icahn, et al., v. Ralph M. Baruch, et al., United States District Court, Southern District of New York, No. 86 Civ. 4215 (RPP) (March 8, 1990).

Deposition of Daniel R. Fischel in Re: Technical Equities Coordination Litigation, Superior Court of the State of California for the County of Santa Clara, Master File No. 1991, Santa Clara County Superior No. 600306 (March 1, 1990).

Deposition of Daniel R. Fischel in Re: Amalgamated Clothing and Textile Workers Union, AFL-CIO, et al. v. David A. Murdock, et al., United States District court for the Central District of California, No. CV-86-6410 IH (February 8, 1990).

Deposition of Daniel R. Fischel in Re: Connecticut National Life Insurance Company, et al. v. Peter A.. Sprecher and Laventhol & Horwath, United States District Court, Central District of California, No. CV 87-1945 WJR (Tx) (January 30, 1990).

Deposition of Daniel R. Fischel in Re: Consolidated Capital Securities Litigation, United States District Court, Northern District of California, No. C-85-7332 AJZ (January 22, 1990).

Declaration of Daniel R. Fischel in Re Plaintiffs' Damages in Re: Liquidity Fund, et al. v. Southmark Corporation, et al. in the Superior Court of the State of California for the County of San Mateo, No. 332435 (January 18, 1990).

Deposition of Daniel R. Fischel in Re: Norman Kamerman, Shirley Brown, Edward Rosen, Lexim Investors Corp., and Dohsa Anstalt, on behalf of themselves and all others similarly situated, and Barnett Stepak v. Saul Steinberg, Reliance Group Holdings, Inc., Reliance Group, Inc., Reliance Financial Services corp., and Reliance Insurance Company, United States District Court, Southern District of New York, No. 84 Civ. 4440 (September 13, 1989).

Affidavit of Daniel R. Fischel in Re: Edward A. Taylor, et al. v. A. O. Smith Corporation et al., Circuit Court for Lincoln County, Tennessee, No. 098-84 (August 11, 1989).

Deposition of Daniel R. Fischel in Re: Container Products Inc. v. Pace Industries, United States District Court, Southern District of New York, No. 88-CIV. 3549 (KMW) (July 19, 1989).

Deposition of Daniel R. Fischel in Re: Joseph B. Moorman, et al. v. Southmark Corporation, et al., Liquidity Fund, et al. v. Southmark Corporation, et al., Superior Court of the State of California for the County of San Mateo, Nos. 322135 and 332435 (July 11, 1989).

Testimony of Daniel R. Fischel in Re: Tessie Wolfson, et al. v. Frederick S. Hammer, and Meritor Financial Group, United States District Court for the Eastern District of Pennsylvania, Civil Action No. 87-8471 (June 20, 1989).

Deposition of Daniel R. Fischel in Re: Richard J. Heckmann, et al. v. C. L. Ahmanson, et al., and Consolidated Cases, Superior Court of the State of California for the County of Los Angeles, Nos. CA000851 and C642081 (June 8, 1989).

Deposition of Daniel R. Fischel in Re: Tessie Wolfson, et al. v. Frederick S. Hammer, United States District Court for the Eastern District of Pennsylvania, Civil Action No. 87-8472 (May 11, 1989).

Testimony of Daniel R. Fischel in Re: Tessie Wolfson, et al. v. Frederick S. Hammer, United States District Court for the Eastern District of Pennsylvania, Civil Action No. 87-8472 (April 13, 1989).

Deposition of Daniel R. Fischel in Re: National Union Fire Insurance Company of Pittsburgh, PA v. Wells Fargo Bank, N.A., District Court of Harris County, Texas, 125th Judicial District, No. 88-49246 (April 10 and 11, 1989).

Deposition of Daniel R. Fischel in Re: Susan Rothenberg, as Custodian for Stephen J. Rothenberg v. Charles E. Hurwitz, United Financial Corporation, United Savings Association of Texas, et al., United States District Court for the Southern District of Texas, Houston Division, Civil Action No. H-86-1435 (March 30, 1989).

Deposition of Daniel R. Fischel in Re: Jose Nodar, et al. v. William Weksel, Albert Bromberg, Henry B. Turner, IV, Frank L. Bryant, Leo Kuperschmid, Bennett S. Lebow, Ernst & Whinney and Oppenheimer & Co., Inc., United States District Court, Southern District of New York, No. 84 Civ. 3870 (VLB) and consolidation case No. 84 Civ. 5132 (VLB) (December 15 and 16, 1988).

Deposition of Daniel R. Fischel in Re: William Steiner, et al. v. Whittaker Corporation, et al., Superior Court of the State of California for the County of Los Angeles, No. CA000817 (December 7, 1988).

Deposition of Daniel R. Fischel in Re: Arnold I. Laven, et al. v. Western Union Corporation, et al., United States District Court for the District, Western District of Washington, MDL No. 551 (August 30 and 31, 1988).

Deposition of Daniel R. Fischel in Re: Washington Public Power Supply System Securities Litigation, United States District Court, Western District of Washington, MDL No. 551 (August 16 and 22, 1988).

Affidavit of Daniel R. Fischel in Re: District Business Conduct Committee for District No. 3 v. Blinder, Robinson & Company Inc., et al., National Association of Securities Dealers, Inc. National Business Conduct Committee, Complaint No. DEN-666 (July 21, 1988).

Deposition of Daniel R. Fischel in Re: Joseph Seidman, et al. v. Stauffer Chemical Company, et al, United States District Court for the District of Connecticut, No. B 84-543 (TFGD) (June 10, 1988 and May 5, 1987).

Deposition of Daniel R. Fischel in Re: Edlin Cattle Co., Inc., and James Edlin v. A. O. Smith Harvestore Products, Inc., et al., United States District Court for the Northern District of Texas, Amarillo Division, No. CA-2-86-0122 (May 12, 1988).

Deposition of Daniel R. Fischel in Re: MicroPro Securities Litigation, United States District Court for the Northern District of California, No. C-85-7428-EFL (A) (May 2, 1988).

Affidavit of Daniel R. Fischel in Re: Pizza Time Theatre Securities Litigation, United States District Court for the Northern District of California, Civil File No. 84-20048-(A)-RPA (March 25, 1988).

Affidavit of Daniel R. Fischel and Robert A. Sherwin in Re: First National Bank of Louisville v. Brooks Farms, and George C. Brooks, et al., Third-Party Plaintiffs v. A. O. Smith Corporation, et al., Circuit Court for Maury County, Tennessee, No. 2058 (March 3, 1988).

Testimony of Daniel R. Fischel in Re: Nucorp Energy Securities Litigation, United States District Court for the Southern District of California, M.D.L. 514 (March 15, 16, 17, and 18, 1988).

Deposition of Daniel R. Fischel in Re: Nucorp Energy Securities Litigation, United States District Court for the Southern District of California, M.D.L. 514 (January 27, 1988).

Deposition of Daniel R Fischel in Re: Anheuser-Busch Companies, Inc. v. W. Paul Thayer, et al., United States District Court for the Northern District of Texas, Dallas Division, No. CA-3-85-0794-R (January 21, 1988; December 4, 1987; and November 5, 1987).

Testimony of Daniel R. Fischel in Re: Securities and Exchange Commission v. First City Finance Corporation Ltd., and Marc Belzberg, United States District Court for the District of Columbia, Civil Action No. 86-2240 (December 18, 1987).

Testimony of Daniel R. Fischel in Re. The Irvine Company v. Athalie Irvine Smith and Athalie R. Clarke, Trustee, State of Michigan Circuit Court for the county of Oakland, Civil Action No. 8327011-CZ (December 14, 15, and 16, 1987).

Deposition of Daniel R. Fischel in Re: Securities and Exchange Commission v. First City Finance Corporation, Ltd. and Marc Belzberg, United States District Court for the District of Columbia, Civil Action No. 86-2240 (December 11, 1987).

Affidavit of Daniel R. Fischel in Re: Gerald D. Broder and Constance D. Broder v. Alphonse H. Bellac and William B. Weinberger v. Combustion Equipment Associates, Inc., et al., and William B. Weinberger v. Coopers & Lybrand, United States District Court for the Southern District of New York, 80 CIV 6175 (CES) 80 CIV 6839 (CES) 84 CIV 8217 (CES) (July 22, 1987).

Deposition of Daniel R. Fischel in Re: The Irvine Company v. Athalie Irvine Smith and Athalie R. Clarke, Trustee, State of Michigan, Circuit Court for the County of Oakland, Civil Action No. 83270011-CZ (June 1, 1987).

Deposition of Daniel R. Fischel in Re: Fortune Systems Securities Litigation, United States District for the Northern District of California, Master File No. 83-3348A-WHO (May 7, 1987).

Deposition of Daniel R. Fischel in Re: Victor Technologies Securities Litigation, United States District Court for the Northern District of California, Master File No. C-83-3906(A)-RFP (FW) (January 8, 1987 and October 30, 1986).

Reply Declaration of Daniel R. Fischel in Support of the Motion by the Activision Defendants for Summary Judgment in Re: Activision Securities Litigation, United States District Court for the Northern District of California, Master File No. C-83-4639(A)-MHP (October 27, 1986).

Testimony of Daniel R. Fischel in Re: NVHomes, L.P. v. Ryan Homes, Inc.; and Ryan Homes, Inc. v. NVHomes, L.P., et al., United States District Court for the Western District of Pennsylvania, Civil Action No. 86-2139 (October 24, 1986).

Supplemental Affidavit of Daniel R. Fischel in Re: NVHomes, L.P. v. Ryan Homes, Inc.; and Ryan Homes, Inc. v. NVHomes, L.P. and NVAcquisition L.P., et al., United States District Court the Western District of Pennsylvania, Civil Action No. 86-2139 (October 24, 1986).

Affidavit of Daniel R. Fischel in Support of the Motion by the Activision Defendants for Summary Judgment in Re: Activision Securities Litigation, United States District Court for the Northern District of California, Master File No. C-86-2139 (October 20, 1986).

Declaration of Daniel R. Fischel in Support of the Motion by the Activision Defendants for Summary Judgment in Re: Activision Securities Litigation, United States District Court for the Northern District of California, Master File No. C-83-4639(A)-MHP (October 2, 1986).

Affidavit in Support of Defendants Motion for Summary Judgment in Re: MCorp Securities Litigation, United States Court for the Southern District of Texas, Civil Action No. H-85-5894 (September 25, 1986).

Deposition of Daniel R. Fischel in Re: Activision Securities Litigation, United States District Court for the Northern District of California, No. C 83 4639 (August 18 and 19, 1986).

Deposition of Daniel R. Fischel in Re: John Mancino v. James A. McMaqhan, et al., United States District Court for the Northern District of California, Civil No. C-84-0407-TEH (August 14, 1986).

Testimony of Daniel R. Fischel in Re: Charles W. Leigh, et al. and George Johnson, et al. v. Clyde William Engle, et al., United States District Court for the Northern District of Illinois, Eastern Division, Case No. 78 C 3799 (August 1, 1986).

Reply Affidavit of Daniel R. Fischel in Re: The Amalgamated Sugar Company v. NL Industries, United States District Court for the Southern District of New York, 86 Civ. 5010 (VLB) (July 28, 1986).

Affidavit of Daniel R. Fischel in Re: The Amalgamated Sugar Company v. NL Industries, United States District Court for the Southern District of New York, 86 Civ. 5010 (VLB) (July 18, 1986).

Deposition of Daniel R. Fischel in Re: Charles W. Leigh, et al. and George Johnson, et al. v. Clyde William Engle, et al., United States District Court for the Northern District of Illinois, Eastern Division, Case No. 78 C 3799 (July 1, 1986).

Deposition of Daniel R. Fischel in Re: Seafirst Corporation v. William M. Jenkins, et al.; and Seafirst Corporation v. John R. Boyd, et al., United States District Court for the Western District of Washington at Seattle, Case No. C83-771R (February 27, 1986).

Deposition of Daniel R. Fischel in Re: Kreindler v. Sambo's Restaurants, Inc., United States District Court for the Southern District of New York, Case No. 79 Civ. 4538 (December 17, 1985).

Affidavit of Daniel R. Fischel in Re: United States of America v. S. Richmond Dole and Clark J. Matthews II (March 19, 1985).

Deposition of Daniel R. Fischel in Re: Craig T. McFarland, et al. v. Memorex Corporation, United States District Court for the Northern District of California, No. C 79-2926-WAI, C 79-2007-WAI, C 79-241-WAI (February 26, 1985; January 29 and 30, 1985).

Testimony of Daniel R. Fischel in Re: Robert J. Lawrence v. Grumman Corp. Pension Plan, et al., United States District Court for the Eastern District of New York, No. CV-81-3530 (December 19, 1983).

Testimony of Daniel R. Fishel in Re: Telvest, Inc. v. Junie L. Bradshaw, et al. and American Furniture Company, United States District Court, for the Eastern District of Virginia Richmond Division, No. CA-79-0722-R (December 4, 1981).

OTHER ACTIVITIES

Member, American Economic Association, American Finance Association.

Member, Board of Directors, Center for the Economy and the State.

Former member, Mid-America Institute Task Force on Stock Market Collapse.

Have acted as a consultant and/or advisor to the New York Stock Exchange, the National Association of Securities Dealers, the Chicago Board of Trade, the Federal Trade Commission, the Department of Labor, the Securities and Exchange Commission, the Canadian Securities and Exchange Commission, the United States Department of Justice, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision.

Referee, Journal of Financial Economics, Journal of Law and Economics, Journal of Legal Studies.

Participant and speaker at multiple conferences on the Economics of Corporate, Securities and Commodities Law and the Regulation of Financial Markets.

Former Chairman, American Association of Law Schools' Section on Law and Economics.

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

NOTICE OF FILING PLEADING UNDER SEAL

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed under seal its Motion to Bar Plaintiff from Suggesting to the Jury that the "Deemed" Facts are "Established" Facts.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and hand-delivery on this 25th day of April, 2005.

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

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

CASE NO: CA 03-5045 AI

DEFENDANT MORGAN STANLEY & CO. INCORPORATED'S RENEWED MOTION FOR MISTRIAL BASED ON RONALD PERELMAN'S FALSE AND INFLAMMATORY ACCUSATION OF ACKNOWLEDGED CRIMINAL ACTIVITY IN THIS CASE

Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully moves this Court to declare a mistrial because of Ronald Perelman's false and inflammatory accusation that "Morgan Stanley was engaged in a criminal activity here . . . [w]hich they've since acknowledged." 4/21/05 Tr. at 9808:6-7 & 9. That sort of assertion would be grounds for mistrial in any case. Here, mistrial is unavoidable, and curative instructions are to no avail. Feature after feature of this case inevitably points the jury toward the conclusion that Mr. Perelman's false accusation of a criminal confession is, notwithstanding the Court's instruction, true. The Court has instructed the jurors that, for purposes of the case, they must accept certain allegations of fraudulent activity by Morgan Stanley – described to them in highly inflammatory terms – as true. That unusual procedure cannot help but lead jurors to speculate that Morgan Stanley must have been convicted of criminal fraud so as to bar it from contesting fraud here. Trial counsel for Coleman (Parent) Holdings, Inc. ("CPH") has repeatedly reinforced that impression. He suggested in his opening that the deemed fraud was the first of the big accounting frauds of which the jury has heard – frauds that, as the jury undoubtedly knows, have often resulted in criminal convictions. And he expressly linked Morgan Stanley with the now-

defunct accounting firm of Arthur Anderson, mentioning that firm's demise – a demise brought on, as the jurors undoubtedly know, by a conviction for criminal misconduct. Under the circumstances, the unfounded accusation that Morgan Stanley has admitted criminal misconduct is so profoundly and incurably prejudicial that a fair trial is impossible.

STATEMENT OF FACTS

On Thursday, April 21, 2005, Mr. Perelman testified to the jury that Morgan Stanley acknowledged it had engaged in criminal activity:

> A. . . . This is a criminal activity. Morgan Stanley was engaged in a criminal activity here, sir.
>
> Q. You don't think it's a crime?
>
> A. Which they've since acknowledged.
>
> MR. HANSEN: Your Honor, move to strike.
>
> THE COURT: I would sustain.
>
> MR. HANSEN: Move for a mistrial and an instruction from the court.

4/21/05 Tr. at 9808:5-13. CPH has introduced no evidence that Morgan Stanley engaged in criminal activity. It has introduced no evidence that Morgan Stanley acknowledged its conduct was criminal.

At sidebar, the Court denied Morgan Stanley's request for a mistrial and agreed to instruct the jury to disregard the testimony. *Id.* at 9810:5. CPH argued against a portion of the Court's proposed instruction, "[b]ecause there has been an acknowledgement of wrongdoing as a matter of law in this case." *Id.* at 9812:21-23.

After the sidebar, the Court gave the following instruction:

> THE COURT: I have an instruction, and you need to pay attention. Morgan Stanley was never charged with a crime in connection with this transaction. They were never convicted of a crime in connection with this transaction, and they have never

acknowledged any wrongdoing in connection with this transaction. Okay? So you need to disregard the last comment. It was inappropriate and we need to move on.

Id. at 9814:18-9815:1.

Notwithstanding the Court's instruction, one juror wrote the following question to ask Mr. Perelman: "What laws do you think Morgan Stanley broke?" 4/22/05 Tr. at 10131:25-10132:1.

ARGUMENT

Mr. Perelman's testimony that Morgan Stanley "engaged in a criminal activity here . . . [w]hich they've since acknowledged" (4/21/05 Tr. 9808:6-7 & 9) is inflammatory and prejudicial. It has deprived Morgan Stanley of a fair trial and necessitates a mistrial. Indeed, in the context of this case, that conclusion is inescapable. In this case, CPH's counsel suggested criminal misconduct in his opening, and the Court's statement of deemed facts – and Morgan Stanley's inability to contest those facts – unavoidably reinforce the impression that Morgan Stanley has already confessed to or been convicted of a crime. Nothing could be further from the truth. And nothing could be more incurably prejudicial.

1. Time and again, Florida appellate courts have required new trials when a witness has accused a party of unrelated criminal activity affecting that party's credibility. In *Parkansky v. Old Key Largo, Inc.*, 546 So. 2d 1143 (Fla. 3d DCA 1989), for example, the Third District Court of Appeals reversed and remanded for a new trial when insurance company's counsel asked an injured claimant whether his boat was in dry dock because it had been "impounded by customs," insinuating that the claimant trafficked in drugs. *Id.* at 1144. Even though the trial court "instructed the jury to disregard the question," the appellate court reversed and remanded for a new trial. *Id.* It explained:

> A new trial is warranted when an improper comment is likely to result in substantial prejudice to the complaining party and where the improper suggestion is of such character that a curative instruction is insufficient "to destroy [its] sinister influence." . . . We agree with the [claimant] that the jury may reasonably have inferred from counsel's remark that [he] was a drug dealer – a reference which may have destroyed the "cold neutrality of an impartial jury" beyond repair.
>
> Because the evidence from both sides made the case close on the pivotal question . . . there is a reasonable probability that a result more favorable to the [claimant] would have been reached if the error had not been committed. For that reason the error was not harmless.

Id. at 1145 (citations omitted; first brackets in original).

In *Fischman v. Suen*, 672 So. 2d 644 (Fla. 4th DCA 1996), the Fourth District likewise reversed and remanded for a new trial when the plaintiff doctor testified that the defendant doctor "told me basically to commit medicare fraud." *Id.* at 645. The court explained that the plaintiff's testimony "involves an accusation of criminal conduct difficult for a jury to ignore." *Id.* "While a curative instruction might alleviate a more benign evidentiary gaffe, the instruction in this case may have amplified the prejudice to [the defendant]. This was a close case. The credibility of the two doctors was central to the contract issues presented to the jury." *Id.* at 645-46 (footnotes omitted).

In *Orvis v. Caulkins Indiantown Citrus Co.*, 861 So. 2d 1181 (Fla. 4th DCA 2003), the Fourth District again reversed and remanded for a new trial when defense counsel asked plaintiff whether he "learned that this agreement is illegal." *Id.* at 1182. The Fourth District followed its earlier decision in *Fischman*:

> Like *Fischman*, the improper question in this case involved "an accusation of criminal conduct difficult for a jury to ignore." Moreover, also like *Fischman*, the curative instruction given by the judge here may have amplified the prejudice to [plaintiff]. . . . [W]here in *Fischman* the credibility of the two doctors was central to the issues presented to the jury, in this case, the credibility of [plaintiff] was critical to the issue sent to the jury. . . . Thus, we find *Fischman* persuasive and hold that the trial court abused its discretion in failing to grant the motion for a new trial.

Id. at 1184.

2. Just as the accusation of criminal misconduct required mistrial in those cases, Mr. Perelman's accusation requires a mistrial here. Indeed, in this case, Mr. Perelman did not merely assert or imply that Morgan Stanley committed a crime. He stated that Morgan Stanley ***confessed*** to criminal misconduct in this very case: Morgan Stanley "engaged in a criminal activity ***here***." 4/21/05 Tr. at 9808:6-7 (emphasis added). And he added that Morgan Stanley has "since ***acknowledged***" its criminal activity. *Id.* at 9808:9 (emphasis added).

Given that Florida appellate courts require new trials when witnesses make ***accusations*** of ***unrelated*** criminal activity, it follows *a fortiori* that a new trial is required by Mr. Perelman's testimony that Morgan Stanley ***"acknowledged"*** its "criminal activity ***here"*** – that is, in this case. In a truncated trial in which liability turns entirely on the credibility of Mr. Perelman's testimony that he relied on Morgan Stanley's deemed "material misrepresentations" (4/7/05 Tr. at 7197:11), nothing could be more prejudicial than testimony that Morgan Stanley allegedly confessed out of court to ***related*** criminal activity. Where a jury in a criminal case is mistakenly permitted to hear otherwise inadmissible evidence that the defendant confessed, "a mistrial at that time or a later grant of a new trial" is "in all probability . . . required." *Morris v. State*, 310 So. 2d 757, 760 (Fla. 1st DCA 1974). *Accord Thomas v. State*, 851 So. 2d 876, 877-78 (Fla. 1st DCA 2003) (mistrial was required where two witnesses referred to defendant's otherwise inadmissible confession); *cf. Bruton v. United States*, 391 U.S. 123, 137 (1968) (holding that, in context of joint trial, admission of codefendant's confession that inculpated defendant was prejudicial error). Surely the same result is required where, as here, the jury in a civil case is erroneously told that the defendant previously confessed to the same misconduct in prior criminal proceedings.

3. The Court's instruction could not and did not cure the prejudicial effect of Mr. Perelman's testimony. To the contrary, in this context, it had the effect of amplifying it. Florida appellate courts are properly skeptical of the utility of instructions asking juries to disregard accusations of criminal activity, let alone ***confessions*** of criminal activity. As the Fourth District Court of Appeal explained in *Fischman* – quoting the trial judge – "[Y]ou can throw a skunk into the jury box and instruct the jurors not to smell it, but it doesn't do any good." 672 So. 2d at 646 n.4 (citations omitted; brackets in original). In the context of confessions, the United States Supreme Court likewise has rejected "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury," which "all practicing lawyers know to be unmitigated fiction." *Bruton*, 391 U.S. at 129. The trial courts in *Parkansky*, *Fischman*, and *Orvis* all instructed the juries to disregard the accusations of customs impoundment, Medicare fraud, and entering into an illegal contract. In all three cases, the appellate courts reversed nonetheless. *See supra* pp. 3-4; *cf. Bruton*, 391 U.S. at 137 (remanding for new trial despite curative instruction); *Thomas*, 851 So. 2d at 878 (remanding for new trial because curative instruction only "seemed to emphasize" defendant's confession).

In the context of this case, moreover, such an instruction cannot dissuade the jurors from believing or speculating that, consistent with Mr. Perelman's false accusation, Morgan Stanley must have admitted to criminal misconduct. The most salient features of the trial – the facts that the Court has directed the jury to accept as true and the fact that Morgan Stanley is foreclosed from protesting its innocence – cannot help but repeatedly reinforce that false conclusion. To the lay juror, the instruction that Morgan Stanley should be presumed guilty and Morgan Stanley's inability to protest its innocence raises an inference that Morgan Stanley's defense is foreclosed by a prior conviction or admission of guilt in criminal proceedings.

That impression has been reinforced by CPH's counsel's repeated references to the "facts established in advance of trial" throughout this case, a phrase that unmistakably implies that certain facts were found in a prior (probably criminal) proceeding. *See, e.g.*, 4/6/05 Tr. at 7071:18-19, 7072:22; 4/19/05 Tr. at 9065:20-9066:1, 9066:16-23, 9159:17-19; 4/21/05 Tr. at 9978:5-12; *see also* 4/6/05 Tr. at 7051 ("Established facts"), 7059:3, 7074:7.

That prejudice is reinforced further still by the opening statement given by CPH's trial counsel. In that statement, he characterized this as the first of the major corporate and accounting frauds now in the news –frauds that, as the jurors know, resulted in many criminal convictions. 4/6/05 Tr. at 6953:8-9, 6955:7-10. And he linked Morgan Stanley to Arthur Anderson and mentioned that accounting firm's demise – a demise triggered, as the jurors know, by a criminal conviction. 4/6/05 Tr. at 6950:21-6951:13.

Even before Mr. Perelman's unfounded assertion, the threat to Morgan Stanley's right to a fair trial was palpable. Now that Mr. Perelman has in open court falsely confirmed what might previously have been speculation, there can be no fair trial. Indeed, one juror has already demonstrated that the accusation of criminal misconduct remains at the forefront of his mind. Seeking further clarification, one juror requested that Mr. Perelman be asked: "What laws do you think Morgan Stanley broke?" 4/22/05 Tr. at 10131:25-10132:1. Under the circumstances, Morgan Stanley plainly cannot get a fair trial. The effect of the false accusation of a criminal confession cannot be undone.

* * * * *

We appreciate that the Court, two-and-a-half weeks into this trial, will have a strong impulse to soldier on and complete what it has started with this jury. But Florida law demands that the Court resist that impulse. *See Thomas*, 851 So. 2d at 878 (despite trial court's "effort to

salvage a lengthy trial," mistrial was required where witnesses referred to defendant's confession). CPH's repeated characterization of the deemed facts as "established before trial," the deemed facts themselves, Morgan Stanley's inability to protest its innocence, and now the entirely unfounded accusation that Morgan Stanley admitted its crime out of court – the cumulative effect of those errors has deprived Morgan Stanley of any semblance of a fair trial.[1]

CONCLUSION

For the foregoing reasons, the Court should declare a mistrial in this case.

[1] Even if the Court is not inclined to grant a mistrial, it should allow Morgan Stanley to mount a defense on the merits, or at the very least permit it to introduce evidence that no other clients have sued Morgan Stanley over the Sunbeam transaction. *Cf. Carbone v. Coblentz*, 132 So. 2d 629, 630 (Fla. 3d DCA 1961) (defendant permitted to "bring out the fact of acquittal" in response to improper testimony of prior killing in wrongful death case). Even that relief, however, will not and cannot sufficiently counter the impact of Mr. Perelman's claim that Morgan Stanley confessed criminal misconduct.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 25th day of April 2005.

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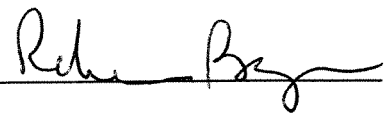
BY: 

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IN THE CIRCUIT CIVIL COURT, IN AND FOR
PALM BEACH COUNTY, FLORIDA

Case No. **2003CA005045**

COLEMAN (PARENT) HOLDINGS INC

Plaintiff(s)

-vs-

MORGAN STANLEY & CO INC

Defendant(s)

CERTIFICATE OF SERVICE BY CLERK

I, SHARON R BOCK, CLERK & COMPTROLLER, hereby certify that a copy of the **LETTER FROM ATTORNEY JAMES KENNEY** filed for record on **4/25/05** has been mailed to: **JOSEPH IANNO JR ESQ, 222 LAKEVIEW AVE, STE 1400, WPB, FL 33401; JOHN SCAROLA ESQ, 2139 PALM BEACH LAKES BLVD, WPB FL 33409; JEROLD S SOLOVY ESQ, ONE IBM PLAZA, STE 4400, CHICAGO, ILL 60611 AND REBECCA BEYNON ESQ, SUMNER SQUARE, 1615 M STREET, NW, STE 400, WASHINGTON, DC 20036**

DATED on April 26, 2005

SHARON R. BOCK, CLERK & COMPTROLLER

By:
KELLI J MORRIS, As Deputy Clerk

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ADMITTED TO PRACTICE BEFORE THE
UNITED STATES SUPREME COURT
MEMBER FLORIDA BAR, NELA, PIABA

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April 18, 2005

Honorable Elizabeth T. Maass
Circuit Judge
15th Judicial Circuit
205 North Dixie Highway
County Court House
West Palm Beach, Florida 33401

Dear Judge Maass:

I am writing to commend you for your courageous and exemplary handling of the matter involving Morgan Stanley and Ronald Pearlman.

Slightly over a year ago, I had a much smaller but strikingly similar battle with the Greenberg Traurig law firm while representing an elderly widow in an arbitration case against Morgan Stanley. In that case, the NASD arbitrators ultimately became so fed up with Morgan Stanley's failures and refusals to produce relevant evidence that they levied a $10,000 per day sanction against the firm. I am enclosing a news story which describes the situation.

This is not an isolated instance. I have personally had other cases against Morgan Stanley where the same or worse tactics were employed by the same law firm. I am also one of two Florida attorneys on the board of the Public Investors Arbitration Bar Association ("PIABA"), a national organization of 750 attorneys representing customers in arbitration against brokerage firms. Our organization recently compiled evidence of a nationwide pattern of discovery abuse by Morgan Stanley in arbitration cases. Our national president, Rosemary Shockman, of Arizona, recently testified before the House Financial Services Committee of the United States Congress regarding discovery abuses by the brokerage industry, particularly by Morgan Stanley.

A PIABA member in Kansas City recently prepared a "Morgan Stanley Discovery Abuse Report." The report describes 25 representative Morgan Stanley responses to standard discovery requests which are "presumptively discoverable" in arbitration cases brought by customers under NASD and NYSE rules. This attorney, Barry Estell, Esquire, concluded that "The consistency and similarity of the Morgan Stanley objections from a variety of defense counsel indicate that it is corporate policy to

resist discovery, stall the discovery process, withhold documents, and switch documents of little value for those more substantive ones called for by the discovery guide. All of this is protected and hidden from public scrutiny by its demands, usually successful, that all documents not previously provided to Claimant in the ordinary course of business be protected by strict confidentiality orders."

I am enclosing herewith the first 33 pages of this 415 page report. Should your Honor desire a complete copy I will be happy to provide it either on CD-rom or on paper printout.

For the record, I have no cases presently pending against Morgan Stanley in any forum.

Sincerely,

James D. Keeney
JAMES D. KEENEY, P.A.

JDK/hls

Enclosures

=DJ Morgan Stanley Sanctioned For Arbitration Evidence Delay

By Lynn Doan
Of DOW JONES NEWSWIRES

WASHINGTON--(Dow Jones)--Brokerage firm Morgan Stanley (MWD) is being sanctioned $10,000 a day by an arbitration panel for not producing documents in an investor's case involving the way the firm sold its own mutual funds.

The National Association of Securities Dealers panel told the New York brokerage firm Monday that it would enforce the sanctions beginning Tuesday. For each day that the firm doesn't produce the requested documents, it will be charged $10,000, according to a letter sent to the firm.

The panel is meeting Tuesday to determine whether the documents have been produced. Morgan Stanley was not immediately able to comment on the sanctions. James E. Keeney, the Sarasota, Fla. attorney representing the investor, said Morgan Stanley is claiming it has complied with the panel's order to produce documents, but he says it has not fulfilled its obligations.

Although the monetary amount of the sanction is not significant to Morgan Stanley, the explanation accompanying it was highly critical of the firm's conduct during the initial stages of the arbitration, which is scheduled to begin next month. In a 12-page letter explaining the sanctions, panel chairwoman Kitty Grubb recounted multi-hour telephone sessions that resulted in a barrage of excuses from Morgan Stanley's outside attorneys about why they could not promptly turn over items ranging from marketing materials to compliance manuals, in one case because the firm's director of compliance wouldn't return phone calls.

"Enough is enough," wrote Grubb. "The parties were forewarned well in advance (of the possibility of sanctions) ... the panel's warnings were not heeded, but ostensibly ignored. Noncompliance with this panel's orders will not be tolerated."

The underlying case that led to the sanction involves a 78-year-old widow Esther Farnsworth, who claims that when she moved her account from Morgan Stanley's Akron, Ohio office to its Venice, Fla. office in October 2000, her new broker switched her assets out of bonds and into B-shares of Morgan Stanley's proprietary mutual funds. She claims the purchases were made without her approval and were inappropriate for a woman of her age, and is seeking about $1,000,000 in compensatory damages.

Farnsworth's attorney, Keeney, said he has been requesting that Morgan Stanley turn over documents related to an internal contest where brokers won prizes for selling the firm's own mutual funds. Last month, the firm paid a $2 million fine to settle NASD charges that it improperly provided incentives to its brokers to sell Morgan Stanley funds over those run by outside fund companies. The Securities and Exchange Commission is considering similar enforcement actions.

A Morgan Stanley executive overseeing the mutual fund contests warned employees in an e-mail not to put any of the details about it in writing. But Keeney said there was obviously enough information available to the NASD for regulators to prepare charges against the firm, and he wants similar evidence made available to his client, whose bond portfolio was liquidated and pushed into the proprietary funds in 2000, as the contest was in full swing.

Sanctions are granted in about 10% to 15% of the cases in which they are

16div-015805

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DISCOVERY ABUSE REPORT TO PIABA

FEB 2 2 2005

To: Chuck Austin, and PIABA Board of Directors

Enclosed is the result of my year-long attempt to document Morgan Stanley discovery abuse. I have taken 25 representative Morgan Stanley responses to standard Discovery Guide requests which are "presumptively discoverable." After each item I have included my comments. I welcome any additions, corrections or suggested deletions which the Board might wish to incorporate for its use. Or, I will send the file to Chuck or anyone he designates who may substitute his or her own comments or interpretations. I bound these copies for ease of transport and review, but have a master copy for PIABA use which I anticipate will be three-hole punched for notebooks so that specific examples can be added on a continuing basis until no longer necessary or useful.

The consistency and similarity of the Morgan Stanley objections from a variety of defense counsel indicate that it is corporate policy to resist discovery, stall the discovery process, withhold documents and switch documents of little value for those more substantive ones called for by the Discovery Guide. All of this is protected and hidden from public scrutiny by its demands (usually successful) that all documents not previously provided to Claimant in the ordinary course of business be protected by strict confidentiality orders. There are some required documents which may never have been produced even with confidentiality orders. The most glaring example being the Morgan Stanley Compliance Procedures Manual. This is a key document that it not only refuses to produce, but even to acknowledge. Only through SEC documents do we know of its existence. If ever produced, confidentiality agreements deny its sharing with similarly situated public customers. The SEC believed it necessary for a supervision complaint, but it is routinely denied claimants.

There are other egregious examples of Morgan Stanley's abusive tactics. The claim that records were destroyed on 9/11 and anyone questioning that completely false explanation is desecrating the memory of Morgan Stanley's dead on that horrible day comes to mind. But these documents are clearly required to be exchanged within 30 days of the Answer in every case "without arbitrator or staff intervention." Under part III of the Discovery Guide concerning the initial prehearing conference, arbitrators are instructed to "order the production of all required documents . . . within 30 days following the conference." To my knowledge, this has never happened in any case before the NASD in the nearly five years since introduction. I believe that the standard refusal to comply with standard requests written by its own trade associations and approved by the SEC is the best evidence of its bad faith abuse and have limited this report to that issue.

Respectfully submitted,

Barry D. Estell

INFORMATIONAL

Arbitration

NASD Regulation Announces New *Discovery Guide* To Be Used In Arbitration Proceedings

SUGGESTED ROUTING

The Suggested Routing function is meant to aid the reader of this document. Each NASD member firm should consider the appropriate distribution in the context of its own organizational structure.

- Legal & Compliance
- Registered Representatives
- Senior Management
- Training

KEY TOPICS

- Arbitration
- Discovery Guide

Executive Summary

On September 2, 1999, the Securities and Exchange Commission (SEC) approved the use of the *Discovery Guide* (see Exhibit I) in National Association of Securities Dealers, Inc. (NASD®) arbitration proceedings involving customer disputes with firms and associated persons. The *Discovery Guide* is now available to use in NASD arbitration proceedings.

The *Discovery Guide*, which includes Document Production Lists, provides guidance to parties on which documents they should exchange without arbitrator or staff intervention, and to arbitrators in determining which documents customers and member firms or associated persons are presumptively required to produce in customer arbitrations.

Questions/Further Information

Questions regarding this *Notice to Members* may be directed to Gary Tidwell, Director, Neutral Management, Office of Dispute Resolution, NASD Regulation, Inc. (NASD Regulation™), at (212) 858-4352; or Eric Moss, Assistant General Counsel, Office of General Counsel, NASD Regulation, at (202) 728-8982.

Discussion

The *Discovery Guide* will be used as a supplement or an addendum to the guidance regarding discovery provided in *The Arbitrator's Manual*, published by Securities Industry Conference on Arbitration (SICA), and particularly the provisions in the section entitled, "Prehearing Conference," on pages 11 through 16. *The Arbitrator's Manual* is compiled by members of SICA as a guide for arbitrators, and is designed to supplement and explain the Uniform Code of Arbitration as developed by SICA. The procedures and policies described in *The Arbitrator's Manual* are discretionary and may be changed by the arbitrators. Further, nothing in the *Discovery Guide*, including the Document Production Lists, precludes the parties from voluntarily agreeing to an exchange of documents in a manner different from that set forth in the *Discovery Guide*.

The *Discovery Guide* consists of introductory and instructional text, and 14 Document Production Lists. It is intended for use by arbitrators in customer arbitrations only. These lists include the following (parenthetical references refer to the party from whom documents are sought):

List 1:
Documents To Be Produced In All Customer Cases (Firm/Associated Person(s))

List 2:
Documents To Be Produced In All Customer Cases (Customer)

List 3:
Churning (Firm/Associated Person(s))

List 4:
Churning (Customer)

List 5:
Failure To Supervise (Firm/Associated Person(s))

List 6:
Failure To Supervise (Customer)

List 7:
Misrepresentation/Omissions (Firm/Associated Person(s))

List 8:
Misrepresentation/Omissions (Customer)

List 9:
Negligence/Breach Of Fiduciary Duty (Firm/Associated Person(s))

List 10:
Negligence/Breach Of Fiduciary Duty (Customer)

List 11:
Unauthorized Trading (Firm/Associated Person(s))

List 12:
Unauthorized Trading (Customer)

List 13:
Unsuitability (Firm/Associated Person(s))

List 14:
Unsuitability (Customer)

The Office of Dispute Resolution (ODR) will provide the parties with the *Discovery Guide* including the Document Production Lists at the time ODR serves the statement of claim. The document production requirements in the first two Document Production Lists, "List 1, Documents To Be Produced In All Customer Cases: Firm/Associated Person(s)," and "List 2, Documents To Be Produced In All Customer Cases: Customer," would apply in virtually all cases involving member-customer or associated person-customer disputes, unless the arbitrator, in the exercise of discretion, determines that some or all of the documents in the relevant Document Production Lists should not be produced. For cases in which allegations of churning, failure to supervise, misrepresentation/omissions, negligence/breach of fiduciary duty, unauthorized trading, or unsuitability are stated, additional Document Production Lists (*e.g.*, Document Production Lists 3 and 4 - Churning) provide additional guidance. If a Document Production List is applicable, the *Discovery Guide* is drafted to guide the arbitrator to order production, unless in the exercise of discretion, the arbitrator believes that there is good cause not to order production.

Exhibit I

DISCOVERY GUIDE

For NASD arbitrations, the Discovery Guide supplements the section in the Securities Industry Conference on Arbitration ("SICA") publication entitled *The Arbitrator's Manual*, and captioned "Prehearing Conference," found on pages 11 through 16, regarding public customer cases.

I. The Need for New Discovery Procedures

Discovery disputes have become more numerous and time consuming. The same discovery issues repeatedly arise. To minimize discovery disruptions, the NASD Regulation Office of Dispute Resolution has developed two initiatives to standardize the discovery process: early appointment of arbitrators to conduct an initial prehearing conference and document production lists (Document Production Lists).

No requirement under the Discovery Guide supersedes any record retention requirement of any federal or state law or regulation or any rule of a self-regulatory organization.

The Discovery Guide and Document Production Lists are designed for customer disputes with firms and Associated Person(s).[1] The Discovery Guide also discusses additional discovery requests, information requests, depositions, admissibility of evidence, and sanctions. The Discovery Guide, including the Document Production Lists, will function as a guide for the parties and the arbitrators; it is not intended to remove flexibility from arbitrators or parties in a given case. For instance, arbitrators can order the production of documents not provided for by the Document Production Lists or alter the production schedule described in the Discovery Guide. Further, nothing in the Discovery Guide precludes the parties from voluntarily agreeing to an exchange of documents in a manner different from that set forth in the Discovery Guide. In fact, the Office of Dispute Resolution encourages the parties to agree to the voluntary exchange of documents and information and to stipulate to various matters. The fact that an item appears on a Document Production List does not shift the burden of establishing or defending any aspect of a claim.

II. Document Production Lists

The Office of Dispute Resolution will provide the parties with Document Production Lists (attached to the Discovery Guide) at the time it serves the statement of claim in customer cases. The arbitrators and the parties should consider the documents described in Document Production Lists 1 and 2 presumptively discoverable. Absent a written objection, documents on Document Production Lists 1 and 2 shall be exchanged by the parties within the time frames set forth below.

The arbitrators and parties also should consider the additional documents identified in Document Production Lists 3 through 14, respectively, discoverable, as indicated, for cases alleging the following causes of action: churning, failure to supervise, misrepresentation/omission, negligence/breach of fiduciary duty, unauthorized trading, and unsuitability. For the general document production and for each of these causes of action, there are separate Document Production Lists for firms/Associated Person(s) and for customers.

NASD Rule 10321 provides that the parties shall cooperate to the fullest extent practicable in the voluntary exchange of documents and information to expedite the arbitration process. As noted, nothing in the Discovery Guide precludes parties from voluntarily agreeing to an exchange of documents in a manner different from that set forth in the Discovery Guide.

A. Time Frames For Document Production and Objections

The parties should produce all required documents listed in the applicable Document Production Lists not later than thirty days[2] from the date the answer is due or filed, whichever is earlier. If a party redacts any portion of a document prior to production, the redacted pages (or ranges of pages) shall be labeled "redacted." A party may object to the production of any document, which would include an objection based upon an established privilege such as the attorney-client privilege. If any party objects to the production of any document listed in the relevant

Document Production Lists, the party must file written objections with the Office of Dispute Resolution and serve all parties not later than thirty days following the date the answer is due or filed, whichever is earlier. Objections should set forth the reasons the party objects to producing the documents. An objection to the production of a document or a category of documents is not an acceptable reason to delay the production of any document not covered by the objection. A response to an objection should be served on all parties within 10 days from service of the written objections. Objections and responses should be filed with the Office of Dispute Resolution at the time they are served on the parties. The arbitrator(s) shall then determine whether the objecting party has overcome the presumption based upon sufficient reason(s).

B. Confidentiality[3]

If a party objects to document production on grounds of privacy or confidentiality, the arbitrator(s) or one of the parties may suggest a stipulation between the parties that the document(s) in question will not be disclosed or used in any manner outside of the arbitration of the particular case, or the arbitrator(s) may issue a confidentiality order. The arbitrator(s) shall not issue an order or use a confidentiality agreement to require parties to produce documents otherwise subject to an established privilege. Objections to the production of documents, based on an established privilege, should be raised in accordance with the time frame for objections set forth above.

C. Affirmation In The Event That There Are No Responsive Documents or Information

If a party responds that no responsive information or documents exist, the customer or the appropriate person in the brokerage firm who has personal knowledge (i.e., the person who has conducted a physical search), upon the request of the requesting party, must: 1) state in writing that he/she conducted a good faith search for the requested information or documents; 2) describe the extent of the search; and 3) state that, based on the search, no such information or documents exist.

III. The Initial Prehearing Conference

To maximize the efficient administration of a case by the arbitration panel,[4] the Office of Dispute Resolution staff will schedule an initial prehearing conference in which the arbitrator(s) usually participates.[5] The initial prehearing conference gives the arbitrator(s) and the parties an opportunity to organize the management of the case, set a discovery cut-off date,[6] identify dispositive or other potential motions, schedule hearing dates, determine whether mediation is desirable, and resolve any other preliminary issues.[7] During the initial prehearing conference, the arbitrator(s) and the parties should schedule hearing dates for the earliest available time, consistent with the parties' need to prepare adequately for the hearing.

Prior to the initial prehearing conference, each arbitrator should become familiar with the claims and defenses asserted in the pleadings filed by the parties. At the initial prehearing conference, the arbitrator(s) should order time limits for discovery that will allow the scheduling of hearing dates within a reasonable time and address all outstanding discovery disputes. If the exchange of properly requested documents has not occurred, the arbitrator(s) should order the production of all required documents, including those outlined in the Document Production Lists (see Section II, above), within 30 days following the conference.

IV. Additional Discovery Requests

The parties may request documents in addition to those identified in the Document Production Lists pursuant to Rule 10321(b). Unless a longer period is allowed by the requesting party, requests should be satisfied or objected to within 30 days from the date of service of the document request. A response to an objection should be served on all parties within 10 days from service of the written objections. Requests, objections, and responses should be filed with the Office of Dispute Resolution at the time they are served on the parties.

A party may move to compel production of documents when the adverse party (a) refuses to produce such documents or (b) offers only to produce alternative documents that are unacceptable to the requesting party. The Office of Dispute Resolution will provide the chairperson of the panel with the motion, opposition, and reply, along

with the underlying discovery documents the parties have attached to their pleadings. The chairperson should determine whether to decide the matter on the papers or to convene a prehearing conference (usually via telephone). In considering motions to compel, particularly where non-production is based upon an argument asserting an established privilege, such as the attorney-client privilege, the arbitrator(s) should always give consideration to the arguments set forth by both sides, particularly as to the relevancy of the documents or information. The arbitrator(s) should carefully consider such motions, regardless of whether the item requested is on any of the Document Production Lists. If in doubt, the arbitrator(s) should ask the requesting party what specific documents it is trying to obtain and what it seeks to prove with the documents.

V. Information Requests

Like requests for documents, parties may serve requests for information pursuant to Rule 10321(b). Requests for information are generally limited to identification of individuals, entities, and time periods related to the dispute; such requests should be reasonable in number and not require exhaustive answers or fact finding. Standard interrogatories, as utilized in state and federal courts, are generally not permitted in arbitration.

Unless a longer period is allowed by the requesting party, information requests should be satisfied or objected to within 30 days from the date of service of the requests. A response to an objection should be served on all parties within 10 days from service of the written objections. Requests, objections, and responses should be filed with the Office of Dispute Resolution at the time they are served on the parties.

A party may move to compel responses to requests for information that the adverse party refuses to provide. The Office of Dispute Resolution will provide the chairperson of the panel with the motion, opposition, and reply, along with the underlying discovery documents the parties have attached to their pleadings. The chairperson should determine whether to decide the matter on the papers or to convene a prehearing conference (usually via telephone).

VI. Depositions

Depositions are strongly discouraged in arbitration. Upon request of a party, the arbitrator(s) may permit depositions, but only under very limited circumstances, such as: 1) to preserve the testimony of ill or dying witnesses; 2) to accommodate essential witnesses who are unable or unwilling to travel long distances for a hearing and may not otherwise be required to participate in the hearing; 3) to expedite large or complex cases; and 4) to address unusual situations where the arbitrator(s) determines that circumstances warrant departure from the general rule. Balanced against the authority of the arbitrator(s) to permit depositions, however, is the traditional reservation about the overuse of depositions in arbitration.

VII. Admissibility

Production of documents in discovery does NOT create a presumption that the documents are admissible at the hearing. A party may state objections to the introduction of any document as evidence at the hearing to the same extent that any other objection may be raised in arbitration.

VIII. Sanctions

The arbitration panel should issue sanctions if any party fails to produce documents or information required by a written order, unless the panel[8] finds that there is "substantial justification" for the failure to produce the documents or information. The panel has wide discretion to address noncompliance with discovery orders. For example, the panel may make an adverse inference against a party or assess adjournment fees, forum fees, costs and expenses, and/or attorneys' fees caused by noncompliance. In extraordinary cases, the panel may initiate a disciplinary referral against a registered entity or person who is a party or witness in the proceeding or may, pursuant to Rule 10305(b), dismiss a claim, defense, or proceeding with prejudice as a sanction for intentional failure to comply with an order of the arbitrator(s) if lesser sanctions have proven ineffective.

DOCUMENT PRODUCTION LISTS

LIST 1

DOCUMENTS TO BE PRODUCED IN ALL CUSTOMER CASES[9]

FIRM/ASSOCIATED PERSON(S)

1) All agreements with the customer, including, but not limited to, account opening documents, cash, margin, and option agreements, trading authorizations, powers of attorney, or discretionary authorization agreements, and new account forms.

2) All account statements for the customer's account(s) during the time period and/or relating to the transaction(s) at issue.

3) All confirmations for the customer's transaction(s) at issue. As an alternative, the firm/Associated Person(s) should ascertain from the claimant and produce those confirmations that are at issue and are not within claimant's possession, custody, or control.

4) All "holding (posting) pages" for the customer's account(s) at issue or, if not available, any electronic equivalent.

5) All correspondence between the customer and the firm/Associated Person(s) relating to the transaction(s) at issue.

6) All notes by the firm/Associated Person(s) or on his/her behalf, including entries in any diary or calendar, relating to the customer's account(s) at issue.

7) All recordings and notes of telephone calls or conversations about the customer's account(s) at issue that occurred between the Associated Person(s) and the customer (and any person purporting to act on behalf of the customer), and/or between the firm and the Associated Person(s).

8) All Forms RE-3, U-4, and U-5, including all amendments, all customer complaints identified in such forms, and all customer complaints of a similar nature against the Associated Person(s) handling the account(s) at issue.

9) All sections of the firm's Compliance Manual(s) related to the claims alleged in the statement of claim, including any separate or supplemental manuals governing the duties and responsibilities of the Associated Person(s) and supervisors, any bulletins (or similar notices) issued by the compliance department, and the entire table of contents and index to each such Manual.

10) All analyses and reconciliations of the customer's account(s) during the time period and/or relating to the transaction(s) at issue.

11) All records of the firm/Associated Person(s) relating to the customer's account(s) at issue, such as, but not limited to, internal reviews and exception and activity reports which reference the customer's account(s) at issue.

12) Records of disciplinary action taken against the Associated Person(s) by any regulator or employer for all sales practices or conduct similar to the conduct alleged to be at issue.

LIST 2

DOCUMENTS TO BE PRODUCED IN ALL CUSTOMER CASES

CUSTOMER

1) All customer and customer-owned business (including partnership or corporate) federal income tax returns, limited to pages 1 and 2 of Form 1040, Schedules B, D, and E, or the equivalent for any other type of return, for the three years prior to the first transaction at issue in the statement of claim through the date the statement of claim was filed.

2) Financial statements or similar statements of the customer's assets, liabilities and/or net worth for the period(s) covering the three years prior to the first transaction at issue in the statement of claim through the date the statement of claim was filed.

3) Copies of all documents the customer received from the firm/Associated Person(s) and from any entities in which the customer invested through the firm/Associated Person(s), including monthly statements, opening account forms, confirmations, prospectuses, annual and periodic reports, and correspondence.

4) Account statements and confirmations for accounts maintained at securities firms other than the respondent firm for the three years prior to the first transaction at issue in the statement of claim through the date the statement of claim was filed.

5) All agreements, forms, information, or documents relating to the account(s) at issue signed by or provided by the customer to the firm/Associated Person(s).

6) All account analyses and reconciliations prepared by or for the customer relating to the account(s) at issue.

7) All notes, including entries in diaries or calendars, relating to the account(s) at issue.

8) All recordings and notes of telephone calls or conversations about the customer's account(s) at issue that occurred between the Associated Person(s) and the customer (and any person purporting to act on behalf of the customer).

9) All correspondence between the customer (and any person acting on behalf of the customer) and the firm/Associated Person(s) relating to the account(s) at issue.

10) Previously prepared written statements by persons with knowledge of the facts and circumstances related to the account(s) at issue, including those by accountants, tax advisors, financial planners, other Associated Person(s), and any other third party.

11) All prior complaints by or on behalf of the customer involving securities matters and the firm's/Associated Person(s') response(s).

12) Complaints/Statements of Claim and Answers filed in all civil actions involving securities matters and securities arbitration proceedings in which the customer has been a party, and all final decisions and awards entered in these matters.

13) All documents showing action taken by the customer to limit losses in the transaction(s) at issue.

LIST 3

CHURNING

FIRM/ASSOCIATED PERSON(S)

1) All commission runs relating to the customer's account(s) at issue or, in the alternative, a consolidated commission report relating to the customer's account(s) at issue.

2) All documents reflecting compensation of any kind, including commissions, from all sources generated by the Associated Person(s) assigned to the customer's account(s) for the two months preceding through the two months following the transaction(s) at issue, or up to 12 months, whichever is longer. The firm may redact all information identifying customers who are not parties to the action, except that the firm/Associated Person(s) shall provide at least the last four digits of the non-party customer account number for each transaction.

3) Documents sufficient to describe or set forth the basis upon which the Associated Person(s) was compensated during the years in which the transaction(s) or occurrence(s) in question occurred, including: a) any bonus or incentive program; and b) all compensation and commission schedules showing compensation received or to be received based upon volume, type of product sold, nature of trade (e.g., agency v. principal), etc.

LIST 4

CHURNING

CUSTOMER

No additional documents identified.

LIST 5

FAILURE TO SUPERVISE

FIRM/ASSOCIATED PERSON(S)

1) All commission runs and other reports showing compensation of any kind relating to the customer's account(s) at issue or, in the alternative, a consolidated commission report relating to the customer's account(s) at issue.

2) All exception reports and supervisory activity reviews relating to the Associated Person(s) and/or the customer's account(s) that were generated not earlier than one year before or not later than one year after the transaction(s) at issue, and all other documents reflecting supervision of the Associated Person(s) and the customer's account(s) at issue.

3) Those portions of internal audit reports at the branch in which the customer maintained his/her account(s) that: (a) focused on the Associated Person(s) or the transaction(s) at issue; and (b) were generated not earlier than one year before or not later than one year after the transaction(s) at issue and discussed alleged improper behavior in the branch against other individuals similar to the improper conduct alleged in the statement of claim.

4) Those portions of examination reports or similar reports following an examination or an inspection conducted by a state or federal agency or a self-regulatory organization that focused on the Associated Person(s) or the transaction(s) at issue or that discussed alleged improper behavior in the branch against other individuals similar to the improper conduct alleged in the statement of claim.

LIST 6

FAILURE TO SUPERVISE

CUSTOMER

No additional documents identified.

LIST 7

MISREPRESENTATION/OMISSIONS

FIRM/ASSOCIATED PERSON(S)

Copies of all materials prepared or used by the firm/Associated Person(s) relating to the transactions or products at issue, including research reports, prospectuses, and other offering documents, including documents intended or identified as being "for internal use only," and worksheets or notes indicating the Associated Person(s) reviewed or read such documents. As an alternative, the firm/Associated Person(s) may produce a list of such documents that contains sufficient detail for the claimant to identify each document listed. Upon further request by a party, the firm/Associated Person(s) must provide any documents identified on the list.

LIST 8

MISREPRESENTATION/OMISSIONS

CUSTOMER

1) Documents sufficient to show the customer's ownership in or control over any business entity, including general and limited partnerships and closely held corporations.

2) Copy of the customer s resume.

3) Documents sufficient to show the customer's complete educational and employment background or, in the alternative, a description of the customer's educational and employment background if not set forth in a resume produced under item 2.

LIST 9

NEGLIGENCE/BREACH OF FIDUCIARY DUTY

FIRM/ASSOCIATED PERSON(S)

Copies of all materials prepared or used by the firm/Associated Person(s) relating to the transactions or products at issue, including research reports, prospectuses, and other offering documents, including documents intended or identified as being "for internal use only," and worksheets or notes indicating the Associated Person(s) reviewed or read such documents. As an alternative, the firm/Associated Person(s) may produce a list of such documents that contains sufficient detail for the claimant to identify each document listed. Upon further request by a party, the firm/Associated Person(s) must provide any documents identified on the list.

LIST 10

NEGLIGENCE/BREACH OF FIDUCIARY DUTY

CUSTOMER

1) Documents sufficient to show the customer's ownership in or control over any business entity, including general and limited partnerships and closely held corporations.

2) Copy of the customer's resume.

3) Documents sufficient to show the customer's complete educational and employment background or, in the alternative, a description of the customer's educational and employment background if not set forth in a resume produced under item 2.

LIST 11

UNAUTHORIZED TRADING

FIRM/ASSOCIATED PERSON(S)

1) Order tickets for the customer's transaction(s) at issue.

2) Copies of all telephone records, including telephone logs, evidencing telephone contact between the customer and the firm/Associated Person(s).

3) All documents relied upon by the firm/Associated Person(s) to establish that the customer authorized the transaction(s) at issue.

LIST 12

UNAUTHORIZED TRADING

CUSTOMER

1) Copies of all telephone records, including telephone logs, evidencing telephone contact between the customer and the firm/Associated Person(s).

2) All documents relied upon by the customer to show that the transaction(s) at issue was made without his/her knowledge or consent.

LIST 13

UNSUITABILITY

FIRM/ASSOCIATED PERSON(S)

1) Copies of all materials prepared, used, or reviewed by the firm/Associated Person(s) related to the transactions or products at issue, including but not limited to research reports, prospectuses, other offering documents, including documents intended or identified as being "for internal use only," and worksheets or notes indicating the Associated Person(s) reviewed or read such documents. As an alternative, the firm/Associated Person(s) may produce a list of such documents. Upon further request by a party, the firm/Associated Person(s) must provide any documents identified on the list.

2) Documents sufficient to describe or set forth the basis upon which the Associated Person(s) was compensated in any manner during the years in which the transaction(s) or occurrence(s) in question occurred, including, but not limited to: a) any bonus or incentive program; and b) all compensation and commission schedules showing compensation received or to be received based upon volume, type of product sold, nature of trade (e.g., agency v. principal), etc.

LIST 14

UNSUITABILITY

CUSTOMER

1) Documents sufficient to show the customer's ownership in or control over any business entity, including general and limited partnerships and closely held corporations.

2) Written documents relied upon by the customer in making the investment decision(s) at issue.

3) Copy of the customer's resume.

4) Documents sufficient to show the customer's complete educational and employment background or, in the alternative, a description of the customer's educational and employment background if not set forth in a resume produced under item 3.

Endnotes

[1]NASD Regulation may develop separate Document Production Lists for intra-industry disputes.

[2]All time periods referenced herein are calendar days.

[3]Section II.B. is also applicable to additional discovery requests and information requests (see Sections IV. and V.).

[4]The panel consists of three arbitrators in most cases. Claims between $25,000 and $50,000 may proceed with a single arbitrator. Claims under $25,000 are decided by a single arbitrator, generally on the pleadings.

[5]In some instances, the parties may opt out of the initial prehearing conference. To opt out, parties must supply the following information to the Office of Dispute Resolution by the specified deadline:

- a minimum of four sets of mutually agreeable hearing dates;
- a discovery cut-off date;
- a list of all anticipated motions with the motion due dates, opposition due dates, and reply due dates provided;
- a minimum of four dates and times for any proposed prehearing conferences to hear motions; and
- a determination whether briefs will be submitted and, if so, the due date for submission.

[6]The Office of Dispute Resolution recommends that the panel set a cut-off date during the initial prehearing conference for service of discovery requests, giving due consideration to time frames that permit timely resolution of objections and disputes prior to the scheduled exchange of hearing exhibits pursuant to the NASD Code of Arbitration Procedure.

[7]The arbitrators should direct one of the parties to prepare and forward to the Office of Dispute Resolution, within 48 hours, a written order memorializing the results of the prehearing conference, approved as to form and content by the other parties. When motions are heard at the initial prehearing conference, the panel may order the parties to submit the order with a stipulation as to form and content from all parties.

[8]As with other rulings, an arbitration panel's ruling need only be by majority vote; it need not be unanimous.

[9]Only named parties must produce documents pursuant to the guidelines set forth herein. However, non-parties may be required to produce documents pursuant to a subpoena or an arbitration panel order to direct the production of documents (see Rule 10322). In addition, the arbitration chairperson may use the Document Production Lists as guidance for discovery issues involving non-parties.

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DOCUMENT PRODUCTION LISTS

General Objections

There is no provision for general objections in the Code of Arbitration Procedure or the Discovery Guide. The Code provides that requests must be specific and relate to the matter in controversy. There is no such requirement for objections. However, the Discovery Guide states that a party "may object to the production of any document," and that if any party objects to any document, "objections should set forth the reasons the party objects to producing the documents." The plain language appears to preclude general objections that may or may not apply to documents which may or may not exist. If a party objects to a specific document, it should identify that document and provide a specific objections. Common objections by Morgan Stanley from the attached examples are listed below.

Morgan Stanley objects to each of the requests to the extent:

1. any portion of any request or any purported instruction or definition seeks to impose obligations greater than those imposed by the Arbitration rules of the NASD;
2. protected by any other applicable (unspecified) privilege;
3. protected by any other applicable privilege such as the right of privacy;
4. otherwise immune from discovery;
5. otherwise immune or protected from discovery or disclosure;
6. other evidentiary privilege;
7. confidential or confidential information;
8. sensitive documents;
9. sensitive and confidential financial information;
10. commercially sensitive information relating to Morgan Stanley's business, internal policies, procedures, programs and/or guidelines;
11. investigative information and/or consulting experts privilege;
12. self-evaluation privilege;
13. not within their possession, custody or control;
14. encompass any time period other than that during which Claimant maintained an account at Respondent and conducted the trading at issue;
15. exceed matter in controversy and therefore impose undue burden, hardship, oppression and expense upon Respondents;
16. seek cumulative documents; will only produce documents sufficient to disclose requested information;
17. conditioned on Claimants production;
18. any request for documents which "relate to", or "relating to" a subject matter;
19. documents have been filed with public agencies or are obtainable from some source other than respondent;
20. vague and ambiguous, burdensome and oppressive;
21. information to which claimant not entitled to require inappropriate expense;
22. call for the production of "all documents;"
23. documents created before or after the relevant time period;
24. documents that were created after the Statement of Claim was filed;
25. request is outside the scope of discoverable documents pursuant to NTM 99-90; or well beyond the scope of permissible discovery, as defined by NTM 99-90.
26. documents destroyed in World Trade Center on September 11, 2001;
27. documents created after Claimants commenced this proceeding;

28. to extent purports to encompass any time period other than that during which Claimants maintained accounts at Morgan Stanley and conducted trading at issue;
29. that exceed the matter in controversy and therefore impose undue burden, hardship oppression and expense upon Respondents;
30. expressly conditioned upon reciprocal cooperation and production by Claimants;
31. to be produced at a mutually convenient time (not the time set by rule);
32. to extent impose undue burden, hardship, oppression and expense;
33. to extent equally available to the propounding party;
34. object to inclusion of Broker X within definition of "associate person" as not having "substantial involvement" in claimant's account and will limit responses to Broker Y;

COMMENT: The General Objections are perhaps the most pernicious of the standard dirty tricks utilized by Morgan Stanley as well as other NASD member firms. Without identifying a specific document, a Respondent may withhold responsive documents, regardless of their substantive value as evidence. The Claimant is not aware that the documents exist, what objection or privilege is being claimed, and has no opportunity to challenge the objection. If Morgan Stanley determines that relevant compliance department documents containing the details and scope of a fraud would hurt its defense, it may secretly designate them as burdensome, confidential, sensitive or self-investigative, and the documents vanish without specific objection and without disclosing to the arbitrators that the document exists. There is no opportunity for claimant to ask the panel for a determination of the relevance, privilege or confidentiality.

Perhaps the most offensive general objection is the claim of "self-investigative" privilege or "other applicable" (but unspecified) privilege, or "privileges" such as the right of privacy or "otherwise immune or protected" from discovery or disclosure. Most of these privileges, self investigative for example, are not commonly recognized, have never been approved by a federal appeals court and are not commonly recognized in the context of securities litigation by federal district courts. Morgan Stanley simply withholds whatever relevant, responsive documents required by the Discovery Guide it doesn't want the panel to see without comment based on undisclosed privileges and protections that would not normally be allowed in a legal setting. Even within the industry-friendly confines of its captive litigation forum, this is outrageous.

General Limitations

Document production is limited to the following:

1. documents in their possession at the time production is made;
2. will not undertake a continuing obligation to update;
3. will not commit to produce all documents at address designated by claimant;
4. will not prepare a privilege log, identify documents no longer in Respondents' possession, custody or control, or; manner in which documents were disposed.
5. based on information known to those to whom Morgan Stanley has assigned the responsibility of gathering documents.
6. expressly reserve the right to use any documents which may be subsequently uncovered;
7. Specific objections and responses to the individual requests incorporate and do not waive general objections and limitations.

COMMENT: This series of limitations allows Morgan Stanley to "ethically" destroy documents prior to "the time of production," refuse to identify privileges, documents

withheld or when destroyed and assign the task to summer interns or temporary employees who can be counted on to be ignorant of what documents do or do not exist. This almost guarantees an incomplete production of required documents.

LIST 1 : **TO BE PRODUCED IN ALL CUSTOMER CASES**

- Maze, 03-07587: No objections, but reserves the right to object to certain categories at a later time.

1) All agreements with the customer, including, but not limited to, account opening documents, cash, margin, and option agreements, trading authorizations, powers of attorney, or discretionary authorization agreements, and new account forms.

- Boyd, 03-08275: Subject to foregoing general objections.

COMMENT: Morgan Stanley conditions all responses to general objections but normally will produce documents that the customer has already seen and might have retained.

2) All account statements for the customer's account(s) during the time period and/or relating to the transaction(s) at issue.

- Boyd, 03-08275: Subject to foregoing general objections.

COMMENT: Morgan Stanley refuses to provide the broker or office copy of the account statements which may have additional information such as commissions on individual transactions and a cumulative commission total for the year.

3) All confirmations for the customer's transaction(s) at issue. As an alternative, the firm/Associated Person(s) should ascertain from the claimant and produce those confirmations that are at issue and are not within claimant's possession, custody, or control.

- Scott, 03-00123 Object that it is duplicative of account statements.
- Boyd, 03-08275: Subject to foregoing general objections.

COMMENT: Morgan Stanley conditions all responses to general objections but normally will produce documents that the customer has already seen and might have retained.

4) All "holding (posting) pages" for the customer's account(s) at issue or, if not available, any electronic equivalent.

- Vandergrift 02-02593: No response.
- Oline, 02-04998: Require confidentiality stipulation;
- Farnsworth 02-07298: Limits to 'electronic."
- Scott, 03-00123 Object that it is duplicative of account statements.
- Boyd, 03-08275: Subject to foregoing general objections and limited to BKD pages for claimant's accounts.
- Abraham 04-01650: Limits to "electronic."

COMMENT: Holding pages also broadly include "cross reference" pages, however, which indicate how many other customers of an individual broker own the same stock and when purchased. These are almost never produced and their existence denied because they might provide substantive evidence of other customers purchasing the same stock at

the same time when the broker claims the customer's purchase was isolated and unsolicited.

5) All correspondence between the customer and the firm/Associated Person(s) relating to the transaction(s) at issue.

- Vandergrift 02-02593: No response.
- Farnsworth 02-07298: Limit to "between Claimant & Respondent."
- Loughney 03-07840: Limited to extent "available."
- Boyd, 03-08275: Subject to foregoing general objections.
- Abraham 04-01650: Limit to "between Claimant & Respondent."
- Stein Revocable Trust, 04-00415: Object to any electronic communications as overly broad and unduly burdensome.
- Anderson Trust, 04-03003: E-mails unavailable as a result of September 11, 2001.
- Peters, 04-03747: E-mails prior to October 9, 2001 unavailable as a result of September 11, 2001.
- Sears, 04-03685: Limits production to correspondence between Claimant and named Respondents relating to specific transactions at issue.

COMMENT: Morgan Stanley insists that all e-mails were destroyed in the World Trade Center. As cases from that period work through the system, the more general objections are more troublesome. Morgan Stanley specifically limits its responses to named respondents so that if the customer wrote the individual financial advisor or office manager and it is damaging, the letter can be withheld if those individuals are not named as a Respondents. By limiting the response to the specific transactions at issue it can withhold documents concerning general investment objectives and suitability issues.

6) All notes by the firm/Associated Person(s) or on his/her behalf, including entries in any diary or calendar, relating to the customer's account(s) at issue.

- Oline, 02-04998: Objects as vague and overbroad.
- Farnsworth 02-07298: Limited to day-timer only, otherwise vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy
- Hadi, 03-02735: Objects on basis of general objections as well as unduly burdensome, and not relevant.
- Loughney 03-07840: Limited to extent "available"
- Boyd, 03-08275: Subject to foregoing general objections.
- Stein Revocable Trust, 04-00415: Subject to the general objections and specifically object to any electronic communications as overly broad and unduly burdensome.
- Abraham 04-01650: Limited to day-timer only, otherwise vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy

COMMENT: Morgan Stanley limits the response to the day-timers which can be routinely edited, reviewed, and filled with self-serving entries after the fact. It refuses to provide electronic notes which have safeguards against after-the-fact dating and e-mail records which are original entries also more difficult to falsify.

7) All recordings and notes of telephone calls or conversations about the customer's account(s) at issue that occurred between the Associated Person(s) and the customer (and any person purporting to act on behalf of the customer), and/or between the firm and the Associated Person(s).

- Oline, 02-04998: Objects as vague, not specific and overly broad.

- Farnsworth 02-07298: Limited to day-timer only, otherwise vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy.
- Hadi, 03-02735: Limited to notes by associated person and object on grounds set forth in the General Objections, and further as overbroad, unduly burdensome, not relevant.
- Boyd, 03-08275: Subject to foregoing general objections and further object the request is overbroad as to time.
- Abraham 04-01650: Limited to day-timer only, otherwise vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy.

COMMENT: Morgan Stanley limits the response to day-timers which can be routinely filled in after the fact. In dealing with documents that it knows the customer has not yet seen, it finds these items, identified by SICA, approved by the SEC and adopted by the NASD, vague, overly broad, unduly burdensome, ambiguous, and seeking private information, etc. After five years of the Discovery Guide, Morgan Stanley, like all the major firms claims to still have no idea what is required of it.

8) All Forms RE-3, U-4, and U-5, including all amendments, all customer complaints identified in such forms, and all customer complaints of a similar nature against the Associated Person(s) handling the account(s) at issue.

- Vandergrift, 02-02593: objects entirely as not relevant and information destroyed in World Trade Center
- Oline, 02-04998: Objects as confidential client and proprietary information that is not relevant, but will produce a CRD.
- Farnsworth 02-07298: Objects to complaints as vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy
- Scott, 03-00123: Object that other customer complaints are overly broad, unduly burdensome, irrelevant, vague, not specific and do not relate to the matter in controversy.
- Hadi, 03-02735: Object to customer complaints and any information concerning supervisors based on general objections as well as overbroad, unduly burdensome and not relevant.
- Garofalo, 03-04130: Other than RE-3, U-4 and U-5, and subject to general objections and limitations object to the request as vague and ambiguous, overly broad, unduly burdensome, improperly requires speculation and not related to the matter in controversy.
- Loughney 03-07840: Limited to CRD
- Boyd, 03-08275: Subject to foregoing general objections and further objects the term "similar nature" is vague and ambiguous, not related to the subject matter of this matter, is overbroad as to time, is unduly burdensome, not reasonably calculated to lead to admissible evidence, and seeks documents that are equally available to the propounding party and agrees to limited production of CRD Report and R#-3 form.
- Abraham 04-01650: Objects to complaints as vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy
- Anderson Trust, 04-03003: Limited to those firm determines to be "similar" and object that all other are overly broad, not related to the matter in controversy and violates the privacy rights of third parties.

- Peters, 04-03747: Limited to those firm determines to be "similar" and object that all other are overly broad, not related to the matter in controversy and violates the privacy rights of third parties.
- 04-03685, Sears: Objects as a violation of privacy rights of Financial Advisor's and unnamed third parties. Demands secrecy agreement.

COMMENT: This is an example of the insidious bait and switch where the firm offers the NASD CRD instead of the designated forms. The NASD CRD is extremely limited in what it discloses; far more than a CRD from a state and doesn't include most customer complaints. In addition, even though it could simply withhold all relevant documents as "not similar," Morgan Stanley often makes the exception explicit. In this case it may withhold documents because complaint A was for a 70 year old man and complaint B was for a 60 year old woman; not similar even though they concern the same suitability claim for the same stock by the same broker in the same week. Morgan Stanley claims extremely broad privacy rights, unsupported by any written policy, for its other customers who have also complained.

9) All sections of the firm's Compliance Manual(s) related to the claims alleged in the statement of claim, including any separate or supplemental manuals governing the duties and responsibilities of the Associated Person(s) and supervisors, any bulletins (or similar notices) issued by the compliance department, and the entire table of contents and index to each such Manual.

- Vandergrift, 02-02593: Object proprietary, confidential, internal documents; produce index only to selected manuals & demand confidentiality agreement
- Oline, 02-04998: Objects that the request is for documents not related to the controversy, is overly broad and beyond the scope of the Discovery Guide, but will produce the Table of Contents and Index from selected compliance manual.
- Farnsworth 02-07298: Table of contents only to selected manuals, demands confidentiality agreement; otherwise objects to complaints as vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy
- Scott, 03-00123: Object that the request seeks confidential proprietary information and trade secrets and is overly broad, unduly burdensome, irrelevant, vague, not specific and do not relate to the matter in controversy.
- Arrighini, 03-00889: Demand confidentiality stipulation and will provide table of contents for Banch Manager's Manual and Compliance Guide to extent firm feels they are relevant but makes no mention of compliance procedures manual or compliance updates.
- Hadi, 03-02735: Limits to section on suitability and table of contents and index to a selected manual (one out of three) and otherwise objects on the grounds of the General Objections and as overbroad, unduly burdensome and not relevant.
- Garofalo, 03-04130: Subject to general objections and after execution of an acceptable confidentiality agreement will produce a Table of Contents from the Branch Managers Manual and the Account Executive Compliance Guide from which Respondents will produce relevant requested portions. Otherwise object to the request as vague and ambiguous, overly broad, unduly burdensome, and not related to the matter in controversy.
- Moss, 03-04984: : Object as over broad, unduly burdensome and not calculated to lead to admissible evidence, but will produce the table of contents and index for a compliance manual subject to a confidentiality agreement.

- DePrince, 03-05643: Objects to "Compliance Department Procedures Manual," "Administrative Policy Manuals," "Branch Office Manager Supervisor's Guides," "Account Executive Compliance Guides." Morgan Stanley Funds Multi-class Manuals" as vague, overbroad, unduly burdensome and not calculated to lead to admissible evidence as well as confidential and proprietary. Objects to other manuals on the same basis but agrees to provide tables of contents for selected (but not all) manuals subject to confidentiality stipulation.
- Loughney 03-07840: Table of Contents only for selected manuals with demand for confidentiality stipulation
- Boyd, 03-08275: Subject to foregoing general objections and further objects that it requires Respondents to speculate as to what claimant's counsel deems "related to the claims alleged in the statement of claim, but after execution of a confidentiality agreement, will produce a Table of Contents from the FA Compliance Guide and Branch Managers Manual.
- Stein Revocable Trust, 04-00415: Subject to the general objections and after execution of a confidentiality agreement, will produce a Table of Contents from the Branch Managers Manual and the Account Executive Compliance Guide from which Respondent will produce relevant portions. Otherwise, object as vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy
- Abraham 04-01650: Table of contents only to selected manuals, demands confidentiality agreement; otherwise objects to complaints as vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy
- Anderson Trust, 04-03003: Object that the request seeks confidential documents without adequate protection. Demands confidentiality stipulation to produce incomplete index of some manuals and no bulletins.
- Peters, 04-03747: Object that the request seeks confidential documents without adequate protection. Demands confidentiality stipulation to produce incomplete index of some manuals and no bulletins.
- 04-03685, Sears: Object as confidential documents without adequate protection. Demands confidentiality stipulation to produce incomplete index of some manuals and no bulletins.

COMMENT: One of the top items which Morgan Stanley refuses to produce in almost all instances. Even when ordered to do so, it refuses to produce relevant sections of "all" manuals or bulletins or updates of the manuals. The normal tactic is to offer a table of contents to claimant and agree to produce "relevant" sections selected from that document by Claimant. It doesn't produce a table of contents for all of its manuals, however, and no index of periodic bulletins. If claimants plays this game, they have automatically agreed to forego the third to half of compliance material for which they are not provided a table or index. Morgan Stanley will then argue over the sections requested from the incomplete indexes and argue endlessly about the relevance of those. The confidentiality requirements are to prevent claimants from comparing production in order to be able to request documents missing from the tables of content. Compliance manuals are not confidential and the NASD's encouragement of arbitrator orders to the contrary is extremely harmful to the investing public. Relevant sections of compliance manuals should be available to be attached to statements of claim in order to promote a meaningful hearing of the facts.

10) All analyses and reconciliations of the customer's account(s) during the time period and/or relating to the transaction(s) at issue.

- Vandergrift, 02-02593: Agreed to responsive non-privileged documents without identifying documents or privilege
- Oline, 02-04998: Objects as requesting privileged information.
- Farnsworth 02-07298: Agreed to non-privileged "profit and loss analyses" without identifying documents or privilege. Objects to other analysis as vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy
- Scott, 03-00123: Limits production to documents previously provided to Claimant and objects that additional documents do not relate to the matter in controversy and would likely be privileged.
- Hadi, 03-02735: Objects on the grounds of the General Objections and as overbroad, unduly burdensome and not relevant.
- Garofalo, 03-04130: Subject to general objections and limitations will produce non-privileged profit and loss analysis only. Object to any additional documents as vague and ambiguous, improperly requires the Respondents to speculate as to documents being sought and not related to the matter in controversy.
- Moss, 03-04984: Limited to those created during relevant time account at Morgan Stanley.
- Loughney 03-07840: Limited to extent "available"
- Boyd, 03-08275: Subject to foregoing general objections.
- Stein Revocable Trust, 04-00415: Subject to the general objections and additionally object that the request is overly broad and unduly burdensome.
- Abraham 04-01650: Agreed to non-privileged "profit and loss analyses and reconciliations" without identifying documents or privilege. Objects to other analysis as vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy
- 04-03685, Sears: Agreed to non-privileged "profit and loss analyses" without identifying documents or privilege.

COMMENT: This is another case of limiting the response to only documents which are not useful, usually the profit and loss analysis which claimant has already done in order to file the claim. Supervisory and compliance reviews and analysis done during the relevant period are withheld as a matter of course. Customer commission to asset ratios and other routine management analysis is almost never produced.

11) All records of the firm/Associated Person(s) relating to the customer's account(s) at issue, such as, but not limited to, internal reviews and exception and activity reports which reference the customer's account(s) at issue.

- Vandergrift, 02-02593: Objects as overbroad, unduly burdensome, oppressive not relevant but will produce non-privileged documents.
- Oline, 02-04998: Objects as seeking information protected by privilege.
- Farnsworth 02-07298: Limits to customer activity reports that reference Claimant's accounts; otherwise objects as vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy
- Fleischer, 03-00072: Object as overbroad, oppressive, harassing, unduly burdensome, irrelevant but willing to produce internal reviews and activity reports that refer to Claimant account.

- Hadi, 03-02735: Limits to associated person and Claimant and otherwise objects on the grounds set forth in the General Objections and as overbroad, unduly burdensome and not relevant.
- Moss, 03-04984: Object that the request is vague, overbroad, unduly burdensome and not calculated to lead to the discovery of admissible evidence.
- Loughney 03-07840: Limited to extent "available"
- Boyd, 03-08275: Subject to foregoing general objections and further object that the request is overbroad and unduly burdensome.
- Stein Revocable Trust, 04-00415: Subject to the general objections and limited to the specific trade complained about, otherwise object as vague, ambiguous, overly broad, unduly burdensome and improperly requires speculation as to which documents are sought.
- Abraham 04-01650: Limits to customer activity reports that reference Claimant's accounts; otherwise objects as vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy
- Anderson Trust, 04-03003: Limit to copies of customer activity reports that reference Claimant's account only. Beyond that, object that the request is vague and ambiguous, overly broad, unduly burdensome and not related to matter in controversy.
- Peters, 04-03747: Limit to reports that reference Claimant's accounts; otherwise object as vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.
- 04-03685, Sears: Limit to reports that reference Claimant's accounts; otherwise object as vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.

COMMENT: Morgan Stanley limits its production to a limited number of reports restricted to the customer accounts in preparation for List 5, #2 which requires the production of all activity reviews and exception reports concerning the Financial Advisor. It is a preemptory objection because Morgan Stanley will go to extraordinary lengths to avoid producing documents detailing other (often many other) red flags being generated by the typical rogue broker involved in multiple arbitrations.

12) Records of disciplinary action taken against the Associated Person(s) by any regulator or employer for all sales practices or conduct similar to the conduct alleged to be at issue.

- Oline, 02-04998: Objects as overly broad and not related to the matter in controversy.
- Farnsworth 02-07298: Objects as overly broad and not related to the matter in controversy
- Scott, 03-00123: Limited to disciplinary action in connection with Claimant's account only and objects that any additional request is "a desperate fishing expedition" and overly broad, unduly burdensome, irrelevant, not specific and do not relate to the matter in controversy.
- Garofalo, 03-04130: In addition to general objections and limitations Respondents specifically object to this request as overly broad and not relevant.
- Moss, 03-04984: Object that the request is vague, overbroad, unduly burdensome and not calculated to lead to the discovery of admissible evidence.
- Loughney 03-07840: Limited to extent "available"

- Boyd, 03-08275: Subject to foregoing general objections and further objections of not relevant, vague and ambiguous, and overbroad, there are not responsive documents.
- Abraham 04-01650: Objects as overly broad and not related to the matter in controversy
- Stein Revocable Trust, 04-00415: Subject to the general objections will produce documents related to the single customer incident only and objects to any other documents as vague and ambiguous, overly broad, unduly burdensome and improperly requires Respondents to speculate as to which documents are sought.
- Stein Revocable Trust, 04-00415: Object as vague, ambiguous, overly broad, unduly burdensome and improperly requiring speculation as to which documents are sought.

COMMENT: Morgan Stanley consistently claims to have no idea what this request means and insists on limiting the response to claimant. Even when ordered to produce the documents, it can choose to interpret the request as for similar conduct as an alternative to "all" sales practices (its an either or request) and find none of the other disciplinary action is similar, there being a difference in age, gender, state of residence, karma, or something.

LIST 3 : **CHURNING**

1) All commission runs relating to the customer's account(s) at issue or, in the alternative, a consolidated commission report relating to the customer's account(s) at issue.

- Vandergrift, 02-02593: Objects not relevant, proprietary, confidential Claimant's commissions only.
- Boyd, 03-08275: Subject to foregoing general objections.
- Abraham 04-01650: Limits to Claimant commissions, otherwise objects as vague, overly broad and unduly burdensome.
- 04-03685, Sears: Object as confidential and subject to a confidentiality agreement.

COMMENT: See List 5, Request #1.

2) All documents reflecting compensation of any kind, including commissions, from all sources generated by the Associated Person(s) assigned to the customer's account(s) for the two months preceding through the two months following the transaction(s) at issue, or up to 12 months, whichever is longer. The firm may redact all information identifying customers who are not parties to the action, except that the firm/Associated Person(s) shall provide at least the last four digits of the non-party customer account number for each transaction.

- Vandergrift, 02-02593: Objects as not relevant, over broad, burdensome, oppressive, proprietary, confidential.
- Scott, 03-00123: Object that the request is overly broad, unduly burdensome and harassing, irrelevant, vague, not specific and do not relate to the matter in controversy.
- Boyd, 03-08275: Subject to foregoing general objections and further object that the request is not related to the subject matter of this action nor reasonably calculated to lead to discovery of admissible evidence and is **unintelligible** in that claimant has never identified the "transactions at issue" in this action.
- Abraham 04-01650: Objects as vague and ambiguous, overly broad, unduly burdensome, not related to the matter in controversy.

- Stein Revocable Trust, 04-00415: Subject to the general objections and additionally as overly broad and unduly burdensome.
- 04-03685, Sears: Object as violating Financial Advisor's privacy rights and subject to confidentiality agreement will produce records only as they pertain to Claimant's account.

COMMENT: This is another request where Morgan Stanley professes not to understand, going so far as to call it "unintelligible." One wonders how the SEC could have understood it. It is also a preemptive objection to List 5, #1 which requires compensation of any kind which Morgan Stanley routinely refuses to produce.

3) Documents sufficient to describe or set forth the basis upon which the Associated Person(s) was compensated during the years in which the transaction(s) or occurrence(s) in question occurred, including: a) any bonus or incentive program; and b) all compensation and commission schedules showing compensation received or to be received based upon volume, type of product sold, nature of trade (e.g., agency v. principal), etc.

- Vandergrift, 02-02593: not relevant, over broad, burdensome, oppressive, proprietary, confidential
- Oline, 02-04998: Objects as overly broad and not related to the controversy, beyond the scope of the Discovery Guide and seeking confidential and proprietary information.
- Scott, 03-00123: Object that the request is overly broad, irrelevant, vague, not specific and do not relate to the matter in controversy.
- Boyd, 03-08275: Subject to foregoing general objections and further object that the request is not related to the subject matter of this action nor reasonably calculated to lead to discovery of admissible evidence and is **unintelligible** in that claimant has never identified the "transactions at issue" in this action.
- Abraham 04-01650: Objects as vague and ambiguous, overly broad, unduly burdensome, not related to the matter in controversy.
- 04-03685, Sears: Object as violating Financial Advisor's privacy rights and confidentiality of documents, but subject to confidentiality agreement will produce some, but not all documents requested.
- Stein Revocable Trust, 04-00415: Subject to the general objections and additionally as overly broad and unduly burdensome.

COMMENTS: Morgan Stanley also characterizes this request as "unintelligible" because it is a comprehensive statement of compensation of Associated Persons which would encompass branch office managers as well as Financial Advisors. It is also a peremptory objection to the more common unsuitability claim of List 13, #2.

LIST 5 : **FAILURE TO SUPERVISE**

- Maze, 03-07587: No objections, but reserves the right to object to certain categories at a later time; requires a confidentiality agreement prior to producing documents concerning compensation

1) All commission runs and other reports showing compensation of any kind relating to the customer's account(s) at issue or, in the alternative, a consolidated commission report relating to the customer's account(s) at issue.

- Vandergrift, 02-02593: Object not relevant, proprietary, confidential; will produce reports showing revenue from Claimant's account only
- Oline, 02-04998: Objects as overly broad, not related to the controversy and beyond the scope of the Discovery Guide, but will provide documents that show commissions in Claimant's account.
- Farnsworth, 02-07298: Commission run microfiche at World Trade Center
- Scott, 03-00123: Limited to Claimant's accounts only and objects that any additional request is overly broad, irrelevant, not specific and does not relate to the matter in controversy.
- Hadi, 03-02735: Limit to basis for compensation; object to additional documents on basis of general objections and as vague, overbroad, unduly burdensome and not relevant.
- Garofalo, 03-04130: Subject to general objections and limitations will produce redacted commission runs only.
- Loughney 03-07840: Limited to extent "available"
- Boyd, 03-08275: Subject to foregoing general objections.
- Abraham 04-01650: Limited to commissions paid by Claimant only; otherwise objects as vague, overly broad and unduly burdensome.
- Anderson Trust, 04-03003: Limit to commissions from Claimant's account only after confidentiality stipulation. Otherwise object the request is vague and ambiguous, overly broad, unduly burdensome, not related to the matter in controversy, violates broker's privacy rights and seeks confidential documents without adequate protection.
- Peters, 04-03747: Limit to commissions in Claimant's accounts only with confidentiality stipulation; otherwise object as vague and ambiguous, overly broad, unduly burdensome, not related to the matter in controversy, violates broker's privacy rights and seeks confidential documents without adequate protection.
- Sears, 04-03685: Object as seeking confidential documents without adequate protection. Subject to confidentiality agreement, will produce some records.

COMMENT: All commission runs are one of the top categories that Morgan Stanley uniformly refuses to provide. It prefers the alternative, a consolidated report showing only commissions paid by the individual claimant. It has gone to the extreme of claiming that all commission runs were destroyed at the World Trade Center for cases predating September 2001. They have even claimed it for accounts opened after 9/11, the subject of a Wall Street Journal story. Without a full commission run showing activity in other customer accounts, the securities purchased and sold and the frequency of the trading, a Claimant can not get a fair hearing. Denied commission runs and with Morgan Stanley claiming that cross reference records do not exist, a financial advisor can claim the trades were not recommended and entirely the customer's idea even though twenty other customers made the same trades on the same days. A consolidated commission report showing only the customer's trades is worthless and it is Morgan Stanley's goal in each and every case except those where the trading is in only one account where the commission runs miraculously appear. A claimant deserves to see what a broker was doing in other accounts just as the broker is entitled under the Discovery Guide to see what the customer was doing at other brokerage firms.

2) All exception reports and supervisory activity reviews relating to the Associated Person(s) and/or the customer's account(s) that were generated not earlier than one year

before or not later than one year after the transaction(s) at issue, and all other documents reflecting supervision of the Associated Person(s) and the customer's account(s) at issue.

- Vandergrift, 02-02593: Object overbroad, unduly burdensome, oppressive not relevant.
- Oline, 02-04998: Objects as overbroad, not related to the controversy and beyond the scope of the Discovery Guide, but will provide documents that relate to Claimant's account only.
- Farnsworth, 02-07298: Limit to CAR's that reference Claimant; otherwise object vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.
- Scott, 03-00123: Limited to Claimant's accounts only and objects that any additional request is "a desperate fishing expedition" and overly broad, unduly burdensome, irrelevant, not specific and do not relate to the matter in controversy.
- Hadi, 03-02735: Object on grounds of general objections, and overbroad, unduly burdensome and not relevant.
- Garofalo, 03-04130: Subject to general objections and limitations will produce customer activity reports relating to Claimant's accounts only and object to further documents as vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.
- Loughney 03-07840: Limited to extent "available".
- Boyd, 03-08275: Subject to foregoing general objections and further object as vague, ambiguous, **unintelligible**, overbroad, and unduly burdensome.
- Abraham 04-01650: Limit to CAR's that reference Claimant; otherwise object vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.
- Anderson Trust, 04-03003: Limited to customer activity reports that reference Claimants' accounts in issue; otherwise object that the request is vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.
- Peters, 04-03747: Limited to customer activity reports that reference Claimants' accounts in issue; otherwise object that the request is vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.
- Sears, 04-03685: Agree to produce responsive documents referring to Claimant only and not to the Associated Person.

COMMENTS: Morgan Stanley limits its production to a limited number of reports restricted to the customer's accounts when the request is for those concerning the associated person. All exception reports and supervisory reviews is highly relevant evidence of failure to supervise a broker. All responsive documents must be produced as substantive evidence that the broker had other (perhaps many other) accounts also showing high turnover and other indicia of abuse requiring supervisory review. Claimants should have a view of the financial advisor's other problem accounts to the same extent that Morgan Stanley has the right to see all claimants other brokerage accounts with other firms.

3) Those portions of internal audit reports at the branch in which the customer maintained his/her account(s) that: (a) focused on the Associated Person(s) or the transaction(s) at issue; and (b) were generated not earlier than one year before or not later than one year after the transaction(s) at issue and discussed alleged improper behavior in the branch against other individuals similar to the improper conduct alleged in the statement of claim.

- Vandergrift, 02-02593: Object overbroad, unduly burdensome, oppressive not relevant
- Oline, 02-04998: Objects as overly broad, not related to the controversy and beyond the scope of the Discovery Guide, and further seeks attorney client or work product privileged information.
- Farnsworth, 02-07298: Limit to reports that reference Claimant; otherwise object vague and ambiguous, overly broad, unduly burdensome, violates self-evaluative privilege, is invasive of employee privacy and not related to the matter in controversy
- Scott, 03-00123: Limited to Claimant's accounts only and objects that any additional request is "a desperate fishing expedition" and overly broad, unduly burdensome, irrelevant, not specific and does not relate to the matter in controversy.
- Garofalo, 03-04130: Subject to general objections and limitations will produce copies of internal audit reports to the extent they reference Claimant. Beyond that object to further documents as vague and ambiguous, overly broad, unduly burdensome privileged, invasive of privacy of Morgan Stanley employees and not related to the matter in controversy.
- Moss, 03-04984: Object as vague, overbroad, unduly burdensome and not calculated to lead to the discovery of admissible evidence.
- Boyd, 03-08275: Subject to foregoing general objections and further object as vague, ambiguous, **unintelligible**, overbroad, and unduly burdensome.
- Abraham 04-01650: Limit to reports that reference Claimant; otherwise object vague and ambiguous, overly broad, unduly burdensome, violates self-evaluative privilege, is invasive of employee privacy and not related to the matter in controversy
- Stein Revocable Trust, 04-00415: Limited to the transaction in question and subject to general objections, otherwise object as vague, ambiguous, overly broad, unduly burdensome and improperly requiring speculation as to which documents are sought.
- Anderson Trust, 04-03003: Limited to internal audit reports that reference Claimants' accounts in issue; otherwise object that the request is vague and ambiguous, overly broad, unduly burdensome, invades attorney-client and **self-evaluative privilege**, is invasive of the privacy of Morgan Stanley employees and is not related to the matter in controversy.
- Peters, 04-03747: Limited to internal audit reports that reference Claimants' accounts in issue; otherwise object that the request is vague and ambiguous, overly broad, unduly burdensome, invades attorney-client and **self-evaluative privilege**, is invasive of the privacy of Morgan Stanley employees and is not related to the matter in controversy.

COMMENT: This is a continuation of Morgan Stanley's tactic of limiting production of documents which are presumptively discoverable. The request itself is excessively limited and Morgan Stanley refuses to comply with even this reduced demands. There is no recognized self-evaluative privilege and Morgan Stanley and the other brokerage firms should not be allowed to create it as a matter of NASD common law. The Supreme Court allowed forced arbitration on the condition that it protect investor's statutory rights. Allowing privileges unknown to federal courts in securities cases violates those rights.

4) Those portions of examination reports or similar reports following an examination or an inspection conducted by a state or federal agency or a self-regulatory organization that

focused on the Associated Person(s) or the transaction(s) at issue or that discussed alleged improper behavior in the branch against other individuals similar to the improper conduct alleged in the statement of claim.

- Vandergrift, 02-02593: Objects as overbroad, unduly burdensome, oppressive not relevant
- Oline, 02-04998: Objects as overly broad, not related to the controversy and beyond the scope of the Discovery Guide, but will provide documents that relate to Claimant's account.
- Farnsworth, 02-07298: Limit to reports that reference Claimant; otherwise object vague and ambiguous, overly broad, violates self-evaluative privilege, is invasive of employee privacy and not calculated to lead to admissible evidence.
- Scott, 03-00123: Limited to Claimant's accounts only and objects that any additional request do not relate to the matter in controversy.
- Hadi, 03-02735: Limit to actual disciplinary action taken by regulator or employer; otherwise object based on general objections and as overbroad, unduly burdensome and not relevant.
- Garofalo, 03-04130: Subject to general objections and limitations will produce reports to the extent they reference Claimant. Beyond that, object to further documents as vague and ambiguous, overly broad, invasive of the privacy of Morgan Stanley employees and not calculated to lead to the discovery of admissible evidence.
- Moss, 03-04984: : Object as overbroad, unduly burdensome and not calculated to lead to admissible evidence, but will produce the table of contents and index for a compliance manual subject to a confidentiality agreement.
- Boyd, 03-08275: Subject to foregoing general objections and further object as vague, ambiguous, **unintelligible**, overbroad, and unduly burdensome.
- Stein Revocable Trust, 04-00415: Subject to the general objections and limited to the one trade in question, otherwise object as vague, ambiguous, overly broad, unduly burdensome and improperly requires speculation as to which documents are sought.
- Abraham 04-01650: Limit to reports that reference Claimant; otherwise object vague and ambiguous, overly broad, violates self-evaluative privilege, is invasive of employee privacy and not calculated to lead to admissible evidence.
- Anderson Trust, 04-03003: Limited to reports that reference Claimants' accounts in issue; otherwise object that the request is vague and ambiguous, overly broad, invades the privacy rights of third parties and is not reasonably calculated to lead to the discovery of admissible evidence.
- Peters, 04-03747: Limited to reports that reference Claimants' accounts in issue; otherwise object that the request is vague and ambiguous, overly broad, invades the privacy rights of third parties and is not reasonably calculated to lead to the discovery of admissible evidence.
- Sears, 04-03685: Object as a violation of Financial Advisor's privacy rights or those of third parties. Subject to confidentiality agreement, will produce some records.

COMMENT: Once again, Morgan Stanley limits its response to a single account which is contrary to the plain wording of the request which already provides ample weasel room with its limitation to "similar" behavior which Morgan Stanley would not recognize without an exact DNA match between customers.

LIST 7 and LIST 9: **MISREPRESENTATION/OMISSIONS NEGLIGENCE/BREACH OF FIDUCIARY DUTY**

Copies of all materials prepared or used by the firm/Associated Person(s) relating to the transactions or products at issue, including research reports, prospectuses, and other offering documents, including documents intended or identified as being "for internal use only," and worksheets or notes indicating the Associated Person(s) reviewed or read such documents. As an alternative, the firm/Associated Person(s) may produce a list of such documents that contains sufficient detail for the claimant to identify each document listed. Upon further request by a party, the firm/Associated Person(s) must provide any documents identified on the list.

- Vandergrift, 02-02593: Objects as overbroad, unduly burdensome, oppressive not relevant
- Oline, 02-04998: Objects as overly broad, not related to the controversy and beyond the scope of the Discovery Guide.
- Farnsworth, 02-07298: Limits to prospectuses, research reports or other offering documents if Claimant can identify the sources of RR's recommendation. Otherwise objects as overly broad, unduly burdensome, not specific and not related to the matter in controversy.
- Scott, 03-00123: Limited to documents previously provided to Claimant and objects that any additional request is overly broad, vague, irrelevant, not specific and do not relate to the matter in controversy.
- Garofalo, 03-04130: Subject to general objections and limitations will produce copies of materials provided to Claimant and research files maintained by the broker. Beyond that, object as overly broad, unduly burdensome and not related to the matter in controversy.
- Moss, 03-04984: Object as overbroad, unduly burdensome and not calculated to lead to the discovery of admissible evidence, however, if Claimant identifies securities or transactions alleged to be unsuitable or unauthorized. Morgan Stanley will **consider** producing research reports.
- Maze, 03-07587: No objections, but reserves the right to object to certain categories at a later time
- Loughney 03-07840: Limit production to research reports and prospectuses to the "extent available"
- Boyd, 03-08275: Subject to foregoing general objections and further object that the request is **unintelligible**.
- Abraham 04-01650: Limits to prospectuses, research reports or other offering documents if Claimant can identify the sources of RR's recommendation. Otherwise objects as overly broad, unduly burdensome, not specific and not related to the matter in controversy.
- Anderson Trust, 04-03003: Limited to reports, prospectuses (or other offering documents) relating to proprietary mutual funds at issue within their possession, custody or control; otherwise object to the request is overly broad, unduly burdensome, and seeks information not specific or related to the matter in controversy
- Peters, 04-03747: Object as overly broad, unduly burdensome and not specific or related to the matter in controversy, but if Claimant identifies specific companies or funds, Respondents will meet and confer regarding the list and if tailored to Respondents satisfaction, will endeavor to collect and deliver "tailored" documents.

- Sears, 04-03685: Object as overly broad and unduly burdensome, but if Claimant identifies specific transactions, products or securities at issue that is reasonably tailored to Respondents satisfaction, will produce prospectus if one would have accompanied securities and company specific research reports. Beyond that, object as overly broad and not reasonably calculated to lead to admissible evidence.

COMMENT: Morgan Stanley consistently refuses to provide the basis for its recommendations. Instead it requires the claimant to identify documents upon which claimant may have relied but which he or she has no idea exist. Respondents thereafter are free to withhold whatever documents Claimant can not identify, most importantly the "For Internal Use Only" sales aides which the Financial Advisors so often use instead of actually reading a prospectus or research report or broker notes from morning sales calls.

LIST 11: **UNAUTHORIZED TRADING**

1) Order tickets for the customer's transaction(s) at issue.

- Oline, 02-04998: Objects as unduly burdensome.
- Scott, 03-00123: Object that the request is duplicative and redundant of the account statements, irrelevant and unduly burdensome.
- Moss, 03-04984: Objects as overbroad, unduly burdensome and not calculated to lead to admissible evidence.
- Boyd, 03-08275: Subject to foregoing general objections, "There are no responsive documents. Respondents do not "order tickets." Respondents use an electronic system.
- Stein Revocable Trust, 04-00415: Object that Respondents do not use order tickets.
- Abraham 04-01650: Agree to produce electronic equivalent ("TARs") when Claimant identifies transactions at issue. (TARs are not electronic equivalent.)
- Peters, 04-03747: **Order tickets do not exist.**
- Sears, 04-03685: Respondents state that they do not use paper order tickets.

COMMENT: Morgan Stanley consistently denies that order tickets exist even though they are required to be prepared and preserved by SEC Rule 17a-3(6) and Rule 17a-4(b)(1). They are allowed to do this because the Discovery Guide uses the commonly understood vernacular "order ticket" instead of the official term "memorandum." These records are made and preserved in electronic form prescribed by the SEC as Morgan Stanley and its outside counsel are fully aware. Statements to the contrary are pure fraud which arbitrators are trained to accept without question or critical thought. It should be an embarrassment to the NASD that its members firms routinely deny the existent of required records.

2) Copies of all telephone records, including telephone logs, evidencing telephone contact between the customer and the firm/Associated Person(s).

- Farnsworth 02-07298: Ordered to produce, but didn't.(Order #4)
- Scott, 03-00123: Objects that the request is an unreasonable burden and will agree only to produce notes of phone calls.
- Stein Revocable Trust, 04-00415: Object as overly broad, unduly burdensome.

- Abraham 04-01650: Objects to anything other than Day-timer notes as vague, ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.
- Moss, 03-04984: Objects as overbroad, unduly burdensome and not calculated to lead to admissible evidence, however if Claimants will identify the relevant telephone numbers, will consider the burden and expense.
- Boyd, 03-08275: Subject to foregoing general objections.
- Sears, 04-03685: Request a list of phone numbers, whereupon will undertake a reasonable search to see if records exist.
- Peters, 04-03747: Object as overly broad, unduly burdensome and not related to the matter in controversy.

COMMENT: Once again, Morgan Stanley objects to any substantive documentary evidence which narrows the scope of its defense and purports to find it overbroad and unduly burdensome.

3) All documents relied upon by the firm/Associated Person(s) to establish that the customer authorized the transaction(s) at issue.

- Moss, 03-04984: Objects as vague, overbroad, unduly burdensome and not calculated to lead to admissible evidence.
- Boyd, 03-08275: Subject to foregoing general objections and further object the request is **unintelligible** claimant has never identified the "transactions at issue."
- Stein Revocable Trust, 04-00415: In addition to the general objections, object as vague.

COMMENT: SICA, the NASD and SEC composed a request that Morgan Stanley and its outside counsel still finds, after five years, too vague and unintelligible to be applicable.

LIST 13: **UNSUITABILITY**

1) Copies of all materials prepared, used, or reviewed by the firm/Associated Person(s) related to the transactions or products at issue, including but not limited to research reports, prospectuses, other offering documents, including documents intended or identified as being "for internal use only," and worksheets or notes indicating the Associated Person(s) reviewed or read such documents. As an alternative, the firm/Associated Person(s) may produce a list of such documents. Upon further request by a party, the firm/Associated Person(s) must provide any documents identified on the list.

- Vandergrift, 02-02593: Objects as overbroad, unduly burdensome, oppressive not relevant
- Oline, 02-04998: Objects as overly broad, not related to the controversy and beyond the scope of the Discovery Guide.
- Farnsworth, 02-07298: Limits to prospectuses, research reports or other offering documents if Claimant can identify the sources of RR's recommendation. Otherwise objects as overly broad, unduly burdensome, not specific and not related to the matter in controversy.
- Scott, 03-00123: Limits production to documents previously provided to Claimant and otherwise objects as overly broad, vague, irrelevant, not specific and does not relate to the matter in controversy.

- Garofalo, 03-04130: Subject to general objections and limitations will produce copies of prospectuses provided to Claimant and research files maintained by the broker. Beyond that, object as vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.
- Moss, 03-04984: Object as overbroad, unduly burdensome and not calculated to lead to the discovery of admissible evidence, however, if Claimant identifies securities or transactions alleged to be unsuitable or unauthorized, Morgan Stanley will **consider** producing research reports.
- Maze, 03-07587: No objections, but reserves the right to object to certain categories at a later time; requires a confidentiality agreement prior to producing documents concerning compensation
- Loughney 03-07840: Limited to extent "available.
- Boyd, 03-08275: (#28) Subject to foregoing general objections and further object as not relevant, overbroad, and equally available to claimant but agree to limit to "an exemplar of a brochure that would have been available to Claimant."
- Abraham 04-01650: Limits to prospectuses, research reports or other offering documents if Claimant can identify the sources of RR's recommendation. Otherwise objects as overly broad, unduly burdensome, not specific and not related to the matter in controversy.
- Anderson Trust, 04-03003: Limited to reports, prospectuses (or other offering documents) relating to proprietary mutual funds at issue within their possession, custody or control; otherwise object to the request is overly broad, unduly burdensome, and seeks information not specific or related to the matter in controversy
- Peters, 04-03747: Object as overly broad, unduly burdensome and not specific or related to the matter in controversy, but if Claimant identifies specific companies or funds, Respondents will meet and confer regarding the list and if tailored to Respondents satisfaction, will endeavor to collect and deliver "tailored" documents.
- Sears, 04-03685: Object as overly broad and unduly burdensome, but if Claimant identifies specific transactions, products or securities at issue that is reasonably tailored to Respondents satisfaction, will produce prospectus if one would have accompanied securities and company specific research reports. Beyond that, object as overly broad and not reasonably calculated to lead to admissible evidence.

COMMENT: Unsuitability is the most common claim made and relevant documents engender the most objections. Morgan Stanley consistently refuses to provide the basis for its recommendations, usually denying a recommendation has been made. Instead it requires the claimant to identify documents which he or she has no idea exist. Respondents thereafter are free to withhold whatever documents Claimant can not identify, most importantly the "For Internal Use Only" sales aides which the Financial Advisors so often use. Morgan Stanley further prefers to place the onus on Claimants to justify why they purchased a security denying that public customers have the legal right to rely on a registered investment professional but are instead required to conduct their own due diligence and be responsible for their own research decisions.

2) Documents sufficient to describe or set forth the basis upon which the Associated Person(s) was compensated in any manner during the years in which the transaction(s) or occurrence(s) in question occurred, including, but not limited to: a) any bonus or incentive program; and b) all compensation and commission schedules showing compensation

received or to be received based upon volume, type of product sold, nature of trade (e.g., agency v. principal), etc.

- Vandergrift. 02-02593: Objects as not relevant, over broad, burdensome, oppressive. proprietary, confidential
- Farnsworth, 02-07298: Limits to redacted commission runs; otherwise objects as vague and ambiguous, overly broad, unduly burdensome, and not related to the matter in controversy.
- Scott, 03-00123: Object that the request is overly broad, irrelevant, not specific and do not relate to the matter in controversy
- Garofalo, 03-04130: In addition to the general objections and limitations, object as vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.
- Moss, 03-04984: Object as overbroad, unduly burdensome and not calculated to lead to the discovery of admissible evidence, however if Claimant identifies securities or transactions alleged to be unsuitable or unauthorized, Morgan Stanley will **consider** producing research reports.
- DePrince, 03-05643: Objects to "Morgan Stanley Financial Advisor Compensation, Benefits and Recognition Programs Booklets" and "MSDW Employee Handbooks" as vague, overbroad, unduly burdensome and not calculated to lead to the discovery of admissible evidence as well as confidential and proprietary.
- Loughney 03-07840: Limited to general booklet on compensation.
- Abraham 04-01650: : Limits to redacted commission runs; otherwise objects as vague and ambiguous, overly broad, unduly burdensome, and not related to the matter in controversy.
- Anderson Trust, 04-03003: Following confidentiality stipulation, will produce documents limited to compensation for transactions at issue; otherwise object the request violates broker's privacy rights, is overly broad, unduly burdensome, not related to the matter in controversy, and seeks to impose the obligation to produce confidential documents without adequate protection.
- 04-03685, Sears: Object as violating Financial Advisor's privacy rights and confidentiality of documents, but subject to confidentiality agreement will produce some, but not all documents requested.
- Peters, 04-03747: Following confidentiality stipulation, will produce documents limited to compensation for transactions at issue; otherwise object the request violates broker's privacy rights, is overly broad, unduly burdensome, not related to the matter in controversy, and seeks to impose the obligation to produce confidential documents without adequate protection.

Morgan Stanley also characterizes this request as "unintelligible" because it is a comprehensive statement of compensation of Associated Persons which would also encompass branch office managers. The incentives and disincentives for selling or not selling different products has been amply demonstrated by the states in the sale of proprietary mutual funds. Morgan Stanley Financial Advisors were rewarded for proprietary fund sales with expense reimbursement checks and officer managers with bonus payments. The basis for all associated persons' compensation (Financial Advisors and branch office managers) is basic information without which customers can not receive a fair hearing. It is presumptively discoverable in all suitability cases and produced in almost none.

MORGAN STANLEY CASES

	CASE #	CLAIMANT	DEFENSE COUNSEL
1.	00-05465,	Albert W. Harrison	Greenberg Traurig, NY
2.	02-01240,	David Hill	Morgan Stanley Law Division
3.	02-02593,	Judy B. Vandergrift -	Morgan Stanley Law Division
4.	02-04998,	Kory Oline	Berkowitz, Stanton, Brandt, Williams & Shaw, KC
5.	02-07298,	Esther Farnsworth	Morgan Stanley Law Division
6.	03-00103,	Inssaf Murad Salim	Greenberg Traurig, LLP, NY
7.	03-00123,	Ronald J. Scott, MD	Greenberg Traurig, West Palm Beach
8.	03-00889,	Giacomo & M. Arighini	Greenberg Traurig, NY
9.	03-02735,	Abdullah Hadi	David Gourevitch, Esq., NY
10.	03-04130,	Rafael J. Garofalo	Kirkland & Ellis, San Francisco
11.	03-04300,	David Heartsfield	Gray Robinson, Tampa, FL
12.	03-04984,	Nicholas Moss	Stradley, Ronon, Stevens & Young, Philadelphia
13.	03-05643,	JoAnne DePrince	Greenberg Traurig, NY
14.	03-05859,	Irma Castillero et al.	Stradling, Yocca, Carlson & Rauth, San Francisco
15.	03-06280,	Paul A. Volz	Greenberg Trauig, P.A., West Palm Beach
16.	03-07587,	Thomas A. Maze	Morgan Stanley Law Division
17.	03-07840,	Joseph R. Loughney	Morgan Stanley Law Division
18.	03-08275,	Dina Boyd	Morgenstein & Jubelirer, San Francisco
19.	03-08511,	Kirsch & Drake	Berkowitz, Stanton, Brandt, Williams & Shaw, KC
20.	04-00113,	Midwest Neurosurgery	Berkowitz, Stanton, Brandt, Williams & Shaw, KC
21.	04-00415,	Jack C. Stein Trust	Morgan Stanley Law Division [1]
22.	04-01650,	Reginald Abraham	Morgan Stanley Law Division
23.	04-03003,	Helen Anderson Trust	Morgan Stanley Law Division
24.	04-03747,	Stacy Lee Peters	Morgan Stanley Law Division
25.	04-03685,	Jean Sears	Stradling, Yocca, Carlson & Rauth, San Francisco

[1] Actually a NYSE case, but indicative of Morgan Stanley's disregard for the facts of a case to the extent that they print NASD on it and list standard, specious objections without discrimination of any sort.

JENNER&BLOCK

April 26, 2005

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Re: ***Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.***

Dear Mark:

I enclose a revised CPH trial exhibit list that reflects the addition of CPH Trial Exhibit Nos. 6A (disclosed in Court today), 1169 (disclosed by letter yesterday), and 1378 (which is the same document as MS 172). In addition, I enclose a marked copy of CPH 1378.

Very truly yours,

Michael T. Brody

cc: Joseph Ianno, Jr., Esq. (by telecopy)
John Scarola, Esq. (by telecopy)
Jerold S. Solovy, Esq.

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

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

_____/

COLEMAN (PARENT) HOLDINGS INC.'S
FURTHER REVISED TRIAL EXHIBIT LIST DATED APRIL 26, 2005

Pursuant to the Court's March 24, 2005 Order, Coleman (Parent) Holdings Inc. ("CPH") hereby provides Morgan Stanley & Co. ("Morgan Stanley") with the attached revised list of the exhibits that CPH currently expects to use at trial. As a result of the Court's March 23, 2005 Order, CPH has endeavored to identify and disclose documents that it may use in direct examination, cross-examination, and to rebut arguments that it presently anticipates may be advanced at trial. CPH substantially has narrowed its original trial exhibit list of more than 1200 exhibits to approximately 200 exhibits. CPH reserves the right to use any of the exhibits identified on the attached list during either phase of its case in chief, in cross-examination, or in rebuttal. CPH further reserves the right to supplement this disclosure or to withdraw any exhibits identified herein as CPH continues to evaluate its proofs in light of the Court's recent rulings, anticipated rulings, default findings, expected findings regarding litigation misconduct, the trial witness disclosure or exhibit list to be provided by Morgan Stanley, or new arguments advanced by Morgan Stanley. CPH further reserves its rights as follows:

1. In addition to the documents set forth on the attached Revised Trial Exhibit List, CPH reserves its right to use additional exhibits that it identifies in connection with ongoing punitive damages and expert discovery.

2. CPH reserves its right to use at trial duplicate copies and/or original versions of any of the documents listed on the attached Revised Trial Exhibit List. Pursuant to an agreement with counsel for Morgan Stanley, more legible copies of these documents may be re-marked with the deposition and trial exhibit numbers and used in that form at trial.

3. CPH reserves its right to use the reports submitted and the documents relied upon by Morgan Stanley's experts as exhibits in cross examining Morgan Stanley's experts.

4. CPH reserves the right to use and/or introduce at trial any proposed trial exhibit identified by Morgan Stanley.

5. CPH reserves its right to submit and introduce summary documents based upon the information included in documents identified in the attached Revised Trial Exhibit List or in the documents identified as exhibits by Morgan Stanley, as well as demonstrative exhibits.

6. By listing documents on the attached Revised Trial Exhibit List, CPH is not conceding the relevance, foundation, and/or admissibility of any of those documents. Further, CPH listed certain of those documents for purposes of rebutting arguments that Morgan Stanley may raise in either phase of the trial. By listing those rebuttal documents, CPH is not conceding the admissibility or relevance of the potential Morgan Stanley arguments or documents in either phase of the trial.

7. In compiling the attached exhibit list, CPH identified documents that it may use to support its case for an award of punitive damages against Morgan Stanley. In identifying those

documents on the attached list, CPH is not conceding the admissibility or relevance of those documents for any purpose other than punitive damages.

I HEREBY CERTIFY that a true and correct copy of the foregoing and its attachment have been sent by facsimile and hand-delivered to the individuals of the attached service list on this 26rd day of April, 2005.

Dated: April 26, 2005

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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REVISED CPH TRIAL EXHIBIT LIST
Dated April 26, 2005

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
6	02/23/1998	CPH Ex. 009	CP 026286 - 026370	
6A	02/23/1998			Original color copy of CPH Trial Ex. 6
7 / 7A	03/19/1998	CPH Ex. 010	CPH 1421272 - 1421343	
8	03/09/1998	CPH Ex. 011	SASMF 10699 - 10705	
11	03/19/1998	CPH Ex. 014	MSC 0016944 - 0016945	
14	03/19/1998	CPH Ex. 017	MS 00375 - 00381	
19	10/16/1998	CPH Ex. 022	CPH 0084462 - 0084532	
30	03/19/1998	CPH Ex. 033	MSC 0029176	
33	04/03/1998	CPH Ex. 036	CPH 0639323 - 0639327	
33 A	04/03/1998		CPH 0145589-0145592	Press release "Sunbeam Corporation Lowers First Quarter Sales and Earnings Expectations; Names Lee Griffith President of Household Products Business"
66	09/11/1997	CPH Ex. 069	MSC 0003894 - 0003930	
67	09/05/1997	CPH Ex. 070	SB 237825 - 237830	
68	10/23/1997	CPH Ex. 071	MSC 0005984 - 0005995	
71	03/05/1998	CPH Ex. 074	MSC 0080356 - 0080358	
72	03/15/1998	CPH Ex. 075	SB 0018202 - 0018288	
73	03/19/1998	CPH Ex. 076	MSC 0025829 - 0025886	
81	03/05/1998	CPH Ex. 084	MSC 0033255 - 033263	
87	02/27/1998	CPH Ex. 089	MSC 0083960 - 0084026	
88	02/27/1998	CPH Ex. 090	CPH 1332631 - 1335633	
98	03/12/1998	CPH Ex. 100	MSC 0004590-0004626	

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
111	03/25/1998	CPH Ex. 112	CPH 0129613 - 0129616	
128	03/15/1998	CPH Ex. 130	CPH 0251869 - 0251889	
134	02/23/1998	CPH Ex. 138	CPH 1411216 - 1411300	
142	03/31/1998	CPH Ex. 146	MSC 0080325 - 0080333	
149	06/01/1998	CPH Ex. 155	CPH 1346133 - 1346250	
150	06/09/1998	CPH Ex. 156	CPH 1346276-1346342	
151	06/11/1998	CPH Ex. 157	MSC 0018702-0018703	
155	06/21/1998	CPH Ex. 162	MSC 0026888 - 0026891	
158	02/17/1998	CPH Ex. 169	MSC 0044556 - 0044573	
168	03/11/1998	CPH Ex. 182	MSC 0004703 - 0004723	
168 A	03/11/1998		CLN 36147-36167	Sunbeam Management Presentation
171	02/23/1998	CPH Ex. 187-A	CP 0254621 - 0254640	
209	12/17/1997	CPH Ex. 236	CPH 1121203 - 1121259	
212	02/25/1998	CPH Ex. 239	CPH 1416194 - 1416213	
226	00/00/0000	CPH Ex. 264	MSC 0024863	
233	10/09/1997	CPH Ex. 272	CPH 0473148 - 0473165	
234	08/07/1997	CPH Ex. 273	MSC 0023225 - 0023229	
235	11/13/1997	CPH Ex. 274	MSC 0054921 - 0054925	
236	01/26/1998	CPH Ex. 275	MSC 0001575 - 0001579	
248	00/00/0000	CPH Ex. 300	MSC 0024863 - 24864	
258	01/19/1999	CPH Ex. 325	CPH 1352836 - 135283	
278	09/15/2004	CPH Ex. 360	MSC 0096879 - 0096972	
289	02/24/1994	CPH Ex. 371	MSC 0085403 - 85419	
290	10/27/1995	CPH Ex. 372	MSC 0085420 - 85435	

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
291	12/31/1996	CPH Ex. 373	MSC 0085436 - 85452	
292	12/31/1997	CPH Ex. 374	MSC 0085453 - 85471	
293	12/31/1998	CPH Ex. 375	MSC 0085472 - 85493	
294	11/18/1998	CPH Ex. 376	MSC 0094016 - 94018	
297	04/28/1998	CPH Ex. 379	CPH 1042288 - 1042317	
298	03/25/1998	CPH Ex. 380	CPH 0485991 - 0485993	
305	03/20/1998	CPH Ex. 388	CPH 1241513 - 1241514	
309	02/27/1998	CPH Ex. 392	MSC 0008011 - 008066	
310	07/30/1999	CPH Ex. 393	MSC 0014766 - 0014775	
320	04/03/1998	MS Ex. 058	CPH 0639323 - 0639327	
322	03/30/1998	MS Ex. 075	CPH 1401525 - 1401534	
323	12/01/1997	MS Ex. 076	CPH 140748 - 1407318	
325	01/23/1998	MS Ex. 080	CPH 1426289 - 1426296	
326	02/06/1998	MS Ex. 081	CPH 1421814 - 1421817	
328	02/20/1998	MS Ex. 083	CPH 1427250 - 1427253	
330	02/25/1998	MS Ex. 088	CPH 0634056 - 0634064	
331	02/27/1998	MS Ex. 093	MS 0007947 - 0008010	
337	02/25/1998	MS Ex. 112	CPH 1401219 - 1401238	
338	02/27/1998	MS Ex. 113	CPH 0634065 - 0634075	
342	02/27/1998	MS Ex. 120	CPH 1400750 - 1400752	
345	01/30/1998	MS Ex. 137	CPH 1427533 - 142739	
349	12/10/1997	MS Ex. 169	MSC 1402232 - 1402235	
352	02/23/1998	MS Ex. 182	CPH 1412533 - 1412551	
354	02/26/1998	MS Ex. 188	CPH 1316960 - 131962	

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
355	02/27/1998	MS Ex. 189	CPH 1399821 - 1399822	
356	01/28/1998	MS Ex. 202	CPH 0468457 - 0468462	
357	01/29/1998	MS Ex. 204	CPH 1393144 - 1393147	
358	03/19/1998	MS Ex. 210	CPH 1395046	
359	03/19/1998	MS Ex. 212	CPH 1393266 - 1393268	
360	03/19/1998	MS Ex. 213	CPH 1415534	
361	03/19/1998	MS Ex. 214	CPH 1393472 - 1393478	
362	03/20/1998	MS Ex. 216	CPH 1393262 - 1393263	
367	07/02/1998	MS Ex. 233	CPH 1328300 - 1328301	
368	03/02/1998	MS Ex. 237	CPH 1325251 - 1144565	
371	03/29/1998	MS Ex. 278	CPH 1094218 - 1094235	
373	05/11/1998	MS Ex. 281	DPW 0035621 - 0035636	
378	06/26/1998	MS Ex. 338	CPH 1350174 - 1350175	
380	01/23/1998	MS Ex. 354	CPH 2005706	
381	01/30/1998	MS Ex. 355	CPH 1278481 - 1278484	
386	06/25/1998	MS Ex. 522	CPH 0642890 - 0642891	
410	01/05/2000		BA 01210	Sunbeam Credit Approval Memorandum Modification (USCG)
438	04/03/1998		CPH 0038539 - 0038544	CIBC Oppenheimer analyst report
439	03/24/1998		CPH 0145503 - 0145505	Buckingham Research analyst report
444	01/28/1998		CPH 0291847 - 0291849	Sunbeam Press Release for Record Year
447	12/08/1997		CPH 0324549	Time Line for Transaction
448	12/08/1997		CPH 0324558	Aggressive Time Line for Transaction

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
449	06/29/1998		CPH 0361142 - 0361148	Minutes of Special Meetings of the Executive Committee and of the Audit Committee of the Board of Directors of Sunbeam
450	07/06/1998		CPH 0361149 - 0361155	Minutes of Special Meetings of the Executive Committee and of the Audit Committee of the Board of Directors of Sunbeam
454	12/08/1997		CPH 0466948 - 0466949	Key Points from Meeting
457	01/30/1998		CPH 0468652 - 0468653	McDonald & Co. analyst report
459	07/24/1997		CPH 0472533 - 0472535	Bear Stearns analyst report
465	12/08/1997		CPH 0586586 - 0586587	Fannin memo re Perelman key points
466	10/23/1997		CPH 0595107 - 0595109	Sunbeam Press Release: Morgan Stanley Retained
470	03/24/1998		CPH 1039208	Buckingham Research Group Research Notes
471	06/15/1998		CPH 1059072 - 1059074	Sunbeam press release: Dunlap fired
482	04/06/1998		CPH 1267992 - 1267993	Goldman Sachs report
485	03/03/1998		CPH 1279605 - 1279606	Merrill Lynch analyst report
487	03/16/1998		CPH 1326304 - 1326476	Sunbeam Corporation Offering Memorandum
493	01/29/1998		CPH 1392529-531	Prudential analyst report
495	03/19/1998		CPH 1393269	Sands Brothers analyst report
496	03/20/1998		CPH 1393270 - 1393271	Goldman Sachs analyst report
497	07/22/1998		CPH 1393699 - 1393700	Letter from H. Gittis to H. Kristol re Sunbeam
503	03/12/1998		CPH 1415380 - 1415399	Paine Webber analyst report
505	02/02/1998		CPH 1415568 - 1415573	Prudential analyst report
506	03/05/1998		CPH 1415595 - 1415597	CIBC Oppenheimer analyst report

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
507	03/12/1998		CPH 1415600 - 1415605	Prudential analyst report
509	04/03/1998		CPH 1417337 - 1317342	Paine Webber analyst report
510	04/06/1998		CPH 1424595 - 1424598	Merrill Lynch report
512	06/23/1998		CPH 0075281 - 0075282	Minutes of Special Meeting of the Board of Directors of Sunbeam Corporation
568	11/30/2002		MSC 0112001 - 0112015	MS & Co.'s Consolidated Statements of Financial Condition
569	11/30/2003		MSC 0112016 - 0112032	MS & Co.'s Consolidated Statements of Financial Condition
591	10/29/2004		None	MS & Co.'s Written Responses to Rule 1.310 Topics (re fees)
596	11/16/2004		None	MS & Co.'s Written Responses to Rule 1.310 Topics (re fees)
597	11/19/2004		None	MS & Co.'s Written Responses to Rule 1.310 Topics (re fees)
600	11/24/2004		None	CPH Response to MS's Fifth Set of Interrogatories -- list of transactions.
705	00/00/2002		None	Arthur Rosenbloom: *Due Diligence for Global Deal Making: The Definitive Guide to Cross-Border Mergers and Acquisitions, Joint Ventures, Financings, and Strategic Alliances* (Bloomberg Press 2002)
718	03/13/2003		None	Rosenbloom Expert Report from Gotham v. Hallwood
809	00/00/2003			SEC Decision (*In re Morgan Stanley and Co. Incorporated*)
810	11/17/2003			SEC Decision (*In re Morgan Stanley DW, Inc.* (3-11335))

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
821	11/12/1998		None	Sunbeam 10-K/A for fiscal year ended 12/28/1997
824	12/06/1999		None	Sunbeam Form S-4/A
838	04/28/2003			SEC press release, "SEC Sues Morgan Stanley for Research Analyst Conflicts of Interest Firm to Settle with SEC, NASD, NYSE, NY Attorney General, and State Regulators"
841	04/24/2003			Administrative Action, N.Y. Attorney Gen., *In the Matter of: Morgan Stanley & Co., Inc.*, Assurance of Discontinuance Pursuant to Executive Law § 63(15)
850	00/00/0000		None	Morgan Stanley Code of Ethics and Business Conduct
941	03/21/1998		CPH 1400753-926	Memo from A. Deitz to S. Cohen attaching Sunbeam Offering Memorandum
952	12/09/2004			NYSE Exchange Hearing Panel Decision 04-184
953	12/09/2004			NYSE Exchange Hearing Panel Decision 04-185
956	03/24/1998		CPH 1393468-69	Merrill Lynch research report re Sunbeam
959	11/30/2001		None	*Financial Markets and Corporate Strategy* (2nd Edition) by Mark Grinblatt and Sheridan Titman
960	11/30/1997		None	*Financial Markets and Corporate Strategy* (1st edition) by Mark Grinblatt and Sheridan Titman
966	01/25/2005			Litigation Release, *SEC v. Morgan Stanley & Co. Inc.*, No. 19050
967	01/25/2005			Complaint, *SEC v. Morgan Stanley & Co. Inc.*, 1:05 CV 00166 (HHK)
1147	01/28/1998		CPH 0251123-72	Transcript of Sunbeam's conference call with analysts

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
1155	11/29/2002		None	Historical mark information for time period April 30, 1998 to November 29, 2002
1159	04/23/1998		CPH 0485964-65	Sunbeam Press Release, "Sunbeam Corporation Responds to Notices of Law Suits"
1165	05/12/1998		CPH 0468716-18	Bear Stearns & Co. analyst report re Sunbeam
1166	05/12/1998		CPH 0468719-22	Merrill Lynch analyst report re Sunbeam
1167	05/12/1998		CPH 0468723-27	Paine Webber analyst report re Sunbeam
1169	03/15/1998	MS Dep. Ex. 194	CPH 1185762-84	
1173	01/27/2005	CPH Dep. Ex. 414	MSC 0112250-0112285	
1174	01/24/2004	CPH Dep. Ex. 416	MSC 0112220-0112249	
1175	11/30/2004	CPH Dep. Ex. 417	MSC 1112219	
1176	11/30/2003	CPH Ex. 418	None	
1179	08/14/1998		MSE021405-0000001-0000023	Email from dunnp@ms.com attaching Global High Yield Capital Markets Weekly Activity Report, updated as of 8/14/98
1180	04/06/1998		MSE021405-0001525-0001547	Email from grays@ms.com forwarding message re MedSource Technologies IPO and attaching Global High Yield Capital Markets Weekly Activity Report, updated as of 4/3/98
1212	00/00/0000		MSE021605-0000134	Morgan Stanley Capital Partners Fund information re Mafco
1221	10/29/1993		MSC 114216-114225	Collection of Italian news articles with translations
1226	12/06/1994		MSC 114119-114121	Translation of Judgment in Italian criminal proceedings

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
1228	11/06/1995		MSC 116520-116522	Notice of Prosecution to William H. Strong and April 17, 1996 letter from U.S. DOJ to William Strong
1229	10/05/1998		MSC 114869-114874	Committal for Trial Order
1230	10/05/1998		MSC 114875-114888	Translation of Committal for Trial Order
1236	07/06/1999		MSC 115805-115806	Disclosure Occurrence Composite for William Strong
1239	02/18/2005		MSC 116176-116189	U-4 Amendment Filing
1240	00/00/0000		None	Declaration of Monroe R. Sonnenborn, Esq.
1241	05/07/1998		WLRK 0003019	Excerpt from May 7 Wachtell letter containing chronology corrections
1244	04/22/1997		MSC 117745	Letter from D. Mayhew to J. Cooney re documents produced to the SFO and a meeting on May 13, 1997 at Clifford Chance (London)
1246	10/29/1993		MSC 117611	Fax cover sheet from G. Curatolo to D. Decotis
1257	05/11/1998		CPH 1427304-1427307	Sunbeam press release re 1st quarter results
1258	03/25/1998		MSC 0016947-016949	Sunbeam press release re Successful Private Placement of $750 Million of Convertible Debentures
1259	03/19/1998		CPH 2008277-2008281	Bloomberg printout of press release re Sunbeam's 1st quarter earnings
1260	03/25/1998		MSC 0000454-0000455	Comfort Letter
1261	04/21/1994		MSC 0119768	Memo from M. Sonnenborn to R. Maschullat, D. DeCotis, G. Giraldi, W. Strong re Trial in Milan Relating to Proposed ENI-SAI Joint Venture

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
1262	01/26/1995		MSC 119823-119836	Overview of Italian Criminal Law System Preliminary Proceedings
1264	02/09/1999		MSC 119748-119759	Letter from J. Cooney to M. Sonnenborn enclosing statement for services re representation of Bill Strong in connection with DePasquale investigation
1267	11/10/1998		MSC 119849-850	Email from J. McFadden re Revised Final Press Statement on Bill Strong, Italy Indictment
1268	11/10/1998		MSC 119848	Email from S. Chapman re Draft Press Statement- Bill Strong Case
1270	02/14/1995		MSC 119241-245	Memo from W. Strong to R. Scott re ENI-SAI
1273	02/23/2005		None	Revised version of February 20, 1998 Privilege Log for documents produced by Morgan Stanley re Strong
1283	05/11/1995		MSC 119235-236	Joint Defense Agreement between Morgan Stanley Salomon Brothers International Limited
1285	00/00/0000		None	Form U-4: Uniform Application for Securities Industry Registration or Transfer
1287	00/00/1994		MSC 0120442-0120445	William Strong 1994 Evaluation Summary
1288	04/03/1998		MSC 0029168-169	Sunbeam press release "Sunbeam Corporation Lowers First Quarter Sales and Earnings Expectations; Names Lee Griffith President of Household Products Business"
1295	05/20/1998		CPH 1011319 - 1011351	Memo from W. Nesbitt to R. Perelman, D. Drapkin, H. Gittis, J. Levin, J. Maher re Review of Sunbeam Research

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
1296A/1296B	02/05/2001		None	Sunbeam Stock Prices, 1993-2001
1297	07/08/1999		MSC 114867-114868	Amendment to Uniform Application for Securities Industry Registration or Transfer
1300	03/17/2005		None	Morgan Stanley 8-K
1301	03/02/1998	MS Ex. 196	CPH 1393830-31	
1302	03/17/2005		None	CD containing MS Earnings Call media file
1304	03/20/1998		MSE031905-0000010-0000012	Email from J. Dormer with chronology and press release
1305	04/06/1998		MSE031905-0000034	Email from D. Fannin to W. Wright re comments at ABA spring meeting
1308	03/19/1998		CPH 1395046-47	Press Release titled "Sunbeam states first quarter revenues may be lower than street estimates"
1309	00/00/0000		None	Comparable Company Stats 1998 Price and Volume
1310	00/00/0000		None	Grinblatt's S&P 500 Index
1311	12/18/1997		CPH 0325148	Project Laser proposed Summary Transaction Terms
1312	02/19/1998		CPH 0498962-0498965	Press release "Coleman Reports Fully Year and Fourth Quarter Results"
1313	10/20/1998		CPH 1325044-1325047	Sunbeam press release "Sunbeam to Restate Financial Results; Discloses Adjustments For 1996, 1997 and First Quarter of 1998"
1314	11/30/2004		None	Morgan Stanley 10-K for fiscal year ended November 30, 2004
1315	02/28/2005	Nye Ex. 1	CPH 20112470-2012472	
1316	03/23/2005		None	Morgan Stanley Form 8-K

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
1317	08/12/1998		CPH 2000731-746	Settlement agreement between CPH and Sunbeam Corporation
1318	12/21/2004	CPH Dep. Ex. 419	None	
1319	12/14/1998		CPH 1039842-850	Memo from L. Bornstein to The Files re Sunbeam Audit Committee meeting December 14, 1998
1320	05/26/1998		CPH 0021696	Press release "Michael Price Responds to Fortune Sunbeam Article"
1321	11/19/1998		CPH 0468925-29	Minutes of a Special Meeting of the Board of Directors of Sunbeam Corporation
1322	06/17/1998		CPH 1351588-89	Bank of America memorandum from D. Doyle to J. Fair, J. Shannahan (cc: M. Murray, J. Meyers) re Sunbeam Corporation
1323	07/23/1998		CPH 1351571-73	Email from C. Francavilla to K. Barnish, J. O'Keane, D. Doyle, S. Sterling re Sunbeam Update
1324	04/06/1998		CPH 1429924-70	Sunbeam Form Schedule 14A SEC Filing
1325	04/29/1998		CPH 1429908-23	ISS materials re Sunbeam 1998 Proxy
1326	04/21/1998		CPH 0484525-42	ISS materials re Sunbeam 1998 Proxy
1327	05/14/1998		CPH 0474917-18	Memo from J. Adams to A. Dunlap, R. Kersh, D. Fannin, R. Richter, J. Kelley re Record Proxy Vote
1328	04/30/1998		CPH 1408704-8722	Sunbeam Corp. Proxy Analysis by Institutional Shareholder Services
1329	05/10/1998		CPH 1268015-20	Report re Sunbeam Corp. from The Proxy Monitor
1330	06/25/1998		CPH 1392168-69	Sunbeam press release "Sunbeam Delays SEC Filing Relating to Debentures"

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
1331	12/19/1994		MSC 0120543-0120560	William Strong 1994 Evaluation
1332	04/03/1998		CPH 0639323 - 0639327	Fax from D. Fannin to W. Strong, J. Stynes, R. Kitts, and J. Tyree with attached Apr. 3, 1997 [sic] "Sunbeam Corporation Lower First Quarter Sales and Earnings Expectations; Names Lee Griffith President of Household Products Business"
1333	07/06/1998		CPH 2000771	Letter from H. Gittis to D. Fannin re Amendment to the Credit Agreement
1334	03/28/2005			Morgan Stanley 8K SEC Filing
1335 A	04/06/2005			Underlined Exhibit A used in CPH Opening Statements
1335 B	04/06/2005			List of Morgan Stanley/MAFCO Transactions used in CPH Opening Statements
1336	04/07/2005			Morgan Stanley Form 10-Q for quarterly period ended February 28, 2005
1337	03/06/1998		CPH 1422497-1422553	Sunbeam 10-K for fiscal year ended December 28, 1997
1339	00/00/0000			Binder of analyst reports used during Emery examination
1340	04/12/2005			MS production in response to Requests No. 1, 2, and 3 of CPH 4/1/05 Notice to Produce
1341	02/28/2005		MSC 0121988-89	Morgan Stanley & Co. Inc. Consolidated Statement of Operations
1342	11/29/2004			Article, "Methodology: Figuring Out Which Companies Gave Most"
1343	12/13/2004			Article, "Beyond the Balance Sheet"

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
1344	12/13/2004			Article, "Beyond the Balance Sheet: Benchmarking Benevolence"
1345	03/19/2004			Excerpt from Pre-Trial Hearing Transcript (pp. 18-26)
1346	03/09/2004			Letter from M. Brody to T. Clare re MS's pending motion for production of electronic documents
1347	03/11/2004			Letter from T. Clare to M. Brody re MS's pending motion for production of electronic documents
1348	03/15/2004			Letter from M. Brody to T. Clare re MS's pending motion for production of electronic documents
1349	03/16/2004			Letter from T. Clare to M. Brody re e-mail archive search
1350	03/17/2004			Letter from M. Brody to T. Clare re e-mail archive search
1351	03/28/2005			Printout from Kroll Ontrack
1352	00/00/0000			Printout from National Data Conversion
1353	10/31/2003			Final Judgment As To Defendant Morgan Stanley and Co. Incorporated (*SEC v. MS & Co.*, No. 03 Civ. 2948, S.D.N.Y)
1354	10/02/2002			SEC Administrative Proceeding File No. 3-10905 Release No. 46578 (*In the Matter of Dean Witter Reynolds Inc., n/k/a Morgan Stanley DW, Inc., Mark Rogers and Paul Grande*)

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
1355	04/06/2000			SEC Administrative Proceeding File No. 3-10181 Release No. 7841 (*In the Matter of Morgan Stanley & Co., Incorporated*)
1356	07/12/2004			Morgan Stanley press release, "EEOC and Morgan Stanley Announce Settlement of Sex Discrimination Suit"
1357	07/12/2004			EEOC press release, "EEOC and Morgan Stanley Announce Settlement of Sex Discrimination Suit"
1358	07/12/2004			Consent Decree (*EEOC and Schieffelin v. Morgan Stanley & Co. Inc. and Morgan Stanley Dean Witter & Co.*)
1359	04/24/1998		CPH 0014677	Sunbeam press release, "Sunbeam Corporation Announces Earnings Release Date"
1360	06/08/1998		CPH 0496259-0496260	Sunbeam press release, "Sunbeam Corporation Denounces False Accusations in Barron's Article"
1361	12/26/1985			Tombstone - Clock commemorating Morgan Stanley's role in Pantry Pride's acquisition of Revlon.
1362	02/26/1992			Tombstone - Lucite Coleman grill commemorating Morgan Stanley's role in the $83 million initial public offering of The Coleman Company's common stock.

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
1363	02/26/1992			Tombstone - Lucite Coleman lantern commemorating Morgan Stanley's role in the $83 million initial public offering of The Coleman Company's common stock.
1364	11/10/1992			Tombstone - Lucite octagon commemorating Morgan Stanley's role in the $85 million 12% senior debt offering for Flavors.
1365	03/04/1993			Tombstone - Lucite rectangle commemorating Morgan Stanley's role in $90 million offering of 10.5% Senior Subordinated Discount Notes for Consolidated Cigar Corporation.
1366	03/04/1993			Tombstone - Cylinder commemorating Morgan Stanley's role in $90 million offering of 10.5% Senior Subordinated Discount Notes for Consolidated Cigar Corporation.
1367	06/24/1994			Tombstone - Lucite television commemorating Morgan Stanley's role in NWCG Holdings Corporation's offering of $420 million Senior Secured Discount Notes.
1368	06/16/1995			Tombstone - Lucite pyramid commemorating Morgan Stanley's role in the merger of Mafco Worldwide Corporation and Consolidated Cigar Corporation with Abex Inc.

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
1369	01/07/1996			Tombstone - Lucite triangle commemorating Morgan Stanley's role in (a) Pantry Pride's acquisition of Revlon (12/26/85); (b) Pantry Pride/Revlon's sale of Norcliff Thayer (12/31/85); (c) Pantry Pride/Revlon's sale of USV Pharmaceutical and Armour Pharmaceutical (01/07/86).
1370	02/28/1996			Tombstone - Lucite rectangle commemorating Morgan Stanley's role in the $180 million initial public offering of Revlon common stock.
1371	02/28/1996			Tombstone - Lucite lipstick commemorating Morgan Stanley's role in the $180 million initial public offering of Revlon common stock.
1372	08/07/1996			Tombstone - Lucite pyramid commemorating Morgan Stanley's role in $48 million sale of Toy Biz common stock.
1373	08/16/1996			Tombstone - Lucite rectangle commemorating Morgan Stanley's role in $124 million initial public offering of Consolidated Cigar common stock.
1374	03/20/1997			Tombstone - Lucite-encased rectangle with convex front commemorating Morgan Stanley's role in the $118 million additional offering of Consolidated Cigar common stock.

CPH TRIAL EX. #	DATE	DEP. EX. #	BATES RANGE	DESCRIPTION
1375	3/30/1998		CPH 1424602 - 1424603	Sunbeam Press Release: "Sunbeam Corporation Acquires Controlling Interest In The Coleman Company"
1376	05/00/1993			Statement of Financial Accounting Standards No. 115
1377/1377A	6/8/1998		CPH 1410021 - 1410022	Fortune Magazine: "Sunbeam's Investors Draw Their Knives; Exit for Chainsaw"
1378	2/27/98	MS Dep. Ex. 172	CPH 1429974-77	

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

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

CASE NO: 2003 CA 005045 AI

PLAINTIFF'S SUPPLEMENTAL MEMORANDUM CONCERNING THE ADMISSIBILITY OF THE PURPORTED FEBRUARY 23, 1998 CONFIDENTIALITY AGREEMENT

Introduction

This Court should not permit Morgan Stanley & Co. Incorporated ("Morgan Stanley") to publish, argue, or otherwise use the supposedly exculpatory language in the purported February 23, 1998 Confidentiality Agreement. Any questioning about the purported agreement should be required to take place outside the presence of the jury as an initial matter. That is so for two basic reasons.

First, as a legal matter, exculpatory clauses are invalid under Florida law with respect to intentional torts because those clauses are against public policy. For the same reasons, Morgan Stanley's effort to exploit an exculpatory clause through the "back door" is against public policy. *See* Part I below.

Second, as a factual matter, Morgan Stanley still has not presented a sufficient factual predicate for publishing, arguing, or otherwise using the purported Confidentiality Agreement because there is no evidence that any decisionmaker at Coleman (Parent) Holdings Inc. ("CPH") ever saw the document, much less relied upon its terms. To the contrary, the testimony and contemporaneous documents confirm that no decisionmaker at CPH ever saw it. Furthermore,

even if a CPH decisionmaker had seen the document, that fact would not have mattered. By its own terms, the exculpatory clause in the purported Confidentiality Agreement is predicated on the phrase, "except as may be otherwise agreed in writing." (Ex. A at 4.) Here, Sunbeam did agree otherwise in writing. In the definitive merger agreement and at closing, Sunbeam warranted that its financials were correct and that there had not been any material adverse change in its business. In addition, the exculpatory clause in the Confidentiality Agreement expressly provides that it does not apply to information that "is or becomes generally available to the public." *Id.* at 1. Sunbeam's fraudulent statements include statements contained in Sunbeam's public financial statements, the debenture offering documents, and the March 19, 1998 press release. Thus, by its own terms, the purported Confidentiality Agreement does not apply to those misstatements. *See* Part II below.

Argument

I. Morgan Stanley's Effort To Exploit the Exculpatory Clause Violates Public Policy.

In its March 28, 2005 Order on Plaintiff's Motion In Limine No. 25, this Court held that the "exculpatory language in the purported February 23, 1998 Confidentiality Agreement" did "not bar CPH's claims for intentional torts, as a matter of law." The Order provided (Ex. B):

> The exculpatory language in the purported February 23, 1998 Confidentiality Agreement; the integration clause in the CPH Merger Agreement; and the exculpatory and nonreliance language of the Debenture Offering Memorandum do not bar CPH's claims for intentional torts, as a matter of law. This ruling is without prejudice to either party's right to argue that the clauses may be relevant for some other purpose.

Morgan Stanley now is attempting to use the exculpatory language in the purported Confidentiality Agreement for the precise purpose of exculpating itself for fraudulent misstatements. This Court should not permit that result because it violates public policy for the same reasons that exculpatory clauses themselves are invalid under Florida law.

As CPH has shown previously, Florida courts follow the blackletter principle expressed in the Restatement (Second) of Contracts: "A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy." RESTATEMENT (SECOND) OF CONTRACTS § 195(1) (1981) (emphasis added). In *Oceanic Villas, Inc. v. Godson*, 4 So. 2d 689 (Fla. 1941), the Supreme Court held that "fundamental principles of law, equity, good morals, public policy, and fair dealing" prohibit a party from "contract[ing] against liability for his own fraud." *Id.* at 690 (citing, *inter alia*, *Stokes v. Victory Land Co.*, 128 So. 408 (Fla. 1930); *Braxton v. Liddon*, 38 So. 717 (Fla. 1905)).

In the 64 years since the Supreme Court decided *Oceanic Villas*, the District Courts of Appeal consistently have held that, although exculpatory clauses sometimes may bar claims of negligence, exculpatory clauses cannot bar intentional-tort claims, including fraud claims. *See, e.g., Horizons Rehabilitation, Inc. v. Health Care & Retirement Corp.*, 810 So. 2d 958, 962 n.3 (Fla. 5th DCA 2002) ("Florida courts will not enforce releases of intentional torts, as they violate public policy" (emphasis in original)), *review denied*, 832 So. 2d 958 (Fla. 2002); *Kellums v. Freight Sales Centers, Inc.*, 467 So. 2d 816, 817 (Fla. 5th DCA 1985) ("A party may by an exculpatory clause, absolve itself of liability for negligence, but an attempt to absolve itself from liability for an intentional tort is against public policy."); *L. Luria & Son, Inc. v. Honeywell, Inc.*, 460 So. 2d 521, 523 (Fla. 4th DCA 1984) ("Fraud is an intentional tort and thus not subject to the cathartic effect of the exculpatory clauses found in contracts . . . ."); *Mankap Enters., Inc. v. Wells Fargo Alarm Servs.*, 427 So. 2d 332, 333-34 (Fla. 3d DCA 1983) (where a buyer accused a seller of intentional misrepresentation, the seller could not "contract against liability for his own fraud in order to exempt him from liability for an intentional tort"); *Goyings v. Jack & Ruth Eckerd Found.*, 403 So. 2d 1144, 1146 (Fla. 2d DCA 1981) ("[A]n attempt by a defendant to

exonerate himself from liability for an intentional tort is against public policy."); *Zuckerman-Vernon Corp. v. Rosen*, 361 So. 2d 804, 806 (Fla. 4th DCA 1978) (a contract's "exculpatory language, attempting to avoid liability for an intentional tort, is void"; "a party cannot contract against liability for his own fraud"); *Fuentes v. Owen*, 310 So. 2d 458, 460 (Fla. 3d DCA 1975) ("[A]n attempt to exempt one from liability for an intentional tort is generally declared void."); *id.* ("While the exculpatory clause would be effective to bar a count based on negligence, it would not so operate with respect to the claims asserted in the complaint based on allegations of intentional tort.").

At the March 24, 2005 hearing on Plaintiff's Motion in Limine No. 25, this Court highlighted the problems inherent in allowing Morgan Stanley to exploit an invalid exculpatory clause (Ex. C, 3/24/05 Tr. 5379-80):

> MR. HANSEN: There's no legal rule here that I'm aware that says we can't put before the jury to consider as a matter of the state of mind of the person who claims to have actually relied.
>
> THE COURT: But let me ask you this then, aren't you encouraging every Defendant in a case like this to insert these clauses that we already know public policy won't enforce, because you can still make this beneficial argument about it later?
>
> MR. HANSEN: Your Honor, I don't believe we are encouraging anybody to do anything other than standard commercial practice.
>
> THE COURT: Which is putting clauses which we know aren't enforceable in cases of fraud, make overt representations of fact and [say], hey, we can't help it if you're too stupid to know these aren't enforceable.

This Court further observed that Morgan Stanley should not be permitted to use an exculpatory clause "to backdoor an affirmative defense [of] failure to do due diligence" (*id.* at 5381-82, emphasis added):

> THE COURT: But we had this discussion probably a month ago about reasonable reliance and justifiable reliance and actual reliance. But the concern

> I expressed then, which is sort of a concern I guess I still have, is that Morgan Stanley would attempt to take the language about reasonable and justifiable reliance and out of that create an affirmative defense of failure to do due diligence. And that I have already ruled is not an affirmative defense here. It's simply not a concept that we recognize in Florida.
>
> So please understand when we talk about reliance we're talking about actual reliance and justifiable reliance, but reliance as a matter of law in Florida is not justified if you know it's untrue or its untruth is obvious. It's not there's some other thing that could make reliance unjustified.
>
> MR. HANSEN: It was my understanding, Your Honor, it would still have to be reasonable to rely.
>
> THE COURT: Please understand, all that does is allow Morgan Stanley to backdoor an affirmative defense [of] a failure to do due diligence.

At bottom, Morgan Stanley is attempting to make enforceable what Florida law declares is unenforceable. That effort is against public policy when it is proffered through the front door, and it is equally against public policy when it is proffered through the back door.

II. The Purported Confidentiality Agreement Also Is Inadmissible Because It Is Irrelevant.

A. The Exculpatory Clause in the Purported Confidentiality Agreement Is Irrelevant Because Morgan Stanley Cannot Show That Any CPH Decisionmaker Saw It or Relied upon It.

Besides the issue of public policy, Morgan Stanley has not established a sufficient factual predicate for publishing, arguing, or otherwise using the purported February 23, 1998 Confidentiality Agreement because Morgan Stanley has not presented evidence that any decisionmaker at CPH ever saw the document, much less relied upon its terms. Again, this Court already has ruled that the exculpatory clause in the purported agreement is invalid and ineffective under Florida law. The whole point of Morgan Stanley's effort to introduce the provision (despite its invalidity) is to show that decisionmakers at CPH supposedly saw it and relied upon it. In Morgan Stanley's view, because those CPH decisionmakers supposedly "didn't get a legal

opinion saying this was unenforceable" beforehand, they must have relied upon it. (Ex. C, 3/24/05 Tr. 5378.) At the prior hearing on CPH's Motion In Limine No. 25, Morgan Stanley's counsel explained Morgan Stanley's position this way (*id.*, emphasis added):

> MR. HANSEN: We say, Mr. So-and-so, you said that you relied on statement X during some conversation with this executive at Sunbeam. Didn't you know, didn't you see this integration clause in the agreement that said that whatever happened before the parties that hadn't been integrated into the final agreement, if it wasn't in the final agreement you weren't going to be relying on it, and, therefore, sir, didn't you make your decision about what to do not in reliance on any oral statement somebody made to you beforehand? And that person would be free to say, no, I didn't make it. And the jury would be free to say, somebody in his position, he's not a lawyer, he didn't get a legal opinion saying this was unenforceable, the question is what was his state of mind?

Putting aside the fact that the exculpatory clause in the purported Confidentiality Agreement does not contain language anything like that which Morgan Stanley suggests (*see* Part II.C below), the point here is that Morgan Stanley's argument is irrelevant given the facts that have been established. Unless Morgan Stanley can show that some decisionmaker at CPH did "see" the exculpatory clause (*id.*), there is no conceivable basis for relying on that invalid clause.

In Morgan Stanley's words, "the question is what was his [that is, the CPH decisionmaker's] state of mind." *Id.* Here, the "state of mind" of the CPH decisionmakers was blank on this topic because apparently none of them ever saw the invalid exculpatory clause contained in the purported agreement. The only evidence that Morgan Stanley can fall back to is the fact that the subsequent merger agreement references something called a "February 23, 1998 Confidentiality Agreement." But that is not sufficient. To establish the chain of relevance, Morgan Stanley must show that (i) a CPH decisionmaker saw the invalid exculpatory clause; (ii) the CPH decisionmaker was not aware that the exculpatory clause was invalid under Florida law; and (iii) the CPH decisionmaker knowingly went forward with the transaction under the

mistaken apprehension that neither Sunbeam nor Morgan Stanley could be held liable for any fraudulent misstatements.

Morgan Stanley has not established, and cannot establish, those links.

B. The Testimony and Contemporaneous Documents Confirm That No Decisionmaker at CPH Ever Saw or Relied upon the Exculpatory Clause.

Morgan Stanley not only has failed to establish the links showing that CPH decisionmakers relied upon the exculpatory clause, the testimony and contemporaneous documents show the opposite. For example:

- The purported Confidentiality Agreement not only is unsigned; it also has a blank on the very page containing the exculpatory clause. *See* Ex. A at 4-5 (stating that Coleman will direct questions, "as well as all bids and proposals, to _____ or persons expressly designated by him and will not contact any other Representative or employee of the Company [Sunbeam]").
- Mr. Salig, a former in-house lawyer at CPH whom this Court agrees was "not a decision maker" for CPH (Ex. D, 4/22/05 Tr. 10219) and to whom Morgan Stanley attributes the February 23 draft, testified that he did not know if the draft is the one referenced in the merger agreement because the draft is "not a complete agreement . . . it's got blank[s] . . . [I]t's not signed." (Ex. E, Salig Dep. 97.) Salig testified that he did not recall ever seeing the draft agreement. *Id.* at 89-90, 93. He further testified that it would not have been his responsibility to have a confidentiality agreement like the February 23 Draft Agreement signed, as "it would have been more ordinary for the person providing the confidential information to present their agreement for the other side to sign." *Id.* at 130. "If Sunbeam wasn't pushing it, if Sunbeam wasn't asking to have it signed, we

wouldn't have signed it." *Id.* at 99. *See also id.* at 86 (confidentiality agreements he used typically varied "depending on whether we were buying or selling").

- The March 30, 1998 chronology submitted by Coleman's outside lawyers, Wachtell Lipton, to the SEC specifically references the February 4, 1998 Confidentiality Agreement, but makes no mention of the purported February 23, 1998 Confidentiality Agreement. (Ex. F, CPH Trial Ex. 322 at 3-4.)
- The April 28, 1998 chronology submitted by Sunbeam's outside lawyers, Skadden Arps, to the SEC likewise specifically references the February 4, 1998 Confidentiality Agreement, but makes no mention of the purported February 23, 1998 Confidentiality Agreement. (Ex. G, CPH Trial Ex. 297 at 5, 10-11.)
- Neither Mr. Perelman nor any other CPH decisionmaker — or their close advisors — testified to having seen even a draft of the purported February 23, 1998 Confidentiality Agreement, much less a competed and signed version. Ex. H, Perelman Dep. 365-66 ("Q: There is a reference in the merger agreements, both the CLN Holdings merger agreement which is Morgan Stanley Exhibit 93 and in the Coleman Merger Agreement, for shorthand, which is Morgan Stanley Exhibit 117 to a second confidentiality agreement which is dated February 23, 1998. Did you ever see that document? A: I don't believe so"); Ex. I, Gittis Dep. 60 ("Q: Did you review the confidentiality agreements between the parties that are identified in section 6.7 of the exhibit? MS 93? A: I have no recollection of seeing the confidentiality agreements in this matter."). Mr. Maher and Mr. Levin were shown MS 133 (the February 4 Confidentiality Agreement), but testified that they did not recall seeing it. Ex. J, Maher Dep. 238-39; Ex. K, Levin Dep. 172-

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73. They were then asked whether it was "customary" for parties in a transaction such as the Coleman-Sunbeam transaction to exchange confidentiality agreements and agreed that it was. Ex. J, Maher Dep. 239; Ex. K, Levin Dep. 173. Neither was shown or asked about the February 23 Draft Agreement.

- Other non-decisionmakers also said they did not recall ever seeing the purported agreement. Ex. L, Schwartz Dep. 139 ("Q: Have you ever seen this document [MS 134] before in any form? This one is not — I will tell you it is not signed. Have you seen this document before? A: No"); Ex. M, Shapiro Dep. 119-20 ("Q: Is MS-134 a draft of the confidentiality agreement referenced in paragraph 7.2 of Exhibit 117 that we discussed earlier? A: I have no idea Q: Well, you read it. Does it appear to be, sir, a draft of it? A: I don't know, because it's not signed"); Ex. N, Slovin Dep. 156 ("Q: Have you ever seen MS 134 [the February 23 Draft Agreement] before today? A: I have no recollection").
- Furthermore, there was no one at Coleman who could have signed or assented to the confidentiality agreement on behalf of CPH. For example, Paul Shapiro -- who signed the public merger agreement on behalf of Coleman -- was never an officer or director of CPH or of MacAndrews & Forbes.

In short, there is no evidence that any CPH decisionmaker relied upon the exculpatory clause upon which Morgan Stanley's evidentiary theory is premised. The facts are to the contrary.

C. Morgan Stanley's Theory Also Is Contradicted by the Purported Confidentiality Agreement's Plain Terms.

Even if a CPH decisionmaker had seen the invalid exculpatory clause in the purported February 23, 1998 Confidentiality Agreement, the clause still is irrelevant because its language does not advance Morgan Stanley's theory.

First, the exculpatory clause is predicated on the phrase "except as may otherwise be agreed in writing." The purported agreement provided (Ex. A at 4, emphasis added):

> You [Coleman] understand that, except as may be otherwise be agreed in writing, neither the Company [Sunbeam] nor its Representatives make any representation or warranty as to the accuracy or completeness of the Evaluation Material. You agree that neither the Company nor its Representatives will have any liability to you or any of your Representatives resulting from the use of the Evaluation Material by you or your Representatives. You agree that, except as provided in this Agreement or any definitive written agreement, unless and until a definitive written agreement between the Company and you with respect to a Transaction has been executed and delivered, neither the Company nor you will be under any legal obligation of any kind whatsoever with respect to the Evaluation Material or a possible Transaction.

But here, Sunbeam did agree otherwise in writing. Sunbeam agreed otherwise in writing when, in the definitive merger agreement and at closing, Sunbeam warranted that its SEC filings were correct, that its financials were correct, and that there had not been any material adverse change in its business. In other words, given the exculpatory clause's plain language, a CPH decisionmaker could not have believed that the exculpatory clause was effective. By its terms, the clause was superseded by subsequent written agreements.

Second, the exculpatory clause disclaimed "any legal obligation of any kind whatsoever" regarding the information being provided "unless and until a definitive written agreement between the Company [Sunbeam] and you [Coleman] with respect to a Transaction has been executed and delivered." (Ex. A at 4, emphasis added.) Whenever Morgan Stanley quotes the

exculpatory clause, Morgan Stanley omits the last sentence of the paragraph containing those terms. That sentence provided (*id.*, emphasis added):

> You agree that, except as provided in this Agreement or any definitive written agreement, unless and until a definitive written agreement between the Company and you with respect to a Transaction has been executed and delivered, neither the Company nor you will be under any legal obligation of any kind whatsoever with respect to the Evaluation Material or a possible Transaction.

That provision can have only one meaning. If a "definitive written agreement" is executed between the parties, then Sunbeam will be under a "legal obligation" regarding "the Evaluation Material" — namely, the legal obligation not to tell falsehoods about Sunbeam's finances. Here, a definitive written agreement (the merger agreement) was executed and delivered between Sunbeam and CPH. As Morgan Stanley observes, the definitive written agreement provides that the Confidentiality Agreement "shall remain in full force and effect." (Ex. O § 12.5.) Morgan Stanley contends that "full force and effect" is the full force and effect of the Confidentiality Agreement as written. But as written, the exculpatory clause only exculpates Sunbeam "unless and until" there is a definitive agreement. Therefore, even if a CPH decisionmaker had seen the exculpatory clause (which none did), that decisionmaker could not have believed it absolved Sunbeam from liability for fraud.

Third, the purported Confidentiality Agreement expressly provides that it does not apply to information that "is or becomes generally available to the public." (Ex. A at 1.) The purported agreement specifically excludes that information from the definition of "Evaluation Material" (*id.*):

> The term "Evaluation Material" does not include information which (i) is or becomes generally available to the public other than as a result of a disclosure by you [Coleman] or your representatives, (ii) was available to you on a non-confidential basis prior to its disclosure to you by the Company or its

> Representatives or (iii) becomes available to you on a non-confidential basis from a source other than the Company or its Representatives . . . .

Here, Sunbeam's fraudulent statements include statements contained in Sunbeam's public financial statements, the debenture offering documents, the March 19, 1998 press release, and analyst reports. All of those materials were "generally available to the public other than as a result of a disclosure" by Coleman. Thus, by its own terms, the exculpatory clause in the purported Confidentiality Agreement does not apply to those misstatements. The clause is simply irrelevant.

Conclusion

For the foregoing reasons, this Court should not permit Morgan Stanley to publish, argue, or otherwise use the purported February 23, 1998 Confidentiality Agreement. Any questioning about the purported agreement should be required to take place outside the presence of the jury as an initial matter.

Dated: April 26, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: Jerold S. Solovy /JTS
One of Its Attorneys

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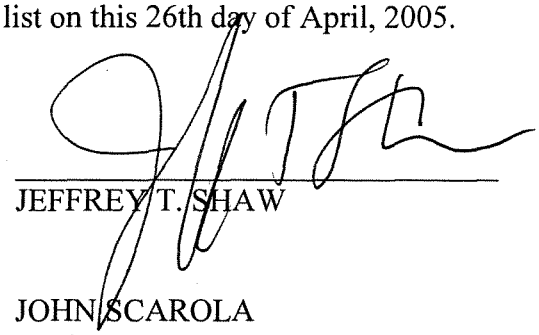
(561) 686-6300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 26th day of April, 2005.



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10972

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

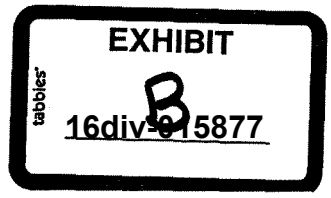
ORDER ON PLAINTIFF'S MOTION IN LIMINE NO. 25 FOR A FINDING AS A MATTER OF LAW THAT THE EXCULPATORY AND INTEGRATION CLAUSES RAISED BY MORGAN STANLEY ARE INEFFECTIVE TO BAR INTENTIONAL-TORT CLAIMS

THIS CAUSE came before the Court March 24, 2005 on Plaintiff's Motion in Limine No. 25 for a Finding as a Matter of Law that the Exculpatory and Integration Clauses Raised by Morgan Stanley are Ineffective to Bar Intentional-Tort Claims, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted. The exculpatory language in the purported February 23, 1998 Confidentiality Agreement; the integration clause in the CPH Merger Agreement; and the exculpatory and nonreliance language of the Debenture Offering Memorandum do not bar CPH's claims for intentional torts, as a matter of law. This ruling is without prejudice to either party's right to argue that the clauses may be relevant for some other purpose.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 30 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge



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Washington, DC 20036

IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 47

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Thursday, March 24, 2005

Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

9:30 a.m. to 12:00 p.m.

We say, Mr. So-and-so, you said that you relied on statement X during some conversation with this executive at Sunbeam. Didn't you know, didn't you see this integration clause in the agreement that said that whatever happened before the parties that hadn't been integrated into the final agreement, if it wasn't in the final agreement you weren't going to be relying on it, and, therefore, sir, didn't you make your decision about what to do not in reliance on any oral statement somebody made to you beforehand? And that person would be free to say, no, I didn't make it. And the jury would be free to say, somebody in his position, he's not a lawyer, he didn't get a legal opinion saying this was unenforceable, the question is what was his state of mind?

THE COURT: You don't see any public policy indications of that?

MR. HANSEN: Not a whit, Your Honor, there has to be actual reliance. Again, I'm not aware of a law that disentitles people to argue reliance. Again, we'd be in the land of punishing Morgan Stanley because the Court has made a --

THE COURT: No. No. This is not some heightened punishment. The punishment -- and, frankly, it's not even punishment -- is that certain findings of fact have been made. There may be some legal determents that flow from those findings of fact, but the legal determinations are not heightened punishment.

MR. HANSEN: With all due respect, if you find fraud by Morgan Stanley, you then use that finding to say we can't argue reliance because the fraud determines that they didn't really rely on these documents, that is another punishment imposed as a result of the first.

THE COURT: I would disagree with that legal analysis.

MR. HANSEN: I respectfully disagree with the Court. But in terms of the issue before the Court were you to find that for some reason there's a public policy exception to actual reliance such that --

THE COURT: No.

MR. HANSEN: There's no legal rule here that I'm aware that says we can't put before the jury to consider as a matter of the state of mind of the person who claims to have actually relied.

THE COURT: But let me ask you this then, aren't you encouraging every Defendant in a case like this to insert these clauses that we already know public policy won't enforce, because you can still make this beneficial argument about it later?

MR. HANSEN: Your Honor, I don't believe we are encouraging anybody to do anything other than standard commercial practice.

THE COURT: Which is putting clauses which we know aren't enforceable in cases of fraud, make overt representations of fact and, hey, we can't help it if you're too stupid to know these aren't enforceable.

MR. HANSEN: With all due respect, that is not a fair characterization of our argument.

As a matter of commercial practice, people know what they're responsible for and they routinely have these kind of clauses. So they go forward with what people are relying on, not what it is they're not. I don't believe that the element of reasonable reliance is wiped out in fraud cases, I believe quite the contrary.

THE COURT: Actual reliance is what we're talking about.

MR. HANSEN: Your questions to me, Your Honor, would suggest to me that there shouldn't be such elements because how could the wrongdoer challenge the reliance of the victim, but that's every fraud case that's ever been tried, Your Honor.

THE COURT: But we had this discussion probably a month ago about reasonable reliance and justifiable reliance and actual reliance. But the concern I expressed then, which is sort of a concern I guess I still have, is that Morgan Stanley would attempt to take the language about reasonable and justifiable reliance and out of that create an affirmative defense of failure to do due diligence. And that I have already ruled is not an affirmative defense here. It's simply not a concept that we recognize in Florida.

So please understand when we talk about reliance we're talking about actual reliance and justifiable reliance, but reliance as a matter of law in Florida is not justified if you know it's untrue or its untruth is obvious. It's not there's some other thing that could make reliance unjustified.

MR. HANSEN: It was my understanding, Your Honor, it would still have to be reasonable to rely.

THE COURT: Please understand, all that does is allow Morgan Stanley to backdoor an affirmative defense a failure to do due diligence.

MR. HANSEN: Your Honor, you've given me a hypothetical of somebody said you're going to get a million dollars because a balloon is going to float down from heaven and put a gold bullion under your car. You wouldn't have to do due diligence to reject it as facially implausible. Even if you actually relied on it, I believe there would be a defense for somebody saying that's not a reasonable reliance.

THE COURT: Right, because its falsity was obvious.

MR. HANSEN: No reasonable person would have relied.

THE COURT: Its falsity was obvious or you knew it was false. But anyway, we're digressing.

MR. HANSEN: Back to my point, Your Honor, I wasn't trying to go back to the prior

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

VOLUME 83

MORGAN STANLEY & CO., INC.,

Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Friday, April 22 2005
2:00 p.m. - 5:32 p.m.

EXHIBIT
tabbies
D
16dfv-015885

look at it or someone in a decision-making capacity knew it was there.

MR. GORSUCH: Here's what I know the evidence would prove from having watched too many bleary-eyed depositions. Mr. Salig, MAFCO employee, produces this out of his own word processor. You read it. He knew what was going on. He's the one who generated the February 4th one himself, admits that and then generated February 23rd one.

THE COURT: But did he provide any information to any of decision makers?

MR. BRODY: No.

MR. GORSUCH: He's a decision maker.

THE COURT: He's not a decision maker.

MR. GORSUCH: Barry Schwartz then signs the document on the -- in the deal. He's binding CPH. He's signing for CPH a merger agreement that says I know these things are out there; I know these things are out there. It's referenced twice in that document, Section 6.7 and Section 12. The notion that these very sophisticated people whose own lawyers generated the documents for them and then signed the document acknowledging its existence somehow can

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA
----------x

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. Case No. CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendants.

----------x

RONALD O. PERELMAN

New York, New York

Thursday, November 18, 2004

Reported by: Steven Neil Cohen, RPR

Job No. 167564

EXHIBIT
tabbies
H
1:03-cv-015887

Q. Did you have any involvement in the drafting of the confidentiality agreements that are referenced in the merger agreements?

A. No.

Q. Did you ever see them?

A. I don't believe so.

Q. Let me show you just one of them and then if you haven't seen them we will move on to another topic.

Let me show you what has been previously marked as Morgan Stanley Exhibit 133.

The reporter has handed you what has been marked previously as Morgan Stanley 133.

Do you have that in front of you?

A. Yes.

Q. This document was signed by Mr. Shapiro and countersigned by Mr. Fannin. Have you ever seen it before?

A. No.

Q. Then you can hand that back to me.

There is a reference in the

merger agreements, both the CLN Holdings merger agreement which is Morgan Stanley Exhibit 93 and in the Coleman Merger Agreement, for shorthand, which is Morgan Stanley Exhibit 117 to a second confidentiality agreement which is dated February 23, 1998.

Did you ever see that document?

A. I don't believe so.

Q. Let's move forward into February. I want to move forward into February of 1998.

Did you participate in a meeting or meetings that took place on February 23, 1998? If it helps you you can refer to MS 75.

A. I don't believe so but I can't recall.

Q. I would like to show you now a document previously marked as Morgan Stanley Exhibit 84.

Do you have that exhibit in front of you?

A. Yes.

Q. Without regard to the handwriting

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

VS.

MORGAN STANLEY & CO., INC.,

Defendant.

VIDEOTAPED DEPOSITION
OF HOWARD GITTIS
New York, New York
Friday, November 19, 2004

Reported by:
Robert X. Shaw, CSR
CSR NO. 817
JOB NO. 167570

EXHIBIT
tabbies
I
16civ-015890

was signed?

A. I have no recollection of whether I did or not.

Q. Would it be your practice to do so?

A. Sometimes, and sometimes not.

Q. Did you review the confidentiality agreements that are referred to in paragraph, if you want to look at this -- it is paragraph 6.7 of the document? On page 18.

A. What's the question?

Q. Did you review the confidentiality agreements between the parties that are identified in section 6.7 of the exhibit? MS '93.

A. I have no recollection of seeing the confidentiality agreements in this matter.

Q. In a transaction of this nature would it be customary, in your view, based on the many deals that you have participated in, to have confidentiality agreements between the parties?

MR. SOLOVY: Objection to the form of the question.

A. Sometimes -- mainly yes, but not always.

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA
----------x

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. Case No. CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendants.

----------x

JAMES ROBERT MAHER

New York, New York

Wednesday, November 3, 2004

Reported by: Steven Neil Cohen, RPR

Job No. 166520

EXHIBIT
J
16div-015892

A. I don't know that they weren't.
Q. Do you know that they were is my question.
Do you have personal knowledge of them, the people you have identified, doing this work?
A. Well, Levin was certainly doing work on the -- on synergies which is certainly part of the due diligence effort.
Q. Anything else?
A. Not that I can think of at the moment.
Q. Let's move forward and there is a reference to Sunbeam entering into a confidentiality agreement with Coleman on or about February 4, 1998.
Do you see that entry?
A. Yes.
Q. Have you seen the confidentiality agreement?
A. I don't recall.
Q. Let me show you a copy of what has been identified as the confidentiality agreement and ask you to please take a moment and look at it.

I have handed the witness what has been marked as MS 133.

Have you had an opportunity to look at MS 133?

A. I have, yes.

Q. Have you ever seen it before?

A. I don't recall seeing it, no.

Q. In your experience as an investment banker is it customary for parties in a transaction being negotiated such as the Coleman-Sunbeam transaction to exchange confidentiality agreements?

A. Generally.

Q. You can hand that back to me.

By the time of the exchange of the confidentiality agreements had you learned of Sunbeam's results for the fourth quarter of 1997?

MR. MARKOWSKI: Object, lack of foundation, mischaracterizes the record. There has been no testimony that there was in fact an exchange of confidentiality agreements.

BY MR. BEMIS:

Q. Let me rephrase the question.

IN THE CIRCUIT COURT

OF THE FIFTEENTH JUDICIAL CIRCUIT

IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,	)	
Plaintiff,	)	No. 03 CA-005045 A1
vs.	)	
MORGAN STANLEY & CO. INCORPORATED,	)	
Defendant.	)	

DEPOSITION OF JERRY W. LEVIN

New York, New York

Wednesday, December 1, 2004

Reported by:
ANDREA L. KINGSLEY, RPR
CSR NO. 001055
JOB NO. 167827

EXHIBIT
tabbies
K
16dif-015895

Q. Does this help you remember the meeting at all because if it doesn't, I will just move on.

A. I simply don't remember this meeting.

Q. Set that exhibit aside. We are done with January 29 for right now.

Did you see at any time before February 19 of 1998 when you got this phone call, did you see the confidentiality agreement that was executed between Sunbeam and the Coleman Company?

MR. MARKOWSKI: Objection to the form.

A. I don't recall.

Q. I will show you the document. Maybe that will help. I only have one clean copy of that one. This is MS 133.

I've handed you what has been marked as Morgan Stanley Exhibit 133. Do you have it in front of you?

A. Yes.

Q. Have you ever seen this document before?

A. I can't recall. I might or might

not have.

Q. In all of the merger transactions or acquisition transactions that you've been involved with, which I think you said was at one point in excess of 300, have you seen confidentiality agreements exchanged among the parties?

A. Yes.

Q. Is it customary in your view, in mergers and acquisitions transactions, for the parties to exchange a form of confidentiality agreement?

MR. MARKOWSKI: Objection to the form. Lack of foundation.

A. Can you repeat the question?

Q. In your experience in mergers and acquisitions as you described your experience, is it customary for the parties to exchange confidentiality agreements?

MR. MARKOWSKI: Objection to the form. Lack of foundation.

A. Yes.

Q. Is it customary, in your experience, for the parties to exchange cross or mutual confidentiality agreements?

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

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,
vs. Case No: CA 03-5045 AI
MORGAN STANLEY & CO, INC.,
Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff
vs. Case No: CA 03-5165 AI
MACANDREWS & FORBES HOLDINGS, INC.,
Defendant

DEPOSITION OF BARRY SCHWARTZ
FRIDAY, JUNE 25, 2004
9:30 A.M.

COPY

EXHIBIT
tabbies
16div-015898

B. Schwartz

Have you ever seen this document before in any form? This one is not -- I will tell you it is not signed. Have you seen this document before?

A No.

Q Do you know who prepared it?

A No. It's on a Sunbeam letterhead or seeming Sunbeam letterhead.

Q It says "Sunbeam" on the top and no emblem.

A Fair point.

Q And if you look at the type on MS 133 and 134 and one having been copied more than one time, would you agree with me that they are identical in terms of language in the first couple of paragraphs?

A Are you asking me about typeface?

Q Let's start with typeface.

A I'm not a type face expert.

Q I don't know what that is, but we have enough common sense --

A They look different to me.

Q Is the language virtually identical on the first page? It's not

IN THE FIFTEENTH JUDICIAL CIRCUIT

IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Case No: CA 03-5045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

MORGAN STANLEY SENIOR FUNDING, INC.,
Case No: CA 03-5165 AI

Plaintiff,

vs.

MACANDREWS & FORBES HOLDINGS, INC.,

Defendant.

DEPOSITION OF PAUL E. SHAPIRO

Tuesday, June 8, 2004

New York, New York

Reported By:

LINDA J. GREENBERG

JOB NO. 161095

EXHIBIT
tabbies 16div 5900

MR. BRODY: Objection.

Argumentative.

Q. Let me show you what's been marked as MS-134.

(Exhibit MS-134 for identification, Draft document).

Q. Please look at MS-134 and tell me when you are done.

MR. BRODY: Do you want him to read it or just look at it?

MR. BEMIS: We don't need to be contentious. I'm doing the same thing I do with everyone. I'm giving him the courtesy of looking at the exhibit and letting me know when he's prepared to answer a question.

If he needs more time after I ask a question, I will, of course, extend to him the courtesy of as much time as he needs to look at it.

A. Yes. I have MS-134 in my hand.

Q. Is MS-134 a draft of the confidentiality agreement referenced in paragraph 7.2 of Exhibit 117 that we

discussed earlier?

A. I have no idea.

Q. Well, you read it. Does it appears to be, sir, a draft of it?

A. I don't know, because it's not signed.

Q. I understand it's not signed and you can't answer it -- let me ask you, can you compare, if you like, MS-134 and the previously identified MS-133, and tell me if there is any apparent difference between the two documents other than, for example -- I'm not suggesting what your answer should be -- the name was left blank on page 4, whereas I believe in MS-133, I believe Mr. Jerry Levin's name is filled in.

A. I mean, it appears to be a draft that somebody prepared of an agreement that is similar to the -- to MS-133.

Q. Did The Coleman Company or one of its affiliates in the MacAndrews & Forbes group of companies send this

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

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED.,
Defendant.

MORGAN STANLEY'S OPPOSITION TO CPH'S AMENDED WITNESS DISCLOSURE AND REPLY IN SUPPORT OF ITS MOTIONS TO QUASH

Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully submits this brief to oppose Coleman (Parent) Holdings, Inc.'s ("CPH") Amended Trial Witness Disclosure and to reply to CPH's oppositions to Morgan Stanley's motions to quash. In the Amended Witness Disclosure (filed on April 22, 2005), CPH seeks to add Donald G. Kempf, Jr. — the Chief Legal Officer of Morgan Stanley's parent company — as a witness for Phase I of the trial. The subpoena that Morgan Stanley has moved to quash seeks to compel Mr. Kempf to appear as a witness at trial and to produce various documents. Finally, the Notices to Produce seek the time records and related information of Morgan Stanley's former and current trial counsel, including Kirkland & Ellis, Kellogg Huber, and Shearman & Sterling.

It is now clear that CPH's fusillade of mid-trial motions, notices, and subpoenas all serve a single goal — to put Morgan Stanley's current lead *counsel* on trial. In particular, CPH urges that lead trial counsel's representation that he has not had sufficient time properly to prepare for trial is "another instance of litigation misconduct" that it may want to place before the jury. Thus, as Phase I nears an end, CPH seeks to support its notice to produce law firm time records by urging that the records are relevant to Mark Hansen's preparedness and the extent to which he

has received support from former lead counsel (Kirkland & Ellis) as well as from other lawyers. *See* CPH's Response in Opposition to Morgan Stanley's Motion To Quash Notice to Produce 1-4 (Apr. 22, 2005). To justify the twelfth-hour addition of Mr. Kempf as a trial witness for Phase I for the trial, CPH urges that it needs to call him to "testify about Kirkand & Ellis's true role in continuing to represent Morgan Stanley" and the role of "Shearman and Sterling." CPH's Amended Trial Witness Disclosure at 1 (Apr. 22, 2005). Finally, and most telling of all, CPH's defense of the trial subpoena duces tecum it served on Mr. Kempf virtually abandons all of the rationales it previously set forth. Instead, it provides as its first and primary rationale its desire that he testify, "during Phase I of the trial, relating to Morgan Stanley's repeated assertions . . . that Kirkland & Ellis no longer is actively assisting in Morgan Stanley's defense and its 'new' counsel from Kellogg Huber is operating at a severe disadvantage in trying the case." CPH's Opposition to Morgan Stanley's Motion to Quash Trial Subpoena Served on Donald J. Kempf, Jr., at 1-2 (Apr. 22, 2005). Those assertions, CPH continues, amount to "litigation misconduct" that should also be presented to the jury during Phase II. *Id.* at 2-3.[1]

CPH's effort to put Morgan Stanley's current lead counsel on trial is unfounded, improper, and exceeds the bounds of professionalism. There is no basis for conducting a mini-trial before the jury or the Court, mid-trial, on the state of Mr. Hansen's preparedness. Any such proceedings would only distract Mr. Hansen from his current efforts to prepare and distract the Court and jury from what is already a three-week-long trial. Nor is there any basis for discovery or for calling Mr. Kempf as a witness in support of such an effort.

---

[1] CPH's remaining justifications for seeking Mr. Kempf's testimony are addressed *infra* pp. 7-10.

I. CPH's Notice To Produce Attorney Records Should be Quashed

A. Mr. Hansen's Truthful Assertions Of Unpreparedness Do Not Constitute Litigation Misconduct

There is no litigation misconduct here to justify CPH's Notice to Produce. CPH's contention that Mr. Hansen has misled or attempted to influence the jury with statements about his preparedness is without foundation. With one unobjected-to exception, every representation at trial about underpreparedness it cites was made to the Court, outside the jury's presence. During opening statement, Mr. Hansen — without any contemporaneous objection from CPH — did state once that he "came into the case somewhat at the last minute," and that he was "here to do the best [he] can to represent Morgan Stanley." 4/6/05 Tr. at 7109. That one passing reference hardly provides grounds for an accusation of litigation misconduct, much less an effort to place counsel on trial before the jury.[2] Indeed, the *Court itself* echoed Mr. Hansen's statement, telling the prospective jurors during *voir dire* — again, without objection by CPH — that the lawyers "who previously served as lead counsel to Morgan Stanley" had withdrawn and that Mr. Hansen would assume the lead even though, "[b]efore the Court's ruling," he "worked on this case in a less substantial capacity." 3/30/05 Tr. at 5823.

Moreover, CPH provides no basis for its charge that Mr. Hansen's protestations to the Court are anything less than genuine. While CPH claims it has reason to believe that Morgan Stanley "is enjoying the full assistance and support of attorneys and staff from Kirkland & Ellis,"

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[2] In its Supplemental Memorandum In Opposition To Morgan Stanley's Motion To Quash Notice to Produce, filed just yesterday, CPH cites two instances in *voir dire* where Mr. Hansen referred to the fact that he was Morgan Stanley's "new lawyer." *Id.* at 3-4. It is difficult to see how this obviously true statement, which was necessary to explain to prospective jurors Mr. Hansen's sudden appearance as lead trial counsel, could possibly be called "litigation misconduct." Again, CPH *never* objected. And again, as noted above, the Court itself commented to the potential jurors on Mr. Hansen's sudden appearance as lead counsel.

it cites *nothing* but its own say-so to support that claim. CPH Response in Opposition to Morgan Stanley's Motion to Quash Notice to Produce at 3. By contrast, in support of Morgan Stanley's motion for a continuance, Mr. Hansen testified under oath that he was not prepared to serve as lead trial counsel. 3/23/05 Tr. at 5203. Later, he represented as an officer of the court that Kirkland & Ellis's participation was strictly circumscribed; he testified that Kirkland & Ellis left a skeleton crew behind; and he explained the level of assistance Kirkland & Ellis was providing. This Court denied the motion for a continuance. 3/28/05 Tr. at 5489:5-5493:5, 5496:3-5499:25, 5509:20-24. Despite having opposed the continuance motion and prevailed in advance of trial, CPH now proposes that there be *new* discovery, a *new* hearing on Mr. Hansen's preparation efforts, and perhaps testimony on the issue before the jury three weeks into trial. To even state the proposal reveals its absurdity. The motion for continuance was denied following an evidentiary hearing *before* trial. There is no motion now pending, and no basis for a hearing.

B. CPH's Assertions Regarding New Lawyers Are Irrelevant To Its Claim of Litigation Misconduct And Thus Cannot Support Its Notice to Produce

CPH's claims about additional new lawyers being provided from Shearman & Sterling are likewise irrelevant to its allegation of litigation misconduct by Mr. Hansen. To the extent new lawyers from Shearman & Sterling – lawyers with limited prior involvement in the case, minimal familiarity with the legal issues, and little knowledge of the documents – are lending assistance, that merely proves that former lead counsel Kirkland & Ellis is not providing "the full assistance and support" CPH posits. If Kirkland & Ellis were providing such assistance, there would be no reason for additional lawyers from an entirely different law firm to fill the gap on the eve of or in the middle of trial. In any event, as Mr. Hansen has pointed out, the number of lawyers thrown at a case is irrelevant: "I could have the Red Army sitting over in barracks someplace, but I'm the one that has to stand up and address Your Honor." 4/11/05 Tr. at 7500.

"To ask a lawyer to master this case" – a case with testimony from more than 80 potential witnesses, 90 depositions, and more than 700 potential trial exhibits – in a matter of days or even weeks is simply "impossible." *Id.*

C. Airing CPH's Spurious Claims Of Litigation Misconduct By Mr. Hansen Before The Jury Would Jeopardize The Trial

Were CPH's accusations permitted to be placed before the jury, counsel would be required to mount a full defense. Mr. Hansen would have to defend his statements, taking the stand to explain precisely how one prepares for trial, the amount of preparation he was permitted here, and the level of support he received. The lawyers attempting to assist Mr. Hansen might need to testify to the circumstances of their participation. Opposing counsel might be required to produce documents and to testify, either to substantiate their claims of Kirkland & Ellis support or to provide the jury with a reasonable benchmark of how long it takes, and how many attorneys are required, to conduct a complex trial like this one. The prospect of a mini-trial on trial preparation is by itself unsettling (although the truth would only help Morgan Stanley). But such a mini-trial to put Morgan Stanley's lawyers on trial would likely derail the main event. Mr. Hansen cannot simultaneously appear as a witness in this case to defend his own integrity against accusations of misconduct while effectively representing his client in this matter as an attorney. Lawyers are not supposed to be counsel and witness in the same case. As the Fourth District has explained: "In order to testify on the merits, arrangements must be made to withdraw from the case." *Hubbard v. Hubbard*, 233 So. 2d 150, 152 (1970); *id.* ("a lawyer cannot be a material witness for his client's cause if he remains in the case"); *id.* ("If the urgency to testify arises after the trial starts, other counsel should take charge or if that cannot be done with convenience to the parties, a continuance should be granted after a full disclosure to the court unless it is shown that prejudice or injustice can be avoided."). Because CPH's proposed attack on Mr. Hansen's

veracity and integrity before the jury would turn Morgan Stanley's counsel from attorney into witness, it could well require withdrawal, a mistrial, and a continuance.

D. CPH's Notice To Produce Is Untimely

The notice to produce documents regarding Morgan Stanley's legal team is a grossly untimely discovery request. As detailed in Morgan Stanley's motion to quash the Kempf subpoena, discovery in this case closed on November 23, 2004. *See* Morgan Stanley's Motion to Quash Kempf Subpoena at 5 (attached as Exh. A). CPH must not be allowed to circumvent this Court's discovery deadline, without prior leave, for the sole purpose of seeking internal legal documents that were relevant, if at all, to the motion for continuance resolved a month ago.

E. CPH's Notice To Produce Seeks Privileged Documents

Last, but not least, the documents sought by CPH — attorney time records and the like — are plainly protected by the attorney-client and the work-product privileges. "In general, these doctrines protect billing records from discovery by an adversarial party in a lawsuit." *Jacob v. Burton*, 877 So. 2d 935, 936 (Fla. 2d DCA 2004). CPH's document request does not fall within either of the cases it misleadingly cites, where billing records were necessary to determine attorney's fees to be awarded. *See Finol v. Finol*, 869 So. 2d 666, 666 (Fla. 4th DCA 2004); *Brown Distributors of West Palm Beach v. Marcel*, 866 So. 2d 160, 161 (Fla. 4th DCA 2004). In contrast to those cases, CPH seeks time records only to further its spurious and untimely litigation-misconduct accusations against Morgan Stanley.

II. The Court Should Quash CPH's Trial Subpoena Of Mr. Kempf And Disallow CPH's Attempt To Amend Its Witness List To Add Mr. Kempf

A. CPH's Untimely Trial Subpoena And Witness List Amendment Seek To Violate Attorney-Client Privilege And In Any Event Provide No Justification For Calling Opposing Counsel In The Midst Of Trial

CPH's belated effort to add Mr. Kempf as a witness — in either Phase I or Phase II of this trial — fares no better. As detailed in the motion to quash, this Court required the parties to designate trial witnesses by January 10, and to submit a *reduced* list by March 26th. *See* Motion to Quash Kempf Subpoena at 4-5. Thus, Mr. Kempf's addition to the list is improper. Moreover, no legitimate basis exists to compel Mr. Kempf's testimony at either stage. For the reasons explained above, the notion that Mr. Kempf should be compelled to testify before the jury on who is helping Mr. Hansen conduct the defense borders on the absurd. And with respect to Phase II, there is simply nothing about which Mr. Kempf could meaningfully testify. *See id.* at 5-12.

Indeed, CPH's primary response with respect to Phase II is to blithely reassert the already discredited grounds set forth in the subpoena itself. For example:

- CPH reasserts the claim that Mr. Kempf could testify about Morgan Stanley's failure to comply with the March 2, 2005 Order. CPH Response in Opposition To Motion To Quash at 3. But CPH ignores the fatal defects in that theory set forth in the Motion to Quash—that Mr. Kempf had no role in and thus has no personal knowledge of the efforts to comply with that order; that the Court has already foreclosed the introduction of any evidence on that issue other than the statement of litigation misconduct drafted by the Court itself; and that any showing would in any event be limited to instances where the discovery failures were intended to hide evidence, proof of which CPH hasn't provided. *See* Motion to Quash Kempf Subpoena at 6-8.

- CPH reasserts that Mr. Kempf can testify about representations concerning e-mail production issues in other litigation. CPH Response in Opposition To Motion To Quash at 3. But CPH ignores cases holding that allegations of misconduct in other lawsuits are inadmissible. Motion to Quash Kempf Subpoena at 9.

- CPH claims that Mr. Kempf can testify about criminal proceedings in Italy regarding William Strong. CPH Response in Opposition To Motion To Quash at 3. But CPH

ignores the undisputed fact that Mr. Kempf's knowledge of that issue is all protected by attorney-client privilege. Motion to Quash Kempf Subpoena at 9-10.

- CPH claims that Mr. Kempf can testify about alleged efforts to blame falsely Kirkland & Ellis for the discovery failures. CPH Response in Opposition To Motion To Quash at 3. But CPH ignores, *yet again*, Morgan Stanley's response—that it has stated in open court that it will not blame Kirkland & Ellis, and that any supposed effort to blame Kirkland & Ellis has no conceivable relationship to whether Morgan Stanley should pay punitive damages in a case where it is accused of committing fraud. Motion to Quash Kempf Subpoena at 8-9.

Indeed, CPH does not dispute that the subpoena improperly calls almost exclusively for privileged materials. Motion to Quash Kempf Subpoena at 11-13. And it makes no effort to dispute the undue burden the subpoena imposes. *Id.* at 13-14. It provides no answer to these arguments because there is none.

That silence would be inexcusable and fatal to CPH's position with respect to any witness. But it is particularly inexcusable given that CPH seeks to call defendant's counsel — the Chief Legal Officer of Morgan Stanley's parent company — in the midst of trial, an "extraordinary" and highly disfavored "step which will rarely be justified." *State v. Donaldson*, 763 So. 2d 1252, 1254 (Fla. 3d DCA 2000); *accord Scottsdale Ins. Co. v. Camara De Comercio Latino-Americana De Los Estados Unidos, Inc.*, 813 So. 2d 250, 252 (Fla. 3d DCA 2002). CPH's response that two of its attorneys, Messrs. Schwartz and Fasman, are potential witnesses in this case is wholly unpersuasive. Those attorneys are fact witnesses as to events that occurred in 1998 (in one case, the transaction itself; in another, CPH's e-mail retention). Moreover, *CPH* made Mr. Fasman a witness by designating him as the Rule 1.310(b)(6) witness on the e-mail issues. *See* Letter From CPH To Morgan Stanley Designating Corporate Deponents (Jan. 6, 2004); *see also* CPH's Witness List for Trial at 1 (filed Jan. 10, 2005) (listing Mr. Fasman). And *CPH* initially listed Mr. Schwartz as a witness, which is not surprising since he was CPH's lead lawyer on the transaction and actually signed the merger agreement on CPH's behalf. CPH's

Witness List for Trial at 2; *see also* CPH's Response to Morgan Stanley's First Set Of Interrogatories at 6 (filed Sept. 2, 2003) (designating Mr. Schwartz as a person with "knowledge of the facts alleged in the Plaintiff's Complaint"). Mr. Kempf, in contrast, has *no* personal knowledge of the events properly at issue in this case. He joined Morgan Stanley long after the transactions at issue took place. Morgan Stanley has never designated him as a witness or identified him as a person with relevant knowledge.

Likewise CPH errs in claiming that the subpoena is no distraction because Mr. Kempf is not "actively involved in presenting Morgan Stanley's defense." Outside the courtroom, Mr. Kempf plays an active and critical role in coordinating, planning, and organizing Morgan Stanley's defense team. Indeed, it is the height of irony that CPH attributes such enormous importance to the imaginary legions of Kirkland & Ellis lawyers supposedly supporting the defense outside the courtroom, but gives no weight to Mr. Kempf's concrete, important, and indisputable role.

B. Mr. Kempf Cannot Be Called To Testify About Putative Corrective Measures

Finally, CPH comes up with a wholly new rationale for seeking Mr. Kempf's testimony in Phase II. According to CPH, Mr. Kempf can testify to "what, if anything, Morgan Stanley has done to rectify the misconduct associated with the Sunbeam fraud." CPH Opposition To Motion To Quash Kempf Subpoena at 3. There is an Alice-in-Wonderland quality to that proposal. Morgan Stanley may, because of litigation misconduct, be "deemed" to have engaged in the fraud *for purposes of this trial*. But the "deemed" fact that Morgan Stanley is culpable does not extend outside the courtroom to the day-to-day operations of the business. Whatever the Court's authority to instruct jurors regarding facts *within* the courtroom, it cannot make those facts true — and cost people their jobs or remake businesses — *outside* the courtroom.

In any event, to the extent CPH persists in pressing that fantastic argument, there will be time enough to address it. For present purposes, CPH has not shown any good reason for taking the "extraordinary" step of pressing Mr. Kempf, an attorney who now has important litigation responsibilities in this very case, into service as a witness on that topic. To the contrary, the effort is wholly unjustified. Because any knowledge Mr. Kempf has regarding such matters is privileged, calling him as a witness would require him repeatedly to invoke the privilege, potentially confusing and inflaming the jury — which, we assume, is precisely what CPH intends. Thus, CPH's last-minute proposal to have Mr. Kempf testify on this topic, like the others, falls fatally short. If CPH really wanted the information it purports to seek, it would name an appropriate witness. That CPH instead keeps seeking to call Mr. Kempf as a witness based on an ever-shifting menu of rationalizations underscores the impropriety of its demand.

CONCLUSION

For the foregoing reasons, Morgan Stanley respectfully requests that this Court quash CPH's addition of Donald G. Kempf, Jr. to its witness list and quash CPH's notices to produce documents regarding Morgan Stanley's counsel.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 26th day of April 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

MORGAN STANLEY & CO. INCORPORATED'S MOTION TO QUASH TRIAL SUBPOENA SERVED ON DONALD G. KEMPF, JR.

Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") moves this Court to quash the trial subpoena served on Donald G. Kempf, Jr., the Chief Legal Officer of Morgan Stanley's parent corporation.

INTRODUCTION

Time and again, Florida courts have recognized that calling opposing counsel to testify "is an extraordinary step which will rarely be justified." *State v. Donaldson*, 763 So. 2d 1252, 1254 (Fla. 3d DCA 2000). Nonetheless, months after the close of discovery, Coleman (Parent) Holdings Inc. ("CPH") served the Chief Legal Officer of Morgan Stanley's parent company – who is actively involved in Morgan Stanley's defense – with a subpoena duces tecum to appear at trial. That effort is untimely, procedurally improper, and substantively baseless. The subpoena improperly asks to add a witness two-and-a-half months after the date for designating witnesses. It improperly calls for Mr. Kempf to produce documents at trial, bypassing this Court's discovery cut-off without seeking the Court's prior leave. It demands testimony and documents that are privileged and confidential. It is enormously burdensome. And it seeks Mr. Kempf's testimony on matters that are not material and as to which Mr. Kempf has no relevant

EXHIBIT
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personal knowledge. The subpoena served on Mr. Kempf and his last-minute placement on CPH's witness list thus must be seen for what they are: tactics to distract Mr. Kempf from his important duties in preparing Morgan Stanley's defense and to embarrass him and Morgan Stanley before the jury by forcing him repeatedly to invoke attorney-client privilege. This Court must not allow CPH to abuse the subpoena power in this manner.

BACKGROUND

Donald G. Kempf, Jr. is the Chief Legal Officer of Morgan Stanley's parent company. On March 23, 2005, two-and-a-half months after the date for designating witnesses had passed, CPH served a subpoena on Mr. Kempf demanding his appearance at trial. Despite the fact that discovery in this matter has been closed for more than four months, the subpoena also seeks production of documents. *See* Subpoena Duces Tecum for Trial (Mar. 25, 2005) ("Trial Subpoena") (Ex. A). The demanded documents consist largely if not entirely of privileged communications between Morgan Stanley and outside counsel (all communications "between Morgan Stanley and Kirkland and Ellis") and between Morgan Stanley employees and "Morgan Stanley's in-house counsel." *Id.*

Three days later, on March 26, 2005, CPH served a motion for leave to take Mr. Kempf's deposition regarding Morgan Stanley's compliance with the Court's Order of March 2, 2005. *See* Motion for Leave to Depose Donald G. Kempf, Jr. (Mar. 26, 2005) (Ex. B). On the same day, CPH submitted an updated witness list and, for the first time, identified Mr. Kempf as a potential witness in the punitive damages phase of the trial. CPH indicated that it would seek Mr. Kempf's testimony at trial on the following issues:

> Morgan Stanley's failure to comply with the Court's March 2, 2005 Order and Morgan Stanley's representations in other litigation concerning the existence and ability to search for and retrieve e-mail. Mr. Kempf also may testify concerning the

> criminal proceedings in Italy involving Mr. Strong. Mr. Kempf also may testify regarding efforts on the part of Morgan Stanley to blame falsely Morgan Stanley's outside counsel for Morgan Stanley's litigation misconduct.

CPH's Witness Disclosure List at 8 (Mar. 26, 2005) (Ex. C).

During argument on the Motion for Leave to Depose Mr. Kempf, the Court recognized that, to the extent CPH seeks evidence of alleged discovery violations beyond those reflected in this Court's Default Order of March 23, 2005, that evidence is not admissible at trial:

> I would consider what sanctions to impose based on what I considered as the body of evidence that was in front of me now. We wouldn't bootstrap the [March 23 Order] by developing other information. That wouldn't be appropriate.

3/28/2005 Tr. at 5556 (Ex. D); *see also id.* at 5567 ("We're not doing [discovery regarding Morgan Stanley's compliance with the March 2 Order] now. I understand we're going to go ahead and start with the trial.").

In response to inquiries at that hearing, counsel for Morgan Stanley repeatedly informed CPH and the Court that Morgan Stanley would not argue at trial that punitive damages should be mitigated because Morgan Stanley's outside counsel was responsible for the discovery problems. Morgan Stanley's counsel was asked directly if "there is going to be any effort to lay the blame of this off on Kirkland and Ellis?" 3/28/05 Tr. at 5572 (Ex. D). After promising an answer the next day, *id.*, Morgan Stanley's new counsel of record returned with an unequivocal answer: "Morgan Stanley does not . . . intend to offer evidence in the punitive damages phase, should we have one[,] regarding Kirkland & Ellis," 3/29/05 Tr. at 5593 (Ex. E). *See also id.* at 5594 (Morgan Stanley does "not intend as part of a mitigation argument" to "put on evidence or assign blame to Kirkland & Ellis").

ARGUMENT

Compelling testimony from opposing counsel, especially in the midst of trial, is an "extraordinary" and highly disfavored "step which will rarely be justified." *State v. Donaldson*, 763 So. 2d 1252, 1254 (Fla. 3d DCA 2000); *accord Scottsdale Ins. Co. v. Camara De Comercio Latino-Americana De Los Estados Unidos, Inc.*, 813 So. 2d 250, 252 (Fla. 3d DCA 2002).

That "extraordinary step" is particularly unjustified here. The subpoena served on Mr. Kempf is not merely an untimely and improper attempt to add witnesses and reopen discovery out of time and without the Court's prior approval. It also comes as Morgan Stanley and its attorneys are in the middle of a complex fraud case, that seeks billions of dollars, with new lead trial counsel. Mr. Kempf is assisting in the resulting scramble to defend Morgan Stanley at trial and should not be distracted from those efforts. That is especially true given that the evidence sought from him is not relevant to this matter; addresses issues foreclosed by this Court's rulings and Florida law; is clearly protected by privilege; imposes oppressive document production demands; and concerns issues about which Mr. Kempf has no personal knowledge. In short, none of CPH's reasons for serving a subpoena duces tecum on Mr. Kempf comes close to the "extraordinary showing" required.

I. The Trial Subpoena of Mr. Kempf Is Untimely and Procedurally Improper

CPH's attempt to subpoena Mr. Kempf is untimely and procedurally improper for two reasons. First, under this Court's scheduling order, CPH was required to designate all trial witnesses by January 10, 2005. *See* Order Concerning Pretrial Schedule & Following Case Mgmt. Conference (Oct. 14, 2004) (Ex. F). While CPH promised a "drastically reduced" witness list by March 26, the addition of Mr. Kempf in fact improperly attempts to expand it. 3/24/05 Tr. at 5273 (Ex. G). The Court has refused to allow Morgan Stanley to add new witnesses when amending its list on April 5, permitting only a change in the corporate

representative witness. *See* Order on Morgan Stanley's Motion to Add Witnesses (Apr. 5, 2005) (Ex. H). The same rule should apply to CPH. Because Mr. Kempf is not a properly added witness, the subpoena should be quashed.

Second, pursuant to this Court's pretrial order, discovery in this case closed on November 23, 2004. *See* 3/24/05 Tr. at 5277 (Ex. G). Yet Mr. Kempf's subpoena duces tecum demands an enormous document production from Morgan Stanley more than five months after that date. Worse, CPH has requested these documents without seeking the Court's prior approval. CPH itself has previously argued against the use of trial subpoenas to obtain widespread document production after the close of discovery. In moving to quash Morgan Stanley's notice to produce MAFCO loan agreements, CPH's counsel argued:

> The notice to produce at trial is generally used for purposes of having the originals of documents that have already been discovered present in the courtroom. . . . It is not a means by which to avoid the restrictions that are imposed on discovery in the Court's pretrial order.

Id. at 5351-52. The Court accepted CPH's argument and granted the motion to quash. *See* Order on CPH's Motion to Quash Morgan Stanley's Notice to Produce MAFCO Loan Agreements (Mar. 24, 2005) (Ex. I). Consistent with that ruling and CPH's prior argument, the Court should reject CPH's attempted end-run of the Court's discovery order and quash the subpoena.

II. CPH Provides No Compelling Basis for Seeking To Call a Party's Counsel – Who Is Actively Involved His Client's Defense – as a Witness in the Current Litigation

A. CPH's Purported Desire To Present Evidence Regarding Morgan Stanley's Non-Compliance with the Order of March 2, 2005 Cannot Justify Calling Mr. Kempf as a Witness.

CPH first urges that it wishes to obtain Mr. Kempf's testimony concerning Morgan Stanley's compliance with this Court's discovery order of March 2, 2005. That purported rationale, however, fails for three distinct reasons.

1. ***No Personal Knowledge.*** First, Mr. Kempf has no personal knowledge of that issue. As Morgan Stanley already has informed this Court, and as Mr. Kempf attested in his prior declaration, Mr. Kempf did not handle Morgan Stanley's production to CPH in response to the Court's March 2, 2005 Order. *See* Opposition to Motion for Leave to Depose Donald G. Kempf, Jr. at 4-5 (Mar. 28, 2005) (Ex. J); Declaration of Donald G. Kempf, Jr. ¶ 1 (Mar. 28, 2005) (Ex. K). That was recently confirmed by James Doyle, the lawyer who had primary in-house responsibility for productions responsive to the Court's March 2, 2005 Order, and whose deposition was recently conducted pursuant to this Court's ruling on CPH's Motion for Leave to Take the Deposition of Donald Kempf (March 29, 2005) (Ex. L). "Q: Did Mr. Kempf have any involvement whatsoever in the efforts to respond to the March 2 order? A: Not that I am aware of." Deposition of James Doyle at 35:5-35:8 (Apr. 17, 2005) (Ex. M). There thus is no basis for questioning Mr. Kempf about Morgan Stanley's compliance with the March 2, 2005 Order. As this Court has already recognized, such inquiries, to the extent permissible at all, must be directed to those "in Morgan Stanley . . . charged with compliance with that . . . order" – not Mr. Kempf. 3/28/05 Tr. at 5568 (Ex. D).

Because Mr. Kempf lacks personal knowledge of the events regarding which his testimony is supposedly being sought, there would be no grounds to compel Mr. Kempf's testimony even if he were an ordinary witness. Mr. Kempf, moreover, is no ordinary witness. He is chief counsel to Morgan Stanley's parent, an active participant in Morgan Stanley's defense and, consequently, a beneficiary of the heightened protection Florida law affords to counsel during pending proceedings. As a result, CPH's attempt to subpoena Mr. Kempf cannot be sustained.

2. ***Foreclosed by prior rulings.*** Second, the topic on which Mr. Kempf's testimony is sought is no longer material. This Court's March 1, 2005 Order declares that the Court will read a statement to the jury regarding Morgan Stanley's discovery conduct. Order on CPH's Motion for Adverse Inference at 13 (Mar. 1, 2005) (Ex. N). The Court's order specifies that the statement would be the *only* evidence presented to the jury on that issue, and that "no other evidence . . . concerning the production of e-mails or lack thereof shall be presented absent further Court order." *Id.* at 13-14 . On March 23, the Court imposed additional sanctions on Morgan Stanley by, *inter alia*, amending the statement to be read to the jury to include a description of additional discovery conduct by Morgan Stanley. *See* Order on CPH's Renewed Motion for Entry of Default Judgment at 17 (Mar. 23, 2005) (Ex. O). The Court did not, however, lift the prohibition against admitting additional evidence regarding the matters that would be contained in the statement.

The Court since has reiterated that there is no need to open a sideshow before the jury concerning compliance with the March 2, 2005 Order: "I would consider what sanctions to impose based on what I considered as the body of evidence that was in front of me now. *We wouldn't bootstrap the order by developing other information. That wouldn't be appropriate.*" 3/28/05 Tr. at 5555-56 (emphasis added) (Ex. D). Even leaving aside the fact that it "wouldn't be appropriate" to use the March 2 order to "bootstrap" Mr. Kempf into testifying, it is difficult to see what Mr. Kempf's testimony – testimony from someone who was not involved in those document productions – conceivably could add to the extensive findings regarding litigation misconduct in the Court's March 5th order.

3. ***Immaterial as a matter of law.*** Finally, calling Mr. Kempf to testify in the punitive damages phase regarding compliance with the March 2, 2005 discovery order cannot be

squared with Florida law. That law dictates that sanctions for litigation misconduct are "not punitive" in nature. *AllState Ins. Co. v. Biddy*, 392 So. 2d 938, 942 (Fla. 2d DCA 1981); *Carr v. Reese*, 788 So. 2d 1067, 1072 (Fla. 2d DCA 2001); Joint Committee of the Trial Lawyers Section of the Florida Bar and Conferences of Circuit and County Court Judges, *Handbook on Discovery Practice* at 4 (2003). *A fortiori*, the Court cannot allow the jury to punish litigation misconduct. Mr. Kempf's testimony would be impermissible as a matter of law for this purpose.

This Court has ruled that the statement of litigation misconduct it plans to read to the jury "shall be limited to those facts which would allow a reasonable juror to conclude that MS & Co. *sought to hide direct evidence* of the Sunbeam fraud or Morgan Stanley's complicity with Sunbeam." Order on Defendant's Motion for Reconsideration of the Court's Sanction Orders at 1 (Apr. 5, 2005) ("April 5 Order") (Ex. P) (emphasis added). Likewise, the Court has emphasized that the statement of litigation misconduct "may be considered *only* for that purpose," *i.e.*, to show Morgan Stanley's consciousness of guilt and intent to withhold direct evidence. *Id.* (emphasis added). Mr. Kempf's testimony would be immaterial as a matter of law for that purpose as well.

As discussed above, Mr. Kempf, the Chief Legal Officer of Morgan Stanley's parent corporation, played no role in the document productions at issue. His testimony thus could not show that Morgan Stanley sought to hide direct evidence. Accordingly, the subpoena served on Mr. Kempf provides no countervailing benefits, and certainly none that justifies such an intrusion on his efforts as an attorney to help his client prepare and present its case at trial

B. CPH's Claims About False Blame Are Wholly Irrelevant to Any Legitimate Issue in This Trial

CPH initially urged that, in the alternative, Mr. Kempf may be called to "testify regarding efforts . . . to blame falsely Morgan Stanley's outside counsel for Morgan Stanley's litigation

misconduct." Even accepting the incorrect premise that Mr. Kempf would testify that any such false-blame efforts occurred — and he would not — there is no longer any basis for seeking his testimony. Counsel for Morgan Stanley has informed the Court that Morgan Stanley would *not* argue in Phase II of this case that Morgan Stanley's outside counsel was responsible for the discovery problems. *See* 3/28/05 Tr. at 5572 (Ex. D); 3/29/05 Tr. at 5593-94 (Ex. E); *see also* p. 3, *supra*. Accordingly, there is simply no basis for the subpoena.

The Court's rulings, discussed pp. 6-7, *supra*, also bar the proposed testimony. First, Mr. Kempf's testimony is barred by the Court's March 5 Order (and statements during the March 28 hearing) foreclosing additional evidence concerning litigation misconduct. Second, the Court's April 5 order provides that litigation misconduct is relevant to punitive damages *only* insofar as it suggests an effort to "hide evidence of either the Sunbeam fraud or Morgan Stanley's complicity." April 5 Order at 1 (Ex. P). Because Mr. Kempf does not have either personal knowledge of the document production or that the discovery problems were designed to hide direct evidence of fraud, *see* pp. 7-8, *supra*, it is hard to see how alleged efforts to blame the discovery misconduct on former counsel would show an intent to hide evidence of the alleged fraud.

C. Evidence Regarding Morgan Stanley's Discovery Conduct in Other Cases Is Irrelevant and Improper

Similarly irrelevant and improper is CPH's effort to seek testimony from Mr. Kempf concerning "Morgan Stanley's representations in *other litigation* concerning the existence and ability to search for and retrieve e-mail." CPH's Witness Disclosure List at 8 (emphasis added) (Ex. C). Florida courts specifically have noted the impropriety of admitting evidence of *discovery abuse* that took place in other cases. *See General Motors Corp. v. McGee*, 837 So. 2d 1010, 1035 (Fla. 4th DCA 2002) (trial court erred by allowing testimony regarding "discovery

abuses" by GM in two other cases).[1] Consequently, Mr. Kempf cannot lawfully be called to testify regarding alleged discovery abuse by Morgan Stanley in other cases.

D. Mr. Kempf Did Not Supervise Morgan Stanley's Production of Documents Regarding Mr. Strong, and Any Testimony He Could Provide About the Underlying Proceedings Against Mr. Strong Is Privileged

CPH has no valid reason for seeking testimony from Mr. Kempf regarding Mr. Strong. The nature of the testimony that CPH seeks on this point is unclear. Mr. Kempf's subpoena, while not specifying the subject matter of testimony, asks for documents relating to "the *production* of documents relating to criminal proceedings against Mr. Strong." Trial Subpoena at 1 (emphasis added) (Ex. A). In contrast, CPH's trial disclosure list states that CPH will seek testimony from Mr. Kempf regarding the underlying proceedings themselves. *See* CPH's Witness Disclosure List at 8 ("Mr. Kempf also may testify concerning the criminal proceedings in Italy involving Mr. Strong") (Ex. C). CPH's inconsistency about the testimony and documents it seeks itself casts serious doubt on the propriety of the request.

In any event, Mr. Kempf did not supervise Morgan Stanley's production of documents regarding Mr. Strong. *See* Declaration of Donald G. Kempf, Jr. (Apr. 19, 2005) (Ex. Q). Accordingly, Mr. Kempf does not have the personal knowledge necessary to testify regarding

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[1] Similarly, the United States Supreme Court has made clear that "[d]ue process does not permit" the jury to consider evidence of unrelated misconduct in assessing punitive damages:

> A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422-23 (2003). *See also Humana Health Ins. Co. of Fla., Inc. v. Chipps*, 802 So. 2d 492 (Fla. 4th DCA 2001) ("To assess punitive damages, a jury must evaluate the degree of 'malice, wantonness, oppression, or outrage' demonstrated by *the evidence in the case.*") (emphasis added).

that issue. Similarly, this Court's March 5th Order precludes CPH from submitting evidence regarding Morgan Stanley's discovery conduct beyond that already included in the statement to be read to the jury. Because that statement already addresses Morgan Stanley's production of documents regarding Mr. Strong, CPH has no right to seek further evidence on that issue from Mr. Kempf. *See* pp. 6-7, *supra.*

Finally, to the extent that CPH seeks to question Mr. Kempf about conversations with Mr. Strong regarding the underlying Italian criminal proceedings, any such conversations would be irrelevant. As the Court ruled in its March 25 order on Morgan Stanley's Motion in Limine No. 23, evidence regarding Mr. Strong's criminal proceedings is relevant as direct proof only to show Mr. Strong's pressures and motivations during the 1998 Coleman-Sunbeam transaction. Mr. Kempf did not join Morgan Stanley until *December 1999.* Consequently, any such conversations with Mr. Strong cannot possibly be relevant to Mr. Strong's pressures and motivations in 1998. In any event, any such conversations between Mr. Kempf and Mr. Strong are plainly protected by the attorney-client privilege.

II. CPH's Trial Subpoena Seeks To Violate Attorney-Client Privilege and Work-Product Doctrine

CPH's subpoena of Mr. Kempf unapologetically seeks evidence that consists primarily, if not entirely, of documents that are unequivocally protected by the attorney-client privilege and the attorney work-product doctrine. The subpoena demands production of:

> Any and all documents, electronic data and other memorializations in any form constituting or referencing all communications *between and among Morgan Stanley employees and agents (including Morgan Stanley's in-house counsel)* and *communications between Morgan Stanley and Kirkland and Ellis* relating directly or indirectly to any and all issues raised in Plaintiff's motions seeking the imposition of sanctions based upon allegations of *litigation* misconduct . . . .

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Trial Subpoena at 1 (emphasis added) (Ex. A). On its face, then, this request seeks communications between Morgan Stanley and its outside attorneys, and between Morgan Stanley's in-house attorneys and other employees of Morgan Stanley, relating to "litigation." The subpoena duces tecum is thus facially improper and must be quashed.

Even if some of the testimony sought from Mr. Kempf were not directly protected by the attorney-client privilege and the work-product doctrine, compelling such testimony nonetheless would strike at the heart of the policy underlying those crucial privileges:

> [I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference . . . . Were [work product] open to opposing counsel on mere demand . . . [a]n attorney's thoughts, heretofore inviolate, would not be his own. . . . The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Hickman v. Taylor, 329 U.S. 495, 510-11 (1947); *accord Atlantic Coast Line R. Co. v. Allen*, 40 So. 2d 115, 116 (Fla. 1949).

Calling counsel to testify at trial regarding pending litigation gravely threatens that privilege. Because issues of privilege and work product are pervasive, the witness would have to make split-second judgments about what is protected and what is not, before answering each question. These judgments often are nuanced and complex. Counsel's underinclusiveness in invoking privilege breaches the sanctity of the attorney-client relationship. Overinclusiveness only invites further litigation and depositions. Avoiding such dilemmas is a primary reason for the courts' disfavor of compelling counsel to testify at trial. Further, any invocation of the privilege might prejudice the jury against Morgan Stanley by suggesting that it has something to hide. Such improper prejudice should not be injected into this case.

Indeed, in related contexts, Florida courts have expressly held that it is error to allow a party to call a witness purely for the purpose of inducing him to invoke the privilege on the stand. *See, e.g., Maul v. State*, 528 So. 2d 1384, 1389 ("Clearly the case law prevents a party . . . from calling a witness '*for the purpose* of invoking the privilege in front of the jury' because of the impermissible inferences the jury may make. Thus when a witness invokes the privilege 'comprehensively,' he cannot be called because that obviously would be 'for the purpose' of invoking the privilege in front of the jury.") (quoting *Apfel v. State*, 429 So. 2d 85, 86 (Fla. 5th DCA 1983)). Compelling Mr. Kempf to testify to force him to invoke attorney-client privilege in this case would be improper as well.[2]

III. CPH's Subpoena of Mr. Kempf Is Unreasonable and Oppressive

A subpoena duces tecum may be quashed if it is "unreasonable and oppressive." Fla. R. Civ. P. 1.410(c)(1). Whether a subpoena is unreasonable and oppressive is determined by "balancing . . . the competing interests to be served by granting discovery or by denying it." *Dade County Med. Ass'n v. Hlis*, 372 So. 2d 117, 121 (Fla. 3d DCA 1979).

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[2] Federal law likewise provides that the jury may not draw an adverse inference from a witness's invocation of the attorney-client privilege. *See Knorr-Bremse Systeme Fuer Nutzfahrzeuge GMBH v. Dana Corp.*, 383 F.3d 1337, 1344 (Fed. Cir. 2004) ("Although the duty to respect the law is undiminished, no adverse inference shall arise from invocation of the attorney-client and/or work product privilege."); *Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208, 226 (2d Cir. 1999) ("If refusal to produce an attorney's opinion letter based on claim of the privilege supported an adverse inference, persons would be discouraged from seeking opinions, or lawyers would be discouraged from giving honest opinions. Such a penalty for invocation of the privilege would have seriously harmful consequences."), *abrogated on other grounds, Moseley v. Victoria's Secret Catalogue, Inc.*, 537 U.S. 418 (2003); *In re Tudor Assoc. Ltd.*, 20 F.3d 115, 120 (4th Cir. 1994) ("A negative inference should not be drawn from the proper invocation of the attorney-client privilege."); *In re Terazosin Hydrochloride Antitrust Litigation*, 335 F. Supp. 2d 1336, 1365 (S.D. Fla. 2004) ("no such negative inference can arise from the assertion of the privilege"). Although not binding on Florida state courts, federal decisions on evidentiary matters are considered persuasive with respect to Florida state law evidentiary issues. *See Rivers v. State*, 423 So. 2d 444 (Fla. 4th DCA 1982), *opinion quashed on other grounds*, 456 So. 2d 462 (Fla. 1984); *Dinter v. Brewer*, 420 So. 2d 932, 934 (Fla. 3d DCA 1982).

The balance here weighs strongly in favor of quashing the subpoena. To comply with the breathtakingly overbroad document request — which seeks an all-encompassing universe of facially privileged documents regarding Morgan Stanley's alleged litigation misconduct — would require Morgan Stanley to generate an enormous privilege log. And then this Court would have to rule on each and every privilege dispute in the middle of a complex and time-consuming trial. Needless to say, these burdens (and distractions from trial) overwhelm the nonexistent benefits to be gained from enforcing the subpoena. For these reasons, too, the subpoena should be quashed.

WHEREFORE, Morgan Stanley respectfully requests that the Court quash the trial subpoena duces tecum of Donald G. Kempf, Jr., together with such other and further relief as is just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 19th day of April, 2005.

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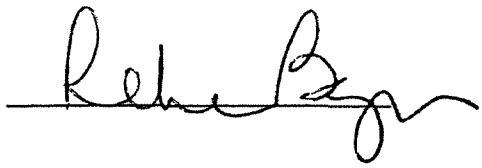
BY: 

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION TO BAR PLAINTIFF FROM SUGGESTING TO THE JURY THAT THE "DEEMED" FACTS ARE "ESTABLISHED" FACTS

THIS CAUSE came before the Court April 25, 2005 on Morgan Stanley's Motion to Bar Plaintiff from Suggesting to the Jury that the "Deemed" Facts are "Established" Facts, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion to Bar Plaintiff from Suggesting to the Jury that the "Deemed" Facts are "Established" Facts is Denied, without prejudice to renewal in Phase II, if Phase II is held.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 26 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION FOR FULL AND FAIR EXAMINATION OF WITNESSES WITHOUT CONTRADICTION OF THE FACTS "DEEMED" ESTABLISHED BY THE COURT'S MARCH 23 ORDER

THIS CAUSE came before the Court on Morgan Stanley's Motion for Full and Fair Examination of Witnesses without Contradiction of the Facts "Deemed" Established by the Court's March 23 Order, which the Court elects to treat as including a Motion for Rehearing. Based on a review of the Motion, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion for Rehearing is Denied, without prejudice to MS & Co.'s right to seek to elicit testimony or present evidence concerning a witness's credibility, if otherwise appropriate. Objections shall be heard and determined on a case-by-case basis.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 20 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S RESPONSE IN OPPOSITION TO MORGAN STANLEY'S MOTION TO COMPEL CPH TO PRODUCE DOCUMENTS REFLECTING LEGAL ADVICE

Morgan Stanley has moved to compel "CPH to produce documents reflecting legal advice given to CPH on or before May 11, 1998, regarding CPH's claims arising out of the Sunbeam transaction," on the ground that Mr. Perelman testified during cross-examination that he received legal advice about the possible rescission of the Sunbeam-Coleman transaction. *See* MS's Mot. 1-4. Morgan Stanley's motion is without merit for two reasons.

First, contrary to Morgan Stanley's assertion, Mr. Perelman's general references to consultations with attorneys in response to leading questions by Morgan Stanley's counsel on cross-examination does not constitute a waiver of the privilege. The Florida Supreme Court case that Morgan Stanley relegates to a footnote (at 4), *Seaboard Air Line Railway v. Parker*, 62 So. 589 (Fla. 1913), confirms that fact. In that case, as here, the plaintiff testified on cross-examination without objection about a communication that he had with his attorney. The Supreme Court held that "this testimony on cross-examination is not a waiver of the privilege that existed between the plaintiff and the attorney." *See id.* at 590. Here, as in *Seaboard Air*

Line, Mr. Perelman's general answers in response to leading questions by Morgan Stanley's counsel do not constitute a waiver of the privilege.

Second, even if there had been a waiver as to the narrow subject matter involved, it would not matter because CPH has not withheld any documents "reflecting legal advice given to CPH on or before May 11, 1998, regarding CPH's claims arising out of the Sunbeam transaction." Morgan Stanley's motion to compel should be denied.

Dated: April 26, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 26th day of April, 2005.

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COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

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

CASE NO: 2003 CA 005045 AI

PLAINTIFF'S RESPONSE TO DEFENDANT'S SUBMISSION REGARDING PHASE II ISSUES

In response to the Court's April 11, 2005 request that the parties submit motions regarding Phase II issues, Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") submitted five motions:

I. Motion to Prevent Extension of Discovery Misconduct Sanctions to Phase II;

II. Motion in Limine No. 29 To Preclude the Use of Certain Prejudicial Evidence;

III. Motion in Limine No. 30 To Exclude Evidence of Litigation Misconduct from Phase II;

IV. Renewed Motion in Limine No. 5 To Bar CPH from Adducing Evidence of Morgan Stanley's Finances or Arguing that Punitive Damages Should Be Predicated on or Enhanced on Account of Those Finances; and

V. Motion in Limine No. 31 To Bar Coleman (Parent) Holdings Inc. from Arguing, Commenting on, or Suggesting that Litigation Misconduct Injured, Had the Potential To Affect, or Otherwise Represented an Affront to the Judicial System.

This filing is intended to respond to all those motions, pointing in many instances to the places

where the issues already have been briefed by CPH and already have been addressed by this Court.

In addition, we note that Morgan Stanley filed a Submission Concerning the Need for Clear and Convincing Proof of Entitlement to Punitive Damages on April 22, 2005. CPH responded to that Submission on April 25, 2005 with CPH's Brief Regarding the Limited Applicability of the "Clear and Convincing" Standard of Proof in Phase Two of Trial, attached here as Ex. A.

I. Morgan Stanley's Motion to Prevent Extension of Discovery Misconduct Sanctions to Phase II Is an Attempt to Reargue Positions This Court Has Already Rejected.

The Court previously has ruled that the facts in Exhibit A are to be "deemed established for all purposes in this action," including during the punitive-damages phase of the trial. Ex. B, 3/23/05 Order on CPH's Renewed Motion for Entry of Default Judgment (emphasis added). The Court also ruled that these facts are not to be contradicted by evidence at trial. *See* Ex. C, 4/8/05 Order on CPH Motion in Limine No. 33. Morgan Stanley argues that these rulings contravene Florida law and due process by depriving Morgan Stanley of the ability to defend itself on punitive damages. Morgan Stanley has already briefed, argued, and lost these arguments.

A. The Court Has Already Rejected Morgan Stanley's Arguments that Florida Law and Federal Constitutional Law Preclude Extending the Court's Sanctions to Phase II.

In its April 4, 2005 Motion for Reconsideration of the Court's Sanction Orders, Morgan Stanley argued, among other things, that the Court's March 23, 2005 Order deprived Morgan Stanley of "the right to contest the degree and nature of its alleged misconduct and offer evidence and circumstances in mitigation" and also deprived Morgan Stanley of "due process

and a fair trial before punishment in the form of punitive damages is imposed." Ex. D, 4/4/05 Mot. at 2-3. The Court rejected these Florida law and due-process claims. *See* Ex. E, 4/5/05 Order on Defendant's Motion for Reconsideration of the Court's Sanction Orders. Although the Court agreed with Morgan Stanley that litigation misconduct presented to the jury must have a nexus to concealing direct evidence of Sunbeam's fraud or Morgan Stanley's complicity in it, the Court denied Morgan Stanley's Reconsideration Motion "[i]n all other respects" — including those now re-raised by Morgan Stanley. These arguments should be rejected again here. Neither Florida law nor due process precludes the Court's sanction of deeming certain facts established for all purposes in the trial. Because the jury will be told that it has the discretion not to impose punitive damages, and because Morgan Stanley will be permitted to introduce mitigating evidence relevant to punitive damages that does not contradict the facts in Exhibit A, the Court is not usurping the jury's role in determining punitive damages.

B. The Florida Caselaw that Morgan Stanley Relies on Is Inapposite.

Morgan Stanley uses misleading snippets from inapposite cases to argue that the Court's deeming facts established in the punitive-damages phase is inconsistent with the justification for sanctions. That is nonsense. As the Court has repeatedly made clear, it has deemed certain facts established not to "punish" Morgan Stanley, but because Morgan Stanley's egregious discovery misconduct "has deprived plaintiff of the very evidence it would need" to prove its claims, including its claims for punitive damages. Ex. F, 4/19/05 Tr. at 9142. If anything, lifting these sanctions in the second phase would unfairly prejudice CPH, which, as a result of Morgan Stanley's misconduct, lacks access to evidence that could help prove its case.

The Florida punitive-damages cases cited by Morgan Stanley are not "directly on point" (Mot. at 2) because they did not involve the sanction at issue here — facts deemed established for all purposes under Rule 1.380(b)(2) of the Florida Rules of Civil Procedure. If anything, those cases confirm the Court's ruling here that punitive damages may be imposed where a defendant is essentially defaulted on liability. *See, e.g., Nordyne, Inc. v. Florida Mobile Home Supply, Inc.*, 625 So. 2d 1283, 1289 (Fla. 1st DCA 1993) (stating that the trial court may tell the jury that "it has already been established that [defendant] committed acts for which an award of punitive damages is an available remedy"). As those cases require, the Court will instruct the jury that it has the discretion not to impose punitive damages at all, and will permit Morgan Stanley to introduce relevant mitigating evidence that is not inconsistent with the established facts. *See, e.g., Humana Health Ins. Co. v. Chipps*, 802 So. 2d 492, 496 (Fla. 4th DCA 2001) (error for the court not to have instructed the jury "that it had the discretion to decline to assess punitive damages or to award only a nominal amount," and to "prevent[] Humana from introducing mitigating evidence"). Unlike *Humana*, the Court's jury instruction will not invade the province of the jury by essentially requiring the jury to conclude that CPH should be awarded punitive damages; rather, the Court will give the jury discretion to decide.

Morgan Stanley claims that the Court has misapplied the Florida Supreme Court's decision in *Robinson v. Nationwide Mutual Fire Insurance Co.*, 887 So. 2d 328 (Fla. 2004), *cited in* Ex. B, 3/23/05 Order on CPH's Renewed Motion for Entry of Default Judgment, at 16. Specifically, Morgan Stanley contends that *Robinson* does not apply to punitive damages. But the Court's reliance on *Robinson* in establishing sanctions applicable to both Phase I and Phase II is well-placed. As the reasoning of *Robinson* makes clear, the Court has the authority to

sanction a litigant who disobeys discovery orders by deeming facts conclusively established against that litigant, even where — unlike here — the sanctioned party can absolutely disprove those facts. Thus, Morgan Stanley may not try to "disprove" the facts in the sanctions order in Phase II any more than it may do so in Phase I. *See Robinson*, 887 So. 2d at 329-30. Indeed, the whole point of the Court's March 23, 2005 Order is that CPH has been deprived of a full and fair opportunity to present the facts, due to Morgan Stanley's egregious destruction of evidence. *See, e.g.*, Ex. F, 4/19/05 Tr. at 9142 ("[T]o the extent Morgan Stanley continually says we now want a trial on the merits, Morgan Stanley by its actions has totally foreclosed that as a possibility.").

C. Morgan Stanley's Due Process Argument Is Unsupported and Incorrect.

None of the U.S. Supreme Court cases cited by Morgan Stanley has anything to do with the effect of discovery sanctions on punitive damages. Indeed, Morgan Stanley's due-process argument that it is being punished "without regard to its actual guilt or innocence" (Mot. at 6) is not specific to the punitive-damages context. Rather, it is a wholesale attack on the Court's power to impose sanctions at all in this case — an attack that the Court has repeatedly rejected. *See, e.g.*, Ex. E, 4/5/05 Order on Defendant's Motion for Reconsideration of the Court's Sanctions Orders. Moreover, it certainly cannot be said that these proceedings will be fundamentally unfair for the following reasons: First, it was Morgan Stanley's own misconduct that resulted in the Court's deeming established the facts in Exhibit A. *See, e.g.*, Ex. F, 4/19/05 Tr. at 9142. Second, the jury still may choose, in its discretion, to impose no punitive damages or nominal punitive damages. *See Humana*, 802 So. 2d at 496. And third, Morgan Stanley may put on relevant evidence in mitigation that does not contradict the facts deemed established. *See id.*

D. CPH's Reference to the Established Facts Does Not Open the Door for Morgan Stanley To Introduce Contradictory Evidence.

Finally, there is no support for Morgan Stanley's claim that CPH may not "bolster" or "embellish" the established facts from Exhibit A by referring to that Exhibit in the punitive phase. CPH's reference to the established facts, or presentation of evidence consistent with these facts, cannot "open the door" to contrary evidence by Morgan Stanley. "Opening the door" is an equitable principle whereby a court has the discretion to permit a party to introduce otherwise inadmissible evidence to correct a false, misleading, or incomplete picture painted by the opposing party. *See, e.g., Bozeman v. State*, 698 So. 2d 629, 630 (Fla. 4th DCA 1997) (for the door to be opened, a party "must first offer misleading testimony or make a specific factual assertion which the [opposing party] has the right to correct so that the jury will not be misled"). Here, because Morgan Stanley's own willful and egregious discovery abuses led the Court to deem certain facts established for all purposes in this litigation, there is no unfair or misleading picture to complete. Rather, the established facts themselves have corrected the imbalance that had been initially created by Morgan Stanley's misconduct.

For the foregoing reasons, the Court should deny Morgan Stanley's Motion to Prevent Extension of Discovery Misconduct Sanctions to Phase II.

II. Morgan Stanley's Motion in Limine No. 29 Seeks to Bar from Phase II Evidence that Is Entirely Appropriate and Relevant, as Is Set Forth More Fully in CPH's Motion in Limine No. 36.

Morgan Stanley seeks to bar four categories of evidence from Phase II of the trial. Each of these categories of evidence is relevant and admissible during Phase II.

A. Morgan Stanley's Similar Bad Acts Are Admissible To Show Morgan Stanley's Knowledge, Intent, Malice, and Recidivism.

Morgan Stanley claims that CPH may not introduce evidence of "other litigation or

other alleged frauds committed by Morgan Stanley," regardless of their similarity to the fraud at issue here. Mot. at 2. As CPH has explained in its own Motion in Limine No. 36, (Ex. G, at 6-8), Florida law and federal constitutional law authorize CPH to introduce evidence of similar bad acts in the punitive damages phase to show Morgan Stanley's knowledge, intent, malice, and recidivism. *See, e.g., State Farm Mutual Ins. Co. v. Campbell*, 538 U.S. 408, 418-19 (2003) (the jury may consider bad acts as evidence of a defendant's recidivism or of its intentional malice, trickery, or deceit; such bad acts must be "similar" but "need not be identical"); *Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483, 484-85 (Fla. 1999) (the jury may consider, *inter alia*, "the degree of reprehensibility" and "the existence and frequency of similar past conduct" in determining punitive damages). If CPH presents such evidence as part of its affirmative punitive damages case, it will limit such evidence to similar bad acts that meet the standards of Florida and federal law in *State Farm*, *Owens-Corning*, and other cases.

Of course, if Morgan Stanley witnesses testify that Morgan Stanley is a good corporate citizen, that will open the door, in fairness, for CPH to present evidence and argument about Morgan Stanley's prior bad acts more generally, so that the jury is not left with an incomplete and misleading picture of Morgan Stanley. As Florida courts recognize, "the concept of 'opening the door' allows the admission of otherwise inadmissible testimony to 'qualify, explain, or limit' testimony or evidence previously admitted." *Rodriguez v. State*, 753 So. 2d 29, 42 (Fla. 2000) (quoting *Tompkins v. State*, 502 So. 2d 415, 419 (Fla. 1986)). Thus, if Morgan Stanley offers testimony designed to persuade the jury that Morgan Stanley is a good corporate citizen, CPH may, in fairness, be permitted to offer evidence of Morgan Stanley's misconduct — regardless of its similarity to the wrongdoing at issue in this case — "to correct"

that inaccurate picture. *Bozeman*, 698 So. 2d at 630; *see, e.g., Metropolitan Dade County v. Zapata*, 601 So. 2d 239, 243 (Fla. 3d DCA 1992) (refusing to admit evidence as "similar fact evidence" for lack of similarity, but proceeding to permit such evidence because the door had been opened by the opposing party).

B. Evidence of Harm to the Investing Public Is Admissible To Show the Magnitude of the Harm and Morgan Stanley's Disregard for Public Welfare.

Morgan Stanley incorrectly claims that "CPH should be precluded from introducing evidence of 'harm' to the public." Mot. at 5. Moreover, Morgan Stanley incorrectly suggests that the Court already has determined that harm to the public is not relevant to CPH's punitive-damages claim. *See id.* To the contrary, the Court merely deferred ruling on this issue until full briefing. *See* Ex. H, 4/5/05 Tr. at 6693. As CPH has explained in its own Motion in Limine No. 36, (Ex. G, at 3-6), evidence showing Morgan Stanley's disregard for the welfare of the public is admissible under both Florida and federal law. Florida caselaw recognizes that punitive damages are particularly appropriate with respect to "public wrongs," and thus "are to be measured by the enormity of the offense, entirely aside from the measure of compensation for the injured plaintiff." *Wransky v. Dalfo*, 801 So. 2d 239, 242 (Fla. 4th DCA 2001) (emphasis added) (quoting *Arab Termite & Pest Control of Fla., Inc. v. Jenkins*, 409 So. 2d 1039, 1043 (Fla. 1982)). Because the broad-based fraud committed by Morgan Stanley and its co-conspirator Sunbeam involved misrepresentations to both CPH and the investing public (for example, in the road-shows and the March 19, 1998 press release), the entire "enormity of the offense" must be accounted for in awarding punitive damages. That punitive damages may be awarded for the entire scope of a defendant's harm makes sense, because the purpose of punitive damages is not to compensate, but to deter and punish. *See, e.g., Owens-Corning*, 749

So. 2d at 486.

Morgan Stanley erroneously contends that federal law prohibits as alleged "double punishment" a consideration of the entire scope of Morgan Stanley's wrong. *State Farm* and other federal constitutional cases hold no such thing. So long as Morgan Stanley is being punished for the wrongful conduct at issue in this case — as opposed to dissimilar other bad acts that may have been lawful where they took place — *State Farm* permits the jury to punish Morgan Stanley for the entire scope of the harm that it caused. *See State Farm*, 538 U.S. at 422 (authorizing punitive damages to "punish and deter conduct" bearing a relation to the harm suffered by plaintiff, but prohibiting "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised," from "serv[ing] as the basis for punitive damages"). The full scope of the harm caused by Morgan Stanley is directly related to the reprehensibility of the misconduct at issue in this case.

Moreover, Morgan Stanley opened the door to evidence of harm to the public for both Phase I and Phase II by repeatedly asking Mr. Perelman during cross-examination about Mr. Perelman's alleged obligations to the "shareholders of Sunbeam, which included lots of public shareholders." Ex. I, 4/21/05 Tr. at 9876. *See generally id.* at 9874-79. By repeatedly suggesting that Mr. Perelman owed some duty to tell the public shareholders what he knew about Sunbeam or that Mr. Perelman should have withheld his proxy from Mr. Dunlap so that the "14 percent shareholder [could] say to the public, I'm not going to vote my shares for you" (*id.* at 9877), Morgan Stanley has opened the door for an inquiry into its own behavior toward the public and the harm that such behavior caused.

C. The Court Already Has Determined that Evidence of William Strong's Performance Evaluations Is Relevant to the Jury's Determination of Punitive Damages in Phase II.

Morgan Stanley claims that CPH should not be permitted to introduce William Strong's performance evaluations in support of its punitive-damages claim because such evidence is allegedly irrelevant and prejudicial. But the Court previously has rejected Morgan Stanley's argument and determined that such evidence is appropriately presented to the jury with respect to punitive damages. *See* Ex. J, 2/4/05 Order on Morgan Stanley's Motion in Limine No. 1 (holding that relevant portions of Strong's evaluations "may be considered only on the appropriateness and, if appropriate, the amount of punitive damages to be awarded if MS & Co. is found liable to CPH on a claim permitting an award of punitive damages"). Such evidence is relevant, among other things, to Morgan Stanley's malice, intent, reprehensibility, and corporate ratification.

D. Evidence of Morgan Stanley Witnesses Attempting To Conceal Evidence Is Admissible in Phase II.

Morgan Stanley claims that CPH should be barred from introducing deposition testimony from two Morgan Stanley employees — Bram Smith (former employee) and John Tyree (current employee). Both deposition excerpts are highly probative to CPH's punitive-damages case and do not unfairly prejudice Morgan Stanley. Rather, any "prejudice" results from both excerpts revealing Morgan Stanley's attempt to conceal its wrongful conduct toward CPH and Morgan Stanley's lack of remorse. *See Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483, 484-85 (Fla. 1999); *General Motors Corp. v. McGee*, 837 So. 2d 1010, 1035 (Fla. 4th DCA 2002).

Bram Smith was a Managing Director at Morgan Stanley during the events at issue, and CPH plans to play a short excerpt from Mr. Smith's deposition in which he refuses to answer a

critical question: whether the March 19, 1998 press release was a full and truthful disclosure in light of what he knew about Sunbeam's condition at that time. His testimony is plainly relevant to CPH's claim that Morgan Stanley acted wrongfully toward CPH, and, in particular, that Morgan Stanley actively has tried to conceal its involvement in the Sunbeam fraud during discovery in this litigation. Morgan Stanley cites no authority for the absolute exclusion of such evidence; in all of the cases Morgan Stanley cites, the excluded evidence was either completely irrelevant or unduly prejudicial in light of the other evidence presented at trial.

John Tyree was an associate in the client services group at Morgan Stanley at the time of the transaction. CPH plans to play an excerpt from Mr. Tyree's deposition demonstrating that Morgan Stanley acted wrongfully toward CPH, and, in particular, that Morgan Stanley has actively tried to conceal its involvement in the Sunbeam fraud during discovery in this litigation. For the same reasons that Mr. Smith's testimony should be permitted, so should Mr. Tyree's.

For the foregoing reasons, the Court should deny Morgan Stanley's Motion in Limine No. 29 To Preclude the Use of Certain Prejudicial Evidence.

III. Morgan Stanley's Motion in Limine No. 30 Is Morgan Stanley's Third Attempt at Reconsideration of the Court's Order Regarding the Litigation-Misconduct Statement.

Since this Court entered its March 1, 2005 Order sanctioning Morgan Stanley for its discovery misconduct, Morgan Stanley has made two motions for reconsideration in an attempt to keep evidence of its litigation misconduct from the jury. Although it is not styled as a motion for reconsideration, this is Morgan Stanley's third such motion.

On March 14, 2005, Morgan Stanley made a Motion to Reconsider and Modify the Court's March 1st Sanctions Order. This Court denied that Motion on March 17, 2005. *See*

Ex. K, 3/17/05 Order on Morgan Stanley's Motion to Reconsider and Modify the Court's March 1st Sanctions Order. In the wake of the Court's March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment, Morgan Stanley filed another Motion for Reconsideration on April 4, 2005. In response, the Court issued its April 5, 2005 Order limiting the litigation-misconduct statement to those facts that show that Morgan Stanley sought to hide direct evidence of either the Sunbeam fraud or Morgan Stanley's complicity with Sunbeam in perpetrating that fraud on CPH. *See* Ex. E, 4/5/05 Order on Defendant's Motion for Reconsideration of the Court's Sanction Orders. Morgan Stanley's Motion in Limine No. 30 is a third attempt at reconsideration of the Court's Orders.

A. Contrary to Morgan Stanley's Assertions, the Court Has Determined that Morgan Stanley Sought To Hide Direct Evidence of the Fraud and Morgan Stanley's Complicity in the Fraud.

Morgan Stanley argues that the Court "did not find, and had no basis for finding, that Morgan Stanley sought to hide 'direct evidence' of the Sunbeam fraud or Morgan Stanley's complicity with Sunbeam in deceiving CPH." Mot. at 4. This argument is based on a perverse misreading of the Court's Orders. Morgan Stanley wants CPH to prove a negative — that the evidence Morgan Stanley has destroyed and concealed throughout this case is direct evidence of the fraud and Morgan Stanley's complicity in it. But the whole point of the Court's Orders is that CPH has been deprived of such evidence by Morgan Stanley's misconduct.

As the Court has recognized, "Not only is Morgan Stanley's actions what placed it in the position it finds itself but Morgan Stanley's actions ha[ve] deprived plaintiff of the very evidence it would need on these things. To the extent Morgan Stanley has manipulated the evidence in this case, it is ludicrous that Morgan Stanley would suggest that somehow we still have the opportunity to have a fair [trial] on those facts. . . . Morgan Stanley deliberately

manipulated the evidence in this case. And to the extent Morgan Stanley continually says we now want a trial on the merits, Morgan Stanley by its actions has totally foreclosed that as a possibility." Ex. F, 4/19/05 Tr. at 9142.

The Court correctly reminded counsel that "[i]f you go back to the order I did on the adverse inference and renewed motion on default judgment, what I concluded was a finding that Morgan Stanley deliberately chose to hide evidence in this case." *Id.* at 9143. It is clear that the Orders referenced by the Court did find that Morgan Stanley's litigation misconduct in this case reflects a deliberate choice to hide direct evidence of the Sunbeam fraud and of Morgan Stanley's complicity with Sunbeam in perpetrating that fraud. As the Court has noted, "The conclusion is inescapable that MS & Co. sought to thwart discovery in this specific case." Ex. L, 3/4/05 Further Amended Order, at 10 (emphasis in the original).

The Court found that "[a] reasonable juror could conclude that evidence of MS & Co.'s misconduct demonstrates its consciousness of guilt," *id.*, and that "MS & Co's concealment of its role in the Sunbeam transaction is evidence of its malice or evil intent, going to the issue of punitive damages," *id.* at 13 (citing *General Motors Corp. v. McGee*, 837 So. 2d 1010 (Fla. 4th DCA 2002)). Thus, the Court concluded that it "shall read to the jury a [statement of evidence of Morgan Stanley's efforts to hide its emails] . . . and the jury will be instructed that it may consider those facts in determining whether MS & Co. sought to conceal its offensive conduct when determining whether an award of punitive damages is appropriate." Ex. B, 3/23/05 Order on CPH's Renewed Motion for Entry of Default Judgment, at 17.

B. Punitive Damages May Be Imposed on a Litigant for Engaging in Discovery Misconduct If that Misconduct Was Designed to Conceal Direct Evidence of Fraud.

Morgan Stanley argues that punitive damages may not be imposed upon a litigant

solely because of a litigant's discovery misconduct. But that is not what CPH is seeking here. That is why the jury will be instructed in Phase II that it can consider Morgan Stanley's discovery misconduct only for the purposes of showing Morgan Stanley's consciousness of guilt, its attempts at concealment of the underlying fraud, and the number and level of employees involved in the cover-up, all of which are factors explicitly enumerated for consideration by the jury in the Florida Supreme Court's decision in *Owens-Corning*, 749 So. 2d at 484-85 (Fla. 1999). On April 21, 2005, CPH proposed a modified statement of litigation misconduct to be read to the jury to comply with the Court's April 5, 2005 Order. The proposed statement tracks the language of the Court's Order in instructing the jury on the purposes for which evidence of Morgan Stanley's litigation misconduct may be considered. *See* Ex. M, 4/21/05 Second Renewed Motion for Correction and Clarification of the Litigation-Misconduct Statement To Be Read To The Jury.

For the foregoing reasons, Morgan Stanley's Motion in Limine No. 30 To Exclude Evidence of Litigation Misconduct from Phase II should be denied.

IV. Morgan Stanley's Renewed Motion in Limine No. 5 Is Based on a Misreading of Both Federal and Florida Law.

Morgan Stanley's Renewed Motion in Limine No. 5 makes five arguments, all of which should be rejected. CPH already has filed a detailed response to Morgan Stanley's initial Motion in Limine No. 5. *See* Ex. P.

A. *State Farm* Does Not Preclude Consideration of a Defendant's Wealth.

Morgan Stanley argues that somehow the U.S. Supreme Court's decision in *State Farm Mutual Insurance Co. v. Campbell*, 538 U.S. 408 (2003), has made consideration of a corporate defendant's wealth unconstitutional. CPH agrees that *State Farm* stands for the proposition that evidence of a defendant's wealth "cannot justify an otherwise unconstitutional

punitive damages award." *State Farm*, 538 U.S. at 427. But the key words there are "otherwise unconstitutional." Presenting evidence of a corporate defendant's wealth is not constitutionally suspect, so long as that evidence is not the sole basis for the award. Indeed, *State Farm* expressly recognizes that although wealth is sometimes used to inflate an award, "[t]hat does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors." *Id.* at 427-28 (internal quotation marks omitted). Morgan Stanley's argument that *State Farm* precludes consideration of its financial resources is incorrect.

B. Morgan Stanley Overlooks the Punitive Purpose of Punitive Damages.

Morgan Stanley next cites academic literature in an attempt to show that a defendant's financial status is irrelevant to the deterrent function of punitive damages. Morgan Stanley overlooks the fact that punitive damages have more than one purpose. As the Florida Supreme Court has noted, "Under Florida law, the purpose of punitive damages is . . . to punish the defendant for its wrongful conduct and to deter similar misconduct by it and other actors in the future." *Owens-Corning*, 749 So. 2d at 486 (emphasis added). Thus, it is not only deterrence, but also punishment that is at issue here.

Just last month, a Florida appellate court recognized the relevance of financial status to the purpose of punishment. The court held that "[b]ecause the amount of an award may be a pittance to a rich man and ruination to a poor one, the goal of punishment must of necessity take into account the financial worth of the wrongdoer." *Estate of Despain v. Avante Group, Inc.*, — So.2d —, 2005 WL 672090, at *3 (Fla. 5th DCA March 24, 2005) (emphasis added); *see also American Med. Int'l, Inc. v. Scheller*, 590 So. 2d 947, 952 (Fla. 4th DCA 1991) ("'The more pecunious the defendant, the greater must be the punitive damages assessed in order 'to

get his attention.'") (quoting *Lassitter v. International Union of Operating Engineers*, 349 So. 2d 622, 626 (Fla. 1976)). To properly punish Morgan Stanley for its wrongful conduct, Morgan Stanley's financial resources must be considered.

C. Morgan Stanley Has No Authority for Its Claim that the Probative Value of Evidence of Its Wealth Is Outweighed by Unfair Prejudice to Morgan Stanley.

Morgan Stanley incorrectly claims that the probative value of evidence concerning its financial status is outweighed by the potential for unfair prejudice. If Morgan Stanley contests its ability to pay a judgment, however, evidence of its financial worth is highly relevant and CPH should be permitted to present such evidence to inform the jury's consideration of the basic goals of punishment and deterrence. *See, e.g., Arab Termite*, 409 So. 2d at 1043 (punitive award must be "painful enough to provide some retribution and deterrence, but [not to] destroy the defendant").

In its original Motion in Limine No. 5, Morgan Stanley argued that financial evidence was irrelevant because there was "no dispute about Morgan Stanley's ability to pay a judgment up to the constitutional maximum." Ex. N, MS Mot. in Limine No. 5, at 8. Given *State Farm*'s recommendation of a single-digit multiplier for punitive damages awards, the constitutional maximum in this case would be an award of up to $6.8 billion — $680 million in compensatory damages, plus nine times that amount ($6.12 billion) in punitive damages. *See also* Ex. O, 12/3/04 Tr. at 74-75 (Morgan Stanley conceding its ability to pay a punitive damages award three times as large as the compensatory damages CPH is seeking); Ex. P, CPH Response to MS Mot. in Limine No. 5, at 6-7 (explaining that Morgan Stanley's concession, in practical terms, meant that it could pay a judgment of at least $2.72 billion, *i.e.*, compensatory damages of $680 million plus a punitive damages award three times that size).

Now, in its Renewed Motion, Morgan Stanley appears to have abandoned its earlier concession. CPH does not agree that Morgan Stanley is free to reverse course. But if Morgan Stanley is permitted to contest its ability to pay and is unwilling to stipulate before the jury what it has already told this Court — that it can pay an award of at least $2.72 billion — then the jury must be allowed to hear CPH's evidence concerning Morgan Stanley's financial resources and ability to pay.

Moreover, Morgan Stanley's argument about the potentially prejudicial effects of introducing financial evidence has been rejected by a long line of Florida caselaw. *See, e.g., Liggett Group Inc. v. Engle*, 853 So. 2d 434, 458 (Fla. 3d DCA 2003) ("A defendant's financial capacity is a crucial factor in determining the appropriateness of a punitive damages award."), *rev. granted*, 873 So. 2d 1222 (Fla. 2004). Florida law considers such evidence relevant and probative, as is clearly reflected in the Florida Standard Jury Instructions expressly instructing the jury to consider the defendant's "financial resources" when making a punitive-damages award. Florida Standard Jury Instructions PD 1b(2)(a)(2) (2003).

D. The Jury Is Permitted To Consider Morgan Stanley's Financial Resources in the Broadest Sense When Deciding a Punitive-Damages Award.

Morgan Stanley argues that if any evidence of financial resources is admitted, that evidence should be limited to the net worth of Morgan Stanley & Co. Incorporated in Florida. This argument should be rejected on both counts.

1. The Jury May Consider the Assets Available to MS & Co. Incorporated Through Its Parent, Morgan Stanley.

Financial-resources evidence should not be limited to Morgan Stanley & Co. Incorporated, in isolation, but instead should take into consideration the financial resources available to Morgan Stanley & Co. Incorporated through its parent company, Morgan Stanley.

As is more fully set out in CPH's Motion in Limine No. 36, (Ex. G, at 9-11), Florida courts have broadly defined a defendant's "financial resources." "Financial resources" is "a general term which includes, but is not limited to, net worth. It encompasses many capabilities and potentials other than naked assets and liabilities." *International Union of Operating Engineers, Local 675 v. Lassitter*, 295 So. 2d 634, 644 (Fla. 4th DCA 1974), *quashed on other grounds*, 314 So. 2d 761 (Fla.), *reversed and remanded on other grounds*, 325 So. 2d 408 (Fla. 4th DCA 1975), *quashed and judgment entered by trial court reinstated*, 349 So. 2d 622 (Fla.1976). Such capabilities and assets include the resources available to the defendant through its parent company. *See, e.g., Humana*, 802 So. 2d at 497 (upholding the admission into evidence of defendant's $1.7 billion indemnity agreement with its parent company); *Wynn Oil Co. v. Purolator Chem. Corp.*, 403 F. Supp. 226, 232 (M.D. Fla. 1974) (applying Florida law) (considering the parent company's resources in evaluating the reasonableness of a punitive-damages award assessed against its subsidiary). Thus, the jury should be allowed to consider not just Morgan Stanley & Co. Incorporated's net worth, but the full resources available to it through its parent, Morgan Stanley.

2. The Jury Is Not Limited to Consideration of Morgan Stanley's Assets and Liabilities in Florida.

The evidence should not be limited to Morgan Stanley's assets and liabilities in Florida alone. Morgan Stanley cites no authority for this contention, and indeed, there apparently is none. No Florida case has ever limited consideration of a corporate defendant's financial resources to its activities in Florida alone. *See generally Owens-Corning*, 749 So. 2d 483; *General Motors Corp.*, 837 So. 2d 1010; *Liggett Group*, 853 So. 2d 434.

Florida law is clear that evidence of a defendant's financial resources is crucial to a jury's determination of an award that is sufficient to punish and deter, but not bankrupt a

defendant. Thus, so long as CPH is not using such evidence to justify an otherwise unconstitutional punitive-damages award, CPH should be permitted to present to the jury a complete picture of Morgan Stanley's financial resources, including the resources available to Morgan Stanley & Co. Incorporated through its parent, Morgan Stanley.

E. CPH Is Permitted To Argue that the Jury May Consider a Percentage of Morgan Stanley's Wealth in Making a Punitive-Damages Award.

"Because the amount of an award may be a pittance to a rich man and ruination to a poor one," CPH is permitted to argue, and the jury is permitted to consider, what amount of punitive damages will best serve the "goal of punishment." *Estate of Despain*, 2005 WL 672090, at *3; *see also American Med. Int'l,* 590 So. 2d at 952 ("'The more pecunious the defendant, the greater must be the punitive damages assessed in order 'to get his attention.'") (quoting *Lassitter*, 349 So. 2d at 626). It would be nonsensical for Florida law to mandate consideration of a defendant's financial resources by the jury when making a punitive-damages award while simultaneously precluding the parties from putting a punitive-damages award in context — for example by quantifying the award as a percentage of the defendant's financial resources. Without some idea of how the award will affect Morgan Stanley financially, the jury will not be able to determine whether the award is "painful enough to provide some retribution and deterrence" without "destroy[ing]" Morgan Stanley. *Arab Termite*, 409 So. 2d at 1043. It is clearly permissible for a jury to consider percentages as one of the relevant factors when deciding on punitive damages. Thus, CPH should be permitted to argue, and the jury should be permitted to consider, what percentage of Morgan Stanley's financial resources a punitive-damages award would represent.

For the foregoing reasons, the Court should deny Morgan Stanley's Renewed Motion in Limine No. 5 To Bar CPH from Adducing Evidence of Morgan Stanley's Finances or Arguing

that Punitive Damages Should Be Predicated on or Enhanced on Account of Those Finances.

V. Morgan Stanley's Litigation Misconduct Is an Affront to the Judicial System, and the Jury May Consider It as Such.

Morgan Stanley's conduct represents a serious affront to the judicial system: As this Court plainly stated in sanctioning Morgan Stanley's litigation misconduct: "The judicial system cannot function this way." Ex. B, 3/23/05 Order on CPH's Renewed Motion for Entry of Default Judgment. By attempting to frustrate CPH's prosecution of its claims at every turn, Morgan Stanley has greatly increased the costs of this litigation to both the Plaintiff and the tax-paying citizens of Palm Beach County. Under Florida law, the jury may consider the costs of the litigation when assessing a punitive-damages award. *See Owens-Corning*, 749 So. 2d at 485. Morgan Stanley's lack of respect for the judicial system also goes to the degree of reprehensibility of its misconduct, and to Morgan Stanley's attitude and conduct upon discovery of its misconduct, which are other factors specifically enumerated by *Owens-Corning*. *See id.* at 484-85. Moreover, if Morgan Stanley argues that it is a good corporate citizen, Morgan Stanley will open the door and CPH must be permitted to show that Morgan Stanley's conduct in this case represented a serious affront to the judicial system.

For the foregoing reasons, the Court should deny Morgan Stanley's Motion in Limine No. 31 To Bar Coleman (Parent) Holdings Inc. from Arguing, Commenting on, or Suggesting that Litigation Misconduct Injured, Had the Potential To Affect, or Otherwise Represented an Affront to the Judicial System.

CONCLUSION

For the foregoing reasons, CPH respectfully requests that this Court deny all five parts of Morgan Stanley's Submission Regarding Phase II Issues.

Dated: April 27, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 27th day of April, 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO. 2003CA 005045 AI

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PLAINTIFF'S BRIEF REGARDING THE LIMITED APPLICABILITY OF THE "CLEAR AND CONVINCING" STANDARD OF PROOF IN PHASE TWO OF TRIAL

Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, respectfully submits this brief regarding the limited applicability of the "clear and convincing" standard of proof in Phase Two of this bifurcated trial, in response to Defendant Morgan Stanley & Co. Incorporated's ("Morgan Stanley's") April 22, 2005 submission on this topic.[1]

The "clear and convincing" standard of proof applies to only one issue in this case: whether Morgan Stanley violated CPH's rights in a manner warranting the imposition of punitive damages. All other issues — including the remaining elements of CPH's claims (*i.e.*, reliance and causation of damages) — are to be decided by the "greater weight of the evidence." In other words, the fact of the violation of CPH's rights is subject to the "greater weight" standard;

[1] The Court has previously rejected Morgan Stanley's argument that the "clear and convincing" standard applies to every element of CPH's underlying claims, explaining that the standard applies only to CPH's overall entitlement to punitive damages. *See* Ex. A, MS Mot. Regarding the Reliance and Damages Issues to be Determined at Phase I of Trial, at 2 (filed April 4, 2005) (claiming that "to establish that punitive damages are even available, CPH must prove fraud — once again, the undefaulted elements — by clear and convincing evidence"); Ex. B, 4/5/05 Order Denying MS Mot.; Ex. C, 4/5/05 Tr. at 6828-35; Ex. D, 4/19/05 Tr. at 9367.

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Morgan Stanley's conscious awareness of or reckless indifference to the fact that it was violating CPH's rights must be proved by clear and convincing evidence.

The first issue that the jury must decide in Phase Two of this trial (which will take place only if the jury has already found each element of one or both of CPH's claims by the "greater weight of the evidence" standard) is whether Morgan Stanley's misconduct warrants punitive damages because it either was intentional or was so wanton and reckless as to serve as the legal equivalent of an intentional violation of CPH's rights. Specifically, in the present intentional-tort context, punitive damages are warranted if the jury finds by clear and convincing evidence that Morgan Stanley intentionally violated CPH's rights.

As Florida's Standard Jury Instructions make clear, what must be proved by clear and convincing evidence is the defendant's wrongful intent or reckless indifference — not all the elements of the underlying tort. For example, for pre-October 1, 1999 negligence actions, the instructions provide: "Punitive damages are warranted if you find by clear and convincing evidence that: (1) the conduct causing [loss] [injury] [or] [damage] to (claimant) was so gross and flagrant as to show a reckless disregard of human life or of the safety of persons exposed to the effects of such conduct; or (2) the conduct showed such an entire lack of care that the defendant must have been consciously indifferent to the consequences; or (3) the conduct showed such an entire lack of care that the defendant must have wantonly or recklessly disregarded the safety and welfare of the public; or (4) the conduct showed such reckless indifference to the rights of others as to be equivalent to an intentional violation of those rights." Florida Standard Civil Jury Instructions PD 1a(2)(a) (2003) (emphasis added); *accord id.* PD

2a(1).[2] Similarly, for post-October 1, 1999 torts, the instructions provide: "Punitive damages are warranted if you find by clear and convincing evidence that (name person whose conduct may warrant punitive damages) was personally guilty of intentional misconduct or gross negligence." *Id.* PD 1a(2)(b) (emphasis added); *accord id.* PD 2a(2).

Thus, the jury's assessment of the quantum of proof for any element of a plaintiff's intentional-tort claim — other than intent — is irrelevant when determining punitive damages. So long as the jury has found each element of at least one claim by the "greater weight of the evidence," that is enough to find liability for compensatory damages and to propel the jury to address the next issue, entitlement to punitive damages. Entitlement to punitive damages, in turn, hinges on clear and convincing evidence that the defendant acted with wrongful intent. Then, once the jury finds that the plaintiff is indeed entitled to an award of punitive damages, all disputed factual issues going to the proper amount of those damages must be decided using the "greater weight of the evidence" standard. *See* Florida Standard Civil Jury Instruction PD 1b(1) (2003) (for amount of punitive damages, "you should decide any disputed factual issues by the greater weight of the evidence"); *accord id.* PD 2d(1).

Morgan Stanley has provided no relevant authority contradicting plaintiff's straightforward reading of the Florida Standard Jury Instructions and Florida caselaw. Rather, Morgan Stanley has cited a slew of inapposite cases, none of which holds or even suggests that a plaintiff must prove each element of the underlying tort by clear and convincing evidence to be

[2] The Standard Jury Instructions applicable to pre-October 1, 1999 causes of action are designed primarily for use in negligence cases, but the notes for those instructions expressly state that the instructions may be modified for particular intentional torts. *See* Florida Standard Civil Jury Instructions PD 1 n.3 & PD 2 n.2 (2003) (citing *First Interstate Dev. Corp. v. Ablanedo*, 511 So. 2d 536 (Fla. 1987); *Metropolitan Life Ins. Co. v. McCarson*, 467 So. 2d 277 (Fla. 1985)). In any event, these instructions make clear that what must be proved by "clear and convincing" evidence is a sufficiently egregious mental state — not each element of the tort cause of action.

entitled to punitive damages. In particular, Morgan Stanley incorrectly claims that *First Interstate Development Corp. v. Ablanedo*, 511 So. 2d 536 (Fla. 1987), supports its argument. Although *First Interstate* does hold, as Morgan Stanley concedes, that "proof of fraud sufficient to support compensatory damages necessarily is sufficient to create a jury question regarding punitive damages," *id.* at 539, Morgan Stanley entirely omits the relevant reasoning from *First Interstate*: "This is so because intentional misconduct is a necessary element of fraud." *Id.* (emphasis added). As this and other caselaw,[3] as well as the Standard Jury Instructions, makes clear, the touchstone for entitlement to punitive damages is the defendant's egregious mental state; it is thus only to that mental state that the clear-and-convincing standard applies.

Finally, the Court should expressly instruct the jury that it has the discretion to decline to award punitive damages. *See, e.g.*, Ex. E, Plaintiff's Proposed Instruction No. 20 ("You may in your discretion decline to assess punitive damages."). At the same time, however, the Court should expressly acknowledge that the facts set forth in "Exhibit A" — including, for example, the fact that "Morgan Stanley knew of [Sunbeam CEO Al] Dunlap's fraudulent scheme and helped to conceal it until after Sunbeam could close the purchase of Coleman," Ex. F, Exhibit A to 3/23/05 Order, at 25 — have been deemed established for all purposes in this action, including with respect to the jury's decision whether to impose punitive damages, and if so, in what amount. Expressly instructing the jury to that effect in no way challenges its discretion to

[3] *See, e.g.*, *First Interstate*, 511 So. 2d at 539 (allowing punitive damages "'where torts are committed with fraud, actual malice or deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others'" (quoting *Winn & Lovett Grocery Co. v. Archer*, 171 So. 214, 221-22 (Fla. 1936)) (emphasis in original)); *Ingram v. Pettit*, 340 So. 2d 922, 924 (Fla. 1976) ("The intentional infliction of harm, or a recklessness which is the result of an intentional act, authorize[s] punishment which may deter future harm to the public by the particular party involved and by others acting similarly.").

decline to award any punitive damages; rather, it merely states the obvious fact that the "conclusively established" facts easily satisfy the "clear and convincing" standard of proof.

CONCLUSION

Accordingly, the Court should reject Defendant's repeated contention that elements of CPH's claims must be proved by clear and convincing evidence for CPH to prove entitlement to punitive damages.

Dated: April 25, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 25th day of April, 2005.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON CPH'S RENEWED MOTION FOR ENTRY OF DEFAULT JUDGMENT

THIS CAUSE came before the Court March 14 and 15, 2005, on CPH's Renewed Motion for Entry of Default Judgment, with both parties well represented by counsel.

Coleman (Parent) Holdings, Inc. ("CPH"), has sued Morgan Stanley & Co., Inc. ("MS & Co."), for aiding and abetting and conspiring with Sunbeam to perpetrate a fraud. Early in the case, CPH was concerned that MS & Co. was not thoroughly looking for emails responsive to its discovery requests. On April 16, 2004, the Court entered an Agreed Order ("Agreed Order") that required MS & Co. to search its oldest full backup tapes for emails subject to certain parameters and certify compliance. MS & Co. certified compliance with the Agreed Order on June 23, 2004. On November 17, 2004, CPH learned that MS & Co. had found some backup tapes that had not been searched. On January 26, 2005 it served its Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order ("Adverse Inference Motion"), claiming that MS & Co.'s violation of the Agreed Order, coupled with its systemic overwriting of emails after 12 months, justified an adverse inference against it. The Court ordered certain limited discovery. Responses to that discovery prompted CPH to orally amend its Adverse Inference Motion to seek more severe sanctions.

The Court held an evidentiary hearing on the Adverse Inference Motion on February

14, 2005. On March 1, 2005 it issued its Amended Order on Coleman (Parent) Holdings Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order ("Adverse Inference Order"). In its current Motion, CPH argues that it has since learned that the discovery abuses addressed in the Adverse Inference Motion and Order represent only a sampling of discovery abuses perpetrated by MS & Co. and that the abuses have continued, unabated. It claims that these abuses, when taken as a whole, infect the entire case. To understand CPH's argument, it is necessary to go back to the beginning.

This case arises out of an acquisition transaction that was negotiated and consummated in late 1997 and early 1998, in which CPH sold its 82% interest in the Coleman Company, Inc., to Sunbeam Corporation. MS & Co. served as financial advisor to Sunbeam for parts of the acquisition transaction and served as the lead underwriter for a $750,000,000.00 debenture offering that Sunbeam used to finance the cash portion of the deal.

CPH's Complaint[1] alleged claims against MS & Co. arising from this transaction for fraudulent misrepresentation, negligent misrepresentation, aiding and abetting fraud, and conspiracy, and sought damages of at least $485 million.

On May 12, 2003, MS & Co. was served with the Complaint and CPH's First Request for Production of Documents ("Request"). The Request sought, in essence, all documents connected with the Sunbeam deal. "Documents" was broadly defined, and specifically included items electronically stored. Concerned that, out of more than 8,000 pages of documents produced, it had received only a handful of emails, CPH on October 29, 2003, served its Motion to Compel Concerning E-Mails. That motion sought an order requiring MS & Co. to make a full investigation for email messages, including a search of magnetic tapes and hard drives; produce within 10 days all emails located; and produce a Rule 1.310 witness

[1]On February 17, 2005, CPH served its First Amended Complaint, which dropped the claims against MS & Co. for fraudulent and negligent misrepresentation, leaving only the aiding and abetting and conspiracy claims.

within 20 days "to describe the search that was conducted, identify any gaps in Morgan Stanley's production, and explain the reasons for any gaps."

In its Opposition to Coleman (Parent) Holdings, Inc.'s Motion to Compel served November 4, 2003, MS & Co. argued that CPH wanted "this Court to order a massive safari into the remote corners of MS & Co.'s email backup systems" and represented that "(t)he restoration efforts demanded by CPH would *cost at least hundreds of thousands of dollars* and require several months to complete (emphasis in original). MS & Co. argued that CPH's "true" motive was to "harass and burden MS & Co. with unnecessary and costly discovery demands and attempt to smear MS & Co. with out-of-context recitations from other proceedings" because "CPH *concedes* that MS & Co. is only able to restore email from backup tapes from January 2000 and later - *more than a year and a half after the events that allegedly gave rise to CPH's claims*," (emphasis in original).

CPH's "concession" was based on representations like the kind made to it by MS & Co.'s counsel in a March 11, 2004 letter that suggested "(t)he burden on Morgan Stanley from . . . a wholesale restoration [of email back up tapes], both in terms of dollars and manpower would be enormous. Regardless of who performs the initial restoration, it would require hundreds (perhaps thousands) of attorney-hours to review millions of irrelevant and non-responsive e-mails . . ."[2]

In response to CPH's Motion to Compel, the parties agreed to reciprocal corporate

[2]Complaints about MS & Co.'s tactics are not new. See Ex. 196 [February 26, 2004, letter from EEOC to Hon. Ronald L. Ellis in EEOC/Schieffelin v. Morgan Stanley & Co., Inc., et al., 01-CV-8421 (RMB) (RLE) (S.D.N.Y.): ("(w)hen EEOC received [Morgan Stanley's] January 27, 2004 Responses to EEOC's Fifth Requests for Production of Documents which did not contain any e-mails, the parties communicated further. At that time, Morgan Stanley took the position that searching for e-mails would be burdensome both in regards to expense and the time it would take to respond. While the parties were in the process of attempting to work out these disputes, EEOC for the first time learned that [Morgan Stanley has] an easy, systematic ability to search for relevant documents. In a February 16, 2004, conversation with an IT representative of [Morgan Stanley], EEOC learned that [Morgan Stanley has] an e-mail system, which, while not yet fully comprehensive, was easily searchable on February 18, 2004, the close of discovery . . . which is certain to produce discoverable information highly relevant to EEOC's and Plaintiff-Intervenor's claims . . . After disclosing their state-of-the-art system to EEOC, [Morgan Stanley] dropped [its] assertion that the process was too expensive, but maintained that they refuse to search for e-mails because it is burdensome for attorneys to review large numbers of documents prior to production.")

depositions on the email issue. CPH deposed Robert Saunders on February 10, 2004.[3] After completion of the corporate representative depositions, and unable to obtain MS & Co.'s agreement to a mutual email restoration protocol, CPH served its Motion for Permission to have Third Party Retrieve Morgan Stanley E-Mail and Other Responsive Documents, proposing that a third party vendor be given access to both parties' email systems for restoration at each party's expense. At the hearing on that Motion, CPH offered to split the expenses evenly. MS & Co. refused.

MS & Co.'s continued assertions that the email searches could be conducted only at enormous cost and would be fruitless because there were not backup tapes with email from 1997 and 1998 were confirmed to the Court by MS & Co.'s counsel, Thomas Clare of Kirkland & Ellis, at a hearing held March 19, 2004:

> Mr. Scarola: Electronic records of e-mails that have been exchanged.
> The Court: Do we agree that there has been such a request outstanding?
> Mr. Clare: There has been a request outstanding.
> The Court: And have you all objected?
> Mr. Clare: From the beginning.
> The Court: And what's the basis of the objection?
> Mr. Clare: We objected to the breadth of the request that they're making. And to answer Your Honor's question directly – and the burden that is associated with it – that given the particular e-mail back-up tapes that are in existence five, six years after the fact of these transactions, that the scope of the e-mail request that they are seeking is improperly and unduly burdensome given the enormous costs that would be required, given the fact that the time period for which we have back-up tapes post dates the events by several years.

Unable to resolve the email issue, on April 9, 2004, CPH served its Motion to Compel

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[3]Saunders provided misleading information in his deposition. See footnote 12, infra.

Concerning E-Mails and Other Electronic Documents. On the eve of the hearing on CPH's Motion to Compel, the parties reached an accommodation, and on April 16, 2004 the Court entered the Agreed Order. Under the Agreed Order, MS & Co. was required to (1) search the oldest full backup tape for each of 36 MS & Co. employees involved in the Sunbeam transaction; (2) review emails dated from February 15, 1998, through April 15, 1998, and emails containing any of 29 specified search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004, all nonprivileged emails responsive to CPH's document requests; (4) give CPH a privilege log; and (5) certify its full compliance with the Agreed Order.

As required by the Agreed Order, MS & Co. produced about 1,300 pages of emails on May 14, 2004. It did not, however, certify compliance with the Agreed Order. After prompting by CPH, on June 23, 2004, MS & Co. served a certificate of compliance signed by Arthur Riel, an Executive Director and manager of its Law/Compliance IT Group.[4]

CPH got its first indication that the Agreed Order may have been violated in the late fall of 2004.

On November 17, 2004, Clare wrote Michael Brody of Jenner & Block, CPH's outside counsel, that MS & Co. had "discovered additional e-mail backup tapes . . ."; that "(t)he data on some of [the] newly discovered tapes has been restored;" that "we have re-run the searches described in [the Agreed Order]"; that "some responsive e-mails have been located as a result of that process"; and that "(w)e will produce the responsive documents to you as soon as the production is finalized."

On December 14, 2004, Brody wrote Clare back:

> in [your November 17, 2004 letter], you state that Morgan Stanley located additional email backup tapes, and that you

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[4]Though CPH would not learn for months that the certificate was false, and even then the magnitude of MS & Co.'s misrepresentations would not be admitted, MS & Co. personnel, including in-house counsel, knew the certification of compliance was false when made.

> would be producing documents soon. Within two days of that letter, you produced some emails to us. In your November 17, 2004 letter, however, you also indicated that "some of the backup tapes are still being restored." Have those backup tapes been restored? Have you found additional responsive emails? If so, when will Morgan Stanley produce those emails? How is it that the tapes were only recently located?

On December 17, 2004, Clare wrote back, telling Brody "(n)o additional responsive e-mails have been located since our November production."[5]

Brody wrote back to Clare December 30, 2004, noting the deficiencies in Clare's correspondence:

> You do not inform us whether the review of the recently-located backup tapes still is ongoing. Please confirm that all email backup tapes from the relevant time period have been reviewed and all responsive emails have been produced. If the review still is proceeding, please let us know when the review will be completed.

Clare wrote back on January 11, 2005, telling Brody that the "restoration of e-mail backup tapes is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

Concerned about Clare's lack of candor, on January 19, 2005 Brody wrote again:

> I write in response to your January 11, 2005 letter concerning e-mails back-up tapes. Unfortunately, your letter raises more questions than it answers. As I requested in my December 14, 2004 letter, please explain the circumstances under which Morgan Stanley located these backup tapes and advise us of the date on which the tapes were located.

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[5]Not only does this letter fail to answer Brody's legitimate questions, it implies that MS &Co. was still processing and reviewing emails from the newly found tapes. As we now know, though, *no* additional information was migrated to the archives between approximately August 18, 2004 and January 15, 2005. *Of course* "no additional responsive e-mails [would have been] located."

> Further, please explain your statement that "the next set of backup tapes" is scheduled to be restored "at the end of January." How many tapes will be restored by the end of January? When exactly in January will Morgan Stanley complete the process of restoring and searching these tapes for responsive documents? Are there other backup tapes that are not yet in the process of being restored? If so, please advise us of (a) the number of tapes that are not yet in the process of being restored; (b) the time period of the data contained on those tapes; and (c) Morgan Stanley's timetable for restoring and searching those tapes. In addition, please explain why those tapes are not yet in the process of being restored. Please also explain why Morgan Stanley cannot complete the restoration and searching of all remaining backup tapes before "the end of January." As you know, our trial is scheduled to begin on February 22, 2005.
>
> We look forward your complete response to these questions no later than January 21, 2005 so that we can bring this matter to the Court's attention, if necessary.

Conforming to what was by now his usual stonewall tactic, Clare responded by letter dated January 21, 2005:

> I write in response to your January 19, 2005 letter regarding Morgan Stanley's production of e-mails restored from backup tapes.
>
> Morgan Stanley completed its initial production of restored e-mail messages on May 14, 2005. The May 2004 production was conducted in accordance with the agreed-upon order governing, and the searches that resulted in that production encompassed data from all of the backup tapes known to exist at the time. Subsequent to the May 2004 production, additional tapes were found in various locations at Morgan Stanley. The discovered tapes were not clearly labeled as to their contents, were not found in locations where e-mail backup tapes customarily were stored, and many of the tapes

> were in a different format than other e-mail backup tapes. In November 2004, once it was determined at least some of the discovered tapes contained recoverable e-mail data, Morgan Stanley re-ran the searches described in the agreed-upon order. Those searches resulted in Morgan Stanley's November 2004 production.
>
> Morgan Stanley's efforts to restore the backup tapes discovered after the May 2004 production are ongoing. It is a time-consuming and painstaking process and, given the absence of clear labels or other index information for the backup tapes, there is no way for Morgan Stanley to know or accurately predict the type or time period of data that might be recovered from tapes that have yet to be restored. While Morgan Stanley cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes, we understand from Morgan Stanley that, when the agreed-upon searches are run again at the end of January, those searches will include approximately one terabyte of additional data restored since the prior production.

On January 26, 2005, CPH served its Adverse Inference Motion, seeking sanctions based on MS & Co.'s disclosure of the newly found tapes. Hearing was scheduled for February 14, 2005. In preparation for that hearing, on February 3, 2005 the Court ordered MS & Co. to produce by noon on February 8, 2005 "(i) all documents to be referred to or relied on by any of the witnesses in his or her testimony; and (ii) all documents within MS & Co.'s care, custody, or control, addressing or related to the additional email backup tapes, including matters relating to the time or manner in which they were discovered; by whom they were discovered; who else learned of their discovery and when; and the manner and timetable by which they were be restored and made searchable, including any correspondence to or from outside or prospective outside vendors."

The Adverse Inference Order outlined the discovery abuses shown at the February 14, hearing. They included MS & Co.'s undisclosed discovery of the 1,423 "Brooklyn" tapes no

later than May of 2004; the undisclosed discovery of the 738 8-millimeter backup tapes in 2002; the presence of unsearched data in the staging area; the discovery of 169 DLT tapes in January 2005; the discovery of more than 200 additional tapes on February 11 and 12, 2005; the discovery of a script error that had prevented MS & Co. from locating responsive email attachments; and discovery of another script error that had infected the ability to gather emails from Lotus Notes platform users.

In response to these deficiencies, the Court issued the Adverse Inference Order. That Order reversed the burden of proof on the aiding and abetting and conspiracy elements and included a statement of evidence of MS & Co.'s efforts to hide its emails to be read to the jury, as relevant to both its consciousness of guilt and the appropriateness of punitive damages. It specifically provided that "MS & Co. shall continue to use its best efforts to comply with the April 16, 2004 Agreed Order and . . . February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search."[6]

It is now clear why MS & Co. was so unwilling to provide CPH with basic information about how and when the tapes were found or when production would be complete. First, candor would have required MS & Co. to admit that it had not done a good faith search for the oldest full backup tapes, and that Riel's certificate of compliance was false. Some unsearched tapes had been found by 2002; others had been found no later than May, 2004. Together, over 2,000 tapes had been found which were not searched prior to the May production. It is untrue that the tapes were "not in locations where e-mail backup tapes customarily were stored."

[6]Concerned that MS & Co. had been less than candid with both CPH and the Court, on February 4, 2004, the Court entered its Order on Coleman (Parent) Holding's ore tenus Motion to Participate in Search of Additional E-Mail Backup Tapes or Appoint Third Party to Conduct Search, ordering MS & Co. to pay for a third party vendor to check its compliance with the Agreed Order. The Court previously found that the two scripts errors testified to by Allison Gorman at the February 14, 2005, hearing would not have been discovered or revealed without the threat that the third-party vendor would discover the errors. Given Ms. Gorman's testimony at the March 14, 2005, hearing, though, it now appears MS & Co. knew about the errors before the appointment of the third-party vendor. Consequently, the errors were only revealed, but not discovered, in response to the February 4, 2004, Order.

Second, MS & Co. desperately wanted to hide an active SEC inquiry into its email retention practices.[7] [8] [9] [10] Finally, MS & Co. did not want to admit the existence of the historical email archive, which would expose the false representations it had made to the Court and used to induce CPH to agree to entry of the Agreed Order.[11] [12]

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[7]On December 17, 2003, CPH served its Third Request for Production seeking "(a)ll materials and documents submitted to the United States Securities and Exchange Commission ("SEC"), received from the SEC, or reflecting communications with the SEC in connection with any investigation, inquiry, or examination concerning or relating to Morgan Stanley's policies and/or procedures with regard to the retention, storage, deletion, and/or back-up of electronic mail (emails) . . ." On October 12, 2004, CPH served its Request for Supplemental Documents seeking to bring MS & Co.'s document production current, requesting "(a)ll documents not previously provided by MS & Co. that are responsive to any Request for Production of Documents that CPH previously has served upon MS & Co. in the litigation, including documents obtained by MS & Co. or its counsel after the date of MS & Co.'s prior productions." No SEC documents were produced in response to either request; no privilege log was generated. On other privilege logs generated in response to court orders, MS & Co. did not show the SEC on the distribution portion of the log. See March 9, 2005 Order Following in Camera Inspection (Riel/SEC Documents) footnotes 1, 2. See, also, footnote 15, infra. Kirland & Ellis, outside counsel for MS & Co. in this litigation, represents MS & Co. in the SEC's inquiry into its email retention practices.

[8]MS & Co. manipulated the unhinging of the SEC's email investigation from the IPO litigation in January, 2005, to conceal the email issues as long as possible.

[9]It is now apparent that MS & Co. chose deliberately to keep its affidavits concerning the informal SEC inquiry submitted to support its privilege claims vague, despite two requests from the Court seeking specific information. See February 28, 2005 Order (Release of Exhibits).

[10]See February 25, 2005 Order on Morgan Stanley's Objections to Coleman (Parent) Holding Inc.'s Notice to Produce at Hearing and Motion for Protective Order and March 4, 2005 Order on Plaintiff's ore tenus Motion to Compel Additional Production.

[11]While MS & Co. contends that its representations to the Court that it would cost "hundreds of thousands of dollars" to search the backup tapes and that there was no pre-2000 backup tapes were not false, they were deliberately misleading: MS & Co. never had an intention to search the back up tapes to respond to the requests and some of the year 2000 backup tapes backed up email back to 1997.

In 2001, MS & Co. decided to create the email archive. By June,2003, it had decided that the archive should have two components. First, MS & Co. wanted to create an archive that captured and stored email as it was generated. Second, MS & Co. wanted to add historical data to the archive. That task involved searching for all email backup tapes containing historical emails; sending those tapes to an outside processor; loading the processed tapes into a staging area; and migrating the stored data from the staging area onto the archive. As we now know, archive searches are quick and inexpensive. They do not cost "hundred of thousands of dollars" or "take several months." The restrictions imposed by the Agreed Order were not needed.

[12]On February 10, 2004, Robert Saunders, an executive director of IT for MS & Co., was deposed. He testified that in January, 2003, MS & Co. had put into effect the email archive system. When specifically asked whether the new email archive system would include prior backups or only going forward backups, he testified that "(t)he way it was built was for going forward backup." He was next asked whether "(w)ith respect to backup dated January 2001 and previously, does Morgan Stanley have any new capabilities to restore and search e-mail?" After counsel interposed a vagueness objection, he answered "(t)here are no new capabilities to search that e-mail." That testimony was so misleading as to be false. As Sauders well knew, since he was on the team responsible, the "live" email capture portion of the archive was already operational. The migration of the historical data to the archive was expected to be completed by April of 2004, just two months after his deposition.

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MS & Co.'s wrongful conduct has continued unabated.[13] Since the February 14, 2005, hearing, it has come to light that:

- Only two whole and four partial tapes from the Brooklyn tapes had been migrated to the archive and were thus searched for the November, 2004, production. MS & Co. sought to hide this information to create the impression that all the produced documents came from the Brooklyn tapes, rather than reveal that the production came from material that had migrated from the staging area to the archive since the May, 2004, production or some other, as yet undisclosed, source.[14]

- Contrary to MS & Co.'s counsel's November 17, 2004, letter to CPH, *none* of the November, 2004 production came from the "newly found" tapes. MS & Co. carefully crafted its responses to inquiries about the November, 2004, production to avoid both disclosure of the existence of the archive and outright lying.

- The scripts MS & Co. used to process emails into its archive caused the bodies of some messages to be truncated. MS & Co. discovered this problem on February 13, 2005, but did not tell the Court about it until March 14, 2005.

- A migration issue caused about 5% of email harvested by NDCI from the backup tapes not to be captured in the archive, based on testing of a representative sample of tapes. MS & Co. told the SEC about this problem on February 24, 2005, but failed to tell CPH or the Court.

- As of June 7, 2004, only 120 out of 143 SDLT tapes had been processed into the archive.

- An analysis requested by the SEC showed that, based on a representative sample, 10% of backup tapes were overwritten after January, 2001.

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[13]MS & Co. sought to use the entry of the Adverse Inference Order as a shield against further inquiry into its email abuses, arguing that the matter was closed by the Adverse Inference Order. It previously used this tactic with the SEC, arguing that the December 3, 2003 Cease and Desist Order shielded it from other sanctions for email retention failures. See Ex. 14 [February 10, 2005 letter from outside counsel for MS &Co. to SEC]

[14]MS & Co. argued at the March 14 and 15, 2005 hearing that there were only 13 unique, new emails contained in the November 2004 production when compared to the May 2004 production. Nine of those emails, however, were originally given to MS& Co.'s lawyers for responsiveness review by the IT staff for the May 2004 production. No explanation of why they were not produced in May was offered. This is particularly concerning given the large number of documents Ms. Gorman testified the search parameters found compared with the relatively small number found responsive and produced after review by counsel.

- A software error caused blind carbon copies not to be captured in the archive process. MS & Co. told the SEC about this problem on February 24, 2005. MS & Co. did not tell CPH or the Court.

- A software error caused the searches to be hyper case-sensitive, resulting in a failure to capture all emails. MS & Co. knew of the problem as of December, 2004, but did not tell CPH or the Court. The problem was not purportedly fixed until March, 2005.

- A script error caused the archive to have problems pulling group email in Lotus Notes.

- MS & Co. provided sworn testimony at the February 14, 2005, hearing that it had located 600 gigabytes of data, while contemporaneously telling the SEC it had located a terabyte of data. A gigabyte represents 20,000 to 100,000 pages. Incredibly, MS & Co.'s witness on this point, Allison Gorman, testified on March 14, 2005, that it was simply a "terminology" issue that she did not choose to correct because it could cause "confusion."

- CPH requested MS & Co. to produce responses it had made to third-parties in civil, criminal, or administrative proceedings describing limitations on MS & Co.'s ability to produce emails and all notices in such proceedings that MS & Co. had newly discovered backup tapes containing email. MS & Co. objected, arguing that there were over 300 separate proceedings, involving over 70 outside law firms, and that the cost of compliance would be too great. On March 2, 2005, the Court ordered the production, after shortening the time period involved, and required production within 12 hours after counsel's review of each item for responsiveness but, in any event, within 10 days. At the time MS & Co. objected to CPH's request as unduly burdensome, it knew of its Well submission to the SEC made on February 10, 2005. Kirkland and Ellis, co-counsel here, was co-counsel for MS & Co. in that SEC proceeding. Consequently, it appears MS & Co.'s real concern was not that expressed to the Court, but was based on its realization that compliance would reveal the existence of the SEC inquiry into its email retention policy and MS & Co.'s efforts to keep the existence of that investigation secret. MS & Co. violated the Court's March 2, 2005, Order on Morgan Stanley's Responses and Objections to Coleman (Parent) Holdings Inc.'s Notice to Produce at Hearing requiring it to disclose items responsive to CPH's Request for Production within 12 hours of review for responsiveness by waiting *days*, not hours, to produce the Wells submission.

- MS & Co.'s failure to produce or log the SEC documents violated the Court's February 3, 2005, Order.[15]

- James Doyle's, the Executive Director of MS & Co.'s Law Division, declaration that he did not learn of additional unsearched backup tapes until the end of October, 2004, was intended to mislead CPH and the Court. Obviously, MS & Co. sought to create the implication in the declaration that *no one* in the Law Division knew of the backup tapes before then. Instead, both Soo-Mi Lee, Doyle's associate, and James Cusick, Doyle's superior, knew of the tapes no later than June 7, 2004.

- In-house counsel for MS & Co. knew as of June 7, 2004, that nearly a third of the restored backup tapes did not contain email, implying they may have been recycled in violation of the December 3, 2002 Cease and Desist Order. They did not tell CPH or the Court.

- MS & Co.'s searches looked for only two types of emails. There are other types of emails that were not included in the searches. CPH did not learn of this deficiency until March 13, 2005.

- MS & Co. improperly failed to produce 125 documents required to be produced by the Court's February 3, 2005, Order Specially Setting Hearing which required limited discovery be made in connection with the February 14, 2005, hearing on the Adverse Inference Motion.

- MS & Co. improperly withheld 13 documents required to be produced by the Court's March 4, 2005, Order on Plaintiff's ore tenus Motion to Compel Additional Production.

- An additional 282 tapes were found on February 23 and 25, 2005; CPH was not told of the discovery until March 13, 2005.

- An additional 3,536 tapes were discovered on February 23, 2005, in a security room.

- An additional 2,718 tapes were found at Recall, MS & Co.'s third party off-site storage vendor, on March 3, 2005.

- An additional 389 tapes were found March 2 through March 5, 2005. CPH was not told

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[15]The Court previously rejected MS & Co.'s argument that the January 14, 2005, email exchange between its outside and in-house counsel was not required to be produced under the February 3, 2005, Order Specially Setting Hearing because it referred to the "documents issue" and not specifically to the backup tapes. See March 16, 2005 Order on Morgan Stanley's Motion to Disqualify Plaintiff's Counsel Searcy, Denney, Scarola, Barnhart & Shipley, P.A. and Jenner & Block, LLC. MS & Co.'s insistence on a narrow interpretation of the February 3, 2005, Order is not particularly sympathetic, when the only reason that Order confined production to the backup tape issue was because MS &Co. had failed to notify the Court of the other deficiencies in its certificate of compliance.

until March 13, 2005.

- On March 4, 2005, the Court entered its Order on Plaintiff's ore tenus Motion to Compel Additional Production, which ordered MS & Co. to produce by 3:00 p.m. on March 7, 2005, all items within its care, custody, or control dealing with the Riel/SEC investigation, other than documents representing communications between or among MS & Co. inside and outside counsel that were not copied to anyone other than counsel. MS & Co. sought to discredit Riel and thus distance itself from the false June 23, 2004 certificate of compliance; in doing so, it sought to hide Riel's whistle blower status and the existence of an SEC investigation into whether MS & Co. employees sought kick backs from third party vendors; whether MS & Co. employees were improperly pressured into dealing with third-party vendors who may provide business to MS & Co.; and whether MS & Co. continued to overwrite backup tapes contrary to the SEC's December 3, 2002, Cease and Desist Order.

- A script error prevented the insertion of some emails into the archive. MS & Co. produced over 4,600 pages of emails on March 21, 2005, some of which it suggested may have been located on correction of the error; alternatively, it suggested the emails may have been located by NDCI as part of its efforts to verify MS & Co.'s searches.

MS & Co.'s discovery abuses have not been confined to its email production.

William Strong is a MS & Co. managing director and was one of the principal players for it in the Sunbeam deal. He took credit for the fees generated. On May 9, 2003, CPH requested a copy of "(a)ll documents concerning employment contracts, performance evaluations, and/or personnel filed (including without limitation any documents that describe or discuss [his] training, experience, competence, and accomplishments) . . ." MS & Co. asserted that the requested documents were not relevant and that production "would unnecessarily infringe on the privacy interests of [Strong]." On March 15, 2004, the Court ordered MS & Co. to produce "(a)ll references (positive or negative) to [Strong's] truthfulness, veracity, or moral turpitude." Some portions of Strong's evaluations were produced in response to that order. Those evaluations noted Strong's colleagues' reservations about his candor and ethics. Two of his evaluators, Joseph Perella and Tarek Abdel-Meguid, were deposed, when some relatively vague testimony about the bases for those conclusions was offered. It now appears Strong was facing criminal prosecution in Italy for complicity in bribery while he was working on the Sunbeam transaction, which his evaluators knew, and that MS & Co. purposely

withheld that information from CPH and the Court.[16]

Even once CPH independently discovered evidence of Strong's indictment in Italy, MS & Co. sought to shield its files from discovery. It claimed that virtually *all* of the documents it had were privileged under joint defense agreements in place between it, Strong, and Saloman Brothers, Strong's employer at the time of the incident. As the Court's March 10, 2005 Order Following In Camera Inspection (Strong) details, the documents MS & Co. relied on to support that position, and sought to prevent CPH from obtaining, reflect no such agreement.

The other discovery abuses and misrepresentations by MS & Co. other than those involving its email production practices are outlined in CPH's Chronology of Discovery Abuses by Defendant served March 1, 2005, and would take a volume to recite. They include:

- failing to provide the information retained by MS & Co.'s internal document management system pertaining to MS & Co.'s work for Sunbeam; falsely representing to the Court that no useful information was contained in that information; and producing a Rule 1.310 representative who had made an insufficient inquiry into authenticity, business record status, and authorship of documents; see February 28, 2005 Order on CPH's Motion to Deem Certain Documents Admissible and for Sanctions due to Morgan Stanley's Disregard of Court Order;

- when faced with contempt proceedings for violating the Stipulated Confidentiality Order by providing a copy of a settlement agreement between CPH and Arthur Andersen to other counsel, representing to the Court that the law firm of Kellogg, Huber was retained to handle the "Andersen aspects" of this litigation because of a conflict between Andersen and Kirkland & Ellis; Mark Hansen, a partner at Kellog, Huber, testified that his firm was hired as co-counsel for all aspects of the case;

- providing answers to interrogatories signed by a corporate representative who performed insufficient verification of the responses;

[16]MS & Co. originally argued that documents concerning the Italian proceedings were not in Strong's "personnel file" and so were not required to be produced in response to CPH's initial request. MS & Co.'s practice of filing damaging information about an employee other than in his personnel file and then claiming it was not included in the request is about at convincing as its argument that, since it has a corporate directive not to keep drafts of documents once they are in final form, document drafts cannot be business records exempt from hearsay because they are not "kept in the course of a regularly conducted business activity." See Fla. Stat. §90.803 (6) (a). In any event, there was *no excuse* for not producing its records of the Italian proceedings once the Court's March 15, 2004 Order was entered.

- routinely asserting unfounded privilege claims;[17] and

- failing to timely comply with the Court's orders; for example, MS & Co. did not produce Strong's 1994 Performance Evaluation until the afternoon of March 15, 2005, though it was obviously included in the Court's March 15, 2004 Order. The failure cannot be excused as oversight since, when CPH specifically asked for the 1994 evaluation in the spring of 2004, MS & Co.'s counsel said it was withheld as non-responsive; see, also, Ex. 197, 198.

In sum, MS & Co. has deliberately and contumaciously violated numerous discovery orders, including the April 16, 2004 Agreed Order; February 3, 2005 Order Specially Setting Hearing; and the March 4, 2005 Order on Plaintiff's ore tenus Motion to Compel Additional Production. At the February 14, 2005, hearing on CPH's Adverse Inference Motion, it chose to hide information about its violations and coach witnesses to avoid any mention of additional, undisclosed problems with its compliance with the Agreed Order. Implicit in the requirement that MS & Co. certify compliance with the Agreed Order was the requirement to disclose impediments to its ability to so certify. As outlined in this Order, MS & Co. employees, and not just counsel, have participated in the discovery abuses. The prejudice to CPH from these failings cannot be cured. Even if all the script errors have been located and corrected, and MS & Co. has failed to show they have, and even if all of the email backup tapes have now been located, and MS & Co. has failed to show they have, the searches cannot be completed in time. The other discovery abuses outlined call into doubt all of MS & Co.'s discovery responses. *The judicial system cannot function this way.* Based on the foregoing and on the Court's March 1, 2005 Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, it is

ORDERED AND ADJUDGED that CPH's Renewed Motion for Entry of Default Judgment is Granted, in part. See Robinson v. Nationwide Mut. Fire Ins. Co., 887 So. 2d 328 (Fla. 2004); Mercer v. Raine, 443 So. 2d 944 (Fla. 1983); Precision Tune Auto Care, Inc. v.

[17]For example, MS & Co. produced over 260 documents dealing with the Strong investigation over which it had previously claimed privilege once the Court announced its intention to conduct an in camera review; the Court found another 200 documents were not privileged after conducting its review, by its March 10, 2005 Order.

Radcliffe, 804 So. 2d 1287 (Fla. 4th DCA 2002); Rule 1.380 (b) (2) (C), Fla. R. Civ. P. Paragraphs 2 (excluding the last sentence thereof); 3 (excluding the portion of the last sentence beginning with "in order to close . . ."); 8-10, 11 (excluding everything after the first sentence); 12 (excluding all parts following "June 1998"); 13 (excluding the last sentence thereof); 14-27; 28 (excluding everything after "firm" in the second to last sentence thereof); 29-39; 41-52; 53 (excluding the second sentence thereof); 54-57; 58 (excluding "CPH and" in the second line thereof); 59-63; 64 (excluding the third line thereof); 65 (excluding the last sentence thereof); 66 (excluding the last sentence thereof); 67-70; 71 (excluding the first word of the last sentence and the remainder of that sentence after "material"); 72; 73 (excluding the first sentence thereof); 74 (excluding the words "CPH and" in the second to last sentence thereof); 75-81; 85; 86; 87 (excluding (g)); 90, and 91 (excluding (g)) of Plaintiff's Amended Complaint, as amended by the Court's Amended Order on Morgan Stanley's Motion to Dismiss, Motion to Strike, and Motion for More Definite Statement, shall be read to the jury and the jury instructed that those facts are deemed established for all purposes in this action. A copy of a redacted Amended Complaint is attached as Exhibit A. It is further

ORDERED AND ADJUDGED that the Court shall read to the jury a Statement similar to that attached as Exhibit A to the Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, but incorporating the relevant additional findings of this Order, and the jury will be instructed that it may consider those facts in determining whether MS & Co. sought to conceal its offensive conduct when determining whether an award of punitive damages is appropriate. See General Motors Corp. v. McGee, 837 So. 2d 1010 (Fla. 4th DCA 2002), rev. den. 851 So. 2d 728 (Fla. 2003). Counsel are each invited to submit proposed Statements. It is further

ORDERED AND ADJUDGED that CPH shall be entitled to an award of reasonable fees and costs incurred as a result of the Renewed Motion for Entry of Default Judgment and the violations of Court orders recited herein. The amount shall be determined at an evidentiary hearing following trial. It is further

ORDERED AND ADJUDGED that MS & Co. is relieved of any future obligation to

comply with the April 16, 2004 Agreed Order and the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s Motion to Participate in Search of Additional E-Mail Back-Up Tapes or Appoint Third Party to Conduct Search. It is further

ORDERED AND ADJUDGED that the pro hac vice admission of Thomas Clare is revoked. It is further

ORDERED AND ADJUDGED that the portions of CPH's Motion for Correction and Clarification of Order on CPH's Motion for Adverse Inference that seek to amend the body of that Order to correct clerical and spelling errors, as agreed to by counsel, is Granted, and the corrections deemed made to the body of the Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, by interlineation. In all other respects the remainder of the Motion for Correction and Clarification is declared moot.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 23rd day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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In April 1997, Morgan Stanley began serving as Sunbeam's investment banker. Morgan Stanley originally attempted to find someone to buy Sunbeam. When Morgan Stanley was unable to find a buyer, Morgan Stanley developed a strategy for Sunbeam to use its fraudulently-inflated stock to acquire a large company that Sunbeam would own and operate. Then, trading on Morgan Stanley's relationships with CPH's senior officers, Morgan Stanley found

Exhibit A

Coleman for Sunbeam. At the time of the sale to Sunbeam, Coleman was a leading manufacturer and marketer of consumer products for the worldwide outdoor recreation market, with annual revenues in excess of $1 billion.

ion shares

After Sunbeam announced plans to acquire Coleman, Morgan Stanley agreed to underwrite a $750 million debenture offering for Sunbeam. Sunbeam needed the proceeds of that debenture offering to complete the acquisition of Coleman. As Sunbeam's investment banker and as the sole underwriter for the $750 million debenture offering, Morgan Stanley received detailed and specific information concerning Sunbeam's financial condition and performance. Morgan Stanley received information that directly contradicted Sunbeam's and Morgan Stanley's assertions to CPH that Sunbeam had undergone a successful turnaround and that its financial performance had dramatically improved. By no later than March 18, 1998, Morgan Stanley knew that Sunbeam's January and February 1998 sales were only 50% of January and February 1997 sales, and Morgan Stanley also knew that the shortfall was caused by Sunbeam's practice of accelerating sales which otherwise would have occurred in 1998 in order to boost Sunbeam's income in 1997. Although Morgan Stanley and Sunbeam previously had advised CPH that Sunbeam's sales were running ahead of analysts' expectations for the first quarter, Morgan Stanley decided not to correct those material misrepresentations. Instead, in March 1998, Morgan Stanley assisted Sunbeam in concealing the problems with Sunbeam's first quarter 1998 sales

16div-015991

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") directly or indirectly owned 44,067,520 shares — or approximately 82% — of Coleman prior to the transactions at issue. On March 30, 1998, Sunbeam acquired CPH's interest in Coleman. Sunbeam paid for the Coleman shares with 14.1 million shares of Sunbeam common stock and other consideration.

Defendant Morgan Stanley & Co., Inc. ("Morgan Stanley") is a highly sophisticated investment banking firm that provides a wide range of financial and securities services. Among other things, Morgan Stanley provides advice on mergers and acquisitions and raises capital in the equity and debt markets. Morgan Stanley served as Sunbeam's investment banker and as the underwriter of securities issued by Sunbeam in connection with the events at issue herein.

16div-015992

Sunbeam Corporation ("Sunbeam") was a publicly-traded company headquartered in Delray Beach, Florida. Sunbeam designed and manufactured small household appliances and outdoor consumer products, which it marketed under the Sunbeam and Oster brand names. Sunbeam filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code in February 2001.

Albert Dunlap ("Dunlap") was the Chief Executive Officer of Sunbeam from July 1996 until June 1998 when he was terminated by Sunbeam's Board of Directors.

Russell Kersh ("Kersh") was the Executive Vice President of Sunbeam from July 1996 until June 1998 when he was terminated by Sunbeam's Board of Directors.

Arthur Andersen LLP ("Andersen") provided outside accounting services to Sunbeam through its West Palm Beach, Florida office. Andersen auditors provided information concerning Sunbeam's first quarter 1998 sales and earnings to Morgan Stanley.

Sunbeam designed and manufactured outdoor and household consumer products, which it marketed under the Sunbeam and Oster brand names. Sunbeam's products included small kitchen appliances, humidifiers, electric blankets, and grills. Many of the country's leading retail stores, including Wal-Mart, Target, and Home Depot, were among Sunbeam's major customers.

Despite Sunbeam's well-known brands and strong customer base, its financial performance was disappointing. In 1994, Sunbeam earned $1.30 per share. In 1995, Sunbeam's earnings declined to $0.61 per share. In 1996, Sunbeam's earnings continued to suffer. On March 22, 1996, Sunbeam issued an early warning that its first quarter earnings would be well under analysts' expectations and down from first quarter 1995. Shortly after issuing the March 22 earnings warning, Sunbeam's Chief Executive Officer and two of Sunbeam's directors announced their resignations. Less than a week later, Sunbeam announced that its first quarter 1996 earnings had plunged 42% from first quarter 1995 levels. Sunbeam also announced that its second quarter 1996 earnings would be lower than its second quarter 1995 earnings.

Sunbeam's disappointing earnings caused its stock price to plummet. During 1995, the price at which Sunbeam's stock traded fell 40%, from a high of $25-1/2. In 1996, Sunbeam's stock price continued to decline until it reached a low of $12-1/4 in July.

On July 18, 1996, Sunbeam's board of directors hired Albert Dunlap as Sunbeam's new Chief Executive Officer. Based upon brief terms as Chief Executive Officer of other publicly traded companies, including Scott Paper Company ("Scott Paper"), Dunlap was viewed as a "turnaround specialist" — that is, someone who could take a poorly performing company and significantly increase its value by "turning around" its financial performance. Because Dunlap touted the benefits from firing large numbers of employees and closing large numbers of plants, Dunlap became widely known as "Chainsaw Al." Dunlap lived in Boca Raton, Florida, and one of his first tasks at Sunbeam was to consolidate the company's six headquarters into one located in Delray Beach, Florida.

Immediately after joining Sunbeam, Dunlap hired Kersh as Sunbeam's Chief Financial Officer. Kersh had teamed with Dunlap for over 15 years, serving as a senior executive with Dunlap at other companies, including Scott Paper. Dunlap also brought in several other hand-picked executives to make up his senior management team.

Dunlap and his senior management team entered into employment agreements with Sunbeam. Under those agreements, Dunlap and his senior management team stood to make tens of millions of dollars if they were able to boost Sunbeam's apparent value and then sell Sunbeam to another company at a premium.

In order to convince other companies that they should want to purchase Sunbeam, Dunlap needed to improve Sunbeam's reported financial performance quickly and dramatically. It was, of course, no small task to transform Sunbeam from a poorly performing company, with weak sales and declining profits, into a strong company with growing sales and

16div-015995

soaring profits. In fact, as the world later learned, Dunlap did not achieve that change in Sunbeam's fortunes. Instead, Dunlap created the illusion of a dramatic turnaround at Sunbeam by engaging in what SEC officials subsequently described as a "case study" in financial fraud.

Dunlap had a three-step plan at Sunbeam. In the first step, Dunlap overstated Sunbeam's financial problems so that Sunbeam appeared to be in worse shape than it really was. After making Sunbeam look worse, Dunlap moved to step two, where he made Sunbeam look more valuable than it really was by inflating Sunbeam's sales and engaging in other earnings manipulations. In step three, Dunlap planned to sell Sunbeam to another company before it became apparent that the "improved" results were fictional. By doing so, Dunlap would make tens of millions of dollars and would be free to blame his successor for any subsequent problems.

Dunlap began implementing his strategy soon after his arrival at Sunbeam in 1996. Claiming to be engaged in a clean-up of Sunbeam's financial problems, Dunlap recorded artificially high reserves and booked expenses that should not have been recorded until later periods. Both of those actions made Sunbeam's financial condition appear worse than it really was, thus lowering the benchmark for measuring Sunbeam's performance in future years.

The overstated reserves also provided Dunlap a means by which he could inflate Sunbeam's future results during the second step of his plan. Dunlap later could "re-evaluate" and release millions of dollars from the overstated reserves to boost income in later periods. The income from released reserves contributed to the illusion of a rapid turnaround in Sunbeam's performance. Using inflated reserves to enhance income in future periods is a fraudulent practice and overstated reserves are commonly called "cookie jar" reserves.

After making Sunbeam look worse than it really was in 1996, Dunlap manipulated Sunbeam's sales and expenses in 1997 to create the false appearance of quarter after quarter improvement in financial performance. For example, Dunlap caused Sunbeam to inflate its sales by engaging in phony "bill and hold" sales. Under this practice, Sunbeam recognized revenues from "sales," even though customers did not actually pay for or even take delivery of the products, which continued to sit in Sunbeam's own warehouses. Although Sunbeam recorded the "bill and hold" sales as if they were current sales, they were, in reality, simply sales stolen from future quarters. In 1997, phony "bill and hold" sales added approximately $29 million in sales and $4.5 million in income.

Throughout 1997, Sunbeam also engaged in a sales practice known as "channel stuffing" — accelerating sales that otherwise would occur in a later period, sometimes by offering steep discounts or other extraordinary customer inducements. On the grand scale employed by Sunbeam, channel stuffing inevitably leads to major sales shortfalls in later periods when "stuffed" customers simply stop buying. Sunbeam's senior sales officer referred to Sunbeam's unsustainable practice of inflating performance through accelerated sales as the "doom loop."

Dunlap further "enhanced" Sunbeam's income in 1997 by causing Sunbeam to record a "profit" of $10 million from a sham sale of its warranty and spare parts business. Dunlap also made Sunbeam appear to be more successful than it really was by reaching into the "cookie jar," reversing inflated reserves, and recording $35 million as income. Sunbeam's 1997 profit margins also looked better than they really were because Dunlap already had recorded millions of dollars of 1997 expenses in 1996.

16div-015997

In October 1997, Dunlap announced that Sunbeam's "turnaround" was complete. Compared to the third quarter of 1996, Sunbeam's third quarter 1997 performance was remarkable. In the third quarter of 1996, Sunbeam had reported a loss of $18.1 million. In the third quarter of 1997, however, Sunbeam reported earnings of $34.5 million — an extraordinary turnaround from substantial losses to hefty profits. Sunbeam's combined results for the first three quarters showed dramatic improvement as well. Sunbeam reported that its profits for the first nine months were up tenfold over the same period the year before — from $6.5 million in 1996 to $67.7 million in 1997. Sunbeam's reversal of fortune caused a spectacular increase in the price of its stock. In July 1996, when Dunlap was hired, Sunbeam's shares traded at $12-1/4. By October 1997, Sunbeam's shares had risen to $49-13/16.

With steps one and two successfully completed, Dunlap was more than eager to complete the final step of his scheme: to sell Sunbeam to another company and collect tens of millions of dollars for himself before the outside world could learn the truth about Sunbeam's phony "turnaround." To accomplish that third and final step, Dunlap needed an investment banking firm

When Dunlap announced in early 1997 that he would begin interviewing investment bankers, Morgan Stanley immediately began pursuing the job. Although Morgan Stanley had no previous relationship with Sunbeam, one of Morgan Stanley's senior executives, William Strong, had worked closely with Dunlap on other large transactions between 1986 and 1993, when Strong was employed by Salomon Brothers.

Morgan Stanley knew that it was competing with other investment bankers, including Mark Davis, for Dunlap's business. Davis was the head of the mergers and acquisitions department at Chase Securities and had worked previously with Strong at Salomon Brothers. Davis had a very strong relationship with Dunlap, and Davis had served as Dunlap's investment advisor on numerous transactions, including Dunlap's sale of Scott Paper. Shortly after arriving at Sunbeam, Dunlap hired Davis to handle the sale of Sunbeam's furniture business.

Morgan Stanley put together a team headed by its Vice Chairman, Bruce Fiedorek, and Strong. Beginning in April 1997, Morgan Stanley's personnel traveled to Sunbeam's offices in Delray Beach, Florida to study Sunbeam and woo Dunlap. After months of uncompensated work, in September 1997, Morgan Stanley finally persuaded Dunlap to name Morgan Stanley as Sunbeam's exclusive investment banker. Dunlap instructed Morgan Stanley to find a buyer for Sunbeam. Morgan Stanley knew that if it failed to deliver a major transaction, Morgan Stanley would not be compensated for the extensive work it had performed for Sunbeam. Morgan Stanley also knew that Davis and Chase Securities were standing by — ready and willing to reclaim their position as Dunlap's investment banker of choice.

Throughout the fall of 1997, Morgan Stanley aggressively searched for a buyer for Sunbeam. Morgan Stanley put together extensive and detailed materials to use in marketing Sunbeam to potential buyers. Morgan Stanley pitched the transaction to more than 10 companies — including Gillette, Colgate, Sara Lee, Rubbermaid, Whirlpool, and Black & Decker — that Morgan Stanley hoped might have an interest in acquiring Sunbeam. Morgan Stanley, however, was not able to find a buyer.

16div-015999

As 1998 approached, the pressure on Dunlap increased. Dunlap was aware that Sunbeam would be unable to sustain the appearance of a successful turnaround in 1998 because Sunbeam had stolen sales from 1998 to boost 1997's numbers and the "cookie jar" reserves had been depleted. Dunlap needed a way to conceal Sunbeam's phony turnaround until a buyer could be found. Morgan Stanley provided the solution to Dunlap's problem.

Morgan Stanley knew that its failure to find a buyer for Sunbeam could prove fatal to the relationship it had worked so hard to establish with Dunlap. As the pressure on Dunlap increased, the pressure on Morgan Stanley increased as well. Although Morgan Stanley was not able to find a buyer for Sunbeam, Morgan Stanley responded with a plan that would allow Dunlap to conceal his fraud. Morgan Stanley recommended that Sunbeam acquire other companies, using Sunbeam's stock, which was fraudulently inflated, as the "currency" that would be used to pay for the acquisitions.

Morgan Stanley's strategy was doubly deceptive. First, Morgan Stanley's acquisition strategy would allow Dunlap to consolidate Sunbeam's results with those of the newly-acquired companies. That would help Dunlap camouflage Sunbeam's results and make it difficult to detect any shortfall in Sunbeam's performance. Dunlap simply could label any problems that were detected as attributable to the poor performance of the acquired companies or as a temporary "blip" caused by the distraction of integrating the acquired companies with Sunbeam. Second, Morgan Stanley's strategy would allow Dunlap to take new massive restructuring charges (purportedly relating to the acquisitions) and thus create more "cookie jar" reserves that could be tapped to bolster the future earnings of the combined companies.

Morgan Stanley identified Coleman as one of the key potential acquisition targets. CPH owned 82% of Coleman's stock. Morgan Stanley searched the ranks of its investment bankers to locate those with the best access to CPH. Drawing on relationships between some of Morgan Stanley's investment bankers and senior CPH officers, Morgan Stanley set about trying to persuade CPH to sell its interest in Coleman to Sunbeam — and, most importantly, to accept Sunbeam stock as consideration.

Morgan Stanley laid the groundwork for a meeting to take place in December 1997 in Palm Beach, Florida between Dunlap and Kersh and representatives of CPH. In advance of the Palm Beach meeting, Morgan Stanley provided materials to Sunbeam to prepare Sunbeam for the meeting. Morgan Stanley also met with Kersh and other Sunbeam personnel to prepare for the Palm Beach meeting. However, Dunlap nearly scuttled Morgan Stanley's carefully crafted plan at the outset. During the December 1997 Palm Beach meeting, when CPH rejected Dunlap's initial all-stock offer, Dunlap became so angry that he cursed and ranted at the CPH representatives and stormed out.

Dunlap's tantrum appeared to kill any chance that CPH would sell its interest in Coleman to Sunbeam. Morgan Stanley, however, worked to revive the discussions. Drawing again on Morgan Stanley's relationships with CPH officers, Morgan Stanley was able to restart the discussions with CPH with the promise that Dunlap would be kept away from the negotiating table. Thereafter, Morgan Stanley, through Managing Directors Strong, James Stynes, and Robert Kitts, led the discussions with CPH on Sunbeam's behalf.

Morgan Stanley knew that it had to persuade CPH not only to sell Coleman, but also to accept Sunbeam stock — ultimately, 14.1 million shares of Sunbeam stock — as a major part of the purchase price. During the course of negotiations, Morgan Stanley prepared and provided CPH with false financial and business information about Sunbeam designed to create the appearance that Sunbeam was prospering and that Sunbeam's stock had great value. For example, Morgan Stanley provided CPH with false 1996 and 1997 sales and revenue figures, as well as false projections that Sunbeam could not expect to achieve. Together, in face-to-face discussions, Morgan Stanley and Sunbeam assured CPH that (a) Sunbeam would meet or exceed its first quarter 1998 earnings estimates; (b) analysts' 1998 earnings estimates for Sunbeam were correct; and (c) Sunbeam's plan to earn $2.20 per share in 1998 was easily achievable and probably low. Morgan Stanley and Sunbeam also falsely assured CPH that Sunbeam's "early buy" sales program would not hurt Sunbeam's future revenues. However, the "early buy" program was one of Sunbeam's revenue acceleration programs — and the devastating effects of Sunbeam's revenue acceleration programs already had begun to materialize at Sunbeam. Sunbeam's January and February 1998 sales were down drastically, although those results were not disclosed to CPH or the public. To the contrary, Morgan Stanley and Sunbeam together specifically advised CPH that Sunbeam's first quarter 1998 sales were "tracking fine" and running ahead of analysts' estimates.

On February 27, 1998, Sunbeam's Board of Directors met at Morgan Stanley's offices to consider the purchase of Coleman, as negotiated by Morgan Stanley.

At the February 27, 1998 meeting, Morgan Stanley made an extensive presentation to Sunbeam's Board concerning the proposed transaction. Numerous Morgan Stanley representatives, including Managing Directors Strong, Kitts, Stynes, Ruth Porat, and Vikram Pandit, attended the meeting.

Morgan Stanley presented Sunbeam's board with Morgan Stanley's opinion on the value of Coleman. Using a discounted cash flow analysis, which Morgan Stanley represented was the best gauge of stand-alone economic value and the best method of capturing the unique value of Coleman, Morgan Stanley valued CPH's Coleman stock at a range of $31.06 to $53.24 per Coleman share. CPH's 44,067,520 Coleman shares were worth, therefore, between $1.369 billion and $2.346 billion.

Following Morgan Stanley's presentation, Sunbeam's Board of Directors voted to acquire Coleman on the very favorable terms that Morgan Stanley had negotiated.

Morgan Stanley spent the following weekend developing Sunbeam's public relations strategy to announce the Coleman transaction. Morgan Stanley scripted the points for Dunlap to make in a conference call with analysts. Morgan Stanley also crafted a list of "key media messages" for Dunlap tc use in his communications with the press. On Sunday, March 1, 1998, Morgan Stanley spoke with a reporter for the Wall Street Journal to inform him that Sunbeam would announce its acquisition of Coleman the following morning.

Sunbeam announced its acquisition of Coleman on Monday, March 2, 1998, prior to the opening of the financial markets. Consistent with Morgan Stanley's valuation, investors viewed Sunbeam's purchase of Coleman — and the price that Sunbeam had paid — very favorably. The day before the acquisition was announced, Sunbeam's stock closed at $41-3/4. In the days following Sunbeam's announcement of the transaction, Sunbeam's stock rose approximately 25%, to a high of $52.

Dunlap knew that Sunbeam needed to raise funds to pay the cash portion of the acquisition consideration. Dunlap also knew that Sunbeam needed cash to purchase two other smaller companies in addition to Coleman. Morgan Stanley recommended that Sunbeam raise funds through a $500 million offering of convertible subordinated debentures. To assure the offering's success, Morgan Stanley lent its name to the offering. Indeed, Morgan Stanley agreed to serve as the sole underwriter for the offering.

The money raised from the sale of the debentures was used by Sunbeam to complete the acquisition of Coleman.

Unbeknownst to CPH or the public, Sunbeam's first quarter 1998 sales were a small fraction of the financial community's expectations for the quarter. If Dunlap could consolidate Sunbeam's sales with Coleman's sales, Dunlap knew that he could obscure Sunbeam's actual first quarter sales. As a result, Dunlap was especially anxious to complete the acquisition of Coleman before Sunbeam announced its first quarter 1998 sales. Indeed, the success of the scheme depended upon Sunbeam's ability to complete the Coleman acquisition before Sunbeam's first quarter results

were announced. To satisfy Dunlap's objectives, Morgan Stanley moved up the launch date of the offering.

The debentures were marketed to investors at a series of "road show" meetings and conference calls arranged by Morgan Stanley. Morgan Stanley prepared and distributed a memorandum for its sales force to use in marketing the debentures to investors. Morgan Stanley also developed the script for Dunlap and Kersh to deliver during the road show. In those materials, Morgan Stanley misrepresented Sunbeam's financial performance and emphasized Dunlap's purported "turnaround" accomplishments.

Morgan Stanley launched the debenture offering with a research analyst presentation to the Morgan Stanley sales force. As part of Morgan Stanley's growing relationship with Sunbeam, one of Morgan Stanley's top-rated research analysts planned to initiate equity coverage of Sunbeam. That Morgan Stanley analyst had modeled values for Sunbeam's acquisition of Coleman that were higher than even Sunbeam's management had predicted.

Although Morgan Stanley initially planned to sell $500 million worth of debentures, Morgan Stanley's efforts were so successful that the size of the offering was increased to $750 million on March 19, 1998 — the day of the last road show. The debentures were sold to investors nationwide, including investors based in Florida.

As Sunbeam's investment banker and the sole underwriter for the debenture offering, Morgan Stanley had a duty to investigate Sunbeam's finances and business operations.

Morgan Stanley, which had been working hand-in-hand with Sunbeam for

almost a year and had traveled to Sunbeam's Florida offices, repeatedly asserted that it had satisfied that duty.

Strong, who was one of the senior Morgan Stanley investment bankers involved, has admitted in sworn testimony that he may have had more than 100 telephone conversations with Dunlap and Kersh (whose offices were in Sunbeam's Delray Beach headquarters) and that Strong was "sure" that he would have been apprised of Sunbeam's financial performance during the first two months of 1998.

With the $750 million debenture offering and the Coleman transaction set to close at the end of March 1998, Sunbeam's Florida-based outside auditors were shocked that Morgan Stanley had not asked them about Sunbeam's financial performance for first quarter 1998. Sunbeam's auditors were alarmed because Sunbeam's first quarter results were a disaster, but Dunlap, Kersh, and Morgan Stanley were telling CPH and the investing public,

that Sunbeam's turnaround was a success, that Sunbeam's sales for the first quarter of 1998 were ahead of the expectations of outside financial analysts, and that Sunbeam was poised for record sales.

On March 17, Sunbeam's auditors forced the issue. From their Florida offices, Sunbeam's auditors sent Morgan Stanley a letter reporting that Sunbeam's net sales through January 1998 were down 60% — $28 million in January 1998, as compared to $73 million in January 1997. The March 17 letter explained that the decline was "primarily due to the . . . new early buy program for grills which accelerated grill sales into the fourth quarter of fiscal 1997."

The next day, Morgan Stanley was faxed a schedule from Sunbeam's Florida office that showed that Sunbeam's January and February 1998 net sales totaled $72 million, an amount that was 50% lower than Sunbeam's January and February 1997 net sales of $143.5 million.

Based on information that Sunbeam and Morgan Stanley had disseminated, Wall Street analysts were anticipating that Sunbeam's first quarter 1998 net sales would be in the range of $285 million to $295 million. Sales in that range would have been approximately 15% higher than first quarter 1997 sales. Sunbeam's January and February 1998 sales, however, totaled barely 25% of $285 million. As Sunbeam's outside auditors advised Morgan Stanley in writing, the sales drop-off was caused by Sunbeam's sales acceleration program. The information put into Morgan Stanley's hands on March 17 and March 18 showed that Morgan Stanley's and Sunbeam's assertions to CPH and other investors were false. Contrary to what Morgan Stanley and Sunbeam had represented, Sunbeam had not undergone a successful turnaround, Sunbeam's financial performance had not dramatically improved, and Sunbeam's performance in 1998 was not better than Wall Street analysts' expectations. It was imperative, therefore, that the truth be kept from CPH until the Coleman transaction closed at the end of March 1998.

Morgan Stanley did not disclose Sunbeam's disastrous first quarter, Morgan Stanley did not insist that Sunbeam disclose its disastrous first quarter, Morgan Stanley did not correct any of the false and misleading statements it and Sunbeam had made to CPH about Sunbeam's business or performance, and Morgan Stanley did not suspend any of the critical transactions that were scheduled to close in the next two weeks. Instead, with Morgan Stanley's knowledge and assistance, Sunbeam prepared and issued a false press release on March 19, 1998 that affirmatively misstated and concealed Sunbeam's true condition.

The March 19, 1998 press release stated: "Sunbeam Corporation . . . said today that it is possible that its net sales for the first quarter of 1998 may be lower than the range of

16div-016007

Wall Street analysts' estimates for $285 million to $295 million, but net sales are expected to exceed 1997 first quarter net sales of $253.4 million. . . . The shortfall from analysts' estimates, if any, would be due to changes in inventory management and order patterns at certain of the Company's major retail customers. The Company further stated that based on the strength of its new product offerings and powerful brand names, it remains highly confident about the overall sales outlook for its products for the entire year."

As Morgan Stanley was fully aware, the March 19, 1998 press release was false, misleading, and failed to disclose material information. The March 19, 1998 press release failed to disclose Sunbeam's actual January and February 1998 sales or the true reasons for the poor results. Instead, the press release held out the false possibility that Sunbeam still could achieve sales of $285 million to $295 million and suggested that, if any shortfall occurred, that shortfall would be due to the fact that certain retailers had decided to defer first quarter purchases to the second quarter. The press release also assured that Sunbeam at least would exceed first quarter 1997 net sales of $253.4 million. Based on information that Morgan Stanley had in its hands on March 18, 1998, it was obvious that Sunbeam would not achieve sales of $285 million to $295 million and that Sunbeam's first quarter 1998 sales would be below its first quarter 1997 numbers. To simply meet 1997 first quarter sales, Sunbeam needed sales of $123.3 million over the 12 remaining days of the quarter — an average of $10.28 million per day. Sales of $10.28 million per day would be 306% more than the average per day sales in March 1997, and 281% more than the average per day sales for the first 17 days of March 1998. Furthermore, Morgan Stanley knew that the shortfall from analysts' estimates was not caused by retailers' deciding to defer purchases from the first quarter of 1998 to the second quarter, as the press release indicated. Rather, as Sunbeam's outside auditors had

advised Morgan Stanley in writing, the collapse in first quarter sales was caused by Sunbeam's acceleration of 1998 sales into the fourth quarter of 1997.

After Sunbeam's false press release was issued, Morgan Stanley stood arm-in-arm with Sunbeam while Dunlap and Kersh told CPH, analysts, and investors that the March 19, 1998 release was a purely cautionary statement because some first quarter 1998 sales might simply "spillover" into the second quarter and that Sunbeam still believed that it actually would meet analysts' estimates of $285 million to $295 million in first quarter 1998 sales.

Morgan Stanley knew that a full and truthful disclosure of Sunbeam's first quarter sales would doom the debenture offering, which was scheduled to close on March 25, 1998,

As Morgan Stanley was fully aware, the written contract between CPH and Sunbeam gave CPH the express legal right to refuse to close the sale if there was a material adverse change in Sunbeam's "business, results of operation or financial condition."

Furthermore, if the transactions did not close, Morgan Stanley would not be paid its $10.28 million fee for the Coleman acquisition or its $22.5 million fee for underwriting the subordinated debenture offering. Morgan Stanley also knew that Sunbeam would promptly replace Morgan Stanley with another investment banking firm – such as the Chase Securities team led by Mark Davis.

Sunbeam's outside auditors already had made it perfectly clear to Morgan Stanley that Sunbeam's first quarter 1998 sales were a disaster,

One of Sunbeam's senior outside auditors, Lawrence Bornstein, has testified under oath that on March 19, 1998, he told Morgan Stanley's John Tyree that the statement in Sunbeam's March 19, 1998 press release — that Sunbeam would at least exceed first quarter 1997 sales of $253.4 million — was not credible: "Just do the math . . . they've done a million dollars in sales the first 70 days of the year and now they need to do $10 million worth of sales for the next . . . I think it was 11 days . . . I mean, something ridiculous." Bornstein also told Tyree: "I've been to every shipping dock domestically, I've been to Hattiesburg, I've been to Neosho, I've been to Mexico City, and I don't think these guys can physically ship this much stuff."

Morgan Stanley knew that the March 19 press release was false and misleading. Despite that knowledge and Bornstein's explicit statements, Morgan Stanley continued with its preparations to close the debenture offering on March 25, 1998 and the Coleman acquisition on March 30, 1998.

As part of those preparations, on March 24, 1998, Morgan Stanley's Tyree spoke by telephone with Sunbeam's Kersh, who was located in Sunbeam's Delray Beach offices, to obtain an updated report concerning Sunbeam's first quarter performance. By the time of that March 24, 1998 call, Sunbeam had fallen even further behind first quarter 1997 sales. As of March 18, 1998, Sunbeam needed to achieve average sales of $10.28 million per day, over 12 days, to reach

first quarter 1997 sales. Sunbeam's sales between March 18 and March 24, 1998 had averaged only $6.81 million per day — well short of the $10.28 million per day that Sunbeam needed to achieve. Sunbeam's March 18 through March 24, 1998 sales were further proof that Sunbeam's March 19, 1998 press release was false and that Sunbeam would not achieve first quarter 1998 sales in excess of first quarter 1997 sales.

Morgan Stanley also knew no later than March 25, 1998, if not much earlier, that Sunbeam's earnings for the first quarter of 1998 were going to miss Wall Street analysts' earnings expectations, which were in the range of $0.28 to $0.31 per share (excluding one-time charges). Sunbeam's outside auditors advised Morgan Stanley on March 25 that Sunbeam had suffered a $41.19 million loss during the first two months of 1998, including a one-time charge of $30.2 million. Even excluding that one-time charge, Sunbeam's loss for the first two months was $0.13 per share. To achieve first quarter 1998 operating earnings of $0.28 per share, which were at the low end of analyst expectations, Sunbeam needed to realize a profit of $35.5 million during March 1998 alone. A net profit of $35.5 million in March was 500% more than Sunbeam's net profit for the entire first quarter of 1997. In fact, Sunbeam's first quarter 1998 earnings fell far short of Wall Street's expectations. Sunbeam's first quarter earnings were material,

Having directly participated in misleading CPH Morgan Stanley had a duty to disclose the true facts before the closing of the debenture offering and the Coleman acquisition. Morgan Stanley also could have required Sunbeam to postpone the closings of

those transactions until the necessary disclosures were made. Morgan Stanley did neither. Instead, Morgan Stanley marched forward and closed the $750 million debenture offering on March 25, 1998, which was needed to close the Coleman transaction, and assisted Sunbeam in closing the acquisition of Coleman on March 30, 1998.

Morgan Stanley received $22.5 million for the subordinated debenture offering and $10.28 million for the Coleman acquisition. Morgan Stanley would have received nothing if the transactions had failed to close.

On April 3, 1998 — just four days after the Coleman transaction closed — Sunbeam announced that sales for the first quarter of 1998 would be approximately 5% below the $253.4 million in sales that Sunbeam reported in the first quarter of 1997. In other words, Sunbeam was expecting sales in the range of $240 million. That sales shortfall was shocking news, particularly in view of assurances provided by Sunbeam both in and after its March 19, 1998 press release that $285 million to $295 million of sales was still a real possibility. The April 3, 1998 press release also disclosed that Sunbeam expected to show a loss for the quarter, although the release did not disclose the magnitude of the loss or how much of the loss was attributable to operating earnings as opposed to one-time charges. Sunbeam's news stunned . . . the market. On April 3rd, Sunbeam's stock price dropped 25% — from $45-9/16 to $34-3/8.

. . . Sunbeam's actual first quarter 1998 performance was even worse than Sunbeam disclosed on April 3, 1998. The April 3, 1998 release indicated that Sunbeam's first quarter sales were in the range of $240 million. In fact, Sunbeam's first quarter sales were $224.5

million. Sunbeam obscured the true shortfall by extending its quarter from March 29 to March 31, 1998 — thereby adding two more days of Sunbeam sales. Sunbeam also failed to disclose that it had included two days of Coleman sales after the Coleman transaction closed on March 30. Further, Sunbeam inflated first quarter 1998 sales with $29 million of new phony "bill and hold" sales.

75. Just as Sunbeam's first quarter 1998 sales had been a disaster, so, too, were Sunbeam's first quarter 1998 earnings. Morgan Stanley and Sunbeam had represented to CPH that Sunbeam would achieve or exceed analyst first quarter 1998 earnings estimates. At the time of that representation, the consensus among analysts was that Sunbeam would enjoy first quarter 1998 earnings of $0.33 per share. However, on May 9, 1998, Sunbeam disclosed that it would record a first quarter loss of $0.09 per share (excluding one-time charges) — more than $0.40 per share lower than CPH had been told to expect.

76. Within weeks, Dunlap's fraudulent scheme began to unravel. In June 1998, after a number of news articles critical of Sunbeam's practices, Sunbeam's Board of Directors launched an internal investigation. That investigation led quickly to the firing of Dunlap and Kersh, and, subsequently, to a restatement of Sunbeam's financial statements for 1996, 1997, and the first quarter of 1998.

[illegible]

77. As detailed above, Morgan Stanley participated in a scheme to mislead CPH and others and cover up the massive fraud at Sunbeam until Morgan Stanley and Sunbeam could close the purchase of Coleman. Morgan Stanley provided CPH with false information concerning Sunbeam's 1996 and 1997 financial performance, its business operations, and the value of Sunbeam's stock. Morgan Stanley also actively assisted Sunbeam in concealing Sunbeam's

16div-016013

disastrous first quarter 1998 sales and earnings and the true reasons for Sunbeam's poor performance.

Morgan Stanley knew that its statements to CPH were materially false and misleading and omitted the true facts.

Morgan Stanley intended that CPH rely on Morgan Stanley's representations concerning Sunbeam.

As detailed above, Dunlap engaged in a fraudulent scheme to inflate the price of Sunbeam's stock by improperly manipulating Sunbeam's 1996 and 1997 performance, by falsely asserting that Sunbeam had successfully "turned around," and by concealing the collapse of Sunbeam's first quarter 1998 sales and earnings and the reasons for Sunbeam's first quarter 1998 performance.

86. As detailed above, Morgan Stanley knew of Dunlap's fraudulent scheme and helped to conceal it until after Sunbeam could close the purchase of Coleman.

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As detailed above, Morgan Stanley provided substantial assistance to Dunlap and Sunbeam, including: concealing Sunbeam's first quarter 1998 sales collapse; assisting with the false March 19, 1998 press release; arranging road shows and meetings with prospective debenture purchasers at which Morgan Stanley, Dunlap, and others made false statements concerning Sunbeam's financial condition and business operations; preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam's financial condition and business operations; providing CPH with false financial and business information concerning Sunbeam; scripting Dunlap's false public statements concerning Sunbeam's acquisition of Coleman;

and underwriting the $750 million convertible debenture offering, proceeds from which were used to fund Sunbeam's purchase of Coleman.

16div-016015

As detailed above, Morgan Stanley conspired with Dunlap and other senior Sunbeam executives to conceal the truth about Sunbeam's financial performance and business operations.

As detailed above, Morgan Stanley committed overt acts in furtherance of the conspiracy, including: concealing Sunbeam's first quarter 1998 sales collapse; assisting with the false March 19, 1998 press release; arranging road shows and meetings with prospective debenture purchasers at which Morgan Stanley, Dunlap, and others made false statements concerning Sunbeam's financial condition and business operations; preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam's financial condition and business operations; providing CPH with false financial and business information concerning Sunbeam; scripting Dunlap's false public statements concerning Sunbeam's acquisition of Coleman;

and underwriting the $750 million convertible debenture offering, proceeds from which were used to fund Sunbeam's purchase of Coleman.

16div-016016

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION IN LIMINE NO. 33 TO BAR MORGAN STANLEY FROM CONTROVERTING THE FACTUAL FINDINGS ESTABLISHED BY EXHIBIT A TO THE MARCH 23, 2005 ORDER

THIS CAUSE came before the Court April 7, 2005 on Coleman (Parent) Holdings, Inc.'s Motion in Limine No. 33 to Bar Morgan Stanley from Controverting the Factual Findings Established by Exhibit A to the March 23, 2005 Order, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Coleman (Parent) Holdings, Inc.'s Motion in Limine No. 33 to Bar Morgan Stanley from Controverting the Factual Findings Established by Exhibit A to the March 23, 2005 Order is Granted. Neither party may present evidence that contradicts the factual findings made in Exhibit A to the Court's March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 8 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant. /

DEFENDANT'S MOTION FOR RECONSIDERATION OF THE COURT'S SANCTION ORDERS AND MEMORANDUM OF LAW

Morgan Stanley & Co. Incorporated ("Morgan Stanley") moves the Court for reconsideration and modification of its Sanctions Orders. In support of this motion, Morgan Stanley states:

1. Evidence of Morgan Stanley's litigation misconduct should not be introduced in either the liability or the punitive damages phase of the trial. To do so will essentially authorize the jury to punish Morgan Stanley for violations of this Court's orders instead of the wrongful conduct alleged by the Plaintiff in the First Amended Complaint, and prejudice the jury in regard to the compensatory damages claim. Because the litigation misconduct described by the Court is not related to the material issues of the underlying tort claim, nor has it been shown to conceal any smoking gun evidence relevant to Plaintiff's underlying tort claims, introduction of such evidence would violate Morgan Stanley's due process rights under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Sections 2 and 9 of the Florida Constitution. See State Farm Ins. Co. v. Campbell, 123 S. Ct. 1513, 1524 (2003) (the "reprehensibility guidepost [of BMW of N. Am. v. Gore, 517 U.S. 559 (1996)]

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does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance"); see also Atkinson v. Orkin Exterminating Co., 604 S.E.2d 385, 392 (S.C. 2004) (Placing Morgan Stanley's litigation misconduct before the jury will permit CPH "to unfairly exaggerate the degree of reprehensibility" of Morgan Stanley's conduct with regard to the underlying tort claims).

2. The de facto default on liability for both compensatory and punitive damages directly flowing from the Court's orders is an unwarranted sanction and deprives Morgan Stanley of its statutory and constitutional rights to defend itself against CPH's underlying tort claim and its punitive damage claim. The purpose of Florida Rule of Civil Procedure 1.380(b) is to ensure compliance with the discovery rules and any order compelling discovery, not to punish or penalize the party in violation. The Court did not find that Morgan Stanley's litigation misconduct prevented CPH from prosecuting its claims for the underlying torts. Because punitive damages are by definition penal in nature, the Court's award of attorneys' fees and its virtual default constitutes **double punishment** against Morgan Stanley, see Smith v. Wade, 461 U.S. 30, 94 (1983) (O'Connor, J. dissenting) ("awards of compensatory damages and attorney's fees already provide significant deterrence"), and further deprives Morgan Stanley of:

a) its right to a trial by jury on punitive damages, see Orkin Exterminating Co. of S. Fla. v. Truly Nolen, Inc., 117 So. 2d 419, 422 (Fla. 3d DCA 1960) (equity court is not permitted to award punitive damages because "any different holding would deprive the defendant of his constitutional right of a jury trial before punishment");

b) due process and a fair trial before punishment in the form of punitive damages is imposed, including its right to confront witnesses in this quasi-criminal proceeding; see Campbell, 123 S. Ct. at 1520 (recognizing that punitive damages "serve the same purposes as criminal penalties"); Honda Motor Co. v. Oberg, 512 U.S. 415, 420 (1994) ("Our recent cases have

recognized that the Constitution imposes a substantive limit on the size of punitive damages awards"); id. ("the Due Process Clause imposes a limit on punitive damages awards") U.S. Const. Ameds. V, VI, XIV; Fla. Const. Art. 1 §§ 2, 9;

c) the right to contest the degree and nature of its alleged misconduct and offer evidence and circumstances in mitigation, see Humana Health Ins. Co. of Fla. v. Chipps, 802 So. 2d 492, 496 (Fla. 4th DCA 2001) (trial court "improperly prevented Humana from introducing mitigating evidence to rebut testimony that Humana's managed care practices violated industry standards"); id. (in assessing punitive damages, the jury should have been permitted to consider "evidence which would have had the effect of 'reducing or softening the moral or social culpability attaching to [the defendant's] act...'"); see also St. Regis Paper Co. v. Watson, 428 So. 2d 243, 246-47 (Fla. 1983) (in assessing punitive damages, a jury should consider 'the nature, extent, and enormity of the wrong, the intent of the party committing it and all circumstances attending the particular incident, as well as any mitigating circumstances'") (citation omitted); Owens-Corning Fiberglas Corp. v. Ballard, 749 So. 2d 483, 484-85 (Fla.1999);

d) Its due process right to present every available defense to this quasi-criminal proceeding. Lindsey v. Normet, 405 U.S. 56, 66 (1972) (Due Process requires that there be an opportunity to present every available defense), and US v. Armour, 402 U.S. 673, 682 (1971) (a defendant's "right to litigate the issues raised" is "a right guaranteed to him by the Due Process Clause");

e) its constitutional right to have a reviewing court determine the reprehensibility of its conduct, in that, unless Morgan Stanley is permitted to mount a meaningful defense to CPH's punitive damages claim, there is no way to assess how reprehensible Morgan Stanley actually was. See Gore, 517 U.S. at

575 (exemplary damages imposed on a defendant should reflect the enormity of his offense. This principle reflects the accepted view that some wrongs are more blameworthy than others); id. at 576 ("To be sure, infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, ... or when the target is financially vulnerable, can warrant a substantial penalty. But this observation does not convert all acts that cause economic harm into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages");

f) the right to force CPH to prove entitlement by **clear and convincing** evidence, see § 768.725, Fla. Stat.; and

g) the right to contest corporate liability for punitive damages, see Schropp v. Crown Eurocars, 654 So. 2d 1158, 1161 (Fla. 1995); Mercury Motors Express v. Smith, 393 So. 2d 545 (Fla. 1981).

3. The constitutional and statutory problems presented by the Court's Orders could be alleviated by the following corrective actions:

a) withdrawing the decision to read a statement to the jury concerning Morgan Stanley's litigation misconduct; and

b) rescinding that part of the Court's order which deems certain paragraphs of the First Amended Complaint "established".

4. Without waiving any of the foregoing, Morgan Stanley submits that in the punitive damages phase of this trial it should be allowed to contest all of the underlying facts supporting the claims for aiding and abetting and conspiracy to commit fraud, as well as issues regarding the corporate liability for punitive damages and the findings regarding litigation misconduct, both as to entitlement and in mitigation of the amount of punitive damages.

5. By the same token, the jury may not consider any evidence of Morgan Stanley's litigation misconduct to punish Morgan Stanley. See Jim Gash, Punitive

Damages, Other Acts Evidence, and the Constitution, 2004 Utah L. Rev. 1191, 1263 (2004) ("the jury ... may not use extraterritorial other acts evidence to punish a defendant, ... the trial court must be similarly required to instruct the jury that it may not use even local other acts to punish a defendant. Whereas the former instruction is mandated by federalism principles, the latter is required by due process") (emphasis added).

6. Morgan Stanley further contests the factual findings and conclusions set forth in the Court's order regarding litigation misconduct and that the failures to comply cannot be cured. See Affidavit of Richard Anfang attached hereto as Exhibit A.

WHEREFORE, Morgan Stanley respectively requests that this Court reconsider its March 1st and 23rd Orders.

In further support of this motion, Morgan Stanley submits the following memorandum of law to highlight particular issues raised in herein.

MEMORANDUM OF LAW

By imposing these drastic sanctions on Morgan Stanley, the Court exceeded its authority under Florida law and violated Morgan Stanley's constitutional rights. Moreover, the Court's Orders invest in the jury the authority to determine the amount in which Morgan Stanley should be punished for litigation misconduct – a power that the jury simply does not have under Florida law. This unprecedented shift of power from the bench (which has already punished Morgan Stanley with a virtual default) to the jury box (for a second punishment) violates Morgan Stanley's rights and precludes Morgan Stanley from obtaining a fair trial on Plaintiff's punitive damages claim. Stripped of its due process rights, Morgan Stanley will suffer irreparable harm if the trial proceeds on the uneven playing field set by the Sanctions Orders.

ARGUMENT

I. EVIDENCE OF MORGAN STANLEY'S LITIGATION MISCONDUCT SHOULD NOT BE INTRODUCED INTO EVIDENCE IN EITHER THE LIABILITY OR THE PUNITIVE DAMAGES PHASE OF THE TRIAL

A. Florida Law is Clear that Evidence Related to Pretrial Litigation Misconduct Generally Should Not be Submitted to the Jury.

This Court's Sanctions Orders must be reconsidered because they improperly allow the Courts findings in respect to pretrial litigation misconduct by Morgan Stanley to be introduced to the jury. Florida law grants only courts, not juries, the authority to sanction litigants for litigation misconduct. See Fla. R. Civ. P. 1.380; Emerson Elec. Co. v. Garcia, 623 So. 2d 523, 525 (Fla. 3d DCA 1993) ("an appropriate sanction was a matter for the court and not for the jury."). For precisely that reason, Florida courts have long held that "[e]vidence relating to the history of pretrial discovery should normally not be a matter submitted for the jury's consideration on the issues of liability." Amlan, Inc. v. Detroit Diesel Corp., 651 So. 2d 701, 703 (Fla. 4th DCA 1995) (citing Garcia).

The Fourth District recognized a limited exception to the rule that juries should not hear evidence regarding discovery misconduct in General Motors Corp. v. McGee, 837 So. 2d 1010, 1036 (Fla. 4th DCA 2003). That case is factually distinguishable, however, and the court's reliance on McGee in issuing its Sanctions Orders was misplaced. In McGee, the Fourth District recognized that evidence of pretrial discovery conduct normally should not be submitted to the jury. Nevertheless, under the facts and circumstances of that case, the Fourth District held that evidence of discovery abuse was properly admitted when the defendant intentionally withheld a highly relevant document that effectively established an element of the plaintiff's claim; to wit: that General Motors knew about the dangers associated with its product but did nothing

about it, and thus subordinated human life to corporate profit. Id. at 1035. Only in the face of all of this evidence about the substance of the withheld document did the Fourth District hold that it was proper to allow the jury to consider concealment of the document. See also Amlan, 651 So. 2d at 703 (distinguishing cases where "the misconduct alleged is the destruction or unexplained disappearance of crucial evidence" from the general rule that evidence of pretrial discovery conduct is not for the jury's consideration).

McGee did not hold that it is permissible to allow a party to present the jury with evidence of litigation misconduct whenever a plaintiff seeks punitive damages, and it does not support the Court's Sanctions Orders here – where there were no findings that Morgan Stanley intentionally withheld documents that it knew supported CPH's claims. To the contrary, "for all we know, any evidence [that was not produced] might be legally irrelevant to the issues framed in the pleadings." New Hampshire Ins. Co. v. Royal Ins. Co., 559 So. 2d 102, 103 (Fla. 4th DCA 1990). For this Court to allow CPH to ask the jury for punitive damages based on litigation misconduct, in the absence of a showing of a "concealment of offensive conduct," is tantamount to allowing the jury to award punitive damages as a sanction for litigation misconduct. Such a ruling allows the jury to usurp the role of the Court, in contravention of Florida law.

Allowing the jury to consider litigation misconduct is not only inappropriate; it is unquestionably prejudicial because of the obvious tendency of this sort of evidence to distract the jury from the underlying issues and taint the jury's perception of the litigants involved. See Emerson Electric Co. v. Garcia, 623 So. 2d 523, 525 (Fla. 3rd DCA 1993) (jury's verdict was tainted because the plaintiff's counsel was permitted to accuse the

defendant's counsel of discovery abuse); see also Werbungs Und Commerz Union Anstalt v. Collectors' Guild, 930 F.2d 1021, 1027 (2d Cir. 1991) (reversing jury verdict because court "permitted the jury to penalize [the defendant] for discovery abuse"); id., at 1028 (Mahoney, J., concurring in part and dissenting in part) ("the instruction regarding discovery abuse by [the defendant] improperly delegated to the jury the authority to participate, in effect, in the imposition of discovery sanctions that are the proper province of the district court"); Jim Gash, Punitive Damages, Other Acts Evidence, and the Constitution, 2004 Utah L. Rev. 1191, 1212 (2004) (introduction of evidence of a defendant's misconduct separate and apart from the allegations of the complaint "creates a real danger that it will be used improperly to punish the party against whom it is being offered. Consequently, whether or not the other acts evidence is relevant, it is almost always highly prejudicial, even devastating, to the party against whom it is offered. This naturally creates powerful incentives for parties to seek to introduce such evidence against their adversaries.").

B. Evidence Supporting Punitive Damages Must Relate to the Conduct That Provides the Basis for CPH's Claims.

The Court's Sanctions Orders allow the jury to consider the Court's findings of litigation misconduct when determining the propriety of punitive damages, in violation of the Due Process Clauses of the Fourteenth Amendment. See State Farm Mutual Auto Insurance v. Campbell, 538 U.S. 408 (2003). Campbell emphasizes the Supreme Court's concern that evidence used to justify punitive damage awards must be closely related to the conduct that gives rise to the plaintiff's claim for punitive damages. "A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be

punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." Id. at 422-23.

Here, the approach employed by the Court expressly authorizes the jury to award punitive damages based on litigation conduct, rather than the conduct that gives rise to CPH's claims (*i.e,*. Morgan Stanley's alleged participation in the Sunbeam fraud). Allowing the jury to consider litigation misconduct when deciding punitive damages creates the very real possibility that the jury will award punitive damages based on conduct wholly unrelated to CPH's claims. And, of course, once findings of litigation misconduct are submitted to the jury, it will be impossible for any reviewing court to determine the basis of any subsequent punitive damages award. See id. (rejecting argument that dissimilar evidence submitted to the jury did not form the basis of the punitive damages award.)

As such, it would violate Morgan Stanley's due process rights if the Court reads any statement concerning litigation misconduct to the jury, or if CPH is permitted to introduce any evidence of that litigation misconduct. Accordingly, the Court should reconsider and withdraw its decision to permit the jury to hear about and consider Morgan Stanley's litigation misconduct in any part of the trial.

II. THE COURT'S SANCTIONS ORDERS ARE IMPROPER, OVERBROAD, AND VIOLATE BOTH FLORIDA LAW AND MORGAN STANLEY'S CONSTITUTIONAL RIGHTS.

A. The Court's Sanctions Are Overly Harsh and Not Commensurate with the Litigation Misconduct Found.

It is well established that discovery sanctions must be commensurate with discovery misconduct. See Garden-Aire Vill. Sea Haven v. Decker, 433 So. 2d 676, 677 (Fla. 4th DCA 1983) (citing Hart v. Weaver, 364 So. 2d 524 (Fla. 2d DCA 1978),

and overturning entry of default judgment as a discovery sanction). There can be no question that the Court's Sanctions Orders impose drastic sanctions on Morgan Stanley. Indeed, the Court's sanctions deprive Morgan Stanley of any meaningful ability to defend against CPH's claims – including CPH's claim for punitive damages. By entering a de facto default on most of the elements of CPH's claims, the Court has so thoroughly stacked the deck that it would be impossible for Morgan Stanley to receive a fair and impartial trial. Put simply, the Court has imposed the harshest of sanctions.

The Court, however, never made any finding that Morgan Stanley's litigation misconduct actually affected CPH's ability to prosecute its claims for the underlying torts. It is axiomatic that Morgan Stanley's failure to produce documents could only have hindered CPH's prosecution if the documents that Morgan Stanley failed to produce were relevant to CPH's underlying tort claims.[1] For all anyone knows, the emails that have not been found – and that Morgan Stanley has requested additional time to retrieve and produce – may have nothing to do with any issue in this case and, for all anyone knows, might actually support Morgan Stanley's defense.

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[1] The Sanctions Orders are also overbroad in that they purport to punish Morgan Stanley for the alleged violation of SEC regulations. See March 23 Order at 10 ("MS & Co. desperately wanted to hide an active SEC inquiry into its email retention practices."). Any discovery misconduct as it relates to the SEC, including Morgan Stanley's violation of SEC regulations, is inadmissible under the preemption doctrine established by Buckman Co. v. Plaintiffs' Legal Commission, 531 U.S. 341, 350 (2001). The Buckman Court held that allegations of fraud on federal agencies "inevitably conflict" with the federal policy of giving federal agencies broad discretion to balance their objectives in regulating disclosures made to them. Thus, the Supreme Court held that state law fraud-on-the-agency claims conflict with, and are therefore preempted by, federal law, finding that "[s]tate-law fraud-on-the-FDA claims inevitably conflict with the FDA's responsibility to police fraud consistently with the Administration's judgment and objectives." Id. at 350.

Thus, the Court has improperly issued "death penalty" sanctions without anything more than the possibility that the withheld documents could have been relevant. See generally New Hampshire Ins. Co. v. Royal Ins. Co., 559 So. 2d 102, 103 (Fla. 4th DCA 1990) (reversing judgment entered as discovery sanction because party requesting discovery failed to show prejudice). The Court erred in taking such a leap, and the consequences of the Court's error are dire – Morgan Stanley's rights under Florida law, the Florida and United States Constitutions have been violated.[2]

The purpose of Florida Rule of Civil Procedure 1.380(b) is to ensure compliance with the discovery rules and any court orders compelling discovery, not to punish or penalize the party in violation. See Garden-Aire Vill. Sea Haven v. Decker, 433 So. 2d 676, 677 (Fla. 4th DCA 1983) (citing Allstate Ins. Co. v. Biddy, 392 So. 2d 938 (Fla. 2d DCA 1980) ("The purpose of reposing in the trial court the authority to enter a default is

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[2] The Court's Sanctions Orders deprive Morgan Stanley of its day in court and thus are excessive. See Baker v. General Motors Corp., 86 F.3d 811, 817 (8th Cir. 1996) (internal citations omitted), rev'd on other grounds, 522 U.S. 222 (1998) ("As this court has stated previously, '[t]here is a strong policy favoring a trial on the merits and against depriving a party of his day in court.' ... The sanction in this case failed to achieve a balance between the policies of preventing discovery delays and deciding cases on the merits. Such a balance recognizes that the opportunity to be heard is a litigant's 'most precious right and should be sparingly denied.' ... GM was not given the right to be heard. Instead, the jury was asked, essentially, to place a monetary value on the loss of human life. Before issuing such a sanction, fairness required the court to consider whether a more 'just and effective' sanction was available. ... In this situation, other, less severe sanctions (including monetary fines against GM and continuances for the plaintiffs) were both available and appropriate. While we do not condone GM's failure to meet its discovery obligations, we find that the sanction chosen by the district court was simply too severe for the facts presented and should have been drawn more narrowly. ... By providing that the fuel pump was defective and continued to operate here, the sanction forced the jury to find for the plaintiffs. Although the case ostensibly proceeded to trial on the issue whether the defect 'directly caused or directly contributed to cause' Garner's death, in effect, the jury instructions had already decided the matter for the jury. Because the district court abused its discretion in entering such a broad sanction, we reverse for imposition of a lesser sanction and for a new trial.").

to ensure compliance with its order, not to punish or penalize"); see also Carr v. Reese, 788 So. 2d 1067, 1072 (Fla. 2d DCA 2001) (reversing default judgment entered as discovery sanction); United Servs. Auto. Ass'n v. Strasser, 492 So. 2d 399, 402 (Fla. 4th DCA 1986) (same). Here, the Court issued sanctions that far exceed those required to ensure compliance with the Court's discovery orders and, by so doing, crossed the forbidden line into the realm of punishment.

B. The Sanctions Orders Impermissibly Instruct the Jury to Award Punitive Damages and Preclude Morgan Stanley from Introduction Mitigating Evidence.

The law is clear that the Court cannot instruct the jury to award punitive damages. See Humana Health Ins. Co. of Fla. v. Chipps, 802 So. 2d 492 (Fla. 4th DCA 2001); see also FSJI PD 1 a.(2)(a) ("Punitive damages are warranted if you find by clear and convincing evidence ...") (emphasis added). And although the Court may not be proposing to give that exact instruction, the Court's proposed instructions are different only in form, not in substance.[3] The Court has held that the jury will be instructed that it must take as true *for all purposes* the Court's findings that Morgan Stanley has engaged in the conduct alleged in the First Amended Complaint. In other words, the jury will effectively be instructed that the Court has all but found that punitive damages are

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[3] Although the Court has repeatedly stated that its orders were not defaults, the Court has on at least one occasion noted that its Order was effectively a default. Hrg. Tran. of March 31, 2005 at p 11 In any event, describing the effect of the Orders as anything other than a default clearly fails the "duck" test. See Florida Bar v. Neiman, 816 So. 2d 587, 599 (Fla. 2002) ("In common parlance, Neiman's activities fail the 'duck' test. That is, in common parlance, one would expect that if it looks like a duck, and walks, talks, and acts like a duck, one can usually safely assume it is a duck"); North Broward Hosp. Dist. v. Eldred, 466 So. 2d 1210, 1211 (Fla. 4th DCA 1985) ("we are convinced that if it looks, walks, quacks and swims like a duck, that is what it is").

appropriate[4], thus denying Morgan Stanley of any of the constitutional protections accorded a defendant in this quasi-criminal proceeding. See Campbell, 123 S. Ct. at 1520 (recognizing that punitive damages "serve the same purposes as criminal penalties"); Oberg, 512 U.S. at 420 (recognizing that the Court has strongly emphasized the importance of the procedural component of the Due Process Clause in dealing with punitive damages issues).

In Humana, the trial court struck the defendant's pleading as a sanction for discovery misconduct and entered a default judgment. 802 So. 2d at 494. At trial, the sole issue for the jury was damages. After the close of the evidence, the court instructed the jury "that all of the other factors in the standard jury instruction on punitive damages were established as a matter of law, and that [the plaintiff was] 'entitled' to recover both compensatory and punitive damages as a matter of law." Id. at 495. The court further instructed the jury that "Humana's conduct was 'so gross and flagrant as to show a reckless disregard of human life or the safety of person exposed to the effects of its conduct'" and that "Humana's conduct 'showed such an entire lack of care that Humana must have wantonly and recklessly disregarded the safety and welfare of the public.'" Id. at 496. The court did not instruct the jury that it had the discretion not to award punitive damages. Id. Not surprisingly, the jury awarded approximately $1.1 million in compensatory damages and $78.5 million in punitive damages against Humana. Id.

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[4] In order for the case to proceed to the punitive phase, the jury will also be required to find the elements of reliance and damages by clear and convincing evidence. See Defendant's Motion to Clarify the Proper Scope of the Liability and Punitive Phases of Trial.

On appeal, the Fourth District held that the trial court's instructions on punitive damages invaded the clear province of the jury by characterizing the conduct of Humana. Id. at 495-96 (court's instructions "interfered with the jury's fact-finding function by characterizing and summarizing the evidence"). In reaching this conclusion, the Fourth District emphasized that even though the trial court had entered a default judgment on the entitlement to punitive damages, "[t]he jury could have awarded no punitive damages if it had determined that Humana's conduct was not as egregious as the court's instruction made it out to be." Id. Thus, the court held that: "While there is overlap between the issues of entitlement to punitive damages and the amount of such damages to be awarded, care should have been taken to let the jury arrive at its own decision regarding the egregiousness of the defendant's conduct." Id. (citing Bankers Multiple Line Ins. Co. v. Farish, 464 So. 2d 530, 532 (Fla. 1985).

The Fourth District further held that the trial court "improperly prevented Humana from introducing mitigating evidence to rebut testimony that Humana's managed care practices violated industry standards." Humana, 802 So. 2d at 496. Evidence of this sort was relevant to the egregiousness of Humana's conduct and could have impacted the punitive damages award. Id. Thus, the Fourth District held that the jury should have been permitted to consider "evidence which would have had the effect of 'reducing or softening the moral or social culpability attaching to [the defendant's] act...' McClelland v. Climax Hosiery Mills, 252 N.Y. 347, 169 N.E. 605, 608 (1930) (Cardozo, C.J., concurring); see also St. Regis Paper Co. v. Watson, 428 So. 2d 243, 246-47 (Fla. 1983) (holding the jury, in assessing punitive damages should consider 'the nature, extent, and enormity of the wrong, the intent of the party committing it and all

circumstances attending the particular incident, as well as any mitigating circumstances') (citation omitted)." Id.

In sum, therefore, the Fourth District held that: (i) a trial court may not interfere with the jury's fact finding role with respect to punitive damages by characterizing the defendant's conduct and summarizing the evidence that would support an punitive damages award; and (ii) a defendant defending a punitive damages claim must be allowed to present mitigating evidence regarding reprehensibility. The Court's Sanctions Orders violate both of these principles. At a minimum, Humana mandates that this Court instruct the jury that the jury has the discretion not to award punitive damages and that the Court allow Morgan Stanley to put on evidence to rebut CPH's claim that punitive damages are warranted in the first instance, and further to put on evidence to defend against the amount of punitive damages, even if that evidence conflicts with the Court's default findings.

C. The Sanctions Orders Violate Morgan Stanley's Constitutional Rights.

This Court's decision on how it intends to conduct the trial of this case necessarily deprives Morgan Stanley of its right to a fair trial on the issue of punitive damages. As the United States Supreme Court has recognized, punitive damages are imposed to redress the state's interest in punishing and deterring unlawful conduct and therefore serve the same purposes as criminal penalties. State Farm Mut. Auto Ins. v Campbell, 538 U.S. 408, 416 (2003). Unlike criminal defendants, however, civil defendants "have not been accorded the protections applicable in a criminal proceeding." Id. at 417-18. As a result, the Supreme Court has expressed grave concern "over the imprecise manner in which punitive damages systems are

administered." Id. There is also concern for the potential of juries to "use their verdicts to express biases against big businesses, particularly those without strong local presences." Id. at 417 (quoting Honda Motor Co v. Oberg, 512 U.S. 415, (1994)). This danger is exacerbated by vague instructions and lack of appropriate guidance for juries in their duty of "assigning appropriate weight to evidence that is relevant and not evidence that is only tangential or only inflammatory." Id.

In this case, reading the Court's findings during trial and permitting Plaintiff to bolster those findings with (in accordance with the Court's statements during hearings) unrebuttable evidence, the Court's instructions will undoubtedly serve to inflame and unduly prejudice the jury in its consideration of whether to award punitive damages against Morgan Stanley. The Court has relieved CPH of any burden of proving serious misconduct and has indicated that it will instruct the jury that Morgan Stanley is guilty of numerous inflammatory charges made by CPH, including but not limited to the Court's findings that:

- Morgan Stanley developed a strategy for Sunbeam to use its "fraudulently-inflated" stock in the acquisition of Coleman.
- Morgan Stanley decided not to correct "material misrepresentations."
- Morgan Stanley assisted Sunbeam in "concealing" problems.
- Morgan Stanley provided Sunbeam with a "plan that would allow [it] to conceal [the] fraud."
- "Morgan Stanley's strategy was doubly deceptive."
- "Morgan Stanley prepared and provided CPH with false financial and business information."
- "Morgan Stanley misrepresented Sunbeam's financial performance."

- "Morgan Stanley did not correct any of the false and misleading statements it and Sunbeam had made."

- "[W]ith Morgan Stanley's knowledge and assistance, Sunbeam prepared and issued a false press release that affirmatively misstated and concealed Sunbeam's true condition."

- "As Morgan Stanley was fully aware, the March 19, 1998 press release was false, misleading, and failed to disclose material information."

- Morgan Stanley knew that if the transactions did not close, it "would not be paid its $10.28 million fee for the Coleman acquisition or its $22.5 million fee for underwriting the subordinated debenture offering."

- "Morgan Stanley received $22.5 million for the subordinated debenture offering and $10.28 million for the Coleman acquisition."

- "Morgan Stanley participated in a scheme to mislead CPH and others and cover up the massive fraud at Sunbeam until Morgan Stanley and Sunbeam could close the purchase of Coleman."

- "Morgan Stanley provided CPH with false information."

- "Morgan Stanley also actively assisted Sunbeam in concealing Sunbeam's disastrous first quarter ..."

- "Morgan Stanley knew that its statements to were materially false and misleading and omitted the true facts."

- "Morgan Stanley intended that CPH rely on Morgan Stanley's representations concerning Sunbeam."

- "Morgan Stanley knew of Dunlap's fraudulent scheme and helped to conceal it."

- "Morgan Stanley "script[ed] Dunlap's false public statements."

- "Morgan Stanley conspired with Dunlap and other senior Sunbeam executives to conceal the truth about Sunbeam's financial performance and business operations."

- "Morgan Stanley committed overt acts in furtherance of the conspiracy."

The Court has stated that it will instruct the jury that these unproven facts must be taken as true for all purposes and that the jury may consider these "facts" – as to which no witness will have testified and no documentary evidence submitted -- and other equally damning conclusions (such as the Court's findings of litigation misconduct) in assessing punitive damages. As if this were not enough, the Court stated that it will in effect tell the jury that Morgan Stanley has admitted these facts as true, when it most certainly has not. And further still, the Court has precluded Morgan Stanley from presenting any evidence or testimony to contradict the findings of the Court or the evidence adduced by CPH.

Thus, the Court has officially sanctioned a process in which CPH will be allowed to elicit additional testimony and evidence on these issues even though the jury will have already been instructed that the allegations are true. Again, the Court has forbidden Morgan Stanley to take issue with that evidence or challenge it in any way. In so doing, the Court has substituted its judgment for that of the jury on the essential elements of the case and has virtually preordained that the jury will have no choice but to render a verdict for the compensatory damages CPH seeks.[5]

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[5] Depriving Morgan Stanley of the right to put on evidence fails the three-part test established by the U.S. Supreme Court in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), and refined in Connecticut v. Doehr, 501 U.S. 1 (1991), and thus, violates the Due Process Clause. Under that test, the Court must consider (1) the private interest affected by the challenged procedures; (2) the risk of an erroneous deprivation of that interest presented by those procedures and the probable value of additional safeguards; and (3) the interest of the opposing party, with due regard for any interest the State may have in utilizing the challenged procedure or forgoing the burden associated with providing additional safeguards. Doehr, 501 U.S. at 11. Here, Morgan Stanley's interest in defending against the quasi-criminal punitive damages claim is substantial. In contrast, the only possible justification for conducting a one-sided punitive damages trial is to punish the defendant for its failure to properly respond to discovery. But that objective has already been satisfied by the imposition of other sanctions such as awarding CPH its attorneys fees and costs. Moreover, allowing a fair fight would impose no undue burden on the State since that is the way civil (and criminal) litigation customarily is conducted.

Moreover, in adopting the First Amended Complaint's highly prejudicial and inflammatory language, the Court in effect makes those words its own. The bias and passion of these inflammatory words will indisputably and profoundly affect a jury sitting within the boundaries of the Court's state-sanctioned authority. At best, the jury will be confused by its role in returning a verdict for compensatory or punitive damages, and at worst, the jury will believe that the Court is mandating a verdict that will punish conduct the Court has already judicially decreed as being fraudulent, misleading, deceptive, and motivated by monetary gain. The process put into place by the Court's Sanctions Orders dispenses with any pretense of conducting a fair trial and ignores the constitutional constraints on the imposition of punitive damages against civil defendants.

Pursuant to BMW of North America, Inc.. v. Gore, 517 U.S. 559, 574-75 (1996), reviewing courts must assess punitive damages in light of three guideposts: (i) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. Further, the failure to provide meaningful judicial review of the amount of punitive damage awards offends the due process right to be free of grossly excessive punitive damage awards. See Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415 (1994) (striking down provision in Oregon Constitution that prohibited judicial review where the sole challenge was excessiveness); Owens-Corning Fiberglass Corp. v. Ballard, 749 So. 2d 483 (Fla. 1999). As the U.S. Supreme Court explained, "In the case before us today, we are not directly concerned with the character of the standard that will identify unconstitutionally

excessive awards; rather we are confronted with the question of what procedures are necessary to ensure that punitive damages are not imposed in an arbitrary manner." Oberg, 512 U.S. at 420. The Court ultimately held that judicial review must be available as a procedural safeguard to violation of a defendant's due process rights.

If the Court follows the procedures outlined in its Sanctions Orders, it will be impossible to apply the Gore criteria post-verdict to any award of punitive damages. The Court has mandated that the jury determine whether punitive damages are appropriate without any defense by Morgan Stanley. And according to this Court's March 23 Order, the jury will be instructed that it can consider Morgan Stanley's actions, as enumerated by the Court, in "determining whether an award of punitive damages is appropriate." Therefore, if the jury returns a verdict for punitive damages, this Court (and later appellate courts) will be charged with reviewing the jury's verdict for reasonableness and in light of the Gore factors. The reviewing court will be severely hamstrung, however, because there will be no meaningful way to assess the Gore factors in the record when Morgan Stanley has been precluded from introducing evidence relevant to those factors.

Finally, the Court's sanctions Orders violate Morgan Stanley's due process rights to the extent that the Court has deemed admitted allegations of misconduct that may have been legal in the jurisdictions in which they took place. See State Farm Ins. Co. v. Campbell, 123 S. Ct. 1513, 1522 (2003)("A State cannot punish a defendant for conduct that may have been lawful where it occurred) (emphasis added); Id. at 1522-23 ("A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.");

BMW of N. Am. v. Gore, 517 U.S. 559, 672 (1996) ("[A] State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other states.")

The manner in which this Court has decreed that the trial of this case will be conducted thus violates the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States, as well Section 2 and 9 of Article 1 of the Florida Constitution. These constitutional infirmities require reconsideration of the Court's Sanctions Orders. At the very least, the Court should allow Morgan Stanley to cross-examine witnesses to establish their credibility, bias, and motive.

CONCLUSION

For all the foregoing reason, Defendant Morgan Stanley respectively requests that this Court reconsider its March 1st and 23rd Orders. Reconsideration of the Sanctions order, coupled with granting the previously requested continuance, would permit a fair trial on the merits and serve the interests of justice. The discovery problems could be addressed. (See Affidavit of Richard Anfang.) Both sides could fairly contest the issues on the merits. The cost to the CPH necessitated by the failures in discovery and any delay, and to the judicial system, would be borne by Morgan Stanley. That cost would be in addition to the monetary sanctions the Court has already imposed (and could additionally impose) on Morgan Stanley for violations of the Court's orders.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 4th day of April, 2004.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

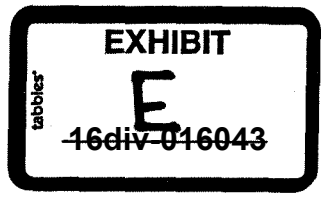
ORDER ON DEFENDANT'S MOTION FOR RECONSIDERATION OF THE COURT'S SANCTION ORDERS

THIS CAUSE came before the Court April 5, 2005 on Defendant's Motion for Reconsideration of the Court's Sanction Orders, with both parties well represented by counsel. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part, and Denied, in part. The statement of litigation misconduct to be read to the jury shall be limited to those facts which would allow a reasonable juror to conclude that MS & Co. sought to hide direct evidence of either the Sunbeam fraud or Morgan Stanley's complicity with Sunbeam in perpetrating that fraud on CPH. The jury shall be instructed that the statement of litigation misconduct may be considered only for that purpose and may not be considered for any other purpose. Specifically, the jury will be instructed that a party's failure to comply fully with a discovery request or Court order, standing alone, is immaterial to the jury's determination of the entitlement to or, if entitlement is determined, the amount of punitive damages. In all other respects the Motion is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 5th day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge



IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. VOLUME 75

MORGAN STANLEY & CO., INC.,

Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Tuesday, April 19, 2005
9:20 a.m. - 12:10 p.m.

EXHIBIT
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16div-016044

defend the case in which witnesses can mix and match artificial facts inconsistent with their own testimony with real facts we're then not permitted to explore.

THE COURT: To the extent that's a renewed motion for a mistrial, I would deny it. Not only is Morgan Stanley's actions what placed it in the position it finds itself but Morgan Stanley's actions has deprived plaintiff of a the very evidence it would need on these things. To the extent Morgan Stanley has manipulated the evidence in this case, it is ludicrous that Morgan Stanley would suggest that somehow we still have the opportunity to have a fair fact (sic) on those facts. I mean fair trial. It's not going to happen. I understand you all disagree.

Morgan Stanley deliberately manipulated the evidence in this case. And to the extent Morgan Stanley continually says we now want a trial on the merits, Morgan Stanley by its actions has totally foreclosed that as a possibility. I understand you disagree.

MR. HANSEN: With all respect, I do agree with what you said is beyond what your prior

ruling said in terms of Morgan Stanley supposedly making evidence of particular items of relevance to this case unavailable. I don't believe there's been any finding on that, nor would there be any evidence to support such a finding.

THE COURT: If you go back to the order I did on the adverse inference and renewed motion on default judgment, what I concluded was a finding that Morgan Stanley deliberately chose to hide evidence in this case. I understand you disagree, but, again, Morgan Stanley by its actions has conclusively foreclosed any possibility this action, very unfortunately, is ever going to be determined finally on its own merits.

MR. HANSEN: Was that "never," Your Honor? I didn't hear you.

THE COURT: Yes. Morgan Stanley has foreclosed the possibility that this case will ever be determined on its own merits. And, you know, I'm sorry that happened. Everybody is sorry that happened, but, quite honestly, it did.

I will see you all after lunch.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO. 2003CA 005045 AI

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CLERK & COMPTROLLER
CIRCUIT CIVIL DIVISION

PLAINTIFF'S MOTION *IN LIMINE* NO. 36 TO CLARIFY WHAT EVIDENCE IS ADMISSIBLE TO SHOW PLAINTIFF'S ENTITLEMENT TO AND AMOUNT OF PUNITIVE DAMAGES

Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, respectfully submits this motion seeking clarification of which categories of evidence and argument are permissible in Phase II of the bifurcated trial to show CPH's entitlement to punitive damages and to show the appropriate amount of punitive damages.[1] In particular, CPH asks the Court to clarify that the admissible evidence in Phase II includes: (1) the fact that the wrongful conduct of Morgan Stanley toward CPH also was injurious to the public, (2) the fact that Morgan Stanley has engaged in similar fraudulent conduct in the past, and (3) the fact that Morgan Stanley engaged in litigation misconduct, which in turn constitutes evidence of consciousness of guilt, refusal to accept responsibility for wrongful conduct and lack of remorse, ratification by management, the number and level of persons involved in the wrongdoing, the duration of the cover-up, as well as ongoing efforts at concealment. In addition, CPH respectfully submits that it should be allowed

[1] CPH previously filed its Motion in Limine No. 28 addressing many of these same issues in the context of a more traditional bifurcation with the determination of entitlement to punitive damages in Phase I. Because the bifurcation was later altered to move the entitlement issue to Phase II, the earlier motion was never answered by Morgan Stanley nor addressed by the Court.

EXHIBIT
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16div-016047

to introduce evidence of defendant's ability to pay, including showing the net worth of both Morgan Stanley & Co. and its parent Morgan Stanley.

Argument

The Florida Supreme Court articulated several factors a jury should consider in making a punitive damages determination in *Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483, 484-85 (Fla. 1999). Relevant to a jury's determination of the amount of punitive damages are:

> (1) an amount reasonable in relation to the harm likely to result from defendant's conduct as well as the harm that actually has occurred;
>
> (2) the degree of reprehensibility of defendant's conduct, the duration of that harmful conduct, defendant's awareness, any concealment and the existence and frequency of similar past conduct;
>
> (3) the profitability to defendant of the wrongful conduct and the desirability of removing that profit and of having defendant also sustain a loss;
>
> (4) the financial condition of defendant and the probable effect thereon of a particular judgment;
>
> (5) all the costs of litigation to defendant and to the plaintiff;
>
> (6) the total punishment defendant has or will probably receive from other sources, as a mitigating factor;
>
> (7) the seriousness of the hazard to the public, the attitude and conduct of defendant upon discovery of the misconduct;
>
> (8) the degree of defendant's awareness of the hazard and of its excessiveness;
>
> (9) the number and level of employees involved in causing or covering up the misconduct;
>
> (10) the duration of both the improper behavior and its cover-up; and
>
> (11) the existence of other civil awards against defendant for the same conduct.

Id. (describing trial court's jury instruction); *see also id.* at 487 ("Initially, we note that before submitting the case to the jury, the trial court properly instructed the jury on a number of relevant

factors it could consider in aggravation and mitigation in determining what, if any, amount of punitive damages to impose."); *see also Johns-Manville Sales Corp. v. Janssens*, 463 So. 2d 242, 248 (Fla. 1st DCA 1984) (discussing similar factors).

These factors should serve as a guide to determining what evidence is permissible in Phase II.

I. CPH Is Entitled To Offer Evidence That Shows the Harmfulness and Wrongfulness of Morgan Stanley's Conduct.

CPH is entitled to introduce any evidence that will assist the jury's assessment of the harmful and wrongful nature of Morgan Stanley's conduct. This includes evidence showing (1) that Morgan Stanley's conduct harmed not only CPH, but also the investing public, (2) that Morgan Stanley has engaged in similar fraudulent conduct in the past, (3) the nature and extent of litigation misconduct in this case as evidence of consciousness of guilt, refusal to accept responsibility for wrongful conduct and lack of remorse, ratification by management, the number and level of persons involved in the wrongdoing, the duration of the cover-up, as well as ongoing efforts at concealment.

A. Evidence Showing Morgan Stanley's Disregard for the Welfare of the Public Is Admissible.

On February 24, 2005, the Court held a hearing on Morgan Stanley's motion to strike certain paragraphs of CPH's first amended complaint. At that hearing, Morgan Stanley argued that certain references to harms to the investing public should be stricken from CPH's amended complaint because "we don't want to be trying this case on the basis that somehow this was a fraud on the public or investors in Florida. The question here is were we defrauding Coleman." Ex. A, 2/24/05 Tr. at 1629. The Court granted, in part, Morgan Stanley's motion, striking some but not all of the references to the investing public from CPH's amended complaint. *See* Ex. B,

2/28/05 Am. Order. At the hearing, CPH argued that the "magnitude of the wrong is a relevant consideration in making a determination as to whether and to what extent punitive damages are justified." Ex. A, 2/24/05 Tr. at 1629. Morgan Stanley agreed with that statement. *See id.* Nevertheless, there was some disagreement about whether Morgan Stanley's conduct constituted a public wrong and, if so, in which phase or phases of the trial evidence regarding the public nature of the harm would be admissible.[2]

Under Florida law, the defendant's conduct toward the public is indeed a relevant consideration in awarding punitive damages. *See* Florida Standard Civil Jury Instruction PD-1(a)(2)(a)(3) (2003) (regarding liability for punitive damages for pre-October 1, 1999 causes of action, punitive damages are warranted if the jury finds by clear and convincing evidence that "the conduct showed such an entire lack of care that the defendant must have wantonly or recklessly disregarded the safety and welfare of the public"). "Because punitive damages are awarded to redress private injuries inflicted which partake of public wrongs, '[t]hey are to be measured by the enormity of the offense, entirely aside from the measure of compensation for the injured plaintiff.'" *Wransky v. Dalfo*, 801 So. 2d 239, 242 (Fla. 4th DCA 2001) (emphasis added) (quoting *Arab Termite & Pest Control of Fla., Inc. v. Jenkins*, 409 So. 2d 1039, 1043 (Fla.1982)); *see also American Cyanamid Co. v. Roy*, 498 So. 2d 859, 861 (Fla. 1987) (punitive damages are "'reserved to those kinds of cases where private injuries partake of public wrongs'" (quoting *Ingram v. Pettit*, 340 So. 2d 922, 923-24 (Fla. 1976)); *Zuckerman v. Robinson*, 846 So. 2d 1257, 1258 (Fla. 4th DCA 2003) ("punitive damages are premised on the enormity of the act resulting in the injury to plaintiff").

[2] On April 5, 2005, the Court denied CPH's *ore tenus* motion to allow introduction of evidence of third party purchases of Sunbeam shares or debentures to establish one of the reasons why CPH relied on fraudulent misrepresentations. *See* Ex. C. The Court's Order did not address the relevance of this evidence to show CPH's entitlement to punitive damages.

Here, Morgan Stanley aided, abetted, and conspired with Sunbeam in perpetrating on CPH and the investing public one of the biggest securities frauds of the twentieth century. Through a series of "road shows," in its debenture-offering documents, and in the press release that Morgan Stanley helped Sunbeam draft, Morgan Stanley told CPH and the investing public, including investors in Florida, that Sunbeam's turnaround was a success, that Sunbeam's sales for the first quarter of 1998 were ahead of the expectations of outside financial analysts, and that Sunbeam was poised for record sales. Morgan Stanley knew all of this to be false. One example of third parties injured by Morgan Stanley are the investors who held the remaining 18% of The Coleman Company's stock, who, like Coleman, received Sunbeam stock and were similarly defrauded by Morgan Stanley and Sunbeam. *See* Ex. D, CPH Tr. Ex. 342 (Credit Suisse First Boston fairness opinion).

Under the standards set forth above, such a broad-based securities fraud constitutes a public wrong and the harm to the public should be considered in awarding punitive damages, even though the action was brought by a single victim. Because it is aimed at the public generally, thereby multiplying the "enormity of the offense," securities fraud is the quintessential public wrong. That is why Florida law recognizes that punitive damages are available to plaintiffs in common law fraud cases involving sale of securities, even though such damages are unavailable under federal securities laws. *See Stowell v. Ted S. Finkel Inv. Servs.*, 489 F. Supp. 1209, 1217 (S.D. Fla. 1980), *aff'd* 641 F.2d 323 (5th Cir. 1981) (declining to exercise pendent jurisdiction over plaintiff's common law securities fraud claim because punitive damages were available to plaintiff under Florida law but not federal law).

Under Florida law, even where the injury was inflicted only on the plaintiff, the jury is authorized to consider the fact that the defendant's conduct risked harm to others – *i.e.* that it

exhibited "'wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public.'" *White Constr. Co. v. Dupont*, 455 So. 2d 1026, 1029 (Fla. 1984) (discussing standard for imposition of punitive damages) (quoting *Carraway v. Revell*, 116 So. 2d 16, 20 n.12 (Fla. 1959)) (emphasis added). *A fortiori*, actual harm to the public may be considered as well. That a plaintiff may recover punitive damages based on the entire scope of the defendant's harm – and not just the portion of harm done to plaintiff – makes eminent sense, because "[u]nder Florida law, the purpose of punitive damages is not to further compensate the plaintiff, but to punish the defendant for its wrongful conduct and to deter similar misconduct by it and other actors in the future." *Owens-Corning*, 749 So. 2d at 486. The concern is unfounded that in a case involving multiple victims, any reference to victims other than the plaintiff gives rise to the possibility that a defendant could be punished repeatedly and excessively for the same act. That very concern is the reason why a defendant is permitted to introduce evidence of prior punitive damage awards relating to the same transaction as mitigating evidence in the second phase of a bifurcated proceeding. *Dessanti*, 695 So. 2d at 846.

B. Evidence of Morgan Stanley's Similar Misconduct In Other Cases Is Admissible.

The evidence admissible in Phase II also would include evidence showing that Morgan Stanley has previously engaged in similar fraudulent conduct involving assisting clients to sell companies or securities in a fraudulent manner. *See Owens-Corning*, 749 So. 2d at 484-85 (noting that a factor for the jury's consideration is "the degree of reprehensibility of [defendant's] conduct, the duration of that harmful conduct, [defendant's] awareness, any concealment and the existence and frequency of similar past conduct") (emphasis added). To the extent CPH can establish such similar prior acts by competent evidence, that evidence is

admissible to show that the events in this case were not a single deviation from lawfulness but that Morgan Stanley acted with full knowledge and intent to defraud CPH.

Under Florida law, Morgan Stanley's prior bad acts can come in because "[s]imilar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." FLA. STAT. § 90.404(2)(a); *see also Mitchell v. State*, 491 So. 2d 596, 598 (Fla. 1st DCA 1986) (noting that the statutory list is not exhaustive). Florida courts consistently have held that similar prior bad acts are admissible if those acts go to show that the defendant acted with the knowledge, intent, and malice that support imposition of punitive damages. *See, e.g., CSX Trans., Inc. v. Palank*, 743 So. 2d 556, 559-60 (Fla. 4th DCA 1999) (evidence regarding prior deficiencies in railroad's staffing and inspection practices was "sufficient to support a jury finding . . . for an award of punitive damages"); *Gulf Power Co. v. Kay*, 493 So. 2d 1067, 1075 (Fla. 1st DCA 1986) (evidence of previous accidents at the same location could be admissible to show "the gross and flagrant negligence required to support the award of punitive damages," if the prior incidents were adequately similar); *Smith v. Telophase Nat. Cremation Soc., Inc.*, 471 So. 2d 163, 166 (Fla. 2d DCA 1985) (evidence of the past conduct, practices and policies on part of cremation society was relevant as bearing on whether conduct could be characterized by jury as extreme and outrageous warranting punitive damages); *Clooney v. Geeting*, 352 So. 2d 1216, 1220 (Fla. 2d DCA 1977) (defendant's past driving record would be admissible if plaintiff had submitted proper claim for punitive damages).

There are, however, constitutional limits on what the jury can consider. Under the United States Supreme Court's opinion in *State Farm Mutual Insurance Co. v. Campbell*, 538 U.S. 408,

418-19 (2003), evidence of a defendant's other bad acts may be considered by the jury because that evidence goes to show the degree of reprehensibility of the misconduct. The jury can consider Morgan Stanley's other bad acts as evidence of Morgan Stanley's recidivism or its intentional malice, trickery, or deceit. *See id.* Morgan Stanley's prior bad acts must be "similar," but "evidence of other acts need not be identical." *Id.* at 424. As the *State Farm* court made clear, evidence of the defendant's actions in other jurisdictions "may be probative" in assessing the degree of reprehensibility of the defendant's conduct. *Id.* at 422.

C. Evidence of Litigation Misconduct Is Admissible.

Also relevant to a determination of entitlement to punitive damages and the proper amount is the pattern of covering up fraud that Morgan Stanley has engaged in during this and other cases. As this Court's March 1, 2005 Order recognized, Morgan Stanley's concealment of its role in the Sunbeam transaction is "evidence of its malice or evil intent, going to the issue of punitive damages." *See* Ex. E, 3/1/05 Order at 14 (citing *General Motors Corp. v. McGee*, 837 So. 2d 1010, 1035 (Fla. 4th DCA 2003) ("[e]vidence of 'concealment of offensive conduct after it initially occurred is indicative of malice or evil intent sufficient to support punitive damages.'" (citation omitted))). Thus, as this Court noted, CPH will be allowed to introduce evidence of Morgan Stanley's discovery misconduct throughout this case to the extent that this conduct shows Morgan Stanley's attempts to conceal its actions in aiding-and-abetting and conspiring with Sunbeam. *Id.; see also* Ex. F (April 5, 2005 Order Partially Granting Reconsideration, which held that the litigation conduct statement read to the jury will be limited to evidence of concealment).

II. Financial Information Is Admissible to Determine Amount of Punitive Damages.

Once the jury has determined that CPH has established Morgan Stanley's entitlement for punitive damages, the next question concerns the amount of punitive damages. At that point, the jury considers "the degree of 'malice, wantonness, oppression, or outrage' demonstrated by the evidence in the case." *Humana Health Ins. Co. v. Chipps*, 802 So. 2d 492, 496 (Fla. 4th DCA 2001). As the Florida Supreme Court has characterized it:

> The jury's major duty in determining the amount of punitive damages is to assess the appropriate degree of punishment to be imposed on the defendant commensurate with the enormity of the offense; the defendant's financial position is only one factor to be considered by the jury. Other factors which the jury may consider include "the nature, extent and enormity of the wrong, the intent of the party committing it and all circumstances attending the particular incident, as well as any mitigating circumstances."

St. Regis Paper Co. v. Watson, 428 So. 2d 243, 246-47 (Fla. 1983) (internal citations omitted) (quoting *Rinaldi v. Aaron*, 314 So. 2d 762, 763 (Fla. 1975)).

It follows that the jury determining the amount of punitive damages should give considerable weight to the evidence already in the trial record relating to the harmfulness and wrongfulness of the defendant's conduct as it affected both the plaintiff and the public, taking into account other prior similar conduct by the defendant. But there are two additional issues that are properly considered — the defendant's ability to pay, and prior punitive awards based on the same conduct, which may constitute a mitigating factor. *Dessanti*, 695 So. 2d at 847.

Morgan Stanley has argued in its motion *in limine* no. 5 to bar evidence of net worth, which this Court deferred addressing on February 23, that financial information is not relevant to a determination of punitive damages. This is clearly false. As is more fully set out in CPH's response to Morgan Stanley's motion *in limine*, under Florida law, information about a defendant's financial condition is highly relevant to setting the appropriate level of punitive

damages. *See, e.g., Liggett Group Inc. v. Engle*, 853 So. 2d 434, 457 n.28 (Fla. 3d DCA 2003) ("Florida courts routinely use net worth to determine whether a punitive award is bankrupting or excessive.") (citing cases dating from 1961 to 2002), *rev. granted*, 873 So. 2d 1222 (Fla. 2004). As the *Liggett Group* court explained: "A defendant's financial capacity is a crucial factor in determining the appropriateness of a punitive damages award. The amount awarded should be large enough to provide retribution and deterrence, but cannot be so great as to result in bankruptcy." *Id.* at 458.

Thus, in Phase II of the trial, although Morgan Stanley has already conceded its ability to pay a punitive damages award three times as large as the compensatory damages CPH is seeking (*see* Ex. G, 12/3/04 Tr. at 74-75), CPH intends to introduce evidence of Morgan Stanley's net worth and ability to pay punitive damages (subject, of course, the Court's ruling on Morgan Stanley's motion *in limine* no. 5). That evidence will address the financial situation of both defendant Morgan Stanley & Co. and its parent Morgan Stanley.

Florida law is clear that when considering the defendant's ability to pay, "financial resources is a general term which includes, but is not limited to, net worth. It encompasses many capabilities and potentials other than naked assets and liabilities." *International Union of Operating Engineers, Local 675 v. Lassiter*, 295 So.2d 634, 644 (Fla. 4th DCA 1974) (emphasis added), *quashed on other grounds*, 314 So. 2d 761 (Fla.), *rev'd and remanded on other grounds*, 325 So. 2d 408 (Fla. 4th DCA 1975), *quashed and judgment entered by trial court reinstated*, 349 So. 2d 622 (Fla. 1976); *see also Donahue v. Herbert*, 355 So. 2d 1264, 1265-66 (Fla. 4th DCA 1978) (discussing breadth of discovery into a defendant's financial resources in punitive damages cases). That is why Florida courts routinely consider not only the assets of the defendant, but also the resources available to the defendant through its parent company. *See,*

e.g., Humana Health Ins. Co. v. Chipps, 802 So. 2d 492, 497 (Fla. 4th DCA 2001) (upholding the admission into evidence of defendant's $1.7 billion indemnity agreement with its parent company because "[t]he purpose of punitive damages are served by awarding a sum of money from the defendant which, according to the defendant's financial ability, will hurt but not bankrupt that defendant"); *Wynn Oil Co. v. Purolator Chemical Corp.*, 403 F. Supp. 226, 232 (M.D. Fla. 1974) (considering the parent company's resources in evaluating the reasonableness of a punitive damages award assessed against its subsidiary).

Consideration of the resources available to a defendant through its parent company makes eminent sense because "[i]f we did not allow trial judges in their sound discretion to admit evidence of the worth of parent corporations, corporations could escape liability simply by incorporating separate departments as a number of undercapitalized subsidiaries." *TXO Prod. Corp. v. Alliance Resources Corp.*, 419 S.E. 870, 890 (W. Va. 1992). Because it is clear that the resources of Morgan Stanley are available to Morgan Stanley & Co., Inc., these resources should be considered by they jury in determining an amount of damages that are "painful enough to provide some retribution and deterrence, but [do not] destroy the defendant." *Arab Termite & Pest Control of Fla., Inc. v. Jenkins*, 409 So. 2d 1039, 1043 (Fla. 1982).

Conclusion

For the foregoing reasons, CPH respectfully requests that this Court issue an Order clarifying which categories of evidence and argument are permissible in Phase I of the bifurcated

trial to show CPH's entitlement to punitive damages and which categories are permissible in Phase II to show the amount of punitive damages.

Dated: April 18, 2005

Respectfully submitted,

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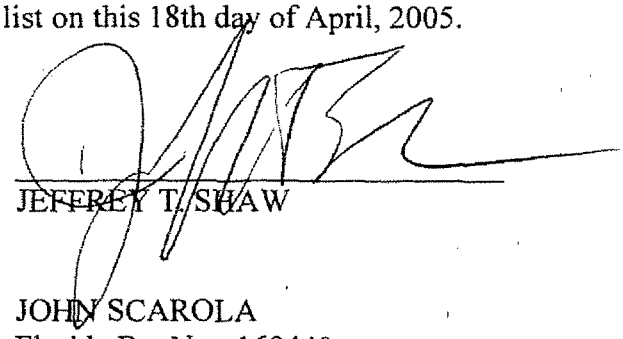
16div-016058

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 18th day of April, 2005.



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IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 57

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Tuesday, April 5, 2005

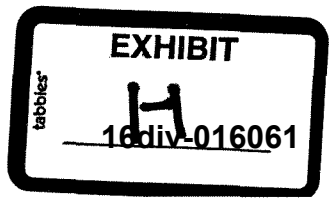
Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

9:30 a.m. to 12:10 p.m.



role of harm to the investing public for phase two. I don't know that that's something that needs to be done today.

So you all have the benefit of my thoughts, you know, my gut reaction is generic harm to the investing public is not relevant. Harm to the other 18 percent shareholders of CPH who went along with this whole transaction, maybe.

Either one of you may be able to convince me otherwise, but those are sort of the distinctions I see.

It strikes me we want to put this one aside because we have lots of other stuff to get done today.

MR. WARNER: If I was able to impose my will on it, I think we could give you something pretty short, like two or three, four pages, that would outline our position on that.

THE COURT: On the phase two issue?

MR. WARNER: Phase two issue of harm to the other investors. The way I see it, you've narrowed the issue to the other 18 percent.

THE COURT: I understand they want to argue everybody. All I'm saying is, I think it would probably take a lot to convince me about

IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 81

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Thursday, April 21, 2005

Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

1:20 p.m. to 5:00 p.m.

Q. And you gave him that, you voted for him, correct?

A. Yes.

Q. Did you think it was proper for your fellow shareholders to have a director who was a fraud and a cheat and a liar?

A. Yes.

Q. Maybe you could explain that answer, Mr. Perelman.

A. The choice that I was faced with was Mr. Dunlap essentially blackmailing me to the effect that if I did not sign the proxy, he and the entire management team was going to walk out that day.

We knew that we did not -- we were a minority shareholder. He had indicated to me at that meeting that he had more than enough votes to secure whatever was in the proxy statement to be voted upon.

As it turned out, he got the highest positive vote of anytime in the history of the corporation. So he was right about that.

So what I was faced with was a form over substance issue of, do I not give him the proxy, which I had refused to give up until that date, and that's why he was there to see me, and have he and the entire management team leave and cause a complete disruption

of that company to the detriment of every single shareholder, including ourselves, or do I acquiesce to his demand in his position that the entire management team was going to leave and give him my proxy, which, by the way, was not going to be determinative of the outcome of that election anyway.

And I succumbed to that pressure in an effort to save the company from complete disruption at that point, not knowing any more than what I knew, that they missed their first quarter sales. Nothing about a fraud, nothing about Arthur Andersen pulling their statements, nothing to that effect.

And yes, I did agree -- I believe I agreed to vote my shares, not to give him the vote. But I agreed to vote the shares, to elect that board of directors, and certain other compensation issues. It did not elect him -- there was nothing on the board that elected him CEO. Even without this election, he would have been CEO of the company.

So that at that moment in time I viewed that there was greater damage to the company in me not voting and having the entire management team leave than me exercising my right and my emotional position and going forward and not giving him my proxy, yes.

Q. Don't you think, Mr. Perelman, that your

fellow shareholders had a right to know that Mr. Dunlap was a fraud and a cheat and a liar?

MR. SCAROLA: Objection, relevance.

THE COURT: Overruled.

THE WITNESS: Everybody had the same knowledge I did. He made the same statements to the public that he made to me. These were not private statements, sir. Both he and Morgan Stanley went on record as to what the numbers were going to be.

BY MR. HANSEN:

Q. Don't you think it would have been a good thing for the shareholders of Sunbeam, which included lots of public shareholders, to have a management kicked out if it was a management of liars and cheats and deceivers?

A. I couldn't do that. I was a minority shareholder.

Q. You could have voted your shares, couldn't you?

A. But that wouldn't have done it. And the final result of that election was that he got over 90 percent support. So my 15 percent or 14 percent, he still would have gotten 80 percent voting for him.

And by the way, that company would have

gotten 80 percent voting for him, and the entire management team would have left.

Q. And you were 14 percent shareholder, were you not?

A. Yes.

Q. And that was the second largest shareholder in Sunbeam at the time?

A. 14 is not 51.

Q. Could you answer my question, sir?

A. Yes.

Q. And wouldn't it have been a dramatic thing for the 14 percent shareholder to say to the public, I'm not going to vote my shares for you, Mr. Dunlap, because I think you're a liar and a deceiver?

A. To what purpose, when the entire management team was going to leave?

Q. Wouldn't that have been a good thing, if the entire management team was filled with people who weren't honest?

A. I didn't know about anybody else in the management team. This included a dozen people or so. I mean, we were not equipped to deal with that kind of issue, sir.

Q. You also previously had conversations with the larger shareholder of Sunbeam, Mr. Price, correct?

A. Yes, and he was supporting management.

Q. Did you call Mr. Price and say to Mr. Price, we've got a duty to our fellow shareholders here to come clean and be honest about Dunlap so people aren't buying this stock based on false information?

A. We tried to get Mr. Price to do something to change management, to do that with us, and he refused.

Q. So you and Mr. Price, then, together had what, about 35 percent of the stock?

A. But we weren't together.

Q. Well, you and he talked together about doing something?

A. And he said no, so we were not together.

Q. So you went ahead and blithely voted your shares for Mr. Dunlap even though he was a dishonest person?

A. I did not blithely vote my shares. Under duress I voted my shares.

Q. Mr. Perelman, you weren't under any duress, were you?

A. Of course I was.

Q. Nobody was forcing you to do anything?

A. Sure he was.

Q. You had every right to take your pen and put "withhold authority" on that box, didn't you?

A. And I would have seen the entire management team of the company leave. That I thought to be duress.

Q. You didn't want to see your stock price go down?

A. It was irrelevant.

Q. Stock price is irrelevant?

A. The status of the company was what I was worried about. And no management of that company would have been disastrous.

Q. Wouldn't have getting rid of somebody who was a liar and deceiver have been good for the company?

A. I did not know he was a fraud.

Q. As long as he's a liar and deceiver he can be --

A. Sir, I did not want to vote for him.

Q. I didn't finish my question, Mr. Perelman.

A. Okay.

Q. I just want to be clear about your answer, and we can move on.

In your mind it's okay for a corporate CEO to be a liar and deceiver in business deals until he crosses some line into a, quote, fraud, whatever that means; is that your testimony?

A. No, it's not, sir.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION IN LIMINE NO. 1 TO EXCLUDE PERFORMANCE EVALUATIONS OR OTHER PROPENSITY EVIDENCE

THIS CAUSE came before the Court February 3, 2005 on Morgan Stanley's Motion in Limine No. 1 to Exclude Performance Evaluations or Other Propensity Evidence, with both parties well represented by counsel. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part, and Denied, in part. CPH may introduce into evidence portions of William H. Strong's performance evaluations that (i) tend to prove that Strong was under or believed he was under economic pressure to produce revenues while employed at MS & Co. in the years 1997 and 1998, which the Court notes may include portions of evaluations pre-dating 1997; or (ii) tend to prove that Strong was less than candid with his colleagues, clients, or opposing parties about aspects of a transaction or contemplated transaction, provided in either event, that the part sought to be introduced reflects (a) comments made directly by Strong's colleagues based on personal knowledge; or (b) conclusions or assessments of Strong's evaluation directors based on the evaluations. The jury shall be instructed, if requested by counsel, that portions included in (ii), above, shall not be considered in determining MS & Co.'s liability, if any, to CPH, but may be considered only on the appropriateness and, if appropriate, the amount of punitive damages to be awarded if MS & Co. is found liable to CPH on a claim permitting an award of punitive damages. MS & Co. shall be permitted to introduce other portions of the evaluations necessary to satisfy the rule of completeness, provided the designated

EXHIBIT 7
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portions otherwise meet the requirements of this Order. By 12 noon on Wednesday, February 9, 2005, CPH shall serve its designation of the portions of the Strong evaluations that it in good faith believes conform to the mandates of this Order. By Friday, February 11, 2005, at 5:00 p.m., MS & Co. shall serve its designation of the portions of Strong's evaluations that it in good faith believes conform to the mandates of this Order and need to be included to comply with the rule of completeness. Beginning February 14, 2005, counsel shall be prepared to offer argument to the Court concerning the portions that a party has designated which the opposing party contends do not meet the mandates of this Order. Either party may file with the Clerk its proffer of those portions of the evaluations it contends should be admissible but which are excluded by this Order.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 4 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION TO RECONSIDER AND MODIFY SANCTIONS ORDER

THIS CAUSE came before the Court, in Chambers, on Morgan Stanley's Motion to Reconsider and Modify Sanctions Order, which the court elects to treat as a Motion for Rehearing. Based on a review of the Motion, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion for Rehearing is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 15 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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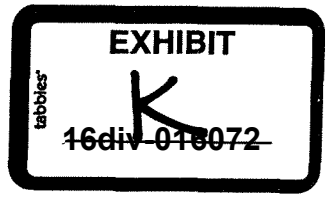
MAR 17 2005



CHANGES MARKED —
REVISED VERSION

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

CASE NO.: 502003CA005045XXOCAI

COLEMAN (PARENT) HOLDINGS INC.
Plaintiff,

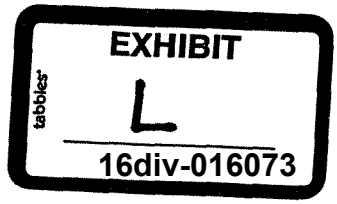
vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

FURTHER AMENDED ORDER ON COLEMAN (PARENT) HOLDINGS, INC.'S MOTION FOR ADVERSE INFERENCE INSTRUCTION DUE TO MORGAN STANLEY'S DESTRUCTIONS OF E-MAILS AND MORGAN STANLEY'S NONCOMPLIANCE WITH THE COURT'S APRIL 16 2004 AGREED ORDER, AND MOTION FOR ADDITIONAL RELIEF AND ORDER ON PLAINTIFF'S MOTION TO COMPEL FURTHER DISCOVERY REGARDING MORGAN STANLEY'S DESTRUCTION AND NON-PRODUCTION OF E-MAILS

THIS CAUSE came before the Court on February 14, 2005 on Coleman (Parent) Holdings, Inc.'s ("CPH's") Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, as modified by CPH's February 14, 2005 ore tenus motion for additional relief, and on February 28, 2005 on Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-Mails, with both counsel present. Based on evidence introduced, the Court finds:

1. CPH has sued Defendant, Morgan Stanley & Co., Inc. ("MS & Co."), for fraud in connection with CPH's sale of its stock in Coleman, Inc., to Sunbeam Corporation in return for Sunbeam stock. Whether MS & Co. had knowledge of the fraudulent scheme undertaken by Sunbeam in 1997 and early 1998 and, if so, the extent of that knowledge, is central to the case. CPH has sought access to MS & Co.'s internal files, including e-mails, since the case was filed.



2. Though MS & Co. instructed its investment bankers to preserve paper documents in their possession in connection with the Sunbeam transaction in February, 1999, it continued its practice of overwriting e-mails after 12 months, despite an SEC regulationn requiring all e-mails be retained in readily accessible form for two years. *See* 17 C.F.R. §240.17a-4 (1997).

3. On April 16, 2004, the Court entered its Agreed Order requiring MS & Co. to (1) search the oldest full backup tape for each of 36 MS & Co. employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all nonprivileged e-mails responsive to CPH's document requests; (4) give CPH a privilege log; and (5) certify its full compliance with the Agreed Order.

4. On May 14, 2004, MS & Co. produced approximately 1,300 pages of e-mails but failed to provide the required certification. Finally, on June 23, 2004, after inquiries by CPH, MS & Co. provided CPH with a certificate of full compliance with the April 16 Agreed Order signed by Arthur Riel, the MS & Co. manager assigned this task.

5. As organized by MS & Co., the effort to recover e-mails from any remaining backup tapes had several stages. First, the relevant backup tapes (in various formats, such as "DLT" tapes and eight-millimeter tapes) had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc. ("NDC"), to be processed, and the data returned to MS & Co. in the form of "SDLT" tapes. Third, MS & Co. had to find a way to upload the contents of these SDLT tapes into its new e-mail archive. Fourth, MS & Co. would run "scripts" to transform this data into a searchable form, so that it could later be searched for responsive e-mails. MS & Co. personnel used the term "staging area" to describe the stage of the process when SDLT tapes remained in limbo, waiting to be uploaded to the archive.

6. At some point prior to May 6, 2004, Arthur Riel and his team became aware that more than 1,000 backup tapes had been found at a MS & Co. facility in Brooklyn, New York. These 1,423 DLT tapes had not been processed by NDCI and thus had not been included in the archive or searched when MS & Co. made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification that it was false. He and others on MS & Co.'s e-mail archive team knew by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990's. MS & Co. neither withdrew its certification nor informed CPH about the potential for additional production of e-mails, however. During the summer of 2004, the Brooklyn tapes were processed and sent to the staging area, but they were not uploaded to the e-mail archive so as to be available to be searched until January **2005**~~2004~~, at least eight months after they were found.

7. MS & Co. also failed to timely produce e-mails from 738 8-millimeter backup tapes found at a MS & Co. facility in Manhattan, in 2002. These 738 8-mm tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched when MS & Co. made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Mr. Riel and others were told by their vendor, NDCI, by July 2, 2004 that the 8-mm tapes contained e-mail dating back at least to 1998. MS & Co. neither withdrew its certification nor informed CPH about the potential for additional production of e-mails, though. During the summer of 2004, the 8-mm tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not uploaded to MS & Co.'s e-mail archive.

8. In August 2004, Mr. Riel was relieved of his employment responsibilities. He and his team were replaced by a new team headed by Allison Gorman Nachtigal.

9. Ms. Gorman testified that she was instructed to describe the circumstances of Mr. Riel's replacement as his having been "placed on administrative leave." That same term appears by interlineation over the original typed description in MS & Co.'s memorandum addressing these issues. The typed language stated: "[Mr. Riel was] dismissed for integrity issues." MS & Co. **represented that the reason for the adverse action taken against Mr. Riel was unrelated to any concern about the accuracy of his June 23, 2004 certification. However, MS & Co.** presented no evidence to explain why Mr. Riel would have been placed on administrative leave rather than terminated. CPH argued that it may have been to deprive CPH of the ability to contact him directly.

10. Upon taping over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area; indeed, she was not informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman met with a group of MS & Co. attorneys. Following that meeting, Ms. Gorman gave the project somewhat greater priority, although even then it clearly did not move as expeditiously as possible. For example, MS & Co. gave no thought to using an outside contractor to expedite the process of completing the discovery, though it had certified completion months earlier; it lacked the technological capacity to upload and search the data at that time, and would not attain that capacity for months; and it knew trial was scheduled to begin in February, 2005. Even at this point, no one from MS & Co. or its outside counsel, Kirkland & Ellis LLP, gave CPH or this Court any hint that the June certification was false.

11. On November 17, 2004, more than six months after the May 14, 2004 deadline for producing e-mails in response to the Agreed Order, MS & Co. sent CPH a letter revealing that its June 23 certificate of compliance was incorrect. The letter stated:

> Morgan Stanley has discovered additional e-mail backup tapes since our e-mail production in May 2004. The data on some of [the] newly discovered tapes has been restored and, to ensure continued compliance

> with the agreed order, we have re-run the searches described in the order. Some responsive e-mails have been located as a result of that process. We will produce the responsive documents to you as soon as the production is finalized.

The letter also foreshadowed further delays: "(s)ome of the backup tapes are still being restored. To ensure continued compliance with the agreed order, we intend to re-run the searches again when the restoration process is complete and will produce any responsive documents that result."

12. The next day, November 18, 2004, MS & Co. produced an additional 8,000 pages of e-mails and attachments. MS & Co.'s November 2004 letter stated that the 8,000 pagers came from "newly discovered" tapes; but the testimony now makes clear that this statement was false because Ms. Gorman's team did not figure out how to upload and make searchable the materials from the staging area until January, 2005.

13. MS & Co. has failed to offer any explanation to reconcile the obvious conflict between its assertions at the time of production that the 8,000 pages came from "newly discovered" tapes (*i.e.*, the "Brooklyn tapes") and the testimony of its own witness, Ms. Gorman, that data from those newly discovered tapes were not capable of being searched until two months later, in January.

14. After a follow-up inquiry by CPH, on December 17, 2004, MS & Co. produced a privilege log and told CPH that "[n]o additional responsive e-mails have been located since our November production." MS & Co. refused to answer CPH's questions about whether MS & Co. had restored all the backup tapes described in its November 17 letter and why the tapes had not been located earlier, however.

15. On December 30, 2004, CPH sought confirmation that MS & Co. had reviewed all e-mail backup tapes and produced all responsive e-mails and, if not, asked when the review would be completed. On January 11, 2005, MS & Co. informed CPH that the "restoration of e-mail backup tapes

is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

16. On January 19, 2004, CPH wrote asking MS & Co. to explain the circumstances under which MS & Co. located the "newly discovered" backup tapes and to disclose when the tapes were located. CPH also asked MS & Co. to explain why the backup tapes could not be restored sooner.

17. On January 21, 2005, MS & Co. sent CPH a letter that failed to answer CPH's questions. Instead, MS & Co. described its efforts to restore the backup tapes as "ongoing"; informed CPH that "there is no way for MS & Co. to know or accurately predict the type or time period of data that might be recovered"; and stated that MS & Co. "cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes."

18. On January 26, 2005, CPH filed the Motion at issue here, asking the Court to instruct the jury that MS & Co.'s destruction of e-mails and other electronic documents and MS. & Co.'s noncompliance with the April 16, 2004 Agreed Order can give rise to an adverse inference that the contents of the missing e-mails would be harmful to MS & Co.'s defense in this case.

19. Meanwhile, MS & Co. found another 169 DLT tapes in January, 2005, that allegedly had been misplaced by its New Jersey storage vendor, Recall. Again, MS & Co., chose to provide no specifics to CPH or to the Court.

20. At a February 2, 2005 hearing on CPH's Motion, Thomas A. Clare of Kirkland & Ellis, LLP, representing MS & Co., stated that "late October of 2004...[is] the date I'm representing to the Court is the first time that anyone knew that there was recoverable e-mail data" on the Brooklyn tapes. Hr'g Tr. (2/2/05) at 133-34. The actual date, however, was at least three months earlier, by July 2, 2004. Furthermore, MS & Co. refused to provide the Court with definitive answers about when its e-mail production would be complete, merely stating that it would proceed with "all deliberate speed." *Id.* at 139. Also at the February 2 hearing, Mr. Clare neglected to inform the Court about the 8-mm

tapes that had been located in 2002, and told the Court that the 1,423 DLT tapes had been found in Brooklyn "sometime during the summer" of 2004. The truth of this assertion is belied by the evidence showing that the tapes were found before May 6, 2004.

21. On February 3, 2005, the Court ordered further discovery and set an evidentiary hearing for February 14, 2005. The discovery took place on February 9 and 10, when CPH deposed the three e-mail witnesses identified by MS. & Co.

22. On Saturday afternoon, February 12, 2005, MS & Co. informed the Court that it had, in the previous 24 hours, discovered additional tapes. Also, MS & Co. stated that its recent production omitted certain "attachments" to e-mails. MS & Co. did not attempt to clarify or substantiate either of these statements to CPH or to the Court until the Monday, February 14, 2005 hearing.

23. At the February 14 hearing, none of the witnesses MS & Co. presented was involved in or familiar with the actual electronic searches conducted using the parameters specified in this Court's April 16, 2004 Agreed Order, and none explained where the 8,000 pages produced in November, 2004 had come from. MS & Co.'s witnesses did, however, describe three new developments. First, Robert Saunders, a Morgan Stanley executive director in the Information Technology Division, testified that he returned to New York after his February 10 deposition and, concerned about his unqualified **deposition** assertion that **he**~~the~~ was "confident" that a complete search for backup tapes had been conducted, decided finally to undertake a personal search of MS & Co.'s "communication rooms," going to the areas he thought most obvious first. By doing so, he and two contractors discovered more than 200 additional backup tapes openly stored in locations known to be used for tape storage. Those discoveries were made on Friday and Saturday, February 11 and 12, 2005. As of the February 14 hearing, NDCI had not yet determined which, if any, of these newly discovered backup tapes contained e-mails. Second, Ms. Gorman reported that on Friday, February 11, 2005 she and her team had discovered that a flaw in the software they had written had prevented MS & Co. from locating all

responsive e-mail attachments. Third, Ms. Gorman reported that MS & Co. discovered on Sunday evening, February 13, 2005, that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so there were at least 7,000 additional e-mail messages that appeared to fall within the scope of the Agreed Order had yet to be fully reviewed by MS. & Co.'s outside counsel for responsiveness and privilege. As counsel for MS & Co. admitted, this problem "dwarf[s]" their previous problems. Hr'g Tr. (2/14/05) at 13. Ms. Gorman indicated she was "90 percent sure" that the problem infected MS & Co.'s original searches in May, which means that **MS & Co.** even **then** ~~they~~ failed to timely produce relevant materials that had been uploaded into the archive by that point. *Id.* at 82-83. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the transaction under review here.

24. On February 19, 2045 MS & Co. informed counsel for CPH that "additional boxes of back up tapes" have been located "in a security room" and that, "(a)s of this morning, Morgan Stanley has identified four (unlabled) DLT tapes among the collection. Those four tapes will be sent to NDCI for further analysis." The disclosure did not state when the discovery was made. MS & Co.'s counsel represented to the Court that it was his understanding that about 73 bankers' boxes of tapes were discovered. No explanation for the late discovery was offered.

25. Throughout this entire process, MS & Co. and its counsels' lack of candor has frustrated the Court and opposing counsel's ability to be fully and timely informed.

26. MS & Co.'s failure during the summer and fall of 2004 to timely process a substantial amount of data that was languishing in the "staging area," rather than being put into searchable form and then searched, was willful and a gross abuse of its discovery obligations.

27. MS & Co.'s failure to timely notify CPH of the existence of the DLT and 8-mm tapes, which it had located as early as 2002 and certainly prior to the June 23, 2004 certification, and its

failure to timely process those raw backup tapes was willful and a gross abuse of its discovery obligations.

28. MS & Co.'s failure to produce all e-mail attachments was negligent, and it was discovered and revealed only as a result of CPH's hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check MS & Co.'s compliance with the April 16, 2004 Agreed Order.

29. MS & Co.'s failure to produce all of the Lotus Notes e-mails was negligent, and it was discovered and revealed only as result of CPH's hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check MS & Co.'s compliance with the April 16, 2004 Agreed Order.

30. MS & Co.'s failure to locate other potentially responsive backup tapes before Saturday, February 12, 2005 was grossly negligent.

31. Given the history of the discovery, there is no way to know if all potentially responsive backup tapes have been located.

32. In sum, despite MS & Co.'s affirmative duty arising out of the litigation to produce its e-mails, and contrary to federal law requiring it to preserve the e-mails, MS & Co. failed to preserve many e-mails and failed to produce all e-mails required by the Agreed Order. The failings include overwriting e-mails after 12 months; failing to conduct proper searches for tapes that may contain e-mails; providing a certificate of compliance known to be false when made and only recently withdrawn; failing to timely notify CPH when additional tapes were located; failing to use reasonable efforts to search the newly discovered tapes; failing to timely process and search data held in the staging area or notify CPH of the deficiency; failing to write software scripts consistent with the Agreed Order; and discovering the deficiencies only after CPH was given the opportunity to check MS & Co.'s work and

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the MS & Co.'s attorneys were required to certify the completeness of the prior searches. Many of these failings were done knowingly, deliberately, and in bad faith.

It is clear that e-mails existed which were requested by CPH that have not been produced because of the deficiencies discussed above. Electronic data are the modern-day equivalent of the paper trail. Indeed, because of the informalities of e-mail, correspondents maybe less guarded than with paper correspondence. In this case, the paper trail is critical to CPH's ability to make out its prima facie case. Thus, MS & Co.'s acts have severely hindered CPH's ability to proceed. The only way to test the potentially self-serving testimony of MS & Co. personnel is with the written record of the events.

The failures outlined in this Order are of two types. First, by overwriting e-mails contrary to its legal obligation to maintain there in readily accessible form for two years and with knowledge that legal action was threatened, MS & Co. has spoiled evidence, justifying sanctions. See Martino v. Wal-Mart Stores Inc., 835 So. 2d 1251 (Fla. 4th DCA 2003). "The appropriateness of sanctions for failing to preserve evidence depends on: (1) willfulness or bad faith of the responsible party, (2) the extent of prejudice suffered by the other party, and (3) what is required to cure the prejudice." Nationwide Lift Trucks Inc. v. Smith, 832 So. 2d 824, 826 (Fla. 4th DCA 2002). Second, MS & Co,'s **willful**~~willfull~~ disobedience of the Agreed Order justifies sanctions. See Rule 1.380 (b) (2), Fla. R. Civ. P. The conclusion is inescapable that MS & Co. sought to thwart discovery *in this specific case*.

Sanctions in this context are not meant to be punitive. They are intended, though, to level the playing field.

A reasonable juror could conclude that evidence of MS & Co.'s misconduct demonstrates its consciousness of **guilt**~~guilty~~. It is relevant to the issues before the jury. Further, CPH should not be penalized by being forced to divert the jurors' attention away from the merits of its claim to focus on highly technical facts going to MS & Co.'s failures here, facts that are not reasonably disputed. Evidence of that failure, though, alone does not make CPH whole. Indeed, it can be said it is not a "sanction" at all, but

merely a statement of unrefuted facts that the jury may find relevant. Shifting the burden of proof, though, forces MS & Co. to accept the practical consequence of its failures-that some information will never be known. Obviously, this sanction is of consequence only in the marginal case. If there is overwhelming proof of MS & Co.'s knowledge of the fraud and collusion with Sunbeam, CPH would have prevailed on those elements in any event. And, to the contrary, if there is overwhelming evidence MS & Co. did not know of the fraud or conspire with or aid Sunbeam in its commission, it would have prevailed in any event. If the case is close on those issues, though, MS & Co., not CPH, should bear the burden of persuasion. Further, shifting the burden on the fraud issue does not relieve CPH of its obligation to establish the other elements of its claims, most notably reliance, proof of which is independent of the MS & Co. e-mails. Thus, the sanctions chosen are the most conservative available to the Court to address the **spoliation**~~spoilation~~ of evidence and **willful**~~willfull~~ violation of the Agreed Order.[1] [2]

Finally, the Court notes that CPH has requested the e-mails since May of 2003. MS & Co. was supposed to comply with the April 16, 2004 Order by May 14, 2064. Fact discovery in this case closed November 24, 2004. MS & Co.'s actions have resulted in the diversion of enormous amounts of resources, by both the parties and the Court, into a fact discovery dispute that should have never arisen and which would have long ago been put to bed had MS & Co. timely recognized its obligations to CPH and this Court. Opening argument in this complex case is set for March 21, 2005. Preliminary jury selection has

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[1] MS & Co.'s bad acts and pocket book may not be used to gain the continuance it has sought from the beginning. Further, the Court has no confidence that, even if a continuance were granted, MS & Co. would fully comply with discovery in this case.

[2] The undersigned notes that the sanctions imposed are not enumerated in Rule 1.380 (b) (2), and is aware of the concern expressed in the 2000 Handbook on Discovery Practice, Joint Committee of the Trial Lawyers Section of the Florida Bar and Conferences of Circuit and County Court Judges ("(f)or the trial court to be on solid footing, it is wise to stay within the enumerated orders" [Handbook at p. 4]). However, MS & Co.'s violations involve both the violation of a discovery order and the intentional **spoliation**~~spoiliation~~ of evidence. The sanction imposed is *less* severe than that provided in Rule 1.380 (b) (2) (B), under which the Court could preclude MS & Co. from presenting evidence of its lack of

begun. MS & Co. has controlled the timetable of this portion of the litigation long enough. Consequently, CPH should have the ability to continue to require MS & Co, to attempt to comply with the Agreed Order and the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search, or to elect to terminate the e-mail discovery and concentrate on trial preparation.

Based on the foregoing, it is

ORDERED AND ADJUDGED that:

1. Plaintiff's Motion for Adverse Interference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Non-Compliance with the Court's April 16, 2004 Agreed Order and Motion for Additional Relief is GRANTED.

2. MS & Co. shall continue to use its best efforts to comply with the April 16, 2004 Agreed Order and shall continue to comply with the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search until March 21, 2005 or written notice from CPH, which ever first occurs. Either party shall notify the other in writing of its intention to offer into evidence e-mails actually produced to CPH prior to termination of e-mail discovery in conformity with this Order, within 72 hours of the e-mail's production to CPH. The Court shall hear and determine any objections to use of the e-mails.

3. The Court shall read to the jury the statement of facts attached as Exhibit A during whatever evidentiary phase of CPH's case that it requests, These findings of fact shall be conclusive. See Rule 1.380 (b) (2) (A). No instruction shall be given to the jury regarding inferences to be drawn from these facts. However, counsel may make such argument to the jury in favor of whatever inferences

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knowledge of or collusion with the Sunbeam fraud, which the Court finds is the least severe enumerated sanction appropriate to place the parties on a level playing field.

that evidence may support. No other evidence concerning the production of e-mails, or lack thereof, shall be presented absent further Court order.

4. CPH will be allowed to argue that MS & Co.'s concealment of its role in the Sunbeam transaction is evidence of its malice or evil intent, going to the issue of punitive damages. See, e.g., General Motors Corp. v. McGee, 837 So.2d 10120.

5. MS & Co. shall bear the burden of proving to the jury, by the greater weight of the evidence, that it lacked knowledge of the Sunbeam fraud and did not aid and abet or conspire with Sunbeam to defraud CPH. The traditional order of proof shall remain unaffected, however.

6. MS & Co. shall compensate CPH for costs and fees associated with the Motion. The amount shall be determined at an evidentiary hearing to be held after the completion of the trial.

7. Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-Mails is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____day of March, 2005.

ELIZABETH T. MAAS
Circuit Court Judge

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EXHIBIT A

A federal regulation in effect in 1997 and all times since required Morgan Stanley to preserve e-mails for three years and to preserve them in a readily accessible place for two years. Beginning in no later than 1997, Morgan Stanley had a practice of overwriting e-mails after 12 months. E-mails could no longer be retrieved once they were overwritten. This practice was discontinued in January, 2001. CPH has sought access to Morgan Stanley's e-mails relating to this transaction since the case was filed in May, 2003.

Prior to 2003, Morgan Stanley recorded e-mails and other electronic data on back up tapes. On April 16, 2004, the Court ordered Morgan Stanley to (1) search the oldest full backup tape for each of 36 Morgan Stanley employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all e-mails relating to this case found by the search I have just described; and (4) certify its full compliance with the Court's order.

On May 14, 2004, Morgan Stanley produced approximately 1,300 pages of e-mails. It did not produce the required certification. On June 23, 2004, after inquiries by CPH, Morgan Stanley provided CPH with a certificate of full compliance with the April 16 Order signed by Arthur Riel, the Morgan Stanley manager assigned this task.

As organized by Morgan Stanley, the effort to recover e-mails from the backup tapes had several stages. First, the relevant backup tapes had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc., which I will call "NDCI", to be processed, and the data returned to Morgan Stanley. Third, Morgan Stanley had to upload the processed data into its e-mail archive. Fourth, Morgan Stanley had to run scripts, or pieces of computer code, to transform this data into a searchable form. Finally, Morgan Stanley had to search the data for e-mails related to this case. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when the processed data returned by NDCI remained in limbo, waiting to be uploaded to Morgan Stanley's archive.

At some point prior to May 6, 2004, Arthur Riel and his team became aware that 1,423 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423 tapes had not been processed by NDCI and thus had not been included in the archive or searched when Morgan Stanley made its production to CPH on May 14, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification of full compliance with the Court's April 16, 2004 Order that it was false. He and others on Morgan Stanley's e-mail archive team knew by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990's. During the summer of 2004, the Brooklyn tapes were processed and the data sent to the staging area. The scripts for e-mails **relating to this case** were not written and tested to permit the search ~~for e-mails relating to this case~~ to begin until the middle of January, 2004. Such a search, even if perfectly done, can take weeks.

Morgan Stanley also failed to timely produce e-mails from 738 backup tapes found at a Morgan Stanley facility in Manhattan in 2002. These 738 tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched by either ~~on~~ May 14, 2004**, when the Court's order required production,** or June 23, 2004**, when Morgan Stanley falsely certified that full production had been made**. Mr. Riel and others were told by NDCI by July 2, 2004 that these tapes contained e-mail dating back at least to 1998. During the summer of 2004, ~~the~~ these tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not searched.

In the course of these proceedings, Morgan Stanley represented to the Court that the first time anyone knew that there was recoverable e-mail data on the Brooklyn tapes was in October 2004. That statement was false. The actual date was at least three months earlier than that, no later than July 2, 2004.

In August 2004, Mr. Riel was relieved of his employment responsibilities **for reasons unrelated to Morgan Stanley's false certification**. He and his team were replaced by a new team headed by Allison Gorman Nachtigal. At that time, the staging area contained about 600 gigabytes of e-mail data that had not yet been uploaded into the Morgan Stanley archive and had not been searched for e-mails relating to this case. **600 gigabytes of data is the equivalent of approximately 30 million printed pages.**

Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts

to address the backlog of data in the staging area. Indeed, she was not informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman gave the project somewhat greater priority, although even then it did not move as expeditiously as possible. Morgan Stanley did not consider using an outside contractor to expedite the process.

In November 2004, Morgan Stanley produced additional e-mails and attachments to CPH. Morgan Stanley told CPH that those materials came from newly discovered tapes. That statement was false. In fact, Morgan Stanley did not begin searching the materials from the staging area until January 2005.

Morgan Stanley found another 169 DLT tapes in January, 2005, that **according to Morgan Stanley** had been misplaced by its New Jersey storage vendor. Morgan Stanley **later disclosed the existence of** ~~discovered~~ more than 200 additional **unsearched** backup tapes openly stored in locations known to be used for tape storage**, which Morgan Stanley claimed to have discovered** on February 11 and 12, 2005.

~~On February 11, 2005~~ Morgan Stanley **claims to have** discovered **on February 11, 2005** that a flaw in the software it had written had prevented Morgan Stanley from locating all e-mail attachments about the Sunbeam transaction. Morgan Stanley **also admits** ~~discovered on February 13, 2005,~~ that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so that additional e-mail messages that appeared to fall within the scope of the April 16, 2004 Order had not been given to CPH. Further, it appears that the problem infected Morgan Stanley's original searches in May of 2004. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the transaction under review here.

Morgan Stanley claims to have discovered the Lotus Notes defects in the searches on February 13, 2005. Both the e-mail attachment defects and the Lotus Notes defects in Morgan Stanley's searches were revealed only as a result of CPH's hiring of a third-party vendor, pursuant to the Court's Order on February 4, 2005, to double-check Morgan Stanley's compliance with the April 16, 2004 Order. On February 16, 2005, Morgan Stanley withdrew its certificate of compliance with the April 16, 2004 Order.

On February 19, 2005 Morgan Stanley notified CPH that it had found boxes of additional tapes that have not been uploaded into its archive or searched for responsive e-mails. Morgan Stanley did not

tell CPH it had found any tapes that it had not searched until November 17, 2004. Even then, it did not tell CPH how many tapes were found, when they were found, or when they would be searched. MS & Co. did not provide all of this information to CPH until February of 2005. The searches had not yet been completed when this trial was begun, when they were terminated without completion.

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

CASE NO.: 502003CA005045XXOCAI

COLEMAN (PARENT) HOLDINGS INC.
Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

FURTHER AMENDED ORDER ON COLEMAN (PARENT) HOLDINGS, INC.'S MOTION FOR ADVERSE INFERENCE INSTRUCTION DUE TO MORGAN STANLEY'S DESTRUCTIONS OF E-MAILS AND MORGAN STANLEY'S NONCOMPLIANCE WITH THE COURT'S APRIL 16 2004 AGREED ORDER, AND MOTION FOR ADDITIONAL RELIEF AND ORDER ON PLAINTIFF'S MOTION TO COMPEL FURTHER DISCOVERY REGARDING MORGAN STANLEY'S DESTRUCTION AND NON-PRODUCTION OF E-MAILS

THIS CAUSE came before the Court on February 14, 2005 on Coleman (Parent) Holdings, Inc.'s ("CPH's") Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, as modified by CPH's February 14, 2005 ore tenus motion for additional relief, and on February 28, 2005 on Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-Mails, with both counsel present. Based on evidence introduced, the Court finds:

1. CPH has sued Defendant, Morgan Stanley & Co., Inc. ("MS & Co."), for fraud in connection with CPH's sale of its stock in Coleman, Inc., to Sunbeam Corporation in return for Sunbeam stock. Whether MS & Co. had knowledge of the fraudulent scheme undertaken by Sunbeam in 1997 and early 1998 and, if so, the extent of that knowledge, is central to the case. CPH has sought access to MS & Co.'s internal files, including e-mails, since the case was filed.

2. Though MS & Co. instructed its investment bankers to preserve paper documents in their possession in connection with the Sunbeam transaction in February, 1999, it continued its practice of overwriting e-mails after 12 months, despite an SEC regulationn requiring all e-mails be retained in readily accessible form for two years. *See* 17 C.F.R. §240.17a-4 (1997).

3. On April 16, 2004, the Court entered its Agreed Order requiring MS & Co. to (1) search the oldest full backup tape for each of 36 MS & Co. employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all nonprivileged e-mails responsive to CPH's document requests; (4) give CPH a privilege log; and (5) certify its full compliance with the Agreed Order.

4. On May 14, 2004, MS & Co. produced approximately 1,300 pages of e-mails but failed to provide the required certification. Finally, on June 23, 2004, after inquiries by CPH, MS & Co. provided CPH with a certificate of full compliance with the April 16 Agreed Order signed by Arthur Riel, the MS & Co. manager assigned this task.

5. As organized by MS & Co., the effort to recover e-mails from any remaining backup tapes had several stages. First, the relevant backup tapes (in various formats, such as "DLT" tapes and eight-millimeter tapes) had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc. ("NDC"), to be processed, and the data returned to MS & Co. in the form of "SDLT" tapes. Third, MS & Co. had to find a way to upload the contents of these SDLT tapes into its new e-mail archive. Fourth, MS & Co. would run "scripts" to transform this data into a searchable form, so that it could later be searched for responsive e-mails. MS & Co. personnel used the term "staging area" to describe the stage of the process when SDLT tapes remained in limbo, waiting to be uploaded to the archive.

6. At some point prior to May 6, 2004, Arthur Riel and his team became aware that more than 1,000 backup tapes had been found at a MS & Co. facility in Brooklyn, New York. These 1,423 DLT tapes had not been processed by NDCI and thus had not been included in the archive or searched when MS & Co. made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification that it was false. He and others on MS & Co.'s e-mail archive team knew by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990's. MS & Co. neither withdrew its certification nor informed CPH about the potential for additional production of e-mails, however. During the summer of 2004, the Brooklyn tapes were processed and sent to the staging area, but they were not uploaded to the e-mail archive so as to be available to be searched until January2005, at least eight months after they were found.

7. MS & Co. also failed to timely produce e-mails from 738 8-millimeter backup tapes found at a MS & Co. facility in Manhattan, in 2002. These 738 8-mm tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched when MS & Co. made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Mr. Riel and others were told by their vendor, NDCI, by July 2, 2004 that the 8-mm tapes contained e-mail dating back at least to 1998. MS & Co. neither withdrew its certification nor informed CPH about the potential for additional production of e-mails, though. During the summer of 2004, the 8-mm tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not uploaded to MS & Co.'s e-mail archive.

8. In August 2004, Mr. Riel was relieved of his employment responsibilities. He and his team were replaced by a new team headed by Allison Gorman Nachtigal.

9. Ms. Gorman testified that she was instructed to describe the circumstances of Mr. Riel's replacement as his having been "placed on administrative leave." That same term appears by interlineation over the original typed description in MS & Co.'s memorandum addressing these issues. The typed language stated: "[Mr. Riel was] dismissed for integrity issues." MS & Co. represented that the reason for the adverse action taken against Mr. Riel was unrelated to any concern about the accuracy of his June 23, 2004 certification. However, MS & Co. presented no evidence to explain why Mr. Riel would have been placed on administrative leave rather than terminated. CPH argued that it may have been to deprive CPH of the ability to contact him directly.

10. Upon taping over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area; indeed, she was not informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman met with a group of MS & Co. attorneys. Following that meeting, Ms. Gorman gave the project somewhat greater priority, although even then it clearly did not move as expeditiously as possible. For example, MS & Co. gave no thought to using an outside contractor to expedite the process of completing the discovery, though it had certified completion months earlier; it lacked the technological capacity to upload and search the data at that time, and would not attain that capacity for months; and it knew trial was scheduled to begin in February, 2005. Even at this point, no one from MS & Co. or its outside counsel, Kirkland & Ellis LLP, gave CPH or this Court any hint that the June certification was false.

11. On November 17, 2004, more than six months after the May 14, 2004 deadline for producing e-mails in response to the Agreed Order, MS & Co. sent CPH a letter revealing that its June 23 certificate of compliance was incorrect. The letter stated:

> Morgan Stanley has discovered additional e-mail backup tapes since our e-mail production in May 2004. The data on some of [the] newly discovered tapes has been restored and, to ensure continued compliance

16div-016093

> with the agreed order, we have re-run the searches described in the order. Some responsive e-mails have been located as a result of that process. We will produce the responsive documents to you as soon as the production is finalized.

The letter also foreshadowed further delays: "(s)ome of the backup tapes are still being restored. To ensure continued compliance with the agreed order, we intend to re-run the searches again when the restoration process is complete and will produce any responsive documents that result."

12. The next day, November 18, 2004, MS & Co. produced an additional 8,000 pages of e-mails and attachments. MS & Co.'s November 2004 letter stated that the 8,000 pagers came from "newly discovered" tapes; but the testimony now makes clear that this statement was false because Ms. Gorman's team did not figure out how to upload and make searchable the materials from the staging area until January, 2005.

13. MS & Co. has failed to offer any explanation to reconcile the obvious conflict between its assertions at the time of production that the 8,000 pages came from "newly discovered" tapes (*i.e.*, the "Brooklyn tapes") and the testimony of its own witness, Ms. Gorman, that data from those newly discovered tapes were not capable of being searched until two months later, in January.

14. After a follow-up inquiry by CPH, on December 17, 2004, MS & Co. produced a privilege log and told CPH that "[n]o additional responsive e-mails have been located since our November production." MS & Co. refused to answer CPH's questions about whether MS & Co. had restored all the backup tapes described in its November 17 letter and why the tapes had not been located earlier, however.

15. On December 30, 2004, CPH sought confirmation that MS & Co. had reviewed all e-mail backup tapes and produced all responsive e-mails and, if not, asked when the review would be completed. On January 11, 2005, MS & Co. informed CPH that the "restoration of e-mail backup tapes

is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

16. On January 19, 2004, CPH wrote asking MS & Co. to explain the circumstances under which MS & Co. located the "newly discovered" backup tapes and to disclose when the tapes were located. CPH also asked MS & Co. to explain why the backup tapes could not be restored sooner.

17. On January 21, 2005, MS & Co. sent CPH a letter that failed to answer CPH's questions. Instead, MS & Co. described its efforts to restore the backup tapes as "ongoing"; informed CPH that "there is no way for MS & Co. to know or accurately predict the type or time period of data that might be recovered"; and stated that MS & Co. "cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes."

18. On January 26, 2005, CPH filed the Motion at issue here, asking the Court to instruct the jury that MS & Co.'s destruction of e-mails and other electronic documents and MS. & Co.'s noncompliance with the April 16, 2004 Agreed Order can give rise to an adverse inference that the contents of the missing e-mails would be harmful to MS & Co.'s defense in this case.

19. Meanwhile, MS & Co. found another 169 DLT tapes in January, 2005, that allegedly had been misplaced by its New Jersey storage vendor, Recall. Again, MS & Co., chose to provide no specifics to CPH or to the Court.

20. At a February 2, 2005 hearing on CPH's Motion, Thomas A. Clare of Kirkland & Ellis, LLP, representing MS & Co., stated that "late October of 2004...[is] the date I'm representing to the Court is the first time that anyone knew that there was recoverable e-mail data" on the Brooklyn tapes. Hr'g Tr. (2/2/05) at 133-34. The actual date, however, was at least three months earlier, by July 2, 2004. Furthermore, MS & Co. refused to provide the Court with definitive answers about when its e-mail production would be complete, merely stating that it would proceed with "all deliberate speed." *Id.* at 139. Also at the February 2 hearing, Mr. Clare neglected to inform the Court about the 8-mm

tapes that had been located in 2002, and told the Court that the 1,423 DLT tapes had been found in Brooklyn "sometime during the summer" of 2004. The truth of this assertion is belied by the evidence showing that the tapes were found before May 6, 2004.

21. On February 3, 2005, the Court ordered further discovery and set an evidentiary hearing for February 14, 2005. The discovery took place on February 9 and 10, when CPH deposed the three e-mail witnesses identified by MS. & Co.

22. On Saturday afternoon, February 12, 2005, MS & Co. informed the Court that it had, in the previous 24 hours, discovered additional tapes. Also, MS & Co. stated that its recent production omitted certain "attachments" to e-mails. MS & Co. did not attempt to clarify or substantiate either of these statements to CPH or to the Court until the Monday, February 14, 2005 hearing.

23. At the February 14 hearing, none of the witnesses MS & Co. presented was involved in or familiar with the actual electronic searches conducted using the parameters specified in this Court's April 16, 2004 Agreed Order, and none explained where the 8,000 pages produced in November, 2004 had come from. MS & Co.'s witnesses did, however, describe three new developments. First, Robert Saunders, a Morgan Stanley executive director in the Information Technology Division, testified that he returned to New York after his February 10 deposition and, concerned about his unqualified deposition assertion that he was "confident" that a complete search for backup tapes had been conducted, decided finally to undertake a personal search of MS & Co.'s "communication rooms," going to the areas he thought most obvious first. By doing so, he and two contractors discovered more than 200 additional backup tapes openly stored in locations known to be used for tape storage. Those discoveries were made on Friday and Saturday, February 11 and 12, 2005. As of the February 14 hearing, NDCI had not yet determined which, if any, of these newly discovered backup tapes contained e-mails. Second, Ms. Gorman reported that on Friday, February 11, 2005 she and her team had discovered that a flaw in the software they had written had prevented MS & Co. from locating all

16div-016096

responsive e-mail attachments. Third, Ms. Gorman reported that MS & Co. discovered on Sunday evening, February 13, 2005, that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so there were at least 7,000 additional e-mail messages that appeared to fall within the scope of the Agreed Order had yet to be fully reviewed by MS. & Co.'s outside counsel for responsiveness and privilege. As counsel for MS & Co. admitted, this problem "dwarf[s]" their previous problems. Hr'g Tr. (2/14/05) at 13. Ms. Gorman indicated she was "90 percent sure" that the problem infected MS & Co.'s original searches in May, which means that MS & Co. even then failed to timely produce relevant materials that had been uploaded into the archive by that point. *Id.* at 82-83. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the transaction under review here.

24. On February 19, 2045 MS & Co. informed counsel for CPH that "additional boxes of back up tapes" have been located "in a security room" and that, "(a)s of this morning, Morgan Stanley has identified four (unlabled) DLT tapes among the collection. Those four tapes will be sent to NDCI for further analysis." The disclosure did not state when the discovery was made. MS & Co.'s counsel represented to the Court that it was his understanding that about 73 bankers' boxes of tapes were discovered. No explanation for the late discovery was offered.

25. Throughout this entire process, MS & Co. and its counsels' lack of candor has frustrated the Court and opposing counsel's ability to be fully and timely informed.

26. MS & Co.'s failure during the summer and fall of 2004 to timely process a substantial amount of data that was languishing in the "staging area," rather than being put into searchable form and then searched, was willful and a gross abuse of its discovery obligations.

27. MS & Co.'s failure to timely notify CPH of the existence of the DLT and 8-mm tapes, which it had located as early as 2002 and certainly prior to the June 23, 2004 certification, and its

16div-016097

failure to timely process those raw backup tapes was willful and a gross abuse of its discovery obligations.

28. MS & Co.'s failure to produce all e-mail attachments was negligent, and it was discovered and revealed only as a result of CPH's hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check MS & Co.'s compliance with the April 16, 2004 Agreed Order.

29. MS & Co.'s failure to produce all of the Lotus Notes e-mails was negligent, and it was discovered and revealed only as result of CPH's hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check MS & Co.'s compliance with the April 16, 2004 Agreed Order.

30. MS & Co.'s failure to locate other potentially responsive backup tapes before Saturday, February 12, 2005 was grossly negligent.

31. Given the history of the discovery, there is no way to know if all potentially responsive backup tapes have been located.

32. In sum, despite MS & Co.'s affirmative duty arising out of the litigation to produce its e-mails, and contrary to federal law requiring it to preserve the e-mails, MS & Co. failed to preserve many e-mails and failed to produce all e-mails required by the Agreed Order. The failings include overwriting e-mails after 12 months; failing to conduct proper searches for tapes that may contain e-mails; providing a certificate of compliance known to be false when made and only recently withdrawn; failing to timely notify CPH when additional tapes were located; failing to use reasonable efforts to search the newly discovered tapes; failing to timely process and search data held in the staging area or notify CPH of the deficiency; failing to write software scripts consistent with the Agreed Order; and discovering the deficiencies only after CPH was given the opportunity to check MS & Co.'s work and

the MS & Co.'s attorneys were required to certify the completeness of the prior searches. Many of these failings were done knowingly, deliberately, and in bad faith.

It is clear that e-mails existed which were requested by CPH that have not been produced because of the deficiencies discussed above. Electronic data are the modern-day equivalent of the paper trail. Indeed, because of the informalities of e-mail, correspondents maybe less guarded than with paper correspondence. In this case, the paper trail is critical to CPH's ability to make out its prima facie case. Thus, MS & Co.'s acts have severely hindered CPH's ability to proceed. The only way to test the potentially self-serving testimony of MS & Co. personnel is with the written record of the events.

The failures outlined in this Order are of two types. First, by overwriting e-mails contrary to its legal obligation to maintain there in readily accessible form for two years and with knowledge that legal action was threatened, MS & Co. has spoiled evidence, justifying sanctions. See Martino v. Wal-Mart Stores Inc., 835 So. 2d 1251 (Fla. 4th DCA 2003). "The appropriateness of sanctions for failing to preserve evidence depends on: (1) willfulness or bad faith of the responsible party, (2) the extent of prejudice suffered by the other party, and (3) what is required to cure the prejudice." Nationwide Lift Trucks Inc. v. Smith, 832 So. 2d 824, 826 (Fla. 4th DCA 2002). Second, MS & Co,'s willful disobedience of the Agreed Order justifies sanctions. See Rule 1.380 (b) (2), Fla. R. Civ. P. The conclusion is inescapable that MS & Co. sought to thwart discovery *in this specific case*.

Sanctions in this context are not meant to be punitive. They are intended, though, to level the playing field.

A reasonable juror could conclude that evidence of MS & Co.'s misconduct demonstrates its consciousness of guilt. It is relevant to the issues before the jury. Further, CPH should not be penalized by being forced to divert the jurors' attention away from the merits of its claim to focus on highly technical facts going to MS & Co.'s failures here, facts that are not reasonably disputed. Evidence of that failure, though, alone does not make CPH whole. Indeed, it can be said it is not a "sanction" at all, but merely a

statement of unrefuted facts that the jury may find relevant. Shifting the burden of proof, though, forces MS & Co. to accept the practical consequence of its failures-that some information will never be known. Obviously, this sanction is of consequence only in the marginal case. If there is overwhelming proof of MS & Co.'s knowledge of the fraud and collusion with Sunbeam, CPH would have prevailed on those elements in any event. And, to the contrary, if there is overwhelming evidence MS & Co. did not know of the fraud or conspire with or aid Sunbeam in its commission, it would have prevailed in any event. If the case is close on those issues, though, MS & Co., not CPH, should bear the burden of persuasion. Further, shifting the burden on the fraud issue does not relieve CPH of its obligation to establish the other elements of its claims, most notably reliance, proof of which is independent of the MS & Co. e-mails. Thus, the sanctions chosen are the most conservative available to the Court to address the spoliation of evidence and willful violation of the Agreed Order.[1] [2]

Finally, the Court notes that CPH has requested the e-mails since May of 2003. MS & Co. was supposed to comply with the April 16, 2004 Order by May 14, 2064. Fact discovery in this case closed November 24, 2004. MS & Co.'s actions have resulted in the diversion of enormous amounts of resources, by both the parties and the Court, into a fact discovery dispute that should have never arisen and which would have long ago been put to bed had MS & Co. timely recognized its obligations to CPH and this Court. Opening argument in this complex case is set for March 21, 2005. Preliminary jury selection has

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[1] MS & Co.'s bad acts and pocket book may not be used to gain the continuance it has sought from the beginning. Further, the Court has no confidence that, even if a continuance were granted, MS & Co. would fully comply with discovery in this case.

[2] The undersigned notes that the sanctions imposed are not enumerated in Rule 1.380 (b) (2), and is aware of the concern expressed in the 2000 Handbook on Discovery Practice, Joint Committee of the Trial Lawyers Section of the Florida Bar and Conferences of Circuit and County Court Judges ("(f)or the trial court to be on solid footing, it is wise to stay within the enumerated orders" [Handbook at p. 4]). However, MS & Co.'s violations involve both the violation of a discovery order and the intentional spoliation of evidence. The sanction imposed is *less* severe than that provided in Rule 1.380 (b) (2) (B), under which the Court could preclude MS & Co. from presenting evidence of its lack of knowledge of or

begun. MS & Co. has controlled the timetable of this portion of the litigation long enough. Consequently, CPH should have the ability to continue to require MS & Co, to attempt to comply with the Agreed Order and the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search, or to elect to terminate the e-mail discovery and concentrate on trial preparation.

Based on the foregoing, it is

ORDERED AND ADJUDGED that:

1. Plaintiff's Motion for Adverse Interference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Non-Compliance with the Court's April 16, 2004 Agreed Order and Motion for Additional Relief is GRANTED.

2. MS & Co. shall continue to use its best efforts to comply with the April 16, 2004 Agreed Order and shall continue to comply with the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search until March 21, 2005 or written notice from CPH, which ever first occurs. Either party shall notify the other in writing of its intention to offer into evidence e-mails actually produced to CPH prior to termination of e-mail discovery in conformity with this Order, within 72 hours of the e-mail's production to CPH. The Court shall hear and determine any objections to use of the e-mails.

3. The Court shall read to the jury the statement of facts attached as Exhibit A during whatever evidentiary phase of CPH's case that it requests, These findings of fact shall be conclusive. See Rule 1.380 (b) (2) (A). No instruction shall be given to the jury regarding inferences to be drawn from these facts. However, counsel may make such argument to the jury in favor of whatever inferences

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collusion with the Sunbeam fraud, which the Court finds is the least severe enumerated sanction appropriate to place the parties on a level playing field.

that evidence may support. No other evidence concerning the production of e-mails, or lack thereof, shall be presented absent further Court order.

4. CPH will be allowed to argue that MS & Co.'s concealment of its role in the Sunbeam transaction is evidence of its malice or evil intent, going to the issue of punitive damages. See, e.g., General Motors Corp. v. McGee, 837 So.2d 10120.

5. MS & Co. shall bear the burden of proving to the jury, by the greater weight of the evidence, that it lacked knowledge of the Sunbeam fraud and did not aid and abet or conspire with Sunbeam to defraud CPH. The traditional order of proof shall remain unaffected, however.

6. MS & Co. shall compensate CPH for costs and fees associated with the Motion. The amount shall be determined at an evidentiary hearing to be held after the completion of the trial.

7. Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-Mails is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ___day of March, 2005.

ELIZABETH T. MAAS
Circuit Court Judge

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EXHIBIT A

A federal regulation in effect in 1997 and all times since required Morgan Stanley to preserve e-mails for three years and to preserve them in a readily accessible place for two years. Beginning in no later than 1997, Morgan Stanley had a practice of overwriting e-mails after 12 months. E-mails could no longer be retrieved once they were overwritten. This practice was discontinued in January, 2001. CPH has sought access to Morgan Stanley's e-mails relating to this transaction since the case was filed in May, 2003.

Prior to 2003, Morgan Stanley recorded e-mails and other electronic data on back up tapes. On April 16, 2004, the Court ordered Morgan Stanley to (1) search the oldest full backup tape for each of 36 Morgan Stanley employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all e-mails relating to this case found by the search I have just described; and (4) certify its full compliance with the Court's order.

On May 14, 2004, Morgan Stanley produced approximately 1,300 pages of e-mails. It did not produce the required certification. On June 23, 2004, after inquiries by CPH, Morgan Stanley provided CPH with a certificate of full compliance with the April 16 Order signed by Arthur Riel, the Morgan Stanley manager assigned this task.

As organized by Morgan Stanley, the effort to recover e-mails from the backup tapes had several stages. First, the relevant backup tapes had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc., which I will call "NDCI", to be processed, and the data returned to Morgan Stanley. Third, Morgan Stanley had to upload the processed data into its e-mail archive. Fourth, Morgan Stanley had to run scripts, or pieces of computer code, to transform this data into a searchable form. Finally, Morgan Stanley had to search the data for e-mails related to this case. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when the processed data returned by NDCI remained in limbo, waiting to be uploaded to Morgan Stanley's archive.

At some point prior to May 6, 2004, Arthur Riel and his team became aware that 1,423 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423 tapes had not been processed by NDCI and thus had not been included in the archive or searched when Morgan Stanley made its production to CPH on May 14, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification of full compliance with the Court's April 16, 2004 Order that it was false. He and others on Morgan Stanley's e-mail archive team knew by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990's. During the summer of 2004, the Brooklyn tapes were processed and the data sent to the staging area. The scripts for e-mails relating to this case were not written and tested to permit the search to begin until the middle of January, 2004. Such a search, even if perfectly done, can take weeks.

Morgan Stanley also failed to timely produce e-mails from 738 backup tapes found at a Morgan Stanley facility in Manhattan in 2002. These 738 tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched by either May 14, 2004, when the Court's order required production, or June 23, 2004, when Morgan Stanley falsely certified that full production had been made. Mr. Riel and others were told by NDCI by July 2, 2004 that these tapes contained e-mail dating back at least to 1998. During the summer of 2004, these tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not searched.

In the course of these proceedings, Morgan Stanley represented to the Court that the first time anyone knew that there was recoverable e-mail data on the Brooklyn tapes was in October 2004. That statement was false. The actual date was at least three months earlier than that, no later than July 2, 2004.

In August 2004, Mr. Riel was relieved of his employment responsibilities for reasons unrelated to Morgan Stanley's false certification. He and his team were replaced by a new team headed by Allison Gorman Nachtigal. At that time, the staging area contained about 600 gigabytes of e-mail data that had not yet been uploaded into the Morgan Stanley archive and had not been searched for e-mails relating to this case. 600 gigabytes of data is the equivalent of approximately 30 million printed pages.

Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area. Indeed, she was not informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman gave the project

somewhat greater priority, although even then it did not move as expeditiously as possible. Morgan Stanley did not consider using an outside contractor to expedite the process.

In November 2004, Morgan Stanley produced additional e-mails and attachments to CPH. Morgan Stanley told CPH that those materials came from newly discovered tapes. That statement was false. In fact, Morgan Stanley did not begin searching the materials from the staging area until January 2005.

Morgan Stanley found another 169 DLT tapes in January, 2005, that according to Morgan Stanley had been misplaced by its New Jersey storage vendor. Morgan Stanley later disclosed the existence of more than 200 additional unsearched backup tapes openly stored in locations known to be used for tape storage, which Morgan Stanley claimed to have discovered on February 11 and 12, 2005.

Morgan Stanley claims to have discovered on February 11, 2005 that a flaw in the software it had written had prevented Morgan Stanley from locating all e-mail attachments about the Sunbeam transaction. Morgan Stanley also admits that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so that additional e-mail messages that appeared to fall within the scope of the April 16, 2004 Order had not been given to CPH. Further, it appears that the problem infected Morgan Stanley's original searches in May of 2004. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the transaction under review here.

Morgan Stanley claims to have discovered the Lotus Notes defects in the searches on February 13, 2005. Both the e-mail attachment defects and the Lotus Notes defects in Morgan Stanley's searches were revealed only as a result of CPH's hiring of a third-party vendor, pursuant to the Court's Order on February 4, 2005, to double-check Morgan Stanley's compliance with the April 16, 2004 Order. On February 16, 2005, Morgan Stanley withdrew its certificate of compliance with the April 16, 2004 Order.

On February 19, 2005 Morgan Stanley notified CPH that it had found boxes of additional tapes that have not been uploaded into its archive or searched for responsive e-mails. Morgan Stanley did not tell CPH it had found any tapes that it had not searched until November 17, 2004. Even then, it did not tell CPH how many tapes were found, when they were found, or when they would be searched. MS & Co. did not provide all of this information to CPH until February of 2005. The searches had not yet been completed when this trial was begun, when they were terminated without completion.

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

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

CASE NO: 2003 CA 005045 AI

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CLERK & COMPTROLLER
CIRCUIT COURT

PLAINTIFF'S SECOND RENEWED MOTION FOR CORRECTION AND CLARIFICATION OF THE LITIGATION-MISCONDUCT STATEMENT TO BE READ TO THE JURY

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") respectfully renews its March 30, 2005 request that the Court correct and clarify the form of its March 29, 2005 Statement about the litigation misconduct of Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley"), which the Court will read to the jury. At the 8:00 a.m. session on Thursday, March 31, 2005, the Court ruled on most, but not all, of CPH's proposed corrections and clarifications. This renewed motion is designed to trigger completion of that process and to modify the Statement in light of (1) the Court's decision later on March 31 to "re-bifurcate" the case and therefore to read the litigation-misconduct Statement to the jury at the start of the second, rather than first, phase of the trial; and (2) the Court's April 5, 2005 Order on Defendant's Motion for Reconsideration of the Court's Sanction Orders, which mandated certain specific instructions to the jury.

Attached to this motion as Exhibit 1 is a clean copy of the Statement that the Court issued on March 29, as amended by the Court's March 31 rulings (the "Court's most recent version of the Statement"). Attached to this motion as Exhibit 2 is a "black-line" comparing the Court's most recent version of the Statement to the Statement initially issued on March 29.

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Attached to this motion as Exhibit 3 is a clean copy of the Statement that CPH now asks the Court to read to the jury at the start of the trial's second phase ("CPH's proposed clarification"). And attached as Exhibit 4 is a "black-line" comparing CPH's proposed clarification to the Court's most recent version of the Statement. The changes reflected in Exhibits 3 and 4 are designed to clarify specific parts of the Statement and to ensure that the Statement clearly conveys to the jury the findings that this Court has made.

Dated: April 20, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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16div-016107

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 20th day of April, 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO. 2003CA 005045 AI

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CLERK & COMPTROLLER
CIRCUIT CIVIL DIVISION

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: April 21, 2005

TIME: 9:30 a.m.

JUDGE: Honorable Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

Plaintiff's Second Renewed Motion For Correction And Clarification Of The Litigation-Misconduct Statement To Be Read To The Jury

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 20th day of April, 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

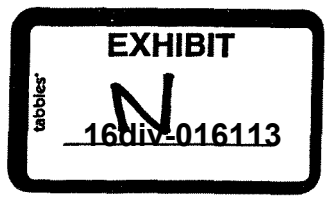
vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

MORGAN STANLEY'S MOTION IN LIMINE NO. 5 TO EXCLUDE IRRELEVANT AND PREJUDICIAL REFERENCES TO MORGAN STANLEY'S NET WORTH

Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully requests that this Court enter an order excluding from trial all reference to Morgan Stanley's financial condition, corporate wealth or net worth (collectively "net worth"). Evidence regarding Morgan Stanley's net worth is irrelevant as it would not tend to prove or disprove any material fact in this case. Fla. Evid. Code §§ 90.401, 90.402. More specifically, any comments elicited by counsel during argument or examination regarding the net worth of a large corporation like Morgan Stanley, which is headquartered in New York, is likely to be misused by the jury to express a bias against big out-of-state business and inflate a punitive damages award beyond the constitutional maximum. *See State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) ("[T]he presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big business, particularly those without strong local presences.") (internal quotations & citation omitted); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 591 (1996) (Breyer, J. concurring) ("[Wealth] provides an open-ended basis for inflating awards when the defendant is wealthy ...."). Such comments and evidence should therefore be excluded under Florida Evidence Code section 90.403, and any reference to Morgan



Stanley's finances should be limited to its gains or losses related to the particular transaction at issue in this case.

In support of this Motion, Morgan Stanley states as follows:

1. Plaintiff CPH, through its discovery requests, has made clear that it will attempt to introduce evidence of Morgan Stanley's net worth in support of its punitive damages claim. Assuming CPH can even establish its entitlement to punitive damages — which Morgan Stanley vigorously contests — CPH should not be permitted to introduce evidence of Morgan Stanley's net worth to justify an award of punitive damages.

2. The sole question presented to this Court in this motion is whether evidence of Morgan Stanley's net worth is relevant and admissible to the issue of punitive damages after the United States Supreme Court's recent decision in *State Farm*, 538 U.S. 408 (2003) and under the facts of this case.

3. Morgan Stanley acknowledges that there is law in Florida and elsewhere suggesting that the wealth of a defendant is relevant in determining the amount of punitive damages. *See, e.g., Rinaldi v. Aaron*, 314 So. 2d 762 (Fla. 1975); Fla. Std. Jury Instr. P.D. 1. Morgan Stanley submits, however, that this law cannot survive scrutiny after the United States Supreme Court's decision in *State Farm*, which addressed the issue of the constitutional limitations on a punitive damages award. After *State Farm*, a plaintiff should not be permitted to introduce evidence of a corporate defendant's net worth in support of an increased punitive award.

4. Morgan Stanley submits that net worth evidence is irrelevant and inadmissible for four separate and distinct reasons: ***first,*** the use of net worth evidence to justify punitive damages violates the constitutional requirements of proportionality and fair notice; ***second,*** the use of net

worth evidence for this purpose evidence would impermissibly punish Morgan Stanley for its lawful business conduct in Florida and other states and countries; ***third,*** net worth evidence is irrelevant to the purposes of punishment and deterrence; and ***fourth,*** any probative value such evidence might have is substantially outweighed by the danger of unfair prejudice to the defendant. For these reasons, any reference CPH purports to make to Morgan Stanley's net worth or finances should be strictly limited to the gains or losses Morgan Stanley realized in connection with the specific transaction at issue in this case.

I. Introduction Of Evidence Concerning Morgan Stanley's Net Worth Violates The Constitutional Requirements Of Proportionality And Fair Notice.

5. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the Supreme Court identified three specific guideposts for evaluating whether a punitive damages award is proportional to the wrong and whether defendant received "fair notice" of the punitive sanction to be imposed: (1) the degree of reprehensibility of the conduct; (2) the relationship between the punitive damages and the harm to the plaintiff; and (3) the disparity between the punitive damages and the legislatively-established fine for comparable conduct. All three guideposts are meant to ensure the constitutionally-required fair notice to defendants subject to punitive damages, and reasonable proportionality between the wrong and the punishment.

6. Notably, the Court did ***not*** include net worth or corporate wealth as a guidepost.[1] To the contrary, in *State Farm*, the Court noted that the lower court's reliance on State Farm's wealth was a "departure from the well-established constraints on punitive damages." 538 U.S. at

[1]Several federal courts have noted this omission from the Supreme Court's analysis. *See, e.g., Pivot Point Int'l, Inc. v. Charlene Prods., Inc.*, 932 F. Supp. 220, 223 (N.D. Ill. 1996) (holding that defendant's wealth inadmissible to establish amount of punitive damages in part because, "even when considering punitive damages based on state law, the Supreme Court did not treat the defendant's wealth as relevant"); *Florez v. Delbovo*, 939 F. Supp. 1341, 1345 (N.D. Ill. 1996) ("the Supreme Court's recent decision in [*Gore*] appears to disfavor consideration of the defendant's financial worth and condition in deciding on what level of punitive damages to award").

427. The Court stated unequivocally that "[t]he wealth of the defendant cannot justify an otherwise unconstitutional punitive damages award," *id.*, and reiterated its earlier pronouncement in *Gore* that "[t]he fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business." *Id.* (quoting *Gore*, 517 U.S. at 585). These decisions, as they relate to constitutional due process considerations, are binding on this Court.

7. For the same reasons as in *State Farm* and *Gore*, in this case, Morgan Stanley's wealth is not relevant to any of the three established guideposts. The company's net worth has nothing to do with degree of reprehensibility of its purported conduct related to the Sunbeam-Coleman merger. Nor does the net worth of Morgan Stanley have any bearing on the proportionality of punitive damages to the harm allegedly suffered by CPH. *See State Farm*, 538 U.S. at 426-27 (noting that "State Farm's enormous wealth ... bear[s] no relation to the award's reasonableness or proportionality to the harm.") Morgan Stanley's wealth or net worth is likewise irrelevant to the "comparable fines" guidepost, because any relevant civil or criminal fine that CPH may attempt to use as an benchmark for punitives — like those considered in *Campbell* and *Gore* — would not vary with the wealth of the defendant. *See Kemezy v. Peters*, 79 F.3d 33, 36 (7th Cir. 1996) ("[t]he usual practice with respect to fines is not to proportion the fine to the defendant's wealth").

8. Moreover, an award of punitive damages based on the defendant's wealth violates the constitutional mandate of fair notice. An award based on wealth allows the jury unfettered discretion to redistribute wealth and leaves the jury's discretion unchecked by any articulated principle. By creating unpredictability, arbitrariness and uncertainty, the introduction of wealth evidence inevitably undermines the constitutional requirement that a defendant have reasonable

notice of the punishment that can be imposed for particular wrongful conduct. *See Gore*, 517 U.S. at 588 (Breyer, J. concurring) ("Legal standards ... must offer some kind of constraint upon a jury or court's discretion and thus protection against purely arbitrary behavior.").

9. In the present case, the arbitrariness of any award of punitive damages based upon the net worth of the company is heightened given the fact that Morgan Stanley's bottom-line "net worth" changes radically over time. If a punitive damages award is based on the financial condition of this defendant, the size of the award would vary greatly depending on the ever-fluctuating wealth of the company at the time of trial. This result, again, would deprive Morgan Stanley of the constitutionally-mandated reasonable notice of the punishment that can be imposed for particular wrongful conduct, and should not be permitted.

II. An Award Based On Corporate Wealth Would Impermissibly Punish Morgan Stanley For Conduct That Did Not Harm Plaintiff, That Was Lawful, And That Occurred Out Of State.

10. The law is well settled that an award of punitive damages must serve the state's interest in punishing and deterring the conduct that harmed the plaintiff in that particular state. *State Farm*, 538 U.S. at 422-23; *Gore*, 517 U.S. at 572-73. The Court made clear in *State Farm* that "defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." *State Farm*, 538 U.S. at 422. In addition, the Supreme Court has mandated that "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Id.* at 423. Further, a defendant may not be punished at all for conduct that was lawful, either in the same state or in other states. *See id.* at 421 ("A state cannot punish a defendant for conduct that may have been lawful where it occurred."); *Gore*, 517 U.S. at 573, n.19 ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basis sort.") (internal quotations & citation omitted).

11. Evidence of Morgan Stanley's overall wealth, whether presented as net worth, revenues, profits, cash on hand, assets, or other measures, reflects the sum total of all of the company's activities in every place that it does business. Allowing a jury to increase the amount of punitive damages awarded based on its total corporate wealth improperly allows punishment of both lawful activities and extraterritorial activities that the state has no right to punish and that have no connection to this plaintiff. *See Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992) ("Corporate assets finance ongoing operations and are unrelated to either the injury done to the victim or the size of the award needed to cause corporate managers to obey the law.").

12. If a jury is permitted to base its punitive damages award on the entire financial net worth of Morgan Stanley — as opposed to the fees and revenues generated by this particular transaction — it would be punishing the company for both lawful and unrelated activities throughout the United States and other countries in direct contravention of the Supreme Court's mandates in *State Farm* and *Gore*.

III. Evidence Concerning Morgan Stanley's Net Worth Is Irrelevant To Punishment And Deterrence.

13. Before *State Farm*, courts that allowed net worth evidence did so on the grounds that such evidence was relevant to the amount necessary to punish and deter similar behavior in the future. *See, e.g., Lassiter v. International Union of Operating Engineers*, 349 So. 2d 622, 626 (Fla. 1977) (greater punitive damages needed "to get [the] attention" of wealthier defendants). As the *Gore* and *Campbell* courts recognized, however, when the defendant is a large corporate entity, net worth evidence is not relevant to the punitive damages determination. *See State Farm*, 538 U.S. at 426-27 (noting that "State Farm's enormous wealth ... bear[s] no relation to the award's reasonableness or proportionality to the harm."); *Gore*, 517 U.S. at 591

(Breyer, J., concurring) (recognizing that wealth is "not necessarily [relevant] to [the state's] interest in deterrence, given the more distant relation between a defendant's wealth and its responses to economic incentives").

14. In the case of a large publicly-held corporate defendant, the Seventh Circuit held that the belief that imposing punitive damages based on the net worth of the entire corporation results in punishment of the wrongdoer or deterrence from future wrong is a fiction:

> For natural persons the marginal utility of money decreases as wealth increases, so that higher fines may be needed to deter those possessing great wealth ... Corporations, however, are not wealthy in the sense that persons are. Corporations are abstractions; investors own the net worth of the business. These investors pay any punitive awards (the value of their shares decreases), and they may be of average wealth. Pension trusts and mutual funds, aggregating the investments of millions of average persons, own the bulk of many large corporations. Seeing the corporation as wealthy is an illusion, which like other mirages frequently leads people astray. Corporate assets finance ongoing operations and are unrelated to either the injury done to the victim or the size of the award needed to cause corporate managers to obey the law. Net worth is a measure of profits that have not yet been distributed to the investors. Why should damages increase because the firm reinvested its earnings?

Zazu Designs, 979 F.2d at 508.

15. The management of a for-profit corporation, regardless of its size, is deterred from engaging in conduct that is not profitable. Thus, in cases such as this, a punitive award that deprives the corporation of any additional profit or cost savings gained by the wrongful conduct is all that is necessary to deter that conduct. *See* 2 A.L.I. *Reporter's Study: Enterprise Responsibility for Personal Injury*, 254 (1991) ("In determining the size of the award that is sufficient for [deterrence], what is relevant is not the defendant's overall wealth, but rather profit it realized from the particular tortuous activity in question."); *see also, Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1338-39 (11th Cir. 1999) (recognizing that it is not necessary to send a message to the board of directors of a large corporation to deter particular conduct).

16. The constitutional mandate that punitive damages be reasonable in relation to the degree of reprehensibility cannot be squared with imposing punishment based on the wealth of the corporation. The punishment must fit the offense, not the wealth of the defendant. *See Zazu Designs*, 979 F.2d at 508 (having a large net worth is not the wrong to be deterred). Thus, in accordance with the most recent Supreme Court precedent on this issue and its progeny, a corporation's total wealth is not relevant to the amount necessary to punish or deter particular conduct and should be excluded.

IV. Any Purported Relevance Of Net Worth Evidence Is Outweighed By The Potential For Prejudice.

17. Even if this Court were to find that Morgan Stanley's wealth has some relevance to the appropriate amount of punitive damages, such evidence is nevertheless more prejudicial than probative and should be excluded pursuant to Florida Code of Evidence sections 90.401-90.403. The relevance of overall corporate wealth to the appropriate amount of punitive damages, particularly when there is no dispute about Morgan Stanley's ability to pay a judgment up to the constitutional maximum, is marginal at best. The potential for prejudice resulting from such evidence, by contrast, is great.

18. The Supreme Court and Florida courts recognize that corporate wealth or net worth evidence carries with it serious risk of jury bias and unconstitutional deprivation on property:

> We have admonished that [p]unitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and ***the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses***, particularly those without strong local presences.

State Farm, 538 U.S. at 417 (quotations omitted; emphasis added); *see also, Gore*, 517 U.S. at 591 (Breyer, J. concurring) ("[Wealth] provides an open-ended basis for inflating awards when

the defendant is wealthy."); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 464 (1993) ("the emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident"); *Liggett Group Inc. v. Engle,* 853 So. 2d 434, 459 n.32 (Fla. 3d DCA 2003) (The "danger of a punitive award resulting in an arbitrary deprivation of property is heightened where a jury is presented with evidence of net worth or evidence that has little bearing as to the amount of punitive damages that should be awarded."), *rev. granted,* 873 So. 2d 1222 (Fla. 2004).

19. Because of the wide recognition that the introduction of evidence related to the overall wealth of a large corporation is likely to be misused by the jury to express a bias against big business, improperly skew the jury's assessment of reprehensibility and harm to the plaintiff, and inflate a punitive damages award beyond the constitutional maximum, evidence of Morgan Stanley's wealth or net worth in this case is more prejudicial than probative and should be excluded.

WHEREFORE, Morgan Stanley respectfully requests that the Court enter an order excluding from trial all reference to its wealth or net worth, and that any reference CPH purports to make to Morgan Stanley's finances should be strictly limited to the gains or losses Morgan Stanley realized in connection with the specific transaction at issue in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 10th day of January, 2005.

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IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

* * *

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH J. MAASS

* * *

West Palm Beach, Florida
December 3rd, 2004
8:00 a.m. - 9:39 a.m.

argument. We believe that the scope is overbroad when they get into global holdings. Even if Mr. Marmer is correct, what Morgan Stanley's net worth is in Asia or Europe --

THE COURT: Why would that not be relevant?

MR. IANNO: Well, Your Honor, their net worth is their net worth. What their global holdings are, whether or not they have plants or interests in other countries, we think they could have limited it as to what is Morgan Stanley's net worth, period, not what are your global holdings, what are all your financial things. There's a limit on the punitive damages that can be awarded in this case of three times compensatory. We all know that, and they recognize that. Whether or not Morgan Stanley has any assets or holdings in any countries all over the world doesn't really affect that. The bottom line is the net worth, and we think that their scope is overbroad.

THE COURT: How would they challenge your statements of net worth then without information on the holdings?

MR. IANNO: That assumes that they want to. They may not challenge it, Judge. If there is follow up, they say we don't believe this, then

perhaps, but, you know --

THE COURT: Again, isn't that sort of, once again, trying to control the discovery?

MR. IANNO: Well, in this situation, the legislature is controlling the discovery to a great extent.

THE COURT: You're not suggesting that the net worth is not relevant because you guys are going to admit that you can answer to three times compensatory damages. We still agree the net worth, if the jury ever got to punitive damages, it would be relevant.

MR. IANNO: I think under your Court's order, I don't think there is a way around that, especially denying the rehearing motion, but because financial discovery is so sensitive, the legislature and the courts are really loathe to grant it to go into a fishing expedition on everything that a company, whether it's Morgan Stanley or any other company that comes before The Court that has a punitive damages claim against it, we need to start out small and then go big.

THE COURT: I understand. It still seems to me it's the same argument I seem to be hearing. It's, look, Judge, we think if we answered just

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

CASE NO. CA 03-5045 AI

DOROTHY H. WILKEN
CLERK OF CIRCUIT COURT
CIRCUIT CIVIL DIVISION

JAN 18 2005

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PLAINTIFF'S RESPONSE TO MORGAN STANLEY'S MOTION IN LIMINE NO. 5 TO EXCLUDE IRRELEVANT AND PREJUDICIAL REFERENCES TO MORGAN STANLEY'S NET WORTH

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") respectfully submits this response opposing Morgan Stanley's Motion in Limine No. 5 to Exclude Irrelevant and Prejudicial References to Morgan Stanley's Net Worth. Morgan Stanley seeks an Order "excluding from trial all reference to Morgan Stanley's financial condition, corporate wealth, [revenues, profits, cash on hand, assets,] or net worth" (collectively "financial condition") and "strictly limiting" any reference to Morgan Stanley's finances "to the gains or losses Morgan Stanley realized in connection with the specific transaction at issue in this case." Mot. at 1, 3, 6, 10.[1]

This motion should be denied because Morgan Stanley's financial condition is relevant to the size of the punitive damages award. As Morgan Stanley concedes, under Florida law, evidence of a defendant's financial condition customarily has played a central role "in determining the amount of punitive damages." Mot. at 2 (citing Florida authority). But contrary to Morgan Stanley's contentions (Mot. at 1-10), nothing in the particular circumstances of this case or in the U.S. Supreme Court's 2003 decision in *State Farm Mutual Automobile Insurance*

[1] Except where expressly noted, CPH does not concur with the recitations of purported facts in Morgan Stanley's motions in limine.

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Co. v. Campbell, 538 U.S. 408 (2003), requires this Court to deviate from that norm. On the issue of defendants' financial condition, *State Farm* broke no new ground, as it merely reaffirmed the Court's 1996 decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). Indeed, this Court has already acknowledged the continuing relevance of financial-condition evidence in this case, at the December 3, 2004 hearing: "THE COURT: 'You're not suggesting that the net worth is not relevant because you guys are going to admit that you can answer to three times compensatory damages. We still agree the net worth, if the jury ever got to punitive damages, it would be relevant.' MR. IANNO [counsel for Morgan Stanley]: 'I think under your Court's order, I don't think there is a way around that . . . .'" Ex. A, 12/3/04 Hr'g Tr. at 75.

ARGUMENT

First, the consistent practice in Florida — both before and after the Supreme Court decided *State Farm* (and, for that matter, both before and after it handed down the *Gore* decision on which the *State Farm* Court relied) — has been to admit financial-condition evidence because it is highly relevant to setting the appropriate level of punitive damages and its probative value outweighs any danger of unfair prejudice. *See, e.g., Liggett Group Inc. v. Engle*, 853 So. 2d 434, 457 n.28 (Fla. 3d DCA 2003) ("Florida courts routinely use net worth to determine whether a punitive award is bankrupting or excessive.") (citing cases dating from 1961 to 2002), *rev. granted*, 873 So. 2d 1222 (Fla. 2004). As the Third District recently explained: "A defendant's financial capacity is a crucial factor in determining the appropriateness of a punitive damages award. The amount awarded should be large enough to provide retribution and deterrence, but cannot be so great as to result in bankruptcy." *Id.* at 458. Indeed, Morgan Stanley concedes this point: "Morgan Stanley acknowledges that there is law in Florida and elsewhere suggesting that

the wealth of a defendant is relevant in determining the amount of punitive damages. *See, e.g.*, *Rinaldi v. Aaron*, 314 So. 2d 762 (Fla. 1975); Fla. Std. Jury Instr. P.D. 1." Mot. at 2.

Second, given that concession, Morgan Stanley then goes on to argue that *State Farm* was a watershed case, and that the Due Process Clause, as re-interpreted in *State Farm*, trumps Florida's long-standing practice of admitting financial-condition evidence. Mot. at 1-5. But *State Farm* in no way bars evidence of a defendant's financial condition. As a general matter, *State Farm* broke little new ground, as the "case [was] neither close nor difficult" under "the principles outlined in *BMW of North America, Inc. v. Gore*." *State Farm*, 538 U.S. at 418. Moreover, to the extent that *State Farm* discussed evidence of defendants' wealth, it never stated, or even suggested, that such evidence should be barred. *See, e.g., id.* at 417, 421-23, 426-27. Rather, *State Farm* elaborated *Gore*'s three "guideposts" that appellate courts must consider when reviewing punitive damages awards: (1) the degree of reprehensibility of defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Id.* at 418.

Far from excluding all evidence of defendants' financial condition, *State Farm* instructed courts to weigh financial condition worth alongside other evidence relevant to these three guideposts, keeping all factors in reasonable balance. That message, however, gets thoroughly distorted by Morgan Stanley's selective quoting from the Justices' opinions. Morgan Stanley's motion twice quotes part of a passage from Justice Breyer's concurrence in *Gore*: "[Wealth] provides an open-ended basis for inflating awards when the defendant is wealthy." *Gore*, 517 U.S. at 591 (Breyer, J., concurring), *quoted in* Mot. at 1, 8-9. But in a sentence that Morgan Stanley conveniently omits, Justice Breyer continued: "That does not make its use unlawful or

inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as 'reprehensibility,' to constrain significantly an award that purports to punish a defendant's conduct." *Id.* (emphasis added). Although Morgan Stanley omitted that key sentence, the *State Farm* Court quoted it with approval. *See State Farm*, 538 U.S. at 427-28 (quoting the entire passage from Justice Breyer's *Gore* concurrence, and concluding that these principles "must be implemented with care").

Courts in Florida and elsewhere have consistently reached the same conclusion in the wake of *State Farm*. Here in Florida, the Third District explained that *State Farm* stands for the proposition that a punitive damages award "must be reasonable and proportionate to the harm suffered and cannot be justified solely upon the wealth of the defendant." *Liggett Group Inc. v. Engle*, 853 So. 2d at 458 n.30 (emphasis added) (citing *State Farm*, 538 U.S. at 427). Likewise, in *White v. Ford Motor Co.*, No. CV-N-95-0279-DWH, 2003 WL 23353600, at *3-*8 (D. Nev. Dec. 30, 2003), Ford filed motions in limine to exclude all evidence and argument relating to the company's financial condition, on the grounds that *State Farm* had made "evidence of corporate financial status not only irrelevant and unduly prejudicial, but also unconstitutional." *Id.* at *4. The court denied Ford's motions, holding that, "far from being irrelevant and solely inflammatory, as Ford contends," evidence of a corporate defendant's financial condition remains "crucial to the jury's exercise of its responsibility." *Id.* at *7 (citing *State Farm*, 538 U.S. at 427-28); *see also Dewick v. Maytag Corp.*, 324 F. Supp. 2d 889, 892-93 (N.D. Ill. 2004) (denying defendant's motion in limine because "evidence as to a defendant's net worth, and arguments based on that evidence, are appropriate to place before a jury that is asked to award punitive damages") (citing *State Farm*, 538 U.S. at 427); *Williams v. Philip Morris Inc.*, 92 P.3d 126, 145 (Or. App. 2004) (affirming the jury's award of punitive damages, which was based in

part on evidence that defendant had a net worth of more than $17 billion and annual profits of $1.6 billion) (citing *State Farm*, 538 U.S. at 427-28).

Third, Morgan Stanley contends, incorrectly, that a defendants' financial condition is irrelevant to whether a punitive damages award serves its prime functions of punishment and deterrence whenever the defendant is "a large corporate entity." Mot. at 6. In making that argument, Morgan Stanley relies solely on a passage from *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499 (7th Cir. 1992), a pre-*State Farm*, pre-*Gore* opinion from a divided panel of the Seventh Circuit. Mot. at 6-7 (quoting *Zazu Designs*, 979 F.2d at 508). But the passage from *Zazu Designs* was just "unsubstantiated economic theory propounded in dicta." *White v. Ford Motor Co.*, 2003 WL 23353600, at *5 n.4 (citing *Zazu Designs*, 979 F.2d at 508). And the Seventh Circuit itself has repudiated this economic theory. *See Lampley v. Onyx Acceptance Corp.*, 340 F.3d 478, 485 (7th Cir. 2003) ("'We think it reasonable to suppose that a sizeable award is both suitable and necessary to punish and deter a corporation of this size.'") (citation omitted), *cert. denied*, 540 U.S. 1182 (2004); *see also Matthias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003) (Posner, J.) (affirming a punitive damages award that was 37 times the size of the jury's compensatory damages award because it was needed for deterrence, given the defendant's $1.6 billion net worth).

Moreover, common sense tells us that a $5 million award of punitive damages directed against a $100 million company does not inflict as much punishment as an identical $5 million award against a $10 million company would inflict. A jury can reasonably find "that a large award [is] necessary in order to punish defendant adequately because it would treat a small award as no more than an insignificant nuisance and part of the cost of doing business." *Williams v. Philip Morris*, 92 P.3d at 145; *see also Lowry's Reports, Inc. v. Legg Mason, Inc.*,

302 F. Supp. 2d 455, 461 (D. Md. 2004) ("the jury's consideration of Legg Mason's wealth was a correct application of the deterrent role of [punitive] damages"); *Eden Elec., Ltd. v. Amana Co.*, 258 F. Supp. 2d 958, 972 (N.D. Iowa 2003) ("[I]f punitive damages are to continue to serve the broader functions of deterrence and retribution, . . . the defendant's wealth must be a consideration in calculating any award.") (citing *State Farm*, 538 U.S. at 416-17). *See generally* 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 5.3(F)(2), at 283-84 (4th ed. 2000) ("The goal of punitive damages to deter and punish the defendant cannot be achieved unless the size of the award is based on the defendant's financial worth. Therefore, the defendant's net worth is a material issue, and the plaintiff is entitled to use discovery procedures to obtain the evidence and present it at trial.") (footnotes omitted).

Fourth, although Morgan Stanley has already conceded to the Court that it has the ability to pay a judgment of at least $2.72 billion, the jury will not know that fact and will be hamstrung in assessing a proper punitive damages award unless it is allowed to hear evidence and argument concerning Morgan Stanley's financial condition. CPH seeks approximately $680 million in compensatory damages (without pre- or post-judgment interest). Morgan Stanley has conceded that punitive damages "'can be awarded in this case of three times compensatory [damages].'" Ex. A, 12/3/04 Hr'g Tr. at 74 (quoting Mr. Ianno); *see also id.* at 75 ("THE COURT: 'You're not suggesting that the net worth is not relevant because you guys are going to admit that you can answer to three times compensatory damages. We still agree the net worth, if the jury ever got to punitive damages, it would be relevant.' MR. IANNO: 'I think under your Court's order, I don't think there is a way around that . . . .'").

A compensatory damages award of $680 million plus a punitive damages award three times that size would result in a $2.72 billion judgment. In its motion in limine, Morgan Stanley

further conceded that "there is no dispute about Morgan Stanley's ability to pay a judgment up to the constitutional maximum." Mot. at 8; *see also State Farm*, 538 U.S. at 425 (suggesting that, the "constitutional maximum" generally cannot exceed "a single-digit ratio [*i.e.*, nine-to-one] between punitive and compensatory damages"); *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 417-18 (Utah) (on remand from the Supreme Court, unanimously entering a punitive damages award with a nine-to-one ratio), *cert. denied*, 125 S. Ct. 114 (2004).

From all this, the Court can readily conclude that Morgan Stanley has the ability to pay a judgment of at least $2.72 billion. But under Morgan Stanley's proposed approach, the jury would never know that. Indeed, the jury would be deprived of the information needed to calibrate its punitive damages award to achieve the basic goals of punishment and deterrence. Therefore, the Court should deny Morgan Stanley's motion and allow evidence of Morgan Stanley's financial condition to come before the jury.

CONCLUSION

For the foregoing reasons, this Court should deny Morgan Stanley's Motion in Limine No. 5.

Dated: January 18, 2005

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Federal Express to all counsel on the attached list on this 18th day of Jan., 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

CASE NO: CA 03-5045 AI

MORGAN STANLEY'S REPLY TO CPH'S BRIEF REGARDING THE REQUIREMENT THAT PLAINTIFF PROVE ENTITLEMENT TO AN AWARD OF PUNITIVE DAMAGES BY CLEAR AND CONVINCING EVIDENCE IN PHASE II

In its response to Morgan Stanley's April 22 motion, CPH has now shifted its position regarding the burden of proof for "entitlement" to punitive damages. Whereas CPH previously endorsed a sort of "sliding scale" approach to the clear and convincing evidence requirement, under which the aggregate "expected value" that ***all*** the elements of fraud were established had to exceed some threshold, 4/19/05 Tr. at 9370, it now argues that ***only*** the defendant's "wrongful intent" needs to be proved by clear and convincing evidence. *See* 4/25/05 CPH Motion in Response at 3. This new position is also clearly wrong under Florida law.[1]

Morgan Stanley's April 22 motion identifies four controlling principles, none of which CPH even attempts to dispute. ***First***, Florida Statutes section 768.725 applies in this case, providing that a plaintiff seeking punitive damages "must establish at trial, by clear and convincing evidence, its entitlement to an award of punitive damages." ***Second***, entitlement is a well-defined Florida common law concept that requires a plaintiff to establish certain legal prerequisites to be eligible to receive an award of punitive damages. *See, e.g., Winn & Lovett*

[1] CPH has not attempted to controvert Morgan Stanley's explanation of why a "sliding scale" approach to the different elements of fraud is both illogical and unprecedented. *See* 4/22/05 Morgan Stanley Motion at 3-4.

Grocery Co. v. Archer, 171 So. 214, 219, 222-23 (Fla. 1936). ***Third***, under Florida law, the prerequisites to receiving an award of punitive damages include proving ***all*** of the elements of the underlying cause of action. *See Oliveira v. Ilion Taxi Aero Ltda*, 830 So. 2d 241, 242 (Fla. 4th DCA 2002) (punitive damages may not be awarded as a matter of law "where there is no finding of liability"); *Liggett Group Inc. v. Engle*, 853 So. 2d 434, 451 (Fla. 3d DCA 2003) (plaintiff must prove all elements of the underlying cause of action, including damages, as "a prerequisite to an award of punitive damages"), *rev. granted*, 873 So. 2d 1222 (Fla. 2004). ***Fourth***, where a tort or offense has multiple elements, Florida courts have consistently required the requisite level of certainty to apply ***to each individual element***. *See, e.g., Stanley v. State*, 560 So. 2d 1269, 1270 (Fla. 3d DCA 1990) (beyond reasonable doubt); *Ritter v. Shamas*, 452 So. 2d 1057, 1059 (Fla. 3d DCA 1984) (clear and convincing evidence); *Sharp v. Long*, 283 So. 2d 567, 568 (Fla. 4th DCA 1973) (preponderance). Considered together, these propositions establish that there must be clear and convincing evidence of each element of fraud — misrepresentation, materiality, reliance, causation, and damages — before CPH may recover punitive damages in this case.

Instead of directly responding to the statutes and case law citations raised in Morgan Stanley's motion, CPH simply recites several standard jury instructions and asserts, ***without any supporting authority***, that "[e]ntitlement to punitive damages * * * hinges on clear and convincing evidence that the defendant acted with wrongful intent." 4/25/05 CPH Motion in Response at 3. While that assertion is no doubt true as far as it goes, the above showing demonstrates that the clear and convincing evidence requirement goes further. While the Florida Legislature ***could have*** required that only the existence of "wrongful intent" be proven by clear

and convincing evidence before punitive damages are legally recoverable, that is not what the legislature actually did.

The instructions CPH cites track Florida Statutes section 768.72, which provides that in all causes of action arising after October 1, 1999, "[a] defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence." §§ 768.72(2), (4). But CPH ignores section 768.725 and neglects to mention that section 768.72 goes on to define "intentional misconduct" in a way that is critical to understanding how section 768.72 operates in fraud cases: According to the statute, "'[i]ntentional misconduct' means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, ***resulting in injury or damage.***" *Id.* § 768.72(2)(a) (emphasis added).[2] These requirements clearly go beyond the mere existence of "wrongful intent," because the phrase "resulting in injury or damage" necessarily incorporates the existence of reliance, causation, and damages; without proof of those elements there is no "resulting" injury. Thus, both sections 768.72 and 768.725 require clear and convincing proof of ***all the elements of fraud.***[3]

CPH's discussion of *Ablanedo* — the sole case cited in Morgan Stanley's April 22 motion that CPH discusses at any length — similarly misses the point. At the time of *Ablanedo*, proof of each element of fraud was ***both necessary and sufficient*** to establish liability for punitive damages. *See First Interstate Dev. Corp. v. Ablanedo*, 511 So. 2d 536, 539 (Fla. 1987). That the

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[2] Because fraud is an intentional tort, the definition of "gross negligence" is irrelevant here.

[3] The remaining two elements of fraud — misrepresentation and materiality — are respectively encompassed in section 768.72 by the requirement that the "defendant had actual knowledge of the wrongfulness of the conduct" and the requirement that there be a "high probability that injury or damage to the claimant would result."

Legislature subsequently raised the burden of proof to establish punitive "entitlement" to clear and convincing evidence does nothing to disrupt the requirement that the plaintiff demonstrate ***all*** elements of the cause of action by the applicable standard before punitive damages may be awarded. CPH never addresses this point.

Accordingly, CPH must prove reliance, causation, and damages (the elements of fraud that are not established by virtue of the Court's sanction in its March 23, 2005 Default Order) by clear and convincing evidence in order to receive punitive damages in this case.[4]

[4] This is of course assuming *arguendo* that the Court does not grant Morgan Stanley's request to withdraw the sanction from the Phase II proceedings. Morgan Stanley reiterates the point that it violates Florida law and due process to extend the effect of the sanction to Phase II of the trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 27th day of April 2005.

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

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

DEFENDANT'S RESPONSE TO PLAINTIFF'S SUPPLEMENTAL MEMORANDUM CONCERNING THE FEBRUARY 23, 1998 CONFIDENTIALITY AGREEMENT

On April 22, 2005, the Court concluded that the requisite evidentiary predicate had been established for a reasonable juror to conclude that CPH assented to the terms of the confidentiality agreement. 4/22/05 Tr. at 10215:2–8. Plaintiff's effort to overturn this ruling should be rejected for several reasons.

First, CPH argues, as it has before, that the admission of the confidentiality agreement is prohibited as a matter of public policy. The Court should decline this invitation for rehearing. Even if the Court were to entertain plaintiff's re-treaded argument, however, case after case in Florida has held that exculpatory clauses like the one at issue *are relevant* to the jury's consideration of reliance, even if they do not foreclose claims of reliance as a matter of law in Florida as they might in other states. Notably, plaintiff cites not a single authority for its position and it fails to address the wall of Florida authority holding clauses like the one at issue here to be admissible evidence. (Point I.)

Second, plaintiff contends that there is no evidence that a "decision maker" knew about the confidentiality agreement. This argument is wrong as a matter of law and fact. Legally, CPH entered into a merger agreement that expressly incorporated the confidentiality agreement

by reference. It is black letter law that the party to an agreement has knowledge of the entire contents of the agreement it signed, including materials incorporated by reference. Further, as a duly authorized agent of CPH, Mr. Schwartz's knowledge *is* plaintiff CPH's knowledge. Plaintiff's contention that no "decision maker" knew about the confidentiality agreement should be rejected as a matter of law. (Point II.A.)

Even if the Court had to proceed further (and it need not), it would quickly find that Mr. Perelman expressly relied on Mr. Schwartz in this transaction; that Mr. Schwartz was one of Mr. Perelman's most intimate advisers; that Mr. Schwartz was a member of Mr. Perelman's daily breakfast club; and that Mr. Schwartz was and is no less an intimate of Mr. Perelman's than Mr. Gittis or Mr. Levin. (Point II.B.)

Finally, CPH closes by offering its interpretive gloss on the language of the confidentiality agreement, arguing that the agreement's exculpatory language applies to some but not all of the materials Sunbeam and Morgan Stanley provided CPH. But such arguments patently go to the weight the jury might choose to afford the confidentiality agreement, not its admissibility. (Point III.)[1]

Argument

I. The Court Should Deny CPH's Motion for Rehearing on Its Public Policy Argument

CPH argues – again – that evidence regarding the confidentiality agreement should be excluded as a matter of public policy. The Court has heard and rejected this argument many

[1] Morgan Stanley does not hereby abandon the argument that, in merger transactions between sophisticated parties, non-reliance clauses are enforceable under Florida law. Nor does it abandon its position that New York or Delaware law controls and that, under the law of those states, the parties' non-reliance clause forecloses CPH's claims as a matter of law.

times, including as recently as last Friday. 4/22/05 Tr. 10215:2-8; 10216:11-17;[2] *see also* Order on CPH Motion in Limine No. 25 (March 28, 2005) & CPH's Motion in Limine No. 25 at 7-9 (repeating argument made here). There is no basis for yet another rehearing on this matter.

Even if the Court were inclined to reexamine this issue, doing so would only underscore the correctness of the Court's conclusion and the fact that CPH invites legal error. The cases CPH cites stand at best for the proposition that, under Florida law, non-reliance contract clauses do not *conclusively* foreclose a plaintiff from claiming justifiable reliance as a matter of law. Not a single one stands for the proposition that non-reliance clauses are *inadmissible* evidence, or irrelevant to the question of justifiable reliance.

Indeed, under Florida law, reliance is a factual question to be determined by reference to "the totality of the circumstances surrounding the type of information, the nature of the communication between the parties, and the relative positions of the parties." *M/I Schottenstein Homes, Inc. v. Azam*, 813 So. 2d 91, 95 (Fla. 4th DCA 2002). Time and again, Florida courts have held that similar clauses—even if they are not absolute defenses as a matter of law—*are relevant evidence* of whether the plaintiff relied and whether reliance was justifiable under the circumstances. *See Joseph v. Liberty National Bank*, 873 So. 2d 384, 389 (Fla. 5th DCA 2004) (holding that the existence of "as is" clauses and an integration clause in a contract for the sale of real property "might well impact a jury's determination regarding the reliance element" of a cause of action for fraud in the inducement); *S&B Investments, LLC v. Motiva Enterprises, LLC*, No. 03-61993-CIV, 2004 WL 3250306, at *4 (S.D. Fla. Dec. 6, 2004) (finding existence of

[2] The Court stated: "I would agree that a reasonable juror could conclude from that that CPH assented to the terms in the February 23rd letter. I think the jury gets to decide whether they did or not. But I think that's clearly sufficient to put before the jury."

integration clause relevant to plaintiff's reliance on alleged misrepresentations that were inconsistent with and expressly contradicted by written contract); *Hillcrest Corp. v. Yamamura*, 727 So. 2d 1053, 1058 (Fla. 4th DCA 1999) (integration clause "demonstrate[s] that Pacific did not reasonably rely upon any material misrepresentations made by the appellees").[3]

No different result should obtain here.

II. Morgan Stanley Has Laid *More* Than a Sufficient Predicate for Admission of the Confidentiality Agreement

CPH argues that the no-reliance clause should be excluded because Morgan Stanley has not laid a factual predicate from which a juror could conclude that a "decision maker" was aware of the terms of the confidentiality agreement. CPH's contention is foreclosed as a matter of law and wrong as a matter of fact.[4]

A. CPH Is Charged With Knowledge of the Confidentiality Agreement's Terms As A Matter of Law

CPH's "decision maker-did-not-know" defense rests on a misapprehension of law. CPH is the plaintiff in this case. One of its senior-most officers, Barry Schwartz,[5] signed the merger agreement on CPH's behalf. *See* MS 93. The merger agreement, in turn, expressly cited and incorporated by reference the February 23, 1998 confidentiality agreement at issue. *See* MS 93 at §§ 6.7, 11.2.

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[3] Under the totality of the circumstances test, moreover, "one who has special knowledge, experience and competence may not be permitted to rely on statements for which the ordinary man might recover, and that one who has acquired expert knowledge concerning the matter dealt with may be required to form his own judgment, rather than take the word of the defendant." W. Page Keeton, Prosser and Keeton on Torts § 108, at 751 (5th ed. 1984).

[4] CPH does not seek rehearing of the Court's ruling that there is a sufficient factual predicate that the confidentiality agreement was signed and assented to by CPH after the fact. *See, e.g.*, 4/22/05 Tr. at 10215:2–8.

[5] *See* Section II.B, *infra* regarding Mr. Schwartz's position and role at CPH.

That much is undisputed by the parties. That much is also sufficient as a matter of law to defeat CPH's argument that "no decision maker knew." It is well-settled that a signatory to a contract "has a duty to learn and know the contents of a proposed contract before he signs and delivers it and is *presumed* to know and understand its contents, terms, and conditions." *Sabin v. Lowe's of Fla., Inc.*, 404 So. 2d 772, 773 (Fla. 5th DCA 1981) (emphasis added); *Estate of Etting v. Regents Park*, 891 So. 2d 558 (Fla. 3d DCA 2004) (*en banc*). CPH's execution of the merger agreement is enough to establish a legal presumption that it knew and understood its contents—including its express references to the existence of the February 23, 1998 confidentiality agreement.[6]

Moreover, Mr. Schwartz's knowledge is CPH's. Mr. Schwartz was plaintiff's agent in signing the merger agreement and it is undisputed that he acted within the scope of his responsibilities. His knowledge is therefore chargeable to CPH. "The general rule is well settled that a principal is chargeable with notice or knowledge received by his agent while acting within the scope of his authority." *Joel Strickland Enterprises v. Atlantic Discount Co.*, 137 So. 2d 627, 629 (1962); *see Seidman & Seidman v. Gee*, 625 So. 2d 1, 2 (Fla. 3d DCA 1992) (referring to "the long-established rule that the knowledge of individuals who exercise substantial control over a corporation's affairs is imputable to the corporation."); *Davies v. Owens-Illinois, Inc.*, 632 So. 2d 1065, 1066, 1067 (Fla. 3d DCA 1993) ("It is well settled that the actions of corporate

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[6] Plaintiff is free to try to defeat the presumption that Mr. Schwartz knew the contents of the deal he signed. But the burden is on plaintiff to defeat do so it is not a light one. *See Allied Van Lines, Inc. v. Bratton*, 351 So. 2d 344, 347–48 (Fla. 1977) (emphasis added) (party must show that it was prevented from reading the agreement or induced not to do so); *accord Sabin*, 404 So. 2d at 773; *Estate of Etting*, 891 So. 2d at 558.

directors and officers are attributable to the corporation itself. . . . Whatever knowledge an agent acquires within the scope of his authority is imputed to his or her principal.").

CPH cites not a single case in support of its theory that because a "decision maker didn't know" the confidentiality agreement must be excluded as a matter of law. Nor can it do so. CPH presses a novel theory that runs headlong into a wall of black letter law. And the sensibleness of the rule of law described above is confirmed and illustrated by this simple fact: Plaintiff is being permitted in this action to claim reliance on and entitlement to the "benefit of the bargain" represented by the merger agreement *even though* Mr. Perelman never read the document. It would be incongruous—to say the least—for the Court to exclude expressly referenced portions of the same agreement based on plaintiff's assertion that Mr. Perelman did not read it.

B. CPH Is Wrong on the Facts

Even if Morgan Stanley were required to show that a CPH decision maker knew about the non-reliance clause before presenting argument on the basis of that clause, it has proffered more than sufficient evidence from which a reasonable juror could that Mr. Perelman and his inner circle of advisors were aware of the Confidentiality Agreement.[7]

- Mr. Perelman testified at trial that he relied on Mr. Schwartz in "deciding to go forward with this transaction and have the merger agreements executed." 4/26/05 Tr. 10662:10-14.
- Mr. Schwartz saw Mr. Perelman "virtually every day" in CPH's New York offices and was one of the few participants in the daily breakfast meetings that

[7] Morgan Stanley incorporates by reference the evidentiary predicate set forth in its previous Motion Regarding Admissibility of Confidentiality Agreement (filed Apr. 20, 2005).

Mr. Perelman held with his closest advisors. Schwartz Dep. 10:11-16; Perelman Dep. 27:21-28:2; Drapkin Dep. 117:8-20; Engleman Dep. 45:5-22.

- Along with Mr. Gittis, Mr. Maher, and Mr. Perelman himself, Mr. Schwartz helped oversee the internal analysis of the merger. "[U]ltimately the four of [them] discussed these issues of whatever analysis was being done" in order to inform Mr. Perelman's decision. Perelman Dep. 47:21-48:1; *see* Schwartz Dep. 82:19-25; Dickes Dep. 28:19-29:2.
- Joram Salig, a MAFCO lawyer, authored both the Coleman and the Sunbeam confidentiality agreements that were incorporated into the merger agreement. Mr. Salig reported directly to Mr. Schwartz. *See* Schwartz Dep. 86:20-24; Shapiro Dep. 110:25-111:5.[8]
- Mr. Schwartz, as chief legal officer of CPH, signed the holdings merger agreement on CPH's behalf. *See* MS 93.
- In addition to signing the document on CPH's behalf, Mr. Schwartz was also involved in the surrounding merger negotiations. *See* Schwartz Dep. 82:16-25.
- Mr. Schwartz "was certain that various drafts of this document [*i.e.*, the holdings merger agreement] and provisions of this document *had been reviewed by me*

[8] Mr. Salig testified that he had "forms" that he "had developed that [he] used when [he] needed a confidentiality agreement." Salig Dep. at 90:12-20. He reviewed MS 133 and MS 307 and testified that "they look[ed] like the type of forms he would have used." *Id.* at 54: 15–17. He also stated that he believed he drafted both the February 4 and 23 confidentiality agreements. *Id.* at 90:12–20, 91:10–14 ("[I]t looks like . . . a draft that I drafted at somebody's request."). Mr. Salig noted that the February 4 confidentiality agreement appears to have come from his files because the document used the same typeface and justification that he typically used. *See id.* at 84:2–10, 17–20.

over the course of the negotiations and the drafting of this document." Schwartz Dep. at 132:4–13.

- Mr. Schwartz worked closely with the lawyers at Wachtell Lipton who discussed Coleman's mirror-image February 4, 1998 confidentiality agreement with him on at least one occasion. Emmerich Dep. 80:17-81:4. The February 23, 1998 confidentiality agreement was likewise faxed from MAFCO to its outside counsel at Wachtell Lipton. *Id.* 94:15-17.
- Mr. Emmerich testified that it is "generally" the practice in sophisticated transactions for the parties to exchange confidentiality agreements like those at issue here. *Id.* 86:6-21.
- Bruce Slovin was the president of McAndrews & Forbes at the time of the merger, and a longtime adviser to Mr. Perelman who had previously worked for him at Revlon and other of Mr. Perelman's companies. Slovin Dep. 63:12-64:23; 68-69.
- Mr. Slovin's job was to search out merger and acquisition targets for Mr. Perelman. *Id.* 118:11-16.
- Mr. Slovin was also a member of the Coleman Board and the individual who *voted MAFCO's shares* in favor of the merger at the February 27 Coleman Board meeting. *Id.* 15:21-16:2. Slovin testified that he had read the merger agreement at least "in part" prior to the consummation of the deal, and that he understood the February 23, 1998 confidentiality agreement was in force given the explicit reference to it in the merger agreement. *Id.* 14:20-15:2, 156:9-157:7.

As this Court has ruled, the jury is entitled to infer from this evidence that CPH assented to the confidentiality agreement. A jury could also reasonably conclude that Mr. Perelman was apprised of the confidentiality agreement. Mr. Schwartz, his chief legal counsel and someone familiar with the agreement, was one of Mr. Perelman's closest advisors and was deeply involved in the internal discussions that led to Mr. Perelman's signing off on the merger. Mr. Perelman expressly acknowledged that he relied on Mr. Schwartz's advice. This Court should not take away the jury's right to weigh the evidence and make fair inferences from these circumstances to determine whether CPH actually or justifiably relied.

III. Plaintiff's Interpretive Glosses on the Confidentiality Agreements Do Not Render It Inadmissible

In a last gasp, CPH offers various textual glosses on the language of the confidentiality agreement. But CPH's interpretations are not arguments for excluding the agreement as a matter of law, and CPH does not purport to cite a single authority in support of such a result. CPH's arguments here are, at most, a preview of its closing argument to the jury, going to the weight it believes the fact finder should give the document once all the evidence is received.

First, CPH highlights the fact that the non-reliance clause is predicated on the phrase "except as may be otherwise agreed in writing." CPH argues that the merger agreement supersedes the non-reliance clause with respect to SEC filings because Sunbeam warranted the accuracy of its SEC filings in the merger agreement. CPH ignores the fact, however, that throughout this trial it has sought to rely on a great deal more than SEC filings in this case. CPH has claimed reliance on multiple oral conversations with Sunbeam and Morgan Stanley over a period of weeks and months, as well as multitudes of presentation materials and the debenture circular (which was not filed with the SEC). The confidentiality agreement's no-reliance clause

indisputably covers all of these conversations and materials and thus, even in plaintiff's view of the world, remains a critical piece of evidence.

Second, CPH relies on a sentence from page 4 stating simply that "unless and until a definitive written agreement" is signed, the parties will not be under any legal obligation whatsoever with respect to the Evaluation Materials or a possible Transaction." By its plain terms, that sentence sought to ensure that the exchange of confidential materials and oral statements made in the course of negotiations are not later taken as establishing any legal obligation to enter into a transaction or engage in any other future course of business conduct. It does not by its terms suggest that, once a definitive agreement was signed, Sunbeam somehow automatically (and despite express language in its agreements to the contrary) warranted the truthfulness of all of the "Evaluation Materials."[9] Whether or not CPH is entitled to argue its strained interpretation to the jury (a non-trivial question), it certainly cannot suggest that it is a basis to exclude a more natural reading of the document.

Third, CPH points to language in the confidentiality agreement that defines "Evaluation Materials" to exclude information that is "generally available to the public." Again, however, this argument goes to weight, not admissibility. Even if *some* evaluation materials eventually became public, it is indisputable many did not, including the documents that Morgan Stanley and Sunbeam gave to CPH at the February 23 meeting, and the various oral statements that Sunbeam and Morgan Stanley were alleged to have made, as well as the debenture offering materials. The

[9] The confidentiality agreement expressly provides that "except as may otherwise be agreed in writing, [there is no] representation or warranty as to the accuracy or completeness of the Evaluation Material. You agree that neither the Company nor its Representatives will have any liability . . . resulting from the use of the Evaluation Material."

jury is plainly entitled to consider the Confidentiality Agreement as it relates to such non-public items and nothing in CPH's argument suggests otherwise.

Conclusion

For the foregoing reasons, the Court should reject CPH's latest motion for rehearing and allow evidence and argument regarding the confidentiality agreement.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 27th day of April 2005.

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CPH's MOTION *IN LIMINE* NO. 39 REGARDING EXCLUSION OF MORGAN STANLEY TRIAL EXHIBIT 1051 (DELAWARE CHANCERY OPINION)

Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, respectfully moves this Court to exclude from evidence MS Trial Exhibit 1051, the Delaware Chancery Court's opinion issued in *Prescott Group Small Cap, L.P. v. The Coleman Company, Inc.*, attached here as Ex. A. Not only is Morgan Stanley far too late in identifying this trial exhibit – it identified MS Ex. 1051 at 10:30 p.m. on April 23, 2005, well past any applicable deadline for identifying trial exhibits – but MS Ex. 1051 plainly is not admissible in evidence. The Delaware Chancery Court's opinion (i) is itself inadmissible hearsay and also contains inadmissible double hearsay; (ii) is irrelevant to these proceedings, because it concerns Justice Jacobs' valuation of The Coleman Company; and (iii) is unfairly prejudicial even assuming it has minimal relevance. For all these reasons, it should be excluded from evidence.

ARGUMENT

The Delaware Chancery Court's opinion in *Prescott Group Small Cap, L.P. v. The Coleman Company, Inc.*, No. Civ. A. 17802, 2004 WL 2059515 (Del. Ch. Sept. 8, 2004) (the "Delaware Chancery Opinion" or the "Opinion"), is inadmissible hearsay. *See* FLA. STAT. ANN.

16div-016155

§ 90.802. In its entirety, the Delaware Chancery Opinion is an out-of-court statement by Justice Jacobs of the Delaware Chancery Court. The Opinion contains and republishes hearsay attributed to others, including Morgan Stanley witness Jerry Levin. *E.g.*, *id.* at *2. It falls within none of the established hearsay exceptions. On hearsay grounds alone, MS Ex. 1051 should be excluded.[1]

Moreover, if Morgan Stanley intends to ask this Court to take judicial notice of the Delaware Chancery Court's opinion, judicial notice would clearly be improper here. Judicial notice is not a means to allow admission into evidence of findings of fact from another court. FLA. STAT. ANN. § 90.202(2), which enumerates those matters that *may* permissibly be the subject of judicial notice, states that a court may take judicial notice of the "[d]ecisional . . . law of every other state . . .," but makes no provision for judicial notice of the factual findings of other courts. FLA. STAT. ANN. § 90.202(2) (emphasis added). Indeed, a contrary rule would permit an end-run around long-established conditions under which collateral estoppel attaches to the decisions of other courts. *See Selim v. Pan Am. Airways Corp.*, 889 So. 2d 149, 153 (Fla. 4th DCA 2004) (collateral estoppel requires identity of parties and issues). Here, not only do the issues differ, but neither Morgan Stanley nor CPH were parties to the Delaware appraisal action. CPH was not even related to The Coleman Company at any time after February 22, 2000, when the appraisal proceedings commenced.

---

[1] Morgan Stanley has already moved in limine to protect its "right to a fair and impartial trial" by excluding the Delaware Chancery opinion on the grounds it is irrelevant hearsay and unfairly prejudicial. *See* Morgan Stanley Motion in Limine No. 14 to Exclude CPH Expert's Reliance on Irrelevant Dicta From the Delaware Chancery Court Opinion in *Prescott Group Small Cap, L.P. v. Coleman Company*, filed January 26, 2005. In its Motion in Limine No. 14, Morgan Stanley claimed it was improper for CPH's out-of-pocket expert Dr. Kursh to refer to the same opinion. This Court did not rule on Morgan Stanley's motion in light of its rulings that benefit-of-the-bargain damages are the proper measure of damages, which eliminated the need to call Dr. Kursh.

The Delaware Chancery Opinion also is irrelevant to these proceedings. *See* FLA. STAT. ANN. § 90.401. The *Prescott Group Small Cap* appraisal proceeding was brought by the Coleman public shareholders, who received cash and shares of Sunbeam in the "backend" merger that followed the merger at issue in this case. The appraisal case concerned an "out-of-pocket" determination of the fair value of the shares of The Coleman Company the public shareholders relinquished in the "backend" merger. The opinion did not value the Sunbeam shares received by the Coleman shareholders. And the views of Justice Jacobs about the value of The Coleman Company are clearly irrelevant to the issue of whether or not CPH actually relied on Morgan Stanley in the context of this case.

Even assuming that the Opinion has some minimal relevance to this case, it should be excluded as unfairly prejudicial under FLA. STAT. ANN. § 90.403. Because it is a judicial opinion, the jury likely will give it disproportionate weight.

CONCLUSION

For all the reasons stated above, this Court should exclude from evidence Morgan Stanley Trial Exhibit 1051.

Dated: April 28, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 28th day of April, 2005.

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.
PRESCOTT GROUP SMALL CAP, L.P., Phil & Jana Frohlich, Phil Fohlich, Ira, Leroy Warren Brewer, and Cede & Co., Petitioners,
v.
THE COLEMAN COMPANY, INC., Respondent.
No. Civ.A. 17802.

Submitted June 9, 2003.
Supplemental Briefs Submitted July 16, 2004.
Decided Sept. 8, 2004.

Stephen E. Jenkins, Steven T. Margolin, and Lauren E. Haley, of Ashby & Geddes, Wilmington, Delaware, for Petitioners.

Thomas J. Allingham, II, Robert S. Saunders, and Edward B. Micheletti, of Skadden, ARPS, Slate, Meagher & Flom LLP, Wilmington, Delaware, for Respondent.

OPINION

JACOBS, J. [FN1]

FN1. Sitting by designation as Vice Chancellor under Del. Const., art. IV, § 13(2).

*1 This appraisal proceeding, brought under 8 Del. C. § 262, arises out of a "going private" merger of The Coleman Company, Inc. ("Coleman") into its majority stockholder-parent, Sunbeam Corporation ("Sunbeam"), on January 6, 2000. The transaction, which occurred in two mergers separated in time by almost two years, was documented in a February 1998 agreement between MacAndrews & Forbes ("M & F") and Sunbeam. Under that Agreement, Sunbeam would acquire Coleman in two steps for a combination of cash and Sunbeam stock valued at $27.50 per Coleman share. In the first ("front end") merger, which occurred on March 30, 1998, Sunbeam acquired M & F's 79% majority interest in Coleman. In exchange for its majority Coleman stock interest, M & F received a package of Sunbeam stock, cash and assumption of debt, at that time all worth about $32 per share.

Had the second ("back end") merger taken place shortly after the "front end" merger, Coleman's minority stockholders would have received value equivalent to that received by M & F. Unfortunately, not long after the front-end merger took place, it was discovered that the financial statements of Coleman's new majority stockholder, Sunbeam, had fraudulently overstated Sunbeam's earnings and financial condition. As a result, the Securities and Exchange Commission ("SEC") prevented Sunbeam from completing the back-end merger until January 2000. By that time, the price of Sunbeam's stock (which represented most of the merger consideration originally agreed to in February 1998) had declined dramatically. As a result, the Coleman minority stockholders received consideration worth only $9.31 per share on the January 6, 2000 back-end merger date. [FN2]

FN2. Petitioners' Exhibit ("PX") 21, Ex. D, p. 2.

The Petitioners, who are former minority shareholders of Coleman, commenced this appraisal proceeding on February 22, 2000. They claim that the fair value of Coleman on the merger date was $31.94 per share. [FN3] The respondent, Coleman, contends that its fair value on the merger date was $5.83 per share. The case was tried beginning January 27, 2003. After the filing of post-trial briefs, post-trial argument took place on June 9, 2003. Thereafter, while the matter was under submission, the Court resolved certain post-trial motions, and also directed the parties to file supplemental briefs on the Petitioner's application for attorneys' fees. Supplemental briefing was completed on July 16, 2004.

FN3. Petitioners actually claim that Coleman's fair value was $33.10 per share but that claim assumes that the number of Coleman shares outstanding was 55.8 million. This Court finds, however, that the correct number of shares outstanding on the merger date was 58.8 million. See Part IIA(1), infra of this Opinion. As a result, all of the Petitioners' valuations that are predicated on 55.8 million shares have been

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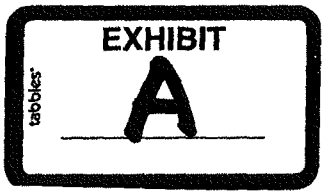

adjusted accordingly.

This is the Opinion of the Court on the merits of the Petitioners' appraisal claim. For the reasons set forth below, the Court concludes that the fair value of Coleman on the merger date was $32.35 per share.

I. FACTS

A. Coleman's Business

Before and on the merger date, [FN4] Coleman was a manufacturer of camping gear and sporting goods. From 1992 until March 30, 1998, approximately 80% of Coleman's voting stock was owned by M & F, an investment entity controlled by Ronald O. Perelman. Between March 30, 1998 and the January 6, 2000 merger date, Coleman's controlling shareholder was Sunbeam.

FN4. Unless otherwise indicated, the term "merger" means the "back end" merger that took place on January 6, 2000.

*2 As of January 6, 2000, Coleman operated in essentially three different business groups that were divided into four distinct "Strategic Business Units" ("SBUs"). Those SBUs were:

1. *Coleman Outdoor Recreation.* This segment represented the historic Coleman business, which manufactured and sold the traditional Coleman camping and outdoor recreation products such as lanterns, portable stoves, coolers, sleeping bags, tents and outdoor furniture.

2. *Powermate.* This business segment was Coleman's second largest SBU. It manufactured and sold portable electric generators (for use as standby power supplies), as well as portable and stationary air compressors. These products were sold under Coleman's "Powermate" brand name in many of the same retail outlets that carried Coleman outdoor recreation products.

3. *Eastpak.* The Eastpak business segment manufactured and sold backpacks, bookbags and related items. Those products, which were manufactured mainly in Puerto Rico, were distributed under the Coleman and Timberland brand names. At the time of the merger, Sunbeam was negotiating a sale of Eastpak to a third party.

4. *International.* A significant amount of Coleman's sales were made overseas, through Coleman's International business segment. That division sold and distributed Coleman products in Europe, Latin America, Japan, Canada and East Asia. The International division also manufactured Camping Gaz camping equipment products, a European business that Coleman acquired in 1996. [FN5]

FN5. The remainder of Coleman's businesses consisted of retail and licensing activities, and (since late 1997) selling discontinued, overstocked and returned products through ten company-owned retail outlet stores in the United States, under the "Camp Coleman" brand name. The vast bulk of Coleman's revenue, however, came from the four SBUs described above.

B. Historical Background Leading To Sunbeam's Purchase of Coleman

M & F purchased Coleman in 1989. In 1992, M & F sold a minority stake in Coleman to the public in an initial public offering (IPO). Upon acquiring Coleman, Mr. Perelman brought in Jerry Levin, a former Pillsbury executive, to be Coleman's Chairman. Two years later, Mr. Levin was transferred from Coleman to Revlon, Inc., another M & F-owned company, where he served at different times in various senior executive positions. During his tenure at Revlon, Mr. Levin was also an M & F Executive Vice President.

After Levin departed from Coleman in 1991, Coleman's successor CEOs caused Coleman to make acquisitions between 1992 and 1997, that turned out to be ill-fated and costly. From 1992 through 1996, Coleman's EBIT [FN6] and EBITDA [FN7] declined precipitately. By 1996, Coleman's debt had ballooned and its stock price had plummeted from a high of $26 at the beginning of the year to the low teens by the end. In February 1997, M & F dispatched Mr. Levin back to Coleman to turn that company around.

FN6. An acronym for Earnings Before Interest and Taxes.

FN7. An acronym for Earnings Before Interest, Taxes, Depreciation and Amortization.

Upon his arrival, Mr. Levin instituted a restructuring plan designed to cut Coleman's costs, slash its debt and improve its operations. That was needed because Coleman was in danger of defaulting on its loan covenants. To avoid Coleman filing for bankruptcy,

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Levin sought to stabilize the company's relationship with its banks and to obtain waivers of default that Coleman needed to continue its business. At that time (as Mr. Levin testified), "[m]orale was pretty bad, as most employees knew ... the company was in trouble.... They had gone into businesses through acquisitions that were really inappropriate and were diverting both the financial and managerial resources. So we needed to dispose of businesses." [FN8] Accordingly, Mr. Levin closed the company's new Colorado headquarters, moved Coleman back to Wichita, Kansas, sold the corporate jet, reduced headcount, and sold or phased out lower margin operations. [FN9]

FN8. Trial Tr. at 158.

FN9. *Id.* at 49-50, 158-59.

*3 By the end of 1997, Levin had achieved part of his goal. Coleman's EBIDTA had increased from $56.6 million in 1996 to $97 million in 1997, and during that same period, Coleman's total debt had significantly decreased. [FN10] The markets reacted positively to Levin's restructuring: in February 1997, Coleman's shares traded at approximately $12 to $14 per share, and by December of that year, Coleman's market price had moved up to the $14 to $16 per share level. [FN11]

FN10. Respondent's Exhibit ("RX") 1 at Ex. 7.

FN11. PX 21, Ex. D, p. 14, 19. During the first few weeks of 1998, the stock traded generally in the range of $15 to $16 per share.

On February 19, 1998, Coleman issued a press release reporting significant progress in reversing the dismal financial results of 1996, and indicating that the major uncertainties of the restructuring were over and that better times lay ahead. [FN12] To that news the market also responded positively, increasing from a closing price of $16.99 per share on February 19, 1998 to $18.63 the following day, and to $19 the day after.

FN12. PX 65.

While Mr. Levin was successfully turning Coleman around, Sunbeam, under the leadership of Albert "Chainsaw" Dunlap, was in deep trouble. Dunlap had been brought in as Chairman and CEO of Sunbeam in an effort to reverse that company's flagging fortunes. Although by early 1998 the stock market believed that Sunbeam's turnaround had been successful, what the public did not know was that, in fact, the basis for Dunlap's "turnaround" was a massive accounting fraud. [FN13]

FN13. See RX 31. In May 2001, the SEC formally determined that "[f]rom the last quarter of 1996 until June 1998, Sunbeam['s] senior management created the illusion of a successful restructuring in order to inflate its stock price and thus improve its value as an acquisition target.... When these measures did not lead to a sale of [Sunbeam], by year-end 1997, senior management took increasingly desperate measures to conceal Sunbeam's mounting financial problems, meanwhile attempting to finance the acquisition of three other public companies in part through the public sale of debt securities." The SEC further found that "Sunbeam negotiated to purchase three other companies [including Coleman] ... to allow [Sunbeam] to conceal its accounting irregularities in another restructuring charge." RX 31 at § III.

Wanting to dispose of Sunbeam before the fraud was discovered, Dunlap hired an investment banking firm, Morgan Stanley, to explore a sale of Sunbeam. Morgan Stanley was unable to find a buyer willing to acquire Sunbeam at a premium over that company's stock market price. Accordingly, Dunlap decided to pursue an acquisition that would enable the fraud to be concealed in a "restructuring" charge. In November 1997, Morgan Stanley approached Coleman, on Sunbeam's behalf, about a possible acquisition. During the ensuing negotiations, Mr. Perelman was unwilling to accept less than $27.50 per share for M & F's majority stock interest in Coleman. In February 1998, the parties reached an agreement to sell Coleman to Sunbeam for a combination of cash and Sunbeam stock that (according to Mr. Levin's testimony) was valued at a "floor" price of $27.50 per share. [FN14]

FN14. Levin Dep. at 89; Trial Tr. at 155-56, 187, 190-91.

C. Sunbeam's Acquisition of Coleman

On February 27, 1998, Coleman and Sunbeam entered into a Merger Agreement to acquire Coleman's publicly-owned shares. That Agreement contemplated Sunbeam and Coleman entering into a

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separate transaction with M & F to acquire M & F's controlling share interest. Those two transactions are next described.

The Front-End Merger. In the front-end merger, which took place on March 30, 1998, Sunbeam acquired M & F's stock interest in Coleman (approximately 79% of Coleman's outstanding shares). In exchange, M & F received $160 million in cash, 14.1 shares of Sunbeam stock, and the assumption of $172 million in holding company debt. At face value, the cash was worth $3.63 per share; the assumption of debt was worth $16.61 per share; and the stock was worth $11.88 per share, thus providing M & F with total consideration valued at $32.12 per share. Under the Merger Agreement, the holders of Coleman options were entitled to cash in their options at the higher of Coleman's stock market price or $27.50 per share in cash. Thereafter, Mr. Levin cashed in his options on 500,000 Coleman shares and received over $30 per share. Shortly thereafter, he left Coleman. Mr. Perelman, however, held on to his options until December 1999, shortly before the back-end merger, but by virtue of the Merger Agreement was able to cash them out at $27.50 per share. [FN15]

FN15. Trial Tr. at 12-15; PX 15 at 117. Mr. Levin testified that he insisted upon these terms for himself and the other Coleman option holders "to put management on [an] equal footing with the other minority stockholders" who were able to sell their Coleman shares on the open market. Trial Tr. at 13.

*4 Although Coleman (through Mr. Levin) now takes the position that Sunbeam (under Dunlap) "clearly overpaid for Coleman" to cover up the accounting fraud, [FN16] that argument is a transparent effort at historical revision. In connection with the front-end merger, two fairness opinions were furnished by the investment banks for both parties--one by Credit Suisse First Boston (CSFB), which represented Coleman, and the other by Morgan Stanley, which represented Sunbeam. Both firms opined that the negotiated transaction was fair to their clients from a financial point of view. At trial and in his deposition, Mr. Levin testified that CSFB did a "responsible professional job" in preparing its report, and that he could not remember having "any material disagreements with it." [FN17]

FN16. Respondent's Opening Post-Trial Br. at 8-9.

FN17. Trial Tr. at 60-61; PX 20 at 45-46.

Mr. Levin gave orders to write off all possible goodwill after taking over the management of Sunbeam. He did not, however, cause Sunbeam to write off the over $1 billion in goodwill that was associated with the purchase of Coleman. [FN18] Levin's decision not to write off that goodwill in 1998 is fatally inconsistent with his trial testimony (in 2003), that the $27.50 valuation of Coleman in 1998 was higher than what Coleman was fairly worth. [FN19]

FN18. Trial Tr. at 82-87; 955-56.

FN19. Nor was the market's reaction to the front-end merger consistent with the Respondent's current litigating position. As earlier noted, Coleman's stock market price increased to the $30+ per share level after the announcement of the front-end merger.

The Back-End Merger. Under the February 1998 Merger Agreement, the back-end merger was to have provided consideration to Coleman's public stockholders of $6.44 in cash plus .5677 shares of Sunbeam stock for each Coleman share. That consideration package was worth $30.14 per share on February 27, 1998, and $32.34 per share on March 2, 1998. [FN20] But in January 2000, by the time the back-end merger took place, Sunbeam's stock price had declined so dramatically that the merger consideration was worth only $9.31 per share. As discussed below, during the interval between the two mergers, Dunlap was removed as Sunbeam's CEO, and, at Perelman's direction, M & F installed new managers of Sunbeam (and Coleman), which included Mr. Levin. Despite the significant decline in the value of the merger consideration, Sunbeam (now under Perelman/Levin management) never reevaluated the original merger terms that were negotiated almost two years before, to ascertain whether those terms remained fair to Coleman's public minority shareholders. Instead, Sunbeam allowed the original merger terms to remain unchanged.

FN20. PX 21, Ex. D, p. 13.

Respondent Coleman's position is that despite the decline in the value of the merger consideration, the back-end merger terms remained fair, because during the 18-month interval between the two mergers, Coleman's value had significantly declined. The

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Petitioners sharply contest that position. They maintain that although Coleman's value did decline under Dunlap's management, after Perelman/Levin management took over that value had been restored by the time the back-end merger took place. The valuation dispute in this case ultimately turns on the question of whether, between March 30, 1998 and January 6, 2000, Coleman had--or had not--lost most of its value. The Court next turns to that factual issue.

D. Coleman's Financial Fortunes Between The Front-End and Back-End Mergers

*5 After Sunbeam acquired control of Coleman in the front-end merger, Dunlap moved quickly to integrate Coleman's operations into those of Sunbeam. He did that by selling off some of Coleman's businesses and by consolidating the remainder with Sunbeam's other businesses. Dunlap consolidated the two companies' manufacturing and distribution facilities. Dunlap consolidated the Coleman sales force into the Sunbeam sales force, he eliminated Coleman's marketing department without hiring replacements, he assimilated Coleman's international businesses into Sunbeam's international businesses, and he merged Coleman's pre-merger corporate level functions into the Sunbeam corporate infrastructure.

Unfortunately, only weeks after the front-end merger, Dunlap's regime started to unravel. On June 13, 1998, Mr. Levin learned that Sunbeam's board had terminated Dunlap. M & F--which at this point was Sunbeam's largest single shareholder--asked Mr. Levin to serve temporarily as the CEO of Sunbeam, since he had previously been Coleman's CEO.

Shortly after Mr. Levin and his team were brought back in, they learned of Dunlap's (and Sunbeam's) fraud, and discovered that the integration of Coleman into Sunbeam had been (as even Petitioners concede) "chaotic and disruptive." [FN21] Most of Coleman's senior managers had left the company. Coleman's EBITDA for 1998 had plummeted because the company was unable to get its product onto the retailers' shelves. And, the SEC would not permit the back-end merger to proceed because of unresolved issues relating to the integrity of Sunbeam's financial statements.

FN21. Petitioners' Opening Post-Trial Br. at 13.

The core fact issue on which the two sides part company is whether the damage that Dunlap inflicted upon Coleman was permanent or temporary. The Petitioners contend that Coleman recovered in a relatively short time, because the new management team successfully persuaded a significant number of senior managers to return to Coleman. Those senior managers were able to turn the company around (Petitioners argue) not only because of their own efforts but also because of Coleman's high quality products and very strong brands. As a result (Petitioners urge) sales and EBITDA bounced back, turning 1999 into a very good year, and Coleman was restored to the growth trend that management was predicting before Sunbeam acquired it. In the end, Petitioners argue, Coleman was at least as, if not more, valuable than it was before Sunbeam (under Dunlap) acquired control.

Coleman, for its part, contends that as a result of Dunlap's fraud, the company suffered "a permanent loss of value in the form of human capital," [FN22] that its relationships with its retailers were "permanently damaged," [FN23] and that Coleman suffered "severe financial distress, materially affecting the businesses of both Sunbeam and Coleman for years to come and ultimately resulting in [Sunbeam's] bankruptcy." [FN24] The Respondent, Coleman, contends that because it lost substantial value between the front-end and back-end mergers, $5.83 per share was Coleman's the fair value at the time of the back-end merger.

FN22. Respondent's Opening Post-Trial Br. at 12.

FN23. *Id.* at 13.

FN24. *Id.* at 13-14. Sunbeam's bankruptcy was accompanied by Sunbeam's causing Coleman to file a Chapter 11 bankruptcy petition on February 6, 2001 in the United States Bankruptcy Court for the Southern District of New York.

*6 The facts that are critical to this central issue are found to be as follows:

1. *Coleman's 1999 Financial Performance*

An important aspect of the dispute over whether Coleman gained or lost value between 1998 and 2000, are the reasons why Coleman's financial performance for 1999 was so favorable. Both sides agree that 1999 was a very good year. From 1996 to 1997, EBITDA climbed from $56.6 million to $97 million; in 1998, EBITDA dropped to $37.1 million,

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but in 1999 it rebounded to $155.8 million. Moreover, between 1997 and 1999 Coleman's debt declined from $543.2 million to $316.3 million. [FN25] These facts are not disputed. What is disputed is whether the 1999 results were a one time "fluke," *i.e.*, an artificially inflated non-recurring event, or whether they reflected the greater strength of Coleman's core business, *i.e.*, Coleman's complete recovery and return to its pre-Sunbeam growth prospects.

FN25. RX 1, Ex. 7.

The Respondent, Coleman's, position is that its exemplary 1999 EBITDA performance was essentially a "bounce," attributable solely to Y2K-related concerns in the consumer marketplace. [FN26] As Respondent puts it, "[f]ueled by Y2K-related fears, consumers were ravaging the marketplace for emergency preparedness products (camping equipment, lanterns, sleeping bags, stoves, and generators)[,]" all of which "would be valuable to a consumer in the event that the lights went out[.]" [FN27] According to Coleman, its management initially believed that the increased sales for 1999 indicated the greater strength of its core business, but by December of 1999 it had become apparent that management's belief was incorrect. Once it became clear that the year 2000 would not cause the widespread disruption that had been anticipated, management knew that 1999 results would not be replicated, and that sales for year 2000 would dramatically decrease.

FN26. "Y2K" is a shorthand for the concern that there would occur a world-wide breakdown of all machinery and equipment, including public and private facilities, that were operated by computers that were manufactured in earlier years and were not calibrated to recognize any date after December 31, 1999.

FN27. Respondent's Opening Post-Trial Br. at 15.

What is wrong with this picture is that Coleman is unable to point to any contemporaneous document of record that supports that scenario--that by late 1999 management came to believe that Coleman would do much worse the next year. All Coleman is able to cite is the testimony of Messrs. Levin and Bobby Jenkins (Coleman's Chief Financial Officer). That testimony can hardly be viewed as either disinterested or non-self serving. Arrayed against that testimony, moreover, are numerous contemporaneous documents that establish that Coleman's management was telling securities analysts and its bankers the precise opposite of what the Respondent is arguing today. That is, the documents overwhelmingly show that until August 2000--long after the merger date--management believed that the results for 2000 would be even better than for 1999, despite the impact of Y2K. These documents are next summarized.

2. *Sunbeam's Projections To Analysts and To Its Bankers Of Its (and Coleman's) Financial Performance For The Years 2000 and Beyond*

(a) *The Reports To The Analysts*

The first group of contemporaneous documents are the scripts of management's quarterly conference calls with analysis. [FN28] Those scripts contain statements that reflected management's best information at the time the statements were made. [FN29] They leave no room to doubt management's genuine and continued optimism about the year 2000, until August of that year.

FN28. See PX 35, 75-76.

FN29. Mr. Levin specifically testified that "everything [he] personally said and everything [he] heard from Mr. Jenkins on any of these calls [he] believed to be true at the time. Trial Tr. at 78. At trial Mr. Levin was questioned about each of the scripts, and after being asked "did you make that statement?" and "was it true when made?", answered in the affirmative each time. Trial Tr. at 78-126.

*7 In a November 9, 1999 conference call, management told the analysts:

-- "What I am calling 'the strategic planning process' has actually been an ongoing effort since mid-1998 ... our strategic plan is indicative of the future direction of the company. [FN30]

FN30. PX 35 at 11810.

-- "Our strategic plans are developed at the business unit level. There have been no corporate mandates, other than to create shareholder value within the boundaries of our vision and principles ." [FN31]

FN31. *Id.*

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-- "We are confident that ... new products at Powermate will allow us to continue to profitably grow this business in 2000 and beyond." [FN32]

FN32. PX 35 at 11813.

-- "We continue to see tremendous global opportunities for all of our brands. Powermate's products, in particular, are in demand." [FN33]

FN33. *Id.*

In the March 8, 2000 conference call, Coleman's management told the analysts:

-- "In our Outdoor Leisure group, both Coleman and Powermate had tremendous years in 1999. While it appears that a portion of their growth during 1999 was due to significant storm activity and Y2K fears, we were able to manage year-end trade inventories lower, such that minimal returns to the trade have not resulted in returns to the Company. The tremendous year we had in 1999 does present a significant hurdle to exceed in 2000, and we have planned our business accordingly. *But we continue to expect that sales of new products will allow us to continue to grow despite the Y2K impact in the prior year.*" [FN34]

FN34. PX 35 at 11824 (emphasis added).

And, in a May 10, 2000 conference call, management said:

-- "While the first quarter is the Company's slowest sales season and operationally its least profitable, the results were very encouraging to us and continue to [represent] ... the ongoing improvement in the performance of our businesses, as both revenues and operating margins were improved versus the prior year period." [FN35]

FN35. PX 75 at 11827.

-- *"[S]trong performance at Coleman both in North America and Japan, more than offset weak performance at our Powermate unit.* [FN36]

FN36. *Id.* (emphasis added).

-- *"As we progress into the back half of the year, we expect Powermate's performance to improve* as new products, including our standby 'Power Station' unit, begin to roll out. These products should permanently add to the core base of the Powermate's revenues." [FN37]

FN37. *Id.* (emphasis added).

-- "Revenues for the Company's Outdoor Leisure Group were up $10 million versus the prior year, an increase of 5% ... *Our Coleman Outdoor Recreation business continued its positive trend with double-digit gains versus the prior year.*" [FN38]

FN38. *Id.* at 11829 (emphasis added).

-- "[R]elative to 'Y2K'-related sales made in 1999, we are now able to report with certainty that returns to the Company's Powermate and Coleman businesses related to such 'Y2K' purchases were minimal, as we had anticipated." [FN39]

FN39. *Id.* at 11832.

These reports to analysts were delivered during the first half of 2000--*more than five months after the merger.* Not until the August 17, 2000 report was there any hint of impending trouble. Yet even then, eight months after the merger, management remained optimistic:

*8 -- "[T]he 2nd quarter of 2000 was negatively impacted by several key factors. Most significantly, as we entered the year, while we realized there was risk, we underestimated the degree to which the sale of Y2K-related products, particularly Powermate generators and Coleman cooking and lighting products, impacted our results in 1999--AND cannibalized 2000 sales in these categories. [FN40]

FN40. PX 76 at 11835.

-- "Excluding ... [Eastpak] ... Outdoor sales were down about $36 million or 11% ... *That said, Coleman's current business is very healthy and, even inclusive of the Y2K-effect, this year and last, their sales are essentially flat year-on-year.*" [FN41]

FN41. *Id.* at 11837 (emphasis in original).

-- "Improved results in the Company's International group helped offset some of the revenue shortfall in our domestic businesses." [FN42]

FN42. *Id.* The script goes on to say that the Company noticed an "industry-wide retail slowdown" starting in May and that it was cautious about the rest of the year. *Id.* at 11841. That slowdown was, in fact, the

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onset of the 2000 recession which, it appears, caused much of the sales slowdown at Coleman and throughout the economy. That recession caught Coleman--and everyone else--by surprise: it was not on the radar screen at the time of the back-end merger in January 2000.

(b) *The Centrality of Sunbeam's January 31, 2000 Projections and Of Its Reports To The Banks*

During that same period, Sunbeam was also making, in its "deliverables" to its banks, representations that were similar to and consistent with what Sunbeam's (and Coleman's) management were telling the analysts. Under the terms of its credit agreement, Sunbeam was required to "deliver" to its banks its management's projections for 2000-2002. [FN43] Mr. Levin testified that the plans delivered to the banks were "our best estimate at that time as to what was happening," [FN44] and that when any corporate officer made a representation in a document it would be "true, correct and complete." [FN45] Similarly, Bobby Jenkins, who served as Coleman's Chief Financial Officer (Outdoor Recreation division) from September 1997 until May 1998, and as Sunbeam's Chief Financial Officer from June 1998 to October 2002, testified that "we always tried to provide information to the banks that was reasonable." [FN46] Indeed, management had no alternative: the banks employed a consultant, Policano & Manzo, that reviewed management's plans and projections on the banks' behalf, to ensure that the projections were reasonable.

FN43. After the front-end merger, Sunbeam did not separately track Coleman's financial results. As a result, there are no "stand-alone" plans or projections for Coleman. However, for external reporting purposes, Sunbeam prepared separate audited financials for Coleman through 1999. Trial Tr. at 810-11.

FN44. Trial Tr. at 58.

FN45. *Id.* at 53.

FN46. Trial Tr. at 881.

A key set of projections were those contained in the January 31, 2000 "deliverable," most of the work for which had been completed before or at the time of the merger. [FN47] The January 31 deliverable incorporated the year 2000 projections that Sunbeam had earlier provided to the banks on January 15, 2000. [FN48] Those projections are highly important in this proceeding, because (i) the Petitioners' valuation expert relied upon them in arriving at the Petitioners' computation of Coleman's fair value, and (ii) Coleman has strived mightily to denigrate the evidentiary significance of those projections and led its own valuation expert to disregard them and create its own projections. Because of their centrality to the valuation issues, these January 31, 2000 "deliverable" projections, and their reliability, are now addressed in some depth.

FN47. PX 51, at 49951, 50027.

FN48. *Id.* at 49954-49957.

According to the report of Coleman's valuation expert, Chicago Partners, Coleman's reported EBITDA for 1999 was $155.8 million; and for the year 2000, management was projecting EBITDA for Coleman of $175.6 million. [FN49] Management's almost $20 million projected EBITDA increase had been determined conservatively: for Coleman Outdoor Recreation, Sunbeam was projecting flat sales and a decline in EBITDA in year 2000; for Powermate, Sunbeam was projecting only a modest growth in net sales and EBITDA. It therefore can be inferred that the Coleman projections had already incorporated a significant Y2K effect. That inference is consistent with, and supported by, Levin's March 2000 report to analysts that Coleman "continue[d] to expect the sales of new products will allow us to continue to grow despite the Y2K impact in the prior year." [FN50]

FN49. RX 1, Ex. 7. RX 21 and PX 51 (the January 31 projections) are identical. For that same year, Sunbeam was projecting EBITDA for the consolidated company (including Coleman) of $225 million. RX 19 at 0001217. That projection is contained in the January 31, 2000 bank deliverable. PX 51 at 49954-49955.

FN50. PX 35 at 11824.

*9 The contemporaneous documents--Sunbeam management's reports to securities analysts and the financial projections for Coleman that its management delivered to the banks--are utterly inconsistent, and cannot be reconciled, with that same management's current litigating position, *viz.*, that by the (back-end) merger date Coleman was a failing company that had lost most of its March 1998 value.

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Presumably, in an effort to prevent that inconsistency from coming to light, Coleman resisted Petitioners' attempts to discover the 1999-2000 financial projections and similar materials, and thereafter, Coleman took the position that those documents did not exist. That position was later shown to be false. After this Court granted the Petitioners' motion to compel, Coleman produced the projections and bank deliverables as part of a 17,000-page production of documents whose existence Coleman had (in great part) previously denied.

Having no choice but to face up to its own management's earlier projections and representations made to the banks in 2000, Coleman (controlled by Sunbeam management), next attempts a different gambit. Coleman now seeks to walk away from its own projections and representations. Coleman attempts that by advancing four arguments, none of which are supported by the contemporaneous documents of record.

Coleman first argues that the Sunbeam/Coleman 2000 projections were not an accurate prediction of Sunbeam's results for 2000, and were designed solely to motivate the SBU's and "stretch" their ability to achieve the best financial performance. The record shows otherwise. Sunbeam/Coleman did furnish its banks with projections containing what was explicitly described as "EBITDA with stretch objectives" [FN51] and "updated financial information ... consistent with the operating targets being established for the long term incentive plan (LTIP) toward which SBU management will be driving." [FN52] But those latter projections were furnished six weeks *after* the projections that were contained in the January 31 bank deliverable. Regarding *that* latter plan, Mr. Levin testified that "it was our best estimate at the time as to what was happening." [FN53] Levin also testified that Sunbeam's objective was to provide the banks with business plans the company could "execute" or "succeed," because as a consequence of having failed to meet aggressive plans in the past, he learned that "the banks didn't really care for that approach." [FN54] In short, the record does not support Coleman's newly minted argument that the 2000 plan was only a cheerleading, motivational device.

FN51. RX 24 at 0005740.

FN52. *Id.* at 0005732.

FN53. Trial Tr. at 57-58.

FN54. Trial Tr. at 55-58, 94-95; PX 29 at 5654.

Coleman's second argument is a variation on the first. Coleman argues that very little work went into creating the projections contained in the January 31 bank deliverable, and that those projections were "not designed to depict what management thought Sunbeam *would* do ... [but rather] were designed to depict what it *could* do in the right circumstances." [FN55] But, the January 31, 2000 "deliverable" projections expose that argument as irrelevant and misleading. They show predicted increases for certain *Sunbeam* SBUs to reflect Sunbeam's performance attaining the level of its competitors. But that was not how the *Coleman* SBUs were portrayed. That is because the Coleman SBUs were already outperforming their competitors, whereas Sunbeam's SBUs were not.

FN55. Respondent's Opening Post-Trial Br. at 19 (emphasis in original).

*10 Specifically, the January 31, 2000 "deliverable" projections: (i) noted that Sunbeam's competitors had average EBITDA margins of between 14% and 17%, (ii) stated that Sunbeam wished to attain those margins over time, and then (iii) projected such increases for each of the *Sunbeam* SBUs. [FN56] The projections for the *Coleman* SBUs, however, showed no such increases. That is because (i) Coleman Outdoor Recreation's EBITDA margin was already 18.3% and Powermate's was 19%, and (ii) for the year 2000 the projections were that those margins would *decrease* to competitive levels. [FN57] Accordingly, the argument that the January 31, 2000 "deliverable" projections were designed to show what management thought *Sunbeam* could do under more ideal circumstances, is irrelevant, because that was *not* how *Coleman* was being depicted. The argument is also misleading, because the Respondent's carefully chosen words (that the projections "were designed to depict what [Sunbeam] *could* do") implies (inaccurately) that that portrayal included Coleman as well.

FN56. PX 51 at 50030, 50030-50033.

FN57. *Id.* at 50033.

The third argument Coleman advances in an effort to walk away from management's contemporaneous projections, is that those projections were "aggressive" and that Sunbeam/Coleman so informed their banks. Thus, Coleman urges that "... Sunbeam's

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2000 plan had been created for motivational, rather than valuation, purposes, and was intended by management to be aggressive." [FN58] This argument is also misleading and wrong. Sunbeam, in fact, did furnish projections described as "aggressive" to its banks. But those were not the January 31, 2000 "deliverable" projections. Rather, they were March 1, 2000 projections, which were self-described as "aggressive" and contained "stretch" EBITDA figures.

FN58. Respondent's Opening Post-Trial Br. at 42 (citing the testimony of Chicago Partners' John Garvey).

PX 51, which is the Sunbeam January 31, 2001 bank "deliverable," contains the projections that Petitioners' expert used to perform his Section 262 valuation of Coleman. Nothing in those projections or in the accompanying cover letter describes them as "aggressive." To the contrary, PX 51 recites Sunbeam management's belief "that actual results for this time period should exceed these projections ..." [FN59] and that:

FN59. PX 51 at 50029.

> [a]s we continue execution of our corporate strategy during 2000 (as discussed at our recent meeting) .... we believe that our growth targets in 2001 and 2002 should increase such that our [EBITDA] performance by 2002 is closer to $450 million versus the $371 million reflected herein. [FN60]

FN60. *Id.* at 50030.

Later, on February 15, 2000, Sunbeam sent its banks a letter promising to provide, among other things, *"anticipated 'stretch' improvements in SBU financial results in 2001 and 2002."* [FN61] On March 1, 2000, Sunbeam sent the banks a new set of projections, which stated that *"the targeted results and timetable could be characterized as somewhat aggressive."* [FN62] The third page of that document explained that the new "stretch" objectives were "being established for the long-term incentive plan (LTIP) toward which SBU management will be driving." [FN63] It was those projections--not the January 31, 2000 "deliverable" projections--that had been designed to give "incentives" to SBU management. [FN64]

FN61. RX 23 at 1462 (emphasis added).

FN62. RX 24 at C5731 (emphasis added).

FN63. *Id.* at C5732.

FN64. The EBITDA "LTIP" targets for 2000-2002 are shown on the chart at page C5732 of RX 24. The projections on page C5740 of that same exhibit confirm that those were the EBITDA targets "with stretch objectives." The projections in RX24, to repeat, came weeks after the January 31(15) 2000 projections.

*11 Coleman's final effort to denigrate its management's projections is to argue that the projections are flawed because they were based on the assumption that Coleman would not lose its financing. Again, however, no contemporaneous document voices any concern about the danger that the banks would not fund Coleman. That is no surprise, because the banks would have been cutting their own throats to do that.1999 was an excellent year. The year 2000 was projected to be even better. If the banks "pulled" their loan, that would force Sunbeam into bankruptcy and possibly liquidation. [FN65] Coleman is what was keeping the entire Sunbeam edifice afloat, and Sunbeam, to all appearances, would be able to work out the problems on its own. [FN66]

FN65. The possibility of the banks cutting off Coleman's credit would have occurred (if at all) only because of Sunbeam's unilateral decision in 1999 to pledge all of Coleman's assets to support Sunbeam's debt. That decision that was made solely for Sunbeam's benefit and needs, not Coleman's.

FN66. As events ultimately turned out, that did not occur, but that result was not knowable until long after the merger date. As of the January 6, 2000 merger date there was every indication--and Sunbeam's management believed--that Sunbeam was on its way to recovering from the harm inflicted by the Dunlap regime. Nonetheless, one year later, in February 2001, Sunbeam filed a Chapter 11 bankruptcy reorganization petition, and caused Coleman to do likewise. Shortly thereafter, the United States Bankruptcy Court lifted the automatic stay and allowed this appraisal proceeding to go forward. The record does not disclose the current status of the Sunbeam bankruptcy.

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E. The Back-End Merger

The final chapter of the narrative is the back-end merger, which occurred on January 6, 2000. By that point, the market price of Sunbeam stock--which comprised the bulk of the merger consideration negotiated in February 1998--had significantly declined. Sunbeam (Coleman) management did not, however, seek financial advice about whether the originally-negotiated merger consideration package, if paid in January 2000, would be fair to the minority. Nor did management employ any other process to determine if the 1998 merger terms remained fair. All Sunbeam (Coleman) management did, in the back-end merger whereby it acquired the publicly-owned Coleman shares, was pay the identical package of cash and Sunbeam stock that had been negotiated in February 1998. In 1998 that package was worth from $27.50 to $30+ per share, but on January 6, 2000 its worth (measured by the market price of Sunbeam stock) had fallen to $9.31 per Coleman share.

In this proceeding, Coleman asserts that as of the merger date, the going concern value of Coleman stock was $5.83 per share--almost $3.50 per share less than the $9.31 per share that the public shareholders (other than the Petitioners, who sought appraisal) actually received. That $5.83 value did not result from any valuation process employed specifically in connection with the back-end merger. It is simply the number that Coleman's valuation expert arrived at *after* it had been retained to give expert testimony in this litigation.

II. THE PARTIES' CONTENTIONS AND THE ISSUES PRESENTED

A. The Applicable Standards

In an 8 *Del. C.* § 262 appraisal proceeding, this Court must "appraise the shares, determining their fair value exclusive of any element of value arising from the accomplishment or expectation of the merger ... together with a fair rate of interest, if any." [FN67] In determining "fair value," the Court must value the appraised company as an ongoing enterprise, *i.e.*, as a going concern, by considering "all relevant factors." [FN68] In doing that, the Court must consider "proof of value by any techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court." [FN69]

FN67. 8 *Del. C.* § 262(h).

FN68. *Id*; *Matter of Shell Oil Co.*, 607 A.2d 1213, 1218 (Del.1992).

FN69. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 713 (Del.1983).

A. The Parties' Appraisals And Their Respective Contentions Summarized

1. *Preliminary*

*12 The ultimate issue that must be decided is Coleman's fair value as of the January 6, 2000 back-end merger date. Based upon the valuation of their expert, Dr. Samuel J. Kursh, the Petitioners claim that Coleman's fair value was $31.94 per share. [FN70] Relying upon the valuation performed by its expert, John Garvey of Chicago Partners, the Respondent contends that Coleman's fair value was $5.83 per share. Because these two quite divergent appraisals generate the issues presented, the methodology employed by each expert, and each side's criticisms of the other's methodology, are next summarized. The details of each expert's methodologies are set forth in footnotes accompanying the description, and the parties' respective contentions are fleshed out more fully in Part III of this Opinion.

FN70. Assuming 58.8 million shares outstanding as of the merger date.

Before the competing valuations (and the parties' challenges thereto) can be meaningfully summarized, the Court must first address a basic, threshold issue: what number of Coleman common shares was outstanding on the date of the merger? It is undisputed that the *actual* number of shares outstanding was 58.8 million. It is that number that forms the basis of Coleman's fair value calculations. The Petitioners claim, however, that the number of outstanding shares that *should* be assumed for purposes of determining Coleman's fair value is 55.8 million--3 million shares less.

The basis for Petitioners' claim is that in 1999, Sunbeam and Coleman entered into agreements under which Sunbeam was issued 3 million shares of convertible preferred Coleman stock at prices that Petitioners contend were unfairly low. That transaction, Petitioners argue, represented a breach of Sunbeam's fiduciary duty to Coleman and should therefore be disregarded. That is, Petitioners argue that Sunbeam's conversion of its preferred stock into common shares shortly before the back-end merger should be treated as if the conversion had never

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occurred.

What complicates the picture is that Petitioners instructed their expert to assume that the 1999 transaction had been equitably undone, such that on the merger date Coleman's outstanding shares totaled 55.8 million, rather than 58.8 million. As a result, the valuation analysis performed by each side's expert assumed a different number of outstanding shares, likening any comparison of their results to apples and oranges. That state of affairs requires the Court to confront at the outset the question of what number of outstanding shares should be assumed for purposes of this appraisal proceeding.

It is unnecessary to decide the merits of the Petitioners' fiduciary duty claim to answer that question. In *Gentile v. Singlepoint Financial, Inc.*, [FN71] Vice Chancellor Noble determined that this Court lacks the power in a Section 262 appraisal proceeding to disregard a pre-merger issuance of stock, even if that transaction is claimed to be improperly dilutive. Because the Court finds *Gentile* to be controlling, the Petitioners' wrongful dilution claim is not cognizable, as it falls outside the scope of issues this Court is empowered to decide in a statutory appraisal proceeding. Accordingly, the discussion of both expert valuations that follows, will assume the *actual* number of Coleman common shares that were outstanding at the time of the merger: 58.8 million. [FN72]

FN71. C.A. No. 18677-NC, 2003 WL 124050 at *5 (Del.Ch. Mar.5, 2003).

FN72. In fairness to the Petitioners, Dr. Kursh did prepare an exhibit to his report (PX 21, Ex. V) that discloses the results of his valuation in alternative form; *i.e.*, assuming that the number of outstanding shares was either 55.8 million or (alternatively) 58.8 million.

2. *Dr. Kursh's Valuation Analysis And Coleman's Attack Upon It*

a. *Dr. Kursh's Valuation Summarized*

***13** Dr. Kursh appraised Coleman by employing four separate valuation methodologies. These methodologies involved analyses of: (1) transactions in Coleman's own stock and assets ("Coleman-specific transactions"); (2) acquisitions of companies whose businesses approximated Coleman's during the relevant period ("comparable company transactions"); (3) a discounted cash flow ("DCF") analysis based upon the January 31, 2000 "deliverable" projections that Coleman provided to its banks; and (4) publicly traded companies analyzed in the March 1998 Morgan Stanley and CSFB fairness opinions ("comparable company analysis"). [FN73]

FN73. PX 21.

Coleman-Specific Transactions Analysis. Dr. Kursh first valued Coleman based upon five transactions that involved Coleman stock or assets: (a) the cash-out of Coleman options on January 6, 2000; (b) the front-end merger involving the purchase of M & F's stake in Coleman on March 30, 1998; (c) the trading history of Coleman stock on February 27, 1998; (d) the proposed IPO of Powermate; and (e) the pending divestiture of Eastpak.

Dr. Kursh's analysis of the first of those transactions--the January 6, 2000 cash-out of Coleman options--yielded a value of $32.35 per share. [FN74] The second transaction (the March 30, 1998 front-end merger) resulted in valuations of $46.82 per share and $33 .31 per share, respectively, depending on whether or not Coleman's EBITDA increased between 1997 and 1999 is taken into account. [FN75] The third subject company transaction--Coleman's actual trading results on the New York Stock Exchange on February 27, 1998 [FN76]--resulted in alternative values of $46.22 per share and $42.38 per share as of January 6, 2000. [FN77] Dr. Kursh's analysis of the fourth transaction (the proposed Powermate IPO) resulted in values ranging from $28.86 to $32.43 per share. [FN78] Dr. Kursh's fifth valuation analysis, which centered on the proposed divestiture of Eastpak at a price of $100 million that had been agreed-to in principle, implied an EBITDA multiple of 14.93x and a value for Coleman of $34.72. [FN79]

FN74. Computed as follows: the option holders were given the right to cash out their shares at the greater of the market price or $27.50 per share. Because the $27.50 figure was derived from a calculation that included a 15% discount for lack of marketability to reflect the restricted stock that M & F was receiving (PX 48 at 43514; PX 21 at 23; Trial Tr. at 252), that discount was "backed out" (i.e., a 15% premium was added), resulting in an undiscounted cash out price of $32.35 per share. That value, which represented an implied EBITDA multiple of 13.35x (PX 21 at 28), is consistent with the

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$30+ per share Mr. Levin received in cashing out his Coleman options.

FN75. Sunbeam's purchase of M & F's majority interest in Coleman represented a 1997 EBITDA multiple of 19.48x, which, when used to calculate Coleman's Total Enterprise Value ("TEV") on the merger date, resulted in an implied fair value of $48.82 per Coleman share. That value reflects Coleman's significantly increased EBITDA between 1997 and 1999. (PX 21 at 22, Ex. G). If, however, it is assumed that there had been no such increase in EBITDA (i.e., if Coleman's TEV were held constant over that period), and if the valuation of the M & F front-end merger (rather than its multiple) were used as an indicator of value as of the merger date, the result would be an EBITDA multiple of 13.71x and an implied fair value of $33.31 per share as of the merger date. *Id.*

FN76. February 27, 1998 was the last day Coleman traded as an independent company before its stock price was influenced by Sunbeam becoming the majority stockholder.

FN77. After converting the assumed number of outstanding shares from 55.8 million to 58.8 million. Coleman's closing price on February 27, 1998 was $20.88 per share. Because that price reflected an implicit minority discount, an adjustment (in the form of an additional control premium) was required. In Dr. Kursh's view, the range of control premiums actually observed in the market was from 30 to 40 percent. (PX 21 at Ex. D, p. 13; Trial Tr. at 256). According to Dr. Kursh, Morgan Stanley, in its fairness opinion, concluded that 50% was the appropriate non-synergy premium. Applying that premium to Coleman's minority trading price yielded an EBITDA multiple of 19.44x and an implied fair value of $48.71 per share. (PX 21, Ex. G). Because 50% was above the range of premiums typically observed, Dr. Kursh performed an alternative valuation that assumed a 35% premium. That analysis yielded an EBITDA multiple of 17.93x and an implied fair value of $44.66 per share as of January 6, 2000. (*Id.*)

FN78. After converting the number of outstanding shares from 55.8 million to 58.8 million. On the merger date, Coleman was considering an IPO of a 19% minority interest in Powermate for at least $100 million, which represented an implied valuation of $500 million for 100% of Powermate. (PX 21 at 27; Trial Tr. at 130-31). To adjust for the minority discount inherent in that offering price, Dr. Kursh applied both the 35% premium observed in the marketplace and the 50% premium used by Morgan Stanley. That yielded an EBITDA multiple range of 12.63x to 14.03x, and a range of fair values from $30.41 to $34.17 per share. (PX 21, Ex. G).

FN79. PX 21 at 26, 27. The $34.72 per share price assumes 58.8 million outstanding shares on the merger date.

To summarize: Dr. Kursh's analysis of actual subject company transactions in Coleman stock (plus the proposed sale of Eastpak and IPO of Powermate) yielded merger-date fair values ranging from $32.35 to $46.86 per share.

Comparable Company Transactions Analysis. Dr. Kursh's second valuation method involved analyzing 37 acquisitions of publicly traded companies in the years before the merger date. Both Morgan Stanley and CSFB had employed that methodology in their 1998 fairness opinions, to derive multiples for their targets' EBITDA for the last twelve months (LTM). Although Dr. Kursh did not believe that any company was truly comparable to Coleman, he, nonetheless, did identify a subset of five acquired companies whose acquisition was relatively close in time to the merger and whose combined product mix were, in his judgment, the most similar to Coleman. These transactions exhibited LTM EBITDA multiples between 12.7x to 14.8x, and a median EBITDA multiple of 14.3x, which was within the range identified by Morgan Stanley's fairness opinion. [FN80] Applying the observed multiples to Coleman's EBITDA yielded values that ranged from $29.56 to $34.92 per share as of the merger date. [FN81]

FN80. From the 31 company groups it analyzed, Morgan Stanley identified a multiple range of 12.0x to 15.6x for use with Coleman's LTM EBITDA. (PX 21 at 31 and Ex. H; PX 42 at CLN 36735/MX10096).

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FN81. PX 21 at 31-32; Ex. V, p. 2.

*14 *Discounted Cash Flow Analysis.* Dr. Kursh also valued Coleman under the DCF methodology, [FN82] using a three-stage model, as distinguished from the two-stage DCF valuation performed by Chicago Partners. In Dr. Kursh's view, the three-stage model is more accurate and less reliant upon the final terminal value. That is because the intermediate stage "smoothes the transition" between the first stage (where values are derived from discounted projected net cash flows for a fixed number of years) and the final stage (where the terminal value is derived). Dr. Kursh employed management's January 31 "bank deliverable" projections for the first stage of his analysis. For the second stage, he developed projections for years 2003 through 2005; and for the third stage he used an accepted financial measure (the Gordon Growth Model) to calculate Coleman's terminal value.

FN82. PX 21 at p. 32-42; Exs. J-O.

Dr. Kursh used the January 31 "deliverable" projections for the first stage because in his view they were highly reliable. First, those projections had been furnished to Coleman/Sunbeam's banks in circumstances where the companies' performance and prospects were being carefully scrutinized and where it was essential that Coleman's actual performance met or exceeded those projections. Second, the projections had been "vetted" for reliability by an independent firm, Policano and Manzo, which the banks had engaged for that purpose. Third, management had represented the projections as their best estimate of the future. The main difficulty with the projections was that they were at the SBU level, rather than being developed for Coleman as a separate entity. Accordingly, Dr. Kursh had to consolidate the financial data from Coleman's separate SBUs, and from that consolidated data he calculated Coleman's aggregate EBITDA and free cash flow. [FN83]

FN83. Coleman questions whether Dr. Kursh's consolidation methodology accurately allocated Sunbeam corporate expenses at a Coleman SBU level. Mindful of the problem, Dr. Kursh checked the 1999 EBITDA results generated by his consolidation model against the EBITDA consolidated figures reported in Coleman's audited figures for 1999. Dr. Kursh's consolidation model produced results that varied from Coleman's own cost-allocated figures by less than one-half percent. Trial Tr. at 278-279; PX 21 at Ex. J. Accordingly, there is no basis to question the accuracy of Dr. Kursh's consolidation.

For his second, or intermediate, stage, Dr. Kursh "ramp[ed] [down] sales growth" from 16.1% in 2002 to 10% in 2005, before applying alternative growth assumption scenarios of 4%, 5%, and 6%, to arrive at Coleman's terminal value. His intermediate period projections also reflected that capital expenditures had exceeded depreciation by a cumulative $32.3 million from 1995 through 1999, and were projected to exceed depreciation from 2000 through 2002 by a cumulative $4.2 million. [FN84]

FN84. PX 21 at p. 41.

To compute Coleman's (third stage) terminal value, Dr. Kursh used a range above the rate of long-term inflation, assuming (alternatively) perpetual growth rates of 4%, 5% and 6%. Because Coleman's product lines had a dominant market share and brand recognition, Dr. Kursh concluded that it was appropriate to assume perpetual growth rates of 5% to 6% to calculate Coleman's terminal value. [FN85]

FN85. Trial Tr. at 280-282; PX 21 at 49 and Ex. O.

Applying discount rates ranging between 11% and 13%, Dr. Kursh reduced the projected cash flows, and the terminal value to present values. [FN86] After analyzing the resulting matrix, Dr. Kursh concluded that the most reasonable range of values (using discount rates between 11.5% and 12%) was from $25.41 to $31.94 per share. [FN87]

FN86. PX 21 at 42 and Ex. V, p. 2. To those values, Dr. Kursh added Coleman's current cash balances and the proceeds of the pending Eastpak sale to arrive at total enterprise value(s).

FN87. PX 21 at Ex. V and § 6.6 at p. 42.

*15 *Comparable Companies Analysis.* Lastly, Dr. Kursh performed an analysis of the stock prices of publicly traded comparable companies, and arrived at a value range of $24.94 to $27.29 per share as of the merger date. [FN88] He concluded, however, that because there were no truly good comparables for Coleman, this method was not an accurate indicator of value and that he would not rely upon it. [FN89] For that reason, Dr. Kursh's comparable companies

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valuation is not further considered in this Opinion.

FN88. *Id;* Trial Tr. at 287.

FN89. Trial Tr. at 287-88.

* * *

Having performed these separate valuations, Dr. Kursh then ranked them based on which valuation, in his judgment, most reliably indicated Coleman's fair value. Dr. Kursh arrived at his ultimate fair value by weighting most heavily the component valuations he determined were the most reliable. In Dr. Kursh's judgment, the Coleman-specific transactions in Coleman's own stock provided the best indication of value. The acquired company transactions analysis merited somewhat less weight and was ranked second; and the DCF valuation analysis, which was accorded the least weight, ranked third. [FN90] Dr. Kursh's ultimate fair value conclusion--$31.94 per share--represented a point on a range line that fell at the lower end of his subject company transaction value range (from $29.38 to 46.86 per share), at the middle of the comparable company transaction value range (from $29.56 to $34.92 per share), and at the high end of the DCF value range (from $25.41 to $31.94 per share). [FN91]

FN90. Trial Tr. at 288-89.

FN91. PX 21, Ex. V; Trial Tr. at 289.

b. *Coleman's Challenges To Dr. Kursh's Valuation Analysis*

Coleman advances an array of arguments, the bottom line of which is that Dr. Kursh's analyses must all be disregarded as conceptually and factually erroneous.

Coleman claims that Dr. Kursh's valuations are conceptually wrong for two reasons. The first is that all of his valuations rely, explicitly or implicitly, upon values obtained from sales of Coleman stock or assets, or sales of comparable companies. That approach, Coleman urges, is impermissible because the focus of Section 262 is going concern value, not "sale value." Sales value cannot be considered, Coleman insists, because it includes statutorily proscribed "elements of value arising from the accomplishment or expectation of the merger." [FN92] This argument, although claimed to invalidate all of Dr. Kursh's valuations, is directed primarily to Dr. Kursh's "Coleman-specific transactions" analysis (which Dr. Kursh weighted most heavily) and to his "acquired company transactions" analysis (to which he gave the second highest weight).

FN92. 8 *Del. C.* § 262(h).

Coleman's second conceptual argument, which also challenges those two valuation methods, is that Dr. Kursh's results do not properly measure Coleman's "going concern value" as of the merger date. In addition, Coleman argues that Dr. Kursh improperly treated Eastpak as a "subject company transaction" at the agreed-to-in-principle sale price of $100 million. That treatment was improper (Coleman says) because the sale of Eastpak did not close until May 2000, and Sunbeam had no definitive agreement to sell Eastpak until March 2000--events that both occurred after the merger. That treatment (Coleman urges) also fatally infected Dr. Kursh's DCF analysis, which should have valued only Eastpak's projected future cash flow, rather than treating Eastpak as a $100 million monetized asset and then adding to it Coleman's DCF value (without Eastpak).

***16** Coleman's also challenges Dr. Kursh's "acquired company transactions" and DCF analyses in more financially specific terms. Coleman contends that Dr. Kursh's acquired company transactions valuation is flawed, because the resulting values include a control premium. Adding a control premium is impermissible, Coleman urges, because there was no express testimony establishing that publicly traded stock prices reflect an implicit minority discount.

Coleman also challenges Dr. Kursh's DCF analysis on the ground that its inputs are faulty in several different respects. Specifically, Coleman claims that Dr. Kursh: (1) improperly projected cost allocations that were based upon Sunbeam's "aggressive" January 31, 2000 projections; (2) improperly used a three-stage DCF, which involved "inventing" three years of additional projections to add extra value to the company; (3) improperly adopted an unreasonably high perpetual growth prediction to calculate terminal value; and (4) improperly used a low discount rate that ignored Coleman's operative reality at the time of the merger.

The Petitioners assiduously dispute all of these criticisms.

3. *Chicago Partners' Valuation Analysis And The Petitioners' Attack Upon It*

a. *Mr. Garvey's Valuation Summarized*

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Coleman's trial valuation expert, John Garvey of Chicago Partners, used two valuation methods to support his conclusion that Coleman's fair value on the merger date was $5.83 per share: the comparable company approach and a DCF analysis. [FN93] Because Garvey concluded that the comparable company valuation approach would more likely provide a reasonable estimate of Coleman's fair value" than the DCF valuation, he used his DCF results only to confirm the conclusions reached under his comparable companies analysis. [FN94]

FN93. RX 1 at 30.

FN94. *Id.* at 36, 31-32.

Mr. Garvey's Comparable Companies Analysis. This method values a firm based on ratios of stock market valuations and the revenue or profitability of the subject firm and of comparable companies in that firm's industry. Market prices derived from comparable companies are used to determine an appropriate multiple of the subject company's EBIT or EBITDA. Common multiples are the ratio of total enterprise value (the value of equity plus debt) to EBIT or EBITDA of the peer companies. The subject firm's projected performance (EBIT or EBITDA) is then multiplied by the selected peer multiple to compute the firm's total enterprise value. The value of the firm's debt and its non-common equity shareholdings is then deducted from enterprise value, to arrive at the value of the firm's common equity shares. [FN95]

FN95. *Id.* at 30-31.

Under this approach the first step was to identify companies that were comparable to Coleman. Mr. Garvey examined the CSFB and Morgan Stanley 1998 fairness opinions, as well as Bloomberg L.P.'s designation of Coleman's peers, and companies identified by Ibbotson Associates. From these sources he then compiled a broad list of 15 companies that manufactured outdoor recreation products (*e.g.*, camping or sporting goods, excluding apparel) and products closely related to Coleman's Powermate or Eastpak businesses. [FN96]

FN96. *Id.* at 37-38.

*17 After gathering relevant historical and projected financial data for those companies, Garvey calculated the ratio of each company's enterprise value to sales, gross margins, EBIT and EBITDA for the latest twelve months (LTM) up to the merger date. He also calculated those ratios from similar projected data for the year 2000. The resulting multiples ranged from 3.82x to 7.58x times EBITDA for year 2000. Within that range the mean multiple was 5.61x and the median was 5.78x. Based upon the peers' reported EBITDA for 1999, the resulting multiples of LTM EBITDA ranged from 3.33x to 11.05x, with a mean multiple of 6.53x and a median multiple of 6.34x. [FN97]

FN97. RX 1 at Exs. 10, 11.

Mr. Garvey next applied his 2000 EBITDA median multiple (5.78x) against a matrix of sales growth and EBITDA margin assumptions for Coleman for the year 2000. Like Dr. Kursh, Mr. Garvey had to create projections for Coleman for year 2000 based upon the Coleman components (SBUs) of Sunbeam's 2000 plan. Combining the Sunbeam projections for the Coleman Outdoor Recreation, Powermate, and Eastpak SBUs, as well as Coleman's portion of the International SBU and the corporate and shared service expense, Garvey arrived at projected sales growth of 12.8%, and projected EBITDA margin of 12.8%, for Coleman. The result was an EBITDA for 2000 of $175 million.

But, Garvey did not use the $175 million EBITDA projections, or any other of management's contemporaneous projections that were delivered to the banks on January 31, 2000. Rather, based primarily on his discussions with Sunbeam/Coleman management, Mr. Garvey concluded that (1) Sunbeam's January 31, 2000 "deliverable" projections had been created for motivational rather than valuation purposes and were intended to be "aggressive;" (2) the projections rested upon assumptions that had either proven false or were still unknown as of the valuation date; [FN98] and (3) based upon Coleman's historical performance, the EBITDA margin Coleman realized in 1999 was not achievable on an ongoing basis. Accordingly, Mr. Garvey's matrix reflected primarily Garvey's own assumptions of lower margins and sales growth. [FN99]

FN98. Those assumptions were that: (i) Sunbeam would be unable to get the necessary bank waiver or the additional receivable financing it needed to continue operating after April 2000; and (ii) management had assumed that Y2K emergencies would occur and increase Coleman's sales of emergency-related equipment. As previously found in Part I of

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this Opinion, the Court rejects Coleman's contention that Sunbeam's projections for 2000 as reflected in the January 31, 2000 bank deliverables were aggressive and unworthy of reliance for purposes of valuing Coleman on the merger date.

FN99. Trial Tr. at 571-581. The "low" end of Mr. Garvey's matrix assumed a 10% decline in Coleman sales and a 6% decline in EBITDA margin, leading to an EBITDA of $65.4 million. (RX 1 at Ex. 12B).

From that matrix, Mr. Garvey selected as the most reasonable enterprise values ranging between $632 million and $790.1 million. Mr. Garvey assumed that sales would increase 12.8% between 1999 and 2000, and that 2000 EBITDA margins would be 8% or 10% of sales, rather than the 12.8% growth rate assumed by the January 31, 2000 Sunbeam "deliverable" projections. [FN100] Unlike Dr. Kursh, Mr. Garvey did not add a control premium to the total enterprise values he derived by the comparable company method.

FN100. Trial Tr. at 579-80.

Mr. Garvey's DCF Analysis. Mr. Garvey also performed a DCF valuation of Coleman. Because no projections or forecasts existed for Coleman as a separate entity on the merger date, Mr. Garvey (like Dr. Kursh) constructed his own forecast for Coleman, by using portions of the Sunbeam 2000 plan and its 2001- 02 projections as building blocks for that forecast. Mr. Garvey valued Coleman's free cash flows through the year 2002 and determined Coleman's terminal value as of year-end 2002.

***18** Mr. Garvey knew that Sunbeam's management had projected Coleman's net revenues to grow by 12.8% in 2000, by 13.6% in 2001 and by 15.5% in 2002; and for those same years, had projected EBITDA margins of 12.8%, 13.4% and 13.9%, respectively. Relying primarily upon his interview with former Sunbeam CFO Bobby Jenkins, Garvey concluded that a more reasonable forecast for Coleman's EBITDA as a percentage of net revenues was 8%, 9% and 10% for years 2000, 2001 and 2002, respectively. [FN101] Mr. Garvey then created a matrix of EBITDA projections, from which he determined Coleman's enterprise values using an 11% Weighted Average Cost of Capital (WACC) and a terminal value multiple of 5.8x times 2002 EBITDA. The resulting enterprise values ranged from $698.9 million to $885.4 million. [FN102]

FN101. Garvey did rely upon management's sales growth rate assumption of 12.8%, 13.6%, and 15.5% growth for years 2000, 2001, and 2002, respectively. (RX 1 at 44, 46).

FN102. RX 1, at 46 and Ex. 15.

Mr. Garvey then reduced those enterprise values to account for "the impact [of] Sunbeam's financial distress ... on the value of Coleman as of the Appraisal Date." [FN103] Based on an earlier academic article that analyzed the probability of a firm defaulting on its debt based on the firm's bond rating, Garvey determined that Sunbeam (which had a low Moody's debt rating as of January 2000) had a 48.4% probability of default. That is, Mr. Garvey found that Sunbeam had a 48.4% probability of filing bankruptcy for itself and its subsidiaries, including Coleman. Assuming that the gross cost of financial distress would be 25% of Coleman's estimated enterprise value, Garvey then multiplied that percentage (25%) by the 48.4% probability of financial distress, to arrive at a 12.1%-of-enterprise-value "cost of financial distress" for Coleman. That "financial distress" adjustment reduced Coleman's enterprise valuation to an amount ranging from $332.5 million to $892.5 million (based on his projected 2000 EBITDA multiple) and from $150.2 million to $853.5 million (based on his projected 2000 EBIT multiple). [FN104]

FN103. RX 1 at 46.

FN104. *Id.* at 47.

Chicago Partners' Fair Value Conclusion. Based upon his review of the record, his discussions with Coleman and Sunbeam management, and his comparable company and DCF valuation analyses, Mr. Garvey concluded that the fair value of Coleman as of January 6, 2000 was $5.83 per share. That value was based on Mr. Garvey's determination that Coleman's enterprise value on the merger date was $750 million, and was derived as follows:

Enterprise Value as of January 6, 2000	$750.0
Less: Financial Distress Discount (12.1%)	(90.8)

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Debt and Minority Interest		(316.3)
Equity Value		343.0
Number of Shares Outstanding	/	58.8
Equity Value Per Share As of January 6, 2000		$ 5.83

b. The Petitioners' Challenges To Mr. Garvey's Valuation Analysis

The Petitioners level a multitude of challenges to Mr. Garvey's valuation analyses, which are next summarized.

Petitioners argue that the valuation resulting from Chicago Partners' primary methodology--its comparable company analysis--is flawed for various reasons. Specifically: (1) the comparable company method is normally not used as a primary, but only as a "back-up," valuation methodology because it is peculiarly susceptible to manipulation; (2) Chicago Partners' inputs--namely, its year 2000 EBITDA figure, its EBITDA multiple, its discount for financial distress, and its net debt whose source was incorrect, self-serving information from management--were conceptually and factually wrong; (3) the "net debt" input was incorrect because it included short term borrowings and minority interests; (4) the year 2000 EBITDA input ($129.75 million) was an after-the-fact projection created during litigation, and was $45 million less than management's $175.6 million projection for year 2000; (5) the EBITDA multiple inputs (LTM multiple=6.33x; year 2000 multiple=5.78x) were wrong because they were based on multiples of companies that were not comparable to Coleman and which analysts had rated as "very, very, very cheap;" [FN105] (6) Garvey's failure to remove the implicit minority discount (by adding an offsetting control premium) was improper as a matter of finance theory and Delaware law; and (7) Garvey's discount for Sunbeam's "financial distress" is unsupported in fact and invalid under Delaware law.

FN105. Petitioners' Opening Post-Trial Br. at 48.

*19 The Petitioners also level a multi-pronged attack upon Chicago Partners' DCF valuation. That valuation, Petitioners argue, merits outright rejection because: (1) Chicago Partners' terminal value represents from 70% to 80% of the entire DCF valuation and is based upon an improper EBITDA multiple (5.78x) derived from its flawed comparable companies analysis; (2) the DCF analysis used the same projections that had been used in the comparable companies approach; and (3) Coleman's cost of debt was miscalculated in determining the weighted average cost of capital (WACC).

Coleman heavily disputes all of these criticisms.

B. The Issues Presented

The parties' competing valuations, and their respective challenges thereto, generate the issues presented, most of which pertain to the validity of either Dr. Kursh's or Chicago Partners' valuation of Coleman.

The issues relating to the validity of Dr. Kursh's valuation are:

(1) Were the valuations resulting from Dr. Kursh's Coleman-specific and acquired company transactions analyses legally improper measures of Coleman's going concern value, because they rely upon values derived from sales of Coleman stock or assets or upon sales of companies (including Coleman)?

(2) Was it proper under Delaware law to add a control premium to the value(s) derived from Dr. Kursh's acquired company transactions methodology?

(3) Was it proper for Dr. Kursh to treat the pending Eastpak sale as a company-specific transaction valued at $100 million, even though the transaction did not become the subject of a formal contract, and did not close, until after the merger?

(4) Were the inputs to Dr. Kursh's DCF analysis improper for any or all of the following reasons:

(a) Dr. Kursh used the management projections that were delivered to Sunbeam's banks on January 31 2000;

(b) Dr. Kursh included three additional years of projected results that he developed as a "second stage" before computing Coleman's terminal value;

(c) Dr. Kursh's terminal value improperly assumed that Coleman would experience perpetual growth above the rate of inflation; and/or

(d) Dr. Kursh's discount rate was unreasonably low, given Coleman's operative reality at the time of the merger?

The issues relating to the validity of Chicago Partners' valuation are:

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(1) Should Chicago Partners' comparable company transaction valuation be rejected for any or all of the following reasons:
(a) It is not commonly regarded as a "primary" valuation methodology in the financial community;
(b) One or more of the inputs to Chicago Partners' comparable company analysis were improper because:
(i) Chicago Partners based certain inputs upon erroneous information it obtained in off-the-record interviews with Sunbeam management;
(ii) Chicago Partners overstated "net debt" by improperly including short-term borrowings and minority interests;
(iii) Chicago Partners created its own year 2000 EBITDA projection in connection with this litigation, rather than relying upon management's own contemporaneous projection, which was $45 million higher;
***20** (iv) Chicago Partners derived its EBITDA multiple(s) from firms that were not comparable to Coleman; and/or
(c) Chicago Partners' failure to eliminate the minority discount implicit in its comparable company valuation (by adding a control premium), was improper as a matter of finance theory and Delaware law?
(2) Should Chicago Partners' DCF valuation of Coleman be rejected for any or all of the following reasons:
(a) Chicago Partners used the same (improper) EBITDA multiple derived from its comparable companies valuation, to calculate a flawed terminal value that represents 70% to 80% of Coleman's total DCF valuation of Coleman;
(b) Chicago Partners based its DCF valuation on the same (flawed) projections that it used to determine Coleman's value under the comparable companies method; and/or
(c) Chicago Partners miscalculated Coleman's cost of debt in determining Coleman's weighted average cost of capital?

* * *

Although the parties have clearly generated a multitude of valuation issues, it is not necessary for this Court to resolve them all in order to determine Coleman's fair value as of the merger date. In Parts III(A) and (B), *infra*, of this Opinion, the Court assesses the merits of the valuations performed by Chicago Partners and Dr. Kursh, respectively. In Part IV(A), the Court independently determines Coleman's fair value, and in Part IV(B), *infra*, the Court determines the appropriate rate of interest. [FN106]

FN106. Petitioners also seek an award of attorneys' fees and expenses against Coleman, on the ground that Coleman has conducted this litigation in bad faith. The attorneys' fee issue is not addressed in this Opinion, and will be the subject of a later separate opinion.

III. ANALYSIS OF THE TWO EXPERTS' VALUATIONS

A. Merits of Chicago Partners' § 262 Valuation of Coleman

Having considered the Chicago Partners valuation, the Court concludes that it is not a reliable measure of Coleman's fair value on the merger date and must be rejected. Several reasons compel that conclusion.

First, the Chicago Partners valuation rests on a core factual assumption that as of January 6, 2000, Coleman was a "basket case," having lost most of its pre-acquisition value, facing an assured decline in sales, facing long-term negative growth, and teetering on the edge of insolvency with its banks poised to cut off its supply of funds. That assumption is flatly contrary to the facts found by this Court, and amounts, in this Court's view, to a transparent contrivance for litigation purposes.

The adjudicated fact, supported by the overwhelming weight of credible evidence, is that despite the damage that Sunbeam inflicted upon Coleman, by January 6, 2000 Coleman had recovered its pre-acquisition value. Indeed, the same M & F management that had turned Coleman around after the Sunbeam disaster was telling the securities market and its banks that Coleman was thriving and would enjoy further growth. The contemporaneous documentary record confirms management's public pronouncements, and provides no support for the quite opposite picture that that same management now seeks to portray to this Court. To be blunt, the entire edifice of the Chicago Partners valuation rests upon a core factual foundation that is plainly wrong.

***21** *Second*, the Chicago Partners valuation relies primarily upon a methodology--the comparable company analysis--that in this particular case is inherently less reliable than the company-specific transaction and DCF approaches. [FN107] The comparable company approach is also of minimal value in this case because: (1) the EBITDA multiples that Chicago Partners derived were from companies that were not "comparable" to Coleman in any meaningful sense; and (2) the projected EBITDA for year 2000 that Chicago Partners used to calculate Coleman's enterprise value(s), was essentially arbitrary because it bore no relationship to Coleman's actual EBITDA for the previous year or to management's actual EBITDA projection for that same year (2000).

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FN107. See *Lane v. Cancer Treatment Centers of America, Inc.*, C.A. No. 12207, 2004 WL 1752847 at *35 (Del. Ch. July 30, 2004) (finding the DCF analysis "more reliable than the comparable companies analysis in the context of finding fair value" for the company being valued, and weighting the DCF valuation 85% and the comparable companies valuation 15%).

Chicago Partners' EBITDA input for year 2000--$129.75 million--was $26 million lower than Coleman's historical 1999 EBITDA ($155.8 million), and almost $45 million lower than management's own contemporaneous EBITDA projection for year 2000 ($175.6 million). Chicago Partners selected that lower ($129.75 million) EBITDA figure essentially because it chose to credit management's unsworn representations, derived from off-the-record interviews, that Coleman's 1999 performance could not be replicated and that management's year 2000 projections were "very aggressive." The Court concludes that Chicago Partners' $129.5 million EBITDA input was flawed and unworthy of acceptance, because (1) this Court has previously found as fact that the management representations that Chicago Partners chose to credit were self-serving and incorrect; and (2) this Court has consistently expressed its preference for the most contemporaneous management projections available on the merger date, and has consistently been skeptical of after-the-fact adjustments to such projections made during litigation. [FN108] As Chancellor Chandler stated in *Cede & Co. v. Technicolor, Inc.*: [FN109]

FN108. *Cede & Co. v. JRC Acquisition Corp.*, C.A. No. 18648, 2004 WL 286963 at *2 (Del. Ch. Feb. 10, 2004) ("[T]his Court prefers valuations based on management projections available as of the date of the merger and holds a healthy skepticism for post-merger adjustments to management projections or the creation of new projections entirely."); accord, *In re Emerging Communications, Inc. Shareholders Litigation*, 2004 WL 1305745 (Del. Ch., May 3, 2004, revised June 4, 2004) at *14.

FN109. C.A. No. 7129, 2003 WL 23700218 (Del. Ch. Dec. 31, 2003, revised July 9, 2004) (appeal pending).

> Contemporary pre-merger management projections are particularly useful in the appraisal context because management projections, by definition, are not tainted by post-merger hindsight and are usually created by an impartial body. In stark contrast, *post hoc*, litigation-driven forecasts have an "untenably high" probability of containing "hindsight bias and other cognitive distortions."
>
> * * *
>
> When management projections are made in the ordinary course of business, they are generally deemed reliable. Experts who then vary from management forecasts should proffer legitimate reasons for such variance. [FN110]

FN110. *Id.* at *7 (quoting *Agranoff v. Miller*, 791 A.2d 880, 892 (Del.Ch.2001)); accord, *In re Emerging Communications Shareholders Litigation, supra.*

Chicago Partners has failed to "proffer legitimate reasons" to vary from the projections that management prepared and delivered to Sunbeam's banks on January 31, 2000, and that were ascertainable on the merger date. Chicago Partners' reason for that variance was (to repeat) its reliance on management's off-the-record denigrations of its own projections, [FN111] which this Court has rejected as counterfactual. The Court, moreover, has validated the January 31 "deliverable" projections as management's honest and best effort, at that time, to predict Coleman's performance for the year 2000.

FN111. See *Emerging Communications Shareholders Litigation, supra*, 2004 WL 1305745 at *25 (criticizing valuation expert's reliance upon "unsworn, post-merger conversations with management" rather than "conduct [ ] careful due diligence using the sworn testimony and contemporaneous discovery record.").

*22 Compounding Chicago Partners' error in selecting the EBITDA input was the extraordinarily low EBITDA multiple that it derived from nine selected "comparable" companies. A comparable company analysis is only as valid as the "comparable" firms upon which the analysis is based, are truly comparable. [FN112] Here, none of the companies selected by Chicago Partners were "comparable" to Coleman in any meaningful sense. Even Mr. Levin conceded that Coleman was "unique," and that he did "not know of any company that is directly comparable to Coleman." [FN113]

FN112. As this Court has previously observed in *In re Radiology Associates, Inc.*, 611 A.2d 485, 490 (Del.Ch.1991):

> The utility of the comparable company approach depends on the similarity between the company [being valued] and the companies used for comparison. At some point the differences become so large that the comparable company

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method becomes meaningless for valuation purposes.

FN113. Trial Tr. at 207.

To understand why that observation is accurate, it is helpful to consider Coleman's major product lines and their proportionate share of their respective markets. Based on Mr. Levin's presentations at brokerage conferences in early 2000, *Coleman was ranked in first place in terms of industry market share, for each of its significant product lines, during the previous year.* [FN114] That information in summarized in chart form below:

FN114. PX 36 at 11853; Trial Tr. at 75-76.

Product Line	Market Position	MarketShare
Outdoor Recreation		
Lanterns	# 1	86%
Camping Stoves	# 1	67%
Accessories	# 1	23%
Branded Tents	# 1	20%
Sleeping Bags	# 1	36%
Power Products		
Generators	# 1	48%
International (Europe)	# 1	in camping and backpacks

In selecting comparables for Coleman, *Chicago Partners did not choose companies whose products were similarly dominant in their respective markets.* Nor did Chicago Partners use the companies Morgan Stanley had identified as comparables in the valuation report it prepared for purposes of the front-end merger in 1998. And, with one possible exception, the companies that Chicago Partners selected were not even in the same business as Coleman.

Of the nine companies that Chicago Partners designated as comparable, three (VF Corp., Russell Corp., and The Kellwood Company) were apparel firms--a category that Chicago Partners in its valuation report claimed it tried to exclude. [FN115] The fourth (Brunswick) was a boating company, of whose business only about 10% was in other outdoor recreation lines. [FN116] The fifth (Pentair) was a manufacturer of tools, water technologies, and enclosures, *i .e.*, a business completely different from Coleman's. [FN117] That is also true for the sixth company (The Stanley Works), which manufactured a wide variety of consumer hand tools, industrial tools, hinges, closet organizing systems, and automatic doors; [FN118] and also for the seventh company (Black & Decker), which manufactured and marketed power tools, electric lawn and garden tools, hardware, home improvement products, and engineered fastening and assembly systems. [FN119] The eighth firm (Briggs & Stratton) made small engines for outdoor appliances (one of its important products being lawnmower engines), but had only a small product line (generators) that competed modestly with Coleman's Powermate SBU. [FN120] The ninth firm (Newell Rubbermaid) had the highest multiple of all nine "comparables." [FN121] The Petitioners concede that Newell Rubbermaid could be considered as comparable to Coleman during 1998, but (they argue) by 1999, even that firm was trading "at a sharp discount" relative to its peers, [FN122] and was "selling at close to its lowest relative valuation in a decade." [FN123]

FN115. RX 1 at 37. Although Kellwood had a subsidiary that made sleeping bags and VF had a business that competed with Eastpak, Mr. Garvey conceded that these were small subsidiaries and that the price of those companies' stocks would be driven by apparel, which was a majority of the business. Trial. Tr. at 693-94.

FN116. Trial Tr. at 695-96.

FN117. RX 1 at Ex. 9. Mr. Garvey was under the impression that Pentair made generators, motors and engines but the pertinent exhibit to Chicago Partners' own report showed that Pentair did not manufacture those products. *Id;* Trial Tr. at 704.

FN118. RX 1 at Ex. 9.

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FN119. *Id.*

FN120. Trial Tr. at 708-09; RX 1 at Ex. 9.

FN121. [11.06x for the last twelve months and 7.58 for the year 2000 .] RX 1 at Exs. 10, 11. Newell Rubbermaid's LTM multiple is almost twice the median LTM multiple (6.53x) and 1.5 times the median 2000 multiple (5.78x) for the nine companies.

FN122. PX 91.

FN123. PX 92.

***23** In short, as of the merger date, none of Chicago Partners' "comparables" was truly comparable to Coleman in any meaningful sense, and none of them had economics similar to Coleman's, specifically, a host of product lines that dominated their respective markets. The only attribute that Chicago Partners' "comparables" had in common was that their stock was significantly undervalued in the market, with resulting low EBITDA multiples, as the year 2000 analyst reports for those companies confirm. [FN124]

FN124. PX 81 (analyst reports that Kellwood trading at approximately one quarter of the S & P 500 multiple); PX 85 (Brunswick trading at a 65% discount to the S & P 500 and a 51% discount to its 10 year historical average P/E); PX 87 (Pentair in "takeover candidate territory"); PX 88 (Briggs & Stratton is "among the most under appreciated in our capital goods universe"); PX 89 ("The past two years have been trying times for [The Stanley Works] shareholders [and] management"); PX 90 (describing Black & Decker as "the most fundamentally misvalued company in our universe"); PX 91 and PX 92 (Newell Rubbermaid stock "remains at low absolute and relative valuations" and "in early December ... was selling at close to its lowest relative valuation in a decade.").

Only by selecting firms whose securities were significantly undervalued in the market could Chicago Partners support its 5.78x EBITDA multiple for the year 2000. That multiple represents only about one third of Coleman's EBITDA multiple on January 6, 1998 (14.27x). [FN125] Mr. Garvey explained that over the ensuing two-year period market multiples had declined by 20% to 30%. But even if that were true, a 25% reduction in Coleman's 1998 EBITDA multiple would still have yielded a multiple of 10.7x--almost twice Chicago Partners' multiple of 5.78x. [FN126] The questions is: if, in fact, market multiples declined by 20% to 30% between the two mergers, why then did Chicago Partners choose an implied market multiple for Coleman that represented a 60% decline? Coleman does not answer that question.

FN125. On January 6, 1998, the closing price of Coleman stock was $15.75 which, when multiplied by 53.4 million shares then outstanding, results in a total enterprise value of $1.3843 billion. Dividing that total enterprise value by Coleman's 1997 EBITDA of $97 million (according to Chicago Partners' report), results in a multiple of 14.27x. (Trial Tr. at 726-34).

FN126. Trial Tr. at 734-35.

Third, Chicago Partners failed to eliminate the minority discount that is implicit in the value that results from its comparable company method, by adding an offsetting control premium. As Vice Chancellor Noble has observed in *Lane v. Cancer Treatment Centers of America, Inc.*:

> Comparable company analysis ... suffers from an inherent minority discount. To determine "the intrinsic worth of a corporation on a going concern basis," a premium must be added to adjust for the minority discount.... [T]his Court has tended to apply a premium on the order of 30%.... [FN127]

FN127. 2004 WL 1752847 at *35 (citing *Doft & Co. v. Travelocity.com, Inc.*, C.A. No. 19734, 2004 WL 1152338 at 10-12 (Del.Ch. May 20, 2004)).

By not adding an offsetting control premium to the value it derived from its comparable companies analysis, Chicago Partners even further undervalued Coleman for Section 262 appraisal purposes.

Fourth, the Chicago Partners comparable company valuation was fatally flawed because it reflected a "parent financial distress" discount that has no basis in corporate finance theory, finance literature, or Delaware law. The rationale for this discount, according to Chicago Partners, was that at the time of the merger, Coleman's parent, Sunbeam, was in financial distress, and the parent's distress would cause equal distress to even a fully solvent subsidiary (Coleman). Chicago Partners arrives at this conclusion by reasoning as follows: Based on the results of a study, [FN128] a firm that has a CCC bond rating (as did Sunbeam) has a 48.4% chance of defaulting on its debt within ten years. Another study found that the direct costs of bankruptcy could equal up to 5%, and that the

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indirect costs could equal up to 20%, of enterprise value. [FN129] Assuming (without factual support) that a corporation's default on debt is tantamount to bankruptcy, Chicago Partners added together the high end of both estimates to arrive at a 25% loss of enterprise value, if Sunbeam were to go bankrupt. Multiplying the 48.4% chance of default by 25%, Chicago arrived at its 12.1% discount for Sunbeam's distress.

FN128. RX 1 at 47.

FN129. Trial Tr. at 628-29.

*24 This argument is unworkable, conceptually, factually and even arithmetically. Under Delaware law the proponent of a valuation methodology must establish that its approach is "generally considered acceptable in the financial community." [FN130] While a discount of some kind might be plausible if it were applied to *Sunbeam*, Chicago Partners was unable to point to any finance authority to support the application of such a discount to *Coleman*.

FN130. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 713 (Del.1983).

Nor does the arithmetic work either. Even if correct, Chicago Partners' 48.4% figure does not represent an *immediate* chance that Sunbeam would default on its debt (let alone go bankrupt) on the specific merger date. All it represents is the likelihood that a default will occur at some point *over the next ten years*. By equating a default with bankruptcy, and then multiplying the "costs" of default by the "chance" of a default, Chicago Partners reached a number that reflects the very maximum bankruptcy (not default) costs that *Sunbeam* might incur at some point over the next ten years.

Thus, the 12.1% number does not reflect value that in any meaningful factual sense Coleman would have lost on the day of the merger. Even if a "parent distress" discount were grounded in finance theory and Delaware law, it was not grounded in reality. At the very least, the 12.1% figure would have to be reduced to present value, which Chicago Partners never did. In short, the discount for distress is simply another contrivance to drive down Coleman's "fair value" to the $5.83 per share level that Chicago Partners needed to justify.

Fifth, the DCF valuation, which Chicago Partners considered to be of only secondary importance in its analysis, [FN131] is also fatally flawed, for two separate reasons. To begin with, Chicago Partners relied upon the same projections that it used--and this Court rejected--in its comparable companies valuation. Indeed, for the first year of its DCF projections Chicago Partners appears to have forecast an even lower EBITDA ($109 million) than it did in its comparable companies analysis ($129 million). [FN132]

FN131. Chicago Partners used a DCF analysis as a check on their comparable company valuation. In its report, Chicago Partners did not "believe that the DCF valuation is the most accurate methodology for estimating Coleman's value for purposes of this appraisal." RX 1 at 32; Trial Tr. at 546.

FN132. See Trial Tr. at 743-44; RX 1 at Exs. 15A-15C.

Moreover, Chicago Partners' DCF terminal value--which represents 70% to 80% of Chicago Partners' total DCF value--is in reality a comparable companies analysis packaged in a different form. To compute Coleman's terminal value, Chicago Partners multiplied the previous year's EBITDA by an EBITDA multiple, and then discounted that result to present value. Although that approach is permissible theoretically, Chicago Partners used the same 5.78x EBITDA multiple it had derived from its comparable companies analysis, and that this Court has rejected. Because Chicago Partners concedes that the terminal value for Coleman represented between 70% and 80% of the total DCF value that it derived, [FN133] it follows that 70% to 80% of that DCF value is dependent upon the comparable companies analysis. Mr. Garvey conceded that if the Court rejected his comparable company analysis as unreliable--as has occurred here--that would render his DCF valuation essentially unreliable as well. [FN134]

FN133. Trial Tr. at 752-53.

FN134. *Id.* at 759-60.

*25 That result is proper and consistent with this Court's precedent. In *Gray v. Cytokine Pharmasciences, Inc.* [FN135] this Court rejected a DCF valuation where the discounted terminal value represented 75% to 85% of total value. Vice Chancellor Lamb held, in terms equally applicable here:

FN135. C.A. No. 17451, 2002 WL 853549 (Del.Ch. Apr.25, 2002).

> [The respondent's] DCF is so heavily dependent on the determination of [the company's] terminal value that the entire exercise amounts to little more than a special case of the comparable companies approach to value and, thus, has little or no independent validity. This is

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easily seen from the fact that [the] discounted terminal value calculations equal or exceed 75% of the total discounted cash flow value of the enterprise in the lowest case and 85% or more in the other three cases presented.... In the circumstances presented, this is an added reason not to rely upon [the respondent's] DCF analysis in valuing [the respondent company]. [FN136]

FN136. *Id.* at *9.

At trial, the Petitioners asked Mr. Garvey to determine what Coleman's fair value would be if certain hypothetical adjustments were made to his $5.83 per share fair value. The results of those adjustments, which were set forth in a chart admitted into evidence as PX 93, [FN137] is summarized below:

FN137. The testimony that describes these adjustments, and their results, is found at Trial Tr. at 765-71.

Adjustment	
-Stated Value in Report	$ 5.83
-Without Discount	7.38
-Actual 1999 EBITDA	9.86
-'99 EBITDA x '98 Adjusted Premium	22.97
-Plus 35% Control Premium =	$ 32.90

The first line of the chart is Mr. Garvey's $5.83 stated value. The second adjusts that value by eliminating the discount for Sunbeam's financial distress. The third line carries over that change but assumes that actual 1999 EBITDA was used rather than Chicago Partners' litigation projections. The fourth line then takes Coleman's 1999 EBITDA and multiplies it by the 10.7x multiple that would result from using Coleman's actual EBITDA multiple for 1998 and then reducing it by 25%. The fifth line applies a 35% control premium to the prior result to offset Coleman's implicit minority discount. Mr. Garvey agreed that the result of the foregoing adjustments would be $32.90 per share.

Having concluded that the Chicago Partners' valuation must be rejected because it does not reliably measure Coleman's going concern value on the merger date, the Court next addresses the merits of Dr. Kursh's valuation.

B. The Merits of Dr. Kursh's § 262 Valuation of Coleman

1. *Coleman's "Sale Value" Argument*

Although Coleman challenges Dr. Kursh's valuation on multitudinous grounds, it levels an overarching criticism that it cuts across all of Dr. Kursh's methodologies. For that reason this criticism is addressed at the outset.

Coleman claims that all of Dr. Kursh's analyses must be rejected, because they utilize, either explicitly or implicitly, the value of Coleman in a sale. That, Coleman says, is impermissible because what Section 262 is intended to capture is going concern value, not "sale value." In statutory terms, Coleman is arguing that "sale value" cannot be considered in determining "fair value," because sale value includes statutorily impermissible "elements of value arising from the accomplishment or expectation of the merger." [FN138]

FN138. 8 *Del. C.* § 262(h).

*26 This argument verbally conflates three distinct concepts and as a result, hopelessly confuses and distorts all three. Coleman persists in referring to a term--"sale value"--that has no fixed meaning. "Sale value" can mean the value obtained in selling a minority block of shares on the market, which normally will produce a minority-discounted value. Or, it could mean the value expected to be obtained *on the market* if the entire company is sold, which is "control" or "going concern" value. Or, it could mean the value of the company to a specific purchaser, which normally includes a synergistic element.

Coleman's argument starts with the correct proposition that "fair value" equals going concern value. Coleman next cites cases that disapprove of valuation techniques that include synergies--what Section 262 describes as "elements of value arising from the expectation or accomplishment of the merger." From those predicates,

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Coleman then leaps to the conclusion that Delaware case law condemns the use of "sale value." Coleman's argument is misguided and misleading, because it does not distinguish between "sale value" that may be considered as evidence of "fair value" and "sale value" that may not be considered as evidence of "fair value." In point of fact, *every* major valuation technique uses one or more of these "sale values," but the only "sale value" that Section 262 and the case law proscribe are valuation techniques that improperly include synergistic elements of value and minority and illiquidity discounts.

To underscore this point, even the comparable company approach upon which Coleman principally relies necessarily incorporates a form of "sale value," Under that approach, an appraisal must multiply some measure of the subject company's financial performance (in this case, EBITDA) by a multiple that is derived from the stock prices of other companies. That is, the appraiser focuses upon sales of stock of presumably comparable companies and assumes that shares of the subject company will sell in the same multiple range. Thus, the comparable companies methodology relies upon one kind of "sale value"--although one that will often reflect an implicit minority discount.

Other valuation approaches, such as the subject company transaction and the comparative price earnings ratio analyses, also use "sales value" measures. Under those methodologies, the inquiry is: what did similar stocks sell for in the market, or what did the subject company sell for in the market, on the relevant valuation date? The only significant valuation method that does not rely primarily upon sale prices is the DCF, but even that methodology is heavily influenced by "sale value," because the discount rate component is developed in large part from stock sales. [FN139] "Sale value" becomes especially significant where terminal value is calculated (as Chicago Partners did here) by multiplying last year's EBITDA by a market-based multiple.

> FN139. For example, the equity component of the weighted average cost of capital ("WACC") is derived from data on stock sales. That is equally true when calculating "beta," if the capital asset pricing model ("CAPM") is used.

*27 In determining "going concern" value, the central inquiry is: what would the asset command in the market, if synergistic elements of value are excluded? Coleman's core valuation premise appears to be that this Court is free to consider sale prices if they are derived from the sale of a minority block of stock in the market, but it is not free to consider sale prices if they are derived from the sale of an entire company in the market. But why? On what principled basis is Chicago Partners free to consider market prices paid for minority stock in very different enterprises, yet Dr. Kursh is not free to consider the market price paid for Coleman itself in 1998?

Under Delaware appraisal law, there is only one principled basis to disregard the price actually derived from the sale of a company as a whole: where, but only to the extent that, the sale price or "sale value" contains synergistic elements. Conversely, therefore, and as the Delaware Supreme Court affirmed in *M.P.M. Enterprises, Inc. v. Gilbert,* a "sale price" that is derived from a sale of an entire company may be considered so long as synergies are excluded:

> A merger price resulting from arms-length negotiations where there are no claims of collusion is a very strong indication of fair value. But in an appraisal action, that merger price must be accompanied by evidence tending to show that it represents *the going concern value of the company, rather than just the value of the company to one specific buyer.* [FN140]
>
> FN140. 731 A.2d 790, 796 (Del.1999) (emphasis added).

That is, "sale value," meaning the sale of an entire subject company, can be a "very strong indication of fair value," if there is evidence that that value does not include synergistic elements--meaning, "the value of the company to one specific buyer." The record shows that the valuation advocated by the Petitioners does not include synergistic elements. [FN141]

> FN141. Exhibit V of Dr. Kursh's valuation report (PX 21) sets forth a range of implied share values flowing from his different valuation analyses. By definition the discounted cash flow valuation does not include synergies, and Dr. Kursh's ultimate fair value ($31.94 per share, assuming 58.8 million shares outstanding) is at the high end of the DCF range. Dr. Kursh's subject company transaction valuation could arguably include synergies, but his ultimate fair value figure ($31.94) falls so close to the bottom end of that valuation range ($30.41 to $48.82) that the only fair conclusion must be that if any synergies were, in fact included, they were eliminated ("backed out") by the selection of an almost bottom-of-the-range value.

In short, Coleman's "sale value" argument attempts to conflate into a single quantity three quite distinct types of sale value: synergistic, minority, and "control" (or "going concern"). Synergistic and minority value are excluded under Section 262. Control value--the value derived from

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a sale of the company as a whole without any discounts for minority status or premia for synergies--is not a proscribed measure of going concern value under Section 262.

Of a similar piece is Coleman's argument that Dr. Kursh's valuations are wrong insofar as they include value that may be attributed to corporate control (i.e., a "control premium"). Coleman's argument is best described with reference to a chart that Coleman prepared, and that counsel used to cross-examine Dr. Kursh at trial. The chart had three parallel lines. The space above the top line was labeled "control value," the space between the top and middle line was labeled "control premium," and the space between the middle and the bottom lines was labeled "non-control value." [FN142]

FN142. Trial Tr. at 299-300.

Unsure of what the chart purported to show, the Court questioned Coleman's counsel about it. In response, Coleman's counsel stated that Coleman's position was that "fair value is equal to what is denominated on this chart as non-control value." [FN143] From that response it follows that Coleman necessarily is contending that any value above what the chart denominates as "non-control value"--that is, any control premium--is impermissible and cannot be considered under Delaware appraisal law. [FN144] Coleman's argument--that Dr. Kursh's valuations are conceptually erroneous because they incorporate control premia--rests upon that unspoken premise.

FN143. *Id.* at 314-15.

FN144. *Id.*

***28** This argument runs so blatantly counter to the settled Delaware precedent on the subject, and so unfairly distorts Dr. Kursh's valuation analysis, as to call into question Coleman's good faith in advancing it. [FN145] To the extent Dr. Kursh's valuations include a control premium, those valuations are consistent with Delaware law. At the trial, Dr. Kursh stated clearly and explicitly his position and understanding that: (1) a control premium and minority discount are "flip sides" of the same phenomenon; (2) "fair value" for purposes of Delaware appraisal proceedings is "control value" (as depicted in Coleman's chart); (3) "noncontrol value" (as depicted in the chart) represents the minority value of the company; that is, the market price of its stock, which reflects a minority discount from "control value;" (4) "minority" or "noncontrol" value does not represent "fair value" under Delaware law; and (5) it is necessary to add a "control premium" to "non-control" value to eliminate the minority discount, and thereby arrive at "control" or "fair" value. [FN146]

FN145. Coleman does not advance this argument to advocate "the extension, modification, or reversal of existing law or the establishment of new law." Ct. Ch. R. 11(b)(2). Rather, Coleman implicitly contends that its argument represents *existing* law. Given their significant sophistication and experience in matters of this kind, Coleman's counsel must know that that existing Delaware law holds precisely the contrary.

FN146. Trial Tr. at 305-08. Coleman also accuses Dr. Kursh of using the "wrong standard" under Section 262, because his report does not use the phrase "going concern value." For what that may be worth, and unfortunately for Coleman, neither does the Chicago Partners report. More substantively, Coleman's argument is misleading, because the going concern premise requires the appraiser to assume that the subject company will continue its operations in the same configuration of revenue-producing assets on the valuation date. Shannon P. Pratt, et al., *Valuing A Business* (4th ed. 2000) ("Pratt") at 33. Dr. Kursh did that, by assuming that Coleman would continue to operate in its normal course and would obtain the financing necessary to do so. The Court has validated that assumption factually, and has invalidated Chicago Partners' contrary assumption, which is that Coleman was on the verge of collapse in January 2000 and would likely not obtain the financing required to continue operations in the ordinary course.

Coleman also argues, in the alternative, that this Court is precluded from crediting the Petitioners' position that publicly traded stock prices reflect an implicit minority discount, because Dr. Kursh did not expressly testify to that effect in this case. According to Coleman, "the only opinion Kursh has offered on the subject ... is his view that stock market prices are on average lower than pro rata *sale value.*" [FN147] Only a studied refusal to read or acknowledge the evidence of record can justify that position, because the record clearly shows that Dr. Kursh did testify to that effect. [FN148] Dr. Kursh's testimony on that point is consistent with both the finance literature and the decisions of this Court, [FN149] whereas Coleman's contrary arguments, and its criticisms of Dr. Kursh's valuation on that basis, are not.

FN147. Coleman Op. Post-Trial Br. at 47-48 (emphasis in original).

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FN148. Trial Tr. at 256 ("[P]retty much everyone in the valuation industry would agree [that the stock price] contains some implicit minority discount."); *Id.* at 285 (testifying that the values generated by the comparable company approach "are all minority trading multiples" because they are derived from the publicly traded stock prices of those companies); and *Id.* at 286 (stating, when asked to explain what he meant by the term "minority discount," that the valuation community recognizes that "public market prices reflect an implied minority discount ... from the pro rata value or the fair value or the full value of an ownership interest.").

FN149. Pratt at 53-54 ("[M]inority ownership interests may be worth considerably less than a pro rata portion of the business value if it were valued as a single, 100 percent ownership interest."); Trial Tr. at 364 (defining the "effect on the pro rata value of an ownership interest" as "the lack of control discount" or "minority discount); *accord, M.G. Bancorporation v. LeBeau*, 737 A.2d 513, 522-23 and n. 26 (Del.1999) (affirming Court of Chancery's recognition that the valuation literature supported determination that "market value of invested capital" approach, which used multiples derived from public market prices, "included a built-in minority discount" and "resulted in a minority valuation.").

If the demerit of Coleman's "minority discount/control premium" argument required any further demonstration, it would be this: on the day before the merger was announced the closing price of Coleman stock was $20.88 per share. [FN150] Given its prior arguments, Coleman's position is that no minority discount was reflected in that trading price, and, that therefore, all of the merger consideration above that $20.88 price represented synergies. There is, however, a way to test that argument. At trial, Mr. Garvey conceded that the way to determine if a stock was trading at a discount is to perform a DCF analysis, and then compare the resulting DCF valuation to the stock trading price. [FN151] In fact, CSFB performed a DCF analysis of Coleman in connection with the first-step merger, and its analysis resulted in valuations that ranged from $24.78 to $29.62 per share--non-synergistic values.

FN150. PX 21 at Ex. D.

FN151. Trial Tr. at 737-38.

Coleman's final challenge to Dr. Kursh's company-specific transaction analysis is that Dr. Kursh valued Eastpak at the $100 million sale price that on the merger date had been agreed-to in principle. That was improper, Coleman urges, because on the merger date the Eastpak sale was not a "transaction." Rather, the Eastpak sale was a "speculative element[ ] of value not susceptible of proof as of the valuation date," because at that time Eastpak had only begun a process of soliciting bids. [FN152] This argument does not square with the law or the evidence of record.

FN152. Coleman Op. Post-Trial Br. at 70. Chicago Partners did not value Eastpak separately, but, rather, accounted for its value by valuing Eastpak's contribution to Coleman's combined EBITDA, as part of its comparable companies analysis.

*29 In a sworn interrogatory response, Coleman stated that in September 1999--almost four months before the merger--Coleman and VF had "agreed to proceed with [the Eastpak] transaction at a $100 million purchase price." [FN153] And, although that sale did not close as soon as expected, Mr. Levin admitted that "at the time of the merger ... Coleman [was] negotiating to sell Eastpak." [FN154]

FN153. PX 18 at p. 6.

FN154. Trial Tr. at 68-69.

Our Supreme Court has held that "any ... facts which were known or which could be ascertained as of the date of the merger and which throw any light on *future prospects* of the merged corporation are not only pertinent to an inquiry as to the value of the dissenting stockholder's interest, but *must be considered* by the agency fixing the value." [FN155] The $100 million Eastpak sale price that as of the merger date had been agreed-to in principle, but was not yet the subject of a definitive contract, is a fact that was known at the time of the merger. Stated differently, that VF considered Eastpak to be worth $100 million at that time, was not speculation but a known fact that may be considered for purposes of this appraisal.

FN155. *Tri-Continental Corp. v. Battye*, 74 A.2d 71, 72 (Del.1950), quoted with approval in *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del.1983) at 713; see also *Cede & Co. v. Technicolor, Inc.*, 684 A.2d 289, 299 (Del.1996).

(2) *Coleman's More Specific Challenges*

Coleman's remaining challenges are more specific and

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relate to Dr. Kursh's DCF valuation analysis.

Coleman attacks Dr. Kursh's DCF valuation on four separate grounds: (a) the valuation was based on the projections contained in the January 31, 2000 bank deliverable; (b) Dr. Kursh improperly created and included three additional years of projected cash flows before computing Coleman's terminal value (the "second stage"); (c) Dr. Kursh's terminal value rested on the erroneous assumption that Coleman would experience perpetual growth; and (d) Dr. Kursh's discount rate was unreasonably low. The Court is not persuaded that any of these criticisms is meritorious.

The Court has previously found that the management projections contained in the January 31, 2000 bank deliverables were reliable and, at the time of the merger, were the most recent projections available. Indeed, one of the reasons that the Court declined to credit the Chicago Partners valuation(s) was that Chicago Partners chose not to rely upon management's January 31 "deliverables" projections, but instead chose to create its own in the context of litigation. Conversely, the Court also found that it was proper for Dr. Kursh to rely upon those management projections that Chicago Partners chose to ignore.

Coleman next criticizes Dr. Kursh's use of a three-stage DCF as a contrivance designed to add extra value to the company. The Court cannot agree. Coleman does not contend that it was improper methodologically to construct a three-stage DCF model. Indeed, Morgan Stanley did that in its valuation. [FN156] Therefore, the only legitimate issue would be whether Dr. Kursh's employment of a three-stage model was reasonable in these specific circumstances. The Court finds that it was.

> FN156. PX 21 at 41, n. 32; see also PX 42 at CLN 36741.

At the time of the merger, Coleman was projecting 16% growth in sales for year 2002, which represented a return to Coleman's prior operating levels. [FN157] Dr. Kursh utilized a three stage model because he did not believe a 16% growth rate was sustainable long-term. Accordingly, his "second stage" projected a gradual decline in growth rate from 16% in 2002 to approximately 14% for 2003, then to 12% for 2004, then to 10% for 2005, and declining thereafter to a final terminal rate of 4% to 6%, which was slightly above the level of long-term inflation.

> FN157. PX 21 at 38 and Exs. J and O.

*30 The Court is unable to find that approach facially unreasonable in any material respect. Coleman argues otherwise. It claims that Dr. Kursh should have followed Chicago Partners' approach, which was to drop immediately from the 2002 growth rate (16%) to his terminal rate (4% to 6%) in a single year, without any intermediate period or gradations. But Coleman points to no evidence of record that supports such a precipitate assumed decline in growth. Nor has Coleman shown that dramatic drops of that kind would normally occur in the real world of business.

Coleman argues that by including an additional three years of forecasts, Dr. Kursh added at least $391 million to his estimated Coleman enterprise value, as if that number were being made up out of whole cloth. But, if $391 million of value is "added," it is only in the sense that that value represents the amount by which Dr. Kursh's enterprise value exceeds the enterprise value determined by Chicago Partners. That added value is "invented" only if one posits (as Coleman apparently does) that only the Chicago Partners' assumed growth rate structure (and the value flowing therefrom) is reasonable, good and true, but any value above that level is not. Accentuating that flawed assumption is the lack of any effort on Coleman's part to demonstrate the reasonableness of its own terminal growth assumptions. The Chicago Partners report does not disclose any calculation that supports those growth assumptions. [FN158] For these reasons, no basis has been shown to reject Dr. Kursh's use of a three-stage DCF model in these circumstances.

> FN158. Petitioners' counsel, however, performed such a calculation, which (counsel argues) indicates that the model that Chicago Partners deemed reasonable assumes that Coleman would experience a negative perpetual EBITDA growth each year, i.e., a perpetual decline in earnings. Petitioners reason as follows: a multiple is an inverse capitalization rate. Thus, inverting Chicago Partners' 5.78x terminal EBITDA multiple results in an effective capitalization rate of 17.3% (1/ 5.78 = .173). A company's capitalization rate can be derived by subtracting its perpetual growth rate from its discount rate. Using Chicago Partners' EBITDA discount rate (5.78), Chicago Partners' perpetual growth rate would be a negative 6.3%, because 17 .3 = 11-(-6.3). The Court notes this argument without deciding whether or not it is correct.

Coleman next claims that Dr. Kursh's terminal value must be disregarded because it rests upon the erroneous assumption that Coleman would experience perpetual growth--at twice the rate of inflation (Respondent claims). Dr. Kursh did project terminal values that assumed

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alternative perpetual growth rates of 4%, 5%, and 6%. What must be kept in mind that in computing a terminal value, only three growth assumptions are possible: (i) perpetual growth, (ii) perpetual stasis (no growth and no decline), and (iii) perpetual decline. To credit Coleman's position, this Court would have to conclude that after 2002, Coleman would experience, in perpetuity, either no sales growth or negative sales growth. Such a finding could only be based upon accepting the Respondent's portrayal of Coleman as a company on the brink of failure--a scenario this Court has rejected as contrary to the weight of the credible evidence of record. The only reasonable inference one can draw from the evidence is that over the long term Coleman's sales would grow, and that its rate of growth would exceed, to some extent, the rate of inflation. That assumption is what that underlies Dr. Kursh's DCF terminal valuation.

Although Respondent contends that Dr. Kursh projected perpetual growth rates at twice his estimated rate of inflation (2% to 3%), that is true only for his 6% assumed growth figures, not for the values derived from the 4% or 5% growth figures. Other than to make unsupported assertions, Respondent has not demonstrated that a 5% (or even 6%) perpetual growth assumption was excessive. In any event, even if it were, the argument is of minimal relevance because Dr. Kursh gave only tertiary weight to the values he derived from his DCF valuation; and Chicago Partners gave its own DCF valuation only secondary weight.

***31** Lastly, Coleman argues that Dr. Kursh's DCF valuation must be rejected because his discount rates, which ranged from 11.5% to 12% to reach his final DCF valuation conclusion, were unreasonably low, given Coleman's operative reality on the date of the merger. This argument is curious, given that Chicago Partners used a discount rate of 11%, which is lower than any of Dr. Kursh's discount rates. Both experts employed the CAPM to estimate a WACC for Coleman, and both utilized virtually identical risk free rates, equity risk premium and beta assumptions.

Coleman's complaint appears to be that Dr. Kursh's derived cost of equity (14.3% to 15%) was higher than Garvey's cost of equity (10 .9% to 13.6%), which would have resulted in a discount rate (for Dr. Kursh) higher than 11.5%, except for the fact that Dr. Kursh "drove down his discount rate" by assuming a pre-tax borrowing rate for Coleman that was less than Dr. Kursh's risk-free rate. What Coleman fails to explain, however, is that if Mr. Garvey's 11% discount rate was reasonable, why Dr. Kursh's higher discount rates were not more reasonable--even though Coleman believes that his discount rates should have been higher.

In the end, however, this quibbling involves much ado over very little. Coleman has not persuaded me that Dr. Kursh's DCF valuation is invalid or should be disregarded. But, by the same token I am persuaded--if only because Dr. Kursh himself concedes--that his DCF analysis deserves less weight in these circumstances than does his company-specific transactions approach. Accordingly, his DCF analysis will be used essentially to verify the soundness of the fair value of Coleman that the Court next independently derives.

IV. THE COURT'S DETERMINATION OF FAIR VALUE AND INTEREST

Having assessed the merits of each side's appraisal of Coleman, the Court must next independently determine Coleman's fair value. Because the Chicago Partners valuation has been rejected, that determination must be based upon reasonable and fair inferences the Court is able to draw from Dr. Kursh's company-specific transactions analysis, and from other reliable evidence of fair value found in the record.

That is much easier said than done, since the task of enterprise valuation, even for a finance expert, is fraught with uncertainty. For a lay person, even one who wears judicial robes, it is even more so. No formula exists that can invest with scientific precision a process that is inherently judgmental. Chancellor Chandler's incisive expression of that problem merits quotation in full text:

> [I]t is one of the conceits of our law that we purport to declare something as elusive as *the* fair value of an entity on a given date.... Experience in the adversarial[ ] battle of the experts' appraisal process under Delaware law teaches one lesson very clearly: valuation decisions are impossible to make with anything approaching complete confidence. Valuing an entity is a difficult intellectual exercise, especially when business and financial experts are able to organize data in support of wildly divergent valuations for the same entity. For a judge who is not an expert in corporate finance, one can do little more than try to detect gross distortions in the experts' opinions. This effort should, therefore, not be understood, as a matter of intellectual honesty, as resulting in *the* fair value of a corporation on a given date. [A corporation's] ....value is not a point on a line, but a range of reasonable values, and the judge's task is to assign one particular value within this range as the most reasonable value ... based on considerations of fairness. [FN159]

FN159. *Cede & Co. v. Technicolor, Inc., supra,* 2003 WL 23700218 at *2.

A. Coleman's Fair Value

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*32 Any analysis of Coleman's fair value as of the merger date must begin with a factual premise--a vision, if you will--about Coleman's financial condition and prospects at that point in time. As this Court has previously found, by the merger date Coleman had recovered its pre-acquisition value that was squandered during the Dunlap regime. And, viewed as a stand-alone firm, Coleman was poised to do even better, *i.e.*, to achieve continued future growth. [FN160] Coleman's favorable prospects were based upon the inherent strength and market position of its product lines, wholly independent of whatever temporary revenue and earnings "bounce" might be attributed to Y2K.

FN160. The qualifier "if viewed as a stand-alone firm" is necessary, because Coleman was caused to file for bankruptcy in 2001 by Sunbeam, which was insolvent and controlled Coleman. There is no basis to suppose that that would have occurred if Coleman was not controlled by Sunbeam.

Two value-related issues flow from that factual premise: (1) what was Coleman's fair value in March 1998 when M & F's controlling interest was acquired by Sunbeam in the front-end merger; and (2) between the front-end merger and the back-end merger, did Coleman's fair value increase or remain constant and if its value increased, by how much? The Court turns to these issues.

In this Court's view, the most reliable and persuasive evidence of Coleman's fair value at the time of the March 1998 front-end merger, is the value of the consideration that was negotiated at arm's length, and that Sunbeam actually paid, to acquire the controlling interest in Coleman and to cash out the options held by Messrs. Levin and Perelman. The contractually guaranteed floor price for cashing out the options, it will be recalled, was $27.50 per share. Similarly, the negotiated purchase price for M & F's control block was a package of consideration valued at $27.50 per share. The $27.50 price, however, reflected a 15% marketability "haircut" or discount. [FN161] Because marketability discounts at the shareholder level are impermissible under Delaware appraisal law, [FN162] Dr. Kursh "added back" that discount, and arrived at a value of $32.35 per share. I accept that value as the fair value of Coleman in March 1998. That value is corroborated by Dr. Kursh's alternative $32.12 per share March 30, 1998 valuation that he derived from multiplying Coleman's EBITDA on that date by the EBITDA multiple paid in the front-end merger, [FN163] and by the March 2, 1998 back-end merger market value of $32.12 to $32.34 per share received by M & F. [FN164]

FN161. PX 21 at 23.

FN162. *Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137, 1144 (Del.1989).

FN163. The $32.12 per share valuation does not take into account the increase in Coleman's EBITDA that occurred in 1997. Dr. Kursh also derived values of $46.22 and $42.38 per share from Coleman's actual NYSE trading results in March 1998, but concluded that those values were not good indicators of value. (PX 21 at 24-25). Accordingly, the Court does not rely upon those valuations for any purpose.

FN164. See pp. 9 & 11, *supra*, of this Opinion.

The next issue is whether Coleman's March 1998 fair value increased during the 18-month interval between the front-end and the back-end mergers. This is a more difficult question. The Court has found that qualitatively speaking, by January 6, 2000 Coleman had recovered its pre-acquisition value and was poised to grow in the future. Those future prospects would suggest a value increase, but if there was an increase the available evidence does not quantify it in any reliable way. For example, the implied value for Coleman that Dr. Kursh derived from his analysis of the proposed IPO of Powermate ranged from $28.86 to $32.43 per share; the implied value that he derived from the pending sale of Eastpak was $34.72; and the values that he derived from his DCF analysis ranged from $25.41 to $31.94 per share. None of these value ranges, or the underlying analysis that produced them, enables the Court to pronounce with any confidence that by the back-end merger date Coleman's fair value had increased by a reliably demonstrable amount.

*33 Because the record does not enable the Court to quantify with any degree of confidence whatever increase in Coleman's March 1998 value may have occurred between the front-end and back-end merger dates, the question of whether Coleman experienced an increase (and if so, by how much) becomes essentially academic. Based upon the available reliable evidence of record, therefore, the Court concludes that the most reasonable (albeit conservative) conclusion is that Coleman's fair value on the January 6, 2000 merger date remained unchanged from its fair value at the time of the March 1998 front-end merger: $32.35 per share.

Although this result reflects the uncertainty that inheres in every judicial appraisal of a corporation's going concern value, there is one additional item of

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corroborating data that affords some degree of comfort. PX 93, it may be recalled, is a chart that chronicles the resulting increases in value by substituting for Mr. Garvey's valuation inputs, the adjustments that Petitioners argued (and this Court has found) are required either factually or by reason of Delaware law. The result of those adjustments, the chart reveals, is to increase Coleman's fair value from the $5.83 per share valuation of Chicago Partners to $32.90 per share--only $.55 per share above the $32.35 per share fair value adjudicated by this Court.

To summarize: the Court determines that the fair value of Coleman on the merger date was $32.35 per share.

B. The Appropriate Rate And Form of Interest

1. *Rate of Interest*

The final issue to be resolved is the appropriate rate of interest on the appraisal award, and whether that interest is to be simple or compound.

Once it determines fair value, this Court is required by Delaware's appraisal statute to determine "the fair rate of interest, if any" after considering "all relevant factors." [FN165] The Court has broad discretion to determine whether interest should be simple or compound, but the Court must explain its choice. [FN166]

FN165. 8 *Del. C.* § 262(h).

FN166. 8 *Del. C.* § 262(i); *LeBeau*, 737 A.2d at 527; *Gonzalves v. Straight Arrow Publishers, Inc.*, 725 A.2d 442 (Table), 1999 WL 87280 at *4 (Del. Feb.25, 1999).

An interest award in appraisal cases has two purposes. The first is to require the respondent to disgorge any benefit it received from its use of the Petitioner's funds. The second is to compensate the Petitioners for the loss of use of its money. *Gonsalves v. Straight Arrow Publishers, Inc.* [FN167] and other decisions of this Court hold that these twin purposes are served by weighting equally (i) the respondent's actual costs of borrowing and (ii) based upon an objective prudent investor standard, the Petitioners' opportunity cost. [FN168]

FN167. 2002 WL 31057465 (Del.Ch. Sept.10, 2002) at * 12-13.

FN168. *Cede & Co. v. JRC Acquisition Corp.*, 2004 WL 286963 (Del.Ch. Feb.10, 2004) at *12; *Ryan v. Tad's Enterprises, Inc.*, 709 A.2d 682, 705 (Del.Ch.1996).

Our case law also holds that where the evidence is insufficient to enable the Court to utilize that approach, the legal interest rate can serve as a default rate for prejudgment interest. [FN169] The Petitioners contend that the "default" legal interest rate should be applied here, because as a result of Sunbeam's bankruptcy, they have been unable to establish what Coleman's unsecured borrowing costs were since the date of the merger, [FN170] and, hence, cannot calculate a fair rate of interest under the prudent investor approach.

FN169. *Ryan*, 709 A.2d at 705.

FN170. The only unsecured borrowing cost of record was 10.5% paid by Coleman Worldwide in 1998, a rate that Petitioners concede "is not particularly helpful for a 2000 valuation." Petitioners' Op. Post-Trial Br. at 72.

*34 The Respondent, Coleman, on the other hand, did cause its expert, Chicago Partners, to perform "prudent investor" rate of return calculations for the relevant period. Those rates of return are claimed to total 4.5%. That rate, Coleman urges, is what the Court should apply, because "cost of borrowing is only a factor the Court *may* consider under § 262(h)," and because "Petitioners cannot cause their own windfall by failing to create a sufficient record on a factor they would have liked the Court to consider." [FN171] Coleman contends the legal interest rate may be used in an appraisal only when the parties "have inadequately developed the record on the issue," which (Coleman says) was not done here. [FN172]

FN171. Respondent's Post-Trial Answering Br. at 39-40. Coleman argues that an award of interest at the legal rate would provide Petitioners with a higher award than they would have obtained in the market. *Id.*

FN172. Respondent's Post-Trial Opening Br. at 74-75 (quoting *Chang's Holdings, S.A. v. Universal Chems & Coatings*, C.A. No. 10856, 1994 WL 681091 at *3 (Del.Ch. Nov.22, 1994).

This argument labors under three difficulties. The first is that Coleman obliquely implies, but makes no effort to argue (or support) straightforwardly, that Petitioners could have obtained the necessary post-merger cost-of borrowing information. The second is that although Coleman did present some information regarding the prudent investor rate in Chicago Partners' report, they did not present evidence of Coleman's borrowing costs either, although that information would appear to be far more readily available to Coleman than to the Petitioners.

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Third, although Coleman urges that its costs of borrowing is a factor that *"may* be considered," it cites only the statute for that proposition, ignoring a decade or more of judicial gloss that requires that factor to be included in the prudent investor analysis. [FN173] Among those authorities is *Chang's Holdings,* the very case that Chicago Partners purported to follow to arrive at its prudent investor rate. [FN174]

FN173. See authorities cited in nn. 168 * 172, *supra.*

FN174. 1994 WL 681091 at *2; RX 1 at 50, n. 76.

In short, the company's cost of borrowing is now an essential ingredient in a prudent investor rate analysis. Here, all the parties have "inadequately developed the record" on that issue. Accordingly, the legal rate of interest will be applied as the default rule.

Fortunately, the record is adequately developed on the legal interest rate question, since the Chicago Partners report chronicles the Delaware legal interest rate on a daily basis from January 2000 through February 28, 2003. [FN175] That report shows the interest rate starting at 10% on the merger date, rising to 10.50% for a period, reaching a high as 11% for a period, and then gradually phasing down to 5.75% between November 2002 and February 28, 2003.

FN175. RX 1, Appendix D, Ex. D.3.

Understandably, because of the time that has elapsed since the trial, the record on the legal interest rate is not current. The parties are directed to work cooperatively to supplement the record with that updated information. In calculating the amount of interest due, the parties shall apply to the amount of the appraisal award each specific legal rate that was in effect during the post-merger period or periods that that rate was actually in effect.

2. *Form of Interest*

The final issue is whether interest shall be simple or compound. The Petitioners contend that interest should be compounded monthly. Our courts have recognized that "in today's financial markets a prudent investor expects to receive a compound rate of interest on his investment," [FN176] and this Court's recent decisions have awarded interest on a monthly basis. [FN177] The Respondent does not oppose the Petitioners' position on this issue. Accordingly, interest shall be compounded monthly.

FN176. *LeBeau v. M.G. Bancorporation,* C.A. No. 13414, 1998 WL 44993 at *12 (Del.Ch. Jan.29, 1998), *aff'd.* 737 A.2d 513 (Del.1999).

FN177. See, e.g., *Emerging Communications,* supra, at *28; *Gray v. Cytokine Pharmasciences, supra* at *12 (Del. Ch.2002); *Onti, Inc. v. Integra Bank,* 751 A.2d at 926; *Hintmann v. Fred Weber, Inc.,* 1998 WL 83052 (Del.Ch. Feb.17, 1998); *Grimes v. Vitalink Communications Corp.,* 1997 WL 5388676 at *13 (Del. Ch. Aug. 28, 1997).

V. CONCLUSION

*35 Based on the rulings in this Opinion, the Court determines that the Petitioners are entitled to receive fair value of $32.35 per Coleman share, plus interest at the legal rate, compounded monthly, from January 6, 2000 to the date of judgment. Counsel shall work cooperatively to prepare an agreed-upon form of order, and to arrange for an in-chambers conference with the Court at the earliest feasible date to determine the course of future proceedings in this case.

2004 WL 2059515 (Del.Ch.)

END OF DOCUMENT

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: April 29, 2005

TIME: 10:15 a.m.

JUDGE: Honorable Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

Coleman (Parent) Holdings Inc.'s Motion *In Limine* No. 38 To Bar Evidence And Argument Concerning Jerry Levin's Personal Views Concerning The Value Of Coleman Shares Prior To The Sunbeam-Coleman Transaction

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 28th day of April, 2005.

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THE FIFTEENTH JUDICIAL CIRCUIT
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PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

CPH's Motion *In Limine* No. 39 Regarding Exclusion Of Morgan Stanley Trial Exhibit 1051 (Delaware Chancery Division)

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 28th day of April, 2005.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON CPH'S ORE TENUS MOTION TO EXCLUDE EVIDENCE OF NON-RELIANCE TERM OF PURPORTED FEBRUARY 23, 1998 CONFIDENTIALITY AGREEMENT

THIS CAUSE came before the Court April 28, 2005 on CPH's ore tenus Motion to Exclude Evidence of Non-Reliance Term of Purported February 23, 1998 Confidentiality Agreement, with both parties well represented by counsel. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part. No evidence or argument concerning a non-reliance term of a confidentiality agreement purportedly made February 23, 1998 shall be placed before the jury absent an evidentiary predicate that would allow a reasonable juror to conclude that either a person charged with investigating the merits of the transaction or a decision maker on the transaction believed (i) a non-reliance term existed and (ii) was enforceable.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 28 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S MOTION *IN LIMINE* NO. 38 TO BAR EVIDENCE AND ARGUMENT CONCERNING JERRY LEVIN'S PERSONAL VIEWS CONCERNING THE VALUE OF COLEMAN SHARES PRIOR TO THE SUNBEAM-COLEMAN TRANSACTION

Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, respectfully asks this Court to bar evidence and argument concerning Jerry Levin's testimony regarding his personal, unexpressed views of the value of The Coleman Company, Inc. ("Coleman") shares prior to the Sunbeam-Coleman transaction. On December 1, 2004, Mr. Levin testified in his deposition that in 1997 he considered on a "quite informal" basis the value of Coleman, had it been sold as an independent, stand-alone company. *See* Ex. A, Levin Dep. at 145-48. CPH anticipates that Morgan Stanley will attempt at trial to elicit testimony from Levin concerning his own thoughts about the value of Coleman shares prior to the Sunbeam-Coleman transaction.

Morgan Stanley should be barred from introducing evidence of Mr. Levin's informal views of the value of Coleman shares because (1) Mr. Levin's testimony was never disclosed as an expert opinion; (2) his testimony falls far short of the standards for expert testimony under Florida law; (3) his testimony concerns a subject matter that is too complex for lay opinion testimony; (4) Mr. Levin's statements are irrelevant to the shares' actual value because they

concern his views of Coleman "valued as an independent company," not its value in a sale to a strategic buyer like Sunbeam, which would generate greater value; and (5) Mr. Levin's subjective belief concerning the value of the shares is irrelevant to whether CPH decision-makers relied on misrepresentations by Sunbeam and Morgan Stanley.

First, Mr. Levin's thoughts on the value of Coleman shares would be inadmissible as an undisclosed expert opinion of an undesignated expert. Morgan Stanley did not designate Mr. Levin as an expert witness by the December 2004 deadlines for disclosing expert testimony, and cannot do so now. *See* Ex. B, 11/23/04 Agreed Order Granting Morgan Stanley's Motion to Extend Expert Discovery and Summary Judgment Deadlines By One Week. Nor has Morgan Stanley disclosed any of Mr. Levin's testimony as lay opinion testimony as required by the Court's December 15, 2004 Order that expert witness disclosures "include disclosures for each witness who will be asked to give any expert opinion, whether or not he also will serve as a fact witness." Ex. C, 12/15/04 Order on Coleman (Parent) Holding Inc.'s Motion for Clarification of Obligations to Disclose Opinion Testimony of Fact Witnesses (emphasis added). Thus, Morgan Stanley is foreclosed from eliciting opinion testimony from Mr. Levin, regardless of whether he is a lay witness or an expert.

Second, Mr. Levin's personal thoughts on the value of Coleman shares do not even come close to meeting the standards of scientific or technical reliability for expert testimony under Florida law. Even if Mr. Levin had been timely disclosed as an expert, the process he used to estimate the value of Coleman shares was wildly unreliable and thus would not pass muster under the test for admitting scientific expert testimony adopted in *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923). *See Stokes v. State*, 548 So.2d 188, 193 (Fla. 1989) (holding that the *Frye* test applies to expert testimony in Florida). Mr. Levin testified that his views concerning the

value of Coleman shares were the result of a "quite informal" process. Ex. A, Levin Dep. at 147. He testified that he only looked at "competitive multiples," "sales," and "estimates" of what the price per share would be if the company had been sold. *Id.* He further admitted that he did not produce any type of "written study." *Id.* at 147-48. Mr. Levin's own testimony makes clear that his views on the price of Coleman stock were not the product of a formal valuation of Coleman shares like the type of formal valuation described in Exhibit A to the Court's March 23, 2005 Order. Ex. D, Exhibit A to 3/23/05 Order at 14 (stating that Morgan Stanley's valuation of Coleman was based on a "discounted cash flow analysis" and demonstrated a per-share value in excess of $31). Moreover, the probative value of Mr. Levin's personal views on this issue is substantially outweighed by its prejudicial effect on CPH. Allowing Morgan Stanley to establish the actual value of Coleman's shares through Mr. Levin's testimony would give his informal views on the value of Coleman's shares an aura of scientific validity that they do not deserve.

Third, the valuation of a public company is a complex matter that is properly established only through the testimony of an expert witness and thus is not a proper matter for lay opinion testimony. A lay witness cannot testify to an inference or an opinion that "require[s] a special knowledge, skill, experience, or training." FLA. STAT. ANN. § 90.701(2) (West 2004). Even if the other predicates could be established, "a party cannot introduce opinion testimony by a lay witness, if the opinion is one that requires the testimony of an expert." 5 PHILIP J. PADOVANO, FLORIDA PRACTICE: CIVIL PRACTICE § 19.9 (2004-2005 ed.). The valuation of a public company is a subject that plainly requires special knowledge and experience and certainly does not fall within the jurors' ordinary experience. *See, e.g., National Communications Indus., Inc. v. Tarlini*, 367 So. 2d 670, 671 (Fla. 1st DCA 1979) (holding that lay opinion regarding the amount of damages was inadmissible because "it was opinion testimony by a non-expert and did

not come within the exception which would allow non-experts to testify on a subject within common knowledge or about matters they themselves perceive").

Fourth, Mr. Levin's subjective belief is irrelevant to what the actual value of the Coleman shares was prior to the Sunbeam-Coleman transaction. Mr. Levin's testimony concerning the value of Coleman shares was based on the sale of Coleman as a stand-alone company for cash — which is not the type of transaction involved in this case. *See* Ex. A, Levin Dep. at 147 (stating that he valued Coleman "as an independent company," and that the process he used was like "trying to figure out what your house is worth when you're not really selling it"). The Sunbeam-Coleman transaction, however, was markedly different from Mr. Levin's model, as it involved a sale to Sunbeam, a strategic buyer that could be combined with Coleman to create synergies, and thus generate greater value. Under the "strategic buyer" model, the value of Coleman stock would be greater than the value of the stock in the hypothetical stand-alone transaction on which Mr. Levin based his figures. Consequently, his informal views of the value of Coleman shares are wholly irrelevant to the actual value of the Coleman shares in this transaction.

Fifth, Mr. Levin's testimony is equally irrelevant to whether CPH decision-makers relied on misrepresentations about Sunbeam. It is undisputed that CPH decision-makers did not share Mr. Levin's opinion regarding the value of the Coleman shares. Morgan Stanley's theory would be, we suppose, that CPH did not rely on the value of Sunbeam stock if it was receiving full value for Coleman in cash and debt relief. But CPH and Mr. Perelman consistently rejected Sunbeam's offers to buy Coleman for prices substantially higher than the mid-teens per-share figure that Mr. Levin estimated, as it was Mr. Perelman's understanding that Coleman was worth $30 per share. *See* Ex. E, Perelman Dep. at 336; Ex. F, Perelman Direct, 4/19/05 Tr. at 9066-67. In their acrimonious December 1997 meeting here in Palm Beach, Mr. Perelman flatly rejected

Sunbeam CEO Al Dunlap's offer of approximately $20 per share. *See* Ex. E, Perelman Dep. at 336; Ex. F, Perelman Direct, 4/19/05 Tr. at 9066-67. In the month or so after negotiations between Sunbeam and CPH resumed in January 1998, CPH rejected Sunbeam's offers of $20 to $24 a share for Coleman stock. *See* Ex. G, Maher Direct, 4/12/05 Tr. at 7891-92. CPH and Mr. Perelman then rejected a series of Sunbeam offers because they fell shy of the $30-per-share figure he set. *See id.* at 7914-15. It follows that Mr. Perelman certainly did not share Mr. Levin's views on the value of Coleman shares. Indeed, Morgan Stanley did not even ask Mr. Perelman at trial whether Mr. Levin communicated his views regarding the Coleman shares' value to him or, if he did, what Mr. Perelman thought of Mr. Levin's opinion. Morgan Stanley's notable failure to ask Mr. Perelman these questions provides further confirmation that Mr. Levin's views regarding the Coleman shares simply had no relevance to CPH's reliance.

CONCLUSION

Accordingly, this Court should bar all evidence and argument concerning Jerry Levin's informal views of the value of Coleman shares prior to the Sunbeam-Coleman transaction.

Dated: April 28, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 28th day of April, 2005.

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IN THE CIRCUIT COURT

OF THE FIFTEENTH JUDICIAL CIRCUIT

IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,	)	
Plaintiff,	)	No. 03 CA-005045 A1
vs.	)	
MORGAN STANLEY & CO. INCORPORATED,	)	
Defendant.	)	

DEPOSITION OF JERRY W. LEVIN

New York, New York

Wednesday, December 1, 2004

Reported by:
ANDREA L. KINGSLEY, RPR
CSR NO. 001055
JOB NO. 167827

EXHIBIT
A

Page 142

A. Well, the three Coleman employees which were myself, Paul Shapiro and Joe Page. I do not recollect whether somebody from MacAndrews & Forbes attended that or not.
Q. The fax cover sheet which appears on MS 78, I think we've established in the record pretty clearly this meeting most likely occurred on December 12, 1997. Would that square with your recollection of the timing of the meeting?
A. It was approximately in that time frame.
Q. Did you know at the time that you had the meeting on or about December 12, 1997 that there was a meeting that was going to take place at Mr. Perelman's or Mr. Gittis' home in Palm Beach with Mr. Dunlap?
A. No.
Q. Did you find out about that meeting after the fact, the meeting at the home?
A. Yes.
Q. You spent about an hour and half,

Page 143

as I think you said, they seemed to listen, you talked. How did the parties leave the meeting?
A. They thanked us. There was really no conversation with us other than we offered if you have additional questions, please call us. They had our business cards and they took copies of the material and that was the end of it from our perspective. We did what we were asked to do as best we could.
Q. Was there any follow-up by the Sunbeam attendees at the December 12 meeting with you?
A. I don't recollect it; but from previous depositions it's been pointed out to me there was another conversation, I don't know if it was by phone or in person, but they did ask me additional questions about this but to this day I don't remember.
Q. Somebody from Sunbeam asked you additional questions?
A. Yes.
Q. As of December 12, 1997, had

Page 144

MacAndrews & Forbes or any of its affiliated companies done a valuation of Coleman?
A. None that I had access to.
Q. Did you hear that there had been such a valuation done?
A. No.
Q. Had you, during the year 1997, in some fashion studied Coleman and concluded what price it could be sold for if it was purchased by another company?
A. I was not interested in selling the company and did not participate in that process.
MR. BEMIS: Ms. Reporter, would you mark as Morgan Stanley Exhibit 443 Mr. Levin's deposition transcript taken June 20, 2001 in the case In the Matter of In Re: Sunbeam Corporation.
(Morgan Stanley Exhibit 443, deposition transcript of Mr. Levin taken June 20, 2001, marked for identification, as of this date.)
Q. First of all, sir, did you give a deposition in the matter set forth in

Page 145

Morgan Stanley Exhibit 443, that is In Re: Sunbeam Corporation?
A. Apparently so.
Q. Was this one of the deposition transcripts that you said after you gave the deposition you read it and you made corrections if you found any errors?
A. Probably.
MR. BIDEAU: Just for the record, the one you gave us doesn't have a signed errata sheet. That's the same for the last transcript. You asked the question but I want to make clear on the record we don't know if the one you have here is the one done after the errata sheet was signed or not.
MR. BEMIS: I don't know if he did an errata sheet.
MR. BIDEAU: I'm not saying he did or didn't. I think -- since you set the precedent, I wanted to be clear. I think these were in the bankruptcy proceedings.
Q. If you will turn to page 25. Tell me when you are there. Are you there, sir?

Page 146

A. Yes.
Q. Were you asked the following questions and give the following answers beginning on page 25, line 9 of your deposition of June 20, 2001:
"Question: Do you recall any discussions about whether or not a purchase price of two times sales was better than what other comparable companies were worth on a trading basis?
"Answer: Yes.
"Question: What do you recall about that?
"Answer: We had studied the question earlier and reached a conclusion that if we sold Coleman somewhere in the mid teens per share, we would be very happy with the transaction.
"Question: When was that?
"Answer: During 1997.
"Question: Did anything change between the point when you had that recognition and the time when Mr. Perelman agreed to the purchase price that would have cost Coleman to have increased

Page 147

significantly in value?
"Answer: As valued as an independent company, no.
"Question: Just so the record is clear, when you say mid teens, that is 15, 16 dollars a share; is that a fair statement?
"Answer: Yes."
Were you asked those questions and did you give those answers in 2001, sir?
MR. MARKOWSKI: Objection to the form.
A. Yes.
Q. How had you studied the valuation of Coleman in 1997? What had been done?
A. I'm sure it was quite informal. We were a public company. We would look at the competitive multiples, we looked at sales that took place. It's kind of like trying to figure out what your house is worth when you're not really selling it and we had estimates that if the company was put up for sale, it would be somewhere in that range. These are done by myself. I

Page 148

don't know that we had a written study.
Q. My understanding is when you reached this price of 15 to 16 dollars a share, that that did include the assumption of whatever Coleman debt had by the buyer; is that correct?
MR. MARKOWSKI: Objection to the form.
A. Yes.
Q. Am I also correct that the 15 to 16 dollar per share price we've been referring to did not include the assumption of debt of the Coleman holding companies, CON holdings of over $500 million in 1997; is that correct?
MR. MARKOWSKI: Objection to the form.
A. I'm not sure -- I get a little confused with how all that debt was held for a long time as I thought about it but for the equity that was trading on the New York Stock Exchange, that was my conclusion.
Q. You can set that transcript aside for the time being.

Page 149

Did you ever see an analysis done by Chase involving a combination of Sunbeam and Coleman?
A. I don't recall seeing anything like that.
Q. Let me show you what has been marked as MS 77. I've handed you what has been marked as Ms. Exhibit 77. Do you have that in front of you?
A. Yes.
Q. This bears CPH Bates numbers 1425610 and then continuing to CPH 1425629. Have you seen this document before?
A. I don't recall seeing it.
Q. Did you ever hear that Chase had done an analysis of a Coleman/Sunbeam Corporation combination?
A. I don't recall ever hearing about that.
Q. You can hand it back to me if you haven't seen it.
Did you report the results of your December 12 meeting with the Sunbeam personnel to anyone at MacAndrews & Forbes?
A. I'm sure I did.

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

AGREED ORDER GRANTING MORGAN STANLEY'S MOTION TO EXTEND EXPERT DISCOVERY AND SUMMARY JUDGMENT DEADLINES BY ONE WEEK

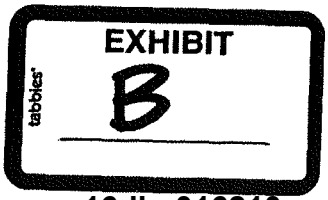
THIS CAUSE having come before the Court on November 23, 2004 upon Morgan Stanley's Motion to Extend Expert Discovery and Summary Judgment Deadlines by One Week, and the Court having been advised of the agreement between the parties, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

1. Morgan Stanley's Motion to Extend Expert Discovery and Summary Judgment Deadlines by One Week is GRANTED in part.

2. The Court's Order of October 14, 2004 shall be amended as follows:

Initial Expert Disclosures	December 7, 2004
Responsive Expert Disclosures	December 17, 2004
Rebuttal Expert Disclosures	December 28, 2004
Depositions of Experts	December 28, 2004-January 14, 2005
Summary Judgment Briefs	December 10, 2004
Summary Judgment Response Briefs	December 23, 2004



Summary Judgment Reply Briefs January 6, 2005

All documents listed above shall be served on or before 5:00 p.m. via facsimile except for responsive expert disclosures on December 17, 2004 which shall be served on or before 3:00 p.m. via facsimile.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 22 day of November, 2004.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION FOR CLARIFICATION OF OBLIGATIONS TO DISCLOSE OPINION TESTIMONY OF FACT WITNESSES

THIS CAUSE came before the Court December 15, 2004 on Coleman (Parent) Holdings, Inc.'s Motion for Clarification of Obligations to Disclose Opinion Testimony of Fact Witnesses, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Coleman (Parent) Holdings, Inc.'s Motion for Clarification of Obligations to Disclose Opinion Testimony of Fact Witnesses is Granted. The Court's March 19, 2004 Agreed Order Concerning Pretrial Schedule is clarified to provide that expert witness disclosures include disclosures for each witness who will be asked to give any expert opinion, whether or not he also will serve as a fact witness.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 15 day of December, 2004.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

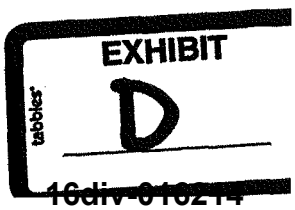
MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON CPH'S RENEWED MOTION FOR ENTRY OF DEFAULT JUDGMENT

THIS CAUSE came before the Court March 14 and 15, 2005, on CPH's Renewed Motion for Entry of Default Judgment, with both parties well represented by counsel.

Coleman (Parent) Holdings, Inc. ("CPH"), has sued Morgan Stanley & Co., Inc. ("MS & Co."), for aiding and abetting and conspiring with Sunbeam to perpetrate a fraud. Early in the case, CPH was concerned that MS & Co. was not thoroughly looking for emails responsive to its discovery requests. On April 16, 2004, the Court entered an Agreed Order ("Agreed Order") that required MS & Co. to search its oldest full backup tapes for emails subject to certain parameters and certify compliance. MS & Co. certified compliance with the Agreed Order on June 23, 2004. On November 17, 2004, CPH learned that MS & Co. had found some backup tapes that had not been searched. On January 26, 2005 it served its Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order ("Adverse Inference Motion"), claiming that MS & Co.'s violation of the Agreed Order, coupled with its systemic overwriting of emails after 12 months, justified an adverse inference against it. The Court ordered certain limited discovery. Responses to that discovery prompted CPH to orally amend its Adverse Inference Motion to seek more severe sanctions.

The Court held an evidentiary hearing on the Adverse Inference Motion on February



14, 2005. On March 1, 2005 it issued its Amended Order on Coleman (Parent) Holdings Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order ("Adverse Inference Order"). In its current Motion, CPH argues that it has since learned that the discovery abuses addressed in the Adverse Inference Motion and Order represent only a sampling of discovery abuses perpetrated by MS & Co. and that the abuses have continued, unabated. It claims that these abuses, when taken as a whole, infect the entire case. To understand CPH's argument, it is necessary to go back to the beginning.

This case arises out of an acquisition transaction that was negotiated and consummated in late 1997 and early 1998, in which CPH sold its 82% interest in the Coleman Company, Inc., to Sunbeam Corporation. MS & Co. served as financial advisor to Sunbeam for parts of the acquisition transaction and served as the lead underwriter for a $750,000,000.00 debenture offering that Sunbeam used to finance the cash portion of the deal.

CPH's Complaint[1] alleged claims against MS & Co. arising from this transaction for fraudulent misrepresentation, negligent misrepresentation, aiding and abetting fraud, and conspiracy, and sought damages of at least $485 million.

On May 12, 2003, MS & Co. was served with the Complaint and CPH's First Request for Production of Documents ("Request"). The Request sought, in essence, all documents connected with the Sunbeam deal. "Documents" was broadly defined, and specifically included items electronically stored. Concerned that, out of more than 8,000 pages of documents produced, it had received only a handful of emails, CPH on October 29, 2003, served its Motion to Compel Concerning E-Mails. That motion sought an order requiring MS & Co. to make a full investigation for email messages, including a search of magnetic tapes and hard drives; produce within 10 days all emails located; and produce a Rule 1.310 witness

[1]On February 17, 2005, CPH served its First Amended Complaint, which dropped the claims against MS & Co. for fraudulent and negligent misrepresentation, leaving only the aiding and abetting and conspiracy claims.

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within 20 days "to describe the search that was conducted, identify any gaps in Morgan Stanley's production, and explain the reasons for any gaps."

In its Opposition to Coleman (Parent) Holdings, Inc.'s Motion to Compel served November 4, 2003, MS & Co. argued that CPH wanted "this Court to order a massive safari into the remote corners of MS & Co.'s email backup systems" and represented that "(t)he restoration efforts demanded by CPH would *cost at least hundreds of thousands of dollars* and require several months to complete (emphasis in original). MS & Co. argued that CPH's "true" motive was to "harass and burden MS & Co. with unnecessary and costly discovery demands and attempt to smear MS & Co. with out-of-context recitations from other proceedings" because "CPH *concedes* that MS & Co. is only able to restore email from backup tapes from January 2000 and later - *more than a year and a half after the events that allegedly gave rise to CPH's claims*," (emphasis in original).

CPH's "concession" was based on representations like the kind made to it by MS & Co.'s counsel in a March 11, 2004 letter that suggested "(t)he burden on Morgan Stanley from . . . a wholesale restoration [of email back up tapes], both in terms of dollars and manpower would be enormous. Regardless of who performs the initial restoration, it would require hundreds (perhaps thousands) of attorney-hours to review millions of irrelevant and non-responsive e-mails . . ."[2]

In response to CPH's Motion to Compel, the parties agreed to reciprocal corporate

[2]Complaints about MS & Co.'s tactics are not new. See Ex. 196 [February 26, 2004, letter from EEOC to Hon. Ronald L. Ellis in EEOC/Schieffelin v. Morgan Stanley & Co., Inc., et al., 01-CV-8421 (RMB) (RLE) (S.D.N.Y.): ("(w)hen EEOC received [Morgan Stanley's] January 27, 2004 Responses to EEOC's Fifth Requests for Production of Documents which did not contain any e-mails, the parties communicated further. At that time, Morgan Stanley took the position that searching for e-mails would be burdensome both in regards to expense and the time it would take to respond. While the parties were in the process of attempting to work out these disputes, EEOC for the first time learned that [Morgan Stanley has] an easy, systematic ability to search for relevant documents. In a February 16, 2004, conversation with an IT representative of [Morgan Stanley], EEOC learned that [Morgan Stanley has] an e-mail system, which, while not yet fully comprehensive, was easily searchable on February 18, 2004, the close of discovery . . . which is certain to produce discoverable information highly relevant to EEOC's and Plaintiff-Intervenor's claims . . . After disclosing their state-of-the-art system to EEOC, [Morgan Stanley] dropped [its] assertion that the process was too expensive, but maintained that they refuse to search for e-mails because it is burdensome for attorneys to review large numbers of documents prior to production.")

16div-016216

depositions on the email issue. CPH deposed Robert Saunders on February 10, 2004.[3] After completion of the corporate representative depositions, and unable to obtain MS & Co.'s agreement to a mutual email restoration protocol, CPH served its Motion for Permission to have Third Party Retrieve Morgan Stanley E-Mail and Other Responsive Documents, proposing that a third party vendor be given access to both parties' email systems for restoration at each party's expense. At the hearing on that Motion, CPH offered to split the expenses evenly. MS & Co. refused.

MS & Co.'s continued assertions that the email searches could be conducted only at enormous cost and would be fruitless because there were not backup tapes with email from 1997 and 1998 were confirmed to the Court by MS & Co.'s counsel, Thomas Clare of Kirkland & Ellis, at a hearing held March 19, 2004:

> Mr. Scarola: Electronic records of e-mails that have been exchanged.
> The Court: Do we agree that there has been such a request outstanding?
> Mr. Clare: There has been a request outstanding.
> The Court: And have you all objected?
> Mr. Clare: From the beginning.
> The Court: And what's the basis of the objection?
> Mr. Clare: We objected to the breadth of the request that they're making. And to answer Your Honor's question directly – and the burden that is associated with it – that given the particular e-mail back-up tapes that are in existence five, six years after the fact of these transactions, that the scope of the e-mail request that they are seeking is improperly and unduly burdensome given the enormous costs that would be required, given the fact that the time period for which we have back-up tapes post dates the events by several years.

Unable to resolve the email issue, on April 9, 2004, CPH served its Motion to Compel

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[3]Saunders provided misleading information in his deposition. See footnote 12, infra.

Concerning E-Mails and Other Electronic Documents. On the eve of the hearing on CPH's Motion to Compel, the parties reached an accommodation, and on April 16, 2004 the Court entered the Agreed Order. Under the Agreed Order, MS & Co. was required to (1) search the oldest full backup tape for each of 36 MS & Co. employees involved in the Sunbeam transaction; (2) review emails dated from February 15, 1998, through April 15, 1998, and emails containing any of 29 specified search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004, all nonprivileged emails responsive to CPH's document requests; (4) give CPH a privilege log; and (5) certify its full compliance with the Agreed Order.

As required by the Agreed Order, MS & Co. produced about 1,300 pages of emails on May 14, 2004. It did not, however, certify compliance with the Agreed Order. After prompting by CPH, on June 23, 2004, MS & Co. served a certificate of compliance signed by Arthur Riel, an Executive Director and manager of its Law/Compliance IT Group.[4]

CPH got its first indication that the Agreed Order may have been violated in the late fall of 2004.

On November 17, 2004, Clare wrote Michael Brody of Jenner & Block, CPH's outside counsel, that MS & Co. had "discovered additional e-mail backup tapes . . ."; that "(t)he data on some of [the] newly discovered tapes has been restored;" that "we have re-run the searches described in [the Agreed Order]"; that "some responsive e-mails have been located as a result of that process"; and that "(w)e will produce the responsive documents to you as soon as the production is finalized."

On December 14, 2004, Brody wrote Clare back:

> in [your November 17, 2004 letter], you state that Morgan Stanley located additional email backup tapes, and that you

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[4]Though CPH would not learn for months that the certificate was false, and even then the magnitude of MS & Co.'s misrepresentations would not be admitted, MS & Co. personnel, including in-house counsel, knew the certification of compliance was false when made.

> would be producing documents soon. Within two days of that letter, you produced some emails to us. In your November 17, 2004 letter, however, you also indicated that "some of the backup tapes are still being restored." Have those backup tapes been restored? Have you found additional responsive emails? If so, when will Morgan Stanley produce those emails? How is it that the tapes were only recently located?

On December 17, 2004, Clare wrote back, telling Brody "(n)o additional responsive e-mails have been located since our November production."[5]

Brody wrote back to Clare December 30, 2004, noting the deficiencies in Clare's correspondence:

> You do not inform us whether the review of the recently-located backup tapes still is ongoing. Please confirm that all email backup tapes from the relevant time period have been reviewed and all responsive emails have been produced. If the review still is proceeding, please let us know when the review will be completed.

Clare wrote back on January 11, 2005, telling Brody that the "restoration of e-mail backup tapes is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

Concerned about Clare's lack of candor, on January 19, 2005 Brody wrote again:

> I write in response to your January 11, 2005 letter concerning e-mails back-up tapes. Unfortunately, your letter raises more questions than it answers. As I requested in my December 14, 2004 letter, please explain the circumstances under which Morgan Stanley located these backup tapes and advise us of the date on which the tapes were located.

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[5]Not only does this letter fail to answer Brody's legitimate questions, it implies that MS &Co. was still processing and reviewing emails from the newly found tapes. As we now know, though, *no* additional information was migrated to the archives between approximately August 18, 2004 and January 15, 2005. *Of course* "no additional responsive e-mails [would have been] located."

> Further, please explain your statement that "the next set of backup tapes" is scheduled to be restored "at the end of January." How many tapes will be restored by the end of January? When exactly in January will Morgan Stanley complete the process of restoring and searching these tapes for responsive documents? Are there other backup tapes that are not yet in the process of being restored? If so, please advise us of (a) the number of tapes that are not yet in the process of being restored; (b) the time period of the data contained on those tapes; and (c) Morgan Stanley's timetable for restoring and searching those tapes. In addition, please explain why those tapes are not yet in the process of being restored. Please also explain why Morgan Stanley cannot complete the restoration and searching of all remaining backup tapes before "the end of January." As you know, our trial is scheduled to begin on February 22, 2005.
>
> We look forward your complete response to these questions no later than January 21, 2005 so that we can bring this matter to the Court's attention, if necessary.

Conforming to what was by now his usual stonewall tactic, Clare responded by letter dated January 21, 2005:

> I write in response to your January 19, 2005 letter regarding Morgan Stanley's production of e-mails restored from backup tapes.
>
> Morgan Stanley completed its initial production of restored e-mail messages on May 14, 2005. The May 2004 production was conducted in accordance with the agreed-upon order governing, and the searches that resulted in that production encompassed data from all of the backup tapes known to exist at the time. Subsequent to the May 2004 production, additional tapes were found in various locations at Morgan Stanley. The discovered tapes were not clearly labeled as to their contents, were not found in locations where e-mail backup tapes customarily were stored, and many of the tapes

were in a different format than other e-mail backup tapes. In November 2004, once it was determined at least some of the discovered tapes contained recoverable e-mail data, Morgan Stanley re-ran the searches described in the agreed-upon order. Those searches resulted in Morgan Stanley's November 2004 production.

Morgan Stanley's efforts to restore the backup tapes discovered after the May 2004 production are ongoing. It is a time-consuming and painstaking process and, given the absence of clear labels or other index information for the backup tapes, there is no way for Morgan Stanley to know or accurately predict the type or time period of data that might be recovered from tapes that have yet to be restored. While Morgan Stanley cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes, we understand from Morgan Stanley that, when the agreed-upon searches are run again at the end of January, those searches will include approximately one terabyte of additional data restored since the prior production.

On January 26, 2005, CPH served its Adverse Inference Motion, seeking sanctions based on MS & Co.'s disclosure of the newly found tapes. Hearing was scheduled for February 14, 2005. In preparation for that hearing, on February 3, 2005 the Court ordered MS & Co. to produce by noon on February 8, 2005 "(i) all documents to be referred to or relied on by any of the witnesses in his or her testimony; and (ii) all documents within MS & Co.'s care, custody, or control, addressing or related to the additional email backup tapes, including matters relating to the time or manner in which they were discovered; by whom they were discovered; who else learned of their discovery and when; and the manner and timetable by which they were be restored and made searchable, including any correspondence to or from outside or prospective outside vendors."

The Adverse Inference Order outlined the discovery abuses shown at the February 14, hearing. They included MS & Co.'s undisclosed discovery of the 1,423 "Brooklyn" tapes no

later than May of 2004; the undisclosed discovery of the 738 8-millimeter backup tapes in 2002; the presence of unsearched data in the staging area; the discovery of 169 DLT tapes in January 2005; the discovery of more than 200 additional tapes on February 11 and 12, 2005; the discovery of a script error that had prevented MS & Co. from locating responsive email attachments; and discovery of another script error that had infected the ability to gather emails from Lotus Notes platform users.

In response to these deficiencies, the Court issued the Adverse Inference Order. That Order reversed the burden of proof on the aiding and abetting and conspiracy elements and included a statement of evidence of MS & Co.'s efforts to hide its emails to be read to the jury, as relevant to both its consciousness of guilt and the appropriateness of punitive damages. It specifically provided that "MS & Co. shall continue to use its best efforts to comply with the April 16, 2004 Agreed Order and . . . February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search."[6]

It is now clear why MS & Co. was so unwilling to provide CPH with basic information about how and when the tapes were found or when production would be complete. First, candor would have required MS & Co. to admit that it had not done a good faith search for the oldest full backup tapes, and that Riel's certificate of compliance was false. Some unsearched tapes had been found by 2002; others had been found no later than May, 2004. Together, over 2,000 tapes had been found which were not searched prior to the May production. It is untrue that the tapes were "not in locations where e-mail backup tapes customarily were stored."

[6]Concerned that MS & Co. had been less than candid with both CPH and the Court, on February 4, 2004, the Court entered its Order on Coleman (Parent) Holding's ore tenus Motion to Participate in Search of Additional E-Mail Backup Tapes or Appoint Third Party to Conduct Search, ordering MS & Co. to pay for a third party vendor to check its compliance with the Agreed Order. The Court previously found that the two scripts errors testified to by Allison Gorman at the February 14, 2005, hearing would not have been discovered or revealed without the threat that the third-party vendor would discover the errors. Given Ms. Gorman's testimony at the March 14, 2005, hearing, though, it now appears MS & Co. knew about the errors before the appointment of the third-party vendor. Consequently, the errors were only revealed, but not discovered, in response to the February 4, 2004, Order.

16div-016222

Second, MS & Co. desperately wanted to hide an active SEC inquiry into its email retention practices.[7] [8] [9] [10] Finally, MS & Co. did not want to admit the existence of the historical email archive, which would expose the false representations it had made to the Court and used to induce CPH to agree to entry of the Agreed Order.[11] [12]

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[7]On December 17, 2003, CPH served its Third Request for Production seeking "(a)ll materials and documents submitted to the United States Securities and Exchange Commission ("SEC"), received from the SEC, or reflecting communications with the SEC in connection with any investigation, inquiry, or examination concerning or relating to Morgan Stanley's policies and/or procedures with regard to the retention, storage, deletion, and/or back-up of electronic mail (emails) . . ." On October 12, 2004, CPH served its Request for Supplemental Documents seeking to bring MS & Co.'s document production current, requesting "(a)ll documents not previously provided by MS & Co. that are responsive to any Request for Production of Documents that CPH previously has served upon MS & Co. in the litigation, including documents obtained by MS & Co. or its counsel after the date of MS & Co.'s prior productions." No SEC documents were produced in response to either request; no privilege log was generated. On other privilege logs generated in response to court orders, MS & Co. did not show the SEC on the distribution portion of the log. See March 9, 2005 Order Following in Camera Inspection (Riel/SEC Documents) footnotes 1, 2. See, also, footnote 15, infra. Kirland & Ellis, outside counsel for MS & Co. in this litigation, represents MS & Co. in the SEC's inquiry into its email retention practices.

[8]MS & Co. manipulated the unhinging of the SEC's email investigation from the IPO litigation in January, 2005, to conceal the email issues as long as possible.

[9]It is now apparent that MS & Co. chose deliberately to keep its affidavits concerning the informal SEC inquiry submitted to support its privilege claims vague, despite two requests from the Court seeking specific information. See February 28, 2005 Order (Release of Exhibits).

[10]See February 25, 2005 Order on Morgan Stanley's Objections to Coleman (Parent) Holding Inc.'s Notice to Produce at Hearing and Motion for Protective Order and March 4, 2005 Order on Plaintiff's ore tenus Motion to Compel Additional Production.

[11]While MS & Co. contends that its representations to the Court that it would cost "hundreds of thousands of dollars" to search the backup tapes and that there was no pre-2000 backup tapes were not false, they were deliberately misleading: MS & Co. never had an intention to search the back up tapes to respond to the requests and some of the year 2000 backup tapes backed up email back to 1997.

In 2001, MS & Co. decided to create the email archive. By June,2003, it had decided that the archive should have two components. First, MS & Co. wanted to create an archive that captured and stored email as it was generated. Second, MS & Co. wanted to add historical data to the archive. That task involved searching for all email backup tapes containing historical emails; sending those tapes to an outside processor; loading the processed tapes into a staging area; and migrating the stored data from the staging area onto the archive. As we now know, archive searches are quick and inexpensive. They do not cost "hundred of thousands of dollars" or "take several months." The restrictions imposed by the Agreed Order were not needed.

[12]On February 10, 2004, Robert Saunders, an executive director of IT for MS & Co., was deposed. He testified that in January, 2003, MS & Co. had put into effect the email archive system. When specifically asked whether the new email archive system would include prior backups or only going forward backups, he testified that "(t)he way it was built was for going forward backup." He was next asked whether "(w)ith respect to backup dated January 2001 and previously, does Morgan Stanley have any new capabilities to restore and search e-mail?" After counsel interposed a vagueness objection, he answered "(t)here are no new capabilities to search that e-mail." That testimony was so misleading as to be false. As Sauders well knew, since he was on the team responsible, the "live" email capture portion of the archive was already operational. The migration of the historical data to the archive was expected to be completed by April of 2004, just two months after his deposition.

16div-016223

MS & Co.'s wrongful conduct has continued unabated.[13] Since the February 14, 2005, hearing, it has come to light that:

- Only two whole and four partial tapes from the Brooklyn tapes had been migrated to the archive and were thus searched for the November, 2004, production. MS & Co. sought to hide this information to create the impression that all the produced documents came from the Brooklyn tapes, rather than reveal that the production came from material that had migrated from the staging area to the archive since the May, 2004, production or some other, as yet undisclosed, source.[14]

- Contrary to MS & Co.'s counsel's November 17, 2004, letter to CPH, *none* of the November, 2004 production came from the "newly found" tapes. MS & Co. carefully crafted its responses to inquiries about the November, 2004, production to avoid both disclosure of the existence of the archive and outright lying.

- The scripts MS & Co. used to process emails into its archive caused the bodies of some messages to be truncated. MS & Co. discovered this problem on February 13, 2005, but did not tell the Court about it until March 14, 2005.

- A migration issue caused about 5% of email harvested by NDCI from the backup tapes not to be captured in the archive, based on testing of a representative sample of tapes. MS & Co. told the SEC about this problem on February 24, 2005, but failed to tell CPH or the Court.

- As of June 7, 2004, only 120 out of 143 SDLT tapes had been processed into the archive.

- An analysis requested by the SEC showed that, based on a representative sample, 10% of backup tapes were overwritten after January, 2001.

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[13]MS & Co. sought to use the entry of the Adverse Inference Order as a shield against further inquiry into its email abuses, arguing that the matter was closed by the Adverse Inference Order. It previously used this tactic with the SEC, arguing that the December 3, 2003 Cease and Desist Order shielded it from other sanctions for email retention failures. See Ex. 14 [February 10, 2005 letter from outside counsel for MS &Co. to SEC]

[14]MS & Co. argued at the March 14 and 15, 2005 hearing that there were only 13 unique, new emails contained in the November 2004 production when compared to the May 2004 production. Nine of those emails, however, were originally given to MS& Co.'s lawyers for responsiveness review by the IT staff for the May 2004 production. No explanation of why they were not produced in May was offered. This is particularly concerning given the large number of documents Ms. Gorman testified the search parameters found compared with the relatively small number found responsive and produced after review by counsel.

- A software error caused blind carbon copies not to be captured in the archive process. MS & Co. told the SEC about this problem on February 24, 2005. MS & Co. did not tell CPH or the Court.

- A software error caused the searches to be hyper case-sensitive, resulting in a failure to capture all emails. MS & Co. knew of the problem as of December, 2004, but did not tell CPH or the Court. The problem was not purportedly fixed until March, 2005.

- A script error caused the archive to have problems pulling group email in Lotus Notes.

- MS & Co. provided sworn testimony at the February 14, 2005, hearing that it had located 600 gigabytes of data, while contemporaneously telling the SEC it had located a terabyte of data. A gigabyte represents 20,000 to 100,000 pages. Incredibly, MS & Co.'s witness on this point, Allison Gorman, testified on March 14, 2005, that it was simply a "terminology" issue that she did not choose to correct because it could cause "confusion."

- CPH requested MS & Co. to produce responses it had made to third-parties in civil, criminal, or administrative proceedings describing limitations on MS & Co.'s ability to produce emails and all notices in such proceedings that MS & Co. had newly discovered backup tapes containing email. MS & Co. objected, arguing that there were over 300 separate proceedings, involving over 70 outside law firms, and that the cost of compliance would be too great. On March 2, 2005, the Court ordered the production, after shortening the time period involved, and required production within 12 hours after counsel's review of each item for responsiveness but, in any event, within 10 days. At the time MS & Co. objected to CPH's request as unduly burdensome, it knew of its Well submission to the SEC made on February 10, 2005. Kirkland and Ellis, co-counsel here, was co-counsel for MS & Co. in that SEC proceeding. Consequently, it appears MS & Co.'s real concern was not that expressed to the Court, but was based on its realization that compliance would reveal the existence of the SEC inquiry into its email retention policy and MS & Co.'s efforts to keep the existence of that investigation secret. MS & Co. violated the Court's March 2, 2005, Order on Morgan Stanley's Responses and Objections to Coleman (Parent) Holdings Inc.'s Notice to Produce at Hearing requiring it to disclose items responsive to CPH's Request for Production within 12 hours of review for responsiveness by waiting *days*, not hours, to produce the Wells submission.

- MS & Co.'s failure to produce or log the SEC documents violated the Court's February 3, 2005, Order.[15]

- James Doyle's, the Executive Director of MS & Co.'s Law Division, declaration that he did not learn of additional unsearched backup tapes until the end of October, 2004, was intended to mislead CPH and the Court. Obviously, MS & Co. sought to create the implication in the declaration that *no one* in the Law Division knew of the backup tapes before then. Instead, both Soo-Mi Lee, Doyle's associate, and James Cusick, Doyle's superior, knew of the tapes no later than June 7, 2004.

- In-house counsel for MS & Co. knew as of June 7, 2004, that nearly a third of the restored backup tapes did not contain email, implying they may have been recycled in violation of the December 3, 2002 Cease and Desist Order. They did not tell CPH or the Court.

- MS & Co.'s searches looked for only two types of emails. There are other types of emails that were not included in the searches. CPH did not learn of this deficiency until March 13, 2005.

- MS & Co. improperly failed to produce 125 documents required to be produced by the Court's February 3, 2005, Order Specially Setting Hearing which required limited discovery be made in connection with the February 14, 2005, hearing on the Adverse Inference Motion.

- MS & Co. improperly withheld 13 documents required to be produced by the Court's March 4, 2005, Order on Plaintiff's ore tenus Motion to Compel Additional Production.

- An additional 282 tapes were found on February 23 and 25, 2005; CPH was not told of the discovery until March 13, 2005.

- An additional 3,536 tapes were discovered on February 23, 2005, in a security room.

- An additional 2,718 tapes were found at Recall, MS & Co.'s third party off-site storage vendor, on March 3, 2005.

- An additional 389 tapes were found March 2 through March 5, 2005. CPH was not told

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[15]The Court previously rejected MS & Co.'s argument that the January 14, 2005, email exchange between its outside and in-house counsel was not required to be produced under the February 3, 2005, Order Specially Setting Hearing because it referred to the "documents issue" and not specifically to the backup tapes. See March 16, 2005 Order on Morgan Stanley's Motion to Disqualify Plaintiff's Counsel Searcy, Denney, Scarola, Barnhart & Shipley, P.A. and Jenner & Block, LLC. MS & Co.'s insistence on a narrow interpretation of the February 3, 2005, Order is not particularly sympathetic, when the only reason that Order confined production to the backup tape issue was because MS &Co. had failed to notify the Court of the other deficiencies in its certificate of compliance.

until March 13, 2005.

- On March 4, 2005, the Court entered its Order on Plaintiff's ore tenus Motion to Compel Additional Production, which ordered MS & Co. to produce by 3:00 p.m. on March 7, 2005, all items within its care, custody, or control dealing with the Riel/SEC investigation, other than documents representing communications between or among MS & Co. inside and outside counsel that were not copied to anyone other than counsel. MS & Co. sought to discredit Riel and thus distance itself from the false June 23, 2004 certificate of compliance; in doing so, it sought to hide Riel's whistle blower status and the existence of an SEC investigation into whether MS & Co. employees sought kick backs from third party vendors; whether MS & Co. employees were improperly pressured into dealing with third-party vendors who may provide business to MS & Co.; and whether MS & Co. continued to overwrite backup tapes contrary to the SEC's December 3, 2002, Cease and Desist Order.

- A script error prevented the insertion of some emails into the archive. MS & Co. produced over 4,600 pages of emails on March 21, 2005, some of which it suggested may have been located on correction of the error; alternatively, it suggested the emails may have been located by NDCI as part of its efforts to verify MS & Co.'s searches.

MS & Co.'s discovery abuses have not been confined to its email production.

William Strong is a MS & Co. managing director and was one of the principal players for it in the Sunbeam deal. He took credit for the fees generated. On May 9, 2003, CPH requested a copy of "(a)ll documents concerning employment contracts, performance evaluations, and/or personnel filed (including without limitation any documents that describe or discuss [his] training, experience, competence, and accomplishments) . . ." MS & Co. asserted that the requested documents were not relevant and that production "would unnecessarily infringe on the privacy interests of [Strong]." On March 15, 2004, the Court ordered MS & Co. to produce "(a)ll references (positive or negative) to [Strong's] truthfulness, veracity, or moral turpitude." Some portions of Strong's evaluations were produced in response to that order. Those evaluations noted Strong's colleagues' reservations about his candor and ethics. Two of his evaluators, Joseph Perella and Tarek Abdel-Meguid, were deposed, when some relatively vague testimony about the bases for those conclusions was offered. It now appears Strong was facing criminal prosecution in Italy for complicity in bribery while he was working on the Sunbeam transaction, which his evaluators knew, and that MS & Co. purposely

withheld that information from CPH and the Court.[16]

Even once CPH independently discovered evidence of Strong's indictment in Italy, MS & Co. sought to shield its files from discovery. It claimed that virtually *all* of the documents it had were privileged under joint defense agreements in place between it, Strong, and Saloman Brothers, Strong's employer at the time of the incident. As the Court's March 10, 2005 Order Following In Camera Inspection (Strong) details, the documents MS & Co. relied on to support that position, and sought to prevent CPH from obtaining, reflect no such agreement.

The other discovery abuses and misrepresentations by MS & Co. other than those involving its email production practices are outlined in CPH's Chronology of Discovery Abuses by Defendant served March 1, 2005, and would take a volume to recite. They include:

- failing to provide the information retained by MS & Co.'s internal document management system pertaining to MS & Co.'s work for Sunbeam; falsely representing to the Court that no useful information was contained in that information; and producing a Rule 1.310 representative who had made an insufficient inquiry into authenticity, business record status, and authorship of documents; see February 28, 2005 Order on CPH's Motion to Deem Certain Documents Admissible and for Sanctions due to Morgan Stanley's Disregard of Court Order;

- when faced with contempt proceedings for violating the Stipulated Confidentiality Order by providing a copy of a settlement agreement between CPH and Arthur Andersen to other counsel, representing to the Court that the law firm of Kellogg, Huber was retained to handle the "Andersen aspects" of this litigation because of a conflict between Andersen and Kirkland & Ellis; Mark Hansen, a partner at Kellog, Huber, testified that his firm was hired as co-counsel for all aspects of the case;

- providing answers to interrogatories signed by a corporate representative who performed insufficient verification of the responses;

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[16]MS & Co. originally argued that documents concerning the Italian proceedings were not in Strong's "personnel file" and so were not required to be produced in response to CPH's initial request. MS & Co.'s practice of filing damaging information about an employee other than in his personnel file and then claiming it was not included in the request is about at convincing as its argument that, since it has a corporate directive not to keep drafts of documents once they are in final form, document drafts cannot be business records exempt from hearsay because they are not "kept in the course of a regularly conducted business activity." See Fla. Stat. §90.803 (6) (a). In any event, there was *no excuse* for not producing its records of the Italian proceedings once the Court's March 15, 2004 Order was entered.

- routinely asserting unfounded privilege claims;[17] and

- failing to timely comply with the Court's orders; for example, MS & Co. did not produce Strong's 1994 Performance Evaluation until the afternoon of March 15, 2005, though it was obviously included in the Court's March 15, 2004 Order. The failure cannot be excused as oversight since, when CPH specifically asked for the 1994 evaluation in the spring of 2004, MS & Co.'s counsel said it was withheld as non-responsive; see, also, Ex. 197, 198.

In sum, MS & Co. has deliberately and contumaciously violated numerous discovery orders, including the April 16, 2004 Agreed Order; February 3, 2005 Order Specially Setting Hearing; and the March 4, 2005 Order on Plaintiff's ore tenus Motion to Compel Additional Production. At the February 14, 2005, hearing on CPH's Adverse Inference Motion, it chose to hide information about its violations and coach witnesses to avoid any mention of additional, undisclosed problems with its compliance with the Agreed Order. Implicit in the requirement that MS & Co. certify compliance with the Agreed Order was the requirement to disclose impediments to its ability to so certify. As outlined in this Order, MS & Co. employees, and not just counsel, have participated in the discovery abuses. The prejudice to CPH from these failings cannot be cured. Even if all the script errors have been located and corrected, and MS & Co. has failed to show they have, and even if all of the email backup tapes have now been located, and MS & Co. has failed to show they have, the searches cannot be completed in time. The other discovery abuses outlined call into doubt all of MS & Co.'s discovery responses. *The judicial system cannot function this way.* Based on the foregoing and on the Court's March 1, 2005 Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, it is

ORDERED AND ADJUDGED that CPH's Renewed Motion for Entry of Default Judgment is Granted, in part. See Robinson v. Nationwide Mut. Fire Ins. Co., 887 So. 2d 328 (Fla. 2004); Mercer v. Raine, 443 So. 2d 944 (Fla. 1983); Precision Tune Auto Care, Inc. v.

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[17]For example, MS & Co. produced over 260 documents dealing with the Strong investigation over which it had previously claimed privilege once the Court announced its intention to conduct an in camera review; the Court found another 200 documents were not privileged after conducting its review, by its March 10, 2005 Order.

Radcliffe, 804 So. 2d 1287 (Fla. 4th DCA 2002); Rule 1.380 (b) (2) (C), Fla. R. Civ. P. Paragraphs 2 (excluding the last sentence thereof); 3 (excluding the portion of the last sentence beginning with "in order to close . . ."); 8-10, 11 (excluding everything after the first sentence); 12 (excluding all parts following "June 1998"); 13 (excluding the last sentence thereof); 14-27; 28 (excluding everything after "firm" in the second to last sentence thereof); 29-39; 41-52; 53 (excluding the second sentence thereof); 54-57; 58 (excluding "CPH and" in the second line thereof); 59-63; 64 (excluding the third line thereof); 65 (excluding the last sentence thereof); 66 (excluding the last sentence thereof); 67-70; 71 (excluding the first word of the last sentence and the remainder of that sentence after "material"); 72; 73 (excluding the first sentence thereof); 74 (excluding the words "CPH and" in the second to last sentence thereof); 75-81; 85; 86; 87 (excluding (g)); 90, and 91 (excluding (g)) of Plaintiff's Amended Complaint, as amended by the Court's Amended Order on Morgan Stanley's Motion to Dismiss, Motion to Strike, and Motion for More Definite Statement, shall be read to the jury and the jury instructed that those facts are deemed established for all purposes in this action. A copy of a redacted Amended Complaint is attached as Exhibit A. It is further

ORDERED AND ADJUDGED that the Court shall read to the jury a Statement similar to that attached as Exhibit A to the Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, but incorporating the relevant additional findings of this Order, and the jury will be instructed that it may consider those facts in determining whether MS & Co. sought to conceal its offensive conduct when determining whether an award of punitive damages is appropriate. See General Motors Corp. v. McGee, 837 So. 2d 1010 (Fla. 4th DCA 2002), rev. den. 851 So. 2d 728 (Fla. 2003). Counsel are each invited to submit proposed Statements. It is further

ORDERED AND ADJUDGED that CPH shall be entitled to an award of reasonable fees and costs incurred as a result of the Renewed Motion for Entry of Default Judgment and the violations of Court orders recited herein. The amount shall be determined at an evidentiary hearing following trial. It is further

ORDERED AND ADJUDGED that MS & Co. is relieved of any future obligation to

comply with the April 16, 2004 Agreed Order and the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s Motion to Participate in Search of Additional E-Mail Back-Up Tapes or Appoint Third Party to Conduct Search. It is further

ORDERED AND ADJUDGED that the pro hac vice admission of Thomas Clare is revoked. It is further

ORDERED AND ADJUDGED that the portions of CPH's Motion for Correction and Clarification of Order on CPH's Motion for Adverse Inference that seek to amend the body of that Order to correct clerical and spelling errors, as agreed to by counsel, is Granted, and the corrections deemed made to the body of the Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, by interlineation. In all other respects the remainder of the Motion for Correction and Clarification is declared moot.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 23rd day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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In April 1997, Morgan Stanley began serving as Sunbeam's investment banker. Morgan Stanley originally attempted to find someone to buy Sunbeam. When Morgan Stanley was unable to find a buyer, Morgan Stanley developed a strategy for Sunbeam to use its fraudulently-inflated stock to acquire a large company that Sunbeam would own and operate. Then, trading on Morgan Stanley's relationships with CPH's senior officers, Morgan Stanley found

Exhibit A

Coleman for Sunbeam. At the time of the sale to Sunbeam, Coleman was a leading manufacturer and marketer of consumer products for the worldwide outdoor recreation market, with annual revenues in excess of $1 billion.

After Sunbeam announced plans to acquire Coleman, Morgan Stanley agreed to underwrite a $750 million debenture offering for Sunbeam. Sunbeam needed the proceeds of that debenture offering to complete the acquisition of Coleman. As Sunbeam's investment banker and as the sole underwriter for the $750 million debenture offering, Morgan Stanley received detailed and specific information concerning Sunbeam's financial condition and performance. Morgan Stanley received information that directly contradicted Sunbeam's and Morgan Stanley's assertions to CPH that Sunbeam had undergone a successful turnaround and that its financial performance had dramatically improved. By no later than March 18, 1998, Morgan Stanley knew that Sunbeam's January and February 1998 sales were only 50% of January and February 1997 sales, and Morgan Stanley also knew that the shortfall was caused by Sunbeam's practice of accelerating sales which otherwise would have occurred in 1998 in order to boost Sunbeam's income in 1997. Although Morgan Stanley and Sunbeam previously had advised CPH that Sunbeam's sales were running ahead of analysts' expectations for the first quarter, Morgan Stanley decided not to correct those material misrepresentations. Instead, in March 1998, Morgan Stanley assisted Sunbeam in concealing the problems with Sunbeam's first quarter 1998 sales

16div-016234

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") directly or indirectly owned 44,067,520 shares — or approximately 82% — of Coleman prior to the transactions at issue. On March 30, 1998, Sunbeam acquired CPH's interest in Coleman. Sunbeam paid for the Coleman shares with 14.1 million shares of Sunbeam common stock and other consideration.

Defendant Morgan Stanley & Co., Inc. ("Morgan Stanley") is a highly sophisticated investment banking firm that provides a wide range of financial and securities services. Among other things, Morgan Stanley provides advice on mergers and acquisitions and raises capital in the equity and debt markets. Morgan Stanley served as Sunbeam's investment banker and as the underwriter of securities issued by Sunbeam in connection with the events at issue herein.

16div-016235

Sunbeam Corporation ("Sunbeam") was a publicly-traded company headquartered in Delray Beach, Florida. Sunbeam designed and manufactured small household appliances and outdoor consumer products, which it marketed under the Sunbeam and Oster brand names. Sunbeam filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code in February 2001.

Albert Dunlap ("Dunlap") was the Chief Executive Officer of Sunbeam from July 1996 until June 1998 when he was terminated by Sunbeam's Board of Directors.

Russell Kersh ("Kersh") was the Executive Vice President of Sunbeam from July 1996 until June 1998 when he was terminated by Sunbeam's Board of Directors.

Arthur Andersen LLP ("Andersen") provided outside accounting services to Sunbeam through its West Palm Beach, Florida office. Andersen auditors provided information concerning Sunbeam's first quarter 1998 sales and earnings to Morgan Stanley.

16div-016236

Sunbeam designed and manufactured outdoor and household consumer products, which it marketed under the Sunbeam and Oster brand names. Sunbeam's products included small kitchen appliances, humidifiers, electric blankets, and grills. Many of the country's leading retail stores, including Wal-Mart, Target, and Home Depot, were among Sunbeam's major customers.

Despite Sunbeam's well-known brands and strong customer base, its financial performance was disappointing. In 1994, Sunbeam earned $1.30 per share. In 1995, Sunbeam's earnings declined to $0.61 per share. In 1996, Sunbeam's earnings continued to suffer. On March 22, 1996, Sunbeam issued an early warning that its first quarter earnings would be well under analysts' expectations and down from first quarter 1995. Shortly after issuing the March 22 earnings warning, Sunbeam's Chief Executive Officer and two of Sunbeam's directors announced their resignations. Less than a week later, Sunbeam announced that its first quarter 1996 earnings had plunged 42% from first quarter 1995 levels. Sunbeam also announced that its second quarter 1996 earnings would be lower than its second quarter 1995 earnings.

Sunbeam's disappointing earnings caused its stock price to plummet. During 1995, the price at which Sunbeam's stock traded fell 40%, from a high of $25-1/2. In 1996, Sunbeam's stock price continued to decline until it reached a low of $12-1/4 in July.

16div-016237

On July 18, 1996, Sunbeam's board of directors hired Albert Dunlap as Sunbeam's new Chief Executive Officer. Based upon brief terms as Chief Executive Officer of other publicly traded companies, including Scott Paper Company ("Scott Paper"), Dunlap was viewed as a "turnaround specialist" — that is, someone who could take a poorly performing company and significantly increase its value by "turning around" its financial performance. Because Dunlap touted the benefits from firing large numbers of employees and closing large numbers of plants, Dunlap became widely known as "Chainsaw Al." Dunlap lived in Boca Raton, Florida, and one of his first tasks at Sunbeam was to consolidate the company's six headquarters into one located in Delray Beach, Florida.

Immediately after joining Sunbeam, Dunlap hired Kersh as Sunbeam's Chief Financial Officer. Kersh had teamed with Dunlap for over 15 years, serving as a senior executive with Dunlap at other companies, including Scott Paper. Dunlap also brought in several other hand-picked executives to make up his senior management team.

Dunlap and his senior management team entered into employment agreements with Sunbeam. Under those agreements, Dunlap and his senior management team stood to make tens of millions of dollars if they were able to boost Sunbeam's apparent value and then sell Sunbeam to another company at a premium.

In order to convince other companies that they should want to purchase Sunbeam, Dunlap needed to improve Sunbeam's reported financial performance quickly and dramatically. It was, of course, no small task to transform Sunbeam from a poorly performing company, with weak sales and declining profits, into a strong company with growing sales and

16div-016238

soaring profits. In fact, as the world later learned, Dunlap did not achieve that change in Sunbeam's fortunes. Instead, Dunlap created the illusion of a dramatic turnaround at Sunbeam by engaging in what SEC officials subsequently described as a "case study" in financial fraud.

Dunlap had a three-step plan at Sunbeam. In the first step, Dunlap overstated Sunbeam's financial problems so that Sunbeam appeared to be in worse shape than it really was. After making Sunbeam look worse, Dunlap moved to step two, where he made Sunbeam look more valuable than it really was by inflating Sunbeam's sales and engaging in other earnings manipulations. In step three, Dunlap planned to sell Sunbeam to another company before it became apparent that the "improved" results were fictional. By doing so, Dunlap would make tens of millions of dollars and would be free to blame his successor for any subsequent problems.

Dunlap began implementing his strategy soon after his arrival at Sunbeam in 1996. Claiming to be engaged in a clean-up of Sunbeam's financial problems, Dunlap recorded artificially high reserves and booked expenses that should not have been recorded until later periods. Both of those actions made Sunbeam's financial condition appear worse than it really was, thus lowering the benchmark for measuring Sunbeam's performance in future years.

The overstated reserves also provided Dunlap a means by which he could inflate Sunbeam's future results during the second step of his plan. Dunlap later could "re-evaluate" and release millions of dollars from the overstated reserves to boost income in later periods. The income from released reserves contributed to the illusion of a rapid turnaround in Sunbeam's performance. Using inflated reserves to enhance income in future periods is a fraudulent practice and overstated reserves are commonly called "cookie jar" reserves.

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After making Sunbeam look worse than it really was in 1996, Dunlap manipulated Sunbeam's sales and expenses in 1997 to create the false appearance of quarter after quarter improvement in financial performance. For example, Dunlap caused Sunbeam to inflate its sales by engaging in phony "bill and hold" sales. Under this practice, Sunbeam recognized revenues from "sales," even though customers did not actually pay for or even take delivery of the products, which continued to sit in Sunbeam's own warehouses. Although Sunbeam recorded the "bill and hold" sales as if they were current sales, they were, in reality, simply sales stolen from future quarters. In 1997, phony "bill and hold" sales added approximately $29 million in sales and $4.5 million in income.

Throughout 1997, Sunbeam also engaged in a sales practice known as "channel stuffing" — accelerating sales that otherwise would occur in a later period, sometimes by offering steep discounts or other extraordinary customer inducements. On the grand scale employed by Sunbeam, channel stuffing inevitably leads to major sales shortfalls in later periods when "stuffed" customers simply stop buying. Sunbeam's senior sales officer referred to Sunbeam's unsustainable practice of inflating performance through accelerated sales as the "doom loop."

Dunlap further "enhanced" Sunbeam's income in 1997 by causing Sunbeam to record a "profit" of $10 million from a sham sale of its warranty and spare parts business. Dunlap also made Sunbeam appear to be more successful than it really was by reaching into the "cookie jar," reversing inflated reserves, and recording $35 million as income. Sunbeam's 1997 profit margins also looked better than they really were because Dunlap already had recorded millions of dollars of 1997 expenses in 1996.

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In October 1997, Dunlap announced that Sunbeam's "turnaround" was complete. Compared to the third quarter of 1996, Sunbeam's third quarter 1997 performance was remarkable. In the third quarter of 1996, Sunbeam had reported a loss of $18.1 million. In the third quarter of 1997, however, Sunbeam reported earnings of $34.5 million — an extraordinary turnaround from substantial losses to hefty profits. Sunbeam's combined results for the first three quarters showed dramatic improvement as well. Sunbeam reported that its profits for the first nine months were up tenfold over the same period the year before — from $6.5 million in 1996 to $67.7 million in 1997. Sunbeam's reversal of fortune caused a spectacular increase in the price of its stock. In July 1996, when Dunlap was hired, Sunbeam's shares traded at $12-1/4. By October 1997, Sunbeam's shares had risen to $49-13/16.

With steps one and two successfully completed, Dunlap was more than eager to complete the final step of his scheme: to sell Sunbeam to another company and collect tens of millions of dollars for himself before the outside world could learn the truth about Sunbeam's phony "turnaround." To accomplish that third and final step, Dunlap needed an investment banking firm

When Dunlap announced in early 1997 that he would begin interviewing investment bankers, Morgan Stanley immediately began pursuing the job. Although Morgan Stanley had no previous relationship with Sunbeam, one of Morgan Stanley's senior executives, William Strong, had worked closely with Dunlap on other large transactions between 1986 and 1993, when Strong was employed by Salomon Brothers.

16div-016241

Morgan Stanley knew that it was competing with other investment bankers, including Mark Davis, for Dunlap's business. Davis was the head of the mergers and acquisitions department at Chase Securities and had worked previously with Strong at Salomon Brothers. Davis had a very strong relationship with Dunlap, and Davis had served as Dunlap's investment advisor on numerous transactions, including Dunlap's sale of Scott Paper. Shortly after arriving at Sunbeam, Dunlap hired Davis to handle the sale of Sunbeam's furniture business.

Morgan Stanley put together a team headed by its Vice Chairman, Bruce Fiedorek, and Strong. Beginning in April 1997, Morgan Stanley's personnel traveled to Sunbeam's offices in Delray Beach, Florida to study Sunbeam and woo Dunlap. After months of uncompensated work, in September 1997, Morgan Stanley finally persuaded Dunlap to name Morgan Stanley as Sunbeam's exclusive investment banker. Dunlap instructed Morgan Stanley to find a buyer for Sunbeam. Morgan Stanley knew that if it failed to deliver a major transaction, Morgan Stanley would not be compensated for the extensive work it had performed for Sunbeam. Morgan Stanley also knew that Davis and Chase Securities were standing by — ready and willing to reclaim their position as Dunlap's investment banker of choice.

Throughout the fall of 1997, Morgan Stanley aggressively searched for a buyer for Sunbeam. Morgan Stanley put together extensive and detailed materials to use in marketing Sunbeam to potential buyers. Morgan Stanley pitched the transaction to more than 10 companies — including Gillette, Colgate, Sara Lee, Rubbermaid, Whirlpool, and Black & Decker — that Morgan Stanley hoped might have an interest in acquiring Sunbeam. Morgan Stanley, however, was not able to find a buyer.

16div-016242

As 1998 approached, the pressure on Dunlap increased. Dunlap was aware that Sunbeam would be unable to sustain the appearance of a successful turnaround in 1998 because Sunbeam had stolen sales from 1998 to boost 1997's numbers and the "cookie jar" reserves had been depleted. Dunlap needed a way to conceal Sunbeam's phony turnaround until a buyer could be found. Morgan Stanley provided the solution to Dunlap's problem.

Morgan Stanley knew that its failure to find a buyer for Sunbeam could prove fatal to the relationship it had worked so hard to establish with Dunlap. As the pressure on Dunlap increased, the pressure on Morgan Stanley increased as well. Although Morgan Stanley was not able to find a buyer for Sunbeam, Morgan Stanley responded with a plan that would allow Dunlap to conceal his fraud. Morgan Stanley recommended that Sunbeam acquire other companies, using Sunbeam's stock, which was fraudulently inflated, as the "currency" that would be used to pay for the acquisitions.

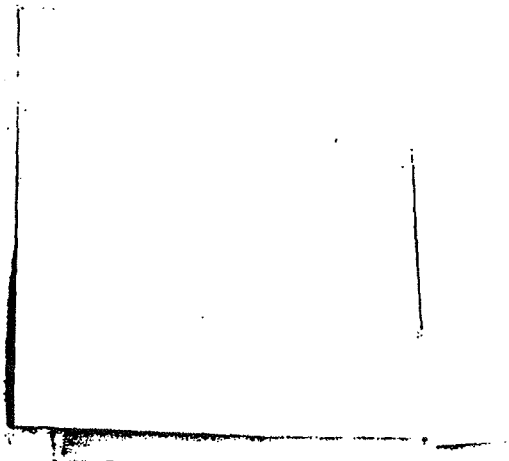
Morgan Stanley's strategy was doubly deceptive. First, Morgan Stanley's acquisition strategy would allow Dunlap to consolidate Sunbeam's results with those of the newly-acquired companies. That would help Dunlap camouflage Sunbeam's results and make it difficult to detect any shortfall in Sunbeam's performance. Dunlap simply could label any problems that were detected as attributable to the poor performance of the acquired companies or as a temporary "blip" caused by the distraction of integrating the acquired companies with Sunbeam. Second, Morgan Stanley's strategy would allow Dunlap to take new massive restructuring charges (purportedly relating to the acquisitions) and thus create more "cookie jar" reserves that could be tapped to bolster the future earnings of the combined companies.

Morgan Stanley identified Coleman as one of the key potential acquisition targets. CPH owned 82% of Coleman's stock. Morgan Stanley searched the ranks of its investment bankers to locate those with the best access to CPH. Drawing on relationships between some of Morgan Stanley's investment bankers and senior CPH officers, Morgan Stanley set about trying to persuade CPH to sell its interest in Coleman to Sunbeam — and, most importantly, to accept Sunbeam stock as consideration.

Morgan Stanley laid the groundwork for a meeting to take place in December 1997 in Palm Beach, Florida between Dunlap and Kersh and representatives of CPH. In advance of the Palm Beach meeting, Morgan Stanley provided materials to Sunbeam to prepare Sunbeam for the meeting. Morgan Stanley also met with Kersh and other Sunbeam personnel to prepare for the Palm Beach meeting. However, Dunlap nearly scuttled Morgan Stanley's carefully crafted plan at the outset. During the December 1997 Palm Beach meeting, when CPH rejected Dunlap's initial all-stock offer, Dunlap became so angry that he cursed and ranted at the CPH representatives and stormed out.

Dunlap's tantrum appeared to kill any chance that CPH would sell its interest in Coleman to Sunbeam. Morgan Stanley, however, worked to revive the discussions. Drawing again on Morgan Stanley's relationships with CPH officers, Morgan Stanley was able to restart the discussions with CPH with the promise that Dunlap would be kept away from the negotiating table. Thereafter, Morgan Stanley, through Managing Directors Strong, James Stynes, and Robert Kitts, led the discussions with CPH on Sunbeam's behalf.

Morgan Stanley knew that it had to persuade CPH not only to sell Coleman, but also to accept Sunbeam stock — ultimately, 14.1 million shares of Sunbeam stock — as a major part of the purchase price. During the course of negotiations, Morgan Stanley prepared and provided CPH with false financial and business information about Sunbeam designed to create the appearance that Sunbeam was prospering and that Sunbeam's stock had great value. For example, Morgan Stanley provided CPH with false 1996 and 1997 sales and revenue figures, as well as false projections that Sunbeam could not expect to achieve. Together, in face-to-face discussions, Morgan Stanley and Sunbeam assured CPH that (a) Sunbeam would meet or exceed its first quarter 1998 earnings estimates; (b) analysts' 1998 earnings estimates for Sunbeam were correct; and (c) Sunbeam's plan to earn $2.20 per share in 1998 was easily achievable and probably low. Morgan Stanley and Sunbeam also falsely assured CPH that Sunbeam's "early buy" sales program would not hurt Sunbeam's future revenues. However, the "early buy" program was one of Sunbeam's revenue acceleration programs — and the devastating effects of Sunbeam's revenue acceleration programs already had begun to materialize at Sunbeam. Sunbeam's January and February 1998 sales were down drastically, although those results were not disclosed to CPH or the public. To the contrary, Morgan Stanley and Sunbeam together specifically advised CPH that Sunbeam's first quarter 1998 sales were "tracking fine" and running ahead of analysts' estimates.



On February 27, 1998, Sunbeam's Board of Directors met at Morgan Stanley's offices to consider the purchase of Coleman, as negotiated by Morgan Stanley.

At the February 27, 1998 meeting, Morgan Stanley made an extensive presentation to Sunbeam's Board concerning the proposed transaction. Numerous Morgan Stanley representatives, including Managing Directors Strong, Kitts, Stynes, Ruth Porat, and Vikram Pandit, attended the meeting.

Morgan Stanley presented Sunbeam's board with Morgan Stanley's opinion on the value of Coleman. Using a discounted cash flow analysis, which Morgan Stanley represented was the best gauge of stand-alone economic value and the best method of capturing the unique value of Coleman, Morgan Stanley valued CPH's Coleman stock at a range of $31.06 to $53.24 per Coleman share. CPH's 44,067,520 Coleman shares were worth, therefore, between $1.369 billion and $2.346 billion.

Following Morgan Stanley's presentation, Sunbeam's Board of Directors voted to acquire Coleman on the very favorable terms that Morgan Stanley had negotiated.

Morgan Stanley spent the following weekend developing Sunbeam's public relations strategy to announce the Coleman transaction. Morgan Stanley scripted the points for Dunlap to make in a conference call with analysts. Morgan Stanley also crafted a list of "key media messages" for Dunlap to use in his communications with the press. On Sunday, March 1, 1998, Morgan Stanley spoke with a reporter for the Wall Street Journal to inform him that Sunbeam would announce its acquisition of Coleman the following morning.

Sunbeam announced its acquisition of Coleman on Monday, March 2, 1998, prior to the opening of the financial markets. Consistent with Morgan Stanley's valuation, investors viewed Sunbeam's purchase of Coleman — and the price that Sunbeam had paid — very favorably. The day before the acquisition was announced, Sunbeam's stock closed at $41-3/4. In the days following Sunbeam's announcement of the transaction, Sunbeam's stock rose approximately 25%, to a high of $52.

Dunlap knew that Sunbeam needed to raise funds to pay the cash portion of the acquisition consideration. Dunlap also knew that Sunbeam needed cash to purchase two other smaller companies in addition to Coleman. Morgan Stanley recommended that Sunbeam raise funds through a $500 million offering of convertible subordinated debentures. To assure the offering's success, Morgan Stanley lent its name to the offering. Indeed, Morgan Stanley agreed to serve as the sole underwriter for the offering.

The money raised from the sale of the debentures was used by Sunbeam to complete the acquisition of Coleman.

Unbeknownst to CPH or the public, Sunbeam's first quarter 1998 sales were a small fraction of the financial community's expectations for the quarter. If Dunlap could consolidate Sunbeam's sales with Coleman's sales, Dunlap knew that he could obscure Sunbeam's actual first quarter sales. As a result, Dunlap was especially anxious to complete the acquisition of Coleman before Sunbeam announced its first quarter 1998 sales. Indeed, the success of the scheme depended upon Sunbeam's ability to complete the Coleman acquisition before Sunbeam's first quarter results

were announced. To satisfy Dunlap's objectives, Morgan Stanley moved up the launch date of the offering.

The debentures were marketed to investors at a series of "road show" meetings and conference calls arranged by Morgan Stanley. Morgan Stanley prepared and distributed a memorandum for its sales force to use in marketing the debentures to investors. Morgan Stanley also developed the script for Dunlap and Kersh to deliver during the road show. In those materials, Morgan Stanley misrepresented Sunbeam's financial performance and emphasized Dunlap's purported "turnaround" accomplishments.

Morgan Stanley launched the debenture offering with a research analyst presentation to the Morgan Stanley sales force. As part of Morgan Stanley's growing relationship with Sunbeam, one of Morgan Stanley's top-rated research analysts planned to initiate equity coverage of Sunbeam. That Morgan Stanley analyst had modeled values for Sunbeam's acquisition of Coleman that were higher than even Sunbeam's management had predicted.

Although Morgan Stanley initially planned to sell $500 million worth of debentures, Morgan Stanley's efforts were so successful that the size of the offering was increased to $750 million on March 19, 1998 — the day of the last road show. The debentures were sold to investors nationwide, including investors based in Florida.

As Sunbeam's investment banker and the sole underwriter for the debenture offering, Morgan Stanley had a duty to investigate Sunbeam's finances and business operations.

Morgan Stanley, which had been working hand-in-hand with Sunbeam for

16div-016248

almost a year and had traveled to Sunbeam's Florida offices, repeatedly asserted that it had satisfied that duty.

Strong, who was one of the senior Morgan Stanley investment bankers involved, has admitted in sworn testimony that he may have had more than 100 telephone conversations with Dunlap and Kersh (whose offices were in Sunbeam's Delray Beach headquarters) and that Strong was "sure" that he would have been apprised of Sunbeam's financial performance during the first two months of 1998.

With the $750 million debenture offering and the Coleman transaction set to close at the end of March 1998, Sunbeam's Florida-based outside auditors were shocked that Morgan Stanley had not asked them about Sunbeam's financial performance for first quarter 1998. Sunbeam's auditors were alarmed because Sunbeam's first quarter results were a disaster, but Dunlap, Kersh, and Morgan Stanley were telling CPH and the investing public,

that Sunbeam's turnaround was a success, that Sunbeam's sales for the first quarter of 1998 were ahead of the expectations of outside financial analysts, and that Sunbeam was poised for record sales.

On March 17, Sunbeam's auditors forced the issue. From their Florida offices, Sunbeam's auditors sent Morgan Stanley a letter reporting that Sunbeam's net sales through January 1998 were down 60% — $28 million in January 1998, as compared to $73 million in January 1997. The March 17 letter explained that the decline was "primarily due to the . . . new early buy program for grills which accelerated grill sales into the fourth quarter of fiscal 1997."

The next day, Morgan Stanley was faxed a schedule from Sunbeam's Florida office that showed that Sunbeam's January and February 1998 net sales totaled $72 million, an amount that was 50% lower than Sunbeam's January and February 1997 net sales of $143.5 million.

16div-016249

Based on information that Sunbeam and Morgan Stanley had disseminated, Wall Street analysts were anticipating that Sunbeam's first quarter 1998 net sales would be in the range of $285 million to $295 million. Sales in that range would have been approximately 15% higher than first quarter 1997 sales. Sunbeam's January and February 1998 sales, however, totaled barely 25% of $285 million. As Sunbeam's outside auditors advised Morgan Stanley in writing, the sales drop-off was caused by Sunbeam's sales acceleration program. The information put into Morgan Stanley's hands on March 17 and March 18 showed that Morgan Stanley's and Sunbeam's assertions to CPH and other investors were false. Contrary to what Morgan Stanley and Sunbeam had represented, Sunbeam had not undergone a successful turnaround, Sunbeam's financial performance had not dramatically improved, and Sunbeam's performance in 1998 was not better than Wall Street analysts' expectations. It was imperative, therefore, that the truth be kept from CPH until the Coleman transaction closed at the end of March 1998.

Morgan Stanley did not disclose Sunbeam's disastrous first quarter, Morgan Stanley did not insist that Sunbeam disclose its disastrous first quarter, Morgan Stanley did not correct any of the false and misleading statements it and Sunbeam had made to CPH about Sunbeam's business or performance, and Morgan Stanley did not suspend any of the critical transactions that were scheduled to close in the next two weeks. Instead, with Morgan Stanley's knowledge and assistance, Sunbeam prepared and issued a false press release on March 19, 1998 that affirmatively misstated and concealed Sunbeam's true condition.

The March 19, 1998 press release stated: "Sunbeam Corporation . . . said today that it is possible that its net sales for the first quarter of 1998 may be lower than the range of

16div-016250

Wall Street analysts' estimates for $285 million to $295 million, but net sales are expected to exceed 1997 first quarter net sales of $253.4 million. . . . The shortfall from analysts' estimates, if any, would be due to changes in inventory management and order patterns at certain of the Company's major retail customers. The Company further stated that based on the strength of its new product offerings and powerful brand names, it remains highly confident about the overall sales outlook for its products for the entire year."

As Morgan Stanley was fully aware, the March 19, 1998 press release was false, misleading, and failed to disclose material information. The March 19, 1998 press release failed to disclose Sunbeam's actual January and February 1998 sales or the true reasons for the poor results. Instead, the press release held out the false possibility that Sunbeam still could achieve sales of $285 million to $295 million and suggested that, if any shortfall occurred, that shortfall would be due to the fact that certain retailers had decided to defer first quarter purchases to the second quarter. The press release also assured that Sunbeam at least would exceed first quarter 1997 net sales of $253.4 million. Based on information that Morgan Stanley had in its hands on March 18, 1998, it was obvious that Sunbeam would not achieve sales of $285 million to $295 million and that Sunbeam's first quarter 1998 sales would be below its first quarter 1997 numbers. To simply meet 1997 first quarter sales, Sunbeam needed sales of $123.3 million over the 12 remaining days of the quarter — an average of $10.28 million per day. Sales of $10.28 million per day would be 306% more than the average per day sales in March 1997, and 281% more than the average per day sales for the first 17 days of March 1998. Furthermore, Morgan Stanley knew that the shortfall from analysts' estimates was not caused by retailers' deciding to defer purchases from the first quarter of 1998 to the second quarter, as the press release indicated. Rather, as Sunbeam's outside auditors had

16div-016251

advised Morgan Stanley in writing, the collapse in first quarter sales was caused by Sunbeam's acceleration of 1998 sales into the fourth quarter of 1997.

After Sunbeam's false press release was issued, Morgan Stanley stood arm-in-arm with Sunbeam while Dunlap and Kersh told CPH, analysts, and investors that the March 19, 1998 release was a purely cautionary statement because some first quarter 1998 sales might simply "spillover" into the second quarter and that Sunbeam still believed that it actually would meet analysts' estimates of $285 million to $295 million in first quarter 1998 sales.

Morgan Stanley knew that a full and truthful disclosure of Sunbeam's first quarter sales would doom the debenture offering, which was scheduled to close on March 25, 1998,

As Morgan Stanley was fully aware, the written contract between CPH and Sunbeam gave CPH the express legal right to refuse to close the sale if there was a material adverse change in Sunbeam's "business, results of operation or financial condition."

Furthermore, if the transactions did not close, Morgan Stanley would not be paid its $10.28 million fee for the Coleman acquisition or its $22.5 million fee for underwriting the subordinated debenture offering. Morgan Stanley also knew that Sunbeam would promptly replace Morgan Stanley with another investment banking firm – such as the Chase Securities team led by Mark Davis.

16div-016252

Sunbeam's outside auditors already had made it perfectly clear to Morgan Stanley that Sunbeam's first quarter 1998 sales were a disaster,

One of Sunbeam's senior outside auditors, Lawrence Bornstein, has testified under oath that on March 19, 1998, he told Morgan Stanley's John Tyree that the statement in Sunbeam's March 19, 1998 press release — that Sunbeam would at least exceed first quarter 1997 sales of $253.4 million — was not credible: "Just do the math . . . they've done a million dollars in sales the first 70 days of the year and now they need to do $10 million worth of sales for the next . . . I think it was 11 days . . . I mean, something ridiculous." Bornstein also told Tyree: "I've been to every shipping dock domestically, I've been to Hattiesburg, I've been to Neosho, I've been to Mexico City, and I don't think these guys can physically ship this much stuff."

Morgan Stanley knew that the March 19 press release was false and misleading. Despite that knowledge and Bornstein's explicit statements, Morgan Stanley continued with its preparations to close the debenture offering on March 25, 1998 and the Coleman acquisition on March 30, 1998.

As part of those preparations, on March 24, 1998, Morgan Stanley's Tyree spoke by telephone with Sunbeam's Kersh, who was located in Sunbeam's Delray Beach offices, to obtain an updated report concerning Sunbeam's first quarter performance. By the time of that March 24, 1998 call, Sunbeam had fallen even further behind first quarter 1997 sales. As of March 18, 1998, Sunbeam needed to achieve average sales of $10.28 million per day, over 12 days, to reach

16div-016253

first quarter 1997 sales. Sunbeam's sales between March 18 and March 24, 1998 had averaged only $6.81 million per day — well short of the $10.28 million per day that Sunbeam needed to achieve. Sunbeam's March 18 through March 24, 1998 sales were further proof that Sunbeam's March 19, 1998 press release was false and that Sunbeam would not achieve first quarter 1998 sales in excess of first quarter 1997 sales.

Morgan Stanley also knew no later than March 25, 1998, if not much earlier, that Sunbeam's earnings for the first quarter of 1998 were going to miss Wall Street analysts' earnings expectations, which were in the range of $0.28 to $0.31 per share (excluding one-time charges). Sunbeam's outside auditors advised Morgan Stanley on March 25 that Sunbeam had suffered a $41.19 million loss during the first two months of 1998, including a one-time charge of $30.2 million. Even excluding that one-time charge, Sunbeam's loss for the first two months was $0.13 per share. To achieve first quarter 1998 operating earnings of $0.28 per share, which were at the low end of analyst expectations, Sunbeam needed to realize a profit of $35.5 million during March 1998 alone. A net profit of $35.5 million in March was 500% more than Sunbeam's net profit for the entire first quarter of 1997. In fact, Sunbeam's first quarter 1998 earnings fell far short of Wall Street's expectations. Sunbeam's first quarter earnings were material,

Having directly participated in misleading CPH Morgan Stanley had a duty to disclose the true facts before the closing of the debenture offering and the Coleman acquisition. Morgan Stanley also could have required Sunbeam to postpone the closings of

16div-016254

those transactions until the necessary disclosures were made. Morgan Stanley did neither. Instead, Morgan Stanley marched forward and closed the $750 million debenture offering on March 25, 1998, which was needed to close the Coleman transaction, and assisted Sunbeam in closing the acquisition of Coleman on March 30, 1998.

Morgan Stanley received $22.5 million for the subordinated debenture offering and $10.28 million for the Coleman acquisition. Morgan Stanley would have received nothing if the transactions had failed to close.

On April 3, 1998 — just four days after the Coleman transaction closed — Sunbeam announced that sales for the first quarter of 1998 would be approximately 5% below the $253.4 million in sales that Sunbeam reported in the first quarter of 1997. In other words, Sunbeam was expecting sales in the range of $240 million. That sales shortfall was shocking news, particularly in view of assurances provided by Sunbeam both in and after its March 19, 1998 press release that $285 million to $295 million of sales was still a real possibility. The April 3, 1998 press release also disclosed that Sunbeam expected to show a loss for the quarter, although the release did not disclose the magnitude of the loss or how much of the loss was attributable to operating earnings as opposed to one-time charges. Sunbeam's news stunned . . . . the market. On April 3rd, Sunbeam's stock price dropped 25% — from $45-9/16 to $34-3/8.

. . . Sunbeam's actual first quarter 1998 performance was even worse than Sunbeam disclosed on April 3, 1998. The April 3, 1998 release indicated that Sunbeam's first quarter sales were in the range of $240 million. In fact, Sunbeam's first quarter sales were $224.5

million. Sunbeam obscured the true shortfall by extending its quarter from March 29 to March 31, 1998 — thereby adding two more days of Sunbeam sales. Sunbeam also failed to disclose that it had included two days of Coleman sales after the Coleman transaction closed on March 30. Further, Sunbeam inflated first quarter 1998 sales with $29 million of new phony "bill and hold" sales.

75. Just as Sunbeam's first quarter 1998 sales had been a disaster, so, too, were Sunbeam's first quarter 1998 earnings. Morgan Stanley and Sunbeam had represented to CPH that Sunbeam would achieve or exceed analyst first quarter 1998 earnings estimates. At the time of that representation, the consensus among analysts was that Sunbeam would enjoy first quarter 1998 earnings of $0.33 per share. However, on May 9, 1998, Sunbeam disclosed that it would record a first quarter loss of $0.09 per share (excluding one-time charges) — more than $0.40 per share lower than CPH had been told to expect.

Within weeks, Dunlap's fraudulent scheme began to unravel. In June 1998, after a number of news articles critical of Sunbeam's practices, Sunbeam's Board of Directors launched an internal investigation. That investigation led quickly to the firing of Dunlap and Kersh, and, subsequently, to a restatement of Sunbeam's financial statements for 1996, 1997, and the first quarter of 1998.

[redacted]

77. As detailed above, Morgan Stanley participated in a scheme to mislead CPH and others and cover up the massive fraud at Sunbeam until Morgan Stanley and Sunbeam could close the purchase of Coleman. Morgan Stanley provided CPH with false information concerning Sunbeam's 1996 and 1997 financial performance, its business operations, and the value of Sunbeam's stock. Morgan Stanley also actively assisted Sunbeam in concealing Sunbeam's

16div-016256

disastrous first quarter 1998 sales and earnings and the true reasons for Sunbeam's poor performance.

Morgan Stanley knew that its statements to CPH were materially false and misleading and omitted the true facts.

Morgan Stanley intended that CPH rely on Morgan Stanley's representations concerning Sunbeam.

As detailed above, Dunlap engaged in a fraudulent scheme to inflate the price of Sunbeam's stock by improperly manipulating Sunbeam's 1996 and 1997 performance, by falsely asserting that Sunbeam had successfully "turned around," and by concealing the collapse of Sunbeam's first quarter 1998 sales and earnings and the reasons for Sunbeam's first quarter 1998 performance.

86. As detailed above, Morgan Stanley knew of Dunlap's fraudulent scheme and helped to conceal it until after Sunbeam could close the purchase of Coleman.

16div-016257

As detailed above, Morgan Stanley provided substantial assistance to Dunlap and Sunbeam, including: concealing Sunbeam's first quarter 1998 sales collapse; assisting with the false March 19, 1998 press release; arranging road shows and meetings with prospective debenture purchasers at which Morgan Stanley, Dunlap, and others made false statements concerning Sunbeam's financial condition and business operations; preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam's financial condition and business operations; providing CPH with false financial and business information concerning Sunbeam; scripting Dunlap's false public statements concerning Sunbeam's acquisition of Coleman;

and underwriting the $750 million convertible debenture offering, proceeds from which were used to fund Sunbeam's purchase of Coleman.

16div-016258

As detailed above, Morgan Stanley conspired with Dunlap and other senior Sunbeam executives to conceal the truth about Sunbeam's financial performance and business operations.

As detailed above, Morgan Stanley committed overt acts in furtherance of the conspiracy, including: concealing Sunbeam's first quarter 1998 sales collapse; assisting with the false March 19, 1998 press release; arranging road shows and meetings with prospective debenture purchasers at which Morgan Stanley, Dunlap, and others made false statements concerning Sunbeam's financial condition and business operations; preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam's financial condition and business operations; providing CPH with false financial and business information concerning Sunbeam; scripting Dunlap's false public statements concerning Sunbeam's acquisition of Coleman;

and underwriting the $750 million convertible debenture offering, proceeds from which were used to fund Sunbeam's purchase of Coleman.

16div-016259

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10380 v3

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA
----------x

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. Case No. CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendants.

----------x

RONALD O. PERELMAN

New York, New York

Thursday, November 18, 2004

Reported by: Steven Neil Cohen, RPR

Job No. 167564

According to -- let me ask you this.

Did Mr. Dunlap call you a pig at the meeting?

A. Not that I recall.

Q. Did he tell you that Coleman was a piece of shit?

A. Not that I recall.

Q. Did you tell him that you, Mr. Perelman, wanted $30 a share for Coleman?

A. Yes.

Q. Did Mr. Dunlap tell you that it was only worth 20 bucks?

A. I don't recall the price but he said a price.

Q. Did you tell him -- strike that.

Did Mr. Dunlap tell you that the price he was offering was an early Christmas present?

A. I don't recall that.

Q. Did Mr. Dunlap get agitated during the meeting?

A. I don't know if "agitated" is the right word. He got excited during the

meeting.

Q. Did he turn red?

A. I don't know if he turned red.

Q. At a point in the meeting did Mr. Dunlap tell you in so many words, fuck you?

A. Possibly.

Q. Did he in so many words tell you, screw you?

A. Possibly.

Q. Did Mr. Dunlap in so many words say to you, to you and Mr. Gittis, you guys don't know what the fuck you are talking about?

A. Possibly.

Q. Did you respond at some point to what Mr. Dunlap said with, fuck you?

A. No.

Q. Never used that word?

A. No.

Q. Did Mr. Dunlap tell you at the meeting on December 18 that he was going to save Coleman for you, Mr. Perelman?

A. No.

Q. Nothing like that?

A. Not that I recall.

Q. Did he tell you I am going to do that because I did it at Scott and Sunbeam, anything like that?

A. Not that I recall.

Q. Did he make any reference, that is, Mr. Dunlap, to his work at Scott and Sunbeam?

A. He was very animated and excited about what a fabulous manager he was, how good he was and he we should do this transaction with him.

Q. Did Mr. Gittis say -- part of it is my accent, it is not intentional.

A. That is not hard.

Q. It is also my midwest accent that sounds improper to you.

Did you, during the meeting with Mr. Dunlap, hear him say, I give heart attacks?

A. Possibly something like that.

Q. Was that in reference to being told to calm down because Mr. Dunlap was going to have a heart attack?

A. Something like that.

Q. Did Mr. Gittis say at the meeting for Mr. Dunlap to calm down because whether we make this deal or not Ron isn't going to be any more or less rich?

A. I don't know.

Q. You don't know --

A. What is that comment, whether we make this deal or not Ron --

Q. Will be any more or less rich?

A. I don't think he would have said that.

Q. At the conclusion of the meeting was -- would you describe Mr. Dunlap as agitated at the end of the meeting?

MR. SOLOVY: Object to the form of the question.

BY MR. BEMIS:

Q. Withdrawn.

At the end of the meeting would you describe Mr. Dunlap as agitated?

A. I am not sure. I don't know how much of it was a show, how much of it was true agitation. I thought it was hysterical. I was just laughing.

Q. Mr. Dunlap was using words like

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

VOLUME 75

MORGAN STANLEY & CO., INC.,

Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Tuesday, April 19, 2005
9:20 a.m. - 12:10 p.m.

CPH. Who attended that meeting on behalf of CPH?

A. Myself and Mr. Howard Gittis.

Q. Where did the meeting take place, sir?

A. At my house here in Palm Beach.

Q. Who attended the meeting on the Sunbeam side of the transaction?

A. Al Dunlap.

Q. Was there anyone else in attendance besides you, Mr. Gittis and Mr. Dunlap?

A. Michael Price who was then the largest shareholder of Sunbeam and the chairman of the board of Mutual Shares and Investment Fund and recognized as one of the smartest investors on Wall Street.

Q. Did you know Mike Price before this meeting?

A. Very very casually.

Q. Before trial it was also established that Sunbeam made an initial all-stock offer for your interest in Coleman at that Palm Beach meeting in December of 1997 and that you rejected Sunbeam's all-stock offer. Why did you reject Sunbeam's offer?

A. I had set a price that I wanted for Coleman of $30 a share, and at that meeting we were not offered $30 a share.

Q. What was the value equivalent that you were offered at that meeting, if you recall?

A. In the low twenties.

Q. How did you come up with the $30 per share price, Mr. Perelman?

A. We looked at what we thought the company was worth at that moment.

Q. Which company, sir?

A. Coleman.

Q. Okay.

A. I'm sorry.

Q. That's all right.

A. We looked at the prospects as to what we thought could be done to the company. The budget for next year was a cash flow of $150 million. We thought that was easily obtainable. We looked at the kind of multiples that these kind of products were selling for in private transactions like this would have been, and that's the value that we came up with.

Q. We know that the total number of shares that CPH held in the Coleman Company was a little bit over 44 million shares. At $30 a share, what would that mean the total price for your interest would be?

A. A little over a billion $300 million.

Q. By December 1997 had you told Sunbeam or Morgan Stanley that you wanted Sunbeam stock rather than cash?

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. VOLUME 66

MORGAN STANLEY & CO., INC.,

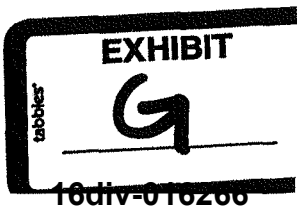
Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Tuesday, April 12, 2005
12:20 p.m. - : P.m.



END OF SIDE BAR.

BY MR. MARKOWSKI:

Q. I'm going to step back a minute with my question, Mr. Maher. In late January 1998, it was your understanding that events occurred to restart discussions with Sunbeam, correct?

A. Yes.

Q. And what did you do at that point? Did you take any action after you learned that discussions were going resume?

A. We restarted work on the analysis of the company, combined enterprise.

Q. Was there a meeting set up at Sunbeam for Morgan Stanley?

MR. WEBSTER: Objection; leading.

THE COURT: Sustained.

BY MR. MARKOWSKI:

Q. Were there further discussions with Morgan Stanley?

A. Yes, there were further discussions with Morgan Stanley.

Q. And what was the first of those discussions?

A. First discussion was a meeting that took

place at, I believe at MacAndrews & Forbes where MacAndrews & Forbes, I believe it was Mr. Stynes and, I believe, Mr. Kitts, although I'm not sure, came by and started to talk about a potential all-stock transaction in the low -- I don't think they actually made a proposal at that point in time, but they gave us a piece of paper or left a document that suggested a transaction in the range of, I believe, 20 to $24 a share for all stock.

Q. When you say all stock...

A. All -- exchanging Sunbeam stock for Coleman stock.

Q. The concept that was being proposed, as you understand it, is Sunbeam could use all Sunbeam stock as part of its proposal to buy Coleman?

A. I believe that's correct.

MR. WEBSTER: Objection; leading.

THE COURT: Sustained.

BY MR. MARKOWSKI:

Q. Your understanding with respect to the type of consideration that was being proposed was what?

A. Was that Sunbeam would exchange all stock for all of the Coleman stock that was outstanding at that point in time. That would be the only consideration of the transaction.

those discussions proceeded over the next three or four-week period?

A. I would characterize that period of time is Morgan Stanley would either call or come visit and make a proposal or talk about the transaction. And I don't know how many times it happened. But let's say four or five times during the course of that month is my recollection. And each time they were told summarily that we weren't interested in what they were talking about, to basically go home. And they kept coming back. That's the way I would describe it.

Q. Did MacAndrews & Forbes make any efforts through you or, to your knowledge, through other people to make counterproposals, counter financial proposals to what Morgan Stanley was offering?

A. No, there were no counterproposals throughout most of that period until there was one right at the end. There were not any counterproposals. No, they were told about as clear as clear could be that the answer was no.

Q. And the answer was no at that point in time for what reason, sir?

A. That we weren't interested in what they were offering in terms of a value of what they were offering.

Q. The values were not high enough?
A. That's correct.
Q. Did you tell -- who was involved? Who was your counterpart in these discussions? Let me ask a background question, sir. Were you yourself directly involved in these conversations with Morgan Stanley?
A. I was.
Q. And who were your counterparts at Morgan Stanley in this discussion that was going on in this four-week period that we're focusing on, late January and mid February?
A. There were two gentlemen principally involved in the negotiations for Morgan Stanley, Jim Stynes and Bob Kitts. And they weren't necessarily on the same conversations all the time, but the two of them, one of the two of them was involved in each conversation.
Q. Was there any point in time, sir, where you told either Mr. Kitts or Mr. Stynes what Mr. Perelman's reactions were to the proposals that were being made by Morgan Stanley during this period from late January through mid February that we're talking about?
A. Well, I assume that they -- I don't know that I was telling them that Mr. Perelman said X. I was saying that we were not interested in their

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO. 2003CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.'S RESPONSE IN OPPOSITION TO MORGAN STANLEY'S MOTION TO ALLOW EXPERT TESTIMONY OF PROFESSOR FISCHEL TO REBUT UNDISCLOSED TESTIMONY BY DR. EMERY

In another effort to resuscitate the untimely expert opinion of Professor Fischel for use at trial, Morgan Stanley has moved for permission to allow Professor Fischel to provide rebuttal testimony, on the ground that the testimony is necessary to refute previously undisclosed opinions volunteered by Dr. Emery in response to five questions posed during his examination. Morgan Stanley's motion is without merit.

1. Morgan Stanley's Motion Constitutes A Renewed And Untimely Motion To Add Professor Fischel As An Expert.

Morgan Stanley's motion is yet another attempt to add a new expert much too late because the deadline for naming experts was back in December 2004. Morgan Stanley already has been permitted to submit a portion of one late expert report — that is, Dr. Grinblatt's supplemental damages report. *See* Ex A, 3/23/05 Order (allowing in portions of Dr. Grinblatt's supplemental report "that express benefit of the bargain damages based on the cell representing the intersection of the Normal Investor for the expected value component and the Full Restatement for the true value component"). But that was not enough. Morgan Stanley then

sought to add still more late experts, including Professor Fischel. This Court denied Morgan Stanley's attempt to add Professor Fischel as an expert on April 5, 2005. *See* Ex. B. Morgan Stanley should not be allowed to add Professor Fischel as an expert now under the guise of a so-called "rebuttal" expert in response to Dr. Emery.

2. Each Of The Five Answers Identified In Morgan Stanley's Motion Was In Response To Legitimate And Unobjectionable Questions.

Morgan Stanley's motion is without merit because all of the testimony of Dr. Emery that is identified in Morgan Stanley's motion was given in response to legitimate and unobjectionable questions — including questions approved by this Court. During the course of the parties' arguments concerning the permissible scope of Dr. Emery's testimony, this Court made clear that Dr. Emery would be allowed to place his testimony in historical context, so long as he did not attempt to draw distinctions between the circumstances prevailing in the 1997-1998 time frame and today (Ex. C at 7358:18-25):

> THE COURT: What's the reformulation?
>
> MR. SCAROLA: Did the investing community have confidence in the honesty and accuracy of publicly filed financial information in 1997 and 1998?
>
> MR. HANSEN: Same objections, Your Honor.
>
> THE COURT: That question I would allow if we're not drawing the distinction.

The first two excerpts of the testimony identified in Morgan Stanley's motion are in response to unobjectionable questions like the one approved by the Court. Each question sought to elicit historical background information without attempting to contrast the situations in different time periods:

> Q. In the 1997, early 1998 time frame in particular, to what extent did analysts place confidence in the honesty and integrity of public corporations'

public financial filings, the documents the SEC requires public corporations to file?

MR. HANSEN: Objection; leading; compound.

THE COURT: Overruled.

THE WITNESS: The general environment has had a significant change since that time period. This is over the last eight or so years.

Id. at 7424:25-7425:9.

Q. Sure. Rather than talking about the changes that have occurred, if any, since 1997 and 1998, I'd like you tell us the degree of confidence the financial analysts placed in the honesty and integrity of those public financial reports back in 1997 and 1998, early 1998.

A. They were generally well thought of. They were generally accepted as being generally true. There were occasionally problems. If you go back several decades, there might have been one or two notable scandals per decade, but there was a general acceptance of them as being valid and representative. And there's been an evolution of increasing doubt.

Id. at 7425:23-7426:10.

Two of the other testimony excerpts are in response to questions posed by jurors and approved by the Court:

Q. Are unaudited receipts reliable?

A. We think of them as being less reliable; although, you know, if you think of what's happened in the last five years, eight years, ten years, you think about the scandals that have happened, audited statements have become less reliable. So people have been fooled. I would say they are more suspect. Unaudited statements are not necessarily unreliable. I mean, I can imagine situations where you would still accept the information, recognizing that they hadn't been audited. Again, it would go back to trust. The illegal aspects, which I have no expertise in, that's not what I'm here for, but there would be a lot of those sorts of considerations that would come in.

Id. at 7987:16-7988:5.

Q. Okay. In your opinion, is there any way First Boston could have known that Morgan Stanley didn't have accurate information if they looked a little harder?

A. As a general course, I think, again, if you go back to what's happened in the last few years, people who are a lot smarter than I am, people who are more knowledgeable, or more knowledgeable in the situation than I have been fooled. If I go back to this situation, I did not study that aspect of it. So I can't say definitively somebody could not have found it out absolutely. At the same time, it certainly, as I said a minute ago, there are things that can't be found out. And so the idea that you could easily find out, there's no way I would think of it as easily found out. I testified about the general consensus. We saw that there was some variation. There was a range of consensus, but the investment community, if you look at the stock price and you see it going up over this time period, I have — I — certainly there were a lot of people fooled about it. So there is no way that I would think that it would be an easy thing. I can't say it couldn't have been done, but I can't envision a way that, oh, sure, just do this and you would have been okay. I think it would have been difficult.

Id. at 7988:6-7989:6. Significantly, counsel for Morgan Stanley moved to strike this testimony as non-responsive, but the Court denied Morgan Stanley's motion. *Id.* at 7989:13-17.

The last testimony excerpt raised in Morgan Stanley's motion arose on redirect. In cross-examination, Morgan Stanley asked Dr. Emery questions concerning what the appropriate level of due diligence is in business transactions today — in the "first quarter of 2005." By asking those questions, Morgan Stanley sought to blur what would be expected today, as opposed to what may have been expected in 1998. Morgan Stanley asked (Ex. A at 7583:1-25):

Q. So let's say for first quarter of 2005 company A says, we're going to sell 100 million dollars worth of goods.

A. Correct.

Q. Let's say we're two months into the quarter and you're talking around the table about a merger. And somebody wants to know — let me back up.

Company B is certainly gong to want to know how company A is doing in terms of its projection, correct?

A. I would think so.

Q. Sure. So company B is going to ask company A, give me your January and February interim financials so I can see whether you're really selling enough to make this 100 million dollars projection, correct?

A. That would seem like a reasonable thing.

Q. That would the typical thing, right?

A. I would think so.

Q. It would odd not to ask for that, wouldn't it? It would raise a red flag, wouldn't it?

A. If you didn't ask, it would be your choice, that wouldn't be the red flag.

Q. But it would suggest that information wasn't important to you, wouldn't it?

A. No.

Following Morgan Stanley's cross-examination about what would be reasonable due diligence that might be conducted in today's world, on redirect, CPH's counsel asked the following question:

> Q. You were asked many questions on cross-examination on what would be typical with respect to due diligence. Is there a difference between what would be typical with respect to due diligence today and what would have been typical with respect to due diligence as it relates to a transaction involving publicly traded corporations, public corporations back in 1997 and early 1998?

Id. at 7738:13-20. This question admittedly sought to contrast "typical" due diligence in different time frames, but Morgan Stanley opened the door to this inquiry during its cross-examination, by asking hypothetical questions about the kind of due diligence that is conducted today. Obviously, Morgan Stanley was attempting to have the jury infer that the level of due diligence that would be commonplace today is the same as the level of due diligence that would have been appropriate at the time of the Sunbeam-Coleman transaction. That attempt to confuse the jury on the part of Morgan Stanley opened the door to CPH's limited inquiry on redirect.

Thus, all of the questions posed were legitimate. Furthermore, if Morgan Stanley thought that any of Dr. Emery's answers went beyond the proper time frame elicited by questions, the

appropriate and necessary response would have been for Morgan Stanley to move to strike the answers. Morgan Stanley moved to strike only one answer and that was Dr. Emery's answer to one of the juror's questions. The Court denied that motion. By failing to move to strike Dr. Emery's answers to the other questions, Morgan Stanley waived "any possible error in admitting [that] testimony." *Fernandez v. State*, 722 So. 2d 879, 881 (Fla. 3d DCA 1998); *see also* Florida Stat. § 90.104(1) (for Court to "predicate error" on the grounds of improperly admitting evidence, there must be "a timely objection or motion to strike . . . , stating the specific ground of objection."); *Wicoma Inv. Co. v. Pridgeon*, 188 So. 597, 599 (Fla. 1939) ("A motion to strike out evidence introduced without objection . . . should be denied where the witness has left the stand before the motion is made, or the motion is made after the witnesses have left court."); Leonard I. Reiser, *Time of Making Motion*, in 55 Fla. Jur. 2d Trial § 77 ("A motion to strike evidence must be timely. . . . A motion to strike evidence introduced without objection should . . . be denied where the witness has left the stand, or where the motion is made after the witnesses have left the court").

Conclusion

Morgan Stanley's motion to allow expert testimony of Professor Fischel to refute the supposedly undisclosed testimony by Dr. Emery should be denied.

Dated: April 28, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

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One of Its Attorneys

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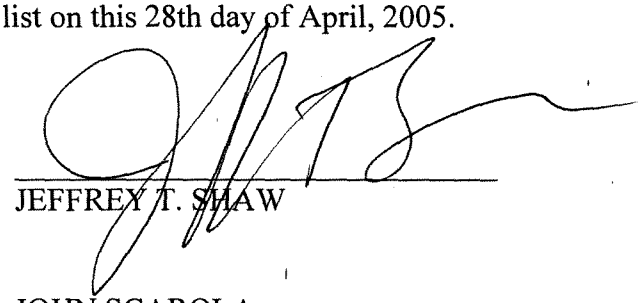
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 28th day of April, 2005.



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10998 v2

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL GRINBLATT REPORT

THIS CAUSE came before the Court March 21, 2005 on Morgan Stanley's Motion for Leave to File Supplemental Grinblatt Report, with both parties well represented by counsel. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part, and Denied, in part. The portions of Dr. Grinblatt's Supplemental Expert Report that express benefit of the bargain damages based on the cell representing the intersection of the Normal Investor for the expected value component and the Full Restatement for the true value component are deemed properly filed. This ruling is without prejudice to CPH's right to present argument to the Court or request to conduct a voir dire examination of Dr. Grinblatt outside the jury's presence seeking to establish that other points in the Supplemental Expert Report are not proper.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ___ day of March, 2005.

SIGNED & DATED
MAR 23 2005
JUDGE ELIZABETH T. MAASS

ELIZABETH T. MAASS
Circuit Court Judge

EXHIBIT
A

16div-016280

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION TO ADD WITNESSES

THIS CAUSE came before the Court April 5, 2005 on Morgan Stanley's Motion to Add Witnesses, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion to Add Witnesses is Granted, in part, and ruling reserved, in part. John Ashley, Scott Cook, Dan Fischel, Jeffrey Haas, and Kevin Woodruff shall not be permitted to testify at trial. MS & Co. shall, by noon on April 6, 2005, disclose each subject on which Mr. Jones will be offered together with a summary of his expected testimony on each point and shall produce him for deposition at a mutually convenient time within the next five calendar days in Palm Beach County, Florida

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 5 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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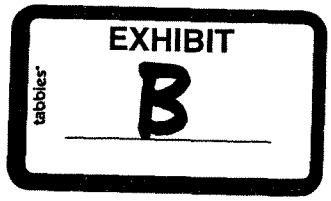


IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. VOLUME 62

MORGAN STANLEY & CO., INC.,

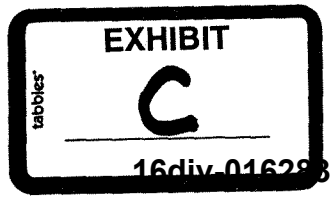
Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Thursday, April 7, 2005
1:30 p.m. - 5:12 p.m.



different now than then?

MR. SCAROLA: I don't recall that he specifically draws the contrast.

THE COURT: Okay. Then I would sustain it.

MR. SCAROLA: I would reformulate the question.

THE COURT: To -- Hold on. He's giving it to us. This is good for you.

MR. HANSEN: He's going to reformulate the question.

THE COURT: I assume he's going to tell us how he's going to formulate, and you can make your objection not in front of the jury. We like that.

MR. HANSEN: What was good for me was Your Honor's ruling sustaining me. That I like even better than Mr. Scarola's reformulation.

THE COURT: What's the reformulation?

MR. SCAROLA: Did the investing community have confidence in the honesty and accuracy of publicly filed financial information in 1997 and 1998?

MR. HANSEN: Same objections, Your Honor.

THE COURT: That question I would permit if we're not drawing the distinction.

for brokerage houses. That's a particular type of analyst, but that's generally, when we say financial analysts that's one we think of first is somebody who works for a stockbroker, firm, a brokerage firm.

Q. Why do securities firms employ analysts?

A. It promotes investments, and it promotes the investment community. And when they -- when brokers help with the sale of stock, a purchase -- a trade of stock, when brokers do that, they generally make a commission so that it promotes their business.

Q. And how specifically do analysts go about performing their jobs?

A. Well, in a general sense they gather information.

Q. In what sources?

A. It depends on the analyst, but it can be from almost any source, depending on how an analyst might go after it, there are many many possibilities. Certainly at a minimum they would look at the financial statements. They would be estimating market share. They would be estimating sales, future sales, trends in sales. They would be analyzing that type of data, including, of course, balance sheets and income statements and those sorts of things.

Q. In the 1997, early 1998 time frame in

particular, to what extent did analysts place confidence in the honesty and integrity of public corporations' public financial filings, the documents the SEC requires public corporations to file?

MR. HANSEN: Objection; leading; compound.

THE COURT: Overruled.

THE WITNESS: The general environment has had a significant change since that time period. This is over the last eight or so years.

BY MR. SCAROLA:

Q. Well, focus specifically on what existed in the 1997, 1998 time frame in terms of the degree of confidence that analysts placed on public financial filings, the honesty and integrity of such filings during that period of time.

A. Well, post turn of the century there have been a state of very public very large --

MR. HANSEN: Objection; nonresponsive, Your Honor.

THE COURT: Sustained. Why don't you repose the question.

BY MR. SCAROLA:

Q. Sure. Rather than talking about the changes that have occurred, if any, since 1997 and 1998, I'd like you to tell us the degree of confidence that

financial analysts placed in the honesty and integrity of those public financial reports back in 1997 and 1998, early 1998.

A. They were generally well thought of. They were accepted as being generally true. There were occasionally problems. If you go back several decades, there might have been one or two notable scandals per decade, but there was a general acceptance of them as being valid and representative. And there's been an evolution of increasing doubt.

Q. All right, sir. We talked about, then, generally the fact that financial analysts conduct investigations of particular companies and publicly report on those companies. Did you in the course of your work in connection with this case review the work of financial analysts as it specifically related to the Sunbeam Corporation in the 1997, 1998 time frame?

MR. HANSEN: I'm sorry, Your Honor, but I object to Mr. Scarola testifying or characterizing testimony.

THE COURT: Overruled.

BY MR. SCAROLA:

Q. You may answer.

A. I did. I did an extensive investigation of analyst reports over starting in 1996 and through '97

IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 63

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Monday, April 11, 2005

Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

9:30 a.m. to 12:00 p.m.

Q. So let's say for first quarter of 2005 company A says, we're going to sell 100 million dollars worth of goods.

A. Correct.

Q. Let's say we're two months into the quarter and you're talking around the table about a merger. And somebody wants to know -- let me back up.

Company B is certainly going to want to know how company A is doing in terms of its projection, correct?

A. I would think so.

Q. Sure. So company B is going to ask company A, give me your January and February interim financials so I can see whether you're really selling enough to make this 100 million dollars projection, correct?

A. That would seem like a reasonable thing.

Q. That would be the typical thing, right?

A. I would think so.

Q. It would be odd not to ask for that, wouldn't it? It would raise a red flag, wouldn't it?

A. If you didn't ask, it would be your choice, that wouldn't be the red flag.

Q. But it would suggest that information wasn't important to you, wouldn't it?

A. No.

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

VOLUME 64

MORGAN STANLEY & CO., INC.,

Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Monday, April 11, 2005
1:30 p.m. - 5:44 p.m.

the Barron's article were matters of serious concern?

A. That article was public information and available to people. And as I testified, largely the investment community didn't believe the article. I guess the allegations in the article that we talked about, the negative allegations that actually came true eventually were not believed. And they would have been factored in when Morgan Stanley, as I mentioned I think the other day, Morgan Stanley when they decided to be the sole underwriter, that's a confident position. I mean, that's a signal to the market that, gosh, you know, they believe in it, they believe in the company.

Q. You were asked many questions on cross-examination about what would be typical with respect to due diligence. Is there a difference between what would be typical with respect to due diligence today and what would have been typical with respect to due diligence as it relates to a transaction involving publicly traded corporations, public corporations back in 1997 and early 1998?

A. If you think back to what we -- what I had said on Thursday about the environment changing and the fact that within the last several years we've had a dramatic number of fraudulent situations and scandals, and so I think that people are much more attune today

IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 67

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Wednesday, April 13, 2005
Palm Beach County Courthouse
Courtroom 11-A
205 North Dixie Highway
West Palm Beach, Florida 33401
8:00 a.m. to 12:00 p.m.

out because you've already taken the steps. I mean, you're already on the train together, on the plane together. A crash would be a bad thing. So, again, it's quite situation-specific.

But the general rule about when you find out something and what you do about it would be the demarcation of you agree to go ahead with the deal, you actually consummate the deal, you're into the deal in some way. Because getting out of the deal, sometimes one party will say, I want out of the deal, things have changed significantly, I want out of the deal. And the other party will say, no, no, everything is okay. Legally you can't get out yet. It hasn't been so bad that you could get out. So there can be disagreements. Different ways to seek remedies.

Q. Are unaudited receipts reliable?

A. We think of them as being less reliable; although, you know, if you think of what's happened in the last five years, eight years, ten years, you think about the scandals that have happened, audited statements have become less reliable. So people have been fooled.

I would say they are more suspect. Unaudited statements are not necessarily unreliable. I mean, I can imagine situations where you would still

accept the information, recognizing that they hadn't been audited. Again, it would go back to trust. The legal aspects, which I have no expertise in, that's not what I'm here for, but there would be a lot of those sorts of considerations that would come in.

Q. Okay.

In your opinion, is there any way First Boston could have known that Morgan Stanley didn't have accurate information if they looked a little harder?

A. As a general course, I think, again, if I go back to what's happened in the last few years, people who are a lot smarter than I am, people who are more knowledgeable, were more knowledgeable in the situation than I have been fooled.

If I go back to this situation, I did not study that aspect of it. So I can't say definitively somebody could not have found it out absolutely.

At the same time, it certainly, as I said a minute ago, there are things that can't be found out. And so the idea that you could easily find out, there's no way I would think of it as easily found out. I testified about the general consensus. We saw that there was some variation. There was a range of consensus, but the investment community, if you look at the stock price and you see it going up over this time

period, I have -- I -- certainly there were a lot of people fooled about it. So there's no way that I would think that it would be an easy thing. I can't say it couldn't have been done, but I can't envision a way that, oh, sure, just do this and you would have been okay. I think it would have been difficult.

THE COURT: Want to come up a moment?

(A bench conference occurred as follows:)

THE COURT: I don't know that that implicated the instruction, because I don't think there was anything specific about this at all.

MR. HANSEN: I would move to strike the testimony as nonresponsive.

THE COURT: I wouldn't grant a motion to strike as nonresponsive, but I don't think it implicates the instruction.

MR. SCAROLA: I think it does, but if Your Honor doesn't believe --

THE COURT: That's fine. Okay.

(The bench conference ended.)

BY THE COURT:

Q. Sir, when did you, Dr. Emery, start your, his involvement with this case, start to finish, month, day, year?

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

CASE NO. 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

_____/

NOTICE OF FILING AFFIDAVIT

Non-Party, Jerry W. Levin, by and through his undersigned counsel, hereby files the attached original Affidavit of Jerry W. Levin in support of his *ore tenus* Motion to be Excused from Trial on May 3, 2005.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand-delivery upon the addressees on the attached Service List, this 29th day of April, 2005.

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WPB-FS1\GLEIML\539937v01\4/29/05

AFFIDAVIT OF JERRY W. LEVIN

I, JERRY W. LEVIN, depose and state as follows:

1. My name is JERRY W. LEVIN. I am over the age of 18 and have personal knowledge of the facts set forth herein.

2. I am the former CEO of American Household, Inc. formerly known as Sunbeam Corporation, n/k/a Jarden Corp.

3. I am Chairman of the 2005 Campaign for the United Jewish Appeal-Federation of New York (the "UJA"). UJA is hosting a private concert to benefit Nazi victims, *A Triumphant Celebration of Life*. The private concert commemorates the Holocaust and raises funds for the UJA's Community Initiative for Nazi Victim Services, which augments certain agencies' ability to provide frail, elderly survivors of Nazi persecution with homecare.

4. As Chairman, I invited as my personal guest to the event, his Excellency Dan Gillerman, Ambassador for Israel to the United Nations. I am extremely grateful that His Excellency, Ambassador Gillerman accepted my invitation.

5. I have been involved in UJA for over 25 years. In addition to serving as Chairman of the Campaign, I am a Director, a member of the Executive Committee and a member or Chairman of several other committees. I travel to Israel at least once per year, meeting with the members of the government including the Prime Minister, and other business, civic and community service leaders on each trip.

6. I personally have committed $5,000 to the success of this event in addition to the $450,000 I have donated to UJA so far this year. I anticipate 300 persons attending.

7. As the Chairman and one of the hosts of this event, I am expected to introduce the Ambassador to many influential persons and possible contributors to the UJA, and I am to give any introductory remarks regarding his appearance at the event.

8. In addition to the event which is scheduled to begin at 8:00 p.m., I have made plans to have a private dinner with the Ambassador beforehand with just my wife and me and the Ambassador and his wife. It would provide undue hardship and embarrassment to me and the UJA if I was unable to attend this dinner and event with the Ambassador. The dinner is scheduled for 6:15 p.m. at a restaurant in New York City, and in order to attend the dinner, I would have to leave for the airport to travel to New York by approximately 1:30 p.m.

9. In addition to the event in honor of the Israeli Ambassador, I also have scheduled on the morning of May 3, 2005, a business meeting which I cannot reschedule.

10. I, along with other investors and colleagues, have been looking to acquire an ongoing business (the "Company"). We have spent tremendous time and invested a significant amount of money analyzing the Company. We have already made a preliminary offer, and our final offer is due May 20, 2005. As part of our preliminary offer and in preparation of our final offer, we have hired law firms, accountants and other professionals. We have scheduled tours of the Company's facilities in both Pennsylvania and Upstate New York on May 3, 2005, which is the only day available to us. The

purchase of this Company is extremely competitive and there are a number of other interested parties. I would be at a complete disadvantage in being prepared to make a final offer if I am not able to tour the facilities on May 3, 2005, as it is my only chance to evaluate these facilities and their operational procedures and practices.

11. While I cannot reschedule my commitments on Tuesday, May 3, 2005, I am willing to move my obligations on Wednesday in order to be available to the Court. On Wednesday I currently have scheduled important business meetings all day, but am willing to reschedule those commitments to make myself available.

12. I have tried to cooperate fully with the parties in this case. I have previously made myself available to Morgan Stanley for an interview, I had my deposition taken over a two-day period of time, and have been working through my counsel with the parties in this case to make myself available for my attendance at trial. It is my understanding that counsel was told a week ago that I would be unable to testify on Tuesday, May 3, 2005.

13. In addition, I rescheduled other business commitments to be available Wednesday, April 27, 2005 and Thursday, April 28, 2005 as those were the dates previously provided to me by Morgan Stanley's counsel as dates they intended to call me as a witness.

14. I completely understand the importance of my presence at trial, and I am willing to cooperate fully with this Court and counsel. However, I would respectfully request that this Court please take into consideration my commitments on Tuesday, May 3, 2005, and allow me to be released from my subpoena for that day.

FURTHER AFFIANT SAYETH NAUGHT.

VERIFICATION

I, JERRY W. LEVIN, declare under penalty of perjury that the foregoing is true and correct.

Executed on this 28 day of April, 2005.

JERRY W. LEVIN

WPB-FS1\539846v04\16560.071300

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION IN LIMINE NO. 38 TO BAR EVIDENCE AND ARGUMENT CONCERNING JERRY LEVIN'S PERSONAL VIEWS CONCERNING THE VALUE OF COLEMAN SHARES PRIOR TO THE SUNBEAM-COLEMAN TRANSACTION

THIS CAUSE came before the Court May 2, 2005 on Coleman (Parent) Holdings, Inc.'s Motion in Limine No. 38 to Bar Evidence and Argument Concerning Jerry Levin's Personal Views Concerning the Value of Coleman Shares Prior to the Sunbeam-Coleman Transaction, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part, and Denied, in part. Levin may not opine on the value of Coleman at any point in time. However, he may testify about what he told a decision maker in the transaction about the value of Coleman prior to execution of the merger agreement. If he testifies about a value in connection with these representations, the jurors shall be told that the testimony is not being offered to establish the value of Coleman, but to show what was told a decision maker about the value of Coleman.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 2nd day of May, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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Washington, DC 20036

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION IN LIMINE NO. 38 TO BAR EVIDENCE AND ARGUMENT CONCERNING JERRY LEVIN'S PERSONAL VIEWS CONCERNING THE VALUE OF COLEMAN SHARES PRIOR TO THE SUNBEAM-COLEMAN TRANSACTION

THIS CAUSE came before the Court May 2, 2005 on Coleman (Parent) Holdings, Inc.'s Motion in Limine No. 38 to Bar Evidence and Argument Concerning Jerry Levin's Personal Views Concerning the Value of Coleman Shares Prior to the Sunbeam-Coleman Transaction, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part, and Denied, in part. Levin may not opine on the value of Coleman at any point in time. However, he may testify about what he told a decision maker in the transaction about the value of Coleman prior to execution of the merger agreement. If he testifies about a value in connection with these representations, the jurors shall be told that the testimony is not being offered to establish the value of Coleman, but to show what was told a decision maker about the value of Coleman.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 2nd day of May, 2005.

_____
ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON PLAINTIFF'S MOTION IN LIMINE NO. 37 TO BAR EVIDENCE OR ARGUMENT REGARDING PLAINTIFF'S ALLEGED FAILURE TO PRESERVE E-MAIL

THIS CAUSE came before the Court April 29, 2005 on Plaintiff's Motion in Limine No. 37 to Bar Evidence or Argument Regarding Plaintiff's Alleged Failure to Preserve E-Mail, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Denied. However, MS & Co. may not argue or imply to the jury that CPH had a duty to maintain the email messages, or that any failure to do so was litigation misconduct. See Royal & Sunalliance v. Lauderdale Marine Center, 877 So. 2d 843 (Fla. 4th DCA 2004).

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 2nd day of May, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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16div-016306

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON PLAINTIFF'S MOTION IN LIMINE NO. 37 TO BAR EVIDENCE OR ARGUMENT REGARDING PLAINTIFF'S ALLEGED FAILURE TO PRESERVE E-MAIL

THIS CAUSE came before the Court April 29, 2005 on Plaintiff's Motion in Limine No. 37 to Bar Evidence or Argument Regarding Plaintiff's Alleged Failure to Preserve E-Mail, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Denied. However, MS & Co. may not argue or imply to the jury that CPH had a duty to maintain the email messages, or that any failure to do so was litigation misconduct. See Royal & Sunalliance v. Lauderdale Marine Center, 877 So. 2d 843 (Fla. 4th DCA 2004).

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 2nd day of May, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER

THIS CAUSE came before the Court May 2, 2005, on its own Moiton. Pursuant to counsels' agreement to the appointment of Kenneth Feinberg as mediator, it is

ORDERED AND ADJUDGED that the parties shall commence mediation of the issues raised in this cause by 10:00 a.m. May 5, 2005 in New York, New York. Kenneth Feinberg, Esq. is appointed as mediator, subject to his acceptance of the appointment. Mediation shall be conducted in the manner directed by Mr. Feinberg, who shall have the sole authority to declare an impasse, absent court order. Mr. Feinberg may direct which representatives of each party shall participate in mediation. If the directed representatives of a party does not have complete authority to resolve the case, or Mr. Feinberg declines to direct which representatives shall appear, a representative or representatives with such authority shall participate as well. The cost of mediation shall be borne by the parties equally.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 2nd day of May, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

16div-016310

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S MOTION FOR A LIMITING INSTRUCTION ON INFERENCES RELATING TO THE ABSENCE OF FURTHER EVIDENCE ON JUDICIALLY "DEEMED FACTS" AT TRIAL

Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully moves the Court to instruct the jury that it is not to draw any inferences, adverse or otherwise, from any failure to introduce additional evidence on the statement of deemed facts the Court read to the jury at the beginning of trial. Because the facts are "deemed established," Morgan Stanley is not permitted to introduce evidence inconsistent with them. This instruction is necessary to ensure that the jury does not draw adverse inferences from Morgan Stanley's failure to present evidence relating to the statement of facts.

1. On March 23, 2005, this Court "deemed established" certain facts in CPH's Amended Complaint as a sanction. Order on CPH's Renewed Motion for Entry of Default Judgment at 17 (Mar. 23, 2005). The Court clarified its ruling on March 24, 2005, stating that no further evidence would be introduced to establish the deemed facts relating to fraud, conspiracy, and aiding and abetting. Likewise, it was generally agreed that no evidence controverting those

facts would be introduced. Instead, the evidence at trial was to be limited to the topics remaining in dispute – reliance and damages. Morgan Stanley's counsel thus explained that the parties had not filed motions in limine on the deemed facts because "[t]hey've been found as facts, so *they would not be subject to proof at trial.*" 3/24/05 Tr. 5269:25-5270:2 (emphasis added). The Court said "*Right.*" *Id.* at 5270:5 (emphasis added). CPH's counsel stated that CPH "agree[d] with what [Morgan Stanley's counsel] said." *Id.* at 5274:19. Although a witness might "repeat something that was in the complaint," that "would really be sort of inadvertent or sort of a little background." *Id.* at 5274:21-25. CPH "intend[s] to put on reliance and damages. That's what's left in the case." *Id.* at 5280:2-3. *See also* Order on CPH's Motion In Limine No. 33 (Apr. 8, 2005) ("Neither party may present evidence that contradicts the factual findings made in Exhibit A to the Court's March 23, 2005 Order").

2. As a result of the March 23 Order, there is a substantial risk that the jury will draw improper and incorrect inferences from Morgan Stanley's failure to present evidence in response to the deemed facts. Morgan Stanley's concern is *not* that the jury will infer from its silence that it engaged in the conduct reflected in the deemed facts—that is the very thing the Court's Order is meant to establish. Rather, Morgan Stanley is concerned that jurors will draw *additional, improper* inferences from its silence. Case after case recognizes that precisely such unfair prejudice may befall a party that maintains its silence in the face of damaging evidence. See *Burns v. State*, 699 So. 2d 646, 651 (Fla. 1997) (Fifth Amendment privilege); *Mosley v. State*, 402 So. 2d 559, 559 (Fla. 1st DCA 1981) (same); *Knorr-Bremse Systeme Fuer*

Nutzfahrzeuge GmbH v. Dana Corp., 383 F.3d 1337, 1341 (Fed. Cir. 2004) (attorney-client privilege).[1]

3. For Morgan Stanley, this risk is especially acute (and particularly unfair) because it is not simply *privileged* to remain silent about the deemed facts. It is *compelled* to do so. That silence may lead the jury to make unwarranted assumptions. First, Morgan Stanley's failure to rebut the facts is likely to create suspicion that Morgan Stanley is not being forthright. As the Florida Supreme Court held in *Burns*, silence may be interpreted as "lack of candor." 699 So. 2d at 651. The jury, confronted day after day with Morgan Stanley's apparent refusal to tell its side of the story, is very likely to infer that Morgan Stanley is stonewalling or hiding the ball. That is particularly likely in view of CPH's contrasting presentation, which repeated and embellished upon the deemed facts. In these circumstances, "the trial judge should give a cautionary instruction" to avoid such inferences. *Id.*[2]

4. Second, Morgan Stanley's silence is likely to lead jurors to draw improper inferences about the reason for that silence. Whatever suspicions jurors may have had at the outset of the trial no doubt crystallized when Mr. Perelman baldly asserted in open court, without any foundation whatsoever, that Morgan Stanley had admitted to criminal conduct. 4/21/05 Tr.

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[1] Morgan Stanley adheres to its position that, because the issues of reliance and damages are as much if not more within CPH's knowledge as within Morgan Stanley's, foreclosing proof on that issue is an inappropriate and unlawful punitive sanction – especially insofar as it requires the jury to accept as true assertions both sides know to be false and apply that falsehood in deciding legal issues that are otherwise being fully litigated at trial. It likewise adheres to its position that the sanctions order was erroneous and unduly punitive. It thus submits this request without prejudice to those contentions (or any others).

[2] Although a trial court need not give a no-adverse-inference instruction when a party invokes its Fifth Amendment privilege in a civil case, see *Fraser v. Security & Inv. Corp.*, 615 So. 2d 841, 842 (Fla. 4th DCA 1993), the reason is that evidence of silence in that context is not "irrelevant and immaterial." *Id.* Here, the evidence of Morgan Stanley's silence *is* irrelevant and (Continued...)

at 9808.[3] The prejudice from an assumption of criminal conviction is obvious, and warrants a curative instruction to ensure that the jury knows that this was not the reason for Morgan Stanley's failure to dispute or address the deemed facts.

5. In light of these potential adverse inferences, Morgan Stanley respectfully moves the Court to read a curative or limiting instruction to the jury before Morgan Stanley presents its case in chief. Morgan Stanley proposes the following lines (without prejudice to alternative proposals):

> CPH has finished presenting its witnesses and evidence. Now it is Morgan Stanley's turn to present its case. As I instructed you earlier, you must accept the statement of facts that I read to you at the beginning of this trial as true for all purposes. Morgan Stanley is not allowed to contest those facts. You therefore must not draw any inferences from Morgan Stanley's failure to present witnesses or otherwise introduce evidence relating to those facts.

CONCLUSION

WHEREFORE Defendant Morgan Stanley respectfully moves that the Court instruct the jury not to draw adverse inferences from Morgan Stanley's failure to introduce evidence regarding the statement of deemed facts during Phase I of the trial.

---

immaterial, because Morgan Stanley has no choice but to remain silent.

[3] Although the Court contemporaneously instructed the jury that Mr. Perelman's statement was inaccurate, 4/21/05 Tr. at 9814, the accusation is one that is difficult to ignore and the instruction likely amplified it. *See Orvis v. Caulkins Indiantown Citrus Co.*, 861 So.2d 1181, 1184 (Fla. 4th DCA 2004).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 2nd day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
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Counsel for Morgan Stanley & Co. Incorporated

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S MOTION IN LIMINE NO. 32 TO EXCLUDE SUPPLEMENTAL REPORT OF MICHAEL J. WAGNER

Morgan Stanley respectfully moves to exclude Coleman (Parent) Holdings, Inc.'s ("CPH's") Updated Expert Report of Michael J. Wagner, served April 21, 2005. Wagner's Report contains new opinions, new analyses, and, in part, reliance on documents available to CPH since at least February 7, 2005. The "Updated" Report thus contravenes the Pretrial Order requiring the submission of expert reports by December 1, 2004, with rebuttal reports due no later than December 20, 2004. The new Report comes four months after that deadline; three months after Wagner's deposition; 15 days into trial; and in any event far too late for Morgan Stanley to conduct the necessary investigation, depositions, and preparation of its own experts that is necessary to respond. As such, Wagner's new Report should be struck, and this Court should exclude any testimony related to this new Report.

ARGUMENT

1. CPH'S introduction of a new expert report after the close of discovery and two weeks into the trial of this case violates the express terms of the Pretrial Order and

unfairly prejudices Morgan Stanley. Florida law is clear that the purpose of disclosure deadlines in a pretrial order is to prevent surprise and eliminate "trial by ambush." *See Binger v. King Pest Control*, 401 So. 2d 1310, 1314 (Fla. 1981). Courts have recognized that disclosing a new expert opinion in the middle of trial is tantamount to disclosing an entirely new expert, because "[u]nless there is meaningful disclosure of opinions in a properly noticed deposition given for that purpose, there can be no true disclosure of the expert witness." *Keller Indus. v. Volk,* 657 So. 2d 1200, 1207 (Fla. 4th DCA 1995) (Pariente, J., concurring in part, dissenting in part).

2. Wagner's new Report, which spans 70 pages, is not merely a permissible "update" to his prior two reports. Even a cursory review of this Report reveals that it contains new opinions. For example, on page 3, Wagner states – for the first time – "[s]ince Morgan Stanley has already reserved $360 million for this litigation, I therefore assume that Morgan Stanley will have an additional pretax expense of $2.32 billion and an after-tax expense of $1.51 billion." *See* April 21, 2005 Report at 3 (emphasis added) (internal footnote omitted). This self-described "assumption" does not appear in any of his prior reports, and is precisely the type of speculation that Morgan Stanley must have the opportunity to question in a deposition. But CPH's eleventh-hour disclosure has rendered any such deposition impossible, and Morgan Stanley is faced with the very real – and very prejudicial – possibility that Wagner will unveil his theory for the first time on the witness stand. This is exactly the type of trial-by-ambush tactic that the Florida Supreme Court has prohibited.

3. Nor does Morgan Stanley's recent production of its first quarter 2005 financial statements justify the delayed submission of the Report. First, the Pretrial Order

contains no provision whatsoever for the introduction of supplemental expert reports after the expiration of the discovery period. Second, Wagner states in his new Report that he relied on, among other things, Morgan Stanley's November 30, 2004 audited financial statements. *See* April 21, 2005 Wagner Report at 1. But Wagner has had these documents in his possession for some months. There is no reason whatsoever for his delay until April 21, 2005 to produce this new Report.

4. Further, there is no justification for introducing new financial information after the Pretrial Order deadline. Wagner has neither the obligation nor the right to update his financial calculations on a rolling basis through trial. By their very nature, discovery cutoffs and pretrial order deadlines limit the scope of relevant facts at trial and invariably exclude recent information. As the Third District has explained, such an exclusion is necessary for trials (and discovery) to function properly:

> [L]awyers have a right to expect that once a trial commences, discovery and examinations must cease. The lawyers who make the opening statement must have a reasonably firm idea of what the evidence will show. Liberal rules of discovery assure this. Once the trial starts the lawyers are engaged in the unfolding of the evidence they have already collected. That is why there are discovery cutoffs. All the discovery rules and the extensive efforts of parties to discover the other party's case would be for naught if one side were able to wait until after the trial started to establish key pieces of evidence such as what occurred in this case.

Owens-Corning Fiberglas Corp. v. McKenna, 726 So. 2d 361, 363 (Fla. 3d DCA 1999) (emphasis added).

5. Wagner's Report is inadmissible on substantive grounds as well. The Report contains irrelevant and unfairly prejudical information regarding Morgan Stanley's finances and is thus inadmissible pursuant to Florida Statutes §§ 90.401-90.403. As fully set forth in Morgan Stanley's Renewed Motion in Limine No. 5, incorporated

herein by reference, such information may not be used in the manner that CPH and Wagner are seeking to use it – namely to enhance an award of punitive damages. Accordingly, Wagner's Report not only violates the express terms of the Pretrial Order and the Florida Code of Evidence, but it also violates the United States Supreme Court's unambiguous holding in *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 427 (2003).[1]

6. Finally, the information on which Wagner bases his new opinion – namely the reserves that Morgan Stanley has taken for this litigation – is unfairly prejudicial compared to its minimal probative value. FLA. STAT. § 90.403. Securities law requires Morgan Stanley to take such reserves for this litigation. But a lay jury, learning of these reserves, would invariably take it as an admission of culpability or, at a minimum, infer that Morgan Stanley expected to lose this case. The end result would be that Morgan Stanley would be punished for complying with its legal obligations under federal securities laws. CPH's last minute attempt to introduce highly prejudicial evidence after the Pretrial Order deadline should not be rewarded, and Wagner's Report should be struck.

[1] Wagner's Report also contains references and opinions related to the financial condition of Morgan Stanley's parent corporation. As fully set forth in Morgan Stanley's Renewed Motion in Limine No. 5, incorporated herein by reference, any such reference is impermissible as a matter of law, and Wagner should not be allowed to predicate his opinion on – or incorporate into his opinion in any way – the financial condition of Morgan Stanley's parent or affiliates.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 2 day of May, 2005.

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COPY

May 3, 2005

The Honorable Elizabeth Maass
Palm Beach County Courthouse
205 North Dixie Highway, Room 11.1208
West Palm Beach, Florida 33401

VIA HAND-DELIVERY

Re: *Coleman (Parent) Holdings Co. v. Morgan Stanley & Co.*

Dear Judge Maass:

We received a copy of correspondence sent to Your Honor by Attorney James Keeney of Sarasota, Florida. Mr. Keeney references an action where Morgan Stanley DW, Inc. was a respondent in an arbitration proceeding. In his correspondence to the Court, Mr. Keeney describes a sanction order entered in that unrelated action in what appears to be an improper *ex parte* attempt to influence Your Honor. The reason we bring this matter to the Court's attention is that Mr. Keeney failed to inform the Court that the arbitration award in the other action was vacated by Judge Kovachevich as a result of arbitrator misconduct. A copy of Judge Kovachevich's Order is enclosed.

Respectfully submitted,

Joseph Ianno, Jr.

Enclosures

cc: Jack Scarola (via hand-delivery w/encl.)
Jerold Solovy (via hand-delivery w/encl.)

FILED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ESTHER FARNSWORTH,

Petitioner/Cross-Respondent,

vs.

CASE NO. 8:04-cv-282-T-17 TBM
Florida Circuit Court Case No.
2004 CA 467 NC

MORGAN STANLEY DW, INC.

Respondent/Cross-Petitioner.
/

JUDGMENT ON THE PLEADINGS

This matter came before the Court on the Petitioner's Motion for Judgment on the Pleadings, pursuant to Rule 12(c), Fed. R. Civ. Proc. The Petition was initially filed by Petitioner Esther Farnsworth in the Circuit Court of the Twelfth Judicial Circuit of Florida, in and for Sarasota County, and was timely removed to this Court by the Respondent, Morgan Stanley DW, Inc. pursuant to 28 U.S.C. §§ 1441(a) and 1446.

This Court has reviewed the pleadings, including the Petitioner's petition to confirm the arbitration award and the answer and cross-petition of Morgan Stanley seeking to vacate the arbitration award, as well as the Petitioner's answer and response to the cross-petition.

This Court finds that on December 30, 2003, before the arbitration award was signed by any of the three NASD arbitrators, one of the arbitrators apparently engaged in conduct which

ought to have been disclosed and if disclosed, might have caused the NASD or a court to remove the arbitrator from the panel.

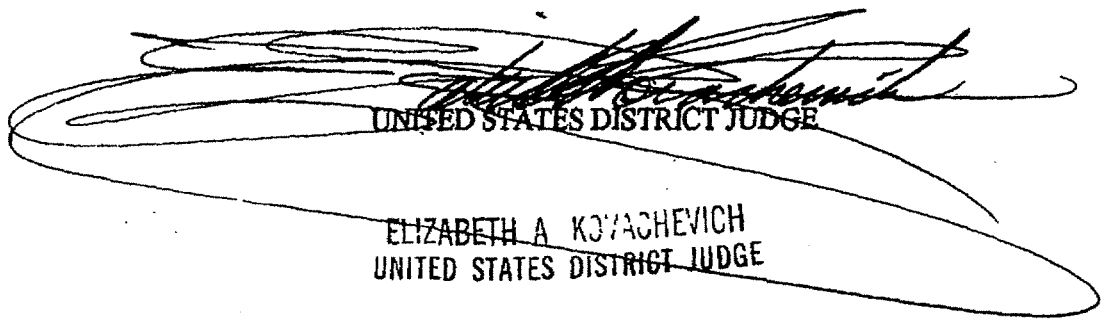
Petitioner Farnsworth alleges that she did not become aware of these facts until after she was served with Morgan Stanley's Response to Motion to Confirm, Cross-Motion to Vacate Arbitration Award and Supporting Memorandum of Law. These new facts relate to the Hill case, and Petitioner does not dispute Morgan Stanley's allegations regarding that case.

In view of these newly revealed facts, Petitioner now concedes that on December 30, 2003, while the present case was pending before the NASD arbitration panel, Arbitrator Kathleen Church engaged in conduct in connection with the Hill case which ought to have been disclosed and if disclosed, might have caused the NASD Director of Arbitration to remove her from the panel of arbitrators before whom the present case was then pending.

Petitioner further concedes that since the arbitration panel's award was signed by each of the three NASD arbitrators and served upon the parties on January 12, 2004, it is now too late for the parties or the NASD Director of Arbitration to cure Arbitrator Church's failure by any of the means and procedures set forth in the NASD Code of Arbitration, such as appointing a third arbitrator to replace Arbitrator Church and allowing the arbitration proceedings to continue. Petitioner therefore does not dispute, and the Court accordingly finds, that Morgan Stanley is entitled to the relief sought in the cross-petition to vacate the arbitration award.

Accordingly, the arbitration award is vacated and the case is remanded to the NASD for a new arbitration hearing before a new panel of three different arbitrators. The new panel should be selected according to the same method that the original arbitrators were selected, and since the present predicament was plainly not the fault of either of the parties, no forum fees, costs or sanctions should be assessed against either of them in connection with the arbitration proceedings conducted to date.

Ordered in Chambers in Tampa, Florida, this 1st day of March ,2004.



UNITED STATES DISTRICT JUDGE

Dated:

ELIZABETH A. KOVACHEVICH
UNITED STATES DISTRICT JUDGE

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S MEMORANDUM IN SUPPORT OF MOTION TO INSTRUCT THE JURY ON RELIANCE AND DAMAGES UNDER THE CLEAR-AND-CONVINCING-EVIDENCE STANDARD IN PHASE I

Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully submits this memorandum in support of the Court's *sua sponte* suggestion that it submit a special interrogatory or verdict form during Phase I that asks the jurors to decide justifiable reliance and the fact of damages under two different standards – greater weight of the evidence and clear and convincing evidence. In our view, that course of action is not only preferable, it is necessary. The jurors must be instructed on and decide justifiable reliance and the fact of damages under the greater-weight-of-the-evidence standard in Phase I in any event. Deciding those issues under the clear-and-convincing-evidence standard at the same time adds no additional burden, and it allows the jury to make that determination when the relevant evidence is fresh in its mind. In contrast, deferring resolution of those issues until Phase II would require their resolution after potentially inflammatory evidence, with no bearing on reliance or damages, has been presented. That is precisely the sort of undue prejudice that the Florida Supreme Court's decision in *W.R. Grace & Co.—Conn. v. Waters*, 638 So. 2d 502 (Fla. 1994), directs trial courts to avoid. The

Court, moreover, should provide special verdict forms during Phase I on the clear-and-convincing-evidence standard even if it doubts that such proof is necessary to establish liability for punitive damages. By presenting the jury with that verdict form, the Court may avoid the necessity of retrial in the event of a successful appeal holding that the Court's doubts were misplaced and its procedures erroneous.

BACKGROUND

On April 4, 2005, Morgan Stanley moved for an order that reliance and damages be determined during Phase I of the trial under both the greater-weight-of-the-evidence and the clear-and-convincing-evidence standards. *See* Defendant's Motion Regarding the Reliance and Damages Issues to Be Determined at Phase I of Trial (Apr. 4, 2005) (Exhibit A). The latter standard is relevant because, under Fla. Stat. § 768.725, CPH must prove each element of its case by clear and convincing evidence to be entitled to pursue an award of punitive damages in Phase II. See *id.* at 2; Morgan Stanley's Submission Concerning the Need for Clear and Convincing Proof of Entitlement to Punitive Damages (Apr. 22, 2005) (Exhibit B); Morgan Stanley's Reply to CPH's Brief Regarding The Requirement That Plaintiff Prove Entitlement To Punitive Damages By Clear and Convincing Evidence in Phase II (Apr. 27, 2005) (Exhibit C).

Although the Court denied Morgan Stanley's motion, the Court has since *sua sponte* indicated that it may reconsider:

> One of the things I was going back and thinking about after I read Morgan Stanley's—I forget what you call it—basically it's the burden of proof stuff on the punitive damages, is whether it makes sense to sort of face the issue fairly quickly of whether Plaintiff needs to show each element of its claim by clear and convincing evidence. And if so, whether it would make sense to ask an interrogatory question on the phase one verdict of whether reliance has been proven by clear and convincing evidence.

> I don't know, as I thought about it, and, again, I'm interested in your thoughts as well, that it makes sense to pose that kind of question as to damages.

4/25/05 Tr. at 10335:11-10336:1.

CPH tentatively agreed with Morgan Stanley's proposal:

> MR. SCAROLA: . . . The inclination is to say that we will probably be in agreement to those matters, but we want to think about it.

4/25/05 Tr. at 10338:10-12. In explaining his "inclination" to agree, CPH's counsel noted that such a procedure could help "protect the record and avoid the necessity of a retrial" because it would allow "this present jury [to] resolve issues [and] enable[] an appellate court to make a determination without retrying the case." *Id.* at 10338:6-10.

Consistent with the Court's comments and CPH's tentative agreement, Morgan Stanley submits that proof of reliance and damages by clear and convincing evidence is appropriately determined during Phase I. This Court should submit interrogatories to the jury at the end of Phase I instructing it to determine both (1) whether CPH has proved reliance by the greater weight of the evidence, and the amount of damages (if any) proved by that standard; and (2) whether CPH has proved justifiable reliance and the fact of damages (irrespective of amount) by clear and convincing evidence (see Attachment 1).[1]

ARGUMENT

I. The Jury Should Be Asked To Determine Reliance and Damages Issues Just Once

There can be no dispute that, because the jury must determine reliance and damages under the greater-weight-of-the-evidence standard in Phase I of the trial, it makes sense for the

[1] Morgan Stanley does not waive and hereby reasserts its various other objections. *See, e.g.*, Defendant's Motion Regarding the Reliance and Damages Issues to be Determined at Phase I of Trial at 2 n.1, 3 n.2 (Apr. 4, 2005).

jury to decide those issues under the clear-and-convincing-evidence standard at the same time. Except for the different standards of proof, the questions are the same. The jury instructions are the same. And the relevant evidence is the same. Accordingly, the two issues are clearly most efficiently considered at the same time. *Cf.* Fla. R. Crim. P. 3.216(d) advisory committee note ("[j]udicial economy" mandates "a single examination" where multiple decisions entail similar issues).

By contrast, requiring the jury to decide those same issues in two different phases makes no sense. Counsel would be required to rehash the same arguments and address the same evidence on issues addressed in Phase I once again during Phase II. The jurors would have to be instructed on those issues twice, with the only difference being the standard of proof. And the jurors would be required to deliberate on the same issues twice. That is particularly troubling given that, by Phase II, the evidence of reliance and damages may no longer be fresh in their minds. *See United States v. Smith*, 44 F.3d 1259, 1268 (4th Cir. 1995) ("unnecessary delays during the course of trial" may aggravate a jury's "foibles of memory," and "to the extent that such delays can be avoided, [trial] courts should recognize their responsibility for doing so").

Moreover, if the jury concludes that CPH has *not* proved reliance or damages by clear and convincing evidence, CPH may be barred from recovering punitive damages altogether. Phase II would then be completely unnecessary. That fact strongly suggests that threshold issues should be resolved *before* embarking on Phase II. If the jury decides those issues only after Phase II is already concluded, that part of the trial will occur even if it is ultimately rendered superfluous. There is no justification for this enormous potential waste of resources.

II. Clear and Convincing Evidence of Reliance and Damages Must Be Decided at Phase I in Order to Avoid Unfair Prejudice

Resolving reliance and damages issues under the clear-and-convincing-evidence standard at Phase I is not only the more sensible result, it is necessary to avoid undue prejudice. The very purpose of bifurcation in cases like this one is to avoid the unfair prejudice that inevitably arises when a jury is confronted with inflammatory evidence relevant only to the amount of punitive damages. See *W.R. Grace*, 638 So. 2d at 506. That same purpose requires all issues related to reliance and damages to be resolved during Phase I here.

If those issues are deferred to Phase II, the jury may improperly rely on Phase II evidence relevant only to the *amount* of punitive damages when deciding whether Morgan Stanley is *liable* for punitive damages. That is of particularly grave concern here given the nature of the Phase II evidence being proposed. The Court, for example, presently plans to read to the jury its findings related to Morgan Stanley's litigation misconduct in Phase II. That evidence, even accepting *arguendo* its relevance to the amount of punitive damages, is not relevant to whether CPH proved the elements of its underlying claims by clear and convincing evidence. Yet even a conscientious juror would be hard-pressed to set it aside if the issues were considered simultaneously. By contrast, there is no risk of unfair prejudice to CPH if the entitlement findings are made in Phase I. The relevant evidence is precisely what the jury will already consider in determining underlying liability.

The Florida Supreme Court's decision in *W.R. Grace* is on point. There, the Court distinguished between findings relevant to *liability* for punitive damages and those relevant to the *amount* of punitive damages, and held that they should be tried separately to the extent the defendant so requests:

> We hold that henceforth trial courts, when presented with a timely motion, should bifurcate the determination of the amount of punitive damages from the remaining issues at trial. *At the first stage of a trial in which punitive damages are an issue*, the jury should hear evidence regarding liability for actual damages, the amount of actual damages, and *liability for punitive damages*, and should make determinations on those issues. If, at the first stage, the jury determines that punitive damages are warranted, the same jury should then hear evidence relevant to *the amount of punitive damages* and should determine the amount for which the defendant is liable.

638 So. 2d at 506 (emphasis added). The court mandated this approach in order to avoid unfair prejudice to the defendant by exposing the jury to inflammatory evidence while it was still deliberating over the defendant's liability for punitive damages. See *id.* Because proof of reliance and damages by clear and convincing evidence relates to "liability for punitive damages" rather than "the amount of punitive damages," *W.R. Grace* supports having those issues decided at "the first stage of a trial" to the extent the defendant so requests. *Id.*[2]

III. The Court Should Adopt Morgan Stanley's Proposal Even If It Concludes that the Clear-and-Convincing-Evidence Standard Applies Only to Intent or Other Elements of Fraud

Even if the Court rejects Morgan Stanley's interpretation of Fla. Stat. § 768.725 and holds that the clear-and-convincing-evidence standard applies only to intent or other elements, it should still submit Morgan Stanley's proposed interrogatories to the jury. If the interrogatories

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[2] Morgan Stanley does not suggest that any *other* potential issues related to liability for punitive damages be resolved at Phase I. That would require the introduction of additional (and potentially inflammatory) evidence; it would require additional instructions to the jury; and it therefore would not serve the interests of fairness or judicial economy. Indeed, CPH's now-concluded Phase I case-in-chief focused on reliance and damages. The Court previously rejected Morgan Stanley's argument that the Court may not, as a matter of Florida or constitutional law, impose a sanction that deems the prerequisites to punitive damages and facts relating to the amount of punitive damages "established," or foreclose Morgan Stanley from contesting those issues. See Morgan Stanley's Motion to Prevent Extension of Discovery Misconduct Sanctions to Phase II (Apr. 18, 2005). Morgan Stanley's current view regarding bifurcation assumes that the Court will not reconsider its ruling and re-open these issues at Phase II of the trial.

are not submitted and the Court's interpretation of § 768.725 is reversed on appeal, an entirely new Phase I trial will be necessary. If the interrogatories are submitted, that eventuality may be avoided. At worst, the responses will be superfluous. *See ITT Hartford Ins. Co. of the Southeast v. Owens*, 816 So. 2d 572, 578 (Fla. 2002) ("'A principal advantage of using a special rather than a general verdict is that an error may only affect a few of the trial court's findings, thus limiting a new trial or vacatur of the judgment to the issues covered by the tainted findings.'" (quoting *United States v. Ofchinick*, 883 F.2d 1172, 1180 (3d Cir. 1989))); *Variety Children's Hosp., Inc. v. Perkins*, 382 So. 2d 331, 334 (Fla. 3d DCA 1980).

CONCLUSION

WHEREFORE Defendant Morgan Stanley respectfully requests that this Court instruct the jury to determine reliance and the existence of damages under the clear-and-convincing-evidence standard during Phase I and approve a suitable special verdict form.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 3rd day of May 2005.

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ATTACHMENT 1
[*SAMPLE FOR ILLUSTRATIVE PURPOSES ONLY*]

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

VERDICT

We, the jury, return the following verdict:

1. **Do you find by the greater weight of the evidence that Plaintiff Coleman (Parent) Holdings, Inc. ("CPH") relied on Sunbeam's allegedly false statements?**

YES _____ NO _____

If your answer to Question 1 is NO, your verdict on this count is for Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley"). If your answer to Question 1 is YES, please answer Question 2.

2. **Do you find by clear and convincing evidence that Plaintiff Coleman (Parent) Holdings, Inc. ("CPH") relied on Sunbeam's allegedly false statements?**

YES _____ NO _____

3. **Did CPH prove by the greater weight of the evidence that damages were caused by Sunbeam's allegedly false statements?**

YES _____ NO _____

If so, in what amount? $_____

If your answer to Question 3 is NO, your verdict on this count is for Morgan Stanley. If your answer to Question 3 is YES, please answer Question 4.

4. **Did CPH prove by clear and convincing evidence that damages were caused by Sunbeam's allegedly false statements?**

YES _____ NO _____

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

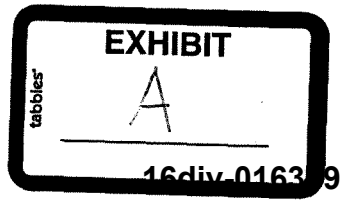
Defendant. /

DEFENDANT'S MOTION REGARDING THE RELIANCE AND DAMAGES ISSUES TO BE DETERMINED AT PHASE I OF TRIAL

Morgan Stanley & Co. Incorporated ("Morgan Stanley") moves for an order providing that the issues of reliance and damages will be determined during Phase I of the trial under both relevant standards of proof – proof by the greater weight of the evidence, and proof by clear and convincing evidence.

In support of this motion, Morgan Stanley states:

1. In this Court's order of March 16, 2005, the Court granted Plaintiff Coleman (Parent) Holding, Inc.'s ("CPH's") motion for entry of default judgment in part, holding that CPH's claims that Morgan Stanley aided and abetted Sunbeam's fraud and conspired with Sunbeam to commit fraud would be deemed established, but that the other elements of CPH's claims, reliance and damages, would be fully litigated. See Tr. Hearing March 31, 2005, at 6276-77; id. at 6279. Following that Order, this Court ruled that it would bifurcate the case. Phase I of the trial is "limited to liability, if any, . . . for compensatory damages." In contrast, Phase II shall address the availability and, "if



necessary, amount of punitive damages." Order of March 31, 2005, at 1 ("Bifurcation Order").

2. To prove entitlement to compensatory damages, CPH must prove the elements of fraud – the undefaulted elements – by the greater weight of the evidence. By contrast, to establish that punitive damages are even available, CPH must prove fraud – once again, the undefaulted elements – by clear and convincing evidence. See Fla. Stat. § 768.72 ("A defendant may be held liable for punitive damages only if the trier of fact, based on *clear and convincing evidence*, finds that the defendant was personally guilty of intentional misconduct") (emphasis added).[1]

3. The Court's current orders appear to contemplate having the jury decide the first issue, namely whether reliance and damages were proved by the greater weight of the evidence, at Phase I of the trial and the second issue, whether the same elements were proved by clear and convincing evidence, at Phase II of the trial. That procedure is neither efficient nor just. Because the jury will be deliberating on whether there was proof of reliance and damages by the greater weight of the evidence in any event at Phase I, it imposes no additional burden to ask the jury at the same time to decide whether those elements have been proved by clear and convincing evidence. Indeed, the jury would merely complete one verdict form question inquiring whether the elements had been proved by a preponderance of the evidence (resolving whether compensatory damages are available), and a second inquiring whether they had been proved by clear and convincing evidence (resolving whether punitive damages are available). See Attachment 1 (sample excerpt verdict form). Upon a determination that

---

[1] We assume for present purposes that the Court's order deems the defaulted elements established for purposes of both compensatory and punitive damages. As we have advised the Court by separate motion, however, deeming those elements established and foreclosing Morgan Stanley from contesting them for purposes of punitive damages is itself an excessive and unfair addition to an already severe sanction, is unprecedented in Florida, and is inconsistent with constitutional standards and binding decisions of Florida's appellate courts.

the elements were all proved by clear and convincing evidence – thus establishing the availability of punitive damages – the case would proceed to Phase II so the jury could determine whether to award them and, if so, in what amount. Or, upon determining that some elements were not so proved, the trial would terminate without need for Phase II.

4. Deferring the determination whether there was clear and convincing proof of reliance and damages to Phase II, in contrast, would waste the Court's, the party's, and the jury's time and energy and would constitute an unnecessary distraction from the central focus of that proceeding. After having litigated reliance and damages in Phase I, the parties would be required to remind the jury of the same evidence, and present the same arguments, again in Phase II to resolve precisely the same issue – reliance and damages – but under a different standard of proof. The jury will be required to deliberate on the same issue again, and consider the same evidence again, again with no difference but the standard of proof. Further, the jury would be required to sit through evidence relating to the amount of punitive damages despite the possibility that, because of a failure to prove fraud by clear and convincing evidence, punitive damages may turn out to be legally unavailable in any event. There is no sensible reason to proceed in that fashion.

5. There is, moreover, a powerful reason for not proceeding in that fashion -- it introduces an unacceptable risk of undue prejudice. Under the Court's current orders, the evidence introduced during Phase II will include potentially inflammatory evidence relating to punitive damages. For example, the Court currently plans to read a statement to the jury setting forth its findings of litigation misconduct.[2] Such evidence has *no* bearing on whether CPH reasonably relied (or whether there was clear and convincing proof of reasonable reliance). But it has the undeniable potential to inflame the jury and taint that determination. Deferring resolution of whether there is clear and

[2] Morgan Stanley, as the Court understands, disputes the propriety of reading such a statement, as its other motions and papers in this case make clear.

convincing proof of reliance and damages to Phase II thus serves not only efficiency, but fairness as well.

6. Morgan Stanley is aware of the Court's considerable frustration (and more) with the way discovery and other matters were handled in this case. But that frustration should not cause the Court to lose sight of its duty to establish procedures that are both efficient and fair. Because the procedures currently contemplated by the Court's orders fall short on both accounts, they must be modified at least in this one respect.

CONCLUSION

For all the foregoing reasons, Defendant Morgan Stanley respectfully requests that this Court reconsider its order of March 31st.

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ATTACHMENT 1

[*SAMPLE FOR ILLUSTRATIVE PURPOSES ONLY*]

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

VERDICT

We, the jury, return the following verdict:

COUNT I—AIDING AND ABETTING

1. Did Defendant Coleman (Parent) Holdings, Inc. ("CPH") actually rely on Sunbeam's allegedly false statements?

A. Was this proved by the greater weight of the evidence?

YES_____ NO_____

B. Was this proved by clear and convincing evidence?

YES_____ NO_____

If your answer to Question 1 is NO, your verdict on this count is for Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley"), and you should proceed to COUNT II—CONSPIRACY. If your answer to Question 1 is YES, please answer Question 2.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

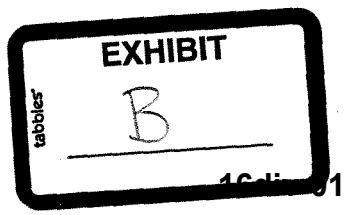
vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

MORGAN STANLEY'S SUBMISSION CONCERNING THE NEED FOR CLEAR AND CONVINCING PROOF OF ENTITLEMENT TO PUNITIVE DAMAGES

On April 19, 2005, the Court requested that Morgan Stanley & Co. Incorporated ("Morgan Stanley") submit additional Phase II briefing addressing the matters that must be proved by clear and convincing evidence under Florida law. *See* 4/19/05 Tr. at 9367-9368. Morgan Stanley is providing this submission in response.

As Coleman (Parent) Holdings Inc. ("CPH") and this Court have both acknowledged, the clear and convincing evidence requirement of Florida Statute § 768.725 applies in this case. *See* 4/05/05 at Tr. 6831; 4/19/05 at Tr. 9355. *Accord* Florida Standard Jury Instructions in Civil Cases PD 1, 2 (2004) (same). By its terms, Florida Statute Section 768.725 provides that a plaintiff seeking punitive damages "must establish at trial, by clear and convincing evidence, its entitlement to an award of punitive damages." Both the plain meaning of Section 768.725 and applicable precedent require that CPH bear the burden to prove each element of fraud — misrepresentation, materiality, reliance, causation and damages, *see Gandy v. Trans World Computer Tech. Group*, 787 So. 2d 116, 118 (Fla. 2d DCA 2001) — by clear and convincing evidence before punitive damages may be recovered.



Under the plain wording of Section 768.725, "entitlement" to an award of punitive damages must be proved by clear and convincing evidence. Entitlement is a well-defined common law concept that requires a plaintiff to establish certain legal prerequisites to be eligible to receive an award of punitive damages. *See, e.g., Winn & Lovett Grocery Co. v. Archer*, 171 So. 214, 219, 222-23 (Fla. 1936). Under current Florida law, these prerequisites include proving all of the elements of the underlying cause of action. *See Oliveira v. Ilion Taxi Aero Ltda*, 830 So. 2d 241, 242 (Fla. 4th DCA 2002) (punitive damages may not be awarded as a matter of law "where there is no finding of liability"); *Liggett Group Inc. v. Engle*, 853 So. 2d 434, 451 (Fla. 3d DCA 2003) ("'where actual damage is an element of the underlying cause of action,'" it — like all the other elements of liability — must be proved as "'a prerequisite to an award of punitive damages'") (quoting *Ault v. Lohr*, 538 So. 2d 454, 457 (Fla. 1989) (Ehrlich, C.J., concurring)). It thus logically follows from the Florida Legislature's choice of the term "entitlement to an award of punitive damages" in Section 768.725 that there can be no imposition of punitive damages unless the plaintiff adduces clear and convincing evidence of each element of the underlying cause of action.

It has long been the rule in Florida that proof of the underlying elements of common-law fraud suffices to establish liability for punitive damages. *E.g., First Interstate Dev. Corp. v. Ablanedo*, 511 So. 2d 536, 539 (Fla. 1987) ("proof of fraud sufficient to support compensatory damages necessarily is sufficient to create a jury question regarding punitive damages"); *Rappaport v. Jimmy Bryan Toyota of Ft. Lauderdale, Inc.*, 522 So. 2d 1005, 1006 (Fla. 4th DCA 1988) (same). Implicit in this holding is that proof that fails to establish the defendant's liability for fraud likewise defeats any claim of entitlement to punitive damages. What must be proved does not change because the tort reform statute subsequently raised the standard of proof to

"clear and convincing evidence"; rather, all that has changed is the level of confidence the jury must have that each element is satisfied.

Under prior practice, a plaintiff in a fraud case who failed to establish each element — misrepresentation, materiality, reliance, causation and damages — by the greater weight of the evidence, and therefore did not prevail with respect to compensatory liability, plainly could not establish entitlement to punitive damages by showing that it had proven some or most of the elements. When the Legislature tightened the burden of proof in Section 768.725, the logical consequence was that everything that previously had to be proven by "greater weight" thereafter had to be established by "clear and convincing evidence." Nothing in this change would have reduced the requirement to demonstrate ***all*** elements of the cause of action by the applicable standard. In this case — where the Court has found misrepresentation and materiality as a sanction pursuant it its March 23, 2005 Default Order (and assuming the Court does not grant Morgan Stanley's request to withdraw the sanction from the Phase II proceedings) — this means that the jury may not award punitive damages unless it finds that CPH has proved reliance, causation and damages by clear and convincing evidence.

While the Court has recognized that clear and convincing proof of the underlying tort is an essential part of a showing of punitive "entitlement," it has suggested that perhaps a sort of "sliding scale" among the elements might apply, such that only "the expected value of the whole thing" need be above a certain threshold before punitive damages may be awarded. 4/19/05 Tr. at 9370. With all respect, neither logic nor precedent supports the view that a tort may be clearly and convincingly proven despite the absence of such proof for each individual required element. Its illogic is shown by the following hypothetical: suppose a tort has three elements, A, B, and C, and suppose that the clear and convincing evidence standard requires an 75% level of

confidence. If A and B are established with absolute certainty but C is only 40% probable, averaging the three would yield 80%, yet not even the greater weight standard would be satisfied in such a case. Indeed, suppose instead that it was undisputed that C was not established; in that circumstance, the average would yield 66%, but it would be manifest that there could be no liability at all.[1]

Precedent confirms this result. Whether the standard at issue is beyond a reasonable doubt, clear and convincing evidence, or a preponderance of the evidence, Florida courts have held that the requisite level of certainty applies to ***each individual element***. *See, e.g.*, *Stanley v. State*, 560 So. 2d 1269, 1270 (Fla. 3d DCA 1990) (instruction violated defendant's due process rights because it "excuse[d] the state from its burden of proving beyond a reasonable doubt each element of the offense"); *Ritter v. Shamas*, 452 So. 2d 1057, 1058 (Fla. DCA 3d 1984) (validity of gift to attorney from client testator required clear and convincing evidence of "every requisite element"); *Sharp v. Long*, 283 So. 2d 567, 568 (Fla. 4th DCA 1973) ("No recitation of authority is necessary for the proposition that the burden of proof is on the plaintiff to establish by a preponderance of the evidence each element of his cause of action."). Nothing gives any indication the Florida Legislature intended to deviate from this widely-accepted method of applying a burden of proof when enacting Section 768.725. Likewise here, CPH must prove each individual element, including reliance, by clear and convincing evidence.

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[1] In this regard assessment of the elements of a claim differs greatly from assessment of pieces of evidence. Obviously a claim can be proven by the aggregation of numerous pieces of evidence, regardless of how strong any single one might be on its own. The elements of a claim, however, must each be proven to the degree of certainty required by the applicable burden of proof, or the claim fails.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery facsimile and hand delivery on this 22 day of April, 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

CASE NO: CA 03-5045 AI

MORGAN STANLEY'S REPLY TO CPH'S BRIEF REGARDING THE REQUIREMENT THAT PLAINTIFF PROVE ENTITLEMENT TO AN AWARD OF PUNITIVE DAMAGES BY CLEAR AND CONVINCING EVIDENCE IN PHASE II

In its response to Morgan Stanley's April 22 motion, CPH has now shifted its position regarding the burden of proof for "entitlement" to punitive damages. Whereas CPH previously endorsed a sort of "sliding scale" approach to the clear and convincing evidence requirement, under which the aggregate "expected value" that ***all*** the elements of fraud were established had to exceed some threshold, 4/19/05 Tr. at 9370, it now argues that ***only*** the defendant's "wrongful intent" needs to be proved by clear and convincing evidence. *See* 4/25/05 CPH Motion in Response at 3. This new position is also clearly wrong under Florida law.[1]

Morgan Stanley's April 22 motion identifies four controlling principles, none of which CPH even attempts to dispute. ***First***, Florida Statutes section 768.725 applies in this case, providing that a plaintiff seeking punitive damages "must establish at trial, by clear and convincing evidence, its entitlement to an award of punitive damages." ***Second***, entitlement is a well-defined Florida common law concept that requires a plaintiff to establish certain legal prerequisites to be eligible to receive an award of punitive damages. *See, e.g., Winn & Lovett*

[1] CPH has not attempted to controvert Morgan Stanley's explanation of why a "sliding scale" approach to the different elements of fraud is both illogical and unprecedented. *See* 4/22/05 Morgan Stanley Motion at 3-4.

EXHIBIT
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Grocery Co. v. Archer, 171 So. 214, 219, 222-23 (Fla. 1936). ***Third***, under Florida law, the prerequisites to receiving an award of punitive damages include proving ***all*** of the elements of the underlying cause of action. *See Oliveira v. Ilion Taxi Aero Ltda*, 830 So. 2d 241, 242 (Fla. 4th DCA 2002) (punitive damages may not be awarded as a matter of law "where there is no finding of liability"); *Liggett Group Inc. v. Engle*, 853 So. 2d 434, 451 (Fla. 3d DCA 2003) (plaintiff must prove all elements of the underlying cause of action, including damages, as "a prerequisite to an award of punitive damages"), *rev. granted*, 873 So. 2d 1222 (Fla. 2004). ***Fourth***, where a tort or offense has multiple elements, Florida courts have consistently required the requisite level of certainty to apply ***to each individual element***. *See, e.g., Stanley v. State*, 560 So. 2d 1269, 1270 (Fla. 3d DCA 1990) (beyond reasonable doubt); *Ritter v. Shamas*, 452 So. 2d 1057, 1059 (Fla. 3d DCA 1984) (clear and convincing evidence); *Sharp v. Long*, 283 So. 2d 567, 568 (Fla. 4th DCA 1973) (preponderance). Considered together, these propositions establish that there must be clear and convincing evidence of each element of fraud — misrepresentation, materiality, reliance, causation, and damages — before CPH may recover punitive damages in this case.

Instead of directly responding to the statutes and case law citations raised in Morgan Stanley's motion, CPH simply recites several standard jury instructions and asserts, ***without any supporting authority***, that "[e]ntitlement to punitive damages * * * hinges on clear and convincing evidence that the defendant acted with wrongful intent." 4/25/05 CPH Motion in Response at 3. While that assertion is no doubt true as far as it goes, the above showing demonstrates that the clear and convincing evidence requirement goes further. While the Florida Legislature ***could have*** required that only the existence of "wrongful intent" be proven by clear

and convincing evidence before punitive damages are legally recoverable, that is not what the legislature actually did.

The instructions CPH cites track Florida Statutes section 768.72, which provides that in all causes of action arising after October 1, 1999, "[a] defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence." §§ 768.72(2), (4). But CPH ignores section 768.725 and neglects to mention that section 768.72 goes on to define "intentional misconduct" in a way that is critical to understanding how section 768.72 operates in fraud cases: According to the statute, "'[i]ntentional misconduct' means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, ***resulting in injury or damage.***" *Id.* § 768.72(2)(a) (emphasis added).[2] These requirements clearly go beyond the mere existence of "wrongful intent," because the phrase "resulting in injury or damage" necessarily incorporates the existence of reliance, causation, and damages; without proof of those elements there is no "resulting" injury. Thus, both sections 768.72 and 768.725 require clear and convincing proof of ***all the elements of fraud.***[3]

CPH's discussion of *Ablanedo* — the sole case cited in Morgan Stanley's April 22 motion that CPH discusses at any length — similarly misses the point. At the time of *Ablanedo*, proof of each element of fraud was ***both necessary and sufficient*** to establish liability for punitive damages. *See First Interstate Dev. Corp. v. Ablanedo*, 511 So. 2d 536, 539 (Fla. 1987). That the

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[2] Because fraud is an intentional tort, the definition of "gross negligence" is irrelevant here.

[3] The remaining two elements of fraud — misrepresentation and materiality — are respectively encompassed in section 768.72 by the requirement that the "defendant had actual knowledge of the wrongfulness of the conduct" and the requirement that there be a "high probability that injury or damage to the claimant would result."

Legislature subsequently raised the burden of proof to establish punitive "entitlement" to clear and convincing evidence does nothing to disrupt the requirement that the plaintiff demonstrate ***all*** elements of the cause of action by the applicable standard before punitive damages may be awarded. CPH never addresses this point.

Accordingly, CPH must prove reliance, causation, and damages (the elements of fraud that are not established by virtue of the Court's sanction in its March 23, 2005 Default Order) by clear and convincing evidence in order to receive punitive damages in this case.[4]

[4] This is of course assuming *arguendo* that the Court does not grant Morgan Stanley's request to withdraw the sanction from the Phase II proceedings. Morgan Stanley reiterates the point that it violates Florida law and due process to extend the effect of the sanction to Phase II of the trial.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION *IN LIMINE* NO. 36

Morgan Stanley submits this response to CPH's Motion in Limine No. 36, which asks the Court to "clarify what evidence is admissible" during Phase II. In large part, however, that motion does not permit the Court to clarify anything at all, because it does not specify what evidence (if any) CPH plans to introduce. For example, while CPH asks the Court to rule that other similar bad acts are admissible, it fails to identify the supposedly similar bad acts it plans to introduce. Without that disclosure, it is impossible for Morgan Stanley to respond and the Court to rule except in an abstract way that offers little guidance. For that reason alone, the Court should deny the motion and require CPH to identify with particularity the other acts and supporting evidence it plans to introduce so that the Court and the parties may have the opportunity to apply the relevant standards to that evidence.

Even on the abstract legal questions, moreover, CPH's relies on a flawed interpretation of older Florida cases, while at the same time all but ignoring the U.S. Supreme Court's most significant punitive damages decisions of the last decade. Indeed, even though CPH's 11-page

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motion cites nearly 30 federal and state cases, only two of those post-date the Supreme Court's opinion in *State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408 (2003), and they are cited only for uncontroversial propositions.[1] As this Court is aware, the 2003 *State Farm* decision dramatically altered the Constitutional landscape for punitive damages. Yet, other than a cursory discussion of *State Farm* in a dismissive paragraph toward the end of its brief, CPH never acknowledges that the U.S. Constitution, as interpreted in *State Farm* and its predecessors, places limits on the types of evidence a jury may consider when deciding whether and in what amount to award punitive damages. Were this Court to accept CPH's invitation to aggressively extend Florida's pre-*State Farm* punitive damages jurisprudence without considering *State Farm*'s effects, it would run a high risk of injecting reversible error into the second phase of this trial without any corresponding gain in the provision of essential information for the jury.

I. Harm to Non-Parties

CPH begins its motion by renewing its request, first made during Phase I, that it be permitted to introduce evidence of alleged harm to "the investing public," including the 18% of Coleman shareholders who are not parties to this suit.[2] As discussed below, considering harms

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[1] *See* CPH MIL 36 at 4 (*quoting Zuckerman v. Robinson*, 846 So. 2d 1257, 1258 (Fla. 4th DCA 2003) ("punitive damages are premised on the enormity of the act resulting in the injury to plaintiff")); *id.* at 10 (*quoting Liggett Group Inc. v. Engle*, 853 So. 2d 434, 457 n.28 (Fla. 3d DCA 2003) ("Florida courts routinely use net worth to determine whether a punitive award is bankrupting or excessive.").

[2] It is unclear from its motion whether CPH has abandoned its effort to introduce evidence of alleged harm to the debenture holders or other, even more remote non-parties. As this court has already recognized, of course, "generic harm to the investing public is not relevant" to CPH's claims, and should be barred. 4/5/05 Tr. at 6693. And, as we discuss below, any mention of harm to the debenture holders, in addition to being unnecessarily prejudicial, would certainly open the door to evidence of harm to Morgan Stanley's affiliate company, MSSF.

to non-parties is disfavored, lest the jury punish for those harms rather than, or in addition to, the harm to CPH, which is the only proper predicate for punishment in this case.

If CPH is permitted to introduce evidence of purported harm to anyone other than the plaintiff, Morgan Stanley must be permitted to mitigate that showing with evidence tending to show that these supposed public harms were not laid at Morgan Stanley's door by their victims. Specifically, Morgan Stanley should be permitted to show that no member of the investing public other than CPH has sued Morgan Stanley for its conduct in this transaction, despite ample opportunity to do so and a demonstrated willingness to pursue claims against others involved in the Sunbeam affair. Indeed, as this Court is aware, a large group of debenture holders has sued Arthur Andersen, Sunbeam, and a long list of Sunbeam's officers and directors. *See In re Sunbeam Sec. Litig.*, No. 98-CV-8258 (S.D. Fla.). Despite taking discovery from Morgan Stanley, none of these plaintiffs chose to sue Morgan Stanley. In addition, the SEC, which thoroughly investigated the Sunbeam affair and imposed sanctions on key Arthur Andersen and Sunbeam personnel for their role in it, never alleged any wrongdoing on Morgan Stanley's part. Finally, any fair account of public harms arising from the Sunbeam fraud must include the fact that part of this "public" was MSSF, which suffered a huge loss from its acquisition of Sunbeam debentures.[3] If the subject of "harm to others" is to be broached before the jury, basic fairness requires that evidence of these facts be allowed in mitigation.

Furthermore, presentation of such evidence in Phase II would open the door to litigating whether the conduct was in fact fraudulent as to the public shareholders of Coleman or the

[3] CPH's proposed evidence clearly opens the door for Morgan Stanley to submit evidence on the loan losses. Independent of such door opening, however, MSSF's loan losses are admissible in Phase II.

purchasers of the debentures. Indeed, in order to properly respond to such allegations, particularly because no Coleman shareholder or debenture holder ever sued Morgan Stanley, we must be free to litigate the issues from which we have been foreclosed from litigating in Phase I. CPH's case rests to a large degree on purported representations made by Sunbeam and Morgan Stanley to it directly – representations never made to the general public. And the Court's sanction applies to the alleged defrauding of CPH; it has not been and should not be extended to claims that Morgan Stanley was complicit in defrauding non-parties.

In any case, CPH's assertions regarding the relevance of "other-harms" evidence are unsupported by either Florida or federal law. CPH claims that under Florida law, "the defendant's conduct toward the public is indeed a relevant consideration in awarding punitive damages." CPH Mot. at 4. This assertion is supported by citations to Florida's Standard Jury Instructions and three Florida cases, none of which stand for the proposition for which CPH cites them. Critically, none of those cases involved purely economic harm, or indeed harm or risk of harm to anyone other than the named plaintiff. *See Wransky v. Dalfo*, 801 So. 2d 239 (Fla. 4th DCA 2001) (drunk driving case with one victim); *American Cyanamid Co. v. Roy*, 498 So. 2d 859 (Fla. 1987) (failure-to-warn case involving one plaintiff and a $45,000 punitive damages award that was reversed); *Zuckerman v. Robinson*, 846 So. 2d 1257 (Fla. 4th DCA 2003) (hit and run accident with one victim).

Moreover, the U.S. Supreme Court has repeatedly cautioned trial courts against admitting any evidence of harm to non-parties when a jury is considering punitive damages. While such harm ***may*** be marginally relevant to the jury's consideration of reprehensibility, its admission creates a grave risk of multiple punishments for the same conduct. As the Supreme Court has explained,

> Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis. . . . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.

State Farm, 538 U.S. at 423 (*citing BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 593 (1996) (Breyer, J., concurring) ("Larger damages might also 'double count' by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover.")).

In MIL No. 3, CPH sought to exclude evidence of losses suffered by MSSF, Morgan Stanley's sister corporation, arguing that such evidence would create undue prejudice and confuse the jury, because the only issue "is about what CPH lost, not what MSSF lost." *Id.* at 3-4. The same thing is true here. Because the jury may not punish Morgan Stanley for the putative losses of non-parties (non-parties who never bothered suing Morgan Stanley), such losses are not only irrelevant but unduly inflammatory.

CPH acknowledges the risk of over-punishment created by placing these other alleged harms before the jury, but claims that any concern in this regard "is unfounded" because "a defendant is permitted to introduce evidence of prior punitive damages awards relating to the same transaction as mitigating evidence." CPH Mot. at 6. This supposed opportunity to mitigate with evidence of prior punitive awards is simply a red herring. None of the other alleged "victims" of Morgan Stanley's conduct has even chosen to ***sue*** Morgan Stanley. Moreover, because any verdict against Morgan Stanley in this case results from a case-specific sanction, the verdict has no predictive value as to the outcome of any suits that other alleged victims might bring. And if Morgan Stanley were to prevail in such hypothetical litigation (as it expects it

would), it would not receive any "credit" for the punishment imposed here, to the extent that punishment goes beyond the harms suffered by CPH.

The risk of prejudice here is far greater than any possible incremental value of this marginally-relevant evidence. It should not be admitted.

II. Evidence of Other Litigation

A. CPH Should Be Required To Disclose The "Similar Fraudulent Conduct" It Intends To Use, In Order To Enable The Court To Determine Its Admissibility

As Morgan Stanley anticipated in its Motion in Limine No. 29, CPH seeks this Court's permission to introduce evidence of Morgan Stanley's as-yet-unspecified "similar fraudulent conduct," which CPH promises to establish by "competent evidence." CPH MIL 36 at 6. But CPH's motion raises more questions than it answers. CPH does not specify ***what*** conduct it plans to introduce. What kind of conduct is "similar" to that alleged in this suit? What kind of "competent evidence" must CPH adduce before sharing such conduct with the jury? Finally, does the marginal relevance to the punitive damages calculus of the allegedly similar matters outweigh the distraction, confusion, and added burden on the judicial system that are the inevitable consequence of allowing this case to degenerate into a series of free-standing trials of those collateral matters? CPH never answers these questions, and none can be fully answered in the abstract.

Because CPH has not so far identified what "other acts" it intends to proffer in the Phase II trial, it is impossible for Morgan Stanley to respond to its request. Therefore, we ask that the Court require CPH to identify with specificity the evidence it proposes to adduce and to give Morgan Stanley an opportunity to respond to that disclosure. That hearing must occur before

this motion is ruled upon. This Court has already recognized the necessity of such a procedure. *See* 4/5/05 Tr. at 6707 ("[I]f either side is going to ask a witness about litigation other than this litigation, you first come up and we talk about it."). Indeed, this procedure is well established under Florida law. *See Stephenson v. Cobb*, 763 So. 2d 1195, 1196 (Fla. 4th DCA 2000) (burden is on the proponent of other incident evidence to lay a sufficient predicate to establish substantial similarity); *Barker v. Deere & Co.*, 60 F.3d 158, 163 (3d Cir. 1995) (proponent of other incident evidence must apprise the court "of the specific facts of previous accidents in order to make a seasoned determination as to whether the prior accidents are substantially similar"). In the absence of such a foundation, a court cannot make a determination of substantial similarity. *See Walmart Stores, Inc. v. McDonald*, 676 So. 2d 12 (Fla. 1st DCA 1996) (because proponent did not lay adequate predicate of substantial similarity evidence properly excluded); *Friddle v. Seaboard Coast Line R.R. Co.*, 306 So. 2d 97 (Fla. 1974).

B. *State Farm* Imposes Strict Limits On Other-Conduct Evidence

In any case, in order for past conduct to be admissible, it must meet three requirements. First, the past conduct must be very similar – indeed, nearly identical – to the conduct at issue in the case. Second, the past conduct must be proved, not merely alleged. Third, and finally, the evidence cannot create such a risk of confusion, distraction, or inflammation that its potential for undue prejudice outweighs its probative value.

1. The conduct must be very similar.

State Farm requires that any "other acts" conduct be ***very*** similar to the conduct alleged to have harmed the plaintiff:

> Although "our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance," in the context of civil actions ***courts must ensure the conduct in question replicates the prior transgressions***.

State Farm, 538 U.S. at 423 (*citing BMW*, 517 U.S. at 577; *TXO*, 509 U.S. at 462 n.28; *Haslip*, 499 U.S. at 21-22). As the Eighth Circuit has recently explained,

> In determining what constitutes a previous example of the same conduct . . . we must be careful not to let the exception swallow the rule. By defining his or her harm at a sufficiently high level of abstraction, a plaintiff can make virtually any prior bad acts of the defendant into evidence of recidivism.
>
> [. . .]
>
> The Supreme Court has therefore emphasized that the relevant behavior must be defined at a low level of generality. "Evidence of other acts need not be identical to have relevance in the calculation of punitive damages," but the conduct must be closely related.

Williams v. ConAgra Poultry Co., 378 F.3d 790, 797 (8th Cir. 2004). This requirement has been broadly and consistently applied. *See, e.g., Richardson v. Tricom Pictures & Prods., Inc.*, 334 F. Supp. 2d 1303 (S.D. Fla. 2004) (excluding evidence of prior allegations of sexual harassment against sexual-harassment defendant because prior acts were not sufficiently similar to plaintiff's claims); *Gober v. Ralphs Grocery Co.*, No. D040473, 2005 WL 895207, at *7 (Cal. Ct. App. Apr. 19, 2005) (evidence of prior misconduct by the defendant must be both "factually and legally similar" to plaintiffs' claims to be relevant to the defendant's reprehensibility); *Atkinson v. Orkin Exterminating Co., Inc.*, 604 S.E.2d 385 (S.C. 2004) (remanding for new trial on punitive damages in suit for fraud and breach of contract, where jury heard evidence of defendant's prior fraudulent acts directed toward existing customers and plaintiff's claim involved fraud toward prospective customers); *Perez Librado v. M.S. Carriers, Inc.*, No.Civ. A.3:02-CV-2095-D, 2004 WL 1490304 (N.D. Tex. June 30, 2004) (excluding evidence of

trucking company's "documented history of a deficient safety control enforcement and compliance" in suit involving motor vehicle accident, because under *State Farm*, a "defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages").

Florida law on other incident evidence is entirely in accord. In considering the admissibility of prior incident evidence, the Supreme Court in *Perret v. Seaboard Coast Line Railroad Co.*, 299 So. 2d 590 (Fla. 1974), specifically warned that "a rule of such broad admissibility would be tantamount to permitting the proof of negligence vel non by a showing of similar prior accidents." *Id.* at 592. *See also Railway Express Agency, Inc. v. Fulmer*, 227 So. 2d 870, 873 (Fla. 1969) (excluding other incidents because the plaintiff failed to demonstrate a substantial similarity); *Voynar v. Butler Mfg.*, 463 So. 2d 409, 413 (Fla. 4th DCA 1985) ("Evidence of prior accidents is not admissible unless the proffer demonstrates they involved the use of the same type of equipment under substantially similar conditions."); *Thursby v. Reynolds Metals Co.*, 466 So. 2d 245 (Fla. 1st DCA 1984) (where two accidents were not shown to exhibit similarities, the evidence of the second accident was properly excluded).

For this reason, Morgan Stanley has already requested that CPH be barred from introducing any "other acts" evidence before the Court has an opportunity to conduct a hearing, outside the presence of the jury, to determine whether the proffered conduct is truly "similar" to the alleged fraud at issue in this case. This was the procedure that the Court adopted in Phase I, and there is no reason to change it for Phase II. Indeed, such a safeguard is particularly important at that stage, because, as noted in Morgan Stanley's MIL No. 29, CPH has recently indicated an intention to explore evidence of, for example, "litigation that has been filed against

Morgan Stanley in general." (Jones Dep. Tr. 16:1-3). Any purported evidence that does not "replicate" the specific conduct at issue here must be barred.

In addition, CPH should certainly be barred from introducing any evidence of prior bad acts by ***any*** entity other than the defendant in this case. As the Court is well aware, CPH has made no attempt in this litigation to pierce Morgan Stanley's corporate veil (and indeed, has argued quite strenuously that Morgan Stanley should not be permitted to inform the jury of any losses suffered by its affiliate companies as a result of the Sunbeam fraud). For this reason, well-established principles of Florida law prohibit CPH's inviting the jury to punish Morgan Stanley for actions taken by its parent company or any other related but distinct corporate entities. The Fourth D.C.A. held as much in *Humana*:

> [T]he [trial] court[] . . . allowed . . . several [witnesses] to testify about their negative experiences with their health insurers. To the extent that these insurers were not the same as Humana, we hold the court erred. Although they shared the same parent company (Humana, Inc.) and although the [plaintiff] argued that Humana, Inc. acted as an agent for its subsidiaries in [committing the alleged fraud], Humana, Inc. was not named as a party to this lawsuit. There was no attempt to pierce the parent company's corporate veil or pursue a legal theory that would have allowed the jury to disregard the corporate structure and hold the subsidiaries responsible for each other's conduct. The evidence was irrelevant and unduly prejudicial.

Humana Health Ins. Co. of Fla., Inc. v. Chipps, 802 So. 2d 492, 497 (Fla. 4th DCA 2001).

2. CPH Must Prove That Morgan Stanley Committed Any Similar Acts.

CPH has a second hurdle to overcome before it may introduce evidence of other acts. Even if such evidence suggests ***identical*** prior conduct by Morgan Stanley (and we do not believe that such evidence exists), CPH may not introduce it except by proof carrying substantial

indicia of reliability. CPH acknowledges this requirement by stating that it may introduce other-acts evidence only "to the extent [it] can establish such similar prior acts by competent evidence." CPH Mot. at 6. There is no reason for CPH to be vague on this point. Well-settled Florida law requires that a defendant's prior bad acts be proven by clear and convincing evidence before they may be considered by a jury pursuant to Fla. Stat. § 90.404(2). *See, e.g.*, *Preciose v. State*, 829 So. 2d 381 (Fla. 4th DCA 2002); *Smith v. State*, 743 So. 2d 141 (Fla. 4th DCA 1999); *State v. Norris*, 168 So. 2d 541 (Fla. 1964).

Thus, at a minimum, CPH may not simply put before the jury the unproven, hearsay allegations contained in lawsuits that have been settled or otherwise not conclusively resolved. *See, e.g.*, *State Farm*, 538 U.S. at 426-27 (holding that evidence of a $100 million verdict in an unrelated lawsuit was "of such marginal relevance that it should have been accorded little or no weight" because "no judgment was entered in the case; and it was later settled for a fraction of the verdict"); *Long Term Care Found., Inc. v. Martin*, 778 So. 2d 1100, 1103 (Fla. 5th DCA 2001) (upholding exclusion of complaint filed in other lawsuit offered in support of punitive damages claim, because the complaint "contained bare allegations against the [defendant] in the form of rank hearsay," and therefore "any relevance the complaint might have had was outweighed by the unfair prejudice against the [defendant]."). To the extent CPH plans to proffer evidence relating to settled lawsuits, well-established principles preclude using those as evidence of wrongdoing by Morgan Stanley. *See* Fla. Stat. § 90.408 ("Evidence of an offer to compromise a claim which was disputed as to validity or amount, as well as any relevant conduct or statements made in negotiations concerning a compromise, is inadmissible to prove liability or absence of liability for the claim or its value."); 1-4 FLORIDA EVIDENCE MANUAL § 90.408 (Fla. Stat. 90.408 applies to completed settlements as well as offers to compromise); *see also, e.g.*, *Sea*

Cabin, Inc. v. Scott, Burk, Royce & Harris, P.A., 496 So. 2d 163, 164 (Fla. 4th DCA 1986) (pursuant to Fla. Stat. 90.408, evidence of settlements not admissible to prove liability); *Taylor Imported Motors, Inc. v. Armstrong*, 391 So. 2d 786 (Fla. 4th DCA 1980) (same). Indeed, CPH may not introduce the results of ***successful*** lawsuits against Morgan Stanley, unless the plaintiffs in those cases were required to prove their allegations by clear and convincing evidence.

3. Extensive Side Litigation Would Distract and Confuse the Jury

In any case, as we noted in our earlier motion, if CPH attempts to introduce evidence of prior bad acts, Morgan Stanley must, at the very least, be granted the opportunity to contest that evidence. Unavoidably, such a process will result in a series of lengthy and distracting side-trials regarding Morgan Stanley's conduct in other matters that were unrelated to CPH. Phase II would degenerate into a confusing and distracting circus, in which evidence of barely relevant collateral matters would consume the Court's and the jury's time and attention. For this reason, even if there were no *State Farm*-based concerns, evidence of outside litigation would still be inadmissible under Fla. Stat. § 90.403, which states that "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." Introduction of other act evidence implicates all of these concerns. *See I.B.L. Corp. v. FP&L*, 400 So. 2d 1288 (Fla. 3d DCA 1981) (the likelihood that evidence will introduce collateral issues and mislead the jury from the matter directly in controversy, was a factor which weighs heavily against the admission of evidence of similar claims). As Florida courts have further recognized:

> The variables and differences inevitably existing in the circumstances of this and the prior accident would preclude delving into the latter with testimony pro and con thereon. To have done so would have served to impose upon the jury the need to decide a collateral issue having slight, if

> any, relevance to the case at hand, and more apt to confuse than to assist the jury in its determination of the issues which were properly before it in this case.

Short v. Allen, 254 So. 2d 34, 36 (Fla. 3d DCA 1971); *accord Ashby Div. of Consol. Aluminum v. Dobkin*, 458 So. 2d 335 (Fla. 3d DCA 1984); *Long Term Care Found., Inc. v. Martin*, 778 So. 2d 1100 (Fla. 5th DCA 2001); *see also Uitts v. General Motors Corp.*, 411 F. Supp. 1380, 1383 (E.D. Pa. 1974) (in order to minimize the prejudicial effect of reports of other incidents, defendant "would have had to go through each one individually with a jury. The result would have been a mini-trial of each of thirty-five reports offered by plaintiffs. This would lengthen the trial considerably and the minds of the jurors would be diverted from the claim of the plaintiffs to the claims contained in these reports").

Moreover, the mere mention of other claims or incidents, and especially the number of other claims, could taint the deliberative process, seriously undermining the integrity and fairness of the trial. *See David v. Brown*, 774 So. 2d 775 (Fla. 4th DCA 2000) (*quoting* CHARLES W. EHRHARDT, Florida Evidence, § 403. 1 at 100-03 (3d ed. 1984)) ("When a trial court considers the danger of unfair prejudice against the probative of evidence, proper considerations include. . . 'the tendency of the evidence to suggest an improper basis to the jury for resolving the matter, e.g., an emotional basis'").

Thus, the Court should refuse CPH's invitation to turn this trial into a broad-based attack on Morgan Stanley's outside conduct. *See, e.g., State v. O'Brien*, 633 So. 2d 96, 98 (Fla. 5th DCA 1994) (upholding trial court's exclusion of other-acts evidence because, *inter alia*, "[c]learly, if allowed, the collateral crimes evidence would become the focal point of the case") (internal citations omitted).

III. Wealth Evidence

Morgan Stanley has already submitted substantial briefing on the proper role of wealth evidence, and we will not burden the Court with a lengthy refutation of CPH's arguments on this subject. We feel compelled, however, to point out three things:

1. CPH's Motion does not confront *State Farm*, which made clear that a defendant's wealth may not be used to enhance an award of punitive damages.

2. The Florida cases cited by CPH ***all*** stand for the uncontroversial proposition that a defendant's net worth may be introduced for purposes of ***mitigation***, or to demonstrate the defendant's ability to pay a punitive award. Because Morgan Stanley has already stipulated to its ability to pay any Constitutional punitive award, CPH has no legitimate grounds, under Florida or Federal law, to introduce evidence of Morgan Stanley's net worth.[4]

3. CPH's assertion that "Florida courts routinely consider" the net worth of a defendant's ***parent*** company is wholly untenable. Florida courts do not ***ever*** do so, unless the plaintiff has introduced evidence that properly pierces the corporate veil. Indeed, the

[4] This does not mean, of course, that Morgan Stanley is barred from introducing evidence of its own net worth, if it chooses to do so for purposes of mitigation. *State Farm* does not bar the use of such evidence for this purpose (*see* 538 U.S. at 427 (the problems with wealth evidence "do[] not make its use unlawful or inappropriate . . . .")), and the Florida law cited in both Morgan Stanley's and CPH's motions clearly establishes the right of a defendant to introduce financial worth evidence for purposes of mitigation. *See, e.g.*, *Bould v. Touchette*, 349 So. 2d 1181, 1187 (Fla. 1977) ("'If defendant's financial worth is meager, it would be to his advantage to introduce such evidence in order to mitigate the damage award.'") (*quoting Rinaldi v. Aaron*, 314 So. 2d 762, 765 (Fla. 1975)). For this reason, Morgan Stanley reserves the right to introduce net-worth evidence as a mitigating factor (if, for example, Plaintiff asks the jury for an amount of punitive damages that is clearly excessive when compared to its net worth), but the choice whether to admit such evidence belongs to the defendant, and not to the plaintiff.

only cases cited by CPH to support the existence of this "routine" practice are *Humana Health Insurance Co. v. Chipps*, 802 So. 2d 492 (Fla. 4th DCA 2001), in which the defendant possessed a contractual indemnity agreement with its parent company, and *Wynn Oil Co. v. Purolator Chemical Corp.*, 403 F. Supp. 226 (M.D. Fla. 1974), a 30-year-old federal case in which ***the parent company was a co-defendant against whom the jury had awarded punitive damages.***

Conclusion

For the foregoing reasons, the motion should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 13 day of May, 2005.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER GOVERNING PROPOSED JURY INSTRUCTIONS

THIS CAUSE came before the Court May 3, 2005, with both parties well represented by counsel. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that by May 5, 2005 at 3:00 p.m., each party shall serve on the other objections to any proposed jury instructions, together with proposed supplemental jury instructions. By 3:00 p.m. May 7, 2005, the parties shall serve any objections to opposing counsel's proposed supplemental jury instructions.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 3 day of May, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION FOR COURT ORDERED DISCOVERY

THIS CAUSE came before the Court May 2, 2005 on Morgan Stanley's Motion for Court Ordered Discovery, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion for Court Ordered Discovery is Granted, in part. Within 3 business days, CPH's counsel shall produce for inspection and copying all items requested in paragraph 4, with information alleged to be privileged redacted, together with a privilege log. Unredacted versions shall be submitted directly to the Court, in a sealed envelope marked "DO NOT OPEN BY MAY 3, 2005, ORDER OF THE COURT", for in camera inspection, with each page Bate-stamped and the portion alleged to be privileged highlighted, together with an affidavit, organized by Bate-stamp numbers, averring the factual basis to support any privilege claims. The Court shall re-seal the documents and place them in the Court file following ruling on any privilege objections. The sealed envelope shall not be unsealed or removed from the Court file without further Order of

this or an appellate Court.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida, this 3rd day of May, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO. 2003CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.'S RESPONSE IN OPPOSITION TO MORGAN STANLEY'S MOTION FOR A LIMITING INSTRUCTION ON INFERENCES RELATING TO THE ABSENCE OF FURTHER EVIDENCE ON JUDICIALLY "DEEMED FACTS" AT TRIAL

Morgan Stanley's motion for a limiting instruction concerning the established facts set forth in Exhibit A to the Court's March 23, 2005 Order is yet another attempt by Morgan Stanley to undermine those factual findings. Morgan Stanley contends that it is concerned that its failure to rebut the established facts will lead the jury to draw improper inferences about the reason for Morgan Stanley's silence, thus warranting a limiting instruction, but what Morgan Stanley actually is attempting to do is play on the sympathies of the jury. Through its proposed limiting instruction, Morgan Stanley wants to suggest to the jury that Morgan Stanley would vigorously dispute the established facts if it were allowed to do so, but that Morgan Stanley cannot adduce any such evidence because its hands have been tied behind its back. Morgan Stanley thus wishes to use the Court's factual findings as a weapon with which to portray Morgan Stanley, instead of

CPH, as the real "victim" in this case. That should not be allowed to occur. Morgan Stanley's motion therefore should be denied.

Dated: May 4, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 4th day of May, 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING JERRY LEVIN

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: Jerry Levin.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 4th day of May, 2005.

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Defendant's Offer of Proof re: Jerry Levin

Morgan Stanley submits that, if permitted to testify in response to those questions to which the Court sustained plaintiff's objections on May 1, 2005, Mr. Levin would have testified as follows:

1. In 1997, Mr. Levin participated in a study of the price at which Coleman might be sold that concluded that they would be "very happy" to sell Coleman for $15-$16 per share, with no assumption of any debt outside of Coleman (and thus would not include assumption of the debt assumed by Sunbeam in this transaction). The testimony would include, and would be consistent with, Mr. Levin's deposition testimony in In re Sunbeam Corporation (6/20/01) MS 443 (at 25:15-26:9):

25

Q. What do you recall about that?
A. We had studied the question earlier and had earlier reached a conclusion that if we sold Coleman somewhere in the mid teens per share we would be very happy with the transaction.
Q. When was that?
A. During 1997.
Q. Did anything change between the point when you had that recognition and the time when Mr. Pearlman agreed to the purchase price that would have caused Coleman to have increased

26

significantly in value?
[OBJECTION OMITTED]
A. As valued as an independent company, no.
Q. Just so the record is clear, when you say mid teens, that is 15, $16 a share, is that a fair statement?
A. Yes.

2. The market price of Coleman stock at the time of the transaction overstated its value. This testimony would include, and would be consistent with, Mr. Levin's trial testimony in Prescott v. Coleman (1/27/03) (35:4-18):

35

Q. And you believe that the market price of Coleman's stock back in 1998, before the Sunbeam deal, reflected the value of Coleman; right?
A. I believe it did up until the early – very early part of the year when there were rumors going about that Sunbeam was going to buy Coleman and the stock did mysteriously trade up.
But prior to the period where the rumors had started that we were trading in the low tones, that that was reasonable. We had full disclosure, we had good analyst coverage. We had some good analysts, some bad analysts. We were trading pretty fairly, I thought, for the situation.
Were you trading fairly in 1997?
I believe so.

3. The February 23, 1998 presentation by Sunbeam raised several red flags in Mr. Levin's mind. This testimony would include, and would be consistent with, Mr. Levin's stricken trial testimony in this matter (5/2 Trial Tr. at 11909:13-15) that:

11909

Did you see some things in the presentation that you considered red flags?
A. Yes.

4. The red flags identified at the meeting included indications of channel stuffing. This testimony would include, and be consistent with, Mr. Levin's testimony in his deposition in this matter (Levin Dep. at 194:8-195:189 (Dec. 1, 2004))

194

Q. Would you read that into the record?
A. "Dumped $10 million blankets Japan and China fourth quarter."
Q. What did you mean by that?
A. They described their entry into

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the Japanese and Chinese markets for electric blankets and based on some questions I asked them, my knowledge of how things worked, it was clear that they had loaded their distributors with the $10 million and booked the sales but it had not sold through in either market.

Q. So you were using "dumped" in a pejorative sense here; weren't you?

A. Yes.

Q. This was your conclusion and analysis that you reached based on the

195

presentation that either Mr. Kersh or Mr. Goudis was giving?

A. That's correct.

Q. Sunbeam did not at this meeting acknowledge they had dumped anything in China; did they?

A. No.

Q. So it was your conclusion, I take it, at the end of this portion of the discussion that Sunbeam had -- loaded the channel, is that the term you used with these blankets in Asia?

A. Well, that -- could be several things. That they actually dumped $10 million of blankets to distributors.

Q. They hadn't sold them, they had put them with distributors?

A. Right.

5. Mr. Levin sought the $27.50 guaranteed redemption price for Coleman option-holders because he was concerned that the price of Sunbeam stock would fall after the merger. This testimony would include, and would be consistent with, Mr. Levin's deposition testimony in Prescott v. Coleman (8/27/02) (MS 684 at 89:9-18):

89

Q. Tell us what that participate was, if you could.

A. I had been informed that the company was

16div-016388

being sold at $27.50 in cash and stock, and I thought based on my assessment of the transaction, that it could depress the Sunbeam stock if the market felt that they had overpaid for Coleman in the other two acquisitions, and I wanted to make sure that I personally, and my management team got at least the $27.50 that was agreed to.

6. Mr. Levin sent MS 200 to Mr. Perelman as a warning because he wanted Mr. Perelman to know that (a) Mr. Dunlap wasn't as successful as he was telling the world – including Mr. Perelman, (b) the warnings that Mr. Levin gave Mr. Perelman against taking Sunbeam stock were correct (as he viewed the article as confirmatory of his views about Sunbeam and Mr. Dunlap's management of Sunbeam), and (c) this article reinforced the views that Mr. Levin had previously communicated to Mr. Perelman about Mr. Dunlap.

7. Mr. Perelman's block of Sunbeam shares was an important block of stock that Mr. Perelman could have tried to use to influence Mr. Dunlap. This testimony would include, and would be consistent with, Mr. Levin's testimony in his deposition in this matter (Levin Dep. at 115:25-116:5 (Dec. 1, 2004)):

115

Q. At that time Mr. Perelman's

116

companies owned approximately 13 percent of Sunbeam?

A. I don't recall.

Q. But it was a substantial amount?

A. It was an important vote.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S OPPOSITION TO COLEMAN (PARENT) HOLDINGS' MOTION *IN LIMINE* NO. 35 TO BAR INAPPROPRIATE OPINION TESTIMONY

Coleman (Parent) Holdings, Inc.'s ("CPH's") Motion *in Limine* to Bar Inappropriate Opinion Testimony is untimely, insufficiently specific, and factually inaccurate. CPH states that it "anticipates" that seven of Morgan Stanley & Co. Incorporated's ("Morgan Stanley's") Phase II witnesses will offer "grossly improper opinion testimony." CPH's MIL No. 35 at 1. But Morgan Stanley has already provided CPH with the ***actual page and line designations*** for those Phase II witnesses who will not be called live. CPH failed to object to that testimony on improper opinion grounds in the designation process. It objects to no specific testimony in its motion. And the designated testimony is relevant and admissible.

BACKGROUND

On April 4, 2005, Morgan Stanley designated witnesses to testify in Phase II. Paraphrasing the language of Florida Pattern Jury Instruction PD-2d(1), the disclosure stated that those witnesses may testify regarding factors applicable to the punitive

damages phase, including "the nature, extent, and degree of Morgan Stanley's alleged misconduct," "the relative experience, sophistication, and access to relevant information of the parties," and "the degree of CPH's alleged injury." Morgan Stanley's April 4, 2005 Revised Trial Witness Disclosure at 13-16.

On April 8, 2005, Morgan Stanley served its page and line designations for Meguid, Perella, Scott, Strong, and Tyree, among others. Although CPH served objections to these designations on April 17, 2005, CPH did not object to ***any*** of Morgan Stanley's page and line designations for these witnesses on the grounds that they constitute improper opinion testimony.

ARGUMENT

CPH's objection to the deposition testimony of seven of Morgan Stanley's Phase II witnesses for offering improper opinion testimony is without merit, for three reasons.

First, CPH's objection is untimely. Morgan Stanley served its page and line designations almost a month ago and CPH served its objections two weeks ago. CPH did not object to any designated testimony on the ground that it offered an improper opinion. CPH's attempt to supplement its objections now should be rejected.

Second, CPH objects to no specific testimony in its motion. CPH has in its possession the ***actual testimony*** of the witnesses. This Court should not have to rule on the propriety of an *in limine* objection to improper opinion testimony when CPH has offered no foundation for believing that an improper opinion will be offered. Indeed, CPH's failure to object to any of the designated deposition testimony on the ground that it offers an improper opinion is virtually conclusive evidence that no improper opinion is offered.

Third, the designated testimony is relevant and admissible. The designated testimony primarily concerns Morgan Stanley's performance evaluations and the specific evaluations given to William Strong. *See, e.g.*, Deposition of Robert Scott at 22: 2-24 (discussing structure of evaluation process); 86:9-21 (discussing evaluation of William Strong); Deposition of Tarek Abdel-Meguid at 22:24 — 23:06; 62:22—63:17 (same); Deposition of Joseph Perella at 21:17 — 22:08; 98:9 — 99:11 (same). The testimony is relevant and admissible on the facts of Mr. Strong's performance and the evaluations of that performance.

* * * * *

For the foregoing reasons, the Court should deny CPH's MIL No. 35.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 4th day of May, 2005.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON CPH'S ORE TENUS MOTION IN LIMINE

THIS CAUSE came before the Court May 3, 2005 on CPH's ore tenus Motion in Limine, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted. No witness or counsel shall present testimony or argument concerning any non-reliance language in the Debenture Offering Memorandum, without first discussing the matter with the Court and opposing counsel outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 9 day of May, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MS & CO.'S ORE TENUS MOTION FOR DIRECTED VERDICT

THIS CAUSE came before the Court May 2, 2005 on MS & Co.'s ore tenus Motion for Directed Verdict, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that MS & Co.'s ore tenus Motion for Directed Verdict is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 4 day of May, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MS & CO.'S ORE TENUS MOTION TO STRIKE TESTIMONY OF DR. NYE

THIS CAUSE came before the Court May 2, 2005 on MS & Co.'s ore tenus Motion to Strike Testimony of Dr. Nye, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that MS & Co.'s ore tenus Motion to Strike Testimony of Dr. Nye is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 4 day of May, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: April 6, 2005

TIME: 8:00 a.m.

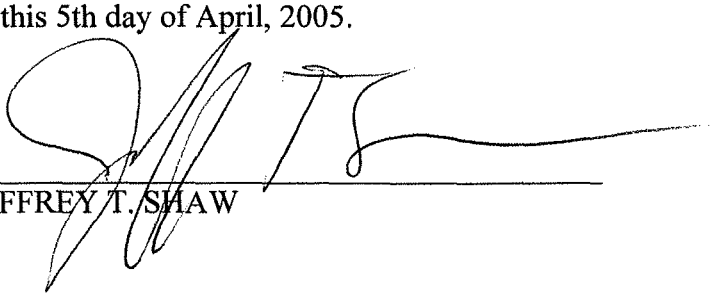
JUDGE: Honorable Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

CPH's Motion *In Limine* No. 32 To Bar References to Plaintiff's Failure To Retain E-Mails As "Litigation Misconduct"

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 5th day of April, 2005.



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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

OBJECTIONS TO MORGAN STANLEY'S PROPOSED PHASE ONE JURY INSTRUCTIONS

Coleman (Parent) Holdings Inc. ("CPH") hereby submits the following objections to the Phase One Proposed Phase One Jury Instructions that Morgan Stanley Inc. ("Morgan Stanley") submitted on April 4, 2005.

General Objection: CPH objects generally to Morgan Stanley's omission of instructions dealing with several important legal issues pertaining to the case:

- that the jury should not find facts contrary to those established before trial (**CPH's Proposed Instruction No. 6**);
- that one conspirator is vicariously liable for the actions of its coconspirators as if those actions were its own (**CPH's Proposed Instruction No. 9**);
- that compensatory damages should not be denied simply because they are impossible to measure with certainty, so long as they can be estimated reasonably (**CPH's Proposed Instruction No. 13**);
- that a plaintiff's recovery should not be reduced by the jury on account of separate recovery from a third party (**CPH's Proposed Instruction No. 14**);

- that a fraudulent omission is the equivalent of making a false statement (**CPH's Proposed Supplemental Instruction No. 1**);
- that a plaintiff may rely on a statement of which it or its agent is a recipient, intended recipient, or foreseeable recipient, regardless of whether the statement was made to the plaintiff directly (**CPH's Proposed Supplemental Instruction No. 2**);
- that the recipient of an intentionally false statement may rely on it without conducting an investigation (**CPH's Proposed Supplemental Instruction No. 3**);
- that a defendant's financial condition is immaterial to the proper amount of compensatory damages (**CPH's Proposed Supplemental Instruction No. 4**);
- a plaintiff is under no legal duty to "hedge" to prevent future loss caused by fraud (**CPH's Proposed Supplemental Instruction No. 5**).

Morgan Stanley's Proposed Jury Instruction No. 1 — Introductory Instruction. CPH objects to the proposed instruction on several grounds.

1. *Incomplete* insofar as it fails to clarify to the jury that they may not find facts that contradict the facts established prior to trial. At the end of the third paragraph, a sentence should be added: "And you may not draw inferences, make deductions, or reach conclusions which are contrary to or inconsistent with the established facts that I read to you at the beginning of the trial." **CPH's Proposed Jury Instruction No. 4** contains appropriate language and should be given instead.
2. *Unnecessary deviation from pattern.* The fourth paragraph should not be part of the opening instruction, but rather given as a separate instruction, as in the STANDARD JURY INSTRUCTIONS IN CIVIL CASES 1.1 (2003).

Morgan Stanley's Proposed Jury Instruction No. 2 — Follow The Law As Instructed. CPH objects to the proposed instruction on several grounds.

1. *Undermines the facts established prior to trial.* The proposed instruction instructs the jury (lines 17-19) that "except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your decision concerning the facts." The jury should not "disregard" the established facts that the Court has read to the jury "during the trial."
2. *Disfavored instruction on circumstantial evidence.* The Florida Supreme Court Committee on Standard Jury Instructions in Civil Cases "recommends that no charge generally be given distinguishing circumstantial from direct evidence." *See* FLORIDA STANDARD JURY INSTRUCTION IN CIVIL CASES 3.9 Comment (2003). Lines 12-16 should be changed to eliminate this reference.
3. *Redundant with Morgan Stanley's Proposed Jury Instruction No. 1.* The Florida Standard Jury Instructions already contain an adequate opening instruction — upon which **CPH's Proposed Instruction No. 4** is modeled — and use of the Eleventh Circuit Instruction is an unnecessary deviation from the Florida pattern instructions. There is no need to give two redundant opening instructions.

Morgan Stanley's Proposed Jury Instruction No. 3 — Believability Of Witnesses. CPH objects to the fourth sentence as a disfavored departure from the Standard Jury Instructions in Civil Cases. The Florida Supreme Court Committee on Standard Jury Instructions in Civil Cases "recommends that no charge be given regarding the relationship (or lack of relationship) between the greater weight of the evidence and the greater or lesser number of witnesses."

FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 3.9 note 2 (2003). **CPH's Proposed Instruction No. 5** follows the pattern and should be given instead.

Morgan Stanley's Proposed Jury Instruction No. 4 — The Difference Between False Testimony And Mistaken Recollections. CPH objects to this instruction as unnecessary. The Florida Standard Instructions in Civil Cases include no instruction on this topic, and it is up to the jurors to apply their own common sense and judgment to decide whether or not witnesses' mistaken recollections affect their credibility.

Morgan Stanley's Proposed Jury Instruction No. 5 — Expert Witnesses. CPH objects to the unnecessary deviation from the pattern instruction. **CPH's Proposed Instruction No. 5** tracks the standard instruction and should be given instead.

Morgan Stanley's Proposed Instruction No. 6 — Charts And Summaries. CPH does not object to this instruction as written.

Morgan Stanley's Proposed Instruction No. 7 — Aiding and Abetting Fraud. CPH objects to the proposed instruction on several grounds.

1. *Unnecessary and confusing division of elements.* CPH objects to the division of the remaining two elements of its aiding and abetting claim into four elements, by artificially dividing the causation inquiry into two questions and adding a fourth requirement that reliance be "reasonable." The jury has throughout been instructed that there are two issues for their determination — (1) reliance, and (2) causation of damages — and dividing the elements further will cause needless confusion.
2. *Mischaracterizes false statements.* The proposed instruction limits the false statements that are the subject of the fraud to "false financial statements"

(Lines 2, 7). The word "financial" should be deleted in line 2 and the phrase "in Sunbeam's financial statements" should be deleted in line 7. The established facts contain numerous misrepresentations made by both Sunbeam and Morgan Stanley beyond those in Sunbeam's financial statements.

3. *Undermines established facts*. Line 14 refers to the established facts as true "for purposes of phase one of this trial." This characterization both casts doubt upon the truthfulness of the established facts and incorrectly implies that the facts are not established for the second phase, if any, of the trial. *See* Ex. A, March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment, at 17 (facts established "for all purposes"). The instruction should simply refer to the facts as "established," as in CPH's Proposed Instruction No. 7.

4. *Misstates law on reliance*. Instructing the jury that Morgan Stanley escapes liability if CPH "should have discovered" the fraud (page 24, line 2) is directly contrary to Florida law and the Court's April 5, 2005 Order on Limiting Instruction on Reliance. *See* Ex. B (April 5, 2005 Order). CPH's proposed Jury Instruction No. 8, CPH's Proposed Supplemental Instruction No. 3, and the April 5, 2005 Order state the law correctly. Page 24, lines 1-2 should be deleted; the word "justifiably" on page 24, line 3 should be deleted; on page 23, line 21, after the word "statement," the phrase ", its falsity was not obvious," should be inserted; and on the same line, after the word "and," "CPH" should be added.

5. *Confusing and misleading use of term "proximate result."* While CPH agrees that it must show that its losses were legally caused by the Sunbeam fraud, the Florida Supreme Court Committee on Standard Jury Instructions in Civil Cases disfavors use of the term "proximate cause" (page 23, line 11; page 24, lines 3 & 5) because it is "misunderstood by juries for a number of reasons," and deliberately crafted the pattern instruction on legal causation, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 5.1, to "express the essential elements ... of 'proximate cause' without using that term." *Id.* comment 1. Each place it appears, the term "proximate" should be deleted or replaced by the word "legal."

6. *Confusing and misleading use of term "burden of proof."* While CPH agrees that it bears the burden of proof on the disputed issues, use of the term "burden of proof" (page 24, line 6) is disfavored under the FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES. *See Id.* § 3.4 note 2. ("'Preponderance of evidence' and 'burden of proof.' The committee recommends that no charge be given using these terms, which are considered not helpful to a jury and not necessary in a charge that otherwise defines 'greater weight of the evidence' (3.9) and instructs the jury on the consequences of its determining that the greater weight of the evidence supports or does not support the claim or defense of a party.") In the first sentence, "CPH has the burden of proving" should be replaced with "CPH must show."

7. *Contrary to established facts establishing foreseeability of harm to CPH.* By listing as an element that Morgan Stanley's assistance be the "proximate cause" of CPH's loss, the proposed instruction submits for the jury's determination a fact that has already been established — whether harm to CPH was the foreseeable result of Morgan Stanley's assistance in the Sunbeam fraud. The established facts include both the conclusion that Morgan Stanley "provided substantial assistance" to Sunbeam's fraud against CPH and that Morgan Stanley intended to induce CPH to rely on its false statements. *See* Ex. A to March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment, Ex. A, at 25-26. The defining characteristic that makes assistance "substantial" is that it is assistance of a sort that will foreseeably cause harm to the victim of the fraud. *See Primavera Familienstiftung v. Askin,* 173 F.R.D. 115, 126 (S.D.N.Y. 1997) ("The substantial assistance element has been construed as a causation concept, requiring that the plaintiff allege that the acts of the aider and abettor proximately caused the harm upon which the primary liability is predicated."); *Diduck v. Kaszycki & Sons Contractors, Inc.* 974 F.2d 270, 284 (2d Cir. 1992) (Under aiding and abetting, "[w]hether the aid rendered is 'enough' to warrant the imposition of liability is essentially a proximate cause inquiry.") The jury must determine whether CPH suffered harm of which the fraud was a legal cause, but the fact that Morgan Stanley's assistance was of such character as to make harm to CPH foreseeable has already been established.

Page 24, lines 3-4 should be deleted; and on line 5 "Morgan Stanley's conduct" should be replaced by "Morgan Stanley and Sunbeam's conduct."

8. *Omits necessary findings.* The proposed instruction's characterization of facts established before trial is incomplete, omitting findings regarding Morgan Stanley's involvement and intent to defraud. The sentence beginning on line 14 should instead read: "These facts establish that Sunbeam and Morgan Stanley made false statements of material fact with the intent that CPH would rely on them. These facts also establish that Morgan Stanley knew of Sunbeam's fraud and substantially assisted it."

9. *Unnecessary division of CPH's claims.* Since the remaining elements CPH must prove for its aiding and abetting fraud claim are the same as those it must prove for its conspiracy to commit fraud claim, CPH objects to the unnecessary division of its claims into two separate instructions.

CPH's Proposed Instruction No. 7 properly states the law on the elements of CPH's claims and should be given instead.

Morgan Stanley's Proposed Instruction No. 8 — Greater Weight Of The Evidence. CPH objects to the third sentence of the proposed instruction as a disfavored departure from the Standard Jury Instructions in Civil Cases. The Florida Supreme Court Committee on Standard Jury Instructions in Civil Cases "recommends that no charge be given regarding the relationship (or lack of relationship) between the greater weight of the evidence and the greater or lesser number of witnesses." FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 3.9 note 2 (2003). **CPH's Proposed Instruction No. 6**, which does not contain the objectionable sentence and also reminds the jury that the established facts cannot be disproved, should be given instead.

Morgan Stanley's Proposed Instruction No. 9 — Clear And Convincing Proof. CPH objects to the entire proposed instruction as unnecessary, confusing, and legally incorrect. No matters submitted to the jury in Phase One of the trial require a showing of clear and convincing evidence. *See* Ex. C, April 5, 2005 Order on Defendant's Motion Regarding the Reliance and Damages Issues to Be Determined at Phase I of the Trial.

Morgan Stanley's Proposed Instruction No. 10 — Aiding and Abetting Fraud — Fraud by Third Party: Reliance. CPH objects to the proposed instruction on several grounds.

1. *Undermines established findings of fact.* The proposed instruction improperly undermines the established findings of fact by referring to Sunbeam's "allegedly" false statements. (Lines 2, 4). The word "allegedly" should be deleted each time it appears. The fact that Morgan Stanley and Sunbeam made false statements with the intent that CPH would rely on them has been established, *see* Ex. A to March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment, Ex. A, at 25; and the jury instructions should not cast doubt on those findings.
2. *Improperly limits origins of false statements.* The proposed instruction states that CPH can only meet its burden if the relevant false statements were made by Sunbeam. Because the established facts include a conspiracy between Sunbeam and Morgan Stanley, statements made by either in furtherance of the conspiracy are attributable to the other, and the established facts also include that Morgan Stanley's substantial assistance to the fraud included making false statements to CPH about Sunbeam's financial state. Therefore, any instruction should refer to false statements by "Sunbeam or Morgan Stanley." To clarify this point, CPH's Proposed Instruction No. 8 should be given instead.

3. *Argumentative.* The second sentence of the instruction is framed in such a way as to cast doubt on the merits of CPH's claim. It follows naturally from instructing the jury on the elements of CPH's claims that they should not find for CPH if CPH fails to establish its claims; instructing them separately on the consequences of such failure suggests that the Court doubts the sufficiency of the evidence. To make the instruction more neutral, the last sentence should be deleted and replaced with: "This means CPH must show it depended upon the accuracy and truthfulness of a false statement made by Morgan Stanley or Sunbeam in its decision-making process. However, CPH may not establish reliance if CPH knew the statement was false or if the statement's falsity was obvious."

CPH's Proposed Instruction No. 8 and its **Proposed Supplemental Instructions Nos. 1-3** state the law on reliance correctly and should be given instead.

Morgan Stanley's Proposed Instruction No. 11 — Aiding and Abetting Fraud — Fraud By Third Party: Justifiable Reliance. CPH objects to the entire proposed instruction on several grounds.

1. *Improperly limits origins of false statements.* CPH may rely on a false statement originating with either Sunbeam or Morgan Stanley. *See supra* CPH's objection No. 2 to Morgan Stanley's Proposed Instruction No. 10. On lines 1 and 14, "or Morgan Stanley's" should be inserted after the word "Sunbeam's."
2. *Misstates law on reliance.* Instructing the jury that Morgan Stanley escapes liability if CPH "should have known" about the fraud, or that CPH "would not reasonably rely on representations of the seller without performing reasonable due diligence as to available information," is directly contrary to both Florida law and

the Court's April 5, 2005 Order on Limiting Instruction on Reliance. *See* Ex. B (April 5 Order). **CPH's Proposed Jury Instruction No. 8, CPH's Proposed Supplemental Instruction No. 3**, and the April 5, 2005 Order contain appropriate language that correctly expresses this concept, and should be given instead. Alternatively, CPH's proposed revisions to Morgan Stanley's Proposed Instruction No. 10 make this entire instruction unnecessary and redundant.

Morgan Stanley's Proposed Instruction No. 12 — Aiding and Abetting Fraud — Fraud By Third Party: Injury Caused To CPH. CPH objects to the proposed instruction on several grounds.

1. *Artificially creates multiple hurdles.* CPH objects to the artificial division of a simple legal causation inquiry into a series of five inquiries in Morgan Stanley's Proposed Instructions Nos. 12 and 13. The effect of such a drawn-out and repetitive instruction is to suggest to the jury that CPH cannot show causation. The jury should instead be instructed that CPH must show it suffered losses of which the fraud was a legal cause, as in **CPH's Proposed Instruction No. 10**, which should be given instead.
2. *Argumentative.* Lines 8-12 are framed in such a way as to cast doubt on the merits of CPH's claim. It follows naturally from instructing the jury on the elements of CPH's claims that they should not find for CPH if CPH fails to establish its claims; instructing them separately on the consequences of such failure suggests that the Court doubts the sufficiency of the evidence. Similarly, the word "actually" in line 2 should be deleted as it tends to cast doubt on the merits of CPH's claim without adding to the meaning of the instruction.

3. *Undermines established findings of fact.* The term "allegedly" should be deleted at lines 1, 5, 8, and 9, as the falsity and fraudulent intent of Sunbeam's statements are established.

4. *Omits Morgan Stanley's false statements.* The proposed instruction (at line 2) ties the causation element only to the false statements that Morgan Stanley "aided or abetted." Because the established facts include that Morgan Stanley's substantial assistance to Sunbeam included false statements about Sunbeam made to CPH, *see supra* CPH's objection No. 2 to Morgan Stanley's Proposed Objection No. 10, any instruction should refer to misstatements by "Sunbeam or Morgan Stanley."

5. *Redundant with Morgan Stanley's Instruction No. 13.* If Morgan Stanley's substantial assistance in the Sunbeam fraud was the legal cause of CPH's losses, then the Sunbeam fraud was, ipso facto, also the legal cause of CPH's losses. Instructing the jury twice on what is essentially the same question is redundant, unfairly prejudices CPH, and unduly emphasizes the causation element of CPH's claim.

Morgan Stanley's Proposed Instruction No. 13 — Aiding and Abetting Fraud — Proximate Cause. CPH objects to the proposed instruction on several grounds.

1. *Artificially creates multiple hurdles.* CPH objects to the artificial division of a simple legal causation inquiry into a series of five inquiries in Morgan Stanley's Proposed Instructions Nos. 12 and 13. The effect of such a drawn-out and repetitive instruction is to suggest to the jury that CPH cannot show causation. The jury should instead be instructed that CPH must show it suffered losses of which the fraud was a legal cause, as in **CPH's Proposed Instruction No. 10**.

2. *Contrary to established facts establishing foreseeability of harm to CPH.* Submitting proximate causation to the jury as distinct from actual causation is an improper attempt to undermine the facts establishing Morgan Stanley's intent to defraud CPH and Morgan Stanley's provision of substantial assistance. *See supra* CPH's Objection No. 7 to Morgan Stanley's Proposed Instruction No. 7.

3. *Redundant with Morgan Stanley's Instruction No. 12.* If Morgan Stanley's substantial assistance in the Sunbeam fraud was a legal cause of CPH's losses, then the Sunbeam fraud was, ipso facto, also a legal cause of CPH's losses. Instructing the jury twice on what is essentially the same question is redundant, unfairly prejudices CPH, and unduly emphasizes the causation element of CPH's claim.

4. *Confusing and misleading use of term "burden of proof."* *See supra* CPH's Objection No. 6 to Proposed Instruction No. 7.

5. *Misstates the law on legal causation.* The instruction falsely states that CPH may not recover for damages "attributable" to "other" factors, without differentiating between foreseeable and unforeseeable "other" causes. Under Florida law, a tort need not be the only cause of damages to be a legal cause thereof, so long as any other contributing causes are foreseeable. Only unforeseeable intervening causes will break the causal chain. FLORIDA STANDARD JURY INSTRUCTION IN CIVIL CASES 5.1 (2003), which is reflected in **CPH's Proposed Instruction No. 10**, correctly expresses this concept and should be given instead.

Morgan Stanley's Proposed Instruction No. 14 — Conspiracy To Commit Fraud. CPH objects to the proposed instruction on several grounds.

1. *Unnecessary and confusing division of elements.* CPH objects to the division of the remaining two elements of its conspiracy claim into three elements, by adding a third requirement that reliance be "reasonable." The jury has throughout been instructed that there are two issues for their determination — (1) reliance and (2) causation of damages — and dividing the elements further will cause needless confusion.

2. *Confusing and misleading use of term "proximate cause."* (Page 33, line 10; page 34, line 1). While CPH agrees that it must show that its losses were legally caused by the Sunbeam fraud, the Florida Supreme Court Committee on Standard Jury Instructions in Civil Cases disfavors use of the term "proximate cause" because it is "misunderstood by juries for a number of reasons," and deliberately crafted the pattern instruction on legal causation, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 5.1, to "express the essential elements ... of 'proximate cause' without using that term." *Id.* comment 1. Each place it appears, the term "proximate" should be deleted or replaced by the word "legal."

3. *Improperly limits origins of false statements.* The proposed instruction states that CPH can only meet its burden if the relevant false statements were made by Sunbeam. (Page 33, lines 18, 22; page 34, line 1). Because the established facts include a conspiracy between Sunbeam and Morgan Stanley, statements made by either in furtherance of the conspiracy are attributable to the other. Therefore, any instruction should refer to false statements by "Sunbeam or Morgan Stanley."

4. *Misstates law on reliance.* Instructing the jury that Morgan Stanley escapes liability if CPH "should have discovered" the fraud (page 33, line 22) is directly contrary to both Florida law and the Court's April 5, 2005 Order on Limiting Instruction on Reliance. *See*

Ex. B (April 5, 2005 Order). CPH's Proposed Jury Instruction No. 8, CPH's Proposed Supplemental Instruction No. 3, and the April 5, 2005 Order state the law correctly. Page 33, lines 22-23 should be deleted, along with the word "justifiably" on page 34. On page 33, line 19, after the word "statement," insert "its falsity was not obvious," and after the word "and" insert "CPH."

5. *Undermines established findings of fact.* The term "allegedly" on page 33, lines 18, 21, should be deleted. The falsity and fraudulent intent of Sunbeam's statements are established.

6. *Confusing and misleading use of term "burden of proof." See supra* CPH's Objection No. 6 to Proposed Instruction No. 7. On page 34, line 3, replace "CPH has the burden of proving" with "CPH must show."

7. *Unnecessary division of CPH's claims.* Since the remaining elements CPH must prove for its aiding and abetting fraud claim are the same as those it must prove for its conspiracy to commit fraud claim, CPH objects to the unnecessary division of its claims into two separate instructions.

CPH's Proposed Instruction No. 7 properly states the law on the elements of CPH's claims and should be given instead.

Morgan Stanley's Proposed Instruction No. 15 — Conspiracy To Commit Fraud — Injury Caused To CPH. CPH objects to the proposed instruction on several grounds.

1. *Misstates the law on legal causation.* The instruction falsely states that CPH may not recover for damages "attributable" to "other" factors, without differentiating between foreseeable and unforeseeable "other" causes. Under Florida law, a tort need not be the only cause of damages to be a legal cause thereof, so long as any other contributing

causes are foreseeable. Only unforeseeable intervening causes will break the causal chain. FLORIDA STANDARD JURY INSTRUCTION IN CIVIL CASES 5.1 (2003), which is reflected in CPH's Proposed Jury Instruction No. 10, correctly expresses this concept and should be given instead.

2. *"Actually" as unduly argumentative.* While CPH agrees that it must show that it suffered loss from the conspiracy, the wording of the instruction, which tells the jury that CPH must prove that it was "actually" harmed by the fraud, is unnecessarily argumentative, as the term "actually" conveys doubt as to the merits of CPH's claim. A more fair and neutral framing would omit the word "actually" from the instruction.

3. *Undermines established findings of fact.* The proposed instruction improperly undermines the established findings of fact by referring to Sunbeam's "allegedly" fraudulent misrepresentations and conduct. The fact that Morgan Stanley and Sunbeam made false statements with the intent that CPH would rely on them has been established, *see* Ex. A to March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment, Ex. A, at 25, and the jury instructions should not cast doubt on those findings.

4. *Artificially creates multiple hurdles.* CPH objects, again, to the unnecessary division of a simple legal causation inquiry into a series of four questions, between Morgan Stanley's Proposed Instructions Nos. 15 and 16. The intent and effect of this artificial division is plainly to suggest to the jury that the Court doubts CPH's ability to show causation. The jury should instead be instructed that CPH must show that it suffered losses of which the fraud was a legal cause, as in **CPH's Proposed Instruction No. 10**, which states the law clearly and correctly and should be given instead.

5. *Repetitive and argumentative.* The third and fourth sentences ask the jury the same question — whether the conspiracy caused CPH to suffer losses. Repeating the same question twice with slightly different wording is misleading and argumentative.
6. *Undermines established findings of fact.* The proposed instruction improperly undermines the established findings of fact by referring to the "alleged" conspiracy (Lines 2, 4, 6). The existence of a conspiracy to defraud CPH is established.

Morgan Stanley's Proposed Instruction No. 16 — Conspiracy To Commit Fraud — Proximate Injury Caused To CPH. CPH objects to the proposed instruction on several grounds.

1. *Artificially creates multiple hurdles.* CPH objects, again, to the unnecessary division of a simple legal causation inquiry into a series of four questions, between Morgan Stanley's Proposed Instructions Nos. 15 and 16. The intent and effect of this artificial division is plainly to suggest to the jury that the Court doubts CPH's ability to show causation. The jury should instead be instructed that CPH must show that it suffered losses of which the fraud was a legal cause, as in **CPH's Proposed Instruction No. 10**, which states the law clearly and correctly and should be given instead.
2. *Confusing and misleading use of term "proximate cause."* While CPH agrees that it must show that its losses were legally caused by the Sunbeam fraud, the Florida Supreme Court Committee on Standard Jury Instructions in Civil Cases disfavors use of the term "proximate cause" because it is "misunderstood by juries for a number of reasons," and deliberately crafted the pattern instruction on legal causation, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 5.1, to "express the essential elements ... of 'proximate

cause' without using that term." *Id.* comment 1. Each place it appears, the term "proximate" should be deleted or replaced by the word "legal."

Morgan Stanley's Proposed Instruction No. 17 First Affirmative Defense — Doctrine of Waiver. CPH objects to the proposed instruction on the grounds that even if Morgan Stanley proves the facts alleged in its Answer to CPH's First Amended Complaint, those facts would be legally insufficient to constitute waiver. The Answer alleges that CPH waived reliance by (1) the integration clauses in the merger agreements, and (2) failing to exercise the right in the merger agreement to inspect Sunbeam's books and records. *See* MS Answer to CPH's First Amended Complaint at 19. The Court has already held, as a matter of Florida law, that the integration clause cannot bar CPH's intentional-tort claims. *See* Ex. G, March 28, 2005 Order on Exculpatory and Integration Clauses. Failing to exercise any inspection rights under the agreement similarly cannot constitute waiver of reliance under Florida because the recipient of a fraudulent misrepresentation is under no duty to conduct an investigation. *See* Ex. B, April 5, 2005 Order on Limiting Instruction on Reliance.

Morgan Stanley's Proposed Instruction No. 18 — Second Affirmative Defense — Doctrine of Estoppel. CPH objects to the proposed instruction on the ground that it contradicts the established facts, which include the finding that Morgan Stanley acted with the intent to deceive CPH. *See* Ex. A to March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment, Ex. A, at 24-25. Morgan Stanley therefore is precluded from establishing an essential element of any estoppel defense: that Morgan Stanley relied, to its detriment, on any purported representations by CPH that it was not relying on Morgan Stanley or Sunbeam's statements concerning Sunbeam. *See Mandarin Paint & Flooring, Inc. v. Potura Coatings of Jacksonville*, 744 So. 2d 482, 485 (Fla. 1st DCA 1999) (party cannot prove detrimental-reliance

element of estoppel where its actions were not caused by statements of opposing party). **Morgan Stanley's Proposed Instruction No. 19 — Third Affirmative Defense — Unclean Hands; In Pari Delicto.** CPH objects to the proposed instruction on several grounds.

1. *Not a legally cognizable defense in tort cases.* "Unclean hands" is a defense only in equity, not in law, and hence is not a defense to a claim in which no equitable relief is sought. *See Jones v. State ex rel. City of Winter Haven*, 870 So. 2d 52, 55 (Fla. 2d DCA 2003) (equitable defenses are "not relevant in an action seeking solely a money judgment for damages").

2. *Waived.* Morgan Stanley did not assert this affirmative defense in its answer to CPH's First Amended Complaint. Morgan Stanley's Sixth Affirmative Defense in its answer alleged that CPH failed to make reasonable inquiry and hence was equally or more at fault for its damages than Morgan Stanley. *See* Morgan Stanley Answer at 22-23. In contrast, the proposed instruction goes to CPH's alleged bad faith, trickery, and deception. Other than both having the title "in pari delicto," the proposed instruction bears no resemblance to the affirmative defense asserted in Morgan Stanley's Answer.

3. *Contradicts established facts.* The proposed instruction asks the jury to find facts that contradict the facts established before trial. At page 14 of Ex. A to the March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment, Ex. A, the established facts state that "Morgan Stanley valued CPH's Coleman stock at a range of $31.06 to $53.24 per Coleman share. CPH's 44,067,520 Coleman shares were worth, therefore, between $1.369 billion and $2.346 billion." Morgan Stanley may not argue that these numbers were false. And because CPH never claimed that its Coleman stock was worth

more than $2.346 billion, Morgan Stanley has not laid a sufficient factual predicate for this affirmative defense.

Morgan Stanley's Proposed Instruction No. 20 — Damages — Benefit Of Bargain. CPH objects to the proposed instruction on several grounds.

1. *Fails to instruct on vicarious liability.* The instruction misleadingly states (page 42, lines 4-5; page 43, line 1) that the jury may consider only damages "attributable to Morgan Stanley." While CPH agrees that it may not recover for any damages not legally caused by Morgan Stanley, the instruction must make clear that Morgan Stanley, as a co-conspirator and aider and abettor, is vicariously liable for the Sunbeam fraud. At page 42, line 5, "the actions at Morgan Stanley" should be replaced with "the Sunbeam fraud"; and on page 43, "Morgan Stanley" should be replaced by "the Sunbeam fraud."
2. *Argumentative.* The second sentence on page 42 adds nothing to the meaning of the instruction. Its sole purpose is to cast doubt on CPH's claims, and it should be deleted to better conform to the pattern instruction. Similarly, the final sentence on pages 42 to 43 is redundant with Morgan Stanley's other causation instructions (Nos. 13, 15, 16, 22) and should be deleted — the effect of repeatedly instructing the jury not to consider damage from other causes is to suggest that the Court believes any harm to CPH was caused by "general market conditions."
3. *Misleading instruction concerning burden of proof.* By stating that CPH "must prove" the value of the Sunbeam stock on the front-end date (page 42, line 10), that CPH "must prove" the value of the stock on the "back-end" date (page 42, line 13), and that the jury "must keep in mind that damages must be supported by the greater weight of the evidence, and may not be unduly speculative" (page 42, lines 20-21), the proposed

instruction may mislead the jury into believing that CPH is not entitled to damages at all if the amount of damages cannot be shown with precision and certainty. The jury should award an amount of damages that the greater weight of the evidence shows will fairly and adequately compensate CPH for its losses, so long as there is some reasonable measure by which those losses can be estimated. **CPH's Proposed Instructions Nos. 12 and 13** contain appropriate language and should be given instead. But if the Court adopts Morgan Stanley's proposed instruction, CPH requests the following changes: On page 42, line 9, add a new sentence: "You must calculate the difference between:" On page 42, lines 10 and 13, delete the phrase "CPH must prove." On page 42, line 12, replace the period after the word "true" with "; and."

4. *Misleading as to "front-end" date for measuring damages.* The proposed instruction is misleading because it states (page 42, lines 10-11) that the expectation of damages must be measured from the "date the transaction occurred." The relevant front-end date is the expectation a reasonable investor would have of the value of the 14.1 million shares of Sunbeam stock in the combined Coleman and Sunbeam companies. On page 42, lines 10-11, the sentence should read "the expectation a reasonable investor would have of the fair market value of the Sunbeam stock that CPH received in the Sunbeam transaction, if . . ."

5. *Misstates law as to "back-end" date for measuring damages.* The proposed instruction falsely states, twice, that CPH's expectations of the stock's value must be measured against the "actual value of the stock on the date of the transaction." (Page 42, lines 13-14.) CPH was legally barred from selling the stock on the "date of the transaction." As the Court properly held in the February 15, 2005 Order on Morgan Stanley's Motion in

Limine No. 16, Ex. D; the February 15, 2005 Order on CPH's Motion in Limine No. 19, Ex. C; and the March 28, 2005 Order on CPH's Motion in Limine 27, Ex. F, the proper date on which to measure CPH's damages is the date on which it could have sold the Sunbeam stock. *See also Silverberg v. Paine, Webber, Jackson & Curtis, Inc.*, 710 F.2d 678, 686 (11th Cir. 1983) (applying Florida law and approving jury instruction stating in part that the "elements which you should consider in arriving at the amount of money damages which will constitute fair and adequate compensation for the loss or damages allegedly incurred include the difference between the purchase price paid for the Posi-Seal stock purchased by the plaintiff and the price at which such stock was or could have been sold by the plaintiff when he learned of the alleged fraud") (emphasis added). The sentence at lines 13-14 should be deleted and replaced with the second factor in **CPH's Proposed Instruction No. 12**. The sentence at lines 15-16 should be deleted as well.

6. *No evidentiary basis.* Morgan Stanley has demonstrated no evidentiary basis for instructing the jury that CPH is not entitled to damages if "the value of what CPH received was equal to or greater than what it would have received if Sunbeam's representations had been true." (Page 42, lines 18-19). The jury will not be presented with any evidence supporting the outlandish conclusion that the Sunbeam fraud actually lowered the value of Sunbeam stock vis-à-vis its true value, and such a conclusion would directly contradict the established fact that the conduct of Sunbeam and Morgan Stanley artificially inflated Sunbeam's stock price. Accordingly, this sentence should be deleted as it will serve only to confuse the jury and to suggest the existence of a dispute concerning facts that may not be disputed.

CPH's Proposed Instructions Nos. 12 and 13 state the law correctly and should be given instead.

Morgan Stanley's Proposed Instruction No. 21 — Damages — Out Of Pocket. CPH objects to this instruction as irrelevant. Damages in this case are being measured under a "benefit of the bargain" standard. *See* Ex. D, February 15, 2005 Order on Morgan Stanley's Motion in Limine No. 16.

Morgan Stanley's Proposed Instruction No. 22 — Damages — Intervening Cause. CPH objects to this proposed instruction on several grounds.

1. *Fails to instruct on vicarious liability.* The instruction misleadingly states that the jury may consider only damages "attributable to Morgan Stanley." The instruction must make clear that Morgan Stanley, as a co-conspirator and aider and abettor, is vicariously liable for the Sunbeam fraud it aided, abetted, and conspired to commit. On lines 1-2, "Morgan Stanley" should be replaced with "the Sunbeam fraud."
2. *Misstates the law on legal causation.* The instruction falsely states that CPH may not recover for damages "attributable" to "other" factors, without differentiating between foreseeable and unforeseeable "other" causes. Under Florida law, a tort need not be the only cause of damages to be a legal cause thereof, so long as any other contributing causes are foreseeable. Only unforeseeable intervening causes will break the causal chain. FLORIDA STANDARD JURY INSTRUCTION IN CIVIL CASES 5.1 (2003), which is reflected in **CPH's Proposed Instruction No. 10**, correctly expresses this concept and should be given instead.

Morgan Stanley's Proposed Instruction No. 23 — Damages: Failure to Mitigate. CPH objects to this instruction on several grounds.

1. *Misstates the law on when duty to mitigate arises.* The proposed instruction, which states that a plaintiff has a duty not only to "minimize" the harm but also to "prevent" or "avoid" suffering loss from a fraud (lines 3, 5), is designed to mislead the jury into believing that CPH's recovery should be reduced if it failed to exercise due care that might have led to discovery of the fraud — a proposition that Florida law rejects, and that this Court has rejected in this case. *See* Ex. B, April 5, 2005 Order on Limiting Instruction on Reliance.
2. *Argumentative.* As written, the proposed instruction is highly argumentative. It fails to make clear that Morgan Stanley bears the burden of proof, and, by stating that CPH "was required" (line 4) to mitigate its damages, suggests to the jury that CPH was remiss.
3. *Unnecessary.* **CPH's Proposed Instruction No. 12**, by building the date at which CPH could have sold the Sunbeam stock into the benefit-of-the-bargain calculation, renders any separate instruction on the supposed duty to mitigate unnecessary.

Morgan Stanley's Proposed Instruction No. 24 — Duty To Deliberate When Only The Plaintiff Claims Damages. CPH objects to this instruction as unnecessary. Under the Florida Standard Jury Instructions in Civil Cases, as well as **CPH's Proposed Instruction No. 11**, which should be given instead, the jury is already instructed before the damages instructions that it should not award any damages if it finds for Morgan Stanley.

Morgan Stanley's Proposed Instructions Nos. 25-35 — Aiding And Abetting Fraud; Aiding And Abetting Fraud — Fraud By Third Party; Aiding And Abetting Fraud — Fraud By Third Party: False Statements Of Existing Fact; Aiding And Abetting Fraud — Fraud By Third Party: Knowingly And Intentionally Made; Aiding And Abetting Fraud — Fraud By Third Party: Materiality; Aiding and Abetting Fraud — Actual Knowledge;

Aiding And Abetting Fraud — Provision Of Substantial Assistance; Conspiracy To Commit Fraud; Conspiracy To Commit Fraud — An Agreement Between Two Or More Parties; Conspiracy To Commit Fraud — A Common Objective To Commit Fraud; Conspiracy To Commit Fraud — Commission of Overt Act In Furtherance Of the Conspiracy. Without waiving any other objections CPH may have to the proposed instructions, CPH objects to this group of instructions as a whole on the grounds that they submit to the jury's determination facts that have already been established in advance of trial.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list, this 5th day of May, 2005.

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16div-016428

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

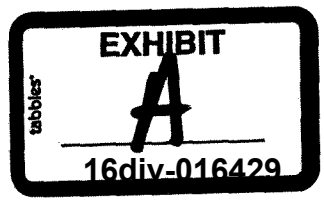
MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON CPH'S RENEWED MOTION FOR ENTRY OF DEFAULT JUDGMENT

THIS CAUSE came before the Court March 14 and 15, 2005, on CPH's Renewed Motion for Entry of Default Judgment, with both parties well represented by counsel.

Coleman (Parent) Holdings, Inc. ("CPH"), has sued Morgan Stanley & Co., Inc. ("MS & Co."), for aiding and abetting and conspiring with Sunbeam to perpetrate a fraud. Early in the case, CPH was concerned that MS & Co. was not thoroughly looking for emails responsive to its discovery requests. On April 16, 2004, the Court entered an Agreed Order ("Agreed Order") that required MS & Co. to search its oldest full backup tapes for emails subject to certain parameters and certify compliance. MS & Co. certified compliance with the Agreed Order on June 23, 2004. On November 17, 2004, CPH learned that MS & Co. had found some backup tapes that had not been searched. On January 26, 2005 it served its Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order ("Adverse Inference Motion"), claiming that MS & Co.'s violation of the Agreed Order, coupled with its systemic overwriting of emails after 12 months, justified an adverse inference against it. The Court ordered certain limited discovery. Responses to that discovery prompted CPH to orally amend its Adverse Inference Motion to seek more severe sanctions.

The Court held an evidentiary hearing on the Adverse Inference Motion on February



14, 2005. On March 1, 2005 it issued its Amended Order on Coleman (Parent) Holdings Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order ("Adverse Inference Order"). In its current Motion, CPH argues that it has since learned that the discovery abuses addressed in the Adverse Inference Motion and Order represent only a sampling of discovery abuses perpetrated by MS & Co. and that the abuses have continued, unabated. It claims that these abuses, when taken as a whole, infect the entire case. To understand CPH's argument, it is necessary to go back to the beginning.

This case arises out of an acquisition transaction that was negotiated and consummated in late 1997 and early 1998, in which CPH sold its 82% interest in the Coleman Company, Inc., to Sunbeam Corporation. MS & Co. served as financial advisor to Sunbeam for parts of the acquisition transaction and served as the lead underwriter for a $750,000,000.00 debenture offering that Sunbeam used to finance the cash portion of the deal.

CPH's Complaint[1] alleged claims against MS & Co. arising from this transaction for fraudulent misrepresentation, negligent misrepresentation, aiding and abetting fraud, and conspiracy, and sought damages of at least $485 million.

On May 12, 2003, MS & Co. was served with the Complaint and CPH's First Request for Production of Documents ("Request"). The Request sought, in essence, all documents connected with the Sunbeam deal. "Documents" was broadly defined, and specifically included items electronically stored. Concerned that, out of more than 8,000 pages of documents produced, it had received only a handful of emails, CPH on October 29, 2003, served its Motion to Compel Concerning E-Mails. That motion sought an order requiring MS & Co. to make a full investigation for email messages, including a search of magnetic tapes and hard drives; produce within 10 days all emails located; and produce a Rule 1.310 witness

[1]On February 17, 2005, CPH served its First Amended Complaint, which dropped the claims against MS & Co. for fraudulent and negligent misrepresentation, leaving only the aiding and abetting and conspiracy claims.

within 20 days "to describe the search that was conducted, identify any gaps in Morgan Stanley's production, and explain the reasons for any gaps."

In its Opposition to Coleman (Parent) Holdings, Inc.'s Motion to Compel served November 4, 2003, MS & Co. argued that CPH wanted "this Court to order a massive safari into the remote corners of MS & Co.'s email backup systems" and represented that "(t)he restoration efforts demanded by CPH would *cost at least hundreds of thousands of dollars* and require several months to complete (emphasis in original). MS & Co. argued that CPH's "true" motive was to "harass and burden MS & Co. with unnecessary and costly discovery demands and attempt to smear MS & Co. with out-of-context recitations from other proceedings" because "CPH *concedes* that MS & Co. is only able to restore email from backup tapes from January 2000 and later - *more than a year and a half after the events that allegedly gave rise to CPH's claims*," (emphasis in original).

CPH's "concession" was based on representations like the kind made to it by MS & Co.'s counsel in a March 11, 2004 letter that suggested "(t)he burden on Morgan Stanley from . . . a wholesale restoration [of email back up tapes], both in terms of dollars and manpower would be enormous. Regardless of who performs the initial restoration, it would require hundreds (perhaps thousands) of attorney-hours to review millions of irrelevant and non-responsive e-mails . . ."[2]

In response to CPH's Motion to Compel, the parties agreed to reciprocal corporate

[2]Complaints about MS & Co.'s tactics are not new. See Ex. 196 [February 26, 2004, letter from EEOC to Hon. Ronald L. Ellis in EEOC/Schieffelin v. Morgan Stanley & Co., Inc., et al., 01-CV-8421 (RMB) (RLE) (S.D.N.Y.): ("(w)hen EEOC received [Morgan Stanley's] January 27, 2004 Responses to EEOC's Fifth Requests for Production of Documents which did not contain any e-mails, the parties communicated further. At that time, Morgan Stanley took the position that searching for e-mails would be burdensome both in regards to expense and the time it would take to respond. While the parties were in the process of attempting to work out these disputes, EEOC for the first time learned that [Morgan Stanley has] an easy, systematic ability to search for relevant documents. In a February 16, 2004, conversation with an IT representative of [Morgan Stanley], EEOC learned that [Morgan Stanley has] an e-mail system, which, while not yet fully comprehensive, was easily searchable on February 18, 2004, the close of discovery . . . which is certain to produce discoverable information highly relevant to EEOC's and Plaintiff-Intervenor's claims . . . After disclosing their state-of-the-art system to EEOC, [Morgan Stanley] dropped [its] assertion that the process was too expensive, but maintained that they refuse to search for e-mails because it is burdensome for attorneys to review large numbers of documents prior to production.")

depositions on the email issue. CPH deposed Robert Saunders on February 10, 2004.[3] After completion of the corporate representative depositions, and unable to obtain MS & Co.'s agreement to a mutual email restoration protocol, CPH served its Motion for Permission to have Third Party Retrieve Morgan Stanley E-Mail and Other Responsive Documents, proposing that a third party vendor be given access to both parties' email systems for restoration at each party's expense. At the hearing on that Motion, CPH offered to split the expenses evenly. MS & Co. refused.

MS & Co.'s continued assertions that the email searches could be conducted only at enormous cost and would be fruitless because there were not backup tapes with email from 1997 and 1998 were confirmed to the Court by MS & Co.'s counsel, Thomas Clare of Kirkland & Ellis, at a hearing held March 19, 2004:

> Mr. Scarola: Electronic records of e-mails that have been exchanged.
> The Court: Do we agree that there has been such a request outstanding?
> Mr. Clare: There has been a request outstanding.
> The Court: And have you all objected?
> Mr. Clare: From the beginning.
> The Court: And what's the basis of the objection?
> Mr. Clare: We objected to the breadth of the request that they're making. And to answer Your Honor's question directly – and the burden that is associated with it – that given the particular e-mail back-up tapes that are in existence five, six years after the fact of these transactions, that the scope of the e-mail request that they are seeking is improperly and unduly burdensome given the enormous costs that would be required, given the fact that the time period for which we have back-up tapes post dates the events by several years.

Unable to resolve the email issue, on April 9, 2004, CPH served its Motion to Compel

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[3]Saunders provided misleading information in his deposition. See footnote 12, infra.

Concerning E-Mails and Other Electronic Documents. On the eve of the hearing on CPH's Motion to Compel, the parties reached an accommodation, and on April 16, 2004 the Court entered the Agreed Order. Under the Agreed Order, MS & Co. was required to (1) search the oldest full backup tape for each of 36 MS & Co. employees involved in the Sunbeam transaction; (2) review emails dated from February 15, 1998, through April 15, 1998, and emails containing any of 29 specified search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004, all nonprivileged emails responsive to CPH's document requests; (4) give CPH a privilege log; and (5) certify its full compliance with the Agreed Order.

As required by the Agreed Order, MS & Co. produced about 1,300 pages of emails on May 14, 2004. It did not, however, certify compliance with the Agreed Order. After prompting by CPH, on June 23, 2004, MS & Co. served a certificate of compliance signed by Arthur Riel, an Executive Director and manager of its Law/Compliance IT Group.[4]

CPH got its first indication that the Agreed Order may have been violated in the late fall of 2004.

On November 17, 2004, Clare wrote Michael Brody of Jenner & Block, CPH's outside counsel, that MS & Co. had "discovered additional e-mail backup tapes . . ."; that "(t)he data on some of [the] newly discovered tapes has been restored;" that "we have re-run the searches described in [the Agreed Order]"; that "some responsive e-mails have been located as a result of that process"; and that "(w)e will produce the responsive documents to you as soon as the production is finalized."

On December 14, 2004, Brody wrote Clare back:

> in [your November 17, 2004 letter], you state that Morgan Stanley located additional email backup tapes, and that you

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[4]Though CPH would not learn for months that the certificate was false, and even then the magnitude of MS & Co.'s misrepresentations would not be admitted, MS & Co. personnel, including in-house counsel, knew the certification of compliance was false when made.

> would be producing documents soon. Within two days of that letter, you produced some emails to us. In your November 17, 2004 letter, however, you also indicated that "some of the backup tapes are still being restored." Have those backup tapes been restored? Have you found additional responsive emails? If so, when will Morgan Stanley produce those emails? How is it that the tapes were only recently located?

On December 17, 2004, Clare wrote back, telling Brody "(n)o additional responsive e-mails have been located since our November production."[5]

Brody wrote back to Clare December 30, 2004, noting the deficiencies in Clare's correspondence:

> You do not inform us whether the review of the recently-located backup tapes still is ongoing. Please confirm that all email backup tapes from the relevant time period have been reviewed and all responsive emails have been produced. If the review still is proceeding, please let us know when the review will be completed.

Clare wrote back on January 11, 2005, telling Brody that the "restoration of e-mail backup tapes is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

Concerned about Clare's lack of candor, on January 19, 2005 Brody wrote again:

> I write in response to your January 11, 2005 letter concerning e-mails back-up tapes. Unfortunately, your letter raises more questions than it answers. As I requested in my December 14, 2004 letter, please explain the circumstances under which Morgan Stanley located these backup tapes and advise us of the date on which the tapes were located.

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[5]Not only does this letter fail to answer Brody's legitimate questions, it implies that MS &Co. was still processing and reviewing emails from the newly found tapes. As we now know, though, *no* additional information was migrated to the archives between approximately August 18, 2004 and January 15, 2005. *Of course* "no additional responsive e-mails [would have been] located."

> Further, please explain your statement that "the next set of backup tapes" is scheduled to be restored "at the end of January." How many tapes will be restored by the end of January? When exactly in January will Morgan Stanley complete the process of restoring and searching these tapes for responsive documents? Are there other backup tapes that are not yet in the process of being restored? If so, please advise us of (a) the number of tapes that are not yet in the process of being restored; (b) the time period of the data contained on those tapes; and (c) Morgan Stanley's timetable for restoring and searching those tapes. In addition, please explain why those tapes are not yet in the process of being restored. Please also explain why Morgan Stanley cannot complete the restoration and searching of all remaining backup tapes before "the end of January." As you know, our trial is scheduled to begin on February 22, 2005.
>
> We look forward your complete response to these questions no later than January 21, 2005 so that we can bring this matter to the Court's attention, if necessary.

Conforming to what was by now his usual stonewall tactic, Clare responded by letter dated January 21, 2005:

> I write in response to your January 19, 2005 letter regarding Morgan Stanley's production of e-mails restored from backup tapes.
>
> Morgan Stanley completed its initial production of restored e-mail messages on May 14, 2005. The May 2004 production was conducted in accordance with the agreed-upon order governing, and the searches that resulted in that production encompassed data from all of the backup tapes known to exist at the time. Subsequent to the May 2004 production, additional tapes were found in various locations at Morgan Stanley. The discovered tapes were not clearly labeled as to their contents, were not found in locations where e-mail backup tapes customarily were stored, and many of the tapes

were in a different format than other e-mail backup tapes. In November 2004, once it was determined at least some of the discovered tapes contained recoverable e-mail data, Morgan Stanley re-ran the searches described in the agreed-upon order. Those searches resulted in Morgan Stanley's November 2004 production.

Morgan Stanley's efforts to restore the backup tapes discovered after the May 2004 production are ongoing. It is a time-consuming and painstaking process and, given the absence of clear labels or other index information for the backup tapes, there is no way for Morgan Stanley to know or accurately predict the type or time period of data that might be recovered from tapes that have yet to be restored. While Morgan Stanley cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes, we understand from Morgan Stanley that, when the agreed-upon searches are run again at the end of January, those searches will include approximately one terabyte of additional data restored since the prior production.

On January 26, 2005, CPH served its Adverse Inference Motion, seeking sanctions based on MS & Co.'s disclosure of the newly found tapes. Hearing was scheduled for February 14, 2005. In preparation for that hearing, on February 3, 2005 the Court ordered MS & Co. to produce by noon on February 8, 2005 "(i) all documents to be referred to or relied on by any of the witnesses in his or her testimony; and (ii) all documents within MS & Co.'s care, custody, or control, addressing or related to the additional email backup tapes, including matters relating to the time or manner in which they were discovered; by whom they were discovered; who else learned of their discovery and when; and the manner and timetable by which they were be restored and made searchable, including any correspondence to or from outside or prospective outside vendors."

The Adverse Inference Order outlined the discovery abuses shown at the February 14, hearing. They included MS & Co.'s undisclosed discovery of the 1,423 "Brooklyn" tapes no

later than May of 2004; the undisclosed discovery of the 738 8-millimeter backup tapes in 2002; the presence of unsearched data in the staging area; the discovery of 169 DLT tapes in January 2005; the discovery of more than 200 additional tapes on February 11 and 12, 2005; the discovery of a script error that had prevented MS & Co. from locating responsive email attachments; and discovery of another script error that had infected the ability to gather emails from Lotus Notes platform users.

In response to these deficiencies, the Court issued the Adverse Inference Order. That Order reversed the burden of proof on the aiding and abetting and conspiracy elements and included a statement of evidence of MS & Co.'s efforts to hide its emails to be read to the jury, as relevant to both its consciousness of guilt and the appropriateness of punitive damages. It specifically provided that "MS & Co. shall continue to use its best efforts to comply with the April 16, 2004 Agreed Order and . . . February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search."[6]

It is now clear why MS & Co. was so unwilling to provide CPH with basic information about how and when the tapes were found or when production would be complete. First, candor would have required MS & Co. to admit that it had not done a good faith search for the oldest full backup tapes, and that Riel's certificate of compliance was false. Some unsearched tapes had been found by 2002; others had been found no later than May, 2004. Together, over 2,000 tapes had been found which were not searched prior to the May production. It is untrue that the tapes were "not in locations where e-mail backup tapes customarily were stored."

[6]Concerned that MS & Co. had been less than candid with both CPH and the Court, on February 4, 2004, the Court entered its Order on Coleman (Parent) Holding's ore tenus Motion to Participate in Search of Additional E-Mail Backup Tapes or Appoint Third Party to Conduct Search, ordering MS & Co. to pay for a third party vendor to check its compliance with the Agreed Order. The Court previously found that the two scripts errors testified to by Allison Gorman at the February 14, 2005, hearing would not have been discovered or revealed without the threat that the third-party vendor would discover the errors. Given Ms. Gorman's testimony at the March 14, 2005, hearing, though, it now appears MS & Co. knew about the errors before the appointment of the third-party vendor. Consequently, the errors were only revealed, but not discovered, in response to the February 4, 2004, Order.

Second, MS & Co. desperately wanted to hide an active SEC inquiry into its email retention practices.[7] [8] [9] [10] Finally, MS & Co. did not want to admit the existence of the historical email archive, which would expose the false representations it had made to the Court and used to induce CPH to agree to entry of the Agreed Order.[11] [12]

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[7]On December 17, 2003, CPH served its Third Request for Production seeking "(a)ll materials and documents submitted to the United States Securities and Exchange Commission ("SEC"), received from the SEC, or reflecting communications with the SEC in connection with any investigation, inquiry, or examination concerning or relating to Morgan Stanley's policies and/or procedures with regard to the retention, storage, deletion, and/or back-up of electronic mail (emails) . . ." On October 12, 2004, CPH served its Request for Supplemental Documents seeking to bring MS & Co.'s document production current, requesting "(a)ll documents not previously provided by MS & Co. that are responsive to any Request for Production of Documents that CPH previously has served upon MS & Co. in the litigation, including documents obtained by MS & Co. or its counsel after the date of MS & Co.'s prior productions." No SEC documents were produced in response to either request; no privilege log was generated. On other privilege logs generated in response to court orders, MS & Co. did not show the SEC on the distribution portion of the log. See March 9, 2005 Order Following in Camera Inspection (Riel/SEC Documents) footnotes 1, 2. See, also, footnote 15, infra. Kirland & Ellis, outside counsel for MS & Co. in this litigation, represents MS & Co. in the SEC's inquiry into its email retention practices.

[8]MS & Co. manipulated the unhinging of the SEC's email investigation from the IPO litigation in January, 2005, to conceal the email issues as long as possible.

[9]It is now apparent that MS & Co. chose deliberately to keep its affidavits concerning the informal SEC inquiry submitted to support its privilege claims vague, despite two requests from the Court seeking specific information. See February 28, 2005 Order (Release of Exhibits).

[10]See February 25, 2005 Order on Morgan Stanley's Objections to Coleman (Parent) Holding Inc.'s Notice to Produce at Hearing and Motion for Protective Order and March 4, 2005 Order on Plaintiff's ore tenus Motion to Compel Additional Production.

[11]While MS & Co. contends that its representations to the Court that it would cost "hundreds of thousands of dollars" to search the backup tapes and that there was no pre-2000 backup tapes were not false, they were deliberately misleading: MS & Co. never had an intention to search the back up tapes to respond to the requests and some of the year 2000 backup tapes backed up email back to 1997.

In 2001, MS & Co. decided to create the email archive. By June,2003, it had decided that the archive should have two components. First, MS & Co. wanted to create an archive that captured and stored email as it was generated. Second, MS & Co. wanted to add historical data to the archive. That task involved searching for all email backup tapes containing historical emails; sending those tapes to an outside processor; loading the processed tapes into a staging area; and migrating the stored data from the staging area onto the archive. As we now know, archive searches are quick and inexpensive. They do not cost "hundred of thousands of dollars" or "take several months." The restrictions imposed by the Agreed Order were not needed.

[12]On February 10, 2004, Robert Saunders, an executive director of IT for MS & Co., was deposed. He testified that in January, 2003, MS & Co. had put into effect the email archive system. When specifically asked whether the new email archive system would include prior backups or only going forward backups, he testified that "(t)he way it was built was for going forward backup." He was next asked whether "(w)ith respect to backup dated January 2001 and previously, does Morgan Stanley have any new capabilities to restore and search e-mail?" After counsel interposed a vagueness objection, he answered "(t)here are no new capabilities to search that e-mail." That testimony was so misleading as to be false. As Sauders well knew, since he was on the team responsible, the "live" email capture portion of the archive was already operational. The migration of the historical data to the archive was expected to be completed by April of 2004, just two months after his deposition.

MS & Co.'s wrongful conduct has continued unabated.[13] Since the February 14, 2005, hearing, it has come to light that:

- Only two whole and four partial tapes from the Brooklyn tapes had been migrated to the archive and were thus searched for the November, 2004, production. MS & Co. sought to hide this information to create the impression that all the produced documents came from the Brooklyn tapes, rather than reveal that the production came from material that had migrated from the staging area to the archive since the May, 2004, production or some other, as yet undisclosed, source.[14]

- Contrary to MS & Co.'s counsel's November 17, 2004, letter to CPH, *none* of the November, 2004 production came from the "newly found" tapes. MS & Co. carefully crafted its responses to inquiries about the November, 2004, production to avoid both disclosure of the existence of the archive and outright lying.

- The scripts MS & Co. used to process emails into its archive caused the bodies of some messages to be truncated. MS & Co. discovered this problem on February 13, 2005, but did not tell the Court about it until March 14, 2005.

- A migration issue caused about 5% of email harvested by NDCI from the backup tapes not to be captured in the archive, based on testing of a representative sample of tapes. MS & Co. told the SEC about this problem on February 24, 2005, but failed to tell CPH or the Court.

- As of June 7, 2004, only 120 out of 143 SDLT tapes had been processed into the archive.

- An analysis requested by the SEC showed that, based on a representative sample, 10% of backup tapes were overwritten after January, 2001.

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[13]MS & Co. sought to use the entry of the Adverse Inference Order as a shield against further inquiry into its email abuses, arguing that the matter was closed by the Adverse Inference Order. It previously used this tactic with the SEC, arguing that the December 3, 2003 Cease and Desist Order shielded it from other sanctions for email retention failures. See Ex. 14 [February 10, 2005 letter from outside counsel for MS &Co. to SEC]

[14]MS & Co. argued at the March 14 and 15, 2005 hearing that there were only 13 unique, new emails contained in the November 2004 production when compared to the May 2004 production. Nine of those emails, however, were originally given to MS& Co.'s lawyers for responsiveness review by the IT staff for the May 2004 production. No explanation of why they were not produced in May was offered. This is particularly concerning given the large number of documents Ms. Gorman testified the search parameters found compared with the relatively small number found responsive and produced after review by counsel.

- A software error caused blind carbon copies not to be captured in the archive process. MS & Co. told the SEC about this problem on February 24, 2005. MS & Co. did not tell CPH or the Court.

- A software error caused the searches to be hyper case-sensitive, resulting in a failure to capture all emails. MS & Co. knew of the problem as of December, 2004, but did not tell CPH or the Court. The problem was not purportedly fixed until March, 2005.

- A script error caused the archive to have problems pulling group email in Lotus Notes.

- MS & Co. provided sworn testimony at the February 14, 2005, hearing that it had located 600 gigabytes of data, while contemporaneously telling the SEC it had located a terabyte of data. A gigabyte represents 20,000 to 100,000 pages. Incredibly, MS & Co.'s witness on this point, Allison Gorman, testified on March 14, 2005, that it was simply a "terminology" issue that she did not choose to correct because it could cause "confusion."

- CPH requested MS & Co. to produce responses it had made to third-parties in civil, criminal, or administrative proceedings describing limitations on MS & Co.'s ability to produce emails and all notices in such proceedings that MS & Co. had newly discovered backup tapes containing email. MS & Co. objected, arguing that there were over 300 separate proceedings, involving over 70 outside law firms, and that the cost of compliance would be too great. On March 2, 2005, the Court ordered the production, after shortening the time period involved, and required production within 12 hours after counsel's review of each item for responsiveness but, in any event, within 10 days. At the time MS & Co. objected to CPH's request as unduly burdensome, it knew of its Well submission to the SEC made on February 10, 2005. Kirkland and Ellis, co-counsel here, was co-counsel for MS & Co. in that SEC proceeding. Consequently, it appears MS & Co.'s real concern was not that expressed to the Court, but was based on its realization that compliance would reveal the existence of the SEC inquiry into its email retention policy and MS & Co.'s efforts to keep the existence of that investigation secret. MS & Co. violated the Court's March 2, 2005, Order on Morgan Stanley's Responses and Objections to Coleman (Parent) Holdings Inc.'s Notice to Produce at Hearing requiring it to disclose items responsive to CPH's Request for Production within 12 hours of review for responsiveness by waiting *days*, not hours, to produce the Wells submission.

- MS & Co.'s failure to produce or log the SEC documents violated the Court's February 3, 2005, Order.[15]

- James Doyle's, the Executive Director of MS & Co.'s Law Division, declaration that he did not learn of additional unsearched backup tapes until the end of October, 2004, was intended to mislead CPH and the Court. Obviously, MS & Co. sought to create the implication in the declaration that *no one* in the Law Division knew of the backup tapes before then. Instead, both Soo-Mi Lee, Doyle's associate, and James Cusick, Doyle's superior, knew of the tapes no later than June 7, 2004.

- In-house counsel for MS & Co. knew as of June 7, 2004, that nearly a third of the restored backup tapes did not contain email, implying they may have been recycled in violation of the December 3, 2002 Cease and Desist Order. They did not tell CPH or the Court.

- MS & Co.'s searches looked for only two types of emails. There are other types of emails that were not included in the searches. CPH did not learn of this deficiency until March 13, 2005.

- MS & Co. improperly failed to produce 125 documents required to be produced by the Court's February 3, 2005, Order Specially Setting Hearing which required limited discovery be made in connection with the February 14, 2005, hearing on the Adverse Inference Motion.

- MS & Co. improperly withheld 13 documents required to be produced by the Court's March 4, 2005, Order on Plaintiff's ore tenus Motion to Compel Additional Production.

- An additional 282 tapes were found on February 23 and 25, 2005; CPH was not told of the discovery until March 13, 2005.

- An additional 3,536 tapes were discovered on February 23, 2005, in a security room.

- An additional 2,718 tapes were found at Recall, MS & Co.'s third party off-site storage vendor, on March 3, 2005.

- An additional 389 tapes were found March 2 through March 5, 2005. CPH was not told

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[15]The Court previously rejected MS & Co.'s argument that the January 14, 2005, email exchange between its outside and in-house counsel was not required to be produced under the February 3, 2005, Order Specially Setting Hearing because it referred to the "documents issue" and not specifically to the backup tapes. See March 16, 2005 Order on Morgan Stanley's Motion to Disqualify Plaintiff's Counsel Searcy, Denney, Scarola, Barnhart & Shipley, P.A. and Jenner & Block, LLC. MS & Co.'s insistence on a narrow interpretation of the February 3, 2005, Order is not particularly sympathetic, when the only reason that Order confined production to the backup tape issue was because MS &Co. had failed to notify the Court of the other deficiencies in its certificate of compliance.

until March 13, 2005.

- On March 4, 2005, the Court entered its Order on Plaintiff's ore tenus Motion to Compel Additional Production, which ordered MS & Co. to produce by 3:00 p.m. on March 7, 2005, all items within its care, custody, or control dealing with the Riel/SEC investigation, other than documents representing communications between or among MS & Co. inside and outside counsel that were not copied to anyone other than counsel. MS & Co. sought to discredit Riel and thus distance itself from the false June 23, 2004 certificate of compliance; in doing so, it sought to hide Riel's whistle blower status and the existence of an SEC investigation into whether MS & Co. employees sought kick backs from third party vendors; whether MS & Co. employees were improperly pressured into dealing with third-party vendors who may provide business to MS & Co.; and whether MS & Co. continued to overwrite backup tapes contrary to the SEC's December 3, 2002, Cease and Desist Order.

- A script error prevented the insertion of some emails into the archive. MS & Co. produced over 4,600 pages of emails on March 21, 2005, some of which it suggested may have been located on correction of the error; alternatively, it suggested the emails may have been located by NDCI as part of its efforts to verify MS & Co.'s searches.

MS & Co.'s discovery abuses have not been confined to its email production.

William Strong is a MS & Co. managing director and was one of the principal players for it in the Sunbeam deal. He took credit for the fees generated. On May 9, 2003, CPH requested a copy of "(a)ll documents concerning employment contracts, performance evaluations, and/or personnel filed (including without limitation any documents that describe or discuss [his] training, experience, competence, and accomplishments) . . ." MS & Co. asserted that the requested documents were not relevant and that production "would unnecessarily infringe on the privacy interests of [Strong]." On March 15, 2004, the Court ordered MS & Co. to produce "(a)ll references (positive or negative) to [Strong's] truthfulness, veracity, or moral turpitude." Some portions of Strong's evaluations were produced in response to that order. Those evaluations noted Strong's colleagues' reservations about his candor and ethics. Two of his evaluators, Joseph Perella and Tarek Abdel-Meguid, were deposed, when some relatively vague testimony about the bases for those conclusions was offered. It now appears Strong was facing criminal prosecution in Italy for complicity in bribery while he was working on the Sunbeam transaction, which his evaluators knew, and that MS & Co. purposely

withheld that information from CPH and the Court.[16]

Even once CPH independently discovered evidence of Strong's indictment in Italy, MS & Co. sought to shield its files from discovery. It claimed that virtually *all* of the documents it had were privileged under joint defense agreements in place between it, Strong, and Saloman Brothers, Strong's employer at the time of the incident. As the Court's March 10, 2005 Order Following In Camera Inspection (Strong) details, the documents MS & Co. relied on to support that position, and sought to prevent CPH from obtaining, reflect no such agreement.

The other discovery abuses and misrepresentations by MS & Co. other than those involving its email production practices are outlined in CPH's Chronology of Discovery Abuses by Defendant served March 1, 2005, and would take a volume to recite. They include:

- failing to provide the information retained by MS & Co.'s internal document management system pertaining to MS & Co.'s work for Sunbeam; falsely representing to the Court that no useful information was contained in that information; and producing a Rule 1.310 representative who had made an insufficient inquiry into authenticity, business record status, and authorship of documents; see February 28, 2005 Order on CPH's Motion to Deem Certain Documents Admissible and for Sanctions due to Morgan Stanley's Disregard of Court Order;

- when faced with contempt proceedings for violating the Stipulated Confidentiality Order by providing a copy of a settlement agreement between CPH and Arthur Andersen to other counsel, representing to the Court that the law firm of Kellogg, Huber was retained to handle the "Andersen aspects" of this litigation because of a conflict between Andersen and Kirkland & Ellis; Mark Hansen, a partner at Kellog, Huber, testified that his firm was hired as co-counsel for all aspects of the case;

- providing answers to interrogatories signed by a corporate representative who performed insufficient verification of the responses;

[16]MS & Co. originally argued that documents concerning the Italian proceedings were not in Strong's "personnel file" and so were not required to be produced in response to CPH's initial request. MS & Co.'s practice of filing damaging information about an employee other than in his personnel file and then claiming it was not included in the request is about at convincing as its argument that, since it has a corporate directive not to keep drafts of documents once they are in final form, document drafts cannot be business records exempt from hearsay because they are not "kept in the course of a regularly conducted business activity." See Fla. Stat. §90.803 (6) (a). In any event, there was *no excuse* for not producing its records of the Italian proceedings once the Court's March 15, 2004 Order was entered.

- routinely asserting unfounded privilege claims;[17] and

- failing to timely comply with the Court's orders; for example, MS & Co. did not produce Strong's 1994 Performance Evaluation until the afternoon of March 15, 2005, though it was obviously included in the Court's March 15, 2004 Order. The failure cannot be excused as oversight since, when CPH specifically asked for the 1994 evaluation in the spring of 2004, MS & Co.'s counsel said it was withheld as non-responsive; see, also, Ex. 197, 198.

In sum, MS & Co. has deliberately and contumaciously violated numerous discovery orders, including the April 16, 2004 Agreed Order; February 3, 2005 Order Specially Setting Hearing; and the March 4, 2005 Order on Plaintiff's ore tenus Motion to Compel Additional Production. At the February 14, 2005, hearing on CPH's Adverse Inference Motion, it chose to hide information about its violations and coach witnesses to avoid any mention of additional, undisclosed problems with its compliance with the Agreed Order. Implicit in the requirement that MS & Co. certify compliance with the Agreed Order was the requirement to disclose impediments to its ability to so certify. As outlined in this Order, MS & Co. employees, and not just counsel, have participated in the discovery abuses. The prejudice to CPH from these failings cannot be cured. Even if all the script errors have been located and corrected, and MS & Co. has failed to show they have, and even if all of the email backup tapes have now been located, and MS & Co. has failed to show they have, the searches cannot be completed in time. The other discovery abuses outlined call into doubt all of MS & Co.'s discovery responses. *The judicial system cannot function this way.* Based on the foregoing and on the Court's March 1, 2005 Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, it is

ORDERED AND ADJUDGED that CPH's Renewed Motion for Entry of Default Judgment is Granted, in part. See Robinson v. Nationwide Mut. Fire Ins. Co., 887 So. 2d 328 (Fla. 2004); Mercer v. Raine, 443 So. 2d 944 (Fla. 1983); Precision Tune Auto Care, Inc. v.

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[17]For example, MS & Co. produced over 260 documents dealing with the Strong investigation over which it had previously claimed privilege once the Court announced its intention to conduct an in camera review; the Court found another 200 documents were not privileged after conducting its review, by its March 10, 2005 Order.

Radcliffe, 804 So. 2d 1287 (Fla. 4th DCA 2002); Rule 1.380 (b) (2) (C), Fla. R. Civ. P. Paragraphs 2 (excluding the last sentence thereof); 3 (excluding the portion of the last sentence beginning with "in order to close . . ."); 8-10, 11 (excluding everything after the first sentence); 12 (excluding all parts following "June 1998"); 13 (excluding the last sentence thereof); 14-27; 28 (excluding everything after "firm" in the second to last sentence thereof); 29-39; 41-52; 53 (excluding the second sentence thereof); 54-57; 58 (excluding "CPH and" in the second line thereof); 59-63; 64 (excluding the third line thereof); 65 (excluding the last sentence thereof); 66 (excluding the last sentence thereof); 67-70; 71 (excluding the first word of the last sentence and the remainder of that sentence after "material"); 72; 73 (excluding the first sentence thereof); 74 (excluding the words "CPH and" in the second to last sentence thereof); 75-81; 85; 86; 87 (excluding (g)); 90, and 91 (excluding (g)) of Plaintiff's Amended Complaint, as amended by the Court's Amended Order on Morgan Stanley's Motion to Dismiss, Motion to Strike, and Motion for More Definite Statement, shall be read to the jury and the jury instructed that those facts are deemed established for all purposes in this action. A copy of a redacted Amended Complaint is attached as Exhibit A. It is further

ORDERED AND ADJUDGED that the Court shall read to the jury a Statement similar to that attached as Exhibit A to the Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, but incorporating the relevant additional findings of this Order, and the jury will be instructed that it may consider those facts in determining whether MS & Co. sought to conceal its offensive conduct when determining whether an award of punitive damages is appropriate. See General Motors Corp. v. McGee, 837 So. 2d 1010 (Fla. 4th DCA 2002), rev. den. 851 So. 2d 728 (Fla. 2003). Counsel are each invited to submit proposed Statements. It is further

ORDERED AND ADJUDGED that CPH shall be entitled to an award of reasonable fees and costs incurred as a result of the Renewed Motion for Entry of Default Judgment and the violations of Court orders recited herein. The amount shall be determined at an evidentiary hearing following trial. It is further

ORDERED AND ADJUDGED that MS & Co. is relieved of any future obligation to

comply with the April 16, 2004 Agreed Order and the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s Motion to Participate in Search of Additional E-Mail Back-Up Tapes or Appoint Third Party to Conduct Search. It is further

ORDERED AND ADJUDGED that the pro hac vice admission of Thomas Clare is revoked. It is further

ORDERED AND ADJUDGED that the portions of CPH's Motion for Correction and Clarification of Order on CPH's Motion for Adverse Inference that seek to amend the body of that Order to correct clerical and spelling errors, as agreed to by counsel, is Granted, and the corrections deemed made to the body of the Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, by interlineation. In all other respects the remainder of the Motion for Correction and Clarification is declared moot.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 23rd day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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In April 1997, Morgan Stanley began serving as Sunbeam's investment banker. Morgan Stanley originally attempted to find someone to buy Sunbeam. When Morgan Stanley was unable to find a buyer, Morgan Stanley developed a strategy for Sunbeam to use its fraudulently-inflated stock to acquire a large company that Sunbeam would own and operate. Then, trading on Morgan Stanley's relationships with CPH's senior officers, Morgan Stanley found

Exhibit A

Coleman for Sunbeam. At the time of the sale to Sunbeam, Coleman was a leading manufacturer and marketer of consumer products for the worldwide outdoor recreation market, with annual revenues in excess of $1 billion.

ion shares

After Sunbeam announced plans to acquire Coleman, Morgan Stanley agreed to underwrite a $750 million debenture offering for Sunbeam. Sunbeam needed the proceeds of that debenture offering to complete the acquisition of Coleman. As Sunbeam's investment banker and as the sole underwriter for the $750 million debenture offering, Morgan Stanley received detailed and specific information concerning Sunbeam's financial condition and performance. Morgan Stanley received information that directly contradicted Sunbeam's and Morgan Stanley's assertions to CPH that Sunbeam had undergone a successful turnaround and that its financial performance had dramatically improved. By no later than March 18, 1998, Morgan Stanley knew that Sunbeam's January and February 1998 sales were only 50% of January and February 1997 sales, and Morgan Stanley also knew that the shortfall was caused by Sunbeam's practice of accelerating sales which otherwise would have occurred in 1998 in order to boost Sunbeam's income in 1997. Although Morgan Stanley and Sunbeam previously had advised CPH that Sunbeam's sales were running ahead of analysts' expectations for the first quarter, Morgan Stanley decided not to correct those material misrepresentations. Instead, in March 1998, Morgan Stanley assisted Sunbeam in concealing the problems with Sunbeam's first quarter 1998 sales

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") directly or indirectly owned 44,067,520 shares — or approximately 82% — of Coleman prior to the transactions at issue. On March 30, 1998, Sunbeam acquired CPH's interest in Coleman. Sunbeam paid for the Coleman shares with 14.1 million shares of Sunbeam common stock and other consideration.

Defendant Morgan Stanley & Co., Inc. ("Morgan Stanley") is a highly sophisticated investment banking firm that provides a wide range of financial and securities services. Among other things, Morgan Stanley provides advice on mergers and acquisitions and raises capital in the equity and debt markets. Morgan Stanley served as Sunbeam's investment banker and as the underwriter of securities issued by Sunbeam in connection with the events at issue herein.

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Sunbeam Corporation ("Sunbeam") was a publicly-traded company headquartered in Delray Beach, Florida. Sunbeam designed and manufactured small household appliances and outdoor consumer products, which it marketed under the Sunbeam and Oster brand names. Sunbeam filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code in February 2001.

Albert Dunlap ("Dunlap") was the Chief Executive Officer of Sunbeam from July 1996 until June 1998 when he was terminated by Sunbeam's Board of Directors.

Russell Kersh ("Kersh") was the Executive Vice President of Sunbeam from July 1996 until June 1998 when he was terminated by Sunbeam's Board of Directors.

Arthur Andersen LLP ("Andersen") provided outside accounting services to Sunbeam through its West Palm Beach, Florida office. Andersen auditors provided information concerning Sunbeam's first quarter 1998 sales and earnings to Morgan Stanley.

16div-016451

Sunbeam designed and manufactured outdoor and household consumer products, which it marketed under the Sunbeam and Oster brand names. Sunbeam's products included small kitchen appliances, humidifiers, electric blankets, and grills. Many of the country's leading retail stores, including Wal-Mart, Target, and Home Depot, were among Sunbeam's major customers.

Despite Sunbeam's well-known brands and strong customer base, its financial performance was disappointing. In 1994, Sunbeam earned $1.30 per share. In 1995, Sunbeam's earnings declined to $0.61 per share. In 1996, Sunbeam's earnings continued to suffer. On March 22, 1996, Sunbeam issued an early warning that its first quarter earnings would be well under analysts' expectations and down from first quarter 1995. Shortly after issuing the March 22 earnings warning, Sunbeam's Chief Executive Officer and two of Sunbeam's directors announced their resignations. Less than a week later, Sunbeam announced that its first quarter 1996 earnings had plunged 42% from first quarter 1995 levels. Sunbeam also announced that its second quarter 1996 earnings would be lower than its second quarter 1995 earnings.

Sunbeam's disappointing earnings caused its stock price to plummet. During 1995, the price at which Sunbeam's stock traded fell 40%, from a high of $25-1/2. In 1996, Sunbeam's stock price continued to decline until it reached a low of $12-1/4 in July.

16div-016452

On July 18, 1996, Sunbeam's board of directors hired Albert Dunlap as Sunbeam's new Chief Executive Officer. Based upon brief terms as Chief Executive Officer of other publicly traded companies, including Scott Paper Company ("Scott Paper"), Dunlap was viewed as a "turnaround specialist" — that is, someone who could take a poorly performing company and significantly increase its value by "turning around" its financial performance. Because Dunlap touted the benefits from firing large numbers of employees and closing large numbers of plants, Dunlap became widely known as "Chainsaw Al." Dunlap lived in Boca Raton, Florida, and one of his first tasks at Sunbeam was to consolidate the company's six headquarters into one located in Delray Beach, Florida.

Immediately after joining Sunbeam, Dunlap hired Kersh as Sunbeam's Chief Financial Officer. Kersh had teamed with Dunlap for over 15 years, serving as a senior executive with Dunlap at other companies, including Scott Paper. Dunlap also brought in several other hand-picked executives to make up his senior management team.

Dunlap and his senior management team entered into employment agreements with Sunbeam. Under those agreements, Dunlap and his senior management team stood to make tens of millions of dollars if they were able to boost Sunbeam's apparent value and then sell Sunbeam to another company at a premium.

In order to convince other companies that they should want to purchase Sunbeam, Dunlap needed to improve Sunbeam's reported financial performance quickly and dramatically. It was, of course, no small task to transform Sunbeam from a poorly performing company, with weak sales and declining profits, into a strong company with growing sales and

16div-016453

soaring profits. In fact, as the world later learned, Dunlap did not achieve that change in Sunbeam's fortunes. Instead, Dunlap created the illusion of a dramatic turnaround at Sunbeam by engaging in what SEC officials subsequently described as a "case study" in financial fraud.

Dunlap had a three-step plan at Sunbeam. In the first step, Dunlap overstated Sunbeam's financial problems so that Sunbeam appeared to be in worse shape than it really was. After making Sunbeam look worse, Dunlap moved to step two, where he made Sunbeam look more valuable than it really was by inflating Sunbeam's sales and engaging in other earnings manipulations. In step three, Dunlap planned to sell Sunbeam to another company before it became apparent that the "improved" results were fictional. By doing so, Dunlap would make tens of millions of dollars and would be free to blame his successor for any subsequent problems.

Dunlap began implementing his strategy soon after his arrival at Sunbeam in 1996. Claiming to be engaged in a clean-up of Sunbeam's financial problems, Dunlap recorded artificially high reserves and booked expenses that should not have been recorded until later periods. Both of those actions made Sunbeam's financial condition appear worse than it really was, thus lowering the benchmark for measuring Sunbeam's performance in future years.

The overstated reserves also provided Dunlap a means by which he could inflate Sunbeam's future results during the second step of his plan. Dunlap later could "re-evaluate" and release millions of dollars from the overstated reserves to boost income in later periods. The income from released reserves contributed to the illusion of a rapid turnaround in Sunbeam's performance. Using inflated reserves to enhance income in future periods is a fraudulent practice and overstated reserves are commonly called "cookie jar" reserves.

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After making Sunbeam look worse than it really was in 1996, Dunlap manipulated Sunbeam's sales and expenses in 1997 to create the false appearance of quarter after quarter improvement in financial performance. For example, Dunlap caused Sunbeam to inflate its sales by engaging in phony "bill and hold" sales. Under this practice, Sunbeam recognized revenues from "sales," even though customers did not actually pay for or even take delivery of the products, which continued to sit in Sunbeam's own warehouses. Although Sunbeam recorded the "bill and hold" sales as if they were current sales, they were, in reality, simply sales stolen from future quarters. In 1997, phony "bill and hold" sales added approximately $29 million in sales and $4.5 million in income.

Throughout 1997, Sunbeam also engaged in a sales practice known as "channel stuffing" — accelerating sales that otherwise would occur in a later period, sometimes by offering steep discounts or other extraordinary customer inducements. On the grand scale employed by Sunbeam, channel stuffing inevitably leads to major sales shortfalls in later periods when "stuffed" customers simply stop buying. Sunbeam's senior sales officer referred to Sunbeam's unsustainable practice of inflating performance through accelerated sales as the "doom loop."

Dunlap further "enhanced" Sunbeam's income in 1997 by causing Sunbeam to record a "profit" of $10 million from a sham sale of its warranty and spare parts business. Dunlap also made Sunbeam appear to be more successful than it really was by reaching into the "cookie jar," reversing inflated reserves, and recording $35 million as income. Sunbeam's 1997 profit margins also looked better than they really were because Dunlap already had recorded millions of dollars of 1997 expenses in 1996.

16div-016455

In October 1997, Dunlap announced that Sunbeam's "turnaround" was complete. Compared to the third quarter of 1996, Sunbeam's third quarter 1997 performance was remarkable. In the third quarter of 1996, Sunbeam had reported a loss of $18.1 million. In the third quarter of 1997, however, Sunbeam reported earnings of $34.5 million — an extraordinary turnaround from substantial losses to hefty profits. Sunbeam's combined results for the first three quarters showed dramatic improvement as well. Sunbeam reported that its profits for the first nine months were up tenfold over the same period the year before — from $6.5 million in 1996 to $67.7 million in 1997. Sunbeam's reversal of fortune caused a spectacular increase in the price of its stock. In July 1996, when Dunlap was hired, Sunbeam's shares traded at $12-1/4. By October 1997, Sunbeam's shares had risen to $49-13/16.

With steps one and two successfully completed, Dunlap was more than eager to complete the final step of his scheme: to sell Sunbeam to another company and collect tens of millions of dollars for himself before the outside world could learn the truth about Sunbeam's phony "turnaround." To accomplish that third and final step, Dunlap needed an investment banking firm

When Dunlap announced in early 1997 that he would begin interviewing investment bankers, Morgan Stanley immediately began pursuing the job. Although Morgan Stanley had no previous relationship with Sunbeam, one of Morgan Stanley's senior executives, William Strong, had worked closely with Dunlap on other large transactions between 1986 and 1993, when Strong was employed by Salomon Brothers.

Morgan Stanley knew that it was competing with other investment bankers, including Mark Davis, for Dunlap's business. Davis was the head of the mergers and acquisitions department at Chase Securities and had worked previously with Strong at Salomon Brothers. Davis had a very strong relationship with Dunlap, and Davis had served as Dunlap's investment advisor on numerous transactions, including Dunlap's sale of Scott Paper. Shortly after arriving at Sunbeam, Dunlap hired Davis to handle the sale of Sunbeam's furniture business.

Morgan Stanley put together a team headed by its Vice Chairman, Bruce Fiedorek, and Strong. Beginning in April 1997, Morgan Stanley's personnel traveled to Sunbeam's offices in Delray Beach, Florida to study Sunbeam and woo Dunlap. After months of uncompensated work, in September 1997, Morgan Stanley finally persuaded Dunlap to name Morgan Stanley as Sunbeam's exclusive investment banker. Dunlap instructed Morgan Stanley to find a buyer for Sunbeam. Morgan Stanley knew that if it failed to deliver a major transaction, Morgan Stanley would not be compensated for the extensive work it had performed for Sunbeam. Morgan Stanley also knew that Davis and Chase Securities were standing by — ready and willing to reclaim their position as Dunlap's investment banker of choice.

Throughout the fall of 1997, Morgan Stanley aggressively searched for a buyer for Sunbeam. Morgan Stanley put together extensive and detailed materials to use in marketing Sunbeam to potential buyers. Morgan Stanley pitched the transaction to more than 10 companies — including Gillette, Colgate, Sara Lee, Rubbermaid, Whirlpool, and Black & Decker — that Morgan Stanley hoped might have an interest in acquiring Sunbeam. Morgan Stanley, however, was not able to find a buyer.

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As 1998 approached, the pressure on Dunlap increased. Dunlap was aware that Sunbeam would be unable to sustain the appearance of a successful turnaround in 1998 because Sunbeam had stolen sales from 1998 to boost 1997's numbers and the "cookie jar" reserves had been depleted. Dunlap needed a way to conceal Sunbeam's phony turnaround until a buyer could be found. Morgan Stanley provided the solution to Dunlap's problem.

Morgan Stanley knew that its failure to find a buyer for Sunbeam could prove fatal to the relationship it had worked so hard to establish with Dunlap. As the pressure on Dunlap increased, the pressure on Morgan Stanley increased as well. Although Morgan Stanley was not able to find a buyer for Sunbeam, Morgan Stanley responded with a plan that would allow Dunlap to conceal his fraud. Morgan Stanley recommended that Sunbeam acquire other companies, using Sunbeam's stock, which was fraudulently inflated, as the "currency" that would be used to pay for the acquisitions.

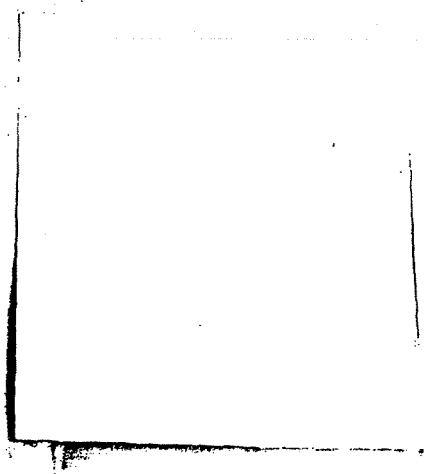
Morgan Stanley's strategy was doubly deceptive. First, Morgan Stanley's acquisition strategy would allow Dunlap to consolidate Sunbeam's results with those of the newly-acquired companies. That would help Dunlap camouflage Sunbeam's results and make it difficult to detect any shortfall in Sunbeam's performance. Dunlap simply could label any problems that were detected as attributable to the poor performance of the acquired companies or as a temporary "blip" caused by the distraction of integrating the acquired companies with Sunbeam. Second, Morgan Stanley's strategy would allow Dunlap to take new massive restructuring charges (purportedly relating to the acquisitions) and thus create more "cookie jar" reserves that could be tapped to bolster the future earnings of the combined companies.

Morgan Stanley identified Coleman as one of the key potential acquisition targets. CPH owned 82% of Coleman's stock. Morgan Stanley searched the ranks of its investment bankers to locate those with the best access to CPH. Drawing on relationships between some of Morgan Stanley's investment bankers and senior CPH officers, Morgan Stanley set about trying to persuade CPH to sell its interest in Coleman to Sunbeam — and, most importantly, to accept Sunbeam stock as consideration.

Morgan Stanley laid the groundwork for a meeting to take place in December 1997 in Palm Beach, Florida between Dunlap and Kersh and representatives of CPH. In advance of the Palm Beach meeting, Morgan Stanley provided materials to Sunbeam to prepare Sunbeam for the meeting. Morgan Stanley also met with Kersh and other Sunbeam personnel to prepare for the Palm Beach meeting. However, Dunlap nearly scuttled Morgan Stanley's carefully crafted plan at the outset. During the December 1997 Palm Beach meeting, when CPH rejected Dunlap's initial all-stock offer, Dunlap became so angry that he cursed and ranted at the CPH representatives and stormed out.

Dunlap's tantrum appeared to kill any chance that CPH would sell its interest in Coleman to Sunbeam. Morgan Stanley, however, worked to revive the discussions. Drawing again on Morgan Stanley's relationships with CPH officers, Morgan Stanley was able to restart the discussions with CPH with the promise that Dunlap would be kept away from the negotiating table. Thereafter, Morgan Stanley, through Managing Directors Strong, James Stynes, and Robert Kitts, led the discussions with CPH on Sunbeam's behalf.

Morgan Stanley knew that it had to persuade CPH not only to sell Coleman, but also to accept Sunbeam stock — ultimately, 14.1 million shares of Sunbeam stock — as a major part of the purchase price. During the course of negotiations, Morgan Stanley prepared and provided CPH with false financial and business information about Sunbeam designed to create the appearance that Sunbeam was prospering and that Sunbeam's stock had great value. For example, Morgan Stanley provided CPH with false 1996 and 1997 sales and revenue figures, as well as false projections that Sunbeam could not expect to achieve. Together, in face-to-face discussions, Morgan Stanley and Sunbeam assured CPH that (a) Sunbeam would meet or exceed its first quarter 1998 earnings estimates; (b) analysts' 1998 earnings estimates for Sunbeam were correct; and (c) Sunbeam's plan to earn $2.20 per share in 1998 was easily achievable and probably low. Morgan Stanley and Sunbeam also falsely assured CPH that Sunbeam's "early buy" sales program would not hurt Sunbeam's future revenues. However, the "early buy" program was one of Sunbeam's revenue acceleration programs — and the devastating effects of Sunbeam's revenue acceleration programs already had begun to materialize at Sunbeam. Sunbeam's January and February 1998 sales were down drastically, although those results were not disclosed to CPH or the public. To the contrary, Morgan Stanley and Sunbeam together specifically advised CPH that Sunbeam's first quarter 1998 sales were "tracking fine" and running ahead of analysts' estimates.



On February 27, 1998, Sunbeam's Board of Directors met at Morgan Stanley's offices to consider the purchase of Coleman, as negotiated by Morgan Stanley.

At the February 27, 1998 meeting, Morgan Stanley made an extensive presentation to Sunbeam's Board concerning the proposed transaction. Numerous Morgan Stanley representatives, including Managing Directors Strong, Kitts, Stynes, Ruth Porat, and Vikram Pandit, attended the meeting.

Morgan Stanley presented Sunbeam's board with Morgan Stanley's opinion on the value of Coleman. Using a discounted cash flow analysis, which Morgan Stanley represented was the best gauge of stand-alone economic value and the best method of capturing the unique value of Coleman, Morgan Stanley valued CPH's Coleman stock at a range of $31.06 to $53.24 per Coleman share. CPH's 44,067,520 Coleman shares were worth, therefore, between $1.369 billion and $2.346 billion.

Following Morgan Stanley's presentation, Sunbeam's Board of Directors voted to acquire Coleman on the very favorable terms that Morgan Stanley had negotiated.

Morgan Stanley spent the following weekend developing Sunbeam's public relations strategy to announce the Coleman transaction. Morgan Stanley scripted the points for Dunlap to make in a conference call with analysts. Morgan Stanley also crafted a list of "key media messages" for Dunlap to use in his communications with the press. On Sunday, March 1, 1998, Morgan Stanley spoke with a reporter for the Wall Street Journal to inform him that Sunbeam would announce its acquisition of Coleman the following morning.

Sunbeam announced its acquisition of Coleman on Monday, March 2, 1998, prior to the opening of the financial markets. Consistent with Morgan Stanley's valuation, investors viewed Sunbeam's purchase of Coleman — and the price that Sunbeam had paid — very favorably. The day before the acquisition was announced, Sunbeam's stock closed at $41-3/4. In the days following Sunbeam's announcement of the transaction, Sunbeam's stock rose approximately 25%, to a high of $52.

Dunlap knew that Sunbeam needed to raise funds to pay the cash portion of the acquisition consideration. Dunlap also knew that Sunbeam needed cash to purchase two other smaller companies in addition to Coleman. Morgan Stanley recommended that Sunbeam raise funds through a $500 million offering of convertible subordinated debentures. To assure the offering's success, Morgan Stanley lent its name to the offering. Indeed, Morgan Stanley agreed to serve as the sole underwriter for the offering.

The money raised from the sale of the debentures was used by Sunbeam to complete the acquisition of Coleman.

Unbeknownst to CPH or the public, Sunbeam's first quarter 1998 sales were a small fraction of the financial community's expectations for the quarter. If Dunlap could consolidate Sunbeam's sales with Coleman's sales, Dunlap knew that he could obscure Sunbeam's actual first quarter sales. As a result, Dunlap was especially anxious to complete the acquisition of Coleman before Sunbeam announced its first quarter 1998 sales. Indeed, the success of the scheme depended upon Sunbeam's ability to complete the Coleman acquisition before Sunbeam's first quarter results

were announced. To satisfy Dunlap's objectives, Morgan Stanley moved up the launch date of the offering.

The debentures were marketed to investors at a series of "road show" meetings and conference calls arranged by Morgan Stanley. Morgan Stanley prepared and distributed a memorandum for its sales force to use in marketing the debentures to investors. Morgan Stanley also developed the script for Dunlap and Kersh to deliver during the road show. In those materials, Morgan Stanley misrepresented Sunbeam's financial performance and emphasized Dunlap's purported "turnaround" accomplishments.

Morgan Stanley launched the debenture offering with a research analyst presentation to the Morgan Stanley sales force. As part of Morgan Stanley's growing relationship with Sunbeam, one of Morgan Stanley's top-rated research analysts planned to initiate equity coverage of Sunbeam. That Morgan Stanley analyst had modeled values for Sunbeam's acquisition of Coleman that were higher than even Sunbeam's management had predicted.

Although Morgan Stanley initially planned to sell $500 million worth of debentures, Morgan Stanley's efforts were so successful that the size of the offering was increased to $750 million on March 19, 1998 — the day of the last road show. The debentures were sold to investors nationwide, including investors based in Florida.

As Sunbeam's investment banker and the sole underwriter for the debenture offering, Morgan Stanley had a duty to investigate Sunbeam's finances and business operations.

Morgan Stanley, which had been working hand-in-hand with Sunbeam for

almost a year and had traveled to Sunbeam's Florida offices, repeatedly asserted that it had satisfied that duty.

Strong, who was one of the senior Morgan Stanley investment bankers involved, has admitted in sworn testimony that he may have had more than 100 telephone conversations with Dunlap and Kersh (whose offices were in Sunbeam's Delray Beach headquarters) and that Strong was "sure" that he would have been apprised of Sunbeam's financial performance during the first two months of 1998.

With the $750 million debenture offering and the Coleman transaction set to close at the end of March 1998, Sunbeam's Florida-based outside auditors were shocked that Morgan Stanley had not asked them about Sunbeam's financial performance for first quarter 1998. Sunbeam's auditors were alarmed because Sunbeam's first quarter results were a disaster, but Dunlap, Kersh, and Morgan Stanley were telling CPH and the investing public,

that Sunbeam's turnaround was a success, that Sunbeam's sales for the first quarter of 1998 were ahead of the expectations of outside financial analysts, and that Sunbeam was poised for record sales.

On March 17, Sunbeam's auditors forced the issue. From their Florida offices, Sunbeam's auditors sent Morgan Stanley a letter reporting that Sunbeam's net sales through January 1998 were down 60% — $28 million in January 1998, as compared to $73 million in January 1997. The March 17 letter explained that the decline was "primarily due to the . . . new early buy program for grills which accelerated grill sales into the fourth quarter of fiscal 1997."

The next day, Morgan Stanley was faxed a schedule from Sunbeam's Florida office that showed that Sunbeam's January and February 1998 net sales totaled $72 million, an amount that was 50% lower than Sunbeam's January and February 1997 net sales of $143.5 million.

Based on information that Sunbeam and Morgan Stanley had disseminated, Wall Street analysts were anticipating that Sunbeam's first quarter 1998 net sales would be in the range of $285 million to $295 million. Sales in that range would have been approximately 15% higher than first quarter 1997 sales. Sunbeam's January and February 1998 sales, however, totaled barely 25% of $285 million. As Sunbeam's outside auditors advised Morgan Stanley in writing, the sales drop-off was caused by Sunbeam's sales acceleration program. The information put into Morgan Stanley's hands on March 17 and March 18 showed that Morgan Stanley's and Sunbeam's assertions to CPH and other investors were false. Contrary to what Morgan Stanley and Sunbeam had represented, Sunbeam had not undergone a successful turnaround, Sunbeam's financial performance had not dramatically improved, and Sunbeam's performance in 1998 was not better than Wall Street analysts' expectations. It was imperative, therefore, that the truth be kept from CPH until the Coleman transaction closed at the end of March 1998.

Morgan Stanley did not disclose Sunbeam's disastrous first quarter, Morgan Stanley did not insist that Sunbeam disclose its disastrous first quarter, Morgan Stanley did not correct any of the false and misleading statements it and Sunbeam had made to CPH about Sunbeam's business or performance, and Morgan Stanley did not suspend any of the critical transactions that were scheduled to close in the next two weeks. Instead, with Morgan Stanley's knowledge and assistance, Sunbeam prepared and issued a false press release on March 19, 1998 that affirmatively misstated and concealed Sunbeam's true condition.

The March 19, 1998 press release stated: "Sunbeam Corporation . . . said today that it is possible that its net sales for the first quarter of 1998 may be lower than the range of

Wall Street analysts' estimates for $285 million to $295 million, but net sales are expected to exceed 1997 first quarter net sales of $253.4 million. . . . The shortfall from analysts' estimates, if any, would be due to changes in inventory management and order patterns at certain of the Company's major retail customers. The Company further stated that based on the strength of its new product offerings and powerful brand names, it remains highly confident about the overall sales outlook for its products for the entire year."

As Morgan Stanley was fully aware, the March 19, 1998 press release was false, misleading, and failed to disclose material information. The March 19, 1998 press release failed to disclose Sunbeam's actual January and February 1998 sales or the true reasons for the poor results. Instead, the press release held out the false possibility that Sunbeam still could achieve sales of $285 million to $295 million and suggested that, if any shortfall occurred, that shortfall would be due to the fact that certain retailers had decided to defer first quarter purchases to the second quarter. The press release also assured that Sunbeam at least would exceed first quarter 1997 net sales of $253.4 million. Based on information that Morgan Stanley had in its hands on March 18, 1998, it was obvious that Sunbeam would not achieve sales of $285 million to $295 million and that Sunbeam's first quarter 1998 sales would be below its first quarter 1997 numbers. To simply meet 1997 first quarter sales, Sunbeam needed sales of $123.3 million over the 12 remaining days of the quarter — an average of $10.28 million per day. Sales of $10.28 million per day would be 306% more than the average per day sales in March 1997, and 281% more than the average per day sales for the first 17 days of March 1998. Furthermore, Morgan Stanley knew that the shortfall from analysts' estimates was not caused by retailers' deciding to defer purchases from the first quarter of 1998 to the second quarter, as the press release indicated. Rather, as Sunbeam's outside auditors had

16div-016466

advised Morgan Stanley in writing, the collapse in first quarter sales was caused by Sunbeam's acceleration of 1998 sales into the fourth quarter of 1997.

After Sunbeam's false press release was issued, Morgan Stanley stood arm-in-arm with Sunbeam while Dunlap and Kersh told CPH, analysts, and investors that the March 19, 1998 release was a purely cautionary statement because some first quarter 1998 sales might simply "spillover" into the second quarter and that Sunbeam still believed that it actually would meet analysts' estimates of $285 million to $295 million in first quarter 1998 sales.

Morgan Stanley knew that a full and truthful disclosure of Sunbeam's first quarter sales would doom the debenture offering, which was scheduled to close on March 25, 1998,

As Morgan Stanley was fully aware, the written contract between CPH and Sunbeam gave CPH the express legal right to refuse to close the sale if there was a material adverse change in Sunbeam's "business, results of operation or financial condition."

Furthermore, if the transactions did not close, Morgan Stanley would not be paid its $10.28 million fee for the Coleman acquisition or its $22.5 million fee for underwriting the subordinated debenture offering. Morgan Stanley also knew that Sunbeam would promptly replace Morgan Stanley with another investment banking firm – such as the Chase Securities team led by Mark Davis.

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Sunbeam's outside auditors already had made it perfectly clear to Morgan Stanley that Sunbeam's first quarter 1998 sales were a disaster,

One of Sunbeam's senior outside auditors, Lawrence Bornstein, has testified under oath that on March 19, 1998, he told Morgan Stanley's John Tyree that the statement in Sunbeam's March 19, 1998 press release — that Sunbeam would at least exceed first quarter 1997 sales of $253.4 million — was not credible: "Just do the math . . . they've done a million dollars in sales the first 70 days of the year and now they need to do $10 million worth of sales for the next . . . I think it was 11 days . . . I mean, something ridiculous." Bornstein also told Tyree: "I've been to every shipping dock domestically, I've been to Hattiesburg, I've been to Neosho, I've been to Mexico City, and I don't think these guys can physically ship this much stuff."

Morgan Stanley knew that the March 19 press release was false and misleading. Despite that knowledge and Bornstein's explicit statements, Morgan Stanley continued with its preparations to close the debenture offering on March 25, 1998 and the Coleman acquisition on March 30, 1998.

As part of those preparations, on March 24, 1998, Morgan Stanley's Tyree spoke by telephone with Sunbeam's Kersh, who was located in Sunbeam's Delray Beach offices, to obtain an updated report concerning Sunbeam's first quarter performance. By the time of that March 24, 1998 call, Sunbeam had fallen even further behind first quarter 1997 sales. As of March 18, 1998, Sunbeam needed to achieve average sales of $10.28 million per day, over 12 days, to reach

first quarter 1997 sales. Sunbeam's sales between March 18 and March 24, 1998 had averaged only $6.81 million per day — well short of the $10.28 million per day that Sunbeam needed to achieve. Sunbeam's March 18 through March 24, 1998 sales were further proof that Sunbeam's March 19, 1998 press release was false and that Sunbeam would not achieve first quarter 1998 sales in excess of first quarter 1997 sales.

Morgan Stanley also knew no later than March 25, 1998, if not much earlier, that Sunbeam's earnings for the first quarter of 1998 were going to miss Wall Street analysts' earnings expectations, which were in the range of $0.28 to $0.31 per share (excluding one-time charges). Sunbeam's outside auditors advised Morgan Stanley on March 25 that Sunbeam had suffered a $41.19 million loss during the first two months of 1998, including a one-time charge of $30.2 million. Even excluding that one-time charge, Sunbeam's loss for the first two months was $0.13 per share. To achieve first quarter 1998 operating earnings of $0.28 per share, which were at the low end of analyst expectations, Sunbeam needed to realize a profit of $35.5 million during March 1998 alone. A net profit of $35.5 million in March was 500% more than Sunbeam's net profit for the entire first quarter of 1997. In fact, Sunbeam's first quarter 1998 earnings fell far short of Wall Street's expectations. Sunbeam's first quarter earnings were material,

Having directly participated in misleading CPH Morgan Stanley had a duty to disclose the true facts before the closing of the debenture offering and the Coleman acquisition. Morgan Stanley also could have required Sunbeam to postpone the closings of

those transactions until the necessary disclosures were made. Morgan Stanley did neither. Instead, Morgan Stanley marched forward and closed the $750 million debenture offering on March 25, 1998, which was needed to close the Coleman transaction, and assisted Sunbeam in closing the acquisition of Coleman on March 30, 1998.

Morgan Stanley received $22.5 million for the subordinated debenture offering and $10.28 million for the Coleman acquisition. Morgan Stanley would have received nothing if the transactions had failed to close.

On April 3, 1998 — just four days after the Coleman transaction closed — Sunbeam announced that sales for the first quarter of 1998 would be approximately 5% below the $253.4 million in sales that Sunbeam reported in the first quarter of 1997. In other words, Sunbeam was expecting sales in the range of $240 million. That sales shortfall was shocking news, particularly in view of assurances provided by Sunbeam both in and after its March 19, 1998 press release that $285 million to $295 million of sales was still a real possibility. The April 3, 1998 press release also disclosed that Sunbeam expected to show a loss for the quarter, although the release did not disclose the magnitude of the loss or how much of the loss was attributable to operating earnings as opposed to one-time charges. Sunbeam's news stunned . . . the market. On April 3rd, Sunbeam's stock price dropped 25% — from $45-9/16 to $34-3/8.

. . . Sunbeam's actual first quarter 1998 performance was even worse than Sunbeam disclosed on April 3, 1998. The April 3, 1998 release indicated that Sunbeam's first quarter sales were in the range of $240 million. In fact, Sunbeam's first quarter sales were $224.5

million. Sunbeam obscured the true shortfall by extending its quarter from March 29 to March 31, 1998 — thereby adding two more days of Sunbeam sales. Sunbeam also failed to disclose that it had included two days of Coleman sales after the Coleman transaction closed on March 30. Further, Sunbeam inflated first quarter 1998 sales with $29 million of new phony "bill and hold" sales.

75. Just as Sunbeam's first quarter 1998 sales had been a disaster, so, too, were Sunbeam's first quarter 1998 earnings. Morgan Stanley and Sunbeam had represented to CPH that Sunbeam would achieve or exceed analyst first quarter 1998 earnings estimates. At the time of that representation, the consensus among analysts was that Sunbeam would enjoy first quarter 1998 earnings of $0.33 per share. However, on May 9, 1998, Sunbeam disclosed that it would record a first quarter loss of $0.09 per share (excluding one-time charges) — more than $0.40 per share lower than CPH had been told to expect.

76. Within weeks, Dunlap's fraudulent scheme began to unravel. In June 1998, after a number of news articles critical of Sunbeam's practices, Sunbeam's Board of Directors launched an internal investigation. That investigation led quickly to the firing of Dunlap and Kersh, and, subsequently, to a restatement of Sunbeam's financial statements for 1996, 1997, and the first quarter of 1998.

23 — [illegible]

77. As detailed above, Morgan Stanley participated in a scheme to mislead CPH and others and cover up the massive fraud at Sunbeam until Morgan Stanley and Sunbeam could close the purchase of Coleman. Morgan Stanley provided CPH with false information concerning Sunbeam's 1996 and 1997 financial performance, its business operations, and the value of Sunbeam's stock. Morgan Stanley also actively assisted Sunbeam in concealing Sunbeam's

16div-016471

disastrous first quarter 1998 sales and earnings and the true reasons for Sunbeam's poor performance.

Morgan Stanley knew that its statements to CPH were materially false and misleading and omitted the true facts.

Morgan Stanley intended that CPH rely on Morgan Stanley's representations concerning Sunbeam.

As detailed above, Dunlap engaged in a fraudulent scheme to inflate the price of Sunbeam's stock by improperly manipulating Sunbeam's 1996 and 1997 performance, by falsely asserting that Sunbeam had successfully "turned around," and by concealing the collapse of Sunbeam's first quarter 1998 sales and earnings and the reasons for Sunbeam's first quarter 1998 performance.

86. As detailed above, Morgan Stanley knew of Dunlap's fraudulent scheme and helped to conceal it until after Sunbeam could close the purchase of Coleman.

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As detailed above, Morgan Stanley provided substantial assistance to Dunlap and Sunbeam, including: concealing Sunbeam's first quarter 1998 sales collapse; assisting with the false March 19, 1998 press release; arranging road shows and meetings with prospective debenture purchasers at which Morgan Stanley, Dunlap, and others made false statements concerning Sunbeam's financial condition and business operations; preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam's financial condition and business operations; providing CPH with false financial and business information concerning Sunbeam; scripting Dunlap's false public statements concerning Sunbeam's acquisition of Coleman;

and underwriting the $750 million convertible debenture offering, proceeds from which were used to fund Sunbeam's purchase of Coleman.

16div-016473

As detailed above, Morgan Stanley conspired with Dunlap and other senior Sunbeam executives to conceal the truth about Sunbeam's financial performance and business operations.

As detailed above, Morgan Stanley committed overt acts in furtherance of the conspiracy, including: concealing Sunbeam's first quarter 1998 sales collapse; assisting with the false March 19, 1998 press release; arranging road shows and meetings with prospective debenture purchasers at which Morgan Stanley, Dunlap, and others made false statements concerning Sunbeam's financial condition and business operations; preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam's financial condition and business operations; providing CPH with false financial and business information concerning Sunbeam; scripting Dunlap's false public statements concerning Sunbeam's acquisition of Coleman;

and underwriting the $750 million convertible debenture offering, proceeds from which were used to fund Sunbeam's purchase of Coleman.

16div-016474

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER
(LIMITING INSTRUCTION ON RELIANCE)

THIS CAUSE came before the Court April 4, 2005 on the proposed limiting instructions on the reliance issues, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Court shall read the attached instruction when testimony or evidence about CPH's due diligence, or lack thereof, is placed before the jury.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 5 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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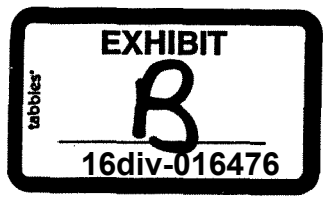

STATEMENT

Under Florida law, a recipient of a intentional misrepresentation may rely on it, without conducting any investigation of his own. A person who deliberately tells another something that is untrue should not be able to escape liability because the person he told believed him. Because of this rule, Morgan Stanley cannot claim that CPH could or should have investigated whether statements made to it were true. However, CPH may not recover for a misrepresentation if it actually knew that the misrepresentation was false or if its falsity was obvious, and it may not recover if it did not actually rely on the misrepresentation. Consequently, evidence about the investigation conducted by CPH may be relevant to your determination of whether CPH knew the statements by Sunbeam and Morgan Stanley were false or if their falsity was obvious, and whether CPH actually relied on any misrepresentation. Consequently, the evidence you are about to hear should be considered by you only for those issues.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON DEFENDANT'S MOTION REGARDING THE RELIANCE AND DAMAGES ISSUES TO BE DETERMINED AT PHASE I OF TRIAL

THIS CAUSE came before the Court April 5, 2005 on Defendant's Motion Regarding the Reliance and Damages Issues to be Determined at Phase I of Trial, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Defendant's Motion Regarding the Reliance and Damages Issues to be Determined at Phase I of Trial is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 5 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

ORDER ON Defendant's **MOTION IN LIMINE NUMBER** 16

THIS CAUSE having come before this Court on February 15, 2005 upon Defendant's Motion in Limine Number 16, and the Court having reviewed the pleadings on file, heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is granted, in part, and denied, in part. Dr. Nye may not testify that the value of the stock received by Plaintiff should be valued as of a date other than the close date without Plaintiff first establishing a predicate that would allow a reasonable juror to conclude that Plaintiff could not have disposed of its interest in the stock prior to that date, as a legal or practical matter.

WPB#589635.1

EXHIBIT
tabbies
16

"Granted" for purposes of the Motion in Limine addressed in this Order shall mean that the parties and their counsel shall not refer to or attempt to introduce into evidence, or otherwise place before the jury, the matter referred to without first proffering the good faith basis to believe that the matter is relevant and admissible outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 15 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

WPB#589655.1

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

ORDER ON Plaintiff's **MOTION IN LIMINE NUMBER** 19

THIS CAUSE having come before this Court on February 15, 2005 upon Plaintiff's Motion in Limine Number 19, and the Court having reviewed the pleadings on file, heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is granted, in part and denied, in part. Dr. Prof. Grinblatt may not testify concerning the value of the Coleman stock received by Sunbeam. He may testify to the value of the Sunbeam stock as of March 31, 1998, based on its value as of May 26, 1998, provided there is a sufficient evidentiary predicate laid that would allow a reasonable juror to conclude that the fraud MS&Co. conspired with or aided and abetted Sunbeam to commit was ~~only~~ limited to the interim 1998 financial statements, ~~Dr.~~ Prof. Grinblatt shall

WPB#589635.1

EXHIBIT
tabbies
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16div-016482

be examined outside the jury's presence prior to testifying as to the availability of a secondary market for the securities and the ability to hedge to establish ~~a~~ whether he had a sufficient basis to establish those predicate facts. See Fla. Stat. §90.705(2). If he ~~does~~ is permitted to testify as to ~~hedg~~ the effects of the ability to hedge on the value of the stock, he may not testify or imply to the jury that Plaintiff had the obligation to enter into such a transaction. Finally, Mr. Prof. Grinblatt may not testify that he was previously retained by Plaintiff's counsel.

"Granted" for purposes of the Motion in Limine addressed in this Order shall mean that the parties and their counsel shall not refer to or attempt to introduce into evidence, or otherwise place before the jury, the matter referred to without first proffering the good faith basis to believe that the matter is relevant and admissible outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 15 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

WPB#589635.1

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

ORDER ON Plaintiff's **MOTION IN LIMINE NUMBER** 20

THIS CAUSE having come before this Court on February 15, 2005 upon Plaintiff's Motion in Limine Number 20, and the Court having reviewed the pleadings on file, heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is denied, without prejudice to Plaintiff's right to object at trial that Mr. Fritz lacks the credentials or expertise to opine as to the list areas at trial.

WPB#589635.1

16div-016485

"Granted" for purposes of the Motion in Limine addressed in this Order shall mean that the parties and their counsel shall not refer to or attempt to introduce into evidence, or otherwise place before the jury, the matter referred to without first proffering the good faith basis to believe that the matter is relevant and admissible outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 15 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

WPB#589635.1

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

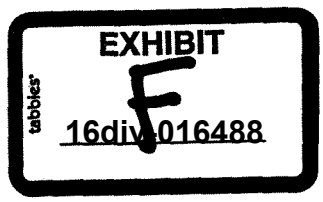
MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON PLAINTIFF'S MOTION IN LIMINE NO. 27 FOR A FINDING AS A MATTER OF LAW THAT THE FEDERAL SECURITIES LAWS PROHIBITED PLAINTIFF FROM SELLING UNREGISTERED SUNBEAM STOCK

THIS CAUSE came before the Court March 24, 2005 on Plaintiff's Motion in Limine No. 27 for a Finding as a Matter of Law that the Federal Securities Laws Prohibited Plaintiff from Selling Unregistered Sunbeam Stock, which the Court elects to treat as including a Motion to Compel Required Pre-Trial Disclosure, with both parties well represented by counsel. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Plaintiff's Motion in Limine No. 27 for a Finding as a Matter of Law that the Federal Securities Laws Prohibited Plaintiff from Selling Unregistered Sunbeam Stock is Granted, in part. The Court concludes that, as a matter of law, the restricted Sunbeam stock received by CPH in the transaction under review could not be sold by CPH under Rule 144A; and that, as a matter of law, under Rule 144, CPH could sell no more than one million shares per quarter, beginning November 25, 1999. It is further

ORDERED AND ADJUDGED that CPH's Motion to Compel is Granted. Within 5 business days, CPH shall serve its supplemental disclosure, detailing facts or opinions to be testified to or supported by documentary evidence to support its position that the Sunbeam shares could not have been sold by CPH, as a matter of fact and as a matter of law, prior to the shares' having become worthless in the market place. MS & Co. shall serve its



supplemental disclosure, detailing facts or opinions to be testified to or supported by documentary evidence to support its position that the Sunbeam shares could have been sold by CPH, as a matter of fact and as a matter of law, prior to the shares' having become worthless in the marketplace. These disclosures are without prejudice to either side's right to seek to have evidence excluded consistent with the disclosures at trial. No expert may testify as to damages based on the value of the Sunbeam stock as of a specific date without first seeking a ruling from the Court that a sufficient evidentiary predicate to support a conclusion that the stock could be sold as of the date to be used has been laid.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 28 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON PLAINTIFF'S MOTION IN LIMINE NO. 25 FOR A FINDING AS A MATTER OF LAW THAT THE EXCULPATORY AND INTEGRATION CLAUSES RAISED BY MORGAN STANLEY ARE INEFFECTIVE TO BAR INTENTIONAL-TORT CLAIMS

THIS CAUSE came before the Court March 24, 2005 on Plaintiff's Motion in Limine No. 25 for a Finding as a Matter of Law that the Exculpatory and Integration Clauses Raised by Morgan Stanley are Ineffective to Bar Intentional-Tort Claims, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted. The exculpatory language in the purported February 23, 1998 Confidentiality Agreement; the integration clause in the CPH Merger Agreement; and the exculpatory and nonreliance language of the Debenture Offering Memorandum do not bar CPH's claims for intentional torts, as a matter of law. This ruling is without prejudice to either party's right to argue that the clauses may be relevant for some other purpose.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 24 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

PLAINTIFF'S PROPOSED SUPPLEMENTAL JURY INSTRUCTIONS

COMES NOW the Plaintiff, by and through its undersigned attorneys, and hereby requests that this Honorable Court give the following jury instructions in addition to the Plaintiff's Amended Proposed Jury Instructions.

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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PLAINTIFF'S PROPOSED SUPPLEMENTAL INSTRUCTION NO. 1
Elements of CPH's Claims
Element 1 — Reliance
Fraudulent Omissions*

For purposes of deciding whether CPH relied on a false statement made by Sunbeam or Morgan Stanley, you are instructed that CPH can prove this element either by showing that it relied on an affirmative misstatement by Sunbeam or Morgan Stanley, or by showing that it relied on a statement by Sunbeam or Morgan Stanley as to which Sunbeam or Morgan Stanley knowingly withheld a material fact thereby leaving the statement as made false or misleading. Knowingly withholding a material fact that leaves a statement false or misleading is the equivalent of knowingly making a false statement.

Authority:
THE FLORIDA BAR, JURY INSTRUCTIONS FOR BUSINESS LITIGATION § 15.66 (2001) ("Even if defendant did not own claimant a duty to disclose facts, once defendant undertook to do so, defendant was required to tell the entire truth."); *id.* § 15.58 (where a defendant, "having made a statement, knowingly withholds a material fact thereby leaving the statement as made false or misleading," the defendant "has committed the equivalent of knowingly making a false statement").

* To be given after CPH's Proposed Instruction No. 8 (Reliance).

PLAINTIFF'S PROPOSED SUPPLEMENTAL INSTRUCTION NO. 2
Elements of CPH's Claims
Element 1 — Reliance
False Statements Need Not Be Made Directly to CPH*

For purposes of deciding whether CPH relied on a false statement made by Sunbeam or Morgan Stanley, you are instructed that CPH need not show that the false statement or statements were communicated to it directly. CPH can prove this element by showing either:

(1) That the false statement or false statements were communicated directly to and relied upon by CPH; or

(2) That the false statement or false statements were communicated to and relied upon by someone acting as an agent of CPH; or

(3) That the false statement or statements were communicated to someone else, but the person making the false statement intended or had reason to expect that CPH or one of its agents would receive and rely or had received and relied upon the statement or statements.

Authority:
April 22, 2005 Order on CPH's Ore Tenus Motion in Limine re: Debenture Offering.

Second Factor: *Albertson v. Richardson-Merrel, Inc.* 441 So. 2d 1146, 1149-50 (Fla. 4th DCA 1983) (where there is an "intention that the representor induce another to act on" a false statement, the law of fraud "does not require that [plaintiff] be the one with whom the misrepresentor directly communicates"); *Kalb v. International Resorts, Inc.*, 396 So. 2d 199, 200-01 (Fla. 2d DCA 1981) (upholding finding of fraud in action brought by principal where principal's agent relied on misrepresentations).

Third Factor: RESTATEMENT (SECOND) OF TORTS § 531 (1977) ("One who makes a fraudulent misrepresentation is subject to liability to the person or class of persons whom he intends or has reason to expect to act or to refrain from acting in reliance upon the misrepresentation." (emphasis added); *Wallis v. South Fla. Sav. Bank*, 574 So. 2d 1108, 1010-11 (Fla. 2d DCA 1990) (Altenbernd, J., concurring) (plaintiffs who relied on defendant bank's promise to extend loan to third party in deciding to extend their own guarantee stated valid fraud claim because bank "certainly had reason to expect" that others would rely on its representation).

---

* To be given after CPH's Proposed Instruction No. 8 (Reliance).

PLAINTIFF'S PROPOSED SUPPLEMENTAL INSTRUCTION NO. 3
Elements of CPH's Claims
Element 1 — Reliance
No Duty to Investigate*

For purposes of deciding whether CPH relied on a false statement by Sunbeam or Morgan Stanley, I instruct you that the recipient of an intentional misrepresentation may rely on it without conducting any investigation of his own. However, evidence about the investigation or lack of investigation conducted by CPH may be relevant to your determination of whether CPH actually relied on the statements of Sunbeam and Morgan Stanley, that is, whether CPH made its decision based on these statements. CPH did not actually rely if it knew the statements to be false, if the falsity was obvious, or if the information was simply disregarded. Consequently, the evidence that you have heard about CPH's investigation or lack of investigation should be considered only in determining whether CPH relied on a false statement by Sunbeam or Morgan Stanley. You may not find against CPH simply by concluding that CPH, by conducting an investigation, could have ascertained the facts and thereby prevented any loss.

Authority:

Transcript of Proceedings, 4/13/05, at 7941-53 (first phrase of first sentence, and final sentence, added for clarification).

* To be given after CPH's Proposed Instruction No. 8 (Reliance).

PLAINTIFF'S PROPOSED SUPPLEMENTAL INSTRUCTION NO. 4
Damages — Compensatory
Defendant's Financial Condition Immaterial*

Your decision with respect to the amount of compensatory damages, if any, to be awarded to CPH should be made without regard to the economic impact that a full and fair award will have on Morgan Stanley. The economic impact of a compensatory award on the defendant is not an appropriate consideration in determining the proper amount of compensatory damages.

Authority:
Rinaldi v. Aaron, 314 So. 2d 762, 764 (Fla. 1975) ("[t]he existence or non-existence of the defendant's wealth or financial support is wholly irrelevant when it comes to compensatory damages") (quoting DOBBS, THE LAW OF REMEDIES at 218-19).

* To be given after CPH's Proposed Instruction No. 13 (No Reduction of Amount on Account of Uncertainty Caused by Defendant).

PLAINTIFF'S PROPOSED SUPPLEMENTAL INSTRUCTION NO. 5
Damages — Compensatory
No Duty to Hedge*

For purposes of deciding the amount of damages to which CPH is entitled, if any, you should not consider the fact that CPH did not "hedge" its investment in Sunbeam. There is no legal obligation or duty to "hedge," or to make any advance arrangements to safeguard oneself from loss on an investment. The lack of any "hedge" therefore does not affect the amount of damages the plaintiff is entitled to recover if the plaintiff suffered losses on an investment as a result of fraud. Consequently you should not consider evidence about "hedging" when you are determining the proper amount of damages, if any, to award to plaintiff CPH.

Authority:
April 15, 2005 Order on Morgan Stanley's Statement on the Relevance of Hedging to Mitigation; February 15, 2005 Order on CPH's Motion in Limine No. 19 to Exclude Portions of Mark Grinblatt's Expert Testimony.

* To be given in lieu of Morgan Stanley's Proposed Instruction No. 23.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list, this 5th day of May, 2005.

JEFFREY T. SHAW

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

PLAINTIFF'S AMENDED PROPOSED JURY INSTRUCTIONS

COMES NOW the Plaintiff, by and through its undersigned attorneys, and hereby requests that this Honorable Court give the following jury instructions. A redline version reflecting the changes from the instructions previously submitted by Plaintiff on April 4, 2005 is attached hereto as Exhibit A.

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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Table of Contents

Instructions During Trial 1
Certain Facts Conclusively Established 1
Deposition Testimony 2
Bates Ranges 3
Introductory Instruction 4
Believability of Witnesses 5
Greater Weight (Preponderance) of the Evidence Defined; Certain Facts Conclusively Established 6
Elements of CPH's Claims 7
Element 1 — Reliance 9
Liability for Acts of Co-Conspirators 10
Element 2 — Causation of Damages 11
Amount of Damages — Compensatory 12
Benefit of the Bargain 13
No Reduction on Account of Uncertainty Caused by Defendant 15
Collateral-Source Rule for Tort Actions 16
Prejudice and Sympathy; Judge Not Involved 17
Closing Instruction, First Phase of Proceedings 18
VERDICT FORM (First Phase of Bifurcated Proceedings) 19

PLAINTIFF'S PROPOSED INSTRUCTION NO. 1
Instructions During Trial
Certain Facts Conclusively Established

[To be read before statement of established facts is read]

In this case, certain facts have been conclusively established before trial, and you will be informed of these established facts in a statement which I will read to you. You are required to accept these facts as true for all purposes in your deliberations. Evidence will be presented to you concerning the issues in the case that remain to be decided by you, but you may not consider any evidence admitted during the trial as contradicting any of the established facts read to you in my statement.

Authority:
March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 2
Instructions During Trial
Deposition Testimony

Members of the jury, the sworn testimony of (name), given before trial, will now be shown to you. You are to consider and weigh this testimony as though the witness had testified here in person.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 1.3a (2003) (modified for videotaped testimony).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 3
Instructions During Trial
Bates Ranges

Many of the documents you will see in this trial have been marked during pretrial proceedings with numbers and other information, usually in the lower right corner. These pretrial markings which were not part of the original document will be identified when a document is admitted into evidence. This numbering system is merely used to keep track of documents during litigation; it does not represent who authored or created the documents. Therefore, you should not attempt to draw any conclusions about documents based on how they have been numbered or otherwise marked for trial.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 4
Introductory Instruction

Members of the jury, I shall now instruct you on the law that you must follow in reaching your verdict. It is your duty as jurors to decide the issues, and only those issues, that I submit for determination by your verdict. In reaching your verdict, you should consider and weigh the evidence, decide the disputed issues of fact, and apply the law on which I shall instruct you, to facts as you find them from the evidence.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in evidence, all facts that may be admitted or agreed to by the parties, any fact of which the Court has taken judicial notice, and all the established facts that I read to you at the beginning of the trial.

In determining the facts, you may draw reasonable inferences from the evidence. You may make deductions and reach conclusions which reason and common sense lead you to draw from the facts shown by the evidence in this case. But you should not speculate on any matters outside the evidence. And you may not draw inferences, make deductions, or reach conclusions which are contrary to or inconsistent with the established facts that I read to you at the beginning of the trial.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 2.1 (2003) (modified in light of March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 5
Believability of Witnesses

General Considerations

In determining the believability of any witness and the weight to be given the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

Expert Witnesses

You have heard opinion testimony on certain technical subjects from persons referred to as "expert witnesses." Some of the testimony before you was in the form of opinions about certain technical subjects.

You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness; the reasons given by the witness for the opinion expressed; and all the other evidence in the case.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 2.2a-b (2003).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 6
Greater Weight (Preponderance) of the Evidence Defined; Certain Facts Conclusively Established

CPH must prove certain matters that I will describe to you by the "greater weight of the evidence." "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. However, the facts that I read to you earlier were established before trial. As a result, you must accept them as true, and no further evidence is required to prove them.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 3.9 (2003) (modified in light of March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 7
Elements of CPH's Claims

I will now instruct you on CPH's claims. CPH claims that Morgan Stanley aided and abetted the Sunbeam fraud, and that Morgan Stanley conspired with Sunbeam to commit fraud. One aids and abets fraud if one knowingly provides substantial assistance to fraud committed by another. One conspires to commit fraud if one makes an agreement with someone else to commit fraud, takes overt action in furtherance of that agreement, and fraud results from one's own actions, the actions of the other party, or some combination of the two.

Several facts relating to both of CPH's claims against Morgan Stanley are already established, and certain findings or conclusions follow directly from those facts. I instruct you to accept that Sunbeam and Morgan Stanley made false statements of material fact with the intent that CPH would rely on them. A fact is material if, in the absence of a misrepresentation concerning the fact, CPH would not have entered into the transaction with Sunbeam or would not have closed the transaction with Sunbeam. I also instruct you to accept that Morgan Stanley knew of Sunbeam's fraud, substantially assisted it, conspired with Sunbeam to defraud CPH, and committed overt acts in furtherance of that agreement.

You must accept each and every one of these findings based on the facts established before trial. Like the established facts, these findings have been conclusively established for all purposes in your deliberations and you may not consider any other evidence admitted during the trial as contradicting any of these established findings.

These findings establish certain elements of CPH's claims, but they do not alone prove CPH's claims. To prove its claims for aiding and abetting fraud and conspiracy to commit fraud, CPH must show two things by the greater weight of the evidence:

First, that CPH relied on a false statement or false statements by Morgan Stanley or Sunbeam, and

Second, that the false statement or false statements by Morgan Stanley or Sunbeam caused CPH to suffer loss.

If you find both of these elements, you must find for CPH on both its aiding and abetting fraud claim and its conspiracy claim. If you find neither of these elements, or find one of these elements but not the other, you must find for Morgan Stanley on both claims. You may not find for CPH on one claim, but for Morgan Stanley on the other. I will now instruct you on these two elements in greater detail.

Authority:
Tew v. Chase Manhattan Bank, N.A., 728 F. Supp. 1551, 1568 (S.D. Fla. 1990) (stating that elements of aiding and abetting fraud under Florida law are (1) a fraud, (2) "knowledge of the fraud," and (3) "knowing rendition of substantial assistance"), *amended on reh'g*, 741 F. Supp. 220 (S.D. Fla. 1990); RESTATEMENT (SECOND) OF TORTS § 876 (1979); *Kent v. Kent*, 431 So. 2d 279, 281 (Fla. 5th DCA 1983) (stating that elements of civil conspiracy under Florida law are "(a) a conspiracy between two or more parties, (b) to do an unlawful act, or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts done under the conspiracy"); *Florida Fern Growers Ass'n v. Concerned Citizens of Putnam County*, 616 So. 2d 562, 565 (Fla. 5th DCA 1993) (same); *Hoch v. Rissman, Weisberg, Barrett*, 742 So. 2d 451, 460 (Fla. 5th DCA 1999) (conspiracy is a "vehicle for imputing the tortious actions of one co-conspirator to another to establish joint and several liability"); THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES MI 8.1 (2003) (elements of fraud); *Casey v. Cohan*, 740 So. 2d 59, 62 (Fla. 4th DCA 1999) (definition of "material fact"); March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 8
Elements of CPH's Claims
Element 1 — Reliance

The first issue for your consideration is whether CPH relied on any false statement or false statements made by Morgan Stanley or Sunbeam. CPH relied upon a statement if CPH depended upon the accuracy and truthfulness of the statement in its decision-making process.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 9
Elements of CPH's Claims
Liability for Acts of Co-Conspirators

You must treat statements made by Sunbeam as if they had been made by Morgan Stanley, and vice versa. Based on the facts conclusively established before trial, Morgan Stanley and Sunbeam conspired to defraud CPH. Under the law, parties to a conspiracy are liable for each other's actions in the conspiracy, as if the actions had been their own. Any person or corporation that enters into a conspiracy after the wrongdoing begins is liable for the acts by other members both before and during the time that it is a member of the conspiracy.

Authority:
August 12, 2004 Order on Morgan Stanley's Motion for Application of New York Law, at 12 (citing *James v. Nationsbank Trust Co. (Florida), N.A.*, 639 So. 2d 1031, 1032 (Fla. 5th DCA 1994)); *Hoch v. Rissman, Weisberg, Barrett*, 742 So. 2d 451, 460 (Fla. 5th DCA 1999) (conspiracy is a "vehicle for imputing the tortious actions of one co-conspirator to another to establish joint and several liability").

PLAINTIFF'S PROPOSED INSTRUCTION NO. 10
Elements of CPH's Claims
Element 2 — Causation of Damages

The second issue for your consideration is whether the fraud Morgan Stanley aided, abetted, and conspired to commit caused CPH to suffer loss. The Sunbeam fraud was the legal cause of CPH's losses if the fraud committed against CPH directly and in natural and continuous sequence produced or contributed substantially to producing such losses, so that it can reasonably be said that, but for the fraud, the losses would not have occurred. To be regarded as a legal cause of CPH's losses, the fraud that Morgan Stanley helped and conspired to commit need not be the only cause of CPH's losses. The fraud may be a legal cause of CPH's losses even though the fraud operated in combination with the act of another or some other cause occurring after the fraud occurred, if such other cause was itself reasonably foreseeable and the fraud contributed substantially to producing CPH's losses.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 5.1 (2003) (modified for party names, nature of claims, and in light of March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 11
Amount of Damages — Compensatory

If you find for Morgan Stanley on both of CPH's claims — aiding and abetting fraud and conspiracy to commit fraud — you will not consider the matter of damages. But if you find for CPH, you should award CPH an amount of money that the greater weight of the evidence shows will fairly and adequately compensate CPH for its loss.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 6.1b (2003) (modified for party names and nature of claims).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 12
Amount of Damages — Compensatory
Benefit of the Bargain

To determine the amount of compensatory damages that will constitute fair and adequate compensation for any loss incurred by CPH, you must calculate the difference between:

(1) The "expected value to a reasonable investor" of the 14.1 million shares of Sunbeam stock that CPH received in the Coleman transaction, if the false statements concerning Sunbeam had actually been true; and

(2) The fair market value at which CPH reasonably could have sold its Sunbeam stock to a buyer who had full knowledge of the entire fraud.

You must first determine the "expected value to a reasonable investor" of the 14.1 million shares of Sunbeam stock that CPH received. When I say "expected value to a reasonable investor," I mean what the market price would have been for the Sunbeam stock once Sunbeam and Coleman were combined, if Sunbeam's financial results had been as they were represented. In other words, if Sunbeam had actually achieved the financial results it claimed, you must determine what the expected value would have been for the 14.1 million shares of Sunbeam stock based on the combination of Coleman and Sunbeam.

You must next determine the fair market value at which CPH reasonably could have sold its Sunbeam stock. For purposes of this determination, I instruct you that because of certain legal prohibitions, CPH could not have sold its Sunbeam stock prior to _____. It is for you, the jury, to decide whether CPH could have sold its Sunbeam stock at any time between _____ and the date of the Sunbeam bankruptcy when the stock became valueless, and, if so, at what fair market value price. Also for purposes of this instruction, "fair market

value" means the amount a purchaser who was willing and able but not obliged to buy would pay to someone willing and able but not obliged to sell.

In other words, CPH's damages are the difference between (1) the value of what CPH was supposed to receive, and (2) the value of what CPH actually did receive, at the point when CPH could sell the Sunbeam stock to a willing and able purchaser.

Authority:
Silverberg v. Paine, Webber, Jackson & Curtis, Inc., 710 F.2d 678, 686 (11th Cir. 1983) (applying Florida law and approving jury instruction stating in part that the "elements which you should consider in arriving at the amount of money damages which will constitute fair and adequate compensation for the loss or damages allegedly incurred include the difference between the purchase price paid for the Posi-Seal stock purchased by the plaintiff and the price at which such stock was or could have been sold by the plaintiff when he learned of the alleged fraud"); *Totale, Inc. v. Smith*, 877 So. 2d 813, 815 (Fla. 4th DCA 2004) (benefit of the bargain rule "awards as damages the difference between the actual value of the property and its value had the alleged facts regarding it been true"); *see Nordyne, Inc. v. Florida Mobile Home Supply, Inc.*, 625 So. 2d 1283, 1286 (Fla. 1st DCA 1993); *Martin v. Brown*, 566 So. 2d 890, 891 (Fla. 4th DCA 1990); *DePuis v. 79th St. Hotel, Inc.*, 231 So. 2d 532 (Fla. 3d DCA), *cert denied*, 238 So. 2d 105 (Fla. 1970); *Strickland v. Muir*, 198 So. 2d 49, 51 (Fla. 4th DCA 1967). *See also Finkelstein v. Department of Trans.*, 656 So. 2d 921, 925 (Fla. 1995) (definition of fair market value); *Valencia Center, Inc. v. Bystrom*, 543 So. 2d 214, 216 (Fla. 1989) (same); *American Reliance Ins. Co. v. Perez*, 689 So. 2d 290, 291 (Fla. 3d DCA 1997) (same); February 15, 2005 Order on Morgan Stanley's Motion in Limine No. 16 to Strike the Expert Opinion of CPH Expert Blaine Nye; February 15, 2005 Order on CPH's Motion in Limine No. 19 to Exclude Portions of Expert Witness Mark Grinblatt's Testimony; March 28, 2005 Order on CPH's Motion in Limine No. 27 for a Finding as a Matter of Law that the Federal Securities Laws Prohibited Plaintiff from Selling Unregistered Sunbeam Stock.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 13
Amount of Damages — Compensatory
No Reduction on Account of Uncertainty Caused by Defendant

If CPH proves it suffered damage by the greater weight of the evidence, CPH is entitled to recover for that damage even though the exact amount of the damage cannot be determined. If you find by the greater weight of the evidence that damage did occur as a result of the Sunbeam fraud, CPH is entitled to recover for that damage as long as there is some reasonable yardstick by which it can be measured — that is, as long as there is some reasonable basis for estimating the amount of the damage, CPH may not be denied damages merely because the amount of the damage is uncertain or difficult to determine. If Morgan Stanley's and Sunbeam's wrongdoing has made CPH's damages more difficult to prove, you should not reduce the amount of damages because of that uncertainty. Morgan Stanley bears the risk of uncertainty caused by its own wrongful acts as well as the wrongful acts of Sunbeam.

Authority:
Miller v. Allstate Ins. Co., 573 So. 2d 24, 27 (Fla. 3d DCA 1990) ("[w]here the defendant's wrong has caused the difficulty of proof of damages," the defendant "cannot complain of the resulting uncertainty"); *Linton v. Pension Services Corp.*, 389 So. 2d 247, 249 (Fla. 2d DCA 1980); *Adams v. Dreyfus Interstate Devel. Corp.*, 352 So. 2d 76, 78 (Fla. 4th DCA 1977); *John Hancock Life Ins. Co. v. Mark-A, Inc.*, 324 So. 2d 674, 674 (Fla. 2d DCA 1975); *Conner v. Atlas Aircraft Corp.*, 310 So. 2d 352, 354 (Fla. 3d DCA 1975); *Asgrow-Kilgore Co. v. Mulford Hickerson Corp.*, 301 So. 2d 441, 445 (Fla. 1974); *McCall v. Sherbill*, 68 So. 2d 362, 364 (Fla. 1954); *Twyman v. Roell*, 166 So. 215, 218 (Fla. 1936); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 250 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 569 (1931).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 14
Amount of Damages — Compensatory
Collateral-Source Rule for Tort Actions

You should not reduce the amount of compensation to which CPH is otherwise entitled on account of any benefits, recovery, or compensation CPH has received or may receive from Sunbeam, Arthur Andersen, or any other source, including but not limited to the warrants received from Sunbeam. The Court will reduce as necessary the amount of compensation to which CPH is entitled on account of any such payments.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 6.13a & note 1 (2003) (modified to identify relevant parties).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 15
Prejudice and Sympathy; Judge Not Involved

In reaching your verdict, you are not to be swayed from the performance of your duty by prejudice, sympathy, or any other sentiment for or against any party. Your verdict must be based on the evidence that has been received and the law on which I have instructed you.

Reaching a verdict is exclusively your job. I cannot participate in that decision in any way. You should not speculate about how I might evaluate the testimony of any witness or any other evidence in this case, and you should not think that I prefer one verdict over another. Also, you should not think, based on the facts I have instructed you to accept as established, that I have a preference regarding how you should decide the matters submitted for your determination. Therefore, in reaching your verdict, you should not consider anything that I have said or done, except for my specific instructions to you.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 7.1 (2003) (modified in light of March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 16
Closing Instruction, First Phase of Proceedings

When you retire to the jury room, you should select one of your number to act as foreman or forewoman to preside over your deliberations and sign your verdict. Your verdict must be unanimous, that is, your verdict must be agreed to by each of you.

You will be given a form of verdict, which I shall now read to you:

[*read form of verdict*]

When you have agreed on your verdict, the foreman or forewoman, acting for the jury, should date and sign the appropriate form of verdict. You may now retire to consider your verdict.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 7.2 (2003).

VERDICT FORM

VERDICT

We, the jury, return the following verdict:

1. Did CPH rely on any false statement or false statements made by Morgan Stanley or Sunbeam?

YES _____ NO _____

If your answer to question 1 is NO, your verdict on each claim is for the defendant, Morgan Stanley, and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 1 is YES, you should proceed to answer question 2.

2. What is the total amount of damages sustained by CPH and caused by the fraud in question?

Total compensatory damages: $ _____

In determining the total amount of CPH's damages, do not make any reduction because of CPH's negligence, if any, or because of any benefit, recovery, or compensation that CPH has received or may receive from Sunbeam, Arthur Andersen, or any other source, including but not limited to the warrants received from Sunbeam.

Date and sign this form and return it to the courtroom.

SO SAY WE ALL, this _____ day of _____, 2005.

_____

FOREPERSON

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list, this 5th day of May, 2005.

JEFFREY T. SHAW

JOHN SCAROLA
Fla. Bar No.: 169440
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2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

PLAINTIFF'S [1]AMENDED PROPOSED JURY INSTRUCTIONS

COMES NOW the Plaintiff, by and through its undersigned attorneys, and hereby requests that this Honorable Court give the following jury instructions. [2]**A redline version reflecting the changes from the instructions previously submitted by Plaintiff on April 4, 2005 is attached hereto as Exhibit A.**

COLEMAN (PARENT) HOLDINGS INC.

By:_____
One of Its Attorneys

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Ronald L. Marmer
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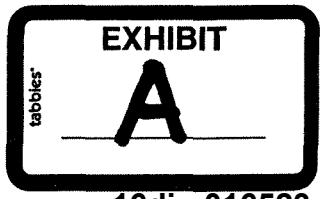

Table of Contents

Instructions During Trial 1
Certain Facts Conclusively Established 1
Deposition Testimony 2
Bates Ranges 3
Introductory Instruction 4
Believability of Witnesses 5
Greater Weight (Preponderance) of the Evidence Defined; Certain Facts Conclusively Established 6
Elements of CPH's Claims 7
Element 1 — Reliance 9
Liability for Acts of Co-Conspirators 10
Element 2 — Causation of Damages 11
Amount of Damages — Compensatory 12
Benefit of the Bargain 13
No Reduction on Account of Uncertainty Caused by Defendant 15
Collateral-Source Rule for Tort Actions 16
Prejudice and Sympathy; Judge Not Involved 17
Closing Instruction, First Phase of Proceedings 18
VERDICT FORM (First Phase of Bifurcated Proceedings) 19
~~[2]Instructions for Second Phase of Trial ..... 20~~
~~[3]Opening Instruction — Second Phase ..... 20~~
~~[4]Opening Statement Regarding Litigation Misconduct ..... 21~~
~~[5]Damages — Punitive — Entitlement ..... 22~~
~~[6]Damages — Punitive — Amount ..... 23~~
~~[7]Closing Instructions, Second Phase of Proceedings ..... 25~~
~~[8]VERDICT FORM (Second Phase of Bifurcated Proceedings) ..... 26~~

PLAINTIFF'S PROPOSED INSTRUCTION NO. 1
Instructions During Trial
Certain Facts Conclusively Established

[To be read before statement of established facts is read]

In this case, certain facts have been conclusively established before trial, and you will be informed of these established facts in a statement which I will read to you. You are required to accept these facts as true for all purposes in your deliberations. Evidence will be presented to you concerning the issues in the case that remain to be decided by you, but you may not consider any evidence admitted during the trial as contradicting any of the established facts read to you in my statement.

Authority:
March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 2
Instructions During Trial
Deposition Testimony

Members of the jury, the sworn testimony of (name), given before trial, will now be shown to you. You are to consider and weigh this testimony as though the witness had testified here in person.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 1.3a (2003) (modified for videotaped testimony).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 3
Instructions During Trial
Bates Ranges

Many of the documents you will see in this trial have been marked during pretrial proceedings with numbers and other information, usually in the lower right corner. These pretrial markings which were not part of the original document will be identified when a document is admitted into evidence. This numbering system is merely used to keep track of documents during litigation; it does not represent who authored or created the documents. Therefore, you should not attempt to draw any conclusions about documents based on how they have been numbered or otherwise marked for trial.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 4
Introductory Instruction

Members of the jury, I shall now instruct you on the law that you must follow in reaching your verdict. It is your duty as jurors to decide the issues, and only those issues, that I submit for determination by your verdict. In reaching your verdict, you should consider and weigh the evidence, decide the disputed issues of fact, and apply the law on which I shall instruct you, to facts as you find them from the evidence.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in evidence, all facts that may be admitted or agreed to by the parties, any fact of which the Court has taken judicial notice, and all the established facts that I read to you at the beginning of the trial.

In determining the facts, you may draw reasonable inferences from the evidence. You may make deductions and reach conclusions which reason and common sense lead you to draw from the facts shown by the evidence in this case. But you should not speculate on any matters outside the evidence. And you may not draw inferences, make deductions, or reach conclusions which are contrary to or inconsistent with the established facts that I read to you at the beginning of the trial.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 2.1 (2003) (modified in light of March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment).

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These findings establish certain elements of CPH's claims, but they do not alone prove CPH's claims. To prove its claims for aiding and abetting fraud and conspiracy to commit fraud, CPH must show two things by the greater weight of the evidence:

First, that CPH relied on a false statement or false statements by Morgan Stanley or Sunbeam, and

Second, that the false statement or false statements by Morgan Stanley or Sunbeam caused CPH to suffer loss.

If you find both of these elements, you must find for CPH on both its aiding and abetting fraud claim and its conspiracy claim. If you find neither of these elements, or find one of these elements but not the other, you must find for Morgan Stanley on both claims. You may not find for CPH on one claim, but for Morgan Stanley on the other. I will now instruct you on these two elements in greater detail.

Authority:
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PLAINTIFF'S PROPOSED INSTRUCTION NO. 8
Elements of CPH's Claims
Element 1 — Reliance

The first issue for your consideration is whether CPH relied on any false statement or false statements made by Morgan Stanley or Sunbeam. [11]~~When you consider whether CPH relied on any false statement or false statements made by Sunbeam or Morgan Stanley, Morgan Stanley is not entitled to the defense that CPH, by exercising reasonable care, could have learned the facts and thereby prevented the loss. Under the law, CPH had no duty or obligation to attempt to obtain more information to determine whether any statement was false. CPH was entitled to rely on any statement made by Morgan Stanley or Sunbeam unless CPH knew that the statement was false or the falsity of the statement was obvious, even if CPH had the means to verify the accuracy of the statements and failed to use those means.~~[12]**CPH relied upon a statement if CPH depended upon the accuracy and truthfulness of the statement in its decision-making process.**

[13]~~Authority:~~
[14]~~Transcript of Proceedings, March 9, 2005, at 2664.~~

PLAINTIFF'S PROPOSED INSTRUCTION NO. 9
Elements of CPH's Claims
Liability for Acts of Co-Conspirators

You must treat statements made by Sunbeam as if they had been made by Morgan Stanley, and vice versa. Based on the facts conclusively established before trial, Morgan Stanley and Sunbeam conspired to defraud CPH. Under the law, parties to a conspiracy are liable for each other's actions in the conspiracy, as if the actions had been their own. Any person or corporation that enters into a conspiracy after the wrongdoing begins is liable for the acts by other members both before and during the time that it is a member of the conspiracy.

Authority:
August 12, 2004 Order on Morgan Stanley's Motion for Application of New York Law, at 12 (citing *James v. Nationsbank Trust Co. (Florida), N.A.*, 639 So. 2d 1031, 1032 (Fla. 5th DCA 1994)); *Hoch v. Rissman, Weisberg, Barrett*, 742 So. 2d 451, 460 (Fla. 5th DCA 1999) (conspiracy is a "vehicle for imputing the tortious actions of one co-conspirator to another to establish joint and several liability").

PLAINTIFF'S PROPOSED INSTRUCTION NO. 10
Elements of CPH's Claims
Element 2 — Causation of Damages

The second issue for your consideration is whether the fraud Morgan Stanley aided, abetted, and conspired to commit caused CPH to suffer loss. The Sunbeam fraud was the legal cause of CPH's losses if the fraud committed against CPH directly and in natural and continuous sequence produced or contributed substantially to producing such losses, so that it can reasonably be said that, but for the fraud, the losses would not have occurred. To be regarded as a legal cause of CPH's losses, the fraud that Morgan Stanley helped and conspired to commit need not be the only cause of CPH's losses. The fraud may be a legal cause of CPH's losses even though the fraud operated in combination with the act of another or some other cause occurring after the fraud occurred, if such other cause was itself reasonably foreseeable and the fraud contributed substantially to producing CPH's losses.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 5.1 (2003) (modified for party names, nature of claims, and in light of March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 11
Amount of Damages — Compensatory

If you find for Morgan Stanley on both of CPH's claims — aiding and abetting fraud and conspiracy to commit fraud — you will not consider the matter of damages. But if you find for CPH, you should award CPH an amount of money that the greater weight of the evidence shows will fairly and adequately compensate CPH for its loss.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 6.1b (2003) (modified for party names and nature of claims).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 12
Amount of Damages — Compensatory
Benefit of the Bargain

To determine the amount of compensatory damages that will constitute fair and adequate compensation for any loss incurred by CPH, you must calculate the difference between:

(1) [16]~~CPH's~~[17]**The "expected value to a** reasonable [18]~~expectation~~[19]**investor"** of the [20]~~fair market value of the~~[21]**14.1 million shares of** Sunbeam stock that CPH received in the Coleman transaction, if the false statements concerning Sunbeam had actually been true; and

(2) [22]~~the~~[23]**The** fair market value at which CPH reasonably could have sold its Sunbeam stock to a buyer who had full knowledge of the entire fraud[24].

[25]**You must first determine the "expected value to a reasonable investor" of the 14.1 million shares of Sunbeam stock that CPH received. When I say "expected value to a reasonable investor," I mean what the market price would have been for the Sunbeam stock once Sunbeam and Coleman were combined, if Sunbeam's financial results had been as they were represented. In other words, if Sunbeam had actually achieved the financial results it claimed, you must determine what the expected value would have been for the 14.1 million shares of Sunbeam stock based on the combination of Coleman and Sunbeam.**

[26]**You must next determine the fair market value at which CPH reasonably could have sold its Sunbeam stock**. For purposes of this determination, I instruct you that because of certain legal prohibitions, CPH could not have sold its Sunbeam stock prior to _____. It is for you, the jury, to decide whether CPH could have sold its Sunbeam stock at any time [27]~~after~~[28]**between** _____[29] **and the date of the Sunbeam bankruptcy when the stock became valueless**, and, if so, at what fair market value price. Also

for purposes of this instruction, "fair market value" means the amount a purchaser who was willing [30]**and able** but not obliged to buy would pay to someone willing [31]**and able** but not obliged to sell.

In other words, CPH's damages are the difference between (1) the value of what CPH was supposed to receive, and (2) the value of what CPH actually did receive, at the point when CPH could sell the Sunbeam stock[32] **to a willing and able purchaser**.

Authority:
Silverberg v. Paine, Webber, Jackson & Curtis, Inc., 710 F.2d 678, 686 (11th Cir. 1983) (applying Florida law and approving jury instruction stating in part that the "elements which you should consider in arriving at the amount of money damages which will constitute fair and adequate compensation for the loss or damages allegedly incurred include the difference between the purchase price paid for the Posi-Seal stock purchased by the plaintiff and the price at which such stock was or could have been sold by the plaintiff when he learned of the alleged fraud"); *Totale, Inc. v. Smith*, 877 So. 2d 813, 815 (Fla. 4th DCA 2004) (benefit of the bargain rule "awards as damages the difference between the actual value of the property and its value had the alleged facts regarding it been true"); *see Nordyne, Inc. v. Florida Mobile Home Supply, Inc.*, 625 So. 2d 1283, 1286 (Fla. 1st DCA 1993); *Martin v. Brown*, 566 So. 2d 890, 891 (Fla. 4th DCA 1990); *DePuis v. 79th St. Hotel, Inc.*, 231 So. 2d 532 (Fla. 3d DCA), *cert denied*, 238 So. 2d 105 (Fla. 1970); *Strickland v. Muir*, 198 So. 2d 49, 51 (Fla. 4th DCA 1967). *See also Finkelstein v. Department of Trans.*, 656 So. 2d 921, 925 (Fla. 1995) (definition of fair market value); *Valencia Center, Inc. v. Bystrom*, 543 So. 2d 214, 216 (Fla. 1989) (same); *American Reliance Ins. Co. v. Perez*, 689 So. 2d 290, 291 (Fla. 3d DCA 1997) (same); February 15, 2005 Order on Morgan Stanley's Motion in Limine No. 16 to Strike the Expert Opinion of CPH Expert Blaine Nye; February 15, 2005 Order on CPH's Motion in Limine No. 19 to Exclude Portions of Expert Witness Mark Grinblatt's Testimony; March 28, 2005 Order on CPH's Motion in Limine No. 27 for a Finding as a Matter of Law that the Federal Securities Laws Prohibited Plaintiff from Selling Unregistered Sunbeam Stock.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 13
Amount of Damages — Compensatory
No Reduction on Account of Uncertainty Caused by Defendant

If CPH proves it suffered damage by the greater weight of the evidence, CPH is entitled to recover for that damage even though the exact amount of the damage cannot be determined. If you find by the greater weight of the evidence that damage did occur as a result of the Sunbeam fraud, CPH is entitled to recover for that damage as long as there is some reasonable yardstick by which it can be measured — that is, as long as there is some reasonable basis for estimating the amount of the damage, CPH may not be denied damages merely because the amount of the damage is uncertain or difficult to determine. If Morgan Stanley's and Sunbeam's wrongdoing has made CPH's damages more difficult to prove, you should not reduce the amount of damages because of that uncertainty. Morgan Stanley bears the risk of uncertainty caused by its own wrongful acts[27] **as well as the wrongful acts of Sunbeam**.

Authority:
Miller v. Allstate Ins. Co., 573 So. 2d 24, 27 (Fla. 3d DCA 1990) ("[w]here the defendant's wrong has caused the difficulty of proof of damages," the defendant "cannot complain of the resulting uncertainty"); *Linton v. Pension Services Corp.*, 389 So. 2d 247, 249 (Fla. 2d DCA 1980); *Adams v. Dreyfus Interstate Devel. Corp.*, 352 So. 2d 76, 78 (Fla. 4th DCA 1977); *John Hancock Life Ins. Co. v. Mark-A, Inc.*, 324 So. 2d 674, 674 (Fla. 2d DCA 1975); *Conner v. Atlas Aircraft Corp.*, 310 So. 2d 352, 354 (Fla. 3d DCA 1975); *Asgrow-Kilgore Co. v. Mulford Hickerson Corp.*, 301 So. 2d 441, 445 (Fla. 1974); *McCall v. Sherbill*, 68 So. 2d 362, 364 (Fla. 1954); *Twyman v. Roell*, 166 So. 215, 218 (Fla. 1936); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 250 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 569 (1931).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 14
Amount of Damages — Compensatory
Collateral-Source Rule for Tort Actions

You should not reduce the amount of compensation to which CPH is otherwise entitled on account of any benefits, recovery, or compensation CPH has received or may receive from Sunbeam, Arthur Andersen, or any other source[28]**, including but not limited to the warrants received from Sunbeam**. The Court will reduce as necessary the amount of compensation to which CPH is entitled on account of any such payments.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 6.13a & note 1 (2003) (modified to identify relevant parties).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 15
Prejudice and Sympathy; Judge Not Involved

In reaching your verdict, you are not to be swayed from the performance of your duty by prejudice, sympathy, or any other sentiment for or against any party. Your verdict must be based on the evidence that has been received and the law on which I have instructed you.

Reaching a verdict is exclusively your job. I cannot participate in that decision in any way. You should not speculate about how I might evaluate the testimony of any witness or any other evidence in this case, and you should not think that I prefer one verdict over another. Also, you should not think, based on the facts I have instructed you to accept as established, that I have a preference regarding how you should decide the matters submitted for [29]your determination. Therefore, in reaching your verdict, you should not consider anything that I have said or done, except for my specific instructions to you.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 7.1 (2003) (modified in light of March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 16
Closing Instruction, First Phase of Proceedings

When you retire to the jury room, you should select one of your number to act as foreman or forewoman to preside over your deliberations and sign your verdict. Your verdict must be unanimous, that is, your verdict must be agreed to by each of you.

You will be given a form of verdict, which I shall now read to you:

[*read form of verdict*]

When you have agreed on your verdict, the foreman or forewoman, acting for the jury, should date and sign the appropriate form of verdict. You may now retire to consider your verdict.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES 7.2 (2003).

VERDICT FORM [30]~~(First Phase of Bifurcated Proceedings)~~

VERDICT

We, the jury, return the following verdict:

1. Did CPH rely on any false statement or false statements made by Morgan Stanley or Sunbeam?

YES _____ NO _____

If your answer to question 1 is NO, your verdict on each claim is for the defendant, Morgan Stanley, and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 1 is YES, [31]~~your verdict is for CPH, and~~ you should proceed to answer question 2.

2. What is the total amount of damages sustained by CPH and caused by the fraud in question?

Total compensatory damages: $ _____

In determining the total amount of CPH's damages, do not make any reduction because of CPH's negligence, if any, or because of any benefit, recovery, or compensation that CPH has received or may receive from Sunbeam, Arthur Andersen, or any other source[32]**, including but not limited to the warrants received from Sunbeam**.

[33]~~Date and sign this form and return it to the courtroom.~~

[34]~~SO SAY WE ALL, this _____ day of _____, 2005.~~

35

36 _____

~~FOREPERSON~~

37

PLAINTIFF'S PROPOSED INSTRUCTION NO. 17

[38]Instructions for Second Phase of Trial

[39]Opening Instruction — Second Phase

[40]The parties may now present additional evidence related to whether punitive damages should be assessed, and, if so, in what amount. You should consider this additional evidence along with the evidence already presented, including those conclusively established facts that I read to you at the beginning of trial.

[41]Authority:

[42]THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES PD-1b(1) (2003) (modified for in light of March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment); April 1, 2005 Order on Morgan Stanley's Motion to Clarify the Proper Scope of the Liability and Punitive Phases of Trial.

43

~~PLAINTIFF'S PROPOSED INSTRUCTION NO. 18~~

~~[44]Instructions for Second Phase of Trial~~

~~[45]Opening Statement Regarding Litigation Misconduct~~

~~[46][Read Statement Regarding Litigation Misconduct]~~

~~[47]Authority:~~

~~[48]March 23, 2005 Order on CPH's Renewal Motion for Entry of Default Judgment.~~

[49]

16div-016545

PLAINTIFF'S PROPOSED INSTRUCTION NO. 19

[50]Instructions for Second Phase of Trial

[51]Damages — Punitive — Entitlement

[52]The issue for your determination in this phase of the trial is whether, in the circumstances of this case, it is appropriate to award punitive damages to punish Morgan Stanley and to serve as a deterrent to Morgan Stanley and others, and, if so, the appropriate amount of such damages.

[53]Punitive damages are warranted if clear and convincing evidence establishes that:

[54](1) Morgan Stanley acted fraudulently;

[55](2) Morgan Stanley acted willfully;

[56](3) Morgan Stanley acted in reckless disregard for the rights of CPH; or

[57](4) Morgan Stanley acted in intentional violation of the rights of CPH.

[58]The findings already made by the Court, which I read to you at the beginning of trial, satisfy CPH's burden of establishing by clear and convincing evidence that Morgan Stanley acted both fraudulently and willfully. Nevertheless, you may in your discretion decline to award punitive damages.

[59]Authority:

[60]THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES PD 1(a) (modified for party names, for intentional tort of fraud, and in light of March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment and April 1, 2005 Order on Morgan Stanley's Motion to Clarify the Proper Scope of the Liability and Punitive Phases of Trial); *id.* Note 3 (noting that "certain types of intentional torts may require a punitive damage charge appropriate to the particular tort); *First Interstate Devel. Corp. v. Ablamedo*, 511 So. 2d 536, 539 (Fla. 1987).

61

PLAINTIFF'S PROPOSED INSTRUCTION NO. 20

[62]Instructions for Second Phase of Trial

[63]Damages — Punitive — Amount

[64]In determining the amount of punitive damages, if any, to be assessed as punishment and as a deterrent to others, you should decide any disputed factual issues by the greater weight of the evidence. "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. You should consider the following in determining the amount of punitive damages to be assessed:

[65](1) The nature, extent, and degree of misconduct, and the related circumstances, including the following:

- [66] the reprehensibility of Morgan Stanley's misconduct, including the extent to which it involved malice, trickery, or deceit ("reprehensible" means "worthy of censure or rebuke");
- [67] the degree of Morgan Stanley's awareness of the wrongfulness of the misconduct;
- [68] the duration of the misconduct;
- [69] whether offensive conduct was repeated on more than one occasion;
- [70] the attitude and conduct of Morgan Stanley upon discovery of the misconduct;
- [71] Morgan Stanley's concealment of its role in the Sunbeam transaction, including its litigation misconduct in this case, as evidence of Morgan Stanley's malice and evil intent; and

[72]• ~~the number and level of responsibility of corporate employees who knew of, participated in, subsequently approved of, or participated in concealing or covering up the misconduct.~~

[73]~~(2) The enormity of the offense. Punitive damages should bear a reasonable relationship to the harmfulness of Morgan Stanley's conduct, and should not be out of proportion to the harm suffered as a consequence of the conduct. Accordingly, you may consider whether and the extent to which Morgan Stanley's conduct caused danger or harm to others besides CPH including harm or danger to the investing public; and~~

[74]~~(3) Morgan Stanley's financial resources. An award of punitive damages must not be out of proportion to Morgan Stanley's financial resources. Punitive damages should be painful enough to punish and deter but should not be so great as to financially destroy or bankrupt Morgan Stanley.~~

[75]~~You may in your discretion decline to assess punitive damages.~~

[76]~~Authority:~~

[77]~~THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES PD 2d(1) (2003) (modified in light of April 1, 2005 Order on Morgan Stanley's Motion to Clarify the Proper Scope of the Liability and Punitive Phases of Trial) (first factor); March 1, 2005 Sanctions Order (sixth subfactor of first factor); *Owens-Corning Fiberglass Corp. v. Ballard*, 749 So. 2d 483, 484-85 (Fla. 1999) (first factor; approving factors for jury's consideration in determining nature, extent, and degree of misconduct); *BMW of North America v. Gore*, 517 U.S. 559, 575-83 (1996) (first and second factors); *Wransky v. Dalfo*, 801 So. 2d 239, 243 (Fla. 4th DCA 2001) (second and third factors); *Arab Termite & Pest Control of Fla. Inc. v. Jenkins*, 409 So. 2d 1039 (Fla. 1982) (third factor); WEBSTER'S II NEW COLLEGE DICTIONARY 941 (1999) (definition of "reprehensible").~~

78

PLAINTIFF'S PROPOSED INSTRUCTION NO. 21

[79]Instructions for Second Phase of Trial

[80]Closing Instructions, Second Phase of Proceedings

[81]Your verdict on the issues raised by CPH's punitive damages claim against Morgan Stanley must be based on the law on which I have instructed you and on evidence that has been received during the entire trial of this action, including both phases of this case, the facts established before trial that I read to you at the beginning of the trial, and the additional facts concerning litigation misconduct that I read to you at the beginning of this second phase of the trial. In reaching your verdict, you are not to be swayed from the performance of your duty by prejudice or sympathy for or against any party.

[82]Your verdict must be unanimous, that is, your verdict must be agreed to by each of you.

[83]You will be given a form of verdict, which I shall now read to you:

[84]*[read form of verdict]*

[85]When you have agreed on your verdict, the foreman or forewoman, acting for the jury, should date and sign the verdict. You may now retire to consider your verdict.

[86]Authority:

[87]THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES PD-1b(3) (2003) (modified in light of March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment).

88

~~VERDICT FORM (Second Phase of Bifurcated Proceedings)~~

[89]~~We, the jury, return the following verdict:~~

[90]~~1.~~ ~~Are punitive damages warranted against Morgan Stanley?~~

[91] ~~YES~~ _____ ~~NO~~ _____

[92]~~2.~~ ~~What is the total amount of punitive damages, if any, which you find should be assessed against Morgan Stanley?~~

[93]~~Total punitive damages: $~~ _____

Date and sign this form and return it to the courtroom.

SO SAY WE ALL, this _____ day of _____, 2005.

_____
FOREPERSON

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list, this [94]4[95]**5**th day of [96]~~April~~[97]**May**, 2005.

_____
JEFFREY T. SHAW

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S MOTION FOR CLARIFICATION OF THE ADMISSIBILITY OF THE TESTIMONY OF PROFESSOR MARK GRINBLATT

Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully requests that this Court clarify its order on the admissibility of the opinions set forth in Professor Mark Grinblatt's supplemental expert report (the "Report").

This Court has already ruled that the damages "cell" in Exhibit 7 of the Report "representing the intersection of Normal Investor for the expected value component and the Full Restatement for the true value component" is "properly filed." The Court's Order does not, however, rule on the admissibility of other cells in that same chart. As Professor Grinblatt explained in both his deposition and his Report, the cells in the top row of his chart represent his analysis of the proper measure of damages corresponding to different scenarios regarding the degree of reliance that Coleman (Parent) Holdings Inc.'s ("CPH") placed on statements made by Sunbeam.[1] As long as CPH's reliance remains a live issue for the jury in this case, Morgan

[1] The different rows in Exhibit 7 represent the "different degrees of information concealment or misrepresentation that Morgan Stanley is responsible for." Grinblatt Dep. 69:10-12. Morgan
(Continued...)

16div-016553

Stanley is entitled to offer Professor Grinblatt's testimony as to those cells and the analysis that generated them.

BACKGROUND

On March 19, 2005, this Court granted in part Morgan Stanley's motion to file a supplemental expert report by Professor Grinblatt, stating:

> The portions of Professor Grinblatt's Supplemental Expert Report that express benefit of the bargain damages based on the cell representing the intersection of Normal Investor for the expected value component and the Full Restatement for the true value component are deemed properly filed. This ruling is without prejudice to CPH's right to present argument to the Court or request to conduct a voir dire examination of Professor Grinblatt outside the jury's presence seeking to establish that other points in the Supplemental Expert Report are not proper.

Order on Morgan Stanley's Motion For Leave To File Supplemental Grinblatt Report (Mar. 23, 2005) ("March 23rd Order"). Since this Order, CPH has signaled its intent to challenge the admissibility of Professor Grinblatt's testimony. *See, e.g.*, 4/15 Trial Tr. at 8666:1-19.[2]

In light of this Court's rulings and CPH's stated intent to challenge the admissibility of Professor Grinblatt's testimony, Morgan Stanley seeks clarification on what opinions it will be allowed to elicit from Professor Grinblatt. Morgan Stanley requests a ruling by this Court on the permissible range of Professor Grinblatt's opinions so that it can adequately prepare its defense.

Stanley recognizes that the analysis corresponding to less-than-full responsibility for the misrepresentations leading up to the October 1998 restatement are inconsistent with the "deemed facts." Accordingly, although it reiterates its objection to this Court's Adverse Inference Order, Morgan Stanley acknowledges that the bottom two rows of Exhibit 7 are not admissible under that Order.

[2] This Court's Order does not, by its terms, exclude any portion of Professor Grinblatt's Report. The Order merely accepts one portion of Professor Grinblatt's report and places the burden on CPH to "present argument to the Court or request to conduct a voir dire" to demonstrate that other portions of Professor Grinblatt's opinion should not be allowed in evidence.

ARGUMENT

Professor Grinblatt should be allowed to testify beyond the single cell of his Report specifically admitted in this Court's March 23rd Order. The top row of Exhibit 7 to Professor Grinblatt's Report – the Exhibit that summarizes the potential damages figures under his various analyses – represents the possible range of damages depending on the extent to which the jury finds that CPH relied upon Sunbeam's allegedly false representations in deciding to enter into the transaction. *See* Deposition of Mark Grinblatt at 68:19-76:5 (Apr. 4, 2005) ("Grinblatt Dep.").

As his Report and his deposition explain, Professor Grinblatt analyzed damages under three different scenarios regarding the degree on which CPH relied on Sunbeam's allegedly false statements. *See* Report ¶ 9; Grinblatt Dep. 68:21-24. These scenarios correspond to the three columns in Exhibit 7. The Normal Investor scenario, represented by the far-left column, postulates that CPH relied entirely on Sunbeam – *i.e.*, that it was situated no differently from a normal investor. *See* Report ¶ 19(a); Grinblatt Dep. 14:1-14. The First Quarter Results scenario, depicted in the middle column, governs a situation in which CPH did not rely on any false statements regarding Sunbeam's first quarter 1998 results. *See* Report ¶ 19(b). And the False Turnaround scenario, depicted in the far-right column, assesses damages in a case where CPH also did not rely on any allegedly false statements regarding the Sunbeam's successful turnaround. *See* Report ¶ 19(c); Grinblatt Dep. 135:12-22.

The top row in Exhibit 7 is therefore unquestionably relevant given that the jury is being asked to determine whether and to what extent CPH relied. For example, if a jury were to find that CPH did not rely on Morgan Stanley with respect to Sunbeam's first quarter results – because, for example, Mr. Levin had warned Mr. Perelman not to take Sunbeam stock – but did

rely on Sunbeam with respect to the remaining accounting fraud eventually disclosed by the October 1998 restatement, Professor Grinblatt's expert opinion is that the proper measure of damages would be $172 million (the top middle cell). *See* Grinblatt Dep. 72:5-76:5. Or, if a jury were to find that CPH relied on Sunbeam "for the information associated with the full restatement except for that component of the full restatement information associated with the false turn-around," due, for example, to the overwhelming attractiveness of the overall deal, Professor Grinblatt's opinion is that the proper damages measure would be $75 million (the top-right-hand cell). *Id.* at 135:12-22.

Simply put, Professor Grinblatt's analysis of damages under these various scenarios is crucially relevant. A central issue for the jury in this case is whether and to what degree CPH relied on Sunbeam and Morgan Stanley, and there is no basis for excluding competent expert testimony regarding the measure of damages corresponding to the various factual scenarios that the jury is being asked to consider and determine.

16div-016556

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 5th day of May, 2005.

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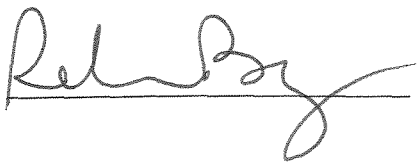
BY: 

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant. /

MORGAN STANLEY'S OBJECTIONS TO COLEMAN (PARENT) HOLDINGS INC.'S PROPOSED JURY INSTRUCTIONS

Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") hereby files its Objections to Coleman (Parent) Holdings Inc.'s Proposed Jury Instructions related to Phase 1 issues. Pursuant to the Court's May 4, 2005 clarification of its Order Governing Jury Instructions, Morgan Stanley will submit objections to Phase 2 instructions at a later date in advance of the charge conference in Phase 2, should Phase 2 be necessary.

Morgan Stanley has submitted a set of jury instructions that should be used instead of CPH's proposed instructions. In making these objections, Morgan Stanley does not waive any other objection to specific claims or damages. Moreover, Morgan Stanley objects to CPH's proposed instructions to the extent that they seek to apply Florida law, in that New York law should apply to these claims. Further, Morgan Stanley objects to CPH's proposed instructions in that those instructions do not contain Morgan Stanley's defenses. Finally, Morgan Stanley reserves the right to supplement these objections at any time before or during the charge conference.

OBJECTIONS

PHASE 1

CPHPI 1 – Certain Facts Conclusively Established	Objection: 1. Court has already read, over Morgan Stanley's objections, the "conclusively established" facts. To re-read those facts at this time would be impermissible because: a. the jury is entitled to consider any and all evidence introduced during trial, and thus the instruction would be both misleading and confusing; b. it is a comment on the evidence; c. it bolsters those facts; d. it is argumentative; and e. it is unfairly prejudicial 2. Instructing the jury that it may not consider any evidence admitted during trial as contradicting the established facts is improper in that: a. the jury is entitled to consider any and all evidence introduced during trial; b. if such evidence has been introduced, the evidence was admitted either without objection or because CPH opened the door; c. it is a comment on the evidence; d. it bolsters those facts; e. it is argumentative; and f. it is unfairly prejudicial 3. The instruction is misleading. Asserting that "the facts were established before trial" indicates that they were proved, when they were not. They are at most deemed facts or the facts "that must be accepted as true" for purposes of this case. 4. The instruction includes language that is unnecessary, confusing, and improperly comments on the evidence (see objections 2a-2f *supra*), in view of the instruction that jury must "accept these facts as true." 5. The instruction's placement gives particular evidence undue weight.

CPHPI 2 – Deposition Testimony	No objection.
CPHPI 3 – Bates Ranges	No objection.
CPHPI 4 – Introductory Instruction	Objection: 1. Instructing the jury that it may not draw inferences, make deductions or reach conclusions contrary to the established facts is improper in that: a. the jury is entitled to consider any and all evidence introduced during trial; b. if such evidence has been introduced, the evidence was admitted either without objection or because CPH opened the door; c. it is a comment on the evidence; d. it bolsters those facts; e. it is misleading, confusing, argumentative and is unfairly prejudicial. 2. The Court should read Defendant's Supplemental Requested Jury Instruction 1 instead of this instruction, as Defendant's requested jury instruction is an applicable Florida Standard Jury Instruction and CPH's is not. 3. Repetitive references to the deemed facts constitute improper bolstering, comment on evidence, are misleading, confusing, unduly prejudicial, and place inappropriate weight on those matters. 4. The reference to "established" facts is misleading. These are deemed facts or facts that must be accepted as true, not established facts; there has been no factual determination as to their correctness. 5. The instruction includes language confusing and unnecessary (and improper because of objections 1a-1e above) in light of instruction that the jury must accept the deemed facts as true.
CPHPI 5 - Believability of Witnesses	No objection.
CPHPI 6 - Greater Weight (Preponderance) of the Evidence Defined; Certain Facts Conclusively Established	Objection: 1. The Court should read Defendant's Supplemental Requested Jury Instruction 6 instead of this instruction, as

	Defendant's requested jury instruction is an applicable Florida Standard Jury Instruction and CPH's is not. 2. Instructing the jury that it must accept all facts read by the Court as true is improper in that: a. the jury is entitled to consider any and all evidence introduced during trial; b. if such evidence has been introduced, the evidence was admitted either without objection or because CPH opened the door; c. it is a comment on the evidence; d. it bolsters those facts; e. it is misleading, confusing, argumentative and is unfairly prejudicial. 3. Repetitive references to deemed facts constitute improper bolstering, comment on evidence, are misleading, confusing, unduly prejudicial, and place inappropriate weight on such matters. 4. Reference to the facts "established" before trial is misleading. These are deemed facts or facts that must be accepted as true, not established facts; they have not been proved. 5. The instruction includes langauge that is unnecessary, confusing, (and improper because of objections 2a-2e above) in light of prior instruction that jury must accept deemed facts as true.
CPHPI 7 - Elements of CPH's Claim	Objection: 1. The Court should read Defendant's Supplemental Requested Jury Instructions 5, 7 and 8 instead of this instruction, as Defendant's requested instructions are correct under the law and CPH's is not. 2. Instructing the jury that it must accept all facts read by the Court as true is improper in that: a. the jury is entitled to consider any and all evidence introduced during trial; b. if such evidence has been introduced, the evidence was admitted either without objection or because CPH opened the door; c. it is a comment on the evidence;

	d. it bolsters those facts; e. it is misleading, confusing, argumentative and is unfairly prejudicial. 3. The instruction contains incorrect and/or incomplete statements of law: a. While the Court has defaulted Morgan Stanley on these elements or directed a verdict against it on those elements, Morgan Stanley objects to that result as contrary to law; b. the instruction does not inform the jury that CPH must prove its claims by the greater weight of the evidence; c. CPH's statement of the aiding and abetting claim and the conspiracy claims are incomplete and/or incorrect under Florida law; d. Florida law does not recognize a claim for aiding and abetting fraud; e. if such evidence has been introduced, the evidence was admitted either without objection or because CPH opened the door; f. the jury is entitled to consider any and all evidence introduced during trial; and g. the instruction is misleading, confusing, argumentative, a comment on the evidence, and is unfairly prejudicial. 4. Repetitive references to deemed facts constitute improper bolstering, comment on evidence, are misleading, confusing, unduly prejudicial, and place inappropriate weight on those matters. 5. Reference to "facts established before trial" is misleading. These are deemed facts or facts that must be accepted as true, not established facts. There has been no proof of those facts before trial. 6. Final sentence confusing and unnecessary (and improper because of objections 3a-3f above) in light of instruction that jury must accept deemed facts as true. 7. Misstates Florida law by omitting requirement that reliance be justifiable. 8. Statement that jury cannot reach different verdict on conspiracy and aiding and abetting claims is incorrect.

CPHPI 8 - Element 1 – Reliance	Objection: 1. The Court should read Defendant's Supplemental Requested Jury Instructions 11-16 instead of this instruction, as Defendant's requested instructions are correct under the law and CPH's is not. 2. The instruction is an improper negative charge. 3. The instruction is an improper comment on the evidence. 4. The instruction contains incorrect and/or incomplete statements of law: a. the instruction misstates Florida law on reliance; b. the instruction does not contain the concept of justifiable reliance, which is well entrenched under Florida law; c. the law imposes a duty or obligation to attempt to obtain more information or to determine whether any statement was false generally, or at a minimum, when presented with the numerous red flags known to CPH; d. the instruction does not inform the jury that CPH is a sophisticated investor which has different responsibilities in a significant arms-length transaction such as this; e. the instruction fails to inform the jury that it should consider the totality of the circumstances in determining whether reliance is justifiable; f. CPH's statement of the aiding and abetting claim and the conspiracy claims are incomplete and/or incorrect under Florida law; g. Florida law does not recognize a claim for aiding and abetting fraud; h. New York law applies to CPH's claims, and thus the instructions are incorrect as a matter of law in that they do not contain the proper elements; 4. The instruction is misleading, confusing, argumentative, improperly comments on the evidence and is unfairly prejudicial.

CPHPI 9 - Liability for Acts of Co-Conspirators	Objection: 1. The Court has read to the jury a statement of deemed facts that Morgan Stanley committed fraudulent acts. Accordingly, this instruction is unnecessary. 2. The instruction contains incorrect and/or incomplete statements of law. 3. The instruction is an improper comment on the evidence. 4. The instruction is misleading, confusing, argumentative, improperly comments on the evidence and is unfairly prejudicial. 5. Repetitive reference to facts conclusively established prior to trial improper for the reasons given in the objections to CHPPI No. 7, objections 2-8, which are hereby incorporated by reference.
CPHPI 10 - Element 2 – Causation of Damages	Objection: 1. The Court should read Defendant's Supplemental Requested Jury Instruction 24 instead of this instruction, as Defendant's requested instruction correctly states the law, whereas CPH's does not. 2. Misstates Florida law in that it fails to incorporate requirement of not only transaction causation but also loss causation 3. There is no basis in the evidence for instructing the jury on the issue of concurrent cause. 4. The instruction on concurrent cause is legally incorrect and/or incomplete. It would be incorrect to suggest that any loss caused by any other factor (such as changes in market conditions, subsequent mismanagement or the like) can be attributed to Morgan Stanley. 5. The instruction is an incorrect statement of law where plaintiff has selected benefit-of-the-bargain damages. 6. The instruction improperly injects negligence causation into securities fraud action.

	7. Instructing the jury as CPH suggests would be an improper comment on the evidence, would be misleading, confusing, argumentative, and unfairly prejudicial, and would comment on the evidence.
CPHPI 11 - Amount of Damages – Compensatory	No objection.
CPHPI 12 - Benefit of the Bargain	Objection: 1. The Court should read Defendant's Supplemental Requested Jury Instructions 22-25 instead of this instruction, as Defendant's requested instructions are correct under the law and CPH's is not. 2. The instruction contains incorrect and/or incomplete statements of law: a. The instruction misstates Florida law on benefit of the bargain, including but not limited to: (i) the instruction erroneously provides for valution not on the date of transaction but years later; (ii) the instruction fails to exclude losses not legally caused by the fraud, such as market declines (*i.e.*, it omits loss-causation requirement). (iii) the instruction improperly conflates "value" as represented by defendant with "expectation"; (iv) the instruction provides rescissionary damages waived by CPH (and relies on rescission case as authority) (v) the instruction improperly requires that property be capable of sale as precondition to having value; (vi) instruction uses unrecognized formulation such as "supposed to receive"; (vii) instruction ignores causation requirement by not requiring proof that CPH would have sold the stock earlier if it could have; (viii) instruction misleads regarding meaning of "market value" by suggesting that restricted (not publicly saleable) securities have no value. b. the instruction does not sufficiently limit the damages that are recoverable. For example, the

	instruction does not inform the jury that it may not consider the fact of later appreciation or depreciation of the property that is subject of the false representation in computing damages; c. the instruction does not inform the jury about CPH's duty to mitigate damages; d. the instruction fails to instruct that damages cannot be based on speculation, guesswork or conjecture; 4. The instruction provides for damages based on allegedly false representations that were not relied upon and that therefore were not legally caused by the alleged fraud. 5. The instruction is misleading, confusing, argumentative and is unfairly prejudicial.
CPHPI 13 - No Reduction on Account of Uncertainty Caused by Defendant	Objection: 1. The instruction contains incorrect and/or incomplete statements of law: a. CPH has the burden to establish its actual damages, not the mere fact of damage; b. the instruction misstates Florida law because it does not inform the jury that damages must be established with reasonable certainty and cannot be based on undue speculation, guesswork or conjecture; c. if damages are speculative, if is because of a failure of proof on CPH's part, the ineffectiveness of CPH's expert; d. the instruction reflects spoliation concerns not present here, i.e., where the defendant destroys evidence the plaintiff needs to prove damages (as the supporting authority cited by CPH shows) e. CPH's instruction improperly interjects the law of negligence into this action premised on fraud. 2. The instruction is misleading, confusing, argumentative, improperly comments on the evidence and is unfairly prejudicial. 3. The Court should read Defendant's Supplemental

	Requested Jury Instructions 23and 26 instead of this instruction, as Defendant's requested instructions are correct under Florida law and CPH's is not.
CPHPI 14 - Collateral-Source Rule for Tort Actions	Objection: 1. There is no evidence of any collateral sources except that introduced by CPH itself. There is no evidence of any settlements, recovery or compensation received by CPH. CPH is not entitled to an instruction to address evidence CPH itself improperly introduced. 2. The instruction is misleading, confusing, argumentative, improperly comments on the evidence and is unfairly prejudicial. 3. It is improper to instruct the jury that the Court will give credit for collateral sources; any instruction should state that any credits are a matter for the Court.
CPHPI 15 - Prejudice and Sympathy; Judge Not Involved	Objection: 1. The Court should read Defendant's Supplemental Requested Jury Instruction 30 instead of this instruction, as Defendant's requested instruction is an applicable Florida Standard Jury Instruction and CPH's is not. 2. The portion of the instruction addressing the "established facts" is misleading, confusing, argumentative, improperly comments on the evidence and is unfairly prejudicial. The above objections to the repeated references to "established facts," *see* objections to CHPPI No. 7, objections 2-8, are hereby incorporated by reference.
CPHPI 16 - Closing Instruction, First Phase of Proceedings	No objection.
CPH Verdict Form (First Phase of Bifurcated Proceeding)	Objection: 1. Morgan Stanley has submitted a verdict form that is correct and should be used instead of CPH's proposed verdict form. 2. The Court's entry of a default or directed verdict against Morgan Stanley was error. Morgan Stanley is entitled to a jury determination of all elements of CPH's

	claims. 3. Morgan Stanley objects to CPH's general verdict form on the issue of reliance. As set out in Morgan Stanley's proposed verdict form, a special interrogatory verdict is necessary on this issue. 4. CPH's proposed verdict form omits the requirement that reliance be justifiable. 5. CPH's proposed verdict form does not contain Morgan Stanley's defenses. 6. CPH's proposed verdict form omits the clear and convincing evidence standard (objection subject to same reservations set forth in Morgan Stanley Proposed Instruction No. 29).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 5th day of May, 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

DEFENDANT'S REVISED PHASE I REQUESTED JURY INSTRUCTIONS RELATING TO NEW YORK LAW

Defendant, Morgan Stanley & Co., Incorporated ("Morgan Stanley") submits the following revised Phase 1 proposed jury instructions under New York law. In submitting these instructions, Defendant does not waive its objections to specific claims or damages. Further, Morgan Stanley has only submitted these particular requests because of the Court's ruling that the facts that Morgan Stanley knowingly made fraudulent statements to CPH, and assisted and conspired with Sunbeam in committing a fraud have been "deemed established for all purposes." Morgan Stanley expressly does not waive its right to a full jury determination of all issues implicated by Plaintiff's First Amended Complaint, and would have submitted a verdict form asking for juror determination of all issues. Defendant recognizes that the Court ruled before trial that Florida law governs, but has sought and reserves the right to seek reconsideration in light of the evidence at trial. Defendant reserves the right to modify these instructions to be consistent with the Court's rulings and evidence at trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 5th day of May, 2005.

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DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 1

You must decide whether CPH was justified in relying on the representation from Sunbeam. Whether the person to whom a representation is made is justified in relying upon it generally depends upon whether the fact represented is one that a reasonable person would believe and consider important in deciding whether to go through with a merger and acquisition transaction. Whether a person is justified in relying on a representation also depends on whether a reasonable person would enter into a merger and acquisition agreement without conducting its own independent investigation.

Source: New York Pattern Jury Instructions, Civil § PJI 3:20 (2d ed 2005) (adapted); Rotterdam Ventures, Inc. v. Ernst & Young LLP, 752 N.Y.S.2d 746, 749 (N.Y. App. Div. 2002) (holding that where a sophisticated party "plainly had both access to the relevant Amnex financial statements and the wherewithal, through his own financial advisors, to ascertain the financial viability of that entity. Thus, as plaintiffs had the means to ascertain the truth of the alleged representations, they cannot prevail in an action for fraud" (citations omitted)); UST Private Equity Fund, Inc. v. Salomon Smith Barney, 733 N.Y.S.2d 385, 386 (N.Y. App. Div. 2001) ("As a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on an alleged misrepresentation if that plaintiff failed to make use of the means of verification that were available to it, such as reviewing the files of other parties."); Abrahami v. UPC Const. Co., 638 N.Y.S.2d 11, 14 (N.Y. App. Div. 1996) (holding that sophisticated businessmen who were parties to a commercial transaction "had a duty to exercise ordinary diligence and conduct an independent appraisal of the risk they were assuming," and noting that "where a party had means available to him for discovering, by the use of ordinary intelligence, the true nature of a transaction he is about to enter into, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations") (internal quotation marks and citations omitted); Schlaifer Nance & Co. v. Estate of Warhol, 119 F.3d 91, 101 (2d Cir. 1997) ("'Where sophisticated businessmen engaged in major transactions enjoy access to critical information but fail to take advantage of that access, New York courts are particularly disinclined to entertain claims of justifiable reliance.'" (quoting Grumman Allied Indus. v. Rohr Indus., Inc., 748 F.2d 729, 737 (2d Cir. 1984)).

GIVEN _____

DENIED _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 2

In this case, the Court has determined that CPH is a sophisticated investor who was aided by sophisticated business and legal advisors. As a sophisticated investor, CPH had a duty to perform reasonable due diligence on all of the information available to it. CPH may not recover for fraudulent misrepresentations if the falsity of the statements would have been apparent had CPH done a proper investigation.

Source: New York Pattern Jury Instructions, Civil § PJI 3:20 (2d ed 2005) (adapted); Order On Morgan Stanley & Co., Incorporated's Motion For Summary Judgment, February 1, 2005; Rotterdam Ventures, Inc. v. Ernst & Young LLP, 752 N.Y.S.2d 746, 749 (N.Y. App. Div. 2002) (holding that where a sophisticated party "plainly had both access to the relevant Amnex financial statements and the wherewithal, through his own financial advisors, to ascertain the financial viability of that entity. Thus, as plaintiffs had the means to ascertain the truth of the alleged representations, they cannot prevail in an action for fraud" (citations omitted)); UST Private Equity Fund, Inc. v. Salomon Smith Barney, 733 N.Y.S.2d 385, 386 (N.Y. App. Div. 2001) ("As a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on an alleged misrepresentation if that plaintiff failed to make use of the means of verification that were available to it, such as reviewing the files of other parties."); Abrahami v. UPC Const. Co., 638 N.Y.S.2d 11, 14 (N.Y. App. Div. 1996) (holding that sophisticated businessmen who were parties to a commercial transaction "had a duty to exercise ordinary diligence and conduct an independent appraisal of the risk they were assuming," and noting that "where a party had means available to him for discovering, by the use of ordinary intelligence, the true nature of a transaction he is about to enter into, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations") (internal quotation marks and citations omitted); Schlaifer Nance & Co. v. Estate of Warhol, 119 F.3d 91, 101 (2d Cir. 1997) ("'Where sophisticated businessmen engaged in major transactions enjoy access to critical information but fail to take advantage of that access, New York courts are particularly disinclined to entertain claims of justifiable reliance.'" (quoting Grumman Allied Indus. v. Rohr Indus., Inc., 748 F.2d 729, 737 (2d Cir. 1984)).

GIVEN _____

DENIED _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 3

If you find that CPH was not justified in relying on the representation from Sunbeam because it failed to conduct its own independent investigation of the available information, you should find in favor of Morgan Stanley on both the aiding and abetting and conspiracy claims.

Source: New York Pattern Jury Instructions, Civil § PJI 3:20 (2d ed 2005) (adapted); Order On Morgan Stanley & Co., Incorporated's Motion For Summary Judgment, February 1, 2005; Rotterdam Ventures, Inc. v. Ernst & Young LLP, 752 N.Y.S.2d 746, 749 (N.Y. App. Div. 2002) (holding that where a sophisticated party "plainly had both access to the relevant Amnex financial statements and the wherewithal, through his own financial advisors, to ascertain the financial viability of that entity. Thus, as plaintiffs had the means to ascertain the truth of the alleged representations, they cannot prevail in an action for fraud" (citations omitted)); UST Private Equity Fund, Inc. v. Salomon Smith Barney, 733 N.Y.S.2d 385, 386 (N.Y. App. Div. 2001) ("As a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on an alleged misrepresentation if that plaintiff failed to make use of the means of verification that were available to it, such as reviewing the files of other parties."); Abrahami v. UPC Const. Co., 638 N.Y.S.2d 11, 14 (N.Y. App. Div. 1996) (holding that sophisticated businessmen who were parties to a commercial transaction "had a duty to exercise ordinary diligence and conduct an independent appraisal of the risk they were assuming," and noting that "where a party had means available to him for discovering, by the use of ordinary intelligence, the true nature of a transaction he is about to enter into, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations") (internal quotation marks and citations omitted); Schlaifer Nance & Co. v. Estate of Warhol, 119 F.3d 91, 101 (2d Cir. 1997) ("'Where sophisticated businessmen engaged in major transactions enjoy access to critical information but fail to take advantage of that access, New York courts are particularly disinclined to entertain claims of justifiable reliance.'" (quoting Grumman Allied Indus. v. Rohr Indus., Inc., 748 F.2d 729, 737 (2d Cir. 1984)).

GIVEN _____

DENIED _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 4

Whether the person to whom a representation is made is justified in relying upon it also depends on the entire context of the transaction, including factors such as its complexity and magnitude, the sophistication of the parties, and the content of any agreements between them.

Source: Emergent Capital Investment Manag., LLC. v. Stonepath Group, Inc., 343 F.3d 189, 195 (2d Cir. 2003) (stating in the context of federal and New York state law fraud claims that "[i]n assessing the reasonableness of a plaintiff's alleged reliance, we consider the entire context of the transaction, including factors such as its complexity and magnitude, the sophistication of the parties, and the content of any agreements between them").

GIVEN _____

DENIED _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 5

A detailed writing developed through negotiations by sophisticated business entities and their advisors defines the boundaries of a particular transaction.

Where a sophisticated party, such as CPH, specifically disclaims reliance upon particular representations in a contract, that party cannot claim that it was fraudulently induced to enter into the contract by the very representations it has disclaimed reliance upon.

Sophisticated parties to major transactions cannot avoid their disclaimers by complaining that they received less than all of the available information.

Source: Harsco v. Segui, 91 F.3d 337, 343 (2d Cir. 1996) (finding that disclaimer precluded state law fraud and negligent misrepresentation claims and concluding that "detailed writing developed via negotiations among sophisticated business entities and their advisors" "defines the boundaries of the transaction"); id. at 345 ("[W]here a party specifically disclaims reliance upon a particular representation in a contract, that party cannot, in a subsequent action for common law fraud, claim that it was fraudulently induced to enter into the contract by the very representation it has disclaimed reliance upon.") (citing Danann Realty Corp. v. Harris, 157 N.E.2d 597 (N.Y. 1959) (where contract for purchase of lease contained disclaimer, purchaser had no right of action against sellers for alleged false representations)); Dyncorp v. GTE Corp., 215 F. Supp. 2d 308, 322 (S.D.N.Y. 2002) (contractual disclaimers of reliance on any warranties or representations not contained in contract precluded fraud in inducement claims); id. ("Sophisticated parties to major transactions cannot avoid their disclaimers by complaining that they received less than all information, for they have negotiated for fuller information or more complete warranties.").

GIVEN _____

DENIED _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 6

If you find that CPH disclaimed reliance on Sunbeam's alleged misrepresentations by executing contracts with Sunbeam which stated that CPH would not rely on representations not contained in the written agreement itself, then you should find in favor of Morgan Stanley on both the aiding and abetting and conspiracy claims.

Source: Harsco v. Segui, 91 F.3d 337, 343 (2d Cir. 1996) (finding that disclaimer precluded state law fraud and negligent misrepresentation claims and concluding that "detailed writing developed via negotiations among sophisticated business entities and their advisors" "defines the boundaries of the transaction"); id. at 345 ("[W]here a party specifically disclaims reliance upon a particular representation in a contract, that party cannot, in a subsequent action for common law fraud, claim that it was fraudulently induced to enter into the contract by the very representation it has disclaimed reliance upon.") (citing Danann Realty Corp. v. Harris, 157 N.E.2d 597 (N.Y. 1959) (where contract for purchase of lease contained disclaimer, purchaser had no right of action against sellers for alleged false representations)); Dyncorp v. GTE Corp., 215 F. Supp. 2d 308, 322 (S.D.N.Y. 2002) (contractual disclaimers of reliance on any warranties or representations not contained in contract precluded fraud in inducement claims); id. ("Sophisticated parties to major transactions cannot avoid their disclaimers by complaining that they received less than all information, for they have negotiated for fuller information or more complete warranties.").

GIVEN _____

DENIED _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 7

Damages in this case, if any, must be determined under the "out-of-pocket" rule. The measure of damages is the difference between the actual value of what CPH received, as measured at the time the transaction occurred, and the price that CPH paid. Changes in the stock's value after the transaction occurred are generally irrelevant to this determination.

Source: New York Pattern Jury Instructions § 3:20, Comment (2005) (adapted); Lama Holding Co. v. Smith Barney, Inc., 88 N.Y.2d 413, 421 (N.Y. 1996) (Under the out-of-pocket rule, "damages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained . . . .[T]here can be no recovery of profits which would have been realized in the absence of fraud.") (citations omitted); Sager v. Friedman, 270 N.Y. 472, 481 (N.Y. 1936) (measure of damages for fraudulent misrepresentation is "indemnity for the actual pecuniary loss sustained as a direct result of the wrong, *i.e.*, the difference between the value of the bargain which a plaintiff was induced by fraud to make and the amount or value of the consideration exacted as the price of the bargain"); Cayuga Harvester, Inc. v. Allis-Chalmers Corp., 95 A.D.2d 5, 22 (4th Dep't 1983) ("Stated simply, fraud damages are to give the plaintiff what he lost because he made the bargain, not what he would have gained had it been performed. Thus, plaintiff's expectation of profits on a resale or other damages which would put him in a better position than he would have been in had he not made the bargain are excluded.").

GIVEN _____

DENIED _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 8

Damages in this case are to be calculated to compensate CPH for what it lost because of the fraud, not to compensate it for what it might have gained. Under the out-of-pocket rule, CPH cannot recover for any profits it would have realized if the fraud had not occurred. CPH's expectation of profits on the Sunbeam-Coleman transaction or other damages which would put CPH in a better position than it would have been had it not agreed to the transaction are excluded from your calculation of CPH's damages.

Source: New York Pattern Jury Instructions § 3:20, Comment (2005) (adapted); Lama Holding Co. v. Smith Barney, Inc., 88 N.Y.2d 413, 421 (N.Y. 1996) (Under the out-of-pocket rule, "damages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained . . . .[T]here can be no recovery of profits which would have been realized in the absence of fraud.") (citations omitted); Sager v. Friedman, 270 N.Y. 472, 481 (N.Y. 1936) (measure of damages for fraudulent misrepresentation is "indemnity for the actual pecuniary loss sustained as a direct result of the wrong, *i.e.*, the difference between the value of the bargain which a plaintiff was induced by fraud to make and the amount or value of the consideration exacted as the price of the bargain"); Cayuga Harvester, Inc. v. Allis-Chalmers Corp., 95 A.D.2d 5, 22 (4th Dep't 1983) ("Stated simply, fraud damages are to give the plaintiff what he lost because he made the bargain, not what he would have gained had it been performed. Thus, plaintiff's expectation of profits on a resale or other damages which would put him in a better position than he would have been in had he not made the bargain are excluded.").

GIVEN _____

DENIED _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 9

If you find that what CPH received in the Sunbeam transaction was greater in value than what it sold at the time of the transaction, then you must find CPH suffered no damages. If you find that CPH received from Sunbeam less than what it had paid to Sunbeam because of the alleged fraud, then you should award CPH the amount of damages representing that difference.

Source: New York Pattern Jury Instructions § 3:20, Comment (2005) (adapted); Lama Holding Co. v. Smith Barney, Inc., 88 N.Y.2d 413, 421 (N.Y. 1996) (Under the out-of-pocket rule, "damages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained . . . .[T]here can be no recovery of profits which would have been realized in the absence of fraud.") (citations omitted); Sager v. Friedman, 270 N.Y. 472, 481 (N.Y. 1936) (measure of damages for fraudulent misrepresentation is "indemnity for the actual pecuniary loss sustained as a direct result of the wrong, *i.e.*, the difference between the value of the bargain which a plaintiff was induced by fraud to make and the amount or value of the consideration exacted as the price of the bargain"); Cayuga Harvester, Inc. v. Allis-Chalmers Corp., 95 A.D.2d 5, 22 (4th Dep't 1983) ("Stated simply, fraud damages are to give the plaintiff what he lost because he made the bargain, not what he would have gained had it been performed. Thus, plaintiff's expectation of profits on a resale or other damages which would put him in a better position than he would have been in had he not made the bargain are excluded.").

GIVEN _____

DENIED _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 10

Parties to an agreement may decide that any disputes between them concerning the agreement will be decided under the law of a particular state. You must decide whether CPH agreed that its claims, or portions thereof, are to be controlled by New York law.

Source: Mazzoni Farms, Inc. v. E.I. DuPont de Nemours and Co., 761 So. 2d 306, 313 (Fla. 2000) (enforcing choice of law provision in case involving fraudulent inducement claim).

GIVEN _____

DENIED _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 11

Parties to an agreement may decide that any disputes between them concerning the agreement will be decided under the law of a particular state. You must decide whether CPH agreed that its claims, or portions thereof, are to be controlled by Delaware law.

Source: Mazzoni Farms, Inc. v. E.I. DuPont de Nemours and Co., 761 So. 2d 306, 313 (Fla. 2000) (enforcing choice of law provision in case involving fraudulent inducement claim).

GIVEN _____

DENIED _____

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

DEFENDANT'S SUPPLEMENTAL PHASE I REQUESTED JURY INSTRUCTIONS

Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") submits the following Supplemental Phase I Requested Jury Instructions. In submitting these supplemental instructions, Morgan Stanley does not waive or withdraw the instructions previously submitted. Morgan Stanley does not waive its objections to specific claims or damages, or its objections to the Court's ruling that certain facts have been "deemed established." Morgan Stanley expressly does not waive its right to a full jury determination of all issues necessary to the determination of Plaintiff's First Amended Complaint. Morgan Stanley reserves the right to modify these instructions to be consistent with the Court's rulings and evidence at trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 5th day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
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Counsel for Morgan Stanley & Co. Incorporated

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DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 1.

Members of the jury, I shall now instruct you on the law that you must follow in reaching your verdict. It is your duty as jurors to decide the issues, and only those issues that I submit for determination by your verdict. In reaching your verdict, you should consider and weigh the evidence, decide the disputed issues of fact, and apply the law on which I shall instruct you, to facts as you find them from the evidence.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in evidence, all facts that may be admitted or agreed to by the parties, and any fact the court has deemed established or of which it has taken judicial notice.

In determining the facts, you may draw reasonable inferences from the evidence. You may make deductions and reach conclusions which reason and common sense lead you to draw from the facts shown by the evidence in this case. But you should not speculate on any matters outside the evidence.

Offered as substitute for Plaintiff's Proposed Instruction No. 4

Source: Florida Standard Jury Instruction 2.1.

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 2.

In determining the believability of any witness and the weight to be given the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in light of all the evidence in the case and in the light of your own experience and common sense.

Source: Florida Standard Jury Instruction 2.2(a).

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 3.

In determining the believability of any witness and the weight to be given the testimony of any witness, you should also ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact; or, whether there was evidence that at some other time the witness said or did something, or failed to say or do something, which was different from the testimony the witness gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

Source: Eleventh Circuit Pattern Jury Instructions (Civil Cases), Impeachment of Witnesses – Inconsistent Statement § 4.1 (1999) (adapted)

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 4.

You have heard opinion testimony on certain technical subjects from persons referred to as expert witnesses.

You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinions expressed, and all other evidence in the case.

Source: Florida Standard Jury Instruction 2.2(b).

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 5.

In your deliberations, you are to consider the claims of Coleman (Parent) Holdings, Inc. that Morgan Stanley & Co. Incorporated aided and abetted and conspired with Sunbeam in committing a fraud upon Coleman (Parent) Holdings, Inc. and that Coleman (Parent) Holdings, Inc. was damaged as a result of this fraud. Morgan Stanley denies these claims and asserts, as defenses, that Coleman (Parent) Holdings, Inc. waived its right to pursue its claims and that Coleman (Parent) Holdings, Inc. failed to mitigate any damages it sustained.

Source: Florida Standard Jury Instruction 2.4 (adapted).

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 6.

As used in these instructions, "greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

Offered as substitute for Plaintiff's Proposed Instruction No. 6

Source: Florida Standard Jury Instruction 3.9

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 7.

ISSUES FOR JURY DETERMINATION

I previously instructed you that certain facts are deemed established and must be accepted as true for purposes of this case. Plaintiff CPH is not required to offer proof on those facts that have been deemed established and Defendant Morgan Stanley is not permitted to dispute or challenge them. As are result, the only issues for your determination on the claims of Plaintiff CPH against Defendant Morgan Stanley are:

1) Whether CPH actually relied on false statements made by Sunbeam or Morgan Stanley; and if so,

2) Whether CPH justifiably relied on the false statements; and if so,

3) Whether CPH sustained damage that was legally caused by the false statements.

If the greater weight of the evidence does not support the claims of Coleman (Parent) Holdings, Inc. against Morgan Stanley & Co. Incorporated on these issues, your verdict should be for Defendant, Morgan Stanley.

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 8.

For you to find for CPH on its claims for aiding and abetting fraud or conspiracy to commit fraud, CPH must prove that it actually and justifiably relied on the allegedly false statements by Sunbeam or Morgan Stanley.

CPH actually relied on such statements if it decided to enter into the transaction with Sunbeam because of the statements. If you find that CPH would have engaged in the transaction with Sunbeam even if Sunbeam or Morgan Stanley had never made such statements, or that CPH knew that the statements were false, or that the falsity of the statements were obvious, or that CPH did not act based on a belief that the statements were true, or that CPH simply disregarded the statements, you must find that CPH did not actually rely upon the statements by Sunbeam or Morgan Stanley.

Offered, in combination with Defendant's Proposed Instructions Nos. 9-15, as a substitute for Plaintiff's Proposed Instruction No. 8.

Source: 4/11/05 Tr. at 7604:25 – 7605:15 (adapted)

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 9.

Even if CPH actually relied, you must still determine whether that reliance was justifiable. In deciding whether CPH was justified in relying upon the truth of any particular representation, you must consider the totality of the circumstances, including, among other factors, the type of information at issue, the nature of the communication between the parties, the relative positions of the parties, and the extent of their knowledge of corporate affairs.

Offered as substitute for Plaintiff's Proposed Instruction No. 8

Source: M/I Schottenstein Homes v. Azam, 813 So. 2d 91, 94-95 (Fla. 2002) (whether reliance is justified is determined "under the totality of the circumstances"); Id. at 95 (in deciding whether the recipient of a misrepresentation is "justified in relying upon its truth," it is necessary to consider "the totality of the circumstances surrounding the type of information, the nature of the communication between the parties, and the relative positions of the parties."); Id. at 93 ("where one has an opportunity to make a cursory examination or investigation and does not do so, he cannot recover"); Hillcrest Pac. Corp. v. Yamamura, 727 So. 2d 1053, 1057-58 (Fla. 4th DCA 1999) ("sophisticated developer in the business of investing millions of dollars in commercial property" did not "reasonably rely upon any material misrepresentations" made by real estate consultants about value of golf course, where sales agreement provided inspection rights and ample opportunity for developer to visit property and "audit the financial records"); Nicholson v. Ariko, 539 So. 2d 1141, 1142 (Fla. 5th DCA 1989) (plaintiff did not reasonably rely on representations of his business partner concerning terms of partnership agreement, where there was "no basis" in the record "to explain why [the plaintiff], an experienced business man, did not insist on a copy of the [agreement] and read it for himself."); L&L Doc's, LLC v. Florida Div. of Alcoholic Beverages & Tobacco, 882 So. 2d 512, 515 (Fla. 4th DCA 2004) (holding in light of circumstances that party was "not justified in relying upon [] misrepresentation[s] which they knew or should have known, with the exercise of some diligence, was false."); Thor Bear, Inc. v. Crocker Mizner Park, 648 So. 2d 168, 172 (Fla. 4th DCA 1994) ("Participants in a normal business transaction are not entitled to rely upon such 'ephemeral matters' as opinions, judgments or legal views expressed by an opposing party."); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER & KEETON ON LAW OF TORTS § 108, p. 751 (5th ed. 1984) ("[O]ne who has special knowledge, experience and competence may not be permitted to rely on statements for which the ordinary man might recover, and . . . one who has acquired expert knowledge concerning the

matter dealt with may be required to form his own judgment, rather than take the word of the defendant").

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 10.

Whether CPH is a sophisticated investor that was aided by experienced advisors is relevant to whether CPH justifiably relied on the allegedly false statements.

Offered as substitute for Plaintiff's Proposed Instruction No. 8

Source: M/I Schottenstein Homes v. Azam, 813 So. 2d 91, 94-95 (Fla. 2002) (whether reliance is justified is determined "under the totality of the circumstances"; "if the recipient 'knows that it [the statement] is false or its falsity is obvious to him,' his reliance is improper, and there can be no cause of action for fraudulent misrepresentation") (brackets in original; citation omitted); Id. at 95 (in deciding whether the recipient of a misrepresentation is "justified in relying upon its truth," it is necessary to consider "the totality of the circumstances surrounding the type of information, the nature of the communication between the parties, and the relative positions of the parties"); Id. at 93 ("where one has an opportunity to make a cursory examination or investigation and does not do so, he cannot recover"); Hillcrest Pac. Corp. v. Yamamura, 727 So. 2d 1053, 1057-58 (Fla. 4th DCA 1999) (holding that "sophisticated developer in the business of investing millions of dollars in commercial property" did not "reasonably rely upon any material misrepresentations" made by real estate consultants about value of golf course, where sales agreement provided inspection rights and ample opportunity for developer to visit property and "audit the financial records"); Nicholson v. Ariko, 539 So. 2d 1141, 1142 (Fla. 5th DCA 1989) (plaintiff did not reasonably rely on representations of his business partner concerning terms of partnership agreement, where there was "no basis" in the record "to explain why [the plaintiff], an experienced business man, did not insist on a copy of the [agreement] and read it for himself."); L&L Doc's, LLC v. Florida Div. of Alcoholic Beverages & Tobacco, 882 So. 2d 512, 515 (Fla. 4th DCA 2004) (holding in light of circumstances that party was "not justified in relying upon [] misrepresentation[s] which they knew or should have known, with the exercise of some diligence, was false."); Thor Bear, Inc. v. Crocker Mizner Park, 648 So. 2d 168, 172 (Fla. 4th DCA 1994) ("Participants in a normal business transaction are not entitled to rely upon such 'ephemeral matters' as opinions, judgments or legal views expressed by an opposing party."); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER & KEETON ON LAW OF TORTS § 108, p. 751 (5th ed. 1984) ("[O]ne who has special knowledge, experience and competence may not be permitted to rely on statements for which the ordinary man might recover, and . . . one who has acquired expert knowledge concerning the matter dealt with may be required to form his own judgment, rather than take the word of the defendant").

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 11.

Whether CPH is a sophisticated investor that was aided by experienced advisors is relevant to whether CPH actually knew that the statements or representations were false, or whether falsity was obvious.

Offered as substitute for Plaintiff's Proposed Instruction No. 8

Source: M/I Schottenstein Homes v. Azam, 813 So. 2d 91, 94-95 (Fla. 2002) (whether reliance is justified is determined "under the totality of the circumstances"; "if the recipient 'knows that it [the statement] is false or its falsity is obvious to him,' his reliance is improper, and there can be no cause of action for fraudulent misrepresentation") (brackets in original; citation omitted); Id. at 95 (in deciding whether the recipient of a misrepresentation is "justified in relying upon its truth," it is necessary to consider "the totality of the circumstances surrounding the type of information, the nature of the communication between the parties, and the relative positions of the parties"); Id. at 93 ("where one has an opportunity to make a cursory examination or investigation and does not do so, he cannot recover"); Hillcrest Pac. Corp. v. Yamamura, 727 So. 2d 1053, 1057-58 (Fla. 4th DCA 1999) (holding that "sophisticated developer in the business of investing millions of dollars in commercial property" did not "reasonably rely upon any material misrepresentations" made by real estate consultants about value of golf course, where sales agreement provided inspection rights and ample opportunity for developer to visit proper and "audit the financial records"); Nicholson v. Ariko, 539 So. 2d 1141,1142 (Fla. 5th DCA 1989) (plaintiff did not reasonably rely on representations of his business partner concerning terms of partnership agreement, where there was "no basis" in the record "to explain why [the plaintiff], an experienced business man, did not insist on a copy of the [agreement] and read it for himself."); L&L Doc's, LLC v. Florida Div. of Alcoholic Beverages & Tobacco, 882 So. 2d 512, 515 (Fla. 4th DCA 2004) (holding in light of circumstances that party was "not justified in relying upon [] misrepresentation[s] which they knew or should have known, with the exercise of some diligence, was false."); Thor Bear, Inc. v. Crocker Mizner Park, 648 So. 2d 168, 172 (Fla. 4th DCA 1994) ("Participants in a normal business transaction are not entitled to rely upon such 'ephemeral matters' as opinions, judgments or legal views expressed by an opposing party."); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER & KEETON ON LAW OF TORTS § 108, p. 751 (5th ed. 1984) ("[O]ne who has special knowledge, experience and competence may not be permitted to rely on statements for which the ordinary man might recover, and . . . one who has acquired expert knowledge concerning the matter dealt with may be required to form his own judgment, rather than take the word of the defendant").

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 12

To determine whether CPH justifiably relied on a misrepresentation, you should consider whether the falsity of the statement would have been apparent had CPH done an appropriate investigation.

Offered as substitute for Plaintiff's Proposed Instruction No. 8

Source: M/I Schottenstein Homes v. Azam, 813 So. 2d 91, 94-95 (Fla. 2002) (in deciding whether the recipient of a misrepresentation is "justified in relying upon its truth," it is necessary to consider "the totality of the circumstances surrounding the type of information, the nature of the communication between the parties, and the relative positions of the parties."). Id. at 93 (where one has an opportunity to make a cursory examination or investigation and does not do so, he cannot recover"); Hillcrest Pac. Corp. v. Yamamura, 727 So. 2d 1053, 1057-58 (Fla. 4th DCA 1999) ("sophisticated developer in the business of investing millions of dollars in commercial property" did not "reasonably rely upon any material misrepresentations" made by real estate consultants about value of golf course, where sales agreement provided inspection rights and ample opportunity for developer to visit property and "audit the financial records"); Nicholson v. Ariko, 539 So. 2d 1141, 1142 (Fla. 5th DCA 1989) (plaintiff did not reasonably rely on representations of his business partner concerning terms of partnership agreement, where there was "no basis" in the record "to explain why [the plaintiff], an experienced business man, did not insist on a copy of the [agreement] and read it for himself."); L&L Doc's, LLC v. Florida Div. of Alcoholic Beverages & Tobacco, 882 So. 2d 512, 515 (Fla. 4th DCA 2004) (holding in light of circumstances that party was "not justified in relying upon [] misrepresentation[s] which they knew or should have known, with the exercise of some diligence, was false.").

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 13A

The court has determined that Plaintiff CPH is a sophisticated investor who was aided by sophisticated advisors. As a result, CPH, had a duty to perform reasonable due diligence as to available information in order to prove that its reliance on a misrepresentation was reasonable. That is, CPH was required to use reasonable due diligence in investigating the transaction and may not recover for fraudulent misrepresentations the falsity of which would have been apparent had the proper investigation been completed.

Offered as substitute for Plaintiff's Proposed Instruction No. 8

Source: Court's February 1, 2005 Order on Morgan Stanley & Co., Incorporated's Motion for Summary Judgment; M/I Schottenstein Homes, Inc. v. Azam, 813 So. 2d 91, 93 (Fla. 2002) ("where one has an opportunity to make a cursory examination or investigation and does not do so, he cannot recover"); L & L Doc's, L.L.C. v. Florida Div. Of Alcoholic Beverages And Tobacco, 882 So. 2d 512, 515 (Fla. 4th DCA 2004) ("Without admitting that there was a misrepresentation, seller argues that, in any event, the buyers were not justified in relying upon a misrepresentation which they knew or should have known, with the exercise of some diligence, was false. We agree."); Hillcrest Pacific v. Yamamura, 727 So. 2d 1053, 1058 (Fla. 4th DCA 1999) ("the express language of the Agreement and other exhibits ... demonstrate that Pacific did not reasonably rely upon any material misrepresentations made by the appellees. Furthermore, as stated above, the Agreement provided inspection rights and ample opportunity for Pacific to visit the Property and audit the financial records. Pacific could have ascertained the value of the property, if they were dissatisfied with the quoted or negotiated price. They were under no obligation to purchase the Property and could have canceled the contract or revised its terms."); Wasser v. Sasoni, 652 So. 2d 411, 412-13 (Fla. 3d DCA 1995) ("We recognize that exceptions to the general rule could exist under certain circumstances, for example, where

specific misrepresentations regarding a latent defect are made to a negligent purchaser . . . . However, there is no exception where the parties are equally sophisticated, and have an equal opportunity to discover a defect.") (citations omitted); Rotterdam Ventures v. Ernst & Young LLP, 752 N.Y.S.2d 746, 749 (N.Y. App. Div. 2002) (Sophisticated party "plainly had both access to the relevant Amnex financial statements and the wherewithal, through his own financial advisors, to ascertain the financial viability of that entity. Thus, as plaintiffs had the means to ascertain the truth of the alleged representations, they cannot prevail in an action for fraud.")); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER & KEETON ON LAW OF TORTS § 108, p. 751 (5th ed. 1984) ("[O]ne who has special knowledge, experience and competence may not be permitted to rely on statements for which the ordinary man might recover, and . . . one who has acquired expert knowledge concerning the matter dealt with may be required to form his own judgment, rather than take the word of the defendant").

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 13B

A sophisticated investor that is aided by sophisticated advisors in a significant transaction has a duty to perform reasonable due diligence as to available information in order for its reliance on a misrepresentation to be justifiable. That is, CPH was required to use reasonable due diligence in investigating the transaction and may not recover for fraudulent misrepresentations the falsity of which would have been apparent had the proper investigation been completed.

Offered as substitute for Plaintiff's Proposed Instruction No. 8

[Proposed as an alternative to Defendant's Proposed Instruction 13A if 13A is not given]

Source: M/I Schottenstein Homes, Inc. v. Azam, 813 So. 2d 91, 93 (Fla. 2002) ("where one has an opportunity to make a cursory examination or investigation and does not do so, he cannot recover"); L & L Doc's, L.L.C. v. Florida Div. Of Alcoholic Beverages And Tobacco, 882 So. 2d 512, 515 (Fla. 4th DCA 2004) ("Without admitting that there was a misrepresentation, seller argues that, in any event, the buyers were not justified in relying upon a misrepresentation which they knew or should have known, with the exercise of some diligence, was false. We agree."); Hillcrest Pacific v. Yamamura, 727 So. 2d 1053, 1058 (Fla. 4th DCA 1999) ("the express language of the Agreement and other exhibits ... demonstrate that Pacific did not reasonably rely upon any material misrepresentations made by the appellees. Furthermore, as stated above, the Agreement provided inspection rights and ample opportunity for Pacific to visit the Property and audit the financial records. Pacific could have ascertained the value of the property, if they were dissatisfied with the quoted or negotiated price. They were under no obligation to purchase the Property and could have canceled the contract or revised its terms."); Wasser v. Sasoni, 652 So. 2d 411, 412-13 (Fla. 3d DCA 1995) ("We recognize that exceptions to the general rule could exist under certain circumstances, for example, where specific misrepresentations regarding a latent defect are made to a negligent purchaser . . . . However, there is no exception where the parties are equally sophisticated, and have an equal opportunity to discover a defect."); Rotterdam Ventures v. Ernst & Young LLP, 752 N.Y.S.2d 746, 749 (N.Y. App. Div. 2002) (holding that where a sophisticated party "plainly had both access to the relevant Amnex

financial statements and the wherewithal, through his own financial advisors, to ascertain the financial viability of that entity. Thus, as plaintiffs had the means to ascertain the truth of the alleged representations, they cannot prevail in an action for fraud.")); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER & KEETON ON LAW OF TORTS § 108, p. 751 (5th ed. 1984) ("[O]ne who has special knowledge, experience and competence may not be permitted to rely on statements for which the ordinary man might recover, and . . . one who has acquired expert knowledge concerning the matter dealt with may be required to form his own judgment, rather than take the word of the defendant").

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 14

A sophisticated investor that is aided by sophisticated advisors in a significant transaction may not justifiably rely on a misrepresentation if the exercise of some diligence would have revealed the representation to be false.

Offered as substitute for Plaintiff's Proposed Instruction No. 8

[Proposed as an alternative if Defendant's Proposed Instructions 13A-B are not given]

Source: L&L Doc's, LLC v. Florida Div. of Alcoholic Beverages & Tobacco, 882 So. 2d 512, 515 (Fla. 4th DCA 2004) (holding in light of circumstances that party was "not justified in relying upo[n] misrepresentation[s] which they knew or should have known, with the exercise of some diligence, was false") (emphasis added); Hillcrest Pac. Corp. v. Yamamura, 727 So. 2d 1053, 1057-58 (Fla. 4th DCA 1999) (holding that a "sophisticated developer in the business of investing millions of dollars in commercial property" did not "reasonably rely upon any material misrepresentations" made by real estate consultants about value of golf course, where sales agreement provided inspection rights and ample opportunity for developer to visit property and "audit the financial records"); see also Nicholson v. Ariko, 539 So. 2d 1141, 1142 (Fla. 5th DCA 1989) (plaintiff did not reasonably rely on representations of his business partner concerning terms of partnership agreement, where there was "no basis" in the record "to explain why [the plaintiff], an experienced business man, did not insist on a copy of the [agreement] and read it for himself"); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER & KEETON ON LAW OF TORTS § 108, p. 751 (5th ed. 1984) ("[O]ne who has special knowledge, experience and competence may not be permitted to rely on statements for which the ordinary man might recover, and . . . one who has acquired expert knowledge concerning the matter dealt with may be required to form his own judgment, rather than take the word of the defendant").

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 15

CPH may not blindly rely upon a misrepresentation the falsity of which would be apparent it if it had utilized its opportunity to make a cursory examination or investigation. In determining whether falsity was obvious to CPH, you should consider the totality of the circumstances, including the type of information, the nature of the communication between the parties, the relative positions of the parties, and whether CPH possessed any special knowledge, experience, or competence.

[Proposed as an alternative if the Court does not give Defendant's Proposed Instructions Nos. 13A-B or 14]

Source: *Besett v. Basnett*, 389 So. 2d 995, 997 (Fla. 1980) (plaintiff "cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation" (quoting Restatement (Second) of Torts § 541 cmt. a)); *M/I Schottenstein Homes, Inc. v. Azam*, 813 So. 2d 91, 95 (Fla. 2002) ("Whether reliance is justifiable involves "a consideration of the totality of the circumstances surrounding the type of information, the nature of the communication between the parties, and the relative positions of the parties."); *Wasser v. Sasoni*, 652 So. 2d 411, 413 (Fla. 3d DCA 1995) ("[A] sophisticated purchaser of commercial property who agreed to an 'as is' purchase contract, had ample opportunity to conduct inspections, and could have discovered an alleged defect through the exercise of ordinary diligence, may be disgruntled, but does not have a cause of action for fraud."); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER & KEETON ON LAW OF TORTS § 108, p. 751 (5th ed. 1984) ("[O]ne who has special knowledge, experience and competence may not be permitted to rely on statements for which the ordinary man might recover, and . . . one who has acquired expert knowledge concerning the matter dealt with may be required to form his own judgment, rather than take the word of the defendant").

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 16

One who has special knowledge, experience and competence may not be permitted to rely on statements for which the ordinary person might recover. One who has acquired expert knowledge concerning the matter dealt with may be required to form his own judgment, rather than take the word of the defendant.

Source: W. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER & KEETON ON LAW OF TORTS § 108, p. 751 (5th ed. 1984) ("[O]ne who has special knowledge, experience and competence may not be permitted to rely on statements for which the ordinary man might recover, and . . . one who has acquired expert knowledge concerning the matter dealt with may be required to form his own judgment, rather than take the word of the defendant").

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 17

A fraudulent statement is a legal cause of loss or damage if the loss or damage is a direct and natural result of the fraud. If the loss or damage was caused by a factor other than the alleged fraud, such as changes in general market conditions, industry-specific or firm-specific conditions, or actions by other actors unrelated to the fraud, then the fraud was not a legal cause of the loss or damage.

Source: Florida Standard Jury Instructions in Civil Cases § 5.1 (2004) (adapted); Florida Standard Jury Instructions in Civil Cases MI § 8.1 (2004) (adapted); *Simon v. Celebration Co.*, 883 So. 2d 826, 833 (Fla. 5th DCA 2004) ("Actual damages is an element of an action for fraud . . . . Moreover, fraud cannot form the basis for recovery of damages unless the damages directly arise from the fraud and are causally connected to the fraud."); *Maliner v. Wachovia Bank*, No. 04-60237CIV, 2005 WL 670293, at *7 (S.D. Fla. Mar. 1, 2005) ("Of course, if the loss is caused by an intervening event, like a general fall in the price of . . . stocks, the chain of causation will not have been established.") (quoting *Emergent Capital Inv. Mgmt. LLC v. Stonepath Group*, 343 F.3d 189, 197 (2d Cir. 2003)); *IMC Phosphates Co. v. Prater*, -- So. 2d --, 2005 WL 548232, at *6 (Fla. 1st DCA Mar. 10, 2005) (holding employer not liable for injury that "is the result of an independent intervening cause attributable to claimant's own intentional conduct"); *Dura Pharms. v. Broudo*, No. 03-932, slip op. at 5 (U.S. Apr. 19, 2005) (securities-fraud plaintiff may not recover for losses that "reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of [the] lower price"); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER & KEETON ON LAW OF TORTS § 110, p. 767 (5th ed. 1984) (losses do "not afford any basis for recovery" if "brought about by business conditions or other factors"), *quoted in Dura Pharms. v. Broudo*, No. 03-932, slip op. at 7 (U.S. Apr. 19, 2005).

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 18.

If the greater weight of the evidence does support the claims of Coleman (Parent) Holdings, Inc., then you shall consider the defense of waiver raised by Morgan Stanley & Co. Incorporated.

Source: Florida Standard Jury Instruction 3.8(a).

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 19.

The issues for your determination on Morgan Stanley & Co. Incorporated's defenses of waiver are:

1) whether CPH intentionally and voluntarily gave up any claims it might have against Sunbeam or Morgan Stanley for fraud by agreeing to the terms of the Merger Agreements, which provided that the Agreements superseded all prior agreements and understandings, oral or written, with respect to the subject of the Agreements, and by failing to take advantage of the "adverse material effect" and "right to examine the books" provisions of those same agreements; or,

2) whether CPH, with knowledge of the Sunbeam fraud and Morgan Stanley's alleged participation in it, intentionally and voluntarily gave up any claims it might have against Sunbeam or Morgan Stanley by agreeing to a settlement with Sunbeam and taking over the management and operations of Sunbeam.

If the greater weight of the evidence supports the defense of waiver, your verdict must be for Morgan Stanley & Co. Incorporated.

Source: Leonardo v. State Farm Fire and Cas. Co., 675 So. 2d 176, 178 (Fla. 4th DCA 1996) (the requirements of the doctrine of waiver are (1) the existence at the time of the waiver of a right, privilege, advantage, or benefit which may be waived; (2) the actual or constructive knowledge of the right; and (3) the intention to relinquish the right); Bush v. Ayer, 728 So. 2d 799, 801 (Fla. 4th DCA 1999) ("A waiver may be express or implied, and may be inferred from conduct or acts that warrant the inference that a known right has been relinquished.")

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 20.

A waiver is the intentional and voluntary relinquishment of a known right or conduct that implies the relinquishment of a known right.

Source: Leonardo v State Farm Fire and Cas. Co., 675 So. 2d 176, 178 (Fla. 4th DCA 1996).

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 21.

If the greater weight of the evidence does not support Morgan Stanley's defense and the greater weight of the evidence does support the claims of CPH, then your verdict should be for Coleman (Parent) Holdings, Inc. in the total amount of its damages.

Source: Florida Standard Jury Instruction 3.8.

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 22.

If you find for Morgan Stanley & Co. Inc., you will not consider the matter of damages. But, if you find for Coleman (Parent) Holdings, Inc., you should award Plaintiff an amount of money that the greater weight of the evidence shows will fairly and adequately compensate Coleman (Parent) Holdings, Inc. for the damages legally caused by the actions of Morgan Stanley in aiding and abetting Sunbeam's fraud or conspiring with Sunbeam to commit fraud.

Offered as substitute for Plaintiff's Proposed Instructions No. 12-14

Source:

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 23.

Damages in this case, if any, must be determined as follows:

The measure of damages is the difference between the value of what CPH would have received had the representations CPH relied upon been accurate, and the value of what CPH actually received.

CPH must prove by the greater weight of the evidence,

First, what the value of the Sunbeam stock would have been, on the date the transaction occurred, if Sunbeam's and Morgan Stanley's representations regarding Sunbeam's financial circumstances had been true.

Second, CPH must prove by the greater weight of the evidence the actual value of the Sunbeam stock on the same date – that is, on the date of the transaction.

The difference between the first and second numbers constitutes the damages to be awarded.

If the greater weight of the evidence does not support CPH's proof of damages, you should not award any damages and your verdict must be for Morgan Stanley.

Offered as substitute for Plaintiff's Proposed Instructions No. 12-14

Source: Kind v. Gittman, 889 So. 2d 87, 90 (Fla. 4th DCA 2004) ("[T]he 'benefit of the bargain' [standard] ... awards as damages the difference between the actual value of the property and its value had the alleged facts regarding it been true." (quoting Martin v. Brown, 566 So. 2d 890, 891-92 (Fla. 4th DCA 1990)); Totale, Inc. v. Smith, 877 So. 2d 813, 815 (Fla. 4th DCA 2004) ("In cases involving a fraudulent sale of stock, 'under either measure of damages, plaintiffs must prove the actual value of the stock at the time of purchase.'"), receded from on other grounds by Teca, Inc. v. WM-TAB, Inc., 726 So. 2d 828 (Fla. 4th DCA 1999) (en banc)).

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 24.

In calculating damages, you may only consider losses that directly resulted from, and were legally caused by, the fraud. Losses caused by factors other than the alleged fraud, such as changes in general market conditions, industry-specific or firm-specific conditions, or actions unrelated to the fraud by other actors, may not be included in your damages award.

Offered as substitute for Plaintiff's Proposed Instructions Nos. 12-14.

Source: *Nerbonne, N.V. v. Lake Bryan Int'l Properties*, 689 So. 2d 322, 325 (Fla. 5th DCA 1997) (if conspiracy to defraud is proven, plaintiff is entitled to recover only those damages that result from the wrongful acts); *Maliner v. Wachovia Bank*, No. 04-60237CIV, 2005 WL 670293, at *7 (S.D. Fla. Mar. 1, 2005) ("Of course, if the loss is caused by an intervening event, like a general fall in the price of . . . stocks, the chain of causation will not have been established.") (quoting *Emergent Capital Inv. Mgmt. LLC v. Stonepath Group*, 343 F.3d 189, 197 (2d Cir. 2003)); *IMC Phosphates Co. v. Prater*, -- So. 2d --, 2005 WL 548232, at *6 (Fla. 1st DCA Mar. 10, 2005) (holding employer not liable for injury that "is the result of an independent intervening cause attributable to claimant's own intentional conduct"); *Dura Pharms. v. Broudo*, No. 03-932, slip op. at 5 (U.S. Apr. 19, 2005) (securities-fraud plaintiff may not recover for losses that "reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of [the] lower price"); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER & KEETON ON LAW OF TORTS § 110, p. 767 (5th ed. 1984) (losses do "not afford any basis for recovery" if "brought about by business conditions or other factors"), *quoted in Dura Pharms. v. Broudo*, No. 03-932, slip op. at 7 (U.S. Apr. 19, 2005).

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 25.

Post-transaction appreciation or depreciation of the property that is the subject of the false representation should not alter or affect the computation of damages.

Source: Totale, Inc. v. Smith, 877 So. 2d 813, 815 (Fla. 4th DCA 2004)

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 26.

The amount of damages must be proved with reasonable certainty. If you cannot determine the amount of damages without speculation, guesswork, or conjecture, you must return a verdict in favor of Morgan Stanley.

Source: *Du Puis v. 79th Street Hotel, Inc.*, 231 So. 2d 532, 536 (Fla. 3d DCA 1970) ("damages under the 'benefit of the bargain' rule" are available only if "proved with sufficient certainty"): *Totale v. Smith*, 877 So. 2d 813, 815 (Fla. 4th DCA 2004) (same); *Himes v. Brown & Co. Securities Corp.*, 518 So. 2d 937, 938 (Fla. 3d DCA 1987) ("In Florida, unless the fact-finder is presented with evidence which will enable it to determine damages for lost profits with a reasonable degree of certainty, rather than by means of speculation and conjecture, the claimant may not recover such damages.").

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 27.

It is the duty of a plaintiff to use reasonable care to reduce as much as reasonably possible the loss or damage, if any, it sustains. A person may not recover for damages suffered as a result of fraud which it permitted to go on without using reasonable care to prevent or diminish it. CPH was required to act with reasonable promptness and in good faith and to do all that was reasonable under the circumstances to try to avoid or minimize the resulting loss or harm. If you find from the greater weight of the evidence that CPH, by using reasonable care could have lessened the loss or damage, if any, it suffered in its sale of its stake in Coleman to Sunbeam, then Morgan Stanley cannot be charged with liability for any such loss or damage resulting from CPH's failure to use such reasonable care.

Offered as substitute for Plaintiff's Proposed Instruction No. 12-14

Source: Eleventh Circuit Pattern Jury Instructions (Civil Cases), Supplemental Damages Instructions – Duty to Mitigate § 1.1 (2000) (adapted); State ex rel. Dresskell v. City of Miami, 13 So. 2d 707, 709 (Fla. 1943) (requirement to mitigate damages "finds its application in virtually every type of case in which the recovery of a money judgment or award is authorized. It addresses itself to the equity of the law that a plaintiff should not recover for those consequences of defendant's act which were readily avoidable by the plaintiff.") (internal citations omitted); Hilsenroth v. Kessler, 446 So. 2d 147, 150 n.3 (Fla. 3d DCA 1984) (a fraud victim is "not relieve[d] . . . of the duty to keep his damages as low as reasonably possible. Accordingly, . . . the trial court is free to apply the doctrine of mitigation of damages, if applicable.")

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 28.

Of course, the fact that I have given you instructions concerning the issue of Plaintiff's damages should not be interpreted in any way as an indication that I believe that CPH should, or should not, prevail in this case.

Any verdict you reach in the jury room must be unanimous. In other words, to return a verdict you must all agree. Your deliberations will be secret; you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case do not hesitate to re-examine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

Remember, that in a very real way you are judges--judges of the facts. Your only interest is to seek the truth from the evidence in the case.

Offered as substitute for Plaintiff's Proposed Instruction No. 15

Source: Eleventh Circuit Pattern Jury Instructions (Civil)—Basic Instructions § 7.1.

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 29

In addition to deciding whether Plaintiff CPH has proved reliance and damages by the greater weight of the evidence, you will also determine whether Plaintiff CPH has proved reliance and damages by clear and convincing evidence. That additional finding is necessary in order to determine whether there will be a second phase of this trial related to punitive damages.

"Clear and convincing evidence" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. In contrast, "clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

Source: Fla. Std. Jury Instr. PD - Modified

GIVEN _____

DENIED _____

[Morgan Stanley proposes this instruction only to the extent that the Court determines that, for purposes of determining whether there should be a Phase II, reliance and damages may be determined during Phase I under the clear-and-convincing evidence standard; only to the extent that the Court declines to permit Morgan Stanley to fully litigate all issues in Phase II, including falsity, intent, conspiracy, and corporate liability for punitive damages; and only to the extent not inconsistent with and without prejudice to Morgan Stanley's right and ability to litigate all *other* issues relating to entitlement to punitive damages, other than reliance and damages, during Phase II.]

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 30

In reaching your verdict, you are not to be swayed from the performance of your duty by prejudice, sympathy or any other sentiment for or against any party. Your verdict must be based on the evidence that has been received and the law on which I have instructed you.

Reaching a verdict is exclusively your job. I cannot participate in that decision in any way. You should not speculate about how I might evaluate the testimony of any witness or any other evidence in this case, and you should not think that I prefer one verdict over another. Therefore, in reaching your verdict, you should not consider anything that I have said or done, except for my specific instructions to you.

Offered as substitute for Plaintiff's Proposed Instruction No. 15

Source: Florida Standard Jury Instruction 7.1.

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 31

When you retire to the jury room, you should select one of your number to act as foreperson to preside over your deliberations and sign your verdict. Your verdict must be unanimous, that is, your verdict must be agreed to by each of you.

You will be given one form of verdict, which I shall now read to you: (read form of verdict)

When you have agreed on your verdict, the foreperson, acting for the jury, should date and sign the appropriate form of verdict. You may now retire to consider your verdict.

Source: Florida Standard Jury Instruction 7.2.

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION. Additional Instructions A1.

The issues for your determination on the claim of Coleman (Parent) Holdings, Inc. that Morgan Stanley & Co. Incorporated aided and abetted Sunbeam in committing a fraud upon Coleman (Parent) Holdings, Inc. are whether:

1) Sunbeam committed a fraud against CPH by knowingly making materially false statements and misrepresentations to CPH;

2) CPH actually and justifiably relied on these statements to its detriment;

3) Morgan Stanley had actual knowledge that Sunbeam was defrauding CPH;

4) With knowledge of Sunbeam's allegedly fraudulent scheme, Morgan Stanley provided substantial assistance in the commission of the fraud; and

5) The fraud was a legal cause of damage sustained by CPH.

If the greater weight of the evidence does not support the aiding and abetting claim of Coleman (Parent) Holdings, Inc. against Morgan Stanley & Co. Incorporated, your verdict should be for Morgan Stanley & Co. Incorporated on this claim.

Offered as substitute for Plaintiff's Proposed Instruction No. 7

Source: Woods v. Barnett Bank of Fort Lauderdale, 765 F.2d 1004, 1009 n.8 (11th Cir. 1985) (aiding-and-abetting securities fraud requires showing that (1) another party committed an independent violation of the securities laws; defendant knew that his role was part of an overall activity that was improper or illegal; and defendant provided knowing and substantial assistance in the conduct that constituted the violation); Schneberger v. Wheeler, 859 F.2d 1477, 1480 (11th Cir. 1988) ("Knowledge of both the

fraudulent scheme and of one's own role in that scheme is required to satisfy the test for aider and abettor liability.").

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION. Additional Instruction A2.

The issues for your determination on the claim of Coleman (Parent) Holdings, Inc. that Morgan Stanley & Co. Incorporated conspired with Sunbeam to commit a fraud upon Coleman (Parent) Holdings, Inc. are whether:

1) Sunbeam committed a fraud against CPH by knowingly making materially false statements and misrepresentations to CPH;

2) CPH actually and justifiably relied on these statements to its detriment;

3) Morgan Stanley entered into an agreement with Sunbeam to defraud CPH;

4) Morgan Stanley had actual knowledge of the fraud, and shared with Sunbeam a common objective to commit fraud;

5) Morgan Stanley or Sunbeam engaged in at least one act in furtherance of the conspiracy; and

6) the fraud was a legal cause of damage sustained by CPH.

If the greater weight of the evidence does not support the conspiracy claim of Coleman (Parent) Holdings, Inc. against Morgan Stanley & Co. Incorporated, your verdict should be for Morgan Stanley & Co. Incorporated on this claim.

Offered as substitute for Plaintiff's Proposed Instruction No. 7

Source: Lipsig v. Ramlawi, 760 So. 2d 170, 180 (Fla. 3d DCA 2000) (To state a cause of action for conspiracy, a plaintiff must allege "(a) an agreement between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts done under the conspiracy."); Raimi v. Furlong, 702 So. 2d 1273, 1284 (Fla. 3d DCA 1997) ("A civil conspiracy requires: (a) an agreement between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts done under the conspiracy.").

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 32.

Both Plaintifff CPH and Defendant Morgan Stanley, are corporations. Because a corporation is a fictional being, a creation of law, with neither will, purpose nor animation, it can only act through its officers, directors or managing agents.

GIVEN _____

DENIED _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 33

In general, a corporation is only responsible for the acts of its officers, directors and managing agents that are made within the scope of their duties.

Source: *Jacksonville American Pub. Co. v Jacksonville Paper Co.*, 143 Fla. 835, at 846, 197 So. 672 (Fla. 1940); Bankers Multiple Line Ins. Co. v. Farish, 464 So. 2d 530 (Fla. 1985)

GIVEN _____

DENIED _____

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

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

CASE NO: 2003 CA 005045 AI

MATERIALS REDACTED WITHOUT PRIOR DETERMINATION OF CONFIDENTIALITY BY COURT

PLAINTIFF'S OPPOSITION TO MORGAN STANLEY'S MOTION FOR CLARIFICATION OF THE ADMISSIBILITY OF THE TESTIMONY OF PROFESSOR MARK GRINBLATT

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") objects to the motion of defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") seeking "clarification" of this Court's Orders concerning the testimony of Professor Mark Grinblatt. The motion is not really a motion for clarification at all. Rather, it is a motion for reconsideration of the Court's March 23, March 28, and April 15, 2005 Orders regarding Grinblatt's testimony. In the March 23 Order, the Court granted in part and denied in part Morgan Stanley's motion for leave to file a supplemental expert report by Grinblatt. This Court expressly limited Grinblatt's damage analysis to one cell in the supplemental report. In the March 28 and April 15 Orders, the Court further held that, even as to that cell, Morgan Stanley must lay a factual predicate before any damage calculation can be introduced — a factual predicate that either (i) CPH could have sold its Sunbeam stock by the date used, or (ii) an appropriate "liquidity discount" existed. Morgan Stanley has not satisfied either predicate here.

As shown below, there is no basis for reconsidering those rulings.

Argument

I. This Court Properly Rejected Grinblatt's Supplemental Report To The Extent That It Was Based On Calculations Outside A Single Cell Of His Damages Analysis.

In its March 23, 2005 Order, this Court granted Morgan Stanley's motion for leave to file a supplemental report by Grinblatt, but ruled that only one cell in the supplemental report — the "Normal Investor/Full Restatement" cell — was relevant (Ex. A, 3/23/05 Order at 1, emphasis added):

> [I]t is ORDERED AND ADJUDGED that the Motion is Granted, in part, and Denied, in part. The portions of Dr. Grinblatt's Supplemental Expert Report that express benefit of the bargain damages based on the cell representing the intersection of the Normal Investor for the expected value component and the Full Restatement for the true value component are deemed properly filed. This ruling is without prejudice to CPH's right to present argument to the Court or request to conduct a voir dire examination of Dr. Grinblatt outside the jury's presence seeking to establish that other points in the Supplemental Expert Report are not proper.

In reaching that result, this Court concluded that the other cells in the supplemental expert report were irrelevant under Florida law and under the Court's prior orders. Grinblatt's supplemental report presented cells representing the intersection of three possible "front end" scenarios formulated by Grinblatt with three possible "back end" scenarios. The three "front end" scenarios were that CPH should be treated (i) as a "Normal Investor"; (ii) as an investor charged with knowing that Sunbeam's "First Quarter Results" were false; or (iii) as an investor charged with knowing that Sunbeam's "Turnaround" story was false. The three "back end" scenarios were that Morgan Stanley was responsible for the portion of the fraud (i) concerning the "First Quarter Results," which Grinblatt assumed was disclosed by May 15, 1998; (ii) concerning the "False Turnaround," which Grinblatt assumed was disclosed by June 16, 1998; or (iii) concerning the "Full Restatement" of Sunbeam's financials, [redacted] (Ex. B, Grinblatt Supp. Rep. at 12-13, 34.) This

Court permitted only one cell — the "Normal Investor/Full Restatement" cell — to be "deemed properly filed." (Ex. A, 3/23/05 Order at 1.)

In its motion for "clarification," Morgan Stanley "acknowledges that the bottom two rows of Exhibit 7 are not admissible" under the Court's rulings (Mtn. 2 n.1) — that is, the rows based on Grinblatt's alternative "back end" scenarios premised on the theory that Morgan Stanley can be held liable for something less than Sunbeam's entire "big fraud." However, Morgan Stanley contends that the "top row of Exhibit 7" — that is, damage calculations based on all three of Morgan Stanley's "front end" numbers — remains admissible. (Mtn. 3.)

In making that contention, Morgan Stanley stretches the Court's March 23 Order beyond recognition. The Court allowed only one of those three cells to be admitted. The other two cells were properly rejected as incorrect as a matter of law. [redacted] (Ex. B, Grinblatt Supp. Rep. at 11) — [redacted] *Id.* at 10. [redacted] *Id.* at 11. [redacted] *Id.*

This Court properly held that Grinblatt's "First Quarter Results" and "False Turnaround" scenarios are contrary to Florida law. Under Florida law, CPH was allowed to rely on false statements unless CPH knew that the statements were false or they were obviously false. *See,*

e.g., Besett v. Basnett, 389 So. 2d 995, 998 (Fla. 1980). Grinblatt's models contradict that legal principle. Grinblatt's "First Quarter Results" and "False Turnaround" scenarios are nothing more than New York law dressed up as purported economic analysis.

In its motion for clarification, Morgan Stanley now comes up with yet another theory as to why those additional "front end" cells nevertheless should be admissible. According to Morgan Stanley, the "front end" numbers in those cells should be viewed not as reflecting the nature of the fraud in which Morgan Stanley participated (that is, the "little fraud" versus the "big fraud"), but rather as reflecting "the degree on which CPH relied on Sunbeam's allegedly false statements." (Mtn. 3.) That argument by Morgan Stanley is baseless.

First, there is only one fraud here — the "big fraud." Months ago, CPH committed to the "big fraud" case against Morgan Stanley. That case alleges that Morgan Stanley aided and abetted and conspired with Sunbeam to engage in the "big fraud." Put simply, CPH either relied on the "big fraud" or it did not. Morgan Stanley cannot whittle the case back to a "little fraud" case via purported "degrees" of reliance.

Second, Morgan Stanley is attempting to confuse the issues of reliance and damages. Grinblatt is Morgan Stanley's damages expert. If the jury reaches the issue of damages, the jury necessarily must have found in favor of CPH on the issue of reliance. Morgan Stanley should not be permitted to use Grinblatt's "First Quarter Results" and "False Turnaround" scenarios as backdoor attacks on reliance — based upon legal principles that the Court has rejected.

In sum, this Court should reject Morgan Stanley's effort to obtain reconsideration of the March 23 Order. Grinblatt's "front end" numbers in the "First Quarter Results" and "False Turnaround" cells should not be introduced. The only "front end" number that can be introduced is the one in the "Normal Investor" cell.

II. Morgan Stanley Has Not Presented The Factual Predicate Necessary For Calculating The "True Value Component" Of Sunbeam Stock.

Even with regard to the one cell that this Court held was "deemed properly filed" (Ex. A, 3/23/05 Order at 1), Morgan Stanley has not complied with the Court's other Orders requiring that Morgan Stanley lay a factual predicate before any damage calculation can be introduced. The required factual predicate is either that (i) CPH could have sold its Sunbeam stock by the date used, or (ii) an appropriate "liquidity discount" existed. Here, Sunbeam has not met either predicate. In other words, Morgan Stanley has not established the predicate for using the "back end" number for the "Full Restatement" scenario in Grinblatt's supplemental report.

In its March 28, 2005 Order, this Court granted in part CPH's Motion in Limine No. 27, which concerned whether the federal securities laws prohibited CPH from selling unregistered Sunbeam shares. The Court held that CPH could not sell any Sunbeam shares until November 1999 at the earliest and that any expert testimony regarding damages had to be based upon a "sufficient evidentiary predicate" that the stock "could be sold as of the date to be used" (Ex. C, 3/28/05 Order at 1-2):

> [I]t is ORDERED AND ADJUDGED that Plaintiff's Motion in Limine No. 27 for a Finding as a Matter of Law that the Federal Securities Laws Prohibited Plaintiff from Selling Unregistered Sunbeam Stock is Granted, in part. The Court concludes that, as a matter of law, the restricted Sunbeam stock received by CPH in the transaction under review could not be sold by CPH under Rule 144A; and that, as a matter of law, under Rule 144, CPH could sell no more than one million shares per quarter, beginning November 25, 1999. It is further
>
> ORDERED AND ADJUDGED that . . . [n]o expert may testify as to damages based on the value of the Sunbeam stock as of a specific date without first seeking a ruling from the Court that a sufficient evidentiary predicate to support a conclusion that the stock could be sold as of the date to be used has been laid.

In its April 15, 2005 Order, the Court amended the last sentence of the March 28, 2005 Order to permit Morgan Stanley to establish the factual predicate not only through proof that the

stock could have been sold, but also through proof of an appropriate "liquidity discount" (Ex. D, 4/15/05 Order at 1, emphasis added):

> The Court's Order on Plaintiff's Motion in Limine No. 27 for a Finding as a Matter of Law that the Federal Securities Laws Prohibited Plaintiff from Selling Unregistered Sunbeam Stock is amended to provide that no expert may testify as to damages based on the value of the Sunbeam stock as of a specific date without first seeking a ruling from the Court that a sufficient evidentiary predicate to support a conclusion that the stock could be sold as of the date to be used has been laid or that an appropriate liquidity discount has been established, is not required, or is implicit in the figure offered. This Order is without prejudice to CPH's right to claim that the stated value of the stock for one purpose is not relevant to determine its actual value for purposes of computing damages.

Here, Morgan Stanley has not satisfied either predicate.

The date predicate. Morgan Stanley has not met the date predicate — the requirement that "the stock could be sold as of the date to be used" (Ex. D, 4/15/05 Order at 1) — because [redacted] (Ex. B, Grinblatt Supp. Rep. at 13, 27.) [redacted] (Ex. E, 4/4/2005 Grinblatt Dep. at 238-39.) But he used those dates anyway.

That approach cannot be squared with this Court's ruling that CPH was legally prohibited from selling its Sunbeam stock until at least November 25, 1999. (Ex. C, 3/28/05 Order at 1.) Therefore, Grinblatt's "back end" damage calculation is irrelevant because it is tied to dates when CPH could not sell its Sunbeam shares.

The "liquidity discount" predicate. Morgan Stanley also has not met the alternative "liquidity discount" predicate. Grinblatt's analysis cannot meet that predicate because Grinblatt has opined — twice — that a "liquidity discount" approach is not proper in his view. In his

opening report, Grinblatt stated that "modern utility theory suggests that the [liquidity] discount that should be applied to CPH's holdings of Sunbeam should be close to zero." (Ex. F, Grinblatt Report at 45, n.58.) [redacted] (Ex. B, Grinblatt Supp. Rep. at 48.) [redacted] (Ex. B, Grinblatt Supp. Rep. at 48-49.) [redacted] *Id.* [redacted] *Id.* at 48.

In sum, even as to the single cell that the Court permitted, Morgan Stanley has not presented the factual predicate necessary for the "back end" or "true value component" of Sunbeam stock contained in Grinblatt's supplemental report. Morgan Stanley should be permitted to introduce only Grinblatt's front end valuation based on the Normal Investor scenario — that is, his calculation based on the closing price on March 30, 1998 of $43.94.

Conclusion

For the foregoing reasons, Morgan Stanley's motion for "clarification" should be denied.

Dated: May 6, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: Jerold S. Solovy / JTS
One of Its Attorneys

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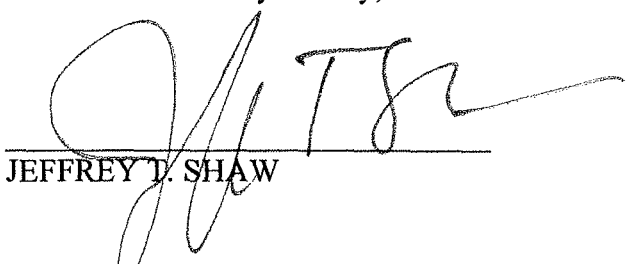
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 6th day of May, 2005.



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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL GRINBLATT REPORT

THIS CAUSE came before the Court March 21, 2005 on Morgan Stanley's Motion for Leave to File Supplemental Grinblatt Report, with both parties well represented by counsel. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part, and Denied, in part. The portions of Dr. Grinblatt's Supplemental Expert Report that express benefit of the bargain damages based on the cell representing the intersection of the Normal Investor for the expected value component and the Full Restatement for the true value component are deemed properly filed. This ruling is without prejudice to CPH's right to present argument to the Court or request to conduct a voir dire examination of Dr. Grinblatt outside the jury's presence seeking to establish that other points in the Supplemental Expert Report are not proper.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ___ day of March, 2005.

SIGNED & DATED
MAR 23 2005

_____
ELIZABETH T. MAASS
Circuit Court Judge

JUDGE ELIZABETH T. MAASS

EXHIBIT
A
16div-016640

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Rebecca Beynon, Esq.
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1615 M Street, NW, Suite 400
Washington, DC 20036

Exhibit Excluded Without Prior Determination of Protectability By Court

16div-016642

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON PLAINTIFF'S MOTION IN LIMINE NO. 27 FOR A FINDING AS A MATTER OF LAW THAT THE FEDERAL SECURITIES LAWS PROHIBITED PLAINTIFF FROM SELLING UNREGISTERED SUNBEAM STOCK

THIS CAUSE came before the Court March 24, 2005 on Plaintiff's Motion in Limine No. 27 for a Finding as a Matter of Law that the Federal Securities Laws Prohibited Plaintiff from Selling Unregistered Sunbeam Stock, which the Court elects to treat as including a Motion to Compel Required Pre-Trial Disclosure, with both parties well represented by counsel. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Plaintiff's Motion in Limine No. 27 for a Finding as a Matter of Law that the Federal Securities Laws Prohibited Plaintiff from Selling Unregistered Sunbeam Stock is Granted, in part. The Court concludes that, as a matter of law, the restricted Sunbeam stock received by CPH in the transaction under review could not be sold by CPH under Rule 144A; and that, as a matter of law, under Rule 144, CPH could sell no more than one million shares per quarter, beginning November 25, 1999. It is further

ORDERED AND ADJUDGED that CPH's Motion to Compel is Granted. Within 5 business days, CPH shall serve its supplemental disclosure, detailing facts or opinions to be testified to or supported by documentary evidence to support its position that the Sunbeam shares could not have been sold by CPH, as a matter of fact and as a matter of law, prior to the shares' having become worthless in the market place. MS & Co. shall serve its

EXHIBIT
C
6div-016643

supplemental disclosure, detailing facts or opinions to be testified to or supported by documentary evidence to support its position that the Sunbeam shares could have been sold by CPH, as a matter of fact and as a matter of law, prior to the shares' having become worthless in the marketplace. These disclosures are without prejudice to either side's right to seek to have evidence excluded consistent with the disclosures at trial. No expert may testify as to damages based on the value of the Sunbeam stock as of a specific date without first seeking a ruling from the Court that a sufficient evidentiary predicate to support a conclusion that the stock could be sold as of the date to be used has been laid.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 28 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION FOR CLARIFICATION OR RECONSIDERATION OF THE COURT'S ORDER ON PLAINTIFF'S MOTION IN LIMINE NO. 27 FOR A FINDING AS A MATTER OF LAW THAT THE FEDERAL SECURITIES LAWS PROHIBITED PLAINTIFF FROM SELLING UNREGISTERED SUNBEAM STOCK

THIS CAUSE came before the Court April 15, 2005 on Morgan Stanley's Motion for Clarification or Reconsideration of the Court's Order on Plaintiff's Motion in Limine No. 27 for a Finding as a Matter of Law that the Federal Securities Laws Prohibited Plaintiff from Selling Unregistered Sunbeam Stock, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part. The Court's Order on Plaintiff's Motion in Limine No. 27 for a Finding as a Matter of Law that the Federal Securities Laws Prohibited Plaintiff from Selling Unregistered Sunbeam Stock is amended to provide that no expert may testify as to damages based on the value of the Sunbeam stock as of a specific date without first seeking a ruling from the Court that a sufficient evidentiary predicate to support a conclusion that the stock could be sold as of the date to be used has been laid or that an appropriate liquidity discount has been established, is not required, or is implicit in the figure offered. This Order is without prejudice to CPH's right to claim that the stated value of the stock for one purpose is not relevant to determine its actual value for purposes of computing damages.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 15 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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1615 M Street, NW, Suite 400
Washington, DC 20036

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oir ó hablar llame al 1-800-955-8771.

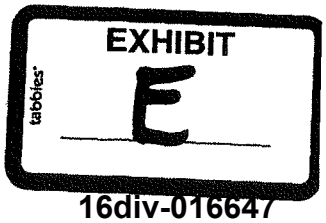
CREOLE

Si ou sé yon moun ki Infim, ki bézwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontakté koôdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro téléfonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résévwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe accommodation pour pouvoir participer á ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

Exhibit Excluded Without Prior Determination of Protectability By Court



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

'Coleman (Parent) Holdings, Inc. Plaintiff v. Morgan Stanley & Co., Inc. Defendant	Case No. 2003 CA 005045 AI

EXPERT REPORT OF PROFESSOR MARK GRINBLATT

Date:
December 17, 2004

Prepared by:

Dr. Mark Grinblatt
Professor of Finance
Anderson School at UCLA
110 Westwood Plaza
Los Angeles, CA 90095-1481
(310) 825-1098

IV.3. The Damage-Maximizing Estimate of the True Value of Sunbeam Stock Received by CPH in the Merger

(87) This section of the report estimates the true value of the Sunbeam stock received by CPH in the merger. The true value of Sunbeam stock is the market price for Sunbeam common shares that would have prevailed on March 30, 1998 if Morgan Stanley's information had been released to the market (the curative action), and the merger had been completed.[58] It is equal to the value at which Sunbeam would have traded on March 30, 1998 after all of the artificial inflation attributed to Morgan Stanley's conduct was removed. As in prior sections, whenever there is an element of uncertainty in the appropriate choice of options, I choose the option that minimizes Sunbeam's value and therefore maximizes damages for the Plaintiff, even if other more reasonable choices exist.

(88) To estimate the true value of Sunbeam on March 30, 1998, I first identify the date closest to March 30 on which Sunbeam's stock price was not artificially inflated due to Morgan Stanley's conduct. The damage maximizing choice here is May 26, 1998. I then adjust the stock price on May 26 back to March 30.

a. In this section (IV), I adopt a methodology for this adjustment that maximizes damages by attributing all of the fall in Sunbeam stock price between March 30 and May 26 to Morgan Stanley.

---

million prepayment penalty. Indenture, Coleman Escrow Corp., May 20, 1997, p. 2; Sunbeam Corp. Form 10-Q for Q2 1998, filed December 22, 1998.

58 I am ignoring any discount due to the lock-up provisions of the Merger Agreement or the fact that the Sunbeam shares were unregistered. Accounting for these issues fairly would *decrease* damages. First, modern utility theory suggests that the discount that should be applied to CPH's holdings of Sunbeam should be close to zero. Second, restrictions on unregistered stock only delay sale to the public. An active Rule 144A market exists for such shares among qualified investors. Third, CPH's overall liquidity increased in the merger transaction. Its ownership percentage of Coleman (over 80%) was much larger than its holdings in Sunbeam (14%) and, given its controlling status, would have been more difficult to sell at market prices, even accounting for the relative difference in legal restriction on sales. Fourth, any sale of the Coleman shares would have been encumbered by the debt covenants of the Holdings Notes. Fifth, a major part of the consideration received in the merger was cash and the assumption of the Holdings Notes, which clearly enhanced the liquidity of CPH's position. As such, applying the liquidity discount to every aspect of the transaction where it is a legitimate consideration would substantially reduce damage estimates for the Plaintiff.

b. Section V.3 discusses a more proper apportionment of the March 30 to May 26 fall in Sunbeam's stock price between the release of the information allegedly concealed by Morgan Stanley and the revelation of other adverse information that should not contribute to Morgan Stanley's damages.

(89) The rest of this subsection proceeds as follows. In Section IV.3.1 I discuss the concepts of "true value" and "artificial inflation" as the terms are applied to Sunbeam and how artificial inflation attributable to Morgan Stanley's alleged concealment of material information can be distinguished from artificial inflation attributable to other sources. In section IV.3.2, I provide my estimate of the true value of Sunbeam on March 30, 1998 and indicate why this estimate is biased in the direction of increasing damages for the Plaintiff.

IV.3.1. True Value and Artificial Inflation When Multiple Parties Have Liability for Damages

(90) Sunbeam traded in an efficient market, which means that, as discussed in Section III.1, the market price of Sunbeam always reflected the information available to the public about the company, including potentially false or incomplete information. False or incomplete information can artificially inflate a stock's market price. I have been asked to calculate damages attributable to Morgan Stanley and not to third parties. For purposes of this analysis I have been asked to assume that Defendant is only responsible for inflation-related damages arising from the Defendant's failure to take the curative action. Therefore, the true value of Sunbeam, for the purpose of calculating damages, is defined to be what its market price would have been in the absence of artificial inflation caused only by the Defendant's alleged malfeasance.

(91) There were at least two sources of artificial inflation in Sunbeam's stock price on March 30:

a. One source is Morgan Stanley's alleged failure to undertake the curative action and cause more accurate information about Sunbeam's first quarter sales and earnings to prevail in the market for Sunbeam stock.

b. The other source is a large number of allegedly fraudulent accounting and auditing practices perpetrated by Sunbeam's management and Arthur Andersen, including those that ultimately required Sunbeam to restate its

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING CONFIDENTIAL PROFFER REGARDING ADAM O. EMMERICH

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby files under seal the attached Defendant's Confidential Offer of Proof re: Adam O. Emmerich.

Morgan Stanley designates the following confidential portions of the sworn deposition of third-party witness Adam O. Emmerich:

9/28/04 Deposition:

(1) **[6:13-6:20]**

(2) **[7:21-8:6]**

(3) **[9:1-9:11]**

(4) **[9:25-10:3]**

(5) **[12:14-12:24]**

(6) **[29:11-29:15]**

(7) **[30:18-31:4]**

(8) **[31:8-31:24]**

(9) **[32:7-32:25]**

(10) **[35:1-37:25]**

(11) **[41:18-42:22]**

(12) **[43:18-44:11]**

(13) **[45:18-46:3]**

(14) **[47:19-48:10]**

(15) **[48:18-49:15]**

(16) **[60:18-60:24]**

(17) **[61:3-61:12]**

(18) **[61:20-62:2]**

(19) **[63:15-64:17]**

(20) **[64:21-65:1]**

(21) **[65:3-66:15]**

(22) **[66:19-66:22]**

(23) **[67:25-70:3]**

(24) **[70:20-70:22]**

(25) **[71:7-72:14]**

(26) **[73:23-74:5]**

(27) **[74:21-75:1]**

(28) **[75:16-76:4]**

(29) **[76:12-76:19]**

(30) **[77:4-77:14]**

(31) **[77:25-78:6]**

(32) **[79:17-80:7]**

(33) **[80:12-81:15]**

(34) **[81:17-81:20]**

(35) **[81:23-81:24]**

(36) **[82:18-83:13]**

(37) **[83:23-84:1]**

(38) **[84:18-84:24]**

(39) **[85:23-86:21]**

(40) **[87:13-87:20]**

(41) **[87:24-88:5]**

(42) **[88:9-88:23]**

(43) **[89:3-89:9]**

(44) **[89:12-89:18]**

(45) **[89:22-89:25]**

(46) **[90:9-90:15]**

(47) **[90:19-90:23]**

(48) **[95:1-95:4]**

(49) **[95:6-97:19]**

(50) **[98:11-99:11]**

(51) **[99:14-99:19]**

(52) **[99:21-100:11]**

(53) **[100:15-100:18]**

(54) **[106:14-110:19]**

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(57) **[113:7-114:25]**

(58) **[115:9-116:3]**

(59) **[116:5-116:12]**

(60) **[117:3-117:15]**

(61) **[118:22-119:2]**

(62) **[119:5-119:13]**

(63) **[119:15-119:19]**

(64) **[120:23-121:1]**

(65) **[121:7-121:8]**

(66) **[122:7-123:5]**

(67) **[128:13-128:23]**

(68) **[130:21-131:4]**

(69) **[131:8-131:10]**

(70) **[131:15-132:9]**

(71) **[132:17-133:2]**

(72) **[133:24-134:21]**

(73) **[135:4-135:25]**

(74) **[138:6-138:14]**

(75) **[139:1-139:10]**

(76) **[141:17-142:4]**

(77) **[142:11-142:21]**

(78) **[142:25-142:25]**

(79) **[143:2-144:1]**

(80) **[144:13-145:1]**

(81) **[147:21-147:25]**

(82) **[148:25-149:15]**

(83) **[151:17-152:14]**

(84) **[154:16-155:20]**

(85) **[156:13-157:12]**

(86) **[157:18-158:7]**

(87) **[158:24-159:1]**

(88) **[159:6-160:3]**

(89) **[162:13-162:19]**

(90) **[163:1-163:8]**

(91) **[164:9-164:24]**

(92) **[168:4-168:7]**

(93) **[168:16-168:18]**

(94) **[169:3-169:25]**

(95) **[171:8-172:4]**

(96) **[172:21-173:4]**

(97) **[173:6-173:7]**

(98) **[173:9-174:4]**

(99) **[174:6-174:11]**

(100) **[175:10-175:18]**

(101) **[175:24-176:1]**

(102) **[176:12-176:15]**

(103) **[177:6-177:10]**

(104) **[177:12-178:15]**

(105) **[178:18-179:1]**

(106) **[181:16-182:7]**

(107) **[183:18-183:24]**

(108) **[186:19-186:25]**

(109) **[187:7-187:7]**

(110) **[188:1-188:5]**

(111) **[188:9-188:15]**

(112) **[188:19-188:19]**

(113) **[188:24-189:4]**

(114) **[189:7-189:9]**

(115) **[190:2-190:7]**

(116) **[190:12-191:3]**

(117) **[192:15-192:20]**

(118) **[192:23-193:2]**

(119) **[193:18-194:1]**

(120) **[199:2-199:3]**

(121) **[199:5-199:6]**

(122) **[199:8-199:8]**

(123) **[199:10-200:8]**

(124) **[201:1-201:5]**

(125) **[201:8-201:10]**

(126) **[201:18-201:22]**

(127) **[202:6-205:10]**

(128) **[205:21-206:7]**

(129) **[206:17-207:15]**

(130) **[208:18-208:24]**

(131) **[210:15-210:15]**

(132) **[210:18-210:22]**

(133) **[211:1-211:3]**

(134) **[211:19-212:2]**

(135) **[215:3-215:8]**

(136) **[215:22-216:2]**

(137) **[216:8-216:8]**

(138) **[216:10-217:3]**

(139) **[220:9-220:12]**

(140) **[221:5-221:11]**

(141) **[221:14-221:21]**

(142) **[222:3-224:5]**

(143) **[225:6-225:16]**

(144) **[227:6-227:14]**

(145) **[227:22-229:8]**

(146) **[229:10-229:12]**

(147) **[229:14-229:24]**

(148) **[230:2-230:14]**

(149) **[231:15-231:22]**

(150) **[233:1-233:17]**

(151) **[234:4-234:12]**

(152) **[235:25-236:9]**

(153) **[236:17-237:1]**

(154) **[237:11-237:25]**

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence:

i. **MS 75/MS 75 (Deposition Exhibit Number/Trial Exhibit Number)**

ii. **MS 84/MS 84**

iii. **MS 87/MS 87**

iv. **MS 88/MS 88**

v. **MS 93/MS 93**

vi. **MS 97/MS 97**

vii. **MS 98/MS 98**

viii. **MS 112/MS 112**

ix. **MS 117/MS 117**

x. **MS 118/MS 118**

xi. **MS 119/MS 119**

xii. **MS 133/MS 133**

xiii. **MS 188/MS 188**

xiv. **MS 210/MS 210**

xv. **MS 234/MS 234**

xvi. **MS 307/MS 307**

xvii. **MS 310/MS 310**

xviii. **MS 342/MS 342**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 6 day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
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BY: _____

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING CONFIDENTIAL PROFFER REGARDING FRANK GIFFORD

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby files under seal the attached Defendant's Confidential Offer of Proof re: Frank Gifford.

Morgan Stanley designates the following confidential portions of the sworn deposition of third-party witness Frank Gifford:

7/22/04 Deposition:

(1) **[6:15-6:19]**

(2) **[7:8-7:14]**

(3) **[9:5-9:19]**

(4) **[9:21-9:21]**

(5) **[12:22-12:24]**

(6) **[13:11-14:12]**

(7) **[14:15-15:3]**

(8) **[19:1-19:5]**

(9) **[19:8-19:12]**

(10) **[20:2-21:5]**

(11) **[21:15-24:19]**

(12) **[25:12-26:7]**

(13) **[26:18-26:25]**

(14) **[28:13-28:23]**

(15) **[30:12-30:16]**

(16) **[31:21-32:14]**

(17) **[34:4-34:18]**

(18) **[38:11-38:20]**

(19) **[40:13-40:23]**

(20) **[43:13-44:1]**

(21) **[44:11-46:15]**

(22) **[46:21-47:8]**

(23) **[48:2-48:15]**

(24) **[50:9-51:14]**

(25) **[54:13-54:21]**

(26) **[57:2-57:15]**

(27) **[58:25-59:12]**

(28) **[61:21-61:24]**

(29) **[62:18-63:3]**

(30) **[63:17-63:19]**

(31) **[64:4-66:2]**

(32) **[66:14-67:4]**

(33) **[69:1-69:3]**

(34) **[69:8-69:8]**

(35) **[69:14-70:4]**

(36) **[71:4-72:10]**

(37) **[72:15-73:12]**

(38) **[74:17-74:23]**

(39) **[79:3-79:15]**

(40) **[82:5-82:8]**

(41) **[93:23-93:1]**

(42) **[98:5-99:17]**

(43) **[104:11-105:23]**

(44) **[106:14-106:18]**

(45) **[108:17-109:3]**

(46) **[109:7-109:11]**

(47) **[112:6-112:17]**

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence:

i. **MS 69/MS 69 (Deposition Exhibit Number / Trial Exhibit Number)**

ii. **MS 88/MS 88**

iii. **MS 112/MS 112**

iv. **MS 118/MS 118**

v. **MS 327/MS 327**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 6 day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING CONFIDENTIAL PROFFER REGARDING JORAM SALIG

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby files under seal the attached Defendant's Confidential Offer of Proof re: Joram Salig

Morgan Stanley designates the following confidential portions of the sworn deposition of third-party witness Joram Salig:

Deposition: 7/8/2004

(1) **[5:14-5:18]**

(2) **[6:2-6:4]**

(3) **[6:15-6:23]**

(4) **[7:8-7:11]**

(5) **[7:22-8:6]**

(6) **[8:18-8:21]**

(7) **[8:25-9:4]**

(8) **[9:9-9:24]**

(9) **[13:9-13:16]**

(10) **[15:16-15:18]**

(11) **[15:23-16:2]**

(12) **[29:24-30:2]**

(13) **[30:5-30:8]**

(14) **[31:5-36:10]**

(15) **[36:23-37:25]**

(16) **[38:17-39:4]**

(17) **[40:25-41:2]**

(18) **[42:4-43:20]**

(19) **[47:21-47:25]**

(20) **[48:5-48:13]**

(21) **[48:21-49:25]**

(22) **[50:3-50:9]**

(23) **[50:13-50:19]**

(24) **[51:23-52:7]**

(25) **[52:15-53:7]**

(26) **[53:9-54:17]**

(27) **[56:12-56:17]**

(28) **[58:16-59:9]**

(29) **[63:18-64:5]**

(30) **[64:12-64:15]**

(31) **[67:22-68:2]**

(32) **[69:4-69:8]**

(33) **[69:13-69:17]**

(34) **[81:13-82:14]**

(35) **[83:12-84:15]**

(36) **[95:11-96:24]**

(37) **[100:7-100:21]**

(38) **[101:11-106:10]**

(39) **[106:21-107:12]**

(40) **[107:14-108:9]**

(41) **[109:9-109:15]**

(42) **[109:19-109:19]**

(43) **[110:14-111:6]**

(44) **[111:13-111:15]**

(45) **[111:18-112:17]**

(46) **[112:21-113:2]**

(47) **[114:4-115:8]**

(48) **[117:8-118:19]**

(49) **[119:4-119:22]**

(50) **[119:25-120:5]**

(51) **[132:11-132:18]**

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence:

i. **MS 93/MS 93 (Deposition Exhibit Number/Trial Exhibit Number)**

ii. **MS 133/MS 133**

iii. **MS 307/MS 307**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 6 day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING ANN JORDAN

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: Ann Jordan.

Morgan Stanley designates the following portions of the sworn deposition of third-party witness Ann Jordan:

10/27/04 Deposition:

(1) **[6:20-7:1]**

(2) **[7:4-7:9]**

(3) **[8:18-12:24]**

(4) **[13:2-13:13]**

(5) **[16:19-16:20]**

(6) **[17:16-18:15]**

(7) **[19:18-20:7]**

(8) **[20:14-21:14]**

(9) **[21:25-23:16]**

(10) **[23:25-24:18]**

(11) **[26:1-27:2]**

(12) **[28:17-28:21]**

(13) **[28:24-31:5]**

(14) **[31:15-32:25]**

(15) **[33:19-33:22]**

(16) **[34:11-34:24]**

(17) **[35:2-35:4]**

(18) **[37:14-38:23]**

(19) **[44:11-45:2]**

(20) **[45:12-45:17]**

(21) **[46:6-46:18]**

(22) **[48:17-49:6]**

(23) **[49:20-50:1]**

(24) **[53:14-54:4]**

(25) **[57:13-57:20]**

(26) **[62:9-63:7]**

(27) **[66:1-66:15]**

(28) **[70:23-71:2]**

(29) **[74:10-75:9]**

(30) **[75:11-75:21]**

(31) **[76:23-77:22]**

(32) **[79:12-79:19]**

(33) **[89:16-89:22]**

(34) **[90:18-91:6]**

(35) **[91:8-91:9]**

(36) **[91:11-91:13]**

(37) **[91:17-91:18]**

(38) **[93:23-97:24]**

(39) **[100:1-100:24]**

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence:

i. **MS 60/MS 60 (Deposition Exhibit Number/Trial Exhibit Number)**

ii. **MS 88/MS 88**

iii. **MS 118/MS 118**

iv. **MS 208/MS 208**

v. **MS 210/MS 210**

vi. **MS 403/MS 403 Confidential – Filed Under Seal**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 6 day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
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Counsel for Morgan Stanley & Co. Incorporated

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING BARRY SCHWARTZ

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: Barry Schwartz

Morgan Stanley designates the following portions of the sworn deposition of third-party witness Barry Schwartz:

6/25/04 Deposition:

(1) **[6:11-6:21]**

(2) **[6:25-7:3]**

(3) **[7:21-10:20]**

(4) **[11:23-12:11]**

(5) **[13:2-14:5]**

(6) **[18:20-19:16]**

(7) **[19:25-20:17]**

(8) **[20:22-21:4]**

(9) **[21:12-21:21]**

(10) **[22:13-22:15]**

(11) **[22:19-23:12]**

(12) **[24:8-24:20]**

(13) **[25:6-25:12]**

(14) **[25:15-26:15]**

(15) **[27:8-28:8]**

(16) **[28:22-30:3]**

(17) **[30:7-30:25]**

(18) **[31:15-31:22]**

(19) **[32:8-33:23]**

(20) **[34:3-34:24]**

(21) **[35:6-36:8]**

(22) **[36:12-36:24]**

(23) **[37:9-37:21]**

(24) **[38:14-39:7]**

(25) **[39:14-40:5]**

(26) **[40:16-41:2]**

(27) **[41:7-42:17]**

(28) **[43:6-43:22]**

(29) **[45:16-46:6]**

(30) **[47:6-48:4]**

(31) **[48:19-51:22]**

(32) **[61:9-62:10]**

(33) **[69:8-69:19]**

(34) **[69:24-70:7]**

(35) **[70:19-70:24]**

(36) **[73:23-75:18]**

(37) **[76:2-76:6]**

(38) **[76:15-76:18]**

(39) **[77:3-77:15]**

(40) **[77:21-78:14]**

(41) **[80:9-80:21]**

(42) **[81:7-84:5]**

(43) **[87:11-89:2]**

(44) **[90:12-94:2]**

(45) **[94:25-95:6]**

(46) **[102:14-103:6]**

(47) **[103:24-104:10]**

(48) **[104:15-106:7]**

(49) **[106:14-107:6]**

(50) **[107:16-108:9]**

(51) **[108:14-109:8]**

(52) **[110:2-111:3]**

(53) **[113:4-113:12]**

(54) **[114:10-116:8]**

(55) **[118:7-118:11]**

(56) **[118:14-118:19]**

(57) **[119:11-120:13]**

(58) **[120:25-122:24]**

(59) **[123:7-123:21]**

(60) **[124:6-124:16]**

(61) **[131:1-131:9]**

(62) **[131:18-131:25]**

(63) **[132:3-133:4]**

(64) **[134:21-135:23]**

(65) **[136:22-137:7]**

(66) **[138:21-139:3]**

(67) **[139:18-140:10]**

(68) **[140:25-142:7]**

(69) **[142:23-144:10]**

(70) **[144:13-145:7]**

(71) **[145:18-145:23]**

(72) **[146:2-146:12]**

(73) **[147:11-148:8]**

(74) **[149:21-150:5]**

(75) **[150:11-152:11]**

(76) **[153:7-154:2]**

(77) **[155:25-157:6]**

(78) **[157:11-158:25]**

(79) **[174:7-175:2]**

(80) **[177:25-180:21]**

(81) **[180:25-182:1]**

(82) **[182:11-183:10]**

(83) **[184:5-184:7]**

(84) **[184:16-184:20]**

(85) **[185:14-186:8]**

(86) **[186:12-186:20]**

(87) **[186:23-188:7]**

(88) **[188:10-188:16]**

(89) **[191:16-192:21]**

(90) **[199:2-199:19]**

(91) **[205:1-205:11]**

(92) **[207:23-208:2]**

(93) **[208:5-209:1]**

(94) **[210:8-211:19]**

(95) **[233:3-233:18]**

(96) **[235:19-236:22]**

(97) **[236:25-239:3]**

(98) **[239:18-240:3]**

(99) **[240:17-241:1]**

(100) **[241:4-241:9]**

(101) **[241:13-242:5]**

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence:

i. **MS 9/MS 9 (Deposition Exhibit Number/Trial Exhibit Number)**

ii. **MS 10/MS 10**

iii. **MS 75/MS 75**

iv. **MS 93/MS 93**

v. **MS 96/MS 96**

vi. **MS 101/MS 101**

vii. **MS 117/MS 117**

viii. **MS 119/MS 119**

ix. **MS 133/MS 133**

x. **MS 134/MS 134**

xi. **MS 143**

xii. **MS 241/MS 241**

xiii. **MS 273/MS 273** **Confidential- Filed Under Seal**

xiv. **MS 274/MS 274** **Confidential- Filed Under Seal**

xv. **MS 279/MS 279**

xvi. **MS 281/MS 281**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 6 day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
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Counsel for Morgan Stanley & Co. Incorporated

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING BRUCE SLOVIN

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: Bruce Slovin

Morgan Stanley designates the following portions of the sworn deposition of third-party witness Bruce Slovin:

5/12/04 Deposition:

(1) **[5:25-5:25]**

(2) **[6:2-6:4]**

(3) **[7:11-7:15]**

(4) **[8:12-8:16]**

(5) **[8:24-8:25]**

(6) **[9:2-9:2]**

(7) **[12:8-12:25]**

(8) **[13:2-13:25]**

(9) **[14:2-14:3]**

(10) **[14:14-14:22]**

(11) **[15:8-15:12]**

(12) **[15:17-15:25]**

(13) **[16:2-16:14]**

(14) **[17:11-17:22]**

(15) **[22:2-22:25]**

(16) **[23:2-23:11]**

(17) **[23:21-23:25]**

(18) **[24:2-24:25]**

(19) **[25:2-25:4]**

(20) **[28:5-28:14]**

(21) **[29:6-29:20]**

(22) **[32:19-32:23]**

(23) **[33:4-33:9]**

(24) **[33:16-33:20]**

(25) **[34:9-34:14]**

(26) **[34:20-34:25]**

(27) **[35:9-35:25]**

(28) **[36:2-36:25]**

(29) **[37:2-37:25]**

(30) **[38:2-38:2]**

(31) **[39:2-39:25]**

(32) **[40:2-40:11]**

(33) **[44:13-44:25]**

(34) **[45:2-45:12]**

(35) **[46:2-46:13]**

(36) **[46:21-46:25]**

(37) **[47:2-47:25]**

(38) **[48:2-48:25]**

(39) **[49:2-49:25]**

(40) **[50:2-50:25]**

(41) **[51:2-51:6]**

(42) **[51:24-51:25]**

(43) **[52:2-52:11]**

(44) **[63:12-63:19]**

(45) **[64:12-64:15]**

(46) **[64:24-64:25]**

(47) **[65:2-65:7]**

(48) **[66:25-66:25]**

(49) **[67:2-67:25]**

(50) **[68:2-68:25]**

(51) **[69:2-69:3]**

(52) **[69:19-69:25]**

(53) **[70:2-70:7]**

(54) **[73:6-73:18]**

(55) **[74:21-74:25]**

(56) **[75:2-75:18]**

(57) **[75:21-75:25]**

(58) **[76:2-76:7]**

(59) **[78:9-78:16]**

(60) **[79:6-79:12]**

(61) **[80:19-80:25]**

(62) **[81:2-81:25]**

(63) **[82:2-82:25]**

(64) **[83:2-83:18]**

(65) **[85:14-85:25]**

(66) **[86:2-86:12]**

(67) **[87:2-87:25]**

(68) **[88:2-88:25]**

(69) **[89:2-89:25]**

(70) **[90:2-90:16]**

(71) **[91:3-91:25]**

(72) **[92:2-92:25]**

(73) **[93:2-93:25]**

(74) **[94:2-94:25]**

(75) **[95:2-95:25]**

(76) **[98:21-98:23]**

(77) **[99:17-99:25]**

(78) **[100:2-100:25]**

(79) **[101:2-101:25]**

(80) **[116:13-116:25]**

(81) **[117:2-117:25]**

(82) **[118:2-118:25]**

(83) **[119:2-119:25]**

(84) **[120:2-120:25]**

(85) **[121:2-121:25]**

(86) **[122:2-122:25]**

(87) **[123:2-123:10]**

(88) **[127:9-127:25]**

(89) **[128:2-128:25]**

(90) **[129:2-129:25]**

(91) **[130:2-130:25]**

(92) **[131:2-131:22]**

(93) **[134:17-134:24]**

(94) **[135:19-135:25]**

(95) **[136:2-136:6]**

(96) **[136:20-136:25]**

(97) **[137:2-137:5]**

(98) **[140:20-140:25]**

(99) **[141:2-141:19]**

(100) **[143:9-143:11]**

(101) **[143:24-143:25]**

(102) **[144:2-144:13]**

(103) **[156:15-156:25]**

(104) **[157:2-157:7]**

(105) **[157:10-157:25]**

(106) **[158:2-158:25]**

(107) **[159:2-159:10]**

(108) **[163:8-163:15]**

(109) **[167:8-167:15]**

(110) **[169:17-169:25]**

(111) **[170:2-170:25]**

(112) **[171:2-171:25]**

(113) **[172:2-172:8]**

(114) **[177:4-177:12]**

(115) **[178:17-178:25]**

(116) **[179:2-179:11]**

(117) **[181:21-181:25]**

(118) **[182:2-182:13]**

(119) **[183:14-183:23]**

(120) **[184:23-184:25]**

(121) **[185:2-185:11]**

(122) **[188:13-188:25]**

(123) **[189:2-189:5]**

(124) **[199:25-199:25]**

(125) **[200:2-200:25]**

(126) **[201:2-201:4]**

(127) **[201:11-201:25]**

(128) **[202:2-202:25]**

(129) **[203:2-203:6]**

(130) **[203:25-203:25]**

(131) **[204:2-204:23]**

(132) **[205:8-205:25]**

(133) **[206:2-206:8]**

(134) **[210:24-210:25]**

(135) **[211:2-211:25]**

(136) **[212:2-212:15]**

(137) **[214:3-214:10]**

(138) **[215:11-215:17]**

(139) **[221:6-221:25]**

(140) **[222:2-222:11]**

(141) **[224:18-224:20]**

(142) **[227:3-227:25]**

(143) **[228:2-228:9]**

(144) **[229:23-229:25]**

(145) **[230:2-230:8]**

(146) **[231:20-231:25]**

(147) **[232:2-232:9]**

(148) **[250:2-250:25]**

(149) **[251:2-251:25]**

(150) **[252:2-252:13]**

(151) **[255:2-255:25]**

(152) **[256:2-256:25]**

(153) **[257:2-257:7]**

(154) **[257:14-257:25]**

(155) **[258:2-258:6]**

(156) **[263:8-263:25]**

(157) **[264:2-264:25]**

(158) **[265:2-265:25]**

(159) **[266:2-266:25]**

(160) **[267:2-267:22]**

(161) **[272:12-272:25]**

(162) **[273:2-273:4]**

(163) **[278:17-278:25]**

(164) **[279:2-279:7]**

(165) **[280:16-280:25]**

(166) **[281:2-281:25]**

(167) **[282:2-282:14]**

(168) **[294:21-294:25]**

(169) **[295:2-295:21]**

(170) **[301:12-301:25]**

(171) **[302:2-302:7]**

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence:

i. **MS 88/MS 88 (Deposition Exhibit Number/Trial Exhibit Number)**

ii. **MS 112/MS 112**

iii. **MS 117/MS 117** **Confidential – Filed Under Seal**

iv. **MS 120/MS 120**

v. **MS 128/MS 128**

vi. **MS 130/MS 130** **Confidential – Filed Under Seal**

vii. **MS 210/MS 210** **Confidential – Filed Under Seal**

viii. **MS 212/MS 212** **Confidential – Filed Under Seal**

ix. **MS 216/MS 216** **Confidential – Filed Under Seal**

x. **MS 237/MS 237**

xi. **MS 240/MS 240** **Confidential – Filed Under Seal**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 6 day of May, 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING IRWIN ENGLEMAN

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: Irwin Engleman

Morgan Stanley designates the following portions of the sworn deposition of third-party witness Irwin Engelman:

Deposition: 8/4/2004

(1) **[5:5-5:11]**

(2) **[18:6-18:10]**

(3) **[18:16-18:22]**

(4) **[19:3-19:21]**

(5) **[19:23-25:23]**

(6) **[26:2-30:23]**

(7) **[34:23-35:12]**

(8) **[36:4-36:8]**

(9) **[36:12-39:6]**

(10) **[40:7-40:14]**

(11) **[40:22-42:16]**

(12) **[42:21-43:6]**

(13) **[43:13-43:14]**

(14) **[43:23-43:24]**

(15) **[44:7-46:25]**

(16) **[48:5-49:5]**

(17) **[50:19-51:10]**

(18) **[51:12-51:20]**

(19) **[52:18-52:24]**

(20) **[57:3-57:5]**

(21) **[57:12-59:23]**

(22) **[73:14-74:12]**

(23) **[75:21-78:14]**

(24) **[78:22-80:7]**

(25) **[80:19-80:25]**

(26) **[81:2-81:2]**

(27) **[81:19-81:21]**

(28) **[82:21-83:25]**

(29) **[85:22-86:3]**

(30) **[86:16-86:23]**

(31) **[87:17-89:15]**

(32) **[91:24-92:15]**

(33) **[99:12-99:22]**

(34) **[100:2-101:11]**

(35) **[103:22-104:10]**

(36) **[106:18-106:23]**

(37) **[107:14-108:3]**

(38) **[109:12-109:18]**

(39) **[115:16-116:4]**

(40) **[116:8-118:7]**

(41) **[119:23-121:15]**

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence:

i. **MS 241/MS 241 (Deposition Exhibit Number/Trial Exhibit Number)**

ii. **MS 117/MS 117**

iii. **MS 336/MS336**

iv. **MS 338/MS 338**

v. **MS 97/MS 97**

vi. **MS 300/MS 300**

vii. **MS 301/MS 301**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 6 day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING JAMES MAHER

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: James Maher.

Morgan Stanley would designate the following portions of the sworn depositions of third-party witness James Maher:

11/2/04 Deposition:

(1) **[6:1-6:15]**

(2) **[16:18-8:5]**

(3) **[8:12-9:11]**

(4) **[16:11-19:5]**

(5) **[20:17-22:14]**

(6) **[23:25-24:17]**

(7) **[26:18-30:12]**

(8) **[30:23-34:20]**

(9) **[35:7-45:2]**

(10) **[46:12-51:22]**

(11) **[52:18-56:21]**

(12) **[57:10-59:2]**

(13) **[60:16-62:21]**

(14) **[63:12-63:18]**

(15) **[63:22-64:5]**

(16) **[64:13-64:16]**

(17) **[64:20-65:11]**

(18) **[66:9-66:24]**

(19) **[67:16-69:7]**

(20) **[73:2-76:9]**

(21) **[76:15-76:25]**

(22) **[78:7-79:3]**

(23) **[79:9-81:16]**

(24) **[83:3-83:14]**

(25) **[83:20-85:23]**

(26) **[86:4-86:19]**

(27) **[98:17-102:4]**

(28) **[102:15-107:8]**

(29) **[107:15-107:20]**

(30) **[113:12-114:2]**

(31) **[119:6-120:2]**

(32) **[120:21-122:6]**

(33) **[122:19-123:12]**

(34) **[124:3-124:24]**

(35) **[126:11-127:13]**

(36) **[127:19-129:6]**

(37) **[137:2-140:12]**

(38) **[145:17-145:24]**

(39) **[150:2-151:19]**

(40) **[160:12-161:1]**

(41) **[161:10-162:13]**

(42) **[163:13-165:20]**

(43) **[166:25-168:17]**

(44) **[169:4-169:11]**

(45) **[169:19-169:25]**

(46) **[170:6-170:16]**

(47) **[171:4-173:8]**

(48) **[187:18-188:16]**

(49) **[191:11-191:16]**

(50) **[192:11-193:15]**

(51) **[194:6-195:5]**

(52) **[195:9-195:14]**

(53) **[195:22-196:10]**

(54) **[196:25-198:22]**

(55) **[199:4-200:3]**

(56) **[200:22-201:12]**

(57) **[203:20-204:25]**

(58) **[207:5-208:22]**

11/3/04 Deposition:

(1) **[211:24-212:8]**

(2) **[219:10-222:6]**

(3) **[222:15-223:21]**

(4) **[224:20-228:9]**

(5) **[230:5-230:25]**

(6) **[231:14-233:10]**

(7) **[235:24-239:13]**

(8) **[240:7-240:18]**

(9) **[241:3-241:18]**

(10) **[242:2-244:20]**

(11) **[245:3-246:2]**

(12) **[249:15-251:1]**

(13) **[252:2-252:7]**

(14) **[252:12-253:14]**

(15) **[254:10-254:25]**

(16) **[255:24-257:16]**

(17) **[258:14-264:4]**

(18) **[260:4-264:4]**

(19) **[264:14-265:22]**

(20) **[266:2-266:13]**

(21) **[272:2-272:16]**

(22) **[273:10-273:16]**

(23) **[275:14-277:2]**

(24) **[277:10-277:20]**

(25) **[280:7-283:12]**

(26) **[283:23-285:16]**

(27) **[285:22-288:6]**

(28) **[289:1-291:3]**

(29) **[291:11-292:11]**

(30) **[293:4-293:19]**

(31) **[294:6-295:13]**

(32) **[295:24-296:16]**

(33) **[297:8-298:6]**

(34) **[299:10-304:3]**

(35) **[308:25-310:23]**

(36) **[311:7-313:2]**

(37) **[319:8-319:21]**

(38) **[319:24-325:1]**

(39) **[327:9-329:13]**

(40) **[330:12-330:18]**

(41) **[331:2-331:8]**

(42) **[331:21-333:2]**

(43) **[333:7-333:16]**

(44) **[334:24-335:24]**

(45) **[336:10-336:11]**

(46) **[338:5-338:12]**

(47) **[341:2-344:16]**

(48) **[345:18-346:5]**

(49) **[346:14-349:9]**

(50) **[349:22-352:18]**

(51) **[353:5-355:11]**

(52) **[355:15-356:11]**

(53) **[356:14-356:17]**

(54) **[356:20-360:9]**

(55) **[361:10-363:7]**

(56) **[364:3-365:19]**

(57) **[365:22-366:11]**

(58) **[366:23-368:14]**

(59) **[368:25-369:21]**

(60) **[370:9-371:13]**

(61) **[372:7-373:15]**

(62) **[374:19-375:2]**

(63) **[375:5-375:12]**

(64) **[378:6-378:17]**

(65) **[380:10-381:13]**

(66) **[382:22-386:21]**

(67) **[387:3-388:4]**

(68) **[389:24-390:4]**

(69) **[390:11-390:11]**

(70) **[391:17-394:7]**

(71) **[394:14-398:17]**

(72) **[400:15-400:24]**

(73) **[401:12-402:18]**

(74) **[403:10-406:20]**

(75) **[407:11-408:20]**

(76) **[409:3-410:25]**

(77) **[413:15-413:24]**

(78) **[414:6-414:21]**

(79) **[416:5-416:13]**

(80) **[416:15-416:22]**

(81) **[418:10-421:2]**

(82) **[421:9-423:21]**

(83) **[425:25-428:8]**

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence:

i. **MS 39/MS 39 (Deposition Exhibit Number/Trial Exhibit Number)**

ii. **MS 75/MS 75**

iii. **MS 76/MS 76**

iv. **MS 81/MS 81**

v. **MS 83/MS 83**

vi. **MS 84/MS 84**

vii. **MS 86/MS 86**

viii. **MS 93/MS 93**

ix. **MS 104/MS 104**

x. **MS 105/MS 105**

xi. **MS 106/MS 106**

xii. **MS 107/MS 107**

xiii. **MS 108/MS 108**

xiv. **MS 133/MS 133**

xv. **MS 166/MS 166**

xvi. **MS 175/MS 175**

xvii. **MS 186/MS 186**

xviii. **MS 193**

xix. **MS 194**

xx. **MS 206/MS 206**

xxi. **MS 208/MS 208**

xxii. **MS 224/MS 224**

xxiii. **MS 251/MS 251**

xxiv. **MS 278/MS 278** **Confidential- Filed Under Seal**

xxv. **MS 279/MS 279**

xxvi. **MS 340/MS 340**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 6 day of May, 2005.

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James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING JOSEPH PAGE

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: Joseph Page.

Morgan Stanley designates the following portions of the sworn deposition of third-party witness Joseph Page:

Deposition: 4/27/2004

(1) **[11:14-11:16]**

(2) **[12:5-12:8]**

(3) **[12:17-12:19]**

(4) **[23:22-24:10]**

(5) **[25:1-25:3]**

(6) **[25:8-25:12]**

(7) **[26:10-26:20]**

(8) **[26:23-27:14]**

(9) **[30:9-32:20]**

(10) **[33:12-33:22]**

(11) **[35:13-38:23]**

(12) **[40:1-40:17]**

(13) **[41:9-42:23]**

(14) **[43:7-43:9]**

(15) **[43:16-44:17]**

(16) **[45:17-46:25]**

(17) **[47:2-49:13]**

(18) **[50:10-51:6]**

(19) **[52:1-52:15]**

(20) **[53:15-54:2]**

(21) **[59:22-60:6]**

(22) **[62:13-63:10]**

(23) **[63:15-63:20]**

(24) **[65:18-65:24]**

(25) **[69:14-69:23]**

(26) **[70:1-70:10]**

(27) **[71:4-71:16]**

(28) **[74:1-75:1]**

(29) **[79:6-79:18]**

(30) **[83:10-84:7]**

(31) **[84:22-85:18]**

(32) **[85:24-86:7]**

(33) **[86:16-87:7]**

(34) **[87:14-87:18]**

(35) **[88:11-88:22]**

(36) **[89:11-89:15]**

(37) **[95:7-95:22]**

(38) **[97:6-98:20]**

(39) **[99:7-101:17]**

(40) **[111:8-111:21]**

(41) **[112:22-113:21]**

(42) **[114:6-114:13]**

(43) **[114:21-115:4]**

(44) **[115:22-116:10]**

(45) **[116:21-117:17]**

(46) **[117:22-118:1]**

(47) **[119:5-119:12]**

(48) **[119:16-121:21]**

(49) **[123:1-123:24]**

(50) **[124:1-124:9]**

(51) **[124:21-125:1]**

(52) **[125:21-127:20]**

(53) **[128:10-128:18]**

(54) **[129:10-129:11]**

(55) **[130:5-131:12]**

(56) **[141:10-141:18]**

(57) **[144:1-144:11]**

(58) **[146:10-146:25]**

(59) **[148:14-148:17]**

(60) **[148:19-151:2]**

(61) **[152:2-152:9]**

(62) **[153:8-153:20]**

(63) **[160:23-162:16]**

(64) **[164:17-164:18]**

(65) **[164:22-165:5]**

(66) **[165:17-166:9]**

(67) **[166:24-167:10]**

(68) **[175:3-175:19]**

(69) **[176:5-176:9]**

(70) **[185:11-185:18]**

(71) **[186:23-187:3]**

(72) **[187:25-189:5]**

(73) **[190:6-191:3]**

(74) **[191:14-191:16]**

(75) **[191:19-191:19]**

(76) **[191:23-191:23]**

(77) **[191:25-192:12]**

(78) **[197:17-198:3]**

(79) **[200:18-201:22]**

(80) **[204:5-204:12]**

(81) **[205:5-205:19]**

(82) **[208:1-208:24]**

(83) **[209:11-209:21]**

(84) **[210:2-210:9]**

(85) **[211:1-214:14]**

(86) **[214:22-215:8]**

(87) **[215:12-216:25]**

(88) **[217:16-218:12]**

(89) **[218:25-219:2]**

(90) **[219:4-219:4]**

(91) **[219:14-225:3]**

(92) **[225:5-225:5]**

(93) **[225:15-225:21]**

(94) **[226:1-227:14]**

(95) **[227:22-229:11]**

(96) **[229:14-229:19]**

(97) **[230:2-230:5]**

(98) **[230:11-230:16]**

(99) **[231:15-232:4]**

(100) **[234:1-234:3]**

(101) **[235:15-235:20]**

(102) **[236:20-237:9]**

(103) **[237:17-238:22]**

(104) **[239:2-240:2]**

(105) **[240:19-240:25]**

(106) **[241:5-241:22]**

(107) **[242:12-243:7]**

(108) **[243:11-243:19]**

(109) **[243:24-244:5]**

(110) **[246:3-246:4]**

(111) **[246:10-247:2]**

(112) **[249:7-249:22]**

(113) **[250:4-250:25]**

(114) **[251:6-253:19]**

(115) **[254:7-254:17]**

(116) **[255:6-255:8]**

(117) **[255:12-255:16]**

(118) **[258:11-258:18]**

(119) **[260:21-261:6]**

(120) **[264:23-266:2]**

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence

i. **MS 11/MS 11 (Deposition Exhibit Number/Trial Exhibit Number)**

ii. **MS 88/MS 88**

iii. **MS 112/MS 112 Confidential- Filed Under Seal**

iv. **MS 113/MS 113 Confidential- Filed Under Seal**

v. **MS 114/MS 114**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 6 day of May, 2005.

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James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
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BY: _____

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West Palm Beach, FL 33401

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING KAREN CLARK

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: Karen Clark.

Morgan Stanley designates the following portions of the sworn deposition of third-party witness Karen Clark:

10/08/04 Deposition:

(1) **[7:12-7:18]**

(2) **[7:21-7:22]**

(3) **[8:3-8:4]**

(4) **[8:18-8:19]**

(5) **[8:22-9:7]**

(6) **[9:23-11:8]**

(7) **[11:20-12:20]**

(8) **[16:19-18:24]**

(9) **[20:10-21:19]**

(10) **[23:5-23:25]**

(11) **[24:11-24:13]**

(12) **[24:17-25:5]**

(13) **[40:19-41:2]**

(14) **[41:10-41:21]**

(15) **[43:14-44:4]**

(16) **[45:6-45:15]**

(17) **[45:19-46:11]**

(18) **[46:19-47:1]**

(19) **[47:13-47:21]**

(20) **[48:13-49:3]**

(21) **[49:5-49:9]**

(22) **[49:23-50:25]**

(23) **[51:9-51:20]**

(24) **[51:22-53:18]**

(25) **[54:2-55:9]**

(26) **[55:19-57:5]**

(27) **[59:7-60:7]**

(28) **[60:20-61:6]**

(29) **[62:5-63:7]**

(30) **[63:13-63:19]**

(31) **[64:22-65:18]**

(32) **[66:6-68:22]**

(33) **[68:25-69:7]**

(34) **[70:3-71:9]**

(35) **[71:21-72:17]**

(36) **[74:5-76:9]**

(37) **[78:24-79:13]**

(38) **[80:13-81:17]**

(39) **[82:16-83:16]**

(40) **[83:19-84:4]**

(41) **[84:6-84:12]**

(42) **[84:14-84:25]**

(43) **[85:2-85:19]**

(44) **[88:16-88:25]**

(45) **[89:17-90:4]**

(46) **[90:20-90:20]**

(47) **[90:22-90:24]**

(48) **[91:1-91:3]**

(49) **[92:16-93:6]**

(50) **[93:8-93:8]**

(51) **[93:17-94:10]**

(52) **[95:12-95:22]**

(53) **[96:11-96:21]**

(54) **[96:25-97:10]**

(55) **[97:15-97:19]**

(56) **[97:22-97:22]**

(57) **[100:2-100:11]**

(58) **[101:12-101:17]**

(59) **[102:7-102:11]**

(60) **[102:13-102:13]**

(61) **[102:21-102:23]**

(62) **[102:25-102:25]**

(63) **[103:2-103:12]**

(64) **[103:14-103:17]**

(65) **[103:19-103:19]**

(66) **[104:14-105:6]**

(67) **[107:2-107:13]**

(68) **[107:17-107:19]**

(69) **[112:22-113:25]**

(70) **[114:2-114:11]**

(71) **[114:14-115:22]**

(72) **[115:25-115:25]**

(73) **[117:21-117:24]**

(74) **[118:1-118:1]**

(75) **[118:3-118:4]**

(76) **[118:6-118:6]**

(77) **[118:8-118:9]**

(78) **[118:11-118:11]**

(79) **[121:25-122:19]**

(80) **[123:12-123:15]**

(81) **[123:24-124:12]**

(82) **[145:14-146:19]**

(83) **[146:22-147:11]**

(84) **[148:6-149:10]**

(85) **[149:14-150:16]**

(86) **[150:21-151:5]**

(87) **[151:15-152:7]**

(88) **[152:25-154:7]**

(89) **[154:9-154:14]**

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence:

i. **MS 96/MS 96 (Deposition Exhibit Number/Trial Exhibit Number)**

ii. **MS 97/MS 97**

iii. **MS 133/MS 133**

iv. **MS 206/MS 206**

v. **MS 251/MS 251**

vi. **MS 260/MS 260**

vii. **MS 392/MS 392** **Confidential – Filed Under Seal**

viii. **MS 393**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 6 day of May, 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING LAWRENCE JONES

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: Lawrence Jones.

Morgan Stanley designates the following portions of the sworn deposition of third-party witness Lawrence Jones:

7/22/04 Deposition:

(1) **[3:1-3:4]**

(2) **[3:14-3:18]**

(3) **[7:24-8:7]**

(4) **[8:11-8:16]**

(5) **[8:22-9:9]**

(6) **[9:12-10:8]**

(7) **[13:2-13:21]**

(8) **[13:25-14:20]**

(9) **[15:6-15:14]**

(10) **[15:24-16:11]**

(11) **[18:19-18:25]**

(12) **[19:4-19:6]**

(13) **[20:15-20:20]**

(14) **[21:12-22:3]**

(15) **[22:17-24:18]**

(16) **[25:10-26:11]**

(17) **[27:2-27:23]**

(18) **[28:2-28:21]**

(19) **[38:10-38:22]**

(20) **[39:6-39:18]**

(21) **[39:22-40:16]**

(22) **[41:16-42:14]**

(23) **[45:8-45:17]**

(24) **[46:1-46:25]**

(25) **[47:1-47:14]**

(26) **[47:19-47:22]**

(27) **[48:25-49:17]**

(28) **[51:5-51:11]**

(29) **[52:24-53:1]**

(30) **[53:7-54:3]**

(31) **[57:21-57:24]**

(32) **[58:7-58:11]**

(33) **[59:20-60:12]**

(34) **[60:16-61:23]**

(35) **[61:25-62:6]**

(36) **[65:7-66:7]**

(37) **[67:18-68:1]**

(38) **[68:21-69:2]**

(39) **[73:8-75:5]**

(40) **[75:24-76:9]**

(41) **[78:7-78:22]**

(42) **[79:4-79:6]**

(43) **[79:10-79:15]**

(44) **[82:7-82:19]**

(45) **[83:8-84:8]**

(46) **[88:4-89:2]**

(47) **[90:20-91:6]**

(48) **[92:16-92:20]**

(49) **[93:6-93:11]**

(50) **[93:17-94:11]**

(51) **[99:9-100:16]**

(52) **[102:4-103:6]**

(53) **[103:14-103:24]**

(54) **[104:16-104:18]**

(55) **[105:23-106:3]**

(56) **[106:10-107:3]**

(57) **[110:12-110:21]**

(58) **[117:11-117:15]**

(59) **[118:4-118:11]**

(60) **[118:16-119:7]**

(61) **[119:18-121:2]**

(62) **[123:7-123:17]**

(63) **[123:25-124:4]**

(64) **[124:18-124:20]**

(65) **[127:18-128:6]**

(66) **[128:14-128:17]**

(67) **[131:15-131:16]**

(68) **[131:19-131:19]**

(69) **[132:2-132:5]**

(70) **[132:7-132:14]**

(71) **[132:24-133:2]**

(72) **[136:10-136:22]**

(73) **[137:4-137:6]**

(74) **[137:9-138:5]**

(75) **[138:8-138:23]**

(76) **[139:4-140:4]**

(77) **[140:20-141:11]**

(78) **[141:13-141:17]**

(79) **[141:19-141:24]**

(80) **[142:1-142:6]**

(81) **[142:15-142:21]**

(82) **[143:6-143:16]**

(83) **[143:19-144:5]**

(84) **[144:7-144:7]**

(85) **[145:6-145:17]**

(86) **[146:15-146:18]**

(87) **[146:20-146:20]**

(88) **[148:8-148:12]**

(89) **[149:23-150:5]**

(90) **[151:23-152:12]**

(91) **[160:19-162:14]**

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence:

i. **MS 36/MS 36 (Deposition Exhibit Number/Trial Exhibit Number)**

ii. **MS 82/MS 82**

iii. **MS 88/MS 88**

iv. **MS 112/MS 112**

v. **MS 117/MS 117**

vi. **MS 120/MS 120**

vii. **MS 130/MS 130**

viii. **MS 138/MS 138**

ix. **MS 210/MS 210**

x. **MS 251/MS 251**

xi. **MS 318/MS 318** **Confidential- Filed Under Seal**

xii. **MS 327/MS 327**

xiii. **MS 368/MS 368** **Confidential- Filed Under Seal**

xiv. **MS 369/MS 369** **Confidential- Filed Under Seal**

xv. **MS 370/MS 370** **Confidential- Filed Under Seal**

xvi. **MS 371/MS 371**

xvii. **MS 372/MS 372** **Confidential- Filed Under Seal**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 6 day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING PAUL SHAPIRO

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: Paul Shapiro

Morgan Stanley designates the following portions of the sworn depositions of third-party witness Paul Shapiro:

6/8/04 Deposition:

(1) **[5:12-5:14]**

(2) **[5:19-6:2]**

(3) **[6:5-6:8]**

(4) **[9:10-9:14]**

(5) **[10:2-10:4]**

(6) **[11:13-11:16]**

(7) **[11:19-11:25]**

(8) **[12:3-12:6]**

(9) **[12:25-14:10]**

(10) **[17:2-17:10]**

(11) **[17:20-18:6]**

(12) **[26:2-26:16]**

(13) **[27:7-27:17]**

(14) **[28:19-30:17]**

(15) **[31:4-33:13]**

(16) **[33:19-34:19]**

(17) **[35:4-35:9]**

(18) **[35:15-37:8]**

(19) **[37:11-37:23]**

(20) **[39:5-40:20]**

(21) **[40:24-43:18]**

(22) **[47:10-47:23]**

(23) **[51:14-52:15]**

(24) **[53:20-54:5]**

(25) **[54:12-55:23]**

(26) **[58:3-59:10]**

(27) **[60:18-62:18]**

(28) **[64:4-64:17]**

(29) **[64:23-65:10]**

(30) **[65:14-65:14]**

(31) **[66:9-66:13]**

(32) **[66:15-66:21]**

(33) **[66:23-67:5]**

(34) **[67:12-68:22]**

(35) **[69:3-69:11]**

(36) **[69:21-70:4]**

(37) **[70:6-70:25]**

(38) **[71:3-71:5]**

(39) **[75:6-77:8]**

(40) **[78:3-78:9]**

(41) **[78:11-78:15]**

(42) **[78:25-79:22]**

(43) **[80:6-81:20]**

(44) **[82:2-85:25]**

(45) **[86:9-86:16]**

(46) **[86:21-87:9]**

(47) **[87:11-89:9]**

(48) **[89:16-89:16]**

(49) **[89:24-91:12]**

(50) **[91:16-92:25]**

(51) **[93:10-94:19]**

(52) **[95:5-95:10]**

(53) **[95:13-95:15]**

(54) **[96:3-96:15]**

(55) **[97:13-97:16]**

(56) **[97:20-98:7]**

(57) **[98:14-98:23]**

(58) **[99:6-99:12]**

(59) **[99:22-101:12]**

(60) **[101:25-103:7]**

(61) **[106:18-107:7]**

(62) **[126:24-127:16]**

(63) **[128:2-128:4]**

(64) **[128:10-133:22]**

(65) **[133:25-136:13]**

(66) **[136:24-138:3]**

(67) **[139:22-144:24]**

(68) **[147:10-147:20]**

(69) **[148:8-149:9]**

(70) **[150:23-151:3]**

(71) **[151:6-151:14]**

(72) **[156:14-157:14]**

(73) **[171:5-171:20]**

(74) **[171:25-173:20]**

(75) **[174:14-175:20]**

(76) **[175:22-179:20]**

(77) **[191:20-192:2]**

(78) **[192:7-192:21]**

(79) **[192:23-192:23]**

(80) **[197:23-197:10]**

(81) **[199:25-200:21]**

(82) **[206:10-206:12]**

(83) **[206:19-206:24]**

(84) **[207:4-207:9]**

(85) **[208:8-209:16]**

(86) **[210:12-210:21]**

(87) **[210:24-211:25]**

(88) **[230:24-231:3]**

(89) **[231:16-232:2]**

(90) **[236:16-236:24]**

(91) **[237:3-237:7]**

(92) **[238:8-238:21]**

(93) **[239:16-239:25]**

(94) **[243:6-245:14]**

7/28/04 Deposition:

(1) **[257:4-257:5]**

(2) **[257:9-258:6]**

(3) **[260:9-260:25]**

(4) **[261:16-262:5]**

(5) **[262:16-262:24]**

(6) **[263:2-263:22]**

(7) **[268:12-268:24]**

(8) **[270:7-271:4]**

(9) **[271:12-272:23]**

(10) **[275:10-276:19]**

(11) **[276:21-278:7]**

(12) **[278:9-278:10]**

(13) **[278:19-279:16]**

(14) **[280:24-281:8]**

(15) **[281:12-282:2]**

(16) **[282:4-282:11]**

(17) **[282:13-282:23]**

(18) **[283:1-285:19]**

(19) **[286:4-287:3]**

(20) **[287:5-287:11]**

(21) **[293:16-294:1]**

(22) **[297:22-298:19]**

(23) **[298:22-300:2]**

(24) **[300:11-302:2]**

(25) **[302:6-303:4]**

(26) **[303:10-304:1]**

(27) **[304:10-304:15]**

(28) **[305:10-307:11]**

(29) **[307:20-308:20]**

(30) **[309:11-311:16]**

(31) **[311:18-311:24]**

(32) **[313:18-314:25]**

(33) **[315:25-316:5]**

(34) **[316:8-316:18]**

(35) **[317:1-317:5]**

(36) **[318:5-318:20]**

(37) **[324:24-327:22]**

(38) **[328:13-329:2]**

(39) **[331:1-331:9]**

(40) **[331:24-332:6]**

(41) **[335:9-335:12]**

(42) **[338:10-339:17]**

(43) **[339:23-341:15]**

(44) **[342:15-343:1]**

(45) **[343:9-344:11]**

(46) **[344:13-347:12]**

(47) **[347:16-347:17]**

(48) **[347:19-352:5]**

(49) **[355:10-355:25]**

(50) **[356:12-357:7]**

(51) **[357:17-359:19]**

(52) **[359:22-360:20]**

(53) **[360:25-361:25]**

(54) **[363:15-364:8]**

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence:

i. **MS 9/MS 9 (Deposition Exhibit Number/Trial Exhibit Number)**

ii. **MS 10/MS 10**

iii. **MS 39/MS 39**

iv. **MS 61/MS 61**

v. **MS 75/MS 75**

vi. **MS 83/MS 83**

vii. **MS 84/MS 84**

viii. **MS 88/MS 88**

ix. **MS 117/MS 117**

x. **MS 118/MS 118**

xi. **MS 120/MS 120**

xii. **MS 166/MS 166**

xiii. **MS 169/MS 169**

xiv. **MS 188/MS 188**

xv. **MS 206/MS 206**

xvi. **MS 243/MS 243**

xvii. **MS 252/MS 252** **Confidential – Filed Under Seal**

xviii. **MS 339/MS 339**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 6 day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING ROBERT DUFFY

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: Robert Duffy.

Morgan Stanley designates the following portions of the sworn deposition of third-party witness Robert Duffy:

7/8/2004 Deposition:

(1) **[6:16-6:18]**

(2) **[6:24-7:1]**

(3) **[7:9-7:16]**

(4) **[10:20-10:24]**

(5) **[17:9-17:10]**

(6) **[17:14-18:4]**

(7) **[20:18-21:16]**

(8) **[21:20-22:10]**

(9) **[22:24-23:15]**

(10) **[24:2-24:24]**

(11) **[26:18-27:12]**

(12) **[27:24-28:21]**

(13) **[28:24-28:25]**

(14) **[30:1-31:9]**

(15) **[31:11-31:15]**

(16) **[32:7-32:21]**

(17) **[33:2-38:3]**

(18) **[42:11-43:24]**

(19) **[44:8-45:7]**

(20) **[45:13-46:11]**

(21) **[47:11-47:16]**

(22) **[50:11-51:5]**

(23) **[51:25-52:6]**

(24) **[53:12-53:20]**

(25) **[54:3-54:12]**

(26) **[55:6-55:15]**

(27) **[55:24-56:6]**

(28) **[57:18-58:7]**

(29) **[58:21-59:1]**

(30) **[59:7-59:18]**

(31) **[60:6-61:18]**

(32) **[62:9-63:11]**

(33) **[64:6-64:25]**

(34) **[65:8-66:23]**

(35) **[67:10-67:20]**

(36) **[68:4-68:14]**

(37) **[70:1-71:8]**

(38) **[71:10-71:11]**

(39) **[76:15-77:16]**

(40) **[79:14-80:10]**

(41) **[80:16-82:10]**

(42) **[84:3-84:13]**

(43) **[86:13-86:21]**

(44) **[86:24-87:3]**

(45) **[87:15-89:18]**

(46) **[90:10-91:17]**

(47) **[92:10-93:18]**

(48) **[94:13-95:1]**

(49) **[95:15-96:7]**

(50) **[96:10-96:19]**

(51) **[96:24-97:7]**

(52) **[100:7-101:3]**

(53) **[102:7-102:11]**

(54) **[102:25-103:24]**

(55) **[105:2-105:8]**

(56) **[105:10-105:17]**

(57) **[107:12-108:3]**

(58) **[108:10-108:24]**

(59) **[109:9-109:9]**

(60) **[117:3-118:15]**

(61) **[119:6-119:21]**

(62) **[120:12-121:3]**

(63) **[123:22-124:15]**

(64) **[125:8-126:2]**

(65) **[126:9-126:24]**

(66) **[129:1-129:15]**

(67) **[132:5-132:11]**

(68) **[132:20-133:11]**

(69) **[134:19-135:10]**

(70) **[137:10-141:22]**

(71) **[141:24-142:15]**

(72) **[143:7-143:25]**

(73) **[144:7-144:24]**

(74) **[145:13-146:23]**

(75) **[147:11-147:17]**

(76) **[148:4-149:2]**

(77) **[149:20-150:8]**

(78) **[154:9-154:10]**

(79) **[154:15-155:24]**

(80) **[157:4-158:15]**

(81) **[158:17-159:1]**

(82) **[159:3-159:7]**

(83) **[159:9-159:10]**

(84) **[160:11-161:9]**

(85) **[161:11-161:15]**

(86) **[162:8-162:11]**

(87) **[162:21-163:9]**

(88) **[166:17-168:17]**

(89) **[169:5-169:8]**

(90) **[169:12-169:22]**

(91) **[170:2-170:4]**

(92) **[170:13-170:20]**

(93) **[172:14-172:24]**

(94) **[173:21-174:11]**

(95) **[176:20-177:18]**

(96) **[178:1-179:10]**

(97) **[183:16-183:23]**

(98) **[184:2-184:16]**

(99) **[184:24-185:17]**

(100) **[186:3-187:2]**

(101) **[188:2-190:7]**

(102) **[191:17-192:8]**

(103) **[192:18-194:10]**

(104) **[196:19-197:18]**

(105) **[198:2-199:9]**

(106) **[201:17-203:6]**

(107) **[203:14-205:2]**

(108) **[210:5-210:9]**

(109) **[211:20-212:25]**

(110) **[214:13-215:8]**

(111) **[217:20-217:24]**

(112) **[218:5-218:11]**

(113) **[218:20-219:10]**

(114) **[220:24-220:25]**

(115) **[221:2-221:10]**

(116) **[224:14-225:10]**

(117) **[226:23-227:8]**

(118) **[229:2-230:2]**

(119) **[230:4-231:1]**

(120) **[231:24-236:18]**

(121) **[237:1-237:7]**

(122) **[237:13-238:14]**

(123) **[240:2-240:15]**

(124) **[241:12-242:11]**

(125) **[242:14-242:18]**

(126) **[243:11-243:24]**

(127) **[244:15-245:11]**

(128) **[249:8-251:7]**

(129) **[253:4-254:11]**

(130) **[255:23-256:22]**

(131) **[257:5-257:15]**

(132) **[257:21-258:14]**

(133) **[261:13-261:16]**

(134) **[289:7-291:7]**

(135) **[291:19-291:22]**

(136) **[291:25-292:25]**

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence:

i. **MS 11/MS 11 (Deposition Exhibit Number / Trial Exhibit Number)**

ii. **MS 75/MS 75**

iii. **MS 76/MS 76**

iv. **MS 78/MS 78**

v. **MS 84/MS 84**

vi. **MS 85/MS 85**

vii. **MS 88/MS 88**

viii. **MS 93/MS 93**

ix. **MS 101/MS 101**

x. **MS 112/MS 112**

xi. **MS 113/MS 113**

xii. **MS 117/MS 117**

xiii. **MS 120/MS 120**

xiv. **MS 133/MS 133**

xv. **MS 169/MS 169**

xvi. **MS 206/MS 206**

xvii. **MS 230/MS 230**

xviii. **MS 277/MS 277** **Confidential – Filed Under Seal**

xix. **MS 315/MS 315** **Confidential – Filed Under Seal**

xx. **MS 317/MS 317** **Confidential – Filed Under Seal**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 6 day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
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BY: _____

Counsel for Morgan Stanley & Co. Incorporated

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING STEVEN GELLER

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: Steven Geller.

Morgan Stanley designates the following portions of the sworn deposition of third-party witness Steven Geller:

7/30/2004 Deposition:

(1) **[5:13-5:15]**

(2) **[5:19-5:25]**

(3) **[6:11-7:1]**

(4) **[11:4-12:6]**

(5) **[16:6-16:14]**

(6) **[17:25-21:20]**

(7) **[22:13-23:2]**

(8) **[24:1-28:13]**

(9) **[29:15-31:1]**

(10) **[31:6-31:11]**

(11) **[31:14-31:22]**

(12) **[31:24-33:8]**

(13) **[33:24-34:4]**

(14) **[36:22-38:19]**

(15) **[38:23-41:2]**

(16) **[42:6-44:14]**

(17) **[45:15-51:17]**

(18) **[52:1-52:8]**

(19) **[53:2-56:11]**

(20) **[61:18-63:19]**

(21) **[65:20-65:24]**

(22) **[66:9-67:8]**

(23) **[68:10-72:12]**

(24) **[72:14-73:7]**

(25) **[74:3-77:5]**

(26) **[77:7-77:16]**

(27) **[78:2-78:9]**

(28) **[79:13-82:17]**

(29) **[82:19-83:6]**

(30) **[84:8-84:11]**

(31) **[84:20-85:23]**

(32) **[86:2-86:7]**

(33) **[86:10-86:16]**

(34) **[87:6-87:21]**

(35) **[89:24-91:6]**

(36) **[91:8-91:24]**

(37) **[92:11-92:15]**

(38) **[93:12-94:24]**

(39) **[95:6-95:8]**

(40) **[95:25-96:5]**

(41) **[96:10-98:4]**

(42) **[98:15-99:13]**

(43) **[99:24-100:1]**

(44) **[100:5-100:13]**

(45) **[104:2-104:12]**

(46) **[104:22-105:2]**

(47) **[105:5-105:12]**

(48) **[105:17-109:21]**

(49) **[109:24-111:1]**

(50) **[111:3-113:13]**

(51) **[114:12-117:21]**

(52) **[118:24-120:7]**

(53) **[120:9-121:2]**

(54) **[121:24-122:1]**

(55) **[122:21-123:3]**

(56) **[123:10-124:12]**

(57) **[125:21-126:2]**

(58) **[126:8-126:21]**

(59) **[127:1-127:9]**

(60) **[127:12-128:13]**

(61) **[129:5-129:6]**

(62) **[129:8-130:12]**

(63) **[130:14-131:18]**

(64) **[132:10-135:19]**

(65) **[136:15-138:15]**

(66) **[139:1-142:5]**

(67) **[142:14-142:17]**

(68) **[142:20-143:1]**

(69) **[143:3-143:9]**

(70) **[144:1-144:6]**

(71) **[144:23-144:25]**

(72) **[145:2-145:2]**

(73) **[145:9-145:23]**

(74) **[146:2-146:14]**

(75) **[146:22-147:1]**

(76) **[147:3-149:13]**

(77) **[149:19-151:17]**

(78) **[152:6-152:10]**

(79) **[153:18-153:22]**

(80) **[154:16-154:19]**

(81) **[154:24-155:6]**

(82) **[155:23-156:11]**

(83) **[157:1-158:5]**

(84) **[160:8-160:18]**

(85) **[161:1-161:13]**

(86) **[161:19-167:24]**

(87) **[168:4-168:6]**

(88) **[168:8-172:3]**

(89) **[173:21-174:15]**

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence:

i. **MS 11/MS 11 (Deposition Exhibit Number / Trial Exhibit Number**

ii. **MS 75/MS 75**

iii. **MS 78/MS 78**

iv. **MS 84/MS 84**

v. **MS 85**

vi. **MS 88/MS 88**

vii. **MS 112/MS 112**

viii. **MS 120/MS 120**

ix. **MS 169/MS 169**

x. **MS 206/MS 206**

xi. **MS 230/MS 230**

xii. **MS 277/MS 277**

xiii. **MS 315/MS 315**

xiv. **MS 317/MS 317**

xv. **MS 329/MS 329** **Confidential – Filed Under Seal**

xvi. **MS 330/MS 330** **Confidential – Filed Under Seal**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 6 day of May, 2005.

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James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING TODD SLOTKIN

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: Todd Slotkin.

Morgan Stanley designates the following portions of the sworn deposition of third-party witness Todd Slotkin:

6/7/04 Deposition:

(1) **[5:16-5:23]**

(2) **[6:3-6:10]**

(3) **[7:3-8:25]**

(4) **[12:25-13:9]**

(5) **[13:24-14:25]**

(6) **[15:2-15:19]**

(7) **[15:22-16:24]**

(8) **[17:1-17:10]**

(9) **[17:14-18:9]**

(10) **[19:6-19:13]**

(11) **[20:22-21:11]**

(12) **[21:14-21:21]**

(13) **[22:19-23:3]**

(14) **[23:10-23:21]**

(15) **[23:23-24:4]**

(16) **[24:13-25:8]**

(17) **[25:22-26:4]**

(18) **[27:8-27:10]**

(19) **[29:5-29:11]**

(20) **[32:19-34:13]**

(21) **[35:8-35:13]**

(22) **[36:15-37:10]**

(23) **[37:12-38:24]**

(24) **[39:13-39:18]**

(25) **[62:18-63:9]**

(26) **[63:16-63:17]**

(27) **[64:4-64:8]**

(28) **[86:14-87:23]**

(29) **[88:24-90:2]**

(30) **[90:9-90:23]**

(31) **[97:14-98:17]**

(32) **[99:3-100:2]**

(33) **[100:6-100:20]**

(34) **[101:17-101:19]**

(35) **[103:14-105:1]**

(36) **[105:15-105:22]**

(37) **[106:20-107:8]**

(38) **[107:13-108:11]**

(39) **[109:8-109:15]**

(40) **[115:8-115:15]**

(41) **[115:19-115:21]**

(42) **[116:1-116:23]**

(43) **[118:3-118:10]**

(44) **[118:13-119:25]**

(45) **[121:2-121:7]**

(46) **[125:21-127:12]**

(47) **[131:20-132:17]**

(48) **[132:24-134:10]**

(49) **[137:12-138:8]**

(50) **[138:10-138:15]**

(51) **[138:21-139:8]**

(52) **[141:11-141:25]**

(53) **[142:4-142:23]**

(54) **[143:3-143:3]**

(55) **[143:25-144:8]**

(56) **[144:20-144:25]**

(57) **[148:7-149:5]**

(58) **[152:21-155:15]**

(59) **[155:20-155:23]**

(60) **[156:7-158:13]**

(61) **[159:4-159:8]**

(62) **[159:10-159:11]**

(63) **[160:8-160:15]**

(64) **[160:17-160:19]**

(65) **[161:9-161:13]**

(66) **[161:18-161:19]**

(67) **[161:21-162:7]**

(68) **[167:3-167:11]**

(69) **[169:4-170:5]**

(70) **[170:20-171:1]**

(71) **[173:16-174:4]**

(72) **[174:6-174:11]**

(73) **[174:16-175:8]**

(74) **[178:8-178:11]**

(75) **[182:3-183:8]**

(76) **[184:4-184:11]**

(77) **[185:20-185:25]**

(78) **[186:20-187:7]**

(79) **[188:1-188:3]**

(80) **[188:10-188:12]**

(81) **[188:19-189:5]**

(82) **[189:24-190:16]**

(83) **[190:20-191:21]**

(84) **[192:8-192:11]**

(85) **[192:25-193:2]**

(86) **[193:11-193:15]**

(87) **[193:24-194:7]**

(88) **[194:14-194:19]**

(89) **[196:7-196:12]**

(90) **[196:15-196:21]**

(91) **[196:23-197:4]**

(92) **[197:11-197:18]**

(93) **[197:20-198:16]**

(94) **[199:9-200:4]**

(95) **[200:19-200:24]**

(96) **[203:9-206:1]**

(97) **[206:15-206:23]**

(98) **[208:18-208:21]**

(99) **[209:5-209:13]**

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence:

i. **MS 70/MS 70 (Deposition Exhibit Number/Trial Exhibit Number)**

ii. **MS 166/MS 166**

iii. **MS 210/MS 210**

iv. **MS 241/MS 241**

v. **MS 297/MS 297** **Confidential – Filed Under Seal**

vi. **MS 298/MS 298** **Confidential – Filed Under Seal**

vii.	**MS 299/MS 299**	**Confidential – Filed Under Seal**
viii.	**MS 300/MS 300**	**Confidential – Filed Under Seal**
ix.	**MS 301/MS 301**	**Confidential – Filed Under Seal**
x.	**MS 302/MS 302**	**Confidential – Filed Under Seal**
xi.	**MS 308/MS 308**	**Confidential – Filed Under Seal**
xii.	**MS 311/MS 311**	**Confidential – Filed Under Seal**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 6 day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
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BY: _____

Counsel for Morgan Stanley & Co. Incorporated

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West Palm Beach, FL 33401

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING WILLIAM NESBITT

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: William Nesbitt.

Morgan Stanley designates the following portions of the sworn depositions of third-party witness William Nesbitt:

8/31/04 Deposition:

(1) **[6:5-6:8]**

(2) **[6:13-6:15]**

(3) **[6:18-6:19]**

(4) **[6:22-7:3]**

(5) **[7:21-8:12]**

(6) **[8:24-9:5]**

(7) **[9:9-9:16]**

(8) **[9:23-10:7]**

(9) **[11:12-12:5]**

(10) **[13:8-16:5]**

(11) **[20:12-20:19]**

(12) **[20:24-22:24]**

(13) **[23:7-23:23]**

(14) **[25:6-26:2]**

(15) **[30:5-30:19]**

(16) **[30:23-31:1]**

(17) **[31:15-31:20]**

(18) **[34:18-35:7]**

(19) **[36:22-36:25]**

(20) **[38:7-38:16]**

(21) **[40:12-40:24]**

(22) **[46:18-48:12]**

(23) **[49:12-50:5]**

(24) **[50:9-51:12]**

(25) **[51:17-51:20]**

(26) **[52:9-52:22]**

(27) **[57:1-58:25]**

(28) **[60:7-62:8]**

(29) **[66:6-66:11]**

(30) **[67:11-69:4]**

(31) **[69:17-70:11]**

(32) **[70:20-71:2]**

(33) **[72:13-73:7]**

(34) **[74:4-74:8]**

(35) **[74:20-75:10]**

(36) **[75:19-76:2]**

(37) **[76:22-77:18]**

(38) **[78:4-78:22]**

(39) **[79:13-80:23]**

(40) **[87:8-88:22]**

(41) **[88:24-90:12]**

(42) **[90:19-90:25]**

(43) **[92:6-92:21]**

(44) **[94:11-94:14]**

(45) **[94:18-96:7]**

(46) **[96:20-97:6]**

(47) **[102:11-103:12]**

(48) **[103:14-104:12]**

(49) **[105:20-106:25]**

(50) **[107:4-107:16]**

(51) **[108:1-109:8]**

(52) **[116:21-117:25]**

(53) **[119:2-119:9]**

(54) **[120:18-121:12]**

(55) **[123:6-123:12]**

(56) **[124:3-124:11]**

(57) **[124:25-125:20]**

(58) **[126:4-127:8]**

(59) **[127:11-127:18]**

(60) **[127:21-127:25]**

(61) **[128:20-129:2]**

(62) **[130:14-130:25]**

(63) **[131:2-131:16]**

(64) **[132:4-132:11]**

(65) **[132:22-134:4]**

(66) **[134:7-134:10]**

(67) **[134:23-135:17]**

(68) **[136:15-137:14]**

(69) **[140:12-141:2]**

(70) **[151:2-152:9]**

(71) **[153:6-153:11]**

(72) **[154:13-154:20]**

(73) **[157:6-158:18]**

(74) **[163:6-163:18]**

(75) **[164:5-166:3]**

(76) **[170:16-171:20]**

(77) **[176:3-176:6]**

(78) **[176:16-176:19]**

(79) **[178:10-179:7]**

(80) **[179:12-180:19]**

(81) **[182:9-183:12]**

(82) **[221:15-222:1]**

(83) **[224:21-225:18]**

(84) **[226:25-227:12]**

(85) **[228:8-229:4]**

(86) **[230:21-231:7]**

(87) **[231:10-231:15]**

(88) **[231:19-231:22]**

(89) **[232:2-232:21]**

9/1/04 Deposition:

(1) **[257:14-261:3]**

(2) **[261:13-262:9]**

(3) **[266:20-266:25]**

(4) **[269:18-270:17]**

(5) **[270:24-271:6]**

(6) **[271:10-271:15]**

(7) **[272:5-273:8]**

(8) **[275:15-275:25]**

(9) **[276:8-280:20]**

(10) **[282:5-282:12]**

(11) **[282:24-284:1]**

(12) **[291:15-292:7]**

(13) **[294:23-295:3]**

(14) **[295:24-296:5]**

(15) **[296:8-296:14]**

(16) **[296:25-298:10]**

(17) **[298:16-299:3]**

(18) **[302:15-304:6]**

(19) **[305:9-306:8]**

(20) **[307:16-308:7]**

(21) **[308:9-308:19]**

(22) **[309:9-310:21]**

(23) **[317:9-318:10]**

(24) **[319:3-319:16]**

(25) **[325:21-326:15]**

(26) **[326:18-326:24]**

(27) **[327:1-328:10]**

(28) **[337:8-339:15]**

(29) **[341:25-342:12]**

(30) **[347:23-349:8]**

(31) **[350:13-351:6]**

(32) **[351:22-352:13]**

(33) **[359:1-360:11]**

(34) **[360:17-360:24]**

(35) **[366:6-366:16]**

(36) **[369:11-370:8]**

(37) **[371:5-371:7]**

(38) **[371:24-374:2]**

(39) **[374:10-375:11]**

(40) **[377:16-378:13]**

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(42) **[380:20-380:24]**

(43) **[382:1-382:25]**

(44) **[383:19-384:23]**

(45) **[398:1-398:5]**

(46) **[398:8-400:6]**

(47) **[403:13-404:15]**

(48) **[405:16-405:20]**

(49) **[406:3-406:8]**

(50) **[406:13-407:18]**

(51) **[408:5-410:13]**

(52) **[411:2-413:6]**

(53) **[424:2-424:14]**

(54) **[430:19-431:5]**

(55) **[431:14-432:11]**

(56) **[433:16-434:9]**

(57) **[437:11-437:24]**

(58) **[438:4-438:10]**

(59) **[443:20-444:3]**

(60) **[448:25-450:5]**

(61) **[450:17-450:20]**

(62) **[450:25-452:2]**

(63) **[452:16-453:9]**

(64) **[459:10-460:21]**

(65) **[470:20-471:21]**

(66) **[478:21-479:6]**

(67) **[479:11-480:11]**

(68) **[482:1-482:7]**

(69) **[482:12-482:24]**

(70) **[483:22-484:3]**

(71) **[484:10-484:15]**

(72) **[485:4-485:7]**

(73) **[485:12-486:9]**

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence:

i. **MS 75/MS 75 (Deposition Exhibit Number/Trial Exhibit Number)**

ii. **MS 76/MS 76**

iii. **MS 81/MS 81**

iv. **MS 84/MS 84**

v. **MS 93/MS 93**

vi. **MS 104/MS 104**

vii. **MS 105/MS 105**

viii. **MS 106/MS 106**

ix. **MS 107/MS 107**

x. **MS 111/MS 111**

xi. **MS 112/MS 112**

xii. **MS 117/MS 117**

xiii. **MS 137/MS 137**

xiv. **MS 165/MS 165**

xv. **MS 167/MS 167**

xvi. **MS 186/MS 186**

xvii. **MS 194**

xviii. **MS 195/MS 195**

xix. **MS 206/MS 206**

xx. **MS 224/MS 224**

xxi. **MS 281/MS 281**

xxii. **MS 355/MS 355** **Confidential- Filed Under Seal**

xxiii. **MS 365/MS 365** **Confidential- Filed Under Seal**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 6 day of May, 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO. 2003CA 005045 AI

NOTICE OF FILING PLEADING UNDER SEAL

Coleman (Parent) Holdings Inc. ("CPH") hereby gives notice of the filing of Plaintiff's Opposition to Morgan Stanley's Motion for Clarification of The Admissibility of The Testimony of Professor Mark Grinblatt.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 6th day of May, 2005.

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9967

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER FOLLOWING IN CAMERA INSPECTION

THIS CAUSE came before the Court, in Chambers, on CPH's counsel's sealed production pursuant to the Court's May 3, 2005 Order on Morgan Stanley's Motion for Court Ordered Discovery. On review of the items produced, the undersigned concludes that none is related to or has any bearing on any of the issues raised by Mr. Comyns' apparent contact with jurors in this action. Because the items produced implicate attorney-client and work-product privileges, they have been resealed and placed in the Court file in an envelope marked "DO NOT OPEN BY MAY 6, 2005 COURT ORDER". The sealed envelope shall not be unsealed or removed from the Clerk's custody absent further order of this or an appellate court.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 6 day of May, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON PLAINTIFF'S MOTION TO IMPOSE SANCTIONS FOR FAILURE TO APPEAR AT COURT-ORDERED MEDIATION

THIS CAUSE came before the Court May 6, 2005 on Plaintiff's Motion to Impose Sanctions for Failure to Appear at Court-Ordered Mediation, with both parties well represented by counsel. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Kenneth Feinberg is respectfully requested to prepare a report of mediator addressing (i) whether the representative(s) of MS & Co. who attended the mediation had complete authority to resolve the case without further consultation; and (ii) whether mediation should continue with representatives of the parties chosen by the mediator attending. The undersigned respectfully requests the report be prepared by noon May 9, 2005, if possible.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 6 day of May, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON PLAINTIFF'S MOTION TO IMPOSE SANCTIONS FOR FAILURE TO APPEAR AT COURT-ORDERED MEDIATION

THIS CAUSE came before the Court May 6, 2005 on Plaintiff's Motion to Impose Sanctions for Failure to Appear at Court-Ordered Mediation, with both parties well represented by counsel. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Kenneth Feinberg is respectfully requested to prepare a report of mediator addressing (i) whether the representative(s) of MS & Co. who attended the mediation had complete authority to resolve the case without further consultation; and (ii) whether mediation should continue with representatives of the parties chosen by the mediator attending. The undersigned respectfully requests the report be prepared by noon May 9, 2005, if possible.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 6 day of May, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

PLAINTIFF'S MOTION TO IMPOSE SANCTIONS FOR FAILURE TO APPEAR AT COURT-ORDERED MEDIATION

Plaintiff, Coleman (Parent) Holdings, Inc., by and through its undersigned attorneys, moves this Honorable Court to impose sanctions against the Defendant, Morgan Stanley, pursuant to the provisions of Rule 1.720(b), Fla. R. Civ. P., for failing to appear at a duly noticed mediation conference without good cause, and in support thereof would show:

1. by Order dated May 2, 2005 (attached as Ex. A), this Court ordered the parties to commence mediation of the above-styled cause by 10:00 a.m., May 5, 2005 and expressly directed:

> Mr. Feinberg may direct which representatives of each party shall participate in mediation. If the directed representatives of a party does not have complete authority to resolve the case, or Mr. Feinberg declines to direct which representatives shall appear, a representative or representatives with such authority shall participate as well. The cost of mediation shall be borne by the parties equally."

2. Rule 1.720(b) provides in relevant part:

> . . . a party is deemed to appear at a mediation conference if the following persons are physically present: (1) The party or its representative having full authority to settle without further consultation.

3. mediation commenced as directed by the Court; however, Morgan Stanley did not appear at the mediation through a "representative having full authority to settle without further consultation."

Wherefore, Plaintiff demands the imposition of sanctions against the Defendant, including an award of mediator and attorneys' fees and other costs, plus such other and further relief as the Court may deem appropriate under the circumstances for violation of the express provisions of this Court's Order and pursuant to the provisions of Rule 1.720.

Dated: May 6, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

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One of Its Attorneys

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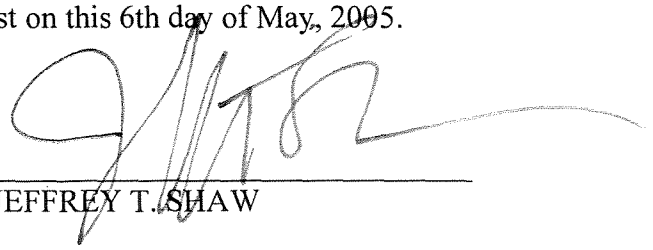
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 6th day of May, 2005.



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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant. /

MORGAN STANLEY'S OBJECTIONS TO COLEMAN (PARENT) HOLDINGS INC.'S PROPOSED AMENDED JURY INSTRUCTIONS

Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") hereby submits its Objections to Coleman (Parent) Holdings Inc.'s ("CPH's") Proposed Amended Jury Instructions related to Phase 1 issues. Pursuant to the Court's May 4, 2005 clarification of its Order Governing Jury Instructions, Morgan Stanley will submit objections to Phase 2 instructions at a later date in advance of the charge conference in Phase 2, should Phase 2 be necessary.

GENERAL OBJECTIONS

Morgan Stanley has submitted a set of jury instructions that should be used instead of CPH's proposed amended instructions. In making these objections, Morgan Stanley does not waive any other objection to specific claims or damages. Morgan Stanley hereby incorporates by reference its prior objections to CPH's proposed instructions.

Morgan Stanley maintains its objection that the Court should not have read the so-called "established facts," nor permitted CPH to discuss those "established facts" during opening statement and use those facts when questioning witnesses. Morgan Stanley therefore further

objects to any mention of the so-called "established facts" in the Court's instructions to the jury, and also objects to any instruction that states that the jury can infer any other fact or conclusion by virtue of the "established facts," as Florida law is settled that any judicial admission of the "deemed facts" imposed as sanction or default can extend only to "the well pleaded allegations of the pleading" and "does not admit facts . . . not properly pleaded or conclusions of law." *Board of Regents v. Stinson-Head, Inc.*, 504 So. 2d 1374, 1375 (Fla. 4th DCA 1987). By the same token, Morgan Stanley has not admitted, and specifically objects to, the contention that Florida law recognizes a claim for aiding and abetting fraud.

Moreover, Morgan Stanley objects to CPH's proposed amended instructions to the extent that they seek to apply Florida law, in that New York law should apply to these claims. Further, Morgan Stanley objects to CPH's proposed amended instructions in that those instructions do not contain Morgan Stanley's defenses. Morgan Stanley hereby incorporates by reference its prior objections to CPH's original proposed instructions. Finally, Morgan Stanley reserves the right to supplement these objections at any time before or during the charge conference.

OBJECTIONS

PHASE 1

CPHPI 1 – Certain Facts Conclusively Established	Objection: 1. The Court has already read, over Morgan Stanley's objections, these "conclusively established" facts. To re-read those facts at this time would be impermissible because: a. the jury is entitled to consider any and all evidence introduced during trial, and thus the instruction would be both misleading and confusing; b. it is a comment on the evidence; c. it bolsters those facts; d. it is argumentative; e. it places undue weight on the facts even though they pertain to issues taken from the jury; f. it is unfairly prejudicial; g. it improperly deems admitted the inflammatory, unnecessary, confusing, argumentative, and imprecise characterizations used in the redacted amended complaint, as well as the redacted amended complaint's conclusions of law. Any judicial admission of the "deemed facts" imposed as sanction or default can extend only to "the well pleaded allegations of the pleading" and "does not admit facts . . . not properly pleaded or conclusions of law." *Board of Regents v. Stinson-Head, Inc.*, 504 So. 2d 1374, 1375 (Fla. 4th DCA 1987). 2. Instructing the jury that it may not consider any evidence admitted during trial as contradicting the established facts is improper in that: a. the jury is entitled to consider any and all evidence introduced during trial; b. if such evidence has been introduced, the evidence was admitted either without objection or because CPH opened the door and is thus properly before the jury; c. it is a comment on the evidence; d. it bolsters those facts; e. it is argumentative; f. it is unfairly prejudicial; g. it improperly deems admitted the inflammatory, unnecessary, confusing, argumentative, and imprecise characterizations used in the redacted amended

	complaint, as well as the redacted amended complaint's conclusions of law. Any judicial admission of the "deemed facts" imposed as sanction or default can extend only to "the well pleaded allegations of the pleading" and "does not admit facts . . . not properly pleaded or conclusions of law." *Board of Regents v. Stinson-Head, Inc.*, 504 So. 2d 1374, 1375 (Fla. 4th DCA 1987). 3. The instruction is misleading. Asserting that "the facts were established before trial" suggests that they were proved, when they were not. They are at most deemed facts or facts "that must be accepted as true" for purposes of this case. Any instruction should reflect that, as Court's prior instruction did: "I have ruled that Morgan Stanley has engaged in litigation misconduct and as a result that it has lost its right to contest certain facts in the case. These facts [were] read to [you] during the trial. Morgan Stanley will not be permitted to dispute or challenge these factual findings. . . . [Y]ou [are] obliged to accept these facts as true[.] [H]owever, there are still disputed issues in the case. And . . . you [must] decide those issues fairly [in your] verdict." 3/30/05 Tr. at 5881:12-25 (adapted). 4. The instruction includes language (*e.g.*, the final sentence) that is unnecessary, confusing, and improperly comments on the evidence (*see* Objections 2a-2g *supra*), in view of the instruction that the jury must "accept" certain facts as true. 5. The instruction's placement gives particular evidence undue weight.
CPHPI 2 – Deposition Testimony	No objection.
CPHPI 3 – Bates Ranges	No objection.
CPHPI 4 – Introductory Instruction	Objection: 1. Instructing the jury that it may not draw inferences, make deductions or reach conclusions contrary to the established facts is improper in that: a. the jury is entitled to consider any and all evidence introduced during trial; b. if such evidence has been introduced, the evidence was admitted either without objection or because CPH opened the door and is thus properly before the jury;

c. it is a comment on the evidence;
d. it bolsters those facts;
e. it is misleading, confusing, argumentative and is unfairly prejudicial;
f. it improperly deems admitted the inflammatory, unnecessary, confusing, argumentative, and imprecise characterizations used in the redacted amended complaint, as well as the redacted amended complaint's conclusions of law. Any judicial admission of the "deemed facts" imposed as sanction or default can extend only to "the well pleaded allegations of the pleading" and "does not admit facts . . . not properly pleaded or conclusions of law." *Board of Regents v. Stinson-Head, Inc.*, 504 So. 2d 1374, 1375 (Fla. 4th DCA 1987).

2. The Court should read Defendant's Supplemental Requested Jury Instruction 1 instead of this instruction, as Defendant's requested jury instruction is an applicable Florida Standard Jury Instruction and CPH's is not.

3. The instruction includes language (*e.g.*, the final sentence) that is also unnecessary, confusing, and improperly comments on the evidence (as well as improper because of Objections 1a-1e above) in light of the prior instruction that the jury must accept the deemed facts as true.

4. Repetitive references to the deemed facts constitute improper bolstering and comment on evidence. Such references are misleading, confusing, argumentative, unduly prejudicial, and place inappropriate weight on those matters.

5. The instruction is misleading. Asserting that "the facts were established before trial" suggests that they were proved, when they were not. They are at most deemed facts or facts "that must be accepted as true" for purposes of this case. Any instruction should reflect that, as Court's prior instruction did: "I have ruled that Morgan Stanley has engaged in litigation misconduct and as a result that it has lost its right to contest certain facts in the case. These facts [were] read to [you] during the trial. Morgan Stanley will not be permitted to dispute or challenge these factual findings. . . . [Y]ou [are] obliged to accept these facts as true[.] [H]owever, there are still disputed issues in the case. And . . . you [must] decide those issues fairly [in your] verdict." 3/30/05 Tr. at 5881:12-25 (adapted).

6. The instruction includes language that is confusing and unnecessary (and improper because of Objections 1a-1e above) in

	light of instruction that the jury must accept the deemed facts as true.
CPHPI 5 - Believability of Witnesses	No objection.
CPHPI 6 - Greater Weight (Preponderance) of the Evidence Defined; Certain Facts Conclusively Established	Objection: 1. The Court should read Defendant's Supplemental Requested Jury Instruction 6 instead of this instruction, as Defendant's requested jury instruction is an applicable Florida Standard Jury Instruction and CPH's instruction is not. 2. Instructing the jury that it must accept all facts read by the Court as true is improper in that: a. the jury is entitled to consider any and all evidence introduced during trial; b. if such evidence has been introduced, the evidence was admitted either without objection or because CPH opened the door; c. it is a comment on the evidence; d. it bolsters those facts; e. it is misleading and confusing; f. . it is argumentative and is unfairly prejudicial; g. it improperly deems admitted the inflammatory, unnecessary, confusing, and imprecise characterizations used in the redacted amended complaint, as well as the redacted amended complaint's conclusions of law. Any judicial admission of the "deemed facts" imposed as sanction or default can extend only to "the well pleaded allegations of the pleading" and "does not admit facts . . . not properly pleaded or conclusions of law." *Board of Regents v. Stinson-Head, Inc.*, 504 So. 2d 1374, 1375 (Fla. 4th DCA 1987). 3. Repetitive references to deemed facts constitute improper bolstering and comment on evidence. Such references are argumentative, misleading, confusing, unduly prejudicial, and place inappropriate weight on such matters. 4. The instruction is misleading. Asserting that "the facts were established before trial" suggests that they were proved, when they were not. They are at most deemed facts or facts "that must be accepted as true" for purposes of this case. Any instruction should reflect that, as Court's prior instruction did: "I have ruled that Morgan Stanley has engaged in litigation misconduct and as a result that it has lost its right to contest certain facts in the case. These

	facts [were] read to [you] during the trial. Morgan Stanley will not be permitted to dispute or challenge these factual findings. . . . [Y]ou [are] obliged to accept these facts as true[.] [H]owever, there are still disputed issues in the case. And . . . you [must] decide those issues fairly [in your] verdict." 3/30/05 Tr. at 5881:12-25 (adapted). 5. The instruction includes language that is unnecessary, confusing (and improper because of Objections 2a-2e above) in light of prior instruction that the jury must accept deemed facts as true.
CPHPI 7 - Elements of CPH's Claim	Objection: 1. The Court should read Defendant's Supplemental Requested Jury Instructions 5, 7 and 8 instead of this instruction, as Defendant's requested instructions are correct under the law and CPH's instruction is not. 2. Instructing the jury that it must accept all facts read by the Court as true is improper in that: a. the jury is entitled to consider any and all evidence introduced during trial; b. if such evidence has been introduced, the evidence was admitted either without objection or because CPH opened the door; c. it is a comment on the evidence; d. it bolsters those facts; e. it is misleading and confusing; f. it is argumentative and is unfairly prejudicial; g. it improperly deems admitted the inflammatory, unnecessary, confusing, and imprecise characterizations used in the redacted amended complaint, as well as the redacted amended complaint's conclusions of law. Any judicial admission of the "deemed facts" imposed as sanction or default can extend only to "the well pleaded allegations of the pleading" and "does not admit facts . . . not properly pleaded or conclusions of law." *Board of Regents v. Stinson-Head, Inc.*, 504 So. 2d 1374, 1375 (Fla. 4th DCA 1987). 3. The instruction is an unnecessary, improper, confusing, argumentative, and unduly prejudicial "summary" or comment on particular deemed facts. It repeats statements already appearing in the deemed facts (*e.g.*, that certain statements were material). It improperly directs the jury to reach particular legal conclusions rather than withdrawing judicially resolved legal issues from the

	jury's consideration. 4. The instruction contains incorrect and/or incomplete statements of law: a. While the Court has defaulted Morgan Stanley on these elements or directed a verdict against it on those elements, Morgan Stanley objects to that result as contrary to law; b. the instruction does not inform the jury that CPH must prove its claims by the greater weight of the evidence; c. CPH's statement of the aiding and abetting claim and the conspiracy claims are incomplete and/or incorrect under Florida law; d. Florida law does not recognize a claim for aiding and abetting fraud; e. if such evidence has been introduced, the evidence was admitted either without objection or because CPH opened the door; f. the jury is entitled to consider any and all evidence introduced during trial; g. the instruction is misleading, confusing, argumentative, a comment on the evidence, and is unfairly prejudicial. 5. Repetitive references to deemed facts constitute improper bolstering and comment on evidence; such references are misleading, confusing, argumentative, unduly prejudicial, and place inappropriate weight on those matters. 6. The instruction is misleading. Asserting that "the facts were established before trial" suggests that they were proved, when they were not. They are at most deemed facts or facts "that must be accepted as true" for purposes of this case. Any instruction should reflect that, as Court's prior instruction did: "I have ruled that Morgan Stanley has engaged in litigation misconduct and as a result that it has lost its right to contest certain facts in the case. These facts [were] read to [you] during the trial. Morgan Stanley will not be permitted to dispute or challenge these factual findings. . . . [Y]ou [are] obliged to accept these facts as true[.] [H]owever, there are still disputed issues in the case. And . . . you [must] decide those issues fairly [in your] verdict." 3/30/05 Tr. at 5881:12-25 (adapted).. 7. The final sentence is confusing and unnecessary (and improper because of objections 3a-3f above) in light of the instruction that the jury must accept the deemed facts as true.

	8. The instruction misstates Florida law by omitting the requirement that reliance be justifiable. 9. The added language stating that a fact is "material" if "CPH would not have entered into the transaction" in "the absence of a misrepresentation concerning [that] fact" is an incomplete and incorrect statement of the law, comments on the evidence, is superfluous, and directs a verdict on the disputed issue of reliance. a. It falsely equates materiality with reliance. Materiality is an objective standard that requires that the misstatement not be so trivial as to be unimportant to a reasonable person. Reliance turns on whether the misstatement in fact induced action or inaction by the particular plaintiff. The instruction improperly conflates them and presents them to suggest that materiality is sufficient to establish reliance; b. It improperly omits other components of the definition of materiality, including those mentioned in the authorities cited by Plaintiff (*e.g.*, an effect on value); c. It improperly directs a verdict on the disputed issue of reliance by stating first that the Court has found materiality and second that a statement is material if CPH would not have entered into the transaction absent that fact; the effect is to direct the jury to conclude that CPH would not have entered into the transaction absent the misrepresentation. This Court has *not* found that CPH would not have entered into the transaction absent particular statements, and the instruction misleads the jury by suggesting otherwise; d. Because materiality is a conclusion of law, the allegation of materiality in a complaint cannot be deemed admitted by default or judicial admission; e. The instruction and definition of materiality are unnecessary and confusing because materiality has already been deemed established by the Court; the jury need not be instructed on the definition of elements the Court has already deemed established and as to which there is nothing for the jury to decide; f. If the Court employs Plaintiff's definition of materiality, it must change the statement of facts deemed established to exclude findings of materiality. The Court, in deeming certain facts to be established, did not intend to determine that Plaintiff would not have entered into the transaction in the absence of the misrepresentations. The alleged litigation misconduct that led to the deemed facts

	could not have affected Plaintiff's ability to prove such a fact, which is within Plaintiff's own knowledge. Further, because the deemed facts have already been read to the jury, the Court cannot change them to omit materiality without declaring a mistrial. 10. The description of the first issue presented for the jury's determination provides an incomplete, misleading, and incorrect statement of law. Among other things, it omits the requirement that reliance be justifiable. 11. The description of the second issue presented for the jury's determination provides an incomplete, misleading, and incorrect statement of law. Among other things, the issue is whether any fraudulent statement on which Plaintiff relied was a legal cause of damage, not whether a false statement caused CPH to suffer a loss. 12. The statement that the jury cannot reach a different verdict on conspiracy and aiding and abetting claims is incorrect.
CPHPI 8 - Element 1 – Reliance	Objection: 1. The Court should read Defendant's Supplemental Requested Jury Instructions 11-16 instead of this instruction, as Defendant's requested instructions are correct under the law and CPH's instruction is not. 2. The instruction contains incorrect and/or incomplete statements of law: a. the instruction misstates Florida law on reliance; b. the instruction does not contain the concept of justifiable reliance, which is well entrenched under Florida law; c. the law imposes a duty or obligation to attempt to obtain more information or to determine whether any statement was false generally, or at a minimum, when presented with the numerous red flags known to CPH; d. the instruction is legally wrong because it does not inform the jury that CPH is a sophisticated investor which has different responsibilities in a significant arms-length transaction such as this; e. the instruction fails to inform the jury that it should consider the totality of the circumstances in determining whether reliance is justifiable; f. Florida law does not recognize a claim for aiding and abetting fraud; g. CPH's statement of the aiding and abetting claim and the

	conspiracy claims are incomplete and/or incorrect under Florida law; h. New York law applies to CPH's claims, and thus the instructions are incorrect as a matter of law in that they do not contain the proper elements. 3. The instruction, as amended, is vague and confusing. The phrase "depended on the accuracy and truthfulness" provides insufficient guidance. 4. Plaintiff's instruction improperly shifts content regarding reliance into a so-called "limiting" instruction (CPH Supplemental Instruction No. 3) that in fact is an attempted definition of reliance rather than a "limit" on permissible uses of particular evidence. *See* 4/29/05 Tr. At 11481:12-19. 5. Plaintiff's instruction corresponds to its unsupportable effort to equate reliance with materiality and suggests incorrectly that the issue has been resolved by the Court already. Morgan Stanley hereby incorporates by reference, to the extent necessary, the objections to CPHPI No. 7 as if fully set forth herein.
CPHPI 9 - Liability for Acts of Co-Conspirators	Objection: 1. The Court has read to the jury a statement of deemed facts that Morgan Stanley committed fraudulent acts. Accordingly, this instruction is unnecessary. 2. The instruction contains incorrect and/or incomplete statements of law. 3. The instruction is an improper comment on the evidence. 4. The instruction is misleading, confusing, argumentative, and is unfairly prejudicial. 5. The instruction is misleading. Asserting that "the facts were established before trial" suggests that they were proved, when they were not. They are at most deemed facts or facts "that must be accepted as true" for purposes of this case. Any instruction should reflect that, as Court's prior instruction did: "I have ruled that Morgan Stanley has engaged in litigation misconduct and as a result that it has lost its right to contest certain facts in the case. These facts [were] read to [you] during the trial. Morgan Stanley will not be permitted to dispute or challenge these factual findings. . . . [Y]ou [are] obliged to accept these facts as true[.] [H]owever, there are still disputed issues in the case. And . . . you [must] decide those

	issues fairly [in your] verdict." 3/30/05 Tr. at 5881:12-25 (adapted)..
CPHPI 10 - Element 2 – Causation of Damages	Objection: 1. The Court should read Defendant's Supplemental Requested Jury Instruction 24 instead of this instruction, as Defendant's requested instruction correctly states the law, whereas CPH's does not. 2. Florida law does not recognize a claim for aiding and abetting fraud. 3. The instruction misstates Florida law in that it fails to incorporate the requirement of not only transaction causation but also loss causation. 4. There is no basis in the evidence for instructing the jury on the issue of concurrent cause. 5. The instruction on concurrent cause is legally incorrect and/or incomplete. It would be incorrect to suggest that any loss caused by any other factor (such as changes in market conditions, subsequent mismanagement, or the like) can be attributed to Morgan Stanley. 6. The instruction is an incorrect statement of law where Plaintiff has selected benefit-of-the-bargain damages. 7. The instruction improperly injects negligence causation into a securities fraud action involving securities. 8. Instructing the jury as CPH suggests would be an improper comment on the evidence, would be misleading, confusing, argumentative, and unfairly prejudicial. 9. The instruction is incomplete, incorrect, and confusing because it directs the jury to award damages for "the fraud," an undefined term, rather than damages resulting from any misstatements on which Plaintiff justifiably relied.

CPHPI 11 - Amount of Damages – Compensatory	No objection.

CPHPI 12 - Benefit of the Bargain	Objection: 1. The Court should read Defendant's Supplemental Requested Jury Instructions 22-25 instead of this instruction, as Defendant's requested instructions are correct under Florida law whereas CPH's instruction is not. 2. The instruction impermissibly incorporates the standard for a rescissionary measure of damages despite the fact that CPH waived any claim for such damages. 3. The instruction contains incorrect and/or incomplete statements of law: a. The instruction misstates Florida law on benefit of the bargain, including but not limited to: (i) expected value is not a proper factor in measuring benefit of the bargain damages; (ii) the definition of expected value is confusing and suggests that expectations regarding *future* performance should be incorporated, such as the effect of the merger on stock value, where such speculation about *future* events (as opposed to current fact) is not actionable as fraud; the instruction conflates subjective expectation of future performance with current value (iii) the instruction employs fair market value at a time when the stock is alienable rather than the actual value at the time of the transaction as required by Florida law; it improperly assumes that fair market value is relevant or can be ascertained only for items that can be sold in the market; even inalienable property (spend-thrift trusts and life estates) have measurable value despite restrictions on sale; (iv) the instruction erroneously provides for actual value to be determined not on the date of the transaction but years later; (v) the instruction erroneously makes the Court the trier-of-fact as to when the stock could have been sold; (vi) the instruction fails to incorporate causation principles by requiring the trier-of-fact to conclude that the alleged misstatements prevented Plaintiff from selling its stock earlier without evidence that Plaintiff in fact *would* have, but for the fraud, sold the stock earlier; (vii) the instruction fails to exclude losses not legally caused by the fraud, such as those caused by market declines or competition, and for which Plaintiff undertook to accept

	risk (*i.e.*, the instruction omits the loss-causation requirement); (vi) the instruction provides rescissionary damages waived by CPH (and relies on rescission cases as authority); (vii) the instruction as amended includes improper comments and characterizations of the evidence regarding valuation on particular dates; (viii) the instruction defines fair market price incorrectly by requiring actual ability to sell when alienability is not a precondition to estimation of fair market price; (ix) the instruction uses undefined and imprecise terms such as "supposed to receive;" (x) the instruction improperly implies there must be an actual willing and able purchaser; b. the instruction does not sufficiently limit the damages that are recoverable. For example, the instruction does not inform the jury that it may not consider the fact of later appreciation or depreciation of the property that is the subject of the false representation in computing damages; c. the instruction does not inform the jury about CPH's duty to mitigate damages; d. the instruction is not neutral in that it fails to instruct that damages cannot be based on speculation, guesswork or conjecture. 4. The instruction provides for damages based on allegedly false representations that were not relied upon; it thus provides for damages that were not legally caused by the misrepresentation. 5. The instruction is not neutral and is further misleading, confusing, argumentative and is unfairly prejudicial.
CPHPI 13 - No Reduction on Account of Uncertainty Caused by Defendant	Objection: 1. The instruction contains incorrect and/or incomplete statements of law: a. CPH has the burden to establish its actual damages, not the mere fact of damage; b. the instruction misstates Florida law because it does not inform the jury that damages must be established with reasonable certainty and cannot be based on undue speculation, guesswork or conjecture; c. if damages are speculative, it is because of a failure of

	proof on CPH's part and/or the ineffectiveness of CPH's expert; d. the instruction reflects spoliation concerns not present here, *i.e.*, where the defendant destroys evidence the plaintiff needs to prove damages (as the supporting authority cited by CPH shows); there is no evidence that proof of extent of damages was despoiled by Morgan Stanley or Sunbeam here; e. CPH's instruction improperly injects the law of negligence into this action premised on fraud. 2. The instruction is not neutral and is further misleading, confusing, argumentative, improperly comments on the evidence and is unfairly prejudicial. 3. The Court should read Defendant's Supplemental Requested Jury Instructions 23 and 26 instead of this instruction, as Defendant's requested instructions are correct under Florida law and CPH's instruction is not.
CPHPI 14 - Collateral-Source Rule for Tort Actions	Objection: 1. There is no evidence of any collateral sources except that introduced by CPH itself. There is no evidence of any recovery or compensation received by CPH in settlement. CPH is not entitled to an instruction to address evidence CPH itself improperly introduced. 2. The instruction is not neutral and is further misleading, confusing, argumentative, improperly comments on the evidence and is unfairly prejudicial. 3. It is improper to instruct the jury that the Court will give credit for collateral sources; any instruction should state that any credits are a matter for the Court. 4. Morgan Stanley further objects to the specific inclusion of warrants as a collateral source. The jury also has not been informed that the warrants are the result of a settlement. There is thus no factual predicate for the instruction that they constitute a collateral source. 5. The mention of warrants is unnecessary and confusing because the instruction already mentions anything received from Sunbeam, so adding a reference to the warrants is unnecessary. There is no more justification for singling out "warrants" from Sunbeam than millions in cash from Andersen.

	6. The instruction about warrants is unnecessary because the only evidence in the record relating to the value of the warrants is that of CPH's own witness, who testified that they were worth nothing. 7. The mention of specific sources renders the instruction misleading, confusing, argumentative, and an improper comment on the evidence, as well as unfairly prejudicial.
CPHPI 15 - Prejudice and Sympathy; Judge Not Involved	Objection: 1. The Court should read Defendant's Supplemental Requested Jury Instruction 30 instead of this instruction, as Defendant's requested instruction is an applicable Florida Standard Jury Instruction and CPH's instruction is not. 2. The portion of the instruction addressing the "established facts" is misleading, confusing, argumentative, improperly comments on the evidence and is unfairly prejudicial. The above objections to the repeated references to "established facts," *see* Objections to CHPPI No. 7, Objections 2-8, are hereby incorporated by reference.
CPHPI 16 - Closing Instruction, First Phase of Proceedings	No objection.
CPH Verdict Form (First Phase of Bifurcated Proceeding)	Objection: 1. Morgan Stanley has submitted a verdict form that is correct and should be used instead of CPH's proposed verdict form. 2. The Court's entry of a default or directed verdict against Morgan Stanley was error. Morgan Stanley is entitled to a jury determination of all elements of CPH's claims. 3. Morgan Stanley objects to CPH's general verdict form on the issue of reliance. As set out in Morgan Stanley's proposed verdict form, a special interrogatory verdict is necessary on this issue. 4. CPH's proposed verdict form omits the requirement that reliance be justifiable. 5. CPH's proposed verdict form does not contain Morgan Stanley's defenses. 6. Morgan Stanley objects to the paragraph in the verdict form

	telling the jury not to make any reduction because of CPH's negligence, as there has been no claim presented to the jury that CPH was negligent, and negligence is not defined in the instructions. Further, Morgan Stanley objects to instructing the jury not to reduce CPH's recovery because of any recovery CPH has or may receive from Sunbeam, Arthur Andersen or any other source, including warrants, as there is no evidence of any monetary settlement before the jury and CPH has claimed that the warrants had no monetary value. 7. Morgan Stanley further objects to the inclusion of warrants as a collateral source. Warrants are not a recognized collateral source under Florida law. 8. Inclusion of the paragraph telling the jury to disregard CPH's negligence and to disregard any compensation received from other non-parties makes this verdict form misleading, confusing, and argumentative. This language further improperly comments on the evidence and is further unfairly prejudicial. 9. CPH's proposed verdict form omits the clear and convincing evidence standard (objection subject to same reservations set forth in Morgan Stanley Proposed Instruction No. 29). 10. CPH's proposed verdict form includes improper repetition of proposed (and incorrect) jury instructions, including the collateral source instruction, rendering the form misleading, argumentative, confusing, and unduly prejudicial. 11. CPH's proposed verdict form incorrectly asks whether CPH relied on "any" false statement, as opposed to material false statements. 12. CPH's proposed verdict form incorrectly asks the jury to determine the "damages sustained" on account of the (undefined) fraud, instead of the damages legally caused by the specific false statements on which Plaintiff justifiably relied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 7th day of May, 2005.

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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDING INC.,
Plaintiff(s),

vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

Report of the Mediator

I respectfully respond to the Order of the Court, dated May 6, 2005, (see also 5/6/2005 transcript at pages 139-41) in which the Honorable Circuit Court Judge Elizabeth T. Maass, requests that I advise the Court concerning (i) "whether the representative(s) of both parties who attended the mediation had complete authority to resolve the case without further consultation; and (ii) whether mediation should continue with representatives of the parties chosen by the mediator attending."

I believe that the representatives of both parties to the mediation did have the necessary authority to resolve the dispute. I also believe that the mediation should continue in an effort to secure a comprehensive settlement of the above-captioned matter, and propose that the mediation continue on Monday, May 9 in Washington, D.C. beginning at 9:00 A.M. at The Willard Hotel , 1401 Pennsylvania Avenue, N.W., and continuing as long as is necessary.

Kenneth R. Feinberg, Esq.
Mediator

May 7, 2005
Date

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TO: Donald Kempf FAX NO: 561-651-7364

FIRM: Morgan Stanley

FROM: Kenneth R. Feinberg, Esq. DATE: May 7, 2005

TOTAL NO. OF PAGES 1 + Facsimile Transmittal Page

CLIENT NO:

MESSAGE: The corrected version, including the specified location of the Monday mediation.

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S MEMORANDUM IN OPPOSITION TO MORGAN STANLEY'S MOTION TO INSTRUCT THE JURY ON RELIANCE AND DAMAGES UNDER THE CLEAR-AND-CONVINCING EVIDENCE STANDARD IN PHASE I

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") submits this response to Morgan Stanley's most recent motion arguing for application of the clear-and-convincing standard to all elements of liability during Phase I of the trial. The Court should not accede to Morgan Stanley's utterly unprecedented suggestion, which is supported neither by law nor by logic. Indeed, the procedure proposed by Morgan Stanley effectively "bifurcates" the determination of entitlement to punitive damages -- the one determination that is subject to the clear-and-convincing standard -- by requiring that the jury first determine at the end of Phase I whether the elements of the underlying torts have been proved by clear-and-convincing evidence. Only if the jury has first said yes to that question would CPH then have the chance, in Phase II, to present much of the other evidence supporting entitlement to punitive damages, such as the glaring evidence of a Morgan Stanley cover-up, and to argue for an award of punitive damages based on instructions fully addressing the applicable standards.. That makes no sense. As this Court has ruled, entitlement to punitive damages should be determined entirely in Phase II, during which

the clear-and-convincing standard can properly be applied to assess the wrongfulness of Morgan Stanley's scienter as the law requires. It would be unwise and unjust if the Court's prior ruling as to the manner of trying this case, designed to protect Morgan Stanley, were now revised to the prejudice of CPH -- the party guilty of no misconduct in this case. Moreover such a procedure would be unprecedented and contrary to established Florida law.

Introduction

It is important, after all the briefing on these issues, to review how we got here:

First, the Court initially granted, over Morgan Stanley's opposition, a *W.R. Grace* bifurcation of the case. Ex. A, 2/16/05 Order on CPH Motion to Bifurcate Trial. Under that approach, issues of liability and entitlement to punitive damages would have been heard in Phase I and CPH could have presented most of the evidence supporting punitive damages including, for example, evidence of litigation misconduct designed to cover up the fraud. Only two types of evidence -- Morgan Stanley's net worth and prior punitive awards (serving as possible mitigation) -- would have had to be deferred to the Phase II "amount" determination because of their potentially prejudicial effects. *See W.R. Grace & Co. v. Waters*, 638 So. 2d 502, 506 (Fla. 1994).

Second, when Morgan Stanley moved to have both the "established facts" and the "litigation misconduct" statements excluded from Phase I, the Court responded with a March 31, 2005 Order directing that "Phase I of the trial shall be limited to the liability, if any, of MS & Co. for compensatory damages." Ex. B, 3/31 Order. The Court indicated that it was acting to prevent undue prejudice to Morgan Stanley in Phase I through exposure to punitive-damages-related evidence like the litigation misconduct statement; the Court's rebifurcation order therefore confined such evidence to Phase II. Ex. C (3/31 Tr. at 6267-75).

Third, having won this novel departure from the usual *W.R. Grace* bifurcation procedure, Morgan Stanley immediately set out to further customize the bifurcation to suit its purposes -- contending (1) that Florida law requires a second finding of all elements of liability by clear-and-convincing evidence and (2) that this issue should be assessed in isolation in Phase I, before evidence and instructions relating to entitlement to punitive damages have been presented. *See* Ex. D (Morgan Stanley's Motion Regarding the Reliance and Damages Issues to Be Determined at Phase I of the Trial, filed 4/4/05). The Court denied Morgan Stanley's first motion seeking this dual relief on April 5. Ex. E, 4/5/05 Order. But Morgan Stanley has since filed three additional briefs seeking some or all of the same relief, including the instant motion, which should be treated as a motion for rehearing.

As shown below, there is no reason to depart from the Court's original rebifurcation order, which was crafted solely for the benefit of Morgan Stanley. Certainly there is no basis for adopting the novel hybrid procedure now being proposed by Morgan Stanley, under which the jury would be asked to address only one part of the "entitlement" issue during Phase I, prior to hearing the full range of evidence relevant to entitlement to punitive damages. Nor is there any basis for Morgan Stanley's' contention that the clear-and-convincing standard properly applies to all elements of CPH's underlying tort claims.

Argument

Morgan Stanley's novel and illogical proposals suffer from several ills.

First, Morgan Stanley's motion is predicated on the erroneous assumption that to obtain punitive damages, CPH must prove all elements of its liability claims under two standards, the greater weight of the evidence and the clear-and-convincing standard. That is not correct. As demonstrated in CPH's April 25, 2005 brief regarding the limited applicability of the clear-and-

convincing standard of proof in Phase II, attached as Ex. F, the clear-and-convincing standard of proof applies only to one issue in this case: whether Morgan Stanley acted with sufficiently egregious intent to cause harm that it merits punishment. All other issues, including the remaining elements of CPH's liability claims (reliance and causation of damages), are liability issues that are decided by the greater weight of the evidence and then taken as established during the consideration of punitive damages.

Morgan Stanley's counter-argument, unsupported by any case law whatsoever, starts with the statutory requirement that a plaintiff "establish at trial, by clear and convincing evidence, its entitlement to an award of punitive damages," Fla. Stat. § 768.725, and combines it with the rule that punitive damages must be premised on a prior finding of tort liability, to produce the startling conclusion that the elements of tort liability, in toto, must be found twice with each finding made under a different standard of proof. *See* Ex. G (Morgan Stanley's Reply to CPH's Brief Regarding the Requirement that Plaintiff Prove Entitlement to an Award of Punitive Damages by Clear and Convincing Evidence in Phase II, filed 4/27/05).

As previously argued, the statutorily elevated burden of proof is in derogation of the common law and must, accordingly, be strictly construed -- i.e., given the narrowest possible application consistent with the statutory language. Especially given that rule, there is no basis for applying the clear-and-convincing standard to any issue beyond the issue of scienter, which has long been the touchstone for awarding punitive damages in Florida. As the Florida Supreme Court put it in *Winn & Lovett Grocery Co. v. Archer*, "[e]xemplary damages are given solely as a punishment, where torts are committed with fraud, actual malice or deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others." 171 So. 214, 221-22 (Fla. 1936), quoted in *First*

Interstate Devel. Corp. v. Ablanedo, 511 So. 2d 536, 539 (Fla. 1987). Similarly, the Supreme Court explained in *Ablanedo* that proof of a fraud claim is sufficient to create a jury question regarding punitive damages "because intentional misconduct is a necessary element of fraud." 511 So. 2d at 539 (emphasis added). The focus on scienter did not change in 1999 when the legislature mandated proof of entitlement by clear and convincing evidence. To the contrary, the very statute on which Morgan Stanley primarily relies, Fla. Stat. § 768.72, which applies only to post-1999 torts, provides that entitlement can be based either on "intentional misconduct" or "gross negligence."

Morgan Stanley suggests that the term "misconduct" incorporates all elements of intentional torts, but neglects to explain why the legislature would have permitted a less serious state of mind -- gross negligence -- to suffice on its own for entitlement to punitive damages without proof of other elements like causation and damages. There is no plausible explanation, and experience teaches volumes here: if Morgan Stanley were correct that all elements of torts have to be proved twice under different standards of proof, then verdict forms would routinely ask juries to apply each standard of proof to each element -- as Morgan Stanley's proposed form does. The fact that no such verdict form has ever, to our knowledge, been proposed or used is telling. Clearly, at the entitlement stage, the real issue is the wrongfulness of the defendants' conduct, which depends on an assessment of state of mind, not all the other elements of the tort.[1]

Second, and in any event, there is still no legal basis for following the procedure proposed by Morgan Stanley. The ultimate issue to be determined under the clear-and-

[1] Here, for example, if the jury has found liability, and finds that Morgan Stanley acted with a level of intentional wrongfulness justifying punitive damages, why should it matter whether the jury only believes that reliance has been proven by the greater weight of the evidence? That should not affect the question of punishment in any way, given that Morgan Stanley intended to induce reliance and profit from reliance.

convincing standard is "entitlement to an award of punitive damages" as a whole. Fla. Stat. § 768.725. Morgan Stanley seeks to separate out what it sees as one part of the entitlement determination -- proof of the tort elements -- and pose it as a question to the jury, applying the clear-and-convincing standard, without telling the jury the purpose. Under such a procedure, the jury would address only the elements of the underlying tort under the clear-and-convincing standard in Phase I, before even hearing the rest of the evidence relevant to the entitlement determination -- such as a pattern of similar misconduct, or efforts to cover up the wrongdoing, as occurred here.

Thus, under Morgan Stanley's proposed procedure, the entitlement issue would itself be "bifurcated" between Phase I, when only the elements of the tort would be assessed, and Phase II, when the jury would first hear about other aspects of the defendant's conduct bearing on the issue of punishment. In this case, for example, the jury would first apply the clear-and-convincing standard to the tort elements before hearing anything about Morgan Stanley's massive and contumacious cover-up. They would do so either with no understanding of the purpose of the inquiry (as we had originally assumed) or after being told, without further explanation, that the inquiry relates to punitive damages (as Morgan Stanley's proposed verdict form appears to assume).

Either way, the clear result of the procedure proposed by Morgan Stanley would be a risk of a compromise verdict in Phase I, precluding the jury from ever even exercising its fully informed discretion about the ultimate issue of entitlement to punitive damages. Such an outcome would flatly contravene the longstanding principle that the question of entitlement to punitive damages is one for the jury to decide in every case in which a defendant has been found liable for fraud. *See First Interstate Devel. Corp. v. Ablanedo, supra.*

Third, administrative convenience cannot trump CPH's right to present all evidence relevant to the jury's determination of punitive damages before the jury makes any decision under the clear-and-convincing standard. Morgan Stanley's justifications for creating such an illogical, pro-defendant hurdle for plaintiffs are (1) administrative convenience (*i.e.*, avoiding the need to reinstruct on the elements of the tort in Phase II), and (2) fairness (*i.e.*, avoiding the prejudicial effects of the jury hearing the other evidence relevant to punitive damages before the elements of the tort are assessed under the higher standard of proof). *See* Mot. at __. But the convenience concern derives solely from the Court's departure -- for Morgan Stanley's protection and at Morgan Stanley's urging -- from the *W.R. Grace* bifurcation procedure under which liability and entitlement to punitive damages are decided simultaneously in Phase I. Morgan Stanley, having sought and received the benefit of the Court's March 31 ruling, should not now be allowed to argue that it would be more convenient to ask the jury some questions at the end of Phase I that are custom-designed to create a risk of cutting off punitive damages before the jury is fully informed and knows what it is deciding.

Morgan Stanley's prejudice argument is equally unavailing. It amounts to a claim that it would be prejudicial for the jury to hear all the evidence relevant to the determination of entitlement to punitive damages before effectively deciding entitlement to punitive damages under the standard of proof (clear and convincing) applicable only to the issue of entitlement to punitive damages. In addition to being nonsensical, the argument flies in the face of *W.R. Grace*, which, as noted, calls for the liability and entitlement issue to be tried and decided together -- with only the issues of prior punitive awards and net worth relegated to the second phase where the amount of punitive damages would be set. *See* 638 So. 2d at 506.

Asking the jury to apply the clear-and-convincing standard to the tort elements in Phase I not only would be unprecedented and create an inappropriate bifurcation of the entitlement determination, but it also would confuse the jury about the appropriate burden of proof applicable to the underlying Phase I liability issues. It is beyond dispute that the unresolved elements of CPH's claims (*i.e*, reliance and damages) are to be decided in Phase I by the greater weight of the evidence. Instructing the jury on two different standards of proof — in a phase of the trial that, at the urging of Morgan Stanley, will not include any punitive-damages-related evidence — would introduce the considerable danger that the jury will assume erroneously that CPH is required to prove its underlying liability case by clear-and-convincing evidence. That should not be allowed to occur.

Conclusion

For all of these reasons, the Court should not accept Morgan Stanley's claim that the clear-and-convincing standard applies to all elements of CPH's claims and certainly should not accept Morgan Stanley's invitation to ask a limited set of questions relevant only to entitlement to punitive damages at a stage of the trial when the plaintiff has not yet had the opportunity to put on its punitive damages case. Morgan Stanley's motion that this Court instruct the jury to determine reliance and damages under the clear-and-convincing evidence standard during Phase I should be denied.

Dated: May 9, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

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One of Its Attorneys

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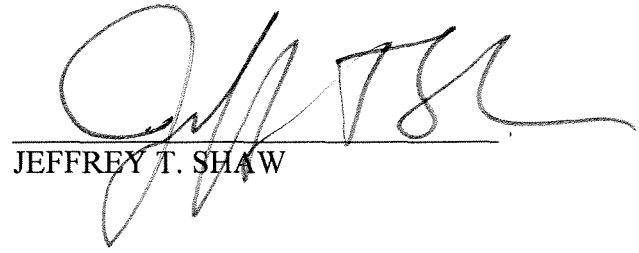
16div-016826

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 9th day of May, 2005.



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#230580/mep

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

CASE NO: 2003 CA 005045 AI

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO BIFURCATE TRIAL

THIS CAUSE having come to be considered upon Coleman (Parent) Holdings Inc.'s Motion to Bifurcate Trial, and the Court having reviewed the file and being fully advised in the premises, it is hereby,

ORDERED and ADJUDGED: the Motion is Granted. Trial of the amount of punitive damages to be assessed shall be bifurcated from for Trial from the remaining issues.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, this 16 day of Feb, 2005.

ELIZABETH T. MAASS
CIRCUIT COURT JUDGE

Copies have been furnished to all counsel on the attached counsel list.

EXHIBIT
A

16div-016829

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16div-016830

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION TO CLARIFY THE PROPER SCOPE OF THE LIABILITY AND PUNITIVE PHASES OF TRIAL

THIS CAUSE came before the Court March 31, 2005 on Morgan Stanley's Motion to Clarify the Proper Scope of the Liability and Punitive Phases of Trial, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion to Clarify the Proper Scope of the Liability and Punitive Phases of Trial is Granted, in part. Phase I of the trial shall be limited to the liability, if any, of MS & Co. for compensatory damages. Phase II shall address entitlement and, if necessary, amount of punitive damages to be assessed if liability is determined in CPH's favor.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 31 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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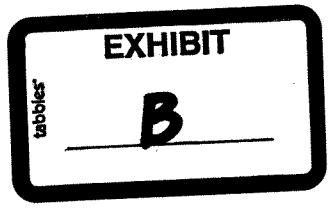

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IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 54

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Thursday, March 31, 2005

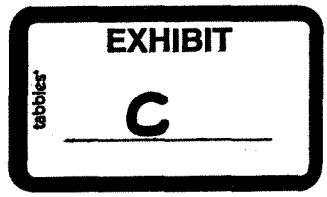
Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

1:00 p.m. to 5:05 p.m.



regard to bifurcation with you, I think, this morning. But it wasn't what I wanted to do. What I wanted to do addressed -- I don't think you can decide that issue unless you decide some issues we wish to raise in regard to how your order, sanctions order, affects the ability of the Defendant to defend itself on both liability and amount to punitive damages.

THE COURT: Let me be honest with both sides and lay our cards on the table, and then you can tell me what, if anything, you need to do.

Please understand, as I sit here now, I'm not contemplating redoing any of the orders I've done.

That said, I do understand Morgan Stanley's concern about having a fair trial on the issues that remain in the case. And given that concern, why would we not do liability and compensatory damages first, wholly apart from punitive damages, and have phase two be both entitlement to punitive damages and amount? And that way, quite honestly, under my prior ruling I don't know that the statement of litigation misconduct would be read to the jury during the liability phase.

And then I would hope we eliminate the possibility that a juror may inappropriately think this is bad stuff, so we're just going to give Coleman money. And then we can still argue the other stuff on the appropriateness of the statement to entitlement and amount of punitive damages. But why went wouldn't I do that just to be fair to Morgan Stanley?

MR. SCAROLA: Because the Supreme Court has told you that is not the appropriate way.

THE COURT: Have they said I can't do it that way, or that's not the way they suggest?

MR. SCAROLA: The response to your question is that they have not precluded you from readjusting the bifurcation line. There clearly is discretion pursuant to Rule 1.270 to sever claims for separate trial. Your Honor has the discretion to do that.

The weight of authority clearly indicates that that is an unnecessary bifurcation in this proceeding. And just so that we get ourselves properly procedurally oriented, this did begin because we filed motion in limine number 28, which asked to make a determination as to what evidence would be admissible in phase one and

what evidence would be admissible in phase two. And Morgan Stanley did indeed respond by saying, it is our intention to request a redrawing of the bifurcation line.

They told us that we would have such a motion by noon today. And at approximately noon we were served with what Morgan Stanley styled: Morgan Stanley's motion to clarify the proper scope of the liability in punitive phases of trial.

I assume Your Honor has received that.

THE COURT: I do. I do.

MR. SCAROLA: Okay. That memorandum, which was supposed to address both our motion in limine and raise the new issue, really presents three questions to be determined.

One is a redrawing of the bifurcation line.

The second is the appropriate burden of proof on a fraud claim.

And the third, although only obliquely referenced, relates to what evidence is admissible on first phase, second phase, and, quite frankly, fails to address most of the issues that we raised in our motion in limine.

I agree that the first issue that we ought

to address is redrawing the bifurcation line.

THE COURT: Why would we not redraw it in the fashion I suggested?

MR. SCAROLA: The only response I have to that, Your Honor, is that the arguments that are being made for the redrawing of the bifurcation line are not unique to this case in any respect at all. Any time there is a punitive damage claim associated with an underlying tort, the evidence that would be introduced to support the claim for punitive damages that is unrelated to the liability aspect of the case, that is, the entitlement evidence, if we can refer to that in a shorthand fashion, could be argued to prejudice the Defendant on the liability aspects of the case.

Those were matters that were considered by the Supreme Court in W.R. Grace. They decided that the only appropriate evidence to excuse from the principal trial was evidence with regard to the Defendant's financial circumstances, their pecuniary circumstances, and evidence that related to other punitive liability, stating, quite reasonably, that Defendant was placed in a very difficult, if not

completely, untenable position in appearing before the jury and saying, we have already been punished enough as a consequence of other punitive damage awards that have been imposed against us, and therefore, we should not be punished more, at the same time that they are saying, we didn't do this.

THE COURT: I understand the Supreme Court has said I can do it that way.

Why in this case, though, specifically? What is the prejudice to your client, the legal prejudice to your client if that's where we draw the line?

MR. SCAROLA: I can't tell Your Honor that there is any legal prejudice that I can specifically identify as a consequence of drawing the line in that fashion. However, I believe it to be entirely unnecessary. I can cite a number of cases where the issue has been directly dealt with. And the appellate courts have held very specific that that type of bifurcation is completely unnecessary.

And in addition to that, because of the Defendant's choices in this case, such a bifurcation no longer makes any sense at all.

THE COURT: Why do you say that?

MR. SCAROLA: Just this morning, the Defendant was given the option of delaying voir dire until after this hearing so that the Defendant could decide whether to directly address both what I will refer to as the litigation misconduct order and the liability order. The Defendant chose, after these arguments were clearly placed before it, to say, no, I want to go forward now, and I want to tell the jury about both orders now.

The initial panel, because the Defendant chose to do it, has been informed that Morgan Stanley has been found to have engaged in very serious litigation misconduct. That's almost a direct quote from Mr. Hansen. This panel has been told exactly the same thing.

Beyond that, this, again, is almost a direct quote from Mr. Hansen from this morning's voir dire, as a consequence of not following court orders, Morgan Stanley can't defend itself.

Now, Your Honor cautioned Mr. Hansen about making exactly that kind of statement repeatedly yesterday. He has chosen to do it again. And we are now placed in the position that I

expressed a concern about yesterday. I laid it out about as clearly as I could lay it out. Our fear is that Morgan Stanley appears before this Court and tells this jury, we have been severely punished by the Judge for litigation misconduct. And they don't get to hear about whether that punishment is justified or not and they feel sorry for Morgan Stanley because Morgan Stanley isn't allowed to defend itself anymore.

That's just totally unfair to the Plaintiff.

Once they have chosen to link the liability findings to the litigation misconduct findings, their voluntary choice repeatedly, the jury is entitled to know that the punishment fits the crime. And they are entitled to know that at both phases of this proceeding.

The prejudice we suffer is as a result of the voluntary choices they have made to link those two things, which Your Honor very carefully tried to separate.

You were scrupulous in your efforts to avoid doing that. There is no mention in Your Honor's order about the violation of court orders, except obliquely an agreed order that the parties entered into.

But this jury is not being told, as Your Honor's statement presently stands, that Morgan Stanley repeatedly violated court orders. That is a fact. But nonetheless, Mr. Hansen has chosen to say, as a consequence of not following court orders, Morgan Stanley can't defend itself.

Well, once he presents that issue to the jury, in fairness to us, the jury is entitled to know that the punishment indeed fits the crime in both phases.

THE COURT: I don't need you to respond.

I can tell you, this is something I've thought about. And I understand the parties may have different opinions. My purpose here is to have a fair trial. And the only way I think we can protect Morgan Stanley against the inappropriate reference to litigation misconduct, that has nothing to do with liability. And I've already found that on the issues we have left is to segregate that and do both entitlement and amount of punitive damages as a phase two. What that means is I would not read a statement about litigation misconduct to the jury in phase one.

That said, I'm also sensitive to Plaintiff's position, because we spoke about that yesterday, that -- and we spoke about it in conjunction of having the statement of litigation misconduct read in phase one -- that the litigation misconduct that resulted in the order on the renewed motion for default judgment is much broader than the litigation misconduct that will be read to the jury at some point.

And I understand Plaintiff's concern that if jurors listen solely to the second statement they might tell themselves, that doesn't seem so bad, I think the Judge was unfair, and I'm going to somehow compensate in the case for it.

What we need to do is assure our service with both panels of jurors, that the jurors we select are able to take the statements of fact that I read them and not question them. And we still have both panels with us, and I'm sure we're able to do that.

And certainly, if I need to give some further instruction when we get to the statement of facts in phase one, we can certainly do it.

That said, Mr. Solovy, yes, sir?

MR. SOLOVY: Well, I think what I understood

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant. /

DEFENDANT'S MOTION REGARDING THE RELIANCE AND DAMAGES ISSUES TO BE DETERMINED AT PHASE I OF TRIAL

Morgan Stanley & Co. Incorporated ("Morgan Stanley") moves for an order providing that the issues of reliance and damages will be determined during Phase I of the trial under both relevant standards of proof – proof by the greater weight of the evidence, and proof by clear and convincing evidence.

In support of this motion, Morgan Stanley states:

1. In this Court's order of March 16, 2005, the Court granted Plaintiff Coleman (Parent) Holding, Inc.'s ("CPH's") motion for entry of default judgment in part, holding that CPH's claims that Morgan Stanley aided and abetted Sunbeam's fraud and conspired with Sunbeam to commit fraud would be deemed established, but that the other elements of CPH's claims, reliance and damages, would be fully litigated. See Tr. Hearing March 31, 2005, at 6276-77; id. at 6279. Following that Order, this Court ruled that it would bifurcate the case. Phase I of the trial is "limited to liability, if any, . . . for compensatory damages." In contrast, Phase II shall address the availability and, "if

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necessary, amount of punitive damages." Order of March 31, 2005, at 1 ("Bifurcation Order").

2. To prove entitlement to compensatory damages, CPH must prove the elements of fraud – the undefaulted elements – by the greater weight of the evidence. By contrast, to establish that punitive damages are even available, CPH must prove fraud – once again, the undefaulted elements – by clear and convincing evidence. See Fla. Stat. § 768.72 ("A defendant may be held liable for punitive damages only if the trier of fact, based on *clear and convincing evidence*, finds that the defendant was personally guilty of intentional misconduct") (emphasis added).[1]

3. The Court's current orders appear to contemplate having the jury decide the first issue, namely whether reliance and damages were proved by the greater weight of the evidence, at Phase I of the trial and the second issue, whether the same elements were proved by clear and convincing evidence, at Phase II of the trial. That procedure is neither efficient nor just. Because the jury will be deliberating on whether there was proof of reliance and damages by the greater weight of the evidence in any event at Phase I, it imposes no additional burden to ask the jury at the same time to decide whether those elements have been proved by clear and convincing evidence. Indeed, the jury would merely complete one verdict form question inquiring whether the elements had been proved by a preponderance of the evidence (resolving whether compensatory damages are available), and a second inquiring whether they had been proved by clear and convincing evidence (resolving whether punitive damages are available). See Attachment 1 (sample excerpt verdict form). Upon a determination that

[1] We assume for present purposes that the Court's order deems the defaulted elements established for purposes of both compensatory and punitive damages. As we have advised the Court by separate motion, however, deeming those elements established and foreclosing Morgan Stanley from contesting them for purposes of punitive damages is itself an excessive and unfair addition to an already severe sanction, is unprecedented in Florida, and is inconsistent with constitutional standards and binding decisions of Florida's appellate courts.

the elements were all proved by clear and convincing evidence – thus establishing the availability of punitive damages – the case would proceed to Phase II so the jury could determine whether to award them and, if so, in what amount. Or, upon determining that some elements were not so proved, the trial would terminate without need for Phase II.

4. Deferring the determination whether there was clear and convincing proof of reliance and damages to Phase II, in contrast, would waste the Court's, the party's, and the jury's time and energy and would constitute an unnecessary distraction from the central focus of that proceeding. After having litigated reliance and damages in Phase I, the parties would be required to remind the jury of the same evidence, and present the same arguments, again in Phase II to resolve precisely the same issue – reliance and damages – but under a different standard of proof. The jury will be required to deliberate on the same issue again, and consider the same evidence again, again with no difference but the standard of proof. Further, the jury would be required to sit through evidence relating to the amount of punitive damages despite the possibility that, because of a failure to prove fraud by clear and convincing evidence, punitive damages may turn out to be legally unavailable in any event. There is no sensible reason to proceed in that fashion.

5. There is, moreover, a powerful reason for not proceeding in that fashion -- it introduces an unacceptable risk of undue prejudice. Under the Court's current orders, the evidence introduced during Phase II will include potentially inflammatory evidence relating to punitive damages. For example, the Court currently plans to read a statement to the jury setting forth its findings of litigation misconduct.[2] Such evidence has *no* bearing on whether CPH reasonably relied (or whether there was clear and convincing proof of reasonable reliance). But it has the undeniable potential to inflame the jury and taint that determination. Deferring resolution of whether there is clear and

[2] Morgan Stanley, as the Court understands, disputes the propriety of reading such a statement, as its other motions and papers in this case make clear.

convincing proof of reliance and damages to Phase II thus serves not only efficiency, but fairness as well.

6. Morgan Stanley is aware of the Court's considerable frustration (and more) with the way discovery and other matters were handled in this case. But that frustration should not cause the Court to lose sight of its duty to establish procedures that are both efficient and fair. Because the procedures currently contemplated by the Court's orders fall short on both accounts, they must be modified at least in this one respect.

CONCLUSION

For all the foregoing reasons, Defendant Morgan Stanley respectfully requests that this Court reconsider its order of March 31st.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 4th day of April, 2004.

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James M. Webster, III

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ATTACHMENT 1

[SAMPLE FOR ILLUSTRATIVE PURPOSES ONLY]

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

VERDICT

We, the jury, return the following verdict:

COUNT I—AIDING AND ABETTING

1. **Did Defendant Coleman (Parent) Holdings, Inc. ("CPH") actually rely on Sunbeam's allegedly false statements?**

A. Was this proved by the greater weight of the evidence?

YES_____ NO_____

B. Was this proved by clear and convincing evidence?

YES_____ NO_____

If your answer to Question 1 is NO, your verdict on this count is for Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley"), and you should proceed to COUNT II—CONSPIRACY. If your answer to Question 1 is YES, please answer Question 2.

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DATE:	April 4, 2005		

MESSAGE:

TOTAL NUMBER OF PAGES: __8__ **(INCLUDING THIS SHEET)**
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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON DEFENDANT'S MOTION REGARDING THE RELIANCE AND DAMAGES ISSUES TO BE DETERMINED AT PHASE I OF TRIAL

THIS CAUSE came before the Court April 5, 2005 on Defendant's Motion Regarding the Reliance and Damages Issues to be Determined at Phase I of Trial, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Defendant's Motion Regarding the Reliance and Damages Issues to be Determined at Phase I of Trial is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 5 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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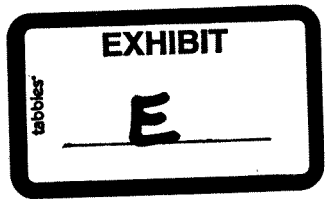

THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO. 2003CA 005045 AI

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PLAINTIFF'S BRIEF REGARDING THE LIMITED APPLICABILITY OF THE "CLEAR AND CONVINCING" STANDARD OF PROOF IN PHASE TWO OF TRIAL

Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, respectfully submits this brief regarding the limited applicability of the "clear and convincing" standard of proof in Phase Two of this bifurcated trial, in response to Defendant Morgan Stanley & Co. Incorporated's ("Morgan Stanley's") April 22, 2005 submission on this topic.[1]

The "clear and convincing" standard of proof applies to only one issue in this case: whether Morgan Stanley violated CPH's rights in a manner warranting the imposition of punitive damages. All other issues — including the remaining elements of CPH's claims (*i.e.*, reliance and causation of damages) — are to be decided by the "greater weight of the evidence." In other words, the fact of the violation of CPH's rights is subject to the "greater weight" standard;

[1] The Court has previously rejected Morgan Stanley's argument that the "clear and convincing" standard applies to every element of CPH's underlying claims, explaining that the standard applies only to CPH's overall entitlement to punitive damages. *See* Ex. A, MS Mot. Regarding the Reliance and Damages Issues to be Determined at Phase I of Trial, at 2 (filed April 4, 2005) (claiming that "to establish that punitive damages are even available, CPH must prove fraud — once again, the undefaulted elements — by clear and convincing evidence"); Ex. B, 4/5/05 Order Denying MS Mot.; Ex. C, 4/5/05 Tr. at 6828-35; Ex. D, 4/19/05 Tr. at 9367.

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Morgan Stanley's conscious awareness of or reckless indifference to the fact that it was violating CPH's rights must be proved by clear and convincing evidence.

The first issue that the jury must decide in Phase Two of this trial (which will take place only if the jury has already found each element of one or both of CPH's claims by the "greater weight of the evidence" standard) is whether Morgan Stanley's misconduct warrants punitive damages because it either was intentional or was so wanton and reckless as to serve as the legal equivalent of an intentional violation of CPH's rights. Specifically, in the present intentional-tort context, punitive damages are warranted if the jury finds by clear and convincing evidence that Morgan Stanley intentionally violated CPH's rights.

As Florida's Standard Jury Instructions make clear, what must be proved by clear and convincing evidence is the defendant's wrongful intent or reckless indifference — not all the elements of the underlying tort. For example, for pre-October 1, 1999 negligence actions, the instructions provide: "Punitive damages are warranted if you find by clear and convincing evidence that: (1) the conduct causing [loss] [injury] [or] [damage] to (claimant) was so gross and flagrant as to show a reckless disregard of human life or of the safety of persons exposed to the effects of such conduct; or (2) the conduct showed such an entire lack of care that the defendant must have been consciously indifferent to the consequences; or (3) the conduct showed such an entire lack of care that the defendant must have wantonly or recklessly disregarded the safety and welfare of the public; or (4) the conduct showed such reckless indifference to the rights of others as to be equivalent to an intentional violation of those rights." Florida Standard Civil Jury Instructions PD 1a(2)(a) (2003) (emphasis added); *accord id.* PD

2a(1).[2] Similarly, for post-October 1, 1999 torts, the instructions provide: "Punitive damages are warranted if you find by clear and convincing evidence that (name person whose conduct may warrant punitive damages) was personally guilty of intentional misconduct or gross negligence." *Id.* PD 1a(2)(b) (emphasis added); *accord id.* PD 2a(2).

Thus, the jury's assessment of the quantum of proof for any element of a plaintiff's intentional-tort claim — other than intent — is irrelevant when determining punitive damages. So long as the jury has found each element of at least one claim by the "greater weight of the evidence," that is enough to find liability for compensatory damages and to propel the jury to address the next issue, entitlement to punitive damages. Entitlement to punitive damages, in turn, hinges on clear and convincing evidence that the defendant acted with wrongful intent. Then, once the jury finds that the plaintiff is indeed entitled to an award of punitive damages, all disputed factual issues going to the proper amount of those damages must be decided using the "greater weight of the evidence" standard. *See* Florida Standard Civil Jury Instruction PD 1b(1) (2003) (for amount of punitive damages, "you should decide any disputed factual issues by the greater weight of the evidence"); *accord id.* PD 2d(1).

Morgan Stanley has provided no relevant authority contradicting plaintiff's straightforward reading of the Florida Standard Jury Instructions and Florida caselaw. Rather, Morgan Stanley has cited a slew of inapposite cases, none of which holds or even suggests that a plaintiff must prove each element of the underlying tort by clear and convincing evidence to be

[2] The Standard Jury Instructions applicable to pre-October 1, 1999 causes of action are designed primarily for use in negligence cases, but the notes for those instructions expressly state that the instructions may be modified for particular intentional torts. *See* Florida Standard Civil Jury Instructions PD 1 n.3 & PD 2 n.2 (2003) (citing *First Interstate Dev. Corp. v. Ablanedo*, 511 So. 2d 536 (Fla. 1987); *Metropolitan Life Ins. Co. v. McCarson*, 467 So. 2d 277 (Fla. 1985)). In any event, these instructions make clear that what must be proved by "clear and convincing" evidence is a sufficiently egregious mental state — not each element of the tort cause of action.

entitled to punitive damages. In particular, Morgan Stanley incorrectly claims that *First Interstate Development Corp. v. Ablanedo*, 511 So. 2d 536 (Fla. 1987), supports its argument. Although *First Interstate* does hold, as Morgan Stanley concedes, that "proof of fraud sufficient to support compensatory damages necessarily is sufficient to create a jury question regarding punitive damages," *id.* at 539, Morgan Stanley entirely omits the relevant reasoning from *First Interstate*: "This is so because intentional misconduct is a necessary element of fraud." *Id.* (emphasis added). As this and other caselaw,[3] as well as the Standard Jury Instructions, makes clear, the touchstone for entitlement to punitive damages is the defendant's egregious mental state; it is thus only to that mental state that the clear-and-convincing standard applies.

Finally, the Court should expressly instruct the jury that it has the discretion to decline to award punitive damages. *See, e.g.*, Ex. E, Plaintiff's Proposed Instruction No. 20 ("You may in your discretion decline to assess punitive damages."). At the same time, however, the Court should expressly acknowledge that the facts set forth in "Exhibit A" — including, for example, the fact that "Morgan Stanley knew of [Sunbeam CEO Al] Dunlap's fraudulent scheme and helped to conceal it until after Sunbeam could close the purchase of Coleman," Ex. F, Exhibit A to 3/23/05 Order, at 25 — have been deemed established for all purposes in this action, including with respect to the jury's decision whether to impose punitive damages, and if so, in what amount. Expressly instructing the jury to that effect in no way challenges its discretion to

[3] *See, e.g.*, *First Interstate*, 511 So. 2d at 539 (allowing punitive damages "'where torts are committed with fraud, actual malice or deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others'" (quoting *Winn & Lovett Grocery Co. v. Archer*, 171 So. 214, 221-22 (Fla. 1936)) (emphasis in original)); *Ingram v. Pettit*, 340 So. 2d 922, 924 (Fla. 1976) ("The intentional infliction of harm, or a recklessness which is the result of an intentional act, authorize[s] punishment which may deter future harm to the public by the particular party involved and by others acting similarly.").

decline to award any punitive damages; rather, it merely states the obvious fact that the "conclusively established" facts easily satisfy the "clear and convincing" standard of proof.

CONCLUSION

Accordingly, the Court should reject Defendant's repeated contention that elements of CPH's claims must be proved by clear and convincing evidence for CPH to prove entitlement to punitive damages.

Dated: April 25, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 25th day of April, 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

MORGAN STANLEY'S REPLY TO CPH'S BRIEF REGARDING THE REQUIREMENT THAT PLAINTIFF PROVE ENTITLEMENT TO AN AWARD OF PUNITIVE DAMAGES BY CLEAR AND CONVINCING EVIDENCE IN PHASE II

In its response to Morgan Stanley's April 22 motion, CPH has now shifted its position regarding the burden of proof for "entitlement" to punitive damages. Whereas CPH previously endorsed a sort of "sliding scale" approach to the clear and convincing evidence requirement, under which the aggregate "expected value" that ***all*** the elements of fraud were established had to exceed some threshold, 4/19/05 Tr. at 9370, it now argues that ***only*** the defendant's "wrongful intent" needs to be proved by clear and convincing evidence. *See* 4/25/05 CPH Motion in Response at 3. This new position is also clearly wrong under Florida law.[1]

Morgan Stanley's April 22 motion identifies four controlling principles, none of which CPH even attempts to dispute. ***First***, Florida Statutes section 768.725 applies in this case, providing that a plaintiff seeking punitive damages "must establish at trial, by clear and convincing evidence, its entitlement to an award of punitive damages." ***Second***, entitlement is a well-defined Florida common law concept that requires a plaintiff to establish certain legal prerequisites to be eligible to receive an award of punitive damages. *See, e.g., Winn & Lovett*

[1] CPH has not attempted to controvert Morgan Stanley's explanation of why a "sliding scale" approach to the different elements of fraud is both illogical and unprecedented. *See* 4/22/05 Morgan Stanley Motion at 3-4.

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Grocery Co. v. Archer, 171 So. 214, 219, 222-23 (Fla. 1936). ***Third***, under Florida law, the prerequisites to receiving an award of punitive damages include proving ***all*** of the elements of the underlying cause of action. *See Oliveira v. Ilion Taxi Aero Ltda*, 830 So. 2d 241, 242 (Fla. 4th DCA 2002) (punitive damages may not be awarded as a matter of law "where there is no finding of liability"); *Liggett Group Inc. v. Engle*, 853 So. 2d 434, 451 (Fla. 3d DCA 2003) (plaintiff must prove all elements of the underlying cause of action, including damages, as "a prerequisite to an award of punitive damages"), *rev. granted*, 873 So. 2d 1222 (Fla. 2004). ***Fourth***, where a tort or offense has multiple elements, Florida courts have consistently required the requisite level of certainty to apply ***to each individual element***. *See, e.g., Stanley v. State*, 560 So. 2d 1269, 1270 (Fla. 3d DCA 1990) (beyond reasonable doubt); *Ritter v. Shamas*, 452 So. 2d 1057, 1059 (Fla. 3d DCA 1984) (clear and convincing evidence); *Sharp v. Long*, 283 So. 2d 567, 568 (Fla. 4th DCA 1973) (preponderance). Considered together, these propositions establish that there must be clear and convincing evidence of each element of fraud — misrepresentation, materiality, reliance, causation, and damages — before CPH may recover punitive damages in this case.

Instead of directly responding to the statutes and case law citations raised in Morgan Stanley's motion, CPH simply recites several standard jury instructions and asserts, ***without any supporting authority***, that "[e]ntitlement to punitive damages * * * hinges on clear and convincing evidence that the defendant acted with wrongful intent." 4/25/05 CPH Motion in Response at 3. While that assertion is no doubt true as far as it goes, the above showing demonstrates that the clear and convincing evidence requirement goes further. While the Florida Legislature ***could have*** required that only the existence of "wrongful intent" be proven by clear

and convincing evidence before punitive damages are legally recoverable, that is not what the legislature actually did.

The instructions CPH cites track Florida Statutes section 768.72, which provides that in all causes of action arising after October 1, 1999, "[a] defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence." §§ 768.72(2), (4). But CPH ignores section 768.725 and neglects to mention that section 768.72 goes on to define "intentional misconduct" in a way that is critical to understanding how section 768.72 operates in fraud cases: According to the statute, "'[i]ntentional misconduct' means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, ***resulting in injury or damage.***" *Id.* § 768.72(2)(a) (emphasis added).[2] These requirements clearly go beyond the mere existence of "wrongful intent," because the phrase "resulting in injury or damage" necessarily incorporates the existence of reliance, causation, and damages; without proof of those elements there is no "resulting" injury. Thus, both sections 768.72 and 768.725 require clear and convincing proof of ***all the elements of fraud.***[3]

CPH's discussion of *Ablanedo* — the sole case cited in Morgan Stanley's April 22 motion that CPH discusses at any length — similarly misses the point. At the time of *Ablanedo*, proof of each element of fraud was ***both necessary and sufficient*** to establish liability for punitive damages. *See First Interstate Dev. Corp. v. Ablanedo*, 511 So. 2d 536, 539 (Fla. 1987). That the

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[2] Because fraud is an intentional tort, the definition of "gross negligence" is irrelevant here.

[3] The remaining two elements of fraud — misrepresentation and materiality — are respectively encompassed in section 768.72 by the requirement that the "defendant had actual knowledge of the wrongfulness of the conduct" and the requirement that there be a "high probability that injury or damage to the claimant would result."

Legislature subsequently raised the burden of proof to establish punitive "entitlement" to clear and convincing evidence does nothing to disrupt the requirement that the plaintiff demonstrate ***all*** elements of the cause of action by the applicable standard before punitive damages may be awarded. CPH never addresses this point.

Accordingly, CPH must prove reliance, causation, and damages (the elements of fraud that are not established by virtue of the Court's sanction in its March 23, 2005 Default Order) by clear and convincing evidence in order to receive punitive damages in this case.[4]

[4] This is of course assuming *arguendo* that the Court does not grant Morgan Stanley's request to withdraw the sanction from the Phase II proceedings. Morgan Stanley reiterates the point that it violates Florida law and due process to extend the effect of the sanction to Phase II of the trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 27th day of April 2005.

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

NOTICE OF FILING PLEADING UNDER SEAL

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed under seal the deposition of James Stynes to Morgan Stanley's Notice of Filing Confidential Proffer Regarding James Stynes.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by facsimile and hand-delivery on this 9th day of May, 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING ALEXANDRE FUCHS

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: Alexandre Fuchs.

Morgan Stanley designates the following portions of the sworn deposition of third-party witness Alexandre Fuchs:

2/13/04 Deposition:

(1) [6:9-6:24]

(2) [9:4-9:18]

(3) [16:13-24:9]

(4) [42:8-43:20]

(5) [77:17-77:24]

(6) [78:3-78:13]

(7) [78:15-78:17]

(8) [79:10-79:13]

(9) [79:16-79:22]

(10) [83:21-84:2]

(11) [84:13-85:2]

(12) [95:5-97:14]

(13) [105:12-107:4]

(14) [107:9-108:17]

(15) [125:11-125:14]

(16) [125:16-125:23]

(17) [150:20-150:24]

(18) [151:9-152:3]

(19) [153:5-153:6]

(20) [153:9-154:8]

(21) [155:7-155:11]

(22) [156:8-156:15]

(23) [157:20-158:5]

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence:

i. **CPH 92/CPH 90 (Deposition Exhibit Number / Trial Exhibit Number) Confidential – Filed Under Seal**

ii. **CPH 138/CPH 134 Confidential – Filed Under Seal**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 9th day of May, 2005.

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Defendant's Offer of Proof re: Alexandre Fuchs

Mr. Fuchs was a Vice-President at Morgan Stanley & Co. Incorporated ("Morgan Stanley") in New York from late 1997 until he left in March 1999. He was part of the Business Development Group in the Mergers and Acquisitions department at Morgan Stanley. Morgan Stanley designates the following portions of the sworn deposition of third-party witness Alexandre Fuchs:

2/13/04 Deposition:

(1) [6:9-6:24]

(2) [9:4-9:18]

(3) [16:13-24:9]

(4) [42:8-43:20]

(5) [77:17-77:24]

(6) [78:3-78:13]

(7) [78:15-78:17]

(8) [79:10-79:13]

(9) [79:16-79:22]

(10) [83:21-84:2]

(11) [84:13-85:2]

(12) [95:5-97:14]

(13) [105:12-107:4]

(14) [107:9-108:17]

(15) [125:11-125:14]

(16) [125:16-125:23]

(17) **[150:20-150:24]**

(18) **[151:9-152:3]**

(19) **[153:5-153:6]**

(20) **[153:9-154:8]**

(21) **[155:7-155:11]**

(22) **[156:8-156:15]**

(23) **[157:20-158:5]**

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence:

i. **CPH 92/CPH 90 (Deposition Exhibit Number / Trial Exhibit Number) Confidential – Filed Under Seal**

ii. **CPH 138/CPH 134 Confidential – Filed Under Seal**

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING DONALD DENKHAUS

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: Donald Denkhaus.

Morgan Stanley designates the following portions of the sworn deposition of third-party witness Donald Denkhaus:

11/06/03 Deposition:

(1) **[5:20-5:21]**

(2) **[7:4-7:18]**

(3) **[8:15-8:23]**

(4) **[10:4-12:11]**

(5) **[12:14-12:16]**

(6) **[18:14-18:17]**

(7) **[18:19-19:2]**

(8) **[19:8-19:15]**

(9) **[19:17-19:18]**

(10) **[20:2-20:4]**

(11) **[20:7-21:1]**

(12) **[21:3-21:6]**

(13) **[24:17-24:22]**

(14) **[25:4-25:6]**

(15) **[25:8-25:11]**

(16) **[28:12-29:11]**

(17) **[68:17-68:20]**

(18) **[68:22-68:22]**

(19) **[69:8-69:13]**

(20) **[72:21-73:17]**

(21) **[74:2-74:7]**

(22) **[74:9-74:17]**

(23) **[74:19-74:20]**

(24) **[74:23-75:9]**

(25) **[75:11-75:13]**

(26) **[75:22-77:10]**

(27) **[86:8-86:15]**

(28) **[97:10-97:17]**

(29) **[97:19-98:3]**

(30) **[101:11-101:14]**

(31) **[101:16-102:4]**

(32) **[102:10-102:22]**

(33) **[102:24-103:3]**

(34) **[117:21-118:6]**

(35) **[118:8-118:12]**

(36) **[118:14-118:15]**

(37) **[124:11-124:13]**

(38) **[124:16-125:7]**

Morgan Stanley would further introduce the following exhibit, if not already admitted into evidence:

i. **CPH 21/CPH 18 (Deposition Exhibit Number/Trial Exhibit Number)**

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c/o MAFCO Holdings, Inc.
777 S. Flagler Drive
Suite 1200 – West Tower
West Palm Beach, FL 33401

Defendant's Offer of Proof re: Donald Denkhaus

Mr. Denkhaus was employed by Arthur Andersen for thirty-three years. Mr. Pastrana became involved with Sunbeam-related work during the restatement of Sunbeam's financials in June of 1998. Morgan Stanley designates the following portions of the sworn deposition of third-party witness Donald Denkhaus:

11/06/03 Deposition:

(1) **[5:20-5:21]**

(2) **[7:4-7:18]**

(3) **[8:15-8:23]**

(4) **[10:4-12:11]**

(5) **[12:14-12:16]**

(6) **[18:14-18:17]**

(7) **[18:19-19:2]**

(8) **[19:8-19:15]**

(9) **[19:17-19:18]**

(10) **[20:2-20:4]**

(11) **[20:7-21:1]**

(12) **[21:3-21:6]**

(13) **[24:17-24:22]**

(14) **[25:4-25:6]**

(15) **[25:8-25:11]**

(16) **[28:12-29:11]**

(17) **[68:17-68:20]**

(18) **[68:22-68:22]**

(19) **[69:8-69:13]**

(20) **[72:21-73:17]**

(21) **[74:2-74:7]**

(22) **[74:9-74:17]**

(23) **[74:19-74:20]**

(24) **[74:23-75:9]**

(25) **[75:11-75:13]**

(26) **[75:22-77:10]**

(27) **[86:8-86:15]**

(28) **[97:10-97:17]**

(29) **[97:19-98:3]**

(30) **[101:11-101:14]**

(31) **[101:16-102:4]**

(32) **[102:10-102:22]**

(33) **[102:24-103:3]**

(34) **[117:21-118:6]**

(35) **[118:8-118:12]**

(36) **[118:14-118:15]**

(37) **[124:11-124:13]**

(38) **[124:16-125:7]**

Morgan Stanley would further introduce the following exhibit, if not already admitted into evidence:

i. **CPH 21/CPH 18 (Deposition Exhibit Number/Trial Exhibit Number)**

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING DENNIS PASTRANA

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: Dennis Pastrana.

Morgan Stanley designates the following portions of the sworn deposition of third-party witness Dennis Pastrana:

1/12/03 Deposition:

(1) **[5:5-5:6]**

(2) **[5:11-6:5]**

(3) **[6:12-8:7]**

(4) **[11:15-11:20]**

(5) **[11:23-13:3]**

(6) **[13:5-13:6]**

(7) **[13:17-14:21]**

(8) **[20:11-20:22]**

(9) **[20:24-20:25]**

(10) **[23:5-23:6]**

(11) **[23:8-23:17]**

(12) **[23:19-23:23]**

(13) **[24:15-24:16]**

(14) **[24:18-24:23]**

(15) **[30:15-32:19]**

(16) **[37:6-38:2]**

(17) **[38:4-38:10]**

(18) **[39:22-40:3]**

(19) **[46:2-46:4]**

(20) **[46:6-46:20]**

(21) **[51:12-51:19]**

(22) **[53:1-53:2]**

(23) **[53:4-53:16]**

(24) **[55:9-55:21]**

(25) **[57:8-57:24]**

(26) **[58:16-58:18]**

(27) **[58:20-58:24]**

(28) **[74:17-75:5]**

(29) **[75:7-75:16]**

(30) **[75:23-76:12]**

(31) **[77:23-80:12]**

(32) **[88:16-89:16]**

(33) **[89:19-90:17]**

(34) **[92:15-94:4]**

(35) **[94:6-94:8]**

(36) **[97:10-98:13]**

(37) **[98:15-98:22]**

(38) **[98:25-100:4]**

(39) **[100:6-100:10]**

(40) **[100:12-100:17]**

(41) **[100:19-100:20]**

(42) **[101:1-101:5]**

(43) **[103:5-103:21]**

(44) **[104:22-106:16]**

(45) **[107:7-108:12]**

(46) **[113:5-113:23]**

(47) **[114:6-114:7]**

(48) **[114:11-115:6]**

(49) **[115:8-116:11]**

(50) **[116:14-119:4]**

(51) **[120:10-121:15]**

(52) **[122:1-124:25]**

(53) **[127:18-129:25]**

(54) **[130:6-130:10]**

(55) **[131:12-132:14]**

(56) **[133:14-133:25]**

(57) **[134:7-135:13]**

(58) **[135:24-137:12]**

(59) **[139:1-139:16]**

(60) **[141:13-141:22]**

(61) **[144:18-145:13]**

(62) **[153:8-154:5]**

(63) **[155:10-155:17]**

(64) **[156:2-156:6]**

(65) **[156:8-156:22]**

(66) **[156:24-157:10]**

(67) **[162:10-163:14]**

(68) **[163:16-164:2]**

(69) **[164:5-164:12]**

(70) **[165:2-166:21]**

(71) **[168:20-169:2]**

(72) **[169:24-170:3]**

(73) **[170:22-171:4]**

(74) **[171:7-171:14]**

(75) **[172:6-173:9]**

(76) **[175:15-176:13]**

(77) **[176:15-176:20]**

(78) **[176:22-176:25]**

(79) **[177:6-177:17]**

(80) **[180:10-181:1]**

(81) **[184:7-184:11]**

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence:

i. **CPH 20/CPH 17 (Deposition Exhibit Number/Trial Exhibit Number)**

ii. **CPH 101/CPH 99**

iii. **CPH 102/CPH 100**

iv. **CPH 103/CPH 101**

v. **CPH 109/CPH 108**

vi. **CPH 112/CPH 111**

vii. **CPH 113/CPH 112**

viii. **MS 20/MS 20**

ix. **MS 21/MS 21**

x. **MS 22/MS 22**

xi. **MS 24/MS 24** **Confidential-Filed Under Seal**

xii. **MS 28/MS 28**

xiii. **MS 32/MS 32**

xiv. **MS 33/MS 33**

xv. **MS 34/MS 34**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 9th day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
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BY: _____

Counsel for Morgan Stanley & Co. Incorporated

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BARNHARDT & SHIPLEY, P.A.
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West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
Michael Brody, Esq.
JENNER & BLOCK, LLC
c/o MAFCO Holdings, Inc.
777 S. Flagler Drive
Suite 1200 – West Tower
West Palm Beach, FL 33401

Defendant's Offer of Proof re: Dennis Pastrana

Mr. Pastrana was employed by Arthur Andersen from 1993 to 2001. Mr. Pastrana was a senior when he began engaging in Sunbeam work, and was promoted to manager in late summer of 1998. Morgan Stanley designates the following portions of the sworn deposition of third-party witness Dennis Pastrana:

1/12/03 Deposition:

(1) **[5:5-5:6]**

(2) **[5:11-6:5]**

(3) **[6:12-8:7]**

(4) **[11:15-11:20]**

(5) **[11:23-13:3]**

(6) **[13:5-13:6]**

(7) **[13:17-14:21]**

(8) **[20:11-20:22]**

(9) **[20:24-20:25]**

(10) **[23:5-23:6]**

(11) **[23:8-23:17]**

(12) **[23:19-23:23]**

(13) **[24:15-24:16]**

(14) **[24:18-24:23]**

(15) **[30:15-32:19]**

(16) **[37:6-38:2]**

(17) **[38:4-38:10]**

(18) **[39:22-40:3]**

(19) **[46:2-46:4]**

(20) **[46:6-46:20]**

(21) **[51:12-51:19]**

(22) **[53:1-53:2]**

(23) **[53:4-53:16]**

(24) **[55:9-55:21]**

(25) **[57:8-57:24]**

(26) **[58:16-58:18]**

(27) **[58:20-58:24]**

(28) **[74:17-75:5]**

(29) **[75:7-75:16]**

(30) **[75:23-76:12]**

(31) **[77:23-80:12]**

(32) **[88:16-89:16]**

(33) **[89:19-90:17]**

(34) **[92:15-94:4]**

(35) **[94:6-94:8]**

(36) **[97:10-98:13]**

(37) **[98:15-98:22]**

(38) **[98:25-100:4]**

(39) **[100:6-100:10]**

(40) **[100:12-100:17]**

(41) **[100:19-100:20]**

(42) **[101:1-101:5]**

(43) **[103:5-103:21]**

(44) **[104:22-106:16]**

(45) **[107:7-108:12]**

(46) **[113:5-113:23]**

(47) **[114:6-114:7]**

(48) **[114:11-115:6]**

(49) **[115:8-116:11]**

(50) **[116:14-119:4]**

(51) **[120:10-121:15]**

(52) **[122:1-124:25]**

(53) **[127:18-129:25]**

(54) **[130:6-130:10]**

(55) **[131:12-132:14]**

(56) **[133:14-133:25]**

(57) **[134:7-135:13]**

(58) **[135:24-137:12]**

(59) **[139:1-139:16]**

(60) **[141:13-141:22]**

(61) **[144:18-145:13]**

(62) **[153:8-154:5]**

(63) **[155:10-155:17]**

(64) **[156:2-156:6]**

(65) **[156:8-156:22]**

(66) **[156:24-157:10]**

(67) **[162:10-163:14]**

(68) **[163:16-164:2]**

(69) **[164:5-164:12]**

(70) **[165:2-166:21]**

(71) **[168:20-169:2]**

(72) **[169:24-170:3]**

(73) **[170:22-171:4]**

(74) **[171:7-171:14]**

(75) **[172:6-173:9]**

(76) **[175:15-176:13]**

(77) **[176:15-176:20]**

(78) **[176:22-176:25]**

(79) **[177:6-177:17]**

(80) **[180:10-181:1]**

(81) **[184:7-184:11]**

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence:

i. **CPH 20/CPH 17 (Deposition Exhibit Number/Trial Exhibit Number)**

ii. **CPH 101/CPH 99**

iii. **CPH 102/CPH 100**

iv. **CPH 103/CPH 101**

v. **CPH 109/CPH 108**

vi. **CPH 112/CPH 111**

vii. **CPH 113/CPH 112**

viii. **MS 20/MS 20**

ix. **MS 21/MS 21**

x. **MS 22/MS 22**

xi. **MS 24/MS 24** **Confidential-Filed Under Seal**

xii. **MS 28/MS 28**

xiii. **MS 32/MS 32**

xiv. **MS 33/MS 33**

xv. **MS 34/MS 34**

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING JOHANNES GROELLER

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: Johannes Groeller.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 9th day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
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BY: _____ *Counsel for Morgan Stanley & Co. Incorporated*

SERVICE LIST

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Jerold S. Solovy, Esq.
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Defendant's Offer of Proof re: Johannes Groeller

If called to testify, Johannes Groeller would state under oath as follows:

Mr. Groeller was a first-year associate at Morgan Stanley & Co. Incorporated ("Morgan Stanley") on the Client Services Group team that worked on Sunbeam Corporation's ("Sunbeam") acquisition of The Coleman Company, Inc. ("Coleman"). As part of Morgan Stanley's due diligence for the acquisition, Mr. Groeller travelled to Wichita, Kansas for a site visit and plant tour and also contacted between five and ten customers.

Mr. Groeller did not know that Sunbeam's performance for the first quarter of 1998 would fall short of its performance in the first quarter of 1997 until Sunbeam issued a press release in April 1998. Specifically, he learned nothing on his site visit and plant tour, or through his contacts with customers that led him to believe Sunbeam would fall short of projections.

In working on the Sunbeam's acquisition of Coleman, Mr. Groeller relied on the truthfulness and accuracy of the financial information provided by Sunbeam and its advisors, including Sunbeam's financial statements that were audited by its independent outside auditor, Arthur Andersen. Mr. Groeller had no reason to suspect that any of the information supplied to him by Sunbeam or any of its advisors was false or misleading or that Sunbeam was engaged in any fraudulent conduct prior to March 30, 1998. Mr. Groeller did not assist Sunbeam in engaging in any alleged fraudulent conduct.

Mr. Groeller has reviewed Exhibit A to the Court's March 23, 2005 Order on CPH's Motion for Default. He strenuously disagrees with those portions of Exhibit A that relate to his conduct. In particular:

- Mr. Groeller denies having any knowledge at the time of the transaction that Sunbeam's stock was fraudulently inflated.

- Mr. Groeller had no knowledge at the time of the transaction that Sunbeam had not undergone a successful turnaround or that Sunbeam's financial position had not dramatically improved.
- Mr. Groeller did not assist Sunbeam in concealing any information.
- Mr. Groeller has no knowledge that anyone at Morgan Stanley employed any strategy designed to hide Sunbeam's financial condition.
- Because Morgan Stanley worked for Sunbeam and CPH had its own investment bankers, Mr. Groeller never intended that CPH rely on Morgan Stanley.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING LAWRENCE A. BORNSTEIN

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: Lawrence Bornstein.

Morgan Stanley designates the following portions of the sworn deposition of Lawrence A. Bornstein:

1/15/04 Deposition:

(1) **[5:10-5:12]**

(2) **[5:15-5:20]**

(3) **[6:8-6:12]**

(4) **[6:16-6:23]**

(5) **[7:18-8:2]**

(6) **[8:10-9:7]**

(7) **[9:13-18]**

(8) **[10:3-10:7]**

(9) **[10:9-11:2]**

(10) **[16:3-16:10]**

(11) **[16:12-16:22]**

(12) **[17:17-18:2]**

(13) **[20:14-21:3]**

(14) **[21:10-21:13]**

(15) **[21:18-21:23]**

(16) **[23:1-23:15]**

(17) **[23:24-24:3]**

(18) **[24:5-24:7]**

(19) **[24:16-26:13]**

(20) **[26:22-27:19]**

(21) **[30:12-30:19]**

(22) **[31:3-32:6]**

(23) **[32:11-32:15]**

(24) **[34:20-34:24]**

(25) **[35:3-37:1]**

(26) **[41:1-41:13]**

(27) **[122:8-122:21]**

(28) **[123:1-123:16]**

(29) **[126:21-126:23]**

(30) **[130:2-130:10]**

(31) **[131:11-131:13]**

(32) **[131:16]**

(33) **[131:18-131:19]**

(34) **[131:22-132:20]**

(35) **[132:23-133:3]**

(36) **[133:6-133:15]**

(37) **[136:18-136:22]**

(38) **[138:9-138:21]**

(39) **[144:7-145:16]**

(40) **[145:19-145:25]**

(41) **[146:11]**

(42) **[150:11-150:22]**

(43) **[150:25-151:7]**

(44) **[152:3-152:7]**

(45) **[157:23-159:6]**

(46) **[159:14-159:16]**

(47) **[159:25-160:6]**

(48) **[160:18-160:25]**

(49) **[164:5-165:6]**

(50) **[165:14-165:22]**

(51) **[166:15-168:2]**

(52) **[168:9-168:17]**

(53) **[168:22-169:6]**

(54) **[169:22-170:12]**

(55) **[175:10-176:19]**

(56) **[177:24-178:3]**

(57) **[178:8-178:17]**

(58) **[178:22-181:7]**

(59) **[183:25-187:14]**

(60) **[194:3-197:7]**

(61) **[197:11-198:5]**

(62) **[198:8-198:23]**

(63) **[199:8-199:14]**

(64) **[199:17-200:5]**

(65) **[200:15-200:16]**

(66) **[200:19]**

(67) **[200:21-201:18]**

(68) **[201:21-202:2]**

(69) **[202:5-202:6]**

(70) **[202:11-202:13]**

(71) **[202:16-202:22]**

(72) **[202:24-203:3]**

(73) **[203:5-203:10]**

(74) **[203:12-203:16]**

(75) **[203:21-204:1]**

(76) **[215:1-215:12]**

(77) **[222:9-222:17]**

(78) **[223:17-224:17]**

(79) **[225:17-225:25]**

(80) **[226:4-226:14]**

(81) **[226:17-227:3]**

(82) **[227:12-227:18]**

(83) **[231:15-231:20]**

(84) **[231:24-232:16]**

(85) **[232:19-233:4]**

(86) **[263:7-264:1]**

(87) **[264:11-265:2]**

(88) **[265:9-265:24]**

(89) **[296:10-296:13]**

(90) **[298:21-299:19]**

(91) **[299:23-300:10]**

(92) **[304:11-304:15]**

(93) **[310:10-310:13]**

(94) **[318:7-318:16]**

(95) **[319:13]**

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence:

i. **CPH 14/CPH 11 (Deposition Exhibit Number/Trial Exhibit Number)**

ii. **CPH 119/CPH 118**

iii. **CPH 121/CPH 120**

iv. **CPH 123/CPH 122**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 9th day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
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BY: _____

Counsel for Morgan Stanley & Co. Incorporated

SERVICE LIST

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Jerold S. Solovy, Esq.
Michael Brody, Esq.
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c/o MAFCO Holdings, Inc.
777 S. Flagler Drive
Suite 1200 – West Tower
West Palm Beach, FL 33401

Defendant's Offer of Proof re: Lawrence Alan Bornstein

Mr. Bornstein was an experience manager on the Sunbeam audit team, and was involved with the 1997 and 1998 audits of Sunbeam. Morgan Stanley designates the following portions of the sworn deposition of third-party witness Lawrence Alan Bornstein:

1/15/04 Deposition:

(1) **[5:10-5:12]**

(2) **[5:15-5:20]**

(3) **[6:8-6:12]**

(4) **[6:16-6:23]**

(5) **[7:18-8:2]**

(6) **[8:10-9:7]**

(7) **[9:13-18]**

(8) **[10:3-10:7]**

(9) **[10:9-11:2]**

(10) **[16:3-16:10]**

(11) **[16:12-16:22]**

(12) **[17:17-18:2]**

(13) **[20:14-21:3]**

(14) **[21:10-21:13]**

(15) **[21:18-21:23]**

(16) **[23:1-23:15]**

(17) **[23:24-24:3]**

(18) **[24:5-24:7]**

(19) **[24:16-26:13]**

(20) **[26:22-27:19]**

(21) **[30:12-30:19]**

(22) **[31:3-32:6]**

(23) **[32:11-32:15]**

(24) **[34:20-34:24]**

(25) **[35:3-37:1]**

(26) **[41:1-41:13]**

(27) **[122:8-122:21]**

(28) **[123:1-123:16]**

(29) **[126:21-126:23]**

(30) **[130:2-130:10]**

(31) **[131:11-131:13]**

(32) **[131:16]**

(33) **[131:18-131:19]**

(34) **[131:22-132:20]**

(35) **[132:23-133:3]**

(36) **[133:6-133:15]**

(37) **[136:18-136:22]**

(38) **[138:9-138:21]**

(39) **[144:7-145:16]**

(40) **[145:19-145:25]**

(41) **[146:11]**

(42) **[150:11-150:22]**

(43) **[150:25-151:7]**

(44) **[152:3-152:7]**

(45) **[157:23-159:6]**

(46) **[159:14-159:16]**

(47) **[159:25-160:6]**

(48) **[160:18-160:25]**

(49) **[164:5-165:6]**

(50) **[165:14-165:22]**

(51) **[166:15-168:2]**

(52) **[168:9-168:17]**

(53) **[168:22-169:6]**

(54) **[169:22-170:12]**

(55) **[175:10-176:19]**

(56) **[177:24-178:3]**

(57) **[178:8-178:17]**

(58) **[178:22-181:7]**

(59) **[183:25-187:14]**

(60) **[194:3-197:7]**

(61) **[197:11-198:5]**

(62) **[198:8-198:23]**

(63) **[199:8-199:14]**

(64) **[199:17-200:5]**

(65) **[200:15-200:16]**

(66) **[200:19]**

(67) **[200:21-201:18]**

(68) **[201:21-202:2]**

(69) **[202:5-202:6]**

(70) **[202:11-202:13]**

(71) **[202:16-202:22]**

(72) **[202:24-203:3]**

(73) **[203:5-203:10]**

(74) **[203:12-203:16]**

(75) **[203:21-204:1]**

(76) **[215:1-215:12]**

(77) **[222:9-222:17]**

(78) **[223:17-224:17]**

(79) **[225:17-225:25]**

(80) **[226:4-226:14]**

(81) **[226:17-227:3]**

(82) **[227:12-227:18]**

(83) **[231:15-231:20]**

(84) **[231:24-232:16]**

(85) **[232:19-233:4]**

(86) **[263:7-264:1]**

(87) **[264:11-265:2]**

(88) **[265:9-265:24]**

(89) **[296:10-296:13]**

(90) **[298:21-299:19]**

(91) **[299:23-300:10]**

(92) **[304:11-304:15]**

(93) **[310:10-310:13]**

(94) **[318:7-318:16]**

(95) **[319:13]**

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence:

i. **CPH 14/CPH 11 (Deposition Exhibit Number/Trial Exhibit Number)**

ii. **CPH 119/CPH 118**

iii. **CPH 121/CPH 120**

iv. **CPH 123/CPH 122**

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING LAURENCE WINOKER

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: Laurence Winoker.

Morgan Stanley designates the following portions of the sworn deposition of third-party witness Laurence Winoker:

11/18/04 Deposition:

(1) **[5:7-5:10]**

(2) **[5:13-5:20]**

(3) **[6:2-6:10]**

(4) **[11:9-11:11]**

(5) **[11:14-11:24]**

(6) **[14:12-14:19]**

(7) **[14:22-14:23]**

(8) **[15:5-18:3]**

(9) **[18:6-18:20]**

(10) **[19:2-19:5]**

(11) **[19:8-21:14]**

(12) **[21:25-22:22]**

(13) **[25:18-25:21]**

(14) **[25:23-27:4]**

(15) **[27:6-27:20]**

(16) **[28:23-29:22]**

(17) **[33:23-34:23]**

(18) **[39:14-39:21]**

(19) **[40:20-41:3]**

(20) **[44:9-44:16]**

(21) **[45:22-45:23]**

(22) **[45:25-46:5]**

(23) **[46:11-47:10]**

(24) **[49:9-50:11]**

(25) **[51:2-51:17]**

(26) **[51:20-52:4]**

(27) **[54:10-54:19]**

(28) **[73:18-73:21]**

3/8/05 Deposition:

(1) **[5:22-6:4]**

(2) **[7:2-7:13]**

(3) **[7:23-8:7]**

(4) **[36:10-36:14]**

(5) **[37:11-37:18]**

(6) **[39:19-39:24]**

(7) **[78:20-79:2]**

(8) **[85:16-85:23]**

(9) **[85:25-86:7]**

(10) **[87:11-87:18]**

(11) **[88:9-88:12]**

(12) **[89:25-90:9]**

(13) **[91:13-92:3]**

(14) **[92:14-92:25]**

(15) **[93:4-93:6]**

(16) **[94:6-94:19]**

(17) **[95:3-96:4]**

(18) **[96:14-96:22]**

(19) **[97:4-97:7]**

(20) **[97:22-99:2]**

(21) **[100:15-101:12]**

(22) **[101:20-102:11]**

(23) **[102:13-102:13]**

(24) **[102:20-103:8]**

(25) **[105:23-106:3]**

(26) **[107:22-108:3]**

(27) **[108:6-109:7]**

(28) **[109:15-109:23]**

(29) **[111:16-111:22]**

(30) **[111:25-112:4]**

(31) **[112:6-112:14]**

(32) **[118:3-118:11]**

(33) **[118:14-120:14]**

(34) **[120:16-121:7]**

(35) **[121:10-121:14]**

(36) **[122:5-122:15]**

(37) **[122:18-123:15]**

(38) **[123:21-124:24]**

(39) **[125:21-126:7]**

(40) **[126:11-128:10]**

(41) **[128:12-128:23]**

(42) **[129:16-129:23]**

(43) **[129:25-130:14]**

(44) **[130:16-130:22]**

(45) **[130:24-131:8]**

(46) **[131:10-131:20]**

(47) **[131:24-132:1]**

(48) **[132:3-133:1]**

(49) **[133:3-134:6]**

(50) **[134:13-134:16]**

(51) **[135:16-135:18]**

(52) **[135:20-135:20]**

(53) **[137:4-137:12]**

(54) **[137:14-137:20]**

(55) **[138:10-138:19]**

(56) **[138:21-138:21]**

(57) **[139:12-140:15]**

(58) **[142:2-142:8]**

(59) **[143:16-144:12]**

(60) **[144:23-145:2]**

(61) **[145:9-146:8]**

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence:

i. **MS 96/MS 96 (Deposition Exhibit Number/Trial Exhibit Number)**

ii. **MS 97/MS 97 Confidential-Filed Under Seal**

iii. **MS 577/MS 577 Confidential-Filed Under Seal**

iv. **MS 813/MS 813 Confidential-Filed Under Seal**

v. **MS 814/MS 814 Confidential-Filed Under Seal**

vi. **MS 833/MS 833 Confidential-Filed Under Seal**

vii. **MS 853/MS 853 Confidential-Filed Under Seal**

viii. **MS 854/MS 854 Confidential-Filed Under Seal**

ix. **MS 857/MS 857 Confidential-Filed Under Seal**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 9th day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
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BY: _____

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Jerold S. Solovy, Esq.
Michael Brody, Esq.
JENNER & BLOCK, LLC
c/o MAFCO Holdings, Inc.
777 S. Flagler Drive
Suite 1200 – West Tower
West Palm Beach, FL 33401

Defendant's Offer of Proof re: Laurence Winoker

Laurence Winoker is Senior Vice President, Controller, and Treasurer of MAFCO. Mr. Winoker held those positions at the time of the merger between Sunbeam and Coleman. Morgan Stanley designates the following portions of the sworn deposition of third-party witness Laurence Winoker:

11/18/04 Deposition:

(1) **[5:7-5:10]**

(2) **[5:13-5:20]**

(3) **[6:2-6:10]**

(4) **[11:9-11:11]**

(5) **[11:14-11:24]**

(6) **[14:12-14:19]**

(7) **[14:22-14:23]**

(8) **[15:5-18:3]**

(9) **[18:6-18:20]**

(10) **[19:2-19:5]**

(11) **[19:8-21:14]**

(12) **[21:25-22:22]**

(13) **[25:18-25:21]**

(14) **[25:23-27:4]**

(15) **[27:6-27:20]**

(16) **[28:23-29:22]**

(17) **[33:23-34:23]**

(18) **[39:14-39:21]**

(19) **[40:20-41:3]**

(20) **[44:9-44:16]**

(21) **[45:22-45:23]**

(22) **[45:25-46:5]**

(23) **[46:11-47:10]**

(24) **[49:9-50:11]**

(25) **[51:2-51:17]**

(26) **[51:20-52:4]**

(27) **[54:10-54:19]**

(28) **[73:18-73:21]**

3/8/05 Deposition:

(1) **[5:22-6:4]**

(2) **[7:2-7:13]**

(3) **[7:23-8:7]**

(4) **[36:10-36:14]**

(5) **[37:11-37:18]**

(6) **[39:19-39:24]**

(7) **[78:20-79:2]**

(8) **[85:16-85:23]**

(9) **[85:25-86:7]**

(10) **[87:11-87:18]**

(11) **[88:9-88:12]**

(12) **[89:25-90:9]**

(13) **[91:13-92:3]**

(14) **[92:14-92:25]**

(15) **[93:4-93:6]**

(16) **[94:6-94:19]**

(17) **[95:3-96:4]**

(18) **[96:14-96:22]**

(19) **[97:4-97:7]**

(20) **[97:22-99:2]**

(21) **[100:15-101:12]**

(22) **[101:20-102:11]**

(23) **[102:13-102:13]**

(24) **[102:20-103:8]**

(25) **[105:23-106:3]**

(26) **[107:22-108:3]**

(27) **[108:6-109:7]**

(28) **[109:15-109:23]**

(29) **[111:16-111:22]**

(30) **[111:25-112:4]**

(31) **[112:6-112:14]**

(32) **[118:3-118:11]**

(33) **[118:14-120:14]**

(34) **[120:16-121:7]**

(35) **[121:10-121:14]**

(36) **[122:5-122:15]**

(37) **[122:18-123:15]**

(38) **[123:21-124:24]**

(39) **[125:21-126:7]**

(40) **[126:11-128:10]**

(41) **[128:12-128:23]**

(42) **[129:16-129:23]**

(43) **[129:25-130:14]**

(44) **[130:16-130:22]**

(45) **[130:24-131:8]**

(46) **[131:10-131:20]**

(47) **[131:24-132:1]**

(48) **[132:3-133:1]**

(49) **[133:3-134:6]**

(50) **[134:13-134:16]**

(51) **[135:16-135:18]**

(52) **[135:20-135:20]**

(53) **[137:4-137:12]**

(54) **[137:14-137:20]**

(55) **[138:10-138:19]**

(56) **[138:21-138:21]**

(57) **[139:12-140:15]**

(58) **[142:2-142:8]**

(59) **[143:16-144:12]**

(60) **[144:23-145:2]**

(61) **[145:9-146:8]**

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence:

i. **MS 96/MS 96 (Deposition Exhibit Number/Trial Exhibit Number)**

ii. **MS 97/MS 97 (Confidential-Filed Under Seal)**

iii. **MS 577/MS 577 (Confidential-Filed Under Seal)**

iv. **MS 813/MS 813 (Confidential-Filed Under Seal)**

v. **MS 814/MS 814 (Confidential-Filed Under Seal)**

vi. **MS 833/MS 833 (Confidential-Filed Under Seal)**

vii. **MS 853/MS 853 (Confidential-Filed Under Seal)**

viii. **MS 854/MS 854 (Confidential-Filed Under Seal)**

ix. **MS 857/MS 857 (Confidential-Filed Under Seal)**

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING PHILLIP E. HARLOW

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: Phillip E. Harlow.

Morgan Stanley designates the following portions of the sworn deposition of third-party witness Phillip E. Harlow:

11/19/04 Deposition:

(1) **[9:18-10:7]**

(2) **[10:24-11:1]**

(3) **11:4-11:5]**

(4) **[11:7-12:3]**

(5) **[11:9-11:15]**

(6) **[14:18-15:12]**

(7) **[15:25-17:15]**

(8) **[19:3-19:19]**

(9) **[20:23-20:25]**

(10) **[21:21-21:25]**

(11) **[22:5-22:10]**

(12) **[22:12-22:13]**

(13) **[23:21-24:6]**

(14) **[24:13-26:18]**

(15) **[27:3-27:6]**

(16) **[27:21-28:18]**

(17) **[28:23-29:8]**

(18) **[29:13-29:19]**

(19) **[30:7-30:20]**

(20) **[31:1-31:7]**

(21) **[31:12-32:23]**

(22) **[33:14-33:17]**

(23) **[34:12-34:15]**

(24) **[34:17-34:19]**

(25) **[34:21-35:10]**

(26) **[35:17-36:21]**

(27) **[37:6-37:8]**

(28) **37:10-37:11]**

(29) **[37:16-37:20]**

(30) **[38:25-43:9]**

(31) **[43:11-43:16]**

(32) **[43:18-44:1]**

(33) **[44:24-45:19]**

(34) **[47:6-47:24]**

(35) **[48:1-48:16]**

(36) **[48:22-49:19]**

(37) **[50:2-50:21]**

(38) **[50:23-51:7]**

(39) **[51:20-51:25]**

(40) **[53:22-53:24]**

(41) **[54:3-54:7]**

(42) **[54:13-55:4]**

(43) **[61:2-62:12]**

(44) **[96:9-96:18]**

(45) **[96:25-97:22]**

(46) **[105:17-106:3]**

(47) **[106:11-107:19]**

(48) **[108:1-108:7]**

(49) **[108:22-110:3]**

(50) **[110:25-111:3]**

(51) **[111:10-112:10]**

(52) **[113:6-113:12]**

(53) **[113:24-114:2]**

(54) **[114:22-114:24]**

(55) **[115:18-116:7]**

(56) **[116:10-117:2]**

(57) **[156:1-115:5]**

(58) **[156:8-156:10]**

(59) **[156:13-156:17]**

Morgan Stanley introduces the following exhibit, if not already admitted into evidence:

i. **MS 39**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 9th day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
Sumner Square
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222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
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BY: _____

Counsel for Morgan Stanley & Co. Incorporated

SERVICE LIST

Jack Scarola, Esq.
SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
Michael Brody, Esq.
JENNER & BLOCK, LLC
c/o MAFCO Holdings, Inc.
777 S. Flagler Drive
Suite 1200 – West Tower
West Palm Beach, FL 33401

Defendant's Offer of Proof re: Phillip E. Harlow

Mr. Harlow was the engagement partner on the Sunbeam audit team for Arthur Andersen. Morgan Stanley designates the following portions of the sworn deposition of third-party witness Phillip Harlow:

11/19/04 Deposition:

(1) **[9:18-10:7]**

(2) **[10:24-11:1]**

(3) **11:4-11:5]**

(4) **[11:7-12:3]**

(5) **[11:9-11:15]**

(6) **[14:18-15:12]**

(7) **[15:25-17:15]**

(8) **[19:3-19:19]**

(9) **[20:23-20:25]**

(10) **[21:21-21:25]**

(11) **[22:5-22:10]**

(12) **[22:12-22:13]**

(13) **[23:21-24:6]**

(14) **[24:13-26:18]**

(15) **[27:3-27:6]**

(16) **[27:21-28:18]**

(17) **[28:23-29:8]**

(18) **[29:13-29:19]**

(19) **[30:7-30:20]**

(20) **[31:1-31:7]**

(21) **[31:12-32:23]**

(22) **[33:14-33:17]**

(23) **[34:12-34:15]**

(24) **[34:17-34:19]**

(25) **[34:21-35:10]**

(26) **[35:17-36:21]**

(27) **[37:6-37:8]**

(28) **37:10-37:11]**

(29) **[37:16-37:20]**

(30) **[38:25-43:9]**

(31) **[43:11-43:16]**

(32) **[43:18-44:1]**

(33) **[44:24-45:19]**

(34) **[47:6-47:24]**

(35) **[48:1-48:16]**

(36) **[48:22-49:19]**

(37) **[50:2-50:21]**

(38) **[50:23-51:7]**

(39) **[51:20-51:25]**

(40) **[53:22-53:24]**

(41) **[54:3-54:7]**

(42) **[54:13-55:4]**

(43) **[61:2-62:12]**

(44) **[96:9-96:18]**

(45) **[96:25-97:22]**

(46) **[105:17-106:3]**

(47) **[106:11-107:19]**

(48) **[108:1-108:7]**

(49) **[108:22-110:3]**

(50) **[110:25-111:3]**

(51) **[111:10-112:10]**

(52) **[113:6-113:12]**

(53) **[113:24-114:2]**

(54) **[114:22-114:24]**

(55) **[115:18-116:7]**

(56) **[116:10-117:2]**

(57) **[156:1-115:5]**

(58) **[156:8-156:10]**

(59) **[156:13-156:17]**

Morgan Stanley introduces the following exhibit, if not already admitted into evidence:

i. MS 39

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING ROBERT KITTS

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: Robert Kitts.

Morgan Stanley introduces the following Trial Exhibit, if not already admitted into evidence:

i. **MS 85**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 9th day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
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Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: _____

Counsel for Morgan Stanley & Co. Incorporated

SERVICE LIST

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West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
Michael Brody, Esq.
JENNER & BLOCK, LLC
c/o MAFCO Holdings, Inc.
777 S. Flagler Drive
Suite 1200 – West Tower
West Palm Beach, FL 33401

Defendant's Offer of Proof re: Robert Kitts

If called to testify, Robert Kitts would state under oath as follows:

Mr. Kitts was a Managing Director of Morgan Stanley & Co. Incorporated's ("Morgan Stanley") Investment Banking Division and head of the Business Development Group within Morgan Stanley's M&A division from 1996 until he left in 1999. Mr. Kitts is now co-head of investment banking at Thomas Weisel Partners. Mr. Kitts has personal knowledge of the facts set forth in this proffer.

In early 1997, Sunbeam Corporation ("Sunbeam") made a public announcement that they were interviewing investment banks. Morgan Stanley representatives, including Mr. Kitts, traveled to Florida to present the Morgan Stanley's credentials. To prepare for the presentation to Sunbeam, Mr. Kitts generated themes and specific acquisition ideas for the presentation. Sunbeam formally engaged Morgan Stanley in September of 1997.

At Sunbeam's request, Morgan Stanley began to explore a possible sale of Sunbeam, but also explored opportunities to purchase another entity. Morgan Stanley prepared an Information Memorandum, which is a packet of general information about Sunbeam. The purpose of the Information Memorandum was to present the opportunity to potential buyers in order to develop a level of interest. Mr. Kitts recalls that several buyers were interested in acquiring Sunbeam, including Gillette and Colgate Palmolive.

In preparing the Information Memorandum, Morgan Stanley only relied on publicly available information, including public filings (10-K's, 10-Q's and annual reports), audited financial statements, and third party research materials, such as research reports published by other investment banks. Morgan Stanley did not prepare its own research materials. Morgan Stanley engaged in several discussions with Sunbeam management, but management did not reveal any additional information outside of what was already publicly

available. Mr. Kitts and other Morgan Stanley representatives also attended a new product launch in October of 1997 to learn more about the growth opportunities Sunbeam was pursuing. Mr. Kitts recalls several conversations between Morgan Stanley and Sunbeam's outside auditors, Arthur Andersen.

Mr. Kitts confirmed that the representations in the Information Memorandum were accurate by conducting due diligence. At the time the Information Memorandum was prepared, Mr. Kitts believed, based on public filings and conversations with senior management, that the statements included in the Information Memorandum were accurate. The Information Memorandum was designed only to present Sunbeam as a potential acquisition to third parties. Those third parties would ultimately have to assess the information presented and make their own informed determination. Mr. Kitts can identify Trial Exhibit MS 85 as a true and accurate copy of the Information Memorandum, which is attached as an exhibit to this proffer.

Sunbeam never told Morgan Stanley that it would miss its numbers for the first quarter of 1998. At some point, Mr. Kitts recalls hearing, in an almost dismissive manner, that there was "some softness" in the first couple of months of Sunbeam's sales but that it was not a problem and Sunbeam would meet expected sales for the quarter. Mr. Kitts had no reason to doubt that Sunbeam would make its numbers for the first quarter of 1998. Mr. Kitts had no additional information about Sunbeam's financial outlook outside of what Sunbeam represented. When Sunbeam announced its disappointing first quarter performance, Mr. Kitts was surprised and believed he had been misled by Sunbeam regarding its sales.

Mr. Kitts relied on the truthfulness and accuracy of the financial information supplied by Sunbeam and its advisors, including Sunbeam's audited financial statements prepared by Sunbeam's independent auditor, Arthur Andersen. Prior to March 30, 1998, the date

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Sunbeam acquired Coleman, Mr. Kitts did not suspect that any of the information supplied by Sunbeam or any of its advisors was false or misleading or that Sunbeam was engaged in any fraudulent conduct. Mr. Kitts did not assist Sunbeam in engaging in any fraudulent conduct.

Mr. Kitts has reviewed Exhibit A to the Court's March 23, 2005 Order on CPH's Motion for Default. He strenuously disagrees with those portions of Exhibit A that relate to his conduct. In particular:

- Mr. Kitts denies having any knowledge at the time he was assisting with the sale of Sunbeam that Sunbeam's stock was fraudulently inflated.
- Mr. Kitts had no knowledge at the time he was assisting with the sale of Sunbeam that Sunbeam had not undergone a successful turnaround or that Sunbeam's financial position had not dramatically improved.
- Mr. Kitts had no knowledge and received no information that any information given to CPH regarding Sunbeam's first quarter 1998 sales (or anything else) was false.
- Mr. Kitts did not assist Sunbeam in concealing any information.
- Mr. Kitts has no knowledge that anyone at Morgan Stanley employed any strategy designed to hide Sunbeam's financial condition.
- Mr. Kitts has no knowledge that anyone at Morgan Stanley prepared or provided CPH with false financial or business information. Any information given to CPH was, to Mr. Kitts's knowledge, entirely accurate and represented the most up-to-date information known about Sunbeam's finances.
- Because Morgan Stanley worked for Sunbeam and CPH had its own investment bankers, Mr. Kitts never intended that CPH rely on Morgan Stanley.

Based on Mr. Kitts' testimony, Morgan Stanley would offer Trial Exhibit MS 85 into evidence. The Plaintiff has not objected to the admissibility of Trial Exhibit MS 85.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING RUTH PORAT

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: Ruth Porat.

Morgan Stanley introduces the following Trial Exhibits, if not already admitted into evidence:

i. **MS 41**

ii. **MS 768**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 9th day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
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Defendant's Offer of Proof re: Ruth Porat

If called to testify, Ruth Porat would state under oath as follows:

In 1998, at the time of Sunbeam's acquisition of Coleman, Ms. Porat was a Managing Director in the Investment Banking Division of Morgan Stanley & Co. Incorporated ("Morgan Stanley"). She is now a Vice-Chairman in Morgan Stanley's Investment Banking Division. Ms. Porat has personal knowledge of the facts set forth in this proffer.

In early 1998, Morgan Stanley's Mergers & Acquisitions Department ("M&A Department") worked with Sunbeam Corporation ("Sunbeam") in connection with Sunbeam's acquisition of three companies – The Coleman Company, Inc. ("Coleman"), First Alert, and Signature Brands. Representatives of Morgan Stanley's M&A Department assigned to the Sunbeam engagement contacted Ms. Porat and her colleagues in Morgan Stanley's Equity Capital Markets Division to ask them to evaluate Sunbeam's options for financing the acquisitions with an equity or equity-related security. Ms. Porat and her colleagues carefully considered the various financing options and ultimately recommended to Sunbeam's Board of Directors that Sunbeam consider a convertible debenture offering. After listening to Morgan Stanley's presentation, the Board decided to finance the acquisitions, in part, through a convertible debenture offering.

In 1998, Ms. Porat was a member of Morgan Stanley's Equity Commitment Committee ("ECC"). At that time, as now, it was Morgan Stanley's policy that the ECC had to review any proposed underwriting transaction before Morgan Stanley could agree to underwrite an offering. In reviewing proposed transactions, the ECC attempted to ensure that Morgan Stanley did not underwrite transactions that were inappropriate.

In 1998, the ECC, including Ms. Porat, reviewed the proposed Sunbeam debenture offering. Ms. Porat will identify Trial Exhibit MS 768 as a true and accurate copy of a memorandum she is familiar with that was prepared for the ECC by Morgan Stanley employees working on the Sunbeam debenture offering. That memo is attached as Exhibit 1. When reviewing the Sunbeam debenture offering, the ECC reviewed this memorandum and discussed it and the offering during a regularly scheduled ECC meeting. After careful review and discussion, the ECC determined that Morgan Stanley would underwrite the Sunbeam debenture offering.

After the ECC approved the Sunbeam debenture offering, Ms. Porat and other Morgan Stanley employees began preparing to market, price and close the offering, culminating in a "road show," wherein Sunbeam management made presentations to Qualified Institutional Buyers who were prospective purchasers of the privately-placed debentures.

On March 18, 1998, Ms. Porat attended a lunch in New York City in connection with the road show and learned for the first time that Sunbeam's first quarter 1998 sales pattern may be slower then anticipated. She and others discussed it and promptly brought this concern to the attention of other Morgan Stanley personnel working on the Sunbeam offering.

Ms. Porat spent the rest of that day and most of the night participating in conference calls with Sunbeam managers, Sunbeam's outside counsel (Skadden, Arps, Meagher, Slate & Flom LLP), Morgan Stanley professionals, and Morgan Stanley's outside counsel for the underwriting (Davis Polk & Wardell LLP) regarding Sunbeam's sales in the first quarter of 1998. During the calls, Ms. Porat learned that Sunbeam's sales for January and February of 1998 were about half of what they had been for the first two months of 1997. Nonetheless,

Sunbeam management was adamant that the slow sales would not hinder Sunbeam's ability to meet analyst's expectations for first quarter sales.

Ms. Porat did not simply accept this representation at face value. She questioned Sunbeam closely about prior quarters and whether there was any precedent for selling as much product as Sunbeam would have to sell in the remaining days of the quarter in order to meet its sales goals. She also asked for a detailed breakdown of sales and projected sales for the quarter. Sunbeam provided a customer-by-customer forecast of first quarter sales based on all of the purchase orders it had received or that it had discussed with customers. Based on her review of this forecast, Ms. Porat can identify Trial Exhibit MS 41 as a true and correct copy of the forecast that Sunbeam provided to her on March 18, 1998. A copy of the forecast is attached as Exhibit 2.

Ms. Porat asked to speak to the Sunbeam executives who were responsible for these sales, and they discussed every line item on Trial Exhibit MS 41. Ms. Porat questioned the Sunbeam executives closely about their reasons for believing that Sunbeam would make the projected sales. The Sunbeam executives stated that they had spoken with the customers that had placed the largest orders and said that, based on those conversations, Sunbeam remained confident that it would meet its sales goals. Ms. Porat believed the representations made by Sunbeam.

Despite Sunbeam's confidence that it would hit or exceed analysts' expectations for first quarter sales, Ms. Porat told Sunbeam that it should publicly disclose the possibility that Sunbeam would not hit those numbers. Sunbeam executives on the call expressed to her that they were very reluctant to make that disclosure. The Morgan Stanley representatives, Sunbeam

representatives, and outside counsel debated at length whether Sunbeam should issue a press release or other disclosure.

Ms. Porat knew that issuing a press release could cause Sunbeam's stock price to decline, and she knew that Sunbeam's management would be upset about that. Ms. Porat called her boss, Richard Kauffman, the head of Equity Capital Markets and a member of the Equity Commitment Committee, to discuss the situation. They agreed that Morgan Stanley would not price the debentures or underwrite the offering unless Sunbeam disclosed the risk that it might not meet analyst's estimates for first quarter sales.

After extensive discussion, Sunbeam finally agreed to issue a press release. Sunbeam and its outside counsel were responsible for drafting the press release and controlled its content. Sunbeam sent a draft of the press release to Morgan Stanley and its outside counsel for their review, although Ms. Porat does not recall commenting on the press release. The draft of the press release indicated that Sunbeam management might not meet analysts' estimates for sales for the first quarter of 1998. Ms. Porat believed it was important to warn the market of this information in advance of the convertible debenture offering. The draft of the press release also stated that Sunbeam management expected to exceed $253 million in revenue in the first quarter of 1998. Based on information provided to her by Sunbeam, Ms. Porat had no reason to believe this projection was anything but accurate. Indeed, Sunbeam management had been so adamant about meeting its sales goals that Ms. Porat believed that this revised estimate was conservative and gave the company a "cushion."

Ms. Porat learned in April 1998 that Sunbeam's first quarter 1998 net sales did not exceed 1997 first quarter net sales. She was very surprised by this announcement.

From Ms. Porat's perspective, Morgan Stanley would not have gone forward with the debenture offering if it had any concern about the accuracy of Sunbeam's financial statements or any concern about Sunbeam. Ms. Porat and, to Ms. Porat's knowledge, others at Morgan Stanley relied on Sunbeam management's representations that the pattern of slow sales for the first two months of 1998 relative to the first two months of 1997 could be attributed to a build-up in sales in the latter part of the first quarter of 1998. Further, Ms. Porat and, to Ms. Porat's knowledge, others at Morgan Stanley relied on Sunbeam management's confidence that based on feedback from its customers, such increased sales at the end of the first quarter of 1998 could be achieved. Ms. Porat did not think that the slow sales in the first two months of 1998 indicated that Sunbeam's management was engaging in fraud; she simply believed that Sunbeam needed to disclose the issue to the public given the risk that sales could be lower than expected. Indeed, in light of Arthur Andersen's "clean" opinions regarding Sunbeam's financial statements, Ms. Porat had no reason to believe Sunbeam had engaged in accounting fraud.

Ms. Porat relied on the truthfulness and accuracy of the financial information supplied by Sunbeam and its advisors, including Sunbeam's financial statements that were audited by its independent outside auditor Arthur Andersen. Prior to March 30, 1998, the date of the closing of the transaction between CPH and Sunbeam, Ms. Porat did not suspect that any of the information supplied by Sunbeam or any of its advisors was false or misleading or that Sunbeam was engaged in any fraudulent conduct. Ms. Porat did not assist Sunbeam in engaging in any fraudulent conduct.

Ms. Porat has reviewed Exhibit A to the Court's March 23, 2005 Order on CPH's Motion for Default. She strenuously disagrees with those portions of Exhibit A that relate to her conduct. In particular:

- Ms. Porat denies having any knowledge at the time of the Sunbeam debenture offering that Sunbeam's stock was fraudulently inflated.
- Ms. Porat had no knowledge at the time of the Sunbeam debenture offering that Sunbeam had not undergone a successful turnaround or that Sunbeam's financial position had not dramatically improved.
- Ms. Porat had no knowledge and received no information that any information given to CPH regarding Sunbeam's first quarter 1998 sales (or anything else) was false.
- Ms. Porat did not assist Sunbeam in concealing any information.
- Ms. Porat has no knowledge that anyone at Morgan Stanley employed any strategy designed to hide Sunbeam's financial condition.
- Ms. Porat has no knowledge that anyone at Morgan Stanley prepared or provided CPH with false financial or business information. Any information given to CPH was, to Ms. Porat's knowledge, entirely accurate and represented the most up-to-date information known about Sunbeam's finances.
- Ms. Porat believes that any materials drafted by Morgan Stanley were accurate to the best of her knowledge.
- Upon learning information about Sunbeam's first quarter 1998 net sales, Ms. Porat insisted that Sunbeam disclose that information.
- Ms. Porat did not believe that Sunbeam's March 19, 1998 Press Release was false or misleading, or failed to disclose material information.
- Because Morgan Stanley worked for Sunbeam and CPH had its own investment bankers, Ms. Porat never intended that CPH rely on Morgan Stanley.

Based on Ms. Porat's testimony, Morgan Stanley would offer Trial Exhibits MS 41 and MS 768 into evidence.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING WILLIAM KOURAKOS

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: William Kourakos.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 9th day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
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Defendant's Offer of Proof re: William Kourakos

If called to testify, William Kourakos would state under oath as follows:

Mr. Kourakos is a Managing Director of Morgan Stanley & Co. Incorporated ("Morgan Stanley"). He has worked at Morgan Stanley since 1986. In 1998, he worked in Morgan Stanley's High Yield Capital Markets Department. He currently works in its Global Capital Markets Department. Mr. Kourakos has personal knowledge of the facts set forth in this proffer.

In 1998, Sunbeam Corporation ("Sunbeam") acquired three companies – the Coleman Company ("Coleman"), First Alert, and Signature Brands. Sunbeam financed these acquisitions through a convertible debenture offering in which Morgan Stanley served as the lead underwriter, and through a credit facility with Morgan Stanley Senior Funding ("MSSF"), First Union National Bank ("First Union"), and Bank of America National Trust & Savings Association ("Bank of America").

Morgan Stanley's Leveraged Finance Commitment Committee (the "LFCC") reviews and approves capital commitments made by MSSF, including loans. Mr. Kourakos was a member of the LFCC during 1998, and remains a member today. MSSF could not and cannot enter into any loan agreement without the LFCC's approval. While he has served on the LFCC, individual bankers have not had the ability to commit capital without LFCC approval. In his experience, the LFCC does not "rubber stamp" the transactions it considers – it rigorously scrutinizes every capital commitment made on behalf of MSSF. The process begins by a deal team making a detailed presentation to the LFCC, which sets forth each aspect of the deal in detail. If one or more LFCC members raises concerns about a particular aspect of the transaction, the deal team attempts to restructure the transaction to address those concerns. As

an LFCC member, Mr. Kourakos considers a myriad of information when analyzing a transaction, including Commitment Committee memoranda, audited financial statements, accountants' opinions, and legal opinions. At meetings of the LFCC, other members of the LFCC also discuss such matters. In general, the LFCC does not approve a particular transaction unless every member agrees on the transaction. He cannot recall any situations where the LFCC approved transactions over the objections of someone on the committee.

Mr. Kourakos attended numerous meetings during late 1997 and 1998 where the LFCC discussed whether MSSF should lend money to Sunbeam. After careful review and discussion, the LFCC approved a senior loan to Sunbeam. In reaching this decision, the LFCC was aware of March 19 press release, which disclosed the fact that Sunbeam may not meet first quarter sales numbers predicted by Wall Street analysts. The LFCC determined, however, that Sunbeam was an investment grade credit and decided to approve the loan. In making this determination, the LFCC considered information Morgan Stanley representatives learned during due diligence sessions with Sunbeam management and Arthur Andersen, Sunbeam's independent auditor. The LFCC also reviewed financial statements audited by Arthur Andersen, as well as Sunbeam's major restructuring and growth plan, which outlined specific goals for growth in 1998. In addition, the LFCC considered detailed financial information and business overviews for Coleman, First Alert and Signature Brands. Specifically, it reviewed summaries of financial projections and assumptions, synergies with each company being acquired, an equity valuation of Sunbeam, potential investor concerns.

Mr. Kourakos relied on the truthfulness and accuracy of the financial information supplied by Sunbeam and its advisors, including Sunbeam's financial statements that were audited by its independent outside auditor Arthur Andersen. Prior to March 30, 1998, the date

MSSF loaned Sunbeam $680 million, Mr. Kourakos did not suspect that any of the information supplied by Sunbeam or any of its advisors was false or misleading or that Sunbeam was engaged in any fraudulent conduct. Mr. Kourakos did not assist Sunbeam in engaging in any fraudulent conduct. Mr. Kourakos would not have voted to approved the senior loan to Sunbeam had he known that Sunbeam was engaged in any fraudulent conduct, and does not believe that anyone else on the LFCC would have approved it.

Mr. Kourakos has reviewed Exhibit A to the Court's March 23, 2005 Order on CPH's Motion for Default. He strenuously disagrees with those portions of Exhibit A that relate to his conduct. In particular:

- Mr. Kourakos denies having any knowledge that Sunbeam's stock was fraudulently inflated at the time that the LFCC considered and approved the senior loan to Sunbeam.
- At the time that the LFCC considered and approved the senior loan to Sunbeam, Mr. Kourakos had no knowledge that Sunbeam had not undergone a successful turnaround or that Sunbeam's financial position had not dramatically improved.
- Mr. Kourakos had no knowledge and received no information that any information given to CPH regarding Sunbeam's first quarter 1998 sales (or anything else) was false.
- Mr. Kourakos did not assist Sunbeam in concealing any information.
- Mr. Kourakos has no knowledge that anyone at Morgan Stanley employed any strategy designed to hide Sunbeam's financial condition.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING WILLIAM H. STRONG

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: William H. Strong.

Morgan Stanley introduces the following Trial Exhibit, if not already admitted into evidence:

i. **MS 741**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 9th day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
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Defendant's Offer of Proof re: William H. Strong

If called to testify, William H. Strong would state under oath as follows:

Mr. Strong is a Managing Director and Vice Chairman in the Investment Banking Division at Morgan Stanley & Co. Incorporated ("Morgan Stanley") in Chicago, Illinois. He has worked for Morgan Stanley since January 1993.

In 1998, Mr. Strong was a Managing Director in Morgan Stanley's Corporate Finance Division. Mr. Strong had no contact with Sunbeam Corporation ("Sunbeam") prior to receiving an unsolicited telephone call from Russell Kersh, the Chief Financial Officer of Sunbeam, in early 1997 regarding Sunbeam's interest in hiring an investment bank to explore a variety of strategic options. Mr. Strong believes he received this call as a result of having worked with Mr. Kersh and Mr. Dunlap in connection with previous successful transactions unrelated to Sunbeam while at Morgan Stanley and Salomon Brothers. Mr. Strong, along with other representatives of Morgan Stanley, participated in an initial presentation to Sunbeam in April 1997. Mr. Strong's colleagues, Jim Stynes and Robert Kitts, took the lead in preparing Morgan Stanley's presentation. At that meeting, Morgan Stanley proposed a variety of strategic options, including Sunbeam's acquisition of another corporation, Sunbeam's sale to another corporation, and a merger with another corporation.

Sunbeam formally retained Morgan Stanley pursuant to a September 5, 1997 engagement letter. Mr. Strong signed the engagement letter on behalf of Morgan Stanley. He will identify MS Trial Exhibit 741 as a true and accurate copy of the engagement letter between Morgan Stanley and Sunbeam for investment banking services. After receiving this mandate, the responsibilities for executing any merger or acquisition, and any related financing, fell to the various execution teams, such as the mergers and acquisitions team. While Mr. Strong did not

have any direct responsibilities in representing Sunbeam in its acquisitions of The Coleman Company, Inc. ("Coleman"), First Alert or Signature Brands, Mr. Strong's role as a Corporate Finance officer from that point forward was to participate in periodic communications between representatives of Sunbeam and members of various Morgan Stanley execution teams. In that regard, Mr. Strong had approximately three or four telephone calls alone with Mr. Dunlap, which, to Mr. Strong's recollection, occurred prior to Morgan Stanley's formal engagement. On all other calls, one or more additional Morgan Stanley representatives were also on the telephone calls.

Mr. Strong attended the February 27, 1998 Sunbeam Board Meeting at which Sunbeam approved the acquisitions of Coleman, First Alert and Signature Brands.

Morgan Stanley did not represent Coleman (Parent) Holdings ("CPH") in the transaction. Morgan Stanley never advised and was never engaged by CPH. CPH had its own advisors – the law firm of Wachtell Lipton Rosen & Katz ("Wachtell") and the investment banking division of Credit Suisse First Boston ("CSFB"). Mr. Strong understood that Wachtell and CSFB were acting on CPH's behalf. Mr. Strong did not know that CPH's advisors did not exercise their contractual rights to inspect Sunbeam's books and records. Mr. Strong assumed that because CPH, MacAndrews & Forbes Holdings Inc., and Ronald Perelman were highly sophisticated parties, they had performed any and all due diligence they considered necessary. Mr. Strong never had any contact with CPH, MacAndrews & Forbes Holdings Inc., Ronald Perelman, CSFB, or Wachtell.

Mr. Strong did not learn that Sunbeam's sales for the first quarter of 1998 might be below the expectations of Wall Street analysts until March 18, 1998, when he received a telephone call from a Morgan Stanley colleague, Ruth Porat. Prior to that time, Mr. Strong only

had received information that suggested that Sunbeam would exceed Wall Street expectations for the quarter. Indeed, Mr. Dunlap and other members of Sunbeam management specifically assured Mr. Strong and, to Mr. Strong's knowledge, other Morgan Stanley representatives that Sunbeam would meet Wall Street sales estimates for the first quarter of 1998.

After learning of the potential shortfall in first quarter sales as compared to Wall Street estimates, Mr. Strong instructed his colleagues to investigate the issue fully and to get information sufficient to determine whether Sunbeam would meet Wall Street sales expectations for the first quarter. In that regard, Mr. Strong participated in calls on March 18th with others at Morgan Stanley and at least one call with lawyers from Davis Polk & Wardwell (Morgan Stanley's outside counsel in connection with the Sunbeam zero coupon convertible debenture offering). He also participated on March 18th in a conference call with Mr. Dunlap, the Chief Executive Officer of Sunbeam, other members of Sunbeam management, Sunbeam's outside law firm, Skadden Arps Slate Meagher & Flom ("Skadden") and other Morgan Stanley representatives.

During these conference calls, Mr. Strong and others discussed the additional due diligence that representatives of Morgan Stanley were conducting and whether Sunbeam should issue a press release disclosing that its expected sales for the first quarter might fall short of Wall Street expectations. Mr. Strong concluded that Sunbeam should issue a press release, and he so informed Mr. Dunlap from a telephone in the San Francisco airport on the evening of March 18th. Mr. Dunlap was upset and angry with this recommendation and stated that he did not believe that Sunbeam needed to issue a press release. In particular, Mr. Dunlap argued that an announcement was unnecessary because it was impossible to predict exactly what Sunbeam's net sales would be for the rest of the first quarter. On that call or earlier in the day, Blaine V. Fogg,

a Skadden partner, also argued that a press release was unnecessary. Mr. Strong did not back down in the face of this opposition. Mr. Strong continued to insist that, although it was ultimately Sunbeam's decision, Sunbeam should issue a press release stating that it might miss first quarter Wall Street analysts' sales estimates.

Mr. Dunlap eventually agreed that Sunbeam would issue a press release announcing that its first quarter sales might miss analysts' estimates. That night, Mr. Strong boarded a "red-eye" flight from San Francisco to Boston to attend the Boston investor meetings for Sunbeam's debenture offering. During the day, Mr. Dunlap complained to Mr. Strong that Morgan Stanley had pushed Sunbeam to issue the press release, that its stock price had dropped as a result, and that Morgan Stanley had cost him millions of dollars.

In early April 1998, Mr. Strong learned for the first time that Sunbeam's net sales for the first quarter of 1998 would fall short of sales for the first quarter of 1997. He was angered and disappointed by this news. Sunbeam had repeatedly assured him, even after issuing the March 19 press release, that Sunbeam would meet Wall Street's higher estimates for its first quarter net sales.

In working for Sunbeam, Mr. Strong relied on the truthfulness and accuracy of the financial information supplied to him by Sunbeam and its independent outside auditor, Arthur Andersen, including its audited financial statements. Mr. Strong had no reason to suspect that any of the information supplied to him by Sunbeam or its auditor was false or misleading or that Sunbeam was engaged in any fraudulent conduct. Mr. Strong did not assist Sunbeam in engaging in any alleged fraudulent conduct. If Mr. Strong had known Sunbeam was engaged in any fraudulent conduct, he would not have permitted Morgan Stanley to continue to serve as Sunbeam's investment banker.

Mr. Strong has reviewed Exhibit A to the Court's March 23, 2005 Order on CPH's Motion for Default. He strenuously disagrees with those portions of Exhibit A that relate to his conduct. In particular:

- As stated previously, Mr. Strong did not "head" the Morgan Stanley team.
- Mr. Strong denies having any knowledge at the time of the transaction that Sunbeam's stock was fraudulently inflated.
- Mr. Strong had no knowledge at the time of the transaction that Sunbeam had not undergone a successful turnaround or that Sunbeam's financial position had not dramatically improved.
- Mr. Strong had no knowledge and received no information that any information given to CPH regarding Sunbeam's first quarter 1998 sales (or anything else) was false.
- Mr. Strong denies that Morgan Stanley developed a plan to conceal fraud.
- Mr. Strong did not assist Sunbeam in concealing any information.
- Mr. Strong has no knowledge that anyone at Morgan Stanley employed any strategy designed to hide Sunbeam's financial condition.
- Mr. Strong denies that Morgan Stanley recommended to Sunbeam to use Sunbeam's "fraudulently inflated" stock as "counterfeit currency" to acquire Coleman.
- Mr. Strong denies that Morgan Stanley had to persuade CPH to accept Sunbeam stock. Rather, Mr. Strong understands that CPH wanted Sunbeam stock as part of the transaction.
- Mr. Strong has no knowledge that anyone at Morgan Stanley prepared or provided CPH with false financial or business information. Any information given to CPH was, to Mr.

Strong's knowledge, entirely accurate and represented the most up-to-date information known about Sunbeam's finances.

- Mr. Strong believes that any materials drafted by Morgan Stanley based upon information supplied by Sunbeam were accurate to the best of his knowledge.
- Upon learning on March 18, 1998 that Sunbeam's first quarter 1998 net sales might not meet analyst expectations, Mr. Strong insisted that Sunbeam disclose that information.
- Mr. Strong did not believe that the March 19, 1998 Press Release was false or misleading, or failed to disclose material information.
- Because Morgan Stanley worked for Sunbeam and CPH had its own investment bankers, Mr. Strong never intended that CPH rely on Morgan Stanley.

Based on Mr. Strong's testimony, Morgan Stanley would offer Morgan Stanley Trial Exhibit 741 into evidence. The plaintiff has not objected to the introduction of this exhibit into evidence. A copy of this exhibit is attached hereto.

16div-016964

GREENBERG
ATTORNEYS AT LAW
TRAURIG

Transmittal Cover Sheet

TO

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FROM Lorie Gleim, Esq.
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File Number 16560.071300

Comments

Date May 9, 2005

No. Pages Including this cover sheet 6

Please notify us immediately if not received properly at 561-650-7900.

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777 South Flagler Drive, Suite 300 East. West Palm Beach, Florida 33401 (561) 650-7900 Fax (561) 655-6222

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

CASE NO. 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

_____/

NOTICE OF FILING AFFIDAVIT

Non-Party, David Fannin, by and through his undersigned counsel, hereby files the attached Affidavit of David C. Fannin in support of his *ore tenus* Motion to be Excused from Trial on May 11, 2005, the afternoon of May 12, 2005 and May 13, 2005.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile upon the addressees on the attached Service List, this 9 day of May, 2005.

GREENBERG TRAURIG, P.A.
777 South Flagler Drive - Suite 300 East
West Palm Beach, FL 33401
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By: _____
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Kellogg, Huber, et al.
1615 M Street, NW, Suite 400
Washington, DC 20036-3209

WPB-FS1\GLEIML\541099v01\5/9/05

AFFIDAVIT OF DAVID C. FANNIN

I, DAVID C. FANNIN, depose and state as follows:

1. My name is DAVID C. FANNIN. I am over the age of 18 and have personal knowledge of the facts set forth herein.

2. I am Executive Vice-President and General Counsel of Office Depot, Inc.

3. I have tried to cooperate fully with the parties in this case. I have previously made myself available to both parties for an interview and have been working through my counsel with the parties in this case to make myself available for my attendance at trial. As a possible third party witness, I have been constantly advising both parties of my availability to testify and have previously advised them of my conflicts on May 11-13, 2005.

4. Prior to this week, I have rescheduled other business commitments to be available on certain dates which were previously provided to me by Morgan Stanley's counsel as the dates they intended to call me as a witness.

5. On Wednesday May 11, 2005, I am scheduled to attend a business meeting in Washington D.C. which I cannot reschedule. I am the Chair of the Coordinating Committee on Corporate Governance which is meeting in Washington D.C. during the Business Roundtable. William Donaldson, Chair of the Securities and Exchange Commission, will be attending the meeting and it would be embarrassing to me personally and Office Depot, Inc. if I was unable to attend this event.

6. On Thursday May 12, 2005, as the General Counsel of Office Depot, Inc., I am required to attend the Audit Committee Meeting in preparation for the Quarterly Board Meeting and Annual Shareholder Meeting of Office Depot, Inc. which are both scheduled for Friday May 13, 2005. My presence as General Counsel is absolutely required at the Audit Committee Meeting of the Board scheduled for Thursday and the Board Meeting and the Annual Shareholder Meeting scheduled for Friday.

7. By rearranging my current schedule, I can myself available in the morning of Thursday May 12, 2005 as long as I am excused from Court no later than Noon so that I can attend the Audit Committee Meeting of the Board scheduled to begin at 2:00 PM.

8. I completely understand the importance of my presence at trial, and I am willing to cooperate fully with this Court and counsel. However, I would respectfully request that this Court please take into consideration my commitments on Wednesday, May 11, 2005 through Friday May 13, 2005 and allow me to be released from my subpoena on May 11, 2005 and the afternoon of May 12, 2005. It is my understanding Court will not be in session on May 13, 2005.

FURTHER AFFIANT SAYETH NAUGHT.

VERIFICATION

I, DAVID C. FANNIN, declare under penalty of perjury that the foregoing is true and correct.

Executed on this 9th day of May, 2005.

DAVID C. FANNIN

WPB-FS1\541056v01\16560.071300

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON CPH'S ORE TENUS MOTION IN LIMINE

THIS CAUSE came before the Court May 6, 2005 on CPH's ore tenus Motion in Limine, with both parties well represented by counsel. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that CPH's ore tenus Motion in Limine is Granted. MS & Co. shall not argue that any sums had been applied towards the $265 million figure which triggered the mandatory prepayment requirements of the term and revolving Credit Agreements, other that the $160 million cash received in the transaction under review, without first proffering the good faith basis to believe the record supports such an argument, outside the jury's presence.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 9th day of May, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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West Palm Beach, FL 33401

John Scarola, Esq.
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Jerold S. Solovy, Esq.
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Chicago, Il 60611

Rebecca Beynon, Esq.
Sumner Square, 1615 M Street, NW, Suite 400
Washington, DC 20036

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION FOR CLARIFICATION OF THE ADMISSIBILITY OF THE TESTIMONY OF PROFESSOR MARK GRINBLATT

THIS CAUSE came before the Court May 6, 2005 on Morgan Stanley's Motion for Clarification of the Admissibility of the Testimony of Professor Mark Grinblatt, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part, and Denied, in part. Dr. Grinblatt's testimony shall be limited to the cell referenced in the March 23, 2005 Order on Morgan Stanley's Motion for Leave to File Supplemental Grinblatt Report. He may not testify as to damages based on any other cell. This ruling is without prejudice to CPH's right to seek to strike Dr. Grinblatt's testimony if the predicate required by the Court's April 15, 2005 Order on Morgan Stanley's Motion for Clarification or Reconsider of the Court's Order on Plaintiff's Motion in Limine No. 27 for a Finding as a Matter of Law that the Federal Securities Laws Prohibited Plaintiff from Selling Unregistered Sunbeam Stock is not laid.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 9th day of May, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION TO ALLOW EXPERT TESTIMONY OF PROFESSOR FISCHEL TO REBUT UNDISCLOSED TESTIMONY BY DR. EMERY

THIS CAUSE came before the Court May 6, 2005 on Morgan Stanley's Motion to Allow Expert Testimony of Professor Fischel to Rebut Undisclosed Testimony by Dr. Emery, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Denied. However, CPH shall not in argument to the jury or otherwise seek to contrast the circumstances involving corporate fraud in 1997-1998 and in 2005.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 9 day of May, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S MOTION FOR RECONSIDERATION OF THE COURT'S MARCH 31 ORDER DEFERRING PRESENTATION OF MORGAN STANLEY'S LITIGATION MISCONDUCT TO PHASE II OF THE TRIAL

Coleman (Parent) Holdings Inc. hereby respectfully requests that the Court reconsider its prior decision to defer presentation of the litigation misconduct statement until Phase II. Although we understand that the Court has already addressed the question, it is now clear that the issue of Morgan Stanley's cover-up of evidence of its participation in the Sunbeam fraud is relevant to issues currently before the jury. Moreover, although the Court acted with particular caution in seeking to shield Morgan Stanley from possible prejudice, Morgan Stanley's own recent request to introduce one piece of the litigation misconduct statement in Phase I argues strongly in favor of allowing the entire statement to be presented.

First, it is important to recall that under the standard *W.R. Grace* bifurcation initially ordered by this Court, it would have been perfectly appropriate for CPH to present in Phase I of the trial all evidence supporting its entitlement to punitive damages -- including evidence of Morgan Stanley's cover-up -- other than evidence of Morgan Stanley's net worth. *See W.R. Grace & Co. v. Waters*, 638 So. 2d 502, 506 (Fla. 1994). Thus, the Florida Supreme Court is on record as holding that such evidence is not inherently prejudicial to a jury's simultaneous

consideration of the underlying liability issue. This Court went beyond the protections mandated in *W.R. Grace* when it deferred the entitlement issue altogether to Phase II -- and with it the litigation misconduct statement.

Second, the Court's decision to do so was based in part on the assumption that the e-mails never produced by Morgan Stanley would have been relevant only to liability issues other than those remaining to be tried -- i.e., CPH's reliance and damages. Ex. A 3/31/05 Tr. at 6274 (litigation misconduct "has nothing to do with liability"). But as explained in court on April 29 by Mr. Marmer and Mr. Solovy, those e-mails might very well have contained evidence relevant to CPH's reliance and even its damages. Ex. B 4/29/05 Tr.. at 11571-79. Accordingly, the argument for an adverse inference to be drawn against Morgan Stanley as to those issues is at least as strong as the adverse inference argument that Morgan Stanley plans to make based on CPH's perfectly lawful non-preservation of its e-mails (even assuming any relevant CPH e-mails ever existed).

For example, the Morgan Stanley e-mails could easily have included internal dialogue among the Morgan Stanley participants in the fraud exulting in how effectively they had pulled the wool over the eyes of CPH's decisionmakers. If such e-mails existed, they might confirm not only that CPH had exhibited a strong interest in the health of Sunbeam and the value of its stock but also that CPH had no inkling of the fraud and was responding primarily to a deliberate campaign of deception. In short, such e-mail could have made the reliance issue an open and shut case.

Even if that kind of e-mail did not exist, there are other ways in which the e-mails could have affected the litigation of the reliance issue. For example, Morgan Stanley has asked any number of CPH's witnesses why, if they cared about the value of Sunbeam, they did not pick up

the phone and call Morgan Stanley for reassurance once problems began to appear on March 19 and April 3. Those questions could not have been asked if CPH were in possession of e-mails in which Morgan Stanley fielded inquiries from unhappy debenture holders during the same time period and reassured them consistently that all was well at Sunbeam.

Finally, even as to damages, there has been considerable debate about whether the right measuring stick is the value of Sunbeam on the date the deal was announced or some subsequent date. E-mail traffic from Morgan Stanley analyzing the response of the market after the announcement could have provided strong support for the proposition that the expected value of what CPH was to receive was much higher than the market value on the announcement date -- because everyone expected the market to respond by raising the price (as in fact it did). Here again, we will never know for sure. But the internal communications among participants at Morgan Stanley certainly could have changed the complexion of the damages dispute.

Third, Morgan Stanley has now had the temerity to ask that one small piece of the litigation misconduct statement introduced into Phase I of the trial. *See* Morgan Stanley's Motion to Take Judicial Notice Pursuant to F.S. § 90.203, filed May 9, 2005. That fact, too, should be considered by the Court in deciding whether to maintain its ruling that Morgan Stanley will be allowed to present testimony and argument on inferences to be drawn from CPH's non-preservation of e-mail, even as the jury remains ignorant of the much greater transgressions of Morgan Stanley. Morgan Stanley, having now asked to exploit for its own benefit an out-of-context snippet of the Court's order sanctioning Morgan Stanley, should be required to accept the presentation of the entire document.

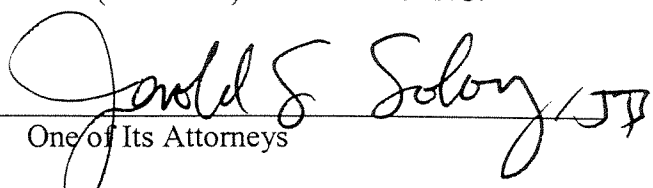
Conclusion

For the foregoing reasons, the Court should grant reconsideration and present the litigation misconduct statement in full in Phase I.

Dated: May 10, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: 
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16div-016979

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 10th day of May, 2005.

JEFFREY T. SHAW

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IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 54

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Thursday, March 31, 2005

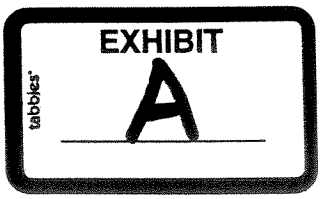
Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

1:00 p.m. to 5:05 p.m.



But this jury is not being told, as Your Honor's statement presently stands, that Morgan Stanley repeatedly violated court orders. That is a fact. But nonetheless, Mr. Hansen has chosen to say, as a consequence of not following court orders, Morgan Stanley can't defend itself.

Well, once he presents that issue to the jury, in fairness to us, the jury is entitled to know that the punishment indeed fits the crime in both phases.

THE COURT: I don't need you to respond.

I can tell you, this is something I've thought about. And I understand the parties may have different opinions. My purpose here is to have a fair trial. And the only way I think we can protect Morgan Stanley against the inappropriate reference to litigation misconduct, that has nothing to do with liability. And I've already found that on the issues we have left is to segregate that and do both entitlement and amount of punitive damages as a phase two. What that means is I would not read a statement about litigation misconduct to the jury in phase one.

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

VOLUME 93

MORGAN STANLEY & CO., INC.,

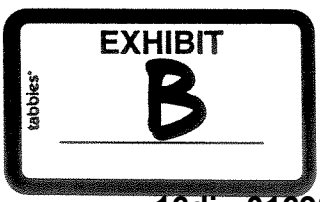
Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Friday, April 29, 2005
2:57 p.m. - 5:25 p.m.



despite discovery for two and a half years, not one of these supposedly still existing e-mails has been produced. I don't see why the jury isn't entitled to consider that as a basis for what still hasn't been produced is relevant, relevant information from key players involved. If they want to put on other evidence, that's an entire different issue.

MR. SOLOVY: Mr. Marmer wants to chime in.

THE COURT: I see.

MR. SOLOVY: Let me remind you, experienced counsel, Kirkland, Mr. Ianno, never ever filed this motion until they were in deep trouble in this case. I think this motion was filed mid to late March of this year. I mean, that's how essential that was to this case, Your Honor.

THE COURT: Okay.

MR. MARMER: The only other thought I wanted to add was if we do end up reaching e-mails in on our side, I do think we need to have a fuller airing of the issue of whether the lack of e-mails from Morgan Stanley does impact either the issues of reliance or damages that do remain. Because so far Your Honor has focused on the notion that the e-mails are most likely

to show the other elements of liability. And I understand that. But the notion that there wouldn't be any possible relationship between what might have been in Morgan Stanley's e-mails and issues that would bear on reliance and damages we need to explore more fully.

Just to give a couple off the top of the head reactions, but I'd like to be able to develop this in a more complete way, one is that we have had some testimony about whether or not it was important to my client that Morgan Stanley continued to stand with Sunbeam well after the deal closed. And, you know, I would anticipate there would be substantial discussions.

THE COURT: What relevance does that have for reliance or damages?

MR. MARMER: If they're going to, on reliance if they're going to take the position or try and suggest that they weren't continuing to reinforce and buck up the legitimacy of the Sunbeam situation well past the closing, then that's one thing. But the questioning certainly has been designed to elicit a suggestion that we were on notice of all sorts of awful things and

that they're at least walking away from their continued participation. So that's one element.

A second is certainly it hasn't been lost on me. One of the themes that has been sounded by Morgan Stanley is, why, you could have just gone to ask. Well, there could be --

THE COURT: Just what?

MR. MARMER: You should just ask. Why didn't you ask Morgan Stanley? You didn't call and ask Morgan Stanley. You didn't call and ask Sunbeam. Why didn't you call Morgan Stanley? Why didn't you ask Morgan Stanley? There could be e-mails where they made quite a bit about the debenture purchasers not suing them. I suspect there's considerable e-mail traffic, whether they sued or not, and it would be fascinating to see what they were telling the purchasers of debentures when they inquired. Just so we have a clear understanding, we have documents, we can show this, but Morgan Stanley shorted the stock at the time that they closed the debenture offering, 250,000 shares -- the debentures.

MR. GORSUCH: This is just smear, Your Honor, and I apologize for interrupting, but this is way off the point.

THE COURT: No, it isn't. Go ahead.

MR. MARMER: And we also know they took, they virtually exited their long positions on April 1st or 2nd just before the April 3 press release came out. We know while they're making markets in the debentures and selling to their customers this enormous amount of debentures and the debentures then go deep south, obviously they don't fall off the wagon the same way the stock does, but there had to have been some unhappy debenture holders out there. Highly likely there wouldn't have been conversations between purchasers of the debentures and the people that sold it to them, Morgan Stanley, asking what's going on at Sunbeam, what's happening here with Sunbeam. We don't have that.

Now let's suppose that we had that traffic, and it showed that when the debenture purchasers inquired of Morgan Stanley, they got disingenuous responses about the nature of what was involved. It seems to me when you get hit about 400 times, as we have, why didn't you just pick up the phone and call someone from Morgan Stanley, we might want to be able to say because

other people who picked up the phone to call Morgan Stanley got lied to by Morgan Stanley. That would be interesting.

There could be further communications on we were talking about the objective measure of the damages. I want to stick on the objective measure of damages, what was the market. It wouldn't surprise me to learn there would be e-mail traffic among someone contemplating a debenture offering of this size to have looked at what the market was doing and reacting preclosing the debenture offering. So you have from March 19 to the date of the closing of the debenture, which I think was March 26th or 28th. I'd have to check, but it's a couple days before our closing. How is the market doing on the stock? Gee, the market seems to have responded really well to the combination of these transactions. This is what we expected. This ought to make a very good position for us. Gee, should we exit our short position? That whole question about exercising the green shoe, the way this was an arbitrage. So they had 500 million to begin with and then they short sell 250, and they say, because we can exercise the

green shoe to cover, so at the time they do the initial transaction, they short sell 250 million. That means if they think at that moment the stock -- the debentures are going to drop, they'll make money from the short. But they're covered, essentially they hedge their own position because if it stays the same or goes up in the demands there, they get to exercise the green shoe on the other 250 million. So there had to be some discussion about why we shorted, the debentures to begin with, whether or not to exercise the green shoe based upon what we thought would or would not happen in the short term, and when they exit their entire position just before the April press release, there's got to be discussions about that.

Well, I --

MR. GORSUCH: Is there going to be a chance I'll be able to respond at some point?

MR. SOLOVY: Let me add --

MR. MARMER: I'm going to finish, and neither of you is going to interrupt if I can help it. So I suspect there would be discussions about the market conditions, how the

market is reacting to the combination of these entities, and that would bear upon and perhaps corroborate what's going on.

We know also there are a number of other averaging things that go on in this case. We know Morgan Stanley when it was calculating its fee in this transaction, their letter agreement on the fee includes averaging. They don't pick a single date. The fee is based upon the closing price of the deal on our deal, and that fee agreement includes an average. It's, I think, ten days, also customary in the industry. So the question of whether it's legitimate or illegitimate to average, I expect there's going to be some discussion on that.

I would suspect there would be e-mail traffic that said something like, gee, I wish we had gone back more than ten days on our fee or, gee -- who knows what that would contain. But the notion the e-mail traffic could not have any bearing on reliance or damages is separate and apart. I understand, and I'm not asking Your Honor to reconsider the question of defaulting them on the other elements of the causes of action. That's not where I'm headed.

MR. GORSUCH: No? I'm surprised to hear that concession, Mr. Marmer.

THE COURT: Why don't you sit down and I'll ask you to stand up when it's your turn.

MR. GORSUCH: Very well.

MR. MARMER: What I'm suggesting is the newfound zeal on Morgan Stanley's side for introducing the issue of discoverable e-mails on the issue of reliance and damages, certainly one could argue at a minimum there is reason to believe there would have been e-mail traffic to Morgan Stanley not available to us that could bear upon these issues. Whether it is as directly dramatic on the issues is a separate question. But that would be, in my view, and we can air it more fully if Your Honor would like, but ought to be an issue that then reinvites the question of whether the one portion of Your Honor's order gets reintroduced into part one. I think you can see my hunch is put to a choice on that Morgan Stanley will revisit its assessment.

MR. SOLOVY: In any event, let me give you an example of how it could bear on reliance. You have Mr. Kitts, Mr. Stynes, Mr. Strong,

Mr. Tyree, Miss Porath all working on this. They could have met with Maher premerger, Nesbitt. They could have sent back an e-mail saying we met with Maher, Nesbitt. They're buying this story wholeheartedly. We've really fooled them. This is great. I've seen all sorts of e-mails. For example, Mr. Strong after the thing tanks the PR people saying we met with the -- you know, we did this, we dissembled that way, blah, blah, blah. So there very well could have been on reliance direct evidence of how they bamboozled us and how they knew we were relying on this.

THE COURT: You obviously wanted to respond. You may now stand. What did you want to add?

MR. GORSUCH: Thank you, Your Honor. Your Honor has entered a pretty heavy sanction.

THE COURT: I'm sorry?

MR. GORSUCH: Your Honor entered a pretty heavy sanction for Morgan Stanley's conduct already. And I don't, I don't see a motion to extend that in any way. The motion here is for reconsideration of two orders previously made. This is a completely new argument I haven't heard.

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO BAR MORGAN STANLEY FROM ARGUING IN ITS CLOSING ABOUT LACK OF RELIANCE ON MORGAN STANLEY'S OWN STATEMENTS

Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, respectfully asks this Court to bar Morgan Stanley from arguing in its closing about the supposed lack of reliance on Morgan Stanley's own statements. Based on testimony Morgan Stanley has elicited at trial, CPH expects that Morgan Stanley will attempt to argue during its closing that certain witnesses, such as Coleman directors, did not rely on statements made by Morgan Stanley specifically. This Court should bar Morgan Stanley from making any argument that draws a distinction between reliance on statements made by Morgan Stanley and reliance on statements made by Sunbeam as such argument is plainly barred by the Court's established finding that Sunbeam and Morgan Stanley are co-conspirators and the rule that acts and statements by a conspirator in furtherance of the conspiracy are imputed to co-conspirators.

First, this Court conclusively found that "Morgan Stanley conspired with Dunlap and other Sunbeam executives to conceal the truth about Sunbeam's financial performance and business operations." March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment, Exhibit A, at 27. In light of the Court's conclusive finding, statements made by

Sunbeam "during the course and in furtherance of the conspiracy" may be imputed to Morgan Stanley and vice versa. *See James v. Nationsbank Trust Co. (Florida) N.A.*, 639 So. 2d 1031, 1032 (Fla. 5th DCA 1994)); *Hoch v. Rissman, Weisberg, Barrett*, 742 So. 2d 451, 460 (Fla. 5th DCA 1999) (conspiracy is a "vehicle for imputing the tortious actions of one co-conspirator to another to establish joint and several liability"). Thus, whether CPH and its decision makers relied on a statement made by Sunbeam or a statement made by Morgan Stanley is irrelevant to the issue of CPH's reliance in this case.

Second, allowing Morgan Stanley to argue about lack of reliance on Morgan Stanley's own statements in its closing would impermissibly mislead the jury as to the governing law in the case and/or the Court's established findings. It is well established under Florida law that a party's closing argument may not mislead the jury as to the law applicable to the case. *See Murphy v. Int'l Robotic Sys., Inc.*, 766 So. 2d 1010, 1028 (Fla. 2000) (The purpose of closing argument is to help the jury understand the issues in a case by "applying the evidence to the law applicable to the case"); *see also Covington v. State*, 842 So. 2d 170, 173 (Fla. 3d DCA 2003) ("While wide latitude is permitted in closing argument, this latitude does not extend to permit improper argument. Here, the prosecutor's closing argument enunciated an erroneous and misleading statement of the State's burden of proof because it improperly asked the jury to determine whether Gore was lying as the sole test for determining the issue of his guilt"); *Cave v. State*, 476 So. 2d 180, 186 (Fla. 1985) ("Counsel may not contravene the law and the jury instructions in arguing to the jury").

Moreover, Florida law also requires that a party's closing argument be supported by evidence properly before the jury. *See Murphy v. Int'l Robotic Sys., Inc.*, 766 So. 2d 1010, 1028 (Fla. 2000) ("Attorneys should be afforded great latitude in presenting closing argument, but

they must 'confine their argument to the facts and evidence presented to the jury and all logical deductions from the facts and evidence'") (quoting *Knoizen v. Bruegger*, 713 So. 2d 1071, 1072 (Fla. 5th DCA 1998)); *Tito v. Potashnick*, 488 So. 2d 100, 101 (Fla. 4th DCA 1986) ("Arguing facts not in evidence or not warranted from the evidence is impermissible"). Counsel may not, under any circumstance, provide counsel's own opinion. *Airport Rent-A-Car, Inc. v. Lewis*, 701 So. 2d 893, 896 (Fla. 4th DCA 1997) ("An attorney's expression of his personal opinion as to the credibility of a witness, or of his personal knowledge of facts, is fundamentally improper.") Nor can counsel present arguments that are not supported by evidence properly before the jury. 5 PHILIP J. PADOVANO, FLORIDA PRACTICE: CIVIL PRACTICE § 23.4 (2004-2005 ed.) ("It is improper for a lawyer to make an argument based on facts that were excluded from evidence or on facts that were not presented during trial").

Allowing Morgan Stanley to argue about lack of reliance on Morgan Stanley's own statements would either mislead the jury about the governing law or constitute an impermissible factual argument lacking a basis in evidence. Counsel would be implying either (1) that, as a matter of law, CPH cannot prevail without showing reliance on statements by Morgan Stanley itself or (2) that there is some factual basis for concluding that Morgan Stanley was not a co-conspirator with Sunbeam (or both). Those implications are directly contrary to the applicable law on co-conspirator liability and this Court's established findings of fact. Such argument would only serve to confuse and mislead the jury and should not be permitted.

CONCLUSION

Accordingly, this Court should bar Morgan Stanley from arguing in its closing about lack of reliance on Morgan Stanley's own statements.

Dated: May 10, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 10th day of May, 2005.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

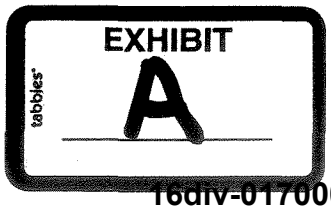
MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON CPH'S RENEWED MOTION FOR ENTRY OF DEFAULT JUDGMENT

THIS CAUSE came before the Court March 14 and 15, 2005, on CPH's Renewed Motion for Entry of Default Judgment, with both parties well represented by counsel.

Coleman (Parent) Holdings, Inc. ("CPH"), has sued Morgan Stanley & Co., Inc. ("MS & Co."), for aiding and abetting and conspiring with Sunbeam to perpetrate a fraud. Early in the case, CPH was concerned that MS & Co. was not thoroughly looking for emails responsive to its discovery requests. On April 16, 2004, the Court entered an Agreed Order ("Agreed Order") that required MS & Co. to search its oldest full backup tapes for emails subject to certain parameters and certify compliance. MS & Co. certified compliance with the Agreed Order on June 23, 2004. On November 17, 2004, CPH learned that MS & Co. had found some backup tapes that had not been searched. On January 26, 2005 it served its Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order ("Adverse Inference Motion"), claiming that MS & Co.'s violation of the Agreed Order, coupled with its systemic overwriting of emails after 12 months, justified an adverse inference against it. The Court ordered certain limited discovery. Responses to that discovery prompted CPH to orally amend its Adverse Inference Motion to seek more severe sanctions.

The Court held an evidentiary hearing on the Adverse Inference Motion on February



As detailed above, Morgan Stanley conspired with Dunlap and other senior Sunbeam executives to conceal the truth about Sunbeam's financial performance and business operations.

As detailed above, Morgan Stanley committed overt acts in furtherance of the conspiracy, including: concealing Sunbeam's first quarter 1998 sales collapse; assisting with the false March 19, 1998 press release; arranging road shows and meetings with prospective debenture purchasers at which Morgan Stanley, Dunlap, and others made false statements concerning Sunbeam's financial condition and business operations; preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam's financial condition and business operations; providing CPH with false financial and business information concerning Sunbeam; scripting Dunlap's false public statements concerning Sunbeam's acquisition of Coleman;

and underwriting the $750 million convertible debenture offering, proceeds from which were used to fund Sunbeam's purchase of Coleman.

16div-017001

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S MOTION FOR A DIRECTED VERDICT

Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, respectfully requests that this Court enter a directed verdict in CPH's favor on the issues of liability and damages.

Argument

A directed verdict for the plaintiff is appropriate where there is no conflict in the relevant evidence and no reasonable inferences adverse to plaintiff can be drawn from that evidence. *See, e.g., Young v. Young*, 443 So. 2d 293, 293 (Fla. 3d DCA 1983); *see also Jarrell v. Churm*, 611 So. 2d 69, 70 (Fla. 4th DCA 1992). Here, in light of this Court's March 23, 2005 Order, all issues have been conclusively determined in CPH's favor except for two — the issues of CPH's reliance and its damages. With respect to those issues, as the evidence at trial has conclusively established, CPH is entitled to a directed verdict.

I. CPH Is Entitled To A Directed Verdict On The Issue Of Reliance.

CPH is entitled to a directed verdict on the issue of reliance. The undisputed evidence at trial demonstrates that CPH specifically demanded and received express contractual assurances — including Sunbeam's representations that its public filings and financial statements were accurate and that it would advise CPH of any material adverse changes — because CPH wanted

to be contractually entitled to rely upon the accuracy of the economic turnaround portrayed by Sunbeam and Morgan Stanley. See Part A below. In addition, the undisputed trial evidence further shows that: (1) Morgan Stanley was drawing on a long relationship of trust with CPH (Part B below); (2) CPH specifically relied on the statements of and information provided by Sunbeam and Morgan Stanley; (3) CPH's reliance on the audited financial statements without undertaking an independent verification of the accuracy of the statements was both reasonable and customary (Part D below); (4) CPH's actions were entirely consistent with reliance and inconsistent with Morgan Stanley's unsupported theories (Part E below); and (5) Morgan Stanley's other contentions do not lead to any other inference on the issue of CPH's reliance (Part F below).

A. CPH received specific contractual assurances that entitled it to rely on the representations about the Sunbeam turnaround.

1. Representations concerning Sunbeam's financial condition.

The undisputed evidence shows that CPH demanded and received contractual assurances that Sunbeam's public filings and financial statements were accurate. The Coleman Public Merger Agreement provided that "Laser has filed all reports, forms, registrations, schedules, statements and other documents required to be filed with the SEC since January 1, 1997. As of their respective dates, the Laser SEC reports complied in all material respects with the requirements of the Securities Act or the Exchange Act, as the case may be, and the applicable rules and regulations promulgated thereunder." CPH 309, § 5.6(a). The Coleman Public Merger Agreement further provided that "[t]he consolidated financial statements of [Sunbeam] included in the Filed [Sunbeam] SEC Reports complied as to form in all material respects with the applicable accounting requirements and the published rules and regulations of the SEC with respect thereto, have been prepared in accordance with GAAP (except, the case of the unaudited

statements, as permitted Form 10-Q of the SEC) applied on a consistent basis during the periods involved . . . and fairly present the consolidated financial position of [Sunbeam] and its consolidated subsidiaries as of the dates thereof . . . ." CPH 309, §5.6(b). Those representations all are incorporated by reference in the CPH Private Merger Agreement. CPH 331, Article V, at 14 ("[Sunbeam] hereby makes the same representations and warranties to Parent Holdings and Holdings as the representations and warranties made by [Sunbeam] to the Company in the Company Merger Agreement").

The contractual representations and warranties made by Sunbeam were "very important" to CPH because the "representations and warranties that are made that says that the documents that are filed with the SEC since January 1, 1997 are true and correct." 4/27/05 Tr. at 10856 (Gittis). As Mr. Nesbitt testified, "we were satisfied that after that that the terms of that contract provided us with sufficient comfort that we were — would either be informed of a change in the company's financial picture and that — excuse me, and what we had relied on in reaching -- in signing that agreement, we never would have signed that agreement had there not been a representation that the company's financial statements were accurate. Would have walked away, gone back to business." 4/18/05 Tr. at 8981-82 (Nesbitt).

2. Representations concerning material adverse changes.

The undisputed evidence also shows that CPH demanded and received contractual assurances concerning the absence of material adverse changes. Section 5.7 of the Coleman Public Merger Agreement, which is incorporated into the CPH Private Merger Agreement, provided that "since the [Sunbeam's] Balance Sheet Date, the business of [Sunbeam] and its subsidiaries has been conducted only in the ordinary course of business consistent with past practice, and there has not been any event, change or development which individually or in the

aggregate has had or would reasonably be expected to have a [Sunbeam] Material Adverse Effect or would impair or delay the ability of [Sunbeam] to consummate the transactions contemplated by, or to satisfy its objections under, this Agreement." *See* CPH 309, § 5.7. The CPH Private Merger Agreement further provided, in the "Advice of Changes" clause, that Sunbeam was obligated to advise CPH both orally and in writing of any material adverse change that might occur in the future. CPH 331, § 6.8. The occurrence of any such material adverse change would entitle CPH to back out of the deal. CPH 331, § 8.2(a)-(b). And as set forth in the established findings of the Court, Morgan Stanley was "fully aware [that] the written contract between CPH and Sunbeam gave CPH the express right to refuse to close the sale if there was a material adverse change in Sunbeam's 'business, results of operation or financial condition.'" *See* Court's March 23, 2005 Findings at 20.

As Mr. Gittis testified, pursuant to the material adverse change clause, "if there were any material change in the facts as represented to us, they had a legal obligation to advise us of that change orally or in writing." 4/27/05 Tr. at 10853 (Gittis); *see also* 4/18/05 Tr. at 8790 (Nesbitt) ("[T]hat was the purpose for a very important statement in the contract by Sunbeam management that their financial statements were accurate. There was a specific representation to that, and there was a specific clause which required them to inform us to the extent that, one, that was not true or if there was a change in their financial picture of a material nature prior to closing."). Sunbeam never informed CPH of any material adverse change at any time before the closing of the transaction. 4/27/05 Tr. at 10853 (Gittis).

B. Morgan Stanley was drawing on a long relationship of trust with CPH.

The trial evidence demonstrates conclusively that Morgan Stanley was drawing on a long relationship of trust with CPH in luring CPH into the Sunbeam-Coleman transaction. Mr.

Perelman had worked with Morgan Stanley since 1986, when he purchased Revlon. 4/19/05 Tr. at 9058 (Perelman); 4/26/05 Tr. at 10689 (Gittis). MAFCO participated in 27 transactions with Morgan Stanley from 1985-1998. 4/26/05 Tr. at 10698 (Gittis); *see also* CPH 600. Of CPH's relationship with Morgan Stanley, Mr. Perelman testified, "[i]t was a very strong very close relationship. We considered them one of our principal and primary bankers." 4/19/05 Tr. at 9058 (Perelman); *see also* 4/19/05 Tr. at 9062-63 (Perelman) ("We were terribly close to the firms and to these individuals. They were literally a part of everything that we looked at or thought about doing. They were a part of every one of our companies' financing or acquisition activities in some way or other, so this was one of the firms that we were closest to on Wall Street. This was one of our principal bankers.").

Morgan Stanley's original overture regarding Sunbeam was made by Bill Reid and Bob Kitts of Morgan Stanley. Mr. Reid already had a close relationship with MAFCO. "I think he could best be described as an account officer, the person who was responsible for anything that Morgan Stanley might do at MacAndrews & Forbes. Any type of work Morgan Stanley would do with MacAndrews & Forbes Bill would coordinate." 4/12/05 Tr. at 7876 (Maher).

Morgan Stanley's involvement in the Sunbeam deal gave the deal enormous credibility. 4/26/05 Tr. at 10643 (Perelman) ("In my entire business career when we were dealing with a first-tier investment banker, much less one of the two premier investment bankers in the world, we would rely on them. We never had any reason not to rely on them."); 4/26/05 Tr. at 10737 (Gittis) ("Listen, when Morgan Stanley represents you, it was a[n] [im]primatur of propriety. They were one of the two white [shoe] firms, what we call white [shoe] firms on Wall Street. It was always Morgan and Goldman battling out for the top spot always. And so when you had Morgan or Goldman representing you, you were a first-class company."); 4/19/05 Tr. at 9064

(Perelman) ("This was a firm that prided itself to be of the highest integrity and quality and character, and we believed that to be the case."); 4/14/05 Tr. at 8381 (Nesbitt) ("[A]s part of this advisory relationship, and we had certainly seen this in their work, you know, with us and in other investment bank's work with us. They had to become intimately familiar with the company's operations in order to advise their client. So we saw it as, again, as a positive that so reputable a firm would embark on an advisory relationship with Sunbeam.").

Indeed, Morgan Stanley's involvement was indispensable to the deal ultimately going through. As Mr. Gittis testified, "Sunbeam could not have possibly done these transactions without Morgan Stanley. First of all, they were cloaked in the Morgan Stanley, you know, ambit of the white shoe firm, but more importantly they needed to do these transactions, two and a half billion dollars in cash. They did not have access to the marketplace to raise that kind of money without Morgan Stanley. Never would have happened." 5/2/05 Tr. at 11734 (Gittis).

Morgan Stanley itself cultivated the kind of image that other businesses could and would rely on. As senior Morgan Stanley executive Mr. Perella put it:

> I think that our firm has very high standards. We have a motto here, first-class business in a first-class way. Secondly, institutional investors, I think, believe that we have higher standards or, let's say, the highest standards on Wall Street. And I think they believe that if we – that they believe that if we put our name on an underwriting that we've done due diligence at a very high standard and that we work for quality companies.

4/19/05 Tr. at 9053 (Perella).

C. CPH specifically relied on the statements of and information provided by Morgan Stanley and Sunbeam.

The undisputed evidence establishes that CPH relied specifically on a number of representations of Sunbeam and Morgan Stanley.

1. Audited financial statements.

The publicly filed financial statements were "the crucial underpinning of [CPH's] decision to go forward" with the transaction. 4/27/05 Tr. at 10951 (Gittis). Prior to March 30, 1998, the 1996 and 1997 financials "indicated a successful turnaround and a very solid financially strong company going into the future." 4/19/05 Tr. at 9094 (Perelman). Mr. Perelman and CPH still believed the 1996 and 1997 financials to be "valid" even after Sunbeam issued the April 3, 1998 press release reporting that sales for first quarter of 1998 were down. 4/19/05 Tr. at 9155 (Perelman). As of April 3, the financial statements that CPH received from Morgan Stanley were still "the valid financial statements." "[T]he auditor had not changed its opinion on whether these financial statements were accurate. It wasn't until sometime later that the auditors said, by the way, '96 and '97 are inaccurate statements and there was a fraud." 4/21/05 Tr. at 9803 (Perelman). "We [CPH] had no reason to believe at that point that we were deceived beyond what we were told for the first quarter sales of 1998. And, in fact, quite the opposite, because neither Morgan Stanley nor Sunbeam had done anything to revoke the previously distributed documents. We continued to be in a position to rely on those." 4/21/05 Tr. at 9816 (Perelman). *See also* 4/27/05 Tr. at 10845 (Gittis) (Mr. Gittis relied on the 1996 financial statements and had no reason to suspect they were inaccurate); 4/27/05 Tr. at 10947 (Gittis) (Morgan Stanley included the 1997 financials in its debenture offering memorandum and this "showed that you could rely upon them."); 4/14/05 Tr. at 8370 (Nesbitt) (Mr. Nesbitt relied on the audited financials, and that was standard practice in the industry: "Again, they were — had been prepared by the company. They had been distributed to any and all shareholders of the company. And they had been filed with the Securities and Exchange Commission subject to the

rules of the Securities and Exchange Commission. The standard basic document that investors rely on, whether they're public investors or small investors or significant investors.").

2. February 23, 1998 materials.

Mr. Perelman placed "[c]omplete reliance" on the Blue Book and the Long-Range Strategic Plan provided at the February 23 meeting. 4/19/05 Tr. at 9092 (Perelman).

a. Morgan Stanley Blue Book (CPH 6).

Mr. Perelman emphasized the importance of the Morgan Stanley Blue Book: "This was, to me, the most important presentation that we were to receive. This was the Morgan Stanley analysis of the Sunbeam company. And this took everything that we had been given to date, both by Sunbeam and then we had gotten from the financially publicly filed SEC filings, and sort of put it all in perspective." 4/19/05 Tr. at 9081-82 (Perelman). The Blue Book was, in a word, "pivotal." 4/19/05 Tr. at 9082 (Perelman). Based on his review of the Blue Book, Mr. Perelman concluded that Sunbeam's "existing financial condition was strong, and its future for growth was positive, and it's supported here in black and white." 4/19/05 Tr. at 9084 (Perelman).

Mr. Gittis echoed Mr. Perelman's view: Upon reading the Blue Book, Mr. Gittis "thought that what Morgan Stanley was saying to us was that Sunbeam's present financial condition is strong; it is going to be a significant cash flow generator; and it has enormous opportunities for growth and strategies for achieving those opportunities. A lot of companies you can see opportunities, but this is a company which they're saying to us they have specific strategies for each of those five operating divisions for how we're going to attain growth. They had specific strategies for how we were going to achieve international distribution. They had specific strategies for what we were going to do for water and air, products they never had been into before. That's what this was saying to me." 4/26/05 Tr. at 10808 (Gittis).

Mr. Perelman relied on "the entire document." 4/19/05 Tr. at 9082 (Perelman). Mr. Gittis read every page of the Morgan Stanley Blue Book, and when he read it, he had no doubt that the representations in the book were being made by Morgan Stanley. 4/26/05 Tr. at 10771-72. Mr. Gittis, like Mr. Perelman, placed "[c]omplete reliance" on the Blue Book. 4/26/05 Tr. at 10809 (Gittis). It "was the backup for the Sunbeam long-range plan. This put the meat on the bones. Sunbeam's plan was the bones. This was the meat." 4/26/05 Tr. at 10809 (Gittis). The Blue Book was "very important" to Mr. Gittis and he had "no reason to know" and "never would have believed" that it was false. 4/26/05 Tr. at 10809 (Gittis).

b. Sunbeam Long-Range Strategic Plan (CPH 352).

The Strategic Plan "showed you what [Sunbeam] thought they were going to be doing in the succeeding three years. It's an important piece of information for you. It shows you here's what Al [Dunlap] was talking about, 20-percent margin right in here. That's a good margin for this kind of a business." 4/26/05 Tr. at 10757 (Gittis). According to Mr. Maher, this information also was very important because it showed "that they were going to meet the expectations of Wall Street in the short term and also in the near term." 4/13/05 Tr. at 8014 (Maher). "I think that at that point in time it [the Strategic Plan] was illustrious that the turnaround in Sunbeam had occurred, that they had very substantial sales and operating income." 4/12/05 Tr. at 7932 (Maher). Mr. Perelman focused closely on the Strategic Plan, "[v]ery much so. This was the Sunbeam presentation that was made at that Morgan Stanley meeting, and this presentation, although not in the same degree of depth and backup as the Morgan Stanley presentation, was dovetailed right into the Morgan Stanley presentation." 4/19/05 Tr. at 9085 (Perelman); *see also* 4/21/05 Tr. at 9086 (when asked which parts of the Long Range Strategic Plan he relied on, Mr. Perelman testified, "[a]ll of them.").

The 1997 results reported in the Strategic Plan were presumed accurate. Mr. Maher testified that "I had no reason not to believe that. They were presented to us as these were the earnings. It was now a month and a half after the end of the year, so I had absolutely no reason to think that they were anything other than that." 4/12/05 Tr. at 7933 (Maher). As Mr. Maher emphasized: "I was left with the impression that they felt it was quite realistic and that they might indeed exceed it." 4/13/05 Tr. at 8011-12 (Maher).

CSFB and the Coleman Board relied on the numbers expressed in the Sunbeam Strategic Plan. CSFB's valuation of the Sunbeam stock used the sales expectations expressed in the Strategic Plan. 4/13/05 Tr. at 8027-28 (Maher); CPH 337; *see also* 4/21/05 Tr. at 9977-78 (Perelman). Coleman's Board relied on CSFB's presentation, which in turn, used the Strategic Plan's figures: "I think it [the value of the Sunbeam stock] was very important to the relevance of that opinion, because that's the consideration that was being received by the Coleman shareholders." 4/13/05 Tr. at 8033 (Maher).

3. Debenture offering.

Morgan Stanley's involvement in the debenture offering also was significant to CPH. As Mr. Perelman explained, "[i]t was extremely important to us. It gave us a confirmation in what we believed to be Morgan Stanley's belief in the company of Sunbeam." 4/19/05 Tr. at 9105 (Perelman).

a. Morgan Stanley Debenture Offering Memorandum (CPH 487 (preliminary); CPH 7A (final)).

Mr. Perelman relied on Morgan Stanley's debenture offering memorandum before coming to his decision to close the transaction. 4/19/05 Tr. at 9121-22 (Perelman). "We got the Morgan Stanley offering documents. And we see, once again, in those documents that there is a confirmation of everything that we had been told." 4/21/05 Tr. at 9763 (Perelman). Mr.

Perelman testified that the last paragraph of page 37 of the Offering Memorandum was "[t]erribly significant. I think, first of all, this demonstrated that Morgan Stanley was telling the other investors the exact same story that they had been telling us in the projections for the years '98, '99, and 2000. Secondly, Morgan Stanley was not putting its name on this document, federally filed document, distributed to the public, again, confirming their supposed comfort in the achieving of these statements. I can't recall when I have ever seen such a strong commitment on the part of an underwriter as in this document." 4/19/05 Tr. at 9127 (Perelman). If Mr. Perelman had known this information was false, "[w]e would not have closed the transaction." 4/19/05 Tr. at 9107 (Perelman).

Mr. Gittis confirmed that Morgan Stanley's underwriting of the debenture offering was "very important" to CPH. "It was Morgan Stanley putting its imprimatur on this offering." 4/27/05 Tr. at 10871 (Gittis). "I was absolutely convinced Morgan Stanley would not sell to its best customers, you know, $750 million worth of debentures knowing of the March 19th release if there was any problem at all. They were the one that knew this company more intimately than anybody. If they were going ahead with that, there was no way that March 19th press release was troublesome." 5/2/05 Tr. at 11723 (Gittis). And Mr. Nesbitt testified that "it was very relevant to our consideration that they would put their reputation on the line to go to their best clients and market securities that would be issued by Sunbeam. And that they had completed their own due diligence related to Sunbeam as to the merits of this note offering." 4/18/05 Tr. at 8994-95 (Nesbitt); *see also id.* at 8979 (Nesbitt) ("we were relying on the successful completion of the debenture offering").

b. Statements at road show meetings (CPH 128).

Mr. Perelman drew significance from Morgan Stanley's presentations to investors at road shows. "First was that these were very sophisticated investors, some of the most sophisticated investors in the industry. I believe the minimum required net worth to be a purchaser of this debenture was $100 million. So it was the top tier of investors that were being asked to participate in this underwriting. Their opinion and their evaluation and their critique of the situation was important to us." 4/19/05 Tr. at 9106 (Perelman). Mr. Gittis also had a great interest in the reactions at the road shows. He "was interested, particularly if there were any questions from the audience — big question-and-answer session afterwards — whether there were any questions or items raised that we had not previously considered and would sort of liked to have known that." 4/27/05 Tr. at 10888 (Gittis).

Mr. Gittis requested that Mr. Nesbitt attend the road show and bring back copies of the presentation given. 4/27/05 Tr. at 10888 (Gittis); *see also id.* at 10889-90 (Mr. Gittis confirming that Mr. Nesbitt reported back to him on the day of the road show). Mr. Nesbitt, in turn, testified that "we were relying on the successful completion of the company's debenture offering. And that is exactly why I attended the road show for the debenture offering, listening to the questions and answers during that road show offering and received a copy of the road show presentation." 4/18/05 Tr. at 8979 (Nesbitt). As Mr. Nesbitt explained, "[t]hey are essentially making a statement to the investment community that they will – and to Sunbeam, very importantly, that they will stand behind their offering, that they could get it done, and in effect what they will do is purchase the debt securities and in effect redistribute them to other investors. It's kind of like a backstop. They're saying we can get it done; we're going to underwrite it. And it provides the

company with a degree of, high degree of confidence, certainty that the offering is going to get done." 4/14/05 Tr. at 8501 (Nesbitt).

4. March 19, 1998 Press Release (CPH 14).

Mr. Perelman relied on the representations in the March 19 press release: "The press release basically confirmed to us the profitability for the first quarter and the year. And here you have them saying that there might be a slight deviation, and they're making a press release on that. So we had great comfort that if there was any kind of deviation on profitability we would have been told that." 4/19/05 Tr. at 9113 (Perelman). When Mr. Gittis was asked whether CPH relied on the press release, he stated flatly, "[o]f course." 4/27/05 Tr. at 10906 (Gittis). Mr. Gittis explained that CPH would not have closed the transaction if it had known that the March 19th press release was false, misleading, and failed to disclose material facts. 4/27/05 Tr. at 10906-07 (Gittis).

Mr. Maher testified that "[a]fter the press release there was no reason not to go forward with the transaction. We believed that there hadn't been a material change in the financial condition of the company. If there had been a material change in the financial condition of the company, there was an obligation on behalf of Sunbeam to tell us that." 4/19/05 Tr. at 9049 (Maher). CPH also took comfort in the fact that Morgan Stanley incorporated the press release into its debenture offering memorandum. This reassured CPH that the press release "didn't stop anybody from buying [the debentures]." 4/27/05 Tr. at 10945 (Gittis).

D. CPH's reliance on the audited financial statements without undertaking any independent verification of the accuracy of the statements was both reasonable and customary.

The uncontroverted evidence is that reliance on the audited financial statements of a public company without independent investigation of the accuracy of such statements in the

context of a transaction such as the Sunbeam merger is both reasonable and customary. 4/14/05 Tr. at 8370 (Nesbitt). In fact, Morgan Stanley and Sunbeam relied upon The Coleman Company's public financial filings without conducting any independent investigation of their accuracy. *See* CPH 88 at 3 (Morgan Stanley's fairness opinion to Sunbeam stating that "[w]e have assumed and relied upon without independent verification the accuracy and completeness of the information reviewed by us for the purposes of this opinion").

E. CPH's actions were entirely consistent with reliance and inconsistent with Morgan Stanley's unsupported theories.

In a variety of different ways, CPH's actions confirm that it was relying on the misrepresentations by Morgan Stanley and Sunbeam.

First, it is undisputed that CPH made no effort to sell Coleman until the unsolicited approach by Dunlap and Sunbeam, orchestrated by Morgan Stanley, and did nothing to restart the talks after they initially broke down. That reality undercuts any notion that CPH was seeking a way to bail out of a "troubled" company at any price — a notion imbedded in questions but totally unsupported by any evidence.

Second, it is undisputed that CPH consistently rejected offers to buy Coleman for less than $30 a share, thus further confirming that the market value of the Sunbeam stock, which itself was premised on the false turnaround story being told by Sunbeam and Morgan Stanley, was a matter of central importance to CPH. A seller not putting any credence in the turnaround story might well have been willing to accept a lower price, as long as there was a strong cash component in the package.

Third, after the deal closed and the fraud was revealed, CPH made multiple requests to have Sunbeam rescind the whole deal. That demand only makes sense if CPH believed that the value of Coleman exceeded the value of the cash component of the consideration paid — *i.e.*,

that CPH's willingness to sell Coleman depended on its belief in the turnaround story and the resulting market price of Sunbeam.

Fourth, Credit Suisse/First Boston was paid $4 million to help with due diligence on the deal. That decision only makes sense if the value of the Sunbeam stock was of critical importance.

F. Morgan Stanley's other contentions do not lead to any other reasonable inference on the issue of reliance.

Morgan Stanley has articulated three basic theories to support its contention that CPH did not reasonably rely: (1) CPH did not care about whether the stock was valuable or not and so made no effort to assure its value; (2) CPH knew about the Sunbeam fraud but decided to take Sunbeam stock anyway; and (3) CPH was interested in the value of the stock but made its decision based on visceral instincts, and not any information obtained from Sunbeam and Morgan Stanley. Each of these theories is without basis in common sense or the evidence adduced at trial.

1. Theory 1: CPH did not care about whether the Sunbeam stock was valuable and thus made no effort to assure its value.

CPH's actions, its rescission demand in particular, demonstrate that it cared about the value of the stock. In June 1998, Mr. Perelman gave Mr. Gittis permission to seek to rescind the Sunbeam-Coleman transaction whereby CPH "would give back all the cash, repay the funds used to defuse the debt of ours and give back all the stock, all the Sunbeam stock in return for Coleman stock." 4/19/05 Tr. at 9159-60 (Perelman). Mr. Perelman and CPH were willing to rescind the transaction because they still had "monumental confidence" in Coleman. 4/19/05 Tr. at 9159-60 (Perelman)

Mr. Gittis thereafter demanded rescission from the Sunbeam Board. At the June 14 Board meeting, Gittis "said to the Sunbeam board, the members, then present, look, if there is the fraud that you have described to us, then we have been defrauded, and I have a very simple solution for this. Why don't you just give us back the Coleman Company. We are delighted to take it even in the state that it was in now that it had been harmed, but if you will rescind the transaction, I will return to you the $525 million and the debt assumption; I will return to you the 160 million in cash; and I will return to you the 14.1 million shares, and we can both go on our separate ways." 4/27/05 Tr. at 11015-16 (Gittis); 4/21/05 Tr. at 9800 (Perelman) ("As we moved along and learned more information, then we became aware of the fraud, and at that moment we asked for rescission"); 4/26/05 Tr. at 10625-28 (Fogg) (Sunbeam's lawyer confirming Mr. Gittis' rescission demand). The Sunbeam Board responded that "they would not entertain that under any circumstances, that Coleman was the best company that they had." 4/27/05 Tr. at 11016 (Gittis).

CPH demanded rescission of Sunbeam four or five times between June 14 and July 22. 4/28/05 Tr. at 11156 (Gittis). On July 22, 1998, for example, Mr.Gittis wrote on behalf of CPH to "reiterate for the record" CPH's desire:

> That the acquisition of CLN Holdings be reversed and rescinded and that matters be returned to the status quo. . . . We would receive from Sunbeam all of its stock from CLN Holdings fundamentally as it existed at the time of the transaction, subject to the intercompany debt and development in the ordinary course of its business and untainted by liabilities of Sunbeam or arrangements with Sunbeam, and we would return to you the 14.1mm Sunbeam shares and cash received in the transaction equal to the cash received by it ($160mm) and the amount of our public debt assumed by Sunbeam ($500mm).

See CPH 367 at 1. CPH demanded rescission "[b]ecause we thought that it was the best way to resolve the dispute. Sunbeam was already a defendant in a number of shareholder suits. We would have been the largest plaintiff. We were being asked to, on an emergency basis, come in

and help manage the company, and we were in an anomalous position. You couldn't be managing the company and be suing it at the same time. So we had to go one way or the other." 4/28/05 Tr. at 11157 (Gittis); *see also* CPH 449 at 3 (June 29, 1998 Sunbeam Board minutes reflecting Mr. Gittis' rescission demand).

2. Theory 2: CPH knew about or suspected the Sunbeam fraud but decided to take Sunbeam stock anyway.

If CPH knew the fraud was occurring, it would have made no economic sense to try to gain some short-term profit from that fraud because (1) Sunbeam's stock was already inflated over 1997 values, and thus there was no short-term profit to make (assuming knowledge of the fraud), and (2) the risk of the fraud being revealed before CPH got out of the stock was incredibly high (again, assuming knowledge of the fraud). This is particularly true where the contract terms included no collar, no hedge had been or could be arranged, CPH was receiving unregistered and restricted stock, and the nature of the fraud about which CPH is alleged to have knowledge was such that it was about to begin to be revealed upon publication of the 1998 first quarter financials. *See* March 23, 2005 Findings of Court at 7 ("In step three, Dunlap planned to sell Sunbeam to another company before it became apparent that the 'improved' results were fictional."); *id.* at 9 ("Dunlap was more than eager to complete the final step of his scheme: to sell Sunbeam to another company and collect tens of millions of dollars for himself before the outside world could learn the truth about Sunbeam's phony 'turnaround'"); *id.* at 15-16 ("Dunlap was especially anxious to complete the acquisition of Coleman before Sunbeam announced its first quarter 1998 sales. Indeed, the success of the scheme depended upon Sunbeam's ability to complete the Coleman acquisition before Sunbeam's first quarter results were announced. To satisfy Dunlap's objective, Morgan Stanley moved up the launch date of the offering").

The testimony is in accord. If CPH knew that Sunbeam had not, in fact, been turned around, CPH "would not have signed the agreement." 4/27/05 Tr. at 10849 (Gittis) If CPH believed that Sunbeam stock had been fraudulently inflated, as Mr. Gittis confirmed, CPH "would have terminated the agreement." And if CPH knew that Morgan Stanley and Sunbeam were engaged in a fraud, as Mr. Gittis also confirmed, CPH "would have stopped the transaction." 4/27/05 Tr. at 10849 (Gittis).

Morgan Stanley nonetheless has contended at trial that there were a number of "red flags" that rendered the fraud obvious to CPH. Talking the evidence in the light most favorable to Morgan Stanley, however, the "red flags" it has identified are at best cautionary warnings that were negligently disregarded or considered and negligently investigated. None of the "red flags" discloses the Sunbeam fraud or renders the fraud obvious.

a. The June 1997 *Barron's* article.

The evidence is undisputed that the Sunbeam stock price was unaffected by the *Barron's* article: "I certainly don't see anything happening there. I thought the article had said, the article itself said very nicely Wall Street's not paying attention to this. Wall Street is thinking things are fine." 4/11/05 Tr. at 7727 (Emery). In fact, the *Barron's* article said several positive and/or neutral things about Sunbeam. *See* 4/11/05 Tr. at 7729-36 (Emery). For example, the article reported that the stock price had risen dramatically, *see id.* at 7729; the overall analyst consensus was positive, *see id.* at 7730, 7732, 7734-35; in the past, Dunlap "has delivered the goods," *id.* at 7731; and that Sunbeam had "really great" projections, *id.* at 7732. The article also pointed out that Sunbeam denied any wrongdoing. *See id.* at 7736.

As Mr. Nesbitt testified, "I reviewed the [Barron's] article numerous times and considered it in the context of all of the other available information that was at my disposal and

considered it significant that the company's financial statements as filed with the Securities & Exchange Commission and with the benefit of the research reports that had been prepared by the financial community which addressed some of those, some of those issues, on balance we felt that Sunbeam was, that its turnaround was intact and the operating performance was — was improving." 4/14/05 Tr. at 8568 (Nesbitt). Mr. Nesbitt also testified that CPH took reasonable steps to investigate the *Barron's* article: "we asked a number of questions that related to this article at our February 23 meeting and I believe the meetings prior to that, and as well we spent considerable time in the company's financial statements which were filed subsequent to this reviewing the procedures, accounting and the performance of the businesses outlined in those and laid out in those financial statements. And so based on all of that work we concluded that the statements or the suggestions in this article in the larger scheme of things did not, you know, have — significantly impact on our view of the company." 4/18/98 Tr. at 8762-63 (Nesbitt)

Of the 14 analyst reports published between the *Barron's* article and the closing, 12 were buy or strong buy, none were sell, and only one was hold. *See* CPH 1339; 4/14/05 Tr. at 8919-22 (Nesbitt). Indeed, even Andrew Shore at PaineWebber discounted the article's accusations, and continued to express confidence in Sunbeam. *See* MS 1011.

b. Morgan Stanley's 1997 10-K reference to "bill-and-hold sales."

Regarding the bill-and-hold issue in the 1997 10-K, as Mr. Perelman confirmed, CPH "discussed that at great length amongst ourselves and with Morgan Stanley, and we were told by Morgan Stanley that the company was doing that to achieve two purposes, which the retailers were encouraging." 4/20/05 Tr. at 9448 (Perelman). "[W]e focused on what they had identified in their 10-K as bill and hold sales. We had numerous conversations about those to make sure that those were valid sales, to make sure that those were sales that were really true sales, and we

were told directly by Morgan Stanley precisely that they were sales, precisely what they were doing, and it was all a lie." 4/20/05 Tr. at 9456 (Perelman). Messrs. Maher and Nesbitt also reported to Perelman "that they were assured by Morgan Stanley that that was a real sale." 4/20/05 Tr. at 9458 (Perelman).

c. Mr. Levin's supposed warnings about the fraud.

Mr. Levin's warnings were not material because his expertise was not in the financials: "Now if Jerry Levin had issues as to whether they could sustain over a long period of time 55 new products coming out of a research and development budget that he thought was too small, then that was something that I would consider. And I would evaluate whether or not I thought he was accurate or whether I thought that, in fact, they did generate a history of being able to do that and he was wrong. But for him to say to me that he did not agree with the financials, the audited financials and with the comments and support that we got from Morgan Stanley against that stuff, that would not have a lot of weight with me, no, sir, it would not." 4/20/05 Tr. at 9477 (Perelman).

d. "Jan Slow Feb."

Mr. Perelman testified that "Mr. Levin came back from the February 23rd meeting with Morgan Stanley and said to me, I agree with what Morgan Stanley is saying here. Maybe I disagree as to how much they're going to make, whether they're going to hit the 2.20 for the year 1998, but it's going to be between $2 and 2.20, in his own handwriting, sir, as I believe you showed me the other day." 4/20/05 Tr. at 9499-500 (Perelman). Mr. Perelman was not alarmed after learning that January sales were slow because "we've seen that thousands of times in companies." 4/21/05 Tr. at 9762 (Perelman).

e. March 19, 1998 press release.

The March 19 press release was not a material adverse change. As Mr. Gittis stated, "[a]ll they were saying was they might miss the sales by a little bit, and they might not. And nothing about profit. I mean, clearly [it] didn't amount to a material adverse change, and neither Sunbeam nor Morgan Stanley advised us that it did as they were obligated to do under the merger agreement." 4/27/05 Tr. at 10912-13 (Gittis). After the March 19 press release, CPH accumulated analyst reports to "see whether they consider[ed] it to be a momentous event." 4/27/05 Tr. at 10913 (Gittis). The analyst reports still rated Sunbeam a buy or a strong buy following the issuance of the press release. 4/27/05 Tr. at 10916-18 (Gittis); *see also* CPH 1339.

Mr. Nesbitt also reviewed the March 19 press release and did not see it as a red flag, because "it was certainly clear to us that the company's operating performance was, generally speaking, intact." 4/18/05 Tr. at 8834 (Nesbitt); *see id.* at 8836 ("I've seen thousands of press releases from public companies, and I would not at all put this into the category of a severe or even moderate warning of the company."). CPH asked Morgan Stanley why Sunbeam issued the March 19 press release and "the answer we got back from Morgan Stanley was that their lawyers required it, but they are still running well ahead of 1997 and will hit the number." 4/21/05 Tr. at 9763 (Perelman).

Although the Sunbeam stock price dropped by ten percent after the press release, "when we signed the deal, the price of the stock was $41 a share, so it was almost $5 a share higher than when we signed the transaction." 4/21/05 Tr. at 9741-42 (Perelman). And the fact that the debenture offering was increased from $500 million to $750 million on March 19, due to the strong interest of institutional investors, is further confirmation that the March 19 press release raised no red flags about Sunbeam. *See* Court's March 23, 2005 Findings at 19.

3. Theory 3: CPH was interested in the value of the stock but made its decision based on visceral instincts instead of on information obtained from Sunbeam and Morgan Stanley.

There is no evidence to support the portrayal of Mr. Perelman as a man who invests hundreds of millions of dollars without careful study of the pertinent information. To the contrary, the undisputed evidence shows that Mr. Perelman made the decision to go ahead with the transaction only after close consultation with his advisors. The decision-making process included "[m]yself [Mr. Perelman], Jim Maher, Howard Gittis, Don Drapkin. To a lesser extent, Will Nesbitt, Jerry Levin." Although Perelman had final authority, he placed "[a] lot" of weight on their recommendations. 4/19/05 Tr. at 9093 (Perelman).

As Mr. Perelman further explained the process, "I have found, as I believe is the case of most CEOs, that when we get involved in a situation one on one with the other side, it tends to bring more theatrics and more show-and-tell to the situation than just the facts. So I have learned over time that the best way to get the facts, be it the initial due diligence stage or at any other due diligence stage, is to send our team, which I believe to be competent, honorable, and honest and trustworthy, in to get the facts. Then we can analyze those facts, analyze the dialogue, review and discuss how we see it, without having either side have to put on a show for the CEO. After the case, I wanted to keep the emotion out of the situation and not bring myself into it and have it done by the professionals, the lawyers and the like, so that this would be dealt with on the most professional possible level." 4/26/05 Tr. at 10649 (Perelman).

* * *

Morgan Stanley's inability to overcome CPH's evidence of reliance is illustrated by the following summary of the "evidence" that Morgan Stanley has put forth on these issues:

LIST OF WITNESSES, SUMMARY OF TESTIMONY, AND DESCRIPTION OF DOCUMENTARY EVIDENCE TENDING TO PROVE THAT CPH KNEW THE SUNBEAM TURNAROUND STORY WAS A FRAUD:

None.

LIST OF WITNESSES, SUMMARY OF TESTIMONY, AND DESCRIPTION OF DOCUMENTARY EVIDENCE TENDING TO PROVE THAT THE FALSITY OF THE MORGAN STANLEY/SUNBEAM MISREPRESENTATIONS WAS OBVIOUS:

None.

LIST OF WITNESSES, SUMMARY OF TESTIMONY, AND DESCRIPTION OF DOCUMENTARY EVIDENCE TENDING TO PROVE THAT CPH DISREGARDED THE MORGAN STANLEY/SUNBEAM MISREPRESENTATIONS:

None.

In sum, because the evidence is undisputed that CPH relied on Sunbeam's and Morgan Stanley's misrepresentations and because no evidence leads to any other inference, CPH is entitled to a directed verdict on the issue of reliance.

II. CPH Is Entitled To A Directed Verdict On The Issue Of Damages.

CPH also is entitled to a directed verdict on the issue of damages because the evidence is undisputed that: (1) CPH had a reasonable expectation that the stock would have a value of $680 million; (2) the stock CPH actually received was worthless because Sunbeam went bankrupt and CPH could not sell the stock; (3) Morgan Stanley has presented no credible contrary testimony to support its fanciful theory of damages.

A. CPH's expectation that the stock would be worth $680 million was reasonable.

The testimony of CPH expert Blaine Nye, a Stanford-trained financial economist, establishes that the objective expected value that CPH received if the false statements concerning Sunbeam had actually been true was $680 million. Dr. Nye testified that the expected value was determined by multiplying CPH's 14.1 million shares of Sunbeam stock times a dollar value per share. Dr. Nye, the only damages expert who has testified about the relevant share price, determined that the proper dollar value per share, conservatively calculated, was $48.26. That figure, multiplied by CPH's 14.1 million shares of Sunbeam stock, equals $680 million.

Dr. Nye computed the $48.26 per share figure by averaging the market price of Sunbeam shares over the month of March 1998, beginning on March 2 — "when the announcement of the acquisition was made" and the market therefore started valuing "Sunbeam with the Coleman Company included" as one "combined company" — and continuing through March 30, "the day the deal closed." 4/25/05 Tr. at 10373-74 (Nye). The figures for that period range from a low of $43.94 on March 30 to a high of $52 on March 4. *See* CPH 1296A at 40. Dr. Nye averaged the

share price over nearly a month-long period to smooth the day-to-day movements and stock prices and more accurately reflect the shares' underlying "core value." 4/25/05 Tr. at 10380-81, 10591, 10597 (Nye). Averaging over a month-long period also was conservative in the circumstances of this case because the most sensible alternative would have been to average only from March 2, when the deal was announced, to March 19, when Sunbeam's press release caused a nearly 10% drop in the share price. 4/24/05 Tr. at 10594-97 (Nye). Limiting the date range (by excluding the latter part of March) would have resulted in an average share price of $50 and total damages in excess of $700 million — instead of the $680 million figure yielded by Dr. Nye's analysis. *See* CPH 1296A at 40.

Dr. Nye's $48.26 figure is consistent with the other trial evidence. For example, CSFB valued the Sunbeam stock at between $45.75 and $51.84 per share. 4/13/05 Tr. at 8025 (Maher). Analysts following Sunbeam universally expected the stock to appreciate in value as a consequence of a merger with another consumer products company. *See* CPH 323 (showing 10/22/97 Oppenheimer Report, 10/24/97 Merrill Lynch report, and 10/29/97 PaineWebber Report). And Morgan Stanley valued the Coleman stock that was exchanged for the Sunbeam stock at a range of $31.06 to $53.24 per share — for a total of between $1.369 billion and $2.346 billion. *See* Court's March 23, 2005 Findings at 14. Thus, Dr. Nye's analysis not only is sound and uncontroverted in its own right, but is supported by objective checks found in the other trial evidence.

B. The stock CPH received had no value.

The evidence further demonstrates that the value of the Sunbeam shares that CPH actually received was zero because CPH could not sell its stock before Sunbeam went bankrupt in February 2001. 5/02/05 Tr. at 11729-30 (Gittis). It is undisputed that CPH never sold a single

share of its Sunbeam stock so what it actually received was zero. As Mr. Gittis put it, CPH "never received one penny" for its Sunbeam stock. 4/28/05 Tr. at 11171 (Gittis).

First, until at least December 1999, CPH's Sunbeam stock could not be registered and therefore could not be sold. With very limited exceptions that do not apply here, as a legal matter, unregistered stock cannot be sold. 4/28/05 Tr. at 11159-60, 11166 (Gittis). The registration of the Sunbeam shares given to Coleman's public shareholders did not take effect until December 6, 1999. 4/28/05 Tr. at 11164-65 (Gittis); *see also* 4/25/05 Tr. at 10629-30, 10635 (Fogg); 4/25/05 Tr. at 10388 (Nye). CPH had to accept stock that was restricted, as is "quite customary" in these kinds of transactions. 4/13/05 Tr. at 8041 (Maher). CPH's Sunbeam shares could not be registered until sometime after the public shareholders' Sunbeam shares were registered — that is, sometime after December 6, 1999. *See also* 5/2/05 Tr. at 11729 (Gittis) (confirming that debentures and stock could not be registered until end of 1999).

Second, even at the point where CPH could have registered the Sunbeam stock, CPH could not sell its shares. As the stock became unrestricted, CPH was unable to sell the shares as a practical matter, because "[t]he market would clearly have viewed that as CPH abandoning a sinking ship and would have destroyed any value for the CPH stock. . . . They would not have thought that Sunbeam would have sold the stock if there were any chances to rescuing the company." 4/28/05 Tr. at 11167 (Gittis); *see also* 5/02/05 Tr. at 11729 (Gittis) ("if I had attempted to register my shares and sell them, the market would have gone to zero because it would have appeared as if we were abandoning Sunbeam at that point. If I had sold the first 100,000 shares, that stock would have gone to nowhere"). CPH also could not sell the stock because its personnel had become insiders at Sunbeam. As Mr. Gittis testified, "I was a director of Sunbeam, and I was a director of CPH Holdings throughout this period. I served on the

Sunbeam Board at the direction of CPH Holdings. Whatever information I had belonged to CPH Holdings as well. And I continually had information not available to the general public after I went on that Board. And for me to have recommended to at least sell CPH Holdings' stock would have been crazy." 4/28/05 Tr. at 11169 (Gittis); *see also* 5/02/05 Tr. at 11729-30 ("There never came a time when I didn't think I had certain inside information and, therefore, I would have been accused of trading on inside information had I attempted to register my shares and sell them."); 4/21/05 Tr. at 9920 (Perelman) (CPH had inside information "*vis-a-vis* Mr. Gittis being on the board of directors").

Even if CPH could have sold its stock after December 1999 as a technical matter, as a practical matter, it would have been unrealistic to do so because Sunbeam's common stock was trading for only $4 or $5 per share in that timeframe — roughly 1/10th of the March 1998 stock price. At most, as Dr. Nye testified, if one is willing to "assum[e] that something that didn't happen, might have happened — that is, if you're willing to assume that CPH could have sold, and did sell, every share that it possibly could have sold regardless of the consequences — even then the maximum actual value of Sunbeam's stock was $46 million. 4/25/05 Tr. at 10393 (Nye). Thus, even under the most hospitable scenario for Morgan Stanley (a scenario unsupported by anything but a naked assumption), CPH's damages would be in the range of $634 million. *See also* 4/25/05 Tr. at 10389, 10391 (Nye).

C. Morgan Stanley has offered no credible rebuttal to CPH's damages analysis.

Morgan Stanley's damages theory — if it can be dignified with that title — reaches a low figure of $74 million by subtracting a so-called "actual value" figure of $450 million from a "expected value" figure of $524 million. *See* MS 282, 822, 857. Morgan Stanley's "analysis"

does not overcome CPH's entitlement to a directed verdict because both figures are facially incorrect and could not permissibly support a conclusion contrary to that advocated by CPH.

First, the $524 million "expected value" figure is based on an irrelevant Sunbeam stock price as of February 27, 1998 — the date of the Merger Agreement. The deal was not even publicly announced until March 2, so the February 27 price reflects the market's assessment of Sunbeam as a stand-alone company, not the much more valuable "combined company" formed by the Sunbeam-Coleman-First Alert-Signature Brands merger contemplated to be the entity in which CPH was to receive its ownership interest. 04/25/05 Tr. at 10587 (Nye). The $524 million figure also incorporates an incorrect "15% liquidity discount," which makes no sense. 4/25/05 Tr. at 10588-90 (Nye) (explaining that a company might show a 15% liquidity discount because it is helpful for accounting purposes and tax write-offs, not because it reflects the actual economic value of the shares); *see also id.*, at 10592-94 (Nye) (explaining that none of the various reasons why a liquidity discount sometimes would reflect the actual economic value of a block of shares applies here).

Second, it is even more fanciful for Morgan Stanley to suggest that the "actual" value of the Sunbeam shares received, taking into account the fraud, was $450 million. The $450 million figure comes from a pair of internal CPH documents that provide "adjusted value[s]" not for the 14.1 million shares of Sunbeam stock at issue in this case, but rather, for those 14.1 million shares plus 23.0 million warrants that would have allowed CPH to purchase Sunbeam stock in the future — something CPH hardly wanted to do given Sunbeam's rapid plunge towards bankruptcy. 4/28/05 Tr. at 11365 (Gittis) ("I didn't ask for [the warrants]. This was the only thing they had to offer me"). Moreover, as the trial evidence makes clear, the $450 million "adjusted value" figure was an estimate of the value of the Sunbeam holdings based on the

assumption of a massive "capital restructuring" and "[earnings] improvements." *See* MS 822, 857. Those events never occurred. Mr. Perelman testified that there never was a capital restructuring of Sunbeam at any time before the Sunbeam bankruptcy. Nor were there any earnings improvements. 4/21/05 Tr. at 9970-71 (Perelman). Furthermore, the documents themselves simultaneously used the same method as Dr. Nye — relying on the market prices of the Sunbeam shares — to estimate the present actual "value" of the 14.1 million shares, as opposed to the optimistic "adjusted value" of the 14.1 million shares plus the 23.0 million warrants. In short, the $450 million figure is irrelevant and misleading.

In sum, Morgan Stanley has no credible evidence to rebut the showing that CPH suffered damages of $680 million — or, at the lowest, $634 million. CPH therefore is entitled to a directed verdict on the issue of damages.

D. Even if CPH is not entitled to a directed verdict on the amount of damages, at a minimum, CPH is entitled to a directed verdict on the issue of causation of damages.

Even if the amount of damages remains in some dispute, at a minimum, the evidence is undisputed that the Sunbeam/Morgan Stanley fraud caused CPH to suffer significant damages. Thus, at least as to the issue of causation, CPH is entitled to a directed verdict in its favor.

Conclusion

For the foregoing reasons, CPH is entitled to a directed verdict, with respect to both of the remaining liability issues in this case.

Dated: May 10, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 10th day of May, 2005.

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11134 v4

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

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

CASE NO: 2003 CA 005045 AI

PLAINTIFF'S MOTION TO PRECLUDE DEFENDANT FROM MAKING UNSUPPORTED ARGUMENTS CONCERNING DAMAGES

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") moves this Court for an Order precluding Morgan Stanley & Co., Inc. ("Morgan Stanley") from presenting before the jury improper arguments related to damages. As the Court recently advised the parties, it is particularly important in this complex case that the parties not be allowed to present arguments to the jury that are not supported by the facts or law, or that risk misleading or confusing the jury. (5/10/05 Tr. at 13499-00.) The Court should preclude the following arguments:

1. Argument regarding the subjective intent of CPH concerning the expected value of CPH's Sunbeam stock.
2. Argument that the February 27, 1998 price of Sunbeam stock can be considered in determining the expected value of CPH's Sunbeam stock.
3. Argument that CPH's damages should be reduced to reflect a liquidity discount.
4. Argument that the difference between the $524 million stock value found in a Sunbeam financial statement and the $450 million figure found in a MacAndrews worksheet is a proper measure of damage.
5. Argument that CPH benefited from the Sunbeam bankruptcy.

6. Argument that Mr. Levin supposedly mismanaged Sunbeam or otherwise caused Sunbeam to fail after the Coleman transaction.

7. Argument about a purported "market crash of 2000."

8. Argument that CPH's should have hedged in order to mitigate its damages.

9. Argument that CPH could have sold any of its 14.1 million shares of Sunbeam stock prior to November 25, 1999.

10. Argument that CPH's decision was motivated or affected by any concern relating to the payment of taxes.

As shown below, the arguments that CPH seeks to bar are irrelevant, are not supported by record evidence, require the introduction of expert proof that Morgan Stanley has failed to present, or are contrary to the rulings the Court already has made. Accordingly, Morgan Stanley should not be permitted to argue them to the jury.

Argument

1. Morgan Stanley Should Not Be Permitted to Argue for a Subjective Theory of Expected Value.

CPH's benefit of the bargain damages begins with the "expected value" of the 14.1 million shares of Sunbeam stock that CPH received in the Sunbeam/Coleman transaction. This Court has ruled that the "expected value" is an objective measure of the value of what CPH expected to receive in the transaction. (4/15/05 Tr. at 8673-75.) Dr. Nye, CPH's damages expert, testified that the expected benefit to CPH from the receipt of 14.1 million shares of Sunbeam stock should be measured by the actual, objective prices of Sunbeam stock. (4/25/05 Tr. at 10372-73.) He calculated that objective measure by averaging the market prices for the Sunbeam stock during the period after the announcement of the merger and until its closing.

Id. at 10381-83. Based on that calculation, Dr. Nye testified that the expected value of CPH's Sunbeam stock, measured objectively, was $680 million dollars. *Id.* at 10383.

Morgan Stanley has signaled its intention to argue that the expected value of the transaction should be measured by, or is somehow affected by, the subjective intent of the parties. For example, in questioning Dr. Nye, Morgan Stanley implied that Dr. Nye's analysis was deficient because he did not consider the subjective intent of CPH's decision makers. (4/25/05 Tr. at 10466-84.) Dr. Nye confirmed that his work was a purely objective measure of the value of the stock that CPH received, and that he did not consider subjective values of the Sunbeam stock. For example, Dr. Nye did not consult Mr. Perelman, Mr. Slotkin, Mr. Winoker, or even read their depositions. *Id.* Similarly, Dr. Nye did not rely upon internal valuations of the stock by CPH or Sunbeam. *Id.* at 10575.

CPH's subjective intent in valuing Sunbeam shares is irrelevant to the expected value of CPH's 14.1 million shares of Sunbeam common stock. As this Court has ruled, subjective measures of expected value have no bearing on the expected value of the transaction for purposes of calculating the benefit of CPH's bargain. Any argument that damages should be calculated based upon CPH's subjective valuation is improper. This Court should prohibit Morgan Stanley from making that argument to the jury.

2. Morgan Stanley Should Not Be Permitted To Argue That The February 27, 1998 Price of Sunbeam Stock Can be Considered in Determining the Expected Value.

As explained above, to calculate CPH's damages, the first step is to determine the expected value of the 14.1 million shares of Sunbeam common stock that CPH received in the transaction. As is apparent from the nature of the transaction, and as Dr. Nye confirmed, CPH was to receive stock in a company — Sunbeam — that owned Coleman. By virtue of the merger transaction itself, Sunbeam would include Coleman. Prior to the announcement of

Sunbeam's acquisition of Coleman, the market price of Sunbeam's common stock did not reflect the market's valuation of the combined Sunbeam and Coleman companies. When the market learned of the transaction on March 2, 1998, the market price of Sunbeam shares rose significantly on the news that Sunbeam would combine with Coleman. The expected value — that is, the benefit of CPH's bargain — must reflect the value of the Sunbeam shares resulting from the combination of Sunbeam and Coleman.

The Court has recognized that testimony concerning the price of the stock on February 27 is not relevant to measuring CPH's expectation because on February 27, the stock price did not yet include the value of the Sunbeam/Coleman combination. (4/22/05 Tr. at 10096-101.) Morgan Stanley should not be permitted to argue that the expected value should be determined with reference to a February 27 valuation date.

3. Morgan Stanley Should Not Be Permitted To Argue that CPH's Damages Should Be Reduced To Reflect a Liquidity Discount.

Morgan Stanley has signaled its intention to argue that CPH's expected value should be reduced by a liquidity discount because the shares that CPH received were restricted and not registered. This Court should bar that argument for five reasons.

First, despite being permitted by the Court to amend and supplement Morgan Stanley's expert's report, Morgan Stanley chose not to introduce any expert testimony regarding liquidity discounts. As a result, Morgan Stanley does not have a proper basis for arguing to the jury that CPH's damages should be reduced by a liquidity discount.

Morgan Stanley has not presented any expert testimony to establish that a liquidity discount would be proper here. Indeed, the only damages expert that Morgan Stanley disclosed before trial — Mark Grinblatt — opined that a liquidity discount was not proper. *See* Grinblatt Report at 45, n.58 (liquidity discount should be "close to zero"); Grinblatt Supp. Rep.

at 48 ("the lack of liquidity caused by various restrictions should have no material impact on the value of the Sunbeam stock to CPH or Mafco").

Under Florida law, the application of a liquidity discount in this case is a matter for expert proof. In cases where a jury lacks a "basis of common knowledge . . . expert testimony may be necessary to provide a sufficient foundation." *Bardy v. Sears, Roebuck & Co.*, 443 So. 2d 212, 215 (Fla. 2d DCA 1983) (holding that expert testimony was necessary to guide the jury's application of *res ipsa loquitur*). The valuation of securities is a complex subject that does not fall within jurors' ordinary experience. *See Morris v. Ricks*, 573 So. 2d 1029, 1030-31 (Fla. 2d DCA 1991) (reversing grant of temporary restraining order on sale of restricted stock because "[t]he actual worth or market value of the lettered stock at the time of the purported wrongful sale can be established by expert testimony, with any conflict in the expert testimony to be resolved by the trial court") (citation omitted); *accord In re TSO Fin. Litig.*, Civ. A. Nos. 87-7903, 1989 WL 73249, *1, *5 (E.D. Pa. June 29, 1989) (approving settlement on grounds that "the 'out-of-pocket' loss suffered by each defrauded shareholder . . . would require expert testimony to establish the fair value of the stock *if* the fraud had *not* taken place") (emphasis in original); *Greenfield v. Footwear Investors, Inc.*, Civ. A. No. 84-5472, 1986 WL 10806, *1, *2 (E.D. Pa. Sept. 30, 1986) (same); *In re Walt's Submarine Sandwiches, Inc.*, 569 N.Y.S.2d 492, 493 (N.Y. App. Div. 1991) ("The valuation process [of a corporation] is fact specific with an emphasis on the particular circumstances of the case, including such pertinent evidence as prior attempts to sell the business, offers to purchase and other expert testimony"); *cf. Courtland Group, Inc. v. Phillips Gold & Co.*, 876 So. 2d 629, 630 (Fla. 3d DCA 2004) (concluding that the trial court properly allowed expert opinion: "We do not see how a jury can properly evaluate the damages in this complicated litigation [further] and

conclude that the defense expert could properly testify as to no damages, just as Courtland's expert testified that it suffered almost $1.5 million in damages").

Instead of presenting expert testimony to support application of a liquidity discount to CPH, Morgan Stanley simply quotes from a footnote in one of Sunbeam's public filings (MS Ex. 282) and one other document (MS Ex. 1000), which was created either by Sunbeam or Arthur Andersen. Those documents are no substitute for expert testimony. Moreover, as shown below Morgan Stanley has not laid a factual predicate for either exhibit.

Second, Morgan Stanley has questioned witnesses about the two Sunbeam documents, which purport to show that Sunbeam used a 15% liquidity discount when Sunbeam recorded the cost to Sunbeam of the acquisition of Coleman. Morgan Stanley relies most heavily upon a footnote in Morgan Stanley Exhibit 282, a Form 10-Q/A statement filed by Sunbeam, in which Sunbeam stated that it applied a 15% liquidity discount as part of Sunbeam's purchase accounting for the Sunbeam stock exchanged in the transaction. Morgan Stanley also has sought to introduce Exhibit 1000, which is an anonymous worksheet reflecting the "Calculation of the Acquisition Cost to Sunbeam." Significantly, Exhibit 1000 was not admitted for its truth. Rather, it was admitted for the limited purpose of permitting Morgan Stanley to ask Dr. Nye why he did not rely on the document. (4/25/05 Tr. 10477-78.)

Morgan Stanley has failed to establish a proper factual predicate for a liquidity discount, as an example illustrates. Assume that Morgan Stanley had called an expert witness who testified that (i) sometimes a liquidity discount can be used for restricted and unregistered stock and (ii) a 15% liquidity discount was justified here based solely on the unexplained statement in Sunbeam's Form 10-Q/A. That purported expert testimony would never pass

muster. In this case, Morgan Stanley has done even less. No witness has testified that a liquidity discount would be appropriate as to CPH in the circumstances of this case.

Like valuation issues, expert testimony also is necessary for proper application and understanding of accounting principles, too. *See, e.g.*, *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002) (approving settlement, in part, because "[m]any of these [accounting questions] would require proof through expert testimony concerning such issues as proper accounting practices"); *In re Landry's Seafood Rest., Inc.*, No. Civ.A. H-99-1948, 2001 WL 34115784, *1, *22 n.28 (S.D. Tex. Feb. 20, 2001) ("If one assumes that sufficient consistency of a defendant's earnings statements with GAAP may preclude liability, whether the defendant's accounting practices were consistent with GAAP is a factual question that requires expert testimony."); *In re Aetna, Inc.*, No. CIV. A. MDL 1219, 2001 WL 20928, *1, *6 (E.D. Pa. Jan. 4, 2001) (observing that "[e]xtensive expert testimony would be required on the nature of Aetna's finances and accounting practices, the comparison of Aetna's practices with GAAP, and the effects of Aetna's practices on the stock price").

In particular, no witness has explained why Sunbeam used a liquidity discount in connection with the cost of the acquisition to Sunbeam. There was no explanation of what accounting rules govern Sunbeam's cost accounting calculations; how or why Sunbeam and/or Arthur Andersen used a liquidity discount; what, if any, evaluative judgments were involved; the accounting justification for that judgment; or the relevance of those accounting judgments to the issue to be tried by the jury.

Nonetheless, Morgan Stanley has chosen not to introduce expert testimony on accounting issues. Morgan Stanley retained an expert on accounting topics — George Fritz. But in his report, Mr. Fritz did not opine on any of the accounting issues Morgan Stanley has

attempted to inject into the case. Had he done so, CPH could have demonstrated that different accounting rules apply to the acquisition cost accounting done by Sunbeam and the recording of investments in securities by CPH. That point is obvious, given that the two parties to the transaction had different values in their financial statements, which were audited by public accounting firms. But Morgan Stanley decided not to call an expert witness on accounting issues. And Morgan Stanley cannot rely upon unexplained accounting treatments to argue that a liquidity discount should be applied here.

Third, Morgan Stanley cannot present a factual predicate for the documents because the documents referring to a liquidity discount are Sunbeam or Arthur Andersen documents — not CPH documents. Morgan Stanley cannot attribute the liquidity discount to CPH without showing that liquidity discounts are the same for everyone. But as Morgan Stanley's own expert, Professor Grinblatt, opined in his report, liquidity discounts are not the same for everyone. Rather, they depend on "portfolio theory" and whose portfolio is being considered. *See* Grinblatt Supp. Rep. at 48-49. Again, Morgan Stanley has not tied up the loose ends.

Fourth, Morgan Stanley's reliance on Sunbeam's unexplained reference to a liquidity discount in Sunbeam documents, such as MS Exs. 282 and 1000, would serve only to confuse the issues and mislead the jury. FLA. STAT. ANN. § 90.403 (2004); *Hendry v. Zelaya*, 841 So. 2d 572, 575 (Fla. 3d DCA 2003). The liquidity discount evidence is confusing because it relates to Sunbeam's accounting for the cost of the acquisition, not CPH's expected value. Thus, it "suggest[s] an improper basis to the jury for resolving the matter" and is premised upon an unexplained "chain of inference necessary to establish the material fact." CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 403.3, at 170-71 (2004); *State v. McClain*, 525 So. 2d 420, 422 (Fla. 1988) (quoting earlier version of Ehrhardt). Morgan Stanley would be piling

improper inference upon improper inference if it were permitted to argue that the jury should apply a liquidity discount based solely on the unexplained references in certain Sunbeam exhibits.

Fifth, under established law, a party's argument to the jury must be supported by evidence in the record. *See Murphy v. Int'l Robotic Sys., Inc.*, 766 So. 2d 1010, 1028 (Fla. 2000) ("Attorneys should be afforded great latitude in presenting closing argument, but they must 'confine their argument to the facts and evidence presented to the jury and all logical deductions from the facts and evidence'") (quoting *Knoizen v. Bruegger*, 713 So. 2d 1071, 1072 (Fla. 5th DCA 1998)); *Tito v. Potashnick*, 488 So. 2d 100, 101 (Fla. 4th DCA 1986) ("Arguing facts not in evidence or not warranted from the evidence is impermissible"). Counsel may not provide counsel's own opinion or present arguments that are not supported by evidence properly before the jury. 5 PHILIP J. PADOVANO, FLORIDA PRACTICE: CIVIL PRACTICE § 23.4 (2004-2005 ed.) ("It is improper for a lawyer to make an argument based on facts that were excluded from evidence or on facts that were not presented during trial"). And as this Court has observed, questions of counsel are not evidence. Without a factual predicate, Morgan Stanley may not argue based on Sunbeam's use of a liquidity discount in the documents. No factual predicate has been established here.

In sum, valuation is a complex matter for expert proof. No witness has testified that a liquidity discount is appropriate for CPH in this case or about the accounting documents upon which Morgan Stanley relies. Morgan Stanley's counsel cannot give his personal views about what the accounting numbers signify or whether this case is appropriate for a liquidity discount as to CPH. That is a matter for evidence, and no inferences may fairly be drawn in the absence of any evidence on that topic. In light of the absence of economic or other proof, this Court

should preclude Morgan Stanley from engaging in "attorney sleight of hand to mislead the jury" and should order that a liquidity discount is not a proper matter for argument. (5/10/05 Tr. at 13499-00.)

4. Morgan Stanley Should Not Be Permitted To Argue That The Difference Between The $524 Million Sunbeam Front End Number And The $450 Million Back End Number Is A Proper Measure Of CPH's Damages.

During the examination of Dr. Nye, Morgan Stanley's counsel invited the jury to use the $524 million number found in the Sunbeam Form 10-Q/A, which we address in the preceding section, as a measure of expected value, and to subtract from that figure the $450 million dollar number found in the worksheet prepared by MacAndrews & Forbes. Morgan Stanley's counsel subtracted one number from the other and entered the difference on a chart in plain view of the jury. This Court sustained CPH's objection to the question, and Morgan Stanley's counsel's notation on the demonstrative chart — although displayed to the jury — is not evidence. (4/25/05 Tr. at 10573.)

A. The $524 Million Sunbeam Number Is Not A Proper Measure Of CPH's Expected Value.

As shown above, Morgan Stanley should not be allowed to argue that the $524 million cost figure found in Sunbeam's Form 10-Q/A is a proper measure of CPH's expected value because it is based, at least in part, on the price of Sunbeam stock on February 27. The Form 10-Q/A states that the $524 million number is based on a blended average of the stock price on February 27 and March 2. (MS Ex. 282 at 6.) As a result, the $524 million is based on the price of Sunbeam before the market was aware that Sunbeam would acquire Coleman. *Id.* As the Court has recognized, the February 27 date is not a proper measurement of CPH's objective expectations. *See* Part 2 above.

In addition, the $524 million number is not an appropriate measure of CPH's expected value. That accounting number, which contains an unexplained liquidity discount, was calculated by Sunbeam for accounting reasons that Morgan Stanley has not explored. There is no basis to use it to calculate CPH's expected value. *See* Part 3 above.

B. The $450 Million Estimate Is Not A Proper Measure Of The "Back End" Value Of The 14.1 Million Shares Of Sunbeam Stock That CPH Received.

The calculation of benefit of the bargain damages requires the calculation of the difference between the "front end" expected value and the "back end" determination of the value that CPH actually received. The $450 million estimate is not a permissible "back end" measure.

First, there is no evidentiary predicate that CPH could derive $450 million in value at year-end 1998 or 1999. In fact, the evidence in the record is to the contrary. The $450 million number is based upon the exercise of the warrants, which never happened. (4/21/05 Tr. at 9971.) Any argument that the 14.1 million shares could have been sold for $450 million ignores the undisputed evidence in the record. For that argument to be correct, the price of Sunbeam common stock would have had to have been nearly $32 a share ($450 million ÷ 14.1 million shares = $31.91/share). Sunbeam's common stock was trading for approximately $5.00 per share at the time Sunbeam stock could first be sold, in November 1999 and at an average price of approximately $4.35 per share in the first quarter of January 2000. (CPH Ex. 1296A.) Even if CPH sold the 75% of the stock it was permitted to sell at that time, CPH's stake in Sunbeam would realize only 10% of the $450 million that Morgan Stanley presumably intends to argue to the jury.

Second, as the Court will recall, Morgan Stanley sought reconsideration of the Court's order relating to what could be proven concerning the back end value of the Sunbeam shares

that CPH received. In its April 15, 2005 Order, the Court amended the last sentence of the March 28, 2005 Order to permit Morgan Stanley to establish the factual predicate through proof of an appropriate "liquidity discount" (4/15/05 Order at 1, emphasis added):

> The Court's Order on Plaintiff's Motion in Limine No. 27 for a Finding as a Matter of Law that the Federal Securities Laws Prohibited Plaintiff from Selling Unregistered Sunbeam Stock is amended to provide that no expert may testify as to damages based on the value of the Sunbeam stock as of a specific date without first seeking a ruling from the Court that a sufficient evidentiary predicate to support a conclusion that the stock could be sold as of the date to be used has been laid or that an appropriate liquidity discount has been established, is not required, or is implicit in the figure offered. This Order is without prejudice to CPH's right to claim that the stated value of the stock for one purpose is not relevant to determine its actual value for purposes of computing damages.

Morgan Stanley has not satisfied the revised predicate concerning the $450 million adjusted value estimate. Morgan Stanley declined to present any proof that "an appropriate liquidity discount has been established, is not required, or is implicit in the figure offered." There is no testimony that the $450 million number reflects a liquidity discount. There also is no testimony that a liquidity discount was not required because the stock could be sold at the implied price per share. Again, because the evidence is to the contrary, it could not be a fair inference that the $450 million number includes a liquidity discount. The actual price of Sunbeam stock is shown on the same exhibit — and it is a fraction of the price needed to justify the $450 million value. In other words, given the actual market price for Sunbeam common stock, there would have to be a massive premium for illiquidity rather than a discount. Morgan Stanley would like the jury to believe that stock worth $4 per share on the open market was somehow actually worth $32. Morgan Stanley should not be permitted to argue its fairy tale suggestion that CPH could spin straw into gold.

C. Morgan Stanley May Not Argue That The Difference Between $524 Million and $450 Million Is An Appropriate Measure Of Damages.

There also is no evidence that subtracting the $450 million number from the $524 million number is an appropriate way to calculate damages. The Court sustained objections to Morgan Stanley's attempt to subtract the numbers during the examination of Dr. Nye. (4/25/05 Tr. 10573.)

Morgan Stanley's damages expert — Dr. Grinblatt — submitted an expert report in which he presented that (flawed) calculation of damages. (Grinblatt Supp. Rep. at 44.) Morgan Stanley made the tactical decision not to call Dr. Grinblatt as a witness, presumably because Morgan Stanley was not eager to have the jury hear that Dr. Grinblatt agrees with Dr. Nye that no liquidity discount would be appropriate for the expected value of the shares and because, on reflection, Morgan Stanley did not want its own expert to opine that CPH's damages were $372 million. In any event, for whatever reason, Morgan Stanley made the tactical decision not to call Dr. Grinblatt and elected not to seek to introduce expert testimony concerning the comparison between the $524 million and $450 million numbers. Thus, there is no proof from which Morgan Stanley can argue that its counsel's flip-chart demonstrative subtraction is a proper measure of damages. Morgan Stanley may not argue that $524 million minus $450 million is an appropriate measure of anything.

5. Morgan Stanley Should Not Be Permitted To Argue That CPH Benefited by Sunbeam's Bankruptcy.

During the examination of Dr. Nye, counsel for Morgan Stanley asked questions concerning hearsay comments of an analyst regarding the potential impact of a Sunbeam bankruptcy. The analyst speculated in August 1998 that MacAndrews would benefit if Sunbeam declared bankruptcy in 1998. Those speculative comments are found in MS Ex. 892,

in evidence. (MS Ex. 892 at 2 ("we find it ironic that SOC's second largest shareholder, Ron Perelman, could end up financially better off if SOC were to enter Chapter 11 than if he had been successful selling Coleman to SOC at a significantly lower, all cash price, as he originally attempted late last year" based upon recognition of a "paper loss").)

There is no factual support for the speculation in the analyst's report. The author of the statement has not appeared in Court to explain it, nor has there been any testimony about how CPH would benefit from a bankruptcy. If Morgan Stanley had called an expert to testify that CPH would have benefited from a bankruptcy, CPH could have cross-examined any such expert and CPH could have offered a rebuttal expert.

In reality, this suggestion is another wild argument that Morgan Stanley has failed to tie up. There is no evidence in the record from which a reasonable juror could infer that CPH benefited from Sunbeam's bankruptcy or pursued a strategy to cause Sunbeam to declare bankruptcy. The evidence is to the contrary. Contemporaneous documents admitted in evidence reflect that CPH was opposed to Sunbeam's bankruptcy in 1998. CPH Tr. Ex. 449 at p. 2 (noting that in 1998, Mafco representatives would resign from Sunbeam in the event of a bankruptcy). And, as we know, CPH's interest in Sunbeam was eliminated altogether when Sunbeam declared bankruptcy in 2001. (4/28/05 Tr. at 11170-71.) Morgan Stanley should not be permitted to refer to the portion of MS Ex. 892 quoted above or to argue in any way that CPH's damages should be reduced because CPH somehow benefited from or pursued bankruptcy.

6. Morgan Stanley Should Not Be Permitted To Argue That Mr. Levin Supposedly Mismanaged Sunbeam Or Otherwise Caused It To Fail After The Coleman Transaction.

Morgan Stanley should not be permitted to argue that Mr. Levin purportedly caused the failure of Sunbeam or that CPH's damages should be lessened as a result.

First, Morgan Stanley has not presented any expert testimony on the subject of why Sunbeam failed. The causes for business failure are complex. For Morgan Stanley to invite the jury to assess blame to CPH, a 14% shareholder without any proof of that complex relationship of cause and effect, is speculative. Morgan Stanley cannot argue that Sunbeam failed because of something CPH did without expert testimony on that point. Because Morgan Stanley does not have any expert testimony on that matter, it cannot argue the point to the jury. *See* Part 3 above. That point also is fatal to Morgan Stanley's attempt to argue that CPH, through Mr. Levin, caused Sunbeam's bankruptcy.

Second, there is no evidence in the record from which a reasonable juror could infer that CPH was responsible for Sunbeam's bankruptcy. Mr. Levin is an experienced and able executive. Sunbeam's board requested that Mr. Levin serve as Sunbeam's CEO after Sunbeam had terminated Mr. Dunlap. Even after Sunbeam filed for reorganization in February 2001, Mr. Levin remained in charge of Sunbeam. Indeed, even after Sunbeam emerged from bankruptcy, the new owners of Sunbeam (Sunbeam's secured lenders) continued to keep Mr. Levin as the CEO. Mr. Levin remained as CEO of the reorganized company — American Household — until it was sold in 2005. (5/1/05 Tr. at 12598-99.) Those facts flatly contradict any inference that anyone believed Mr. Levin to be a poor manager or otherwise at a fault.

Third, regardless of why Sunbeam failed, there is no evidence that CPH was responsible for the failure. As a 14% shareholder, CPH did not control Sunbeam. CPH did not control the board of Sunbeam and could not dictate management policies. *See* 4/28/05 Tr. at

11369-70. There is no basis to saddle CPH with Sunbeam's business failure. Accordingly, CPH is entitled to recover its full losses stemming from the fraud.

7. Morgan Stanley Should Not Be Permitted To Argue That There Was A "Market Crash of 2000."

In cross-examining Dr. Nye, Morgan Stanley referenced a purported "market crash of 2000." (4/25/05 Tr. at 10529-30.) In arguments before the Court, Morgan Stanley likewise referenced a purported "market crash of 2000." (5/02/05 Tr. 11998.) The Court should prohibit Morgan Stanley from making any argument about a supposed "market crash of 2000" because Morgan Stanley has not presented any evidence of a purported market crash of 2000.

Although that should be the end of the matter, we also note that Sunbeam traded on the NYSE. The NYSE Composite Index for 2000 fluctuated throughout the year and ultimately closed higher for the year than when it started (ranging from 6876.09 at the beginning of 2000 to 6945.57 at the end). The other major indexes fluctuated throughout the year and ended lower, but not dramatically so. The Dow Jones Industrial Average ranged from 11497.12 at the beginning of 2000 to 10786.85 at the end. The S&P 500 Index ranged from 1469.25 at the beginning of 2000 to 1320.28 at the end.

In short, Morgan Stanley has not presented any evidence of a "market crash of 2000," and there was no such crash. Morgan Stanley should not be permitted to argue or otherwise imply that there was.

8. Morgan Stanley Should Not Be Permitted To Argue That CPH's Damages Should Be Reduced Because CPH Failed to Hedge.

This Court has ruled that the fact that CPH did not hedge its investment in Sunbeam is not relevant to any issue pertaining to damages. On April 15, 2005, this Court denied Morgan Stanley's Motion for Rehearing of a prior Order on CPH's Motion in Limine No. 19. This

Court ordered: "MS & Co. may not contend that CPH had a duty to hedge to attempt to mitigate its damages once the fraud was disclosed. First, the Court concludes that there is no legal obligation to enter into a hedging transaction to mitigate damages. Second, even if there were, such a defense would require an expert opinion, and no such expert opinion was timely disclosed." (4/15/05 Order Denying Rehearing of CPH MIL No. 19.)

In light of the Court's unambiguous ruling, any argument regarding the impact of hedging on damages is improper.

9. Morgan Stanley Should Not Be Permitted To Argue That CPH Could Have Sold Any Of Its Sunbeam Shares Prior To November 25, 1999.

On March 28, 2005, this Court granted CPH Motion in Limine No. 27 and held that the only lawful means by which CPH could have sold its unregistered shares — Rule 144 — did not permit CPH to sell any shares prior to November 25, 1999. Even under Rule 144, CPH was not able to sell more than one million shares per quarter beginning on November 25, 1999. (3/28/05 Order Granting MIL 27.) The testimony in the trial has been consistent with that Order. Mr. Fogg testified as to the difficulties Sunbeam encountered in registering shares. (4/26/05 Tr. at 10629-35.) Despite its best efforts, Sunbeam was not able to register the shares of Sunbeam stock to be distributed to the public Coleman shareholders until December 1999 and those registered shares were not distributed to the public Coleman shareholders until January 6, 2000. (4/28/05 Tr. at 11163.) Even then, as Mr. Gittis testified, there were practical impediments to CPH selling any shares. (4/28/05 Tr. at 11167-68.) There is no contrary proof.

In light of the Court's Orders and the evidence of record, Morgan Stanley may not argue that CPH was able to sell any of its 14.1 million shares of Sunbeam stock at any time prior to November 25, 1999.

10. Morgan Stanley Should Not Be Permitted To Argue That CPH Was Motivated by Concerns About the Payment of Taxes.

Morgan Stanley has attempted to show that CPH's conduct was influenced by possible tax consequences. There is no proper basis for that argument. Mr. Perelman testified that he did not consider tax consequences (4/20/05 Tr. 9485-86), and the Court sustained objections to questions in that area. The Court found that there was no "evidentiary value at all" to the tax consequences of the sale of Sunbeam stock. (4/21/05 Tr. 9724-25.) Accordingly, Morgan Stanley should not be permitted to argue that potential tax consequences motivated CPH not to sell its Sunbeam stock.

Nor should Morgan Stanley be permitted to argue that tax consequences played a role in whether to hedge CPH's Sunbeam stock. As shown above, CPH did not have any duty to hedge its ownership of Sunbeam shares. Thus, there is no relevance or evidentiary value to how tax consequences may have affected hedging.

Morgan Stanley should be prohibited from making any argument about tax consequences.

Dated: May 10, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile to all counsel on the attached list on this 10th day of May, 2005.

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

RESPONSE OF COLEMAN (PARENT) HOLDINGS INC. TO MORGAN STANLEY'S MOTION TO TAKE JUDICIAL NOTICE PURSUANT TO F.S. § 90.203

Plaintiff Coleman (Parent) Holdings Inc. hereby responds to Morgan Stanley's motion filed on May 9 asking the court to take judicial notice of one of its own prior orders in this case - the March 1 Order on CPH's Motion for Adverse Inference Instruction due to Morgan Stanley's Destruction of E-mails and Morgan Stanley's Noncompliance with the Court's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-mails (Ex. A) ("Adverse Inference Order").[1] It appears that Morgan Stanley is asking the Court to take judicial notice of one sentence from the litigation misconduct statement appended to that order relating to Morgan Stanley back-up tapes ("E-mails could no longer be retrieved once they were overwritten."). Morgan Stanley's apparent intent is that the Court should import that finding into the trial record and apply it to an entirely different set of back-up tapes generated by CPH/MAFCO. Such an action would be legally erroneous and unjust for multiple reasons.

First, the finding at issue related to a specific set of back-up tapes -- those generated by Morgan Stanley in the late 1990s and overwritten by Morgan Stanley's systems. The Court did

[1] This order was amended several times and ultimately supplanted by the Court's March 23 Order on CPH's Renewed Motion for Default Judgment.

not purport to make a finding about the retrievability of files from all overwritten back-ups tapes in all settings. It would therefore be unwarranted for Morgan Stanley to suggest to the jury that the Court has made a finding about the characteristics of CPH's back-up tapes. *See Selim v. Pan American Airways Corp.*, 889 So. 2d 149, 153 (Fla. 4th DCA 2004) (party may be bound by prior finding under doctrine of collateral estoppel where the parties and issues were identical in the prior proceeding).

Second, the doctrine of judicial notice does not supply a basis for importing findings from a prior proceeding that would not otherwise be binding on the non-moving party. Judicial notice allows courts to take account of the other courts' "decisional law," Fla. Stat. § 90.202(2)., "[o]fficial actions," *id.* § 90.202(5), or "[r]ecords," *id.* § 90.202(6). It has nothing to do with making prior findings of fact admissible in evidence for the truth of what some prior court -- even the same court in the same action -- previously found.

Third, even assuming there were some legal basis for taking a finding of fact about Morgan Stanley's back-up tapes and introducing it at trial as potentially applicable to CPH's back-up tapes - and there is not - presentation of the finding to the jury in this situation would be prejudicial in the extreme. Morgan Stanley's evident intent is to buttress its argument for an adverse inference based on CPH's perfectly lawful non-preservation of e-mails by suggesting that there is no doubt about whether e-mails might have been recoverable later. But in fact, it is quite possible that e-mails might have been recoverable from CPH's hard drives if Morgan Stanley had accepted CPH's offer to split the costs of have a third-party vendor search the systems of both parties for relevant materials still residing there. *See* Ex. B, Order on Morgan Stanley's Motion for an Adverse Inference Instruction (March 23, 2005) (authorizing CPH to "present evidence of its offer to have a third-party vendor given access to retrieve emails from

CPH's systems") (emphasis added). Morgan Stanley hopes to confuse the jury into believing (1) that the Court has found that CPH's back-up tapes no longer contained retrievable material and (2) that as a result nothing further could have been done to recoverable any relevant CPH e-mails that might ever have existed..

Allowing introduction of the prior finding would be particularly prejudicial here, in light of the Court's decision to defer the reading of the most current version of the litigation misconduct statement until Phase II of the trial. Given the effort by Morgan Stanley to apply a finding about its back-up tapes to CPH's back-up tapes, the jury might well draw the false conclusion that the pretrial proceedings it heard about during voir dire focused, at least in part, on litigation misconduct by CPH. That should not be allowed to occur.

Conclusion

Morgan Stanley's motion should be denied.

Dated: May 10, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
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16div-017056

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

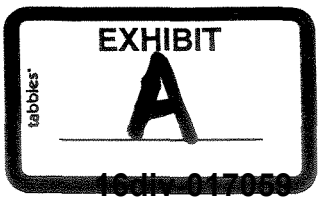
ORDER ON MORGAN STANLEY'S MOTION FOR AN ADVERSE INFERENCE INSTRUCTION

THIS CAUSE came before the Court March 21, 2005 on Morgan Stanley's Motion for an Adverse Inference Instruction, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion for an Adverse Inference Instruction is Denied, without prejudice to MS & Co.'s right to present evidence about CPH's email retention practices and its failure to direct that emails related to the Sunbeam transaction be saved and CPH's right to present evidence of its offer to have a third-party vendor given access to retrieve emails from CPH's system, without reference to discovery requests or court orders, and for either counsel to argue in favor of whatever inferences that evidence may support. See Jordan v. Masters, 821 So. 2d 342 (Fla. 4th DCA 2002) cf.; Amlan, Inc. v. Detroit Diesel Corp., 651 So. 2d 701 (Fla. 4th DCA 1995). If either party intends to present evidence on the issue of CPH's email retention practices or third-party vendor offer it shall, within 5 business days, serve on opposing counsel (i) the name, address, and business title of any witness expected to testify, together with a fair summary of his or her expected testimony; (ii) a designation of any deposition testimony the designating party intends to offer on this issue; and (iii) copies of any documents to be referred to by a witness or offered into evidence on this issue.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 23 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge



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

CASE NO.: 502003CA005045XXOCAI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

AMENDED ORDER ON COLEMAN (PARENT) HOLDINGS, INC.'S MOTION FOR ADVERSE INFERENCE INSTRUCTION DUE TO MORGAN STANLEY'S DESTRUCTIONS OF E-MAILS AND MORGAN STANLEY'S NONCOMPLIANCE WITH THE COURT'S APRIL 16, 2004 AGREED ORDER, AND MOTION FOR ADDITIONAL RELIEF AND ORDER ON PLAINTIFF'S MOTION TO COMPEL FURTHER DISCOVERY REGARDING MORGAN STANLEY'S DESTRUCTION AND NON-PRODUCTION OF E-MAILS

THIS CAUSE came before the Court on February 14, 2005 on Coleman (Parent) Holdings, Inc.'s ("CPH's") Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, as modified by CPH's February 14, 2005 ore tenus motion for additional relief, and on February 28, 2005 on Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-Mails, with both counsel present. Based on evidence introduced, the Court finds:

1. CPH has sued Defendant, Morgan Stanley & Co., Inc. ("MS & Co."), for fraud in connection with CPH's sale of its stock in Coleman, Inc., to Sunbeam Corporation in return for Sunbeam stock. Whether MS & Co. had knowledge of the fraudulent scheme undertaken by Sunbeam in 1997 and early 1998 and, if so, the extent of that knowledge, is central to the case. CPH has sought access to MS & Co.'s internal files, including e-mails, since the case was filed.

MAR 2

EXHIBIT
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2. Though MS & Co. instructed its investment bankers to preserve paper documents in their possession in connection with the Sunbeam transaction in February, 1999, it continued its practice of overwriting e-mails after 12 months, despite an SEC regulation requiring all e-mails be retained in readily accessible form for two years. *See* 17 C.F.R. §240.17a-4 (1997).

3. On April 16, 2004, the Court entered its Agreed Order requiring MS & Co. to (1) search the oldest full backup tape for each of 36 MS & Co. employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all nonprivileged e-mails responsive to CPH's document requests; (4) give CPH a privilege log; and (5) certify its full compliance with the Agreed Order.

4. On May 14, 2004, MS & Co. produced approximately 1,300 pages of e-mails but failed to provide the required certification. Finally, on June 23, 2004, after inquiries by CPH, MS & Co. provided CPH with a certificate of full compliance with the April 16 Agreed Order signed by Arthur Riel, the MS & Co. manager assigned this task.

5. As organized by MS & Co., the effort to recover e-mails from any remaining backup tapes had several stages. First, the relevant backup tapes (in various formats, such as "DLT" tapes and eight-millimeter tapes) had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc. ("NDC"), to be processed, and the data returned to MS & Co. in the form of "SDLT"tapes. Third, MS & Co. had to find a way to upload the contents of these SDLT tapes into its new e-mail archive. Fourth, MS & Co. would run "scripts" to transform this data into a searchable form, so that it could later be searched for responsive e-mails. MS & Co. personnel used the term "staging area" to describe the stage of the

process when SDLT tapes remained in limbo, waiting to be uploaded to the archive.

6. At some point prior to May 6, 2004, Arthur Riel and his team became aware that more than 1,000 backup tapes had been found at a MS & Co. facility in Brooklyn, New York. These 1,423 DLT tapes had not been processed by NDCI and thus had not been included in the archive or searched when MS & Co. made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification that it was false. He and others on MS & Co.'s e-mail archive team knew by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990's. MS & Co. neither withdrew its certification nor informed CPH about the potential for additional production of e-mails, however. During the summer of 2004, the Brooklyn tapes were processed and sent to the staging area, but they were not uploaded to the e-mail archive so as to be available to be searched until January 2004, at least eight months after they were found.

7. MS & Co. also failed to timely produce e-mails from 738 8-millimeter backup tapes found at a MS & Co. facility in Manhattan, in 2002. These 738 8-mm tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched when MS & Co. made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Mr. Riel and others were told by their vendor, NDCI, by July 2, 2004 that the 8-mm tapes contained e-mail dating back at least to 1998. MS & Co. neither withdrew its certification nor informed CPH about the potential for additional production of e-mails, though. During the summer of 2004, the 8-mm tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not uploaded

to MS & Co.'s e-mail archive.

8. In August 2004, Mr. Riel was relieved of his employment responsibilities. He and his team were replaced by a new team headed by Allison Gorman Nachtigal.

9. Ms. Gorman testified that she was instructed to describe the circumstances of Mr. Riel's replacement as his having been "placed on administrative leave." That same term appears by interlineation over the original typed description in MS & Co.'s memorandum addressing these issues. The typed language stated: "[Mr. Riel was] dismissed for integrity issues." MS & Co. presented no evidence to explain why Mr. Riel would have been placed on administrative leave rather than terminated. CPH argued that it may have been to deprive CPH of the ability to contact him directly.

10. Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area; indeed, she was not informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman met with a group of MS & Co. attorneys. Following that meeting, Ms. Gorman gave the project somewhat greater priority, although even then it clearly did not move as expeditiously as possible. For example, MS & Co. gave no thought to using an outside contractor to expedite the process of completing the discovery, though it had certified completion months earlier; it lacked the technological capacity to upload and search the data at that time, and would not attain that capacity for months; and it knew trial was scheduled to begin in February, 2005. Even at this point, no one from MS & Co. or its outside counsel, Kirkland & Ellis LLP, gave CPH or this Court any hint that the June certification was false.

11. On November 17, 2004, more than six months after the May 14, 2004 deadline for

producing e-mails in response to the Agreed Order, MS & Co. sent CPH a letter revealing that its June 23 certificate of compliance was incorrect. The letter stated:

> Morgan Stanley has discovered additional e-mail backup tapes since our e-mail production in May 2004. The data on some of [the] newly discovered tapes has been restored and, to ensure continued compliance with the agreed order, we have re-run the searches described in the order. Some responsive e-mails have been located as a result of that process. We will produce the responsive documents to you as soon as the production is finalized.

The letter also foreshadowed further delays: "(s)ome of the backup tapes are still being restored. To ensure continued compliance with the agreed order, we intend to re-run the searches again when the restoration process is complete and will produce any responsive documents that result."

12. The next day, November 18, 2004, MS & Co. produced an additional 8,000 pages of e-mails and attachments. MS & Co.'s November 2004 letter stated that the 8,000 pages came from "newly discovered" tapes; but the testimony now makes clear that this statement was false because Ms. Gorman's team did not figure out how to upload and make searchable the materials from the staging area until January, 2005.

13. MS & Co. has failed to offer any explanation to reconcile the obvious conflict between its assertions at the time of production that the 8,000 pages came from "newly discovered" tapes (*i.e.*, the "Brooklyn tapes") and the testimony of its own witness, Ms. Gorman, that data from those newly discovered tapes were not capable of being searched until two months later, in January.

14. After a follow-up inquiry by CPH, on December 17, 2004, MS & Co. produced a privilege log and told CPH that "[n]o additional responsive e-mails have been located since our November production." MS & Co. refused to answer CPH's questions about whether MS & Co.

had restored all the backup tapes described in its November 17 letter and why the tapes had not been located earlier, however.

15. On December 30, 2004, CPH sought confirmation that MS & Co. had reviewed all e-mail backup tapes and produced all responsive e-mails and, if not, asked when the review would be completed. On January 11, 2005, MS & Co. informed CPH that the "restoration of e-mail back tapes is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

16. On January 19, 2004, CPH wrote asking MS & Co. to explain the circumstances under which MS & Co. located the "newly discovered" backup tapes and to disclose when the tapes were located. CPH also asked MS & Co. to explain why the backup tapes could not be restored sooner.

17. On January 21, 2005, MS & Co. sent CPH a letter that failed to answer CPH's questions. Instead, MS & Co. described its efforts to restore the backup tapes as "ongoing"; informed CPH that "there is no way for MS & Co. to know or accurately predict the type or time period of data that might be recovered"; and stated that MS & Co. "cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes."

18. On January 26, 2005, CPH filed the Motion at issue here, asking the Court to instruct the jury that MS & Co.'s destruction of e-mails and other electronic documents and MS. & Co.'s noncompliance with the April 16, 2004 Agreed Order can give rise to an adverse inference that the contents of the missing e-mails would be harmful to MS & Co.'s defense in this case.

19. Meanwhile, MS & Co. found another 169 DLT tapes in January, 2005, that allegedly

had been misplaced by its New Jersey storage vendor, Recall. Again, MS & Co., chose to provide no specifics to CPH or to the Court.

20. At a February 2, 2005 hearing on CPH's Motion, Thomas A. Clare of Kirkland & Ellis, LLP, representing MS & Co., stated that "late October of 2004...[is] the date I represent to Court is the first time that anyone knew that there was recoverable e-mail data" on the Brooklyn tapes. Hr'g Tr. (2/2/05) at 133-34. The actual date, however, was at least three months earlier, by July 2, 2004. Furthermore, MS & Co. refused to provide the Court with definitive answers about when its e-mail production would be complete, merely stating that it would proceed with "all deliberate speed." *Id.* at 139. Also at the February 2 hearing, Mr. Clare neglected to inform the Court about the 8-mm tapes that had been located in 2002, and told the Court that the 1,423 DLT tapes had been found in Brooklyn "sometime during the summer" of 2004. The truth of this assertion is belied by the evidence showing that the tapes were found before May 6, 2004.

21. On February 3, 2005, the Court ordered further discovery and set an evidentiary hearing for February 14, 2005. The discovery took place on February 9 and 10, when CPH deposed the three e-mail witnesses identified by MS. & Co.

22. On Saturday afternoon, February 12, 2005, MS & Co. informed the Court that it had, in the previous 24 hours, discovered additional tapes. Also, MS & Co. stated that its recent production omitted certain "attachments" to e-mails. MS & Co. did not attempt to clarify or substantiate either of these statements to CPH or to the Court until the Monday, February 14, 2005 hearing.

23. At the February 14 hearing, none of the witnesses MS & Co. presented was involved in or familiar with the actual electronic searches conducted using the parameters specified in this

Court's April 16, 2004 Agreed Order, and none explained where the 8,000 pages produced in November, 2004 had come from. MS & Co.'s witnesses did, however, describe three new developments. First, Robert Saunders, a Morgan Stanley executive director in the Information Technology Division, testified that he returned to New York after his February 10 deposition and, concerned about his unqualified assertion that the was "confident" that a complete search for backup tapes had been conducted, decided finally to undertake a personal search of MS & Co.'s "communication rooms," going to the areas he thought most obvious first. By doing so, he and two contractors discovered more than 200 additional backup tapes openly stored in locations known to be used for tape storage. Those discoveries were made on Friday and Saturday, February 11 and 12, 2005. As of the February 14 hearing, NDCI had not yet determined which, if any, of these newly discovered backup tapes contained e-mails. Second, Ms. Gorman reported that on Friday, February 11, 2005 she and her team had discovered that a flaw in the software they had written had prevented MS & Co. from locating all responsive e-mail attachments. Third, Ms. Gorman reported that MS & Co. discovered on Sunday evening, February 13, 2005, that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so there were at least 7,000 additional e-mail messages that appeared to fall within the scope of the Agreed Order had yet to be fully reviewed by MS. & Co.'s outside counsel for responsiveness and privilege. As counsel for MS & Co. admitted, this problem "dwarf[s]" their previous problems. Hr'g Tr. (2/14/05) at 13. Ms. Gorman indicated she was "90 percent sure" that the problem infected MS & Co.'s original searches in May, which means that even they failed to timely produce relevant materials that had been uploaded into the archive by that point. *Id.* at 82-83. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the

transaction under review here.

24. On February 19, 2005 MS & Co. informed counsel for CPH that "additional boxes of back up tapes" have been located "in a security room" and that, "(a)s of this morning, Morgan Stanley has identified four (unlabled) DLT tapes among the collection. Those four tapes will be sent to NDCI for further analysis." The disclosure did not state when the discovery was made. MS & Co.'s counsel represented to the Court that it was his understanding that about 73 bankers' boxes of tapes were discovered. No explanation for the late discovery was offered.

25. Throughout this entire process, MS & Co. and its counsels' lack of candor has frustrated the Court and opposing counsel's ability to be fully and timely informed.

26. MS & Co.'s failure during the summer and fall of 2004 to timely process a substantial amount of data that was languishing in the "staging area," rather than being put into searchable form and then searched, was willful and a gross abuse of its discovery obligations.

27. MS & Co.'s failure to time notify CPH of the existence of the DLT and 8-mm tapes, which it had located as early as 2002 and certainly prior to the June 23, 2004 certification, and its failure to timely process those raw backup tapes was willful and a gross abuse of its discovery obligations.

28. MS & Co.'s failure to produce all e-mail attachments was negligent, and it was discovered and revealed only as a result of CPH's hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check MS & Co.'s compliance with the April 16, 2004 Agreed Order.

29. MS & Co.'s failure to produce all of the Lotus Notes e-mails was negligent, and it was discovered and revealed only as result of CPH's hiring a third-party vendor, pursuant to the

Court's February 4, 2005 Order, to double-check MS & Co.'s compliance with the April 16, 2004 Agreed Order.

30. MS & Co.'s failure to locate other potentially responsive backup tapes before Saturday, February 12, 2005 was grossly negligent.

31. Given the history of the discovery, there is no way to know if all potentially responsive backup tapes have been located.

32. In sum, despite MS & Co.'s affirmative duty arising out of the litigation to produce its e-mails, and contrary to federal law requiring it to preserve the e-mails, MS & Co. failed to preserve many e-mails and failed to produce all e-mails required by the Agreed Order. The failings include overwriting e-mails after 12 months; failing to conduct proper searches for tapes that may contain e-mails; providing a certificate of compliance known to be false when made and only recently withdrawn; failing to timely notify CPH when additional tapes were located; failing to use reasonable efforts to search the newly discovered tapes; failing to timely process and search data held in the staging area or notify CPH of the deficiency; failing to write software scripts consistent with the Agreed Order; and discovering the deficiencies only after CPH was given the opportunity to check MS & Co.'s work and the MS & Co.'s attorneys were required to certify the completeness of the prior searches. Many of these failings were done knowingly, deliberately, and in bad faith.

It is clear that e-mails existed which were requested by CPH that have not been produced because of the deficiencies discussed above. Electronic data are the modern-day equivalent of the paper trail. Indeed, because of the informalities of e-mail, correspondents may be less guarded than with paper correspondence. In this case, the paper trail is critical to CPH's ability to make out its prima facie case. Thus, MS & Co.'s acts have severely hindered CPH's ability to

proceed. The only way to test the potentially self-serving testimony of MS & Co. personnel is with the written record of the events.

The failures outlined in this Order are of two types. First, by overwriting e-mails contrary to its legal obligation to maintain them in readily accessible form for two years and with knowledge that legal action was threatened, MS & Co. has spoiled evidence, justifying sanctions. See Martino v. Wal-Mart Stores, Inc., 835 So. 2d 1251 (Fla. 4th DCA 2003). "The appropriateness of sanctions for failing to preserve evidence depends on: (1) willfulness or bad faith of the responsible party, (2) the extent of prejudice suffered by the other party, and (3) what is required to cure the prejudice." Nationwide Lift Trucks, Inc. v. Smith, 832 So. 2d 824, 826 (Fla. 4th DCA 2002). Second, MS & Co.'s willfull disobedience of the Agreed Order justifies sanctions. See Rule 1.380 (b) (2), Fla. R. Civ. P. The conclusion is inescapable that MS & Co. sought to thwart discovery *in this specific case*.

Sanctions in this context are not meant to be punitive. They are intended, though, to level the playing field.

A reasonable juror could conclude that evidence of MS & Co.'s misconduct demonstrates its consciousness of guilty. It is relevant to the issues before the jury. Further, CPH should not be penalized by being forced to divert the jurors' attention away from the merits of its claim to focus on highly technical facts going to MS & Co.'s failures here, facts that are not reasonably disputed. Evidence of that failure, though, alone does not make CPH whole. Indeed, it can be said it is not a "sanction" at all, but merely a statement of unrefuted facts that the jury may find relevant. Shifting the burden of proof, though, forces MS & Co. to accept the practical consequence of its failures--that some information will never be known. Obviously, this sanction is of consequence only in the

marginal case. If there is overwhelming proof of MS & Co.'s knowledge of the fraud and collusion with Sunbeam, CPH would have prevailed on those elements in any event. And, to the contrary, if there is overwhelming evidence MS & Co. did not know of the fraud or conspire with or aid Sunbeam in its commission, it would have prevailed in any event. If the case is close on those issues, though, MS & Co., not CPH, should bear the burden of persuasion. Further, shifting the burden on the fraud issue does not relieve CPH of its obligation to establish the other elements of its claims, most notably reliance, proof of which is independent of the MS & Co. e-mails. Thus, the sanctions chosen are the most conservative available to the Court to address the spoilation of evidence and willfull violation of the Agreed Order.[1] [2]

Finally, the Court notes that CPH has requested the e-mails since May of 2003. MS & Co. was supposed to comply with the April 16, 2004 Order by May 14, 2004. Fact discovery in this case closed November 24, 2004. MS & Co.'s actions have resulted in the diversion of enormous amounts of resources, by both the parties and the Court, into a fact discovery dispute that should have never arisen and which would have long ago been put to bed had MS & Co. timely recognized its obligations to CPH and this Court. Opening argument in this complex case is set for March 21,

---

[1]MS & Co.'s bad acts and pocket book may not be used to gain the continuance it has sought from the beginning. Further, the Court has no confidence that, even if a continuance were granted, MS & Co. would fully comply with discovery in this case.

[2]The undersigned notes that the sanctions imposed are not enumerated in Rule 1.380 (b) (2), and is aware of the concern expressed in the 2000 Handbook on Discovery Practice, Joint Committee of the Trial Lawyers Section of the Florida Bar and Conferences of Circuit and County Court Judges ("(f)or the trial court to be on solid footing, it is wise to stay within the enumerated orders" [Handbook at p. 4]). However, MS & Co.'s violations involve both the violation of a discovery order and the intentional spoiliation of evidence. The sanction imposed is *less* severe than that provided in Rule 1.380 (b) (2) (B), under which the Court could preclude MS & Co. from presenting evidence of its lack of knowledge of or collusion with the Sunbeam fraud, which the Court finds is the least severe enumerated sanction appropriate to place the parties on a level playing field.

2005. Preliminary jury selection has begun. MS & Co. has controlled the timetable of this portion of the litigation long enough. Consequently, CPH should have the ability to continue to require MS & Co. to attempt to comply with the Agreed Order and the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search, or to elect to terminate the e-mail discovery and concentrate on trial preparation.

Based on the foregoing, it is

ORDERED AND ADJUDGED that:

1. Plaintiff's Motion for Adverse Interference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Non-Compliance with the Court's April 16, 2004 Agreed Order and Motion for Additional Relief is GRANTED.

2. MS & Co. shall continue to use its best efforts to comply with the April 16, 2004 Agreed Order and shall continue to comply with the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search until March 21, 2005 or written notice from CPH, which ever first occurs. Either party shall notify the other in writing of its intention to offer into evidence e-mails actually produced to CPH prior to termination of e-mail discovery in conformity with this Order, within 72 hours of the e-mail's production to CPH. The Court shall hear and determine any objections to use of the e-mails.

3. The Court shall read to the jury the statement of facts attached as Exhibit A during whatever evidentiary phase of CPH's case that it requests. These findings of fact shall be conclusive. See Rule 1.380 (b) (2) (A). No instruction shall be given to the jury regarding inferences to be drawn from these facts. However, counsel may make such argument to the jury in favor of whatever inferences that evidence may support. No other evidence concerning the production of e-mails, or

lack thereof, shall be presented absent further Court order.

4. CPH will be allowed to argue that MS & Co.'s concealment of its role in the Sunbeam transaction is evidence of its malice or evil intent, going to the issue of punitive damages. See, e.g., General Motors Corp. v. McGee, 837 So.2d 10120.

5. MS & Co. shall bear the burden of proving to the jury, by the greater weight of the evidence, that it lacked knowledge of the Sunbeam fraud and did not aid and abet or conspire with Sunbeam to defraud CPH The traditional order of proof shall remain unaffected, however.

6. MS & Co. shall compensate CPH for costs and fees associated with the Motion. The amount shall be determined at an evidentiary hearing to be held after the completion of the trial.

7. Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-Mails is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 1 day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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EXHIBIT A

A federal regulation in effect in 1997 and all times since required Morgan Stanley to preserve e-mails for three years and to preserve them in a readily accessible place for two years. Beginning in no later than 1997, Morgan Stanley had a practice of overwriting e-mails after 12 months. E-mails could no longer be retrieved once they were overwritten. This practice was discontinued in January, 2001. CPH has sought access to Morgan Stanley's e-mails relating to this transaction since the case was filed in May, 2003.

Prior to 2003, Morgan Stanley recorded e-mails and other electronic data on back up tapes. On April 16, 2004, the Court ordered Morgan Stanley to (1) search the oldest full backup tape for each of 36 Morgan Stanley employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all e-mails relating to this case found by the search I have just described; and (4) certify its full compliance with the Court's order.

On May 14, 2004, Morgan Stanley produced approximately 1,300 pages of e-mails. It did not produce the required certification. On June 23, 2004, after inquiries by CPH, Morgan Stanley provided CPH with a certificate of full compliance with the April 16 Order signed by Arthur Riel, the Morgan Stanley manager assigned this task.

As organized by Morgan Stanley, the effort to recover e-mails from the backup tapes had several stages. First, the relevant backup tapes had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc., which I will call "NDCI", to be processed, and the data returned to Morgan Stanley. Third, Morgan Stanley had to upload the processed data into its e-mail archive. Fourth, Morgan Stanley had to run scripts, or pieces of computer code, to transform this data into a searchable form. Finally, Morgan Stanley had to search the data for e-mails related to this case. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when the processed data returned by NDCI remained in limbo, waiting to be uploaded to Morgan Stanley's archive.

At some point prior to May 6, 2004, Arthur Riel and his team became aware that 1,423 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423 tapes had not been processed by NDCI and thus had not been included in the archive or searched when Morgan Stanley made its production to CPH on May 14, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification of full compliance with the Court's April 16, 2004 Order that it was false. He and others on Morgan Stanley's e-mail archive team knew by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990's. During the summer of 2004, the Brooklyn tapes were processed and the data sent to the staging area. The scripts were not written and tested to permit the search for e-mails relating to this case to begin until the middle of January, 2004. Such a search, even if perfectly done, can take weeks.

Morgan Stanley also failed to timely produce e-mails from 738 backup tapes found at a Morgan Stanley facility in Manhattan in 2002. These 738 tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched by either on May 14, 2004 or June 23, 2004. Mr. Riel and others were told by NDCI by July 2, 2004 that these tapes contained e-mail dating back at least to 1998. During the summer of 2004, the these tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not searched.

In August 2004, Mr. Riel was relieved of his employment responsibilities. He and his team were replaced by a new team headed by Allison Gorman Nachtigal. At that time, the staging area contained about 600 gigabytes of e-mail data that had not yet been uploaded into the Morgan Stanley archive and had not been searched for e-mails relating to this case.

Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area. Indeed, she was not informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman gave the project somewhat greater priority, although even then it did not move as expeditiously as possible. Morgan Stanley did not consider using an outside contractor to expedite the process.

Morgan Stanley found another 169 DLT tapes in January, 2005, that had been misplaced

by its New Jersey storage vendor. Morgan Stanley discovered more than 200 additional backup tapes openly stored in locations known to be used for tape storage on February 11 and 12, 2005. On February 11, 2005 Morgan Stanley discovered that a flaw in the software it had written had prevented Morgan Stanley from locating all e-mail attachments about the Sunbeam transaction. Morgan Stanley discovered on February 13, 2005, that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so that additional e-mail messages that appeared to fall within the scope of the April 16, 2004 Order had not been given to CPH. Further, it appears that the problem infected Morgan Stanley's original searches in May of 2004. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the transaction under review here. On February 16, 2005, Morgan Stanley withdrew its certificate of compliance with the April 16, 2004 Order. On February 19, 2005 Morgan Stanley notified CPH that it had found boxes of additional tapes that have not been uploaded into its archive or searched for responsive e-mails. Morgan Stanley did not tell CPH it had found any tapes that it had not searched until November 17, 2004. Even then, it did not tell CPH how many tapes were found, when they were found, or when they would be searched. MS & Co. did not provide all of this information to CPH until February of 2005. The searches had not yet been completed when this trial was begun, when they were terminated without completion.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING INDEX OF PROFFER EXHIBITS

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby files the attached index of proffer exhibits filed on Friday, May 6, 2005, Monday, May 9, 2005 and Tuesday, May 10, 2005. The attached index excludes those exhibits that have already been admitted in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 10th day of May, 2005.

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Morgan Stanley Proffered Trial Exhibits

Exhibit		*Date*	*Description*	*Bates*
MS	7	08/14/1997	Memo from V. Kistler to File re Sunbeam Neosho Inventory	CPH 0009020-0009021
MS	8	11/21/1997	Memo from D. Pastrana to Sunbeam Inventory Observation Team re Sunbeam - Inventory Observations	CPH 0078581-0078585
MS	9	03/19/1998	Comfort Letter from Arthur Andersen to Morgan Stanley	MSC 0000376-0000382
MS	10	03/25/1998	Second Comfort Letter from Arthur Andersen to Morgan Stanley	CPH 1084897-1084898
MS	14	00/00/1998	Special Audit Procedures	CPH 0090040-0090045
MS	16	11/11/1998	Memo from D. Denkhaus to Distribution re Sunbeam Corporation Document Retention	CPH 0076949
MS	20	12/28/1997	Work Program Sunbeam Corp. - Core Operations	CPH 0011408-0011468
MS	21	12/28/1997	Work Program Sunbeam Corp. - Consolidation and Financial Reporting	CPH 0011752-0011754
MS	22	01/30/1998	Memo from D. Pastrana to the Files re Sunbeam Corp. Audit 12/31/97 Residual Audit Risk Reduction Approach	CPH 0011144-0011152
MS	23	12/28/1997	Sunbeam Preliminary Materiality Assessment	CPH 0010963-0010971
MS	24	05/21/1998	Fax from D. Pastrana to R. Gluck with attached Sunbeam Corporation Blueback Clearance Form	CPH 0244904-0244915
MS	25	03/05/1998	Postaudit Review for Subsequent Material Transactions and Events After the Date of the Auditors' Report, Sunbeam Corporation 10K for Dec. 28, 1997	CPH 0130041-0130050
MS	26	03/05/1998	Sunbeam P&L, Actuals Comparison Reporting Period January 1998 with marginalia	CPH 0013023-0013027

Exhibit		Date	Description	Bates
MS	28	03/16/1998	Postaudit Review for Subsequent Material Transactions and Events After the Date of the Auditors' Report, Sunbeam Corporation Sale of $2.014 Billion Zero Coupon Senior Subordinated Debentures due 2018 for Dec. 28, 1997	CPH 0129926-0129936
MS	32	03/21/1998	Email from D. Pastrana to L. Bornstein, M. Brockelman with attached draft Sunbeam Comfort Letter and grl	CPH 0041650-0041661
MS	34	03/23/1998	Letter from A. Dunlap, R. Kersh, D. Fannin, and R. Gluck to Arthur Andersen re Representations submitted with Offering Memorandum	CPH 0129642-0129644
MS	35	03/13/1998	Postaudit Review for Subsequent Material Transactions and Events After the Date of the Auditors' Report, Sunbeam Corporation Registration Statement for Dec. 28, 1997	CPH 0129979-0129988
MS	37	12/15/1998	Sunbeam Corporation Arthur Andersen Fees & Expenses Restatement and Other Accounting Services from July 1, 1998 through December 15, 1998	CPH 0083764-0083765
MS	39	03/19/1998	R. Goudis, "Sunbeam States that First Quarter Revenues May Be Lower than Street Estimates"	CPH 1075408
MS	40	03/19/1998	Sunbeam Offering Memorandum $2,014,000,000 Zero Coupon Convertible Senior Subordinated Debentures Due 2018	MSC 0000001-0000175
MS	41	03/18/1998	Sunbeam Sales Forecast, Jan. & Feb. Consolidated Net Sales Actual, March Net Sales through Mar. 17,1998	MSC 0028858
MS	42	00/00/1998	Form for Documentation of Referencing Procedures, Sunbeam Corporation Comfort letter dated March 19, 1998	CPH 0129975-0129977
MS	43	03/16/1998	Postaudit Review for Subsequent Material Transactions and Events After the Date of the Auditors' Report, Sunbeam Corporation Sale of $2.014 Billion Zero Coupon Senior Subordinated Debentures due 2018 for Dec. 28, 1997	CPH 0129927-0129936
MS	47	03/23/1998	Letter from A. Dunlap, R. Kersh, D. Fannin, and R. Gluck to Arthur Andersen re Representations submitted with Offering Memorandum	CPH 0129642-0129644
MS	56	03/10/1998	Fax from S. Boone to T. Freed with attached March 7, 1998 Memo from J. Tyree to Sunbeam Financing Team re Accounting Due Diligence Call	CPH 0635892-0635895
MS	57	03/10/1998	Fax from S. Boone to T. Molitor with attached March 7, 1998 Memo from J. Tyree to Sunbeam Financing Team re Accounting Due Diligence Call	FUNB016564-016567

Exhibit		Date	Description	Bates
MS	60	07/24/1998	Memo from D. Denkhaus to the Files re Sunbeam Corporation - Interview with Deborah McDonald	CPH 1071418-1071432
MS	61	10/16/1998	Management Letter from Arthur Andersen to Board of Directors and Management of Sunbeam Corporation	CPH 0084406-0084458
MS	67	06/08/2001	Complaint, Coleman (Parent) Holdings v. Arthur Andersen and Phillip Harlow, No. CA 01-06062 (15th Jud. Dist Fla.)	
MS	71	06/29/1998	Sunbeam Oster Co. / Coleman Acquisitions, Contact List	CPH 0024601-0024602
MS	73	03/13/1998	Draft Information Statement Pursuant to Section 14(f), The Coleman Company, Inc.	CPH 1421226-1421248
MS	75	03/30/1998	Letter from P. Rowe to S. Youn enclosing Wachtell Chronology	CPH 1401525-1401534
MS	76	12/12/1997	Credit Suisse First Boston Material Prepared for Discussion Sunbeam	CPH 1407048-1407318
MS	78	12/15/1997	Fax from D. Fannin to R. Kitts, W. Strong and J. Stynes with attached Schedule of Synergies	MSC 0026587-0026588
MS	81	02/06/1998	Project Laser Proposed Summary Transaction Terms	CPH 1421814-1421817
MS	82	02/12/1998	Project Laser, Laser Stand Alone Income Statement, I/B/E/S Case	CPH 1406962-1406964
MS	86	12/01/1997	James Maher Calendar, Dec. 1, 1997 - March 31, 1998	CPH 2000687-2000707
MS	87	02/25/1998	Memo from A. Emmerich, F. Miler to G. Dickes, R. Duffy, N. Ginstling; S. Isko; W. Nesbitt, J. Salig, B. Schwartz, P. Shapiro, R. Gordon re Structure of Proposed Transactions	CPH 1422243-1422246
MS	92	04/25/2001	Affidavits & Declaration from Taxpayer Under Reg. Section 301.9100-3(e)(2) Mafco Holdings, Inc.	CPH 1429803-1429805
MS	96 A	08/12/1998	Settlement Agreement between Sunbeam and Coleman (Parent) Holdings Inc.	CPH 2000731-2000763

Exhibit		*Date*	*Description*	*Bates*
MS	97	04/02/1999	Memo from S. Tripp to Sunbeam Audit Files re M&F Warrants Accounting and Valuation	CPH 1308865-1308870
MS	98	00/00/1998	Sunbeam Treasure Stock Calculation - Warrants	CPH 1428744
MS	100	04/20/1998	CLN Holdings Inc. Consolidated Statement of Operations	CPH 0282212-0282227
MS	101	02/23/1998	Draft Confidentiality Agreement from The Coleman Company, Inc. to Sunbeam Corporation	CPH 1421213-1421219
MS	102	03/04/1998	The Coleman Company Organizational Chart	CPH 0171292-0171296
MS	104	12/08/1997	Sunbeam/Coleman Comparison with marginalia	CPH 2000144-2000149
MS	105	12/10/1997	W. Nesbitt Sunbeam/Coleman Merger Consequences	CPH 1426299-1426303
MS	106	01/26/1998	W. Nesbitt Sunbeam/Coleman Comparison re Merger Consequences Assuming Cost Savings of: 100,000	CPH 1425922-1425931
MS	107	01/26/1998	W. Nesbitt Sunbeam/Coleman Comparison re Merger Consequences Assuming Cost Savings of: 150,000	CPH 2000086-2000095
MS	108	02/06/1998	W. Nesbitt Sunbeam/Coleman Comparison re Merger Consequences Assuming Cost Savings of: 75,000 with marginalia	CPH 1120631-1120659
MS	113	02/27/1998	Minutes of a Meeting of The Board of Directors of The Coleman Company, Inc.	CPH 0634065-0634075
MS	119	01/02/2002	Coleman (Parent) Holdings' Response to Andersen's Motion to Compel Production of Documents Related to the Coleman Company (Coleman (Parent) Holdings, Inc. v. Arthur Andersen LLP and Phillip E. Harlow, Case No.: CA 01-06062AN (15th Jud. Dist. Fla.)	CPH 1315399-1315409
MS	120 A	02/27/1998	Fairness Opinion Letter from G. Rich (Credit Suisse First Boston) to Board of Directors of The Coleman Company, Inc.	CPH 1400750-1400752
MS	129	00/00/0000	Resolution re Officer and Committee Member Appointments	DPW 0014143-0014144

Exhibit			Date	Description	Bates
MS	130	A	03/18/1998	The Coleman Company, Inc. Information Statement Pursuant to Section 14(f) of the Securities Exchange Act of 1934, as amended, and Rule 14f-1 thereunder	CPH 1406746-1406765
MS	133		02/04/1998	Confidentiality Agreement from P. Shapiro (The Coleman Company, Inc.) to D. Fannin (Sunbeam Corporation)	CPH 0642925-0642932
MS	134	A	02/23/1998	Draft Confidentiality Agreement from Sunbeam Corporation to The Coleman Company, Inc.	CPH 1427533-1427539
MS	138		02/06/1998	A. Shore, Did Al Show His Hand Too Soon?, PaineWebber	CPH 1327714-1327721
MS	140		03/31/1997	Form 10K Annual Report for the fiscal Year Ended Dec. 29, 1996 for Sunbeam Corporation	CPH 1402732-1402772
MS	143		06/30/1997	Form 10K Annual Report for the Fiscal Year ended Dec. 31, 1996 for Sunbeam Corp.	CPH 1402814-1402827
MS	166		03/19/1998	Sunbeam Offering Memorandum $2,014,000,000 Zero Coupon Convertible Senior Subordinated Debentures Due 2018	CPH 1362487-1326662
MS	172		02/27/1998	Coleman (Parent) Holdings Inc. Consent of Directors in Lieu of Board of Directors' Meeting attaching Resolutions of the Board of Directors Coleman (Parent) Holdings Inc. Approving Proposed Merger Transactions and Related Agreements	CPH 1429974-1429977
MS	174		12/16/1997	Memo from A. Dunlap to R. Perelman re confirming meeting	CPH 1066774
MS	175		01/26/1998	Laser Corporation Key Assumptions	CPH 0482090-0482098
MS	180		02/21/1998	Memo from A. Emmerich to R. Easton, A. Fuchs re Laser Term Sheet	CPH 1408948-1408949
MS	186		02/22/1998	Sunbeam Corporation Presentation with marginalia	CPH 1324775-1324850
MS	187		09/02/2003	Coleman (Parent) Holdings Inc.'s Response to Morgan Stanley & Co., Incorporated's First Set of Interrogatories	
MS	190		02/27/1998	Project Laser Consideration Calculations with marginalia	CPH 1406986

Exhibit		Date	Description	Bates
MS	194	03/15/1998	Draft Morgan Stanley Sunbeam Road Show Presentation Speaking Points	CPH 1185762-1185784
MS	198	06/16/1997	Jonathan R. Laing, "High Noon At Sunbeam: Does Chainsaw Al Have a Truly Revived Operation," Barron's, 29	CPH 1429021-1429025
MS	206	01/29/1998	J. Buenao, "Sunbeam Posts Profit Below Forecasts, A Stumble That Sends Stock Down 9.5%," Wall Street Journal, A6	CPH 1327166-1327167
MS	208	03/06/1998	Form 10K Annual Report for the Fiscal Year Ended December 28, 1997, Sunbeam Corporation	CPH 1428829-1428887
MS	209	03/09/1998	"Into the Maw, Sunbeam's Chainsaw Al Goes on a Buying Binge," Barron's	CPH 1409994-1409995
MS	210	03/19/1998	R. Goudis, "Sunbeam States First Quarter Revenues May Be Lower Than Street Estimates", Business Wire	CPH 1395046
MS	211	03/19/1998	S. Matthews, "Sunbeam Warns 1st-Qtr Sales May Be Below Estimates (Update5)," Bloomberg	CPH 1392706-1392707
MS	212	03/19/1998	A. Shore, Sunbeam: Grilled!!!, PaineWebber	CPH 1393266-1393268
MS	216	03/20/1998	E. Fontenelli, Sunbeam Corporation: Trimmed Q1: 98E/1998E on Potential Q1 Sales Shortfall; RL, Goldman Sachs	CPH 1393262-1393263
MS	227	03/09/1998	Sunbeam's Dunlap Gets Stock, Options Worth $68 Mln, Bloomberg L.P.	CPH 1392708-1392709
MS	228	12/12/1997	Schedule of Synergies with marginalia	CPH 1406941
MS	229	12/12/1997	Schedule of Synergies with marginalia	CPH 1426262
MS	230	02/25/1998	Memo from G. Rich, R. Duffy, S. Geller, R. Chakrapani to Investment Banking Committee re Proposed Sale of The Coleman Company, Inc. to Sunbeam Corporation	CPH 1121260-1121271
MS	231	12/12/1997	Schedule of Synergies with marginalia	CPH 1406939

Exhibit		Date	Description	Bates
MS	232	07/06/1998	Letter from H. Gittis to D. Fannin re Amendment to the Credit Agreement	CPH 2000771
MS	234	08/24/1998	Letter from A. Emmerich to M. Cohen re Enclosed Warrant No. W-1 for Sunbeam Stock re Pledge	CPH 2000830
MS	235	10/10/2002	Settlement Agreement between Arthur Andersen, Coleman (Parent) Holdings, Inc., New Coleman Holdings, Inc. MacAndrews & Forbes & Holdings, Inc. and Mafco Holdings, Inc.	
MS	237	03/02/1998	R. Goudis, "Sunbeam Acquires Three Publicly Traded Consumer Products Companies: Coleman, Signature Brands And First Alert"	CPH 1325251-1325253
MS	239	03/18/1998	Information Statement Pursuant to Section 14(f) of the Securities and Exchange Act of 1934 and Rule F-1 Thereunder for Coleman Company, Inc.	
MS	240	09/06/1993	C. Horowitz, "The Richest Guy In Town; The High Life and Times of Ron Perelman, Master of Revlon," New York	CPH 1144559-1144565
MS	241	05/15/1997	Coleman Escrow Corp. $732,035,000 Offering Memorandum	CPH 1107884-1108079
MS	242	03/19/1998	$2,014,000,000 Sunbeam Corporation Zero Coupon Convertible Senior Subordinated Debentures Due 2018, Purchase Agreement	DPW 0023754-0023787
MS	243	03/20/1998	Comfort Letter from Ernst & Young to CLN and Morgan Stanley re audited consolidated balance sheets	CPH 1084899-1084901
MS	249	01/01/1998	Montgomery's Auditing, Section 30 Letters for Underwriters	
MS	250	05/31/1998	Shapiro Calendar May 31, 1998 - Nov. 6, 1998	CPH 0508863-0508898
MS	252	06/26/1998	Bio Paul E. Shapiro	CPH 1292877-1292878
MS	255	03/06/1998	Letter from J. Kroog to P. Shapiro re Acquisition of the Coleman Co, Inc. (CLN) by Sunbeam Co. (SOC) NYSE Investigation #98611	CPH 1421977-1421980
MS	258	08/12/1998	Letter from P. Langerman to Sunbeam Shareholders re settlement agreement with MacAndrews & Forbes, Inc.	CPH 1131177-1131178

Exhibit		Date	Description	Bates
MS	260	12/14/1998	Memo from B. Jenkins to G. Kristol, C. Elson, F. Whittlesey, D. Denkhaus, N. Spiegel, S. Thibault, P. Shapiro, J. Kelley re Audit Committee Meeting	CPH 1039844-1039850
MS	261	10/14/1998	Memo from M. Shiffman to P. Langerman, J. Levin, K. Clark, S. Dalberth, R. Dunbar, B. Jenkins, J. Kelley, P. Shapiro, H. Gittis, B. Schwartz, J. Conroy, F. Fogg, R. Zimet, R. Easton, M. Bailey, G. Sard, D. Denkhaus, N. Spiegel re Final Draft - Restatement Communications	CPH 0599715-0599741
MS	272	08/14/1998	Memo from S. Ash to J. Levin, P. Shapiro, J. Kelly, M. Shiffman, B. Jenkins, K. Clark, G. Wisler, M. Evans, J. Rasmus, L. Feldkamp, S. Daniels, J. Harvel re The Coleman Company, Inc. - Form 10Q June 30, 1998	CPH 0642954-0642974
MS	273	02/27/1998	CLN Holdings, Inc. Unanimous Written Consent of the Board of Directors, Resolution of the Board of Directors CLN Holdings Inc. Approving Proposed Merger Transactions and Related Agreements	WLRK 0009189-0009195
MS	274	02/27/1998	Resolutions of the Board of Directors Coleman Worldwide Corporation Approving Proposed Merger Transactions and Related Agreements	WLRK 0009197-0009199
MS	277	02/27/1998	Credit Suisse First Boston S. Acquires C: Assumptions of Zero Coupon	CPH 1433908-1433911
MS	278	03/29/1998	Registration Rights Agreement between Sunbeam Corporation and Coleman (Parent) Holdings, Inc.	CPH 1094218-1094235
MS	279	12/06/1999	The Coleman Company, Inc., Notice Of Merger And Appraisal Rights And Information Statement, *Sunbeam Corporation* Prospectus	CPH 1398266-1398537
MS	288	06/21/2004	"Ron Perelman," CigarAficianado.com	
MS	295	03/30/1998	MAFCO Holdings Inc. Structured Equity Products Hedging Techniques	CPH 2010664-2010666
MS	296	04/03/1998	Letter from W. Ortner to J. Maher re meeting with Citibank and price options	CPH 2010681
MS	298	04/23/1998	Fax from D. Kim to G. Dickes, T. Slotkin, P., Savas, G. Woodlan with attached Memo from M. O'Sullivan to the Mafco Finance Lenders re Mafco Finance Credit Facilities	CPH 2010668-2010675
MS	307	02/23/1998	Fax from J. Salig to A. Emmerich with attached Letter from Sunbeam to Coleman re Evaluation Material for possible transaction	CPH 1421212-1421219

Exhibit		Date	Description	Bates
MS	309	02/27/1998	Certain SEC Filings Relating to the Acquisition by Sunbeam Corporation of The Coleman Company, Inc.	CPH 1410183-1410230
MS	310	05/15/1998	Fax from G. Dickes to P. Efron, D. Hiscano re Sunbeam Equity Hedge	CPH 2011528-2011531
MS	315	03/30/1998	Letter from Credit Suisse Boston to Coleman re Amended and Restated Credit Agreement dated 8/3/1995	CPH 0643329-0643338
MS	316	11/25/1998	Form 10QA Quarterly Report for the Period ended March 31, 1998 for Sunbeam Corporation	
MS	317	00/00/1997	CSFB Handwritten Notes re Major Risks	CPH 2011532-2011533
MS	318	02/25/1998	Agenda for a Meeting of The Coleman Company, Inc. Board of Directors to be held on Feb. 25, 1998	CPH 1408945-1408947
MS	325	12/09/1997	Minutes of a Meeting of the Board of Directors of the Coleman Company	CPH 1395054-1395058
MS	327	10/30/1997	Minutes of a Meeting of the Board of Directors of the Coleman Company, Inc.	DPW 0013825-0013827
MS	329	02/23/1998	Sunbeam Long Range Strategic Plan with marginalia	CSFBC 0001623-0001641
MS	330	02/25/1998	Credit Suisse, Backup Materials Prepared for the Investment Banking Committee - The Coleman Company, Inc.	CPH 1121275-1121332
MS	332	02/04/1999	Preliminary Form S1 Registration Statement for Sunbeam Corporation Debentures	
MS	335	05/06/1998	Panavision Inc. Proxy Statement/Prospectus Combined Annual and Special Meeting of Stockholders to be Held on June 4, 1998	
MS	336	06/21/1998	Memo from D. Doyle to J. Shannahan re Sunbeam Corporation, Draft	CPH 1350190-1350194
MS	337	06/22/1998	Memo from T. Molitor to Distribution re Sunbeam Corporation	CPH 1258279-1258282

Exhibit		Date	Description	Bates
MS	338	06/26/1998	Email from C. Francavilla to M. Murray, J. Fair, J. Shannahan, D. Doyle, K. Barnish, S. Sterling, H. Husby, T. Biaggi, P. Wheelock, S. Swilt, J. O'Keane re Update on Sunbeam with marginalia	CPH 1350174-1350175
MS	339	03/16/1998	"Sunbeam Reaches Out" National Law Journal	DPW0004788
MS	340	02/20/1998	Fax from J. Webber to A. Emmerich with attached Project Laser Proposed Summary Transaction Terms	WLRK 0010284-0010288
MS	358	03/11/1998	Memo from A. Emmerich to S. Cohen, F. Miller, P. Rowe, R. Silverberg, P. Canellos, D. Einhorn, D. Paul, M. Katzke, I. Gotts, M. Jahnke with attachment March 6, 1998 Letter from J. Kroog to P. Shapiro re Acquisition of the Coleman Co. by Sunbeam NYSE Investigation	WLRK 0020591-0020595
MS	368	00/00/1995	Coleman Annual Report - 1995	CPH 1272487-1272536
MS	369	07/30/1996	Minutes of a Meeting of the Board of Directors of the Coleman Company, Inc., July 30 and 31, 1996	DPW 0014073-0014074
MS	370	10/29/1996	Minutes of a Teleconference Meeting of the Audit Committee of the Board of Directors of the Coleman Company, Inc.	DPW 0014028-0014029
MS	372	05/13/1997	Minutes of a Meeting of the Board of Directors of the Coleman Company, Inc.	DPW 0013720-0013723
MS	377	02/11/1997	Minutes of a Meeting of the Audit Committee of the Board of Directors of the Coleman Company	DPW 0013935-0013936
MS	390	03/06/1998	Memo from J. Tyree, B. Derito to J. Levin, J. Page, K. Clark re Coleman Co. information books	CPH 1413987
MS	392	04/24/1998	Letter from J. Torraco to K. Clark re confirmation of her employment as VP Operations Finance at Sunbeam	CPH 0242977-0242978
MS	395	00/00/1998	AICPA Codification of Statements on Auditing Standards (1998)	
MS	398	04/17/1998	"Coleman's Levin Profits by Selling Stock After Sale to Sunbeam" Bloomberg	CPH 0475169-0475172
MS	400	02/20/1998	Memo from R. Goudis to A. Fuchs re Questions for Camper with marginalia	CPH 0501780

Exhibit			Date	Description	Bates
MS	401		12/31/1997	Sunbeam Management Letter Comments	CPH 0031790-0031797
MS	403		03/19/1998	The Coleman Company, Inc. Consent of Directors in Lieu of Board of Directors' Meeting	CPH 0637558-0637570
MS	410		03/31/1998	Form 10K for the Fiscal Year ended Dec. 31, 1997 for Revlon Holdings Inc.	
MS	412		12/11/1997	Sunbeam Corporation Preliminary Due Diligence Issues	CPH 1088622
MS	422		02/24/1998	Letter from J. Nisa to Federal Trade Commission and Department of Justice, Antitrust Division re Premerger Notification under the Hart-Scott-Rodino Antitrust Improvements Act of 1976	WLRK 0019442-0019443
MS	423		02/27/1998	CLN Holdings Unanimous Written Consent of the Board of Directors; Resolutions of the Board of Directors CLN Holdings Inc. Approving Proposed Merger Transactions and Related Agreements	CPH 1402971-1402977
MS	424		02/27/1998	Coleman Worldwide Corporation Consent of Directors in Lieu of Board of Directors' Meeting	CPH 1402978-1402982
MS	425		02/27/1998	Letter from R. Perelman to the Coleman Company, Inc. re resignation from Board of Directors of CLN Holdings	WLRK 0007478
MS	426		03/04/1998	Notification and Report Form for Certain Mergers and Acquisitions, *Sunbeam and R. Perelman*	WLRK 0019387-0019440
MS	431	A	01/29/2001	J. Laing, "Party On, Ron: With his biggest holdings in tank, Perelman is squeezing fellow investors" Barrons	
MS	432	B	06/26/1998	Fax from K. Clark to R. Perelman re Sunbeam information with attached Sunbeam financial spreadsheets	CPH 1425676-1425680
MS	432	BB	12/08/1998	Appliance Division 1999 Plan with marginalia	CPH 1423075-1423120
MS	432	CC	12/09/1998	Memo from R. Esterson to R. Perelman re Operating Reviews with attached 1999 Operating Plan Financials	CPH 1422913-1422973
MS	432	D	06/25/1998	Memo from B. Knibb to J. Levin (bcc: R. Perelman, H. Gittis) re Notes from Sunbeam Operating Reviews	CPH 2005684

Exhibit			Date	Description	Bates
MS	432	DD	12/10/1998	1999 Operating Plan Health Division presentation slides	CPH 1423121-1423177
MS	432	EE	12/15/1998	Fax from R. Esterson to R. Perelman with attached daily sales and order writing	CPH 1423178-1423179
MS	432	F	07/07/1998	Memo from B. Gitto to J. Levin forwarded to R. Perelman re product Line Review Revisions with attached average price slides	CPH 1425152-1425155
MS	432	FF	12/16/1998	Fax from J. Levin to R. Perelman with attached presentation slides Outdook Cooking Revised Agenda	CPH 1422793-1422825
MS	432	G	07/14/1998	Memo from R. Esterson to R. Perelman re Follow up items from yesterday's trip	CPH 1422488-1422489
MS	432	GG	02/04/1999	Fax from R. Esterson to R. Perelman with attached daily sales and order writing	CPH 1428203-1428204
MS	432	H	07/14/1998	Memo from R. Esterson to R. Perelman re Neosho, MO Grille Manufacturing	CPH 1422490
MS	432	I	07/14/1998	Memo from R. Esterson to R. Perelman re Sunbeam Finished Invetory with attached summary of finished goods	CPH 1422789-1422790
MS	432	J	07/14/1998	Memo from R. Esterson to R. Perelman re Follow up items from yesterday's trip	CPH 1423877-1423878
MS	432	K	07/15/1998	Fax from R. Esterson to R. Perelman with attached Sunbeam financial spreadsheets	CPH 1325460-1325467
MS	432	L	07/17/1998	Fax from R. Esterson to R. Perelman re list of issues	CPH 1422727-1422733, 1424027-1424028
MS	432	N	07/20/1998	Fax from R. Esterson to R. Perelman with attached Long Form P&Ls	CPH 1422443-1422471
MS	432	O	07/20/1998	Memo from J. Levin to R. Perelman with attached Sunbeam financial spreadsheets	CPH 1422721-1422726
MS	432	P	07/20/1998	Fax from R. Esterson to R. Perelman with attached Sunbeam analysis by product category	CPH 1423951-1423955
MS	432	R	07/22/1998	Sunbeam financial spreadsheet faxed to R. Esterson and R. Perelman	CPH 1423888

Exhibit			Date	Description	Bates
MS	432	S	07/26/1998	Fax from R. Esterson to R. Perelman, J. Levin with attached overview of Mr. Coffee business	CPH 1422476-1422483
MS	432	T	08/26/1998	Memo from R. Esterson to R. Perelman re Follow Up to Today's Questions	CPH 2005651
MS	432	U	07/27/1998	Memo from R. Esterson to R. Perelman re Sunbeam info with attached Sales by Customer and answers to follow up questions	CPH 1422714-1422720
MS	432	V	09/18/1998	Fax from R. Esterson to R. Perelman	
MS	432	W	10/22/1998	Fax from R. Esterson to R. Perelman re Daily Sales & Order Writing with attached Sunbeam Scorecard Summary	
MS	432	Y	11/11/1998	Memo from R. Esterson to R. Perelman re Eastpak Strategic Review with attached Eastpak presentation slides	CPH 1423025-1423074
MS	432	Z	11/13/1998	Memo from R. Esterson to R. Perelman re Strategic Review with attached financial pages from Strategic Reviews [two versions with varying marginalia and pages included]	CPH 1425050-1425151, CPH 1428586-1428678
MS	440		03/03/1998	Fax from R. Easton to J. Tyree, A. Dean with attached Index of Information	DPW 0007049-0007069
MS	441		03/18/1998	Fax from H. Stack to T. Freed re Sunbeam documents for Due Diligence review	CPH 0632981
MS	457		12/07/2004	Expert Report of George P. Fritz	
MS	458		12/17/2004	Expert Report of Mark Grinblatt	
MS	466		01/04/2005	Rebuttal Report of George P. Fritz	
MS	502		02/26/1998	Draft Agreement and Plan of Merger with redlines	CPH 1411598-1411654
MS	505		01/04/2005	William Horton Expert Witness Experience	

Exhibit		Date	Description	Bates
MS	509	09/19/1997	Letter from W. Strong to A. Dunlap re Sale Transaction fee	MSC 0008966-0008967
MS	510	05/11/1998	Sunbeam Audit Committee Meeting May 11, 1998	CPH 1266982-1266988
MS	517	02/20/1998	Project Laser Items for Discussion with Marginalia	CPH 1339685-1339686
MS	520	03/30/1998	Credit Agreement among Sunbeam Corporation, Morgan Stanley Senior Funding, Bank of America National Trust and Savings Association and First Union National Bank	MSC 0007544-0007773
MS	522	06/25/1998	"Sunbeam Delays SEC Filing Related to Debentures"	CPH 0642890-0642891
MS	525	04/00/1998	April and May 1998 Calendar with names Dunlap, Kersh, Fannin	CLN 7518-7520
MS	528	09/18/1997	Memo from Project Laser Team to A. Dunlap, R. Kersh, D. Fannin, R. Goudis (cc F. Fogg) re Further Revisions to Information Memorandum	CPH 0467009
MS	530	03/25/1998	Closing Binder, $2,014,000,000 Sunbeam Corporation Zero Coupon	
MS	536	00/00/1998	Email from B. Jenkins to B. Zimet, F. Fogg, N. Speigel, D. Denkhaus, P. Shapiro, J. Kelly, K. Clark re Conference Call with SEC	CPH 0087973-0087979
MS	539	02/27/1998	Minutes of a Special Meeting of the Board of Directors of the Sunbeam Corporation	CPH 0142817-0142829
MS	542	09/10/1997	Project Laser Working Group List	CPH 1086363-1086372
MS	544	03/29/1998	Letter from G. Dickes to Sunbeam Corporation, D. Fannin re Feb. 27, 1998 Agreement and Plan of Merger with A. Dunlap Signature	CPH 1094178-1094180
MS	551	03/30/1998	Citibank MAFCO Holdings Inc. Structured Equity Products Hedging Techniques Presentation	CPH 2011624-2011647
MS	552	04/03/1998	Goldman Sachs Presentation to MacAndrews & Forbes Holdings regarding Single Stock Risk Management Strategies	CPH 2011585-2011623

Exhibit		Date	Description	Bates
MS	558	04/15/1998	P. Beckett, "SEC May Rein in Lucrative Hedging of Restricted Stock," Wall Street Journal, B15	CPH 2010685
MS	559	04/03/1998	Letter from W. Ortner to J. Maher re meeting with Citibank and price options	CPH 2010681
MS	563	05/13/1998	Fax from D. Hiscano to J. Maher with attached Zero Cost Collar	WLRK 0028222-0028224
MS	564	05/15/1998	Fax from G. Dickes to D. Hiscano re Sunbeam Equity Hedge	WLRK 0028233-0028235
MS	565	05/15/1998	Fax from G. Dickes to P. Efron re Sunbeam Equity Hedge	WLRK 0028230-0028232
MS	573	05/28/1998	MAFCO Put/Call Analysis	CPH 2011537-2011543
MS	577	11/03/2004	Letter from M. Occhuizzo to M. Brody re Nov. 3, 2004 Amended Notice of Deposition	
MS	600	03/07/1998	Memo from J. Tyree to Sunbeam Financing Team re Accounting Due Diligence Call	CPH 0635893
MS	602	03/18/1998	Sunbeam Sales Forecast, Jan. & Feb. Consolidated Net Sales Actual, March Net Sales through Mar. 17,1998	CPH 1145796
MS	603	03/18/1998	Sunbeam Sales Forecast, Jan. & Feb. Consolidated Net Sales Actual, March Net Sales through Mar. 17,1998	MSC 0028858
MS	604	03/01/1998	Skadden Arps Time Records for Sunbeam Corporation March 1, 1998 - March 31, 1998	SASMF 19645-19687
MS	605	06/09/1998	Minutes of a Special Meeting of the Board of Directors of Sunbeam Corporation	CPH 1060052-1060053
MS	606	06/13/1998	Minutes of a Special Meeting of the Board of Directors of Sunbeam Corporation	CPH 0361136-0361137
MS	609	03/19/1998	Memo from J. Tyree, J. Groeller to B. Gluck, A. Dean, G. Fernicola re Bring-down due diligence	MSC 0029176
MS	610	03/20/1998	Memo from R. Porat, B. Harris, J. Tyree, J. Groeller to R. Kersh, D. Fannin, J. Kelly, D. Uzzi, B. Gluck, A. Dean, G. Fernicola re Bring-down due diligence	CPH 0520973

Exhibit		Date	Description	Bates
MS	611	03/23/1998	Memo from J. Tyree, J. Groeller, S. Boone to R. Kersh, D. Fannin, J. Kelly, D. Uzzi, B. Gluck, A. Dean, G. Fernicola re Sunbeam Bring-down due diligence	CPH 1257351
MS	615	12/31/1998	MacAndrews & Forbes Detail General Ledger for Periods 01/98 - 12/31/1998	CPH 2011835-2011836
MS	617	07/27/1998	Memo from D. Fannin to Skadden Arps Team, Arthur Andersen re March 18, 1998 Conference Call	CPH 1048413-1048415
MS	628	11/19/2004	CPH Written Response re MAFCO Credit Balance and Related Correspondence	
MS	676	00/00/1998	SEC Form 144, Notice of Proposed Sale of Securities Pursuant to Rule 144 Under the Securities Act of 1933 for The Coleman Company	
MS	683	02/00/1998	Coleman Daily and Weekly Volume for the Period 2/2/1998-2/27/1998	
MS	700	09/23/2003	Coleman (Parent) Holdings Inc.'s Supplemental Response to Interrogatory Number 5 of Morgan Stanley & Co. Incorporated's First Set of Interrogatories	
MS	702	12/24/2004	Coleman (Parent) Holdings Inc.'s Supplemental Response to Interrogatory No. 4 and No. 6 of Morgan Stanley & Co., Inc.'s Second Set of Interrogatories	
MS	703	03/01/2004	Coleman (Parent) Holdings Inc.'s Second Supplemental Response and Objections to Defendant Morgan Stanley & Co., Inc.'s Third Set of Interrogatories	
MS	704	02/12/2004	Coleman (Parent) Holdings Inc.'s Amended Response to Interrogatory No. 1 of Morgan Stanley & Co., Inc.'s Third Set of Interrogatories	
MS	710	11/24/2004	Coleman (Parent) Holdings Inc.'s Responses and Objections to Morgan Stanley & Co., Inc.'s Fifth Set of Interrogatories	
MS	719	03/11/1998	Letter from J. Tyree to P. Harlow re MS opinion pursuant to comfort-letter request procedures	CPH 0012526-0012527
MS	724	04/01/1998	Memo from V. Kistler to the Files re Hattiesburg Sales Cutoff Testing (49 North and AMDC)	CPH 0129292-0129296

Exhibit		Date	Description	Bates
MS	725	00/00/1998	Sunbeam Corporation Interviews #2 conducted by Arthur Andersen	CPH 0062489-0062733
MS	727	08/00/2000	Davis Polk & Wardwell Chronology in Response to June 30, 2000 Subpoena Sunbeam Securities Litigation	DPW000001-000002
MS	732	03/20/1998	Memo from R. Porat, Harris, J. Tyree, J. Groeller to R. Kersh, D. Fannin, J. Kelly, D. Uzzi, R. Gluck, A. Dean, G. Fernicola re Bring-down due diligence with marginalia	CPH 0520973-0520974
MS	733	03/23/1998	Memo from J. Tyree, J. Groeller, S. Boone to R. Kersh, D. Fannin, J. Kelly, D. Uzzi, B. Gluck, A. Dean, G. Fernicola re Sunbeam Bring-down due diligence	CPH 1257351
MS	735	08/04/1997	Memo from R. Goudis to D. Uzzi (cc R. Kersh) re 1998 Operating Plan Goals	CPH 0322353-0322354
MS	736	03/11/1998	Fax from T. Chang to D. MacDonald including Project Laser Financial Statements, Projections and Proformas	CPH 0284977-0285008
MS	737	03/18/1998	Sunbeam Sales Forecast, Jan. & Feb. Consolidated Net Sales Actual, March Net Sales through Mar. 17,1998 with marginalia	MSC 0028423
MS	738	03/26/1998	Sunbeam Sales Forecast, Jan. & Feb. Consolidated Net Sales Actual, March Net Sales through Mar. 17,1998 with marginalia faxed to Arthur Andersen	CPH 0038717
MS	741	09/05/1997	Engagement Letter from W. Strong to A. Dunlap	SB 237825-237830
MS	749	03/05/1998	Project Laser: Chronology of Events (Analyzing Project Laser Chonology.doc)	MSC 0033255-0033263
MS	752	02/23/1998	Project Laser: Summary Financial Information Request List for Camper Company & Due Diligence (laser-due diligence.doc)	MSC 0031791-0031799
MS	754	01/24/1998	Memo from D. Pastrana to The Files re Review of Significant sales transactions near year-end	CPH 1192163-1192164
MS	755	03/05/1998	Sunbeam P&L, Actuals Comparison Jan. and Feb. 1998	CPH 0013023-0013027
MS	756	03/01/1998	Sunbeam P&L Variations	CPH 1056006-1056010

Exhibit		*Date*	*Description*	*Bates*
MS	760	04/02/1998	Memo from B. Holman to D. Pastrana re Aurora Shipping Cut-Off and Bill and Hold Inventory	CPH 0129271-0129275
MS	762	03/21/1998	Email from L. Bornstein to W. Biese re Sunbeam	CPH 0041649
MS	763	03/24/1998	Email from D. Pastrana to L. Bornstein re Cutoff testing with attached cutoff test.doc	CPH 0021362; CPH 0015109-0015113
MS	764	03/19/1998	Draft insert to Offering Memorandum of Sunbeam Press Release with marginalia	CPH 0039327; CPH 0038707
MS	765	07/02/1998	Memo from L. Bornstein to The Files re Due Diligence call with Morgan Stanley	CPH 0021365-0021368
MS	769	03/20/1998	Memo from W. Strong, A. Savarie, R. Kitts, J. Stynes, A. Fuchs, G. Yoo, J. Webber, T. Chang, L. Radii, B. Smith, M. Hart, R. Gilbert, T. Burchill, I. Seth, R. Porat, W. Harris, J. Woodsworth, S. Prasad, A. Conway, J. Dormer, W. Wright, J. Tyree, J. Groeller, B. Derito, S. Boone, C. Whelan, J. Kunreuther, J. Foley, K. Eltrich to The Leveraged Finance Committee re Sunbeam Corp. - $2.0 Billion Senior Secured Credit Facilities with marginalia	MSC 0059244-0059266
MS	769 A	03/20/1998	Memo from W. Strong, A. Savarie, R. Kitts, J. Stynes, A. Fuchs, G. Yoo, J. Webber, T. Chang, L. Radii, B. Smith, M. Hart, R. Gilbert, T. Burchill, I. Seth, R. Porat, W. Harris, J. Woodsworth, S. Prasad, A. Conway, J. Dormer, W. Wright, J. Tyree, J. Groeller, B. Derito, S. Boone, C. Whelan, J. Kunreuther, J. Foley, K. Eltrich to The Leveraged Finance Committee re Sunbeam Corp. - $2.0 Billion Senior Secured Credit Facilities with marginalia	MSC 0025830-0025886
MS	772	06/01/1998	Sunbeam $1,700,000,000 Senior Secured Credit Facilities Info Memo	CPH 1346133-1346250
MS	774	02/09/1998	Project Laser Potential Acquirors	MSC 0044556-0044573
MS	775	10/06/2003	Morgan Stanley Senior Funding, Inc.'s Responses and Objections to Defendant Coleman (Parent) Holding Inc.'s First Set of Interrogatories; Morgan Stanley Senior Funding, Inc. vs. MacAndrews & Forbes Holdings, Inc., and Coleman (Parent) Holdings, Inc.; Case	
MS	777	03/19/1998	Fax from H. Stack to T. Freed requesting documents for due diligence review.	CPH 0632981

Exhibit		Date	Description	Bates
MS	779	03/17/1998	Memo from J. Tyree, J. Groeller to B. Gluck, A. Dean, G. Fernicola re Bring-Down Due Diligence	CPH 1257359
MS	782	02/06/1998	Memo from A. Amorison to G. Yoo re Project Laser Due Diligence Review	CPH 0639174-0639182
MS	787	03/05/1998	Fax from C. Whelan to K. Eltrich with attached Coleman Co. Due Diligence Review Agenda	MSC 0036633-0036634
MS	790	11/13/1997	Press Release: "Coleman Reports Third Quarter Results"	MSC 0054921-0054925
MS	795	03/20/1998	Memo from R. Porat, B. Harris, J. Tyree, J. Groeller to R. Kersh, D. Fannin, J. Kelly, D. Uzzi, B. Gluck, A. Dean, G. Fernicola re Bring-down due diligence	MSC 0028209
MS	803	03/25/1998	R. Goudis "Sunbeam Corporation Announces Successful Private Placement of $750 Million of Convertible Debentures"	CPH 0485991-0485993
MS	804	03/01/1998	Skadden Arps Time Records for Sunbeam Corporation March 1, 1998 - March 31, 1998	SASMF 19645-19687
MS	805	04/27/1998	Skadden Arps Invoice 732137, Professional Services rendered through April 17, 1998	SASMF 19691-19692
MS	807	04/05/1998	Sunbeam Corporation Closing Analysis Profit and Loss Statement, Period: February 1998	CPH 1210285-1210317
MS	808	02/16/1998	Sunbeam Corporation Closing Analysis Profit and Loss Statement, Period: January 1998	CPH 1211211-1211233
MS	809	12/24/2004	Coleman (Parent) Holdings Inc.'s Written Statement Regarding Due Diligence Performed by Ernst & Young LLP with attached correspondence between T. Clare and M. Brody re extent of stipulation	
MS	813	03/30/1998	Compilation of book and accounting values ascribed to CPH's Sunbeam investment, MacAndrews & Forbes GL Accounting Distribution (Produced by CPH 2/24/2005)	CPH 2012198-2012218
MS	815	04/27/2000	MAFCO Holdings, Inc. Consolidated Financial Statements for the Year Ended December 31, 1999 with Report of Independent Auditors (produced by CPH 2/24/2005)	CPH2012307-2012368
MS	817	03/23/1998	Form 10-K for the Fiscal Year Ended December 31, 1997 for CLN Holdings Inc.	CPH 0061885-0061976

Exhibit		Date	Description	Bates
MS	831	01/00/1998	Compilation of MAFCO General Ledger Report from January, 1998 through year end 2000 (produced by CPH 2/28/2005)	CPH 2012468-2012474
MS	832	12/31/1998	MAFCO Holdings worksheets re Estimated Fair Value Calculations 12/31/1998 and 12/31/1999 (produced by CPH 2/28/2005)	CPH 2012475-2012478
MS	833	09/30/1998	Sunbeam Impairment Worksheet (produced by CPH 2/28/2005)	CPH 2012487-2012490
MS	841	03/20/2000	MAFCO Holdings Estimated Fair Value Calculation (produced by CPH 2/28/2005)	CPH 2012481-2012482
MS	844	03/20/1997	Fifth Amended and Restated Mafco Security Agreement Dated as of March 30, 1997 from MAFCO Holdings Inc. to Citibank, N.A. as Collateral Agent	CPH 2006869-2006896
MS	853	04/29/1999	Letter from L. Winoker to Corporate Finance and Negotiations Department re Mafco Holdings Inc. (produced by CPH 3/8/2005)	CPH 2012517-2012518
MS	860	12/28/1997	Sunbeam Cutoff Testing	CPH 0125693-0125698
MS	861	05/08/1998	Amendment No. 1 to Credit Agreement (execution copy)	MSC 0020157-0020167
MS	862	01/20/2005	Coleman (Parent) Holdings Inc.'s Second Amended Supplemental Response to Morgan Stanley & Co. Inc.'s Fifth Set of Interrogatories	
MS	866	01/04/1993	Sunbeam Corp Stock Price Data January 1993-February 2001	
MS	915	02/23/1998	Sunbeam Long Range Strategic Plan with Marginalia	CPH 1412552-1412570
MS	916	03/10/1998	Memo from W. Strong, A. Savarie, R. Kitts, J. Stynes, A. Fuchs, G. Yoo, J Webber, T. Chang, L. Rafii, W. Wright, J. Tyree, J. Groeller, B. Derito, S. Boone, R. Porat, W. Harris, J. Woodworth, S. Prasad, C. Whelan, J. Kunreuther, A. Conway, J. Dormer to the Equity Commitment Committee re Sunbeam Corp -- Rule 144A Zero Coupon Convertible Offering ($500MM)	MSC 0000513-0000541
MS	923	08/25/1998	Cox News Service, Sunbeam Redesigns Comeback	

Exhibit		Date	Description	Bates
MS	928	00/00/1997	Arthur Andersen - Sunbeam Corporation Additional Procedures Relating to 1996 and 1997 Restatement - File 2A Interview Memoranda	
MS	929	12/24/2004	CPH Written Statement Regarding Due Diligence by Ernst & Young	
MS	938	03/14/2005	03/14/2005 Hearing Exhibit 12 - A. Riel Certification	
MS	996	04/06/2005	CPH Opening Materials: 8 pictures (toy table); CPH Powerpoint; underlined Exhibit A; 4 pages of IOU and invoices	
MS	997		Draft of Plaintiff's outline for direct examination of Emery	
MS	998		Coleman Company Financial Documents with marginalia	CLN 43510-43515
MS	999		Coleman Company Financial Document with marginalia	CPH 0143250
MS	1001		Coleman Company Financial Document with marginalia	CLN 53801-53802
MS	1004		Coleman Company Financial Documents with marginalia	CPH 1385992-13859994
MS	1010	00/00/1996	Albert J. Dunlap with Bob Andelman, "Mean Business; How to Save Bad Companies and Make Good Companies Great"	
MS	1038	12/16/1999	PR Newswire, Sunbeam Reports Second and Third Quarter 1998 Results (Dec. 16, 1998)	
MS	1047	08/24/1998	Sunbeam Outlines New Strategy, Organizational Structure (8/24/1998)	
MS	1053	12/22/1998	Sunbeam 10-Q Second Quarter for period ending 6/30/1998	CPH 0626112-145

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING
INDEX OF MORGAN STANLEY PROFFERS FILED ON MAY 10, 2005

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby files the Index of Morgan Stanley Proffers Filed on May 9, 2005, which was provided to the Court on May 9, 2005.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 10th day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
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BY: _____

Counsel for Morgan Stanley & Co. Incorporated

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Index of Morgan Stanley Proffers filed on May 10, 2005
Table of Contents

NAME	TAB NUMBER
Dean, Alan	1
Fannin, David	2
Gittis, Howard	3
Hart, Michael	4
Lurie, James	5
Perelman, Ronald	6
Petrick, Michael	7
Smith, Richard Bram	8
Stack, Heather	9
Tyree, John	10
Morgan Stanley Confidential Exhibits	11
Morgan Stanley Exhibits	12
Revised Proffer re Hedging	13

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING ALAN DEAN

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: Alan Dean.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 10th day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
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BY: _____

Counsel for Morgan Stanley & Co. Incorporated

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Defendant's Offer of Proof re: Alan Dean

If called to testify, Alan Dean would state under oath as follows:

Mr. Dean has been a partner in the Corporate Department at the law firm Davis Polk & Wardwell LLP ("Davis Polk") in New York since 1986. His area of expertise is capital markets transactions and general corporate advice. Davis Polk and Mr. Dean represented Morgan Stanley & Co. Incorporated ("Morgan Stanley") as initial purchaser of Sunbeam Corporation's ("Sunbeam") debenture offering in 1998. Mr. Dean has personal knowledge of the facts in this proffer.

Mr. Dean, and the Davis Polk attorneys he supervised, assisted Morgan Stanley in reviewing the offering memorandum (the document used to market the Sunbeam debentures to institutional investors), assisted Morgan Stanley in conducting due diligence at Sunbeam, Coleman Company, Inc., First Alert and Signature Brands, and drafted legal documents. As part of the due diligence effort, Mr. Dean, among other things, participated in telephone conferences with a number of employees at Sunbeam and participated in a due diligence meeting at Sunbeam's headquarters in Florida.

On March 18, 1998, Mr. Dean learned of the possibility that Sunbeam's net sales for the first quarter of 1998 might not meet analysts' expectations. Prior to that time, Mr. Dean did not have any knowledge that Sunbeam's net sales might not meet analysts' expectations for the first quarter of 1998.

That day, Mr. Dean participated in a conference call with representatives from Morgan Stanley, Sunbeam and its outside law firm, Skadden Arps Slate Meagher & Flom LLP ("Skadden"), to discuss Sunbeam's sales performance for the first quarter. During this call, Mr. Dean suggested that Sunbeam issue a press release announcing that its net sales for the first

quarter might not meet analysts' expectations. Morgan Stanley also recommended that Sunbeam issue such a press release. After discussions with Morgan Stanley, Mr. Dean believed that any potential shortfall in Sunbeam's net sales, compared to analysts' expectations, should be disclosed to investors.

Sunbeam and its counsel both disagreed with Mr. Dean's suggestion. They argued that it was not necessary to issue a press release because Sunbeam would meet analysts' expectations for the first quarter and that it would be unusual to announce intra-quarter results within a particular quarter. Although Sunbeam was resistant to issuing a press release, Sunbeam assured Morgan Stanley and Davis Polk that it would meet analysts' expectations for first quarter net sales. Mr. Dean later learned that Sunbeam did issue a press release on March 19 announcing that its net sales for the first quarter might not meet analysts' expectations. Davis Polk did not draft this press release.

Mr. Dean was not at Global Financial Press on March 19, 1998 for the printing of the offering memorandum. However, two other Davis Polk lawyers, James Lurie and Heather Stack were present at the printer on March 19. As best as he can recall, Mr. Dean did not receive a phone call from Mr. Lurie or Ms. Stack regarding any doubt or concern expressed by Sunbeam's independent outside auditor, Arthur Andersen, concerning Sunbeam's ability to exceed its net sales from the first quarter of 1997.

Mr. Dean was surprised by Sunbeam's April 3, 1998 press release. Based on all of the disclosures regarding Sunbeam that subsequently occurred, Mr. Dean now believes that Davis Polk and Morgan Stanley were not provided accurate information by Sunbeam.

Prior to the close of Sunbeam's debenture offering on March 25, 1998, Mr. Dean did not have any information that Sunbeam was engaged in fraudulent activity, nor did he have any reason to believe anyone at Morgan Stanley had such information.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING RICHARD BRAM SMITH

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: Richard Bram Smith.

Morgan Stanley designates the following portions of the sworn deposition of third-party witness Richard Bram Smith:

2/24/04 Deposition:

(1) **[5:18-6:7]**

(2) **[6:13-7:5]**

(3) **[19:5-19:14]**

(4) **[20:16-20:20]**

(5) **[20:23-21:25]**

(6) **[22:4-22:10]**

(7) **[22:18-23:4]**

(8) **[24:9-25:4]**

(9) **[52:8-53:15]**

(10) **[83:20-86:9]**

(11) **[107:17-107:22]**

(12) **[108:8-108:15]**

(13) **[113:18-114:3]**

(14) **[119:15-119:23]**

(15) **[206:5-206:11]**

(16) **[207:12-207:19]**

(17) **[208:3-208:15]**

(18) **[211:10-211:18]**

(19) **[213:2-213:8]**

(20) **[213:14-214:6]**

(21) **[214:13-215:12]**

(22) **[215:23-216:7]**

(23) **[217:1-217:5]**

(24) **[217:10-217:15]**

(25) **[219:5-219:11]**

(26) **[225:9-225:13]**

(27) **[225:18-226:6]**

(28) **[236:1-237:2]**

(29) **[252:19-254:4]**

(30) **[257:11-257:15]**

(31) **[258:19-258:21]**

(32) **[259:4-259:22]**

(33) **[262:19-262:23]**

(34) **[284:8-284:17]**

(35) **[294:19-295:6]**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 10th day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
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BY: _____

Counsel for Morgan Stanley & Co. Incorporated

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Defendant's Offer of Proof re: Richard Bram Smith

From 1996 to 2002, Mr. Smith was a Managing Director of Morgan Stanley & Co., Incorporated ("Morgan Stanley") and was President of Morgan Stanley Senior Funding ("MSSF"). He is no longer employed by Morgan Stanley or MSSF. Morgan Stanley designates the following portions of the sworn deposition of third-party witness Richard Bram Smith:

2/24/04 Deposition:

(1) **[5:18-6:7]**

(2) **[6:13-7:5]**

(3) **[19:5-19:14]**

(4) **[20:16-20:20]**

(5) **[20:23-21:25]**

(6) **[22:4-22:10]**

(7) **[22:18-23:4]**

(8) **[24:9-25:4]**

(9) **[52:8-53:15]**

(10) **[83:20-86:9]**

(11) **[107:17-107:22]**

(12) **[108:8-108:15]**

(13) **[113:18-114:3]**

(14) **[119:15-119:23]**

(15) **[206:5-206:11]**

(16) **[207:12-207:19]**

(17) **[208:3-208:15]**

(18) **[211:10-211:18]**

(19) **[213:2-213:8]**

(20) **[213:14-214:6]**

(21) **[214:13-215:12]**

(22) **[215:23-216:7]**

(23) **[217:1-217:5]**

(24) **[217:10-217:15]**

(25) **[219:5-219:11]**

(26) **[225:9-225:13]**

(27) **[225:18-226:6]**

(28) **[236:1-237:2]**

(29) **[252:19-254:4]**

(30) **[257:11-257:15]**

(31) **[258:19-258:21]**

(32) **[259:4-259:22]**

(33) **[262:19-262:23]**

(34) **[284:8-284:17]**

(35) **[294:19-295:6]**

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING DAVID C. FANNIN

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: David C. Fannin.

Morgan Stanley introduces the following Trial Exhibit, if not already admitted into evidence:

i. **MS 307** **Confidential-Filed Under Seal**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 10th day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
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BY: _____

Counsel for Morgan Stanley & Co. Incorporated

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West Palm Beach, FL 33401

Defendant's Offer of Proof Re: David C. Fannin

If called to testify, David C. Fannin would state under oath as follows:

Mr. Fannin is the former General Counsel of Sunbeam Corporation ("Sunbeam"). He served in that capacity from January 1994 until February or March 1998, at which time he became the Chief Legal Officer of Sunbeam. Mr. Fannin resigned from Sunbeam in August, 1998. Mr. Fannin has personal knowledge of the facts set forth in this proffer.

Mr. Fannin will identify Exhibit MS 307 as a true and correct copy of a draft of a Confidentiality Agreement dated February 23, 1998 between Sunbeam and Coleman Company, Inc. ("Coleman"). Mr. Fannin believes he signed a final version of the Confidentiality Agreement that was in substantially the same form represented in MS 307. The agreement was drafted by Coleman and provided to Mr. Fannin for comment and signature. The agreement was a predicate to a due diligence meeting of the same date between Sunbeam and Coleman. Although Mr. Fannin does not have a clear recollection of having signed the document, he believes that he did and he doubts that he would have allowed Sunbeam to reveal confidential information to Coleman in the February 23, 1998 due diligence meeting in the absence of such an agreement. He believed at the time and continues to believe today that these types of agreements are enforceable under Florida and New York law, including the non-reliance provision of the agreement.

On March 18, 1998, Mr. Fannin attended a "road show" presentation at the St. Regis Hotel in New York for the purposes of promoting Sunbeam's debenture offering to institutional investors. The debenture offering was intended to raise funds to be used towards the purchase of Coleman Parent Holding Co. ("CPH") and other companies

Sunbeam sought to acquire. Attending the "road show" meeting were James Stynes and Ruth Porat of Morgan Stanley & Co. Incorporated ("Morgan Stanley"). Mr. Stynes and Ms. Porat asked Mr. Fannin whether sales for the first quarter of 1998 were "well short" of Sunbeam's plan. Mr. Fannin did not know the answer to that question and agreed to call Robert Gluck, Sunbeam's Vice-President and Controller. Mr. Fannin could not reach Gluck, so he left the St. Regis and went to the offices of Skadden Arps ("Skadden"), Sunbeam's outside counsel, to see what he could learn.

Later in the day on March 18, 1998, Mr. Fannin participated in a conference call among representatives of Sunbeam management, Skadden, Morgan Stanley and Davis Polk & Wardwell ("Davis Polk") (Morgan Stanley's counsel). During the call Ms. Porat asked Donald Uzzi, Sunbeam's Chief Operating Officer, whether Sunbeam would meet analysts' sales expectations for the first quarter of 1998. Although Mr. Uzzi expressed confidence that Sunbeam would meet analysts' expectations, Ms. Porat pressed him for a guarantee. When Mr. Uzzi was unable to provide such a guarantee, Davis Polk, on behalf of Morgan Stanley, and Morgan Stanley insisted there be a disclosure of the fact that Sunbeam's first quarter sales might fall short of analysts' expectations. When Mr. Uzzi was asked by Blaine V. Fogg, a partner of Skadden, whether Sunbeam would at least meet last year's sales numbers, without hesitation Mr. Uzzi replied that Sunbeam would do so.

Later in the day on March 18, 1998, there was another conference call in which Al Dunlap, Russell Kersh and Mr. Fannin of Sunbeam, Mr. Fogg, and another partner, Richard Easton, of Skadden, and Mr. Strong of Morgan Stanley, participated. The purpose of this call was to convince Mr. Dunlap that Sunbeam should issue the press

release. Mr. Strong was forceful in insisting that the press release be issued, notwithstanding strong resistance from Mr. Dunlap. Mr. Dunlap ultimately authorized the issuance of the press release.

As a result of Morgan Stanley and Davis Polk's insistence on a disclosure of the fact that Sunbeam's first quarter sales might fall short of analysts' expectations, Skadden drafted the Sunbeam press release that was issued on March 19, 1998. Based upon the assurances by Mr. Uzzi in response to Mr. Fogg's question, referred to above, Skadden suggested the insertion of the following words in the press release: "but net sales are expected to exceed 1997 first quarter net sales of $253.4 million."

On March 19, 1998, during a road show presentation in Boston, Mr. Dunlap told an analyst that the lawyers and investment bankers made him issue the press release and made it clear he thought the press release was unnecessary.

Mr. Fannin has no reason to believe Morgan Stanley had any knowledge of any fraud or other misconduct by Sunbeam or Arthur Andersen at any time prior to approximately June 15, 2005. Morgan Stanley was thorough in the execution of its responsibilities on behalf of Sunbeam, asked many questions and had multiple employees in the Sunbeam offices doing due diligence in connection with Sunbeam's debenture offering. Mr. Fannin is unaware of any instance in which Morgan Stanley failed to do something it should have done as a result of pressure placed on it by Mr. Dunlap.

MS 307

(CONFIDENTIAL AND FILED UNDER SEAL)

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING HOWARD GITTIS

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby files the attached Defendant's Offer of Proof re: Howard Gittis.

Morgan Stanley designates the following portions of the sworn deposition of third-party witness Howard Gittis:

11/19/04 Deposition:

(1) **[6:16-6:19]**

(2) **[6:25-7:2]**

(3) **[9:1-9:17]**

(4) **[12:17-12:25]**

(5) **[13:23-14:2]**

(6) **[15:2-15:8]**

(7) **[15:16-16:3]**

(8) **[16:6-18:23]**

(9) **[19:14-20:7]**

(10) **[20:11-20:13]**

(11) **[22:22-23:15]**

(12) **[24:18-24:21]**

(13) **[25:4-25:12]**

(14) **[25:16-27:16]**

(15) **[28:3-28:8]**

(16) **[28:19-28:25]**

(17) **[30:15-30:18]**

(18) **[30:24-31:13]**

(19) **[32:1-32:16]**

(20) **[33:10-33:19]**

(21) **[35:20-36:1]**

(22) **[46:11-46:15]**

(23) **[47:13-48:8]**

(24) **[50:21-50:25]**

(25) **[51:2-51:4]**

(26) **[51:15-51:24]**

(27) **[52:2-52:6]**

(28) **[52:9-52:24]**

(29) **[55:23-56:6]**

(30) **[56:8-56:25]**

(31) **[57:11-58:12]**

(32) **[60:17-60:21]**

(33) **[60:24-60:25]**

(34) **[64:19-64:25]**

(35) **[68:6-69:17]**

(36) **[74:23-75:20]**

(37) **[76:9-76:18]**

(38) **[78:3-78:16]**

(39) **[81:3-83:20]**

(40) **[85:20-86:16]**

(41) **[89:8-89:15]**

(42) **[97:20-98:7]**

(43) **[100:9-100:24]**

(44) **[101:21-102:14]**

(45) **[104:6-104:15]**

(46) **[105:5-105:10]**

(47) **[110:4-111:2]**

(48) **[112:6-112:20]**

(49) **[115:1-115:7]**

(50) **[116:2-116:14]**

(51) **[121:20-121:23]**

(52) **[123:21-124:1]**

(53) **[124:23-125:16]**

(54) **[125:25-126:6]**

(55) **[126:17-126:21]**

(56) **[127:20-127:22]**

(57) **[127:25-128:4]**

(58) **[128:11-128:14]**

(59) **[131:21-132:1]**

(60) **[134:4-134:14]**

(61) **[140:8-140:21]**

(62) **[158:19-159:8]**

(63) **[163:1-163:6]**

(64) **[163:10-163:17]**

(65) **[171:12-171:15]**

(66) **[174:4-174:17]**

(67) **[179:2-179:7]**

(68) **[187:2-187:7]**

(69) **[189:11-189:17]**

(70) **[190:1-190:12]**

(71) **[195:2-195:14]**

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence:

i. **MS 58/MS 58 (Deposition Exhibit Number/Trial Exhibit Number)**

ii. **MS 84/MS 84**

iii. **MS 85/MS 85**

iv. **MS 93/MS 93**

v. **MS 123/MS 123** **Confidential – Filed Under Seal**

vi. **MS 172/MS 172**

vii. **MS 278/MS 278**

viii. **MS 337/MS 337** **Confidential – Filed Under Seal**

ix. **MS 423/MS 423**

x. **MS 424/MS 424**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 10th day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
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JENNER & BLOCK, LLC
c/o MAFCO Holdings, Inc.
777 S. Flagler Drive
Suite 1200 – West Tower
West Palm Beach, FL 33401

Defendant's Offer of Proof re: Howard Gittis

Mr. Gittis is the Vice-Chairman and Chief Administrative Officer of MacAndrews & Forbes Holdings Inc. Morgan Stanley designates the following portions of the sworn deposition of third-party witness Howard Gittis:

11/19/04 Deposition:

(1) **[6:16-6:19]**

(2) **[6:25-7:2]**

(3) **[9:1-9:17]**

(4) **[12:17-12:25]**

(5) **[13:23-14:2]**

(6) **[15:2-15:8]**

(7) **[15:16-16:3]**

(8) **[16:6-18:23]**

(9) **[19:14-20:7]**

(10) **[20:11-20:13]**

(11) **[22:22-23:15]**

(12) **[24:18-24:21]**

(13) **[25:4-25:12]**

(14) **[25:16-27:16]**

(15) **[28:3-28:8]**

(16) **[28:19-28:25]**

(17) **[30:15-30:18]**

(18) **[30:24-31:13]**

(19) **[32:1-32:16]**

(20) **[33:10-33:19]**

(21) **[35:20-36:1]**

(22) **[46:11-46:15]**

(23) **[47:13-48:8]**

(24) **[50:21-50:25]**

(25) **[51:2-51:4]**

(26) **[51:15-51:24]**

(27) **[52:2-52:6]**

(28) **[52:9-52:24]**

(29) **[55:23-56:6, 56:8-56:25]**

(30) **[57:11-58:12]**

(31) **[60:17-60:21, 60:24-60:25]**

(32) **[64:19-64:25]**

(33) **[68:6-69:17]**

(34) **[74:23-75:20]**

(35) **[76:9-76:18]**

(36) **[78:3-78:16]**

(37) **[81:3-83:20]**

(38) **[85:20-86:16]**

(39) **[89:8-89:15]**

(40) **[97:20-98:7]**

(41) **[100:9-100:24]**

(42) **[101:21-102:14]**

(43) **[104:6-104:15]**

(44) **[105:5-105:10]**

(45) **[110:4-111:2]**

(46) **[112:6-112:20]**

(47) **[115:1-115:7]**

(48) **[116:2-116:14]**

(49) **[121:20-121:23]**

(50) **[123:21-124:1]**

(51) **[124:23-125:16]**

(52) **[125:25-126:6]**

(53) **[126:17-126:21]**

(54) **[127:20-127:22]**

(55) **[127:25-128:4]**

(56) **[128:11-128:14]**

(57) **[131:21-132:1]**

(58) **[134:4-134:14]**

(59) **[140:8-140:21]**

(60) **[158:19-159:8]**

(61) **[163:1-163:6]**

(62) **[163:10-163:17]**

(63) **[171:12-171:15]**

(64) **[174:4-174:17]**

(65) **[179:2-179:7]**

(66) **[187:2-187:7]**

(67) **[189:11-189:17]**

(68) **[190:1-190:12]**

(69) **[195:2-195:14]**

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence:

i. **MS 58/MS 58 (Deposition Exhibit Number/Trial Exhibit Number)**

ii. **MS 84/MS 84**

iii. **MS 85/MS 85**

iv. **MS 93/MS 93**

v. **MS 123** **Confidential- Filed Under Seal**

vi. **MS 172/MS 172**

vii. **MS 278/MS 278**

viii. **MS 337/MS 337** **Confidential- Filed Under Seal**

ix. **MS 423/MS 423**

x. **MS 424/MS 424**

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING HEATHER M. STACK

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: Heather M. Stack.

Morgan Stanley designates the following portions of the sworn deposition of third-party witness Heather M. Stack:

5/25/04 Deposition:

(1) **[24:7-24:16]**

(2) **[37:21-39:10]**

(3) **[39:25-41:8]**

(4) **[42:11-42:21]**

(5) **[91:15-91:24]**

(6) **[99:12-99:17]**

(7) **[99:24-100:11]**

(8) **[103:13-103:25]**

(9) **[108:25-109:21]**

(10) **[115:8-115:25]**

(11) **[116:5-116:10]**

(12) **[135:21-136:5]**

(13) **[136:21-137:9]**

(14) **[147:13-148:17]**

(15) **[149:5-149:7]**

(16) **[149:14-149:16]**

(17) **[150:12-152:5]**

(18) **[171:16-172:4]**

(19) **[173:4-173:14]**

(20) **[185:13-185:18]**

(21) **[188:15-189:21]**

(22) **[189:24-190:8]**

(23) **[191:13-192:7]**

(24) **[192:15-193:14]**

(25) **[193:17-193:22]**

(26) **[194:4-194:22]**

(27) **[212:23-213:19]**

(28) **[222:16-223:18]**

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence:

i. **CPH 24/CPH 21 (Deposition Exhibit Number / Trial Exhibit Number)**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 10 day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
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BY: _____

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Michael Brody, Esq.
JENNER & BLOCK, LLC
c/o MAFCO Holdings, Inc.
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Suite 1200 – West Tower
West Palm Beach, FL 33401

Defendant's Offer of Proof re: Heather Stack

Ms. Stack was an associate in the Corporate department at the law firm Davis Polk & Wardwell LLP ("Davis Polk") in New York from September 1997 until August 2000. She was part of the Davis Polk team that represented Morgan Stanley as underwriter of Sunbeam Corporation's convertible debenture offering in the spring of 1998. Morgan Stanley designates the following portions of the sworn deposition of third-party witness Heather M. Stack:

5/25/04 Deposition:

(1) **[24:7-24:16]**

(2) **[37:21-39:10]**

(3) **[39:25-41:8]**

(4) **[42:11-42:21]**

(5) **[91:15-91:24]**

(6) **[99:12-99:17]**

(7) **[99:24-100:11]**

(8) **[103:13-103:25]**

(9) **[108:25-109:21]**

(10) **[115:8-115:25]**

(11) **[116:5-116:10]**

(12) **[135:21-136:5]**

(13) **[136:21-137:9]**

(14) **[147:13-148:17]**

(15) **[149:5-149:7]**

(16) **[149:14-149:16]**

(17) **[150:12-152:5]**

(18) **[171:16-172:4]**

(19) **[173:4-173:14]**

(20) **[185:13-185:18]**

(21) **[188:15-189:21]**

(22) **[189:24-190:8]**

(23) **[191:13-192:7]**

(24) **[192:15-193:14]**

(25) **[193:17-193:22]**

(26) **[194:4-194:22]**

(27) **[212:23-213:19]**

(28) **[222:16-223:18]**

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence:

i. **CPH 24/CPH 21 (Deposition Exhibit Number / Trial Exhibit Number)**

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING JAMES LURIE

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: James Lurie.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 10 day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
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BY: _____

Counsel for Morgan Stanley & Co. Incorporated

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Jerold S. Solovy, Esq.
Michael Brody, Esq.
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c/o MAFCO Holdings, Inc.
777 S. Flagler Drive
Suite 1200 – West Tower
West Palm Beach, FL 33401

Defendant's Offer of Proof re: James Lurie

If called to testify, James Lurie would state as follows under oath:

From 1979 through April 1998, Mr. Lurie was an attorney in the Corporate Department at the law firm Davis Polk & Wardwell LLP ("Davis Polk") in New York. In March of 1998, Mr. Lurie was a Senior Attorney. Davis Polk represented Morgan Stanley & Co. Incorporated ("Morgan Stanley") as underwriter of Sunbeam Corporation's ("Sunbeam") debenture offering. As part of the Davis Polk team representing Morgan Stanley, Mr. Lurie, among other things, reviewed the offering memorandum (the document used to sell Sunbeam debentures to institutional investors), participated in a variety of meetings and conference calls, and assisted Morgan Stanley in conducting due diligence on Sunbeam. Documents that Davis Polk reviewed as part of the due diligence effort were provided to Davis Polk by Sunbeam or its outside counsel Skadden Arps Slate Meagher & Flom ("Skadden"), which represented Sunbeam in the transaction. Mr. Lurie has personal knowledge of the facts in this proffer.

On or about March 18, 1998, Mr. Lurie learned of the possibility that Sunbeam's net sales for the first quarter of 1998 might not meet analysts' expectations. This was the first time that Mr. Lurie heard anything of a potential sales shortfall. That day, he participated in a conference call to discuss whether Sunbeam should issue a press release announcing this potential shortfall. During this call, Sunbeam reviewed its net sales for January, February and the first part of March, and its forecasted sales for the rest of the quarter.

On the evening of March 19, Mr. Lurie was at Global Financial Press for the printing of the Sunbeam offering memorandum. Representatives from Arthur Andersen (Sunbeam's independent outside auditor), Skadden, and Morgan Stanley were also at the printer on March 19. Mr. Lurie believes that it was an uneventful and cordial evening at the printers.

He does not believe there was any heated discussion. Nor does he recall anyone from Arthur Andersen expressing any skepticism about Sunbeam's ability to exceed its net sales from the first quarter of 1997. If anyone at Arthur Andersen voiced such skepticism, Mr. Lurie would have contacted Mr. Dean, the Davis Polk partner on this engagement, to determine how Davis Polk and Morgan Stanley should proceed.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING JOHN TYREE

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: John Tyree.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 10 day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
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Counsel for Morgan Stanley & Co. Incorporated

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Defendant's Offer of Proof re: John Tyree

If called to testify, John Tyree would state under oath as follows:

Mr. Tyree is currently employed by Morgan Stanley & Co. Incorporated ("Morgan Stanley") in the Global Capital Markets Group. After receiving his MBA from Dartmouth's Tuck School of Business in 1994, Mr. Tyree began training and employment in Morgan Stanley's Investment Banking Division in New York City. From approximately 1996 to 2000, Mr. Tyree worked in the Client Services Group ("CSG"), first as an associate, and later as a vice president. Mr. Tyree has personal knowledge of the facts set forth in this proffer.

Morgan Stanley advises clients involved in financing transactions, including issuance of stocks, high-yield bonds, and bank loans. CSG focuses on the logistics and execution of the financing portion of transactions, including performing due diligence.

Morgan Stanley provided investment banking services to Sunbeam in connection with the transaction between the Coleman Company, Inc. ("Coleman") and Sunbeam Corporation ("Sunbeam"), including acting as placement agent for the related financing. Mr. Tyree was assigned to work on the Sunbeam debenture offering in early to mid-February 1998, which was designed to provide funding to complete the acquisitions of Coleman, First Alert and Signature Brands. He attended the Sunbeam Board of Directors meeting at which the acquisitions of Coleman, First Alert, and Signature Brands were approved. He helped prepare a presentation given by Morgan Stanley about the financing associated with the acquisitions, market conditions, pricing, and timing.

In the Sunbeam transaction, Mr. Tyree's responsibilities included managing and shepherding Morgan Stanley's due diligence of Sunbeam and making sure that the right people were involved at each step. In Mr. Tyree's experience, the due diligence process is designed to

help the placement agents gain an understanding of the company, its assets, management's strategic plan, risks to that plan, the financial and performance drivers for the company, and the environment in which the company operates. One of the reasons for conducting due diligence on Sunbeam was to satisfy an institutional need to become familiar with, among other things, public statements made by Sunbeam management regarding Sunbeam's financial performance, the viability of Sunbeam's strategy going forward, and the company's size, assets and liabilities. Due diligence, however, is not an audit of the company.

Mr. Tyree and other Morgan Stanley representatives conducted extensive due diligence in connection with the Sunbeam-Coleman transaction. Typically, due diligence is an iterative process which consists of, among other things, a series of phone calls, meetings and interviews with key players in order to learn more about the company. During the diligence process for the Sunbeam debenture offering, Mr. Tyree participated in numerous phone calls and meetings with Sunbeam's management team and Sunbeam's outside advisor Arthur Andersen. He made a trip to Sunbeam headquarters in Florida on March 4, 1998, and does not recall being advised of anything out of the ordinary concerning Sunbeam's performance in the first quarter of 1998. Mr. Tyree recalls that Sunbeam's management agreed with analysts' projections and that Sunbeam's executives were very specific about sales projections meeting expected targets.

On March 12, 1998, Mr. Tyree participated in a series of due diligence calls with the outside auditors of Coleman, Sunbeam, Signature Brands and First Alert. During those calls, no one advised Mr. Tyree that Sunbeam's internal auditors objected to Sunbeam's bill-and-hold transactions. Mr. Tyree does not recall knowing or being advised that Sunbeam participated in extensive bill-and-hold practices beyond that which was included in Sunbeam's 1997 form 10-K.

Mr. Tyree first heard that Sunbeam's first quarter sales were slow on March 18, 1998, during a conversation with Ruth Porat, a more senior Morgan Stanley team member. Upon learning this information, Mr. Tyree and other Morgan Stanley personnel participated in a series of calls to discuss the situation with Sunbeam management and others, including Sunbeam's outside counsel. Mr. Tyree approached these sessions with considerable skepticism. During the calls in which Mr. Tyree participated, Morgan Stanley personnel questioned Sunbeam management thoroughly and at length. Sunbeam addressed Morgan Stanley's concerns about the January and February 1998 sales figures with specific information, explanations, and strong assurances that Sunbeam was on track to meet its targets. In particular, Mr. Tyree recalls discussing a list of potential orders from Sunbeam and receiving assurances from either Al Dunlap or Russ Kersh, Sunbeam's CEO and CFO, respectively, that current sales numbers coupled with potential sales would allow Sunbeam to meet expected first quarter sales. Mr. Dunlap or Mr. Kersh emphasized that the list of potential orders Sunbeam provided to Morgan Stanley represented strong assurances from the salespeople that Sunbeam would meet expected first quarter sales projections. Mr. Dunlap or Mr. Kersh also stressed that Sunbeam would meet its numbers because salespeople typically undershoot on sales projections. Mr. Dunlap was extremely confident in Sunbeam's ability to achieve those sales numbers. In fact, Mr. Tyree recalls Sunbeam management making additional calls to salespeople to get an effective guarantee of those financial results. Mr. Tyree relied on Sunbeam management's judgments. He did not know that the statements made by Sunbeam were untrue.

Mr. Tyree was at Global Financial Press, a financial printer, during the evening of March 19, 1998, when the Sunbeam debenture Offering Memorandum was being finalized. Present with him were representatives from Morgan Stanley's outside counsel, Davis Polk, and

Arthur Andersen, Sunbeam's independent auditor. The Sunbeam management team approved the addition of language describing the March 19 Sunbeam press release in the "Recent Announcements" section of the Offering Memorandum. Mr. Tyree does not recall any conversation or other event at the printer that involved or raised concerns about the Offering Memorandum, or its description of the March 19 press release.

Mr. Tyree does not recall Mr. Bornstein telling him at the printer or otherwise that the statement in Sunbeam's March 19, 1998 press release – that Sunbeam would at least exceed first quarter 1997 sales of $253.4 million – was not credible. Nor does Mr. Tyree recall Mr. Bornstein saying "Just do the math . . . they've done a million dollars in sales the first 70 days of the year and now to do $10 million worth of sales for the next . . . I think it was 11 days . . . I mean, something ridiculous." Mr. Tyree also has no recollection of Mr. Bornstein saying "I've been to every shipping dock domestically, I've been to Hattiesburg, I've been to Neosho, I've been to Mexico City, and I don't think these guys can physically ship this much stuff," or that Mr. Bornstein intended to send Arthur Andersen audit personnel out to every Sunbeam loading dock at the end of the first quarter to make sure that Sunbeam properly cut off its recognition of sales for the quarter. In addition, if such conversations had occurred, Mr. Tyree would have recalled those conversations and addressed whatever concerns were raised.

At no point during the March 12 accounting due diligence call, the iterative process of drafting and revising the debenture Offering Memorandum, or at the printer on March 19, did Mr. Bornstein ever tell Mr. Tyree that there were problems with Sunbeam's audited financial statements for 1996, 1997, or the interim financial statements for the first quarter of 1998. In fact, Arthur Andersen confirmed to Mr. Tyree that Arthur Andersen was comfortable with all of the information in the Offering Memorandum, including the March 19 press release.

After the press release and Offering Memorandum were issued, Mr. Tyree and other Morgan Stanley representatives participated in "bring-down" due diligence, in order to receive any update of the progress of Sunbeam's sales as the quarter progressed. During this process, Mr. Tyree recalls another series of calls with Morgan Stanley personnel and Sunbeam management. During these calls, the parties went through Sunbeam's financials account by account. Sunbeam described the progress it had made towards meeting its targets and then reassured Morgan Stanley that Sunbeam would meet them. Mr. Tyree recalls spending a fairly lengthy period of time with Sunbeam walking through, in detail, Sunbeam's comfort level with different customers. He recalls Sunbeam reiterating that the numbers it had set forth in the March 18th call were, if anything, on the low end. Mr. Tyree received comfort on Sunbeam's individual sales numbers and the progress Sunbeam had made.

Mr. Tyree explained to Sunbeam management that it was critical that the information in the Offering Memorandum be accurate. In performing due diligence, Mr. Tyree relied on the truthfulness and accuracy of the financial information supplied by Sunbeam and its advisors, including Sunbeam's financial statements that were audited by its independent outside auditor Arthur Andersen. Mr. Tyree is not an auditor and did not conduct a re-audit of a Sunbeam's financials. Prior to March 30, 1998, the date Sunbeam acquired Coleman, Mr. Tyree did not suspect that any of the information supplied by Sunbeam or any of its advisors was false or misleading or that Sunbeam was engaged in any fraudulent conduct. Mr. Tyree did not assist Sunbeam in engaging in any alleged fraudulent conduct.

Mr. Tyree has reviewed Exhibit A to the Court's March 23, 2005 Order on CPH's Motion for Default. He strenuously disagrees with those portions of Exhibit A that relate to his conduct. In particular:

- Mr. Tyree denies having any knowledge at the time of the transaction that Sunbeam's stock was fraudulently inflated.
- Mr. Tyree had no knowledge at the time of the transaction that Sunbeam had not undergone a successful turnaround or that Sunbeam's financial position had not dramatically improved.
- Mr. Tyree had no knowledge and received no information that any information given to CPH regarding Sunbeam's first quarter 1998 sales (or anything else) was false.
- Mr. Tyree did not assist Sunbeam in concealing any information.
- Mr. Tyree has no knowledge that anyone at Morgan Stanley employed any strategy designed to hide Sunbeam's financial condition.
- Mr. Tyree has no knowledge that anyone at Morgan Stanley prepared or provided CPH with false financial or business information.
- Mr. Tyree believes that any materials drafted by Morgan Stanley were accurate to the best of his knowledge.
- Upon learning information about Sunbeam's first quarter 1998 financials, Mr. Tyree insisted that Sunbeam disclose that information.
- Mr. Tyree did not believe that the March 19, 1998 Press Release was false or misleading, or failed to disclose material information.
- Mr. Tyree believes, and believed at the time, that the Press Release was sufficient to put CPH on notice of Sunbeam's worsening financial situation.
- Because Morgan Stanley worked for Sunbeam and CPH had its own investment bankers, Mr. Tyree never intended that CPH rely on Morgan Stanley.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING MICHAEL A. HART

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: Michael A. Hart.

Morgan Stanley introduces the following Trial Exhibits, if not already admitted into evidence:

i. **CPH 73**

ii. **MS 520**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 10th day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
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BY: _____

Counsel for Morgan Stanley & Co. Incorporated

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Michael Brody, Esq.
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777 S. Flagler Drive
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West Palm Beach, FL 33401

Defendant's Offer of Proof re: Michael A. Hart

If called to testify, Michael A. Hart would state under oath as follows:

Michael A. Hart is a Managing Director of Morgan Stanley & Co. Incorporated ("Morgan Stanley") and heads the Loan Products Group, which is primarily responsible for the origination and execution of senior lending and bridge loans for Morgan Stanley's clientele. He oversees approximately 30 employees who have primary responsibility for originating and syndicating Morgan Stanley's loan positions. Mr. Hart is also a director and President of Morgan Stanley Senior Funding ("MSSF"), the lender of record when Morgan Stanley enters into loan transactions. Mr. Hart has personal knowledge of the facts set forth in this proffer.

Sometime in February of 1998, Mr. Hart became involved in Sunbeam Corporation's ("Sunbeam") acquisitions of the Coleman Company, Inc. ("Coleman") and two other companies. Mr. Hart worked with the leveraged finance team on a senior credit agreement in which MSSF and two other secured lenders, First Union (now Wachovia) and Bank of America, loaned Sunbeam over one billion dollars to help finance the three Sunbeam acquisitions. Mr. Hart was responsible for structuring and negotiating the credit agreement. He also participated in certain aspects of Morgan Stanley's due diligence efforts related to the issuance of the senior loan. Mr. Hart was also involved in the syndication of the senior loan, a process in which senior lenders distribute their exposure to other investors or lenders. In his experience, Mr. Hart has found that there are different ways to syndicate a loan depending on the nature of the transaction. He has found that there can be advantages to a senior lender funding the loan and then undertaking syndication. These advantages can include more favorable market conditions and a more orderly syndication process. When a loan is not pre-syndicated, Mr. Hart

has found that the lender's risk profile increases. When Morgan Stanley funded the loan to Sunbeam prior to its syndication, Morgan Stanley increased its exposure.

Although Mr. Hart does not recall seeing the March 5, 1998 "Highly Confident Letter" from Bram Smith of Morgan Stanley to Russ Kersh of Sunbeam, in Mr. Hart's experience, a "highly confident letter" is used to express a view as to the feasibility of financing a particular transaction. In Mr. Hart's experience, a "highly confident" letter is not a commitment letter or a guarantee of financing, but rather an opinion based on information known at the time and expressly subject to the satisfactory completion of due diligence. In the case of Sunbeam, Mr. Hart does not recall anyone suggesting that issuing a "highly confident letter" would increase the likelihood that Sunbeam would use MSSF to fund the senior loan.

Mr. Hart assisted in the preparation of a memorandum designed to give Morgan Stanley's Leveraged Finance Commitment Committee (the "LFCC") an understanding of the transaction and a means of evaluating the potential loan to Sunbeam. On March 20, 1998, the LFCC held a meeting where it discussed the credit and potential risks of the loan, but Mr. Hart does not recall anyone raising concerns about Sunbeam or about approving the loan.

Mr. Hart will identify Trial Exhibit CPH 73 as a true and correct copy of two memoranda that were presented to the LFCC regarding the Sunbeam loan. One memorandum is dated March 19, 1998, and is from R.B. Smith to the LFCC. The second memorandum is dated March 20, 1998, and is from multiple authors to the LFCC. Trial Exhibit CPH 73 is attached to this proffer.

MSSF served as the Syndication Agent and was the principal participant in the March 30, 1998 Credit Agreement (the "Credit Agreement"), pursuant to which MSSF agreed to loan Sunbeam $680 million and two other secured lenders, First Union and Bank of America,

agreed to loan Sunbeam $510 million each, to help Sunbeam finance the acquisition of Coleman and two other companies. After the LFCC meeting on March 20, 1998, the LFCC approved the senior loan commitment to Sunbeam. Mr. Hart does not recall that the March 19, 1998 press release had any effect on the timing or syndication of the senior loan. Mr. Hart will identify Trial Exhibit MS 520 as a true and accurate copy of the Credit Agreement by and between MSSF, First Union, Bank of America and Sunbeam. Trial Exhibit MS 520 is attached to this proffer

By funding the senior loan prior to syndication, MSSF took on $680 million of financial risk. If syndication were unsuccessful, MSSF would be exposing itself to a loss of up to $680 million. Even in the case of a successful syndication, MSSF had planned to retain a portion of the senior loan in the amount of approximately $50-60 million. MSSF would not loan Sunbeam $680 million, or even $50-60 million, if it believed Sunbeam would not be able to satisfy its obligations under the credit agreement.

Ultimately, the senior loan to Sunbeam was not syndicated, and was pulled from the market. Looking back, Mr. Hart believes that Sunbeam's management misled him and Morgan Stanley regarding its financial performance for the first quarter of 1998. Further, Mr. Hart did not become aware of the misstatements by Sunbeam until after the first quarter ended.

In working for Sunbeam, Mr. Hart relied on the truthfulness and accuracy of the financial information supplied to him by Sunbeam and its advisors, including its financial statements that were audited by its independent outside auditor, Arthur Andersen. Mr. Hart had no reason to suspect that any of the information supplied to him by Sunbeam or any of its advisors was false or misleading or that Sunbeam had engaged in any fraudulent conduct. Mr. Hart did not assist Sunbeam in engaging in any alleged fraudulent conduct.

Mr. Hart has reviewed Exhibit A to the Court's March 23, 2005 Order on CPH's Motion for Default. He strenuously disagrees with those portions of Exhibit A that relate to subject matters with which he is familiar. In particular:

- Mr. Hart denies having any knowledge that Sunbeam's stock was fraudulently inflated at the time that the LFCC considered and approved the senior loan to Sunbeam.
- At the time that the LFCC considered and approved the senior loan to Sunbeam, Mr. Hart had no knowledge that Sunbeam had not undergone a successful turnaround or that Sunbeam's financial position had not dramatically improved.
- Mr. Hart had no knowledge and received no information that any information given to CPH regarding Sunbeam's first quarter 1998 sales (or anything else) was false.
- Mr. Hart did not assist Sunbeam in concealing any information.
- Mr. Hart has no knowledge that anyone at Morgan Stanley employed any strategy designed to hide Sunbeam's financial positions.

Based on Mr. Hart's testimony, Morgan Stanley would offer Trial Exhibits CPH 73 and MS 520 into evidence.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING MICHAEL J. PETRICK

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby files Defendant's Offer of Proof re: Michael J. Petrick.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 10th day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
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777 S. Flagler Drive
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West Palm Beach, FL 33401

Defendant's Offer of Proof re: Michael J. Petrick

If called to testify, Michael J. Petrick would state under oath as follows:

Mr. Petrick is currently employed by Morgan Stanley & Co. Incorporated ("Morgan Stanley") as the co-head of Morgan Stanley's Credit Products Group in New York. Mr. Petrick started working at Morgan Stanley in 1989 as a High Yield Credit Research Analyst. From 1992 to 1999, he was a Salesman, Vice President, Executive Director and Managing Director of High Yield Sales. In 1999, Mr. Petrick began working in the High Yield Distressed Debt Trading Group, which he co-ran until 2001. Mr. Petrick has personal knowledge of the facts set forth in this proffer.

Mr. Petrick's involvement on the Sunbeam Corporation ("Sunbeam") engagement began in mid-1998 after Morgan Stanley Senior Funding ("MSSF") had extended Sunbeam Corporation ("Sunbeam") a $680 million loan in connection with its purchase of The Coleman Company, Inc. ("Coleman") and well after Sunbeam announced its first quarter results. By this point, MSSF and the other lenders had also abandoned their efforts to syndicate their loans to Sunbeam. Mr. Petrick was part of the team responsible for monitoring MSSF's loan. In this capacity, Mr. Petrick attended a variety of meetings between MSSF and Sunbeam management designed to assess Sunbeam's performance.

After Sunbeam's board terminated Al Dunlap, the former Chief Executive Officer of Sunbeam, and Russ Kersh, the former Chief Financial Officer, in June 1998, MSSF agreed to various amendments of the credit agreement between MSSF and the other lenders and Sunbeam. MSSF continued to fund the loan to Sunbeam and agreed to additional amendments for several years after Sunbeam actually acquired Coleman. Each of these amendments had to be approved by the Leveraged Finance Commitment Committee. MSSF did this to give Sunbeam additional

liquidity to execute on its business plan, which if Sunbeam were successful, would work to the advantage of Sunbeam's stockholders.

When Sunbeam filed for bankruptcy, MSSF was its largest creditor. MSSF also loaned money to Sunbeam in the form of what is known as debtor-in-possession ("DIP") financing when Sunbeam filed for bankruptcy.

Sunbeam emerged from bankruptcy as American Household, Inc. ("AHI"). As part of Sunbeam's reorganization, MSSF, as its largest creditor, received shares in the reorganized entity, AHI, as well as a note payable to MSSF. Thereafter, Jarden Corporation ("Jarden") acquired the shares of AHI, including the shares owned by MSSF. After the closing of this transaction, MSSF recovered approximately $300 million of the $640 million Sunbeam owed it when it filed for bankruptcy. MSSF lost approximately $340 million on its loan to Sunbeam.

Mr. Petrick can identify Morgan Stanley Trial Exhibit 799 as a true and correct copy of the recovery analysis prepared by MSSF in connection with its loan to Sunbeam. He will testify that the analysis was created at or near the time of Jarden's acquisition of AIH to determine how much MSSF would recover of its initial loan to Sunbeam. He will also testify that it was kept in the ordinary course of business.

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

NOTICE OF FILING PLEADING UNDER SEAL

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed under seal Morgan Stanley's Notice of Filing Proffer Regarding Morgan Stanley Confidential Exhibits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by hand-delivery on this 10th day of May, 2005.

Mark C. Hansen (*pro hac vice*)
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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING MORGAN STANLEY CONFIDENTIAL EXHIBITS

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby files the following attached confidential exhibits under seal:

MS 57/MS 57 **(Trial Exhibit/Deposition Exhibit)**

MS 92/MS 92

MS 100/MS 100

MS 102/MS 102

MS 129/MS 129

MS 180/MS 180

MS 190/MS 190

MS 198/MS 198

MS 209/MS 209

MS 227/MS 227

MS 228/MS 228

MS 229/MS 229

MS 231/MS 231

MS 242/MS 242

MS 250/MS 250

MS 255/MS 255

MS 258/MS 258

MS 261/MS 261

MS 272/MS 272

MS 295/MS 295

MS 296/MS 296

MS 309/MS 309

MS 325/MS 325

MS 358/MS 358

MS 377/MS 377

MS 390/MS 390

MS 395/MS 395

MS 400/MS 400

MS 412/MS 412

MS 441/MS 441

MS 502/MS 502

MS 509/MS 509

MS 517/MS 517

MS 525/MS 525

MS 528/MS 528

MS 542/MS 542

MS 544/MS 544

MS 558/MS 558

MS 559/MS 559

MS 563/MS 563

MS 564/MS 654

MS 565/MS 565

MS 573/MS 573

MS 602/MS 602

MS 606/MS 606

MS 610/MS 610

MS 615/MS 615

MS 703/MS 703

MS 704/MS 704

MS 724/MS 724

MS 735/MS 735

MS 736/MS 736

MS 737/MS 737

MS 738/MS 738

MS 752/MS 752

MS 772/MS 772

MS 775/MS 775

MS 777/MS 777

MS 779/MS 779

MS 782/MS 782

MS 787/MS 787

MS 790/MS 709

MS 795/MS 795

MS 805/MS 805

MS 807/MS 807

MS 808/MS 808

MS 817/MS 817

MS 831/MS 831

MS 832/MS 832

MS 841/MS 841

MS 844/MS 844

CPH 114/CPH 115

Bates Ranges:

CPH 0124926-37

CPH 1082791

CPH 0127980-8006

CPH 1008035-39

CPH 0128009-10

CPH 1226083-88

CPH 1225857

CPH 1225865-66

CPH 0122542

CPH 1177346

CPH 0014493-98

CPH 0127322-27

CPH 0013409-14

CPH 1070384-85

CPH 1074407-15

CPH 1001842-1001844

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 10th day of May, 2005.

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BY: _____

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING MORGAN STANLEY EXHIBITS

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby files the following exhibits:

MS 7/MS 7 **(Trial Exhibit/Deposition Exhibit)**

MS 14/MS 14

MS 16/MS 16

MS 23/MS 23

MS 37/MS 37

MS 42/MS 42

MS 43/MS 43

MS 47/MS 47

MS 67/MS 67

MS 71/MS 71

MS 73/MS 73

MS 198/MS 198

MS 209/MS 209

MS 227/MS 227

MS 235/MS 235

MS 249/MS 249

MS 316/MS 316

MS 332/MS 332

MS 395/MS 395

MS 398/MS 398

MS 401/MS 401

MS 422/MS 422

MS 432U/MS 432U

MS 440/MS 440

MS 457/MS 457

MS 458/MS 458

MS 466/MS 466

MS 505/MS 505

MS 530/MS 530

MS 536/MS 536

MS 539/MS 539

MS 558/MS 558

MS 600/MS 600

MS 604/MS 604

MS 609/MS 609

MS 611/MS 611

MS 617/MS 617

MS 628/MS 628

MS 676/MS 676

MS 683/MS 683

MS 700/MS 700

MS 702/MS 702

MS 710/MS 710

MS 719/MS 719

MS 725/MS 725

MS 727/MS 727

MS 732/MS 732

MS 733/MS 733

MS 749/MS 749

MS 754/MS 754

MS 755/MS 755

MS 756/MS 756

MS 760/MS 760

MS 763/MS 763

MS 764/MS 764

MS 765/MS 765

MS 769/MS 769

MS 769A/MS 769A

MS 774/MS 774

MS 790/MS 790

MS 803/MS 803

MS 804/MS 804

MS 809/MS 809

MS 861/MS 861

MS 862/MS 862

MS 866/MS 866

MS 916/MS 916

MS 923/MS 923

MS 928/MS 928

MS 929/MS 929

MS 938/MS 938

MS 996/MS 996

MS 998/MS 998

MS 999/MS 999

MS 1001/MS 1001

MS 1004/MS 1004

MS 1010/MS 1010

MS 1038/MS 1038

MS 1047/MS 1047

MS 1053/MS 1053

CPH 118/CPH 119

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 10th day of May, 2005.

Mark C. Hansen (*pro hac vice*)
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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING PROFFER REGARDING RONALD O. PERELMAN

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby files the attached Defendant's Offer of Proof re: Ronald O. Perleman.

Morgan Stanley designates the following portions of the sworn deposition of Ronald O. Perelman:

11/17/04 Deposition:

(1) **[16:5-16:9]**

(2) **[16:19-16:25]**

(3) **[31:22-31:25]**

(4) **[32:8-33:23]**

(5) **[42:19-43:11]**

(6) **[44:5-44:8]**

(7) **[45:24-46:2]**

(8) **[47:3-48:1]**

(9) **[49:2-49:20]**

(10) **[50:1-50:6]**

(11) **[50:15-51:3]**

(12) **[51:9-51:12]**

(13) **[52:2-52:8]**

(14) **[52:15-52:18]**

(15) **[59:9-59:21]**

(16) **[60:6-60:9]**

(17) **[61:10-62:5]**

(18) **[62:11-62:18]**

(19) **[64:14-64:23]**

(20) **[65:1-65:22]**

(21) **[65:24-66:4]**

(22) **[66:14-67:5]**

(23) **[67:19-67:23]**

(24) **[68:7-68:18]**

(25) **[68:22-69:5]**

(26) **[71:3-71:21]**

(27) **[72:4-72:18]**

(28) **[75:5-75:25]**

(29) **[77:7-77:10]**

(30) **[77:18-78:16]**

(31) **[78:18-79:1]**

(32) **[79:22-79:24]**

(33) **[80:7-80:12]**

(34) **[80:24-81:8]**

(35) **[85:13-86:1]**

(36) **[87:14-87:24]**

(37) **[88:5-88:9]**

(38) **[88:22-89:6]**

(39) **[89:9-89:11]**

(40) **[89:18-90:25]**

(41) **[92:4-92:12]**

(42) **[93:2-93:8]**

(43) **[94:8-94:15]**

(44) **[94:23-95:15]**

(45) **[96:4-96:6]**

(46) **[96:15-96:21]**

(47) **[97:5-97:18]**

(48) **[98:3-98:8]**

(49) **[98:15-98:22]**

(50) **[109:9-109:10]**

(51) **[109:19-109:25]**

(52) **[111:15-112:1]**

(53) **[114:6-114:19]**

(54) **[115:9-115:13]**

(55) **[119:23-120:6]**

(56) **[121:4-121:8]**

(57) **[121:17-121:21]**

(58) **[128:9-128:11]**

(59) **[128:22-128:25]**

(60) **[134:2-134:12]**

(61) **[134:16-135:1]**

(62) **[135:7-135:7]**

(63) **[139:1-139:7]**

(64) **[139:9-139:10]**

(65) **[139:15-139:24]**

(66) **[141:4-141:8]**

(67) **[141:12-142:1]**

(68) **[142:17-142:24]**

(69) **[180:13-180:22]**

(70) **[192:4-192:9]**

(71) **[194:8-194:13]**

(72) **[195:11-195:16]**

(73) **[196:10-197:5]**

(74) **[198:24-199:4]**

(75) **[199:10-199:17]**

(76) **[204:7-204:10]**

(77) **[204:13-204:19]**

(78) **[204:24-205:4]**

(79) **[205:11-205:16]**

(80) **[206:5-206:25]**

(81) **[207:21-208:8]**

(82) **[208:21-209:15]**

(83) **[210:9-210:21]**

(84) **[211:4-211:18]**

(85) **[212:12-213:10]**

(86) **[223:2-223:23]**

(87) **[224:20-224:23]**

(88) **[225:10-225:15]**

(89) **[226:1-226:6]**

(90) **[229:1-229:9]**

(91) **[229:18-230:10]**

(92) **[230:13-230:19]**

(93) **[230:23-231:15]**

(94) **[232:12-234:1]**

(95) **[234:6-234:13]**

(96) **[239:2-239:7]**

(97) **[239:14-240:2]**

(98) **[242:12-242:21]**

(99) **[242:25-243:9]**

(100) **[243:21-243:22]**

(101) **[244:1-244:10]**

(102) **[244:16-244:24]**

(103) **[246:12-246:16]**

(104) **[246:24-247:6]**

(105) **[248:6-248:15]**

(106) **[249:15-250:21]**

(107) **[251:1-251:8]**

(108) **[252:5-252:20]**

(109) **[253:7-253:8]**

(110) **[253:11-253:25]**

(111) **[254:9-254:15]**

(112) **[255:15-255:17]**

(113) **[256:4-256:10]**

(114) **[256:13-256:24]**

(115) **[257:6-257:17]**

(116) **[259:9-261:20]**

(117) **[262:6-262:8]**

(118) **[262:15-262:17]**

(119) **[263:6-263:19]**

(120) **[264:25-265:4]**

(121) **[268:2-268:3]**

(122) **[268:6-268:13]**

(123) **[268:6-268:13]**

(124) **[268:20-268:24]**

(125) **[269:2-269:23]**

(126) **[270:10-271:2]**

(127) **[271:15-271:15]**

(128) **[272:21-273:10]**

(129) **[275:8-275:19**

(130) **[278:10-278:16]**

(131) **[279:12-279:23]**

(132) **[280:1-280:25]**

(133) **[281:5-281:8]**

(134) **[281:11-281:17]**

(135) **[282:2-283:2]**

(136) **[283:15-284:2]**

(137) **[284:13-285:11]**

(138) **[286:3-287:13]**

(139) **[287:18-288:24]**

(140) **[289:7-289:25]**

(141) **[292:8-292:12]**

(142) **[292:15-293:21]**

11/18/04 Deposition:

(1) **[333:19-335:22]**

(2) **[336:3-338:12]**

(3) **[338:13-339:5]**

(4) **[339:19-340:25]**

(5) **[341:11-343:25]**

(6) **[344:10-344:16]**

(7) **[344:20-345:11]**

(8) **[345:18-345:22]**

(9) **[346:7-346:11]**

(10) **[346:21-347:14]**

(11) **[347:20-347:21]**

(12) **[347:23-348:3]**

(13) **[348:14-348:17]**

(14) **[348:20-348:23]**

(15) **[349:22-350:4]**

(16) **[350:6-350:11]**

(17) **[351:25-355:4]**

(18) **[355:19-358:4]**

(19) **[358:20-359:8]**

(20) **[359:16-360:3]**

(21) **[360:19-360:24]**

(22) **[361:1-361:8]**

(23) **[361:25-362:6]**

(24) **[363:3-364:13]**

(25) **[366:10-366:3]**

(26) **[367:7-367:15]**

(27) **[367:19-368:16]**

(28) **[368:19-370:8]**

(29) **[370:14-371:5]**

(30) **[371:15-372:3]**

(31) **[373:5-373:11]**

(32) **[373:18-374:18]**

(33) **[375:16-375:19]**

(34) **[376:3-376:11]**

(35) **[376:16-376:24]**

(36) **[377:4-378:7]**

(37) **[378:16-378:25]**

(38) **[379:3-379:8]**

(39) **[379:22-380:16]**

(40) **[381:5-381:20]**

(41) **[382:23-383:1]**

(42) **[383:16-383:23]**

(43) **[384:10-385:5]**

(44) **[386:14-388:4]**

(45) **[390:3-390:8]**

(46) **[390:14-390:19]**

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(188) **[76:16-76:17]**

(189) **[79:7-79:17]**

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence:

11/17/2004 Deposition:

i. **MS 85/MS 85 (Deposition Exhibit Number/Trial Exhibit Number)**

ii. **MS 88/MS 88**

iii. **MS 172/MS 172**

iv. **MS 211/MS 211**

v. **MS 239/MS 239**

vi. **MS 241/MS 241**

vii. **MS 251/MS 215**

viii. **MS 335/MS 335**

ix. **MS 410/MS 410**

x. **MS 423/MS 423**

xi. **MS 424/MS 424**

xii. **MS 425/MS 425** **(Confidential – Filed Under Seal)**

xiii. **MS 426/MS 426** **(Confidential – Filed Under Seal)**

xiv. **MS 431/MS 431**

11/18/2004 Deposition:

xv. **MS 75/MS 75**

xvi. **MS 78/MS 78**

xvii. **MS 84/MS 84**

xviii. **MS 85/MS 85**

xix. **MS 96/MS 96**

xx. **MS 104/MS 104**

xxi. **MS 105/MS 105**

xxii. **MS 112/MS 112**

xxiii. **MS 115/MS 115**

xxiv. **MS 138/MS 138**

xxv. **MS 174/MS 174** **(Confidential – Filed Under Seal)**

xxvi. **MS 187/MS 187** **(Confidential – Filed Under Seal)**

xxvii. **MS 206/MS 206**

xxviii. **MS 208/MS 208**

xxix. **MS 232/MS 232** **(Confidential – Filed Under Seal)**

xxx. **MS 279/MS 279**

xxxi. **MS 431/MS 431**

xxxii. **MS 432/MS 432** **(Confidential – Filed Under Seal)**

3/10/2005 Deposition:

xxxiii. **MS 814/MS 814** **(Confidential – Filed Under Seal)**

xxxiv. **MS 815/MS 815** **(Confidential – Filed Under Seal)**

xxxv. **MS 822/MS 822** **(Confidential – Filed Under Seal)**

xxxvi. **MS 855/MS 855**

xxxvii. **MS 857/MS 857**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 10th day of May, 2005.

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Defendant's Offer of Proof re: Ronald O. Perelman

Mr. Perelman is 100 percent owner of MAFCO Holdings, Inc, and through it and various other holding companies, owner of 82 percent of Coleman at the time of the merger between Coleman and Sunbeam. Morgan Stanley designates the following portions of the sworn deposition of Ronald O. Perelman:

11/17/04 Deposition:

(1) **[16:5-16:9]**

(2) **[16:19-16:25]**

(3) **[31:22-31:25]**

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(47) **[75:15-75:15]**

(48) **[76:11-76:14]**

(49) **[76:16-76:17]**

(50) **[79:7-79:17]**

Morgan Stanley would further introduce the following exhibits, if not already admitted into evidence:

11/17/2004 Deposition:

i. **MS 85/MS 85 (Deposition Exhibit Number/Trial Exhibit Number)**

ii. **MS 88/MS 88**

iii. **MS 172/MS 172**

iv. **MS 211/MS 211**

v. **MS 239/MS 239**

vi. **MS 241/MS 241**

vii. **MS 251/MS 215**

viii. **MS 335/MS 335**

ix. **MS 410/MS 410**

x. **MS 423/MS 423**

xi. **MS 424/MS 424**

xii. **MS 425/MS 425** **(Confidential – Filed Under Seal)**

xiii. **MS 426/MS 426** **(Confidential – Filed Under Seal)**

xiv. **MS 431/MS 431**

11/18/2004 Deposition:

xv. **MS 75/MS 75**

xvi. **MS 78/MS 78**

xvii. **MS 84/MS 84**

xviii. **MS 85/MS 85**

xix. **MS 96/MS 96**

xx. **MS 104/MS 104**

xxi. **MS 105/MS 105**

xxii. **MS 112/MS 112**

xxiii. **MS 115/MS 115**

xxiv. **MS 138/MS 138**

xxv. **MS 174/MS 174** **(Confidential – Filed Under Seal)**

xxvi. **MS 187/MS 187** **(Confidential – Filed Under Seal)**

xxvii. **MS 206/MS 206**

xxviii. **MS 208/MS 208**

xxix. **MS 232/MS 232** **(Confidential – Filed Under Seal)**

xxx. **MS 279/MS 279**

xxxi. **MS 431/MS 431**

xxxii. **MS 432/MS 432** **(Confidential – Filed Under Seal)**

3/10/2005 Deposition:

xxxiii. **MS 814/MS 814** **(Confidential – Filed Under Seal)**

xxxiv. **MS 815/MS 815** **(Confidential – Filed Under Seal)**

xxxv. **MS 822/MS 822** **(Confidential – Filed Under Seal)**

xxxvi. **MS 855/MS 855**

xxxvii. **MS 857/MS 857**

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF FILING REVISED OFFER OF PROOF WITH RESPECT TO CPH'S ABILITY TO MITIGATE ITS DAMAGES THROUGH HEDGING STRATEGIES

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written proffers, Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby files Morgan Stanley & Co. Incorporated's Revised Offer of Proof With Respect to CPH's Ability to Mitigate Its Damages Through Hedging Strategies.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY & CO. INCORPORATED'S REVISED OFFER OF PROOF WITH RESPECT TO CPH'S ABILITY TO MITIGATE ITS DAMAGES THROUGH HEDGING STRATEGIES[1]

INTRODUCTION AND SUMMARY OF PROFFER

Defendant Morgan Stanley & Co. Incorporated ("MS & Co.") offers to prove, through an expert witness, Professor Jeffrey Haas, and cross-examination of Plaintiffs' witnesses, that Ronald Perelman and Plaintiff Coleman (Parent) Holdings, Inc. ("CPH") could have virtually eliminated or substantially minimized[2] their exposure to Sunbeam stock volatility by engaging in one or more well-known risk mitigation investment strategies known as hedging, none of which involved a sale of any restricted securities.

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1 The Order on Plaintiff's Motion in Limine No. 27 is not implicated by the proffer made herein because, notwithstanding CPH's arguments to the contrary, hedging strategies need not involve sales of securities, and, as described herein, do not in fact do so.

2 The potential protection available to Mr. Perelman and CPH would have ranged from 96% of the investment in Sunbeam, or $597.2 million (by use of a one-year forward contract) to 81% of the investment in Sunbeam shares, or $498.8 million (by use of a three-year TRACES transaction), and at least two other variations with protection between the two examples cited, see *infra* at 25-28.

MS & Co. will show that, where, as here, an investor obtains a large position in a single, undiversified investment and has negotiated a lock-up agreement with the issuer that enables the investor to hedge the risk, entering into hedging strategies is typical and prudent under such circumstances. MS & Co. will further show that the carve-outs in the lock-up that Mr. Perelman and CPH entered into expressly permitted pledging so as to facilitate CPH's ability to hedge CPH's risks.

MS & Co. will offer to prove that neither Mr. Perelman nor CPH had any legal or contractual restraints on their ability to engage in these hedging strategies. First — according to their own certifications in their filings with the Securities and Exchange Commission (the "Commission") — neither Mr. Perelman nor CPH was an "affiliate" or "control person" between March 30, 1998, when it acquired the restricted Sunbeam shares, and June 15, 1998, when Al Dunlap, Sunbeam's CEO, was ousted and Sunbeam granted Mr. Perelman the right to designate two directors to its board of directors. Second, during this entire period, neither CPH nor Mr. Perelman was constrained under the federal securities laws from engaging in a hedging strategy that did not involve the sale of Sunbeam shares. Third, the lock-up agreement with Sunbeam did not prohibit hedging, nor did it prevent certain transactions relating to the shares (such as pledging in connection with bona fide debts and "other obligations") that are sometimes conditions to entering into effective hedging strategies. Indeed, the strategies that CPH was contemplating were designed with the lock-up restrictions in mind.

It is undisputed that CPH actively considered such hedging strategies in March and April 1998. At least three major investment banks, Goldman, Sachs & Co. (MS 552), Bear Stearns (MS 550), and Citibank (MS 551), made presentations to Mr. Perelman regarding the Sunbeam positions that CPH was about to acquire, offering solutions to hedge CPH's substantial risk of

holding 14.1 million restricted Sunbeam shares without downside protection.[3] However, Mr. Perelman ultimately decided against securing downside protection for CPH's Sunbeam shares, even though he could have virtually eliminated or substantially minimized his risk of loss.

The only argument that CPH has made regarding hedging possibilities is that CPH could not sell any of its restricted Sunbeam shares.[4] This argument is beside the point. None of the hedging strategies proposed to Mr. Perelman and CPH in March and April 1998 required the sale of any Sunbeam shares.

The Court has ruled that MS & Co. may not introduce Professor Haas as a witness.[5] MS & Co. respectfully submits that the Court's decision constitutes substantial error and accordingly submits this offer as proof. If the Court had permitted, MS & Co. would have presented the following evidence as to CPH's ability and opportunity to mitigate its damages.

1. OFFER OF EVIDENCE PROVING THAT THE FEDERAL SECURITIES LAWS DID NOT PREVENT CPH FROM USING HEDGING STRATEGIES TO VIRTUALLY ELIMINATE OR SUBSTANTIALLY MINIMIZE THE LOST VALUE OF ITS SUNBEAM INVESTMENT

Initially, MS & Co. would introduce the testimony of Professor Jeffrey Haas, whose qualifications and experience as an expert in hedging strategies are attached as Exhibit A.

Professor Haas is currently a professor at New York Law School specializing in corporate and securities law and derivative transactions. Since 1996, Professor Haas has taught a

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3 As discussed below, *see infra* note 46 and accompanying text, Mr. Perelman was familiar with the types of instruments used to hedge risk. In 1993, Mr. Perelman implemented a hedging strategy through Coleman Worldwide Corporation using a similar product, Liquid Yield Option Notes ("LYONS™"), developed by Merrill Lynch & Co., see Registration Statement of Coleman Worldwide Corporation (Nos. 33-60274/33-61346) (MS 992)

4 *See* Plaintiff's Motion in Limine No. 27.

5 *See* Order dated April 5, 2005, denying Defendant's Motion to Add Witnesses.

number of courses in the field of corporate and securities law including mergers and acquisitions, corporate finance, and securities regulation. In addition, Professor Haas is a member of the ABA Committee on the Federal Regulation of Securities and Subcommittee on the Securities Act of 1933, as amended (the "Securities Act"). As a member of the ABA, Professor Haas co-authored two comment letters in 1995 and 1997 to the Commission addressing separate rulemaking proposals published by the Commission to amend Rules 144 and 145 of the Securities Act. Professor Haas is also an author of a book on corporate finance which devotes a chapter to derivative instruments and a section on hedging concentrated equity positions.[6]

Prior to joining New York Law School, Professor Haas was in private practice specializing in corporate and securities law, including mergers and acquisitions, private and public securities offerings, and restricted stock monetizations and related hedging activities. Professor Haas has continued to counsel investment banks on hedging strategies even as a professor. His representative clients have included UBS PaineWebber Inc., CommerzBank AG, CIBC World Markets Corp. and Raymond James & Associates Inc.

Professor Haas earned his law degree, *cum laude*, from the University of Pennsylvania in 1988 and a bachelor of science degree, *summa cum laude*, with a double major in Finance and Classical Civilizations from Florida State University in 1984.

Professor Haas has testified as an expert witness in a number of matters dealing with a variety of topics, including public and private securities offerings, tracking stock equity structures, derivative instruments, broker-dealer regulation, mutual fund and investment adviser

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6 *See* Jeffrey J. Haas, Corporate Finance in a Nutshell (Thomson/West 2004).

regulation, corporate law and contract law. A complete list of Professor Haas' testifying experience is attached hereto as Exhibit B.

Based upon his knowledge and experience in the field of corporate and securities law and his review of the underlying facts in this case, Professor Haas is qualified to testify as an expert on the hedging strategies in which Mr. Perelman and CPH could have engaged. He would have testified to the following:

( ) Neither CPH Nor Mr. Perelman Was A "Control Person" Or An "Affiliate" Of Sunbeam During the Period Beginning on March 30, 1998 Through June 15, 1998.

If Professor Haas had been allowed to testify, he would have testified that the question whether CPH or Mr. Perelman was an "affiliate" or "control person" of Sunbeam is important because it affects their ability to engage in certain transactions involving Sunbeam stock. Professor Haas would have testified that neither CPH nor Mr. Perelman was a "control person" or an "affiliate" of Sunbeam during the period beginning March 30, 1998 through June 15, 1998, the date Sunbeam granted CPH the right to appoint two persons to the Sunbeam board of directors. Indeed, as discussed below, both CPH and Mr. Perelman certified in their filings with the Commission that they were *not* control persons of Sunbeam.[7]

Professor Haas would have initially identified the securities laws relevant to this issue. Section 4(1) of the Securities Act provides an important transactional exemption to the

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[7] *See infra* notes 18-23 and accompanying text; *see also* Schedule 13G of Ronald O. Perelman and Coleman (Parent) Holdings Inc. (filed April 8, 1998), available at <http://www.sec.gov/Archives/edgar/data/3662/0000898822-98-000377.txt> (certifying that CPH and Mr. Perelman's Sunbeam shares "were not acquired and are not held for the purpose of or with the effect of changing or influencing the control or the issuer of the securities and were not acquired and are not held in connection with or as a participant in any transaction having that purpose or effect").

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registration requirements of the Securities Act. Section 4(1) provides an exemption for resales of securities by most parties. Specifically, anyone other than an issuer, underwriter or dealer may use the exemption in Section 4(1) of the Securities Act to sell securities without registering the sale under Section 5 of the Securities Act.

Thus, that exemption cannot be used for resales by anyone considered to be an "issuer, underwriter or dealer."[8] Section 2(a)(11) of the Securities Act, which defines "underwriter," states that any person who directly or indirectly controls or is controlled by an actual issuer of securities, or any person who is under direct or indirect common control with such an issuer, is considered to be an issuer as well.[9] Hence, a "control person" is deemed to be an "issuer" for purposes of Section 2(a)(11).

Similarly, Securities Act Rule 144, a safe harbor provision for resales under Sections 4(1) and 4(3), places limitations on the ability of an "affiliate" of an issuer to effect resales under the Rule. Securities Act Rule 405 defines an "affiliate" as a person that directly, or indirectly through one or more intermediaries, "controls or is controlled by, or is under common control with," the person specified.[10] This Rule also defines the term "control" as the possession, direct or indirect, of the power to "direct or cause the direction of the management and policies of a person."[11] According to the legislative history of Section 2(a)(11), the concept of control "is not a narrow one, depending upon a mathematical formula of 51 percent of voting power, but is

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8 15 U.S.C.A. § 77d(1).

9 *See* U.S.C.A. § 77b(a)(11).

10 17 C.F.R. § 230.405.

11 *Id.*

broadly defined to permit the provisions of the [Securities Act] to become effective wherever the fact of control actually exists."[12] Specifically, Congress intended the concept of "control" to cover a person having the power to force an issuer to file a registration statement covering his or her shares.[13]

The approach to control taken by the courts and the Commission is broader than the legislative history. According to the Commission, control is "a factual question which must be determined by considering all the relevant facts in accordance with the test set forth in Rule 405."[14] Given Securities Act Rule 405's focus on the power to direct or cause the direction of the management and policies of the issuer, the Commission's approach can be summarized in a simple question: Who has the power to run the show?[15] The courts and the Commission have identified the following relevant factors:

0. Voting power generally and relative to that of other shareholders;
0. The power to force the registration of shares;
0. Offices/directorships held (or lack thereof);
0. Contractual management rights, such as the right to appoint directors;
0. Personally running the affairs of the business;
0. Conduct towards the issuer; and
0. Family ties

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12 *See* H.R. Rep. No. 85, 73d Cong., 1st Sess. 13 – 14 (1933).

13 *Id.* at 14 (quoting the Committee on Interstate and Foreign Commerce).

14 *First National Bank*, SEC No-Action Letter, 1976 WL 11611 (avail. Mar. 11, 1976).

15 *See* A.A. Sommer, Jr., "*Who's "In Control*"?—S.E.C., 21 Bus. Law. 559 (1966).

Voting power is one of the important factors in determining controlling person or affiliate status. In the case at hand, the documents show that Mr. Perelman, through CPH, held approximately 14% of the outstanding shares of Sunbeam. Professor Haas would testify that in his experience working on corporate and securities transactions involving issues of control, if an individual or entity holds more than 10% of an issuer's voting securities, a careful analysis needs to be made to see if that person or entity is a controlling person or an affiliate. The Commission, however, has underscored that stock ownership is just "one fact which must be taken into consideration along with the other relevant circumstances."[16]

The facts in this case show that Mr. Perelman, while an indirect 14% shareholder (through his ownership of CPH), was not Sunbeam's largest shareholder. Franklin Mutual Advisors, Inc. ("FMA") owned 17.4% of Sunbeam's outstanding shares. As its largest shareholder, FMA also had a seat on Sunbeam's board of directors, which further minimized the relative control value of CPH's stock ownership, especially given that CPH was not represented on the Sunbeam board until several months later. Additionally, Sunbeam's three largest shareholders (other than CPH), together with its management team, owned 36.7% of Sunbeam's outstanding shares on March 30, 1998, the date that the CPH-Sunbeam transaction closed. Finally, Sunbeam's seven-member board of directors included two of its executive officers (Messrs. Dunlap and Kersh, who were Sunbeam's Chief Executive Officer and Chief Financial Officer, respectively) and the above-referenced representative of FMA.

Based on these facts, Professor Haas would have concluded that during the period from March 30, 1998 to June 15, 1998, CPH did not possess (and could not have used its 14%

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16 *American Standard*, SEC No-Action Letter, 1972 WL 19628 (avail. Oct. 4, 1972).

ownership interest to exert) control over or influence Sunbeam's management and policies. Professor Haas would have further concluded that the profiles of Sunbeam's shareholders and board members clearly indicate that CPH was not a controlling person of Sunbeam.[17]

Another important basis of Professor Haas's opinion that neither Mr. Perelman nor CPH were "control persons" or "affiliates" from March 30, 1998 through June 15, 1998 is their explicit concession of this point in public filings with the Commission. On March 30, 1998, CPH became the beneficial owner of more than 5% of Sunbeam's common stock. Within 10 days after the date of this acquisition, CPH and Mr. Perelman (as the sole beneficial owner of CPH) were required to publicly disclose the terms of this transaction with the Commission by filing a Schedule 13D or Schedule 13G. However, pursuant to Rule 13d-1(c)(1) under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), CPH was permitted to report the transaction on Schedule 13G instead of Schedule 13D *only* if the Sunbeam shares were *not* acquired with "any purpose, or with the effect of, changing or influencing the control of the issuer."[18]

It is therefore highly significant that Mr. Perelman and CPH filed a Schedule 13G with the Commission on April 8, 1998 which was within the ten day period after March 30, 1998. This demonstrates a conscious decision by CPH and Mr. Perelman that they qualified for the

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17 *Accord SEC v. Sherwood*, 175 F. Supp. 480 (S.D.N.Y. 1959) (where an 8% shareholder unable to secure representation on a company's board was held not to be a control person of that company).

18 17 C.F.R. § 240.13d-1(c)(1) (see also Exchange Act Release No. 34-39538, 1998 WL 7449 (Jan. 12, 1998). Persons who cannot certify that they are not a control person and have no intention to control the issuer are considered to have a "disqualifying purpose or effect" for purposes of Schedule 13G eligibility and must report on Schedule 13D instead. Exchange Release No. 34-39538, *supra*, at footnote 10.

form that was available only if they individually *certified* that they were not "changing or influencing the control of the issuer."[19] Further, on June 16, 1998, Mr. Perelman updated the Schedule 13G by filing a Schedule 13D on June 16, 1998, thus certifying for the first time a controlling purpose or effect.[20] The filing occurred on the *same day* that Sunbeam expanded its board by three directors and granted to CPH the right to designate two such directors.[21] Thus, Professor Haas would testify that, in his opinion, CPH and Mr. Perelman's filing of the Schedule 13G was an admission that prior to June 15, 1998, neither CPH nor Mr. Perelman possessed the power to direct or cause the direction of the management and policies of Sunbeam.

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19 Schedule 13G of Ronald O. Perelman and Coleman (Parent) Holdings Inc. (filed April 8, 1998), available at <http://www.sec.gov/Archives/edgar/data/3662/0000898822-98-000377.txt> (certifying that "the securities referred to above [14,099,749 shares of Sunbeam common stock] were not acquired and are not held for the purpose of or with the effect of changing or influencing the control or the issuer of the securities and were not acquired and are not held in connection with or as a participant in any transaction having that purpose or effect").

20 Under Exchange Act Rule 13d-1(e)(1), a formerly passive investor who has filed a Schedule 13G and subsequently becomes a control person must file a Schedule 13D no later than 10 days after the investor's change in investment purpose. In addition, under Rule 13d-1(e)(2), such a person must refrain from exercising control for a ten-day "cooling-off" period from the time of the change in investment purpose until the tenth day after the filing of the Schedule 13D, during which time "the reporting person is prohibited from voting or directing the voting of the subject securities." *See* Exchange Act Release No. 34-39538, 1998 WL 7449 (Jan. 12, 1998).

21 According to the Schedule 13D filed on June 16, 1998 by CPH and Mr. Perelman, Sunbeam's appointment of Messrs. Levin and Kersh to its board of directors was part of a significant restructuring of Sunbeam's management and board composition, which included: (i) the termination of Mr. Dunlap as Chairman and Chief Executive Officer; (ii) the hiring of Mr. Levin as Chief Executive Officer; (iii) the appointment of Mr. Langerman, FMA's Chief Operating Officer, as Chairman and (iv) the appointment of one additional FMA designee to serve on the board. In connection with these announcements, CPH and Mr. Perelman had "discussions with representatives of Sunbeam and [FMA] with respect to Sunbeam and the matters described [in the previous sentence]." *Id.*

From these facts and conclusions, Professor Haas would have further concluded that it would have been important for CPH to have a registration rights for the Sunbeam shares it was acquiring, thus allowing CPH to engage in public resales. Furthermore, the facts show that CPH knew that its stock position after the merger would not provide it with the power needed to force Sunbeam's board to register its restricted shares for public resale. Accordingly, CPH negotiated for and received registration rights for its shares as part of the agreement to sell Coleman to Sunbeam. Thus, CPH acquired registration rights at a point in time when it actually did have leverage with Sunbeam (in the form of its ability to approve or deny the sale of Coleman). Further, the fact that CPH required and ultimately received *contractual* registration rights demonstrates that it was otherwise unable to force the Sunbeam board with respect to registration or any other matter through its mere stock ownership.

Professor Haas would also testify that, in his experience, another important factor in determining controlling person or affiliate status is contractual management rights. Based upon the documents in the case, Professor Haas would testify that CPH had no contractual right to control or influence the management and affairs of Sunbeam. Nor did Mr. Perelman have the contractual right to be elected to Sunbeam's board or to have nominees of CPH's choosing elected to Sunbeam's board. This contrasts starkly with the position of Sunbeam's largest shareholder, FMA. From March 30, 1998 through June 15, 1998, Mr. Perelman did not serve as a director or officer of Sunbeam. Nor during that time did anyone associated with CPH serve in either capacity.

Mr. Perelman's own deposition testimony confirms that, during that time period, he did not "run the show" at Sunbeam. When asked about his reaction to Sunbeam's April 3, 1998 press release concerning its disappointing financial results for the first quarter of 1998, Mr.

Perelman testified that he did not personally take any steps to communicate directly with Sunbeam's CEO or any other member of Sunbeam's management to discuss the release or obtain additional financial information. He further stated he was not aware of anyone else at Coleman who attempted to contact Sunbeam.[22] By acting as a passive bystander, Mr. Perelman's own conduct towards Sunbeam is consistent with his not being a control person prior to June 15, 1998 and thus not an affiliate of Sunbeam. Finally, it is clear that Mr. Perelman did not have any family ties with anyone connected with Sunbeam.

Professor Haas would also testify based on the facts of this case that CPH's sale of Coleman to Sunbeam was completely on an arm's-length basis. The transaction was heavily negotiated, and CPH was represented by a team of lawyers and financial advisers whose focus was to protect CPH's interests (and, by extension, Mr. Perelman's interests).

Finally, Professor Haas reviewed the Goldman Sachs' hedging presentation made to MacAndrews & Forbes Holdings on or about April 3, 1998. In its presentation to MacAndrews & Forbes Holdings, Goldman Sachs unequivocally states the following under the heading "Our Understanding of MacAndrews & Forbes' Objectives": "MacAndrews & Forbes is *not* an affiliate of Sunbeam, but the 14 million shares [of Sunbeam stock] are currently 'restricted' for securities law purposes."[23] As counsel to several investment banking firms during the 1990s (including during the time frame in question), it is Professor Haas' experience that firms like Goldman Sachs do not independently make such determinations. Therefore, it would be Professor Haas' opinion that Goldman Sachs' statement of CPH's non-affiliate status stemmed

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22 *See* Perelman November 18 deposition, p.57.

23 Presentation to MacAndrews & Forbes Holdings Regarding Single Stock Risk Management Strategies, Goldman Sachs & Co., April 3, 1998 at CPH 2011588 (emphasis added).

from representations made by Mr. Perelman, his counsel or another executive at CPH prior to the time Goldman Sachs prepared the presentation. Accordingly, it would be Professor Haas' opinion that neither CPH nor Mr. Perelman was a "control person" or an "affiliate" of Sunbeam during the period beginning March 30, 1998 through June 15, 1998.

( ) CPH Was Not An "Insider" Of Sunbeam Until June 15, 1998 At The Earliest

A related issue is when CPH began to possess "insider" information regarding Sunbeam. As CPH correctly notes in its April 4, 2005 Supplemental Disclosure, the Exchange Act imposes both civil and criminal liability on persons who sell stock "while in possession of material, nonpublic information."[24] Thus, if and when CPH acquired material nonpublic information regarding Sunbeam, it was prohibited from purchasing or selling Sunbeam securities on the basis of such information. Moreover, the Court should note that one can be an "insider" without possessing "material nonpublic information," in which case he or she would be free to continue trading activities. CPH disingenuously blurs these two concepts in its Supplemental Disclosure.

First, it is *undisputed* that Mr. Perelman was not an insider of Sunbeam and therefore did not possess material nonpublic information from March 30, 1998 until at least June 15, 1998, and perhaps longer. Mr. Perelman's own testimony regarding when he learned about certain Sunbeam events relative to when they were publicly announced proves his outsider status during this period. Similarly, CPH's filings with the Court and with the Commission *concede* that CPH was not an insider prior to June 15, 1998.[25] There is, therefore, no doubt that CPH could have

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24 15 U.S.C.A. § 78t-1.

25 *See* Plaintiff's Supplemental Disclosure, filed April 4, 2005, pp.18-21.

entered into non-sale derivative transactions at any time from March 30, 1998 to June 15, 1998 in compliance with the federal securities laws.

Second, and contrary to what CPH argues, CPH's status as an insider is *not* dispositive of whether it could have sold Sunbeam shares after June 15, 1998. Rather, CPH would be prohibited from trading *only* if Mr. Perelman (as CPH's sole beneficial owner and ultimate decision-maker with respect to potential sales) actually possessed material, nonpublic information.[26] Yet CPH has not alleged that CPH or Mr. Perelman actually possessed material, nonpublic information about Sunbeam.

Mr. Perelman was not a board member of Sunbeam and had no direct access to material nonpublic information. While it is true that Messrs. Levin and Gittis, who joined Sunbeam's board on June 15, 1998, were former executives of MacAndrews & Forbes, CPH does not allege that these individuals actually provided material nonpublic information to Mr. Perelman. Therefore, CPH has not demonstrated that was unable to sell Sunbeam shares without violating the federal insider trading laws.

C. CPH Could Hedge Its Sunbeam Stock Without Breaching The 90-Day "Lock-Up" Provision Contained In Section 7.1 Of The Merger Agreement

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[26] Nor can Perelman argue that Section 16(b) of the Exchange Act (referred to as the "short-swing profit rule") prevented him from selling his Sunbeam shares. Section 16(b) requires holders of more than 10% of a public company's equity securities to disgorge any profit made by purchasing and selling, or by selling and purchasing, those securities during any six-month period. Perelman acquired Sunbeam stock in connection with the merger on March 30, 1998. Importantly, Section 16(b) excludes from the purview of the short-swing profit rule any transaction where the beneficial owner of the stock is not such both at the time of the purchase and sale, or the sale and purchase. *Foremost-McKesson, Inc. v. Provident Sec. Co.*, 423 U.S. 232, 250 & 250 n.25 (1976). Thus, Perelman's acquisition of Sunbeam stock on March 30, 1998 is excluded from the short-swing profit analysis. *See id.* at 250 (holding that a beneficial owner must account for short-swing profits under Section 16(b) "only if he was a beneficial owner 'before the purchase'").

CPH negotiated (to its benefit) a merger agreement that allowed it to use derivative instruments to virtually eliminate the price risk associated with its Sunbeam stock holdings. Unlike more typical lock-up agreements, which ordinarily preclude hedging arrangements in respect of the locked up shares, the merger agreement between CPH and Sunbeam contained no such restriction. The language of Section 7.1 of the merger agreement is clear:

> SALES OF LASER SHARES. Parent Holdings agrees not to, directly or indirectly, ***sell, transfer, pledge, assign or otherwise dispose of or otherwise transfer*** (other than, in any such case, in connection with a pledge to secure BONA FIDE indebtedness or other obligations) (collectively, "TRANSFER"), any Laser Shares received pursuant to the terms hereof as consideration for the Holdings Merger, other than to one of its Affiliates who agrees in writing to be bound by the terms of this Section 7.1, for a period of nine (9) months from and after the Holdings Effective Time, except that Parent Holdings may Transfer (A) from and after the date that is three (3) months following the Holdings Effective Time, twenty-five percent (25%) of the total number of the Laser Shares, and (B) from and after the date that is six (6) months following the Holdings Effective Time, an additional twenty-five percent (25%) of the total number of the Laser Shares (such that a total of fifty percent (50%) of the total number of the Laser Shares shall be Transferable from and after the date that is six (6) months following the Holdings Effective Time) (emphasis added).

Thus, nothing in Section 7.1 prohibited CPH from using hedging arrangements or non-sale derivative instruments. Section 7.1 prohibited only the sale, transfer, pledging (except in connection with the bona fide debts and "other obligations" carve-out), assignment or other

disposition of Sunbeam shares until June 30, 1998.[27] However, as a sophisticated investor, CPH knew that it did not have to "sell, transfer, pledge, assign or otherwise dispose of or otherwise transfer" its Sunbeam stock in order to reduce its downside risk in such a significant un-hedged position. Indeed, each of Goldman, Sachs & Co., Citicorp Securities, Inc. and Bear, Stearns & Co. Inc. separately acknowledged the lock-up agreement in their risk management strategy presentations made to CPH in which each of these investment banks presented a variety of non-sale derivative instruments that would have enabled CPH to hedge its economic exposure.[28]

The fact that Section 7.1 did not restrict CPH's ability to hedge its risk by using non-sale derivative instruments is telling — particularly given the frequency with which investors with far less sophistication than Mr. Perelman implemented such hedging strategies during the late 1990s. Professor Haas would testify that most sophisticated companies and investors were using in 1998, and today are routinely using, lock-up agreements that expressly prohibited the use of derivative instruments. Professor Haas also would testify that CPH, as a sophisticated investor, should have known that the broadly drafted lock-up in Section 7.1 permitted the use of such instruments. In support of his position, Professor Haas would point to the following "lock-up" provisions that are contained in merger agreements that were executed in 1998:

AT&T CORP
8-K, EX-2 - AGREEMENT AND PLAN OF MERGER filed 01/16/98
(http://www.sec.gov/Archives/edgar/data/5907/0000005907-98-000002.txt)

> 7.9. Affiliates of Parent and the Company. Concurrently with the execution of this Agreement, each of the directors of the Company

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27 The Certificate of Merger was filed on March 30, 1998 (the "Holdings Effective Time"). The lock-up provision prevented CPH from selling its Sunbeam shares for ninety (90) days thereafter (June 30, 1998).

28 *See* MS 550, 551, and 552.

has executed an agreement to the effect set forth in this Section 7.9. Prior to the Effective Time, the Company shall deliver to Parent a letter identifying all other Persons who, to the Company's knowledge, at the time of the execution and delivery of the Stockholders Consent or at the Effective Time, may be deemed to be "affiliates" of the Company for purposes of Rule 145 under the Securities Act or who may otherwise be deemed to be Affiliates of the Company (the "Rule 145 Affiliates"). The Company shall use all reasonable efforts to cause each Person who is identified as a Rule 145 Affiliate in such list to deliver to Parent on or prior to the 30th day prior to the Effective Time, a written agreement, in the form attached hereto as Exhibit A, that such Rule 145 Affiliate will not (a) sell, pledge, transfer or otherwise dispose of any Parent Common Shares issued to such Rule 145 Affiliate pursuant to the Merger, except pursuant to an effective registration statement or in compliance with Rule 145 under the Securities Act or an exemption from the registration requirements of the Securities Act, or (b) sell, pledge, transfer or otherwise dispose of, ***or hedge or otherwise reduce its risk with respect to, any Shares or any Parent Common Shares***, . . . (emphasis added).

EXCEL COMMUNICATIONS INC.
8-K - EX-2, MERGER AGREEMENT filed 06/24/98
(http://www.sec.gov/Archives/edgar/data/1045538/0000909518-98-000438.txt)

5.11 Rule 145 Affiliates of Teleglobe and Excel; Pooling Letters. Concurrently with the execution of this Agreement, each of the directors of Excel and of Teleglobe has executed an agreement in the form attached hereto as Exhibit I or J or as applicable. No later than 30 days following the date of this Agreement, Excel shall deliver to Teleglobe a letter identifying all other Persons who, to Excel's knowledge, at the time of execution of the Excel Stockholders Consent, at any Excel Stockholders Meeting or at the Effective Time, may be deemed to be "affiliates" of Excel for purposes of Rule 145 under the Securities Act or who may otherwise be deemed to be Affiliates of Excel (the "Rule 145 Affiliates"). Excel shall use its best efforts to cause each Person who is identified as a Rule 145 Affiliate in such list to deliver to Teleglobe at or prior to the Effective Time a written agreement to the effect that such Rule 145 Affiliate will not (a) sell, pledge, transfer or otherwise dispose of any Teleglobe Common Shares issued to such Rule 145 Affiliate pursuant to the Merger, except pursuant to an effective registration statement or in compliance with Rule 145 under the Securities Act or an exemption from the registration requirements of the Securities Act, or (b) sell, pledge, transfer or otherwise dispose of, ***or hedge or otherwise reduce its***

16div-017238

> ***risk with respect to, any common shares of Teleglobe capital stock or any shares of Excel Common Stock*** . . . . (emphasis added).

In sum, CPH's decision not to use the various non-sale derivative instruments that were available to it was not the result of any contractual prohibition. Contractually, CPH was free to do so, as no fewer than three major investment banks informed CPH.

( ) CPH Was Permitted Under The Securities Act To Sell Sunbeam Shares At Any Time After The Expiration Of Its Contractual Lock-Up

Section 7.1 of the Merger Agreement specifically allows CPH to sell up to 25% of its shares of Sunbeam stock on June 30, 1998, an additional 25% on September 30, 1998, and the balance on December 30, 1998 (i.e., three, six, and nine months after the merger closing). In its Supplemental Disclosure, CPH wrongly asserts that the federal securities laws did not permit it to sell at this time. Professor Haas would testify that this assertion is both legally and factually incorrect.

Professor Haas would testify that CPH could have utilized the well-established resale exemption provided under Section 4(1) of the Securities Act.[29] CPH refers to this as an "implied 'hybrid' exemption that merges the concepts underlying Sections 4(1) and 4(2)", but its analysis is wrong. As Professor Haas would explain, the proposed transaction lies squarely within a long-standing and universally recognized resale provision consistent with the statutory provisions of

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[29] Section 4(1) states that any transaction "by any person other than an issuer, underwriter, or dealer" is exempt from registration. In this case, CPH is clearly not an issuer or a dealer. Moreover, CPH would not be an "underwriter" because the purchaser would be an institutional investor or other accredited investor who would purchase the securities subject to transfer restrictions and not with a view towards distribution.

Section 4(1).[30] In such a transaction, CPH would sell its restricted shares privately to institutional investors (typically investment banks) or other accredited investors. These investors acquire the shares for investment purposes only and not with a view to distribution. To ensure these restricted shares do not leak into the public market in violation of the Securities Act, they are subject to certain restrictions on transfer.

Thus, Professor Haas would testify that, so long as CPH complied with the contractual lock-up provisions and the federal securities laws, CPH could have resold its shares in private transactions under Section 4(1) of the Securities Act. Professor Haas would further testify that such transactions are routinely entered into by holders of restricted securities who wish to monetize their investments and minimize their exposure to potential negative stock price changes during the terms of their applicable holding periods.

2. OFFER OF EVIDENCE PROVING THAT CPH COULD HAVE UTILIZED A VARIETY OF HEDGING STRATEGIES TO VIRTUALLY ELIMINATE OR SUBSTANTIALLY MINIMIZE THE LOST VALUE OF ITS SUNBEAM INVESTMENT

If Professor Haas were permitted to testify, he would have described various hedging strategies that were independently presented by multiple investment banks to CPH in March and April, 1998.[31] *Each of these proposed hedging strategies was designed to be implemented without the sale of any Sunbeam shares.* Accordingly, CPH could have used any of these

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30 CPH is correct that most practitioners refer to this resale as a "Section 4(1½)" transaction because its structure bears resemblance to the private placement resale exemption from registration under Section 4(2). However, CPH's suggestion that this is somehow a phantom exemption that exists in theory is wrong. *See* Securities Act Release No. 33-6188, 1980 WL 29482 at n.178 (Feb. 1, 1980) (finding that this proposed transaction is "clearly within [the] intended purpose" of the Securities Act.).

31 *See* MS 550, 551, and 552.

strategies as early as March 30, 1998 virtually eliminate or substantially minimize its downside investment risk without selling any Sunbeam shares.[32] For illustrative purposes, four of these strategies, each of which was actually proposed to CPH, are described below.

Forward Contract[33]

CPH could have executed a one-year forward contract with Bear Stearns in order to virtually eliminate the risk of a Sunbeam stock price decline. Pursuant to this hedging strategy, CPH would enter into a contract with Bear Stearns to sell all 14.1 million Sunbeam shares to Bear Stearns on some future date, at a price per share substantially equal to the market price as of the contract date. Thus, CPH would have locked in 96% of the market value of the Sunbeam stock on the contract date. Bear Stearns would likely require CPH to pledge its Sunbeam shares as collateral, which it is permitted to do under the lock-up agreement. The expiration date of the forward contract would be no earlier than the end of the applicable holding period under Securities Act Rule 144. Thus, because no Sunbeam shares were being sold or transferred, CPH could enter into this hedging strategy in compliance with the federal securities laws and the lock-up agreement.

Put Options[34]

CPH could have purchased put options from Goldman Sachs in order to substantially reduce the risk of a Sunbeam stock price decline. A put option eliminates an investor's risk that

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32 *See* MS 552 at CPH 2011589.

33 *See* MS 550 at CPH 2011566 – 567. Note that the hedging strategy offered by Bear Stearns is called a "synthetic forward," which utilizes a slightly different structure than a forward contract but has the same net effect.

34 *See* MS 552 at CPH 2011605 – 606.

the stock price will fall below the exercise or "strike" price of the put option during the option's term. If, at the end of the option's term, the market price of the Sunbeam stock had fallen below the strike price of the put option, Goldman Sachs would have had to purchase CPH's Sunbeam shares for the strike price.[35] Moreover, if, during the term of the option, the market price of Sunbeam stock had risen rather than fallen, CPH would have benefited from the stock price appreciation less the cost of the put options. A put option strategy would not have required CPH to sell or otherwise transfer any of its Sunbeam stock and would have been a viable hedging strategy for an investor holding restricted stock.[36]

OTC Equity Collar[37]

CPH could have also executed an OTC[38] equity collar to substantially reduce its risk relating to a Sunbeam stock price decline. To establish an equity collar, CPH would have purchased *put* options from Goldman Sachs while simultaneously selling *call* options to

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35 An example will illustrate this transaction. Suppose an investor holds 100 shares of Sunbeam stock and desires to hedge any price decline over the next 12 months. Assuming the current market price of Sunbeam stock is $50 per share, the investor could purchase a 12-month put option with a $45 strike price from an investment bank covering his 100 shares. If, after the end of the 12-month period, Sunbeam's stock price has fallen to $30 per share, the investment bank must purchase all 100 shares for $45 per share. If, after the end of the 12-month period, Sunbeam's stock price has risen to $65 per share, the investor keeps all the price appreciation less the cost of the option, which expires worthless.

36 Section III provides an example of CPH's ability to have mitigated its damages in this case had it used put options.

37 *See* MS 552 at CPH 2011597 – 603.

38 Because the collar is privately negotiated, it is referred to as an "over-the-counter" or "OTC" product.

Goldman Sachs.39 The put options operate exactly as described above, and thus would have eliminated CPH's downside risk below the strike price of the put options.

Such put options, however, are not free. In order to offset this cost, CPH would have sold call options to Goldman Sachs. If the amount CPH received for selling the call options completely offsets the amount it paid for purchasing the put options, the collar is referred to as a "costless collar." While a call option allows an investor to participate in any stock price appreciation up to the strike price of the call option, it does not allow participation in any appreciation beyond the strike price. Thus, if at the end of the option's term the market price of the Sunbeam stock had risen above the strike price of the call option, CPH would still have had to sell its Sunbeam shares to Goldman Sachs for the strike price.[40]

An OTC equity collar strategy would not have required Mr. Perelman to sell or otherwise transfer any of his Sunbeam stock. Thus, it is a viable hedging strategy for an investor holding restricted stock.[41] Moreover, this strategy could have been utilized at no cost to CPH.

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39 Because the strike price of the put options establishes a stock price "floor," while the strike price of the call options establishes a stock price "ceiling," the strategy is referred to as a "collar." Indeed, the two strike prices "surround" the current market price of the stock at the time the options are written.

40 An example will illustrate this transaction. Suppose an investor holding 100 shares of Sunbeam stock sells a call option covering those shares to an investment bank. He or she may do so in order to cover the cost of a put option covering those same shares he purchased from that same investment bank. Assuming the current market price of Sunbeam stock is $50 per share, the investor could sell a 12-month call option with a $55 strike price. If, after the end of the 12-month period, Sunbeam's stock price has risen to $65 per share, the investor must still sell the 100 shares at the strike price ($55).

41 Section III provides an example of CPH's ability to have mitigated its damages in this case had it used an equity collar.

Stock Monetization Via Trust ACES ("TRACES[SM]")[42]

CPH could have also utilized Goldman Sachs' proprietary product called Stock Monetization Via Trust ACES ("TRACES[SM]") to limit its downside exposure and thus mitigate its damages in this case. The TRACES strategy proposed by Goldman Sachs was familiar to Mr. Perelman, who in 1993 implemented a similar strategy through Coleman Worldwide Corporation ("Coleman Worldwide") using a similar product, Liquid Yield Option Notes ("LYONS[TM]"), developed by Merrill Lynch & Co.[43]

Had CPH utilized a TRACES strategy it would have (1) protected itself from a Sunbeam stock decline, (2) provided an immediate cash return and (3) shared in any stock price appreciation. A TRACES strategy is attractive to an investor holding restricted shares because the conversion process (described below) can easily be structured to occur after the expiration of the applicable holding period under Securities Act Rule 144. Thus, this strategy would not have required CPH to sell or otherwise transfer ownership of any of its restricted Sunbeam shares at the time it was implemented.[44]

A TRACES strategy involves three distinct steps. First, CPH would place its restricted Sunbeam shares into an escrow account for a period of time at least as long as the applicable holding period of the restricted shares. During this time, Mr. Perelman would retain ownership

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42 *See* MS 552 at CPH 2011608 – 613.

43 *See* Registration Statement of Coleman Worldwide Corporation (Nos. 33-60274/33-61346) (MS 992).

44 Section III provides an example of CPH's ability to have mitigated its damages in this case had it used a TRACES strategy.

of the shares, including the right to vote the shares and receive any dividends and other distributions.

Second, a special purpose trust would simultaneously be established. This trust would raise an amount of money equal to the current market value of the Sunbeam shares placed into escrow by selling specialized equity securities (TRACES) that pay a fixed dividend for the duration of the strategy. CPH would be entitled to a substantial portion of the money raised by the sale of the TRACES. The trust would use the remaining money it raised to purchase U.S. treasury securities, the principal and interest of which would be used by the trust to pay the fixed dividends owed on the TRACES securities.

Third, at the end of the applicable holding period for the restricted shares (or perhaps longer, at the investor's discretion), holders of the TRACES securities would be contractually obligated to convert their securities into shares of Sunbeam stock in accordance with a predetermined formula. The Sunbeam stock being held in escrow (which is no longer restricted) would be used in connection with this conversion.[45]

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[45] Because of the conversion ratio, CPH would bear no investment risk related to declines in Sunbeam's stock price beyond 17% because CPH would have already received 83% of the proceeds generated from the sale of the TRACES securities. Accordingly, CPH would have guaranteed 83% of its investment and could have shared in any appreciation in the Sunbeam stock. If the Sunbeam stock price had increased during the strategy term, then the TRACES security holders would have received less than one share of Sunbeam stock for each TRACES security they held. This would have left some Sunbeam shares still in the escrow account to be returned to CPH. In other words, any appreciation in the Sunbeam stock price would have been shared between the TRACES security holders and CPH. Sharing would have occurred in accordance with a predetermined formula under which the shares held in escrow would be divided between the TRACES security holders and CPH. Note, however, that the TRACES holders would not acquire beneficial ownership of the Sunbeam shares until after the expiration of the applicable holding period under Securities Act Rule 144 and therefore the TRACES structure would have complied with both the federal securities laws and the contractual lock-up.

3. ADDITIONAL EVIDENCE SUPPORTING MS & CO.'S ARGUMENT THAT CPH COULD HAVE SUBSTANTIALLY MITIGATED ITS DAMAGES

Morgan Stanley contends that CPH could have virtually eliminated or substantially minimized its investment losses in Sunbeam through one or more hedging strategies, none of which involved a prohibited transfer of Sunbeam shares. These strategies could have been implemented as early as March 30, 1998, the closing date of the CPH-Sunbeam transaction. If Professor Haas had been permitted to testify, he would have described the following transactions,[46] *each of which was proposed to CPH and Mr. Perelman* by various investment banks in March and April 1998:

1. One-Year Forward Contract: *This hedging strategy would have protected 96% of CPH's investment in Sunbeam without any upfront payment by CPH.* On March 30, 1998, CPH would have entered into a contract with a purchaser (typically an investment bank[47]) pursuant to which CPH would have agreed to sell 14.1 million Sunbeam shares on the future date of March 30, 1999 at a price of $42.36 per share (i.e., the share price on March 30, 1998, as adjusted for applicable transaction fees). Thus, on March 30, 1999, when the market value of CPH's Sunbeam shares was only $79.2 million,[48] CPH would have sold its entire Sunbeam position for $42.36 per share and generated cash proceeds of $597.2 million.

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46 Professor Haas has reviewed supporting data for the transactions discussed herein, including the calculations set forth herein, which were performed by MS & Co. and with which Professor Haas concurs.

47 For purposes of simplicity, these examples assume that CPH transacted with only one investment bank. However, given that at least three investment banks met with CPH representatives around the time of the CPH-Sunbeam transaction, one could reasonably conclude that it could have hedged through multiple institutions.

48 Based on a closing stock price of $5.62 per share on March 30, 1999.

CPH would have been required to provide collateral in connection with this transaction, either in the form of a pledge of Sunbeam shares (which it was permitted to do under the lock-up agreement) or cash. The parties would have negotiated and documented the transaction within one day. Because Sunbeam shares would not have been transferred until the expiration of the forward contract, this hedging arrangement would not have constituted a sale and therefore would not have violated the federal securities laws or breached the lock-up agreement. Moreover, CPH could have utilized this strategy regardless of whether or not it was an "affiliate" or "insider" of Sunbeam.

2. Three-Year TRACES: *This hedging strategy would have protected 81% of CPH's investment in Sunbeam, or $498.8 million.* Implementation of this strategy would not have constituted a sale or transfer of Sunbeam stock in violation of federal securities laws or the lock-up agreement. As evidence of its ongoing ownership of the shares, CPH would have retained the right to vote the shares and receive dividends or other distributions.

Pursuant to the TRACES strategy, CPH would have first placed its 14.1 million restricted Sunbeam shares into an escrow account for a period of three years, which is longer than any of the applicable holding periods under Securities Act Rule 144. Simultaneously, the investment bank would have established a special purpose trust to raise $601.0 million through a public offering of TRACES securities. Of this amount, CPH would have received $498.8 million and the remaining $102.2 million would have been used to purchase U.S. treasury securities, the principal and interest on which would pay fixed dividends owed to the TRACES holders during the life of the security. Implementation of this hedging strategy would have had the benefit of not requiring the short sale of Sunbeam shares, which would have placed downward pressure on the Sunbeam stock price. When the special purpose trust expired on March 30, 2001, the holders

of TRACES would have received the Sunbeam shares held in the escrow account (now worthless) and CPH would have retained the $498.8 million that it received three years earlier.

3. One-Year OTC Equity "Costless" Collar: *This hedging strategy would have protected 88% of CPH's investment in Sunbeam, or $544.4 million.* CPH would have simultaneously done the following: (i) sold call options with respect to 14.1 million Sunbeam shares with a strike price of $46.74 (i.e., 115% of the presumed stock price on March 30, 1998 after implementation of the proposed strategy); and (ii) purchased put options with respect to 14.1 million Sunbeam shares with a strike price of $38.61 (i.e., 95% of the presumed stock price on March 30, 1998 after implementation of the proposed strategy). Thus, CPH would have realized up to 15% appreciation in its Sunbeam investment during the term of the options, while at the same time protected against any decline in its investment greater than 5%. Because the amount CPH would have received for selling the call options would have completely offset the amount CPH would have paid for purchasing the put options, this hedging strategy would have cost nothing to implement (hence, a "costless" collar). Since no Sunbeam shares would have been sold or transferred for one year, this hedging strategy would not have violated the federal securities laws or the lock-up agreement. Upon the expiration of both sets of options on March 30, 1999, when the market value of CPH's Sunbeam shares was only $79.2 million, CPH would have sold its entire Sunbeam position for $38.61 per share, or aggregate cash proceeds of $544.4 million.

4. One-Year Put Option: *This hedging strategy would have protected 82% of CPH's investment in Sunbeam, or $507.2 million.* CPH would have purchased put options with respect to 14.1 million Sunbeam shares with a strike price of $42.62 per share (i.e., the presumed stock market price on March 30, 1998 after implementation of the proposed strategy). The total cost of the put options would be approximately $93.8 million. Implementation of this strategy would

have almost fully protected against any declines in its Sunbeam investment while still retaining unlimited upside potential. Since no Sunbeam shares would have been sold or traded for one year, this hedging strategy would not have violated the federal securities laws or the lock-up agreement. Upon the expiration of the put options on March 30, 1999, when the market value of CPH's Sunbeam shares was only $79.2 million, CPH would have sold its entire Sunbeam position for $42.62 per share, or aggregate net cash proceeds of $507.2 million.

CONCLUSION

MS & Co. respectfully requests that this proffer be entered into the trial record.

EXHIBIT A

Resume of Professor Jeffrey J. Haas

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BOOKS/PUBLICATIONS/WRITINGS:

Starting from Scratch: The New Saudi Arabian Securities Laws (work in progress)

CORPORATE FINANCE IN A NUTSHELL (Thomson West 2004)

When the Endowment Tanks–Some Lessons for Nonprofits, BUSINESS LAW TODAY, Amer. Bar Assoc. (May-June 2003).

Nonprofit Directors' Duties as Endowment Performance Declines, N.Y.L.J., Jan. 17, 2003, at 4.

The Heartland Funds' Receivership and Its Implications for Independent Mutual Fund Directors, 51 EMORY L. J. 153 (2002) (co-authored with Steven Howard of Paul, Weiss, Rifkind, Wharton & Garrison)

The Heartland Funds: Factors That Trigger a Mutual Fund Receivership, INVESTMENT LAWYER, June 2002, at 13 (co-authored with Steven Howard of Paul, Weiss, Rifkind, Wharton & Garrison)

Fiduciary Duties of Tracking Stock Directors Under Delaware Law, DIRECTOR'S MONTHLY (Nat'l Assoc. of Corp. Directors), May 2001, at 7.

Tracking Stocks: What Directors Need To Know, THE CORPORATE BOARD, Nov./Dec. 1999, at 6.

Tracking Stock as a Strategic Choice, SECURITIES REGULATORY UPDATE (CCH), Oct. 4, 1999, at 1.

How Quantum, DLJ and Ziff-Davis Are Keeping on Track with "Tracking Stock," WALLSTREETLAWYER.COM, Sept. 1999 (Part I), at 1; Oct. 1999 (Part II), at 8.

"Suitability" in the Self-Managed Internet Offering Context, WALLSTREETLAWYER.COM, Jan. 1999, at 10

Small Issue Public Offerings Conducted Over the Internet: Are They 'Suitable' for the Retail Investor?, 72 SO. CAL. L. REV. 67 (1998) (reprinted in 2000 CORP. PRAC. COMM. 419)

ABA Comment Letter on Rules 144 and 145, delivered to Securities and Exchange Commission on May 9, 1997 (written with John Huber)

Directorial Fiduciary Duties in a Tracking Stock Equity Structure: The Need for a Duty of Fairness, 94 MICH. L. REV. 2089 (1996) (reprinted in THE BEST IN SECURITIES OFFERINGS (Bowne & Co. 2001 ed. & 1998 ed.) and THE BEST IN D&O DUTIES AND LIABILITIES (Bowne & Co. 1997))

ABA Comment Letter on Rule 144, delivered to Securities and Exchange Commission on September 6, 1995 (written with Peter Romeo, John Huber, et al.)

Introduction to Tracking Stocks, PLI B4-7051 (1993) (written with Erica Steinberger)

Insights into Lender Liability: An Argument for Treating Controlling Creditors as Controlling Shareholders, 135 U. PA. L. REV. 1321 (1987)

WORK EXPERIENCE:

The New York Law School (July 1996 to present)
Professor of Law (since May 2000)
Associate Professor of Law (July 1996 to April 2000)

Courses taught include Securities Regulation, Mergers & Acquisitions, Mutual Fund Regulation, Corporate Finance, Corporations and Contracts. Research interests include directorial fiduciary duties, Internet stock offerings, private placements, mutual funds and investment advisers, "tracking stock" equity structures and Rule 144 and 144A transactions.

LATHAM & WATKINS, New York, New York (July 1993 to Sept. 1995) (description below)

CRAVATH, SWAINE & MOORE, New York, New York (Sept. 1988 to June 1993)
Corporate Attorney (at both Latham and Cravath):

Diverse corporate and securities practice, including extensive general corporate counseling, mergers and acquisitions (both friendly and hostile), private and public securities offerings (including equity derivative securities and "tracking" stock), restricted stock monetizations and related hedging activities, and banking and secured lending.

ADDITIONAL TEACHING EXPERIENCE:

University of Pennsylvania Law School (Spring 2005 & 2002)
Adjunct Professor of Law (taught Securities Regulation and Corporate Finance)

Florida State University College of Law (Fall 2003)
Visiting Professor of Law (taught Business Associations and Corporate Finance)

Cardozo School of Law (Spring 2002)
Visiting Professor of Law (taught Securities Regulation and Corporate Finance)

Cardozo School of Law (Spring 2004 & 1999; Fall 2004)
Adjunct Professor of Law (taught Corporate Finance, Mergers & Acquisitions and Corporations)

Seton Hall University School of Law (Spring 1996)
Adjunct Professor of Law (taught Business Planning)

EDUCATION:

UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, Philadelphia, Pennsylvania
J.D.–1988 *cum laude*

Activities: *Law Review*–Comment Editor (3L): Associate Editor (2L)
Awards: *Block Award* for highest grade in Trusts and Estates

FLORIDA STATE UNIVERSITY, Tallahassee, Florida
B.S.–1984 *summa cum laude* (double major in Finance and Classical Civilizations)

Honors: Phi Beta Kappa; Rotary Foundation Scholar; Phi Kappa Phi
Awards: *Kathleen Rankin Memorial Prize in Classics*; Florida Bankers Association Scholar

THE UNIVERSITY OF MELBOURNE, Victoria, Australia
1983–Rotary Foundation Scholar (Monetary and International Economics)

CERTIFICATIONS/AFFILIATIONS:

Member, New York Bar (admitted 1989)
Member, American Bar Association
Member, ABA Committee on Fed. Reg. of Securities and Subcommittee on 1933 Act

EXHIBIT B

Testifying Experience of Professor Jeffrey J. Haas

Spahn v. Federated Investors, Inc. (W.D. Pa. - continuing) (expert for plaintiffs in case involving mutual fund regulation)

Pinal Creek Group v. Newmont Mining Corp. (D. Ariz. 2005) (expert for plaintiffs in case involving corporate successor liability)

In re AT&T Corp. Securities Litigation (D. N.J. 2003 - continuing) (expert for plaintiffs in case involving tracking stock capital structure)

May v. Prost (Del. Ch. 2003) (expert for defendant in case involving investment adviser regulation)

Reiner v. Wenig (N.Y. Sup. Ct. 2001) (expert for defendant in case involving option agreement, registration rights, and public offering of securities)

Day v. Meyer (S.D.N.Y. 2001) (expert for plaintiff in case involving option agreements)

Peters v. Smith (N.Y. Sup. Ct. 1999) (expert for plaintiff in case involving investment adviser compensation)

Connell v. Spencer (D. Maine 1999) (expert for plaintiff in case involving breach of contract)

In addition to the foregoing, Professor Haas has served as an expert in numerous NASD securities arbitrations alleging broker-dealer misconduct.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 10th day of May, 2005.

Mark C. Hansen (*pro hac vice*)
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Suite 1200 – West Tower
West Palm Beach, FL 33401

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

NOTICE OF FILING RETURN OF SERVICE

Defendant, MORGAN STANLEY & CO. INCORPORATED, by and through its undersigned counsel, hereby gives notice that it has filed the original Returns of Service of the trial subpoenas for the Records Custodian of MAFCO Holdings, Inc. and Records Custodian of Coleman (Parent) Holdings, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand-delivery on this 10th day of May, 2005.

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RETURN OF SERVICE

State of Florida **County of Palm Beach** **Circuit Court**

Case Number: CA 03-5045 AI Court Date: 4/26/2005

Plaintiff:
COLEMAN (PARENT) HOLDINGS, INC.

vs.

Defendant:
MORGAN STANLEY & CO., INC.

For:
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Suite 1400
West Palm Beach, FL 33401

Received by BLACKHAWK LEGAL SERVICE INC on the 25th day of April, 2005 at 2:45 pm to be served on **RECORDS CUSTODIAN FOR MAFCO HOLDINGS, INC., 35 E. 62nd Street, New York, NY 10021**.

I, Denise Sucato, do hereby affirm that on the **25th day of April, 2005** at **4:30 pm, I:**

SERVED the within named **BUSINESS** by delivering a true copy of the Subpoena for Trial with the date and hour of service endorsed thereon by me to **HOWARD GITTIS** as **Records Custodian**.

Additional Information pertaining to this Service:
Served at Palm Beach County Courthouse, 205 N. Dixie Highway, Room 11A, West Palm Beach, FL. P/S arrived at courthouse at 3:00pm and waitied until subject appeared at 4:30pm.

Under penalty of perjury, I do hereby certify that I am not a party to the above captioned case and have no interest in the above action, that I am over the age of eighteen, that I have read the foregoing and that the facts stated in it are true, and that I am a **Certified Process Server** in good standing in the Fifteenth Judicial Circuit in and for Palm Beach County, Florida. Pursuant to F.S. 92.525(2) NO NOTARY IS REQUIRED.

Denise Sucato
CPS #PBC574

BLACKHAWK LEGAL SERVICE INC
4521 P G A Boulevard, #210
Palm Beach Gardens, FL 33418
(561) 622-0711

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16div-017259

Priority

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED.,

Defendant.
_____/

CASE NO: CA 03-5045 AI

SUBPOENA FOR TRIAL

THE STATE OF FLORIDA

TO: Records Custodian of MAFCO Holdings, Inc.
35 E. 62nd Street
New York, New York 10021

YOU ARE COMMANDED to appear before The Honorable Elizabeth Maass, Judge of the Circuit Court, at the Palm Beach County Courthouse, Courtroom 11A, 205 North Dixie Highway, West Palm Beach, Florida on April 26, 2005* at 9:30 a.m., to testify in this action. If you fail to appear, you may be in contempt of court.

You are subpoenaed to appear by the following attorneys, and unless excused form this subpoena by these attorneys or the Court, you shall respond to this Subpoena as directed.

Dated: April 25, 2005

BY: Joseph Ianno
Joseph Ianno, Jr.
For the Court

Joseph Ianno, Jr.,
Florida Bar No: 655351
CARLTON FIELDS, P.A.
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Counsel for Defendant
Morgan Stanley & Co. Incorporated

***BEFORE YOU APPEAR**

PLEASE CALL JOYCE DILLARD, CLA AT (561) 659-7070 TO CONFIRM THE EXACT TIME AND DATE YOU WILL BE CALLED TO TESTIFY

RETURN OF SERVICE

State of Florida **County of Palm Beach** **Circuit Court**

Case Number: CA 03-5045 AI Court Date: 4/26/2005

Plaintiff:
COLEMAN (PARENT) HOLDINGS, INC.

vs.

Defendant:
MORGAN STANLEY & CO., INC.

For:
Joseph Ianno, Jr., Esq.
CARTLON, FIELDS P.A.,
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Received by BLACKHAWK LEGAL SERVICE INC on the 25th day of April, 2005 at 2:45 pm to be served on **RECORDS CUSTODIAN FOR COLEMAN (PARENT) HOLDINGS, INC., 35 E. 62nd Street, New York, NY 10021**.

I, Denise Sucato, do hereby affirm that on the **25th day of April, 2005** at **4:30 pm, I:**

SERVED the within named **BUSINESS** by delivering a true copy of the Subpoena for Trial with the date and hour of service endorsed thereon by me to **HOWARD GITTIS** as **Records Custodian**.

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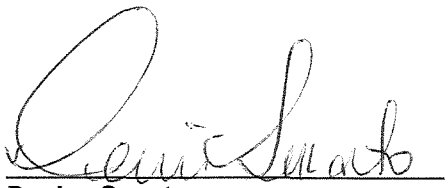

Denise Sucato
CPS #PBC574

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Our Job Serial Number: 2005001959

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Priority

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Dated: April 25, 2005

BY: Joseph Ianno Jr.
Joseph Ianno, Jr.
For the Court

Joseph Ianno, Jr.,
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Counsel for Defendant
Morgan Stanley & Co. Incorporated

***BEFORE YOU APPEAR**

PLEASE CALL JOYCE DILLARD, CLA AT (561) 659-7070 TO CONFIRM THE EXACT TIME AND DATE YOU WILL BE CALLED TO TESTIFY

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S RENEWED MOTION TO APPLY NEW YORK LAW

Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully moves the Court to apply New York law to Coleman (Parent) Holdings, Inc.'s ("CPH's") claims for aiding and abetting fraud and conspiracy to defraud. Morgan Stanley renews its argument at this stage of the proceedings because the evidence at trial undermines key assumptions the Court made when it previously rejected Morgan Stanley's arguments.

BACKGROUND

Morgan Stanley has consistently argued that New York law should apply to all of CPH's claims. On August 11, 2004, the Court agreed with respect to CPH's "direct" claims for fraud and negligent misrepresentation (Counts I and IV) and held that New York law applies to both. See Order on Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc.'s Motion for Application of New York Law (Aug. 11, 2004). CPH subsequently dismissed those claims. On March 29, 2005, the Court reached a contrary conclusion with respect to CPH's "indirect" claims for aiding and abetting and conspiracy to defraud, ruling that Florida law

applies. *See* Order on Morgan Stanley's Motion to Apply New York Law to CPH's Aiding and Abetting and Conspiracy Claims (Mar. 29, 2005).

ARGUMENT

Where proof at trial differs from the pretrial record, a court should revisit its choice of law rulings to conform to the evidence. See *Chance v. E. I. Du Pont De Nemours & Co.*, 57 F.R.D. 165, 170 (E.D.N.Y. 1972) ("During the course of the trial the court may reach different determinations on the facts and decide that a different rule of law applies . . . .").[1] The evidence at trial here—and CPH's own assessment of the evidence in its directed verdict motion—demonstrate that the case CPH has actually chosen to present to the jury should be governed by New York law.

I. The Trial Record Demonstrates That New York Rather Than Florida Law Governs CPH's Indirect Fraud Claims

Florida choice of law follows the Restatement's "most significant relationship" test. *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999 (Fla. 1980); *Trumpet Vine Inv., N.S. v. Union Capital Partners I, Inc.*, 92 F.3d 1110 (11th Cir. 1996). In interstate fraud cases, courts weigh the following six factors: (1) the place of reliance; (2) the place where the plaintiff received the misrepresentation; (3) the place where the defendant made the misrepresentation; (4) the domiciles of the parties; (5) the place of the tangible subject matter of the agreement, if any; and (6) the place of performance. Restatement (Second) of Conflict of Laws § 148 (1971).

---

[1] Florida law does not address the proper procedure for resolving disputed factual issues underlying choice of law determinations. CPH, however, has relied on *Chance* as authority. *See* CPH's Response to Morgan Stanley's Notice to Apply New York Law to CPH's Aiding and Abetting and Conspiracy Claims at 2 (Mar. 9, 2005).

Several of these factors indisputably favor New York. First, because the merger was consummated in New York, see 3/29/05 Order at 4; CPH 330, 338, the reliance and performance factors favor that state. The Court has already ruled that "[t]he reliance factors point primarily, but not exclusively, to New York." 3/29/05 Order at 5. Second, because both CPH and Morgan Stanley have their principal place of business in New York, the domicile factor also favors that state. See 8/11/04 Order at 6; 4/19/05 Tr. at 9178.

Based on CPH's pretrial representations, however, the Court applied Florida law based on "where the conduct took place." 3/29/05 Order at 5. It made two key assumptions: (1) that "[m]ost of the misrepresentations were made in Florida," and (2) that "CPH received the misrepresentations and omissions in both New York and Florida." *Id.* The case and evidence CPH has presented at trial belie both assumptions.

A. Most of the Misrepresentations Were Made in New York

The trial evidence showed that most of the relied-upon misstatements were made in New York, not Florida. CPH's own directed verdict motion proves that. In six and a half pages, it catalogues the six allegedly most significant misstatements relied upon. CPH Motion for a Directed Verdict at 6-13 (May 10, 2005). *Four of the six statements* were indisputably made in New York:

1. **Morgan Stanley Blue Book from the February 23 Meeting**. CPH's own witnesses testified that the Blue Book was the "most important presentation that we were to receive," 4/19/05 Tr. at 9081-82 (Perelman); that it was "pivotal," *id.* (Perelman); and that it was "very important," 4/26/05 Tr. at 10809 (Gittis).

2. **Sunbeam Long-Range Strategic Plan from the February 23 Meeting**. Mr. Gittis testified that this document, also presented in New York, was "an important piece of information." 4/26/05 Tr. at 10757.

3. **Morgan Stanley Debenture Offering Memorandum**. This document, delivered in New York, was described as "[t]erribly significant" by Mr. Perelman, 4/19/05 Tr. at 9127, and "very important" and "absolutely convinc[ing]" by Mr. Gittis,

4/27/05 Tr. at 10871. Mr. Nesbitt described it as "very relevant." 4/18/05 Tr. at 8994.

4. **Morgan Stanley Road Show**. The statements made at the "road show" were, like the others, characterized as "important," 4/19/05 Tr. at 9106 (Perelman), or "very important," 4/27/05 Tr. at 10871 (Gittis).

In contrast, only two of the six misrepresentations mentioned in CPH's directed verdict motion—the Sunbeam financial statements and the March 19, 1998, press release—were arguably "made" anywhere other than in New York. Critically, there is nothing in the trial record suggesting that the representations in the Sunbeam financials were "made" in Florida rather than in Washington D.C. or New York.

B. All the Misrepresentations Were Received in New York

Also contrary to this Court's assumption, the trial evidence failed to show that "CPH received the misrepresentations and omissions in both New York and Florida." 3/29/05 Order at 5. *All six* of the statements described above were *received* in New York. CPH witnesses all testified that, aside from the December 1997 meeting with Al Dunlap, no relevant events took place in Florida:

- Maher was "[n]ever in Florida for any of these discussions." 4/13/05 Tr. at 8110.
- Nesbitt said that the "overwhelming majority" of his work was done in New York; that the meetings with Morgan Stanley and Sunbeam were in New York; and that he never once went to Florida. 4/18/05 Tr. at 8896-98.
- Perelman went to Florida for the December 1997 meeting; aside from that, "everything else was in New York." 4/19/05 Tr. at 9168-69.
- Gittis said that, between December 1997 and March 1998, "[n]othing of any substance" was done in Florida. 4/28/05 Tr. at 11321.
- Finally, according to Perelman, virtually none of the misrepresentations about Sunbeam came from Sunbeam in Florida; instead, they all came from Morgan Stanley in New York: "Morgan Stanley gave us every piece of information about Sunbeam that we got . . . . And it came from Sun—from Morgan Stanley to our company directly from Morgan Stanley." 4/20/05 Tr. at 9451.

The only merger-related meeting that took place in Florida was the December 1997 meeting with Al Dunlap. Yet there is no evidence that CPH relied on any misrepresentations that were made in that unsuccessful meeting. CPH's directed verdict motion does not claim otherwise. Thus, *all* of the relied-upon misstatements were received in New York.

In summary:

Restatement Factor	Assumption in Pretrial Orders	Evidence at Trial
Place of Reliance	Mostly New York	Mostly New York
Place Misstatements Made	Mostly Florida	Mostly New York
Place Misstatements Received	Both Florida and New York	All New York
Domicile of Parties	New York	New York
Place of Subject Matter	Florida	Florida and New York
Place of Performance	Mostly New York	Mostly New York

II. CPH Manipulated Its Pleadings and Proof in Order to Manufacture Application of Florida Law

That the case as proved at trial centered on New York should hardly come as a surprise. The Court originally determined that New York law applied to CPH's direct fraud and negligent misrepresentation claims. In response, CPH dismissed those claims and attempted to convince the Court that its vicarious liability claims would focus on conduct occurring in Florida instead. As the Court explained:

> Condensing these facts down to their simplest form, CPH alleges that Sunbeam, a publicly traded company headquartered in Florida, published false information to the investing public to artificially inflate the value of its stock so it could foist that inflated stock on an unsuspecting third party to allow its executives to earn large incentive bonuses, *and [Morgan Stanley] helped.*

3/29/05 Order at 2.

The actual proof at trial, however, bore no resemblance to that description. Far from addressing fraudulent statements made by Sunbeam in Florida that were "helped" by Morgan

Stanley, the trial was very much about Morgan Stanley's *own* misstatements, or misrepresentations by Sunbeam *through* Morgan Stanley, in New York. Thus, Morgan Stanley's role in the February 23 "due diligence" meeting and the debenture offering—episodes that had minimal significance pretrial—suddenly became critical. In Ronald Perelman's words:

> We had many, many, many, many [conversations with Morgan Stanley]. Th[ere] was not a meeting held with a Sunbeam executive that Morgan Stanley wasn't at. *Morgan Stanley gave us every piece of information about Sunbeam that we got . . . . And it came from Sun—from Morgan Stanley to our company directly from Morgan Stanley.*

4/20/05 Tr. at 9451. Perelman, moreover, conceded that all of his interactions with Morgan Stanley occurred in New York. 4/19/05 Tr. at 9168-69. Thus, while CPH dismissed its direct fraud claims to avoid the application of New York law, the actual case it presented to the jury was still in substance the same direct fraud case, with the same New York focus. It is hard to imagine what CPH would have done differently had its direct fraud claims still been in play.

CPH should not be permitted to manufacture a favorable choice of law by dismissing the claims that require application of New York law but then presenting its case as if nothing had changed. The Court's earlier understanding of the case rested on a premise that there was some distinction between the direct fraud claim and the aiding and abetting and conspiracy claims—that the essential nature of CPH's remaining case was a Florida-based fraud by Sunbeam that Morgan Stanley merely "helped." The case CPH actually presented resembled nothing of the sort. Having chosen to present a case in which Morgan Stanley itself is a direct participant in the fraudulent misstatements, CPH is stuck with the choice-of-law consequences of that decision.

CONCLUSION

WHEREFORE Morgan Stanley respectfully requests that the Court apply New York law to CPH's claims, in light of the evidence presented at trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 11th day of May, 2005.

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BY: _____

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IN THE CIRCUIT COURT OF THE
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COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S MOTION IN LIMINE NO. 34 TO ALLOW PHASE II MITIGATION EVIDENCE DEMONSTRATING THAT CPH WAS NOT A VULNERABLE VICTIM

Morgan Stanley & Co. Inc. ("Morgan Stanley") respectfully moves this Court for an Order allowing Morgan Stanley – in Phase II (should there be one) – to: (i) submit mitigating evidence demonstrating that CPH Coleman (Parent) Holdings, Inc. ("CPH") was not a vulnerable victim; and (ii) make argument regarding this evidence.[1] The mitigation evidence that Morgan Stanley seeks to admit includes deposition designations regarding the admitted business sophistication of CPH's principals, their access to material information, and the number of well-respected advisors CPH hired in connection with the Sunbeam deal. Morgan Stanley's Motion relies on controlling United States Supreme Court and Fourth District precedent, which establish that Morgan Stanley is entitled to present such mitigating evidence, especially if necessary to impeach evidence adduced by CPH in Phase I or in Phase II.

[1] Morgan Stanley has elsewhere moved to be allowed fully to litigate all punitive damages issues. This motion is submitted for consideration in the event Morgan Stanley is not allowed to defend its conduct generally.

BACKGROUND AND PROCEDURAL POSTURE

During Phase I, CPH sought to persuade the jury that it was particularly vulnerable and susceptible to the fraud that Morgan Stanley is deemed to have committed. By way of example, CPH presented testimony that Mr. Perelman placed particular trust in Morgan Stanley because of a prior working relationship between the two, that Morgan Stanley had superior access to information regarding Sunbeam, and that Morgan Stanley's sterling reputation as one of the top two investment banks somehow lulled CPH and its army of advisors into refraining from conducting the kind of thorough due diligence that, according to CPH's own expert Professor Emery, is "typical" in mergers and acquisitions. *See* 04/11/05 Tr. at 7573-74.

During Phase II, Morgan Stanley anticipates that CPH will make these and other similar arguments with even greater vigor in an effort to persuade the jury to punish Morgan Stanley more severely than it otherwise might. Morgan Stanley has a right under both Florida law and the Due Process Clause to present mitigating evidence that will refute any suggestion that Mr. Perelman was somehow especially vulnerable to this deemed fraud.

Morgan Stanley has previously designated deposition testimony – to be played in Phase II – that will place before the jury highly relevant evidence regarding whether CPH could possibly qualify as a "vulnerable victim," as the concept has been employed by the Supreme Court. This includes testimony from Karen Clark, Donald Drapkin, Robert Duffy, Adam Emmerich, Irwin Engleman, Howard Gittis, Jerry Levin, James Maher, William G. Nesbitt, Joseph P. Page, Joseph R. Perella, Ronald O. Perelman, Barry Schwartz, Paul E. Shapiro, and Bruce Slovin. The Court and Plaintiff's counsel have

questioned the relevance and purpose of this testimony. *See, e.g.*, April 19, 2005 Tr. at 9364-66. As set forth below, the testimony that Morgan Stanley intends to present constitutes exactly the sort of mitigating evidence that the United States Supreme Court, the Fourth DCA, and other courts addressing the issue all conclude must be admitted into evidence when punitive damages are at issue. Furthermore, as we explain, Morgan Stanley has the right to introduce this evidence even if CPH does not first suggest that it was particularly vulnerable.

ARGUMENT

1. The United States Supreme Court has held that the single most important factor in determining whether a punitive damages award is constitutionally reasonable is "the degree of reprehensibility of the defendant's conduct." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)). In assessing reprehensibility, the Supreme Court has instructed lower courts to assess, among other factors, whether "the target of the conduct had financial vulnerability." *State Farm*, 538 U.S. at 419. To determine whether a party to a commercial transaction was "financially vulnerable," lower courts consider whether the plaintiff and defendant had equal bargaining power, whether the plaintiff was experienced and sophisticated in commercial transactions, and whether the contract was negotiated at arms-length. *See TVT Records v. Island Def Jam Music Group*, 279 F. Supp. 2d 413, 447-49 (S.D.N.Y. 2003). Thus, there is no doubt that testimony regarding CPH's lack of financial vulnerability – including specifically its sophistication in these types of transactions – is relevant and admissible in the punitive damages phase.

As set forth above, in an apparent effort to lay a foundation of alleged reprehensibility, CPH has already presented evidence and argument to this jury regarding CPH's supposed vulnerability to the deemed fraud. CPH will almost certainly continue with this course if a punitive damage phase becomes necessary. Morgan Stanley has a constitutional right to challenge CPH on this point and to offer evidence proving that CPH was not in fact especially vulnerable to the deemed fraud.[2] This mitigation evidence would include, but would not be limited to, evidence of CPH's business sophistication, its access to material information, its ability to consult numerous advisors, and its own self-interested reasons for selling its Coleman stock. All this evidence is relevant to Morgan Stanley's reprehensibility under *State Farm* but is not at all inconsistent with the deemed fraud. Accordingly, even if the litigation misconduct sanction is extended to Phase II, Morgan Stanley retains a constitutional right to introduce this (and similar) evidence.

2. The Fourth District has definitively held that a defendant is entitled to present evidence to a jury tending to mitigate the need for and propriety of punitive damages. In *Humana Health Ins. Co. of Fla., Inc. v. Chipps*, 802 So. 2d 492 (Fla. 4th DCA 2001), the court found that the trial court "improperly prevented Humana from introducing mitigating evidence to rebut testimony that Humana's managed care practices violated industry standards." *Id.* at 496. Instead, "[t]he jury should have been allowed to consider any evidence which would have had the effect of 'reducing or softening the moral or social culpability attaching to the defendant's act.'" *Id.* (citation omitted). In so

[2] It seems clear that what the Supreme Court had in mind in identifying the defrauding of "vulnerable" victims as an aggravating factor is people who by reason of financial crisis, mental deficiency, etc. – the classic "widows and orphans" – are preyed upon by unscrupulous persons. By no stretch of the imagination does CPH fall into the category of victims requiring special solicitude.

holding, the court referenced the Florida Standard Pattern Jury Instructions, which provide that a jury, in considering whether to award punitive damages, "should consider . . . any other circumstance which may affect the amount of punitive damages." Fla. Std. Jury Instr. (Civ.) PD (1), *quoted in Humana*, 802 So. 2d at 496 n.6. *See also* Pattern Jury Instruction PD-2d(1) (providing that a jury should consider "the nature, extent and degree of misconduct and the related circumstances" in determining the amount of a punitive damages award).

In different circumstances, reasonable jurors could conclude that defrauding the vulnerable or those with no access to material information is particularly reprehensible and worthy of punishment. In reliance on this inapposite set of circumstances, CPH has sought to cast Morgan Stanley's deemed fraud in a false light. Nevertheless, despite the many facts deemed established as a discovery sanction, Morgan Stanley remains entitled to present evidence demonstrating that any fraud was not aggravated by some defenselessness on the part of Mr. Perelman. Such evidence, including Mr. Perelman's sophistication, his access to material information, his sophisticated and expert advisors, and his motivation for selling Coleman, is relevant to a fair and balanced consideration of the "moral or social culpability" associated with the deemed fraud and is not inconsistent with any of the deemed facts. Moreover, it will provide the jury with a clear and more accurate understanding of the "nature, extent and degree" of Morgan Stanley's deemed misconduct.

3. Numerous courts in other jurisdictions, following the Supreme Court's *State Farm* decision, have allowed defendants to introduce evidence of the plaintiff's sophistication as part of a vulnerability determination. For example, in *Harris v. Archer*,

134 S.W.3d 411 (Tex. App. 2004), the court based its remittutur of a punitive damages award on the fact that the plaintiffs were "reasonably sophisticated businessmen" whose backgrounds and experiences revealed an absence of financial vulnerability. *Id.* at 438. Likewise, in *Simon v. San Paolo U.S. Holding Co., Inc.*, 7 Cal. Rptr. 3d 367 (Cal. App. 2003), the court identified the plaintiff as a "sophisticated multi-millionaire businessman who had a law degree, and therefore had no financial vulnerability." 7 Cal. Rptr. 3d at 384 (the California Supreme Court granted review on the separate issue of how to measure the ratio between compensatory and punitive damages, *see* 11 Cal.Rptr.3d 510 (2004)). Accordingly, the court found that "the third reprehensibility factor [financial vulnerability] does not weigh in [the plaintiff's] favor." *Id.* at 385; *see also Konvitz v. Midland Walwyn Capital, Inc.*, D.C.No. CV-98-06913, 2005 WL 697053 at *3 (9th Cir. Mar. 28, 2005) (slip copy) (holding that evidence that the corporate plaintiff was not financially vulnerable justified, in part, remittutur of punitive damages award); *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446, 467 (3d Cir. 1999) (stating that "[r]elevant also is that [the plaintiff] is not a financially weak or vulnerable target . . . mitigat[ing] the need for a high punitive damages award"); *Eden Elec., Ltd. v. Amana Co., L.P.*, 258 F. Supp. 2d 958, 970 (N.D. Iowa 2003) (finding that the corporate plaintiff should not be considered financially vulnerable because it was "a large, successful enterprise"). The reasoning of these courts is persuasive and should be followed here.

Accordingly, this Court should grant Morgan Stanley's Motion in Limine and allow Morgan Stanley to present the mitigating evidence that *State Farm* and *Humana* entitle Morgan Stanley to present.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 12 day of May, 2005.

Mark C. Hansen (*pro hac vice*)
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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION FOR A MISTRIAL OR OTHER RELIEF FOR PLAINTIFF'S VIOLATIONS OF SECTIONS 46.015(3) AND 768.041(3)

THIS CAUSE came before the Court May 9, 2005 on Morgan Stanley's Motion for a Mistrial or Other Relief for Plaintiff's Violations of Sections 46.015(3) and 768.041(3), with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Denied. However, the jury shall be instructed that CPH settled with both Sunbeam and Arthur Andersen, but that the settlements are irrelevant to the jury's determination and any sums received in settlement will be applied to reduce an award of damages in CPH's favor, if any.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 10th day of May, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S REQUEST TO TAKE JUDICIAL NOTICE PURSUANT TO F.S. §90.202 AND §90.203

THIS CAUSE came before the Court May 10, 2005 on Morgan Stanley's Request to Take Judicial Notice Pursuant to F.S. §90.202 and §90.203, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Request to Take Judicial Notice Pursuant to F.S. §90.202 and §90.203 is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 10 day of May, 2005.

_____
ELIZABETH T. MAASS
Circuit Court Judge

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S RESPONSE TO PLAINTIFF'S MOTION FOR DIRECTED VERDICT

CPH spends thirty pages spinning out its long familiar story on reliance and damages. Morgan Stanley will not attempt, overnight, a point-by-point response, nor, absent direction from the Court, does Morgan Stanley believe one is necessary.

The critical fact—one that even thirty pages of argument cannot obscure—is that CPH is unable to cite a *single* case directing a verdict in remotely analogous circumstances, let alone a case upholding such a verdict on appeal. Over the last 5 weeks a deeply complex and rich factual record has been developed, including testimony from 24 different witnesses (17 of which were presented by the defense) and over 120 exhibits received in evidence (more than 70 of which offered by the defense). The Court and jury have heard wildly different and fundamentally irreconcilable accounts of the facts—and this even among plaintiff's own associates and colleagues. CPH has not cited any authority for directed verdict in a case of this character, and we are aware of none. This alone is dispositive.

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Indeed, as its motion labors to a close, CPH virtually concedes the futility of its effort, arguing that "Morgan Stanley has no credible evidence" to rebut CPH's case. Mot. at 29. But determining which pieces of evidence are *credible* and which are not is precisely the jury's function, not something CPH may arrogate to itself. Even more astonishingly, CPH's thirty page motion is devoted almost entirely to repeating snippets of evidence taken not from the more disinterested witnesses or even its contemporary business records, as one might have expected, but from Messrs. Perelman and Gittis, two highly interested witnesses whose credibility is, to say the least, very much in dispute.

The self-serving testimony of Mr. Perelman (who personally stands to gain handsomely from any verdict for the plaintiff) was impeached, undermined, and called into question repeatedly throughout this trial. The biggest whopper, of course, came when Mr. Perelman told the jury that Morgan Stanley admitted to criminal wrongdoing in connection with this matter and the Court was forced to try to correct that lie on the record in front of the jury. But that testimony was just the tip of the iceberg. Mr. Perelman also testified that Mr. Levin never warned him "in the strongest possible terms" against accepting stock in Sunbeam; that Mr. Levin expressed no doubts about Sunbeam's business plan; and that Mr. Dunlap "extorted" him into giving his proxy. Mr. Levin, no friend of Morgan Stanley, contradicted each and every one of these assertions—and many more besides. And these are merely a *few* examples of the many contradictions between Mr. Perelman and *one* other witness. Similar contradictions can be found throughout this record between the testimony of Mr. Perelman and many other witnesses as well. Plainly, the jury is entitled to reject *all* of Mr. Perelman's testimony and, with it, CPH's case.

Mr. Gittis, of course, was not the decision maker and thus, try as he might, he can hardly save Mr. Perelman if the jury chooses to discredit Mr. Perelman's story. Even so, Mr. Gittis's credibility was also very much called into question. Mr. Perelman's right-hand man for many years, Mr. Gittis spent two days on direct examination trying to bolster his boss by regaling the jury with a tale about how McAndrews & Forbes supposedly engaged in extensive and diligent efforts to study the Sunbeam transaction, beginning in 1997 and continuing through the March 30, 1998 closing. Within minutes of cross-examination beginning, however, Mr. Gittis was impeached by his own prior testimony in which he admitted that McAndrews & Forbes did *no due diligence* after February 23, 1998. And then he was immediately impeached *again* by prior testimony in which he conceded that he personally had almost no involvement in the transaction after December 1997. These impeachments (along with others that followed) went to the core of Mr. Gittis's testimony and his credibility as a witness in this case. The jury is free to conclude that Mr. Gittis and Mr. Perelman are birds of a feather when it comes to depicting the facts of this case accurately. And that alone is sufficient to defeat a motion that depends almost entirely on their say-so.

For the foregoing reasons, and in the face of the extensive factual record before the Court, plaintiff's motion should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 11th day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION FOR RECONSIDERATION OF THE COURT'S MARCH 31 ORDER DEFERRING PRESENTATION OF MORGAN STANLEY'S LITIGATION MISCONDUCT TO PHASE II OF THE TRIAL

THIS CAUSE came before the Court, in Chambers, on Coleman (Parent) Holdings Inc.'s Motion for Reconsideration of the Court's March 31 Order Deferring Presentation of Morgan Stanley's Litigation Misconduct to Phase II of the Trial. Based on a review of the Motion, it is

ORDERED AND ADJUDGED that Coleman (Parent) Holdings Inc.'s Motion for Reconsideration of the Court's March 31 Order Deferring Presentation of Morgan Stanley's Litigation Misconduct to Phase II of the Trial is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 10 day of May, 2005.

_____
ELIZABETH T. MAASS
Circuit Court Judge

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

NOTICE OF FILING UNDER SEAL

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed the Addendum to Morgan Stanley's Opposition To Coleman (Parent) Holdings Inc.'s Second Renewed Motion For Correction And Clarification Of The Litigation-Misconduct Statement To Be Read To The Jury And Reply In Support Of Defendant's Motion *In Limine* No. 30 under seal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 12th day of May, 2005.

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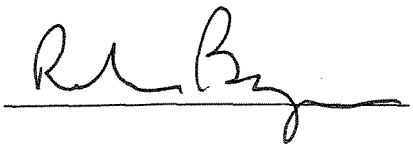
BY: 

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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
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CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER FOLLOWING IN CAMERA INSPECTION

THIS CAUSE came before the Court May 11, 2005 on MS & Co.'s Motion to Compel Plaintiff Coleman (Parent) Holdings, Inc. (re: legal advice given to CPH on or before May 11, 1998), with both parties well represented by counsel. Based on the proceedings before the Court, and following an in camera inspection of document numbers 593, 627, 628, and 629 and their attachments, it is

ORDERED AND ADJUDGED that MS & Co.'s Motion to Compel is Denied. The Court has sealed the items reviewed in camera and placed them in the Court file. The sealed items shall not be unsealed or released from the Clerk's custody without further order of this or an appellate court.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 12 day of May, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

CASE NO: CA 03-5045 AI

MORGAN STANLEY'S OPPOSITION TO COLEMAN (PARENT) HOLDINGS INC.'S SECOND RENEWED MOTION FOR CORRECTION AND CLARIFICATION OF THE LITIGATION-MISCONDUCT STATEMENT TO BE READ TO THE JURY AND REPLY IN SUPPORT OF DEFENDANT'S MOTION *IN LIMINE* NO. 30

Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully requests that the Court deny Coleman (Parent) Holdings Inc.'s ("CPH's") Second Renewed Motion for Correction and Clarification of the Litigation-Misconduct Statement to Be Read to the Jury (Apr. 20, 2005) ("CPH's Second Renewed Motion") and grant Defendant's Motion *in Limine* No. 30 to Exclude Evidence of Litigation Misconduct from Phase II (Apr. 18, 2005) ("MIL No. 30").

CPH wants to argue in Phase II that Morgan Stanley's "litigation misconduct [was] designed to cover up the fraud" and thereby justifies an enhancement of punitive damages. Coleman (Parent) Holdings Inc.'s Memorandum in Opposition to Morgan Stanley's Motion to Instruct the Jury on Reliance and Damages under the Clear-and-Convincing Evidence Standard in Phase I at 2 (May 9, 2005) ("CPH's CCE Opp."). However, in its Sanctions Reconsideration Order, this Court ruled that "***[t]he statement of litigation misconduct to be read to the jury shall be limited to those facts which would allow a reasonable juror to conclude that MS & Co. sought to hide direct evidence of either the Sunbeam fraud or Morgan Stanley's complicity***

with Sunbeam in perpetrating that fraud on CPH." Order on Defendant's Motion for Reconsideration of the Court's Sanctions Orders 1 (Apr. 5, 2005) (emphasis added).

No reasonable juror could conclude that Morgan Stanley engaged in litigation misconduct to hide direct evidence of the Sunbeam fraud or its complicity with Sunbeam. Consequently, the topic of litigation misconduct has no proper place in Phase II. To begin with, the Court expressly found that Morgan Stanley engaged in litigation misconduct in order to conceal its discovery problems, not to cover up the Sunbeam fraud. (While Morgan Stanley contests that finding as well, it in any event affords no basis for placing the topic of litigation conduct before the jury.) In addition, the record developed in the sanctions hearings would not support a finding that Morgan Stanley hid evidence to cover up the Sunbeam fraud. Lastly, if the subject of Morgan Stanley's litigation conduct were fully aired – as we submit it must be if injected into Phase II at all – the conclusion would be inescapable that Morgan Stanley had no improper intent.

ARGUMENT

1. Litigation-misconduct evidence is relevant to the jury's punitive damages determination only if Morgan Stanley hid evidence for the purpose of avoiding liability in this lawsuit. Other motives for litigation misconduct would lack any sufficient nexus to the underlying tort to be relevant to the jury's task of setting an appropriate punishment (if any) for that tort. Discovery shortcomings reflecting carelessness, incompetence, or even a willful attempt to conceal or falsely exculpate discovery failures, while perhaps relevant to the Court's imposition of discovery sanctions, are not part of the wrong for which punishment is being

sought. The Court has so ordered in its Sanctions Reconsideration Order, and CPH appears to agree.[1]

2. The Court found that Morgan Stanley engaged in litigation misconduct to conceal evidence of discovery problems, not to cover up the Sunbeam fraud. That finding – which we believe is itself totally unsupported by the record – falls far short of rendering Morgan Stanley's litigation conduct relevant to the jury's punitive damages determination.

In its Default Order, the Court concluded that "[i]t is now clear why" Morgan Stanley engaged in litigation misconduct, and made three findings – all of which concern discovery derelictions. Order on CPH's Renewed Motion for Entry of Default Judgment at 9 (Mar. 23, 2005). "First, candor would have required MS & Co. to admit that it had not done a good faith search for the oldest full backup tapes, and that Riel's certificate of compliance was false." *Id.* "Second, MS & Co. desperately wanted to hide an active SEC inquiry into its email retention practices." *Id.* at 10 (footnotes omitted). "Finally, MS & Co. did not want to admit the existence of the historical email archive, which would expose the false representations it had made to the Court and used to induce CPH to agree to entry of the Agreed Order." *Id.* (footnotes omitted). The Court thus found that Morgan Stanley engaged in litigation misconduct to hide its failure properly to retain, search, and produce e-mail messages, and to hide a separate SEC inquiry into

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[1] *See* Plaintiff's Response to Defendant's Submission Regarding Phase II Issues at 13-14 (Apr. 27, 2005) ("CPH's Phase II Submission") (CPH is "not" seeking to have punitive damages "imposed upon a litigant *solely* because of a litigant's discovery misconduct"; "[t]hat is why the jury will be instructed in Phase II that it can consider Morgan Stanley's discovery misconduct only for the purposes of showing Morgan Stanley's consciousness of guilt, its attempts at concealment of the underlying fraud, and the number and level of employees involved in the cover-up * * * *").

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such issues, not to hide evidence of the Sunbeam fraud or Morgan Stanley's complicity with Sunbeam in deceiving CPH.

CPH simply ignores the Court's written finding.[2] Instead, CPH quotes the Court's extemporaneous comments before a lunch break during the trial that "Morgan Stanley deliberately chose to hide evidence in this case." CPH's Phase II Submission at 13 (quoting 4/19/05 Tr. 9143:10-11); *see id.* at 12-13. However, even if Morgan Stanley chose to hide evidence "deliberately" (and we reiterate emphatically that there is no foundation for that finding), that does not answer the critical question ***why*** Morgan Stanley did so – to conceal its alleged role in the Sunbeam fraud, or to conceal its discovery failures? The Court found that Morgan Stanley acted for the latter purpose. It follows from the Court's Sanctions Reconsideration Order and the factual finding in its Default Order that the subject of litigation misconduct should be no part of Phase II.

3. Moreover, the record developed at the sanctions hearings simply does not support a finding that Morgan Stanley hid evidence to cover-up its alleged involvement in the Sunbeam fraud. To be sure, the Court stated in its Adverse Inference Order that "[a] reasonable juror could conclude that evidence of MS & Co.'s misconduct demonstrates its consciousness of guilt." Further Amended Adverse Inference Order at 10 (Mar. 4, 2005); *see* CPH's Phase II Submission at 13 (quoting same). There are two problems, however, with CPH's reliance on that statement:

First, while "consciousness of guilt" may have been relevant when the jury was being asked to find whether Morgan Stanley was complicit in any Sunbeam fraud, it ceased to be

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2 CPH ignored the Court's factual finding twice. Morgan Stanley filed MIL No. 30 on April 18, 2005. CPH filed its Second Renewed Motion on April 20, 2005 and its Phase II Submission, which responded to MIL No. 30, on April 27, 2005. On neither occasion did CPH address the Court's factual finding.

relevant once the sanction was expanded to take that issue away from the jury. Unless the Court decides to withdraw application of the default sanction from Phase II, the hypothesis that one could infer Morgan Stanley's complicity from its litigation misconduct does not materially advance the jury's inquiry.

Second, and in any event, that one sentence in the March 4, 2005 Further Amended Adverse Inference Order was superseded by the finding in the March 23, 2005 Default Order (which followed the March 14-15, 2005 evidentiary hearing) in which the Court found that "[i]t is now clear why" Morgan Stanley engaged in litigation misconduct. Default Order at 9.[3] In contrast to the six single-spaced footnotes of evidence in support of the latter finding – none of which suggest an attempt to hide evidence of Morgan Stanley's alleged complicity in the Sunbeam fraud (*see id.* at 10 nn. 7-10) – no explanation follows the solitary sentence in the Adverse Inference Order, no evidence is cited to support it, and the record on which it is based focused on what Morgan Stanley failed to produce and whether non-production was deliberate, not ***why*** Morgan Stanley failed to produce it. *See* 2/14/05 Tr. 334:3-335:2 (the Court's summary of the "five deficiencies" and whether they were "willful" or "negligent").

As explained in Morgan Stanley's MIL No. 30 (at 5-6), the belated discovery of e-mail backup tapes and the teething problems associated with the creation of Morgan Stanley's new e-mail archive and the voluntary migration of hundreds of millions of e-mail messages from tens of thousands of back-up tapes to that archive did not, and by their nature could not, selectively

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[3] CPH appears to agree that the Adverse Inference Order was superceded by the subsequent Default Order. *See* Response of Coleman (Parent) Holdings Inc. to Morgan Stanley's Motion to Take Judicial Notice Pursuant to F.S. § 90.203 (May 10, 2005) ("This [March 1 Adverse Inference Order] was amended several times and ultimately supplanted by the Court's March 23 Order on CPH's Renewed Motion for Default Judgment.").

target e-mail messages relating to the alleged Sunbeam fraud. Tellingly, CPH's Phase II Submission cites ***no*** evidence that Morgan Stanley engaged in litigation misconduct to conceal its alleged involvement in the Sunbeam fraud. *See* CPH's Phase II Submission at 11-14. Likewise, the four "other discovery abuses" that CPH proposes to add to the Statement of Litigation Misconduct show (at worst) that Morgan Stanley sought to avoid sanctions for discovery misconduct, not to cover-up any alleged involvement in the Sunbeam fraud. CPH's Second Renewed Motion, Exhibit 4 at 9-10.

Because the record developed at the sanctions hearings shows that Morgan Stanley was, at worst, hiding evidence to mitigate or excuse its discovery lapses (a finding that Morgan Stanley vigorously disputes), and not to cover up its alleged involvement in the Sunbeam fraud, reading the proposed account of discovery abuses in the punitive-damages phase of the trial would be a naked invitation to the jury to punish Morgan Stanley for its litigation misconduct (which the Court has already punished severely) rather than for its alleged involvement in the Sunbeam fraud or deception of CPH.[4] Such punishment is flatly inconsistent with the Court's Sanctions Reconsideration Order and CPH's own concession that imposition of punitive damages "upon a litigant *solely* because of a litigant's discovery misconduct" is "not what CPH is seeking here." CPH's Phase II Submission at 13-14 (emphasis in original).

4. As noted, it is common ground that the subject of discovery failures by Morgan Stanley has no role to play in Phase II unless there is a basis for finding that those failures were

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[4] *See Werbungs und Commerz Union Austalt v. Collectors' Guild, Ltd.*, 930 F.2d 1021, 1027 (2d Cir. 1991) (admitting evidence of discovery misconduct "essentially permitted the jury to penalize [the defendant] for discovery abuse and to disregard even the * * * evidence that was properly admitted"); *see also Emerson Elec. Co. v. Garcia*, 623 So. 2d 523, 525 (Fla. 3d DCA 1993) (per curiam) ("even if there had been evidence of a [pretrial discovery] violation, an appropriate sanction was a matter for the court and not for the jury").

motivated by a purpose to cover up Morgan Stanley's alleged participation in the Sunbeam fraud. We have explained above how the Court's earlier finding provides no basis for broaching the subject of litigation misconduct in Phase II. Nor does the record before the Court – or, indeed, any full and fair inquiry into the circumstances surrounding Morgan Stanley's incomplete or delayed e-mail production – permit the requisite finding. To the contrary, the circumstances surrounding Morgan Stanley's discovery performance are flatly inconsistent with any conclusion that it selectively targeted documents from the Sunbeam transaction for non-production and, instead, demonstrate that its discovery shortcomings could not have been intended to cover-up Morgan Stanley's alleged involvement in the Sunbeam fraud.

To the extent the Court is inclined to review or reconsider Morgan Stanley's conduct to determine whether there is any basis for CPH's assertions of a cover-up, and in order to demonstrate that any Phase II inquiry into alleged litigation misconduct must allow Morgan Stanley the opportunity to proffer to the jury its side of the story, we are submitting a written proffer as an addendum to this opposition. That proffer, and its accompanying narrative, compel the conclusions that (a) no material evidence was lost or destroyed, and Morgan Stanley was willing and would have been able to produce additional responsive e-mail messages if given an additional three months (with all costs thus imposed on CPH or the Court to be borne by Morgan Stanley); and (b) any litigation misconduct was not intended to avoid liability for the Sunbeam fraud and, thus, provides no basis for enhancing punitive damages. In sum, the evidence would not allow a reasonable juror to conclude that Morgan Stanley's "litigation misconduct [was]

designed to cover up the fraud." CPH's CCE Opp. at 2. In the absence of such evidence, litigation misconduct is neither relevant nor admissible in Phase II.[5]

5. If the Court nevertheless concludes that litigation-misconduct evidence is relevant and admissible in Phase II, it cannot properly read a Statement but must instead allow the parties to litigate how and why the discovery failures occurred.

Because litigation misconduct is relevant to the jury's punitive damages determination only if Morgan Stanley acted to conceal its underlying liability in this lawsuit, the jury must hear evidence as to the reasons for Morgan Stanley's actions. Without such evidence, the jury would simply be invited to speculate that Morgan Stanley engaged in litigation misconduct because it wished to conceal damaging evidence of its conduct in the Sunbeam transaction. Any punitive damages award would have to be vacated because it might rest in whole or part on the jury's impermissible speculation.[6]

CPH's proposed instruction on "the limited relevance of the litigation misconduct" (CPH's Second Renewed Motion, Exhibit 4 at 2) does not solve this problem and, indeed, would have the Court invite jury speculation in the form of a thinly veiled comment on the litigation-misconduct evidence (*id.*, Exhibit 4 at 11-12):

> The litigation misconduct by Morgan Stanley that I have described – and that you are required to accept as true – may be relevant in determining whether and in what

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[5] Morgan Stanley believes the proffer is sufficiently compelling that the Court should reconsider its Default Order. Accordingly, Morgan Stanley moves for a mistrial in Phase I.

[6] *See Humana Health Ins. Co. of Fla., Inc. v. Chipps*, 802 So. 2d 492, 495, 497 (Fla. 4th DCA 2001) (reversing entire $78.5 million punitive damages award because (among other reasons) the jury was allowed to hear improper damages evidence; "Because of these errors discussed above, and given the severity of the total award, we cannot discern from this record whether any or all of these mistakes contributed to the jury's overall verdict. As such, we are constrained to reverse all of the awards and remand this case for a new trial.").

amount punitive damages should be assessed against Morgan Stanley. Specifically, Morgan Stanley's litigation misconduct may show:

(1) that Morgan Stanley sought to hide direct evidence of the Sunbeam fraud;

(2) that Morgan Stanley sought to hide direct evidence of Morgan Stanley's complicity with Sunbeam in perpetrating that fraud on CPH;

(3) that Morgan Stanley attempted to frustrate the prosecution of CPH's claims through means other than hiding evidence; and

(4) that Morgan Stanley officers and employees who may not have been involved in the primary wrongdoing subsequently approved of the misconduct or participated in concealing or covering up the misconduct.

By suggesting to the jury that Morgan Stanley's litigation misconduct "may be relevant" to Morgan Stanley's liability for and the amount of punitive damages, CPH would have the Court through its instruction improperly encourage the jury to speculate about a Sunbeam-related basis for Morgan Stanley's litigation misconduct for which there is no sufficient evidentiary basis.

* * * * *

The subject of litigation misconduct and its motivation is not being submitted to the jury as a sanction for that misconduct, but for its supposed evidentiary value in demonstrating a cover-up motivation. The reading of CPH's proposed statement – or, indeed, any statement – in lieu of allowing evidence would be tantamount to granting CPH a summary judgment on that evidentiary question. Even supposing *arguendo* that a reasonable juror fully apprised of what transpired ***could*** conclude that Morgan Stanley was engaged in a cover up, the evidence hardly compels any such conclusion, as the accompanying proffer plainly demonstrates. In such circumstances, there is no warrant for taking the issue away from the jury in favor of CPH's proposed assignment of a sinister motivation to the conduct.

CONCLUSION

WHEREFORE Morgan Stanley respectfully requests that this Court deny CPH's Second Renewed Motion for Correction and Clarification of the Litigation-Misconduct Statement to Be Read to the Jury (Apr. 20, 2005) and grant Defendant's Motion *in Limine* No. 30 to Exclude Evidence of Litigation Misconduct from Phase II (Apr. 18, 2005), or in the alternative allow the subject to be litigated by the parties.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 12th day of May 2005.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S RENEWED MOTION TO APPLY NEW YORK LAW

THIS CAUSE came before the Court May 11, 2005 on Morgan Stanley's Renewed Motion to Apply New York Law, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Renewed Motion to Apply New York Law is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 12 day of May, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

NOTICE OF FILING PLEADING UNDER SEAL

Coleman (Parent) Holdings Inc. ("CPH") hereby gives notice of the filing of Coleman (Parent) Holdings Inc.'s Response in Opposition to Morgan Stanley's Motion in Limine No. 32 to Exclude Supplemental Report of Michael J. Wagner.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 13th day of May, 2005.

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final instructions 5/13/05

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

Members of the jury, I shall now instruct you on the law that you must follow in reaching your verdict. It is your duty as jurors to decide the issues, and only those issues that I submit for determination by your verdict. In reaching your verdict, you should consider and weigh the evidence, decide the disputed issues of fact, and apply the law on which I shall instruct you to, facts as you find them from the evidence.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in evidence, all facts admitted or agreed to by the parties, and all facts I read to you at the commencement of the evidence in this case.

You are required to accept the admitted or agreed to facts and the facts I read to you earlier as true. In determining any other facts you may draw reasonable inferences from the evidence. You may make deductions and reach conclusions which reason and common sense lead you to draw from the facts shown by the evidence in this case. But you should not speculate on any matters outside the evidence.

In determining the believability of any witness and the weight to be given the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the

testimony of the witness, considered in light of all the evidence in the case and in the light of your own experience and common sense.

You have heard opinion testimony on certain technical subjects from people referred to as expert witnesses. You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all the other evidence in the case.

In your deliberations, you are to consider the claims of Coleman (Parent) Holdings, Inc., or CPH, that Morgan Stanley & Co. Incorporated, or Morgan Stanley, aided and abetted and conspired with Sunbeam in committing a fraud upon CPH and that CPH was damaged as a result of this fraud. Morgan Stanley denies these claims and asserts, as a defense, that CPH failed to mitigate any damages it sustained.

CPH, Morgan Stanley, and Sunbeam are corporations. A corporation can act only through its officers, directors, or managing agents.

As used in these instructions, "greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

I previously instructed you that certain facts are deemed established and must be accepted as true for purposes of this case. CPH is not required to offer proof on those facts that have been deemed established and Morgan Stanley is not permitted to dispute or challenge them. As a result, the only issues for your determination on CPH's claims against Morgan Stanley are:

(i) whether CPH relied on the false statements made by Sunbeam or Morgan Stanley and, if so

(ii) whether CPH sustained damage that was legally caused by the false statements.

If the greater weight of the evidence does not support CPH's claims against Morgan Stanley on these issues, your verdict should be for Morgan Stanley.

For you to find for CPH on its claims for aiding and abetting fraud and conspiracy to

commit fraud, CPH must prove that it actually relied on the false statements by Sunbeam or Morgan Stanley.

CPH actually relied on such statements if it would not have entered into the transaction with Sunbeam but for the statements. CPH did not actually rely if

(i) it would have engaged in the transaction with Sunbeam even if the statements had never been made;

(ii) if CPH knew that the statements were false;

(iii) if CPH did not act based on a belief that the statements were true;

(iv) if the falsity of the statements was obvious; or

(v) if the information was simply disregarded.

You must treat statements made by Sunbeam as if they had been made by Morgan Stanley, and vice versa. Under the law, parties to a conspiracy are liable for each other's actions, as if the actions had been their own. Any person or corporation that enters into a conspiracy after the wrongdoing begins is liable for the acts by other members both before and during the time that it is a member of the conspiracy.

For purposes of deciding whether CPH relied on a false statement made by Sunbeam or Morgan Stanley, CPH need not show that the false statement or statements were communicated to it directly. It can prove this element by showing either

(i) that the false statement or statements were communicated directly to and relied upon by CPH; or

(ii) that the false statement or statements were communicated to and relied upon by someone known by Morgan Stanley or Sunbeam to be acting as an agent of CPH; or

(iii) that the false statement or statements were communicated to someone else, but the person making the false statement intended or had reason to expect that CPH or one of its agents would receive and rely or had received and relied upon the statement or statements.

The second issue for your consideration is whether the fraud caused CPH to suffer

loss. The Sunbeam fraud was the legal cause of CPH's losses if the fraud committed against CPH directly and in natural and continuous sequence produced or contributed substantially to producing such losses, so that it can reasonably be said that, but for the fraud, the losses would not have occurred. To be regarded as a legal cause of CPH's losses, the fraud that Morgan Stanley helped and conspired to commit need not be the only cause of CPH's losses. The fraud may be a legal cause of CPH's losses even though the fraud operated in combination with the act of another or some other cause occurring after the fraud occurred, if such other cause was itself reasonably foreseeable and the fraud contributed substantially to producing CPH's losses.

If you find for Morgan Stanley you will not consider the matter of damages. But, if you find for CPH you should award it an amount of money that the greater weight of the evidence shows will fairly and adequately compensate it for the damages legally caused by the fraud.

To determine the amount of damages that will constitute fair and adequate compensation for any loss incurred by CPH, you must calculate the difference between

(i) the fair market value of the 14.1 million shares of Sunbeam stock that CPH received in the Coleman transaction, if the false statements concerning Sunbeam had actually been true; and

(ii) the fair market value at which CPH reasonably could have sold its 14.1 million shares of Sunbeam stock to a buyer who had full knowledge of the entire fraud, including those consequences of the fraud that occurred after the closing but before CPH could sell its Sunbeam stock.

You must first determine the fair market value of the 14.1 million shares of Sunbeam stock that CPH received, by which I mean what the market price would have been for the Sunbeam stock once Sunbeam and Coleman were combined, if Sunbeam's financial results had been as they were represented. In other words, if Sunbeam had actually achieved the financial results it claimed, you must determine what the expected value would have been

for the 14.1 million shares of Sunbeam stock based on the combination of Coleman and Sunbeam.

You must next determine the fair market value at which CPH reasonably could have sold its Sunbeam stock to a buyer with full knowledge of the fraud. For purposes of this determination, I instruct you that because of certain legal prohibitions, CPH could not have sold its Sunbeam stock prior to November 25, 1999, at which point it could sell no more that one million shares per quarter unless the shares were registered. As a matter of law, the shares were registrable by December 6, 1999. It is for you, the jury, to decide whether CPH could have registered and sold its Sunbeam stock at any time after that date. For purposes of this instruction, "fair market value" means the amount a purchaser who was willing and able but not obliged to buy would pay to someone willing and able but not obliged to sell.

In other words, CPH's damages are the difference between (1) the value of what CPH was supposed to receive, and (2) the value of what CPH actually did receive.

In calculating damages, you may only consider losses that directly resulted from, and were legally caused by, the fraud. Losses caused by factors other than the alleged fraud, such as changes in general market conditions, or industry-specific or firm-specific conditions may not be included in your damages award.

However, if CPH proves it suffered damage by the greater weight of the evidence, it is entitled to recover for that damage even though the exact amount of the damage cannot be determined. If you find by the greater weight of the evidence that damage did occur as a result of the Sunbeam fraud, CPH is entitled to recover for that damage as long as there is some reasonable yardstick by which it can be measured -- that is, as long as there is some reasonable basis for estimating the amount of the damage, CPH may not be denied damages merely because the amount of the damage is uncertain or difficult to determine. If Morgan Stanley's or Sunbeam's wrongdoing has made CPH's damages more difficult to prove, you should not reduce the amount of damages because of that uncertainty. Morgan Stanley bears the risk of uncertainty caused by its own wrongful acts as well as the wrongful acts of

Sunbeam.

If the greater weight of the evidence does support CPH's claims, then you shall consider the defense of failure to mitigate damages raised by Morgan Stanley.

CPH had a duty to use reasonable care to reduce as much as reasonably possible the loss or damage, if any, it sustained. Morgan Stanley has claimed that CPH violated this duty by choosing to install its own executives at Sunbeam and entering into a management agreement with Sunbeam. If you find from the greater weight of the evidence that CPH failed to mitigate its damages, then Morgan Stanley cannot be charged with liability for any such loss or damage resulting from CPH's failure to use such reasonable care.

Morgan Stanley may not claim, though, that CPH had a legal obligation or duty to "hedge," or to make any advance arrangements to safeguard itself from loss on an investment. The lack of any "hedge" therefore does not affect the amount of damages, if any, that CPH is entitled to recover if it suffered losses on an investment as a result of fraud. Evidence about hedging was introduced for its relevancy, if any, on whether CPH actually relied on the statements by Morgan Stanley or Sunbeam.

You have heard testimony that CPH previously filed a lawsuit against Arthur Andersen for its role in the Sunbeam fraud. That lawsuit resulted in a settlement with Arthur Andersen. You also have heard testimony that there was a settlement between MacAndrews & Forbes Holdings, Inc., and Sunbeam.

You should not reduce the amount of compensation to which CPH is otherwise entitled on account of any benefits, recovery, or compensation CPH has received or may have received from Sunbeam or Arthur Andersen. The Court will reduce as necessary the amount of compensation to which CPH is entitled on account of any such payments.

In addition to deciding whether CPH has proved reliance and damages by the greater weight of the evidence, you will also be asked to determine whether CPH has proved reliance and damages by clear and convincing evidence.

"Clear and convincing evidence" differs from the "greater weight of the evidence" in

that it is more compelling and persuasive. "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. In contrast, "clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

In reaching your verdict, you are not to be swayed from the performance of your duty by prejudice, sympathy or any other sentiment for or against any party. Your verdict must be based on the evidence that has been received and the law on which I have instructed you.

Reaching a verdict is exclusively your job. I cannot participate in that decision in any way. You should not speculate about how I might evaluate the testimony of any witness or any other evidence in this case, and you should not think that I prefer one verdict over another. Therefore, in reaching your verdict, you should not consider anything that I have said or done, except for my specific instructions to you.

When you retire to the jury room, you should select one of your number to act as foreperson to preside over your deliberations and sign your verdict. Your verdict must be unanimous, that is, your verdict must be agreed to by each of you.

You will be given one form of verdict, which I shall now read to you:

When you have agreed on your verdict, the foreperson, acting for the jury, should date and sign the appropriate from of verdict. You may now retire to consider your verdict.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,
vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

VERDICT FORM

We, the jury, return the following verdict:

1. **Do you find by the greater weight of the evidence that CPH relied on the false statements made by Morgan Stanley or Sunbeam?**

YES _____ NO _____

If your answer to Question 1 is "NO," your verdict is for Morgan Stanley and you should proceed no further except to sign and date this verdict form and return it to the courtroom. If your answer to Question 1 is "YES," please proceed to Question 2.

2. **Do you find by clear and convincing evidence that CPH relied on the false statements made by Morgan Stanley or Sunbeam?**

YES _____ NO _____

3. **Do you find by the greater weight of the evidence that the fraud was a legal cause of CPH's damages?**

YES _____ NO _____

If your answer to Question 3 is "NO," your verdict is for Morgan Stanley and you should proceed no further except to sign and date this verdict form and return it to the courtroom. If your answer to Question 3 is "YES," please proceed to Question 4.

4. **Do you find by clear and convincing evidence that the fraud was a legal cause of CPH's damages?**

YES _____ NO _____

5. **By the greater weight of the evidence, what is the total amount of damages sustained by CPH and legally caused by the fraud in question?**

Total damages: $ _____

Please date and sign this form and return it to the courtroom.

SO SAY WE ALL, this _____ day of _____, 2005.

_____
FOREPERSON

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S RESPONSE IN OPPOSITION TO MORGAN STANLEY'S MOTION *IN LIMINE* NO. 34 TO ALLOW PHASE II MITIGATION EVIDENCE DEMONSTRATING THAT CPH WAS NOT A VULNERABLE VICTIM

Continuing its strategy of blaming the victim rather than explaining its own conduct on the merits, Morgan Stanley has identified 15 Phase II witnesses, who supposedly will testify about such matters as the "admitted business sophistication of CPH's principals, their access to material information, and the number of well-respected advisors CPH hired in connection with the Sunbeam deal." *See* Morgan Stanley Mot. 1. Morgan Stanley's attempt to present this evidence — which has nothing whatsoever to do with the reprehensibility of Morgan Stanley's conduct, the issue that is the proper focus of the punitive damages inquiry in Phase II — should be barred for multiple reasons.[1]

First, with respect to six of the 15 witnesses, the deposition designations identified by Morgan Stanley are improper because they either have been barred by this Court or have been withdrawn by Morgan Stanley. *See* Ex. A, 4/14/05 Order (reflecting that deposition designations

[1] CPH addressed Morgan Stanley's improper deposition designations in its April 18, 2005 Motion to Bar Improper Deposition Designations, but by an Order dated April 14, 2005, this Court deferred ruling on some of those Phase II designations. *See* Ex. A, 4/14/05 Order. The arguments made in CPH's motion, *see* Ex. B at 4, now are ripe for resolution.

for Howard Gittis, Jerry Levin, and Paul Shapiro were withdrawn by Morgan Stanley and that designations for Ronald Perelman, Bruce Slovin, and Robert Duffy were stricken by Court); *see also* Ex. C, 4/13/05 Tr. 8315-21.

Second, all of the deposition designations are improper because they erroneously focus on the conduct and status of the plaintiff, rather than on the conduct and status of the defendant. Florida law, including the standard jury instruction on punitive damages, confirms that the focus of attention should be on various factors relating to the reprehensibility of defendant's conduct and the appropriateness of ensuring that the punishment acts as a sufficient deterrent. *See* Florida Standard Jury Instruction (Civil) PD(2); *see also Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483, 486-87 (Fla. 1999) (in assessing punitive damages a jury must evaluate the degree of "malice, wantonness, oppression, or outrage" demonstrated by the evidence in the case).

Third, the cases cited by Morgan Stanley — *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), *Humana Health Ins. Co. of Fla., Inc. v. Chipps*, 802 So. 2d 492 (Fla. 4th DCA 2001), and *TVT Records v. Island Def Jam Music Co.*, 279 F. Supp. 2d 413 (S.D.N.Y. 2003) — do not support Morgan Stanley's sweeping attempt to turn the Phase II trial into a scrutiny of CPH's business activities and status. In *State Farm*, the Supreme Court emphasized that the central punitive damages inquiry should be into the reprehensibility of defendant's conduct, not the conduct of the plaintiff (538 U.S. at 419, quotations and citations omitted):

> [T]he most important indicium of the reasonableness of the punitive damages award is the degree of reprehensibility of the defendant's conduct. We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Although Morgan Stanley suggests that *State Farm* justifies an inquiry into the financial condition of CPH, that suggestion is a perversion of the above passage from *State Farm*, which clearly indicates that a plaintiff's financial vulnerability is an aggravating factor to be considered in awarding punitive damages. Morgan Stanley cites no case suggesting that a defendant can use a plaintiff's financial sophistication as a mitigating circumstance to avoid an award of punitive damages. Any such suggestion would be akin to saying that it is acceptable to cheat the rich but not the poor. Any such suggestion also would be directly contrary to the prior Orders of this Court, and in addition, to settled Florida law. *See* Ex. D, 4/5/05 Order (confirming "CPH's right to seek an appropriate instruction to the jury that the beneficiary of a punitive damages award is not relevant to the amount to be awarded").

Chipps likewise is no assistance to Morgan Stanley. The Fourth District in that case held that "the Court improperly prevented Humana from introducing mitigating evidence to rebut testimony that Humana's Managed Care practices violated industry standards. This testimony reflected on the egregiousness of Humana's conduct, and, thus could, have impacted the amount of damages the jury awarded." *See* 802 So. 2d at 496. *Chipps* merely confirms that Morgan Stanley may be entitled to present mitigating evidence reflecting on the egregiousness of its own conduct. Nothing in *Chipps* remotely suggests that a defendant can attempt to avoid a punitive damages verdict by blaming the victim and focusing on the conduct of the plaintiff.

TVT Records, Morgan Stanley's last case, does suggest that a defendant's wrongful acts may be mitigated "by the extent to which the parties are well known to each other, have had prior dealings and are engaged in an arms-length transaction, and the victim has some degree of knowledge, sophistication of involvement in respect of the events produced in the harms at issue." 279 F. Supp. 2d at 439. But the trial court in that case did not cite a single authority for

the proposition that the punitive damages inquiry should focus on the conduct of the plaintiff, rather than the reprehensibility of the defendant's conduct, and any such holding would be contrary to Florida law. Consequently, none of the cases Morgan Stanley cites supports the relief it seeks.

WHEREFORE, for the foregoing reasons, CPH respectfully requests that this Court bar Morgan Stanley's proposed Phase II testimony of Karen Clark, Donald Drapkin, Robert Duffy, Adam Emmerich, Irwin Engleman, Howard Gittis, Jerry Levin, James Maher, William Nesbitt, Joseph Page, Joseph Perella, Ronald Perelman, Barry Schwartz, Paul Shapiro, and Bruce Slovin.

Dated: May 15, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 15th day of May, 2005.

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11260 v1

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO BAR UNTIMELY DEPOSITION DESIGNATIONS

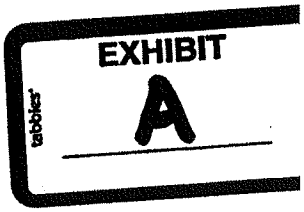
THIS CAUSE came before the Court April 13, 2005 on Coleman (Parent) Holdings, Inc.'s Motion to Bar Untimely Deposition Designations, with both parties well represented by counsel. In open Court counsel for MS & Co. withdrew MS & Co.'s designations for Gittis, Levin, Shapiro, and Denkhaus. Based on the foregoing and on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the designations of Gittis, Levin, Shapiro, and Denkhaus are hereby deemed withdrawn. It is further

ORDERED AND ADJUDGED that the designations of Fasman are limited to those relevant to CPH's policies involving overwriting emails and offer to allow a third party vendor to retrieve overwritten emails. Within one day MS & Co. shall revise its designations as so limited by this Order. CPH shall serve its counterdesignations and objections within three calendar days thereafter. MS & Co. shall serve its objections to the counterdesignations within two calendar days thereafter. It is further

ORDERED AND ADJUDGED that the deposition designations as to Perelman are stricken. It is further

ORDERED AND ADJUDGED that the designations for Abdel-Meguid, Scott, Strong, Perella, and Tyree shall be limited to Phase II. CPH shall serve its



counterdesignations and objections within three calendar days. MS & Co. shall serve its objections to the counterdesignations within two calendar days thereafter. It is further

ORDERED AND ADJUDGED that the April 8, 2005 designations which designate parts of the depositions of Slovin and Duffy not previously designated are stricken. It is further

ORDERED AND ADJUDGED that ruling on all deposition designations for persons not specifically mentioned herein is deferred, pending further hearing.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 14 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO. 2003CA 005045 AI

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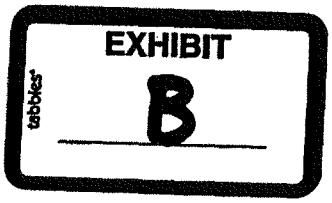
CLERK & COMPTROLLER
CIRCUIT CIVIL DIVISION

COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO BAR IMPROPER DEPOSITION DESIGNATIONS

Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, hereby requests that this Court enter an Order barring improper deposition designations made by Morgan Stanley. This motion arises because, in its recent deposition designations, Morgan Stanley has designated testimony from witnesses that is barred by prior rulings of this Court and is otherwise improper. The following categories of depositions designations are improper and therefore should be barred by this Court:

Designations Inconsistent With March 23, 2005 Order

Morgan Stanley has designated deposition testimony that is directly contrary to the conclusive findings attached to this Court's March 23, 2005 Order. *See* Ex. A. The testimony relates to such things as what transpired at the March 18, 1998 meeting preceding the issuance of the March 19, 1998 press release, who drafted the press release, and the like. That testimony contradicts the conclusive findings set forth in the March 23, 2005 Order and should therefore be barred.



Deposition Designations Concerning February 1998 Confidentiality Agreements

Morgan Stanley has designated testimony from certain witnesses concerning the alleged February 1998 Confidentiality Agreements between Coleman and Sunbeam. *See* Ex. B. However, as a result of prior Orders of this Court, those designations are improper — or, at the very least, premature. Specifically, in its March 28, 2005 Order on CPH's motion *in limine* no. 25, this Court held that "[t]he exculpatory language in the purported February 23, 1998 Confidentiality Agreement . . . [does] not bar CPH's claims for intentional torts, as a matter of law. This ruling is without prejudice to either party's right to argue that the clauses may be relevant for some other purpose." *See* Ex. C. And in its February 17, 2005 Order on CPH's motion *in limine* no. 13, this Court found that "[t]here shall be no evidence or argument offered about the terms of the February 23, 1998 purported letter agreement absent the Court's first finding that a sufficient evidentiary predicate has been laid that would allow a reasonable juror to conclude that CPH assented to its terms." *See* Ex. D.

Given these findings, and the time-consuming nature of the counter-designation process, CPH should not be required in the middle of trial to finalize and argue designations until the predicates set forth in the Court's Orders first are established by Morgan Stanley. Thus, before any finalization of or argument relating to designations concerning the confidentiality agreements, Morgan Stanley should be required to: (1) demonstrate the relevance of the depositions to the Court's satisfaction; and (2) establish a sufficient evidentiary basis for allowing a reasonable juror to conclude that CPH assented to the terms of the February 23, 1998 Confidentiality Agreement.

Depositions Designations Concerning the Sunbeam Warrants

Morgan Stanley has designated testimony from certain witnesses about the Sunbeam warrants. *See* Ex. E. However, in ruling on CPH's motion *in limine* no. 8 on February 3, 2005, this Court barred evidence or argument concerning "the amount of the settlement of MAFCO's claim against Sunbeam Corporation without first proffering the good faith basis to believe the matter is relevant and otherwise admissible outside the jury's presence." *See* Ex. F. Morgan Stanley has no such basis, and thus, the designations should be barred.

Designations Concerning Hedging

Morgan Stanley also has designated deposition testimony concerning hedging that is irrelevant to any issue in dispute. Specifically, at a hearing on February 15, 2005, Morgan Stanley conceded that it does not intend to present any hedging testimony on the issue of damages (Ex. G, 2/15/05 Tr. 505):

> THE COURT: Is it fair to say, though, that you are not arguing that plaintiff had an obligation to hedge?
>
> MR. BEMIS: I'm not saying that.
>
> THE COURT: We agree would have been a mitigation of damages.
>
> MR. BEMIS: And I said that's not what it was being offered for.

But in its designations, Morgan Stanley has included a considerable amount of hedging testimony, including testimony about the lack of hedging after the closing of the Sunbeam-Coleman transaction on March 30, 1998. *See* Ex. H. Given that the designations relate to hedging after the closing, the testimony cannot possibly relate to CPH's reliance on misrepresentations in entering into the Sunbeam-Coleman transaction, and must instead relate to damages — an issue as to which Morgan Stanley has waived its reliance on hedging testimony by its failure to timely disclose an expert opinion on the subject, as this Court concluded in its

April 15, 2005 Order. *See* Ex. I. The post-closing hedging testimony designated by Morgan Stanley therefore should be barred.

Designations of CPH Witness Testimony For Phase II

Morgan Stanley has designated testimony from several witnesses for Phase II of the trial relating to punitive damages. The testimony focuses on the conduct of CPH and its advisors — including the level of due diligence conducted by CPH and its advisors (*see, e.g.*, Schwartz Dep. at 144:13-45:7; Clark Dep. at 112:16-13:16; Nesbitt Dep. at 438:20-39:4, 440:19-41:8, 443:13-44:3; Page Dep. at 98:24-101:17), the sophistication of Mr. Perelman and CPH's advisors (*see, e.g.*, Maher Dep. at 32:1-38:17; Nesbitt Dep. at 60:14-62:8); Mr. Perelman's role in the Sunbeam transaction (*see, e.g.*, Nesbitt Dep. at 66:6-66:11; Maher Dep. at 23:11-23:14); the value of Coleman at the time it was acquired by Sunbeam (*see, e.g.*, Clark Dep. at 59:7-60:7, 60:20-61:1, 62:5-62:25; Nesbitt Dep. at 142:13-43:12); and the restructuring occurring at Coleman at the time of the Sunbeam acquisition (*see e.g.*, Clark Dep. at 64:22-65:18, 67:19-67:23,70:18-71:9, 71:21-72:1).

That testimony is not relevant to Phase II of the trial. As this Court found in its March 31, 2005 Order concerning bifurcation, "Phase II shall address entitlement and, if necessary, amount of punitive damages to be assessed if liability is determined in CPH's favor." *See* Ex. J. The Florida Supreme Court has articulated several factors that a jury should consider in making a punitive damages determination, but significantly, the factors focus on the defendant rather than the plaintiff. *See Owens-Fiberglass Corp. v. Ballard*, 749 So. 2d 483, 484-85 (Fla. 1999). Because no CPH witness has provided testimony relevant to the factors the jury must consider in Phase II, Morgan Stanley's designations should be barred.

Designations Concerning Irrelevant Debt

Morgan Stanley has designated testimony concerning debt held by MAFCO and associated credit agreements, as well as testimony concerning the aggregate debt of The Coleman Company and CLN Holdings. *See* Ex. K. This evidence is improper and irrelevant in light of this Court's prior rulings.

First, evidence concerning the debt of MAFCO and associated credit agreements is barred by a prior ruling of this Court. Specifically, when Morgan Stanley served a notice to produce at trial relating to MAFCO's debt, CPH moved to quash that notice to produce. This Court granted CPH's motion to quash. *See* Ex. L. Morgan Stanley should not be allowed to explore the same issues through other means. Moreover, evidence of the debt of MAFCO is irrelevant in the remaining issue of reliance and damages.

Second, evidence concerning the aggregate debt of The Coleman Company and the public debt issued by CLN Holdings is barred by this Court's Order on CPH's motion *in limine* no. 15. In that order, this Court determined that "[w]hen speaking of the corporate debt assumed by Sunbeam in the transaction, neither Morgan Stanley's and Coleman's witnesses nor counsel shall aggregate or co-mingle that debt with debt owed by the Coleman Company." *See* Ex. M. That ruling bars Morgan Stanley's use of the testimony it has elicited about the aggregate debt of Coleman and CLN Holdings.

Depositions of James Maher, William Nesbitt, and Barry Schwartz

The disputes concerning the depositions of Messrs. Maher, Nesbitt, and Schwartz are left over from CPH's April 11, 2005 motion relating to Morgan Stanley's improper deposition designations. As CPH demonstrated in that motion, Morgan Stanley abandoned its designations from the depositions of Messrs. Maher and Nesbitt during the meet-and-confer process that

commenced in February because CPH advised Morgan Stanley that CPH would be calling these witnesses live. Morgan Stanley since has subpoenaed these two individuals to appear in its case live and therefore has mooted the need for deposition designations.

Similarly, with regard to Mr. Schwartz, Morgan Stanley abandoned its designations last month when CPH accepted service of a trial subpoena on behalf of Mr. Schwartz. Moreover, in the witness disclosure Morgan Stanley served on April 4, 2005, Morgan Stanley designated Mr. Schwartz as a live trial witness. *See* Ex. N at 11. Morgan Stanley's attempt to designate deposition testimony of Mr. Schwartz thus is improper.

At the hearing on CPH's prior motion, Morgan Stanley's counsel indicated that she would attempt to work out the issues with regard to these witnesses with CPH, but all that Morgan Stanley's counsel did after the hearing was turn around and insist on CPH providing counter-designations. Moreover, counsel for Morgan Stanley insists that CPH submit counter-designations for those witnesses, even though counsel for Morgan Stanley admittedly has not decided whether Morgan Stanley will use those designations at trial. Indeed, counsel for CPH has made repeated requests to counsel for Morgan Stanley to confirm that Morgan Stanley actually intends to use those designations, but counsel refuses to provide that confirmation. Given that the parties are in the middle of the trial, and that the process of counter-designating is time-consuming, CPH should not be required to provide counter-designations to five days of Phase I testimony and four days of Phase II testimony from these witnesses. Morgan Stanley's deposition designations instead should be barred in light of the fact that Messrs. Maher, Nesbitt, and Schwartz are under subpoena to appear as live witnesses at trial.

Conclusion

For the foregoing reasons, CPH respectfully requests that this Court bar the deposition designations set forth above and rule that CPH need not provide any counter-designations to those designations.

Dated: April 18, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

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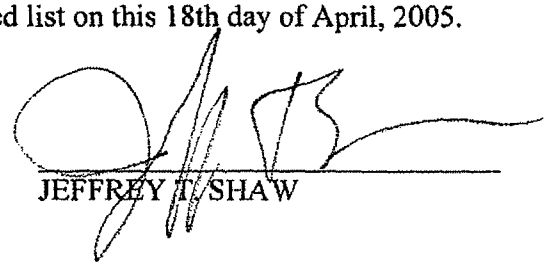
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 18th day of April, 2005.



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10829 v1

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. VOLUME 69

MORGAN STANLEY & CO., INC.,

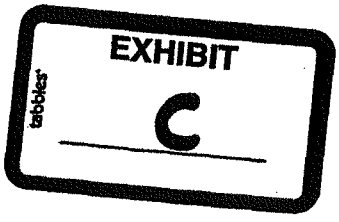
Defendant.

- - -

TRANSCRIPT OF THE CONTINUATION OF PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Wednesday, April 13, 2005
5:10 p.m. - 6:15 p.m.



Mr. Gittis on this.

MR. SOLOVY: I thought Your Honor had made an equitable ruling, and that is for them to tell us what they really need.

MS. BEYNON: We have tried to do that, Mr. Solovy, in providing you with designations.

THE COURT: When you're talking, I can't think.

MS. BEYNON: I'm sorry. My apologies.

THE COURT: I would strike it as to Mr. Perelman. You've withdrawn it as to Mr. Gittis. The remainder I accept your representations that these are folks you don't want to call live, but I think we need to know when that decision --

MS. BEYNON: That we will not call them live.

THE COURT: Yes. Has that decision been made? Because this is a lot of work.

MR. BEYNON: I understand that, Your Honor. We can provide you with an answer tomorrow morning whether we will call them live. My very strong assumption is we would not call these witnesses live. But I would like to consult with Mr. Hansen before.

Just to be, just to sort of give you my sense of the process here, this is a process that is complicated, but I think it's gotten a little overly complicated because of the length of time the parties have had to address these issues. I've worked on cases where you designate your initials, you designate your counters, have objections and do all of this in a two-week time frame. This has gotten to be an enormously complicated task simply because of the exchange of e-mails and the length of time the parties have had to deal with these. We can do this quickly and resolve it quickly.

THE COURT: Tell you what...

MR. SOLOVY: Should we flip the page?

THE COURT: Hold on. I'm still thinking about what I want to do. Okay.

MS. BEYNON: Your Honor, I can make it easy for Mr. Levin and Mr. Shapiro. Those we will withdraw.

MR. SOLOVY: Then Mr. Slovin and Mr. Duffy have --

THE COURT: Hold on.

MR. SOLOVY: I'm sorry. Your Honor.

THE COURT: Okay.

MR. SOLOVY: Mr. Slovin and Mr. Duffy we went through the process. Now they're designating stuff that has been excluded. That just shows you the havoc that gets wreaked here on the needless work.

THE COURT: Are these new ones and if so why?

MS. BEYNON: Mr. Slovin --

THE COURT: Is Mr. Webster still here? Do we want to do those questions today or some other time? I don't want to make you wait.

MR. WEBSTER: We don't need to do them now. I mean, Mr. Markowski is gone as well.

THE COURT: You want to do them tomorrow at 5:00?

MR. SCAROLA: Sure or Friday.

THE COURT: Okay. I just don't want to make you wait if we're not going to get to them.

MS. BEYNON: I'm sorry this is taking so long.

THE COURT: No, that's okay. I didn't want to have him hang around if he has other things to do. Okay. Slovin and Duffy.

MR. SOLOVY: We say this is abusive.

MS. BEYNON: Coming in new to the case, we

did take a look at these. We may have designated some testimony of Mr. Slovin that we were unaware had been ruled upon before. Opposing counsel has not contacted us about this. They've not informed us to which lines they object to or which testimony they're talking about. It wouldn't be proper to completely strike Mr. Slovin as a witness simply because we may have --

THE COURT: Why won't we be striking the new stuff? Why would we at this juncture, other than the substitution of counsel and your view on how the case should be litigated why would anything be added as to Slovin or Duffy?

MS. BEYNON: I'm talking only about Mr. Slovin right now who is the only witness we understand Your Honor has ruled upon. We did not understand you had ruled upon Mr. Duffy.

MS. PRYSAK: In fact, you did rule on Slovin and Duffy. Miss Beynon earlier last week sent us phase one designations for Slovin and Duffy.

THE COURT: Do you want me to go -- I mean, do you accept that I have the depositions I've ruled on and I can go get them, and that will tell me if I did or not and what date?

MS. BEYNON: I have looked back through the records, and I did not understand Mr. Duffy was one. My apologies for this, Your Honor.

THE COURT: Let me go get them because I have them.

Slovin we know we did. Duffy is the one we're looking for; is that correct?

MR. SOLOVY: Yes, Your Honor.

MS. BEYNON: They attached no Exhibit for Mr. Duffy. I'm not sure what testimony they're talking about. They do attach an Exhibit talking about Mr. Slovin.

MS. PRYSAK: Well, just so we're clear, our Exhibits weren't meant to be preclusive.

THE COURT: Duffy, done 3-10-05. This is the July 8, 2004 depo.

MS. PRYSAK: Yes.

THE COURT: We did it.

MS. PRYSAK: When they gave us their phase one Slovin and Duffy depositions that were for the most part in accordance with what we knew they were designated, we gave them the counters. But then on Friday they sent over phase two designations for Slovin and Duffy which hurled a bunch more additional testimony in there that

you've never seen and we've never designated.

THE COURT: Is this because we don't want to call him live in phase two?

MS. BEYNON: These are not our witnesses, so we don't have that concern.

THE COURT: You don't want to call them live in phase two? We just changed strategy?

MS. BEYNON: We've been focusing much more closely on phase two as a result of Your Honor's rulings, as you can imagine. And this has become of tremendous importance to us.

THE COURT: Who are Slovin and Duffy?

MS. BEYNON: Slovin and Duffy --

MR. SOLOVY: I'll say --

MS. BEYNON: Please do.

MR. SOLOVY: Mr. Slovin was a director of Coleman, and Mr. Duffy was a member of Credit Suisse First Boston.

THE COURT: Why do we think they're phase two?

MR. SOLOVY: I have no idea, Your Honor.

MR. BEYNON: I'm sorry I don't have a mastery of the entire case. Folks have made a determination these are relevant to phase two. The only suggestion I would have here is it

would be very helpful before having to bring these to Your Honor's attention to receive communication from opposing counsel telling us that they think these are inappropriate designations so that we can try to resolve this before coming up here and fighting like cats and dogs about deposition designations we were never given a notice there was any objection to.

THE COURT: Are there any other ones that you're withdrawing?

MS. BEYNON: Mr. Dickhouse (phonetic). As far as I know -- And, again, I apologize for the confusion on our end. It has been a complicated process. I don't think we provided deposition designations.

THE COURT: I would agree on Slovin and Duffy absent you guys coming back with some motion for rehearing, I would agree as to them. It strikes me that it is -- and I can appreciate new counsel may have a new theory of how the case should be tried. But I would strike the deposition designations that add -- made April 8th that add material.

MS. BEYNON: Very well. I understand that we can come back in and ask --

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON PLAINTIFF'S MOTION IN LIMINE NO. 29 TO BAR EVIDENCE AND ARGUMENT IDENTIFYING THE BENEFICIARY OF ANY PUNITIVE-DAMAGES AWARD

THIS CAUSE came before the Court April 4, 2005 on Plaintiff's Motion in Limine No. 29 to Bar Evidence and Argument Identifying the Beneficiary of any Punitive-Damages Award, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Plaintiff's Motion in Limine No. 29 to Bar Evidence and Argument Identifying the Beneficiary of any Punitive-Damages Award is Granted, in part, and Denied, in part. MS &Co. may ask Mr. Perelman the amount of compensatory damages CPH seeks and whether CPH also seeks punitive damages, without suggesting the amount of punitive damages to be claimed, without prejudice to CPH's right to seek an appropriate instruction to the jury that the beneficiary of a punitive damages award is not relevant to the amount to be awarded.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 5 day of April, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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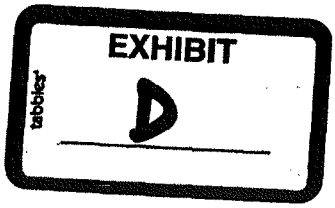

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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

PLAINTIFF'S AMENDED PROPOSED PHASE TWO JURY INSTRUCTIONS

COMES NOW the Plaintiff, by and through its undersigned attorneys, and hereby requests that this Honorable Court give the following jury instructions.

COLEMAN (PARENT) HOLDINGS INC.

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One of Its Attorneys

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Table of Contents

Opening Instruction — Second Phase 1
Appropriateness of Punitive Damages 2
Amount of Punitive Damages 3
Instruction on Litigation Misconduct 5
Closing Instructions, Second Phase of Proceedings 6
VERDICT FORM 7

PLAINTIFF'S PROPOSED SECOND PHASE INSTRUCTION NO. 1
Opening Instruction — Second Phase

The parties may now present additional evidence related to whether punitive damages should be assessed, and, if so, in what amount. You should consider this additional evidence along with the evidence already presented, including all facts admitted or agreed to by the parties and all facts I read to you at the commencement of the evidence in the first phase of the trial. You are required to accept the admitted or agreed to facts and the facts I read to you earlier as true.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES PD-1b(1) (2003) (modified for in light of March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment); April 1, 2005 Order on Morgan Stanley's Motion to Clarify the Proper Scope of the Liability and Punitive Phases of Trial.

PLAINTIFF'S PROPOSED PHASE TWO INSTRUCTION NO. 2
Appropriateness of Punitive Damages

The first issue for your determination in this phase of the trial is whether, in the circumstances of this case, punitive damages are warranted to punish Morgan Stanley for its wrongful conduct and to deter similar misconduct by Morgan Stanley and others in the future.

Punitive damages are warranted if you find by clear and convincing evidence that Morgan Stanley intentionally violated CPH's rights. The findings already made by the Court, which I read to you at the beginning of the trial, are sufficient to show, by clear and convincing evidence, that Morgan Stanley intentionally violated CPH's rights by participating in defrauding CPH. Thus, you may in your discretion assess punitive damages against Morgan Stanley to punish Morgan Stanley for its wrongful conduct and to deter similar misconduct by Morgan Stanley and others in the future. Or, in your discretion, you may decline to assess punitive damages.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES PD-1(a) (modified for party names, for intentional tort of fraud, and in light of March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment and April 1, 2005 Order on Morgan Stanley's Motion to Clarify the Proper Scope of the Liability and Punitive Phases of Trial); *id.* Note 3 (noting that "certain types of intentional torts may require a punitive damage charge appropriate to the particular tort"); *Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483, 486 (Fla. 1999); *First Interstate Dev. Corp. v. Ablanedo*, 511 So. 2d 536, 539 (Fla. 1987).

PLAINTIFF'S PROPOSED PHASE TWO INSTRUCTION NO. 3
Amount of Punitive Damages

In determining the amount of punitive damages, if any, to be assessed as punishment to Morgan Stanley and as a deterrent to Morgan Stanley and to others, you should decide any disputed factual issues by the greater weight of the evidence. "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. You should consider the following in determining the amount of punitive damages to be assessed:

(1) The nature, extent, and degree of misconduct, and the related circumstances, including the following:

- the reprehensibility of Morgan Stanley's misconduct, including the extent to which it involved malice, trickery, or deceit;
- the degree of Morgan Stanley's awareness of the wrongfulness of the misconduct;
- the duration of the misconduct;
- whether offensive conduct was repeated on more than one occasion;
- the attitude and conduct of Morgan Stanley upon discovery of the misconduct;
- Morgan Stanley's concealment of its role in the Sunbeam transaction, including its litigation misconduct in this case, as evidence of Morgan Stanley's malice and evil intent; and
- the number and level of responsibility of corporate employees who knew of, participated in, subsequently approved of, or participated in concealing or covering up the misconduct.

(2) The enormity of the offense. Punitive damages should bear a reasonable relationship to the harmfulness of Morgan Stanley's conduct, and should not be out of proportion to the harm suffered as a consequence of the conduct. Accordingly, you may consider whether and the extent to which Morgan Stanley's conduct caused danger or harm to others besides CPH including harm or danger to the investing public; and

(3) Morgan Stanley's financial resources. An award of punitive damages must not be out of proportion to Morgan Stanley's financial resources. Punitive damages should be painful enough to punish Morgan Stanley and deter Morgan Stanley and others but should not be so great as to financially destroy or bankrupt Morgan Stanley.

You may in your discretion decline to assess punitive damages.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES PD-2d(1) (2003) (modified in light of April 1, 2005 Order on Morgan Stanley's Motion to Clarify the Proper Scope of the Liability and Punitive Phases of Trial) (first factor); March 1, 2005 Sanctions Order (sixth subfactor of first factor); *Owens-Corning Fiberglass Corp. v. Ballard*, 749 So. 2d 483, 484-85 (Fla. 1999) (first factor; approving factors for jury's consideration in determining nature, extent, and degree of misconduct); *BMW of North America v. Gore*, 517 U.S. 559, 575-83 (1996) (first and second factors); *Wransky v. Dalfo*, 801 So. 2d 239, 243 (Fla. 4th DCA 2001) (second and third factors); *Arab Termite & Pest Control of Fla. Inc. v. Jenkins*, 409 So. 2d 1039 (Fla. 1982) (third factor).

PLAINTIFF'S PROPOSED PHASE TWO INSTRUCTION NO. 4[1]
Instruction on Litigation Misconduct

You have heard, in this phase of the trial, evidence of Morgan Stanley's litigation misconduct. The failure to comply with a discovery request or a Court order, standing alone, does not justify the imposition of punitive damages or justify an increase in the amount of punitive damages. However, the failure to comply with either a discovery request or Court order under circumstances that indicate an effort to hide evidence or otherwise avoid responsibility for wrongdoing may be considered in determining the following factors that do relate to the decision as to whether and in what amount punitive damages should be assessed against Morgan Stanley:

- the degree of Morgan Stanley's awareness of the wrongfulness of the misconduct;
- the attitude and conduct of Morgan Stanley upon discovery of the misconduct;
- Morgan Stanley's concealment of its role in the Sunbeam transaction; and
- the number and level of responsibility of corporate employees who knew of, participated in, subsequently approved of, or participated in concealing or covering up the misconduct.

Authority:

April 5, 2005 Order on Morgan Stanley's Motion for Reconsideration of the Court's Sanction Orders.

[1] This Supplemental Instruction is submitted in response to and in compliance with this Court's Order on Defendant's Motion for Reconsideration of the Court's Sanctions Order, which Order was entered April 5, 2005.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 5
Closing Instructions, Second Phase of Proceedings

Your verdict on the issues raised by CPH's punitive damages claim against Morgan Stanley must be based on the law on which I have instructed you and on evidence that has been received during the entire trial of this action, including both phases of this case, all facts admitted or agreed to by the parties, all facts I read to you at the commencement of evidence in the first phase of the trial, and the additional facts concerning litigation misconduct that I read to you at the beginning of this second phase of the trial. In reaching your verdict, you are not to be swayed from the performance of your duty by prejudice or sympathy for or against any party.

Your verdict must be unanimous, that is, your verdict must be agreed to by each of you.

You will be given a form of verdict, which I shall now read to you:

[read form of verdict]

When you have agreed on your verdict, the foreman or forewoman, acting for the jury, should date and sign the verdict. You may now retire to consider your verdict.

Authority:
THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES PD-1b(3) (2003) (modified in light of March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment).

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,
vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

VERDICT FORM

We, the jury, return the following verdict:

1. **Do you find by clear and convincing evidence that punitive damages are warranted against Morgan Stanley?**

YES _____ NO _____

2. **What is the total amount of punitive damages, if any, which you find by the greater weight of the evidence should be assessed against Morgan Stanley?**

Total punitive damages: $ _____

Date and sign this form and return it to the courtroom.

SO SAY WE ALL, this _____ day of May, 2005.

_____
FOREPERSON

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list, this 16th day of May, 2005.

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO MODIFY NOTICE TO PRODUCE AND TO COMPEL COMPLIANCE WITH THE NOTICE

Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, respectfully requests that this Court enter an Order modifying CPH's Notice to Produce of April 17, 2005 (attached hereto as Ex. A), and compelling compliance with that Notice. In support of this motion, CPH states as follows:

1. This motion arises for two reasons. First, Morgan Stanley's May 12, 2005 litigation-misconduct brief and proffer appear to have been written by the law firm of Kirkland & Ellis even though Morgan Stanley's present counsel repeatedly has represented that Kirkland & Ellis has no substantive role in this litigation. The May 12 brief and proffer reflect a degree of knowledge about e-mail issues and a style of presentation that strongly suggest Kirkland's continued role. Second, Morgan Stanley has failed to comply with a Notice to Produce that CPH served on April 17, which seeks basic information concerning the work that Kirkland & Ellis and other law firms have done on this case since March 21, 2005.

2. The foregoing information is relevant to the issue of punitive damages because it evidences further litigation misconduct by Morgan Stanley, in the form of its misrepresentations

to this Court about the true continuing role of Kirkland & Ellis in this litigation. The requested information also is essential to test Morgan Stanley's repeated assertion that it is operating at a severe disadvantage because Kirkland & Ellis had been fired and the Kellogg Huber firm only recently has become actively involved in the litigation. That assertion is renewed in support of Morgan Stanley's request for a continuance that is incorporated into Morgan Stanley's opposition to CPH's second renewed motion for corrections and clarification. Morgan Stanley should not be permitted to continue to repeat claims that it has been and remains disadvantaged by the departure of Kirkland & Ellis (which Morgan Stanley voluntarily chose), without supporting its contested claims with sworn testimony subjected to documentary discovery and cross-examination.

3. CPH's original Notice to Produce, to which Morgan Stanley has objected (Ex. B), arguably sought documents sufficient to show Kirkland & Ellis' role in the preparation of the May 12 brief and proffer. Out of an abundance of caution, however, CPH respectfully requests that this Court enter an Order amending CPH's April 17, 2005 Notice to Produce to include a request for time records of Kirkland & Ellis LLP sufficient to show Kirkland & Ellis' role in

preparing the pleadings. In addition, CPH respectfully requests that this Court direct Morgan Stanley to comply with the April 17, 2005 Notice to Produce as amended, without further delay.

Dated: May 16, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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Jeffrey T. Shaw
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John Scarola
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 16th day of May, 2005.

JEFFREY T. SHAW

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11271 v1

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.
_____/

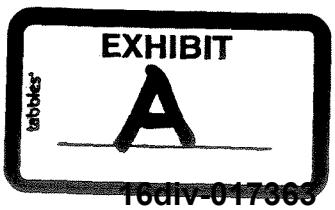
PLAINTIFF'S NOTICE TO PRODUCE AT TRIAL *INSTANTER*

Coleman (Parent) Holdings Inc., pursuant to Rule 1.410 of the Florida Rules of Civil Procedure, requests that Defendant Morgan Stanley & Co., Inc. produce and permit Plaintiff to inspect and copy each of the documents described below. It is requested that the aforesaid production be made immediately. Inspection will be made by visual observation, examination, and/or copying.

Definitions

CPH incorporates by reference the Definitions and Instructions set forth in Plaintiff's First Request for Production of Documents served in this action. In addition, CPH defines the following term as follows:

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



Documents Requested

1. All time records of Kirkland & Ellis LLP since March 21, 2005 reflecting the number of individuals associated with Kirkland & Ellis LLP who have rendered services related directly or indirectly to this litigation, including the dates and number of hours spent in rendering such services, and the capacity in which the individuals are associated with Kirkland & Ellis LLP (attorney, paralegal, secretary, clerical assistant, etc.).

2. All correspondence including e-mails and other documents of whatever description which define, describe, limit, expand, modify or otherwise relate directly or indirectly to the nature and scope of the responsibilities of Kirkland & Ellis LLP, in connection with this litigation, as such responsibilities have existed since March 21, 2005.

3. All monthly time records or other documents necessary and sufficient to determine with respect to Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C. and Sherman & Sterling LLP the number of individuals associated with each law firm who have rendered services related directly or indirectly to this litigation and to *Morgan Stanley Senior Funding, Inc. v. MacAndrews & Forbes Holdings, Inc., et al.*, 2003 CA 005165 (Fla. 15th Jud. Cir.), including the dates and number of hours spent in rendering such services, and the capacity in which the individuals are associated with each law firm (attorney, paralegal, secretary, clerical assistant, etc.).

4. All documents and data compilations of whatever description including e-mails which define or describe the nature and scope of the responsibilities of Sherman & Sterling LLP, relating directly or indirectly to this litigation.

5. Any and all communications, documents, and data compilations of whatever description by or through which Morgan Stanley or any person or entity purporting to act on behalf of Morgan Stanley has placed Kirkland & Ellis LLP or any person or entity associated with or believed to have been acting on behalf of Kirkland & Ellis LLP on notice of any claim or potential claim or of any waiver of any claim or potential claim relating to, arising out of, or associated with this litigation.

Dated: April 17, 2005

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 17th day of April, 2005.

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10842 v1

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

MORGAN STANLEY'S MOTION TO QUASH COLEMAN (PARENT) HOLDINGS INC.'S NOTICE TO PRODUCE FOR *IN CAMERA* INSPECTION *INSTANTER*

Defendant Morgan Stanley & Co. Incorporated moves to quash Plaintiff Coleman (Parent) Holding, Inc.'s ("CPH's") Notice to Produce for *In Camera* Inspection *Instanter*, dated April 17, 2005 (attached as Exhibit A). The Notice demands the production at trial of (i) the responses of any Morgan Stanley entity to third-party requests for e-mails and (ii) notices by any Morgan Stanley entity indicating it had newly-discovered backup tapes containing e-mails. The Notice is improper for three reasons. First, it improperly seeks to raise through a second subpoena a dispute regarding the time period for production that this Court has already settled. As such, the Notice is nothing more than an unsupported Motion for Rehearing. Second, it improperly seeks to expand the identity of the parties from whom production is sought. In so doing, it demands that Morgan Stanley undertake a massive new search for additional documents that CPH claims were "withheld" from production, when the reality is that CPH did not ask for these additional (irrelevant) documents in the first place. And third, the Notice is not authorized by the Florida Rules of Civil Procedure.

1. On February 20, 2005, CPH served a Notice to Produce seeking the same documents (albeit from a more limited number of parties) covering the same time period as

covered by CPH's new Notice. This Court sustained Morgan Stanley & Co. Incorporated's ("Morgan Stanley") objections "in part." 3/2/05 Tr. Vol. 19, 1855:20-21. The Court ruled that it "would limit [CPH's document demand] to responses made on *or after* May 1st of 2002, which is a year before this litigation was started." *Id.* at 21-24 (emphasis added). A copy of the Order is attached as Exhibit B.

In the new trial notice at issue here, CPH seeks to obtain documents from the time period for which this Court previously declined to require production. Specifically, while the Court's prior order specifically limited production to responses "made on or *after* May 1st of 2002," the new trial notice demands "[a]ll documents, *generated on or before May 1, 2002*, withheld by Morgan Stanley as nonresponsive" to the notice served on February 20, 2005. That effort to end-run the Court's orders is wholly improper. A party may not use a trial subpoena "to avoid the orderly process of discovery and to relitigate the scope of documentary discovery." *Motiva Enterprises, Inc. v. Wyatt Energy, Inc.*, No. X01CV020172116s, 2002 WL 31462502, at *1 (Super. Ct. Conn. Oct. 16, 2002). In *Motiva Enterprises*, the court of appeals granted a protective order that relieved the plaintiffs of the burden of responding to a trial subpoena for documents the defendant had previously sought but that the court had ruled were not properly subject to discovery. *Id.* The court held that the defendant "may not use subpoenas to file what is actually a repetition of their fourth request for production of documents and seek to enforce such requests as part of a hearing" where the court had "sustain[ed] objections in part or in full" once before. *Id.* CPH may not use the current notice "to file what is actually a repetition of" a request it made and the Court rejected just 2 months ago.

CPH itself has recognized this point. In moving to quash Morgan Stanley's notice to produce MAFCO loan agreements, CPH's counsel argued:

> The notice to produce at trial is generally used for purposes of having the originals of documents that have already been discovered present in the courtroom....It is not a means by which to avoid the restrictions that are imposed on discovery in the Court's pretrial order.

See 3/24/05 Tr. at 5351-52. The Court accepted CPH's argument and granted the motion to quash. *See* Order on CPH's Motion to Quash Morgan Stanley's Notice to Produce MAFCO Loan Agreements (March 24, 2005). Consistent with that ruling and CPH's prior argument, the Court should reject CPH's attempted end-run of the Court's discovery order and quash the Notice.

2. CPH's new Notice appears to seek discovery from a different and significantly larger number of entities than its prior discovery request. The new Notice defines "MS&Co." to mean "Morgan Stanley & Co., Inc. or any of its affiliates, parents, subsidiaries, divisions, predecessors, successors, present and former employees, representatives, agents, attorneys, accountants, advisors, or all other persons acting or purporting to act on its behalf." By including "affiliates," this definition of "MS&Co." is substantially broader than the definition of "Morgan Stanley" in the notice of February 20, 2005, in which CPH did not seek documents from Morgan Stanley's affiliates.[1]

While read literally, CPH's new Notice does not accomplish CPH's apparent intention, because – although it defines "MS&Co." broadly – the new Notice requests the production of documents withheld by "Morgan Stanley," not by "MS&Co.," it is clear that it is CPH's intention to significantly widen the number of entities who must respond to the request.

---

[1] By incorporated reference to CPH's First Request for Production of Documents dated May 9, 2003, the notice of February 20, 2005, defined "Morgan Stanley" to mean the same entity presently defined as "MS&Co." and specifically did not include "affiliates" and "parents."

This is significant. By seeking production from a significantly wider group of entities than the earlier discovery request, the Notice has no relevance to any alleged litigation misconduct – CPH's purported basis for seeking the production. This wider group of entities was not previously requested to produce the now sought information. Thus, the new Notice's request for documents "withheld by Morgan Stanley as nonresponsive" mischaracterizes the state of the record.

3. The subpoena, in any event, is not authorized by Florida Rule of Civil Procedure 1.410(c). Rule 1.410(c) authorizes the issuance of a notice to obtain "*evidence at trial.*" (emphasis added); *cf., e.g., United States v. Noriega*, 764 F. Supp. 1480, 1492-1493 n.11 (S.D. Fla. 1991) ("the purpose of a trial subpoena is limited to obtaining admissible evidence relevant to specific offenses already identified"). The trial in this case is to a *jury*. CPH's notice, however, seeks documents for inspection *in camera* by *the court*. Because the judge is not the trier of fact, CPH's notice for *in camera* inspection does not seek "evidence at trial" and thus is not authorized by Rule 1.410(c). Further, because there is no present claim of privilege, the request for *in camera* review is improper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery facsimile and hand delivery on this 21st day of April, 2005.

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Counsel for Morgan Stanley & Co. Incorporated

BY: Rebecca Beynon /sme

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON PLAINTIFF'S MOTION IN LIMINE NO. 36 TO CLARIFY WHAT EVIDENCE IS ADMISSIBLE TO SHOW PLAINTIFF'S ENTITLEMENT TO AND AMOUNT OF PUNITIVE DAMAGES

THIS CAUSE came before the Court May 13, 2005 on Plaintiff's Motion in Limine No. 36 to Clarify what Evidence is Admissible to Show Plaintiff's Entitlement to and Amount of Punitive Damages, with both parties well represented by counsel.

By its March 1, 2005 Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction, the Court found that MS & Co. sought to hide evidence in this specific case. By its March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment, the Court found that the discovery failings could not be cured, and deemed certain facts not subject to dispute. Both Orders were predicated, in part, on a finding that MS &Co. had manipulated the record in this case, depriving CPH to access to documents crucial to its claims. CPH claims that the deemed facts should apply for all purposes in the punitive damages phase of the trial, if any. MS & Co. claims that they should have no further effect. CPH claims that the Court's findings of litigation misconduct remain relevant in any punitive damages phase. MS & Co. claims they do not.

Four principles are clear. First, the legal significance in the punitive damages phase of facts admitted by default is narrow. See Humana Health Insurance Company of Florida, Inc. v. Chipps, 802 So. 2d 492 (Fla. 4th DCA 2001). Second, punitive damages are focused on a defendant's conduct, not a plaintiff's harm. See Nordyne, Inc., v. Florida

Mobile Home Supply, Inc., 625 So. 2d 1283 (Fla. 1st DCA 1993). Third, evidence of general pre-trial discovery disputes is not relevant. Amlan, Inc. v. Detroit Diesel Corp., 651 So. 2d 701 (Fla. 4th DCA 1995). Finally, evidence of concealment of a fraud, even if during the discovery phase, is relevant in the punitive damages phase as indicative of malice. See General Motors Corp. v. McGee, 837 So. 2d 1010 (Fla. 4th DCA 2003).

Applying these principles, it is clear that the consequences of MS & Co.'s litigation misconduct carry forward into Phase II in two discrete ways. First, as described in the March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment, MS & Co.'s acts in depriving CPH of crucial documents and discovery to prove its claims require that certain facts be removed from dispute, in order to level the playing field. Second, MS & Co.'s efforts to hide its fraud may be indicative of malice. Were it otherwise, a defendant whose liability is clear facing a claim for punitive damages would have a strong economic motive to destroy all incriminating documents: at worst, liability for compensatory damages, which was already clear, would be admitted; at best, neither the documents nor their destruction would be available in the punitive damages phase.

The Court concludes, then, that (i) the deemed facts should continue to bind MS & Co., but only for the specific fraud under review and should not be permitted to be used as a predicate for a separate fraud[1]; and (ii) MS & Co.'s attempts to hide direct evidence of its wrongdoing remain relevant as indicative of malice.

Based on the foregoing, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part, and ruling deferred, in part. If this action proceeds to Phase II on punitive damages, the facts established by Exhibit A to the Court's March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment shall be binding on the parties to support a claim for punitive damages predicated solely on the fraud against CPH. If CPH seeks to argue entitlement or amount of punitive damages based on any other bad acts or collateral consequences, all predicate facts, including MS & Co.'s knowledge of and participation in the fraud, shall be

[1]This ruling balances the need to keep the playing field level with the need to focus on MS & Co.'s acts, not CPH's harm.

independently proved. It is further

ORDERED AND ADJUDGED that the statement concerning litigation misconduct to be read to the jury shall be limited to the email issue. MS & Co. shall be permitted to offer evidence not inconsistent with its findings such as would permit a reasonable juror to conclude that MS & Co. did not intend to conceal evidence of the fraud.[2] It is further

ORDERED AND ADJUDGED that the Court shall consider the admissibility of evidence of similar misconduct on a case-by-case basis.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 16 day of May, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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Sumner Square
1615 M Street, NW, Suite 400
Washington, DC 20036

[2]MS & Co. cannot refute the deemed facts, because their misconduct prevented a full trial on the merits. In contrast, those facts found by the Court following evidentiary inquiry are binding on the parties to this litigation, but may be supplemented.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION IN LIMINE NO. 32 TO EXCLUDE SUPPLEMENTAL REPORT OF MICHAEL J. WAGNER

THIS CAUSE came before the Court May 13, 2005 on Morgan Stanley's Motion in Limine No. 32 to Exclude Supplemental Report of Michael J. Wagner, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part, and Denied, in part. Wagner shall be limited to the opinions stated in his initial and supplemental reports. He may not testify about the purpose of the $360 million reserve. This Order is without prejudice to MS & Co.'s right to object to specific testimony on relevancy grounds.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 16 day of May, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MS & CO.'S ORE TENUS MOTION FOR CLARIFICATION OF SCOPE OF EXPERT TESTIMONY-PHASE II

THIS CAUSE came before the Court May 16, 2005 on MS & Co.'s ore tenus Motion for Clarification of Scope of Expert Testimony-Phase II, with both parties well represented by counsel. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part, and ruling deferred, in part. CPH may present evidence concerning MS & Co.'s credit agreements with its parent, provided it first lays a factual predicate, outside the jury's presence, that would permit a reasonable juror to conclude that the credit agreements exist; have available finds to draw down; and are not subject to contingencies beyond MS & Co.'s control. The Court defers ruling on the portion of the Motion seeking to limit evidence of MS & Co.'s net income, pending further argument.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 16 day of May, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,
vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

VERDICT FORM

We, the jury, return the following verdict:

1. **Do you find by the greater weight of the evidence that CPH relied on the false statements made by Morgan Stanley or Sunbeam?**

YES ✓ NO _____

If your answer to Question 1 is "NO," your verdict is for Morgan Stanley and you should proceed no further except to sign and date this verdict form and return it to the courtroom. If your answer to Question 1 is "YES," please proceed to Question 2.

2. **Do you find by clear and convincing evidence that CPH relied on the false statements made by Morgan Stanley or Sunbeam?**

YES ✓ NO _____

3. **Do you find by the greater weight of the evidence that the fraud was a legal cause of CPH's damages?**

YES ✓ NO _____

If your answer to Question 3 is "NO," your verdict is for Morgan Stanley and you should proceed no further except to sign and date this verdict form and return it to the courtroom. If your answer to Question 3 is "YES," please proceed to Question 4.

4. **Do you find by clear and convincing evidence that the fraud was a legal cause of CPH's damages?**

YES ✓ NO _____

5. **By the greater weight of the evidence, what is the total amount of damages sustained by CPH and legally caused by the fraud in question?**

Total damages: $ 604,334,000.00(M)

Please date and sign this form and return it to the courtroom.

SO SAY WE ALL, this 16th day of MAY, 2005.

Laurinda K. Stallone
FOREPERSON

LAURINDA STALLONE

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

COPY
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MAY 17 2005
SHARON R. BOCK
CLERK & COMPTROLLER
CIRCUIT CIVIL DIVISION

MORGAN STANLEY'S NOTICE OF FILING OFFERS OF PROOF IN PHASE II

Pursuant to section 90.104(1), Florida Statutes and this Court's *ore tenus* ruling regarding written offers of proof, Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), hereby re-submits in Phase II of the trial of this matter each of the offers of proof listed below. Morgan Stanley hereby incorporates by reference the content and exhibits of each such offer of proof as if re-filed in its entirety herein:

Offers of Proof filed May 6, 2005:

1. Defendant's Offer of Proof re: Karen Clark
2. Defendant's Offer of Proof re: Glenn Dickes
3. Defendant's Offer of Proof re: Donald Drapkin
4. Defendant's Offer of Proof re: Robert Duffy
5. Defendant's Offer of Proof re: Adam O. Emmerich
6. Defendant's Offer of Proof re: Irwin Engleman

7. Defendant's Offer of Proof re: Steven Geller

8. Defendant's Offer of Proof re: Frank Gifford

9. Defendant's Offer of Proof re: Lawrence Jones

10. Defendant's Offer of Proof re: Ann Jordan

11. Defendant's Offer of Proof re: James Maher

12. Defendant's Offer of Proof re: William Nesbitt

13. Defendant's Offer of Proof re: Joseph Page

14. Defendant's Offer of Proof re: Joram Salig

15. Defendant's Offer of Proof re: Barry Schwartz

16. Defendant's Offer of Proof re: Paul Shapiro

17. Defendant's Offer of Proof re: Todd Slotkin

18. Defendant's Offer of Proof re: Bruce Slovin

Offers of Proof Filed May 9, 2005:

19. Defendant's Offer of Proof re: Shani Boone

20. Defendant's Offer of Proof re: Lawrence Bornstein

21. Defendant's Offer of Proof re: Mark Brockelman

22. Defendant's Offer of Proof re: Tyrone Chang

23. Defendant's Offer of Proof re: Donald Denkhaus

24. Defendant's Offer of Proof re: Alexandre Fuchs

25. Defendant's Offer of Proof re: Johannes Groeller

26. Defendant's Offer of Proof re: Phillip Harlow

27. Defendant's Offer of Proof re: Vance Kistler

28. Defendant's Offer of Proof re: Robert Kitts

29. Defendant's Offer of Proof re: William Kourakos

30. Defendant's Offer of Proof re: Dennis Pastrana

31. Defendant's Offer of Proof re: Ruth Porat

32. Defendant's Offer of Proof re: William Strong

33. Defendant's Offer of Proof re: James Stynes

34. Defendant's Offer of Proof re: Laurence Winoker

Offers of Proof Filed May 10, 2005:

35. Defendant's Offer of Proof re: Alan Dean

36. Defendant's Offer of Proof re: David Fannin

37. Defendant's Offer of Proof re: Howard Gittis

38. Defendant's Offer of Proof re: Michael Hart

39. Defendant's Offer of Proof re: James Lurie

40. Defendant's Offer of Proof re: Ronald Perelman

41. Defendant's Offer of Proof re: Michael Petrick

42. Defendant's Offer of Proof re: Richard Bram Smith

43. Defendant's Offer of Proof re: Heather Stack

44. Defendant's Offer of Proof re: John Tyree

45. Morgan Stanley Confidential Exhibits

46. Morgan Stanley Exhibits

47. Revised Proffer re Hedging

Offers of Proof Filed May 12, 2005

48. The Summary of Offer of Proof Regarding Defendant's Alleged Litigation Misconduct attached as Addendum to Morgan Stanley's Opposition to Coleman (Parent) Holdings Inc.'s Second Renewed Motion for Correction and Clarification of the Litigation-Misconduct Statement to be Read to the Jury and Reply in Support of Defendant's Motion in Limine No. 30, and the following exhibits :

1. Defendant's Offer of Proof re: Richard Anfang

1A. Deposition Designations of Richard Anfang

2. Defendant's Offer of Proof re: Bruce Buchanan

2A. Deposition Designations of Bruce Buchanan

3. Defendant's Offer of Proof re: Thomas Clare

4. Defendant's Offer of Proof re: James P. Cusick

5. Defendant's Offer of Proof re: James F. Doyle

6. Defendant's Offer of Proof re: Allison Gorman Nachtigal

6A. Deposition Designations of Allison Gorman Nachtigal

7. Defendant's Offer of Proof re: William Hollister

7A. 1/12/01 E-mail from T. Scherer to W. Hollister

8. Defendant's Offer of Proof re: Soo-Mi Lee

9. Defendant's Offer of Proof re: John Plotnick

9A. Deposition Designations of John Plotnick

10. Defendant's Offer of Proof re: Arthur Riel

10A. Deposition Designations of Arthur Riel

11. Defendant's Offer of Proof re: Robert John Saunders

11A. Deposition Designations of Robert John Saunders

12. Defendant's Offer of Proof re: Glenn Seickel

12A. Deposition Designations of Glenn Seickel

12B. MS 953

13. MS 232

14. MS 96

15. MS 196

16. 3/9/04 Fax Cover from T. Clare to M. Brody

17. MS 960

18. 11/17/04 Letter from T. Clare to M. Brody

19. 11/18/04 Letter from M. Occhuizzo to M. Brody

20. Deposition Designations of Steven L. Fasman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 17th day of May, 2005.

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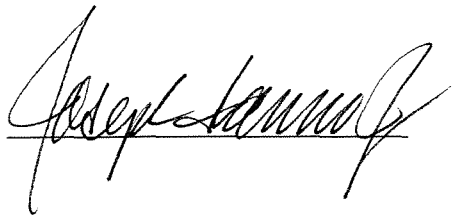
BY: 

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

COPY
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CLERK & COMPTROLLER
CIRCUIT CIVIL DIVISION

NOTICE OF FILING PLEADING UNDER SEAL

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed under seal its Notice of Filing Confidential Offer of Proof in Phase II.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the service list below by hand-delivery on this 17th day of May, 2005.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,
vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

The first issue for your determination in this phase of the trial is whether, in addition to the compensatory damages awarded, in the circumstances of this case, punitive damages are warranted to punish Morgan Stanley for its wrongful conduct and to deter similar misconduct by Morgan Stanley and others in the future. You may in your discretion assess punitive damages against Morgan Stanley, or, in your discretion, you may decline to assess punitive damages.

Punitive damages and compensatory damages serve different purposes. Compensatory damages are designed to compensate the plaintiff for its loss. In contrast, punitive damages are intended to punish the defendant for any intentional misconduct that harmed the plaintiff and thereby discourage similar acts in the future.

CPH recovered all of its losses by your award of compensatory damages. You should therefore award punitive damages only if you find by clear and convincing evidence that Morgan Stanley's culpability is so reprehensible that, in addition to the compensatory damages that Morgan Stanley must pay, a penalty is necessary to achieve just punishment and adequate deterrence.

You will recall that I instructed you that, in considering the defendant's liability for damages to compensate the plaintiff for its losses, you needed to find that the elements of the plaintiff's claims were established by the greater weight of the evidence — in other words, that they were more likely than not. A different and more demanding standard applies to liability for punitive damages, which must be proved by clear and convincing evidence. "Clear and convincing evidence" differs from the "greater weight of the evidence" in that it must be more compelling and persuasive. "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. In contrast, "clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

In determining the amount of punitive damages, if any, to be assessed as punishment to Morgan Stanley and as a deterrent to Morgan Stanley and to others, you should decide any disputed factual issues by the greater weight of the evidence. "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. You should consider the following in determining the amount of punitive damages to be assessed, along with any other factors that you think relevant to setting an appropriate punishment:

(1) The nature, extent, and degree of misconduct, and the related circumstances, including the following:

- the reprehensibility, if any, of Morgan Stanley's misconduct, including whether the conduct caused or threatened physical injury, or merely economic harm, and the extent to which it may have involved malice, trickery, or deceit;

- the degree of Morgan Stanley's awareness of the wrongfulness of the misconduct;
- whether the target of the conduct was an especially vulnerable victim or was preyed upon because of its inability to defend itself;
- Morgan Stanley's litigation misconduct in this case.

(2) Punitive damages should not be unreasonable in relation to the harmfulness of the conduct to CPH.

(3) Punitive damages, if any, should be sufficient to punish Morgan Stanley and deter it and others. You must not award punitive damages in any amount larger than is reasonably necessary to accomplish those purposes. Punitive damages should not be so great as to financially destroy or bankrupt Morgan Stanley.

You may in your discretion decline to assess punitive damages.

The statement of litigation misconduct may be considered by you only for the purpose of determining whether Morgan Stanley sought to hide direct evidence of either the Sunbeam fraud or Morgan Stanley's complicity with Sunbeam. It may not be considered for any other purpose. A party's failure to comply fully with a discovery request or Court order, standing alone, should not affect your determination of whether to award punitive damages, or the amount of punitive damages to award. That matter has been dealt with by the Court. It is not your job to punish Morgan Stanley for breaking the rules of this Court.

You should not impose punishment for harms, if any, suffered by any persons or entities other than CPH.

Your verdict on the issues raised by CPH's punitive damages claim against Morgan Stanley must be based on the law on which I have instructed you and on evidence that has been received during the entire trial of this action. In reaching your verdict, you are not to be swayed from the performance of your duty by prejudice or sympathy for or against any party.

Your verdict must be unanimous, that is, your verdict must be agreed to by each of you.

You will be given a form of verdict, which I shall now read to you:

[read form of verdict]

When you have agreed on your verdict, the foreman or forewoman, acting for the jury, should date and sign the verdict. You may now retire to consider your verdict.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,
vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

VERDICT FORM

We, the jury, return the following verdict:

1. **Do you find by clear and convincing evidence that punitive damages are warranted against Morgan Stanley?**

YES _____ NO _____

If your answer to question 1 is NO, you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 1 is YES, you should proceed to answer question 2.

2. **What is the total amount of punitive damages, if any, which you find by the greater weight of the evidence should be assessed against Morgan Stanley?**

$ _____

Date and sign this form and return it to the courtroom.

SO SAY WE ALL, this _____ day of May, 2005.

_____
FOREPERSON

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR MISTRIAL BECAUSE OF IMPROPER *EX PARTE* JUROR COMMUNICATIONS

Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully submits this supplemental memorandum in support of its oral motion – which Plaintiff Coleman (Parent) Holdings, Inc. ("CPH") initially supported – for a mistrial because of improper *ex parte* communications with the jurors. In further support of that motion, Morgan Stanley submits the following additional facts that confirm that there is *prima facie* evidence of prejudice that requires a mistrial under Florida law. *See Nationwide Mut. Fire Ins. Co. v. Tucker*, 608 So. 2d 85, 88 (Fla. 2d DCA 1992) (emphasis added).

Since the filing of Morgan Stanley's initial memorandum,[1] additional details regarding Mr. Comyns's criminal record have come to light. In addition to the 1979 guilty plea to forgery in New York state court that was referred to in the 2004 Palm Beach Post article cited in Morgan

[1] Morgan Stanley's Memorandum in Support of Motion for Mistrial Because of Improper *Ex Parte* Juror Communications (May 2, 2005).

Stanley's initial memorandum (at 3), Morgan Stanley has learned that Mr. Comyns was convicted in 1979 in federal district court for the Southern District of Florida for mail fraud. He received a five-year suspended sentence and was placed on two years' supervised probation.

New details about Mr. Comyns's most recent arrest and conviction have also come to Morgan Stanley's attention. In April 2001, Mr. Comyns was arrested by the U.S. Marshal's Service in Miami; he and his wife were indicted for conspiracy to defraud in violation of 18 U.S.C. § 371 and four counts of attempted tax evasion in violation of 26 U.S.C. § 7201. *See* Indictment, No. 01-8051, *United States v. James A. Comyns and Carol A. Comyns* (S.D. Fla. filed Apr. 5, 2001) (attached as Exh. A). He pled guilty to two counts of the Indictment in October 2001. As indicated in Morgan Stanley's initial memorandum, now confirmed by the official judgment of conviction, Mr. Comyns was sentenced to 24 months' in prison and 3 years' supervised release, and ordered to pay a $40,000 fine. *See* Amended Judgment, *United States v. James Comyns*, No. 9:01CR8051 (S.D. Fla. June 30, 2003) (attached as Exh. B). The sentence was increased "due to what the Court found to be an obstruction of justice for hiding assets." http://www.irs.gov/ compliance/enforcement/article/0,,id=125261,00.html. New information indicates that Mr. Comyns's confrontation of the jurors in this case came no more than eight weeks after his release from federal prison on or around February 26, 2005, and during his ongoing three-year term of release under the supervision of the Federal Probation Department in West Palm Beach. *See* Petition for Writ of Habeas Corpus, *Comyns v. Miner, Warden*, No. 1:04-cv-03547 (D.N.J. filed July 26, 2004) (attached as Exh. C).

These additional facts confirm the need for a mistrial. That a repeat felon – who is implicated in a web of connections to Mr. Scarola and may have myriad undisclosed motives to

assist Mr. Scarola in this case[2] – visited the courtroom and then, knowingly and in disregard of this Court's admonitions not to talk to the jurors, accosted three members of the jury believed to be friendliest to the defense, and persistently grilled them about the case, creates the sinister specter of intentional jury tampering. *See, e.g., Norman v. Gloria Farms, Inc.*, 668 So. 2d 1016, 1019 (Fla. 4th DCA 1996) ("contact with a juror during trial about a pending matter" by a person associated with a participant in the litigation constitutes an act that is so "potentially harmful" to the integrity of the judicial process that it is "presumptively prejudicial"). Moreover, Mr. Comyns's robust criminal history – for crimes involving deceit (fraud, tax evasion) and obstruction of justice – casts serious doubt on the credibility of his account of the events, which is irreconcilably at odds with the statement of the three jurors themselves. Mr. Comyns's word cannot possibly be enough to rebut the strong presumption of prejudice. *See Tucker*, 608 So. 2d at 88 (internal quotation marks omitted) (Morgan Stanley is entitled to a new trial unless CPH "can demonstrate that there is no reasonable possibility that the jury misconduct affected the verdict"); *Del'Ostia v. Strasser*, 798 So. 2d 785, 788 (Fla. 4th DCA 2001) (even a credible affidavit attesting to unrecorded communications with jurors is not sufficient to prove those communications harmless). Under settled Florida law, Morgan Stanley is entitled to a mistrial.

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[2] Morgan Stanley has confirmed additional details as to Mr. Comyns's relationship with Mr. Scarola. Mr. Scarola admitted to the Court that Mr. Comyns is his "current client." 4/25/05 Tr. 10434:19-21. Court records confirm that Mr. Scarola is counsel of record for Mr. Comyns in a civil action currently pending before Judge Brunson of this Court. *See* Docket Printout, *KK Aggregates, Inc. et al. v. Carol Comyns et al.*, Case No. CL 98-6152 AH (Fla. 15th Jud. Cir.) (attached as Exh. D). Additionally, Mr. Scarola represents his own law firm, which is a co-defendant in that same case along with Mr. Comyns and his wife. *See id.* The complaint in that case, which originally named Mr. Scarola himself as a defendant, alleges that Mr. Scarola's firm helped Mr. Comyns and his wife unlawfully misappropriate assets from Plaintiffs. *See* First Amended Complaint, *KK Aggregates, Inc., supra* (filed Jan. 22, 1999).

CONCLUSION

For the foregoing reasons, and those provided in its initial memorandum of law, Morgan Stanley respectfully renews its motion for a mistrial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 11th day of May 2005.

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EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 01-8051 CR-MIDDLEBROOKS
18 U.S.C. Sec. 371
26 U.S.C. Sec. 7201

MAGISTRATE JUDGE
JOHNSON

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES A. COMYNS and
CAROL A. COMYNS, a/k/a
Carol A. Czerwiec,

Defendants.

INDICTMENT

The Grand Jury charges that:

INTRODUCTION AND BACKGROUND

1. From in and around March 1993, to in or around September 1998, the exact dates being unknown to the Grand Jury, at Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

JAMES A. COMYNS and
CAROL A. COMYNS, a/k/a Carol Czerwiec,

and others known and unknown to the Grand Jury, did knowingly

16div-017404

and willfully combine, conspire, confederate, agree and reach a tacit understanding with each other to defraud the United States by attempting to impede, impair, obstruct and defeat the lawful governmental functions of the Internal Revenue Service (IRS) of the United States Treasury Department in the ascertainment, computation, assessment and collection of the revenue: to wit, income taxes.

OBJECTS OF THE CONSPIRACY

2. It was an object of the conspiracy that the defendants, together with persons and entities known and unknown to the Grand Jury, would endeavor to defraud the United States by impeding, impairing, obstructing, and defeating the lawful governmental functions of the IRS in the collection of the revenue, to wit, income taxes, by evading and attempting to evade the payment of federal income tax liabilities due and owing by the defendant JAMES A. COMYNS for the years 1988, 1990, and 1991; and

3. It was a further object of the conspiracy that the defendants, together with persons and entities known and unknown to the Grand Jury, would endeavor to defraud the United States by impeding, impairing, obstructing, and defeating the lawful governmental function of the IRS in the ascertainment, computation, assessment, and collection of the

revenue, to wit, income taxes, by evading and attempting to evade the assessment and payment of federal income tax liabilities of defendant JAMES A. COMYNS for the years 1993, 1994, 1995, and 1996.

PERSONS, PARTIES AND ENTITIES INVOLVED

4. Defendant JAMES A. COMYNS operated a quarry located on Southern Boulevard as a consultant to GKK Corporation ("GKK") from approximately March 1993 to August 1997. Prior to that time, defendant JAMES A. COMYNS operated the same quarry through Belvedere Sand & Stone, a Florida corporation.

5. Defendant CAROL A. COMYNS, a/k/a Carol Czerwiec, worked as an employee and officer of GKK at the quarry site from approximately March 1993 to August 1997. Prior to that time, defendant CAROL A. COMYNS worked for Belvedere Sand & Stone. During all relevant times, defendants JAMES A. COMYNS and CAROL A. COMYNS, a/k/a Carol Czerwiec, were married.

6. CAC Aggregates, Inc. ("CAC"), was a Florida corporation formed on or about March 17, 1993, and was wholly owned by defendant CAROL A. COMYNS, a/k/a Carol Czerwiec. During the time defendant CAROL A. COMYNS owned CAC, its primary business activities were to operate a lunch stand at GKK's quarry and to purchase a residence for defendants JAMES A. COMYNS and CAROL A. COMYNS.

MANNER AND MEANS BY WHICH THE CONSPIRACY WAS CARRIED OUT

It was a manner and means of the conspiracy that:

7. In September 1992, defendant JAMES A. COMYNS filed individual income tax returns, reporting his status as "married filing separate return," for the years 1990 and 1991 which, together, showed a tax due of approximately $79,933; no payment was made with the returns. At the time he filed his 1990 and 1991 tax returns, defendant JAMES A. COMYNS had an outstanding tax due and owing of approximately $21,828, based on his previously-filed 1988 individual income tax return. Despite owing the IRS approximately $101,761 altogether, and despite the IRS's attempts to collect all or part of this tax liability, defendant JAMES A. COMYNS made no payment or offer to pay his income tax liability.

8. In or around September 1992, defendant JAMES A. COMYNS, through Belvedere Sand & Stone, Inc., controlled a potentially valuable leasehold interest in a quarry located at State Road 80, in Palm Beach County, Florida. The property was leased from Prudential Life Insurance Co. ("Prudential"). The quarry produced, among other things, aggregate stone suitable for use as a road base material.

9. In or around mid-to-late 1992, the exact dates being

unknown to the grand jury, defendant JAMES A. COMYNS, faced with financial difficulties in the quarry's operation, began discussing those difficulties with individuals known to the grand jury, which individuals later became associated with GKK, and encouraged those individuals to purchase the quarry property outright from Prudential.

10. In or around February 1993, GKK purchased the property from Prudential. As part of this transaction, GKK agreed to pay a "finders fee" of $500,000 to JAMES A. COMYNS, and to hire defendant JAMES A. COMYNS to continue to operate the quarry, for a consulting fee of $240,000 per year, to give him certain rights to net profits of the quarry, as well as certain rights upon the sale of the quarry.

11. To conceal defendant JAMES A. COMYNS's receipt of the "finders fee" from the IRS, to which he owed over $100,000 in back taxes, the defendants, JAMES A. COMYNS and CAROL A. COMYNS, formed CAC to act as a nominee for JAMES A. COMYNS. JAMES A. COMYNS collected his finder's fee by filling out a GKK check for $500,000, making it payable to CAC. An agreement was later drafted and back-dated to make it appear that the fee had been paid to CAC in exchange for CAC's services in obtaining various regulatory approvals (which CAC never obtained).

12. Neither defendant JAMES A. COMYNS nor defendant CAROL A. COMYNS reported the receipt of the GKK check for $500,000 on their respective income tax returns for 1993. Nor did the defendants, JAMES A. COMYNS and CAROL A. COMYNS, report the receipt of that check on CAC's 1993 income tax return. In fact, during all relevant periods, neither JAMES A. COMYNS nor CAROL A. COMYNS ever filed a federal income tax return for CAC.

13. To further conceal from the IRS JAMES A. COMYNS's ownership and control of substantial assets that could be used to satisfy his tax obligations, in or around April 1994, the defendants, through CAC, purchased a $955,000 residence and an adjacent lot located at 2410 Muir Circle, Palm Beach Polo and Country Club, Wellington, Florida. The mortgage for the properties was obtained by the defendants, in part, by pledging proceeds from JAMES A. COMYNS's $500,000 finders fee. On or about September 18, 1998, defendant CAROL A. COMYNS, claiming to act on behalf of CAC, quitclaimed the residence back to herself. Defendants JAMES A. COMYNS and CAROL A. COMYNS continue to reside in the house located at 2410 Muir Circle.

14. Defendant JAMES A. COMYNS began receiving consulting fees from GKK in 1993; no federal income taxes were withheld

from those payments. To conceal this income from the IRS, JAMES A. COMYNS endorsed his weekly GKK checks, each in the amount of $4,615.38, and provided them to defendant CAROL A. COMYNS. Defendant CAROL A. COMYNS then endorsed her husband's checks and deposited them into bank accounts that she controlled.

15. During all relevant periods, JAMES A. COMYNS did not hold any bank accounts in his own name, except one account opened in or around April 1997 into which defendant JAMES A. COMYNS had payments from social security directly deposited.

16. To further conceal his receipt of substantial income from the IRS and ownership of substantial assets, defendant JAMES A. COMYNS routinely used a credit card account issued in the name of one of his sons.

17. To further conceal his receipt of substantial income and control of substantial assets from the IRS, defendant JAMES A. COMYNS filed false and fraudulent individual income tax returns with the IRS for the years 1993 through 1996, or failed to file any return at all.

18. In an attempt to prevent the IRS from learning about his GKK income, at various times, defendant JAMES A. COMYNS instructed GKK staff not to prepare or file Forms 1099 reporting his income to the IRS, and instructed GKK staff to

prepare false Forms 1099, which dramatically understated his income. JAMES A. COMYNS provided his return preparer with these false Forms 1099 to be used in the preparation of his income tax returns.

19. In order to obtain a loan for the purchase of the house at the Palm Beach Polo & Country Club, defendant JAMES A. COMYNS instructed GKK staff to prepare a false 1993 Form 1099 reporting that his wife, defendant CAROL A. COMYNS, received $240,000 in income from GKK. Defendant CAROL A. COMYNS submitted this false Form 1099 to the mortgage lender. Between 1993 and 1997, defendant CAROL A. COMYNS was a salaried GKK employee, who received between approximately $40,000 to $50,000 a year from GKK.

20. Until sometime in or around August 1997, defendant CAROL A. COMYNS was a GKK corporate officer. One of her duties, as a GKK corporate officer, was to supervise the transmission of GKK's year-end Forms 1099 to the IRS and to certify, under penalties of perjury, that the forms filed with the IRS were true, correct, and complete. On several occasions, defendant CAROL A. COMYNS transmitted year-end Forms 1099 to the IRS which omitted reporting any payments whatsoever to co-defendant JAMES A. COMYNS.

OVERT ACTS

21. In furtherance of the conspiracy, and to effect its aims and objects, one or more of the co-conspirators committed at least one of the following overt acts in the Southern District of Florida:

A. On or about March 17, 1993, defendants JAMES A. COMYNS and CAROL A. COMYNS caused to be filed Articles of Incorporation with the State of Florida, Department of State, for CAC Aggregates, Inc.

B. On or about March 18, 1993, defendant JAMES A. COMYNS presented to a person known to the grand jury an already completed GKK check no. 0307 for signature in the amount of $500,000, made payable to the order of C.A.C. Aggregates, Inc.

C. On or about March 19, 1993, defendants caused GKK check no. 0307 to be deposited into CAC Aggregates's First Union Account No. 2166020040872.

D. On or about April 19, 1993, defendant CAROL A. COMYNS, as "C. Czerwiec," signed GKK check No. 0213 in the amount of $4,615.38 payable to defendant JAMES A. COMYNS; shortly thereafter, both defendants endorsed that check and caused it to be deposited into accounts controlled by defendant CAROL A. COMYNS.

E. On or about April 27, 1993, defendant JAMES A. COMYNS

signed a "Non-compete and Consulting Agreement" providing for payment of a $240,000 annual consulting fee from GKK.

F. On or about May 4, 1993, defendant CAROL A. COMYNS, signing as "C. A. Czerwiec," executed an Agreement between GKK and CAC, which provided for various services to be performed by CAC for GKK.

G. On or about July 19, 1993, defendant CAROL A. COMYNS, as "C. Czerwiec," signed GKK check no. 556 in the amount of $4,615.38, payable to defendant JAMES A. COMYNS; shortly thereafter, both defendants endorsed that check and caused it to be deposited into accounts controlled by defendant CAROL A. COMYNS.

H. In or around January 1994, defendant JAMES A. COMYNS instructed a person known to the grand jury not to issue him a 1993 GKK Form 1099 in the amount of $193,845.91 for the consulting fees he received in 1993.

I. On or about February 14, 1994, defendant CAROL A. COMYNS, as "C. Czerwiec," signed GKK check no. 1451 in the amount of $4,615.38, payable to defendant JAMES A. COMYNS; shortly thereafter, both defendants endorsed that check and caused it to be deposited into accounts controlled by defendant CAROL A. COMYNS.

J. In or around April 1994, defendant JAMES A. COMYNS

instructed a person known to the grand jury to create a false GKK Form 1099 for defendant CAROL A. COMYNS indicating that she had received $240,000 in "non-employee compensation" in 1993.

K. In or around April 1994, defendants caused the false 1993 GKK Form 1099 for defendant CAROL A. COMYNS described above to be submitted to a mortgage lender.

L. On or about April 6, 1994, defendant CAROL A. COMYNS executed a loan application for a mortgage on which she falsely listed her annual salary as $240,000.

M. On or about April 15, 1994, defendant JAMES A. COMYNS filed a false individual income tax return, Form 1040, with a false GKK Form 1099 attached indicating that he only received $3,600 in income from GKK in 1993.

N. On or about April 26, 1994, defendant CAROL A. COMYNS executed a mortgage for the purchase of a residence located at 2410 Muir Circle, Palm Beach Polo & Country Club, in Wellington, Florida, as the President of CAC Aggregates, Inc.

O. On or about August 8, 1994, defendant CAROL A. COMYNS, as "C. Czerwiec," signed GKK check no. 2448 in the amount of $4,615.38, payable to defendant JAMES A. COMYNS; shortly thereafter, both defendants endorsed that check and caused it to be deposited into accounts controlled by

defendant CAROL A. COMYNS.

P. On or about February 27, 1995, defendant CAROL A. COMYNS, as "C. Czerwiec," signed GKK check no. 3722 in the amount of $4,615.38, payable to defendant JAMES A. COMYNS; shortly thereafter, both defendants endorsed that check and caused it to be deposited into an account controlled by defendant CAROL A. COMYNS.

Q. On or about April 10, 1995, defendant CAROL A. COMYNS, as "C. Czerwiec," signed GKK check no. 4061 in the amount of $4,615.38, payable to defendant JAMES A. COMYNS; shortly thereafter, both defendants endorsed that check and caused it to be deposited into accounts controlled by defendant CAROL A. COMYNS.

R. On or about April 12, 1995, defendant JAMES A. COMYNS advised his return preparer that he had no income in 1994.

S. On or about August 18, 1995, defendant CAROL A. COMYNS, as "C. Czerwiec," signed GKK check no. 5200 in the amount of $4,615.38, payable to defendant JAMES A. COMYNS; shortly thereafter, both defendants endorsed that check and caused it to be deposited into accounts controlled by defendant CAROL A. COMYNS.

T. On or about February 9, 1996, defendant CAROL A. COMYNS, as "C. Czerwiec," signed GKK check no. 6803 in the

amount of $4,615.38, payable to defendant JAMES A. COMYNS; shortly thereafter, both defendants endorsed that check and caused it to be deposited into accounts controlled by defendant CAROL A. COMYNS.

U. On or about February 28, 1996, defendant CAROL A. COMYNS, signing as "C. Czerwiec," vice president of GKK, executed and transmitted to the IRS GKK's 1995 Form 1096, which document did not include a Form 1099 for defendant JAMES A. COMYNS.

V. On or about April 5, 1996, defendant CAROL A. COMYNS, as "C. Czerwiec," signed GKK check no. 7269 in the amount of $4,615.38, payable to defendant JAMES A. COMYNS; shortly thereafter, both defendants endorsed that check and caused it to be deposited into accounts controlled by defendant CAROL A. COMYNS.

W. In or around April 1996, defendant JAMES A. COMYNS directed a person known to the grand jury to create a false GKK Form 1099 indicating that he had received only $7,800 in 1995.

X. On or about April 15, 1996, defendant JAMES A. COMYNS filed a false individual income tax return, Form 1040, with a false GKK Form 1099 attached indicating that he only received $7,800 in income from GKK in 1995.

Y. On or about February 28, 1997, defendant CAROL A. COMYNS, signing as "C. Czerwiec," vice president of GKK, executed and transmitted to the IRS GKK's 1996 Form 1096, which document did not include a Form 1099 for defendant JAMES A. COMYNS.

Z. On or about April 14, 1997, defendant JAMES A. COMYNS advised his return preparer that he had $5,000 of income in 1996.

AA. On or about September 17, 1998, defendant CAROL A. COMYNS, signing as "Carol A. Czerwiec," executed a quit-claim deed for the property at 2410 Muir Circle, Wellington, from CAC to defendant CAROL A. COMYNS.

All in violation of Title 18, United States Code, Sections 371 and 2.

COUNT TWO

ATTEMPTED EVASION OF PAYMENT

22. The allegations of paragraphs 4 through 20 are realleged and incorporated herein by this reference.

23. From in or around March 1993, through in or around September 1998, the exact dates being unknown to the Grand Jury, at Wellington, Palm Beach County, in the Southern District of Florida, and elsewhere, the defendant,

and others known and unknown to the Grand Jury, did willfully attempt to evade and defeat the payment of a large amount of the substantial income tax due and owing by the defendant JAMES A. COMYNS to the United States of America for the calendar years 1988, 1990 and 1991, in the amount of approximately $101,761, by committing at least one affirmative act of evasion, including, among other things, concealing and attempting to conceal from the IRS the nature and extent of defendant JAMES A. COMYNS'S income and assets; making false statements and providing false documents to defendant JAMES A. COMYNS's return preparer; and making and filing false individual income tax returns for defendant JAMES A. COMYNS.

All in violation of Title 26, United States Code, Section 7201.

COUNT THREE

ATTEMPTED TAX EVASION

24. The allegations of paragraphs 4 through 20 are realleged and incorporated herein by this reference.

25. During the calendar year 1994, the defendant,

JAMES A. COMYNS,

a resident of Wellington, Florida, had and received taxable

income in the sum of approximately $240,000; that upon said taxable income there was due and owing to the United States a substantial income tax of approximately $96,367; and well knowing and believing the foregoing facts, the defendant, in Palm Beach County, in the Southern District of Florida, and elsewhere, did willfully attempt to evade and defeat said substantial income tax due and owing by him to the United States for said calendar year by failing to make an income tax return on or before April 17, 1995, as required by law, or on or before October 15, 1995, pursuant to the extension requests filed on behalf of the defendant, or at any time thereafter, to any proper officer of the Internal Revenue Service, by failing to pay to the Internal Revenue Service said income tax, by making false statements to his return preparer, and by concealing and attempting to conceal from all proper officers of the United States his true and correct income.

All in violation of Title 26, United States Code, Section 7201.

COUNT FOUR

ATTEMPTED TAX EVASION

26. The allegations of paragraphs 4 through 20 are realleged and incorporated herein by this reference.

27. On or about the 15th day of April, 1996, at Palm Beach County, in the Southern District of Florida, and elsewhere, the defendant,

JAMES A. COMYNS,

did willfully attempt to evade and defeat a large part of the substantial income tax due and owing by him to the United States of America for the calendar year 1995, by causing the creation of a false Form 1099, indicating that he had received $7,800 in miscellaneous income from GKK corporation in 1995 and providing that false Form 1099 to his return preparer; and by filing and causing to be filed with the Director, Internal Revenue Service Center, at Atlanta, Georgia, a false and fraudulent U.S. Individual Income Tax Return, Form 1040, wherein he stated that his taxable income for the calendar year 1995 was $3,789, and that the amount of tax due and owing thereon was the sum of $1,668, whereas, as he then and there well knew and believed, his taxable income for the said calendar year was approximately $192,824, upon which said taxable income there was due and owing to the United States of America a substantial additional income tax of approximately $76,674.

All in violation of Title 26, United States Code, Section 7201.

16div-017420

COUNT FIVE

ATTEMPTED TAX EVASION

28. The allegations of paragraphs 4 through 20 are realleged and incorporated herein by this reference.

29. During the calendar year 1996, the defendant,

JAMES A. COMYNS,

a resident of Wellington, Florida, had and received taxable income in the sum of approximately $173,565; that upon said taxable income there was due and owing to the United States a substantial income tax of approximately $69,246; and well knowing and believing the foregoing facts, the defendant, on or about April 15, 1997, in Palm Beach County, in the Southern District of Florida, and elsewhere, did willfully attempt to evade and defeat the said substantial income tax due and owing by him to the United States for said calendar year by failing to make an income tax return on or before April 15, 1997, as required by law, to any proper officer of the Internal Revenue Service, by failing to pay to the Internal Revenue Service said income tax, by making false statements to his return preparer, and by concealing and attempting to conceal from all proper officers of the United States his true and correct income.

16div-017421

All in violation of Title 26, United States Code, Section 7201.

A TRUE BILL

Foreman

for GUY A. LEWIS
UNITED STATES ATTORNEY

NEIL A. KARADBIL
ASSISTANT U.S. ATTORNEY

ARTHUR S. LOWRY
SPECIAL ATTORNEY
UNITED STATES DEPARTMENT OF JUSTICE

16div-017422

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

v.

JAMES A. COMYNS and
CAROL A. COMYNS

CASE NO. 01-8051

CERTIFICATE OF TRIAL ATTORNEY*

CR-MIDDLEBROOKS

MAGISTRATE JUDGE JOHNSON

Superseding Case Information:

New Defendant(s) Yes ___ No ___
Number of New Defendants ___
Total number of counts ___

Court Division: (Select One)

___ Miami ___ Key West
___ FTL _X_ WPB ___ FTP

I do hereby certify that:

1. I have carefully considered the allegations of the indictment, the number of defendants, the number of probable witnesses and the legal complexities of the Indictment/Information attached hereto.

2. I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28 U.S.C. Section 3161.

3. Interpreter: (Yes or No) No
List language and/or dialect ___

4. This case will take 10 days for the parties to try.

5. Please check appropriate category and type of offense listed below:

(Check only one)			(Check only one)	
I	0 to 5 days	___	Petty	___
II	6 to 10 days	X	Minor	___
III	11 to 20 days	___	Misdem.	___
IV	21 to 60 days	___	Felony	X
V	61 days and over	___		

6. Has this case been previously filed in this District Court? (Yes or No) No
If yes:
Judge: ___ Case No. ___
(Attach copy of dispositive order)

Has a complaint been filed in this matter? (Yes or No) No
If yes:
Magistrate Case No. N/A
Related Miscellaneous numbers: N/A
Defendant(s) in federal custody as of N/A
Defendant(s) in state custody as of N/A
Rule 20 from the N/A District of ___

Is this a potential death penalty case? (Yes or No) No

7. Does this case originate from a matter pending in the U. S. Attorney's Office prior to April 1, 1999? ___ Yes _X_ No If yes, was it pending in the Central Region? ___ Yes __ No

ARTHUR LOWRY, Trial Attorney
DOJ TAX DIVISION
Admin. No. 5500362

for
NEIL KARADBIL
ASSISTANT UNITED STATES ATTORNEY
Admin. No. 5500073

*Penalty Sheet(s) attached
N:\LLopez\informat\CERTIFICATE.wpd

REV.3/19/99

16div-017423

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
PENALTY SHEET

Defendant's Name: JAMES A. COMYNS No.:

Count #: 1 01-8051 CR-MIDDLEBROOKS

18 USC § 371; conspiracy to commit tax fraud

MAGISTRATE JUDGE JOHNSON

*Max. Penalty: 5 Years Imprisonment; $250,000 Fine

Count #: 2-5

26 USC § 7201; attempted tax evasion

*Max. Penalty: 5 Years Imprisonment; $250,000 Fine as to each count

Count #:

*Max. Penalty:

Count #:

*Max. Penalty:

Count #:

*Max. Penalty:

Count #:

*Max. Penalty:

Count #:

*Max. Penalty:

***Refers only to possible term of incarceration, does not include possible fines, restitution, special assessments, parole terms, or forfeitures that may be applicable.**

REV. 12/12/96

16div-017424

JAMES A. COMYNS

DEFENDANT

Personal Surety Bond of $250,000 is recommended as to defendant.

NEIL KARADBIL
ASSISTANT UNITED STATES ATTORNEY

ARTHUR LOWRY
TRIAL ATTORNEY, DOJ TAX DIVISION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
PENALTY SHEET

Defendant's Name: CAROL A. COMYNS No.:

Count #: 1 91-8051 CR-MIDDLEBROOKS

18 USC § 371; conspiracy to commit tax fraud

MAGISTRATE JUDGE
JOHNSON

*Max. Penalty: 5 Years Imprisonment; $250,000 Fine
Count #:

*Max. Penalty:
Count #:

*Max. Penalty:
Count #:

*Max. Penalty:
Count #:

*Max. Penalty:
Count #:

*Max. Penalty:
Count #:

*Max. Penalty:

***Refers only to possible term of incarceration, does not include possible fines, restitution, special assessments, parole terms, or forfeitures that may be applicable.**

REV. 12/12/96

16div-017426

CAROL A. COMYNS

DEFENDANT

Personal Surety Bond of $250,000 is recommended as to defendant.

NEIL KARADBIL
ASSISTANT UNITED STATES ATTORNEY

ARTHUR LOWRY
TRIAL ATTORNEY, DOJ TAX DIVISION

No. _____

UNITED STATES DISTRICT COURT

Southern *District of* Florida
Northern *Division*

THE UNITED STATES OF AMERICA

vs.

JAMES A. COMYNS and

CAROL A. COMYNS

INDICTMENT

18 USC 371
26 USC 7201

A true bill.

Walter Bahnsen

Foreman

Filed in open court this 5th *day*

of April *A.D. 19* 2001.

E Guerra

Clerk

Bail. $ _____

GPO 863 928

16div-017428

EXHIBIT B

UNITED STATES DISTRICT COURT

SOUTHERN District of FLORIDA

UNITED STATES OF AMERICA
V.
JAMES A. COMYNS

Date of Original Judgment: June 2, 2003
(Or Date of Last Amended Judgment)

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 9:01CR8051-MIDDLEBROOKS
RICHARD LUBIN, Esq. KERRY BARON, AUSA
Defendant's Attorney

Reason for Amendment:

- ☐ Correction of Sentence on Remand (Fed. R. Crim. P. 35(a))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P.
- X Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)
- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant to ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
- ☐ Modification of Restitution Order (18 U.S.C. §

FILED by D.C.
JUL 02 2003
CLARENCE MADDOX
CLERK U.S. DIST. CT.
S.D. OF FLA. - W.P.B.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

THE DEFENDANT:

- X pleaded guilty to count(s) II & IV of the Indictment.
- ☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.
- ☐ was found guilty on count(s) _____ after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
26 U.S.C. 7201	ATTEMPTED TAX EVASION	9-30-1998	II
26 U.S.C. 7201	ATTEMPTED TAX EVASION	4-15-1996	IV

The defendant is sentenced as provided in pages 2 _____ of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____
- X Count(s) ALL REMAINING COUNTS ☐ is X are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.: 084-24-8619

Defendant's Date of Birth: 2-14-1931

Defendant's USM No.: 71603-004

Defendant's Residence Address:
WATERFORD CONDOMINIUM #2150 CAMP HILL
PENNSYLVANIA, 17011

Defendant's Mailing Address:
WATERFORD CONDOMINIUM #2150 CAMP HILL
PENNSYLVANIA, 17011

June 26, 2003
Date of Imposition of Judgment

Signature of Judicial Officer

Donald M. Middlebrooks, United States District Judge
Name and Title of Judicial Officer

6/27/03
Date

RA
23

16div-017430

DEFENDANT: JAMES A. COMYNS
CASE NUMBER: 9:01CR8051-Middlebrooks

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total total term of 24 MONTHS AS TO COUNTS .

II & IV TO RUN CONCURRENTLY WITH EACH OTHER.

☐ The court makes the following recommendations to the Bureau of Prisons:

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JAMES A. COMYNS
CASE NUMBER: 9:01CR8051-MIDDLEBROOKS

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 YEARS AS TO COUNTS II & IV TO RUN CONCURRENTLY WITH EACH OTHER.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

☐ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record, personal history, or characteristics and shall permit the probation officer to make such notifications and confirm the defendant's compliance with such notification requirement.

DEFENDANT: JAMES A. COMYNS
CASE NUMBER: 9:01CR8051-MIDDLEBROOKS

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

The defendant shall cooperate fully with the Internal Revenue Service in determining and paying any tax liabilities. The defendant shall provide to the Internal Revenue Service all requested documents and information for purposes of any civil audits, examinations, collections, or other proceedings. It is further ordered that the defendant file accurate income tax returns and pay all taxes, interest, and penalties due and owing by him/her to the Internal Revenue Service.

DEFENDANT: JAMES A. COMYNS
CASE NUMBER: 9:01CR8051-MIDDLEBROOKS

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
TOTALS	$ 50.00 as to Count II $50.00 as to Count IV	$ 40,000	$

FOR A TOTAL OF $100.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment

TOTALS	$ _____	$ _____

☐ If applicable, restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine and/or ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

DEFENDANT: JAMES A. COMYNS
CASE NUMBER: 9:01CR8051-MIDDLEBROOKS

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A X Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, or ☐ E below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ E below); or

C ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JAMES A. COMYNS,	:	
Petitioner,	:	**CIVIL ACTION NO.**
v.	:	
JONATHAN C. MINER, WARDEN, Federal Correctional Institution, Fairton, New Jersey,	:	
Respondent.	:	

PETITION FOR WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2241
BY A PRISONER IN FEDERAL CUSTODY

James A. Comyns, an inmate serving a sentence at the Federal Prison Camp attached to the Federal Correctional Institution at Fairton, New Jersey ("FPC Fairton"), petitions this Court pursuant to 28 U.S.C. § 2241 for a Writ of Habeas Corpus. Petitioner challenges the decision of the Respondent Warden denying him any more than 62 days' community confinement at the conclusion of his sentence. The Warden's action is based solely on an erroneous legal opinion of the Attorney General. Absent that opinion and under established Bureau of Prisons ("BoP") rules, Petitioner is eligible for placement at a Community Corrections Center ("CCC" or "halfway house") 180 days prior to his projected release from federal custody, or more, and, under past practice at FPC Fairton, would have likely received 180 days' CCC confinement. Accounting for anticipated good conduct time credit, Petitioner will be 180 days' short of completion of his sentence on August 30, 2004. Prompt action on this petition is therefore required. In support of his claims, the Petitioner, by undersigned counsel, states:

PARTIES

1. By virtue of a judgment of the United States District Court for the Southern District of Florida (Donald M. Middlebrooks, U.S.D.J.), the Petitioner, James Comyns, is

presently committed to the custody of the BoP. He is confined at FPC Fairton, within the jurisdiction of this Court. Petitioner's projected release from federal custody, which takes into account the anticipated award of good conduct time under 18 U.S.C. § 3624(b), is February 26, 2005. His Bureau of Prisons' Register Number is 71603-004.

2. Petitioner James ("Jim") Comyns is a 73-year-old nonviolent offender.

a. Mr. Comyns' wife of nearly 40 years is 63 years old and resides alone in the family's West Palm Beach, Florida, home, having lost their previous home and considerable personal assets during the underlying prosecution.

b. The couple has two grown children through their union, and Mr. Comyns has four children from an earlier marriage. The second oldest of Mr. Comyns' children, a 46-year-old son, is a diagnosed, paranoid schizophrenic whose mental health problems date back some 30 years. Information presented at sentencing demonstrated a unique bond between Mr. Comyns and this son, who reportedly has decompensated mentally in his father's absence and has experienced significant weight loss (approximately 100 pounds).

c. Petitioner Comyns' only prior criminal involvement, occurring in 1979, did not compel an increase in his Criminal History Score for guidelines sentencing purposes.

d. Although not medically restricted from work or prohibited from transfer to a CCC, Mr. Comyns suffers from chronic medical problems, including arterial blockages, constricting blood vessels, recurring sessile polyps (which were most recently removed from his colon in December 2003, on referral from BoP to a local hospital), and obstructive sleep apnea.

3. The Respondent Warden, Jonathan Miner, exercises the delegated authority, vested by law in the BoP, to "provide for the safekeeping, care, and subsistence" of the Petitioner. 18 U.S.C. § 4042(a)(2). Respondent is further charged with the authority to approve any transfer of Petitioner from FPC Fairton to another "appropriate and suitable" place of confinement, choosing any "available penal or correctional facility that meets minimum standards of health and habitability ..., whether maintained by the Federal

Government or otherwise ...." 18 U.S.C. § 3621(b). This authority includes transfer of Petitioner to a Community Corrections Center for the final portion of his imprisonment to facilitate release. See 28 C.F.R. §§ 571.10 - 571.13; BoP Program Statement ("P.S.") 7310.04, Community Corrections Center (CCC) Utilization and Transfer Procedures ¶12.a., at 12 (1998); P.S. 5100.07, Security Designation and Custody Classification Manual, ch. 10, ¶2.g., at 8A (2002 rev.) (procedures for "pre-release transfers"). Respondent is sued in his official capacity both as the person responsible for the challenged decision and as Petitioner's immediate custodian.

JURISDICTIONAL ALLEGATIONS

4. This Court has jurisdiction to issue a writ of habeas corpus and to grant relief as law and justice require under 28 U.S.C. §§ 1331, 2241(a), (c)(1) and 2243, because Petitioner is confined within the territorial jurisdiction of this Court, where he is held in Respondent's custody under color of the authority of the United States.

5. This Court also has jurisdiction under 28 U.S.C. § 1361 to issue relief in the nature of a writ of mandamus, compelling the Respondent in his official capacity to perform a duty owed to Petitioner, that is, to refrain from denying him more than 62 days' confinement at a Community Corrections Center on the mistaken premise that such placement is prohibited by law. Declaratory relief under 28 U.S.C. § 2201 is also sought.

FACTUAL ALLEGATIONS INCLUDING EXHAUSTION OF REMEDIES

6. On or about April 5, 2001, an Indictment was returned in the United States District Court for the Southern District of Florida charging James Comyns with a single count of Conspiracy to Defraud the United States in violation of 18 U.S.C. § 371 and four counts of Attempted Tax Evasion in violation of 26 U.S.C. § 7201. Mr. Comyns entered a not guilty as to all counts at his April 12, 2001, arraignment and was released on a personal surety bond.

7. Pursuant to a Plea Agreement filed in the Southern District of Florida, Petitioner appeared before Judge Middlebrooks on October 18, 2001, and entered guilty pleas to

Counts Two and Four of the original Indictment. Through these guilty pleas, Petitioner acknowledged (a) under Count Two, that during a period of time ending on or about September 30, 1998, he willfully attempted to evade the payment of approximately $101,761 in taxes owing for tax years 1988, 1990 and 1991 by, inter alia, making false statements to his tax return preparer and by filing false income tax returns, and (b) under Count Four, that he willfully attempted on or about April 15, 1996, to evade the payment of taxes on $244,615 in income during calendar year 1995 by, inter alia, not disclosing the true nature and extent of his income and by filing a false income tax return for the year 1995.

8. The U.S. Marshal's Office processed Mr. Comyns on April 10, 2001, and he earned one day of jail credit for this time in the Marshal's custody.

9. The U.S. Probation Office completed a Presentence Investigation Report, and sentencing was held on June 2, 2003. Judge Middlebrooks sentenced Petitioner to 24 months' imprisonment to be followed by three years' supervised release, concurrent as to each count of conviction. The Court also ordered Petitioner to pay $100 in special assessments and a $40,000 fine. Judgment was entered on June 3, 2003; however, an amended Judgment was entered on July 2, 2003, increasing the special assessment on Count Two under Fed.R.Crim.P. 36 (correction of clerical errror), making the total $150. (The judgment remained the same in all other respects.) Judgment became final not later than July 17, 2003, when the time to file a notice of appeal from the amended judgment expired pursuant to Fed.R.App.P. 4(b).

10. Judge Middlebrooks ordered Mr. Comyns remanded to custody immediately after the June 2, 2003, hearing to commence service of his 24-month sentence (less the aforementioned day of jail time credit). Petitioner was taken to the county jail and held one night in solitary confinement. He was then transported to the United States Penitentiary in Atlanta (GA), by way of the Miami (FL) Metropolitan Detention Center, where he was housed in 23½-hour lockdown status, with three men in a two-man cell, for approximately

20 days before being moved to FPC Fairton on July 28, 2003. According to the BoP's official calculation, Petitioner's sentence will "expire full term" on May 31, 2005. His "projected release date," however, based on credit for accumulated good conduct time under 18 U.S.C. § 3624(b), is February 26, 2005. Accordingly, Respondent calculates Petitioner's "10% date" -- the date BoP considers Petitioner to be eligible for placement at a CCC ([full term, less credit for good conduct] x 0.9) -- to be December 26, 2004.

11. BoP rules have long allowed confinement at a halfway house for up to 180 days (and sometimes longer) at the end of a prisoner's sentence, even if that is more than 10% of the time to be served. P.S. 7310.04, CCC Utilization and Transfer Procedures ¶5, at 3-4. In the years prior to December 2002, Respondent and his predecessors customarily transferred FPC Fairton prisoners to halfway houses well before their "10% dates" regardless of sentence length.

12. The recommendation of the staff at FPC Fairton with regard to the duration of Mr. Comyns' pre-release halfway house opportunity is, since December 2002, constrained by a national BoP policy limiting all CCC placements, except in certain circumstances not relevant here, to the final ten percent (10%) of the time an inmate serves. Through meeting with his Unit Team, Petitioner Comyns learned that his recommended "CCC date" coincides exactly with his "10% date," that is December 26, 2004. However, due to expected bed space limitations at the West Palm Beach at that time, staff has informed Mr. Comyns that he will not be transferred to a CCC until January 13, 2005.

13. Informal review of institution determinations can be made by an inmate's Unit Team, with formal review of the Team's response available through a request for administrative remedy and the Bureau's three-step administrative remedy program. See 28 C.F.R. §§ 542.10 - 542.15. Petitioner Comyns did not initiate an administrative appeal. Utilization of that remedial mechanism, which is the only one available, is and would be futile, and is therefore unnecessary prior to filing this habeas corpus action, for several reasons. Accordingly, general principles of habeas corpus law do not require that Petitioner exhaust

administrative remedies, as none are actually available to him, nor does any statute require exhaustion of remedies.

a. Exhaustion of administrative remedies under the BoP's procedures requires the inmate to appeal to the Warden, then to the Regional Director, and finally to the BoP's General Counsel. The time this takes is as long, if not longer, than the period remaining between this filing and August 30, 2004, the date when Petitioner contends he should by law be deemed eligible for halfway house placement and, under Respondent's past practices, when he could have expected transfer to a CCC. See 28 C.F.R. § 542.18.

b. Under 28 C.F.R. § 542.15, the highest level of administrative appeal available is to the BoP's General Counsel. On December 20, 2002, the Bureau's General Counsel issued a "Memorandum for Chief Executive Officers" captioned "Community Confinement Procedure Changes." (Despite its title, no procedures are changed by this memorandum, only substantive eligibility standards.) Through this memorandum, BoP's General Counsel declared: "Effective immediately" -- and notwithstanding the BoP's long-standing, published rule as referenced in ¶11 ante, which was not, and has not been, withdrawn or rescinded -- "[p]re-release programming CCC designations are limited in duration to the last 10% of the prison sentence, not to exceed six months." Mem., at 2 (there are minor exceptions inapplicable here). This memorandum is expressly predicated upon the opinion of the Attorney General's Office of Legal Counsel. See Re: Bureau of Prisons practice of placing in community confinement certain offenders who have received sentences of imprisonment (DOJ-OLC, Dec. 13, 2002). There is thus a fixed, uniform, national policy requiring rejection of any administrative appeal that Petitioner were to file, and that policy was announced by the very official to whom any administrative appeal would have to be brought.

c. Numerous judges across the country have invalidated BoP's rote application of the December 20, 2002, policy. These courts have ordered that wardens consider inmate halfway house eligibility pursuant to their respective institution's past practices. In at least

one instance, a court has directly ordered that a warden transfer an inmate from a prison camp "forthwith" to a halfway house, before that inmate's "10% percent" date.

d. Insufficient time remains before the issue presented in this petition becomes moot for Petitioner to pursue an administrative remedy appeal to the BoP's national office and await a rote denial that recites the Bureau's settled policy.

14. The Prisoner Litigation Reform Act, including its provision at 42 U.S.C. § 1997e(a) for exhaustion of administrative remedies, does not apply to federal prisoners' habeas corpus actions such as this one.

CLAIMS FOR RELIEF

15. Respondent's refusal to consider Petitioner for any more than 62 days' assignment to a halfway house is contrary to the laws of the United States. It is based exclusively on the BoP General Counsel's adherence to the Attorney General's erroneous reinterpretation of 18 U.S.C. §§ 3621(b) and 3624(c), which itself is expressed only in a footnote to the OLC opinion.

a. In exercising his power to approve any transfer of the Petitioner, Respondent is authorized to choose any "available penal or correctional facility that meets minimum standards of health and habitability ..., whether maintained by the Federal Government or otherwise ...." 18 U.S.C. § 3621(b).

b. Respondent's broad, statutory discretion over transfers of the Petitioner and other prisoners is subject to a minimum statutory obligation, "to the extent practicable, to assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community." 18 U.S.C. § 3624(c). See 28 C.F.R. §§ 571.10 - 571.13; P.S. 5100.07, supra ch. 10, ¶2.g, at 8A; P.S. 7310.04, supra ¶12.a, at 12.

c. Among the penal or correctional facilities to which Respondent might transfer Petitioner for the final portion of his sentence to facilitate his release, whether for

the minimum period assured (if practicable) by 18 U.S.C. § 3624(c) or longer under 18 U.S.C. § 3621(b), is a Community Corrections Center, also known as a halfway house. P.S. 7310.04, supra ¶¶ 5, 9.a(1), at 3-4, 8.

d. Properly construing these two statutes in pari materia and in accordance is longstanding administrative practice, the BoP's general authority to designate a place of confinement under § 3621(b) supplements the mandate of § 3624(c), which encourages pre-release preparation by assuring prisoners at least a minimum period of such preparation, "to the extent practicable." Section 3624(c) does not refer directly to halfway houses, much less abridge their use. (It does expand authority under § 3621(b), however, to the extent stated -- to include home confinement.) Thus, § 3624(c) does not act to restrict the general designation authority under § 3621(b) nor Respondent's long-recognized discretion, in the exercise of that authority, to approve halfway house placements commencing prior to an inmate's 10% date and to effectuate the same.

e. Under an appropriate exercise of discretion, as reflected in pre-December 2002 practices, unconstrained by mistaken legal limitations, Petitioner would likely be approved for 180 days' halfway house placement, or nearly that much, prior to being allowed, during the last 10% of his term (that is, for up to 62 days), to participate in home confinement.

16. The revised interpretation on which the Respondent's challenged action is grounded is invalid, because it was not pre-published for notice and comment as required by the Administrative Procedure Act, 5 U.S.C. § 553(b)-(d).

17. Even if the Attorney General's new interpretation is not erroneous or invalid, it must not be retroactively applied to a sentence imposed upon a conviction obtained prior to December 13, 2002, or for an offense committed before that date, as in this case.

a. The prior, longstanding interpretation of 18 U.S.C. §§ 3621(b) and 3624(c) by the courts and the BoP itself is found in P.S. 7310.04, which allows CCC placement of

"up to 180 days" (or more "with extraordinary justification") at the end of the time to be served, regardless of sentence length. P.S. 7310.04, supra ¶9.a(1), at 8.

b. As Program Statement 7310.04 concludes, after quoting the two statutes: "Therefore, the Bureau is not restricted by § 3624(c) in designating a CCC for an inmate and may place an inmate in a CCC for more than the 'last ten per centum of the term,' or more than six months, if appropriate." Id. ¶5, at 3-4.

c. If a CCC is not a "place of imprisonment," then application of the revised interpretation would violate the Ex Post Facto Clause, U.S. Const. art. I, § 9, by substantially increasing the portion of Petitioner's sentence that must be served in imprisonment.

VERIFICATION

Pursuant to 28 U.S.C. § 2242, Peter Goldberger verifies, as a person acting on the Petitioner's behalf, to wit, as Petitioner's retained counsel, who seeks appointment via the Criminal Justice Act under separate cover today, that all of the factual averments of this Petition are true, either based upon Mr. Goldberger's personal knowledge or upon his personal examination of the pertinent files and records, and other reasonable investigation, as witnessed by his signature below.

WHEREFORE, Petitioner prays that this Court:

(a) Issue a temporary restraining order, preliminary injunction, or writ in the nature of mandamus, directing Respondent to reconsider Petitioner for more than 62 days' placement (up to 180 days) in a Community Corrections Center, without regard to the Attorney General's December 2002 opinion;

(b) Enter an order under Fed.R.Civ.P. 81(a)(2) directing Respondent to show cause before this Court within 15 days why a Writ of Habeas Corpus should not be issued invalidating Respondent's decision. A shortened time for response is warranted in light of the many similar petitions which the Bureau has already answered, and its ongoing pattern of refusal to abide in future cases by the rulings rendered in past cases;

(c) After full consideration on the merits, including such discovery and/or hearing as the Court may deem appropriate, issue the writ of habeas corpus or an order in the nature of mandamus, declaring the proper construction of 18 U.S.C. §§ 3621(b) and 3624(c) to be as heretofore understood -- that is, as authorizing the Bureau of Prisons, in its discretion, to designate a Community Corrections Center as the place for service of any portion of a defendant's sentence -- and directing Respondent not to rely upon the erroneous December 13, 2002, opinion of the Attorney General's Office of Legal Counsel (or any BoP directive based thereon) when selecting the appropriate portion of Petitioner's sentence that he may serve in community confinement, relying instead on FPC Fairton's past practices; and

(d) Grant such other or further relief pursuant to 28 U.S.C. § 2243 as law and justice require, including his costs and fees and reasonable attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412.

Respectfully submitted,

Dated: July _26_, 2004

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Attorneys for Petitioner

EXHIBIT D

Case ID : 1998CA006152 - KK AGGREGATES INC V CAROL COMYNS UCN : 501998CA006152XXOCAH
Docket Date : 10-Feb-2005 to 26-Apr-2005 Case Filed : 14-Jul-1998 Status : PE - PENDING

Case Type	Court	Location	Division	Jury
OC - OTHER CIRCUIT	CA	MB	AH	N

Type	Party Name	Represented by
JUDGE	BRUNSON, JUDGE CATHERINE M.	
DEFENDANT	SEARCY DENNEY SCAROLA BARNHART & SH	SCAROLA, JOHN
PLAINTIFF	CAC AGGREGATES INC	MULLIN, JOHN M.
PLAINTIFF	KK AGGREGATES INC	MULLIN, JOHN M. GALLE, CRAIG T.
DEFENDANT	LEVY KNEEN MARIANI CURTIN WEINER KORN	MARIANI, JOHN F.
DEFENDANT	O'CONNELL & ARONOVITZ PC	
PLAINTIFF	G.K.K. CORPORATION NKA PALM BEACH AC	MULLIN, JOHN M.
COUNTER DEFENDANT	SAM W. KLEIN TRUST UNDER 1973 DEC. OF T	
3RD PARTY DEFENDANT	PAGE MRACHEK FITZGERALD & ROSE PA	MRACHEK, LORIN LOUIS
DEFENDANT	COMYNS, JAMES	SCAROLA, JOHN
DEFENDANT	COMYNS, CAROL	MRACHEK, LORIN LOUIS
DEFENDANT	MARIANI, JOHN F.	MARIANI, JOHN F.
DEFENDANT	MCEVOY, ANDREW T.	MARIANI, JOHN F.
DEFENDANT	SCAROLA, JOHN	SCAROLA, JOHN
COUNTER DEFENDANT	KLEIN, SAM	
COUNTER DEFENDANT	STRAUB, GLENN	GALLE, CRAIG T.
3RD PARTY DEFENDANT	GALLE, CRAIG F.	

Filing Date	Docket No	Pages	Docket Description	Docket Code	Docket Text	Book No	Page No
10-Feb-2005	830		NOTICE OF UNAVAILABILITY	NOUN	OF DEFTS ATTY		
01-Mar-2005	831		MOTION	MOT	(AGREED) OF PLTFS TO REVALIDATE TRIAL SUBPOENAS		

Case ID : 1998CA006152 - KK AGGREGATES INC V CAROL COMYNS
Docket Date : 10-Feb-2005 to 26-Apr-2005

UCN : 501998CA006152XXOCAH
Case Filed : 14-Jul-1998 Status : PE - PENDING

Filing Date	Docket No	Pages	Docket Description	Docket Code	Docket Text	Book No	Page No
01-Mar-2005	832		ORDER	ORD	REVALIDATING TRIAL SUBPOENAS		
28-Mar-2005	833		NOTICE OF HEARING	NOH	ON 4/5/05 @ 8:45 AM ON COMYNS MOT TO SPECIALLY SET TRIAL DATE		
29-Mar-2005	834		ORDER RESETTING	ORST	CASE FOR JURY TRIAL DURING WEEKS OF 5/9/05 THROUGH 6/17/05. CALENDAR CALL ON 4/27/05 AT 9:30 AM		
05-Apr-2005	835		ORDER	ORD	ON COUNTERPLTFS' MTN TO SPECIALLY SET TRIAL DATE		
26-Apr-2005	836		NOTICE	NOT	OF PLTFS OF TRIAL CONFLICT & NOTICE OF UNAVAILABILITY		

Case ID : 1998CA006152 - KK AGGREGATES INC V CAROL COMYNS UCN : 501998CA006152XXOCAH
Docket Date : 10-Feb-2005 to 26-Apr-2005 Case Filed : 14-Jul-1998 Status : PE - PENDING

Docket Entries : 7
Last Activity : 05-Apr-2005

*** end of report czezdk ***

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant. /

MORGAN STANLEY'S REVISED AND CORRECTED OBJECTIONS TO PROPOSED JURY INSTRUCTIONS

Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") hereby files these revised Objections to the jury instructions that the Court ruled on May 17, 2005 will be read to the jury. Morgan Stanley adopts and incorporates by reference its objections lodged or presented orally at the charge conference on May 16, 2005, and on May 17, 2005. These revised objections correct several paragraph numbering and other errors in the previous objections. Morgan Stanley further incorporates by reference its previously filed motions, memoranda and all oral arguments in favor of permitting a full trial on punitive damages in which the preclusive "established facts" are not considered by the jury and all the facts are presented, and further adopts all motions, memoranda and all oral arguments against reading any statement of "litigation misconduct" to the jury or permitting punitive damages to be assessed based on that "litigation misconduct."

Morgan Stanley has submitted a set of jury instructions that should be used instead of the instructions that will be given. In making these objections, Morgan Stanley does not waive any

other objection to specific claims or damages. Moreover, Morgan Stanley objects to the instructions to the extent that they apply Florida law, in that New York law should apply to these claims. Finally, Morgan Stanley reserves the right to supplement these objections at any time before they are read to the jury.

Moreover, Plaintiff is not entitled to punitive damages against Defendant as a matter of law. Further, any verdict against Morgan Stanley, particularly one resulting from the Court's reliance upon these instructions would violate Defendant's rights under the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution, and Defendant's rights under article 1, sections 2 and 9 of the Florida Constitution.

Paragraph 1 (former version as of 9:00 a.m.)	Objection: 1. Morgan Stanley objects to instructing the jury that it may consider "the evidence presented" to the extent that the evidence presented constitutes the statement of "established facts" from Phase 1 and the statement of "litigation misconduct" in Phase 2. Permitting the jury to award punitive damages based on these facts violates the following rights of Morgan Stanley: a. its statutory and constitutional rights to defend itself against CPH's punitive damage claim; b. its right to a trial by jury on punitive damages; c. due process and a fair trial before punishment in the form of punitive damages is imposed, including its right to confront witnesses in this quasi-criminal proceeding; d. the right to contest the degree and nature of its alleged misconduct and offer evidence and circumstances in mitigation; e. its constitutional right to have a reviewing court determine the reprehensibility of its conduct, in that, unless Morgan Stanley is permitted to mount a meaningful defense to CPH's punitive damages claim, there is no way to assess how reprehensible Morgan Stanley actually was; f. the ability to force CPH to prove entitlement

	by clear and convincing evidence; and g. the right to contest corporate liability for punitive damages. 2. The instruction impermissibly comments on the evidence, and operates as a directed verdict against Morgan Stanley. The Court should used Morgan Stanley's proposed jury instruction 1 instead of this instruction, as Morgan Stanley's instruction is a correct statement of law and this is not. 3. Directing the jury to accept deemed facts imposed as a sanction as true for purposes of punitive damages impermissibly imposes punitive damages as a sanction for litigation misconduct. 4. Direct the jury to accept the facts this Court has deemed established for purposes of phase II effectively directs a verdict of punitive damages.
Paragraph 2 (as of 10:20 a.m.)	1. The instruction impermissibly comments on the evidence, and operates as a directed verdict against Morgan Stanley. The Court should read Morgan Stanley's Proposed Instruction 2 instead of this instruction, as Morgan Stanley's instruction was a correct statement of law, and the Court's redacted version is incomplete; therefore denying Morgan Stanley of the protections guaranteed by the United States and Florida constitutions as set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *State Farm Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003).
Paragraph 3 & 4 (as of 10:20 a.m.)	1. The Court should read Morgan Stanley's Proposed Instructions 3 and 4 instead of this instruction, as Morgan Stanley's instructions were a correct statement of law, and the Court's redacted version is incomplete; therefore denying Morgan Stanley of the protections guaranteed by the United States and Florida constitutions as set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *State Farm Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003).
Paragraph 5 (including (1)-(3) and associated bullets)	Objection: 1. The Court should read Morgan Stanley's Proposed

	Instructions 10 instead of this instruction, as Morgan Stanley's instructions was a correct statement of law, and the Court's redacted and revised version is incomplete. 2. The Court's version denies Morgan Stanley of the protections guaranteed by the United States and Florida constitutions as set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *State Farm Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003). 3. The instruction impermissibly comments on the evidence, and operates as a directed verdict against Morgan Stanley. 4. The jury may not consider litigation misconduct in deciding whether punitive damages are appropriate. Allowing the jury to consider litigation misconduct deprives Morgan Stanley of: a. its statutory and constitutional rights to defend itself against CPH's punitive damage claim; b. its right to a trial by jury on punitive damages; c. due process and a fair trial before punishment in the form of punitive damages is imposed, including its right to confront witnesses in this quasi-criminal proceeding; d. the right to contest the degree and nature of its alleged misconduct and offer evidence and circumstances in mitigation; e. its constitutional right to have a reviewing court determine the reprehensibility of its conduct, in that, unless Morgan Stanley is permitted to mount a meaningful defense to CPH's punitive damages claim, there is no way to assess how reprehensible Morgan Stanley actually was; f. the ability to force CPH to prove entitlement by clear and convincing evidence; and g. the right to contest corporate liability for punitive damages. 5. To the extent litigation misconduct is put before the jury, the Court may not preclude Morgan Stanley from fully contesting the facts. The Court's instruction requires the jury to accept its findings as true, forecloses Morgan Stanley from contesting those facts, and directs a

	verdict against Morgan Stanley. 6. The mention of litigation misconduct constitutes double-counting (with deception, trickery) and is confusing. The instruction in effect directs the jury to punish Morgan Stanley for the litigation misconduct.
Paragraph 6	No objection
Paragraph 7	Objection: 1. The jury may not consider litigation misconduct in deciding whether punitive damages are appropriate. Allowing the jury to consider litigation misconduct deprives Morgan Stanley of: a. its statutory and constitutional rights to defend itself against CPH's punitive damage claim; b. its right to a trial by jury on punitive damages; c. due process and a fair trial before punishment in the form of punitive damages is imposed, including its right to confront witnesses in this quasi-criminal proceeding; d. the right to contest the degree and nature of its alleged misconduct and offer evidence and circumstances in mitigation; e. its constitutional right to have a reviewing court determine the reprehensibility of its conduct, in that, unless Morgan Stanley is permitted to mount a meaningful defense to CPH's punitive damages claim, there is no way to assess how reprehensible Morgan Stanley actually was; f. the ability to force CPH to prove entitlement by clear and convincing evidence; and g. the right to contest corporate liability for punitive damages. 2. Although Morgan Stanley submits that no instruction on "litigation misconduct" should be given, because the Court has ruled over Morgan Stanley's objection that an instruction will be read, the Court should use Morgan Stanley's proposed supplemental instruction instead of this instruction, as Morgan Stanley's instruction is a correct statement of law and is necessary to ensure

	Morgan Stanley receives the protections guaranteed by the United States and Florida constitutions as set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *State Farm Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003). 3. This instruction constitutes an impermissible directed verdict on punitive damages. 4. The instruction as a whole is misleading, confusing, argumentative, improperly comments on the evidence and is unfairly prejudicial.
Pargraph 8 (no punishment for harms suffered by other presons)	No objection.
Paragraph 9	Objection. The jury should not be required to accept the facts deemed established by the Court as true for purposes of Phase II (the punitive damages phase). That is contrary to Florida law (including *Humana*) and the United States Constitution, as Morgan Stanley's prior motions on this issue make clear. Morgan Stanley hereby incorporates by reference its motions seeking clarification and reconsideration of the Court's decision to make the deemed facts applicable in Phase II of the trial and the prior objections, including pargraphs 1 and 2.
Paragraph 10	No objection.
Paragraph 11	No objection.
Verdict Form	Objection: 1. The verdict form is incomplete and misleading. The verdict form does not ask the jury to decide the question of whether CPH met its burden of proving a specific officer, director or managing agent's conduct, and thus violates Florida law 2. The Court should used Morgan Stanley's proposed verdict form instead of this verdict form, as Morgan Stanley's verdict form conforms to the Florida Standard Jury Instructions and both Florida and federal law, and CPH's does not.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 18th day of May, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,
vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

FILED
5-18 20 05
SHARON R. BOCK
CLERK & COMPTROLLER
BY Jeannette Hagen
DEPUTY CLERK

VERDICT FORM

We, the jury, return the following verdict:

1. **Do you find by clear and convincing evidence that punitive damages are warranted against Morgan Stanley?**

YES ✓ NO ____

If your answer to question 1 is NO, you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 1 is YES, you should proceed to answer question 2.

2. **What is the total amount of punitive damages, if any, which you find by the greater weight of the evidence should be assessed against Morgan Stanley?**

$ 850,000,000.00 (Million)

Date and sign this form and return it to the courtroom.

SO SAY WE ALL, this 18th day of May, 2005.

Laurinda Stallone
FOREPERSON
LAURINDA STALLONE

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO. 2003CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.'S RESPONSE AND OBJECTIONS TO MORGAN STANLEY'S SUMMARY OF OFFER OF PROOF REGARDING DEFENDANT'S LITIGATION MISCONDUCT AND BRIEF ARGUING AGAINST READING TO THE JURY ANY LITIGATION-MISCONDUCT STATEMENT

Morgan Stanley has presented a series of legal and factual obfuscations, in a brief and a proffer, all designed to persuade the Court that the jury should never be told that Morgan Stanley engaged in a massive effort to conceal evidence relevant to this case, followed by a massive effort to cover up its prior concealment. Ultimately, these arguments — which ignore or defy the Court's own prior findings of fact and legal conclusions — show only that Morgan Stanley is completely unremorseful and unapologetic about its outrageous prior conduct. There is no reason for the Court to revisit its prior determination that a statement of Morgan Stanley's litigation misconduct will be read to the jury during Phase Two. In addition, CPH intends to argue that Morgan Stanley's lack of remorse and continued attempts to disclaim responsibility for its wrongdoing are relevant to the jury's assessment of punitive damages.

I. Morgan Stanley's Legal Argument that the Court's Prior Findings Do Not Show an Effort to Cover Up Involvement in the Sunbeam Fraud Is Completely Erroneous.

This Court has found, after extensive briefing and evidentiary hearings, that Morgan Stanley engaged in deliberate and extensive litigation misconduct that has prevented CPH from obtaining the evidence necessary for a full and fair trial on its claims that Morgan Stanley conspired with Sunbeam and aided and abetted Sunbeam's fraudulent conduct. *See* Ex. A, 3/4/05 Further Amended Order on CPH's Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, at 10 [the "Adverse Inference Order"] ("The conclusion is inescapable that MS & Co. sought to thwart discovery *in this specific case*.") (emphasis in the original); Ex. B, 3/23/05 Order on CPH's Renewed Motion for Entry of Default Judgment [the "Default Order"]; *see also* Ex. C, 3/28/05 Tr. at 5539 ("It strikes me that it's bad not to tell the Court things that the Court is supposed to know, but I think we're talking here for punitive damages is — it's bad not to tell the opposing party things that the opposing party had a right to know."); Ex. D, 4/19/05 Tr. at 9142-43 ("Morgan Stanley's actions ha[ve] deprived plaintiff of the very evidence it would need on these things. . . . Morgan Stanley deliberately manipulated the evidence in this case. . . . If you go back to the Order I did on the adverse inference and renewed motion on default judgment, what I concluded was a finding that Morgan Stanley deliberately chose to hide evidence in this case."); Ex. E, 5/13/05 Tr. at 14656 ("First of all, in the adverse inference order I did make a finding that there was obviously an attempt to hide discovery in this case."); *id.* at 14663 ("[I]t strikes me it's one of two things, either Morgan Stanley was specifically concerned about this case and sought to hide discovery into its e-mails, or Morgan Stanley simply has a corporate policy of preventing full discovery.").

As we note below, one part of Morgan Stanley's current strategy for addressing these findings and minimizing their impact on the case is a proffer that attempts to "spin" all the many sworn statements by Morgan Stanley's employees that ranged from deceptive to flatly false. That presentation of the relevant "facts" is supplemented by a legal brief[1] arguing that the "topic of litigation misconduct has no proper place in Phase II" because any litigation misconduct committed by Morgan Stanley was done "to conceal . . . discovery problems, not to cover up the Sunbeam fraud," and because Morgan Stanley had no "improper intent." Br. at 2. That legal argument is completely erroneous. Moreover, Morgan Stanley's continued attempts to disclaim responsibility for its wrongdoing are relevant to the jury's consideration of punitive damages. *See, e.g., Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483, 485 (Fla. 1999) (listing "the attitude and conduct of [the defendant] upon discovery of [its] misconduct" as a relevant factor for the jury's punitive-damages determination).

Morgan Stanley does not dispute the legal principle that it is appropriate for the jury to hear, in Phase Two, about efforts the defendant made to hide evidence for the purpose of avoiding liability. Instead, it pulls language from the Court's March 23 Default Order, reads it out of context, and attempts to establish a distinction between (1) lies and deceit designed to cover up fraud, and (2) lies and deceit designed to cover up prior discovery abuses. In so doing, it relies on a paragraph from pages 9 and 10 of the March 23 Order in which the Court explained why Morgan Stanley, in a series of letters in late 2004 and early 2005, was unwilling to be open and candid with CPH about the timing and details of its full completion of e-mail discovery. *See* Ex. B, Default Order, at 9 ("It is now clear why MS & Co. was so unwilling to provide CPH with

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[1] Morgan Stanley's Opposition to Coleman (Parent) Holdings Inc.'s Second Renewed Motion for Correction and Clarification of the Litigation Misconduct Statement to be Read to the Jury and Reply in Support of Defendant's Motion *in Limine* No. 30 ["Br."].

basic information about how and when the tapes were found or when production would be complete."). The Court explained that candor would generated three problems: first, it would have required Morgan Stanley to admit to the falsity of the June 23, 2004 Certification of Compliance; second, it could have led to revelation of the SEC's e-mail inquiry; and third, it would have led to revelation of the existence of the e-mail archive, which in turn would have revealed the "false representations [Morgan Stanley] made to the Court and used to induce CPH to agree to entry of the [April 16, 2004] Agreed Order." Ex. B, Default Order, at 9-10.

Morgan Stanley distorts the meaning of this paragraph by falsely characterizing it as making findings about why "Morgan Stanley engaged in litigation misconduct." Br. at 3. Based on that distortion, it concludes that the cover-up here was intended to hide prior "discovery derelictions" and had nothing to do with hiding evidence of Morgan Stanley's complicity in the fraud. Br. at 3. This is absurd. To begin with, the Court, in that paragraph, was not even addressing the issue of what motivated Morgan Stanley to engage in litigation misconduct. It was focusing on a particular set of letters in which Morgan Stanley was evasive about its production of e-mails from "newly discovered backup tapes." In any event, the "discovery derelictions" were themselves efforts to prevent disclosure of evidence Morgan Stanley feared would support CPH's claims against Morgan Stanley.

The bottom line is that Morgan Stanley did everything it could to prevent a full inquiry into its e-mail records by CPH because Morgan Stanley was worried about what might be found there. It began by using lies under oath in depositions and lies in letters from counsel to prevent disclosure of the existence of an easily searchable archive of e-mails. That, in turn, led to the entry of an Agreed Order that narrowly limited Morgan Stanley's e-mail discovery obligations. Even then, Morgan Stanley failed to comply with the Agreed Order because it failed to search a

large number of backup tapes that never had been inserted into the archive. When all of this began to unravel, Morgan Stanley did everything possible to prevent CPH and the Court from obtaining a full and fair picture of the prior attempts to suppress evidence.

Just as Morgan Stanley stonewalled the Court and CPH throughout the pretrial discovery process, Morgan Stanley now continues to stonewall the Court and CPH from responding to a simple question, posed by the Court last Friday: "[W]hy would you guys do this unless there was something you were trying to hide? Sort of a common sense argument, why would you do this?" Ex. E, 5/13/05 Tr. at 14656. Instead of responding to the Court's inquiries, Morgan Stanley's counsel persists in its tired argument that "we weren't representing Morgan Stanley at this time." *Id.* at 14657. As this Court has repeatedly recognized, it is the behavior of Morgan Stanley, not its counsel, that is at issue here. The Court has already found that Morgan Stanley deliberately set out to prevent any meaningful discovery into its e-mail records by falsely claiming burdensomeness, hiding the existence of the archive, falsely certifying compliance with an Agreed Order that was itself artificially limited through deception, and then seeking to prevent a meaningful inquiry into these events when they started to leak out. There is every reason to disclose this story to the jury. Indeed, Morgan Stanley does not mount any legal argument to the contrary — choosing instead to distort the issues beyond recognition.

Clearly, Morgan Stanley's discovery failures are relevant to several factors for the jury's consideration in Phase Two, including "the degree of reprehensibility of defendant's conduct, the duration of that harmful conduct, defendant's awareness, any concealment . . . , [and] the duration of both the improper behavior and its cover-up." *Owens-Corning*, 749 So. 2d at 484-85. Moreover, Morgan Stanley's continued lack of remorse and refusal to accept responsibility for

its wrongdoing are factors for the jury's consideration, as this Court has recognized. *See* Ex. F, 4/21/05 Tr. at 9812-13.

Finally, there is no basis for Morgan Stanley's argument that the jury should hear all the facts and decide for itself the "reasons for Morgan Stanley's actions." Br. at 8. The Court has already conducted evidentiary hearings and determined that Morgan Stanley intentionally suppressed evidence in this case to such a degree that the problem is irreparable and a full and fair trial on the merits is impossible. There can be no doubt that it was appropriate for the Court to make that inquiry prior to trial. Now that those conclusions are established, there is no reason whatsoever for a retrial in front of the jury. The jury should simply be told what happened.

II. The Proffer Provides No Basis Whatsoever for Questioning the Court's Prior Findings About Morgan Stanley's Intentional Suppression of Relevant Evidence.

As noted, the other prong of Morgan Stanley's effort to prevent the presentation of the litigation misconduct statement is a lengthy but unsworn proffer of statements about the factual record, in which Morgan Stanley attempts to explain away a long list of deceptive and downright false statements made by its agents, all obviously designed to prevent a full and fair inquiry into the relevant evidence. Morgan Stanley asserts in a footnote in its brief that the proffer is sufficiently "compelling" that the Court should reconsider its Default Order and grant a mistrial. Br. at 8 n.5. As we show, that is not exactly an accurate statement.[2]

The gist of the proffer is aptly captured by two sentences on page 1:

> Here, the evidence establishes that Morgan Stanley's shortcomings with respect to e-mail production resulted from mistakes made in the course of a good-faith attempt to respond fully and quickly to discovery requests, not an effort to conceal fraud. The record shows that Morgan Stanley made substantial voluntar[y] efforts to process its historical e-mails in a good-faith effort to facilitate collection and production of e-mails responsive to Coleman (Parent) Holdings, Inc.'s ("CPH's") discovery requests.

[2] In the very same proffer, Morgan Stanley also argues that there is no private right of action for violating the SEC's regulations on e-mail retention. Proffer, at 10-11 n.2.

Proffer, at 1 (emphasis added). The introductory paragraph goes on to suggest that the problems here were limited to "belated discovery of additional backup tapes" and "unforeseen computer programming errors." *Id.* A more obvious effort to distort the reality of what occurred is hard to imagine. Accordingly, CPH objects to Morgan Stanley's proffer for all the reasons stated herein.

We will not burden the Court with a line-by-line response to this remarkable document, which relies on descriptions of what witnesses would say, rather than declarations under oath. A few examples should suffice to show that Morgan Stanley has not come close to a fair and accurate presentation of the evidence.

A. Morgan Stanley Attempts to Take Credit for Creating and Using an Archive that It Went to Extraordinary Lengths to Hide from CPH and the Court.

A central theme of the proffer is that many of the discovery problems were an unpredicted result of Morgan Stanley's "voluntary and commendable decision to migrate historical e-mails from tens of thousands of hard-to-use backup tapes to one central e-mail Archive." Proffer, at 2. Morgan Stanley argues that CPH benefited from this action and that Morgan Stanley went out of its way to do a much more comprehensive search, using the archive, than was required by the April 16, 2004 Agreed Order. *Id.* What this ignores, of course, is the fact that Morgan Stanley went to great — and dishonest — lengths to avoid disclosing the existence of an archive containing historical e-mails so that it could cite "burdensomeness" as a basis for avoiding or severely curtailing CPH's discovery into Morgan Stanley's e-mail records.

Morgan Stanley's deception included an affidavit filed in November 2003 and deposition testimony by Robert Saunders in February 2004. *See* Proffer, at 18-19. The Court correctly found that the former was deliberately deceptive because it attempted to support Morgan Stanley's refusal to produce e-mail by claiming that searches of backup tapes would be enormously costly and time-consuming, without noting that Morgan Stanley had decided to

create an archive making this material easily accessible. Ex. B, Default Order, at 10 n.11. Morgan Stanley's current argument that the evidence does not support that conclusion — because "the Archive was not capable of searching pre-2003 e-mails in November 2003," Proffer, at 18 — is beyond the pale. A non-deceptive affidavit would have acknowledged that non-burdensome searches would become possible long before the close of discovery.

The same is true of Morgan Stanley's claim that Mr. Saunders was not deceptive in his February 2004 deposition. Proffer, at 19-20. Morgan Stanley relies on the fact that only 15 percent of the known pre-2003 e-mails had been loaded into the archive at the time of the deposition, *id.* at 19, as a basis for claiming that Mr. Saunders gave technically accurate and proper answers to two relevant questions. That claim is insupportable.

Mr. Saunders initially was asked: "[D]id the new e-mail archive system enhance capabilities with respect to prior backup or does it only affect going forward backup?" Ex. G, 2/10/04 Saunders Dep. at 74, *quoted in* Proffer, at 19. He answered: "The way it was built was for going forward backups." *Id.*, *quoted in* Proffer, at 19. We are told that this answer was factually accurate even though, at that time, Morgan Stanley had already begun loading historical e-mails into the archive and had, in fact, transferred data from more than 5000 (15% of 35,000) of the relevant backup tapes. Then, Mr. Saunders was asked: "With respect to backup dated January 2001 and previously, does Morgan Stanley have any new capabilities to restore and search that e-mail?" *Id.*, *quoted in* Proffer, at 19-20. His answer was: "There are no new capabilities to search that e-mail." *Id.*, *quoted in* Proffer, at 20. Here again, we are told that this answer was "technically accurate" because the insertion of pre-2003 data, although substantially underway, was not complete.

The deceptiveness — indeed, downright falsity — of Mr. Saunders's answers is obvious, and cannot be papered over by quoting from a treatise about how witnesses should answer the question asked. *See* Proffer, at 20. Mr. Saunders did not answer the questions asked. First, the new e-mail archive clearly did "enhance capabilities with respect to prior backup tapes." But Mr. Saunders avoided acknowledging that fact by focusing on what the archive was originally "built for." Second, Morgan Stanley clearly did have "new capabilities" to restore and search pre-2003 e-mail. But Mr. Saunders testified that there were "no new capabilities" even though data from thousands of pre-2003 backup tapes already was in the archive and more was being inserted daily. The obvious goal was to deceive CPH and the Court into believing that the archive contained only "going forward" data.

As the Court noted in the March 23 Default Order, what followed next was a March 11, 2004 letter from Mr. Thomas A. Clare stating that the "'burden on Morgan Stanley . . . from a wholesale restoration [of e-mail backup tapes], both in terms of dollars and manpower would be enormous. Regardless of who performs the initial restoration, it would require hundreds (perhaps thousands) of attorney-hours to review millions of irrelevant and non-responsive e-mails . . . .'" Ex. B, Default Order, at 3 (quoting letter). Morgan Stanley does not even attempt to defend the veracity of this statement in its Proffer. But it was this statement that led CPH to accept the April 16, 2004 Agreed Order in which Morgan Stanley was obligated to search only the oldest available full backup tape for each of 36 Morgan Stanley employees or former employees. *See* Ex. B, Default Order, at 5; Proffer, at 21. Obviously, as this Court has recognized, if the existence of an easily searchable e-mail archive had been revealed, CPH never would have entered into such a limited agreement. *See* Ex. B, Default Order, at 10 ("MS & Co. did not want to admit the existence of the historical email archive, which would have expose[d]

the false representations it had made to the Court and used to induce CPH to agree to entry of the Agreed Order.").

Remarkably, however, the Proffer goes on to use the limited nature of the Agreed Order as a basis for praising the scope of Morgan Stanley's subsequent discovery efforts and for making other points. Morgan Stanley suggests, for example, that it was appropriate for Mr. Riel to run searches of the archive even though he knew about thousands of tapes not yet inserted into the archive, on the theory that he reasonably believed that the "oldest full backup tapes" had been loaded. Proffer, at 23. And it addresses the 8-millimeter backup tapes — which were known to Morgan Stanley as long ago as 2002 but not loaded into the archive until 2005, and which contained 1.3 million unique e-mails from the late 1990s, *see id.* at 25 — by pointing out that they were "incremental backups" and thus not required to be searched under the Agreed Order. *Id.* Finally, in touting its compliance efforts in March 2005, Morgan Stanley repeatedly measures its compliance by reference to an Agreed Order that was itself a product of deception designed to minimize discovery obligations. *Id.* at 42-43.

B. Morgan Stanley Continues to Excuse the Falsity of Its June 23, 2004 Certification of Compliance.

Just as stunning as Morgan Stanley's continuing effort to cling to the technical terms of the April 16, 2004 Agreed Order, which (as we have just shown) were procured through lies and deception, is Morgan Stanley's continued defense of its June 23, 2004 Certification of Compliance with that Agreed Order. Following this Court's hearings on February 14, March 14, and March 15, 2005, if one thing was clear, it was that the June 23 Certificate of Compliance signed by Arthur Riel not only was "false," but also was "known to be false when made" in June

2004. Ex. B, Default Order, at 5 n.4, 9, 14; Ex. A, Adverse Inference Order, at 9.[3] Far from fully complying with the Agreed Order (as the Certification asserted), Morgan Stanley had baldly violated the Order.

But Morgan Stanley persists in asserting that its Certification "tracked the terms of the Agreed Order," and that Morgan Stanley and Mr. Riel "reasonably believed that his Certification was accurate." Proffer, at 23. Morgan Stanley also persists in arguing that no one in the Law Division was specifically informed that any of the Brooklyn Tapes or the 8-millimeter tapes contained e-mail until late October 2004, and therefore in-house counsel acted properly in standing by Mr. Riel's June 23 Certificate of Compliance until then. *Id.* at 26-27.

That argument ignores two key facts. First, Morgan Stanley did not actually withdraw the Certification until March 2005 — long after Morgan Stanley's in-house counsel learned that these tapes did indeed contain e-mail. Second, Morgan Stanley's in-house counsel knew of the existence of the then-unsearched Brooklyn Tapes before Mr. Riel signed the Certification on June 23. As Morgan Stanley concedes, its in-house attorneys James Cusick and Soo-Mi Lee had learned of the Brooklyn Tapes' existence by June 7, 2004 — more than two weeks before Mr. Riel signed the Certification. With that knowledge, Mr. Cusick and Ms. Lee and their colleagues in the Law Division never should have allowed Morgan Stanley to send CPH the Certification in the first place. And once it had been sent, they should have circled back to the IT professionals to ask whether the unsearched tapes actually contained potentially relevant e-mail — a question

[3] In its new Proffer, Morgan Stanley continues its schizophrenic approach to Mr. Riel — in one breath, praising his work in assembling Morgan Stanley's May 14, 2004 document production in response to the April 16, 2004 Agreed Order, see Proffer at 22-23, and in the next breath highlighting the need to place him on administrative leave for misconduct, *id.* at 27.

Mr. Riel and his team would have answered affirmatively had it been asked anytime after July 2. *See id.* at 24.[4]

Another disturbing feature of Morgan Stanley's Proffer is that it adopts the lie that NDCI's Bruce Buchanan told this Court at the March 13 hearing, when he took the fall for his largest client by testifying that he — not Morgan Stanley — had "'messed up'" by not following Morgan Stanley's supposed instructions "to search the Brooklyn Tapes for all e-mail regardless of format." Proffer, at 24 n.5 (emphasis added) (quoting Buchanan's testimony, Ex. H, 3/14/05 Tr. at 3643). But at his deposition the night before, Buchanan had testified that Morgan Stanley had instructed NDCI to search for only two types of e-mail — iMap mail and Lotus files. *See* Ex. I, 3/13/05 Buchanan Dep. at 13-15. Buchanan testified in deposition that Morgan Stanley intentionally had opted not to have NDCI conduct an exhaustive search for all e-mail on these tapes. *See id.* at 13-18, 27-34, 49-56. And he further testified in deposition that, when NDCI discovered that more than half of the roughly 1,400 Brooklyn tapes used a third type of e-mail software ("ArcServe Novell"), Buchanan so informed Morgan Stanley — but Morgan Stanley never asked him to search those 700-plus tapes. *See id.* In its Proffer, Morgan Stanley conveniently omits any mention of this deposition testimony and instead quotes Buchanan falling on his sword at the next day's hearing in Court, claiming that he, not Morgan Stanley, had "messed up."

Morgan Stanley did not complete its searches of the Brooklyn Tapes until after Buchanan's March 13 deposition and his (contradictory) March 14 in-Court testimony. Having completed those searches, Morgan Stanley now admits that, for at least four of the 36 Morgan Stanley employees involved in the Sunbeam-Coleman transaction and covered by the Agreed

[4] The proffers from Mr. Cusick and Ms. Lee, as well as Mr. Doyle, constitute waivers of the attorney-client privilege.

Order, the "oldest full backup tapes" were in fact from the Brooklyn Tapes. Proffer, at 43. Of course, the contents of these Brooklyn Tapes had not been processed and uploaded to the archive by June 23, 2004. Despite this fact, Morgan Stanley's Proffer never cleanly acknowledges the obvious falsity of the June 23, 2004 Certification of Compliance.

As the Court will recall, once the falsity of the Certification began unraveling, Morgan Stanley was anything but forthcoming. But the Proffer repeatedly suggests the contrary. For example, according to the Proffer, neither Morgan Stanley nor Allison Gorman ever "intended to, or did, mislead the Court as to the amount of e-mail data awaiting migration" in the staging area. Proffer, at 29. But that simply is not the case. Ms. Gorman testified under oath at her deposition on February 10 that there were 600 gigabytes of stored data, and then executed two separate affidavits on February 11 stating that the quantity of data was one terabyte (*i.e.*, roughly 1,000 gigabytes), and then testified before the Court on February 14 that the amount of data was indeed 600 gigabytes. On March 14, when she was asked to explain, she managed to keep a straight face while stating that she did not want to confuse the SEC with the truth. At the same time, she was forced to concede that there were 10 separate software glitches, even though she had described only three of those problems in her February 14 testimony in response to the Court's direct question — "I want to make sure I'm understanding your testimony . . . , there were sort of three problems here?" Ex. J, 2/14/05 Tr. at 80-81. Ms. Gorman later admitted that she had discovered a fourth problem before February 14, but chose not to raise it at the February 14 hearing, *see* Proffer at 39; apparently, she feared that the truth would "confuse" this Court, just as it would confuse the SEC. The only conclusion one can draw from the history of Ms. Gorman's sworn statements is that she will sign any affidavit that is put before her. She is entitled to no credibility whatsoever.

Morgan Stanley's recalcitrance is further exhibited by its unwillingness to admit any deficiencies that have not already been revealed to the Court. For example, in Buchanan's deposition, he admitted, for the first time that there was another previously undisclosed set of so-called "found" tapes. Ex. I, 3/13/05 Buchanan Dep. at 68-69. At the time of his March 13 deposition, Morgan Stanley had already been forced to own up to eight sets of "found" tapes, but Buchanan created a stir that evening when he reached into his briefcase and pulled out notes listing a ninth set of tapes, which he called the "TAR backup tapes." *Id.* at 63, 68-69; *see also id.* at 63 ("I have my own list that I follow. This [Morgan Stanley Exhibit #21] is Morgan Stanley's list." (emphasis added)). The TAR backup tapes were 97 DLT tapes that NDCI had received (unbeknownst to CPH) three or four weeks earlier — in the immediate aftermath of the Court's February 14 hearing. *Id.* at 68. The TAR backup tapes definitely contained e-mail, Buchanan testified that evening. *Id.* at 68-69. The next afternoon, because Buchanan was the last witness at the Court's March 14 hearing, there was no time for a lengthy cross-examination, so this issue was never vetted before the Court and therefore did not appear in the March 23 Default Order. But it still is relevant to Morgan Stanley's noncompliance with the Agreed Order.

Are the e-mails from the TAR backup tapes mentioned anywhere in Morgan Stanley's May 12 Proffer? Of course not.

Just as Morgan Stanley's lack of candor continues right up to this day, so too does Morgan Stanley's noncompliance with the Agreed Order. Morgan Stanley admits that Ms. Gorman and her team still "are in the process of re-migrating affected e-mails into the Archive." Proffer, at 31. Morgan Stanley also admits that, "[a]s of this filing, it is unknown how many unique e-mails were on the [670 additional] tapes [turned up by Mr. Anfang's search], although approximately 6,000 unique e-mails have already been harvested and added to the Archive." *Id.*

at 40 (emphasis added). Morgan Stanley admits that it is still "migrat[ing] to the Archive" cc:Mail e-mails that were processed after the March 14 hearing. *Id.* at 42. And finally, Morgan Stanley promises that it "anticipate[s]" that all these efforts will be "substantially" — though perhaps not entirely — completed "by July 2005." *Id.* at 43-44.

We still do not know whether the e-mails that were belatedly found and could not be reconstructed and searched prior to trial contain important substantive evidence. We do not know whether the e-mails that were destroyed in defiance of SEC regulations contained important substantive evidence. What we do know is that Morgan Stanley routinely destroyed e-mails it should have kept; that Morgan Stanley routinely attempted to keep everyone in the dark about its abilities to search those e-mails it had kept; and that Morgan Stanley had no compunction about making grossly inconsistent sworn statements to different tribunals in an effort to keep the full truth from surfacing.

With its latest Proffer, Morgan Stanley again attempts to persuade the Court that it did nothing wrong. It is clear that Morgan Stanley is unrepentant concerning its behavior in this case. But for the determination of CPH — and the looming threat of third-party verification triggered by this Court's February 4, 2005 Order — Morgan Stanley would be playing games with its e-mail production to this very day.

16div-017474

CONCLUSION

As this Court concluded in its March 23, 2005 Default Order, the Court should read to the jury a Litigation-Misconduct Statement incorporating the findings of that Order and of the March 1, 2005 Adverse Inference Order — including not only Morgan Stanley's destruction and nonproduction of e-mails, but also the rest of the litany of Morgan Stanley discovery abuses that Morgan Stanley largely ignores in this latest Proffer. *See* Ex. B, Default Order, at 17. Furthermore, the Court should instruct the jury "that it may consider those facts in determining whether an award of punitive damages is appropriate." *Id.* (citing *General Motors Corp. v. McGee*, 837 So. 2d 1010 (Fla. 4th DCA 2002), *rev. denied*, 851 So. 2d 728 (Fla. 2003)).

Dated: May 19, 2005

Respectfully submitted,

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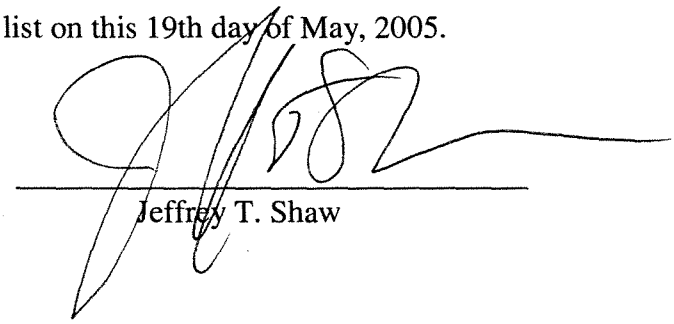
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 19th day of May, 2005.



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CHANGES MARKED — REVISED VERSION

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

CASE NO.: 502003CA005045XXOCAI

COLEMAN (PARENT) HOLDINGS INC.
Plaintiff,

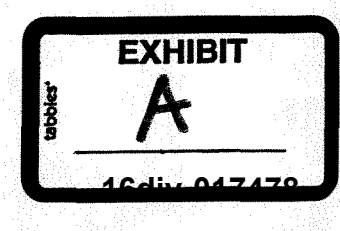
vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

FURTHER AMENDED ORDER ON COLEMAN (PARENT) HOLDINGS, INC.'S MOTION FOR ADVERSE INFERENCE INSTRUCTION DUE TO MORGAN STANLEY'S DESTRUCTIONS OF E-MAILS AND MORGAN STANLEY'S NONCOMPLIANCE WITH THE COURT'S APRIL 16 2004 AGREED ORDER, AND MOTION FOR ADDITIONAL RELIEF AND ORDER ON PLAINTIFF'S MOTION TO COMPEL FURTHER DISCOVERY REGARDING MORGAN STANLEY'S DESTRUCTION AND NON-PRODUCTION OF E-MAILS

THIS CAUSE came before the Court on February 14, 2005 on Coleman (Parent) Holdings, Inc.'s ("CPH's") Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, as modified by CPH's February 14, 2005 ore tenus motion for additional relief, and on February 28, 2005 on Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-Mails, with both counsel present. Based on evidence introduced, the Court finds:

1. CPH has sued Defendant, Morgan Stanley & Co., Inc. ("MS & Co."), for fraud in connection with CPH's sale of its stock in Coleman, Inc., to Sunbeam Corporation in return for Sunbeam stock. Whether MS & Co. had knowledge of the fraudulent scheme undertaken by Sunbeam in 1997 and early 1998 and, if so, the extent of that knowledge, is central to the case. CPH has sought access to MS & Co.'s internal files, including e-mails, since the case was filed.



2. Though MS & Co. instructed its investment bankers to preserve paper documents in their possession in connection with the Sunbeam transaction in February, 1999, it continued its practice of overwriting e-mails after 12 months, despite an SEC regulationn requiring all e-mails be retained in readily accessible form for two years. *See* 17 C.F.R. §240.17a-4 (1997).

3. On April 16, 2004, the Court entered its Agreed Order requiring MS & Co. to (1) search the oldest full backup tape for each of 36 MS & Co. employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all nonprivileged e-mails responsive to CPH's document requests; (4) give CPH a privilege log; and (5) certify its full compliance with the Agreed Order.

4. On May 14, 2004, MS & Co. produced approximately 1,300 pages of e-mails but failed to provide the required certification. Finally, on June 23, 2004, after inquiries by CPH, MS & Co. provided CPH with a certificate of full compliance with the April 16 Agreed Order signed by Arthur Riel, the MS & Co. manager assigned this task.

5. As organized by MS & Co., the effort to recover e-mails from any remaining backup tapes had several stages. First, the relevant backup tapes (in various formats, such as "DLT" tapes and eight-millimeter tapes) had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc. ("NDC"), to be processed, and the data returned to MS & Co. in the form of "SDLT" tapes. Third, MS & Co. had to find a way to upload the contents of these SDLT tapes into its new e-mail archive. Fourth, MS & Co. would run "scripts" to transform this data into a searchable form, so that it could later be searched for responsive e-mails. MS & Co. personnel used the term "staging area" to describe the stage of the process when SDLT tapes remained in limbo, waiting to be uploaded to the archive.

6. At some point prior to May 6, 2004, Arthur Riel and his team became aware that more than 1,000 backup tapes had been found at a MS & Co. facility in Brooklyn, New York. These 1,423 DLT tapes had not been processed by NDCI and thus had not been included in the archive or searched when MS & Co. made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification that it was false. He and others on MS & Co.'s e-mail archive team knew by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990's. MS & Co. neither withdrew its certification nor informed CPH about the potential for additional production of e-mails, however. During the summer of 2004, the Brooklyn tapes were processed and sent to the staging area, but they were not uploaded to the e-mail archive so as to be available to be searched until January **2005**~~2004~~, at least eight months after they were found.

7. MS & Co. also failed to timely produce e-mails from 738 8-millimeter backup tapes found at a MS & Co. facility in Manhattan, in 2002. These 738 8-mm tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched when MS & Co. made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Mr. Riel and others were told by their vendor, NDCI, by July 2, 2004 that the 8-mm tapes contained e-mail dating back at least to 1998. MS & Co. neither withdrew its certification nor informed CPH about the potential for additional production of e-mails, though. During the summer of 2004, the 8-mm tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not uploaded to MS & Co.'s e-mail archive.

8. In August 2004, Mr. Riel was relieved of his employment responsibilities. He and his team were replaced by a new team headed by Allison Gorman Nachtigal.

9. Ms. Gorman testified that she was instructed to describe the circumstances of Mr. Riel's replacement as his having been "placed on administrative leave." That same term appears by interlineation over the original typed description in MS & Co.'s memorandum addressing these issues. The typed language stated: "[Mr. Riel was] dismissed for integrity issues." MS & Co. **represented that the reason for the adverse action taken against Mr. Riel was unrelated to any concern about the accuracy of his June 23, 2004 certification. However, MS & Co.** presented no evidence to explain why Mr. Riel would have been placed on administrative leave rather than terminated. CPH argued that it may have been to deprive CPH of the ability to contact him directly.

10. Upon taping over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area; indeed, she was not informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman met with a group of MS & Co. attorneys. Following that meeting, Ms. Gorman gave the project somewhat greater priority, although even then it clearly did not move as expeditiously as possible. For example, MS & Co. gave no thought to using an outside contractor to expedite the process of completing the discovery, though it had certified completion months earlier; it lacked the technological capacity to upload and search the data at that time, and would not attain that capacity for months; and it knew trial was scheduled to begin in February, 2005. Even at this point, no one from MS & Co. or its outside counsel, Kirkland & Ellis LLP, gave CPH or this Court any hint that the June certification was false.

11. On November 17, 2004, more than six months after the May 14, 2004 deadline for producing e-mails in response to the Agreed Order, MS & Co. sent CPH a letter revealing that its June 23 certificate of compliance was incorrect. The letter stated:

> Morgan Stanley has discovered additional e-mail backup tapes since our e-mail production in May 2004. The data on some of [the] newly discovered tapes has been restored and, to ensure continued compliance

> with the agreed order, we have re-run the searches described in the order. Some responsive e-mails have been located as a result of that process. We will produce the responsive documents to you as soon as the production is finalized.

The letter also foreshadowed further delays: "(s)ome of the backup tapes are still being restored. To ensure continued compliance with the agreed order, we intend to re-run the searches again when the restoration process is complete and will produce any responsive documents that result."

12. The next day, November 18, 2004, MS & Co. produced an additional 8,000 pages of e-mails and attachments. MS & Co.'s November 2004 letter stated that the 8,000 pagers came from "newly discovered" tapes; but the testimony now makes clear that this statement was false because Ms. Gorman's team did not figure out how to upload and make searchable the materials from the staging area until January, 2005.

13. MS & Co. has failed to offer any explanation to reconcile the obvious conflict between its assertions at the time of production that the 8,000 pages came from "newly discovered" tapes (*i.e.*, the "Brooklyn tapes") and the testimony of its own witness, Ms. Gorman, that data from those newly discovered tapes were not capable of being searched until two months later, in January.

14. After a follow-up inquiry by CPH, on December 17, 2004, MS & Co. produced a privilege log and told CPH that "[n]o additional responsive e-mails have been located since our November production." MS & Co. refused to answer CPH's questions about whether MS & Co. had restored all the backup tapes described in its November 17 letter and why the tapes had not been located earlier, however.

15. On December 30, 2004, CPH sought confirmation that MS & Co. had reviewed all e-mail backup tapes and produced all responsive e-mails and, if not, asked when the review would be completed. On January 11, 2005, MS & Co. informed CPH that the "restoration of e-mail backup tapes

is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

16. On January 19, 2004, CPH wrote asking MS & Co. to explain the circumstances under which MS & Co. located the "newly discovered" backup tapes and to disclose when the tapes were located. CPH also asked MS & Co. to explain why the backup tapes could not be restored sooner.

17. On January 21, 2005, MS & Co. sent CPH a letter that failed to answer CPH's questions. Instead, MS & Co. described its efforts to restore the backup tapes as "ongoing"; informed CPH that "there is no way for MS & Co. to know or accurately predict the type or time period of data that might be recovered"; and stated that MS & Co. "cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes."

18. On January 26, 2005, CPH filed the Motion at issue here, asking the Court to instruct the jury that MS & Co.'s destruction of e-mails and other electronic documents and MS. & Co.'s noncompliance with the April 16, 2004 Agreed Order can give rise to an adverse inference that the contents of the missing e-mails would be harmful to MS & Co.'s defense in this case.

19. Meanwhile, MS & Co. found another 169 DLT tapes in January, 2005, that allegedly had been misplaced by its New Jersey storage vendor, Recall. Again, MS & Co., chose to provide no specifics to CPH or to the Court.

20. At a February 2, 2005 hearing on CPH's Motion, Thomas A. Clare of Kirkland & Ellis, LLP, representing MS & Co., stated that "late October of 2004...[is] the date I'm representing to the Court is the first time that anyone knew that there was recoverable e-mail data" on the Brooklyn tapes. Hr'g Tr. (2/2/05) at 133-34. The actual date, however, was at least three months earlier, by July 2, 2004. Furthermore, MS & Co. refused to provide the Court with definitive answers about when its e-mail production would be complete, merely stating that it would proceed with "all deliberate speed." *Id.* at 139. Also at the February 2 hearing, Mr. Clare neglected to inform the Court about the 8-mm

tapes that had been located in 2002, and told the Court that the 1,423 DLT tapes had been found in Brooklyn "sometime during the summer" of 2004. The truth of this assertion is belied by the evidence showing that the tapes were found before May 6, 2004.

21. On February 3, 2005, the Court ordered further discovery and set an evidentiary hearing for February 14, 2005. The discovery took place on February 9 and 10, when CPH deposed the three e-mail witnesses identified by MS. & Co.

22. On Saturday afternoon, February 12, 2005, MS & Co. informed the Court that it had, in the previous 24 hours, discovered additional tapes. Also, MS & Co. stated that its recent production omitted certain "attachments" to e-mails. MS & Co. did not attempt to clarify or substantiate either of these statements to CPH or to the Court until the Monday, February 14, 2005 hearing.

23. At the February 14 hearing, none of the witnesses MS & Co. presented was involved in or familiar with the actual electronic searches conducted using the parameters specified in this Court's April 16, 2004 Agreed Order, and none explained where the 8,000 pages produced in November, 2004 had come from. MS & Co.'s witnesses did, however, describe three new developments. First, Robert Saunders, a Morgan Stanley executive director in the Information Technology Division, testified that he returned to New York after his February 10 deposition and, concerned about his unqualified **deposition** assertion that ~~he~~**he** was "confident" that a complete search for backup tapes had been conducted, decided finally to undertake a personal search of MS & Co.'s "communication rooms," going to the areas he thought most obvious first. By doing so, he and two contractors discovered more than 200 additional backup tapes openly stored in locations known to be used for tape storage. Those discoveries were made on Friday and Saturday, February 11 and 12, 2005. As of the February 14 hearing, NDCI had not yet determined which, if any, of these newly discovered backup tapes contained e-mails. Second, Ms. Gorman reported that on Friday, February 11, 2005 she and her team had discovered that a flaw in the software they had written had prevented MS & Co. from locating all

responsive e-mail attachments. Third, Ms. Gorman reported that MS & Co. discovered on Sunday evening, February 13, 2005, that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so there were at least 7,000 additional e-mail messages that appeared to fall within the scope of the Agreed Order had yet to be fully reviewed by MS. & Co.'s outside counsel for responsiveness and privilege. As counsel for MS & Co. admitted, this problem "dwarf[s]" their previous problems. Hr'g Tr. (2/14/05) at 13. Ms. Gorman indicated she was "90 percent sure" that the problem infected MS & Co.'s original searches in May, which means that **MS & Co.** even **then** ~~they~~ failed to timely produce relevant materials that had been uploaded into the archive by that point. *Id.* at 82-83. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the transaction under review here.

24. On February 19, 2045 MS & Co. informed counsel for CPH that "additional boxes of back up tapes" have been located "in a security room" and that, "(a)s of this morning, Morgan Stanley has identified four (unlabled) DLT tapes among the collection. Those four tapes will be sent to NDCI for further analysis." The disclosure did not state when the discovery was made. MS & Co.'s counsel represented to the Court that it was his understanding that about 73 bankers' boxes of tapes were discovered. No explanation for the late discovery was offered.

25. Throughout this entire process, MS & Co. and its counsels' lack of candor has frustrated the Court and opposing counsel's ability to be fully and timely informed.

26. MS & Co.'s failure during the summer and fall of 2004 to timely process a substantial amount of data that was languishing in the "staging area," rather than being put into searchable form and then searched, was willful and a gross abuse of its discovery obligations.

27. MS & Co.'s failure to timely notify CPH of the existence of the DLT and 8-mm tapes, which it had located as early as 2002 and certainly prior to the June 23, 2004 certification, and its

failure to timely process those raw backup tapes was willful and a gross abuse of its discovery obligations.

28. MS & Co.'s failure to produce all e-mail attachments was negligent, and it was discovered and revealed only as a result of CPH's hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check MS & Co.'s compliance with the April 16, 2004 Agreed Order.

29. MS & Co.'s failure to produce all of the Lotus Notes e-mails was negligent, and it was discovered and revealed only as result of CPH's hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check MS & Co.'s compliance with the April 16, 2004 Agreed Order.

30. MS & Co.'s failure to locate other potentially responsive backup tapes before Saturday, February 12, 2005 was grossly negligent.

31. Given the history of the discovery, there is no way to know if all potentially responsive backup tapes have been located.

32. In sum, despite MS & Co.'s affirmative duty arising out of the litigation to produce its e-mails, and contrary to federal law requiring it to preserve the e-mails, MS & Co. failed to preserve many e-mails and failed to produce all e-mails required by the Agreed Order. The failings include overwriting e-mails after 12 months; failing to conduct proper searches for tapes that may contain e-mails; providing a certificate of compliance known to be false when made and only recently withdrawn; failing to timely notify CPH when additional tapes were located; failing to use reasonable efforts to search the newly discovered tapes; failing to timely process and search data held in the staging area or notify CPH of the deficiency; failing to write software scripts consistent with the Agreed Order; and discovering the deficiencies only after CPH was given the opportunity to check MS & Co.'s work and

the MS & Co.'s attorneys were required to certify the completeness of the prior searches. Many of these failings were done knowingly, deliberately, and in bad faith.

It is clear that e-mails existed which were requested by CPH that have not been produced because of the deficiencies discussed above. Electronic data are the modern-day equivalent of the paper trail. Indeed, because of the informalities of e-mail, correspondents maybe less guarded than with paper correspondence. In this case, the paper trail is critical to CPH's ability to make out its prima facie case. Thus, MS & Co.'s acts have severely hindered CPH's ability to proceed. The only way to test the potentially self-serving testimony of MS & Co. personnel is with the written record of the events.

The failures outlined in this Order are of two types. First, by overwriting e-mails contrary to its legal obligation to maintain there in readily accessible form for two years and with knowledge that legal action was threatened, MS & Co. has spoiled evidence, justifying sanctions. See Martino v. Wal-Mart Stores Inc., 835 So. 2d 1251 (Fla. 4th DCA 2003). "The appropriateness of sanctions for failing to preserve evidence depends on: (1) willfulness or bad faith of the responsible party, (2) the extent of prejudice suffered by the other party, and (3) what is required to cure the prejudice." Nationwide Lift Trucks Inc. v. Smith, 832 So. 2d 824, 826 (Fla. 4th DCA 2002). Second, MS & Co,'s **willful**~~willfull~~ disobedience of the Agreed Order justifies sanctions. See Rule 1.380 (b) (2), Fla. R. Civ. P. The conclusion is inescapable that MS & Co. sought to thwart discovery *in this specific case*.

Sanctions in this context are not meant to be punitive. They are intended, though, to level the playing field.

A reasonable juror could conclude that evidence of MS & Co.'s misconduct demonstrates its consciousness of **guilt**~~guilty~~. It is relevant to the issues before the jury. Further, CPH should not be penalized by being forced to divert the jurors' attention away from the merits of its claim to focus on highly technical facts going to MS & Co.'s failures here, facts that are not reasonably disputed. Evidence of that failure, though, alone does not make CPH whole. Indeed, it can be said it is not a "sanction" at all, but

merely a statement of unrefuted facts that the jury may find relevant. Shifting the burden of proof, though, forces MS & Co. to accept the practical consequence of its failures-that some information will never be known. Obviously, this sanction is of consequence only in the marginal case. If there is overwhelming proof of MS & Co.'s knowledge of the fraud and collusion with Sunbeam, CPH would have prevailed on those elements in any event. And, to the contrary, if there is overwhelming evidence MS & Co. did not know of the fraud or conspire with or aid Sunbeam in its commission, it would have prevailed in any event. If the case is close on those issues, though, MS & Co., not CPH, should bear the burden of persuasion. Further, shifting the burden on the fraud issue does not relieve CPH of its obligation to establish the other elements of its claims, most notably reliance, proof of which is independent of the MS & Co. e-mails. Thus, the sanctions chosen are the most conservative available to the Court to address the **spoliation**~~spoilation~~ of evidence and **willful**~~willfull~~ violation of the Agreed Order.[1] [2]

Finally, the Court notes that CPH has requested the e-mails since May of 2003. MS & Co. was supposed to comply with the April 16, 2004 Order by May 14, 2064. Fact discovery in this case closed November 24, 2004. MS & Co.'s actions have resulted in the diversion of enormous amounts of resources, by both the parties and the Court, into a fact discovery dispute that should have never arisen and which would have long ago been put to bed had MS & Co. timely recognized its obligations to CPH and this Court. Opening argument in this complex case is set for March 21, 2005. Preliminary jury selection has

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[1] MS & Co.'s bad acts and pocket book may not be used to gain the continuance it has sought from the beginning. Further, the Court has no confidence that, even if a continuance were granted, MS & Co. would fully comply with discovery in this case.

[2] The undersigned notes that the sanctions imposed are not enumerated in Rule 1.380 (b) (2), and is aware of the concern expressed in the 2000 Handbook on Discovery Practice, Joint Committee of the Trial Lawyers Section of the Florida Bar and Conferences of Circuit and County Court Judges ("(f)or the trial court to be on solid footing, it is wise to stay within the enumerated orders" [Handbook at p. 4]). However, MS & Co.'s violations involve both the violation of a discovery order and the intentional **spoliation**~~spoiliation~~ of evidence. The sanction imposed is *less* severe than that provided in Rule 1.380 (b) (2) (B), under which the Court could preclude MS & Co. from presenting evidence of its lack of

begun. MS & Co. has controlled the timetable of this portion of the litigation long enough. Consequently, CPH should have the ability to continue to require MS & Co, to attempt to comply with the Agreed Order and the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search, or to elect to terminate the e-mail discovery and concentrate on trial preparation.

Based on the foregoing, it is

ORDERED AND ADJUDGED that:

1. Plaintiff's Motion for Adverse Interference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Non-Compliance with the Court's April 16, 2004 Agreed Order and Motion for Additional Relief is GRANTED.

2. MS & Co. shall continue to use its best efforts to comply with the April 16, 2004 Agreed Order and shall continue to comply with the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search until March 21, 2005 or written notice from CPH, which ever first occurs. Either party shall notify the other in writing of its intention to offer into evidence e-mails actually produced to CPH prior to termination of e-mail discovery in conformity with this Order, within 72 hours of the e-mail's production to CPH. The Court shall hear and determine any objections to use of the e-mails.

3. The Court shall read to the jury the statement of facts attached as Exhibit A during whatever evidentiary phase of CPH's case that it requests, These findings of fact shall be conclusive. See Rule 1.380 (b) (2) (A). No instruction shall be given to the jury regarding inferences to be drawn from these facts. However, counsel may make such argument to the jury in favor of whatever inferences

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knowledge of or collusion with the Sunbeam fraud, which the Court finds is the least severe enumerated sanction appropriate to place the parties on a level playing field.

that evidence may support. No other evidence concerning the production of e-mails, or lack thereof, shall be presented absent further Court order.

4. CPH will be allowed to argue that MS & Co.'s concealment of its role in the Sunbeam transaction is evidence of its malice or evil intent, going to the issue of punitive damages. See, e.g., General Motors Corp. v. McGee, 837 So.2d 10120.

5. MS & Co. shall bear the burden of proving to the jury, by the greater weight of the evidence, that it lacked knowledge of the Sunbeam fraud and did not aid and abet or conspire with Sunbeam to defraud CPH. The traditional order of proof shall remain unaffected, however.

6. MS & Co. shall compensate CPH for costs and fees associated with the Motion. The amount shall be determined at an evidentiary hearing to be held after the completion of the trial.

7. Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-Mails is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____day of March, 2005.

ELIZABETH T. MAAS
Circuit Court Judge

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EXHIBIT A

A federal regulation in effect in 1997 and all times since required Morgan Stanley to preserve e-mails for three years and to preserve them in a readily accessible place for two years. Beginning in no later than 1997, Morgan Stanley had a practice of overwriting e-mails after 12 months. E-mails could no longer be retrieved once they were overwritten. This practice was discontinued in January, 2001. CPH has sought access to Morgan Stanley's e-mails relating to this transaction since the case was filed in May, 2003.

Prior to 2003, Morgan Stanley recorded e-mails and other electronic data on back up tapes. On April 16, 2004, the Court ordered Morgan Stanley to (1) search the oldest full backup tape for each of 36 Morgan Stanley employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all e-mails relating to this case found by the search I have just described; and (4) certify its full compliance with the Court's order.

On May 14, 2004, Morgan Stanley produced approximately 1,300 pages of e-mails. It did not produce the required certification. On June 23, 2004, after inquiries by CPH, Morgan Stanley provided CPH with a certificate of full compliance with the April 16 Order signed by Arthur Riel, the Morgan Stanley manager assigned this task.

As organized by Morgan Stanley, the effort to recover e-mails from the backup tapes had several stages. First, the relevant backup tapes had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc., which I will call "NDCI", to be processed, and the data returned to Morgan Stanley. Third, Morgan Stanley had to upload the processed data into its e-mail archive. Fourth, Morgan Stanley had to run scripts, or pieces of computer code, to transform this data into a searchable form. Finally, Morgan Stanley had to search the data for e-mails related to this case. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when the processed data returned by NDCI remained in limbo, waiting to be uploaded to Morgan Stanley's archive.

At some point prior to May 6, 2004, Arthur Riel and his team became aware that 1,423 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423 tapes had not been processed by NDCI and thus had not been included in the archive or searched when Morgan Stanley made its production to CPH on May 14, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification of full compliance with the Court's April 16, 2004 Order that it was false. He and others on Morgan Stanley's e-mail archive team knew by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990's. During the summer of 2004, the Brooklyn tapes were processed and the data sent to the staging area. The scripts for e-mails **relating to this case** were not written and tested to permit the search ~~for e-mails relating to this case~~ to begin until the middle of January, 2004. Such a search, even if perfectly done, can take weeks.

Morgan Stanley also failed to timely produce e-mails from 738 backup tapes found at a Morgan Stanley facility in Manhattan in 2002. These 738 tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched by either ~~on~~ May 14, 2004**, when the Court's order required production,** or June 23, 2004**, when Morgan Stanley falsely certified that full production had been made**. Mr. Riel and others were told by NDCI by July 2, 2004 that these tapes contained e-mail dating back at least to 1998. During the summer of 2004, ~~the~~ these tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not searched.

In the course of these proceedings, Morgan Stanley represented to the Court that the first time anyone knew that there was recoverable e-mail data on the Brooklyn tapes was in October 2004. That statement was false. The actual date was at least three months earlier than that, no later than July 2, 2004.

In August 2004, Mr. Riel was relieved of his employment responsibilities **for reasons unrelated to Morgan Stanley's false certification**. He and his team were replaced by a new team headed by Allison Gorman Nachtigal. At that time, the staging area contained about 600 gigabytes of e-mail data that had not yet been uploaded into the Morgan Stanley archive and had not been searched for e-mails relating to this case. **600 gigabytes of data is the equivalent of approximately 30 million printed pages.**

Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts

to address the backlog of data in the staging area. Indeed, she was not informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman gave the project somewhat greater priority, although even then it did not move as expeditiously as possible. Morgan Stanley did not consider using an outside contractor to expedite the process.

In November 2004, Morgan Stanley produced additional e-mails and attachments to CPH. Morgan Stanley told CPH that those materials came from newly discovered tapes. That statement was false. In fact, Morgan Stanley did not begin searching the materials from the staging area until January 2005.

Morgan Stanley found another 169 DLT tapes in January, 2005, that **according to Morgan Stanley** had been misplaced by its New Jersey storage vendor. Morgan Stanley **later disclosed the existence of** ~~discovered~~ more than 200 additional **unsearched** backup tapes openly stored in locations known to be used for tape storage**, which Morgan Stanley claimed to have discovered** on February 11 and 12, 2005.

~~On February 11, 2005~~ Morgan Stanley **claims to have** discovered **on February 11, 2005** that a flaw in the software it had written had prevented Morgan Stanley from locating all e-mail attachments about the Sunbeam transaction. Morgan Stanley **also admits** ~~discovered on February 13, 2005,~~ that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so that additional e-mail messages that appeared to fall within the scope of the April 16, 2004 Order had not been given to CPH. Further, it appears that the problem infected Morgan Stanley's original searches in May of 2004. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the transaction under review here.

Morgan Stanley claims to have discovered the Lotus Notes defects in the searches on February 13, 2005. Both the e-mail attachment defects and the Lotus Notes defects in Morgan Stanley's searches were revealed only as a result of CPH's hiring of a third-party vendor, pursuant to the Court's Order on February 4, 2005, to double-check Morgan Stanley's compliance with the April 16, 2004 Order. On February 16, 2005, Morgan Stanley withdrew its certificate of compliance with the April 16, 2004 Order.

On February 19, 2005 Morgan Stanley notified CPH that it had found boxes of additional tapes that have not been uploaded into its archive or searched for responsive e-mails. Morgan Stanley did not

tell CPH it had found any tapes that it had not searched until November 17, 2004. Even then, it did not tell CPH how many tapes were found, when they were found, or when they would be searched. MS & Co. did not provide all of this information to CPH until February of 2005. The searches had not yet been completed when this trial was begun, when they were terminated without completion.

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

CASE NO.: 502003CA005045XXOCAI

COLEMAN (PARENT) HOLDINGS INC.
Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

FURTHER AMENDED ORDER ON COLEMAN (PARENT) HOLDINGS, INC.'S MOTION FOR ADVERSE INFERENCE INSTRUCTION DUE TO MORGAN STANLEY'S DESTRUCTIONS OF E-MAILS AND MORGAN STANLEY'S NONCOMPLIANCE WITH THE COURT'S APRIL 16 2004 AGREED ORDER, AND MOTION FOR ADDITIONAL RELIEF AND ORDER ON PLAINTIFF'S MOTION TO COMPEL FURTHER DISCOVERY REGARDING MORGAN STANLEY'S DESTRUCTION AND NON-PRODUCTION OF E-MAILS

THIS CAUSE came before the Court on February 14, 2005 on Coleman (Parent) Holdings, Inc.'s ("CPH's") Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, as modified by CPH's February 14, 2005 ore tenus motion for additional relief, and on February 28, 2005 on Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-Mails, with both counsel present. Based on evidence introduced, the Court finds:

1. CPH has sued Defendant, Morgan Stanley & Co., Inc. ("MS & Co."), for fraud in connection with CPH's sale of its stock in Coleman, Inc., to Sunbeam Corporation in return for Sunbeam stock. Whether MS & Co. had knowledge of the fraudulent scheme undertaken by Sunbeam in 1997 and early 1998 and, if so, the extent of that knowledge, is central to the case. CPH has sought access to MS & Co.'s internal files, including e-mails, since the case was filed.

2. Though MS & Co. instructed its investment bankers to preserve paper documents in their possession in connection with the Sunbeam transaction in February, 1999, it continued its practice of overwriting e-mails after 12 months, despite an SEC regulationn requiring all e-mails be retained in readily accessible form for two years. *See* 17 C.F.R. §240.17a-4 (1997).

3. On April 16, 2004, the Court entered its Agreed Order requiring MS & Co. to (1) search the oldest full backup tape for each of 36 MS & Co. employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all nonprivileged e-mails responsive to CPH's document requests; (4) give CPH a privilege log; and (5) certify its full compliance with the Agreed Order.

4. On May 14, 2004, MS & Co. produced approximately 1,300 pages of e-mails but failed to provide the required certification. Finally, on June 23, 2004, after inquiries by CPH, MS & Co. provided CPH with a certificate of full compliance with the April 16 Agreed Order signed by Arthur Riel, the MS & Co. manager assigned this task.

5. As organized by MS & Co., the effort to recover e-mails from any remaining backup tapes had several stages. First, the relevant backup tapes (in various formats, such as "DLT" tapes and eight-millimeter tapes) had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc. ("NDC"), to be processed, and the data returned to MS & Co. in the form of "SDLT" tapes. Third, MS & Co. had to find a way to upload the contents of these SDLT tapes into its new e-mail archive. Fourth, MS & Co. would run "scripts" to transform this data into a searchable form, so that it could later be searched for responsive e-mails. MS & Co. personnel used the term "staging area" to describe the stage of the process when SDLT tapes remained in limbo, waiting to be uploaded to the archive.

6. At some point prior to May 6, 2004, Arthur Riel and his team became aware that more than 1,000 backup tapes had been found at a MS & Co. facility in Brooklyn, New York. These 1,423 DLT tapes had not been processed by NDCI and thus had not been included in the archive or searched when MS & Co. made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification that it was false. He and others on MS & Co.'s e-mail archive team knew by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990's. MS & Co. neither withdrew its certification nor informed CPH about the potential for additional production of e-mails, however. During the summer of 2004, the Brooklyn tapes were processed and sent to the staging area, but they were not uploaded to the e-mail archive so as to be available to be searched until January2005, at least eight months after they were found.

7. MS & Co. also failed to timely produce e-mails from 738 8-millimeter backup tapes found at a MS & Co. facility in Manhattan, in 2002. These 738 8-mm tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched when MS & Co. made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Mr. Riel and others were told by their vendor, NDCI, by July 2, 2004 that the 8-mm tapes contained e-mail dating back at least to 1998. MS & Co. neither withdrew its certification nor informed CPH about the potential for additional production of e-mails, though. During the summer of 2004, the 8-mm tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not uploaded to MS & Co.'s e-mail archive.

8. In August 2004, Mr. Riel was relieved of his employment responsibilities. He and his team were replaced by a new team headed by Allison Gorman Nachtigal.

9. Ms. Gorman testified that she was instructed to describe the circumstances of Mr. Riel's replacement as his having been "placed on administrative leave." That same term appears by interlineation over the original typed description in MS & Co.'s memorandum addressing these issues. The typed language stated: "[Mr. Riel was] dismissed for integrity issues." MS & Co. represented that the reason for the adverse action taken against Mr. Riel was unrelated to any concern about the accuracy of his June 23, 2004 certification. However, MS & Co. presented no evidence to explain why Mr. Riel would have been placed on administrative leave rather than terminated. CPH argued that it may have been to deprive CPH of the ability to contact him directly.

10. Upon taping over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area; indeed, she was not informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman met with a group of MS & Co. attorneys. Following that meeting, Ms. Gorman gave the project somewhat greater priority, although even then it clearly did not move as expeditiously as possible. For example, MS & Co. gave no thought to using an outside contractor to expedite the process of completing the discovery, though it had certified completion months earlier; it lacked the technological capacity to upload and search the data at that time, and would not attain that capacity for months; and it knew trial was scheduled to begin in February, 2005. Even at this point, no one from MS & Co. or its outside counsel, Kirkland & Ellis LLP, gave CPH or this Court any hint that the June certification was false.

11. On November 17, 2004, more than six months after the May 14, 2004 deadline for producing e-mails in response to the Agreed Order, MS & Co. sent CPH a letter revealing that its June 23 certificate of compliance was incorrect. The letter stated:

> Morgan Stanley has discovered additional e-mail backup tapes since our e-mail production in May 2004. The data on some of [the] newly discovered tapes has been restored and, to ensure continued compliance

> with the agreed order, we have re-run the searches described in the order. Some responsive e-mails have been located as a result of that process. We will produce the responsive documents to you as soon as the production is finalized.

The letter also foreshadowed further delays: "(s)ome of the backup tapes are still being restored. To ensure continued compliance with the agreed order, we intend to re-run the searches again when the restoration process is complete and will produce any responsive documents that result."

12. The next day, November 18, 2004, MS & Co. produced an additional 8,000 pages of e-mails and attachments. MS & Co.'s November 2004 letter stated that the 8,000 pagers came from "newly discovered" tapes; but the testimony now makes clear that this statement was false because Ms. Gorman's team did not figure out how to upload and make searchable the materials from the staging area until January, 2005.

13. MS & Co. has failed to offer any explanation to reconcile the obvious conflict between its assertions at the time of production that the 8,000 pages came from "newly discovered" tapes (*i.e.*, the "Brooklyn tapes") and the testimony of its own witness, Ms. Gorman, that data from those newly discovered tapes were not capable of being searched until two months later, in January.

14. After a follow-up inquiry by CPH, on December 17, 2004, MS & Co. produced a privilege log and told CPH that "[n]o additional responsive e-mails have been located since our November production." MS & Co. refused to answer CPH's questions about whether MS & Co. had restored all the backup tapes described in its November 17 letter and why the tapes had not been located earlier, however.

15. On December 30, 2004, CPH sought confirmation that MS & Co. had reviewed all e-mail backup tapes and produced all responsive e-mails and, if not, asked when the review would be completed. On January 11, 2005, MS & Co. informed CPH that the "restoration of e-mail backup tapes

is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

16. On January 19, 2004, CPH wrote asking MS & Co. to explain the circumstances under which MS & Co. located the "newly discovered" backup tapes and to disclose when the tapes were located. CPH also asked MS & Co. to explain why the backup tapes could not be restored sooner.

17. On January 21, 2005, MS & Co. sent CPH a letter that failed to answer CPH's questions. Instead, MS & Co. described its efforts to restore the backup tapes as "ongoing"; informed CPH that "there is no way for MS & Co. to know or accurately predict the type or time period of data that might be recovered"; and stated that MS & Co. "cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes."

18. On January 26, 2005, CPH filed the Motion at issue here, asking the Court to instruct the jury that MS & Co.'s destruction of e-mails and other electronic documents and MS. & Co.'s noncompliance with the April 16, 2004 Agreed Order can give rise to an adverse inference that the contents of the missing e-mails would be harmful to MS & Co.'s defense in this case.

19. Meanwhile, MS & Co. found another 169 DLT tapes in January, 2005, that allegedly had been misplaced by its New Jersey storage vendor, Recall. Again, MS & Co., chose to provide no specifics to CPH or to the Court.

20. At a February 2, 2005 hearing on CPH's Motion, Thomas A. Clare of Kirkland & Ellis, LLP, representing MS & Co., stated that "late October of 2004...[is] the date I'm representing to the Court is the first time that anyone knew that there was recoverable e-mail data" on the Brooklyn tapes. Hr'g Tr. (2/2/05) at 133-34. The actual date, however, was at least three months earlier, by July 2, 2004. Furthermore, MS & Co. refused to provide the Court with definitive answers about when its e-mail production would be complete, merely stating that it would proceed with "all deliberate speed." *Id.* at 139. Also at the February 2 hearing, Mr. Clare neglected to inform the Court about the 8-mm

tapes that had been located in 2002, and told the Court that the 1,423 DLT tapes had been found in Brooklyn "sometime during the summer" of 2004. The truth of this assertion is belied by the evidence showing that the tapes were found before May 6, 2004.

21. On February 3, 2005, the Court ordered further discovery and set an evidentiary hearing for February 14, 2005. The discovery took place on February 9 and 10, when CPH deposed the three e-mail witnesses identified by MS. & Co.

22. On Saturday afternoon, February 12, 2005, MS & Co. informed the Court that it had, in the previous 24 hours, discovered additional tapes. Also, MS & Co. stated that its recent production omitted certain "attachments" to e-mails. MS & Co. did not attempt to clarify or substantiate either of these statements to CPH or to the Court until the Monday, February 14, 2005 hearing.

23. At the February 14 hearing, none of the witnesses MS & Co. presented was involved in or familiar with the actual electronic searches conducted using the parameters specified in this Court's April 16, 2004 Agreed Order, and none explained where the 8,000 pages produced in November, 2004 had come from. MS & Co.'s witnesses did, however, describe three new developments. First, Robert Saunders, a Morgan Stanley executive director in the Information Technology Division, testified that he returned to New York after his February 10 deposition and, concerned about his unqualified deposition assertion that he was "confident" that a complete search for backup tapes had been conducted, decided finally to undertake a personal search of MS & Co.'s "communication rooms," going to the areas he thought most obvious first. By doing so, he and two contractors discovered more than 200 additional backup tapes openly stored in locations known to be used for tape storage. Those discoveries were made on Friday and Saturday, February 11 and 12, 2005. As of the February 14 hearing, NDCI had not yet determined which, if any, of these newly discovered backup tapes contained e-mails. Second, Ms. Gorman reported that on Friday, February 11, 2005 she and her team had discovered that a flaw in the software they had written had prevented MS & Co. from locating all

responsive e-mail attachments. Third, Ms. Gorman reported that MS & Co. discovered on Sunday evening, February 13, 2005, that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so there were at least 7,000 additional e-mail messages that appeared to fall within the scope of the Agreed Order had yet to be fully reviewed by MS. & Co.'s outside counsel for responsiveness and privilege. As counsel for MS & Co. admitted, this problem "dwarf[s]" their previous problems. Hr'g Tr. (2/14/05) at 13. Ms. Gorman indicated she was "90 percent sure" that the problem infected MS & Co.'s original searches in May, which means that MS & Co. even then failed to timely produce relevant materials that had been uploaded into the archive by that point. *Id.* at 82-83. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the transaction under review here.

24. On February 19, 2045 MS & Co. informed counsel for CPH that "additional boxes of back up tapes" have been located "in a security room" and that, "(a)s of this morning, Morgan Stanley has identified four (unlabled) DLT tapes among the collection. Those four tapes will be sent to NDCI for further analysis." The disclosure did not state when the discovery was made. MS & Co.'s counsel represented to the Court that it was his understanding that about 73 bankers' boxes of tapes were discovered. No explanation for the late discovery was offered.

25. Throughout this entire process, MS & Co. and its counsels' lack of candor has frustrated the Court and opposing counsel's ability to be fully and timely informed.

26. MS & Co.'s failure during the summer and fall of 2004 to timely process a substantial amount of data that was languishing in the "staging area," rather than being put into searchable form and then searched, was willful and a gross abuse of its discovery obligations.

27. MS & Co.'s failure to timely notify CPH of the existence of the DLT and 8-mm tapes, which it had located as early as 2002 and certainly prior to the June 23, 2004 certification, and its

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failure to timely process those raw backup tapes was willful and a gross abuse of its discovery obligations.

28. MS & Co.'s failure to produce all e-mail attachments was negligent, and it was discovered and revealed only as a result of CPH's hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check MS & Co.'s compliance with the April 16, 2004 Agreed Order.

29. MS & Co.'s failure to produce all of the Lotus Notes e-mails was negligent, and it was discovered and revealed only as result of CPH's hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check MS & Co.'s compliance with the April 16, 2004 Agreed Order.

30. MS & Co.'s failure to locate other potentially responsive backup tapes before Saturday, February 12, 2005 was grossly negligent.

31. Given the history of the discovery, there is no way to know if all potentially responsive backup tapes have been located.

32. In sum, despite MS & Co.'s affirmative duty arising out of the litigation to produce its e-mails, and contrary to federal law requiring it to preserve the e-mails, MS & Co. failed to preserve many e-mails and failed to produce all e-mails required by the Agreed Order. The failings include overwriting e-mails after 12 months; failing to conduct proper searches for tapes that may contain e-mails; providing a certificate of compliance known to be false when made and only recently withdrawn; failing to timely notify CPH when additional tapes were located; failing to use reasonable efforts to search the newly discovered tapes; failing to timely process and search data held in the staging area or notify CPH of the deficiency; failing to write software scripts consistent with the Agreed Order; and discovering the deficiencies only after CPH was given the opportunity to check MS & Co.'s work and

the MS & Co.'s attorneys were required to certify the completeness of the prior searches. Many of these failings were done knowingly, deliberately, and in bad faith.

It is clear that e-mails existed which were requested by CPH that have not been produced because of the deficiencies discussed above. Electronic data are the modern-day equivalent of the paper trail. Indeed, because of the informalities of e-mail, correspondents maybe less guarded than with paper correspondence. In this case, the paper trail is critical to CPH's ability to make out its prima facie case. Thus, MS & Co.'s acts have severely hindered CPH's ability to proceed. The only way to test the potentially self-serving testimony of MS & Co. personnel is with the written record of the events.

The failures outlined in this Order are of two types. First, by overwriting e-mails contrary to its legal obligation to maintain there in readily accessible form for two years and with knowledge that legal action was threatened, MS & Co. has spoiled evidence, justifying sanctions. See Martino v. Wal-Mart Stores Inc., 835 So. 2d 1251 (Fla. 4th DCA 2003). "The appropriateness of sanctions for failing to preserve evidence depends on: (1) willfulness or bad faith of the responsible party, (2) the extent of prejudice suffered by the other party, and (3) what is required to cure the prejudice." Nationwide Lift Trucks Inc. v. Smith, 832 So. 2d 824, 826 (Fla. 4th DCA 2002). Second, MS & Co,'s willful disobedience of the Agreed Order justifies sanctions. See Rule 1.380 (b) (2), Fla. R. Civ. P. The conclusion is inescapable that MS & Co. sought to thwart discovery *in this specific case*.

Sanctions in this context are not meant to be punitive. They are intended, though, to level the playing field.

A reasonable juror could conclude that evidence of MS & Co.'s misconduct demonstrates its consciousness of guilt. It is relevant to the issues before the jury. Further, CPH should not be penalized by being forced to divert the jurors' attention away from the merits of its claim to focus on highly technical facts going to MS & Co.'s failures here, facts that are not reasonably disputed. Evidence of that failure, though, alone does not make CPH whole. Indeed, it can be said it is not a "sanction" at all, but merely a

statement of unrefuted facts that the jury may find relevant. Shifting the burden of proof, though, forces MS & Co. to accept the practical consequence of its failures-that some information will never be known. Obviously, this sanction is of consequence only in the marginal case. If there is overwhelming proof of MS & Co.'s knowledge of the fraud and collusion with Sunbeam, CPH would have prevailed on those elements in any event. And, to the contrary, if there is overwhelming evidence MS & Co. did not know of the fraud or conspire with or aid Sunbeam in its commission, it would have prevailed in any event. If the case is close on those issues, though, MS & Co., not CPH, should bear the burden of persuasion. Further, shifting the burden on the fraud issue does not relieve CPH of its obligation to establish the other elements of its claims, most notably reliance, proof of which is independent of the MS & Co. e-mails. Thus, the sanctions chosen are the most conservative available to the Court to address the spoliation of evidence and willful violation of the Agreed Order.[1] [2]

Finally, the Court notes that CPH has requested the e-mails since May of 2003. MS & Co. was supposed to comply with the April 16, 2004 Order by May 14, 2064. Fact discovery in this case closed November 24, 2004. MS & Co.'s actions have resulted in the diversion of enormous amounts of resources, by both the parties and the Court, into a fact discovery dispute that should have never arisen and which would have long ago been put to bed had MS & Co. timely recognized its obligations to CPH and this Court. Opening argument in this complex case is set for March 21, 2005. Preliminary jury selection has

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[1] MS & Co.'s bad acts and pocket book may not be used to gain the continuance it has sought from the beginning. Further, the Court has no confidence that, even if a continuance were granted, MS & Co. would fully comply with discovery in this case.

[2] The undersigned notes that the sanctions imposed are not enumerated in Rule 1.380 (b) (2), and is aware of the concern expressed in the 2000 Handbook on Discovery Practice, Joint Committee of the Trial Lawyers Section of the Florida Bar and Conferences of Circuit and County Court Judges ("(f)or the trial court to be on solid footing, it is wise to stay within the enumerated orders" [Handbook at p. 4]). However, MS & Co.'s violations involve both the violation of a discovery order and the intentional spoliation of evidence. The sanction imposed is *less* severe than that provided in Rule 1.380 (b) (2) (B), under which the Court could preclude MS & Co. from presenting evidence of its lack of knowledge of or

begun. MS & Co. has controlled the timetable of this portion of the litigation long enough. Consequently, CPH should have the ability to continue to require MS & Co, to attempt to comply with the Agreed Order and the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search, or to elect to terminate the e-mail discovery and concentrate on trial preparation.

Based on the foregoing, it is

ORDERED AND ADJUDGED that:

1. Plaintiff's Motion for Adverse Interference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Non-Compliance with the Court's April 16, 2004 Agreed Order and Motion for Additional Relief is GRANTED.

2. MS & Co. shall continue to use its best efforts to comply with the April 16, 2004 Agreed Order and shall continue to comply with the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search until March 21, 2005 or written notice from CPH, which ever first occurs. Either party shall notify the other in writing of its intention to offer into evidence e-mails actually produced to CPH prior to termination of e-mail discovery in conformity with this Order, within 72 hours of the e-mail's production to CPH. The Court shall hear and determine any objections to use of the e-mails.

3. The Court shall read to the jury the statement of facts attached as Exhibit A during whatever evidentiary phase of CPH's case that it requests, These findings of fact shall be conclusive. See Rule 1.380 (b) (2) (A). No instruction shall be given to the jury regarding inferences to be drawn from these facts. However, counsel may make such argument to the jury in favor of whatever inferences

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collusion with the Sunbeam fraud, which the Court finds is the least severe enumerated sanction appropriate to place the parties on a level playing field.

that evidence may support. No other evidence concerning the production of e-mails, or lack thereof, shall be presented absent further Court order.

4. CPH will be allowed to argue that MS & Co.'s concealment of its role in the Sunbeam transaction is evidence of its malice or evil intent, going to the issue of punitive damages. See, e.g., General Motors Corp. v. McGee, 837 So.2d 10120.

5. MS & Co. shall bear the burden of proving to the jury, by the greater weight of the evidence, that it lacked knowledge of the Sunbeam fraud and did not aid and abet or conspire with Sunbeam to defraud CPH. The traditional order of proof shall remain unaffected, however.

6. MS & Co. shall compensate CPH for costs and fees associated with the Motion. The amount shall be determined at an evidentiary hearing to be held after the completion of the trial.

7. Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-Mails is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ___day of March, 2005.

ELIZABETH T. MAAS
Circuit Court Judge

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EXHIBIT A

A federal regulation in effect in 1997 and all times since required Morgan Stanley to preserve e-mails for three years and to preserve them in a readily accessible place for two years. Beginning in no later than 1997, Morgan Stanley had a practice of overwriting e-mails after 12 months. E-mails could no longer be retrieved once they were overwritten. This practice was discontinued in January, 2001. CPH has sought access to Morgan Stanley's e-mails relating to this transaction since the case was filed in May, 2003.

Prior to 2003, Morgan Stanley recorded e-mails and other electronic data on back up tapes. On April 16, 2004, the Court ordered Morgan Stanley to (1) search the oldest full backup tape for each of 36 Morgan Stanley employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all e-mails relating to this case found by the search I have just described; and (4) certify its full compliance with the Court's order.

On May 14, 2004, Morgan Stanley produced approximately 1,300 pages of e-mails. It did not produce the required certification. On June 23, 2004, after inquiries by CPH, Morgan Stanley provided CPH with a certificate of full compliance with the April 16 Order signed by Arthur Riel, the Morgan Stanley manager assigned this task.

As organized by Morgan Stanley, the effort to recover e-mails from the backup tapes had several stages. First, the relevant backup tapes had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc., which I will call "NDCI", to be processed, and the data returned to Morgan Stanley. Third, Morgan Stanley had to upload the processed data into its e-mail archive. Fourth, Morgan Stanley had to run scripts, or pieces of computer code, to transform this data into a searchable form. Finally, Morgan Stanley had to search the data for e-mails related to this case. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when the processed data returned by NDCI remained in limbo, waiting to be uploaded to Morgan Stanley's archive.

At some point prior to May 6, 2004, Arthur Riel and his team became aware that 1,423 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423 tapes had not been processed by NDCI and thus had not been included in the archive or searched when Morgan Stanley made its production to CPH on May 14, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification of full compliance with the Court's April 16, 2004 Order that it was false. He and others on Morgan Stanley's e-mail archive team knew by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990's. During the summer of 2004, the Brooklyn tapes were processed and the data sent to the staging area. The scripts for e-mails relating to this case were not written and tested to permit the search to begin until the middle of January, 2004. Such a search, even if perfectly done, can take weeks.

Morgan Stanley also failed to timely produce e-mails from 738 backup tapes found at a Morgan Stanley facility in Manhattan in 2002. These 738 tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched by either May 14, 2004, when the Court's order required production, or June 23, 2004, when Morgan Stanley falsely certified that full production had been made. Mr. Riel and others were told by NDCI by July 2, 2004 that these tapes contained e-mail dating back at least to 1998. During the summer of 2004, these tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not searched.

In the course of these proceedings, Morgan Stanley represented to the Court that the first time anyone knew that there was recoverable e-mail data on the Brooklyn tapes was in October 2004. That statement was false. The actual date was at least three months earlier than that, no later than July 2, 2004.

In August 2004, Mr. Riel was relieved of his employment responsibilities for reasons unrelated to Morgan Stanley's false certification. He and his team were replaced by a new team headed by Allison Gorman Nachtigal. At that time, the staging area contained about 600 gigabytes of e-mail data that had not yet been uploaded into the Morgan Stanley archive and had not been searched for e-mails relating to this case. 600 gigabytes of data is the equivalent of approximately 30 million printed pages.

Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area. Indeed, she was not informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman gave the project

somewhat greater priority, although even then it did not move as expeditiously as possible. Morgan Stanley did not consider using an outside contractor to expedite the process.

In November 2004, Morgan Stanley produced additional e-mails and attachments to CPH. Morgan Stanley told CPH that those materials came from newly discovered tapes. That statement was false. In fact, Morgan Stanley did not begin searching the materials from the staging area until January 2005.

Morgan Stanley found another 169 DLT tapes in January, 2005, that according to Morgan Stanley had been misplaced by its New Jersey storage vendor. Morgan Stanley later disclosed the existence of more than 200 additional unsearched backup tapes openly stored in locations known to be used for tape storage, which Morgan Stanley claimed to have discovered on February 11 and 12, 2005.

Morgan Stanley claims to have discovered on February 11, 2005 that a flaw in the software it had written had prevented Morgan Stanley from locating all e-mail attachments about the Sunbeam transaction. Morgan Stanley also admits that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so that additional e-mail messages that appeared to fall within the scope of the April 16, 2004 Order had not been given to CPH. Further, it appears that the problem infected Morgan Stanley's original searches in May of 2004. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the transaction under review here.

Morgan Stanley claims to have discovered the Lotus Notes defects in the searches on February 13, 2005. Both the e-mail attachment defects and the Lotus Notes defects in Morgan Stanley's searches were revealed only as a result of CPH's hiring of a third-party vendor, pursuant to the Court's Order on February 4, 2005, to double-check Morgan Stanley's compliance with the April 16, 2004 Order. On February 16, 2005, Morgan Stanley withdrew its certificate of compliance with the April 16, 2004 Order.

On February 19, 2005 Morgan Stanley notified CPH that it had found boxes of additional tapes that have not been uploaded into its archive or searched for responsive e-mails. Morgan Stanley did not tell CPH it had found any tapes that it had not searched until November 17, 2004. Even then, it did not tell CPH how many tapes were found, when they were found, or when they would be searched. MS & Co. did not provide all of this information to CPH until February of 2005. The searches had not yet been completed when this trial was begun, when they were terminated without completion.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

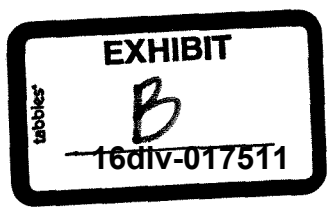
MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON CPH'S RENEWED MOTION FOR ENTRY OF DEFAULT JUDGMENT

THIS CAUSE came before the Court March 14 and 15, 2005, on CPH's Renewed Motion for Entry of Default Judgment, with both parties well represented by counsel.

Coleman (Parent) Holdings, Inc. ("CPH"), has sued Morgan Stanley & Co., Inc. ("MS & Co."), for aiding and abetting and conspiring with Sunbeam to perpetrate a fraud. Early in the case, CPH was concerned that MS & Co. was not thoroughly looking for emails responsive to its discovery requests. On April 16, 2004, the Court entered an Agreed Order ("Agreed Order") that required MS & Co. to search its oldest full backup tapes for emails subject to certain parameters and certify compliance. MS & Co. certified compliance with the Agreed Order on June 23, 2004. On November 17, 2004, CPH learned that MS & Co. had found some backup tapes that had not been searched. On January 26, 2005 it served its Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order ("Adverse Inference Motion"), claiming that MS & Co.'s violation of the Agreed Order, coupled with its systemic overwriting of emails after 12 months, justified an adverse inference against it. The Court ordered certain limited discovery. Responses to that discovery prompted CPH to orally amend its Adverse Inference Motion to seek more severe sanctions.

The Court held an evidentiary hearing on the Adverse Inference Motion on February



14, 2005. On March 1, 2005 it issued its Amended Order on Coleman (Parent) Holdings Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order ("Adverse Inference Order"). In its current Motion, CPH argues that it has since learned that the discovery abuses addressed in the Adverse Inference Motion and Order represent only a sampling of discovery abuses perpetrated by MS & Co. and that the abuses have continued, unabated. It claims that these abuses, when taken as a whole, infect the entire case. To understand CPH's argument, it is necessary to go back to the beginning.

This case arises out of an acquisition transaction that was negotiated and consummated in late 1997 and early 1998, in which CPH sold its 82% interest in the Coleman Company, Inc., to Sunbeam Corporation. MS & Co. served as financial advisor to Sunbeam for parts of the acquisition transaction and served as the lead underwriter for a $750,000,000.00 debenture offering that Sunbeam used to finance the cash portion of the deal.

CPH's Complaint[1] alleged claims against MS & Co. arising from this transaction for fraudulent misrepresentation, negligent misrepresentation, aiding and abetting fraud, and conspiracy, and sought damages of at least $485 million.

On May 12, 2003, MS & Co. was served with the Complaint and CPH's First Request for Production of Documents ("Request"). The Request sought, in essence, all documents connected with the Sunbeam deal. "Documents" was broadly defined, and specifically included items electronically stored. Concerned that, out of more than 8,000 pages of documents produced, it had received only a handful of emails, CPH on October 29, 2003, served its Motion to Compel Concerning E-Mails. That motion sought an order requiring MS & Co. to make a full investigation for email messages, including a search of magnetic tapes and hard drives; produce within 10 days all emails located; and produce a Rule 1.310 witness

[1]On February 17, 2005, CPH served its First Amended Complaint, which dropped the claims against MS & Co. for fraudulent and negligent misrepresentation, leaving only the aiding and abetting and conspiracy claims.

within 20 days "to describe the search that was conducted, identify any gaps in Morgan Stanley's production, and explain the reasons for any gaps."

In its Opposition to Coleman (Parent) Holdings, Inc.'s Motion to Compel served November 4, 2003, MS & Co. argued that CPH wanted "this Court to order a massive safari into the remote corners of MS & Co.'s email backup systems" and represented that "(t)he restoration efforts demanded by CPH would *cost at least hundreds of thousands of dollars* and require several months to complete (emphasis in original). MS & Co. argued that CPH's "true" motive was to "harass and burden MS & Co. with unnecessary and costly discovery demands and attempt to smear MS & Co. with out-of-context recitations from other proceedings" because "CPH *concedes* that MS & Co. is only able to restore email from backup tapes from January 2000 and later - *more than a year and a half after the events that allegedly gave rise to CPH's claims*," (emphasis in original).

CPH's "concession" was based on representations like the kind made to it by MS & Co.'s counsel in a March 11, 2004 letter that suggested "(t)he burden on Morgan Stanley from . . . a wholesale restoration [of email back up tapes], both in terms of dollars and manpower would be enormous. Regardless of who performs the initial restoration, it would require hundreds (perhaps thousands) of attorney-hours to review millions of irrelevant and non-responsive e-mails . . ."[2]

In response to CPH's Motion to Compel, the parties agreed to reciprocal corporate

[2]Complaints about MS & Co.'s tactics are not new. See Ex. 196 [February 26, 2004, letter from EEOC to Hon. Ronald L. Ellis in EEOC/Schieffelin v. Morgan Stanley & Co., Inc., et al., 01-CV-8421 (RMB) (RLE) (S.D.N.Y.): ("(w)hen EEOC received [Morgan Stanley's] January 27, 2004 Responses to EEOC's Fifth Requests for Production of Documents which did not contain any e-mails, the parties communicated further. At that time, Morgan Stanley took the position that searching for e-mails would be burdensome both in regards to expense and the time it would take to respond. While the parties were in the process of attempting to work out these disputes, EEOC for the first time learned that [Morgan Stanley has] an easy, systematic ability to search for relevant documents. In a February 16, 2004, conversation with an IT representative of [Morgan Stanley], EEOC learned that [Morgan Stanley has] an e-mail system, which, while not yet fully comprehensive, was easily searchable on February 18, 2004, the close of discovery . . . which is certain to produce discoverable information highly relevant to EEOC's and Plaintiff-Intervenor's claims . . . After disclosing their state-of-the-art system to EEOC, [Morgan Stanley] dropped [its] assertion that the process was too expensive, but maintained that they refuse to search for e-mails because it is burdensome for attorneys to review large numbers of documents prior to production.")

depositions on the email issue. CPH deposed Robert Saunders on February 10, 2004.[3] After completion of the corporate representative depositions, and unable to obtain MS & Co.'s agreement to a mutual email restoration protocol, CPH served its Motion for Permission to have Third Party Retrieve Morgan Stanley E-Mail and Other Responsive Documents, proposing that a third party vendor be given access to both parties' email systems for restoration at each party's expense. At the hearing on that Motion, CPH offered to split the expenses evenly. MS & Co. refused.

MS & Co.'s continued assertions that the email searches could be conducted only at enormous cost and would be fruitless because there were not backup tapes with email from 1997 and 1998 were confirmed to the Court by MS & Co.'s counsel, Thomas Clare of Kirkland & Ellis, at a hearing held March 19, 2004:

> Mr. Scarola: Electronic records of e-mails that have been exchanged.
> The Court: Do we agree that there has been such a request outstanding?
> Mr. Clare: There has been a request outstanding.
> The Court: And have you all objected?
> Mr. Clare: From the beginning.
> The Court: And what's the basis of the objection?
> Mr. Clare: We objected to the breadth of the request that they're making. And to answer Your Honor's question directly – and the burden that is associated with it – that given the particular e-mail back-up tapes that are in existence five, six years after the fact of these transactions, that the scope of the e-mail request that they are seeking is improperly and unduly burdensome given the enormous costs that would be required, given the fact that the time period for which we have back-up tapes post dates the events by several years.

Unable to resolve the email issue, on April 9, 2004, CPH served its Motion to Compel

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[3]Saunders provided misleading information in his deposition. See footnote 12, infra.

Concerning E-Mails and Other Electronic Documents. On the eve of the hearing on CPH's Motion to Compel, the parties reached an accommodation, and on April 16, 2004 the Court entered the Agreed Order. Under the Agreed Order, MS & Co. was required to (1) search the oldest full backup tape for each of 36 MS & Co. employees involved in the Sunbeam transaction; (2) review emails dated from February 15, 1998, through April 15, 1998, and emails containing any of 29 specified search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004, all nonprivileged emails responsive to CPH's document requests; (4) give CPH a privilege log; and (5) certify its full compliance with the Agreed Order.

As required by the Agreed Order, MS & Co. produced about 1,300 pages of emails on May 14, 2004. It did not, however, certify compliance with the Agreed Order. After prompting by CPH, on June 23, 2004, MS & Co. served a certificate of compliance signed by Arthur Riel, an Executive Director and manager of its Law/Compliance IT Group.[4]

CPH got its first indication that the Agreed Order may have been violated in the late fall of 2004.

On November 17, 2004, Clare wrote Michael Brody of Jenner & Block, CPH's outside counsel, that MS & Co. had "discovered additional e-mail backup tapes . . ."; that "(t)he data on some of [the] newly discovered tapes has been restored;" that "we have re-run the searches described in [the Agreed Order]"; that "some responsive e-mails have been located as a result of that process"; and that "(w)e will produce the responsive documents to you as soon as the production is finalized."

On December 14, 2004, Brody wrote Clare back:

> in [your November 17, 2004 letter], you state that Morgan Stanley located additional email backup tapes, and that you

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[4]Though CPH would not learn for months that the certificate was false, and even then the magnitude of MS & Co.'s misrepresentations would not be admitted, MS & Co. personnel, including in-house counsel, knew the certification of compliance was false when made.

> would be producing documents soon. Within two days of that letter, you produced some emails to us. In your November 17, 2004 letter, however, you also indicated that "some of the backup tapes are still being restored." Have those backup tapes been restored? Have you found additional responsive emails? If so, when will Morgan Stanley produce those emails? How is it that the tapes were only recently located?

On December 17, 2004, Clare wrote back, telling Brody "(n)o additional responsive e-mails have been located since our November production."[5]

Brody wrote back to Clare December 30, 2004, noting the deficiencies in Clare's correspondence:

> You do not inform us whether the review of the recently-located backup tapes still is ongoing. Please confirm that all email backup tapes from the relevant time period have been reviewed and all responsive emails have been produced. If the review still is proceeding, please let us know when the review will be completed.

Clare wrote back on January 11, 2005, telling Brody that the "restoration of e-mail backup tapes is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

Concerned about Clare's lack of candor, on January 19, 2005 Brody wrote again:

> I write in response to your January 11, 2005 letter concerning e-mails back-up tapes. Unfortunately, your letter raises more questions than it answers. As I requested in my December 14, 2004 letter, please explain the circumstances under which Morgan Stanley located these backup tapes and advise us of the date on which the tapes were located.

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[5]Not only does this letter fail to answer Brody's legitimate questions, it implies that MS &Co. was still processing and reviewing emails from the newly found tapes. As we now know, though, *no* additional information was migrated to the archives between approximately August 18, 2004 and January 15, 2005. *Of course* "no additional responsive e-mails [would have been] located."

> Further, please explain your statement that "the next set of backup tapes" is scheduled to be restored "at the end of January." How many tapes will be restored by the end of January? When exactly in January will Morgan Stanley complete the process of restoring and searching these tapes for responsive documents? Are there other backup tapes that are not yet in the process of being restored? If so, please advise us of (a) the number of tapes that are not yet in the process of being restored; (b) the time period of the data contained on those tapes; and (c) Morgan Stanley's timetable for restoring and searching those tapes. In addition, please explain why those tapes are not yet in the process of being restored. Please also explain why Morgan Stanley cannot complete the restoration and searching of all remaining backup tapes before "the end of January." As you know, our trial is scheduled to begin on February 22, 2005.
>
> We look forward your complete response to these questions no later than January 21, 2005 so that we can bring this matter to the Court's attention, if necessary.

Conforming to what was by now his usual stonewall tactic, Clare responded by letter dated January 21, 2005:

> I write in response to your January 19, 2005 letter regarding Morgan Stanley's production of e-mails restored from backup tapes.
>
> Morgan Stanley completed its initial production of restored e-mail messages on May 14, 2005. The May 2004 production was conducted in accordance with the agreed-upon order governing, and the searches that resulted in that production encompassed data from all of the backup tapes known to exist at the time. Subsequent to the May 2004 production, additional tapes were found in various locations at Morgan Stanley. The discovered tapes were not clearly labeled as to their contents, were not found in locations where e-mail backup tapes customarily were stored, and many of the tapes

were in a different format than other e-mail backup tapes. In November 2004, once it was determined at least some of the discovered tapes contained recoverable e-mail data, Morgan Stanley re-ran the searches described in the agreed-upon order. Those searches resulted in Morgan Stanley's November 2004 production.

Morgan Stanley's efforts to restore the backup tapes discovered after the May 2004 production are ongoing. It is a time-consuming and painstaking process and, given the absence of clear labels or other index information for the backup tapes, there is no way for Morgan Stanley to know or accurately predict the type or time period of data that might be recovered from tapes that have yet to be restored. While Morgan Stanley cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes, we understand from Morgan Stanley that, when the agreed-upon searches are run again at the end of January, those searches will include approximately one terabyte of additional data restored since the prior production.

On January 26, 2005, CPH served its Adverse Inference Motion, seeking sanctions based on MS & Co.'s disclosure of the newly found tapes. Hearing was scheduled for February 14, 2005. In preparation for that hearing, on February 3, 2005 the Court ordered MS & Co. to produce by noon on February 8, 2005 "(i) all documents to be referred to or relied on by any of the witnesses in his or her testimony; and (ii) all documents within MS & Co.'s care, custody, or control, addressing or related to the additional email backup tapes, including matters relating to the time or manner in which they were discovered; by whom they were discovered; who else learned of their discovery and when; and the manner and timetable by which they were be restored and made searchable, including any correspondence to or from outside or prospective outside vendors."

The Adverse Inference Order outlined the discovery abuses shown at the February 14, hearing. They included MS & Co.'s undisclosed discovery of the 1,423 "Brooklyn" tapes no

later than May of 2004; the undisclosed discovery of the 738 8-millimeter backup tapes in 2002; the presence of unsearched data in the staging area; the discovery of 169 DLT tapes in January 2005; the discovery of more than 200 additional tapes on February 11 and 12, 2005; the discovery of a script error that had prevented MS & Co. from locating responsive email attachments; and discovery of another script error that had infected the ability to gather emails from Lotus Notes platform users.

In response to these deficiencies, the Court issued the Adverse Inference Order. That Order reversed the burden of proof on the aiding and abetting and conspiracy elements and included a statement of evidence of MS & Co.'s efforts to hide its emails to be read to the jury, as relevant to both its consciousness of guilt and the appropriateness of punitive damages. It specifically provided that "MS & Co. shall continue to use its best efforts to comply with the April 16, 2004 Agreed Order and . . . February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search."[6]

It is now clear why MS & Co. was so unwilling to provide CPH with basic information about how and when the tapes were found or when production would be complete. First, candor would have required MS & Co. to admit that it had not done a good faith search for the oldest full backup tapes, and that Riel's certificate of compliance was false. Some unsearched tapes had been found by 2002; others had been found no later than May, 2004. Together, over 2,000 tapes had been found which were not searched prior to the May production. It is untrue that the tapes were "not in locations where e-mail backup tapes customarily were stored."

[6]Concerned that MS & Co. had been less than candid with both CPH and the Court, on February 4, 2004, the Court entered its Order on Coleman (Parent) Holding's ore tenus Motion to Participate in Search of Additional E-Mail Backup Tapes or Appoint Third Party to Conduct Search, ordering MS & Co. to pay for a third party vendor to check its compliance with the Agreed Order. The Court previously found that the two scripts errors testified to by Allison Gorman at the February 14, 2005, hearing would not have been discovered or revealed without the threat that the third-party vendor would discover the errors. Given Ms. Gorman's testimony at the March 14, 2005, hearing, though, it now appears MS & Co. knew about the errors before the appointment of the third-party vendor. Consequently, the errors were only revealed, but not discovered, in response to the February 4, 2004, Order.

Second, MS & Co. desperately wanted to hide an active SEC inquiry into its email retention practices.[7] [8] [9] [10] Finally, MS & Co. did not want to admit the existence of the historical email archive, which would expose the false representations it had made to the Court and used to induce CPH to agree to entry of the Agreed Order.[11] [12]

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[7]On December 17, 2003, CPH served its Third Request for Production seeking "(a)ll materials and documents submitted to the United States Securities and Exchange Commission ("SEC"), received from the SEC, or reflecting communications with the SEC in connection with any investigation, inquiry, or examination concerning or relating to Morgan Stanley's policies and/or procedures with regard to the retention, storage, deletion, and/or back-up of electronic mail (emails) . . ." On October 12, 2004, CPH served its Request for Supplemental Documents seeking to bring MS & Co.'s document production current, requesting "(a)ll documents not previously provided by MS & Co. that are responsive to any Request for Production of Documents that CPH previously has served upon MS & Co. in the litigation, including documents obtained by MS & Co. or its counsel after the date of MS & Co.'s prior productions." No SEC documents were produced in response to either request; no privilege log was generated. On other privilege logs generated in response to court orders, MS & Co. did not show the SEC on the distribution portion of the log. See March 9, 2005 Order Following in Camera Inspection (Riel/SEC Documents) footnotes 1, 2. See, also, footnote 15, infra. Kirland & Ellis, outside counsel for MS & Co. in this litigation, represents MS & Co. in the SEC's inquiry into its email retention practices.

[8]MS & Co. manipulated the unhinging of the SEC's email investigation from the IPO litigation in January, 2005, to conceal the email issues as long as possible.

[9]It is now apparent that MS & Co. chose deliberately to keep its affidavits concerning the informal SEC inquiry submitted to support its privilege claims vague, despite two requests from the Court seeking specific information. See February 28, 2005 Order (Release of Exhibits).

[10]See February 25, 2005 Order on Morgan Stanley's Objections to Coleman (Parent) Holding Inc.'s Notice to Produce at Hearing and Motion for Protective Order and March 4, 2005 Order on Plaintiff's ore tenus Motion to Compel Additional Production.

[11]While MS & Co. contends that its representations to the Court that it would cost "hundreds of thousands of dollars" to search the backup tapes and that there was no pre-2000 backup tapes were not false, they were deliberately misleading: MS & Co. never had an intention to search the back up tapes to respond to the requests and some of the year 2000 backup tapes backed up email back to 1997.

In 2001, MS & Co. decided to create the email archive. By June,2003, it had decided that the archive should have two components. First, MS & Co. wanted to create an archive that captured and stored email as it was generated. Second, MS & Co. wanted to add historical data to the archive. That task involved searching for all email backup tapes containing historical emails; sending those tapes to an outside processor; loading the processed tapes into a staging area; and migrating the stored data from the staging area onto the archive. As we now know, archive searches are quick and inexpensive. They do not cost "hundred of thousands of dollars" or "take several months." The restrictions imposed by the Agreed Order were not needed.

[12]On February 10, 2004, Robert Saunders, an executive director of IT for MS & Co., was deposed. He testified that in January, 2003, MS & Co. had put into effect the email archive system. When specifically asked whether the new email archive system would include prior backups or only going forward backups, he testified that "(t)he way it was built was for going forward backup." He was next asked whether "(w)ith respect to backup dated January 2001 and previously, does Morgan Stanley have any new capabilities to restore and search e-mail?" After counsel interposed a vagueness objection, he answered "(t)here are no new capabilities to search that e-mail." That testimony was so misleading as to be false. As Sauders well knew, since he was on the team responsible, the "live" email capture portion of the archive was already operational. The migration of the historical data to the archive was expected to be completed by April of 2004, just two months after his deposition.

MS & Co.'s wrongful conduct has continued unabated.[13] Since the February 14, 2005, hearing, it has come to light that:

- Only two whole and four partial tapes from the Brooklyn tapes had been migrated to the archive and were thus searched for the November, 2004, production. MS & Co. sought to hide this information to create the impression that all the produced documents came from the Brooklyn tapes, rather than reveal that the production came from material that had migrated from the staging area to the archive since the May, 2004, production or some other, as yet undisclosed, source.[14]

- Contrary to MS & Co.'s counsel's November 17, 2004, letter to CPH, *none* of the November, 2004 production came from the "newly found" tapes. MS & Co. carefully crafted its responses to inquiries about the November, 2004, production to avoid both disclosure of the existence of the archive and outright lying.

- The scripts MS & Co. used to process emails into its archive caused the bodies of some messages to be truncated. MS & Co. discovered this problem on February 13, 2005, but did not tell the Court about it until March 14, 2005.

- A migration issue caused about 5% of email harvested by NDCI from the backup tapes not to be captured in the archive, based on testing of a representative sample of tapes. MS & Co. told the SEC about this problem on February 24, 2005, but failed to tell CPH or the Court.

- As of June 7, 2004, only 120 out of 143 SDLT tapes had been processed into the archive.

- An analysis requested by the SEC showed that, based on a representative sample, 10% of backup tapes were overwritten after January, 2001.

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[13]MS & Co. sought to use the entry of the Adverse Inference Order as a shield against further inquiry into its email abuses, arguing that the matter was closed by the Adverse Inference Order. It previously used this tactic with the SEC, arguing that the December 3, 2003 Cease and Desist Order shielded it from other sanctions for email retention failures. See Ex. 14 [February 10, 2005 letter from outside counsel for MS &Co. to SEC]

[14]MS & Co. argued at the March 14 and 15, 2005 hearing that there were only 13 unique, new emails contained in the November 2004 production when compared to the May 2004 production. Nine of those emails, however, were originally given to MS& Co.'s lawyers for responsiveness review by the IT staff for the May 2004 production. No explanation of why they were not produced in May was offered. This is particularly concerning given the large number of documents Ms. Gorman testified the search parameters found compared with the relatively small number found responsive and produced after review by counsel.

- A software error caused blind carbon copies not to be captured in the archive process. MS & Co. told the SEC about this problem on February 24, 2005. MS & Co. did not tell CPH or the Court.

- A software error caused the searches to be hyper case-sensitive, resulting in a failure to capture all emails. MS & Co. knew of the problem as of December, 2004, but did not tell CPH or the Court. The problem was not purportedly fixed until March, 2005.

- A script error caused the archive to have problems pulling group email in Lotus Notes.

- MS & Co. provided sworn testimony at the February 14, 2005, hearing that it had located 600 gigabytes of data, while contemporaneously telling the SEC it had located a terabyte of data. A gigabyte represents 20,000 to 100,000 pages. Incredibly, MS & Co.'s witness on this point, Allison Gorman, testified on March 14, 2005, that it was simply a "terminology" issue that she did not choose to correct because it could cause "confusion."

- CPH requested MS & Co. to produce responses it had made to third-parties in civil, criminal, or administrative proceedings describing limitations on MS & Co.'s ability to produce emails and all notices in such proceedings that MS & Co. had newly discovered backup tapes containing email. MS & Co. objected, arguing that there were over 300 separate proceedings, involving over 70 outside law firms, and that the cost of compliance would be too great. On March 2, 2005, the Court ordered the production, after shortening the time period involved, and required production within 12 hours after counsel's review of each item for responsiveness but, in any event, within 10 days. At the time MS & Co. objected to CPH's request as unduly burdensome, it knew of its Well submission to the SEC made on February 10, 2005. Kirkland and Ellis, co-counsel here, was co-counsel for MS & Co. in that SEC proceeding. Consequently, it appears MS & Co.'s real concern was not that expressed to the Court, but was based on its realization that compliance would reveal the existence of the SEC inquiry into its email retention policy and MS & Co.'s efforts to keep the existence of that investigation secret. MS & Co. violated the Court's March 2, 2005, Order on Morgan Stanley's Responses and Objections to Coleman (Parent) Holdings Inc.'s Notice to Produce at Hearing requiring it to disclose items responsive to CPH's Request for Production within 12 hours of review for responsiveness by waiting *days*, not hours, to produce the Wells submission.

- MS & Co.'s failure to produce or log the SEC documents violated the Court's February 3, 2005, Order.[15]

- James Doyle's, the Executive Director of MS & Co.'s Law Division, declaration that he did not learn of additional unsearched backup tapes until the end of October, 2004, was intended to mislead CPH and the Court. Obviously, MS & Co. sought to create the implication in the declaration that *no one* in the Law Division knew of the backup tapes before then. Instead, both Soo-Mi Lee, Doyle's associate, and James Cusick, Doyle's superior, knew of the tapes no later than June 7, 2004.

- In-house counsel for MS & Co. knew as of June 7, 2004, that nearly a third of the restored backup tapes did not contain email, implying they may have been recycled in violation of the December 3, 2002 Cease and Desist Order. They did not tell CPH or the Court.

- MS & Co.'s searches looked for only two types of emails. There are other types of emails that were not included in the searches. CPH did not learn of this deficiency until March 13, 2005.

- MS & Co. improperly failed to produce 125 documents required to be produced by the Court's February 3, 2005, Order Specially Setting Hearing which required limited discovery be made in connection with the February 14, 2005, hearing on the Adverse Inference Motion.

- MS & Co. improperly withheld 13 documents required to be produced by the Court's March 4, 2005, Order on Plaintiff's ore tenus Motion to Compel Additional Production.

- An additional 282 tapes were found on February 23 and 25, 2005; CPH was not told of the discovery until March 13, 2005.

- An additional 3,536 tapes were discovered on February 23, 2005, in a security room.

- An additional 2,718 tapes were found at Recall, MS & Co.'s third party off-site storage vendor, on March 3, 2005.

- An additional 389 tapes were found March 2 through March 5, 2005. CPH was not told

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[15]The Court previously rejected MS & Co.'s argument that the January 14, 2005, email exchange between its outside and in-house counsel was not required to be produced under the February 3, 2005, Order Specially Setting Hearing because it referred to the "documents issue" and not specifically to the backup tapes. See March 16, 2005 Order on Morgan Stanley's Motion to Disqualify Plaintiff's Counsel Searcy, Denney, Scarola, Barnhart & Shipley, P.A. and Jenner & Block, LLC. MS & Co.'s insistence on a narrow interpretation of the February 3, 2005, Order is not particularly sympathetic, when the only reason that Order confined production to the backup tape issue was because MS &Co. had failed to notify the Court of the other deficiencies in its certificate of compliance.

until March 13, 2005.

- On March 4, 2005, the Court entered its Order on Plaintiff's ore tenus Motion to Compel Additional Production, which ordered MS & Co. to produce by 3:00 p.m. on March 7, 2005, all items within its care, custody, or control dealing with the Riel/SEC investigation, other than documents representing communications between or among MS & Co. inside and outside counsel that were not copied to anyone other than counsel. MS & Co. sought to discredit Riel and thus distance itself from the false June 23, 2004 certificate of compliance; in doing so, it sought to hide Riel's whistle blower status and the existence of an SEC investigation into whether MS & Co. employees sought kick backs from third party vendors; whether MS & Co. employees were improperly pressured into dealing with third-party vendors who may provide business to MS & Co.; and whether MS & Co. continued to overwrite backup tapes contrary to the SEC's December 3, 2002, Cease and Desist Order.

- A script error prevented the insertion of some emails into the archive. MS & Co. produced over 4,600 pages of emails on March 21, 2005, some of which it suggested may have been located on correction of the error; alternatively, it suggested the emails may have been located by NDCI as part of its efforts to verify MS & Co.'s searches.

MS & Co.'s discovery abuses have not been confined to its email production.

William Strong is a MS & Co. managing director and was one of the principal players for it in the Sunbeam deal. He took credit for the fees generated. On May 9, 2003, CPH requested a copy of "(a)ll documents concerning employment contracts, performance evaluations, and/or personnel filed (including without limitation any documents that describe or discuss [his] training, experience, competence, and accomplishments) . . ." MS & Co. asserted that the requested documents were not relevant and that production "would unnecessarily infringe on the privacy interests of [Strong]." On March 15, 2004, the Court ordered MS & Co. to produce "(a)ll references (positive or negative) to [Strong's] truthfulness, veracity, or moral turpitude." Some portions of Strong's evaluations were produced in response to that order. Those evaluations noted Strong's colleagues' reservations about his candor and ethics. Two of his evaluators, Joseph Perella and Tarek Abdel-Meguid, were deposed, when some relatively vague testimony about the bases for those conclusions was offered. It now appears Strong was facing criminal prosecution in Italy for complicity in bribery while he was working on the Sunbeam transaction, which his evaluators knew, and that MS & Co. purposely

withheld that information from CPH and the Court.[16]

Even once CPH independently discovered evidence of Strong's indictment in Italy, MS & Co. sought to shield its files from discovery. It claimed that virtually *all* of the documents it had were privileged under joint defense agreements in place between it, Strong, and Saloman Brothers, Strong's employer at the time of the incident. As the Court's March 10, 2005 Order Following In Camera Inspection (Strong) details, the documents MS & Co. relied on to support that position, and sought to prevent CPH from obtaining, reflect no such agreement.

The other discovery abuses and misrepresentations by MS & Co. other than those involving its email production practices are outlined in CPH's Chronology of Discovery Abuses by Defendant served March 1, 2005, and would take a volume to recite. They include:

- failing to provide the information retained by MS & Co.'s internal document management system pertaining to MS & Co.'s work for Sunbeam; falsely representing to the Court that no useful information was contained in that information; and producing a Rule 1.310 representative who had made an insufficient inquiry into authenticity, business record status, and authorship of documents; see February 28, 2005 Order on CPH's Motion to Deem Certain Documents Admissible and for Sanctions due to Morgan Stanley's Disregard of Court Order;

- when faced with contempt proceedings for violating the Stipulated Confidentiality Order by providing a copy of a settlement agreement between CPH and Arthur Andersen to other counsel, representing to the Court that the law firm of Kellogg, Huber was retained to handle the "Andersen aspects" of this litigation because of a conflict between Andersen and Kirkland & Ellis; Mark Hansen, a partner at Kellog, Huber, testified that his firm was hired as co-counsel for all aspects of the case;

- providing answers to interrogatories signed by a corporate representative who performed insufficient verification of the responses;

[16]MS & Co. originally argued that documents concerning the Italian proceedings were not in Strong's "personnel file" and so were not required to be produced in response to CPH's initial request. MS & Co.'s practice of filing damaging information about an employee other than in his personnel file and then claiming it was not included in the request is about at convincing as its argument that, since it has a corporate directive not to keep drafts of documents once they are in final form, document drafts cannot be business records exempt from hearsay because they are not "kept in the course of a regularly conducted business activity." See Fla. Stat. §90.803 (6) (a). In any event, there was *no excuse* for not producing its records of the Italian proceedings once the Court's March 15, 2004 Order was entered.

- routinely asserting unfounded privilege claims;[17] and

- failing to timely comply with the Court's orders; for example, MS & Co. did not produce Strong's 1994 Performance Evaluation until the afternoon of March 15, 2005, though it was obviously included in the Court's March 15, 2004 Order. The failure cannot be excused as oversight since, when CPH specifically asked for the 1994 evaluation in the spring of 2004, MS & Co.'s counsel said it was withheld as non-responsive; see, also, Ex. 197, 198.

In sum, MS & Co. has deliberately and contumaciously violated numerous discovery orders, including the April 16, 2004 Agreed Order; February 3, 2005 Order Specially Setting Hearing; and the March 4, 2005 Order on Plaintiff's ore tenus Motion to Compel Additional Production. At the February 14, 2005, hearing on CPH's Adverse Inference Motion, it chose to hide information about its violations and coach witnesses to avoid any mention of additional, undisclosed problems with its compliance with the Agreed Order. Implicit in the requirement that MS & Co. certify compliance with the Agreed Order was the requirement to disclose impediments to its ability to so certify. As outlined in this Order, MS & Co. employees, and not just counsel, have participated in the discovery abuses. The prejudice to CPH from these failings cannot be cured. Even if all the script errors have been located and corrected, and MS & Co. has failed to show they have, and even if all of the email backup tapes have now been located, and MS & Co. has failed to show they have, the searches cannot be completed in time. The other discovery abuses outlined call into doubt all of MS & Co.'s discovery responses. *The judicial system cannot function this way.* Based on the foregoing and on the Court's March 1, 2005 Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, it is

ORDERED AND ADJUDGED that CPH's Renewed Motion for Entry of Default Judgment is Granted, in part. See Robinson v. Nationwide Mut. Fire Ins. Co., 887 So. 2d 328 (Fla. 2004); Mercer v. Raine, 443 So. 2d 944 (Fla. 1983); Precision Tune Auto Care, Inc. v.

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[17]For example, MS & Co. produced over 260 documents dealing with the Strong investigation over which it had previously claimed privilege once the Court announced its intention to conduct an in camera review; the Court found another 200 documents were not privileged after conducting its review, by its March 10, 2005 Order.

Radcliffe, 804 So. 2d 1287 (Fla. 4th DCA 2002); Rule 1.380 (b) (2) (C), Fla. R. Civ. P. Paragraphs 2 (excluding the last sentence thereof); 3 (excluding the portion of the last sentence beginning with "in order to close . . ."); 8-10, 11 (excluding everything after the first sentence); 12 (excluding all parts following "June 1998"); 13 (excluding the last sentence thereof); 14-27; 28 (excluding everything after "firm" in the second to last sentence thereof); 29-39; 41-52; 53 (excluding the second sentence thereof); 54-57; 58 (excluding "CPH and" in the second line thereof); 59-63; 64 (excluding the third line thereof); 65 (excluding the last sentence thereof); 66 (excluding the last sentence thereof); 67-70; 71 (excluding the first word of the last sentence and the remainder of that sentence after "material"); 72; 73 (excluding the first sentence thereof); 74 (excluding the words "CPH and" in the second to last sentence thereof); 75-81; 85; 86; 87 (excluding (g)); 90, and 91 (excluding (g)) of Plaintiff's Amended Complaint, as amended by the Court's Amended Order on Morgan Stanley's Motion to Dismiss, Motion to Strike, and Motion for More Definite Statement, shall be read to the jury and the jury instructed that those facts are deemed established for all purposes in this action. A copy of a redacted Amended Complaint is attached as Exhibit A. It is further

ORDERED AND ADJUDGED that the Court shall read to the jury a Statement similar to that attached as Exhibit A to the Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, but incorporating the relevant additional findings of this Order, and the jury will be instructed that it may consider those facts in determining whether MS & Co. sought to conceal its offensive conduct when determining whether an award of punitive damages is appropriate. See General Motors Corp. v. McGee, 837 So. 2d 1010 (Fla. 4th DCA 2002), rev. den. 851 So. 2d 728 (Fla. 2003). Counsel are each invited to submit proposed Statements. It is further

ORDERED AND ADJUDGED that CPH shall be entitled to an award of reasonable fees and costs incurred as a result of the Renewed Motion for Entry of Default Judgment and the violations of Court orders recited herein. The amount shall be determined at an evidentiary hearing following trial. It is further

ORDERED AND ADJUDGED that MS & Co. is relieved of any future obligation to

comply with the April 16, 2004 Agreed Order and the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s Motion to Participate in Search of Additional E-Mail Back-Up Tapes or Appoint Third Party to Conduct Search. It is further

ORDERED AND ADJUDGED that the pro hac vice admission of Thomas Clare is revoked. It is further

ORDERED AND ADJUDGED that the portions of CPH's Motion for Correction and Clarification of Order on CPH's Motion for Adverse Inference that seek to amend the body of that Order to correct clerical and spelling errors, as agreed to by counsel, is Granted, and the corrections deemed made to the body of the Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, by interlineation. In all other respects the remainder of the Motion for Correction and Clarification is declared moot.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 23rd day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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In April 1997, Morgan Stanley began serving as Sunbeam's investment banker. Morgan Stanley originally attempted to find someone to buy Sunbeam. When Morgan Stanley was unable to find a buyer, Morgan Stanley developed a strategy for Sunbeam to use its fraudulently-inflated stock to acquire a large company that Sunbeam would own and operate. Then, trading on Morgan Stanley's relationships with CPH's senior officers, Morgan Stanley found

Exhibit A

Coleman for Sunbeam. At the time of the sale to Sunbeam, Coleman was a leading manufacturer and marketer of consumer products for the worldwide outdoor recreation market, with annual revenues in excess of $1 billion.

...ion shares

After Sunbeam announced plans to acquire Coleman, Morgan Stanley agreed to underwrite a $750 million debenture offering for Sunbeam. Sunbeam needed the proceeds of that debenture offering to complete the acquisition of Coleman. As Sunbeam's investment banker and as the sole underwriter for the $750 million debenture offering, Morgan Stanley received detailed and specific information concerning Sunbeam's financial condition and performance. Morgan Stanley received information that directly contradicted Sunbeam's and Morgan Stanley's assertions to CPH that Sunbeam had undergone a successful turnaround and that its financial performance had dramatically improved. By no later than March 18, 1998, Morgan Stanley knew that Sunbeam's January and February 1998 sales were only 50% of January and February 1997 sales, and Morgan Stanley also knew that the shortfall was caused by Sunbeam's practice of accelerating sales which otherwise would have occurred in 1998 in order to boost Sunbeam's income in 1997. Although Morgan Stanley and Sunbeam previously had advised CPH that Sunbeam's sales were running ahead of analysts' expectations for the first quarter, Morgan Stanley decided not to correct those material misrepresentations. Instead, in March 1998, Morgan Stanley assisted Sunbeam in concealing the problems with Sunbeam's first quarter 1998 sales

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") directly or indirectly owned 44,067,520 shares — or approximately 82% — of Coleman prior to the transactions at issue. On March 30, 1998, Sunbeam acquired CPH's interest in Coleman. Sunbeam paid for the Coleman shares with 14.1 million shares of Sunbeam common stock and other consideration.

Defendant Morgan Stanley & Co., Inc. ("Morgan Stanley") is a highly sophisticated investment banking firm that provides a wide range of financial and securities services. Among other things, Morgan Stanley provides advice on mergers and acquisitions and raises capital in the equity and debt markets. Morgan Stanley served as Sunbeam's investment banker and as the underwriter of securities issued by Sunbeam in connection with the events at issue herein.

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Sunbeam Corporation ("Sunbeam") was a publicly-traded company headquartered in Delray Beach, Florida. Sunbeam designed and manufactured small household appliances and outdoor consumer products, which it marketed under the Sunbeam and Oster brand names. Sunbeam filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code in February 2001.

Albert Dunlap ("Dunlap") was the Chief Executive Officer of Sunbeam from July 1996 until June 1998 when he was terminated by Sunbeam's Board of Directors.

Russell Kersh ("Kersh") was the Executive Vice President of Sunbeam from July 1996 until June 1998 when he was terminated by Sunbeam's Board of Directors.

Arthur Andersen LLP ("Andersen") provided outside accounting services to Sunbeam through its West Palm Beach, Florida office. Andersen auditors provided information concerning Sunbeam's first quarter 1998 sales and earnings to Morgan Stanley.

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Sunbeam designed and manufactured outdoor and household consumer products, which it marketed under the Sunbeam and Oster brand names. Sunbeam's products included small kitchen appliances, humidifiers, electric blankets, and grills. Many of the country's leading retail stores, including Wal-Mart, Target, and Home Depot, were among Sunbeam's major customers.

Despite Sunbeam's well-known brands and strong customer base, its financial performance was disappointing. In 1994, Sunbeam earned $1.30 per share. In 1995, Sunbeam's earnings declined to $0.61 per share. In 1996, Sunbeam's earnings continued to suffer. On March 22, 1996, Sunbeam issued an early warning that its first quarter earnings would be well under analysts' expectations and down from first quarter 1995. Shortly after issuing the March 22 earnings warning, Sunbeam's Chief Executive Officer and two of Sunbeam's directors announced their resignations. Less than a week later, Sunbeam announced that its first quarter 1996 earnings had plunged 42% from first quarter 1995 levels. Sunbeam also announced that its second quarter 1996 earnings would be lower than its second quarter 1995 earnings.

Sunbeam's disappointing earnings caused its stock price to plummet. During 1995, the price at which Sunbeam's stock traded fell 40%, from a high of $25-1/2. In 1996, Sunbeam's stock price continued to decline until it reached a low of $12-1/4 in July.

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On July 18, 1996, Sunbeam's board of directors hired Albert Dunlap as Sunbeam's new Chief Executive Officer. Based upon brief terms as Chief Executive Officer of other publicly traded companies, including Scott Paper Company ("Scott Paper"), Dunlap was viewed as a "turnaround specialist" — that is, someone who could take a poorly performing company and significantly increase its value by "turning around" its financial performance. Because Dunlap touted the benefits from firing large numbers of employees and closing large numbers of plants, Dunlap became widely known as "Chainsaw Al." Dunlap lived in Boca Raton, Florida, and one of his first tasks at Sunbeam was to consolidate the company's six headquarters into one located in Delray Beach, Florida.

Immediately after joining Sunbeam, Dunlap hired Kersh as Sunbeam's Chief Financial Officer. Kersh had teamed with Dunlap for over 15 years, serving as a senior executive with Dunlap at other companies, including Scott Paper. Dunlap also brought in several other hand-picked executives to make up his senior management team.

Dunlap and his senior management team entered into employment agreements with Sunbeam. Under those agreements, Dunlap and his senior management team stood to make tens of millions of dollars if they were able to boost Sunbeam's apparent value and then sell Sunbeam to another company at a premium.

In order to convince other companies that they should want to purchase Sunbeam, Dunlap needed to improve Sunbeam's reported financial performance quickly and dramatically. It was, of course, no small task to transform Sunbeam from a poorly performing company, with weak sales and declining profits, into a strong company with growing sales and

16div-017535

soaring profits. In fact, as the world later learned, Dunlap did not achieve that change in Sunbeam's fortunes. Instead, Dunlap created the illusion of a dramatic turnaround at Sunbeam by engaging in what SEC officials subsequently described as a "case study" in financial fraud.

Dunlap had a three-step plan at Sunbeam. In the first step, Dunlap overstated Sunbeam's financial problems so that Sunbeam appeared to be in worse shape than it really was. After making Sunbeam look worse, Dunlap moved to step two, where he made Sunbeam look more valuable than it really was by inflating Sunbeam's sales and engaging in other earnings manipulations. In step three, Dunlap planned to sell Sunbeam to another company before it became apparent that the "improved" results were fictional. By doing so, Dunlap would make tens of millions of dollars and would be free to blame his successor for any subsequent problems.

Dunlap began implementing his strategy soon after his arrival at Sunbeam in 1996. Claiming to be engaged in a clean-up of Sunbeam's financial problems, Dunlap recorded artificially high reserves and booked expenses that should not have been recorded until later periods. Both of those actions made Sunbeam's financial condition appear worse than it really was, thus lowering the benchmark for measuring Sunbeam's performance in future years.

The overstated reserves also provided Dunlap a means by which he could inflate Sunbeam's future results during the second step of his plan. Dunlap later could "re-evaluate" and release millions of dollars from the overstated reserves to boost income in later periods. The income from released reserves contributed to the illusion of a rapid turnaround in Sunbeam's performance. Using inflated reserves to enhance income in future periods is a fraudulent practice and overstated reserves are commonly called "cookie jar" reserves.

After making Sunbeam look worse than it really was in 1996, Dunlap manipulated Sunbeam's sales and expenses in 1997 to create the false appearance of quarter after quarter improvement in financial performance. For example, Dunlap caused Sunbeam to inflate its sales by engaging in phony "bill and hold" sales. Under this practice, Sunbeam recognized revenues from "sales," even though customers did not actually pay for or even take delivery of the products, which continued to sit in Sunbeam's own warehouses. Although Sunbeam recorded the "bill and hold" sales as if they were current sales, they were, in reality, simply sales stolen from future quarters. In 1997, phony "bill and hold" sales added approximately $29 million in sales and $4.5 million in income.

Throughout 1997, Sunbeam also engaged in a sales practice known as "channel stuffing" — accelerating sales that otherwise would occur in a later period, sometimes by offering steep discounts or other extraordinary customer inducements. On the grand scale employed by Sunbeam, channel stuffing inevitably leads to major sales shortfalls in later periods when "stuffed" customers simply stop buying. Sunbeam's senior sales officer referred to Sunbeam's unsustainable practice of inflating performance through accelerated sales as the "doom loop."

Dunlap further "enhanced" Sunbeam's income in 1997 by causing Sunbeam to record a "profit" of $10 million from a sham sale of its warranty and spare parts business. Dunlap also made Sunbeam appear to be more successful than it really was by reaching into the "cookie jar," reversing inflated reserves, and recording $35 million as income. Sunbeam's 1997 profit margins also looked better than they really were because Dunlap already had recorded millions of dollars of 1997 expenses in 1996.

In October 1997, Dunlap announced that Sunbeam's "turnaround" was complete. Compared to the third quarter of 1996, Sunbeam's third quarter 1997 performance was remarkable. In the third quarter of 1996, Sunbeam had reported a loss of $18.1 million. In the third quarter of 1997, however, Sunbeam reported earnings of $34.5 million — an extraordinary turnaround from substantial losses to hefty profits. Sunbeam's combined results for the first three quarters showed dramatic improvement as well. Sunbeam reported that its profits for the first nine months were up tenfold over the same period the year before — from $6.5 million in 1996 to $67.7 million in 1997. Sunbeam's reversal of fortune caused a spectacular increase in the price of its stock. In July 1996, when Dunlap was hired, Sunbeam's shares traded at $12-1/4. By October 1997, Sunbeam's shares had risen to $49-13/16.

With steps one and two successfully completed, Dunlap was more than eager to complete the final step of his scheme: to sell Sunbeam to another company and collect tens of millions of dollars for himself before the outside world could learn the truth about Sunbeam's phony "turnaround." To accomplish that third and final step, Dunlap needed an investment banking firm

When Dunlap announced in early 1997 that he would begin interviewing investment bankers, Morgan Stanley immediately began pursuing the job. Although Morgan Stanley had no previous relationship with Sunbeam, one of Morgan Stanley's senior executives, William Strong, had worked closely with Dunlap on other large transactions between 1986 and 1993, when Strong was employed by Salomon Brothers.

Morgan Stanley knew that it was competing with other investment bankers, including Mark Davis, for Dunlap's business. Davis was the head of the mergers and acquisitions department at Chase Securities and had worked previously with Strong at Salomon Brothers. Davis had a very strong relationship with Dunlap, and Davis had served as Dunlap's investment advisor on numerous transactions, including Dunlap's sale of Scott Paper. Shortly after arriving at Sunbeam, Dunlap hired Davis to handle the sale of Sunbeam's furniture business.

Morgan Stanley put together a team headed by its Vice Chairman, Bruce Fiedorek, and Strong. Beginning in April 1997, Morgan Stanley's personnel traveled to Sunbeam's offices in Delray Beach, Florida to study Sunbeam and woo Dunlap. After months of uncompensated work, in September 1997, Morgan Stanley finally persuaded Dunlap to name Morgan Stanley as Sunbeam's exclusive investment banker. Dunlap instructed Morgan Stanley to find a buyer for Sunbeam. Morgan Stanley knew that if it failed to deliver a major transaction, Morgan Stanley would not be compensated for the extensive work it had performed for Sunbeam. Morgan Stanley also knew that Davis and Chase Securities were standing by — ready and willing to reclaim their position as Dunlap's investment banker of choice.

Throughout the fall of 1997, Morgan Stanley aggressively searched for a buyer for Sunbeam. Morgan Stanley put together extensive and detailed materials to use in marketing Sunbeam to potential buyers. Morgan Stanley pitched the transaction to more than 10 companies — including Gillette, Colgate, Sara Lee, Rubbermaid, Whirlpool, and Black & Decker — that Morgan Stanley hoped might have an interest in acquiring Sunbeam. Morgan Stanley, however, was not able to find a buyer.

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As 1998 approached, the pressure on Dunlap increased. Dunlap was aware that Sunbeam would be unable to sustain the appearance of a successful turnaround in 1998 because Sunbeam had stolen sales from 1998 to boost 1997's numbers and the "cookie jar" reserves had been depleted. Dunlap needed a way to conceal Sunbeam's phony turnaround until a buyer could be found. Morgan Stanley provided the solution to Dunlap's problem.

Morgan Stanley knew that its failure to find a buyer for Sunbeam could prove fatal to the relationship it had worked so hard to establish with Dunlap. As the pressure on Dunlap increased, the pressure on Morgan Stanley increased as well. Although Morgan Stanley was not able to find a buyer for Sunbeam, Morgan Stanley responded with a plan that would allow Dunlap to conceal his fraud. Morgan Stanley recommended that Sunbeam acquire other companies, using Sunbeam's stock, which was fraudulently inflated, as the "currency" that would be used to pay for the acquisitions.

Morgan Stanley's strategy was doubly deceptive. First, Morgan Stanley's acquisition strategy would allow Dunlap to consolidate Sunbeam's results with those of the newly-acquired companies. That would help Dunlap camouflage Sunbeam's results and make it difficult to detect any shortfall in Sunbeam's performance. Dunlap simply could label any problems that were detected as attributable to the poor performance of the acquired companies or as a temporary "blip" caused by the distraction of integrating the acquired companies with Sunbeam. Second, Morgan Stanley's strategy would allow Dunlap to take new massive restructuring charges (purportedly relating to the acquisitions) and thus create more "cookie jar" reserves that could be tapped to bolster the future earnings of the combined companies.

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Morgan Stanley identified Coleman as one of the key potential acquisition targets. CPH owned 82% of Coleman's stock. Morgan Stanley searched the ranks of its investment bankers to locate those with the best access to CPH. Drawing on relationships between some of Morgan Stanley's investment bankers and senior CPH officers, Morgan Stanley set about trying to persuade CPH to sell its interest in Coleman to Sunbeam — and, most importantly, to accept Sunbeam stock as consideration.

Morgan Stanley laid the groundwork for a meeting to take place in December 1997 in Palm Beach, Florida between Dunlap and Kersh and representatives of CPH. In advance of the Palm Beach meeting, Morgan Stanley provided materials to Sunbeam to prepare Sunbeam for the meeting. Morgan Stanley also met with Kersh and other Sunbeam personnel to prepare for the Palm Beach meeting. However, Dunlap nearly scuttled Morgan Stanley's carefully crafted plan at the outset. During the December 1997 Palm Beach meeting, when CPH rejected Dunlap's initial all-stock offer, Dunlap became so angry that he cursed and ranted at the CPH representatives and stormed out.

Dunlap's tantrum appeared to kill any chance that CPH would sell its interest in Coleman to Sunbeam. Morgan Stanley, however, worked to revive the discussions. Drawing again on Morgan Stanley's relationships with CPH officers, Morgan Stanley was able to restart the discussions with CPH with the promise that Dunlap would be kept away from the negotiating table. Thereafter, Morgan Stanley, through Managing Directors Strong, James Stynes, and Robert Kitts, led the discussions with CPH on Sunbeam's behalf.

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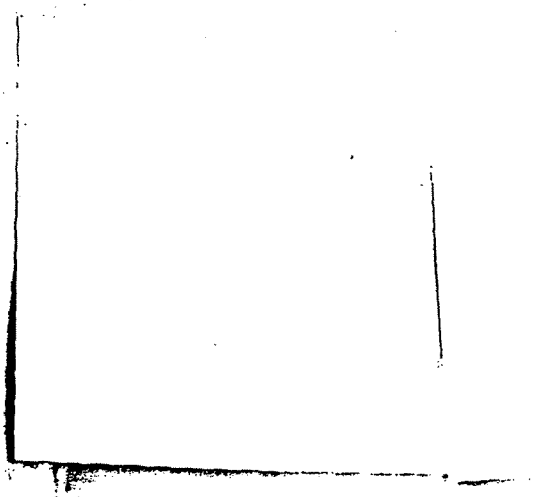
Morgan Stanley knew that it had to persuade CPH not only to sell Coleman, but also to accept Sunbeam stock — ultimately, 14.1 million shares of Sunbeam stock — as a major part of the purchase price. During the course of negotiations, Morgan Stanley prepared and provided CPH with false financial and business information about Sunbeam designed to create the appearance that Sunbeam was prospering and that Sunbeam's stock had great value. For example, Morgan Stanley provided CPH with false 1996 and 1997 sales and revenue figures, as well as false projections that Sunbeam could not expect to achieve. Together, in face-to-face discussions, Morgan Stanley and Sunbeam assured CPH that (a) Sunbeam would meet or exceed its first quarter 1998 earnings estimates; (b) analysts' 1998 earnings estimates for Sunbeam were correct; and (c) Sunbeam's plan to earn $2.20 per share in 1998 was easily achievable and probably low. Morgan Stanley and Sunbeam also falsely assured CPH that Sunbeam's "early buy" sales program would not hurt Sunbeam's future revenues. However, the "early buy" program was one of Sunbeam's revenue acceleration programs — and the devastating effects of Sunbeam's revenue acceleration programs already had begun to materialize at Sunbeam. Sunbeam's January and February 1998 sales were down drastically, although those results were not disclosed to CPH or the public. To the contrary, Morgan Stanley and Sunbeam together specifically advised CPH that Sunbeam's first quarter 1998 sales were "tracking fine" and running ahead of analysts' estimates.



On February 27, 1998, Sunbeam's Board of Directors met at Morgan Stanley's offices to consider the purchase of Coleman, as negotiated by Morgan Stanley.

At the February 27, 1998 meeting, Morgan Stanley made an extensive presentation to Sunbeam's Board concerning the proposed transaction. Numerous Morgan Stanley representatives, including Managing Directors Strong, Kitts, Stynes, Ruth Porat, and Vikram Pandit, attended the meeting.

Morgan Stanley presented Sunbeam's board with Morgan Stanley's opinion on the value of Coleman. Using a discounted cash flow analysis, which Morgan Stanley represented was the best gauge of stand-alone economic value and the best method of capturing the unique value of Coleman, Morgan Stanley valued CPH's Coleman stock at a range of $31.06 to $53.24 per Coleman share. CPH's 44,067,520 Coleman shares were worth, therefore, between $1.369 billion and $2.346 billion.

Following Morgan Stanley's presentation, Sunbeam's Board of Directors voted to acquire Coleman on the very favorable terms that Morgan Stanley had negotiated.

Morgan Stanley spent the following weekend developing Sunbeam's public relations strategy to announce the Coleman transaction. Morgan Stanley scripted the points for Dunlap to make in a conference call with analysts. Morgan Stanley also crafted a list of "key media messages" for Dunlap tc use in his communications with the press. On Sunday, March 1, 1998, Morgan Stanley spoke with a reporter for the Wall Street Journal to inform him that Sunbeam would announce its acquisition of Coleman the following morning.

Sunbeam announced its acquisition of Coleman on Monday, March 2, 1998, prior to the opening of the financial markets. Consistent with Morgan Stanley's valuation, investors viewed Sunbeam's purchase of Coleman — and the price that Sunbeam had paid — very favorably. The day before the acquisition was announced, Sunbeam's stock closed at $41-3/4. In the days following Sunbeam's announcement of the transaction, Sunbeam's stock rose approximately 25%, to a high of $52.

Dunlap knew that Sunbeam needed to raise funds to pay the cash portion of the acquisition consideration. Dunlap also knew that Sunbeam needed cash to purchase two other smaller companies in addition to Coleman. Morgan Stanley recommended that Sunbeam raise funds through a $500 million offering of convertible subordinated debentures. To assure the offering's success, Morgan Stanley lent its name to the offering. Indeed, Morgan Stanley agreed to serve as the sole underwriter for the offering.

The money raised from the sale of the debentures was used by Sunbeam to complete the acquisition of Coleman.

Unbeknownst to CPH or the public, Sunbeam's first quarter 1998 sales were a small fraction of the financial community's expectations for the quarter. If Dunlap could consolidate Sunbeam's sales with Coleman's sales, Dunlap knew that he could obscure Sunbeam's actual first quarter sales. As a result, Dunlap was especially anxious to complete the acquisition of Coleman before Sunbeam announced its first quarter 1998 sales. Indeed, the success of the scheme depended upon Sunbeam's ability to complete the Coleman acquisition before Sunbeam's first quarter results

were announced. To satisfy Dunlap's objectives, Morgan Stanley moved up the launch date of the offering.

The debentures were marketed to investors at a series of "road show" meetings and conference calls arranged by Morgan Stanley. Morgan Stanley prepared and distributed a memorandum for its sales force to use in marketing the debentures to investors. Morgan Stanley also developed the script for Dunlap and Kersh to deliver during the road show. In those materials, Morgan Stanley misrepresented Sunbeam's financial performance and emphasized Dunlap's purported "turnaround" accomplishments.

Morgan Stanley launched the debenture offering with a research analyst presentation to the Morgan Stanley sales force. As part of Morgan Stanley's growing relationship with Sunbeam, one of Morgan Stanley's top-rated research analysts planned to initiate equity coverage of Sunbeam. That Morgan Stanley analyst had modeled values for Sunbeam's acquisition of Coleman that were higher than even Sunbeam's management had predicted.

Although Morgan Stanley initially planned to sell $500 million worth of debentures, Morgan Stanley's efforts were so successful that the size of the offering was increased to $750 million on March 19, 1998 — the day of the last road show. The debentures were sold to investors nationwide, including investors based in Florida.

As Sunbeam's investment banker and the sole underwriter for the debenture offering, Morgan Stanley had a duty to investigate Sunbeam's finances and business operations.

Morgan Stanley, which had been working hand-in-hand with Sunbeam for

almost a year and had traveled to Sunbeam's Florida offices, repeatedly asserted that it had satisfied that duty.

Strong, who was one of the senior Morgan Stanley investment bankers involved, has admitted in sworn testimony that he may have had more than 100 telephone conversations with Dunlap and Kersh (whose offices were in Sunbeam's Delray Beach headquarters) and that Strong was "sure" that he would have been apprised of Sunbeam's financial performance during the first two months of 1998.

With the $750 million debenture offering and the Coleman transaction set to close at the end of March 1998, Sunbeam's Florida-based outside auditors were shocked that Morgan Stanley had not asked them about Sunbeam's financial performance for first quarter 1998. Sunbeam's auditors were alarmed because Sunbeam's first quarter results were a disaster, but Dunlap, Kersh, and Morgan Stanley were telling CPH and the investing public,

that Sunbeam's turnaround was a success, that Sunbeam's sales for the first quarter of 1998 were ahead of the expectations of outside financial analysts, and that Sunbeam was poised for record sales.

On March 17, Sunbeam's auditors forced the issue. From their Florida offices, Sunbeam's auditors sent Morgan Stanley a letter reporting that Sunbeam's net sales through January 1998 were down 60% — $28 million in January 1998, as compared to $73 million in January 1997. The March 17 letter explained that the decline was "primarily due to the . . . new early buy program for grills which accelerated grill sales into the fourth quarter of fiscal 1997."

The next day, Morgan Stanley was faxed a schedule from Sunbeam's Florida office that showed that Sunbeam's January and February 1998 net sales totaled $72 million, an amount that was 50% lower than Sunbeam's January and February 1997 net sales of $143.5 million.

Based on information that Sunbeam and Morgan Stanley had disseminated, Wall Street analysts were anticipating that Sunbeam's first quarter 1998 net sales would be in the range of $285 million to $295 million. Sales in that range would have been approximately 15% higher than first quarter 1997 sales. Sunbeam's January and February 1998 sales, however, totaled barely 25% of $285 million. As Sunbeam's outside auditors advised Morgan Stanley in writing, the sales drop-off was caused by Sunbeam's sales acceleration program. The information put into Morgan Stanley's hands on March 17 and March 18 showed that Morgan Stanley's and Sunbeam's assertions to CPH and other investors were false. Contrary to what Morgan Stanley and Sunbeam had represented, Sunbeam had not undergone a successful turnaround, Sunbeam's financial performance had not dramatically improved, and Sunbeam's performance in 1998 was not better than Wall Street analysts' expectations. It was imperative, therefore, that the truth be kept from CPH until the Coleman transaction closed at the end of March 1998.

Morgan Stanley did not disclose Sunbeam's disastrous first quarter, Morgan Stanley did not insist that Sunbeam disclose its disastrous first quarter, Morgan Stanley did not correct any of the false and misleading statements it and Sunbeam had made to CPH about Sunbeam's business or performance, and Morgan Stanley did not suspend any of the critical transactions that were scheduled to close in the next two weeks. Instead, with Morgan Stanley's knowledge and assistance, Sunbeam prepared and issued a false press release on March 19, 1998 that affirmatively misstated and concealed Sunbeam's true condition.

The March 19, 1998 press release stated: "Sunbeam Corporation . . . said today that it is possible that its net sales for the first quarter of 1998 may be lower than the range of

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Wall Street analysts' estimates for $285 million to $295 million, but net sales are expected to exceed 1997 first quarter net sales of $253.4 million. . . . The shortfall from analysts' estimates, if any, would be due to changes in inventory management and order patterns at certain of the Company's major retail customers. The Company further stated that based on the strength of its new product offerings and powerful brand names, it remains highly confident about the overall sales outlook for its products for the entire year."

As Morgan Stanley was fully aware, the March 19, 1998 press release was false, misleading, and failed to disclose material information. The March 19, 1998 press release failed to disclose Sunbeam's actual January and February 1998 sales or the true reasons for the poor results. Instead, the press release held out the false possibility that Sunbeam still could achieve sales of $285 million to $295 million and suggested that, if any shortfall occurred, that shortfall would be due to the fact that certain retailers had decided to defer first quarter purchases to the second quarter. The press release also assured that Sunbeam at least would exceed first quarter 1997 net sales of $253.4 million. Based on information that Morgan Stanley had in its hands on March 18, 1998, it was obvious that Sunbeam would not achieve sales of $285 million to $295 million and that Sunbeam's first quarter 1998 sales would be below its first quarter 1997 numbers. To simply meet 1997 first quarter sales, Sunbeam needed sales of $123.3 million over the 12 remaining days of the quarter — an average of $10.28 million per day. Sales of $10.28 million per day would be 306% more than the average per day sales in March 1997, and 281% more than the average per day sales for the first 17 days of March 1998. Furthermore, Morgan Stanley knew that the shortfall from analysts' estimates was not caused by retailers' deciding to defer purchases from the first quarter of 1998 to the second quarter, as the press release indicated. Rather, as Sunbeam's outside auditors had

advised Morgan Stanley in writing, the collapse in first quarter sales was caused by Sunbeam's acceleration of 1998 sales into the fourth quarter of 1997.

After Sunbeam's false press release was issued, Morgan Stanley stood arm-in-arm with Sunbeam while Dunlap and Kersh told CPH, analysts, and investors that the March 19, 1998 release was a purely cautionary statement because some first quarter 1998 sales might simply "spillover" into the second quarter and that Sunbeam still believed that it actually would meet analysts' estimates of $285 million to $295 million in first quarter 1998 sales.

Morgan Stanley knew that a full and truthful disclosure of Sunbeam's first quarter sales would doom the debenture offering, which was scheduled to close on March 25, 1998,

As Morgan Stanley was fully aware, the written contract between CPH and Sunbeam gave CPH the express legal right to refuse to close the sale if there was a material adverse change in Sunbeam's "business, results of operation or financial condition."

Furthermore, if the transactions did not close, Morgan Stanley would not be paid its $10.28 million fee for the Coleman acquisition or its $22.5 million fee for underwriting the subordinated debenture offering. Morgan Stanley also knew that Sunbeam would promptly replace Morgan Stanley with another investment banking firm – such as the Chase Securities team led by Mark Davis.

16div-017549

Sunbeam's outside auditors already had made it perfectly clear to Morgan Stanley that Sunbeam's first quarter 1998 sales were a disaster,

One of Sunbeam's senior outside auditors, Lawrence Bornstein, has testified under oath that on March 19, 1998, he told Morgan Stanley's John Tyree that the statement in Sunbeam's March 19, 1998 press release — that Sunbeam would at least exceed first quarter 1997 sales of $253.4 million — was not credible: "Just do the math . . . they've done a million dollars in sales the first 70 days of the year and now they need to do $10 million worth of sales for the next . . . I think it was 11 days . . . I mean, something ridiculous." Bornstein also told Tyree: "I've been to every shipping dock domestically, I've been to Hattiesburg, I've been to Neosho, I've been to Mexico City, and I don't think these guys can physically ship this much stuff."

Morgan Stanley knew that the March 19 press release was false and misleading. Despite that knowledge and Bornstein's explicit statements, Morgan Stanley continued with its preparations to close the debenture offering on March 25, 1998 and the Coleman acquisition on March 30, 1998.

As part of those preparations, on March 24, 1998, Morgan Stanley's Tyree spoke by telephone with Sunbeam's Kersh, who was located in Sunbeam's Delray Beach offices, to obtain an updated report concerning Sunbeam's first quarter performance. By the time of that March 24, 1998 call, Sunbeam had fallen even further behind first quarter 1997 sales. As of March 18, 1998, Sunbeam needed to achieve average sales of $10.28 million per day, over 12 days, to reach

16div-017550

first quarter 1997 sales. Sunbeam's sales between March 18 and March 24, 1998 had averaged only $6.81 million per day — well short of the $10.28 million per day that Sunbeam needed to achieve. Sunbeam's March 18 through March 24, 1998 sales were further proof that Sunbeam's March 19, 1998 press release was false and that Sunbeam would not achieve first quarter 1998 sales in excess of first quarter 1997 sales.

Morgan Stanley also knew no later than March 25, 1998, if not much earlier, that Sunbeam's earnings for the first quarter of 1998 were going to miss Wall Street analysts' earnings expectations, which were in the range of $0.28 to $0.31 per share (excluding one-time charges). Sunbeam's outside auditors advised Morgan Stanley on March 25 that Sunbeam had suffered a $41.19 million loss during the first two months of 1998, including a one-time charge of $30.2 million. Even excluding that one-time charge, Sunbeam's loss for the first two months was $0.13 per share. To achieve first quarter 1998 operating earnings of $0.28 per share, which were at the low end of analyst expectations, Sunbeam needed to realize a profit of $35.5 million during March 1998 alone. A net profit of $35.5 million in March was 500% more than Sunbeam's net profit for the entire first quarter of 1997. In fact, Sunbeam's first quarter 1998 earnings fell far short of Wall Street's expectations. Sunbeam's first quarter earnings were material,

Having directly participated in misleading CPH Morgan Stanley had a duty to disclose the true facts before the closing of the debenture offering and the Coleman acquisition. Morgan Stanley also could have required Sunbeam to postpone the closings of

16div-017551

those transactions until the necessary disclosures were made. Morgan Stanley did neither. Instead, Morgan Stanley marched forward and closed the $750 million debenture offering on March 25, 1998, which was needed to close the Coleman transaction, and assisted Sunbeam in closing the acquisition of Coleman on March 30, 1998.

Morgan Stanley received $22.5 million for the subordinated debenture offering and $10.28 million for the Coleman acquisition. Morgan Stanley would have received nothing if the transactions had failed to close.

On April 3, 1998 — just four days after the Coleman transaction closed — Sunbeam announced that sales for the first quarter of 1998 would be approximately 5% below the $253.4 million in sales that Sunbeam reported in the first quarter of 1997. In other words, Sunbeam was expecting sales in the range of $240 million. That sales shortfall was shocking news, particularly in view of assurances provided by Sunbeam both in and after its March 19, 1998 press release that $285 million to $295 million of sales was still a real possibility. The April 3, 1998 press release also disclosed that Sunbeam expected to show a loss for the quarter, although the release did not disclose the magnitude of the loss or how much of the loss was attributable to operating earnings as opposed to one-time charges. Sunbeam's news stunned . . . the market. On April 3rd, Sunbeam's stock price dropped 25% — from $45-9/16 to $34-3/8.

. . . Sunbeam's actual first quarter 1998 performance was even worse than Sunbeam disclosed on April 3, 1998. The April 3, 1998 release indicated that Sunbeam's first quarter sales were in the range of $240 million. In fact, Sunbeam's first quarter sales were $224.5

16div-017552

million. Sunbeam obscured the true shortfall by extending its quarter from March 29 to March 31, 1998 — thereby adding two more days of Sunbeam sales. Sunbeam also failed to disclose that it had included two days of Coleman sales after the Coleman transaction closed on March 30. Further, Sunbeam inflated first quarter 1998 sales with $29 million of new phony "bill and hold" sales.

75. Just as Sunbeam's first quarter 1998 sales had been a disaster, so, too, were Sunbeam's first quarter 1998 earnings. Morgan Stanley and Sunbeam had represented to CPH that Sunbeam would achieve or exceed analyst first quarter 1998 earnings estimates. At the time of that representation, the consensus among analysts was that Sunbeam would enjoy first quarter 1998 earnings of $0.33 per share. However, on May 9, 1998, Sunbeam disclosed that it would record a first quarter loss of $0.09 per share (excluding one-time charges) — more than $0.40 per share lower than CPH had been told to expect.

76. Within weeks, Dunlap's fraudulent scheme began to unravel. In June 1998, after a number of news articles critical of Sunbeam's practices, Sunbeam's Board of Directors launched an internal investigation. That investigation led quickly to the firing of Dunlap and Kersh, and, subsequently, to a restatement of Sunbeam's financial statements for 1996, 1997, and the first quarter of 1998.

[illegible]

77. As detailed above, Morgan Stanley participated in a scheme to mislead CPH and others and cover up the massive fraud at Sunbeam until Morgan Stanley and Sunbeam could close the purchase of Coleman. Morgan Stanley provided CPH with false information concerning Sunbeam's 1996 and 1997 financial performance, its business operations, and the value of Sunbeam's stock. Morgan Stanley also actively assisted Sunbeam in concealing Sunbeam's

16div-017553

disastrous first quarter 1998 sales and earnings and the true reasons for Sunbeam's poor performance.

Morgan Stanley knew that its statements to CPH were materially false and misleading and omitted the true facts.

Morgan Stanley intended that CPH rely on Morgan Stanley's representations concerning Sunbeam.

As detailed above, Dunlap engaged in a fraudulent scheme to inflate the price of Sunbeam's stock by improperly manipulating Sunbeam's 1996 and 1997 performance, by falsely asserting that Sunbeam had successfully "turned around," and by concealing the collapse of Sunbeam's first quarter 1998 sales and earnings and the reasons for Sunbeam's first quarter 1998 performance.

86. As detailed above, Morgan Stanley knew of Dunlap's fraudulent scheme and helped to conceal it until after Sunbeam could close the purchase of Coleman.

16div-017554

As detailed above, Morgan Stanley provided substantial assistance to Dunlap and Sunbeam, including: concealing Sunbeam's first quarter 1998 sales collapse; assisting with the false March 19, 1998 press release; arranging road shows and meetings with prospective debenture purchasers at which Morgan Stanley, Dunlap, and others made false statements concerning Sunbeam's financial condition and business operations; preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam's financial condition and business operations; providing CPH with false financial and business information concerning Sunbeam; scripting Dunlap's false public statements concerning Sunbeam's acquisition of Coleman;

and underwriting the $750 million convertible debenture offering, proceeds from which were used to fund Sunbeam's purchase of Coleman.

16div-017555

As detailed above, Morgan Stanley conspired with Dunlap and other senior Sunbeam executives to conceal the truth about Sunbeam's financial performance and business operations.

As detailed above, Morgan Stanley committed overt acts in furtherance of the conspiracy, including: concealing Sunbeam's first quarter 1998 sales collapse; assisting with the false March 19, 1998 press release; arranging road shows and meetings with prospective debenture purchasers at which Morgan Stanley, Dunlap, and others made false statements concerning Sunbeam's financial condition and business operations; preparing and disseminating the preliminary and final offering memoranda for the subordinated debenture offering, both of which contained false information concerning Sunbeam's financial condition and business operations; providing CPH with false financial and business information concerning Sunbeam; scripting Dunlap's false public statements concerning Sunbeam's acquisition of Coleman;

and underwriting the $750 million convertible debenture offering, proceeds from which were used to fund Sunbeam's purchase of Coleman.

16div-017556

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IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. VOLUME 49

MORGAN STANLEY & CO., INC.,

Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Monday, March 28, 2005
9:35 a.m. - 12:10 p.m.

EXHIBIT
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to the questions Your Honor was asking.

THE COURT: Okay.

MR. SOLOVY: I want to emphasize when we drafted this, Your Honor, we didn't add facts. We took these from your order.

THE COURT: No, I understand that. Okay. I need to go back and see if we can shorten it some by just incorporating the concept that Morgan Stanley didn't alert -- because it's sort of hiding the offensive conduct from your client.

MR. SCAROLA: I'm sorry. I missed that, Your Honor.

THE COURT: I need to go back and figure out -- I mean -- I need to think about it some. It strikes me that it's bad not to tell the court things that the court is supposed to know, but I think we're talking here for punitive damages is -- it's bad not to tell the opposing party things that the opposing party had a right to know. Because you're the party they're trying to hide it from.

MR. SOLOVY: I think it's both, Your Honor.

THE COURT: I'm saying to the extent it's the court, again, I don't want a discovery

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

VOLUME 75

MORGAN STANLEY & CO., INC.,

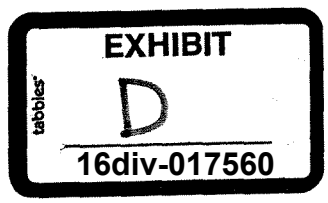
Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Tuesday, April 19, 2005
9:20 a.m. - 12:10 p.m.



defend the case in which witnesses can mix and match artificial facts inconsistent with their own testimony with real facts we're then not permitted to explore.

THE COURT: To the extent that's a renewed motion for a mistrial, I would deny it. Not only is Morgan Stanley's actions what placed it in the position it finds itself but Morgan Stanley's actions has deprived plaintiff of a the very evidence it would need on these things. To the extent Morgan Stanley has manipulated the evidence in this case, it is ludicrous that Morgan Stanley would suggest that somehow we still have the opportunity to have a fair fact (sic) on those facts. I mean fair trial. It's not going to happen. I understand you all disagree.

Morgan Stanley deliberately manipulated the evidence in this case. And to the extent Morgan Stanley continually says we now want a trial on the merits, Morgan Stanley by its actions has totally foreclosed that as a possibility. I understand you disagree.

MR. HANSEN: With all respect, I do agree with what you said is beyond what your prior

ruling said in terms of Morgan Stanley supposedly making evidence of particular items of relevance to this case unavailable. I don't believe there's been any finding on that, nor would there be any evidence to support such a finding.

THE COURT: If you go back to the order I did on the adverse inference and renewed motion on default judgment, what I concluded was a finding that Morgan Stanley deliberately chose to hide evidence in this case. I understand you disagree, but, again, Morgan Stanley by its actions has conclusively foreclosed any possibility this action, very unfortunately, is ever going to be determined finally on its own merits.

MR. HANSEN: Was that "never," Your Honor? I didn't hear you.

THE COURT: Yes. Morgan Stanley has foreclosed the possibility that this case will ever be determined on its own merits. And, you know, I'm sorry that happened. Everybody is sorry that happened, but, quite honestly, it did.

I will see you all after lunch.

IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 114

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Friday, May 13, 2005

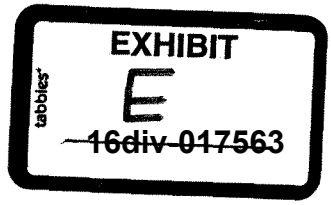
Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

9:30 a.m. to 12:00 p.m.



tort that's here, not for litigation misconduct that Morgan Stanley engaged in.

These discovery shortcomings that Your Honor found carelessness and incompetence and perhaps even a willful attempt to conceal or falsely -- but these aren't part of the wrong for which this punishment is being sought.

THE COURT: Let me ask you this: First of all, in the averse inference order I did make a finding that there was obviously an attempt to hide discovery in this case. But, two, what would also be the response to the argument that why would you guys do this unless there was something you were trying to hide? Sort of a common sense argument, why would you do this?

MS. BEYNON: I think it's why we were trying to hide. I think it would go to what Your Honor has previously looked at. And were we trying to hide facts from CPH in this case or was there some other reason to try to --

THE COURT: What other reason could they be other than -- I guess I'm still flummoxed that in November Morgan Stanley didn't come up and fess up and say, gosh, we were creating this whole e-mail archive and we shouldn't have

screwed up and shouldn't have misled Plaintiff, we're really sorry, give us another eight months and we'll make good.

MS. BEYNON: Obviously, we weren't representing Morgan Stanley at this time.

THE COURT: I'm not talking about you, and now I'm talking about the corporate not the attorneys.

MS. BEYNON: I don't think there has been a finding -- Your Honor has not allow -- conducted that kind of inquiry that would allow anyone to conclude why Morgan Stanley has engaged in this conduct.

Frankly, Your Honor has concluded that the facts were hidden, that the discovery is not produced. Has determined what it is that's been produced, but it hasn't made any inquiry into why it hasn't been produced. I think that in order for a jury to find why it hasn't been produced we would have to have a hearing on that issue. We should put up witnesses to --

THE COURT: Do you want to make a proffer why it wasn't produced? Because they may accept it.

MS. BEYNON: We submitted a proffer

collateral issue that should not be injected into this case at all.

The only relevant issue would be: Did we attempt expressly to hide information, key information from Plaintiffs in this case in a way that prevented them from getting the evidence that they needed?

And all that's been shown here has been a general failure to produce e-mail. There has been no showing at all that this was targeted to prevent CPH from getting evidence in this case.

As you know, this very e-mail issue has had consequences for other lawsuits that Morgan Stanley is involved. This was not a directed-at-this-case effort.

THE COURT: Let me ask you this: Are you telling me -- it strikes me it's one of two things, either Morgan Stanley was specifically concerned about this case and sought to hide discovery into its e-mails, or Morgan Stanley simply has a corporate policy of preventing full discovery. And I think you're telling me it's the latter and that that's the defense --

MS. BEYNON: I'm telling you neither, Your Honor. Morgan Stanley does not have a corporate

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. VOLUME 80

MORGAN STANLEY & CO., INC.,

Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Thursday, April 21, 2005
9:30 a.m. - : P.m.

EXHIBIT
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convicted. Do you want -- has never acknowledged.

MR. HANSEN: That's not good enough. I don't think that's even close to good enough. That is only part of way. Morgan Stanley has not engaged in any criminal activity.

THE COURT: Again, I can't give that.

MR. HANSEN: Mr. Perelman -- I don't think that you can possibly eliminate --

THE COURT: Please understand I've denied the motion for mistrial. What we're talking about now is the instruction. Never charged with a crime. Never convicted of a crime. Do you want never acknowledged?

MR. HANSEN: Has never acknowledged any wrongdoing; has never acknowledged any wrongdoing.

THE COURT: Any objection to that?

MR. SCAROLA: Yes.

THE COURT: Why?

MR. SCAROLA: Because there has been an acknowledgment of wrongdoing as a matter of law in this case.

THE COURT: That's why I'm asking if you want that because it might come back to bite you

on the punitive damages. That's the only reason I'm asking.

MR. HANSEN: The facts have been deemed. We're not admitting those are true. I do want that --

THE COURT: Never convicted, never charged with a crime in connection with the transaction, never committed -- never convicted of a crime in connection with the transaction, has consistently denied any wrongdoing in connection with the transaction.

MR. HANSEN: Right.

MR. WEBSTER: It could also be interpreted by the jury the fact that we were sued by somebody else, we settled, acknowledging we did something wrong. They should be instructed we were not sued by anybody else, we have not settled with anybody else.

THE COURT: No, because a crime is not -- do you want never --

MR. WEBSTER: If you just talk about the crime, they can interpret that there was a civil suit.

MR. HANSEN: They never acknowledged --

THE COURT: -- any wrongdoing in connection

CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

VS.

MORGAN STANLEY & CO., INC.,

Defendant.

DEPOSITION OF ROBERT J. SAUNDERS
New York, New York
Tuesday, February 10, 2004

Reported by:
Robert X. Shaw, CSR
CSR NO. 817
JOB NO. 157127

Saunders

A. That is correct.
Q. And did the new e-mail archive system enhance capabilities with respect to prior backup or does it only affect going forward backup?
A. The way it was built was for going forward backups.
Q. Has Morgan Stanley undertaken any efforts to enhance its ability to restore backup from the period January 2001, historically?
A. Could you rephrase your question?
Q. Sure. With respect to backup dated January 2001 and previously, does Morgan Stanley have any new capabilities to restore and search that e-mail?
MS. BROWN: Objection. Vague.
A. There are no new capabilities to search that e-mail.
Q. How about restoration? Is Morgan Stanley in a position today to restore backup from, say, 2000 when it was not in that position, say, in 2001?
MS. BROWN: Objection. Facts not in

Saunders

evidence.
A. Can you restate the question? I don't understand the question.
Q. Let me put it in the simplest way that I can.
Has Morgan Stanley's ability to restore e-mail improved over the past several years?
A. You are calling for a characterization. The answer is, our relationship with NDCI, we have worked with an external vendor to be able to handle requests from legal in a timely manner to restore e-mail for people and, in some cases, you know, a number of requests.
Q. I read about the Nmatrix capability. Is that something offered by NDCI or is that a different capability?
A. Nmatrix is, and I am not the expert on Nmatrix, it is more of a relationship with legal. My understanding is that they will take restored e-mail information on CD or DVD and they are able to apply a process to make it easier for legal-type folks to get at that

Saunders

information. For example, D-duplicating e-mails from users in boxes or folders.
Q. So that the associates have fewer e-mails to review?
A. Sure.
Q. As you understand it, Nmatrix is a capability that improves the searching and review of e-mails; it is not a restoration process?
A. That is my understanding.
Q. NDCI is the entity that provides the restoration capability?
A. Yes.
Q. Can you explain for me, again to the extent that you can do it in lay terms, that would be great, the restoration process, to the extent that you understand it?
A. To be clear, the e-mail restoration process?
Q. Yes. Focus on that.
A. As we --
Q. Actually, I do not want to interrupt.
I will back up even further.

Saunders

Let's assume I wanted a tape restored from Recall. Can you take me through the process whereby the tape gets from Recall and then is restored?
A. Okay. A request is made of Recall for a specific tape by members of my team, the backup and restore group.
That tape would be delivered to Morgan Stanley's site, generally as part of a larger request, and it is very, you know, infrequent, to be able to request one tape.
As I indicated earlier, the data partitions are large, and it is not one tape per day, it is one tape per week, or there could be many tapes a week, depending on the volume and the number of users on that particular server.
So, the tapes would be brought back on site. The backup and restore personnel would pull the appropriate tape. They would verify that its label matched, you know, the original request.
That tape would then be shipped to NDCI, and NDCI would, again, verify that the

IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 35

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Monday, March 14, 2005

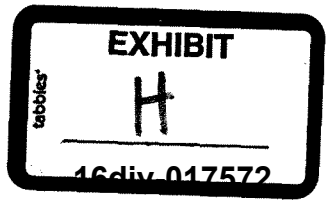
Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

1:30 p.m. to 4:30 p.m.



Q. Do you recall the approximate number of tapes?

A. 1400 and change.

Q. Can you describe those tapes for us?

A. We received those tapes in boxes. They had no labels, no bar codes. They were just DLT cartridges with no labeling, no identification as to what they were.

Q. Did you receive any instructions as to whether to look for e-mail on these Brooklyn tapes?

A. Yes.

Q. All of the tapes?

A. Yes.

Q. Were you paid to process e-mail on all of the tapes?

A. Yes.

Q. Did Morgan Stanley place any limitations on what you were to look for?

A. I'm sorry?

Q. Let me ask it again. Did Morgan Stanley place any limitations on what you were to look for in terms of processing the tapes?

A. No.

Q. What did you do to look for e-mail on the tapes?

IN THE CIRCUIT COURT FOR THE

15TH JUDICIAL CIRCUIT IN AND FOR

PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

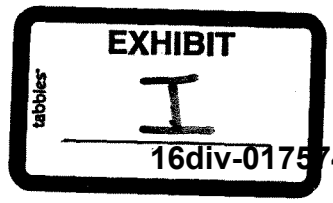
MORGAN STANLEY & CO., INC.,

Defendant.
/

DEPOSITION OF BRUCE BUCHANAN

Taken before Tracey L. Spatara, Registered Professional Reporter, Notary Public in and for the State of Florida at Large, pursuant to Notice of Taking Deposition filed by the Plaintiff in the above cause.

Sunday, March 13, 2005
222 Lakeview Avenue
West Palm Beach, Florida
7:35 p.m. to 9:35 p.m.



the final output results should be. We don't have a price sheet, per se. Every job is priced separately.

Q. If you were asked to search all of the SDLT tapes that you created in the course of doing this archive project for 36 employees to see what mail went to them or from them or ccs or bccs from them for a date range and few dozen key words, what, very approximately, would that have cost?

A. $350 a tape.

Q. How many SDLT tapes did you generate in this project?

A. For the initial project of 35,000 tapes, I believe it was roughly 200. I may be off a couple.

Q. When you were working on the archive project, who did you report to at Morgan Stanley?

A. I don't know that I had an individual. We had a weekly status meeting. There were actually more than one person that I could receive instructions from.

Q. Who were the people that you did receive instructions from?

A. Wray Stewart, Arthur Riel, Glenn Seickel, I believe.

Q. Anybody else?

A. I think that's it.

Q. What were you told to look for on these

35,000 backup tapes?

A. We were told to look for, under certain mail clients that were backed up, on the backup tapes, to look for two categories of mail that were on those mail servers; one was any iMap mail, and the other was any Lotus files that had the naming convention for Morgan Stanley's e-mail.

Q. Let's take those one at a time.

What would be an example of a Lotus file without the naming convention?

A. Most don't follow naming convention, because most are created by Lotus for other reason than e-mail.

Q. Tell me what you mean by naming convention here.

A. When a user is set up in the mail system, for example, in this case Lotus, there is a user name assigned to that user. And Morgan Stanley's naming convention was ML, a series of numbers, and that was the user's name. Each user was assigned a user name, similar to a password.

Q. And would there have been types of mail on these tapes other than Lotus files with naming conventions in iMap files?

A. There could have been, yes.

Q. And you were asked not to search for those?

A. No, we were asked to search for what I described we searched for.

Q. Did you ever search for other types of e-mail on those 35,000 tapes?

A. No.

Q. Were you asked to search or not search for --

A. Back up for a second.

I'm trying to remember -- I'm sorry, I want to correct.

Q. Please.

A. The Brooklyn tapes, I believe, really came after the 35,000 were done. We did do a different process with the Brooklyn tapes.

Q. We'll get to that in a moment.

But right now can you summarize what you did for the archive project that was different from what you later did for the Brooklyn tapes?

A. I'm sorry?

Q. Excuse me. It's late in the evening.

You indicated just now that you used a different process for the Brooklyn tapes than for the 35,000 tapes that were part of the archive project initially?

A. That is correct.

Q. Can you describe that difference?

A. Well, the difference was that the majority of the Brooklyn -- can I describe the process of the Brooklyn tapes? Would that --

Q. Sure.

A. The Brooklyn tapes were mounted or attempted to be processed through the archive process that I described. Some of the tapes were processed that way.

When mounting the Brooklyn tapes, part of the process that we used was we were looking for certain types of backups which were part of the agreement to do the archive project.

If a tape was mounted that did not meet that criteria, the operator was notified and the tape was put aside.

For the Brooklyn tapes, most of the tapes met that criteria and were put aside. For those I asked, at the time, one of my guys to find out what are these tapes, and took a sample of the tapes. And he came back to me and he said they were Novell backups.

Q. So you're saying some of the Brooklyn tapes were Novell backups?

A. Yes.

Q. And were some of the 35,000 tapes in the initial set?

A. No, not a single one.

Q. Do you know how many of the Brooklyn tapes were Novell backups?

A. I don't, no. Most, but I don't know the exact number.

Q. More than half?

A. I would believe so, yes, yes.

Q. We'll return to that in a minute, but let me ask you about the initial 35,000.

Were you asked to search for e-mail backups using the Legato system?

A. Yes.

Q. And were you asked to search for backups using the Veritas?

A. Yes.

Q. What else were you asked to use?

A. ArcServe, straight ArcServe.

Q. When you say straight you mean ArcServe?

A. ArcServe, not Novell.

Q. What's the difference?

A. ArcServe is a backup similar to Legato or Veritas in terms of what the features of it are. When you introduce Novell -- what happens is Novell is a different operating environment, and Novell compresses the volumes on the server and gives that to ArcServe,

so what you're restoring are really data that -- I mean, what you're backing up are data that to restore you have to restore back to a Novell server; whereas that is different than Legato and Veritas, different processes are required.

Q. And were there straight ArcServe tapes in the original 35,000 set?

A. Yes. I don't know how many.

Q. Do you know approximately how many?

A. Few, there were not many.

Q. And were there ArcServe Novell tapes in the original 35,000?

A. No.

Q. And before you said that more than half of the Brooklyn tapes were Novell backups, did you, by that, mean ArcServe Novell?

A. Yes.

Q. And were there straight ArcServe tapes in the Brooklyn set?

A. I don't remember.

Q. Let me show you a document. I'm going to mark this as CPH Exhibit 873.

(Plaintiff's Exhibit 873 was marked for identification.)

BY MR. HIRSCH:

(Plaintiff's Exhibit 876 was marked for identification.)

BY MR. HIRSCH:

Q. If you can take a moment and read this and let me know when you're done.

Can you please explain to me the meaning of this e-mail as best you can understand it?

A. Best I can understand it is it might have been a question made to my boss, that's Michael Daniec there whose e-mail this is about cc mail. At this time, if this is May, June, July, August time frame, we were going through the requirements, determining what exactly would be done for the archive project and the requirements he involved and changed, et cetera, with more analysis and conversation as is normal.

Q. And the reason that this discussion is going on is because of the need to deal with the Brooklyn tapes, right?

A. No. Absolutely not. This would be before, because I remember -- I know that down here where it says "and standard add on of at cc mail is not what we did for the archive project." It was changed before that, before we started. So I know this has to be before the archive project started.

Q. Earlier you said that when you went through

the roughly 1400 Brooklyn tapes -- can I confirm that's roughly the right number?

A. Yes, that's roughly it.

Q. Then when you went through those 1400 Brooklyn tapes that more than half of them were ArcServe Novell?

A. I believe so. I don't know the number.

Q. And that those were the first ArcServe Novell tapes that you had to deal with -- let me rephrase that. Strike that.

That you had had no ArcServe Novell tapes in the original 35,000?

A. Correct, we didn't have any ArcServe Novell tapes.

Q. What did you do when you discovered that some of these tapes were ArcServe Novell? What did you do with those tapes?

A. I let the people in the meeting know that these are not regular, you know, these are not the regular type of backup, Veritas, Legato, et cetera, that was allowed for the archive projects, so I can't process them in the archive project this way, they're different.

Q. Did you tell them whether or not there was e-mail on any of those tapes?

A. At the time I told them that, no, I wouldn't have known.

Q. Did you tell them whether or not there might be e-mail on those tapes?

A. No, I wouldn't have known whether they might or they might not at that time.

Q. And subsequently did you find out that there was e-mail on some of those tapes?

A. No, I do not think I saw any e-mail on the tapes that we looked at.

Q. So is it your belief today that none of the ArcServe Novell tapes from Brooklyn contain any mail whatsoever?

A. Not after what I've learned the last few days, I can't say that, no.

Q. Was there any discussion in the weekly archive meetings or otherwise about whether to search for e-mail on these ArcServe Novell tapes from Brooklyn?

A. There was a request to look for e-mail, yes, on those tapes.

Q. Who gave you that request?

A. I think it was in a meeting. I don't recall.

Q. Do you recall when?

A. I would assume the same -- it was a little later than when those tapes were found, because the first thing I know we did with those tapes is we mounted them into the archive process. So we didn't know they were ArcServe Novell until a little later than that.

So it went later than June, wherever I thought that we first learned about the Brooklyn tapes, it would have been a little later than that.

Q. So you informed the people at the weekly meeting that these were ArcServe Novell tapes, and there was no instruction to you to search them for e-mail?

A. No, I made the suggestion -- it's my recollection is I made the suggestion at the time, I can list a couple of these tapes and we can take a look to see if there's any e-mail on them by listing them.

Q. And did you do that?

A. Yes, I did that.

Q. And what did you find?

A. The tapes that we listed I did not find any users -- excuse me -- any users e-mail on those tapes that I saw. And I had someone run some programs, because we had received two mail client names for Lotus, and those mail clients were not on the -- I

can't remember if it's two or three tapes that we listed -- were not on those two or three tapes.

So I would have reported that I could find no mail on those listings. But this was not a program I can analyze, if you will.

Q. So you said before that more than half of the 1400 plus Brooklyn tapes were of this category ArcServe Novell?

A. I believe so, I don't know.

Q. So it's fair to assume, is there not, that more than 700 of these tapes?

A. Probably.

Q. And you checked a sample of two of them, correct?

A. No, we did what's called header check. We did tape checks of more than two to look at to see what kind of backups they were. I only did a full listing of two or three. I believe it was two or three. I don't remember the exact number.

Q. A full listing was what you needed to do to determine whether there was any e-mail on those tapes?

A. Yes, we should be able to find from the listing whether there might be e-mail on those tapes, yes.

Q. And did you say you found absolutely no

e-mail on those two or three tapes or no user e-mail?

A. No user e-mail.

Q. Is that the same as no e-mail, period?

A. No. Well, I know I was looking for -- I could not find any cc mail on the ones I looked at. And I know that there was NSF files. There were Lotus files. But there were none with the naming convention that Morgan Stanley used for Lotus.

Q. So what would those files have been, then?

A. Which files?

Q. The ones that didn't have the naming convention.

A. Well, Lotus as an application is a collaborative software suite. And NSF extension is what they call their database files. Lotus puts everything that is done in Lotus in database files. One of them is an e-mail type of file. The others can be anything, just anything, including system files, things such as that.

Q. Tell me about the other less than half of the 1400 Brooklyn tapes; were they all of the same type?

A. I don't know. I don't know.

Q. Were they all Legato?

A. I don't know.

Q. Were some of them Legato?

A. I assume so.

Some of them were definitely either Legato or Veritas or straight ArcServe. But I don't have numbers.

Q. When did you first learn that some of the Brooklyn tapes, some of the 1400 plus Brooklyn tapes, did contain e-mail?

A. It would have been soon after we started processing them through the archive system, because some of them did process, and e-mail was identified and deduplicated and et cetera.

Q. How soon after you received them?

A. It would have been very -- we would have started it, I'm sure, the day we received them, we would have started the process.

Q. So you would have learned within a day or two of receiving them that there was at least some e-mail on these tapes?

A. Not necessarily, no. I don't know what sequence they were processed and mounted. We had to go through a separate process for them just to process them, because they came with no bar code labels, which is how Morgan Stanley keeps track of their tape archives. So these were unusual in that aspect than

that in the 35,000 we had not received bar code.

So the first thing we had to do was we made up a bar code and we stuck bar code labels on the tapes so we could track them with all our quality control processes, et cetera. That would have been the first thing, that would have taken maybe a couple of days.

And I don't know in what sequence they were mounted, if the ones that were unknown format were, let's say, all were mounted first. It would have been several days before the ones with mail were mounted. I don't know.

Q. So at the outside, how long would it have been between the time you received the shipment to the time you discovered that at least some of them had some e-mail?

A. I don't know. I could guess, but I don't know for sure.

Q. Take a guess.

A. I would guess within three or four days, tops. That's my guess. Although it could have been longer if luck of the draw was all the bad ones were first.

MR. HIRSCH: I'll mark as an exhibit CPH 877.

(Plaintiff's Exhibit 877 was marked for

ways to do it. Some ways you don't find user e-mail, but you find things that look like they are e-mail.

Q. And how many of those tapes did you search for e-mail?

A. The ones that have been returned?

Q. No, of the ArcServe tapes that were found in Brooklyn.

A. Just the sample that I mentioned.

Q. Two or three?

A. Two or three.

Q. Are you aware of anything about Renew Data's methodology that you think is incorrect?

A. I'm not aware of their methodology at all.

Q. Yesterday morning you received 34 tapes from NDCI; is that correct?

A. From Renew Data?

Q. Excuse me, from Renew Data.

And in your handwritten notes here you mention four of them, correct?

A. Correct, those are four of them.

Q. Was that the separate set of four and there was a separate set of 30?

A. Yes.

Q. Have you looked at any of the 30 tapes?

A. Yes.

Q. What have you done with them?
A. Well, we are in the process of listing the tapes and restoring the data from the tapes.
Q. And where are you in that process right now?
A. I don't know right this minute. I'm guessing we should be very close to being done. I don't know. I haven't had a chance to check.
Q. Do you know whether e-mail has been found on any of those 30 tapes?
A. I know that there have been files found that might contain users' e-mail or might not, yes. That's as much as I know right now.
Q. How do you determine whether they actually do or do not contain users e-mail?
A. Those are processes that are proprietary to us.
Q. And have you done any of those processes?
A. Not yet, no. I'm sorry, on these 30 tapes are you asking?
Q. Yes.
A. No, I don't believe so.
Q. And when do you think you'll have those done?
A. Done?
Q. The processes necessary to determine whether

there's actual users e-mail on those tapes.

A. I would say a day or two more possibly.

MR. HIRSCH: Excuse me one moment.

Let me mark an exhibit. This will be CPH 879.

(Plaintiff's Exhibit 879 was marked for identification.)

BY MR. HIRSCH:

Q. If you could read the message at the top of the page there.

A. Okay.

Q. There's a reference here to the original job; is that the 35,000 tape job?

A. Yes.

Q. And there's a reference to 7,293 e-mails that contained -- excuse -- me, tapes that contained no e-mail.

A. That contained no mail for the process we were using to find e-mail. So it doesn't really mean that there was no e-mail at all on those tapes.

Q. And were those tapes DLT tapes?

A. Some of them might have been 8 millimeter, I don't know.

Q. Do you have any idea of why they contained no e-mail of the type you were looking for?

A. No.

Q. Do you have any idea why you were not instructed to look for all types of e-mail?

MR. JONES: Object to the form of the question.

THE WITNESS: I'm sorry?

MR. JONES: I just objected to the form of the question.

BY MR. HIRSCH:

Q. You can answer.

A. I'm sorry, could you repeat the question?

(A portion of the record was read by the reporter.)

THE WITNESS: Do I have any idea? Yes. Because the project was to, for Morgan Stanley was building an archive of e-mail data from the company to be a repository, I believe, for compliance. And they had already -- I believe -- yes, they had already installed at the time the facility that when e-mail is sent, like from that day forward, were going into the repository. They needed to add the Legacy e-mail from the backup tapes. The decision was made to only -- to take mail that had been backed up through the company's approved e-mail

server, e-mail server systems. And that was to -- what was going to be used to populate -- could I get some water.

MR. JONES: Also, let me just, it's really not so much an objection, but to remind the witness to testify about things he really knows about, but to the extent he's making assumptions here.

THE WITNESS: I'm answering an idea.

MR. HIRSCH: I asked him if he had any idea, and he told me yes, and now I'm asking why he has an idea.

MR. JONES: That's fine. Go ahead.

THE WITNESS: Where was I?

BY MR. HIRSCH:

Q. You were explaining that they were compliance.

A. Company approved e-mail servers that would have backed up the company approved users e-mail and procedures and backup policies that would be for the company, which is the way we do a lot of Legacy e-mail restoration to feed repositories.

And if my memory serves me correct, they're all done with that same concept in mind. What we want to do is capture the company approved e-mail; in other

words, we've done many jobs where we haven't been asked to look for any e-mail outside of where the company e-mail is suppose to have been backed up according to procedure and policy.

Q. And it was done for, you said, compliance with --

A. I believe --

MR. JONES: Objection, foundation, lacks foundation.

You can answer if you know.

BY MR. HIRSCH:

Q. I'm sorry, if I can finish the question and then you can object.

You said it was being done for compliance, that's things like compliance with SEC regulations and other legal requirements?

MR. JONES: Objection, foundation.

BY MR. HIRSCH:

Q. You can answer.

MR. JONES: If you know.

THE WITNESS: Compliance is my word, and my interpretation is that it's not for specific litigation or for specific discovery. It's for compliance. I'm not familiar enough with all the laws to say which one it would meet or

wouldn't meet.

Q. So if e-mails could be found that were 15 years old, since that wouldn't be needed for compliance, it would be a waste of the company's resources to gather those, I take it?

MR. JONES: Objection, foundation.

BY MR. HIRSCH:

Q. You can answer.

MR. JONES: Well, if you know.

THE WITNESS: I don't know. I guess. I don't know because I don't know all the laws, so I don't know what the timing requirements all are in all cases. I don't know.

BY MR. HIRSCH:

Q. Could you tell if these 7,000 some odd e-mails mentioned in this exhibit -- excuse me -- 7,000 some odd tapes mentioned in this exhibit had previously contained e-mail but had been overwritten?

A. Can I tell?

Q. Uh-huh.

A. No, absolutely not.

Q. And were these tapes that are discussed in this e-mail processed in basically the same way as the Brooklyn tapes?

A. Well, as I said, all the Brooklyn tapes were

mounted to go into the process. They all did not go through the process.

Q. I'm going to ask you about the 8 millimeter tapes briefly.

Do you know how many 8 millimeter tapes you restored for Morgan Stanley?

A. Not offhand, no.

MR. HIRSCH: I'm going to mark Exhibit CPH 880.

(Plaintiff's Exhibit 880 was marked for identification.)

BY MR. HIRSCH:

Q. If you can take a minute to read that.

Do you know on the first line of the message where it says, "the original 743," do you know what that refers to?

A. No. It doesn't ring a bell, no.

Q. Do you know what the tapes requested by Glenn refer to?

A. No.

Q. Would that be Glenn Seickel?

A. I would guess it is. I don't know for sure.

Q. And do you know what the garbage bag full from Wray Stewart refers to?

A. No.

A. They weren't all restorations. I don't know the -- the top line doesn't ring a bell.

The second one, yes, we would be done with that.

I don't know on the third line if that's -- I don't know what's missing.

Q. I'll represent to you I believe that's the set of 169 DLT IVs?

A. I have my own list that I follow. This is Morgan Stanley's list. I'm sorry, I'm not sure whether their names and my names are the same.

Q. Do you have it with you here?

A. Yes, I believe I do.

Q. Terrific. Thank you.

A. Well this one I can tell from, I think.

MR. JONES: Okay.

THE WITNESS: Okay. You said 169?

BY MR. HIRSCH:

Q. I think the third row in this table on this Exhibit 21 represents the 169 DLT IVs that were found at the facility in Jersey.

A. I believe those are all finished, yes.

Q. And the next row in Exhibit 21, those are tapes found on February 11th and 12th?

A. Those we have, I think, some 8 millimeter

Q. And I assume by the fact that you created SDLTs that those did also contain e-mail?

A. I believe one 8 millimeter did.

Q. The others did not?

A. If I remember correctly.

Q. Is there anything on your table that's not reflected in these eight rows?

A. That's not been done?

Q. No. Is there anything on your personal list that you do not see reflected in one of these eight rows of Exhibit 21?

A. I think just one thing.

Q. What is that?

A. What was called Tar backup tapes. There were 97 DLT tapes.

Q. When did you receive those?

A. I would say three or four weeks ago.

Q. And have those been restored yet?

A. Yes. They're done.

Q. And did they have e-mail on them?

A. A little bit, yes.

Q. And you put that on SDLTs?

A. Yes.

Q. Do you know roughly when that project was finished?

A. Roughly it would have been finished, I'm going to say a week ago Friday, give or take a couple days.

Q. Approximately March 4th? That's the Friday of that week, that's the week you're referring to?

A. Yes.

Q. Are you aware of any other backup tapes that Morgan Stanley has given you or will give you that need to be restored?

A. I don't know of anything that they will give me, no.

Q. They've told you some thing is in the pipeline coming?

A. No, not that I'm aware of. The B K 12 row, aside from the 349 tapes that we restored already, there are the original set of tapes was 3536, I believe, that we were asked to do the header check on. And the 349 were selected as a result of doing the header check. Then I think we header checked roughly 1700 of those tapes before we started processing the 349.

And then last Friday I was asked to go ahead and do the header check on the remaining ones we had not done the header check.

Q. So roughly half of those have not yet had a

IN THE CIRCUIT Court FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME I

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Monday, February 14, 2004

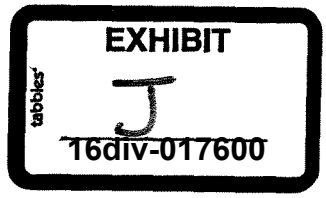
Palm Beach County Courthouse

Courtroom 11-A

205 North Dixie Highway

West Palm Beach, Florida 33401

9:30 a.m. to 12:15 p.m.



Would there have been a way for the data that was in staging, if somebody had said to you -- one of the questions that were asked by opposing counsel, somebody had said to you: Go into the staging area and from this 600 gigabytes, figure out what part of that comes from the Brooklyn tapes, would you have been able to do that?

A. I don't think so. We lose that association -- the data gets really merged together as it moves through the process, so certain distinctions, like what original DLT tape it came from, get sort of lost in the translation.

MR. JONES: That's all I have.

THE COURT: Can I just ask a couple of questions? And I apologize, I want to make sure I'm understanding your testimony. And please correct me if I'm wrong.

As I understand what you're telling me, there were sort of three problems here. The first is that there was a large part of, or 600 gigabytes of information in the staging area that just hadn't been searched?

THE WITNESS: Yes.

THE COURT: Problem number two is sort of Friday's problem when we discovered under the

script that was being used attachments that had been decoupled were not picked up in the search?

THE WITNESS: Yes.

THE COURT: And problem three is the Sunday problem when we discovered that the e-mails inserted from Lotus weren't being searched at all either?

THE WITNESS: Yes. Weren't being pulled up, yes.

THE COURT: The attachment problem. Do we know, can we quantify that?

THE WITNESS: There was a number of attachments that got passed off on Friday night. We did not deduplicate that number.

THE COURT: You mean you don't know the number?

THE WITNESS: No, no. So the number, so the -- I heard a 4,000 type number. I can't remember the exact number. But the distinction there is we didn't make any attempt to what I would call deduplicate those attachments. So if we found an e-mail and it was associated with an attachment and another one was associated with the same attachment, we pulled it twice. We were very simple and straight in the way we

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER SPECIALLY SETTING HEARING

THIS CAUSE having come before the Court, it is hereby

ORDERED AND ADJUDGED that hearing on all post-verdict motions; regarding entitlement to and amount of pre-judgment interest; all motions directed to set-off; and all other pending motions, excluding attorney's fees, is specially set before the Honorable Elizabeth T. Maass on June 20, 2005, at 9:30 a.m. and June 21, 2005, at 9:30 a.m., in Courtroom 11A, 205 N. Dixie Hwy, WPB, FL 33401.

The parties shall exchange initial briefs regarding entitlement to and amount of pre-judgment interest on June 6, 2005. Each party may serve a response to the opposing party's brief by June 13, 2005.

All other memoranda of law in support of motions scheduled for hearing herein shall be served by June 6, 2005. Responsive memoranda shall be served by June 15, 2005.

MS & Co. shall serve its exhibit and witness lists, listing exhibits and witnesses it intends to use to support any motion for set-off, by June 6, 2005. If MS & Co. intends to offer expert testimony, it shall disclose, in addition, the subject matter about which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; a copy of any written reports issued by the expert regarding this case; and a copy of the expert's curriculum vitae. CPH shall serve its exhibit and witness lists, including any similar expert witness

disclosure, by June 13, 2005. Each party shall make its witnesses available for deposition prior to the hearing set herein. It is further

ORDERED AND ADJUDGED that the attorneys/parties must submit to the Court one (1) week before the hearing:

1. copies of all relevant pleadings;
2. a copy of any memorandum of law; and
3. copies of all case law authority.

This hearing shall not be canceled unless the issues have been settled and orders entered.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 18 day of May, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
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1615 M Street, NW, Suite 400
Washington, DC 20036

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oir ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki Infim, ki bézwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontakté koôdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro téléfonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résévwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe accommodation pour pouvoir participer á ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO.
INCORPORATED,

Defendant. /

MORGAN STANLEY'S MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT AND ALTERNATIVE MOTION FOR NEW TRIAL

Pursuant to Florida Rules of Civil Procedure 1.480 and 1.530, Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") moves to set aside the Phase I verdict and for the entry of a judgment in accordance with Defendant's Motion for Directed Verdict and Alternative Motion for New Trial.[1] As grounds, Morgan Stanley states:

I. THE EVIDENCE IS INSUFFICIENT OR DOES NOT SUPPORT CPH'S CLAIM FOR DAMAGES, AND CPH'S PROOF AS TO DAMAGES IS SPECULATIVE AND DOES NOT MEET THE STANDARDS OF CERTAINTY REQUIRED BY FLORIDA LAW.[2]

A. CPH Did Not Prove the Sunbeam Stock's Represented Value on the Date of the Transaction

[1] Morgan Stanley will be filing separate motions directed to the jury's later verdict awarding punitive damages.

[2] These arguments are set out more fully in Morgan Stanley's motion for a directed verdict, 5/2/85 Tr. 11990-13083; its Motions in Limine Nos. 16 and 17 to exclude the testimony of CPH damages expert Blaine Nye (Jan. 26, 2005), its Motion to Reconsider Rulings on Blaine Nye (filed Apr. 12, 2005), the motion to strike Blaine Nye's testimony, 5/02/05 Tr. 11990-12030, 12059-12066; and Morgan Stanley's Motion to Reconsider the Court's order on CPH MIL No. 27 (filed April 12, 2005).

CPH did not prove what the value of the Sunbeam Stock would have been, had the representations been true on the date of the transaction. *Totale, Inc. v. Smith*, 877 So. 2d 813, 815 (Fla. 4th DCA 2004); *Kind v. Gittman*, 889 So. 2d 87, 90 (Fla. 4th DCA 2004), *Accord Teca, Inc. v. WM-TAB, Inc.*, 726 So. 2d 828, 829 (Fla. 4th DCA 1999) (en banc). CPH's only damages expert, Dr. Nye, calculated the represented value of the Sunbeam stock based on a 21-day average of prices rather than the price on the date of the transaction. See 4/25/05 Tr. at 10377, 10382. Because that method is not authorized under Florida law and because the record contains no expert or other testimony establishing the represented value under the correct standard, CPH failed to prove damages, an essential element of its claim and Morgan Stanley is entitled to judgment in its favor.

B. CPH Did Not Prove the Sunbeam Stock's Objective Represented Value

CPH failed to prove the objective value of what the Sunbeam stock would have been (if all representations had been true) because the evidence presented was erroneously based on Dr. Nye's estimation of the subjective expectations of CPH and its officers. See 4/25/05 Tr. 10466:11-17 ("Q. But it's your view that the expectation you were trying to measure in your damages model was Mr. Ronald O. Perelman's, correct? A. If indeed he's the decision maker, yes."); Tr. 10461:21-24 ("Q. You were trying to estimate what Coleman anticipated its shares would be worth when they signed the deal, correct? A. Sure.").

C. CPH Did Not Prove the Actual Value of Sunbeam Stock's on the Date of the Transaction

CPH failed to prove the actual value of the Sunbeam stock on the date of the transaction. The only evidence it presented related to the value of the stock on various dates after December 6, 2001, years after the transaction, when the stock was first eligible for registration for public sale. See 4/25/05 Tr. 10383-92. Dr. Nye admitted that he did not compute actual value on the date of the transaction. See *id.* at 10487-88, 10522-23.

D. CPH Did Not Prove Loss Causation

CPH failed to prove the portion of its losses proximately caused by the fraud. Plaintiffs in securities fraud cases must prove *loss causation*, *i.e.*, that stock price declines were caused by the fraud rather than by market forces, mismanagement, or other factors. See *Dura Pharmaceuticals, Inc. v. Broudo*, 125 S. Ct. 1627, 1632 (2005); *Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1447 & n.5 (11th Cir. 1997); Prosser & Keeton on Torts § 110, at 767 (5th ed. 1984). Other "contributing forces" to the investment's decline in value "must be isolated and removed." *Robbins*, 116 F.3d at 1447 n.5; *Miller v. Asensio & Co.*, 364 F.3d 223, 233 (4th Cir. 2004). Dr. Nye admitted that many factors influence stock price, and that he made no effort to determine what portion of CPH's losses were caused by non-fraud factors, such as the stock market crash of 2000 and decisions made by Sunbeam's new management. See 4/25/05 Tr. 10529-30. Because CPH failed to prove the actual value of the stock on the date of the transaction and failed to provide any other evidence from which a reasonable jury could determine the portion of its losses proximately caused by the fraud, Morgan Stanley is entitled to judgment as a matter of law.

E. CPH Did Not Prove Actual Value on the Date the Sale Restriction Ended

Assuming *arguendo* that CPH was entitled to prove actual value on the date the shares were first eligible for registration rather than the date of the transaction, CPH failed to do so because Dr. Nye based his damages calculation on the stock's average price over the following quarter rather than its price on the date the shares became eligible for registration. See 4/25/05 Tr. 10389.

F. CPH Did Not Prove That It Could Not Sell Its Sunbeam Stock Before December 6, 1999

Assuming *arguendo* that CPH was entitled to prove actual value on the date the shares could first be sold rather than the date of the transaction, CPH failed to do so. The fact that the shares were not eligible for registration until December 6, 1999, proves at most that they could not be sold *to the public* before that date. Mr. Perelman testified that he did not know whether

private sales were possible during this period. 4/20/05 Tr. 9671:10-18. And Morgan Stanley has demonstrated that private sales were possible under Section 4(1) of the Securities Act of 1933. See Morgan Stanley's Offer of Proof With Respect to CPH's Ability to Mitigate (Apr. 15, 2005). Because CPH failed to prove that it could not have sold its shares in a private transaction or otherwise in compliance with law before December 6, 1999, Morgan Stanley is entitled to a judgment in its favor.

G. CPH Did Not Prove That It Would Have Sold Its Sunbeam Stock Before December 6, 1999

Assuming *arguendo* that CPH was entitled to prove actual value on a date other than the date of the transaction and that CPH could not have sold its shares before December 6, 1999, CPH failed to prove damages proximately caused by the fraud because it did not prove that it *would* have sold its shares before December 6, 1999, had it been able to do so. To the contrary, plaintiff has testified that it was a long term holder. It agreed to an initial lock-up period on its stock of up to nine months. It chose to extend that period for 3 years for a portion of its stock. And when restrictions lifted on most of its shares, it still made no effort to sell, failing even to register its shares so that it might sell some portion of them to the public.

H. CPH Is Not Entitled to Benefit-of-the-Bargain Damages

CPH failed to prove its out-of-pocket losses and is not legally entitled to recover damages under any other method, including benefit of the bargain. First, CPH's claims should be governed by New York law, which permits recovery only for out-of-pocket losses. See *Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 421 (N.Y. 1996). Second, even under Florida law, benefit-of-the-bargain damages can be awarded only if those damages are proved with "sufficient certainty." *Totale*, 877 So. 2d at 815. For the above-described reasons, CPH failed to prove its damages with the requisite certainty. Third, benefit-of-the-bargain damages are available only where the plaintiff and defendant are in contractual privity. See Restatement (Second) of Torts § 549 cmt. g (1977). CPH and Morgan Stanley were not in contractual privity.

Further, because of the contract provision regarding choice of law, CPH's claim against Sunbeam would have been governed by New York law, not Florida law.

I. Out of Pocket Loss Is the Proper Measure of Damages

Morgan Stanley renews its argument that out-of-pocket losses are the only appropriate measure of damages in fraud cases. Compare *Greater Coral Springs Realty v. Century 21 Real Estate of So. Fla., Inc.*, 412 So. 2d 940, 941 (Fla. 3d DCA 1982), and *Sprayberry v. Sheffield Auto & Truck Serv., Inc.*, 422 So. 2d 1073, 1075 (Fla. 1st DCA 1982), with *Totale v. Smith*, 877 So. 2d 813 (Fla. 4th DCA 2004). Because CPH is not entitled to benefit-of-the-bargain damages and failed to present evidence sufficient to sustain an award of out-of-pocket damages, Morgan Stanley is entitled to a judgment in its favor.

J. CPH's Proof of Damages Is Supported Only by Incompetent Expert Testimony

The testimony of Dr. Nye should have been excluded or stricken. Dr. Nye failed to use generally accepted methodologies. He identified no support for his "averaging" method of determining the represented value of Sunbeam stock, nor did he identify any support for his method of determining actual value (*i.e.*, assuming the stock was worthless several years later because he was told to do so by plaintiffs' counsel). In fact, Dr. Nye's methods in this case conflict with his approach in earlier cases. See 4/25/05 Tr. 10484-86. Dr. Nye also failed to follow generally accepted methodologies because he did not use an event study or any reasonable equivalent to ascertain the true value of Sunbeam stock on the date of the transaction. See *In re Imperial Credit Industries, Inc. Sec. Litig.*, 252 F. Supp. 2d 1005, 1014-16 (C.D. Cal. 2003).

Dr. Nye also failed to give meaningful consideration to relevant record evidence. *Brito v. County of Palm Beach*, 753 So. 2d 109 (Fla. 4th DCA 1998); *Husky Indus, Inc., v. Black*, 434 So. 2d 988 (Fla. 4th DCA 1983). Dr. Nye failed to give proper consideration to (1) the $524 million valuation of the Sunbeam shares prior to disclosure of the alleged fraud in Sunbeam's SEC filings, which was substantially lower than the represented value Dr. Nye used, 4/25/05 Tr.

10512:7-14; (2) the valuation of the Sunbeam shares prior to disclosure of the alleged fraud in MS 1000, which was also substantially lower than the figure Dr. Nye used, *id.* at 10472:20-10474:9; (3) the valuation of Sunbeam shares at 12-1/8 per share in the two MAFCO working papers valuing its total stake at $450 million even after disclosure of the alleged fraud, which was much higher than the figure Dr. Nye used, *id.* at 10570-71, 10578; (4) the fact that CPH could have elected to forego the transaction after partial revelation of the fraud on March 19, *id.* at 10489:25-10490:5; (5) evidence as to whether CPH could have sold its shares prior to December 6, 1999, or February 5, 2001.

Finally, Dr. Nye was not competent to testify to the effect of the sale restrictions on the represented value of the Sunbeam shares. Dr. Nye opined that the sale restriction did not decrease the value of the Sunbeam shares, but he was not an expert in liquidity discounts, had no substantial experience in valuing restricted stock, and did not have an adequate basis for offering such an opinion. See 4/25/05 Tr. 10505-06, 10592-94.

II. CPH DID NOT PROVE THAT ITS RELIANCE WAS REASONABLE AND JUSTIFIABLE

A. CPH Failed To Exercise Due Diligence

Florida applies a "totality of the circumstances" test of justifiable reliance that considers "the type of information, the nature of the communication between the parties, and the relative positions of the parties." *M/I Schottenstein Homes, Inc. v. Azam*, 813 So. 2d 91, 95 (Fla. 2002). In cases involving sophisticated investors, Florida courts have refused to find justifiable reliance where plaintiffs failed to exercise due diligence. See *Hillcrest Pac. Corp. v. Yamamura*, 727 So. 2d 1053, 1057-58 (Fla. 4th DCA 1999); *Nicholson v. Ariko*, 539 So. 2d 1141, 1142 (Fla. 5th DCA 1989); cf. *L & L Doc's, LLC v. Fla. Div. of Alcoholic Beverages & Tobacco*, 882 So. 2d 512, 515 (Fla. 4th DCA 2004). A sophisticated investor negotiating a significant deal aided by experienced business and legal advisors would not reasonably rely on representations of the

seller or the seller's agents without performing reasonable due diligence as to available information. Recovery is thus denied where a sophisticated plaintiff "had the right and a full and fair opportunity to inspect [the property], its use and value, and its financial records," but failed to exercise that right. *Hillcrest*, 727 So. 2d at 1057-58.

B. CPH Ignored "Red Flags"

A plaintiff cannot justifiably rely when "there are 'red flags' indicating such reliance is unwarranted." *Lewis v. Bank of America NA*, 343 F.3d 540, 546 (5th Cir. 2003) (internal quotation marks omitted) (applying Restatement test). Numerous "red flags" which CPH witnesses acknowledge warned CPH to look behind Sunbeam's publicly filed financial statements, *see e.g.* 4/18/05 Tr. at 8768; *id.* at 8777; *id.* at 8784; *id.* at 8788; *id.* at 8794; *id.* at 8797; *id.* at 8800; and 5/02/05 Tr. 12070-12073. In addition, Mr. Levin specifically cautioned Mr. Perelman not to accept Sunbeam stock and warned of potential problems with Sunbeam's accounts.

III. CPH WAIVED THE FRAUD

Execution of a new contract respecting a former transaction known to have been fraudulent waives *any claim* based on the previous fraud. *Benn v. Key West Propane Gas Corp.*, 72 So. 2d 910 (Fla. 1954); *Harpold v. Stock*, 65 So. 2d 477, 478 (Fla. 1953). "[W]hen a party claiming to have been defrauded enters, after discovery of the fraud, into new arrangements concerning the subject matter of the contract to which the fraud applies, he is deemed to have waived any claim on account of the fraud; and he can neither rescind, nor maintain an action for damages." *Price v. Airlift International, Inc.*, 181 So. 2d 549, 550 (Fla. 3d DCA 1966). Here, the evidence showed that CPH entered into a new and continuing relationship with Sunbeam, after acquiring knowledge of the alleged fraud. See 5/02/05 Tr. at 12074-12076.

IV. FLORIDA DOES NOT RECOGNIZE A CAUSE OF ACTION FOR AIDING AND ABETTING FRAUD

Florida does not recognize a cause of action for aiding and abetting a fraud. Cf. *Ft. Myers Dev. Corp. v. J.W. McWilliams Co.*, 122 So. 264, 268-269 (Fla. 1929). Lower courts have no authority to create a new tort the Supreme Court has not yet recognized. *Hoffman v. Jones*, 280 So. 2d 431, 434 (Fla. 1973).

V. THE EVIDENCE IS INSUFFICIENT TO ESTABLISH CORPORATE LIABILITY FOR MISCONDUCT BECAUSE THERE IS NO PROOF AS TO ANY SPECIFIC WRONGFUL ACTS BY ANY CORPORATE OFFICERS, DIRECTORS OR AGENTS

Because a corporation is a fictional being, it can only act through its officers, directors or managing agents. *Jacksonville American Pub. Co. v. Jacksonville Paper Co.*, 143 Fla. 835, at 846, 197 So. 672 (Fla. 1940); *Bankers Multiple Line Ins. Co. v. Farish*, 464 So. 2d 530 (Fla. 1985). Fraud must be pleaded and proved with particularity as to who said what, where, and when. CPH failed to produce evidence and prove specific wrongful acts by particular corporate agents of Morgan Stanley. Rule 1.120(b), Fla. R. Civ. P.

VI. THIS COURT'S SANCTIONS ORDER IMPROPERLY EXCUSED CPH FROM PROVING THE OTHER ELEMENTS OF ITS CLAIMS

CPH failed to establish other elements of its fraud claims, including falsity and scienter, knowledge of the fraud, agreement to conspire as to a common goal, and acts in furtherance, with knowledge. The only "evidence" supporting those aspects of CPH's claims are the allegations in CPH's complaint, which the Court "deemed established" and read to the jury as a discovery sanction. Because that sanction was procedurally and substantively improper (for a variety of reasons), the allegations of the First Amended Complaint cannot support CPH's claims. Alternatively, to the extent CPH offered evidence and testimony as to the deemed facts,

those facts should no longer be treated as deemed, and CPH's case should fail because the evidence offered is insufficient to meet CPH's burden of proof.

VII. NEW YORK LAW APPLIES, AND CPH HAS NOT PROVED JUSTIFIABLE RELIANCE UNDER NEW YORK LAW

A. The Evidence at Trial Demonstrates that New York Has the Most Significant Relationship to This Case

The evidence at trial clearly shows that New York law should apply to CPH's claims and the underlying transaction. Both parties have their principal place of business there. *All* the acts of reliance occurred in New York rather than Florida, and *all* the allegedly fraudulent misrepresentations were received there. Maher testified that he was never in Florida in connection with the merger, and that "[a]ll of [his] discussions occurred in New York." 4/13/05 Tr. at 8110. Nesbitt likewise conceded having done the "overwhelming majority" of his work in New York, and that he never once went to Florida. 4/18/05 Tr. at 8896-98. Perelman went to Florida only once, for the December 1997 meeting with Al Dunlap. Aside from that one meeting, "everything else was in New York." 4/19/05 Tr. at 9168-69. The evidence at trial failed to establish that any fraudulent misrepresentations were received at the one meeting in Florida. Thus, *all* the acts of reliance occurred in New York and *all* the fraudulent statements were received there.

The trial evidence demonstrates that New York's relationship predominates over Florida's even with respect to where the *misrepresentations were made*. The allegedly most critical episode in the case -- the February 23 meeting of Morgan Stanley, Sunbeam, and CPH -- occurred in New York. See 4/13/05 Tr. at 8110; 4/18/05 Tr. at 8996. At the meeting, Morgan Stanley and Sunbeam each provided documents containing allegedly fraudulent financial information to CPH. 4/19/05 Tr. at 9078-93. Perelman testified that these documents were

"pivotal" in his decision to proceed with the merger. *Id.* at 9082, 9086-87. Nesbitt referred to the materials as the "culminating document that we all had a very serious interest in prior to signing." 4/14/05 Tr. at 8496. Mr. Maher likewise characterized the "information provided at meeting as very important" to deliberations. 4/13/05 Tr. at 8013.

Likewise, the January 23 meeting where Nesbitt allegedly received fraudulent financial documents occurred in New York. *See* 4/14/05 Tr. at 8411-20. The "road show" Nesbitt attended, where allegedly fraudulent statements were made and where he obtained documents in connection with the debenture offering, was in New York. See 4/14/05 Tr. at 8500-03; see also 4/19/05 Tr. at 9107-08 (Perelman's claim that he relied on debenture documents). Perelman also testified that, after Sunbeam issued its March 19 press release, Morgan Stanley falsely assured him that the company was still "performing on target." 4/21/05 Tr. at 9763. Even Sunbeam's March 19 press release was allegedly issued with Morgan Stanley's "knowledge and assistance" 4/7/05 Tr. at 7221.

Perelman pointed to numerous other statements by Morgan Stanley as well, none in Florida. See, *e.g.*, 4/19/05 Tr. at 9122-23, 4/20/05 Tr. at 9577-79, *id.* at 9589-90, 4/21/05 Tr. at 9815. And Perelman asserted that all the false information he received, he received from Morgan Stanley.

> Morgan Stanley gave us every piece of information about Sunbeam that we got . . .. And it came from Sun — from Morgan Stanley to our company directly from Morgan Stanley.

4/20/05 Tr. at 9451. CPH's witnesses testified repeatedly that Morgan Stanley's involvement added credibility and an aura of quality to the transaction. See 4/14/05 Tr. at 8381; 4/19/05 Tr. at 9053; *id.* at 9065; 4/20/05 Tr. at 9591-92. Perelman testified that he placed much greater weight on the analyst reports that Morgan Stanley recommended. See 4/19/05 Tr. at 9300, 9304.

Yet Perelman and every other witness has agreed that *all* of Morgan Stanley's conduct and representations occurred in New York.

B. CPH Failed To Prove Fraud Under New York Law

Under New York law, a sophisticated investor cannot claim justifiable reliance if it does not conduct appropriate due diligence. "As a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on an alleged misrepresentation if that plaintiff failed to make use of the means of verification that were available to it, such as reviewing the files of other parties." *UST Private Equity Investors Fund, Inc. v. Salomon Smith Barney*, 733 N.Y.S.2d 385, 386 (App. Div. 2001); see also *Rotterdam Ventures, Inc. v. Ernst & Young LLP*, 752 N.Y.S.2d 746, 749 (App. Div. 2002); *Schlaifer Nance & Co. v. Estate of Warhol*, 119 F.3d 91, 98 (2d Cir. 1997). There is no question that CPH and its principals are sophisticated investors subject to this rule. See, e.g., 4/18/05 Tr. at 8871; 4/14/05 Tr. at 8517.

For all the reasons given above with respect to Florida law, CPH's inadequate due diligence and disregard for "red flags" render its reliance unjustifiable under New York law. No reasonable juror could conclude anything but that CPH had "means of verification . . . available to it" and failed to use them. *UST Private Equity Investors Fund*, 733 N.Y.S.2d at 386. CPH thus cannot claim justifiable reliance as a matter of law.

C. CPH Did Not Justifiably Rely on the Alleged Misstatements Because It Disclaimed Reliance in the Merger Agreement's Integration Clause and in Confidentiality Agreements

CPH did not establish justifiable reliance under either Florida or New York law because the merger agreement includes an integration clause that disclaims reliance on any other representations. Specifically, Section 12.5 of the agreement provides: "This Agreement

(including all Schedules and Exhibits hereto) contains the entire agreement among the parties hereto with respect to the subject matter hereof and supersedes all prior agreements and understandings, oral or written, with respect to such matters . . . ." MS 93 § 12.5. An integration clause precludes justifiable reliance on purported representations not memorialized in the agreement. *Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 165 F. Supp. 2d 615, 622 (S.D.N.Y. 2001), *aff'd*, 343 F.3d 189, 193 (2d Cir. 2003); see also *Valassis Communications, Inc. v. Weimer*, 758 N.Y.S.2d 311, 312 (App. Div. 2003). CPH likewise disclaimed reliance in the February 23, 1998, confidentiality agreement, which provides that "except as may otherwise be agreed in writing, neither [Sunbeam] nor its Representatives make any representation or warranty as to the accuracy or completeness" of the material provided to CPH, and that "neither the Company nor its Representatives will have any liability to [Coleman and its affiliates, including CPH] nor its Representatives resulting from the use" of the information. MS 307 at 4. CPH ratified this agreement when it executed the merger agreement. See MS 93 § 12.5 (providing that confidentiality agreement "will remain in full force and effect").

Under New York law, "where a party specifically disclaims reliance upon a particular representation in a contract, that party cannot, in a subsequent action for common law fraud, claim it was fraudulently induced to enter into the contract by the very representation it has disclaimed reliance upon." *Harsco Corp. v. Segui*, 91 F.3d 337, 345 (2d Cir. 1996); *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 323 (1959).

MOTION FOR NEW TRIAL

Alternatively, Morgan Stanley is entitled to a new trial based on the following:

I. THE VERDICT IS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE, UNSUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE, AND CONTRARY TO LAW

Morgan Stanley hereby incorporates by reference the above arguments supporting its motion for judgment in accordance with its motion for a directed verdict. The verdict that CPH proved damages under the requisite standard, that CPH suffered harm in a sufficiently certain amount, and that CPH proved that the alleged fraud was the legal cause of the entire claimed decline in Sunbeam stock are all contrary to the manifest weight of, and unsupported by, the evidence.

II. THE COURT ERRED AND/OR ABUSED ITS DISCRETION BY ALLOWING CPH TO PRESENT EVIDENCE BEYOND THE FACTS DEEMED ESTABLISHED BY THIS COURT'S MARCH 23, 2005 ORDER WHILE DENYING MORGAN STANLEY AN OPPORTUNITY TO REBUT OR IMPEACH THOSE FACTS

The Court erred and/or abused its discretion by barring Morgan Stanley from rebutting or impeaching the "deemed facts" or additional evidence offered by CPH, when CPH opened the door by presenting facts and evidence outside the factual allegations of the complaint deemed established by this Court's March 23, 2005 Order. The March 23rd Order effectively constituted a default judgment against Morgan Stanley on certain facts and elements of CPH's claims as alleged in the First Amended Complaint. Florida law is settled that a default judgment admits only well pleaded facts. See e.g., *Board of Regents v. Stinson-Head, Inc.*, 504 So. 2d 1374, 1376 (Fla. 4th DCA 1987); see also, *Humana Health Insurance Co. of Florida, Inc. v. Chipps*, 802 So. 2d 492, 495 (Fla. 4th DCA 2001)(holding that trial court erred in instructing jury on an unpled claim that was not encompassed by default judgment). The Court's Order cannot be expanded to encompass claims or facts that are not well-pled.

Upon default, the party seeking affirmative relief may not be granted relief that is not supported by the pleadings or by substantive law applicable to those pleadings. *Stinson-Head, Inc.*, 504 So. 2d at 1375. "A party in default may rely on these limitations." *Id.* at 1375 (emphasis and internal quotations omitted). Once CPH opened the door by presenting facts and evidence outside the well-pled allegations of its complaint, Morgan Stanley should have been allowed to impeach or rebut that evidence and any related "deemed facts." The Court erred and/or abused its discretion by failing to allow Morgan Stanley this fundamental right of due process.

III. THE COURT ERRED AND/OR ABUSED ITS DISCRETION WITH RESPECT TO THE FOLLOWING EVIDENTIARY RULINGS

A. CPH's "Expert" Witnesses

The court repeatedly permitted incompetent, undisclosed, and prejudicial expert testimony to be presented to the jury, and improperly limited cross-examination of those experts. For example:

1. **Professor Emery.** The Court erred in admitting the testimony of Professor Emery, which consisted entirely of undisclosed expert opinion. Although Emery was retained to opine upon the financial performance of Sunbeam from a corporate finance perspective, see Report of Prof. Emery at 1 (¶ I.A.1), Professor Emery was permitted to testify extensively regarding the facts deemed established by this Court's March 23, 2005 Order. On issue after issue, Professor Emery was permitted to provide "expert" testimony that was not previously disclosed, that was without foundation, that was unduly prejudicial and cumulative, and that he was not qualified to offer. At the same time, the Court improperly restricted cross-examination of this unique "witness." Among other things:

(a) As CPH's first witness, Professor Emery became a vehicle for republishing the "deemed" facts for a third time in rapid succession, after the Court had already read them itself and after CPH's counsel had read and embellished on them for hours in his

opening statement. Emery was permitted to embellish on Exhibit A, beyond simply providing definitions. 4/7/05 Tr. at 7186, 7295-96. Counsel was permitted to question Emery by repeating phrases such as "we know from the established facts . . . ," further republishing Exhibit A. See, e.g., *id.* at 7527, 7533.

(b) Professor Emery mentioned Morgan Stanley only twice in his report (and then only in passing), has no experience in investment banking, and did not offer opinions on what is usual or unusual for investment bankers to do in his report. Yet he was permitted to testify that certain actions were "unusual" and otherwise opine on investment banking issues. *Id.* at 7186-7191; 7312-14, 7379, 7412 ("uncommon" to have exclusive underwriter).

(c) Professor Emery was permitted to provide testimony on matters relating to reliance that were not only unsubstantiated, undisclosed, and outside his qualifications, but also unduly prejudicial and had no relevance to what CPH itself did. For example, he testified about what investors may reasonably rely on, see *id.* at 7299-7300; 7319-20; 7336-37, and what "average" investors rely on, *id.* at 7344. He was permitted to answer a series of questions designed to bolster reliance, by stating how the types of misrepresentations alleged here affect the ability of investors to value stock. *See, e.g.*, *id.* at 7533, 7539-40.

(d) Professor Emery testified about the market functioning differently in 1997/1998, in an obvious effort to justify CPH's supposed reliance and to draw the jurors' attention to recent corporate scandals. See, 4/7/05 Tr. at 7425-28, 7459; 4/11/05 Tr. at 7738-42; 4/13/05 Tr. at 7987-89. This unfounded and improper opinion testimony was unduly prejudicial and inflammatory, particularly in view of CPH's opening statement, drawing the jurors' attention to infamous corporate accounting scandals with no disclosed similarity to this case. The Court denied Morgan Stanley's request that be permitted to present expert testimony to rebut that previously undisclosed opinion, but barred CPH from arguing differences between 1997/1998 and today in closing. Contravening that order, counsel for CPH made a point of referencing such differences in his closing nonetheless. See, 5/12/05 Tr. at 14331.

(e) Professor Emery was permitted to testify about accounting issues such as how a company would record expenses in a different year to improve apparent performance, even though he is not an accountant, had not disclosed such opinions before trial, and was not qualified to offer an opinion. See, 4/7/05 Tr. at 7349-50, 7352; 4/11/05 Tr. at 7514, 7517-18, 7521, 7545-46, 7987.

(f) Professor Emery was permitted to testify about "typical" due diligence even though he has no experience and offered no previous opinion on it. *Id.* at 7721-22; 4/13/05 Tr. at 7984; 7988.

(g) Further, Professor Emery was permitted to testify how corporate transactions work, even though he has not worked on any transactions and did not disclose any in his report, 4/7/05 Tr. at 7386, 7392; and how the market values stock, whether market prices are true measures of value, and different valuation methodologies, even though he had performed no studies and had not previously disclosed those opinions, *id.* at 7301, 7382-86, 7394-95. Professor Emery did no more than read analyst reports and synthesize them, *id.* at 7354.

(h) Professor Emery used hindsight and was improperly permitted to speculate on Sunbeam's motive ("why would Sunbeam" do certain things). *Id.* at 7407. Such hindsight speculation is improper in its own right, and there was no basis for that previously undisclosed opinion. He likewise testified about the existence of duties to disclose information, another matter beyond the scope of his report and his qualifications. *Id.* at 7408-7409.

(i) Professor Emery was permitted to ascribe "significance" to events, and speculate about the market or Wall Street interpreted them (including the Barron's article that disclosed Sunbeam's alleged fraud), even though he offered no disclosed opinion on that and had no basis or methodology for his sweeping opinions. *E.g.*, *id.* at 7411 ("significance" of having a sole underwriter in debenture offering); *id.* at 7412 (sole underwriter communicates "confidence" in offering); *id.* at 7458-59 (significance of Arthur Andersen being auditors, and the confidence the "investing community in 1997 and 1998 time frame" had in publicly filed documents); *id.* at 7512 ("significance to the investing community" of loss reserves); *id.* at 7532-33 ("significance"

of increasing the size of a debenture offering); *id.* at 7537-38 (significance certain disclosures would have had for debenture offering).

(j) Even though Professor Emery had testified about how the market values stock, the Court precluded him from being examined on how the consideration given to minority shareholders in a merger is established and valued. 4/11/05 Tr. at 7710-11, 7719. The Court likewise precluded Morgan Stanley from inquiring how the transaction might have been structured differently, or which terms might have changed, or CPH's ability to seek different terms in the transaction, such as whether CPH might merely have obtained more stock in the event the alleged misrepresentations had not been made -- even though that goes directly to reliance issues, such as whether CPH would have entered the transaction, or merely entered into it on different terms, if it had done some due diligence or the alleged misrepresentations had not been made. 4/11/05 Tr. at 7499-7500.

2. Dr. Nye.

(a) The Court failed to exclude or strike the testimony of Dr. Blaine Nye. For the reasons stated above, Dr. Nye's testimony was incompetent and should not have been admitted.

(b) The Court improperly allowed Dr. Nye to testify to the value of Sunbeam shares on various dates based on assumptions he had been told to make by plaintiffs' counsel. See 4/25/05 Tr. at 10386. By doing so, the Court allowed CPH to proceed in a manner inconsistent with its earlier Order on Morgan Stanley's Motion for Clarification or Reconsideration of the Court's Order on Plaintiff's Motion in Limine No. 27 (Apr. 15, 2005), which required both parties to establish appropriate evidentiary predicates *before* offering expert testimony on share value on particular dates. This error prejudiced Morgan Stanley by impairing its ability to challenge Dr. Nye's testimony in light of the omitted factual predicates.

(c) The Court erroneously refused to allow Morgan Stanley to impeach Dr. Nye with his prior testimony that the March 19 press release was a "partial disclosure of the fraud." 4/25/05 Tr. 10495-501. That evidence was relevant to damages because it undermined

the rationale for Dr. Nye's use of a 21-day average rather than the closing date. If the press release was a *partial disclosure of the fraud* (and not merely bad news), CPH could not have relied on it to the extent of the disclosure and in fact could have broken off the transaction. Moreover, to the extent the Court excluded the testimony because it conflicted with the "deemed facts," the Court improperly allowed the sanction to extend to disputed issues of damages.

(d) The Court improperly limited Morgan Stanley's cross-examination of Dr. Nye about causes of Sunbeam's failure unrelated to the fraud. See 4/25/05 Tr. 10533, 10544-46. That topic was critically related to key issues in the case, proximate cause and recoverable losses. The Court foreclosed the questioning essentially because Dr. Nye had been instructed to assume the facts bearing on actual value by CPH's counsel. See *id.* at 10546. But Dr. Nye's opinion on those topics was still highly probative and relevant to his conclusions regarding actual value and why his *opinion* of actual value (based as it was on pure assumption) did not correspond to the *true* actual value.

(e) The Court erroneously excluded evidence that Dr. Nye's testimony and methodology had been found unreliable in prior cases and erroneously precluded cross-examination and impeachment on the topic. See 4/25/05 Tr. 10576.

B. The Court Improperly Excluded The Testimony Of Morgan Stanley's Experts

1. **Dr. Grinblatt.** For the reasons set forth in Morgan Stanley's Motion for Clarification of the Admissibility of the Testimony of Professor Mark Grinblatt (May 5, 2005), and throughout the case, the Court erroneously excluded all of Dr. Grinblatt's damages estimates except one. The Court erred in ruling that CPH is entitled to recover damages on account of alleged misrepresentations on which it did not rely or which were revealed before the transaction was closed.

2. **Denial of Motion to Add Witnesses.** Even though the Court's order of March 23, 2005 changed the character of the case entirely, and even though Morgan Stanley's prior lead counsel withdrew just before trial, the Court abused its discretion in precluding

Morgan Stanley from adding witnesses to adjust to those changes or in response to belated document production by CPH. See Morgan Stanley's Motion to Add Witnesses (filed Apr. 5, 2005).

(a) Morgan Stanley should have been permitted to present the testimony of Professors Dan Fischel and Jeffrey Haas, as well as the testimony of Messrs. Scott Cook and Kevin Woodruff relating to CPH's claimed benefit-of-the-bargain damages. The need for their testimony became apparently only after the Court, one month before trial, concluded that benefit-of-the-bargain damages were available and struck much of Morgan Stanley's expert's testimony as a result; and when, after jury selection had started, the Court permitted the parties to make supplemental disclosures regarding when CPH could have sold its Sunbeam shares.

(b) Morgan Stanley should have been permitted to present the testimony of Mr. John Ashley to show that CPH's alleged offer to attempt to retrieve overwritten e-mails was illusory, consistent with the Courts March 23, 2005 declaration that "e-mails could no longer be retrieved once they were overwritten."

(c) Given the absence of prejudice to CPH (and the court's willingness to allow undisclosed expert testimony in CPH's case in chief), the Court's denial of Morgan Stanley's motion to add witnesses was an abuse of discretion under *Binger* v. *King Pest Control*, 401 So. 2d 1310 (Fla. 1981).

C. Improper Testimony and Evidence

The Court erroneously permitted the presentation of inadmissible, incompetent, cumulative, and unduly prejudicial testimony and evidence before the jury, including, among other things:

1. **Prohibited speculation.** The court allowed CPH's witnesses to speculate about what they would have done if they had received accurate information from Sunbeam or Morgan Stanley. *See, e.g.*, 4/19/05 Tr. at 9092 (Perelman testimony); 4/14/05 Tr. 8340 (Maher), 4/27/05 Tr. at 10911, 10951 (Gittis). "It has long been the rule that a witness's opinion as to

what would have happened if circumstances were different constitutes rank speculation that is not competent evidence." *LeMaster v. Glock, Inc.*, 610 So. 2d 1336, 1338 (Fla. 1st DCA 1992). "A statement by a witness as to what action he would have taken if something occurred which did not occur . . . or what course of action a person would have pursued under certain circumstances . . . will ordinarily be rejected as inadmissible and as proving nothing." *Drackett Products v. Blue*, 152 So. 2d 463, 465 (Fla. 1963);

2. **Repetition and Bolstering of the "Deemed Facts."** Even after republishing the "deemed" facts for a third time through Dr. Emery, CPH was permitted to present them yet again through gratuitous and inflammatory references in questioning Maher, Nesbitt, and other witnesses. *See, e.g.*, 4/12/05 Tr. at 8052-54, 8059-63 (Maher); 4/14/05 Tr. at 8471-72 (Nesbitt); 4/19/05 Tr. at 9089, 9130 (Perelman).

3. **Purported Reliance on the Debenture Documents.** As explained more fully in Morgan Stanley's Opposition To Coleman (Parent) Holdings Inc.'s Submission On CPH's Purported Reliance On Debenture Offering Documents (filed Apr. 22, 2005), the court erred by permitting CPH to assert reliance on disclosures made in Debenture Offering materials, where those materials were not directed to CPH and proposed a different (debt rather than equity) transaction than the one CPH accepted. See *Wollenberger v. Hoover*, 346 Ill. 511 (1931). The Court also erred in permitting testimony on reliance on these documents and other alleged representations after CPH had agreed to the merger.

4. **Incompetent Expert Testimony, Hearsay, and Improper and Cumulative Summary Testimony.** The Court also erroneously permitted witnesses unqualified as experts to give testimony, admitted extensive hearsay evidence, and permitted witnesses to testify in order to summarize the testimony already given. For example, Mr. Gittis was permitted to testify as to matters not within his personal knowledge and offer rank hearsay. His testimony about events leading up to and immediately after the transaction was not merely cumulative. It was a summary of the testimony that preceded his (and which he observed in the courtroom); Mr. Gittis was permitted to do so even though he had virtually no personal involvement in the relevant

events. Mr. Gittis was never qualified as an expert, yet was permitted to testify about when the Sunbeam stock could be registered, whether and when it could be sold, the effects of the federal securities laws regarding registration, and the prohibition on insider trading. *See, e.g.*, 4/27/05 Tr. at 11166; *see id.*, at 11171-72. Mr. Gittis, moreover, was permitted to speculate with no factual basis or relevant expertise about how the markets would have responded to efforts to sell the Sunbeam stock. *See, e.g.*, 4/28/05 Tr. at 11167.

D. Premising A Trial On And Permitting Witnesses to Testify to False Facts Without Impeachment

The Court erred and otherwise abused its discretion by precluding Morgan Stanley from cross-examining witnesses based on the assertion that the examination would contradict the deemed facts, even though CPH had adduced testimony in addition to and beyond the deemed facts. See *Board of Regents v. Stinson-Head, Inc.*, 504 So. 2d 1374, 1375 (Fla. 4th DCA 1987) (party in default may rely on the limitation that relief may not be granted that is not supported by the pleadings or substantive law applicable to the pleadings). Particularly "in matters relevant to credibility," the "right of full cross-examination is absolute." *Russ v. City of Jacksonville*, 734 So. 2d 508, 511 (Fla. 1st DCA 1999).

The Court nonetheless repeatedly permitted CPH's witnesses to attest to and embellish the "facts" deemed established by the Court, even where they were not true. The Court precluded any effort to impeach their testimony (even as to disputed issues at trial, including reliance). That cannot be justified by the Court's March 23, 2005 Order because (1) the alleged discovery abuse on which that order was premised could not have impaired CPH's access to the facts at issue, (2) insofar as the facts related to CPH's reliance, they would uniquely be within CPH's knowledge, and (3) it is improper to permit that order to become a license to lie or mislead the jury, and (4) barring Morgan Stanley from fully examining the witnesses denied it a fair trial. Moreover, on repeated occasions, Messrs. Maher, Nesbitt, and Perelman *departed from* the text of the deemed facts. The Court precluded cross examination and testimony that would

not contravene the deemed facts. See, e.g., Morgan Stanley's Motion for Full and Fair Examination Without Contradiction of the Deemed Facts. (Apr. 23, 2005)

The prejudice was heightened by CPH's repeated reference to the deemed facts as "established facts," or "facts established before trial." Those phrases left the misleading impression that there had been a determination that the facts were found proved in a prior proceeding, when in fact they were merely "deemed" true by the Court as a sanction for alleged litigation misconduct.

E. Limits on Witness Examinations

The Court also abused its discretion and otherwise erred by circumscribing Morgan Stanley's examination of critical witnesses.

1. **Mr. Perelman.** Although Mr. Perelman's credibility was a key issue in this case, the Court repeatedly precluded Morgan Stanley from impeaching him if the impeachment was alleged to be inconsistent with the "deemed facts." Perelman was thus permitted to embellish on those facts and testify falsely with impunity. The Court thus excluded documents deemed contrary to the deemed facts. 4/22/05 Tr. at 9642. It thus improperly foreclosed cross-examination regarding what Mr. Perelman received and learned from Messrs. Nesbitt and Maher (even absent necessary contradiction with the deemed facts). 4/21/05 Tr. at 9788-9791.

Even where Mr. Perelman clearly departed from the deemed facts, testifying that CPH employees had "numerous conversations" with Morgan Stanley following the March 19, 2005 press release to obtain reassurances, 4/21/05 Tr. at 9765-66, Morgan Stanley was barred from impeaching him with evidence that the employees who supposedly had those conversations denied having them and/or were on vacation when the conversations supposedly had occurred. See Morgan Stanley's Motion For Full And Fair Examination Of Witnesses, *supra*, at 3-4; 4/21/05 Tr. at 9767-69. Yet nothing in the deemed facts supported Mr. Perelman's story (deliberately designed to leave a false impression), and nothing in the cross-examination would have contradicted the deemed facts.

Given that Mr. Perelman's credibility was critical in this case (especially given the contradictions between his testimony and Levin's), foreclosing the cross-examination to disclose Mr. Perelman's whole-cloth fabrication foreclosed the possibility of a fair trial. Indeed, the Court all but conceded as much. 4/19/05 Tr. at 9142 ("I mean fair trial. It's not going to happen"). "[T]he truth-seeking function of trial" is utterly destroyed unless "cross examination reveals the whole story of a transaction only partly explained in direct examination. *Bozeman v. State*, 698 So. 2d 629, 631 (Fla. 4th DCA 1997). That is precisely what happened here. Once CPH elected to testify beyond the deemed facts, CPH's witnesses were subject to cross-examination and impeachment regarding those additional facts.

The Court also improperly precluded Morgan Stanley from examining Perelman about (1) the amount of due diligence on prior deals, 4/19/05 Tr. at 9249-9250; (2) the motives arising from MAFCO's debt position, 4/20/05 Tr. at 9422-23, 9430-31; (3) that he will be the beneficiary of any punitive award, which gave him an incentive to vilify Morgan Stanley and exaggerate its role (an issue made particularly important by the false suggestion by CPH's counsel, during voir dire, that punitive damages go to the State for special purposes, 3/16/05 Tr. at 4039-40); (4) the tax consequences arising from the structure of the deal. At the same time, Mr. Perelman was permitted to respond to questions with speeches, to lecture counsel, to comment on the questions, to ask questions of counsel, to offer non-responsive answers, and obstruct the course otherwise proper examination by inappropriate means.

2. **Mr. Levin.** The Court improperly restricted Morgan Stanley's examination of Jerry Levin. A critical issue for the jury in this case was whether to believe Levin, who testified that he warned Perelman he should not take stock in Sunbeam -- that the numbers did not work -- or Perelman, who testified Levin never warned him. See 5/13/05 Tr. at 14668-14671 (juror request for Levin testimony). In resolving that conflict, the jury would naturally consider whether (and why) Levin, if he had such concerns about Sunbeam, *voted in favor of the merger* as a member of the Coleman Board. The Court, however, foreclosed Morgan Stanley from examining Levin on any of his impressions of Sunbeam or the merger,

including those that might affect his vote as a board member, allowing him to testify only on what he communicated to Perelman or others at CPH. That limit was never imposed on other CPH witness (including Levin's subordinates). See Morgan Stanley's Motion To Admit Jerry Levin's Testimony Regarding The Valuation Of Coleman Stock And The Accuracy Of Sunbeam's Financial Statements (May 4, 2005); 4/14/05 Tr. at 8399-402, 8450-51 (agreeing with CPH contention that it was not required to show communication because of agency principles); *e.g.*, 5/04/05 Tr. at 12528-29, 12589-90, 12605 (allowing CPH to elicit personal viewpoints); 4/14/05 Tr. at 8357 (Nesbitt); 4/27/05 Tr. at 10920-22 (Gittis). It is inconsistent with the Court's instructions, which allowed jurors to consider representations made to any corporate agent (and even ones made to third parties).

More important, the Court's decision to foreclose such testimony was based on *CPH's express representation* that it would *not* rely on Levin's vote as a board member of the Coleman board in closing. 5/04/05 Tr. at 12545, 12547 ("If you're going to argue that, that somehow the fact that Levin voted as a board member of the Coleman operating company, then you're opening up an inquiry in front of the jury about why he may or may have not thought it was a good deal for Coleman"); *id.* at 12548 ("We don't intend to make that argument"); see also 5/02/05 Tr. at 11801-02, 11849, 11850, 11854, 11877, 11884-85; 11909, 11958-59 (foreclosing testimony); 5/04/05 Tr. at 12353. Yet the Court later permitted CPH to do precisely what it promised not to do, namely argue to the jury that Levin voted in favor of the merger. 5/12/05 Tr. at 14219 (ruling); *id.* at 14535-546 (emphasizing that Mr. Levin "in fulfillment of [] fiduciary duty, . . . cast a vote in favor of this transaction" in effect saying "yes, this is a deal that's fair to everyone involved"). The Court thus foreclosed Morgan Stanley from establishing the basis for Mr. Levin's vote based on CPH's promise not to argue the vote, but then allowed CPH to rely on that vote nonetheless. That bait-and-switch prevented Morgan Stanley from presenting critical information to the jury about this critical witness; it was grossly unfair; and it denied Morgan Stanley a fair trial.

The Court also improperly restricted Levin's testimony on other matters, including but not limited to testimony on (1) valuation of the deal and how the stock component fit into that valuation, *e.g.*, 5/02/05 Tr. at 11900-03; (2) the type and extent of due diligence in other contexts, *e.g.*, *id.* at 11987-88, even though directly responsive to CPH witness testimony, *id.* at 11987; (3) Levin's public statements after taking over Sunbeam about Sunbeam's prospects - statements that rebut the claim that Sunbeam stock was valueless - even though Levin was still a MAFCO executive and a party opponent, *e.g.*, 5/04/05 Tr. at 12431-33; 12456-59; and (4) evidence of Levin's communications with Perelman after Levin took over Sunbeam despite evidentiary predicates, 5/02/05 Tr. at 11972-78; 5/4/05 Tr. at 12380-89; see also Morgan Stanley's Notice of Filing Proffer Regarding Jerry Levin (May 4, 2005).

The Court hamstrung Morgan Stanley's presentation by refusing to permit Levin to be examined as an adverse party witness, relying on his demeanor rather than his interests in supporting CPH's story (to avoid taking blame himself), his alignment, and his conduct (such as refusing to meet with Morgan Stanley's attorneys). 5/02/05 Tr. at 11771-773. In contrast, the Court permitted CPH (1) to ask leading questions, even though Levin was not hostile or adverse to CPH's interests, *e.g.*, *id.* at 12540; 12584; (2) to elicit argument and unsupported opinion testimony, *e.g.*, 5/04/05 Tr. at 12523-24, 12600-01; and (3) bolster witness testimony with hearsay, *e.g.*, *id.* at 12593-95.

3. **Mr. Gittis.** The Court likewise improperly limited Morgan Stanley's examination of Mr. Gittis. For example, the Court refused to permit Mr. Gittis to be impeached with his earlier inconsistent testimony. 4/28/05 at 11180-81. It prevented counsel from impeaching Mr. Gittis in a reasonable, question by question manner, and instead required the use of an extensive prior statement that obscured the basis for impeachment. 4/28/05 Tr. at 11187-11190, 11192-11196. And the Court permitted extensive objections, speaking objections, and sidebars throughout the examination, often requiring breaks in this examination. *See, e.g.*, 4/28-05 Tr. at 11190, 11206-08, 11209-21, 11285-86, 11287-88, 11295, 11297-98, 11299-11302.

That not only prolonged the examination, but interfered with its effectiveness. And the Court did not exercise control over Mr. Gittis, permitting him to give speeches and lecture counsel.

E. The Court erred in excluding or improperly limiting discovery and/or the introduction of evidence on the following topics:

1. That CPH had already recovered its investment in Coleman. Order for CPH Motion in Limine No. 1 (Feb. 17, 2005). That evidence was relevant to show, among other things, why CPH was satisfied with selling Coleman in return for cash and debt relief by themselves, without regard to the value of the allegedly inflated Sunbeam stock and potential risks.

2. CPH's and Perelman's need and motive for prompt debt relief. Even though CPH produced documents relating to motive belatedly, the Court quashed Morgan Stanley's Notice To Produce MAFCO Loan Agreements. See, Order on Coleman (Parent) Holdings, Inc. Motion to Quash Morgan Stanley's Notice to Produce MAFCO Loan Agreements. (March 24, 2005). It likewise foreclosed any inquiry about MAFCO's debt, the fact that its assets were all pledged, and the effect of the deal on those obligations. 04/20/05 Tr. at 9422-23, 9330. Finally, the Court improperly foreclosed proof relating to why certain agreements with banks gave Mr. Perelman an incentive to accept stock over cash.

3. The size of other transactions that Perelman, his advisors, and MAFCO had conducted. See Order on Plaintiff's Motion in Limine Number No. 2 (Feb. 17, 2005). That evidence was relevant to their degree of financial sophistication, including the fact that they had repeatedly conducted transactions far larger than the one at issue in this case.

4. That debenture holders never sued Morgan Stanley after CPH put the debenture holders directly at issue in its opening statement, *e.g.*, 4/06/05 Tr. at 6961-62; by claiming that it relied on disclosures in the debenture documents, *e.g.*, 4/19/05 9107-09, 9116; and by attempting to make Morgan Stanley look more culpable by referencing its role as the sole manager and underwriter of the debenture offering, including the fee it earned, 4/19/05 Tr. at 9105. The deemed facts also cite the underwriter's alleged duty to obtain and verify relevant

information. 4/7/05 Tr. 7218. But CPH was not a debenture holder, and the entities that did purchase debentures never filed suit against Morgan Stanley. See, Order on CPH's Motion in Limine Number 10 (Feb. 17, 2005).

5. That Revlon had been accused of engaging in the same practices -- bill and hold sales and channel stuffing -- underlying CPH's accusations against Sunbeam. Order on CPH's Motion in Limine Number 11 (Feb. 17, 2005). That evidence tended to show that CPH's officers were at least well positioned to recognize the practices, and that they understood and were willing to undertake the risks involved therein.

6. The extensive due diligence CPH and MAFCO officials conducted for other transactions, including the Panavision acquisition. That evidence was relevant to show, among other things, that CPH's officers were sophisticated and able to undertake extensive diligence; the sort of diligence efforts they employ for matters (unlike Sunbeam's financial condition) on which they plan to rely; and that diligence efforts would likely have caused price to be renegotiated rather than anything else.

7. Evidence of the Non-reliance Clause in Sunbeam's Feb. 23, 1998 Confidentiality Agreement and Integration/Merger Clauses in the Merger Agreements. Those clauses in essence provided that CPH would not rely on non-public materials or representations provided by Sunbeam or Morgan Stanley in connection with merger discussions, many of which formed the basis of CPH's lawsuit here. Those clauses were relevant both to (1) whether CPH in fact relied (having represented that it would not) and (2) whether such reliance was justified under Florida law. Although the Court agreed that a reasonable juror could find that CPH in fact had assented to the non-reliance clauses, which were incorporated by reference into the merger agreement, 4/22/05 Tr. at 10215, the Court erroneously excluded them from evidence after requiring proof to the Court's satisfaction that individual "decisionmakers" were aware of agreements. That was contrary to Florida law, which presumes that corporations are aware of the contents of the agreements they enter into and charges corporations with the knowledge of their agents. It invaded the province of the jury, which was entitled to determine factual issues

of what particular CPH agents knew (particularly where CPH was contesting knowledge of agreements incorporated by reference into important merger agreements signed by high-ranking CPH officers). The Court declined to consider evidence that such agreements were regularly used by CPH itself, reinforcing the likelihood of knowledge.

8. That CPH accepted Sunbeam warrants after disclosure of the fraud, which tended to show that CPH still thought Sunbeam was viable and had entered into a new agreement with Sunbeam after knowledge of the fraud.

9. Evidence of CPH's out of pocket loss. The jury should have been permitted to consider the alternative measure of out-of-pocket loss because CPH's benefit-of-the-bargain measure was uncertain and speculative. Further, the minimal or non-existent nature of CPH's out-of-pocket loss was relevant to reliance, since it demonstrates why CPH – which received most, all, or more than the value of Coleman in other consideration – was indifferent to any risks from accepting potentially inflated Sunbeam stock.

10. Evidence that CPH could have mitigated its risk and loss through private sales or hedging. The Court erred and/or abused its discretion in precluding Morgan Stanley from introducing evidence that CPH could have captured value from the transaction after learning of the fraud so as to mitigate damages, through swaps, hedging, and similar transactions and by instructing the jury not to consider such evidence. See, Order on Defendant's Proffer and Renewed Motion with Respect to Hedging (Apr. 19, 2005). To the extent expert testimony was required, the Court should have permitted Professor Haas to testify.

11. Further evidence of the value that the Sunbeam stock would have had, if Sunbeam's stock had been as represented. The Court erred and/or abused its discretion by precluding evidence of and calculations regarding the consideration given to minority CPH shareholders in connection with the merger. That evidence and those calculations were probative of the value of the Sunbeam as represented.

12. Evidence concerning the Sunbeam and Andersen settlements. CPH witnesses opened the door by bringing up the Sunbeam and/or Andersen settlements in their

testimony. The Court erred Morgan Stanley was precluded from presenting probative evidence pertaining to those matters.

13. Evidence that Morgan Stanley Senior Funding lost hundreds of millions of dollars.

F. The Court Improperly Commented On the Evidence And Signaled Distrust and Disbelief of Morgan Stanley To the Jury

Time and again, the Court gave a "limiting" instruction on reliance in connection with examinations on the scope of CPH's diligence efforts. 4/11/05 Tr. at 7604-05. The instruction itself was improper, because (1) it constituted improper comment on the evidence; (2) was not a limiting instruction at all, but the standard the Court chose to employ in defining reliance; (3) singled Morgan Stanley out to the jury and signaled the Court's expectation that it would make improper arguments, stating that "Morgan Stanley can not claim that . . ."; (4) misstated Florida law, which requires justifiable reliance from sophisticated parties in significant transactions; and (5) was incorrect under New York law, which should have governed. The suggestion that the Court anticipated improper argument from Morgan Stanley was particularly damaging given that the Court had already instructed the jury, using inflammatory terms, to accept that Morgan Stanley had committed fraud and the jury was instructed about litigation misconduct during voir dire.

The Court compounded the error, commenting on the evidence repeatedly, by giving the instruction, a variant thereof, or reminding the jury of it, more than a dozen times, often several times a day. See, e.g., 4/13/05 Tr. 8000-01, 8125, 8128, 8129-30, 8153, 8162, 8202; 4/14/05 Tr. 8569-70; 4/18/05 Tr. 8768-69; 8782-83, 8958. The instructions were given at points that destroyed the flow of the examination. The form and timing of the instruction also undermined the credibility of the defense. Further, the cumulative effect of repeating this instruction was prejudicial.

IV. THE COURT ERRED AND/OR ABUSED ITS DISCRETION WITH RESPECT TO THE JURY INSTRUCTIONS AND VERDICT FORM[3]

A. Error With Respect To The Jury Instructions

1. The Court erred in refusing Morgan Stanley's requested instructions and in granting CPH's requested instructions. The court erred by not instructing the jury under New York law as requested in Defendant's Revised Phase 1 Requested Jury Instruction Relating to New York Law (filed May 5, 2005).

2. The court erred by instructing the jury to consider CPH's claim for aiding and abetting fraud in that Florida law does not recognize such a claim.

3. The court erred and/or abused its discretion when it instructed the jury that it was required to accept the "admitted or agreed to facts I read to you earlier as true." Instructing the jury to consider "admitted or agreed to facts" was an impermissible, unwarranted and unfairly prejudicial sanction against Morgan Stanley for litigation misconduct. Morgan Stanley never "admitted or agreed" to the facts that the Court conclusively established as a result of Morgan Stanley's alleged litigation misconduct. Thus, the instruction was contrary to the facts of record.

4. Instructing in this fashion was erroneous and/or an abuse of discretion because it was argumentative, unfairly prejudicial and commented on the evidence. The instruction charging the jury that it may not consider any evidence admitted during trial as contradicting the established facts was improper in that the jury should have been entitled to consider any and all evidence introduced during trial.

5. The court erred and/or abused its discretion when it instructed the jury that "I previously instructed you that certain facts are deemed established and must be accepted as true for purposes of this case. CPH is not required to offer proof on these facts that have been deemed established and Morgan Stanley is not permitted to dispute or challenge them." 5/13/05 Tr. at

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[3] Morgan Stanley adopts and incorporates by reference its written objections to CPH's proposed jury instructions, as well as all arguments made in opposition to the Court's instructions and in favor of the instructions proposed by Morgan Stanley at the charge conference.

14606. In addition to the foregoing, repeating the instruction was unfairly repetitious and argumentative, and bolstered the importance of the "established facts" and gave them undue weight.

6. The court erred and/or abused its discretion when it instructed the jury that the only issues for its determination were reliance and damages. The jury should have been required to determine all elements of CPH's claims.

7. The court erred and/or abused its discretion when it instructed the jury that CPH was required to prove only whether it "relied on the false statements made by Sunbeam or Morgan Stanley." Under Florida law, the issue for the jury was whether CPH justifiably relied on such statements.

8. The court erred and/or abused its discretion when it instructed the jury that CPH was required to prove that it "actually relied" on false statements. The correct standard for reliance under Florida law is "justifiable reliance." Assuming, arguendo that use of "actual reliance" was proper, the Court's limitation on the definition of "actual reliance" was improper, legally erroneous and/or an abuse of discretion.

9. The court erred and/or abused its discretion when it refused to instruct the jury that when deciding whether reliance was justifiable, it should consider the totality of the circumstances and by failing to instruct the jury on the relevant factors for its consideration, including: the type of information at issue, the nature of the communication between the parties, the relative position of the parties, and the extent of the parties' knowledge of corporate affairs (including the fact that CPH is a sophisticated investor that was aided by experienced advisors).

10. The court erred and/or abused its discretion when it instructed the jury that there was no duty to investigate or use due diligence. The sufficiency of CPH's investigation into the Sunbeam transaction was, at a minimum, a relevant factor for its consideration. Even if justifiable reliance does not require a plaintiff to demonstrate that it made reasonable inquiries, a plaintiff is barred if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation, and "a

person may not justifiably rely on a representation if "there are 'red flags' indicating such reliance is unwarranted." *Lewis v. Bank of America NA*, 343 F.3d 540, 546 (5th Cir. 2003).

11. The court erred and/or abused its discretion when it instructed the jury that it must treat statements by Sunbeam as if they had been made by Morgan Stanley and vice versa. The instruction given contains incomplete and/or incorrect statements of the law; is repetitive; improperly comments upon and unfairly bolsters CPH's evidence; and was prejudicial.

12. The court erred and/or abused its discretion when it instructed the jury that, for purposes of establishing reliance, CPH need not show that the false statements were communicated to decision-makers. The instruction was contrary to the pleadings and to the "established facts" in that CPH has not asserted a claim that it was damaged by reliance on any false statements made by Morgan Stanley or Sunbeam to anyone other CPH. The instruction was contrary to the facts in evidence, and unfairly commented on the evidence. The instruction was unbalanced, confusing and argumentative. For example, it distinguished between information conveyed to CPH (a corporation) and information conveyed to CPH's agents and employees, a distinction that makes no sense. Finally, the instruction was legally incorrect and/or incomplete and inconsistent with the Court's other rulings. In limiting the scope of Levin's testimony regarding his observations, and precluding Morgan Stanley from introducing evidence of non-reliance and similar clauses, the Court required Morgan Stanley to show that the information (Levin's observations or the fact of the non-reliance clauses) was conveyed to a CPH decision-maker.

13. The court erred and/or abused its discretion when it instructed the jury to consider concurrent causes. The instruction was not supported by the evidence because there was no evidence of a concurrent cause. Further, the Court improperly modified Florida Standard Jury Instruction 5.1(b) (without stating sufficient reasons to do so) by charging the jury that the fraud "may be a legal cause of CPH's losses even though the fraud operated in combination with the act of another or some other cause occurring after the fraud occurred." (emphasis added). Such acts

are not concurring causes as a matter of law. Finally, the instruction is not applicable to intentional tort claims such as this.

14. The Court erred and/or abused its discretion by instructing the jury to determine damages according to the benefit-of-the-bargain method. 5/13/05 Tr. at 14609-10. Benefit-of-the-bargain damages are not available because (1) the case is governed by New York law, which does not allow such damages; (2) CPH failed to prove its damages with the requisite certainty; (3) Morgan Stanley is not in privity with CPH; and (4) Florida law does not permit benefit-of-the bargain damages.

15. The Court erred and/or abused its discretion by failing to instruct the jury that the represented value of the shares must be computed as of the date of the transaction, and by instructing the jury to base damages on the "expected" value of the shares.

16. The Court erred and/or abused its discretion by instructing the jury to calculate damages based on "the fair market value at which CPH reasonably could have sold its" shares. *Id*, at 14609, 14610. Because CPH received restricted shares, the price at which it reasonably could have sold those shares (several years later) bears no relation to, and is not a legally valid proxy for, the actual value of the shares on the date of the transaction. For similar reasons, the references to the "market value" and "willing and able" purchasers and sellers, *id.* at 14610-11, were misleading, erroneous, and an abuse of discretion.

17. The Court erred and/or abused its discretion by failing to instruct the jury to calculate actual value as of the date of the transaction, and instead instructed the jury to calculate actual value as of a date no earlier than November 25, 1999. *Id.* at 14610. Under Florida law, actual value must be calculated as of the date of the transaction The Court's instruction relieved CPH of it burden to prove the portion of its losses proximately caused by the fraud and effectively allowed CPH to recover both benefit-of-the-bargain and rescissionary damages rather than electing between the two.

18. The Court erred and/or abused its discretion by failing to instruct the jury that subsequent appreciation or depreciation was not recoverable.

19. The Court's instructions on recoverable damages and proximate cause were erroneous, an abuse of discretion, confusing, internally inconsistent, and incapable of rational application. The Court instructed the jury to determine damages based on the difference between the stock's represented value and its actual value no earlier than November 25, 1999, *Id.* at 14610, but later instructed the jury that CPH could not recover for losses caused by factors other than the alleged fraud, *Id*, at 14611. Those instructions were internally inconsistent because the former instruction requires the jury to compute damages based on all losses suffered over the nearly two-year sale-restricted period, regardless of cause. To the extent the latter instruction could have been construed as a modification of, or limitation on, the former instruction (and without conceding any reasonable likelihood the jury would have so understood the instructions), the Court effectively reversed the burden of proof and presumed that all losses suffered during the sale-restricted period were caused by the fraud absent evidence to the contrary. It was CPH's burden to isolate and remove the portion of its losses not proximately caused by the fraud.

20. The Court erred and/or abused its discretion by instructing the jury that Sunbeam could not have sold its stock prior to November 25, 1999. *Id.* The instruction ignored the fact that CPH could have sold its shares by private sale or other legal means before that date, and improperly invaded the province of the trier of fact.

21. The Court erred and/or abused its discretion by failing to instruct the jury that CPH could not recover losses based on an inability to sell before a particular date without proof that it would have sold before that date had it been able.

22. The Court erred and/or abused its discretion by failing to instruct the jury that CPH could recover only those damages caused by fraudulent statements upon which it actually (and justifiably) relied.

23. The court erred and/or abused its discretion when it instructed the jury that any uncertainty in computing damages should not preclude an award of damages because Morgan Stanley "bears the risk of uncertainty caused by its own wrongful acts as well as the

wrongful acts of Sunbeam." The instruction is legally incorrect and/or incomplete and is further unbalanced and argumentative because it does not also provide that CPH had the burden to establish its actual damages; that damages must be proved with reasonable certainty; and that damages may not be based on speculation. It is contrary to the Florida Bar's instruction for business litigation. See, Florida Jury Instruction for Business Litigation §15.96 (2001). The instruction is erroneously based on spoliation issues, even though CPH did not assert any claim for spoliation and the jury did not hear any evidence that Morgan Stanley despoiled evidence relating to valuation. The instruction is also contrary to law because, if a plaintiff cannot prove benefit-of-the-bargain damages with reasonable certainty, that measure of damages is unavailable and the plaintiff must seek out-of-pocket loss or another measure. The instruction also improperly injects negligence concepts into this action.

24. The court erred and/or abused its discretion when it instructed the jury on Morgan Stanley's mitigation defense. The court's instruction was an erroneous and/or incomplete statement of the law. It improperly limited the defense and improperly commented on the evidence.

25. The court erred and/or abused its discretion when it instructed the jury as to hedging. The court's instruction was an erroneous statement of the law. It improperly limited the use of hedging as a defense and improperly commented on the evidence.

26. The court erred and/or abused its discretion when it gave the jury a collateral source instruction based on the Arthur Andersen or Sunbeam settlements, where those settlements were injected into the case by CPH and there was no evidence of the amounts of those settlements.

27. The court erred and/or abused its discretion in failing to give Defendant's Supplemental Phase 1 Requested Jury Instruction numbers 1, 3, 5, 7, 8, 9, 10, 11, 12, 13A, 13B, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, A1, A2, 32, and 33. Each of these instructions correctly stated the law; they were supported by the evidence and were necessary to explain the elements of Plaintiff's cause of action as well as Morgan Stanley's defenses.

B. **Error With Respect to the Verdict Form**

1. The Court erred and/or abused its discretion by refusing to use Morgan Stanley's proposed verdict form and by using CPH's verdict form.

2. The court erred and/or abused its discretion by failing to ask the jury whether CPH actually relied on false statements by Sunbeam or Morgan Stanley.

3. The court erred and/or abused its discretion by failing to ask the jury to determine damages based on the false statements on which CPH relied, rather than for a "fraud" of undefined scope.

4. The court erred and/or abused its discretion by failing to ask the jury whether CPH's reliance was justifiable.

V. OTHER GROUNDS REQUIRING NEW TRIAL

A. **Excessiveness**. The verdict is excessive, particularly in comparison to the actual losses and uncertainty over the value of the bargain, shocks the judicial conscience, is contrary to the manifest weight of the evidence, contrary to law, and is the result of prejudice, passion, and sympathy.

B. **The Jury Panel Was Tainted.** As set forth in Defendant's Motion to Strike the Jury Panels, during the middle of voir dire this Court entered its March 23, 2005 Order on Plaintiff's Renewed Motion for Default Judgment. The Court's Order came after both jury panels had been extensively questioned concerning claims of fraud and defenses to those claims. The withdrawal of Morgan Stanley's lead counsel and sudden appearance of new counsel prejudiced Morgan Stanley's ability to obtain a fair trial. The Court erred when it failed to give a curative instruction concerning Plaintiff's counsel's improper arguments concerning the recipient of an award of punitive damages, religious topics, and comments concerning opposing counsel. Under these circumstances a new trial is warranted.

C. **Improper Dismissal of Qualified Jurors.** Despite saying that they could be fair and impartial during questioning, the Court at CPH's request nonetheless dismissed several jurors that were proper jurors. Those jurors included Mr. Katz, Mr. Sigman and Mr. Silverberg.

D. **Improper Ex Parte Contacts With Jurors.** As set forth more fully in Morgan Stanley's motion for a mistrial based on improper ex parte contact, and ore tenus, Morgan Stanley is entitled to a new trial based on the misconduct of Mr. James Comyns in contacting the jurors in view of the relationship between Comyns and Plaintiff's counsel. As the Court is aware, Mr. James Comyns is a current client of CPH's lead trial counsel. He intentionally and improperly contacted at least three jurors during the course of the trial. In addition, court records indicate that Mr. Comyns was a co-defendant in a lawsuit with Mr. Scarola, CPH's lead trial counsel, and apparently still is a co-defendant with the CPH's lead trial counsel's firm, Searcy, Denney, et al. Further, a search of the public records demonstrates that the law firm of Searcy, Denney is or was a creditor of Mr. Comyns. As shown by the UCC-1 Financing Statements attached hereto as Exhibit "A", Searcy, Denney has or had a security interest in virtually every piece of personal property owned by Mr. Comyns and his wife. These facts were not disclosed by Plaintiff's counsel during the course of the trial. These facts unequivocally require the Court to grant a new trial. In addition, the likelihood of prejudice is enhanced by numerous facts from which the jurors may have mistakenly inferred that Mr. Comyns was associated with Morgan Stanley, as well as the Court's refusal to take corrective action or give curative instructions. Therefore, a new trial is warranted on this ground as well.

E. **Improper Accusation of Criminal Misconduct.** During his testimony, Mr. Perelman falsely stated that Morgan Stanley had admitted engaging in criminal misconduct. As explained in Morgan Stanley's oral mistrial motion and its Renewed Motion for Mistrial Based on Ronald Perelman's False and Inflammatory Accusation of Acknowledged Criminal Activity (filed Apr. 25, 2005), the Court's effort to cure the prejudice was insufficient and in fact re-emphasizes the allegation. Particularly in combination with (a) the Court's reading of deemed facts (which included inflammatory terms), (b) CPH's constant references to the deemed facts as "established" or "established before trial" (implying a prior proceeding at which the facts were proved), (c) CPH's efforts to link Morgan Stanley with Arthur Andersen (which was criminally convicted in other matters) and other recent corporate scandals (resulting in criminal

convictions), and (d) Morgan Stanley's inability to dispute the fraud at trial, the unfounded accusation left the unmistakable and unduly prejudicial impression that Morgan Stanley was criminally convicted.

F. Improper Opening Statement. Morgan Stanley is entitled to a new trial based on improper comments by counsel during opening statement. Morgan Stanley hereby adopts the objections made during opening statement (including standing objections) and its repeated motions for mistrial. The improper statements requiring a new trial include, but are not limited to, all references to and use of the so-called "established facts," as well as the following:

1. improper references to matters outside the evidence that were clearly designed to engender sympathy from the jury and turn the jurors into witnesses for CPH, including most egregiously, efforts to associate Coleman with products used by the jurors during Hurricane Jeanne:

> The Coleman Company is a well known manufacturer of camping gear, lanterns, stoves, coolers. Perhaps there were some of you who, like my family, after we were visited by Jeanne --

Other improper comments include a reference to September 11, 2001; improper references to matters outside the evidence that were clearly designed to plant prejudicial facts in the minds of the jurors, including statements designed to elicit Arthur Andersen's criminal prosecution and the number of well-publicized corporate frauds uncovered in the late 1990s, and the victims of those corporate frauds;

2. a litany of argumentative statements designed to inflame the jury, including repeated commentary to the effect that "you can't fool all of the people all of the time" and "[i]n this courtroom, the time for trying to fool anyone is over." Counsel told the jury "[t]his case is about Morgan Stanley for a very good reason." He also argued to the jury that Morgan Stanley and Sunbeam had to "find a way to continue to perpetuate the smoke and mirrors illusion that has been created by the games that [had] been played with the books."

Other examples of improper comments designed to enflame the jury against this corporate defendant include counsel's statements that:

> I think it is probably fairly apparent to you how it might be that firing large numbers of employees and closing large numbers of plants, although obviously not a benefit to those who get fired or those communities who lose their manufacturing facilities ... may indeed have an economic benefit to a company that is striving for more efficiency.

and

> For $32 million in investment banking fees Morgan Stanley put the good name it had in 1998 behind a conspiracy and a fraud.

3. numerous improper statements where CPH's counsel attempted to take over the proper function of the Court and instruct the jury about, among other things, the roles of the parties and their attorneys and the jurors. Counsel sought to tell the jury why the established facts characterize evidence a certain way. He also improperly repeatedly attempted to instruct the jury on the law, and improperly commented on the defense strategy;

4. numerous statements designed to personalize the issues for the jury and an improper golden rule argument that the Court made light of before the jury despite sustaining the objection;

5. statements designed to vouch for the witnesses to be called by CPH, particularly Dr. Emery;

6. improper statements complimenting the members of CPH's trial team;

7. an improper demonstration using children's toys; and

8. improper references to punitive damages.

G. <u>Improper Closing Argument</u>. Morgan Stanley is entitled to a new trial based on improper comments by counsel during closing arguments. Morgan Stanley hereby adopts the objections made during closing argument (including standing objections) and its repeated motions for mistrial. The improper statements requiring a new trial include, but are not limited to, all references to and use of the so-called "established facts," and the following:

1. an enormous number of improper attacks on the defense strategy and defense counsel:

> For the last five weeks we have witnessed a concerted, carefully constructed effort to present to you a blame-the-victim defense.
>
> When we look at the evidence in this case and when we look at the law in this case, we will find that that blame-the-victim defense is constructed out of lawyer suggestions in leading questions. It is constructed out of lawyer argument, and it has absolutely no basis whatsoever in the facts.
>
> ***
>
> We have listened to three hours of a carefully crafted continuation of misdirection and diversion that can only be successful if you, ladies and gentlemen of the jury, do what the defense has done. Because during three hours of carefully crafted misdirection and diversion you heard not one word about the law. Not a single word. And only if you ignore the court's instructions on the law as the defense has ignored the instructions on the law can you arrive at the conclusions promoted in advance by the defense.
>
> ***
>
> Maybe there's a world in which that makes some sense to someone. Maybe there is someone out there who could be fooled by that argument some of the time. But this is not the time for fooling people, and this is not the place for people to be fooled. And that is a fool's argument.
>
> ***
>
> No wonder they want you to ignore the established facts.
>
> ***
>
> Trying to get a hold of the defense in this case is like trying to put your thumb on a blob of mercury. It just keeps squirting out every time you got a handle on it, it's gone. It's some place else.
>
> ***
>
> So, again, you know, we're just trying to get a hold of this amorphous constantly changing defense, and you just don't know in which direction to turn. What are you going to do with an argument like that? What are you going to do with a defense like that? What are you going to do with ongoing efforts to continue to misdirect your attention from what the true facts are in this case?

***

> And what has the Defendant offered you in response to the testimony of Dr. Nye? In response to the testimony of Dr. Nye, the defense has offered you nothing. Nothing. Now you may use your common sense and sound judgment. You can't speculate, but you may use our common sense and sound judgment. And does it make common sense to you that if indeed there were some glaring defect in Dr. Nye's damage calculations that Morgan Stanley with the resources available to it would not have presented an expert witness to come in and say Dr. Nye is all wet? You need to apply a liquidity discount. You can't use the averaging method that he used. It's unreasonable you have to take a different approach.

2. improper comments relating to Jerry Levin, a witness called by the defense. Counsel repeated repeatedly referred to Mr. Levin as the "darling of the defense" when attempting to attack Morgan Stanley's strategy in this case;

3. improper argument to the jury that "[t]he time for fooling people has ended. The place for fooling people is certainly not in this courtroom." Counsel's argument represented an improper send a message/conscience of the community argument. It improperly interjected counsel's personal opinion and vouched for the justness of his clients cause, and was highly inflammatory and unfairly prejudicial;

4. improper personal opinions attempting to vouch for CPH's expert witness Dr. Nye;

5. improper attempts to instruct the jury on the law, and improper accusations that Morgan Stanley's counsel had acted improperly by not attempting to instruct the jury on the law. Further, counsel displayed a demonstrative to the jury that contained an incorrect instruction on the measure of damages;

6. improper comments that violated the Court's order that counsel was not permitted to discuss alleged differences in practices in 1997 and the present time (in view of the Court's refusal to allow Morgan Stanley to rebut undisclosed expert testimony on that issue). Counsel stated that CPH's investment banker, CSFB did not conduct a fraud investigation "because it just isn't done." Counsel further stated "[I]t is customary, it is reasonable, it is

regular -- at least it was in 1997 and early 1998 -- to assume that when a respected accounting firm like Arthur Andersen puts its stamp of approval on audited financial statements, that those audited financial statements can be relied upon as being true."

7. improper comments and argument based on Jerry Levin's vote to approve the Sunbeam-Coleman merger. Those comments did not merely contravene counsel's prior representation that he would not argue from Levin's vote (and from which the Court erroneously released him, as explained above). They also exceeded the boundaries of the Court's order, which clearly directed counsel to do no more than mention the vote and refrain from argument.

8. use of a demonstrative and comments by counsel that violated the Court's orders. Before beginning CPH's rebuttal argument, Morgan Stanley objected to CPH's use of a demonstrative showing that Morgan Stanley valued CPH's interest between $31.06 and $53.24 per share. The court stated that the demonstrative could only be used to establish reliance by Dr. Nye on similar numbers. Counsel then violated the Court's order by using the graphic to attempt to establish damages.

9. improper misstatements of the trial record and references to matters outside the evidence;

Morgan Stanley is entitled to a new trial based on the cumulative and pervasive error contained in CPH's counsel's opening statement and closing argument and hereby renews its previously made motions for mistrial.

H. Improper Presentation of Materials to Jurors. In connection with closing argument, CPH's counsel presented the jurors with marked up copies of the jury instructions that stressed some parts of the instructions over others. Morgan Stanley was forced to object (prejudicing it in the eyes of the jury) and to cause those copies to be taken away. In addition, during the entire sidebar conference, the jurors reviewed the marked-up copies presented by counsel.

I. Mistrial Motions. Morgan Stanley hereby renews its previously made motions for mistrial.

J. **Disqualification of Plaintiff's Counsel.** The court erred in denying disqualification of Plaintiff's counsel on the grounds of unfair use of an obviously privileged document that was inadvertently produced. *See Abamar Housing and Development v. Lisa Daly Lady Decor, Inc.*, 724 So. 2d 572 (Fla. 3d DCA 1998) (granting certiorari and holding that plaintiff's counsel should have been disqualified when document inadvertently produced to them was used to unfair advantage.)

K. **Denial of Motions for continuance.** The court abused its discretion in denying Morgan Stanley's Motion for Continuance after granting Morgan Stanley's primary trial counsel, Kirkland & Ellis LLP permission to withdraw just prior to trial and in not giving Morgan Stanley additional time to supplement its email productions.

L. **Inconsistent rulings**. The Court issued numerous inconsistent rulings through trial, including but not limited to the following: When CPH sought to introduce exhibits not timely included on the exhibit list, the Court permitted it to do so. 4/14/05 Tr. 8430-32. When Morgan Stanley sought to add and introduce exhibits, the Court refused to allow it, regardless whether CPH was prejudiced or not. 4/18/05 Tr. 8771-73, 8879. The Court imposed a purported duty on Morgan Stanley to preserve documents in anticipation of litigation, but held that there was no such duty as to CPH. When CPH sought to use toy irons as demonstrative exhibits, the Court permitted it; when Morgan Stanley sought to use pictures of irons, the Court refused to permit it. When CPH's witnesses sought to testify about receiving false representations and their subjective impressions, they were permitted to do so without showing that the information was conveyed to the actual decision-makers based on the theory that they were agents for CPH; the jury was instructed accordingly. When Morgan Stanley sought to introduce evidence that CPH had agreed to non-reliance clauses, it was required to show that CPH decision-makers knew of the clauses. Morgan Stanley was likewise precluded from presenting Mr. Levin's testimony regarding his impressions unless it was shown in advance that those impressions were conveyed to Mr. Perelman.

M. **Intrusion on work product.** The Court repeated and improperly required Morgan Stanley's counsel to reveal the content of his proposed cross-examinations and arguments in advance, eliminating spontaneity and reducing the likelihood of witness candor.

N. **Motion to Disqualify.** The Court likewise should have granted Morgan Stanley's motion to disqualify. Failing that, it should have granted Morgan Stanley's mistrial motions to prevent Morgan Stanley from having to proceed through trial with a well founded fear that it could not receive, and was not receive, a fair trial.

O. **Motion to Amend Waiver Defense.** The Court abused its discretion in denying Morgan Stanley's Motion to Amend its defense of waiver to conform to the evidence.

P. **Order on CPH's Motion for Adverse Inference and Renewed Motion for Default Judgment.** It was error and the Court abused its discretion in entering these two orders.

Q. **Improper Bifurcation.** The Court bifurcated the trial at plaintiff CPH's request and over defendant Morgan Stanley's objection even though bifurcation is designed for the protection of defendants, and should not be imposed over a defendant's objection.

R. **Cumulative error and impact.** Morgan Stanley is entitled to a new trial based on the cumulative and pervasive errors in this case, including but not limited to the errors listed above. Those errors singly and in combination deprived Morgan Stanley of a fair trial.

WHEREFORE, Defendant, Morgan Stanley, asks that the Court grant Defendant's Motion for Judgment in Accordance with Motion for Directed Verdict or Alternative Motion for New Trial together with such other and further relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 16th day of May, 2005.

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant. /

MORGAN STANLEY'S MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT IN PHASE II, OR, IN THE ALTERNATIVE, NEW TRIAL ON PUNITIVE DAMAGES OR FOR REMITTITUR OF PUNITIVE DAMAGES

Pursuant to Florida Rules of Civil Procedure 1.480 and 1.530, and Section 768.74, Fla. Stat. (2005), Defendant Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully moves for a judgment in accordance with its prior Motion for Directed Verdict in Phase II or, in the alternative, a new trial on punitive damages or for a reduction or remittitur of the punitive damages awarded by the jury. As grounds for such relief, Morgan Stanley states:[1]

MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT IN PHASE II

Morgan Stanley is entitled to a judgment in accordance with its Motion for Directed Verdict in Phase II for the following reasons:

[1] In accordance with this Court's May 18, 2005 Order Specially Setting Hearing, Morgan Stanley will file its Memoranda of Law in support of all its post-trial motions by June 6, 2005.

1. There is no evidence, or the evidence is insufficient, to establish CPH's entitlement to an award of punitive damages by clear and convincing evidence as required by Florida law.

2. There is no evidence, or the evidence is insufficient, to establish a basis for the jury's determination of the amount of punitive damages by the greater weight of the evidence as required by Florida law.

3. There is no evidence, or the evidence is insufficient, to establish a basis for the excessive amount of the punitive damages awarded by the jury.

4. There is no evidence, or the evidence is insufficient, to establish Morgan Stanley's corporate liability for punitive damages. Neither CPH's pleadings nor the evidence presented at trial established conduct on the part of specific Morgan Stanley officers or directors that would serve as a basis for punitive damages.

5. CPH's pleadings fail to establish a basis for Morgan Stanley's corporate liability for punitive damages.

6. The evidence affirmatively shows that Morgan Stanley is entitled to judgment as a matter of law on CPH's claim for punitive damages.

7. There is no competent evidence on the issues of fact raised by the pleadings from which the jury could legally render a verdict awarding punitive damages for CPH.

8. The "deemed facts" arising from this Court's March 23, 2005 sanctions order are insufficient to serve as a basis for punitive damages. Facts established by the court may not, as a matter of law, serve as a basis for punitive damages.

9. Morgan Stanley hereby adopts and renews its Motion for Directed Verdict in Phase II. The Court erred in denying Morgan Stanley's Motion for Directed Verdict. For the

reasons stated in that Motion, the Court should enter a judgment in Morgan Stanley's favor in accordance with Morgan Stanley's Motion for Directed Verdict in Phase II.

WHEREFORE, Defendant, Morgan Stanley, requests this Court enter a judgment in favor of Morgan Stanley on CPH's claim for punitive damages in accordance with Morgan Stanley's Motion for Directed Verdict in Phase II together with such other and further relief as is just and proper.

MOTION FOR NEW TRIAL

If the Court denies Morgan Stanley's motion for judgment in accordance with its Motion for Directed Verdict in Phase II, Morgan Stanley is entitled to a new trial on punitive damages for the following reasons:

1. The Court erred and/or abused its discretion by extending the sanctions imposed for alleged litigation misconduct into the punitive-damages phase:

a) The Court erred and/or abused its discretion by prohibiting Morgan Stanley from contesting its complicity in the fraud prior to the imposition of punitive damages. This sanction went far beyond what was necessary to cure any prejudice from the discovery misconduct.

b) The Court erred and/or abused its discretion by prohibiting Morgan Stanley from contesting its complicity in the fraud prior to a determination of entitlement to an award of punitive damages. By extending litigation misconduct sanctions to Phase II, the Court effectively directed a verdict against Morgan Stanley on entitlement to punitive damages.

c) Even if the extension of litigation sanctions into Phase II was not error or an abuse of discretion, the Court erred and/or abused its discretion by failing to eliminate from

its statement of deemed facts all indicia of reprehensibility. For example, the Court should not have deemed true any facts stating or implying that:

i) Morgan Stanley was a leader in targeting CPH;

ii) Morgan Stanley became aware of the fraud at particular times;

iii) Morgan Stanley abused CPH's trust;

iv) the fraud was a heavily detailed plan;

v) particular Morgan Stanley officials participated in the supposed fraud.

d) The court erred and/or abused its discretion by prohibiting Morgan Stanley from telling the jury why the "deemed facts" from Exhibit A were not being contested and/or that those "deemed facts" had never actually been proved.

e) The court erred and/or abused its discretion by admitting evidence of litigation misconduct in Phase II.

f) Even if evidence of litigation misconduct were relevant in Phase II, the court erred and/or abused its discretion by reading a statement of litigation misconduct in Phase II.

g) Even if evidence of litigation misconduct were relevant in Phase II and the reading of some statement of litigation misconduct was a proper exercise of the Court's discretion, the Court erred and/or abused its discretion by including in that statement facts "found" in a pre-trial evidentiary hearing, including what the Court believed to be "reasonable" inferences from the actual evidence. It was error (and a violation of Morgan Stanley's right to a jury trial) to allow punitive damages to be imposed on the basis of the Court's, rather than the

jury's, findings of fact, where those findings were not themselves a sanction. The prejudicial and erroneous aspects of the statement include, but are not limited to:

i) the Court's failure to clarify that it did not know the content of the e-mails that were not produced;

ii) the Court's references to what Morgan Stanley's law division allegedly knew;

iii) the Court's failure to allow Morgan Stanley to adduce evidence indicating that CPH had destroyed a greater proportion of its e-mails;

iv) the Court's failure to clarify that, because of e-mail duplication, "substantially less" (rather than merely "less") than 10% of e-mails were not produced;

v) the statement that certain Brooklyn tapes were not searched.

h) Even if it was not error to present the jury with a statement of "deemed facts" about litigation misconduct, the Court nonetheless erred and/or abused its discretion by prohibiting Morgan Stanley from adducing evidence contradicting those "deemed facts." This ruling prevented Morgan Stanley from mounting an effective defense to the imposition of punitive damages because its witnesses would have been constrained in their ability to give full and complete testimony without contradicting, in at least some respects, the statement of litigation misconduct.

i) The Court erred and/or abused its discretion by failing to inform the jury that it should not speculate whether the Court had itself determined whether there was any direct evidence that Morgan Stanley committed litigation misconduct for the purpose of concealing the Sunbeam fraud.

j) The Court erred and/or abused its discretion by permitting CPH to show misleading demonstrative exhibits to the jury that commingled the Court's actual findings with the further inferences that CPH wished the jury to draw.

k) The Court failed to afford Morgan Stanley a fair opportunity to contest the motivations for any discovery shortcomings.

l) These errors were all in derogation of Morgan Stanley's rights under Florida law, its right to due process embodied in Art. I, § 9 of the Florida Constitution, its right of access to courts embodied in Art. I, § 21 of the Florida Constitution, and its rights under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

2. The court erred and/or abused its discretion by permitting CPH to present evidence of Morgan Stanley's finances during the punitive damages phase:

a) The court erred and/or abused its discretion by permitting CPH to introduce evidence of Morgan Stanley's finances in its case in chief. Unless invoked by the defendant as a limitation on its ability to pay punitive damages, such evidence is irrelevant to the jury's task, is more prejudicial than probative, and violates the defendant's rights under the Due Process Clause of the United States Constitution and Art. I, § 9 of the Florida Constitution in this type of case.

b) Even if some evidence of Morgan Stanley's finances was admissible, the Court abused its discretion by permitting CPH to introduce evidence of:

i) Morgan Stanley's subordinated credit agreement with its parent corporation;

ii) Morgan Stanley's income.

Such evidence was irrelevant and more prejudicial than probative. CPH also failed to lay a sufficient evidentiary predicate for evidence of the subordinated credit agreement.

c) Even if the Court was correct in permitting CPH to adduce some evidence of Morgan Stanley's finances, the Court erred and/or abused its discretion by prohibiting Morgan Stanley from questioning CPH's damages expert about the effect that a $400 million award of prejudgment interest would have on his expert analysis. Morgan Stanley should have been able to adduce evidence on how payment of prejudgment interest would affect the need for deterrence and retribution and the impact of the total judgment against Morgan Stanley.

d) The court erred and/or abused its discretion by prohibiting Morgan Stanley from introducing evidence of Morgan Stanley's cash reserves.

e) The court erred and/or abused its discretion by including references to the $750 million debenture offering and other direct and indirect references to Morgan Stanley's financial resources in the statement of "deemed facts."

f) The court erred and/or abused its discretion by denying Morgan Stanley's motion for a mistrial after CPH's counsel encouraged the jury during closing argument to look at the page of Morgan Stanley's financial statements detailing Morgan Stanley's total assets, which encouraged the jury to base its award on an inappropriately large figure.

3. The Court erred and/or abused its discretion by failing to properly instruct the jury on the law.

a) The Court erred and/or abused its discretion by failing to instruct the jury that compensatory damages serve a deterrent function.

b) The Court erred and/or abused its discretion by failing to instruct the jury that it may award punitive damages only if it finds that Morgan Stanley is so culpable that, in addition to the compensatory damages that Morgan Stanley must pay, a "further penalty" is necessary to achieve just punishment and adequate deterrence.

c) The Court erred and/or abused its discretion by failing to instruct the jury to consider whether the compensatory award completely removed Morgan Stanley's profit from its alleged wrongdoing and whether additional damages were needed for deterrent purposes in light of the relation between the compensatory damages and Morgan Stanley's gain.

d) The Court erred and/or abused its discretion by failing to instruct the jury regarding the indicia of reprehensibility identified by the United States Supreme Court.

e) The Court erred and/or abused its discretion by failing to instruct the jury that the Plaintiff had no right to be awarded punitive damages simply because it had been awarded compensatory damages.

f) The Court erred and/or abused its discretion by failing to instruct the jury not to consider the fact that Morgan Stanley is a large business or the fact that its principal offices are outside of Florida.

g) The Court erred and/or abused its discretion by failing to instruct the jury not to increase any award of punitive damages on the basis of Morgan Stanley's size or financial circumstances.

h) The Court erred and/or abused its discretion by failing to instruct the jury to consider "whether Morgan Stanley had a reasonable basis to believe that its conduct was lawful."

i) The Court erred and/or abused its discretion by failing to inform the jury of the nature of Morgan Stanley's punishment for alleged litigation misconduct.

j) The Court erred and/or abused its discretion by failing to instruct the jury that the proportionality (or "reasonable relationship") principle is not violated by a determination to award no punitive damages or an amount of punitive damages smaller than the compensatory award.

k) The Court erred and/or abused its discretion by failing to instruct the jury that, given the size of the compensatory award, a punitive award could not constitutionally exceed the amount of compensatory damages.

l) The Court erred and/or abused its discretion by failing to instruct the jury that it could not award punitive damages without finding that Morgan Stanley's alleged misconduct was undertaken by specific high-level officers, directors, or managing agents of the corporation.

m) The Court erred and/or abused its discretion by instructing the jury to consider Morgan Stanley's financial resources and to award an amount of punitive damages not disproportionate to Morgan Stanley's financial resources.

n) The Court's punitive damages instructions were not fairly balanced, because the Court identified for the jury factors favorable to CPH's claims while refusing to advise the jury of key mitigating factors on which Morgan Stanley's defense depended.

4. The Court erred and/or abused its discretion by permitting inflammatory and prejudicial argument during the Phase-II opening and closing statements. Such prejudicial statements included, but are not limited to:

a) an invitation to the jury to use its punitive award to send a message to corporate America that the "law of the jungle" does not apply.

b) requests for a specific amount of punitive damages.

c) statements that CPH was "vulnerable" given the trust it had for Morgan Stanley.

d) references to "spanking" and to parallels between punitive damages and child punishment.

e) references to the blind "lady justice," who should use her "sword" when the "scales are tipped."

f) other arguments, including those about going to jail, referencing harm to other parties, about "might mak[ing] right," about people whose only "God is profit and the only commandment is do unto others before they do unto you," and about "civilized and organized society."

g) the argument that Morgan Stanley should be responsible for the actions of its alleged co-conspirators. (The Court's curative instruction was inadequate to remove the taint of this argument.)

h) requiring Morgan Stanley to object repeatedly in closing arguments prejudiced the jury against Morgan Stanley at a critical moment in the case.

5. The Court erred and/or abused its discretion by failing to grant a mistrial after CPH gave an unvetted, underlined copy of the jury instructions to the jury. The Court's curative instruction was inadequate to remove the prejudice of this unauthorized disclosure.

6. The Court erred and/or abused its discretion by permitting CPH's counsel, during voir dire, to suggest to the jury that punitive damages are paid to the state, and not to the plaintiff and by failing to correct that misimpression at any point before or during trial.

7. The Court erred and/or abused its discretion by prohibiting Morgan Stanley from introducing relevant mitigating evidence and expert testimony, including, but not limited to:

a) expert testimony on deterrence theory;

b) challenges to the qualifications and methodology of CPH's damages expert;

c) evidence that CPH sued Arthur Andersen before it sued Morgan Stanley;

d) evidence that CPH settled with Arthur Andersen;

e) evidence of the Plaintiff's finances, including its parity with Morgan Stanley;

f) evidence that the SEC took action against Sunbeam and Arthur Andersen but not Morgan Stanley; and

g) evidence of losses sustained by and loans made by Morgan Stanley's affiliate corporation, Morgan Stanley Senior Funding ("MSSF");

i) The Court erred and/or abused its discretion by holding that, if Morgan Stanley introduced such evidence, CPH would be permitted to introduce evidence of the financial resources of Morgan Stanley's parent corporation.

h) evidence of Morgan Stanley's valuable functions and good works.

i) The Court erred and/or abused its discretion by holding that, if Morgan Stanley introduced such evidence, CPH would be permitted to introduce evidence of Morgan Stanley's purported bad acts.

8. Morgan Stanley is entitled to a new trial based on the cumulative and pervasive error in this case.

9. Morgan Stanley is entitled to a new trial because the jury's award of punitive damages is excessive under both Florida law and the due process clauses of the 14th Amendment to the United States Constitution and Article 1, section 9 of the Florida Constitution.

10. Morgan Stanley hereby renews its previously made motions for mistrial.

WHEREFORE, Defendant, Morgan Stanley, requests this Court grant a new trial on punitive damages together with such other and further relief as is just and proper.

MOTION FOR REDUCTION OR REMITTITUR OF PUNITIVE DAMAGES

If this Court denies Morgan Stanley's motion for judgment in accordance with its motion for directed verdict in Phase II and motion for new trial on punitive damages, Morgan Stanley is entitled, pursuant to section 768.74, Florida Statutes (2000) and other applicable laws, to a reduction or remittitur of the punitive damages. Even if some amount of punitive damages is appropriate in this case, and even if there were no prejudicial trial errors, the $850 million punitive award is so excessive as to constitute a deprivation of property without due process of law. U.S. Const. Amd. XIV; Fla. Const. Art. 1, § 9. Specifically,

a) the punitive award is disproportionate to the reprehensibility of Morgan Stanley's alleged misconduct;

b) the punitive award is far greater than any gain Morgan Stanley realized or hoped to realize from its alleged fraudulent conduct;

c) given the substantial compensatory award, due process does not, at a minimum, permit any award greater than the compensatory damages awarded by the jury. Indeed, given the other circumstances of the case, even a punitive award equal to the compensatory award would be constitutionally excessive; and

d) the amount awarded far exceeds any amount that can be justified as necessary to achieve the State's goals of retribution and deterrence.

The punitive award therefore is both constitutionally infirm and excessive under Florida law. A reduction or remittitur of the punitive award is therefore warranted.

WHEREFORE, Defendant, Morgan Stanley, asks that the Court grant Defendant's Motion for Reduction or Remittitur of Punitive Damages to a small fraction of the compensatory damages together with such other and further relief as is just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 27th day of May, 2005.

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003 CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S INITIAL BRIEF IN SUPPORT OF ITS MOTION FOR PREJUDGMENT INTEREST

Plaintiff Coleman (Parent) Holdings Inc. ("CPH") respectfully submits this initial brief in support of its motion for prejudgment interest. Florida law firmly establishes that prejudgment interest should be awarded on compensatory damages for economic harm suffered by a plaintiff, such as that inflicted upon CPH by Morgan Stanley & Co. Incorporated ("Morgan Stanley"). Accordingly, CPH should receive prejudgment interest, as computed by the Clerk of the Court pursuant to Fla. Stat. Ann. §§ 55.03 and 687.01, on its damages from February 6, 2001 — the date that Sunbeam Corporation declared bankruptcy, at which point CPH's Sunbeam stock was rendered worthless and the harm to CPH caused by Morgan Stanley was indisputably complete.

Florida has adopted "the 'loss theory' of prejudgment interest," under which the plaintiff's loss of interest "itself is a wrongful deprivation by a defendant of the plaintiff's property and the plaintiff is to be made whole from the date of loss once liability and the amount of damages [are] set by the fact finder." *Boulis v. Florida Dep't of Transp.*, 733 So. 2d 959, 961 (Fla. 1999). Because "Florida has adopted the position that prejudgment interest is merely another element of pecuniary damages," *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d

212, 214 (Fla. 1985), such interest is awarded as a matter of course where a plaintiff has suffered an economic loss prior to entry of judgment. *See, e.g., Coppola Enters., Inc. v. Alfone*, 531 So. 2d 334, 335-36 (Fla. 1988) (holding that the plaintiff was entitled to an award of "'benefit of bargain' damages of $64,310.00 together with prejudgment interest of $43,295.38," and dismissing defendant's petition for review of the Fourth District Court of Appeal's judgment, which had unanimously affirmed the Circuit Court for Palm Beach County's award). Neither "the merit of the defense nor the certainty of the amount of loss" prior to the verdict "affects the award of prejudgment interest." *Argonaut*, 474 So. 2d at 215.

Applying this framework, Florida courts routinely award prejudgment interest in cases — such as this case — involving damages suffered from fraud. *See, e.g., Greenberg v. Grossman*, 683 So. 2d 156, 157 (Fla. 3d DCA 1996); *Vining v. Martyn*, 660 So. 2d 1081, 1082 (Fla. 4th DCA 1995); *Getelman v. Levey*, 481 So. 2d 1236, 1240 (Fla. 3d DCA), *rev. denied*, 494 So. 2d 1150 (Fla. 1986). In *Siedlecki v. Arabia*, 699 So. 2d 1040 (Fla. 4th DCA 1997), *rev. dismissed*, 707 So. 2d 1126 (Fla. 1998), the Fourth District explained the justification for awarding prejudgment interest in a fraud case concerning a bogus investment: "By awarding damages to Arabia, the jury determined that Arabia has lost something, *i.e.*, his potential investment, which held certain monetary value, by the fraud committed by Appellants. Because Arabia lost something of monetary value, his damages are properly considered pecuniary damages, of which prejudgment interest is simply another component." *Id.* at 1042.

In contrast, in tort cases involving non-economic damages — namely, personal injury cases — prejudgment interest is generally not awarded. *See, e.g., Argonaut*, 474 So. 2d at 214 n.1 ("We are mindful that this Court has ruled that prejudgment interest is not recoverable on awards for personal injury."); *Parker v. Brinson Constr. Co.*, 78 So. 2d 873, 875 (Fla. 1955)

("'In actions growing out of contract and in some actions in tort we have approved the recovery of interest from the time of accrual of the cause of action, but in personal injury cases we have consistently declined to approve interest before entry of judgment.'" (citation omitted)). Thus, the only tort claims that are generally excepted from the rule allowing prejudgment interest are those involving personal injuries.

In this case, CPH pursued a "benefit of the bargain" damages theory, under which CPH was entitled to recover the expected value of the Sunbeam stock that CPH received in the Sunbeam transaction, minus the actual value — if any — of that stock. The Court, in turn, instructed the jury to apply that standard. Ex. A, 5/13/05 Tr. at 14609-14 (requiring the jury to determine the difference between the value of what CPH was supposed to receive and the value of what CPH actually did receive). The jury must be understood as having accepted CPH's benefit-of-the-bargain damages theory in awarding CPH $604,334,000 in compensatory damages for the difference between the expected value and the actual value of the fraudulently inflated Sunbeam stock. Accordingly, CPH is entitled to prejudgment interest on these damages dating from February 6, 2001 — the date that Sunbeam declared bankruptcy, at which point CPH's Sunbeam stock was rendered worthless and the harm to CPH caused by Morgan Stanley was indisputably complete. *See, e.g.*, *Argonaut*, 474 So. 2d at 215 ("Plaintiff is to be made whole from the date of the loss . . . ."); *Getelman*, 481 So. 2d at 1240 (awarding prejudgment interest in a fraud case as of the date that plaintiff sold his interest in a company to defendant based on defendant's fraudulent misrepresentations); *see also Coppola Enters., Inc. v. Alfone*, 531 So. 2d at 335-36 (prejudgment interest awarded on benefit-of-the-bargain damages).

Under Florida law, where, as here, the full measure of a plaintiff's loss becomes clear only over a period of time, prejudgment interest begins to accrue as of the date when the harm to

plaintiff is complete and the full extent of damages is fixed and ascertainable. For example, in *Developers of America, Corp. v. ABC Promotions Unlimited, Inc.*, 549 So. 2d 1042 (Fla. 3d DCA 1989), the key issue was the date on which prejudgment interest should begin to accrue. *See id.* at 1043-44. There, the defendant leased a piece of property to the plaintiff ("ABC") for the sale of Christmas trees, and then leased the same property to a different company ("Thomas") for the same period of time and for the same purpose. *Id.* at 1043. When ABC attempted to take possession of the leased property, it discovered that Thomas's tents were already occupying the prime spots, so ABC was forced to set up its tent behind Thomas's tents. *Id.* On December 6, 1986, in an effort to minimize its losses, ABC bought out Thomas and thus obtained sole use of the property. *Id.* At trial, ABC's president testified, based on his years of experience selling Christmas trees, that ABC should have been able to sell up to 3,500 trees at the leased premises over the course of the season; but instead, ABC had sold only 1,746 trees by Christmas Day, 1986. *Id.* The trial court held the defendant liable and awarded damages for lost profits based on the shortfall in Christmas tree sales. *Id.* at 1043-44. Although the Third District Court of Appeal upheld the compensatory damages award, it reversed the award of prejudgment interest on the ground that the trial court had applied the wrong date of accrual. *Id.* at 1044. The trial court had calculated interest from the date in October 1986 when the defendant and Thomas had entered into the second lease, which was the act that caused injury to ABC. *Id.* But the appellate court held that interest on the lost profits should have been calculated from Christmas Day, 1986, because it was not until then that ABC knew how far short of its expected sales it would fall: "[ABC's] claim for lost profit damages . . . did not become liquidated until December 25, 1986, which was the date that the full extent of ABC's damages was, in fact, fixed and ascertainable." *Id.*

Presumably, ABC suffered no actual injury after December 6, when it obtained sole use of the entire property. But because the full measure of ABC's pre-December 6 damages could not be calculated until December 25 — when ABC could compare the 3,500 trees that it expected to sell during the entire Christmas season with the 1,746 trees that it actually sold — that was the date from which prejudgment interest on the lost profits must accrue. *Id.*; *see Tolin v. Doudov*, 626 So. 2d 1054, 1056 (Fla. 4th DCA 1993) (requiring a "determination be made as to the date that the claim became fixed," and finding damages fixed at the end of a six-year period during which the defendant failed to perform required construction); *Charles Buzbee & Sons, Inc. v. Falkner*, 585 So. 2d 1190, 1191 (Fla. 2d DCA 1991) (awarding prejudgment interest as of when the plaintiff "realized in dollars the degree of loss he sustained as a result" of the defendant's harm to his crops); *see also Pine Ridge at Haverhill Condominium Ass'n, Inc. v. Hovnanian of Palm Beach II, Inc.*, 629 So. 2d 151, 151 (Fla. 4th DCA 1993) (awarding prejudgment interest from the last date on which the jury verdict might have effectively fixed the damages), *rev. denied*, 639 So. 2d 978 (Fla. 1994).

The same approach applies here. The full extent of CPH's damages was fixed and ascertainable no later than February 6, 2001, when Sunbeam declared bankruptcy. So prejudgment interest should accrue from that date.

CPH's prejudgment interest should continue up through the date when this Court enters its final judgment, including the weeks following the jury's rendering of the verdict. Although personal-injury plaintiffs who are generally ineligible to recover prejudgment interest may not recover prejudgment interest from the date of the verdict through the date of the judgment, plaintiffs who are otherwise eligible to recover pre-verdict prejudgment interest are entitled to postverdict prejudgment interest, as well. *See Amerace Corp. v. Stallings*, 823 So. 2d 110, 111-

14 (Fla. 2002) (per curiam); *id.* at 115-21 (Pariente, J., joined by Anstead & Quince, JJ., dissenting); *cf. Hyundai Motor Co. v. Ferayorni*, 876 So. 2d 680, 681-82 (Fla. 4th DCA) (citing *Amerace*, and awarding postverdict prejudgment interest), *rev. denied*, 891 So. 2d 551 (Fla. 2004). Because *Amerace* appears to prohibit postverdict prejudgment interest on awards that are ineligible for pre-verdict prejudgment interest, CPH wishes to preserve for review by the Supreme Court of Florida, should this case reach that Court, the issue of its entitlement to postverdict prejudgment interest on the award of punitive damages, running from May 18, 2005 (the date of the jury's punitive damages verdict), to the date when this Court enters final judgment.

Finally, because Morgan Stanley is seeking settlement setoffs, CPH is entitled to prejudgment interest on the full sum of compensatory damages through the date of receipt of any third-party settlement, and thereafter is entitled to prejudgment interest on the full sum of compensatory damages plus accrued interest to date, minus any settlement setoff. *See, e.g.*, *Young Mfg., Inc. v. Brooks*, 543 So. 2d 388, 388-89 (Fla. 3d DCA 1989) (holding that to be made whole, a plaintiff "is entitled to pre-judgment interest on the remaining amount due after the settlement [has been deducted], including both principal and interest then remaining unpaid, from and after the date of the settlement to the date of the judgment"); *id.* (explaining the precise calculations); *see also* 17 FLA. JUR. 2D *Damages* § 89 (2005) ("[I]f one defendant settles a claim against several defendants, the plaintiff is still entitled to prejudgment interest on the claim from the other defendants, calculated from the date of loss through the date of settlement, and added to the principal due." (emphasis added)). Thus, here CPH should receive prejudgment interest on the full $604,334,000 in damages from February 6, 2001 through October 17, 2002, the date when Arthur Andersen actually paid CPH pursuant to the settlement of their litigation. At that

point, the to-date accrued interest should be added to the $604,334,000 principal; the value of the settlement should be deducted; and prejudgment interest should accrue on the remaining principal plus interest from October 17, 2002, through the date of the final judgment. *See* Ex. B (demonstrating this calculation of prejudgment interest).

CONCLUSION

For the foregoing reasons, the Court should award CPH prejudgment interest on its compensatory damages, at the statutory rate, from February 6, 2001, to the date of the final judgment. Upon awarding prejudgment interest, the Court should enter a final judgment merging the compensatory damages, the prejudgment interest on the compensatory damages, and the punitive damages into a single sum on which postjudgment interest would then accrue. *See* FLA. STAT. ANN. § 55.03(2) (West 2005) ("Any judgment for money damages . . . shall bear, on its face, the rate of interest that is payable on the judgment. The rate of interest stated in the judgment accrues on the judgment until it is paid."); *Amerace Corp. v. Stallings*, 823 So. 2d at 114; *Quality Engineered Installation, Inc. v. Higley South, Inc.*, 670 So. 2d 929, 931 (Fla. 1996).

Dated: June 6, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Federal Express to all counsel on the attached list on this 6th day of JUNE, 2005.

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IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
/

VOLUME 114

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Friday, May 13, 2005
Palm Beach County Courthouse
Courtroom 11-A
205 North Dixie Highway
West Palm Beach, Florida 33401
9:30 a.m. to 12:00 p.m.

may be a legal cause of CPH's losses even though the fraud operated in combination with the act of another or some other cause occurring after the fraud occurred, if such other cause was itself reasonably foreseeable and the fraud contributed substantially to producing CPH's losses.

If you find for Morgan Stanley, you will not consider the matter of damages. But if you find for CPH, you should award it an amount of money that the greater weight of the evidence shows will fairly and adequately compensate it for the damages legally caused by the fraud.

In determining the amount of damages which will constitute fair and adequate compensation for any loss incurred by CPH, you must calculate the difference between, one, the fair market value of the 14.1 million shares of Sunbeam stock that CPH received in the Coleman transaction, if the false statements concerning Sunbeam had actually been true; and, two, the fair market value at which CPH reasonably could have sold its 14.1 million shares of Sunbeam stock to a buyer who had full knowledge of the entire fraud, including those consequences of

the fraud that occurred after the closing but before CPH could sell its Sunbeam stock.

You must first determine the fair market value of the 14.1 million shares of Sunbeam stock that CPH received, by which I mean, what the market price would have been for the Sunbeam stock when Sunbeam and Coleman were combined if Sunbeam's financial results had been as they were represented.

In other words, if Sunbeam had actually achieved the financial results it claimed, you must determine what the expected value would have been for the 14.1 million shares of Sunbeam stock based on the combination of Coleman and Sunbeam.

You must next determine the fair market value at which CPH reasonably could have sold its Sunbeam stock to a buyer with full knowledge of the fraud. For purposes of this determination, I instruct you that because of certain legal prohibitions, CPH could not have sold its Sunbeam stock prior to November 25th, 1999, at which point it could sell no more than 1 million shares per quarter unless the shares were registered. As a matter of law, the shares

were registrable by December 6th, 1999.

It is for you the jury to decide whether CPH could have registered and sold its Sunbeam stock at any date after that date -- I'm sorry, at any time after that date.

For purposes of this instruction, fair market value means the amount a purchaser who was willing and able but not obligated to buy would pay to someone willing and able but not obligated to sell. In other words, CPH's damages are the difference between, one, the value of what CPH was supposed to receive and, two, the value of which CPH actually did receive.

In calculating damages, you may only consider losses that directly resulted from and were legally caused by the fraud. Losses caused by a factor other than the alleged fraud such as changes in general market conditions or industry specific or firm specific conditions may not be included in your damages award. However, if CPH proves it suffered damage by the greater weight of the evidence, it is entitled to recover for that damage even though the exact amount of the damage cannot be determined. If you find by the

greater weight of the evidence that damage did occur as a result of the Sunbeam fraud, CPH is entitled to recover for that damage as long as there are some reasonable yardstick by which can be measured. That is, as long as there is some reasonable basis for estimating the amount of damage. CPH may not be denied damages merely because the amount of damage is uncertain or difficult to determine. If Morgan Stanley or Sunbeam's wrongdoing has made CPH's damages more difficult to prove, you should not reduce the amount of damages because of that uncertainty. Morgan Stanley bears the risk of uncertainty caused by its own wrongful acts as well as the wrongful acts of Sunbeam.

If the greater weight of the evidence does not support CPH's claims, then you shall consider -- I'm sorry. If the greater weight of the evidence does support CPH's claims, then you shall consider the defense a failure to mitigate damages by Morgan Stanley.

CPH had a duty to use reasonable care to reduce as much as reasonably possible the loss or damage, if any, it sustained. Morgan Stanley has claimed that CPH violated this duty by

choosing to install its own executives at Sunbeam and entering into a management agreement with Sunbeam. If you find from the greater weight of the evidence that CPH failed to mitigate its damages, then Morgan Stanley cannot be charged with liability for any such loss or damage resulting from CPH's failure to use such reasonable care.

Morgan Stanley may not claim, though, that CPH had a legal obligation or duty to hedge or to make any advance arrangements to safeguard itself from losses on an investment. The lack of any hedge, therefore, does not affect the amount of damages, if any, that CPH is entitled to recover if it suffered losses on an investment as a result of fraud.

Evidence about hedging was introduced for its relevancy, if any, on whether CPH actually relied on the statements by Morgan Stanley or Sunbeam.

You have heard testimony that CPH previously filed a lawsuit against Arthur Andersen for its role in the Sunbeam fraud. That lawsuit resulted in a settlement with Arthur Andersen. You have also heard testimony that there was a

settlement between MacAndrews and Forbes Holding, Inc. and Sunbeam. You should not reduce the amount of compensation to which CPH is otherwise entitled on account of any benefits, recovery or compensation CPH has received or may have received from Sunbeam or Arthur Andersen. The Court will reduce, as necessary, the amount of compensation to which CPH is entitled on account of any such payments.

In addition to deciding whether CPH has proved reliance and damages by the greater weight of the evidence, you will also be asked to determine whether CPH has proved reliance and damages by clear and convincing evidence.

Clear and convincing evidence differs from the greater weight of the evidence in that it is more compelling and persuasive. Greater weight of the evidence means the more persuasive and convincing force and effect of the entire evidence in the case. In contrast, clear and convincing evidence is evidence that is precise, explicit, lacking in confusion and of such weight that it produces a firm belief or conviction without hesitation about the matter in issue.

Pre-Judgment Interest

Coleman (Parent) Holdings Inc.
v. Morgan Stanley & Co., Incorporated

Compensatory Damages Award	$ 604,334,000
Interest from 2/6/2001 to 10/17/2002	102,803,008
New Principal Balance as of 10/17/2002	$ 707,137,008
Arthur Andersen Settlement Amount	70,000,000
Principal Amount as Offset at 10/17/2002	$ 637,137,008
Interest from 10/17/2002 to 5/16/2005	111,106,221
Total through Date of Verdict	$ 748,243,229
Interest from 5/16/2005 to 6/21/2005	4,398,864
TOTAL AWARD WITH INTEREST AND OFFSETS	**$ 752,642,093**
Additional Interest Per Day from 6/21/2005 to Judgment	$ 122,191

Applicable Fla. Statutory Interest Rate Each Year:

2001	2002	2003	2004	2005
11%	9%	6%	7%	7%

Simple Interest Factors:

From:	To:	Factor:
2/6/2001	5/16/2005	34.47%
2/6/2001	10/17/2002	17.01%
10/17/2002	5/16/2005	17.44%

EXHIBIT
B

#230580/mep

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

_____/

CASE NO.: 2003 CA 005045 AI

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: June 20, 2005

TIME: 9:30 a.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

Coleman (Parent) Holdings Inc.'s Motion to Modify Notice to Produce and to Compel Compliance with the Notice
Filed 5/16/05

Morgan Stanley's Motion to Quash Coleman (Parent) Holdings Inc.'s Notice to Produce for In-Camera Inspection Instanter
Filed 4/17/05

Morgan Stanley's Motion to Quash Coleman (Parent) Holdings Inc.'s Notice to Produce at Trial Instanter Attorney-Client Records and Documents
Filed 4/21/05

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Case No.: 2003 CA 005045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Fedex to all Counsel on the attached list, this 6TH day of JUNE, 2005.

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Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

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

CASE NO: CA 03-5045 AI

MORGAN STANLEY'S EXHIBIT LIST FOR THE JUNE 20-21, 2005 POST-TRIAL HEARING

Pursuant to the Court's May 18, 2005 Order, Morgan Stanley & Co. Incorporated ("Morgan Stanley") hereby provides its list of exhibits upon which Morgan Stanley may rely at the post-trial hearing on June 21 and 22, 2005. Morgan Stanley reserves the right to modify or supplement its list of exhibits consistent with the Florida Rules of Civil Procedure, the agreement of the parties, further orders of the Court, or any other applicable law or procedure. Morgan Stanley reserves the right to modify or supplement this list in response to unexpected evidence or argument presented by Coleman (Parent) Holdings Inc. ("CPH") which requires rebuttal; to cross-examine CPH witnesses; or in response to rulings by the Court. In addition, Morgan Stanley reserves the right to use as exhibits any documents relied upon by expert witnesses, exhibits listed by CPH on its exhibit list, and demonstrative exhibits.

Morgan Stanley's Exhibits
June 20-21, 2005 Hearing

Exhibit No.		*Date*	*Description*	*Bates*
MS	67	06/08/2001	Complaint, Coleman (Parent) Holdings v. Arthur Andersen and Phillip Harlow, No. CA 01-06062 (15th Jud. Dist Fla.)	
MS	96	08/12/1998	Settlement Agreement between Sunbeam and Coleman (Parent) Holdings Inc.	CPH 1167614-1167
MS	96 A	08/12/1998	Settlement Agreement between Sunbeam and Coleman (Parent) Holdings Inc. - Exhibit A (Warrant for the Purchase of Shares of Common Stock of Sunbeam Corporation)	CPH 2000731-2000
MS	96 B	08/12/1998	Settlement Agreement between Sunbeam and Coleman (Parent) Holdings Inc. - Exhibit B (Amendment to Registration Rights Agreement)	CPH 2000731-2000
MS	97	04/02/1999	Memo from S. Tripp to Sunbeam Audit Files re M&F Warrants Accounting and Valuation	CPH 1308865-1308
MS	99	05/14/1999	Sunbeam Annual Report 1998 and Form 10K	CPH 0639339-0639
MS	235	10/10/2002	Settlement Agreement between Arthur Andersen, Coleman (Parent) Holdings, Inc., New Coleman Holdings, Inc. MacAndrews & Forbes & Holdings, Inc. and Mafco Holdings, Inc.	
MS	260	12/14/1998	Memo from B. Jenkins to G. Kristol, C. Elson, F. Whittlesey, D. Denkhaus, N. Spiegel, S. Thibault, P. Shapiro, J. Kelley re Audit Committee Meeting	CPH 1039844-1039
MS	408	05/08/2003	Complaint, Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc., Case No. CA 03-5045 AI (15th Jud. Dist Fla.)	
MS	513	04/02/1999	Memo from S. Tripp to Sunbeam Audit Files re M&F Warrants Accounting and Valuation	CPH 0647025-0647
MS	813	03/30/1998	Compilation of book and accounting values ascribed to CPH's Sunbeam investment, MacAndrews & Forbes GL Accounting Distribution	CPH 2012198-2012
MS	814	04/05/1999	MAFCO Holdings, Inc. Consolidated Financial Statements for the Year Ended December 31, 1998 with Report of Independent Auditors	CPH2012219-20123

Exhibit No.		*Date*	*Description*	*Bates*
MS	822	12/31/1998	MAFCO Holdings Estimated Fair Value Calculations 12/31/1998 and 12/31/1999	CPH 2012216-2012
MS	831	01/00/1998	Compilation of MAFCO General Ledger Report from January, 1998 through year end 2000	CPH 2012468-2012
MS	832	12/31/1998	MAFCO Holdings worksheets re Estimated Fair Value Calculations 12/31/1998 and 12/31/1999	CPH 2012475-2012
MS	833	09/30/1998	Sunbeam Impairment Worksheet	CPH 2012487-2012
MS	834	06/30/1998	Coleman Sale Gain Worksheets	CPH 2012491-2012
MS	841	03/20/2000	MAFCO Holdings Estimated Fair Value Calculation	CPH 2012481-2012
MS	849	03/07/2005	Production of additional documents related to MAFCO's estimated fair value calculation	CPH 2012505-2012
MS	857	04/19/1999	Memo from L. Winoker to R. Perelman re Fair Value Disclosure	CPH 2012512-2012
CPH	1296	01/01/1993	Summary of Sunbeam Corporation's closing stock prices	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 6th day of June, 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.

MORGAN STANLEY'S MEMORANDUM IN OPPOSITION TO CPH'S MOTION FOR PREJUDGMENT INTEREST

Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully requests that the Court deny Coleman (Parent) Holdings Inc.'s ("CPH") Motion for Prejudgment Interest. It is well established that prejudgment interest is not available in tort cases where, as here, the damages are not liquidated and there is no date certain from which the interest should run. CPH has admitted in its complaint that its damages were uncertain and "to be determined at trial"; CPH presented expert testimony offering a variety of theories of how to calculate damages; CPH asked for and received instructions from the Court that "CPH may not be denied damages merely because the amount of damages is uncertain or difficult to determine"; and the jury ultimately chose a damages amount that had not been proposed or argued by either party. Furthermore, CPH expressly declined to specify a date certain for the determination of damages; CPH's expert presented a variety of possible dates at trial; and the jury was neither asked to set nor did it set a date on which CPH incurred damages. *Indeed, even in its motion for prejudgment interest, CPH fails to specify the relevant date from which the Court should supposedly calculate prejudgment interest.* A more telling omission would be hard to imagine.

The law is clear. Having demanded and obtained damages under a theory that is uncertain as to both date and amount, CPH may not now recover prejudgment interest.

Moreover, even if CPH had established both a date certain and an amount certain for damages, equity would still preclude an award of prejudgment interest during the extended period before CPH filed this case. CPH did not bring its claim for years and eventually filed on the last day before the expiration of the statute of limitations (which the parties had extended through a tolling agreement). Morgan Stanley should not be held liable for CPH's delay in filing suit.

I. PREJUDGMENT INTEREST MUST BE DENIED ON UNCERTAIN TORT DAMAGES

Prejudgment interest is available if and only if: (1) damages are *liquidated*; and (2) there is a *date certain* from which interest should run. *See Kissimmee Util. Auth. v. Better Plastics, Inc.*, 526 So. 2d 46, 47 (Fla. 1988); *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212, 215 (Fla. 1985). Consequently, a court may assess prejudgment interest only where the loss "can be determined *with exactness* from the cause of action *as pleaded*, i.e., from a pleaded agreement between the parties, by an arithmetical calculation or by application of definite rules of law." *Asian Imps., Inc. v. Pepe*, 633 So. 2d 551, 552 (Fla. 1st DCA 1994) (emphasis added). When damages are liquidated, computation of prejudgment interest is a straight-forward mathematical computation, requiring no fact-finding and no exercise of discretion. *See Argonaut*, 474 So. 2d at 215. Rather, "it is a purely ministerial duty of the trial judge or clerk of the court." *Id.*

Prejudgment interest therefore is typically unavailable in tort cases such as this one, because the date of the loss is uncertain and the amount of damages is too speculative to be determined until trial. *See Lumbermens Mut. Cas. Co. v. Percefull*, 653 So. 2d 389 (Fla. 1995) ("tort claims are generally excepted from the rule allowing prejudgment interest, primarily because tort damages are generally too speculative to liquidate before final judgment"). If the plaintiff suffers an out-of-pocket loss that can be calculated precisely and pinpointed to a specific date — unlike the uncertain measure of damages sought by CPH here — prejudgment interest

may be allowed from the date of loss. *Air Ambulance Prof'ls, Inc. v. Thin Air*, 809 So. 2d 28, 31-32 (Fla. 4th DCA 2002); *see also Alvarado v. Rice*, 614 So. 2d 498, 499 (Fla. 1993) (prejudgment interest not allowed on medical bills accrued but unpaid because plaintiff must have "suffered an actual, out-of-pocket loss at some date prior to the entry of judgment"); *Totale, Inc. v. Smith*, 877 So. 2d 813, 816 (Fla. 4th DCA 2004) (prejudgment interest awarded on out-of-pocket portion of damage award that returned the dollars invested). But where, as here, the damages sought and obtained were uncertain in value and were not fixed to a date certain, they are unliquidated and ineligible for prejudgment interest. *See Air Ambulance*, 809 So. 2d at 31 ("Prejudgment interest is allowed on only liquidated claims, that is, sums which are certain, but which the defendant refuses to surrender."); *ACR Elecs., Inc. v. Switlik Parachute Co.*, 624 So. 2d 1144, 1144 (Fla. 4th DCA 1993) (prejudgment interest reversed because amount of loss could not be determined on the date of breach and turned on subsequent events). Indeed, "the ascertainment of their exact sum require[d] the taking of testimony to ascertain facts upon which to base a value judgment," precluding prejudgment interest. *Asian Imps.*, 633 So. 2d at 553.

A. The Damages Sought And Obtained By CPH Are By Their Nature Inexact, Uncertain, and Thus Unliquidated

Unlike readily calculable damages linked to a loss suffered on a specific date, the "benefit-of-the-bargain" damages CPH purported to seek here cannot meet the test of certainty. Indeed, plaintiff's complaint conceded this uncertainty, alleging that CPH suffered "damages in an amount in excess of $485 million" and that they sought "damages *to be determined at trial* in excess of $485 million." First Amended Comp. ¶¶ 88, 92, prayers for relief at 26, 28 (filed Feb. 17, 2005). At the trial itself, CPH's expert offered alternative theories of damages and CPH's counsel repeatedly acknowledged that the proper calculation of damages was subject to legitimate dispute and had to be determined by the jury. CPH's concessions, the Court's rulings

and instructions, the arguments of counsel, and even the jury's verdict all demonstrate that the amount of damages sought by CPH was inexact. As a result, prejudgment interest is unavailable. It was CPH itself, moreover, that not only elected benefit-of-the-bargain damages, but also elected to proceed on a legal theory – adopted by the Court over Morgan Stanley's objection – that made the date of loss wholly uncertain, and the amount of loss dependent on jury findings in light of events that took place three years after the challenged merger.

At the close of evidence, the Court instructed the jury to calculate damages in two steps. First, the jury was to determine "the fair market value of the 14.1 million shares of Sunbeam stock that CPH received in the Coleman transaction, if the false statements concerning Sunbeam had actually been true." 5/13/05 Tr. at 14609:17-21. Second, the jury was to subtract "the fair market value at which CPH reasonably *could have sold* its 14.1 million shares of Sunbeam stock to a buyer who had full knowledge of the entire fraud." *Id.* at 14609:21-25 (emphasis added). Under the Court's instructions, both of those numbers were inherently inexact, and could be determined only through the subjective assessment of expert testimony and inferences drawn from other evidence introduced at trial.[1]

1. *The value of the Sunbeam stock as represented.* Determining the value that Sunbeam stock would have had if the allegedly false statements had been accurate is an inherently inexact process. CPH's expert, Dr. Blaine Nye, estimated the value at $680 million, *see* 4/25/05 Tr. at 10383:2-18; CPH documents show a value of $619 million, *see* MS 833 at CPH 2012488; and

[1] Morgan Stanley adheres to its position that, under *Totale*, it was error for the Court to direct the jury to award damages based on value of the Sunbeam stock on dates other than the date of the transaction; to permit valuation only once the stock became alienable; to restrict fair market value to public market sales to the exclusion of private transactions; and to instruct the jury to value the stock from the perspective of a clairvoyant purchaser with full knowledge of future *events* (as opposed to a hypothetical reasonable purchaser with an awareness of relevant *risks*).

Sunbeam documents placed the value at $524 million, *see* 4/25/05 Tr. at 10509:18-10511:9 (Nye testimony); 5/4/05 Tr. at 12477:12-12479:10 (Jerry Levin testimony). Adding further complexity, the Court instructed the jury to determine the value the Sunbeam stock would have had if it had been as represented in light of "what the market price would have been for the Sunbeam stock *when Sunbeam and Coleman were combined.*" 5/13/05 Tr. at 14610:5-7 (emphasis added). The jury thus needed to consider, on top of the conflicting evidence, unquantifiable "synergies" or other enhancements resulting from the combination of the two companies (a matter complicated still further by Sunbeam's mergers with two other companies, First Alert and Signature Brands). 4/7/05 Tr. at 7379:8-19, 7388:13-23, 7400:21-7401:10 (Dr. Douglas Emery); 5/12/05 Tr. at 14284:4-14285:22 (CPH's closing argument). Such synergies and the financial gains that can be derived therefrom, of course, are inherently uncertain and incapable of the exactness required for prejudgment interest.

Dr. Nye also constructed his proposed methodology on other uncertainties. First, he estimated Sunbeam's stock value using an *average* stock price between the date the acquisition was announced (March 2, 1998) and the date the merger closed (March 30, 1998). *See* 4/25/05 Tr. at 10374, 10377, 10381-82, 10390-91. An "average" purchase price, by definition, cannot form the basis of liquidated damages. *See Air Ambulance*, 809 So. 2d at 31-32 (rejecting prejudgment interest for damages that were not "fixed" on date of alleged breach). Second, Dr. Nye acknowledged that he tried to find "the *estimated* value that Coleman and Sunbeam put on those shares when they negotiated the deal" and "using that *estimate* as the *best estimates* of what two other rational and reasonable investors would come to," 4/25/05 Tr. at 10382:14-24 (emphasis added), thus estimating value based on subjective expectations. Dr. Nye's testimony

standing alone demonstrates that the damages sought by CPH were not liquidated on a date certain.

2. *The value of the Sunbeam shares CPH actually received.* Likewise, the value of the Sunbeam shares that CPH actually received, under this Court's instructions, could be determined only after "the taking of testimony to ascertain facts upon which to base a value judgment," precluding the award of prejudgment interest. *Asian Imps.*, 633 So. 2d at 553. The Court directed the jury to determine, based on the evidence at trial, the fair market value at which CPH "reasonably could have sold its Sunbeam stock to a buyer with full knowledge of the fraud," 5/13/05 Tr. at 14610:17-19, and directed the jury to decide – again, based on the evidence at trial – "whether CPH could have registered and sold its Sunbeam stock . . . at any time after" December 6, 1999, *id.* at 14611:2-5. Because the stock fluctuated in value and the Court's instructions failed to specify a date certain, the jury needed to choose among numerous possible valuations. For example, CPH's own counsel presented at least three different valuations: (1) Zero (5/12/05 Tr. at 14320:3-16); (2) $16,860,000 (*id.* at 14323:21-22); and (3) $46,432,000 (*id.* at 14324:2-8). Other evidence supported a valuation of $450 million; that was how CPH valued the stock on its books after the restrictions on sale expired on December 6, 1999. *See* MS 833; MS 822 at CPH 2012216. Indeed, this Court held that a reasonable jury could conclude that the value of the stock, by December 6, 1999, was $450 million. *See* Order on Plaintiff's Ore Tenus Motion in Limine (filed Apr. 15, 2005); 4/18/05 Tr. at 9024:8-9025:16 (side bar ruling allowing evidence of $450 million value as "fair"); 4/25/05 Tr. at 10563:14-15 (same).

Dr. Nye's testimony further underscored that uncertainty, since he made no effort to determine the value of the Sunbeam shares in the absence of fraud on the day of the transaction, *see* 4/25/05 Tr. at 10487:15-88:6; or any other date for that matter, *id.* at 10404:14-19. Plaintiff's

counsel admitted that uncertainty when moving for a directed verdict: "I will acknowledge there's a jury issue with regard to the amount. That is the one issue that we should ask these good folks to be deciding." 5/11/05 Tr. at 13858:14-17.

Finally, after all the conflicting evidence and complex expert testimony, the Court instructed the jury that CPH's damages did not have to be certain:

> However, if CPH proves it suffered damage by the greater weight of the evidence, it is entitled to recover for that damage even though the exact amount of the damage cannot be determined. . . . CPH may not be denied damages merely because the amount of damage is uncertain or difficult to determine.

5/13/05 Tr. at 14611:21-14612:9.

Consistent with those concessions, the jury's verdict (upon which CPH now seeks prejudgment interest) found a number that was ***different*** from any of those presented by ***any*** of the parties and, indeed, that was not consistent with any of the evidence. The fact that the jury calculated a damage figure never even proposed by either party, and not offered by CPH's own damages expert, demonstrates the unliquidated nature of CPH's claim. Until the jury rendered its verdict, there was no sum certain that Morgan Stanley could pay to reimburse CPH for its alleged loss. Because the jury was asked to, and did, award benefit-of-the-bargain damages that are indefinite as to both amount and date, CPH may not receive prejudgment interest.

The Second District's decision in *Checkers Drive-in Restaurants, Inc. v. Tampa Checkmate Food Services, Inc.*, 805 So. 2d 941, 945 (Fla. 2d DCA 2001), proves the point. There, like CPH, counterclaimant Tampa Checkmate sued for fraud and sought benefit-of-the-bargain damages. The jury agreed that the defendant fraudulently induced Tampa Checkmate into signing a franchise agreement and awarded $151,330 — the present value of the difference between what Tampa Checkmate was *told* it would earn and what it *actually* earned. To

determine that amount, the jury relied on testimony "by an accountant who calculated the damages by comparing what Checkers represented the profits of the Tampa franchise would be to the actual profits anticipated throughout the twenty-year grant of the franchise." *Id.* Because damages turned on that sort of testimony, the Second District held that "Tampa Checkmate's damages for fraudulent inducement were not liquidated until the jury rendered its verdict." *Id.*

Similarly, in *Perdue Farms Inc. v. Hook*, 777 So. 2d 1047 (Fla. 2d DCA 2001), the inventor of a cooking process sought benefit-of-the-bargain (lost profit) damages from a company that misappropriated his cooking process. The jury found in favor of the plaintiff and the trial court awarded prejudgment interest from the date on which, according to the jury, the defendant company had misappropriated the plaintiff's cooking process. *See id.* at 1054-55. The Second District reversed the award of prejudgment interest. *See id.* The court noted that it was improper for the trial court to award prejudgment interest from any date before the verdict because the amount of the loss was not liquidated until the jury listened to the testimony of the plaintiff's expert and made a value judgment based on that testimony. *See id.*

Finally, the United States Court of Appeals for the Eleventh Circuit applied the same Florida requirement in a case involving securities in *Messer v. E.F. Hutton & Co.*, 833 F.2d 909 (11th Cir. 1987). There, an investor sued his broker for unauthorized trades. The court refused to award prejudgment interest from the date of the unauthorized trades because it found that the amount of damages was "not ascertainable at the time of the breach." *Id.* at 923. The amount of damages, the Court explained, depended on how long the defendant left the trade in place and how the market behaved at the time. *See id.*

Those cases foreclose prejudgment interest here. As in *Messer*, the amount of damages was not ascertainable at the time of the transaction. Instead, the Court has determined that events

post-closing — even Sunbeam's eventual bankruptcy — were all relevant to calculating CPH's damages. As in *Messer*, the amount of damages turned on "conflicting evidence, inferences and interpretations." *Id.* Finally, as in *Tampa Checkmate* and *Perdue Farms*, the amount of damages could not be determined until the jury listened to the testimony of the plaintiff's expert and made a value judgment based on that testimony. Just as prejudgment interest was unavailable in those cases, it is unavailable here.

B. There Is No Date Certain From Which Interest Can Run

The Court's rulings and the evidence adduced at trial also preclude the identification of a date certain from which to measure CPH's damages, rendering prejudgment interest unavailable. *See Perdue Farms*, 777 So. 2d at 1054-55 (denying prejudgment interest where there were twelve different dates pertinent to the damage issue, with no single date on which damages could be ascertained); *ACR Elecs*, 624 So. 2d at 1144 (no prejudgment interest where estimation of damages turns on subsequent events). CPH appears to concede this point in its Motion for Prejudgment Interest when, quite remarkably, it fails even to specify the date from which it is requesting prejudgment interest.

As in *Perdue Farms*, the sheer number of possibilities confirms that there was no fixed date from which CPH measured its damages. Any number of dates could have provided a potential date from which the jury might have made its determination. But, given the damages number calculated by the jury, it is impossible to know from which date the jury calculated damages. Because there is no "fixed" date from which prejudgment interest can be calculated under CPH's damages theory, CPH's damages award cannot as a matter of law include prejudgment interest. *See Air Ambulance*, 809 So. 2d at 31.

Moreover, CPH never asked that the jury fix a date of loss. Nor did it rely on a theory of damages from which a date of loss might be implied by the verdict. In a normal securities fraud case, whether litigated on a benefit-of-the-bargain or out-of-pocket damages theory, the plaintiff proves loss on the date of the transaction by subtracting the stock's actual value *on that date* from either its represented value, or the consideration paid, *on that date*. Here, however, CPH did not prove actual value on the date of the transaction. Instead, its expert offered two alternative theories of damages. In one, the expert simply assumed that "CPH was never able to receive anything of value, never realize any value from these shares. And, therefore, the value of that is zero." 4/25/05 Tr. at 10387:10-12. The expert did not opine that the value of the shares was zero on the date of the transaction or on any other particular date. In his second theory, the expert measured damages based on the assumption that CPH could sell 75% of its Sunbeam stock at Sunbeam's average trading price for the first three months of the year 2000 and that the remaining 25% were worthless when the additional lockup provisions – which were not part of the original agreement and to which CPH assented to months *after* the merger transaction, MS 96 at 7-8 – expired in August 2001. *See id.* at 10388:12-10392:11. Of course, since the jury adopted a compensatory damages figure that was less than either of the numbers Dr. Nye offered, it is impossible to determine which, if either, of the two theories the jury accepted.

Dr. Nye's two damages theories are the antithesis of a "date certain." The first relies on the fact that CPH never realized any value for its Sunbeam stock. Obviously, the *non*-occurrence of an event cannot supply a date certain when there is no evidence at all of any specific date on which the sale could have occurred, had it occurred. And the second theory relies on a *mélange* of dates, mostly spread over the first three months of the year 2000 and the remaining one plucked arbitrarily from August 2001. Dr. Nye could not have calculated CPH's claimed

damages, even under his own flawed theories, until all those dates had elapsed. And, again, since the jury rejected both of Nye's figures, we have no idea what date *it* actually used.

CPH could have proceeded under a normal theory of damages by proving the value of the Sunbeam stock (with an appropriate liquidity discount, if any) on the date of the transaction. Instead it adopted a "wait and see" theory of damages that depended on declines in the actual future share price of Sunbeam stock well into 2001. That approach made both the date of loss and the amount of loss inherently uncertain; rendered their determination impossible absent trial; and made both dependent on value judgments from expert testimony. The jury, moreover, was never asked to fix a date of loss. Having discarded the normal "date of transaction" requirement in proving damages, CPH cannot now receive prejudgment interest.

II. EQUITY REQUIRES THAT ANY PREJUDGMENT INTEREST BE LIMITED BY PLAINTIFF'S DELAY

Prejudgment interest must be denied if the plaintiff's own actions or delay increased the amount of interest accrued. As the Florida Supreme Court stated in *Flack v. Graham*, 461 So. 2d 82 (Fla. 1984), "'interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable.'" *Id.* at 84 (quoting *Board of Comm'rs of Jackson County v. United States*, 308 U.S. 343, 352 (1939)). Thus, a plaintiff's right to prejudgment interest "is not absolute and may depend on equitable considerations." *Broward County v. Finlayson*, 555 So. 2d 1211, 1213 (Fla. 1990); *see also State of Fla. v. Family Bank of Hallandale*, 623 So. 2d 474, 479 (Fla. 1993).

A. CPH Should Not Be Permitted To Create An Involuntary Loan Through Unilateral Delay

Equity weighs against awarding prejudgment interest where the plaintiff causes the delay between injury and judgment. *See Hallandale*, 623 So. 2d at 480; *Finlayson*, 555 So. 2d at 1213 (interest to run from date of defendant's notice of claim; award of interest for the entire period claimed by the plaintiffs unfair); *Cuillo v. McCoy*, 810 So. 2d 1061, 1064 (Fla. 4th DCA 2002) ("it would be inequitable . . . to award prejudgment interest before [defendant] had notice of the default"); *Volkswagen of Am., Inc. v. Smith*, 690 So. 2d 1328, 1331 (Fla. 1st DCA 1997) ("Depending on the equities of a given case, an award of prejudgment interest may be a windfall to the plaintiff and an unfair burden on the defendant.").

For example, in *Hallandale*, the Florida Supreme Court held that the award of prejudgment interest was improper partly because it included interest for periods of undue delay caused by the plaintiff. *See* 623 So. 2d at 480; *see also Volkswagen*, 690 So. 2d at 1330-32 (suspending prejudgment interest during time in which the plaintiff had voluntarily dismissed Volkswagen from the case while he proceeded against another defendant); *Osterneck v. E.T. Barwick Indus. Inc.*, 825 F.2d 1521, 1536 (11th Cir. 1987), *aff'd*, 489 U.S. 169 (1989) (holding that, under Georgia law, because defendants were responsible for only one-third of the delay in bringing suit, they were responsible for only one-third of the prejudgment interest which might be awarded).

Likewise here, CPH unnecessarily prolonged delays. CPH's own witnesses testified that they knew they had been lied to shortly after the transaction took place in 1998. *See, e.g.*, 4/21/05 Tr. at 9795:20 - 9796:1, 9798:12 - 9798:22 (testimony of Ronald. O. Perelman); 4/27/05 Tr. at 10979:11 - 10983:11; 4/28/05 Tr. at 11315:6 - 11316:10, 11334:21 - 11335:16 (testimony of Howard Gittis). Yet CPH did not sue Morgan Stanley until years and years later. In the

meantime, CPH in effect took over Sunbeam and enjoyed the fruits of the Coleman/Sunbeam merger for years before bringing suit against Morgan Stanley. Even when CPH asserted claims against Sunbeam, and later Arthur Andersen, CPH made no demand on Morgan Stanley. Awarding prejudgment interest for the period of plaintiff's delay in bringing suit would result in an unfair burden on Morgan Stanley, just as in *Hallandale* and *Volkswagen*. Indeed, it in effect would allow CPH to turn Morgan Stanley into an involuntary lender at statutory rates of interest based on liabilities for which Morgan Stanley had not yet been given notice. Accordingly, if the Court awards prejudgment interest, the interest should begin accruing only on May 8, 2003, the date CPH brought suit.[2]

B. CPH Is Not Entitled To Interest During The Tolling Period

At a minimum, interest should be suspended during the period of the parties' Tolling Agreement, from March 28, 2002 to the date of suit, May 8, 2003. (A copy is attached as Exhibit A.) The Tolling Agreement provided that, by mutual consent of the parties, the applicable statute of limitations would be tolled from March 28, 2002 to September 28, 2002. The Tolling Agreement was amended several times and extended through the date of suit. *See id.*

The effect of the Tolling Agreement in this case is analogous to an abatement by mutual consent. Courts have held that prejudgment interest is improper under those circumstances. For example, in *Assurance Generale de France v. Cathcart*, 756 So. 2d 1055 (Fla. 4th DCA 2000), the plaintiff brought an action against her insurer to recover out-of-pocket damages for the loss

[2] Likewise, under the Court's instructions, the amount of damages was uncertain and could be determined, at the earliest, some time after December 1999, when the Sunbeam stock first became registrable. At a minimum, then, any period before December 1999 must be excluded from the calculation.

of a fishing vessel that her husband tried to sink. The parties by mutual consent abated the proceedings pending the outcome of the husband's federal criminal trial. *See id.* at 1058. The lower court later entered summary judgment for the plaintiff and awarded prejudgment interest for the entire period, including the time the case was abated. *See id.* The Fourth District reversed the award of prejudgment interest, holding that the abatement constituted a "'peculiar or exceptional circumstance[]'" that justified reducing the amount of the award by the fourteen month period during which the proceedings were abated. *See id.* (quoting *Hilton Oil Transp. v. Oil Transp. Co.*, 659 So. 2d 1141, 1154 (Fla. 3d DCA 1995)).

Like the abatement in *Cathcart,* the Tolling Agreement here benefited both parties. Morgan Stanley should not pay prejudgment interest during this period in which it agreed to toll the statute of limitations for the parties' mutual advantage. Rather, the Tolling Agreement creates exactly the type of "peculiar or exceptional circumstance" that justifies reducing prejudgment interest. None should be awarded from the date the Tolling Agreement was executed, on March 28, 2002 to May 8, 2003, the date CPH filed suit.[3]

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[3] CPH also is not entitled to post-verdict prejudgment interest. In *Amerace Corp. v. Stallings*, 823 So. 2d 110 (Fla. 2002), the Florida Supreme Court held that recovery of post-verdict prejudgment interest is not appropriate. Denying interest, the court held, encourages the prompt request to enter judgment and is consistent with Fla. Stat. Ann. § 55.03, which "specifically provides that interest does not accrue until the date of the judgment, not verdict." *Id.* at 114. Although in one case the Fourth District Court of Appeal opined that *Amerace* should be limited to its facts, *see Hyundai Motor Co. v. Ferayorni*, 876 So. 2d 680, 682 (Fla. 4th DCA 2004), it has also applied *Amerace* without qualification, *see Coral Cadillac, Inc. v. Stephens*, 867 So. 2d 556, 559 (Fla. 4th DCA 2004) ("interest does not accrue until the date of the judgment, not the verdict"). A fair reading of *Amerace* requires that where, as here, the defendant is not responsible for any inappropriate delay in entry of *judgment* following the verdict, no ground exists to award post-*verdict* prejudgment interest.

CONCLUSION

For these reasons, prejudgment interest cannot be assessed on CPH's compensatory damages. If the Court disagrees, it should begin accrual of interest only from the date CPH brought suit — May 8, 2003. At a minimum, the Court should suspend the accrual of interest for the term of the parties' Tolling Agreement.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 6th day of June, 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

**MORGAN STANLEY'S MEMORANDUM
IN SUPPORT OF ITS MOTION FOR JUDGMENT
IN ACCORDANCE WITH MOTION FOR DIRECTED
VERDICT AND ALTERNATIVE MOTION FOR NEW TRIAL**

Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully submits this memorandum in support of its Motion for Judgment in Accordance with Motion for Directed Verdict and Alternative Motion for New Trial, filed May 26, 2005. Morgan Stanley submits this memorandum to address and highlight certain issues presented in its post-trial motions for the convenience of the Court. In so doing, Morgan Stanley does not waive, and specifically readopts, the arguments made in all of its pretrial, trial, and post-trial filings. As explained more fully below, Morgan Stanley is entitled to judgment in accordance with its motion for a directed verdict or a new trial on, among others, the following grounds:

- The Court's decision to apply Florida rather than New York law (a) based on an erroneous reading of the Restatement and (b) even though CPH's own proof and witnesses at trial demonstrated that New York's interests overwhelmingly predominate on the disputed issues of justifiable reliance and damages;

- The Court's failure to instruct the jury on the requirement of justifiable reliance, and its erroneous and repeated comment on the evidence through the repetition of a "putative" limiting instruction on reliance during trial;

- CPH's failure to adduce evidence of damages consistent with controlling precedent regarding the measure of damages, and the Court's erroneous instructions regarding the measure of and burden of proving damages;

- The ex parte contacts between a close associate of CPH's lead trial counsel and certain members of the jury;

- The Court's denial of a continuance and imposition of severe sanctions; and

- Evidentiary and other errors during trial that, singly and cumulatively, denied Morgan Stanley a fair trial.

Even if the Court were to deny the motion with respect to the compensatory award, Morgan Stanley is entitled to relief with respect to the award of punitive damages, as explained below. Among other things:

- The Court erred in prohibiting Morgan Stanley from contesting its complicity in the alleged fraud (and the scope of that complicity) in contravention of controlling law from the Fourth District and the decisions of other state courts.

- The Court invaded the jury's factfinding function by reading the litigation misconduct statement to the jury and erroneously precluded Morgan Stanley from contradicting the statement's findings;

- The Court allowed the admission of improper financial evidence;

- The Phase II jury instructions were highly unbalanced; and

- The punitive damages award is grossly excessive.

ARGUMENT

I. THE CASE SHOULD HAVE BEEN TRIED UNDER NEW YORK LAW, NOT FLORIDA LAW.

Morgan Stanley is entitled to judgment (or, failing that, a new trial) because the Court erroneously applied Florida rather than New York law to the case. *See* Order on Morgan Stanley's Motion to Apply New York Law (Mar. 29, 2005) [hereinafter "Choice of Law Order"].

A. New York Has the Most Significant Relationship to the Case.

Florida choice of law follows the Restatement's "most significant relationship" test. *Bishop v. Fla. Specialty Paint Co.*, 389 So. 2d 999 (Fla. 1980); *Trumpet Vine Invs., N.V. v. Union Capital Partners I, Inc.*, 92 F.3d 1110 (11th Cir. 1996). In interstate fraud cases, courts weigh the following six factors:

> (a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations,
>
> (b) the place where the plaintiff received the representations,
>
> (c) the place where the defendant made the representations,
>
> (d) the domicil, residence, nationality, place of incorporation and place of business of the parties,
>
> (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and
>
> (f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.

Restatement (Second) of Conflict of Laws § 148 (1971). The trial record shows that these factors overwhelmingly favor New York.[1]

1. Place of Reliance

All the acts of reliance occurred in New York. CPH's witnesses all testified that, aside from a December 1997 meeting with Al Dunlap, all of their relevant conduct took place in New York, not Florida:

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[1] In determining choice of law, where the trial record differs from the court's pretrial understanding of the case, the trial record governs. *See Chance v. E. I. Du Pont De Nemours & Co.*, 57 F.R.D. 165, 170 (E.D.N.Y. 1972) ("During the course of the trial the court may reach different determinations on the facts and decide that a different rule of law applies . . . ."); *Bituminous Cas. Corp. v. Rway Servs., Inc.*, No. CIV. CCB-97-3331, 2000 WL 1593519, at *2 (D. Md. Oct 20, 2000) ("reevaluat[ing] . . . choice of applicable law" in light of developments in the case). As described in Morgan Stanley's Renewed Motion to Apply New York Law (May 11, 2005) (incorporated by reference herein), the trial record differed substantially from the Court's pretrial assumptions about the case.

- Maher was "[n]ever in Florida for any of these discussions." 4/13/05 Tr. at 8110:11-14.

- Nesbitt said that the "overwhelming majority" of his work was done in New York; that the meetings with Morgan Stanley and Sunbeam were in New York; and that he never once went to Florida. 4/18/05 Tr. at 8896-98.

- Perelman went to Florida for the December 1997 meeting; aside from that, "everything else was in New York." 4/19/05 Tr. at 9168-69.

- Gittis said that, between December 1997 and March 1998, "[n]othing of any substance" was done in Florida. 4/28/05 Tr. at 11321:10.

Furthermore, it is undisputed that the merger agreement was executed in New York and that the merger closed in New York. *See* Order on Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc.'s Motion for Application of New York Law at 8 (Aug. 11, 2004) (undisputed facts #22, 26); *see also* CPH 330, 338.

The trial evidence did not show that any act of reliance was performed in Florida. In fact, the ***only*** potentially relevant conduct by CPH agents in Florida was the December 1997 meeting with Al Dunlap, and there was no evidence that any act of reliance took place at that meeting. To the contrary, the parties broke off discussions because they disagreed over price, and Perelman testified that he assumed thereafter that the deal was "dead." 4/19/05 Tr. at 9069.

The Court ruled that CPH's acts of reliance took place in part in Florida because that is where "any notice of material adverse changes was to be delivered." Choice of Law Order at 4; *see* CPH 331 § 12.1. The place where a notice of material adverse change was to be delivered, however, is not a place of "reliance." CPH's theory of the case, repeated throughout trial, was that it relied on the allegedly fraudulent statements by proceeding with the merger; the merger agreement was executed and closed in New York. CPH's non-receipt of a notice of material adverse change was not in any sense an act of ***reliance***.

Even if it were, the Court should not have given any weight to that fact in its reliance calculus. The trial record did not bear out the assumption that the material adverse change clause played any significant role. Even though reliance was the primary contested issue at trial, CPH did not mention the material adverse change clause ***once*** during its closing argument. *See* 5/12/05 Tr. at 14267-331. And even if the clause were relevant, the particular place where Sunbeam was contractually required to give notice under it is a legal triviality that should not have played a significant role in the Court's analysis.

2. Place Representations Received

Every relevant representation in the case was received in New York. As noted in the preceding section, except for the December 1997 meeting with Al Dunlap, CPH's agents were never in Florida in connection with the relevant events of the case. Therefore, CPH could not have received any fraudulent misstatements there.

The Court nevertheless determined that misrepresentations were received in "both New York and Florida." Choice of Law Order at 5. The Court was apparently referring to the 1997 meeting with Al Dunlap in Florida. The trial evidence, however, failed to reveal that any relied-upon fraudulent misstatements were made at that meeting. *See* 4/19/05 Tr. at 9065-69; 4/26/05 Tr. at 10710-16. Other than the parties' disagreement over price, the trial testimony revealed virtually nothing about the substance of that meeting. In any event, in comparison to the many other statements CPH received in New York, the significance of any statements at that early meeting was *de minimis*.

3. Place Representations Made

The trial evidence showed that most of the relied-upon misstatements were made in New York, not Florida. CPH's own directed verdict motion proves that. In six and a half pages, it catalogues the six allegedly most significant misstatements relied upon. CPH Motion for

Directed Verdict at 6-13 (May 10, 2005). ***Four of the six statements*** were indisputably made in New York, and CPH's witnesses repeatedly testified to how crucial those statements were to their decisionmaking:

1. *Morgan Stanley Blue Book from the February 23 Meeting.* CPH's own witnesses testified that the Blue Book, presented at the February 23 meeting in New York, was the "most important presentation that we were to receive," 4/19/05 Tr. at 9081-82 (Perelman); that it was "pivotal," *id.* (Perelman); and that it was "very important," 4/26/05 Tr. at 10809 (Gittis).

2. *Sunbeam Long-Range Strategic Plan from the February 23 Meeting.* Mr. Gittis testified that this document, also presented in New York, was "an important piece of information." 4/26/05 Tr. at 10757.

3. *Morgan Stanley Debenture Offering Memorandum.* This document, delivered in New York, was described as "[t]erribly significant" by Mr. Perelman, 4/19/05 Tr. at 9127, and "very important" by Mr. Gittis, 4/27/05 Tr. at 10871. Mr. Nesbitt described it as "very relevant." 4/18/05 Tr. at 8994.

4. *Morgan Stanley Road Show.* The statements made at the "road show" in New York were, like the others, characterized as "important," 4/19/05 Tr. at 9106 (Perelman), or "very important," 4/27/05 Tr. at 10871 (Gittis).

In contrast, only two of the six misrepresentations — the Sunbeam financial statements and the March 19, 1998, press release — were arguably "made" anywhere other than in New York. And the March 19 press release, though published in Florida, was "drafted by Sunbeam's lawyers at the New York offices of Skadden Arps" and was "reviewed by [Morgan Stanley] in New York." *See* Order on Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc.'s Motion for Application of New York Law at 8 (Aug. 11, 2004) (undisputed fact #17).

Indeed, CPH's own witnesses stressed that their principal source of information about the transaction was Morgan Stanley in New York. In Mr. Perelman's words:

> We had many, many, many, many [conversations with Morgan Stanley]. Th[ere] was not a meeting held with a Sunbeam executive that Morgan Stanley wasn't at. ***Morgan Stanley gave us every piece of information about Sunbeam that we got***

> ***. . . . And it came from Sun — from Morgan Stanley to our company directly from Morgan Stanley.***

4/20/05 Tr. at 9451:4-12.

The Court downplayed the New York statements on the ground that they "consisted, in large part, of reaffirmation of representations first made in Florida." Choice of Law Order at 4. Even if so, that does not change the fact that the statements CPH ultimately *relied on* were the subsequent reaffirmations in New York rather than earlier disseminations of financial information to the market at large. CPH's witnesses barely referred to financial information received from Sunbeam before the February 23 meeting in New York.

Moreover, CPH's witnesses were adamant that Morgan Stanley's alleged standing behind and vouching for Sunbeam's finances was a key factor in their decision to proceed with the transaction. *See, e.g.*, 4/19/05 Tr. at 9065. Thus, Morgan Stanley's statements (all of which occurred in New York) were more than mere "reaffirmations" of what Sunbeam had previously disclosed to the market. The trial record unequivocally shows that, in terms of their significance to CPH's decisionmaking, the most important statements were those Morgan Stanley and Sunbeam made in New York.

4. Principal Place of Business

Both CPH and Morgan Stanley have their principal place of business in New York. *See* Order on Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc.'s Motion for Application of New York Law at 6 (Aug. 11, 2004) (undisputed facts #1, 2); 4/19/05 Tr. at 9178. Under the Restatement, the plaintiff's "principal place of business" is a "contact[] of substantial significance when the loss is pecuniary in its nature." Restatement (Second) of Conflict of Laws § 148 cmt. i. That consideration clearly favors New York. Only Sunbeam, a non-party co-conspirator, is based in Florida.

In analyzing this factor, the Court relied on Sunbeam's place of business but ignored Morgan Stanley's entirely. *See* Choice of Law Order at 5. That was unwarranted. Morgan Stanley's location is highly relevant because, according to CPH, Morgan Stanley did not merely "help" Sunbeam make its own fraudulent statements; rather, ***both*** Morgan Stanley and Sunbeam made allegedly fraudulent statements to CPH. According to Perelman, "Morgan Stanley gave [CPH] every piece of information about Sunbeam that we got . . . . And it came from Sun — from Morgan Stanley to our company directly from Morgan Stanley." 4/20/05 Tr. at 9451:6-12. Since Morgan Stanley itself made many of the statements CPH complains about, there is no basis for treating ***its*** place of business as any less relevant than its alleged co-conspirator's.

The Court also should not have placed substantial weight on Sunbeam's place of business. Sunbeam was not a party to the case — CPH settled with it long before suing Morgan Stanley. Because no possible outcome in the litigation could have affected Sunbeam, Florida had no interest in applying its law to the case on the basis of Sunbeam's place of business.

5. Place of the Tangible Thing That Is the Subject of the Transaction

Because Sunbeam, the subject of the transaction, is not a "tangible thing," this factor does not apply. Indeed, CPH has agreed that this factor favors neither state. *See* CPH's Response in Opposition to Motion for Application of New York Law at 33 (June 4, 2004) ("In fact, the transaction involved an exchange of intangibles . . . , so this factor does not favor either New York or Florida.").

Despite that concession, the Court mistakenly found that this factor favored Florida because "CPH received stock in a Florida based company." Choice of Law Order at 5. The Court did not address the "tangible thing" requirement, nor did it reconcile its ruling with its acknowledgement in the following paragraph that this is a case "involving intangibles." *Id.*

6. Place of Performance

CPH's performance occurred in New York. As noted above, the merger was closed in New York. That is what CPH agreed to "perform."

The Court found that this factor did not favor New York because "CPH as a Delaware corporation was merged into another Delaware corporation." Choice of Law Order at 5. The state of incorporation, however, is not the state of performance. As a corporation, CPH was a fictional being that could act only through its agents. The relevant question is where CPH's agents performed their contractual obligation to effect the merger. The answer is New York.

7. Summary

Four of the five applicable Restatement factors clearly favor New York over Florida. Only one of the factors — the place the statements were made — is ambiguous, but the trial evidence suggests that even that factor favors New York. The Restatement provides that "[i]f any two of the above-mentioned contacts, apart from the defendant's domicil, state of incorporation or place of business, are located wholly in a single state, this will usually be the state of the applicable law with respect to most issues." *See* Restatement (Second) of Conflict of Laws § 148 cmt. j. Obviously, then, if ***four*** and arguably even ***five*** factors support New York, there is no basis for applying Florida law.

B. The Court's March 25 Choice of Law Order Misinterpreted and Misapplied the Restatement.

The Court went astray in its March 25 Choice of Law Order by misinterpreting and misapplying critical sections of the Restatement. Without those errors, the Court would have reached a contrary result.

1. The Court Misinterpreted the Restatement To Say That the Place of Reliance Is Less Important Than the Place of Misrepresentation.

The linchpin of the Court's analysis was that, in fraud cases involving pecuniary loss, the Restatement accords greater weight to the place of the misrepresentation than to the place of reliance:

> Given the difficulty of determining the location of reliance and injury in cases of pecuniary loss involving intangibles, the reliance factors are accorded less weight than the misrepresentation factors. *Restatement (Second) Conflict of Laws* § 148, cmt. c.

Choice of Law Order at 5. That analysis was apparently the reason the Court relied on Florida's public policy of deterring fraud without even considering New York's countervailing public policies requiring that reliance be justifiable and reflect due diligence. *See id.* at 5-7.

The Court's analysis was based on a misinterpretation of comment c. That comment does not address "place of reliance" at all, but rather "[p]lace of *loss*." Restatement (Second) of Conflict of Laws § 148 cmt. c (emphasis added). The comment notes that, because of the difficulty in assigning a location to pecuniary losses for intangibles, "the place of loss does not play so important a role in the determination of the law governing actions for fraud and misrepresentation as does the place of injury in the case of injuries to persons or to tangible things." *Id.* "Place of loss" is not listed as one of the six factors in section 148, and the evident function of comment c is to explain that omission.

Place of reliance, on the other hand, *is* addressed in comment f, which nowhere suggests that there is any particular difficulty in determining the place of reliance or that the factor should be accorded only limited weight. To the contrary, comment g of the Restatement goes on to say precisely the opposite. It provides:

> *The place where the plaintiff received the representations.* This is the place where the representations were first communicated to the plaintiff. This place

> constitutes approximately ***as important a contact as does the place where the defendant made the representations***. On the other hand, this place is ***not so important a contact as is the place where the plaintiff acted in reliance on the defendant's representations***.

Restatement (Second) of Conflict of Laws § 148 cmt. g (emphasis added). Comment g thus makes it clear that, while where the representations were received is "approximately as important" as the place where representations were made, the place where *reliance* occurs is more important than either of those factors. To be clear: ***Under the Restatement, in pecuniary loss cases, the place of reliance is more important than the place the misrepresentations were made.*** That is directly contrary to the Court's reasoning in its Choice of Law Order.

Nor, contrary to the Court's ruling, does the Restatement suggest any particular difficulty in determining a place of reliance in the case of "intangibles." *See* Choice of Law Order at 5 ("Given the difficulty of determining the location of reliance and injury in cases of pecuniary loss ***involving intangibles***, the reliance factors are accorded less weight than the misrepresentation factors. *Restatement (Second) Conflict of Laws* § 148, cmt. c."). Comment c does state that "[w]hen the loss is pecuniary in its nature, the place of *loss* is far more difficult to locate than when the damage consists of physical injury to persons or tangible things." *Id.* § 148 cmt. c (emphasis added). But, again, that sentence (and the entire paragraph in which it appears) addresses the place of ***loss***, not the place of reliance. The reasons why intangible ***losses*** are difficult to locate in no way suggests that ***reliance*** is difficult to locate. For example, in this case, regardless of where CPH's losses occurred, its reliance clearly occurred in New York, where it considered the information received, made its decisions, and executed and closed the merger agreement. Comment g's prescription (that place of reliance is more important than place where misrepresentations were made) is in no way diminished in the case of intangibles. To the contrary, section 148 of the Restatement addresses only pecuniary losses, as opposed to

"physical injury . . . to tangible things" which are governed by other rules. *Id.* § 148 cmt. a. Because section 148 excludes physical injury to *tangible* things, its rules — including comment g's rule that the place of reliance is more important than the place where the misrepresentations are made — unquestionably applies to intangibles.

The Court's misinterpretation recurred throughout its Choice of Law Order. For example, in the next paragraph, the Court stated:

> Where the primary purpose of a tort rule is to deter or punish misconduct, the place where the conduct took place is more important than the state where the injury may have occurred. *Restatement (Second) Conflict of Laws* § 145, cmt. c.

Choice of Law Order at 5. Again, the distinction being drawn in that section is between the place of the ***conduct*** and the place of ***injury*** (*i.e.*, the place of loss). The place of ***reliance*** is not the same thing as the place of ***injury***. Nothing in this cited passage trumps the clear directive in comment g of section 148 that the place of reliance is more important than the place where the misrepresentations were made.

The Court's misinterpretation recurred a third time in footnote 5:

> The Restatement emphasizes the relative importance of this factor [i.e. place misrepresentations were made], equating it in importance to the place of a defendant's conduct in the case of personal injury. *Restatement (Second) Conflict of Laws* § 148, cmt. c at 445.

Id. at 5 n.5. That is not what the Restatement says. The cited comment states merely that "[t]he place where the defendant made his false representations, on the other hand, is ***as important*** a contact in the selection of the law governing actions for fraud and misrepresentation as is the place of the defendant's conduct in the case of injuries to persons or to tangible things." Restatement (Second) of Conflict of Laws § 148, cmt. c (emphasis added). That merely distinguishes place of loss which, as the preceding paragraph of the comment discusses, is ***less important*** in pecuniary fraud than in tangible injury cases. Nothing in this comment addresses

the "relative importance" of the place where misrepresentations were made compared to the place of reliance. That topic is addressed in comment g, which says that place of reliance is ***more important*** than where the misrepresentations were made — precisely the opposite of the rule the Court applied.

2. The Court Misinterpreted the Restatement Rule Governing "Fortuitous" Places of Injury.

The Court also misinterpreted the Restatement in concluding that the New York contacts were "fortuitous." Citing comment e to section 145, the Court observed that the rule that place of conduct is more important than place of injury "is particularly true where the place of injury is fortuitous." Choice of Law Order at 5. The court later added that "the location of the ultimate victim was fortuitous" in this case because "Sunbeam, through [Morgan Stanley], approached more than ten other companies before it approached CPH." *Id.* at 5-6 & n.6.

By its terms, comment e to section 145 addresses fortuitous places of ***injury*** (*i.e.*, place of loss). The comment goes on to indicate in the very next sentence, however, that the place of loss is not a significant factor in pecuniary fraud cases generally, because of the difficulty of locating intangible injuries. *See* Restatement (Second) of Conflict of Laws § 145 cmt. e ("This will also be so when, such as in the case of fraud and misrepresentation (*see* § 148), there may be little reason in logic or persuasiveness to say that one state rather than another is the place of injury . . . ."); *cf. id.* § 148 cmt. c (same point). In contrast to the place of loss, however, the place of ***reliance*** is a very important factor, and the place where misrepresentations were ***received*** is equally important as the place they were made. *See id.* § 148 cmt. g. Nothing in section 145's discussion of fortuitous places of injury has any bearing on the weight given to ***those*** factors.

Even if section 145 were a rule about "fortuitous" contacts generally, there is nothing fortuitous about New York's connection to this case. A contact is "fortuitous," as that term is used in the Restatement, only when the state has no other substantial relationship to the issues in the case. Typical examples are when a resident of state A injures another resident of state A while the two happen to be traveling through state B and the issue has nothing to do with state B's interests in regulating conduct within its borders, or when a pilot negligently crashes a plane in state C en route from state A to state B and none of the passengers is a resident of state C. *See Leinhart v. Jurkovich*, 882 So. 2d 456, 458 (Fla. 4th DCA 2004); *Proprietors Ins. Co. v. Valsecchi*, 435 So. 2d 290, 295-96 (Fla. 3d DCA 1983). Florida courts have consistently refused to find a contact "fortuitous" where it bore some other substantial relationship to the case. *See Hoffman v. Ouellette*, 798 So. 2d 42, 44 (Fla. 4th DCA 2001) (place of injury not fortuitous because the parties were also residents of that state and had other ties there); *Murphy v. Thornton*, 746 So. 2d 575, 576 (Fla. 1st DCA 1999) (place of injury not fortuitous because defendant also owned the premises involved there); *see also Valsecchi*, 435 So. 2d at 296-97 (analyzing three cases and explaining why the place of injury was not fortuitous in each: *Jones v. Wittenberg Univ.*, 534 F.2d 1203 (6th Cir. 1976) (place of injury not fortuitous because it was also temporary residence of one party and permanent residence of the other); *Maguire v. Exeter & Hampton Elec. Co.*, 325 A.2d 778 (1974) (place of injury not fortuitous because it was also decedent's chosen site of employment); *Hurtado v. Superior Court of Sacramento County*, 11 Cal. 3d 574 (1974) (place of injury not fortuitous because it was also domicile of defendants)).

Under that standard, the New York contacts here cannot be dismissed as fortuitous. Both parties are based in New York. Many, if not most, of the relevant alleged fraudulent statements were intentionally made there and all were intended to be received there. The parties agreed to

execute and close the merger in New York and therefore intended that the acts of reliance occur there. Moreover, given that New York is the nation's financial capital, none of those contacts is the least bit surprising. Thus, this case presents a New York victim claiming injury from acts by a New York defendant taking place primarily in New York. It would be surprising indeed if Florida law rather than New York law would be chosen to govern such claims. This is especially so because the only two issues being tried, reliance and damages, have virtually no connection to Florida.

Those contacts are not rendered fortuitous by the mere fact that Sunbeam, through Morgan Stanley, approached ten other companies before allegedly defrauding CPH. As the cases cited above illustrate, whether a place of injury is "fortuitous" depends on whether it has any other connection to the parties or the events ***of the tort that actually occurred*** — not whether events might have unfolded differently so that an entirely different plaintiff might have been defrauded in some other state. Under the Court's theory, if a reckless driver on a cross-country trip injured a pedestrian in the pedestrian's home state, that state would nevertheless be "fortuitous" because the driver could as easily have hit a different pedestrian in any of the other states he drove through. That result flies in the face of basic conflicts principles, which would clearly apply the law of the place of the accident in those circumstances. *See* Restatement (Second) of Conflict of Laws § 145.

Moreover, justifying disregard of New York law based on the assertion that there were ten earlier unsuccessful approaches in other locations is particularly unjustified given that the issues on which New York and Florida law differ are reliance and damages. None of the ten earlier approaches was successful, so none of them resulted in either reliance or damages. The only place where reliance actually occurred was New York, and the only party actually damaged

was a New York company. Certainly from CPH's point of view, it was not at all "fortuitous" that its acts of reliance occurred in the state where its principal place of business was located, and which is best suited to determine the extent of any diligence or reliance obligations to impose on its domiciliaries.[2]

On the facts of this case, New York is not a "fortuitous" jurisdiction as that term is used in the Restatement. The Court's ruling appears to be a substantial departure from precedent on this issue. We have not found a single case in which a jurisdiction was held "fortuitous" despite the fact that both parties were domiciled there and that the defendant intentionally undertook a substantial portion of the alleged wrongful conduct there. We respectfully submit that the Court misinterpreted the Restatement on this point.

3. The Court Misapplied the Restatement in Analyzing Florida's Interests and Failing To Analyze New York's Interests.

Based on its mistaken conclusion that the place of reliance was less important than the place the misrepresentations were made, and that the New York contacts were "fortuitous," the Court proceeded to resolve the choice of law issue by examining Florida's interests in applying its tort rules in the two respects they departed from New York law, namely (1) its more limited (or nonexistent) justifiable reliance requirement; and (2) its provision of benefit-of-the-bargain damages. As to the first issue, the Court relied on Florida's public policies in favor of "protecting the public from fraud, even if the public acts negligently." Choice of Law Order at 5. As to the second, it relied on Florida's public policy of ensuring that "the defendant [does] not escape liability" in cases where no out-of-pocket loss was suffered. *Id.* at 6 (quoting

[2] Moreover, even if the ten earlier approaches were relevant, they were effected by Morgan Stanley, *see* Choice of Law Order at 6 n.6, whose status as a New York domiciliary is sufficient to give any one of those alleged attempted frauds a contact in New York.

Restatement (Second) of Torts § 549, cmt. i). The court did not consider any New York public policies or how they might have been implicated by the case.

The Court's failure to analyze New York's public policies was a misapplication of the Restatement. Plainly, New York has interests that are implicated here. New York's due diligence requirement reflects that State's determination that sophisticated investors should not be entitled to rely blindly on representations when means of verification are available but disregarded. See *UST Private Equity Investors Fund, Inc. v. Salomon Smith Barney*, 733 N.Y.S.2d 385, 386 (App. Div. 2001); *Rotterdam Ventures, Inc. v. Ernst & Young LLP*, 752 N.Y.S.2d 746, 749 (App. Div. 2002); *Schlaifer Nance & Co. v. Estate of Andy Warhol*, 119 F.3d 91, 98 (2d Cir. 1997). New York's highest court has described that State's justifiable reliance requirement as a "fundamental precept" of New York law. *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 322 (N.Y. 1959). The policy discourages negligent conduct by sophisticated investors. Whether or not the Court agrees with the wisdom of the requirement, it is a key element of New York law that is entitled to weight in the choice-of-law calculus. "A rule which exempts the actor from liability for harmful conduct is entitled to the same consideration in the choice-of-law process as is a rule which imposes liability." Restatement (Second) of Conflicts of Laws § 145 cmt. c.

New York's policy bears directly on the disputed issues in this case. As this Court has acknowledged, in Florida, choice of law is analyzed on an "issue by issue" basis. See Order on Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc.'s Motion for Application of New York Law at 3 (Aug. 11, 2004). The due diligence requirement is an aspect of ***reliance***, so the most relevant contacts are the state where the reliance occurred and the state where the relying party was domiciled. Both of those factors point to New York. Awarding

CPH an enormous sum of money despite its failure to prove reasonable diligence contravenes New York's policy.

In contrast, Florida's policy of "protecting the public from fraud, even if the public acts negligently," is only marginally implicated here. While Florida's public policy undoubtedly justifies applying Florida law to defrauded members of the ***Florida*** public, the State's interest in protecting the unreasonable reliance of ***New Yorkers relying in New York*** is marginal to nonexistent. Florida has no roving police power to protect members of the "public" in whatever state they may reside. *Cf. Tune v. Philip Morris Inc.*, 766 So. 2d 350, 352-53 (Fla. 2d DCA 2000).

The Court also failed to consider New York's countervailing state interests on the damages issue. The Court relied entirely on Florida's supposed public policy of ensuring that "the defendant [does] not escape liability" in cases where no out-of-pocket loss was suffered. *Id.* at 6. New York, however, has adopted a contrary policy that damages in fraud cases should be limited to the plaintiff's actual loss. Applying Florida law impinges on that New York policy no less than applying New York law would impinge on Florida's policy.

Moreover, whether or not Florida's interest would justify applying Florida damages law to a direct fraud claim against Sunbeam, it does not justify applying Florida damages law to claims for conspiracy and aiding-and-abetting fraud, where only one of the two parties to the conspiracy is a Florida resident and that party settled with the plaintiff long before litigation began. After the settlement, Florida no longer had an interest in ensuring that Sunbeam "[does] not escape liability" because no possible result of this litigation could impose liability on Sunbeam. *Cf. Bituminous Cas. Corp.*, 2000 WL 1593519, at *2. Florida's only remaining admonitory interest relates to Morgan Stanley, and that interest is greatly diminished given that

Morgan Stanley is a New York company whose relevant conduct transpired primarily in New York.

In short, as to the two disputed issues in the case, the Court overstated the significance of Florida's interests and failed to appreciate New York's. On issues of reliance and damages, New York's policies should have been given more weight than Florida's, because the acts of reliance occurred in New York and the damages were suffered by a New York-based corporation. Florida's interests, if any, related to the defendant-centered elements of misrepresentation and fraudulent intent — elements rendered irrelevant by the Court's default order. Even if Florida law might have applied to those elements, under Florida's "issue by issue" approach, that does not justify ignoring New York law on the plaintiff-centered elements of reliance and damages, where New York clearly has the predominant interest. The Court applied Florida law where New York law should have applied instead.

4. The Court Misapplied the Restatement by Relying on Uniformity as a Reason To Apply Florida Law.

Finally, the Court relied in part on the fact that Sunbeam's statements "were dispersed nationwide" and that "[m]any investors purchased the inflated Sunbeam stock, not just CPH." Choice of Law Order at 7 & n.8. It thought these facts relevant because the Restatement invites courts to consider interests in "certainty, predictability and uniformity of result." Restatement (Second) of Conflict of Laws § 6(2)(f). That consideration does not apply here.

While section 6(2)(f) advises courts to treat like cases alike, CPH is not similarly situated to other Sunbeam investors. Much of CPH's case at trial focused on statements made specifically to CPH and not to the public at large — most notably, the statements at the allegedly "absolutely pivotal" February 23 meeting and the two documents handed out there. Moreover, the principal issue on which Florida and New York law differ is reliance. Applying the same

legal standard to CPH and other investors on reliance would not promote uniformity because reliance must be evaluated on a case-by-case basis: CPH's reliance on a particular statement does not mean any other investor relied as well. That is even more true given that the representations CPH relied on are different from those the public relied on and that the magnitude of CPH's investment in Sunbeam bore no resemblance to that of a typical investor.

* * *

The Court has already acknowledged that the correctness of its earlier choice of law ruling presents a "significant legal issue" in the case. 5/11/05 Tr. at 13832. Morgan Stanley respectfully submits that, in light of these respects in which the Court misinterpreted or misapplied the Restatement, the Court should revisit its earlier choice of law determination, particularly in view of the very different case CPH proved at trial. Because CPH failed to present evidence sufficient to sustain its burden of proof under New York law, Morgan Stanley is entitled to judgment. Failing that, Morgan Stanley is at least entitled to a new trial conducted under New York law.

II. THE COURT ERRONEOUSLY PERMITTED THE JURY TO DETERMINE LIABILITY ON THE FRAUD CLAIM UNDER FLORIDA LAW WITHOUT ANY FINDING THAT CPH'S RELIANCE ON THE FALSE STATEMENTS WAS JUSTIFIABLE IN THE TOTALITY OF THE CIRCUMSTANCES AND WITHOUT ANY FINDING THAT CPH HAD CONDUCTED REASONABLE DUE DILIGENCE.

Even if Florida law applied, the Court's jury instructions on the reliance element of CPH's fraud claim were materially erroneous. First, the Court instructed the jury that CPH was entitled to recover on its fraud claim if it "actually relied" on false statements by Sunbeam or Morgan Stanley. Under governing Florida law, however, a party may recover on a fraud claim only if it further proves that its actual reliance was justifiable based on the totality of the circumstances. The Court erred in refusing to instruct the jury accordingly. Second, Florida law

also makes clear that a sophisticated party with an opportunity to investigate must undertake at least some investigation before it can justifiably rely on false statements, particularly in the face of warning signs. The Court erred in refusing to instruct the jury concerning this duty to investigate and in repeatedly telling the jury that Morgan Stanley could not even claim that CPH had a duty of investigation. These fundamental errors require a new trial.

A. The Court Erred by Failing To Instruct the Jury on Justifiable Reliance.

Under controlling Florida law, a party may not recover in a fraud case unless it can prove that it ***justifiably*** relied on the allegedly false statements. As the Florida Supreme Court has explained, "[t]he question . . . is whether the recipient of the misrepresentation is 'justified in relying upon its truth.'" *M/I Schottenstein Homes, Inc. v. Azam*, 813 So. 2d 91, 94 (Fla. 2002) (quoting *Besett v. Basnett*, 389 So. 2d 995, 997 (Fla. 1980)). Actual reliance was presumed in *Azam*. The issue on appeal was whether the trial court properly granted judgment ***as a matter of law*** to a fraud defendant on the ground that the plaintiffs, by searching public land records, could have discovered the falsity of certain misrepresentations concerning real estate they had purchased. The Supreme Court concluded that it was a fact question for the jury "whether the purchasers' reliance was justifiable under the totality of the circumstances." *Azam*, 813 So. 2d at 94. If actual reliance were sufficient by itself for a fraud recovery, the Court could easily have reversed the trial court in a one-sentence opinion. Instead, it embarked on a careful analysis of its precedent and ultimately articulated a clear standard under which the jury must determine, based on the "totality of the circumstances," whether the plaintiff's reliance was justifiable.

The Restatement (Second) of Torts, which the Florida Supreme Court adopted in *Besett*, *supra*, likewise emphasizes that recovery on a fraud claim requires a showing not only that the plaintiff actually relied on the misrepresentation but also that its reliance was justifiable. The "general rule" is that:

> The recipient of a fraudulent misrepresentation can recover against its maker for pecuniary loss resulting from it if, but only if,
>
> (a) he relies on the misrepresentation in acting or refraining from action, and
>
> (b) ***his reliance is justifiable***.

Restatement (Second) of Torts § 537 (emphasis added). Indeed, Sections 540 and 541 of the Restatement, addressed by the Supreme Court in *Azam*, are part of "Title C" of the Restatement, which is entitled "Justifiable Reliance."

The Court here instructed the jury that the "only issues" for its determination were damages and "whether CPH relied on the false statements made by Sunbeam or Morgan Stanley." Jury Instructions 2 (given May 13, 2005). It further instructed that CPH need only "prove that it ***actually relied*** on the false statements by Sunbeam or Morgan Stanley." *Id.* at 3 (emphasis added). By completely omitting the requirement of "justifiable reliance," the Court ignored Florida law and rendered the jury's verdict insufficient to support CPH's fraud claim.

The jury's verdict cannot be saved by the Court's instruction that "CPH did not actually rely if . . . the falsity of the statements was obvious." Jury Instructions 3. In the charge conference, the Court expressed its belief that so long as Morgan Stanley's representations were not obviously false, CPH did not need to make any further showing of justifiable reliance. 5/11/05 Tr. at 13943-44. Although obviousness is certainly relevant to the question of justifiable reliance, *see Azam*, 813 So. 2d at 93 ("The recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him.") (quotations omitted), it is only one of many potentially relevant factors, all of which are embraced within the "totality of the circumstances" test.

The Court refused to give Morgan Stanley's Requested Jury Instruction No. 9, under which the jury would have been told: "In deciding whether CPH was justified in relying upon

the truth of any particular representation, you must consider the totality of the circumstances, including, among other factors, the type of information at issue, the nature of the communication between the parties, the relative positions of the parties, and the extent of their knowledge of corporate affairs." This language is taken almost verbatim from *Azam*, in which the Supreme Court first announced the totality-of-the-circumstances test. 813 So. 2d at 94 (stating the question on remand as "whether the purchasers' reliance was justifiable under the totality of the circumstances"); *id.* at 95 ("[T]his factual examination is indeed a consideration of the totality of the circumstances surrounding the type of information, the nature of the communication between the parties, and the relative positions of the parties.").

The Court's failure to give the totality-of-the-circumstances instruction was particularly prejudicial here, where CPH's extremely high level of sophistication and its battalion of advisors — i.e., "the relative positions of the parties" addressed in *Azam* — were directly relevant to whether it justifiably relied on the alleged representations. Indeed, in addition to Instruction No. 9's simple statement of the totality test, the Court refused Proposed Instructions 10 and 13-16, all of which would have offered the jury an opportunity to take into account CPH's sophistication and highly skilled advisors in determining justifiable reliance, as required by Florida precedent and other jurisdictions applying the Restatement.[3]

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[3] *See Hillcrest Pac. Corp. v. Yamamura*, 727 So. 2d 1053, 1057-58 (Fla. 4th DCA 1999) ("sophisticated developer in the business of investing millions of dollars in commercial property" did not "reasonably rely upon any material misrepresentations" where the sales agreement provided inspection rights and an opportunity to "audit the financial records"); *Thor Bear, Inc. v. Crocker Mizner Park*, 648 So. 2d 168, 172 (Fla. 4th DCA 1994) ("Participants in a normal business transaction are not entitled to rely upon such 'ephemeral matters' as opinions, judgments or legal views expressed by an opposing party."); *Wasser v. Sasoni*, 652 So. 2d 411, 412-13 (Fla. 3d DCA 1995) ("[A] sophisticated purchaser of commercial property who . . . had ample opportunity to conduct inspections, and could have discovered an alleged defect through the exercise of ordinary diligence, may be disgruntled, but does not have a cause of action for fraud."); *Lewis v. Bank of Am. NA*, 343 F.3d 540, 547 (5th Cir. 2003) ("[v]iewing the

The Court's refusal to give the totality instruction thus deprived the jury of the proper context in which to assess even the Court's inadequate obviousness test. What is obvious to a sophisticated investor like CPH may not be obvious to a novice. Thus, as *Besett* and the Restatement make clear, obviousness must itself be assessed in light of the sophistication of the parties. *Besett*, 389 So. 2d at 997 ("Thus a defect that any experienced horseman would at once recognize at first glance may not be patent to a person who has had no experience with horses.") (quoting Restatement (Second) of Torts § 541, cmt. a)). The Court erred in refusing to give the jury the opportunity, in considering obviousness, to take into account CPH's sophistication. *See* Morgan Stanley's Supplemental Phase I Requested Jury Instruction No. 11 (May 5, 2005) (instructing that CPH's sophistication is relevant to obviousness).

B. The Court Erred by Refusing To Instruct the Jury That a Sophisticated Party Like CPH May Not Recover if It Failed To Conduct At Least Some Diligence.

The *Azam* Court held that, under the totality-of-the-circumstances test, a plaintiff ordinarily may not justifiably rely on a representation without first conducting at least a minimal inquiry into its truth or falsity. *Id.* at 93 ("[W]here one has an opportunity to make a cursory examination and investigation and does not do so, he cannot recover."); *see also Besett*, 389 So.

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circumstances in their entirety," including plaintiff's "business background" and "access to professional accountants," plaintiff's decision to go forward with transaction in the face of "red flag[s]" "without undertaking additional investigation . . . was not justifiable"); *B.O. v. C.O.*, 590 A.2d 313, 316 (Pa. 1991) ("Relative to [justifiable reliance] the Pennsylvania Supreme Court has held that the character, intelligence, experience, age and mental and physical condition of the parties must be considered."); *Lockard v. Carson*, 287 N.W.2d 871, 878 (Iowa 1980) (holding that the test for justifiable reliance is "whether the complaining party, in view of his own information and intelligence, had a right to rely on the representations. This subjective standard depends not on what an ordinarily prudent person reasonably would do to protect his or her interests, but upon what the complaining party reasonably could be expected to do."); Prosser & Keeton on Law of Torts § 108, p. 751 (5th ed. 1984) ("[O]ne who has special knowledge, experience, and competence may not be permitted to rely on statements for which the ordinary man might recover, and . . . one who has acquired expert knowledge concerning the matter dealt with may be required to form his own judgment, rather than take the word of the defendant.").

2d at 997 (plaintiff "cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation"). The requirement is accentuated in the case of a highly sophisticated party like CPH. If a sophisticated party has an opportunity to investigate, it must exercise at least some due diligence before it can be said to have justifiably relied. *L & L Doc's, L.L.C. v. Fla. Div. of Alcoholic Beverages & Tobacco*, 882 So. 2d 512, 515 (Fla. 4th DCA 2004) (purchaser of commercial property was "not justified in relying upon misrepresentation[s] which they knew or should have known, ***with the exercise of some diligence***, was false") (emphasis added); *Hillcrest Pac. Corp. v. Yamamura*, 727 So. 2d 1053, 1057-58 (Fla. 4th DCA 1999) ("sophisticated developer in the business of investing millions of dollars in commercial property" did not "reasonably rely upon any material misrepresentations" where the sales agreement provided inspection rights and an opportunity to "audit the financial records"); *Wasser v. Sasoni*, 652 So. 2d 411, 412-13 (Fla. 3d DCA 1995) (stating the "general rule" that "a misrepresentation is not actionable where its truth might have been discovered by the exercise of ordinary diligence" and holding that "a sophisticated purchaser of commercial property who . . . had ample opportunity to conduct inspections, and could have discovered an alleged defect through the exercise of ordinary diligence, may be disgruntled, but does not have a cause of action for fraud"); *Adams v. Prestressed Sys. Indus.*, 625 So. 2d 895, 897 (Fla. 1st DCA 1993) ("[A] party who relies on a misrepresentation must show that it exercised ***some diligence*** in investigating the misrepresentation, unless it is shown that the fraudulent party had exclusive or superior knowledge, or prevented further investigation.") (citations omitted and emphasis added). A failure to investigate is particularly fatal when "red flags indicat[e] . . . reliance is unwarranted." *Lewis v. Bank of America NA*, 343 F.3d 540, 546-47 (5th Cir. 2003) (in light of plaintiff's

"business background" and "access to professional accountants," plaintiff's decision to go forward with transaction "without undertaking additional investigation . . . was not justifiable" where "red flag warrant[ed] further investigation").

Notwithstanding the plain applicability of these cases, the Court refused to issue Morgan Stanley's Requested Instructions 12-15, which dealt with the requirement of a sophisticated party to undertake some due diligence, at the very least a cursory investigation, particularly when confronted with numerous red flags. Moreover, the Court's oft-repeated "limiting instruction on reliance" instructed the jury, in direct contravention of Florida law, that "Morgan Stanley ***cannot claim*** that CPH could or should have investigated whether statements made to it were true." Order (Limiting Instruction on Reliance) (Apr. 5, 2005). The cumulative prejudicial effect of the Court's failure to give any instructions on CPH's duty to investigate and the Court's incessant broadcasting of its erroneous "limiting instruction" manifestly require a new trial.

III. CPH FAILED TO MEET ITS BURDEN OF PROOF ON DAMAGES.

Morgan Stanley is entitled to judgment as a matter of law because CPH failed to meet its burden of proof on damages. Although CPH's proof was deficient in several respects, its most glaring omission was its failure to prove the actual value, ***as of the date of the transaction***, of the Sunbeam shares it received.

A. CPH Failed To Prove the Actual Value of the Sunbeam Stock on the Date of the Transaction.

CPH elected to proceed on a benefit-of-the-bargain theory of damages. Under that measure, damages are "the difference between the actual value of the property and its value had the alleged facts regarding it been true." *Totale, Inc. v. Smith*, 877 So. 2d 813, 815 (Fla. 4th DCA 2004). Florida law is clear that actual value must be determined as of the "'***time of purchase***.'" *Totale*, 877 So. 2d at 815 (quoting *Strickland v. Muir*, 198 So. 2d 49, 51 (Fla. 4th

DCA 1967)) (emphasis added); *see also Kind v. Gittman*, 889 So. 2d 87, 90 (Fla. 4th DCA 2004); *Teca, Inc. v. WM-TAB, Inc.*, 726 So. 2d 828, 829 (Fla. 4th DCA 1999) (en banc); *Perlman v. Ferman Corp.*, 611 So. 2d 1340, 1341 (Fla. 4th DCA 1993). Thus, CPH was required to produce evidence of (1) the represented value of the Sunbeam stock on the date of the transaction; and (2) the actual value of the stock on that date.

To prove represented value, parties typically offer evidence of the acquired stock's market price, and that is what CPH attempted to do here.[4] To prove actual value — *i.e.*, represented value minus artificial inflation — parties typically introduce evidence of an "event study." *See In re Imperial Credit Indus., Inc. Sec. Litig.*, 252 F. Supp. 2d 1005, 1014-16 (C.D. Cal. 2003); *In re World Access, Inc. Sec. Litig.*, 310 F. Supp. 2d 1281, 1298 n.10 (N.D. Ga. 2004); *In re N. Telecom Ltd. Sec. Litig.*, 116 F. Supp. 2d 446, 460 (S.D.N.Y. 2000); *In re Oracle Sec. Litig.*, 829 F. Supp. 1176, 1180-81 (N.D. Cal. 1993); Jon Koslow, *Estimating Aggregate Damages in Class-Action Litigation Under Rule 10b-5 for Purposes of Settlement*, 59 Fordham L. Rev. 811, 817-26 (1991). In an event study, an expert examines subsequent movements in stock price and separates those caused by the fraud from those caused by general market fluctuations and other non-fraud-related factors. By aggregating the fraud-related losses, the expert determines the amount by which the share price was artificially inflated on the date of the transaction. Subtracting that inflation from the market price on that date yields actual value. *See* Daniel R. Fischel, *Use of Modern Finance Theory in Securities Fraud Cases Involving Actively Traded Securities*, 38 Bus. Law. 1, 17-19 (1982); Koslow, *supra*, at 817-26.

Using event studies or similar methods to prove actual value on the date of the transaction is essential, because not all subsequent share price declines are caused by the fraud.

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[4] CPH's calculation of represented value was flawed for other reasons. *See* pp. 39-40, *infra*.

Those who purchase stock willingly subject themselves to market-based fluctuations in value unrelated to fraud, and they therefore have no legitimate right of recovery under a benefit-of-the-bargain theory for any price decline that cannot be shown to have been caused by the fraud. *See Dura Pharm., Inc. v. Broudo*, 125 S. Ct. 1627, 1632 (2005); *Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1447 & n.5 (11th Cir. 1997); Prosser & Keeton on Torts § 110, at 767 (5th ed. 1984); *see also E.F. Hutton & Co., Inc. v. Rousseff*, 537 So. 2d 978, 981 (Fla. 1989) ("loss causation was deemed necessary in order to balance and fairly restrict liability" under federal securities laws modeled on "common law tort of deceit"); *Totale*, 877 So. 2d at 815 ("Later appreciation or depreciation of the property that is subject of the false representation generally does not alter the fraud damage computation."). Other "contributing forces" to the investment's decline in value "must be isolated and removed." *Robbins*, 116 F.3d at 1447 n.5; *Miller v. Asensio & Co.*, 364 F.3d 223, 233 (4th Cir. 2004).[5]

CPH failed to introduce an event study or to present any other evidence of the actual value of the Sunbeam stock on the date of the transaction. The only evidence CPH presented related to the value of the Sunbeam stock on various dates after December 6, 1999, nearly two years ***after*** the transaction, when the stock could first be registered for public sale. *See* 4/25/05 Tr. at 10383-92. Plaintiffs' expert, Dr. Nye, admitted that he did not compute the actual value of the Sunbeam stock on the date of the transaction. *See id.* at 10487-88, 10522-23. Nye also admitted that many factors influence stock price and that he had made no effort to determine

[5] Florida and federal law are not materially different on this point. *See Butterworth v. Quick & Reilly, Inc.*, 998 F. Supp. 1404, 1411 (M.D. Fla. 1998). Both require damages to be proved on the date of the transaction, *compare Totale*, 877 So. 2d at 815, *with Huddleston v. Herman & MacLean*, 640 F.2d 534, 556 (5th Cir. 1981), *modified on other grounds*, 459 U.S. 375 (1983); and both justify that requirement on the need to exclude subsequent appreciation or depreciation unrelated to the fraud, *compare Totale*, 877 So. 2d at 815, *with Huddleston*, 640 F.2d at 555.

what portion of CPH's losses were caused by non-fraud factors, such as the stock market crash of 2000 and decisions made by Sunbeam's new management. *See id.* at 10529-30. CPH presented no evidence showing that the actual value of Sunbeam stock was the same on the date of the transaction as on those latter dates. The Fourth District has repeatedly held that evidence of damages was insufficient where a plaintiff has failed to prove actual value on the date of the transaction. *Kind*, 889 So. 2d at 90; *Teca*, 726 So. 2d at 829; *Perlman*, 611 So. 2d at 1341. That is precisely the situation here.

CPH's failure of proof is all the more glaring given the circumstances of the case. This is not a situation where the modest financial stakes involved made it impractical to conduct an event study. To the contrary, CPH had multiple damages experts who could have conducted an event study to determine actual value on the date of the transaction. The failure of proof here was the result of a strategic litigation decision designed to inflate the damages estimate, not any difficulty in conducting the necessary analysis.

The results of CPH's approach to damages are striking. By proving actual value on a date approximately two years after the transaction, CPH effectively held Morgan Stanley liable for every decline in Sunbeam's share value, from $680 million to nearly zero, over that entire two-year period — regardless of whether those declines were caused by disclosure of the fraud or by market fluctuations, mismanagement by Sunbeam, or other non-fraud-related factors. CPH effectively made Morgan Stanley its insurer for all share losses over that period. That is just the sort of overreaching the law forbids.

B. CPH's Measure of Damages Is Not Justified by the Sale Restrictions.

CPH's only justification for its unorthodox measure of damages is that it was restricted from selling its stock until December 6, 1999. Those restrictions, however, do not justify the measure of damages CPH applied.

1. The Restrictive Feature of the Stock Did Not Prevent Compliance with *Totale.*

The sale restriction did not mean that the stock was valueless or that its value could not be determined on the date of the transaction. Obviously, the mere fact that something cannot presently be sold does not mean that it has no value. It means only that value must be determined by means other than reference to market price. Restricted stock is routinely valued by expert testimony or other methods, typically by starting with the market price of comparable unrestricted stock and then reducing that price by an appropriate liquidity discount, if any. Both the Financial Accounting Standards Board and the Securities and Exchange Commission have issued guidelines for calculating "fair value" of restricted stock that follow this approach. *See* Financial Accounting Standards Board, Proposed Statement of Financial Accounting Standards No. 1201-100: Fair Value Measurements, at iii, v, 23-24, 43-44 (June 23, 2004), *available at* http://www.fasb.org/draft/ed_fair_value_measurements.pdf; Statement Regarding "Restricted Securities," 1969 WL 95335, at *3 (S.E.C. Release No. AS-113, Oct. 21, 1969); *see also* Mukesh Bajaj et al., *Firm Value and Marketability Discounts*, 27 J. Corp. L. 89, 96-100 (2001).

Courts, too, have recognized that restricted stock can be valued despite its restrictive feature. In *Morris v. Ricks*, 573 So. 2d 1029 (Fla. 2d DCA 1991), for example, the Second District reversed the trial court's injunction against wrongful sale of restricted stock on the ground that the plaintiff had an adequate remedy in damages. Responding to the objection that the stock "was not tradeable in the open market, but was stock which was restricted in the time and manner of transfer," the court observed that "[t]he actual worth or market value of the [restricted] stock at the time of the purported wrongful sale can be established by expert testimony." *Id.* at 1030; *see also Rochez Bros., Inc. v. Rhoades*, 527 F.2d 891, 894 (3d Cir. 1975).

Ironically, CPH's expert ***did*** present evidence of a liquidity discount. Dr. Nye explained in some detail why, in his view, the appropriate liquidity discount under the circumstances for an investor in CPH's position was 0%. *See* 4/25/05 Tr. at 10591-94. Thus, any complications that sale restrictions may normally introduce into computing actual value were no impediment here. Dr. Nye could have performed an event study on the unrestricted Sunbeam stock that traded in the market and then offered his opinion that no liquidity discount was appropriate. The problem, of course, is that Dr. Nye never computed actual value ***even for the unrestricted stock***. That failure has nothing to do with the sale restriction.

2. The Restrictive Feature of the Stock Did Not Justify Noncompliance with *Totale*.

That the Sunbeam stock was subject to a sale restriction is no justification for valuing the stock on a date other than the date of the transaction.

CPH knew going into the transaction that a sale restriction existed — by contract, it had agreed not to sell half its Sunbeam stock for nine months and the remainder for shorter periods. 4/25/05 Tr. at 10481. Thus, the stock "as represented" was restricted; those restrictions were part of the bargain. By accepting restricted stock, CPH agreed to subject itself to market fluctuations and other non-fraud-related share price declines during the restricted period without the option to sell. While CPH is entitled to compensation for any losses actually caused by fraud, allowing it to recover for ***all*** share price declines during the restricted period regardless of whether they were caused by fraud or by other factors gives CPH ***more*** than its benefit of the bargain.

It is no response that the alleged fraud made the sale-restricted period longer than it otherwise would have been. CPH contends that the fraud prevented it from selling to the public before December 6, 1999, when it could first register its shares for public sale. Even so, that does not justify departing from *Totale*. The appropriate measure of damages remains the

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difference between the represented value and the actual value on the date of the transaction. As represented, the stock was fraud-free and subject to a three-to-nine-month contractual lock-up. To the extent the lock-up period was extended by virtue of the fraud, CPH is at most entitled to any diminution of value on the date of the transaction attributable to the longer sale restriction. That is achieved by adjusting the liquidity discount for the stock received — not by making Morgan Stanley liable for unrelated events occurring after the merger.

Even if the unanticipated extension of the sale-restricted period justified recovery of all losses suffered during the extension, it cannot possibly justify recovery of all losses during the entire restricted period. As noted above, CPH ***contractually agreed*** to lock-ups for the first three to nine months. That was the far more significant period in terms of share price declines: When the transaction closed on March 30, 1998, the share price was $43.94. CPH 1296 at 40. Nine months later, when the latter half of the contractual lock-ups expired, the share price had already fallen to $6.88. *Id.* at 46. When the shares could first be registered on December 6, 1999, the shares had fallen further, but only to $4.56. *Id.* at 52. Thus, the vast majority of share price declines occurred during the period where CPH had contractually agreed not to sell its shares. During that period, at least, CPH was required to exclude losses not caused by the fraud by proving actual value on the date of the transaction.

3. *Silverberg* Does Not Support a Contrary Result.

The only legal authority CPH cites in support of its approach is a federal appellate decision applying Florida law, *Silverberg v. Paine, Webber, Jackson & Curtis, Inc.*, 710 F.2d 678 (11th Cir. 1983), a case that has nothing to do with restricted stock. CPH nevertheless claims that *Silverberg* supports its theory of damages because the court approved a jury instruction that allowed the plaintiff to recover without proving actual value on the date of the transaction. That decision does not support CPH's measure of damages.

In *Silverberg*, the court allowed the plaintiff to recover the difference between the price at which he purchased certain securities and the price at which he later sold them. That is a ***rescissional*** measure of damages, designed to place the parties in the position they occupied prior to the transaction. *See Huddleston v. Herman & MacLean*, 640 F.2d 534, 554 (5th Cir. 1981), *modified on other grounds*, 459 U.S. 375 (1983). The *Silverberg* court expressly referred to the remedy at issue in that case as "rescissional" and cited several federal cases (including *Huddleston*) that discuss the rescissional measure of damages. See *Silverberg*, 710 F.2d at 687-88 & nn.13-15.[6] Unlike benefit-of-the-bargain damages, rescissional damages do not require proof of actual value on the date of the transaction and do not require proof of the portion of stock-price declines proximately caused by the fraud. *See E.F. Hutton*, 537 So. 2d at 981. At the same time, however, a rescissional-damages theory allows a plaintiff to recover only the consideration paid, not any benefit of the bargain. *See* Restatement (Second) of Torts § 549 cmt. e (1977); *E.F. Hutton*, 537 So. 2d at 981 (rescission "restricted to consideration paid").

Silverberg most certainly does not support the proposition, advanced by CPH, that a plaintiff may recover benefit-of-the-bargain damages based on proof that would justify only rescissional damages. A plaintiff cannot ask a court to rescind a transaction while at the same time retaining its benefit of the bargain. *See Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co.*, 761 So. 2d 306, 313 (Fla. 2000); *Bliss & Laughlin Indus., Inc. v. Malley*, 364 So. 2d 65, 66

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[6] Elsewhere the court stated (without citation) that "[t]he Florida courts refer to this measure of damages, *i.e.* the difference between the amount the plaintiff paid for the stock and the amount the plaintiff recognized on sale of the stock, as the 'out of pocket rule.'" 710 F.2d at 686 n.12. In fact, however, Florida law measures out-of-pocket damages based on actual value on the date of the transaction, not the price realized upon resale. *See Totale*, 877 So. 2d at 815; *Kind*, 889 So. 2d at 90; *Teca*, 726 So. 2d at 829; *Perlman*, 611 So. 2d at 1341; *see also Huddleston*, 640 F.2d at 554-56 (distinguishing rescissional from out-of-pocket damages). Any imprecision in terminology is irrelevant, however. Whether *Silverberg* was applying rescissional damages or a variant of out-of-pocket damages identical to rescissional damages, the point remains that it was ***not*** applying benefit-of-the-bargain damages, the measure CPH elected here.

(Fla. 4th DCA 1978); *Nystrom v. Cabada*, 652 So. 2d 1266, 1268 (Fla. 2d DCA 1995). The plaintiff in *Silverberg* was not seeking the benefit of his bargain; rather, he was asking merely to be put back in the financial position he was in prior to the transaction. The jury instruction accordingly limited damages to "the difference between the ***purchase price paid for the Posi-Seal stock*** purchased by the plaintiff and the price at which such stock was or could have been sold by the plaintiff when he learned of the alleged fraud." *Silverberg*, 710 So. 2d at 685 (emphasis altered).

CPH, by contrast, did not base its damages claim on the value of the consideration it paid for the Sunbeam stock. Rather, it relied on the (much higher) value of the Sunbeam stock as represented. It sought ***both*** to be compensated for all losses suffered during the sale-restricted period regardless of cause ***and*** to be awarded its benefit of the bargain. That mix-and-match approach to damages is contrary to both precedent and common sense. Rescissional and benefit-of-the-bargain damages are inconsistent remedies — rescission rejects the contract; benefit-of-the-bargain affirms it. The plaintiff must therefore elect between them. *See Mazzoni Farms*, 761 So. 2d at 313; *Bliss & Laughlin Indus., Inc.*, 364 So. 2d at 66; *Nystrom*, 652 So. 2d at 1268. CPH instead sought rescissional damages without the normal limitation to purchase price paid, and, at the same time, benefit-of-the-bargain damages without separating losses caused by the fraud from bargained-for consequences. The result is that CPH failed to prove damages under either theory.

C. CPH's Failure of Proof Requires Entry of Judgment in Favor of Morgan Stanley or at Least a New Trial.

CPH's failure to prove actual value on the date of the transaction requires entry of judgment in favor of Morgan Stanley. Failure to present evidence sufficient to sustain an award of damages under the legally prescribed method results in judgment as a matter of law. *See*

Teca, 726 So. 2d at 830; *Perlman*, 611 So. 2d at 1341. CPH is not entitled to another opportunity to fill the evidentiary gaps in the record. Trial courts do not "allow[] a second bite at the apple when there has been no proof at trial concerning the correct measure of damages." *Teca*, 726 So. 2d at 830. Even if that result may be harsh in other cases, it certainly is not harsh here, where the evidentiary failings are the result of CPH's own strategic litigation decisions.

In any event, as we next discuss, even if there were sufficient evidence in the record to support an award under CPH's elected measure of damages, numerous related trial errors relating to the damages issue would require at least a new trial.

1. Evidentiary Errors

First, the Court erred by not excluding or striking the testimony of Dr. Blaine Nye. Dr. Nye's testimony was irrelevant and prejudicial because he did not prove actual value on the date of the transaction, nor did he provide any equivalent method by which the jury could have determined the portion of CPH's losses caused by the fraud rather than by other factors. Indeed, at one point, the Court affirmatively prohibited the parties from proving actual value on the date of the transaction by precluding testimony of value on any date unless the stock "could be sold as of the date to be used." *See* Order on CPH's MIL No. 27 (Mar. 28, 2005). Although the Court subsequently reconsidered that order and allowed alternative proof that "an appropriate liquidity discount has been established, is not required, or is implicit in the figure offered," *see* Order on Morgan Stanley's Motion for Clarification or Reconsideration of the Court's Order on Plaintiff's Motion in Limine No. 27 (Apr. 15, 2005), that order did not cure the problem. CPH bears the burden of proving damages under the legally correct method. Proof of actual value on the date of the transaction with an appropriate liquidity discount (if any) is legally sufficient; proof of value on a date two years later when the stock could first be sold is not. CPH is not entitled to choose between a valid measure of damages and an invalid one.

Nye's approach to calculating damages is not a generally accepted methodology and fails to comply with Florida law. Well-accepted methodologies for calculating actual value exist — namely, event studies — but Dr. Nye failed to use them. For those reasons, his testimony should have been excluded or stricken. Because Nye was CPH's only damages expert and because his testimony was necessary to support the verdict, exclusion would result in judgment for Morgan Stanley. At the very least, Nye's improper testimony had an obvious prejudicial impact on the verdict, and Morgan Stanley is entitled to a new trial.

Moreover, the Court also committed prejudicial trial error by sharply limiting Morgan Stanley's cross-examination of Nye with respect to other causes of the Sunbeam stock's decline in value. *See, e.g.*, 4/25/05 Tr. at 10533, 10544-46. That topic was critically related to key issues in the case, proximate cause and damages. The Court foreclosed the questioning essentially because CPH's counsel had instructed Dr. Nye to assume the facts bearing on actual value. *See id.* at 10546. But Dr. Nye's opinion on other potential causes of Sunbeam stock's decline in value would still have been highly probative because it illustrated why his ***opinion*** of actual value (based as it was on pure assumption) did not correspond to the ***true*** actual value and should not be credited by the jury. By sharply limiting Morgan Stanley's cross-examination on that topic, the court hampered Morgan Stanley in illustrating the inadequacies of Nye's testimony to the jury. That prejudicial error on a key issue in the case requires a new trial.[7]

[7] Moreover, by allowing Dr. Nye to testify to the value of Sunbeam shares on various dates based on assumptions he had been told to make by plaintiffs' counsel, *see* 4/25/05 Tr. at 10386, the Court allowed CPH to proceed in a manner inconsistent with its earlier Order on Morgan Stanley's Motion for Clarification or Reconsideration of the Court's Order on Plaintiff's Motion in Limine No. 27 (Apr. 15, 2005), which required both parties to establish appropriate evidentiary predicates ***before*** offering expert testimony on share value on particular dates.

2. Instructional Errors

The Court similarly erred in its jury instructions. The Court failed to instruct the jury to calculate actual value as of the date of the transaction, as Florida law requires, and instead instructed it to calculate actual value as of a date no earlier than November 25, 1999. *Id.* at 14610. The Court's instruction relieved CPH of its burden to prove the portion of its losses proximately caused by the fraud and effectively allowed CPH to recover an unprecedented blend of benefit-of-the-bargain and rescissional damages without requiring CPH to elect between the two theories.

The court also erroneously instructed the jury to calculate damages based on "the fair market value at which CPH reasonably could have sold its" shares. 5/13/05 Tr. at 14609, 14610. Because CPH received restricted shares, the price at which it reasonably could have sold them was not an appropriate measure of value on the date of the transaction. CPH ***could not*** have sold its shares on that date, so it is nonsensical to base a measure of damages on the price at which it "reasonably could have sold" its shares on that date. Some other method of proving value on that date — for example, expert testimony — was required. *See Morris*, 573 So. 2d at 1030-31; *Rochez Brothers*, 527 F.2d at 894. The Court compounded its instructional error by referring to "market value" and "willing and able" purchasers and sellers. 5/13/05 Tr. at 14610-11. Phrases like those are inappropriate where the property by its nature cannot be sold on the relevant date and so must be valued by some other means.

The Court's instructions were also internally inconsistent. The Court instructed the jury to determine damages based on the difference between the stock's represented value and its actual value no earlier than November 25, 1999, *id.* at 14610, but later instructed the jury that CPH could not recover for losses caused by factors other than the alleged fraud, *id.* at 14611. Those instructions were internally inconsistent because the former instruction required the jury to

compute damages based on *all* losses suffered over the nearly two-year sale-restricted period, regardless of cause. The ***purpose*** of the date-of-transaction requirement is to exclude subsequent unrelated appreciation and depreciation, *i.e.*, those losses caused by factors other than the alleged fraud. *See Totale*, 877 So. 2d at 815. A jury cannot ***both*** base its damages award on actual value on a date two years after the transaction and return a verdict that excludes losses not proximately caused by the fraud.[8]

D. CPH's Proof of Damages Was Deficient in Numerous Other Respects.

CPH failed to prove damages in numerous other respects, and the Court committed related errors that necessitate a new trial.

1. Benefit-of-the-Bargain Damages Are Not Available.

Morgan Stanley is entitled to judgment (or, at least, a new trial) because CPH proved damages under a benefit-of-the-bargain theory when that measure of damages is not available in this case.

Benefit-of-the-bargain damages are available only where the plaintiff and defendant are in contractual privity, so that there is a "bargain" between them. *See* Restatement (Second) of Torts § 549 cmt. g (1977). CPH and Morgan Stanley were not in contractual privity. The Court nevertheless allowed CPH to seek benefit-of-the-bargain damages on the theory that CPH conspired with Sunbeam and therefore may be held liable under any theory of damages that CPH could assert against Sunbeam. That reasoning, however, assumes that co-conspirators can be held liable on a contractual theory of damages. Florida, like many other jurisdictions, has not recognized a cause of action for conspiracy to breach a contract. *Cf. Leasehold Expense*

[8] At best, the Court's conflicting instructions reversed the burden of proof on the damages element of CPH's claim. It was CPH's burden to isolate and remove the portion of its losses not proximately caused by the fraud.

Recovery, Inc. v. Mothers Work, Inc., 331 F.3d 452, 463 (5th Cir. 2003). If co-conspirators cannot be held liable for benefit-of-the-bargain damages for breach of contract, there is no justification for holding them liable for a contractual measure of damages on a fraudulent inducement claim.[9]

2. CPH Failed To Prove Represented Value.

CPH failed to prove the value the stock would have had on the date of the transaction if it had been as represented. *See Teca*, 726 So. 2d at 829; *Totale*, 877 So. 2d at 815. Dr. Nye calculated the represented value of the Sunbeam stock based on a 21-day average of prices between the agreement and the closing dates. *See* 4/25/05 Tr. at 10377, 10382. CPH presented no evidence that anyone at Morgan Stanley or Sunbeam ever "represented" that the stock had that particular value on the date of the transaction.[10]

Moreover, Dr. Nye compounded his error by choosing the dates for his 21-day average based on the subjective expectations of the parties to the transaction. Under Florida law, benefit-of-the-bargain requires an ***objective*** measure of value. *See* 5/11/05 Tr. at 13998:1-4 (conceding the point). Yet Nye admitted that his decision to use the 21-day average was based on the ***subjective*** expectations of CPH and its principals. *See* 4/25/05 Tr. at 10466:11-17 ("Q. But it's your view that the expectation you were trying to measure in your damages model was Mr.

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[9] In addition, benefit-of-the-bargain damages are not available in this case because (1) New York law applies and allows only out-of-pocket damages, *see Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 421 (N.Y. 1996); and (2) CPH failed to prove its benefit of the bargain with "sufficient certainty," for all the reasons given above, *see Totale*, 877 So. 2d at 815. Furthermore, Morgan Stanley preserves its argument that benefit-of-the-bargain damages are not appropriate in fraud cases even under Florida law. *Compare Greater Coral Springs Realty, Inc. v. Century 21 Real Estate of S. Fla., Inc.*, 412 So. 2d 940, 941 (Fla. 3d DCA 1982), and *Sprayberry v. Sheffield Auto & Truck Serv., Inc.*, 422 So. 2d 1073, 1075 (Fla. 1st DCA 1982), *with Totale*, 877 So. 2d 813.

[10] Dr. Nye relied on a similarly arbitrary averaging methodology in determining the price at which CPH could have sold its stock after the sale restrictions ended. *See* 4/25/05 Tr. at 10390-91.

Ronald O. Perelman's, correct? A. If he's indeed the decision maker, yes."); *id.* at 10461:21-24 ("Q. You were trying to estimate what Coleman anticipated its shares would be worth when they signed the deal, correct? A. Sure."). It should go without saying that the subjective expectation of a purchaser necessarily overstates value; if the purchaser did not believe the stock was in some sense worth more than the purchase price, he ordinarily would not make the purchase.

Dr. Nye's use of arbitrary averages relying on subjective expectations was not a generally accepted methodology and is inconsistent with Florida law. His testimony was insufficient to meet CPH's burden of proving the represented value of Sunbeam stock and, in any event, was improper and should have been excluded or stricken. The Court should accordingly award judgment to Morgan Stanley, or at least grant a new trial.[11]

3. CPH Failed To Prove the Sale Restrictions Precluded Private Sale.

Assuming *arguendo* that CPH was entitled to prove actual value on the date the shares could first be sold rather than the date of the transaction, it failed to do so. The ineligibility for registration until December 6, 1999, proves at most that the shares could not be sold ***to the public*** before that date. Perelman testified that he did not know whether private sales were possible during this period. 4/20/05 Tr. at 9671:10-18. And Morgan Stanley has demonstrated

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[11] Nye's testimony also should have been excluded or stricken because he failed to give adequate consideration to the record evidence, including: (1) the $524 million valuation of the Sunbeam shares prior to disclosure of the alleged fraud in Sunbeam's SEC filings, which was substantially lower than the represented value Dr. Nye used, 4/25/05 Tr. at 10512:7-14; (2) the valuation of the Sunbeam shares prior to disclosure of the alleged fraud in MS 1000, which was also substantially lower than the figure Dr. Nye used, *id.* at 10472:20-10474:9; (3) the valuation of Sunbeam shares at 12-1/8 per share in the two MAFCO working papers valuing its total stake at $450 million even after disclosure of the alleged fraud, which was much higher than the figure Dr. Nye used, *id.* at 10489:25-10490:5; (4) the fact that CPH could have elected to forgo the transaction after partial revelation of the fraud on March 19, *id.* at 10489:25-10490:5; (5) evidence as to whether CPH could have sold its shares prior to December 6, 1999, or February 5, 2001. *See Brito v. County of Palm Beach*, 753 So. 2d 109 (Fla. 4th DCA 1998); *Husky Indus., Inc., v. Black*, 434 So. 2d 988 (Fla. 4th DCA 1983).

that private sales were possible under the Securities Act of 1933. *See* Morgan Stanley's Proffer of Evidence and Argument Regarding CPH's Ability to Sell its Sunbeam Stock as Early as June 30, 1998 (Apr. 15, 2005).

Because CPH failed to prove that it could not have sold its shares in a private transaction or otherwise in compliance with law before December 6, 1999, Morgan Stanley is entitled to a judgment in its favor. At most, the practical impediments CPH identified create a jury issue, and the Court invaded the province of the trier of fact by instructing the jury on when CPH could sell its stock rather than instructing it to determine that fact for itself. That instructional error warrants a new trial.

4. CPH Failed to Prove It *Would* Have Sold the Stock.

Again assuming *arguendo* that CPH was entitled to prove actual value on a date other than the date of the transaction, CPH failed to prove damages proximately caused by the fraud because it did not prove that it ***would*** have sold its shares before December 6, 1999, had it been able to do so. If CPH would not have sold its shares even if it could have, the sale restrictions were not a but-for cause of any of CPH's losses and cannot supply a rationale for measuring actual value on a date other than the date of the transaction.

The record contains numerous indications that CPH was a long-term holder, and a jury could easily find that CPH would have held its Sunbeam stock after disclosure of the fraud rather than sell it at the depressed prices. CPH agreed to an initial lock-up period on its stock of up to nine months. *See* 4/20/05 Tr. at 9670-71; 4/25/05 Tr. at 10481. It chose to extend that period for 3 years for a portion of its stock when it settled with Sunbeam. *See* 4/25/05 Tr. at 10391. When restrictions lifted on most of its shares, it still made no effort to sell, failing even to register its shares so that it might sell some portion of them to the public. 4/28/05 Tr. at 11166-67; 5/2/05 Tr. at 11728-30. Finally, it continued to value its stake in Sunbeam at $450 million, long after

disclosure of the fraud, based on aspirations for a successful management turn-around of the company. *See* MS 822; 4/25/05 Tr. at 10578-79.

By neglecting to prove the date on which it ***would*** have sold its Sunbeam stock, CPH failed to meet its burden of proof even under its own erroneous theory of damages, and Morgan Stanley is entitled to judgment. Even if a jury could infer from the record that CPH would have sold its stock as soon as it could have, the Court's instructions failed to present that issue to the jury and instead precluded use of any date before CPH ***could*** have sold its shares. Morgan Stanley is at least entitled to a new trial at which the jury is properly instructed on this issue.

IV. MORGAN STANLEY IS ENTITLED TO A NEW TRIAL BECAUSE OF IMPROPER EX PARTE COMMUNICATION WITH JURORS BY A CLOSE ASSOCIATE OF CPH'S LEAD COUNSEL.

Morgan Stanley is entitled to a new trial because, in the midst of the trial, a current client and longtime close associate of CPH's lead trial counsel accosted three jurors and asked them questions about the case.[12] The risk of prejudice to Morgan Stanley inherent in that improper contact is heightened even further by the likelihood that the jury associated the jury tamperer with ***Morgan Stanley***. The necessity for a new trial in these circumstances is so clear that CPH initially ***joined*** Morgan Stanley's request for a mistrial and twice reiterated its support for a new trial. *See* 4/25/05 Tr. at 10445.

More important, Florida law compels a new trial. Time and again, Florida appellate courts have recognized that "prima facie" evidence of "potentially prejudicial" acts such as "private communications, contact, indirect or direct tampering with a jury" by persons associated

[12] This ground for a new trial is set forth in greater detail in Morgan Stanley's Motion for Mistrial Because of Improper Ex Parte Juror Communications (May 2, 2005) ("Mistrial Motion"), incorporated by reference herein. Morgan Stanley further incorporates by reference the additional information contained in its motion to permit juror interviews (filed May 26, 2005).

with a participant in a case "raise[s] a ***presumption*** of prejudice." *Nationwide Mut. Fire Ins. Co. v. Tucker*, 608 So. 2d 85, 88 (Fla. 2d DCA 1992) (emphasis added). The presumption cannot be overcome absent proof "that there is ***no reasonable*** *possibility*" of an effect on the fairness of the trial. *Id.* (emphasis added).

There is no serious dispute that, during a break in the trial, an individual, later identified as Mr. James Comyns, approached three jurors, began asking them questions about this case, and pursued them when they apparently gave vague responses. As one juror told the Court, "[i]t was very obvious [from] the questions he was asking he was trying to get information from us." 4/25/05 Tr. at 10416:24 – 10417:01. "[H]e kept talking and asking us questions." *Id.* at 10417:6-7. The jurors told the Court that Mr. Comyns said "you guys are probably on the Stanley case," *id.* at 10417:3-4, and that they provided "very vague" answers to his questions about the case, *id.* at 10417:4-5. Even when the jurors "walked away," "he followed us, right behind us," "[s]till asking questions." *Id.* at 10417:8-11.

Nor is there any dispute that Mr. Comyns had observed the trial earlier on at least three different occasions. He had been seated behind the Morgan Stanley defense table where Morgan Stanley's advisors and counsel sit. 4/26/05 Tr. at 10615:20 – 10616:01. And he was seen inspecting Morgan Stanley's nearby boxes of defense materials. 4/25/05 Tr. at 10420:19-20. When asked to describe Mr. Comyns, one juror recalled seeing him in the courtroom: "He was actually sitting in the back over there," pointing to the area behind the Morgan Stanley counsel table. *Id.* at 10417:14-15. At that point, Morgan Stanley's counsel determined that the individual who had approached the jurors was Mr. Comyns. *Id.* at 10418:10-12.

Mr. Comyns has a significant criminal history, including obstruction of justice. He is also is a longstanding and "current client" of CPH's lead trial counsel, Mr. Scarola. 4/25/05 Tr.

10434:19-21. When the tampering came to light, CPH's lead trial counsel conceded that Mr. Comyns was a client (and continued that relationship by purporting to represent Mr. Comyns' interests even in connection with the jury tampering concerns in *this* case). CPH's lead trial counsel did not disclose that: (1) He and Mr. Comyns were co-defendants in another matter; (2) his law firm and Mr. Comyns apparently remain co-defendants in that action; and (3) Mr. Scarola's law firm is a creditor of Mr. Comyns, with security interests in *virtually every piece of personal property owned by Mr. Comyns and his wife.* Under the circumstances, Morgan Stanley is entitled to a new trial.

A. The Ex Parte Contact by a Close Associate of CPH's Lead Counsel Gives Rise to a Strong Presumption of Prejudice

As the Florida Supreme Court explained more than half a century ago, "[a]pproaching a juror to find out how he stands with reference to a case, or sounding out a juror . . . or acts which have a tendency to enable a person to make certain the result of a litigated case involving a trial by jury" are "justly regarded as evil, being viewed as an infringement upon the equilibrium of mind and independence of judgment of those jurors who are likely to be called upon to become triers of fact . . . ." *State v. Clark*, 46 So. 2d 488, 489 (Fla. 1950) (quoting *Baumgartner v. Joughin*, 141 So. 185, 188 (Fla. 1932)). Contact is absolutely forbidden because it "might intimidate, either obliquely or directly; it might subtly create empathy; [or] it might disclose facts of which the jury ought not to be aware." *Hobson v. Wilson*, 737 F.2d 1, 48 (D.C. Cir. 1984). "[I]t is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made." *Remmer v. United States*, 350 U.S. 377, 382 (1956).

Certain acts are so "potentially harmful" that they are "presumptively prejudicial." *Amazon v. State*, 487 So. 2d 8, 11 (Fla. 1986); *Norman v. Gloria Farms, Inc.*, 668 So. 2d 1016,

1020 (Fla. 4th DCA 1996); *Tucker*, 608 So. 2d at 88. Among these acts are "private communications, contact, indirect or direct tampering with a jury" by persons associated with participants in the litigation. *Id.* (citing *Remmer v. United States*, 347 U.S. 227, 229 (1954)). The Fourth District has squarely held that "[c]ontact with a juror during trial about the pending matter falls within this category." *Norman*, 668 So. 2d at 1020 (citing *Amazon*, 487 So. 2d at 11). Likewise, there is a presumption in favor of a new trial if there is a prima facie showing of ***potential*** prejudice. *Tucker*, 608 So. 2d at 88. Once the moving party makes a "prima facie" showing of such "potentially harmful misconduct," "the burden then shifts to the party seeking to preserve the jury's verdict." *Norman*, 668 So. 2d at 1020; *accord Amazon*, 487 So. 2d at 11-12; *Tucker*, 608 So. 2d at 88; *see also Mattox v. United States*, 146 U.S. 140, 150 (1892) ("Private communications, possibly prejudicial, between jurors and third persons . . . are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.").

Precisely the evil that the law seeks to avoid — unauthorized contact between jurors and someone closely associated with a party — has materialized here. Mr. Comyns, a convicted felon and a client and debtor of, and former co-defendant with, CPH's lead trial counsel, ***knowingly*** accosted the three jurors. The jurors testified that Mr. Comyns specifically asked whether they were serving on ***this case***, "the Stanley case." 4/25/05 Tr. at 10417:3-4. Mr. Comyns contacted the jurors in direct violation of this Court's oft-repeated admonitions to the jury, "Don't talk to anybody about the case, don't let anybody talk to you about the case." *Id.* at 10411:13-15; *see Norman*, 668 So. 2d at 1019-20 (granting mistrial where person questioned juror "in contravention of an express instruction by the trial court not to discuss the case with anyone"). Most importantly, Mr. Comyns ***persistently*** sought to extract information from the jurors ***concerning this case***. *See id.* at 1019 (questioning juror as to "'how the case was going'

. . . represents an instance of improper contact which will not be tolerated as a matter of public policy"). Those facts by themselves establish the prima facie case of "contact with a juror during trial about the pending matter" that creates a presumption of prejudice. *Norman*, 668 So. 2d at 1020; *Tucker*, 608 So. 2d at 88; *Amazon*, 487 So. 2d at 11.

The presumption of prejudice is particularly strong here because of the uniquely close lawyer-client, co-defendant, and debtor-creditor relationship between Mr. Comyns and CPH's lead trial counsel, Jack Scarola, Esq., and his firm. Mr. Comyns is a longstanding client of Mr. Scarola's. He was a co-defendant with Mr. Scarola in a civil case where both were accused of serious corporate misfeasance. And he continues to be a co-defendant in that case along with Mr. Scarola's law firm. Mr. Scarola's firm continues to hold liens on much of Mr. Comyns' property. Mr. Scarola has defended Mr. Comyns in the press. Mr. Scarola has spoken to Mr. Comyns in court in this case. And Mr. Comyns allegedly attended trial for the sole purpose of speaking to Mr. Scarola about a pending case. Indeed, Mr. Scarola even appeared for Mr. Comyns ***after he was revealed as the jury tamperer***, resisting, "***as Mr. Comyns' attorney***," Morgan Stanley's reasonable request to bar Mr. Comyns from the courtroom. 4/25/05 Tr. at 10432:21-23 (emphasis added). Finally, Mr. Scarola or his firm obtained from Mr. Comyns an *ex parte* affidavit to explain his conduct. *See infra* pp. 50-53.

In case after case, courts have held that similarly close relationships between a party and one who makes improper contact with the jury give rise to a presumption of prejudice. For example, in *Norman*, the Fourth District concluded that contact between the jury foreman and his brother constituted an influence "extrinsic to the verdict which potentially compromises the integrity of the fact-finding process." 668 So. 2d at 1019. In that case, the foreman's brother, an employee of the defendant's liability insurer, asked only "how the case was going." *Id.* Even

though the liability insurer was not a party to the case, and there was no effort to influence the result, the Court held that the brother's inquiry was "potentially harmful misconduct that is presumptively prejudicial," requiring a new trial. *Id.* at 1020.

Norman involved a solitary and otherwise seemingly innocuous inquiry with one juror initiated by an individual who had no direct relationship with a party or counsel; he was merely an employee of the defendant's liability insurer, a non-party. *See Norman*, 668 So. 2d at 1018-19 & n.1. Here, there was a persistent effort at contact initiated by an individual with a close relationship to CPH's lead trial counsel. New trials have often been required even where a party's mere "friend" approaches a juror. For example, in *Atlantic Coast Line R. Co. v. Hardwick*, 193 So. 730, 734 (Ala. 1940), the Alabama Supreme Court reversed the denial of a mistrial and applied a presumption of prejudice in a case where "a friend" of the plaintiff gave one juror an excerpt from the Saturday Evening Post that "had nothing to do with the case." *Id.* at 731-32. The Court explained that, because the individual who contacted the juror was "actively interested in the result of the trial and [was] friendly to the plaintiff and [was] instrumental in distracting the juror's attention, if not in making an intentional approach to him," a "mistrial should have been granted" regardless "whether the motive was innocent or sinister." *Id.* at 735. Here, Mr. Comyns is more than a mere friend; he is an intimate associate, client, and former co-defendant of Mr. Scarola's. And far from passing an innocuous newspaper article to a single juror, he approached three jurors, addressed this case specifically, pursued them when they tried to walk away, and pressed them for information about the case. Under the circumstances, prejudice is presumed and a new trial is required.[13]

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[13] The close, ongoing relationship between Mr. Comyns and CPH's lead trial counsel distinguishes this case from others in which the contacting party had no current relationship with a party or its attorney and no apparent motive to tamper with the jury. *See Hutchinson v. State*,

B. Morgan Stanley Has Made a Prima Facie Showing of Potential Prejudice.

Mr. Comyns' improper contact with the three jurors is not only presumptively prejudicial — which is all that the law requires to shift the burden to CPH. It also prima facie establishes potential prejudice on the facts of this case. The jurors were well aware that the contact was improper. This Court repeatedly admonished them not to talk to anybody about the case. *See, e.g.*, 4/25/05 Tr. at 10433:10-12 (The Court: "In all honesty, virtually every break we take I remind the jurors not to talk to anybody about the case."). They tried not to answer Mr. Comyns' questions about the case. *Id.* at 10417:4-5. And they tried to leave when he persisted. *Id.* at 10417:6-9. When the Court admonished the jury not to talk to anyone after Mr. Comyns' improper contact, one juror "looked at [the Court] and smiled, so I think he knew why I was giving that again." *Id.* at 10414:9-12.

Not only did the jurors know that Mr. Comyns' conduct was wrong, but also it is likely that they blamed *Morgan Stanley* for Mr. Comyns' actions. When Mr. Comyns introduced himself to the three jurors, he referred to the case as the Morgan Stanley case, not the Coleman case or the CPH case. 4/25/05 Tr. at 10417:3-4; *see also id.* at 10412:9-15. The jurors saw Mr. Comyns sitting behind Morgan Stanley's lead trial counsel among members of Morgan Stanley's team. And it was Morgan Stanley's counsel who, on hearing the jurors' description, recognized who the suspicious individual was and signaled that recognition to the Court: "We need to talk, Judge." 4/25/05 Tr. at 10417:25.

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882 So. 2d 943, 956-57 (Fla. 2004); *First Nat'l Bank in Tarpon Springs v. Bliss*, 56 So. 2d 922, 923-24 (Fla. 1952). In those cases, moreover, the contact was fleeting rather than persistent. Nonetheless, even in those cases, the trial court *sua sponte* conducted a thorough interview of the jurors individually, obtained the facts, and determined that the contact would not (or did not) influence the jurors' conduct. *See Hutchinson*, 882 So. 2d at 956; *Bliss*, 56 So. 2d at 924.

Other events in the case likewise (but incorrectly) pointed toward Morgan Stanley. The Court instructed the jury that "Morgan Stanley has engaged in litigation misconduct." 3/30/05 Tr. at 5822:23-24 (one juror); *id.* at 5881:13-14 (complete jury pool). CPH's principal witness gratuitously and falsely told the jury that Morgan Stanley had "acknowledged" that it engaged in criminal activity. 4/21/05 Tr. at 9808:5-13. The Court told the jury that Morgan Stanley committed the acts of dishonesty and deception set forth in the Complaint, an impression reinforced by CPH's constant references to those allegations as the "facts established in advance of trial." *See, e.g.*, 4/6/05 Tr. at 7071:18-19, 7072:22; 4/19/05 Tr. at 9065:20-9066:1, 9066:16-23, 9159:17-19; 4/21/05 Tr. at 9978:5-12; *see also* 4/6/05 Tr. at 7051:21 ("Established facts"), 7059:3, 7074:7. And CPH's counsel characterized this case as the first of the major corporate and accounting frauds now in the news — frauds that, as the jurors knew, resulted in many criminal convictions. 4/6/05 Tr. at 6953:8-9, 6955:7-10. In light of these circumstances, when a suspicious character pumps three jurors for information, after having sat behind and among the Morgan Stanley defense team, the jurors likely inferred that Morgan Stanley took a page from the script of *Runaway Jury*.

The three jurors improperly contacted, moreover, were then thought to be among the most favorable to the defense. 4/25/05 Tr. at 10442:16-21, 10446:17-20. That those jurors were singled out does not merely reinforce the inference of bad intent. It also exacerbated the unfair prejudice by poisoning the impressions of the jurors who might otherwise have been favorably inclined. Moreover, it is common knowledge that jurors form tight bonds with each other and often discuss their experiences. Thus, these events likely were "communicated to other jurors," infecting the entire panel. *Hobson*, 737 F.2d at 48; *see also* 4/26/05 Tr. at 10669:14-16.

16div-017757

It is well recognized that, "[w]hen there has been an attempt at jury tampering, the court ***must*** guard against the possibility that the jury will assume one of the parties was responsible for the attempt and, based on that assumption, decide the merits of the case unfavorably to that party." *United States v. Forrest*, 620 F.2d 446, 457 (5th Cir. 1980) (emphasis added). Here, the Court has made no effort to protect Morgan Stanley from that harm, despite counsel's direct request. 4/26/05 Tr. at 10725:4 – 10726:3. The potential that Morgan Stanley was prejudiced by the improper jury contact requires a new trial.

C. Mr. Comyns' Affidavit Fails To Rebut the Potential for Prejudice and Instead Reinforces It.

Once the moving party makes a "prima facie" showing of "potentially harmful misconduct," "the burden then shifts to the party seeking to preserve the jury's verdict." *Norman*, 668 So. 2d at 1020; *accord Amazon*, 487 So. 2d at 11-12; *Tucker*, 608 So. 2d at 88. The moving party is "***entitled to a new trial*** unless the opposing party can demonstrate that there is ***no reasonable possibility*** that the jury misconduct affected the verdict." *Id.* (quoting *State v. Hamilton*, 574 So. 2d 124, 129 (1991) (emphases altered)). As set forth in greater detail in Morgan Stanley's mistrial motions filed in connection with this event, far from rebutting the presumption and prima facie case of prejudice, the sworn statement prepared by Mr. Comyns at Mr. Scarola's firm — that, contrary to the jurors' accounts, he "never talked to any jurors about anything" — is so inherently implausible that it reinforces the likelihood of prejudice and appearance of impropriety.

Mr. Comyns' affidavit is inconsistent with the jurors' accounts and incredible in its own right. The jurors testified that Mr. Comyns approached three of them and pressed them for information about the case. "It was very obvious [from] the questions he was asking he was trying to get information from us"; "he kept talking and asking us questions"; even when they

"walked away," Mr. Comyns "followed us, right behind us," "[s]till asking questions." 4/25/05 Tr. at 10416:24 – 10417:01, 10417:6-10. By contrast, Mr. Comyns swore that he did not ask questions about the case (only whether the case was "over for the day"); did not obtain information about the case ("I never talked to any jurors about anything"); and did not follow the jurors ("I left to go upstairs in courtroom (just starting))." Comyns Aff. at 2. Unless the jurors were lying, Mr. Comyns' affidavit demonstrates that he was being less than forthright.

Mr. Comyns' affidavit is inherently implausible. Mr. Comyns claims that he approached the jurors solely to ask whether the case was "over for the day." Comyns Aff. at 2. At the time Mr. Comyns approached the jurors, however, it was approximately 10 o'clock in the morning. That Mr. Comyns thought court was over for the day at 10 o'clock defies credulity. Mr. Comyns, moreover, avers that — despite his attendance in court and his extensive experience with the judicial system — he never heard the Court's repeated admonitions to the jurors not to talk to anyone about the case. *See* Comyns Aff. at 2. That assertion is utterly implausible, as the Court itself observed. Because the Court openly reminded the jurors not to speak to anyone at "virtually every break we take," the Court understandably had "a hard time believing that some courtroom spectator would believe that he was privileged to approach the jurors." 4/25/05 Tr. at 10433:10-14.

The affidavit, moreover, contradicts itself. In one part, Mr. Comyns indicates that, after joking about the length of the trial, "I left to go upstairs in courtroom (just starting)." But a few sentences later, Mr. Comyns claims he "waited about 3-5 minutes and left." Comyns Aff. at 2. This case simply has too much at stake for serious questions of impropriety to be dismissed on the self-contradictory say-so of a convicted felon with a criminal history that includes obstruction of justice.

In any event, in cases of improper jury contact, "[s]o delicate are the balances in weighing justice" that not "only the evil . . . ***but the appearances of evil***, if possible, should be avoided." *Atlantic Coast Line R. Co.*, 193 So. at 734 (emphasis added). As the Fourth District has recognized, a new trial based on improper juror contact "may be required under 'some circumstances . . . for the purpose of maintaining confidence in the integrity of jury trials.'" *Norman*, 668 So. 2d at 1020 (quoting *Policari v. Cerbasi*, 625 So. 2d 998, 998 (Fla. 5th DCA 1993)). This is just such a case. This was no mere happenstance hallway conversation between a bystander and a juror. This was an intentional interaction concerning this case directed at jurors because they were jurors on this case. The improper contact was initiated by a longstanding client and former co-defendant of CPH's trial counsel, most of whose property is subject to liens held by CPH's lead trial counsel's firm. And after the wrongdoer was revealed, he concocted an unlikely story in an *ex parte* affidavit, prepared at the plaintiff's law firm, that casts even further suspicion on these events. In these circumstances, a new trial does not merely serve the interests of fairness in this case. It helps protect the judicial system's reputation for fairness and integrity.

V. CPH WAIVED THE FRAUD.

Morgan Stanley is entitled to judgment as a matter of law because the evidence conclusively shows that CPH waived the fraud. Execution of a new contract respecting a former transaction known to have been fraudulent waives ***any claim*** based on the previous fraud. *Benn v. Key West Propane Gas Corp.*, 72 So. 2d 910, 913 (Fla. 1954); *Harpold v. Stock*, 65 So. 2d 477, 478 (Fla. 1953). "[W]hen a party claiming to have been defrauded enters, after discovery of the fraud, into new arrangements concerning the subject matter of the contract to which the fraud applies, he is deemed to have waived any claim on account of the fraud; and he can neither

rescind, nor maintain an action for damages." *Price v. Airlift Int'l, Inc.*, 181 So. 2d 549, 550 (Fla. 3d DCA 1966).

The undisputed evidence showed that CPH entered into new arrangements with Sunbeam after acquiring knowledge of the alleged fraud. Howard Gittis testified:

> All I know is fraud was going on, and that was told to us by the existing Sunbeam board. We sent people down to try and help run the business. We weren't interested in investigating the fraud. We were interested in running the business. That was the only chance we had to recover any money.

4/28/05 Tr. at 11342:18-23. By its own admission, therefore, CPH had "discover[ed] . . . the fraud" but entered into "new arrangements concerning the subject matter" of the merger agreement. *Price*, 181 So. 2d at 550. That constitutes waiver of the fraud under Florida law. *Id.* It does not matter whether those new arrangements involved Sunbeam or Morgan Stanley. Under Florida law, execution of a new contract respecting a transaction known to be fraudulent operates as a "waiver of ***any claim*** based on the previous fraud." *Benn*, 72 So. 2d at 913 (emphasis added). Having entered into those arrangements with Sunbeam, CPH cannot now sue Morgan Stanley for fraud.[14]

VI. A NEW TRIAL IS WARRANTED BECAUSE THE COURT SHOULD NOT HAVE PROHIBITED MORGAN STANLEY FROM CONTESTING ITS ALLEGED COMPLICITY IN THE SUNBEAM FRAUD IN PHASE I.

A. Morgan Stanley has previously explained why it believes the March 1, 2005 Adverse Inference Order and March 23, 2005 Default Order (the "Sanctions Orders") exceeded the Court's authority under Florida Rule of Civil Procedure 1.380(b)(2) and other applicable law, violated Morgan Stanley's rights against deprivation of property without due process of law under Art. I, § 9 of the Florida Constitution and the Fourteenth Amendment of the United States

[14] Alternatively, even if CPH's decision to affirm the merger agreement and enter into new arrangements with Sunbeam did not waive the fraud claims entirely, it at least waived any entitlement to rescission or a rescissionary measure of damages. *See* pp. 33-34, *supra*.

Constitution, and deprived Morgan Stanley of its right of access to the courts under Art. I, § 21 of the Florida Constitution. Rather than repeat its assignments of error, Morgan Stanley incorporates them by reference here. For purposes of this new trial motion, Morgan Stanley summarizes why the Phase I sanctions and the manner in which the Court applied them were not necessary to "level the playing field" (Adverse Inference Order at 11) and were instead grossly disproportionate to the alleged misconduct.

Assuming for purposes of this motion that Morgan Stanley did not timely furnish documents that it was ordered to produce, and even that its failure to do so was intentional (an accusation that it vigorously disputes), the Court nonetheless failed adequately to consider the sufficiency of a more measured response, such as a continuance coupled with monetary sanctions sufficient both to compel Morgan Stanley to produce the missing documents and to compensate CPH for the costs of its motions practice and the delay of trial. This could have been coupled with the appointment (at Morgan Stanley's expense) of a Court-designated expert to oversee the completion of Morgan Stanley's production obligations. No contemporaneous findings explain why monetary sanctions coupled with a continuance at Morgan Stanley's cost would not have cured the production problems and permitted all disputed issues to be resolved by the jury on their merits. In the absence of such reasoning and findings, the Court failed to exercise its informed discretion under Florida Rule of Civil Procedure 1.380(b)(2), and its Sanctions Orders constitute an arbitrary deprivation of property under the Florida and United States Constitutions.

Even if monetary sanctions had been imposed and proved ineffective, the Court still had no sufficient basis to presume that the missing documents were relevant to CPH's fraud allegations, let alone that they might establish Morgan Stanley's complicity in the Sunbeam fraud. The missing documents were only a small portion of the thousands of paper documents

and e-mail messages and 90 depositions produced during the discovery phase in this case. In light of the available testimony and documents on CPH's claims, as well as the evidence taken in connection with CPH's sanctions motions, the absence of ***any*** evidence suggesting that the missing documents implicated Morgan Stanley in the Sunbeam fraud made it an abuse of discretion for the Court to default Morgan Stanley on all of the fraud elements of the case other than reliance and damages. The sanctions the Court imposed were not commensurate with Morgan Stanley's alleged misconduct and thus exceeded the Court's authority and served as punishment in violation of due process and Florida law.

Once the Court effectively defaulted Morgan Stanley on all elements of CPH's claims other than reliance and damages, the Court had no legitimate basis for reading to the jury those portions of CPH's First Amended Complaint (the "Redacted Amended Complaint") that related to the elements it had just deemed established. Although Rule 1.380(b)(2) permits circuit courts in appropriate circumstances to strike paragraphs of a defendant's answer (which has the effect of deeming the corresponding paragraphs of the complaint admitted) ***or*** enter a default, we are not aware of any Florida precedent in which a court ***both*** partially defaulted a defendant ***and*** read to the jury deemed admissions that related to the defaulted elements but were not relevant to any issue the jury was to decide.[15] The Court's error in repeatedly reading the Redacted Amended Complaint to the jury prejudiced the entire trial. The Redacted Amended Complaint included demonstrably incorrect statements, inflammatory, argumentative, and unsupported allegations, and speculative and prejudicial characterizations that collectively deprived Morgan Stanley of

[15] Rule 1.380(b)(2) authorizes circuit courts (in appropriate circumstances) to establish as true facts relevant to a party's claims or defenses. It does not authorize circuit courts to deem as true facts unrelated to a party's claims or defenses and read those unrelated facts to the jury. As a consequence, Rule 1.380(b)(2) did not authorize the Court to read the Statement of Litigation Misconduct to the jury in Phase II. Morgan Stanley discusses the Statement later in this brief.

any independent consideration of its defenses on reliance and compensatory damages. The dispositive effect of the Redacted Amended Complaint on those ostensibly unrelated issues is perhaps best demonstrated by CPH's relentless highlighting of the Redacted Amended Complaint despite the fact that it was logically and legally irrelevant to any issue before the jury. CPH devoted the vast majority of its five-hour opening statement to the Redacted Amended Complaint. It elicited several hours of expert testimony on the meaning of the deemed facts in the Redacted Amended Complaint. And it responded to Morgan Stanley's closing argument on reliance and compensatory damages by emphasizing that those issues had to be determined in the context of the deemed facts. Those facts were emphatically irrelevant to the jury's Phase I determination and their admission unfairly prejudiced the Phase I verdict.

The Court should allow Morgan Stanley to complete its production of documents and conduct a new trial on liability and compensatory damages.

B. The Court's implementation of the March 23, 2005 Order, moreover, injected further error into the trial. As explained in greater detail in Morgan Stanley's motion for a new trial (which Morgan Stanley incorporates by reference), the Court curtailed Morgan Stanley's ability to cross examine witnesses to show their lack of credibility, even on issues where the witnesses contradicted the true facts and their own prior testimony, for fear that the cross-examination might contradict the facts deemed true by the March 23, 2005 Order. *See* Morgan Stanley's Motion for Judgment in Accordance with Motion for Directed Verdict and Alternative Motion for New Trial at 21-22 (May 26, 2005). (The Court so limited Morgan Stanley's examinations despite Morgan Stanley's willingness to conduct the examinations under a limiting instruction deeming them relevant for credibility purposes alone.) And the Court precluded examination of witnesses even where the witness testimony varied from, elaborated on, or

contradicted the facts established by the March 23, 2005 Order. *See id.* In so doing, the Court erroneously elevated the March 23, 2005 Order's sanction above the fundamental purpose of the trial — a search for truth — and unnecessarily denied Morgan Stanley its right to a fair trial even as to those issues where no default was imposed.

VII. THE COURT'S NUMEROUS LEGAL ERRORS, TAKEN INDEPENDENTLY AND CUMULATIVELY, REQUIRE A NEW TRIAL.

Morgan Stanley's New Trial Motion presents in great detail the Court's numerous legal errors, including its markedly different treatment of Morgan Stanley and CPH throughout the course of this trial. These errors individually and collectively operated to deny Morgan Stanley a fair trial.

A new trial is warranted where "cumulative prejudicial errors denied [the defendant] a fair trial." *State Farm Mut. Auto. Ins. Co. v. Revuelta*, 2005 WL 1107491, at *2 (Fla. 3d DCA May 11, 2005). Even where errors are harmless individually, they warrant a new trial where their "cumulative impact . . . resulted in unfair prejudice to the defense." *Pier 66 Co. v. Poulos*, 542 So. 2d 377, 380 (Fla. 4th DCA 1989).

That is what happened here. As set forth more fully in Morgan Stanley's Motion for Judgment in Accordance with Motion for Directed Verdict and Alternative Motion for New Trial (May 26, 2005), which Morgan Stanley incorporates by reference, the Court among other things (1) allowed CPH's experts to present undisclosed and incompetent testimony; (2) improperly limited Morgan Stanley's cross-examination of CPH's damages expert; (3) improperly excluded Morgan Stanley's expert testimony and refused to allow Morgan Stanley to add other witnesses; (4) allowed CPH's witnesses to engage in improper speculation; (5) countenanced gratuitous repetition of inflammatory "deemed facts"; (6) permitted irrelevant evidence of Morgan Stanley's debenture offering; (7) allowed CPH's lay witnesses to offer expert and legal opinions;

(8) relied on the "deemed facts" to limit Morgan Stanley's cross-examination and impeachment of CPH witnesses without adequate justification; (9) applied inconsistent standards for imputing knowledge of CPH's agents to the corporation; (10) excluded testimony about Levin's reasons for voting for the merger and then allowed CPH to refer to that vote in closing argument, contrary to its earlier representation; (11) excluded other relevant evidence; (12) delivered jury instructions that were erroneous, an abuse of discretion, and internally contradictory; (13) empanelled a tainted jury; (14) disqualified qualified jurors; (15) allowed improper opening and closing argument; (16) failed to disqualify CPH's counsel for improper use of privileged material; (17) denied Morgan Stanley's reasonable request for a continuance; (18) made inconsistent rulings on exhibits not timely included on the exhibit lists; (19) made inconsistent rulings on whether Florida law imposes a duty to retain e-mail in anticipation of litigation; (20) required Morgan Stanley to reveal the content of its cross-examination in advance; (21) abused its discretion in denying Morgan Stanley's motion to conform its waiver defense to the evidence; and (22) bifurcated the trial over Morgan Stanley's objection. Further prejudice occurred when Perelman falsely accused Morgan Stanley of admitting to criminal conduct, and when a client of CPH's counsel badgered the jury and attempted to extract information. Even if some of those errors may not have been fatally harmful individually, in the aggregate they were clearly prejudicial and denied Morgan Stanley a fair trial. Accordingly, Morgan Stanley is entitled to a new trial.

VIII. A NEW TRIAL IS WARRANTED BECAUSE THE COURT SHOULD NOT HAVE PROHIBITED MORGAN STANLEY FROM CONTESTING ITS COMPLICITY IN THE SUNBEAM FRAUD IN PHASE II.

For the reasons previously explained in Morgan Stanley's Motion For Reconsideration Of The Court's Sanctions Order and Morgan Stanley's Motion To Prevent Extension Of Discovery Misconduct Sanctions To Phase II and as argued before this Court, the Court's

16div-017766

decision to prohibit Morgan Stanley from adducing evidence in Phase II that would demonstrate its lack of complicity in the Sunbeam fraud violated *Humana Health Insurance Co. of Florida v. Chipps*, 802 So. 2d 492 (Fla. 4th DCA 2001), *Nordyne, Inc. v. Florida Mobile Home Supply, Inc.*, 625 So. 2d 1283 (Fla. 1st DCA 1993), and the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Rather than repeat its previous arguments here, Morgan Stanley incorporates them by reference and focuses on the following three points.[16]

First, in *Humana*, the appellate court found two independent grounds for reversal: (a) the trial court's jury instructions had "invaded the province of the jury by characterizing the conduct of the defendants" and determining "the egregiousness of the defendant's conduct," 802 So. 2d at 495-96; and (b) the trial court erred by prohibiting the defendant from presenting certain "industry standard" evidence, because "[t]he jury should have been allowed to consider ***any*** evidence which would have had the effect of 'reducing or softening the moral or social culpability attaching to [the defendant's] act,'" *id.* at 496 (emphasis added and citation omitted). Although this Court suggested that it could adhere to the first holding by refraining from instructing the jury that it must find that Morgan Stanley's conduct was egregious, *e.g.*, 5/13/05 Tr. at 14649:16-20, this was insufficient because prohibiting Morgan Stanley from contesting the underlying allegations effectively directed a verdict on entitlement to punitive damages.

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[16] Morgan Stanley also notes that, for the reasons expressed in Morgan Stanley's prior motions, the extension of the sanctions order to Phase II also violated Morgan Stanley's right to due process under Article I, § 9 of the Florida Constitution and its right of access to the courts under Article I, § 21 of the Florida Constitution. *See State ex rel. Pittman v. Stanjeski*, 562 So. 2d 673, 679 (Fla.1990) (construing statute to permit automatic entry of a judgment for delinquent support monies without giving the defendant an opportunity to present defense would violate the right of access to courts); *Bonavista Condo. Ass'n, Inc. v. Bystrom*, 520 So. 2d 84, 86 (Fla. 3d DCA 1988) (per curiam) ("The due process protections afforded by the fourteenth amendment of the United States Constitution are the same as those provided by article I, section 9 of the Florida Constitution.").

In addition, the Court misapplied the second holding in *Humana* by suggesting that the decision required only the ability to present "pure mitigation evidence as opposed to a contradiction of a statement of fact that had previously already been determined by default." 4/05/05 Tr. at 6666:24-6667:2. This distinction is nowhere present in *Humana*. To the contrary, the opinion uses the word "any," which must be interpreted to mean what it says — ***any***. Accordingly, any evidence that has the effect of "reducing or softening the moral or social culpability attaching to [the defendant's] act" is relevant to the jury's determination of the degree of egregiousness of the defendant's conduct and should be allowed.

Second, we have found no authority from any jurisdiction permitting a court, as a discovery sanction, to preclude an appearing defendant from contesting its underlying liability prior to the imposition of punitive damages. Indeed, all the cases that we have found are squarely to the contrary.

In *Hunter v. Spaulding*, 388 S.E.2d 630 (N.C. Ct. App. 1990), for instance, the trial court entered a default as a discovery sanction, leaving the issue of "entitlement" to punitive damages to the jury but prohibiting the defendant from putting on evidence on his behalf. The appellate court reversed, explaining:

> The judge in this case properly entered judgment for the [plaintiffs] on their claim of compensatory damages, and he rightly left the question of their entitlement to punitive damages for the jury. ***By submitting the issue without affording [the defendant] an opportunity to contest those damages, however, the judge erred.*** It is, for example, questionable whether the damages the jury awarded relate to the real estate claim or, in part or in whole, to [the defendant's] failure to comply with discovery. Permissible sanctions for the latter do not include the party's answering in punitive damages.

Id. at 635-36 (emphasis added). Indeed, according to the court, submitting the issue of punitive damages without allowing the defendant "an opportunity to present evidence addressed to that

issue" deprived the defendant "of his rights to be heard and a trial of the punitive-damages claim and contravened both his due process rights and [North Carolina sanctions law]." *Id.* at 636.

Similarly, in *Gallegos v. Franklin*, 547 P.2d 1160 (N.M. Ct. App. 1976), the court entered a default as a sanction for the defendant's failure to comply with discovery orders. The court explained that, while "the defendants have admitted the allegations of the complaint" "[b]y virtue of the default," a "punitive damage claim is not admitted by a default." *Id.* at 1165, 1167 (citing *Florida E. Coast Ry. v. McRoberts*, 149 So. 631 (Fla. 1933)). Before the imposition of punitive damages, a hearing was required "in which evidence may be presented by the plaintiff, . . . with the right granted to defendants to contest this issue." *Id.* at 1167.

The Oklahoma Supreme Court reached the same conclusion in *Payne v. Dewitt*, 995 P.2d 1088 (Okla. 1999). In *Payne*, the defendant failed to comply with discovery orders. As a sanction, the trial court entered a default and declared that, although there would be a bench hearing on actual and punitive damages, "at that hearing, [the defendant] could not cross-examine [the plaintiff's] witnesses, object to introduction of testimony or exhibits offered, or otherwise participate in the evidentiary process." *Id.* at 1091 (emphasis omitted). The Oklahoma Supreme Court reversed, stating:

> A default declaration, imposed as a . . . sanction, cannot extend beyond saddling the defendant with liability for the harm occasioned and for imposition of punitive damages. The trial court must leave to a meaningful inquiry the quantum of actual and punitive damages ***without stripping the party in default of basic forensic devices to test the truth of the plaintiff's evidence***.

Id. at 1095 (emphasis altered). It violated due process to preclude the defendant from contesting the evidence against him, as "[o]bstacles that unreasonably impede full disclosure of the truth are an anathema to due process." *Id.*

The list of cases in accord is lengthy. *See, e.g., id.* at 1095 n.21 (citing fifteen "other jurisdictions which hold that a defaulting party has the right to participate in [punitive damages]

proceedings and introduce affirmative evidence on its own behalf in mitigation of damages"). There simply is no reason to make Florida an outlier from this established consensus.

Third, it clearly was improper for the Court to presume prejudice to CPH's ability to litigate Phase II issues before knowing the content of the omitted e-mails. The Fourth District Court of Appeal has previously admonished trial courts for this very thing. *See New Hampshire Ins. Co. v. Royal Ins. Co.*, 559 So. 2d 102 (Fla. 4th DCA 1990) (per curiam). In *New Hampshire Insurance Co.*, the trial court struck the appellant's pleading "for intentional failure to comply with court's order and prejudice shown by [appellee]" after appellee asked for an underwriting file of unknown content and the appellant replied that it had been destroyed. *Id.* at 102. The Fourth District reversed because there was no "showing of prejudice to appellee on this record." *Id.* at 103. "[F]or all we know," the court explained, "any evidence which might have been contained within those files might be legally irrelevant to the issues framed in the pleadings." *Id.* In the instant case, of course, it remained possible to ascertain the content of the unproduced e-mails, which had not been destroyed.

A new trial on punitive damages is accordingly warranted.

IX. EVEN IF THE COURT COULD PERMISSIBLY EXTEND THE SANCTION TO PHASE II, A NEW TRIAL IS WARRANTED BECAUSE THE COURT SHOULD HAVE MORE THOROUGHLY REDACTED THE "DEEMED FACTS" TO COMPLY WITH *HUMANA*.

Even if certain facts could be conclusively established for all purposes as a discovery sanction, the "deemed facts" here — which established far more than the existence of Morgan Stanley's participation in the Sunbeam fraud — went way beyond what *Humana* allows. Many "deemed facts" were argumentative and inherently prejudicial (*e.g.*, "Morgan Stanley's strategy was doubly deceptive"), and other "deemed facts" inexorably tainted the jury's consideration of Morgan Stanley's reprehensibility, including many facts stating or implying that: (i) Morgan

Stanley was a leader in targeting CPH;[17] (ii) Morgan Stanley became aware of the fraud at particular times;[18] (iii) Morgan Stanley abused CPH's trust;[19] (iv) the fraud was a heavily detailed plan;[20] and (v) particular Morgan Stanley officials participated in the supposed fraud.[21] Because these facts go to the heart of the "the degree" of the defendant's misconduct, *Humana* requires their determination by the jury. *See Humana*, 802 So. 2d at 496 ("To assess punitive damages, a jury must evaluate the degree of 'malice, wantonness, oppression, or outrage' demonstrated by the evidence in the case . . . . [C]are should have been taken to let the jury arrive at its own decision regarding the egregiousness of the defendant's conduct.") (citations omitted).

The Court held that Morgan Stanley was "stuck" with these "deemed facts," 5/16/05 Tr. at 14884:22, 14885:2, because *Humana* prohibited only descriptions of "motivation other than financial motivation," statements of "evil intent," or "inflammatory emotional descriptions of Morgan Stanley's motivation." *Id.* at 14905:10-14909:10. *Humana*, however, is not so limited.

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[17] *E.g.*, Exhibit A attached to Default Order ("Morgan Stanley developed a strategy for Sunbeam to use its fraudulently-inflated stock" in the acquisition of Coleman; "Morgan Stanley prepared and provided CPH with false financial and business information about Sunbeam"; "Morgan Stanley provided CPH with false information"; Morgan Stanley "script[ed] Dunlap's false public statements").

[18] *E.g.*, *id.* (pursuant to "Morgan Stanley's carefully crafted plan," "Morgan Stanley laid the groundwork for a meeting to take place in December 1997 in Palm Beach, Florida between Dunlap and Kersh and representatives of CPH").

[19] *E.g.*, *id.* ("Drawing on relationships between some of Morgan Stanley's investment bankers and senior CPH officers, Morgan Stanley set about trying to persuade CPH to sell its interest in Coleman to Sunbeam — and, most importantly, to accept Sunbeam stock as consideration.").

[20] *E.g.*, *id.* ("Morgan Stanley responded with a plan that would allow Dunlap to conceal his fraud. Morgan Stanley recommended that Sunbeam acquire other companies, using Sunbeam's stock, which was fraudulently inflated, as the 'currency' that would be used to pay for the acquisitions.").

[21] *E.g.*, *id.* ("Thereafter, Morgan Stanley through Managing Directors Strong, James Stynes, and Robert Kitts, led the discussions with CPH on Sunbeam's behalf.").

It requires that the "***jury*** [] evaluate the degree of 'malice, wantonness, oppression, or outrage' demonstrated by the evidence in the case." *See Humana*, 802 So. 2d at 496 (emphasis added). Indeed, there is no practical difference between directing the jury to find that Morgan Stanley acted with "evil intent" and precluding Morgan Stanley from contradicting the deemed facts that supposedly demonstrate its "evil intent" (such as the allegedly detailed nature of the plan and certain executive's awareness of the fraud at particular times). Thus, even assuming that *certain* facts could be established as true prior to the imposition of punitive damages, the Court violated *Humana* by not redacting the "deemed facts" more thoroughly here.

Furthermore, because due process requires punishment to be based on the actual "'degree of reprehensibility of the defendant's conduct,'" *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)), the Court's decision to establish these particular "deemed facts" raises significant due process concerns, both under the United States and the Florida Constitution.

For all of these reasons as well, a new trial on punitive damages is required.

X. A NEW TRIAL IS WARRANTED BECAUSE IT WAS IMPROPER FOR THE COURT TO READ TO THE JURY A LITIGATION MISCONDUCT STATEMENT IN PHASE II THAT CONTAINED FACTUAL FINDINGS THAT MORGAN STANLEY COULD NOT CONTRADICT.

As this Court has previously recognized, evidence of litigation misconduct is normally prohibited at trial because it is "for the court and not for the jury" to sanction litigants for discovery abuses, and such evidence is inherently prejudicial, inexorably tainting the jury's perceptions of the litigants. *See Emerson Elec. Co. v. Garcia*, 623 So. 2d 523, 525 (Fla. 3d DCA 1993) (per curiam); Order On Plaintiff's MIL No. 36 at 2 (May 16, 2005) (citing *Amlan, Inc. v. Detroit Diesel Corp.*, 651 So. 2d 701 (Fla. 4th DCA 1995)); *cf. Werbungs & Commerz Union Austalt v. Collectors Guild, Ltd.*, 930 F.2d 1021, 1027 (2d Cir. 1991) (presenting discovery

misconduct to the jury raises the impermissible prospect that the jury will "penalize [the defendant] for [those] discovery abuse[s]" instead of the "evidence that was properly admitted").

This Court nevertheless held, relying on *General Motors Corp. v. McGee*, 837 So. 2d 1010 (Fla. 4th DCA 2003), that evidence of litigation misconduct was relevant and admissible in Phase II. *See* Order On Plaintiff's MIL No. 36, at 2. But, unlike *McGee*, in which each side was free to introduce relevant evidence on the subject with the jury left to draw its own findings of fact from the evidence, the Court here held that its factual findings from the evidentiary hearings conducted before imposing sanctions would be taken as true and read to the jury in the form of a litigation misconduct statement. *E.g.*, 5/16/05 Tr. at 14923:24-14924:3.

The Court erred in both rulings. *McGee* does not support allowing the jury to consider evidence of litigation misconduct in this case because there are material differences between the circumstances here and those in *McGee*. For example, unlike in *McGee*, CPH presented absolutely no evidence that any sort of "smoking gun" has been concealed here. Thus, evidence of litigation misconduct should not have been admitted in Phase II at all.

In addition, even if evidence of litigation misconduct were admissible in Phase II, the Court erred by establishing its factual findings from the pre-trial hearings as conclusive, which invaded the jury's role as trier of facts. Indeed, even if the Court had the authority to establish facts in this manner — which it does not — doing so in the circumstances of this case caused a due process violation because of the lack of adequate notice to Morgan Stanley that this was a possibility beforehand. *See Khan v. Dep't of Revenue*, No. 4D03-2607, 2005 WL 1109576, at *1 (Fla. 4th DCA May 11, 2005) (not yet released for publication) (defendant's due process rights were violated when the court failed to give the defendant adequate notice of the "specific issue[s] that will be considered" at the hearing on a motion for discovery sanctions).

In short, if evidence of litigation misconduct was to be placed before the jury at all in Phase II of this case, it should have occurred, as in *McGee*, without a judicial thumb on the scale. For these and other reasons explained below, a new trial on punitive damages is warranted.[22]

A. *General Motors Corp. v. McGee* Does Not Provide a Basis for Considering Litigation Misconduct in This Case.

Because this Court is already familiar with *McGee*, we will not reiterate *McGee's* underlying facts here. Rather, we will focus on two material differences between the discovery misconduct at issue in this case and that in *McGee*.

First, in *McGee*, there was evidence that the defendants were deliberately withholding documents concerning the significance of a "smoking gun" (the "Ivey Report"), the contents of which were known to the court at the time it decided to allow the plaintiff to air the discovery issue before the jury. *See* 837 So. 2d at 1022-23. In this case, by contrast, CPH adduced absolutely no evidence that Morgan Stanley concealed any "smoking gun" or related documents. Indeed, as the Court has acknowledged, there is no evidence that any Morgan Stanley personnel knew the nature or content of the undisclosed e-mails, 5/16/05 Tr. at 15044:5-7, and, more importantly, ***the Court still "ha[s] no idea" whether any of the withheld e-mails contained any relevant evidence at all***, 5/16/05 Tr. at 15046:3-9. Lacking this knowledge, the Court engaged in undue speculation in concluding that the discovery omissions were part of an effort by Morgan Stanley to conceal its complicity in the Sunbeam fraud. *Cf. Amlan*, 651 So. 2d at 703 (distinguishing cases in which "the misconduct alleged is the destruction or unexplained

[22] Many of Morgan Stanley's arguments are set forth more fully in Morgan Stanley's Motion For Reconsideration Of The Court's Sanctions Order and in Morgan Stanley MIL 30 To Exclude Litigation Misconduct Evidence From Phase II. We incorporate those arguments by reference here.

disappearance of crucial evidence" from the general rule that evidence of pretrial discovery conduct is not for the jury's consideration).

Second, in *McGee*, the documents concerning the significance of the "Ivey Report" were concealed not just after the accident in that case (1991) but also before the accident occurred, in litigation throughout the 1980s; the concealment thus was relevant to General Motors' state of mind in letting the design defect persist. 837 So. 2d at 1015, 1022. By contrast, the discovery violations found by the Court here occurred years after the conduct underlying CPH's claims and hence could not have had any bearing on Morgan Stanley's state of mind at the time of the underlying transactions.

For these reasons and others, the nexus between the discovery violations and the conduct underlying CPH's claim is far more attenuated than that in *McGee*. Hence, in accordance with the United States Supreme Court's admonition that a "defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages," *State Farm*, 538 U.S. at 422, *McGee* should be interpreted as nothing more than a narrow, case-specific exception to "the general rule," rather than an open-ended endorsement of allowing evidence of litigation misconduct in punitive damages litigation on the basis of speculation that it might have been part of an effort to cover up the misconduct. Thus, *McGee* does not support injecting the issue of litigation misconduct into Phase II.

B. Even if Evidence of Litigation Misconduct Were Relevant to Phase II, It Was Inappropriate for the Court To Make Its Own, Conclusive Factual Findings on the Subject.

This Court first held that it would read to the jury a statement of litigation misconduct consisting of its own factual findings in its sanctions order of March 1, 2005. On the eve of the Phase II trial, however, it clarified that it was doing so not as a discovery sanction but rather because there had already been an evidentiary hearing on the litigation misconduct, from which

the Court had concluded that there was evidence that Morgan Stanley attempted to conceal its role in the Coleman-Sunbeam transaction. Moreover, the Court explained, Morgan Stanley could not introduce evidence that contradicted its factual findings because there had already been a "full evidentiary hearing on this that was contested on both sides. We're not going to redo the things that have already been determined." 5/16/05 Tr. at 14922:24-14923:2; *see also id.* at 14923:25-14924:2 ("These are the deemed [litigation misconduct] facts because these were done after a full evidentiary hearing."); Order on CPH's MIL No. 36 at 3 n.2 (May 16, 2005) ("MS & Co. cannot refute the deemed facts, because their misconduct prevented a full trial on the merits. ***In contrast***, those [litigation misconduct] facts found by the Court following evidentiary inquiry are binding on the parties to this litigation, but may be supplemented.") (emphasis added).

Florida law is clear that this was improper. Indeed, even if the Court could have made some factual findings pertaining to the litigation misconduct, the Court clearly abused its discretion by not amending the litigation misconduct statement to remove some of its more prejudicial attributes or allowing Morgan Stanley to present evidence that CPH had overwritten many e-mails.

1. In Actions at Law, It Is the Exclusive Province of the *Jury* To Resolve Questions of Fact.

It is a fundamental precept of Florida law that "[t]he right of trial by jury shall be secure to all and remain inviolate." Fla. Const. art. 1, § 22. "The constitutional right to a trial by jury is not to be narrowly construed." *In re Forfeiture of 1978 Chevrolet Van Vin: CGD1584167858*, 493 So. 2d 433, 435 (Fla. 1986).

A central tenet of this jury trial right is that it is the jury's role to evaluate evidentiary conflicts and decide issues of fact. *E.g.*, *Mercy Hosp., Inc. v. Larkins*, 174 So. 2d 408, 409 (Fla.

3d DCA 1965) (per curiam). As the Florida Supreme Court has previously explained, it is "well-recognized" that:

> Under our court system, the jury in an action at law is the trier of the facts and in such capacity resolves the conflicts in the evidence, as well as the conflicting inferences deducible from the same evidence. ***Neither the trial court nor the appellate court is authorized to substitute its judgment for that of the jury as to questions of fact.***

Buck v. Lopez, 250 So. 2d 6, 8 (Fla. 1971) (citation and internal quotation marks omitted; emphasis added); *cf. Carver v. Jenkins*, 209 So. 2d 882, 883 (Fla. 3d DCA 1968) (per curiam) ("Questions of law are for the court to decide; questions of fact are for the jury to decide."); *Kaufmann v. Miami Beach Ry.*, 131 So. 2d 767, 768 (Fla. 3d DCA 1961) (per curiam) (trial court erred in directing verdict based on its "weigh[ing] the evidence, in much the same way as the jury might be expected to do, [and] . . . descredit[ing] the testimony of one of the chief witnesses") (citation and internal quotation marks omitted).

Nowhere is the jury's fact-finding responsibility more important than in the punitive damages context. Florida courts have long held that it is up to the jury, when assessing punitive damages, to "evaluate the degree of 'malice, wantonness, oppression, or outrage' ***demonstrated by the evidence in the case.***" *Humana*, 802 So. 2d at 496 (citation omitted, emphasis added); *id.* (discussing "the jury's fact-finding function"); *see also Wackenhut Corp. v. Canty*, 359 So. 2d 430, 436 (Fla. 1978) ("Punitive damages 'are peculiarly left to the discretion of the jury as the degree of punishment to be inflicted must always be dependent on the circumstances of each case, as well as upon the demonstrated degree of malice, wantonness, oppression, or outrage ***found by the jury from the evidence.***'") (citing *Winn & Lovett Grocery Co. v. Archer*, 171 So. 214, 221 (Fla. 1936)) (emphasis added); *Rinaldi v. Aaron*, 314 So. 2d 762, 763 (Fla. 1975) (same). Although the Court was entitled to make findings for the limited purpose of deciding

whether to impose discovery sanctions — a decision for the Court and not the jury — only the jury could resolve factual disputes relevant to its duties.

McGee is instructive in this regard. Despite the significant evidence of discovery misconduct in that case adduced before and during a pretrial evidentiary hearing, 837 So. 2d at 1025, the court did not find any "litigation misconduct" facts on its own. It simply determined that the evidence of concealment was relevant to the jury's determination of how much punitive damages to award, and therefore that the parties could introduce evidence on the subject for the jury's consideration. *Id.* The parties did, and the jury ultimately decided to award no punitive damages. *Id.* at 1015, 1025-26. That course of conduct stands in stark contrast to the trial here.

2. Disputed Issues of *Fact* Cannot Be Taken from the Jury on the Basis of a Pretrial Evidentiary Hearing on a Different Subject Matter.

Despite the apparent unconventionality of its approach, the Court believed that it could determine the litigation misconduct facts for all purposes in the litigation because it had held a "full evidentiary hearing" on the subject and there was no need "to redo the things that have already been determined." 5/16/05 Tr. at 14922:24-14923:2. Respectfully, that conclusion is flawed in at least three significant ways.

First, as discussed above, this result is inconsistent with *McGee* and other Florida law pertaining to Morgan Stanley's jury trial rights. It is irrelevant that there was a pretrial evidentiary hearing on the matter. The result of the hearings may have sufficed to establish relevance — a conclusion that Morgan Stanley vigorously contests — but they did not allow the court to resolve factual matters reserved for the jury.

Second, this Court should not have presumed that the evidentiary hearings held prior to the imposition of sanctions provided a full and fair opportunity to litigate the issues that would be relevant to punitive damages in Phase II. The subject of those prior hearings was completely

different: whether Morgan Stanley had made a good faith effort to comply with CPH's discovery requests and the Agreed Order of April 16, 2004. *See, e.g.*, Order Specially Setting Hearing, at 1 (Feb. 3, 2005). While certain testimony may have touched upon issues of concealment, those hearings overwhelmingly focused on technical issues concerning the existence of the Morgan Stanley e-mail archive, the misplaced backup tapes, and the programming glitches that led to the discovery shortcomings. Indeed, all but one of the witnesses at the February 14 hearing were information technology (IT) people,[23] and ***none*** had any idea (or notice) that they were defending against the imposition of punitive damages at that time.[24] Testimony at the hearing on March 14 likewise all centered on information technology issues.[25] Thus, as counsel for Morgan Stanley previously explained to this Court:

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[23] The witnesses were: Allison Gorman Nachtigal, who was in the Morgan Stanley IT Department and "responsible for the e-mail archive as well as other data retention initiatives around the web," 2/14/05 Tr. at 25:16, 26:11-19; Robert J. Saunders, who was an Executive Director in the IT Department and "responsible for the maintenance of the server hardware," *id.* at 84:14-25; Quentin Gregor, who was Vice-President of a company called eMag solutions, which specialized in tape and e-mail restoration, and who testified about how long the searches would take, *id.* at 227; and Thomas Clare, counsel for Morgan Stanley, *id.* at 173.

[24] Indeed, prior to the February 14 hearing, CPH had moved for an adverse inference but had not asked the Court to find litigation misconduct facts and establish them conclusively for all purposes in the litigation. *See* CPH Motion For Adverse Inference, at 5 (filed Jan. 26, 2005). Nor did the Court state that it was considering this option or ask for briefing on the subject.

In fact, it was Morgan Stanley that requested the evidentiary hearing during argument on the adverse inference motion on February 2, after the Court suggested that the sworn declarations it submitted were insufficient to defeat the motion. 2/2/05 Tr. at 125:1-2, 17-18. The Court's February 3 order did not specify issues to be discussed but left that to Morgan Stanley's discretion. *See* Order Specially Setting Hearing, at 1 (Feb. 3, 2005); *see also* 2/2/05 Tr. at 157:23-158:6. ("[T]he basic concept [to the order] is going to be . . . Morgan Stanley needs to designate everybody who's going to testify at the hearing; needs to provide copies of all the documents that are sort of relevant to the issues before the court and all the documents, correspondence between Morgan Stanley and any outside or prospective outside vendors.").

[25] In addition to Ms. Gorman, Morgan Stanley called Richard Anfang, a Managing Director in Morgan Stanley's Information Technology Department and head of its Enterprise Infrastructure Group, to testify about the various steps that Morgan Stanley had taken to locate additional e-mail back up tapes and about the creation of Morgan Stanley's e-mail archive,

> MS. BEYNON: That evidentiary hearing was not directed at this specific question [of concealment of the Sunbeam Fraud] in any way . . . .
>
> * * *
>
> MS. BEYNON: . . . The questions that were addressed were . . . e-mails not produced; what e-mails were not produced; what's going on here. ***The motives that underlay those — that failure make those productions weren't explored.***

5/16/05 Tr. at 14924:3-19 (emphasis added). It thus was inappropriate for the Court to presume that the prior hearings were in fact adequate with respect to the issues to be litigated in Phase II. *Cf. Trucking Employees of N. Jersey Welfare Fund, Inc. v. Romano*, 450 So. 2d 843, 845 (Fla. 1984) ("[C]ollateral estoppel may be asserted only when the ***identical*** issue has been litigated between the same parties or their privies.") (emphasis added).

Third, the facts were not so indisputably clear as to leave no genuine issue for a jury to resolve. While the Court based its findings on what it believed to be reasonable inferences from the evidence — as may be done for the purpose of assessing whether sanctions were warranted — that was the opposite of how it must view the evidence when deciding whether a factual issue may be taken away from the jury. *See, e.g., Green v. CSX Transp., Inc.*, 626 So. 2d 974, 975 (Fla. 1st DCA 1993) (per curiam). Indeed, the very fact that the Court had to resort to witness testimony and make credibility findings with respect thereto in order to make its factual findings, *see, e.g.*, Default Order at 10 n.11; Adverse Inference Order at 9-10, shows that those issues should have been left to the jury's determination insofar as their impact on punitive damages was concerned.

03/14/05 Tr. at 3580:1; and LaRue Bruce Buchanan, an employee of National Data Correction Institute, a third-party vendor, who testified about the processing of e-mails from back-up tapes as part of the Archive migration project, *id.* at 3636:20. CPH, for its part, called one witness (whose testimony was later stricken), Stephen Wolfe, an employee of "Renew Data," another third party vendor, to testify about the processing of e-mails on tapes delivered by Morgan Stanley to Renew Data, 3/14/05 Tr. at 3516:15.

In sum, assuming that the evidence was relevant and not more prejudicial than probative, it was the jury's role to hear the evidence and decide for itself what transpired and whether it was part of an attempt by Morgan Stanley to cover up its alleged role in the Sunbeam fraud. The fact that the Court may have heard the evidence beforehand did not justify judicial resolution of the underlying factual disputes.

3. Even if Florida Law Did Permit the Court To Make Conclusive Factual Findings Pertaining to Litigation Misconduct, Doing So in the Circumstances of This Case Violated Morgan Stanley's Rights to Due Process.

This Court's conclusive determination of disputed issues of fact also violated Morgan Stanley's rights to due process under the U.S. and Florida Constitutions because of insufficient notice prior to the pre-trial evidentiary hearings that such a determination was to be made at those hearings.

As described above, the Court first held that it would read a litigation misconduct statement to the jury consisting of its conclusive findings of fact in its adverse inference motion on March 1, but prior to that point the Court had never stated that it was considering this option or asked for any briefing on the subject, and no party had asked for this relief.[26] While the Court

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[26] On February 14, CPH did orally move for additional relief, including entry of default. 2/14/05 Tr. at 242:11-16, 284:2-3. A default, however, admits only "all well-pled factual allegations of the complaint." *State Farm Mut. Auto. Ins. Co. v. Horkheimer*, 814 So. 2d 1069, 1072 (Fla. 4th DCA 2001). Thus, because the litigation misconduct facts were not referenced in the complaint, they were not included within the purview of CPH's request for a default. *Cf. id.* at 1074-75 (default judgment could not exceed $50,000 that the insured alleged as the policy limits in the complaint even though insured later claimed that policy limits were in excess of one million dollars, as defendant "was entitled to notice" relating to a change in her claim); *Hooters of Am., Inc. v. Carolina Wings, Inc.*, 655 So. 2d 1231, 1235 (Fla. 1st DCA 1995) (holding that claimant could not get $4,227,543 more than it asked for in the complaint, as "[a]dequate notice is a fundamental element of the right to due process" and even a defaulted "litigant should be entitled to anticipate the consequences that reasonably flow from" its actions).

At this hearing, counsel for CPH also briefly suggested to the Court that it could "fashion a statement that the court would make to the jury establishing Morgan Stanley's knowledge of

subsequently, on March 14, held additional hearings and supplemented its findings, again the only subject was whether Morgan Stanley had made a good-faith effort to comply with CPH's discovery requests and the Agreed Order.[27] *See, e.g.*, Morgan Stanley's Opposition To CPH's Motion For A Default Judgment (filed March 13, 2005) (discussing whether default sanction was justified based on the evidence in the record). Consequently, even if the Court's actions were authorized under Florida law, they still violated Morgan Stanley's rights to due process because of the lack of adequate notice beforehand.

Controlling precedent supports that conclusion. The Fourth District Court of Appeal recently faced precisely this issue in *Khan v. Department of Revenue*, No. 4D03-2607, 2005 WL 1109576 (Fla. 4th DCA May 11, 2005) (not yet released for publication). In *Khan*, a mother (in a domestic relations case) moved for sanctions against the father for failing to comply with an outstanding order compelling discovery. "At the end of a hearing on that motion, at which the father was not present or represented, the trial court entered what is in effect a default final judgment awarding child support and arrearages to the mother." *Id.* at *1. The Fourth District Court of Appeal reversed on the ground of insufficient notice, explaining that "it is an essential part of the concept of due process that any relief granted at a hearing be within the kind of relief

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the fraud" as of February 15, 2005. 2/14/05 Tr. at 288:10-15. But it never specified this request further. Moreover, the context of the suggestion clearly indicates that this was not a request to establish many litigation misconduct facts based on the hearing that day but rather merely to establish the single fact of when Morgan Stanley was aware of the Sunbeam fraud.

[27] At the end of testimony on March 14th, the Court did suggest that it "may be helpful when we get to argument" if each side prepared a list "of what you believe to be facts now known which were not known as of the time of the February 14th evidentiary hearing. And also indicate whether those are facts that occurred before February 14th that we just didn't know about or are they developments subsequent to February 14th." 3/14/05 Tr. at 3656:20-3657:3. But the Court never specified how it intended to use these facts, nor indicated that they were relevant to anything beyond the issue of whether more severe sanctions were warranted, not to conclusively prevent Morgan Stanley from litigating these facts in a punitive damages phase of the trial.

sought by the notice given for hearing." *Id.* "[N]otice of [a] hearing must advise parties of [the] specific issue that will be considered at [the] hearing." *Id.* (citing *Hammond v. Hammond*, 492 So. 2d 837 (Fla. 5th DCA 1986)). Because "notice of contempt proceeding [did] not provide sufficient notice that [the] court [could] modify a previously imposed child support obligation," the court had overstepped its bounds in adjudicating an issue that was not before it at that hearing and thus had violated due process. *Id.* (citation, internal quotation marks, and emphasis omitted); *cf. Roco Tobacco (USA), Inc. v. Florida Div. of Alcoholic Beverages*, No. 3D02-2180, 2004 WL 1778864, at *3 (Fla. 3d DCA Aug. 11, 2004) (not yet released for publication) (reversing award of costs because "[o]rders that adjudicate issues not before the court or presented by the pleadings, fail to place the parties on notice and thereby deny fundamental due process").

Because fair "notice encompasses a reasonable opportunity to prepare and offer evidence," *City of Ormand Beach v. City of Daytona Beach*, 794 So. 2d 660, 663 (Fla. 5th DCA 2001), and Morgan Stanley lacked that opportunity here, Morgan Stanley's due process rights were violated.

4. The Court Abused Its Discretion by Reading the Litigation Misconduct Statement to the Jury at the Start of Phase II and by Failing To Make Clarifications and Redactions Necessary To Alleviate the Potential for Prejudice Against Morgan Stanley.

Finally, the Court should not have read litigation misconduct facts to the jury in the form of a litigation misconduct statement at the start of Phase II without making clarifications and redactions that were necessary to alleviate the potential for prejudice.

Reading the statement at the start of Phase II was itself seriously prejudicial because it cast Morgan Stanley in a highly negative light. Furthermore, the potential for prejudice was enhanced by, among other things, the Court's failure to: (i) clarify that it did not know the content of the e-mails that were not produced; (ii) take out all references to what certain

individuals in Morgan Stanley's Law Division knew; and (iii) allow Morgan Stanley to point out that CPH had overwritten many e-mails.[28]

Brown v. Ford, No. 1D04-1525, 2005 WL 708393 (Fla. 1st DCA Mar. 30, 2005) (per curiam) (not yet released for publication), is instructive. In *Brown*, the plaintiff received compensatory and punitive damages for injuries sustained in an automobile collision that occurred "during a high speed police chase while two of the defendants attempted to avoid an arrest for sale of cocaine." *Id.* at *1. At trial, "the plaintiff presented testimony from several witnesses regarding the drug sting operation, drug trafficking, and the dangers of drug dealing," a theme that "continued throughout plaintiff's closing argument." *Id.* The First District Court of Appeal held that a new trial was warranted, for although "[t]here is no doubt that the evidence of the drug deal was relevant," "[t]he problem is that the evidence was exploited in a way that invited jurors to use the defendants' misconduct and bad character as a basis for an award of damages." *Id.* at *3.

That "problem" occurred in this case as well because the Court's decision to read the litigation misconduct statement at the start of Phase II and its failure to ensure that the found facts were presented in a non-prejudicial manner invited jurors to use Morgan Stanley's discovery misconduct as a basis for an award of punitive damages. While the Court did, to be sure, instruct the jury that it was not its "job to punish Morgan Stanley for breaking the rules of this Court" because "[t]he matter has been dealt with by the Court," 5/17/05 Tr. at 15446:9-16, this instruction did not cure the potential for prejudice because Morgan Stanley was not

[28] Also prejudicial was how the Court cherry-picked which of Morgan Stanley's admissions it chose to incorporate into the litigation misconduct facts and which it chose to exclude. For instance, it was improper for the Court to find that 10% of the back-up tapes were not produced based on Morgan Stanley's admission — but refuse to find that, because of e-mail duplication, less than 2% of the e-mails were not produced — on the ground that the latter admission was a "self-serving" admission. 5/16/05 Tr. at 15063:5-6; 15261:8-9.

permitted to tell the jury the composition and severity of the sanction, and therefore adequately explain why no further punishment was needed on the basis of the litigation misconduct itself. Accordingly, a new trial is warranted on this ground too.

C. Morgan Stanley Was Not Given a Fair Opportunity To Defend Itself Against the Cover-Up Accusation.

Although the Court had previously indicated that its litigation misconduct statement would be the only permissible evidence on the subject in Phase II, *see* Adverse Inference Order at 13-14, the Court partially reversed course on May 16, 2005 — one day before Phase II was to begin — allowing Morgan Stanley "to offer evidence not inconsistent with its findings such as would permit a reasonable juror to conclude that MS & Co. did not intend to conceal evidence of the fraud." Order on CPH's MIL No. 36, at 3; 5/16/05 Tr. at 14923:11-13 ("And that's why if you want to put on evidence, sort of the keystone cops, we weren't trying to hide stuff[, you can]."). This last-minute change of course did not provide Morgan Stanley a fair opportunity to present a meaningful defense for two reasons.

First, as a practical matter, Morgan Stanley's witnesses could not testify completely regarding the causes of the discovery failures without contradicting in part at least the statement of litigation misconduct. Indeed, the statement included not only objective facts (such as how many tapes were found on a certain date) but many conclusions and suppositions to boot. The problem would have been especially severe in responding to cross-examination, because CPH was free to use the Court's findings in cross-examining Morgan Stanley's witnesses, yet truthful answers would have required contradicting those "facts." *See, e.g.*, 5/16/05 Tr. at 15025:6-15028:8 (discussing possible testimony by Mr. Anfang and scope of potential cross-examination by CPH).

16div-017785

Second, the opportunity simply occurred too late in the trial for Morgan Stanley to take advantage of it. One day to prepare was simply not enough considering both the massive complexity of the subject of Morgan Stanley's e-mail production efforts and the tightrope created by the Court's restrictions on what the witnesses could and could not say.

In sum, the Phase II trial plan clearly violated Morgan Stanley's right to due process under the Fourteenth Amendment of the United States Constitution and art. I, § 9 of the Florida Constitution by denying Morgan Stanley a fair opportunity to present a meaningful defense. *See, e.g.*, *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).

D. A New Trial Is Warranted Because CPH's Demonstratives Were Misleading and Augmented the Possibility of Prejudice Against Morgan Stanley.

During closing arguments, CPH used slides that combined the litigation misconduct facts the Court found and the inferences CPH sought to have the jury draw from those established facts. Those slides were very misleading because their text did not clearly distinguish between (i) what facts the Court had determined and (ii) what inference CPH was asking the jury to make. *E.g.*, 5/18/05 Tr. at 15587-88, 15649 ("Morgan Stanley lied to CPH by representing that all e-mail data for any time period before January 2000 had been destroyed when it knew that back-up tapes dating back to at least 1997 existed."; the word "destroyed" was not in the litigation misconduct statement).

Given the Court's instruction to the jury that it had to accept the litigation misconduct facts as true, this commingling of fact and inference in the slide was highly prejudicial to Morgan Stanley.[29] It accordingly augmented the possibility that the jury awarded punitive

[29] Counsel for CPH did explain orally what part of the slide was established fact and what part was the inference it sought. But this explanation was insufficient to cure the possibility of prejudice that would arise if the juror simply read the slide and ignored (or was distracted from) what counsel said.

damages on the basis of improper grounds in violation of *Brown*. *Cf. Medina v. State*, 748 So. 2d 360, 361-62 (Fla. 4th DCA 2000) (to be used during trial, "'demonstrative evidence must be an accurate and reasonable reproduction of the object involved'") (citing *Florida Evidence* § 401.1 (1999 ed.)). Accordingly, a new trial on punitive damages is warranted on this ground as well.

XI. A NEW TRIAL IS WARRANTED BECAUSE OF THE ADMISSION OF IMPROPER FINANCIAL EVIDENCE.

Over Morgan Stanley's repeated objections, CPH was permitted to adduce evidence of Morgan Stanley's finances, including both its net worth and the amount of money it is permitted to borrow from its parent company under a revolving credit agreement. Under *State Farm* and other relevant federal and Florida law, such evidence may not be considered by a jury assessing punitive damages except when offered by the defendant in mitigation. Its introduction was immensely prejudicial, likely resulted in an inflated punitive damages award, and is grounds for a new trial.

The question whether a plaintiff may introduce any evidence of a defendant's financial resources during the punitive damages phase has already been extensively briefed, and in the interest of brevity we do not here repeat arguments we have already made in multiple filings before this Court. Instead, we refer the Court to Morgan Stanley's submissions offered in support of its Motion in Limine No. 5 and in opposition to CPH's Motion in Limine No. 36.

We focus here instead on CPH's introduction of irrelevant, highly misleading evidence of Morgan Stanley's revolving credit agreement with its parent organization for its supposed bearing on Morgan Stanley's ability to pay punitive damages. To begin, as a matter of simple logic a ***loan*** is a ***liability***, not an ***asset***. Obtaining the loan does not increase net worth. Although there was considerable dispute between the parties as to whether the credit agreement imposes

16div-017787

mandatory obligations on Morgan Stanley's parent or is merely discretionary, there was ***no*** dispute that under the agreement, any credit extended to Morgan Stanley by its parent organization ***would need to be repaid***. Arguing that the availability of a billion-dollar loan is the same as the possession of a billion-dollar asset is no different from arguing that a person whose assets exceed his liabilities by only $1,000 but holds a credit card with a $20,000 limit in fact has a net worth of $21,000. Morgan Stanley's "ability to pay" a punitive award is a function of its net worth, not its available credit.

We are aware of no Florida case in which a jury has been permitted to consider a line of credit as an available asset. To the contrary, Florida law recognizes that it is erroneous to treat sources of even complete ***reimbursement*** as assets for purposes of calculating net worth in the punitive damages phase of a trial. For example, in *Odoms v. Travelers Insurance Co.*, 339 So. 2d 196, 199 (Fla. 1976), the Florida Supreme Court held that the trial court had erred by allowing the plaintiff to introduce evidence of the defendant's "insurance policy's liability limits . . . on the theory that the policy limits could be considered in assessing punitive damages" because the policy was an "asset" of the defendant's. Such insurance policy limits should not be shared with the jury, the Court held, and they are irrelevant to the jury's calculation of the defendant's net worth. Likewise, in *Wransky v. Dalfo*, 801 So. 2d 239 (Fla. 4th DCA 2001), the Fourth District held it was error to admit evidence of the defendant's potentially successful bad-faith claim against an insurer as part the evidence of the defendant's net worth. The court reasoned that if such sources of reimbursement were admissible, "the size of the punitive award could be unlimited." Indeed, even evidence of a contractual ***indemnity agreement*** with a defendant's parent corporation is ordinarily inadmissible to show that a punitive award will be paid by a third party. *CSX Transp., Inc. v. Palank*, 743 So. 2d 556, 562 (Fla. 4th DCA 1999) ("Liability for

punitive damages and the amount thereof is not determined from the assets of a third party nor from an agreement of a third party to pay such damages. In short, the indemnity agreement was not relevant evidence to the issue of the amount of punitive damages.").[30]

In truth, evidence of this revolving credit agreement was nothing more than a backdoor method of conveying to the jury that it should not worry about the impact of an award on Morgan Stanley's financial condition because its far larger parent stood behind it. As this Court had already determined during both phases of this trial, Florida law flatly prohibits references to the financial resources of non-party affiliates unless the plaintiff satisfies the strict criteria for "piercing the corporate veil" by proving that the subsidiary is a "mere instrumentality" or "alter ego" of the parent company, and that the parent used the subsidiary to defraud creditors. CPH has, of course, made no such showing. It was therefore error to allow it to sidestep Florida's veil-piercing requirements through the use of this credit agreement. *See generally Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114, 1116-22 (Fla. 1984); *State ex rel. Continental*

[30] We acknowledge that in *Humana*, 802 So. 2d at 498, the Fourth District held that evidence of a $1.7 billion indemnity agreement with the defendant's parent corporation ***was*** relevant to the determination of the amount of punitive damages, where it was offered in order to rebut the defendant's assertion that a punitive award would force the company into financial straits. The *Humana* court distinguished *CSX* by noting that the agreement in that case had been offered for a different purpose from the one asserted in *Humana*.

There are two obvious differences between the indemnity agreement in *Humana* and the credit agreement in this case. First, the defendant in *Humana* had an ***indemnity*** agreement with its parent, not a ***line of credit***. In other words, it was asserted that the *Humana* defendant's parent corporation ***was required to pay*** any punitive award imposed upon its subsidiary, up to $1.7 billion. Even assuming that CPH's interpretation of the credit agreement is correct (and we do not believe that it is), Morgan Stanley's parent corporation has merely agreed to ***loan*** Morgan Stanley the funds necessary to cover the punitive award. Such a loan, like any other, would create a liability on Morgan Stanley's books and would have to be paid back. Second, the *Humana* court was clear that evidence of the indemnity agreement was relevant and thus admissible as ***rebuttal*** evidence, where the defendant had argued that a large punitive award would amount to economic castigation. Morgan Stanley made no such argument to the jury. Indeed, while it unequivocally argues to this Court that the award is grossly excessive when considered in relation to Morgan Stanley's net worth, it has never suggested that it would fail or be unable to pay any constitutionally permissible award.

Distilling Sales Co. v. Vocelle, 27 So. 2d 728, 729 (Fla. 1946) (orig. proceeding); *Lipsig v. Ramlawi*, 760 So. 2d 170, 187 (Fla. 3d DCA 2000); *Ocala Breeders' Sales Co. v. Hialeah, Inc.*, 735 So. 2d 542, 543 (Fla. 3d DCA 1999) (per curiam).

Finally, even if evidence of the availability of a loan from a defendant's parent corporation ***were*** tangentially relevant to the jury's consideration of that defendant's ability to pay a punitive award, CPH did not adduce sufficient evidence to prove that such a loan was in fact available to Morgan Stanley. The only record testimony offered by CPH to support its assertion that Morgan Stanley's parent would loan it money to cover a punitive judgment came from the deposition of Joseph D'Auria, who said no such thing: In answer to the question,

> In your experience, is it the case that if Morgan Stanley, the Parent, is able to support the capital needs of Morgan Stanley & Company, it will do so?

D'Auria responded,

> [F]or the future, I can't predict the parent's ability or willingness to make such a payment obligation, you know, on behalf of MS & Co., but when it's come up in my past experience, the capital requirements being a focal point, the times that MS & Co. has asked for subsidized loans or capital loans, there is a loan.

5/16/05 Tr. at 15094:21 – 15095:8. This answer does ***not*** support CPH's assertion that Morgan Stanley's parent corporation is ***obligated*** to provide capital loans in the future. The ***only*** other evidence CPH offered in support of its contention was the revolving credit agreement itself, which CPH failed to show binds the parent to loan money to cover a punitive damages judgment. The agreement calls for the proceeds of loans to be used by the borrower "as part of its capital." *Id.* at 15096:3. The term "capital" is undefined and could easily be interpreted by the lender not to include the satisfaction of litigation debt. Moreover, the credit agreement contains a series of covenants that, if breached by Morgan Stanley, would not only make further loans unavailable, but would also cause any outstanding loans to be immediately due and payable back to the parent. As Morgan Stanley argued during the evidentiary hearing on this subject, plaintiff's

expert's undisputed deposition testimony suggested that Morgan Stanley's aggregate indebtedness was already high enough to trigger those covenants and place Morgan Stanley in default. *See* 5/16/05 Tr. at 15096:9-15100:5. CPH adduced ***no*** evidence to show that Morgan Stanley's parent corporation would issue ***any*** loans under the revolving credit agreement under those circumstances.

In short, even if CPH were correct that the availability of a guaranteed loan to cover a large punitive award is relevant to the jury's task, CPH did not lay a sufficient evidentiary predicate for the argument that Morgan Stanley had access to such a guaranteed loan.

This was not a harmless error. The jury knew that its $604 million compensatory verdict had already stripped Morgan Stanley of approximately 12% of its $5.2 billion net worth. There is a substantial likelihood that the jury's punitive verdict was inflated based on the (false) belief, encouraged by introduction of this evidence, that Morgan Stanley's much wealthier parent would fund any necessary further payments.

XII. THE PHASE II JURY INSTRUCTIONS WERE HIGHLY UNBALANCED AND RESULTED IN A MISCARRIAGE OF JUSTICE.

The Court refused to give various crucial jury instructions requested by Morgan Stanley during the punitive damages phase. As a result of these refusals, the jury charge was highly unbalanced, and the jury was left without critical tools necessary to the task of evaluating whether a punitive award was necessary, and if so, what amount of punitive damages was appropriate. We have listed in our motion 14 separate errors in the Court's charge. Our grounds for objecting on all of these points were explained in our previous submissions and at oral argument, and we do not wish to belabor all of them with further briefing. Three of these errors, however, were so damaging that we believe they merit brief discussion and elaboration here.

Specifically, we call the Court's attention to the severely prejudicial combined effect of its failure to instruct the jury:

(1) that compensatory damages serve a deterrent function;

(2) that the jury should consider whether punitive damages were necessary to completely remove Morgan Stanley's profit from its alleged wrongdoing; and

(3) that the proportionality (or "reasonable relationship") principle is not violated by a determination to award no punitive damages or an amount of punitive damages smaller than the compensatory award.

The failure to give these instructions resulted in a jury charge that strongly suggested to the jury that a huge punitive award such as it in fact returned was necessary to deter Morgan Stanley from future misconduct. Such error requires the grant of a new trial.

As the Court is aware, "the failure to give a requested instruction constitutes reversible error when the complaining party establishes that the requested instruction accurately states the applicable law, the facts in the case support giving the instruction, and the instruction was necessary to allow the jury to properly resolve all issues in the case." *Wransky*, 801 So. 2d at 243 (citing *Auster v. Gertrude & Philip Strax Breast Cancer Detection Inst., Inc.*, 649 So. 2d 883, 887 (Fla. 4th DCA 1995) (per curiam)); *see also Cornette v. Spalding & Evenflo Cos.*, 608 So. 2d 144 (Fla. 4th DCA 1992); *Orange County v. Piper*, 523 So. 2d 196 (Fla. 5th DCA 1988).

We respectfully submit that each of Morgan Stanley's requested instructions indisputably represented accurate statements of the law and were also supported by the facts in the case:

(1) It is well established that compensatory damages can serve a significant deterrent function, even in the absence of punitive damages. *See Memphis Cmty. Sch. Dist. v.*

Stachura, 477 U.S. 299, 307 (1986) ("Deterrence . . . operates through the mechanism of damages that are compensatory . . . .") (emphasis omitted); *State Farm*, 538 U.S. at 419 ("It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence."); *id.* at 425 ("When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."); *see also, e.g.*, *Lane v. Hughes Aircraft Co.*, 993 P.2d 388, 424 (Cal. 2000) (Brown, J., concurring) ("[L]arge compensatory damage awards not based on a defendant's ill-gotten gains have a strong deterrent and punitive effect in themselves.").

(2) Along the same lines, there is no question that a jury is permitted to consider whether its compensatory award has completely removed any profit the defendant earned or hoped to earn as a result of its alleged wrongdoing. One of the principal purposes of punitive damages is deterrence. *See, e.g.*, *W. R. Grace & Co.-Conn. v. Waters*, 638 So. 2d 502, 504 (Fla. 1994). Indeed, when the defendant is a corporation, and not an individual, deterrence is arguably the only relevant purpose of punitive damages. *See, e.g.*, *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992). A compensatory award that equals or, as here, greatly exceeds, the defendant's actual and expected profit will generally suffice fully to deter the defendant and others from committing similar acts in the future. *See, e.g.*, *Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483, 485 (Fla. 1999) (jury assessing punitive damages should

consider "the profitability to [the defendant] of the wrongful conduct and the desirability of removing that profit and of having [the defendant] also sustain a loss"). As this Court recognized elsewhere in its charge, the jury is not permitted to award punitive damages in an amount "larger than is reasonably necessary" to punish and deter. *See, e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 584 (1996) ("The [punitive damages] sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal."). It was therefore essential for the jury to consider the amount of Morgan Stanley's expected and actual profit in order to determine whether the compensatory award — which in this case was over ten times the defendant's expected profit — was fully adequate to deter similar bad behavior. This was the single most powerful argument Morgan Stanley had for awarding no or modest punitive damages, and Morgan Stanley was entitled to have the jury understand from the Court that it was a legally proper factor for it to weigh.

(3) Finally, the Court refused to instruct the jury that the compensatory award can and should be considered as a factor influencing the amount of the punitive damages that are needed. Specifically, the Court refused to instruct the jury, in the context of the reasonable relationship instruction, that it would not violate the proportionality principle to return no punitive award or one that was low in relation to the compensatory damages. *See* 5/17/05 Tr. at 15295:24 – 15299:13 (rejecting instruction that "[t]he requirement of a reasonable relationship is not violated by awarding no punitive damages or a smaller award of punitive damages.")

These requested instructions were particularly germane in the instant case, covering points that were central to the jury's proper performance of its difficult punishment-setting task. As given, the Court's charge studiously avoided any suggestion that the purposes of punitive damages might already have been served by the jury's award of $604 million in compensatory damages. A jury unaware that it may factor compensatory damages into the deterrence calculus and may award small punitive damages without violating proportionality principles is far more likely than an informed jury to believe that substantial punitive damages are necessary to deter the defendant from future bad behavior.

In addition, the Court refused to instruct the jury that it was required to find that any conduct for which Morgan Stanley was punished resulted from the actions of a specific managing agent, director, or officer of the corporation. Under Florida law, a corporation may not be subjected to punitive damages unless the jury makes such a finding. *See Schropp v. Crown Eurocars*, 654 So. 2d 1158, 1161 (Fla. 1995). Therefore, a directed verdict is warranted. In any case, even if the jury had been properly instructed, any finding of entitlement would have been against the weight of the evidence, and warrants a new trial on punitive damages.

XIII. THE PUNITIVE AWARD IS GROSSLY EXCESSIVE AND MUST BE REDUCED.

The punitive award of $850 million in this case is a gigantic exaction which, if upheld, would dwarf anything in the history of Florida jurisprudence. As the Court reviews this award, we ask it to keep well in mind the admonition of the United States Supreme Court that, because punitive damages are punishment, substantial protections are needed to ensure that they are neither arbitrary nor excessive. *E.g.*, *State Farm*, 538 U.S. at 417.

As punishment, $850 million for a single incident of misconduct is truly extraordinary. It is orders of magnitude greater than the $2 million punitive award that the U.S. Supreme Court

considered "tantamount to a severe criminal penalty" in *BMW*, 517 U.S. at 585; it is ***17 times*** the ***largest*** punitive damages award ever upheld by the courts of Florida ($50 million), *see CSX*, 743 So. 2d at 562; and it is a startling 16% of Morgan Stanley & Co.'s net worth (28% when combined with the compensatory award).

Even far smaller punitive awards led the Supreme Court to acknowledge the existence of substantive constitutional limitations on the amount of punitive damages that could be awarded in a given case. Concerned about "the imprecise manner in which punitive damages systems are administered," *State Farm*, 538 U.S. at 417, the Court has instructed lower courts to consider three "guideposts" for determining whether a punitive award is unconstitutionally excessive — (1) whether the magnitude of the award truly reflects conduct of commensurate reprehensibility; (2) whether the punitive award is disproportionate to the harm caused by the conduct; and (3) the civil penalties, if any, applicable to comparable conduct. *BMW*, 517 U.S. at 574-76. The Court has also indicated that "exacting" judicial review is necessary to "ensure[] that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice." *State Farm*, 538 U.S. at 418 (internal quotation marks omitted).

Here, the required "exacting" review compels the conclusion that the $850 million punitive award is grossly excessive. Under the *BMW* analysis, as refined in *State Farm*, the constitutional maximum amount of punitive damages in this case is no more than a nominal amount, and in no circumstances could exceed the amount of compensatory damages. There would be something gravely askew were this Court to hold that Morgan Stanley's dealings with a billionaire investor who had legions of advisors reasonably warrants a punitive award that dwarfs any upheld by any court in the wake of *State Farm* in a case involving an individual

plaintiff.[31] A dramatic reduction in the amount of punitive damages is therefore constitutionally required.

A. Morgan Stanley's Conduct Ranks Relatively Low on the Reprehensibility Scale.

"The most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419 (internal quotation marks and alterations omitted). Put succinctly, "punitive damages may not be grossly out of proportion to the severity of the offense." *BMW*, 517 U.S. at 576 (internal quotation marks omitted).

In *State Farm*, the Supreme Court instructed lower courts to consider five factors when measuring the degree of reprehensibility of a defendant's conduct: (i) whether "the harm caused was physical as opposed to economic"; (ii) whether "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others"; (iii) whether "the target of the conduct had financial vulnerability"; (iv) whether "the conduct involved repeated actions or was an isolated incident"; and (v) whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident." 538 U.S. at 419. Importantly, the Court added, "[t]he existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." *Id.*

Here, the only reprehensibility factor even arguably present is the existence of deceit; the rest of the reprehensibility factors are all clearly absent.

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[31] The only larger exaction of which we are aware — $4.5 billion — was awarded to a class of tens of thousands of people and businesses whose livelihoods were destroyed by the tanker disaster in *In re Exxon Valdez*, 296 F. Supp. 2d 1071 (D. Alaska 2004). Even there, the punitive award (which was reduced from $5 billion) was only 5% of Exxon's "shareholder's equity" (a synonym for net worth) at the time of the trial court's remittitur. *See* 10-K Filed on 2/28/05 for Exxon Mobil Corporation, at 28 (financial data for year-end 2003). Exxon has since appealed the reduced judgment on excessiveness grounds.

First, no physical harm was involved; instead, the harm was purely economic.

Second, the tortious conduct did not endanger the health or safety of others.

Third, Mr. Perelman, a billionaire, certainly was not financially vulnerable. Although CPH repeatedly claimed at trial that Perelman was a vulnerable victim because Morgan Stanley abused his trust, there was no special relationship of trust, such as one that would give rise to a fiduciary duty; rather, Morgan Stanley and Perelman were on opposite sides of a commercial transaction. Plainly, the "vulnerability" claimed by Perelman is not the sort of vulnerability with which *State Farm* was concerned. *See, e.g.*, *Bardis v. Oates*, 14 Cal. Rptr. 3d 89, 104-05 (Cal. Ct. App. 2004) (fellow investors "in a multimillion-dollar land speculation deal" were not considered vulnerable even though the defendant breached his fiduciary duty to them), *cert. denied*, 125 S. Ct. 1325 (2005). Rather, if it is to have any value in distinguishing highly reprehensible conduct from conduct that only barely crosses the threshold of punishability, the "vulnerable victim" factor must be confined to circumstances in which the defendant has preyed upon the financially desperate or the gullible and unsophisticated — the classic "widows and orphans" — who lack knowledge of their rights and are therefore particularly defenseless against trickery or deceit. *Cf. Life Ins. Co. of Ga. v. Johnson*, 701 So. 2d 524, 526-29 (Ala. 1997) (finding conduct highly reprehensible because the defendant engaged in a pattern of selling worthless Medicare supplement policies to "elderly, uneducated, single black women," but nevertheless reducing what originally was a $15 million punishment to $3 million). *See generally State Farm*, 538 U.S. at 433 (Ginsburg, J., dissenting) (discussing how torts are particularly reprehensible when the victim is one of "the weakest of the herd — the elderly, the poor, and other consumers who are least knowledgeable about their rights and thus most vulnerable to trickery or deceit.") (internal quotation marks omitted). It would drain the

"vulnerable victim" concept of all meaning to include Mr. Perelman, a tremendously sophisticated businessman with a team of business and legal advisors to protect his interests, within its reach.

Fourth, there is no evidence in the record that the Sunbeam fraud was anything other than an isolated incident. *See, e.g.*, *Park v. Mobil Oil Guam, Inc.*, No. CVA03-001, 2004 WL 2595897, at *13 (Guam 2004) (fraud was an "isolated incident" under *State Farm* even though the "wrongful acts . . . spanned several years"); *Harris v. Archer*, 134 S.W.3d 411, 437-38 (Tex. Ct. App. Amarillo 2004, pet. denied) (fraud was "isolated incident" although fraudulent acts occurred over several-month period); *cf. Gober v. Ralphs Grocery Co.*, No. D040473, 2005 WL 895207, at *7-8 (Cal. Ct. App. Apr. 19, 2005) (discussing how the repeated misconduct factor looks to whether the defendant is a "recidivist[]") (citing *State Farm*, 538 U.S. at 423).

Thus, this is a paradigm of a "low" reprehensibility case for which *State Farm* allows only a modest punitive award, ***if any at all***. *See State Farm*, 538 U.S. at 419.

The California Court of Appeal's recent decision in *Streetscenes, L.L.C. v. ITC Entertainment Group, Inc.*, No. B168835, 2004 WL 2668695 (Cal. Ct. App. Nov. 23, 2004) (unpublished), is particularly instructive. In *Streetscenes*, the defendant had tricked the plaintiff and several others into investing in a sham film production. The court held that the fraud "ranks relatively low on the reprehensibility scale," as "the harm was purely economic and did not involve the health or safety of the victims" or "implicate the kind of massive fraud associated with Enron, WorldCom and similar recent business scandals." *Id.* at *3-4. "Rather, this unextraordinary fraud case concerned misrepresentations by a corporate agent to experienced investors in an inherently risky product." *Id.* at *4. This type of misconduct, the court recognized, did not "demand the kind of substantial award . . . [as] in cases of 'extreme

reprehensibility' resulting in death or substantial injury." *Id.* The court accordingly held that the $8 million punitive award was unconstitutionally excessive and remanded for a new trial on the amount of punitive damages. *Id.* at *7. The present case involves a fraud of a similar, non-aggravated character.

B. The 1.4:1 Ratio of Punitive to Compensatory Damages Is Indicative of a Grossly Excessive Punishment in the Circumstance of This Case.

"Ratio" considerations merit a reduction in the amount of punitive damages as well. In *State Farm*, the Supreme Court undertook to provide lower courts with more detailed guidance regarding the significance of the ratio between the amount of punitive and compensatory damages than it had supplied in previous cases. Of special significance here, the Court made clear that the existence of a seemingly "low" ratio is no guarantor of non-excessive punitive damages. Most notably for present purposes, the Court explained that compensatory damages alone may suffice to impose all the liability that can be justified in some circumstances, 538 U.S. at 419, and added that "***[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee,***" *id.* at 425 (emphasis added). Applying these guidelines to the facts of the case before it, the Court observed that, even though State Farm's conduct was "reprehensible" and "merit[ed] no praise," *id.* at 419-20, "a punitive damages award at or near the amount of compensatory damages" — *i.e.*, a 1:1 ratio — was likely the constitutional maximum given the "substantial" $1 million compensatory award in that case. *Id.* at 429.

There can be no doubt that compensatory damages totaling $604 million are not just "substantial" as *State Farm* used the term in reference to a $1 million compensatory award, but staggeringly huge. In view of the massive amount of compensatory damages, which dwarfed any gain that Morgan Stanley made or expected to make, and the relatively low reprehensibility

of Morgan Stanley's conduct, any award of punitive damages must be well below the amount of compensatory damages.

Williams v. ConAgra Poultry Co., 378 F.3d 790 (8th Cir. 2004), a recent Eighth Circuit decision involving materially more egregious conduct (racial harassment in the workplace) and materially smaller compensatory damages than the present case ($600,000), is illustrative. In *Williams*, the Eighth Circuit held a $6 million punitive award unconstitutionally excessive and ordered a remittitur to the amount of compensatory damages, explaining:

> Mr. Williams's large compensatory award . . . militates against departing from the heartland of permissible exemplary damages. The Supreme Court has stated that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." Mr. Williams received $600,000 to compensate him for his harassment. Six hundred thousand dollars is a lot of money. Accordingly, we find that due process requires that the punitive damages award on Mr. Williams's harassment claim be remitted to $600,000.

Id. at 799 (citation omitted); *see also Czarnik v. Illumina, Inc.*, No. D041034, 2004 WL 2757571, at *11 (Cal. Ct. App. Dec. 3, 2004) (unpublished) ("1:1 ratio of punitive to compensatory damages [was] the maximum award that is sustainable against a due process challenge" where compensatory damages were $2,196,935 and defendant's conduct "was not highly reprehensible"); *cf. Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 63-64 (2d Cir. 2004) (directing district court to reconsider whether a $2.1 billion punitive award that was equal to the amount of compensatory damages was constitutionally excessive in fraud case where the harm was economic, "defendants did not endanger the health and safety of others," and "plaintiffs in this case were arguably not 'financially vulnerab[le]"), *cert denied*, 73 U.S.L.W. 3570 (2005).[32]

[32] Even more recently, the Eighth Circuit reduced a $15,000,000 punitive award to $5,000,000 in a products liability action against a tobacco company in which the jury had awarded $4,025,000 in compensatory damages. *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594 (8th Cir. 2005). The court explained that, given the substantiality of the compensatory award, "a ratio of approximately 1:1 would comport with the requirements of due

Indeed, the U.S. Supreme Court's underlying reasoning in both *BMW* and *State Farm* suggests that even a punitive award equal to the $604 million compensatory award would be far too high in the circumstances here. As the Supreme Court explained in *State Farm*, "[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages ***should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.***" 538 U.S. at 419 (emphasis added). And even then, the amount of punitive damages must be no greater than the ***minimum*** necessary to achieve the State's interest in retribution and deterrence. *See, e.g.*, *id.* at 419-20 ("While we do not suggest there was error in awarding punitive damages based upon State Farm's conduct toward the Campbells, a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further."); *BMW*, 517 U.S. at 584 ("The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal. The fact that a multimillion dollar penalty prompted a change in policy sheds no light on the question whether a lesser deterrent would have adequately protected the interests of Alabama consumers."); *Continental Trend Res., Inc. v. OXY USA Inc.*, 101 F.3d 634, 641 (10th Cir. 1996) (the relevant issue under *BMW* is "the minimum level of penalty necessary to achieve the state's goal of deterrence").

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process" notwithstanding that the misconduct, fraudulent marketing of cigarettes resulting in the death of the plaintiff's decedent, was "highly reprehensible." *Id.* at 602-03. Suffice it to say, Morgan Stanley's conduct is of substantially lesser reprehensibility than that of the defendant in *Boerner*, and its liability for compensatory damages massively greater, making even a "ratio of approximately 1:1" excessive in this case.

Here, the amount of punitive damages necessary to achieve Florida's legitimate interests in retribution and deterrence (assuming that it has any such interests at all where both perpetrator and victim were located in New York) is substantially less than $604 million. As the Supreme Court has recognized, "deterrence . . . operates through the mechanism of damages that are compensatory" as well. *Memphis Cmty. Sch. Dist.*, 477 U.S. at 307; *cf. San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) ("The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."). Here, the $604 million in compensatory damages vastly exceeds the approximately $32 million in total fees that Morgan Stanley allegedly made through the Sunbeam transaction. No rational company would risk having to pay $604 million for the prospect of making $32 million unless it was virtually certain that the fraud would go undiscovered, as plainly was not the case here. Consequently, ***no*** further liability, or at most some nominal amount of punitive damages, can be justified as needed for deterrent purposes here. *See, e.g.*, *United States v. Bailey*, 288 F. Supp. 2d 1261, 1281 (M.D. Fla. 2003) (setting aside $3,000,000 punitive award "in its entirety" because, among other things, the compensatory damages exceeded the gain to the defendant, making "the imposition of further sanctions to achieve punishment or deterrence" unnecessary).[33]

Still another factor that makes it inappropriate to use the $604 million compensatory award as a benchmark for the punitive damages in this case is that this figure far exceeds the

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[33] A firm will be deterred whenever the gain is less than the expected loss (which is equal to the actual loss times the probability of detection). *See, e.g.*, Kenneth S. Abraham & John C. Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of the Defendant's Wealth*, 18 J. LEGAL STUD. 415, 417 (1989) ("[A] potentially liable defendant will compare the benefits it will derive from an action that risks tort liability against the discounted present expected value of the liability that will be imposed if the risk occurs."). Because the alleged gain to Morgan Stanley was $32 million, and the probability of detection was surely far higher than 5%, the compensatory award of $604 million more than suffices by itself to deter Morgan Stanley and other investment banks from partaking in misconduct such as that alleged here.

harm attributable to Morgan Stanley's conduct. That is so for two reasons. First, Morgan Stanley played at most an accessorial role in any fraud: Sunbeam was the principal wrongdoer (and beneficiary), and Arthur Andersen appears to have been an accessory. Second, $604 million is a benefit-of-the-bargain figure, which is a contractual measure of damages that is untethered from the amount of harm to the victim. Of course, punitive damages are not available for contract breaches. *Ferguson Transp., Inc. v. North Am. Van Lines, Inc.*, 687 So. 2d 821, 822 (Fla. 1996) (per curiam). It follows that the proper comparison should be with that portion of the actual out-of-pocket loss sustained by CPH, which is almost surely far less than the $604 million assignable to Morgan Stanley. Because the record does not permit ascertainment of that figure — and indeed because it is possible that CPH suffered no harm at all from the Sunbeam transaction — the amount of CPH's compensatory award provides no support for the massive punitive award here.

In sum, even assuming that some punitive damages were allowable here, it is clear that a more "modest" punitive award would suffice and that this Court should go "no further." *State Farm*, 538 U.S. at 419-20. The Third Circuit's decision in *Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc.*, 181 F.3d 446 (3d Cir. 1999), is precisely on point. In that case, a manufacturer of bone fixators and several of its distributors were found liable for breach of contract, fraud, and other business torts. *Id.* at 453. The jury awarded $48 million in compensatory damages and $100,600,000 in punitive damages, which the trial court reduced to $50 million (3.3% of the defendant's net worth). *Id.* at 453-54, 469 n.6. The Third Circuit held that the reduced punitive award remained unconstitutionally excessive because, among other things, the plaintiff (to whom the defendant, as its agent, arguably owed a fiduciary duty) "[was] not a financially weak or vulnerable target" and "the harm inflicted on [it] was economic, rather

than physical, and hence 'less worthy of large punitive damages awards than torts inflicting injuries to health or safety." *Id.* at 467 (citing *Continental Trend Res.*, 101 F.3d at 638). In these circumstances, the court explained, the high amount of compensatory damages "may more appropriately be accompanied by a lower punitive damages ratio." *Id.* at 467-68 (citing *BMW*, 517 U.S. at 582). It therefore "conclude[d] that the proper, reasonable punitive damages award is no more than $1 million." *Id.* at 468-69.

C. The Third Guidepost Also Indicates That the Punitive Verdict Is Excessive.

BMW's third guidepost — "the disparity between the punitive damages award and the civil penalties authorized or imposed in comparable cases," *State Farm*, 538 U.S. at 428 (internal quotation marks omitted) — also indicates that an $850 million punishment is grossly excessive. Indeed, as far as Morgan Stanley is aware, the highest punitive award for fraudulent activity ever upheld by Florida courts is approximately $8 million, *see Banderas v. Banco Central del Ecuador*, 461 So. 2d 265 (Fla. 3d DCA 1985), for a purely economic tort is $19 million, *see American Med. Int'l, Inc. v. Scheller*, 590 So. 2d 947, 951 (Fla. 4th DCA 1992) (per curiam), and for any tort is $50 million (wrongful death caused by deficient railroad track maintenance), *see CSX*, 743 So. 2d at 562.[34] Based on this precedent, Morgan Stanley certainly did not have "fair notice" that an $850 million punishment could be imposed for its misconduct. *Cf. BMW*, 517

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[34] The second highest punitive verdict ever upheld by the Florida courts is $31 million (for widespread harms caused by asbestos). *See Owens-Corning Fiberglas*, 749 So. 2d at 489; *cf. id.* (Overton, J., dissenting) (observing that, at the time, "[t]his was the largest punitive damage verdict awarded by Florida courts"). *CSX, Ballard*, and *Scheller* are discussed more thoroughly below.

A $137 million punitive award was imposed in Florida federal court against the Cuban Air Force ***for the torture and death of three individuals.*** *See Alejandre v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997). For reasons relating to foreign sovereign immunity, that award does not appear to have been challenged on excessiveness grounds or collected. *See Alejandre v. Telefonica Larga Distancia De Puerto Rico, Inc.*, 183 F.3d 1277 (11th Cir. 1999).

U.S. at 584 (considering judicial decisions as part of third guidepost analysis). Accordingly, this guidepost also indicates that a substantial reduction in the punitive award is necessary.

XIV. THE PUNITIVE VERDICT IS EXCESSIVE UNDER FLORIDA LAW.

"A punitive damages award is considered excessive [under Florida law] when the amount of damages is out of proportion to the degree of malice or wantonness of the defendant's conduct in relation to the defendant's financial worth." *Gregg v. U.S. Indus., Inc.*, 887 F.2d 1462, 1477 (11th Cir. 1989) (citing *Arab Termite & Pest Control of Fla., Inc. v. Jenkins*, 409 So. 2d 1039, 1043 (Fla. 1982)). Morgan Stanley is aware of no Florida case involving a defendant whose net worth was at least $100 million where a punitive award of more than 2% of net worth has been upheld on appeal. *See CSX*, 743 So. 2d at 562 (affirming $50 million punitive award, which was 1% of defendant's $5 billion net worth); *Ballard*, 749 So. 2d at 487, 489 (affirming $31 million punitive award, which was 1.24% of the asbestos company's $2.5 billion net worth); *Scheller*, 590 So. 2d at 951 (affirming $19 million punitive award for tortious interference with business relationship where defendants had a "combined net worth of over one billion"); *cf. Gregg*, 887 F.2d at 1476-77 (affirming trial court remittitur of $18.5 million punitive award for fraud to $2 million, which was ".4% of [the defendant's] net worth of $520 million"). *See generally Dunn v. Hovic*, 1 F.3d 1371, 1383 (3d Cir. 1993) ("'[A] typical ratio for a punitive damages award to a defendant's net worth may be around one percent.'") (quoting *Cash v. Beltmann N. Am. Co.*, 900 F.2d 109, 111 n.3 (7th Cir. 1990)).

Even a punitive award equal to 2% of Morgan Stanley's net worth (approximately $104 million) is excessive here, because Morgan Stanley's conduct was markedly less reprehensible than that of the defendants in other cases involving punishments for large companies at or approaching the 2% level. In *CSX*, for instance, the defendant had purposely engaged in "cutbacks" in railroad track maintenance and inspection at several locations in order to save

"approximately $2.4 billion for the company." 743 So. 2d at 560. After a train derailed, killing eight, the trial court explained that the $50 million punitive award was reasonable in light of the evidence of the misconduct in that case:

> This Court finds the evidence to be clear and convincing, sufficiently showing that Defendant's conduct in breaching its duty was deliberate, reckless, willful, and wanton, evincing a reckless disregard for the safety of rail passengers and the public at large. This evidence showed that although cost-cutting measures may have saved Defendant over two billion dollars, society paid with eight human lives. The clear and convincing evidence showed that the price of cost-cutting safety to turnover larger profits is too great of a price. This not only bespeaks culpable negligence, it is borderline criminal.

Id. at 562-63. The Fourth District Court of Appeal affirmed. *Id.* at 564.

In *Ballard*, the evidence revealed that "for more than thirty (30) years Owens-Corning concealed what it knew about the dangers of asbestos," including the fact that asbestos was "toxic" and that "even slight exposures to asbestos in [its product] could cause mesothelioma, . . . an always fatal cancer of the lining of the chest wall." 749 So. 2d at 487. Moreover, the evidence indicated that the defendant knew of ways to remove the asbestos from its product but refrained from doing so "because the removal of asbestos from [its product] at that time did not offer any sales growth potential." *Id.* In the face of this evidence, the Florida Supreme Court held that $31 million in punitive damages was not excessive, remarking that "it would be difficult to envision a more egregious set of circumstances than those found herein by the trial court to constitute a blatant disregard for human safety involving large numbers of people put at life-threatening risk." *Id.* at 489.

In *Scheller*, the harm was economic but reflected a pattern of malicious and repeated misconduct that was motivated by a desire for "outright revenge." 590 So. 2d at 952. The conduct began in 1979, when a hospital owned by the defendant terminated Dr. Scheller from its staff. He then solicited other members of the hospital's staff to designate him as their medical

expert and rendered pathology services to certain designated patients. *Id.* at 948. After a hospital administrator tried to thwart him from doing do, Dr. Scheller sued the hospital for tortious interference with advantageous business relationships, obtaining some injunctive relief. *Id.* at 949. Over the next ten years, the interference got worse, in part out of acrimony resulting from the prior suit. Dr. Scheller sued again, this time receiving $19 million in punitive damages. *Id.* at 951. The trial judge upheld the award, stating:

> The recurrence of the activity after an adverse verdict and the shortness of time, the fact there had been courts that had interpreted the by-laws and had clearly told the hospital what it could and could not do, all of that was before the jury.
>
> And, the jury had a right to consider [the administrator's] explanation of what his motivation was.
>
> But the point is there was an opposite picture that was put forth, a history of ten years of contentious and antagonistic relationships that had a certain theme to it and I think the jury was fully able to look at that and arrive at its determination as to what was the true motivation behind the hospital's activities and was there a degree of recklessness, and malice and outright revenge that came into play here, and the jury had made that determination.

Id. at 951-52. Though remarking that "[t]he enormity of the punitive damages award has not escaped our attention," the Fourth District Court of Appeal affirmed. *Id.* at 951.

The misconduct here at issue is not nearly as egregious as in these prior record-setting cases. Unlike *CSX* and *Ballard*, the fraud here was a solitary incident and did not involve any risks to health or safety, much less result in physical harm. Unlike *Scheller*, there was no evidence of "antagonism" or "outright revenge."

Indeed, proper application of the eleven misconduct "factors" listed in *Ballard*, 749 So. 2d at 484-85, reveals that a small amount of punitive damages, or none at all, is appropriate under Florida law here. Those factors are:

> (1) an amount reasonable in relation to the harm likely to result from [the defendant's] conduct as well as the harm that actually has occurred;

(2) the degree of reprehensibility of [the defendant's] conduct, the duration of that harmful conduct, [the defendant's] awareness, any concealment and the existence and frequency of similar past conduct;

(3) the profitability to [the defendant] of the wrongful conduct and the desirability of removing that profit and of having [the defendant] also sustain a loss;

(4) the financial condition of [the defendant] and the probable effect thereon of a particular judgment;

(5) all the costs of litigation to defendant and to the plaintiff;

(6) the total punishment [the defendant] has or will probably receive from other sources, as a mitigating factor;

(7) the seriousness of the hazard to the public, the attitude and conduct of [the defendant] upon discovery of the misconduct;

(8) the degree of [the defendant's] awareness of the hazard and of its excessiveness;

(9) the number and level of employees involved in causing or covering up the . . . misconduct;

(10) the duration of both the improper . . . behavior and its cover-up; and

(11) the existence of other civil awards against [the defendant] for the same conduct.

The first and second considerations track the first two *BMW* guideposts and certainly do not warrant a large punitive award here, for reasons already discussed. The third consideration — "the profitability to [the defendant] of the wrongful conduct and the desirability of removing that profit and of having [the defendant] also sustain a loss" — strongly supports a drastic reduction of the jury's award, because the compensatory damages alone impose a massive loss on Morgan Stanley that far exceeds any gain it received or could have expected to receive from the alleged misconduct. *Cf. CSX*, 743 So. 2d at 559-60 (safety cutbacks resulted in savings of $2.4 billion but compensatory damages were only $6.14 million). In addition, beyond any

pecuniary loss, the finding of liability for fraud threatens to cause Morgan Stanley serious reputational injury.

The fourth factor is the defendant's wealth, which in this Court's words determines the proper degree of "ouch." *E.g.*, 5/13/05 Tr. at 14804:16. Given the clear pattern in Florida of punitive damages that do not exceed 2% of net worth for large companies, this factor too weighs heavily in favor of a drastic reduction of the award.[35]

The fifth consideration is the cost of litigation to the defendant and the plaintiff. Again, as expensive as litigating a big case may be, those costs are dwarfed by the size of the award of compensatory damages alone in this case — an award that is substantially greater than the amount necessary to make CPH whole for its loss and instead constitutes quasi-contractual benefit-of-the-bargain damages. In such circumstances, no amount of punitive damages (much less $850 million) can be justified as necessary to ensure that the cost to the plaintiff of pursuing a claim does not erode the compensatory damages to the point of undermining deterrence.

The sixth factor — the extent to which the defendant has been punished by other means for the conduct at issue — is employed "as a mitigating factor." It was undisputed that MSSF lost at least $300 million due to the Sunbeam fraud. This loss is a relevant and important mitigating factor in this case. So too is the inevitable reputational harm that Morgan Stanley has suffered as a consequence of this lawsuit.

The seventh consideration is the seriousness of the hazard to the public and the defendant's behavior upon discovery of the misconduct. This factor is primarily concerned with product manufacturers who leave a hazardous product on the market for many years (or do not

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[35] This is a larger percentage of net worth than would be permitted in other jurisdictions. *See, e.g.*, *Proctor v. Davis*, 682 N.E.2d 1203, 1217 (Ill. App. Ct. 1997) ("[A]lthough Upjohn is a large corporation with a net worth of approximately $1.7 billion, punishment in the amount of 2% of its net worth is excessive in the extreme.").

act quickly enough to recall the product after learning about a new danger), such as Owens-Corning in the *Ballard* case. *See, e.g.*, 749 So. 2d at 487-88. It is completely inapposite to an investment banking firm and its billionaire "victim."

The eighth factor is the defendant's degree of awareness of the hazard and its excessiveness. This factor too is concerned with health and safety dangers, as the term "hazard" indicates. Even assuming that it also encompasses purely economic frauds, it would not warrant a significant punitive award here, as no evidence at trial demonstrated that Morgan Stanley was aware that Perelman, who after all had his own team of lawyers and investment bankers, was relying so extensively as now claimed on its statements.[36]

The ninth consideration is the number and level of employees involved in the misconduct. The deemed facts and the facts in the litigation misconduct statement identify only a handful of employees. In a company of Morgan Stanley's size and scope (with more than 8000 employees), that is an insignificant number. Accordingly, this factor does not indicate that a record-breaking punitive award is warranted.

The tenth factor is the duration of the misconduct and any cover-up. Although the deemed facts indicate that Dunlap had been manipulating the books since 1996, those facts also indicate that Morgan Stanley did not become involved in the alleged conspiracy until much later (April 1997). Talks with Coleman did not occur until several months after that (December 1997), with the acquisition being completed within three months (March 1998). This hardly resembles the thirty-year course of conduct in *Ballard*, 749 So. 2d at 487, or ten-year feud in

[36] In fact, Morgan Stanley was not aware of the Sunbeam fraud at all. But, because of this Court's discovery sanctions, Morgan Stanley has been precluded from establishing that. Indeed, the very fact that the sanction has effectively barred Morgan Stanley from establishing the inapplicability of aggravating factors under Florida law perfectly illustrates why the sanctions order in this case violates its rights under *Humana* and the Due Process Clause.

Scheller, 590 So. 2d at 951. Accordingly, this factor too cannot support the record-breaking punitive award.

The final factor is the existence of other civil awards against the defendant for the same conduct. Although ordinarily the existence of multiple awards for the same conduct might be thought to be a mitigating factor, it does not follow that the absence of other awards is not. To the contrary, when, as here, the relevant federal agency (the SEC) pursued other parties (Sunbeam and Arthur Andersen), while electing not to penalize the defendant, that is powerful reason to conclude that the defendant's conduct is not especially egregious and that a record-breaking punitive damages award is wholly unwarranted.

In sum, several of the *Ballard* factors are inapplicable in cases involving purely economic injury. The remaining factors may permit some punitive damages, but they certainly do not justify the record-smashing $850 million punitive award in this case. Indeed, even if the Court were to find that Morgan Stanley attempted to conceal the fraud — a finding that we submit would be unsupported by the record evidence — such a finding would not justify a punitive award equaling the highest one ever upheld in Florida ($50 million), much less one 17 times that amount. *Cf. McGee*, 837 So. 2d at 1015 (jury awarded no punitive damages even though there was tortious conduct and evidence that "Ivey Report" had been withheld). The Court should accordingly order a remittitur to a figure well below the amounts that Florida courts have upheld in cases involving substantially greater degrees of culpability.

CONCLUSION

For the foregoing reasons and those stated in the Motion for Judgment in Accordance with Motion for Directed Verdict and Alternative Motion for New Trial, the Court should enter

judgment in favor of Morgan Stanley or, in the alternative, grant Morgan Stanley's motion for new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 9 day of June, 2005.

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

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

CASE NO: CA 03-5045 AI

MORGAN STANLEY'S WITNESS DISCLOSURE FOR THE JUNE 20-21, 2005 POST-TRIAL HEARING

Pursuant to the Court's May 18, 2005 Order, Morgan Stanley & Co. Incorporated ("Morgan Stanley") hereby provides its list of witnesses that Morgan Stanley may call at the post trial hearing on June 21 and 22, 2005. Morgan Stanley reserves the right to modify or supplement its list of witnesses consistent with the Florida Rules of Civil Procedure, the agreement of the parties, further orders of the Court, or any other applicable law or procedure. Morgan Stanley further reserves the right to call any of the witnesses identified on Coleman (Parent) Holdings, Inc.'s ("CPH's") witness list. Morgan Stanley further reserves the right to add or withdraw witnesses in response to CPH's witness disclosure or exhibit list. Morgan Stanley further reserves the right to modify or supplement this list in response to unexpected evidence or argument presented by Coleman (Parent) Holdings Inc. ("CPH") which requires rebuttal; to cross-examine CPH witnesses; or in response to rulings by the Court.

1. Deloitte & Touche USA, L.L.P. (live): A corporate representative of Deloitte & Touche may testify regarding the creation, authenticity, and contents of trial exhibit MS 97, MS 260, and the two memos that comprised trial exhibit MS 513.

2. Sunbeam Corporation (live): A corporate representative of Sunbeam may testify regarding the creation, authenticity, and contents of trial exhibit MS 260.

3. David Ross (live): Mr. Ross is a Senior Vice President of Lexecon, Inc., a consulting firm that specializes in the application of economics to a variety of legal and regulatory issues. Mr. Ross is an expert in financial economics and the economics of corporate law. Mr. Ross will testify regarding the value of the warrants CPH received from Sunbeam in the August 12, 1998 settlement agreement. Mr. Ross's opinions are disclosed in his report, which is submitted together with this disclosure.

4. Todd Slotkin (live and/or by deposition): Mr. Slotkin is the Chief Financial Officer and Executive Officer and Executive Vice President of MAFCO. Mr. Slotkin may testify regarding the valuation of the warrants CPH received from Sunbeam pursuant to the August 12, 1998 settlement agreement.

5. Lawrence Winoker (live and/or by deposition): Mr. Winoker is Senior Vice President, Controller, and Treasurer of MAFCO. Mr. Winoker may testify regarding the valuation of the warrants CPH received from Sunbeam pursuant to the August 12, 1998 settlement agreement.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 6th day of June, 2005.

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Exhibit to Morgan Stanley's Witness Disclosure for the June 20-21, 2005 Post-Trial Hearing

Report of David J. Ross

REPORT OF DAVID J. ROSS

I. QUALIFICATIONS

1. I, David J. Ross, am Senior Vice President of Lexecon, a consulting firm that specializes in the application of economics to a variety of legal and regulatory issues. Among the staff and professional affiliates of Lexecon are several prominent academics and a group of full time economists, accountants, computer programmers, and research assistants. At Lexecon, I have specialized in the areas of financial economics and the economics of corporate law. I have worked on hundreds of matters involving a wide variety of financial issues. I have also published several articles. My curriculum vitae, which contains a list of my publications and other professional activities, is attached as Exhibit A.

2. I received a B.A. in economics from the University of Chicago in 1983. In 1985, I received an M.B.A. from the Graduate School of Business at the University of Chicago, having completed the specialization requirements in economics, finance and industrial relations.

3. I have testified as an expert witness regarding a wide variety of financial issues (including valuation) in proceedings throughout the United States. My prior testimony is also shown on Exhibit A.

II. INTRODUCTION AND SUMMARY OF CONCLUSIONS

4. On August 12, 1998, Sunbeam Corporation ("Sunbeam" or the "Company") entered into a settlement agreement (the "Settlement Agreement") with Coleman (Parent) Holdings Inc. ("CPH"). See MS 96. On August 24, 1998, pursuant to the Settlement Agreement, Sunbeam issued to CPH certain warrants ("the Warrants") to

purchase shares of Sunbeam Common Stock (the "Warrant Shares"). See MS 96A. The warrants provided that CPH, its successor or permitted assigns (the "Holder") could purchase from the Company 23,000,000 shares of Sunbeam Common Stock (the "Warrant Share Amount") at $7.00 per share (the "Exercise Price") at any time until August 24, 2003 (the "Expiration Date"). Id.

5. I have been asked by counsel for Morgan Stanley to estimate the fair market value of the Warrants on the date of the Settlement Agreement as well as the date the Warrants were issued. In performing this work, I have received assistance from members of Lexecon's professional staff. Exhibit B identifies the materials we have reviewed in connection with the preparation of this report. As a result of this analysis, I have reached the following principal conclusions:

- The best estimate of the value of the Warrants on the date of the Settlement Agreement is $135,846,645.
- The best estimate of the value of the Warrants on the date the Warrants were issued is $140,426,588.

In the remainder of this report, I provide the bases for my principal conclusions. I also critique the purported valuations of the Warrants that appear in MS 513 and MS 833 and explain why these purported valuations differ from mine.

III. THE VALUE OF THE WARRANTS

A. Principals of warrant valuation

6. Warrants are a special type of call option, which is a financial instrument that provides the holder with the right to buy shares of an underlying stock at a specified price (known as the exercise price) during a given time period. The principal distinction between ordinary call options and warrants is that call options are issued by a

third party (who receives the proceeds and deliver shares of the underlying stock to the holder if the call option is exercised) whereas warrants are issued by the firm (which receives the proceeds and issues shares of its own stock to the holder if the warrant is exercised).

7. The Black-Scholes formula is the standard method in finance for valuing call options. See, e.g., Brealey, Richard A., and Myers, Stewart C., Principles of Corporate Finance (7th Edition, McGraw-Hill/Irwin, 2003), at 603. This formula expresses the value of the call option as a function of five variables: the price of the underlying stock (S), the exercise price of the option (K), the number of years until the option expires (t), the annual standard deviation (or "volatility") of the returns of the underlying stock (σ), and the risk-free rate of interest (r).[1] Other things equal, the value of a call option is greater, the greater the price of the underlying stock, the lower the exercise price, the longer the time until maturity, and the greater the volatility of the underlying stock.[2]

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1. Specifically, the Black-Scholes formula for the value of a call option is:

$$S\,N(d1) - \exp(-rt)\,K\,N(d2),$$

where $d1 = \log[P/\exp(-rT)]/\sigma\sqrt{t} + \sigma\sqrt{t}/2$,
$d2 = d1 - \sigma\sqrt{t}$, and
$N(\,)$ is the cumulative normal probability function. Id.

2. When the current price of the underlying stock (S) exceeds the exercise price of a call option (K), the option is said to be "in-the-money." Conversely, when the exercise price of a call option exceeds the current stock price, the option is said to be "out-of-the-money." Even out-of-the-money options are valuable prior to maturity because it is possible that such options will be in-the-money at maturity. (The greater the volatility of the underlying stock, the more likely this is to occur.) See, e.g., Brealey & Myers (2003), Table 20.1 (showing the June 22, 2001 prices of out-of-the-money call options on AOL Time Warner stock). The data establish that Sunbeam's out-of-the-money call options were valuable, too. For example, on August 13, 1998, call options on Sunbeam stock with an exercise price of $12.50 that matured in January 2001 traded at prices ranging from $2 3/8 to $2 3/4 per share, and call options with an

8. Since warrants are a special type of call option, it is not surprising that the valuation of warrants is closely related to the valuation of call options. In fact, the value of warrants can be derived using the Black-Scholes model with three adjustments: (1) the stock price (S) is replaced the equity value of the firm per share of common stock (V/N); (2) the standard deviation of the returns on common stock (σ) is replaced by the standard deviation of the firm's equity (σ_v); and (3) the entire formula is multiplied by the dilution factor (N + M)/(N), where V = the equity value of the firm, N is the number of common shares outstanding, and M is the number of additional common shares to be issued upon exercise of the warrants. See Galai, D. and Schneller, M.I. "Pricing of warrants and the value of the firm," The Journal of Finance (1978), 1333-42; Schultz, G. U. and Trautmann, S., "Robustness of option-like warrant valuation," J. of Banking & Finance (1994), 841-59; Sidenius, Jakob, "Warrant Pricing – Is Dilution a Delusion?" Financial Analysis Journal, September/October 1996, 77-80; Veld, C., "Warrant pricing: a review of empirical research," The European Journal of Finance (2003), 61-91. I refer to this as the "dilution-adjusted Black-Scholes formula."

9. Warrants also can be valued as otherwise identical call options on the value of the firm's common stock; this is referred to as "option-like warrant valuation." See Schultz and Trautmann (1994), Sidenius (1996), and Veld (2003). Because one does not have to calculate σ_v (which can not be observed directly) to implement option-like warrant valuation, this approach is more tractable than the

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exercise price of $10 that matured in January 2001 traded at prices ranging from $2 7/8 to $3 1/4 per share; these options were out-of-the-money because Sunbeam stock closed at $8 9/16 on August 13, 1998. (We obtained data for options on Sunbeam stock from OptionMetrics, a widely available, comprehensive source of high quality historical data for the U.S. equity options market.)

dilution-adjusted Black-Scholes formula. Academic research has also found that except in unusual cases (which are not relevant here), the valuations resulting from either method will be essentially the same. Id.

B. Special considerations applicable to the Warrants

10. In addition to the general considerations discussed above, there are two special considerations that are relevant to the valuation of the Warrants. First, exercise of the Warrants would have provided the Holder with a large-percentage block of Sunbeam Common Stock. When the Warrants were issued, Sunbeam had approximately 100 million shares of common stock outstanding. Thus, if the Warrants had been exercised, the 23 million Warrant Shares would have constituted approximately 19 percent of Sunbeam's common stock (other things equal). This, by itself, would have been the largest single block of Sunbeam common stock.[3] The Warrant Shares combined with 14 million shares of Sunbeam Common Stock that CPH already owned would constitute approximately 30 percent of Sunbeam's outstanding shares.

11. Large-percentage blocks of common stock are typically priced at substantial premiums to the exchange price. See Barclay, M. and Holderness, Clifford G., "Private Benefits From Control of Public Corporations," Journal of Financial Economics (1989) 371-395. These authors found that block trade prices average 20 percent above the post-announcement exchange price. Id., at 371.[4] Since the Warrants

3. When the Warrants were issued, the largest block of Sunbeam common stock (17,541,398 shares) was held by Franklin Mutual Advisers, Inc. See Sunbeam Corp. proxy statement, May 12, 1998 and Sunbeam Corp. proxy statement dated May 11, 1999.

4. The sample studied consisted of 63 block trades that occurred between 1978 and 1982 involving at least 5 percent of the common stock of NYSE or Amex corporations. Id., at 371. Block sizes in the sample ranged from 6.6 percent to 63.4 percent; the average was 20.7 percent, and the median was 17.4 percent. Id., at 378. All of the blocks involved the firm's largest blockholder. Id., at 384.

provided the Holder with the right to acquire the largest block of Sunbeam Common stock, and the per-share value of such large-percentage blocks is typically greater than the per share value of exchange traded shares, it is appropriate to apply a large-percentage block premium to the price of the underlying shares when valuing the Warrants. Therefore, in order to value the Warrants, I apply a 20 percent premium to the exchange price of the underlying shares.[5] (I also report what the values would be if no such premium were applicable.)

12. The second special consideration is restrictions on the sale the Warrants and the Warrant Shares. CPH agreed not to transfer at least 50 percent of the Warrants or the Warrant Shares for a period of three years from the date of the Settlement Agreement. See MS 96, at 7-8. Moreover, the Warrants and the Warrant Shares were not registered. See MS 96A, at 1.[6] Under these circumstances, it might be appropriate to apply a discount for lack of marketability.

13. Several recent academic studies have analyzed the relationship between the prices of new issues of restricted stock with similar issues of registered shares.[7] Wruck found that the difference in average discounts between the restricted

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5. Barclay and Holderness (1989) also present the results of multiple regression analyses which examine the relationship between the size of the premium, the characteristics of the issuer and the characteristics of the block. Id, at 390. We applied their coefficient estimates to data concerning Sunbeam and the Warrant Shares and found that one would expect the block premium for the Warrant Shares to be larger than the 20 percent average discussed in the text.
6. Note, however, that Coleman Parent obtained registration rights as part of the Settlement Agreement. See MS 96, at 3 & Exhibit B.
7. See Wruck, K. H., "Equity Ownership Concentration and Firm Value," Journal of Financial Economics (1989), 3-28; Hertzel, M. and Smith, R. L., "Market Discounts and Shareholder gains for Placing Equity Privately, Journal of Finance (1993) 459-69; Bajaj, M., Denis, D. J., Ferris, Sp. P., and Sarin, A., "Firm Value and Marketability Discounts, Journal of Corporate Law (2001), 89-115; Wu, Y., "The choice of equity-selling mechanism," Journal of Financial Economics (2004), 93-119;

shares in her study and registered shares was 17.6 percent, while the difference in median discounts was 10.4 percent. See Wruck (1993), at 17. Krishnamurthy et. al. found that the average difference in discounts between restricted shares and shares with registration pending or not known to be restricted was 18.03 percent in their sample. See Krishnamurthy et. al. (2005), at 222. Hetzel & Smith used a multiple regression analysis to take into account the affect of other variables on discounts, and found that the discount for restricted shares in their study was 13.5 percent. See Hetzel & Smith (1993), at 479. Both Bajaj et. al. (2001) and Wu (2004) also used multiple regression analyses; these authors found a discount for restricted shares of 7.23 percent and 9.06 percent, respectively, in their samples. See Bajaj et. al. (2001), at 113; Wu (2004), at 117. Based on these studies, I apply a 15 percent discount for lack of marketability to the Warrants.[8]

C. The Value of the Warrants

14. In order to value the Warrants using either the dilution-adjusted Black-Scholes formula or the option-like warrant valuation method, data regarding five input variables are required: the price of the underlying stock (S), the exercise price of the option (K), the number of years until the option expires (t), the volatility of the returns of the underlying stock (σ), and the risk-free rate of interest (r). Two of these inputs are determined by the terms of the Warrants: the exercise price of the Warrants was $7.00 per share, and the Warrants expired five years after they were issued. The risk-free rate of interest is also straightforward: on August 12, 1998, the date of the Settlement

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Krishnamurthy, S., Spindt, P., Subramaniam, V., and Woidtke, T., "Does investors identity matter in equity issues? Evidence from private placements," Journal of Financial Intermediation (2005), 210-238.

8. The liquidity discount is applied to the Warrants, not the price of the underlying security, because the restrictions on transfer lapsed prior to the expiration date of the Warrants. See ¶ 12 supra.

Agreement, the yield on 5-year U.S. Treasury notes was 5.33 percent; on August 24, 1998, the date the Warrants were issued, the yield on 5-year U.S. Treasury notes was 5.16 percent. The other two inputs -- the price of the underlying stock, S, and the volatility of the returns of the underlying stock (σ) -- require more discussion.

15. On August 12, 1998, Sunbeam stock closed at $6 7/8 per share. However, this price does not reflect the Settlement Agreement because Sunbeam did not disclose the Settlement Agreement until after the close of trading.[9] On the next day, August 13, 1998, Sunbeam's stock price increased by 24.6 percent in response to the disclosure, and closed at $8 9/16. See Exhibit C (a Dow Jones News Service report dated August 13, 1998). Since the closing price on August 13, 1998 does reflect the Settlement Agreement, I use the closing price on August 13, 1998 to value the Warrants on the date of the Settlement Agreement. On August 24, 1998, the closing price of Sunbeam's stock was $8 13/16; I use this price to value the Warrants on the date the Warrants were issued.

16. There are two standard approaches to estimating the volatility of stock returns. The first is to calculate the historic volatility of the actual returns of the underlying stock in a period prior to the valuation date. See, e.g., Hull, J. C., Options, Futures & Other Derivatives, (Fourth Edition, Prentice-Hall, Inc., 2000), at 241-44. The length of the historical time period chosen is somewhat arbitrary. Sometimes daily data over the most recent 90 to 180 days is used because data that are too old may not be relevant for predicting the future. Id., at 242. Sometimes the time period over which the volatility is measured is set equal to the time period over which it is to be applied; for a five-year option, five years of historical data would be used. Id. Exhibit D reports the

9. The Dow Jones News Service reported the Settlement Agreement at 6:25 p.m. (Eastern Standard Time).

historic volatility of Sunbeam's stock returns on various dates. Id. For dates in 1998, the 90-day and 180-day historic volatilities range from approximately 84 percent to 104 percent. However, by December 31, 1999, the 90-day historic volatility was approximately 76 percent and the 180-day historic volatility was approximately 70 percent. At all the dates shown the 5-year historic volatility was approximately 55 percent.

17. The alternative approach involves what is known as "implied volatilities." See, e.g., Hull, J. C., Options, Futures & Other Derivatives, (Fourth Edition, Prentice-Hall, Inc., 2000), at 255. Implied volatilities are calculated by determining the volatilities that when used in the Black-Scholes formula would yield the observed prices of traded options and reflect the market's current forecast of the future volatility of the stock. Id. In other words, the implied volatilities reflect the actual prices at which willing buyers and willing sellers actually trade options. Exhibit E reports the implied volatility of Sunbeam's stock returns using data for Sunbeam's long-term call options. In August 1998, the implied volatilities were approximately 65 percent; at the end of 1998 and the end of 1999, the implied volatility was somewhat greater.[10]

18. With these inputs, the value of the Warrants on the date of the Settlement Agreement can be calculated. Exhibit F reports the calculated values of the Warrants on the date of the Settlement Agreement, assuming a 20 percent large-percentage block premium. The exhibit reports values calculated using both the dilution-adjusted Black-Scholes formula, and the option-like warrant valuation method for various levels of volatility.[11] The exhibit also reports values before and after a 15 percent

10. We obtained the data concerning implied volatility from OptionMetrics.

11. Note that in the dilution-adjusted Black-Scholes formula, the volatility of the firm's equity should be used, not the volatility of the firm's stock. See ¶ 9 supra. While the

liquidity discount. Among other things, the exhibit shows that using the option-like warrant valuation method, a volatility of 65 percent, and a 15 percent liquidity discount, the value of the Warrants is $135,846,645. In my opinion, this is the best estimate of the value of the Warrants on the date of the Settlement Agreement.

19. Exhibit G reports the calculated values of the Warrants on the date of the Settlement Agreement, assuming no large-percentage block premium is applicable. Among other things, the exhibit shows that using the option-like warrant valuation method, a volatility of 65 percent, and a 15 percent liquidity discount, the value of the Warrants is $106,834,918.[12]

20. Exhibit H reports the calculated values of the Warrants on the issuance date, assuming a 20 percent large-percentage block premium. Among other things, the exhibit shows that using the option-like warrant valuation method, a volatility of 65 percent, and a 15 percent liquidity discount, the value of the Warrants is $140,426,588. In my opinion, this is the best estimate of the value of the Warrants on the issuance date.

21. Exhibit I reports the calculated values of the Warrants on the issuance date, assuming no large-percentage block premium is applicable. Among other things, the exhibit shows that using the option-like warrant valuation method, a volatility

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volatility of the firm's equity can not be calculated directly, the volatility of the firm's equity must be greater than the volatility of the firm's stock.

12. Exhibit I also shows that the estimated value of the Warrants on August 24, 1998 is $5.245 per share, prior to the application of the liquidity discount (and using a volatility of 65 percent). By way of comparison, call options on Sunbeam stock with an exercise price of $7.50 that expired in January 2001 traded at prices ranging from $4 to $4 3/8 on August 24, 1998. The value of the Warrants is necessarily higher than the value of these call options because the Warrants had a lower exercise price, and a longer term to maturity.

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of 65 percent, and a 15 percent liquidity discount, the value of the Warrants is $110,478,255.

E. MS 513

22. MS 513 describes two valuations of the Warrants, one performed by The Blackstone Group and the other by Deloitte & Touche. MS 513, at CPH0647028-30. I discuss each, in turn.

The Blackstone Group's valuation

23. According to MS 513, Blackstone's valuation was based on the Black-Scholes model, and the Blackstone report estimated a value of the warrants to range from $30 million to $107 million with a midpoint of $70 million, based on assumed equity values ranging from $500 million to $1,000 million, and assumed volatilities ranging from 45 to 55 percent. Id.

24. Blackstone's valuations differ from mine for four principal reasons. First, "Blackstone performed an equity valuation based on several scenarios of projected operating results for [the Company] ... rather than using the price of the Company's common stock as Blackstone believed that the market could not properly value the common stock at the grant date because of the uncertainties surrounding the Company at the time...." Id., at CPH0647029. This rationale makes no sense because there is no reason to believe that Blackstone's ability to evaluate the potential uncertainties surrounding the Company was any better than the market's. In contrast, as the document indicates, Deloitte & Touche's valuation was based on the market price of the Company's stock because its financial instruments specialist believed that the market price provided the best indication of the value of the Company. Id. In any event,

Blackstone's reported equity valuation appears to be consistent with the market price of Sunbeam common stock.[13]

25. Second, Blackstone does not explicitly take into account the large-percentage block premium, which would lead to a higher value for the Warrants. See ¶¶ 10-11 supra. However, its range of assumed equity values is sufficiently large to include such a premium.[14]

26. Third, while Blackstone reported valuations based on volatilities ranging from 25 percent to 85 percent, Blackstone's recommended valuation range was based on volatilities ranging from 45 percent to 55 percent. MS 513, at CPH0647029. Blackstone's recommended range was apparently based on its observation "that the mean volatility of comparable companies range from 25 percent to 40 percent, but that Sunbeam's volatility was significantly greater because of the unusual events that had taken place." Id. This justification is inadequate: even though the unusual events might provide a reason to provide relatively little weight to historic volatility calculations, they do not provide any reason to reject the implied volatility calculation. As noted above, on the relevant dates, the implied volatility of Sunbeam Common Stock exceeded 65 percent, which implies a higher value for the Warrants. See ¶ 18 supra.

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13. At the closing price on August 12, 1998, for example, the market value of Sunbeam's outstanding common stock was approximately $692 million. At the closing price on August 13, 1998, the market value of Sunbeam's outstanding common stock was approximately $862 million. Both of these figures are within the range of equity values presented in the Blackstone report. See MS 513, at CPH0647029.
14. For example, with a 20 percent premium, the market value of Sunbeam's outstanding common stock on August 12, 1998 and August 13, 1998 would be approximately $830 million and $1,034 million, respectively. Both of these figures are within the range of equity values presented in the Blackstone report. See MS 513, at CPH0647029.

27. Finally, Blackstone does not take into account any liquidity discount, a factor which would lead to a lower value for the Warrants (other things equal). See ¶¶ 12-13 supra.

Deloitte & Touche's Valuation

28. Deloitte & Touche performed valuation calculations using both the dilution-adjusted Black-Scholes method and the option-like warrant valuation method. See MS 513, at CPH0647031. Deloitte & Touche then provided schedules showing results for volatilities ranging from 30 percent to 100 percent. Id., at CPH0647032. The schedule that uses the dilution-adjusted Black-Scholes formula reports values for the Warrants ranging from $53.8 million to $118.6 million. Id., at CPH0647034. The schedule that uses the option-like valuation method reports values for the Warrants ranging from $56.7 million to $121.4 million. Id., at CPH0647036.

29. There are three differences between Deloitte & Touche's valuation and mine. First, Deloitte & Touche used a stock price of $6.875, which is the closing price of Sunbeam common stock on August 12, 1998. Id., at CPH0647034-35. Therefore, Deloitte & Touche's valuation does not take into account the increase in the price of Sunbeam's common stock that occurred when the Settlement Agreement was publicly disclosed. See ¶ 16 supra. Second, Deloitte & Touche's valuation does not take into account the large-percentage block premium, which would lead to a higher value for the Warrants. See ¶¶ 10-11 supra. Finally, Deloitte & Touche does not take into account any liquidity discount, a factor which would lead to a lower value for the Warrants (other things equal). See ¶¶ 12-13 supra.

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F. MS 833

30. MS 833 is a spreadsheet which contains an entry for the "value of warrants 8/12/98" of $41,737,500. MS 833, at CPH2012487. This figure is derived as "70000000 – (70000000*.205)-13912500." Id., at CPH2012489. In his deposition, Todd J. Slotkin testified that "$70 million is the number that was the Blackstone value from the Black-Scholes model that was given to Sunbeam ..." Slotkin Dep., March 4, 2005, at 157:9-12. Mr. Slotkin also testified that 20.5 percent of $70 million was "subtracted out" to take "into account the dilution" that would result from exercising the Warrants. Id., at 157:15-158:12. Finally, Mr. Slotkin testified that $13,912,500 was subtracted as a "discount for illiquidity of the instrument." Id., at 158:7-159:8.

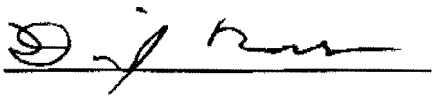
31. In my opinion, this calculation greatly understates the fair market value of the Warrants for three reasons.[15] First, the valuation is based on the $70 million midpoint of Blackstone's recommended range of values, a valuation which is too low for the reasons discussed above.

32. Second, MS 833 improperly applies a 20.5 percent dilution adjustment, purportedly based on the assumption that the Black-Scholes model used by Blackstone did not adjust for dilution. Slotkin Dep., at 157:15-158:12. However, if Blackstone did not account for dilution (and it is unclear from MS 513 whether it did), the purported dilution adjustment on MS 833 would be incorrect, and result in an underestimate of the value of the Warrants. See Veld (2003), at 67. A proper dilution adjustment would also have to take into account the increase in equity value per share resulting from the issuance of the Warrants, and the extent to which the volatility of

15. I have no opinion regarding the appropriate valuation of the Warrants for accounting purposes.

equity exceeds the volatility of stock. Id. These two adjustments would offset the effect of the adjustment made in MS 513. See ¶ 10 supra.

33. Finally, MS 833 applies a discount for lack of marketability that is too large. The $13,912,500 liquidity discount is 25 percent of the assumed pre-discount Warrant value of $55,650,000 (i.e., 79.5 percent of $70,000,000). As explained above, recent academic research shows that liquidity discounts are generally smaller. See ¶¶ 12-13 supra.



David J. Ross

June 6, 2005

Exhibit A

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March 2005

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EMPLOYMENT

LEXECON INC., Chicago, Illinois
(1985 - present) Current Position: Senior Vice President

AREAS OF SPECIALIZATION

Finance
Labor Economics
Economic Analysis of Law

ACADEMIC HONORS AND SCHOLARSHIPS

Beta Gamma Sigma
University of Chicago Graduate School of Business Fellowship
Phi Beta Kappa
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ARTICLES

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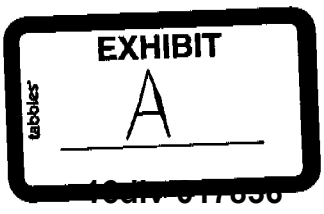

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OTHER ACTIVITIES

Member, American Economic Association, American Finance Association.

Member, Finance Committee, Jewish United Fund/Jewish Federation of Metropolitan Chicago.

Have acted as a consultant and/or advisor to the Commodity Futures Trading Commission, The National Association of Securities Dealers, the United States Department of Justice, The Federal Deposit Insurance Corporation, the Office of Thrift Supervision and the Internal Revenue Service.

Referee: Journal of Business, Journal of Law and Economics, Journal of Legal Studies.

EXPERT TESTIMONY

Affidavit of David J. Ross in Re: Sprint Corporation ERISA Litigation, United States District Court, District of Kansas; Case No. 2:03-CV-02202-JWL; (March 7, 2005).

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Affidavit of David J. Ross in Re: Electronic Data Systems Corp. "ERISA" Litigation, United States District Court, Eastern District of Texas, Tyler Division; Case No. 6:03-MD-1512; Lead Case: 6:03-CV-126; (May 24, 2004).

Declaration of David J. Ross in Re: McKesson HBOC, Inc. Securities Litigation, United States District Court, Northern District of California; Case No. CV-99-20743 RMW; (January 16, 2004).

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Testimony of David J. Ross in Re: Jerome Feldman, et al. vs. National Westminster Bank, et al.,

Index No. 605549/99 and Roberta Hayes, et al. vs. National Westminster Bank, Index No. 403545/00; Supreme Court of the State of New York, County of New York, Civil Term: Part 27; (April 9, 2001).

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Deposition of David J. Ross in Re: Coast Federal Bank, F.S.B. vs. United States of America; United States Court of Federal Claims; Civil Action No. 92-466C; (April 17, 18, & 19, 2000).

Deposition of David J. Ross in Re: Granite Partners et al, v. Bear, Stearns & Co. Inc. et al; United States District Court, Southern District of New York; No. 96-Civ.-7874 and ABF Capital Management et al. v. Askin Capital Management, L.P. et al; No. 96-Civ-2978, (March 9, 2000).

Testimony of David J. Ross in Re: United States of America v. Robert Krilich; United States District Court, Northern District of Illinois; No. 94-CR-419; (January 28 & 31, 2000).

Affidavit of David J. Ross in Re: Kaufman v. Motorola, Inc.; United States District Court, Northern District of Illinois, Eastern Division; No. 95-C-1069; (October 15, 1999).

Supplemental Affidavit of David J. Ross in Re: IES Industries, Inc. and Subsidiaries vs. United States of America; United States District Court, Northern District of Iowa, Cedar Rapids Division; No. C97-206-EJM; (May 4, 1999).

Testimony of David J. Ross in Re: United States of America v. Gordon Hall et al.; United States District Court, Southern District of New York; No. S1-97-Cr.-1215 (DC); (May 3, 1999).

Affidavit of David J. Ross in Re: FTD Corporation, et al. v. Bankers Trust Company, et al.; United States District Court, Southern District of New York; No. 96-CIV-0405; (April 29, 1999).

Supplemental Declaration of David J. Ross in Re: Borland Securities Litigation, United States District Court, Northern District of California; Case No. C-95-2295 VRW; (April 27, 1999).

Affidavit of David J. Ross in Re: IES Industries, Inc. and Subsidiaries vs. United States of America; United States District Court, Northern District of Iowa, Cedar Rapids Division; No. C97-206-EJM; (March 23, 1999).

Testimony of David J. Ross in Re: LaSalle Talman, F.S.B. vs. United States of America; United States Court of Federal Claims; No. 92-652C; (March 1, 2, & 12, 1999).

Deposition of David J. Ross in Re: IES Industries, Inc. and Subsidiaries vs. United States of America; United States District Court, Northern District of Iowa; No. C97-206-EJM; (December 29, 1998).

Deposition of David J. Ross in Re: LaSalle Talman, F.S.B. vs. United States of America; United States District Court, Northern District of Illinois, Eastern Division; No. 92-562C; (December 17 & 18, 1998).

Deposition of David J. Ross in Re: County of Orange vs. McGraw-Hill Companies, Inc. d/b/a Standard & Poors; United States District Court, Central District of California; Case No. CV 96-0765-GLT; (December 14, 1998).

Deposition of David J. Ross in Re: Boca Investerings Partnership vs. United States; United States District Court, Northern District of Illinois; No. 1:97-CV-602 (PLF); (November 30, 1998).

Supplemental Declaration of David J. Ross in Re: California Micro Devices Securities Litigation, United States District Court, Northern District of California, Master File No. C-94-2817-VRW; (August 26, 1998).

Affidavit of David J. Ross in Re: David Orman, et al., v. America Online, et at., United States District Court, Eastern District of Virginia, Alexandria Division; Civil Action No. 97-264-A; (February 20, 1998).

Joint Affidavit of Daniel R. Fischel and David J. Ross in Re: Publicis Communication v. True North Communications Inc., et al.; United States District Court, Northern District of Illinois, Eastern Division; Case No. 97-C-8263; (December 7, 1997).

Declaration of David J. Ross In Re: Borland Securities Litigation, United States District Court, Northern District of California; Case No. C-95-2295 VRW; (October 29, 1997).

Testimony of David J. Ross in Re: District Business Conduct Committee for District No. 10 v. A.S. Goldmen & Co., Inc., Anthony J. Marchiano, Stuart E. Winkler, Stacy Meyers, NASD Regulation, Inc., New York, New York; Complaint No. C10960208; (September 17 & October 14, 1997).

Affidavit of David J. Ross in Re: Westcap Enterprises, Inc. (successor by merger to Westcap Securities, L.P.) and The Westcap Corporation, (successor by merger to Westcap Securities Investment, Inc. and Westcap Securities Management, Inc.), Debtors; Board of Trustees of Community College District No. 508, County of Cook, State of Illinois, Claimant, v. Westcap Enterprises, Inc. and The Westcap Corporation, Debtors, United States Bankruptcy Court, Southern District of Texas, Houston Division, (Jointly Administered Under) Case No. 96-43191-H2-11; (September 14, 1997).

Deposition of David J. Ross in Re: Marcia Rubin, Jason Gorchow, and Michelle Gorchow vs. Jules Laser, Civil Action No. 93-CH-010972, Circuit Court of Cook County, Illinois, County Department - Chancery Division, (July 15 & October 1, 1997).

Deposition of David J. Ross in Re: David M. Abbott, et al. vs. Kidder, Peabody & Company Incorporated, et al. Civil Action No. 93-S-1709, United States District Court for the District of Colorado, (July 11, 1997).

Testimony of David J. Ross in Re: Sandra Lerner, Leonard Bosack, and The Trust v. Goldman Sachs & Co., Kent C. McCarthy, Craig A.S. Steiger, Simon J. Michael, Ralph Severson, William J. Buckley & Roy Zuckerberg, Before The American Arbitration Association; 75-136-00090-94; (April 8, 9, 10 & 11, 1997; May 28, 1997 & June 4, 1997).

Testimony of David J. Ross Re: The Matter of the Arbitration Between Metrobank, Claimant and Shearson Lehman Brothers, Inc. and Wayne A. Wagner, Respondents, Municipal Securities Rulemaking Board; MS 96-4; (February 19 & 20, 1997).

Testimony of David J. Ross in Re: Bert Vladimir v. United States Banknote Corporation, Morris Weissman, John T. Gorman, and Stanley Kreitman, United States District Court, Southern District of New York, 94-CV-0255-MGC; (January 16, 1997).

Supplemental Declaration of David J. Ross in Re: California Micro Devices Securities Litigation, United States District Court, Northern District of California, Master File No. C-94-2817-VRW, (December 11, 1996).

Declaration of David J. Ross in Re: California Micro Devices Securities Litigation, United States District Court, Northern District of California, Master File No. C-94-2817-VRW, (October 16, 1996).

Deposition of David J. Ross in Re: Thomas De La Rue AG vs. U.S. Banknote Corporation, No. 94-Civ-0255 (MGC) and U.S. Banknote Corporation vs. Thomas De La Rue AG, and De La Rue pk, No. 94-Civ-0704 (MGC), United States District Court Southern District of New York, (June 17, 1996).

Deposition of David J. Ross in Re: Andrew W. McGhee vs. Richard L. Joutras et al., United States District Court, Northern District of Illinois, Master File No. 94-C-7052, (May 30, 1996).

Deposition of David J. Ross in Re: Bert Vladimir v. U.S. Banknote Corporation, United States District Court, Southern District of New York, Civil Action No. 94-CIV-0255 (MGC), (March 20, 1996).

Deposition of David J. Ross in Re: Scattered Corporation vs. Midwest Clearing Corporation, Circuit Court of Cook County, Illinois County Department, Law Division, No. 93 L 10216, (February 27, 1996).

Deposition of David J. Ross in Re: Andrew W. McGhee vs. Richard L. Joutras et al., United States District Court, Northern District of Illinois, Master File No. 94-C-7052, (August 3 & 4, 1995).

Declaration of David J. Ross in Re: Wells Fargo Securities Litigation, United States District Court, Northern District of California, Master File No. C-91-1944 VRW, (March 31, 1995).

Testimony of David J. Ross In The Matter Of: Scattered Corporation: Leon Aaron Greenblatt, III, Andrew Alvin Jahelka, Richard Owen Nichols and Laura Bryant, The Chicago Stock Exchange, Incorporated, Proceeding No. CHX-D-93-1, (December 19, 20, 21 & 22, 1994).

Deposition of David J. Ross in Re: Gloria G. Haft v. Herbert H. Haft, Superior Court of the District of Columbia, Civil Action No. DR-2087-93d, (April 8, 1994).

Supplemental Declaration of David J. Ross in Re: Oracle Securities Litigation, United States District Court, Northern District of California, Master File No. C 90 0931 VRW, (May 21, 1993).

Declaration of David J. Ross in Re: Oracle Securities Litigation, United States District Court, Northern District of California, Master File No. C 90 0931 VRW, (April 20, 1993).

Testimony of David J. Ross in Re: State of West Virginia v. Morgan Stanley & Co. Incorporated, in the Circuit Court of Kanawha County, West Virginia, Civil Action No. 89-C-3700, (May 5, 1992).

Deposition of David J. Ross in Re: State of West Virginia v. Morgan Stanley & Co. Incorporated, in the Circuit Court of Kanawha County, West Virginia, Civil Action No. 89-C-3700, (April 25, 1992).

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Affidavit of David J. Ross in Re: Dean Peter Debruyne and Evelyn S. Carlyle, individually and on behalf of all others similarly situated v. The Equitable Life Assurance Society of the United States and Equitable Capital Management Corporation, United States District Court, Northern District of Illinois, Eastern Division, No. 88 C 10098 (October 12, 1989).

Exhibit B

EXHIBIT B
Materials Reviewed

1. Discovery Documents

MS 096

MS 096A

MS 096B

MS 235

MS 260

MS 513

MS 814

MS 822

MS 831

MS 832

MS 833

MS 834

MS 841

MS 849

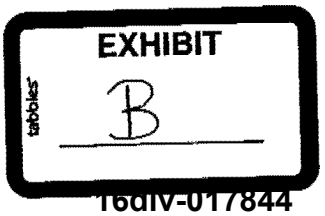
MS 857

CPH 1296

2. Depositions

Deposition of Todd Slotkin, March 3, 2005 & March 4, 2005

Deposition of Laurence Winoker, November 18, 2004 & March 8, 2005.



3. Data

Stock price, returns, volume and volatility data for Sunbeam Common Stock

Option price, volume and volatility data and data documentation from OptionMetrics

Market returns data

Interest rate data

4. SEC Filings

Sunbeam Corp., Proxy Statements

Sunbeam Corp. Annual and Quarterly Reports

5. Books and Articles

Financial press articles concerning Sunbeam

Brealey, Richard A., and Myers, Stewart C., Principles of Corporate Finance (7th Edition, McGraw-Hill/Irwin, 2003)

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Galai, D. and Schneller, M.I. "Pricing of warrants and the value of the firm," The Journal of Finance (1978), 1333-42

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Sidenius, Jakob, "Warrant Pricing – Is Dilution a Delusion?" Financial Analysis Journal, September/October 1996, 77-80

Veld, C., "Warrant pricing: a review of empirical research," The European Journal of Finance (2003), 61-91

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Mikkelson, W. and Regassa, H., "Premiums Paid in Block Transactions," Managerial and Decision Economics (1991), 511-17

16div-017845

Wruck, K. H., "Equity Ownership Concentration and Firm Value," Journal of Financial Economics (1989), 3-28

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Bajaj, M., Denis, D. J., Ferris, Sp. P., and Sarin, A., "Firm Value and Marketability Discounts, Journal of Corporate Law (2001), 89-115

Wu, Y., "The choice of equity-selling mechanism," Journal of Financial Economics (2004), 93-119

Krishnamurthy, S., Spindt, P., Subramaniam, V., and Woidtke, T., "Does investors identity matter in equity issues? Evidence from private placements," Journal of Financial Intermediation (2005), 210-238

Exhibit C

HD Sunbeam Up 21% On Settlement With MacAndrews & Forbes >SOC
BY By Kate Berry
WC 681 words
PD 13 August 1998
ET 12:28 pm
SN Dow Jones News Service
SC DJ
LA English
CY (Copyright (c) 1998, Dow Jones & Company, Inc.)

LP MIAMI (Dow Jones)--Despite a dilution to current shares, investors reacted warmly to a legal settlement between **Sunbeam** Corp. (SOC) and its second-largest shareholder, MacAndrews & Forbes Holdings Inc., which agreed not to sue the appliance maker in exchange for the right to increase its stake in the company.

The deal, announced late Wednesday, also locks in a three-year employment contract for **Sunbeam**'s new chief executive, Jerry W. Levin, and two top officers, who are expected to turn around **Sunbeam**.

TD "I guess this is sort of one kernel of certainty in a vast sea of uncertainty," said Merrill Lynch & Co. analyst John Gibbons, who called the deal a "surprise."

"On the one hand, it's dilutive for other shareholders," he said. "On the other hand, I guess the silver lining for shareholders is that Jerry Levin and his top management have signed three-year employment contracts. They provide some credibility to the turnaround story."

Analysts said the settlement gives billionaire Ronald O. Perelman attractive terms to purchase **Sunbeam** warrants, essentially allowing him to recoup his investment in **Sunbeam**.

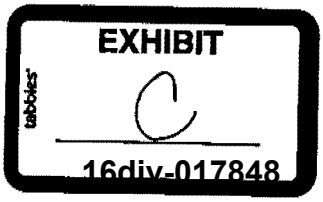
Sunbeam's troubles date back to March, when the company first disclosed that its financial performance was worsening. At that time, the company bought Coleman Co. from closely-held MacAndrews in exchange for 14 million shares, or 14% of **Sunbeam**. At that time, **Sunbeam**'s stock was trading at $40 a share.

Under the settlement, MacAndrews has the right to purchase 23 million **Sunbeam** shares at an exercise price of $7 a share.

In an unusual move, **Sunbeam** appointed a special committee of four outside directors with no relationship to MacAndrews, to approve the transaction so it does not require a shareholder vote. **Sunbeam** said a shareholder vote would "seriously jeopardize the financial viability of the company" and would have delayed a settlement with MacAndrews. **Sunbeam** said it will send a letter notifying shareholders of its intent to issue warrants to MacAndrews without seeking their approval. That deal will be completely 10 days after the letter is mailed.

Peter Langerman, **Sunbeam**'s chairman, said in a statement that the deal "will eliminate the risk of protracted legal proceedings."

NYSE-listed shares of **Sunbeam** recently were up 1 1/2, or 21.8%, to 8 3/8 on volume of 4.1 million, compared with average daily volume of 2.6 million. The shares hit a 52-week low at 5 1/8 Tuesday.



Gibbons said "it seemed a little odd," that shareholders were applauding the deal.

"I think it is providing some certainty about management," he said.

Analysts said the deal with MacAndrews eliminates the possibility that **Sunbeam**'s creditors would force the company into Chapter 11 bankruptcy proceedings.

That possibility was raised last week, when **Sunbeam** announced it will restate its unaudited financial statements for the first quarter of 1998 and its audited 1997 financial statements.

The restatements aren't due until September. Prudential Securities Inc. downgraded **Sunbeam** shares to sell from hold last week and stated that the company's tangible net worth appears to be "steadily and sharply" declining.

"At this point we have no idea what happened in the second quarter or where business is," said Gibbons at Merrill Lynch. "It will take the better part of a year before things are back to normal."

Sunbeam confirmed in June that its accounting principles were being investigated by the Securities and Exchange Commission. That came two weeks after **Sunbeam**'s board fired its former chief executive, Albert J. Dunlap, and put in place a hand-picked management team that hailed mostly from Coleman Co.

The two other executives that have signed three-year contracts are Paul Shapiro, **Sunbeam**'s executive vice president and chief administrative officer, and Bobby Jenkins, executive vice president and chief financial officer.

Sunbeam's shares traded at a 52-week high of $53 a share in March.
-By Kate Berry; 305-379-3744; kate.berry@cor.dowjones.com.

(END) DOW JONES NEWS 08-13-98

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IN I3302: Computers/Electronics | I346: Household Appliances | ICNP: Consumer Products

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Exhibit D
Historical Volatility of Sunbeam Stock Returns

Date	Estimation Period		
	90 Days	180 Days	60 Months
08/12/98	94.95	84.11	54.30
08/13/98	103.21	88.54	54.30
08/14/98	103.73	88.80	54.30
08/24/98	103.81	89.63	54.30
12/31/98	96.13	99.97	54.57
12/31/99	76.22	69.59	57.48

Source: Bloomberg.
Note: Bloomberg calculates monthly volatility as of the end of the month. The 60-month historical volatilities for all dates in August 1998 are as of 08/31/98.

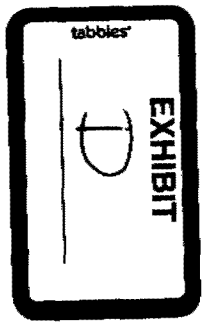

Exhibit E

Exhibit E
Implied Volatility of Sunbeam Stock Returns

Date	Implied Volatility
08/12/98	65.12
08/13/98	66.72
08/24/98	69.14
12/31/98	78.07
12/31/99	79.12

Source: OptionMetrics. The interpolated volatility of long-term (730-day) call options is shown.

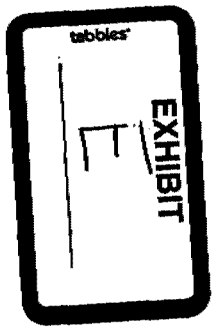

Exhibit F

Exhibit F
Sunbeam Corp. Warrant Valuation
Warrant Valuation, Assuming 20% Large Block Premium

Valuation Date	08/12/98
Expiration Date	08/24/03
Year to Expiration	5.04
Closing Stock Price (8/13/98, with 20% premium)	10.275
Oustanding Shares	100,725,952
Warrant Shares	23,000,000
Exercise Price	7.000
Risk-Free Rate	5.326%

Volatility	45%	55%	65%	75%	85%	95%	105%
Dilution-Adjusted Black-Scholes Method							
Equity Value, Per Share	11.609	11.715	11.822	11.926	12.023	12.113	12.194
Warrant Value, Per Share	5.842	6.308	6.777	7.230	7.656	8.049	8.405
Warrant Value, Total	134,365,282	145,087,597	155,862,972	166,281,770	176,091,021	185,134,005	193,320,668
Warrant Value (with 15% liquidity discount)	114,210,490	123,324,457	132,483,526	141,339,505	149,677,367	157,363,904	164,322,568
Option-Like Warrant Valuation							
Warrant Value, Per Share	5.994	6.476	6.949	7.398	7.815	8.196	8.536
Warrant Value, Total	137,867,981	148,941,552	159,819,604	170,157,885	179,755,427	188,498,670	196,333,473
Warrant Value (with 15% liquidity discount)	117,187,784	126,600,319	135,846,663	144,634,202	152,792,113	160,223,870	166,883,452

Notes: (1) The Risk-Free Rate is the 5-year U.S. Treasury rate on 8/12/98 (Source: Bloomberg).
(2) The number of outstanding Sunbeam common shares on 6/30/98 was 100,725,952 (Source: 6/30/98 10-Q, p. 3).

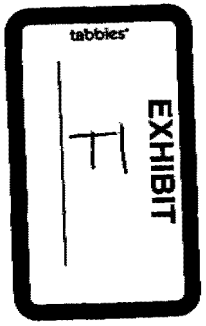

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Exhibit G

Exhibit G
Sunbeam Corp. Warrant Valuation
Warrant Valuation, Assuming No Large Block Premium

Valuation Date	08/12/98
Expiration Date	08/24/03
Year to Expiration	5.04
Closing Stock Price (8/13/98)	8.563
Oustanding Shares	100,725,952
Warrant Shares	23,000,000
Exercise Price	7.000
Risk-Free Rate	5.326%

Volatility	45%	55%	65%	75%	85%	95%	105%
Dilution-Adjusted Black-Scholes Method							
Equity Value, Per Share	9.562	9.668	9.772	9.871	9.963	10.047	10.123
Warrant Value, Per Share	4.377	4.844	5.299	5.731	6.134	6.503	6.835
Warrant Value, Total	100,675,669	111,400,562	121,867,320	131,816,018	141,082,272	149,563,535	157,203,299
Warrant Value (with 15% liquidity discount)	85,574,318	94,690,478	103,587,222	112,043,616	119,919,931	127,129,004	133,622,804
Option-Like Warrant Valuation							
Warrant Value, Per Share	4.531	5.008	5.465	5.892	6.285	6.641	6.958
Warrant Value, Total	104,221,750	115,184,112	125,688,149	135,522,702	144,564,562	152,747,130	160,044,847
Warrant Value (with 15% liquidity discount)	88,588,488	97,906,495	106,834,926	115,194,297	122,879,878	129,835,061	136,038,120

Notes: (1) The Risk-Free Rate is the 5-year U.S. Treasury rate on 8/12/98 (Source: Bloomberg).
(2) The number of outstanding Sunbeam common shares on 6/30/98 was 100,725,952 (Source: 6/30/98 10-Q, p. 3).

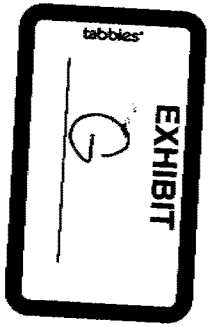

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Exhibit H

Exhibit H
Sunbeam Corp. Warrant Valuation
Warrant Valuation, Assuming 20% Large Block Premium

Valuation Date	08/24/98
Expiration Date	08/24/03
Year to Expiration	5.00
Closing Stock Price (with 20% premium)	10.575
Oustanding Shares	100,725,952
Warrant Shares	23,000,000
Exercise Price	7.000
Risk-Free Rate	5.163%

Volatility	45%	55%	65%	75%	85%	95%	105%
Dilution-Adjusted Black-Scholes Method							
Equity Value, Per Share	11.961	12.068	12.175	12.280	12.379	12.470	12.552
Warrant Value, Per Share	6.069	6.536	7.009	7.467	7.899	8.298	8.660
Warrant Value, Total	139,576,080	150,338,586	161,203,729	171,740,194	181,681,422	190,861,826	199,185,365
Warrant Value (with 15% liquidity discount)	118,639,668	127,787,798	137,023,170	145,979,165	154,429,209	162,232,552	169,307,560
Option-Like Warrant Valuation							
Warrant Value, Per Share	6.221	6.705	7.183	7.638	8.061	8.447	8.794
Warrant Value, Total	143,090,802	154,226,097	165,207,772	175,671,924	185,405,450	194,286,978	202,257,172
Warrant Value (with 15% liquidity discount)	121,627,181	131,092,183	140,426,606	149,321,135	157,594,633	165,143,932	171,918,596

Notes: (1) The Risk-Free Rate is the 5-year U.S. Treasury rate on 8/24/98 (Source: Bloomberg).
(2) The number of outstanding Sunbeam common shares on 6/30/98 was 100,725,952 (Source: 6/30/98 10-Q, p. 3).

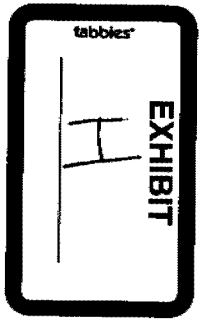

Exhibit I

Exhibit I
Sunbeam Corp. Warrant Valuation
Warrant Valuation, Assuming No Large Block Premium

Valuation Date	08/24/98
Expiration Date	08/24/03
Year to Expiration	5.00
Closing Stock Price	8.813
Oustanding Shares	100,725,952
Warrant Shares	23,000,000
Exercise Price	7.000
Risk-Free Rate	5.163%

Volatility	45%	55%	65%	75%	85%	95%	105%
Dilution-Adjusted Black-Scholes Method							
Equity Value, Per Share	9.852	9.959	10.064	10.164	10.258	10.343	10.421
Warrant Value, Per Share	4.553	5.022	5.483	5.921	6.330	6.705	7.043
Warrant Value, Total	104,707,952	115,515,832	126,098,289	136,179,176	145,583,993	154,204,096	161,978,777
Warrant Value (with 15% liquidity discount)	89,001,759	98,188,457	107,183,545	115,752,299	123,746,394	131,073,481	137,681,961
Option-Like Warrant Valuation							
Warrant Value, Per Share	4.708	5.189	5.651	6.085	6.484	6.846	7.169
Warrant Value, Total	108,284,869	119,345,519	129,974,429	139,945,815	149,127,834	157,448,440	164,878,501
Warrant Value (with 15% liquidity discount)	92,042,139	101,443,691	110,478,265	118,953,943	126,758,659	133,831,174	140,146,725

Notes: (1) The Risk-Free Rate is the 5-year U.S. Treasury rate on 8/24/98 (Source: Bloomberg).
(2) The number of outstanding Sunbeam common shares on 6/30/98 was 100,725,952 (Source: 6/30/98 10-Q, p. 3).

16div-017860

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

NOTICE OF FILING PLEADING UNDER SEAL

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed under seal its Morgan Stanley's Memorandum in Support of Its Alternative Motion for Reduction of Compensatory Damages Under Florida Statutes Sections 46.015 & 768.041.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 6th day of June, 2005.

Mark C. Hansen *(Pro Hac Vice)*
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2005 WL 6336897 (Fla.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Florida.
Fifteenth Judicial Circuit
Palm Beach County

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

No. CA 03-5045 AI.
June 6, 2005.

Morgan Stanley's Memorandum in Support of Its Motion for Judgment in Accordance with Motion for Directed Verdict and Alternative Motion for New Trial

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Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully submits this memorandum in support of its Motion for Judgment in Accordance with Motion for Directed Verdict and Alternative Motion for New Trial, filed May 26, 2005. Morgan Stanley submits this memorandum to address and highlight certain issues presented in its post-trial motions for the convenience of the Court. In so doing, Morgan Stanley does not waive, and specifically readopts, the arguments made in all of its pretrial, trial, and post-trial filings. As explained more fully below, Morgan Stanley is entitled to judgment in accordance with its motion for a directed verdict or a new trial on, among others, the following grounds:

• The Court's decision to apply Florida rather than New York law (a) based on an erroneous reading of the Restatement and (b) even though CPH's own proof and witnesses at trial demonstrated that New York's interests overwhelmingly predominate on the disputed issues of justifiable reliance and damages;

• The Court's failure to instruct the jury on the requirement of justifiable reliance, and its erroneous and repeated comment on the evidence through the repetition of a "putative" limiting instruction on reliance during trial;

• CPH's failure to adduce evidence of damages consistent with controlling precedent regarding the measure of damages, and the Court's erroneous instructions regarding the measure of and burden of proving damages;

• The ex parte contacts between a close associate of CPH's lead trial counsel and certain members of the jury;

• The Court's denial of a continuance and imposition of severe sanctions; and

• Evidentiary and other errors during trial that, singly and cumulatively, denied Morgan Stanley a fair trial.

Even if the Court were to deny the motion with respect to the compensatory award, Morgan Stanley is entitled to relief with respect to the award of punitive damages, as explained below. Among other things:

• The Court erred in prohibiting Morgan Stanley from contesting its complicity in the alleged fraud (and the scope of that complicity) in contravention of controlling law from the Fourth District and the decisions of other state courts.

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• The Court invaded the jury's factfinding function by reading the litigation misconduct statement to the jury and erroneously precluded Morgan Stanley from contradicting the statement's findings;

• The Court allowed the admission of improper financial evidence;

• The Phase II jury instructions were highly unbalanced; and

• The punitive damages award is grossly excessive.

ARGUMENT

I. THE CASE SHOULD HAVE BEEN TRIED UNDER NEW YORK LAW, NOT FLORIDA LAW.

Morgan Stanley is entitled to judgment (or, failing that, a new trial) because the Court erroneously applied Florida rather than New York law to the case. *See* Order on Morgan Stanley's Motion to Apply New York Law (Mar. 29, 2005) [hereinafter "Choice of Law Order"].

A. New York Has the Most Significant Relationship to the Case.

Florida choice of law follows the Restatement's "most significant relationship" test. *Bishop v. Fla. Specialty Paint Co.*, 389 So. 2d 999 (Fla. 1980); *Trumpet Vine Invs., N.V. v. Union Capital Partners I, Inc.*, 92 F.3d 1110 (11th Cir. 1996). In interstate fraud cases, courts weigh the following six factors:
(a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations,

(b) the place where the plaintiff received the representations,

(c) the place where the defendant made the representations,

(d) the domicil, residence, nationality, place of incorporation and place of business of the parties,

(e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and

(f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.

Restatement (Second) of Conflict of Laws § 148 (1971). The trial record shows that these factors overwhelmingly favor New York. [1]

1. Place of Reliance

All the acts of reliance occurred in New York. CPH's witnesses all testified that, aside from a December 1997 meeting with A1 Dunlap, all of their relevant conduct took place in New York, not Florida:
• Maher was "[n]ever in Florida for any of these discussions." 4/13/05 Tr. at 8110:11-14.

• Nesbitt said that the "overwhelming majority" of his work was done in New York; that the meetings with Morgan Stanley and Sunbeam were in New York; and that he never once went to Florida. 4/18/05 Tr. at 8896-98.

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• Perelman went to Florida for the December 1997 meeting; aside from that, "everything else was in New York." 4/19/05 Tr. at 9168-69.

• Gittis said that, between December 1997 and March 1998, "[n]othing of any substance" was done in Florida. 4/28/05 Tr. at 11321:10.

Furthermore, it is undisputed that the merger agreement was executed in New York and that the merger closed in New York. *See* Order on Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc.'s Motion for Application of New York Law at 8 (Aug. 11, 2004) (undisputed facts #22, 26); *see also* CPH 330, 338.

The trial evidence did not show that any act of reliance was performed in Florida. In fact, the *only* potentially relevant conduct by CPH agents in Florida was the December 1997 meeting with A1 Dunlap, and there was no evidence that any act of reliance took place at that meeting. To the contrary, the parties broke off discussions because they disagreed over price, and Perelman testified that he assumed thereafter that the deal was "dead." 4/19/05 Tr. at 9069.

The Court ruled that CPH's acts of reliance took place in part in Florida because that is where "any notice of material adverse changes was to be delivered." Choice of Law Order at 4; *see* CPH 331 § 12.1. The place where a notice of material adverse change was to be delivered, however, is not a place of "reliance." CPH's theory of the case, repeated throughout trial, was that it relied on the allegedly fraudulent statements by proceeding with the merger, the merger agreement was executed and closed in New York. CPH's non-receipt of a notice of material adverse change was not in any sense an act of ***reliance***.

Even if it were, the Court should not have given any weight to that fact in its reliance calculus. The trial record did not bear out the assumption that the material adverse change clause played any significant role. Even though reliance was the primary contested issue at trial, CPH did not mention the material adverse change clause *once* during its closing argument. *See* 5/12/05 Tr. at 14267-331. And even if the clause were relevant, the particular place where Sunbeam was contractually required to give notice under it is a legal triviality that should not have played a significant role in the Court's analysis.

2. Place Representations Received

Every relevant representation in the case was received in New York. As noted in the preceding section, except for the December 1997 meeting with A1 Dunlap, CPH's agents were never in Florida in connection with the relevant events of the case. Therefore, CPH could not have received any fraudulent misstatements there.

The Court nevertheless determined that misrepresentations were received in "both New York and Florida." Choice of Law Order at 5. The Court was apparently referring to the 1997 meeting with A1 Dunlap in Florida. The trial evidence, however, failed to reveal that any relied-upon fraudulent misstatements were made at that meeting. *See* 4/19/05 Tr. at 9065-69; 4/26/05 Tr. at 10710-16. Other than the parties' disagreement over price, the trial testimony revealed virtually nothing about the substance of that meeting. In any event, in comparison to the many other statements CPH received in New York, the significance of any statements at that early meeting was *de minimis*.

3. Place Representations Made

The trial evidence showed that most of the relied-upon misstatements were made in New York, not Florida. CPH's own directed verdict motion proves that. In six and a half pages, it catalogues the six allegedly most significant misstatements

relied upon. CPH Motion for Directed Verdict at 6-13 (May 10, 2005). *Four of the six statements* were indisputably made in New York, and CPH's witnesses repeatedly testified to how crucial those statements were to their decisionmaking:
1. *Morgan Stanley Blue Book from the February 23 Meeting*. CPH's own witnesses testified that the Blue Book, presented at the February 23 meeting in New York, was the "most important presentation that we were to receive," 4/19/05 Tr. at 9081-82 (Perelman); that it was "pivotal," *id*. (Perelman); and that it was "very important," 4/26/05 Tr. at 10809 (Gittis).

2. *Sunbeam Long-Range Strategic Plan from the February 23 Meeting*. Mr. Gittis testified that this document, also presented in New York, was "an important piece of information." 4/26/05 Tr. at 10757.

3. *Morgan Stanley Debenture Offering Memorandum*. This document, delivered in New York, was described as "[t]erribly significant" by Mr. Perelman, 4/19/05 Tr. at 9127, and "very important" by Mr. Gittis, 4/27/05 Tr. at 10871. Mr. Nesbitt described it as "very relevant." 4/18/05 Tr. at 8994.

4. *Morgan Stanley Road Show*. The statements made at the "road show" in New York were, like the others, characterized as "important," 4/19/05 Tr. at 9106 (Perelman), or "very important," 4/27/05 Tr. at 10871 (Gittis).

In contrast, only two of the six misrepresentations -- the Sunbeam financial statements and the March 19, 1998, press release -- were arguably "made" anywhere other than in New York. And the March 19 press release, though published in Florida, was "drafted by Sunbeam's lawyers at the New York offices of Skadden Arps" and was "reviewed by [Morgan Stanley] in New York." *See* Order on Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc.'s Motion for Application of New York Law at 8 (Aug. 11, 2004) (undisputed fact #17).

Indeed, CPH's own witnesses stressed that their principal source of information about the transaction was Morgan Stanley in New York. In Mr. Perelman's words:

> We had many, many, many, many [conversations with Morgan Stanley]. Th[ere] was not a meeting held with a Sunbeam executive that Morgan Stanley wasn't at. ***Morgan Stanley gave us every piece of information about Sunbeam that we got . . . . And it came from Sun -- from Morgan Stanley to our company directly from Morgan Stanley***.

4/20/05 Tr. at 9451:4-12.

The Court downplayed the New York statements on the ground that they "consisted, in large part, of reaffirmation of representations first made in Florida." Choice of Law Order at 4. Even if so, that does not change the fact that the statements CPH ultimately *relied on* were the subsequent reaffirmations in New York rather than earlier disseminations of financial information to the market at large. CPH's witnesses barely referred to financial information received from Sunbeam before the February 23 meeting in New York.

Moreover, CPH's witnesses were adamant that Morgan Stanley's alleged standing behind and vouching for Sunbeam's finances was a key factor in their decision to proceed with the transaction. *See, e.g.*, 4/19/05 Tr. at 9065. Thus, Morgan Stanley's statements (all of which occurred in New York) were more than mere "reaffirmations" of what Sunbeam had previously disclosed to the market. The trial record unequivocally shows that, in terms of their significance to CPH's decisionmaking, the most important statements were those Morgan Stanley and Sunbeam made in New York.

4. Principal Place of Business

Both CPH and Morgan Stanley have their principal place of business in New York. *See* Order on Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc.'s Motion for Application of New York Law at 6 (Aug. 11, 2004) (undisputed facts #1, 2); 4/19/05 Tr. at 9178. Under the Restatement, the plaintiff's "principal place of business" is a "contact[] of substantial significance when the loss is pecuniary in its nature." Restatement (Second) of Conflict of Laws § 148 cmt. i. That consideration clearly favors New York. Only Sunbeam, a non-party co-conspirator, is based in Florida.

In analyzing this factor, the Court relied on Sunbeam's place of business but ignored Morgan Stanley's entirely. *See* Choice of Law Order at 5. That was unwarranted. Morgan Stanley's location is highly relevant because, according to CPH, Morgan Stanley did not merely "help" Sunbeam make its own fraudulent statements; rather, ***both*** Morgan Stanley and Sunbeam made allegedly fraudulent statements to CPH. According to Perelman, "Morgan Stanley gave [CPH] every piece of information about Sunbeam that we got ... . And it came from Sun -- from Morgan Stanley to our company directly from Morgan Stanley." 4/20/05 Tr. at 9451:6-12. Since Morgan Stanley itself made many of the statements CPH complains about, there is no basis for treating ***its*** place of business as any less relevant than its alleged co-conspirator's.

The Court also should not have placed substantial weight on Sunbeam's place of business. Sunbeam was not a party to the case -- CPH settled with it long before suing Morgan Stanley. Because no possible outcome in the litigation could have affected Sunbeam, Florida had no interest in applying its law to the case on the basis of Sunbeam's place of business.

5. Place of the Tangible Thing That Is the Subject of the Transaction

Because Sunbeam, the subject of the transaction, is not a "tangible thing," this factor does not apply. Indeed, CPH has agreed that this factor favors neither state. *See* CPH's Response in Opposition to Motion for Application of New York Law at 33 (June 4, 2004) ("In fact, the transaction involved an exchange of intangibles ..., so this factor does not favor either New York or Florida.").

Despite that concession, the Court mistakenly found that this factor favored Florida because "CPH received stock in a Florida based company." Choice of Law Order at 5. The Court did not address the "tangible thing" requirement, nor did it reconcile its ruling with its acknowledgement in the following paragraph that this is a case "involving intangibles." *Id.*

6. Place of Performance

CPH's performance occurred in New York. As noted above, the merger was closed in New York. That is what CPH agreed to "perform."

The Court found that this factor did not favor New York because "CPH as a Delaware corporation was merged into another Delaware corporation." Choice of Law Order at 5. The state of incorporation, however, is not the state of performance. As a corporation, CPH was a fictional being that could act only through its agents. The relevant question is where CPH's agents performed their contractual obligation to effect the merger. The answer is New York.

7. Summary

Four of the five applicable Restatement factors clearly favor New York over Florida. Only one of the factors -- the place the statements were made -- is ambiguous, but the trial evidence suggests that even that factor favors New York. The Restatement provides that "[i]f any two of the above-mentioned contacts, apart from the defendant's domicil, state of incorporation or place of business, are located wholly in a single state, this will usually be the state of the applicable law with respect to most issues." *See* Restatement (Second) of Conflict of Laws § 148 cmt. j. Obviously, then, if ***four*** and arguably even ***five*** factors support New York, there is no basis for applying Florida law.

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B. The Court's March 25 Choice of Law Order Misinterpreted and Misapplied the Restatement

The Court went astray in its March 25 Choice of Law Order by misinterpreting and misapplying critical sections of the Restatement. Without those errors, the Court would have reached a contrary result.

1. The Court Misinterpreted the Restatement To Say That the Place of Reliance Is Less Important Than the Place of Misrepresentation.

The linchpin of the Court's analysis was that, in fraud cases involving pecuniary loss, the Restatement accords greater weight to the place of the misrepresentation than to the place of reliance:

> Given the difficulty of determining the location of reliance and injury in cases of pecuniary loss involving intangibles, the reliance factors are accorded less weight than the misrepresentation factors. *Restatement (Second) Conflict of Laws* § 148, cmt. c.

Choice of Law Order at 5. That analysis was apparently the reason the Court relied on Florida's public policy of deterring fraud without even considering New York's countervailing public policies requiring that reliance be justifiable and reflect due diligence. *See id.* at 5-7.

The Court's analysis was based on a misinterpretation of comment c. That comment does not address "place of reliance" at all, but rather "[p]lace of *loss*" Restatement (Second) of Conflict of Laws § 148 cmt. c (emphasis added). The comment notes that, because of the difficulty in assigning a location to pecuniary losses for intangibles, "the place of loss does not play so important a role in the determination of the law governing actions for fraud and misrepresentation as does the place of injury in the case of injuries to persons or to tangible things." *Id.* "Place of loss" is not listed as one of the six factors in section 148, and the evident function of comment c is to explain that omission.

Place of reliance, on the other hand, *is* addressed in comment f, which nowhere suggests that there is any particular difficulty in determining the place of reliance or that the factor should be accorded only limited weight. To the contrary, comment g of the Restatement goes on to say precisely the opposite. It provides:

The place where the plaintiff received the representations. This is the place where the representations were first communicated to the plaintiff. This place constitutes approximately ***as important a contact as does the place where the defendant made the representations***. On the other hand, this place is ***not so important a contact as is the place where the plaintiff acted in reliance on the defendant's representations***.

Restatement (Second) of Conflict of Laws § 148 cmt. g (emphasis added). Comment g thus makes it clear that, while where the representations were received is "approximately as important" as the place where representations were made, the place where *reliance* occurs is more important than either of those factors. To be clear: ***Under the Restatement, in pecuniary loss cases, the place of reliance is more important than the place the misrepresentations were made***. That is directly contrary to the Court's reasoning in its Choice of Law Order.

Nor, contrary to the Court's ruling, does the Restatement suggest any particular difficulty in determining a place of reliance in the case of "intangibles." *See* Choice of Law Order at 5 ("Given the difficulty of determining the location of reliance and injury in cases of pecuniary loss ***involving intangibles***, the reliance factors are accorded less weight than the misrepresentation factors. *Restatement (Second) Conflict of Laws* § 148, cmt. c."). Comment c does state that "[w]hen the loss is pecuniary in its nature, the place of *loss* is far more difficult to locate than when the damage consists of physical injury to persons or tangible things." *Id.* § 148 cmt. c (emphasis added). But, again, that sentence (and the entire paragraph

in which it appears) addresses the place of ***loss***, not the place of reliance. The reasons why intangible ***losses*** are difficult to locate in no way suggests that ***reliance*** is difficult to locate. For example, in this case, regardless of where CPH's losses occurred, its reliance clearly occurred in New York, where it considered the information received, made its decisions, and executed and closed the merger agreement. Comment g's prescription (that place of reliance is more important than place where misrepresentations were made) is in no way diminished in the case of intangibles. To the contrary, section 148 of the Restatement addresses only pecuniary losses, as opposed to "physical injury ... to tangible things" which are governed by other rules. *Id.* § 148 cmt. a. Because section 148 excludes physical injury to *tangible* things, its rules -- including comment g's rule that the place of reliance is more important than the place where the misrepresentations are made -- unquestionably applies to intangibles.

The Court's misinterpretation recurred throughout its Choice of Law Order. For example, in the next paragraph, the Court stated:

> Where the primary purpose of a tort rule is to deter or punish misconduct, the place where the conduct took place is more important than the state where the injury may have occurred. *Restatement (Second) Conflict of Laws* § 145, cmt. c. Choice of Law Order at 5. Again, the distinction being drawn in that section is between the place of the ***conduct*** and the place of ***injury*** (*i.e.*, the place of loss). The place of ***reliance*** is not the same thing as the place of ***injury***. Nothing in this cited passage trumps the clear directive in comment g of section 148 that the place of reliance is more important than the place where the misrepresentations were made.

The Court's misinterpretation recurred a third time in footnote 5:

> The Restatement emphasizes the relative importance of this factor [i.e. place misrepresentations were made], equating it in importance to the place of a defendant's conduct in the case of personal injury. *Restatement (Second) Conflict of Laws* § 148, cmt. c at 445.

Id. at 5 n.5. That is not what the Restatement says. The cited comment states merely that "[t]he place where the defendant made his false representations, on the other hand, is ***as important*** a contact in the selection of the law governing actions for fraud and misrepresentation as is the place of the defendant's conduct in the case of injuries to persons or to tangible things." Restatement (Second) of Conflict of Laws § 148, cmt. c (emphasis added). That merely distinguishes place of loss which, as the preceding paragraph of the comment discusses, is ***less important*** in pecuniary fraud than in tangible injury cases. Nothing in this comment addresses the "relative importance" of the place where misrepresentations were made compared to the place of reliance. That topic is addressed in comment g, which says that place of reliance is ***more important*** than where the misrepresentations were made -- precisely the opposite of the rule the Court applied.

2. The Court Misinterpreted the Restatement Rule Governing "Fortuitous" Places of Injury.

The Court also misinterpreted the Restatement in concluding that the New York contacts were "fortuitous." Citing comment e to section 145, the Court observed that the rule that place of conduct is more important than place of injury "is particularly true where the place of injury is fortuitous." Choice of Law Order at 5. The court later added that "the location of the ultimate victim was fortuitous" in this case because "Sunbeam, through [Morgan Stanley], approached more than ten other companies before it approached CPH." *Id.* at 5-6 & n.6.

By its terms, comment e to section 145 addresses fortuitous places of ***injury*** (*i.e.*, place of loss). The comment goes on to indicate in the very next sentence, however, that the place of loss is not a significant factor in pecuniary fraud cases generally, because of the difficulty of locating intangible injuries. *See* Restatement (Second) of Conflict of Laws § 145 cmt. e ("This will also be so when, such as in the case of fraud and misrepresentation (*see* § 148), there may be little

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reason in logic or persuasiveness to say that one state rather than another is the place of injury... ."); *cf. id.* § 148 cmt. c (same point). In contrast to the place of loss, however, the place of ***reliance*** is a very important factor, and the place where misrepresentations were ***received*** is equally important as the place they were made. *See id.* § 148 cmt. g. Nothing in section 145's discussion of fortuitous places of injury has any bearing on the weight given to ***those*** factors.

Even if section 145 were a rule about "fortuitous" contacts generally, there is nothing fortuitous about New York's connection to this case. A contact is "fortuitous," as that term is used in the Restatement, only when the state has no other substantial relationship to the issues in the case. Typical examples are when a resident of state A injures another resident of state A while the two happen to be traveling through state B and the issue has nothing to do with state B's interests in regulating conduct within its borders, or when a pilot negligently crashes a plane in state C en route from state A to state B and none of the passengers is a resident of state C. *See Leinhart v. Jurkovich*, 882 So. 2d 456, 458 (Fla. 4th DCA 2004); *Proprietors Ins. Co. v. Valsecchi*, 435 So. 2d 290, 295-96 (Fla 3d DCA 1983). Florida courts have consistently refused to find a contact "fortuitous" where it bore some other substantial relationship to the case. *See Hoffman v. Ouellette*, 798 So. 2d 42, 44 (Fla. 4th DCA 2001) (place of injury not fortuitous because the parties were also residents of that state and had other ties there); *Murphy v. Thornton*, 746 So. 2d 575, 576 (Fla. 1st DCA 1999) (place of injury not fortuitous because defendant also owned the premises involved there); *see also Valsecchi*, 435 So. 2d at 296-97 (analyzing three cases and explaining why the place of injury was not fortuitous in each: *Jones v. Wittenberg Univ.*, 534 F.2d 1203 (6th Cir. 1976) (place of injury not fortuitous because it was also temporary residence of one party and permanent residence of the other); *Maguire v. Exeter & Hampton Elec. Co.*, 325 A.2d 778 (1974) (place of injury not fortuitous because it was also decedent's chosen site of employment); *Hurtado v. Superior Court of Sacramento County*, 11 Cal. 3d 574 (1974) (place of injury not fortuitous because it was also domicile of defendants)).

Under that standard, the New York contacts here cannot be dismissed as fortuitous. Both parties are based in New York. Many, if not most, of the relevant alleged fraudulent statements were intentionally made there and all were intended to be received there. The parties agreed to execute and close the merger in New York and therefore intended that the acts of reliance occur there. Moreover, given that New York is the nation's financial capital, none of those contacts is the least bit surprising. Thus, this case presents a New York victim claiming injury from acts by a New York defendant taking place primarily in New York. It would be surprising indeed if Florida law rather than New York law would be chosen to govern such claims. This is especially so because the only two issues being tried, reliance and damages, have virtually no connection to Florida.

Those contacts are not rendered fortuitous by the mere fact that Sunbeam, through Morgan Stanley, approached ten other companies before allegedly defrauding CPH. As the cases cited above illustrate, whether a place of injury is "fortuitous" depends on whether it has any other connection to the parties or the events ***of the tort that actually occurred*** -- not whether events might have unfolded differently so that an entirely different plaintiff might have been defrauded in some other state. Under the Court's theory, if a reckless driver on a crosscountry trip injured a pedestrian in the pedestrian's home state, that state would nevertheless be "fortuitous" because the driver could as easily have hit a different pedestrian in any of the other states he drove through. That result flies in the face of basic conflicts principles, which would clearly apply the law of the place of the accident in those circumstances. *See* Restatement (Second) of Conflict of Laws § 145.

Moreover, justifying disregard of New York law based on the assertion that there were ten earlier unsuccessful approaches in other locations is particularly unjustified given that the issues on which New York and Florida law differ are reliance and damages. None of the ten earlier approaches was successful, so none of them resulted in either reliance or damages. The only place where reliance actually occurred was New York, and the only party actually damaged was a New York company. Certainly from CPH's point of view, it was not at all "fortuitous" that its acts of reliance occurred in the state where its principal place of business was located, and which is best suited to determine the extent of any diligence or reliance obligations to impose on its domiciliaries. [2]

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On the facts of this case, New York is not a "fortuitous" jurisdiction as that term is used in the Restatement. The Court's ruling appears to be a substantial departure from precedent on this issue. We have not found a single case in which a jurisdiction was held "fortuitous" despite the fact that both parties were domiciled there and that the defendant intentionally undertook a substantial portion of the alleged wrongful conduct there. We respectfully submit that the Court misinterpreted the Restatement on this point.

3. The Court Misapplied the Restatement in Analyzing Florida's Interests and Failing To Analyze New York's Interests.

Based on its mistaken conclusion that the place of reliance was less important than the place the misrepresentations were made, and that the New York contacts were "fortuitous," the Court proceeded to resolve the choice of law issue by examining Florida's interests in applying its tort rules in the two respects they departed from New York law, namely (1) its more limited (or nonexistent) justifiable reliance requirement; and (2) its provision of benefit-of-the-bargain damages. As to the first issue, the Court relied on Florida's public policies in favor of "protecting the public from fraud, even if the public acts negligently." Choice of Law Order at 5. As to the second, it relied on Florida's public policy of ensuring that "the defendant [does] not escape liability" in cases where no out-of-pocket loss was suffered. *Id.* at 6 (quoting Restatement (Second) of Torts § 549, cmt. i). The court did not consider any New York public policies or how they might have been implicated by the case.

The Court's failure to analyze New York's public policies was a misapplication of the Restatement. Plainly, New York has interests that are implicated here. New York's due diligence requirement reflects that State's determination that sophisticated investors should not be entitled to rely blindly on representations when means of verification are available but disregarded. See *UST Private Equity Investors Fund, Inc. v. Salomon Smith Barney*, 733 N.Y.S.2d 385, 386 (App. Div. 2001); *Rotterdam Ventures, Inc. v. Ernst & Young LLP*, 752 N.Y.S.2d 746, 749 (App. Div. 2002); *Schlaifer Nance & Co. v. Estate of Andy Warhol*, 119 F.3d 91, 98 (2d Cir. 1997). New York's highest court has described that State's justifiable reliance requirement as a "fundamental precept" of New York law. *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 322 (N.Y. 1959). The policy discourages negligent conduct by sophisticated investors. Whether or not the Court agrees with the wisdom of the requirement, it is a key element of New York law that is entitled to weight in the choice-of-law calculus. "A rule which exempts the actor from liability for harmful conduct is entitled to the same consideration in the choice-of-law process as is a rule which imposes liability." Restatement (Second) of Conflicts of Laws § 145 cmt. c.

New York's policy bears directly on the disputed issues in this case. As this Court has: acknowledged, in Florida, choice of law is analyzed on an "issue by issue" basis. See Order on Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc.'s Motion for Application of New York Law at 3 (Aug. 11, 2004). The due diligence requirement is an aspect of ***reliance***, so the most relevant contacts are the state where the reliance occurred and the state where the relying party was domiciled. Both of those factors point to New York. Awarding CPH an enormous sum of money despite its failure to prove reasonable diligence contravenes New York's policy.

In contrast, Florida's policy of "protecting the public from fraud, even if the public acts negligently," is only marginally implicated here. While Florida's public policy undoubtedly justifies applying Florida law to defrauded members of the ***Florida*** public, the State's interest in protecting the unreasonable reliance of ***New Yorkers relying in New York*** is marginal to nonexistent. Florida has no roving police power to protect members of the "public" in whatever state they may reside. *Cf. Tune v. Philip Morris Inc.*, 766 So. 2d 350, 352-53 (Fla. 2d DCA 2000).

The Court also failed to consider New York's countervailing state interests on the damages issue. The Court relied entirely on Florida's supposed public policy of ensuring that "the defendant [does] not escape liability" in cases where no out-of-pocket loss was suffered. *Id.* at 6. New York, however, has adopted a contrary policy that damages in fraud cases should be limited to the plaintiff's actual loss. Applying Florida law impinges on that New York policy no less than applying New York law would impinge on Florida's policy.

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Moreover, whether or not Florida's interest would justify applying Florida damages law to a direct fraud claim against Sunbeam, it does not justify applying Florida damages law to claims for conspiracy and aiding-and-abetting fraud, where only one of the two parties to the conspiracy is a Florida resident and that party settled with the plaintiff long before litigation began. After the settlement, Florida no longer had an interest in ensuring that Sunbeam "[does] not escape liability" because no possible result of this litigation could impose liability on Sunbeam. *Cf. Bituminous Cos. Corp.*, 2000 WL 1593519, at *2. Florida's only remaining admonitory interest relates to Morgan Stanley, and that interest is greatly diminished given that Morgan Stanley is a New York company whose relevant conduct transpired primarily in New York.

In short, as to the two disputed issues in the case, the Court overstated the significance of Florida's interests and failed to appreciate New York's. On issues of reliance and damages, New York's policies should have been given more weight than Florida's, because the acts of reliance occurred in New York and the damages were suffered by a New York-based corporation. Florida's interests, if any, related to the defendant-centered elements of misrepresentation and fraudulent intent -- elements rendered irrelevant by the Court's default order. Even if Florida law might have applied to those elements, under Florida's "issue by issue" approach, that does not justify ignoring New York law on the plaintiff-centered elements of reliance and damages, where New York clearly has the predominant interest. The Court applied Florida law where New York law should have applied instead.

4. The Court Misapplied the Restatement by Relying on Uniformity as a Reason To Apply Florida Law.

Finally, the Court relied in part on the fact that Sunbeam's statements "were dispersed nationwide" and that "[m]any investors purchased the inflated Sunbeam stock, not just CPH." Choice of Law Order at 7 & n.8. It thought these facts relevant because the Restatement invites courts to consider interests in "certainty, predictability and uniformity of result." Restatement (Second) of Conflict of Laws § 6(2)(f). That consideration does not apply here.

While section 6(2)(f) advises courts to treat like cases alike, CPH is not similarly situated to other Sunbeam investors. Much of CPH's case at trial focused on statements made specifically to CPH and not to the public at large -- most notably, the statements at the allegedly "absolutely pivotal" February 23 meeting and the two documents handed out there. Moreover, the principal issue on which Florida and New York law differ is reliance. Applying the same legal standard to CPH and other investors on reliance would not promote uniformity because reliance must be evaluated on a case-by-case basis: CPH's reliance on a particular statement does not mean any other investor relied as well. That is even more true given that the representations CPH relied on are different from those the public relied on and that the magnitude of CPH's investment in Sunbeam bore no resemblance to that of a typical investor.

* * *

The Court has already acknowledged that the correctness of its earlier choice of law ruling presents a "significant legal issue" in the case. 5/11/05 Tr. at 13832. Morgan Stanley respectfully submits that, in light of these respects in which the Court misinterpreted or misapplied the Restatement, the Court should revisit its earlier choice of law determination, particularly in view of the very different case CPH proved at trial. Because CPH failed to present evidence sufficient to sustain its burden of proof under New York law, Morgan Stanley is entitled to judgment. Failing that, Morgan Stanley is at least entitled to a new trial conducted under New York law.

II. THE COURT ERRONEOUSLY PERMITTED THE JURY TO DETERMINE LIABILITY ON THE FRAUD CLAIM UNDER FLORIDA LAW WITHOUT ANY FINDING THAT CPH'S RELIANCE ON THE FALSE STATEMENTS WAS JUSTIFIABLE IN THE TOTALITY OF THE CIRCUMSTANCES AND WITHOUT ANY FINDING THAT CPH HAD CONDUCTED REASONABLE DUE DILIGENCE.

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Even if Florida law applied, the Court's jury instructions on the reliance element of CPH's fraud claim were materially erroneous. First, the Court instructed the jury that CPH was entitled to recover on its fraud claim if it "actually relied" on false statements by Sunbeam or Morgan Stanley. Under governing Florida law, however, a party may recover on a fraud claim only if it further proves that its actual reliance was justifiable based on the totality of the circumstances. The Court erred in refusing to instruct the jury accordingly. Second, Florida law also makes clear that a sophisticated party with an opportunity to investigate must undertake at least some investigation before it can justifiably rely on false statements, particularly in the face of warning signs. The Court erred in refusing to instruct the jury concerning this duty to investigate and in repeatedly telling the jury that Morgan Stanley could not even claim that CPH had a duty of investigation. These fundamental errors require a new trial.

A. The Court Erred by Failing To Instruct the Jury on Justifiable Reliance.

Under controlling Florida law, a party may not recover in a fraud case unless it can prove that it ***justifiably*** relied on the allegedly false statements. As the Florida Supreme Court has explained, "[t]he question ... is whether the recipient of the misrepresentation is 'justified in relying upon its truth.' " *M/I Schottenstein Homes, Inc. v. Azam*, 813 So. 2d 91, 94 (Fla. 2002) (quoting *Besett v. Basnett*, 389 So. 2d 995, 997 (Fla. 1980)). Actual reliance was presumed in *Azam*. The issue on appeal was whether the trial court properly granted judgment ***as a matter of law*** to a fraud defendant on the ground that the plaintiffs, by searching public land records, could have discovered the falsity of certain misrepresentations concerning real estate they had purchased. The Supreme Court concluded that it was a fact question for the jury "whether the purchasers' reliance was justifiable under the totality of the circumstances." *Azam*, 813 So. 2d at 94. If actual reliance were sufficient by itself for a fraud recovery, the Court could easily have reversed the trial court in a one-sentence opinion. Instead, it embarked on a careful analysis of its precedent and ultimately articulated a clear standard under which the jury must determine, based on the "totality of the circumstances," whether the plaintiff's reliance was justifiable.

The Restatement (Second) of Torts, which the Florida Supreme Court adopted in *Besett, supra*, likewise emphasizes that recovery on a fraud claim requires a showing not only that the plaintiff actually relied on the misrepresentation but also that its reliance was justifiable. The "general rule" is that:

The recipient of a fraudulent misrepresentation can recover against its maker for pecuniary loss resulting from it if, but only if,

(a) he relies on the misrepresentation in acting or refraining from action, and

(b) ***his reliance is justifiable***.

Restatement (Second) of Torts § 537 (emphasis added). Indeed, Sections 540 and 541 of the Restatement, addressed by the Supreme Court in *Azam*, are part of "Title C" of the Restatement, which is entitled "Justifiable Reliance."

The Court here instructed the jury that the "only issues" for its determination were damages and "whether CPH relied on the false statements made by Sunbeam or Morgan Stanley." Jury Instructions 2 (given May 13, 2005). It further instructed that CPH need only "prove that it ***actually relied*** on the false statements by Sunbeam or Morgan Stanley." *Id.* at 3 (emphasis added). By completely omitting the requirement of "justifiable reliance," the Court ignored Florida law and rendered the jury's verdict insufficient to support CPH's fraud claim.

The jury's verdict cannot be saved by the Court's instruction that "CPH did not actually rely if ... the falsity of the statements was obvious." Jury Instructions 3. In the charge conference, the Court expressed its belief that so long as Morgan Stanley's representations were not obviously false, CPH did not need to make any further showing of justifiable reliance. 5/11/05 Tr. at 13943-44. Although obviousness is certainly relevant to the question of justifiable reliance, *see Azam*, 813 So. 2d at 93 ("The recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he

knows that it is false or its falsity is obvious to him.") (quotations omitted), it is only one of many potentially relevant factors, all of which are embraced within the "totality of the circumstances" test.

The Court refused to give Morgan Stanley's Requested Jury Instruction No. 9, under which the jury would have been told: "In deciding whether CPH was justified in relying upon the truth of any particular representation, you must consider the totality of the circumstances, including, among other factors, the type of information at issue, the nature of the communication between the parties, the relative positions of the parties, and the extent of their knowledge of corporate affairs." This language is taken almost verbatim from *Azam*, in which the Supreme Court first announced the totality-of-the-circumstances test. 813 So. 2d at 94 (stating the question on remand as "whether the purchasers' reliance was justifiable under the totality of the circumstances"); *id.* at 95 ("[T]his factual examination is indeed a consideration of the totality of the circumstances surrounding the type of information, the nature of the communication between the parties, and the relative positions of the parties.").

The Court's failure to give the totality-of-the-circumstances instruction was particularly prejudicial here, where CPH's extremely high level of sophistication and its battalion of advisors -- i.e., "the relative positions of the parties" addressed in *Azam* -- were directly relevant to whether it justifiably relied on the alleged representations. Indeed, in addition to Instruction No. 9's simple statement of the totality test, the Court refused Proposed Instructions 10 and 13-16, all of which would have offered the jury an opportunity to take into account CPH's sophistication and highly skilled advisors in determining justifiable reliance, as required by Florida precedent and other jurisdictions applying the Restatement. [3]

The Court's refusal to give the totality instruction thus deprived the jury of the proper context in which to assess even the Court's inadequate obviousness test. What is obvious to a sophisticated investor like CPH may not be obvious to a novice. Thus, as *Besett* and the Restatement make clear, obviousness must itself be assessed in light of the sophistication of the parties. *Besett*, 389 So. 2d at 997 ("Thus a defect that any experienced horseman would at once recognize at first glance may not be patent to a person who has had no experience with horses.") (quoting Restatement (Second) of Torts § 541, cmt. a)). The Court erred in refusing to give the jury the opportunity, in considering obviousness, to take into account CPH's sophistication. *See* Morgan Stanley's Supplemental Phase I Requested Jury Instruction No. 11 (May 5, 2005) (instructing that CPH's sophistication is relevant to obviousness).

B. The Court Erred by Refusing To Instruct the Jury That a Sophisticated Party Like CPH May Not Recover if It Failed To Conduct At Least Some Diligence.

The *Azam* Court held that, under the totality-of-the-circumstances test, a plaintiff ordinarily may not justifiably rely on a representation without first conducting at least a minimal inquiry into its truth or falsity. *Id.* at 93 ("[W]here one has an opportunity to make a cursory examination and investigation and does not do so, he cannot recover."); *see also Besett*, 389 So. 2d at 997 (plaintiff "cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation"). The requirement is accentuated in the case of a highly sophisticated party like CPH. If a sophisticated party has an opportunity to investigate, it must exercise at least some due diligence before it can be said to have justifiably relied. *L & L Doc's, L.L.C. v. Fla. Div. of Alcoholic Beverages & Tobacco*, 882 So. 2d 512, 515 (Fla. 4th DCA 2004) (purchaser of commercial property was "not justified in relying upon misrepresentation[s] which they knew or should have known, ***with the exercise of some diligence***, was false") (emphasis added); *Hillcrest Pac. Corp. v. Yamamura*, 727 So. 2d 1053, 1057-58 (Fla. 4th DCA 1999) ("sophisticated developer in the business of investing millions of dollars in commercial property" did not "reasonably rely upon any material misrepresentations" where the sales agreement provided inspection rights and an opportunity to "audit the financial records"); *Wasser v. Sasoni*, 652 So. 2d 411, 412-13 (Fla. 3d DCA 1995) (stating the "general rule" that "a misrepresentation is not actionable where its truth might have been discovered by the exercise of ordinary diligence" and holding that "a sophisticated purchaser of commercial property who ... had ample opportunity to conduct inspections, and could have discovered an alleged defect through the exercise of ordinary diligence, may be disgruntled, but does not have a cause of action for fraud"); *Adams v. Prestressed Sys. Indus.*, 625 So. 2d 895, 897 (Fla.

1st DCA 1993) ("[A] party who relies on a misrepresentation must show that it exercised ***some diligence*** in investigating the misrepresentation, unless it is shown that the fraudulent party had exclusive or superior knowledge, or prevented further investigation.") (citations omitted and emphasis added). A failure to investigate is particularly fatal when "red flags indicat[e]... reliance is unwarranted." *Lewis v. Bank of America NA*, 343 F.3d 540, 546-47 (5th Cir. 2003) (in light of plaintiffs "business background" and "access to professional accountants," plaintiff's decision to go forward with transaction "without undertaking additional investigation ... was not justifiable" where "red flag warrant[ed] further investigation").

Notwithstanding the plain applicability of these cases, the Court refused to issue Morgan Stanley's Requested Instructions 12-15, which dealt with the requirement of a sophisticated party to undertake some due diligence, at the very least a cursory investigation, particularly when confronted with numerous red flags. Moreover, the Court's oft-repeated "limiting instruction on reliance" instructed the jury, in direct contravention of Florida law, that "Morgan Stanley ***cannot claim*** that CPH could or should have investigated whether statements made to it were true." Order (Limiting Instruction on Reliance) (Apr. 5, 2005). The cumulative prejudicial effect of the Court's failure to give any instructions on CPH's duty to investigate and the Court's incessant broadcasting of its erroneous "limiting instruction" manifestly require a new trial.

III. CPH FAILED TO MEET ITS BURDEN OF PROOF ON DAMAGES.

Morgan Stanley is entitled to judgment as a matter of law because CPH failed to meet its burden of proof on damages. Although CPH's proof was deficient in several respects, its most glaring omission was its failure to prove the actual value, ***as of the date of the transaction,*** of the Sunbeam shares it received.

A. CPH Failed To Prove the Actual Value of the Sunbeam Stock on the Date of the Transaction.

CPH elected to proceed on a benefit-of-the-bargain theory of damages. Under that measure, damages are "the difference between the actual value of the property and its value had the alleged facts regarding it been true." *Totale, Inc. v. Smith*, 877 So. 2d 813, 815 (Fla. 4th DCA 2004). Florida law is clear that actual value must be determined as of the " '***time of purchase***.' " *Totale*, 877 So. 2d at 815 (quoting *Strickland v. Muir*, 198 So. 2d 49, 51 (Fla. 4th DCA 1967)) (emphasis added); *see also Kind v. Gittman*, 889 So. 2d 87, 90 (Fla. 4th DCA 2004); *Teca, Inc. v. WM-TAB, Inc.*, 726 So. 2d 828, 829 (Fla. 4th DCA 1999) (en banc); *Perlman v. Ferman Corp.*, 611 So. 2d 1340, 1341 (Fla. 4th DCA 1993). Thus, CPH was required to produce evidence of (1) the represented value of the Sunbeam stock on the date of the transaction; and (2) the actual value of the stock on that date.

To prove represented value, parties typically offer evidence of the acquired stock's market price, and that is what CPH attempted to do here.[4] To prove actual value -- *i.e.*, represented value minus artificial inflation -- parties typically introduce evidence of an "event study." *See In re Imperial Credit Indus., Inc. Sec. Litig.*, 252 F. Supp. 2d 1005, 1014-16 (CD. Cal. 2003); *In re World Access, Inc. Sec. Litig.*, 310 F. Supp. 2d 1281, 1298 n.10 (N.D. Ga. 2004); *In re N. Telecom Ltd. Sec. Litig*, 116 F. Supp. 2d 446, 460 (S.D.N.Y. 2000); *In re Oracle Sec. Litig*, 829 F. Supp. 1176, 1180-81 (N.D. Cal. 1993); Jon Koslow, *Estimating Aggregate Damages in Class-Action Litigation Under Rule 10b-5 for Purposes of Settlement*, 59 Fordham L. Rev. 811, 817-26 (1991). In an event study, an expert examines subsequent movements in stock price and separates those caused by the fraud from those caused by general market fluctuations and other non-fraud-related factors. By aggregating the fraud-related losses, the expert determines the amount by which the share price was artificially inflated on the date of the transaction. Subtracting that inflation from the market price on that date yields actual value. *See* Daniel R. Fischel, *Use of Modern Finance Theory in Securities Fraud Cases Involving Actively Traded Securities*, 38 Bus. Law. 1, 17-19 (1982); Koslow, *supra*, at 817-26.

Using event studies or similar methods to prove actual value on the date of the transaction is essential, because not all subsequent share price declines are caused by the fraud. Those who purchase stock willingly subject themselves to

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market-based fluctuations in value unrelated to fraud, and they therefore have no legitimate right of recovery under a benefit-of-the-bargain theory for any price decline that cannot be shown to have been caused by the fraud. *See Dura Pharm., Inc. v. Broudo*, 125 S. Ct. 1627, 1632 (2005); *Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1447 & n.5 (11th Cir. 1997); Prosser & Keeton on Torts § 110, at 767 (5th ed. 1984); *see also E.F. Hutton & Co., Inc. v. Rousseff*, 537 So. 2d 978, 981 (Fla. 1989) ("loss causation was deemed necessary in order to balance and fairly restrict liability" under federal securities laws modeled on "common law tort of deceit"); *Totale*, 877 So. 2d at 815 ("Later appreciation or depreciation of the property that is subject of the false representation generally does not alter the fraud damage computation."). Other "contributing forces" to the investment's decline in value "must be isolated and removed." *Robbins*, 116 F.3d at 1447 n.5; *Miller v. Asensio & Co.*, 364 F.3d 223, 233 (4th Cir. 2004). [5]

CPH failed to introduce an event study or to present any other evidence of the actual value of the Sunbeam stock on the date of the transaction. The only evidence CPH presented related to the value of the Sunbeam stock on various dates after December 6, 1999, nearly two years ***after*** the transaction, when the stock could first be registered for public sale. *See* 4/25/05 Tr. at 10383-92. Plaintiffs' expert, Dr. Nye, admitted that he did not compute the actual value of the Sunbeam stock on the date of the transaction. *See id.* at 10487-88, 10522-23. Nye also admitted that many factors influence stock price and that he had made no effort to determine what portion of CPH's losses were caused by non-fraud factors, such as the stock market crash of 2000 and decisions made by Sunbeam's new management. *See id.* at 10529-30. CPH presented no evidence showing that the actual value of Sunbeam stock was the same on the date of the transaction as on those latter dates. The Fourth District has repeatedly held that evidence of damages was insufficient where a plaintiff has failed to prove actual value on the date of the transaction. *Kind*, 889 So. 2d at 90; *Teca*, 726 So. 2d at 829; *Perlman*, 611 So. 2d at 1341. That is precisely the situation here.

CPH's failure of proof is all the more glaring given the circumstances of the case. This is not a situation where the modest financial stakes involved made it impractical to conduct an event study. To the contrary, CPH had multiple damages experts who could have conducted an event study to determine actual value on the date of the transaction. The failure of proof here was the result of a strategic litigation decision designed to inflate the damages estimate, not any difficulty in conducting the necessary analysis.

The results of CPH's approach to damages are striking. By proving actual value on a date approximately two years after the transaction, CPH effectively held Morgan Stanley liable for every decline in Sunbeam's share value, from $680 million to nearly zero, over that entire two-year period -- regardless of whether those declines were caused by disclosure of the fraud or by market fluctuations, mismanagement by Sunbeam, or other non-fraud-related factors. CPH effectively made Morgan Stanley its insurer for all share losses over that period. That is just the sort of overreaching the law forbids.

B. CPH's Measure of Damages Is Not Justified by the Sale Restrictions.

CPH's only justification for its unorthodox measure of damages is that it was restricted from selling its stock until December 6, 1999. Those restrictions, however, do not justify the measure of damages CPH applied.

1. The Restrictive Feature of the Stock Did Not Prevent Compliance with *Totale*.

The sale restriction did not mean that the stock was valueless or that its value could not be determined on the date of the transaction. Obviously, the mere fact that something cannot presently be sold does not mean that it has no value. It means only that value must be determined by means other than reference to market price. Restricted stock is routinely valued by expert testimony or other methods, typically by starting with the market price of comparable unrestricted stock and then reducing that price by an appropriate liquidity discount, if any. Both the Financial Accounting Standards Board and the Securities and Exchange Commission have issued guidelines for calculating "fair value" of restricted stock that follow this approach. *See* Financial Accounting Standards Board, Proposed Statement of Financial Accounting Standards

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No. 1201-100: Fair Value Measurements, at iii, v, 23-24, 43-44 (June 23, 2004), *available at* http://www.fasb.org/draft/ed_fair_value_ measurements.pdf; Statement Regarding "Restricted Securities," 1969 WL 95335, at *3 (S.E.C. Release No. AS-113, Oct. 21, 1969); *see also* Mukesh Bajaj et al., *Firm Value and Marketability Discounts*, 27 J. Corp. L. 89, 96-100 (2001).

Courts, too, have recognized that restricted stock can be valued despite its restrictive feature. In *Morris v. Ricks*, 573 So. 2d 1029 (Fla. 2d DCA 1991), for example, the Second District reversed the trial court's injunction against wrongful sale of restricted stock on the ground that the plaintiff had an adequate remedy in damages. Responding to the objection that the stock "was not tradeable in the open market, but was stock which was restricted in the time. and manner of transfer," the court observed that "[t]he actual worth or market value of the [restricted] stock at the time of the purported wrongful sale can be established by expert testimony." *Id.* at 1030; *see also Rochez Bros., Inc. v. Rhoades*, 527 F.2d 891, 894 (3d Cir. 1975).

Ironically, CPH's expert ***did*** present evidence of a liquidity discount. Dr. Nye explained in some detail why, in his view, the appropriate liquidity discount under the circumstances for an investor in CPH's position was 0%. *See* 4/25/05 Tr. at 10591-94. Thus, any complications that sale restrictions may normally introduce into computing actual value were no impediment here. Dr. Nye could have performed an event study on the unrestricted Sunbeam stock that traded in the market and then offered his opinion that no liquidity discount was appropriate. The problem, of course, is that Dr. Nye never computed actual value ***even for the unrestricted stock*.** That failure has nothing to do with the sale restriction.

2. The Restrictive Feature of the Stock Did Not Justify Noncompliance with *Totale*.

That the Sunbeam stock was subject to a sale restriction is no justification for valuing the stock on a date other than the date of the transaction.

CPH knew going into the transaction that a sale restriction existed -- by contract, it had agreed not to sell half its Sunbeam stock for nine months and the remainder for shorter periods. 4/25/05 Tr. at 10481. Thus, the stock "as represented" was restricted; those restrictions were part of the bargain. By accepting restricted stock, CPH agreed to subject itself to market fluctuations and other non-fraud-related share price declines during the restricted period without the option to sell. While CPH is entitled to compensation for any losses actually caused by fraud, allowing it to recover for ***all*** share price declines during the restricted period regardless of whether they; were caused by fraud or by other factors gives CPH ***more*** than its benefit of the bargain. It is no response that the alleged fraud made the sale-restricted period longer than it otherwise would have been. CPH contends that the fraud prevented it from selling to the public before December 6, 1999, when it could first register its shares for public sale. Even so, that does not justify departing from *Totale*. The appropriate measure of damages remains the difference between the represented value and the actual value on the date of the transaction. As represented, the stock was fraud-free and subject to a three-to-nine-month contractual lock-up. To the extent the lock-up period was extended by virtue of the fraud, CPH is at most entitled to any diminution of value on the date of the transaction attributable to the longer sale restriction. That is achieved by adjusting the liquidity discount for the stock received -- not by making Morgan Stanley liable for unrelated events occurring after the merger.

Even if the unanticipated extension of the sale-restricted period justified recovery of all losses suffered during the extension, it cannot possibly justify recovery of all losses during the entire restricted period. As noted above, CPH ***contractually agreed*** to lock-ups for the first three to nine months. That was the far more significant period in terms of share price declines: When the transaction closed on March 30, 1998, the share price was $43.94. CPH 1296 at 40. Nine months later, when the latter half of the contractual lock-ups expired, the share price had already fallen to $6.88. *Id.* at 46. When the shares could first be registered on December 6, 1999, the shares had fallen further, but only to $4.56. *Id.* at 52. Thus, the vast majority of share price declines occurred during the period where CPH had contractually agreed not to sell its shares. During that period, at least, CPH was required to exclude losses not caused by the fraud by proving actual value on the date of the transaction.

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3. *Silverberg* Does Not Support a Contrary Result.

The only legal authority CPH cites in support of its approach is a federal appellate decision applying Florida law, *Silverberg v. Paine, Webber, Jackson & Curtis, Inc.*, 710 F.2d 678 (11th Cir. 1983), a case that has nothing to do with restricted stock. CPH nevertheless claims that *Silverberg* supports its theory of damages because the court approved a jury instruction that allowed the plaintiff to recover without proving actual value on the date of the transaction. That decision does not support CPH's measure of damages.

In *Silverberg*, the court allowed the plaintiff to recover the difference between the price at which he purchased certain securities and the price at which he later sold them. That is a ***rescissional*** measure of damages, designed to place the parties in the position they occupied prior to the transaction. *See Huddleston v. Herman & MacLean*, 640 F.2d 534, 554 (5th Cir. 1981), *modified on other grounds*, 459 U.S. 375 (1983). The *Silverberg* court expressly referred to the remedy at issue in that case as "rescissional" and cited several federal cases (including *Huddleston*) that discuss the rescissional measure of damages. See *Silverberg*, 710 F.2d at 687-88 & nn.13-15. [6] Unlike benefit-of-the-bargain damages, rescissional damages do not require proof of actual value on the date of the transaction and do not require proof of the portion of stock-price declines proximately caused by the fraud. *See E.F. Hutton*, 537 So. 2d at 981. At the same time, however, a rescissional-damages theory allows a plaintiff to recover only the consideration paid, not any benefit of the bargain. *See* Restatement (Second) of Torts § 549 cmt. e (1977); *E.F. Hutton*, 537 So. 2d at 981 (rescission "restricted to consideration paid").

Silverberg most certainly does not support the proposition, advanced by CPH, that a plaintiff may recover benefit-of-the-bargain damages based on proof that would justify only rescissional damages. A plaintiff cannot ask a court to rescind a transaction while at the same time retaining its benefit of the bargain. *See Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co.*, 761 So. 2d 306, 313 (Fla. 2000); *Bliss & Laughlin Indus., Inc. v. Malley*, 364 So. 2d 65, 66 (Fla. 4th DCA 1978); *Nystrom v. Cabada*, 652 So. 2d 1266, 1268 (Fla. 2d DCA 1995). The plaintiff in *Silverberg* was not seeking the benefit of his bargain; rather, he was asking merely to be put back in the financial position he was in prior to the transaction. The jury instruction accordingly limited damages to "the difference between the ***purchase price paid for the Posi-Seal stock*** purchased by the plaintiff and the price at which such stock was or could have been sold by the plaintiff when he learned of the alleged fraud." *Silverberg*, 710 So. 2d at 685 (emphasis altered).

CPH, by contrast, did not base its damages claim on the value of the consideration it paid for the Sunbeam stock. Rather, it relied on the (much higher) value of the Sunbeam stock as represented. It sought ***both*** to be compensated for all losses suffered during the sale-restricted period regardless of cause ***and*** to be awarded its benefit of the bargain. That mix-and-match approach to damages is contrary to both precedent and common sense. Rescissional and benefit-of-the-bargain damages are inconsistent remedies -- rescission rejects the contract; benefit-of-the-bargain affirms it. The plaintiff must therefore elect between them. *See Mazzoni Farms*, 761 So. 2d at 313; *Bliss & Laughlin Indus., Inc.*, 364 So. 2d at 66; *Nystrom*, 652 So. 2d at 1268. CPH instead sought rescissional damages without the normal limitation to purchase price paid, and, at the same time, benefit-of-the-bargain damages without separating losses caused by the fraud from bargained-for consequences. The result is that CPH failed to prove damages under either theory.

C. CPH's Failure of Proof Requires Entry of Judgment in Favor of Morgan Stanley or at Least a New Trial.

CPH's failure to prove actual value on the date of the transaction requires entry of judgment in favor of Morgan Stanley. Failure to present evidence sufficient to sustain an award of damages under the legally prescribed method results in judgment as a matter of law. *See Teca*, 726 So. 2d at 830; *Perlman*, 611 So. 2d at 1341. CPH is not entitled to another opportunity to fill the evidentiary gaps in the record. Trial courts do not "allow[] a second bite at the apple when there has been no proof at trial concerning the correct measure of damages." *Teca*, 726 So. 2d at 830. Even if that result may

be harsh in other cases, it certainly is not harsh here, where the evidentiary failings are the result of CPH's own strategic litigation decisions.

In any event, as we next discuss, even if there were sufficient evidence in the record to support an award under CPH's elected measure of damages, numerous related trial errors relating to the damages issue would require at least a new trial.

1. Evidentiary Errors

First, the Court erred by not excluding or striking the testimony of Dr. Blaine Nye. Dr. Nye's testimony was irrelevant and prejudicial because he did not prove actual value on the date of the transaction, nor did he provide any equivalent method by which the jury could have determined the portion of CPH's losses caused by the fraud rather than by other factors. Indeed, at one point, the Court affirmatively prohibited the parties from proving actual value on the date of the transaction by precluding testimony of value on any date unless the stock "could be sold as of the date to be used." *See* Order on CPH's MIL No. 27 (Mar. 28, 2005). Although the Court subsequently reconsidered that order and allowed alternative proof that "an appropriate liquidity discount has been established, is not required, or is implicit in the figure offered," *see* Order on Morgan Stanley's Motion for Clarification or Reconsideration of the Court's Order on Plaintiff's Motion in Limine No. 27 (Apr. 15, 2005), that order did not cure the problem. CPH bears the burden of proving damages under the legally correct method. Proof of actual value on the date of the transaction with an appropriate liquidity discount (if any) is legally sufficient; proof of value on a date two years later when the stock could first be sold is not. CPH is not entitled to choose between a valid measure of damages and an invalid one.

Nye's approach to calculating damages is not a generally accepted methodology and fails to comply with Florida law. Well-accepted methodologies for calculating actual value exist -- namely, event studies -- but Dr. Nye failed to use them. For those reasons, his testimony should have been excluded or stricken. Because Nye was CPH's only damages expert and because his testimony was necessary to support the verdict, exclusion would result in judgment for Morgan Stanley. At the very least, Nye's improper testimony had an obvious prejudicial impact on the verdict, and Morgan Stanley is entitled to a new trial.

Moreover, the Court also committed prejudicial trial error by sharply limiting Morgan Stanley's cross-examination of Nye with respect to other causes of the Sunbeam stock's decline in value. *See, e.g.*, 4/25/05 Tr. at 10533, 10544-46. That topic was critically related to key issues in the case, proximate cause and damages. The Court foreclosed the questioning essentially because CPH's counsel had instructed Dr. Nye to assume the facts bearing on actual value. *See id.* at 10546. But Dr. Nye's opinion on other potential causes of Sunbeam stock's decline in value would still have been highly probative because it illustrated why his ***opinion*** of actual value (based as it was on pure assumption) did not correspond to the ***true*** actual value and should not be credited by the jury. By sharply limiting Morgan Stanley's cross-examination on that topic, the court hampered Morgan Stanley in illustrating the inadequacies of Nye's testimony to the jury. That prejudicial error on a key issue in the case requires a new trial. [7]

2. Instructional Errors

The Court similarly erred in its jury instructions. The Court failed to instruct the jury to calculate actual value as of the date of the transaction, as Florida law requires, and instead instructed it to calculate actual value as of a date no earlier than November 25, 1999. *Id.* at 14610. The Court's instruction relieved CPH of its burden to prove the portion of its losses proximately caused by the fraud and effectively allowed CPH to recover an unprecedented blend of benefit-of-the-bargain and rescissional damages without requiring CPH to elect between the two theories.

The court also erroneously instructed the jury to calculate damages based on "the fair market value at which CPH reasonably could have sold its" shares. 5/13/05 Tr. at 14609, 14610. Because CPH received restricted shares, the price

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at which it reasonably could have sold them was not an appropriate measure of value on the date of the transaction. CPH ***could not*** have sold its shares on that date, so it is nonsensical to base a measure of damages on the price at which it "reasonably could have sold" its shares on that date. Some other method of proving value on that date -- for example, expert testimony -- was required. *See Morris*, 573 So. 2d at 1030-31; *Rochez Brothers*, 527 F.2d at 894. The Court compounded its instructional error by referring to "market value" and "willing and able" purchasers and sellers. 5/13/05 Tr. at 14610-11. Phrases like those are inappropriate where the property by its nature cannot be sold on the relevant date and so must be valued by some other means.

The Court's instructions were also internally inconsistent. The Court instructed the jury to determine damages based on the difference between the stock's represented value and its actual value no earlier than November 25, 1999, *id.* at 14610, but later instructed the jury that CPH could not recover for losses caused by factors other than the alleged fraud, *id.* at 14611. Those instructions were internally inconsistent because the former instruction required the jury to compute damages based on *all* losses suffered over the nearly two-year sale-restricted period, regardless of cause. The ***purpose*** of the date-of-transaction requirement is to exclude subsequent unrelated appreciation and depreciation, *i.e.*, those losses caused by factors other than the alleged fraud. *See Totale*, 877 So. 2d at 815. A jury cannot ***both*** base its damages award on actual value on a date two years after the transaction and return a verdict that excludes losses not proximately caused by the fraud. [8]

D. CPH's Proof of Damages Was Deficient in Numerous Other Respects.

CPH failed to prove damages in numerous other respects, and the Court committed related errors that necessitate a new trial.

1. Benefit-of-the-Bargain Damages Are Not Available.

Morgan Stanley is entitled to judgment (or, at least, a new trial) because CPH proved damages under a benefit-of-the-bargain theory when that measure of damages is not available in this case.

Benefit-of-the-bargain damages are available only where the plaintiff and defendant are in contractual privity, so that there is a "bargain" between them. *See* Restatement (Second) of Torts § 549 cmt. g (1977). CPH and Morgan Stanley were not in contractual privity. The Court nevertheless allowed CPH to seek benefit-of-the-bargain damages on the theory that CPH conspired with Sunbeam and therefore may be held liable under any theory of damages that CPH could assert against Sunbeam. That reasoning, however, assumes that co-conspirators can be held liable on a contractual theory of damages. Florida, like many other jurisdictions, has not recognized a cause of action for conspiracy to breach a contract. *Cf. Leasehold Expense Recovery, Inc. v. Mothers Work, Inc.*, 331 F.3d 452, 463 (5th Cir. 2003). If co-conspirators cannot be held liable for benefit-of-the-bargain damages for breach of contract, there is no justification for holding them liable for a contractual measure of damages on a fraudulent inducement claim. [9]

2. CPH Failed To Prove Represented Value.

CPH failed to prove the value the stock would have had on the date of the transaction if it had been as represented. *See Teca*, 726 So. 2d at 829; *Totale*, 877 So. 2d at 815. Dr. Nye calculated the represented value of the Sunbeam stock based on a 21-day average of prices between the agreement and the closing dates. *See* 4/25/05 Tr. at 10377, 10382. CPH presented no evidence that anyone at Morgan Stanley or Sunbeam ever "represented" that the stock had that particular value on the date of the transaction. [10]

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Moreover, Dr. Nye compounded his error by choosing the dates for his 21-day average based on the subjective expectations of the parties to the transaction. Under Florida law, benefit-of-the-bargain requires an ***objective*** measure of value. *See* 5/11/05 Tr. at 13998:1-4 (conceding the point). Yet Nye admitted that his decision to use the 21-day average was based on the ***subjective*** expectations of CPH and its principals. *See* 4/25/05 Tr. at 10466:11-17 ("Q. But it's your view that the expectation you were trying to measure in your damages model was Mr. Ronald O. Perelman's, correct? A. If he's indeed the decision maker, yes."); *id.* at 10461:21-24 ("Q. You were trying to estimate what Coleman anticipated its shares would be worth when they signed the deal, correct? A. Sure."). It should go without saying that the subjective expectation of a purchaser necessarily overstates value; if the purchaser did not believe the stock was in some sense worth more than the purchase price, he ordinarily would not make the purchase.

Dr. Nye's use of arbitrary averages relying on subjective expectations was not a generally accepted methodology and is inconsistent with Florida law. His testimony was insufficient to meet CPH's burden of proving the represented value of Sunbeam stock and, in any event, was improper and should have been excluded or stricken. The Court should accordingly award judgment to Morgan Stanley, or at least grant a new trial. [11]

3. CPH Failed To Prove the Sale Restrictions Precluded Private Sale.

Assuming *arguendo* that CPH was entitled to prove actual value on the date the shares could first be sold rather than the date of the transaction, it failed to do so. The ineligibility for registration until December 6, 1999, proves at most that the shares could not be sold ***to the public*** before that date. Perelman testified that he did not know whether private sales were possible during this period. 4/20/05 Tr. at 9671:10-18. And Morgan Stanley has demonstrated that private sales were possible under the Securities Act of 1933. *See* Morgan Stanley's Proffer of Evidence and Argument Regarding CPH's Ability to Sell its Sunbeam Stock as Early as June 30, 1998 (Apr. 15, 2005).

Because CPH failed to prove that it could not have sold its shares in a private transaction or otherwise in compliance with law before December 6, 1999, Morgan Stanley is entitled to a judgment in its favor. At most, the practical impediments CPH identified create a jury issue, and the Court invaded the province of the trier of fact by instructing the jury on when CPH could sell its stock rather than instructing it to determine that fact for itself. That instructional error warrants a new trial.

4. CPH Failed to Prove It *Would* Have Sold the Stock.

Again assuming *arguendo* that CPH was entitled to prove actual value on a date other than the date of the transaction, CPH failed to prove damages proximately caused by the fraud because it did not prove that it ***would*** have sold its shares before December 6, 1999, had it been able to do so. If CPH would not have sold its shares even if it could have, the sale restrictions were not a but-for cause of any of CPH's losses and cannot supply a rationale for measuring actual value on a date other than the date of the transaction.

The record contains numerous indications that CPH was a long-term holder, and a jury could easily find that CPH would have held its Sunbeam stock after disclosure of the fraud rather than sell it at the depressed prices. CPH agreed to an initial lock-up period on its stock of up to nine months. *See* 4/20/05 Tr. at 9670-71; 4/25/05 Tr. at 10481. It chose to extend that period for 3 years for a portion of its stock when it settled with Sunbeam. *See* 4/25/05 Tr. at 10391. When restrictions lifted on most of its shares, it still made no effort to sell, failing even to register its shares so that it might sell some portion of them to the public. 4/28/05 Tr. at 11166-67; 5/2/05 Tr. at 11728-30. Finally, it continued to value its stake in Sunbeam at $450 million, long after disclosure of the fraud, based on aspirations for a successful management turn-around of the company. *See* MS 822; 4/25/05 Tr. at 10578-79.

By neglecting to prove the date on which it ***would*** have sold its Sunbeam stock, CPH failed to meet its burden of proof even under its own erroneous theory of damages, and Morgan Stanley is entitled to judgment. Even if a jury could infer from the record that CPH would have sold its stock as soon as it could have, the Court's instructions failed to present that issue to the jury and instead precluded use of any date before CPH ***could*** have sold its shares. Morgan Stanley is at least entitled to a new trial at which the jury is properly instructed on this issue.

IV. MORGAN STANLEY IS ENTITLED TO A NEW TRIAL BECAUSE OF IMPROPER EX PARTE COMMUNICATION WITH JURORS BY A CLOSE ASSOCIATE OF CPH'S LEAD COUNSEL.

Morgan Stanley is entitled to a new trial because, in the midst of the trial, a current client and longtime close associate of CPH's lead trial counsel accosted three jurors and asked them questions about the case. [12] The risk of prejudice to Morgan Stanley inherent in that improper contact is heightened even further by the likelihood that the jury associated the jury tamperer with ***Morgan Stanley***. The necessity for a new trial in these circumstances is so clear that CPH initially ***joined*** Morgan Stanley's request for a mistrial and twice reiterated its support for a new trial. *See* 4/25/05 Tr. at 10445.

More important, Florida law compels a new trial. Time and again, Florida appellate courts have recognized that "prima facie" evidence of "potentially prejudicial" acts such as "private communications, contact, indirect or direct tampering with a jury" by persons associated with a participant in a case "raise[s] a ***presumption*** of prejudice." *Nationwide Mut. Fire Ins. Co. v. Tucker*, 608 So. 2d 85, 88 (Fla. 2d DCA 1992) (emphasis added). The presumption cannot be overcome absent proof "that there is ***no reasonable*** *possibility*" of an effect on the fairness of the trial. *Id.* (emphasis added).

There is no serious dispute that, during a break in the trial, an individual, later identified as Mr. James Comyns, approached three jurors, began asking them questions about this case, and pursued them when they apparently gave vague responses. As one juror told the Court, "[i]t was very obvious [from] the questions he was asking he was trying to get information from us." 4/25/05 Tr. at 10416:24 - 10417:01. "[H]e kept talking and asking us questions." *Id.* at 10417:6-7. The jurors told the Court that Mr. Comyns said "you guys are probably on the Stanley case," *id.* at 10417:3-4, and that they provided "very vague" answers to his questions about the case, *id.* at 10417:4-5. Even when the jurors "walked away," "he followed us, right behind us," "[s]till asking questions." *Id.* at 10417:8-11.

Nor is there any dispute that Mr. Comyns had observed the trial earlier on at least three different occasions. He had been seated behind the Morgan Stanley defense table where Morgan Stanley's advisors and counsel sit. 4/26/05 Tr. at 10615:20 - 10616:01. And he was seen inspecting Morgan Stanley's nearby boxes of defense materials. 4/25/05 Tr. at 10420:19-20. When asked to describe Mr. Comyns, one juror recalled seeing him in the courtroom: "He was actually sitting in the back over there," pointing to the area behind the Morgan Stanley counsel table. *Id.* at 10417:14-15. At that point, Morgan Stanley's counsel determined that the individual who had approached the jurors was Mr. Comyns. *Id.* at 10418:10-12.

Mr. Comyns has a significant criminal history, including obstruction of justice. He is also is a longstanding and "current client" of CPH's lead trial counsel, Mr. Scarola. 4/25/05 Tr. 10434:19-21. When the tampering came to light, CPH's lead trial counsel conceded that Mr. Comyns was a client (and continued that relationship by purporting to represent Mr. Comyns' interests even in connection with the jury tampering concerns in *this* case). CPH's lead trial counsel did not disclose that: (1) He and Mr. Comyns were co-defendants in another matter; (2) his law firm and Mr. Comyns apparently remain co-defendants in that action; and (3) Mr. Scarola's law firm is a creditor of Mr. Comyns, with security interests in *virtually every piece of personal property owned by Mr. Comyns and his wife*. Under the circumstances, Morgan Stanley is entitled to a new trial.

A. The Ex Parte Contact by a Close Associate of CPH's Lead Counsel Gives Rise to a Strong Presumption of Prejudice

As the Florida Supreme Court explained more than half a century ago, "[a]pproaching a juror to find out how he stands with reference to a case, or sounding out a juror... or acts which have a tendency to enable a person to make certain the result of a litigated case involving a trial by jury" are "justly regarded as evil, being viewed as an infringement upon the equilibrium of mind and independence of judgment of those jurors who are likely to be called upon to become triers of fact . . . ." *State v. Clark*, 46 So. 2d 488, 489 (Fla. 1950) (quoting *Baumgartner v. Joughin*, 141 So. 185, 188 (Fla. 1932)). Contact is absolutely forbidden because it "might intimidate, either obliquely or directly; it might subtly create empathy, [or] it might disclose facts of which the jury ought not to be aware." *Hobson v. Wilson*, 737 F.2d 1, 48 (D.C. Cir. 1984). "[I]t is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made." *Remmer v. United States*, 350 U.S. 377, 382 (1956).

Certain acts are so "potentially harmful" that they are "presumptively prejudicial." *Amazon v. State*, 487 So. 2d 8, 11 (Fla. 1986); *Norman v. Gloria Farms, Inc.*, 668 So. 2d 1016, 1020 (Fla. 4th DCA 1996); *Tucker*, 608 So. 2d at 88. Among these acts are "private communications, contact, indirect or direct tampering with a jury" by persons associated with participants in the litigation. *Id.* (citing *Remmer v. United States*, 347 U.S. 227, 229 (1954)). The Fourth District has squarely held that "[c]ontact with a juror during trial about the pending matter falls within this category." *Norman*, 668 So. 2d at 1020 (citing *Amazon*, 487 So. 2d at 11). Likewise, there is a presumption in favor of a new trial if there is a prima facie showing of ***potential*** prejudice. *Tucker*, 608 So. 2d at 88. Once the moving party makes a "prima facie" showing of such "potentially harmful misconduct," "the burden then shifts to the party seeking to preserve the jury's verdict." *Norman*, 668 So. 2d at 1020; *accord Amazon*, 487 So. 2d at 11-12; *Tucker*, 608 So. 2d at 88; *see also Mattox v. United States*, 146 U.S. 140, 150 (1892) ("Private communications, possibly prejudicial, between jurors and third persons ... are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.").

Precisely the evil that the law seeks to avoid -- unauthorized contact between jurors and someone closely associated with a party -- has materialized here. Mr. Comyns, a convicted felon and a client and debtor of, and former co-defendant with, CPH's lead trial counsel, ***knowingly*** accosted the three jurors. The jurors testified that Mr. Comyns specifically asked whether they were serving on ***this case***, "the Stanley case." 4/25/05 Tr. at 10417:3-4. Mr. Comyns contacted the jurors in direct violation of this Court's oft-repeated admonitions to the jury, "Don't talk to anybody about the case, don't let anybody talk to you about the case." *Id.* at 10411:13-15; *see Norman*, 668 So. 2d at 1019-20 (granting mistrial where person questioned juror "in contravention of an express instruction by the trial court not to discuss the case with anyone"). Most importantly, Mr. Comyns ***persistently*** sought to extract information from the jurors ***concerning this case***. *See id.* at 1019 (questioning juror as to " 'how the case was going' ... represents an instance of improper contact which will not be tolerated as a matter of public policy"). Those facts by themselves establish the prima facie case of "contact with a juror during trial about the pending matter" that creates a presumption of prejudice. *Norman*, 668 So. 2d at 1020; *Tucker*, 608 So. 2d at 88; *Amazon*, 487 So. 2d at 11.

The presumption of prejudice is particularly strong here because of the uniquely close lawyer-client, co-defendant, and debtor-creditor relationship between Mr. Comyns and CPH's lead trial counsel, Jack Scarola, Esq., and his firm. Mr. Comyns is a longstanding client of Mr. Scarola's. He was a co-defendant with Mr. Scarola in a civil case where both were accused of serious corporate misfeasance. And he continues to be a co-defendant in that case along with Mr. Scarola's law firm. Mr. Scarola's firm continues to hold hens on much of Mr. Comyns' property. Mr. Scarola has defended Mr. Comyns in the press. Mr. Scarola has spoken to Mr. Comyns in court in this case. And Mr. Comyns allegedly attended trial for the sole purpose of speaking to Mr. Scarola about a pending case. Indeed, Mr. Scarola even appeared for Mr. Comyns ***after he was revealed as the jury tamperer*****,** resisting, **"*as Mr. Comyns' attorney*,"** Morgan Stanley's reasonable request to bar Mr. Comyns from the courtroom. 4/25/05 Tr. at 10432:21-23 (emphasis added). Finally, Mr. Scarola or his firm obtained from Mr. Comyns an *ex parte* affidavit to explain his conduct. *See infra* pp. 50-53.

In case after case, courts have held that similarly close relationships between a party and one who makes improper contact with the jury give rise to a presumption of prejudice. For example, in *Norman*, the Fourth District concluded that contact between the jury foreman and his brother constituted an influence "extrinsic to the verdict which potentially compromises

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the integrity of the fact-finding process." 668 So. 2d at 1019. In that case, the foreman's brother, an employee of the defendant's liability insurer, asked only "how the case was going." *Id.* Even though the liability insurer was not a party to the case, and there was no effort to influence the result, the Court held that the brother's inquiry was "potentially harmful misconduct that is presumptively prejudicial," requiring a new trial. *Id.* at 1020.

Norman involved a solitary and otherwise seemingly innocuous inquiry with one juror initiated by an individual who had no direct relationship with a party or counsel; he was merely an employee of the defendant's liability insurer, a non-party. *See Norman*, 668 So. 2d at 1018-19 & n.1. Here, there was a persistent effort at contact initiated by an individual with a close relationship to CPH's lead trial counsel. New trials have often been required even where a party's mere "friend" approaches a juror. For example, in *Atlantic Coast Line R. Co. v. Hardwick*, 193 So. 730, 734 (Ala. 1940), the Alabama Supreme Court reversed the denial of a mistrial and applied a presumption of prejudice in a case where "a friend" of the plaintiff gave one juror an excerpt from the Saturday Evening Post that "had nothing to do with the case." *Id.* at 731-32. The Court explained that, because the individual who contacted the juror was "actively interested in the result of the trial and [was] friendly to the plaintiff and [was] instrumental in distracting the juror's attention, if not in making an intentional approach to him," a "mistrial should have been granted" regardless "whether the motive was innocent or sinister." *Id.* at 735. Here, Mr. Comyns is more than a mere friend; he is an intimate associate, client, and former co-defendant of Mr. Scarola's. And far from passing an innocuous newspaper article to a single juror, he approached three jurors, addressed this case specifically, pursued them when they tried to walk away, and pressed them for information about the case. Under the circumstances, prejudice is presumed and a new trial is required. [13]

B. Morgan Stanley Has Made a Prima Facie Showing of Potential Prejudice.

Mr. Comyns' improper contact with the three jurors is not only presumptively prejudicial -- which is all that the law requires to shift the burden to CPH. It also prima facie establishes potential prejudice on the facts of this case. The jurors were well aware that the contact was improper. This Court repeatedly admonished them not to talk to anybody about the case. *See, e.g.*, 4/25/05 Tr. at 10433:10-12 (The Court: "In all honesty, virtually every break we take I remind the jurors not to talk to anybody about the case."). They tried not to answer Mr. Comyns' questions about the case. *Id.* at 10417:4-5. And they tried to leave when he persisted. *Id.* at 10417:6-9. When the Court admonished the jury not to talk to anyone after Mr. Comyns' improper contact, one juror "looked at [the Court] and smiled, so I think he knew why I was giving that again." *Id.* at 10414:9-12.

Not only did the jurors know that Mr. Comyns' conduct was wrong, but also it is likely that they blamed *Morgan Stanley* for Mr. Comyns' actions. When Mr. Comyns introduced himself to the three jurors, he referred to the case as the Morgan Stanley case, not the Coleman case or the CPH case. 4/25/05 Tr. at 10417:3-4; *see also id.* at 10412:9-15. The jurors saw Mr. Comyns sitting behind Morgan Stanley's lead trial counsel among members of Morgan Stanley's team. And it was Morgan Stanley's counsel who, on hearing the jurors' description, recognized who the suspicious individual was and signaled that recognition to the Court: "We need to talk, Judge." 4/25/05 Tr. at 10417:25.

Other events in the case likewise (but incorrectly) pointed toward Morgan Stanley. The Court instructed the jury that "Morgan Stanley has engaged in litigation misconduct." 3/30/05 Tr. at 5822:23-24 (one juror); *id.* at 5881:13-14 (complete jury pool). CPH's principal witness gratuitously and falsely told the jury that Morgan Stanley had "acknowledged" that it engaged in criminal activity. 4/21/05 Tr. at 9808:5-13. The Court told the jury that Morgan Stanley committed the acts of dishonesty and deception set forth in the Complaint, an impression reinforced by CPH's constant references to those allegations as the "facts established in advance of trial." *See, e.g.*, 4/6/05 Tr. at 7071:18-19, 7072:22; 4/19/05 Tr. at 9065:20-9066:1, 9066:16-23, 9159:17-19; 4/21/05 Tr. at 9978:5-12; *see also* 4/6/05 Tr. at 7051:21 ("Established facts"), 7059:3, 7074:7. And CPH's counsel characterized this case as the first of the major corporate and accounting frauds now in the news -- frauds that, as the jurors knew, resulted in many criminal convictions. 4/6/05 Tr. at 6953:8-9, 6955:7-10. In light of these circumstances, when a suspicious character pumps three jurors for information, after having sat behind

and among the Morgan Stanley defense team, the jurors likely inferred that Morgan Stanley took a page from the script of *Runaway Jury*.

The three jurors improperly contacted, moreover, were then thought to be among the most favorable to the defense. 4/25/05 Tr. at 10442:16-21, 10446:17-20. That those jurors were singled out does not merely reinforce the inference of bad intent. It also exacerbated the unfair prejudice by poisoning the impressions of the jurors who might otherwise have been favorably inclined. Moreover, it is common knowledge that jurors form tight bonds with each other and often discuss their experiences. Thus, these events likely were "communicated to other jurors," infecting the entire panel. *Hobson*, 737 F.2d at 48; *see also* 4/26/05 Tr. at 10669:14-16.

It is well recognized that, "[w]hen there has been an attempt at jury tampering, the court ***must*** guard against the possibility that the jury will assume one of the parties was responsible for the attempt and, based on that assumption, decide the merits of the case unfavorably to that party." *United States v. Forrest*, 620 F.2d 446, 457 (5th Cir. 1980) (emphasis added). Here, the Court has made no effort to protect Morgan Stanley from that harm, despite counsel's direct request. 4/26/05 Tr. at 10725:4 - 10726:3. The potential that Morgan Stanley was prejudiced by the improper jury contact requires a new trial.

C. Mr. Comyns' Affidavit Fails To Rebut the Potential for Prejudice and Instead Reinforces It.

Once the moving party makes a "prima facie" showing of "potentially harmful misconduct," "the burden then shifts to the party seeking to preserve the jury's verdict." *Norman*, 668 So. 2d at 1020; *accord Amazon*, 487 So. 2d at 11-12; *Tucker*, 608 So. 2d at 88. The moving party is "***entitled to a new trial*** unless the opposing party can demonstrate that there is ***no reasonable possibility*** that the jury misconduct affected the verdict." *Id.* (quoting *State v. Hamilton*, 574 So. 2d 124, 129 (1991) (emphases altered)). As set forth in greater detail in Morgan Stanley's mistrial motions filed in connection with this event, far from rebutting the presumption and prima facie case of prejudice, the sworn statement prepared by Mr. Comyns at Mr. Scarola's firm -- that, contrary to the jurors' accounts, he "never talked to any jurors about anything" -- is so inherently implausible that it reinforces the likelihood of prejudice and appearance of impropriety.

Mr. Comyns' affidavit is inconsistent with the jurors' accounts and incredible in its own right. The jurors testified that Mr. Comyns approached three of them and pressed them for information about the case. "It was very obvious [from] the questions he was asking he was trying to get information from us"; "he kept talking and asking us questions"; even when they "walked away," Mr. Comyns "followed us, right behind us," "[s]till asking questions." 4/25/05 Tr. at 10416:24 - 10417:01, 10417:6-10. By contrast, Mr. Comyns swore that he did not ask questions about the case (only whether the case was "over for the day"); did not obtain information about the case ("I never talked to any jurors about anything"); and did not follow the jurors ("I left to go upstairs in courtroom (just starting))." Comyns Aff. at 2. Unless the jurors were lying, Mr. Comyns' affidavit demonstrates that he was being less than forthright.

Mr. Comyns' affidavit is inherently implausible. Mr. Comyns claims that he approached the jurors solely to ask whether the case was "over for the day." Comyns Aff. at 2. At the time Mr. Comyns approached the jurors, however, it was approximately 10 o'clock in the morning. That Mr. Comyns thought court was over for the day at 10 o'clock defies credulity. Mr. Comyns, moreover, avers that -- despite his attendance in court and his extensive experience with the judicial system -- he never heard the Court's repeated admonitions to the jurors not to talk to anyone about the case. *See* Comyns Aff. at 2. That assertion is utterly implausible, as the Court itself observed. Because the Court openly reminded the jurors not to speak to anyone at "virtually every break we take," the Court understandably had "a hard time believing that some courtroom spectator would believe that he was privileged to approach the jurors." 4/25/05 Tr. at 10433:10-14.

The affidavit, moreover, contradicts itself. In one part, Mr. Comyns indicates that, after joking about the length of the trial, "I left to go upstairs in courtroom Oust starting)." But a few sentences later, Mr. Comyns claims he "waited about

3-5 minutes and left." Comyns Aff. at 2. This case simply has too much at stake for serious questions of impropriety to be dismissed on the self-contradictory say-so of a convicted felon with a criminal history that includes obstruction of justice.

In any event, in cases of improper jury contact, "[s]o delicate are the balances in weighing justice" that not "only the evil... ***but the appearances of evil***, if possible, should be avoided." *Atlantic Coast Line R. Co.*, 193 So. at 734 (emphasis added). As the Fourth District has recognized, a new trial based on improper juror contact "may be required under 'some circumstances ... for the purpose of maintaining confidence in the integrity of jury trials.' " *Norman*, 668 So. 2d at 1020 (quoting *Policari v. Cerbasi*, 625 So. 2d 998, 998 (Fla. 5th DCA 1993)). This is just such a case. This was no mere happenstance hallway conversation between a bystander and a juror. This was an intentional interaction concerning this case directed at jurors because they were jurors on this case. The improper contact was initiated by a longstanding client and former co-defendant of CPH's trial counsel, most of whose property is subject to liens held by CPH's lead trial counsel's firm. And after the wrongdoer was revealed, he concocted an unlikely story in an *ex parte* affidavit, prepared at the plaintiff's law firm, that casts even further suspicion on these events. In these circumstances, a new trial does not merely serve the interests of fairness in this case. It helps protect the judicial system's reputation for fairness and integrity.

V. CPH WAIVED THE FRAUD.

Morgan Stanley is entitled to judgment as a matter of law because the evidence conclusively shows that CPH waived the fraud. Execution of a new contract respecting a former transaction known to have been fraudulent waives ***any claim*** based on the previous fraud. *Benn v. Key West Propane Gas Corp.*, 72 So. 2d 910, 913 (Fla. 1954); *Harpold v. Stock*, 65 So. 2d 477, 478 (Fla. 1953). "[W]hen a party claiming to have been defrauded enters, after discovery of the fraud, into new arrangements concerning the subject matter of the contract to which the fraud applies, he is deemed to have waived any claim on account of the fraud; and he can neither rescind, nor maintain an action for damages." *Price v. Airlift Int'l, Inc.*, 181 So. 2d 549, 550 (Fla. 3d DCA 1966).

The undisputed evidence showed that CPH entered into new arrangements with Sunbeam after acquiring knowledge of the alleged fraud. Howard Gittis testified:

> All I know is fraud was going on, and that was told to us by the existing Sunbeam board. We sent people down to try and help run the business. We weren't interested in investigating the fraud. We were interested in running the business. That was the only chance we had to recover any money.

4/28/05 Tr. at 11342:18-23. By its own admission, therefore, CPH had "discover [ed] ... the fraud" but entered into "new arrangements concerning the subject matter" of the merger agreement. *Price*, 181 So. 2d at 550. That constitutes waiver of the fraud under Florida law. *Id.* It does not matter whether those new arrangements involved Sunbeam or Morgan Stanley. Under Florida law, execution of a new contract respecting a transaction known to be fraudulent operates as a "waiver of ***any claim*** based on the previous fraud." *Benn*, 72 So. 2d at 913 (emphasis added). Having entered into those arrangements with Sunbeam, CPH cannot now sue Morgan Stanley for fraud. [14]

VI. A NEW TRIAL IS WARRANTED BECAUSE THE COURT SHOULD NOT HAVE PROHIBITED MORGAN STANLEY FROM CONTESTING ITS ALLEGED COMPLICITY IN THE SUNBEAM FRAUD IN PHASE I.

A. Morgan Stanley has previously explained why it believes the March 1, 2005 Adverse Inference Order and March 23, 2005 Default Order (the "Sanctions Orders") exceeded the Court's authority under Florida Rule of Civil Procedure 1.380(b)(2) and other applicable law, violated Morgan Stanley's rights against deprivation of property without due process of law under Art. I, § 9 of the Florida Constitution and the Fourteenth Amendment of the United States Constitution, and deprived Morgan Stanley of its right of access to the courts under Art. I, § 21 of the Florida Constitution. Rather than repeat its assignments of error, Morgan Stanley incorporates them by reference here. For

purposes of this new trial motion, Morgan Stanley summarizes why the Phase I sanctions and the manner in which the Court applied them were not necessary to "level the playing field" (Adverse Inference Order at 11) and were instead grossly disproportionate to the alleged misconduct.

Assuming for purposes of this motion that Morgan Stanley did not timely furnish documents that it was ordered to produce, and even that its failure to do so was intentional (an accusation that it vigorously disputes), the Court nonetheless failed adequately to consider the sufficiency of a more measured response, such as a continuance coupled with monetary sanctions sufficient both to compel Morgan Stanley to produce the missing documents and to compensate CPH for the costs of its motions practice and the delay of trial. This could have been coupled with the appointment (at Morgan Stanley's expense) of a Court-designated expert to oversee the completion of Morgan Stanley's production obligations. No contemporaneous findings explain why monetary sanctions coupled with a continuance at Morgan Stanley's cost would not have cured the production problems and permitted all disputed issues to be resolved by the jury on their merits. In the absence of such reasoning and findings, the Court failed to exercise its informed discretion under Florida Rule of Civil Procedure 1.380(b)(2), and its Sanctions Orders constitute an arbitrary deprivation of property under the Florida and United States Constitutions.

Even if monetary sanctions had been imposed and proved ineffective, the Court still had no sufficient basis to presume that the missing documents were relevant to CPH's fraud allegations, let alone that they might establish Morgan Stanley's complicity in the Sunbeam fraud. The missing documents were only a small portion of the thousands of paper documents and e-mail messages and 90 depositions produced during the discovery phase in this case. In light of the available testimony and documents on CPH's claims, as well as the evidence taken in connection with CPH's sanctions motions, the absence of ***any*** evidence suggesting that the missing documents implicated Morgan Stanley in the Sunbeam fraud made it an abuse of discretion for the Court to default Morgan Stanley on all of the fraud elements of the case other than reliance and damages. The sanctions the Court imposed were not commensurate with Morgan Stanley's alleged misconduct and thus exceeded the Court's authority and served as punishment in violation of due process and Florida law.

Once the Court effectively defaulted Morgan Stanley on all elements of CPH's claims other than reliance and damages, the Court had no legitimate basis for reading to the jury those portions of CPH's First Amended Complaint (the "Redacted Amended Complaint") that related to the elements it had just deemed established. Although Rule 1.380(b)(2) permits circuit courts in appropriate circumstances to strike paragraphs of a defendant's answer (which has the effect of deeming the corresponding paragraphs of the complaint admitted) ***or*** enter a default, we are not aware of any Florida precedent in which a court ***both*** partially defaulted a defendant ***and*** read to the jury deemed admissions that related to the defaulted elements but were not relevant to any issue the jury was to decide. [15] The Court's error in repeatedly reading the Redacted Amended Complaint to the jury prejudiced the entire trial. The Redacted Amended Complaint included demonstrably incorrect statements, inflammatory, argumentative, and unsupported allegations, and speculative and prejudicial characterizations that collectively deprived Morgan Stanley of any independent consideration of its defenses on reliance and compensatory damages. The dispositive effect of the Redacted Amended Complaint on those ostensibly unrelated issues is perhaps best demonstrated by CPH's relentless highlighting of the Redacted Amended Complaint despite the fact that it was logically and legally irrelevant to any issue before the jury. CPH devoted the vast majority of its five-hour opening statement to the Redacted Amended Complaint. It elicited several hours of expert testimony on the meaning of the deemed facts in the Redacted Amended Complaint. And it responded to Morgan Stanley's closing argument on reliance and compensatory damages by emphasizing that those issues had to be determined in the context of the deemed facts. Those facts were emphatically irrelevant to the jury's Phase I determination and their admission unfairly prejudiced the Phase I verdict.

The Court should allow Morgan Stanley to complete its production of documents and conduct a new trial on liability and compensatory damages.

B. The Court's implementation of the March 23, 2005 Order, moreover, injected further error into the trial. As explained in greater detail in Morgan Stanley's motion for a new trial (which Morgan Stanley incorporates by reference), the Court curtailed Morgan Stanley's ability to cross examine witnesses to show their lack of credibility, even on issues where the witnesses contradicted the true facts and their own prior testimony, for fear that the cross-examination might contradict the facts deemed true by the March 23, 2005 Order. *See* Morgan Stanley's Motion for Judgment in Accordance with Motion for Directed Verdict and Alternative Motion for New Trial at 21-22 (May 26, 2005). (The Court so limited Morgan Stanley's examinations despite Morgan Stanley's willingness to conduct the examinations under a limiting instruction deeming them relevant for credibility purposes alone.) And the Court precluded examination of witnesses even where the witness testimony varied from, elaborated on, or contradicted the facts established by the March 23, 2005 Order. *See id.* In so doing, the Court erroneously elevated the March 23, 2005 Order's sanction above the fundamental purpose of the trial -- a search for truth -- and unnecessarily denied Morgan Stanley its right to a fair trial even as to those issues where no default was imposed.

VII. THE COURT'S NUMEROUS LEGAL ERRORS, TAKEN INDEPENDENTLY AND CUMULATIVELY, REQUIRE A NEW TRIAL.

Morgan Stanley's New Trial Motion presents in great detail the Court's numerous legal errors, including its markedly different treatment of Morgan Stanley and CPH throughout the course of this trial. These errors individually and collectively operated to deny Morgan Stanley a fair trial.

A new trial is warranted where "cumulative prejudicial errors denied [the defendant] a fair trial." *State Farm Mut. Auto. Ins. Co. v. Revuelta*, 2005 WL 1107491, at *2 (Fla. 3d DCA May 11, 2005). Even where errors are harmless individually, they warrant a new trial where their "cumulative impact... resulted in unfair prejudice to the defense." *Pier 66 Co. v. Poulos*, 542 So. 2d 377, 380 (Fla. 4th DCA 1989).

That is what happened here. As set forth more fully in Morgan Stanley's Motion for Judgment in Accordance with Motion for Directed Verdict and Alternative Motion for New Trial (May 26, 2005), which Morgan Stanley incorporates by reference, the Court among other things (1) allowed CPH's experts to present undisclosed and incompetent testimony; (2) improperly limited Morgan Stanley's cross-examination of CPH's damages expert; (3) improperly excluded Morgan Stanley's expert testimony and refused to allow Morgan Stanley to add other witnesses; (4) allowed CPH's witnesses to engage in improper speculation; (5) countenanced gratuitous repetition of inflammatory "deemed facts"; (6) permitted irrelevant evidence of Morgan Stanley's debenture offering; (7) allowed CPH's lay witnesses to offer expert and legal opinions; (8) relied on the "deemed facts" to limit Morgan Stanley's cross-examination and impeachment of CPH witnesses without adequate justification; (9) applied inconsistent standards for imputing knowledge of CPH's agents to the corporation; (10) excluded testimony about Levin's reasons for voting for the merger and then allowed CPH to refer to that vote in closing argument, contrary to its earlier representation; (11) excluded other relevant evidence; (12) delivered jury instructions that were erroneous, an abuse of discretion, and internally contradictory; (13) empanelled a tainted jury; (14) disqualified qualified jurors; (15) allowed improper opening and closing argument; (16) failed to disqualify CPH's counsel for improper use of privileged material; (17) denied Morgan Stanley's reasonable request for a continuance; (18) made inconsistent rulings on exhibits not timely included on the exhibit lists; (19) made inconsistent rulings on whether Florida law imposes a duty to retain e-mail in anticipation of litigation; (20) required Morgan Stanley to reveal the content of its cross-examination in advance; (21) abused its discretion in denying Morgan Stanley's motion to conform its waiver defense to the evidence; and (22) bifurcated the trial over Morgan Stanley's objection. Further prejudice occurred when Perelman falsely accused Morgan Stanley of admitting to criminal conduct, and when a client of CPH's counsel badgered the jury and attempted to extract information. Even if some of those errors may not have been fatally harmful individually, in the aggregate they were clearly prejudicial and denied Morgan Stanley a fair trial. Accordingly, Morgan Stanley is entitled to a new trial.

VIII. A NEW TRIAL IS WARRANTED BECAUSE THE COURT SHOULD NOT HAVE PROHIBITED MORGAN STANLEY FROM CONTESTING ITS COMPLICITY IN THE SUNBEAM FRAUD IN PHASE II.

For the reasons previously explained in Morgan Stanley's Motion For Reconsideration Of The Court's Sanctions Order and Morgan Stanley's Motion To Prevent Extension Of Discovery Misconduct Sanctions To Phase II and as argued before this Court, the Court's decision to prohibit Morgan Stanley from adducing evidence in Phase II that would demonstrate its lack of complicity in the Sunbeam fraud violated *Humana Health Insurance Co. of Florida v. Chipps*, 802 So. 2d 492 (Fla. 4th DCA 2001), *Nordyne, Inc. v. Florida Mobile Home Supply, Inc.*, 625 So. 2d 1283 (Fla. 1st DCA 1993), and the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Rather than repeat its previous arguments here, Morgan Stanley incorporates them by reference and focuses on the following three points. [16]

First, in *Humana*, the appellate court found two independent grounds for reversal: (a) the trial court's jury instructions had "invaded the province of the jury by characterizing the conduct of the defendants" and determining "the egregiousness of the defendant's conduct," 802 So. 2d at 495-96; and (b) the trial court erred by prohibiting the defendant from presenting certain "industry standard" evidence, because "[t]he jury should have been allowed to consider ***any*** evidence which would have had the effect of 'reducing or softening the moral or social culpability attaching to [the defendant's] act,' " *id.* at 496 (emphasis added and citation omitted). Although this Court suggested that it could adhere to the first holding by refraining from instructing the jury that it must find that Morgan Stanley's conduct was egregious, *e.g.*, 5/13/05 Tr. at 14649:16-20, this was insufficient because prohibiting Morgan Stanley from contesting the underlying allegations effectively directed a verdict on entitlement to punitive damages.

In addition, the Court misapplied the second holding in *Humana* by suggesting that the decision required only the ability to present "pure mitigation evidence as opposed to a contradiction of a statement of fact that had previously already been determined by default." 4/05/05 Tr. at 6666:24-6667:2. This distinction is nowhere present in *Humana*. To the contrary, the opinion uses the word "any," which must be interpreted to mean what it says -- ***any***. Accordingly, any evidence that has the effect of "reducing or softening the moral or social culpability attaching to [the defendant's] act" is relevant to the jury's determination of the degree of egregiousness of the defendant's conduct and should be allowed.

Second, we have found no authority from any jurisdiction permitting a court, as a discovery sanction, to preclude an appearing defendant from contesting its underlying liability prior to the imposition of punitive damages. Indeed, all the cases that we have found are squarely to the contrary.

In *Hunter v. Spaulding*, 388 S.E.2d 630 (N.C. Ct. App. 1990), for instance, the trial court entered a default as a discovery sanction, leaving the issue of "entitlement" to punitive damages to the jury but prohibiting the defendant from putting on evidence on his behalf. The appellate court reversed, explaining:

> The judge in this case properly entered judgment for the [plaintiffs] on their claim of compensatory damages, and he rightly left the question of their entitlement to punitive damages for the jury. ***By submitting the issue without affording [the defendant] an opportunity to contest those damages, however, the judge erred.*** It is, for example, questionable whether the damages the jury awarded relate to the real estate claim or, in part or in whole, to [the defendant's] failure to comply with discovery. Permissible sanctions for the latter do not include the party's answering in punitive damages.

Id. at 635-36 (emphasis added). Indeed, according to the court, submitting the issue of punitive damages without allowing the defendant "an opportunity to present evidence addressed to that issue" deprived the defendant "of his rights to be heard and a trial of the punitive-damages claim and contravened both his due process rights and [North Carolina sanctions law]." *Id.* at 636.

Similarly, in *Gallegos v. Franklin*, 547 P.2d 1160 (N.M. Ct. App. 1976), the court entered a default as a sanction for the defendant's failure to comply with discovery orders. The court explained that, while "the defendants have admitted the allegations of the complaint" "[b]y virtue of the default," a "punitive damage claim is not admitted by a default." *Id.* at 1165, 1167 (citing *Florida E. Coast Ry. v. McRoberts*, 149 So. 631 (Fla. 1933)). Before the imposition of punitive damages, a hearing was required "in which evidence may be presented by the plaintiff, ... with the right granted to defendants to contest this issue." *Id.* at 1167.

The Oklahoma Supreme Court reached the same conclusion in *Payne v. Dewitt*, 995 P.2d 1088 (Okla. 1999). In *Payne*, the defendant failed to comply with discovery orders. As a sanction, the trial court entered a default and declared that, although there would be a bench hearing on actual and punitive damages, "at that hearing, [the defendant] could not cross-examine [the plaintiff's] witnesses, object to introduction of testimony or exhibits offered, or otherwise participate in the evidentiary process." *Id.* at 1091 (emphasis omitted). The Oklahoma Supreme Court reversed, stating:

> A default declaration, imposed as a ... sanction, cannot extend beyond saddling the defendant with liability for the harm occasioned and for imposition of punitive damages. The trial court must leave to a meaningful inquiry the quantum of actual and punitive damages ***without stripping the party in default of basic forensic devices to test the truth of the plaintiff's evidence.***

Id. at 1095 (emphasis altered). It violated due process to preclude the defendant from contesting the evidence against him, as "[o]bstacles that unreasonably impede full disclosure of the truth are an anathema to due process." *Id.*

The list of cases in accord is lengthy. *See, e.g., id.* at 1095 n.21 (citing fifteen "other jurisdictions which hold that a defaulting party has the right to participate in [punitive damages] proceedings and introduce affirmative evidence on its own behalf in mitigation of damages"). There simply is no reason to make Florida an outlier from this established consensus.

Third, it clearly was improper for the Court to presume prejudice to CPH's ability to litigate Phase II issues before knowing the content of the omitted e-mails. The Fourth District Court of Appeal has previously admonished trial courts for this very thing. *See New Hampshire Ins. Co. v. Royal Ins. Co.*, 559 So. 2d 102 (Fla. 4th DCA 1990) (per curiam). In *New Hampshire Insurance Co.*, the trial court struck the appellant's pleading "for intentional failure to comply with court's order and prejudice shown by [appellee]" after appellee asked for an underwriting file of unknown content and the appellant replied that it had been destroyed. *Id.* at 102. The Fourth District reversed because there was no "showing of prejudice to appellee on this record." *Id.* at 103. "[F]or all we know," the court explained, "any evidence which might have been contained within those files might be legally irrelevant to the issues framed in the pleadings." *Id.* In the instant case, of course, it remained possible to ascertain the content of the unproduced e-mails, which had not been destroyed.

A new trial on punitive damages is accordingly warranted.

IX. EVEN IF THE COURT COULD PERMISSIBLY EXTEND THE SANCTION TO PHASE II, A NEW TRIAL IS WARRANTED BECAUSE THE COURT SHOULD HAVE MORE THOROUGHLY REDACTED THE "DEEMED FACTS" TO COMPLY WITH *HUMANA*.

Even if certain facts could be conclusively established for all purposes as a discovery sanction, the "deemed facts" here -- which established far more than the existence of Morgan Stanley's participation in the Sunbeam fraud -- went way beyond what *Humana* allows. Many "deemed facts" were argumentative and inherently prejudicial (*e.g.*, "Morgan Stanley's strategy was doubly deceptive"), and other "deemed facts" inexorably tainted the jury's consideration of Morgan Stanley's reprehensibility, including many facts stating or implying that: (i) Morgan Stanley was a leader in targeting CPH;[17] (ii) Morgan Stanley became aware of the fraud at particular times;[18] (iii) Morgan Stanley abused

CPH's trust; [19] (iv) the fraud was a heavily detailed plan; [20] and (v) particular Morgan Stanley officials participated in the supposed fraud. [21] Because these facts go to the heart of the "the degree" of the defendant's misconduct, *Humana* requires their determination by the jury. *See Humana*, 802 So. 2d at 496 ("To assess punitive damages, a jury must evaluate the degree of 'malice, wantonness, oppression, or outrage' demonstrated by the evidence in the case .... [C]are should have been taken to let the jury arrive at its own decision regarding the egregiousness of the defendant's conduct.") (citations omitted).

The Court held that Morgan Stanley was "stuck" with these "deemed facts," 5/16/05 Tr. at 14884:22, 14885:2, because *Humana* prohibited only descriptions of "motivation other than financial motivation," statements of "evil intent," or "inflammatory emotional descriptions of Morgan Stanley's motivation." *Id.* at 14905:10-14909:10. *Humana*, however, is not so limited. It requires that the "***jury*** [] evaluate the degree of 'malice, wantonness, oppression, or outrage' demonstrated by the evidence in the case." *See Humana*, 802 So. 2d at 496 (emphasis added). Indeed, there is no practical difference between directing the jury to find that Morgan Stanley acted with "evil intent" and precluding Morgan Stanley from contradicting the deemed facts that supposedly demonstrate its "evil intent" (such as the allegedly detailed nature of the plan and certain executive's awareness of the fraud at particular times). Thus, even assuming that *certain* facts could be established as true prior to the imposition of punitive damages, the Court violated *Humana* by not redacting the "deemed facts" more thoroughly here.

Furthermore, because due process requires punishment to be based on the actual " 'degree of reprehensibility of the defendant's conduct,' " *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)), the Court's decision to establish these particular "deemed facts" raises significant due process concerns, both under the United States and the Florida Constitution.

For all of these reasons as well, a new trial on punitive damages is required.

X. A NEW TRIAL IS WARRANTED BECAUSE IT WAS IMPROPER FOR THE COURT TO READ TO THE JURY A LITIGATION MISCONDUCT STATEMENT IN PHASE II THAT CONTAINED FACTUAL FINDINGS THAT MORGAN STANLEY COULD NOT CONTRADICT.

As this Court has previously recognized, evidence of litigation misconduct is normally prohibited at trial because it is "for the court and not for the jury" to sanction litigants for discovery abuses, and such evidence is inherently prejudicial, inexorably tainting the jury's perceptions of the litigants. *See Emerson Elec. Co. v. Garcia*, 623 So. 2d 523, 525 (Fla. 3d DCA 1993) (per curiam); Order On Plaintiff's MIL No. 36 at 2 (May 16, 2005) (citing *Amlan, Inc. v. Detroit Diesel Corp.*, 651 So. 2d 701 (Fla. 4th DCA 1995)); *cf. Werbungs & Commerz Union Austalt v. Collectors Guild, Ltd.*, 930 F.2d 1021, 1027 (2d Cir. 1991) (presenting discovery misconduct to the jury raises the impermissible prospect that the jury will "penalize [the defendant] for [those] discovery abuse[s]" instead of the "evidence that was properly admitted").

This Court nevertheless held, relying on *General Motors Corp. v. McGee*, 837 So. 2d 1010 (Fla. 4th DCA 2003), that evidence of litigation misconduct was relevant and admissible in Phase II. *See* Order On Plaintiff's MIL No. 36, at 2. But, unlike *McGee*, in which each side was free to introduce relevant evidence on the subject with the jury left to draw its own findings of fact from the evidence, the Court here held that its factual findings from the evidentiary hearings conducted before imposing sanctions would be taken as true and read to the jury in the form of a litigation misconduct statement. *E.g.*, 5/16/05 Tr. at 14923:24-14924:3.

The Court erred in both rulings. *McGee* does not support allowing the jury to consider evidence of litigation misconduct in this case because there are material differences between the circumstances here and those in *McGee*. For example, unlike in *McGee*, CPH presented absolutely no evidence that any sort of "smoking gun" has been concealed here. Thus, evidence of litigation misconduct should not have been admitted in Phase II at all.

In addition, even if evidence of litigation misconduct were admissible in Phase II, the Court erred by establishing its factual findings from the pre-trial hearings as conclusive, which invaded the jury's role as trier of facts. Indeed, even if the Court had the authority to establish facts in this manner -- which it does not -- doing so in the circumstances of this case caused a due process violation because of the lack of adequate notice to Morgan Stanley that this was a possibility beforehand. *See Khan v. Dep't of Revenue*, No. 4D03-2607, 2005 WL 1109576, at *1 (Fla. 4th DCA May 11, 2005) (not yet released for publication) (defendant's due process rights were violated when the court failed to give the defendant adequate notice of the "specific issue [s] that will be considered" at the hearing on a motion for discovery sanctions).

In short, if evidence of litigation misconduct was to be placed before the jury at all in Phase II of this case, it should have occurred, as in *McGee*, without a judicial thumb on the scale. For these and other reasons explained below, a new trial on punitive damages is warranted. [22]

A. *General Motors Corp. v. McGee* Does Not Provide a Basis for Considering Litigation Misconduct in This Case.

Because this Court is already familiar with *McGee*, we will not reiterate *McGee's* underlying facts here. Rather, we will focus on two material differences between the discovery misconduct at issue in this case and that in *McGee*.

First, in *McGee*, there was evidence that the defendants were deliberately withholding documents concerning the significance of a "smoking gun" (the "Ivey Report"), the contents of which were known to the court at the time it decided to allow the plaintiff to air the discovery issue before the jury. *See* 837 So. 2d at 1022-23. In this case, by contrast, CPH adduced absolutely no evidence that Morgan Stanley concealed any "smoking gun" or related documents. Indeed, as the Court has acknowledged, there is no evidence that any Morgan Stanley personnel knew the nature or content of the undisclosed e-mails, 5/16/05 Tr. at 15044:5-7, and, more importantly, ***the Court still "ha[s] no idea" whether any of the withheld e-mails contained any relevant evidence at all***, 5/16/05 Tr. at 15046:3-9. Lacking this knowledge, the Court engaged in undue speculation in concluding that the discovery omissions were part of an effort by Morgan Stanley to conceal its complicity in the Sunbeam fraud. *Cf. Amlan*, 651 So. 2d at 703 (distinguishing cases in which "the misconduct alleged is the destruction or unexplained disappearance of crucial evidence" from the general rule that evidence of pretrial discovery conduct is not for the jury's consideration).

Second, in *McGee*, the documents concerning the significance of the "Ivey Report" were concealed not just after the accident in that case (1991) but also before the accident occurred, in litigation throughout the 1980s; the concealment thus was relevant to General Motors' state of mind in letting the design defect persist. 837 So. 2d at 1015, 1022. By contrast, the discovery violations found by the Court here occurred years after the conduct underlying CPH's claims and hence could not have had any bearing on Morgan Stanley's state of mind at the time of the underlying transactions.

For these reasons and others, the nexus between the discovery violations and the conduct underlying CPH's claim is far more attenuated than that in *McGee*. Hence, in accordance with the United States Supreme Court's admonition that a "defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages," *State Farm*, 538 U.S. at 422, *McGee* should be interpreted as nothing more than a narrow, case-specific exception to "the general rule," rather than an open-ended endorsement of allowing evidence of litigation misconduct in punitive damages litigation on the basis of speculation that it might have been part of an effort to cover up the misconduct. Thus, *McGee* does not support injecting the issue of litigation misconduct into Phase II.

B. Even if Evidence of Litigation Misconduct Were Relevant to Phase II, It Was Inappropriate for the Court To Make Its Own, Conclusive Factual Findings on the Subject

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This Court first held that it would read to the jury a statement of litigation misconduct consisting of its own factual findings in its sanctions order of March 1, 2005. On the eve of the Phase II trial, however, it clarified that it was doing so not as a discovery sanction but rather because there had already been an evidentiary hearing on the litigation misconduct, from which the Court had concluded that there was evidence that Morgan Stanley attempted to conceal its role in the Coleman-Sunbeam transaction. Moreover, the Court explained, Morgan Stanley could not introduce evidence that contradicted its factual findings because there had already been a "full evidentiary hearing on this that was contested on both sides. We're not going to redo the things that have already been determined." 5/16/05 Tr. at 14922:24-14923:2; *see also id.* at 14923:25-14924:2 ("These are the deemed [litigation misconduct] facts because these were done after a full evidentiary hearing."); Order on CPH's MIL No. 36 at 3 n.2 (May 16, 2005) ("MS & Co. cannot refute the deemed facts, because their misconduct prevented a full trial on the merits. ***In contrast***, those [litigation misconduct] facts found by the Court following evidentiary inquiry are binding on the parties to this litigation, but may be supplemented.") (emphasis added).

Florida law is clear that this was improper. Indeed, even if the Court could have made some factual findings pertaining to the litigation misconduct, the Court clearly abused its discretion by not amending the litigation misconduct statement to remove some of its more prejudicial attributes or allowing Morgan Stanley to present evidence that CPH had overwritten many e-mails.

1. In Actions at Law, It Is the Exclusive Province of the *Jury* To Resolve Questions of Fact.

It is a fundamental precept of Florida law that "[t]he right of trial by jury shall be secure to all and remain inviolate." Fla. Const, art. 1, § 22. "The constitutional right to a trial by jury is not to be narrowly construed." *In re Forfeiture of 1978 Chevrolet Van Vin: CGD1584167858*, 493 So. 2d 433, 435 (Fla. 1986).

A central tenet of this jury trial right is that it is the jury's role to evaluate evidentiary conflicts and decide issues of fact. *E.g., Mercy Hosp., Inc. v. Larkins*, 174 So. 2d 408, 409 (Fla. 3d DCA 1965) (per curiam). As the Florida Supreme Court has previously explained, it is "well-recognized" that:

> Under our court system, the jury in an action at law is the trier of the facts and in such capacity resolves the conflicts in the evidence, as well as the conflicting inferences deducible from the same evidence. ***Neither the trial court nor the appellate court is authorized to substitute Us judgment for that of the jury as to questions of fact.***

Buck v. Lopez, 250 So. 2d 6, 8 (Fla. 1971) (citation and internal quotation marks omitted; emphasis added); *cf. Carver v. Jenkins*, 209 So. 2d 882, 883 (Fla. 3d DCA 1968) (per curiam) ("Questions of law are for the court to decide; questions of fact are for the jury to decide."); *Kaufmann v. Miami Beach Ry.*, 131 So. 2d 767, 768 (Fla. 3d DCA 1961) (per curiam) (trial court erred in directing verdict based on its "weighting] the evidence, in much the same way as the jury might be expected to do, [and] ... descredit[ing] the testimony of one of the chief witnesses") (citation and internal quotation marks omitted).

Nowhere is the jury's fact-finding responsibility more important than in the punitive damages context. Florida courts have long held that it is up to the jury, when assessing punitive damages, to "evaluate the degree of 'malice, wantonness, oppression, or outrage' ***demonstrated by the evidence in the case.***" *Humana*, 802 So. 2d at 496 (citation omitted, emphasis added); *id.* (discussing "the jury's fact-finding function"); *see also Wackenhut Corp. v. Canty*, 359 So. 2d 430, 436 (Fla. 1978) ("Punitive damages 'are peculiarly left to the discretion of the jury as the degree of punishment to be inflicted must always be dependent on the circumstances of each case, as well as upon the demonstrated degree of malice, wantonness, oppression, or outrage ***found by the jury from the evidence***.' ") (citing *Winn & Lovett Grocery Co. v. Archer*, 171 So. 214, 221 (Fla. 1936)) (emphasis added); *Rinaldi v. Aaron*, 314 So. 2d 762, 763 (Fla. 1975) (same). Although the Court was

entitled to make findings for the limited purpose of deciding whether to impose discovery sanctions -- a decision for the Court and not the jury -- only the jury could resolve factual disputes relevant to its duties.

McGee is instructive in this regard. Despite the significant evidence of discovery misconduct in that case adduced before and during a pretrial evidentiary hearing, 837 So. 2d at 1025, the court did not find any "litigation misconduct" facts on its own. It simply determined that the evidence of concealment was relevant to the jury's determination of how much punitive damages to award, and therefore that the parties could introduce evidence on the subject for the jury's consideration. *Id.* The parties did, and the jury ultimately decided to award no punitive damages. *Id.* at 1015, 1025-26. That course of conduct stands in stark contrast to the trial here.

2. Disputed Issues of *Fact* Cannot Be Taken from the Jury on the Basis of a Pretrial Evidentiary Hearing on a Different Subject Matter.

Despite the apparent unconventionality of its approach, the Court believed that it could determine the litigation misconduct facts for all purposes in the litigation because it had held a "full evidentiary hearing" on the subject and there was no need "to redo the things that have already been determined." 5/16/05 Tr. at 14922:24-14923:2. Respectfully, that conclusion is flawed in at least three significant ways.

First, as discussed above, this result is inconsistent with *McGee* and other Florida law pertaining to Morgan Stanley's jury trial rights. It is irrelevant that there was a pretrial evidentiary hearing on the matter. The result of the hearings may have sufficed to establish relevance -- a conclusion that Morgan Stanley vigorously contests -- but they did not allow the court to resolve factual matters reserved for the jury.

Second, this Court should not have presumed that the evidentiary hearings held prior to the imposition of sanctions provided a full and fair opportunity to litigate the issues that would be relevant to punitive damages in Phase II. The subject of those prior hearings was completely different: whether Morgan Stanley had made a good faith effort to comply with CPH's discovery requests and the Agreed Order of April 16, 2004. *See, e.g.*, Order Specially Setting Hearing, at 1 (Feb. 3, 2005). While certain testimony may have touched upon issues of concealment, those hearings overwhelmingly focused on technical issues concerning the existence of the Morgan Stanley e-mail archive, the misplaced backup tapes, and the programming glitches that led to the discovery shortcomings. Indeed, all but one of the witnesses at the February 14 hearing were information technology (IT) people,[23] and ***none*** had any idea (or notice) that they were defending against the imposition of punitive damages at that time.[24] Testimony at the hearing on March 14 likewise all centered on information technology issues.[25] Thus, as counsel for Morgan Stanley previously explained to this Court:

MS. BEYNON: That evidentiary hearing was not directed at this specific question [of concealment of the Sunbeam Fraud] in any way....
* * *

MS. BEYNON: ... The questions that were addressed were ... e-mails not produced; what e-mails were not produced; what's going on here. ***The motives that underlay those -- that failure make those productions weren't explored.***

5/16/05 Tr. at 14924:3-19 (emphasis added). It thus was inappropriate for the Court to presume that the prior hearings were in fact adequate with respect to the issues to be litigated in Phase II. *Cf. Trucking Employees of N. Jersey Welfare Fund, Inc. v. Romano*, 450 So. 2d 843, 845 (Fla. 1984) ("[C]ollateral estoppel may be asserted only when the ***identical*** issue has been litigated between the same parties or their privies.") (emphasis added).

Third, the facts were not so indisputably clear as to leave no genuine issue for a jury to resolve. While the Court based its findings on what it believed to be reasonable inferences from the evidence -- as may be done for the purpose of assessing whether sanctions were warranted -- that was the opposite of how it must view the evidence when deciding whether a factual issue may be taken away from the jury. *See, e.g., Green v. CSX Transp., Inc.*, 626 So. 2d 974, 975 (Fla. 1st DCA 1993) (per curiam). Indeed, the very fact that the Court had to resort to witness testimony and make credibility findings with respect thereto in order to make its factual findings, *see, e.g.*, Default Order at 10 n.11; Adverse Inference Order at 9-10, shows that those issues should have been left to the jury's determination insofar as their impact on punitive damages was concerned.

In sum, assuming that the evidence was relevant and not more prejudicial than probative, it was the jury's role to hear the evidence and decide for itself what transpired and whether it was part of an attempt by Morgan Stanley to cover up its alleged role in the Sunbeam fraud. The fact that the Court may have heard the evidence beforehand did not justify judicial resolution of the underlying factual disputes.

3. Even if Florida Law Did Permit the Court To Make Conclusive Factual Findings Pertaining to Litigation Misconduct, Doing So in the Circumstances of This Case Violated Morgan Stanley's Rights to Due Process.

This Court's conclusive determination of disputed issues of fact also violated Morgan Stanley's rights to due process under the U.S. and Florida Constitutions because of insufficient notice prior to the pre-trial evidentiary hearings that such a determination was to be made at those hearings.

As described above, the Court first held that it would read a litigation misconduct statement to the jury consisting of its conclusive findings of fact in its adverse inference motion on March 1, but prior to that point the Court had never stated that it was considering this option or asked for any briefing on the subject, and no party had asked for this relief. [26] While the Court subsequently, on March 14, held additional hearings and supplemented its findings, again the only subject was whether Morgan Stanley had made a good-faith effort to comply with CPH's discovery requests and the Agreed Order. [27] *See, e.g.*, Morgan Stanley's Opposition To CPH's Motion For A Default Judgment (filed March 13, 2005) (discussing whether default sanction was justified based on the evidence in the record). Consequently, even if the Court's actions were authorized under Florida law, they still violated Morgan Stanley's rights to due process because of the lack of adequate notice beforehand.

Controlling precedent supports that conclusion. The Fourth District Court of Appeal recently faced precisely this issue in *Khan v. Department of Revenue*, No. 4D03-2607, 2005 WL 1109576 (Fla. 4th DCA May 11, 2005) (not yet released for publication). In *Khan*, a mother (in a domestic relations case) moved for sanctions against the father for failing to comply with an outstanding order compelling discovery. "At the end of a hearing on that motion, at which the father was not present or represented, the trial court entered what is in effect a default final judgment awarding child support and arrearages to the mother." *Id.* at *1. The Fourth District Court of Appeal reversed on the ground of insufficient notice, explaining that "it is an essential part of the concept of due process that any relief granted at a hearing be within the kind of relief sought by the notice given for hearing." *Id.* "[N]otice of [a] hearing must advise parties of [the] specific issue that will be considered at [the] hearing." *Id.* (citing *Hammond v. Hammond*, 492 So. 2d 837 (Fla. 5th DCA 1986)). Because "notice of contempt proceeding [did] not provide sufficient notice that [the] court [could] modify a previously imposed child support obligation," the court had overstepped its bounds in adjudicating an issue that was not before it at that hearing and thus had violated due process. *Id.* (citation, internal quotation marks, and emphasis omitted); *cf. Roco Tobacco (USA), Inc. v. Florida Div. of Alcoholic Beverages*, No. 3D02-2180, 2004 WL 1778864, at *3 (Fla. 3d DCA Aug. 11, 2004) (not yet released for publication) (reversing award of costs because "[o]rders that adjudicate issues not before the court or presented by the pleadings, fail to place the parties on notice and thereby deny fundamental due process").

Because fair "notice encompasses a reasonable opportunity to prepare and offer evidence," *City of Ormand Beach v. City of Daytona Beach*, 794 So. 2d 660, 663 (Fla. 5th DCA 2001), and Morgan Stanley lacked that opportunity here, Morgan Stanley's due process rights were violated.

4. The Court Abused Its Discretion by Reading the Litigation Misconduct Statement to the Jury at the Start of Phase II and by Failing To Make Clarifications and Redactions Necessary To Alleviate the Potential for Prejudice Against Morgan Stanley.

Finally, the Court should not have read litigation misconduct facts to the jury in the form of a litigation misconduct statement at the start of Phase II without making clarifications and redactions that were necessary to alleviate the potential for prejudice.

Reading the statement at the start of Phase II was itself seriously prejudicial because it cast Morgan Stanley in a highly negative light. Furthermore, the potential for prejudice was enhanced by, among other things, the Court's failure to: (i) clarify that it did not know the content of the e-mails that were not produced; (ii) take out all references to what certain individuals in Morgan Stanley's Law Division knew; and (iii) allow Morgan Stanley to point out that CPH had overwritten many e-mails. [28]

Brown v. Ford, No. 1D04-1525, 2005 WL 708393 (Fla. 1st DCA Mar. 30, 2005) (per curiam) (not yet released for publication), is instructive. In *Brown*, the plaintiff received compensatory and punitive damages for injuries sustained in an automobile collision that occurred "during a high speed police chase while two of the defendants attempted to avoid an arrest for sale of cocaine." *Id.* at *1. At trial, "the plaintiff presented testimony from several witnesses regarding the drug sting operation, drug trafficking, and the dangers of drug dealing," a theme that "continued throughout plaintiff's closing argument." *Id.* The First District Court of Appeal held that a new trial was warranted, for although "[t]here is no doubt that the evidence of the drug deal was relevant," "[t]he problem is that the evidence was exploited in a way that invited jurors to use the defendants' misconduct and bad character as a basis for an award of damages." *Id.* at *3.

That "problem" occurred in this case as well because the Court's decision to read the litigation misconduct statement at the start of Phase II and its failure to ensure that the found facts were presented in a non-prejudicial manner invited jurors to use Morgan Stanley's discovery misconduct as a basis for an award of punitive damages. While the Court did, to be sure, instruct the jury that it was not its "job to punish Morgan Stanley for breaking the rules of this Court" because "[t]he matter has been dealt with by the Court," 5/17/05 Tr. at 15446:9-16, this instruction did not cure the potential for prejudice because Morgan Stanley was not permitted to tell the jury the composition and severity of the sanction, and therefore adequately explain why no further punishment was needed on the basis of the litigation misconduct itself. Accordingly, a new trial is warranted on this ground too.

C. Morgan Stanley Was Not Given a Fair Opportunity To Defend Itself Against the Cover-Up Accusation.

Although the Court had previously indicated that its litigation misconduct statement would be the only permissible evidence on the subject in Phase II, *see* Adverse Inference Order at 13-14, the Court partially reversed course on May 16, 2005 -- one day before Phase II was to begin -- allowing Morgan Stanley "to offer evidence not inconsistent with its findings such as would permit a reasonable juror to conclude that MS & Co. did not intend to conceal evidence of the fraud." Order on CPH's MIL No. 36, at 3; 5/16/05 Tr. at 14923:11-13 ("And that's why if you want to put on evidence, sort of the keystone cops, we weren't trying to hide stuff[, you can]."). This last-minute change of course did not provide Morgan Stanley a fair opportunity to present a meaningful defense for two reasons.

First, as a practical matter, Morgan Stanley's witnesses could not testify completely regarding the causes of the discovery failures without contradicting in part at least the statement of litigation misconduct. Indeed, the statement included not

only objective facts (such as how many tapes were found on a certain date) but many conclusions and suppositions to boot. The problem would have been especially severe in responding to cross-examination, because CPH was free to use the Court's findings in cross-examining Morgan Stanley's witnesses, yet truthful answers would have required contradicting those "facts." *See, e.g.*, 5/16/05 Tr. at 15025:6-15028:8 (discussing possible testimony by Mr. Anfang and scope of potential cross-examination by CPH).

Second, the opportunity simply occurred too late in the trial for Morgan Stanley to take advantage of it. One day to prepare was simply not enough considering both the massive complexity of the subject of Morgan Stanley's e-mail production efforts and the tightrope created by the Court's restrictions on what the witnesses could and could not say.

In sum, the Phase II trial plan clearly violated Morgan Stanley's right to due process under the Fourteenth Amendment of the United States Constitution and art. I, § 9 of the Florida Constitution by denying Morgan Stanley a fair opportunity to present a meaningful defense. *See, e.g., Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).

D. A New Trial Is Warranted Because CPH's Demonstratives Were Misleading and Augmented the Possibility of Prejudice Against Morgan Stanley.

During closing arguments, CPH used slides that combined the litigation misconduct facts the Court found and the inferences CPH sought to have the jury draw from those established facts. Those slides were very misleading because their text did not clearly distinguish between (i) what facts the Court had determined and (ii) what inference CPH was asking the jury to make. *E.g.*, 5/18/05 Tr. at 15587-88, 15649 ("Morgan Stanley lied to CPH by representing that all e-mail data for any time period before January 2000 had been destroyed when it knew that back-up tapes dating back to at least 1997 existed."; the word "destroyed" was not in the litigation misconduct statement).

Given the Court's instruction to the jury that it had to accept the litigation misconduct facts as true, this commingling of fact and inference in the slide was highly prejudicial to Morgan Stanley.[29] It accordingly augmented the possibility that the jury awarded punitive damages on the basis of improper grounds in violation of *Brown*. *Cf. Medina v. State*, 748 So. 2d 360, 361-62 (Fla. 4th DCA 2000) (to be used during trial, " 'demonstrative evidence must be an accurate and reasonable reproduction of the object involved' ") (citing *Florida Evidence* § 401.1 (1999 ed.)). Accordingly, a new trial on punitive damages is warranted on this ground as well.

XI. A NEW TRIAL IS WARRANTED BECAUSE OF THE ADMISSION OF IMPROPER FINANCIAL EVIDENCE.

Over Morgan Stanley's repeated objections, CPH was permitted to adduce evidence of Morgan Stanley's finances, including both its net worth and the amount of money it is permitted to borrow from its parent company under a revolving credit agreement. Under *State Farm* and other relevant federal and Florida law, such evidence may not be considered by a jury assessing punitive damages except when offered by the defendant in mitigation. Its introduction was immensely prejudicial, likely resulted in an inflated punitive damages award, and is grounds for a new trial.

The question whether a plaintiff may introduce any evidence of a defendant's financial resources during the punitive damages phase has already been extensively briefed, and in the interest of brevity we do not here repeat arguments we have already made in multiple filings before this Court. Instead, we refer the Court to Morgan Stanley's submissions offered in support of its Motion in Limine No. 5 and in opposition to CPH's Motion in Limine No. 36.

We focus here instead on CPH's introduction of irrelevant, highly misleading evidence of Morgan Stanley's revolving credit agreement with its parent organization for its supposed bearing on Morgan Stanley's ability to pay punitive damages. To begin, as a matter of simple logic a ***loan*** is a ***liability***, not an ***asset***. Obtaining the loan does not increase

net worth. Although there was considerable dispute between the parties as to whether the credit agreement imposes mandatory obligations on Morgan Stanley's parent or is merely discretionary, there was ***no*** dispute that under the agreement, any credit extended to Morgan Stanley by its parent organization ***would need to be repaid***. Arguing that the availability of a billion-dollar loan is the same as the possession of a billion-dollar asset is no different from arguing that a person whose assets exceed his liabilities by only $1,000 but holds a credit card with a $20,000 limit in fact has a net worth of $21,000. Morgan Stanley's "ability to pay" a punitive award is a function of its net worth, not its available credit.

We are aware of no Florida case in which a jury has been permitted to consider a line of credit as an available asset. To the contrary, Florida law recognizes that it is erroneous to treat sources of even complete ***reimbursement*** as assets for purposes of calculating net worth in the punitive damages phase of a trial. For example, in *Odoms v. Travelers Insurance Co.*, 339 So. 2d 196, 199 (Fla. 1976), the Florida Supreme Court held that the trial court had erred by allowing the plaintiff to introduce evidence of the defendant's "insurance policy's liability limits ... on the theory that the policy limits could be considered in assessing punitive damages" because the policy was an "asset" of the defendant's. Such insurance policy limits should not be shared with the jury, the Court held, and they are irrelevant to the jury's calculation of the defendant's net worth. Likewise, in *Wransky v. Dalfo*, 801 So. 2d 239 (Fla. 4th DCA 2001), the Fourth District held it was error to admit evidence of the defendant's potentially successful bad-faith claim against an insurer as part the evidence of the defendant's net worth. The court reasoned that if such sources of reimbursement were admissible, "the size of the punitive award could be unlimited." Indeed, even evidence of a contractual ***indemnity agreement*** with a defendant's parent corporation is ordinarily inadmissible to show that a punitive award will be paid by a third party. *CSX Transp., Inc. v. Palank*, 743 So. 2d 556, 562 (Fla, 4th DCA 1999) ("Liability for punitive damages and the amount thereof is not determined from the assets of a third party nor from an agreement of a third party to pay such damages. In short, the indemnity agreement was not relevant evidence to the issue of the amount of punitive damages."). [30]

In truth, evidence of this revolving credit agreement was nothing more than a backdoor method of conveying to the jury that it should not worry about the impact of an award on Morgan Stanley's financial condition because its far larger parent stood behind it. As this Court had already determined during both phases of this trial, Florida law flatly prohibits references to the financial resources of non-party affiliates unless the plaintiff satisfies the strict criteria for "piercing the corporate veil" by proving that the subsidiary is a "mere instrumentality" or "alter ego" of the parent company, and that the parent used the subsidiary to defraud creditors. CPH has, of course, made no such showing. It was therefore error to allow it to sidestep Florida's veil-piercing requirements through the use of this credit agreement. *See generally Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114, 1116-22 (Fla. 1984); *State ex rel. Continental Distilling Sales Co. v. Vocelle*, 27 So. 2d 728, 729 (Fla. 1946) (orig. proceeding); *Lipsig v. Ramlawi*, 760 So. 2d 170, 187 (Fla. 3d DCA 2000); *Ocala Breeders' Sales Co. v. Hialeah, Inc.*, 735 So. 2d 542, 543 (Fla. 3d DCA 1999) (per curiam).

Finally, even if evidence of the availability of a loan from a defendant's parent corporation ***were*** tangentially relevant to the jury's consideration of that defendant's ability to pay a punitive award, CPH did not adduce sufficient evidence to prove that such a loan was in fact available to Morgan Stanley. The only record testimony offered by CPH to support its assertion that Morgan Stanley's parent would loan it money to cover a punitive judgment came from the deposition of Joseph D'Auria, who said no such thing: In answer to the question,

> In your experience, is it the case that if Morgan Stanley, the Parent, is able to support the capital needs of Morgan Stanley & Company, it will do so?

D'Auria responded,

> [F]or the future, I can't predict the parent's ability or willingness to make such a payment obligation, you know, on behalf of MS & Co., but when it's come up in my past experience, the capital requirements being a focal point, the times that MS & Co. has asked for subsidized loans or capital loans, there is a loan.

5/16/05 Tr. at 15094:21 - 15095:8. This answer does ***not*** support CPH's assertion that Morgan Stanley's parent corporation is ***obligated*** to provide capital loans in the future. The ***only*** other evidence CPH offered in support of its contention was the revolving credit agreement itself, which CPH failed to show binds the parent to loan money to cover a punitive damages judgment. The agreement calls for the proceeds of loans to be used by the borrower "as part of its capital." *Id.* at 15096:3. The term "capital" is undefined and could easily be interpreted by the lender not to include the satisfaction of litigation debt. Moreover, the credit agreement contains a series of covenants that, if breached by Morgan Stanley, would not only make further loans unavailable, but would also cause any outstanding loans to be immediately due and payable back to the parent. As Morgan Stanley argued during the evidentiary hearing on this subject, plaintiff's expert's undisputed deposition testimony suggested that Morgan Stanley's aggregate indebtedness was already high enough to trigger those covenants and place Morgan Stanley in default. *See* 5/16/05 Tr. at 15096:9-15100:5. CPH adduced ***no*** evidence to show that Morgan Stanley's parent corporation would issue ***any*** loans under the revolving credit agreement under those circumstances.

In short, even if CPH were correct that the availability of a guaranteed loan to cover a large punitive award is relevant to the jury's task, CPH did not lay a sufficient evidentiary predicate for the argument that Morgan Stanley had access to such a guaranteed loan.

This was not a harmless error. The jury knew that its $604 million compensatory verdict had already stripped Morgan Stanley of approximately 12% of its $5.2 billion net worth. There is a substantial likelihood that the jury's punitive verdict was inflated based on the (false) belief, encouraged by introduction of this evidence, that Morgan Stanley's much wealthier parent would fund any necessary further payments.

XII. THE PHASE II JURY INSTRUCTIONS WERE HIGHLY UNBALANCED AND RESULTED IN A MISCARRIAGE OF JUSTICE.

The Court refused to give various crucial jury instructions requested by Morgan Stanley during the punitive damages phase. As a result of these refusals, the jury charge was highly unbalanced, and the jury was left without critical tools necessary to the task of evaluating whether a punitive award was necessary, and if so, what amount of punitive damages was appropriate. We have listed in our motion 14 separate errors in the Court's charge. Our grounds for objecting on all of these points were explained in our previous submissions and at oral argument, and we do not wish to belabor all of them with further briefing. Three of these errors, however, were so damaging that we believe they merit brief discussion and elaboration here. Specifically, we call the Court's attention to the severely prejudicial combined effect of its failure to instruct the jury:

(1) that compensatory damages serve a deterrent function;

(2) that the jury should consider whether punitive damages were necessary to completely remove Morgan Stanley's profit from its alleged wrongdoing; and

(3) that the proportionality (or "reasonable relationship") principle is not violated by a determination to award no punitive damages or an amount of punitive damages smaller than the compensatory award.

The failure to give these instructions resulted in a jury charge that strongly suggested to the jury that a huge punitive award such as it in fact returned was necessary to deter Morgan Stanley from future misconduct. Such error requires the grant of a new trial.

As the Court is aware, "the failure to give a requested instruction constitutes reversible error when the complaining party establishes that the requested instruction accurately states the applicable law, the facts in the case support giving the instruction, and the instruction was necessary to allow the jury to properly resolve all issues in the case." *Wransky*, 801 So. 2d at 243 (citing *Auster v. Gertrude & Philip Strax Breast Cancer Detection Inst., Inc.*, 649 So. 2d 883, 887 (Fla. 4th DCA 1995) (per curiam)); *see also Comette v. Spalding & Evenflo Cos.*, 608 So. 2d 144 (Fla. 4th DCA 1992); *Orange County v. Piper*, 523 So. 2d 196 (Fla. 5th DCA 1988).

We respectfully submit that each of Morgan Stanley's requested instructions indisputably represented accurate statements of the law and were also supported by the facts in the case:
(1) It is well established that compensatory damages can serve a significant deterrent function, even in the absence of punitive damages. *See Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) ("Deterrence ... operates through the mechanism of damages that are compensatory . . . .") (emphasis omitted); *State Farm*, 538 U.S. at 419 ("It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence."); *id.* at 425 ("When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."); *see also, e.g., Lane v. Hughes Aircraft Co.*, 993 P.2d 388, 424 (Cal. 2000) (Brown, J., concurring) ("[L]arge compensatory damage awards not based on a defendant's ill-gotten gains have a strong deterrent and punitive effect in themselves.").

(2) Along the same lines, there is no question that a jury is permitted to consider whether its compensatory award has completely removed any profit the defendant earned or hoped to earn as a result of its alleged wrongdoing. One of the principal purposes of punitive damages is deterrence. *See, e.g., W. R. Grace & Co.-Conn. v. Waters*, 638 So. 2d 502, 504 (Fla. 1994). Indeed, when the defendant is a corporation, and not an individual, deterrence is arguably the only relevant purpose of punitive damages. *See, e.g., Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992). A compensatory award that equals or, as here, greatly exceeds, the defendant's actual and expected profit will generally suffice fully to deter the defendant and others from committing similar acts in the future. *See, e.g., Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483, 485 (Fla. 1999) (jury assessing punitive damages should consider "the profitability to [the defendant] of the wrongful conduct and the desirability of removing that profit and of having [the defendant] also sustain a loss"). As this Court recognized elsewhere in its charge, the jury is not permitted to award punitive damages in an amount "larger than is reasonably necessary" to punish and deter. *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 584 (1996) ("The [punitive damages] sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal."). It was therefore essential for the jury to consider the amount of Morgan Stanley's expected and actual profit in order to determine whether the compensatory award -- which in this case was over ten times the defendant's expected profit -- was fully adequate to deter similar bad behavior. This was the single most powerful argument Morgan Stanley had for awarding no or modest punitive damages, and Morgan Stanley was entitled to have the jury understand from the Court that it was a legally proper factor for it to weigh.

(3) Finally, the Court refused to instruct the jury that the compensatory award can and should be considered as a factor influencing the amount of the punitive damages that are needed. Specifically, the Court refused to instruct the jury, in the context of the reasonable relationship instruction, that it would not violate the proportionality principle to return no punitive award or one that was low in relation to the compensatory damages. *See* 5/17/05 Tr. at 15295:24 - 15299:13 (rejecting instruction that "[t]he requirement of a reasonable relationship is not violated by awarding no punitive damages or a smaller award of punitive damages.")

These requested instructions were particularly germane in the instant case, covering points that were central to the jury's proper performance of its difficult punishment-setting task. As given, the Court's charge studiously avoided any

suggestion that the purposes of punitive damages might already have been served by the jury's award of $604 million in compensatory damages. A jury unaware that it may factor compensatory damages into the deterrence calculus and may award small punitive damages without violating proportionality principles is far more likely than an informed jury to believe that substantial punitive damages are necessary to deter the defendant from future bad behavior.

In addition, the Court refused to instruct the jury that it was required to find that any conduct for which Morgan Stanley was punished resulted from the actions of a specific managing agent, director, or officer of the corporation. Under Florida law, a corporation may not be subjected to punitive damages unless the jury makes such a finding. *See Schropp v. Crown Eurocars*, 654 So. 2d 1158, 1161 (Fla. 1995). Therefore, a directed verdict is warranted. In any case, even if the jury had been properly instructed, any finding of entitlement would have been against the weight of the evidence, and warrants a new trial on punitive damages.

XIII. THE PUNITIVE AWARD IS GROSSLY EXCESSIVE AND MUST BE REDUCED.

The punitive award of $850 million in this case is a gigantic exaction which, if upheld, would dwarf anything in the history of Florida jurisprudence. As the Court reviews this award, we ask it to keep well in mind the admonition of the United States Supreme Court that, because punitive damages are punishment, substantial protections are needed to ensure that they are neither arbitrary nor excessive. *E.g., State Farm*, 538 U.S. at 417.

As punishment, $850 million for a single incident of misconduct is truly extraordinary. It is orders of magnitude greater than the $2 million punitive award that the U.S. Supreme Court considered "tantamount to a severe criminal penalty" in *BMW*, 517 U.S. at 585; it is ***17 times*** the ***largest*** punitive damages award ever upheld by the courts of Florida ($50 million), *see CSX*, 743 So. 2d at 562; and it is a startling 16% of Morgan Stanley & Co.'s net worth (28% when combined with the compensatory award).

Even far smaller punitive awards led the Supreme Court to acknowledge the existence of substantive constitutional limitations on the amount of punitive damages that could be awarded in a given case. Concerned about "the imprecise manner in which punitive damages systems are administered," *State Farm*, 538 U.S. at 417, the Court has instructed lower courts to consider three "guideposts" for determining whether a punitive award is unconstitutionally excessive -- (1) whether the magnitude of the award truly reflects conduct of commensurate reprehensibility; (2) whether the punitive award is disproportionate to the harm caused by the conduct; and (3) the civil penalties, if any, applicable to comparable conduct. *BMW*, 517 U.S. at 574-76. The Court has also indicated that "exacting" judicial review is necessary to "ensure[] that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice." *State Farm*, 538 U.S. at 418 (internal quotation marks omitted).

Here, the required "exacting" review compels the conclusion that the $850 million punitive award is grossly excessive. Under the *BMW* analysis, as refined in *State Farm*, the constitutional maximum amount of punitive damages in this case is no more than a nominal amount, and in no circumstances could exceed the amount of compensatory damages. There would be something gravely askew were this Court to hold that Morgan Stanley's dealings with a billionaire investor who had legions of advisors reasonably warrants a punitive award that dwarfs any upheld by any court in the wake of *State Farm* in a case involving an individual plaintiff. [31] A dramatic reduction in the amount of punitive damages is therefore constitutionally required.

A. Morgan Stanley's Conduct Ranks Relatively Low on the Reprehensibility Scale.

"The most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419 (internal quotation marks and alterations omitted). Put succinctly,

"punitive damages may not be grossly out of proportion to the severity of the offense." *BMW*, 517 U.S. at 576 (internal quotation marks omitted).

In *State Farm*, the Supreme Court instructed lower courts to consider five factors when measuring the degree of reprehensibility of a defendant's conduct: (i) whether "the harm caused was physical as opposed to economic"; (ii) whether "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others"; (iii) whether "the target of the conduct had financial vulnerability"; (iv) whether "the conduct involved repeated actions or was an isolated incident"; and (v) whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident." 538 U.S. at 419. Importantly, the Court added, "[t]he existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." *Id.*

Here, the only reprehensibility factor even arguably present is the existence of deceit; the rest of the reprehensibility factors are all clearly absent.

First, no physical harm was involved; instead, the harm was purely economic.

Second, the tortious conduct did not endanger the health or safety of others.

Third, Mr. Perelman, a billionaire, certainly was not financially vulnerable. Although CPH repeatedly claimed at trial that Perelman was a vulnerable victim because Morgan Stanley abused his trust, there was no special relationship of trust, such as one that would give rise to a fiduciary duty; rather, Morgan Stanley and Perelman were on opposite sides of a commercial transaction. Plainly, the "vulnerability" claimed by Perelman is not the sort of vulnerability with which *State Farm* was concerned. *See, e.g., Bardis v. Oates*, 14 Cal. Rptr. 3d 89, 104-05 (Cal. Ct. App. 2004) (fellow investors "in a multimillion-dollar land speculation deal" were not considered vulnerable even though the defendant breached his fiduciary duty to them), *cert. denied*, 125 S. Ct. 1325 (2005). Rather, if it is to have any value in distinguishing highly reprehensible conduct from conduct that only barely crosses the threshold of punishability, the "vulnerable victim" factor must be confined to circumstances in which the defendant has preyed upon the financially desperate or the gullible and unsophisticated -- the classic "widows and orphans" -- who lack knowledge of their rights and are therefore particularly defenseless against trickery or deceit. *Cf. Life Ins. Co. of Ga. v. Johnson*, 701 So. 2d 524, 526-29 (Ala. 1997) (finding conduct highly reprehensible because the defendant engaged in a pattern of selling worthless Medicare supplement policies to "elderly, uneducated, single black women," but nevertheless reducing what originally was a $15 million punishment to $3 million). *See generally State Farm*, 538 U.S. at 433 (Ginsburg, J., dissenting) (discussing how torts are particularly reprehensible when the victim is one of "the weakest of the herd -- the elderly, the poor, and other consumers who are least knowledgeable about their rights and thus most vulnerable to trickery or deceit.") (internal quotation marks omitted). It would drain the "vulnerable victim" concept of all meaning to include Mr. Perelman, a tremendously sophisticated businessman with a team of business and legal advisors to protect his interests, within its reach.

Fourth, there is no evidence in the record that the Sunbeam fraud was anything other than an isolated incident. *See, e.g., Park v. Mobil Oil Guam, Inc.*, No. CVA03-001, 2004 WL 2595897, at *13 (Guam 2004) (fraud was an "isolated incident" under *State Farm* even though the "wrongful acts ... spanned several years"); *Harris v. Archer*, 134 S.W.3d 411, 437-38 (Tex. Ct. App. Amarillo 2004, pet. denied) (fraud was "isolated incident" although fraudulent acts occurred over several-month period); *cf. Gober v. Ralphs Grocery Co.*, No. D040473, 2005 WL 895207, at *7-8 (Cal. Ct. App. Apr. 19, 2005) (discussing how the repeated misconduct factor looks to whether the defendant is a "recidivist[]") (citing *State Farm*, 538 U.S. at 423).

Thus, this is a paradigm of a "low" reprehensibility case for which *State Farm* allows only a modest punitive award, ***if any at all***. *See State Farm*, 538 U.S. at 419.

The California Court of Appeal's recent decision in *Streetscenes, L.L.C. v. ITC Entertainment Group, Inc.*, No. B168835, 2004 WL 2668695 (Cal. Ct. App. Nov. 23, 2004) (unpublished), is particularly instructive. In *Streetscenes*, the defendant had tricked the plaintiff and several others into investing in a sham film production. The court held that the fraud "ranks relatively low on the reprehensibility scale," as "the harm was purely economic and did not involve the health or safety of the victims" or "implicate the kind of massive fraud associated with Enron, WorldCom and similar recent business scandals." *Id.* at *3-4. "Rather, this unextraordinary fraud case concerned misrepresentations by a corporate agent to experienced investors in an inherently risky product." *Id.* at *4. This type of misconduct, the court recognized, did not "demand the kind of substantial award ... [as] in cases of 'extreme reprehensibility' resulting in death or substantial injury." *Id.* The court accordingly held that the $8 million punitive award was unconstitutionally excessive and remanded for a new trial on the amount of punitive damages. *Id.* at *7. The present case involves a fraud of a similar, non-aggravated character.

B. The 1.4:1 Ratio of Punitive to Compensatory Damages Is Indicative of a Grossly Excessive Punishment in the Circumstance of This Case.

"Ratio" considerations merit a reduction in the amount of punitive damages as well. In *State Farm*, the Supreme Court undertook to provide lower courts with more detailed guidance regarding the significance of the ratio between the amount of punitive and compensatory damages than it had supplied in previous cases. Of special significance here, the Court made clear that the existence of a seemingly "low" ratio is no guarantor of non-excessive punitive damages. Most notably for present purposes, the Court explained that compensatory damages alone may suffice to impose all the liability that can be justified in some circumstances, 538 U.S. at 419, and added that "***[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee***," *id.* at 425 (emphasis added). Applying these guidelines to the facts of the case before it, the Court observed that, even though State Farm's conduct was "reprehensible" and "merit[ed] no praise," *id.* at 419-20, "a punitive damages award at or near the amount of compensatory damages" -- *i.e.*, a 1:1 ratio -- was likely the constitutional maximum given the "substantial" $1 million compensatory award in that case. *Id.* at 429.

There can be no doubt that compensatory damages totaling $604 million are not just "substantial" as *State Farm* used the term in reference to a $1 million compensatory award, but staggeringly huge. In view of the massive amount of compensatory damages, which dwarfed any gain that Morgan Stanley made or expected to make, and the relatively low reprehensibility of Morgan Stanley's conduct, any award of punitive damages must be well below the amount of compensatory damages.

Williams v. ConAgra Poultry Co., 378 F.3d 790 (8th Cir. 2004), a recent Eighth Circuit decision involving materially more egregious conduct (racial harassment in the workplace) and materially smaller compensatory damages than the present case ($600,000), is illustrative. In *Williams*, the Eighth Circuit held a $6 million punitive award unconstitutionally excessive and ordered a remittitur to the amount of compensatory damages, explaining:

Mr. Williams's large compensatory award ... militates against departing from the heartland of permissible exemplary damages. The Supreme Court has stated that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." Mr. Williams received $600,000 to compensate him for his harassment. Six hundred thousand dollars is a lot of money. Accordingly, we find that due process requires that the punitive damages award on Mr. Williams's harassment claim be remitted to $600,000.

Id. at 799 (citation omitted); *see also Czarnik v. Illumina, Inc.*, No. D041034, 2004 WL 2757571, at *11 (Cal. Ct. App. Dec. 3, 2004) (unpublished) ("1:1 ratio of punitive to compensatory damages [was] the maximum award that is sustainable against a due process challenge" where compensatory damages were $2,196,935 and defendant's conduct "was not highly reprehensible"); *cf. Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 63-64 (2d Cir. 2004) (directing district court to reconsider whether a $2.1 billion punitive award that was equal to the amount of compensatory damages was constitutionally

excessive in fraud case where the harm was economic, "defendants did not endanger the health and safety of others," and "plaintiffs in this case were arguably not 'financially vulnerab[le]"), *cert denied*, 73 U.S.L.W. 3570 (2005). [32]

Indeed, the U.S. Supreme Court's underlying reasoning in both *BMW* and *State Farm* suggests that even a punitive award equal to the $604 million compensatory award would be far too high in the circumstances here. As the Supreme Court explained in *State Farm*, "[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages ***should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence***." 538 U.S. at 419 (emphasis added). And even then, the amount of punitive damages must be no greater than the ***minimum*** necessary to achieve the State's interest in retribution and deterrence. *See, e.g., id.* at 419-20 ("While we do not suggest there was error in awarding punitive damages based upon State Farm's conduct toward the Campbells, a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further."); *BMW*, 517 U.S. at 584 ("The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal. The fact that a multimillion dollar penalty prompted a change in policy sheds no light on the question whether a lesser deterrent would have adequately protected the interests of Alabama consumers."); *Continental Trend Res., Inc. v. OXY USA Inc.*, 101 F.3d 634, 641 (10th Cir. 1996) (the relevant issue under *BMW* is "the minimum level of penalty necessary to achieve the state's goal of deterrence").

Here, the amount of punitive damages necessary to achieve Florida's legitimate interests in retribution and deterrence (assuming that it has any such interests at all where both perpetrator and victim were located in New York) is substantially less than $604 million. As the Supreme Court has recognized, "deterrence ... operates through the mechanism of damages that are compensatory" as well. *Memphis Cmty. Sch. Dist.*, 477 U.S. at 307; *cf. San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) ("The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."). Here, the $604 million in compensatory damages vastly exceeds the approximately $32 million in total fees that Morgan Stanley allegedly made through the Sunbeam transaction. No rational company would risk having to pay $604 million for the prospect of making $32 million unless it was virtually certain that the fraud would go undiscovered, as plainly was not the case here. Consequently, ***no*** further liability, or at most some nominal amount of punitive damages, can be justified as needed for deterrent purposes here. *See, e.g., United States v. Bailey*, 288 F. Supp. 2d 1261, 1281 (M.D. Fla. 2003) (setting aside $3,000,000 punitive award "in its entirety" because, among other things, the compensatory damages exceeded the gain to the defendant, making "the imposition of further sanctions to achieve punishment or deterrence" unnecessary). [33]

Still another factor that makes it inappropriate to use the $604 million compensatory award as a benchmark for the punitive damages in this case is that this figure far exceeds the harm attributable to Morgan Stanley's conduct. That is so for two reasons. First, Morgan Stanley played at most an accessorial role in any fraud: Sunbeam was the principal wrongdoer (and beneficiary), and Arthur Andersen appears to have been an accessory. Second, $604 million is a benefit-of-the-bargain figure, which is a contractual measure of damages that is untethered from the amount of harm to the victim. Of course, punitive damages are not available for contract breaches. *Ferguson Transp., Inc. v. North Am. Van Lines, Inc.*, 687 So. 2d 821, 822 (Fla. 1996) (per curiam). It follows that the proper comparison should be with that portion of the actual out-of-pocket loss sustained by CPH, which is almost surely far less than the $604 million assignable to Morgan Stanley. Because the record does not permit ascertainment of that figure -- and indeed because it is possible that CPH suffered no harm at all from the Sunbeam transaction -- the amount of CPH's compensatory award provides no support for the massive punitive award here.

In sum, even assuming that some punitive damages were allowable here, it is clear that a more "modest" punitive award would suffice and that this Court should go "no further." *State Farm*, 538 U.S. at 419-20. The Third Circuit's decision in *Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc.*, 181 F.3d 446 (3d Cir. 1999), is precisely on point. In that case, a manufacturer of bone fixators and several of its distributors were found liable for breach of contract, fraud, and other

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business torts. *Id.* at 453. The jury awarded $48 million in compensatory damages and $100,600,000 in punitive damages, which the trial court reduced to $50 million (3.3% of the defendant's net worth). *Id.* at 453-54, 469 n.6. The Third Circuit held that the reduced punitive award remained unconstitutionally excessive because, among other things, the plaintiff (to whom the defendant, as its agent, arguably owed a fiduciary duty) "[was] not a financially weak or vulnerable target" and "the harm inflicted on [it] was economic, rather than physical, and hence 'less worthy of large punitive damages awards than torts inflicting injuries to health or safety." *Id.* at 467 (citing *Continental Trend Res.*, 101 F.3d at 638). In these circumstances, the court explained, the high amount of compensatory damages "may more appropriately be accompanied by a lower punitive damages ratio." *Id.* at 467-68 (citing *BMW*, 517 U.S. at 582). It therefore "conclude [d] that the proper, reasonable punitive damages award is no more than $1 million." *Id.* at 468-69.

C. The Third Guidepost Also Indicates That the Punitive Verdict Is Excessive.

BMW's third guidepost -- "the disparity between the punitive damages award and the civil penalties authorized or imposed in comparable cases," *State Farm*, 538 U.S. at 428 (internal quotation marks omitted) -- also indicates that an $850 million punishment is grossly excessive. Indeed, as far as Morgan Stanley is aware, the highest punitive award for fraudulent activity ever upheld by Florida courts is approximately $8 million, *see Bander as v. Banco Central del Ecuador*, 461 So. 2d 265 (Fla. 3d DCA 1985), for a purely economic tort is $19 million, *see American Med. Int'l, Inc. v. Scheller*, 590 So. 2d 947, 951 (Fla. 4th DCA 1992) (per curiam), and for any tort is $50 million (wrongful death caused by deficient railroad track maintenance), *see CSX*, 743 So. 2d at 562. [34] Based on this precedent, Morgan Stanley certainly did not have "fair notice" that an $850 million punishment could be imposed for its misconduct. *Cf. BMW*, 517 U.S. at 584 (considering judicial decisions as part of third guidepost analysis). Accordingly, this guidepost also indicates that a substantial reduction in the punitive award is necessary.

XIV. THE PUNITIVE VERDICT IS EXCESSIVE UNDER FLORIDA LAW.

"A punitive damages award is considered excessive [under Florida law] when the amount of damages is out of proportion to the degree of malice or wantonness of the defendant's conduct in relation to the defendant's financial worth." *Gregg v. U.S. Indus., Inc.*, 887 F.2d 1462, 1477 (11th Cir. 1989) (citing *Arab Termite & Pest Control of Fla., Inc. v. Jenkins*, 409 So. 2d 1039, 1043 (Fla. 1982)). Morgan Stanley is aware of no Florida case involving a defendant whose net worth was at least $100 million where a punitive award of more than 2% of net worth has been upheld on appeal. *See CSX*, 743 So. 2d at 562 (affirming $50 million punitive award, which was 1% of defendant's $5 billion net worth); *Ballard*, 749 So. 2d at 487, 489 (affirming $31 million punitive award, which was 1.24% of the asbestos company's $2.5 billion net worth); *Scheller*, 590 So. 2d at 951 (affirming $19 million punitive award for tortious interference with business relationship where defendants had a "combined net worth of over one billion"); *cf. Gregg*, 887 F.2d at 1476-77 (affirming trial court remittitur of $18.5 million punitive award for fraud to $2 million, which was ".4% of [the defendant's] net worth of $520 million"). *See generally Dunn v. Hovic*, 1 F.3d 1371, 1383 (3d Cir. 1993) (" '[A] typical ratio for a punitive damages award to a defendant's net worth may be around one percent.' ") (quoting *Cash v. Beltmann N. Am. Co.*, 900 F.2d 109, 111 n.3 (7th Cir. 1990)).

Even a punitive award equal to 2% of Morgan Stanley's net worth (approximately $104 million) is excessive here, because Morgan Stanley's conduct was markedly less reprehensible than that of the defendants in other cases involving punishments for large companies at or approaching the 2% level. In *CSX*, for instance, the defendant had purposely engaged in "cutbacks" in railroad track maintenance and inspection at several locations in order to save "approximately $2.4 billion for the company." 743 So. 2d at 560. After a train derailed, killing eight, the trial court explained that the $50 million punitive award was reasonable in light of the evidence of the misconduct in that case:

> This Court finds the evidence to be clear and convincing, sufficiently showing that Defendant's conduct in breaching its duty was deliberate, reckless, willful, and wanton, evincing a reckless disregard for the safety of rail passengers and the public at large. This evidence showed that although

> cost-cutting measures may have saved Defendant over two billion dollars, society paid with eight human lives. The clear and convincing evidence showed that the price of cost-cutting safety to turnover larger profits is too great of a price. This not only bespeaks culpable negligence, it is borderline criminal.

Id. at 562-63. The Fourth District Court of Appeal affirmed. *Id.* at 564.

In *Ballard*, the evidence revealed that "for more than thirty (30) years Owens-Corning concealed what it knew about the dangers of asbestos," including the fact that asbestos was "toxic" and that "even slight exposures to asbestos in [its product] could cause mesothelioma, ... an always fatal cancer of the lining of the chest wall." 749 So. 2d at 487. Moreover, the evidence indicated that the defendant knew of ways to remove the asbestos from its product but refrained from doing so "because the removal of asbestos from [its product] at that time did not offer any sales growth potential." *Id.* In the face of this evidence, the Florida Supreme Court held that $31 million in punitive damages was not excessive, remarking that "it would be difficult to envision a more egregious set of circumstances than those found herein by the trial court to constitute a blatant disregard for human safety involving large numbers of people put at life-threatening risk." *Id.* at 489.

In *Scheller*, the harm was economic but reflected a pattern of malicious and repeated misconduct that was motivated by a desire for "outright revenge." 590 So. 2d at 952. The conduct began in 1979, when a hospital owned by the defendant terminated Dr. Scheller from its staff. He then solicited other members of the hospital's staff to designate him as their medical expert and rendered pathology services to certain designated patients. *Id.* at 948. After a hospital administrator tried to thwart him from doing do, Dr. Scheller sued the hospital for tortious interference with advantageous business relationships, obtaining some injunctive relief. *Id.* at 949. Over the next ten years, the interference got worse, in part out of acrimony resulting from the prior suit. Dr. Scheller sued again, this time receiving $19 million in punitive damages. *Id.* at 951. The trial judge upheld the award, stating:

> The recurrence of the activity after an adverse verdict and the shortness of time, the fact there had been courts that had interpreted the by-laws and had clearly told the hospital what it could and could not do, all of that was before the jury.
>
> And, the jury had a right to consider [the administrator's] explanation of what his motivation was.
>
> But the point is there was an opposite picture that was put forth, a history of ten years of contentious and antagonistic relationships that had a certain theme to it and I think the jury was fully able to look at that and arrive at its determination as to what was the true motivation behind the hospital's activities and was there a degree of recklessness, and malice and outright revenge that came into play here, and the jury had made that determination.

Id. at 951-52. Though remarking that "[t]he enormity of the punitive damages award has not escaped our attention," the Fourth District Court of Appeal affirmed. *Id.* at 951.

The misconduct here at issue is not nearly as egregious as in these prior record-setting cases. Unlike *CSX* and *Ballard*, the fraud here was a solitary incident and did not involve any risks to health or safety, much less result in physical harm. Unlike *Scheller*, there was no evidence of "antagonism" or "outright revenge."

Indeed, proper application of the eleven misconduct "factors" listed in *Ballard*, 749 So. 2d at 484-85, reveals that a small amount of punitive damages, or none at all, is appropriate under Florida law here. Those factors are:

> (1) an amount reasonable in relation to the harm likely to result from [the defendant's] conduct as well as the harm that actually has occurred;

(2) the degree of reprehensibility of [the defendant's] conduct, the duration of that harmful conduct, [the defendant's] awareness, any concealment and the existence and frequency of similar past conduct;

(3) the profitability to [the defendant] of the wrongful conduct and the desirability of removing that profit and of having [the defendant] also sustain a loss;

(4) the financial condition of [the defendant] and the probable effect thereon of a particular judgment;

(5) all the costs of litigation to defendant and to the plaintiff;

(6) the total punishment [the defendant] has or will probably receive from other sources, as a mitigating factor;

(7) the seriousness of the hazard to the public, the attitude and conduct of [the defendant] upon discovery of the misconduct;

(8) the degree of [the defendant's] awareness of the hazard and of its excessiveness;

(9) the number and level of employees involved in causing or covering up the ... misconduct;

(10) the duration of both the improper ... behavior and its cover-up; and

(11) the existence of other civil awards against [the defendant] for the same conduct.

The first and second considerations track the first two *BMW* guideposts and certainly do not warrant a large punitive award here, for reasons already discussed. The third consideration -- "the profitability to [the defendant] of the wrongful conduct and the desirability of removing that profit and of having [the defendant] also sustain a loss" -- strongly supports a drastic reduction of the jury's award, because the compensatory damages alone impose a massive loss on Morgan Stanley that far exceeds any gain it received or could have expected to receive from the alleged misconduct. *Cf. CSX*, 743 So. 2d at 559-60 (safety cutbacks resulted in savings of $2.4 billion but compensatory damages were only $6.14 million). In addition, beyond any pecuniary loss, the finding of liability for fraud threatens to cause Morgan Stanley serious reputational injury.

The fourth factor is the defendant's wealth, which in this Court's words determines the proper degree of "ouch." *E.g.*, 5/13/05 Tr. at 14804:16. Given the clear pattern in Florida of punitive damages that do not exceed 2% of net worth for large companies, this factor too weighs heavily in favor of a drastic reduction of the award. [35]

The fifth consideration is the cost of litigation to the defendant and the plaintiff. Again, as expensive as litigating a big case may be, those costs are dwarfed by the size of the award of compensatory damages alone in this case -- an award that is substantially greater than the amount necessary to make CPH whole for its loss and instead constitutes quasi-contractual benefit-of-the-bargain damages. In such circumstances, no amount of punitive damages (much less $850 million) can be justified as necessary to ensure that the cost to the plaintiff of pursuing a claim does not erode the compensatory damages to the point of undermining deterrence.

The sixth factor -- the extent to which the defendant has been punished by other means for the conduct at issue -- is employed "as a mitigating factor." It was undisputed that MSSF lost at least $300 million due to the Sunbeam fraud. This loss is a relevant and important mitigating factor in this case. So too is the inevitable reputational harm that Morgan Stanley has suffered as a consequence of this lawsuit.

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The seventh consideration is the seriousness of the hazard to the public and the defendant's behavior upon discovery of the misconduct. This factor is primarily concerned with product manufacturers who leave a hazardous product on the market for many years (or do not act quickly enough to recall the product after learning about a new danger), such as Owens-Corning in the *Ballard* case. *See, e.g.*, 749 So. 2d at 487-88. It is completely inapposite to an investment banking firm and its billionaire "victim."

The eighth factor is the defendant's degree of awareness of the hazard and its excessiveness. This factor too is concerned with health and safety dangers, as the term "hazard" indicates. Even assuming that it also encompasses purely economic frauds, it would not warrant a significant punitive award here, as no evidence at trial demonstrated that Morgan Stanley was aware that Perelman, who after all had his own team of lawyers and investment bankers, was relying so extensively as now claimed on its statements. [36]

The ninth consideration is the number and level of employees involved in the misconduct. The deemed facts and the facts in the litigation misconduct statement identify only a handful of employees. In a company of Morgan Stanley's size and scope (with more than 8000 employees), that is an insignificant number. Accordingly, this factor does not indicate that a record-breaking punitive award is warranted.

The tenth factor is the duration of the misconduct and any cover-up. Although the deemed facts indicate that Dunlap had been manipulating the books since 1996, those facts also indicate that Morgan Stanley did not become involved in the alleged conspiracy until much later (April 1997). Talks with Coleman did not occur until several months after that (December 1997), with the acquisition being completed within three months (March 1998). This hardly resembles the thirty-year course of conduct in *Ballard*, 749 So. 2d at 487, or ten-year feud in *Scheller*, 590 So. 2d at 951. Accordingly, this factor too cannot support the record-breaking punitive award.

The final factor is the existence of other civil awards against the defendant for the same conduct. Although ordinarily the existence of multiple awards for the same conduct might be thought to be a mitigating factor, it does not follow that the absence of other awards is not. To the contrary, when, as here, the relevant federal agency (the SEC) pursued other parties (Sunbeam and Arthur Andersen), while electing not to penalize the defendant, that is powerful reason to conclude that the defendant's conduct is not especially egregious and that a record-breaking punitive damages award is wholly unwarranted.

In sum, several of the *Ballard* factors are inapplicable in cases involving purely economic injury. The remaining factors may permit some punitive damages, but they certainly do not justify the record-smashing $850 million punitive award in this case. Indeed, even if the Court were to find that Morgan Stanley attempted to conceal the fraud -- a finding that we submit would be unsupported by the record evidence -- such a finding would not justify a punitive award equaling the highest one ever upheld in Florida ($50 million), much less one 17 times that amount. *Cf. McGee*, 837 So. 2d at 1015 (jury awarded no punitive damages even though there was tortious conduct and evidence that "Ivey Report" had been withheld). The Court should accordingly order a remittitur to a figure well below the amounts that Florida courts have upheld in cases involving substantially greater degrees of culpability.

CONCLUSION

For the foregoing reasons and those stated in the Motion for Judgment in Accordance with Motion for Directed Verdict and Alternative Motion for New Trial, the Court should enter judgment in favor of Morgan Stanley or, in the alternative, grant Morgan Stanley's motion for new trial.

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Footnotes

1 In determining choice of law, where the trial record differs from the court's pretrial understanding of the case, the trial record governs. *See Chance v. E. I. Du Pont De Nemours & Co.*, 57 F.R.D. 165, 170 (E.D.N.Y. 1972) ("During the course of the trial the court may reach different determinations on the facts and decide that a different rule of law applies . . . ."); *Bituminous Cos. Corp. v. Rway Servs., Inc.*, No. CIV. CCB-97-3331, 2000 WL 1593519, at *2 (D. Md. Oct 20, 2000) ("reevaluat[ing]... choice of applicable law" in light of developments in the case). As described in Morgan Stanley's Renewed Motion to Apply New York Law (May 11, 2005) (incorporated by reference herein), the trial record differed substantially from the Court's pretrial assumptions about the case.

2 Moreover, even if the ten earlier approaches were relevant, they were effected by Morgan Stanley, *see* Choice of Law Order at 6 n.6, whose status as a New York domiciliary is sufficient to give any one of those alleged attempted frauds a contact in New York.

3 *See Hillcrest Pac. Corp. v. Yamamura*, 727 So. 2d 1053, 1057-58 (Fla. 4th DCA 1999) ("sophisticated developer in the business of investing millions of dollars in commercial property" did not "reasonably rely upon any material misrepresentations" where the sales agreement provided inspection rights and an opportunity to "audit the financial records"); *Thor Bear, Inc. v. Crocker Mizner Park*, 648 So. 2d 168, 172 (Fla. 4th DCA 1994) ("Participants in a normal business transaction are not entitled to rely upon such 'ephemeral matters' as opinions, judgments or legal views expressed by an opposing party."); *Wasser v. Sasoni*, 652 So. 2d 411, 412-13 (Fla. 3d DCA 1995) ("[A] sophisticated purchaser of commercial property who ... had ample opportunity to conduct inspections, and could have discovered an alleged defect through the exercise of ordinary diligence, may be disgruntled, but does not have a cause of action for fraud."); *Lewis v. Bank of Am. NA*, 343 F.3d 540, 547 (5th Cir. 2003) ("[v]iewing the circumstances in their entirety," including plaintiff's "business background" and "access to professional accountants," plaintiff's decision to go forward with transaction in the face of "red flag[s]" "without undertaking additional investigation ... was not justifiable"); *B.O. v. CO.*, 590 A.2d 313, 316 (Pa. 1991) ("Relative to [justifiable reliance] the Pennsylvania Supreme Court has held that the character, intelligence, experience, age and mental and physical condition of the parties must be considered."); *Lockard v. Carson*, 287 N.W.2d 871, 878 (Iowa 1980) (holding that the test for justifiable reliance is "whether the complaining party, in view of his own information and intelligence, had a right to rely on the representations. This subjective standard depends not on what an ordinarily prudent person reasonably would do to protect his or her interests, but upon what the complaining party reasonably could be expected to do."); Prosser & Keeton on Law of Torts § 108, p. 751 (5th ed. 1984) ("[O]ne who has special knowledge, experience, and competence may not be permitted to rely on statements for which the ordinary man might recover, and ... one who has acquired expert knowledge concerning the matter dealt with may be required to form his own judgment, rather than take the word of the defendant.").

4 CPH's calculation of represented value was flawed for other reasons. *See* pp. 39-40, *infra*.

5 Florida and federal law are not materially different on this point. *See Butterworth v. Quick & Reilly, Inc.*, 998 F. Supp. 1404, 1411 (M.D. Fla. 1998). Both require damages to be proved on the date of the transaction, *compare Totale*, 877 So. 2d at 815, *with Huddleston v. Herman & MacLean*, 640 F.2d 534, 556 (5th Cir. 1981), *modified on other grounds*, 459 U.S. 375 (1983); and both justify that requirement on the need to exclude subsequent appreciation or depreciation unrelated to the fraud, *compare Totale*, 877 So. 2d at 815, *with Huddleston*, 640 F.2d at 555.

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6 Elsewhere the court stated (without citation) that "[t]he Florida courts refer to this measure of damages, *i.e.* the difference between the amount the plaintiff paid for the stock and the amount the plaintiff recognized on sale of the stock, as the 'out of pocket rule.' " 710 F.2d at 686 n.12. In fact, however, Florida law measures out-of-pocket damages based on actual value on the date of the transaction, not the price realized upon resale. *See Totale*, 877 So. 2d at 815; *Kind*, 889 So. 2d at 90; *Teca*, 726 So. 2d at 829; *Perlman*, 611 So. 2d at 1341; *see also Huddleston*, 640 F.2d at 554-56 (distinguishing rescissional from out-of-pocket damages). Any imprecision in terminology is irrelevant, however. Whether *Silverberg* was applying rescissional damages or a variant of out-of-pocket damages identical to rescissional damages, the point remains that it was ***not*** applying benefit-of-the-bargain damages, the measure CPH elected here.

7 Moreover, by allowing Dr. Nye to testify to the value of Sunbeam shares on various dates based on assumptions he had been told to make by plaintiffs' counsel, *see* 4/25/05 Tr. at 10386, the Court allowed CPH to proceed in a manner inconsistent with its earlier Order on Morgan Stanley's Motion for Clarification or Reconsideration of the Court's Order on Plaintiff's Motion in Limine No. 27 (Apr. 15, 2005), which required both parties to establish appropriate evidentiary predicates ***before*** offering expert testimony on share value on particular dates.

8 At best, the Court's conflicting instructions reversed the burden of proof on the damages element of CPH's claim. It was CPH's burden to isolate and remove the portion of its losses not proximately caused by the fraud.

9 In addition, benefit-of-the-bargain damages are not available in this case because (1) New York law applies and allows only out-of-pocket damages, *see Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 421 (N.Y. 1996); and (2) CPH failed to prove its benefit of the bargain with "sufficient certainty," for all the reasons given above, *see Totale*, 877 So. 2d at 815. Furthermore, Morgan Stanley preserves its argument that benefit-of-the-bargain damages are not appropriate in fraud cases even under Florida law. *Compare Greater Coral Springs Realty, Inc. v. Century 21 Real Estate of S. Fla., Inc.*, 412 So. 2d 940, 941 (Fla. 3d DCA 1982), and *Sprayberry v. Sheffield Auto & Truck Serv., Inc.*, 422 So. 2d 1073, 1075 (Fla. 1st DCA 1982), *with Totale*, 877 So. 2d 813.

10 Dr. Nye relied on a similarly arbitrary averaging methodology in determining the price at which CPH could have sold its stock after the sale restrictions ended. *See* 4/25/05 Tr. at 10390-91.

11 Nye's testimony also should have been excluded or stricken because he failed to give adequate consideration to the record evidence, including: (1) the $524 million valuation of the Sunbeam shares prior to disclosure of the alleged fraud in Sunbeam's SEC filings, which was substantially lower than the represented value Dr. Nye used, 4/25/05 Tr. at 10512:7-14; (2) the valuation of the Sunbeam shares prior to disclosure of the alleged fraud in MS 1000, which was also substantially lower than the figure Dr. Nye used, *id.* at 10472:20-10474:9; (3) the valuation of Sunbeam shares at 12-1/8 per share in the two MAFCO working papers valuing its total stake at $450 million even after disclosure of the alleged fraud, which was much higher than the figure Dr. Nye used, *id.* at 10489:25-10490:5; (4) the fact that CPH could have elected to forgo the transaction after partial revelation of the fraud on March 19, *id.* at 10489:25-10490:5; (5) evidence as to whether CPH could have sold its shares prior to December 6, 1999, or February 5, 2001. *See Brito v. County of Palm Beach*, 753 So. 2d 109 (Fla. 4th DCA 1998); *Husky Indus., Inc., v. Black*, 434 So. 2d 988 (Fla. 4th DCA 1983).

12 This ground for a new trial is set forth in greater detail in Morgan Stanley's Motion for Mistrial Because of Improper Ex Parte Juror Communications (May 2, 2005) ("Mistrial Motion"), incorporated by reference herein. Morgan Stanley further incorporates by reference the additional information contained in its motion to permit juror interviews (filed May 26, 2005).

13 The close, ongoing relationship between Mr. Comyns and CPH's lead trial counsel distinguishes this case from others in which the contacting party had no current relationship with a party or its attorney and no apparent motive to tamper with the jury. *See Hutchinson v. State*, 882 So. 2d 943, 956-57 (Fla. 2004); *First Nat'l Bank in Tarpon Springs v. Bliss*, 56 So. 2d 922, 923-24 (Fla. 1952). In those cases, moreover, the contact was fleeting rather than persistent. Nonetheless, even in those cases, the trial court *sua sponte* conducted a thorough interview of the jurors individually, obtained the facts, and determined that the contact would not (or did not) influence the jurors' conduct. *See Hutchinson*, 882 So. 2d at 956; *Bliss*, 56 So. 2d at 924.

14 Alternatively, even if CPH's decision to affirm the merger agreement and enter into new arrangements with Sunbeam did not waive the fraud claims entirely, it at least waived any entitlement to rescission or a rescissionary measure of damages. *See* pp. 33-34, *supra*.

15 Rule 1.380(b)(2) authorizes circuit courts (in appropriate circumstances) to establish as true facts relevant to a party's claims or defenses. It does not authorize circuit courts to deem as true facts unrelated to a party's claims or defenses and read those unrelated facts to the jury. As a consequence, Rule 1.380(b)(2) did not authorize the Court to read the Statement of Litigation Misconduct to the jury in Phase II. Morgan Stanley discusses the Statement later in this brief.

16 Morgan Stanley also notes that, for the reasons expressed in Morgan Stanley's prior motions, the extension of the sanctions order to Phase II also violated Morgan Stanley's right to due process under Article I, § 9 of the Florida Constitution and its right of access to the courts under Article I, § 21 of the Florida Constitution. *See State ex rel. Pittman v. Stanjeski*,

562 So. 2d 673, 679 (Fla. 1990) (construing statute to permit automatic entry of a judgment for delinquent support monies without giving the defendant an opportunity to present defense would violate the right of access to courts); *Bonavista Condo. Ass'n, Inc. v. Bystrom*, 520 So. 2d 84, 86 (Fla. 3d DCA 1988) (per curiam) ("The due process protections afforded by the fourteenth amendment of the United States Constitution are the same as those provided by article I, section 9 of the Florida Constitution.").

17 *E.g.*, Exhibit A attached to Default Order ("Morgan Stanley developed a strategy for Sunbeam to use its fraudulently-inflated stock" in the acquisition of Coleman; "Morgan Stanley prepared and provided CPH with false financial and business information about Sunbeam"; "Morgan Stanley provided CPH with false information"; Morgan Stanley "script[ed] Dunlap's false public statements").

18 *E.g., id.* (pursuant to "Morgan Stanley's carefully crafted plan," "Morgan Stanley laid the groundwork for a meeting to take place in December 1997 in Palm Beach, Florida between Dunlap and Kersh and representatives of CPH").

19 *E.g., id.* ("Drawing on relationships between some of Morgan Stanley's investment bankers and senior CPH officers, Morgan Stanley set about trying to persuade CPH to sell its interest in Coleman to Sunbeam -- and, most importantly, to accept Sunbeam stock as consideration.").

20 *E.g., id.* ("Morgan Stanley responded with a plan that would allow Dunlap to conceal his fraud. Morgan Stanley recommended that Sunbeam acquire other companies, using Sunbeam's stock, which was fraudulently inflated, as the 'currency' that would be used to pay for the acquisitions.").

21 *E.g., id.* ("Thereafter, Morgan Stanley through Managing Directors Strong, James Stynes, and Robert Kitts, led the discussions with CPH on Sunbeam's behalf.").

22 Many of Morgan Stanley's arguments are set forth more fully in Morgan Stanley's Motion For Reconsideration Of The Court's Sanctions Order and in Morgan Stanley MIL, 30 To Exclude Litigation Misconduct Evidence From Phase II. We incorporate those arguments by reference here.

23 The witnesses were: Allison Gorman Nachtigal, who was in the Morgan Stanley IT Department and "responsible for the e-mail archive as well as other data retention initiatives around the web," 2/14/05 Tr. at 25:16, 26:11-19; Robert J. Saunders, who was an Executive Director in the IT Department and "responsible for the maintenance of the server hardware," *id.* at 84:14-25; Quentin Gregor, who was Vice-President of a company called eMag solutions, which specialized in tape and e-mail restoration, and who testified about how long the searches would take, *id.* at 227; and Thomas Clare, counsel for Morgan Stanley, *id.* at 173.

24 Indeed, prior to the February 14 hearing, CPH had moved for an adverse inference but had not asked the Court to find litigation misconduct facts and establish them conclusively for all purposes in the litigation. *See* CPH Motion For Adverse Inference, at 5 (filed Jan. 26, 2005). Nor did the Court state that it was considering this option or ask for briefing on the subject. In fact, it was Morgan Stanley that requested the evidentiary hearing during argument on the adverse inference motion on February 2, after the Court suggested that the sworn declarations it submitted were insufficient to defeat the motion. 2/2/05 Tr. at 125:1-2, 17-18. The Court's February 3 order did not specify issues to be discussed but left that to Morgan Stanley's discretion. *See* Order Specially Setting Hearing, at 1 (Feb. 3, 2005); *see also* 2/2/05 Tr. at 157:23-158:6. ("[T]he basic concept [to the order] is going to be ... Morgan Stanley needs to designate everybody who's going to testify at the hearing; needs to provide copies of all the documents that are sort of relevant to the issues before the court and all the documents, correspondence between Morgan Stanley and any outside or prospective outside vendors.").

25 In addition to Ms. Gorman, Morgan Stanley called Richard Anfang, a Managing Director in Morgan Stanley's Information Technology Department and head of its Enterprise Infrastructure Group, to testify about the various steps that Morgan Stanley had taken to locate additional e-mail back up tapes and about the creation of Morgan Stanley's e-mail archive, 03/14/05 Tr. at 3580:1; and LaRue Bruce Buchanan, an employee of National Data Correction Institute, a third-party vendor, who testified about the processing of e-mails from back-up tapes as part of the Archive migration project, *id.* at 3636:20. CPH, for its part, called one witness (whose testimony was later stricken), Stephen Wolfe, an employee of "Renew Data," another third party vendor, to testify about the processing of e-mails on tapes delivered by Morgan Stanley to Renew Data, 3/14/05 Tr. at 3516:15.

26 On February 14, CPH did orally move for additional relief, including entry of default. 2/14/05 Tr. at 242:11-16, 284:2-3. A default, however, admits only "all well-pled factual allegations of the complaint." *State Farm Mut. Auto. Ins. Co. v. Horkheimer*, 814 So. 2d 1069, 1072 (Fla. 4th DCA 2001). Thus, because the litigation misconduct facts were not referenced in the complaint, they were not included within the purview of CPH's request for a default. *Cf. id.* at 1074-75 (default judgment could not exceed $50,000 that the insured alleged as the policy limits in the complaint even though insured later claimed that policy limits were in excess of one million dollars, as defendant "was entitled to notice" relating to a change in her claim); *Hooters of Am., Inc. v. Carolina Wings, Inc.*, 655 So. 2d 1231, 1235 (Fla. 1st DCA 1995) (holding that claimant could not get

$4,227,543 more than it asked for in the complaint, as "[a]dequate notice is a fundamental element of the right to due process" and even a defaulted "litigant should be entitled to anticipate the consequences that reasonably flow from" its actions).

At this hearing, counsel for CPH also briefly suggested to the Court that it could "fashion a statement that the court would make to the jury establishing Morgan Stanley's knowledge of the fraud" as of February 15, 2005.2/14/05 Tr. at 288:10-15. But it never specified this request further. Moreover, the context of the suggestion clearly indicates that this was not a request to establish many litigation misconduct facts based on the hearing that day but rather merely to establish the single fact of when Morgan Stanley was aware of the Sunbeam fraud.

27 At the end of testimony on March 14th, the Court did suggest that it "may be helpful when we get to argument" if each side prepared a list "of what you believe to be facts now known which were not known as of the time of the February 14th evidentiary hearing. And also indicate whether those are facts that occurred before February 14th that we just didn't know about or are they developments subsequent to February 14th." 3/14/05 Tr. at 3656:20-3657:3. But the Court never specified how it intended to use these facts, nor indicated that they were relevant to anything beyond the issue of whether more severe sanctions were warranted, not to conclusively prevent Morgan Stanley from litigating these facts in a punitive damages phase of the trial.

28 Also prejudicial was how the Court cherry-picked which of Morgan Stanley's admissions it chose to incorporate into the litigation misconduct facts and which it chose to exclude. For instance, it was improper for the Court to find that 10% of the back-up tapes were not produced based on Morgan Stanley's admission -- but refuse to find that, because of e-mail duplication, less than 2% of the e-mails were not produced -- on the ground that the latter admission was a "self-serving" admission. 5/16/05 Tr. at 15063:5-6; 15261:8-9.

29 Counsel for CPH did explain orally what part of the slide was established fact and what part was the inference it sought. But this explanation was insufficient to cure the possibility of prejudice that would arise if the juror simply read the slide and ignored (or was distracted from) what counsel said.

30 We acknowledge that in *Humana*, 802 So. 2d at 498, the Fourth District held that evidence of a $1.7 billion indemnity agreement with the defendant's parent corporation ***was*** relevant to the determination of the amount of punitive damages, where it was offered in order to rebut the defendant's assertion that a punitive award would force the company into financial straits. The *Humana* court distinguished *CSX* by noting that the agreement in that case had been offered for a different purpose from the one asserted in *Humana*.

There are two obvious differences between the indemnity agreement in *Humana* and the credit agreement in this case. First, the defendant in *Humana* had an ***indemnity*** agreement with its parent, not a ***line of credit***. In other words, it was asserted that the *Humana* defendant's parent corporation ***was required to pay*** any punitive award imposed upon its subsidiary, up to $1.7 billion. Even assuming that CPH's interpretation of the credit agreement is correct (and we do not believe that it is), Morgan Stanley's parent corporation has merely agreed to ***loan*** Morgan Stanley the funds necessary to cover the punitive award. Such a loan, like any other, would create a liability on Morgan Stanley's books and would have to be paid back. Second, the *Humana* court was clear that evidence of the indemnity agreement was relevant and thus admissible as ***rebuttal*** evidence, where the defendant had argued that a large punitive award would amount to economic castigation. Morgan Stanley made no such argument to the jury. Indeed, while it unequivocally argues to this Court that the award is grossly excessive when considered in relation to Morgan Stanley's net worth, it has never suggested that it would fail or be unable to pay any constitutionally permissible award.

31 The only larger exaction of which we are aware -- $4.5 billion -- was awarded to a class of tens of thousands of people and businesses whose livelihoods were destroyed by the tanker disaster in *In re Exxon Valdez*, 296 F. Supp. 2d 1071 (D. Alaska 2004). Even there, the punitive award (which was reduced from $5 billion) was only 5% of Exxon's "shareholder's equity" (a synonym for net worth) at the time of the trial court's remittitur. *See* 10-K Filed on 2/28/05 for Exxon Mobil Corporation, at 28 (financial data for year-end 2003). Exxon has since appealed the reduced judgment on excessiveness grounds.

32 Even more recently, the Eighth Circuit reduced a $15,000,000 punitive award to $5,000,000 in a products liability action against a tobacco company in which the jury had awarded $4,025,000 in compensatory damages. *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594 (8th Cir. 2005). The court explained that, given the substantiality of the compensatory award, "a ratio of approximately 1:1 would comport with the requirements of due process" notwithstanding that the misconduct, fraudulent marketing of cigarettes resulting in the death of the plaintiff's decedent, was "highly reprehensible." *Id.* at 602-03. Suffice it to say, Morgan Stanley's conduct is of substantially lesser reprehensibility than that of the defendant in *Boerner*, and its liability for compensatory damages massively greater, making even a "ratio of approximately 1:1" excessive in this case.

33 A firm will be deterred whenever the gain is less than the expected loss (which is equal to the actual loss times the probability of detection). *See, e.g.*, Kenneth S. Abraham & John C. Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of the Defendant's Wealth*, 18 J. Legal Stud. 415, 417 (1989) ("[A] potentially liable defendant will compare the benefits it will derive

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from an action that risks tort liability against the discounted present expected value of the liability that will be imposed if the risk occurs."). Because the alleged gain to Morgan Stanley was $32 million, and the probability of detection was surely far higher than 5%, the compensatory award of $604 million more than suffices by itself to deter Morgan Stanley and other investment banks from partaking in misconduct such as that alleged here.

34 The second highest punitive verdict ever upheld by the Florida courts is $31 million (for widespread harms caused by asbestos). *See Owens-Corning Fiberglas*, 749 So. 2d at 489; *cf. id.* (Overton, J., dissenting) (observing that, at the time, "[t]his was the largest punitive damage verdict awarded by Florida courts"). *CSX, Ballard*, and *Scheller* are discussed more thoroughly below. A $137 million punitive award was imposed in Florida federal court against the Cuban Air Force ***for the torture and death of three individuals.*** *See Alejandre v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997). For reasons relating to foreign sovereign immunity, that award does not appear to have been challenged on excessiveness grounds or collected. *See Alejandre v. Telefonica Larga Distancia De Puerto Rico, Inc.*, 183 F.3d 1277 (11th Cir. 1999).

35 This is a larger percentage of net worth than would be permitted in other jurisdictions. *See, e.g., Proctor v. Davis*, 682 N.E.2d 1203, 1217 (Ill. App. Ct. 1997) ("[A]lthough Upjohn is a large corporation with a net worth of approximately $1.7 billion, punishment in the amount of 2% of its net worth is excessive in the extreme.").

36 In fact, Morgan Stanley was not aware of the Sunbeam fraud at all. But, because of this Court's discovery sanctions, Morgan Stanley has been precluded from establishing that. Indeed, the very fact that the sanction has effectively barred Morgan Stanley from establishing the inapplicability of aggravating factors under Florida law perfectly illustrates why the sanctions order in this case violates its rights under *Humana* and the Due Process Clause.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

NOTICE OF FILING PLEADING UNDER SEAL

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed under seal its Morgan Stanley's Witness Disclosure for the June 20-21, 2005 Post-Trial Hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 7th day of June, 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

CASE NO.: 2003 CA 005045 AI

/

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: June 13, 2005

TIME: 8:45 a.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

MOTION FOR ENTRY OF PARTIAL FINAL JUDGMENT

Moving counsel certifies that he or she contacted opposing counsel and attempted to resolve the discovery dispute without hearing.

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Fedex to all Counsel on the attached list, this 8th day of June, 2005.

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Case No.: 2003 CA 005045 AI
Notice of Hearing

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.

CASE NO: 2003 CA 005045 AI

/

MOTION FOR ENTRY OF PARTIAL FINAL JUDGMENT

Plaintiff moves this Honorable Court for entry of a Partial Final Judgment covering the punitive damage award in the above-styled cause and in support of this motion would show that delay in entry of a judgment on the jury's punitive damage verdict is likely to cost the Plaintiff $163,013.70 per day and that delay is neither necessary nor reasonable.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Fedex to all counsel on the attached list on this 8th day of June, 2005.

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Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Motion For Entry Of Partial Final Judgment
Case No.: 2003 CA 005045 AI

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

NOTICE OF FILING EXHIBIT

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed the foregoing Exhibit A to Morgan Stanley's Memorandum in Opposition to CPH's Motion for Prejudgment Interest, served June 6, 2005.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 8th day of June, 2005.

Mark C. Hansen *(Pro Hac Vice)*
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Exhibit A

TOLLING AGREEMENT

Agreement made as of this 28th day of March, 2002, by and between Coleman (Parent) Holdings, Inc., together with its parents and subsidiaries (collectively "Coleman Parent"), on the one hand, and Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc., together with their parents and subsidiaries (collectively "Morgan Stanley"), on the other hand:

WHEREAS, Coleman Parent has brought an action against Arthur Andersen LLP and other defendants in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, U.S.A., in a case entitled, *Coleman (Parent) Holdings, Inc. v. Arthur Andersen LLP et al.*, No. CA 01-06062AN (the "Florida Action");

WHEREAS, absent a Tolling Agreement, Coleman Parent intends to name certain Morgan Stanley entities as additional defendants in the Florida Action; and

WHEREAS, Morgan Stanley may have claims against Coleman Parent in the Florida Action or concerning the subject matter of or facts underlying the Florida Action that Morgan Stanley desires to have covered by a Tolling Agreement;

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Coleman Parent and Morgan Stanley do hereby agree as follows:

1. The period between March 28, 2002, and the Termination Date as defined below in Paragraphs Four and Five, shall not be included in determining the applicability of any statute of limitation, laches, statute of repose, or any other defense based on the lapse of time in any action or claim asserted by Coleman Parent or Morgan Stanley in connection with the Florida Action or concerning the subject matter of or facts underlying the Florida Action.

2. Nothing in this Agreement shall affect any defense available to Coleman Parent or Morgan Stanley as of the date of this Agreement, and this Agreement shall not be deemed to revive any claim that is already time-barred as of the date of this Agreement. Nothing in this Agreement,

or in the circumstances that gave rise to this Agreement, shall be construed as an acknowledgment by any party that any claim has or has not heretofore been barred, or is about to be barred, by any statute of limitation, laches, statute of repose, or other defense based on the lapse of time.

3. This Agreement shall not operate as an admission of liability by any party. Neither this Agreement nor any action taken hereunder shall be offered or received in evidence in any action or proceeding as an admission of liability or wrongdoing of any nature on the part of any party.

4. Any party may withdraw from this Agreement, and thereby cease the tolling provided for hereunder on claims by and against it, on thirty (30) days prior written notice to the other party. The Termination Date shall occur thirty (30) days after the date notice is sent both by facsimile transmission and registered mail, and this Agreement and the tolling provisions set forth herein shall remain in full force and effect until the expiration of this thirty (30) day period. Notice directed to Coleman Parent shall be sent to its counsel, Jerold S. Solovy, Jenner & Block, LLC, One IBM Plaza, 330 North Wabash, Chicago, Illinois 60611, U.S.A. (fax: 312-527-0484). Notice directed to Morgan Stanley shall be sent to its counsel, James P. Cusick, Managing Director, Morgan Stanley Law Department, 1221 Avenue of the Americas, 27th Floor, New York, New York 10020 (fax: 212-762-8834).

5. Unless this Agreement is terminated earlier in accordance with the procedure set forth in Paragraph Four above, the Termination Date of this Agreement shall be September 28, 2002. The term of this Agreement may be extended beyond that date, but only pursuant to the procedure set forth in Paragraph Seven below.

6. This Agreement shall be construed according to the laws of the State of Florida, without reference to that state's conflict of law rules.

7. This Agreement may be modified, amended, or supplemented only by a written instrument signed by the parties hereto.

8. Each of the undersigned hereby represents, warrants, and states that all legal action necessary for the effectuation and execution of this Agreement has been validly taken and that the undersigned is duly authorized to execute this Agreement on behalf of his or her respective party.

9. This Agreement may be executed in counterpart.

COLEMAN (PARENT) HOLDINGS, INC., Together With Its Parents And Subsidiaries	MORGAN STANLEY & CO. INCORPORATED and MORGAN STANLEY SENIOR FUNDING, INC., Together With Their Parents And Subsidiaries
By: Eric W. Golden	By: _____
Print Name: Eric W. Golden	Print Name: _____
Title: Vice President	Title: _____

Dated: March 28, 2002

16div-017929

AMENDMENT TO TOLLING AGREEMENT
DATED MARCH 28, 2002

Amendment made as of this 9th day of September, 2002 to the Tolling Agreement dated March 28, 2002 by and between Coleman (Parent) Holdings, Inc., together with its parents and subsidiaries (collectively "Coleman Parent"), on the one hand, and Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc., together with their parents and subsidiaries (collectively "Morgan Stanley"), on the other hand (a copy of which is attached hereto as Exhibit A):

For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Coleman Parent and Morgan Stanley do hereby agree that the Termination Date set forth in Paragraph Five of the Tolling Agreement shall be amended to November 27, 2002. The remaining terms and provisions of the Tolling Agreement shall remain in full force and effect and are hereby affirmed, confirmed, and ratified in all respects.

COLEMAN (PARENT) HOLDINGS, INC., Together With Its Parents And Subsidiaries	MORGAN STANLEY & CO. INCORPORATED and MORGAN STANLEY SENIOR FUNDING, INC., Together With Their Parents And Subsidiaries
By: Sina Toossi	By:
Print Name: SINA TOOSSI	Print Name:
Title: VICE PRESIDENT & ASSISTANT SECRETARY	Title:

Dated: September 9, 2002

THIRD AMENDMENT TO TOLLING AGREEMENT
DATED MARCH 28, 2002

Third amendment made as of this 2th day of December, 2002 to the Tolling Agreement dated March 28, 2002 by and between Coleman (Parent) Holdings, Inc., together with its parents and subsidiaries (collectively "Coleman Parent"), on the one hand, and Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc., together with their parents and subsidiaries (collectively "Morgan Stanley"), on the other hand (a copy of which is attached hereto as Exhibit A):

For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Coleman Parent and Morgan Stanley do hereby agree that the Termination Date set forth in Paragraph Five of the Tolling Agreement shall be amended to April 2, 2003. The remaining terms and provisions of the Tolling Agreement shall remain in full force and effect and are hereby affirmed, confirmed, and ratified in all respects.

COLEMAN (PARENT) HOLDINGS, INC., Together With Its Parents And Subsidiaries	MORGAN STANLEY & CO. INCORPORATED and MORGAN STANLEY SENIOR FUNDING, INC., Together With Their Parents And Subsidiaries
By: Barry F. Schwartz	By: _____
Print Name: Barry F. Schwartz	Print Name: _____
Title: Executive Vice President and General Counsel	Title: _____

Dated: December 2, 2002

16div-017933

FOURTH AMENDMENT TO TOLLING AGREEMENT
DATED MARCH 28, 2002

Fourth amendment made as of this 19th day of February, 2003 to the Tolling Agreement dated March 28, 2002 by and between Coleman (Parent) Holdings, Inc., together with its parents and subsidiaries (collectively "Coleman Parent"), on the one hand, and Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc., together with their parents and subsidiaries (collectively "Morgan Stanley"), on the other hand (a copy of which is attached hereto as Exhibit A):

For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Coleman Parent and Morgan Stanley do hereby agree that the Termination Date set forth in Paragraph Five of the Tolling Agreement shall be amended to May 2, 2003. The remaining terms and provisions of the Tolling Agreement shall remain in full force and effect and are hereby affirmed, confirmed, and ratified in all respects.

COLEMAN (PARENT) HOLDINGS, INC., Together With Its Parents And Subsidiaries	MORGAN STANLEY & CO. INCORPORATED and MORGAN STANLEY SENIOR FUNDING, INC., Together With Their Parents And Subsidiaries
By:_____	By: [signature]
Print Name:_____	Print Name: James P. Cusick
Title:_____	Title: Managing Director

Dated: February 19, 2003

FOURTH AMENDMENT TO TOLLING AGREEMENT
DATED MARCH 28, 2002

Fourth amendment made as of this 19th day of February, 2003 to the Tolling Agreement dated March 28, 2002 by and between Coleman (Parent) Holdings, Inc., together with its parents and subsidiaries (collectively "Coleman Parent"), on the one hand, and Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc., together with their parents and subsidiaries (collectively "Morgan Stanley"), on the other hand (a copy of which is attached hereto as Exhibit A):

For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Coleman Parent and Morgan Stanley do hereby agree that the Termination Date set forth in Paragraph Five of the Tolling Agreement shall be amended to May 2, 2003. The remaining terms and provisions of the Tolling Agreement shall remain in full force and effect and are hereby affirmed, confirmed, and ratified in all respects.

COLEMAN (PARENT) HOLDINGS, INC., Together With Its Parents And Subsidiaries	MORGAN STANLEY & CO. INCORPORATED and MORGAN STANLEY SENIOR FUNDING, INC., Together With Their Parents And Subsidiaries
By: Barry F. Schwartz	By: _____
Print Name: Barry F. Schwartz	Print Name: _____
Title: Executive Vice President and General Counsel	Title: _____

Dated: February 19, 2003

FIFTH AMENDMENT TO TOLLING AGREEMENT DATED MARCH 28, 2002

Fifth amendment made as of this 30th day of April, 2003 to the Tolling Agreement dated March 28, 2002 by and between Coleman (Parent) Holdings, Inc., together with its parents and subsidiaries (collectively "Coleman Parent"), on the one hand, and Morgan Stanley & Co. Incorporated and Morgan Stanley Senior Funding, Inc., together with their parents and subsidiaries (collectively "Morgan Stanley"), on the other hand (a copy of which is attached hereto as Exhibit A):

For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Coleman Parent and Morgan Stanley do hereby agree that the Termination Date set forth in Paragraph Five of the Tolling Agreement shall be amended to May 9, 2003. The remaining terms and provisions of the Tolling Agreement shall remain in full force and effect and are hereby affirmed, confirmed, and ratified in all respects.

COLEMAN (PARENT) HOLDINGS, INC., Together With Its Parents And Subsidiaries

By: Barry F. Schwartz

Print Name: Barry F. Schwartz

Title: Executive Vice President and General Counsel

MORGAN STANLEY & CO. INCORPORATED and MORGAN STANLEY SENIOR FUNDING, INC., Together With Their Parents And Subsidiaries

By: James P. Cusick

Print Name: James P. Cusick

Title: MANAGING DIRECTOR

Dated: April 30, 2003

TOTAL P.03

96x

** TOTAL PAGE.02 **
P.02

TOTAL P.03

** TOTAL PAGE.02 **

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO. 2003CA 005045 AI

COLEMAN PARENT HOLDINGS INC.'S WITNESS LIST FOR POST-TRIAL HEARING ON JUNE 20-21, 2005

Pursuant to the Court's May 18, 2005 Order, Coleman (Parent) Holdings Inc. ("CPH") hereby provides Morgan Stanley & Co. ("Morgan Stanley") with a list of witnesses CPH currently expects to call at the hearing on June 20 and June 21, either through live testimony, deposition testimony, or prior testimony, and a summary of the currently anticipated testimony of each witness. The witnesses identified in this submission accurately reflect CPH's present intentions; however, CPH reserves the right to call additional witnesses, to withdraw any witness identified herein, or to supplement this disclosure as CPH continues to evaluate its proofs in light of any rulings by the Court or any additional arguments advanced by Morgan Stanley. In addition, because Morgan Stanley bears the burden of proof at the hearing, CPH witnesses may offer testimony to respond to and/or rebut any testimony offered by Morgan Stanley. CPH cannot at this time anticipate the full scope of any such testimony.

5. Todd Slotkin (live). Mr. Slotkin is the Chief Financial Officer and Executive Vice President of MacAndrews & Forbes Holdings, Inc. Mr. Slotkin may testify about the warrants CPH received from Sunbeam as part of the August 12, 1998 settlement agreement between CPH and Sunbeam, including MacAndrews & Forbes' accounting of the warrants and internal documents relating to the warrants. In addition, Mr. Slotkin may offer testimony to respond to and/or rebut testimony offered by any Morgan Stanley witnesses.

I HEREBY CERTIFY that a true and correct copy of the foregoing and its attachment has been sent by Federal Express and facsimile to the individuals on the attached service list on this 13th day of June, 2005.

Dated: June 13, 2005

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

Jerold S. Solovy
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

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

SERVICE LIST

Mark C. Hansen, Esq.
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Suite 400
Washington, D.C. 20036-3209

Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

PLAINTIFF'S DEPOSITION DESIGNATIONS OF JAMES ROBERT MAHER
Date of Deposition: November 3, 2004

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN PARENT HOLDINGS INC.'S WITNESS LIST FOR POST-TRIAL HEARING ON JUNE 20-21, 2005

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1. Lawrence Bornstein (live). Mr. Bornstein is a former senior manager at Arthur Andersen LLP. Mr. Bornstein may testify concerning Sunbeam's December 14, 1998 Audit Committee meeting, during which Sunbeam's directors discussed with Sunbeam's auditors how Sunbeam would record the warrants on its books and records. Mr. Bornstein also may testify regarding the authenticity, foundation, and facts described in CPH Trial Exhibit 1319.

2. Howard Gittis (live). Mr. Gittis is a director, Vice Chairman, and Chief Administrative Officer of MacAndrews & Forbes Holdings, Inc. Mr. Gittis may testify about the warrants CPH received from Sunbeam as part of the August 12, 1998 settlement agreement between CPH and Sunbeam, including MacAndrews & Forbes' and Sunbeam's valuations of the warrants, and the ability and impact of any efforts to sell the warrants on Sunbeam and its stock. In addition, Mr. Gittis may offer testimony to respond to and/or rebut testimony offered by any Morgan Stanley witnesses.

3. James Maher (by 11/3/04 deposition). Mr. Maher is the former President of Mafco Consolidated Group, Inc. Mr. Maher' testimony is set forth in the designated portions of his deposition, which are attached hereto.

4. Blaine Nye (live or by deposition). Dr. Nye may testify about the warrants CPH received from Sunbeam Corporation ("Sunbeam") as part of the August 12, 1998 settlement agreement between CPH and Sunbeam, including the valuation of those warrants. In addition, Dr. Nye may offer testimony to respond to and/or rebut testimony offered by Morgan Stanley's expert witness, David Ross, or any other Morgan Stanley witnesses. Dr. Nye's opinions are disclosed in his initial report, dated December 7, 2004; rebuttal report, dated December 28, 2004; and supplemental report, dated June 13, 2005; as well as his prior depositions and trial testimony in this case.

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Dated: June 13, 2005

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

Jerold S. Solovy
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
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JENNER&BLOCK

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date:	June 13, 2005		
TO:	Joseph Ianno, Jr., Esq.	Fax:	(561) 659-7368
		Voice:	(561) 659-7070
	Mark C. Hansen, Esq.	Fax:	(202) 326-7999
		Voice:	(202) 326-7900
From:	Michael T. Brody 312 923-2711		
Employee Number:		Client Number:	41198-10003

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO. 2003CA 005045 AI

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One of Its Attorneys

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THE FIFTEENTH JUDICIAL CIRCUIT
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FLORIDA

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

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Dated: June 13, 2005

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

Jerold S. Solovy
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
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Date of Deposition: November 3, 2004

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JENNER&BLOCK

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date:	June 13, 2005		
TO:	Joseph Ianno, Jr., Esq.	Fax:	(561) 659-7368
		Voice:	(561) 659-7070
	Mark C. Hansen, Esq.	Fax:	(202) 326-7999
		Voice:	(202) 326-7900
From:	Michael T. Brody 312 923-2711		
Employee Number:		Client Number:	41198-10003

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Chicago
Dallas
Washington, DC

Date:	June 13, 2005		
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		Voice:	(561) 659-7070
	Mark C. Hansen, Esq.	Fax:	(202) 326-7999
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THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN PARENT HOLDINGS INC.'S OBJECTIONS TO MORGAN STANLEY & CO., INC.'s WITNESS DISCLOSURE

Coleman (Parent) Holdings Inc. ("CPH") hereby objects to Morgan Stanley & Co., Inc.'s ("Morgan Stanley") witness disclosure for the June 20-21, 2005 post-trial hearing, that it served upon CPH on June 6, 2005. CPH's objections are as follows:

1. Deloitte & Touche USA, L.L.P.: Morgan Stanley's disclosure is inadequate because it fails to disclose the name of the witness and fails to disclose with sufficient specificity the substance and nature of the testimony that Morgan Stanley intends to elicit. CPH further objects insofar as Morgan Stanley attempts to elicit undisclosed opinion testimony under the guise of presenting testimony about the "creation" or "contents" of Morgan Stanley Exhibits 97, 260, and 513. Finally, CPH has not raised an authenticity objection to Morgan Stanley Exhibits 97, 260, and 513. Thus, there is no need for a witness to testify concerning the authenticity of those three exhibits. Accordingly, Morgan Stanley should be barred from calling a representative of Deloitte & Touche USA, L.L.P. ("Deloitte & Touche) at the June 20-21, 2005 hearing.

2. Sunbeam Corporation: Morgan Stanley's disclosure is inadequate because it fails to disclose the name of the witness and fails to disclose with sufficient specificity the substance and nature of the testimony that Morgan Stanley intends to elicit. CPH further objects insofar as Morgan Stanley attempts to elicit undisclosed opinion testimony under the guise of presenting testimony about the "creation" or "contents" of Morgan Stanley Exhibit 260. Finally, CPH has not raised an authenticity objection to Morgan Stanley Exhibit 260. Thus, there is no need for a witness to testify concerning the authenticity of that exhibit. Accordingly, Morgan Stanley should be barred from calling a representative of Sunbeam Corporation ("Sunbeam") at the June 20-21, 2005 hearing.

3. David Ross: Morgan Stanley should be barred from calling David Ross as a witness at the June 20-21, 2005 hearing because Morgan Stanley's disclosure of Mr. Ross is untimely. On November 23, 2004, this Court ordered that the parties disclose by December 7, 2004 all experts that would be called to testify for each topic upon which that party bore the burden of persuasion. Because Morgan Stanley expressly pled setoff as an affirmative defense in its answer (*see* Answer of Morgan Stanley & Co., Incorporated, at 20), Morgan Stanley bears the burden of persuasion as to the amount of the Sunbeam settlement and of any other potential set offs. Because Morgan Stanley's disclosure of Mr. Ross comes six months too late, Morgan Stanley should be barred from presenting the expert testimony of David Ross.

4. Todd Slotkin (live and/or by deposition): Morgan Stanley should be barred from presenting Mr. Slotkin's testimony live at the June 20-21, 2005 hearing because Mr. Slotkin is not under subpoena. Morgan Stanley should be barred from presenting Mr. Slotkin's testimony by deposition designation because Morgan Stanley has failed to disclose its designations of Mr. Slotkin.

5. Lawrence Winoker (live and/or by deposition): Morgan Stanley should be barred presenting Mr. Winoker's testimony live at the June 21-22, 2005 hearing because Mr. Winoker is not under subpoena. Morgan Stanley should be barred from presenting Mr. Winoker's testimony by deposition designation because Morgan Stanley has failed to disclose its designations for Mr. Winoker.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by Federal Express and facsimile to the individuals on the attached service list on this 13th day of June, 2005.

Dated: June 13, 2005

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

Jerold S. Solovy
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

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Joseph Ianno, Jr., Esq.
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222 Lake View Avenue
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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC., CASE NO: 2003 CA 005045 AI

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.
_____/

MOTION TO ESTABLISH SCHEDULE FOR THE TAKING OF DEPOSITION TESTIMONY

Plaintiff, COLEMAN (PARENT) HOLDINGS, INC., by and through the undersigned counsel, moves this Honorable Court to enter an Order establishing a schedule for the taking of deposition testimony regarding the post-trial evidentiary hearings in the above-styled cause and in support would show that the parties have been unable to agree on the scheduling of the depositions of each of their experts.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Federal Express to all counsel on the attached list on this 13th day of June, 2005.

JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
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Coleman (Parent) Holdings, Inc. vs. Morgan Stanley & Co., Inc.
Motion To Establish Schedule For The Taking Of Deposition Testimony
Case No.: 2003 CA 005045 AI

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO.
INCORPORATED,

Defendant.

MORGAN STANLEY'S RESPONSE TO CPH'S INITIAL BRIEF SUPPORTING CPH'S MOTION FOR PREJUDGMENT INTEREST

Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully submits this Memorandum in response to Coleman (Parent) Holdings, Inc.'s ("CPH") Initial Brief supporting its motion for prejudgment interest. The Court should reject CPH's request for prejudgment interest because CPH's damages were not liquidated prior to the jury's verdict, and the jury was not asked to determine, and did not determine, any fixed date on which CPH suffered a readily calculable sum of damages.

It is pure speculation for CPH to postulate now that the jury ***must have*** decided that CPH lost the sum of $604,334,000 on February 6, 2001, the date Sunbeam filed for bankruptcy. The jury did not hear a scintilla of evidence that Sunbeam's stock lost all value as of February 6, 2001. In fact, the value of Sunbeam stock had been eroding over an extended period, and, well after February 6, 2001, the stock was still trading for value. The jury thus did not, and could not, and was never asked to, find that CPH's damages became fixed on that date (or any other date).

CPH's prejudgment interest request is flawed for several additional reasons: (1) it fails to reduce the total principal amount by the value of warrants received by CPH in its settlement agreement with Sunbeam; (2) it delays reducing the principal amount by the Arthur Andersen settlement; (3) it includes prejudgment interest for the period of time that the parties were bound by a tolling agreement; and (4) it provides for compound, rather than simple, interest.

I. Without Damages Fixed As to Date and Amount, CPH May Not Receive Prejudgment Interest

In all tort cases, whether for personal injury or not, prejudgment interest remains the "exception." *See Lumbermens Mut. Cas. Co. v. Percefull*, 653 So. 2d 389, 390 (Fla. 1995) ("tort claims are generally excepted from the rule allowing prejudgment interest, primarily because tort damages are generally too speculative to liquidate before final judgment"). The exception exists where damages are fixed and certain on a specific date. *See Kennedy v. George Cully Real Estate, Inc.*, 336 So. 2d 484, 486 (Fla. 3d DCA 1976) ("[I]nterest is not ordinarily allowed on an unliquidated tort claim . . . . An exception . . . exists where the recovery, although in tort, is *based upon a contract* which makes the amount of damages fixed and recoverable *as of a specific date of the breach of contract*") (emphases added); *Florida E. Coast Ry. v. Hill*, 233 So. 2d 845 (Fla. 3d DCA 1970) (no prejudgment interest in a wrongful discharge case).[1] Thus, before allowing prejudgment interest in a tort case, courts must carefully examine each claim to determine whether the damages sought are ***liquidated***, and whether there is a ***date certain*** from

[1] CPH mischaracterizes *Coppola Enterprises, Inc. v. Alfone*, 531 So. 2d 334, 335-36 (Fla. 1988), claiming it is a case "*holding* that the plaintiff was entitled to an award of 'benefit of the bargain damages of $64,310.00 together with prejudgment interest of $43,295.38.'" CPH Initial Brief at 2 (emphasis added). The Florida Supreme Court did not examine the award of prejudgment interest, expressly stating that the defendant did not contest the prejudgment interest award on appeal. *See id.* at 335 n.1.

which interest should run. *See Kissimmee Util. Auth. v. Better Plastics, Inc.*, 526 So. 2d 46,47; *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212, 215 (Fla. 1985); *Asian Imports, Inc. v. Pepe*, 633 So. 2d 551, 552 (Fla. 1st DCA 1994).

CPH's assertion that a bright-line rule exempts only personal injury damages is not supported by Florida law. *See, e.g., Messer v. E.F. Hutton & Co.*, 833 F.2d 909, 923 (11th Cir. 1987) (denying prejudgment interest in a non-personal injury tort case), *amended on other grounds*, 847 F.2d 673 (11th Cir. 1988); *Air Ambulance Prof'ls, Inc. v. Thin Air*, 809 So. 2d 28, 31 (Fla. 4th DCA 2002) (same); *Perdue Farms Inc. v. Hook*, 777 So. 2d 1047, 1054 (Fla. 2d DCA 2001) (same); *Checkers Drive-In Rests., Inc. v. Tampa Checkmate Food Servs., Inc.*, 805 So. 2d 941, 945 (Fla. 2d DCA 2001) (same). When reviewed under the correct standard, CPH may not recover prejudgment interest because its damages are uncertain in amount and date.

A. The Damages Sought by CPH Were Unliquidated

CPH acknowledges (as it must) that it sought a putative "benefit-of-the-bargain" recovery determined by the difference between "the expected value of the Sunbeam stock" it received and the stock's "actual value" in view of later events. CPH's Initial Brief Supporting CPH's Motion for Prejudgment Interest at 3 ("CPH Initial Brief"). That theory, along with the Amended Complaint, the expert testimony, and the jury instructions, demonstrates that a calculation of these values involves rank speculation. Indeed, CPH offered several different options for valuing the Sunbeam shares and several different dates for those valuations. *See* Morgan Stanley's Memorandum in Opposition to CPH's Motion for Prejudgment Interest at 4-7 (June 6, 2005). In fact, the Court specifically instructed the jury not to let the uncertainty as to damages cause [it] concern:

> [I]f CPH proves it suffered damage by the greater weight of the evidence, it is entitled to recover for that damage ***even though the exact amount of the damage cannot be determined.*** . . . CPH may not be denied damages merely because the amount of damage is ***uncertain or difficult to determine.***

5/13/05 Tr. at 14611:21-14612:9 (emphases added).

That uncertainty with respect to the amount of damages cannot be squared with an award of prejudgment interest. Florida law prohibits prejudgment interest where damage calculations are based on "conflicting evidence, inferences and interpretations." *Messer*, 833 F.2d at 923. *See also Asian Imports*, 633 So. 2d at 553 (prejudgment interest denied where "'ascertainment of their exact sum requires the taking of testimony to ascertain facts upon which to base a value judgment'") (quoting *Bowman v. Kingsland Dev., Inc.*, 432 So. 2d 660, 663 (Fla. 5th DCA 1983)); *Air Ambulance*, 809 So. 2d at 31. For this reason alone, the Court should deny prejudgment interest here.

B. No Date Certain Exists from Which Interest Can Run

CPH's initial motion did not even specify the date from which it thought prejudgment interest should run. CPH now asserts that the relevant date – which "bec[ame] clear only over a period of time" (CPH Initial Motion at 3) – is the date on which Sunbeam filed for bankruptcy. This assertion is supported neither by the evidence nor by any jury finding, and it cannot form the factual basis to determine liquidated damages.

As an initial matter, CPH's unsupported assertion that an unliquidated loss can somehow become liquidated "over a period of time" contradicts settled Florida law requiring a single, fixed date of loss. This case is wholly different from *Developers of America Corp. v. ABC Promotions Unlimited, Inc.*, 549 So. 2d 1042 (Fla. 3d DCA 1989), the case upon which CPH relies so heavily. *Developers* was a *breach of contract case*, not a fraud case. Moreover, in

Developers, there was a fixed date – Christmas Day – when the Christmas tree sales at issue necessarily ended and no further lost profits would accrue. The other cases cited by CPH also involved a clear date certain. *See Pine Ridge at Haverhill Condo. Ass'n, Inc. v. Hovnanian of Palm Beach II, Inc.*, 629 So. 2d 151, 151-52 (Fla. 4th DCA 1993) (damages for construction defects fixed when contractor turned over condominium to condominium association); *Tolin v. Doudov*, 626 So. 2d 1054, 1056 (Fla. 4th DCA 1993) (loss-of-use damages from improperly withheld access became fixed when seller provided promised access road to land); *Charles Buzbee & Sons, Inc. v. Falkner*, 585 So. 2d 1190, 1191 (Fla. 2d DCA 1991) (farmer's out-of-pocket losses fixed at the end of growing season where extent of crop damage is learned). No such natural and logical date exists under CPH's theory of damages.

At trial, CPH offered several alternative dates from which to calculate damages and the jury was not asked to, and did not, make a finding as to the appropriate date. It is pure speculation to assume that the jury picked February 6, 2001, out of the several dates offered, as the exact date on which damages became fixed. This is similar to the circumstances in *Perdue Farms*. In *Perdue Farms*, the court denied prejudgment interest where there were several possible dates from which prejudgment interest might have been calculated – even though in that case the jury in fact selected a date of loss – because there was no firm basis for selecting one date over another. 777 So. 2d at 1054-55. Here, the Court's instructions allowed for myriad possible dates on which to assess CPH's alleged damages. Here, moreover, the jury made no finding about the date of loss and calculated a sum for damages that not a single CPH witness (lay or expert) suggested, let alone pegged to February 6, 2001.

Indeed, CPH's claim (CPH Initial Brief at 5) that the "full extent of [its] damages was fixed and ascertainable no later than February 6, 2001, when Sunbeam declared bankruptcy" is

demonstrably false. The mere filing of a bankruptcy petition does not render a debtor's shares worthless on that date, as CPH appears to presume. Equity holders may recover through the course of, or as a result of, a Chapter 11 bankruptcy proceeding. *See, e.g.*, Philip S. Russel et al., *Market Valuation of Bankrupt Firms: Is There an Anomaly?*, 38 Quarterly J. of Bus. and Econ., No. 2, at 1 (Mar. 1999) (finding that in 40% of corporate bankruptcies between 1984 and 1993 equity holders received some consideration at the end of the bankruptcy).[2] Indeed, when asked about the effect of bankruptcy on stock value, CPH's own expert, Dr. Emery, testified that bankruptcy generally has a "negative effect" but that "in many cases by the time it happens it actually turns out to be positive."[3]

Here, Sunbeam shares retained value long after Sunbeam filed its bankruptcy petition, according to data available on Bloomberg and FACTset, two financial reporting services. In the month before bankruptcy, January 2 to February 5, Sunbeam shares traded between $.31 and $.88. In July 2001, five months after bankruptcy, the stock still traded off-exchange as high as $.30 per share, closing as high as $.27-.29 (July 12-13, 2001); and over a year later (May 22, 2002), it traded and closed at $.19 per share. Thus, there is no basis whatsoever for selecting February 6, 2001, the date of bankruptcy, as a magical date when the loss became fixed. To the

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[2] Indeed, it is common for shares of large bankrupt corporations to trade for substantial positive value right up until the day the bankruptcy court approves the Chapter 11 reorganization plan. *See, e.g.*, Riva D. Atlas, *U-Haul's Parent Finds Equity Gains in Bankruptcy*, N.Y. Times, Aug. 20, 2003, at C1; Jeff D. Opdyke, *At WorldCom, Shares May Die, but They Might Not Fade Away*, Wall St. J., Apr. 15, 2003, at C3; *Millions of Enron Shares Still Being Sold — and Bought*, Daily Bankruptcy Review, Mar. 12, 2002, at 6.

[3] *See* 4/7/05 Tr. at 7457:15-23 ("Q. What relationship, if any, does the filing of a bankruptcy petition have on the value of a company's stock? A. It's a very important event. Generally we think of it as being negative, *but in many cases by the time it happens it actually turns out to be positive* because expectations have grown so negative that the filing of the bankruptcy petition is viewed as a positive step in the company's life.") (emphasis added).

contrary, CPH held value in Sunbeam shares after Sunbeam declared bankruptcy (as it did just before); the "full extent of CPH's damages" was not "fixed" on February 6, 2001.

It is therefore wholly unjustified for CPH simply to assume that the "jury must be understood" (CPH Initial Brief at 3) to have found that the February 6, 2001 bankruptcy filing was the date of CPH's loss. The jury was told that CPH *ultimately* did not recover any money for its stock after bankruptcy was filed. But CPH points to no testimony or evidence before the jury stating the value of the Sunbeam stock locked in at zero the day bankruptcy was filed. Likewise, the jury was ***never*** asked to find, and the jury never did find, that damages became fixed and certain on the date of bankruptcy.[4]

Because the jury made no finding on this issue, determining whether damages had become fixed the date bankruptcy was filed (and the value on that date) would require the Court to *conduct an evidentiary hearing and to find facts* in contravention of Florida law. The calculation of prejudgment interest "is merely a mathematical computation. There is no 'finding of fact' needed." *Argonaut*, 474 So. 2d at 215. And prejudgment interest is unavailable if an award would require the taking of testimony and findings of fact, particularly where it would require a second trial after verdict and a set of findings on disputed issues. *See id.*; *Asian Imports*, 633 So. 2d at 553 (prejudgment interest is inappropriate when "the ascertainment of their exact sum requires the taking of testimony to ascertain facts upon which to base a value judgment"); *Air Ambulance*, 809 So. 2d at 31; *Checkers Drive-In*, 805 So. 2d at 945

[4] If CPH were entitled to prejudgment interest at all — which it is not — the earliest possible date would be the date that Sunbeam's plan of reorganization was confirmed and the time for appeal expired (some time after November 27, 2002), more than a year and a half after the February 2001 date arbitrarily selected by CPH. *See* Order Confirming Debtor's Third Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, As Amended on November 18, 2002, *In re Sunbeam Corp.*, No. 01-40291 (Bankr. S.D.N.Y. Nov. 27, 2002).

(accountant's calculation of anticipated profits "makes clear that [plaintiff's] damages for fraudulent inducement were not liquidated until the jury rendered its verdict"). Having failed to ask the jury to determine when damages became fixed, CPH asks the Court to resolve that dispute, weigh the conflicting evidence, and determine that Sunbeam stock, in fact, lost all value as of a particular date. The necessity of such findings simply underscores the fact that CPH's damages became liquidated only when the jury issued its verdict, and not before.

II. CPH's Prejudgment Interest Calculation Incorrectly Includes the Period Covered by the Parties' Tolling Agreement

CPH assumes that it is entitled to prejudgment interest as a matter of right. It is not. An award of prejudgment interest "is not absolute and may depend on equitable considerations." *Broward County v. Finlayson*, 555 So. 2d 1211, 1213 (Fla. 1990). Prejudgment interest should not accrue during periods where the parties abate the action by mutual consent. *See Assurance Generale de France v. Cathcart*, 756 So. 2d 1055, 1058 (Fla. 4th DCA 2000).

Here, CPH and Morgan Stanley entered into a Tolling Agreement covering the period March 28, 2002 to the date of suit, May 8, 2003. Exhibit A to Morgan Stanley's Memorandum in Opposition to CPH's Motion for Prejudgment Interest (June 6, 2005). The Tolling Agreement provided that, by mutual consent of the parties, the applicable statute of limitations would be tolled from March 28, 2002 to September 28, 2002. The Tolling Agreement was amended several times and extended through the date of suit. *See id.* CPH's prejudgment interest calculations fail to subtract the 14-month period between March 28, 2002 and May 8, 2003. At a minimum, the Court should suspend interest during this period of time. *See* Morgan Stanley's Memorandum in Opposition to CPH's Motion for Prejudgment Interest at 13-14 (June 6, 2005).

III. CPH's Set-Off Adjustment Is Flawed and Improperly Fails To Take Into Account the Settlement with Sunbeam

Although CPH acknowledges that settlements must be deducted from the damages award and thus the interest calculation, it manipulates the timing and amount of that deduction to inflate the prejudgment interest calculation.

A. The Arthur Andersen Settlement Must Be Deducted *Before* Any Interest Accrues

CPH seeks prejudgment interest on two different amounts during two different time periods based on the Arthur Andersen settlement. It asks for interest on the full $604,334,000 verdict from the date of Sunbeam's bankruptcy filing (February 6, 2001) until the date it settled with Arthur Andersen (October 17, 2002). It then reduces the amount of principal by the amount of the Arthur Andersen settlement for the period after October 17, 2002. This approach violates the Florida set-off statutes, assesses prejudgment interest on the portion of the compensatory award for which Andersen is responsible, and grants CPH double recovery.

CPH's methodology violates the plain language of Florida's set-off statutes, which provide for a single set-off by the Court at time of judgment, not a series of set-off dates on changing principal sums. Florida Statutes sections 46.015 and 768.041 expressly state that the court shall "set off this amount *from the amount of any judgment to which the plaintiff would be otherwise entitled* at the time of rendering judgment." Fla. Stat. §§ 46.015(2), 768.041(2) (emphasis added). Prejudgment interest (if any) is then calculated on the amount of the judgment. *Id.* §§ 55.03, 687.01. Courts have consistently applied the statutes in this straightforward manner. *Palm Springs Gen. Hosp., Inc. v. Valdes*, 784 So. 2d 1151, 1153-54 (Fla. 3d DCA 2001) (affirming judgment that "set off [the settlement amount] against the full amount of damages determined by the jury" before prejudgment interest assessed); *Centex-*

Rooney Constr. Co. Inc. v. Martin County, 706 So. 2d 20, 25, 29 (Fla. 4th DCA 1997) (affirming the trial court's judgment that reduced the jury verdict and "subsequently" added prejudgment interest); *Paper Corp. of America v. Sandow,* 558 So. 2d 75, 76 (Fla. 3d DCA 1990) (directing trial court to enter judgment in favor of plaintiff on the principal amount due "[minus any set offs or credits which may be due to the defendant Sandow] plus prejudgment interest") (alteration in original).

Furthermore, forcing Morgan Stanley to pay prejudgment interest on sums for which Arthur Andersen ultimately accepted responsibility constitutes a double recovery. The settlement amount agreed upon with Arthur Andersen presumably incorporates some compensation to address the likelihood that, if the case had gone to trial, Arthur Andersen would have been required to pay prejudgment interest for the relevant period. Requiring Morgan Stanley to pay prejudgment interest on amounts ultimately paid by Arthur Andersen effectively allows CPH to recover prejudgment interest twice. This would result in a double recovery contrary to the statute's purpose. *See Logue v. Clarendon Nat'l Ins. Co.*, 777 So. 2d 1122, 1125 (Fla. 4th DCA 2001) (holding that an award to the insured of collision damages against an automobile insurer would be an improper double recovery following insured's settlement with a third party). Alternatively, the $70,000,000 Arthur Andersen settlement amount itself should be valued with prejudgment interest *before* set-off. *See Schmidt v. Turiano*, 536 So. 2d 1073, 1074 (Fla. 4th DCA 1988) ("Schmidt's entitlement to a setoff for the rental value of the premises which the trial court allowed should also be subject to prejudgment interest.").

B. CPH Ignores the Warrants Paid Under the Sunbeam Settlement

CPH does not mention the warrants Sunbeam gave to CPH in settlement. As set forth in the Morgan Stanley Reduction Motion, the jury's compensatory damages award should be offset by an additional $140.4 million, the value of the Sunbeam warrants. As with a cash settlement, Morgan Stanley is entitled to a credit for the value negotiated by CPH in exchange for the release it provided Sunbeam. Combined with the value of the Arthur Andersen settlement, the Court should reduce CPH's compensatory damages award by $210.4 million, in addition to any other appropriate reductions. It is only after all reductions are made to the jury's compensatory damage calculation that prejudgment interest (if awarded over Morgan Stanley's objections) may then be computed.

C. Florida Law Permits Only Simple, Not Compound, Interest

Finally, CPH's calculation suffers from a further interest-inflating defect (evident in Exhibit B to CPH's Memorandum but not from the memorandum itself). Under Fourth District law, prejudgment interest is *simple* rather than compound (absent prior agreement of the parties). *See PDGS, Ltd. v. Motwani*, 729 So. 2d 399, 401 (Fla. 4th DCA 1998); *Ebaugh v. State*, 623 So. 2d 844, 846 (Fla. 5th DCA 1993). Despite that clear rule, CPH includes the $102,803,008 of claimed interest from 2/6/2001 to 10/17/2002 in its "New Principal Balance as of 10/17/2002" and then uses that "New Principal Balance" in its subsequent interest calculations. That clearly violates the rule against compound interest – it gives interest on interest – and improperly inflates the resulting calculations.

Conclusion

The Court should deny CPH's request for prejudgment interest in its entirety. If the Court disagrees, the Court should (1) offset all consideration received by CPH in its settlements with Arthur Andersen and Sunbeam before calculating interest, and (2) permit interest to accrue only from the date CPH brought suit, May 8, 2003. At a minimum, the court should exclude interest during the term of the parties' Tolling Agreement and permit only simple, not compound, interest.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 6th day of June, 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.

CASE NO: 2003 CA 005045 AI

/

NOTICE OF CANCELLATION OF UNIFORM MOTION CALENDAR HEARING ON PLAINTIFF'S MOTION TO ESTABLISH SCHEDULE FOR THE TAKING OF DEPOSITION TESTIMONY

Plaintiff hereby gives notice of the cancellation of the previously noticed hearing on Plaintiff's Motion to Establish Schedule for the Taking of Deposition Testimony for Tuesday, June 14, 2005 at 8:45 a.m.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and U.S. Mail to all counsel on the attached list on this 13th day of June, 2005.

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Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Notice Of Cancellation Of Uniform Motion Calendar Hearing On Plaintiff's Motion For Entry Of Partial Final Judgment
Case No.: 2003 CA 005045 AI

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Re: Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Matter No.: 029986-230580

Dear Judge Maass:

Enclosed please find a copy of Plaintiff's Emergency Motion to Establish Schedule for the Taking of Deposition Testimony.

Respectfully,

JACK SCAROLA
JS/mep
Enc.

cc: Joseph Ianno, Esq. (via fax)
Mark Hansen, Esq. (via fax)
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#230580/mep

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

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.

Defendant.

_____/

CASE NO: 2003 CA 005045 AI

PLAINTIFF'S EMERGENCY MOTION TO ESTABLISH SCHEDULE FOR THE TAKING OF DEPOSITION TESTIMONY

Plaintiff, COLEMAN (PARENT) HOLDINGS INC., by and through the undersigned counsel, moves this Honorable Court to enter an Order establishing a schedule for the taking of deposition testimony regarding the post-trial evidentiary hearings in the above-styled cause and in support would show that the parties have been unable to agree on the scheduling of the depositions of each of their experts. The expert testimony relates to issues of set-off as to which the Defendant bears the burden of proof. The Court has previously ordered the parties to submit their experts for discovery depositions in advance of the evidentiary hearing scheduled for June 20 and June 21, 2005. Defendant has offered its expert for deposition no earlier than Thursday, June 17, 2005 for 1/2 day. The proposed time allows inadequate time for Plaintiff to prepare its expert to rebut the Defendant's expert testimony in a deposition that is anticipated to be used at the hearing due to the unavailability of Plaintiff's expert to testify in person.

WHEREFORE, Plaintiff seeks entry of an order requiring the Defendant to produce its expert for deposition no later than Wednesday, June 16, 2005.

Coleman (Parent) Holdings, Inc. vs. Morgan Stanley & Co., Inc.
Motion To Establish Schedule For The Taking Of Deposition Testimony
Case No.: 2003 CA 005045 AI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Federal Express to all counsel on the attached list on this 13th day of June, 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO. CA 03-5045 AI

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

COLEMAN (PARENT) HOLDING INC.'S OBJECTIONS
TO MORGAN STANLEY'S JUNE 20-21, 2005 HEARING EXHIBITS

Coleman (Parent) Holdings Inc. ("CPH") hereby objects to Morgan Stanley's June 20-21, 2005 hearing exhibits and reserves its rights as follows:

1. CPH reserves its right to make additional objections to foundation or to withdraw foundation objections to particular exhibits depending upon the testimony (whether live or by deposition) offered in connection with that exhibit at the hearing.

2. CPH preserves all objections to the authenticity, authorship, and foundation of handwriting on Morgan Stanley's exhibits.

3. CPH preserves all objections to any summaries or demonstratives Morgan Stanley prepares from Morgan Stanley's exhibits.

[illegible]	[illegible] OBJECTIONS
MS 67	NR
MS 96	No Objection
MS 96A	No Objection
MS 96B	No Objection
MS 97	IO, NR, NF, P, H
MS 99	NR, H, NF
MS 235	No Objection
MS 260	H, NF, NR, P, IO
MS 408	No Objection
MS 513	IO, NR, NF, P, H
MS 813	IG, IO, NF
MS 814	IO, NF, NR
MS 822	IO, NF, NR
MS 831	IG -- first two pages don't belong; IO, NF, NR

STATE EXHIBIT	DEFENDANT'S JUNE 2005 HEARING OBJECTIONS
MS 832	IO, NF, NR
MS 833	IO, NF, NR
MS 834	NR, IG, IO, NF
MS 841	IO, NF, NR
MS 849	IO, NF, NR, IG
MS 857	IO, NF, NR
CPH 1296	No Objection

KEY

H = Hearsay

IG = Improper Grouping IO = Improper Opinion

NF = No Foundation NR = Not Relevant P = Rule 90.403

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by Federal Express and facsimile to the individuals on the attached service list on this 13th day of June, 2005.

Dated: June 13, 2005

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

Jerold S. Solovy
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, Illinois 60611
(312) 222-9350

Jack Scarola
SEARCY DENNEY SCAROLA BARNHART & SHIPLEY P.A.
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JENNER&BLOCK

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date:	June 13, 2005		
TO:	Joseph Ianno, Jr., Esq.	Fax: Voice:	(561) 659-7368 (561) 659-7070
	Mark C. Hansen, Esq.	Fax: Voice:	(202) 326-7999 (202) 326-7900
From:	Michael T. Brody 312 923-2711		
Employee Number:		Client Number:	41198-10003

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

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,
_____/

COLEMAN (PARENT) HOLDINGS INC.'S EXHIBIT LIST FOR POST-TRIAL HEARING ON JUNE 20-21, 2005

Plaintiff, Coleman (Parent) Holdings Inc. ("CPH") hereby submits its Exhibit List, which is attached hereto as Exhibit A, for the post-trial hearing on June 20-21, 2005. In connection with its Exhibit List, CPH reserves its rights as follows:

1. In addition to the documents set forth on the attached Exhibit List, CPH reserves the right to use additional exhibits that it identifies in connection with the ongoing expert discovery.

2. CPH reserves the right to use any documents created by or relied upon by Morgan Stanley's expert witness, David Ross, in connection with his expert report and/or testimony at the hearing.

3. CPH reserves the right to use at the hearing duplicate copies and/or original versions of any of the documents listed on the attached Exhibit List.

4. CPH reserves the right to use additional documents at the hearing that are not contained on its Exhibit List for purposes of cross-examination and/or rebuttal.

5. CPH reserves the right to use and/or introduce at the hearing any proposed trial exhibit that has been identified by Morgan Stanley.

6. CPH reserves the right to submit and introduce summary documents based upon the information included in documents identified in the attached Exhibit List or in the documents that Morgan Stanley has identified, as well as demonstrative exhibits.

7. By listing documents on the attached Exhibit List, CPH is not conceding the relevance, foundation, and/or admissibility of any of those documents. CPH reserves the right not to offer at the hearing any of its proposed exhibits identified in the attached list. In compiling the attached list, CPH endeavored to identify and disclose documents that it may use to rebut arguments that might be advanced by Morgan Stanley at the hearing.

I HEREBY CERTIFY that a true and correct copy of the foregoing and its attachment has been sent by Federal Express and facsimile to the individuals on the attached service list on this 13th day of June, 2005.

Dated: June 13, 2005

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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222 Lake View Avenue
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EXHIBIT A

[illegible]	[illegible]	[illegible]	DESCRIPTION
824	12/06/1999	N/A	Sunbeam Form S-4/A
1319	12/14/1998	CPH 1039842-850	Memo from L. Bornstein to The Files re Sunbeam Audit Committee meeting December 14, 1998
1391	12/31/2000	CPH 2012369-2012424	Mafco Holdings Inc. Consolidated Financial Statements For the Year Ended December 31, 2000 With Report of Independent Auditors
1392	12/31/1999	CPH 2012307-2012368	Mafco Holdings Inc. Consolidated Financial Statements For the Year Ended December 31, 1999 With Report of Independent Auditors
1395	03/29/1998	CPH 1094218-1094235	Registration Rights Agreement
1398	11/12/1999	N/A	Opinion (In re The Coleman Company, Inc. Shareholders Litigation), 750 A.2d 1202
1400	06/13/2005	N/A	Supplemental Expert Report of Blaine Nye

FAX TRANSMITTAL

JENNER&BLOCK

Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date:	June 14, 2005		
TO:	Joseph Ianno, Jr., Esq.	Fax:	(561) 659-7368
		Voice:	(561) 659-7070
	John Scarola, Esq.	Fax:	(561) 684-5816 (before 5 PM)
		Voice:	(561) 686-6350, Ext. 140
	Rebecca Beynon, Esq. James Webster, Esq.	Fax:	(202) 326-7999
		Voice:	(202) 326-7900
From:	Michael T. Brody 312 923-2711		
Employee Number:		Client Number:	41198-10003

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JENNER&BLOCK

June 14, 2005

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Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036-3209

Re: ***Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.***

Dear Rebecca and Jim:

Confirming our recent conversation, we have arranged the following schedule for depositions in this matter:

1. David Ross will appear for deposition at the Chicago offices of Jenner & Block at 2:00 p.m., on Wednesday, June 15, 2005. I enclose a notice of deposition for Mr. Ross's deposition.

2. Blaine Nye will appear for deposition at the Palm Beach offices of Carlton Fields at 2:00 p.m. on Friday, June 17, 2005. If, for some reason, Carlton Fields is unable to arrange a location for the deposition, contact us and we will attempt to arrange the deposition at Mr. Scarola's offices.

3. The Ross and Nye depositions will each last one-half day.

4. The parties will advise the Court at the hearing that they intend to present Mr. Ross and Dr. Nye for testimony at the hearing on Monday, June 20, 2005. You indicated that you may call an as of yet unknown Deloitte witness on Monday, but that the testimony of the witness will be brief. The parties have agreed to use their best efforts to conclude the Ross and Nye testimony on Monday.

Please contact me if this letter does not accurately state our agreement.

Very truly yours,

Michael T. Brody

cc: John Scarola, Esq. (by telecopy)
Joseph Ianno, Jr.. Esq. (by telecopy)
Jerold S. Solovy, Esq.

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

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

CASE NO. CA 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

NOTICE OF TAKING VIDEOTAPED DEPOSITION

To: Joseph Ianno, Jr., Esq.
CARLTON FIELDS, P.A.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

Mark C. Hansen, Esq.
Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.
Sumner Square
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036-3209

PLEASE TAKE NOTICE that Plaintiff Coleman (Parent) Holdings Inc. will take the deposition upon oral examination of the following witness pursuant to Florida Rule of Civil Procedure 1.310 on the date, time, and location set forth below:

DEPONENT	**DATE AND TIME**
David Ross	June 15, 2005, at 2:00 p.m.

The deposition will be conducted at Jenner & Block LLP, 330 N. Wabash Avenue, Chicago, Illinois. The deposition will be recorded by stenographic means and by videotape. The deposition will be taken before a person authorized to administer oaths and will continue day to day until completed. You are invited to attend and cross-examine.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile to all counsel on the attached Service List this 14th day of June 2005.

Dated: June 14, 2005

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

MEMORANDUM OF COLEMAN (PARENT) HOLDINGS IN OPPOSITION TO MORGAN STANLEY'S ALTERNATIVE MOTION FOR REDUCTION OF COMPENSATORY DAMAGES UNDER FLORIDA STATUTES SECTIONS 46.015 & 768.041

Coleman (Parent) Holdings Inc. ("CPH") opposes Morgan Stanley's motion to reduce the jury's award of compensatory damages to reflect a claimed setoff for the settlement with Sunbeam and the settlement with Arthur Andersen ("Andersen").

First, Morgan Stanley is estopped from asserting a claim for setoff regarding either of those settlements because of Morgan Stanley's arguments to the jury in the punitive damages phase of the trial. Morgan Stanley argued over and over to the jury that Morgan Stanley would have to pay the full $604 million compensatory award. Morgan Stanley further argued to the jury that the $604 million award was punishment enough on Morgan Stanley. In response, the jury returned a punitive damages award far less than what CPH sought or Florida law permits. Having successfully relied upon the $604 million figure to reduce the jury's punitive damages award, Morgan Stanley cannot now seek to lower that figure. *See* Part I below.

Second, with regard to the Sunbeam settlement, Morgan Stanley is not entitled under the jury's findings to any setoff for the value of the warrants that CPH received as part of that

transaction. There cannot be any setoff for the warrants because, over CPH's objection, Morgan Stanley presented to the jury as a supposedly proper deduction to CPH's compensatory damages the $450 million figure that already included the warrants. Thus the jury already has determined the issue, rejecting Morgan Stanley's contention. *See* Part II.A below. There also cannot be any setoff for the warrants because CPH could not have sold any warrants for Sunbeam shares beyond the number of shares that the jury already took into account in fixing damages. The jury determined that damages in this case should be calculated based on CPH's ability to have sold under Rule 144 the maximum number of unregistered Sunbeam securities. 17 C.F.R. § 230.144. Under that Rule, unregistered convertible securities such as warrants are to be counted with the underlying securities for the purposes of the Rule's volume restrictions. Therefore, under the approach to damages determined by the jury, CPH already was "maxed out" on sales of Sunbeam securities and could not have sold any more even if it had wanted to do so. *See* Part II.B below.

Third, in the alternative, even if the jury had determined that CPH could have sold additional Sunbeam securities by seeking to register them (a scenario that is inconsistent with the jury's determination), CPH could not have registered and sold any of the warrants until December 6, 1999. Under this Court's rulings, that date is the earliest one on which any Sunbeam securities could have been sold via registration. CPH's expert, Dr. Blaine Nye, calculates that as of that date, the most that CPH could have realized for the warrants was $14.5 million, assuming that someone was available and willing to purchase them. *See* Part III below.

Fourth, Morgan Stanley presents various arguments for a higher value of the warrants, ignoring the lack of any willing purchaser for them. Morgan Stanley's expert testimony on that topic is from an entirely new expert and is untimely. Morgan Stanley has known from the start

that it bore the burden of proving the amount of the Sunbeam settlement. *See, e.g., Maser v. Fioretti*, 498 So. 2d 568, 570 (Fla. 5th DCA 1986) (defendant has burden of showing setoff). Yet Morgan Stanley did not disclose an expert on the issue until now. Moreover, none of Morgan Stanley's theories regarding the valuation of the warrants is correct. *See* Part IV below.

Fifth, all of Morgan Stanley's theories regarding a setoff for the warrants are irrelevant because they ignore CPH's efforts to mitigate its damages. CPH reasonably believed that if it had "bailed out" of the warrants in August 1998 — even if CPH could have done so — that act would have devastated Sunbeam and ruined the remainder of the investment of CPH and the public. Under the law, CPH's reasonable decision not to do so is a mitigation cost borne by Morgan Stanley, not CPH. *See* Part V below.

Background

Morgan Stanley's motion asks the Court to reduce the compensatory damages award to reflect the value purportedly received by CPH from its settlements with Sunbeam and Andersen. Prior to trial, CPH entered into separate settlements with both of those parties.

The Sunbeam Settlement. On August 12, 1998, as part of CPH's attempt to mitigate its damages by aiding Sunbeam's effort to turn around the company, CPH released all of its claims against Sunbeam. CPH determined that it could not pursue claims against Sunbeam while at the same time assisting Sunbeam in its struggle to save the company. As part of the settlement, CPH forfeited its claims against Sunbeam in exchange for the express right (and duty) to assist Sunbeam in its turn-around effort. (Ex. 1, Settlement Agreement at 6-7.) CPH also received warrants to purchase an additional 23 million shares of Sunbeam stock at an exercise price of $7.00 per share. Neither the warrants nor the shares into which the warrants could be converted were registered with the SEC, although the parties could seek registration under an Amended Registration Rights Agreement. *Id.* at 3. Even if the warrants could have been registered

promptly, which they could not, one-half of the warrants were subject to a three-year contractual "lock-up" under the terms of the settlement agreement. *Id.* at 7. Under the lock-up, half of the warrants (and the stock into which that half was convertible) could not be sold prior to the third anniversary of the settlement agreement — that is, until August 12, 2001, which was well after Sunbeam declared bankruptcy. *Id.*

In order to exercise the warrants and receive Sunbeam stock, CPH was required to pay Sunbeam the full $7.00 per share exercise price. In other words, given that CPH would have to pay Sunbeam $7.00 for each share exercised, it would make no economic sense to exercise the warrants unless the shares could be sold for significantly more than $7.00 per share. On the day of the execution of the settlement agreement, August 12, 1998, Sunbeam's stock closed at $6.88. Although Sunbeam's stock occasionally traded at prices above $7.00 per share thereafter, the stock generally traded at prices less than the $7.00 per share exercise price after August 12, 1998. (Ex. 2, stock chart at 51-62 (CPH Ex. 1296A).) In the following months, Sunbeam's stock price continued to decline.

Despite CPH's efforts to help, Sunbeam's business continued its downward course. CPH ultimately realized no value from the warrants. Sunbeam entered bankruptcy on February 6, 2001. At that point, CPH still held the warrants, which were discharged in the Sunbeam bankruptcy.

The Andersen Settlement. On October 2, 2002, CPH entered into a settlement agreement with Andersen. (Ex. 2 to MS Motion.) Under that settlement, Andersen paid CPH a confidential amount, and CPH released its claims against Andersen.

Argument

I. Morgan Stanley Is Estopped From Asserting A Claim For Any Setoffs Because Of Morgan Stanley's Arguments To The Jury During The Punitive Damages Phase.

In the punitive damages phase of the trial, Morgan Stanley argued to the jury that the financial effect on Morgan Stanley of the compensatory damages award was the full amount of the $604 million verdict. In requesting the jury not to impose punitive damages, Morgan Stanley urged the jury to take into consideration the fact that Morgan Stanley would bear the full $604 million compensatory damages award. Morgan Stanley argued that in light of Morgan Stanley's obligation to pay the full $604 million award, Morgan Stanley had been punished enough and that additional punitive damages were not justified. Morgan Stanley repeated those points over and over to the jury. For example:

- "You and you alone get to decide whether to take more of Morgan Stanley's assets beyond the $604 million you've already awarded." (Ex. 3, 5/18/05 Trial Tr. at 15402.)

- "Neither Morgan Stanley nor any other investment bank in its right mind, reading your verdict, would ever think it worthwhile to run the risk of losing $604 million in order to get a $32 million fee." *Id.* at 15410.

- "Morgan Stanley has been devastated by your $604 million verdict. It has paid a high price." *Id.* at 15667.

- "We don't think you should want, you should feel the need to hurt, to punish Morgan Stanley more than what's already occurred here, which is itself strong, powerful and very very very well absorbed and inflicted on Morgan Stanley." *Id.*

- "Put bluntly, was it so bad, was it so reprehensible that you want to harm Morgan Stanley, that you want to smack them and damage them? Do you want to go beyond the $604 million verdict that you've already rendered that has both a powerful financial impact on Morgan Stanley and a powerful effect on the reputation of Morgan Stanley . . . ?" *Id.* at 15694.

- "I said about Morgan Stanley's, some key facts nobody disputes. Its net worth is 5.2 billion. We've already lost 12 percent of Morgan Stanley's net worth through your compensatory verdict that's been awarded. That's

> a pretty substantial chunk of Morgan Stanley's net worth right there." *Id.* at 15709. [12 percent of $5.2 billion is $624 million.]

- "Do you want to stop them [Morgan Stanley] from financing new businesses? If you get to 1.7 [billion] total compensatory and punitive, that means Morgan Stanley will have to start cutting back its business. Is that what you want to do to Morgan Stanley?" *Id.* at 15712.

In response, the jury returned an $850 million punitive damages award, far less than the amount that CPH requested or that Florida law permitted.

Morgan Stanley's current effort to reduce the amount of compensatory damages is inconsistent with its prior representations to the jury. Having invited the jury to return a reduced punitive damages award because the full compensatory judgment would be borne by Morgan Stanley, Morgan Stanley cannot shift back and argue that the compensatory award should be reduced. That principle applies all the more given that Morgan Stanley was successful in its argument to the jury. The jury's punitive damages award was substantially less than the amount CPH sought or the maximum amount permitted under Florida law. Because Morgan Stanley successfully lowered its punitive damages by arguing that the $604 million award would be borne by Morgan Stanley and was itself sufficient compensation, Morgan Stanley cannot now argue that the compensatory damages should be reduced further.

Under the law, a litigant cannot assert one state of facts for one purpose and then, having achieved that purpose, assert a different state of facts for another purpose:

> The general rule has long been established in Florida and other jurisdictions that litigants are not permitted to take inconsistent positions in judicial proceedings and that a party cannot allege one state of facts for one purpose and at the same action or proceeding deny such allegations and set up a new and different state of facts inconsistent thereto for another purpose.

Federated Mut. Implement & Hardware Ins. Co. v. Griffin, 237 So. 2d 38, 41-42 (Fla. 1st DCA 1970); *accord Bailey v. State Farm Mut. Auto. Ins. Co.*, 789 So. 2d 1181, 1183 (Fla. 4th DCA

2001) (a party is "preclude[d] from maintaining a position inconsistent with another position which is sought to be maintained at the same time or which was asserted at a previous time . . . . The doctrine requires of a party consistency of conduct, when inconsistency would work substantial injury to the other party"); *DuBois v. Osborne*, 745 So. 2d 479, 481 (Fla. 1st DCA 1999) (doctrine prevents "a party who has gained something from the assertion of its first position to, by the assertion of the second, inconsistent position, gain something more, to which it would not have been entitled under the first position"); 22 Fla. Jur. 2d Estoppel and Waiver § 60 (2005) ("[A] party cannot occupy inconsistent positions in the course of a litigation").

II. Under The Jury's Findings, Morgan Stanley Is Not Entitled To Any Setoff For The Value Of The Warrants That CPH Received From Sunbeam.

A. There Cannot Be Any Setoff For The Warrants Because The Value Of The Warrants Was Included In The $450 Million Figure That Morgan Stanley Presented To The Jury And That The Jury Rejected.

Under the Constitution and laws of Florida, the right of trial by jury "shall be secure to all and remain inviolate." Florida Const., Article I, Section 22. Applying that constitutional principle, Florida courts have made clear that a jury's findings concerning facts that are presented to the jury and that are common to matters to be decided by the Court must be respected in the subsequent proceedings before the Court. *See, e.g., Billian v. Mobile Corp.*, 710 So. 2d 984, 992 (4th DCA 1998). As *Billian* held, a trial court is bound by the jury's findings of fact in subsequent proceedings where the fact issues are similar:

> Where the fact issues decided by a jury in an action at law are sufficiently similar to the fact issues on a related equitable claim, the trial court is bound by the jury's finding of fact in making its ruling on the equitable claim.

Id.; see also, e.g., Paoli v. Natherson, 732 So. 2d 486, 488 (Fla. 2nd DCA 1999) ("When a jury decides fact issues in an action at law, and the issues are sufficiently similar to the fact issues in a

related equitable claim, the trial court is bound by the jury's findings of fact when it then rules on the equitable claim").

Here, Morgan Stanley directly and expressly argued to the jury that CPH's compensatory damages should be reduced by $450 million, a figure that reflected both the value of the stock CPH received on March 30, 1998 and the warrants that CPH received pursuant to the August 12, 1998 settlement with Sunbeam. Morgan Stanley stated to the jury (Ex. 3, 5/12/05 Trial Tr. at 14515-17, emphasis added):

> [T]his was [Mr. Perelman's] best estimate of value knowing all the facts and he's an experienced businessman, the best position to value it is his Sunbeam stock at the end of 1998 was worth $450 million regardless of it having [a] lower market price. He knows, he's in the best position to say that.
>
> But it's not just that year. Because we then go on to the next year. . . . Again, what's the adjusted value of the [Sunbeam] holdings at the end of 1999? $450 million. Now what's the significance of the date? At the end of 1999, according to the instruction you'll be given, there is no longer an inability to sell. The shares were registerable, and Mr. Perelman told you he had a contract right to, so he could sell them. The lockups had expired. He could sell the stock. And this is his value about what he could sell for. Present value as of 12-31-1999, total value.
>
> . . . .
>
> You know what that gives you in damages? $74 million. [That is, $524 million, which was Morgan Stanley's contention regarding the expected value of the Sunbeam investment, minus $450 million.]

There is no question that the $450 million figure included the warrants. The very document from which Morgan Stanley obtained the $450 million figure said so. *See* Ex. 4 (MS 822 at CPH2012217, stating that the "Sunbeam - warrants" were "[i]ncluded in Sunbeam $450 [million] - same as prior year"). Morgan Stanley stated point blank at trial that the $450 million figure included the warrants (Ex. 3, 4/5/05 Trial Tr. 6796, 6806):

> MR. HANSEN: . . . Mr. Perelman and his very able financial evaluators look at their Sunbeam holdings, all of which they got as a result of this deal, and they've put a price tag, 450 million dollars.
>
> THE COURT: That includes the warrants?

> MR. HANSEN: Includes the warrants, Your Honor. . . .
>
> . . . .
>
> THE COURT: Do we agree that the 450 million included the warrants?
>
> MR. HANSEN: It appears to, Your Honor. Our position is the warrants are part and parcel of the bargain.

Indeed, the only debate at trial was whether the $450 million figure was net of the $7.00 per share exercise price of the warrants. *See, e.g.*, Ex. 3, 4/18/05 Trial Tr. at 9024-25. The Court ruled that the issue of whether the $450 million figure included or was net of the warrant exercise price was for the jury to determine. *Id.* at 9025. Regardless, the warrants plainly were included in the $450 million figure.

Over CPH's objection, Morgan Stanley invited the jury to reduce the award of damages by the full $450 million, without deducting the amount attributable to the warrants. *See* Ex. 3, 5/12/05 Trial Tr. at 14517 ("You know what that gives you in damages? $74 million."). CPH specifically objected to Morgan Stanley's arguments on that point because they permitted the jury to reduce CPH's damages by the value of the warrants and the stock into which the warrants could be converted. Indeed, CPH filed a brief on the topic. *See* Plaintiff's 5/11/05 Motion To Preclude Defendant From Making Unsupported Arguments Concerning Damages at 11-12 (contending that the "$450 million estimate is not a permissible 'back end' measure" because the "$450 million number is based upon the exercise of the warrants, which never happened"). But at Morgan Stanley's behest, CPH's objection was overruled. The Court permitted Morgan Stanley to argue to the jury that CPH's damages should be reduced by the full amount of the $450 million, which included the purported value of the warrants. *See* Ex. 3, 5/11/05 Trial Tr. at 14151 (THE COURT: "The 450 I would deny the motion on. I think we've fully vetted that. That's purely argument that can be made to the jury how did the plaintiff itself value this"); *see*

also Morgan Stanley's 6/6/05 Mem. in Opp. to Mtn. for Prejudgment Interest at 6 ("[T]his Court held that a reasonable jury could conclude that the value of the stock, by December 6, 1999, was $450 million").

As a result of Morgan Stanley's trial strategy, the jury already has resolved this issue. The jury's verdict reflects Morgan Stanley's effort to reduce CPH's damages by the purported value of the warrants. Under Florida law, that factual finding by the jury must be respected in these proceedings. Otherwise, Morgan Stanley will be permitted to obtain relief on a claim that the jury already has rejected, in violation of CPH's right to a civil jury.

B. There Cannot Be Any Setoff For The Warrants Because Under Rule 144, CPH Could Not Have Sold Any Warrants For Shares Beyond The Shares That The Jury Already Took Into Account In Fixing Damages.

In reaching its damages award, as explained more fully below, the jury already has taken into account the full amount of Sunbeam securities that CPH could have sold under SEC Rule 144's volume restrictions — which is the approach that the jury determined was proper. 17 C.F.R. § 230.144. Thus, there cannot be a setoff for the warrants because, under the jury's approach, CPH could not have sold any additional Sunbeam shares or any warrants that were convertible into additional shares.

The Court permitted the jury to decide whether and when the unregistered Sunbeam securities that CPH received could have been sold. The Court instructed the jury that CPH could not have sold any of its Sunbeam stock prior to November 25, 1999, at which point CPH could not have sold more than 1 million shares per quarter (pursuant to Rule 144) unless the shares were registered. The Court further instructed the jury that the shares were first registrable on December 6, 1999 and that "[i]t is for you, the jury, to decide whether CPH could have registered

and sold its Sunbeam stock at any time after that date." The Court's instruction stated (Ex. 5 at 5):

> You must determine the fair market value at which CPH reasonably could have sold its Sunbeam stock to a buyer with full knowledge of the fraud. For purposes of this determination, I instruct you that because of certain legal prohibitions, CPH could not have sold its Sunbeam stock prior to November 25, 1999, at which point it could sell no more than one million shares per quarter unless the shares were registered. As a matter of law, the shares were registrable by December 6, 1999. It is for you, the jury, to decide whether CPH could have registered and sold its Sunbeam stock at any time after that date. For purposes of this instruction, "fair market value" means the amount a purchaser who was willing and able but not obliged to buy would pay to someone willing and able but not obliged to sell.

An analysis of the jury's verdict indicates that the jury determined that damages should be calculated based on CPH's ability to have sold the maximum number of shares under Rule 144. Because the jury fixed damages based upon that determination, Morgan Stanley cannot contend that CPH could have sold additional Sunbeam securities — namely, the warrants or the shares into which the warrants were convertible. The reason is because Rule 144 provides that convertible securities such as warrants must be counted with the underlying securities for the purpose of Rule 144's volume restrictions. The Rule provides (17 C.F.R. § 230.144(e)(3)(i)):

> Where both convertible securities and securities of the class into which they are convertible are sold, the amount of convertible securities sold shall be deemed to be the amount of securities of the class into which they are convertible for the purpose of determining the aggregate amount of securities of both classes sold.

In other words, under the approach to damages adopted by the jury, CPH already was "maxed out" on sales of Sunbeam securities under Rule 144. Thus, CPH's damages cannot be reduced on the theory that CPH could have sold any warrants.

The jury's "front end" calculation.

In particular, in Phase One of the trial, the only damages expert was Dr. Blaine F. Nye. Please note that the remainder of this section II.B, which explains how the jury likely reached its

compensatory damage award, is essentially the same as the one presented in CPH's June 13, 2005 Response Brief in Support of Its Motion for Prejudgment interest at pages 11-14. CPH repeats substantially the same discussion here for the Court's convenience.

Dr. Nye testified that the best objective measure of the "fair market value" of the Sunbeam shares held by CPH was the actual stock price on the relevant dates. (Ex. 3, 4/25/2005 Tr. at 10374-75, 10392-93.) Dr. Nye used actual stock prices from March 1998 to calculate a "front end" figure representing the value of what CPH was supposed to receive; and used actual stock prices from 2000 and early 2001 to calculate a "back end" figure representing the value of what CPH actually did receive. *See id.* at 10377-94. He testified that the difference between the front-end and back-end figures equals CPH's total damages. *See id.* at 10391-92.

To determine the front-end figure for what CPH was supposed to receive, Dr. Nye multiplied CPH's 14.1 million Sunbeam shares times the average price for Sunbeam shares from March 2, 1998 (the date on which the Sunbeam-Coleman transaction was publicly announced) through March 30, 1998 (the date on which the transaction closed). (Ex. 3, 4/25/2005 Tr. at 10372-83, 10597.) Relying on CPH Trial Exhibit 1296A, a chart showing Sunbeam's daily stock prices, Dr. Nye testified that the average price for those dates in March 1998 was $48.26, ranging from a high of $52.00 on March 4 to a low of $43.94 on March 30. *Id.* at 10377-83; Ex. 2, CPH Ex. 1296A at 40. When multiplied by 14.1 million shares, that $48.26 average price resulted in a front-end figure in excess of $680 million. (Ex. 3, 4/25/2005 Trial Tr. at 10383.)

On cross examination, Morgan Stanley attacked Dr. Nye's use of an average and argued that the stock price on the closing date should be used as the front-end figure — $43.94 on March 30, 1998. (Ex. 3, 4/25/2005 Tr. at 10458-60, 10502.) The 14.1 million shares times the March 30 closing price of $43.94 produced a front-end figure of $619.554 million. *See id.*

(cross-examining Dr. Nye, and repeatedly referring to the $619 million figure). As shown below, the jury apparently credited Morgan Stanley's $619 million figure in calculating damages.

The jury's "back end" calculation.

To see how the jury might have reduced that front-end figure to the total damages figure of $604.334 million — a difference of about $15 million — one must turn to the back-end calculation valuing what CPH actually did receive. The Court instructed the jury that, on November 25, 1999, CPH could have begun selling one million shares of unregistered Sunbeam stock per quarter (under Rule 144). *See* Ex. 5 at 5 (jury instructions); *see also* Ex. 6, 3/28/2005 Order on CPH Motion in Limine No. 27 (concluding "that, as a matter of law, under Rule 144, CPH could sell no more than one million shares per quarter, beginning November 25, 1999"). The period from that date until February 5, 2001, the day before Sunbeam declared bankruptcy, spanned just under five quarters. Thus, in theory CPH could have sold 5 million of its 14.1 million shares under Rule 144 before Sunbeam went bankrupt.

In closing argument, CPH explained that those sales could have netted CPH no more than $16.87 million, even assuming (conservatively) that CPH had been able in each quarter to sell the entire block of one million shares on the very day when the stock price was at its zenith for that quarter (and without further driving down the stock price). *See* Ex. 3, 5/12/2005 Trial Tr. at 14323. CPH displayed a demonstrative in the form of the table reproduced below and invited the jurors to use CPH Trial Exhibit 1296A (the chart showing daily stock prices) to run the jury's own calculations on what CPH could have realized by selling a million shares per quarter beginning November 25, 1999. *See* Ex. 3, 5/12/2005 Trial Tr. at 14323 ("You're going to have

the Sunbeam stock price chart back there with you [in the jury room, during jury deliberations], and that's the source of the information from which this [table] was derived.").

Quarter Running	*HIGH* Price	Date	Total for Quarter
11/25/99 - 2/24/00	$5.56	1/18/00	$5,560,000
2/25/00 - 5/24/00	5.00	3/24/00	5,000,000
5/25/00 - 8/24/00	3.50	6/29/00	3,500,000
8/25/00 - 11/24/00	2.06	8/25/00	2,060,000
11/25/00 - 2/5/01	0.75	dates around 1/10/01	750,000
Total			$16,870,000

That demonstrative was based on the "high price" for Sunbeam shares in each quarter. Subtracting the resulting $16.870 million back-end figure from the $619.554 million front-end figure yields a total damages figure of $602.684 million. Using the exact same methodology — but assuming that CPH would have sold its million shares at the lowest price in each quarter — leads to a back-end figure of $9.560 million. When subtracted from the $619.554 million front-end figure, that back-end figure would yield total damages of $609.994 million. Thus, depending on when in each quarter CPH might have sold its million shares of Sunbeam stock, the back-end figure could range from $9.560 million to $16.870 million. Accordingly, the total damages could range from $602.684 million to $609.994 million. That tight range narrowly brackets — well within 1% on either side — the jury's actual award of $604.334 million.

The jury's ultimate damage calculation.

Rather than selecting the highest, or lowest, price in each quarter, which would systematically benefit either Morgan Stanley or CPH, respectively, the jury might well have picked other dates within each quarter. There are literally dozens of combinations of dates that would result in a back-end figure of $15,220,000 which, when subtracted from the $619,554,000 front-end figure would result in total damages of $604,334,000 — which is precisely the jury award. This is one example:

Quarter Running	Price	Date	Total for Quarter
11/25/99 - 2/24/00	$5.00	11/28/99	$5,000,000
2/25/00 - 5/24/00	4.25	3/29/00	4,250,000
5/25/00 - 8/24/00	3.50	6/29/00	3,500,000
8/25/00 - 11/24/00	1.94	8/29/00	1,940,000
11/25/00 - 2/5/01	0.53	1/29/01	530,000
Total			$15,220,000

Of course, jury secrecy prevents us from ever knowing how the jurors actually arrived at their verdict. But the jury's award of compensatory damages closely tracks the actual pecuniary losses that CPH sustained as a result of Morgan Stanley's fraud based on the application of potential sales under Rule 144. Because the jury's verdict can be explained by concluding that the jury reduced the claimed damages to reflect proceeds from the sale of the maximum amount of Sunbeam securities that could be sold under Rule 144, CPH could not have sold any more warrants or shares. Thus, Morgan Stanley cannot argue for an additional deduction for the value of the warrants that supposedly could be sold under Rule 144. Based on the jury's determination of the correct method for calculating damages, CPH's damages already have been reduced by the maximum amount that CPH could have realized from its sale of Sunbeam securities.

III. In the Alternative, If CPH Had Registered And Sold The Sunbeam Warrants Beginning December 6, 1999, CPH Would Have Realized No More Than $14.5 Million.

The only other possible explanation for the verdict is that the jury determined that CPH could have obtained registration of the shares and sold small amounts of them after December 6, 1999. Again, the Court instructed the jury that the shares were first registrable on December 6, 1999 and that "[i]t is for you, the jury, to decide whether CPH could have registered and sold its Sunbeam stock at any time after that date." (Ex. 5 at 5.)

As shown in the previous section (Part II.B above), that scenario — that is, sales via the registration path rather than sales of unregistered securities under Rule 144 — does not appear to

be consistent with the jury's verdict. But for purposes of this analysis, CPH assumes that the jury did find that some shares could have been registered and sold beginning on December 6, 1999.[1/]

CPH's expert, Dr. Nye, has calculated the value of the warrants using that approach as an alternative measure. Dr. Nye determined the maximum value of the warrants as of December 6, 1999, subject to the restrictions and conditions applicable to the warrants and subject to the assumption that the warrants could have been registered and that a willing buyer could have been found for them. As shown in his report, the half of the warrants that was not subject to the three-year lock up agreement had a maximum value on December 6, 1999 of $14.5 million. *See* Ex. 7, Nye Post-Trial Report at 12-13. The other half of the warrants could not be sold until August 12, 2001, at which point Sunbeam had filed for bankruptcy and the warrants became worthless. *Id.* at 3. Even the $14.5 million value assumes the existence of a willing buyer, which Morgan Stanley cannot demonstrate. *See* Part IV.A below. That value further assumes that efforts by CPH to sell the warrants would not have a deleterious effect on their value — the "CPH is bailing out" effect — which also contradicts the trial testimony. *See* Parts IV.C and V below.

IV. Morgan Stanley's Arguments Concerning The Value Of The Sunbeam Warrants Are Unsupported.

Morgan Stanley's motion and brief address three valuations for the warrants: (a) $135 to $140 million, which is the value advocated by Morgan Stanley's new and belatedly disclosed expert, David Ross; (b) $70 million, which is the figure contained in the Sunbeam financial

[1] CPH showed at trial that if CPH's Sunbeam shares had been registered on the first day on which the shares could have been registered (December 6, 1999) and were sold in an orderly fashion over the next quarter to minimize depressing the price, CPH would have obtained approximately $46 million in proceeds. (Ex. 3, 4/25/05 Trial Tr. at 10393-94.) However, the jury did not deduct $46 million from any measure of CPH's expected value. Thus, the jury apparently concluded that such an approach was not the correct way to calculate CPH's damages.

statements; and (c) $41.7 million, which is the figure contained in CPH's financial statements. In addition to all of the reasons shown above, none of those figures is an appropriate measure for a setoff.

A. Morgan Stanley's Expert Report Is Untimely, And The Opinions In It Are Incorrect.

1. Mr. Ross's report is untimely.

Morgan Stanley has presented a report of an entirely new expert — David Ross — who values the warrants (from which CPH actually received nothing) at approximately $135 to $140 million. The disclosure of Mr. Ross as an expert comes months too late. Morgan Stanley has known from the start that it bore the burden of proving the amount of the Sunbeam settlement and of any other potential setoffs upon which it was relying. *See, e.g., Maser*, 498 So.2d at 570 (Fla. 5th DCA 1986) (defendant has burden of showing setoff).

In its November 23, 2004 order regarding expert disclosures, this Court directed each party to disclose its expert witnesses by December 7, 2004. However, Morgan Stanley failed to submit any expert disclosure concerning the value of the Sunbeam warrants that CPH received. Morgan Stanley disclosed a damages expert — Dr. Grinblatt. However, Dr. Grinblatt testified at his deposition that he had not valued the warrants and had not made any effort to calculate the amount of the setoffs claimed by Morgan Stanley in its affirmative defense. (Ex. 8, 1/7/05 Grinblatt Dep. at 166-68.) Nor did Dr. Grinblatt value the warrants in the supplemental expert report that the Court granted Morgan Stanley leave to submit. In his March 10, 2005 supplemental report, Dr. Grinblatt acknowledged that any award to CPH would be subject to setoffs, but he did not make any effort to value the warrants. *See* Grinblatt Supp. Report at 45.

Morgan Stanley bore the burden of proving the amount of any setoffs from CPH's damages. Morgan Stanley failed to present such proof in a timely fashion. Morgan Stanley's attempt to do so now comes too late.

2. Mr. Ross's approach is incorrect.

Mr. Ross's approach to valuing the warrants also is faulty, as demonstrated in the accompanying point-by-point analysis by CPH's expert, Dr. Nye. (Ex. 7, Nye Post-Trial Report.) Dr. Nye explains the defects in Mr. Ross's report, which are summarized here:

- **The warrants that CPH received in fact had no realizable value.** The warrants were well out-of-the-money by the time that CPH could have registered the warrants or the shares into which the warrants were convertible. Even then, 11.5 million of the shares represented by the warrants were restricted from sale or transfer until August 2001. By that date, Sunbeam was insolvent and in bankruptcy and its equity interests, including the warrants, were worthless. *See* Ex. 7, Nye Post-Trial Report at 2-3. As a result, the opinion that Dr. Nye presented in his original report was correct: "As stated in the [original] Nye Report, as a result of litigation, contractual restrictions, and the fact that the warrant could not be registered until at least December 6, 1999, 'it is unlikely Plaintiff could have offset any of its claimed losses by attempting to monetize the warrants it received.'" *Id.* at 3 (quoting Original Nye Report at 16).

- **The Black-Scholes model upon which Mr. Ross relies does not account for the possibility of bankruptcy or the restricted nature of the warrants.** The model upon which Mr. Ross's report is premised assumes that the company's stock price continues to fluctuate with the company's business fortunes, thereby creating the possibility that an "out of the money" option or warrant may have value in the future. But in reality, once a company enters bankruptcy, the probability is zero that the stock may increase meaningfully in value.

Thus the probability that the option or warrant will have future value is zero. *See* Ex. 7, Nye Post-Trial Report at 4-5.

Moreover, courts have criticized the use of the Black-Scholes model when applied outside the realm of standard, publicly traded options. *See, e.g., Louisiana State Employees' Retirement System v. Citrix Systems, Inc.*, 2001 WL 1131364 at *7 (Del. Ch. Sept. 19, 2001) (discussing argument that "while the Black-Scholes formula may be appropriate for valuing freely tradeable options, the model overstates the value" of options "which are not liquid, freely tradeable options"; concluding that concerns over the model "are accentuated here where the model — even if applied without any hint of bias — may not accurately value the types of illiquid options at issue"); *Lewis v. Vogelstein*, 699 A.2d 327, 331-32 (Del. Ch. 1997) ("Significant doubt exists whether the Black-Scholes option-pricing formula, or other similar option-pricing models, provide a sufficiently reliable estimate of the value of options" that "include restrictive terms that are different from those of typical, publicly-traded options and which may affect their value").

- **Mr. Ross's warrant valuations are hypothetical and are based on unreasonable assumptions.** Mr. Ross's analysis achieves a value for the warrants that is far beyond the value of the Sunbeam shares determined by the jury award. Dr. Nye observes, "As a matter of logic, it is difficult to attach a higher valuation to a warrant, which requires payment of an exercise price before it can be converted into stock, than to shares — which is exactly what Mr. Ross does." *Id.* at 5. Mr. Ross does so by assuming a market for the warrants and a hypothetical buyer where none existed. Mr. Ross also does so by choosing various flawed inputs for his model, including stock price, volatility, valuation date, and the application of a control premium and liquidity discount. Each input is skewed in a way that improperly increases the

purported value of the warrants. *See id.* at 5-11. For example, contrary to Morgan Stanley's own legal theory of a proper valuation date, Mr. Ross uses the higher August 13, 1998 stock price (instead of the lower August 12, 1998 stock price) in order to obtain the bump in price that may have been attributed to the disclosure of the news that CPH's claims against Sunbeam had been resolved.

- **Using more reasonable inputs for Mr. Ross's model greatly reduces the estimated valuations of the warrants — if the warrants could be sold at all.** Mr. Ross's entire approach assumes that the warrants should be ascribed some value as of August 1998. However, that assumption is incorrect as a practical matter because the warrants and the underlying shares "were not registered nor tradable" as of that date and the company was in turmoil. *See* Ex. 7, Nye Post-Trial Report at 11-12.

That last point is critical — that Mr. Ross's assumptions ignore the "real world" facts about Sunbeam, the litigation being prosecuted against it at the time, and the lack of a market for its warrants. It is undisputed that CPH actually received nothing from its ownership of the Sunbeam warrants, and the warrants were discharged in bankruptcy. Morgan Stanley has not met its burden of presenting evidence that CPH actually could have received value from the warrants by managing the warrant investment in some other way. Sunbeam obviously was a distressed company. The evidence at trial showed that any effort by CPH to "bail out" of its Sunbeam investment would have driven down the stock price and devastated the company. *See* Part V below.

As a result, there is no basis for this Court to conclude that a willing buyer ever would have paid any sum for the Sunbeam warrants. *See* Ex. 5, Jury Instructions at 5 (instructing the jury to determine the fair market value of the securities that CPH received by determining the

value "at which CPH reasonably could have sold" the securities to a buyer, and stating that fair market value means the amount "a purchaser who was willing and able but not obliged to buy would pay to someone willing and able but not obliged to sell"). There is no evidence that a market — either public or private — existed for the warrants or that CPH had the opportunity to sell the warrants at any price. Morgan Stanley bears the burden of establishing a valid basis for setoff, and Morgan Stanley has not met its burden here.

B. Sunbeam's $70 Million Valuation Is Not An Appropriate Measure Of The Value Of The Warrants.

Morgan Stanley also refers in its motion to the fact that Sunbeam's financial statements reported that Sunbeam recorded the warrants at $70 million in August 1998. (MS Motion at 2.) That figure, and the Sunbeam documents that contain it, are hearsay. No Sunbeam witness has testified as to the derivation of the $70 million figure or the appropriateness of the judgments used in its calculation or the purpose for which the figure was derived. No Sunbeam witness has provided any foundation for that figure.

In addition, the Sunbeam valuation again does not reflect the price at which the warrants could be sold to a willing buyer at any point in time when the warrants actually could be sold. In August 1998, the Sunbeam warrants were not registered and could not be sold by CPH. There was no market for the warrants. As Dr. Nye has explained, "To speak of a liquid or illiquid market for Plaintiff's warrant is nonsense as there was no market and it had zero liquidity." (Ex. 7, Nye Post-Trial Report at 10-11.) Thus, the Sunbeam warrant valuation does not reflect an appropriate measure of the warrants' value for purposes of this case.

Morgan Stanley also refers to the year-end worksheets that MacAndrews & Forbes prepared as one input into the estimation process used annually to determine the enterprise value of MacAndrews & Forbes. *See, e.g.* Ex. 4 (MS Ex. 822). Those worksheets — which are the

same ones that contained the $450 million figure that Morgan Stanley presented to the jury — likewise contain a $70 million estimated value of the warrants. *See* Part II.A above; Ex. 4 (MS Ex. 822). As has been made clear by the testimony of Todd Slotkin, however, that number was simply copied from the Sunbeam valuation. (Ex. 9, 3/3/05 Slotkin Dep. at 102-03, 122-25.) The number does not reflect the price at which a willing buyer would acquire the warrants at any point when the warrants actually could be sold. Moreover, as shown above, the jury rejected the $450 million figure — which included the $70 million estimated value — as a proper measure of damages. *See* Part II.A above.

C. CPH's Accounting Valuation Is Not An Appropriate Measure Of The Value Of The Warrants.

MacAndrews & Forbes recorded a value of the warrants for accounting purposes according to generally accepted accounting principles ("GAAP"). Although recorded at $41.7 million as of December 31, 1998, that valuation was entered as a post-closing adjustment in April 1999. (Ex. 10 at 1 (MS Ex. 833).) Again, in 1998 and most of 1999, CPH could not have sold the warrants because they were unregistered and were not subject to any exemption from registration. As shown above, valuations — particularly valuations according to GAAP rather than valuations at market — that are derived at a time other than when the warrants could have been sold are not consistent with the jury's determination or the rules adopted by this Court for the valuation of securities received by CPH. Valuations at those times also would have been inconsistent with evidence concerning CPH's exposure to insider trading liability in connection with any sales of Sunbeam securities. (Ex. 3, 4/28/05 Trial Tr. at 11169, 11371-72 (testimony of Mr. Gittis).)

CPH's accounting records do not shed any light on the value of the warrants at later times when the warrants could have been sold. As stated in CPH's financial statements, CPH

accounted for its interest in Sunbeam pursuant to the "equity method" of accounting. (Ex. 11 at F-27 (MS Ex. 814).) The equity method required that CPH adjust the value of its total Sunbeam investment — both stock and warrants — by CPH's *pro rata* share of the gains or losses of Sunbeam. *See* Financial Accounting Standards Board, *Accounting Standards*, Investments: Equity Method, § I82 at 27715 (FASB 2004). Rather than reflect changing market values of the warrants, CPH's subsequent accounting reflected CPH's *pro rata* share (by ownership) of Sunbeam's losses. At year end 1998, 1999, and 2000, CPH wrote down its total investment in Sunbeam — stock and warrants — to reflect Sunbeam's losses. CPH reduced its investment by $43.5 million as of year end 1998, $41.8 million as of year end 1999, and wrote down its investment to zero as of year end 2000 (the year-end 2000 writedown was made in April 2001, after Sunbeam's bankruptcy, as part of the normal process of preparing the MacAndrews & Forbes year-end financial statements). CPH's internal accounting treatment, which is driven by the rules of the accounting profession rather than the legal valuation standards applicable in this Court, does not reflect a value relevant to this Court's consideration of the Sunbeam settlement.

V. None Of Morgan Stanley's Theories Regarding The Warrants Is Relevant Because Morgan Stanley Is Responsible For Reasonable Mitigation Costs.

Besides all the reasons shown above, Morgan Stanley cannot obtain a setoff for the warrants because CPH's decision to retain the warrants was part of CPH's reasonable efforts to mitigate damages. Put simply, CPH reasonably understood that if it had "bailed out" of the warrants in August 1998 (even if CPH could have done so), that act would have devastated Sunbeam and would have ruined the remainder of the investment of CPH and the public. Under the law, the cost of that reasonable mitigation decision must be borne by Morgan Stanley, not CPH.

16div-018027

That principle eliminates Morgan Stanley's setoff claim even if Morgan Stanley's theories otherwise were right. Assume for the sake of argument that Morgan Stanley were correct in asserting that the warrants were worth $140 million on the day that CPH received them. Assume also for the sake of argument that CPH somehow possessed the ability immediately to extract that entire sum of money in August 1998, either by selling the warrants or through some other unstated and unproven method. Even under those assumptions (which are incorrect for the reasons shown above) Morgan Stanley still is not entitled to any setoff regarding the warrants because CPH's purported choice to forgo that sum in August 1998 in order to salvage its much larger equity investment was a reasonable cost of mitigation efforts. CPH understood that if it immediately had sold all 23 million warrants in August 1998, that act would have destroyed Sunbeam and wiped out the remainder of CPH's investment in Sunbeam and that of the public. *See, e.g.*, Ex. 3, 4/28/05 Trial Tr. at 11167 (Mr. Gittis: "The market would clearly have viewed that as CPH abandoning a sinking ship and would have destroyed any value for the CPH stock. . . . [The market] would not have thought that [CPH] would have sold the stock if there were any chances [of] rescuing the company"); *cf.* Ex. 3, 4/24/05 Trial Tr. at 10393 (Dr. Nye: "[A] block sale" of securities is a "signal to the market that maybe the captain was handing over the ship as he gets in the life boat").

Thus, even if the warrants had substantial value and even if CPH could have captured that value in August 1998, CPH's decision not to do so in these circumstances was a reasonable effort to limit damages. Under the law, a plaintiff who incurs reasonable costs to mitigate the effects of a defendant's wrongdoing can recover those costs, even if the mitigation efforts ultimately prove unsuccessful. The *Restatement (Second) of Torts* makes that exact point. Section 919 of the Restatement is entitled "Harm Suffered and Expenditures Made in Efforts to

Avert Harm." That Section provides that a plaintiff can recover the costs incurred "in a reasonable effort to avert further harm" (*id.*):

> (1) One whose legally protected interests have been endangered by the tortious conduct of another is entitled to recover for expenditures reasonably made or harm suffered in a reasonable effort to avert the harm threatened.
>
> (2) One who has already suffered injury by the tort of another is entitled to recover for expenditures reasonably made or harm suffered in a reasonable effort to avert further harm.

The comments to that section of the Restatement contain a subpart entitled "Unsuccessful efforts." *Restatement (Second) Torts* § 919, comment c (1979). That subpart makes clear that the right to recover mitigation costs exists "whether or not" the mitigation efforts turn out to be successful (*id.*):

> The rule stated in this Section applies whether or not the efforts to avert the threatened harm are successful. If the efforts fail, the tortfeasor is liable not only for the harm threatened but also for any further harm or expense caused by reasonable efforts to avert it.

Accord Kanter v. Safran, 68 So. 2d 553, 558 (Fla. 1953) (holding that lessor was entitled to recover against lessee expenses reasonably necessary in order to obtain a tenant and mitigate damages under the lease); *In re The Securities Groups*, 116 B.R. 839, 845 (Bankr. M.D. Fla. 1990) (party's reasonable expenses in attempting to mitigate damages, whether successful or not, are recoverable against the debtor).

In short, all of Morgan Stanley's warrant valuation theories are beside the point because Morgan Stanley is responsible for CPH's reasonable mitigation costs. CPH's decision not to ruin Sunbeam by "bailing out" of the warrants — even if CPH had the ability to do so — was a reasonable mitigation cost. That cost is borne by Morgan Stanley.

Conclusion

For the foregoing reasons, this Court should decline to reduce the compensatory damage award.

Dated: June 15, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to all counsel on the attached list on this 15th day of June, 2005.

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS, INC.'S RESPONSE IN OPPOSITION TO MORGAN STANLEY'S VERIFIED MOTION FOR ORDER ALLOWING INTERVIEW OF JURORS AND NOTICE OF INTENT TO INTERVIEW JURORS

In the wake of an adverse jury verdict, Morgan Stanley now seeks to attack the messengers of the bad news, by requesting permission to interview all of the jurors who sat on the case in the hope of conjuring a case of juror bias. Morgan Stanley seeks this relief even though this Court repeatedly offered Morgan Stanley the opportunity to interview all of the jurors before the verdict, and even though Morgan Stanley uniformly rejected those invitations. Morgan Stanley's motion, seeking relief that it previously was offered but waived, is improper because it is made after the jury verdict and is insufficient on its face.

I. Morgan Stanley Has Waived Its Request To Interview The Jurors By Declining The Court's Repeated Invitations To Conduct Juror Interviews Before There Was A Verdict.

The evidence of record establishes that after this Court interviewed the three jurors who were approached by Mr. Comyns and satisfied itself that there was no jury taint, the Court repeatedly gave Morgan Stanley the opportunity to interview the jurors further -- but Morgan Stanley expressed no interest in doing so. Specifically, during the morning session on April 25, when the juror contacts came to light. the Court questioned the three jurors involved at Morgan

Stanley's request, and gave both sides the opportunity to ask follow-up questions. *See* Ex. A, 4/25/05 Tr. 10414-18. Counsel for Morgan Stanley then argued that a mistrial was necessary because what had occurred was "on its face jury tampering" and that "no further showing need be made." *See id.* at 10423; *see also id.* at 10424 ("I don't think we need to have an evidentiary hearing"); *id.* ("It's a serious matter and there's no way we can ever get to the bottom of it in any kind of reasonable way. And we don't wish to have an extended evidentiary proceeding[]. We think that what occurred is sufficient.").

The Court disagreed that what had come to light was sufficient to warrant a mistrial, and invited Morgan Stanley to develop the record by making further inquiries of Mr. Comyns and the jurors themselves, but Morgan Stanley declined the opportunity (*id.* at 10427-29, emphasis added):

> THE COURT: Based on the record before me now, I think there would be insufficient information to declare a mistrial. We have sort of supposition and innuendo, but certainly nothing any stronger than that. And that's why, I guess, I think my question is more directed to Morgan Stanley: What, if anything else, do you want to do?
>
> MR. HANSEN: We don't think, frankly, there could be any basis to get to the bottom by deposing this gentleman under time circumstances. He'll merely deny that he was doing anything other than being friendly. And I don't think we have the resources now to do a full inquiry about it. So I don't wish to go down that road. I strongly oppose doing anything prejudicial as to the three jurors. I don't believe the issue is confined to them and I don't think they've done anything inappropriate. But I do state on the record before the Court right now we do not have just an appearance of jury tampering, we have an effort of jury tampering on someone who is affiliated with one of the parties. I would not – on Morgan Stanley's behalf, we do not want to take half measures. <u>If the Court is not inclined to declare a mistrial, we don't want to have the jurors further question[ed]</u>.
>
> THE COURT: <u>You don't want any further evidentiary inquiry into the incident?</u>
>
> MR. HANSEN: <u>No, Your Honor</u>.

That afternoon, the matter came up again, and the Court reiterated its view that the three jurors who had been contacted were not tainted in any way (Ex. B, 4/25/05 Tr. 10668, emphasis added):

> What I am faced with are three jurors who did exactly what we asked them to do, which is notify us of any attempt of anybody to speak with them. None of the three – each [side] had the opportunity to question the three. None of the three indicated in any fashion that this could possibly influence their deliberations. So there is nothing that would lead me to believe there is any problem with the jury at all.

In response to the Court's comment, Morgan Stanley's counsel insisted that the juror taint supposedly was irremediable, because it would be impossible ever to know whether any of the jurors had become biased by the contact (*id.* at 10669-70):

> Your Honor, we can't know exactly how this taint gets into the water and [a]ffects people. The jurors did say what they said. But we can't know how it [a]ffects their decision process. We can't know if they attribute it to one side or the other. We can't know if this Mr. Comyns brushed up against jurors who weren't as forthcoming as the three. . . . We will never know if the jurors think that Mr. Comyns was really part of our group and therefore Morgan Stanley's effort to taint. We will never know if he [sic] feels they're associated with Mr. Scarola's group and hold it against Mr. Scarola. These are things we can never know. And that is why we take such steps to preserve the process as we do.

In response to the comments of Morgan Stanley's counsel, this Court rejected the theory that an outside contact with a juror inherently taints the jury, and once again invited Morgan Stanley's counsel to consider questioning some or all of the jurors further (*id.* at 10670-71, emphasis added):

> The logical extent your making is any time a juror is approached, somehow the entire jury panel is tainted and we need to declare a mistrial. If you'd like to conduct a more in-depth questioning of all of the jurors or some of the jurors, that's something we can talk about.

Notwithstanding this Court invitation, however, Morgan Stanley's counsel let the matter drop.

The next day, April 26, Morgan Stanley's counsel rebuffed yet another opportunity to interview the jurors. In response to Morgan Stanley's renewed request for a mistrial or for a jury

instruction that Mr. Comyns is a client of Mr. Scarola and had no affiliation to Morgan Stanley (Ex. C, 4/26/05 Tr. 10724-25), the Court reiterated both its view that the jurors were not tainted and its prior invitation to interview the jurors (*id.* at 10726, emphasis added):

> As I said from my conversations with the three affected jurors yesterday, I don't have any doubt they can be fair and impartial, and they weren't tainted in the least by this contact. That said, I've offered both sides the opportunity to interview the jurors further. And, you know, unless or until – I would not be inclined to give such an instruction after – unless those jurors first told us that they somehow attributed this person to one side or the other or it could affect their deliberations. As I said, these jurors did exactly what we want jurors to do.

Morgan Stanley asserted that it allegedly was the obligation of the Court and not the parties to pursue the matter of jury bias. The Court responded that it had made a satisfactory inquiry, and then invited Morgan Stanley's counsel to suggest further questioning of not only the three jurors who had been contacted, but all nine of the jurors who sat at the trial (*id.* at 10727-28, emphasis added):

> MR. HANSEN: Just so I'm clear for the record, it's defendant's position here that, with all respect, it's the court's obligation to pursue this matter, not a party's obligation to try and supplement the record.
>
> THE COURT: I understand that. And I guess my response to that would be I have done the inquiry I feel necessary to assure myself that this juror, this jury remains pristine. So to the extent there is something else at play, that is not a matter for my concern during the trial. Are we ready to get the jurors?
>
> MR. HANSEN: Your Honor, we would suggest you would at least make an inquiry of the other jurors to see if they were affected by this contact with Mr. Comyns. Even though three came forward, we're not sure about the other nine [sic].
>
> THE COURT: This is what I offered I think first thing this morning. If you're affirmatively suggesting you want to interview jurors, we can certainly talk about the manner in which that would be done and appropriate areas for questioning. But I have no reason to think any of these jurors has violated his or her oath. In fact, I have every reason to think that they behaved in an exemplary fashion.

> MR. HANSEN: With all respect, that's not the issue, we believe. We believe the issue is has there been a taint imposed into the process in a way that we can't have complete confidence that the process has not been affected.
>
> THE COURT: If you have a specific proposal, I'm happy to listen to it. I don't, based on the record before me, feel the need to investigate it more myself right now.

Morgan Stanley's counsel never made any such proposal for interviewing of jurors.

* * *

The undisputed record shows that this Court consistently and repeatedly afforded Morgan Stanley an opportunity to interview all of the jurors before the verdict — but Morgan Stanley consistently and repeatedly rejected those invitations. Florida courts uniformly hold that where, as here, the trial judge has extended to a party an opportunity to cure a defect in the composition of the jury, and the party foregoes the opportunity to cure, any subsequent complaint about the composition of the jury has been waived. *See, e.g., Akins v. State*, 694 So. 2d 847, 849 (Fla. 4th DCA 1997); *Palmer v. State*, 572 So. 2d 1012, 1013 (Fla. 4th DCA 1991); *Slaughter v. State*, 585 So. 2d 1087, 1088 (Fla. 3d DCA 1991); *Casimiro v. State*, 557 So. 2d 223, 224 (Fla. 3d DCA 1990).

II. Morgan Stanley Also Waived Its Request To Interview the Jurors By Allowing All Of The Jurors To Deliberate Prior To Verdict.

Morgan Stanley waived its ability to question the jurors, not only by refusing this Court's invitation to do so prior to verdict, but by allowing all the jurors to deliberate before the verdict was returned. Morgan Stanley, as observed above, could have interviewed the jurors but chose not to. If Morgan Stanley had interviewed all nine jurors, and if any of those jurors had exhibited bias, any such juror could have been excused. Indeed, even if all three of the jurors who came forward and disclosed Mr. Comyns' contact with them had recanted their statements

to the Court and revealed that they were biased in some way, the trial could have continued with the remaining six jurors deliberating.

But Morgan Stanley chose not to pursue the possible biases of the jurors when the contact with Mr. Comyns came to light. Morgan Stanley instead made the tactical decision to allow the three jurors to remain. Indeed, presumably because Morgan Stanley then considered those three jurors to be sympathetic to the defense, Morgan Stanley opposed CPH's request that any perceived taint be addressed by excusing those three jurors. *See* Ex. A at 10427 (Morgan Stanley's counsel stating "You Honor, we would strongly oppose any effort to punish the three jurors who acted appropriately"). Morgan Stanley also made the further tactical decision to permit all nine jurors to deliberate — perhaps either because Morgan Stanley felt the three alternate jurors also were sympathetic to the defense, or because Morgan Stanley believed a nine-member jury would have a more difficult time reaching a unanimous verdict. In pursuing those tactical choices, Morgan Stanley waived its ability to interview the jurors and challenge their impartiality. Florida courts recognize that it is unfair for a party "to hold back an objection like a trump card, ready to be played in the event of an unfavorable verdict." *Rooney v. Hannon*, 732 So. 2d 408, 411 (Fla. 4th DCA 1999). That is exactly what Morgan Stanley is attempting to do here — but this Court should not entertain that attempt.

III. Morgan Stanley's Motion Should Be Denied Because It Is Not Supported By Sworn Allegations Sufficient To Support The Extraordinary Relief Morgan Stanley Seeks.

Morgan Stanley's motion, even if it sought relief that has not been waived, still would fall far short of the stringent showing that must be made under Florida law. The Florida Supreme Court has held repeatedly that "'juror interviews are not permissible unless the moving party has made sworn allegations that, if true, would require the Court to order a new trial because the alleged error was so fundamental and prejudicial as to obviate the entire

proceedings.'" *Power v. State*, 886 So. 2d 952, 957 (Fla. 2004) (citations omitted, emphasis added); *see also Johnson v. State*, 804 So. 2d 1218, 1224 (Fla. 2001); *Baptist Hospital of Miami, Inc. v. Maler*, 579 So. 2d 97, 100 (Fla. 1991). Florida law imposes this stringent standard because of "the strong public policy against allowing litigants either to harass jurors or to upset a verdict by attempting to ascertain some improper motive underlying it." *Baptist Hospital*, 579 So. 2d at 100.[1]

Morgan Stanley's motion does not set forth any sworn allegation that, if true, would require a new trial. Instead, Morgan Stanley argues merely (at 3) that it should be permitted to interview jurors to determine whether their contact with Mr. Comyns "may have influenced them." Morgan Stanley, however, sets forth no sworn factual allegation showing or even suggesting that any improper jury influence or bias exists, let alone sworn allegations that, if true, would warrant a new trial. Morgan Stanley's entire motion rests on rank speculation — and indeed, speculation that is flatly inconsistent with the juror interviews conducted by the Court, which confirmed that nothing of substance was communicated and that the impartiality of the jurors was not compromised — and therefore is far from sufficient to warrant the "extraordinary and intrusive procedure" of juror interviews. *See Schmitz v. S.A.B.T.C. Townhouse Association*, 537 So. 2d 130, 131 (Fla. 5th DCA 1988). Because juror interviews should "rarely be granted

[1] Morgan Stanley's motion ignores the standard set forth in these Florida Supreme Court cases — despite making a cursory citation to *Baptist Hospital* — and instead argues that it need provide only "a reasonable basis" for its motion. But the case Morgan Stanley cites for that proposition, the Second District's 1983 decision in *Albertsons, Inc. v. Johnson*, 442 So. 2d 371 (Fla. 2d DCA 1983), obviously does not set the standard in light of the considerably more recent and controlling Florida Supreme Court cases cited above. Moreover, Morgan Stanley fails to mention that even in *Albertsons*, the Second District faulted the party who requested juror interviews for failing to set forth its grounds for that relief more specifically in its motion, and for failing to produce affidavits to support the allegations. *Id.* at 372. Morgan Stanley's own motion suffers from those same fatal defects.

and the sanctity of the jury process as well as the privacy rights of the jurors themselves should be closely guarded and protected" (*id.*), and because Morgan Stanley has not made a showing sufficient to overcome the strong presumption against such interviews, Morgan Stanley's request should be rejected.

Conclusion

For the foregoing reasons, because Morgan Stanley's motion seeks relief that it previously was offered but waived, is improper because it is made after the jury verdict, and is insufficient on its face, Morgan Stanley's motion should be denied.

Dated: June 15, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and Federal Express to all counsel on the attached list on this 15th day of June, 2005.

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

CASE NO: 03 CA-005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

NOTICE OF VIDEOTAPED DEPOSITION

PLEASE TAKE NOTICE that Defendant Morgan Stanley & Company Incorporated will take the videotaped deposition of Dr. Blaine F. Nye, pursuant to Florida Rule of Civil Procedure 1.310. The oral examination will take place beginning on June 17, 2005, at 2:00 p.m. and continue from day to day until completed at the offices of Carlton Fields, P.A., 222 Lakeview Avenue, Suite 1400, West Palm Beach, Florida 33401. The deposition will be taken before a person authorized to administer oaths and recorded by stenographic and videographic means. The video operator will be Visual Evidence, 601 North Dixie Highway, West Palm Beach, Florida 33401.

Dated: June 15, 2005

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS' RESPONSE IN OPPOSITION TO MORGAN STANLEY'S MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT AND ALTERNATIVE MOTION FOR NEW TRIAL AND MORGAN STANLEY'S MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT IN PHASE II, OR, IN THE ALTERNATIVE, NEW TRIAL ON PUNITIVE DAMAGES OR FOR REMITTITUR OF PUNITIVE DAMAGES

Morgan Stanley's motions reduce to a request that this Court revisit virtually every ruling that is adverse to Morgan Stanley. Based on the reasoning set forth in numerous orders of the Court, and based on the voluminous arguments and authorities submitted previously by the parties, there is no ground for any of the relief Morgan Stanley seeks in what amounts to a long series of motions for reconsideration of the Court's prior rulings.[1]

[1] This brief responds to Morgan Stanley's Motion for Judgment in Accordance with Motion for Directed Verdict and Alternative Motion for a New Trial, as well as its separate Motion for Judgment in Accordance with Motion for a Directed Verdict in Phase II, or, in the Alternative, New Trial on Punitive Damages or for Remittitur of Punitive Damages. Morgan Stanley filed a consolidated brief on June 6 supporting these motions. Due to the sheer volume of the arguments raised by Morgan Stanley, we respond here solely to the primary ones. To the extent that there are particular evidentiary arguments in the motions that are not answered here, we rely on our previous briefing and argument.

I. This Court Correctly Ruled That Florida Law Governed CPH's Claims.

Morgan Stanley argues (at 2-20) that it is entitled to a directed verdict or a new trial because New York law, instead of Florida law, applies to this case. Morgan Stanley argues that New York law governs because: (1) New York has the most significant relationship to the dispute; and (2) this Court's March 29, 2005 choice of law order misapplies the applicable *Restatement* factors. Morgan Stanley's arguments are without merit.

A. Florida Has The Most Significant Relationship To This Dispute.

As this Court determined in its choice of law order, Florida has the most significant relationship to this dispute. Applying the relevant factors of *Restatement (Second) Conflict of Laws* § 148(2), this Court found that (Ex. 1, 3/29/05 Order, at 5, citations omitted):

> The reliance factors point primarily, but not exclusively, to New York. The misrepresentation factors point primarily, but not exclusively, to Florida. Given the difficulty of determining the location of reliance and injury in cases of pecuniary loss involving intangibles, the reliance factors are accorded less weight than the misrepresentation factors. Consequently, the § 148(2) factors point to Florida as the state with the most significant relationship on this issue.
>
> The choice of Florida is confirmed by the General Principle governing choice of law selection for torts. Where the primary purpose of a tort rule is to deter or punish misconduct, the place where the conduct took place is more important than the state where the injury may have occurred. This is particularly true where the place of injury is fortuitous. Florida's rule that a recipient of a fraudulent misrepresentation may relay on its truth, even if it has the means to verify it, is a strong statement of its policy of protecting the public from fraud, even if the public acts negligently. Florida's policy can be consistently furthered only if it utterers of false misrepresentations in Florida are made to account, wherever the recipient is, particularly where, as here, the location of the ultimate victim was fortuitous. Thus, Florida substantive law, which does not permit a plaintiff's negligent failure to investigate to defeat a claim for intentional misrepresentation, controls over New York law on this point.
>
> Those same policy concerns control the choice of law on damages.... Because the primary purpose of the availability of benefit of the bargain measure of damages is to control a defendant's behavior, and not to compensate a plaintiff for the tort, under the same analysis as above, Florida law controls. In sum, because Florida has an interest in controlling the behavior of its citizens; the rule in Florida on both issues in which it differs from New York is intended to deter

> fraudulent misrepresentations; the bulk of the misrepresentations remain in Florida; misrepresentations were disbursed nationwide; the location of the alleged victim was fortuitous; and the loss pecuniary only, Florida law controls.[2]

In arguing that New York law governs, Morgan Stanley ignores all of the trial evidence that undermines its position — especially the allegations in CPH's amended complaint that the Court read to the jury as established facts. That evidence confirms this Court's conclusion that the Sunbeam fraud was centered in Florida and that the location of the ultimate victims was fortuitous. There is no reason for this Court to reconsider its ruling that Florida law governs.

B. This Court Did Not Misapply The *Restatement*.

There is no basis for Morgan Stanley's contention that this Court misapplied the applicable *Restatement* factors.

First, Morgan Stanley contends (at 10-13) that this Court misinterpreted the *Restatement* in concluding that the place of reliance was less important than the place of the misrepresentations. In fact, as the Court's choice of law order makes clear, this Court properly quoted and applied the relevant *Restatement* comments. Moreover, Morgan Stanley's argument is based on the erroneous assumption that the exclusive place of reliance was New York, which is not the case. As this Court correctly found in its choice of law order (Ex. 1, 3/29/05 Order, at 4-5), CPH relied not only in New York, but in Florida.

Second, Morgan Stanley challenges (at 13-16) the Court's contention that the place of injury was fortuitous, principally by emphasizing the supposed New York contacts in this case — contending (at 14) that "[b]oth parties are based in New York" and that "most of the relevant alleged fraudulent misstatements were intentionally made there and all were intended to be received there." By making this argument, Morgan Stanley ignores myriad Florida contacts,

[2] The exhibits cited herein are contained in a separately bound appendix.

including the fact that this case is about the Florida-based Sunbeam fraud that was implemented in large part in Florida.

Third, Morgan Stanley similarly attacks (at 16-19) this Court's determination that Florida has a strong interest in this dispute — once again by ignoring all of the Florida contacts with this case. Contrary to Morgan Stanley's selective citation of the facts, because this case is about the Florida-based Sunbeam fraud, Florida has the paramount interest in having its liability and damages rules applied.

Fourth, Morgan Stanley lastly criticizes (at 19-20) the Court's determination that the need for uniformity is a reason to apply Florida law, by highlighting the ways in which CPH is not situated similarly with other investors in Sunbeam. Those distinctions, however, make no difference: the fact is that CPH was a victim of the same fraudulent turnaround story that misled every other investor in Sunbeam stock. The Court's uniformity determination, like all other aspects of the choice of law order, is unassailable.

In sum, based on the reasoning in this Court's March 29, 2005 choice of law order — and based on the arguments and authorities cited by CPH in CPH's Response to Morgan Stanley's Notice to Apply New York Law to CPH's Aiding and Abetting Claim (filed March 9, 2005) (Ex. 2), CPH's Response in Opposition to Morgan Stanley's Motion for Summary Judgment (filed December 23, 2004) (Ex. 3), and CPH's and MacAndrews & Forbes Holdings, Inc.'s Response in Opposition to Motion for Application of New York Law (filed June 4, 2004) (Ex. 4), which are hereby incorporated by reference — there is no basis for this Court to reconsider its holding that Florida law governed CPH's claims in this case.

II. This Court Correctly Instructed The Jury On The Issue Of Reliance.

Morgan Stanley next contends (at 20-26) that it is entitled to a new trial because this Court committed instructional errors by failing to instruct the jury on justifiable reliance and by failing to instruct the jury that a sophisticated party such as CPH may not recover if it failed to conduct due diligence. Contrary to Morgan Stanley's contentions, however, this Court properly instructed the jury in accordance with Florida law.

First, this Court correctly instructed the jury on the issue of reliance. This Court instructed the jury that "CPH did not actually rely if . . . CPH knew the statements were false . . . [or] the falsity of the statements was obvious. . . ." *See* Ex. 5, Tr. 14607. That instruction is squarely supported by controlling Florida Supreme Court precedent starting with the seminal case of *Besett v. Basnett*, 389 So. 2d 995, 997 (Fla. 1980). Although Morgan Stanley complains that the word "justifiable" is not used in the instruction, as the Florida Supreme Court has made clear, "[t]he recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him." *M/I Schottenstein Homes, Inc. v. Azam*, 813 So. 2d 91, 93 (Fla. 2002). Thus, the concept of justifiable reliance that Morgan Stanley claims is absent from the jury instructions in fact is inherent in the language adopted by this Court.

Second, this Court correctly refused to instruct the jury that a sophisticated party cannot recover for fraud without conducting due diligence. As is demonstrated in detail in CPH's Memorandum Regarding the Reliance Requirement for Fraud-Based Claims (filed March 1, 2005) (Ex. 6), which is hereby incorporated by reference, Florida law is clear that a victim of fraud has no duty to investigate. Florida's standard jury instruction for fraudulent misrepresentation claims states that "[t]he plaintiff may rely on a false statement, even though its

falsity could have been discovered if plaintiff had made an investigation." *See In re Standard Jury Instructions — Civil Cases*, 828 So. 2d 377, at MI 8.1(a) (Fla. 2002). That principle applies categorically to all victims of fraud — regardless of their so-called business sophistication. As the Fourth District has determined, "[t]he rule of *Besett* [makes] it . . . improper to instruct the jury . . . that a party's business experience and its success may be considered in determining whether reliance was justifiable." *Gold v. Perry*, 456 So. 2d 1197, 1201 (Fla. 4th DCA 1984); *see also Choice Restaurant Acquisition Limited v. Whitley, Inc.*, 816 So. 2d 1165, 1168 (Fla. 4th DCA 2002) (Farmer, J. concurring specially) ("'[D]ue diligence' is irrelevant"); *Eastern Cement v. Halliburton Co.*, 600 So. 2d 469, 471 (Fla. 4th DCA 1992) (under *Besett*, "there is no duty to investigate [a misrepresentation's] truth or falsity unless the recipient knows of its falsity, a situation not present here"); *Greene v. Kolpac Builders, Inc.*, 549 So. 2d 1150, 1151-52 (Fla. 3d DCA 1989) (rejecting the defendant's argument that plaintiff "should have performed independent investigations and cannot now claim it was mistaken or misled" because, under *Besett*, the plaintiff "was not under a duty to discover an affirmative misrepresentation by" defendant); *H&W Enterprises, Inc. v. Ellis*, 467 So. 2d 790, 793 (Fla. 1st DCA 1985) ("*Besett* . . . adopted a rule where the recipient of a misrepresentation is not required to make an investigation unless the falsity is known or obvious").

III. CPH Carried Its Burden Of Proof On Damages.

Morgan Stanley assails (at 26-42) the damages award on multiple grounds, all but one of which (the last point addressed at the end of the section, which clearly was added as an afterthought) are reprises of arguments that have been considered and rejected by this Court. Those arguments do not gain persuasive force by mere repetition.

A. A Number Of Morgan Stanley's Arguments Are Predicated On The Assumption, Already Rejected By This Court, That CPH Was Required To Prove The Actual Value Of The Sunbeam Stock On The Date Of The Transaction.

Several Morgan Stanley damages arguments (at 26-38) are predicated on the assumption that CPH was required to prove the actual value of the Sunbeam stock on the date of the transaction. Morgan Stanley's argument was addressed already in CPH's Response To Morgan Stanley's Motion In Limine No. 16 To Strike The Expert Opinion Of CPH Expert Blaine Nye (filed February 9, 2005) (Ex. 7), which CPH incorporates by reference, and by this Court's February 15, 2005 Order on Morgan Stanley's Motion In Limine #16 (Ex. 8). In that order, this Court rejected Morgan Stanley's contention and ruled that CPH could prove its damages based on the date on which CPH actually was able to sell its shares so long as CPH could present a factual predicate that it was unable to sell its shares until that date. Thus, the legal arguments that Morgan Stanley advances simply rehash contentions that have been rejected by this Court. There is no reason to reconsider Morgan Stanley's arguments.

B. Morgan Stanley's Cross-Examination Was Not "Sharply" Limited.

Morgan Stanley next focuses (at 36) on a couple of instances in which the Court supposedly "sharply" limited Morgan Stanley's cross-examination of Dr. Nye. Those quibbles are without merit — and certainly do not warrant a new trial.

First, the questions appearing at page 10533 of the April 25, 2005 transcript are argumentative, lack foundation for the theory being suggested, and are improper in light of the Court's prior rulings and findings. *See* Ex. 5, Tr. 10533 ("Q. But for one to do a fair calculation of damages, wouldn't one need to ask the question what caused Sunbeam to go bankrupt and thus make shares worthless?" "Q. Is it fair in your mind, Dr. Nye, to attribute to Morgan Stanley

damages that were caused by factors other than Morgan Stanley's conduct?"). So there was no error in limiting those questions — let alone prejudicial error.

Second, with respect to the other questions on pages 10544-46, this Court was clear that because Dr. Nye was asked to assume that the evidence would show that CPH could not sell its Sunbeam stock and that it recovered nothing out of bankruptcy, Dr. Nye was not offering an opinion on the "back end." *See id.* at 10546 (Court observing "I think that doesn't have any legal relevance. I think that's sort of a so-what. If you ask if that is a document you listed and relied on, you can ask that, but then we move on. My understanding of his testimony is he didn't do this second half of the analysis"). Thus, cross examination of him on this point was inappropriate.

C. Morgan Stanley's Argument That CPH's Proof Of Damages Was Deficient In "Numerous Other Respects" Likewise Is Baseless.

Morgan Stanley lastly argues (at 38-42) that CPH's damages proof was deficient in several other miscellaneous respects. Those arguments are without merit.

First, Morgan Stanley argues (at 38-39) that benefit-of-the-bargain damages are not available. The baselessness of this argument has been addressed in detail at pages 3-10 of CPH's Response To Morgan Stanley's Motion In Limine No. 16 To Strike The Expert Opinion Of CPH Expert Blaine Nye (filed February 9, 2005) (Ex. 7), which is incorporated by reference, and at pages 1-8 of Plaintiff's Motion In Limine (No. 19) To Exclude Portions Of Expert Witness Mark Grinblatt's Testimony (filed January 26, 2005) (Ex. 9), which also is incorporated by reference. This Court correctly allowed CPH to proceed on the benefit-of-the-bargain damages theory and there is no basis for reconsidering that determination.

Second, Morgan Stanley next contends (at 39-40) that CPH failed to prove the value the stock would have had on the date of the transaction if the stock had been as represented. This is

another formulation of an argument that CPH addressed and debunked in CPH's Response To Morgan Stanley's Motion In Limine No. 16 To Exclude Certain Testimony Of CPH's Damages Expert Dr. Blaine Nye (filed February 9, 2005). *See* Ex. 7.

As for Morgan Stanley's argument (at 39) that Dr. Nye "compounded his error by choosing the dates for his 21-day average based on the subjective expectations of the parties to the transaction," this also is a rehash of an argument made in connection with Morgan Stanley's Motion In Limine No. 17, in which Morgan Stanley sought to exclude Dr. Nye's testimony on the ground that his use of an average was unsupported and inappropriate. *See* Ex. 10. This Court denied Morgan Stanley's motion by an order dated February 15, 2005. *See* Ex. 11, 2/15/05 Order. Consistent with the Court's ruling, Dr. Nye testified that he used an average to determine the objective, expected value of the shares CPH received. In his professional judgment, the average eliminated daily fluctuations that might be temporary or aberrational. *See* Ex. 5, Tr. 10381-82. Moreover, as Dr. Nye testified, the inclusion in the calculated average of dates after March 18, 1998 actually had the effect of depressing damages, because that period included the market decline resulting from the March 19 press release, which itself introduced a partial effect of the fraud. *Id.* at 10378-79, 10596-97. Morgan Stanley's attack on Dr. Nye's use of an average therefore is baseless.

Third, Morgan Stanley's argument that CPH failed to prove that the sales restrictions precluded a private sale is a reprise of an argument that has been made numerous times, and rejected by this Court as many times. The lack of merit of Morgan Stanley's contentions is demonstrated in Plaintiff's Motion In Limine No. 27 For A Finding As A Matter Of Law That The Federal Securities Law Prohibits Plaintiff From Selling Unregistered Sunbeam Stock (filed March 16, 2005) (Ex. 12), by Plaintiff's Supplemental Disclosure Concerning Plaintiff's

Inability To Sell Its Unregistered Sunbeam Stock (filed April 4, 2005) (Ex. 13), by this Court's March 28, 2005 Order on Motion In Limine No. 27 (Ex. 14), and by this Court's April 14, 2005 Order on Morgan Stanley's Motion for Clarification of the March 28 Order (Ex. 15). This Court repeatedly has rejected Morgan Stanley's arguments, not only in its prior orders, but in its jury instructions.

Fourth, Morgan Stanley's last argument (at 41-42) — that CPH failed to prove that it would have sold the stock before December 6, 1999 had it been able to do so — is a new argument that is entitled to short shrift. The legal reality is that CPH could not sell its stock before then, so engaging in an inquiry at trial about what CPH might have done in the absence of legal impediments would have been pointless. Moreover, legal impediments aside, there were practical barriers to the sale of the stock — specifically, sales of Sunbeam stock by CPH would have sent a ruinous signal to the market that would have cratered the stock price. This argument, like Morgan Stanley's other arguments, therefore has no merit.

IV. Morgan Stanley Is Not Entitled To A New Trial Due To The *Ex Parte* Communication With Jurors By A Third Party.

Morgan Stanley argues (at 42-52) that it is entitled to a new trial because of a third party's communication with several jurors during the course of trial. Morgan Stanley's arguments, which have been vetted fully by the Court already, are without merit.[3]

First, based on this Court's own questioning of the jurors, this Court already has concluded that there is no basis for believing that any of the jurors' impartiality was tainted in any way. *See* Ex. 5, Tr. 10427-29, 10668, 10726-28. Morgan Stanley offers no evidence to the contrary.

[3] CPH is filing a separate response to Morgan Stanley's separately filed motion to interview jurors.

Second, Morgan Stanley's present speculation is entitled to no weight, particularly given that Morgan Stanley repeatedly was offered but rejected opportunities to depose Mr. Comyns and to interview all of the jurors — as is demonstrated in detail in CPH's Response in Opposition to Morgan Stanley's Verified Motion for Order Allowing Interview of Jurors and Notice of Intent to Interview Jurors (filed June 15, 2005), which is incorporated by reference.

Third, as demonstrated in detail in CPH's Opposition to Morgan Stanley's Motion for Mistrial Because of Improper *Ex Parte* Juror Communications (filed May 5, 2005) (Ex. 16), which also is incorporated by reference, the existing record does not come close to establishing that "prejudice resulted or that the [misconduct] was of such a character as to raise a presumption of prejudice." *See Amazon v. State*, 487 So. 2d 8, 11 (Fla. 1986); *see also Hutchinson v. State*, 882 So. 2d 943, 956-57 (Fla. 2004); *First National Bank in Tarpon Springs v. Bliss*, 56 So. 2d 922, 923-24 (Fla. 1952).

V. Morgan Stanley's Argument That CPH Waived The Fraud Is Without Merit.

Morgan Stanley contends (at 52-53) that it is entitled to judgment as a matter of law because the evidence "conclusively" shows that CPH waived the fraud. Morgan Stanley's argument, which has already been considered and rejected by this Court, is without merit.

First, Morgan Stanley waived its waiver argument by failing to raise it as an affirmative defense, either in its answer to CPH's original complaint or in its answer to CPH's amended complaint. Nor was the issue tried by implication, as this Court expressly found at trial. *See* Ex. 5, Tr. 13779.

Second, as this Court also found, there was no evidence offered at trial to support Morgan Stanley's claim of waiver in any event (*id.* at 13780):

> The other thing, I'm not sure if an amendment were permitted, I've said I think that would be wholly improper, that there would be sufficient evidence even to

> support such an affirmative defense here. Waiver [is] an intentional relinquishment of a known right. The evidence is undisputed the first time CPH learned of a potential claim against Morgan Stanley was after they sued Arthur Andersen in discovery in the Arthur Andersen case. And that was in 2001 or thereafter. We're talking about developments that happened in 1998. So clearly there wasn't a waiver of a claim against Morgan Stanley.

Third, as explained by CPH's counsel at trial (*id.* at 13767-71), the cases cited by Morgan Stanley in support of its waiver theory do not stand for the proposition that if a victim of a fraud settles with one of the defrauders, the victim waives the right to sue another party who aided and abetted the fraud. Thus, for multiple reasons, Morgan Stanley's waiver argument fails.

VI. The Court Acted Properly In Not Permitting Morgan Stanley To Contest Its Complicity In The Sunbeam Fraud.

Morgan Stanley argues (at 53-58) that it is entitled to a new trial because this Court should not have prohibited Morgan Stanley from contesting its alleged complicity in the Sunbeam fraud during Phase I. This argument, which amounts to yet another motion to reconsider this Court's March 23, 2005 order, should be rejected. For the reasons stated in that order — and in CPH's Renewed Motion for Entry of Default Judgment and Other Sanctions (filed March 9, 2005) (Ex. 17), which is incorporated by reference — the egregious misconduct by Morgan Stanley in connection with this case would have justified this Court entering a complete default judgment. Those same circumstances clearly justify the lesser sanction adopted by this Court.

VII. The Court Should Reject Morgan Stanley's Request For A New Trial Based On A List Of Supposedly Erroneous Evidentiary Rulings.

The Court should deny Morgan Stanley's request (at 57-58) for a new trial based on cumulative legal error because Morgan Stanley does not come close to showing that the Court's evidentiary rulings were either wrong or so prejudicial as to warrant a new trial. Indeed, Morgan

Stanley's laundry list of so-called prejudicial errors is replete with evidentiary rulings that were both entirely correct and non-prejudicial.

For example, Morgan Stanley asserts that the Court erred in refusing to allow Morgan Stanley to cross-examine CPH's damages expert — Dr. Nye — on whether the March 19 press release partially disclosed the Sunbeam fraud. *See* 5/26/2005 MS Mot. for Judgment in Accordance With the Mot. for Directed Verdict, at 17-18; Ex. 5, Tr. 10490-96 (Court sustaining CPH's objection to Morgan Stanley's questioning of Dr. Nye). Counsel for Morgan Stanley stated that the purpose of asking Dr. Nye whether the March 19 press release partially disclosed the fraud was to impeach Mr. Perelman's testimony on reliance. *See* Ex. 5, Tr. 10491. However, the Court correctly found — in sustaining CPH's objection to Morgan Stanley's use of the word "fraud" in its questioning of Dr. Nye — that Dr. Nye "is perfectly competent to testify [ ] based on his investigation what information caused the stock price to fall. But to sort of jump and use fraud as more of a legal term of art, which is what you're attempting to do, I think is misleading to the jury on reliance." *Id.* at 10495. While Morgan Stanley was not allowed to use the word "fraud," Morgan Stanley was permitted to ask Dr. Nye whether the March 19 press release was "terribly bad news to the shareholders of Sunbeam" and whether the press release told "the marketplace that there were serious issues at the Sunbeam company." *Id.* at 10496. The Court's ruling was proper and there was no unfair prejudice to Morgan Stanley.

Similarly, Morgan Stanley contends that the Court erred in allowing CPH to argue to the jury that CPH relied on the debenture offering materials. *See* 5/26/2005 MS Mot. for Judgment in Accordance With the Mot. for Directed Verdict, at 20. Morgan Stanley states that CPH could not argue it relied on the debenture offering materials because they "were not directed to CPH." *Id.* However, the Court required CPH to present evidence to the jury that "MS & Co. or

Sunbeam had a reason to expect that CPH would act in reliance" upon the offering materials, Ex. 18, 4/22/2005 Order on CPH's Mot. in Limine re: Debenture Offering. A plaintiff may sue if his receipt of, and reliance on, a defendant's fraudulent statement was intended or reasonably foreseeable, irrespective of whether the statement was made to the plaintiff in the first instance. *See Albertson v. Richardson-Merrel, Inc.*, 441 So. 2d 1146, 1149-50 (Fla. 4th DCA 1983) (permitting fraud claims by patients against drug company for false statements made to doctors, but not to patients themselves; law of fraud "does not require that [plaintiff] be the one with whom the misrepresentor directly communicates"). CPH put forward evidence indicating that its reliance on the debenture offering materials was proper. *See, e.g.*, Ex. 5, Tr. 10887-90. Thus, the Court's ruling on this evidentiary issue was proper and Morgan Stanley was not unfairly prejudiced.

Morgan Stanley also claims that the Court erred in limiting Morgan Stanley's questioning of Jerry Levin regarding Levin's personal, subjective valuation of the Coleman-Sunbeam merger. *See* 5/26/2005 MS Mot. for Judgment in Accordance With the Mot. for Directed Verdict, at 25. The Court held that "Levin may not opine on the value of Coleman at any point in time. However, he may testify about what he told a decision maker in the transaction about the value of Coleman prior to execution of the merger agreement." Ex. 19, 5/2/2005 Order on CPH's Mot. In Limine No. 38. The Court's ruling was proper because, as we argued in CPH's Motion in Limine No. 38, Morgan Stanley should not have been allowed to elicit undisclosed expert testimony — under the guise of Mr. Levin's lay opinion — about the value of the merger. Additionally, the Court's order served only as a narrow limitation on Morgan Stanley's ability to question Mr. Levin because Morgan Stanley was allowed to ask Mr. Levin to testify as to whether he conveyed his views on the value of the merger to Mr. Perelman. *See id.*; *see also*

Ex. 5, Tr. 11898-904 (Morgan Stanley's direct examination of Mr. Levin). The Court's ruling was correct and Morgan Stanley was not unfairly prejudiced.

Morgan Stanley argues in addition that the Court erred in restricting Morgan Stanley's ability to question CPH officials about due diligence performed on other transactions, including the Panavision acquisition. *See* 5/26/2005 MS Mot. for Judgment in Accordance With the Mot. for Directed Verdict, at 27. However, there were numerous factual differences between the Coleman-Sunbeam merger and the Panavision acquisition. For example, CPH was only a minority investor in Sunbeam, while MAFCO acquired a controlling interest in Panavision, and during due diligence on the Panavision acquisition the other party fully disclosed that Panavision's earning would be modestly lower than analysts' estimates, while Morgan Stanley and Sunbeam failed to honestly disclose Sunbeam's substantial earnings shortfall. Considering these key distinguishing characteristics, the Court properly excluded any argument by Morgan Stanley regarding MAFCO's due diligence efforts on the Panavision acquisition as irrelevant, unfairly prejudicial, and likely to cause confusion or mislead the jury.

As these examples show, there is nothing in Morgan Stanley's compilation of supposedly erroneous evidentiary rulings that comes close to undermining the validity of the jury's verdict in this case.

VIII. It Was Appropriate To Extend The Partial Default Judgment To Phase II.

Morgan Stanley is equally unpersuasive in arguing (at 58-62) that even if the partial default judgment was proper and justified, it should not have applied to Phase II and that in that phase Morgan Stanley should have been allowed to contest the very elements of CPH's liability case that the jury had just been told to treat as "established" in Phase I. To begin with, it makes no sense to suggest that Phase II was an appropriate time to litigate the merits of the underlying

claims in this case. During that phase, liability — established according to whatever procedure a court has mandated in Phase I — is a given, and the only issue is punitive damages.

Establishing facts for the liability phase in order (as the Court found necessary) to "level the playing field" but then restoring the tilt in favor of Morgan Stanley would have been inherently unfair. This Court determined based on well-supported factual findings that Morgan Stanley, through its intentional misconduct, had prevented CPH from having a full and fair opportunity to prove some elements of its conspiracy and aiding-and-abetting claims. *See* Ex. 20, Order on Plaintiff's Motion in Limine No. 36 to Clarify What Evidence Is Admissible to Show Plaintiff's Entitlement to and Amount of Punitive Damages, at 2 (May 16, 2005) (hereafter "Order on CPH MIL 36") (explaining that in the March 23 Default Order, the Court determined that "MS & Co.'s acts in depriving CPH of crucial documents and discovery to prove its claims require that certain facts be removed from dispute"). That was why the Court conclusively determined the facts as to those elements, leaving remaining elements for trial in Phase I.

The Court went on to determine, after careful consideration, that it was also necessary and appropriate to have the same facts be treated as "established" in Phase II. *See id.* ("If the case proceeds to Phase II on punitive damages, the facts established by Exhibit A to the Court's March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment shall be binding on the parties to support a claim for punitive damages predicated solely on the fraud against CPH."). It did so because it would have been just as unfair to try those issues in Phase II, given Morgan Stanley's non-production of relevant evidence and other violations that impacted CPH's proof of its case. *See id.* at 3 n.2 ("MS & Co. cannot refute the deemed facts [in Phase II], because their misconduct prevented a full trial on the merits.").

Morgan Stanley offers no persuasive reason to rethink the Court's prior determinations on this point. In Phase II, because of Morgan Stanley's discovery misconduct, CPH would still have been unfairly hobbled in proving whether and how Morgan Stanley intentionally set out to work with Sunbeam on defrauding CPH. For that reason, Morgan Stanley's argument is, in effect, that it had a right to an unfairly skewed trial of the merits in Phase II even though it was Morgan Stanley that prevented a full and fair trial in the first instance. This Court properly rejected such a notion.

Nor do the cases cited by Morgan Stanley demand such an illogical conclusion. For example, the language Morgan Stanley relies on in *Humana Health Ins. Co. v. Chipps*, 802 So. 2d 492 (Fla. 4th DCA 2001), did not involve facts conclusively determined by the Court prior to Phase II. To the contrary, as this Court noted on April 5 during an argument on this issue, the evidence improperly excluded in *Humana* was "pure mitigation evidence [as opposed to evidence in] contradiction of a statement of fact that had previously already been determined by default." 4/5/05 Tr. at 6666-67. Nothing in that case even suggests a right to litigate facts in Phase II that were properly conclusively established in Phase I. The same is true for *Nordyne, Inc. v. Florida Mobile Home Supply, Inc.*, 625 So. 2d 1283, 1289 (Fla. 1st DCA 1993).

As for the out-of-state cases cited, *Hunter v. Spaulding*, 388 S.E.2d 630, 635-36 (N.C. App. 1990), and *Gallegos v. Franklin*, 547 P.2d 1160 (N.M. App. 1976), stand only for the proposition that a party defaulted at the liability stage should be given the opportunity to present some evidence in an attempt to stave off or minimize punitive damages. They in no way support the notion that there is a right in the punitive phase to contradict the facts found by the court by virtue of the default. *See id.* at 1165 ("Generally, a default judgment precludes a trial of facts, except as to damages. The allegations of the complaint, in effect, become findings of fact.").

See also Payne v. Dewitt, 995 P.2d 1088, 1094-95 (Okla. 1999) (error to deny defaulted defendant right to cross-examine in damages phase).

Finally, *New Hampshire Ins. Co. v. Royal Ins. Co.*, 559 So. 2d 102 (Fla. 4th DCA 1990), is inapposite as well. There, the defendant was very tardy in responding to discovery relating to a particular file but finally did respond by swearing that the file had been destroyed. The trial court granted a default judgment. The court of appeals reversed, holding (1) that the defendant had answered the discovery inquiry and thus could not be defaulted on that basis, and (2) that the destruction of the relevant file could not by itself be a basis for a default absent a showing that the file contained significant information. *Id.* at 103. That ruling hardly suggests that a default should not have been entered, or should not have been extended to Phase II, where the Court found violations of multiple court orders, including a massive effort to destroy, conceal, and suppress evidence which included false statements of counsel, false testimony under oath, a false certification, repeated failures to conduct thorough searches, repeated failures to analyze tapes competently and on a timely basis, and more.

IX. There Was No Error In The Court's Decisions About Redaction Of The Established Facts.

Morgan Stanley goes on to argue (at 62-64) that the established facts should have been edited in Phase II to eliminate particular details in the established facts — selected according to no particular principle we can discern — that Morgan Stanley sees as excessively indicative of the reprehensibility of its conduct. Morgan Stanley again tries to rely on *Humana Health Ins. Co. v. Chipps, supra*, which held that the Court should be careful not to make comments that prevent a jury from making its own determination about the egregiousness of a defendant's conduct. But because the Court complied scrupulously with that rule, Morgan Stanley is forced to try to distort the rule — claiming that there is "no practical difference between directing the

jury to find that Morgan Stanley acted with 'evil intent' [as in *Humana*] and precluding Morgan Stanley from contradicting the deemed facts that supposedly demonstrate its 'evil intent.'" Br. at 64.

There is, of course, a world of difference. Facts like those Morgan Stanley complains about — such as the details of when Morgan Stanley learned about the fraud and which Morgan Stanley personnel were involved — are the evidence that juries use to assess egregiousness and reprehensibility. They are not the same as a determination of reprehensibility. To be sure, in this instance, the Court properly determined that those facts could not be litigated because of Morgan Stanley's abusive suppression of the necessary evidence. But assuming the validity of that determination, *see supra*, *Humana* provides no basis for picking and choosing among the established facts to identify particular details that Morgan Stanley would prefer to have had excluded. To the contrary, asking the jury to make a determination about reprehensibility without hearing the very facts most relevant to that assessment would have deprived CPH of a fair hearing and ended up allowing Morgan Stanley to benefit from the fact that it had precluded a full and fair adjudication based on all the relevant evidence.

X. It Was Proper To Read The Litigation Misconduct Statement To The Jury In Phase II.

Morgan Stanley next argues (at 64-79) that the Court erred in presenting the litigation misconduct statement to the jury in Phase II, arguing (1) that litigation misconduct was not legally relevant, (2) that the facts relating to misconduct should have been relitigated from scratch in front of the jury, (3) that Morgan Stanley did not receive proper notice during pretrial proceedings that such a statement might be read, (4) that the statement should have been further redacted, (5) that the Court did not go far enough in allowing Morgan Stanley to respond with

evidence of its own, and (6) that CPH's demonstratives were unfair. None of these arguments holds water.

First, as to relevance, this Court has already specifically held, after full consideration, that "evidence of concealment of a fraud, even if during the discovery phase, is relevant in the punitive damages phase as indicative of malice." Ex. 20, Order on CPH MIL 36, at 2 (citing *General Motors Corp. v. McGee*, 837 So. 2d 1010 (Fla. 4th DCA 2003)). The Court explained that, were the rule otherwise, a defendant facing a likelihood of liability in an intentional tort case would have every incentive to destroy the evidence that might support punitive damages, because that destruction could not augment its exposure. *Id.* The Court accordingly confirmed on May 16 "that the statement concerning litigation misconduct [shall] be read to the jury." *Id.* at 3. But it carefully limited that ruling. The Court held that only those portions of the statement relating to e-mail could be presented, because those portions were most directly relevant to covering up the tortious conduct at issue here. *Id.* The Court thus excluded references to matters like the hiding of evidence relating to Strong's Italian prosecution — even though that evidence tended to show Morgan Stanley's efforts to hide some of the circumstances that motivated it to engage in fraud — and other matters that could have buttressed the case for punitive damages. Then the Court held that Morgan Stanley could present any evidence not inconsistent with the Court's findings "such as would permit a reasonable juror to conclude that MS & Co. did not intend to conceal evidence of the fraud." *Id.*

Morgan Stanley clearly errs in trying to distinguish *General Motors Corp. v. McGee* on the ground that it has not been shown that the withheld or destroyed e-mails contained a "smoking gun." The case contains no such requirement. Moreover, it is almost bizarre for Morgan Stanley to claim (at 66) that in the absence of such a smoking gun, "the Court engaged

in undue speculation in concluding that the discovery omissions were part of an effort by Morgan Stanley to conceal its complicity in the Sunbeam fraud." Far from engaging in undue speculation, the Court properly found what was an obvious fact: that Morgan Stanley engaged in a lengthy and deliberate campaign of deception and defiance that could only have been aimed at preventing any substantial discovery of relevant internal e-mails. Based on that pattern of egregious conduct, the only possible inference is that Morgan Stanley personnel — many of whom were involved in the transactions and communications at issue — had good reason to fear what the e-mails would reveal. There is no logical reason to require more than that — *i.e.*, a smoking gun. To do so would reward those defendants most successful in their cover-ups.

Nor is the rule of *General Motors Corp. v. McGee* limited to situations in which the cover-up began before the particular tort at issue in the case occurred. If a cover-up is relevant to punitive damage because it is evidence of malice, as *General Motors Corp. v. McGee* holds, then there is no logical reason to demand that the cover-up have begun before the particular incident at issue. A defendant's punishment for an intentional tort is properly augmented if it went on to engage in dishonest and illegal conduct to prevent the victim from obtaining redress.

Second, Morgan Stanley has no basis for suggesting that the Court had a duty to force CPH to relitigate the cover-up issue from scratch in front of the jury. The Court held full-blown evidentiary hearings before trial to determine the nature and extent of Morgan Stanley's litigation misconduct aimed at preventing access to e-mail in order to cover up tortious conduct. Morgan Stanley does not and cannot claim that such an evidentiary inquiry was unfair or improper. The Court, in turn, entered detailed findings of fact well supported by the evidence presented at those hearings. Morgan Stanley also does not claim that those findings were clearly erroneous.

It follows that the right to a jury trial was not violated when Morgan Stanley was then barred at trial from contesting the facts found by the Court. To the contrary, that right extends only to issues that are properly subject to dispute at the time the case goes to trial. A party may not claim a right to have a jury reconsider facts that are no longer debatable because the party is collaterally estopped on that issue, or because the party had previously made a binding admission, or because the Court has previously entered findings of fact at an evidentiary hearing.

For example, in *In re Estate of Howard v. Baumer*, 542 So. 2d 395 (Fla. 1st DCA 1989), a party to an equitable probate proceeding argued that it was error for the court to decide key factual issues without a jury because its findings might control the outcome in related, pending actions at law subject to the right to a jury trial. *Id.* at 399. The First DCA rejected that argument by analogizing to a well-known U.S. Supreme Court decision:

> The United States Supreme Court has held that even if a prior judgment in an equitable proceeding collaterally estops a party from litigating the same facts before a jury in another pending action, the judgment in the equitable proceeding does not amount to a violation of the party's right to a trial by jury under the Seventh Amendment to the United States Constitution. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). This is so because the party against whom estoppel is asserted has litigated questions of fact, and has had the facts determined against him in an earlier proceeding. There is no further fact-finding function for the jury to perform, since the common factual issues have been resolved in the previous action. 439 U.S. at 336.

542 So. 2d at 399.

Ignoring this precedent, Morgan Stanley presents a discussion of case law that has no relevance to its claims. It cites cases holding that it is up to the jury to weigh evidence and determine facts, but no case holding that prior findings by a judge may not be treated as binding in a subsequent jury trial. Certainly *General Motors Corp. v. McGee*, *supra*, does not support that proposition. The court there did allow the parties to present evidence to the jury relating to

the defendant's cover-up — but there is no indication that the trial court had made any prior findings of fact that could have been binding at trial. So the case has no pertinence whatsoever.

Implicitly recognizing the analogy to collateral estoppel, Morgan Stanley also argues that it did not have a full and fair opportunity to litigate the cover-up issue. But this argument is premised on a gross mischaracterization of the issues that were litigated in the pretrial hearings. Morgan Stanley states that the subject of those prior hearings was not concealment of e-mails but something "completely different: whether Morgan Stanley had made a good faith effort to comply with CPH's discovery requests and the Agreed Order of April 16, 2004." But, of course, that is a distinction without a difference. The Court's findings that Morgan Stanley acted deceptively and in bad faith in its response to discovery requests and knowingly violated the Agreed Order were tantamount to a finding of an intentional cover-up of evidence.

Certainly it is not true (at 71) that the focus of the hearings was "technical issues" relating to the e-mail archive, "misplaced" back-up tapes, and "programming glitches that led to the discovery shortcomings." Those statements reflect Morgan Stanley's public relations strategy but not the reality of what occurred. The late-found back-up tapes and programming glitches were a piece of a much larger puzzle dominated by the reality that Morgan Stanley had deliberately sought to conceal the existence of an e-mail archive containing pre-2000 e-mail, had certified compliance with the Agreed Order at a time when its IT personnel and its counsel knew there were unsearched back-up tapes, had learned within days after that certification that the unsearched tapes contained e-mails, and only revealed any of this grudgingly many months later when an SEC inquiry raised concerns that the facts could not be suppressed forever.

Morgan Stanley cannot deny that it had a fair opportunity to contest those facts. Nor is there any argument that it lacked the notice or incentive needed to do so. The facts of the cover-

up simply could not be denied. Indeed, many of the facts on which the Court relied were not even contested. For example, it was not contested that an archive containing thousands of "historic" e-mails was up and running by the winter of 2004, when Robert Saunders gave sworn testimony denying its existence and counsel wrote a letter saying that producing any e-mail would be enormously costly, burdensome and time-consuming. Nor was it contested that the June 2004 Riel certification was knowingly false. Nor was it denied that counsel misstated the facts again in November 2004 in reporting the existence of "newly discovered" back-up tapes. Frankly, given that reality, it is hard to believe Morgan Stanley would really have preferred a full-fledged factual inquiry into these issues in front of the jury. Instead, it is desperately casting about now for arguments for overturning the verdict.

Third, there is no basis for suggesting (at 73-75) that due process required the Court to announce the possibility of a litigation misconduct statement being presented at trial before the relevant evidentiary hearings were commenced. To begin with, it is spurious, for reasons already stated, for Morgan Stanley to suggest that it was surprised to learn that it might be bound at trial by the court's earlier factual findings. Moreover, even assuming such a surprise occurred, Morgan Stanley has not suggested a single thing it would have done differently at the hearings. Given that it knew it was addressing a motion for an adverse inference and later a default judgment, it had every incentive to make the best case possible. It cannot now complain that the Court also granted the lesser relief of telling the jury the facts about Morgan Stanley's cover-up efforts.

Fourth, Morgan Stanley is not persuasive in arguing (at 75-76) that the litigation misconduct statement, which the Court redacted heavily, should have been redacted even further. It asserts, without explanation, that the Court committed reversible error by failing to "take out

all references to what certain individuals in Morgan Stanley's Law Division knew." *Id.* But given that the litigation misconduct was being read to help the jury assess the issue of Morgan Stanley's malice in covering up its conduct, it is hard to imagine why this particular piece of evidence should have been excluded. It was obviously highly relevant and does not create an undue risk of the jury punishing Morgan Stanley for its discovery misconduct directly.

Fifth, Morgan Stanley errs in claiming that it should have been allowed to "point out that CPH had overwritten many e-mails" and that the Court should have told the jury that "it did not know the content of the [Morgan Stanley] e-mails that were not produced." *Id.* As to the former, those facts were already in the record as a result of the Court allowing Morgan Stanley to present the Fasman deposition in Phase I of the trial. Moreover, the two parties' conduct is not comparable because CPH acted lawfully while Morgan Stanley violated federal law when it failed to preserve e-mails. As for the complaint that the Court should have told the jury that the content of the e-mails remained unknown, Morgan Stanley fails to explain why this would have been relevant, let alone essential. The maliciousness of Morgan Stanley's conduct was not mitigated by the fact that the case went to trial before the substance of all of the withheld evidence — at least the evidence that still exists — was revealed.

Morgan Stanley goes on to complain (at 77-78) that it was not given sufficient notice of its right to present "evidence not inconsistent with [the litigation misconduct statement] such as would permit a reasonable juror to conclude that MS & Co. did not intend to conceal evidence of the fraud." Ex. 20, Order on CPH MIL 36, at 3. But this statement from the Court was nothing new. It was clear all along that Morgan Stanley was free to present any relevant evidence that did not contradict the Court's findings. Moreover, as Morgan Stanley simultaneously concedes (at 77), it could not have presented the contemplated testimony — to the effect that the discovery

problems resulted from sloppiness and mistakes (the "Keystone cops" defense) — without contradicting factual findings in the litigation misconduct statement precluding any such conclusion. The reality, as this Court found based on ample evidence, is that only some of the discovery shortfalls could possibly have resulted from negligence. The rest were part of a campaign to defraud CPH and the Court. So the argument about the timeliness of the Court's order allowing Morgan Stanley to call explanatory witnesses is a red herring for multiple reasons.

Sixth, Morgan Stanley cannot obtain a new trial by pointing to a single, allegedly improper word in a single demonstrative used by CPH in argument to the jury during Phase II. The demonstrative said that Morgan Stanley lied about pre-2000 e-mails having been "destroyed." Morgan Stanley complains that the litigation misconduct statement did not use that word. But the statement did refer to CPH being told, falsely, that "no e-mail data existed for any time period before January 2000," Ex. 5, Tr. 15447, a statement that could only lead the recipient to infer a failure to preserve that evidence. Moreover, as Morgan Stanley acknowledges (at 78 n.29), CPH expressly told the jury that the slide at issue represented an inference they were being asked to draw from the established facts. *See id.* at 15648 ("We have gone through the exact quotes from the litigation misconduct statement. What you are about to see are the conclusions that we suggest follow from the exact quotes that you have just reviewed.") So there is no conceivable unfairness here. *See Dessaure v. State*, 891 So. 2d 455, 468 (Fla. 2004) ("'[t]he proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence'") (citation omitted).

XI. There Was No Error In The Admission Of Financial Information In Phase II.

In arguing (at 79-83) about the admission of financial information in Phase II, Morgan Stanley incorporates by reference all of its prior briefing arguing that, under *State Farm Mut. Ins.*

Co. v. Campbell, 538 U.S. 408 (2003), it is improper to tell the jury how much money a defendant has. We incorporate by reference CPH's reply briefing on that point. *See, e.g.*, Plaintiff's Response to Defendant's Submission Regarding Phase II Issues (filed April 28, 2005), at 14-17 (Ex. 21); CPH's Supplemental Memorandum of Law in Support of the Permissible Scope of Phase II Evidence Regarding the Defendant's Pecuniary Circumstances (filed May 16, 2005) (Ex. 22). As we have shown, and this Court has ruled, *see* Ex. 5, Tr. 14825, nothing in federal or state law prohibits consideration of wealth, as long as wealth is not given excessive emphasis. To ignore this factor would ignore the punitive purpose of punitive damages. *See id.* at 14824 ("Are you telling me you don't think Plaintiff can put on any financial information at all? How do we know the ouch?"). Indeed, the central reason for bifurcation of jury trials involving punitive damages claims in Florida is to allow for introduction of financial evidence after the liability verdict has come in. *See W.R. Grace & Co. v. Waters*, 638 So. 2d 502, 506 (Fla. 1994).

As for the issue of the admissibility of the credit agreement with MS & Co.'s parent company, the Court considered that issue in detail and correctly determined that the agreement was relevant to the key question of how large a punitive damages award could be imposed without mortally wounding the defendant. As a matter of law, the relevant evidence of a defendant's financial resources is not limited to its net worth. As the Fourth DCA put it:

> "And now back to the term "financial resources" contained in the instruction. As stated, it is the broader concept and, depending upon the circumstances, there may well be additional proofs which would be helpful to the jury and court, which proofs would not be necessarily included in a defendant's balance sheet. Thus, the term gives the trial judge a more liberal standard to determine whether a given proffer of evidence is relevant and material. For instance, there could well be, and properly so, proof as to income, cash flow, expenses, anticipated income, anticipate diminutions of income, anticipated casualties and, as in the instant case, proofs as to assessments of the membership possibilities. These items, among

> other of like moment, would be receivable in addition to net worth figures under the scope of financial resources."

Donahue v. Hebert, 355 So. 2d 1264, 1265 (Fla. 4th DCA 1978) (citation omitted).

In the present circumstances, the Court correctly determined that relevant financial resources include a credit agreement with a parent that is obliged to supply particular capital needs that may arise. This is particularly true when you are dealing with a subsidiary that throws off considerable income but maintains a relatively low net worth, secure in the knowledge that it can obtain needed funds at a moment's notice. Absent this information, the jury could have arrived at conclusions about the defendant's ability to pay that were absolutely false.

XII. The Jury Instructions In Phase II Were Proper.

Morgan Stanley next complains (at 83-87) about the instructions given to the jury in Phase II. Morgan Stanley's argument, however, proceeds from a flawed premise — that a litigant is entitled to have any requested instruction read to the jury in the form it requests, so long as the instruction does not affirmatively misstate the law. Contrary to Morgan Stanley's implication, the law in Florida is that "if jury instructions, viewed as a whole, fairly state the applicable law to the jury, the failure to give particular instructions will not be error." *CSX Trans. Inc. v. Whittler*, 584 So. 2d 579, 586 (Fla. 4th DCA 1991); *Ryder Trs., Ins. v. Hirsch*, 2005 WL 475411 at *2 (Fla. 4th DCA May 11, 2005) (failure to give defendant's requested jury instruction "better tailored to [defendant's] defense" is not error so long as the instructions that are given "did not mislead or confuse the jury."). The three instructions Morgan Stanley now claims should have been given were all properly omitted: the concept conveyed in the first instruction was already given elsewhere, the second instruction was specifically refused by Morgan Stanley's counsel when offered by the Court, and the third was unnecessary. Thus, none of the omitted instructions about which Morgan Stanley complains satisfies the standard of being

"necessary to allow the jury to properly resolve all issues in the case." *Wransky v. Dalfo*, 801 So. 2d 239, 243 (Fla. 4th DCA 2001) (internal citations omitted).

Morgan Stanley first complains (at 84) that the Court did not give its requested instruction that "compensatory damages serve a deterrent function." The jury was specifically instructed, as per Morgan Stanley's request, that punitive damages are warranted only if "Morgan Stanley's culpability is so reprehensible that *in addition to the compensatory damages that Morgan Stanley must pay*, a penalty is necessary to achieve just punishment and adequate deterrence." Ex. 5, Tr. 15730 (emphasis added). While Morgan Stanley might have preferred an instruction "better tailored" to Morgan Stanley's view of the case, *Ryder Trs.*, 2005 WL 475411 at *2, that is not a reason for discarding the verdict. The instruction actually given correctly expresses the legal concept Morgan Stanley now complains was lacking.

Second, Morgan Stanley claims it was error not to give an instruction Morgan Stanley's counsel specifically refused when offered by the Court — namely whether "punitive damages were necessary to completely remove Morgan Stanley's profit from its alleged wrongdoing," Br. at 84. As Morgan Stanley notes in its brief, the "profitability to [the defendant] of the wrongful conduct and the desirability of removing that profit and having [the defendant] also sustain a loss" is one of the factors the jury may sometimes consider in determining the amount of punitive damages. Br. at 86, quoting *Owens-Corning Fiberglass Corp. v. Bollard*, 749 So. 2d 483, 485 (Fla. 1999). The Court accordingly offered to instruct the jury that the profitability of the conduct to Morgan Stanley was among the factors it should consider in determining the amount of punitive damages — an instruction virtually identical to the one the Florida Supreme Court approved in *Owens-Corning*, 749 So. 2d at 485. Morgan Stanley's counsel, however, refused the offered instruction, insisting that Morgan Stanley did not want it at all unless it

additionally commented on the effect of compensatory damages. Ex. 5, Tr. 15220-21. Morgan Stanley may not now complain that the Court denied it the "the single most powerful argument Morgan Stanley had for awarding no or modest punitive damages," Br. at 86, when it refused a legally accurate instruction offered that would have supported Morgan Stanley's argument that the profitability of its own misconduct was modest relative to the amount of money at stake in the case. Again, the instruction offered by the Court could have been "better tailored to [Morgan Stanley's] defense," *Ryder Trs.*, 2005 WL 475411 at *2, but the Court's refusal to word the instruction in the manner requested by Morgan Stanley and comment on the compensatory award did not leave the instruction "mislead[ing] or confus[ing]," *id.*, particularly where the jury had already been instructed that the question in Phase Two was whether punitive damages were necessary "in addition to the compensatory damages that Morgan Stanley must pay." Ex. 5, Tr. 15730. Indeed, had the Court given the instruction in the form Morgan Stanley demanded, the jury instructions would have been affirmatively misleading, as they would have strongly suggested to the jury that the profitability of Morgan Stanley's misconduct was relevant only to the deterrent purpose of punitive damages, and not also to their punitive purpose.

Third, Morgan Stanley objects (at 86) that the Court did not give a negative charge instructing the jury that the "requirement of a reasonable relationship is not violated by awarding no punitive damages or a smaller award of punitive damages." There are two things wrong with this argument. First, the Court never instructed the jury about any "requirement on a reasonable relationship" to compensatory damages in the first place; rather it instructed the jury that "punitive damages *should not be unreasonable* in relation to the harmfulness of the conduct to CPH." Ex. 5, Tr. 15733 (emphasis added). Given that the jury was never instructed on any affirmative requirement that punitive damages should bear a reasonable relationship to

compensatory damages, there was no need to give a negative charge to clarify the hypothetical affirmative charge. Second, the Court twice instructed the jury that they could award no punitive damages at all, *see* Ex. 5, Tr. 15730, 15733, so it is hardly plausible that the jury believed it was obligated to award an amount similar to the compensatory damages award.

Morgan Stanley objects (at 87) additionally to the fact that the issue of corporate liability was determined through the established facts rather than resubmitted to the jury during the punitive damages phase. This is nothing more than a repetition of Morgan Stanley's previous argument that the established facts should not have applied in Phase II, and it should be rejected for the same reasons. Certainly there can be no doubt that the established facts sufficed to establish Morgan Stanley's corporate liability. *See Winn-Dixie Stores, Inc. v. Robinson*, 472 So. 2d 722, 724 (Fla. 1985) (jury finding the corporation was itself responsible for wrongful acts sufficed to hold it liable for punitive-damages purposes); *Schropp v. Crown Eurocars, Inc.*, 654 So. 2d 1158, 1160-61 (Fla. 1995) (affirming that *Winn-Dixie Stores* was decided under managing-agent theory of corporate liability).

XIII. The Punitive Damage Award Was Not Impermissibly Excessive.

Finally, Morgan Stanley argues that the punitive damages award of $850 million is excessive. In so arguing, Morgan Stanley says repeatedly that an award of this magnitude is nearly unprecedented. But it fails to come to grips with the fact that the magnitude of the fraud was also virtually unprecedented. Given the nature and enormity of the wrong that Morgan Stanley played a central role in committing, a punitive award of 1.4 times the compensatory award was far from excessive as a punishment for a defendant with the kind of financial resources available to Morgan Stanley. *See Owens-Corning*, 749 So. 2d at 487 ("Punitive damages 'are peculiarly left to the discretion of the jury'") (citation omitted).

First, as to reprehensibility, Morgan Stanley makes much of the fact that it inflicted no physical injury and did not harm a vulnerable victim. But the fact remains that it worked closely with Sunbeam over a period of many months to execute a scheme by which the financial status of that company was grossly misrepresented in order that CPH could be duped into receiving worthless stock. Morgan Stanley then took on a central role in persuading Mr. Perelman to become a victim of the fraud, to the tune of more than $600 million. Such a tort is especially reprehensible for an esteemed investment bank that trades on trust, inviting the investing community to rely on its honesty and the quality of its due diligence. In the words of former Vice-Chairman Joseph Perella, investors believe that "if we put our name on an underwriting that we've done due diligence at a very high standard and we work for quality companies." *See* Tr. 9054.

Moreover, it makes no sense for Morgan Stanley to argue that because of the massive scale of its tort — resulting in a very large compensatory award — there is no need to add a punitive award to achieve the goals of deterrence. To begin with, deterrence is not the only purpose of punitive damages. They serve to punish as well. More fundamentally, there is no apparent reason why the tortious conduct of a large Wall Street firm should be treated any differently from that of any other business, just because the dollar figures are much larger.

Certainly it is not correct for Morgan Stanley to claim that *State Farm* capped punitive damages at a ratio of 1:1 when substantial compensatory damages have been awarded. To the contrary, as counsel for Morgan Stanley conceded in December, "there's a limit on the punitive damages that can be awarded in this case of three times compensatory. We all know that, and they recognize it." Ex. 23, Tr. 74. And nothing in the jurisprudence of the Supreme Court suggests that this was a legal error. Indeed, on remand in *State Farm*, the Utah Supreme Court

approved punitive damages in an amount nine times the compensatory, *Campbell v. State Farm Mut. Auto Ins. Co.*, 98 P.3d 409, 417-18 (Utah 2004), and the U.S. Supreme Court denied further review, 125 S. Ct. 114 (2004). Nor, as we have already suggested, can the verdict be attacked by reference to the net worth of MS & Co. That figure is infinitely manipulable in a situation where money is passed back and forth between parent and subsidiary routinely. The reality is that only a punitive verdict in the range of the one actually awarded would actually get Morgan Stanley's attention. Indeed, if anything, the jury's punitive verdict was conservative given that CPH requested an award in the range of $1.2 - 1.8 billion.

Conclusion

For the foregoing reasons, Morgan Stanley's motion for judgment in accordance with motion for directed verdict and alternative motion for a new trial, and Morgan Stanley's motion for judgment in accordance with motion for directed verdict in phase II, or, in the alternative, new trial on punitive damages or for remittitur of punitive damages, should be denied.

Dated: June 15, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and Federal Express to all counsel on the attached list on this 15th day of June, 2005.

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

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

AGREED ORDER GRANTING
VERIFIED MOTION TO ADMIT MICHAEL KELLOGG, *PRO HAC VICE*

THIS CAUSE having come before the Court upon the Verified Motion to Admit Michael Kellogg, *Pro Hac Vice*, and the Court having been advised of the agreement of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

Morgan Stanley's Verified Motion to Admit Michael Kellogg, *Pro Hac Vice* is **GRANTED**. Mr. Kellogg is admitted to practice in this case.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____ of June, 2005.

SIGNED & DATED
JUN 16 2005
JUDGE ELIZABETH T. MAASS

Elizabeth T. Maass
Circuit Court Judge

cc: Counsel of Record on attached Service List

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June 16, 2005

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Re: Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Matter No.: 029986-230580

Dear Judge Maass:

The accompanying motion requests emergency relief relating to the hearings scheduled before Your Honor on Monday and Tuesday. I believe that the issue can be resolved in a very brief telephone hearing at the Court's convenience.

Respectfully,

JACK SCAROLA
JS/mep
Enc.

cc: Joseph Ianno, Esq. (Via Fax)
Mark Hansen, Esq. (Via Fax)
Jerold S. Solovy, Esq. (Via Fax)

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS, INC.'S EMERGENCY MOTION TO COMPEL MORGAN STANLEY TO PRODUCE SUBPOENA SERVED ON DELOITTE & TOUCHE

Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys, respectfully requests that this Court direct Morgan Stanley to provide CPH with a copy of a subpoena relating to the upcoming hearings on June 20 and 21, 2005 that Morgan Stanley has served on Deloitte & Touche. In support of this motion, CPH states as follows:

1. This motion arises because Morgan Stanley has refused, for inexplicable reasons, to provide a copy of a subpoena that it served on Deloitte & Touche in connection with the upcoming hearings on June 20 and 21. Morgan Stanley advised CPH yesterday that it served the subpoena. When CPH learned of this fact, in accordance with Morgan Stanley's prior agreement in this case to provide all subpoenas served on third parties to CPH, CPH wrote Mr. Ianno requesting a copy of the subpoena. *See* Ex. A. CPH was advised that Mr. Ianno was out of the office until Friday of this week. When CPH learned of this fact, CPH contacted Mr. Webster of Kellogg Huber to obtain a copy of the subpoena. Mr. Webster responded with a non-response: Mr. Webster stated that, because Kellogg Huber is so "new" to the case, this was a matter that was left to Mr. Ianno. Mr. Webster consequently stated that CPH should take up the matter with

Mr. Ianno — even after counsel for CPH advised him that Mr. Ianno was out of the office until Friday.

2. CPH thereafter contacted Mr. Ianno's office again and was advised for the second time that Mr. Ianno was out of the office until Friday. When asked whether Mr. Ianno would be checking his messages before then, CPH was given no assurance that he would do so.

3. The runaround that CPH is encountering in obtaining a copy of the Deloitte & Touche subpoena is, quite frankly, silly. CPH in fairness should be provided with a copy of the subpoena in advance of the upcoming hearings. But given the runaround that CPH has received from Morgan Stanley's counsel — both in West Palm Beach and in Washington, D.C. — CPH has no alternative but to seek emergency relief from this Court. Consequently, for the foregoing reasons, CPH respectfully requests that this Court direct Morgan Stanley to provide to CPH immediately the subpoena served on Deloitte & Touche in connection with the upcoming June 20 and 21 hearings.

Dated: June 16, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and Federal Express to all counsel on the attached list on this 16th day of June, 2005.

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June 15, 2005

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Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.*

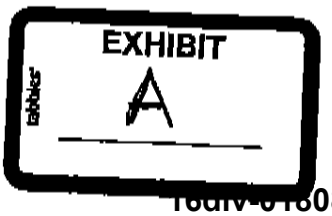
Dear Joe:

Yesterday afternoon, Jim Webster and Rebecca Beynon informed us that Morgan Stanley has issued and served a subpoena on Deloitte & Touche. As you know, Morgan Stanley committed to provide contemporaneous notice of all subpoenas issued in this case. (See attached 5/11/04 letter from T. Clare.) To date, we have not received a copy of the Deloitte & Touche subpoena. Jim and Rebecca advised us that you were responsible for service of this subpoena. Although Jim and Rebecca advised us yesterday that they would ask you to send us a copy of the subpoena, we still have not received it. Please provide the subpoena immediately.

Very truly yours,

Michael T. Brody

MTB:cjg
Attachment
cc: John Scarola, Esq. (by telecopy)
Mark C. Hansen, Esq. (by telecopy)
Jerold S. Solovy, Esq.



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May 11, 2004

By Facsimile

Michael Brody, Esq.
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Re: *Coleman (Parent) Holdings v. Morgan Stanley & Co.*
Morgan Stanley Senior Funding v. MacAndrews & Forbes et al.

Dear Mike:

I write in response to your letter of earlier today. With all due respect, your attempt to manufacture an "impasse" on this issue is tiresome — and nothing more than an exercise in semantic gamesmanship. Surely there are more important matters to which we each can devote our time. To put this issue to rest, let me repeat: We have not served any other subpoenas — nor will we serve any in the future — without providing you with contemporaneous notice. Nor have we served — and nor will we serve — any subpoenas "of which [we] believe [you] have knowledge."

Sincerely,

Thomas A. Clare

Thomas A. Clare

cc: Joseph Ianno, Esq.
Mark Hansen, Esq.
John Scarola, Esq.

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

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER AND NOTICE OF HEARING

This case came before the Court, in Chambers, on Coleman (Parent) Holdings, Inc.'s Emergency Motion to Compel Morgan Stanley to Produce Subpoena Served on Deloitte & Touche. Based on the foregoing, it is

ORDERED AND ADJUDGED that hearing on Coleman (Parent) Holdings, Inc.'s Emergency Motion to Compel Morgan Stanley to Produce Subpoena Served on Deloitte & Touche is hereby set for

June 17, 2005, at 8:45 a.m.

at the West Palm Beach Courthouse, Room 11A, 205 N Dixie Hwy, WPB, FL. Any counsel may appear by speaker telephone upon prior arrangement with the Court's judicial assistant at (561) 355-6050.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 16 day of June, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

16div-018091

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If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oir ó hablar llame al 1-800-955-8771.

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#230580/mep

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiffs,

vs.
MORGAN STANLEY & CO., INC.

Defendant.

CASE NO: 2003 CA 005045 AI

PLAINTIFF'S NOTICE OF FILING ADDITIONAL AUTHORITIES IN SUPPORT OF COLEMAN (PARENT) HOLDINGS INC.'S OPPOSITION TO MORGAN STANLEY'S ALTERNATIVE MOTION FOR REDUCTION OF COMPENSATION DAMAGES UNDER FLORIDA STATUTES SECTIONS 46.015 & 768.041

Plaintiff hereby gives notices of the filing of the following additional authorities in support of Coleman (Parent) Holdings Inc.'s Opposition to Morgan Stanley's Alternative Motion for Reduction of Compensation Damages Under Florida Statutes Section 46.015 & 768.041:

Louisiana State Employees' Retirement System v. Citrix Systems, Inc., 2001 WL 1131364 (Del. Ch.)

Accounting Standards, Volume II, Section 182.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and U.S. Mail to all counsel on the attached list on this 16th day of June, 2005.

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Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Plaintiff's Notice Of Filing Additional Authorities in Support Of Coleman (Parent) Holdings Inc.'s Opposition To Morgan Stanley's Alternative Motion For Reduction Of Compensation Damages Under Florida Statutes Sections 46.015 & 768.041
Case No.: 2003 CA 005045 AI

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.
LOUISIANA STATE EMPLOYEES' RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiff,
v.
CITRIX SYSTEMS, INC., Michael W. Brown, Kevin R. Compton, John P. Cunningham, Stephen M. Dow, Robert M. Goldman, Edward E. Iacobucci, Tyrone F. Pike, Roger W. Roberts, Mark B. Templeton, and John W. White, Defendants.
No. Civ.A. 18298.

Submitted June 27, 2001.
Decided Sept. 17, 2001.
Sept. 19, 2001.

Stuart M. Grant and Megan D. McIntyre, of Grant & Eisenhofer, P.A. , Wilmington, Delaware, for Plaintiff.

Robert K. Payson and Stephen C. Norman, of Potter Anderson & Corroon LLP, Wilmington, Delaware; Michael D. Torpey, James N. Kramer, and Steven S. Kaufhold, of Brobeck, Phleger & Harrison LLP, San Francisco, California, for Defendants, of counsel.

MEMORANDUM OPINION

CHANDLER, J.

*1 In this purported class action, plaintiff Louisiana State Employees' Retirement System ("LASERS") seeks an award of $2,000,000 in attorneys' fees and litigation costs. After LASERS filed this lawsuit, Citrix Systems, Inc. ("Citrix" or the "Company") withdrew an amendment to Citrix's stock option plan. Contending its lawsuit caused this corporate action, and asserting that the withdrawn option plan resulted in a $183,000,000 benefit to Citrix's stockholders, LASERS requests an attorney's fee of $2,000,000, plus up to $60,000 in expenses. For reasons described more fully later, I conclude that plaintiff's $2,000,000 fee request is not justified by the record in this case. Instead, the circumstances in this case warrant a fee, based on *quantum meruit* principles, of $140,000, together with costs of $8,250.

I. FACTUAL AND PROCEDURAL BACKGROUND

At the Citrix annual stockholder meeting held May 18, 2000 (the "Annual Meeting"), four proposals were put forth for stockholder approval. The Company closed the polls on three proposals that had been approved by a majority of stockholders. Nevertheless, Citrix adjourned the Annual Meeting with the polls still open on Proposal 3, a proposal to amend the Company's stock option plan to increase the number of stock options available to all employees from 69,945,623 to 80,000,000. Proposal 3 would have failed to pass had the polls been closed on it at the Annual Meeting. Later, on June 2, 2000, Citrix reconvened the Annual Meeting, closed the polls on Proposal 3, and Proposal 3 passed by approximately 1% of the votes cast.

Several days later, on June 12, 2000, Citrix announced that its results for its soon-to-be-completed second fiscal quarter would likely be between $105 and $110 million below expectations. Within hours, shareholders filed the first in a series of thirty stockholder class actions against the Company (and three of its former officers and directors) asserting violations of federal securities laws. On July 20, 2000, a federal district court entered an order consolidating these actions as *In re Citrix Systems, Inc. Sec. Litig.*, No. 00-6796-CIV-DIMITROULEAS (S.D.Fla.2000) (order consolidating complaints).

In the meantime, LASERS took steps to inquire into the reasons justifying the adjournment of the Annual Meeting with the polls still open on Proposal 3. Toward this end, LASERS submitted, pursuant to 8 *Del. C.* § 220, a request to inspect Citrix records relating to the stockholder vote. By letter dated August 31, 2000, Citrix denied this request. Shortly thereafter, on September 8, 2000, LASERS filed its class action complaint in Delaware alleging, among other things, that the defendants "inequitably manipulated the voting procedures at and after the shareholder meeting in order to pass the amendment to the 1995 incentive [stock] plan, which otherwise would have been defeated" (the "Voting Manipulation Claim"). [FN1] LASERS' complaint also asserted fiduciary duty claims based on Citrix's alleged failure to disclose fully and accurately in its

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Proxy Statement all material information in connection with the stockholder votes at the Annual Meeting (the "Disclosure Claim"). On October 31, 2000, Citrix and the individual defendants moved to stay the Delaware class action.

FN1. Compl., ¶ 39.

*2 These facts chronicling this dispute do not reveal the entire context of this litigation, however. As described above, LASERS' complaint set forth two separate legal theories. Although the Disclosure Claim shared substantial similarities with the securities claims asserted in the federal action, the Voting Manipulation Claim was substantially similar, if not identical, to allegations contained in a contemporaneous lawsuit in this Court, *State of Wisconsin Investment Board v. Peerless Systems, Inc.* [FN2] As the facts described below illustrate, that litigation (the "Peerless litigation") played an important role in this lawsuit.

FN2. Del. Ch., C.A. No. 17637, mem. op., Chandler, C. (Dec. 4, 2000).

On December 4, 2000, this Court denied cross motions for summary judgment in the *Peerless* action, but required the defendants to show a compelling justification for their decision to adjourn an annual meeting while leaving the polls open on a proposal that would have otherwise failed to pass. [FN3] On the date the Court decided *Peerless*, LASERS' lawsuit was moving through its briefing schedule on Citrix's motion to stay. The Citrix defendants filed an opening brief in support of their motion to stay on October 31, 2000. LASERS filed its answering brief on December 1, 2000. The defendants filed their reply brief on December 8, 2000.

FN3. *Id.*

The opening brief submitted by the Citrix defendants contains no references to the Peerless litigation or even to the arguments being made in that dispute. [FN4] The answering brief made only one direct reference to the Peerless litigation:

> LASERS alleges that by keeping the polls open, Defendants' [sic] inequitably exercised corporate power with the purpose and effect of impairing the effective exercise of the shareholder franchise, without a compelling justification. *LASERS believes that this claim raises issues which have never been decided by a Delaware court, and which are presently sub judice in [the* Peerless litigation]. [FN5]

FN4. *See* Defs.' Opening Br. on the Mot. to Stay, at 14 n. 18 ("The only allegations in the State Action which are not duplicative of those in the Federal Action are that defendants made misstatements and omissions concerning the timing of the vote on Proposal No. 3.... As a legal matter, these allegations cannot be parsed out from other alleged misstatements and omissions purportedly made by defendants.")

FN5. *See* Pl.'s Answering Br. on the Mot. to Stay, at 2 n. 2 (emphasis added).

The defendants' reply brief, however, made three direct references to the then just-released *Peerless* decision. [FN6] Although the defendants continued to argue in favor of a stay, *Peerless* was clearly within their purview as this lawsuit moved toward oral argument scheduled for December 14, 2000. [FN7]

FN6. *See* Defs.' Reply Br. on the Mot. to Stay, at 7, 13-14.

FN7. *See, e.g.*, Defs.' Reply Br. on the Mot. to Stay, at 13 ("the Court [in its *Peerless* decision] has recently and extensively addressed the very claims at issue in this case").

According to an affidavit of John P. Cunningham, [FN8] the Company recognized that the *Peerless* decision reflected on the propriety of Citrix's decision to adjourn the Annual Meeting while leaving the polls open on Proposal 3. [FN9] Throughout December 2000, Citrix's management discussed Proposal 3 and the effect of the *Peerless* decision. [FN10] In particular, on December 12, 2000, two days before the oral argument in this Court, Cunningham participated in a conversation with the Chairman of the Citrix Board of Directors, the Chief Operating Officer of Citrix, and outside counsel concerning the possibility of withdrawing Proposal 3. [FN11] To that end, senior management directed the Company's human resources department to reassess the need for Proposal 3 in light of (1) the challenge presented by the present lawsuit, (2) the weakening macroeconomic business conditions in general, and (3) the reduced need for the additional options to attract and retain qualified personnel.

FN8. Cunningham is the Chief Financial

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Officer, Senior Vice President of Finance and Administration, Treasurer, and Assistant Secretary of Citrix.

FN9. Defs.' Answering Br. on the Mot. for Attys' Fees, Ex. A, ¶ 20.

FN10. *Id.* at ¶¶ 22-25.

FN11. *Id.* at ¶ 22.

*3 At the December 14 oral argument on defendants' motion to stay, *Peerless* was clearly portrayed as an important development in this litigation. Counsel for the defendants explicitly stated that the Company was examining its conduct in light of certain considerations, including guidance provided by *Peerless*. [FN12] Defendants' counsel also indicated that the Company was considering the possibility of withdrawing Proposal 3:

FN12. *See* Tr. from Oral Argument on Mot. to Stay (Dec. 14, 2001), at 10, 48-49, 72-73.

> In light of *Peerless*, if the Company were to modify or withdraw Proposal 3, if that will make a difference to Your Honor, in staying the case, give us an opportunity to do that. As I mentioned earlier, once the company saw *Peerless*, they said, 'You know what, this is a new development in the law. We need to look at what we have done.' If Your Honor tells me if the Company does something to modify or nullify Proposal 3 that makes a material difference, give us a couple of weeks to do that, or maybe three weeks.... Give us an opportunity to do that. [FN13]

FN13. *See* Tr., at 50-51. *See also* Tr., at 10.

During the oral argument, the Court suggested it might conditionally grant the stay as to the Disclosure Claim but deny the stay as to the Voting Manipulation Claim. [FN14] Given this inclination, the Court noted that Citrix should continue to examine the possibility of withdrawing or modifying Proposal 3 in a manner that would result in the plaintiff achieving its desired form of relief. [FN15]

FN14. *See* Tr., at 59-62.

FN15. *See* Tr., at 76.

On Friday January 5, 2001, the Court conditionally stayed the Disclosure Claim, but denied the motion to stay the Voting Manipulation Claim. [FN16] In the Opinion, the Court noted that the conditionally stayed Disclosure Claim "presents a clear case where the plaintiff has repackaged federal securities law claims as Delaware fiduciary duty claims." [FN17] In contrast, the Court noted that the Voting Manipulation Claim "implicated ... an issue governing the internal affairs of a Delaware corporation." [FN18] On Monday, January 8, 2001, Citrix notified the Court of its intention to withdraw Proposal 3. [FN19]

FN16. *Louisiana State Employees' Retirement System v. Citrix Systems, Inc.*, Del. Ch., C.A. No. 18292, let. op., Chandler, C. (Jan. 5, 2001).

FN17. *Id.* at 10.

FN18. *Id.*

FN19. On January 30, 2001, Citrix advised the Court that Proposal 3 had been withdrawn consistent with its counsel's letter of January 8, 2001.

Following Citrix's withdrawal of Proposal 3, LASERS' counsel promptly moved for an award of fees and costs. In applying for attorney fees, plaintiff's counsel points to the analysis of its expert who estimates that the dilutive costs to plaintiff stockholders' total value as of January 25, 2001, would have been approximately $183 million had Proposal 3 not been withdrawn. [FN20] Based on this expert analysis, plaintiff's attorneys have petitioned this Court for an award of $2 million in attorneys' fees and $60,000 in litigation costs.

FN20. Pl.'s Opening Br. on the Mot. for Attys' Fees, Ex. I, Aff. of W. Dana Northcut, at ¶ 21 (the "Northcut Analysis").

II. ANALYSIS

A. Is the Fee Request Premature?

As a threshold matter, the defendants point out that LASERS has applied for an award of attorneys' fees while a portion of the litigation, the Disclosure Claim, remains active, albeit stayed. In general, "[j]udicial economy and the orderly conduct of litigation are usually better served if interim awards of attorneys' fees are avoided and applications for attorney fees are often rejected if the litigation has not been completed." [FN21]

FN21. *Gans v. Liquidating Corp.*, Del. Ch.,

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C.A. No. 9630, let. op. at 3, Hartnett, V.C. (May 28, 1993).

*4 Nevertheless, interim fee awards may be appropriate where the plaintiff has achieved the benefit sought by the claim that has been mooted or settled and that benefit is not subject to reversal or alteration as the remaining portion of the litigation proceeds. [FN22] The Voting Manipulation Claim sought the withdrawal of Proposal 3. Citrix withdrew Proposal 3, and that withdrawal is in no way threatened by any aspect of the stayed Disclosure Claim. To that extent, therefore, LASERS' request for a reasonable fee in connection with the Voting Manipulation Claim is not premature. In addition, following oral argument on the fee application, LASERS voluntarily dismissed the Disclosure Claim, the only remaining aspect of this lawsuit. Although the dismissal is without prejudice, no reason exists for delaying a decision on the pending fee request.

FN22. *See, e.g., Gans,* let. op. at 3-4 (denying request for interim attorneys' fee following the issuance of an interlocutory order for the primary reason that the benefit to the class was still capable of being reversed later in the litigation); *Frazer v. Worldwide Energy Corp.,* Del. Ch., C.A. No. 8822, Jacobs, V.C. (May 6, 1991) (denying request for interim attorneys' fee where the complete benefit created for the plaintiffs could not be known until the end of the litigation after any indemnity or contribution claims had been made against the common fund).

B. Standard on a Motion to Grant Attorneys' Fees

Traditionally, parties are responsible for the payment of their own counsel fees in the absence of statutory authority or a contractual undertaking to the contrary. [FN23] Where no common monetary fund has been created but the efforts of counsel have resulted in a non-monetary benefit, Delaware courts recognize an exception to this rule, an exception based on what is sometimes referred to as the therapeutic or corporate benefit doctrine. [FN24] The basic principle behind this doctrine holds simply that stockholders who benefit from the litigious efforts of another should share in the costs of achieving that benefit. [FN25]

FN23. *See, e.g., Goodrich v. E.F. Hutton Group,* Del.Supr., 681 A.2d 1039, 1044 (1996); *Tandycrafts, Inc. v. Initio Partners,* Del.Supr., 562 A.2d 1162, 1164 (1989).

FN24. *See Tandycrafts,* 562 A.2d at 1164-67.

FN25. *United Vanguard Fund, Inc. v. Takecare, Inc.,* Del.Supr., 693 A.2d 1076, 1079 (1997).

Under the rubric of the corporate benefit doctrine exists a subcategory of cases where defendants have taken some action that effectively moots a derivative or class claim before its final adjudication. [FN26] In such cases, the Court may award a fee to plaintiff's counsel if the plaintiff can demonstrate that (i) the litigation was meritorious when filed, (ii) the action rendering the litigation moot produced the same or a similar benefit sought by the litigation, and (iii) there was a causal relationship between the litigation and the action taken producing the benefit. [FN27] Where the plaintiff has prevailed on this three factor inquiry, attorneys' fees are awarded at the discretion of the Court based on the fairness and reasonableness of the fee requested in proportion to the benefit achieved by the litigation. [FN28]

FN26. *See, e.g., Grimes v. Donald,* Del. Ch., C.A. No. 13358, mem. op. at 4, Lamb, V.C. (Nov. 30, 2000); *Allied Artists Picture Corp. v. Baron,* Del.Supr., 413 A.2d 876 (1980).

FN27. *Grimes,* mem op. at 4-5; *Takecare,* 693 A.2d at 1079; *Allied Artists,* 413 A.2d at 876.

FN28. *See In re Dr. Pepper/Seven Up Companies, Inc. Shareholders Litig.,* Del. Ch., C.A. No. 13109, Chandler, V.C. (Feb. 9, 1996), *aff'd,* Del.Supr., 683 A.2d 58 (Aug. 16, 1996).

1. Was the Lawsuit Meritorious When Filed?

As to the first prong of the standard, the defendants acknowledge that the Voting Manipulation Claim relating to Proposal 3 was " 'meritorious when filed' to the limited extent that it 'implicate[d] a recently elucidated aspect of Delaware law." ' [FN29]

FN29. Defs.' Answering Br. on the Mot. for Attys' Fees, at 12 (quoting *Louisiana State Employees' Retirement System v. Citrix Systems, Inc.,* let. op. at 10).

2. The Benefit Achieved by the Action

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There is no question that the complaint in this matter sought to achieve the withdrawal of Proposal 3 as one of its main objectives. [FN30] The dispute here concerns the value of the benefit that this withdrawal conferred on the Citrix stockholders. This dispute will be discussed at length below.

FN30. Compl., ¶ 12. *See* Tr., at 34.

3. The Causal Relationship Between the Withdrawal and the Litigation

***5** Under well-established Delaware law, the fact that the corporate action mooting the plaintiff's claim occurred after the filing of that claim "is enough to create an inference that the two events were connected." [FN31] The defendants bear the burden to demonstrate that *no* causal connection existed between the initiation of the lawsuit and any later benefit to the shareholders. [FN32] The defendants may attempt to rebut the causal presumption by affidavit. [FN33]

FN31. *Grimes v. Donald,* Del.Supr., 455 A.2d 388 (2000) (ORDER).

FN32. *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d at 1080.

FN33. *Grimes,* mem. op. at 10.

The defendants have offered the affidavit of Citrix's Chief Financial Officer, John P. Cunningham, to demonstrate that the present litigation was not the cause of the withdrawal. Specifically, Cunningham asserts that the senior management of Citrix and the Citrix Board decided to withdraw Proposal 3 based on "our desire to conform to the Court's guidance in the *Peerless* decision and on the sufficiency of the option reserves that pre-dated the amendment to the [Company's employee stock option plan]" in light of the deteriorating general business climate. [FN34] Cunningham also points out that on January 3, 2001, Citrix management reached its decision to recommend to the Citrix Board that Proposal 3 be withdrawn. On Thursday, January 4, a draft version of the letter to be submitted to the Court on Monday, January 8, announcing the withdrawal of Proposal 3, was circulated at Citrix. This letter, in substantially the same form as its draft version, was submitted to the Court as planned on January 8.

FN34. Cunningham Aff., ¶ ¶ 25, 31.

LASERS urges this Court to reject defendants' arguments concerning causation for two reasons. First, it argues that *Peerless* was not new law, but rather "merely amplified the well settled standard and burden of proof applicable to [the] issue [involved in that case]." [FN35] The Court's own words in its earlier decision in this matter-noting that *Peerless* "implicated a recently elucidated aspect of Delaware law"-belies this assertion. [FN36]

FN35. Pl.'s Opening Br. on the Mot. for Attys' Fees, at 8.

FN36. *Louisiana State Employees' Retirement System v. Citrix Systems, Inc.*, let. op. at 10.

The plaintiff's second argument challenges defendants' assertion (that Citrix would have withdrawn Proposal 3 absent this litigation) as little more than a *post hoc* mischaracterization of what actually occurred. Of course, at a certain level, it is almost impossible for this Court to divine exactly what caused what in this corporate version of the chicken and the egg. Nevertheless, the unrebutted affidavit is clear in its assertion that Citrix management made its decision to recommend to the Citrix Board the withdrawal of Proposal 3 *before* the issuance of this Court's decision on the motion to stay.

LASERS points out, with good reason, that the actual withdrawal conveniently occurred almost immediately after this Court's denial of the motion to stay the Voting Manipulation Claim. That argument, however, ignores the discussion that occurred at the oral argument. That is, I indicated that although I had not come to a final conclusion, I was inclined to grant the stay as to the Disclosure Claim and deny the stay as to the Voting Manipulation Claim. Counsel for the defendants indicated that Citrix was in the process of analyzing its actions in light of *Peerless* and requested two-to-three weeks to complete this reexamination. Counsel clearly represented that the Company was strongly considering modifying or withdrawing Proposal 3, especially if that would make a material difference to the Court in deciding the motion to stay. [FN37] True to their word, this appears to be precisely what happened.

FN37. *See* Tr., at 48-49.

***6** Although I appreciate LASERS' penchant for military symbolism in arguing its case, I am not persuaded that "Citrix chose to fight on until confronted with certain defeat" before the Company

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"unconditionally surrendered in this litigation." [FN38] Rather, while the defendants telegraphed their intentions at the oral argument, they continued to defend themselves to the best of their abilities should the Court have decided to change its mind following the oral argument. The fact that the decision on the motion to stay was followed closely by the withdrawal of Proposal 3 does not indicate that the defendants "caved," but rather that they had every intention of living up to the representations made before this Court at the oral argument.

FN38. Pl.'s Opening Br. on the Mot. for Attys' Fees, at 1, 8.

Ultimately, however, the intertwining of the *Peerless* litigation with this litigation and the overall totality of the circumstances leads me to the conclusion that Proposal 3 was withdrawn for a combination of reasons which included: the *Peerless* decision, the deterioration of the economic climate for technology companies, and the efforts of counsel in this lawsuit. It is impossible, in my opinion, to identify precisely the degree to which this lawsuit caused Citrix to withdraw Proposal 3. But I am not required to determine this issue with mathematical exactitude. I need only conclude, as I do, that the withdrawal was, at least in part, precipitated by this lawsuit. [FN39] I need not conclude any stronger causal connection between the lawsuit and the withdrawal than that. [FN40]

FN39. *United Vanguard Fund, Inc. v. TakeCare, Inc.*, Del. Ch., 727 A.2d 844, 854 (1998).

FN40. *See In re Dunkin' Donuts Shareholders Litig.*, Del. Ch., C.A. No. 10907, mem. op. at 14, Chandler, V.C. (Nov. 27, 1990).

LASERS has satisfied the preliminary three-factor test and may be awarded an appropriate fee in connection with its counsels' services in prosecuting this lawsuit. In determining a proper fee, however, the Court is mindful of the following indisputable fact: although the efforts of LASERS' counsel were important to achieving the desired result, those efforts were not the *only* cause of the benefit conferred upon the Citrix stockholders as a result of Proposal 3's withdrawal.

C. The Reasonableness of the Fee Request

In determining what fee is appropriate, the Court typically considers: (1) the results achieved for the benefit of the shareholders; (2) the efforts of counsel and the time spent in connection with the case; (3) the contingent nature of the fee; (4) the difficulty of the litigation; and (5) the standing and ability of counsel involved. [FN41] "Typically, the benefit achieved by the action is accorded the greatest weight." [FN42]

FN41. *Sugarland Industries Inc. v. Thomas*, Del.Supr., 420 A.2d 142, 149 (1980).

FN42. *Dunkin' Donuts*, mem. op. at 17.

LASERS has offered the Northcut Analysis to support its argument that Citrix stockholders received a benefit of approximately $183 million following Proposal 3's withdrawal. Northcut used the **Black-**Scholes option pricing model "to determine the cost of dilution to existing shareholder value relative to the issuance of new shares proposed by Proposal 3." [FN43] According to LASERS, "the cost of dilution on existing shareholder value of a new employee stock option is the fair value of the option." [FN44]

FN43. Pl.'s Opening Br. on the Mot. for Attys' Fees, at 7.

FN44. *Id.*

*7 The defendants point to several problems inherent in this attempt to value any purported benefit to Citrix stockholders following the withdrawal. First, the defendants note that the Northcut Analysis on its own terms is fatally flawed in its attempt to value the dilutive costs associated with the withdrawal. Simply put, the Northcut Analysis attempts to quantify the dilutive effect of the additional stock options authorized by Proposal 3 in the absence of the issuance of any of these options. That is, the Northcut Analysis assumes that the additional 10,054,377 options available under Proposal 3 would have been *granted* by Citrix at some point in the future. [FN45]

FN45. At his deposition, Professor Northcut stated, "It's an implicit assumption [of my analysis] that the options would have been exercised on January 25th, 2001-let me restate that, would have been granted-not exercised, but granted-on January 25th, 2001." Northcut Dep. 24:22-25:1. Later in his deposition, Professor Northcut backtracked from the January 25, 2001 date as the assumed date of issuance of all 10,054,377 shares. However, he reasserted

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that his analysis assumed that all of the stock options would have been granted. Northcut Dep. 46:15-47:16.

Contrary to this assumption, Citrix was not required to issue any of these additional options and there is no way to predict whether Citrix would have issued these additional options. In fact, the Company never issued any of these additional options. To effect the withdrawal of Proposal 3, the Citrix Board of Directors decreased the number of shares available under the stock plan to the number of shares available before Proposal 3 passed. No other action was necessary because the additional shares had never been granted. Absent issuance of any of the additional options, plaintiff's attempt to accurately calculate the dilutive costs associated with that issuance is premature and speculative.

Second, the defendants question the applicability of the **Black**-Scholes option valuation model to the employee stock options at issue in the present matter. In particular, the affidavit of the defendants' expert witness, Steven R. Grenadier (the "Grenadier Affidavit"), notes that while the **Black**-Scholes formula may be appropriate for valuing freely tradeable options, the model overstates the value of employee stock options (technically structured as warrants, not call options) which are not liquid, freely tradeable options. [FN46] I have previously indicated my concerns with the application of the **Black**-Scholes model when determining the significance of the benefit achieved at settlement where its use may be pivotal in influencing the size of the fee awarded to plaintiff's counsel. [FN47] Those concerns are accentuated here where the model-even if applied without any hint of bias-may not accurately value the types of illiquid options at issue.

FN46. Grenadier Aff., ¶ 8.

FN47. *See, e.g.*, ***In re Coleman Company, Inc. Shareholders Litig.*, Del. Ch., 750 A.2d 1202, 1208 (1999)**; *Rovner v. Health-Chem Corp.*, Del. Ch., C.A. No. 15007, mem. op. at 12, Chandler, C. (April 27, 1998).

Third, even if the Northcut Analysis properly valued the dilutive *costs* associated with the additional options authorized under Proposal 3, the plaintiff's argument remains fatally flawed because it ignores any *benefits* that may have accrued to the Citrix stockholders due to Proposal 3. That is, the Northcut Analysis makes no attempt to calculate the *net economic benefit* resulting from the adoption of Proposal 3. The defendants contend that the additional stock options would have been issued "to attract and retain employees, to motivate employees, to align employees' interests with those of Citrix shareholders and to minimize the amount of cash compensation necessary for payment to Citrix employees." [FN48] The Grenadier Affidavit points out that the benefits attributable to the Citrix employee stock option plan are illustrated by the Company's well-below-average employee turnover rate among technology companies, while the cash compensation paid by Citrix to its employees ranks between the 25 th-to-50th percentile of peer group companies. [FN49] As Grenadier points out, the plaintiff's analysis would not differ had Citrix issued the additional options to random people on the street as opposed to employees of the Company. [FN50] This simple example demonstrates the fundamental difficulties with the analysis presented by LASERS as the foundation for its fee request. In recognizing costs while ignoring any possible benefits associated with Proposal 3, LASERS has presented this Court with an incomplete accounting of the economic value of the withdrawal.

FN48. Defs.' Answering Br. on the Mot. for Attys' Fees, at 17-18.

FN49. Grenadier Aff., ¶ 7.

FN50. *Id.*

***8** As the defendants correctly recognize, any attempt to accurately value the net economic benefit conferred by either the passage or the withdrawal of Proposal 3 is at best an inexact science. The defendants submit that the dilutive costs, if any, associated with Proposal 3, "would have been completely offset by benefits in terms of employee recruitment, retention and motivation (as well as lower cash compensation to Citrix employees)." [FN51] Quantitatively speaking, any attempt by this Court to directly calculate the precise value of the employee recruitment, retention, and motivation effects provided by Proposal 3 seems more like ill-conceived alchemy than science.

FN51. Defs.' Answering Br. on the Mot. for Attys' Fees, at 18-19.

Nevertheless, if LASERS is correct in its contention that Proposal 3's withdrawal actually resulted in a $183 million benefit to Citrix shareholders, one

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would clearly expect the stock market to reflect this large benefit into the price of Citrix stock. LASERS apparently agrees with this line of reasoning, as its expert asserted as part of his analysis that "[t]he dilutive effects of employee stock options should be priced into existing equity share values when the issue of new options is first announced." [FN52]

FN52. *See* Northcut Aff., ¶ 19.

According to the event study analysis performed by Professor Grenadier, the evidence indicates neither that the market reacted negatively to any disclosure of information related to the passage of Proposal 3 nor that the market reacted positively to any disclosure concerning the withdrawal of Proposal 3. [FN53] If anything, Professor Grenadier's analysis suggests that investors determined that the approval and eventual withdrawal of Proposal 3 resulted in no clear net economic benefit or harm to Citrix shareholders.

FN53. *See* Grenadier Aff., ¶ 9.

The plaintiff counters this analysis by pointing out that it has alleged that the proxy materials disseminated in connection with Proposal 3 and the Annual Meeting were materially false and misleading. The market, therefore, was not correctly informed as to the costs and benefits associated with the passage and withdrawal of Proposal 3. Further, plaintiff argues, any announcements regarding Proposal 3 did not occur in isolation. The proxy materials released by Citrix related to three other proposals in addition to Proposal 3. Thus, even assuming there was no statistically significant movement in the Company's stock on the dates in question, the plaintiff contends that at most this shows that the market viewed the filings as a whole to have a neutral impact on shareholder value.

These competing arguments leave me in the unenviable position of possessing two vastly different attempts to value the benefit achieved in this litigation, where both such attempts have clear shortcomings as pointed out by opposing counsel. But, even if I could accurately divine the value of the net benefit conferred, the previously referred to causation quandary also complicates the calculation of an appropriate fee. Finally, the only reason why I must even consider valuing the benefit achieved here is, of course, because the purported stockholder class will receive no direct monetary benefit as a result of this lawsuit.

***9** Given this context, no good reason exists for me to engage in complicated and highly speculative intellectual exercises in attempting to quantify what is, in essence, the non-quantifiable benefit achieved by this litigation. Instead, I note that the primary benefits sought by LASERS as to the Voting Manipulation Claim-a vindication of its voting rights as stockholders of a Delaware corporation and its concern over stockholder dilution-has been achieved in its entirety. These benefits have clear value to stockholders of the Company.

As the Court previously has noted:

> [i]n cases where the benefit created is not quantifiable, the *quantum meruit* approach is often appropriate.... When an unquantifiable benefit is involved, the *quantum meruit* approach gives the Court a more equitable means of determining a reasonable fee. [FN54]

FN54. *Dunkin' Donuts,* mem. op. at 17 (citation omitted).

Turning to the other *Sugarland* factors, I note that plaintiff's counsel expended approximately 281 hours on or before January 8, 2001, in litigating this matter. Although LASERS urges this Court to allow its counsel to recover for time and expenses incurred in connection with the fee application, that request is properly denied as that time created no direct benefit for the stockholder class and is, therefore, non-compensable. [FN55] Similarly, plaintiff's counsel cannot recover for costs incurred in pursuing their fee application. That is, plaintiff's counsel may not recover for fees paid to an expert whose analysis was prepared solely for use in supporting the motion for a fee award.

FN55. *In re Diamond Shamrock Corp.,* Del. Ch., C.A. No. 8798, let. op. at 5-6, Jacobs, V.C. (Feb. 23, 1989) (citing *Lindy Bros. Builders, Inc. of Phila. v. American Radiation & Sanitary Corp.,* 540 F.2d 102, 111 (3rd Cir.1976)).

No one questions that LASERS' counsel aggressively and efficiently prosecuted this action on a strictly contingent basis. Similarly, no issue exists as to the superior standing and ability of plaintiff's counsel, a frequent advocate in this Court. Nevertheless, the Court also must weigh the difficulty of the litigation involved here. Although the Court in no way doubts the abilities of counsel to prosecute this litigation should *Peerless* have reached a different conclusion, the fact of the matter is that

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the *Peerless* decision was fortuitously on point. Even the drafting of the complaint in this matter as to the Voting Manipulation Claim was almost entirely based on the previously filed complaint in the Peerless litigation. Due to the "piggyback" relationship of this case to the Peerless litigation, by the standards set by cases commonly seen in this Court, this was not particularly difficult litigation.

LASERS instituted this lawsuit to achieve the withdrawal of Proposal 3, a hotly contested proposal among shareholders of the Company. To that end, Proposal 3's withdrawal, at least from the perspective of LASERS and other stockholders who shared its view concerning Proposal 3's wisdom, was a vindication of LASERS' voting rights as a stockholder in a Delaware corporation. Although this vindication was perhaps caused in part by the issuance of the *Peerless* decision, as well as worsening general economic conditions, the plaintiff's attorneys, retained at least in part to accomplish that result, successfully achieved this therapeutic benefit. A fee recognizing the efforts of counsel is, in my view, appropriate.

***10** Mindful of the uncertainties and the concerns earlier discussed, I conclude that a reasonable fee in this case is $140,000, plus $8,250 in costs. [FN56] In my view, an award of $140,000 adequately compensates plaintiff's counsel for the contingent risk inherent in this litigation and for performing the work that created a non-quantifiable, yet clearly intended and valued benefit. I also believe this fee is consistent with past fee awards granted by this Court and is reasonable given the totality of the circumstances in this matter. [FN57]

FN56. Solely as a cross-check of my *quantum meruit* analysis, I note that a fee of $140,000 translates to an hourly rate of approximately $500 per hour. This hourly rate represents a significant premium of roughly 100% when compared to the mean billing rate charged per hour by all those who participated in plaintiff's counsel's efforts. Thus, this award-although in form based on a *quantum meriut* analysis-actually contains a significiant premium for the quality of the work that was done.

FN57. *See, e.g., Siegman v. Palomar Medical Technologies Inc.*, Del. Ch., C.A. No. 15894, Jacobs, V.C. (July 13, 1998) (awarding $125,000 on a *quantum meruit* basis in response to a fee request of $550,000 where plaintiff achieved a substantial, but unquantifiable corporate benefit claimed to be approximately $50,000,000); *Dunkin Donuts*, mem. op. at 11-18 (awarding shareholder class plaintiffs $125,000 in response to a request for fees of $2,500,000 where class plaintiff's litigation was, at most, only partially responsible for a substantial, but unquantifiable corporate benefit). A survey of fee awards in therapeutic benefit cases over the last three years reveals an average award of $273,586. Although the fees awarded by this Court have been slightly higher in the last two years, the fee request in this case is significantly higher than the average request. The highest fee request in a therapeutic benefit case in the last three years was $3,055,000 (*Shaev v. Wyly*, Del. Ch., C.A. No. 15559, Strine, V.C. (1999), which the Court reduced to $300,000.

Finally, I note that I have chosen not to attempt to apportion any of the hours worked by LASERS' counsel between the Voting Manipulation Claim and the stayed Disclosure Claim. As a close reading of the complaint and the later-filed briefs in this matter demonstrates, the two theories on which this litigation was based were closely related in certain respects, including their mutual goal of forcing the withdrawal of Proposal 3. [FN58] The efforts of plaintiff's counsel may have in part attempted to advance the Disclosure Claim. But that does not imply that those same efforts may not have also advanced the Voting Manipulation Claim, particularly during the earliest stages of the litigation (*i.e.*, when counsel are formulating their case, drafting the complaint, and engaging in the earliest forms of discovery).

FN58. The defendants themselves recognized these similarities earlier in this litigation. *See, e.g., supra* n. 4.

III. CONCLUSION

For the reasons set forth above, I grant the request for an award of a reasonable attorneys' fee and conclude that LASERS' counsel should be awarded fees of $140,000 and costs of $8,250.

IT IS SO ORDERED.

2001 WL 1131364 (Del.Ch.)

END OF DOCUMENT

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ACCOUNTING STANDARDS

CURRENT TEXT

VOLUME II

GENERAL STANDARDS

Sections F25 to N35

Financial Accounting Standards Board
401 MERRITT 7, P.O. BOX 5116, NORWALK, CONNECTICUT 06856-5116

INVESTMENTS: EQUITY METHOD SECTION I82

Sources: APB Opinion 18; AICPA Interpretations of APB Opinion 18; FASB Statement 58; FASB Statement 94; FASB Statement 109; FASB Statement 115; FASB Statement 128; FASB Statement 133; FASB Statement 142; FASB Interpretation 35; FASB Technical Bulletin 79-19

[Note: A list of Issues discussed by the Emerging Issues Task Force (EITF) that provide supplemental guidance for this section is presented in paragraph .1000. A list of AICPA Accounting Standards Executive Committee (AcSEC) pronouncements that also provide supplemental guidance for this section is presented in paragraph .2000.]

Summary

The equity method is a method of accounting for investments. An investor using the equity method initially records an investment at cost. Subsequently, the carrying amount of the investment is increased to reflect the investor's share of income of the investee and is reduced to reflect the investor's share of losses of the investee or dividends received from the investee. The investor's share of the income or losses of the investee is included in the investor's net income as the investee reports them. Adjustments similar to those made in preparing consolidated financial statements, such as elimination of intercompany gains and losses and amortization of the difference between cost and underlying equity in net assets, also are applicable to the equity method. Under the equity method, an investment in common stock is generally shown in the balance sheet of an investor as a single amount. Likewise, an investor's share of earnings or losses from its investment is ordinarily shown in its income statement as a single amount.

This section requires that an investor use the equity method to account for investments in corporate joint ventures. This section also requires use of the equity method to account for other investments in common stock if the investor has the ability to exercise significant influence over operating and financial policies of the investee enterprise. That ability is presumed to exist for investments of 20 percent or more and is presumed not to exist for investments of less than 20 percent; both presumptions may be overcome by predominant evidence to the contrary.

Scope

.101 This section does not apply to investments in common stock held by (a) investment enterprises registered under the Investment Company Act of 1940 or investment

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

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN PARENT HOLDINGS INC.'S AMENDED WITNESS LIST FOR POST-TRIAL HEARING ON JUNE 20-21, 2005

Pursuant to the Court's May 18, 2005 Order, Coleman (Parent) Holdings Inc. ("CPH") hereby provides Morgan Stanley & Co. ("Morgan Stanley") with an amended list of witnesses CPH currently expects to call at the hearing on June 20 and June 21, either through live testimony, deposition testimony, or prior testimony, and a summary of the currently anticipated testimony of each witness. The witnesses identified in this submission accurately reflect CPH's present intentions; however, CPH reserves the right to call additional witnesses, to withdraw any witness identified herein, or to supplement this disclosure as CPH continues to evaluate its proofs in light of any rulings by the Court or any additional arguments advanced by Morgan Stanley. In addition, because Morgan Stanley bears the burden of proof at the hearing, CPH witnesses may offer testimony to respond to and/or rebut any testimony offered by Morgan Stanley. CPH cannot at this time anticipate the full scope of any such testimony.

1. Lawrence Bornstein (live). Mr. Bornstein is a former senior manager at Arthur Andersen LLP. Mr. Bornstein may testify concerning Sunbeam's December 14, 1998 Audit Committee meeting, during which Sunbeam's directors discussed with Sunbeam's auditors how Sunbeam would record the warrants on its books and records. Mr. Bornstein also may testify regarding the authenticity, foundation, and facts described in CPH Trial Exhibit 1319.

2. Howard Gittis (live). Mr. Gittis is a director, Vice Chairman, and Chief Administrative Officer of MacAndrews & Forbes Holdings, Inc. Mr. Gittis may testify about the warrants CPH received from Sunbeam as part of the August 12, 1998 settlement agreement between CPH and Sunbeam, including MacAndrews & Forbes' and Sunbeam's valuations of the warrants, and the ability and impact of any efforts to sell the warrants on Sunbeam and its stock. In addition, Mr. Gittis may testify about the attorneys' fees, costs, and expenses paid by CPH in connection with *Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP, et al.*, Case No: CA 01-06062 AN. Finally, Mr. Gittis may offer testimony to respond to and/or rebut testimony offered by any Morgan Stanley witnesses.

3. James Maher (by 11/3/04 deposition). Mr. Maher is the former President of Mafco Consolidated Group, Inc. Mr. Maher' testimony is set forth in the designated portions of his deposition, which are attached hereto.

4. Blaine Nye (live or by deposition). Dr. Nye may testify about the warrants CPH received from Sunbeam Corporation ("Sunbeam") as part of the August 12, 1998 settlement agreement between CPH and Sunbeam, including the valuation of those warrants. In addition, Dr. Nye may offer testimony to respond to and/or rebut testimony offered by Morgan Stanley's expert witness, David Ross, or any other Morgan Stanley witnesses. Dr. Nye's opinions are disclosed in his initial report, dated December 7, 2004; rebuttal report, dated December 28, 2004;

and supplemental report, dated June 13, 2005; as well as his prior depositions and trial testimony in this case.

5. Todd Slotkin (live). Mr. Slotkin is the Chief Financial Officer and Executive Vice President of MacAndrews & Forbes Holdings, Inc. Mr. Slotkin may testify about the warrants CPH received from Sunbeam as part of the August 12, 1998 settlement agreement between CPH and Sunbeam, including MacAndrews & Forbes' accounting of the warrants and internal documents relating to the warrants. In addition, Mr. Slotkin may offer testimony to respond to and/or rebut testimony offered by any Morgan Stanley witnesses.

I HEREBY CERTIFY that a true and correct copy of the foregoing and its attachment has been sent by Federal Express and facsimile to the individuals on the attached service list on this 17th day of June, 2005.

Dated: June 17, 2005

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

_____/

COLEMAN (PARENT) HOLDINGS INC.'S AMENDED EXHIBIT LIST FOR POST-TRIAL HEARING ON JUNE 20-21, 2005

Plaintiff, Coleman (Parent) Holdings Inc. ("CPH") hereby submits its Amended Exhibit List, which is attached hereto as Exhibit A, for the post-trial hearing on June 20-21, 2005. In connection with its Amended Exhibit List, CPH reserves its rights as follows:

1. In addition to the documents set forth on the attached Amended Exhibit List, CPH reserves the right to use additional exhibits that it identifies in connection with the ongoing expert discovery.

2. CPH reserves the right to use any documents created by or relied upon by Morgan Stanley's expert witness, David Ross, in connection with his expert report and/or testimony at the hearing.

3. CPH reserves the right to use at the hearing duplicate copies and/or original versions of any of the documents listed on the attached Amended Exhibit List.

4. CPH reserves the right to use additional documents at the hearing that are not contained on its Amended Exhibit List for purposes of cross-examination and/or rebuttal.

5. CPH reserves the right to use and/or introduce at the hearing any proposed trial exhibit that has been identified by Morgan Stanley.

6. CPH reserves the right to submit and introduce summary documents based upon the information included in documents identified in the attached Amended Exhibit List or in the documents that Morgan Stanley has identified, as well as demonstrative exhibits.

7. By listing documents on the attached Amended Exhibit List, CPH is not conceding the relevance, foundation, and/or admissibility of any of those documents. CPH reserves the right not to offer at the hearing any of its proposed exhibits identified in the attached list. In compiling the attached list, CPH endeavored to identify and disclose documents that it may use to rebut arguments that might be advanced by Morgan Stanley at the hearing.

I HEREBY CERTIFY that a true and correct copy of the foregoing and its attachment has been sent by Federal Express and facsimile to the individuals on the attached service list on this 17th day of June, 2005.

Dated: June 17, 2005

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EXHIBIT A

CPH TRIAL EX. NUMBER	DATE	BATES RANGE	DESCRIPTION
824	12/06/1999	N/A	Sunbeam Form S-4/A
1319	12/14/1998	CPH 1039842-850	Memo from L. Bornstein to The Files re Sunbeam Audit Committee meeting December 14, 1998
1391	12/31/2000	CPH 2012369-2012424	Mafco Holdings Inc. Consolidated Financial Statements For the Year Ended December 31, 2000 With Report of Independent Auditors
1392	12/31/1999	CPH 2012307-2012368	Mafco Holdings Inc. Consolidated Financial Statements For the Year Ended December 31, 1999 With Report of Independent Auditors
1395	03/29/1998	CPH 1094218-1094235	Registration Rights Agreement
1398	11/12/1999	N/A	Opinion (In re The Coleman Company, Inc. Shareholders Litigation), 750 A.2d 1202
1400	06/13/2005	N/A	Supplemental Expert Report of Blaine Nye
1401		N/A	Documents establishing the attorneys' fees, costs, and expenses CPH paid to Jenner & Block LLP and Searcy, Denney, Scarola, Barnhart & Shipley, P.A. in connection with *Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP, et al.*

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

NOTICE

Morgan Stanley & Co. Incorporated ("Morgan Stanley") hereby notifies the court and Plaintiff that it retracts, withdraws and corrects certain statements in the offers of proof, declaration, and related statements more fully described and listed below.

1. In the listed offers of proof and related statements, Morgan Stanley asserted that its Law Division was not aware that any of the Brooklyn Tapes contained e-mail until October 2004 and was not aware of certain 8-mm tapes until November 2004.

2. As a result of a review of e-mails discovered by a new e-mail search, Morgan Stanley has determined that the offers of proof and related statements should be corrected to state that the Law Division was aware in July 2004 that some of the Brooklyn Tapes contained e-mail and that certain 8-mm tapes existed.

3. Morgan Stanley submits this Notice to: (a) correct Defendant's Offers of Proof from James P. Cusick, Soo-Mi Lee, and James F. Doyle (the first sentence of paragraph 4 and the entirety of paragraph 5); (b) withdraw the Declaration of James F. Doyle of January 31,

2005; and (c) correct related statements that reference or were based on the foregoing submissions[1].

4. Morgan Stanley does not limit this notice and correction to the specific documents described or listed herein. Morgan Stanley retracts, withdraws and corrects any and all statements, written or oral, made or submitted on its behalf, to the effect that its Law Division was not aware that any of the Brooklyn Tapes contained e-mail until October 2004 and was not aware of certain 8-mm tapes until November 2004.

---

[1] The related statements include: paragraph 4 on pages 2-3 of Morgan Stanley's Opposition to CPH's Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, dated January 31, 2005; the first two sentences of the second full paragraph on page 2 of Morgan Stanley's Supplemental Opposition to CPH's Motion for Adverse Inference Instruction, dated February 11, 2005; the last paragraph on page 6 that carries over to page 7 of Morgan Stanley Opposition to CPH's Motion for a Default Judgment, dated February 28, 2005; the last clause of the fourth sentence from the bottom and the last two sentences on page 20, and the first two sentences of the second full paragraph on page 31 of Morgan Stanley's Opposition to CPH's Motion for a Default Judgment (corrected version filed March 13, 2005 and original version served March 12, 2005); the second sentence in the second full paragraph on page 7 of Morgan Stanley's Submission of Proposed Statement to be Read to the Jury Pursuant to Court's March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment, dated March 28, 2005; the second sentence of the first full paragraph on page 24, the second sentence on page 26, the heading for Section C and the second and third sentences in that section on page 26, the last clause in the second to last sentence and the last sentence in that section on page 27, the final sentence on page 33 that carries over to the top of page 34, and the first clause of the second sentence of the first full paragraph on page 35 of the Summary of Offer of Proof Regarding Defendant's Alleged Litigation Misconduct (Addendum to Morgan Stanley's Opposition to Coleman (Parent) Holdings Inc.'s Second Renewed Motion for Correction and Clarification of the Litigation-Misconduct Statement) ("Summary of Offer of Proof"), originally filed May 12, 2005 and re-filed on May 17, 2005 in Phase II; February 2, 2005 Hr'g Tr. 132:1-7, 133:6-11, 147:22-25 (statements by counsel); the second half of the heading for Section C on page 15 and the first paragraph of page 17 of Morgan Stanley's Response to CPH's Chronology of Purported Discovery Abuses, dated March 15, 2005; the second, third and fifth rows (first sentence) on page 6 of Morgan Stanley & Co. Inc.'s Overnight Response to CPH's Additional Submission in Support of its Motion for Default, dated March 15, 2005; May 16, 2005 Hr'g Tr. 15266:4-8; and May 18, 2005 Hr'g Tr. 15607:4-8, 11-13, 15608:8-13, 17-19.

Respectfully submitted,

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BY: _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 17th day of June, 2005.

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

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

CASE NO: 2003 CA 005045 AI

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S EMERGENCY MOTION TO COMPEL MORGAN STANLEY TO PRODUCE SUBPOENA SERVED ON DELOITTE & TOUCHE

THIS CAUSE having come to be considered upon the Plaintiff's Emergency Motion to Compel Morgan Stanley to Produce Subpoena Served on DeLoitte & Touche, and the Court having reviewed the file and being fully advised in the premises, it is hereby,

ORDERED and ADJUDGED: the Motion's Granted. MSCO. shall provide CPM a copy of the subpoena by 12noon.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, this 17 day of June, 2005.

ELIZABETH T. MAASS
CIRCUIT COURT JUDGE

Copies have been furnished to all counsel on the attached counsel list.

16div-018121

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June 18, 2005

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Re: ***Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.***

Dear Rebecca:

I enclose a Second Amended Exhibit List for the post-trial hearing on June 20 and 21, 2005.

Please note that we have re-marked the Supplemental Report of Dr. Blaine Nye as CPH Ex. 1404 to conform with Dr. Nye's deposition transcript and re-marked the Report of David J. Ross as CPH Ex. 1401 to conform with Mr. Ross's deposition transcript.

Very truly yours,

Michael T. Brody

cc: John Scarola, Esq. (by telecopy)
Joseph Ianno, Jr., Esq. (by e-mail)
Jerold S. Solovy, Esq.

CHICAGO_1273874_1

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

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S SECOND AMENDED EXHIBIT LIST FOR POST-TRIAL HEARING ON JUNE 20-21, 2005

Plaintiff, Coleman (Parent) Holdings Inc. ("CPH") hereby submits its Second Amended Exhibit List, which is attached hereto as Exhibit A, for the post-trial hearing on June 20-21, 2005. In connection with its Second Amended Exhibit List, CPH reserves its rights as follows:

1. In addition to the documents set forth on the attached Second Amended Exhibit List, CPH reserves the right to use additional exhibits that it identifies in connection with the ongoing expert discovery.

2. CPH reserves the right to use any documents created by or relied upon by Morgan Stanley's expert witness, David Ross, in connection with his expert report and/or testimony at the hearing.

3. CPH reserves the right to use at the hearing duplicate copies and/or original versions of any of the documents listed on the attached Second Amended Exhibit List.

4. CPH reserves the right to use additional documents at the hearing that are not contained on its Second Amended Exhibit List for purposes of cross-examination and/or rebuttal.

5. CPH reserves the right to use and/or introduce at the hearing any proposed trial exhibit that has been identified by Morgan Stanley.

6. CPH reserves the right to submit and introduce summary documents based upon the information included in documents identified in the attached Second Amended Exhibit List or in the documents that Morgan Stanley has identified, as well as demonstrative exhibits.

7. By listing documents on the attached Second Amended Exhibit List, CPH is not conceding the relevance, foundation, and/or admissibility of any of those documents. CPH reserves the right not to offer at the hearing any of its proposed exhibits identified in the attached list. In compiling the attached list, CPH endeavored to identify and disclose documents that it may use to rebut arguments that might be advanced by Morgan Stanley at the hearing.

I HEREBY CERTIFY that a true and correct copy of the foregoing and its attachment has been sent by e-mail to the individuals on the attached service list on this 18th day of June, 2005.

Dated: June 18, 2005

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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EXHIBIT A

CPH TRIAL EX. NUMBER	DATE	BATES RANGE	DESCRIPTION
824	12/06/1999	N/A	Sunbeam Form S-4/A
1319	12/14/1998	CPH 1039842-850	Memo from L. Bornstein to The Files re Sunbeam Audit Committee meeting December 14, 1998
1391	12/31/2000	CPH 2012369-2012424	Mafco Holdings Inc. Consolidated Financial Statements For the Year Ended December 31, 2000 With Report of Independent Auditors
1392	12/31/1999	CPH 2012307-2012368	Mafco Holdings Inc. Consolidated Financial Statements For the Year Ended December 31, 1999 With Report of Independent Auditors
1395	03/29/1998	CPH 1094218-1094235	Registration Rights Agreement
1398	11/12/1999	N/A	Opinion (In re The Coleman Company, Inc. Shareholders Litigation), 750 A.2d 1202
1401	06/06/2005	N/A	Report of David J. Ross (*CPH v. MS & Co.*)
1401 A	00/00/0000	N/A	Documents establishing the attorneys' fees, costs, and expenses CPH paid to Jenner & Block LLP and Searcy, Denney, Scarola, Barnhart & Shipley, P.A. in connection with *Coleman (Parent) Holdings Inc. v. Arthur Andersen LLP, et al.*
1402	06/06/2005	N/A	Letter from R. Beynon to M. Brody re Ross report
1403	06/06/2005	N/A	David J. Ross Curriculum Vitae

CPH TRIAL EX. NUMBER	DATE	BATES RANGE	DESCRIPTION
1404	06/13/2005	N/A	Post-Trial Rebuttal Report of Blaine F. Nye, Ph.D
1405	02/06/2001	MSC 0121997-0122125	Event Study of Sunbeam Corp. for Class Period July 1, 1996 - February 6, 2001
1406	02/06/2001	MSC 0122127-0122154	CRSP NYSE Equally-Weighted Index with Dividends
1407	00/00/0000	MSC 0122126	Percentage Premium of Block Price Over Exchange Price
1408	00/00/1989	N/A	"Private Benefits From Control of Public Corporations", by M. Barclay and C. Holderness
1409	03/00/2001	N/A	"The Block Pricing Puzzle" by M. Barclay, C. Holderness and D. Sheehan
1410	06/02/2005	N/A	Historical Price Volatility of Sunbeam Corporation
1411	00/00/0000	MSC 0122188-0122265	Option Price data
1412	07/16/2003	N/A	Report of David J. Ross (*In the matter of Quanex Corporation and Affiliated Subsidiaries*)
1413	08/12/2003	N/A	Rebuttal Report of David J. Ross (*In the matter of Quanex Corporation and Affiliated Subsidiaries*)
1414	11/14/2000	N/A	Report of David J. Ross (*In the matter of Nicole Rose Corp.*)
1415	04/08/1994	N/A	Deposition of David J. Ross (*Gloria G. Haft v. Herbert H. Haft*)

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June 19, 2005

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Re: ***Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.***

Dear Rebecca:

I enclose a Third Amended Exhibit List for the post-trial hearing on June 20 and 21, 2005.

As set forth in Deirdre Connell's e-mail to you this afternoon, we object to your untimely disclosure of approximately 50 new exhibits. In response to your untimely disclosure today, we hereby add CPH Exhibits 1416 to 1418.

Additionally, we object to your untimely designations from Mr. Slotkin's deposition testimony, which we received this evening by e-mail from Jim Webster at 8:10 p.m.

Very truly yours,

Michael T. Brody

cc: John Scarola, Esq. (by telecopy)
Joseph Ianno, Jr., Esq. (by e-mail)
Jerold S. Solovy, Esq.

CHICAGO_1273951_1

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

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S THIRD AMENDED EXHIBIT LIST FOR POST-TRIAL HEARING ON JUNE 20-21, 2005

Plaintiff, Coleman (Parent) Holdings Inc. ("CPH") hereby submits its Third Amended Exhibit List, which is attached hereto as Exhibit A, for the post-trial hearing on June 20-21, 2005. In connection with its Third Amended Exhibit List, CPH reserves its rights as follows:

1. In addition to the documents set forth on the attached Third Amended Exhibit List, CPH reserves the right to use additional exhibits that it identifies in connection with the ongoing expert discovery.

2. CPH reserves the right to use any documents created by or relied upon by Morgan Stanley's expert witness, David Ross, in connection with his expert report and/or testimony at the hearing.

3. CPH reserves the right to use at the hearing duplicate copies and/or original versions of any of the documents listed on the attached Third Amended Exhibit List.

4. CPH reserves the right to use additional documents at the hearing that are not contained on its Third Amended Exhibit List for purposes of cross-examination and/or rebuttal.

5. CPH reserves the right to use and/or introduce at the hearing any proposed trial exhibit that has been identified by Morgan Stanley.

6. CPH reserves the right to submit and introduce summary documents based upon the information included in documents identified in the attached Third Amended Exhibit List or in the documents that Morgan Stanley has identified, as well as demonstrative exhibits.

7. By listing documents on the attached Third Amended Exhibit List, CPH is not conceding the relevance, foundation, and/or admissibility of any of those documents. CPH reserves the right not to offer at the hearing any of its proposed exhibits identified in the attached list. In compiling the attached list, CPH endeavored to identify and disclose documents that it may use to rebut arguments that might be advanced by Morgan Stanley at the hearing.

I HEREBY CERTIFY that a true and correct copy of the foregoing and its attachment has been sent by e-mail to the individuals on the attached service list on this 19th day of June, 2005.

Dated: June 19, 2005

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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EXHIBIT A

CPH TRIAL EX. NUMBER	DATE	BATES RANGE	DESCRIPTION
824	12/06/1999	N/A	Sunbeam Form S-4/A
1319	12/14/1998	CPH 1039842-850	Memo from L. Bornstein to The Files re Sunbeam Audit Committee meeting December 14, 1998
1391	12/31/2000	CPH 2012369-2012424	Mafco Holdings Inc. Consolidated Financial Statements For the Year Ended December 31, 2000 With Report of Independent Auditors
1392	12/31/1999	CPH 2012307-2012368	Mafco Holdings Inc. Consolidated Financial Statements For the Year Ended December 31, 1999 With Report of Independent Auditors
1395	03/29/1998	CPH 1094218-1094235	Registration Rights Agreement
1398	11/12/1999	N/A	Opinion (In re The Coleman Company, Inc. Shareholders Litigation), 750 A.2d 1202
1401	06/06/2005	N/A	Report of David J. Ross (*CPH v. MS & Co.*)
1402	06/06/2005	N/A	Letter from R. Beynon to M. Brody re Ross report
1403	06/06/2005	N/A	David J. Ross Curriculum Vitae
1404	06/13/2005	N/A	Post-Trial Rebuttal Report of Blaine F. Nye, Ph.D
1404A	06/13/2005	N/A	Exhibit 1 to Post-Trial Rebuttal Report of Blaine F. Nye, Ph.D
1404B	06/13/2005	N/A	Exhibit 2 to Post-Trial Rebuttal Report of Blaine F. Nye, Ph.D

CPH TRIAL EX. NUMBER	DATE	BATES RANGE	DESCRIPTION
1405	02/06/2001	MSC 0121997-0122125	Event Study of Sunbeam Corp. for Class Period July 1, 1996 - February 6, 2001
1406	02/06/2001	MSC 0122127-0122154	CRSP NYSE Equally-Weighted Index with Dividends
1407	00/00/0000	MSC 0122126	Percentage Premium of Block Price Over Exchange Price
1408	00/00/1989	N/A	"Private Benefits From Control of Public Corporations", by M. Barclay and C. Holderness
1409	03/00/2001	N/A	"The Block Pricing Puzzle" by M. Barclay, C. Holderness and D. Sheehan
1410	06/02/2005	N/A	Historical Price Volatility of Sunbeam Corporation
1411	00/00/0000	MSC 0122188-0122265	Option Price data
1412	07/16/2003	N/A	Report of David J. Ross (*In the matter of Quanex Corporation and Affiliated Subsidiaries*)
1413	08/12/2003	N/A	Rebuttal Report of David J. Ross (*In the matter of Quanex Corporation and Affiliated Subsidiaries*)
1414	11/14/2000	N/A	Report of David J. Ross (*In the matter of Nicole Rose Corp.*)
1415	04/08/1994	N/A	Deposition of David J. Ross (*Gloria G. Haft v. Herbert H. Haft*)
1416	00/00/0000	N/A	Implied Volatilities for Quotations for Long-Term Sunbeam Call Options Traded on August 13, 1998 Shown on MS Ex. 1088

CPH TRIAL EX. NUMBER	DATE	BATES RANGE	DESCRIPTION
1417	00/00/0000	N/A	Implied Volatilities for Quotations for Long-Term Sunbeam Call Options Traded on August 24, 1998 Shown on MS Ex. 1089
1418	00/00/0000	N/A	Implied Volatilities for Quotations for Long-Term Sunbeam Call Options Traded on December 6, 1999 Shown on MS Ex. 1090

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

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

CASE NO: CA 03-5045 AI

MORGAN STANLEY'S AMENDED EXHIBIT LIST FOR THE JUNE 20-21, 2005 POST-TRIAL HEARING

Pursuant to the Court's May 18, 2005 Order, Morgan Stanley & Co. Incorporated ("Morgan Stanley") hereby provides its amended list of exhibits upon which Morgan Stanley may rely at the post-trial hearing on June 21 and 22, 2005. Morgan Stanley reserves the right to modify or supplement its list of exhibits consistent with the Florida Rules of Civil Procedure, the agreement of the parties, further orders of the Court, or any other applicable law or procedure. Morgan Stanley reserves the right to modify or supplement this list in response to unexpected evidence or argument presented by Coleman (Parent) Holdings Inc. ("CPH") which requires rebuttal; to cross-examine CPH witnesses; or in response to rulings by the Court. In addition, Morgan Stanley reserves the right to use as exhibits any documents relied upon by expert witnesses, exhibits listed by CPH on its exhibit list, and demonstrative exhibits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile on this 19th day of June, 2005 and Federal Express on the 20th day of June, 2005.

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James M. Webster, III *(Pro Hac Vice)*
Rebecca A. Beynon *(Pro Hac Vice)*
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BY: _____

Counsel for Morgan Stanley & Co. Incorporated

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Morgan Stanley's Exhibits
June 20-21, 2005 Hearing

Exhibit No.		*Date*	*Description*	*Bates*
MS	67	06/08/2001	Complaint, Coleman (Parent) Holdings v. Arthur Andersen and Phillip Harlow, No. CA 01-06062 (15th Jud. Dist Fla.)	
MS	96	08/12/1998	Settlement Agreement between Sunbeam and Coleman (Parent) Holdings Inc.	CPH 1167614-1167
MS	96 A	08/12/1998	Settlement Agreement between Sunbeam and Coleman (Parent) Holdings Inc. - Exhibit A (Warrant for the Purchase of Shares of Common Stock of Sunbeam Corporation)	CPH 2000731-2000
MS	96 B	08/12/1998	Settlement Agreement between Sunbeam and Coleman (Parent) Holdings Inc. - Exhibit B (Amendment to Registration Rights Agreement)	CPH 2000731-2000
MS	97	04/02/1999	Memo from S. Tripp to Sunbeam Audit Files re M&F Warrants Accounting and Valuation	CPH 1308865-1308
MS	99	05/14/1999	Sunbeam Annual Report 1998 and Form 10K	CPH 0639339-0639
MS	235	10/10/2002	Settlement Agreement between Arthur Andersen, Coleman (Parent) Holdings, Inc., New Coleman Holdings, Inc. MacAndrews & Forbes & Holdings, Inc. and Mafco Holdings, Inc.	
MS	260	12/14/1998	Memo from B. Jenkins to G. Kristol, C. Elson, F. Whittlesey, D. Denkhaus, N. Spiegel, S. Thibault, P. Shapiro, J. Kelley re Audit Committee Meeting	CPH 1039844-1039
MS	408	05/08/2003	Complaint, Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc., Case No. CA 03-5045 AI (15th Jud. Dist Fla.)	
MS	513	04/02/1999	Memo from S. Tripp to Sunbeam Audit Files re M&F Warrants Accounting and Valuation	CPH 0647025-0647
MS	813	03/30/1998	Compilation of book and accounting values ascribed to CPH's Sunbeam investment, MacAndrews & Forbes GL Accounting Distribution	CPH 2012198-2012
MS	814	04/05/1999	MAFCO Holdings, Inc. Consolidated Financial Statements for the Year Ended December 31, 1998 with Report of Independent Auditors	CPH2012219-20123

Exhibit No.		Date	Description	Bates
MS	822	12/31/1998	MAFCO Holdings Estimated Fair Value Calculations 12/31/1998 and 12/31/1999	CPH 2012216-2012
MS	831	01/00/1998	Compilation of MAFCO General Ledger Report from January, 1998 through year end 2000	CPH 2012468-2012
MS	832	12/31/1998	MAFCO Holdings worksheets re Estimated Fair Value Calculations 12/31/1998 and 12/31/1999	CPH 2012475-2012
MS	833	09/30/1998	Sunbeam Impairment Worksheet	CPH 2012487-2012
MS	834	06/30/1998	Coleman Sale Gain Worksheets	CPH 2012491-2012
MS	841	03/20/2000	MAFCO Holdings Estimated Fair Value Calculation	CPH 2012481-2012
MS	849	03/07/2005	Production of additional documents related to MAFCO's estimated fair value calculation	CPH 2012505-2012
MS	857	04/19/1999	Memo from L. Winoker to R. Perelman re Fair Value Disclosure	CPH 2012512-2012
MS	1065	01/18/1995	"Business Brief - Shawmut National Corp.: Company Reports Earnings for Fourth Quarter Fell 36%," The Wall Street Journal (Jan. 18, 1995)	
MS	1066	02/22/1995	Wilke, John R. and Joseph Rebello, "Fleet to Buy Shawmut for $3.45 Billion, Creating Regional Banking Powerhouse - Combination Would Dwarf Rivals in New England; Antitrust Scrutiny Seen," The Wall Street Journal (Feb. 22, 1995)	
MS	1067	11/30/1995	Fleet Financial Group, Inc. SEC Form 8-K	
MS	1068	09/04/2001	Deogun, Nikhil, Gary McWilliams, Molly Williams, "Computer Deal: H-P Reaches Accord to Acquire Compaq For $25 Billion in Stock - Hit by Global PC Slowdown, Fires Aim for Growth In the Services Business - Carly Fiorina Places Her Bet," The Wall Street Journal (Sept. 4, 2001)	
MS	1069	05/01/2002	Hewlett-Packard Company Form 8-K	
MS	1070	01/11/2002	"Business Brief - Rational Software Corp.: Loss Is Posted for a Quarter On a 21% Drop in Revenue," The Wall Street Journal (Jan. 11, 2002)	

Exhibit No.	*Date*	*Description*	*Bates*
MS 1071	12/09/2002	Bulkeley, William M. and Don Clark, "IBM's Rational Deal Augurs Realism - Big Blue's $2.1 Billion Offer For Software Maker Signals Changing Tech Valuations," The Wall Street Journal (Dec. 9, 2002)	
MS 1072	02/21/2003	International Business Machines Corporation SEC Form 8-K, attaching press release regarding acquisition of Rational Software Corp.	
MS 1073	01/13/2003	Hechinger, John, "Fleet to Take $450 Million Charge," The Wall Street Journal (Jan 13, 2003)	
MS 1074	04/18/2003	John Hechinger and Mark Maremont, The Wall Street Journal, Trouble on the Floor: The Price of Joining the 'Club' - FleetBoston Finds Its NYSE Unit Is No Longer Low-Profile (Apr. 18, 2003)	
MS 1075	10/28/2003	Mollenkamp, Carrick and John Hechinger, "Branching Out: Bank of America Bets on Consumer - Acquisition of FleetBoston For $43 Billion Signals Growing Industry Battle - A Race to Find New Accounts,"The Wall Street Journal (Oct. 28, 2003)	
MS 1076	04/01/2004	Bank of America Corp. SEC Form 8-K	
MS 1077	04/20/1995	Bulkeley, William M., "Lotus Reports Large 1st Quarter Loss, Says It Will Reorganize Operations," The Wall Street Journal (Apr. 20, 1995)	
MS 1078	06/06/1995	Hays, Laurie, Steven Lipin, and William M. Bulkeley, "Blue Notes: Software Landscape Shifts as IBM Makes Hostile Bid for Lotus - Giant Is Determined to Lead In Business of Lashing Desktop PCs Together - Will Another Suitor Emerge?" The Wall Street Journal (Jun. 6, 1995)	
MS 1079	06/30/1995	International Business Machines Corporation SEC Form 10-Q for the Quarter Ended June 30, 1995	
MS 1080	07/23/2003	Craig, Susanne and Tom Lauricella, "Lehman Goes From the Prey To the Hunter," The Wall Street Journal (July 23, 2003)	
MS 1081	10/31/2003	Lehman Brothers and Neuberger Berman Complete Strategic Combination (Oct. 31, 2003)	
MS 1082		Bajaj, M., Denis, D. J., Ferris, Sp. P., and Sarin, A., "Firm Value and Marketability Discounts, Journal of Corporate Law (2001)	

Exhibit No.	*Date*	*Description*	*Bates*
MS 1083		Barclay, M. and Holderness, Clifford G., "Private Benefits From Control of Public Corporations," Journal of Financial Economics (1989)	
MS 1084		Hertzel, M. and Smith, R. L., "Market Discounts and Shareholder gains for Placing Equity Privately, Journal of Finance (1993)	
MS 1085		Hull, J. C., Options, Futures & Other Derivatives, (Fourth Edition, Prentice-Hall, Inc., 2000)	
MS 1086		Johnson, Herb and Rene Stulz, "The Pricing of Options with Default Risk," The Journal of Finance (June 1987) 267-280	
MS 1087		Clark, Kent and Eli Ofek, "Mergers as a Means of Restructuring Distressed Firms. An Empirical Investigation," Journal of Financial and Quantitative Analysis (December 1994) 541-565	
MS 1088		Sunbeam Corp. Quotations for Long-term Call Options Traded on August 13, 1998	
MS 1089		Sunbeam Corp. Quotations for Long-term Call Options Traded on August 24, 1998	
MS 1090		Sunbeam Corp. Quotations for Long-term Call Options Traded on December 6, 1999	
MS 1091		Sunbeam Corp. Warrant Valuation, December 6, 1999 Assuming 20% Large Block Premium	
MS 1092		Sunbeam Corp. Warrant Valuation, December 6, 1999 Assuming No Large Block Premium	
MS 1093	10/27/2003	A. Weinberg, Bank Of America Expands Its Fleet, Forbes Magazine (Oct. 27, 2003)	
MS 1094	10/28/2003	T. Fogarty, Bank of America, Fleet would create No. 2 bank, USA Today (Oct. 28, 2003)	
MS 1095	06/06/2005	J. Stempel, Washington Mutual to buy Providian, Washington Post (Jun. 6, 2005).	
MS 1096	06/06/2005	J. Strasburg, Return to regular view Washington Mutual to buy S.F.'s Providian, San Francisco Chronicle (Jun. 6, 2005).	

Exhibit No.	*Date*	*Description*	*Bates*
MS 1097	03/13/2000	J. Surowiecki, Qwest's Dangerous Liaison, Slate.com (Mar. 13, 2000)	
MS 1098	03/13/2001	D. Reed, Soaring to the top of the heap; TWA deal would make American largest airline, Forth-Worth Star Telegram (Mar. 13, 2001)	
MS 1099	02/28/2005	P. Bhatnagar, Federated-May set $11B deal Cash-and-stock merger would combine two of the most historic names in department store retailing, CNN/Money (Feb. 28, 2005)	
MS 1100	11/17/2004	F. Barbash & M. Barbaro, Sears, Kmart to Merge in $11B Deal, Washington Post (Nov. 17, 2004)	
MS 1101	03/26/2005	T. Zeller, Blockbuster Ends Bid For Rival, NY Times at C1 (Mar. 26, 2005)	
MS 1102	06/06/2005	E. Dash, "Washington Mutual to Buy Providian for $6.45 Billion," NY Times (June 6, 2005)	
MS 1103	08/02/1999	S. Brull, "Qwest-U.S. West: They're Merging, but is it worth it? Their marriage could be bait for the big boys," BusinessWeek Online (Aug. 2, 1999)	
MS 1104	07/19/1999	R. Cantwell, "Telecom Colossus - Qwest Announce $48.5 Billion Merger of Telephone, Fiber Optic Systems," Rocky Mountain News (July 19, 1999)	
MS 1105	11/17/2004	D. Lieberman, "Sears, Kmart to Merge," USA Today	
MS 1106	11/22/2004	J. Knight, "Sears-Kmart might just be a real estate deal," (Nov. 22, 2004)	
MS 1107	03/04/2005	T. Schooley, "Federated/May merger could open door for new retailers in Pittsburgh," Pittsburgh Business Times (Mar. 4, 2005)	
MS 1108	09/23/2000	E. Andrews, "The New Rolls Royce; An Automotive Classic Coming to Dealerships in 2003," The New York Times (Sept. 23, 2000)	
MS 1109	03/23/2000	K. Bradsher, "Gentlemen, Merge Your Manufacturers; Consolidation Hits on Virtually All Cylinders," The New York Times (Mar. 23, 2000)	

Exhibit No.	*Date*	*Description*	*Bates*
MS 1110	04/09/1997	C. Bagli, "Rival Railroads Agree on Conrails Assets," The New York Times (Apr. 9, 1997)	
MS 1111	08/03/2003	E. Torbenson, "Too heavy a burden?; AMR's debt-laden purchase of TWA could prove less of a hindrance in time," The Dallas Morning News (Aug. 3, 2003)	
MS 1112	06/07/2005	Expert Report of David J. Ross	
MS 1113	06/13/2005	Post-Trial Rebuttal Report of Blaine F. Nye, Ph.D.	
CPH 1296	01/01/1993	Summary of Sunbeam Corporation's closing stock prices	

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S VERIFIED MOTION FOR ORDER ALLOWING INTERVIEW OF JURORS

THIS CAUSE came before the Court June 20, 2005 on Morgan Stanley's Verified Motion for Order Allowing Interview of Jurors, with all counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Verified Motion for Order Allowing Interview of Jurors is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 21 day of June, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Rebecca Beynon, Esq.
Sumner Square
1615 M Street, NW, Suite 400
Washington, DC 20036

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER AND NOTICE OF HEARING

This cause having come before the Court, it is

ORDERED AND ADJUDGED that hearing on MS & Co.'s ore tenus Motion to Stay and any written Motion to Stay Execution for Final Judgment is hereby set for

June 23, 2005, at 9:30 a.m.

at the West Palm Beach Courthouse, Room 11A, 205 N Dixie Hwy, WPB, FL. Any counsel other than local counsel may appear by speaker telephone upon prior arrangement with the Court's judicial assistant at (561) 355-6050.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 22 day of June, 2005.

_____
ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Rebecca Beynon, Esq.
Sumner Square
1615 M Street, NW, Suite 400
Washington, DC 20036

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oir ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki Infim, ki bézwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontakté koôdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro téléfonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résévwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe accommodation pour pouvoir participer á ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER AND NOTICE OF HEARING

THIS CAUSE came before the Court June 21, 2005, with both parties well represented by counsel. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that within 25 days of entry of the Final Judgment in this cause each side shall serve its petition for award of fees and costs previously awarded by the Court subject to a reservation of jurisdiction to determine the amount thereof. It is further

ORDERED AND ADJUDGED that a status conference is specially set before the Honorable Elizabeth T. Maass on August 26, 2005, at 8:45 a.m., in Courtroom 11A, 205 N. Dixie Hwy, WPB, FL 33401. This is a specially set hearing which shall be limited to 15 minutes. Any counsel may appear by speaker telephone upon prior arrangement with the undersigned's judicial assistant at (561) 355-6050. The purpose of the status conference is to discuss the status of each party's claim to fees and costs and, if necessary, set the matter or matters for evidentiary hearing. It is further

ORDERED AND ADJUDGED that

1. All parties are required to participate in mediation of the issues raised by each party's petition for award of fees and costs.

a. The appearance of counsel who will present the petition for each party and representatives of each party with full authority to enter into a complete compromise and settlement is mandatory.

b. At least one week before the conference, all parties shall file with the mediator a brief, written summary of the case containing a list of issues as to each party. If an attorney or party filing the summary wishes its content to remain confidential, he/she must advise the mediator in writing at when the report is filed.

c. All discussions, representations, and statements made at the mediation conference shall be privileged consistent with Florida Statutes 44.302 and 90.408.

d. The mediator has no power to compel or enforce a settlement agreement. If a settlement is reached, it shall be the responsibility of the attorneys or parties to reduce the agreement to writing and to comply with Florida Rule of Civil Procedure 1.730(b), unless waived.

2. Plaintiff's attorney shall be responsible for scheduling mediation. **Mediation shall be held prior to the status conference scheduled herein**. The parties should agree on a mediator, if possible. If they are unable to agree, any party may apply to the Court for appointment of a mediator. The lead attorney or party shall file and serve on all parties and the mediator a Notice of Mediation giving the time, place, and date of the mediation and the mediator's name. The mediator shall be paid $175.00 per hour, absent Court order or the agreement of all parties and the mediator.

3. Completion of mediation is a prerequisite to hearing on the petitions If mediation is not conducted, or if a party fails to participate in mediation, the petition may be stricken and other sanctions may be imposed.

4. Any party opposing mediation may proceed under Florida Rule of Civil Procedure 1.700(b).

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 29 day of June, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Rebecca Beynon, Esq.
Sumner Square
1615 M Street, NW, Suite 400
Washington, DC 20036

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oir ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki Infim, ki bézwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontakté koôdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro téléfonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résévwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe accommodation pour pouvoir participer á ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

FINAL JUDGMENT

Pursuant to the Verdicts rendered in this action,

IT IS ADJUDGED that Plaintiff, Coleman (Parent) Holdings Inc., a Delaware corporation, the corporate headquarters of which are located at 35 East 62nd Street, New York, NY, shall recover from Defendant, Morgan Stanley & Co., Incorporated, a Delaware corporation, the corporate headquarters of which are located at 1585 Broadway, New York, NY, $589,784,885 for compensatory damages (including credits for set-offs) and $137,911,290.83 for prejudgment interest, resulting in total compensatory damages of $727,696,175.83.[1]

IT IS FURTHER ADJUDGED that Plaintiff shall recover from Defendant $850,000,000 for

---

[1]The jury awarded $604,334,000 in compensatory damages. Based on the evidence presented, the Court determines that MS & Co. is entitled to set-offs in the amounts of $14,549,115 as of August 12, 1998, and $70,000,000 as of October 17, 2002, and that prejudgment interest began to accrue on February 6, 2001. Applying these determinations:

	$604,334,000	
	- 14,549,115	
	$589,784,885	due as of February 6, 2001
2001 interest @ 11% (329 days) =	$58,477,575.31	
2002 interest through October 16 @ 9% (289 days) =	42,028,232.49	
	$100,505,807.80	interest through October 16, 2002
	+589,784,885.00	
	$690,290,692.80	total due through October 16, 2002
	- 70,000,000.00	October 17, 2002 set-off
	$620,290,692.80	due as of October 17, 2002 ($589,784,885 principal and $30,505,807.80 interest)

unpaid pre-October 17, 2002 interest	30,505,807.80
2002 interest from October 17 - December 31 @ 9% (76 days)	11,052,407.16
2003 interest @ 6%	35,387,093.10
2004 interest @ 7%	41,284,941.95
2005 interest @ 7% (174 days)	19,681,040.82
Total accrued and unpaid interest	$137,911,290.83

punitive damages.

The combined total judgment against the Defendant and in favor of the Plaintiff in the amount of $1,577,696,175.83 shall bear interest at the rate of 7% a year. Execution shall issue on request of Plaintiff on or after July 1, 2005. The Court retains jurisdiction to consider the parties' claims for fees and costs.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 23rd day of June, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Rebecca Beynon, Esq.
Sumner Square
1615 M Street, NW, Suite 400
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CARLTON FIELDS, P.A.

ATTORNEYS AT LAW

ESPERANTÉ
222 LAKEVIEW AVENUE, SUITE 1400
WEST PALM BEACH, FLORIDA 33401-6149

MAILING ADDRESS
P.O. BOX 150, WEST PALM BEACH, FL 33402-0150
TEL (561) 659-7070 FAX (561) 659-7368

FAX COVER SHEET

		Phone Number	Fax Number
Date:	June 23, 2005		
To:	Jack Scarola	(561) 686-6300	(561) 684-5816
	Jerold Solovy/Michael Brody	(312) 222-9350	(312) 840-7711
	Rebecca Beynon/Mark Hansen	(202) 326-7900	(202) 326-7999
From:	Joyce Dillard, CLA	(561) 659-7070	(561) 659-7368

Client/Matter No.: 47877/14092 **Employee No.:**

Total Number of Pages Being Transmitted, Including Cover Sheet: 4

Message:

Coleman v. Morgan Stanley & Co., Inc.

To follow please find a copy of Joe Ianno's letter of today's date to Judge Maass with attached comments to Judge Maass' draft final judgment.

☐ ***Original to follow Via Regular Mail*** ☐ ***Original will Not be Sent*** ☐ ***Original will follow via Overnight Courier***

****
The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (if long distance, please call collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.
****

IF THERE ARE ANY PROBLEMS OR COMPLICATIONS, PLEASE NOTIFY US IMMEDIATELY AT:
(561) 659-7070

TELECOPIER OPERATOR: _____

ATLANTA
MIAMI
ORLANDO
ST. PETERSBURG
TALLAHASSEE
TAMPA
WEST PALM BEACH

CARLTON FIELDS
ATTORNEYS AT LAW

Esperanté
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401-6149
P.O. Box 150
West Palm Beach, Florida 33402-0150

561.659.7070
561.659.7368 fax
www.carltonfields.com

Joseph Ianno, Jr.
Shareholder
(561) 650-8008 direct
jianno@carltonfields.com

June 23, 2005

The Honorable Elizabeth Maass
Palm Beach County Courthouse
205 North Dixie Highway, Room 11.1208
West Palm Beach, Florida 33401

VIA HAND-DELIVERY

Re: *Coleman (Parent) Holdings Co. v. Morgan Stanley & Co.*
Case No: CA 03-5045 AI

Dear Judge Maass:

Enclosed please find our edits and objections to the proposed form of Final Judgment. We will appear at 3:30 to fully explain the basis of our calculations. Thank you for your attention to this matter.

Respectfully,

for Joseph Ianno, Jr.

/jed

Enclosures

cc: Jack Scarola (via facsimile w/encl.)
Jerold Solovy (via facsimile w/encl.)
Mark Hansen (via facsimile w/encl.)

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

FINAL JUDGMENT
(DRAFT)

Pursuant to the Verdict rendered in this action,

IT IS ADJUDGED that Plaintiff, Coleman (Parent) Holdings Inc., a Delaware corporation, the corporate headquarters of which are located at 35 East 62nd Street, New York, NY, shall recover from Defendant, Morgan Stanley & Co., Incorporated, a Delaware corporation, the corporate headquarters of which are located at 1585 Broadway, New York, NY, $589,784,885 for compensatory damages (including credits for set-offs) and ~~$137,911,290.83~~ 195,163,619.60 for prejudgment interest, resulting in total compensatory damages of ~~$727,696,175.83~~[1] $714,948,504.60

IT IS FURTHER ADJUDGED that Plaintiff shall recover from Defendant $850,000,000 for

[1]The jury awarded $604,334,000 in compensatory damages. Based on the evidence presented, the Court determines that MS & Co. is entitled to set-offs in the amounts of $14,549,115 as of August 12, 1998, and $70,000,000 as of October 17, 2002, and that prejudgment interest began to accrue on February 6, 2001. Applying these determinations:

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	$100,505,807.80	interest through October 16, 2002
	+589,784,885.00	
	$690,290,692.80	total due through October 16, 2002
	- 70,000,000.00	October 17, 2002 set-off 519
	$620,290,692.80	due as of October 17, 2002 ($589,784,885 principal and $30,505,807.80 interest)

~~unpaid pre-October 17, 2002 interest~~	~~30,505,807.80~~	
2002 interest from October 17 - December 31 @ 9% (76 days)	~~11,052,407.16~~	9,740,626.34
2003 interest @ 6%	~~26,307,093.10~~	31,187,093.10
2004 interest @ 7%	~~41,284,941.95~~	36,854,941.95
2005 interest @ 7% (174 days)	~~19,681,040.82~~	17,345,150.41
Total accrued and unpaid interest	~~$137,911,290.83~~	$195,163,619.60

punitive damages. $1,564,948,504.60

The combined total judgment against the Defendant and in favor of the Plaintiff in the amount of ~~$1,577,696,175.83~~ shall bear interest at the rate of 7% a year. Execution shall issue on request of Plaintiff on or after July 1, 2005. The Court retains jurisdiction to consider the parties' claims for fees and costs.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ___ day of June, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
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Washington, DC 20036

CARLTON FIELDS, P.A.

ATTORNEYS AT LAW

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FAX COVER SHEET

		Phone Number	Fax Number
Date:	June 23, 2005		
To:	Jack Scarola	(561) 686-6300	(561) 684-5816
	Jerold Solovy/Michael Brody	(312) 222-9350	(312) 840-7711
	Rebecca Beynon/Mark Hansen	(202) 326-7900	(202) 326-7999
From:	Joyce Dillard, CLA	(561) 659-7070	(561) 659-7368

Client/Matter No.: 47877/14092 **Employee No.:**

Total Number of Pages Being Transmitted, Including Cover Sheet: 5

Message:

Coleman v. Morgan Stanley & Co., Inc.

Notice of Filing Declaration of Marilyn Needleman.

☐ ***Original to follow Via Regular Mail*** ☐ ***Original will Not be Sent*** ☐ ***Original will follow via Overnight Courier***

****
The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (if long distance, please call collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.
****

IF THERE ARE ANY PROBLEMS OR COMPLICATIONS, PLEASE NOTIFY US IMMEDIATELY AT:
(561) 659-7070

TELECOPIER OPERATOR: _____

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

NOTICE OF FILING DECLARATION OF MARILYN NEEDLEMAN

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed the attached Declaration of Marilyn Needleman.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 23rd day of June, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
KELLOGG, HUBER, ET AL.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999

Counsel for Morgan Stanley & Co. Incorporated

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: _____
JOSEPH IANNO, JR.
Florida Bar No: 655351

SERVICE LIST

Jack Scarola
SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza
Suite 400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

DECLARATION OF MARILYN NEEDLEMAN

1. I have been employed by Morgan Stanley & Co. Incorporated ("Morgan Stanley") since 1997. I have personal knowledge of the matters set forth herein.

2. One of my responsibilities with regard to the above-styled litigation is to secure a supersedeas bond that would cover the potential maximum amount of a final judgment in this case.

3. Morgan Stanley has taken reasonable and necessary steps to obtain a supersedeas bond. Morgan Stanley began discussions in early April with various sureties licensed to do business in Florida for purposes of obtaining a bond for this case if necessary.

4. As a result of extensive negotiations, Morgan Stanley has entered into an agreement with a surety licensed to do business in the State of Florida to provide the required bond.

5. Morgan Stanley has complied with conditions of that agreement concerning the establishment of collateral or security to satisfy the surety.

6. Morgan Stanley is now in the process of prepayment of the bond premium based upon the potential maximum amount of the final judgment. However, it will take a short period of time after entry of the final judgment to finalize the required documentation and post the supersedeas bond. I estimate that five (5) business days from the date of the final judgment should provide sufficient time to post the bond.

VERIFICATION PURSUANT TO FLA. STAT. 92.525

Under penalties of perjury, I declare that I have read the foregoing Declaration and that the facts stated in it are true.

Name: Marilyn Needleman

Title: Executive Director;
Director of Risk & Insurance
Management

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER AND DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court, in Chambers, on its own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Clerk is directed to docket and file the facsimile transmissions from attorneys Jack Scarola and Joseph Ianno dated June 23, 2005.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 23 day of June, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
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Rebecca Beynon, Esq.
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1615 M Street, NW, Suite 400
Washington, DC 20036

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT AND ALTERNATIVE MOTION FOR NEW TRIAL

THIS CAUSE came before the Court June 21, 2005 on Morgan Stanley's Motion for Judgment in Accordance with Motion for Directed Verdict and Alternative Motion for New Trial, with all counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion for Judgment in Accordance with Motion for Directed Verdict and Alternative Motion for New Trial is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 23 day of June, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
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Jerold S. Solovy, Esq.
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Rebecca Beynon, Esq.
Sumner Square
1615 M Street, NW, Suite 400
Washington, DC 20036

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT IN PHASE II, OR, IN THE ALTERNATIVE, NEW TRIAL ON PUNITIVE DAMAGES OR FOR REMITTITUR OF PUNITIVE DAMAGES

THIS CAUSE came before the Court June 21, 2005 on Morgan Stanley's Motion for Judgment in Accordance with Motion for Directed Verdict in Phase II, or, in the Alternative, New Trial on Punitive Damages or for Remittitur of Punitive Damages, with all counsel present.

The punitive damage awarded did not exceed the statutory cap. See Fla. Stat. §768.73; St. John v. Coisman, 799 So. 2d 1110 (Fla. 5th DCA 2001 (where punitive damages are challenged on constitutional grounds, court first looks to state statute to determine whether damages should be reduced). Further, the amount awarded is not excessive in light of facts and circumstances presented to the jury. See Fla. Stat. §768.74. MS & Co. conspired with Sunbeam to defraud CPH. The economic damages that could be expected to, and which did, occur were enormous. The lengths MS & Co. went to to hide the evidence of its complicity were extreme. Indeed, its efforts may well have been successful against any claimant other than one as tenacious and well financed as CPH. Finally, MS & Co. was on notice of the possible magnitude of a punitive damages award for its actions, and the award itself is not grossly disproportionate to the gravity of the offense and its potential harm. It violates neither substantive or procedural due process.

See Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001); BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996); TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993). Based on the foregoing

ORDERED AND ADJUDGED that Morgan Stanley's Motion for Judgment in Accordance with Motion for Directed Verdict in Phase II, or, in the Alternative, New Trial on Punitive Damages or for Remittitur of Punitive Damages is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 23 day of June, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
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Rebecca Beynon, Esq.
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Washington, DC 20036

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER AND NOTICE OF HEARING

This case came before the Court June 23, 2005, with all counsel present or participating by speaker telephone. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that counsel are invited to review the attached draft Final Judgment for mathematical and form objections only. Counsel may send any form objections not previously heard and objections to the mathematical calculations (but not the legal or factual predicate on which they are based) to the facsimile number previously provided by 3:30 p.m. June 23, 2005. A status conference shall be held June 23, 2005 at 3:30 p.m. at the West Palm Beach Courthouse, Room 11A, 205 N Dixie Hwy, WPB, FL. to discuss any objections received. Any counsel may participate by speaker telephone upon prior arrangement with the Court's judicial assistant at (561) 355-6050.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 23 day of June, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished via facsimile transmission:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Fax: (561) 659-7368

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
Fax: (561) 684-5816

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oir ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki Infim, ki bézwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontakté koôdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro téléfonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résévwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe accommodation pour pouvoir participer á ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

FINAL JUDGMENT
(DRAFT)

Pursuant to the Verdict rendered in this action,

IT IS ADJUDGED that Plaintiff, Coleman (Parent) Holdings Inc., a Delaware corporation, the corporate headquarters of which are located at 35 East 62nd Street, New York, NY, shall recover from Defendant, Morgan Stanley & Co., Incorporated, a Delaware corporation, the corporate headquarters of which are located at 1585 Broadway, New York, NY, $589,784,885 for compensatory damages (including credits for set-offs) and $137,911,290.83 for prejudgment interest, resulting in total compensatory damages of $727,696,175.836.[1]

IT IS FURTHER ADJUDGED that Plaintiff shall recover from Defendant $850,000,000 for

---

[1]The jury awarded $604,334,000 in compensatory damages. Based on the evidence presented, the Court determines that MS & Co. is entitled to set-offs in the amounts of $14,549,115 as of August 12, 1998, and $70,000,000 as of October 17, 2002, and that prejudgment interest began to accrue on February 6, 2001. Applying these determinations:

	$604,334,000	
	- 14,549,115	
	$589,784,885	due as of February 6, 2001
2001 interest @ 11% (329 days) =	$58,477,575.31	
2002 interest through October 16 @ 9% (289 days) =	42,028,323.49	
	$100,505,807.80	interest through October 16, 2001
	+589,784,885.00	
	$690,290,692.80	total due through October 16, 2002
	- 70,000,000.00	October 17, 2001 set-off
	$620,290,692.80	due as of October 17, 2002 ($589,784,885 principal and $30,505,807.80 interest)

unpaid pre-October 17, 2002 interest	30,505,807.80
2002 interest from October 17 - December 31 @ 9% (76 days)	11,052,407.16
2003 interest @ 6%	35,387,093.10
2004 interest @ 7%	41,284,941.95
2005 interest @ 7% (174 days)	19,681,040.82
Total accrued and unpaid interest	$137,911,290.83

punitive damages.

The combined total judgment against the Defendant and in favor of the Plaintiff in the amount of $1,577,696,175.83 shall bear interest at the rate of 7% a year. Execution shall issue on request of Plaintiff on or after July 1, 2005. The Court retains jurisdiction to consider the parties' claims for fees and costs.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ___ day of June, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Rebecca Beynon, Esq.
Sumner Square
1615 M Street, NW, Suite 400
Washington, DC 20036

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER AND NOTICE OF HEARING

This cause having come before the Court, it is

ORDERED AND ADJUDGED that a status conference is hereby set for

June 24, 2005, at 2:30 p.m.

at the West Palm Beach Courthouse, Room 11A, 205 N Dixie Hwy, WPB, FL. This status conference is to discuss Plaintiff's counsel's request for attestation of the Final Judgment. Any counsel may appear by speaker telephone by calling (561) 355-6050 at the time of the hearing.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 24 day of June, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Rebecca Beynon, Esq.
Sumner Square
1615 M Street, NW, Suite 400
Washington, DC 20036

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oir ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki Infim, ki bézwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontakté koôdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro téléfonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résévwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe accommodation pour pouvoir participer á ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER AND DIRECTIONS TO THE CLERK

THIS CAUSE came before the Court, in Chambers, on its own Motion. Based on the foregoing, it is

ORDERED AND ADJUDGED that the Clerk is directed to docket and file attorney Jack Scarola's letter dated June 24, 2005.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 24 day of June, 2005.

_____
ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
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Chicago, Il 60611

Rebecca Beynon, Esq.
Sumner Square
1615 M Street, NW, Suite 400
Washington, DC 20036

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT AND ALTERNATIVE MOTION FOR NEW TRIAL

THIS CAUSE came before the Court June 21, 2005 on Morgan Stanley's Motion for Judgment in Accordance with Motion for Directed Verdict and Alternative Motion for New Trial, with all counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion for Judgment in Accordance with Motion for Directed Verdict and Alternative Motion for New Trial is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 25 day of June, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Rebecca Beynon, Esq.
Sumner Square
1615 M Street, NW, Suite 400
Washington, DC 20036

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT AND ALTERNATIVE MOTION FOR NEW TRIAL

THIS CAUSE came before the Court June 21, 2005 on Morgan Stanley's Motion for Judgment in Accordance with Motion for Directed Verdict and Alternative Motion for New Trial, with all counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion for Judgment in Accordance with Motion for Directed Verdict and Alternative Motion for New Trial is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 25 day of June, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

2184

Jerold S. Solovy, Esq.
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1615 M Street, NW, Suite 400
Washington, DC 20036

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT AND ALTERNATIVE MOTION FOR NEW TRIAL

THIS CAUSE came before the Court June 21, 2005 on Morgan Stanley's Motion for Judgment in Accordance with Motion for Directed Verdict and Alternative Motion for New Trial, with all counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion for Judgment in Accordance with Motion for Directed Verdict and Alternative Motion for New Trial is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 23 day of June, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
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Chicago, Il 60611

Rebecca Beynon, Esq.
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1615 M Street, NW, Suite 400
Washington, DC 20036

CARLTON FIELDS, P.A.

ATTORNEYS AT LAW

ESPERANTÉ
222 LAKEVIEW AVENUE, SUITE 1400
WEST PALM BEACH, FLORIDA 33401-6149

MAILING ADDRESS
P.O. BOX 150, WEST PALM BEACH, FL 33402-0150
TEL (561) 659-7070 FAX (561) 659-7368

FAX COVER SHEET

		Phone Number	Fax Number
Date:	June 27, 2005		
To:	Jack Scarola	(561) 686-6300	(561) 684-5816
	Jerold Solovy/Michael Brody	(312) 222-9350	(312) 840-7711
	Rebecca Beynon/Mark Hansen	(202) 326-7900	(202) 326-7999
From:	Joyce Dillard, CLA	(561) 659-7070	(561) 659-7368

Client/Matter No.: 47877/14092 **Employee No.:**

Total Number of Pages Being Transmitted, Including Cover Sheet: 3

Message:

Coleman v. Morgan Stanley & Co., Inc.

To follow please find a copy of Morgan Stanley's Notice of Serving Supersedeas Bond.

☐ ***Original to follow Via Regular Mail*** ☐ ***Original will Not be Sent*** ☐ ***Original will follow via Overnight Courier***

****
The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (if long distance, please call collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.
****

IF THERE ARE ANY PROBLEMS OR COMPLICATIONS, PLEASE NOTIFY US IMMEDIATELY AT:
(561) 659-7070

TELECOPIER OPERATOR: _____

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S NOTICE OF SERVING ITS CIVIL SUPERSEDEAS BOND

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has served a copy of its Civil Supersedeas Bond on Plaintiff, Coleman (Parent) Holdings, Inc. on this 27th day of June, 2005.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 27th day of June, 2005.

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368
E-mail: jianno@carltonfields.com

BY: _____
Thomas E. Warner
Florida Bar No: 176725
Joseph Ianno, Jr.
Florida Bar No. 655351

Counsel for Morgan Stanley & Co. Incorporated

16div-018181

SERVICE LIST

Jack Scarola
SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy
Michael Brody
JENNER & BLOCK, LLC
One IBM Plaza, Suite 400
Chicago, IL 60611

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Defendant/Appellant, MORGAN STANLEY & CO. INCORPORATED ("Morgan Stanley"), appeals to the Fourth District Court of Appeal the Final Judgment entered on June 23, 2005 by Fifteenth Judicial Circuit Judge Elizabeth T. Maass and rendered upon denial of Morgan Stanley's authorized and timely post-trial motions on June 23, 2005.

The nature of the orders on appeal is a final judgment, based on two jury verdicts, and orders disposing of authorized, timely-filed post-trial motions that completed rendition of the final order pursuant to Florida Rule of Appellate Procedure 9.020(h).

Conformed copies of the Final Judgment and orders designated in this notice of appeal are attached herewith, in accordance with Florida Rules of Appellate Procedure 9.110(d).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile, U.S. Mail, and Federal Express on this 27th day of June, 2005.

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

BY: _____
THOMAS E. WARNER
Florida Bar No: 176725
JOSEPH IANNO, JR.
Florida Bar No: 655351

Attorneys for Defendant/Appellant
Morgan Stanley & Co. Incorporated

SERVICE LIST

Jack Scarola, Esq.
SEARCY, DENNEY, SCAROLA,
BARNHARDT & SHIPLEY, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409

Jerold S. Solovy, Esq.
Michael Brody, Esq.
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, Illinois 60611

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

502003CA005045XXXOCAI

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

05 JUN 23 PM 3:5
PALM BEACH COUNTY
CIRCUIT CIVIL 2

FINAL JUDGMENT

Pursuant to the Verdicts rendered in this action,

IT IS ADJUDGED that Plaintiff, Coleman (Parent) Holdings Inc., a Delaware corporation, the corporate headquarters of which are located at 35 East 62nd Street, New York, NY, shall recover from Defendant, Morgan Stanley & Co., Incorporated, a Delaware corporation, the corporate headquarters of which are located at 1585 Broadway, New York, NY, $589,784,885 for compensatory damages (including credits for set-offs) and $137,911,290.83 for prejudgment interest, resulting in total compensatory damages of $727,696,175.83.[1]

IT IS FURTHER ADJUDGED that Plaintiff shall recover from Defendant $850,000,000 for

---

[1]The jury awarded $604,334,000 in compensatory damages. Based on the evidence presented, the Court determines that MS & Co. is entitled to set-offs in the amounts of $14,549,115 as of August 12, 1998, and $70,000,000 as of October 17, 2002, and that prejudgment interest began to accrue on February 6, 2001. Applying these determinations:

	$604,334,000	
	- 14,549,115	
	$589,784,885 due as of February 6, 2001	
2001 interest @ 11% (329 days) =	$58,477,575.31	
2002 interest through October 16 @ 9% (289 days) =	42,028,232.49	
	$100,505,807.80	interest through October 16, 2002
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	$690,290,692.80	total due through October 16, 2002
	- 70,000,000.00	October 17, 2002 set-off
	$620,290,692.80	due as of October 17, 2002 ($589,784,885 principal and $30,505,807.80 interest)

unpaid pre-October 17, 2002 interest	30,505,807.80
2002 interest from October 17 - December 31 @ 9% (76 days)	11,052,407.16
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2004 interest @ 7%	41,284,941.95
2005 interest @ 7% (174 days)	19,681,040.82
Total accrued and unpaid interest	$137,911,290.83

2183

punitive damages.

The combined total judgment against the Defendant and in favor of the Plaintiff in the amount of $1,577,696,175.83 shall bear interest at the rate of 7% a year. Execution shall issue on request of Plaintiff on or after July 1, 2005. The Court retains jurisdiction to consider the parties' claims for fees and costs.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 23rd day of June, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

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One IBM Plaza, Suite 4400
Chicago, Il 60611

Rebecca Beynon, Esq.
Sumner Square
1615 M Street, NW, Suite 400
Washington, DC 20036

STATE OF FLORIDA · PALM BEACH COUNTY
I hereby certify that the foregoing is a true copy of the record in my office.
THIS 23 DAY OF June, 2005
SHARON R. BOCK
CLERK & COMPTROLLER
By _____ DEPUTY CLERK

16div-018187

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT IN PHASE II, OR, IN THE ALTERNATIVE, NEW TRIAL ON PUNITIVE DAMAGES OR FOR REMITTITUR OF PUNITIVE DAMAGES

THIS CAUSE came before the Court June 21, 2005 on Morgan Stanley's Motion for Judgment in Accordance with Motion for Directed Verdict in Phase II, or, in the Alternative, New Trial on Punitive Damages or for Remittitur of Punitive Damages, with all counsel present.

The punitive damage awarded did not exceed the statutory cap. See Fla. Stat. §768.73; St. John v. Coisman, 799 So. 2d 1110 (Fla. 5th DCA 2001 (where punitive damages are challenged on constitutional grounds, court first looks to state statute to determine whether damages should be reduced). Further, the amount awarded is not excessive in light of facts and circumstances presented to the jury. See Fla. Stat. §768.74. MS & Co. conspired with Sunbeam to defraud CPH. The economic damages that could be expected to, and which did, occur were enormous. The lengths MS & Co. went to to hide the evidence of its complicity were extreme. Indeed, its efforts may well have been successful against any claimant other than one as tenacious and well financed as CPH. Finally, MS & Co. was on notice of the possible magnitude of a punitive damages award for its actions, and the award itself is not grossly disproportionate to the gravity of the offense and its potential harm. It violates neither substantive or procedural due process.

(215)

See Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001); BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996); TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993). Based on the foregoing

ORDERED AND ADJUDGED that Morgan Stanley's Motion for Judgment in Accordance with Motion for Directed Verdict in Phase II, or, in the Alternative, New Trial on Punitive Damages or for Remittitur of Punitive Damages is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 23 day of June, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Rebecca Beynon, Esq.
Sumner Square
1615 M Street, NW, Suite 400
Washington, DC 20036

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT AND ALTERNATIVE MOTION FOR NEW TRIAL

THIS CAUSE came before the Court June 21, 2005 on Morgan Stanley's Motion for Judgment in Accordance with Motion for Directed Verdict and Alternative Motion for New Trial, with all counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley's Motion for Judgment in Accordance with Motion for Directed Verdict and Alternative Motion for New Trial is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 23 day of June, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Rebecca Beynon, Esq.
Sumner Square
1615 M Street, NW, Suite 400
Washington, DC 20036

BOND NUMBER: 29-55-01

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INC.,

Defendant.

/

COPY
RECEIVED FOR FILING
JUN 2 7 2005
SHARON R. BOCK
CLERK & COMPTROLLER
CIRCUIT CIVIL DIVISION

CIVIL SUPERSEDEAS BOND

We, Morgan Stanley & Co. Incorporated, as Principal, and National Union Fire Insurance Company of Pittsburgh, PA., as Surety, are held and firmly bound unto Coleman (Parent) Holdings, Inc., in the principal sum of $1,798,573,640.45, for payment of which we bind ourselves, our heirs, personal representatives, successors, and assigns, jointly and severally.

The condition of this obligation is: the above-named Principal has entered an appeal to the District Court of Appeal, Fourth District, State of Florida, to review the Final Judgment entered in the above case on June 23, 2005, and filed in the records of said court in book 18800 at page 0095. In no event shall the aggregate amount payable under this bond by Surety and/or Principal exceed $1,798,573,640.45.

NOW THEREFORE, if the Principal shall satisfy any money judgment contained in the judgment in full, including, if allowed by law, costs, interest, and attorneys' fees, and damages for delay, in the event said appeal is dismissed or said judgment is affirmed, then this obligation shall be null and void; otherwise to remain in full force and effect.

Signed on June 24, 2005 at New York, New York.

MORGAN STANLEY & CO. INCORPORATED,
Principal

By: Alan Scheuer
Alan Scheuer
Treasurer and Managing Director

Signed on June 24, 2005 at New York, New York.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.,
Surety

By: Todd A. Robinson
Todd Robinson
Project Manager

American Home Assurance Company
National Union Fire Insurance Company of Pittsburgh, Pa.
Principal Bond Office: 175 Water Street, New York, NY 10038

POWER OF ATTORNEY

No. 01-E-1047242

KNOW ALL MEN BY THESE PRESENTS:

That American Home Assurance Company, a New York corporation, and National Union Fire Insurance Company of Pittsburgh, Pa., a Pennsylvania corporation, does each hereby appoint

--- Todd A. Robinson: of New York, New York ---

its true and lawful Attorney(s)-in-Fact, with full authority to execute on its behalf bonds, undertakings, recognizances and other contracts of indemnity and writings obligatory in the nature thereof, issued in the course of its business, and to bind the respective company thereby.

IN WITNESS WHEREOF, American Home Assurance Company and National Union Fire Insurance Company of Pittsburgh, Pa. have each executed these presents

this 20th day of May, 2005.

Vincent P. Forte, Vice President

STATE OF NEW YORK }
COUNTY OF NEW YORK }ss.

On this 20th day of May, 2005 before me came the above named officer of American Home Assurance Company and National Union Fire Insurance Company of Pittsburgh, Pa., to me personally known to be the individual and officer described herein, and acknowledged that he executed the foregoing instrument and affixed the seals of said corporations thereto by authority of his office.

JULIANA E. HALLENBECK
NOTARY PUBLIC, STATE OF NEW YORK
No. 01HA6125671
QUALIFIED IN BRONX COUNTY
MY COMMISSION EXPIRES APRIL 18, 2009

CERTIFICATE

Excerpts of Resolutions adopted by the Boards of Directors of American Home Assurance Company and National Union Fire Insurance Company of Pittsburgh, Pa. on May 18, 1976:

"RESOLVED, that the Chairman of the Board, the President, or any Vice President be, and hereby is, authorized to appoint Attorneys-in-Fact to represent and act for and on behalf of the Company to execute bonds, undertakings, recognizances and other contracts of indemnity and writings obligatory in the nature thereof, and to attach thereto the corporate seal of the Company, in the transaction of its surety business;

"RESOLVED, that the signatures and attestations of such officers and the seal of the Company may be affixed to any such Power of Attorney or to any certificate relating thereto by facsimile, and any such Power of Attorney or certificate bearing such facsimile signatures or facsimile seal shall be valid and binding upon the Company when so affixed with respect to any bond, undertaking, recognizance or other contract of indemnity or writing obligatory in the nature thereof;

"RESOLVED, that any such Attorney-in-Fact delivering a secretarial certification that the foregoing resolutions still be in effect may insert in such certification the date thereof, said date to be not later than the date of delivery thereof by such Attorney-in-Fact."

I, Elizabeth M. Tuck, Secretary of American Home Assurance Company and of National Union Fire Insurance Company of Pittsburgh, Pa. do hereby certify that the foregoing excerpts of Resolutions adopted by the Boards of Directors of these corporations, and the Powers of Attorney issued pursuant thereto, are true and correct, and that both the Resolutions and the Powers of Attorney are in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the facsimile seal of each corporation

this _____ day of _____, ____

Elizabeth M. Tuck, Secretary

16div-018195

FAX TRANSMITTAL

JENNER&BLOCK

Jenner&Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Tel 312 222-9350
www.jenner.com

Chicago
Dallas
Washington, DC

Date:	June 27, 2005	
To:	Mark Hansen, Esq. KELLOGG HUBER	**Fax:** 202-326-7999 Voice:
From:	Suzanne J. Prysak 312 923-2915	
Employee Number:		Client Number: 41198 10003

Important: This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is attorney work product, privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via postal service. Thank you.

Message: Please see attached.

Total number of pages including this cover sheet:	Time Sent:
If you do not receive all pages, please call: 312 222-9350	Sent By:
Secretary:	Extension:

Civil Action Cover Sheet **(Rev. 6/19/03) CCL 0520**

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

COLEMAN (PARENT) HOLDINGS, INC.

v.

MORGAN STANLEY & CO., INC.

} No.

CIVIL ACTION COVER SHEET

A Civil Action Cover Sheet shall be filed with the complaint in all civil actions. The information contained herein is for administrative purposes only and cannot be introduced into evidence. Please check the box in front of the appropriate general category and then check the subcategory thereunder, if applicable, which best characterizes your action.

(FILE STAMP)

Jury Demand ☐ **Yes** ☐ **No**

☐ **PERSONAL INJURY/WRONGFUL DEATH**

- ☐ 027 Motor Vehicle
- ☐ 040 Medical Malpractice
- ☐ 047 Asbestos
- ☐ 048 Dram Shop
- ☐ 049 Product Liability
- ☐ 051 Construction Injuries (including Structural Work Act, Road Construction Injuries Act and negligence)
- ☐ 052 Railroad/FELA
- ☐ 053 Pediatric Lead Exposure
- ☐ 061 Other Personal Injury/Wrongful Death
- ☐ 063 Intentional Tort
- ☐ 064 Miscellaneous Statutory Action *(Please Specify Below**)*
- ☐ 065 Premises Liability
- ☐ 078 Fen-phen/Redux Litigation
- ☐ 199 Silicone Implant

☐ **062 PROPERTY DAMAGE**

☐ **066 LEGAL MALPRACTICE**

☐ **TAX & MISCELLANEOUS REMEDIES**

- ☐ 007 Confession of Judgment
- ☐ 008 Replevin
- ☐ 009 Tax
- ☐ 015 Condemnation
- ☐ 017 Detinue
- ☐ 029 Unemployment Compensation
- ☐ 036 Administrative Review Action
- ☑ 085 Petition to Register Foreign Judgment
- ☐ 099 All Other Extraordinary Remedies

☐ **COMMERCIAL LITIGATION**

- ☐ 002 Breach of Contract
- ☐ 070 Professional Malpractice (other than legal or medical)
- ☐ 071 Fraud
- ☐ 072 Consumer Fraud
- ☐ 073 Breach of Warranty
- ☐ 074 Statutory Action *(Please Specify Below**)*
- ☐ 075 Other Commercial Litigation *(Please Specify Below**)*
- ☐ 076 Retaliatory Discharge

☐ **077 LIBEL/SLANDER**

☐ **OTHER ACTIONS**

- ☐ 079 Petition for Qualified Orders
- ☐ 084 Petition to Issue Subpoena
- ☐ 100 Petition for Discovery

** _____

_____

By: _____ (Attorney) (Pro Se)

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

16div-018197

Notice of Filing of Foreign Judgment **CCG N612-10M-6/09/04( )**

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY **DEPARTMENT** LAW **DIVISION/DISTRICT**

COLEMAN (PARENT) HOLDINGS, INC.
Plaintiff

v.

MORGAN STANLEY & CO., INC.
Defendant

No. _____

NOTICE OF FILING OF FOREIGN JUDGMENT

TO: Morgan Stanley & Co., Inc.
1585 Broadway
New York, NY 10036

Mark C. Hansen, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C
Sumner Square, 1615 M Street N.W., Ste. 400
Washington, D.C. 20036

Joseph Ianno, Jr., Esq.
Carlton Fields, P.A.
222 Lake View Ave., Ste. 1400
West Palm Beach, FL 33401

You are hereby notified that Jenner & Block LLP, Jerold S. Solovy
Name

1 IBM Plaza | Chicago | IL | 60611,
Address | **City** | **State** | **Zip**

attorney/s for Coleman (Parent) Holdings, Inc.
Name

35 East 62nd Street | New York | NY | 10021
Address | **City** | **State** | **Zip**

did this day file an authenticated copy of a certain Foreign Judgment in the above entitled action, entered in the

15th Judicial Circuit **Court of** Palm Beach **County, State of** Florida

on the 23rd **day of** June, 2005.

Date _____, _____

_____
DOROTHY BROWN,
Clerk of the Circuit Court

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

(Rev. 11/12/02) CCG 0620

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

FOREIGN JUDGMENT REGISTRATION COVER SHEET

CASE NO. _____

AMOUNT OF JUDGMENT $1,577,696,175.83

TYPE OF CASE Civil Case, Money Judgment

ATTORNEY CODE 05003

	Name	Address	State	City	Zip
PL	Coleman (Parent) Holdings, Inc.	35 E. 62nd Street	NY	New York	10021
DF	Morgan Stanley & Co., Inc.	1585 Broadway	NY	New York	10036

* * * * * * * * * * * **ADDITIONAL LITIGANTS** * * * * * * * * * *

P/D					

CLERK: STAPLE THIS COVER SHEET TO THE AUTHENTICATED FOREIGN JUDGMENT. IT IS PART OF THE PERMANENT FILE.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

16div-018199

Address:

CFN 20050391183
OR BK 18800 PG 0095
RECORDED 06/23/2005 16:04:05
Palm Beach County, Florida
Sharon R. Bock, CLERK & COMPTROLLER
Pgs 0095 - 96; (2pgs)

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA
502003CA005045XXXOCAI
CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

05 JUN 23 PM 3:5
PALM BEACH COUNTY, FL
CIRCUIT CIVIL 2

FINAL JUDGMENT

Pursuant to the Verdicts rendered in this action,

IT IS ADJUDGED that Plaintiff, Coleman (Parent) Holdings Inc., a Delaware corporation, the corporate headquarters of which are located at 35 East 62nd Street, New York, NY, shall recover from Defendant, Morgan Stanley & Co., Incorporated, a Delaware corporation, the corporate headquarters of which are located at 1585 Broadway, New York, NY, $589,784,885 for compensatory damages (including credits for set-offs) and $137,911,290.83 for prejudgment interest, resulting in total compensatory damages of $727,696,175.83.[1]

IT IS FURTHER ADJUDGED that Plaintiff shall recover from Defendant $850,000,000 for

---

[1]The jury awarded $604,334,000 in compensatory damages. Based on the evidence presented, the Court determines that MS & Co. is entitled to set-offs in the amounts of $14,549,115 as of August 12, 1998, and $70,000,000 as of October 17, 2002, and that prejudgment interest began to accrue on February 6, 2001. Applying these determinations:

$604,334,000
- 14,549,115
$589,784,885 due as of February 6, 2001

2001 interest @ 11% (329 days) =	$58,477,575.31	
2002 interest through October 16 @ 9% (289 days) =	42,028,232.49	
	$100,505,807.80	interest through October 16, 2002
	+589,784,885.00	
	$690,290,692.80	total due through October 16, 2002
	- 70,000,000.00	October 17, 2002 set-off
	$620,290,692.80	due as of October 17, 2002 ($589,784,885 principal and $30,505,807.80 interest)

unpaid pre-October 17, 2002 interest	30,505,807.80
2002 interest from October 17 - December 31 @ 9% (76 days)	11,052,407.16
2003 interest @ 6%	35,387,093.10
2004 interest @ 7%	41,284,941.95
2005 interest @ 7% (174 days)	19,681,040.82
Total accrued and unpaid interest	$137,911,290.83

2183

punitive damages.

The combined total judgment against the Defendant and in favor of the Plaintiff in the amount of $1,577,696,175.83 shall bear interest at the rate of 7% a year. Execution shall issue on request of Plaintiff on or after July 1, 2005. The Court retains jurisdiction to consider the parties' claims for fees and costs.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 23rd day of June, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Rebecca Beynon, Esq.
Sumner Square
1615 M Street, NW, Suite 400
Washington, DC 20036

STATE OF FLORIDA - PALM BEACH COUNTY
I hereby certify that the foregoing is a true copy of the record in my office.
THIS 23 DAY OF June, 20 05
SHARON R. BOCK
CLERK & COMPTROLLER
By [signature]
DEPUTY CLERK

IN CIRCUIT COURT OF THE COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

COLEMAN (PARENT) HOLDINGS, INC.,	)	
Plaintiff,	)	No. _____
vs.	)	
MORGAN STANLEY & CO., INC.,	)	
Defendant	)	

AFFIDAVIT OF JEROLD S. SOLOVY

I, Jerold S. Solovy, state under oath and penalty of perjury as follows:

1. I am an attorney licensed to practice law in the State of Illinois.

2. I represent the judgment creditor, Colman (Parent) Holdings, Inc., 35 East 62nd Street, New York, NY, 10021. On behalf of Coleman (Parent) Holdings, Inc., I am registering a foreign judgment obtained against Morgan Stanley & Co., Inc. pursuant to the Uniform Enforcement of Foreign Judgments Act, 735 ILCS 5/12-650 through 657.

3. The judgment debtor is Morgan Stanley & Co., Inc. Based on information that the judgment debtor has provided to Coleman Parent Holdings, Inc., I believe the last known address for Morgan Stanley & Co., is as follows:

Morgan Stanley & Co., Inc.
1585 Broadway
New York, NY 10036

Jerold S. Solovy

Subscribed and sworn to before me
this 27th day of June, 2005.

Notary Public

"OFFICIAL SEAL"
MARIANNE D. BROCKHOUSE
Notary Public, State of Illinois
My Commission Expires Dec. 01, 2007

16div-018202

CERTIFICATE OF SERVICE

I, Jerold S. Solovy, an attorney, certify that I caused true and correct copies of Plaintiff Coleman (Parent) Holdings, Inc.'s Civil Action Cover Sheet, Notice of Filing, Foreign Judgment Registration Cover Sheet, Affidavit of Jerold S. Solovy, and Certified Copy of Judgment to be served upon the following parties via certified U.S. first class mail, postage pre-paid on the 27th day of June, 2005:

Morgan Stanley & Co., Inc.
c/o James Cusick, Law Department
1585 Broadway
New York, NY 10036

Mark C. Hansen, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
Sumner Square, 1615 M Street N.W.
Suite 400
Washington, D.C. 20036-3209

Joseph Ianno, Jr., Esq.
Carlton Fields, P.A.
222 Lake View Avenue
Suite 1400
West Palm Beach, FL 33401

Jerold S. Solovy

CARLTON FIELDS, P.A.

ATTORNEYS AT LAW

ESPERANTÉ
222 LAKEVIEW AVENUE, SUITE 1400
WEST PALM BEACH, FLORIDA 33401-6149

MAILING ADDRESS
P.O. BOX 150, WEST PALM BEACH, FL 33402-0150
TEL (561) 659-7070 FAX (561) 659-7368

FAX COVER SHEET

		Phone Number	Fax Number
Date:	July 7, 2005		
To:	Jack Scarola	(561) 686-6300	(561) 684-5816
	Jerold Solovy/Michael Brody	(312) 222-9350	(312) 840-7711
	Rebecca Beynon/Mark Hansen	(202) 326-7900	(202) 326-7999
From:	Joyce Dillard, CLA	(561) 659-7070	(561) 659-7368

Client/Matter No.: 47877/14092 **Employee No.:**

Total Number of Pages Being Transmitted, Including Cover Sheet: 13

Message:

Coleman v. Morgan Stanley & Co., Inc.

To follow please find a copy of Morgan Stanley's Directions to the Clerk and Designations to Court Reporter.

☑ ***Original to follow Via Regular Mail*** ☐ ***Original will Not be Sent*** ☑ ***Original will follow via Overnight Courier***

****
The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (if long distance, please call collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.
****

IF THERE ARE ANY PROBLEMS OR COMPLICATIONS, PLEASE NOTIFY US IMMEDIATELY AT:
(561) 659-7070

TELECOPIER OPERATOR: _____

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

DESIGNATION TO REPORTER

Defendant/Appellant, Morgan Stanley & Co. Incorporated, files this Designation to Reporter and directs court reporter Precision Reporting of South Florida, Inc., 4114 Northlake Blvd., Suite 101, Palm Beach Gardens, FL 33410, (561) 622-1717, to transcribe an original and two (2) copies of:

1. The following transcripts of pre-trial hearings held in the above-captioned matter:

DATES	TITLE
06/02/03	Hearing Transcript
12/12/03	Hearing Transcript
01/12/04	Hearing Transcript
03/19/04	Hearing Transcript
04/16/04	Hearing Transcript
06/28/04	Hearing Transcript

07/02/04	Hearing Transcript
10/04/04	Hearing Transcript
10/07/04	Hearing Transcript
10/14/04	Hearing Transcript
11/04/04	Hearing Transcript
11/15/04	Hearing Transcript
11/16/04	Hearing Transcript
11/17/04	Hearing Transcript
12/03/04	Hearing Transcript
12/22/04	Hearing Transcript
01/21/05	Hearing Transcript

2. The entire trial held in the above-captioned matter, including all pretrial motions, voir dire, the full trial proceedings, and all post-trial proceedings. This designation includes the following transcripts:

DATES	TITLE
02/02/05	Hearing Transcript
02/03/05	Hearing Transcript
02/04/05	Hearing Transcript
02/14/05	Trial Vols. 1, 2 and 3
02/15/05	Trial Vols. 4 and 5
02/16/05	Trial Vols. 6 and 7, including sealed portion
02/17/05	Trial Vols. 8 and 9

02/18/05	Trial Vol. 10 and Jury Vols. 1 and 2
02/22/05	Trial Vols. 11 and 12, and Jury Vols. 3 and 4
02/23/05	Trial Vols. 13 and 14
02/24/05	Trial Vols. 15 and 16
02/28/05	Trial Vol. 17
03/01/05	Trial Vol. 18, including sealed portion
03/02/05	Trial Vol. 19
03/03/05	Trial Vols. 20 and 21
03/04/05	Trial Vols. 22 and 23
03/07/05	Trial Vol. 24
03/08/05	Trial Vols. 25 and 26
03/09/05	Trial Vols. 27 and 28
03/10/05	Trial Vols. 29 and 30
03/11/05	Trial Vols. 31, 32 and 33
03/14/05	Trial Vols. 34 and 35
03/15/05	Trial Vols. 36 and 37
03/16/05	Trial Vols. 38 and 39
03/17/05	Trial Vols. 40 and 41
03/21/05	Trial Vols. 42 and 43
03/22/05	Trial Vols. 44 and 45
03/23/05	Trial Vol. 46
03/24/05	Trial Vols. 47 and 48
03/28/05	Trial Vol. 49
03/29/05	Trial Vol. 50

03/30/05	Trial Vols. 51 and 52
03/31/05	Trial Vols. 53 and 54
04/04/05	Trial Vols. 55 and 56
04/05/05	Trial Vols. 57 and 58
04/06/05	Trial Vols. 59 and 60
04/07/05	Trial Vols. 61 and 62
04/11/05	Trial Vols. 63 and 64
04/12/05	Trial Vols. 65 and 66
04/13/05	Trial Vols. 67, 68 and 69
04/14/05	Trial Vols. 70 and 71
04/15/05	Trial Vol. 72
04/18/05	Trial Vols. 73 and 74
04/19/05	Trial Vols. 75, 76 and 77
04/20/05	Trial Vols. 78 and 79
04/21/05	Trial Vols. 80 and 81
04/22/05	Trial Vols. 82 and 83
04/25/05	Trial Vols. 84 and 85
04/26/05	Trial Vols. 86 and 87
04/27/05	Trial Vols. 88 and 89
04/28/05	Trial Vols. 90 and 91
04/29/05	Trial Vols. 92 and 93
05/02/05	Trial Vols. 94, 95 and 96
05/03/05	Trial Vols. 97 and 98
05/04/05	Trial Vols. 99 and 100

05/05/05	Trial Vols. 101 and 102
05/06/05	Trial Vol. 103
05/09/05	Trial Vols. 104, 105 and 106
05/10/05	Trial Vols. 107 and 108
05/11/05	Trial Vols. 109, 110 and 111
05/12/05	Trial Vol. 112
05/13/05	Trial Vols. 113, 114 and 115
05/16/05	Trial Vols. 116, 117 and 118
05/17/05	Trial Vols. 119 and 120
05/18/05	Trial Vols. 121 and 122
06/17/05	Hearing Transcript
06/20/05	Trial Vols. 123 and 124
06/21/05	Trial Vols. 125 and 126
06/23/05	Trial Vols. 127 and 128

3. The court reporter is directed to file the original transcripts with the clerk of the lower tribunal and to serve one copy on each of the following (unless the requirement is waived by either party because copies have already been provided):

a. Thomas E. Warner, Esquire, Carlton Fields, P.A., 222 Lakeview Ave., Suite 1400, West Palm Beach, FL 33401.

b. Jack Scarola, Esq., Searcy, Denney, Scarola, Barnhardt & Shipley, P.A., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida 33409.

I hereby certify that satisfactory financial arrangements have been made with the court reporter for preparation of the transcripts.

Respectfully submitted,

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

BY: _____
THOMAS E. WARNER
Florida Bar No: 176725
JOSEPH IANNO, JR.
Florida Bar No: 655351

Attorneys for Defendant/Appellant
Morgan Stanley & Co. Incorporated

REPORTER'S ACKNOWLEDGEMENT

1. The foregoing designation was served on _____, 2005, and received on _____, 2005.

2. Satisfactory arrangements have ( ) have not ( ) been made for payment of the transcript cost. These financial arrangements were completed on _____.

3. Number of trial or hearing days _____.

4. Estimated number of transcript pages _____.

5. The transcript will be available within 30 days of service of the foregoing designation and will be filed on or before the ____ day of _____, 2005.

6. Completion and filing of this acknowledgment by the court reporter constitutes submission to the jurisdiction of the court for all purposes in connection with these appellate proceedings.

7. The undersigned court reporter certifies that the foregoing is true and correct and that a copy has been furnished by mail ( ) hand delivery ( ) this _____ day of _____, 2005, to each of the parties or their counsel.

_____
Precision Reporting of South Florida, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Designation to Reporter has been furnished by facsimile, Federal Express, and U.S. Mail to each of the persons identified in the mailing list below, on this 7th day of July, 2005.

Jerold S. Solovy, Esq. — **Counsel for Plaintiff/Appellee**
Jenner & Block LLC
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Chicago, IL 60611

Jack Scarola, Esq. — **Counsel for Plaintiff/Appellee**
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Precision Reporting of South Florida, Inc. — **Court Reporter**
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By: _____
Thomas E. Warner
Florida Bar No. 176725

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

DIRECTIONS TO THE CLERK

Appellant/Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), directs the clerk to include the following items in the original record described in rule 9.200(a)(1):

1. All items that would automatically be included in the original record pursuant to Florida Rule of Appellate Procedure 9.200(a)(1), including all original documents, exhibits, trial exhibits, and transcripts of proceedings filed in the trial court.

2. All notices of filing and attachments thereto.

3. All depositions, affidavits, or other discovery filed in the trial court record.

4. All memoranda of law.

5. All documents or other exhibits offered and accepted into evidence at trial by either party.

6. All documents, transcripts, or other items marked for identification at trial by either party.

7. All documents, transcripts, or other items proffered into evidence at trial by either party.

8. All transcripts of the trial proceedings that are to be prepared and filed by the court reporters, pursuant to the designations that were contemporaneously filed this day. Defendant/Appellant asks that the Clerk place these transcripts at the end of the record (just before the trial exhibits), and not renumber the pages of the trial transcript.

9. All trial clerk's notes.

10. All transcripts or other documents attached to notices of filing that were contemporaneously filed this day or that may be filed within a reasonable time before the record is transferred to the Fourth District.

11. All jury questions given by the trial court or presented to the trial court, including all requested jury instructions.

12. To the extent that any of the above-referenced items have been filed under seal pursuant to the Court's July 31, 2003 Stipulated Confidentiality Order as modified by the Court's Order on Morgan Stanley's Motion to Dismiss or Strike Plaintiff's Motion for Contempt dated September 15, 2004, the clerk is directed to include those items as part of the record

to the Fourth District Court of Appeal, while keeping those items under seal. The clerk should describe the contents of the sealed materials in the clerk's index to the record.

Respectfully submitted,

CARLTON FIELDS, P.A.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

BY: _____
THOMAS E. WARNER
Florida Bar No: 176725
JOSEPH IANNO, JR.
Florida Bar No: 655351

Attorneys for Defendant/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Directions to Clerk have been furnished by facsimile, Federal Express and U.S. Mail to each of the persons identified in the mailing list below, on this 7th day of July, 2005.

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CARLTON FIELDS, P.A.

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FAX COVER SHEET

		Phone Number	Fax Number
Date:	July 7, 2005		
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From:	Joyce Dillard, CLA	(561) 659-7070	(561) 659-7368

Client/Matter No.: 47877/14092 **Employee No.:**

Total Number of Pages Being Transmitted, Including Cover Sheet:

Message:

Coleman v. Morgan Stanley & Co., Inc.

To follow please find a copy of Morgan Stanley's Notice of Filing Hearing Transcripts without attachment.

☐ ***Original to follow Via Regular Mail*** ☐ ***Original will Not be Sent*** ☑ ***Original will follow via Overnight Courier***

****
The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (if long distance, please call collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.
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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

NOTICE OF FILING HEARING TRANSCRIPTS

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed the attached November 6, 2003, December 16, 2003 (original), December 17, 2003 (original) and January 4, 2005 hearing transcripts.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 7th day of July, 2005.

CARLTON FIELDS, P.A.
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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

NOTICE OF FILING DEFENDANT'S PROPOSED JURY INSTRUCTIONS

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed the attached Defendant's Proposed Jury Instructions, served April 4, 2005.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 7th day of July, 2005.

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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

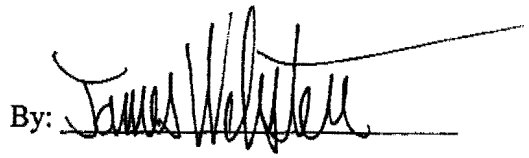
MORGAN STANLEY & CO., INC.,

Defendant.
_____/

DEFENDANT'S PROPOSED JURY INSTRUCTIONS

Defendant Morgan Stanley & Co. Incorporated ("MS & Co.") hereby requests that the Court give the following jury instructions.

In submitting these instructions, Morgan Stanley does not waive its objections to specific claims or damages. Defendant reserves the right to modify these instructions to be consistent with the Court's rulings and evidence at trial. Further, Morgan Stanley submits these proposed instructions as to punitive damages without prejudice to, or waiver of, its contentions that, among other things, Plaintiff is not entitled to punitive damages against Morgan Stanley as a matter of Florida law; that any verdict against Defendant, particularly one resulting from the Court's reliance solely upon the Florida Standard Jury Instructions (Civil) entitled, "PD, Punitive Damages," or the appended model verdict form, would violate Defendant's rights under the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution, and Defendant's rights under article 1, section 2 (Basic Rights) and article I, section 9 (Due Process) of the Florida Constitution.

By: 

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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

DEFENDANT'S PROPOSED PRELIMINARY INSTRUCTIONS (LIABILITY PHASE)

TABLE OF CONTENTS

Responsibility Of Jury And Judge 4

Steps In Trial 5

Bifurcated Proceedings 6

Things To Be Avoided 7

Objections 8

The Judge's Conferences With Attorneys 9

Recesses 10

Note-taking permitted 11

Juror Questions 12

Nature Of The Case And Legal Issues 13

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DEFENDANT'S PROPOSED PRELIMINARY JURY INSTRUCTION NO. 1

Responsibility Of Jury And Judge

You have now been sworn as the jury to try this case. This is a civil case involving a disputed claim or claims between the parties. Those claims and other matters will be explained to you later. I will instruct you that certain facts are deemed established for purposes of this action. By your verdicts, you will decide certain other disputed issues of fact. I will decide the questions of law that arise during the trial, and before you retire to deliberate at the close of the trial, I will instruct you on the law that you are to follow and apply in reaching your verdicts. In other words, it is your responsibility to determine the facts and to apply the law to those facts. Thus, the function of the jury and the function of the judge are well defined, and they do not overlap. This is one of the fundamental principles of our system of justice.

Reaching a verdict is exclusively your job. I cannot participate in that decision in any way. You should not speculate about how I might evaluate the testimony of any witness or any other evidence in this case, and you should not think that I prefer one verdict over another. Therefore, in reaching your verdict, you should not consider anything that I say or do, except for my specific instructions to you.

Sources:

Order on CPH's Renewed Motion for Entry of Default Judgment at 17 (March 23, 2005).

Florida Standard Jury Instructions In Civil Cases § 1.1 (2004) (adapted).

DEFENDANT'S PROPOSED PRELIMINARY JURY INSTRUCTION NO. 2

Steps In Trial

Before proceeding further, it will be helpful for you to understand how a trial is conducted. In a few moments, the attorneys for the parties will have an opportunity to make opening statements, in which they may explain to you the issues in the case and summarize the facts that they expect the evidence will show. Following the opening statements, witnesses will be called to testify under oath. They will be examined and cross-examined by the attorneys. Documents and other exhibits also may be received as evidence.

After all the evidence has been received, the attorneys will again have an opportunity to address you and to make their final arguments. The statements that the attorneys now make and the arguments that they later make are not to be considered by you either as evidence in the case or as your instruction on the law. Nevertheless, these statements and arguments are intended to help you properly understand the issues, the evidence, and the applicable law, so you should give them your close attention.

Following the final arguments by the attorneys, I will instruct you on the law.

Sources:

Florida Standard Jury Instructions In Civil Cases § 1.1 (2004).

DEFENDANT'S PROPOSED PRELIMINARY JURY INSTRUCTION NO. 3

Bifurcated Proceedings

The presentation of evidence and your deliberations may occur in two stages.

Sources:

Florida Standard Jury Instructions In Civil Cases § 1.1 (2004) (adapted).

DEFENDANT'S PROPOSED PRELIMINARY JURY INSTRUCTION NO. 4

Things To Be Avoided

You should give careful attention to the testimony and other evidence as it is received and presented for your consideration, but you should not form or express any opinion about the case until you have received all the evidence, the arguments of the attorneys and the instructions on the law from me. In other words, you should not form or express any opinion about the case until you are retired to the jury room to consider your verdicts, after having heard all of these matters.

The case must be tried or heard by you only on the evidence presented during the trial in your presence, and in the presence of the attorneys and myself. You must not conduct any investigation of your own, including any type of research relating to this case, the parties, possible witnesses, or the attorneys. This includes but is not limited to Internet searches. Accordingly, you must avoid reading newspaper headlines and articles relating to this case and trial. You must also avoid seeing or hearing television and radio comments or accounts of this trial while it is in progress.

Sources:

Florida Standard Jury Instructions In Civil Cases § 1.1 (2004) (adapted).

DEFENDANT'S PROPOSED PRELIMINARY JURY INSTRUCTION NO. 5

Objections

The attorneys are trained in the rules of evidence and trial procedure, and it is their duty to make all objections they feel are proper. When a lawyer makes an objection, I will either overrule or sustain the objection. If I overrule an objection to a question, the witness will answer the question. When I sustain, or uphold, an objection, the witness cannot answer the question. If I sustain an objection, you must not speculate on what might have happened, or what the witness might have said, had I permitted the witness to answer. You should not draw any inference from the question itself.

Sources:

Florida Standard Jury Instructions In Civil Cases § 1.1 (2004).

DEFENDANT'S PROPOSED PRELIMINARY JURY INSTRUCTION NO. 6

The Judge's Conferences With Attorneys

During the trial, it may be necessary for me to confer with the attorneys out of your hearing, talking about matters of law and other matters that require consideration by me alone. It is impossible for me to predict when such a conference may be required or how long it will last. When such conferences occur, they will be conducted so as to consume as little of your time as necessary for a fair and orderly trial of the case.

Sources:

Florida Standard Jury Instructions In Civil Cases § 1.1 (2004).

DEFENDANT'S PROPOSED PRELIMINARY JURY INSTRUCTION NO. 7

Recesses

During the trial we will take recesses. During these recesses you shall not discuss the case among yourselves or with anyone else, nor permit anyone to say anything to you or in your presence about the case. Further, you must not talk with the attorneys, the witnesses, or any of the parties about anything, until your deliberations are finished. In this way, any appearance of something improper can be avoided.

If during a recess you see one of the attorneys and he or she does not speak to you, or even seem to pay attention to you, please understand that the attorney is not being discourteous but is only avoiding the appearance of some improper contact with you. If anyone tries to say something to you or in your presence about this case, tell that person that you are on the jury trying this case, and ask that person to stop. If he or she keeps on, leave at once and immediately report this to the bailiff or court deputy, who will advise me.

Sources:

Florida Standard Jury Instructions In Civil Cases § 1.1 (2004).

DEFENDANT'S PROPOSED PRELIMINARY JURY INSTRUCTION NO. 8

Note-taking permitted

If you would like to take notes during the trial, you may do so. On the other hand, of course, you are not required to take notes if you do not want to. That will be left up to you individually.

You will be provided with a note pad and a pen for use if you wish to take notes. Any notes that you take will be for your personal use. However, you should not take them with you from the courtroom. During recesses, the bailiff will take possession of your notes and will return them to you when we reconvene. After you have completed your deliberations, the bailiff will deliver your notes to me. They will be destroyed. No one will ever read your notes. If you take notes, do not get so involved in note-taking that you become distracted from the proceedings. Your notes should be used only as aids to your memory.

Whether or not you take notes, you should rely on your memory of the evidence and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than each juror's memory of the evidence.

Sources:

Florida Standard Jury Instructions In Civil Cases § 1.8 (2004).

DEFENDANT'S PROPOSED PRELIMINARY JURY INSTRUCTION NO. 9

Juror Questions

Jurors normally do not ask a witness questions. However, I allow jurors to ask important questions during the trial under certain conditions.

If you feel that the answer to your question would be helpful in understanding the issues in the case, please raise your hand after the lawyers have completed their examination but before I have excused the witness. You will then be given pen and paper with which to write your question for the witness.

I will then talk privately with the lawyers and decide whether the question is proper under the law. If the question is proper, I will ask the witness the question. Some questions may be rewritten or rejected. Do not be concerned or draw any implications if the question is not asked.

Do not discuss your question with anyone, including the marshal or clerk. Remember, you are not to discuss the case with the other jurors until it is submitted for your decision.

If you have difficulty hearing a witness or lawyer, please raise your hand immediately.

Sources:

K. Omalley et al., Federal Jury Practice And Instructions—Civil § 101.15 (5th ed. 2004)

DEFENDANT'S PROPOSED PRELIMINARY JURY INSTRUCTION NO. 10

Nature Of The Case And Legal Issues

After all the evidence has been presented, I will give you complete instructions regarding the law governing your deliberations. At this time, however, I will explain the nature of the case to assist you in considering the evidence.

This case involves claims made by a company called Coleman (Parent) Holdings, Inc. (which I shall call "CPH") against a company called Morgan Stanley & Co., Incorporated (which I shall call "Morgan Stanley") for aiding and abetting fraud and conspiracy to commit fraud. It arises out of two 1998 Merger Agreements between CPH, The Coleman Company, Inc., and the Sunbeam Corporation (which I shall call "Sunbeam"). Pursuant to the Agreement, CPH sold its 82% stock interest in Coleman (a manufacturer and marketer of outdoor recreation products) to Sunbeam in exchange for 14.1 million shares of Sunbeam, approximately $160 million dollars in cash, and Sunbeam's assumption of approximately one billion dollars in debt. Morgan Stanley provided investment banking and financial advisory services to Sunbeam in connection with the acquisition and merger.

CPH asserts that Albert Dunlap, the CEO of Sunbeam, manipulated the financial and business records of Sunbeam to make the company look more successful than it was and to inflate the stock value. CPH further asserts that Morgan Stanley had actual knowledge of this scheme and aided and abetted or conspired with Sunbeam to misrepresent the value of Sunbeam and induce CPH to sell its interest in the Coleman Company. CPH further asserts that it reasonably and justifiably relied on Sunbeam's misrepresentations and was damaged as a direct and foreseeable result of Sunbeam's false statements and Morgan Stanley's conduct.

I will instruct you that you are to take certain facts as established for purposes of phase one of this trial. You will therefore not have to decide in phase one whether or not you find that

Sunbeam misrepresented the value of Sunbeam and whether Morgan Stanley provided substantial assistance to Sunbeam.

After you have heard all of the evidence, and then received my instructions on the law, you will be asked whether you find for CPH or for Morgan Stanley, based on the facts you find to have been proved with respect to the issues of justifiable reliance and damages, and the application of the law to those facts.

Morgan Stanley denies that CPH reasonably and justifiably relied on Sunbeam's misrepresentations. Morgan Stanley also denies that CPH was damaged as a direct and foreseeable result of Sunbeam's false statements and Morgan Stanley's conduct.

At this time, the attorneys for the parties will have an opportunity to make their opening statements, in which they may explain to you the issues in the case and give you a summary of the facts they expect the evidence will show.

Sources:

Order on CPH's Renewed Motion for Entry of Default Judgment at 17 (March 23, 2005).

Florida Standard Jury Instructions In Civil Cases § 1.1 (2004) (adapted).

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

DEFENDANT'S PROPOSED JURY INSTRUCTIONS
FOLLOWING PRESENTATION OF EVIDENCE (LIABILITY PHASE)

TABLE OF CONTENTS

Introductory Instruction 17

Follow The Law As Instructed 18

Believability Of Witnesses 18

The Difference Between False Testimony And Mistaken Recollections 20

Expert Witnesses 21

Charts and Summaries 22

Aiding and Abetting Fraud 22

Greater Weight of the Evidence 25

Clear and Convincing Proof 26

Aiding and Abetting Fraud—Fraud by Third Party: Reliance 27

Aiding and Abetting Fraud—Fraud by Third Party: Justifiable Reliance 28

Aiding and Abetting Fraud—Fraud by Third Party: Injury Caused To CPH 30

Aiding and Abetting Fraud—Proximate Cause 31

Conspiracy to Commit Fraud....32

Conspiracy To Commit Fraud— Injury Caused To CPH....35

Conspiracy To Commit Fraud— Proximate Injury Caused To CPH....36

First Affirmative Defense—Doctrine of Waiver....37

Second Affirmative Defense—Doctrine of Estoppel....38

Third Affirmative Defenses—Unclean Hands; In Pari Delicto....40

Damages—Benefit Of Bargain....41

Damages—Out Of Pocket....44

Damages—Intervening Cause....45

Damages: Failure to Mitigate....46

Duty To Deliberate When Only The Plaintiff Claims Damages....47

Aiding and Abetting Fraud....48

Aiding and abetting Fraud—Fraud by Third Party....50

Aiding and Abetting Fraud—Fraud by Third Party: False statements of existing fact....52

Aiding and Abetting Fraud—Fraud by Third Party: Knowingly and intentionally made....53

Aiding and Abetting Fraud—Fraud by Third Party: Materiality....54

Aiding and Abetting Fraud—Actual Knowledge....55

Aiding and Abetting Fraud—Provision of Substantial Assistance....57

Conspiracy to Commit Fraud....59

Conspiracy To Commit Fraud An Agreement Between Two Or More Parties....61

Conspiracy To Commit Fraud—A Common Objective To Commit Fraud....63

Conspiracy to Commit Fraud—Commission of Overt Act in Furtherance of the Conspiracy....65

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 1

Introductory Instruction

Members of the jury, I shall now instruct you on the law that you must follow in reaching your verdicts. It is your duty as jurors to decide the issues, and only those issues, that I submit for your determination. In reaching your verdict, you should consider and weigh the evidence, decide the disputed issues of fact, and apply the law (as I shall instruct you) to the facts you find from the evidence.

The evidence in this case consists of the sworn testimony of the witness, all exhibits received in evidence, facts that may be admitted or agreed to by the parties, and facts that were established prior to trial.

In determining the facts, you may draw reasonable inferences from the evidence. You may make deductions and reach conclusions that reason and common sense lead you to draw from the facts shown by the evidence in this case. But you should not speculate on any matters outside the evidence in this case.

In the course of the trial it has been necessary for me to rule on the admission of evidence and on motions made with respect to the applicable law. You must not conclude from any such ruling I have made or from any questions I may have asked or from anything that I have said during the course of the trial or from these instructions or the manner in which they are given that I favor any party to this lawsuit. It is your recollection of evidence and your decision on the issues of fact that will decide this case.

Sources:

Florida Standard Jury Instructions in Civil Cases § 2.1 (2004) (adapted).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 2

Follow The Law As Instructed

In deciding the case you must follow and apply all of the law as I explain it to you, whether you agree with that law or not; and you must not let your decision be influenced in any way by sympathy, or by prejudice, for or against anyone.

The fact that corporations are involved as parties in this case must not affect your decision in any way. A corporation and all other persons stand equal before the law and must be dealt with as equals in a court of justice. When a corporation is involved, of course, it may act only through people as its employees; and, in general, a corporation is responsible under the law for any of the acts and statements of its employees that are made within the scope of their duties as employees of the company.

In your deliberations you should consider only the evidence—that is, the testimony of the witnesses and the exhibits I have admitted in the record – but as you consider the evidence, both direct and circumstantial, you may make deductions and reach conclusions that reason and common sense lead you to make. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness. "Circumstantial evidence" is proof of a chain of facts and circumstances tending to prove, or disprove, any fact in dispute. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

Remember that anything the lawyers say is not evidence in the case. And, except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your decision concerning the facts. It is your own recollection and interpretation of the evidence that controls.

Source:

Eleventh Circuit Pattern Jury Instructions (Civil)—Basic Instructions § 2.2 (2000).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 3

Believability Of Witnesses

Now, in saying that you must consider all of the evidence, I do not mean that you must accept all of the evidence as true or accurate. You must decide whether to believe what a particular witness had to say and how much importance to give to that testimony. In making that decision, you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling.

In deciding whether you believe or do not believe any witness, I suggest that you ask yourself a few questions: Did the witness impress you as one who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from other testimony or other evidence? You should consider these questions in light of your own experience and common sense.

Sources:

Florida Standard Jury Instructions in Civil Cases § 2.2 (2004) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil)—Basic Instructions § 3 (2000) (adapted).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 4

The Difference Between False Testimony And Mistaken Recollections

You should also ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact; or, whether there was evidence that at some other time the witness said or did something, or failed to say or do something, which was different from the testimony the witness gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things and remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

Source:

Eleventh Circuit Pattern Jury Instructions (Civil)—Basic Instructions § 4.1 (2000).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 5

Expert Witnesses

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field is permitted to state an opinion concerning those technical matters. These witnesses are called "expert" witnesses.

You have heard opinion testimony on various technical subjects from expert witnesses in this case. You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all the other evidence in the case. Merely because such a witness has been designated an "expert" and has expressed an opinion does not mean that you must accept that opinion. As with any other witness, it is up to you to decide whether to rely upon it.

Source:

Florida Standard Jury Instructions in Civil Cases § 2.2 (2004) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil) - Basic Instructions § 5.1 (2000) (adapted).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 6

Charts and Summaries

Certain charts and summaries have been shown to you in order to help explain facts disclosed by books, records, and other documents that are in evidence in the case. These charts or summaries are not themselves evidence or proof of any facts. If the charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, you should disregard them.

In other words, the charts or summaries are used only as a matter of convenience. To the extent that you find they are not truthful summaries of facts or figures shown by the evidence in the case, you are to disregard them entirely.

Source:

3 Federal Jury Practice and Instructions (Civil) § 104.50 (5th ed. 2004).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 7

Aiding and Abetting Fraud

In Count One of the Complaint, CPH alleges that Sunbeam engaged in a fraudulent scheme to inflate the price of Sunbeam's stock by making false financial statements and that Morgan Stanley aided and abetted this fraud.

There are four elements to CPH's aiding and abetting fraud count, each of which must be satisfied in order for Morgan Stanley to be liable on this count:

1) Sunbeam committed a *fraud against CPH* by knowingly making materially false statements and misrepresentations in Sunbeam's financial statements, and CPH reasonably and justifiably relied on these statements to its detriment;
2) Morgan Stanley had *actual knowledge* that Sunbeam was defrauding CPH;
3) With knowledge of Sunbeam's allegedly fraudulent scheme, Morgan Stanley provided *substantial assistance* in the commission of the fraud; and
4) CPH *suffered injury* as a proximate result of Morgan Stanley's conduct.

I have instructed you that certain facts are true for purposes of phase one of this trial. These facts establish for phase one that Sunbeam actually made one or more false statements or representations to CPH; that Sunbeam knew these statements were false; and that the statements were a material factor in Sunbeam's decision to go forward with the transaction.

For purposes of your deliberations in phase one, therefore, you are to accept all of the elements as having been established except for the following, each of which must be proved by the greater weight of the evidence:

1) CPH actually *relied* on Sunbeam's allegedly false statements, in that CPH believed the truthfulness of the statement and acted based upon its belief in the statement's truth;

2) CPH was *justified* in relying on these allegedly false statements, meaning that it neither knew nor should have discovered Sunbeam's false statements;

3) CPH *suffered injury* as a proximate result of justifiably relying on Sunbeam's false statements; and

4) CPH *suffered injury* as a proximate result of Morgan Stanley's conduct.

CPH has the burden of proving each of the four elements of the aiding and abetting count by the greater weight of the evidence

Sources:

Order on CPH's Renewed Motion for Entry of Default Judgment at 17 (March 23, 2005).

Eleventh Circuit Pattern Jury Instructions (Civil)—Basic Instructions § 2.2 (2000) (adapted).

Florida Standard Jury Instructions in Civil Cases § 3.9 (2004) (adapted).

Florida Standard Jury Instructions in Civil Cases—Miscellaneous § 8.1 (2004) (adapted).

Florida Standard Jury Instructions in Civil Cases—Punitive Damages § 1a (2004) (adapted).

37 Am. Jur. 2d *Fraud and Deceit* § 302 ("Persons who aid and abet another in the commission of a fraud may be liable for that fraud if the plaintiff alleges and proves in addition to the perpetration of the underlying fraud that there was knowledge of this fraud on the part of the aider and abettor, and substantial assistance by the aider and abettor in the achievement of the fraud, and that damages to the plaintiff were proximately caused thereby. To establish a common law cause of action for aiding and abetting fraud, plaintiffs must at least demonstrate some measure of 'active participation' and knowing provision of substantial assistance by the defendant to the principal's alleged fraud.").

Restatement (First) of Torts § 876 (2004). Comment on Clause (b) ("Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortuous, it has the same effect upon the liability of the adviser as participation or physical assistance. If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other's act.").

Woods v. Barnett Bank of Fort Lauderdale, 765 F.2d 1004, 1009 n.8 (11th Cir. 1985) (aiding-and-abetting securities fraud requires showing that (1) another party committed an independent violation of the securities laws; defendant knew that his role was part of

an overall activity that was improper or illegal; and defendant provided knowing and substantial assistance in the conduct that constituted the violation).

Schneberger v. Wheeler, 859 F.2d 1477, 1480 (11th Cir. 1988) ("Knowledge of both the fraudulent scheme and of one's own role in that scheme is required to satisfy the test for aider and abettor liability.").

In re Cascade Int'l Secs. Litig., 840 F. Supp. 1558, 1565-66 (S.D. Fl. 1993) (Attorneys did not give "substantial assistance" to corporate client's securities fraud and were not liable for aiding and abetting; they acted as scriveners of public documents, attempted to curb questions about client's financial condition, and engaged in nothing more than activities making up "daily grist of the mill.").

Rudolph v. Arthur Andersen & Co., 800 F.2d 1040, 1045-46 (11th Cir. 1986) (Whether assistance alleged to have aided and abetted fraud was "substantial" depends on the totality of the circumstances.).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 8

Greater Weight of the Evidence

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. That is, if you were to evaluate the entire evidence in the case, the greater weight would be the side that has the more persuasive and convincing force and effect.

The "greater weight" does not simply mean that more pieces of evidence are stacked up on one side rather than the other; in other words, you could find that one piece of critical evidence on one side outweighs many pieces of evidence on the other side.

Source:

Florida Standard Jury Instructions in Civil Cases § 3.9 (2004) (adapted).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 9

Clear and Convincing Proof

"Clear and convincing proof" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. In contrast, "clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

Source:

Florida Standard Jury Instructions in Civil Cases—Punitive Damages § 1a (2004).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 10

Aiding and Abetting Fraud—Fraud by Third Party: Reliance

CPH must establish by the greater weight of the evidence that it *relied upon* Sunbeam's allegedly fraudulent statements. In other words, if you find that CPH would have engaged in the transaction with Sunbeam anyway or that CPH did not act based on its belief in the statement's truth, then CPH did not *rely upon* Sunbeam's allegedly false statements and therefore Morgan Stanley could not have aided and abetted Sunbeam in committing fraud.

Sources:

Florida Standard Jury Instructions in Civil Cases - Miscellaneous §8.1 (2004) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), Federal Claims Instructions - Securities Fraud § 4.2 (2000) (adapted).

Simon v. Celebration Co., 883 So. 2d 826, 832 (Fla. 5th DCA 2004) ("In order to allege a viable cause of action for fraudulent inducement a plaintiff must allege that: (1) the defendant made a false statement regarding a material fact; (2) the defendant knew that the statement was false when he made it or made the statement knowing he was without knowledge of its truth or falsity; (3) the defendant intended that the plaintiff rely and act on the false statement; and (4) the plaintiff justifiably relied on the false statement to his detriment.").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 11

Aiding and Abetting Fraud—Fraud by Third Party: Justifiable Reliance

If you find that CPH established that it relied on Sunbeam's allegedly fraudulent statements, you must also find that CPH established by the greater weight of the evidence that its reliance was *justified.* In deciding whether CPH was justified in relying upon the truth of any particular representation, you must consider the totality of the circumstances, including, among other factors, the type of information at issue, the nature of the communication between the parties, the relative positions of the parties, and the extent of their knowledge of corporate affairs. For example, whether a party is a sophisticated investor who was aided by experienced business and legal advisors is relevant to what it actually knew or should have known. A sophisticated investor negotiating a significant deal would not reasonably rely on representations of the seller without performing reasonable due diligence as to available information. To determine whether CPH justifiably relied on a misrepresentation, you should consider whether the falsity of the statement would have been apparent had CPH done a proper investigation.

Accordingly, if you find that CPH, in the exercise of reasonable diligence, should have discovered that Sunbeam's statements were false, and thus was not justified in relying on them, then you should find that Sunbeam did not defraud CPH, and therefore Morgan Stanley did not aid and abet Sunbeam in committing fraud.

Sources:

Florida Standard Jury Instructions in Civil Cases - Miscellaneous §8.1 (2004) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), Federal Claims Instructions - Securities Fraud § 4.2 (2000) (adapted).

M/I Schottenstein Homes, Inc. v. Azam, 813 So. 2d 91, 94-95 (2002) (whether reliance is justified is determined "under the totality of the circumstances"; "if the recipient 'knows that it [the statement] is false or its falsity is obvious to him,' his reliance is improper, and there can be no cause of action for fraudulent misrepresentation") (brackets in original; citation omitted). *Id.* at 95 (in deciding whether the recipient of a misrepresentation is "justified in relying upon its truth," it is necessary to consider "the totality of the

circumstances surrounding the type of information, the nature of the communication between the parties, and the relative positions of the parties."). *Id.* at 93 ("[W]here one has an opportunity to make a cursory examination or investigation and does not do so, he cannot recover.").

Hillcrest Pac. Corp. v. Yamamura, 727 So. 2d 1053, 1057-58 (Fla. 4th DCA 1999) (holding that "sophisticated developer in the business of investing millions of dollars in commercial property" did not "reasonably rely upon any material misrepresentations" made by real estate consultants about value of golf course, where sales agreement provided inspection rights and ample opportunity for developer to visit proper and "audit the financial records").

Nicholson v. Ariko, 539 So. 2d 1141,1142 (Fla. 5th DCA 1989) (plaintiff did not reasonably rely on representations of his business partner concerning terms of partnership agreement, where there was "no basis" in the record "to explain why [the plaintiff], an experienced business man, did not insist on a copy of the [agreement] and read it for himself.").

L&L Doc's, LLC v. Florida Div. of Alcoholic Beverages & Tobacco, 882 So. 2d 512, 515 (Fla. 4th DCA 2004) (holding in light of circumstances that party was "not justified in relying upon [] misrepresentation[s] which they knew or should have known, with the exercise of some diligence, was false.").

Thor Bear, Inc. v. Crocker Mizner Park, Inc., 648 So. 2d 168, 172 (Fla. 4th DCA 1994) ("Participants in a normal business transaction are not entitled to rely upon such 'ephemeral matters' as opinions, judgments or legal views expressed by an opposing party.").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 12

Aiding and Abetting Fraud—Fraud by Third Party: Injury Caused To CPH

CPH must prove by the greater weight of the evidence that the allegedly fraudulent statements or misrepresentations that Morgan Stanley aided or abetted actually caused CPH injury. If CPH fails to prove that it suffered any loss as a result of its transaction with Sunbeam, then you must find that there was no fraud, and therefore Morgan Stanley is not liable to CPH. CPH must also prove that Sunbeam's alleged fraud was the cause of any loss it did suffer as result of the Coleman-Sunbeam transaction. CPH must first establish that but for Sunbeam's alleged fraud, CPH would not have been harmed. Moreover, CPH must also prove that its injury was a reasonably foreseeable result of Sunbeam's allegedly fraudulent conduct. If CPH has failed to show by the greater weight of the evidence both that Sunbeam's alleged false statements and misrepresentations were the actual cause of CPH's injury, and that this injury was reasonably foreseeable from Sunbeam's conduct, then you must find that Sunbeam did not defraud CPH, and thus Morgan Stanley is not liable for aiding and abetting a fraud.

Sources:

Florida Standard Jury Instructions in Civil Cases § 5.1 (2004) (adapted).

Florida Standard Jury Instructions in Civil Cases - Miscellaneous §8.1 (2004) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), State Claims Instructions - Fraud § 3.1 (2000) (adapted).

Simon v. Celebration Co., 883 So. 2d 826, 833 (Fla. 5th DCA 2004) ("[A]ctual damages is an element of an action for fraud. . . . Moreover, fraud cannot form the basis for recovery of damages unless the damages directly arise from the fraud and are causally connected to the fraud.").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 13

Aiding and Abetting Fraud—Proximate Cause

Finally, CPH bears the burden of proving by the greater weight of the evidence the fourth element of the aiding and abetting claim—that CPH suffered injury that was *proximately caused* by Morgan Stanley's conduct.

If the harm is caused by factors other than the alleged conspiracy to defraud, such as general changes in market conditions, or conduct by CPH that is not reasonably foreseeable or attributable to Defendant Morgan Stanley, proximate cause has not been shown.

In this regard, CPH must prove by the greater weight of the evidence (1) that CPH sustained injury relating to the Coleman-Sunbeam transaction; (2) that, but for Morgan Stanley's conduct, it would not have sustained those injuries; and (3) that those injuries were a reasonably foreseeable result of Morgan Stanley's conduct.

Sources:

K. O'Malley et al., Federal Jury Practice And Instructions—Civil § 120.60 (5th ed. 2000) (adapted).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 14

Conspiracy to Commit Fraud

In Count Two of its complaint, CPH claims that Morgan Stanley conspired with Sunbeam to conceal the truth about Sunbeam's financial condition. In order to establish CPH's conspiracy claim, the following elements must be satisfied:

1) Sunbeam defrauded CPH;
2) Morgan Stanley entered into an *agreement* with Sunbeam to defraud CPH;
3) Morgan Stanley had *actual knowledge* of the fraud, and shared with Sunbeam a *common objective to commit fraud*;
4) Morgan Stanley or Sunbeam engaged in at least *one act in furtherance of the conspiracy*; and
5) CPH *suffered injury* as a proximate result of the fraud.

As with the aiding and abetting count, moreover, in order to prevail on its conspiracy count, CPH must show by the greater weight of the evidence that a fraud was committed. In other words, in order for there to be a valid claim for conspiracy to commit fraud, the elements of fraud on which I previously instructed you must be proven. As with the aiding and abetting count, however, you are to accept all of the elements as having been established for purposes of your deliberations in phase one, **except** for the following, each of which must be proved by the greater weight of the evidence:

1) CPH actually *relied* on Sunbeam's allegedly false statements, in that CPH believed the truthfulness of the statement and acted based upon its belief in the statement's truth;
2) CPH was *justified* in relying on these allegedly false statements, meaning that it neither knew nor should have discovered Sunbeam's false statements;

3) CPH *suffered injury* as a proximate result of justifiably relying on Sunbeam's false statements.

CPH has the burden of proving all three elements by the greater weight of the evidence in order to prevail on its conspiracy claim. You must find in favor of CPH on each of these elements according to my previous instructions in order to find Morgan Stanley liable on CPH's conspiracy claim.

Sources:

Order on CPH's Renewed Motion for Entry of Default Judgment at 17 (March 23, 2005).

Eleventh Circuit Pattern Jury Instructions (Civil)—Basic Instructions § 2.2 (2000) (adapted).

Florida Standard Jury Instructions in Civil Cases—General § 3.9 (2004) (adapted).

Florida Standard Jury Instructions in Civil Cases—Miscellaneous § 8.1 (2004) (adapted).

27 Florida Jurisprudence 2d—Fraud and Deceit § 80 (2004) (adapted).

10 Florida Jurisprudence 2d—Conspiracy §§ 1, 2, 3, 9, 11 (2004)

15A Corpus Juris Secundum—Conspiracy §§ 46, 47, 48 (2004)

Loeb v. Geronemus, 66 So. 2d 241, 243 (Fla. 1953) (the gist of a civil action for conspiracy is not the conspiracy itself, but the civil wrong that is done pursuant to the conspiracy and which results in damage to the plaintiff).

Lipsig v. Ramlawi, 760 So. 2d 170, 180 (Fla. 3d DCA 2000) (To state a cause of action for conspiracy, a plaintiff must allege "(a) an agreement between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts done under the conspiracy.").

Hoch v. Rissman, Weisberg, Barrett, 742 So. 2d 451, 460 (Fla. 5th DCA 1999) ("A conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose by unlawful means. ... Conspiracy is not a separate or independent tort but is a vehicle for imputing the tortuous actions of one co-conspirator to another to establish joint and several liability.").

Raimi v. Furlong, 702 So. 2d 1273, 1284 (Fla. 3d DCA 1997) ("A civil conspiracy requires: (a) an agreement between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the

conspiracy, and (d) damage to plaintiff as a result of the acts done under the conspiracy.").

Voto v. State, 509 So. 2d 1291 (Fla. 4th DCA 1987) (a conspiracy may not be inferred from aiding and abetting. Conspiracy requires evidence of both intent and an agreement. Here, although there was substantial proof of participation in the offense, there was insufficient evidence of participation in any underlying understanding or agreement).

Nicholson v. Kellin, 481 So. 2d 931, 935 (Fla. 5th DCA 1985) (a civil conspiracy has been defined as a combination of two or more persons to do an unlawful or criminal act or to do a lawful act by unlawful means or for an unlawful purpose).

A.S.J. Drugs, Inc. v. Berkowitz, 459 So. 2d 348, 350 (Fla. 4th DCA 1984) ("A mere opinion, of course, will not serve as a fraudulent representation, unless the party making it did so with the intent of preventing the other party from making an independent investigation of the facts.").

Buckner v. Lower Florida Keys Hosp. Dist., 403 So. 2d 1025, 1027 (Fla. 2d DCA 1981) ("gist of a civil conspiracy is not the conspiracy itself but the civil wrong which is done through the conspiracy which results in injury to the Plaintiff.").

Palmer v. Gotta Have it Golf Collectibles, Inc., 106 F. Supp. 2d 1289 (S.D. Fla. 2000) (under Florida law a claim that is found not to be actionable cannot serve as underlying basis for a conspiracy claim).

DEFENDANT'S JURY INSTRUCTION NO. 15

Conspiracy To Commit Fraud—Injury Caused To CPH

CPH must prove by the greater weight of the evidence the last element of its conspiracy claim—that the alleged conspiracy involving Morgan Stanley actually caused CPH harm.

CPH must prove by the greater weight of the evidence that it suffered a loss as a result of the alleged fraud or conspiracy to commit fraud. CPH must also prove that the alleged fraud or conspiracy was the cause of any loss it did suffer. Losses attributable to other factors not caused by or attributable to the alleged fraud or conspiracy are not included.

Sources:

Florida Standard Jury Instructions in Civil Cases § 5.1 (2004) (adapted).

Florida Standard Jury Instructions in Civil Cases - Miscellaneous § 8.1 (2004) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), State Claims Instructions - Fraud § 3.1 (2000) (adapted).

Lipsig v. Ramlawi, 760 So. 2d 170, 180 (Fla. 3d DCA 2000) (To state a cause of action for conspiracy, a plaintiff must allege "(a) an agreement between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts done under the conspiracy.").

Nerbonne, N.V. v. Lake Bryan Int'l Properties, 689 So. 2d 322, 325 (Fla. 5th DCA 1997) (if conspiracy is proven, plaintiff is entitled to recover only those damages that directly result from the wrongful acts).

Maliner v. Wachovia Bank, No. 04-60237CIV, 2005 WL 670293, at *7 (S.D. Fla. Mar. 1, 2005) ("Of course, if the loss is caused by an intervening event, like a general fall in the price of . . . stocks, the chain of causation will not have been established.") (quoting *Emergent Capital Inv. Management LLC v. Stonepath Group*, 343 F.3d 189, 197 (2d Cir. 2003)).

Cook v. Sheriff of Monroe County, No. 03-14784, 2005 WL 552483, at *20 (11th Cir. Mar. 10, 2005) ("self-inflicted injury . . . is treated as an independent, intervening cause, which may suffice to break the causal connection" if not "foreseeable or reasonable").

IMC Phosphates Co. v. Prater, No. 1D03-4954, 2005 WL 548232, at *6 (Fla. App. 1st Dist. Mar. 10, 2005) (employer not liable for injury that "is the result of an independent intervening cause attributable to claimant's own intentional conduct.").

DEFENDANT'S JURY INSTRUCTION NO. 16

Conspiracy To Commit Fraud—Proximate Injury Caused To CPH

Finally, CPH must also prove that the conspiracy was the proximate cause of any injury it suffered. To establish proximate cause, CPH must show that the injuries were a *reasonably foreseeable* result of the alleged conspiracy.

If the harm is caused by factors other than the alleged conspiracy to defraud, such as general changes in market conditions, or conduct by CPH that is not reasonably foreseeable or attributable to Defendant Morgan Stanley, proximate cause has not been shown.

If CPH does not show by the greater weight of the evidence *both* (1) that the alleged conspiracy was the actual cause of CPH's injury, and (2) that this injury was reasonably foreseeable from the alleged conspiracy, then you must find Morgan Stanley not liable on the conspiracy count.

Sources:

Nerbonne, N.V. v. Lake Bryan Int'l Properties, 689 So. 2d 322, 325 (Fla. 5th DCA 1997) (if conspiracy is proven, plaintiff is entitled to recover only those damages that directly result from the wrongful acts).

Maliner v. Wachovia Bank, No. 04-60237CIV, 2005 WL 670293, at *7 (S.D. Fla. Mar. 1, 2005) ("Of course, if the loss is caused by an intervening event, like a general fall in the price of . . . stocks, the chain of causation will not have been established.") (quoting *Emergent Capital Inv. Management LLC v. Stonepath Group*, 343 F.3d 189, 197 (2d Cir. 2003)).

Cook v. Sheriff of Monroe County, No. 03-14784, 2005 WL 552483, at *20 (11th Cir. Mar. 10, 2005) ("self-inflicted injury . . . is treated as an independent, intervening cause, which may suffice to break the causal connection" if not "foreseeable or reasonable").

IMC Phosphates Co. v. Prater, No. 1D03-4954, 2005 WL 548232, at *6 (Fla. App. 1st Dist. Mar. 10, 2005) (employer not liable for injury that "is the result of an independent intervening cause attributable to claimant's own intentional conduct.").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 17

First Affirmative Defense -- Doctrine of Waiver

Morgan Stanley raises as its first affirmative defense that CPH's claims against it are barred by the doctrine of waiver. A waiver is the intentional or voluntary relinquishment of a known right, or conduct which implies the relinquishment of a known right. In order to prevail in asserting the affirmative defense of waiver, Morgan Stanley must prove by the greater weight of the evidence the following elements:

1) the existence at the time of CPH's alleged waiver of a right, privilege, advantage, or benefit which may be waived;
2) CPH's actual or constructive knowledge of the right; and
3) CPH's intention to relinquish the right.

A waiver may be express or implied, and may be inferred from conduct or acts that warrant the inference that a known right has been relinquished.

If you find that Morgan Stanley has proven, by the greater weight of the evidence, that CPH waived its alleged claims, either expressly or impliedly, then you must find Morgan Stanley not liable to CPH for CPH's alleged injury. If, however, you find that CPH did not waive its alleged claims, then Morgan Stanley cannot assert this affirmative defense against CPH's claims.

Sources:

Bishop v. Bishop, 858 So. 2d 1234, 1237 (Fla. 5th DCA 2003)

Bush v. Ayer, 728 So. 2d 799, 801 (Fla. 4th DCA 1999) ("A waiver may be express or implied, and may be inferred from conduct or acts that warrant the inference that a known right has been relinquished.").

Leonardo v. State Farm Fire and Cas. Co., 675 So. 2d 176, 178 (Fla. 4th DCA 1996) (the requirements of the doctrine of waiver are (1) the existence at the time of the waiver of a right, privilege, advantage, or benefit which may be waived; (2) the actual or constructive knowledge of the right; and (3) the intention to relinquish the right).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 18

Second Affirmative Defense – Doctrine of Estoppel

Morgan Stanley raises as its second affirmative defense that CPH's claims are barred by the doctrine of estoppel. For Morgan Stanley to successfully raise the defense of estoppel, you must find that it has proven by the greater weight of the evidence the following elements:

1) CPH made a representation as to a material fact to Morgan Stanley that is contrary to position that CPH asserted later;
2) Morgan Stanley relied on CPH's representation; and
3) Morgan Stanley changed its position to its detriment, caused by its reliance on CPH's representation.

The representation required to invoke estoppel principles is not limited to oral or written words. Conduct calculated to convey a misleading impression is sufficient to constitute misrepresentation. It is also not necessary that there has been an express statement. It is enough that a representation is implied, either from acts, silence or conduct.

If you find that Morgan Stanley has proven by the greater weight of the evidence that CPH had represented that it was not relying on Sunbeam and Morgan Stanley, but was instead conducting its own investigation as a sophisticated business party, and that Morgan Stanley relied on these representations by CPH to its detriment, you must find Morgan Stanley not liable to CPH. However, if you find that CPH did not make such representations, that Morgan Stanley did not rely on such representations, or that Morgan Stanley was not disadvantaged by relying on such representations, then Morgan Stanley cannot assert this affirmative defense against CPH's claims.

Sources:

State Dept. of Revenue v. Anderson, 403 So. 2d 397, 400 (Fla. 1981) (The elements of equitable estoppel are "(1) a representation as to a material fact that is contrary to a

later-asserted position; (2) reliance on that representation; and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon.").

Davis v. Evans, 132 So. 2d 476, 481 (Fla. 1st DCA 1961).

Francoeur v. Pipers, Inc., 560 So. 2d 244, 245 (Fla. 3d DCA 1990).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 19

Third Affirmative Defense – Unclean Hands; In Pari Delicto

Morgan Stanley raises as its third affirmative defense that CPH's claims are barred by the doctrine of unclean hands or *in pari delicto*. It is a rule that one coming into equity, must come with clean hands or all relief will be denied him regardless of the merit of his claim. Where both parties are at fault relief should be withheld from both. Unscrupulous practices, overreaching, concealment, trickery or other improper conduct are sufficient to bar relief. It is not essential that the act be a crime; it is enough that it be condemned by honest and reasonable people.

One who has acted in bad faith, resorted to trickery and deception, or been guilty of fraud, injustice, or unfairness will appeal in vain to a court of conscience, even though in his wrongdoing he may have kept himself strictly within the law. The law will not assist one in extricating himself from circumstances which he has created.

If you find that CPH knew that Coleman did not have the value that CPH claimed it had at the time of the Sunbeam-Coleman transaction, then you must find Morgan Stanly not liable to CPH.

Sources:

27 Florida Jurisprudence 2d Equity §§ 78, 80, 81, 85 (2004).

McMichael v. McMichael, 28 So. 2d 692 (Fla. 1947).

Hensel v. Aurilio, 417 So. 2d 1035 (Fla. 4th DCA 1982) (quoting 22 Fla. Jur. 2d Equity § 50).

Roberts v. Roberts, 84 So. 2d 717 (Fla. 1956).

Peninsula Land Co. v. Howard, 6 So. 2d 384 (Fla. 1941).

Hill v. Lummus, 123 So. 2d 365 (Fla. 3d DCA 1960).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 20

Damages—Benefit Of Bargain

If you find for Defendant, Morgan Stanley, you will not consider the matter of damages. Only if you find for CPH on the other elements must you address the issue of damages. But, if you find for CPH, you should award it an amount of money, if any, that the greater weight of the evidence shows will fairly and adequately compensate CPH for the damages caused by or resulting from the actions of Morgan Stanley, in aiding and abetting Sunbeam's fraud or conspiring with Sunbeam to commit fraud.

Damages in this case, if any, must be determined under the "benefit of the bargain" rule. The measure of damages is the difference between the value of what CPH would have received had Sunbeam's representations been accurate, and the value of what CPH actually received.

First, CPH must prove what the value of the stock would have been, on the date the transaction occurred, if Sunbeam's representations regarding Sunbeam's financial circumstances had been true.

Second, CPH must prove the actual value of the stock on the date of the transaction. The time for measurement is the date of the transaction.

Later appreciation or depreciation of the property that is subject of the false representation generally does not alter the computation.

The difference between the first and second numbers constitutes the damages to be awarded. If the value of what CPH received was equal to or greater than what it would have received had Sunbeam's representations been true, then CPH is not entitled to damages.

In calculating these damages, you are to keep in mind that damages must be supported by the greater weight of the evidence, and may not be unduly speculative. Finally, you are to award

damages only for losses that are attributable to Morgan Stanley, not for losses caused by other factors, such as general market conditions.

Sources:

Florida Standard Jury Instructions in Civil Cases—Miscellaneous § 8.1 (2004) (adapted).

Florida Standard Jury Instructions in Civil Cases—Miscellaneous § 12.1 (2004) (adapted).

Bidon v. Department of Professional Regulation, Florida Real Estate, 596 So. 2d 450, 452 (Fla. 1992) ("Actual or compensatory damages are those amounts necessary to compensate adequately an injured party for losses sustained as the result of a defendant's wrongful or negligent actions.").

Kind v. Gittman, 889 So. 2d 87, 90 (Fla. 4th DCA 2004) ("[T]he 'benefit of the bargain' [standard] ... awards as damages the difference between the actual value of the property and its value had the alleged facts regarding it been true." (quoting Martin v. Brown, 566 So. 2d 890, 891-92 (Fla. 4th DCA 1990)).

Totale, Inc. v. Smith, 877 So. 2d 813, 815 (Fla. 4th DCA 2004) ("In cases involving a fraudulent sale of stock, 'under either measure of damages, plaintiffs must prove the actual value of the stock at the time of purchase.'" (quoting *Strickland v. Muir*, 198 So. 2d 49, 51 (Fla. 4th DCA 1967), receded from on other grounds by *Teca, Inc. v. WM-TAB, Inc.*, 726 So. 2d 828 (Fla. 4th DCA 1999) (en banc)).

Id. at 816 (reversing benefit-of-the-bargain damages where evidence of damages was "too speculative").

Cook v. Sheriff of Monroe County, No. 03-14784, 2005 WL 552483, at *20 (11th Cir. Mar. 10, 2005) ("self-inflicted injury . . . is treated as an independent, intervening cause, which may suffice to break the causal connection" if not "foreseeable or reasonable").

IMC Phosphates Co. v. Prater, No. 1D03-4954, 2005 WL 548232 (Fla. App. 1st Dist. Mar. 10, 2005) (employer not liable for injury that "is the result of an independent intervening cause attributable to claimant's own intentional conduct.").

Nerbonne, N.V. v. Lake Bryan Int'l Properties, 689 So. 2d 322, 325 (Fla. 5th DCA 1997) (if conspiracy is proven, plaintiff is entitled to recover only those damages that directly result from the wrongful acts).

Maliner v. Wachovia Bank, No. 04-60237CIV, 2005 WL 670293, at *7 (S.D. Fla. Mar. 1, 2005) ("Of course, if the loss is caused by an intervening event, like a general fall in the price of . . . stocks, the chain of causation will not have been established.") (quoting *Emergent Capital Inv. Management LLC v. Stonepath Group*, 343 F.3d 189, 197 (2d Cir. 2003)).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 21

Damages—Out Of Pocket

If you find for Defendant, Morgan Stanley, you will not consider the matter of damages. Only if you find for CPH on the other elements must you address the issue of damages.

The purpose of the damages is to compensate CPH for what it lost as a result of Morgan Stanley's conduct, not to compensate it for what it might have gained had the representations been accurate. In determining damages, you must determine the difference between the actual value of what CPH received, as measured at the time the transaction occurred, and the price that CPH paid. Changes in the stock's value after the transaction occurred are generally irrelevant to this determination. In other words, if you find that Morgan Stanley is liable to CPH, the appropriate calculation of damages is the difference between what CPH contributed to the transaction and what it received from the transaction.

If you find that what CPH received in the transaction was greater in value than what it sold at the time of the transaction, then you must find CPH suffered no damages. If you find that CPH received from Sunbeam less than what it had paid to Sunbeam because of the alleged fraud, then you should award CPH the amount of damages representing that difference.

Sources:

Bidon v. Department of Professional Regulation, Florida Real Estate, 596 So. 2d 450, 452 (Fla. 1992) ("Actual or compensatory damages are those amounts necessary to compensate adequately an injured party for losses sustained as the result of a defendant's wrongful or negligent actions.").

Totale, Inc. v. Smith, 877 So. 2d 813, 815 (Fla. 4th DCA 2004) (explaining that out-of-pocket damages are determined by "the difference between the purchase price and the real or actual value of the property.").

Id. ("In cases involving a fraudulent sale of stock, 'under either measure of damages, plaintiffs must prove the actual value of the stock at the time of purchase.'") (quoting *Strickland v. Muir*, 198 So. 2d 49, 51 (Fla. 4th DCA 1967), *receded from on other grounds by Teca, Inc. v. WM-TAB, Inc.*, 726 So. 2d 828 (Fla. 4th DCA 1999) (*en banc*).

Id. ("[T]he crucial time for the measurement [of damages] is the time of the fraudulent representation. Later appreciation or depreciation of the property that is subject of the false representation generally does not alter the fraud damage computation.").

Nerbonne, N.V. v. Lake Bryan Int'l Properties, 689 So. 2d 322, 325 (Fla. 5th DCA 1997) (if conspiracy is proven, plaintiff is entitled to recover only those damages that directly result from the wrongful acts).

Maliner v. Wachovia Bank, No. 04-60237CIV, 2005 WL 670293, at *7 (S.D. Fla. Mar. 1, 2005) ("Of course, if the loss is caused by an intervening event, like a general fall in the price of . . . stocks, the chain of causation will not have been established.") (quoting *Emergent Capital Inv. Management LLC v. Stonepath Group,* 343 F.3d 189, 197 (2d Cir. 2003)).

Cook v. Sheriff of Monroe County, No. 03-14784, 2005 WL 552483, at *20 (11th Cir. Mar. 10, 2005) ("self-inflicted injury . . . is treated as an independent, intervening cause, which may suffice to break the causal connection" if not "foreseeable or reasonable").

IMC Phosphates Co. v. Prater, No. 1D03-4954, 2005 WL 548232, at *6 (Fla. App. 1st Dist. Mar. 10, 2005) (employer not liable for injury that "is the result of an independent intervening cause attributable to claimant's own intentional conduct.").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 22

Damages—Intervening Cause

When determining damages, you may only consider losses attributable to Morgan Stanley, not other factors. Damages should not include injury attributable to intervening causes or factors other than the alleged fraud, such as market conditions or conduct by CPH that was not a foreseeable consequence of the alleged fraud.

Sources:

Nerbonne, N.V. v. Lake Bryan Int'l Properties, 689 So. 2d 322, 325 (Fla. 5th DCA 1997) (if conspiracy is proven, plaintiff is entitled to recover only those damages that directly result from the wrongful acts).

Maliner v. Wachovia Bank, No. 04-60237CIV, 2005 WL 670293, at *7 (S.D. Fla. Mar. 1, 2005) ("Of course, if the loss is caused by an intervening event, like a general fall in the price of . . . stocks, the chain of causation will not have been established.") (quoting *Emergent Capital Inv. Management LLC v. Stonepath Group*, 343 F.3d 189, 197 (2d Cir. 2003)).

Cook v. Sheriff of Monroe County, No. 03-14784, 2005 WL 552483, at *20 (11th Cir. Mar. 10, 2005) ("self-inflicted injury . . . is treated as an independent, intervening cause, which may suffice to break the causal connection" if not "foreseeable or reasonable").

IMC Phosphates Co. v. Prater, No. 1D03-4954, 2005 WL 548232, at *6 (Fla. App. 1st Dist. Mar. 10, 2005) (employer not liable for injury that "is the result of an independent intervening cause attributable to claimant's own intentional conduct.").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 23

Damages: Failure to Mitigate

It is the duty of a plaintiff to use reasonable care to reduce as much as reasonably possible the loss or damage, if any, it sustains. A person may not recover for damages suffered as a result of fraud which it permitted to go on without using reasonable care to prevent or diminish it. CPH was required to act with reasonable promptness and in good faith and to do all that was reasonable under the circumstances to try to avoid or minimize the resulting loss or harm. If you find from the greater weight of the evidence that CPH, by using reasonable care could have lessened the loss or damage, if any, it suffered in its sale of its stake in Coleman to Sunbeam, then Morgan Stanley cannot be charged with liability for any such loss or damage resulting from CPH's failure, if any, to use such reasonable care.

Sources:

Eleventh Circuit Pattern Jury Instructions (Civil Cases), Supplemental Damages Instructions – Duty to Mitigate § 1.1 (2000) (adapted).

State ex rel. Dresskell v. City of Miami, 13 So. 2d 707, 709 (Fla. 1943) (holding that requirement to mitigate damages "finds its application in virtually every type of case in which the recovery of a money judgment or award is authorized. It addresses itself to the equity of the law that a plaintiff should not recover for those consequences of defendant's act which were readily avoidable by the plaintiff.") (internal citations omitted).

Hilsenroth v. Kessler, 446 So. 2d 147, 150 n.3 (Fla. 3d DCA 1984) (holding that a fraud victim is "not relieve[d] . . . of the duty to keep his damages as low as reasonably possible. Accordingly, . . . the trial court is free to apply the doctrine of mitigation of damages, if applicable.").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 24

Duty To Deliberate When Only The Plaintiff Claims Damages

Of course, the fact that I have given you instructions concerning the issue of Plaintiff's damages should not be interpreted in any way as an indication that I believe that CPH should, or should not, prevail in this case.

Any verdict you reach in the jury room must be unanimous. In other words, to return a verdict you must all agree. Your deliberations will be secret; you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case do not hesitate to re-examine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

Remember, that in a very real way you are judges--judges of the facts. Your only interest is to seek the truth from the evidence in the case.

Sources:

Eleventh Circuit Pattern Jury Instructions (Civil)—Basic Instructions § 7.1 (2000).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 25[1]

Aiding and Abetting Fraud

In Count One of the Complaint, CPH alleges that Sunbeam engaged in a fraudulent scheme to inflate the price of Sunbeam's stock by making false financial statements and that Morgan Stanley aided and abetted this fraud.

There are four elements to CPH's aiding and abetting fraud count, each of which must be satisfied in order for you to find Morgan Stanley liable on this count:

1) Sunbeam committed a *fraud against CPH by making false statements and misrepresentations in Sunbeam's financial statements*;

2) Morgan Stanley had *actual knowledge* that Sunbeam was defrauding CPH;

3) With knowledge of Sunbeam's allegedly fraudulent scheme, Morgan Stanley provided *substantial assistance* to Sunbeam in the commission of the fraud; and

4) CPH *suffered injury* as a proximate result of Morgan Stanley's conduct.

CPH has the burden of proving each of the four elements of the aiding and abetting count by the greater weight of the evidence.

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. That is, if you were to evaluate the entire evidence in the case, the greater weight would be the side that has the more persuasive and convincing force and effect.

The "greater weight" does not simply mean that more pieces of evidence are stacked up on one side rather than the other; in other words, you could find that one piece of critical evidence on one side outweighs many pieces of evidence on the other side.

Sources:

Eleventh Circuit Pattern Jury Instructions (Civil)—Basic Instructions § 2.2 (2000) (adapted).

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[1] To be given only if court instructs on all elements of each cause of action, in lieu of Proposed Jury Instruction No. __.

Florida Standard Jury Instructions in Civil Cases § 3.9 (2004) (adapted).

Florida Standard Jury Instructions in Civil Cases—Miscellaneous § 8.1 (2004) (adapted).

37 Am. Jur. 2d *Fraud and Deceit* § 302 ("Persons who aid and abet another in the commission of a fraud may be liable for that fraud if the plaintiff alleges and proves in addition to the perpetration of the underlying fraud that there was knowledge of this fraud on the part of the aider and abettor, and substantial assistance by the aider and abettor in the achievement of the fraud, and that damages to the plaintiff were proximately caused thereby. To establish a common law cause of action for aiding and abetting fraud, plaintiffs must at least demonstrate some measure of 'active participation' and knowing provision of substantial assistance by the defendant to the principal's alleged fraud.").

Restatement (First) of Torts § 876 (2004). Comment on Clause (b) ("Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortuous, it has the same effect upon the liability of the adviser as participation or physical assistance. If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other's act.")

Woods v. Barnett Bank of Fort Lauderdale, 765 F.2d 1004, 1009 n.8 (11th Cir. 1985) (aiding-and-abetting securities fraud requires showing that (1) another party committed an independent violation of the securities laws; defendant knew that his role was part of an overall activity that was improper or illegal; and defendant provided knowing and substantial assistance in the conduct that constituted the violation).

Schneberger v. Wheeler, 859 F.2d 1477, 1480-81 (11th Cir. 1988) ("Knowledge of both the fraudulent scheme and of one's own role in that scheme is required to satisfy the test for aider and abettor liability.")

In re Cascade Int'l Secs. Litig., 840 F. Supp. 1558, 1565-66 (S.D. Fl. 1993) (Attorneys did not give "substantial assistance" to corporate client's securities fraud and were not liable for aiding and abetting; they acted as scriveners of public documents, attempted to curb questions about client's financial condition, and engaged in nothing more than activities making up "daily grist of the mill.").

Rudolph v. Arthur Andersen & Co., 800 F.2d 1040, 1045-46 (11th Cir. 1986) (Whether assistance alleged to have aided and abetted fraud was "substantial" depends on the totality of the circumstances).

Woods v. Barnett Bank of Ft. Lauderdale, 765 F.2d 1004, 1009 (11th Cir. 1985) (Stronger evidence of complicity is required for an alleged aider and abettor who conducts what appears to be a transaction in the ordinary course of his business. The proof "must demonstrate actual awareness of the party's role in the fraudulent scheme.") (citation omitted).

National Westminster Bank USA v. Weksel, 511 N.Y.S.2d 626, 629-30 (N.Y. App. Div. 1987) (claim for aiding and abetting a fraud must satisfy same high evidentiary standard as predicate fraud itself).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 26[2]

Aiding and Abetting Fraud—Fraud by Third Party

CPH must prove by the greater weight of the evidence the first element of its aiding and abetting fraud—that a third party, Sunbeam, actually defrauded CPH. You cannot find in favor of CPH on the aiding and abetting count unless Sunbeam actually committed fraud against CPH. Fraud is never presumed, but always must be proven by the greater weight of the evidence. You should assume that persons are fair and honest in their dealings until the contrary is shown from the evidence. If the transaction that CPH calls into question is *equally* capable of two interpretations—one honest and the other fraudulent—it should be found to be honest.

In order to prove that Sunbeam acted fraudulently, CPH must show six things by the greater weight of the evidence:

1) Sunbeam actually made one or more *false statements or representations* to CPH concerning Sunbeam's financial affairs;

2) Sunbeam *knew* that the statements or representations were false;

3) Sunbeam's alleged false statements or misrepresentations were a *material factor* in CPH agreeing to sell its stake in Coleman to Sunbeam;

4) CPH actually *relied* on Sunbeam's allegedly false statements, in that CPH believed the truthfulness of the statement and acted based upon its belief in the statement's truth;

5) CPH was *justified* in relying on these allegedly false statements, meaning that it neither knew nor should have discovered Sunbeam's false statement; and

6) CPH *suffered injury* as a proximate result of justifiably relying on Sunbeam's false statements.

Sources:

Order on Morgan Stanley & Co., Inc.'s Motion for Summary Judgment, February 1, 2005.

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[2] To be given only if court instructs on all elements of each cause of action, in lieu of Proposed Jury Instruction No. __.

Florida Standard Jury Instructions in Civil Cases § 5.1 (2004) (adapted).

Florida Standard Jury Instructions in Civil Cases - Miscellaneous §8.1 (2004) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), Federal Claims Instructions - Securities Fraud § 4.2 (2000) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), State Claims Instructions - Fraud § 3.1 (2000) (adapted).

3 Federal Jury Practice and Instructions (Civil) § 123.10 (5th ed. 2004).

27 Florida Jurisprudence 2d Fraud and Deceit § 80 (2004) (adapted).

Simon v. Celebration Co., 883 So. 2d 826, 832 (Fla. 5th DCA 2004) ("In order to allege a viable cause of action for fraudulent inducement a plaintiff must allege that: (1) the defendant made a false statement regarding a material fact; (2) the defendant knew that the statement was false when he made it or made the statement knowing he was without knowledge of its truth or falsity; (3) the defendant intended that the plaintiff rely and act on the false statement; and (4) the plaintiff justifiably relied on the false statement to his detriment.").

Hillcrest Pac. Corp. v. Yamamura, 727 So. 2d 1053, 1057-59 (Fla. 4th DCA 1999) (setting forth elements of claim of fraud in the inducement).

Thor Bear, Inc. v. Crocker Mizner Park, Inc., 648 So. 2d 168 (Fla. 4th DCA 1994) (setting forth element of claim of fraudulent misrepresentation)

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 27[3]

Aiding and Abetting Fraud—Fraud by Third Party: False statements of existing fact

First, CPH must show that Sunbeam made a false statement or misrepresentation. This simply means to state as a fact something that is *false or untrue*. If you find that CPH fails to establish by the greater weight of the evidence that Sunbeam's alleged statements were false, then there was no fraud, and you must find in favor of Morgan Stanley on the aiding and abetting count. In addition, to constitute fraud, a statement that is allegedly false must relate to an *existing fact.* Therefore, statements that are mere opinions, promises of future conduct, and forward-looking statements are not grounds for a fraud claim as they are not false statements of existing fact, unless the party stating the opinion has exclusive or superior knowledge of existing facts that are inconsistent with such opinion.

Thus, if CPH fails to prove by the greater weight of the evidence that any allegedly false statements or representations Sunbeam made were related to existing facts concerning the company's financial circumstances, rather than mere opinions or predictions as to future events concerning its performance or prospects, you should find that Sunbeam did not defraud CPH, and therefore Morgan Stanley did not aid and abet Sunbeam in committing fraud.

Sources:

Florida Standard Jury Instructions in Civil Cases - Miscellaneous §8.1 (2004) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), State Claims Instructions - Fraud § 3.1 (2000) (adapted).

Thor Bear, Inc. v. Crocker Mizner Park, Inc., 648 So. 2d 168 (Fla. 4th DCA 1994) ("The general rule of law is that a false statement of fact must concern a past or existing fact in order to be actionable. A successful action for fraudulent misrepresentation may not ordinarily be premised upon a promise of future action.")

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[3] To be given only if court instructs on all elements of each cause of action.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 28[4]

Aiding and Abetting Fraud—Fraud by Third Party: Knowingly and intentionally made

Second, CPH must prove that Sunbeam made any false statements or representations *knowingly and intentionally*, rather than as a result of a mistake, misapprehension of facts, or accident. If you find that CPH has not shown by the greater weight of the evidence that Sunbeam knew that its statements were false, or that Sunbeam made the statements knowing it lacked knowledge of whether they were true or false, then you should find that Sunbeam did not defraud CPH, and therefore Morgan Stanley did not aid and abet Sunbeam in committing fraud.

Sources:

Florida Standard Jury Instructions in Civil Cases - Miscellaneous §8.1 (2004) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), State Claims Instructions - Fraud § 3.1 (2000) (adapted).

[4] To be given only if court instructs on all elements of each cause of action.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 29[5]

Aiding and Abetting Fraud—Fraud by Third Party: Materiality

It is also CPH's burden to establish by the greater weight of the evidence that Sunbeam's allegedly false statements were a *material* reason why CPH agreed to sell its stake in Coleman to Sunbeam. A statement is material if it is of such importance that CPH would not have entered into the transaction with Sunbeam, but for the false statement. If you find that CPH would have sold its stake in Coleman to Sunbeam even in the absence of Sunbeam's alleged false statements, then you should find that Sunbeam did not defraud CPH, and therefore Morgan Stanley did not aid and abet Sunbeam in committing fraud.

Sources:

Florida Standard Jury Instructions in Civil Cases - Miscellaneous §8.1 (2004) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), State Claims Instructions - Fraud § 3.1 (2000) (adapted).

[5] To be given only if court instructs on all elements of each cause of action.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 30[6]

Aiding and Abetting Fraud—Actual Knowledge

On the second element of the aiding and abetting count, CPH has the burden of proving by the greater weight of the evidence that Morgan Stanley knew Sunbeam was defrauding CPH. Thus, in carrying its burden, CPH must show that Morgan Stanley was *actually aware* that Sunbeam made the statements that CPH alleges were fraudulent and that Morgan Stanley was aware that those statements were false.

Because an aiding and abetting claim requires that the defendant had actual knowledge of the underlying fraud, you cannot find against Morgan Stanley on this element merely because Morgan Stanley might have acted recklessly, imprudently, or even negligently in failing to know of Sunbeam's alleged fraud. In addition, an ordinary economic motive in advising Sunbeam in the acquisition of Coleman is not equivalent to Morgan Stanley having the actual knowledge of Sunbeam's fraud, as required in an aiding and abetting claim. Nor was Morgan Stanley under any duty to uncover Sunbeam's alleged fraudulent plan.

If you find that CPH has not shown that Morgan Stanley had actual knowledge of Sunbeam's purported fraud against CPH, then Morgan Stanley is not liable for aiding and abetting a fraud.

Sources:

Eleventh Circuit Pattern Jury Instructions (Civil Cases), Federal Claims Instructions - Securities Fraud § 4.2 (2000) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), State Claims Instructions - Fraud § 3.1 (2000) (adapted).

Fort Myers Dev. Corp. v. J.W. McWilliams Co., 122 So. 264 (Fla. 1929) (requiring "knowledge," "concurrence," and "participation" to prove a claim for aiding and abetting fraudulent promoters of corporations).

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[6] To be given only if court instructs on all elements of each cause of action.

Wassall v. Payne, 682 So. 2d 678, 680-81 (Fla. 1st DCA 1996) (recognizing the existence of an "actual knowledge" requirement in fraud claims).

Schneberger v. Wheeler, 859 F.2d 1477, 1480-81 (11th Cir. 1988) ("Knowledge of both the fraudulent scheme and of one's own role in that scheme is required to satisfy the test for aider and abettor liability.").

Woods v. Barnett Bank of Ft. Lauderdale, 765 F.2d 1004, 1010 (11th Cir. 1985) (concluding that stronger evidence of complicity is required for an alleged aider and abettor who conducts what appears to be a transaction in the ordinary course of his business. The claim requires "actual awareness of the party's role in the fraudulent scheme.") (citation omitted).

Official Cmte. of Unsecured Creditors of Toy King Distrib., Inc. v. Liberty Savings Bank, FSB (In re Toy King Distrib., Inc.), 256 B.R. 1, 179 (M.D. Fla. 2000) (holding that knowing participation in a fraud requires more than a defendant's mere recklessness, imprudence or negligence. Holding further, that where the primary breach was already a "historical fact" at the time of the defendant's alleged aiding and abetting of harm, defendant lacked actual knowledge).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 31[7]

Aiding and Abetting Fraud—Provision of Substantial Assistance

CPH also bears the burden of proving by the greater weight of the evidence the third element of the aiding and abetting claim—that Morgan Stanley *knowingly and substantially assisted* Sunbeam in carrying out its fraud.

CPH must show that Morgan Stanley affirmatively and knowingly assisted, participated in and furthered Sunbeam's alleged fraud against CPH. The mere failure to *expose* Sunbeam's allegedly fraudulent scheme is insufficient to impose liability on Morgan Stanley for aiding and abetting. Thus, it is not enough that Morgan Stanley's silence allowed Sunbeam's allegedly fraudulent scheme to succeed, or that it failed to announce the existence of Sunbeam's alleged false financial statements. Rather, Morgan Stanley must have *affirmatively assisted* Sunbeam in committing Sunbeam's alleged fraudulent plan, with knowledge of the plan's allegedly fraudulent nature, in order for Morgan Stanley to be liable.

Even if you find that Morgan Stanley assisted Sunbeam in committing fraud, you still cannot find Morgan Stanley liable unless you find that Morgan Stanley's assistance was *substantial*. Whether Morgan Stanley's assistance was substantial depends upon the totality of the circumstances. In other words, you must take all of the evidence into account before determining whether Morgan Stanley's participation in Sunbeam's alleged fraud was substantial. If you find that Morgan Stanley participated in Sunbeam's alleged fraud, but that Morgan Stanley's participation was not substantial, you must find Morgan Stanley not liable for aiding and abetting.

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[7] To be given only if court instructs on all elements of each cause of action.

If CPH has failed to prove that Morgan Stanley affirmatively and substantially assisted Sunbeam's allegedly fraudulent scheme, then you must find in favor of Morgan Stanley on the aiding and abetting count.

Sources:

Eleventh Circuit Pattern Jury Instructions (Civil Cases), Federal Claims Instructions - Securities Fraud § 4.2 (2000) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), State Claims Instructions - Fraud § 3.1 (2000) (adapted).

37 Am. Jur. 2d *Fraud and Deceit* § 302 ("To establish a common law cause of action for aiding and abetting fraud, plaintiffs must at least demonstrate some measure of 'active participation' and knowing provision of substantial assistance by the defendant to the principal's alleged fraud.").

Transpetrol Ltd. v. Radulovic, 764 So. 2d 878, 880-81 (Fla. 4th DCA 2000) (disallowing aiding and abetting theory of liability in fraud and RICO counts because plaintiffs did not rely on actions or words of alleged aiders and abettors).

Allerton v. State Dept. of Ins., 635 So. 2d 36, 38 (Fla. 1st DCA 1994) (recognizing that a claim for aiding and abetting a breach of fiduciary duty would be based on defendant's "substantially assisting, contributing to and furthering accomplishment of the breach[]").

Rudolph v. Arthur Andersen & Co., 800 F.2d 1040, 1045-46 (11th Cir. 1986) (holding that whether assistance alleged to have aided and abetted fraud was "substantial" depends on the totality of the circumstances).

In re Cascade International Securities Litigation, 840 F. Supp. 1558, 1565-66 (S.D. Fl. 1993) (Attorneys did not give "substantial assistance" to corporate client's securities fraud and were not liable for aiding and abetting; they acted as scriveners of public documents, attempted to curb questions about client's financial condition, and engaged in nothing more than activities making up "daily grist of the mill.").

Armco Industrial Credit Corp. v. SLT Warehouse Co., 782 F.2d 475, 486 (5th Cir. 1986) ("Even accepting the evidence in the record in the light most favorable to Armco, as we must with a jury verdict, we hold that Conklin's failure to expose the existence of the bogus invoices does not rise to the level of aiding and abetting. Although Conklin became aware of the bogus invoices and did nothing to reveal their existence, this awareness and inaction amounted at most to nothing more than 'mere negative acquiescence' . . . . it is not enough that Conklin's silence allowed the scheme to succeed. Conklin must have shared Pritchett's and Rigby's criminal intent if he is to be found liable as an aider and abettor."), cited by 3B Fed. Jury Prac. & Instr. Ch. 161 Overview (5th ed.), Part VII. Instructions For Civil Actions Governed By Federal Law Chapter 161. Racketeer Influenced And Corrupt Organizations Act (RICO).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 32[8]

Conspiracy to Commit Fraud

In Count Two of its complaint, CPH claims that Morgan Stanley conspired with Sunbeam to conceal the truth about Sunbeam's financial condition. As with the aiding and abetting count, in order to prevail on its conspiracy count, CPH must show by the greater weight of the evidence that a fraud was committed. In other words, in order for there to be a valid claim for conspiracy to commit fraud, there must be a valid underlying fraud claim.

However, for Morgan Stanley to be liable for conspiracy to commit fraud requires more than liability under CPH's aiding and abetting count. In addition to establishing the existence of an underlying fraud, for CPH to prevail on its conspiracy claim, you must find that the following elements are satisfied:

(1) Morgan Stanley entered into an *agreement* with Sunbeam to defraud CPH;

(2) Morgan Stanley had *actual knowledge* of the fraud, and shared with Sunbeam a *common objective to commit fraud*;

(3) Morgan Stanley or Sunbeam engaged in at least *one act in furtherance of the conspiracy*; and

(4) CPH *suffered injury* as a proximate result of the fraud.

Sources:

Florida Standard Jury Instructions in Civil Cases—General § 3.9 (2004) (adapted).

Florida Standard Jury Instructions in Civil Cases—Miscellaneous § 8.1 (2004) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil)—Basic Instructions § 2.2 (2000).

27 Florida Jurisprudence 2d—Fraud and Deceit § 80 (2004) (adapted).

10 Florida Jurisprudence 2d—Conspiracy §§ 1, 2, 3, 9, 11 (2004)

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[8] To be given only if court instructs on all elements of each cause of action, in lieu of Proposed Jury Instruction No. __.

15A Corpus Juris Secundum—Conspiracy §§ 46, 47, 48 (2004)

Loeb v. Geronemus, 66 So. 2d 241, 243 (Fla. 1953) (the gist of a civil action for conspiracy is not the conspiracy itself, but the civil wrong that is done pursuant to the conspiracy and which results in damage to the plaintiff).

Lipsig v. Ramlawi, 760 So. 2d 170, 180 (Fla. 3d DCA 2000) (To state a cause of action for conspiracy, a plaintiff must allege "(a) an agreement between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts done under the conspiracy.").

Hoch v. Rissman, Weisberg, Barrett, 742 So. 2d 451, 460 (Fla. 5th DCA 1999) ("A conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose by unlawful means. ... Conspiracy is not a separate or independent tort but is a vehicle for imputing the tortuous actions of one co-conspirator to another to establish joint and several liability.").

Raimi v. Furlong, 702 So. 2d 1273, 1284 (Fla. 3d DCA 1997) ("A civil conspiracy requires: (a) an agreement between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts done under the conspiracy.").

Voto v. State, 509 So. 2d 1291 (Fla. 4th DCA 1987) (a conspiracy may not be inferred from aiding and abetting. Conspiracy requires evidence of both intent and an agreement. Here, although there was substantial proof of participation in the offense, there was insufficient evidence of participation in any underlying understanding or agreement.).

Nicholson v. Kellin, 481 So. 2d 931, 935 (Fla. 5th DCA 1985) (a civil conspiracy has been defined as a combination of two or more persons to do an unlawful or criminal act or to do a lawful act by unlawful means or for an unlawful purpose.).

A.S.J. Drugs, Inc. v. Berkowitz, 459 So. 2d 348, 350 (Fla. 4th DCA 1984) ("A mere opinion, of course, will not serve as a fraudulent representation, unless the party making it did so with the intent of preventing the other party from making an independent investigation of the facts.").

Buckner v. Lower Florida Keys Hosp. Dist., 403 So. 2d 1025, 1027 (Fla. 2d DCA 1981) ("gist of a civil conspiracy is not the conspiracy itself but the civil wrong which is done through the conspiracy which results in injury to the Plaintiff.").

Palmer v. Gotta Have it Golf Collectibles, Inc., 106 F. Supp. 2d 1289 (S.D. Fla. 2000) (under Florida law a claim that is found not to be actionable cannot serve as underlying basis for a conspiracy claim).

DEFENDANT'S JURY INSTRUCTION NO. 33[9]

Conspiracy To Commit Fraud—
An Agreement Between Two Or More Parties

The first element of the conspiracy count requires that CPH prove by the greater weight of the evidence that Morgan Stanley entered into an agreement or understanding with someone else to cooperate in pursuit of a common objective. A conspiracy is formed whenever two or more persons or corporations knowingly join together to accomplish an unlawful purpose by concerted action. The essence of a conspiracy is an agreement to violate or disregard the law. CPH must prove by the greater weight of the evidence that Morgan Stanley and Sunbeam knowingly came to a common and mutual understanding to accomplish, or to attempt to accomplish, an unlawful purpose.

There is no requirement that the agreement be a formal contract; you may infer the existence of an agreement by finding that there exists a preponderance of circumstantial evidence to show, for example, that the parties conformed their conduct around a particular arrangement or understanding. However, in order to rely on such circumstantial evidence to infer the existence of an agreement, you must conclude that such an inference outweighs all other reasonable inferences to the contrary. In other words, if the circumstantial evidence points as easily to the existence of an agreement as it does to the absence of an agreement, you must find that such evidence fails to satisfy the requirement that an agreement be proven by the greater weight of the evidence.

Therefore, in order for you to find that there was an agreement between Morgan Stanley and Sunbeam, you must find by the greater weight of the evidence that Morgan Stanley's conduct can only be explained by the existence of a conspiracy to commit fraud. If you find that Morgan Stanley merely agreed to perform the financial services of any investment bank, and that

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[9] To be given only if court instructs on all elements of each cause of action.

it did not agree to engage in any actions beyond those that a typical investment bank performs, then you must find for Morgan Stanley. However, if you find that beyond agreeing to perform customary investment bank functions, Morgan Stanley agreed with Sunbeam to commit a fraud, then CPH has satisfied this element of its conspiracy claim.

Sources:

Eleventh Circuit Pattern Jury Instructions (Civil Cases), Federal Claims Instructions - Antitrust, Sherman Act Section 1, Per Se Violation, Conspiracy to Fix Prices § 3.1 (2000) (adapted).

10 Florida Jurisprudence 2d—Conspiracy §§ 1, 2, 3, 9, 11 (2004).

16 Am. Jur. 2d Conspiracy § 51 (2004).

Diamond v. Rosenfeld, 511 So. 2d 1031, 1034 (Fla. 4th DCA 1987) ("in a civil case, a fact may be established by circumstantial evidence alone only when the inference sought to be created by such circumstantial evidence outweighs all reasonable inferences to the contrary.").

Raimi v. Furlong, 702 So. 2d 1273, 1284 (Fla. 3d DCA 1998) (while a civil conspiracy may be proven by circumstantial evidence, this may be done only when the inference sought to be created by such circumstantial evidence outweighs all reasonable inferences to the contrary).

JES Properties, Inc. v. USA Equestrian, Inc., 253 F. Supp. 2d 1273, 1279 (M.D. Fla. 2003) (rejecting conspiracy allegation; to show that an agreement existed a plaintiff must present "evidence that tends to exclude the possibility that the parties were acting independently." The court held that there must be direct or circumstantial evidence that reasonably tends to prove that the parties had a conscious commitment to a common scheme designed to achieve an unlawful objective.)

DEFENDANT'S JURY INSTRUCTION NO. 34[10]

Conspiracy To Commit Fraud—
A Common Objective To Commit Fraud

On the second element of the conspiracy claim, CPH must prove by the greater weight of the evidence that Morgan Stanley had actual knowledge of the fraud *and* that Sunbeam and Morgan Stanley had a common objective to commit fraud.

Because a conspiracy claim requires that the defendant had actual knowledge of the underlying fraud, you cannot find against Morgan Stanley on this element merely because Morgan Stanley might have acted imprudently, negligently, or even recklessly, in failing to inform itself about Sunbeam's alleged fraud. As with the aiding and abetting claim, CPH must establish by the greater weight of the evidence (1) that Morgan Stanley was aware that Sunbeam made the statements that CPH alleges are false; (2) that Morgan Stanley was aware of the falsity of those statements; and (3) that Morgan Stanley believed that those statements were material and that CPH could justifiably rely upon those statements. If CPH has not established by the greater weight of the evidence that Morgan Stanley had direct knowledge of the fraud, then you must find Morgan Stanley not liable on the conspiracy count.

In addition to proving that Morgan Stanley had direct knowledge of the fraud, CPH must establish by the greater weight of the evidence that Morgan Stanley shared the objective of Sunbeam's alleged scheme. It is not enough, therefore, for you to find that Morgan Stanley engaged in otherwise lawful activities that may have furthered others in pursuit of their fraudulent objectives in order for CPH to prevail. If CPH failed to prove that Morgan Stanley pursued a common objective of committing fraud, then you must find Morgan Stanley not liable on the conspiracy count.

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[10] To be given only if court instructs on all elements of each cause of action.

Sources:

10 Florida Jurisprudence 2d Conspiracy—Civil Aspects § 1 (2004).

15A C.J.S. *Conspiracy* § 12 (2004).

v. Furlong, 702 So. 2d 1273, 1284 (Fla. 3rd DCA 1997) (citing *Trautz v. Weisman*, 809 F. Supp. 239, 246 (S.D.N.Y. 1992) ("[M]ere knowledge of the conspiracy is insufficient; there must be an actual knowing participation.).

Ginsberg v. Lennar Florida Holdings, Inc., 645 So. 2d 490, 502 (Fla. 3d DCA 1994) (holding that there can be no conspiracy without an intent to achieve an illegal goal).

Cedar Hills Properties Corp. v. Eastern Federal Corp., 575 So. 2d 673 (Fla. 1st DCA 1991) (holding that a conspiracy requires the combination of two or more persons, a meeting of two independent minds intent on one purpose).

Cummings v. State, 514 So. 2d 406 (Fla. 4th DCA 1987) (citing *United States v. Bascaro*, 742 F.2d 1335 (11th Cir. 1984)) (A defendant may be found guilty of conspiracy only if he had knowledge of its essential objective and voluntarily became a part of it.).

Buckner v. Lower Florida Keys Hospital Dist., 403 So. 2d 1025 (Fla. 3d DCA 1981) (Conspiracy to commit a tort requires that there has been a combination of two or more persons (or entities) seeking to accomplish an unlawful act or to accomplish a lawful act by unlawful means. The actors must have a common purpose.).

Renpak, Inc. v. Oppenheimer, 104 So. 2d 642 (Fla. 1st DCA 1958) ("[C]ivil conspiracy . . . is a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish some purpose not in itself unlawful by unlawful means." *Id.* at 646 (quoting 15 C.J.S. Conspiracy § 1, pp. 996-997)).

DEFENDANT'S JURY INSTRUCTION NO. 35[11]

Conspiracy to Commit Fraud—
Commission of Overt Act in Furtherance of the Conspiracy

The third element of CPH's conspiracy claim requires CPH to prove by the greater weight of the evidence that Morgan Stanley or Sunbeam committed some overt act in furtherance of the conspiracy, either through an unlawful act or through a lawful act performed by unlawful means.

An overt act is an action taken towards completion of the ends of the conspiracy. An overt act is a discrete act, distinct from the alleged agreement, and it need not be unlawful in and of itself. However, the overt act must be proven, by the greater weight of the evidence, to have moved the alleged conspiracy forward—that is, to have carried the conspiracy beyond mere preparation—while not itself necessarily accomplishing the conspiracy's ultimate goals.

Thus, if you find that neither Morgan Stanley nor Sunbeam committed an overt act that furthered the alleged conspiracy, you must find Morgan Stanley not liable of conspiracy to commit fraud.

Sources:

James v. Nationsbank Trust Co. (Florida) Nat'l Ass'n, 639 So. 2d 1031 (Fla. 5th DCA 1994) (must demonstrate that defendant actually took steps in furtherance of the conspiracy).

Lloyd v. Hines, 474 So. 2d 376 (Fla. 1st DCA 1985) (a conspiracy action is not maintainable of the allegations are not supported by a description of the particular overt acts of the accused).

[11] To be given only if court instructs on all elements of each cause of action.

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

DEFENDANT'S PROPOSED PRELIMINARY INSTRUCTIONS (PUNITIVE PHASE)

TABLE OF CONTENTS

Punitive Damages—Introduction....69

Punitive Damages—Clear And Convincing Proof Of Intentional Misconduct Required....70

Punitive Damages—Liability For Punitive Damages: Aiding and Abetting Fraud—Fraud by Third Party: False statement of existing fact....72

Punitive Damages—Liability For Punitive Damages: Aiding and Abetting Fraud—Fraud by Third Party: Knowingly and intentionally made....73

Punitive Damages—Liability For Punitive Damages: Aiding and Abetting Fraud—Fraud by Third Party: Materiality....74

Punitive Damages—Liability For Punitive Damages: Aiding and Abetting Fraud—Provision of Substantial Assistance....75

Punitive Damages—Liability For Punitive Damages: Conspiracy To Commit Fraud—An Agreement Between Two or More Parties....77

Punitive Damages—Liability For Punitive Damages: Conspiracy To Commit Fraud—A Common Objective To Commit Fraud....79

Punitive Damages—Liability For Punitive Damages: Conspiracy To Commit Fraud—Commission of Overt Act in Furtherance of the Conspiracy....81

Punitive Damages—Corporate Liability for Punitive Damages....82

Punitive Damages—Clear and Convincing Evidence 83
Punitive Damages—Standard of Proof....84
Punitive Damages—Actual Knowledge Required....85
Punitive Damages—Plaintiff Has No Right To Recover Punitive Damages 86
Punitive Damages—Improper Considerations 87
Punitive Damages—Jury May Not Consider Litigation Misconduct....87
Punitive Damages—No Punishment For Out-Of-State Conduct....90
Punitive Damages—Determination Of Amount 93
Punitive Damages—Award No More Than Necessary To Accomplish Purposes....95
Punitive Damages—Punishment Only For Harms To CPH....96
Punitive Damages—Consider Nature Of Defendant's Misconduct 97
Punitive Damages—Do Not Consider Financial Condition 98
Punitive Damages—Relevance Of Financial Condition....100
Punitive Damages—Reasonable Relationship Required....101
Punitive Damages—Reasonable Relationship Required....102
Punitive Damages—Consider Effect Of Compensatory Damages....103
Punitive Damages—Award Limited To Earnings 104
Punitive Damages—Concluding Instruction 15

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 1

Punitive Damages—Introduction

You have found for CPH and against Morgan Stanley on CPH's [aiding and abetting] [and/or] [conspiracy] claim[s] and awarded CPH compensatory damages. You should now consider whether Morgan Stanley should be required to pay punitive damages to CPH, and if so in what amount.

Punitive damages and compensatory damages serve different purposes. You should presume that CPH has been made whole for its injuries by your award of compensatory damages. You should award punitive damages only if you find that Morgan Stanley's culpability, after having paid compensatory damages, is so reprehensible that it warrants the imposition of a further penalty to achieve just punishment and adequate deterrence.

Source:

Florida Standard Jury Instructions in Civil Cases—Punitive Damages § 2(a) (2004) (adapted).

State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 416, 419 (2003) ("[P]unitive damages serve a broader function; they are aimed at deterrence and retribution. . . . It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 2

Punitive Damages—Clear And Convincing Proof Of Intentional Misconduct Required

You may award punitive damages only if you find that CPH has proven that Morgan Stanley is guilty of the intentional misconduct on which you found it liable by clear and convincing proof.

"Clear and convincing proof" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. In contrast, "clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

In this case, there are two forms of intentional misconduct at issue: (1) aiding and abetting fraud; and (2) conspiracy to commit fraud. You may award punitive damages only if you find that CPH showed the elements of its claims for aiding and abetting and conspiracy by clear and convincing evidence.

For aiding and abetting, CPH must show by clear and convincing evidence:

1) That Sunbeam committed a fraud against CPH by making false statements and misrepresentations in Sunbeam's financial statements—that is:

   a) Sunbeam actually made one or more *false statements or representations* to CPH concerning Sunbeam's financial affairs;

   b) Sunbeam *knew* that the statements or representations were false;

   c) Sunbeam's alleged false statements or misrepresentations were a *material factor* in CPH agreeing to sell its stake in Coleman to Sunbeam;

CPH actually *relied* on Sunbeam's allegedly false statements, in that CPH believed the truthfulness of the statement and acted based upon its belief in the statement's truth;

d) CPH was *justified* in relying on these allegedly false statements, meaning that it neither knew nor should have discovered Sunbeam's false statements; and

e) CPH *suffered injury* as a proximate result of justifiably relying on Sunbeam's false statements;

2) That Morgan Stanley had *actual knowledge* that Sunbeam was defrauding CPH;

3) That with knowledge of Sunbeam's allegedly fraudulent scheme, Morgan Stanley provided *substantial assistance* to Sunbeam in the commission of the fraud;

4) That CPH *suffered injury* as a proximate result of Morgan Stanley's conduct.

For conspiracy to commit fraud, CPH must show by clear and convincing evidence:

1) That Sunbeam committed a fraud against CPH by making false statements and misrepresentations in Sunbeam's financial statements according to my previous instructions;

2) That Morgan Stanley entered into an *agreement* with Sunbeam to defraud CPH;

3) That Morgan Stanley had *actual knowledge* of the fraud, and shared with Sunbeam a *common objective to commit fraud*;

4) That Morgan Stanley or Sunbeam engaged in at least *one act in furtherance of the conspiracy*; and

5) That CPH *suffered injury* as a proximate result of the fraud.

If you find that CPH has not proven by clear and convincing evidence all of the facts necessary to establish the basis for an award of punitive damages, you must return a verdict for Morgan Stanley on punitive damages.

I have already instructed you in phase one of the trial on several elements of aiding and abetting liability and conspiracy to commit fraud. I will now provide instructions on the other elements described above.

Sources:

Florida Standard Jury Instructions in Civil Cases - Punitive Damages §§ 1 & 2 (2004) (adapted).

Florida Forms of Jury Instruction, § 60.73[1], Vol. 4, Matthew Bender & Co., Inc., approved by the Hon. Morton Abram (2004).

Fla. Stat. § 768.725.

See prior jury instructions on aiding and abetting and conspiracy to commit fraud.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 3

Punitive Damages—Liability for Punitive Damages:

Aiding and Abetting Fraud—Fraud by Third Party: False statements of existing fact

CPH must show that Sunbeam made a false statement or misrepresentation. This simply means to state as a fact something that is *false or untrue*. If you find that CPH fails to establish by the clear and convincing evidence that Sunbeam's alleged statements were false, then there was no fraud, and you must find in favor of Morgan Stanley on the aiding and abetting count. In addition, to constitute fraud, a statement that is allegedly false must relate to an *existing fact.* Therefore, statements that are mere opinions, promises of future conduct, and forward-looking statements are not grounds for a fraud claim as they are not false statements of existing fact, unless the party stating the opinion has exclusive or superior knowledge of existing facts that are inconsistent with such opinion.

Thus, if CPH fails to prove by the clear and convincing evidence that any allegedly false statements or representations Sunbeam made were related to existing facts concerning the company's financial circumstances, rather than mere opinions or predictions as to future events concerning its performance or prospects, you should find that Morgan Stanley is not liable for punitive damages for aiding and abetting.

Sources:

Florida Standard Jury Instructions in Civil Cases - Miscellaneous §8.1 (2004) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), State Claims Instructions - Fraud § 3.1 (2000) (adapted).

Thor Bear, Inc. v. Crocker Mizner Park, Inc., 648 So. 2d 168 (Fla. 4th DCA 1994) ("The general rule of law is that a false statement of fact must concern a past or existing fact in order to be actionable. A successful action for fraudulent misrepresentation may not ordinarily be premised upon a promise of future action.").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 4

Punitive Damages—Liability for Punitive Damages:

Aiding and Abetting Fraud—Fraud by Third Party: Knowingly and Intentionally Made

CPH must prove that Sunbeam made any false statements or representations *knowingly and intentionally*, rather than as a result of a mistake, misapprehension of facts, or accident. If you find that CPH has not shown by clear and convincing evidence that Sunbeam knew that its statements were false, or that Sunbeam made the statements knowing it lacked knowledge of whether they were true or false, then you should find that Morgan Stanley is not liable for punitive damages for aiding and abetting.

Sources:

Florida Standard Jury Instructions in Civil Cases - Miscellaneous §8.1 (2004) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), State Claims Instructions - Fraud § 3.1 (2000) (adapted).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 5

Punitive Damages—Liability for Punitive Damages:

Aiding and Abetting Fraud—Fraud by Third Party: Materiality

It is also CPH's burden to establish by clear and convincing evidence that Sunbeam's allegedly false statements were a *material* reason why CPH agreed to sell its stake in Coleman to Sunbeam. A statement is material if it is of such importance that CPH would not have entered into the transaction with Sunbeam, but for the false statement. If you find that CPH would have sold its stake in Coleman to Sunbeam even in the absence of Sunbeam's alleged false statements, then you should find that Sunbeam did not defraud CPH, and therefore Morgan Stanley is not liable for punitive damages for aiding and abetting.

Sources:

Florida Standard Jury Instructions in Civil Cases - Miscellaneous §8.1 (2004) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), State Claims Instructions - Fraud § 3.1 (2000) (adapted).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 6

Punitive Damages—Liability for Punitive Damages:

Aiding and Abetting Fraud—Provision of Substantial Assistance

CPH also bears the burden of proving by clear and convincing evidence the third element of the aiding and abetting claim—that Morgan Stanley *knowingly and substantially assisted* Sunbeam in carrying out its fraud.

CPH must show that Morgan Stanley affirmatively and knowingly assisted, participated in and furthered Sunbeam's alleged fraud against CPH. The mere failure to *expose* Sunbeam's allegedly fraudulent scheme is insufficient to impose liability on Morgan Stanley for aiding and abetting. Thus, it is not enough that Morgan Stanley's silence allowed Sunbeam's allegedly fraudulent scheme to succeed, or that it failed to announce the existence of Sunbeam's alleged false financial statements. Rather, Morgan Stanley must have *affirmatively assisted* Sunbeam in committing Sunbeam's alleged fraudulent plan, with knowledge of the plan's allegedly fraudulent nature, in order for Morgan Stanley to be liable.

Even if you find that Morgan Stanley assisted Sunbeam in committing fraud, you still cannot find Morgan Stanley liable unless you find that Morgan Stanley's assistance was *substantial*. Whether Morgan Stanley's assistance was substantial depends upon the totality of the circumstances. In other words, you must take all of the evidence into account before determining whether Morgan Stanley's participation in Sunbeam's alleged fraud was substantial. If you find that Morgan Stanley participated in Sunbeam's alleged fraud, but that Morgan Stanley's participation was not substantial, you must find Morgan Stanley not liable for aiding and abetting.

If CPH has failed to prove that Morgan Stanley affirmatively and substantially assisted Sunbeam's allegedly fraudulent scheme, then you must find that Morgan Stanley is not liable for punitive damages on aiding and abetting.

Sources:

Eleventh Circuit Pattern Jury Instructions (Civil Cases), Federal Claims Instructions - Securities Fraud § 4.2 (2000) (adapted).

Eleventh Circuit Pattern Jury Instructions (Civil Cases), State Claims Instructions - Fraud § 3.1 (2000) (adapted).

37 Am. Jur. 2d *Fraud and Deceit* § 302 ("To establish a common law cause of action for aiding and abetting fraud, plaintiffs must at least demonstrate some measure of 'active participation' and knowing provision of substantial assistance by the defendant to the principal's alleged fraud.").

TransPetrol Ltd. v. Radulovic, 764 So. 2d 878, 880-81 (Fla. 4th DCA 2000) (disallowing aiding and abetting theory of liability in fraud and RICO counts because plaintiffs did not rely on actions or words of alleged aiders and abettors).

Allerton v. State Dept. of Ins., 635 So. 2d 36, 38 (Fla. 1st DCA 1994) (recognizing that a claim for aiding and abetting a breach of fiduciary duty would be based on defendant's "substantially assisting, contributing to and furthering accomplishment of the breach[]").

Rudolph v. Arthur Andersen & Co., 800 F.2d 1040, 1045-46 (11th Cir. 1986) (holding that whether assistance alleged to have aided and abetted fraud was "substantial" depends on the totality of the circumstances).

In re Cascade International Securities Litigation, 840 F. Supp. 1558, 1565-66 (S.D. Fl. 1993) (Attorneys did not give "substantial assistance" to corporate client's securities fraud and were not liable for aiding and abetting; they acted as scriveners of public documents, attempted to curb questions about client's financial condition, and engaged in nothing more than activities making up "daily grist of the mill.").

Armco Industrial Credit Corp. v. SLT Warehouse Co., 782 F.2d 475, 486 (5th Cir. 1986) ("Even accepting the evidence in the record in the light most favorable to Armco, as we must with a jury verdict, we hold that Conklin's failure to expose the existence of the bogus invoices does not rise to the level of aiding and abetting. Although Conklin became aware of the bogus invoices and did nothing to reveal their existence, this awareness and inaction amounted at most to nothing more than 'mere negative acquiescence' . . . . it is not enough that Conklin's silence allowed the scheme to succeed. Conklin must have shared Pritchett's and Rigby's criminal intent if he is to be found liable as an aider and abettor."), cited by 3B Fed. Jury Prac. & Instr. Ch. 161 Overview (5th ed.), Part VII. Instructions For Civil Actions Governed By Federal Law Chapter 161. Racketeer Influenced And Corrupt Organizations Act (RICO).

DEFENDANT'S JURY INSTRUCTION NO. 7

Punitive Damages—Liability for Punitive Damages:

Conspiracy To Commit Fraud—
An Agreement Between Two Or More Parties

CPH must prove by clear and convincing evidence that Morgan Stanley entered into an agreement or understanding with someone else to cooperate in pursuit of a common objective. A conspiracy is formed whenever two or more persons or corporations knowingly join together to accomplish an unlawful purpose by concerted action. The essence of a conspiracy is an agreement to violate or disregard the law. CPH must prove by clear and convincing evidence that Morgan Stanley and Sunbeam knowingly came to a common and mutual understanding to accomplish, or to attempt to accomplish, an unlawful purpose.

There is no requirement that the agreement be a formal contract; you may infer the existence of an agreement by finding that there exists a preponderance of circumstantial evidence to show, for example, that the parties conformed their conduct around a particular arrangement or understanding. However, in order to rely on such circumstantial evidence to infer the existence of an agreement, you must conclude that such an inference outweighs all other reasonable inferences to the contrary. In other words, if the circumstantial evidence points as easily to the existence of an agreement as it does to the absence of an agreement, you must find that such evidence fails to satisfy the requirement that an agreement be proven by clear and convincing evidence.

Therefore, in order for you to find that there was an agreement between Morgan Stanley and Sunbeam, you must find by the clear and convincing evidence that Morgan Stanley's conduct can only be explained by the existence of a conspiracy to commit fraud. If you find that Morgan Stanley merely agreed to perform the financial services of any investment bank, and that

it did not agree to engage in any actions beyond those that a typical investment bank performs, then you must find for Morgan Stanley. However, if you find that beyond agreeing to perform customary investment bank functions, Morgan Stanley agreed with Sunbeam to commit a fraud, then CPH has satisfied this element of its conspiracy claim.

Sources:

Eleventh Circuit Pattern Jury Instructions (Civil Cases), Federal Claims Instructions - Antitrust, Sherman Act Section 1, Per Se Violation, Conspiracy to Fix Prices § 3.1 (2000) (adapted).

10 Florida Jurisprudence 2d—Conspiracy §§ 1, 2, 3, 9, 11 (2004)

16 Am. Jur. 2d *Conspiracy* § 51 (2004).

Diamond v. Rosenfeld, 511 So. 2d 1031, 1034 (Fla. 4th DCA 1987) ("in a civil case, a fact may be established by circumstantial evidence alone only when the inference sought to be created by such circumstantial evidence outweighs all reasonable inferences to the contrary.").

Raimi v. Furlong, 702 So. 2d 1273, 1284 (Fla. 3d DCA 1998) (while a civil conspiracy may be proven by circumstantial evidence, this may be done only when the inference sought to be created by such circumstantial evidence outweighs all reasonable inferences to the contrary).

JES Properties, Inc. v. USA Equestrian, Inc., 253 F. Supp. 2d 1273, 1279 (M.D. Fla. 2003) (rejecting conspiracy allegation; to show that an agreement existed a plaintiff must present "evidence that tends to exclude the possibility that the parties were acting independently." The court held that there must be direct or circumstantial evidence that reasonably tends to prove that the parties had a conscious commitment to a common scheme designed to achieve an unlawful objective.).

DEFENDANT'S JURY INSTRUCTION NO. 8

Punitive Damages—Liability for Punitive Damages:

Conspiracy To Commit Fraud—
A Common Objective To Commit Fraud

CPH must prove by clear and convincing evidence that Morgan Stanley had actual knowledge of the fraud *and* that Sunbeam and Morgan Stanley had a common objective to commit fraud.

Because a conspiracy claim requires that the defendant had actual knowledge of the underlying fraud, you cannot find against Morgan Stanley on this element merely because Morgan Stanley might have acted imprudently, negligently, or even recklessly, in failing to inform itself about Sunbeam's alleged fraud. As with the aiding and abetting claim, CPH must establish by clear and convincing evidence (1) that Morgan Stanley was aware that Sunbeam made the statements that CPH alleges are false; (2) that Morgan Stanley was aware of the falsity of those statements; and (3) that Morgan Stanley believed that those statements were material and that CPH could justifiably rely upon those statements. If CPH has not established by clear and convincing evidence that Morgan Stanley had direct knowledge of the fraud, then you must find Morgan Stanley not liable for punitive damages on the conspiracy count.

In addition to proving that Morgan Stanley had direct knowledge of the fraud, CPH must establish by clear and convincing evidence that Morgan Stanley shared the objective of Sunbeam's alleged scheme. It is not enough, therefore, for you to find that Morgan Stanley engaged in otherwise lawful activities that may have furthered others in pursuit of their fraudulent objectives in order for CPH to prevail. If CPH failed to prove that Morgan Stanley pursued a common objective of committing fraud, then you must find Morgan Stanley not liable for punitive damages on the conspiracy count.

Sources:

10 Florida Jurisprudence 2d Conspiracy—Civil Aspects § 1 (2004).

15A C.J.S. *Conspiracy* § 12 (2004).

Raimi v. Furlong, 702 So. 2d 1273, 1284 (Fla. 3rd DCA 1997) (citing *Trautz v. Weisman*, 809 F. Supp. 239, 246 (S.D.N.Y. 1992)) (Mere awareness of the conspiracy is insufficient; there must be an actual knowing participation.).

Ginsberg v. Lennar Florida Holdings, Inc., 645 So. 2d 490, 502 (Fla. 3d DCA 1994) (holding that there can be no conspiracy without an intent to achieve an illegal goal).

Cedar Hills Properties Corp. v. Eastern Federal Corp., 575 So. 2d 673 (Fla. 1st DCA 1991) (holding that a conspiracy requires the combination of two or more persons, a meeting of two independent minds intent on one purpose).

Cummings v. State, 514 So. 2d 406 (Fla. 4th DCA 1987) (citing *United States v. Bascaro*, 742 F.2d 1335 (11th Cir. 1984)) (A defendant may be found guilty of conspiracy only if he had knowledge of its essential objective and voluntarily became a part of it.).

Buckner v. Lower Florida Keys Hospital Dist., 403 So. 2d 1025, (Fla. 3rd DCA 1981) (Conspiracy to commit a tort requires that there has been a combination of two or more persons (or entities) seeking to accomplish an unlawful act or to accomplish a lawful act by unlawful means. The actors must have a common purpose.).

Renpak, Inc. v. Oppenheimer, 104 So. 2d 642 (Fla. 1st DCA 1958) ("[C]ivil conspiracy . . . is a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish some purpose not in itself unlawful by unlawful means." *Id.* at 646 (quoting 15 C.J.S. Conspiracy § 1, pp. 996-997)).

DEFENDANT'S JURY INSTRUCTION NO. 9

Punitive Damages—Liability for Punitive Damages:

Conspiracy to Commit Fraud—
Commission of Overt Act in Furtherance of the Conspiracy

You may not find Morgan Stanley liable for punitive damages unless you conclude that CPH has proven by clear and convincing evidence that Morgan Stanley or Sunbeam committed some overt act in furtherance of the conspiracy, either through an unlawful act or through a lawful act performed by unlawful means.

An overt act is an action taken towards completion of the ends of the conspiracy. An overt act is a discrete act, distinct from the alleged agreement, and it need not be unlawful in and of itself. However, the overt act must be proven, by clear and convincing evidence, to have moved the alleged conspiracy forward—that is, to have carried the conspiracy beyond mere preparation—while not itself necessarily accomplishing the conspiracy's ultimate goals.

Thus, if you find that neither Morgan Stanley nor Sunbeam committed an overt act that furthered the alleged conspiracy, you must find Morgan Stanley not liable of punitive damages for conspiracy to commit fraud.

Sources:

James v. Nationsbank Trust Co. (Florida) Nat'l Ass'n, 639 So. 2d 1031 (Fla. 5th DCA 1994) (must demonstrate that defendant actually took steps in furtherance of the conspiracy).

Lloyd v. Hines, 474 So. 2d 376 (Fla. 1st DCA 1985) (a conspiracy action is not maintainable of the allegations are not supported by a description of the particular overt acts of the accused).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 10

Punitive Damages – Corporate Liability for Punitive Damages

Punitive damages are only warranted if you find by clear and convincing evidence that Morgan Stanley was guilty of intentional misconduct.

Morgan Stanley is a corporation and, for purposes of deciding whether to impose punitive damages, Morgan Stanley can only act through its officers, directors or managing agents authorized to make corporate policies or it can act through its employees. Thus, in order to impose punitive liability on Morgan Stanley, you must find by clear and convincing evidence that:

A specific managing agent, director or officer of Morgan Stanley who has the power to make corporate policies, engaged in conduct that constituted intentional misconduct and that conduct contributed to the loss or damage suffered by Plaintiff.

If you find that clear and convincing evidence shows that the conduct of (name managing agent, primary owner, or other person whose conduct may warrant punitive damages without proof of a superior's fault) was a substantial cause of damage to CPH and that such conduct warrants punitive damages against Morgan Stanley in accordance with the standards I have mentioned, then in your discretion you may also determine that punitive damages are warranted against Morgan Stanley.

Source: Florida Standard Jury Instructions in Civil Cases – Punitive Damages § PD 2b(1)(2) (2004) (adapted).

Schropp v. Crown Eurocars, 654 So. 2d 1158, 1161 (Fla. 1995)

Bankers Multiple Line Ins. Co. v. Farish, 464 So. 2d 530, 533 (Fla. 1985).

DEFENDANT'S PROPOSED INSTRUCTION NO. 11

Punitive Damages – Clear and Convincing Evidence

"Clear and convincing evidence" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. In contrast, "clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

Source:

Florida Standard Jury Instructions in Civil Cases – Punitive Damages § PD 2a(1) (2004).

DEFENDANT'S PROPOSED INSTRUCTION NO. 12

Punitive Damages – Burden of Proof

If you find that Plaintiff has not proven by clear and convincing evidence all of the facts necessary to establish the basis for an award of punitive damages, you must return a verdict for Morgan Stanley on punitive damages.

Source: § 768.725, Fla. Stat.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 13

Punitive Damages—Actual Knowledge Required

To award punitive damages, it is not enough to establish that Morgan Stanley should have known it was conspiring with Sunbeam to defraud CPH, or that Morgan Stanley should have known it was aiding and abetting Sunbeam commit a fraud upon CPH. Rather, CPH must show that an individual at Morgan Stanley actually knew of the fraud complained of at the time it participated in the sale of Coleman to Sunbeam and knew of the high probability of harm to CPH and, despite that continued to participate in the transaction resulting in harm to Plaintiff. Mere failure to recognize the existence of a fraud or failure to exercise proper judgment in such a situation are not sufficient.

Sources:

Florida Standard Jury Instructions in Civil Cases – Punitive Damages § PD 2c(2) (2004) (adapted).

Chrysler Corp. v. Wolmer, 499 So. 2d 823, 824-25 (Fla. 1986).

White Constr. Co. v. Dupont, 455 So. 2d 1026, 1029 (Fla. 1984).

Carraway v. Revell, 116 So. 2d 16, 20 (Fla. 1959).

Vinci Dev. Co. v. Connell, 509 So. 2d 1128, 1133 (Fla. 2d DCA 1987) ("[e]ven a wrongful act committed by mistake in the good-faith assertion of a supposed right, but lacking malicious motive or wrong intention, will not support an award of punitive damages.").

Hemenway v. Peabody Coal Co., 159 F.3d 255, 262 (7th Cir. 1998) (the standard for punitive damages in Indiana is whether "the defendant acted with malice, fraud, gross negligence or oppressiveness which was not the result of a mistake of fact or law, honest error of judgment, over zealousness, mere negligence, or other human failing.").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 14

Punitive Damages—Plaintiff Has No Right To Recover Punitive Damages

CPH has no right to recover punitive damages, even though you have found it entitled to compensatory damages. Punitive damages are not intended to compensate a plaintiff for its actual injuries. You may in your discretion decline to award punitive damages even if you find that the evidence supports such an award.

Sources:

Chrysler Corp. v. Wolmer, 499 So. 2d 823, 825 (Fla. 1986) (punitive damages not intended as means by which a plaintiff can recover extra damages).

St. Regis Paper Co. v. Watson, 428 So. 2d 243, 247 (Fla. 1983) (recognizing distinct purposes for compensatory and punitive damages and noting that "a plaintiff has no right to punitive damages").

Carraway v. Revell, 116 So. 2d 16, 20 (Fla. 1959) (punitive damages are imposed "not as compensation ... but as punishment").

BMW of North Am. v. Gore, 517 U.S. 559, 567 (1996).

Florida Standard Jury Instructions in Civil Cases – Punitive Damages § PD 2(d)(2) (2004) (adapted) ("[Y]ou may in your discretion decline to assess punitive damages").

Humana Health Ins. Co. of Fla. v. Chipps, 802 So. 2d 492 (Fla. 4th DCA 2001).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 15

Punitive Damages—Improper Considerations

You may not allow your decision regarding punitive damages to be affected by the fact that Morgan Stanley is a large business, or by the fact that its principal offices are outside of this State.

Source:

Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994) (noting the danger "that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 16

Punitive Damages—Jury May Not Consider Litigation Misconduct[12]

You have heard evidence about litigation misconduct by Morgan Stanley during the course of this case. Such evidence was admissible only to establish the fact that Morgan Stanley had knowledge that its conduct in connection with the Coleman/Sunbeam transaction was improper. You may not consider any evidence of Morgan Stanley's litigation misconduct in deciding whether to award punitive damages and, if so, the amount of punitive damages to award.

Sources:

> *Ostano Commerzanstalt v. Telewide Sys., Inc.*, 794 F.2d 763, 768 (2d Cir. 1986) ("While this conduct might well justify the imposition of sanctions, it alone does not justify the award of punitive damages.") (citation omitted).
>
> *Federal Deposit Ins. Corp. v. British-American Corp.*, 755 F.Supp. 1314, 1329 (E.D.N.C. 1991) ("Punitive damages are available when the underlying conduct on which the lawsuit is premised is willful, wanton, egregious, or the like. They are not intended to redress misconduct occurring during the litigation process. Such misconduct is properly redressed through the Federal Rules of Civil Procedure.") (citation omitted).
>
> *James v. Powell*, 225 N.E.2d 741, 747 (N.Y. 1967) (punitive damages not properly awarded where court levied them based on contempt citations in related proceedings rather than on account of the fraud at issue).
>
> Jim Gash, *Punitive Damages, Other Acts Evidence, and the Constitution*, 2004 Utah L. Rev. 1191, 1212 (2004) ("[I]t seems axiomatic that if the trial court is constitutionally required to instruct the jury that it may not use extraterritorial other acts evidence to punish a defendant, *the trial court must be similarly required to instruct the jury that it may not use even local other acts to punish a defendant. Whereas the former instruction*

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[12] Morgan Stanley submits this instruction to be used only in the event evidence of litigation misconduct is admitted during trial, or if the Court reads any statement to the jury concerning litigation misconduct, and does so without waiving its argument that no evidence or mention of litigation misconduct should be placed before the jury. Permitting the jury to hear evidence of "the nuances of discovery and the 'hardball' tactics employed by the lawyers may confuse the jury" and "rather than focus on the issues in the case, the jury may instead be misled by the irrelevant side issues of the discovery process." *Thompson v. Gleamed Trust Co.*, 1996 WL 529693, at *2 (E.D. Pa. Sept. 17, 1996). Juror prejudice results not only from the negative inferences a juror inevitably draws from a sanctions order, but also from the fact that juries are likely to give any court order "undue" and "exaggerated" weight. *Nipper v. Snipes*, 7 F.3d 415, 418 (4th Cir. 1993); *Greys, Inc. v. Proud*, 826 F.2d 1560, 1567 (7th Cir. 1987).

is mandated by federalism principles, the latter is required by due process.") (emphasis added).

State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1522-23 (2003) ("A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 17

Punitive Damages—No Punishment For Out-Of-State Conduct

You may not award any punitive damages (1) for any conduct occurring outside Florida; (2) for injuries that may have occurred outside of Florida; (3) on the basis of out-of-state conduct that was lawful where it occurred; or (4) for the purpose of changing Morgan Stanley's conduct outside of Florida.

For purposes of evaluating whether Morgan Stanley's conduct in New York was lawful, you must consider whether CPH has shown by clear and convincing evidence that, under New York law, CPH justifiably relied upon Sunbeam's allegedly fraudulent statements. I instruct you that under New York law CPH must establish that it *relied upon* Sunbeam's allegedly fraudulent statements, that CPH was *justified* in doing so, and that Sunbeam's allegedly fraudulent statements were a substantial factor in CPH's decision to engage in the transaction with Sunbeam. In other words, if you find that CPH did not believe the alleged misrepresentations, or that CPH would have engaged in the transaction with Sunbeam anyway and that the alleged misrepresentations had no effect upon CPH's decision, then there was no reliance and therefore no punitive damages should be awarded. Furthermore, if you find that it was unreasonable for CPH simply rely upon Sunbeam's representations without undertaking an independent investigation, then CPH's reliance was not justified and you should not award punitive damages.

Under New York law, a sophisticated investor has a duty to perform reasonable due diligence as to available information in order to prove that its reliance on a misrepresentation was justified. Sophisticated investors are required to use reasonable due diligence in investigating the transaction to discover misrepresentations, the falsity of which would have been apparent had a proper investigation been completed. A sophisticated investor may not disregard a risk that the investor actually knew about, or was so obvious that the investor should have

known of it. If you conclude that CPH was a sophisticated investor and that it failed to prove such justifiable reliance by clear and convincing evidence, you should not award punitive damages.

Source:

State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 421-23 (2003) ("A State cannot punish a defendant for conduct that may have been lawful where it occurred. . . . A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for conduct that was lawful in the jurisdiction where it occurred.").

BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572-73 (1996) ("[A] State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States.").

White v. Ford Motor Co., 312 F.3d 998 (9th Cir. 2002) ("The district court's refusal to limit the jury to consideration of Nevada's interests, combined with the plaintiffs' lawyers exhortations to let the decision resonate 'across the country,' compels us to conclude that the jury here was permitted to engage in 'a due process violation of the most basic sort' when it arrived at its punitive damages award.").

New York Pattern Jury Instructions – Civil §3.20 (2004) (adapted).

14 New York Practice - New York Law of Torts §§ 1:69, 1:70, 1:71, 1:73, 1:74.

Rotterdam Ventures, Inc. v. Ernst & Young LLP, 752 N.Y.S.2d 746, 749 (N.Y. App. Div. 2002) (holding that where a sophisticated party "plainly had both access to the relevant AMNEX financial statements and the wherewithal, through his own financial advisors, to ascertain the financial viability of that entity. Thus, as plaintiffs had the means to ascertain the truth of the alleged representations, they cannot prevail in an action for fraud") (citations omitted).

UST Private Equity Investors Fund, Inc. v. Salomon Smith Barney, 733 N.Y.S.2d 385, 386 (N.Y. App. Div. 2001) ("As a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on an alleged misrepresentation if that plaintiff failed to make use of the means of verification that were available to it, such as reviewing the files of other parties.").

Stuart Silver Assocs., Inc. v. Baco Dev. Corp., 665 N.Y.S.2d 415, 417 (N.Y. App. Div. 1997) ("Where a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on defendant's misrepresentations.").

Schlaifer Nance & Co. v. Estate of Warhol, 119 F.3d 91, 101 (2d Cir. 1997) ("'Where sophisticated businessmen engaged in major transactions enjoy access to critical information but fail to take advantage of that access, New York courts are particularly disinclined to entertain claims of justifiable reliance.'" (quoting *Grumman Allied Indus. v. Rohr Indus., Inc.*, 748 F.2d 729, 737 (2d Cir. 1984)).

Abrahami v. UPC Const. Co., 638 N.Y.S.2d 11, 14 (N.Y. App. Div. 1996) (holding that sophisticated businessmen who were parties to a commercial transaction "had a duty to exercise ordinary diligence and conduct an independent appraisal of the risk they were assuming," and noting that "where a party has means available to him for discovering, by the [use] of ordinary intelligence, the true nature of a transaction he is about to enter into, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations") (internal quotation marks and citations omitted).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 18

Punitive Damages—Determination Of Amount

In determining the amount of punitive damages, you should consider the following:

1. the nature, extent, and degree of misconduct and the related circumstances, including:
    - whether the harm caused was economic as opposed to physical;
    - whether the misconduct demonstrated an indifference to or a reckless disregard of the health or safety or others;
    - whether the target of the conduct was financially vulnerable;
    - whether, at the time of the injury, Morgan Stanley had a specific intent to harm CPH;
    - the financial condition of Morgan Stanley and the probable effect of a judgment thereon;[13] and
    - the degree of Morgan Stanley's awareness of the misconduct, including whether Morgan Stanley had other arguably legitimate grounds to conclude that its conduct was lawful; and
2. whether there is a reasonable relationship between the amount of punitive damages and CPH's harm.

Any punitive damages you assess would be in addition to any compensatory damages you award. Even if you find that Morgan Stanley engaged in conduct that makes it subject to punitive damages, it is entirely within your discretion whether or not to award punitive damages. You should award punitive damages only if you conclude that punitive damages are necessary to accomplish the goals of punishment and deterrence.

[13] Morgan Stanley submits this instruction to be used only in the event evidence of Morgan Stanley's wealth is admitted and does so without waiving its argument that no evidence of wealth should be admitted.

However, you may not award an amount of damages that would bankrupt or financially destroy Morgan Stanley.

Source:

Florida Standard Jury Instructions in Civil Cases—Punitive Damages § 2 (2004) (adapted).

State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 419-429 (2003).

BMW of N. Am. v. Gore, 517 U.S. 559, 577-80 (evaluating reprehensibility in light of compliance with state disclosure statutes, which provided a "good faith basis for believing that no duty to disclose exists.").

Langmead v. Admiral Cruises, 696 So. 2d 1189, 1192-94 (Fla. 3d DCA 1997) (assessing the degree of reprehensibility of the defendant's conduct and the actual harm caused by such conduct).

Owens-Corning Fiberglass Corp. v. Ballard, 749 So. 2d 483, 484-5 (Fla. 1999) (holding that lower court properly included in jury instructions on punitive damages additional factors relating to the circumstances of the case).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 19

Punitive Damages—Award No More Than Necessary To Accomplish Purposes

The primary purpose of imposing punitive damages against a corporation is to punish the wrongdoer and deter similar misconduct in the future by the defendant and others. You must not award punitive damages in any amount larger than what is needed to accomplish this purpose.

Source:

Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 17-18 (1991) ("We note again our concern about punitive damages that 'run wild,'" and analyzing necessity for adequate guidance to the jury, as well as judicial review, to ensure that punitive damage awards meet standards of reasonableness and deterrence).

State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1521 (2003) ("It should be presumed that a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.").

Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 434-36 (2001) (imposition of punitive damages reflects policy decisions more than actual findings and *de novo* appellate review is required to ensure fidelity to constitutional limits).

BMW of N. Am. v. Gore, 517 U.S. 559, 584 (1996) ("The [punitive damages] sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal.").

Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 307 (1986)("[d]eterrence ... operates through mechanism of damages that are compensatory").

Beliz v. W.H. McLeod & Sons Packing, 765 F.2d 1317, 1332 (5th Cir. 1985) ("[d]eterrent effect may be achieved without awarding exemplary damages").

Rosado v. Santiago, 562 F.2d 114, 121 (1st Cir. 1977) (reversing punitive damages where "[a]n award of actual damages coupled with reinstatement ... is ample relief ... and a sufficient deterrent to future wrongdoing").

Maiorino v. Schering-Plough Corp., 695 A.2d 353 (N.J. Super. 1997) (vacating punitive award in light of substantial deterrent of $435,000 compensatory award).

Chandler v. Denton, 741 P.2d 855, 868 (Okla. 1987) (total verdict "was so large that the addition of substantial punitive damages was 'not ... responsive to the purpose of civil punishment'").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 20

Punitive Damages—Punishment Only For Harms To CPH

You may not impose punishment for harms suffered by any persons or corporations other than CPH.

Source:

State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 422-23 (2003) ("A defendant should be punished for conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant . . . .").

Cooper Indus., Inc. v. Letherman Tool Group, Inc., 532 U.S. 424, 435 (2001) (characterizing second *BMW* guidepost as "the relationship between the penalty and the harm *to the victim* caused by the defendant's actions").

BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996) (looking into "the disparity between the harm or potential harm suffered *by Dr. Gore* and his punitive damages award") (emphasis added).

Owens-Corning Fiberglass Corp. v. Ballard, 749 So. 2d 483, 484-5 (Fla. 1999) (holding that lower court properly included in jury instructions on punitive damages additional factors relating to the circumstances of the case).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 21

Punitive Damages—Consider Nature Of Defendant's Misconduct

In deciding what level of punishment and deterrence, if any, is warranted in this case, the most important factor to consider is the nature, degree, and extent of the misconduct, if any, of Morgan Stanley's participation in the transaction. Not all conduct that is subject to punishment is equally wrongful or deserving of the same punishment. Thus, you should consider how blameworthy Morgan Stanley's conduct was in deciding what level or amount of punishment that conduct deserves, if any.

Source:

Florida Standard Jury Instructions in Civil Cases – Punitive Damages § PD 2d(2) (2004).

Langmead v. Admiral Cruises, 696 So. 2d 1189, 1192-94 (Fla. 3d DCA 1997) (assessing the degree of reprehensibility of the defendant's conduct and the actual harm caused by such conduct).

State Farm Mut. Auto. Ins. Co. v. Campbell, 123 U.S. 1513, 1521 (2003).

BMW of N. Am. v. Gore, 517 U.S. 559, 575-78 (1996) ("the most important indicum of the reasonableness of punitive damages award is the degree of reprehensibility of the conduct").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 22

Punitive Damages—Do Not Consider Financial Condition

In determining the proper amount of punitive damages, if any, you may not consider Morgan Stanley's size, wealth, overall profits and revenues, or profits.

Source:

State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1525 (2003) ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.").

BMW of N. Am. v. Gore, 517 U.S. 559, 574-85 (1996) (wealth of defendant not included in due process analysis; the "fact that [a] defendant is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several states impose on the conduct of its business.").

Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994) ("[T]he presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.").

Sand Hill Energy v. Smith, 142 S.W.3d 153, 167 (Ky. 2004) ("[I]n *State Farm*, the United States Supreme Court frowned upon 'the presentation of evidence of a defendant's net worth'").

Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793, 805 (Cal. Ct. App. 2003) ("the jury in this case was instructed that, in addition to other factors, it should consider in arriving at an award of punitive damages '[t]he amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition.' As we have discussed above, this view of 'actual' deterrence, while clearly supported by California law ..., fails to restrict the jury to punishment and deterrence based solely on the harm to the plaintiffs, as apparently required by federal due process").

Zazu Designs v. L'Oreal, S.A., 979 F.2d 499, 508 (7th Cir. 1992) ("[c]orporate assets finance ongoing operations and are unrelated to either the injury done to the victim or the size of the award needed to cause corporate managers to obey the law.").

Kemezy v. Peters, 79 F.3d 33, 35 (7th Cir. 1996) (the economics principal of "diminishing marginal utility" "does not apply to institutions as distinct from natural persons.").

Pivot Point Int'l v. Charlene Prods., 932 F. Supp. 220, 223 (N.D. Ill. 1996) (evidence of wealth inadmissible to establish the proper amount of punitive damages in part because, "even when considering punitive damages based on state law, the Supreme Court [in *BMW*] did not treat the defendant's wealth as relevant.").

Anthony J. Franze & Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After State Farm*, 6 U. Pa. J. Const. L. 423, 521 (2004) ("basing

an award on a defendant's financial condition or profits risks punishing a defendant for harm to nonparties, a practice barred by *State Farm*").

American Law Institute, *Reporters' Study: Enterprise Responsibility for Personal Injury*, Vol. II, at 253-55 (1991).

But see Rinaldi v. Aaron, 314 So. 2d 762 (Fla. 3d DCA 1975).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 23

Punitive Damages—Relevance Of Financial Condition[1]

You may not impose a larger punishment simply because a defendant is a large corporation with substantial net worth, income, or revenues. Regardless of the defendant's wealth, you should base the amount of your punitive award, if any, on the factors about which I have already instructed you.

Source:

> *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 427 (2003) ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.").

[1] Morgan Stanley submits this instruction to be used only in the event evidence of Morgan Stanley's wealth is admitted and does so without waiving its argument that no evidence of wealth should be admitted.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 24

Punitive Damages—Reasonable Relationship Required

Although evidence of Morgan Stanley's size and financial resources was introduced in this case, you should only consider such evidence for the limited purpose of ensuring that the award will not financially destroy Morgan Stanley. In determining the amount of punitive damages, you must focus on the nature, extent and degree of culpable misconduct, the relationship between punitive damages and the amount of compensatory damages awarded, and civil or criminal penalties for comparable misconduct.

Source:

Florida Standard Jury Instructions in Civil Cases – Punitive Damages § PD 2d(2) (2004) (adapted).

State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1525 (2003).

BMW of N. Am. v. Gore, 517 U.S. 559, 576 n.23 (1996).

St. Regis Paper Co. v. Watson, 428 So. 2d 243, 248 (Fla. 1983).

Anthony J. Franze and Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After State Farm*, 6 U. Pa. J. Const. L. 423, 520 (2004) (where net worth is admissible "[t]o avoid constitutional concerns, juries also should be told that a defendant's wealth should be used only as a limiting factor in setting the amount of an award").

But cf. Rinaldi v. Aaron, 314 So. 2d 762 (Fla. 3d DCA 1975).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 25

Punitive Damages—Reasonable Relationship Required

Any amount of punitive damages you award may not be disproportionate to the harm caused to CPH and to the compensatory damages you have awarded.

Source:

State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1524 (2003) ("the measure of punishment [must be] both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered," "when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages can reach the outermost limit of the due process guarantee.").

BMW of N. Am. v. Gore, 517 U.S. 559, 580 (1996) ("The principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree ...").

Owens-Corning Fiberglas v. Ballard, 749 So. 2d 483 (Fla. 1999) (an amount reasonable in relation to the harm likely to result from the conduct as well as the actual harm).

Langmead v. Admiral Cruises, 696 So. 2d 1189, 1192-94 (Fla. 3d DCA 1997) ("An enormous disparity between the actual damages awarded ... and the punitive damages awarded ... has most certainly raised the suspicious judicial eyebrow[s] of this Court").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 26

Punitive Damages—Consider Effect Of Compensatory Damages

Because the compensatory damages you have already awarded are substantial, a lesser amount of punitive damages may be appropriate based on other factors I have identified for you. You should consider that, because the compensatory damages are substantial, a punitive award equal to or less than the compensatory award may well be sufficient to achieve the State's interest in punishing and deterring the defendant, in which case you may not award more than that amount.

Source:

State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1524 (2003) ("the measure of punishment [must be] both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered," "when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages can reach the outermost limit of the due process guarantee.");

BMW of N. Am. v. Gore, 517 U.S. 559, 580 (1996) ("The principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree ...").

Owens-Corning Fiberglas v. Ballard, 749 So. 2d 483 (Fla. 1999) (an amount reasonable in relation to the harm likely to result from the conduct as well as the actual harm).

Langmead v. Admiral Cruises, 696 So. 2d 1189, 1192-94 (Fla. 3d DCA 1997) ("An enormous disparity between the actual damages awarded ... and the punitive damages awarded ... has most certainly raised the suspicious judicial eyebrow[s] of this Court").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 27

Punitive Damages—Award Limited To Earnings

Ordinarily, it constitutes sufficient punishment and deterrence to deprive a corporate defendant of the monetary benefit it gained from its wrongful conduct of its employees.

Therefore, if you decide to award punitive damages in this case, the maximum amount you may award is the amount, if any, earned by Morgan Stanley as a result of its participation in the transaction, less any compensatory damages you award. If, however, based on the other factors I have instructed you to consider, you conclude that a lesser amount will provide sufficient punishment and deterrence, you should award that lesser amount.

Source:

BMW of N. Am. v. Gore, 517 U.S. 559 (1996).

Uniform Law Commissioners' Model Punitive Damages Act § 6(c) ("liability of a legal entity or principal for punitive damages under this subsection is limited to an amount necessary to deprive the entity or principal of any profit or gain, obtained through the wrongful action of the director, officer, or agent, in excess of that likely to be divested by an action against the entity or principal for compensatory damages")

American Law Institute, *Reporters' Study: Enterprise Responsibility for Personal Injury*, Vol. II, at 254 (1991) ("[W]hat is relevant is not the defendant's *overall* wealth, but rather the profit it realized from the particular tortuous activity in question.")

Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424, 432 (2001) (holding that punitive damages must be linked to the profits generated by the alleged wrongdoing, and explaining that "it would be unrealistic to assume that all of [the defendant's] sales ... would have been attributable to its misconduct").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 29

Punitive Damages—Concluding Instruction

Your verdict must now be unanimous, that is, your verdict must be agreed to by each of you.

You will be given a form of verdict, which I shall now read to you:

[Insert jury form]

When you have agreed on your verdict, the foreman or forewoman, acting for the jury, should date and sign the verdict. You may now retire to consider your verdict.

Source:

Florida Standard Jury Instructions in Civil Cases - Punitive Damages § 1 (2004) (adapted).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 4 day of April, 2005.

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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

NOTICE OF FILING FEBRUARY 20, 2004 HEARING TRANSCRIPT

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed the attached February 20, 2004 hearing transcript.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 7th day of July, 2005.

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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR
PALM BEACH COUNTY, FLORIDA
CASE NO. 2003 CA 005045 AI

COPY

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiffs,

-vs-

MORGAN STANLEY & CO., INC.,

Defendant.

_____/

Transcript of Proceedings beginning at 3:30 p.m., and concluding at 4:29 p.m., on Friday, February 20, 2004, taken at the Palm Beach County Courthouse, West Palm Beach, Florida, before the Honorable Elizabeth T. Maass, Circuit Court Judge. Reported by Shirley D. King, Professional Court Reporter.

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P R O C E E D I N G S

- - -

THE COURT: Good afternoon. Have a seat. This is Coleman and Morgan Stanley. Where do we want to start?

MR. SCAROLA: Your Honor, Jack Scarola on behalf of Coleman Parent. With me is Mr. Jerry Solovy, Mr. Ron Marmer, and this is Steve Fasman, our corporate representative.

And I think that we are probably in agreement that the first issue to be dealt with, which can be dealt with rather easily, is a determination as to the consolidation of the two related pending cases. And I think that both parties are in agreement that it is appropriate, both for purposes of discovery and trial, to consolidate these related matters.

THE COURT: Is that accurate?

MR. BEMIS: Good afternoon, Your Honor. Lawrence Bemis with Kirkland & Ellis on behalf of Morgan Stanley and Morgan Stanley Senior Funding.

The answer is, yes, I think we all agree to that.

THE COURT: I'm just trying to think,

mechanically, how do we want to do that?

MR. BEMIS: Your Honor, there is no separate order on that. We did submit a proposed order which was based on what we understood was a sample pretrial compliance order for case management conference Your Honor had entered, but the consolidation issue, for reasons which escape me, was not put in there, so we will need a separate order ordering consolidation.

THE COURT: Right. But I'm just trying to figure out mechanically what we want the clerk to do with the files and how we would like to proceed with the pleadings.

MR. BEMIS: I think the way it's done is we put both case captions on each and file them accordingly.

MR. SCAROLA: Either that or Your Honor's order can simply direct us to file all pleadings under the lower case number and we'll just style everything under the lower case number. I think what otherwise happens is that the clerk requires us to file duplicates.

THE COURT: We don't want to do that. I want to have one place where we look for everything.

MR. BEMIS: What I would like, Your Honor, is not to have the single number on the cases, but that both numbers appear, for reasons I'm going to explain. There may be additional counsel in this case who will be only in one of the cases and not the other.

THE COURT: So are we agreeing we're consolidating for all purposes?

MR. SCAROLA: Yes, Your Honor, both discovery and trial.

MR. BEMIS: Yes, Your Honor.

THE COURT: For discovery and trial. Okay. So we will use a joint caption, but with the lower number listed first, and you'll direct the clerk to place everything from now on in the lower-numbered case?

MR. SCAROLA: I think that works.

MR. BEMIS: That's fine, Your Honor.

THE COURT: Okay. Is there a written motion to consolidate? If so, who filed it?

MR. BEMIS: It is not, Your Honor. But it would normally be something that under Rule 1.200 we would take up at this time.

THE COURT: No, no. I'm just trying to think. I'm writing my notes so I can do the

order and whether I had to say it was a joint or was it written or oral --

MR. SCAROLA: Pursuant to oral stipulation of the parties.

THE COURT: So we agree it is a joint ore tenus motion to consolidate?

MR. BEMIS: Actually, it's in our joint written statement to the Court, as you ordered, that we agreed to it, so it's actually pursuant to a written statement.

THE COURT: Okay. What next?

MR. SCAROLA: Your Honor, I think that the next matter appropriately addressed is the issue of the trial date. I think that once Your Honor has made a determination as to when this case will be tried, then the parties are going to be able to come to an agreement with regard to establishing other related deadlines based upon that trial date.

And Your Honor may recall from a review of our submissions, that not surprisingly on this side of the courtroom we have requested an August trial date and on that side of the courtroom they have suggested a February 2005 trial date.

I will tell Your Honor, that from the

Plaintiff's perspective, we are prepared to split the difference with the defense and choose a date between the August and February date, taking into account these considerations; the Jewish Holidays are in September and it would be difficult for us to select a date that was either during or very close to the September Jewish Holidays, and, obviously I think that all parties would be concerned in terms of our ability to select a jury if we start bumping up against Thanksgiving, Christmas and the New Year. What that means, since we anticipate 15 trial days, three weeks of trial, is that a date approximately the middle of October would be far enough away from the September holidays and also far enough away from Thanksgiving that we would be able to comfortably complete the trial in that period. So our suggestion, in light of the requests that have been made on both sides, if it fits in with Your Honor's calendar, we are suggesting that a date be selected in the beginning, approximately mid October.

THE COURT: I guess a more fundamental preliminary question, are we at issue yet?

MR. BEMIS: We are in --

MR. SCAROLA: We are currently at issue.

THE COURT: Although you still plan to file a motion to amend punitive damages?

MR. SCAROLA: That is correct, we are anticipating filing a motion to amend to add punitive damages.

I will tell Your Honor that it is our position that that motion does not, because it only goes to the relief sought, place the case in a position where this matter is not at issue and could not be set for trial.

THE COURT: Your suggestion is this be set for trial in mid October?

MR. SCAROLA: That's correct.

THE COURT: That strikes me, quit honestly, as pretty ambitious for a case this size.

MR. SCAROLA: Well, Your Honor, we have been proceeding very quickly with regard to the discovery in this matter. As Your Honor is well aware, this is not the first litigation that arises out of these related circumstances, so discovery has been expedited by virtue of the fact that we have been able to exchange documents previously compiled in relation to other litigation and rely upon prior deposition

testimony taken in connection with other litigation. And while this certainly is a matter of substantial magnitude, we feel very comfortable about our ability to be ready for trial in early August and certainly anticipate no problem whatsoever in being ready to go to trial in October. So I don't think it is as ambitious as might appear at first blush.

MR. BEMIS: Your Honor, may I use the podium?

THE COURT: However you're more comfortable is fine.

MR. BEMIS: I'm used to a podium.

Your Honor, as you're aware, there are two calendars. And I won't go in the intermediate base because I do agree with Mr. Scarola, that once we have a trial date, we can work backwards. And whatever date you select, we'll deal with that offline and not take the Court's time.

I didn't know until just now that they're in agreement that it's a three-week trial. So it's a jury trial.

THE COURT: Well, the only thing I will point out is we're not in trial on Fridays. So

if we're talking about 15 trial days, it's really a four-week trial.

MR. BEMIS: So it's a four-week trial, Your Honor.

Based on the original schedule, we proposed a date approximately 12 months forward. And I thought that was a very aggressive schedule, for reasons I'm going to tell you, and I question whether we can meet it. And the reason is, overall, while they say this has been done before, it is true that they have done it before, as I'm going to explain, but Morgan Stanley and Morgan Stanley Senior Funding haven't been a party to any of the other litigation and we haven't gone through all of this before, so they had a huge head start in terms of their preparation for the case.

Even an October schedule, Your Honor, I think is extraordinarily unrealistic for a number of reasons. First of all, it is a huge case and it's not old. I mean, these cases were filed in May of 2003. It was on the very eve of the running of the statute of limitations, which had already been extended by --

THE COURT: That's not relevant to what

we're looking at, but go ahead, sir.

MR. BEMIS: But the point of it is that there are no equities in this case that require us to go on a crazy track of double tracking depositions and creating all kinds of logistical difficulties when a pace of one year to get this case finished is not unreasonable, given its size. We have $2 billion of damages asserted on one side; $680 million on our side. You have five sets of parties to this case: You have the parties to the acquisition, we have the accountants, we have the law firm, investment bankers, financial advisors. There are three sets of either litigation or proposed litigation that were massive that preceded this. There was the Coleman claims against Sunbeam, which did not result in litigation, but there was a lot of paperwork generated there. Coleman sued Arthur Anderson. There was a big settlement there. You're familiar with that because we had an issue over the production of the settlement agreement. There was a shareholder suit for Sunbeam. SEC investigation. We received in August 400 boxes of documents in the case. There have been 210 witnesses who have given testimony in these cases

over 400 plus days. And we have had eight months at this point to try to work ourself through that.

Now the parties have been moving quickly. I've been on the case only three or four weeks. And I was brought in because it has been moving quickly and because I've also -- I practiced in Florida for 18 years. This case -- in nine months we have accomplished an extraordinary amount of written discovery. I could go through it, but I think you're aware of it. We have many document requests, hundreds of requests for admissions, interrogatories. And that's on both cases. We've been doing both cases simultaneously. We've had 18 depositions taken already. There are 28 deposition notices or commissions pending today. Twenty-eight. Now in terms of motion practice, you're well familiar with that. And on top of what we've accomplished, we have the pending appeal on the venue issue. Now Your Honor's ruled on that issue on December 15th. The first appellant brief, Your Honor, is due February 25th. And if we assume the 40/40 -- or excuse me -- 20/20 plus extensions, if any are requested, we still have

the briefing, their oral argument, which we'll be requesting. I frankly -- my experience in the Fourth DCA is that we probably won't have a decision by either August or October. Now I could be wrong on that. But the last case I had, which the decision came down in October of last year, it took 18 months from oral argument to get an opinion and it's now on rehearing. So I think we're kidding ourselves that we're going to get that issue resolved. Now why is that important? Two reasons. One is, you can't enter a final judgement in the case, even if you triad (ph) the verdict, for either party. You'd have to stay entry of the judgement. If the court of appeals were to disagree with Your Honor -- and respectfully that is a possibility --

THE COURT: Sure.

MR. BEMIS: -- the entire trial is a nullity, under the Supreme Court's decision in Leroy versus Great Western United at 443 U.S. 173. It was a case under the Williams Act. I don't believe there's any Florida case directly on point, but I know that's Federal law and I believe that would be the law in Florida.

Also, Your Honor, there's going to be an

additional party requested to be added. Morgan Stanley Senior Funding intends to add Arthur Anderson as a defendant to the case in the Morgan Stanley Senior Funding case. The claims there will be essentially duplicative, in the sense that they will mirror the claims that Coleman filed against Arthur Anderson and resulted in the settlement agreement that you reviewed. We have proposed a date of April 16th to get that resolved.

One of the reasons why we need additional time is that Kirkland & Ellis cannot represent Morgan Stanley Senior Funding in that action. We have a conflict. And so Morgan Stanley Senior Funding is reviewing counsel now and they're going to have to handle that matter. The significance of this I think Your Honor would be aware of, having reviewed the settlement agreement, which is subject to a protective order so I don't want to go into the terms of it because it would, I think, violate the terms of it, unless we did an in camera in chambers, but I think Your Honor would know the reason we would bring them in now that we have the settlement agreement, which we didn't get, by the way, until

December, so it's a fairly recent development in the case.

Another reason, Your Honor, about what is going to happen in terms of scheduling, is just the sheer number of depositions in this case. I did say there have been 18 taken to date. There are now requested, and that means notices are out or commissions have been requested, so we're manipulating dates and witness availability -- and, by the way, these have been set without witnesses being asked whether they're available, 28 of them in 10 states. We intend to request a total of 42 more depositions and they're located all over the United States. In summary, we've got 28 pending, most of which are by the Plaintiffs. There are some that we have commissions for and we're going to request a total of 42. That's 70 depositions. It's not possible to take 70 depositions in the time that was originally proposed, August 2nd, for trial. That would be one deposition a day, because there's only 70 days left until their proposed discovery cutoff. It's not going to happen. And even extending the discovery cutoff on fact discovery, it is a maniacal schedule that is not

conducive to justice in the case. It just isn't necessary when there are no equities to advancement.

There are issues you're going to have to resolve, whether it be by summary judgement, which is likely on somebody's part on some of the claims, and we are going to respectfully renew our request that the choice of law issue be resolved prior --

THE COURT: Let me ask you all this: I mean, in all honesty, I think October is two ambitious of a date realistically. What I would like to do is, I'm looking -- can I have a 2005 calendar?

I believe a good day to start it would be January 27th. That would be the first day of the new docket for me. In my experience, that's a good time to get jurors. Their vacations are done; they're not in that spring vacation mode yet. I just want to double-check that that is a Monday. January 27th is a Monday. I don't know if it's a holiday.

MR. BEMIS: It's President's Day.

THE COURT: Well, no, I think it might be Martin Luther King's Birthday. It's a holiday.

MR. BEMIS: It's one of those days. President's Day is February.

THE COURT: That may be Martin Luther King Day. If it is, we'll be starting on a Tuesday.

But assuming we take that as a trial date to start, let's work backwards from there.

MR. BEMIS: My suggestion on that would be to adopt Mr. Scarola's offer, and that is, that we meet on that and not ask you to take the time today to beat out 30 days, because there are a lot of days --

MR. SCAROLA: I agree, Your Honor. That's not likely to create a problem between us. We'll be able to come to an agreement with regard to the dates that fall working backwards from that trial date.

THE COURT: That's fine. The only other two things I would like to do then, if we're going to sort of take that as a trial date, is take, I would imagine, at least a day -- you all are going to have to tell me if it needs to be longer than that -- maybe a week or two weeks before the trial date to do all the motions in limine and to do any objections to deposition testimony, and, we need to talk about the procedure for

designating both deposition testimony and objections to it. But the only thing that upsets me, particularly if there's a long trial like that, is if we inconvenience the jurors and ask them to wait and waste their time to do things that we, frankly, didn't do ahead of time.

MR. BEMIS: I think the proposed schedule that we had put before Your Honor does deal with all those issues. And we'll make sure that it conforms to your suggestion.

THE COURT: What I would want to do now, quite honestly, is pick out the time at a minimum for subsequent case management conference hearings and that hearing time we know we're going to need a week or two before the trial gets started. You all then can back into whatever scheduling you want as long as it's before me in a timely manner. But I want the hearing time carved out so we know we have it.

MR. SCAROLA: Your Honor, I anticipate that as a consequence of the nature of the litigation and the geographic diversity of the witnesses involved, there will be substantial testimony presented by way of videotape. That will require

considerable judicial labor, in terms of page and line designations, and rulings on objections far enough in advance of trial to be able to complete the editing process.

THE COURT: Right.

MR. SCAROLA: So even the idea that that might be done in a day I think is probably --

THE COURT: How long do you think we need?

MR. SCAROLA: I'm strictly -- I'm guesstimating based on prior experience in dealing with that kind of situation before. And I would think that we're probably looking at three or four days.

THE COURT: That's fine. I'm just looking.

MR. SCAROLA: I might suggest that that might be an appropriate task for a special master. That's not something I've discussed with my client or cocounsel yet, but it may be.

THE COURT: I don't mind doing that. My only concern would be that requires you to designate the depositions far enough ahead of time so the master can listen to it, issue a report, give time for objections, and then give me time to do whatever I need to do after the

objections.

MR. SCAROLA: I understand. And, again, I haven't thought about the logistics of that, but it's a suggestion that I think both sides needs to consider. That may help to expedite things ultimately.

THE COURT: The only thing I'm wondering, and you all can tell me, my personal experience is that nothing much happens right before or after Christmas. And I'm looking, December 24th is a Friday, whether we want to try to set aside that Monday, Tuesday, Wednesday, Thursday, so now we know we have that time. It's sitting there and if we can use it. . .

MR. SCAROLA: That works for us, Your Honor.

THE COURT: We can do all the motions in limine and any other objections I'm going to have to rule on we have it ready then.

MR. BEMIS: Your Honor, if you do that, I'm going to be stuck here for Christmas.

THE COURT: You can't get out the 23rd? You're going the wrong way. Where are you going?

MR. BEMIS: I'm going back to the west coast. You said the 24th --

MR. SCAROLA: That'll be the 20th, the 21st and the 22nd.

THE COURT: Just those three days.

MR. BEMIS: Monday, Tuesday and Wednesday is fine.

THE COURT: Monday, Tuesday, Wednesday. That would take us only to the 22nd, those three days.

MR. SOLOVY: I can think of worse places to be stuck than Palm Beach, Your Honor.

THE COURT: Most people are coming down here.

MR. BEMIS: Thank you, Your Honor.

THE COURT: Okay.

MR. SOLOVY: That's a great time to get this stuff done.

THE COURT: That way we have it done going into the New Year, motions in limine and objections to -- in your proposed timetable, you give time frames for you all to do designations of deposition testimony, objections and --

MR. BEMIS: Yes. And then we'd have to present that as a package. We need to work out the logistics of that. Mr. Scarola and I have been through it, I'm sure, and can figure out a

way to do it. It isn't easy and it won't be easy for you no matter how we do it.

THE COURT: That's fine.

I know Defendant had a concern about at some point reaching a determination on what substantive law applies. Are we thinking we would do this by summary judgement or by what mechanism?

MR. BEMIS: My suggestion to that, and it's in our schedule, that we brief that issue separately.

THE COURT: Tell me procedurally how we're doing it.

MR. BEMIS: It's called a motion. We file an undifferentiated motion for choice of law based on the claims. There are four claims in the case. And those four claims state the substantive law -- will determine the substantive law that apply.

THE COURT: I hate to do this -- and it's just the way I think. I apologize -- what kind of motion is this? Is it declaratory judgement? Is it summary? What are we calling it?

MR. BEMIS: It's just a motion, Your Honor.

Just under Florida Rules you can have an undifferentiated motion for anything that requires an order in the case. And Your Honor has to decide the issue at some point. We can't do jury instructions.

THE COURT: I agree we need to decide it. Is this something that would require evidence be considered?

MR. BEMIS: You can take evidence on it. In fact, we cited some cases in the motion to dismiss. I didn't argue that, but I read the briefs. And it is possible, and not only is it possible, but it should be done that way for your benefit, as well as the parties. Because when we get to the point of summary judgement, the jury instructions, we need to know this issue. And we've put a date in our order to brief the issue.

THE COURT: Does Plaintiff agree that this should be done by a motion?

MR. SCAROLA: No, Your Honor. As a matter of fact, you may recall that this same suggestion has been made repeatedly by the Defense in earlier hearings and Your Honor's reaction was exactly the same as the reaction you're now having.

The choice of law issue needs to be determined in a factual context. And you expressly stated that it seems to you that the correct procedural presentation of that issue was by way of motion for summary judgement.

THE COURT: Let me ask you this: Do we agree that this is a decision that needs to be -- we certainly don't want to be making it in the middle of trial.

MR. SCAROLA: We absolutely agree that it needs to be made in advance of trial. And I agree with the suggestion that Your Honor has made repeatedly in the past, the way to address it is by way of summary judgement.

THE COURT: Well, why can't I do this: What if there's disputed issues of fact on a summary judgement so we can't reach it on summary judgement. Then what happens?

MR. SCAROLA: Well, in the presentation of the summary judgment motion we still need to make a determination, based upon the facts presented to the court, as to the standard that is going to be applied. So the facts can be presented to the court in the context of a summary judgement motion and you'll then be able to determine which

law applies. Even if you ultimately determine, that because there are disputed issues of fact, under the law that applies, no summary judgement can be granted. But I really think that Your Honor needs to have a factual context in which to make that determination. It cannot be done in the abstract.

MR. BEMIS: Your Honor, the issue of the substantive law that is applicable to the case does not turn on contested issues of who said what to whom. They turn on the gravity of the claims in the sense of the restatement. Those issues can be resolved, you may take evidence on those issues, and you're not going to decide any liability or damages.

THE COURT: I understand that.

MR. BEMIS: And that should be determined before we go into the process of briefing summary judgment, because it will complicate the matter immeasurably for us to try to prepare for this case for trial with 80 some depositions if we don't know what the controlling law is.

When Your Honor first considered this -- and I've read the transcript. I understand you had some difficulties with it. I think the reason

for it was -- and I'm not putting my words into your head, but as I read it, it was the combination of the venue issue and trying to deal with what you do with that and the facts related to that and how that would interplay with the summary judgement, as well as a feeling that perhaps you need to have the summary judgement of who said what to whom framed when you were deciding choice of law. And I think fundamentally that's not right. And this one I've heard -- and you'll tell me if you disagree -- I think the process should be, look at the gravity of the claims. Those gravity issues are not dispositive of summary judgement. And we can decide. Who said what to whom will be on summary judgement. What law applies to who said what to whom and when they did it, those are summary judgement issues. The rest is a substantive legal issue that you need to decide as a precursor for deciding summary judgement, if those motions are filed. And that should be decided as promptly as possible, given your schedule.

THE COURT: Tell you what, neither one of you is going to convince me today that one

approach is correct or incorrect. But I'm just telling you, I still have the same concerns I've had all along, which is something to suggest we do an evidentiary hearing on this kind of point.

MR. BEMIS: I don't think it's an evidentiary hearing. I think gravity of claims is like personal jurisdiction, for the most part. You know, those are not dispositive to the case. It's, where did it happen.

THE COURT: That's still evidentiary.

MR. BEMIS: This is a case about who said what to whom. We need to know what law applies to those representations.

THE COURT: Nobody's suggesting it's not an important issue. All we're suggesting is, how do we want to do this.

MR. BEMIS: My suggestion is, Your Honor, let's brief the issue. We're the ones doing the work, other than you reading the brief. If you conclude, I can't decide it, I think it's improper without an evidentiary hearing or I'm not going to have an evidentiary hearing, so be it. Then we'll proceed to the next step. But we ought to be given an opportunity to put the issue --

THE COURT: So what you are suggesting --

MR. SCAROLA: Is an advisory opinion from the Court.

MR. BEMIS: No.

THE COURT: Well, I'm still trying to figure out how we want to do this. I understand the point you're making, but I also -- let me ask you this: Are you all in agreement on the timetable when this needs to be determined?

MR. SCAROLA: It is our belief that it only needs to be determined in the context of whatever summary judgment motions are filed. If the choice of law issue is not dispositive of a claim, then how could it affect the presentation of evidence at trial?

THE COURT: No. I understand that you all don't want to be briefing the substantive motion for summary judgement and have to brief it under both law because I haven't made a decision on which one's going to apply.

MR. SCAROLA: On the contrary, I believe that's exactly what we should be doing. I think that we should be briefing the summary judgment motions in the context of conflicting laws because the decision doesn't need to be made,

except as the laws in fact conflict with regard to a particular set of facts. If there's no difference in the law under Set of Facts A and Set of Facts B, then Your Honor doesn't need to determine which law applies.

THE COURT: Yes. But on the other hand, then I'm going through the mental exercise of looking at two different state's laws and deciding whether they're the same or not; and then if they're different, having to go the step to decide -- and I'm doing that on every point of law I'm having to consider, while making the fundamental decision of are we going to apply New York or Florida substantive law. Then we're only looking at one law from then on.

MR. SCAROLA: Except that the authorities suggest that this needs to be an issue-by-issue determination.

MR. BEMIS: It is an issue-by-issue by claim. There are four claims in the case. Whether they're our claims or their claims or our claims against Arthur Anderson, there are four claims. They're all "who said what to who" claims. You need to decide the gravity of the law that applies to those claims before we get

into trying to briefing whether the "who said what to who" gives rise to a liability.

THE COURT: I understand what you're saying and I will tend to agree, although I'm still hung up on procedurally how we're going to get to where we need to go.

MR. BEMIS: Just brief it and make a decision whether we're right or wrong and one way or the other we live with it and we go on with the case.

MR. SCAROLA: Respectfully, Your Honor, if we're briefing something, don't we have to brief it in the context of some kind of motion? And if it's not a summary judgment motion, what is it?

MR. BEMIS: There is no rule in Florida that motions have to be summary judgement or anything else. Any request for an order is a motion.

THE COURT: I would agree that there are certain requests to the court that simply aren't appropriate. And if I could only have labels on the motions that are appropriate, we know they're appropriate, and there's procedures in place for considering them.

MR. BEMIS: Well, that's true, because they have a certain set we review all of the time.

But every case has peculiar issues and we don't have choice of law in most cases so we have to have an order telling us. How do you do that? You do it by motion. And any request in Florida for an order by the court is done by motion. Some we have labels for and we have specific standards for. The case law on choice of law, there's a law for that, isn't in the rules, it's in the cases. And there are cases talking about what you consider to determine choice of law, which, again, is not a question of who said what to who, but where's the gravity of the law and how we apply it.

THE COURT: Here's what I think we need to do: I think we need to set a deadline for you all to file whatever motions you're going to be filing seeking for determination on choice of law. And if we decide it should be done on summary judgement, you're doing your summary judgement. If somehow I can do a hearing that's not a summary judgment, you file an appropriate motion. If you think it's evidentiary, you put that in a motion.

MR. BEMIS: We have a date for that in our proposed order. It's June 21st. But we're going

to have to move it in light of your change of the date. But we do have a date for that, which would allow us to get the issue teed up.

THE COURT: I think what we need to do now then is to set aside the hearing time for hearing these motions so we know where we're going.

MR. BEMIS: We had set the week of June 21st for the hearing. We had a little bit earlier date for this, but we can --

MR. SCAROLA: The order anticipates, Your Honor, that there will be a deadline for filing motions and then a period of time shortly following that when those motions --

THE COURT: What I'm suggesting, though, is this is a motion that needs to be sped up. This will not be sort of a generic motion for summary judgement.

MR. BEMIS: No. What we had contemplated in our order -- and again, we may have to advance this in light of the trial date -- but we had suggested May 28th as the briefing date, responses on June 18th, and a hearing on the week of June 21st. We're perfectly willing to live with that schedule, or we can advance it if we have to. We're far enough in advance of the

trial preparation and summary judgement to get that done.

So the week of June 21st was our hearing. We were going to suggest that week. We didn't know what your calendar held.

THE COURT: Frankly, I'm busy on that day.

MR. SCAROLA: We were hoping it was August.

THE COURT: And it's sort of hard because right now we don't know how long it would take.

MR. BEMIS: I would suggest that we're talking probably an hour, an hour hearing, 30 minutes. I mean, if the United States Supreme Court can -- Bush versus Gore was argued 20 minutes per side.

THE COURT: Sure. But I assume that we're assuming then that we're not taking any evidence.

MR. BEMIS: If we do, we'd have to come back. We're far enough in advance we can tell you, Your Honor, the next time we meet with you we're suggesting, I think, at your suggestion, a monthly conference. This is an issue we could address --

THE COURT: If you're suggesting we not carve out the time now, that's fine.

MR. BEMIS: Give us a date during the week of June 21st. We'll live with that and work against it.

THE COURT: The week of June 21st we actually have a judges conference. I'm looking at Monday, June 28th, nine-thirty.

MR. BEMIS: That's fine. I'm not that busy yet.

MR. SCAROLA: Obviously, Your Honor, we need to see what the motion is in order to make a determination as to whether it is an appropriate way in which to present these issues to the Court. And we can't judge that until we see the motion.

MR. BEMIS: We do have a provision for reply in responses to the motion.

THE COURT: That is all motions seeking a determination of choice of law.

MR. BEMIS: And we'll have those on file by -- I think the 18th would be a completion date, which would give Your Honor 10 days in advance. You'd have all the materials, which I would hope would be adequate for consideration.

THE COURT: Okay.

MR. SCAROLA: Your Honor, just so that I'm

sure I understand what you have just said. If it is the Plaintiff's position that choice of law issues need to be resolved in the context of summary judgment motions --

THE COURT: What I'm saying is, no, that we're not going to be doing -- to the extent -- if at some point you're going to be seeking a determination from me prior to trial of the appropriate substantive law to apply, those motions are going to be heard that day.

MR. SCAROLA: Well, our position is that Florida Law applies.

THE COURT: Then you wouldn't be seeking any other determination other than Florida Law.

MR. SCAROLA: But what I'm trying to determine is, if it is our position that Florida Law applies and consequently we are not filing a choice of law motion, but rather only planning on presenting our summary judgment motions pursuant to Florida Law, is there any --

THE COURT: Assuming you won't be arguing in those same motions that Florida Law is the law that gets applied.

MR. SCAROLA: Well, clearly whenever we file a summary judgement motion we're arguing that

Florida Law applies.

MR. BEMIS: Your Honor --

THE COURT: You're arguing Florida Law applies, but there is not -- please understand, that what I don't want is motions for summary judgement filed by the Plaintiff in October which both argue Florida Law and argue that Florida Law is the applicable law. The point of this is to determine, for the purposes of this case, the substantive law that will apply. And after this, we won't be arguing which substantive law applies for various claims because we will already, my hope is, have determined that.

MR. SCAROLA: And so that the Court understands what our position is, it is our position that the choice of law determination cannot be made in the abstract, but only in the context of specific issues presented in either a summary judgment motion or some other motion that is fact specific.

THE COURT: But we already have your claims, correct?

MR. SCAROLA: You do have our claims, absolutely. Yes, they're stated in our complaint.

THE COURT: Right. And so presumably they're going to be determined by substantive law of New York or Florida.

MR. SCAROLA: We presume they're going to be determined by Florida Law.

MR. BEMIS: And we presume New York, and that's what we're going to thrash out. Who said what to who will be determined in summary judgement, but the gravity of law will be determined by you as a matter of law, which is your responsibility --

THE COURT: But please understand, so you know what I'm trying to say, if we get into October and you file something seeking summary judgment on Florida Law, you can argue Florida Law to me, but you won't be able to argue the applicability of the Florida Law.

MR. SCAROLA: Because you will have already made that determination --

THE COURT: Because that's the point -- on this point, I agree with Defendant. This is a threshold issue we need to reach, both for the economy of your client and for the economy of the court. It's simply not an efficient way to run a case, not to know which substantive law applies.

MR. SCAROLA: I think I understand what the Court's intention is. I'm just having a little bit of difficulty understanding, as a practical matter, how that motion is going to be -- the procedural manner in which that motion is going to be presented to the Court, other than by way of summary judgment.

THE COURT: Obviously I share that concern and I'm sure we're going to get educated.

MR. BEMIS: Thank you, Your Honor.

MR. SCAROLA: Okay.

MR. BEMIS: Are there any other critical dates of the pretrial schedule that Your Honor would like to address?

THE COURT: Hold on. I just want to finish my notes.

And we agree this is a 15-day trial?

MR. BEMIS: Fifteen trial days, Your Honor, yes.

THE COURT: Is that including jury selection?

MR. BEMIS: Yes. I mean, that's our best guess. I mean, at this point it's tough to tell, but that's our best guess. And apparently Mr. Scarola agrees that 15 days appears to be what

we're going to need.

MR. SCAROLA: I believe so, Your Honor.

Your Honor, I'm sorry to go back one more time, but I do want to be certain that I understand.

If it is our position that Florida Law does apply in this case, is it necessary for us to be filing something affirmatively?

THE COURT: Only if -- please understand -- I can't think of how to say it more clearly. Let me think if I can -- that you would be precluded then from arguing later on in your motions for summary judgement the applicability of Florida Law; this would simply be an assumption that it did apply. But if there were disputed issues about whether it did, we wouldn't be arguing it then.

MR. SCAROLA: I only need to understand where the burden lies. If nobody does anything between now and the time of filing of motions for summary judgement, I would assume that the law that would have to be applied, based upon what Your Honor just said, is the Law of Florida.

THE COURT: No. I would not have a law to apply. And if you go back, that meant that you

didn't follow the order following the case management conference.

MR. BEMIS: Your Honor, we're going to file a motion that it's New York Law.

THE COURT: Right, and that becomes moot, because you're going to force the issue.

MR. SCAROLA: If there's a clear understanding that they're forcing the issue, then that's fine. I know that they're going to file a motion to which we're going to respond.

But it seems to me, that in the absence of their assuming the burden of demonstrating that New York Law applies, the law that ordinarily applies to Florida cases is Florida Law. So I just need to make sure that we're counting on them filing a motion. And if they don't file a motion --

MR. BEMIS: We will. And it will say that New York Law applies and they will respond that Florida Law applies and Your Honor will make a judicial ruling and we'll follow up.

MR. SCAROLA: That's fine. The record is clear as to how that's going to happen then.

THE COURT: All right. It strikes me, we need to stop abusing 8:45's and carve up some

reasonable hearing time.

MR. BEMIS: We have, Your Honor, what I call a modest proposal to reduce frequent flyer miles from our standpoint, and that is, that we take you up on your suggestion of setting aside an hour or if you believe more -- I don't know the appropriate frequency, whether it should be once a month or whether every three weeks, depends on your calendar and what's pending, and then have everything scheduled at one time. I would suggest a seven-and-two rule, where seven days in advance all motions are filed, two days before that responses are filed and Mr. Scarola and I can take alternating responsibility for providing Your Honor with the materials several days in advance. Then we just go through them seriatim.

THE COURT: It strikes me that every three weeks may be about right. I'm afraid every month may not be often enough.

MR. BEMIS: Three weeks is fine with us.

MR. SCAROLA: May I have just one moment?

THE COURT: Sure.

MR. SCAROLA: Is it Your Honor's intent that there will be no uniform motion calendars during --

THE COURT: Well, that's something we can talk about. We've had a number of hearings on the uniform motion calendar that probably shouldn't have been set there. In all honesty, you guys are sophisticated enough attorneys, I would be shocked if you had a motion that clearly was probably not a UMC. It strikes me, you guys will work it out. On the other hand, if there is one, I certainly don't mind hearing it.

MR. SCAROLA: I only asked that question because it'll make a difference in terms of what we think appropriate frequency to be.

THE COURT: Sure. We're talking about frequency and length of the hearing, whether we think it should be an hour, an hour and a half or two hours, and that depends on how frequently we're going to do it.

MR. BEMIS: Your Honor, my proposal is three weeks, two hours. We'll know in advance. I love your suggestion, so that's fine with us.

THE COURT: Why don't we just cross out all our time for this case.

MR. BEMIS: Actually, Your Honor, your suggestion yesterday is really, in my experience here, it is really the most expeditious way, and

the state courts, big cases, just carve it out --

THE COURT: I agree with that. Two hours every three weeks is fairly aggressive, but if that's what it needs. I don't want to put all the things in place to have a specially set trial and discover that we didn't have to, a sufficient hearing would have been fine.

MR. SCAROLA: Our past experience, our track record thus far is, that we would not consume two hours of Your Honor's time every three weeks. I would also anticipate, however, that as discovery heats up in this case, that we might consume that much time. My suggestion would be that we might want to start out at an hour and then increase the time as we get farther on down the road, because we'll probably need additional time later.

MR. BEMIS: That's fine with me, Your Honor.

MR. SCAROLA: And we can let you know at one of those one-hour hearings the point in time in which we anticipate we're going to now need two hours.

THE COURT: Frankly, by that time it's too late to give you the two hours. I'm going to set the time up right now.

MR. SCAROLA: Well then that's great. Then we'll take the two hours now.

THE COURT: So first of all, we want mid March. Is that what we're talking about first?

MR. SCAROLA: That's fine.

THE COURT: I can give you an hour at three-thirty on March 19th. I don't have anything in the morning. Do you want that one?

MR. BEMIS: Three-thirty is fine with us.

MR. SCAROLA: That's fine.

THE COURT: 3/19/04, three-thirty, one hour.

The next one is going to be early April. I can do four o'clock on April 16th.

MR. BEMIS: April 16th, 4 p.m.

THE COURT: Then we got May.

We could do it May 7th. Would you prefer morning or afternoon, if given a choice?

MR. BEMIS: Frankly, we'd prefer the mornings, so we can come in the night before.

THE COURT: I could do eight o'clock on May 7th?

MR. BEMIS: Fine.

THE COURT: All right. And after that we'll start the two-hour ones. So we're looking the

beginning of June. That's May 28th. We prefer 8 a.m. again?

MR. BEMIS: That's fine, Your Honor. What day of the week is May 28th?

THE COURT: These are all Fridays, because those are all the special set.

MR. BEMIS: May 28th, is that the Friday before Memorial Day?

THE COURT: It is the Friday before Memorial Day.

MR. BEMIS: Either come up or go back from the 28th, because Memorial Day is very difficult to get in and out.

THE COURT: June 4th, 8 a.m., still two hours.

MR. BEMIS: Fine.

THE COURT: You probably don't want July 2nd?

MR. BEMIS: July 2nd is okay. That will be okay with us.

THE COURT: You sure?

MR. BEMIS: Yes.

THE COURT: That's a little more than -- that's four weeks instead of three.

MR. BEMIS: I think by summer we're going to

be so deep in depositions that --

THE COURT: 8 a.m., two hours.

Late July. July 23rd?

MR. BEMIS: Fine.

THE COURT: That would be 9 a.m.

We're in mid August.

MR. IANNO: Your Honor, July 23rd was 9 a.m.?

THE COURT: Yes.

Do you want August 13th or August 20th?

MR. SCAROLA: 13th, please.

MR. BEMIS: 13th is fine.

THE COURT: August 13th, '04, 8 a.m.

Early September. September 3rd. That would be one-thirty for two hours.

MR. BEMIS: Where is that in relation to Labor Day?

THE COURT: You want to avoid that?

MR. BEMIS: It's so hard to travel on those holidays.

THE COURT: I know. I generally go away for a long weekend right after that.

MR. SCAROLA: Last week in August.

THE COURT: We already have August 13th.

MR. BEMIS: If we could just move it to

another week in September if you have it, because that's a vacation period for a lot of people and a holiday weekend.

THE COURT: But then we're up to September --

MR. SCAROLA: 10th.

THE COURT: No. That's the weekend I usually go away. September 17th or go back in late August.

MR. BEMIS: The 17th is fine with us.

THE COURT: Isn't the 16th Rosh Hashanah.

MR. SOLOVY: Yes it is, and the 17th. So why don't we go the end of August, Your Honor.

THE COURT: That's fine. We can go back to August 27th.

MR. BEMIS: That's fine.

THE COURT: And that we can do 8 a.m. again.

And then we're in late September. September 25 -- oh, Yom Kipper.

MR. SOLOVY: And that's a Saturday anyway, Your Honor.

THE COURT: Oh, that's right. Could you do the 24th? You can't do it first thing in the morning?

MR. SOLOVY: No, that will be too hard for me. The only way, if we could intrude upon your Thursday the 23rd, that would work. Anything earlier that week.

THE COURT: I could do it the afternoon of the 23rd. I couldn't do it the morning.

MR. BEMIS: That's fine.

MR. SOLOVY: That would work.

THE COURT: 3 p.m.

October 15th.

MR. BEMIS: That's fine.

THE COURT: 8 a.m.

November 5th, 8 a.m.

And then I think our last one would be early December. December 3rd.

MR. BEMIS: That's fine.

MR. SOLOVY: Fine.

THE COURT: 8 a.m. Okay. We'll get all those done.

MR. SCAROLA: Thank you.

Your Honor, we do have by agreement one discovery dispute set on the uniform motion calendar for next Thursday I believe, which we would want to be able to --

THE COURT: We'll do it then.

MR. BEMIS: I think there are actually two set, one on each side.

Our suggestion is, let's move them over to the first conference.

MR. SCAROLA: We do not want to delay ours.

THE COURT: Let me see next week's calendar.

Tell you what, I think I could do it nine-thirty on Thursday. Do you want to do that, and then I could give you more time?

MR. SCAROLA: I am in trial in front of Judge Miller and we generally begin at nine-thirty.

MR. BEMIS: Could I have one second, Your Honor?

THE COURT: Sure.

I don't mind if you come and we try to do them. I really haven't looked at them so I don't know what they are.

MR. BEMIS: First of all, I can't come next week, but I can come on the 19th on this one. It's my anniversary and I'm going to be on vacation.

THE COURT: March 19th?

MR. BEMIS: I can't be here, but I'm going

to have somebody here. We'll have it covered by one of the firms. That's an impossible -- it's my 35th wedding anniversary.

THE COURT: I understand. That's fine.

MR. BEMIS: With regard to Mr. Scarola's motion, I have been looking at this -- I haven't had as much time in the case unfortunately -- I am going to make a concerted effort to see if I can resolve that motion.

THE COURT: The one that's set next Thursday?

MR. BEMIS: The one he wants to hear on the 19th.

THE COURT: When you said the 19th, you confused me.

MR. BEMIS: I misspoke. The 26th.

I thought I could clearly have it resolved by then. I'm almost certain I cannot resolve it by next Thursday with the client to deal with what he wants and to see what we can do. That is why I would like to see it moved. I represent to the Court we already started the process of trying to get through the issues clearly with the client to see if we can get it resolved in a fashion that's acceptable or better than what we

are currently doing with them so you don't have to intervene.

THE COURT: So are you telling me you don't think you can resolve it with the client by next Thursday --

MR. BEMIS: Yes, I cannot.

THE COURT: -- but we recognize Mr. Scarola doesn't want to wait until March 19th to have it heard.

MR. BEMIS: Even if you give us just a couple more -- rather than one week, give us two weeks, even if it has to be on the uniform calendar.

THE COURT: I could do it Wednesday, March 3rd at eight-thirty.

MR. BEMIS: That would be much better for us. We might resolve it by then.

MR. SCAROLA: That's fine, Your Honor. We're willing to make that concession. This is an outstanding discovery --

THE COURT: Was this noticed for next Thursday?

MR. SCAROLA: Actually, it was noticed for earlier. They requested that we push it back. We've pushed it back. And we will agree to push

it back again, but this is a discovery matter that has been pending for a long time.

THE COURT: So it's already noticed for Thursday?

MR. SCAROLA: Yes.

THE COURT: Resetting the hearing -- and Thursday is, what, the 26th -- 2/26/04 at eight forty-five to 3/3/04 at eight-thirty.

MR. SCAROLA: Is Your Honor planning on sending out a notice with respect to that hearing?

THE COURT: Yes. We'll just include it in this.

MR. CLARE: Your Honor, clarification: There are two motions that are pending. There is one filed by the Plaintiff and one filed by the Defendant.

THE COURT: That's why I wanted to make sure there was a notice of hearing, so my order wouldn't be referencing something else.

MR. SCAROLA: That works. Thank you, Your Honor.

Your Honor, one additional matter that I think we need to address in light of the comments about an amendment of the pleadings to add a

party. Obviously, if that were to occur, then this matter would not be at issue at that time. And certainly if such an amendment is going to take place or if there's going to be an attempt made to amend, because we fully anticipate resisting such an amendment, that's something that should be done within the very immediate future.

THE COURT: Well, I would hope when you guys talk about time frames, you come up with a time frame for filing any motion to amend.

MR. BEMIS: We did. April 16th is the day we suggested.

Our problem is, we're conflicted out and we need to find counsel and get them -- this is a massive case to get them into quickly and there's limits as to what I can do as counsel for Morgan Stanley with a conflict. They're going to have to get in -- but they will only be joining on the Morgan Stanley Senior Funding side and they will be asserting one claim. There are going to be multiple claims, but they will only be against Arthur Anderson. They will in large measure, I believe, mirror Coleman's claims against Arthur Anderson, claiming that, hey, just like Coleman

claims they got defrauded or they were misrepresented too, Morgan Stanley Senior Funding was misrepresented too when it lent $680 million in this transaction and lost it.

MR. SOLOVY: Judge, the reason for the push is -- we also think there's a lot of skulduggery involved in this motion. And being a little old and inept, when he didn't want to keep one number, that sort of baffled me for a moment, until I heard the terms of Arthur Anderson being brought in. It isn't that Kirkland & Ellis, this little small, thousand-person firm is undermanned and this came as a lightning bolt to them. So we think that this is improper adding of a party too late, for many reasons, and we're not wanting them to tarry anymore.

THE COURT: All I can say is, we're arguing about something that's not in front of me now. And I can tell you I have a habit of tuning it out because it's things I don't need to know. If the motion's made, we'll consider it on the merits then. And I'm sure you guys are going to argue we're too far down the road to allow him in.

MR. SOLOVY: I just wanted to give this

Court a note ahead of time, Your Honor, so by my silence you didn't think I was thinking this was a happy development.

MR. SCAROLA: I would only mention, in the context of what is relevant to the issues before Your Honor, that there is a distinction between a motion to amend to add a new party and the motion to amend with regard to the punitive damage claim, which we likely would not be prepared to make by an April date.

MR. BEMIS: We don't have any objection to that. We have the same issue. We'll work that out.

THE COURT: Let's assume, and I'm acutely aware when attorneys attempt to give me information that I don't need until the issue's in front of me, and I have to assume they're doing it for other things that may not be appropriate.

MR. BEMIS: Understood.

THE COURT: Thank you very much.

MR. SCAROLA: Thank you very much, Your Honor.

(At 4:29 p.m., the deposition was concluded.)

C E R T I F I C A T E

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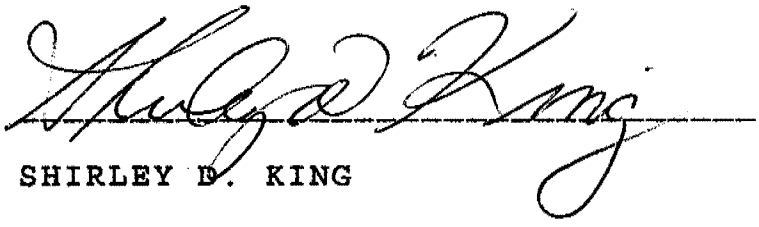
STATE OF FLORIDA

COUNTY OF PALM BEACH

I, SHIRLEY D. KING, Professional Court Reporter, do hereby certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and correct transcription of my stenotype notes of the proceedings.

Dated this 1st day of March, 2004.



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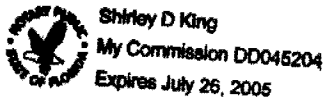
Professional Court Reporter



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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

NOTICE OF FILING HEARING TRANSCRIPTS

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed the attached November 6, 2003, December 16, 2003 (original), December 17, 2003 (original) and January 4, 2005 hearing transcripts.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 7th day of July, 2005.

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IN THE FIFTEENTH JUDICIAL CIRCUIT COURT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CASE NUMBER: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiffs,

vs.

COPY

MORGAN STANLEY & CO., INC.

Defendant.
_____/

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

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- - -

Thursday, November 6, 2003
Palm Beach County Courthouse
West Palm Beach, Florida

TRANSCRIPT OF THE PROCEEDINGS, TAKEN BEFORE THE HONORABLE ELIZABETH MAASS IN COURTROOM 11B, PALM BEACH COUNTY COURTHOUSE, WEST PALM BEACH, FLORIDA, ON THURSDAY, NOVEMBER 6, 2003, BEGINNING AT 8:55 A.M.

- - -

THE COURT: Do we really think we're going to do this this morning?

MR. SCAROLA: We are going to surprise Your Honor.

THE COURT: Okay. How are we doing that?

MR. SCAROLA: We're going to surprise you by telling you first that with regard to the motion to compel production of emails, we have come to an agreement.

THE COURT: Okay.

MR. SCAROLA: And we will describe the terms of that agreement for the record.

For the record, my name is Jack Scarola. I'm hear on behalf of the Plaintiff Coleman (Parent) Holdings. There are two motions. First is motion to compel directed to the production of emails.

The agreement that we have reached is that the Defendant Morgan Stanley will produce a witness who is knowledgeable with respect to the retention and retrieval -- the retention policies

and retrieval capabilities with regard to emails. They will also produce all documents that were submitted to federal regulators with regard to Morgan Stanley's email retention policies and retrieval capabilities.

THE COURT: I don't think I have that motion. The only one I have deals with the objections to production of the settlement agreement. Are you submitting a proposed agreed order on this?

MR. SCAROLA: We will submit a proposed agreed order.

THE COURT: You're just telling me stuff and hopefully I'll remember it when I see the order.

MR. SCAROLA: Yes.

We have agreed reciprocally that we will provide a corporate representative who will address the same issues on behalf of Coleman (Parent) Holdings, Incorporated.

THE COURT: Okay.

MR. SCAROLA: With regard to the second motion, that's the Defense's motion, so I'll allow them to go first.

THE COURT: That's the one. Do we really think we're going to get this done at an 8:45?

MR. CLARE: Judge, this is on Morgan

Stanley's motion to compel the production of a single document, the settlement agreement between Coleman (Parent) and Arthur Andersen. And just briefly, I think it's fairly straightforward in terms of the history of this, that prior to initiating the lawsuit against Morgan Stanley, Coleman (Parent) brought a virtually identical lawsuit against Arthur Andersen, same allegations, same claim of damages, and now have settled.

THE COURT: Let me ask you this. This is the notebook you gave me for this; right?

MR. CLARE: That includes the cases that we've cited.

THE COURT: I can't do this on an 8:45. Please understand, 8:45's are things -- I can read everything. I can walk in and not know anything. I can read everything I've got to read, absorb everything I've got to, and I can do it in ten minutes. I can't even reed your motion in ten minutes.

MR. CLARE: I have one case, City of Homestead case, that --

THE COURT: I'm happy to get the book and specially set. I'm happy to do it on an expedited basis. I cannot do this on an 8:45. If you

bothered to put together a notebook like this, I know I need more time with it, okay?

Do you want me to get the book? Do you have access to your schedules?

MR. CLARE: Sure.

MR. SCAROLA: I don't, but can make a phone call to my office.

THE COURT: Okay. That's great.

MR. SCAROLA: Would you like me to get my office on the line, Your Honor?

THE COURT: Sure.

MR. CLARE: Just in the interest of completeness and while we're waiting for the schedule, Mr. Scarola described in broad outlines what the agreed upon order would be on this other motion. There is one caveat I explained to Mr. Scarola in the hallway, and we will work it out between the parties before we submit an agreed upon order to Your Honor. I am not aware as I sit here right now what limitations there are right now without disclosing to Mr. Scarola's client information we provided to federal regulators. We agreed to provide whatever it is we can provide.

THE COURT: Are you saying we might have a legal dispute later about what you're permitted to

disclose?

MR. CLARE: About what we're permitted to disclose, and I just don't know all the details without consulting with my client. We have an agreement in principle that whatever we can provide on this, we'll provide. I know there are materials we can provide, I just don't know the scope of it. And I don't want to represent to the court that we're waiving or even have the ability to waive protections that I'm not aware of right now.

MR. SCAROLA: The only caveat to that is that there's a commitment that they will provide good faith cooperation in obtaining whatever information is necessary in order to make full disclosure.

THE COURT: Okay.

MR. CLARE: That's correct.

THE COURT: We can try the 14th, which is a week from tomorrow at 4:30. Do you know if you're available, sir?

MR. CLARE: There was a deposition that was scheduled that day.

THE COURT: In this case?

MR. CLARE: In this case in New York.

THE COURT: Who?

MR. CLARE: Mr. John Tirey (ph) is coming from that the United Kingdom for a deposition that day.

THE COURT: You have depositions in this case, so that's probably not a good day. Let's find a better time.

We could try 4:30 on Tuesday, November 25. That's the Tuesday of Thanksgiving week, just so you-all are clear.

MR. CLARE: That's fine with me, Your Honor.

MR. IANNO: That's not a problem.

MR. SCAROLA: That works, Your Honor.

THE COURT: Is that okay? We will do it then. And I'll hold the stuff you gave me. If you want me to look at anything else, send it to me a few days ahead of time so I have it.

MR. CLARE: Thank you.

MR. SCAROLA: Thank you, Your Honor.

THE COURT: Thank you.

(Whereupon, at 9:03 a.m., the proceedings concluded.)

C E R T I F I C A T E

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STATE OF FLORIDA

COUNTY OF PALM BEACH

I, PAMELA GRIMALDI, Registered Professional Reporter, do hereby certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and correct transcription of my stenotype notes of the proceedings.

Dated this 18th day of November, 2003.

PAMELA GRIMALDI

Registered Professional Reporter

The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/or direction of the certifying reporter.

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CASE NUMBER: 2003 CA 005045 AJ

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

ORIGINAL

TRANSCRIPT OF THE PROCEEDINGS
BEFORE THE HONORABLE ELIZABETH T. MAASS,
ON TUESDAY, DECEMBER 16, 2003.

APPEARANCES:

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BY: JACK SCAROLA, ESQUIRE

CARLTON, FIELDS
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ATTORNEYS FOR THE DEFENDANT
BY: JOSEPH IANNO, JR., ESQUIRE

Tuesday, December 16, 2003
Courtroom 11B, Palm Beach County Courthouse
West Palm Beach, Florida

TRANSCRIPT OF THE PROCEEDINGS, TAKEN BEFORE THE HONORABLE ELIZABETH T. MAASS IN COURTROOM 11B, PALM BEACH COUNTY COURTHOUSE, WEST PALM BEACH, FLORIDA, ON TUESDAY, DECEMBER, 16, 2003, BEGINNING AT 8:41 A.M.

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MR. SCAROLA: Good morning, Your Honor.

THE COURT: Good morning.

MR. SCAROLA: We are here on Coleman Parent Holdings versus Morgan Stanley, and those are the relevant pleadings. This is a proposed order.

This is a continuation of matters that the Court has previously addressed. This relates to efforts on the part of Coleman Parent Holdings, Incorporated to obtain documents and testimony regarding e-mails.

Your Honor will recall that we had presented a stipulation to the Court. We then attempted by way of motion to compel enforcement of that stipulation. Your Honor, having reviewed the transcript, declined to compel enforcement of the stipulation, so we are now here on the underlying merits of that motion.

And what we are seeking is specifically to obtain those documents that were exchanged between Morgan Stanley and Company, Incorporated and the SEC relating to e-mail retention policies and to obtain testimony of a corporate representative with knowledge regarding those e-mail retention policies of the corporation.

In our broad production requests seeking the production of e-mails, the response that we obtained contained very little e-mail communication. There were indications that it would be overly burdensome to attempt to search records in order to determine whether additional e-mails did or did not exist, and we are seeking to explore the basis of those assertions.

We filed appropriate requests for production. We filed a Rule 1.310 corporate designation request. We obtained testimony from a corporate representative who could not address those issues. We attempted by way of letter communications to address the deficiencies in the testimony provided, and we have gotten no response, no substantive

response to those communications.

So the purpose of this motion is to have the Court enter the order that we believed was stipulated to at the prior hearing.

THE COURT: Okay. What's the response?

MR. IANNO: Judge, Joe Ianno here on behalf of Morgan Stanley.

Mr. Scarola's last statement makes it plainly clear what the Plaintiff is seeking in this case is a rehearing of the Court's order denying the motion for entry of a stipulation. He's asking for the same relief that the Court already denied.

What's conspicuously absent from the amended motion to compel are the discovery requests they are seeking to be compelled. And the reason for that is, in the Court's order you had authorized Mr. Scarola to renew his original motion to compel e-mails, which we have substantive responses to that would require far more than five minutes to argue on the e-mails.

So instead, they filed an amended motion and said, compel us to produce what was produced to the federal regulators. No request

for production for that document. Compel us to produce a corporate representative pursuant to 1.310.

We have produced a corporate representative. That corporate representative was deposed and there is nothing in here, in his deposition testimony.

What would probably be proper is to say you didn't produce a sufficient corporate rep, but that's not before the Court.

THE COURT: You are saying his remedy is to pursue complaints about the underlying discovery, not to seek to enforce a stipulation that apparently was never reduced in sufficient detail to allow --

MR. IANNO: What he's asking for is exactly what the Court didn't allow him to get.

THE COURT: What's the response to that?

MR. SCAROLA: We are clearly not seeking a rehearing of Your Honor's decision not to enforce the stipulation. We presented the substantive motions to Your Honor at an earlier hearing; those motions are on file. We are here to address those motions and only suggesting that the appropriate relief to the

underlying motions --

THE COURT: Well, do you have the original motion to compel and the discovery that's disputed?

MR. SCAROLA: Yes. And let me provide to the Court --

MR. IANNO: This stack, Your Honor.

THE COURT: Okay, go ahead.

MR. SCAROLA: This is the copy of the notice of deposition, Rule 1.310 notice of deposition, which clearly would call for the production of a witness capable of addressing exactly what we have asked to be addressed in this motion through the production of a witness with knowledge regarding policies and procedures.

THE COURT: Do I have a transcript that would suggest that they didn't produce the appropriate person?

MR. SCAROLA: Well, what you have attached to that motion is the exchange of correspondence where we have alerted them to the deficiencies.

I can provide the Court with the transcript of the deposition testimony, but

there has never been a dispute previously on the Defendant's part that the witness they produced was not capable of responding to those questions. He acknowledged clearly in his deposition that was outside his area of knowledge.

THE COURT: Do you agree with that?

MR. IANNO: No, Your Honor. That's the problem.

THE COURT: All right. Then we need to specially set the underlying motion. If you want, we can set it right now.

MR. SCAROLA: That's fine. Happy to do that.

THE COURT: All right.

MR. SCAROLA: Perhaps I should get my office on the line.

THE COURT: Yeah. Hopefully nobody is on that phone. Just dial 9 to get out.

Do we have all the paperwork here?

MR. IANNO: Well, I don't think so, Your Honor, because we intend to produce a witness to testify at that hearing.

THE COURT: So how long do you think it's going to take?

MR. IANNO: Probably more than half an hour, depending on --

THE COURT: Like does that mean --

MR. IANNO: Forty-five minutes to an hour would be my best estimate, Your Honor, because we need to produce our IT person to tell you what's involved in producing the e-mails and the burden and the expense of that.

THE COURT: Can you-all do it tomorrow morning?

MR. IANNO: He has to come from New York.

THE COURT: He can't testify by phone?

MR. SCAROLA: I am willing to stipulate to his telephone testimony. I mean, exactly what we want is the person to give us that information under oath.

THE COURT: Well, do you know if this person would be available to testify by phone tomorrow?

MR. IANNO: I have no idea, Your Honor.

THE COURT: Is there somebody in your office you could --

MR. IANNO: No. I have to call Washington to find out if he's available.

THE COURT: Well, do we want to try to do

it?

First of all, is there any objection to his testifying by phone?

MR. IANNO: As long as Mr. Scarola doesn't. I don't even know if he is in town, Your Honor. He could be on vacation for the holidays.

THE COURT: I understand that. But do we want to try to do it tomorrow? And if we can't, then --

MR. IANNO: What time tomorrow?

THE COURT: I can do it right at 9:30 if you want.

MR. IANNO: Can we start at 10:00?

THE COURT: We can start at 10:00.

MR. IANNO: 10:00 would work better for me, subject to his availability.

MR. SCAROLA: I'm available at 10:00 tomorrow.

THE COURT: My hope is, even if you can maybe do the parts of the motion that we can get done without his testimony. I mean, there is some discovery requests, right?

MR. IANNO: That's the problem I have with scheduling, Your Honor. We were originally

here today on the amended motion to compel and not on the original motion. So if we are going back to the other motion -- I will do whatever the Court orders me to do. If this person is available to testify --

THE COURT: I mean, I thought the original motion to compel went to production. It wasn't just the deposition testimony, it was the --

MR. IANNO: It was strictly on e-mail backup systems.

THE COURT: Right.

MR. IANNO: So it's that testimony.

THE COURT: I thought there was a question of whether you could produce the things that you have given to the regulators.

MR. IANNO: No, no. We object to that, Your Honor.

THE COURT: I think that was part of the original motion to compel, wasn't it?

MR. IANNO: There is no request for the federal submissions.

THE COURT: No request for production of documents?

MR. IANNO: No request, correct.

MR. SCAROLA: It is our position, Your

Honor, that the requests that were made request all communications regarding e-mail retention policies. Clearly, it does not say the SEC documents, but we've requested all communication regarding e-mail retention policies.

THE COURT: And you're saying that your request for production was broad enough to include that?

MR. SCAROLA: Absolutely. And what we have done is, we have voluntarily limited it to the SEC production and told them that we will just take your SEC production.

THE COURT: You are available tomorrow then?

MR. SCAROLA: Yes, ma'am.

THE COURT: So we will do a notice of hearing on the original motion, the motion to compel?

MR. IANNO: Your Honor, if I could have probably an hour to find out if people are available, especially the witness that I need. But if he's not, I understand Your Honor wants to go forward.

THE COURT: We will do the parts that we

can do.

MR. SCAROLA: That's fine. Thank you.

THE COURT: Is that okay?

MR. SCAROLA: Yes, absolutely.

THE COURT: Do you know when your original motion to compel was served? I'm asking that only so I can get the file and I can find it.

MR. IANNO: It was October 29th, Your Honor. It was filed under seal. I have an extra copy, Your Honor.

THE COURT: Do you? That would be great. Thank you very much. This is the one we're talking about. 12-17-03, 10:00 a.m.

MR. IANNO: Your Honor, I have our opposition to that.

THE COURT: That would be helpful, too. Thank you very much. See you tomorrow.

MR. SCAROLA: Thank you very much, Your Honor.

(Thereupon, at 8:53 a.m. the hearing was concluded.)

C E R T I F I C A T E

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STATE OF FLORIDA

COUNTY OF PALM BEACH

I, Norma Scherer, do hereby certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and correct transcription of my stenotype notes of the proceedings.

Dated this 16th day of December, 2003.

Norma Scherer

Norma Scherer
My Commission DD167796
Expires December 01, 2006

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NUMBER: 2003-CA 005045 AJ

COLEMAN (PARENT) HOLDINGS,INC.,

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

APPEARANCES:

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BY: JOSEPH IANNO, JR., ESQUIRE

- - -

Wednesday, December 17, 2003
PALM BEACH COUNTY COURTHOUSE
WEST PALM BEACH, FLORIDA

ORIGINAL

P R O C E E D I N G S

- - -

THE COURT: Good morning. Have a seat. I apologize for keeping you waiting.

This is Coleman & Morgan and it's Plaintiffs' motion to compel concerning the E-mails.

MR. SCAROLA: It is, in fact, Plaintiff's amended motion to compel concerning E-mails.

THE COURT: I thought it was Plaintiff's motion to compel.

MR. IANNO: And I had the same confusion, Your Honor, yesterday. And Mr. Scarola and I exchanged E-mails, I don't know if we spoke on the phone, but we definitely exchanged E-mails. I believe that it was the original motion.

THE COURT: Yeah, I looked at my notice of hearing.

MR. IANNO: I have the transcript, Your Honor. Apparently -- and Mr. Scarola can correct me -- it's the underlying motion, but the relief that's being sought is an order compelling us to produce the documents that were submitted to the SCC and to produce a

corporate representative. It's not the actual production of the E-mails or testimony regarding the burden, expense of going through and restoring the E-mails from the magnetic tapes. I believe that's what we're going to argue this morning.

MR. SCAROLA: If I could just have a moment to walk the Court through this, I think it will become apparent what it is we're doing here.

THE COURT: Sure.

MR. SCAROLA: This is Plaintiffs' first request for production.

THE COURT: Okay.

MR. SCAROLA: I would call the Court's attention initially to the definition of terms, paragraph 7; documents means E-mails or any other electronic form of communication.

THE COURT: Okay.

MR. SCAROLA: If Your Honor will then turn to Request No. 48, and you can read it faster than I can read it to you.

THE COURT: I'll see what it says.

Okay.

MR. SCAROLA: Forty-nine, 50 and 51.

THE COURT: Okay.

MR. SCAROLA: All right. I think there is little doubt, having read through the definition in those sections, that we are looking for all relevant E-mails concerning these issues. And Your Honor will recall the presentations that were made to you last week concerning the underlying allegations in this complaint, that clearly a very significant issue in this claim for fraud against Morgan Stanley is what Morgan Stanley knew and when Morgan Stanley knew it. We have a burden to prove that there were knowingly false misrepresentations that were made and that Morgan Stanley was participating in aiding and abetting conspiring with Sunbeam in its knowing false misrepresentations.

So obviously a significant source of information concerning what Morgan Stanley knew would be Morgan Stanley's internal communications regarding all issues relating to Sunbeam. And we filed a request to produce which clearly encompasses that sort of document reading electronic information.

What we received in response was a

substantial production that contained very, very few E-mail communications. And we also learned that Morgan Stanley had been sanctioned by the SCC for failing to comply with Federal regulations regarding the preservation, specifically, of E-mail communications.

We noticed the deposition under Rule 1.310 of a corporate representative -- and if Your Honor will take a look at paragraphs 2 and 3 of the description of the information that we were seeking -- we sought specifically, in paragraph 2, policies and procedures for maintaining and preserving electronic or hard copy documents and/or files of Morgan Stanley & Co., Incorporated and the location and/or procedure for the collection of documents responsive to Coleman (parents) previously served request for production of documents. So we wanted to get behind the production to make a determination as to what efforts were made to attempt to find E-mails and what potential existed for the recovery of E-mails.

We took the deposition of the corporate representative. And if Your Honor will take a look at Exhibit B to the amended motion to

compel -- do you have that handy?

THE COURT: I know I looked at it yesterday. Whether I have it handy now, I don't know.

MR. IANNO: Let me provide the Court with a copy of that.

THE COURT: This is the transcript or a portion of the transcript of the deposition?

MR. SCAROLA: Yes, Your Honor, we provided you with portions of the copy of the transcript of the deposition. I don't have the exhibit here. I apologize for that.

THE COURT: I know I read it. 126 or 127 something.

MR. SCAROLA: Let me give you my copy.

Following the corporate representative's deposition, we communicated in writing with Morgan Stanley and specifically identified deficiencies in the corporate representative's ability to respond within those areas designated in the notice of deposition and made specific transcript references to where the corporate representative acknowledged his inability to provide information that was clearly relevant and material. We then filed

our initial motion to compel.

THE COURT: That I do have. Actually, that's what I had looked at, I guess, that had copies of the transcripts attached.

MR. SCAROLA: Well, then, Your Honor is aware that what we were seeking in that motion were three things.

First, that Morgan Stanley be compelled to undertake a full investigation of the information in its possession, including magnetic tapes and hard drives for E-mail messages responsive to Coleman (parent) Holdings document request.

Now, once we request the documents, the law imposes an obligation on them to conduct a reasonable, thorough investigation within the corporation to make the determination as to what exists. We're simply asking the Court, at that point, to compel them to do that which is inherent in the obligation to respond to the request to produce.

The second request was to produce within 10 days any E-mails that are located, which obviously they would be obliged to do under the terms of the previously served request to

produce.

THE COURT: Your initial response to the request to produce, did it say that there were items within their possession, custody or control that weren't produced because the cost inherent in it?

MR. SCAROLA: That came in the very substantial response they filed to the motion to produce.

Now, at no time in this response did they ever raise an issue that Coleman (parent) was seeking to compel something that had not been requested. Their response asserted four objections. They said what we were asking in our motion to compel -- and I didn't finish with the third thing.

The third thing was to comply with their obligation to produce a corporate representative that had knowledge with regard to these matters. What they said was that the tasks we were asking be performed were overly burdensome, that it was harassing, that it was unlikely to lead to the discovery of admissible evidence because -- well, they'll have to explain that to you because I really don't

understand what their argument is in support of that contention. But the fourth and final argument they made was that Morgan Stanley was somehow not entitled to this discovery because Morgan Stanley had unclean hands because Morgan Stanley, Sr. funded hadn't preserved all of its E-mails, so it was not right for Morgan Stanley -- excuse me -- that MAFCO, our parent corporation, had not preserved all of its E-mails.

Well, I hope that we don't need to deal with that issue, but I want to respond to it very quickly. And that is, there is a difference between the obligations imposed and --

THE COURT: Let me stop you there. To me, that's -- and can you respond -- it's sort of a red herring issue, because it's apples and oranges. If they had some sort of destruction of evidence, we can address that separately when it's properly framed by the pleadings and talk about the appropriate sanctions. But I know what the appropriate sanction is, if I don't look at the motion currently in front of me and make a sanction going to that motion.

MR. IANNO: I didn't want to interrupt Mr. Scarola, but I don't know if we're arguing the amended motion now or if we're back to the original motion.

If we're back to the original, I have some problems with arguing that to the Court today.

MR. SCAROLA: We're not back to the original motion. Your Honor needs to understand this background to understand the relief that we're currently requesting.

THE COURT: Do you have a copy of the amended motion? I thought we were doing the original motion. That's the one I have a copy of. Do you have an extra copy?

MR. IANNO: I do.

THE COURT: Thank you. Let me -- I'm trying to figure where we're going. And I apologize for interrupting your argument.

But realistically, are you seeking anything today other than having a competent corporate representative testify as to both their retention policy and what efforts they have made to locate this stuff and copies of the documents they gave to the SCC?

MR. SCAROLA: No. That's all we are

asking for.

THE COURT: That's all you want?

MR. SCAROLA: That's all we want.

THE COURT: So what you're saying is sort of twofold. One is, produce the corporate rep like we originally asked who can answer all these questions and then we can figure out if your answers are taken in good faith.

MR. SCAROLA: That's precisely right. They raised a burdensome objection and we're entitled to explore that. We're not obliged to accept on its face their assertion without any particulars whatsoever, if it's going to take a lot of time and cost us a lot of money and it's not going to lead to anything productive. We want sworn testimony that allows us to assess those contentions. If they are right, we may abandon our efforts to get E-mails. If they are wrong, we have placed ourselves in a position to come back before Your Honor on the original motion to get them to do that which we originally requested that they do.

THE COURT: What did you want to say in support of the contention that they should produce the documents produced to the SCC?

That's the other prong of what we're looking for today.

MR. SCAROLA: Yes, that's correct.

The other prong of what we're looking at is production of the documents that were sent to the SCC.

THE COURT: First of all, can we agree you guys should produce somebody who's competent to testify to these matters?

MR. IANNO: Under a proper 1.310 notice, yes. That's where we have our disagreement, is the testimony that Mr. Scarola is asking for is not contained with the original deposition notice.

What we said is, let's both mutually produce our corporate representatives on an agreed upon list of topics for the expense, the procedures for restoring back-up tapes.

THE COURT: I'm looking at the notice of taking deposition that was served August 22nd.

In items 2 and 3, is it your position you produced somebody competent to testify to those matters?

MR. IANNO: Mr. Plotnick was produced on September 9th.

THE COURT: Right.

MR. IANNO: And he had rendered 160 pages of deposition testimony on those three topics.

Now, if the Court -- if Mr. Scarola says he didn't testify on the topics that were in this deposition notice that you're looking at, I think you have to look at all 160 pages to see that he did testify on the policies and procedures of document retention at Morgan Stanley.

THE COURT: I thought he said he didn't know anything about pre 2000.

MR. IANNO: You could, Your Honor, read the 160 pages. But I think that the solution here on this is to have an agreed upon list of topics that Mr. Scarola's client and our client want mutual corporate representatives to testify to here. The point here is not the retention policy, it's what it would take to restore back-up tapes.

THE COURT: It's sort of a little bit of both I would imagine.

Let me ask you this: I think the proposal on the table, as I understand it, sort of mixes these two things again and says, if you produce

somebody to testify about your policy, we'll produce somebody to testify about our policies.

Are you willing to accept that offer or not?

MR. SCAROLA: We have always been willing to produce a corporate representative to testify about our policies. That was part of the stipulation that we entered on the record before the Court. We are still prepared to do that, although there is no motion to require us to do it. We're willing to do that. That's discovery that they're entitled to.

The contention that we have failed to identify specifically what it is we need is just false. If you look at the letter of September 18, we could not have been more specific about the deficiencies in Mr. Plotnick's deposition. We identify precisely the information that we need and we identify the page and line references where Mr. Plotnick was unable to provide that information. I don't know what more we could do than that. That is our specific list of everything that we need from this defendant.

THE COURT: So I'm clear, are you saying you will accept their stipulation and we need to sit down right now and make a list of things this person is going to testify to --

MR. IANNO: Apparently so.

THE COURT: -- or are we going back to the motion?

MR. IANNO: I have the SCC filings. There is a separate and totally distinct argument on that.

THE COURT: I understand that. We're not doing that now. We'll do it today. We're not doing it at this moment.

I took your copy of the September 18 letter, right?

MR. SCAROLA: Yes, Your Honor. That is attached as an exhibit to the amended --

MR. IANNO: It's attached as Exhibit C to the original motion.

MR. SCAROLA: The original motion. So you do have a copy of it.

THE COURT: I do have it someplace.

MR. SCAROLA: There are numerous letters going back and forth between the parties. I don't have all the letters that were sent by

Morgan Stanley.

THE COURT: No, I don't think that we're going to be able to use it as a prompt for what it is we want the person to be competent to testify to, right?

MR. SCAROLA: That's our list.

THE COURT: Okay. He will be right back then.

So, if we were going to make a global stipulation, it will be, I assume, somebody competent to testify as to the policies and procedures for maintaining, preserving electronic or photocopied documents and/or files of the party, right, that would be Number 2?

MR. SCAROLA: That's correct.

THE COURT: Number 3 would be the location and/or procedure, the collection of documents -- here's your copy back.

MR. SCAROLA: Thank you very much.

THE COURT: You dictate to me the list, what you want this person -- you think this person should be competent to testify about.

MR. SCAROLA: I think we could very easily simply state that the defendants shall produce

a corporate representative --

THE COURT: Well, each party.

MR. SCAROLA: -- each party shall produce a corporate representative who can address all matters identified in the letter of September 18, 2003, attached hereto.

THE COURT: But that's sort of one-sided.

MR. SCAROLA: I'm agreeing to make it reciprocal.

THE COURT: So addressing the types of issues addressed?

MR. IANNO: That's why we wanted a new notice that said, we want a corporate representative to testify about A, B, C, D, so we wouldn't have this disagreement, because we believe we already complied with what's in the September 18th letter. We can get Mr. Clare on the phone and he can address it. I haven't had the time to prepare and go through line by line Mr. Plotnick's deposition testimony to address this specific issue. But the parties, three months ago, exchanged correspondence. They responded to these, and we said we have prepared, is my understanding, and he was adequately prepared.

My understanding is, the purpose of today's hearing was simply to tell -- bring a corporate representative to say this is what it would take to restore the E-mails to support our objection, not to whether or not we retained them, not whether or not the retention policies were, because that's what I thought Mr. Scarola was getting at.

We believe Mr. Plotnick already testified to the three areas here. But if they want to have a reciprocal witness that says it would cost millions of dollars and months and months of work to restore the magnetic tapes that are available on back up --

MR. SCAROLA: Your Honor, this is -- I'm sorry.

MR. IANNO: -- we would produce somebody like that the first two weeks of January.

MR. SCAROLA: This is the language included in the amended motion to compel: To provide within 15 days of the production that we are requesting a corporate representative to testify, pursuant to Florida Rules of Civil Procedure 1.310, concerning Morgan Stanley's E-mail retention policies, practices and

procedures and concerning Morgan Stanley's ability, including the procedures, time, labor and expense involved to retrieve E-mails.

THE COURT: Now, can you live with that?

MR. IANNO: The second phrase of it, yes, Your Honor, because we believe on the first phrase of it, the policies and procedures, Mr. Plotnick testified to that.

THE COURT: I can go back and look at it. Maybe I'm thinking of something else. I thought he was vague about what it was about from '99 to 2000.

MR. IANNO: Well, there is a reason for that. I believe it was explained and it can be explained further if necessary. But the deposition lasted 160 pages and the Court was only provided with excerpts of it. And I think if the Court -- if the Court will indulge me for a minute, Mr. Scarola said he didn't understand our relevance objection. And the Court may or may not recall Mr. Scarola's motion to compel on Scott Paper documents, that the Court ruled on anything pre, I believe, 2000 should be produced, but anything post 2000 should not be produced.

THE COURT: Right.

MR. IANNO: The problem is, there is no E-mails that predate 2000. That was the basis for the relevance objection. And I believe somebody will testify to that on the second phrase of Mr. Scarola's wherefor clause concerning the ability, including the procedures, time and labor expenses involved to retrieve E-mails. And that will explain that. I think that's what he needs to do.

But the point that we've always made and the point I made yesterday at the Uniform Motion Calendar is, there is no deposition notice that asked for that second phrase. We're trying to agree that we will produce a corporate representative on that second phrase of the wherefor clause. But to say motion to compel --

THE COURT: Let me stop you. Give me an example from the September 18th letter, for instance, that you think requests information that either Mr. Plotnick did provide, but was not included in the ambient of the taking of the deposition.

MR. IANNO: I would love to, but I have to

be honest with the Court, in the 24 hours, I have not had a chance to go through Mr. Plotnick's deposition. As this Court knows, I wasn't in the office yesterday afternoon. We haven't had sufficient time to prepare a response to that. But there are letters that I could have sent over to the Court that respond specifically to Mr. Scarola's September 18th letter. That's a problem with having the hearing today. I did my best to get everything together on this and I just couldn't get everything together in the 24 hours to put in a package to the Court to show how we responded to Mr. -- I guess it's Jenner & Block's September 18th letter.

MR. SCAROLA: It really is unfair to represent that they have had 24 hours to respond to these issues. Your Honor is well aware that these matters have been before the Court now for a long time and there is no reason to delay resolution of these issues beyond today. They've had this letter identifying deficiencies since September 18. And the second part of the letter --

THE COURT: Let me ask you this --

MR. SCAROLA: Yes.

THE COURT: -- are you -- if we pick up the language from the wherefor clause of your motion, asking for somebody competent to testify concerning the E-mail retention policies and practices and the procedures to retrieve the E-mails and the costs, if they produce somebody other than Plotnick, are you happy? Because obviously --

MR. SCAROLA: I don't care who the person is. It's the information that we want.

THE COURT: I don't know that there was an obligation for him to go do some independent investigation before he was deposed.

MR. SCAROLA: Respectfully, Your Honor, that's exactly what the law says. When we issue 30 -- a Rule 1.310 notice of deposition of a corporate representative, they are obliged -- the corporate representative is obliged to educate himself with respect to the knowledge that the corporation has. We didn't notice the deposition to Mr. Plotnick.

THE COURT: I understand that.

MR. SCAROLA: And, I'm sorry, I don't have that case law at hand.

THE COURT: I thought they had to produce the person most knowledgable on that topic.

MR. SCAROLA: I hope Mr. Ianno will agree to this without having to get into a legal argument. The case law is very clear, that there is an obligation imposed upon the corporation to educate itself with respect to what knowledge exists within the corporation, so they are producing an individual who is capable of speaking on behalf of the corporation with regard to these topics to disclose the full corporate knowledge on those topics. And if it takes 10 people to respond, they're obliged to produce as many people as necessary to address those topics on the corporation's behalf. That's the whole purpose of that rule. And it is very clear from case law with respect to that rule, that there is an obligation to conduct a good faith investigation in advance in order to be able to respond on behalf of the corporation.

THE COURT: Okay. Do you agree with that statement?

MR. IANNO: Briefly, Your Honor. This wasn't my motion to argue. This was Mr.

Clair's motion. I'm not fully aware of all of the facts. I'm not prepared -- I'm not prepared. Mr. Clare was home with a 104 fever yesterday.

With respect to the 301(b)6 notice, my interpretation and understanding of the rule is very consistent with Mr. Scarola's. It's not the person most knowledgable. It's the corporation has an obligation to produce a representative to testify on these areas and the noticing party takes it at their risk if their areas are not specific and they're vague, like they are in this case. It's subject to interpretation, policies and procedures.

We produced a corporate representative that testified as to what Morgan Stanley's policies and procedures were with respect to retention. He was educated.

THE COURT: That's where we were then. What you're now telling me is that we're not going to reach an agreement on this point.

MR. SCAROLA: I'm prepared to stipulate --

THE COURT: You want a stipulation that they both have to produce somebody knowledgable about their E-mail retention policy and

somebody knowledgable about the cost retrieving the E-mails? You're not willing to do the former?

MR. IANNO: We're willing to produce someone to support our cost and burdensome objection on the first two weeks of January, Your Honor.

THE COURT: You're not willing to do the former?

MR. IANNO: We believe --

THE COURT: That's not my question. We're not going to get this done in the time we have. We're back to arguing the motion.

What did you want to say in support?

MR. SCAROLA: Are we doing it in two parts still?

THE COURT: I think we're still on two parts. I think I have your argument on part one. Let them respond and we'll come back to the SCC argument.

MR. SCAROLA: I'm happy to do that.

THE COURT: What did you want to say?

MR. IANNO: I'm not sure I can add anything else.

THE COURT: Do you have a copy of

Plotnick's deposition for me?

MR. IANNO: I do. This is the entire deposition, together with exhibits.

THE COURT: Thank you.

So it's your position that all --

MR. IANNO: That what is sought -- it's my understanding what was sought here and what the discussion has been since the Uniform Motion Calendar about three weeks ago has been, produce someone to testify as to the costs and the expense and the time and the burden that will be involved in going through the thousands of magnetic back-up tapes that Morgan Stanley has for a certain time period that exists, and we are willing to produce that person.

We believe we have produced the corporate representative that was appropriately identified in the corporate representative deposition topics 1 through 3 of the 310(b)6 deposition notice.

As I explained to the Court, I did my best to get fully up to speed on this issue. Unfortunately, I did not have the time to go through Mr. Plotnick's entire deposition last night. I downloaded it to go through that. I

could send over to the Court this afternoon our response letters that go through in detail what Mr. Plotnick testified to, but it was my understanding what we were going to argue today was simply whether or not we would produce the corporate representative on the E-mail burden.

And the other thing, Your Honor, is, Mr. Scarola's client waited three months, the September 18 letter, before they brought this to the Court's attention and we had to wait months for our motion to dismiss hearing. If we could have some additional time, I'm sure Mr. Clare will be fully prepared to address each and every one of the questions the Court has requested of Mr. Plotnick's deposition that I'm not able to do.

THE COURT: Okay. Let's do the SCC documents.

MR. SCAROLA: Thank you.

I have called the Court's attention to the broad scope of our request to produce, the specific paragraphs in that prior request that impose a burden to produce all communications regarding E-mails, as well as all E-mails, specifically communications with the SCC are

referenced. And the only objection that we have had to the production of the SCC documents has been that an order may be entered in response to somebody's motion in a New York court that might preclude the disclosure of these documents at sometime in the future.

Our efforts to determine who filed the motion, what the motion is seeking to do, have been ignored. They don't chose to tell us. And the potential for some court sometime in the future to restrict the Defendant's ability to make disclosure sometime in the future ought not in any way to impact upon this Court's ordering production of that which has been requested in the past.

So as we stand right now, there is no assertion of any inability to produce documents that have been requested. And, again, all we are seeking is predicate information to determine the validity of the objections that have been raised.

THE COURT: Do you have a copy of what their response was on this issue?

MR. SCAROLA: The only response on this issue has been the response that was filed to

our original motion to compel, which alleges that this is burdensome, harassing and not likely to lead to the discovery of admissible evidence.

THE COURT: So how do you --

MR. SCAROLA: The argument about the New York --

THE COURT: Right.

MR. SCAROLA: -- the New York court, that's argument that was made before Your Honor in open court. That's never been reduced to writing. No, that's simply the verbal representations made to Your Honor in response to -- in the context of our motion to enforce the in-court stipulation. You remember --

THE COURT: Right.

MR. SCAROLA: -- that's a piece I left out in the middle. But in the middle of all of this, we thought we had an agreement. We obviously, in the Court's opinion, didn't have an agreement.

But during the course of those arguments, they told Your Honor, we don't want you to order us to do this yet because a New York court may sometime enter a response to some

motion, which they couldn't tell us anything about and refuse to tell us anything about.

THE COURT: So I'm clear, what we're talking about doesn't have anything to do with E-mail retention policies or anything else?

MR. SCAROLA: No. It specifically relates to E-mail retention policies.

THE COURT: The action before the SCC on that point, we're not talking about trying to discover E-mails, we're trying to get hard copies, presumably, of documents provided to the SCC?

MR. SCAROLA: Regarding E-mail retention policies and E-mail destruction, so that we can find out what is in fact available and how readily available it is or is not, at least according to what they told the SCC, correct.

THE COURT: And where in any response -- how did Morgan Stanley place the Plaintiff on notice that these documents were retained and not produced?

MR. IANNO: Well, that's the heart of this matter, Your Honor. It's not that they were not produced, it's that they were not responsive. They were only offered to the

Plaintiff as a possible resolution to the motion to compel.

I can walk the Court through why this document is not responsive.

THE COURT: You're telling me it's not included in the Plaintiffs' first request for production?

MR. SCAROLA: Absolutely not.

THE COURT: Tell me why not.

MR. SCAROLA: This is a document that was produced by attorneys.

THE COURT: Is it a single document?

MR. IANNO: Yes, produced in response to the SCC by attorneys. It is not a Morgan Stanley policy. It is not a Morgan Stanley procedure. It is more akin to a pleading that was produced -- and this is the key point, Your Honor, that Mr. Scarola omitted from his argument -- that it is produced in a separate IPO allocation proceeding. It has absolutely nothing to do with Sunbeam. It has absolutely nothing to do with the facts of this case. And if the Court looks at Definition No. 12 in the first request for production, they went through great pains to define terms. SCC

administrative proceeding means, in the matter of Sunbeam Corp, and it lists the proceeding number, and in the matter of David C. Fannin, F-A-N-N-I-N, and it lists an administrative proceeding. This document was not submitted in connection with either of those proceedings. It was not submitted in connection with arbitration concerning Mr. Dunlop or in connection with any of the litigations, which are all defined terms in this request for production.

If the Court goes through Request No. 48 through 51, which are the only ones Mr. Scarola identified, all of the documents requested there are limited to those three definitions. This document --

THE COURT: Tell me again what proceeding it was produced, the SCC in connection with?

MR. IANNO: It's called an IPO allocation proceeding, which involved numerous securities firms, investment bankers, Your Honor. It had nothing to do with Sunbeam.

And the reason -- the only reason that Mr. Scarola knows about it, is because it was widely reported. And in an effort to resolve

the motion to compel originally, the one that we had the failed stipulation on, we offered to produce it if we could. That's the only reason the New York court comes into play.

The procedure that's being utilized today on the motion to compel is improper, because this document was never requested. If the Plaintiff wants these documents, they can file a request for production. We will respond to it in due course. We can argue about whether or not it's admissible.

THE COURT: So they just need to do, what you're telling me, a request using this administrative proceeding number?

MR. IANNO: Not this --

THE COURT: Well, the 3-10597. That's the one where they did the order dealing with retention?

MR. IANNO: I don't have the number in front of me.

MR. SCAROLA: It is attached as an exhibit.

THE COURT: Right.

So you're saying they amend their --

MR. IANNO: Well, they need to do a

request before they do a motion to compel.

THE COURT: No, I understand.

What's the response to that argument, that this is in a separate proceeding and it's just within the ambit of this request?

MR. SCAROLA: Well, it isn't within the ambit of the defined SCC proceeding.

The requests include paragraph 50, all documents you have provided to the SCC, the Attorney General of New York, or any other governmental or regulatory body concerning Sunbeam.

THE COURT: They say this doesn't concern Sunbeam.

MR. SCAROLA: It does concern Sunbeam, from the perspective it concerns all of their E-mail communications, Sunbeam and others.

THE COURT: That's a nice argument. Assume I'm not going to accept that one.

MR. SCAROLA: If you're not going to accept that argument and the sole objection that they are making is that this has not been specifically requested, I go back to my office, I file that request.

What I don't want to happen is, what we

get are objections that bring us right back to this same point all over again. If what they're saying is they are willing to produce it as specifically requested, that's fine. We'll specifically request it. But we ought not -- we ought not to play the game for the first time in this hearing, raising the objection that this was not specifically requested because that objection has never previously been raised, to raise that objection now, to have us make this specific request and then to file some sort of new objections to the production after we spent as much time as we have trying to reach this point.

THE COURT: I understand your concern. I also understand, if it wasn't originally requested, they didn't have an obligation to file objection to something that wasn't requested.

My hope is that you go back and request it. You will have either it will be produced or have something that frames the legal issues presumably along the lines we discussed. At least I will need less education next time to get to the point that we're at now.

MR. SCAROLA: Will the Court entertain an Ore Tenus motion to require a response to that request to produce within 10 days?

MR. IANNO: Ten days is over the Holidays. I will do a shortened time. Probably right after the first of the year.

THE COURT: Can you do?

MR. IANNO: January 5th.

THE COURT: It's a Monday.

MR. SCAROLA: I think it's a Friday.

THE COURT: I think January 5th is a Monday.

MR. SCAROLA: It's difficult for me to imagine, with this issue having been discussed as much as it's been discussed, if there is an objection to be raised. I'm not talking about producing the documents within that period of time. But if there is an objection to be raised, let's get it on the table, get it on the table now. Ten days should be more than adequate time. I would think that 48 hours is enough time. So I would request, I persist in my request that a 10-day time limit be set.

MR. IANNO: Can we have the Socii (ph) Rule in affect, Your Honor? Whenever we need

something quickly, we can't get it; whenever the Plaintiff wants something quickly, they get it.

I'd love to, but this is December 17; Christmas is in a week, the New Year holiday. Mr. Scarola's office is closed for a week. I mean, I'm willing to do it in a shorter time, maybe even earlier than that. I hate to be burdened. If the Court wants, the 2nd is a Friday.

THE COURT: I'll tell you what, I'll do it 15 days. I'm not sure the request --

MR. SCAROLA: Fifteen days from the filing of the request?

THE COURT: Fifteen days from service of the request, including five days in the mail.

MR. SCAROLA: It will be faxed today.

MR. IANNO: Just on side, the parties have an agreement that all service is either by fax, E-mail and Federal Express. We're trying to get everybody -- because of the lawyers involved, we're trying to serve everybody by E-mails or fax and everything goes by Federal Express.

THE COURT: I appreciate that. What I'm

looking for real quick, I need to get an order on this. Obviously I lost it. Was the number for the proceedings we are talking about. Obviously we were only talking about shortening the time to respond to the request to produce. My documents deal with that proceeding.

MR. IANNO: I believe it's addressed as Exhibit B, Your Honor. I think this is -- I want to say that it's this one.

MR. SCAROLA: Administrative proceeding File No. 3-10597.

THE COURT: Seeking documents provided to the SCC.

MR. SCAROLA: And received from the SCC in connection with that matter.

THE COURT: Okay. I'll take the first one under advisement and you will get an order.

MR. IANNO: Thank you, Your Honor.

MR. SCAROLA: Thank you. And we are closed next week. Merry Christmas, Your Honor.

MR. IANNO: Your Honor, just, if that's the wrong proceeding number, I'd be happy to advise the Court. I'll just call your JA. I assume it's the right one. I want to make

sure. I'll check and make sure. I don't want the Plaintiff to request the wrong documents either.

THE COURT: Advise us in writing. Let Mr. Scarola know.

MR. IANNO: I will.

THE COURT: I assume, Mr. Scarola, if we get something from Mr. Ianno saying that's the wrong number, we can put in the right number?

MR. SCAROLA: Yeah. I don't know how it could be the wrong number when that's the proceeding in which they were fined over a million dollars.

If Mr. Ianno informs you of a different number, I assume he will be doing so in good faith, Your Honor can substitute that different number. If it turns out there is a problem, we'll be back to see you.

THE COURT: He's done it at his own peril, so I have no doubt he would not intentionally advise the Court.

MR. IANNO: If you don't hear from me, that is the number.

THE COURT: I appreciate that.

(At 10:45 a.m. the hearing was adjourned.)

C E R T I F I C A T E

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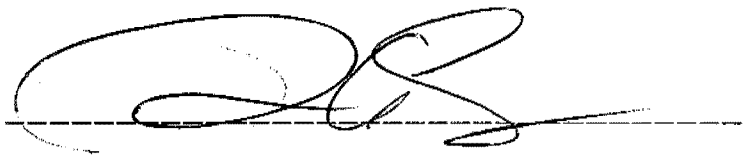
STATE OF FLORIDA

COUNTY OF PALM BEACH

I, PATRICIA A. LANOSA, Registered Professional Reporter, do hereby certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and correct transcription of my stenotype notes of the proceedings.

Dated this 17th day of December, 2003.



PATRICIA A. LANOSA

Registered Professional Reporter

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IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN
AND FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,
vs Case No. CA 03-5045 AI
MORGAN STANLEY & CO., INC.,
Defendant.
_____/
MORGAN STANLEY SENIOR FUNDING, INC.,
Plaintiff,
vs Case No. CA 03-5165 AI
MACANDREWS & FORBES HOLDINGS, INC.,
Defendant.
_____/

HEARING BEFORE THE
HONORABLE ELIZABETH T. MAASS

Tuesday, January 4, 2005
Palm Beach County Courthouse
West Palm Beach, Florida
8:15 a.m. - 8:30 a.m.

APPEARANCES:

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Attorneys for the Defendant
BY: JOSEPH IANNO, JR., ESQUIRE

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P R O C E E D I N G S

The hearing before the Hon. Elizabeth T. Maass was taken before me, Susan Fannon, Certified Shorthand Reporter, Notary Public, State of Florida at Large, at the Palm Beach County Courthouse, 250 South Dixie Highway, West Palm Beach, Florida, beginning at the hour of 8:15 a.m. on Tuesday, January 4, 2005 pursuant to the Notice filed herein, in the above-entitled cause pending before the above-named Court.

- - - -

THE COURT: We have two motions, and I guess they are related, Coleman's motion to strike portions of Morgan Stanley's proposed findings of fact, of law; and Morgan Stanley's motion for summary judgment; and then Coleman's motion that would at least extend this time to respond to the motion for summary judgment?

MR. SCAROLA: Yes, your Honor; and may I suggest that we take up the second first?

THE COURT: I think that makes sense.

MR. SCAROLA: That is the motion to extend time.

THE COURT: Okay.

MR. SCAROLA: Because I understand from the comments that your Honor made at the earlier hearing, although pursuant to Mr. Ianno's objection, that hearing did not go forward because of the notice problems. There was

some discussion with regard to these issues; and your Honor indicated an inclination not to strike the pleading, to require some answer at our peril in choosing what we wanted.

THE COURT: Right, I mean, my recollection, maybe it's inaccurate, is that my concern was we simply didn't have time to adequately hear that motion before the hearings on the summary judgment motion were set. In any event --

MR. SCAROLA: That's correct; and your Honor made those comments -- and I understand that -- but I thought that it was important for us because the hearing was not actually held as a consequence of Mr. Ianno's objection to re-notice it so that your Honor could enter whatever order you considered to be appropriate in response to that motion.

Of more significance is our motion for an extension of time in which to respond to the over 90 pages, more than 330 separate paragraphs, many of which contain multiple assertions of alleged fact.

And what we have requested is that we have until January 10th in which to file the response to those, what we have characterized as in effect request for admissions.

Under the ordinary summary judgment rule, we would have obviously considerably more time than through

January 10th, which is 11 days in advance of the hearing to controvert assertions of fact contained in a summary judgment motion. We could file affidavits days before, and that would be a timely response to the motion for summary judgment.

Pursuant to your Honor's order, as agreed to by the parties, we have entered into a procedure that allows for an abbreviated period. And what we are asking is that you extend that period somewhat to give us until January 10th, which is 11 days in advance.

THE COURT: When does it expire now?

MR. SCAROLA: Pardon me?

THE COURT: When does it expire now?

MR. SCAROLA: Well, we have already filed our response to the motion for summary judgment.

THE COURT: When was it required to be filed?

MR. IANNO: The agreed order, Judge, when this first came up that I handed to the Court before we started the hearing, Mr. Scarola and I had agreed to December 24th, which was an extra day for them to file their response in absence of further extensions; and that our reply would be due this Friday, which is one day later than it was originally scheduled.

THE COURT: Okay.

MR. SCAROLA: And so that your Honor

understands, we have filed our response to the motion for summary judgment, a very detailed response. We filed it in accordance with our agreement on time, and we believe that we have established in that response record evidence to support every material allegation of each of the claims that we have made against Morgan Stanley and dealt with all of the material assertions of fact included in the Defendant's statement of fact that have any bearing upon that motion for summary judgment.

So that part has been done. And Morgan Stanley is in the position, based upon that response, to file whatever reply they choose to with regard to those allegations of fact that we believe are essential to rebut their motion for summary judgment.

Although the burden is obviously on them to prove the non-existence of material allegations, we have gone through the record and established where the record supports each of the claims that we have made.

What we are asking for additional time for in effect is to respond to what goes considerably beyond that and amounts to request for admissions and a request from the Court to establish these allegations in particular paragraphs as established facts.

And I would like to just give your Honor a very brief example. Let me hand you a copy of Morgan Stanley's

proposed findings of fact and conclusions of law in support of its motion for summary judgment. I don't know if your Honor has really had a chance to look at that.

THE COURT: I have looked at that.

MR. SCAROLA: Okay. Well, you can start at the very beginning. I mean, we take a look at the first paragraph; and the first paragraph really contains seven separate -- excuse me -- eight separate assertions of fact.

Ronald O. Perelman is an individual residing in New York, New York. That's one. Now, what that has to do with a motion for summary judgment in a case by Coleman (Parent) Holding, Inc., I really don't know. And that's an example of the kinds of things that are irrelevant to making a determination as to whether Coleman (Parent) Holding Company has asserted appropriate claims against Morgan Stanley.

The next assertion is he holds an MBA.

The next assertion is the MBA is from the Wharton School.

The next assertion is that he is a sophisticated businessman, whatever bearing that may have.

The next is that he owns hundreds of companies.

The next is that he controls hundreds of companies.

The next is that he owns and controls those

hundreds of companies through a series of holding companies.

And the next is that that series of holding companies is complex.

That's eight assertions of fact.

Now, some of those may have some indirect bearing on the motion for summary judgment. To the extent to which they do, we have addressed them. We have addressed the issue of the sophistication of the Plaintiff, Coleman (Parent) Holding, in our response to motion for summary judgment.

But this is typical of what we are being asked to go through and respond to in over 330 separate paragraphs; and many of them contain these same kinds of multiple assertions of fact.

We have been working on this diligently. We expect to be able to have it finished in its entirety by January 10th. I don't know how the defense could be prejudiced in any respect by filing this by the 10th of January, 11 days in advance of the summary judgment hearing, when our response to the motion for summary judgment was filed on December 24th.

THE COURT: What is your response?

MR. IANNO: Judge, this strikes me as do onto others. Every time we've asked for an extension, our feet have been held to the fire.

But, more importantly, the findings of fact and conclusions of law are an integral part of our reply, they're a part of our motion. Before we can reply to the motion and their response, we need to know what their response is to what we say is a statement of undisputed facts.

So they're asking for January 10th. Our reply is through January 7th. Are we going to push everything back and waste our time? They've had this now for over three weeks.

Take Mr. Scarola's first point here on the statement of undisputed facts. There's three citations given to that. All they have to do to respond to that are go to those citations, that's not what it says.

THE COURT: What do you mean that's not what it says?

MR. IANNO: Well, I mean, for the statement in paragraph 1 --

THE COURT: Right.

MR. IANNO: -- there's given three citations, Mr. Perelman's deposition, Mr. Sloven's deposition and Mr. Givins' deposition. That is what we use as our support. They can go and look at those cites. They're are a few pages. It's not like this is an in-depth, detailed process. We have done all the work for them to do this.

If they have a response to that particular statement that our citations are incorrect or that there's a disputed fact, then say it's disputed. If they choose not to address it because they say it's irrelevant, the Court's already told them, do so at your peril.

THE COURT: Let me ask you this, for instance, calling somebody a sophisticated businessman. That is one of those sort of loaded terms you wouldn't normally see as an assertion of fact in a motion for summary judgment. And I don't know if you are saying sophisticated businessman under New York Law standards, under Florida Law standards, under a common balance, compared to somebody who shops at Publix, I mean, I'm not sure what you are saying.

MR. IANNO: And that's why this is an integral part of the motion for summary judgment. Under New York Law, you have two very sophisticated companies here, one of them suing another for fraud and misrepresentation.

THE COURT: Yes, but if you say somebody is a sophisticated businessman, how are they supposed to know what legal standards you're applying?

MR. IANNO: It's Mr. Perelman's words, Judge. He was asked, are you a sophisticated businessman. In his opinion, he is a sophisticated businessman.

THE COURT: Well, then you should have said

Mr. Perelman believes he is a sophisticated businessman.

In all honesty, I think it's fair that they have time to respond to this. I have not seen a motion for summary judgment using this kind of emotionally charged language in a case this complex before. I think they should have more time to respond.

MR. IANNO: And then are we permitted to extend our time to reply then?

THE COURT: I think we're going to have to talk about what's fair. And I don't know if you want to wait until you get the response.

MR. IANNO: Because our response under the agreed order now or applied is due this Friday.

THE COURT: Which obviously you can't, but you can reply to what you have already.

MR. IANNO: But, see, we did this as an all-in-one process. Mr. Scarola has chosen or the Plaintiff has chosen to divvy this up, the motion, the memorandum and the statement of fact. Ours is all together. They all fit together like a puzzle, Judge; and piece mealing it doesn't work for our reply.

I mean, that's the problem. The way we've structured our motion for summary judgment is this is why we're entitled to judgment. These are a statement of undisputed facts; and under 1.510(D), this is the facts we

want the Court to consider if you don't grant all the relief we ask for.

MR. SCAROLA: Your Honor -- I'm sorry. I didn't mean to interrupt.

MR. IANNO: So that's why we can't really piece meal our reply. I mean, we can have it probably done in the next week.

THE COURT: I think you're going have to reply to what you have already on time. And then we can talk about what do you think is a reasonable time frame for them to attempt to respond to what it is you plan to file by the 10th?

MR. SCAROLA: Your Honor, as long has we have it five days in advance of the hearing, that's fine.

THE COURT: Okay. And the hearing is the 21st?

MR. IANNO: Well, the hearing is the 21st, which would be two weeks from Friday. The five days --

THE COURT: So if you had it by the 14th, that would give you --

MR. IANNO: Four days. That would actually give us -- The 10th is Monday. Assuming we don't receive it until Monday night, which is likely, Judge, that gives us Tuesday, Wednesday and Thursday; and we have to file it the next day. I would say the 17th, which gives them four days,

the Monday before the hearing.

THE COURT: Any problem with that?

MR. SCAROLA: That's fine.

THE COURT: I'm only pointing out the 17th is Martin Luther King Day. I mean, as long as you all are willing, I mean, it's technically -- Well, it is a holiday.

MR. IANNO: Right.

THE COURT: Still saying due that day is fine?

MR. SCAROLA: That's not a problem for us.

MR. IANNO: And that brings us to another point, Judge, then. When do you want to get -- I know Mr. Scarola has sent over a complete set -- Obviously, this is large, to say the least.

THE COURT: Right.

MR. IANNO: When does the Court want to receive all of the papers?

THE COURT: If I can get what you all have --

MR. IANNO: I mean, my thought was originally to send over everything together at one time.

THE COURT: Which is always better. But I think what may be better though is to give me everything but your reply ahead of time --

MR. IANNO: Okay.

THE COURT -- and then just give me your reply when you have it.

MR. IANNO: Okay; and this would be the reply to the statement of facts or --

THE COURT: Right, to their supplemental filing.

MR. IANNO: Right, and then we'll give you our reply we file on Friday, either Friday or Monday if that's okay with the Court.

THE COURT: Sure.

(Pause.)

THE COURT: What I did on the motion to strike is just say that I found there is insufficient time available to permit the motion to be heard prior to the hearing set on the motion for summary judgment.

And on the motion to extend time, I said the motion is granted in part. Plaintiff shall have until January 10th to serve by facsimile transmission or hand delivery its response to those portions of the Defendant's motion for summary judgment where Plaintiff contends, asserts facts not necessary to the motion for underlying claims; Defendant shall serve its reply to Plaintiff's response by hand delivery or by facsimile transmission by January 17th. Okay?

MR. SCAROLA: Thank you, your Honor.

THE COURT: Thank you very much.

MR. IANNO: Thank you, Judge.

THE COURT: Here's your copy of this back, Mr. Scarola.

MR. IANNO: Judge, on the copies sent to the Court, to reduce the volume, would the Court prefer them double-sided? I know what I do a lot of times is I double-side it just so it's not as thick, but whatever the Court --

THE COURT: Probably not.

MR. IANNO: Okay.

THE COURT: Thank you very much.

MR. IANNO: Thank you.

(Thereupon, the hearing concluded at 8:30 a.m.)

- - - -

C E R T I F I C A T E

STATE OF FLORIDA)

COUNTY OF PALM BEACH)

I, Susan Fannon, Certified Shorthand Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true record to the best of my skill, knowledge and ability.

Dated this 4th day of January 2005.

Susan Fannon, CSR

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

NOTICE OF FILING DEFENDANT'S
PROPOSED AMENDED PHASE II JURY INSTRUCTIONS

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed the attached Defendant's Proposed Amended Phase II Jury Instructions, served May 16, 2005.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 7th day of July, 2005.

CARLTON FIELDS, P.A.
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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

DEFENDANT'S PROPOSED AMENDED PHASE II JURY INSTRUCTIONS

Defendant Morgan Stanley & Co. Incorporated ("MS & Co.") hereby requests that the Court give the jury instructions attached hereto in the event a second, punitive-damages phase of trial ("Phase II") is necessary.

As this Court is aware, the Supreme Court's decision in *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003), dramatically changed the constitutional backdrop against which punitive damages are awarded. Florida, like many other states, is still struggling to incorporate that decision into its standard jury instructions. See Fla. Std. Jury Instr. PD1 (introductory comment) ("The committee is considering whether these instructions need to be revised in light of *State Farm v. Campbell*."). *State Farm* expressed particular concern about the fact that prevailing jury instructions "typically leave the jury with wide discretion in choosing amounts" of punitive damages and "do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory." 538 U.S. at 418. Florida's current pattern instructions are no exception. By

failing to place constitutionally required constraints on the jury's discretion, they run afoul of the basic teachings of *State Farm*. Defendant's requested instructions seek to correct those inadequacies and to ensure that constitutional error is not needlessly injected into the case.

In submitting these instructions, Morgan Stanley does not waive or withdraw the instructions previously submitted. Morgan Stanley does not waive its objections to specific claims or damages, or its objections to the Court's ruling that certain facts have been "deemed established." Morgan Stanley expressly does not waive its right to a full jury determination of all issues necessary to the determination of the issues in Phase II of the trial. Morgan Stanley reserves the right to modify these instructions to be consistent with the Court's rulings and evidence at trial.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

DEFENDANT'S PROPOSED AMENDED PHASE II JURY INSTRUCTIONS

TABLE OF CONTENTS

Introduction....5

Purpose of Punitive Damages....6

Presumption of Full Compensation....7

Clear and Convincing Evidence....8

Corporate Liability for Punitive Damages....9

No Right To Punitive Damages....10

Permissible to Award No Punitive Damages....11

Improper Considerations....12

Jury May Not Punish Litigation Misconduct....13

Determination of Amount....15

Reasonable Relationship Required....16

Award No More Than Necessary To Accomplish Purposes 18

Consider Deterrent Effect of Compensatory Damages 19

Punishment Only For Harms to CPH 21

Do Not Consider Financial Condition to Increase Award 22

Relevance of Financial Condition 24

Concluding Instruction 25

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 1

Punitive Damages—Introduction

You have found for CPH and against Morgan Stanley on CPH's aiding and abetting and conspiracy claims and awarded CPH compensatory damages. You should now consider whether Morgan Stanley should be required to pay punitive damages to CPH, and if so in what amount.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 2

Punitive Damages—Purposes of Punitive Damages

Punitive damages and compensatory damages serve different purposes. Compensatory damages are designed to compensate the plaintiff for its loss. In contrast, punitive damages are an extraordinary remedy and are reserved for special circumstances. They are intended to punish the defendant for any intentional misconduct that harmed the plaintiff and thereby discourage the defendant from acting in a similar way in the future.

Source:

Florida Standard Jury Instructions in Civil Cases—Punitive Damages § 2(a) (2004) (adapted).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 3

Punitive Damages—Presumption of Full Compensation

CPH recovered all of its losses by your award of compensatory damages. You should therefore award punitive damages only if you find that Morgan Stanley is so culpable that, in addition to the compensatory damages that Morgan Stanley must pay, a further penalty is necessary to achieve just punishment and adequate deterrence.

Source:

> *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 416, 419 (2003) ("[P]unitive damages serve a broader function; they are aimed at deterrence and retribution. . . . It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 4

Punitive Damages—Clear and Convincing Evidence

You will recall that I instructed you that, in considering the defendant's liability for damages to compensate the plaintiff for its losses, you needed to find that the elements of the plaintiff's claims were established by the greater weight of the evidence—in other words, that they were more likely than not. A different and more demanding standard applies to liability for punitive damages, which must be proved by clear and convincing evidence. "Clear and convincing evidence" differs from the "greater weight of the evidence" in that it must be more compelling and persuasive. "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. In contrast, "clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

Put another way, to decide for the plaintiff, it is not enough to find that the preponderance of the evidence is in the plaintiff's favor. A party that must prove its case by a preponderance of the evidence need satisfy you only that the evidence supporting its case more nearly represents what actually happened than the evidence that is opposed to it. But a party that must establish its case by clear and convincing evidence must satisfy you that the evidence makes it highly probable that what it claims is what actually happened.

Because the burden of proof that the plaintiff must satisfy is greater for punitive than for compensatory damages, it would not be inconsistent for you to find, for example, that a defendant committed fraud for purposes of requiring it to pay compensatory damages but not for purposes of subjecting it to punitive damages.

Source:

Florida Standard Jury Instructions in Civil Cases – Punitive Damages § PD 2a(1) (2004).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 5

Punitive Damages – Corporate Liability for Punitive Damages

Punitive damages are only warranted only if you find by clear and convincing evidence that Morgan Stanley was guilty of intentional misconduct.

Morgan Stanley is a corporation. It is subject to punitive damages for the acts of its officers, directors or managing agents authorized to make corporate policies, and not for actions of lower level employees. Thus, in order to award punitive damages against Morgan Stanley, you must find by clear and convincing evidence that:

A specific managing agent, director or officer of Morgan Stanley who has the power to make corporate policies, engaged in conduct that constituted intentional misconduct and that conduct contributed to CPH's losses.

If you do not find that clear and convincing evidence shows that the conduct of such an officer, director, or managing agent was a substantial cause of damage to CPH and that such conduct warrants punitive damages against Morgan Stanley in accordance with the standards I have mentioned, then you should return a verdict for Morgan Stanley on the question of punitive damages.

Source: Florida Standard Jury Instructions in Civil Cases – Punitive Damages § PD 2b(1)(2) (2004) (adapted).

Schropp v. Crown Eurocars, 654 So. 2d 1158, 1161 (Fla. 1995)

Bankers Multiple Line Ins. Co. v. Farish, 464 So. 2d 530, 533 (Fla. 1985).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 6

Punitive Damages—Plaintiff Has No Right To Recover Punitive Damages

CPH has no right to be awarded punitive damages simply because you have awarded compensatory damages. Punitive damages are not intended to compensate a plaintiff for its actual injuries.

Sources:

Chrysler Corp. v. Wolmer, 499 So. 2d 823, 825 (Fla. 1986) (punitive damages not intended as means by which a plaintiff can recover extra damages).

St. Regis Paper Co. v. Watson, 428 So. 2d 243, 247 (Fla. 1983) (recognizing distinct purposes for compensatory and punitive damages and noting that "a plaintiff has no right to punitive damages").

Carraway v. Revell, 116 So. 2d 16, 20 (Fla. 1959) (punitive damages are imposed "not as compensation ... but as punishment").

State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 416-17 (2003) ("It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.").

BMW of North Am. v. Gore, 517 U.S. 559, 567 (1996).

Smith v. Wade, 461 U.S. 30, 52 (1983) (noting that punitive damages "are never awarded as of right, no matter how egregious the defendant's conduct").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 7

Punitive Damages—Permissible to Award No Punitive Damages

It is up to you whether to impose punitive damages on Morgan Stanley. You may in your discretion refuse to award punitive damages even if Morgan Stanley's conduct might otherwise make it subject to such an award.

Sources:

State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 416-17 (2003) ("It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.").

Florida Standard Jury Instructions in Civil Cases – Punitive Damages § PD 2(d)(2) (2004) (adapted) ("[Y]ou may in your discretion decline to assess punitive damages").

Humana Health Ins. Co. of Fla. v. Chipps, 802 So. 2d 492 (Fla. 4th DCA 2001).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 8

Punitive Damages—Improper Considerations

You may not allow your decision regarding punitive damages to be affected by the fact that Morgan Stanley is a large business, or by the fact that its principal offices are outside of this State.

Source:

Liggett Group Inc. v. Engle, 853 So. 2d 434, 458 (Fla. 3d DCA 2003) (noting the danger "that juries will use their verdicts to express biases against big businesses.") (quoting *Honda Motor Co. v. Oberg*, infra).

Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994) (noting the danger "that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.").

State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 421-22, 427 (2003).

TXO Prod. Corp. v. Alliance Resources Corp., 50 U.S. 443, 464 (1993) (plurality opinion) (expressing concern about "prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 9

Punitive Damages—Jury May Not Punish Litigation Misconduct

You have heard evidence about litigation misconduct by Morgan Stanley during the course of this case. That matter has been dealt with by the Court. It is not your job to punish Morgan Stanley for breaking the rules of this Court, and I instruct you not to do so.

The statement of litigation misconduct may be considered by you only for the purpose of concluding whether Morgan Stanley sought to hide direct evidence of either the Sunbeam fraud or Morgan Stanley's complicity with Sunbeam in perpetrating that fraud on CPH. It may not be considered for any other purpose. A party's failure to comply fully with a discovery request or Court order, standing alone, should not affect your determination of whether to award punitive damages, or the amount of punitive damages to award.[1]

Sources:

This Court's Order on Defendant's Motion for Reconsideration of the Court's Sanction Orders (April 5, 2005)

Hanna v. Industrial Labor Service, Inc., 636 So. 2d 773, 776 (Fla. 1st DCA 1994) (the Florida civil rules authorize trial courts to impose sanctions only "to effect compliance, not to punish")

Precision Tune Auto Care, Inc. v. Radcliffe, 804 So. 2d 1287, 1290 (Fla. 4th DCA 2002) ("The purpose of reposing in the trial court the authority to enter a default is to ensure compliance with its order, not to punish or penalize")

Leatherby Ins. Co. v. Jones, 332 So. 2d 139, 141 (Fla. 3d DCA 1976) ("The sanctions under the discovery rules are neither punitive nor penal. Their objective is to compel compliance with discovery, and then only in flagrant and aggravated cases.")

JOINT COMMITTEE OF THE TRIAL LAWYERS SECTION OF THE FLORIDA BAR AND CONFERENCES OF CIRCUIT AND COUNTY COURT JUDGES, HANDBOOK ON DISCOVERY

[1] It continues to be Morgan Stanley's position that there is no basis whatever for any finding of an effort to cover-up the alleged Sunbeam fraud. Accordingly, this second paragraph should be given only if the Court rejects that argument and permits CPH to contend that there has been a cover-up.

PRACTICE 4 (2003) ("Sanctions under the discovery rules are neither punitive nor penal, and their objective is to compel compliance with discovery.")

Florida Physicians Ins. Reciprocal v. Baliton, 436 So. 2d 1110, 1112 (Fla. 4th DCA 1983) (vacating $150,000 fine because it was punitive and not an authorized sanction absent a finding of contempt).

Ostano Commerzanstalt v. Telewide Sys., Inc., 794 F.2d 763, 768 (2d Cir. 1986) ("While this conduct might well justify the imposition of sanctions, it alone does not justify the award of punitive damages.") (citation omitted).

Federal Deposit Ins. Corp. v. British-American Corp., 755 F.Supp. 1314, 1329 (E.D.N.C. 1991) ("Punitive damages are available when the underlying conduct on which the lawsuit is premised is willful, wanton, egregious, or the like. They are not intended to redress misconduct occurring during the litigation process. Such misconduct is properly redressed through the Federal Rules of Civil Procedure.") (citation omitted).

James v. Powell, 225 N.E.2d 741, 747 (N.Y. 1967) (punitive damages not properly awarded where court levied them based on contempt citations in related proceedings rather than on account of the fraud at issue).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 10

Punitive Damages—Determination Of Amount

The law recognizes that not all bad acts are the same and not all bad acts requires the same punishment. Therefore, you should consider how blameworthy Morgan Stanley's conduct was in deciding what level or amount of punishment that conduct deserves, if any.

In deciding how much, if any, punitive damages to award, you need to consider the nature, degree, and extent of any misconduct associated with Morgan Stanley's participation in the Sunbeam transaction. To do so, you should consider the following factors, along with any others that you think relevant to setting an appropriate punishment:

- whether the harm caused was economic as opposed to physical;
- whether the misconduct demonstrated an indifference to or a reckless disregard of the health or safety or others;
- whether the target of the conduct was an especially vulnerable victim or was preyed upon because of its inability to defend itself;
- the financial condition of Morgan Stanley and the probable effect of a judgment thereon;[2] and
- the degree of Morgan Stanley's awareness of the misconduct, including whether Morgan Stanley had other arguably legitimate grounds to conclude that its conduct was lawful; and
- the monetary benefit Morgan Stanley gained or hoped to gain from its punishable conduct, and the extent to which the compensatory damages already awarded removes that gain.

[2] Morgan Stanley submits this portion of the instruction to be used only in the event evidence of Morgan Stanley's finances is admitted and does so without waiving its argument that no such evidence should be admitted.

Source:

Florida Standard Jury Instructions in Civil Cases—Punitive Damages § 2 (2004) (adapted).

State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 419-429 (2003).

BMW of N. Am. v. Gore, 517 U.S. 559, 575-78 (1996) ("the most important indicium of the reasonableness of punitive damages award is the degree of reprehensibility of the conduct").

Langmead v. Admiral Cruises, 696 So. 2d 1189, 1192-94 (Fla. 3d DCA 1997) (assessing the degree of reprehensibility of the defendant's conduct and the actual harm caused by such conduct).

Owens-Corning Fiberglass Corp. v. Ballard, 749 So. 2d 483, 484-5 (Fla. 1999) (holding that lower court properly included in jury instructions on punitive damages additional factors relating to the circumstances of the case).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 11

Punitive Damages—Reasonable Relationship Required

The amount of punitive damages you award, if any, must have a reasonable relationship to the harm caused to CPH and to the compensatory damages you have awarded.

Source:

State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1524 (2003) ("the measure of punishment [must be] both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered," "when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages can reach the outermost limit of the due process guarantee.").

BMW of N. Am. v. Gore, 517 U.S. 559, 580 (1996) ("The principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree ...").

Owens-Corning Fiberglas v. Ballard, 749 So. 2d 483 (Fla. 1999) (an amount reasonable in relation to the harm likely to result from the conduct as well as the actual harm).

Langmead v. Admiral Cruises, 696 So. 2d 1189, 1192-94 (Fla. 3d DCA 1997) ("An enormous disparity between the actual damages awarded ... and the punitive damages awarded ... has most certainly raised the suspicious judicial eyebrow[s] of this Court").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 12

Punitive Damages—Award No More Than Necessary To Accomplish Purposes

The primary purpose of imposing punitive damages is to punish the wrongdoer and deter similar misconduct in the future by the defendant. You must not award punitive damages in any amount larger than is reasonably necessary to accomplish this purpose.

Source:

Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 22 (1991) (approving standards that allow determination of "whether a particular award is greater than reasonably necessary to punish and deter . . . .")..

State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1521 (2003) ("It should be presumed that a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.").

Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 434-36 (2001) (imposition of punitive damages reflects policy decisions more than actual findings and *de novo* appellate review is required to ensure fidelity to constitutional limits).

BMW of N. Am. v. Gore, 517 U.S. 559, 584 (1996) ("The [punitive damages] sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal.").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 13

Punitive Damages—Consider Deterrent Effect Of Compensatory Damages

As I have explained, one of the purposes of punitive damages is to deter future misconduct. The law recognizes that punitive damages are not the only way to deter. Rather, any payments that a defendant has to make on account of its actions, such as the compensatory damages that you have already awarded to the plaintiff, will also have a deterrent effect. You must decide whether adequate deterrence or punishment requires additional liability in the form of punitive damages.

Source:

State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003) ("It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence."); id. at 425 ("When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.").

Williams v. ConAgra Poultry Co., 2004 WL 1752583 (8th Cir. Aug. 6, 2004) (recognizing deterrent effect of $600,000 compensatory award, which the court termed "a lot of money").

In re Exxon Valdez, 270 F.3d 1215, 1244 (9th Cir. 2001) (holding that other costs and punishments incurred by defendant, including clean-up costs, settlement amounts, and net compensatory damages, all should be considered as part of the deterrent already imposed and the amount of punitive damages awarded should be lowered accordingly).

Lane v. Hughes Aircraft Co., 993 P.2d 388, 400-01 (Cal. 2000) (Brown, J., concurring) ("[L]arge compensatory damage awards not based on a defendant's ill-gotten gains have a strong deterrent and punitive effect in themselves.").

Brown v. Farkas, 511 N.E.2d 1143, 1148 (Ill. App. Ct. 1986) (reducing punitive award on the basis of large compensatory award).

Buzzard v. Farmers Ins. Co., 824 P.2d 1105, 1116 (Okla. 1991) (ordering $2 million punitive exaction reduced to $400,000 in light of the compensatory award of $200,000, which, it noted, was "not an insignificant sum").

Dzinglski v. Weirton Steel Corp., 191 W.Va. 278, 281 (1994) (affirming trial court vacatur of $150,000 punitive award in light of $500,000 compensatory damages).

Mirkin v. Williamson, 5 Cal.4th 1082, 1106 (1993) ("[T]he overall size of compensatory damages alone may constitute a significant deterrent") (citation and internal quotation marks omitted).

Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 206 (1st Cir. 1987) (stating that compensatory award of $299,000 "provides significant deterrence" even to a large employer).

Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 307 (1986) ("[d]eterrence ... operates through mechanism of damages that are compensatory").

Beliz v. W.H. McLeod & Sons Packing, 765 F.2d 1317, 1332 (5th Cir. 1985) ("[d]eterrent effect may be achieved without awarding exemplary damages").

Rosado v. Santiago, 562 F.2d 114, 121 (1st Cir. 1977) (reversing punitive damages where "[a]n award of actual damages coupled with reinstatement ... is ample relief ... and a sufficient deterrent to future wrongdoing").

Maiorino v. Schering-Plough Corp., 695 A.2d 353 (N.J. Super. 1997) (vacating punitive award in light of substantial deterrent of $435,000 compensatory award).

Chandler v. Denton, 741 P.2d 855, 868 (Okla. 1987) (total verdict "was so large that the addition of substantial punitive damages was 'not ... responsive to the purpose of civil punishment'").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 14

Punitive Damages—Punishment Only For Harms To CPH

You may not impose punishment for harms suffered by any persons or entities other than CPH.

Source:

State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 422-23 (2003) ("A defendant should be punished for conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant . . . .").

Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 435 (2001) (characterizing second *BMW* guidepost as "the relationship between the penalty and the harm *to the victim* caused by the defendant's actions").

BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996) (looking into "the disparity between the harm or potential harm suffered *by Dr. Gore* and his punitive damages award") (emphasis added).

Owens-Corning Fiberglass Corp. v. Ballard, 749 So. 2d 483, 484-5 (Fla. 1999) (holding that lower court properly included in jury instructions on punitive damages additional factors relating to the circumstances of the case).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 15

Punitive Damages—Do Not Consider Financial Condition

You may not base any award of punitive damages on Morgan Stanley's size, wealth, overall revenues, profits, or any other measure of financial worth, nor may you increase any award you would otherwise deem appropriate on the basis of such information.

Source:

State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1525 (2003) ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.").

BMW of N. Am. v. Gore, 517 U.S. 559, 574-85 (1996) (wealth of defendant not included in due process analysis; the "fact that [a] defendant is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several states impose on the conduct of its business.").

Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994) ("[T]he presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.").

Sand Hill Energy v. Smith, 142 S.W.3d 153, 167 (Ky. 2004) ("[I]n *State Farm*, the United States Supreme Court frowned upon 'the presentation of evidence of a defendant's net worth'").

Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793, 805 (Cal. Ct. App. 2003) ("the jury in this case was instructed that, in addition to other factors, it should consider in arriving at an award of punitive damages '[t]he amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition.' As we have discussed above, this view of 'actual' deterrence, while clearly supported by California law ..., fails to restrict the jury to punishment and deterrence based solely on the harm to the plaintiffs, as apparently required by federal due process").

Zazu Designs v. L'Oreal, S.A., 979 F.2d 499, 508 (7th Cir. 1992) ("[c]orporate assets finance ongoing operations and are unrelated to either the injury done to the victim or the size of the award needed to cause corporate managers to obey the law.").

Kemezy v. Peters, 79 F.3d 33, 35 (7th Cir. 1996) (the economics principal of "diminishing marginal utility" "does not apply to institutions as distinct from natural persons.").

Pivot Point Int'l v. Charlene Prods., 932 F. Supp. 220, 223 (N.D. Ill. 1996) (evidence of wealth inadmissible to establish the proper amount of punitive damages in part because, "even when considering punitive damages based on state law, the Supreme Court [in *BMW*] did not treat the defendant's wealth as relevant.").

Anthony J. Franze & Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After State Farm*, 6 U. Pa. J. Const. L. 423, 521 (2004) ("basing an award on a defendant's financial condition or profits risks punishing a defendant for harm to nonparties, a practice barred by *State Farm*").

American Law Institute, *Reporters' Study: Enterprise Responsibility for Personal Injury*, Vol. II, at 253-55 (1991).

But see Rinaldi v. Aaron, 314 So. 2d 762 (Fla. 3d DCA 1975).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 15(a)

Punitive Damages—Relevance Of Financial Condition[1]

Although you may award punitive damages if you choose to do so based on Morgan Stanley's conduct, you may not award a larger amount simply because Morgan Stanley is a large corporation with substantial net worth, income, or revenues. Thus, the evidence you have heard about Morgan Stanley's financial resources can only be considered by you as a mitigating factor—that is, as evidence that would reduce the amount of punitive damages, if any, you choose to award. Under no circumstances may you award an amount of damages that would bankrupt or financially destroy Morgan Stanley. Regardless of the defendant's financial circumstances, you should base the amount of your punitive award, if any, on the factors about which I have already instructed you.

Source:

> *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 427 (2003) ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.").

[1] Morgan Stanley submits this instruction as an alternative to Proposed Jury Instruction No. 14, to be used only in the event evidence of Morgan Stanley's finances is placed before the jury. Morgan Stanley does so without waiving its argument that no such evidence should be admitted.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 16

Punitive Damages—Concluding Instruction

Your verdict must now be unanimous, that is, your verdict must be agreed to by each of you.

You will be given a form of verdict.

When you have agreed on your verdict, the foreman or forewoman, acting for the jury, should date and sign the verdict. You may now retire to consider your verdict.

Source:

Florida Standard Jury Instructions in Civil Cases - Punitive Damages § 1 (2004) (adapted).

#230580/mep

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiffs,

vs.
MORGAN STANLEY & CO., INC.

Defendant.
_____/

CASE NO: 2003 CA 005045 AI

PLAINTIFF'S NOTICE OF FILING TRANSCRIPTS

Plaintiff hereby gives notice of the filing of the transcripts on the attached list for purposes of incorporation into the Record on Appeal.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and U.S. Mail to all counsel on the attached list on this 14th day of July, 2005.

JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
Phone: (561) 686-6300
Fax: (561) 478-0754
Attorneys for Plaintiff

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Plaintiff's Notice Of Filing Transcripts

COUNSEL LIST

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1615 M Street, N.W., Suite 400
Washington, D.C. 20036-3209

leman (Parent) Holdings Inc. v. Morgan Stanley & Co., Inc.
se No. 2003 CA 005045 AI
Filing Transcripts by CPH

09/29/2003	Transcript of Hearing re MS & Co.'s Motion to Dismiss
11/06/2003	Transcript of Hearing re Motion to Compel Concerning Emails, Motion to Compel Production of Settlement Agreement With Arthur Andersen
11/25/2003	Transcript of Hearing- [MS & Co.] Motion to Compel Production of Settlement Agreement With Arthur Andersen
12/17/2003	Court Transcript – [CPH] Motion to Compel Morgan Stanley Emails
01/08/2004	Transcript of hearing – [CPH] Motion for Protective Order
02/19/2004	Transcript of Proceedings from hearing on Motion to Compel Production of Employee Records.
02/20/2004	Transcript of February 20 Case Management Conference
03/03/2004	Transcript of hearing on entry of Order on Motion to Compel Production of Employee Records from 2/19/2004
04/22/2004	Transcript of hearing on MS's Motion for Protective Order Regarding the Use of Personnel Evaluations
04/30/2004	Transcript of hearing on CPH's Motion to Show Cause.
05/28/2004	Court Transcript: Hearing on CPH's Motion to Allow Arthur Andersen Access to Confidential Information. (CONFIDENTIAL)
06/07/2004	Court Transcript: Hearing on CPH's Motion to Allow Arthur Andersen Access to Confidential Information.
07/14/2004	Court Transcript: Hearing re Case Management Conference Scheduling/Procedure, Compelling Contempt Discovery Compliance.
07/23/2004	Court Transcript: CMC and hearing on Motion to Extend Merit Discovery and Set a Hearing on Contempt Motion
08/13/2004	Court Transcript: Case Management Conference
09/15/2004	Court Transcript: Scheduling hearing
09/23/2004	Court Transcript: Scheduling hearing
11/05/2004	Court Transcript: Case Management Conference
12/15/2004	Court Transcript: Various motions.
01/04/2005	Court Transcript: Various motions (incl. extension of time to respond to Findings of Fact)
01/11/2005	Court Transcript: Various motions
01/12/2005	Court Transcript: Various motions
01/13/2005	Court Transcript: Various Motions
01/19/2005	Court Transcript
01/26/2005	Court Transcript: CPH's Motion to Deem Certain Documents Admissible

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY'S MOTION
FOR AN AWARD OF ATTORNEYS' FEES AND COSTS

Morgan Stanley & Co. Incorporated ("Morgan Stanley") respectfully requests the Court to award Morgan Stanley reasonable attorneys' fees and court costs pursuant to the Court's February 24, 2005 Order on Morgan Stanley's Motion for Additional Discovery Regarding MAFCO's Internal Valuation of Sunbeam Stock and Morgan Stanley's Motion for Sanctions and Additional Discovery Concerning Plaintiff's Improper Concealment of the Value of the Sunbeam Warrants ("February 24 Order") (attached hereto as Exhibit A).

In support of this motion, Morgan Stanley states as follows:

1. In its February 24 Order, this Court ordered CPH to pay reasonable costs and attorneys' fees associated with Morgan Stanley's Motions for Additional Discovery Regarding MAFCO's Internal Valuation of Sunbeam Stock and for Sanctions and Additional Discovery Concerning Plaintiff's Improper Concealment of the Value of the Sunbeam Warrants ("Morgan Stanley Motions"), including those fees incurred in connection with the depositions permitted by the February 24 Order, to be determined following trial. *See* February 24 Order.

2. In an Order dated June 22, 2005, the Court directed the parties to serve petitions for award of fees and costs previously awarded by the Court, subject to a reservation of jurisdiction to determine the amount thereof, within 25 days of entry of final judgment in this matter.

3. The law firm of Kirkland & Ellis LLP ("K&E") performed the work associated with the Morgan Stanley Motions and the depositions conducted in connection with those motions.

4. K&E staff and counsel spent approximately 413 hours, at hourly rates of $105 to $660, in connection with the Morgan Stanley Motions and associated depositions. A chart detailing the legal services performed is attached to this Motion as Exhibit B. The total sum of these services is $194,027.

5. Costs of depositions conducted pursuant to the February 24 Order and associated deposition transcripts totaled $6,721. Copies of these invoices are attached to this Motion as Exhibit C.

6. Since this Court has already determined entitlement to legal fees and costs, it is requested that this Court award Morgan Stanley a total of $200,748.

WHEREFORE, Morgan Stanley respectfully requests that the Court grant this Motion together with such other and further relief as is just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 18th day of July, 2005.

Mark C. Hansen (*pro hac vice*)
James M. Webster, III (*pro hac vice*)
Rebecca A. Beynon (*pro hac vice*)
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
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BY: _____

Counsel for Morgan Stanley & Co. Incorporated

SERVICE LIST

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Jerold S. Solovy, Esq.
Michael Brody, Esq.
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, Illinois 60611

Exhibit A

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY'S MOTION FOR ADDITIONAL DISCOVERY REGARDING MAFCO'S INTERNAL VALUATION OF SUNBEAM STOCK AND MORGAN STANLEY'S MOTION FOR SANCTIONS AND ADDITIONAL DISCOVERY CONCERNING PLAINTIFF'S IMPROPER CONCEALMENT OF THE VALUE OF THE SUNBEAM WARRANTS

THIS CAUSE came before the Court February 24, 2005 on Morgan Stanley's Motion for Additional Discovery Regarding MAFCO's Internal Valuation of Sunbeam Stock and Morgan Stanley's Motion for Sanctions and Additional Discovery Concerning Plaintiff's Improper Concealment of the Value of the Sunbeam Warrants, with both counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motions are Granted. CPH shall produce its corporate representative with the most knowledge of the internal valuation of the Sunbeam stock and warrants for deposition on March 1, 2005. CPH shall produce such other witnesses for deposition on the limited subject of the internal valuation of the stock and warrants and the effect, if any, on CPH's expert testimony on damages as MS & Co. shall reasonably require. CPH shall pay MS & Co. its reasonable costs and fees for the Motions, including those fees incurred in connection with the depositions permitted herein, to be determined at an evidentiary hearing following trial.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 24 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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West Palm Beach, FL 33401

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655 15th Street, NW, Suite 1200
Washington DC 20005

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Rebecca Beynon, Esq.
Sumner Square
1615 M Street, NW, Suite 400
Washington, DC 20036

Exhibit B

Fees	$194,027.50				
Costs	$6,721.20				
	$200,748.70				
Fees					
Date	**Timekeeper**	**Description**	**Time**	**Rate**	**Total**
03/02/05	Alterman, Victoria B	Prepare exhibits needed for deposition.	5.00	$105.00	$525.00
03/07/05	Alterman, Victoria B	Mark new deposition exhibits.	3.00	$105.00	$315.00
03/08/05	Alterman, Victoria B	Travel to Court to set up deposition materials and bring items needed by attorneys.	1.00	$105.00	$105.00
03/10/05	Alterman, Victoria B	Prepare materials for deposition.	2.50	$105.00	$262.50
	Alterman, Victoria B Total		**11.50**		**$1,207.50**
02/28/05	Bemis, Lawrence P	Prepare deposition outline.	6.00	$660.00	$3,960.00
03/01/05	Bemis, Lawrence P	Prepare for deposition.	4.00	$660.00	$2,640.00
03/02/05	Bemis, Lawrence P	Prepare for deposition	6.00	$660.00	$3,960.00
03/03/05	Bemis, Lawrence P	Take deposition of Todd Slotkin.	8.00	$660.00	$5,280.00
03/04/05	Bemis, Lawrence P	Prepare for depositions; telephone conference.	9.00	$660.00	$5,940.00
03/07/05	Bemis, Lawrence P	Prepare for depositions.	14.00	$660.00	$9,240.00
03/08/05	Bemis, Lawrence P	Prepare for deposition; take deposition of L. Winoker.	8.00	$660.00	$5,280.00
03/09/05	Bemis, Lawrence P	Prepare motion; prepare for deposition.	12.00	$660.00	$7,920.00
03/10/05	Bemis, Lawrence P	Take deposition of R. Perelman.	8.00	$660.00	$5,280.00
03/11/05	Bemis, Lawrence P	Take deposition of Blaine Nye.	8.00	$660.00	$5,280.00
	Bemis, Lawrence P Total		**83.00**		**$54,780.00**
02/22/05	Chervenak, Kimberly A H	Perform paralegal tasks related to preparation of motion.	7.50	$210.00	$1,575.00
02/23/05	Chervenak, Kimberly A H	Perform paralegal tasks related to preparation of motion.	5.00	$210.00	$1,050.00
	Chervenak, Kimberly A H Total		**12.50**		**$2,625.00**
02/18/05	Hagen, Eric	Analyze and prepare motions and discovery requests.	7.50	$480.00	$3,600.00
02/19/05	Hagen, Eric	Analyze and prepare motions and discovery requests.	10.00	$480.00	$4,800.00

02/20/05	Hagen, Eric	Draft motion for additional discovery.	4.00	$480.00	$1,920.00
02/21/05	Hagen, Eric	Draft motion for additional discovery; prepare sanctions motion.	14.25	$480.00	$6,840.00
02/22/05	Hagen, Eric	Finalize and file motion for sanctions and additional discovery; draft and revise motion re additional discovery.	17.00	$480.00	$8,160.00
02/23/05	Hagen, Eric	Finalize and file motion for additional discovery and prepare for argument.	8.50	$480.00	$4,080.00
02/24/05	Hagen, Eric	Prepare for and attend hearing re motion for sanctions re CPH's nondisclosure of Sunbeam warrants valuation; prepare for deposition; review and analyze MAFCO's internal financial statements.	13.00	$480.00	$6,240.00
02/25/05	Hagen, Eric	Review and analyze MAFCO internal financial statements and prepare for deposition.	8.50	$480.00	$4,080.00
02/26/05	Hagen, Eric	Analyze CPH's late-produced financial statements and draft deposition outline.	11.50	$480.00	$5,520.00
02/27/05	Hagen, Eric	Analyze valuations of Sunbeam stock and warrants in MAFCO financial statements and prepare deposition outline.	11.25	$480.00	$5,400.00
02/28/05	Hagen, Eric	Draft and revise deposition outline; review correspondence, pleadings, discovery, and transcripts; prepare amended 1.310(b)(6) deposition notice.	10.00	$480.00	$4,800.00
03/01/05	Hagen, Eric	Prepare for and attend hearing re objections to 1.310 deposition notice; draft and revise deposition outline; review and analyze late-produced financial documents.	16.50	$480.00	$7,920.00
03/02/05	Hagen, Eric	Draft outline, compile exhibits, and prepare for deposition.	15.00	$480.00	$7,200.00
03/03/05	Hagen, Eric	Prepare for deposition; attend deposition of T. Slotkin.	14.50	$480.00	$6,960.00
03/04/05	Hagen, Eric	Prepare for depositions; attend T. Slotkin deposition and hearing related to further discovery re MAFCO financial documents.	10.50	$480.00	$5,040.00
03/05/05	Hagen, Eric	Review and analyze deposition transcripts and draft deposition outlines.	6.50	$480.00	$3,120.00

03/07/05	Hagen, Eric	Prepare for deposition; review and analyze additional MAFCO financial documents and compile exhibits for deposition.	16.00	$480.00	$7,680.00
03/08/05	Hagen, Eric	Prepare for and attend L. Winoker deposition; prepare for deposition.	8.50	$480.00	$4,080.00
03/09/05	Hagen, Eric	Prepare for deposition.	6.50	$480.00	$3,120.00
03/10/05	Hagen, Eric	Prepare for depositions; attend R. Perelman deposition.	13.00	$480.00	$6,240.00
03/11/05	Hagen, Eric	Prepare for deposition and attend B. Nye deposition.	6.00	$480.00	$2,880.00
	Hagen, Eric Total		**228.50**		**$109,680.00**
02/21/05	Mastroberte, Glen G	Conduct legal research; prepare memorandum; conference with other K&E lawyers regarding discovery re MAFCO financial documents.	4.50	$340.00	$1,530.00
02/22/05	Mastroberte, Glen G	Conduct legal research; prepare memorandum; conference with other K&E lawyers regarding discovery re MAFCO financial documents.	5.25	$340.00	$1,785.00
02/24/05	Mastroberte, Glen G	Review motions re discovery of warrant valuation and sanctions.	1.25	$340.00	$425.00
03/02/05	Mastroberte, Glen G	Prepare for depositions regarding MAFCO financial information.	9.00	$340.00	$3,060.00
03/06/05	Mastroberte, Glen G	Review MAFCO financial information in preparation for depositions regarding same.	5.75	$340.00	$1,955.00
03/09/05	Mastroberte, Glen G	Prepare for depositions regarding MAFCO financial information.	6.00	$340.00	$2,040.00
	Mastroberte, Glen G Total		**31.75**		**$10,795.00**
02/13/05	Phair, Ryan P	Draft motion to compel MAFCO book value documents.	3.50	$360.00	$1,260.00
02/14/05	Phair, Ryan P	Research, draft and edit motion to compel MAFCO valuation documents.	7.00	$360.00	$2,520.00
02/19/05	Phair, Ryan P	Perform legal work re additional discovery re MAFCO valuation docs.	1.50	$360.00	$540.00
02/20/05	Phair, Ryan P	Perform legal work re additional discovery re MAFCO valuation docs.	1.00	$360.00	$360.00
02/22/05	Phair, Ryan P	Research, draft and edit MS motion for additional discovery re MAFCO docs.	3.50	$360.00	$1,260.00

02/23/05	Phair, Ryan P	Edit and revise motion for additional discovery re MAFCO docs; prepare for hearing.	4.25	$360.00	$1,530.00
02/24/05	Phair, Ryan P	Prepare rule 1.310 dep notices and other additional discovery requests re MAFCO valuation docs.	2.25	$360.00	$810.00
02/25/05	Phair, Ryan P	Edit and revise Rule 1,310 dep notice re MAFCO valuation docs; coordinate deposition scheduling.	1.50	$360.00	$540.00
02/28/05	Phair, Ryan P	Coordinate amended deposition notice and scheduling.	1.00	$360.00	$360.00
03/03/05	Phair, Ryan P	Conference with co-counsel.	1.25	$360.00	$450.00
03/11/05	Phair, Ryan P	Conference with co-counsel.	1.50	$360.00	$540.00
	Phair, Ryan P Total		**28.25**		**$10,170.00**
02/20/05	Rothman, Kathryn R.	Conduct research; draft sanctions motions.	10.00	$265.00	$2,650.00
02/22/05	Rothman, Kathryn R.	Draft warrants brief.	5.00	$265.00	$1,325.00
02/24/05	Rothman, Kathryn R.	Conference with co-counsel.	3.00	$265.00	$795.00
	Rothman, Kathryn R. Total		**18.00**		**$4,770.00**
	Grand Total		**413.50**		**$194,027.50**

Costs					
Date	**Deponent**	Invoice			**Cost**
03/03/2005	Slotkin	Precision Reporting BG 2421			$1,258.80
03/04/2005	Slotkin	Precision Reporting BG 2421			$1,397.40
03/08/2005	Winoker	Precision Reporting BG 2443			$1,697.75
03/10/2005	Perelman	Precision Reporting TS/BG 2445			$929.00
03/11/2005	Nye	Precision Reporting TS/BG 2447			$1,438.25
					$6,721.20

Exhibit C

PRECISION REPORTING
of South Florida, Inc.
4114 Northlake Blvd., Suite 101 • Palm Beach Gardens, FL 33410
(561) 622-1717 Phone • (561) 622-2922 Fax

March 19, 2005

Joseph Ianno, Jr., Esquire
Carlton, Fields
Esperante
222 Lakeview Avenue, Suite 1400
West Palm Beach, FL 33401

Invoice Number
BG 2421

Description of services Re: Coleman vs. Morgan Stanley

Reference		
Appearance Fee		140.00
O+1 (Daily)	Deposition of Todd Slotkin (Vol. I) 3/3/05 (144 pgs.)	1108.80
Appearance Fee		140.00
O+1 (Daily)	Deposition of Todd Slotkin (Vol. II) 3/4/05 (162 pgs.)	1247.40
Courier	(Rush)	20.00
	Invoice total:	**$2,656.20**

Payable upon receipt. Thank you for your continued patronage.

TAX ID: 05-0570072

PRECISION REPORTING
of South Florida, Inc.
4114 Northlake Blvd., Suite 101 • Palm Beach Gardens, FL 33410
(561) 622-1717 Phone • (561) 622-2922 Fax

March 19, 2005

Joseph Ianno, Jr., Esquire
Carlton, Fields
Esperante
222 Lakeview Avenue, Suite 1400
West Palm Beach, FL 33401

Invoice Number
TS/BG 2443

Description of services Re: Coleman vs. Morgan Stanley

Reference		
Coleman Per Diem		225.00
Coleman O+1 (Instant)	Deposition of L. Winoker 3/8/05 (149 pages)	1452.75
Courier	(Rush)	20.00
	Invoice total:	**$1,697.75**

Payable upon receipt. Thank you for your continued patronage.

TAX ID: 05-0570072

PRECISION REPORTING
of South Florida, Inc.

4114 Northlake Blvd., Suite 101 • Palm Beach Gardens, FL 33410
(561) 622-1717 Phone • (561) 622-2922 Fax

March 19, 2005

Joseph Ianno, Jr., Esquire
Carlton, Fields
Esperante
222 Lakeview Avenue, Suite 1400
West Palm Beach, FL 33401

Invoice Number
TS/BG 2445

Description of services Re: Coleman vs. Morgan Stanley

Reference		
Coleman Per Diem		90.00
Coleman O+1 (Instant)	Deposition of Ron Perelman 3/10/05 (84 pages)	819.00
Courier	(Rush)	20.00
	Invoice total:	**$929.00**

Payable upon receipt. Thank you for your continued patronage.

TAX ID: 05-0570072

PRECISION REPORTING
of South Florida, Inc.
4114 Northlake Blvd., Suite 101 • Palm Beach Gardens, FL 33410
(561) 622-1717 Phone • (561) 622-2922 Fax

March 19, 2005

Joseph Ianno, Jr., Esquire
Carlton, Fields
Esperante
222 Lakeview Avenue, Suite 1400
West Palm Beach, FL 33401

Invoice Number
TS/BG 2447

Description of services Re: Coleman vs. Morgan Stanley

Reference		
Coleman Per Diem		180.00
Coleman O+1 (Instant)	Deposition of Blaine Nye 3/11/05 (127 pgs)	1238.25
Courier	(Rush)	20.00
	Invoice total:	**$1,438.25**

Payable upon receipt. Thank you for your continued patronage.

TAX ID: 05-0570072

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

CASE NO. CA 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S PETITION FOR ATTORNEYS' FEES AND COSTS

Plaintiff Coleman Parent Holdings, Inc. ("CPH"), pursuant to Rule 1.380 of the Florida Rules of Civil Procedure, respectfully requests that the Court enter a judgment against Morgan Stanley & Co., Inc. ("Morgan Stanley") for attorneys' fees and costs, plus pre-petition interest. In support of this Petition, CPH states as follows:

1. The Orders Involved.

This Court has entered four orders that provide the basis for CPH's entitlement to an award of fees and costs as a sanction for Morgan Stanley's repeated violations of discovery orders.[1] Those orders relate to three general categories: (1) work performed in connection with the January 12, 2005 and February 11, 2005 depositions of James Doyle, including work

[1] The orders awarding fees and costs to CPH include: (1) the February 3, 2005 Order on CPH's Motion to Deem Certain Documents Admissible and for Sanctions Due to Morgan Stanley's Disregard of Court Order; (2) the February 28, 2005 Order on CPH's Motion to Deem Certain Documents Admissible and for Sanctions Due to Morgan Stanley's Disregard of Court Order; (3) the March 1, 2005 Order on CPH's Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order (as amended on March 1 and 4, 2005); and (4) the March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment. The orders are attached hereto as Exhibits 1-4.

associated with CPH's January 18, 2005 Motion to Deem Certain Documents Admissible and for Sanctions Due to Morgan Stanley's Disregard of Court Order; (2) work resulting from Morgan Stanley's non-production and destruction of e-mails, including work associated with CPH's January 26, 2005 Motion for an Adverse Inference Instruction and March 9, 2005 Renewed Motion for Default Judgment; and (3) work resulting from Morgan Stanley's discovery violations regarding Mr. Strong's employment records, including documents pertaining to Mr. Strong's criminal proceedings in Italy.

2. The Work Performed.

A. Work With Respect to Mr. Doyle's Depositions.

1. On January 18, 2005, CPH filed its Motion to Deem Certain Documents Admissible and For Sanctions Due to Morgan Stanley's Disregard of Court Order (hereinafter, "CPH's Motion to Deem Documents Admissible"). The motion arose as a result of Morgan Stanley's disregard of the Court's December 3, 2004 Order, which required Morgan Stanley to produce a witness for a Rule 1.310 deposition to testify concerning the authenticity, business purpose, and authorship of certain documents. Morgan Stanley produced James Doyle for deposition on January 12, 2005. In disregard of the Court's order, however, Mr. Doyle was not a witness competent to testify regarding the Rule 1.310 topics.

2. On January 24, 2005, Morgan Stanley filed its opposition to CPH's Motion to Deem Documents Admissible, and on February 2, 2005, this Court heard arguments on the motion.

3. On February 3, 2005, the Court granted CPH's motion in part and denied it in part. Specifically, the Court ordered that: "CPH is entitled to an award of fees for preparing for and taking Mr. Doyle's prior deposition; for preparing and arguing CPH's Motion to Deem

Documents Admissible . . . and for any related fees and costs." (2/3/05 Order at 2). The Court also reserved jurisdiction to award other sanctions. *Id.*

4. This Court's February 3, 2005 order also granted CPH the right to re-depose Mr. Doyle concerning the authenticity, source, creation, use, maintenance, and business purpose of certain documents. At his February 11, 2005 deposition, however, Mr. Doyle again failed to fulfill his duty to testify to matters known or reasonably available to Morgan Stanley. Accordingly, on February 16, 2005, CPH filed a Motion to Deem Certain Documents Admissible and for Additional Sanctions Due to Morgan Stanley & Co., Inc.'s Disregard of Court Order. (hereinafter, "CPH's Motion for Additional Sanctions").

5. On February 21, 2005, Morgan Stanley filed its opposition to CPH's Motion for Additional Sanctions. This Court heard argument on the motion on February 22 and February 23, 2005.

6. On February 28, 2005, this Court granted in part CPH's Motion for Additional Sanctions. Specifically, this Court found that despite Morgan Stanley's numerous refusals to admit its involvement with certain key documents, Morgan Stanley, indeed, was the author of those documents. This Court, consequently, held that the jury would be told of Morgan Stanley's authorship. The Court then ordered that "CPH shall be entitled to recover 50% of its reasonable fees and costs incurred in taking Mr. Doyle's February 11, 2005 deposition." (02/28/2005 Order at 3). The Court reserved jurisdiction to award reasonable fees and costs incurred by CPH after a post-trial evidentiary hearing. *Id.*

B. Work With Respect to Morgan Stanley's Discovery Violations Pertaining to E-mail.

7. On October 29, 2003, CPH filed a Motion to Compel Concerning E-mails as a result of Morgan Stanley's failure to produce e-mail responsive to CPH's document requests.

On November 4, 2003, Morgan Stanley filed its opposition. After a reciprocal agreement between the parties fell through, CPH renewed its Motion to Compel Concerning E-mails on December 2, 2003, and then filed an Amended Motion to Compel Concerning E-mails on December 3, 2003. On December 17, 2003, this Court heard arguments and on December 18, 2003, this Court entered an Order granting CPH's Motion in part and ordering Morgan Stanley to produce a corporate representative concerning e-mail.

8. On February 10, 2004, CPH deposed Morgan Stanley's corporate representative on e-mail, Robert Saunders, who provided false information in his deposition. On March 12, 2004, CPH filed its Motion for Permission to have Third Party Retrieve Morgan Stanley E-mail and Other Responsive Documents, in which CPH proposed that a third-party vendor be given access to both parties' e-mail systems. Morgan Stanley refused CPH's offer to split evenly the costs of a third-party vendor.

9. Morgan Stanley persisted in its refusal to retrieve and produce e-mail responsive to CPH's documents requests, and on April 9, 2004, CPH filed another Motion to Compel Concerning E-mails and Other Electronic Documents. On April 16, 2004, this Court entered an Agreed Order, which required Morgan Stanley to search its e-mail archives, retrieve and produce responsive e-mails, and certify compliance with the Agreed Order. In response to CPH's (repeated) requests, on June 23, 2004, Morgan Stanley certified compliance with the Agreed Order.

10. Morgan Stanley's substantial violations of the April 16, 2004 Agreed Order to produce e-mails and certify compliance, prompted CPH on January 26, 2005, to file a Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-mails and Morgan

Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order (hereinafter, "Motion for Adverse Inference").

11. On January 31, 2005, Morgan Stanley filed its opposition to CPH's Motion for Adverse Inference. After a February 2, 2005 hearing on CPH's motion, this Court, on February 3, 2005, ordered further discovery and set an evidentiary hearing for February 14, 2005. On February 9 and 10, CPH deposed three e-mail witnesses identified by Morgan Stanley. Additionally, concerns regarding the adequacy of Morgan Stanley's efforts to search its e-mail archives led this Court on February 4, 2005, to enter an Order on CPH's *ore tenus* motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search. As a result Morgan Stanley was ordered to pay for a third-party vendor to check its compliance with the April 16, 2004 Agreed Order. On February 14, 2005, the Court held an evidentiary hearing relating to Morgan Stanley's discovery misconduct with regard to e-mails.

12. On March 1, 2005, the Court granted CPH's Motion for Adverse Inference, and among other things ruled that Morgan Stanley "shall compensate CPH for costs and fees associated for the Motion [for Adverse Inference]." (3/1/2005 Order at 14).

13. In connection with CPH's continued investigation of Morgan Stanley's e-mail practices, on February 22, 2005, CPH filed a Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-mails. On March 7, 2005 and March 8, 2005, CPH took the depositions of Allison Gorman and Arthur Riel respectively.

14. When by March 9, 2005, evidence of Morgan Stanley's discovery abuses persisted despite the Court's prior sanctions order, CPH filed a Renewed Motion for Entry of Default Judgment and Other Sanctions (hereinafter, "Motion for Default Judgment"). This Court set an evidentiary hearing on the Motion for Default Judgment for March 14, 2005.

15. On March 13, 2005, in preparation for the evidentiary hearing, CPH took the depositions of Morgan Stanley witnesses Richard Anfang, Fred Block, Allison Gorman Nachtigal, and Bruce Buchanan, and defended the deposition of Stephen Wolfe, CPH's e-mail expert.

16. On March 14, 2005, Morgan Stanley filed a brief in opposition to CPH's Motion for Default Judgment, and this Court held an evidentiary hearing on the motion on March 14 and 15, 2005.

17. On March 23, 2005, this Court entered an order granting the Motion for Default Judgment, in part. With respect to Morgan Stanley's e-mail discovery violations, the Court ruled that "CPH shall be entitled to an award of reasonable fees and costs incurred as a result of the Renewed Motion for Entry of Default Judgment and the violations of Court orders recited herein." (3/23/05 Order at 17). Among the violations of court orders enumerated in the March 23, 2005 Order were Morgan Stanley's violations of the April 16, 2004 Agreed Order to produce e-mails and certify compliance, its failure to produce 125 documents required to be produced by the February 3, 2005 Order Specially Setting Hearing, and its improper withholding of 13 documents required to be produced by the Court's March 4, 2005 Order on CPH's *ore tenus* Motion to Compel Additional Production. *See* 3/23/2005 Order at 13 & 16.

C. Work With Respect to Morgan Stanley's Discovery Violations Pertaining to Mr. Strong.

18. As outlined in this Court's March 23, 2005 order, Morgan Stanley's discovery abuses were not confined to its e-mail production. (3/23/2005 Order at 14). For example, the Court found that in violation of a March 15, 2004 order, Morgan Stanley improperly withheld documents from William Strong's personnel files that contained references to Mr. Strong's "truthfulness, veracity [and] moral turpitude." *Id.* Specifically, Morgan Stanley failed to

produce documents concerning William Strong's criminal proceedings in Italy, and later sought to shield the files from discovery with unsubstantiated claims of privilege. *Id.* at 15. In addition, even when the fact that Morgan Stanley had withheld responsive documents relating to Mr. Strong's Italian indictment was discovered, Morgan Stanley continued to withhold many of those documents by asserting baseless privilege claims. Those baseless privilege claims were uncovered only after CPH demanded a privilege log and questioned many of the entries thereon. Thereafter, the Court, after extensive *in camera* review, ordered Morgan Stanley to produce those documents. Because of Morgan Stanley's improper conduct with regard to the Strong documents, the Court ordered that "CPH shall be entitled to an award of reasonable fees and costs incurred" as a result of Morgan Stanley's violation of this Court's March 15, 2004 order concerning production of Mr. Strong's personnel files. (3/23/05 Order at 17).

3. The Fees And Costs Requested.

19. Attached hereto as Exhibit 5 is the Affidavit of Jerold S. Solovy along with supporting backup material. As set forth more fully in Mr. Solovy's affidavit, he analyzed Jenner & Block's fees and costs from a number of perspectives.

(a) As an initial matter, Mr. Solovy, and the attorneys, paralegals, and project assistants working under his supervision, reviewed Jenner & Block's billing and time records to allocate time to the matters at issue. As attested in Mr. Solovy's affidavit, and as set forth in the time records attached to that affidavit, the amount of time identified in this manner, less time that was written-off in the billing process, resulted in $1,070,661.16 in fees that were billed to CPH.[2] In Mr. Solovy's opinion, however, that number does not fairly reflect the total expense that CPH incurred in connection with Morgan Stanley's discovery misconduct.

[2] In providing the time records attached hereto, CPH does not waive and expressly preserves all attorney-client and work product privileges.

(b) Because Morgan Stanley's misconduct increased the expense of litigating this case in ways the billing records could not possibly capture, Mr. Solovy allocated a percentage of the total bills for January, February, and March 2005 to reflect the time devoted to Morgan Stanley's discovery abuses in that period. Based on his experience both at the bar and in this litigation, Mr. Solovy believes that the following percentages represent the amount of time and expense devoted to Morgan Stanley's discovery misconduct: 15% for January 2005, 30% for February 2005, and 30% for March 2005. The total fees were $2,116,608.75 for January 2005, $2,698,625 for February 2005, and $3,400,000 for March 2005. Based on the percentages just described, the total amount of fees and costs under this alternative measure is $2,147,078.81. That figure, however, does not reflect the total expense that CPH incurred in connection with Morgan Stanley's discovery misconduct because it is limited to a three-month window of activity. Clearly, as the litigation record of this case establishes, CPH incurred considerable expense during other periods as a result of Morgan Stanley's discovery misconduct.

(c) A more accurate measure of CPH's incurred expenses as a result of Morgan Stanley's discovery misconduct is one that Morgan Stanley itself has proposed. Specifically, in its motion seeking a six-month continuance due to the withdrawal of Kirkland & Ellis as counsel, Morgan Stanley acknowledged that one measure of the expense caused by its misconduct was the expense incurred by CPH from November 17, 2004, the date of the discovery cutoff, through March 22, 2005, the date that Morgan Stanley filed its continuance motion. Thus, in paragraph 7 of its motion, Morgan Stanley stated that it was "prepared to pay the costs to the court and the jury system, as well as the reasonable attorneys' fees and costs of Plaintiff from November 17, 2004 to date." Those fees, excluding costs, are $9,545,757.

That figure is an appropriate measure of the actual expenses incurred by CPH as a result of the discovery misconduct of Morgan Stanley. From the time of the November 17, 2004 discovery cut-off to March 22, 2005 (the day before the Court's sanctions order was issued), CPH was engaged in extensive preparation for trial based on a discovery record that was manifestly incomplete and incorrect. CPH engaged and worked with experts, participated in extensive motion practice, and otherwise prepared for trial based on a version of the historical facts that was distorted beyond recognition due to Morgan Stanley's destruction of e-mails and other discovery misconduct — misconduct that, as this Court recognized, ensured that the actual facts never would be known. That entire pretrial preparation period is one for which CPH should be compensated in full because of Morgan Stanley's systematic destruction and obstruction of the actual facts.

(d) Even if one could argue that it is inappropriate to charge Morgan Stanley with the entire $9.5 million in fees incurred during the November 17, 2004 through March 22, 2005 period, any reduction from that figure should be limited in scope. Indeed, viewed from another perspective, it is certainly fair to state that Morgan Stanley's discovery misconduct increased CPH's litigation expenses by at least 25%. Jenner & Block billed a total of $29,418,421.25 in fees to CPH from November 2002 through May 2005. Twenty-five percent of that amount is $7,354,605.31.

(e) Based on the foregoing analysis, and on Mr. Solovy's 50 years at the bar, his years of experience litigating complex cases, and his expertise regarding attorney fee awards, it is Mr. Solovy's professional opinion that the appropriate fees, excluding costs, to be awarded in connection with Morgan Stanley's discovery misconduct range from between $7.3 and $9.5 million.

20. In addition to Jenner & Block's fees, CPH also incurred substantial costs as a result of Morgan Stanley's discovery misconduct. As set forth in Mr. Solovy's affidavit and the detailed charts attached thereto, CPH incurred costs attributable to Morgan Stanley's discovery misconduct in the amount of $214,408.82.[3] Those costs include $145,530.12 in expenses that CPH incurred as a result of the week-long continuance that Morgan Stanley obtained over CPH's objection following the entry of the March 23, 2005 partial default judgment.

21. In addition to Jenner & Block's fees and costs, CPH also paid fees to its other trial counsel, John Scarola, who also spent a substantial amount of time on matters relating to Morgan Stanley's discovery misconduct. However, because CPH had a partial contingency fee arrangement with Mr. Scarola, whereby Mr. Scarola performed services at a reduced hourly rate, CPH has decided to forego burdening this Court with the task of determining how to award fees for Mr. Scarola's time under these unusual circumstances.

4. Fees Incurred in Preparation of CPH's Petition for Attorneys' Fees and Costs.

22. In addition to the fees and costs expressly awarded by this Court's February 3, 2005, February 28, 2005, March 1, 2005, and March 23, 2005 Orders, CPH requests an award of the fees incurred in preparation of its Petition for Attorneys' Fees and Costs. Through July 17, 2005, CPH has incurred fees in the amount of approximately $234,043.75. A court entering an order granting attorney's fees as a sanctions may, in its discretion, award fees incurred for preparing the fee petition. *See Condren v. Bell,* 853 So. 2d 609, 610 (Fla. 4th DCA 2003)

[3] As the prevailing party, CPH also is submitting a petition for recovery of taxable costs. None of the costs that CPH seeks herein is included in that petition for recovery of costs. To the extent that the Court denies any part of CPH's request for costs herein, CPH reserves its right to supplement its petition for taxable costs as the prevailing party to include, as appropriate, any of the costs included in this petition.

(affirming award of fees incurred during preparation of fee petition). Such an award is especially warranted when the purpose of the underlying fee award was to sanction the opposing party. *Id.*

Conclusion

For the foregoing reasons, CPH respectfully requests that this Court award attorneys' fees and costs as set forth herein. In addition, as the party awarded attorneys' fees, CPH is entitled to interest from the date the "entitlement to attorney fees is fixed through agreement, arbitration, or court determination." *Quality Engineered Installation, Inc. v. Higley South, Inc.*, 670 So. 2d 929, 930-31 (Fla. 1996) (holding that the party awarded fees may collect interest from the date of the award, even if the award amount has not yet been determined).

Dated: July 18, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By:_____
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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

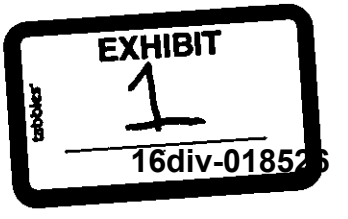
COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO DEEM CERTAIN DOCUMENTS ADMISSIBLE AND FOR SANCTIONS DUE TO MORGAN STANLEY'S DISREGARD OF COURT ORDER

THIS CAUSE came before the Court February 2, 2005 on Coleman (Parent) Holdings, Inc.'s Motion to Deem Certain Documents Admissible and for Sanctions Due to Morgan Stanley's Disregard of Court Order, with all counsel present. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part. By 12 noon February 7, 2005, MS & Co. shall serve its sworn statement (i) as to documents designated as CPH 9, CPH 75, CPH 130, CPH 170, CPH 182, and CPH 217, averring to *all* information conveyed by or inferrable from what has been referred to as MS & Co.'s word processing stamp or computer footer and any other markings or identifiers associated with the documents, and the specific conveyed or inferrable information for each document; the averrment shall specifically state the methodology by which such information may be obtained or inferred; and (ii) as to documents CPH 264, CPH 265, and CPH 170, averring the authenticity, source, creation, use, maintenance, and business purpose of the document, to the best of MS & Co.'s corporate knowledge. MS & Co. shall use its best faith efforts to investigate the subject matter of the averments required by this Order. CPH shall have two business days after receipt of the sworn statement(s) to elect to depose a Rule 1.310 (b) (6) representative of MS & Co. concerning the information ordered to be included in the sworn



statement(s) by this Order, in which event MS & Co. shall produce the deponent within two business days for deposition in Palm Beach County, Florida. It is further

ORDERED AND ADJUDGED that CPH is entitled to an award of fees for preparing for and taking Mr. Doyle's prior deposition; for preparing and arguing the Motion to Deem Certain Documents Admissible and for Sanctions Due to Morgan Stanley's Disregard of Court Order; and for any related fees and costs. The amount thereof shall be determined at a later hearing. The Court reserves jurisdiction to award other sanctions.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 3rd day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO.: 502003CA005045XXOCAI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

ORDER ON CPH'S MOTION TO DEEM CERTAIN DOCUMENTS ADMISSIBLE AND FOR SANCTIONS DUE TO MORGAN STANLEY'S DISREGARD OF COURT ORDER

THIS CAUSE came before the Court February 22 and 23, 2005 on CPH's Motion to Deem Certain Documents Admissible and for Sanctions Due to Morgan Stanley's Disregard of Court Order, with both parties well represented by counsel.

Throughout this case, CPH has been trying to determine MS & Co.'s role in creating certain disputed documents. On January 8, 2004, Tyrone Chang was deposed and disclosed that in 1997 and 1998 MS & Co. had the ability to retrieve electronic data regarding authors and editors of documents stored on MS & Co.'s network. In response, on January 20, 2004, counsel for CPH wrote counsel for MS & Co. and stated:

> Third, Mr. Chang testified that in 1997 and 1998, Morgan Stanley's internal document network utilized a version of PC Docs. That program allows users to identify authors and editors of documents stored on the network. Please produce all information retained by this document management system pertaining to the documents concerning Morgan Stanley's work for Sunbeam.

Counsel for MS & Co. responded:

EXHIBIT
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> Third, we utilized the PC Docs program, including its ability to identify authors of documents, to conduct our search for responsive documents by authors and keywords--a search which we described in our September 2, 2003 written response to the 1.310 topics. All responsive documents that were located using that program have already been produced. In addition, the time records you addressed in your January 23, 2004 letter to Tom Clare also have already been produced.

Thus, there seems to have been a basic miscommunication between counsel: CPH asked for information available from the PC Docs program; MS & Co. responded that it had used the information to locate requested documents, without providing the information.

On October 22, 2004, CPH served its Sixth Request for Admission, seeking predicate admissions to establish that certain documents were business records. In addition, CPH served its Rule 1.310 Notice of Deposition, seeking deposition of a corporate representative should MS & Co. deny any of the requests. MS & Co. sought a protective order, which was denied November 17, 2004. On November 22, 2004 MS & Co. served its responses to the requests. On December 3, 2004, the Court overruled MS & Co.'s objections and compelled both better answers and the deposition of the corporate representative. On January 12, 2005, MS & Co. produced its in-house counsel, James Doyle, as its 1.310 representative. Mr. Doyle was wholly unprepared to fulfill his duties. Consequently, on February 3, 2005, the Court ordered MS & Co. to provide a sworn statement averring to all information conveyed by or inferable from the word processing stamp or computer footer and, at CPH's election, for it to produce a 1.310 representative to be deposed. Mr. Doyle was again produced, on February 11, 2005. While Mr. Doyle provided some information at his second deposition, taken as a whole he once again failed to faithfully fulfill his duty to testify as to matters known or reasonably available to MS & Co..

Based on the foregoing and the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part. MS & Co. is hereby found to be the author of those documents designated as CPH 9 and 182 and the jury shall be so told, subject to MS & Co.'s right to present evidence that it relied on information supplied by a third party in authoring the documents. All information conveyed by the profile and profile histories provided as to all documents shall be admissible in evidence before the jury. See Rule 1.380 (b) (2) (A), Fla. R. Civ. P. CPH shall be entitled to recover 50% of its reasonable fees and costs incurred in taking Mr. Doyle's February 11, 2005 deposition, which the Court reserves jurisdiction to award after an evidentiary hearing following trial in this matter. See 1.380 (b) (2), Fla. R. Civ. P.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 28 day of February, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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CHANGES MARKED —
REVISED VERSION

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 502003CA005045XXOCAI

COLEMAN (PARENT) HOLDINGS INC.
Plaintiff,

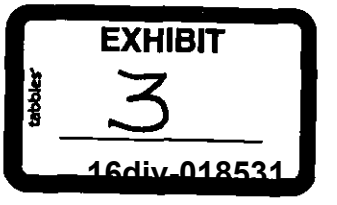
vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

FURTHER AMENDED ORDER ON COLEMAN (PARENT) HOLDINGS, INC.'S MOTION FOR ADVERSE INFERENCE INSTRUCTION DUE TO MORGAN STANLEY'S DESTRUCTIONS OF E-MAILS AND MORGAN STANLEY'S NONCOMPLIANCE WITH THE COURT'S APRIL 16 2004 AGREED ORDER, AND MOTION FOR ADDITIONAL RELIEF AND ORDER ON PLAINTIFF'S MOTION TO COMPEL FURTHER DISCOVERY REGARDING MORGAN STANLEY'S DESTRUCTION AND NON-PRODUCTION OF E-MAILS

THIS CAUSE came before the Court on February 14, 2005 on Coleman (Parent) Holdings, Inc.'s ("CPH's") Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, as modified by CPH's February 14, 2005 ore tenus motion for additional relief, and on February 28, 2005 on Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-Mails, with both counsel present. Based on evidence introduced, the Court finds:

1. CPH has sued Defendant, Morgan Stanley & Co., Inc. ("MS & Co."), for fraud in connection with CPH's sale of its stock in Coleman, Inc., to Sunbeam Corporation in return for Sunbeam stock. Whether MS & Co. had knowledge of the fraudulent scheme undertaken by Sunbeam in 1997 and early 1998 and, if so, the extent of that knowledge, is central to the case. CPH has sought access to MS & Co.'s internal files, including e-mails, since the case was filed.



2. Though MS & Co. instructed its investment bankers to preserve paper documents in their possession in connection with the Sunbeam transaction in February, 1999, it continued its practice of overwriting e-mails after 12 months, despite an SEC regulationn requiring all e-mails be retained in readily accessible form for two years. *See* 17 C.F.R. §240.17a-4 (1997).

3. On April 16, 2004, the Court entered its Agreed Order requiring MS & Co. to (1) search the oldest full backup tape for each of 36 MS & Co. employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all nonprivileged e-mails responsive to CPH's document requests; (4) give CPH a privilege log; and (5) certify its full compliance with the Agreed Order.

4. On May 14, 2004, MS & Co. produced approximately 1,300 pages of e-mails but failed to provide the required certification. Finally, on June 23, 2004, after inquiries by CPH, MS & Co. provided CPH with a certificate of full compliance with the April 16 Agreed Order signed by Arthur Riel, the MS & Co. manager assigned this task.

5. As organized by MS & Co., the effort to recover e-mails from any remaining backup tapes had several stages. First, the relevant backup tapes (in various formats, such as "DLT" tapes and eight-millimeter tapes) had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc. ("NDC"), to be processed, and the data returned to MS & Co. in the form of "SDLT" tapes. Third, MS & Co. had to find a way to upload the contents of these SDLT tapes into its new e-mail archive. Fourth, MS & Co. would run "scripts" to transform this data into a searchable form, so that it could later be searched for responsive e-mails. MS & Co. personnel used the term "staging area" to describe the stage of the process when SDLT tapes remained in limbo, waiting to be uploaded to the archive.

6. At some point prior to May 6, 2004, Arthur Riel and his team became aware that more than 1,000 backup tapes had been found at a MS & Co. facility in Brooklyn, New York. These 1,423 DLT tapes had not been processed by NDCI and thus had not been included in the archive or searched when MS & Co. made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification that it was false. He and others on MS & Co.'s e-mail archive team knew by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990's. MS & Co. neither withdrew its certification nor informed CPH about the potential for additional production of e-mails, however. During the summer of 2004, the Brooklyn tapes were processed and sent to the staging area, but they were not uploaded to the e-mail archive so as to be available to be searched until January **2005**~~2004~~, at least eight months after they were found.

7. MS & Co. also failed to timely produce e-mails from 738 8-millimeter backup tapes found at a MS & Co. facility in Manhattan, in 2002. These 738 8-mm tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched when MS & Co. made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Mr. Riel and others were told by their vendor, NDCI, by July 2, 2004 that the 8-mm tapes contained e-mail dating back at least to 1998. MS & Co. neither withdrew its certification nor informed CPH about the potential for additional production of e-mails, though. During the summer of 2004, the 8-mm tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not uploaded to MS & Co.'s e-mail archive.

8. In August 2004, Mr. Riel was relieved of his employment responsibilities. He and his team were replaced by a new team headed by Allison Gorman Nachtigal.

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9. Ms. Gorman testified that she was instructed to describe the circumstances of Mr. Riel's replacement as his having been "placed on administrative leave." That same term appears by interlineation over the original typed description in MS & Co.'s memorandum addressing these issues. The typed language stated: "[Mr. Riel was] dismissed for integrity issues." MS & Co. **represented that the reason for the adverse action taken against Mr. Riel was unrelated to any concern about the accuracy of his June 23, 2004 certification. However, MS & Co.** presented no evidence to explain why Mr. Riel would have been placed on administrative leave rather than terminated. CPH argued that it may have been to deprive CPH of the ability to contact him directly.

10. Upon taping over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area; indeed, she was not informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman met with a group of MS & Co. attorneys. Following that meeting, Ms. Gorman gave the project somewhat greater priority, although even then it clearly did not move as expeditiously as possible. For example, MS & Co. gave no thought to using an outside contractor to expedite the process of completing the discovery, though it had certified completion months earlier; it lacked the technological capacity to upload and search the data at that time, and would not attain that capacity for months; and it knew trial was scheduled to begin in February, 2005. Even at this point, no one from MS & Co. or its outside counsel, Kirkland & Ellis LLP, gave CPH or this Court any hint that the June certification was false.

11. On November 17, 2004, more than six months after the May 14, 2004 deadline for producing e-mails in response to the Agreed Order, MS & Co. sent CPH a letter revealing that its June 23 certificate of compliance was incorrect. The letter stated:

> Morgan Stanley has discovered additional e-mail backup tapes since our e-mail production in May 2004. The data on some of [the] newly discovered tapes has been restored and, to ensure continued compliance

> with the agreed order, we have re-run the searches described in the order. Some responsive e-mails have been located as a result of that process. We will produce the responsive documents to you as soon as the production is finalized.

The letter also foreshadowed further delays: "(s)ome of the backup tapes are still being restored. To ensure continued compliance with the agreed order, we intend to re-run the searches again when the restoration process is complete and will produce any responsive documents that result."

12. The next day, November 18, 2004, MS & Co. produced an additional 8,000 pages of e-mails and attachments. MS & Co.'s November 2004 letter stated that the 8,000 pagers came from "newly discovered" tapes; but the testimony now makes clear that this statement was false because Ms. Gorman's team did not figure out how to upload and make searchable the materials from the staging area until January, 2005.

13. MS & Co. has failed to offer any explanation to reconcile the obvious conflict between its assertions at the time of production that the 8,000 pages came from "newly discovered" tapes (*i.e.*, the "Brooklyn tapes") and the testimony of its own witness, Ms. Gorman, that data from those newly discovered tapes were not capable of being searched until two months later, in January.

14. After a follow-up inquiry by CPH, on December 17, 2004, MS & Co. produced a privilege log and told CPH that "[n]o additional responsive e-mails have been located since our November production." MS & Co. refused to answer CPH's questions about whether MS & Co. had restored all the backup tapes described in its November 17 letter and why the tapes had not been located earlier, however.

15. On December 30, 2004, CPH sought confirmation that MS & Co. had reviewed all e-mail backup tapes and produced all responsive e-mails and, if not, asked when the review would be completed. On January 11, 2005, MS & Co. informed CPH that the "restoration of e-mail backup tapes

is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

16. On January 19, 2004, CPH wrote asking MS & Co. to explain the circumstances under which MS & Co. located the "newly discovered" backup tapes and to disclose when the tapes were located. CPH also asked MS & Co. to explain why the backup tapes could not be restored sooner.

17. On January 21, 2005, MS & Co. sent CPH a letter that failed to answer CPH's questions. Instead, MS & Co. described its efforts to restore the backup tapes as "ongoing"; informed CPH that "there is no way for MS & Co. to know or accurately predict the type or time period of data that might be recovered"; and stated that MS & Co. "cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes."

18. On January 26, 2005, CPH filed the Motion at issue here, asking the Court to instruct the jury that MS & Co.'s destruction of e-mails and other electronic documents and MS. & Co.'s noncompliance with the April 16, 2004 Agreed Order can give rise to an adverse inference that the contents of the missing e-mails would be harmful to MS & Co.'s defense in this case.

19. Meanwhile, MS & Co. found another 169 DLT tapes in January, 2005, that allegedly had been misplaced by its New Jersey storage vendor, Recall. Again, MS & Co., chose to provide no specifics to CPH or to the Court.

20. At a February 2, 2005 hearing on CPH's Motion, Thomas A. Clare of Kirkland & Ellis, LLP, representing MS & Co., stated that "late October of 2004...[is] the date I'm representing to the Court is the first time that anyone knew that there was recoverable e-mail data" on the Brooklyn tapes. Hr'g Tr. (2/2/05) at 133-34. The actual date, however, was at least three months earlier, by July 2, 2004. Furthermore, MS & Co. refused to provide the Court with definitive answers about when its e-mail production would be complete, merely stating that it would proceed with "all deliberate speed." *Id.* at 139. Also at the February 2 hearing, Mr. Clare neglected to inform the Court about the 8-mm

tapes that had been located in 2002, and told the Court that the 1,423 DLT tapes had been found in Brooklyn "sometime during the summer" of 2004. The truth of this assertion is belied by the evidence showing that the tapes were found before May 6, 2004.

21. On February 3, 2005, the Court ordered further discovery and set an evidentiary hearing for February 14, 2005. The discovery took place on February 9 and 10, when CPH deposed the three e-mail witnesses identified by MS. & Co.

22. On Saturday afternoon, February 12, 2005, MS & Co. informed the Court that it had, in the previous 24 hours, discovered additional tapes. Also, MS & Co. stated that its recent production omitted certain "attachments" to e-mails. MS & Co. did not attempt to clarify or substantiate either of these statements to CPH or to the Court until the Monday, February 14, 2005 hearing.

23. At the February 14 hearing, none of the witnesses MS & Co. presented was involved in or familiar with the actual electronic searches conducted using the parameters specified in this Court's April 16, 2004 Agreed Order, and none explained where the 8,000 pages produced in November, 2004 had come from. MS & Co.'s witnesses did, however, describe three new developments. First, Robert Saunders, a Morgan Stanley executive director in the Information Technology Division, testified that he returned to New York after his February 10 deposition and, concerned about his unqualified **deposition** assertion that **he**~~the~~ was "confident" that a complete search for backup tapes had been conducted, decided finally to undertake a personal search of MS & Co.'s "communication rooms," going to the areas he thought most obvious first. By doing so, he and two contractors discovered more than 200 additional backup tapes openly stored in locations known to be used for tape storage. Those discoveries were made on Friday and Saturday, February 11 and 12, 2005. As of the February 14 hearing, NDCI had not yet determined which, if any, of these newly discovered backup tapes contained e-mails. Second, Ms. Gorman reported that on Friday, February 11, 2005 she and her team had discovered that a flaw in the software they had written had prevented MS & Co. from locating all

responsive e-mail attachments. Third, Ms. Gorman reported that MS & Co. discovered on Sunday evening, February 13, 2005, that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so there were at least 7,000 additional e-mail messages that appeared to fall within the scope of the Agreed Order had yet to be fully reviewed by MS. & Co.'s outside counsel for responsiveness and privilege. As counsel for MS & Co. admitted, this problem "dwarf[s]" their previous problems. Hr'g Tr. (2/14/05) at 13. Ms. Gorman indicated she was "90 percent sure" that the problem infected MS & Co.'s original searches in May, which means that **MS & Co.** even **then** ~~they~~ failed to timely produce relevant materials that had been uploaded into the archive by that point. *Id.* at 82-83. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the transaction under review here.

24. On February 19, 2045 MS & Co. informed counsel for CPH that "additional boxes of back up tapes" have been located "in a security room" and that, "(a)s of this morning, Morgan Stanley has identified four (unlabled) DLT tapes among the collection. Those four tapes will be sent to NDCI for further analysis." The disclosure did not state when the discovery was made. MS & Co.'s counsel represented to the Court that it was his understanding that about 73 bankers' boxes of tapes were discovered. No explanation for the late discovery was offered.

25. Throughout this entire process, MS & Co. and its counsels' lack of candor has frustrated the Court and opposing counsel's ability to be fully and timely informed.

26. MS & Co.'s failure during the summer and fall of 2004 to timely process a substantial amount of data that was languishing in the "staging area," rather than being put into searchable form and then searched, was willful and a gross abuse of its discovery obligations.

27. MS & Co.'s failure to timely notify CPH of the existence of the DLT and 8-mm tapes, which it had located as early as 2002 and certainly prior to the June 23, 2004 certification, and its

failure to timely process those raw backup tapes was willful and a gross abuse of its discovery obligations.

28. MS & Co.'s failure to produce all e-mail attachments was negligent, and it was discovered and revealed only as a result of CPH's hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check MS & Co.'s compliance with the April 16, 2004 Agreed Order.

29. MS & Co.'s failure to produce all of the Lotus Notes e-mails was negligent, and it was discovered and revealed only as result of CPH's hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check MS & Co.'s compliance with the April 16, 2004 Agreed Order.

30. MS & Co.'s failure to locate other potentially responsive backup tapes before Saturday, February 12, 2005 was grossly negligent.

31. Given the history of the discovery, there is no way to know if all potentially responsive backup tapes have been located.

32. In sum, despite MS & Co.'s affirmative duty arising out of the litigation to produce its e-mails, and contrary to federal law requiring it to preserve the e-mails, MS & Co. failed to preserve many e-mails and failed to produce all e-mails required by the Agreed Order. The failings include overwriting e-mails after 12 months; failing to conduct proper searches for tapes that may contain e-mails; providing a certificate of compliance known to be false when made and only recently withdrawn; failing to timely notify CPH when additional tapes were located; failing to use reasonable efforts to search the newly discovered tapes; failing to timely process and search data held in the staging area or notify CPH of the deficiency; failing to write software scripts consistent with the Agreed Order; and discovering the deficiencies only after CPH was given the opportunity to check MS & Co.'s work and

16div-018539

the MS & Co.'s attorneys were required to certify the completeness of the prior searches. Many of these failings were done knowingly, deliberately, and in bad faith.

It is clear that e-mails existed which were requested by CPH that have not been produced because of the deficiencies discussed above. Electronic data are the modern-day equivalent of the paper trail. Indeed, because of the informalities of e-mail, correspondents maybe less guarded than with paper correspondence. In this case, the paper trail is critical to CPH's ability to make out its prima facie case. Thus, MS & Co.'s acts have severely hindered CPH's ability to proceed. The only way to test the potentially self-serving testimony of MS & Co. personnel is with the written record of the events.

The failures outlined in this Order are of two types. First, by overwriting e-mails contrary to its legal obligation to maintain there in readily accessible form for two years and with knowledge that legal action was threatened, MS & Co. has spoiled evidence, justifying sanctions. See Martino v. Wal-Mart Stores Inc., 835 So. 2d 1251 (Fla. 4th DCA 2003). "The appropriateness of sanctions for failing to preserve evidence depends on: (1) willfulness or bad faith of the responsible party, (2) the extent of prejudice suffered by the other party, and (3) what is required to cure the prejudice." Nationwide Lift Trucks Inc. v. Smith, 832 So. 2d 824, 826 (Fla. 4th DCA 2002). Second, MS & Co,'s **willful**~~willfull~~ disobedience of the Agreed Order justifies sanctions. See Rule 1.380 (b) (2), Fla. R. Civ. P. The conclusion is inescapable that MS & Co. sought to thwart discovery *in this specific case*.

Sanctions in this context are not meant to be punitive. They are intended, though, to level the playing field.

A reasonable juror could conclude that evidence of MS & Co.'s misconduct demonstrates its consciousness of **guilt**~~guilty~~. It is relevant to the issues before the jury. Further, CPH should not be penalized by being forced to divert the jurors' attention away from the merits of its claim to focus on highly technical facts going to MS & Co.'s failures here, facts that are not reasonably disputed. Evidence of that failure, though, alone does not make CPH whole. Indeed, it can be said it is not a "sanction" at all, but

merely a statement of unrefuted facts that the jury may find relevant. Shifting the burden of proof, though, forces MS & Co. to accept the practical consequence of its failures-that some information will never be known. Obviously, this sanction is of consequence only in the marginal case. If there is overwhelming proof of MS & Co.'s knowledge of the fraud and collusion with Sunbeam, CPH would have prevailed on those elements in any event. And, to the contrary, if there is overwhelming evidence MS & Co. did not know of the fraud or conspire with or aid Sunbeam in its commission, it would have prevailed in any event. If the case is close on those issues, though, MS & Co., not CPH, should bear the burden of persuasion. Further, shifting the burden on the fraud issue does not relieve CPH of its obligation to establish the other elements of its claims, most notably reliance, proof of which is independent of the MS & Co. e-mails. Thus, the sanctions chosen are the most conservative available to the Court to address the spoliation~~spoilation~~ of evidence and willful~~willfull~~ violation of the Agreed Order.[1] [2]

Finally, the Court notes that CPH has requested the e-mails since May of 2003. MS & Co. was supposed to comply with the April 16, 2004 Order by May 14, 2064. Fact discovery in this case closed November 24, 2004. MS & Co.'s actions have resulted in the diversion of enormous amounts of resources, by both the parties and the Court, into a fact discovery dispute that should have never arisen and which would have long ago been put to bed had MS & Co. timely recognized its obligations to CPH and this Court. Opening argument in this complex case is set for March 21, 2005. Preliminary jury selection has

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[1] MS & Co.'s bad acts and pocket book may not be used to gain the continuance it has sought from the beginning. Further, the Court has no confidence that, even if a continuance were granted, MS & Co. would fully comply with discovery in this case.

[2] The undersigned notes that the sanctions imposed are not enumerated in Rule 1.380 (b) (2), and is aware of the concern expressed in the 2000 Handbook on Discovery Practice, Joint Committee of the Trial Lawyers Section of the Florida Bar and Conferences of Circuit and County Court Judges ("(f)or the trial court to be on solid footing, it is wise to stay within the enumerated orders" [Handbook at p. 4]). However, MS & Co.'s violations involve both the violation of a discovery order and the intentional spoliation~~spoiliation~~ of evidence. The sanction imposed is *less* severe than that provided in Rule 1.380 (b) (2) (B), under which the Court could preclude MS & Co. from presenting evidence of its lack of

16div-018541

begun. MS & Co. has controlled the timetable of this portion of the litigation long enough. Consequently, CPH should have the ability to continue to require MS & Co, to attempt to comply with the Agreed Order and the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search, or to elect to terminate the e-mail discovery and concentrate on trial preparation.

Based on the foregoing, it is

ORDERED AND ADJUDGED that:

1. Plaintiff's Motion for Adverse Interference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Non-Compliance with the Court's April 16, 2004 Agreed Order and Motion for Additional Relief is GRANTED.

2. MS & Co. shall continue to use its best efforts to comply with the April 16, 2004 Agreed Order and shall continue to comply with the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search until March 21, 2005 or written notice from CPH, which ever first occurs. Either party shall notify the other in writing of its intention to offer into evidence e-mails actually produced to CPH prior to termination of e-mail discovery in conformity with this Order, within 72 hours of the e-mail's production to CPH. The Court shall hear and determine any objections to use of the e-mails.

3. The Court shall read to the jury the statement of facts attached as Exhibit A during whatever evidentiary phase of CPH's case that it requests, These findings of fact shall be conclusive. See Rule 1.380 (b) (2) (A). No instruction shall be given to the jury regarding inferences to be drawn from these facts. However, counsel may make such argument to the jury in favor of whatever inferences

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knowledge of or collusion with the Sunbeam fraud, which the Court finds is the least severe enumerated sanction appropriate to place the parties on a level playing field.

that evidence may support. No other evidence concerning the production of e-mails, or lack thereof, shall be presented absent further Court order.

4. CPH will be allowed to argue that MS & Co.'s concealment of its role in the Sunbeam transaction is evidence of its malice or evil intent, going to the issue of punitive damages. See, e.g., General Motors Corp. v. McGee, 837 So.2d 10120.

5. MS & Co. shall bear the burden of proving to the jury, by the greater weight of the evidence, that it lacked knowledge of the Sunbeam fraud and did not aid and abet or conspire with Sunbeam to defraud CPH. The traditional order of proof shall remain unaffected, however.

6. MS & Co. shall compensate CPH for costs and fees associated with the Motion. The amount shall be determined at an evidentiary hearing to be held after the completion of the trial.

7. Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-Mails is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ___day of March, 2005.

ELIZABETH T. MAAS
Circuit Court Judge

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EXHIBIT A

A federal regulation in effect in 1997 and all times since required Morgan Stanley to preserve e-mails for three years and to preserve them in a readily accessible place for two years. Beginning in no later than 1997, Morgan Stanley had a practice of overwriting e-mails after 12 months. E-mails could no longer be retrieved once they were overwritten. This practice was discontinued in January, 2001. CPH has sought access to Morgan Stanley's e-mails relating to this transaction since the case was filed in May, 2003.

Prior to 2003, Morgan Stanley recorded e-mails and other electronic data on back up tapes. On April 16, 2004, the Court ordered Morgan Stanley to (1) search the oldest full backup tape for each of 36 Morgan Stanley employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all e-mails relating to this case found by the search I have just described; and (4) certify its full compliance with the Court's order.

On May 14, 2004, Morgan Stanley produced approximately 1,300 pages of e-mails. It did not produce the required certification. On June 23, 2004, after inquiries by CPH, Morgan Stanley provided CPH with a certificate of full compliance with the April 16 Order signed by Arthur Ricl, the Morgan Stanley manager assigned this task.

As organized by Morgan Stanley, the effort to recover e-mails from the backup tapes had several stages. First, the relevant backup tapes had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc., which I will call "NDCI", to be processed, and the data returned to Morgan Stanley. Third, Morgan Stanley had to upload the processed data into its e-mail archive. Fourth, Morgan Stanley had to run scripts, or pieces of computer code, to transform this data into a searchable form. Finally, Morgan Stanley had to search the data for e-mails related to this case. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when the processed data returned by NDCI remained in limbo, waiting to be uploaded to Morgan Stanley's archive.

At some point prior to May 6, 2004, Arthur Riel and his team became aware that 1,423 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423 tapes had not been processed by NDCI and thus had not been included in the archive or searched when Morgan Stanley made its production to CPH on May 14, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification of full compliance with the Court's April 16, 2004 Order that it was false. He and others on Morgan Stanley's e-mail archive team knew by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990's. During the summer of 2004, the Brooklyn tapes were processed and the data sent to the staging area. The scripts for e-mails **relating to this case** were not written and tested to permit the search ~~for e-mails relating to this case~~ to begin until the middle of January, 2004. Such a search, even if perfectly done, can take weeks.

Morgan Stanley also failed to timely produce e-mails from 738 backup tapes found at a Morgan Stanley facility in Manhattan in 2002. These 738 tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched by either ~~on~~ May 14, 2004**, when the Court's order required production,** or June 23, 2004**, when Morgan Stanley falsely certified that full production had been made**. Mr. Riel and others were told by NDCI by July 2, 2004 that these tapes contained e-mail dating back at least to 1998. During the summer of 2004, ~~the~~ these tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not searched.

In the course of these proceedings, Morgan Stanley represented to the Court that the first time anyone knew that there was recoverable e-mail data on the Brooklyn tapes was in October 2004. That statement was false. The actual date was at least three months earlier than that, no later than July 2, 2004.

In August 2004, Mr. Riel was relieved of his employment responsibilities **for reasons unrelated to Morgan Stanley's false certification**. He and his team were replaced by a new team headed by Allison Gorman Nachtigal. At that time, the staging area contained about 600 gigabytes of e-mail data that had not yet been uploaded into the Morgan Stanley archive and had not been searched for e-mails relating to this case. **600 gigabytes of data is the equivalent of approximately 30 million printed pages.**

Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts

to address the backlog of data in the staging area. Indeed, she was not informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman gave the project somewhat greater priority, although even then it did not move as expeditiously as possible. Morgan Stanley did not consider using an outside contractor to expedite the process.

In November 2004, Morgan Stanley produced additional e-mails and attachments to CPH. Morgan Stanley told CPH that those materials came from newly discovered tapes. That statement was false. In fact, Morgan Stanley did not begin searching the materials from the staging area until January 2005.

Morgan Stanley found another 169 DLT tapes in January, 2005, that according to Morgan Stanley had been misplaced by its New Jersey storage vendor. Morgan Stanley later disclosed the existence of ~~discovered~~ more than 200 additional unsearched backup tapes openly stored in locations known to be used for tape storage, which Morgan Stanley claimed to have discovered on February 11 and 12, 2005.

~~On February 11, 2005~~ Morgan Stanley claims to have discovered on February 11, 2005 that a flaw in the software it had written had prevented Morgan Stanley from locating all e-mail attachments about the Sunbeam transaction. Morgan Stanley also admits ~~discovered on February 13, 2005,~~ that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so that additional e-mail messages that appeared to fall within the scope of the April 16, 2004 Order had not been given to CPH. Further, it appears that the problem infected Morgan Stanley's original searches in May of 2004. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the transaction under review here.

Morgan Stanley claims to have discovered the Lotus Notes defects in the searches on February 13, 2005. Both the e-mail attachment defects and the Lotus Notes defects in Morgan Stanley's searches were revealed only as a result of CPH's hiring of a third-party vendor, pursuant to the Court's Order on February 4, 2005, to double-check Morgan Stanley's compliance with the April 16, 2004 Order. On February 16, 2005, Morgan Stanley withdrew its certificate of compliance with the April 16, 2004 Order.

On February 19, 2005 Morgan Stanley notified CPH that it had found boxes of additional tapes that have not been uploaded into its archive or searched for responsive e-mails. Morgan Stanley did not

tell CPH it had found any tapes that it had not searched until November 17, 2004. Even then, it did not tell CPH how many tapes were found, when they were found, or when they would be searched. MS & Co. did not provide all of this information to CPH until February of 2005. The searches had not yet been completed when this trial was begun, when they were terminated without completion.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 502003CA005045XXOCAI

COLEMAN (PARENT) HOLDINGS INC.
Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

FURTHER AMENDED ORDER ON COLEMAN (PARENT) HOLDINGS, INC.'S MOTION FOR ADVERSE INFERENCE INSTRUCTION DUE TO MORGAN STANLEY'S DESTRUCTIONS OF E-MAILS AND MORGAN STANLEY'S NONCOMPLIANCE WITH THE COURT'S APRIL 16 2004 AGREED ORDER, AND MOTION FOR ADDITIONAL RELIEF AND ORDER ON PLAINTIFF'S MOTION TO COMPEL FURTHER DISCOVERY REGARDING MORGAN STANLEY'S DESTRUCTION AND NON-PRODUCTION OF E-MAILS

THIS CAUSE came before the Court on February 14, 2005 on Coleman (Parent) Holdings, Inc.'s ("CPH's") Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, as modified by CPH's February 14, 2005 ore tenus motion for additional relief, and on February 28, 2005 on Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-Mails, with both counsel present. Based on evidence introduced, the Court finds:

1. CPH has sued Defendant, Morgan Stanley & Co., Inc. ("MS & Co."), for fraud in connection with CPH's sale of its stock in Coleman, Inc., to Sunbeam Corporation in return for Sunbeam stock. Whether MS & Co. had knowledge of the fraudulent scheme undertaken by Sunbeam in 1997 and early 1998 and, if so, the extent of that knowledge, is central to the case. CPH has sought access to MS & Co.'s internal files, including e-mails, since the case was filed.

2. Though MS & Co. instructed its investment bankers to preserve paper documents in their possession in connection with the Sunbeam transaction in February, 1999, it continued its practice of overwriting e-mails after 12 months, despite an SEC regulationn requiring all e-mails be retained in readily accessible form for two years. *See* 17 C.F.R. §240.17a-4 (1997).

3. On April 16, 2004, the Court entered its Agreed Order requiring MS & Co. to (1) search the oldest full backup tape for each of 36 MS & Co. employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all nonprivileged e-mails responsive to CPH's document requests; (4) give CPH a privilege log; and (5) certify its full compliance with the Agreed Order.

4. On May 14, 2004, MS & Co. produced approximately 1,300 pages of e-mails but failed to provide the required certification. Finally, on June 23, 2004, after inquiries by CPH, MS & Co. provided CPH with a certificate of full compliance with the April 16 Agreed Order signed by Arthur Riel, the MS & Co. manager assigned this task.

5. As organized by MS & Co., the effort to recover e-mails from any remaining backup tapes had several stages. First, the relevant backup tapes (in various formats, such as "DLT" tapes and eight-millimeter tapes) had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc. ("NDC"), to be processed, and the data returned to MS & Co. in the form of "SDLT" tapes. Third, MS & Co. had to find a way to upload the contents of these SDLT tapes into its new e-mail archive. Fourth, MS & Co. would run "scripts" to transform this data into a searchable form, so that it could later be searched for responsive e-mails. MS & Co. personnel used the term "staging area" to describe the stage of the process when SDLT tapes remained in limbo, waiting to be uploaded to the archive.

6. At some point prior to May 6, 2004, Arthur Riel and his team became aware that more than 1,000 backup tapes had been found at a MS & Co. facility in Brooklyn, New York. These 1,423 DLT tapes had not been processed by NDCI and thus had not been included in the archive or searched when MS & Co. made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification that it was false. He and others on MS & Co.'s e-mail archive team knew by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990's. MS & Co. neither withdrew its certification nor informed CPH about the potential for additional production of e-mails, however. During the summer of 2004, the Brooklyn tapes were processed and sent to the staging area, but they were not uploaded to the e-mail archive so as to be available to be searched until January2005, at least eight months after they were found.

7. MS & Co. also failed to timely produce e-mails from 738 8-millimeter backup tapes found at a MS & Co. facility in Manhattan, in 2002. These 738 8-mm tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched when MS & Co. made its supposedly complete production on May 14, 2004, and when Mr. Riel certified full compliance with the Agreed Order on June 23, 2004. Mr. Riel and others were told by their vendor, NDCI, by July 2, 2004 that the 8-mm tapes contained e-mail dating back at least to 1998. MS & Co. neither withdrew its certification nor informed CPH about the potential for additional production of e-mails, though. During the summer of 2004, the 8-mm tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not uploaded to MS & Co.'s e-mail archive.

8. In August 2004, Mr. Riel was relieved of his employment responsibilities. He and his team were replaced by a new team headed by Allison Gorman Nachtigal.

9. Ms. Gorman testified that she was instructed to describe the circumstances of Mr. Riel's replacement as his having been "placed on administrative leave." That same term appears by interlineation over the original typed description in MS & Co.'s memorandum addressing these issues. The typed language stated: "[Mr. Riel was] dismissed for integrity issues." MS & Co. represented that the reason for the adverse action taken against Mr. Riel was unrelated to any concern about the accuracy of his June 23, 2004 certification. However, MS & Co. presented no evidence to explain why Mr. Riel would have been placed on administrative leave rather than terminated. CPH argued that it may have been to deprive CPH of the ability to contact him directly.

10. Upon taping over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area; indeed, she was not informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman met with a group of MS & Co. attorneys. Following that meeting, Ms. Gorman gave the project somewhat greater priority, although even then it clearly did not move as expeditiously as possible. For example, MS & Co. gave no thought to using an outside contractor to expedite the process of completing the discovery, though it had certified completion months earlier; it lacked the technological capacity to upload and search the data at that time, and would not attain that capacity for months; and it knew trial was scheduled to begin in February, 2005. Even at this point, no one from MS & Co. or its outside counsel, Kirkland & Ellis LLP, gave CPH or this Court any hint that the June certification was false.

11. On November 17, 2004, more than six months after the May 14, 2004 deadline for producing e-mails in response to the Agreed Order, MS & Co. sent CPH a letter revealing that its June 23 certificate of compliance was incorrect. The letter stated:

> Morgan Stanley has discovered additional e-mail backup tapes since our e-mail production in May 2004. The data on some of [the] newly discovered tapes has been restored and, to ensure continued compliance

16div-018551

> with the agreed order, we have re-run the searches described in the order. Some responsive e-mails have been located as a result of that process. We will produce the responsive documents to you as soon as the production is finalized.

The letter also foreshadowed further delays: "(s)ome of the backup tapes are still being restored. To ensure continued compliance with the agreed order, we intend to re-run the searches again when the restoration process is complete and will produce any responsive documents that result."

12. The next day, November 18, 2004, MS & Co. produced an additional 8,000 pages of e-mails and attachments. MS & Co.'s November 2004 letter stated that the 8,000 pagers came from "newly discovered" tapes; but the testimony now makes clear that this statement was false because Ms. Gorman's team did not figure out how to upload and make searchable the materials from the staging area until January, 2005.

13. MS & Co. has failed to offer any explanation to reconcile the obvious conflict between its assertions at the time of production that the 8,000 pages came from "newly discovered" tapes (*i.e.*, the "Brooklyn tapes") and the testimony of its own witness, Ms. Gorman, that data from those newly discovered tapes were not capable of being searched until two months later, in January.

14. After a follow-up inquiry by CPH, on December 17, 2004, MS & Co. produced a privilege log and told CPH that "[n]o additional responsive e-mails have been located since our November production." MS & Co. refused to answer CPH's questions about whether MS & Co. had restored all the backup tapes described in its November 17 letter and why the tapes had not been located earlier, however.

15. On December 30, 2004, CPH sought confirmation that MS & Co. had reviewed all e-mail backup tapes and produced all responsive e-mails and, if not, asked when the review would be completed. On January 11, 2005, MS & Co. informed CPH that the "restoration of e-mail backup tapes

is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

16. On January 19, 2004, CPH wrote asking MS & Co. to explain the circumstances under which MS & Co. located the "newly discovered" backup tapes and to disclose when the tapes were located. CPH also asked MS & Co. to explain why the backup tapes could not be restored sooner.

17. On January 21, 2005, MS & Co. sent CPH a letter that failed to answer CPH's questions. Instead, MS & Co. described its efforts to restore the backup tapes as "ongoing"; informed CPH that "there is no way for MS & Co. to know or accurately predict the type or time period of data that might be recovered"; and stated that MS & Co. "cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes."

18. On January 26, 2005, CPH filed the Motion at issue here, asking the Court to instruct the jury that MS & Co.'s destruction of e-mails and other electronic documents and MS. & Co.'s noncompliance with the April 16, 2004 Agreed Order can give rise to an adverse inference that the contents of the missing e-mails would be harmful to MS & Co.'s defense in this case.

19. Meanwhile, MS & Co. found another 169 DLT tapes in January, 2005, that allegedly had been misplaced by its New Jersey storage vendor, Recall. Again, MS & Co., chose to provide no specifics to CPH or to the Court.

20. At a February 2, 2005 hearing on CPH's Motion, Thomas A. Clare of Kirkland & Ellis, LLP, representing MS & Co., stated that "late October of 2004...[is] the date I'm representing to the Court is the first time that anyone knew that there was recoverable e-mail data" on the Brooklyn tapes. Hr'g Tr. (2/2/05) at 133-34. The actual date, however, was at least three months earlier, by July 2, 2004. Furthermore, MS & Co. refused to provide the Court with definitive answers about when its e-mail production would be complete, merely stating that it would proceed with "all deliberate speed." *Id.* at 139. Also at the February 2 hearing, Mr. Clare neglected to inform the Court about the 8-mm

tapes that had been located in 2002, and told the Court that the 1,423 DLT tapes had been found in Brooklyn "sometime during the summer" of 2004. The truth of this assertion is belied by the evidence showing that the tapes were found before May 6, 2004.

21. On February 3, 2005, the Court ordered further discovery and set an evidentiary hearing for February 14, 2005. The discovery took place on February 9 and 10, when CPH deposed the three e-mail witnesses identified by MS. & Co.

22. On Saturday afternoon, February 12, 2005, MS & Co. informed the Court that it had, in the previous 24 hours, discovered additional tapes. Also, MS & Co. stated that its recent production omitted certain "attachments" to e-mails. MS & Co. did not attempt to clarify or substantiate either of these statements to CPH or to the Court until the Monday, February 14, 2005 hearing.

23. At the February 14 hearing, none of the witnesses MS & Co. presented was involved in or familiar with the actual electronic searches conducted using the parameters specified in this Court's April 16, 2004 Agreed Order, and none explained where the 8,000 pages produced in November, 2004 had come from. MS & Co.'s witnesses did, however, describe three new developments. First, Robert Saunders, a Morgan Stanley executive director in the Information Technology Division, testified that he returned to New York after his February 10 deposition and, concerned about his unqualified deposition assertion that he was "confident" that a complete search for backup tapes had been conducted, decided finally to undertake a personal search of MS & Co.'s "communication rooms," going to the areas he thought most obvious first. By doing so, he and two contractors discovered more than 200 additional backup tapes openly stored in locations known to be used for tape storage. Those discoveries were made on Friday and Saturday, February 11 and 12, 2005. As of the February 14 hearing, NDCI had not yet determined which, if any, of these newly discovered backup tapes contained e-mails. Second, Ms. Gorman reported that on Friday, February 11, 2005 she and her team had discovered that a flaw in the software they had written had prevented MS & Co. from locating all

responsive e-mail attachments. Third, Ms. Gorman reported that MS & Co. discovered on Sunday evening, February 13, 2005, that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so there were at least 7,000 additional e-mail messages that appeared to fall within the scope of the Agreed Order had yet to be fully reviewed by MS. & Co.'s outside counsel for responsiveness and privilege. As counsel for MS & Co. admitted, this problem "dwarf[s]" their previous problems. Hr'g Tr. (2/14/05) at 13. Ms. Gorman indicated she was "90 percent sure" that the problem infected MS & Co.'s original searches in May, which means that MS & Co. even then failed to timely produce relevant materials that had been uploaded into the archive by that point. *Id.* at 82-83. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the transaction under review here.

24. On February 19, 2045 MS & Co. informed counsel for CPH that "additional boxes of back up tapes" have been located "in a security room" and that, "(a)s of this morning, Morgan Stanley has identified four (unlabled) DLT tapes among the collection. Those four tapes will be sent to NDCI for further analysis." The disclosure did not state when the discovery was made. MS & Co.'s counsel represented to the Court that it was his understanding that about 73 bankers' boxes of tapes were discovered. No explanation for the late discovery was offered.

25. Throughout this entire process, MS & Co. and its counsels' lack of candor has frustrated the Court and opposing counsel's ability to be fully and timely informed.

26. MS & Co.'s failure during the summer and fall of 2004 to timely process a substantial amount of data that was languishing in the "staging area," rather than being put into searchable form and then searched, was willful and a gross abuse of its discovery obligations.

27. MS & Co.'s failure to timely notify CPH of the existence of the DLT and 8-mm tapes, which it had located as early as 2002 and certainly prior to the June 23, 2004 certification, and its

failure to timely process those raw backup tapes was willful and a gross abuse of its discovery obligations.

28. MS & Co.'s failure to produce all e-mail attachments was negligent, and it was discovered and revealed only as a result of CPH's hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check MS & Co.'s compliance with the April 16, 2004 Agreed Order.

29. MS & Co.'s failure to produce all of the Lotus Notes e-mails was negligent, and it was discovered and revealed only as result of CPH's hiring a third-party vendor, pursuant to the Court's February 4, 2005 Order, to double-check MS & Co.'s compliance with the April 16, 2004 Agreed Order.

30. MS & Co.'s failure to locate other potentially responsive backup tapes before Saturday, February 12, 2005 was grossly negligent.

31. Given the history of the discovery, there is no way to know if all potentially responsive backup tapes have been located.

32. In sum, despite MS & Co.'s affirmative duty arising out of the litigation to produce its e-mails, and contrary to federal law requiring it to preserve the e-mails, MS & Co. failed to preserve many e-mails and failed to produce all e-mails required by the Agreed Order. The failings include overwriting e-mails after 12 months; failing to conduct proper searches for tapes that may contain e-mails; providing a certificate of compliance known to be false when made and only recently withdrawn; failing to timely notify CPH when additional tapes were located; failing to use reasonable efforts to search the newly discovered tapes; failing to timely process and search data held in the staging area or notify CPH of the deficiency; failing to write software scripts consistent with the Agreed Order; and discovering the deficiencies only after CPH was given the opportunity to check MS & Co.'s work and

the MS & Co.'s attorneys were required to certify the completeness of the prior searches. Many of these failings were done knowingly, deliberately, and in bad faith.

It is clear that e-mails existed which were requested by CPH that have not been produced because of the deficiencies discussed above. Electronic data are the modern-day equivalent of the paper trail. Indeed, because of the informalities of e-mail, correspondents maybe less guarded than with paper correspondence. In this case, the paper trail is critical to CPH's ability to make out its prima facie case. Thus, MS & Co.'s acts have severely hindered CPH's ability to proceed. The only way to test the potentially self-serving testimony of MS & Co. personnel is with the written record of the events.

The failures outlined in this Order are of two types. First, by overwriting e-mails contrary to its legal obligation to maintain there in readily accessible form for two years and with knowledge that legal action was threatened, MS & Co. has spoiled evidence, justifying sanctions. See Martino v. Wal-Mart Stores Inc., 835 So. 2d 1251 (Fla. 4th DCA 2003). "The appropriateness of sanctions for failing to preserve evidence depends on: (1) willfulness or bad faith of the responsible party, (2) the extent of prejudice suffered by the other party, and (3) what is required to cure the prejudice." Nationwide Lift Trucks Inc. v. Smith, 832 So. 2d 824, 826 (Fla. 4th DCA 2002). Second, MS & Co,'s willful disobedience of the Agreed Order justifies sanctions. See Rule 1.380 (b) (2), Fla. R. Civ. P. The conclusion is inescapable that MS & Co. sought to thwart discovery *in this specific case*.

Sanctions in this context are not meant to be punitive. They are intended, though, to level the playing field.

A reasonable juror could conclude that evidence of MS & Co.'s misconduct demonstrates its consciousness of guilt. It is relevant to the issues before the jury. Further, CPH should not be penalized by being forced to divert the jurors' attention away from the merits of its claim to focus on highly technical facts going to MS & Co.'s failures here, facts that are not reasonably disputed. Evidence of that failure, though, alone does not make CPH whole. Indeed, it can be said it is not a "sanction" at all, but merely a

16div-018557

statement of unrefuted facts that the jury may find relevant. Shifting the burden of proof, though, forces MS & Co. to accept the practical consequence of its failures-that some information will never be known. Obviously, this sanction is of consequence only in the marginal case. If there is overwhelming proof of MS & Co.'s knowledge of the fraud and collusion with Sunbeam, CPH would have prevailed on those elements in any event. And, to the contrary, if there is overwhelming evidence MS & Co. did not know of the fraud or conspire with or aid Sunbeam in its commission, it would have prevailed in any event. If the case is close on those issues, though, MS & Co., not CPH, should bear the burden of persuasion. Further, shifting the burden on the fraud issue does not relieve CPH of its obligation to establish the other elements of its claims, most notably reliance, proof of which is independent of the MS & Co. e-mails. Thus, the sanctions chosen are the most conservative available to the Court to address the spoliation of evidence and willful violation of the Agreed Order.[1] [2]

Finally, the Court notes that CPH has requested the e-mails since May of 2003. MS & Co. was supposed to comply with the April 16, 2004 Order by May 14, 2064. Fact discovery in this case closed November 24, 2004. MS & Co.'s actions have resulted in the diversion of enormous amounts of resources, by both the parties and the Court, into a fact discovery dispute that should have never arisen and which would have long ago been put to bed had MS & Co. timely recognized its obligations to CPH and this Court. Opening argument in this complex case is set for March 21, 2005. Preliminary jury selection has

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[1] MS & Co.'s bad acts and pocket book may not be used to gain the continuance it has sought from the beginning. Further, the Court has no confidence that, even if a continuance were granted, MS & Co. would fully comply with discovery in this case.

[2] The undersigned notes that the sanctions imposed are not enumerated in Rule 1.380 (b) (2), and is aware of the concern expressed in the 2000 Handbook on Discovery Practice, Joint Committee of the Trial Lawyers Section of the Florida Bar and Conferences of Circuit and County Court Judges ("(f)or the trial court to be on solid footing, it is wise to stay within the enumerated orders" [Handbook at p. 4]). However, MS & Co.'s violations involve both the violation of a discovery order and the intentional spoliation of evidence. The sanction imposed is *less* severe than that provided in Rule 1.380 (b) (2) (B), under which the Court could preclude MS & Co. from presenting evidence of its lack of knowledge of or

16div-018558

begun. MS & Co. has controlled the timetable of this portion of the litigation long enough. Consequently, CPH should have the ability to continue to require MS & Co, to attempt to comply with the Agreed Order and the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search, or to elect to terminate the e-mail discovery and concentrate on trial preparation.

Based on the foregoing, it is

ORDERED AND ADJUDGED that:

1. Plaintiff's Motion for Adverse Interference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Non-Compliance with the Court's April 16, 2004 Agreed Order and Motion for Additional Relief is GRANTED.

2. MS & Co. shall continue to use its best efforts to comply with the April 16, 2004 Agreed Order and shall continue to comply with the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search until March 21, 2005 or written notice from CPH, which ever first occurs. Either party shall notify the other in writing of its intention to offer into evidence e-mails actually produced to CPH prior to termination of e-mail discovery in conformity with this Order, within 72 hours of the e-mail's production to CPH. The Court shall hear and determine any objections to use of the e-mails.

3. The Court shall read to the jury the statement of facts attached as Exhibit A during whatever evidentiary phase of CPH's case that it requests, These findings of fact shall be conclusive. See Rule 1.380 (b) (2) (A). No instruction shall be given to the jury regarding inferences to be drawn from these facts. However, counsel may make such argument to the jury in favor of whatever inferences

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collusion with the Sunbeam fraud, which the Court finds is the least severe enumerated sanction appropriate to place the parties on a level playing field.

that evidence may support. No other evidence concerning the production of e-mails, or lack thereof, shall be presented absent further Court order.

4. CPH will be allowed to argue that MS & Co.'s concealment of its role in the Sunbeam transaction is evidence of its malice or evil intent, going to the issue of punitive damages. See, e.g., General Motors Corp. v. McGee, 837 So.2d 10120.

5. MS & Co. shall bear the burden of proving to the jury, by the greater weight of the evidence, that it lacked knowledge of the Sunbeam fraud and did not aid and abet or conspire with Sunbeam to defraud CPH. The traditional order of proof shall remain unaffected, however.

6. MS & Co. shall compensate CPH for costs and fees associated with the Motion. The amount shall be determined at an evidentiary hearing to be held after the completion of the trial.

7. Plaintiff's Motion to Compel Further Discovery Regarding Morgan Stanley's Destruction and Non-Production of E-Mails is Denied.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ___day of March, 2005.

ELIZABETH T. MAAS
Circuit Court Judge

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EXHIBIT A

A federal regulation in effect in 1997 and all times since required Morgan Stanley to preserve e-mails for three years and to preserve them in a readily accessible place for two years. Beginning in no later than 1997, Morgan Stanley had a practice of overwriting e-mails after 12 months. E-mails could no longer be retrieved once they were overwritten. This practice was discontinued in January, 2001. CPH has sought access to Morgan Stanley's e-mails relating to this transaction since the case was filed in May, 2003.

Prior to 2003, Morgan Stanley recorded e-mails and other electronic data on back up tapes. On April 16, 2004, the Court ordered Morgan Stanley to (1) search the oldest full backup tape for each of 36 Morgan Stanley employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998 through April 15, 1998 and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman", regardless of their date; (3) produce by May 14, 2004 all e-mails relating to this case found by the search I have just described; and (4) certify its full compliance with the Court's order.

On May 14, 2004, Morgan Stanley produced approximately 1,300 pages of e-mails. It did not produce the required certification. On June 23, 2004, after inquiries by CPH, Morgan Stanley provided CPH with a certificate of full compliance with the April 16 Order signed by Arthur Riel, the Morgan Stanley manager assigned this task.

As organized by Morgan Stanley, the effort to recover e-mails from the backup tapes had several stages. First, the relevant backup tapes had to be located by searching the potential storage locations. Second, the tapes were sent to an outside vendor, National Data Conversion, Inc., which I will call "NDCI", to be processed, and the data returned to Morgan Stanley. Third, Morgan Stanley had to upload the processed data into its e-mail archive. Fourth, Morgan Stanley had to run scripts, or pieces of computer code, to transform this data into a searchable form. Finally, Morgan Stanley had to search the data for e-mails related to this case. Morgan Stanley personnel used the term "staging area" to describe the stage of the process when the processed data returned by NDCI remained in limbo, waiting to be uploaded to Morgan Stanley's archive.

At some point prior to May 6, 2004, Arthur Riel and his team became aware that 1,423 backup tapes had been found at a Morgan Stanley facility in Brooklyn, New York. These 1,423 tapes had not been processed by NDCI and thus had not been included in the archive or searched when Morgan Stanley made its production to CPH on May 14, 2004. Aware of the tapes' discovery, Mr. Riel knew when he executed the certification of full compliance with the Court's April 16, 2004 Order that it was false. He and others on Morgan Stanley's e-mail archive team knew by July 2, 2004 that these "Brooklyn tapes" contained e-mail dating back at least to the late 1990's. During the summer of 2004, the Brooklyn tapes were processed and the data sent to the staging area. The scripts for e-mails relating to this case were not written and tested to permit the search to begin until the middle of January, 2004. Such a search, even if perfectly done, can take weeks.

Morgan Stanley also failed to timely produce e-mails from 738 backup tapes found at a Morgan Stanley facility in Manhattan in 2002. These 738 tapes, like the 1,423 Brooklyn tapes, had not been processed by NDCI and thus had not been included in the archive and searched by either May 14, 2004, when the Court's order required production, or June 23, 2004, when Morgan Stanley falsely certified that full production had been made. Mr. Riel and others were told by NDCI by July 2, 2004 that these tapes contained e-mail dating back at least to 1998. During the summer of 2004, these tapes were processed and sent to the staging area. Like the Brooklyn tapes, though, they also were not searched.

In the course of these proceedings, Morgan Stanley represented to the Court that the first time anyone knew that there was recoverable e-mail data on the Brooklyn tapes was in October 2004. That statement was false. The actual date was at least three months earlier than that, no later than July 2, 2004.

In August 2004, Mr. Riel was relieved of his employment responsibilities for reasons unrelated to Morgan Stanley's false certification. He and his team were replaced by a new team headed by Allison Gorman Nachtigal. At that time, the staging area contained about 600 gigabytes of e-mail data that had not yet been uploaded into the Morgan Stanley archive and had not been searched for e-mails relating to this case. 600 gigabytes of data is the equivalent of approximately 30 million printed pages.

Upon taking over Mr. Riel's responsibilities, Ms. Gorman did not initially make significant efforts to address the backlog of data in the staging area. Indeed, she was not informed of the existence of this litigation until five months later, in January 2005. In October 2004, Ms. Gorman gave the project

somewhat greater priority, although even then it did not move as expeditiously as possible. Morgan Stanley did not consider using an outside contractor to expedite the process.

In November 2004, Morgan Stanley produced additional e-mails and attachments to CPH. Morgan Stanley told CPH that those materials came from newly discovered tapes. That statement was false. In fact, Morgan Stanley did not begin searching the materials from the staging area until January 2005.

Morgan Stanley found another 169 DLT tapes in January, 2005, that according to Morgan Stanley had been misplaced by its New Jersey storage vendor. Morgan Stanley later disclosed the existence of more than 200 additional unsearched backup tapes openly stored in locations known to be used for tape storage, which Morgan Stanley claimed to have discovered on February 11 and 12, 2005.

Morgan Stanley claims to have discovered on February 11, 2005 that a flaw in the software it had written had prevented Morgan Stanley from locating all e-mail attachments about the Sunbeam transaction. Morgan Stanley also admits that the date-range searches for e-mail users who had a Lotus Notes platform were flawed, so that additional e-mail messages that appeared to fall within the scope of the April 16, 2004 Order had not been given to CPH. Further, it appears that the problem infected Morgan Stanley's original searches in May of 2004. The bulk of the employees using the Lotus Notes platform in the relevant time period came from the Investment Banking Division, the division responsible for the transaction under review here.

Morgan Stanley claims to have discovered the Lotus Notes defects in the searches on February 13, 2005. Both the e-mail attachment defects and the Lotus Notes defects in Morgan Stanley's searches were revealed only as a result of CPH's hiring of a third-party vendor, pursuant to the Court's Order on February 4, 2005, to double-check Morgan Stanley's compliance with the April 16, 2004 Order. On February 16, 2005, Morgan Stanley withdrew its certificate of compliance with the April 16, 2004 Order.

On February 19, 2005 Morgan Stanley notified CPH that it had found boxes of additional tapes that have not been uploaded into its archive or searched for responsive e-mails. Morgan Stanley did not tell CPH it had found any tapes that it had not searched until November 17, 2004. Even then, it did not tell CPH how many tapes were found, when they were found, or when they would be searched. MS & Co. did not provide all of this information to CPH until February of 2005. The searches had not yet been completed when this trial was begun, when they were terminated without completion.

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

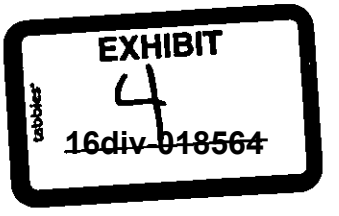
MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON CPH'S RENEWED MOTION FOR ENTRY OF DEFAULT JUDGMENT

THIS CAUSE came before the Court March 14 and 15, 2005, on CPH's Renewed Motion for Entry of Default Judgment, with both parties well represented by counsel.

Coleman (Parent) Holdings, Inc. ("CPH"), has sued Morgan Stanley & Co., Inc. ("MS & Co."), for aiding and abetting and conspiring with Sunbeam to perpetrate a fraud. Early in the case, CPH was concerned that MS & Co. was not thoroughly looking for emails responsive to its discovery requests. On April 16, 2004, the Court entered an Agreed Order ("Agreed Order") that required MS & Co. to search its oldest full backup tapes for emails subject to certain parameters and certify compliance. MS & Co. certified compliance with the Agreed Order on June 23, 2004. On November 17, 2004, CPH learned that MS & Co. had found some backup tapes that had not been searched. On January 26, 2005 it served its Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order ("Adverse Inference Motion"), claiming that MS & Co.'s violation of the Agreed Order, coupled with its systemic overwriting of emails after 12 months, justified an adverse inference against it. The Court ordered certain limited discovery. Responses to that discovery prompted CPH to orally amend its Adverse Inference Motion to seek more severe sanctions.

The Court held an evidentiary hearing on the Adverse Inference Motion on February



14, 2005. On March 1, 2005 it issued its Amended Order on Coleman (Parent) Holdings Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order ("Adverse Inference Order"). In its current Motion, CPH argues that it has since learned that the discovery abuses addressed in the Adverse Inference Motion and Order represent only a sampling of discovery abuses perpetrated by MS & Co. and that the abuses have continued, unabated. It claims that these abuses, when taken as a whole, infect the entire case. To understand CPH's argument, it is necessary to go back to the beginning.

This case arises out of an acquisition transaction that was negotiated and consummated in late 1997 and early 1998, in which CPH sold its 82% interest in the Coleman Company, Inc., to Sunbeam Corporation. MS & Co. served as financial advisor to Sunbeam for parts of the acquisition transaction and served as the lead underwriter for a $750,000,000.00 debenture offering that Sunbeam used to finance the cash portion of the deal.

CPH's Complaint[1] alleged claims against MS & Co. arising from this transaction for fraudulent misrepresentation, negligent misrepresentation, aiding and abetting fraud, and conspiracy, and sought damages of at least $485 million.

On May 12, 2003, MS & Co. was served with the Complaint and CPH's First Request for Production of Documents ("Request"). The Request sought, in essence, all documents connected with the Sunbeam deal. "Documents" was broadly defined, and specifically included items electronically stored. Concerned that, out of more than 8,000 pages of documents produced, it had received only a handful of emails, CPH on October 29, 2003, served its Motion to Compel Concerning E-Mails. That motion sought an order requiring MS & Co. to make a full investigation for email messages, including a search of magnetic tapes and hard drives; produce within 10 days all emails located; and produce a Rule 1.310 witness

[1]On February 17, 2005, CPH served its First Amended Complaint, which dropped the claims against MS & Co. for fraudulent and negligent misrepresentation, leaving only the aiding and abetting and conspiracy claims.

within 20 days "to describe the search that was conducted, identify any gaps in Morgan Stanley's production, and explain the reasons for any gaps."

In its Opposition to Coleman (Parent) Holdings, Inc.'s Motion to Compel served November 4, 2003, MS & Co. argued that CPH wanted "this Court to order a massive safari into the remote corners of MS & Co.'s email backup systems" and represented that "(t)he restoration efforts demanded by CPH would *cost at least hundreds of thousands of dollars* and require several months to complete (emphasis in original). MS & Co. argued that CPH's "true" motive was to "harass and burden MS & Co. with unnecessary and costly discovery demands and attempt to smear MS & Co. with out-of-context recitations from other proceedings" because "CPH *concedes* that MS & Co. is only able to restore email from backup tapes from January 2000 and later - *more than a year and a half after the events that allegedly gave rise to CPH's claims*," (emphasis in original).

CPH's "concession" was based on representations like the kind made to it by MS & Co.'s counsel in a March 11, 2004 letter that suggested "(t)he burden on Morgan Stanley from . . . a wholesale restoration [of email back up tapes], both in terms of dollars and manpower would be enormous. Regardless of who performs the initial restoration, it would require hundreds (perhaps thousands) of attorney-hours to review millions of irrelevant and non-responsive e-mails . . ."[2]

In response to CPH's Motion to Compel, the parties agreed to reciprocal corporate

[2]Complaints about MS & Co.'s tactics are not new. See Ex. 196 [February 26, 2004, letter from EEOC to Hon. Ronald L. Ellis in EEOC/Schieffelin v. Morgan Stanley & Co., Inc., et al., 01-CV-8421 (RMB) (RLE) (S.D.N.Y.): ("(w)hen EEOC received [Morgan Stanley's] January 27, 2004 Responses to EEOC's Fifth Requests for Production of Documents which did not contain any e-mails, the parties communicated further. At that time, Morgan Stanley took the position that searching for e-mails would be burdensome both in regards to expense and the time it would take to respond. While the parties were in the process of attempting to work out these disputes, EEOC for the first time learned that [Morgan Stanley has] an easy, systematic ability to search for relevant documents. In a February 16, 2004, conversation with an IT representative of [Morgan Stanley], EEOC learned that [Morgan Stanley has] an e-mail system, which, while not yet fully comprehensive, was easily searchable on February 18, 2004, the close of discovery . . . which is certain to produce discoverable information highly relevant to EEOC's and Plaintiff-Intervenor's claims . . . After disclosing their state-of-the-art system to EEOC, [Morgan Stanley] dropped [its] assertion that the process was too expensive, but maintained that they refuse to search for e-mails because it is burdensome for attorneys to review large numbers of documents prior to production.")

depositions on the email issue. CPH deposed Robert Saunders on February 10, 2004.[3] After completion of the corporate representative depositions, and unable to obtain MS & Co.'s agreement to a mutual email restoration protocol, CPH served its Motion for Permission to have Third Party Retrieve Morgan Stanley E-Mail and Other Responsive Documents, proposing that a third party vendor be given access to both parties' email systems for restoration at each party's expense. At the hearing on that Motion, CPH offered to split the expenses evenly. MS & Co. refused.

MS & Co.'s continued assertions that the email searches could be conducted only at enormous cost and would be fruitless because there were not backup tapes with email from 1997 and 1998 were confirmed to the Court by MS & Co.'s counsel, Thomas Clare of Kirkland & Ellis, at a hearing held March 19, 2004:

> Mr. Scarola: Electronic records of e-mails that have been exchanged.
> The Court: Do we agree that there has been such a request outstanding?
> Mr. Clare: There has been a request outstanding.
> The Court: And have you all objected?
> Mr. Clare: From the beginning.
> The Court: And what's the basis of the objection?
> Mr. Clare: We objected to the breadth of the request that they're making. And to answer Your Honor's question directly – and the burden that is associated with it – that given the particular e-mail back-up tapes that are in existence five, six years after the fact of these transactions, that the scope of the e-mail request that they are seeking is improperly and unduly burdensome given the enormous costs that would be required, given the fact that the time period for which we have back-up tapes post dates the events by several years.

Unable to resolve the email issue, on April 9, 2004, CPH served its Motion to Compel

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[3]Saunders provided misleading information in his deposition. See footnote 12, infra.

Concerning E-Mails and Other Electronic Documents. On the eve of the hearing on CPH's Motion to Compel, the parties reached an accommodation, and on April 16, 2004 the Court entered the Agreed Order. Under the Agreed Order, MS & Co. was required to (1) search the oldest full backup tape for each of 36 MS & Co. employees involved in the Sunbeam transaction; (2) review emails dated from February 15, 1998, through April 15, 1998, and emails containing any of 29 specified search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004, all nonprivileged emails responsive to CPH's document requests; (4) give CPH a privilege log; and (5) certify its full compliance with the Agreed Order.

As required by the Agreed Order, MS & Co. produced about 1,300 pages of emails on May 14, 2004. It did not, however, certify compliance with the Agreed Order. After prompting by CPH, on June 23, 2004, MS & Co. served a certificate of compliance signed by Arthur Riel, an Executive Director and manager of its Law/Compliance IT Group.[4]

CPH got its first indication that the Agreed Order may have been violated in the late fall of 2004.

On November 17, 2004, Clare wrote Michael Brody of Jenner & Block, CPH's outside counsel, that MS & Co. had "discovered additional e-mail backup tapes . . ."; that "(t)he data on some of [the] newly discovered tapes has been restored;" that "we have re-run the searches described in [the Agreed Order]"; that "some responsive e-mails have been located as a result of that process"; and that "(w)e will produce the responsive documents to you as soon as the production is finalized."

On December 14, 2004, Brody wrote Clare back:

> in [your November 17, 2004 letter], you state that Morgan Stanley located additional email backup tapes, and that you

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[4]Though CPH would not learn for months that the certificate was false, and even then the magnitude of MS & Co.'s misrepresentations would not be admitted, MS & Co. personnel, including in-house counsel, knew the certification of compliance was false when made.

> would be producing documents soon. Within two days of that letter, you produced some emails to us. In your November 17, 2004 letter, however, you also indicated that "some of the backup tapes are still being restored." Have those backup tapes been restored? Have you found additional responsive emails? If so, when will Morgan Stanley produce those emails? How is it that the tapes were only recently located?

On December 17, 2004, Clare wrote back, telling Brody "(n)o additional responsive e-mails have been located since our November production."[5]

Brody wrote back to Clare December 30, 2004, noting the deficiencies in Clare's correspondence:

> You do not inform us whether the review of the recently-located backup tapes still is ongoing. Please confirm that all email backup tapes from the relevant time period have been reviewed and all responsive emails have been produced. If the review still is proceeding, please let us know when the review will be completed.

Clare wrote back on January 11, 2005, telling Brody that the "restoration of e-mail backup tapes is ongoing. Restoration of the next set of backup tapes is estimated to be completed at the end of January. We intend to re-run the searches described in the agreed order at that time."

Concerned about Clare's lack of candor, on January 19, 2005 Brody wrote again:

> I write in response to your January 11, 2005 letter concerning e-mails back-up tapes. Unfortunately, your letter raises more questions than it answers. As I requested in my December 14, 2004 letter, please explain the circumstances under which Morgan Stanley located these backup tapes and advise us of the date on which the tapes were located.

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[5]Not only does this letter fail to answer Brody's legitimate questions, it implies that MS &Co. was still processing and reviewing emails from the newly found tapes. As we now know, though, *no* additional information was migrated to the archives between approximately August 18, 2004 and January 15, 2005. *Of course* "no additional responsive e-mails [would have been] located."

> Further, please explain your statement that "the next set of backup tapes" is scheduled to be restored "at the end of January." How many tapes will be restored by the end of January? When exactly in January will Morgan Stanley complete the process of restoring and searching these tapes for responsive documents? Are there other backup tapes that are not yet in the process of being restored? If so, please advise us of (a) the number of tapes that are not yet in the process of being restored; (b) the time period of the data contained on those tapes; and (c) Morgan Stanley's timetable for restoring and searching those tapes. In addition, please explain why those tapes are not yet in the process of being restored. Please also explain why Morgan Stanley cannot complete the restoration and searching of all remaining backup tapes before "the end of January." As you know, our trial is scheduled to begin on February 22, 2005.
>
> We look forward your complete response to these questions no later than January 21, 2005 so that we can bring this matter to the Court's attention, if necessary.

Conforming to what was by now his usual stonewall tactic, Clare responded by letter dated January 21, 2005:

> I write in response to your January 19, 2005 letter regarding Morgan Stanley's production of e-mails restored from backup tapes.
>
> Morgan Stanley completed its initial production of restored e-mail messages on May 14, 2005. The May 2004 production was conducted in accordance with the agreed-upon order governing, and the searches that resulted in that production encompassed data from all of the backup tapes known to exist at the time. Subsequent to the May 2004 production, additional tapes were found in various locations at Morgan Stanley. The discovered tapes were not clearly labeled as to their contents, were not found in locations where e-mail backup tapes customarily were stored, and many of the tapes

were in a different format than other e-mail backup tapes. In November 2004, once it was determined at least some of the discovered tapes contained recoverable e-mail data, Morgan Stanley re-ran the searches described in the agreed-upon order. Those searches resulted in Morgan Stanley's November 2004 production.

Morgan Stanley's efforts to restore the backup tapes discovered after the May 2004 production are ongoing. It is a time-consuming and painstaking process and, given the absence of clear labels or other index information for the backup tapes, there is no way for Morgan Stanley to know or accurately predict the type or time period of data that might be recovered from tapes that have yet to be restored. While Morgan Stanley cannot accurately estimate when all of the tapes will be restored or whether any recoverable data will be found on the remaining tapes, we understand from Morgan Stanley that, when the agreed-upon searches are run again at the end of January, those searches will include approximately one terabyte of additional data restored since the prior production.

On January 26, 2005, CPH served its Adverse Inference Motion, seeking sanctions based on MS & Co.'s disclosure of the newly found tapes. Hearing was scheduled for February 14, 2005. In preparation for that hearing, on February 3, 2005 the Court ordered MS & Co. to produce by noon on February 8, 2005 "(i) all documents to be referred to or relied on by any of the witnesses in his or her testimony; and (ii) all documents within MS & Co.'s care, custody, or control, addressing or related to the additional email backup tapes, including matters relating to the time or manner in which they were discovered; by whom they were discovered; who else learned of their discovery and when; and the manner and timetable by which they were be restored and made searchable, including any correspondence to or from outside or prospective outside vendors."

The Adverse Inference Order outlined the discovery abuses shown at the February 14, hearing. They included MS & Co.'s undisclosed discovery of the 1,423 "Brooklyn" tapes no

later than May of 2004; the undisclosed discovery of the 738 8-millimeter backup tapes in 2002; the presence of unsearched data in the staging area; the discovery of 169 DLT tapes in January 2005; the discovery of more than 200 additional tapes on February 11 and 12, 2005; the discovery of a script error that had prevented MS & Co. from locating responsive email attachments; and discovery of another script error that had infected the ability to gather emails from Lotus Notes platform users.

In response to these deficiencies, the Court issued the Adverse Inference Order. That Order reversed the burden of proof on the aiding and abetting and conspiracy elements and included a statement of evidence of MS & Co.'s efforts to hide its emails to be read to the jury, as relevant to both its consciousness of guilt and the appropriateness of punitive damages. It specifically provided that "MS & Co. shall continue to use its best efforts to comply with the April 16, 2004 Agreed Order and . . . February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s ore tenus Motion to Participate in Search of Additional E-Mail Back Up Tapes or Appoint Third Party to Conduct Search."[6]

It is now clear why MS & Co. was so unwilling to provide CPH with basic information about how and when the tapes were found or when production would be complete. First, candor would have required MS & Co. to admit that it had not done a good faith search for the oldest full backup tapes, and that Riel's certificate of compliance was false. Some unsearched tapes had been found by 2002; others had been found no later than May, 2004. Together, over 2,000 tapes had been found which were not searched prior to the May production. It is untrue that the tapes were "not in locations where e-mail backup tapes customarily were stored."

[6]Concerned that MS & Co. had been less than candid with both CPH and the Court, on February 4, 2004, the Court entered its Order on Coleman (Parent) Holding's ore tenus Motion to Participate in Search of Additional E-Mail Backup Tapes or Appoint Third Party to Conduct Search, ordering MS & Co. to pay for a third party vendor to check its compliance with the Agreed Order. The Court previously found that the two scripts errors testified to by Allison Gorman at the February 14, 2005, hearing would not have been discovered or revealed without the threat that the third-party vendor would discover the errors. Given Ms. Gorman's testimony at the March 14, 2005, hearing, though, it now appears MS & Co. knew about the errors before the appointment of the third-party vendor. Consequently, the errors were only revealed, but not discovered, in response to the February 4, 2004, Order.

Second, MS & Co. desperately wanted to hide an active SEC inquiry into its email retention practices.[7] [8] [9] [10] Finally, MS & Co. did not want to admit the existence of the historical email archive, which would expose the false representations it had made to the Court and used to induce CPH to agree to entry of the Agreed Order.[11] [12]

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[7]On December 17, 2003, CPH served its Third Request for Production seeking "(a)ll materials and documents submitted to the United States Securities and Exchange Commission ("SEC"), received from the SEC, or reflecting communications with the SEC in connection with any investigation, inquiry, or examination concerning or relating to Morgan Stanley's policies and/or procedures with regard to the retention, storage, deletion, and/or back-up of electronic mail (emails) . . ." On October 12, 2004, CPH served its Request for Supplemental Documents seeking to bring MS & Co.'s document production current, requesting "(a)ll documents not previously provided by MS & Co. that are responsive to any Request for Production of Documents that CPH previously has served upon MS & Co. in the litigation, including documents obtained by MS & Co. or its counsel after the date of MS & Co.'s prior productions." No SEC documents were produced in response to either request; no privilege log was generated. On other privilege logs generated in response to court orders, MS & Co. did not show the SEC on the distribution portion of the log. See March 9, 2005 Order Following in Camera Inspection (Riel/SEC Documents) footnotes 1, 2. See, also, footnote 15, infra. Kirland & Ellis, outside counsel for MS & Co. in this litigation, represents MS & Co. in the SEC's inquiry into its email retention practices.

[8]MS & Co. manipulated the unhinging of the SEC's email investigation from the IPO litigation in January, 2005, to conceal the email issues as long as possible.

[9]It is now apparent that MS & Co chose deliberately to keep its affidavits concerning the informal SEC inquiry submitted to support its privilege claims vague, despite two requests from the Court seeking specific information. See February 28, 2005 Order (Release of Exhibits).

[10]See February 25, 2005 Order on Morgan Stanley's Objections to Coleman (Parent) Holding Inc.'s Notice to Produce at Hearing and Motion for Protective Order and March 4, 2005 Order on Plaintiff's ore tenus Motion to Compel Additional Production.

[11]While MS & Co. contends that its representations to the Court that it would cost "hundreds of thousands of dollars" to search the backup tapes and that there was no pre-2000 backup tapes were not false, they were deliberately misleading: MS & Co never had an intention to search the back up tapes to respond to the requests and some of the year 2000 backup tapes backed up email back to 1997.

In 2001, MS & Co. decided to create the email archive. By June,2003, it had decided that the archive should have two components. First, MS & Co. wanted to create an archive that captured and stored email as it was generated. Second, MS & Co. wanted to add historical data to the archive. That task involved searching for all email backup tapes containing historical emails; sending those tapes to an outside processor; loading the processed tapes into a staging area; and migrating the stored data from the staging area onto the archive. As we now know, archive searches are quick and inexpensive. They do not cost "hundred of thousands of dollars" or "take several months." The restrictions imposed by the Agreed Order were not needed.

[12]On February 10, 2004, Robert Saunders, an executive director of IT for MS & Co., was deposed. He testified that in January, 2003, MS & Co. had put into effect the email archive system. When specifically asked whether the new email archive system would include prior backups or only going forward backups, he testified that "(t)he way it was built was for going forward backup." He was next asked whether "(w)ith respect to backup dated January 2001 and previously, does Morgan Stanley have any new capabilities to restore and search e-mail?" After counsel interposed a vagueness objection, he answered "(t)here are no new capabilities to search that e-mail." That testimony was so misleading as to be false. As Sauders well knew, since he was on the team responsible, the "live" email capture portion of the archive was already operational. The migration of the historical data to the archive was expected to be completed by April of 2004, just two months after his deposition.

MS & Co.'s wrongful conduct has continued unabated.[13] Since the February 14, 2005, hearing, it has come to light that:

- Only two whole and four partial tapes from the Brooklyn tapes had been migrated to the archive and were thus searched for the November, 2004, production. MS & Co. sought to hide this information to create the impression that all the produced documents came from the Brooklyn tapes, rather than reveal that the production came from material that had migrated from the staging area to the archive since the May, 2004, production or some other, as yet undisclosed, source.[14]

- Contrary to MS & Co.'s counsel's November 17, 2004, letter to CPH, *none* of the November, 2004 production came from the "newly found" tapes. MS & Co. carefully crafted its responses to inquiries about the November, 2004, production to avoid both disclosure of the existence of the archive and outright lying.

- The scripts MS & Co. used to process emails into its archive caused the bodies of some messages to be truncated. MS & Co. discovered this problem on February 13, 2005, but did not tell the Court about it until March 14, 2005.

- A migration issue caused about 5% of email harvested by NDCI from the backup tapes not to be captured in the archive, based on testing of a representative sample of tapes. MS & Co. told the SEC about this problem on February 24, 2005, but failed to tell CPH or the Court.

- As of June 7, 2004, only 120 out of 143 SDLT tapes had been processed into the archive.

- An analysis requested by the SEC showed that, based on a representative sample, 10% of backup tapes were overwritten after January, 2001.

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[13]MS & Co. sought to use the entry of the Adverse Inference Order as a shield against further inquiry into its email abuses, arguing that the matter was closed by the Adverse Inference Order. It previously used this tactic with the SEC, arguing that the December 3, 2003 Cease and Desist Order shielded it from other sanctions for email retention failures. See Ex. 14 [February 10, 2005 letter from outside counsel for MS &Co. to SEC]

[14]MS & Co. argued at the March 14 and 15, 2005 hearing that there were only 13 unique, new emails contained in the November 2004 production when compared to the May 2004 production. Nine of those emails, however, were originally given to MS& Co.'s lawyers for responsiveness review by the IT staff for the May 2004 production. No explanation of why they were not produced in May was offered. This is particularly concerning given the large number of documents Ms. Gorman testified the search parameters found compared with the relatively small number found responsive and produced after review by counsel.

- A software error caused blind carbon copies not to be captured in the archive process. MS & Co. told the SEC about this problem on February 24, 2005. MS & Co. did not tell CPH or the Court.

- A software error caused the searches to be hyper case-sensitive, resulting in a failure to capture all emails. MS & Co. knew of the problem as of December, 2004, but did not tell CPH or the Court. The problem was not purportedly fixed until March, 2005.

- A script error caused the archive to have problems pulling group email in Lotus Notes.

- MS & Co. provided sworn testimony at the February 14, 2005, hearing that it had located 600 gigabytes of data, while contemporaneously telling the SEC it had located a terabyte of data. A gigabyte represents 20,000 to 100,000 pages. Incredibly, MS & Co.'s witness on this point, Allison Gorman, testified on March 14, 2005, that it was simply a "terminology" issue that she did not choose to correct because it could cause "confusion."

- CPH requested MS & Co. to produce responses it had made to third-parties in civil, criminal, or administrative proceedings describing limitations on MS & Co.'s ability to produce emails and all notices in such proceedings that MS & Co. had newly discovered backup tapes containing email. MS & Co. objected, arguing that there were over 300 separate proceedings, involving over 70 outside law firms, and that the cost of compliance would be too great. On March 2, 2005, the Court ordered the production, after shortening the time period involved, and required production within 12 hours after counsel's review of each item for responsiveness but, in any event, within 10 days. At the time MS & Co. objected to CPH's request as unduly burdensome, it knew of its Well submission to the SEC made on February 10, 2005. Kirkland and Ellis, co-counsel here, was co-counsel for MS & Co. in that SEC proceeding. Consequently, it appears MS & Co.'s real concern was not that expressed to the Court, but was based on its realization that compliance would reveal the existence of the SEC inquiry into its email retention policy and MS & Co.'s efforts to keep the existence of that investigation secret. MS & Co. violated the Court's March 2, 2005, Order on Morgan Stanley's Responses and Objections to Coleman (Parent) Holdings Inc.'s Notice to Produce at Hearing requiring it to disclose items responsive to CPH's Request for Production within 12 hours of review for responsiveness by waiting *days*, not hours, to produce the Wells submission.

- MS & Co.'s failure to produce or log the SEC documents violated the Court's February 3, 2005, Order.[15]

- James Doyle's, the Executive Director of MS & Co.'s Law Division, declaration that he did not learn of additional unsearched backup tapes until the end of October, 2004, was intended to mislead CPH and the Court. Obviously, MS & Co. sought to create the implication in the declaration that *no one* in the Law Division knew of the backup tapes before then. Instead, both Soo-Mi Lee, Doyle's associate, and James Cusick, Doyle's superior, knew of the tapes no later than June 7, 2004.

- In-house counsel for MS & Co. knew as of June 7, 2004, that nearly a third of the restored backup tapes did not contain email, implying they may have been recycled in violation of the December 3, 2002 Cease and Desist Order. They did not tell CPH or the Court.

- MS & Co.'s searches looked for only two types of emails. There are other types of emails that were not included in the searches. CPH did not learn of this deficiency until March 13, 2005.

- MS & Co. improperly failed to produce 125 documents required to be produced by the Court's February 3, 2005, Order Specially Setting Hearing which required limited discovery be made in connection with the February 14, 2005, hearing on the Adverse Inference Motion.

- MS & Co. improperly withheld 13 documents required to be produced by the Court's March 4, 2005, Order on Plaintiff's ore tenus Motion to Compel Additional Production.

- An additional 282 tapes were found on February 23 and 25, 2005; CPH was not told of the discovery until March 13, 2005.

- An additional 3,536 tapes were discovered on February 23, 2005, in a security room.

- An additional 2,718 tapes were found at Recall, MS & Co.'s third party off-site storage vendor, on March 3, 2005.

- An additional 389 tapes were found March 2 through March 5, 2005. CPH was not told

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[15]The Court previously rejected MS & Co.'s argument that the January 14, 2005, email exchange between its outside and in-house counsel was not required to be produced under the February 3, 2005, Order Specially Setting Hearing because it referred to the "documents issue" and not specifically to the backup tapes. See March 16, 2005 Order on Morgan Stanley's Motion to Disqualify Plaintiff's Counsel Searcy, Denney, Scarola, Barnhart & Shipley, P.A. and Jenner & Block, LLC. MS & Co.'s insistence on a narrow interpretation of the February 3, 2005, Order is not particularly sympathetic, when the only reason that Order confined production to the backup tape issue was because MS &Co. had failed to notify the Court of the other deficiencies in its certificate of compliance

until March 13, 2005.

- On March 4, 2005, the Court entered its Order on Plaintiff's ore tenus Motion to Compel Additional Production, which ordered MS & Co. to produce by 3:00 p.m. on March 7, 2005, all items within its care, custody, or control dealing with the Riel/SEC investigation, other than documents representing communications between or among MS & Co. inside and outside counsel that were not copied to anyone other than counsel. MS & Co. sought to discredit Riel and thus distance itself from the false June 23, 2004 certificate of compliance; in doing so, it sought to hide Riel's whistle blower status and the existence of an SEC investigation into whether MS & Co. employees sought kick backs from third party vendors; whether MS & Co. employees were improperly pressured into dealing with third-party vendors who may provide business to MS & Co.; and whether MS & Co. continued to overwrite backup tapes contrary to the SEC's December 3, 2002, Cease and Desist Order.

- A script error prevented the insertion of some emails into the archive. MS & Co. produced over 4,600 pages of emails on March 21, 2005, some of which it suggested may have been located on correction of the error; alternatively, it suggested the emails may have been located by NDCI as part of its efforts to verify MS & Co.'s searches.

MS & Co.'s discovery abuses have not been confined to its email production.

William Strong is a MS & Co. managing director and was one of the principal players for it in the Sunbeam deal. He took credit for the fees generated. On May 9, 2003, CPH requested a copy of "(a)ll documents concerning employment contracts, performance evaluations, and/or personnel filed (including without limitation any documents that describe or discuss [his] training, experience, competence, and accomplishments) . . ." MS & Co. asserted that the requested documents were not relevant and that production "would unnecessarily infringe on the privacy interests of [Strong]." On March 15, 2004, the Court ordered MS & Co. to produce "(a)ll references (positive or negative) to [Strong's] truthfulness, veracity, or moral turpitude." Some portions of Strong's evaluations were produced in response to that order. Those evaluations noted Strong's colleagues' reservations about his candor and ethics. Two of his evaluators, Joseph Perella and Tarek Abdel-Meguid, were deposed, when some relatively vague testimony about the bases for those conclusions was offered. It now appears Strong was facing criminal prosecution in Italy for complicity in bribery while he was working on the Sunbeam transaction, which his evaluators knew, and that MS & Co. purposely

withheld that information from CPH and the Court.[16]

Even once CPH independently discovered evidence of Strong's indictment in Italy, MS & Co. sought to shield its files from discovery. It claimed that virtually *all* of the documents it had were privileged under joint defense agreements in place between it, Strong, and Saloman Brothers, Strong's employer at the time of the incident. As the Court's March 10, 2005 Order Following In Camera Inspection (Strong) details, the documents MS & Co. relied on to support that position, and sought to prevent CPH from obtaining, reflect no such agreement.

The other discovery abuses and misrepresentations by MS & Co. other than those involving its email production practices are outlined in CPH's Chronology of Discovery Abuses by Defendant served March 1, 2005, and would take a volume to recite. They include:

- failing to provide the information retained by MS & Co.'s internal document management system pertaining to MS & Co.'s work for Sunbeam; falsely representing to the Court that no useful information was contained in that information; and producing a Rule 1.310 representative who had made an insufficient inquiry into authenticity, business record status, and authorship of documents; see February 28, 2005 Order on CPH's Motion to Deem Certain Documents Admissible and for Sanctions due to Morgan Stanley's Disregard of Court Order;

- when faced with contempt proceedings for violating the Stipulated Confidentiality Order by providing a copy of a settlement agreement between CPH and Arthur Andersen to other counsel, representing to the Court that the law firm of Kellogg, Huber was retained to handle the "Andersen aspects" of this litigation because of a conflict between Andersen and Kirkland & Ellis; Mark Hansen, a partner at Kellog, Huber, testified that his firm was hired as co-counsel for all aspects of the case;

- providing answers to interrogatories signed by a corporate representative who performed insufficient verification of the responses;

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[16]MS & Co. originally argued that documents concerning the Italian proceedings were not in Strong's "personnel file" and so were not required to be produced in response to CPH's initial request. MS & Co.'s practice of filing damaging information about an employee other than in his personnel file and then claiming it was not included in the request is about at convincing as its argument that, since it has a corporate directive not to keep drafts of documents once they are in final form, document drafts cannot be business records exempt from hearsay because they are not "kept in the course of a regularly conducted business activity." See Fla. Stat §90.803 (6) (a). In any event, there was *no excuse* for not producing its records of the Italian proceedings once the Court's March 15, 2004 Order was entered.

- routinely asserting unfounded privilege claims;[17] and

- failing to timely comply with the Court's orders; for example, MS & Co. did not produce Strong's 1994 Performance Evaluation until the afternoon of March 15, 2005, though it was obviously included in the Court's March 15, 2004 Order. The failure cannot be excused as oversight since, when CPH specifically asked for the 1994 evaluation in the spring of 2004, MS & Co.'s counsel said it was withheld as non-responsive; see, also, Ex. 197, 198.

In sum, MS & Co. has deliberately and contumaciously violated numerous discovery orders, including the April 16, 2004 Agreed Order; February 3, 2005 Order Specially Setting Hearing; and the March 4, 2005 Order on Plaintiff's ore tenus Motion to Compel Additional Production. At the February 14, 2005, hearing on CPH's Adverse Inference Motion, it chose to hide information about its violations and coach witnesses to avoid any mention of additional, undisclosed problems with its compliance with the Agreed Order. Implicit in the requirement that MS & Co. certify compliance with the Agreed Order was the requirement to disclose impediments to its ability to so certify. As outlined in this Order, MS & Co. employees, and not just counsel, have participated in the discovery abuses. The prejudice to CPH from these failings cannot be cured. Even if all the script errors have been located and corrected, and MS & Co. has failed to show they have, and even if all of the email backup tapes have now been located, and MS & Co. has failed to show they have, the searches cannot be completed in time. The other discovery abuses outlined call into doubt all of MS & Co.'s discovery responses. *The judicial system cannot function this way.* Based on the foregoing and on the Court's March 1, 2005 Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, it is

ORDERED AND ADJUDGED that CPH's Renewed Motion for Entry of Default Judgment is Granted, in part. See Robinson v. Nationwide Mut. Fire Ins. Co., 887 So. 2d 328 (Fla. 2004); Mercer v. Raine, 443 So. 2d 944 (Fla. 1983); Precision Tune Auto Care, Inc. v.

[17]For example, MS & Co. produced over 260 documents dealing with the Strong investigation over which it had previously claimed privilege once the Court announced its intention to conduct an in camera review; the Court found another 200 documents were not privileged after conducting its review, by its March 10, 2005 Order.

Radcliffe, 804 So. 2d 1287 (Fla. 4th DCA 2002); Rule 1.380 (b) (2) (C), Fla. R. Civ. P. Paragraphs 2 (excluding the last sentence thereof); 3 (excluding the portion of the last sentence beginning with "in order to close . . ."); 8-10, 11 (excluding everything after the first sentence); 12 (excluding all parts following "June 1998"); 13 (excluding the last sentence thereof); 14-27; 28 (excluding everything after "firm" in the second to last sentence thereof); 29-39; 41-52; 53 (excluding the second sentence thereof); 54-57; 58 (excluding "CPH and" in the second line thereof); 59-63; 64 (excluding the third line thereof); 65 (excluding the last sentence thereof); 66 (excluding the last sentence thereof); 67-70; 71 (excluding the first word of the last sentence and the remainder of that sentence after "material"); 72; 73 (excluding the first sentence thereof); 74 (excluding the words "CPH and" in the second to last sentence thereof); 75-81; 85; 86; 87 (excluding (g)); 90, and 91 (excluding (g)) of Plaintiff's Amended Complaint, as amended by the Court's Amended Order on Morgan Stanley's Motion to Dismiss, Motion to Strike, and Motion for More Definite Statement, shall be read to the jury and the jury instructed that those facts are deemed established for all purposes in this action. A copy of a redacted Amended Complaint is attached as Exhibit A. It is further

ORDERED AND ADJUDGED that the Court shall read to the jury a Statement similar to that attached as Exhibit A to the Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, but incorporating the relevant additional findings of this Order, and the jury will be instructed that it may consider those facts in determining whether MS & Co. sought to conceal its offensive conduct when determining whether an award of punitive damages is appropriate. See General Motors Corp. v. McGee, 837 So. 2d 1010 (Fla. 4th DCA 2002), rev. den. 851 So. 2d 728 (Fla. 2003). Counsel are each invited to submit proposed Statements. It is further

ORDERED AND ADJUDGED that CPH shall be entitled to an award of reasonable fees and costs incurred as a result of the Renewed Motion for Entry of Default Judgment and the violations of Court orders recited herein. The amount shall be determined at an evidentiary hearing following trial. It is further

ORDERED AND ADJUDGED that MS & Co. is relieved of any future obligation to

comply with the April 16, 2004 Agreed Order and the February 4, 2005 Order on Coleman (Parent) Holdings Inc.'s Motion to Participate in Search of Additional E-Mail Back-Up Tapes or Appoint Third Party to Conduct Search. It is further

ORDERED AND ADJUDGED that the pro hac vice admission of Thomas Clare is revoked. It is further

ORDERED AND ADJUDGED that the portions of CPH's Motion for Correction and Clarification of Order on CPH's Motion for Adverse Inference that seek to amend the body of that Order to correct clerical and spelling errors, as agreed to by counsel, is Granted, and the corrections deemed made to the body of the Amended Order on Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction Due to Morgan Stanley's Destructions of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, by interlineation. In all other respects the remainder of the Motion for Correction and Clarification is declared moot.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 23rd day of March, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

Thomas D. Yannucci
655 15th Street, NW, Suite 1200
Washington DC 20005

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2003 CA 005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS INC.'S MOTION TO TAX COSTS

Plaintiff, Coleman (Parent) Holdings Inc. ("CPH"), respectfully requests that this Court enter an order taxing costs against Defendant, Morgan Stanley & Co., Inc. ("Morgan Stanley"). In support thereof, Plaintiff states as follows:

1. On May 16, 2005, the jury returned a verdict against Morgan Stanley for compensatory damages in the amount of $604,334,000. On May 18, 2005, the jury returned a verdict against Morgan Stanley for punitive damages in the amount of $850,000,000.

2. This Court entered a final judgment against Morgan Stanley on June 23, 2005 in the amount of $1,577,696,175.83.

3. Pursuant to § 57.041 of the Florida Statutes, CPH, as the prevailing party in this action, is entitled to recover taxable costs from Morgan Stanley. Fla. Stat. § 57.041.

4. The specific amount of the taxable costs claimed by CPH is set forth in the Affidavit of Taxable Costs, attached hereto as Exhibit A.

WHEREFORE, CPH respectfully requests that this Court enter a final judgment in CPH's favor, awarding taxable costs to it, as set forth in Exhibit A.

Dated: July 25, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

Jerold S. Solovy
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(561) 686-6300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Federal Express to all counsel on the attached list on this 25th day of July, 2005.

JOHN SCAROLA
Florida Bar No.: 169440
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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC., CASE NO: 2003 CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.

Defendant.
_____/

AFFIDAVIT OF TAXABLE COSTS

STATE OF FLORIDA)
) ss
COUNTY OF PALM BEACH)

BEFORE ME, the undersigned authority, personally appeared, Jerold S. Solovy, who being first duly sworn, deposes and says:

1. I am more than eighteen (18) years of age and legally competent to make this Affidavit. The facts and statements contained within this Affidavit are made of my own personal knowledge.

2. I am one of the counsel for Plaintiff Coleman (Parent) Holdings, Inc.

3. On May 16, 2005, the jury returned a verdict for compensatory damages in favor of the Plaintiff in this matter in the amount of $604,334,000.

4. On May 18, 2005, the jury returned a verdict for punitive damages in favor of the Plaintiff in this matter in the amount of $850,000,000.

5. On June 23, 2005, the Court entered final judgment in favor of the Plaintiff in this matter in the amount of $1,577,696,175.83.

6. In connection with the prosecution of this matter, Plaintiff has incurred and expended the following costs, which Plaintiff seeks to tax against Defendant Morgan Stanley & Co., Inc.:[1]

[1] CPH has submitted separately a Petition for Attorneys' Fees and Costs based on four Orders entered by this Court granting CPH an entitlement to fees and costs as a result of Morgan Stanley's repeated violations of discovery orders. To the extent that the Court does not award CPH any of the taxable costs requested by CPH's Petition for Attorneys' Fees and Costs, CPH requests that the Court award those costs as part of this petition. Attached hereto as Exhibit A are the costs that CPH has requested as part of its Petition for Attorneys' Fees and Costs.

Expert Witness Fees

Witness	Service	Invoice Date	Amount
Dr. Blaine Nye - Stanford Consulting Group	Expert		
		4/19/2004	8,303.00
		5/19/2004	5,846.00
		6/23/2004	4,371.00
		6/26/2004	29,380.00
		8/25/2004	1,768.00
		9/17/2004	16,383.00
		10/22/2004	7,150.00
		11/19/2004	14,022.00
		12/20/2004	43,276.00
		1/24/2005	42,557.00
		2/23/2005	33,333.00
		3/24/2005	18,131.00
		4/27/2005	65,504.00
		5/19/2005	136,314.00
		6/25/2005	2,530.00
		6/29/2005	155,007.00
			$583,875.00
Michael Wagner - RGI/CRA (Punitive damages work only)	Expert		
		1/27/2005	9,148.00
		2/28/2005	4,361.50
		3/22/2005	2,486.50
		4/26/2005	5,326.00
		6/9/2005	38,003.36
			$59,325.36
Dr. Douglas Emery - Analysis Group	Expert		
		12/16/2004	54,593.57
		1/12/2005	12,892.90
		2/9/2005	26,930.02
		3/8/2005	3,347.50
		4/15/2005	14,290.45
		5/18/2005	35,055.25
			$147,109.69
Expert Witness Fees Subtotal			**$790,310.05**

Court Transcripts

Vendor	Service	Invoice Date	Amount
Esquire Deposition Services	Hearing	10/12/04	65.00
	Hearing	10/12/04	202.20
			$267.20
Pinnacle Reporting	Hearing	10/23/03	60.00
	Hearing	11/24/03	60.00
	Hearing	11/24/03	60.00
	Hearing	12/31/03	60.00
	Hearing	12/31/03	60.00
	Hearing	01/19/04	60.00
	Hearing	01/19/04	170.00
	Hearing	02/18/04	120.00
	Hearing	02/18/04	97.50
	Hearing	03/18/04	374.72
	Hearing	03/18/04	206.12
	Hearing	06/09/04	275.92
	Hearing	06/21/04	298.50
	Hearing	12/18/04	270.50
	Hearing	03/25/05	136.00
	Hearing	03/25/05	151.20
			$2,460.46
Precision Reporting	Hearing	06/13/03	49.25
	Hearing	07/24/03	62.25
	Hearing	10/15/03	77.50
	Hearing	12/31/03	153.50
	Hearing	01/19/04	299.44
	Hearing	02/09/04	81.75
	Hearing	02/26/04	46.75
	Hearing	03/22/04	73.25
	Hearing	04/12/04	306.45
	Hearing	05/03/04	930.50
	Hearing	05/26/04	549.12
	Hearing	06/14/04	51.75
	Hearing	07/08/04	32.00
	Hearing	07/23/04	145.42
	Hearing	07/23/04	1,062.10
	Hearing	07/23/04	266.25

Affidavit of Taxable Costs
2003 CA 005045 AI

Court Transcripts

Vendor	Service	Invoice Date	Amount
	Hearing	08/06/04	595.50
	Hearing	08/30/04	324.74
	Hearing	10/13/04	618.50
	Hearing	10/13/04	716.94
	Hearing	10/28/04	47.50
	Hearing	10/28/04	880.50
	Hearing	11/02/04	134.50
	Hearing	11/12/04	90.09
	Hearing	11/12/04	71.90
	Hearing	12/09/04	475.50
	Hearing	12/09/04	983.30
	Hearing	12/18/04	618.05
	Hearing	12/18/04	339.50
	Hearing	12/18/04	227.98
	Hearing	01/14/05	147.50
	Hearing	01/14/05	567.34
	Hearing	01/27/05	159.60
	Hearing	02/08/05	196.80
	Hearing	02/18/05	1,083.20
	Hearing	02/18/05	164.09
	Hearing	02/18/05	574.00
	Hearing	03/14/05	3,161.77
	Hearing	03/14/05	2,989.33
	Hearing	03/14/05	3,001.39
	Hearing	03/14/05	2,710.87
	Hearing	03/14/05	1,588.16
	Hearing[2]	03/14/05	1,550.75
	Hearing	03/25/05	2,591.21
	Hearing[2]	03/25/05	710.02
	Hearing	03/25/05	859.25
	Hearing/Trial	04/12/05	2,226.98
	Hearing/Trial	04/12/05	1,288.10
	Hearing/Trial	04/12/05	1,375.22
	Hearing/Trial	04/12/05	875.98
	Hearing/Trial	04/12/05	4,706.18
	Hearing/Trial	04/12/05	1,240.31
	Hearing/Trial	04/12/05	707.96
	Hearing/Trial	04/12/05	1,060.13

[2] CPH has included 50% of this invoice in this petition and requested the other 50% of the invoice in CPH's Petition for Attorneys' Fees and Costs. *See* Ex. A.

Affidavit of Taxable Costs
2003 CA 005045 AI

Court Transcripts

Vendor	Service	Invoice Date	Amount
	Hearing/Trial	04/12/05	2,308.88
	Hearing/Trial	04/12/05	3,226.16
	Hearing/Trial	04/21/05	2,387.59
	Hearing/Trial	04/21/05	1,973.77
	Hearing/Trial	04/21/05	3,971.68
	Hearing/Trial	04/21/05	2,637.16
	Hearing/Trial	04/21/05	2,461.30
	Hearing/Trial	04/21/05	3,194.08
	Hearing/Trial	04/21/05	3,349.69
	Hearing/Trial	04/21/05	1,862.98
	Hearing/Trial	04/21/05	2,571.19
	Hearing/Trial	04/21/05	2,316.85
	Hearing/Trial	05/12/05	2,730.67
	Hearing/Trial	05/12/05	3,656.14
	Hearing/Trial	05/12/05	3,341.05
	Hearing/Trial	05/12/05	3,345.37
	Hearing/Trial	05/12/05	1,380.22
	Hearing/Trial	05/12/05	3,631.12
	Hearing/Trial	05/12/05	1,961.26
	Hearing/Trial	05/12/05	2,616.46
	Hearing/Trial	05/12/05	4,593.67
	Hearing/Trial	05/17/05	3,537.61
	Hearing/Trial	05/17/05	3,721.66
	Hearing/Trial	05/17/05	4,138.90
	Hearing/Trial	05/17/05	4,048.81
	Hearing/Trial	05/17/05	4,532.02
	Hearing/Trial	05/17/05	647.50
	Hearing/Trial	05/17/05	3,169.06
	Hearing/Trial	05/17/05	2,636.71
	Hearing/Trial	05/17/05	3,394.06
	Hearing/Trial	05/17/05	4,249.69
	Hearing/Trial	05/17/05	3,500.08
	Hearing/Trial	05/20/05	4,532.47
	Hearing/Trial	05/20/05	3,660.01
	Hearing/Trial	05/20/05	3,058.72
	Hearing/Trial	05/20/05	2,149.63
	Hearing/Trial	05/20/05	2,853.97
	Hearing/Trial	06/17/05	4,434.64
	Hearing/Trial	06/17/05	3,169.06
	Hearing/Trial	06/17/05	5,158.33
	Hearing/Trial	06/17/05	3,734.62

Affidavit of Taxable Costs
2003 CA 005045 AI

Court Transcripts

Vendor	Service	Invoice Date	Amount
	Hearing/Trial	06/17/05	4,106.14
	Hearing/Trial	06/17/05	3,463.00
	Hearing/Trial	06/17/05	3,979.87
	Hearing/Trial	06/23/05	2,461.30
	Hearing/Trial	06/23/05	194.00
	Hearing/Trial	07/04/05	8,095.50
			$197,992.57
Weathers & Associates	Hearing	03/25/05	**$120.95**
Mudrick Court Reporting	Hearing	04/26/04	**$60.36**
Livenote, Inc.	Hearing / Trial	4/8/2005	35.00
	Hearing / Trial	6/17/2005	35.06
	Hearing / Trial	4/8/2005	70.00
	Hearing / Trial	5/10/2005	170.00
	Hearing / Trial	5/10/2005	170.00
	Hearing / Trial	3/9/2005	350.00
	Hearing / Trial	3/9/2005	409.00
	Hearing / Trial	5/10/2005	455.00
	Hearing / Trial	5/10/2005	510.00
	Hearing / Trial	4/8/2005	700.00
	Hearing / Trial	4/8/2005	765.00
	Hearing / Trial	5/10/2005	1,050.00
	Hearing / Trial	6/17/2005	1,051.85
	Hearing / Trial	6/17/2005	1,051.85
	Hearing / Trial	6/17/2005	1,362.41
	Hearing / Trial	5/10/2005	1,615.00
	Hearing / Trial	6/17/2005	1,617.86
	Hearing / Trial	7/2005	175.00
			11,593.03
			$11,593.03
			(1,435.00)[3]
			$10,158.03
Court Transcript Subtotal			**$211,059.57**

[3] CPH has requested these costs in its Petition for Attorneys' Fees and Costs. See Ex. A.

Deposition Transcript/Services

Vendor	Witness	Service	Invoice Date	Amount
Esquire Deposition Services	Plotnick, John	Reporter, transcript	9/27/2003	1,217.50
	Tyree, John	Reporter, transcript	11/25/2003	1,554.50
	Strong, William	Reporter, transcript	12/16/2003	1,551.72
	Tyree, John	Reporter, video	1/6/2004	716.46
	Strong, William	Reporter, video	1/6/2004	816.57
	Kistler, Vance	Reporter, transcript	1/14/2004	715.00
	Tyree, John	Reporter, transcript	1/15/2004	1,317.10
	Yales, Scott M.	Reporter, video	1/28/2004	735.00
	Chang, Tyrone	Reporter, video	1/28/2004	716.64
	Savarie, Andrew	Reporter, transcript	2/3/2004	1,110.40
	Denkaus, Donald	Reporter, transcript	2/4/2004	1,047.55
	Yales, Scott M.	Reporter, transcript	2/4/2004	1,541.40
	Pruitt, William	Reporter, transcript	2/4/2004	437.80
	Fasman, Steven (Rule 1.310)	Reporter, transcript	2/6/2004	889.50
	Pruitt, William	Reporter, video	2/11/2004	96.00
	Savarie, Andrew	Reporter, video	2/11/2004	616.53
	Brockelman, Mark	Reporter, transcript	2/13/2004	1,357.80
	Bornstein, Lawrence	Reporter, transcript	2/13/2004	2,507.00
	Pastrana, Dennis	Transcript	2/18/2004	1,371.40
	Kitts, Robert	Video	2/27/2004	518.00
	Saunders, Robert (Rule 1.310)	Reporter, transcript	3/5/2004	434.50
	Smith, R. Bram	Reporter, video	3/5/2004	735.00
	Brockelman, Mark	Reporter, video	3/9/2004	635.00
	Bornstein, Lawrence	Reporter, video	3/9/2004	885.00
	Kitts, Robert	Reporter, transcript	3/12/2004	662.00
	Fuchs, Alexandre	Reporter, video	3/12/2004	685.00
	Fuchs, Alexandre	Reporter, transcript	3/12/2004	833.50
	Pastrana, Dennis	Reporter, video	3/22/2004	157.00
	Smith, R. Bram	Reporter, transcript	3/24/2004	1,554.50
	Chang, Tyrone	Reporter, transcript	3/29/2004	1,292.20
	Rafii, Lily	Reporter, transcript	4/9/2004	770.50
	Rafii, Lily	Reporter, video	4/21/2004	560.00
	Ginstling, Norman	Reporter, video	4/21/2004	201.00
	Ginstling, Norman	Reporter, transcript	4/26/2004	1,473.75
	Boone, Shani	Reporter, transcript	5/5/2004	1,008.25
	Page, Joseph	Reporter, transcript	5/11/2004	1,412.20
	Boone, Shani	Reporter, video	5/13/2004	646.65

Affidavit of Taxable Costs
2003 CA 005045 AI

Deposition Transcript/Services

Vendor	Witness	Service	Invoice Date	Amount
	Page, Joseph	Reporter, video	5/13/2004	157.00
	Slovin, Bruce	Reporter, transcript	5/20/2004	1,545.00
	Slovin, Bruce	Reporter, video	5/20/2004	201.00
	Hart, Michael	Reporter, transcript	5/26/2004	1,464.25
	Stack, Heather	Reporter, transcript	5/28/2004	886.00
	Webber, Joshua	Reporter, transcript	5/28/2004	999.40
	Webber, Joshua	Reporter, video	6/9/2004	635.00
	Stack, Heather	Reporter, video	6/10/2004	485.00
	Hart, Michael	Reporter, video	6/10/2004	835.00
	Conway, Andrew	Reporter, transcript	6/11/2004	747.00
	Conway, Andrew	Reporter, video	6/15/2004	385.00
	Dean, Alan	Reporter, transcript	6/16/2004	1,003.50
	Shapiro, Paul	Reporter, transcript	6/16/2004	1,279.00
	Dean, Alan	Reporter, video	6/18/2004	535.00
	Stack, Heather	Reporter, ASCII	6/22/2004	307.50
	Shapiro, Paul	Reporter, video	6/22/2004	157.00
	Lurie, James	Reporter, transcript	6/23/2004	1,022.50
	Yoo, Gene	Video	6/29/2004	785.00
	Yoo, Gene	Transcript	6/29/2004	1,165.00
	Schwartz, Barry	Transcript	6/30/2004	970.00
	Drapkin, Donald	Video	7/2/2004	157.00
	Drapkin, Donald	Transcript	7/2/2004	1,036.75
	Schwartz, Barry	Video	7/7/2004	157.00
	Wright, William	Reporter, transcript	7/13/2004	770.75
	Wright, William	Reporter, video	7/14/2004	113.00
	Slotkin, Todd	Reporter, video	7/14/2004	157.00
	Duffy, Robert	Reporter, video	7/14/2004	201.00
	Salig, Joram	Reporter, video	7/14/2004	113.00
	Lurie, James	Reporter, video	7/19/2004	635.00
	Slotkin, Todd	Reporter, transcript	7/19/2004	1,155.50
	Salig, Joram	Reporter, transcript	7/19/2004	704.25
	Stynes, James	Reporter, video	7/21/2004	485.00
	Whelan, Christopher	Reporter, video	7/21/2004	435.00
	Whelan, Christopher	Reporter, transcript	7/27/2004	794.50
	Stynes, James	Reporter, transcript	7/27/2004	713.75
	Gifford, Frank	Reporter, transcript	7/29/2004	704.25
	Gifford, Frank	Reporter, video	8/4/2004	113.00
	Shapiro, Paul	Reporter, transcript	8/6/2004	588.50
	Seth, Ishaan	Reporter, transcript	8/6/2004	675.75
	Shapiro, Paul	Reporter, video	8/6/2004	157.00
	Duffy, Robert	Reporter, transcript	8/9/2004	1,678.00

Affidavit of Taxable Costs
2003 CA 005045 AI

Deposition Transcript/Services

Vendor	Witness	Service	Invoice Date	Amount
	Geller, Steven	Reporter, transcript	8/10/2004	932.25
	Seth, Ishaan	Reporter, video	8/11/2004	435.00
	Engelman, Irwin	Reporter, video	8/11/2004	157.00
	Geller, Steven	Reporter, video	8/18/2004	113.00
	Jones, Lawrence	Reporter, video	9/3/2004	157.00
	Burchill, Thomas	Reporter, video	9/7/2004	335.00
	Burchill, Thomas	Reporter, transcript	9/8/2004	508.50
	Nesbitt, William	Reporter, transcript	9/8/2004	1,274.25
	Nesbitt, William	Reporter, transcript	9/10/2004	1,207.75
	Nesbitt, William	Reporter, video	9/14/2004	157.00
	Nesbitt, William	Reporter, video	9/14/2004	201.00
	Jones, Lawrence	Reporter, transcript	9/23/2004	651.50
	Moran, John	Reporter, transcript	9/23/2004	804.00
	Kunreuther, Jason	Reporter, transcript	9/29/2004	354.00
	Moran, John	Reporter, video	9/30/2004	157.00
	Kunreuther, Jason	Reporter, video	10/4/2004	285.00
	Emmerich, Adam	Reporter, transcript	10/5/2004	1,269.50
	Isko, Steven	Reporter, video	10/8/2004	69.00
	Emmerich, Adam	Reporter, video	10/12/2004	157.00
	Isko, Steven	Reporter, transcript	10/20/2004	414.50
	Hart, Michael	Reporter, video	10/21/2004	435.00
	Eltrich, Karen	Reporter, transcript	10/22/2004	1112.75
	Hart, Michael	Transcript	10/22/2004	656.75
	Clark, Karen	Reporter, video	10/28/2004	157.00
	Hart, Michael	Reporter, transcript	10/28/2004	656.75
	Foley, Jake	Reporter, transcript	10/28/2004	837.25
	Foley, Jake	Reporter, video	10/28/2004	485.00
	Eltrich, Karen	Reporter, video	10/29/2004	485.00
	Harris, Brooks	Reporter, transcript	10/29/2004	1,027.25
	Engelman, Irwin	Reporter, transcript	11/1/2004	530.40
	Clark, Karen	Reporter, transcript	11/3/2004	531.00
	Kourakos, William	Reporter, transcript	11/4/2004	894.25
	Jordan, Ann	Reporter, transcript	11/9/2004	572.20
	Maher, James	Reporter, transcript	11/9/2004	1,084.25
	Maher, James	Reporter, transcript	11/12/2004	1,117.50
	Harris, Brooks	Reporter, video	11/12/2004	485.00
	Sipprelle, Dwight	Reporter, video	11/15/2004	235.00
	Rankowitz, Michael	Reporter, transcript	11/16/2004	424.00
	Kourakos, William	Reporter, video	11/16/2004	585.00
	Maher, James	Reporter, video	11/16/2004	157.00
	Maher, James	Reporter, video	11/16/2004	157.00

Affidavit of Taxable Costs
2003 CA 005045 AI

Deposition Transcript/Services

Vendor	Witness	Service	Invoice Date	Amount
	Rankowitz, Michael	Reporter, video	11/17/2004	285.00
	Sipprelle, Dwight	Reporter, transcript	11/17/2004	281.50
	Jordan, Ann	Reporter, video	11/23/2004	113.00
	Perelman, Ronald	Reporter, transcript	11/24/2004	1,635.25
	Perelman, Ronald	Reporter, transcript	11/24/2004	1,203.00
	Winoker, Laurence	Reporter, transcript	11/29/2004	1,127.00
	Gittis, Howard	Reporter, transcript	11/30/2004	1,041.50
	Petrick, Michael	Reporter, transcript	11/30/2004	979.75
	Porat, Ruth	Reporter, transcript	11/30/2004	1,127.00
	Harlow, Phillip	Video	11/30/2004	84.00
	Gittis, Howard	Reporter, video	12/7/2004	157.00
	Perelman, Ronald	Reporter, video	12/7/2004	201.00
	Perelman, Ronald	Reporter, video	12/7/2004	157.00
	Winoker, Laurence	Reporter, video	12/7/2004	201.00
	Petrick, Michael	Reporter, video	12/7/2004	685.00
	Amorison, Allison	Reporter, video	12/7/2004	69.00
	Porat, Ruth	Reporter, video	12/7/2004	635.00
	Groeller, Johannes	Reporter, transcript	12/8/2004	399.40
	Rankin, Simon	Reporter, transcript	12/8/2004	548.20
	Feraro, Joseph	Reporter, transcript	12/9/2004	561.75
	Levin, Jerry	Reporter, transcript	12/9/2004	1,250.50
	Levin, Jerry	Reporter, transcript	12/9/2004	880.00
	Fiedorek, Bruce	Reporter, transcript	12/15/2004	538.00
	Freed, Todd	Reporter, transcript	12/20/2004	433.50
	Perella, Joseph	Reporter, transcript	12/20/2004	713.75
	Porat, Ruth	Reporter, transcript	12/20/2004	785.00
	Abdel-Meguid, Tarek	Reporter, transcript	12/20/2004	519.00
	Amorison, Allison	Reporter, transcript	12/21/2004	266.50
	Levin, Jerry	Reporter, video	12/21/2004	157.00
	Perella, Joseph	Reporter, video	12/21/2004	385.00
	Scott, Robert	Reporter, video	12/21/2004	335.00
	Porat, Ruth	Reporter, video	12/21/2004	435.00
	Feraro, Joseph	Reporter, video	12/23/2004	113.00
	Levin, Jerry	Reporter, video	12/23/2004	157.00
	Fiedorek, Bruce	Reporter, video	12/23/2004	335.00
	Scott, Robert	Reporter, transcript	12/23/2004	542.75
	Abdel-Meguid, Tarek	Reporter, video	12/23/2004	385.00
	Fogg, Blaine	Reporter, transcript	12/23/2004	827.75
	Fogg, Blaine	Reporter, transcript	12/28/2004	1,169.75
	Rankin, Simon	Reporter, video	12/30/2004	1,102.50
	Groeller, Johannes	Video	12/30/2004	811.00

Affidavit of Taxable Costs
2003 CA 005045 AI

Deposition Transcript/Services

Vendor	Witness	Service	Invoice Date	Amount
	Freed, Todd	Reporter, video	1/5/2005	285.00
	Horton, William	Reporter, transcript	1/10/2005	1,497.28
	Grinblatt, Mark	Reporter, transcript	1/14/2005	1,786.60
	Gillfillan, Michael	Reporter, transcript	1/17/2005	1,285.48
	Horton, William	Reporter, video	1/19/2005	272.00
	Wagner, Michael	Reporter, transcript	1/19/2005	1,131.20
	Nye, Blaine	Reporter, transcript	1/19/2005	1,081.28
	Rosenbloom, Arthur	Reporter, transcript	1/21/2005	1,236.25
	Emery, Douglas	Reporter, transcript	1/24/2005	1,186.45
	Nye, Blaine	Reporter, video	1/26/2005	184.00
	Rosenbloom, Arthur	Reporter, video	1/26/2005	885.00
	Grinblatt, Mark	Reporter, video	1/26/2005	885.00
	Fritz, George	Reporter, transcript	1/26/2005	1,789.00
	Gillfillan, Michael	Reporter, video	1/28/2005	245.00
	Wagner, Michael	Reporter, video	1/31/2005	184.00
	Emery, Douglas	Reporter, video	2/8/2005	228.00
	Fritz, George	Reporter, video	2/11/2005	685.00
	Amorison, Allison	Reporter, ASCII	2/11/2005	86.25
	D'Auria, Judith	Reporter, transcript	2/11/2005	1,074.75
	D'Auria, Joseph	Reporter, video	2/15/2005	635.00
	Ross, David	Video	07/01/2005	783.00
	Ross, David	Transcript	07/15/2005	908.20
				$126,120.76
Precision Reporting				
	Harlow, Phillip	Reporter, transcript	11/19/04	953.42
	Doyle, James (50%)[4]	Reporter, transcript	04/17/05	323.75
	Jones, Robert	Reporter, transcript	05/12/05	1,533.25
	Grinblatt, Mark	Reporter, transcript	05/12/05	3,595.00
	Nye, Blaine	Reporter, transcript	06/17/05	1,380.90
				$7,786.32

[4] In its February 28, 2005 order, the Court awarded CPH 50% of the costs associated with the taking of Mr. Doyle's deposition on February 11, 2005. Accordingly, CPH has requested 50% of this cost in its Petition for Attorneys' Fees and Costs and requests the remaining 50% of those costs here.

Affidavit of Taxable Costs
2003 CA 005045 AI

Deposition Transcript/Services

Vendor	Witness	Service	Invoice Date	Amount
Visual Evidence				
	Harlow, Phillip	Video	11/19/04	84.00
	Doyle, James (50%)[5]	Video	04/17/05	204.32
	Grinblatt, Mark	Video	05/17/05	1,786.88
	Ross, Davis	Video	07/2005	616.25
				$2,691.45
Deposition Transcripts/Services Subtotal				**$136,598.53**

[5] *Ibid.*

Service/Filing Fees

Vendor	Witness	Service	Invoice Date	Amount
Signed, Sealed, Delivered				
	Wachovia Bank	Service	07/24/03	25.00
	Wachovia Bank		07/24/03	25.00
	Bank of America		07/24/03	25.00
	Bank of America		07/24/03	25.00
	Bank of America		08/11/03	25.00
	Wachovia Bank		08/11/03	25.00
	Bank of America		08/11/03	25.00
	Wachovia Bank		08/11/03	25.00
	Krayer, Kevin C.		10/08/03	50.00
	Urban Kantola		10/08/03	50.00
	Kistler, Vance F.		10/08/03	50.00
	Pricewaterhouse Coopers		10/08/03	50.00
	Pricewaterhouse Coopers		10/08/03	50.00
	Krayer , Kevin C.		10/23/03	87.00
	Denkhaus, Donald		10/23/03	85.00
	Kistler, Vance F.		10/23/03	50.00
	Urban Kantola		11/24/03	50.00
	Bloomberg Inc.		04/02/04	61.00
	Hill & Knowlton, Inc.		05/05/04	51.00
	Wachovia Bank		07/13/04	51.00
	Wachovia Bank		07/23/04	51.00
	Bank of NY Trust Co		12/14/04	86.00
				$1,022.00
Advanced Process Ct. Corp. System		Service	06/13/03	**$66.00**
Wright, Lindsey & Jennings, LLP.	Llama, Inc.	Service	3/11/2004	**$431.34**

Affidavit of Taxable Costs
2003 CA 005045 AI

Service/Filing Fees

Vendor	Witness	Service	Invoice Date	Amount
Shapiro Forman Allen Miller & McPherson, LLP				
	New York Subpoenas	Filing	01/12/2004	1,149.85
			05/12/2004	362.87
			07/02/2004	479.56
			09/13/2004	418.53
			12/07/2004	1,302.89
				$3,713.70
Cohen Lans, LLP				
	New York Subpoenas	Service/Court Fees	12/13/2004	1,145.25
			02/09/2005	2,171.14
				$3,316.39
United Processing				
	Savarie, Andrew	Service	01/16/2004	75.00
	Arthur Andersen, LLP		12/10/2004	60.00
				$135.00
Susman Godfrey, LLP				
	Chang, Tyrone	Service - California	07/09/2004	**$448.00**
Clerk of Circuit Court, Palm Beach County		Filing - Petition to Issue Subpoena, Savarie	01/16/2004	271.00
		Filing - Petition to Issue Subpoena, Andersen	12/10/2004	271.00
				$542.00
Clerk of Circuit Court, Palm Beach County		Filing - Complaint	05/08/03	206.00
		Filing - Reopen Case	07/08/03	50.00
		Cert. Copies - Pleadings	06/30/04	201.00
		Cert. Copies - Pleadings	08/10/04	33.00
		Filing - Pro Hac Vice (x3)	10/08/04	300.00
		Filing - Pro Hac Vice (x2)	02/11/05	200.00
				$990.00
Service/Filing Fees Subtotal				**$10,664.43**

Witness Fees

Witness	Invoice Date	Amount
Wachovia	07/30/03	10.00
Bank of America	07/30/03	10.00
V. F. Justker	09/22/03	10.00
Pricewaterhouse Coopers	09/30/03	10.00
Pricewaterhouse Coopers	09/30/03	10.00
W. D. Pruitt	10/16/03	10.00
Savarie, Andrew	01/16/04	28.40
Wachovia Bank, Records Custodian	07/12/04	7.50
Bornstein, Lawrence A.	12/14/04	5.84
Harlow, Phillip	12/22/04	10.16
Pastrana, Dennis	01/25/05	13.16
Denkhaus, Donard	01/25/05	13.16
Brockelman, Mark	01/25/05	7.40
Pruitt, William	01/25/05	15.55
Kempf, Donald	03/23/05	155.00
Fannin, David	05/09/05	5.72
Witness Fees Subtotal		**$321.89**

Document Production Costs

Vendor	Service	Invoice Date	Cost
Compulit	Electronic Production & Bates Numbering	11/12/2003	43,919.43
		01/16/2004	3,035.14
			$46,954.57
Ikon Office Solutions	Electronic Production & Bates Numbering	12/10/2004	**$9,465.55**
Lex Solutio Corp	Electronic Production & Bates Numbering	1/16/2004	97.63
		2/18/2004	49.92
		2/18/2004	910.19
		6/15/2004	108.00
		6/15/2004	131.32
		7/09/2004	1,848.52
			$3,145.58
Ikon Office Solutions	Paper Copies of Documents Produced Only Electronically	11/12/2003	820.63
		12/5/2003	2,791.77
		2/18/2004	250.33
		1/16/2004	367.30
		1/16/2004	1,024.40
		1/16/2004	1,499.20
		1/16/2004	1,450.80
		5/10/2004	1,481.76
		6/15/2004	620.26
			$10,306.45
McGuire Woods	Bank of America	10/10/2003	**$1,215.74**
Kenny Nachwalter	PriceWaterhouseCooper	1/16/2004	2,429.57
		1/16/2004	5,844.50
			$8,274.07
Document Production Costs			**$79,361.96**

Mediation Costs

Mediator	Service	Invoice Date	Amount
Marksadr, LLC	Mediation	12/14/2004	**$48,935.00**
The Feinberg Group, Inc.	Mediation	6/07/2005	**$39,513.60**
Mediation Subtotal			**$88,448.60**

Grand Total of Taxable Costs **$1,316,765.03**

FURTHER AFFIANT SAYETH NOT

JEROLD S. SOLOVY

The foregoing instrument was acknowledged before me this 22nd day of July, 2005, by JEROLD S. SOLOVY, who is personally known to me ~~or who has produced _____ as identification and who did~~ / did not take an oath.

Notary Signature

"OFFICIAL SEAL"
YOLANDA CHAGOYA-GEORGE
Notary Public, State of Illinois
My Commission Expires Feb. 2, 2007

EXPENSES RELATED TO DOYLE 1/12/05 DEPOSITION, 1/26/05 & 2/2/05 HEARINGS	
DESCRIPTION	**AMOUNT**
1/11-1/12/05 - Expenses to attend deposition of Joseph Doyle: Airfare, hotel, taxi, meals	$1,675.15
Transcript of 1/12/05 Doyle Deposition	$861.00
Video of 1/12/05 Doyle Deposition	$485.00
Court transcript of hearing on 1/26/05	$217.00
Court transcript of hearing on 2/2/05	$1,300.00
TOTAL	$4,538.15

EXPENSES RELATED TO DOYLE 2/11/05 DEPOSITION	
DESCRIPTION	**AMOUNT**
Transcript, video of 2/11/05 Doyle Deposition	$1,654.72
	$1,654.72
TOTAL	**50% of Costs: $827.36**

EXPENSES RELATED TO E-MAIL HEARINGS AND DEPOSITIONS

DESCRIPTION	AMOUNT
2/8-2/15 - Expenses to attend evidentiary hearing of 2/14: Airfare, hotel, car rental, parking, and meals of R. Byman	$5,210.95
2/28-3/12 - Expenses to attend evidentiary hearings; Airfare, hotel, taxis, parking, and meals of R. Byman.	$4,488.97
3/7-3/8 -Expenses to attend deposition of Gorman and Riel: Airfare, hotel, taxi, meals, and parking of R. Byman	$1,207.74
3/7-3/8 - Expenses to attend depositions of Gorman and Riel: Airfare, hotel, taxi, meals, and parking of B. Hauck	$971.20
3/12-3/15 - Expenses to attend evidentiary depositions and hearings: Hotel, car rental, taxis; parking, and meals of R. Byman	$2,959.64
Email expert services, Quinn Gregor	$10,112.00
Airfare of email expert witness	$268.50
Transcript of 3/7 Gorman (Nachtigal) Deposition	$566.50
Video of 3/7 Gorman (Nachtigal) Deposition	$435.00
Transcript of 3/8 Riel Deposition	$851.50
Transcripts of 3/13 Anfang, 3/13 Block, 3/13 Nachital, 3/13 Buchanan, and 3/13 Wolfe Depositions	$4,706.18
Transcript of 2/9 Gorman (Nachtigal) Deposition	$954.00
Transcript of 2/10 Saunders Deposition	$971.28
Transcript of 3/14 Seickel Deposition	$902.16
Court Transcript of 2/4/05 Hearing (email)	$326.69
Court Transcript of 2/14/05 Hearing (email)	$3,100.12
Court Transcript of 2/23/05 Hearing (Doyle/adverse inference (email issue))	$1,956.71
Court Transcript of 3/2/05 Hearing (email)	$710.02
Court Transcript of 3/2/05 Hearing (email)	$764.84
Court Transcript of 3/4/05 AM Hearing (email)	$421.31
Court Transcript of 3/4/05 PM Hearing (email)	$355.79
Court Transcript of 3/8/05 Hearing (email)	$875.98
Court Transcript of 3/14/05 Hearing (sanctions for email)	$2,628.97
Court Transcript of 3/15/05 Hearing (sanctions for email)	$2,923.81
LiveNote services - 2/14/05 Hearing	$205.00
LiveNote services - 2/23/05 Hearing	$205.00
LiveNote services - 2/28/05 Hearing	$102.50
LiveNote services - 3/2/05 Hearing	$102.50
LiveNote services - 3/4/05 AM Hearing	$102.50

LiveNote services - 3/4/05 PM Hearing	$102.50
LiveNote services - 3/8/05 Hearing	$102.50
LiveNote services - 3/14/05 Hearing	$205.00
LiveNote services - 3/15/05 Hearing	$205.00
	$50,002.36

CONTINUANCE EXPENSES 3/23/05 THROUGH 3/30/05	
DESCRIPTION	**AMOUNT**
Rental Cars for trial team	$2,580.56
Hotel Rooms for trial team	$96,851.78
Catering services for trial team	$14,260.70
Trial Office Expenses (Rent, Furniture, Copy Machines, etc.)	$26,927.07
Misc. Individual Expenses Incurred during 3/23/05-3/30/05	$4,910.01
TOTAL	**$145,530.12**

EXPENSES RELATED TO STRONG INVESTIGATION AND HEARINGS	
DESCRIPTION	**AMOUNT**
Italian legal services and investigation	$7,040.00
Italian translation	$4,369.50
Italian legal research	$448.08
Court Transcript of 2/22/05 Hearing re Strong	$1,550.75
LiveNote services - 2/22/05 Hearing re Strong	$102.50
TOTAL	**$13,510.83**

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a hearing has been set in the above-styled case as follows:

DATE:	August 2, 2005
TIME:	8:45 a.m.
PLACE:	Palm Beach County Courthouse, Courtroom 11A 205 North Dixie Highway West Palm Beach, Florida 33401
BEFORE:	Judge Elizabeth T. Maass
CONCERNING:	Morgan Stanley's Motion to Remove Confidentiality Designation

KINDLY GOVERN YOURSELVES ACCORDINGLY.

The undersigned counsel hereby certifies that a good faith attempt to resolve the issues contained in the foregoing motions or matters will be made with opposing counsel prior to hearing on these matters on the Court's Motion Calendar.

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no costs to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-2431 within two (2) working days of your receipt of this notice; if you are hearing or voice impaired, call 1-800-955-8771.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 26th day of July, 2005.

Mark C. Hansen *(Pro Hac Vice)*
James M. Webster, III *(Pro Hac Vice)*
Rebecca A. Beynon *(Pro Hac Vice)*
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JOSEPH IANNO, JR.
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Chicago, IL 60611

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY & CO. INCORPORATED'S
MOTION TO REMOVE CONFIDENTIALITY DESIGNATION

Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby moves that this Court enter an order removing the confidentiality designations from Coleman (Parent) Holdings Inc.'s Petition for Attorneys' Fees and Costs and directing the Clerk to place Plaintiff's Petition in the public court file, and states:

1. Coleman (Parent) Holdings Inc. ("CPH") served their confidential Petition for Attorneys' Fees and Costs on July 18, 2005. CPH served their Petition and marked it "*Confidential Subject to the terms of the Stipulated Confidentiality Order*".

2. Under paragraph 4 of the July 31, 2003 Stipulated Confidentiality Order (as modified), the only documents that can be designated as confidential are documents that the designating party "believes, in good faith, constituted, contain, reveal or reflect proprietary or confidential trade secrets or technical, business, financial or personal information of a current nature." The Stipulated Confidentiality Order further states in paragraph 15 that "the party making the designation shall bear the burden of proof" of establishing the document's

confidentiality. Morgan Stanley submits that CPH's Petition does not qualify for confidential treatment pursuant to the Protective Order.

WHEREFORE, in accordance with the terms of the Stipulated Confidentiality Order, Morgan Stanley & Co. Incorporated requests that the Court enter an order granting the removal of the confidentiality designation from Coleman (Parent) Holdings Inc.'s Petition for Attorneys' Fees and Costs and directing the Clerk to place the Petition in the public court file, together with such other and further relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 26th day of July, 2005.

Mark C. Hansen *(Pro Hac Vice)*
James M. Webster, III *(Pro Hac Vice)*
Rebecca A. Beynon *(Pro Hac Vice)*
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CARLTON FIELDS, P.A.

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P.O. BOX 150, WEST PALM BEACH, FL 33402-0150
TEL (561) 659-7070 FAX (561) 659-7368

FAX COVER SHEET

		Phone Number	Fax Number
Date:	July 28, 2005		
To:	Jack Scarola	(561) 686-6300	(561) 684-5816
	Jerold Solovy/Michael Brody	(312) 222-9350	(312) 840-7711
	Rebecca Beynon/Mark Hansen	(202) 326-7900	(202) 326-7999
From:	Joyce Dillard, CLA	(561) 659-7070	(561) 659-7368

Client/Matter No.: 47877/14092 **Employee No.:**

Total Number of Pages Being Transmitted, Including Cover Sheet: 14

Message:

Coleman v. Morgan Stanley & Co., Inc.

To follow please find a copy of Morgan Stanley's Notice of Filing Proposed Verdict Froms.

☐ ***Original to follow Via Regular Mail*** ☐ ***Original will Not be Sent*** ☐ ***Original will follow via Overnight Courier***

****

The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (if long distance, please call collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.

****

IF THERE ARE ANY PROBLEMS OR COMPLICATIONS, PLEASE NOTIFY US IMMEDIATELY AT:
(561) 659-7070

TELECOPIER OPERATOR: _____

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

NOTICE OF FILING

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby gives notice that it has filed its Proposed Phase I Verdict Forms submitted May 5, 2005, attached hereto as Exhibit "A", and Proposed Phase I Verdict Form submitted May 12, 2005, attached hereto as Exhibit "B".

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 28th day of July, 2005.

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BY: _____
JOSEPH IANNO, JR.
Florida Bar No: 655351

Counsel for Morgan Stanley & Co. Incorporated

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Chicago, IL 60611

EXHIBIT "A"

IN THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant. /

VERDICT FORM

WE, the jury, return the following verdict:

1. Did Plaintiff Coleman (Parent) Holdings, Inc. actually rely on false statements of fact by Sunbeam or Morgan Stanley when it entered into the merger agreement?

YES ___ NO ___

If your answer to question 1 is "NO," your verdict is for Defendant and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 1 is "YES," please proceed to question 2.

2. Was Plaintiff Coleman (Parent) Holdings, Inc.'s reliance, if any, justifiable?

YES ___ NO ___

If your answer to question 2 is "NO," your verdict is for Defendant and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 2 is "YES," please proceed to question 3.

3. Were the false statements relied on by Plaintiff Coleman (Parent) Holdings, Inc., if any, a legal cause of damage to Plaintiff Coleman (Parent) Holdings, Inc.?

YES ___ NO ___

If your answer to question 3 is "NO," your verdict is for Defendant and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 3 is "YES," please proceed to question 4.

4. Did Plaintiff, Coleman (Parent) Holdings, Inc. waive its right to pursue this claim against Morgan Stanley?

YES ___ NO ___

If your answer to question 4 is "YES," your verdict is for Defendant and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 4 is "NO," please proceed to question 5.

5. What is the amount, if any, of damages sustained by Plaintiff Coleman (Parent) Holdings, Inc. that was legally caused by the false statements on which Plaintiff Coleman (Parent) Holdings, Inc. justifiably relied?

$_____

SO SAY WE ALL, this _____ day of _____, 2005.

_____
FOREPERSON

IN THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant. /

VERDICT FORM

WE, the jury, return the following verdict:

1. Do you find by the greater weight of the evidence that Plaintiff Coleman (Parent) Holdings, Inc. actually relied on Sunbeam's or Morgan Stanley's false statements of fact?

YES ___ NO ___

If your answer to question 1 is "NO," your verdict is for Defendant and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 1 is "YES," please proceed to question 2.

2. Do you find by the greater weight of the evidence that Plaintiff Coleman (Parent) Holdings, Inc.'s reliance, if any, was justifiable?

YES ___ NO ___

If your answer to question 2 is "NO," your verdict is for Defendant and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 2 is "YES," please proceed to question 3.

3. Do you find by the greater weight of the evidence that the false statements relied on by Plaintiff Coleman (Parent) Holdings, Inc., if any, were a legal cause of damage to Plaintiff Coleman (Parent) Holdings, Inc.?

YES ___ NO ___

If your answer to question 3 is "NO," your verdict is for Defendant and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 3 is "YES," please proceed to question 4.

4. Do you find by the greater weight of the evidence that Plaintiff, Coleman (Parent) Holdings, Inc. waived its right to pursue this claim against Morgan Stanley?

YES ___ NO ___

If your answer to question 4 is "YES," your verdict is for Defendant and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 4 is "NO," please proceed to question 5.

5. What is the amount, if any, of damages sustained by Plaintiff, Coleman (Parent) Holdings, Inc. that was caused by the fraud committed by Sunbeam and Morgan Stanley?

$_____

PUNITIVE DAMAGES ISSUES

6. Do you find by clear and convincing evidence that Plaintiff, Coleman (Parent) Holdings, Inc. actually relied on Sunbeam's or Morgan Stanley's false statements of fact?

YES ___ NO ___

If your answer to question 6 is "NO," your verdict is for Defendant on the issue of punitive damages and you should not proceed further except to

date and sign this verdict form and return it to the courtroom. If your answer to question 6 is "YES," please proceed to question 7.

7. Do you find by clear and convincing evidence that Plaintiff Coleman (Parent) Holdings, Inc.'s reliance, if any, was justifiable?

YES ___ NO ___

If your answer to question 7 is "NO," your verdict is for Defendant on the issue of punitive damages and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 7 is "YES," please proceed to question 8.

8. Do you find by clear and convincing evidence that that the false statements relied on by Plaintiff Coleman (Parent) Holdings, Inc., if any, were a legal cause of damage to Plaintiff Coleman (Parent) Holdings, Inc.?

YES ___ NO ___

SO SAY WE ALL, this _____ day of _____, 2005.

_____
FOREPERSON

IN THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant. /

VERDICT FORM*

WE, the jury, return the following verdict:

1. Did Morgan Stanley & Co. Incorporated aid and abet Sunbeam in committing a fraud upon Coleman (Parent) Holdings, Inc. which was a legal cause of damage to Coleman (Parent) Holdings, Inc.?

YES ___ NO ___

2. Did Morgan Stanley & Co. Incorporated conspire with Sunbeam in committing a fraud upon Coleman (Parent) Holdings, Inc. which was a legal cause of damage to Coleman (Parent) Holdings, Inc.?

YES ___ NO ___

If your answer to questions 1 and 2 are "NO," your verdict is for Defendant and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to questions 1 or 2 is "YES," please proceed to question 3.

3. Did Plaintiff, Coleman (Parent) Holdings, Inc. waive its right to pursue this claim against Morgan Stanley?

YES ___ NO ___

If your answer to question 3 is "YES," your verdict is for Defendant and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 3 is "NO," please proceed to question 4.

4. What is the amount, if any, of damages sustained by Plaintiff, Coleman (Parent) Holdings, Inc. that was caused by the fraud committed by Sunbeam and Morgan Stanley?

$_____

SO SAY WE ALL, this _____ day of _____, 2005.

_____
FOREPERSON

*Proposed for use in conjunction or combination with, and not as an alternative to, Morgan Stanley's other proposed verdict forms.

EXHIBIT "B"

Morgan Stanley proposal

IN THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO: CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant. /

VERDICT FORM

WE, the jury, return the following verdict:

1. Do you find by the greater weight of the evidence that Plaintiff, Coleman (Parent) Holdings, Inc., relied on Morgan Stanley's or Sunbeam's false statements of fact?

_____ YES _____ NO

If your answer to Question 1 is "NO," your verdict is for Morgan Stanley and you should proceed no further except to sign and date this verdict form and return it to the courtroom. If your answer to question 1 is "YES," please proceed to question 2.

2. Do you find by clear and convincing evidence that Plaintiff, Coleman (Parent) Holdings, Inc., relied on Morgan Stanley's or Sunbeam's false statements of fact?

_____ YES _____ NO

3. Do you find by the greater weight of the evidence that the false statements of fact relied on by Plaintiff, Coleman (Parent) Holdings, Inc., if any, were a legal cause of damage Coleman (Parent) Holdings, Inc?

_____ YES _____ NO

If your answer to Question 3 is "NO," your verdict is for Morgan Stanley and you should proceed no further except to sign and date this verdict form and return it to the courtroom. If your answer to question 3 is "YES," please proceed to question 4.

4. Do you find by clear and convincing evidence that the false statements of fact relied on by Plaintiff, Coleman (Parent) Holdings, Inc., if any, were a legal cause of damage Coleman (Parent) Holdings, Inc?

_____ YES _____ NO

5. What is the amount, if any, of damages sustained by Plaintiff, Coleman (Parent) Holdings that was legally caused by its reliance on Morgan Stanley's or Sunbeam's false statements of fact?

$ _____

SO SAY WE ALL, this _____ day of _____, 2005.

_____
FOREPERSON

#230580/mep

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

_____/

CASE NO.: 2003 CA 005045 AI

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: August 4, 2005

TIME: 8:45 a.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

VERIFIED PETITION FOR A SHOW-CAUSE ORDER REGARDING MORGAN STANLEY'S CRIMINAL CONTEMPT OF COURT

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Case No.: 2003 CA 005045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Federal Express to all Counsel on the attached list, this 29th day of July, 2005.

JACK SCAROLA
Florida Bar No.: 169440
Searcy Denney Scarola
Barnhart & Shipley, P.A.
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Fax: (561) 478-0754
Attorney for Plaintiff

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Co., Inc.
Case No.: 2003 CA 005045 AI
Notice of Hearing

COUNSEL LIST

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THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC., CASE NO. 2003CA 005045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

COLEMAN (PARENT) HOLDINGS' RESPONSE IN OPPOSITION TO MORGAN STANLEY'S MOTION TO REMOVE CONFIDENTIALITY DESIGNATION

Morgan Stanley has moved this Court for an order removing the confidentiality designation from the petition for attorneys' fees and costs that CPH served on Morgan Stanley and directing the Clerk to place the petition in the public court file even though CPH's petition has not even been filed. Morgan Stanley is not entitled to the relief that it seeks because CPH's petition for attorneys' fees properly was designated as confidential for several reasons.

First, CPH's confidential designation clearly is authorized by the plain terms of the Stipulated Confidentiality Order. Paragraph 4 of the Order provides that "[a]ny party or non-party may designate as 'Confidential' any Litigation Materials [defined in part in Paragraph 1 as "all non-public and Confidential information disclosed by any party thereto during the course of the captioned litigation"] or portions thereof which the party or non-party believes, in good faith, constitute, contain, reveal or reflect proprietary or confidential trade secrets or technical, business, financial or personnel information of a current nature." CPH's petition for attorneys' fees contains detailed information concerning the legal services that CPH's attorneys have performed for CPH in this litigation, the rates charged by the attorneys for their work, and the amount CPH has paid the attorneys for that work. That information — which is much more

detailed than Morgan Stanley's petition, which contains only conclusory entries of the work performed — clearly reflects "proprietary," "business," and "financial" information "of a current nature." Thus, under the plain terms of the Stipulated Confidentiality Order, CPH's designation of its petition for attorneys' fees as confidential is amply justified and should not be removed by this Court.

Second, none of the information concerning the legal services performed by CPH or the billing rates of the attorneys who performed those services is public. Indeed, as a matter of customary business practice, it has been everyone's expectation that the legal services performed and the expenses associated with those legal services would remain private. It would frustrate those legitimate and proprietary expectations to make CPH's fee petition public.

Third, CPH's petition was prepared in connection with a Court-ordered private mediation. CPH did not file the petition. No basis exists for exposing CPH's petition to public access.

Fourth, there certainly is no public interest in, or need for, CPH's fee petition becoming a matter of public record. Morgan Stanley's only possible motivation for seeking this relief is to attempt to expose CPH's request for fees to Morgan Stanley's public media "spin" — just as Morgan Stanley has mischaracterized, in statements to the press, virtually every other adverse ruling in this case — but that is not a sufficient justification. Again, CPH's confidential designation under the Stipulated Confidentiality Order clearly was proper, and Morgan Stanley's motion to remove that designation should be denied for that reason.

Dated: August 1, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

Jerold S. Solovy
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Jeffrey T. Shaw
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One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

John Scarola
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2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33402-3626
(561) 686-6300

#1289197

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and Federal Express to all counsel on the attached list on this 1st day of August, 2005.

JOHN SCAROLA
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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON MORGAN STANLEY & CO. INCORPORATED'S MOTION TO REMOVE CONFIDENTIALITY DESIGNATION

THIS CAUSE came before the Court August 2, 2005 on Morgan Stanley & Co. Incorporated's Motion to Remove Confidentiality Designation, which the Court elects to treat as including a Motion to Clarify, with all counsel present or participating by speaker telephone. Based on the foregoing and on the proceedings before the Court, it is

ORDERED AND ADJUDGED that Morgan Stanley & Co. Incorporated's Motion to Clarify is Granted. The Stipulated Confidentiality Order, as amended ("Order"), is clarified to provide that attorneys retained as experts or consultants in connection with CPH's Petition for Attorney's Fees and Costs are deemed experts or consultants under paragraph 9 (h) thereof. The Court defers ruling on Morgan Stanley & Co. Incorporated's contention that the Petition does not contain Confidential materials, as defined in the Order, pending further hearing.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 2nd day of August, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER SPECIALLY SETTING HEARING

THIS CAUSE having come before the Court, it is hereby

ORDERED AND ADJUDGED that hearing on CPH's Verified Petition for a Show-Cause Order Regarding Morgan Stanley's Criminal Contempt of Court is specially set before the Honorable Elizabeth T. Maass on October 21, 2005, at 8:00 a.m., in Courtroom 11A, 205 N. Dixie Hwy, WPB, FL 33401. This is a specially set hearing which shall be limited to 1 hour. MS & Co. shall serve any opposition to the Petition within 30 days. CPH shall serve any response thereto within 14 days thereafter. It is further

ORDERED AND ADJUDGED that the attorneys/parties must submit to the Court one (1) week before the hearing:

1. copies of all relevant pleadings;
2. a copy of any memorandum of law; and
3. copies of all case law authority.

This hearing shall not be canceled unless the issues of the Petition have been settled, and an order entered, or the Petition withdrawn.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 4 day of August, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
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Washington, DC 20036

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oir ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki Infim, ki bézwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontakté koôdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro téléfonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résévwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe accommodation pour pouvoir participer á ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

CASE NO.: 2003 CA 005045 AI

MORGAN STANLEY & CO., INCORPORATED,

Defendant.
_____/

COURT
RECEIVED FOR FILING
AUG 25 2005
SHARON R. BOCK
CLERK & COMPTROLLER
CIRCUIT CIVIL DIVISION

JOINT NOTICE

Coleman (Parent) Holdings Inc. ("CPH") and Morgan Stanley & Co. Incorporated ("Morgan Stanley") hereby jointly give notice that they have resolved, through mediation and settlement, all claims relating to the costs and attorneys' fees awarded in orders issued on February 2, February 24, February 28, March 1, and March 23, 2005 ("Orders Awarding Attorneys' Fees and Costs"), without prejudice to either party's right to assert, including on appeal, that any of the Orders Awarding Attorneys' Fees and Costs, or any part thereof, was erroneously entered, provided that nothing shall permit either party to contest the payment of costs and fees relating to the Orders Awarding Attorneys' Fees and Costs.

Dated: August ___, 2005

Coleman (Parent) Holdings Inc.

By: _____
One of its Attorneys

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Morgan Stanley & Co., Inc.

By: _____ 00961/05
One of its Attorneys

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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).

ORDER AND RENOTICE OF HEARING

This case came before the Court, in Chambers, on the Court's own Motion and the Courthouse being closed due to Tropical Strom Katrina. Based on the foregoing, it is

ORDERED AND ADJUDGED that the status conference set August 26, 2005 is canceled and is hereby reset for

September 13, 2005, at 3:30 p.m.

at the West Palm Beach Courthouse, Room 11A, 205 N Dixie Hwy, WPB, FL.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 29 day of August, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
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West Palm Beach, FL 33401

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West Palm Beach, FL 33409

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1615 M Street, NW, Suite 400
Washington, DC 20036

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-4380 within two (2) working days of your receipt of this [describe notice]; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si Ud. es una persona incapacitada que necesita de un servicio especial para participar en este proceso, Ud. tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinador de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida, 33401, teléfono (561) 355-4380, dentro de los dos (2) próximos días hábiles después de recibir esta [describa la notificación]; si tiene incapacidad de oir ó hablar llame al 1-800-955-8771.

CREOLE

Si ou sé yon moun ki Infim, ki bézwen ninpôt akomodasyon pou ka patisipé nan pwosè sa-a, ou gen dwa, san'l pa kouté'w anyin, pou yo ba'w kèk sèvis. Tanpri kontakté koôdinatè ADA ya nan Biro Administratif Tribinal nan cité Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, niméro téléfonn-nan sé (561) 355-4380, rélé dé (2) jou dé lè ou résévwa [notis sa-a]; si ou bèbè ou byen soud rélé 1-800-955-8771.

FRENCH

Si vous êtes infirme, et en besoin de n'importe accommodation pour pouvoir participer á ces procédures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinateur du Bureau Administratif du Tribunal de Palm Beach, située à 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numéro de téléphone (561) 355-4380 durant deux (2) jours suivant la réception de [cette note]; si vous êtes muets ou sourds, appelez 1-800-955-8771.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

AGREED ORDER GRANTING EXTENSION OF TIME FOR COLEMAN (PARENT) HOLDINGS INC. TO FILE AND SERVE ITS REPLY TO MORGAN STANLEY'S OPPOSITION TO CPH'S VERIFIED PETITION FOR A SHOW CAUSE ORDER REGARDING MORGAN STANLEY'S CRIMINAL CONTEMPT OF COURT

THIS CAUSE having come before the Court upon the agreement of counsel for an Order granting an extension of time for the filing and service of the reply of Coleman (Parent) Holdings Inc. ("CPH") to the opposition of Morgan Stanley & Co. Incorporated ("Morgan Stanley") to CPH's Verified Petition for a Show Cause Order Regarding Morgan Stanley's Criminal Contempt of Court, and the Court having been advised of the agreement of counsel and being otherwise fully advised, it is hereby

ORDERED AND ADJUDGED that:

CPH shall have up to and including October 11, 2005 to file and serve its reply to Morgan Stanley's opposition to CPH's Verified Petition for a Show Cause Order Regarding Morgan Stanley's Criminal Contempt of Court.

DONE AND ORDERED in West Palm beach, Palm Beach County, Florida this ___ day of September, 2005.

Elizabeth T. Maass
Circuit Court Judge

cc: Counsel of Record on attached Service List

SERVICE LIST

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#1312814

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

September 6, 2005

CASE NO.: 4D05-2606
L.T. No. : CA 03-5045 AI

MORGAN STANLEY & CO., INCORPORATED	v.	COLEMAN (PARENT) HOLDINGS, INC.
Appellant / Petitioner(s),		Appellee / Respondent(s).

BY ORDER OF THE COURT:

ORDERED that the appellant's August 18, 2005, motion to enforce automatic stay provision of Rule 9.310(b)(1) and for expedited consideration is granted. Appellee shall suspend all further proceedings in relation to the judgment. *See Freedom Insurors, Inc. v. M.D. Moody & Sons, Inc.*, 869 So. 2d 1283, 1285 (Fla. 4th DCA 2004).

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Sharon R. Bock, Clerk	Thomas E. Warner	Joseph Ianno, Jr.
Michael Brody	Jack Scarola	Jerold S. Solovy
Joel D. Eaton	Paul M. Smith	Mark C. Hansen
Jeffrey T. Shaw	Rebecca Beynon	John R. Blue
Michael K. Kellogg	Ronald L. Marmer	

pb

Marilyn Beuttenmuller
MARILYN BEUTTENMULLER, Clerk
Fourth District Court of Appeal

DISTRICT COURT OF APPEAL * FOURTH DISTRICT * STATE OF FLORIDA

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

STIPULATION REGARDING BRIEFING SCHEDULE FOR MOTION FOR AN ORDER TO SHOW CAUSE

WHEREAS, Coleman (Parent) Holdings ("CPH"), by Verified Petition dated July 27, 2005, requested that the Court issue an Order to Show Cause why Morgan Stanley & Co. Incorporated ("Morgan Stanley"), Donald G. Kempf, Jr., James P. Cusick, Soo-Mi Lee and James F. Doyle (collectively, the "Non-Party Individuals") should not be held in criminal contempt;

WHEREAS, CPH served Morgan Stanley with the Verified Petition on or about July 27, 2005;

WHEREAS, on August 4, 2005, CPH and Morgan Stanley appeared before the Court in connection with the Verified Petition, and the Court ordered that Morgan Stanley submit any opposition papers in response to the Verified Petition 30 days later, that CPH submit any reply papers 14 days thereafter, and that a hearing on the Verified Petition would be held on October 21, 2005;

WHEREAS, on August 11, 2005, counsel for the Non-Party Individuals accepted service of the Verified Petition on behalf of their clients, without prejudice to any jurisdictional issues that might be raised; and

WHEREAS, counsel for CPH and the Non-Party Individuals have conferred and wish to memorialize their agreement with respect to a

briefing schedule in connection with the Verified Petition and to submit that agreement for the approval of the Court;

IT IS HEREBY STIPULATED AND AGREED THAT:

1. The Non-Party Individuals shall submit any opposition papers in response to the Verified Petition by no later than September 20, 2005 and shall not contest personal jurisdiction in any such submission.

2. CPH will file and serve any reply papers to any such submissions by the Non-Party Individuals by no later than October 11, 2005.

3. This Stipulation can be submitted to the Court with facsimile signatures in conjunction with this undersigned order.

By: _____
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(561) 686-6300
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By: _____
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(Attorneys for Non-Party, Soo-Mi-Lee)

By: _____
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By: _____
Richard G. Lubin
1217 S. Flagler Drive
West Palm Beach, FL 33401
(Attorneys for Non-Party, James F. Doyle)

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By: _____
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(Attorneys for Non-Party, James F. Doyle)

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3. This Stipulation can be submitted to the Court with facsimile signatures in conjunction with this undersigned order.

By: _____
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By: _____
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(Attorneys for Non-Party, Donald G. Kempf)

By: _____
Richard G. Lubin
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(Attorneys for Non-Party, James F. Doyle)

AGREED ORDER ON STIPULATION REGARDING BRIEFING SCHEDULE FOR MOTION FOR AN ORDER TO SHOW CAUSE

This Cause came before the Court on the above Stipulation. The Court, hereby approves the Stipulation, and it is hereby ordered that:

1. The Non-Party Individuals shall submit any opposition papers in response to the Verified Petition by no later than September 20, 2005;

2. CPH will file and serve any reply papers to any such submissions by the Non-Party Individuals by no later than October 11, 2005.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this ____ day of ____September__, 2005

SIGNED & DATED
9/12/2005
JUDGE ELIZABETH T. MAASS

ELIZABETH T. MAASS
Circuit Court Judge

Copies furnished to:

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(Attorneys for Non-Party, James F. Doyle)

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,	
Plaintiff,	
- against -	Case No.: CA 03-5045-AI
MORGAN STANLEY & CO. INCORPORATED,	
Defendant.	

NON-PARTY RESPONDENT JAMES P. CUSICK'S OPPOSITION TO CPH'S VERIFIED PETITION FOR A SHOW-CAUSE ORDER

James P. Cusick respectfully urges this Court to reject Coleman (Parent) Holding Inc.'s ("CPH") verified petition on the grounds that the petition does not establish an adequate basis for this Court to issue an order to show cause against him for criminal contempt. See Verified Petition for a Show-Cause Order Regarding Morgan Stanley's Criminal Contempt of Court ("CPH Petition").

By way of background, on May 17, 2005, as part of its effort to persuade the Court not to read to the jury a statement relating what the Court had found to be discovery misconduct by Morgan Stanley & Co., Inc ("Morgan Stanley"), Morgan Stanley submitted a document entitled "Summary of Offer of Proof Regarding Defendant's Litigation Misconduct and Brief Arguing Against Reading to the Jury Any Litigation-Misconduct Statement" ("May 2005 Offer of Proof"). The May 2005 Offer of Proof addressed a number of issues. Among them was whether Morgan Stanley had made timely disclosure to CPH of the fact that certain back-up tapes found in a Morgan

Stanley facility in Brooklyn, NY ("Brooklyn Tapes") and certain 8-millimeter tapes ("8mm Tapes") contained e-mail. The May 2005 Offer of Proof stated that the Morgan Stanley Law Division did not learn that the Brooklyn Tapes or the 8mm Tapes contained emails until October and November 2004 respectively. See Exhibit 1. Morgan Stanley made similar statements at other times during the court proceedings. See Exhibit 2 (Notice).

The May 2005 Offer of Proof attached, among other things, the proffers of a number of witnesses, including an unsworn "Offer of Proof re: James P. Cusick." See Exhibit 3 ("Cusick Proffer"). Mr. Cusick was at the time (and remains today) a Managing Director in Morgan Stanley's Law Division.

The Cusick Proffer stated that Mr. Cusick first learned of the discovery of the Brooklyn Tapes on or about June 6, 2004, and that he was informed, at that time, that it was "not known whether the Brooklyn tapes contained e-mail." Exhibit 3. The proffer went on to state that Mr. Cusick believed he "first learned that that there was e-mail on some of the Brooklyn Tapes" on or about October 25, 2004. Id. The Cusick Proffer similarly stated that Mr. Cusick first learned in November 2004 of both the existence of the 8mm Tapes and that some of them contained e-mails. Id.

Shortly after Morgan Stanley filed the May 2005 Offer of Proof containing the Cusick Proffer and related materials, Morgan Stanley located for the first time e-mails that prompted them to correct Mr. Cusick's proffer and the statements of the other Morgan Stanley personnel familiar with the matter. See Exhibit 2 (Notice dated June 17, 2005 ("the June 2005 Notice")). The newly discovered e-mails indicated that the Morgan Stanley Law Division had learned in July 2004 ("July 2004 e-mails") about the existence

of e-mails on the Brooklyn Tapes as well as of the discovery of the 8mm Tapes. Id. They immediately, voluntarily and without prompting brought the new information to the Court's attention, by informing the Court and plaintiff CPH that as a result of a "review of e-mails discovered by a new e-mail search, . . . the offers of proof and related statements should be corrected to state that the Law Division was aware in July 2004 that some of the Brooklyn Tapes contained e-mail and that certain 8-mm tapes existed." Id.

Based on nothing more than these facts, CPH now seeks to have this Court accuse Mr. Cusick of criminal contempt. See CPH Petition at 1. While the CPH Petition generally asserts that Morgan Stanley and four individuals should be held in contempt for "deliberately and obstructively misleading the Court" with regard to the issue of when the Legal Division learned of the fact that the Brooklyn Tapes contained e-mail and of the existence of the 8mm Tapes, the CPH Petition is devoid of factual allegations giving probable cause to conclude that Mr. Cusick is guilty of any intentional wrongdoing, as required under applicable law, let alone that there is or could be any evidence to prove this beyond a reasonable doubt.

There is no allegation in the CPH Petition that Mr. Cusick's error reflected any intention to mislead the Court. The Petition does not even acknowledge that the error was promptly and voluntarily corrected in a filing made with this Court. It implies that Mr. Cusick intentionally deceived this Court in the Cusick Proffer, but verifies no evidence that Cusick knew any statement in the Cusick Proffer or any other statement to the Court was incorrect at the time that he made it. In the place of specific allegations, the Petition instead simply offers the sweeping assertion that "because the contumacious conduct at issue here involved withholding information known to Morgan Stanley's Law

Division, it is also appropriate to include in the show-cause Order the in-house attorneys involved." Petition for Show Cause Order, at ¶ 2; p. 6.

For the reasons set forth below, Mr. Cusick respectfully urges this Court not to issue an Order to Show Cause and submits that the facts cited by CPH do not merit such an Order.[1]

First, the factual allegations are wholly insufficient to warrant the exercise of this Court's criminal contempt power. To initiate a criminal contempt proceeding, the petitioner must provide a signed affidavit that states the essential facts constituting the criminal contempt charged. See Fla. R. Crim. P. 3.840; see also Pugliese v. Pugliese, 347 So. 2d 422, 424 (Fla. 1977); Hutcheson v. State, 903 So. 2d 1060, 1062 (Fla. 5th DCA 2005). One of the essential facts for a finding of criminal contempt is that the defendant intentionally lied to the court or intentionally obstructed the court's proceedings. See Millan v. Williams, 655 So. 2d 207, 208 (Fla. 3d DCA 1995). To convict Mr. Cusick of criminal contempt, this Court must find evidence that Mr. Cusick "intentionally lied." Millan, 655 So. 2d at 208 (reversing conviction of contempt for failure to find that defendant had "intentionally lied" in false affidavit); see also Brown v. Florida, 579 So. 2d 898 (Fla. 4th DCA 1991) (reversing conviction where state records contradicted witness absent evidence that witness knew of the records at the time of his testimony). At trial "there must be proof beyond a reasonable doubt that the individual intended" to commit the contempt. Tide v. State, 804 So. 2d 412, 413 (Fla. 4th DCA 2001) (quoting Levine v. State, 650 So. 2d 666, 668 (Fla. 4th DCA 1995)). Indeed, the required intent is such that, where direct evidence is absent, a conviction will not stand if

[1] Mr. Cusick joins in the opposition briefs of Morgan Stanley and Non-Party Respondents Donald G. Kempf, Jr., James F. Doyle and Soo-Mi Lee, to the extent applicable to him.

"the circumstantial evidence is not 'inconsistent with any reasonable hypothesis of innocence.'" Paul v. Johnson, 604 So. 2d 883, 884 (Fla. 5th DCA 1992).

In addition, "contempt should be reserved only for the most blatant cases in which the perjury is virtually undisputed." Emanuel v. State, 601 So. 2d 1273, 1275 (Fla. 4th DCA 1992). Thus, in the case of a false statement made to a court, reliance on purely circumstantial evidence is generally insufficient to support either a conviction or a charge of contempt. "[I]t must appear beyond a reasonable doubt from the personal knowledge of the court or by admission from the lips of the defendant in open court and from no other source that the representations were untrue and that defendant knew they were untrue when they were made." People v. Randall, 89 Ill. App. 3d 406, 414 (Ill. App. Ct. 1980); see also Emanuel, 601 So. 2d at 1275 ("It has been held that the standard is satisfied only where the witness admits the falsity or other circumstances demonstrate beyond question the false nature of testimony.").

In the words of Paul v. Johnson, the CPH Petition is not "inconsistent with a reasonable hypothesis of innocence." 604 So. 2d at 884. A reasonable hypothesis of innocence consistent with the CPH Petition's allegations would be a mistake of fact or an error in recollection, which is insufficient as a matter of law to satisfy the stringent intent requirement. In State *ex. rel.* Luban v. Coleman, the Florida Supreme Court reversed a criminal contempt charge on the grounds that a failure to recollect an event one year prior cannot suffice to prove that a witness intentionally lied. 138 Fla. 555 (Fla. 1939). The witness in the case recalled speaking with three men, and recalled certain statements, but could not recall which man made the statements. The Florida Supreme Court concluded that "[i]t would indeed be unthinkable to hold that a trial judge may send any man to

prison for contempt of court because he says he cannot remember which of three men made statements to him on some occasion more than a year in the past merely because the judge thinks he should remember." Id. at 558. In other words, it is not enough to show that a witness had an incorrect recollection, especially where, as here, a substantial period of time has passed. See also People v. Gorisek, 176 Ill. App. 3d 266 (Ill. App. Ct. 1988) (incorrect recollection after significant lapse of time is, as a matter of law, insufficient basis for a finding of criminal contempt).

Measured against these standards and cases, the CPH Petition is insufficient to warrant commencement of criminal contempt proceedings. There is no allegation, nor any evidence presented that, at the time of the Cusick Proffer, Mr. Cusick deliberately concealed the fact that members of the Law Division were informed in July 2004 (rather than in October and November 2004), that some of the Brooklyn Tapes had e-mail or that the 8mm Tapes existed. Without verified evidence as to Mr. Cusick's intent, such as an admission by Mr. Cusick that he lied, a charge of criminal contempt cannot be found against Mr. Cusick beyond a reasonable doubt. See Emanuel, 601 So. 2d at 1275.

The CPH Petition is based entirely on the fact that Morgan Stanley filed the June 2005 Notice correcting the earlier statements. Far from demonstrating a knowing falsity, a much more logical inference from the voluntary and immediate filing of the June 2005 Notice is that the original proffer was not made with any intent to deceive the Court.

Second, even if the allegations in the CPH Petition were sufficient to support commencement of criminal proceedings (and they are not), the Court should exercise its discretion to refrain from such a holding given this state's policy of judicial restraint in the criminal contempt context. Under Florida law, the judicial criminal contempt power

"should always be exercised with judicial restraint." Emanuel, 601 So. 2d at 1274. Thus, "the power to punish for contempt should be cautiously and sparingly exercised." Demetree v. State, 89 So. 2d 498, 501 (Fla. 1956); In re: Weinstein, 518 So. 2d 1370, 1373 (Fla. 4th DCA 1988); Harper v. State, 217 So. 2d 591, 593 (Fla. 4th DCA 1968). As one court noted:

> [J]udges should approach the possible exercise of this unique power with the same hesitant caution and wariness one would use in picking up a glowing ember. It must be used only rarely and with circumspection. The provocation must never be slight, doubtful, or of shifting interpretation. The occasion should be real and necessary, not murky, and not ameliorated in some less formal manner.

Schenck v. State, 645 So. 2d 71, 74 (Fla. 4th DCA 1994); see also Martin v. State, 397 So. 2d 1012, 1014 (Fla. 1st DCA 1981) ("Courts recognize that the power to punish for contempt is extraordinary and far-reaching and, unless used cautiously and prudently, can be subject to abuse.").

As a result, it is generally preferred that executive branch authorities investigate charges of criminal wrongdoing, especially where the evidence turns on the intent of the witness. This is exemplified in a number of Florida court holdings in which the courts make clear that, "in the ordinary situation, where perjury is suspected, a state prosecution for perjury is the preferred alternative." Emanuel, 601 So. 2d at 1275; see also Luban, 138 Fla. at 560 ("Where, however, the falsity of testimony is denied . . . the court . . . should leave the alleged contemnor to be punished criminally if guilty of perjury.").

In light of the facts, Mr. Cusick respectfully submits that an Order to Show Cause should not issue in this case.

Dated: September 20, 2005 Respectfully submitted,

Of counsel:
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Scott W. Muller (service of pro hac vice motion pending)
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By:_____
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Florida Bar No. 224162
(Attorneys for Non-Party, James P. Cusick)

I HEREBY CERTIFY that a true copy of the foregoing document has been furnished via Federal Express this 20th day of September, 2005, to:.

Counsel List

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By:_____
ROBERT D. CRITTON, JR., ESQ.
Florida Bar No. 224162
(Attorneys for Non-Party, James P. Cusick)

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

NON-PARTY RESPONDENT JAMES F. DOYLE'S OPPOSITION TO COLEMAN (PARENT) HOLDING INC.'S VERIFIED PETITION FOR A SHOW-CAUSE ORDER

This Court should not issue a show-cause order against James Doyle because plaintiff Coleman (Parent) Holdings, Inc.'s ("CPH") Petition fails to set forth sworn facts on personal knowledge alleging that Mr. Doyle made a knowingly false statement with the intent to obstruct this Court's proceedings. In the absence of specific facts relating to Mr. Doyle, CPH's Petition impermissibly relies on the collective conduct of Morgan Stanley & Co. Incorporated in its efforts to pursue James Doyle and the other co-respondents individually. Under Florida law such non-specific pleadings will not support a show-cause order for criminal contempt. For all these reasons, we respectfully request that the Court reject CPH's Petition.

FACTS

The history of the contentious discovery in this litigation is well known to the Court. The current proceeding relates to Morgan Stanley's decision to correct certain discovery –related statements it had made in this litigation regarding when its Law Division learned of the

existence of a set of e-mail back-up tapes located in Brooklyn (the "Brooklyn Tapes") as well as another set of 8-mm back-up tapes (the "8-mm tapes"). *See* Verified Petition for a Show-Cause Order Regarding Morgan Stanley's Criminal Contempt of Court ("Petition"), at Ex. I.

On June 17, 2005, Morgan Stanley filed a Notice (the "June 17 Notice") correcting the statement that its "Law Division was not aware that any of the Brooklyn Tapes contained e-mail until October 2004 and was not aware of certain 8-mm tapes until November 2004" (the "Corrected Statement"). *Id.* The June 17 Notice explained that Morgan Stanley corrected the earlier statement as a consequence of a new e-mail search that revealed that the "Law Division was aware in July 2004 that some of the Brooklyn Tapes contained e-mail and that certain 8-mm tapes existed." *Id.* In light of that determination, Morgan Stanley "retract[ed], withdr[ew] and correct[ed]" every statement made or submitted on its behalf "to the effect that the Law Division was not aware that any of the Brooklyn Tapes contained e-mail until October 2004 and was not aware of certain 8-mm tapes until November 2004." *Id.*

The June 17 Notice also withdrew or corrected certain statements relating to the personal knowledge of Morgan Stanley's in-house lawyers, including a declaration submitted by James Doyle on January 31, 2005 (the "Doyle Declaration"). *See id.* at Ex. E & I. The Doyle Declaration stated that Mr. Doyle had "learned that additional e-mail backup tapes had been located within Morgan Stanley" at the end of October 2004. *Id.* at Ex. E. The June 17 Notice also corrected several proffered statements submitted by Morgan Stanley in May 2005. *See id.* at Ex. I. One of those proffers repeats Mr. Doyle's statement regarding his knowledge of when he learned of the existence of the tapes at issue (the "Doyle Proffer"). *See id.* at Ex. M. The Doyle Proffer states that "Mr. Doyle did not learn of the existence of the e-mail backup tapes which have been referenced as the Brooklyn Tapes until October 2004." *Id.* The June 17 Notice

corrected that sentence from the Doyle Proffer, although the Notice does not provide a corrected statement to be inserted in place of that sentence. *See id.* at Ex. I. The June 17 Notice also corrected without substitution a second sentence in the Doyle Proffer which states that "Mr. Doyle did not learn of the existence of the 8-millimeter tapes containing e-mails until November 2004." *Id.* at Ex. I & M.

In response to the June 17 Notice, on July 27, CPH filed its Petition.

ARGUMENT

I. CPH's Petition Fails To Allege Specific Facts Demonstrating That Mr. Doyle Made A Knowingly False Statement That Was Intended To Obstruct the Litigation

Under Florida law, a show-cause order must state *all of the essential facts* constituting a respondent's alleged criminal contempt. *See Hagerman v. Hagerman*, 751 So.2d 152, 153-54 (Fla. 2d DCA 2000) (reversing trial court's contempt order because the show-cause order "failed to set forth . . . any of the essential facts which purportedly constituted the charged criminal contempt."); *Kersh v. State Farm Fire & Casualty Co.*, 686 So.2d 782, 782 (Fla. 3d DCA 1967) (reversing trial court because defendant was not provided the "specifics as to what conduct constitutes the alleged contempt."). Where the conduct at issue in the show-cause order is alleged perjury, one of the essential facts that must be set forth in the petition is that the respondent intended to obstruct the proceedings. *See Eubanks v. Agner*, 636 So.2d 596 (Fla. 1st DCA 1994); *see also Brown v. State*, 570 So.2d 898, 899 (Fla. 4th DCA 1991) ("Intent is an essential element of perjury . . . ."). Accordingly, CPH's Petition must state facts sufficient to constitute probable cause that respondent James Doyle acted deliberately to obstruct a judicial proceeding. CPH's Petition fails to satisfy this requirement with respect to Mr. Doyle and, therefore, must be dismissed.

The crux of CPH's Petition against Mr. Doyle concerns the following statement made in his Declaration: "At the end of October 2004, I learned that additional e-mail backup tapes had been located within Morgan Stanley . . . ." Petition at Ex. E. This statement appears to be the basis for CPH's allegation that Mr. Doyle "knew of the existence of unsearched backup tapes and knew that those tapes contained potentially responsive e-mail." Petition at 1. However, the Petition fails to allege any specific facts that would constitute probable cause that Mr. Doyle believed his statement was false and, intentionally so, at the time he signed his Declaration.

The only allegation about Mr. Doyle's state of mind is as follows:

> [S]tatements withdrawn pursuant to the Notice include the [Doyle Declaration] in which he stated that he personally did not learn about the existence of unsearched e-mail on the Brooklyn Tapes until the 'end of October 2004.' . . . It thus appears that Mr. Doyle himself was among those aware of unsearched e-mail in July, despite his sworn declaration to the contrary.

Id. at 3. This assertion, which is based solely on Morgan Stanley's decision to withdraw the Doyle Declaration, falls far short of giving rise to probable cause that Mr. Doyle made an intentionally false statement in his Declaration and that he intended to obstruct the proceedings. *See Hagerman v. Hagerman*, 751 So.2d 152, 153-54 (Fla. 2d DCA 2000) (holding that show-cause order was inadequate because "[i]t merely stated that it *appeared* that [the defendant] had violated a prior court order")(emphasis added). Even assuming for purposes of this Opposition that the statement in Mr. Doyle's Declaration regarding the Brooklyn Tapes was not accurate, CPH's Petition alleges no facts with respect to Mr. Doyle that tend to demonstrate the error was

anything but inadvertent and unintentional.[1] While there is no dispute that Morgan Stanley withdrew its prior submissions (including the Doyle Declaration), correcting the record regarding the state of its corporate knowledge, this standing alone does not give rise to an inference that Mr. Doyle's statement was intentionally false and intended to obstruct the proceedings. Simply stated, this void regarding the essential element of intent should preclude the issuance of a show-cause order.

In the absence of any specific allegations creating probable cause that Mr. Doyle's Declaration was intentionally false, and in the absence of *any* allegation whatsoever that Mr. Doyle intended to obstruct the proceeding, the Court must dismiss the Petition against him.

II. CPH's Petition Must Be Dismissed Because Mr. Doyle Cannot Be Held in Contempt Based on the Allegations of Collective Conduct

As discussed above, CPH's Petition fails to make any specific allegations against Mr. Doyle that would support criminal contempt on the basis of Mr. Doyle's own statements or actions. However, CPH's Petition seemingly suggests that because Mr. Doyle was a member of Morgan Stanley's Law Division, because he participated in the litigation, because he submitted a Declaration that was subsequently withdrawn by Morgan Stanley, and because the Court found that Morgan Stanley failed to accurately inform the Court and Plaintiffs about the true state of recoverable e-mails, criminal contempt should lie against Mr. Doyle. Indeed, CPH's Petition states that "because the contumacious conduct at issue here involved withholding information known to Morgan Stanley's Law Division, it is appropriate to include in the show-cause Order

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[1] The Court's initial reaction to CPH's Petition appeared to reach the same conclusion. *See* 8/4/05 Tr. at Ex. A ("[O]ne of the questions I would have is just on the face of the documents I have now, how would I conclude that the testimony was knowingly false when given as opposed to, you know, people are talking about things that happened a few years ago and they just screwed up?").

the in-house attorneys involved." Petition at 6. CPH seemingly ignores the requirement that a contempt allegation must be tied to specific facts relating to the individual to be charged. *See In re Broward County State Attorney's Office*, 577 So.2d 967, 971 (Fla. 4th DCA 1991) (citing *Shelley v. District Court of Appeal*, 350 So.2d 471 (Fla. 1977).

The Fourth District Court of Appeal has previously rejected this type of non-individualized group pleading and group culpability in a criminal contempt action. *See id.* In *In re Broward County State Attorney's Office*, the Court of Appeal reversed a trial court order holding the entire State Attorney's Office in contempt as a result of the conduct of three individual attorneys. *See id.* The District Court of Appeal explained that the contempt order could not be "applied to the entire work force in the state attorney's office" because there was no evidence that the other attorneys had "personal knowledge" of the improper conduct. *Id.* Indeed, in a criminal action, assessment of guilt is specific to the individual and must be based on facts that demonstrate individual – not collective – responsibility for the wrongful acts at issue. Nonetheless, CPH focuses not on any specific conduct of the individual respondents but instead seeks to impose contempt liability based on the collective actions of the group. Stripped of its collective guilt pleading, the Petition is devoid of any support for the contention that Mr. Doyle intentionally set forth false information in his affidavit in an effort to obstruct the litigation. For this reason as well, the Petition must be rejected.[2]

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2 Even if the Petition's collective pleading were sufficient, the Petition should still be rejected. Morgan Stanley's June 17 Notice effectively qualifies as recantation pursuant to Section 837.07 of Florida's criminal law. Fla. Sta. Ann. § 837.07 (West 2005). Given that CPH's action against Mr. Doyle is based primarily on the corporate conduct of Morgan Stanley (or the collective acts of Morgan Stanley's employees), the withdrawal of the Corrected Statement – *i.e.* Morgan Stanley's statement about the knowledge of its Law Division – must also preclude CPH from pursuing a derivative contempt action against Mr. Doyle. *See State v. Mark Marks, P.A.*, 833 So.2d 249, 250-251 (Fla. 4th DCA 2002) (concluding that if action for contempt against client was barred under Section 837.07, then the case against the lawyers was also barred).

III. It is Within the Court's Discretion Whether or Not to Issue a Show-Cause Order Against Mr. Doyle

Florida courts have broad discretion to decide whether or not to prosecute alleged criminal contempt. *See Burk v. Washington*, 713 So.2d 988, 993-94 (Fla. 1998). In deciding whether to prosecute, the critical issue is whether a contempt prosecution is necessary to preserve "respect for the integrity of the court as an institution of justice." *Id.* With respect to Mr. Doyle, there is simply no evidence that he intentionally demonstrated any disregard for this Court's integrity.

When considering whether the issuance of a show-cause order against Mr. Doyle is necessary, we urge the Court to consider the Florida Supreme Court's guidance that the "power to punish for contempt should be cautiously and sparingly exercised." *Demetree v. State*, 89 So.2d 498, 501 (Fla. 1956). The Fourth District Court of Appeal has similarly recognized that the court's contempt power should be used "only rarely and with circumspection . . . and the occasions should be real and necessary, not murky, and not ameliorated in some less formal manner." *Schenck v. State*, 645 So.2d 71, 73-74 (Fla. 4th DCA 1994). Bearing in mind these standards, we respectfully submit that a show-cause order against Mr. Doyle is not warranted.[3]

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[3] Mr. Doyle also adopts and incorporates all applicable arguments contained in the submissions of co-respondents Morgan Stanley & Co. Incorporated, Donald G. Kempf, Jr., James Cusick and Soo-Mi Lee.

CONCLUSION

For the reasons stated above, as well as for the applicable reasons set forth in the submissions of Co-Respondents Morgan Stanley & Co. Incorporated, Donald G. Kempf, Jr., James Cusick and Soo-Mi Lee, Mr. Doyle respectfully requests that the Court dismiss CPH's Petition against him.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on this 20th day of September, 2005.

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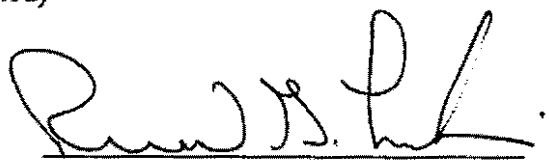

Richard G. Lubin

EXHIBIT A

ROUGH DRAFT

IN THE CIRCUIT COURT FOR THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

/

PROCEEDINGS BEFORE THE HONORABLE ELIZABETH T. MAASS

Thursday, August 4, 2005
Palm Beach County Courthouse
Courtroom 11-A
205 North Dixie Highway
West Palm Beach, Florida 33401
8:45 a.m. to 9:05 a.m.

FOR ATTORNEY USE ONLY

D

ROUGH DRAFT

APPEARANCES:

16div-018677

issues don't have time today to deal with them all, but the point I wish to make we don't need and should not even start down the road.

THE COURT: What did you want to respond.

MR. SCAROLA: What Mr. Hansen characterizes as the correction of an error we suggest is more appropriately characterized as an effort to withdraw perjuried testimony at a point in time after Morgan Stanley had repeatedly attempted to rely upon and reaffirm that perjuried testimony and perjuried statements before the Court.

THE COURT: Let me -- we're obviously not going to get to the substance right now but I guess one of the questions I would have is just on the face of the documents I have now, how would I conclude that the testimony was knowingly false when given as opposed to, you know, people are talking about things that happened a few years ago and they just screwed up?

MR. SCAROLA: Your Honor, clearly those would be matters that would need to be presented to the court for ultimate determination.

The only determination that Your Honor would

make at this point in time is whether there is probable cause to believe that a crime /TPHAEU

16div-018678

COVER SHEET

FAX

To: Mark Hansen, Esquire
Fax #: 1-202-326-7999
Subject: CPH v. Morgan Stanley; (Donald Kempf Jr., Esquire)
Date: 9-20-05
Pages: 2Ø

COMMENTS: see attached

****

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September 20, 2005

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Re: **CPH v. Morgan Stanley**
Case No. CA-03-5045 AI

Dear Mr. Scarola and Mr. Solovy:

Please find enclosed herewith Non-Party Respondent Donald Kempf's Opposition Brief to Verified Petition for Show Cause Order, reference the above-styled cause.

I am also enclosing Verified Motions for Admission Pro Hac Vice of Mr. John F. Siffert, Esquire and John Pellettieri, Esquire, of Lankler, Siffert & Wohl, LLP, New York, New York. Please advise if there is any objection to my submitting an Agreed Order to Judge Maas, reference these Pro Hac Vice Motions.

Thank you.

Respectfully yours,

ROTH & DUNCAN, P.A.

DOUGLAS DUNCAN
DD/gdk
cc: Donald G. Kempf, Jr., Esquire
John F. Siffert, Esquire
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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

NON-PARTY RESPONDENT DONALD KEMPF'S OPPOSITION TO VERIFIED PETITION FOR A SHOW-CAUSE ORDER

This Court should not issue an Order requiring non-party respondent Donald G. Kempf, Jr., Esq. to show cause why he should not be charged with indirect criminal contempt—what would be, in essence, a criminal indictment—because Coleman (Parent) Holdings, Inc.'s ("CPH") Petition fails to set forth probable cause that Mr. Kempf engaged in misconduct, much less that he acted with the requisite intent. Moreover, the allegations in CPH's Petition are so vague and imprecise that it would violate due process to issue an Order to show cause based on those allegations.

Preliminary Statement

This Court should deny CPH's Petition to require Mr. Kempf to show cause why he should not be charged with indirect criminal contempt pursuant to Florida Rule of Criminal Procedure 3.840 because the Petition is inadequate on its face. CPH does not allege that Mr. Kempf personally made any misstatement to the Court or, for that matter, that he had any personal involvement in Morgan Stanley & Co. Incorporated's ("Morgan

Stanley") making of an erroneous statement that it corrected of its own volition. In fact, CPH is careful not to allege that Mr. Kempf engaged in any conduct that was intended to mislead the Court or otherwise frustrate the administration of justice. The only factual allegation that CPH asserts as the basis to charge Mr. Kempf with indirect criminal contempt of court is that he "became heavily and personally involved in supervising the litigation at least as early as March 2005." Verified Petition for a Show-Cause Order ("CPH Petition") at 6.[1]

This sole allegation in the Petition does not satisfy the standards governing indirect criminal contempt. The Fourth District has held that the criminal contempt power "should be used cautiously and sparingly." Berman v. State, 751 So. 2d 612, 616 (Fla. 4th DCA 1999); see also Emanuel v. State, 601 So. 2d 1273, 1274 (Fla. 4th DCA 1992) ("The contempt power should always be exercised with judicial restraint."). Indirect criminal contempt is "a crime in the ordinary sense." Parisi v. Broward County, 769 So. 2d 359, 364 (Fla. 4th DCA 2000). In order to find someone guilty of criminal contempt, it must be "proven beyond a reasonable doubt that the individual" acted contumaciously. Tide v. State, 804 So. 2d 412, 413 (Fla. 4th DCA 2001). Because indirect criminal contempt is akin to charging an individual with a crime, a petitioner must establish probable cause—not, as here, mere suspicion or speculation—that the individual engaged in criminal misconduct. See State v. Kadivar, 460 So. 2d 391, 392 (Fla. 4th DCA 1985) ("[The prosecutor] is not to institute criminal charges without probable cause . . . .").

[1] Mr. Kempf joins Morgan Stanley's Opposition to Verified Petition for a Show-Cause Order ("Morgan Stanley Brief"), as well as the briefs of the other individual respondents, to the extent applicable to him.

1. **CPH's Petition should be dismissed for failure to set forth probable cause that Mr. Kempf engaged in contumacious conduct.**

Courts have carefully circumscribed the conduct for indirect contempt of court. Prerequisites are the violation of a clear and definite court order or conduct that "is calculated to embarrass, hinder, or obstruct the court in the administration of justice or calculated to lessen the court's authority and dignity." Eubanks v. Agner, 636 So. 2d 596, 598 (Fla. 1st DCA 1994); see also Via v. State, 633 So. 2d 1198, 1198 (Fla. 2d DCA 1994).

An integral element to any criminal contempt is that the individual act willfully. Tubero v. Ellis, 472 So. 2d 548, 550 (Fla. 4th DCA 1985) ("Intent is a necessary element of contempt."); see also Murrell v. State, 595 So. 2d 1049, 1050 (Fla. 4th DCA 1992) ("Importantly, . . . the conduct alleged to be contemptuous must be *calculated* to cause harm.") (emphasis in original). Thus contempt for "false swearing or perjury" cannot be "founded upon confusion and incorrect statements alone." Silver v. State, 117 So. 2d 509, 511 (Fla. 3d DCA 1960); see also Jones v. State, 659 So. 2d 1281, 1282 (Fla. 4th DCA 1995). As the Fourth District Court of Appeal wrote in Baitty v. Weaver: "[A]n order of contempt cannot be approved where the underlying factual basis for the finding of contempt is not supported by the record and there is considerable doubt as to the contemnor's intent to either violate a court order or hinder the court in its administration of justice." 734 So. 2d 582, 584-85 (Fla. 4th DCA 1999).[2]

[2] Here, the Petition fails to set forth probable cause that Mr. Kempf acted with the requisite intent, much less that CPH could establish proof of intent beyond a reasonable doubt. See Tide v. State, 804 So. 2d 412, 413 (Fla. 4th DCA 2001) ("[T]o prove indirect criminal contempt, 'there must be proof beyond a reasonable doubt that the individual intended to disobey the court.'") (quoting Levine v. State, 650 So. 2d 666, 668 (Fla. 4th DCA 1995)); Thomson v. Florida, 398 So. 2d 514, 517 (Fla. 2d DCA 1981) (holding that where circumstantial evidence alone is relied on to establish intent for the crime of contempt it must be inconsistent with any reasonable hypothesis of innocence).

CPH's Petition does not allege that Mr. Kempf violated any court order, let alone one that "clearly and definitely advise[d] [him] of its command and direction." Eubanks, 636 So. 2d at 598. Nor does CPH allege how Mr. Kempf, in his role supervising the litigation in March 2005, in any way impaired the administration of justice. Conspicuously absent from the Petition is any allegation that Mr. Kempf suborned perjury, conspired to submit a false statement, or acted knowingly or willfully in any respect. And the Court may not draw inferences that Mr. Kempf committed any such misconduct based upon the bare assertion that, in his capacity as Chief Legal Officer, he engaged in the lawful task of overseeing litigation during the course of performing his job—managing an assemblage of approximately 1,000 lawyers and other employees.

CPH appears to ask this Court to infer that Mr. Kempf supervised others who made a misstatement to the Court. But CPH's Petition must fail even under this construction of it. The Fourth District's decision in In re Broward County State Attorney's Office, 577 So. 2d 967 (Fla. 4th DCA 1991) precludes a finding, based on the allegations in CPH's Petition, of probable cause that Mr. Kempf engaged in conduct for which he can be charged with indirect criminal contempt.[3]

In Broward, two assistant state attorneys from the Broward County State Attorney's office gave conflicting statements, at three separate hearings, about the state attorney's office's readiness to try a case. The court held the state attorney's office in contempt for "'deliberately and repeatedly' announcing it was ready for trial when it knew full well it was not." Id. at 968. On appeal, the Fourth District Court of Appeal reversed, holding that the state attorney's office could not be held in contempt because

[3] Moreover, Mr. Kempf should not be held to answer charges when there is no basis to conclude that those who made the misstatement did so either at Mr. Kempf's direction or with the intent to mislead the Court.

there was "no record support for the proposition that the entire state attorney's office had personal knowledge of the tactical games that were played by improperly announcing ready." Id. at 971. Additionally, the court held that "*the* state attorney himself [could not] be held accountable on a captain-of-the-ship theory," because—as here with Mr. Kempf—there was "nothing in the record to suggest that he had personal knowledge of the acts of contempt." Id. (emphasis in original); see also Shelley v. District Court of Appeal, 350 So. 2d 471, 473-74 (Fla. 1977) (cited in Broward) (holding that the public defender could not be held in contempt for an assistant public defender's failure to prosecute an appeal).

Because CPH presents no allegations establishing probable cause that Mr. Kempf engaged in any conduct for which he can be charged with indirect criminal contempt—much less that he acted with criminal intent—this Court should deny CPH's Petition and decline to issue the Order to show cause. See Eubanks, 636 So. 2d at 598 (issuing a writ of prohibition ordering that no further proceedings be had on an order to show cause that failed to allege contumacious conduct).[4]

[4] In this respect, Mr. Kempf reiterates the point in Morgan Stanley's brief that the Florida Rules of Criminal Procedure do not authorize the discovery that CPH seeks in its Petition. See Morgan Stanley Brief at 5-6; Henderson v. State, 745 So. 2d 319, 324 (Fla. 1999) (explaining that if a defendant uses the rules of discovery only then does he have a duty to reciprocate in certain discovery). It is not permissible to charge a defendant with criminal misconduct and then to launch discovery in order to see whether facts can be found to support the charge. See State ex rel. Hardy v. Blount, 261 So. 2d 172, 174 (Fla. 1972) ("When a prosecuting attorney files an information against a defendant, he conclusively determines that the evidence is adequate to establish probable cause to put the defendant on trial."). In fact, CPH's proposal for wide-ranging discovery confirms its inability to come forward with the requisite evidentiary basis for a charge of criminal contempt against Mr. Kempf. CPH surely knows that, to have a well-founded Petition, it must set forth facts that would establish probable cause that Mr. Kempf did something calculated to mislead the Court or obstruct the judicial process. CPH's failure to do so reflects its inability to establish probable cause, and CPH cannot, instead, hang its hat on a proposal to conduct far-reaching discovery that is unavailable under Florida law.

2. **It would violate due process to issue an Order to show cause based on CPH's Petition.**

Because indirect criminal contempt proceedings are criminal in nature, "persons accused of contempt are as much entitled to the basic constitutional rights as those accused of violating criminal statutes." Aaron v. State, 284 So. 2d 673, 675 (Fla. 1973); see also Emanuel v. State, 601 So.2d at 1275. And Florida Rule of Criminal Procedure 3.840, which governs indirect criminal contempt proceedings, "reflects the greater procedural due process safeguards imposed when proceedings are for indirect criminal contempt." Pugliese v. Pugliese, 347 So. 2d 422, 425 (Fla. 1977); see also Wisniewski v. Wisniewski, 657 So. 2d 944 (Fla. 2d DCA 1995) ("Greater procedural due process safeguards are accorded when proceedings are for indirect criminal contempt. This principle is recognized in Florida Rule of Criminal Procedure 3.840.").

In proceedings for indirect criminal contempt, due process "requires that the accused be sufficiently advised of the charge so as to accord him a reasonable opportunity to meet the charges by way of defense or explanation." Deter v. Deter, 353 So. 2d 614, 617-18 (Fla. 4th DCA 1977); see also Grant v. State, 464 So. 2d 650, 652 (Fla. 4th DCA 1985). Rule 3.840 reflects this requirement by providing, in relevant part, that an order to show cause for indirect criminal contempt must "stat[e] the essential facts constituting the criminal contempt charged." Fla. R. Crim. P. 3.840(a). "The procedures under rule 3.840 must be strictly followed before a person is found guilty of indirect criminal contempt." Mix v. State, 827 So. 2d 397, 399 (Fla. 2d DCA 2002). Failure to do so "constitutes fundamental error." Giles v. Renew, 639 So. 2d 701, 702-03 (Fla. 2d DCA 1994).

The sole factual allegation in CPH's Petition that pertains to Mr. Kempf is that "he became heavily and personally involved in supervising the litigation at least as early as March 2005." CPH Petition at 6. It is difficult, if not impossible, to discern from this pleading what CPH specifically alleges Mr. Kempf did that might feasibly constitute the crime of indirect criminal contempt of court.

The factual allegations found deficient in the orders in Wisniewski v. Wisniewski, 657 So. 2d 944 (Fla. 2d DCA 1995) and Deter v. Deter, 353 So. 2d 614 (Fla. 4th DCA 1977), in fact, were far more specific than those in CPH's Petition. Consequently, it would contravene Rule 3.840 and violate Mr. Kempf's due process rights if this Court were to issue an Order to show cause based on CPH's Petition. See also J.M.P.U. v. State, 858 So. 2d 389, 390 (Fla. 3d DCA 2003) (reversing a criminal contempt finding because the order did not sufficiently specify the acts that constituted the alleged contempt); Flanagan v. State, 840 So. 2d 379, 380 (Fla. 1st DCA 2003) (same); In re Guardianship of Meyer, 672 So. 2d 85, 88 (Fla. 2d DCA 1996) (same); Hill v. State, 643 So. 2d 1178, 1178 (Fla. 2d DCA 1994) (same).

Conclusion

For the foregoing reasons, this Court is respectfully requested to deny CPH's Petition asking the Court for an Order to show cause why Donald G. Kempf, Jr. should not be charged with indirect criminal contempt.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 20th day of September, 2005.

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(Counsel for Defendant Morgan Stanley & Co. Incorporated)

IN THE CIRCUIT COURT FOR THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA. CIVIL DIVISION.

COLEMAN (PARENT)HOLDINGS, INC. CASE NO. CA-03-5045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INCORPORATED,

Defendant

VERIFIED MOTION FOR ADMISSION PRO HAC VICE

John Pellettieri, Esquire, an associate of Lankler, Siffert & Wohl, LLP, 500 Fifth Avenue, 33rd Floor, New York, NY 10110-3398, respectfully requests permission to appear Pro Hac Vice as co-counsel for Donald G. Kempf, Jr., Esquire, a non-party Respondent in the above-styled cause. As grounds in support of this request, Mr. Pellettieri states as follows:

1. I am a member in good standing of the State Bar of New York. I am not a Florida resident;

2. I have never appeared Pro Hac Vice in any Florida state court;

3. I was retained by Donald G. Kempf, Jr., Esquire on August 16, 2005;

4. Douglas Duncan, Esquire of the law firm of Roth & Duncan, P.A., a member in good standing of the Bar of the State of Florida, has been associated to be co-counsel for purposes of the representation herein;

5. I have read The Rules Governing The Florida Bar, Rule 1-3.10 and Florida Rules of Judicial Administration, Rule 2.061. My Verified Motion For Leave To Appear Pro Hac

Vice is filed in compliance with these rules.

WHEREFORE, John Pellettieri, Esquire respectfully requests this Court to grant the instant Motion and enter an Order allowing him to appear as Pro Hac Vice as requested above.

DATED this 20 day of September, 2005.

Respectfully submitted,

BY: _____

John Pellettieri
New York State Bar No. 4145371
Lankler, Siffert & Wohl, LLP
500 Fifth Avenue, 33rd Floor
New York, NY 10110-3398
Telephone: (212)-921-8399
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STATE OF NEW YORK
COUNTY OF ~~MANHATTAN~~ New York

Before me, the undersigned authority, on this 20th day of September personally appeared John Pellettieri, known to me to be the person whose name is subscribed to the foregoing document and acknowledged to me that the information contained therein is within his personal knowledge and is true and correct.

Given under my hand and seal of office this 20th day of September, 2005.

_____
Notary Public
State of New York

ADELE D. CALMEL
Notary Public, State Of New York
No. 01CA5011796
Qualified In New York County
Commission Expires June 15 2007

DATED this 20 day of September, 2005.

BY: _____
Douglas Duncan
Fla. Bar #309672
Roth & Duncan, P.A.
Northbridge Centre, Suite 325
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P.O. Box 770
West Palm Beach, Florida 33402
Tele: (561)-655-5529

STATE OF FLORIDA
COUNTY OF PALM BEACH

Before me, the undersigned authority, on this 20 day of September personally appeared Douglas Duncan, known to me to be the person whose name is subscribed to the foregoing document and acknowledged to me that the information contained therein is within his personal knowledge and is true and correct.

Given under my hand and seal of office this 20 day of September, 2005.

Gail Davis-Kemly
Commission # DD336664
Expires July 24, 2008
Bonded Troy Fain - Insurance, Inc. 800-385-7019

_____
Notary Public
State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached Service List by facsimile and U.S. Mail on this 20 day of September, 2005.

Respectfully submitted,

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IN THE CIRCUIT COURT FOR THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA. CIVIL DIVISION.

COLEMAN (PARENT)HOLDINGS, INC. CASE NO. CA-03-5045 AI

Plaintiff,

vs.

MORGAN STANLEY & CO., INCORPORATED,

Defendant

VERIFIED MOTION FOR ADMISSION PRO HAC VICE

John S. Siffert, Esquire, a partner of Lankler, Siffert & Wohl, LLP, 500 Fifth Avenue, 33rd Floor, New York, NY 10110-3398, respectfully requests permission to appear Pro Hac Vice as co-counsel for Donald G. Kempf, Jr., Esquire, a non-party Respondent in the above-styled cause. As grounds in support of this request, Mr. Siffert states as follows:

1. I am a member in good standing of the State Bar of New York, Southern District of New York, Eastern District of New York, Second Circuit Court of Appeals, , U.S. Supreme Court. I am not a Florida resident;

2. I have never appeared Pro Hac Vice in any Florida state court;

3. I was retained by Donald G. Kempf, Jr., Esquire on August 16, 2005;

4. Douglas Duncan, Esquire of the law firm of Roth & Duncan, P.A., a member in good standing of the Bar of the State of Florida, has been associated to be co-counsel for purposes of the representation herein;

5. I have read The Rules Governing The Florida Bar, Rule 1-3.10, and Florida

Rules of Judicial Administration, Rule 2.061. My Verified Motion For Leave To Appear Pro Hac Vice is filed in compliance with these rules.

WHEREFORE, John S. Siffert, Esquire respectfully requests this Court to grant the instant Motion and enter an Order allowing him to appear as Pro Hac Vice as requested above.

DATED this 20th day of September, 2005.

Respectfully submitted,

BY: _____
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STATE OF NEW YORK
COUNTY OF ~~MANHATTAN~~ New York

Before me, the undersigned authority, on this 20th day of September personally appeared John S. Siffert, known to me to be the person whose name is subscribed to the foregoing document and acknowledged to me that the information contained therein is within his personal knowledge and is true and correct.

Given under my hand and seal of office this 20th day of September, 2005.

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Notary Public
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ADELE D. CALMEL
Notary Public, State Of New York
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Qualified In New York County
Commission Expires June 15, 2007

DATED this 20 day of September, 2005.

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STATE OF FLORIDA
COUNTY OF PALM BEACH

Before me, the undersigned authority, on this 20 day of September personally appeared Douglas Duncan, known to me to be the person whose name is subscribed to the foregoing document and acknowledged to me that the information contained therein is within his personal knowledge and is true and correct.

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NOTARY PUBLIC STATE OF FLORIDA
Gail Davis-Kemly
Commission # DD336664
Expires July 24, 2008
Bonded Troy Fain - Insurance, Inc. 800-385-7019

_____
Notary Public
State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached Service List by facsimile and U.S. Mail on this 20 day of September, 2005.

Respectfully submitted,

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RE: *Coleman vs. Morgan Stanley*

COMMENTS

Confidentiality Note: The documents accompanying this facsimile contain information from the law firm of Zuckerman Spaeder LLP, which may be confidential and/or privileged. The information is intended only for the use of the individual or entity named on this transmission sheet. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on the contents of this facsimile is strictly prohibited, and that the documents should be returned to this Firm immediately. If you have received this facsimile in error, please notify us by telephone immediately so that we can arrange for the return of the original documents to us at no cost to you.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INC.,
Defendant.

NON-PARTY RESPONDENT SOO-MI LEE'S OPPOSITION TO COLEMAN (PARENT) HOLDINGS INC.'S VERIFIED PETITION SEEKING ORDER TO SHOW CAUSE

Non-party respondent Soo-Mi Lee ("Ms. Lee") respectfully submits this memorandum in opposition to the Verified Petition by plaintiff Coleman (Parent) Holdings, Inc. ("CPH") seeking an order to show cause why Ms. Lee should not be held in indirect criminal contempt pursuant to Florida Rule of Criminal Procedure 3.840.

PRELIMINARY STATEMENT

The power to initiate criminal contempt proceedings should be used sparingly and only when absolutely necessary.[1] Such care is particularly critical where, as here, the potential defendant is an attorney. It is difficult to overstate how devastating it would be for Ms. Lee, professionally and personally, if this Court were to issue an order to show cause why she should not be held in indirect criminal contempt.

As detailed below, to meet the standard under Florida law for issuance of an order to show cause, the Verified Petition must set forth facts showing that Ms. Lee engaged in conduct deliberately calculated to obstruct the Court. CPH has neither pleaded nor cited evidence that Ms. Lee intended to mislead the Court. More specifically, the relevant

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[1] *See, e.g.*, Morgan Stanley's Opposition To Verified Petition For A Show Cause Order dated September 13, 2005, at 3, which Ms. Lee joins and hereby incorporates by reference to the extent applicable; Ms. Lee also joins and hereby incorporates by reference to the extent applicable the memoranda of law being filed today on behalf of Messrs. Kempf, Cusick and Doyle.

sentences of the Offer of Proof as to Ms. Lee's expected testimony if called to testify were expressly based on her recollection and knowledge as of the date of submission of the Offer of Proof. *See* Morgan Stanley's Summary of Offer of Proof Regarding Defendant's Alleged Litigation Misconduct, at Ex. 8 (filed May 12, 2005) (stating that "Ms. Lee *recalls* first learning in late October that there was e-mail on some of the Brooklyn Tapes. *To Ms. Lee's knowledge*, no one in Morgan Stanley's Law Division learned that there was e-mail on some of the Brooklyn Tapes before that time.") (emphasis added). When a subsequent e-mail search showed that Ms. Lee's recollection was inaccurate, Morgan Stanley promptly corrected the Offer of Proof. *See* Morgan Stanley's Notice (filed June 17, 2005). The logical inference to be drawn from these facts – which are the only basis for the Petition as to Ms. Lee – is that Ms. Lee made an innocent error that was corrected promptly. CPH's contention in the Petition that these facts support an indictment of Ms. Lee for indirect criminal contempt rests on nothing more than CPH's speculation and argument.[2]

CPH's Verified Petition suffers from at least two other fundamental flaws. CPH requests that the Court issue document and deposition subpoenas to Ms. Lee and Morgan Stanley (tacitly acknowledging that the Petition is inadequate to support issuance of a show cause order), but this request is without basis in Florida law. As for CPH's counsel's request to be appointed to serve as prosecutor, that request is contrary to the Due Process Clause, the reasoning of a United States Supreme Court case and ethical precepts.

On behalf of Ms. Lee, we respectfully urge that the order to show cause sought by CPH be denied and that Ms. Lee not be subjected to the equivalent of criminal indictment

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[2] As this Court stated on August 4, 2005, when Morgan Stanley and CPH appeared in connection with the Verified Petition: "[T]he question I would have is just on the face of the documents I have now, how would I conclude that the testimony was knowingly false when given as opposed to, you know, people are talking about things that happened a few years ago and they just screwed up?" 8/4/05 Tr. at 10:15-21. The Court also noted that it "would be extraordinarily reluctant to go down this road." *Id.* at 13:9-10.

based on a statement, promptly corrected, as to what she remembered as of a particular date.

ARGUMENT

I. THE PETITION IS INSUFFICIENT TO WARRANT THE ISSUANCE OF AN ORDER TO SHOW CAUSE BECAUSE IT PRESENTS NO FACTS THAT WOULD SUPPORT A FINDING THAT MS. LEE ENGAGED IN CONDUCT INTENDED TO MISLEAD THE COURT

Florida law is unambiguous that before an order to show cause regarding indirect criminal contempt may issue, there must be clear evidence that the defendant acted deliberately and with intent to mislead the Court or otherwise to hinder or to obstruct the judicial process. The Verified Petition fails as to Ms. Lee because there is no allegation and no evidence that Ms. Lee acted with any such intent.

The requirement that indirect criminal contempt must be based on evidence of intentional conduct is well established in Florida law. In *Eubanks v. Agner*, 636 So. 2d 596 (Fla. 1st DCA 1994), the Court of Appeal issued a writ of prohibition to prevent further proceedings pursuant to an order to show cause issued for alleged indirect criminal contempt. The Court of Appeal held that "the facts alleged in the order to show cause, if taken as true, do not and could not constitute contempt of court" because there was no evidence that the conduct at issue had been deliberately calculated to obstruct the judicial process. *Id.* at 598.

> Indirect criminal contempt may be found for violation of a court order but the order must clearly and definitely advise the person of its command and direction. If no order has been violated, *contempt can only be found if the conduct is calculated to embarrass, hinder or obstruct the court in the administration of justice* or calculated to lessen the court's authority and dignity.

Id. (citation omitted; emphasis added).

Numerous criminal contempt convictions have been reversed because the evidence adduced failed to prove beyond a reasonable doubt that the alleged contemnor

acted in a manner deliberately calculated to hinder or obstruct the judicial process. For example, in *Brown v. State*, 579 So. 2d 898, 899 (Fla. 4th DCA 1991), the defendant was convicted of criminal contempt for denying on cross-examination that he had been fired from his position as a correctional officer. The records of the state agency "indisputably showed that the state thought he had been fired rather than quitting," but there was no evidence that the defendant himself believed that to be so. Thus, the conviction was reversed. *Id. Accord, e.g., Berman v. State*, 751 So. 2d 612, 614 (Fla. 4th DCA 1999) ("the record fails to support a finding that appellant's conduct constituted a willful, ... intentional or substantial interference and/or interruption of the orderly conduct of the court's business."); *Johnson v. State*, 697 So. 2d 995, 997 (Fla. 5th DCA 1997) (conviction reversed because "Johnson did not act or fail to act with the intent to hinder the orderly functions of the court"); *Ippolito v. State*, 678 So. 2d 381, 384 (Fla. 2d DCA 1996) ("we cannot objectively conclude that the comment was calculated to hinder or obstruct the court in the administration of justice"); *Jones v. State*, 659 So. 2d 1281, 1282 (Fla. 4th DCA 1995) (reversing contempt conviction for lack of direct evidence of intent); *Murrell v. State*, 595 So. 2d 1049, 1050-51 (Fla. 4th DCA 1992) ("Importantly, as noted above, the conduct alleged to be contemptuous must be calculated to cause harm....") (citations omitted); *In re the Forfeiture of 1973 Ford Truck*, 507 So. 2d 738, 738 (Fla. 4th DCA 1987) ("no showing has been made that appellant had any intention to embarass [sic], hinder or obstruct the court in the administration of justice"); *Patierno v. State*, 391 So. 2d 391, 392 (Fla. 2d DCA 1980) ("there was no evidence that Patierno or Ellis intended to embarrass, hinder or obstruct the court in the administration of justice").

Mere mistake or confusion on the part of the alleged contemnor is insufficient to warrant a charge of indirect criminal contempt, even if the conduct had the effect of obstructing the judicial process (and here, there is no such evidence of any obstructive effect). For example, in *Stevens v. State*, 547 So. 2d 279, 280 (Fla. 5th DCA 1989), the defendant, an employee of the Department of Health and Rehabilitative Services, had

failed to produce documents in response to a subpoena *duces tecum* because she was confused about whether such production was proper, given that the responsive records should have been destroyed previously pursuant to the agency's records retention schedule. The Court of Appeal reversed her conviction for indirect criminal contempt.

> *The evidence taken in the light most favorable to the appellee, State of Florida, is insufficient as a matter of law* to support the adjudication of indirect criminal contempt and resulting sentence of imprisonment of two days in the county jail. The courts of this state have consistently held that *criminal contempt requires some wilful act or omission calculated to hinder the orderly functions of the court.*

Id. (citation omitted; emphasis added).

The foregoing cases establish that under Florida law a necessary element of a charge of indirect criminal contempt is that the supposed contemnor acted with the specific intent to hinder or to obstruct the court. The Verified Petition plainly fails to satisfy the intent element with respect to Ms. Lee because it contains no allegation, much less any evidence, that Ms. Lee consented to Morgan Stanley's submission of a summary of her expected testimony with the intention of perpetrating a fraud on the Court. The summary of Ms. Lee's expected testimony within the Offer of Proof contained her recollection of when she first learned of e-mails on certain tapes. The Offer of Proof was submitted in mid-May; a previously unrecovered e-mail was subsequently discovered; and shortly thereafter, Morgan Stanley filed its June 17 Notice to correct the Offer of Proof. Nothing about these facts suggests that the Offer of Proof represented anything other than Ms. Lee's best recollection at the time the Offer of Proof was submitted.

Here as in *Eubanks*, "the facts alleged in the order to show cause, if taken as true, do not and could not constitute contempt of court." 636 So. 2d at 598. The Verified Petition contains no allegation, and certainly no evidence, that Ms. Lee acted in a manner deliberately calculated to hinder or obstruct the judicial process. Thus, an order to show cause should not issue as to Ms. Lee.

II. THE DISCOVERY SOUGHT BY CPH DOES NOT EXIST IN CRIMINAL CONTEMPT CASES

By requesting that it be authorized to conduct an "investigation," "take videotaped depositions" of the four alleged individual contemnors and "subpoena . . . Morgan Stanley's record custodian," Pet. at 12-13, CPH effectively concedes Point I *supra,* namely, that the Petition fails to support the issuance of a show cause order as to Ms. Lee. CPH apparently hopes to cure this deficiency through discovery, but CPH fails to identify any authority to support its discovery demands. There is no such authority.

Rule 3.840(a) provides that the Court may issue an order to show cause ". . . on affidavit of any person having knowledge of the facts." Given that "[h]istorically, criminal contempt, both direct and indirect . . . . [is] handled in a summary fashion, to assure speedy judicial progress without interruption," *Aaron v. State,* 284 So. 2d 673, 675 (Fla. 1973), Rule 3.840 does not contemplate *any* discovery prior to issuance of a show cause order. Instead, Rule 3.840 contemplates that a show cause order will issue on request of a private party only if the facts set forth in that request warrant issuance of the show cause order, including being supported by affidavit of a person with "personal knowledge of the facts."

In other words, *if* sufficient facts have been alleged in such an affidavit, *then* the Court, in its discretion, may issue an order to show cause. *If,* on the other hand, the affidavit, as here, is based not on "facts" but mere conjecture and speculation, *then* there is no basis for issuance of an order to show cause. To authorize a private party to conduct a judicially sanctioned investigation to elicit "facts" to supplement a party's deficient affidavit would render meaningless the requirement that the factual allegations undergirding a request for a show cause order be made under oath by someone with personal knowledge of the facts. Accordingly, the rules do not contemplate any pre-order "discovery."

As to any discovery that would take place if the Court were to issue an order to show cause, CPH's proposed course of investigation directly violates the alleged contemnors' constitutional rights and tramples upon the rules governing the criminal discovery process, and is another reason to deny it pre-order. In this vein, "criminal contempt is a crime in the ordinary sense" and requires "that a contemnor be afforded the same constitutional due process protections afforded to criminal defendants," *Parisi v. Broward County*, 769 So. 2d 359, 364 (Fla. 2000) (internal quotations omitted), including the right to not be compelled to testify against oneself. *Id.* Notwithstanding these protections, CPH mistakenly believes it can nonetheless take "[v]ideotaped depositions" that "would focus primarily on a handful of witnesses, including the four individual contemnors named in this Petition." (Pet. at 12)

CPH's intention of conducting discovery to obtain information from Morgan Stanley and the four alleged individual contemnors reveals a stunning disregard for the rules governing discovery in criminal cases. To the extent a defendant has any obligation to participate in discovery in connection with a criminal contempt proceeding, such obligation is only triggered if a defendant "elects to participate in discovery, either through the filing of an appropriate notice or by participating in any discovery process, including the taking of a discovery deposition." Fla. R. Crim. P. 3.220(d)(1); *Able Builders Sanitation Co. v. State*, 368 So. 2d 1340, 1342 (Fla. 1979); *State v. Barreiro*, 432 So. 2d 138, 140 (Fla. 3d DCA 1983) ("[W]here a defendant does not file a demand for discovery under Florida Rule of Criminal Procedure 3.220 . . . he is not obliged to produce for the State's inspection the corresponding items in his possession or control."). Thus, the discovery that CPH requests in order to cure the manifest deficiencies in its Petition is unavailable as a matter of law.

III. APPOINTMENT OF CPH'S ATTORNEYS AS PROSECUTORS WOULD BE FUNDAMENTALLY UNFAIR

Even though the United States Supreme Court, in the exercise of its supervisory authority, has held that a request such as CPH's must be denied in any federal case, CPH invites the Court to appoint its attorneys as the *de facto* prosecuting attorneys for criminal contempt purposes. *See Young v. United States ex rel. Vuitton*, 481 U.S. 787, 790 (1987) ("We . . . hold that counsel for the party that is a beneficiary of a court order may *not* be appointed to undertake contempt prosecutions for alleged violations of that order."). This Court should decline CPH's invitation to appoint its attorneys as counsel due to the serious concerns that CPH's attorneys: (1) would be thrust into an impermissible conflict of interest; and (2) would not be disinterested and impartial prosecutors.

First, if CPH's attorneys were appointed as prosecutors, as they request, they would be placed in an irreconcilable conflict of interest. In their role as prosecutors, CPH's attorneys would be required, among other things, to scrupulously honor the defendants' rights and to abandon any charge not borne out by the evidence. In their role as CPH's attorneys in the civil case, however, CPH's attorneys have the duty to ensure that the $1.5 billion judgment against Morgan Stanley remains undisturbed – even if it means using the contempt proceeding as a Sword of Damocles to secure that objective. CPH's conflict of interest is palpable because "[i]n a case where a prosecutor represents an interested party, . . . the ethics of the legal profession *require* that an interest other than the [Court's] be taken into account." *Young*, 481 U.S. at 807 (emphasis in original); *see also Bhd. of Locomotive Firemen & Enginemen v. United States*, 411 F.2d 312, 319 (5th Cir. 1969) (reversing criminal contempt conviction on Due Process grounds because "the governance of the whole criminal contempt proceeding was delivered into the hands of counsel for private parties, not the National Sovereign").

Second, appointment of CPH's counsel as prosecutors would be fundamentally unfair. As the Supreme Court observed in *Young*, a "private attorney appointed to

prosecute a criminal contempt . . . should be as disinterested as a public prosecutor who undertakes such a prosecution," 481 U.S. at 804, and to hold otherwise "is a violation of due process." 481 U.S. at 815 (Blackmun, J., concurring).

From Ms. Lee's perspective, faith in the fairness of the criminal justice system would disintegrate were CPH's attorneys appointed to prosecute her. It is implausible that CPH's attorneys would do all in their power to ensure that Ms. Lee receives fair consideration when CPH's attorneys clearly have an incentive to leverage a settlement of the civil case through a criminal contempt prosecution against Ms. Lee, her colleagues and Morgan Stanley. Every facet of the prosecution would be tainted by Ms. Lee's unshakable, and quite reasonable, perception that CPH's attorneys would be less interested in seeing justice done than in gaining leverage in their "battle" against Morgan Stanley.[3] Under these circumstances, the maxim that "justice must satisfy the appearance of justice" would be unattainable. *Offutt v. United States*, 348 U.S. 11, 14 (1954).[4] Indeed, the fact that CPH's attorneys have already demanded discovery of Ms. Lee that is without basis in Florida law and would violate fundamental due process and procedural rights, *supra* at Point II, underscores that CPH's attorneys cannot be appointed as prosecutor in this matter.

For these reasons, we respectfully urge, on behalf of Ms. Lee, that CPH's request to be appointed to prosecute Ms. Lee should be denied.

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[3] CPH's attorneys, in a self-promotional brochure, describe the case as "a David and Goliath battle" wherein CPH "has brought this Goliath to its knees." Moreover, in describing their victory, CPH's attorneys announce their intent to "pursue contempt sanctions" against Morgan Stanley. (Ex. 1) Based on the tone of this self-promotional brochure, Ms. Lee's fear that CPH's attorneys would be anything but "impartial" ministers of justice is well founded.

[4] In addition to the United States Supreme Court, several other courts have condemned the practice of using private attorneys who represent a party in a civil action to prosecute related criminal actions against their client's adversary. *See, e.g., People v. ---, Attorney Respondent*, 427 P.2d 330, 331 (Colo. 1967); *Tennessee v. Eldridge*, 951 S.W.2d 775, 783 n.3 (Tenn. Crim. App. 1997); *Cantrell v. Virginia*, 329 S.E.2d 22, 26 (Va. 1985); *Polo Fashions, Inc. v. Stock Buyers Int'l, Inc.*, 760 F.2d 698, 705 (6th Cir. 1985).

CONCLUSION

Restraint is the guiding principle that governs the exercise of a court's criminal contempt power. *Demetree v. State*, 89 So. 2d 498, 501 (Fla. 1956) ("[T]he power to punish for contempt should be cautiously and sparingly exercised."); *M.L. v. State*, 819 So. 2d 240, 242 (Fla. 2d DCA 2002) ("[C]ontempt power should always be exercised with judicial restraint."). For the foregoing reasons, Soo-Mi Lee respectfully requests that the Court deny CPH's request that the Court issue an order to show cause why Ms. Lee should not be held in indirect criminal contempt.

Date: September 20, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by First Class Mail this 20th day of September, 2005, to:

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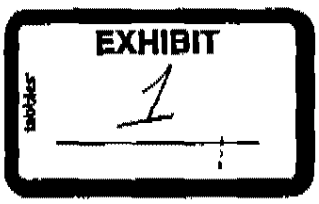
EXHIBIT
1

SEARCY DENNEY SCAROLA BARNHART & SHIPLEY

OF COUNSEL

A quarterly report to clients and attorneys.
VOLUME 05
NUMBER 3

SDSBS Teams Up To Win Landmark Victory

Perelman: $1.58 Billion
Morgan Stanley: 0

On May 18, 2005, a jury in West Palm Beach, Florida delivered an historic judgment of almost $1.45 billion against Morgan Stanley & Co. on behalf of financier Ronald O. Perelman's company, Coleman (Parent) Holdings, Inc. The jury found the investment banker liable for its role in a fraud relating to the 1998 sale of Coleman Company to Sunbeam Corporation. Reportedly, it is the largest judgment ever returned in the U.S. for the benefit of a single individual. The case was marked by the defendant's efforts to evade obligations to produce evidence and its accusations of improper conduct against everyone from the judge to its own lawyers.

It was a David vs. Goliath battle. Mr. Perelman's David, however, had the determination and resources necessary to pursue Morgan's Goliath. The battle took place before Palm Beach County Circuit Court Judge Elizabeth T. Maass, who frequently found herself and the integrity of the legal system challenged by Morgan's aggressive defense.

In December 1997, Mr. Perelman, with controlling interest in Coleman, was approached by Sunbeam with an offer to buy Coleman. No agreement was reached. Morgan then contacted Mr. Perelman on behalf of Sunbeam, and negotiated the sale. The sale was completed in March 1998, netting Mr. Perelman $1.5 billion, $680 million of which was in Sunbeam stock. Morgan's fee was $10 million.

Weeks later, Sunbeam's market value dropped. New sales and earnings figures conflicted with earlier statements backed by Morgan. Sunbeam's accountant, Arthur Andersen, withdrew an audit of the company's books. In 2001, Sunbeam filed for bankruptcy and its shareholders were left with worthless stock. Mr. Perelman focused on Andersen's role in Sunbeam's demise.

During the Andersen litigation, Mr. Perelman's legal team discovered a letter from Andersen to Morgan dated days before the Coleman-Sunbeam sale closed. It outlined Sunbeam's decreasing sales, escalating debts, and accumulating losses. Nonetheless, Sunbeam issued a press release, drafted with Morgan's approval, that presented Sunbeam's economic performance as optimistic, concealing the true facts.

Charged by Mr. Perelman with fraud for its part in the cover-up, Morgan argued that it had accurately reported all of the information available to it at the time, and that it, too, was being lied to by Sunbeam. However, Morgan not only knew of Sunbeam's financial difficulties, but had participated in concealing them. In May 2003, Mr. Perelman sued Morgan.

Jerold Solovy, of Jenner & Block, was the primary litigator for Mr. Perelman. Mr. Solovy had successfully partnered with Jack Scarola, of Searcy Denney Scarola Barnhart & Shipley, for a $70 million ***Continued on page two.***

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NOTE: The accounts of recent trials, verdicts and settlements contained in this newsletter are intended to illustrate the experience of the firm in a variety of litigation areas. Each case is unique, and the results in one case do not necessarily indicate the quality or value of any other case. Omitting clients' names and/or defendants' names are the result of requests for anonymity.

Scarola Wins $1.58 Billion Verdict Against Morgan Stanley Financial Services Firm

(Continued from page one.)

Jack Scarola

settlement on the case against Andersen. Jack Scarola was asked to partner on the case against Morgan.

During discovery, Morgan engaged in a concerted effort to delay and obstruct the litigation. It failed to produce court-ordered documents, destroyed evidence, and falsely certified that it had disclosed other documents.

Confronted with Morgan's misconduct, Judge Maass opted for sanctions against Morgan, directed at correcting the misconduct rather than punishment. Morgan continued to evade court orders, charging the Judge with bias and emotionalism. The Court escalated sanctions against Morgan.

In March 2005, Judge Maass concluded that the abuses by Morgan during discovery had come to "infect the entire case." She directed the jury to accept as fact that Morgan had conspired with and assisted Sunbeam in perpetrating a fraud. As the Court summarized its findings, "[D]iscovery abuses and misrepresentations by Morgan Stanley . . . would take a volume to recite." The plaintiff no longer had the burden to show that fraudulent behavior occurred, but only to show that Mr. Perelman had relied on false information from Sunbeam/Morgan and had suffered damage as a result.

Morgan tried to have Judge Maass removed from the case, arguing that she had "bias, antagonism, and hostility" toward the company. Morgan's motion was denied by Judge Maass and by the appellate court. On May 16, the jury awarded Mr. Perelman $604 million in compensatory damages for having relied on Morgan's misrepresentations. Two days later, the jury awarded Mr. Perelman $850 million in punitive damages. And a month later, the trial judge added millions in interest owed by Morgan Stanley to Ronald Perelman. The judgment now totals $1.58 billion. Morgan said it plans to appeal the verdict.

Lawyers representing Mr. Perelman's company, Coleman (Parent) Holdings, Inc., intend to pursue contempt sanctions against Morgan, including millions of dollars in attorneys' fees and costs. Federal regulatory and enforcement agencies have focused on the disclosures made in this case. Morgan's current CEO, Philip Purcell, recently announced his resignation following the earlier departure of several other Morgan executives. The very future of Morgan Stanley, a Wall Street giant, is in question.

Morgan's Goliath may not be dead, but Ronald Perelman has certainly brought this Goliath to its knees. ■

"Justice is most often depicted in art as a woman. She is blindfolded. In one hand she holds scales, and in the other hand a sword. The reason for the blindfold is because justice is, indeed, blind to power, position, wealth, religion, national origin. Those things do not matter.
The scale is there so that equity and justice may be accurately weighed. And when the scale is placed out of balance, when it is tipped in a way that results in injustice, that strong and powerful woman is prepared to use her sword in order to restore the balance, in order to make certain that the scales are not tipped unfairly again. Each of you, no matter what your gender may be, have your hand on that sword. It is an awesome responsibility. It is a tremendous power that you have."

- - Excerpt from Jack Scarola's closing argument

16div-018715

SEARCY DENNEY SCAROLA BARNHART & SHIPLEY P.A.

SDSBS Teams Up To Win Landmark Victory

Perelman: $1.58 Billion
Morgan Stanley: 0

On May 18, 2005, a jury in West Palm Beach, Florida delivered an historic judgment against Morgan Stanley & Co. on behalf of financier Ronald O. Perelman's company, Coleman (Parent) Holdings, Inc. The jury found the investment banking firm liable for its role in a fraud relating to the 1998 sale of The Coleman Company, the well-known camping gear manufacturer, to Sunbeam Corporation, known for its production of small household appliances. The award (for compensatory and punitive damages) totaled almost $1.45 billion. This is reportedly the largest judgment ever returned in the U.S. for the benefit of a single individual. The case was marked by the defendant's extra-ordinary efforts to evade its court-ordered obligations to produce evidence, and its accusations of improper conduct against everyone from the judge to its own lawyers.

It was a David vs. Goliath battle between one of the nation's most astute investors, Mr. Perelman, and a group of equally astute investment bankers. Mr. Perelman's David, however, had the determination, the resources, and the highly-skilled legal team necessary to pursue Morgan's Goliath to a spectacular decision. He also had the great fortune of having the battle take place before Palm Beach County Circuit Court Judge Elizabeth T. Maass, an extremely competent jurist who found herself and the integrity of the legal system challenged by Morgan's aggressive behavior at every turn.

Mr. Perelman charged that the investment firm had participated in a massive fraud involving the 1998 sale of Coleman to Sunbeam. In December, 1997, Mr. Perelman, who owned controlling interest in Coleman (with 82% of its stock) was approached by Sunbeam's new chief executive, Mr. Albert ("Chainsaw Al") Dunlap, with an offer to buy Coleman. Discussions went poorly and the two men parted with-out agreement. Shortly thereafter, Morgan re-initiated contact with Mr. Perelman on behalf of Sunbeam, and negotiated a deal for the sale of Coleman to Sunbeam. Morgan had brokered the first of many deals with Mr. Perelman 20 years ago, and Mr. Perelman felt confident in working directly with Morgan. The sale, completed in March 1998, was calculated to net Mr. Perelman about $1.5 billion, $680 million of which was in Sunbeam stock. As Sunbeam's exclusive investment banker, Morgan earned a $10 million fee on completing the deal.

"Justice is most often depicted in art as a woman. She is blindfolded. In one hand she holds scales, and in the other hand a sword. The reason for the blindfold is because justice is, indeed, blind to power, position, wealth, religion, national origin. Those things do not matter. The scale is there so that equity and justice may be accurately weighed. And when the scale is placed out of balance, when it is tipped in a way that results in injustice, that strong and powerful woman is prepared to use her sword in order to restore the balance, in order to make certain that the scales are not tipped unfairly again. Each of you, no matter what your gender may be, have your hand on that sword. It is an awesome responsibility. It is a tremendous power that you have."

-- Excerpt from
Jack Scarola's closing argument

Just weeks after the deal closed, the market value of Mr. Perelman's Sunbeam holdings began to evaporate. Newly published sales and earnings figures dramatically conflicted with earlier Sunbeam statements that had been backed-up by Morgan. The revelations led to the ouster of Sunbeam CEO Dunlap, and then its accountant, Arthur Andersen, withdrew an audit of the company's books. The Securities and Exchange Commission (SEC) later charged Mr. Dunlap with fraud in "cooking the books" of Sunbeam to create an illusion of financial success brought about by his leadership, when, in fact, the company was in deep financial trouble. Mr. Dunlap was later fined by the SEC and barred for life from running any public company because of the fraud he had conducted at Sunbeam. In 2001, after efforts to save the doomed company failed, Sunbeam filed for bankruptcy and all of Sunbeam's shareholders, including Mr. Perelman, were left holding worthless stock. Unable to seek meaningful compensation from bankrupt Sunbeam, Mr. Perelman focused on Andersen's role in contributing to Sunbeam's demise.

During the course of the Andersen litigation, Mr. Perelman's legal team discovered a letter dated just days before the Coleman-Sunbeam deal was to close. That letter from Andersen to Morgan Stanley was delivered to Morgan, as the bank also prepared to close Sunbeam's $750 million bond offering needed to finance the Coleman deal. The letter outlined serious financial troubles at Sunbeam, including decreasing sales, escalating debts, and accumulating losses. Rather than face the loss of tens of millions of dollars in transaction fees, Morgan Stanley made the decision to help conceal Sunbeam's true condition. A press release drafted with Morgan's cooperation and issued by Sunbeam with Morgan's approval continued to paint a grossly misleading picture of Sunbeam's economic performance. Other documents prepared by Morgan for Sunbeam's bond offering further misrepresented Sunbeam's financial condition, enabling Morgan to attract enough other deceived investors to earn a $22.5 million fee for its work on that offering. A week after the offering closed, Sunbeam acknowledged that its sales would fall dramatically short of earlier estimates. Three years later, Sunbeam filed for bankruptcy.

Morgan Stanley argued that it had accurately reported all of the information available to it at the time, and that it, too, was being lied to by Sunbeam. Mr. Perelman's position was that Morgan not only knew of the financial difficulties behind the scenes, but had a hand in preparing documents that concealed the financial ill health of Sunbeam, and had a duty to make accurate disclosures to Mr. Perelman even though Morgan sat on the opposite side of the negotiating table. In May 2003, after months of investigation, argument, and fruitless negotiating efforts between the parties, Mr. Perelman sued.

Legendary litigator Jerold Solovy, the highly-respected Chairman of the 400-plus lawyer Chicago-based firm, Jenner & Block, was chosen as the primary architect of Mr. Perelman's trial strategy. Mr. Solovy had successfully partnered with Jack Scarola of Searcy Denney Scarola Barnhart & Shipley to secure a $70 million settlement on behalf of Mr. Perelman against Arthur Andersen. When the battle lines formed with Morgan Stanley, Mr. Perelman and Mr. Solovy naturally turned once again to Searcy Denney Scarola Barnhart & Shipley and Jack Scarola to round out the trial team.

From the very beginning and throughout the trial, counsel for the defendant battled aggressively with the plaintiff, plaintiff's counsel, and the judge. During discovery before the trial, Morgan engaged in protracted, deliberate and concerted efforts to delay and obstruct the litigation by failing to produce e-mail and other documents demanded by the plaintiff and ordered to be produced by the court; by destruction of evidence; by representing that documents had been destroyed when it knew back-up and archived data existed; by concealing the fact that its lead banker on the merger was being criminally prosecuted for complicity in bribery at the very time he was representing Morgan on the merger; and by falsely certifying to plaintiff and the court that it had searched for, located and disclosed documents.

Jack Scarola

Confronted with compelling and largely unrefuted evidence of Morgan Stanley's misconduct, Judge Maass responded at several critical junctures in the trial with tempered restraint. At each step, she opted for carefully measured, minimal sanctions against Morgan expressly directed at correcting the imbalances created by the misconduct rather than punishment. Morgan's response was to continue to evade court orders and to openly charge the judge with bias and emotionalism. As Morgan's conduct continued unabated, the Court was compelled to escalate the level of sanctions imposed against Morgan in an effort to alleviate the harm done to the plaintiff by Morgan's repeated and intentional violation of court orders.

In March 2005, shortly before the trial began and following days of evidentiary hearings, Judge Maass concluded that the abuses by Morgan during discovery had come to "infect the entire case", and she announced her intention to issue a partial default order, directing the jury to accept as established fact that Morgan had conspired with and assisted Sunbeam in perpetrating a fraud. Morgan had forfeited its right to defend itself only on those issues directly related to the evidence that Morgan had destroyed or concealed. The court stopped significantly short of the full relief available under Florida's procedural rules and well-established case law. In an obvious effort to buy more time and divert attention from its own misconduct, Morgan notified the judge that it intended to fire its own lead counsel – that very day, without notice – and asked for a six-month continuance to find new counsel. Noting that two other law firms had been actively defending Morgan for months, the judge denied the request.

As the Court summarized its findings, "[D]iscovery abuses and misrepresentations by Morgan Stanley . . . would take a volume to recite. . . . Morgan Stanley has deliberately and contumaciously violated numerous discovery orders . . . it chose to hide information about its violations and coach witnesses to avoid any mention of additional, undisclosed problems. . . . the prejudice to [Mr. Perelman and Coleman (Parent) Holdings, Inc.] from these failings cannot be cured . . ." The jury was instructed to accept as fact that the investment bank participated in a scheme to mislead Mr. Perelman and to cover up its involvement in Sunbeam's fraud on Mr. Perelman. Considering Morgan's relentless assault on the integrity of the judicial system, and its persistent and serious abuses, the trial court's measured response was not only justified but essential. However, the court's order left significant issues open for trial and Morgan had plenty of fight and virtually limitless resources left to continue its relentless defense. At this point, the plaintiff no longer had the burden to show that fraudulent behavior had occurred, but only to show that Mr. Perelman had relied on the Sunbeam/Morgan Stanley lies and had suffered damage as a result of that reliance. While important battles had clearly been won, the war was hardly over. Proving that Ronald Perelman, a hugely successful investor, with a large and sophisticated team of business advisors of his own, placed any reliance on Sunbeam and Morgan's statements in deciding to enter

into a $1.5 billion deal would prove to be a daunting task. Mr. Scarola spent four hours in opening statement to lay the complex foundation for the case, which took almost two months to try despite the fact that the issues had been substantially narrowed.

Morgan's next response was an attempt to have Judge Maass removed from the case, arguing that her "bias, antagonism, and hostility" toward the company undermined the integrity of the court and the ability of the defendant to obtain a fair trial. Morgan's motion was denied twice – first by Judge Maass herself and then by the appellate court, which acted in support of Judge Maass with extraordinary swiftness. The appeal was denied within hours of the appellate court's receipt of Morgan's papers. Morgan then sought a mistrial by alleging jury tampering, one of dozens of unsuccessful mistrial motions that peppered the trial proceedings. Morgan completely underestimated the judge's determination to conduct a fair and equitable trial, and the jury's ability to comprehend the massive scope and complexity of Morgan's fraud. On May 16, the jury awarded Mr. Perelman $604 million in compensatory damages for having relied on Morgan's misrepresentations about Sunbeam's finances. The second phase, to determine both entitlement and amount of punitive damages, started immediately.

Two days later, the jury awarded Mr. Perelman $850 million in punitive damages. The two jury awards totaled $1.45 billion. On June 23rd, the trial judge added interest owed by Morgan Stanley to Mr. Perelman. The judgment now totals $1.58 billion. That amount sends a message to businesses like Morgan Stanley that transparency is the order of the day, that honesty is essential in business transactions and in litigation, and that deception will not be tolerated. Morgan said it plans to appeal the verdict.

Jack Scarola stated in an interview following the trial that Judge Maass is an extremely bright, scrupulously fair, and well-respected judge who is very rarely reversed at the appellate level. She carefully documented the basis of every one of her rulings and acted well within the bounds of established precedent. "We are extremely confident that this is a record that is going to withstand the most rigorous appellate review," Scarola said.

The after-shocks of the verdict are significant. Lawyers representing Mr. Perelman's company, Coleman (Parent) Holdings, Inc., intend to pursue contempt sanctions against Morgan, including millions of dollars in attorneys' fees and costs expended in establishing the bank's willful violation of court orders. Mr. Perelman's counsel has received numerous inquiries from lawyers throughout the United States seeking information on behalf of their clients who are investors with serious questions of their own regarding Morgan Stanley's business practices. Federal regulatory and enforcement agencies have focused attention on the disclosures made in this case concerning Morgan Stanley's activities. Morgan's stock price has reacted to the bad news, and its current CEO, Philip Purcell, recently announced his resignation following the earlier departure of numerous high-ranking Morgan Stanley executives. The very future of Morgan Stanley, a Wall Street giant, is in question.

Morgan's Goliath may not be dead, but Ronald Perelman has certainly brought this Goliath to its knees. ■

SEARCY DENNEY SCAROLA BARNHART & SHIPLEY PA

Attorneys at Law

AREAS OF PRACTICE:

PERSONAL INJURY
WRONGFUL DEATH
MEDICAL MALPRACTICE
COMMERCIAL LITIGATION
AUTO ACCIDENTS
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PRODUCTS LIABILITY
SECURITIES LITIGATION
GOVERNMENTAL TORTS
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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. CASE NO. CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

ORDER

THIS CAUSE coming before the Court on Non-Party Respondent Soo-Mi Lee's Unopposed Verified Motion For The Admission Of Attorney Andrew Gardner To Appear Pro Hac Vice, and the Court being fully advised in the premises, it is hereby

ORDERED AND ADJUDGED, that Non-Party Respondent Soo-Mi Lee's Unopposed Verified Motion For The Admission Of Attorney Andrew Gardner To Appear Pro Hac Vice is **GRANTED**, and said admitted to practice for purposes of this case, on payment of the Clerk's fee. The unidentified mail box rule on the non-party's standing is

DONE AND ORDERED at WPB, Florida, this 22 day of Sept., 2005.

Circuit Court Judge

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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs. CASE NO. CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

ORDER

THIS CAUSE coming before the Court on Non-Party Respondent Soo-Mi Lee's Unopposed Verified Motion For The Admission Of Attorney Audrey Strauss To Appear Pro Hac Vice, and the Court being fully advised in the premises, it is hereby

ORDERED AND ADJUDGED, that Non-Party Respondent Soo-Mi Lee's Unopposed Verified Motion For The Admission Of Attorney Audrey Strauss To Appear Pro Hac Vice is **GRANTED** and counsel admitted to practice for purposes of this case, on payment of the Clerk's fee. The undersigned makes no ruling at this time as to the non-party's standing.

DONE AND ORDERED at WPB, Florida, this 28 day of Sep, 2005.

_____
Circuit Court Judge

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vs. CASE NO. CA 03-5045 AI

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

ORDER

THIS CAUSE coming before the Court on Non-Party Respondent Soo-Mi Lee's Unopposed Verified Motion For The Admission Of Attorney Lisa Bebchick To Appear Pro Hac Vice, and the Court being fully advised in the premises, it is hereby

ORDERED AND ADJUDGED, that Non-Party Respondent Soo-Mi Lee's Unopposed Verified Motion For The Admission Of Attorney Lisa Bebchick To Appear Pro Hac Vice is **GRANTED**, and counsel admitted to appear for purposes of this case, on payment of the Clerk's fee. The undersigned makes no ruling on fees + non-party's standing.

DONE AND ORDERED at West Palm Beach, Florida, this 22 day of Sept., 2005.

Circuit Court Judge

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_____/

ORDER

THIS CAUSE coming before the Court on Non-Party Respondent Soo-Mi Lee's Unopposed Verified Motion For The Admission Of Attorney Sloan Johnston To Appear Pro Hac Vice, and the Court being fully advised in the premises, it is hereby

ORDERED AND ADJUDGED, that Non-Party Respondent Soo-Mi Lee's Unopposed Verified Motion For The Admission Of Attorney Sloan Johnston To Appear Pro Hac Vice is **GRANTED**, and counsel admitted to practice for purposes of this case, on payment of the clerk's fee. The undersigned makes no ruling on the non-party's standing.

DONE AND ORDERED at West Palm Beach, Florida, this 22 day of Sept, 2005.

Circuit Court Judge

Copies furnished to:
Jerold S. Solovy
Ronald L. Marmer
Jeffrey T. Shaw
JENNER & BLOCK LLP
One IBM Plaza
Chicago, Illinois 60611-7603
(Plaintiff's counsel)

John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409
(Plaintiff's counsel)

Richard G. Lubin
Richard G. Lubin, P.A.
Second Floor, Flagler Plaza
1217 South Flagler Drive
West Palm Beach, Florida 33401
(Counsel for non-party respondent James F. Doyle)

Douglas Duncan
Roth & Duncan
Northbridge Center, Suite 325
P.O. Box 770
West Palm Beach, Florida 33402
(Counsel for non-party respondent Donald Kempf)

Robert D. Critton
Burman, Critton, Luttier & Coleman
515 N. Flagler Drive
Suite 400
West Palm Beach, Florida 33401
(Counsel for non-party respondent James P. Cusick)

Joseph Ianno, Jr.
Carlton Fields, et al.
222 Lakeview Avenue, Suite 1400
West Palm Beach, Florida 33401
(Counsel for Defendant Morgan Stanley & Co. Incorporated)

Mark C. Hansen
Kellog, Huber, Hansen, Todd, Evans & Figel, PLLC
1615 M. Street, N.W., Suite 400
Washington, D.C. 20036-3209
(Counsel for Defendant Morgan Stanley & Co. Incorporated)

Morris Weinberg, Jr.
Zuckerman Spaeder LLP
101 E. Kennedy Blvd., Suite 1200
Tampa, FL 33602

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY. CIVIL ACTION.

CASE NO.: CA-03-5045 AI

COLEMAN (PARENT) HOLDIGNS, INC.

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

AGREED ORDER ADMITTING, ROBERT B. FISKE, JR., ESQ. TO APPEAR PRO HAC VICE

THIS CAUSE having come before the Court on **Robert B. Fiske, Jr., Esq.'s Verified Motion For Leave To Specially Appear Pro Hac Vice,**

The Court having reviewed the motion and being otherwise fully advised in the premises that the parties agree, it is hereby

ORDERED and ADJUDGED that Robert B. Fiske, Jr., Esq., may appear before this Court Pro Hac Vice, as additional counsel in the above-styled matter, subject to the Local Rules of this Court, on page VII of Court's standards. The undersigned motions only on NP
The following attorney is the designated member of the trial bar of this court with whom the Court and opposing counsel may readily communicate and upon whom papers may be served. non-party; grudy. K

Robert D. Critton, Jr.
Burman, Critton, Luttier & Coleman
515 North Flagler Drive, Suite 400
West Palm Beach, FL 33401
Tel. No. 561-842-2820

DONE and ORDERED at Palm Beach County Courthouse, West Palm Beach, Florida, this

23 day of Sept, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

Copies to:

Robert D. Critton, Jr., Esq.
Burman, Critton, Luttier & Coleman
515N. Flagler Drive
Suite 400
West Palm Beach, FL 33401
(Attorneys for James Cusick)
Of counsel:
Robert B. Fiske, Jr., Esq.
Scott W. Muller, Esq.
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, NY 10017

John Scarola, Esq.
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
(Attorneys for Plaintiff, Coleman (Parent) Holdings, Inc.))

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza, Suite 4400
Chicago, IL 60611-7603
(Attorneys for Plaintiff, Coleman (Parent) Holdings, Inc.)

Joseph Ianno, Jr., Esq.
Carlton Fields, et al.
222 Lakeview Avenue
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West Palm Beach, FL 33401
(Attorneys for Defendant, Morgan Stanley & Co. Incorporated)

Mark C. Hansen, Esq.
Kellogg, Huber, Hansen,
Todd, Evans & Figel, P.L.L.C.

1615 M. Street, N.W. Suite 400
Washington, D.C. 20036-3209
(Attorneys for Defendant, Morgan Stanley & Co. Incorporated)

Morris Weinberg, Jr., Esq.
Zuckerman Spaeder, LLP
101 East Kennedy Boulevard
Suite 1200
Tampa, FL 33601-5838
(Attorneys for Non Party, Soo-Mi-Lee)

Douglas N. Duncan
Roth & Duncan, P.A.
515 North Flagler Drive
West Palm Beach, FL 33401
(Attorneys for Non-Party, Donald G. Kempf)

Richard G. Lubin
1217 S. Flagler Drive
West Palm Beach, FL 33401
(Attorneys for Non-Party, James F. Doyle)

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY. CIVIL ACTION.

CASE NO.: CA-03-5045 AI

COLEMAN (PARENT) HOLDIGNS, INC.

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

AGREED ORDER ADMITTING, SCOTT W. MULLER, ESQ. TO APPEAR PRO HAC VICE

THIS CAUSE having come before the Court on **Scott W. Muller , Esq.'s Verified Motion For Leave To Specially Appear Pro Hac Vice,**

The Court having reviewed the motion and being otherwise fully advised in the premises that the parties agree, it is hereby

ORDERED and ADJUDGED that Scott W. Muller, Esq., may appear before this Court Pro Hac Vice, as additional counsel in the above-styled matter, subject to the Local Rules of this Court, on payment of the Clerk's fee. The undersigned makes no ruling on the co-counsel's The following attorney is the designated member of the trial bar of this court with whom the Court and opposing counsel may readily communicate and upon whom papers may be served.

Robert D. Critton, Jr.
Burman, Critton, Luttier & Coleman
515 North Flagler Drive, Suite 400
West Palm Beach, FL 33401
Tel. No. 561-842-2820

DONE and ORDERED at Palm Beach County Courthouse, West Palm Beach, Florida, this 23 day of Sept., 2005.

ELIZABETH T. MAASS
Circuit Court Judge

Copies to:

Robert D. Critton, Jr., Esq.
Burman, Critton, Luttier & Coleman
515N. Flagler Drive
Suite 400
West Palm Beach, FL 33401
(Attorneys for James Cusick)
Of counsel:
Robert B. Fiske, Jr., Esq.
Scott W. Muller, Esq.
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, NY 10017

John Scarola, Esq.
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
(Attorneys for Plaintiff, Coleman (Parent) Holdings, Inc.))

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza, Suite 4400
Chicago, IL 60611-7603
(Attorneys for Plaintiff, Coleman (Parent) Holdings, Inc.)

Joseph Ianno, Jr., Esq.
Carlton Fields, et al.
222 Lakeview Avenue
Suite 400
West Palm Beach, FL 33401
(Attorneys for Defendant, Morgan Stanley & Co. Incorporated)

Mark C. Hansen, Esq.
Kellogg, Huber, Hansen,
Todd, Evans & Figel, P.L.L.C.

1615 M. Street, N.W. Suite 400
Washington, D.C. 20036-3209
(Attorneys for Defendant, Morgan Stanley & Co. Incorporated)

Morris Weinberg, Jr., Esq.
Zuckerman Spaeder, LLP
101 East Kennedy Boulevard
Suite 1200
Tampa, FL 33601-5838
(Attorneys for Non Party, Soo-Mi-Lee)

Douglas N. Duncan
Roth & Duncan, P.A.
515 North Flagler Drive
West Palm Beach, FL 33401
(Attorneys for Non-Party, Donald G. Kempf)

Richard G. Lubin
1217 S. Flagler Drive
West Palm Beach, FL 33401
(Attorneys for Non-Party, James F. Doyle)

IN THE CIRCUIT COURT FOR
THE FIFTEENTH JUDICIAL
CIRCUIT IN AND FOR PALM
BEACH COUNTY, FLORIDA.
CIVIL DIVISION.

CASE NO. CA-03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.

Plaintiff,

vs.

MORGAN STANLEY & CO., INCORPORATED,

Defendant

AMENDED VERIFIED MOTION FOR LEAVE TO SPECIFICALLY APPEAR PRO HAC VICE

Pursuant to Rule 1-3.10 The Rules Governing The Florida Bar, and Rule 2.061, Florida Rules of Judicial Administration, John S. Siffert, Esquire, a partner of Lankler, Siffert & Wohl, LLP, 500 Fifth Avenue, 33rd Floor, New York, NY 10110-3398, a member in good standing of The New York Bar respectfully requests permission to appear Pro Hac Vice as co-counsel for Donald G. Kempf, Jr., Esquire, a non-

party Respondent in the above-styled cause. As required by Rule 1-3.10, and Rule 2.061, Mr. Siffert states as follows:

1. I am not currently a member of The Florida Bar.

2. I am currently a member in good standing of the State Bar of New York, Southern District of New York, Eastern District of New York, Second Circuit Court of Appeals, , U.S. Supreme Court.

3. I was retained by Donald G. Kempf, Jr., Esquire on August 16, 2005;

4. I have never appeared Pro Hac Vice in any Florida state court during the past five (5) years;

5. I have not been disciplined in any matter in any jurisdiction during the past five (5) years;

6. I have read The Rules Governing The Florida Bar, Rule 1-3.10, and Florida Rules of Judicial Administration, Rule 2.061. My Amended Verified Motion For Leave To Appear Pro Hac Vice is filed in compliance with these rules.

7. Douglas Duncan, Esquire of the law firm of Roth & Duncan, P.A., a member in good standing of The Florida Bar, has been associated to be co-counsel for purposes of the representation herein;

WHEREFORE, John S. Siffert, Esquire respectfully requests this Court to grant the instant Amended Motion and enter an Order allowing him to appear as Pro Hac Vice as requested above.

DATED this 29th day of September, 2005.

Respectfully submitted,

BY: _____
John S. Siffert
New York State Bar No.1010263
Lankler, Siffert & Wohl, LLP
500 Fifth Avenue, 33rd Floor
New York, NY 10110-3398
Telephone: (212)-921-8399
Facsimile: (212)-764-3701

STATE OF NEW YORK
COUNTY OF NEW YORK

Before me, the undersigned authority, on this 29th day of September, 2005 personally appeared John S. Siffert, known to me to be the person whose name is subscribed to the foregoing document and acknowledged to me that the information contained therein is within his personal knowledge and is true and correct.

Given under my hand and seal of office this 29th day of September, 2005 2005.

_____
Notary Public
State of New York

ADELE D. CALMEL
Notary Public, State Of New York
No. 01CA5011796
Qualified In New York County
Commission Expires June 15 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached Service List by facsimile and U.S. Mail on this 30 day of September, 2005.

Respectfully submitted,
ROTH & DUNCAN, P.A.
Northbridge Centre, Suite 325
515 N. Flagler Drive
P.O. Box 770
West Palm Beach, Florida 33402
Tele: (561)-655-5529

DOUGLAS DUNCAN
Fla. Bar # 309672
(Attorneys for Non-Party,
Donald G. Kempf, Jr., Esquire)

COUNSEL LIST

John Scarola, Esquire
Searcy, Denney, Scarola, et al.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
(Attorneys for Plaintiff, Coleman (Parent) Holdings, Inc.)

Jerold S. Solovy, Esquire
Jenner & Block, LLP
One IBM Plaza, Suite 4400
Chicago, IL 60611-7603
(Attorneys for Plaintiff, Coleman (Parent) Holdings, inc.)

Joseph Ianno, Jr., Esquire
Carlton Fields, et al.
222 Lakeview Avenue, Suite 400
West Palm Beach, FL 33401
(Attorneys for Defendant, Morgan Stanley & Co., Incorporated)

Mark C. Hansen, Esquire
Kellogg, Huber, Hansen, et al.
1615 M. Street, N.W. Suite 400
Washington, D.C. 20036-3209
(Attorneys for Defendant, Morgan Stanley & Co. Incorporated)

Morris ASandy@ Weinberg, Jr., Esquire
Zuckerman, Spaeder, LLP
101 E. Kennedy Blvd., Suite 1200
Tampa, FL 33601-5838
(Attorneys for Non-Party, Soo-Mi-Lee)

Robert D. Critton, Jr., Esquire
Burman, Critton, Luttier, & Coleman
515 N. Flagler Drive, Suite 400
West Palm Beach, FL 33401
(Attorneys for Non Party, James P. Cusick)

Richard G. Lubin, Esquire
1217 S. Flagler Drive
West Palm Beach, FL 33401
(Attorneys for Non-Party, James F. Doyle)

BURMAN, CRITTON, LUTTIER
& COLEMAN

A LIMITED LIABILITY PARTNERSHIP

RITA H. BUDNYK
J. MICHAEL BURMAN, P.A.*
GREGORY W. COLEMAN, P.A.
ROBERT D. CRITTON, JR., P.A.*
BERNARD LEBEDEKER
MARK T. LUTTIER, P.A.
ANDREW M. PELINO
JEFFREY C. PEPIN
MICHAEL J. PIKE
HEATHER McNAMARA RUDA
* FLORIDA BOARD CERTIFIED CIVIL TRIAL LAWYER

ADELQUI J. BENAVENTE
PARALEGAL / INVESTIGATOR

MARY LAGNADO, CLA
BARBARA M. McKENNA
ELIANA PUTNEY
BETTY STOKES
PARALEGALS

PAULA PETERSON-ROTH
NURSE PARALEGAL

September 26, 2005

SENT BY HAND DELIVERY

Judge Elizabeth T. Maas
Fifteenth Judicial Circuit
Palm Beach County Courthouse
205 North Dixie Highway
Courtroom 11A
West Palm Beach, FL 33401

Re: **Coleman v. Morgan Stanley**
Case No. CA -03-5045 AI

Dear Judge Maass:

Enclosed please find an executed Stipulation and Agreed Order Regarding Unsealing Exhibit "1" to Non-Party Respondent, James P. Cusick's, Opposition To CPH's Verified Petition For A Show-Cause Order.

If the Order meets with your approval, please sign and forward conformed copies to the counsel of record listed on the service list. Enclosed are envelopes for return mail.

Respectfully submitted,

Robert D. Critton, Jr.

RDC/bmm
Enclosures
cc: Counsel of record attached to service

L · A · W · Y · E · R · S
515 N. FLAGLER DRIVE / SUITE 400 / WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 842-2820 FAX (561) 844-6929
mail@bclclaw.com

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA. CIVIL ACTION

CASE NO.: CA-03-5045 AI

COLEMAN (PARENT) HOLDIGNS, INC.

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

STIPULATION AND AGREED ORDER REGARDING UNSEALING EXHIBIT "1" TO NON-PARTY RESPONDENT, JAMES P. CUSICK'S, OPPOSITION TO CPH'S VERIFIED PETITION FOR A SHOW-CAUSE ORDER

STIPULATION REGARDING UNSEALING EXHIBIT "1" TO NON-PARTY RESPONDENT, JAMES P. CUSICK'S, OPPOSITION TO CPH'S VERIFIED PETITION FOR A SHOW-CAUSE ORDER

On September 20, 2005 counsel for Non-Party Respondent, James P. Cusick, filed his Opposition to CPH's Verified Petition for a Show-Cause Order, attaching Exhibit "1" as a Confidential-Filed Under Seal document. Thereafter, counsel for James P. Cusick was advised by Plaintiff's counsel that the document (Exhibit "1") which was previously filed under seal was subsequently unsealed by this court. Attorney Solovy on behalf of CPH has agreed to the entry of an Order directing the Clerk to Unseal Exhibit "1" to Non-Party Respondent's, James P. Cusick, Opposition to CPH's Verified Petition for a Show-Cause Order, by removing Exhibit "1" from the envelope in which it was filed and re-attaching it to the pleading in the Court file.

By:_____
Robert D. Critton, Jr.
BURMAN, CRITTON, LUTTIER &
COLEMAN, LLP
515 North Flagler Drive, Suite 400
West Palm Beach, FL 33414
(561) 842-2820
(Attorneys for Non-Party James P. Cusick)

By:_____ and
John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33401-3626
(561) 686-6300
(Attorneys for Plaintiff Coleman (Parent)
Holding, Inc.)

Jerold S. Solovy, Esq.
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, IL 60611-7603
(Attorneys for Plaintiff, Coleman
(Parent) Holdings, Inc.)

AGREED ORDER REGARDING UNSEALING EXHIBIT "1" TO NON-PARTY RESPONDENT, JAMES P. CUSICK'S, OPPOSITION TO CPH'S VERIFIED PETITION FOR A SHOW-CAUSE ORDER

THIS CAUSE came before the Court on the above Stipulation Regarding Unsealing Exhibit "1" to Non-Party Respondent, James P. Cusick's, Opposition to CPH's Verified Petition for a Show-Cause Order. The Court hereby adopts the above Stipulation and the Clerk is hereby directed to Unseal Exhibit "1" to Non-Party Respondent's, James P. Cusick, Opposition to CPH's Verified Petition for a Show-Cause Order, by removing Exhibit "1" from the envelope in which it was filed and re-attaching it to the pleading in the Court file

DONE and ORDERED at Palm Beach County Courthouse, West Palm Beach,

Florida, this _____day of _____, 2005.

_____
ELIZABETH T. MAASS
Circuit Court Judge

Counsel List

Robert D. Critton, Jr.
Burman, Critton, Luttier & Coleman, LLP
515 North Flagler Drive, Suite 400
West Palm Beach, FL 33401
(Attorneys for Non-Party James P. Cusick)
Of counsel:
Robert B. Fiske, Jr.
Scott W. Muller
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, NY 10017

John Scarola, Esq.
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
(Attorneys for Plaintiff, Coleman (Parent) Holdings, Inc.))

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza, Suite 4400
Chicago, IL 60611-7603
(Attorneys for Plaintiff, Coleman (Parent) Holdings, Inc.)

Joseph Ianno, Jr., Esq.
Carlton Fields, et al.
222 Lakeview Avenue
Suite 400
West Palm Beach, FL 33401
(Attorneys for Defendant, Morgan Stanley & Co. Incorporated)

Mark C. Hansen, Esq.
Kellogg, Huber, Hansen,
Todd, Evans & Figel, P.L.L.C.
1615 M. Street, N.W. Suite 400
Washington, D.C. 20036-3209
(Attorneys for Defendant, Morgan Stanley & Co. Incorporated)

Morris Weinberg, Jr., Esq.
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Tampa, FL 33601-5838
(Attorneys for Non Party, Soo-Mi-Lee)

Douglas N. Duncan
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(*Attorneys for Non-Party, Donald G. Kempf)*

Richard G. Lubin
1217 S. Flagler Drive
West Palm Beach, FL 33401
(*Attorneys for Non-Party, James F. Doyle)*

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA. CIVIL ACTION

CASE NO.: CA-03-5045 AI

COLEMAN (PARENT) HOLDIGNS, INC.

Plaintiff,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

STIPULATION AND AGREED ORDER REGARDING UNSEALING EXHIBIT "1" TO NON-PARTY RESPONDENT, JAMES P. CUSICK'S, OPPOSITION TO CPH'S VERIFIED PETITION FOR A SHOW-CAUSE ORDER

STIPULATION REGARDING UNSEALING EXHIBIT "1" TO NON-PARTY RESPONDENT, JAMES P. CUSICK'S, OPPOSITION TO CPH'S VERIFIED PETITION FOR A SHOW-CAUSE ORDER

On September 20, 2005 counsel for Non-Party Respondent, James P. Cusick, filed his Opposition to CPH's Verified Petition for a Show-Cause Order, attaching Exhibit "1" as a Confidential-Filed Under Seal document. Thereafter, counsel for James P. Cusick was advised by Plaintiff's counsel that the document (Exhibit "1") which was previously filed under seal was subsequently unsealed by this court. Attorney Solovy on behalf of CPH has agreed to the entry of an Order directing the Clerk to Unseal Exhibit "1" to Non-Party Respondent's, James P. Cusick, Opposition to CPH's Verified Petition for a Show-Cause Order, by removing Exhibit "1" from the envelope in which it was filed and re-attaching it to the pleading in the Court file.

By:_____
Robert D. Critton, Jr.
BURMAN, CRITTON, LUTTIER &
COLEMAN, LLP
515 North Flagler Drive, Suite 400
West Palm Beach, FL 33414
(561) 842-2820
(Attorneys for Non-Party James P. Cusick)

By:_____ and
John Scarola
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33401-3626
(561) 686-6300
(Attorneys for Plaintiff Coleman (Parent)
Holding, Inc.)

Jerold S. Solovy, Esq.
JENNER & BLOCK LLP
One IBM Plaza, Suite 4400
Chicago, IL 60611-7603
(Attorneys for Plaintiff, Coleman
(Parent) Holdings, Inc.)

AGREED ORDER REGARDING UNSEALING EXHIBIT "1" TO NON-PARTY RESPONDENT, JAMES P. CUSICK'S, OPPOSITION TO CPH'S VERIFIED PETITION FOR A SHOW-CAUSE ORDER

THIS CAUSE came before the Court on the above Stipulation Regarding Unsealing Exhibit "1" to Non-Party Respondent, James P. Cusick's, Opposition to CPH's Verified Petition for a Show-Cause Order. The Court hereby adopts the above Stipulation and the Clerk is hereby directed to Unseal Exhibit "1" to Non-Party Respondent's, James P. Cusick, Opposition to CPH's Verified Petition for a Show-Cause Order, by removing Exhibit "1" from the envelope in which it was filed and re-attaching it to the pleading in the Court file

DONE and ORDERED at Palm Beach County Courthouse, West Palm Beach,

SIGNED & DATED
SEP 27 2005
JUDGE ELIZABETH T. MAASS

Florida, this _____day of _____, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

Counsel List

Robert D. Critton, Jr.
Burman, Critton, Luttier & Coleman, LLP
515 North Flagler Drive, Suite 400
West Palm Beach, FL 33401
(Attorneys for Non-Party James P. Cusick)
Of counsel:
Robert B. Fiske, Jr.
Scott W. Muller
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, NY 10017

John Scarola, Esq.
Searcy Denney Scarola
Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
(Attorneys for Plaintiff, Coleman (Parent) Holdings, Inc.))

Jerold S. Solovy, Esq.
Jenner & Block LLP
One IBM Plaza, Suite 4400
Chicago, IL 60611-7603
(Attorneys for Plaintiff, Coleman (Parent) Holdings, Inc.)

Joseph Ianno, Jr., Esq.
Carlton Fields, et al.
222 Lakeview Avenue
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West Palm Beach, FL 33401
(Attorneys for Defendant, Morgan Stanley & Co. Incorporated)

Mark C. Hansen, Esq.
Kellogg, Huber, Hansen,
Todd, Evans & Figel, P.L.L.C.
1615 M. Street, N.W. Suite 400
Washington, D.C. 20036-3209
(Attorneys for Defendant, Morgan Stanley & Co. Incorporated)

Morris Weinberg, Jr., Esq.
Zuckerman Spaeder, LLP
101 East Kennedy Boulevard
Suite 1200
Tampa, FL 33601-5838
(Attorneys for Non Party, Soo-Mi-Lee)

Douglas N. Duncan
Roth & Duncan, P.A.
515 North Flagler Drive
West Palm Beach, FL 33401
(*Attorneys for Non-Party, Donald G. Kempf)*

Richard G. Lubin
1217 S. Flagler Drive
West Palm Beach, FL 33401
(*Attorneys for Non-Party, James F. Doyle)*

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON VERIFIED MOTION FOR ADMISSION PRO HAC VICE (JOHN PELLETTIERI)

THIS CAUSE came before the Court, in Chambers, on John Pellettieri's Verified Motion for Admission Pro Hac Vice. Based on a review of the Motion, it is

ORDERED AND ADJUDGED that the Motion is Denied, without prejudice to renewal on filing a motion containing the information required by Rule 2.061 (b) (3), Florida Rules of Judicial Administration.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 28 day of September, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Rebecca Beynon, Esq.
Sumner Square
1615 M Street, NW, Suite 400
Washington, DC 20036

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON VERIFIED MOTION FOR ADMISSION PRO HAC VICE (JOHN S. SIFFERT)

THIS CAUSE came before the Court, in Chambers, on John S. Siffert's Verified Motion for Admission Pro Hac Vice. Based on a review of the Motion, it is

ORDERED AND ADJUDGED that the Motion is Denied, without prejudice to renewal on filing a motion containing the information required by Rule 2.061 (b) (3), Florida Rules of Judicial Administration.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 28 day of September, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:
Joseph Ianno, Jr., Esq.
222 Lakeview Ave., Suite 1400
West Palm Beach, FL 33401

John Scarola, Esq.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jerold S. Solovy, Esq.
One IBM Plaza, Suite 4400
Chicago, Il 60611

Rebecca Beynon, Esq.
Sumner Square
1615 M Street, NW, Suite 400
Washington, DC 20036

IN THE CIRCUIT COURT FOR THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA. CIVIL DIVISION.

CASE NO. CA-03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.

Plaintiff,

vs.

MORGAN STANLEY & CO., INCORPORATED,

Defendant

AMENDED VERIFIED MOTION FOR LEAVE TO SPECIFICALLY APPEAR PRO HAC VICE

Pursuant to Rule 1-3.10 The Rules Governing The Florida Bar, and Rule 2.061, Florida Rules of Judicial Administration, John Pellettieri, Esquire, an associate of Lankler, Siffert & Wohl, LLP, 500 Fifth Avenue, 33rd Floor, New York, NY 10110-3398, a member in good standing of The New York Bar respectfully requests permission to appear Pro Hac Vice as co-counsel for Donald G. Kempf,

Jr., Esquire, a non-party Respondent in the above-styled cause. As required by Rule 1-3.10, and Rule 2.061, Mr. Pellettieri states as follows:

1. I am not currently a member of The Florida Bar;

2. I am currently a member in good standing of the State Bar of New York since October, 2004;

3. I was retained by Donald G. Kempf, Jr., Esquire on August 16, 2005;

4. I have never appeared Pro Hac Vice in any Florida state court, during the past five (5) years;

5. I have not been disciplined in any matter in any jurisdiction for the past five (5) years;

6. I have read The Rules Governing The Florida Bar, Rule 1-3.10 and Florida Rules of Judicial Administration, Rule 2.061. My Amended Verified Motion For Leave To Appear Pro Hac Vice is filed in compliance with these rules;

7. Douglas Duncan, Esquire of the law firm of Roth & Duncan, P.A., a member in good standing of The Florida Bar, has been associated to be co-counsel for purposes of the representation herein.

WHEREFORE, John Pellettieri, Esquire respectfully requests this Court to grant the instant Amended Motion and enter an Order allowing him to appear as Pro Hac Vice as requested above.

DATED this 29 day of September, 2005.

Respectfully submitted,

BY: _____

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STATE OF NEW YORK
COUNTY OF NEW YORK

Before me, the undersigned authority, on this 29th day of September, 2005 personally appeared John Pellettieri, known to me to be the person whose name is subscribed to the foregoing document and acknowledged to me that the information contained therein is within his personal knowledge and is true and correct.

Given under my hand and seal of office this 29th day of September, 2005 2005.

_____
Notary Public

ADELE D. CALMEL
Notary Public, State Of New York
No. 01CA5011796
Qualified In New York County
Commission Expires June 15 2007

State of New York

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached Service List by facsimile and U.S. Mail on this 30 day of September, 2005.

Respectfully submitted,

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COVER SHEET

FAX

To: Mark C. Hansen, Esquire
Kellog, Huber, et al.
Fax #: **(202)-326-7999**
Subject: CPH v. Morgan Stanley
Date: September 30, 2005
Pages: 3, including this cover sheet.

COMMENTS: See attached

****

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From the desk of...

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IN THE CIRCUIT COURT FOR
THE FIFTEENTH JUDICIAL
CIRCUIT IN AND FOR PALM
BEACH COUNTY, FLORIDA.
CIVIL DIVISION.

CASE NO. CA-03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.

Plaintiff,

vs.

MORGAN STANLEY & CO., INCORPORATED,

Defendant

AMENDED VERIFIED MOTION FOR LEAVE TO SPECIFICALLY APPEAR PRO HAC VICE

Pursuant to Rule 1-3.10 The Rules Governing The Florida Bar, and Rule 2.061, Florida Rules of Judicial Administration, John S. Siffert, Esquire, a partner of Lankler, Siffert & Wohl, LLP, 500 Fifth Avenue, 33rd Floor, New York, NY 10110-3398, a member in good standing of The New York Bar respectfully requests permission to appear Pro Hac Vice as co-counsel for Donald G. Kempf, Jr., Esquire, a non-

party Respondent in the above-styled cause. As required by Rule 1-3.10, and Rule 2.061, Mr. Siffert states as follows:

1. I am not currently a member of The Florida Bar.

2. I am currently a member in good standing of the State Bar of New York, Southern District of New York, Eastern District of New York, Second Circuit Court of Appeals, , U.S. Supreme Court.

3. I was retained by Donald G. Kempf, Jr., Esquire on August 16, 2005;

4. I have never appeared Pro Hac Vice in any Florida state court during the past five (5) years;

5. I have not been disciplined in any matter in any jurisdiction during the past five (5) years;

6. I have read The Rules Governing The Florida Bar, Rule 1-3.10, and Florida Rules of Judicial Administration, Rule 2.061. My Amended Verified Motion For Leave To Appear Pro Hac Vice is filed in compliance with these rules.

7. Douglas Duncan, Esquire of the law firm of Roth & Duncan, P.A., a member in good standing of The Florida Bar, has been associated to be co-counsel for purposes of the representation herein;

WHEREFORE, John S. Siffert, Esquire respectfully requests this Court to grant the instant Amended Motion and enter an Order allowing him to appear as Pro Hac Vice as requested above.

DATED this 29th day of September, 2005.

Respectfully submitted,

BY: _____
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STATE OF NEW YORK
COUNTY OF NEW YORK

Before me, the undersigned authority, on this 29th day of September, 2005 personally appeared John S. Siffert, known to me to be the person whose name is subscribed to the foregoing document and acknowledged to me that the information contained therein is within his personal knowledge and is true and correct.

Given under my hand and seal of office this 29th day of September, 2005 2005.

_____
Notary Public
State of New York

ADELE D. CALMEL
Notary Public, State Of New York
No. 01CA5011796
Qualified In New York County
Commission Expires June 15 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached Service List by facsimile and U.S. Mail on this 30 day of September, 2005.

Respectfully submitted,
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IN THE CIRCUIT COURT FOR THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA. CIVIL DIVISION.

CASE NO. CA-03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.

Plaintiff,

vs.

MORGAN STANLEY & CO., INCORPORATED,

Defendant

AMENDED VERIFIED MOTION FOR LEAVE TO SPECIFICALLY APPEAR PRO HAC VICE

Pursuant to Rule 1-3.10 The Rules Governing The Florida Bar, and Rule 2.061, Florida Rules of Judicial Administration, John Pellettieri, Esquire, an associate of Lankler, Siffert & Wohl, LLP, 500 Fifth Avenue, 33rd Floor, New York, NY 10110-3398, a member in good standing of The New York Bar respectfully requests permission to appear Pro Hac Vice as co-counsel for Donald G. Kempf,

Jr., Esquire, a non-party Respondent in the above-styled cause. As required by Rule 1-3.10, and Rule 2.061, Mr. Pellettieri states as follows:

1. I am not currently a member of The Florida Bar;

2. I am currently a member in good standing of the State Bar of New York since October, 2004;

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DATED this 29 day of September, 2005.

Respectfully submitted,

BY: _____

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STATE OF NEW YORK
COUNTY OF NEW YORK

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IN THE FIFTEENTH JUDICIAL COURT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

CASE NO. CA 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

CPH'S VERIFIED REPLY BRIEF IN SUPPORT OF CPH'S VERIFIED PETITION FOR A CRIMINAL-CONTEMPT SHOW-CAUSE ORDER

Petitioner Coleman (Parent) Holdings Inc. ("CPH") respectfully submits this Verified Reply Brief in support of its Verified Petition for a show-cause order regarding criminal contempt of Court by Respondents Morgan Stanley & Co., Incorporated ("Morgan Stanley"), Donald G. Kempf, Jr., James P. Cusick, Soo-Mi Lee, and James F. Doyle.

INTRODUCTION

What is most telling about the five responses to CPH's Verified Petition is what they don't contain. First, none of the Respondents produced — or even described with any specification — the "newly discovered" e-mails that supposedly led Morgan Stanley to issue its June 17, 2005 Notice retracting no fewer than fifteen prior misstatements. Indeed, when CPH expressly requested production of those e-mails, all five Respondents flatly rejected that request. Second, none of the Respondents attempted to explain why they were running searches, apparently post-trial, that would have turned up these pivotal e-mails — or what the parameters of those searches were. Because Morgan Stanley was no longer under any Order from this Court

to run such searches, the claim that they were nonetheless doing so as late as June 2005 appears to be pretextual. Third (and this relates directly to the first two points), none of the Respondents addressed why the e-mail searches they ran in February and March 2005, when they were running searches under this Court's direct Orders, failed to turn up these e-mails. And fourth, the individual Respondents failed to explain how they were overcome by collective amnesia regarding what they knew about the Brooklyn Tapes back in July 2004 and, at the same time, could exude collective certitude about what they claimed to have learned about those tapes for the first time in October 2004. It would be peculiar enough if one Respondent had believed, with certainty, that he or she first learned such a critical fact (that the Brooklyn Tapes contained e-mail) in October 2004, when in fact he or she had known that fact for at least three months, since July 2004. But when all four individual Respondents apparently suffer from this same combination of amnesia followed by certitude, it can hardly be mere coincidence.

Instead of dealing forthrightly with any of these four issues, Respondents ask this Court to take on faith their unsworn assertions that they did not find (and apparently could not recall) the pivotal July 2004 e-mails until June 2005, and that they then acted responsibly by immediately notifying CPH and the Court. That story is too convenient. If Respondents intentionally withheld these e-mails back in February and March 2005, when the Court was determining what sanctions to impose on Morgan Stanley, that would be such a clear obstruction of the judicial process as to demand a finding of criminal contempt. And even if Respondents did not find these e-mails until sometime later, during the trial, withholding them until June 17, 2005 — after the Court had finished crafting the litigation-misconduct statement describing Morgan Stanley's abuses, after the jury had listened to that statement and delivered its punitive-

damages verdict, and indeed after the trial had concluded — is likewise so clearly obstructive as to require contempt sanctions.

Moreover, given their long history of lying about what documents they have in their possession, and when and how they found them, Respondents are entitled to no deference on these matters. The Court should not take their unsworn assertions on faith. At a minimum, the Court should insist on seeing with its own eyes these mysterious e-mails, inspecting the internal documents that describe the timing and circumstances of the searches that led to the e-mails' supposedly recent discovery, and taking sworn testimony (at least by affidavit, and preferably by deposition or live in-Court hearing) on why these e-mails were not discovered earlier.

The need to test Respondents' assertions under oath is particularly strong here. It is inherently implausible that the individual Respondents forgot that they had learned about the e-mails on the Brooklyn Tapes in July 2004, and that they remained certain they had never had such prior knowledge when they were again informed of the existence of those e-mails three months later in October 2004. The undisputed facts make it likely that Respondents were knowingly lying about this to CPH and to the Court, beginning in January 2005 with the Doyle Declaration and continuing through the second phase of the trial in May 2005.

The most efficient route to resolving this whole dispute is clear: Issue a show-cause order, and then appoint undersigned counsel to assist the Court in developing the facts it needs to conduct a thorough, but speedy, evidentiary hearing under the Florida Rules of Criminal Procedure.

Morgan Stanley and its attorneys again tell the Court, as they have at every turn in this litigation, that pursuing these matters will be time-consuming, inefficient, and ultimately fruitless. But every time this Court has persisted in searching out the truth notwithstanding

Morgan Stanley's protestations, the Court's skepticism has been confirmed. This dispute likely will prove to be no different. Therefore, CPH respectfully asks the Court to grant its Verified Petition.

I. This Court Has Jurisdiction to Enter a Show-Cause Order.

Morgan Stanley, joined by the four individual Respondents, contends that its appeal deprives this Court of jurisdiction to initiate criminal-contempt proceedings. *See* MS Opp'n at 1-3; *see also* Kempf Opp'n at 2 n.1 (joining the other Respondents' briefs to the extent applicable); Cusick Opp'n at 4 n.1 (same); Lee Opp'n at 1 n.1 (same); Doyle Opp'n at 7 n.3 (same). Morgan Stanley's argument confuses the law governing criminal contempt with the law governing litigation sanctions.

Under Florida law, criminal-contempt proceedings "are not part of the original cause." *In re Brevard County Grand Jury*, 206 So. 2d 398, 399 (Fla. 4th DCA 1968) (citing *Seaboard Airline R. Co. v. Tampa Southern R.R. Co.*, 134 So. 529 (Fla. 1931)). Criminal contempt is "an offense against the court itself, arising from some conduct in the trial of the original cause." *Kirk v. State*, 481 So. 2d 510, 510 (Fla. 3d DCA 1986); *see also Gay v. McCaughan*, 105 So. 2d 771, 774 (Fla. 1958) (unlike "civil contempt remedial in nature and triable in the principal action . . . , criminal contempt or transgression of the authority of the court itself" is "under our law . . . treated as an independent punitive proceeding") (citations omitted).

The "power of [a] court to punish for contempt is [an] inherent one" and "is essential to [the] execution, maintenance, and integrity of [the] judiciary." *Walker v. Bentley*, 678 So. 2d 1265, 1267 (Fla. 1996). Accordingly, because criminal contempt is a new matter, a court's jurisdiction to protect its integrity does not depend on whether it continues to exercise jurisdiction over the original litigation in which the contumacious conduct took place. For instance, in *Sprouse v. Sprouse*, 408 So. 2d 632, 633 (Fla. 5th DCA 1981), the Fifth District

expressly rejected the argument that a trial court, once divested of jurisdiction over a case by a change of venue to another court, lacks jurisdiction to enter criminal-contempt sanctions for conduct in the case. Distinguishing prior caselaw holding that a change of venue divests the original court of jurisdiction to issue civil-contempt sanctions, the *Sprouse* court held that criminal contempt is "separate and distinct from the case in chief" because it is "an offense against the court itself." *Id.*; *see also, e.g.*, *Vetrick v. Hollander*, 743 So. 2d 1128, 1129 (Fla. 4th DCA 1999) (reversing in part a contempt order, but noting without criticism that it was entered "[w]hile th[e] appeal was pending"); *Walker v. Edel*, 727 So. 2d 359, 360 (Fla. 5th DCA 1999) (remanding, for further proceedings, a contempt order issued by a circuit court while the underlying litigation was on appeal).

Morgan Stanley does not cite a single case to support the argument that the Court lacks jurisdiction to conduct criminal-contempt proceedings. Instead, Morgan Stanley relies exclusively upon caselaw defining a court's ability to retain jurisdiction over litigation sanctions — which are part of the original action — after an appeal has been perfected. *See* MS Opp'n at 1-3 (citing *Publix Super Markets, Inc. v. Griffin*, 837 So. 2d 1139 (Fla. 2d DCA 2003); *Amlan, Inc. v. Detroit Diesel Corp.*, 651 So. 2d 701 (Fla. 4th DCA 1995)). The other cases cited by Morgan Stanley also are inapposite, stating only the familiar rule that a trial court may not alter a final judgment after appeal. *See* MS Opp'n at 3 (citing *McGurn v. Scott*, 596 So. 2d 1042 (Fla. 1992) (circuit court may not reserve jurisdiction to determine prejudgment interest after entry of final judgment, as prejudgment interest is part of compensatory damages); *Florida Patient's Comp. Fund v. Scherer*, 558 So. 2d 411, 415 (Fla. 1990) (defendant could not make a post-judgment motion to limit liability in the trial court after an appeal already had been taken); *Palma Sola Harbour Condominium, Inc. v. Huber*, 374 So. 2d 1135, 1138 (Fla. 2d DCA 1979)

(circuit court could not reserve jurisdiction to determine damages after the entry of final judgment)).

Because criminal-contempt sanctions are not part of the judgment in the underlying litigation, this Court has jurisdiction to grant the Verified Petition and issue a show-cause order.

II. CPH's Petition Establishes Probable Cause for Criminal Contempt.

The Respondents all contend that CPH's Petition, on its face, fails to establish probable cause for criminal contempt. *See* MS Opp'n at 3-6; Kempf Opp'n at 3-5; Cusick Opp'n at 4-6; Lee Opp'n at 3-5; Doyle Opp'n at 3-5. That contention is wrong for three reasons. First, as shown below, the Respondents repeatedly invoke the reasonable-doubt standard of proof that applies to criminal-contempt convictions. But that standard does not apply here. The Verified Petition must establish only probable cause. Second, rather than directly confronting the sufficiency of the allegations set forth in CPH's sworn Petition, the individual Respondents repeatedly and improperly inject their own unsworn factual assertions. Third, Respondents try to suggest that the misrepresentations at issue here were based on foggy memories of distant events that took place "years ago." But the actual chronology of events, spelled out in the Petition and further elaborated below, refutes that suggestion and shows that Respondents knowingly misled this Court about critical events.

A. Respondents Apply the Wrong Standard.

Respondents repeatedly sow confusion about the proper standard for determining whether to issue a criminal-contempt show-cause order. Upon receiving a verified petition stating the essential facts constituting acts of criminal contempt, a trial court may issue a show-cause order if it finds "probable cause" to suspect that the respondents have committed the acts of contempt alleged in the petition. *See Brown v. State*, 595 So. 2d 259, 260 (Fla. 2d DCA 1992). The term "probable cause" here, as in any criminal case, means an objectively reasonable ground to

believe that a crime has been committed and that the accused person committed that crime. *See* FLA. R. CRIM. P. 3.133(b)(5) (West 2005); *Perry v. State*, 842 So. 2d 301, 303 n.2 (Fla. 5th DCA 2003) (citing *Johnson v. State*, 660 So. 2d 648, 653 (Fla. 1995)). Thus, the quantum of evidence needed to initiate contempt proceedings is substantially less than the quantum needed for a final judgment of guilt. Just as "probable cause" is the standard for a normal criminal indictment, and "proof beyond a reasonable doubt" is the standard at an ordinary criminal trial, probable cause is the standard for evaluating a verified petition and initiating a contempt proceeding, and the reasonable-doubt standard becomes relevant only at the evidentiary hearing to adjudicate criminal contempt. *See Covey v. Sweat*, 185 So. 337, 338 (Fla. 1938) (contrasting the evidence "sufficient to sustain a verdict of guilty" with the evidence sufficient to show "probable cause"); *cf. State v. Knight*, 866 So. 2d 1195, 1210 (Fla. 2003) (discussing "probable cause to indict"), *cert. denied*, 541 U.S. 1066 (2004). *See generally* 4 WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE § 15.2(f), at 281-82 (2d ed. 1999) (contrasting the quantum of proof needed to indict under the "probable cause" standard with the quantum of proof needed to convict under the "guilt beyond a reasonable doubt" standard).

Respondents repeatedly run away from this hornbook law. For example, Messrs. Kempf and Cusick propose a standard unknown to the law: probable cause to establish proof beyond a reasonable doubt. Mr. Kempf takes CPH to task because its Verified Petition allegedly "fails to set forth probable cause that . . . CPH could establish proof of [Mr. Kempf's] intent beyond a reasonable doubt." Kempf Opp'n at 3 n.2. Similarly, Mr. Cusick faults the Petition's supposed lack of "factual allegations giving probable cause to conclude . . . that there is or could be any evidence to prove [that Mr. Cusick is guilty of intentional wrongdoing] beyond a reasonable doubt." Cusick Opp'n at 3. But neither Mr. Kempf nor Mr. Cusick can cite any case or other

authority to support this convoluted "probable cause [to] establish proof . . . beyond a reasonable doubt" standard. Instead, Mr. Kempf cites three cases, none of which addresses probable cause at all, much less the issuance of a show-cause order for criminal contempt. *See* Kempf Opp'n at 3 n.2 (citing cases). The three cases all speak to the standard of proof for criminal-contempt convictions. *See Tide v. State*, 804 So. 2d 412, 413 (Fla. 4th DCA 2001) (requiring proof beyond a reasonable doubt "to prove indirect criminal contempt") (emphasis added); *Levine v. State*, 650 So. 2d 666, 668 (Fla. 4th DCA 1995) (same); *Thomson v. State*, 398 So. 2d 514, 517 (Fla. 2d DCA 1981) (describing how to evaluate circumstantial evidence when deciding whether to convict).

Similarly, in seeking to distance themselves from Morgan Stanley, the individual Respondents rely on cases such as *In re Broward County State Attorney's Office*, 577 So. 2d 967, 968-71 (Fla. 4th DCA 1991), and *Shelley v. District Court of Appeal*, 350 So. 2d 471, 473-74 (Fla. 1977), for the proposition that the leaders of an entity's legal team cannot be convicted for criminal contempt absent "record evidence" that they each had "personal knowledge" of the wrongful conduct engaged in by the entity itself. *See, e.g.*, Kempf Opp'n at 4-5; Doyle Opp'n at 6. But none of those cases suggests that "record evidence" of a contemnor's "personal knowledge" is necessary at this early stage of the proceedings. Under Florida law, evidence adduced at the hearing must meet the standards enunciated in *In re Broward County State Attorney's Office* and *Shelley*. Demanding such evidence at the rule-to-show-cause stage puts the cart before the horse.

The applicable standard here is probable cause, and the Verified Petition meets that standard, as shown below in Part II-C (at pages 11-17).

B. Respondents Improperly Attempt to Rebut Sworn Allegations with Unsworn Assertions.

The individual Respondents' briefs are chock full of unsworn factual assertions designed to rebut the Petition's sworn allegations. For example, Mr. Cusick claims that e-mails that Morgan Stanley "located for the first time" in the late spring of 2005 led Morgan Stanley's attorneys to file the June 17 Notice "immediately, voluntarily and without prompting." Cusick Opp'n at 3; *see also id.* (alleging that "Mr. Cusick's error . . . was promptly and voluntarily corrected in [the June 17, 2005] filing made with this Court"); *id.* at 6 (again alleging the "voluntary and immediate filing" of the June 17 Notice). Likewise, Ms. Lee offers unsworn "testimony" about the timing of the Morgan Stanley e-mail search that supposedly triggered the June 17 reversal: She states that Morgan Stanley acted "promptly" to correct her proffer once an "e-mail search showed that [her] recollection was inaccurate." Lee Opp'n at 2; *see also id.* at 5 ("[A] previously unrecovered e-mail was subsequently discovered; and shortly thereafter, Morgan Stanley filed its June 17 Notice . . . .") (emphasis added). Ms. Lee also attempts to slip in, through her unsworn brief, testimony about the fuzziness of her "recollection[s]" and the "innocen[ce]" of her errors, *id.* at 2, 5 — all designed to counter the Petition's sworn allegation that she acted "deliberately and obstructively" in misleading this Court. CPH Pet. at 1.

All of those unsworn assertions are improper and should be ignored. *See* FLA. R. CRIM. P. 3.840(a) (West 2005) (authorizing judges to issue show-cause orders for indirect criminal contempt either on the judge's own motion or on the sworn allegations of any person having knowledge of the facts); *see also Cole v. State*, 714 So. 2d 479, 488-89 (Fla. 2d DCA 1998) (holding that contempt allegations were insufficient because they were unsworn). Indeed, it would be error for the Court even to consider Respondents' unsworn assertions. *See Chrysler Corp. v. Miller*, 450 So. 2d 330, 330 (Fla. 4th DCA 1984) ("'Trial judges cannot rely upon [counsel's] unsworn statements as the basis for making factual determinations; and this court

cannot so consider them on review of the record.'") (quoting *Leon Shaffer Golnick Advertising, Inc. v. Cedar*, 423 So. 2d 1015, 1016-17 (Fla. 4th DCA 1982)); *Sears Roebuck & Co. v. Polchinsky*, 636 So. 2d 1369, 1371 (Fla. 4th DCA 1994) ("We remind attorneys of our previous admonition that unsworn statements or representations of counsel, absent a stipulation, cannot be considered evidence.").

None of these unsworn factual assertions is credible in any event. Ms. Lee's fuzzy "recollections," leading to supposedly "innocent" errors, *see* Lee Opp'n at 2, 5, are undercut by the actual chronology of events, as explained in detail below, in Part II-C (at pages 11-17). And as for the timing issue, Respondents had plenty of reason to delay the retractions that Morgan Stanley eventually made on June 17, 2005 — after the Court's litigation sanctions had been established, after the jury had completed its deliberations, and indeed after the trial was over. Moreover, it is hard to imagine why the July 2004 e-mails whose discovery supposedly triggered the "prompt" filing of the June 17, 2005 Notice would not have turned up last winter. At that time, Morgan Stanley was under this Court's February 3, 2005 Order to produce all documents, including e-mails, "addressing or related to" the Brooklyn "e-mail back up tapes, including . . . the manner and timetable by which they were to be restored and made searchable." Ex. A, 2/3/05 Order. Searches conducted pursuant to that Court Order did turn up the June 7, 2004 e-mail telling Mr. Cusick and Ms. Lee that the Brooklyn Tapes had been located and were about to be searched for e-mail. *See* Ex. B, 6/7/04 E-mail from Riel to Cusick & Lee.[1] But supposedly, those same searches in February 2005 did not turn up the July 2004 e-mails that allegedly triggered the June 17, 2005 Notice. That is not a credible story — and it is certainly not to be credited at this stage in the absence of documentary evidence and sworn testimony explaining

[1] *See infra* pages 14-15 (describing Morgan Stanley's efforts to conceal this e-mail).

why the June 2005 search was so much more effective in excavating critical evidence than was the February 2005 search. Given Morgan Stanley's track record of dishonesty, Respondents' story cannot convincingly rest on unsworn assertions of fact.

Furthermore, when CPH asked Respondents to provide sworn support for their briefs' factual assertions, Respondents declined.[2] And likewise, when CPH requested immediate production of the e-mails that purportedly led Morgan Stanley to file its June 17, 2005 Notice, Respondents again declined.[3] So Respondents assert that certain e-mails led them to retract their prior statements, but Respondents refuse to supply any sworn testimony or documents supporting their assertions — or even to disclose the mystery e-mails. Yet, at the same time, Respondents urge the Court to rely upon their recitation of the facts.

In assessing probable cause, the Court should consider only the undisputed facts alleged under oath in CPH's Petition and should ignore Respondents' unsworn factual assertions — which are not credible in any event.

C. The Petition's Sworn Allegations Set Forth Facts Supporting A Finding of Criminal Contempt.

The sworn allegations in CPH's Petition establish probable cause of criminal contempt and easily satisfy the legal standard for evaluating a verified petition seeking criminal-contempt charges. Under the Florida Rules, a verified petition is facially valid if it alleges essential facts that, if true, would constitute contempt of court. *See* FLA. R. CRIM. P. 3.840(a) (West 2005) (requiring that the court's show-cause order "stat[e] the essential facts constituting the criminal contempt charged"). Specifically, for criminal-contempt proceedings based on a party's or

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[2] *See* Ex. C, Letter from CPH's Counsel, 9/23/05; Ex. D, Letter from MS's Counsel, 9/27/05; Ex. E, Letter from Kempf's Counsel, 9/26/05; Ex. F, Letter from Cusick's Counsel, 9/26/05; Ex. G, Letter from Lee's Counsel, 9/26/05; Ex. H, Letter from Doyle's Counsel, 9/26/05.

[3] *See* Ex. C, Letter from CPH's Counsel, 9/23/05; Ex. D, Letter from MS's Counsel, 9/27/05.

witness's false statements, the petition's essential facts must satisfy "a three-element test: (1) there must exist judicial knowledge of the falsity of the statements; (2) the false statements must be pertinent to the issues at trial; and (3) the false statements must have an obstructive effect." CPH Pet. at 4-5 (citing *Duff v. Southern Bell Tel. & Tel. Co.*, 386 So. 2d 253, 255 (Fla. 5th DCA 1980)).

As the Petition explains in detail, each of these three elements is satisfied here. *See* CPH Pet. at 5-6. CPH's sworn Petition, as well as this sworn Reply Brief, allege that

- each of the four individual Respondents personally engaged in, and knowingly intended to commit, the acts of contempt described in the Petition;
- at the time Morgan Stanley made each of the statements described or listed in its June 17 Notice, each of the four individual Respondents knew that those statements were false;
- with the intention of perpetrating a fraud on the Court, each of the four individual Respondents personally consented to Morgan Stanley's submission of those misstatements to this Court; and
- those willful acts and knowing misstatements were calculated to mislead the Court and to obstruct the judicial process.

Respondents' briefs do not dispute the presence of most of the elements of a finding of criminal contempt. With the possible exception of Mr. Doyle, none of the Respondents disputes the clear falsity of numerous representations made by Morgan Stanley to this Court — indeed, Morgan Stanley expressly admits the falsity of those representations.[4] And none of the

[4] Only Mr. Doyle suggests any potential willingness to contest the truthfulness of Morgan Stanley's June 17 Notice. One of the statements that the June 17 Notice retracted and withdrew was the averment about the Brooklyn Tapes in Mr. Doyle's Declaration, which stated: "At the end of October 2004, I learned that additional e-mail backup tapes had been located within Morgan Stanley . . . ." CPH Pet. Ex. E at 1 (emphasis added). Unlike Morgan Stanley, Mr.

Respondents disputes that the false statements were pertinent to the issues at trial or that the statements had an obstructive effect on the proceedings. The only issue that Respondents really address is whether they knew that the statements were false when given — and on this subject, Respondents' unsworn arguments are simply not credible, let alone sufficient to avoid the issuance of a show-cause order.

In support of their unsworn pleas of innocence, Respondents advance a chronology that bears little resemblance to reality. Mr. Cusick implies that his own situation involves an innocent failure of recollection of detailed facts over a span of years. He cites one case — involving a "failure to recollect an event one year prior" — and another case — involving a "significant lapse of time." Cusick Opp'n at 5-6 (emphasis added). Mr. Cusick then asks the Court to "measure [his case] against these standards and cases" and describes his case as one where "a substantial period of time has passed." *Id.* at 5-6; *see id.* at 6 (referring to a "significant lapse of time") (citation omitted). In a similar vein, both Ms. Lee and Mr. Doyle suggest that this contempt Petition involves "'people [who were] talking about things that happened a few years ago.'" Lee Opp'n at 2 n.2 (emphasis added; citation omitted); *accord* Doyle Opp'n at 5 n.1.

That factual shell game is itself evidence of an intent to mislead the Court. The time periods here can be measured in weeks and months, not in years. As the Court will recall, a central feature of this controversy was Respondents' persistent defense of the June 23, 2004 Certificate of Compliance with this Court's April 16, 2004 Agreed Order regarding production of

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Doyle has not conceded that this Declaration was inaccurate. *See* Doyle Opp'n at 4 ("Even assuming for purposes of this Opposition that the statement in Mr. Doyle's Declaration regarding the Brooklyn Tapes was not accurate . . . ."); *see also id.* at 5 (referring to the Declaration as one that was "submitted" by Mr. Doyle but "withdrawn by Morgan Stanley") (emphasis added). This wordsmithing suggests that Mr. Doyle intends to keep his options open.

e-mail. It was undisputed that Morgan Stanley's information technology ("IT") professionals informed Mr. Cusick and Ms. Lee of the existence of hundreds of not-yet-searched Brooklyn Tapes in early June 2004, some two weeks before the Certificate was signed and served on June 23, 2004. *See* Ex. B, 6/7/04 E-mail from Riel to Cusick & Lee. Indeed, both Mr. Cusick and Ms. Lee submitted proffers to that effect in May 2005. *See* Ex. I, Cusick Proffer; Ex. J, Lee Proffer. An e-mail message sent to Mr. Cusick and Ms. Lee on the morning of June 7, 2004, stated that the IT professionals were having the Brooklyn Tapes processed and would "inform [Mr. Cusick and Ms. Lee] if any pre-2000 email tapes are found." Ex. B, 6/7/04 E-mail from Riel to Cusick & Lee. Knowing that the Brooklyn Tapes would soon be searched, Mr. Cusick and Ms. Lee and their colleagues in the Law Division never should have allowed Morgan Stanley to submit the Certificate in the first place. And once the Certificate had been submitted, they should have circled back to the IT professionals to ask whether the previously unsearched Brooklyn Tapes actually contained potentially relevant e-mail — a question that would have been answered affirmatively had it been asked anytime after July 2, 2004. *See* Ex. K, 7/2/04 E-mail from Buchanan to Riel *et al.* (informing Morgan Stanley's IT professionals that their outside vendor had found e-mail on the Brooklyn Tapes).

Back in February and March 2005, Morgan Stanley initially refused to produce the June 7, 2004 e-mail, even though it was indisputably responsive to this Court's then-pending discovery Orders. *See, e.g.*, Ex. A, 2/3/05 Order. On Morgan Stanley's privilege log, Morgan Stanley described the e-mail innocuously as "Email from IT professional to in-house counsel seeking legal advice regarding e-mail restoration process." Ex. L, 3/7/05 Privilege Log, at 12. Upon inspecting the e-mail *in camera* and demanding affidavits to explain Morgan Stanley's assertion of privilege, this Court discovered that the June 7, 2004 e-mail "had been provided to

the SEC." Ex. M, 3/9/05 Order Following In Camera Inspection (Riel/SEC Documents), at 3 n.1. As the Court explained, Morgan Stanley had withheld that critical fact "in an apparent attempt to prevent CPH from learning of the SEC's current informal inquiry into [Morgan Stanley's] e-mail retention practices." *Id.* Voluntary disclosure of a document to a third party such as the SEC, of course, waives the privilege. *See id.* And knowingly concealing such a voluntary disclosure when submitting a privilege log violates Florida Rule of Civil Procedure 1.280(b)(5), which requires that privilege logs enable the opposing party to assess the privilege's applicability. *See id.* Therefore, the Court ordered Morgan Stanley to produce the June 7, 2004 e-mail to CPH immediately. *Id.* at 3, 5. Had it not been for this Court's vigilance, that e-mail would have remained hidden from CPH and from this Court to this day.

What the June 17, 2005 Notice revealed for the first time — contrary to at least fifteen prior statements from Respondents — was that attorneys in Morgan Stanley's Law Division had learned that the Brooklyn Tapes contained e-mail by no later than July 2004, roughly the same time when the IT team learned that same critically important fact and within days after allowing Morgan Stanley to submit the false June 23, 2004 Certificate. Yet, in the months preceding the trial and throughout the trial itself, Respondents persisted in falsely claiming that they learned this fact only months later, in late October or November 2004, when it purportedly came as quite a surprise. That falsehood was convenient because it helped to explain why Morgan Stanley's legal team (1) waited until 2005 to renounce the June 23, 2004 Certificate of Compliance; and (2) waited until November 2004 to inform CPH of the existence of previously unsearched e-mail backup tapes.

The falsehoods retracted by the June 17 Notice date back at least to January 2005, when Mr. Doyle filed his false Declaration with this Court. So at the time of that false Declaration,

Mr. Doyle was claiming to have learned, with surprise, just three months earlier, a critically important fact that he actually had known for six or seven months. Moreover, his assertions were affirmative denials that his knowledge about the Brooklyn Tapes predated October or November 2004, not just claims of a failure to recall such knowledge. Far from being "'people [who were] talking about things that happened a few years ago,'" Lee Opp'n at 2 n.2 (emphasis added; citation omitted); *accord* Doyle Opp'n at 5 n.1, Mr. Doyle and his colleagues in the Law Division were making affirmative misrepresentations about critical events that had happened only a few months earlier. That distortion of the record is itself tellingly incriminating.

Furthermore, Respondents' abusive tactics have continued through the filing of the June 17 Notice, *see* CPH Pet. at 1, 12, and up to the present day. Respondents have refused to provide information about the "new e-mail search" that supposedly generated previously unreviewed e-mails, which in turn supposedly triggered the filing of the June 17 Notice. E-mails from 2004 — unlike e-mails from the late 1990s, when the underlying Sunbeam fraud took place — did not have to be restored from backup tapes. Rather, they were automatically captured in Morgan Stanley's E-Mail Archive immediately upon being sent or received. *See* CPH Pet. Ex. A, 3/23/05 Order, at 10 nn.11-12. So e-mails showing that the Law Division was aware in July 2004 that the Brooklyn Tapes contained e-mail could have been called up by a simple word search of the Archive at any time.

In sum, as the Petition lays out in detail, *see* CPH Pet. at 1-6, the Court already has plenty of evidence to conclude that there is probable cause that acts of criminal contempt were intentionally committed and that Morgan Stanley and its in-house counsel committed them. Morgan Stanley obviously hopes that this Court — which has invested enormous time and effort in understanding all these factual predicates — will leave this inquiry to someone else, someone

who will have to learn these detailed facts from scratch. But as shown below, this Court is in the best position to conduct this investigation.

III. Discovery Is Appropriate Before a Criminal-Contempt Hearing.

Morgan Stanley asserts that "CPH does not have the right to conduct the discovery that CPH suggests, since criminal discovery is [solely] the defendant's right under the Florida Rules of Criminal Procedure." MS Opp'n at 5-6; *see also* Lee Opp'n at 6-7; Kempf Opp'n at 5 n.4. Like Morgan Stanley's jurisdictional argument, *see supra* Part I (at pages 4-6), this argument misconceives the nature of criminal-contempt proceedings. As explained below, *see infra* Part IV-B (at pages 22-26), CPH does not seek to conduct its own discovery; rather, it seeks to assist the Court in conducting the Court's pre-hearing investigation, in order to expedite and streamline the evidentiary hearing on contempt.

Every "trial judge has the inherent power to do those things necessary to enforce its orders, to conduct its business in a proper manner, and to protect the court from acts obstructing the administration of justice." *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co.*, 639 So. 2d 606, 608-09 (Fla. 1994). That power includes the "power to conduct an independent investigation in order to determine whether it has been the victim of fraud." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991); *see also United States v. Shaffer Equip. Co.*, 11 F.3d 450, 462 (4th Cir. 1993) (noting that under its "inherent power" a court may "punish for contempt" and "conduct investigations as necessary to exercise the power"); *Suthpin v. Tom Arnold Drilling Contractor, Inc.*, 17 S.W.3d 765, 772-73 (Tex. App. 2000) (a trial court possesses, incident to its criminal-contempt power, the "inherent power to investigate the veracity of affidavits" submitted to the court).

Although Morgan Stanley and the individual Respondents invoke Florida Rule of Criminal Procedure 3.220 (the Rule generally governing criminal discovery) and cases applying

that Rule to run-of-the-mill criminal cases, *see e.g., Henderson v. State*, 745 So. 2d 319, 324 (Fla. 1999), *cited in* Kempf Opp'n at 5 n.4, they do not cite a single case suggesting that this Rule truncated courts' inherent power to investigate contempt. To the contrary, at least since 1989, Rule 3.220 has recognized the trial courts' authority to expand the scope of permissible discovery "[o]n a showing of materiality" and "as justice may require." FLA. R. CRIM. P. 3.220(f) (West 2005) ("Additional Discovery. On a showing of materiality, the court may require such other discovery to the parties as justice may require."); *see id.* committee notes for 1989 amendment ("Subdivision (f) . . . has been modified to permit the prosecutor, as well as the defense attorney, to seek additional discovery.").[5]

Conducting a limited pre-hearing investigation is an eminently reasonable use of the Court's inherent power to investigate fraud and to conduct an efficient hearing "to determine the guilt or innocence of the [criminal contempt] defendant." FLA. R. CRIM. P. 3.840(d) (West 2005). Indeed, the Respondents themselves have injected defenses and assertions into these proceedings that should be tested. Mr. Doyle, for instance, asserts the defense of "recantation" under Section 837.07 of the Florida Statutes. *See* Doyle Opp'n at 6 n.2. Leaving aside for the moment the irony that Mr. Doyle has kept open the option of contesting the truthfulness of Morgan Stanley's recantation, *see supra* note 4, Mr. Doyle's theory is that when Morgan Stanley filed the June 17 Notice recanting its earlier statements about the knowledge of its Law Division, Morgan Stanley effectively insulated itself (and, by extension, its in-house attorneys) from any

[5] The cases Ms. Lee cites, *see* Lee Opp'n at 7 — *Able Builders Sanitation Co. v. State*, 368 So. 2d 1340, 1342 (Fla. 3d DCA), *appeal dismissed*, 373 So. 2d 461 (Fla. 1979), and *State v. Barreiro*, 432 So. 2d 138 (Fla. 3d DCA 1983) — predate the 1989 amendment to Rule 3.220(f). And in any event, neither case involved a contempt charge. Nor does Ms. Lee cite any support for her argument that Rule 3.840(a) bars the Court from investigating allegations of indirect criminal contempt. *See* Lee Opp'n at 6. Rule 3.840(a) simply describes how the Court may initiate indirect contempt proceedings. Rule 3.840(a) does nothing to curtail the Court's inherent investigatory power once such proceedings have begun.

potential conviction for criminal contempt based on perjury. *See id.* But in a case like this one, where the false statements have substantially affected the proceedings, the recantation statute would require Mr. Doyle and his fellow Respondents to prove that they filed the June 17 Notice "before it ha[d] become manifest" that their false statements would be exposed. FLA. STAT. ANN. § 837.07 (West 2005). In light of the multiple forums in which Morgan Stanley continues to face inquiries about unlawful e-mail practices, there is ample reason to believe that the false statements retracted by the Notice on June 17 had already been, or soon would have been, exposed. The limited pre-hearing investigation proposed in CPH's Petition would most efficiently get to the bottom of these and related issues.

IV. Due Process Does Not Bar Appointment of CPH's Counsel to Assist the Court.

Morgan Stanley and Ms. Lee argue that, even if CPH's Petition establishes probable cause for criminal contempt, allowing counsel for CPH, which has an interest in the matter, to prosecute that contempt would violate the constitutional guarantee of due process. *See* MS Opp'n at 1, 6-8; Lee Opp'n at 2, 8-9. That argument, however, suffers from two fatal defects: (1) due process is not implicated here; and (2) CPH's counsel are not asking to serve as prosecutors, but instead, are asking only to assist the Court in its search for the truth — a role that parties in CPH's exact position routinely undertake in contempt proceedings.

A. Due Process Is Not Implicated Here.

In making their due-process argument, Morgan Stanley and Ms. Lee rely almost entirely on *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987). But as Morgan Stanley concedes, "the *Young* Court rested its holding on its 'supervisory power' over the federal courts," MS Opp'n at 7 (quoting *Young*, 481 U.S. at 802) — not on the Due Process Clause.

Only one member of the *Young* Court — Justice Blackmun — was willing to hold that due process requires a disinterested prosecutor in a criminal-contempt proceeding. Justice

Brennan's plurality opinion, in contrast, expressly avoided all constitutional issues and instead relied on the Supreme Court's supervisory authority over the lower federal courts — a factor obviously not at issue in this state-court action. *See Young*, 481 U.S. at 809 n.21. Justice Powell's partial dissent, joined by Chief Justice Rehnquist and Justice O'Connor, went further, explaining that appointing "counsel for a party in a civil suit as a prosecutor in a related criminal contempt proceeding . . . is not [an error] of constitutional dimension." *Id.* at 825-26 (emphasis added). And in dissent, Justice White went further yet, as he "agree[d] with the Court of Appeals that there was no error, constitutional or otherwise, in the appointments made in this action and that [the contemnor-petitioners] were not denied due process of law." *Id.* at 827. Thus, it was only Justice Blackmun who would have held (based on a 1969 lower-court opinion and a student note from the *Fordham Law Review*) that "the practice — federal or state — of appointing an interested party's counsel to prosecute for criminal contempt is a violation of due process." *Id.* at 814-15 (Blackmun, J., concurring).

Like Justice Blackmun, Morgan Stanley and Ms. Lee cite *Brotherhood of Locomotive Firemen & Enginemen v. United States*, 411 F.2d 312 (5th Cir. 1969), where the court "conclude[d] that the proceedings did not meet the demands of due process as to notice and time" because the defendant had only one day's notice and a vague indictment, *id.* at 317-18, and also separately offered the view that those procedural defects had come about because private lawyers, rather than the United States Attorney, had prosecuted the charges, *id.* at 319. *See* MS Opp'n at 7; Lee Opp'n at 8. The passage cited by Morgan Stanley and Ms. Lee, suggesting a blanket rule that appointment of private prosecutors is constitutionally impermissible, is dictum and has been rejected repeatedly by other courts. *See, e.g., Musidor, B.V. v. Great Am. Screen*, 658 F.2d 60, 64 (2d Cir. 1981) (declining to follow *Brotherhood*'s "broad statement" that

interested private prosecutors violate due process, because the case's actual holding was that "the notice of charges was vague and only one day was allowed to prepare the defense"); *United States v. Crawford Enters.*, 643 F. Supp. 370, 379-80 (S.D. Tex. 1986) (declining to follow *Brotherhood*'s dictum), *appeal dismissed in part*, 826 F.2d 392 (5th Cir. 1987). Indeed, the Eleventh Circuit, which is bound by pre-1981 holdings of the Fifth Circuit, has expressly declined to adopt such a broad rule. *See Midway Mfg. Co. v. Kruckenberg*, 779 F.2d 624, 626 (11th Cir. 1986) (noting that defendant had cited the Fifth Circuit's opinion in *Brotherhood*, but refusing to decide "whether there is a plenary rule forbidding in all criminal cases appointment of counsel as prosecutors," and instead remanding for a determination of whether the appointment of particular private attorneys had been appropriate). So even before the Supreme Court decided *Young* on nonconstitutional grounds in 1987, federal courts had consistently declined to hold that the Due Process Clause prohibits an interested party's private attorneys from serving as special prosecutors.

In the 18 years since *Young* was decided, the Supreme Court has cited *Young* a dozen times — but no member of the Court has adopted Justice Blackmun's position. Meanwhile, state courts have continued to allow attorneys for interested private parties to prosecute criminal contempt — a procedure that would be flatly unconstitutional if Justice Blackmun's (and Morgan Stanley's and Ms. Lee's) position were correct. *See, e.g., Wilson v. Wilson*, 984 S.W.2d 898, 899-905 (Tenn. 1998) (due process does not automatically bar a private attorney representing the beneficiary of a civil court order from prosecuting a criminal-contempt action alleging a violation of that order), *cert. denied*, 528 U.S. 822 (1999); *In re Marriage of Betts*, 558 N.E.2d 404, 426 (Ill. App. 1990) ("counsel for a party which is the beneficiary of a court order

may . . . prosecute contempt charges premised on an alleged violation of that order"), *appeal denied sub nom. Betts v. Betts*, 567 N.E.2d 328 (Ill. 1991).

B. CPH's Counsel Seek to Assist the Court's Prosecution, Not to Serve as Special Prosecutors.

The second problem with Morgan Stanley's and Ms. Lee's argument is that *Young* did not address the request that CPH actually makes in its Petition. *Young* involved the appointment of private counsel as special prosecutors; this case involves the proposed appointment of private counsel to assist the Court in prosecuting the criminal-contempt charges. This is a proper and commonplace procedure recognized repeatedly in Florida decisions, as described below.

In *Young*, the respondent's private attorneys were appointed as "special counsel to prosecute [the] criminal contempt action." 481 U.S. at 791. Once appointed as special counsel representing the United States, the attorneys set up a "sting" operation, conducted and covertly recorded meetings with the alleged contemnors, and launched an extensive undercover investigation, with wiretaps eventually generating "more than 100 audio and video tapes . . . of meetings and telephone conversations." *Id.* at 791-92. As Justice Brennan noted, these "private" prosecutors were free to exercise unsupervised discretion over a broad range of decisions, including "the determination of which persons should be targets of investigation, what methods of investigation should be used, what information will be sought as evidence, which persons should be charged with what offenses, which persons should be utilized as witnesses, whether to enter into plea bargains and the terms on which they will be established, and whether any individuals should be granted immunity." *Id.* at 807.

Here, CPH's counsel request a far more limited role, merely assisting the Court in its prosecution of the contempt outlined in the Petition. Under Florida's law of indirect criminal contempt, it is the circuit court itself — not the assisting attorneys — that exercises "discretion . .

. in prosecuting or not prosecuting alleged contemnors for misconduct against the court." *Burk v. Washington*, 713 So. 2d 988, 993-94 (Fla. 1998). As the Florida Supreme Court recently explained, a criminal-contempt proceeding's "focus is on preservation of respect for the integrity of the court as an institution of justice and the enforcement of a court order, not a criminal prosecution for a statutory violation brought by the executive branch through the state attorney." *Id.* at 994. Therefore, the State's prosecuting attorney, or the court-appointed private attorney, becomes involved "only at the court's invitation and then only as its agent in upholding the court's integrity and authority. In that situation, the [attorney] is not acting in its independent capacity as the discretionary enforcer of state law." *Id.* (emphasis added); *see also* Ex. N, 8/4/05 Hr'g Tr., at 6 (statement of Morgan Stanley's counsel) (conceding that "Mr. Scarola has been asked to be appointed effectively an agent of the Court") (emphasis added). Thus, the special prosecutors' role in *Young* bears little resemblance to the role proposed here for CPH's counsel. Indeed, Justice Brennan recognized this very distinction in *Young* when he contrasted "the appointment of an interested prosecutor . . . to be in control of the prosecution" with the appointment of an interested private attorney to "assist[] a disinterested prosecutor in pursuing the contempt action." *Young*, 481 U.S. at 806 n.17 (emphasis in the original).[6]

The only Florida cases that Morgan Stanley cites, *see* MS Opp'n at 7 n.3 (citing three District Court of Appeal precedents), all confirm the appropriateness of the procedure CPH is

[6] The rules of criminal procedure also reflect this basic distinction. Whereas *Young* holds that a federal district court in the first instance should refer a contempt case to the United States Attorney's Office, *see id.* at 802, Florida Rule of Criminal Procedure 3.840 expressly grants the trial judge three options: She may ask the State's prosecuting attorney to assist her, she may appoint a private attorney to assist her, or she may conduct the contempt hearing without assistance of counsel. *See* FLA. R. CRIM. P. 3.840(d) (West 2005) ("The judge may conduct a hearing without assistance of counsel or may be assisted by the prosecuting attorney or by an attorney appointed for that purpose."). In all three scenarios under the Florida rules, the trial judge retains full control over the proceedings.

suggesting: They are cases in which counsel for a civil litigant was allowed to assist the trial court in prosecuting "a criminal contempt proceeding arising out of [the] civil case." *Id.* In the most recent of those three cases, *Feltner v. Columbia Pictures Television, Inc.*, 789 So. 2d 453 (Fla. 4th DCA 2001), which arose in Palm Beach County, Judge Carlisle allowed an interested private party's attorney both to act as the judge's lead assistant and to testify as the "main witness" at the same contempt hearing. *Id.* at 454 (noting the alleged contemnor's unsuccessful objection). In the second case, the family-law case of *Lascaibar v. Lascaibar*, 773 So. 2d 1236 (Fla. 3d DCA 2000), the Third District noted uncritically that Ms. Lascaibar's lawyer had helped prosecute the indirect criminal-contempt charges against her former husband. *See id.* at 1236 & n.*.

And in the third case that Morgan Stanley cites, *Routh v. Routh*, 565 So. 2d 709 (Fla. 5th DCA 1990), the trial judge also appointed a former wife's lawyer to help prosecute her former husband for indirect criminal contempt. *Id.* at 710. Recognizing that the Florida Rules of Criminal Procedure authorized the trial judge to make that appointment, the Fifth District affirmed the former husband's conviction, but held that the trial judge had erred in awarding the former wife her attorney's fees and costs. *Id.* (citing *Anderson v. City of Wilton Manors*, 490 So. 2d 1313 (Fla. 4th DCA 1986)). In dissent, Judge Harris (who would have affirmed the award of attorney's fees) expressly approved the trial judge's appointment of the wife's lawyer: After all, he was the attorney most "familiar with the case," including the husband's "prior performance and . . . financial ability." *Id.* at 711. And Florida's standard practice of "appoint[ing] the opposing party's counsel to 'represent the court'" in indirect criminal-contempt proceedings promoted both "efficiency and promptness," Judge Harris explained. *Id.* Indeed, as a general matter, allowing the attorney best acquainted with "the factual underpinnings of the contempt

proceeding" to present the facts supporting criminal contempt is the most "[j]udicious use of the court's, government's and the private attorney's time and resources." *United States v. Crawford Enters.*, 643 F. Supp. at 380; *see also, e.g., Person v. Miller*, 854 F.2d 656, 662-64 (4th Cir. 1988) (explaining that counsel for an interested private party may assist in prosecuting criminal contempt, so long as they do not effectively control the proceedings).[7]

Here, efficiency concerns also weigh heavily in favor of CPH's request. As explained in the Petition, the Court's pre-hearing investigation need not be complex or lengthy, as only a handful of depositions plus a subpoena covering about half a dozen discrete categories of documents should be required. *See* CPH Pet. at 12-13 & n.1. But as Morgan Stanley's June 17, 2005 Notice concedes, Morgan Stanley and its attorneys made misrepresentations to the Court in at least fifteen different pleadings and transcripts, spread out over several months — and Morgan Stanley has, so far, refused to limit its notice and correction to those fifteen specific documents. *See* CPH Pet. Ex. I, 6/17/05 Notice, at 2 & n.1. Given the enormous quantity of potentially relevant pretrial and trial documents, it would be terribly inefficient to ask the State Attorney to serve as the Court's main assistant in this action, as the State Attorney would have to start from scratch to become familiar with the documentary evidence and the factual underpinnings of the case. By contrast, the assistance of CPH's counsel would likely be of great help to the Court in streamlining and expediting this matter. The "efficiency and promptness" concerns described by Judge Harris in *Routh* therefore strongly favor appointment of CPH's counsel to assist this Court

[7] Ms. Lee does not even attempt to cite any Florida cases in support of her contrary argument. *See* Lee Opp'n at 8-9. And her attempt to invoke "ethical precepts," Lee Opp'n at 2; *see id.* at 8-9; *see also* MS Opp'n at 8, misses the mark. An attorney appointed to assist a court under Rule 3.840(d) does not exercise the sort of discretion likely to generate the conflicts of interest Ms. Lee predicts.

in preparing for and conducting the contempt hearing under Florida Rule of Criminal Procedure 3.840(d).

V. The Individual Respondents Do Not Deserve Special Treatment Simply Because They Are Attorneys.

Lurking throughout all four individual Respondents' briefs is the suggestion that attorneys, with their special relationship to the judiciary, should not be held to the same rules that govern all other citizens of Florida who enter the courtroom. To articulate that suggestion, of course, is to defeat it.

More than a half century ago, in *Sacher v. United States*, 343 U.S. 1 (1952), attorneys who had been convicted of criminal contempt likewise sought special treatment, asking the Supreme Court to "protect counsel in fearless, vigorous and effective [advocacy]." *Id.* at 13. Speaking for the Court, Justice Jackson rejected their plea for leniency, as he refused to "equate contempt with courage or insults with independence." *Id.* at 14. The judiciary's highest duty, he reminded them, was "to protect the processes of orderly trial, which is the supreme object of the lawyer's calling." *Id.*

CONCLUSION

For the reasons set forth here and in the Verified Petition, this Court should (1) order Respondents Morgan Stanley & Co., Incorporated, Donald G. Kempf, Jr., James P. Cusick, Soo-Mi Lee, and James F. Doyle to appear before the Court to show cause why they should not be held in criminal contempt of Court; (2) direct Respondents to provide the discovery suggested in the Petition; and (3) appoint undersigned counsel to assist the Court in preparing for and conducting the contempt hearing pursuant to Florida Rules of Criminal Procedure 3.220(f) and 3.840(d).

Dated: October 11, 2005

Respectfully submitted,

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I hereby swear under penalty of perjury that the facts stated above are true and correct.

_____

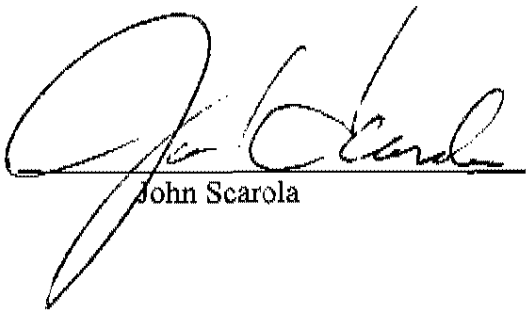
Sworn before me this 11th day of October, 2005.

_____
Notary Public

MARY PIRROTTA
MY COMMISSION # DD347345
EXPIRES: November 04, 2008
Fl. Notary Discount Assoc. Co.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and overnight delivery to all counsel on the attached list on this 11th day of October, 2005.



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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 502003CA005045XXXXMB

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

AMENDED ORDER SETTING STATUS CONFERENCE
(date and time change)

THIS CAUSE having come before the Court, it is hereby

ORDERED AND ADJUDGED that a Status Conference will be held before the Honorable Elizabeth T. Maass on October 19, 2005 at 4:00 p.m., in Courtroom 11A, 205 N. Dixie Hwy, WPB, FL 33401. The purpose of this hearing is to determine whether the special set hearing on Friday, October 21, 2005 at 8:00 a.m. may go forward. Any counsel may appear by speaker telephone. If more than one counsel wishes to do so, Plaintiff's counsel will be responsible for arranging a conference call to 561-355-1774.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 19th day of October, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

16div-018800

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Re: Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Matter No.: 029986-230580

Dear Judge Maass:

Enclosed please find a courtesy copy of CPH's Verified Motion for Leave to File A Supplemental Affidavit From Arthur Riel, Morgan Stanley's Former Executive Director of Technology, together with a Notice of Hearing adding this motion to our scheduled hearing for Friday, October 21, 2005 at 8:00 a.m.

Respectfully yours,

JACK SCAROLA
JS/mep
Enc.

cc: All counsel via fax and Fedex

#230580/mep

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO.: CA 03-5045 AI

vs.
MORGAN STANLEY & CO., INC.,

Defendant,
_____/

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: October 21, 2005

TIME: 8:00 a.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

CPH'S VERIFIED MOTION FOR LEAVE TO FILE A SUPPLEMENTAL AFFIDAVIT FROM ARTHUR RIEL, MORGAN STANLEY'S FORMER EXECUTIVE DIRECTOR OF TECHNOLOGY

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Case No.: CA 03-5045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Federal Express to all Counsel on the attached list, this 19th day of October, 2005.

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IN THE FIFTEENTH JUDICIAL COURT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

CASE NO. CA 03-5045 AI

CPH'S VERIFIED MOTION FOR LEAVE TO FILE A SUPPLEMENTAL AFFIDAVIT FROM ARTHUR RIEL, MORGAN STANLEY'S FORMER EXECUTIVE DIRECTOR OF TECHNOLOGY

Coleman (Parent) Holdings Inc. ("CPH") hereby moves for leave to file a supplemental affidavit of Mr. Arthur Riel in support of CPH's Verified Petition and Verified Reply Brief seeking a criminal-contempt show-cause order against Respondents Morgan Stanley & Co., Incorporated ("Morgan Stanley"), Donald G. Kempf, Jr., James P. Cusick, Soo-Mi Lee, and James F. Doyle. The affidavit is attached hereto as Exhibit 1.

After filing its Verified Reply Brief last week, CPH learned that Morgan Stanley had finally terminated its Executive Director of Technology, Arthur Riel, after more than 13 months on "administrative leave." Freed from the restrictions arising from his employment, Mr. Riel expressed a willingness to testify before this Court and completed the attached affidavit explaining several critical points related to CPH's Verified Petition.

As this Court will recall, Mr. Riel figured prominently in Morgan Stanley's attempts to explain away the e-mail controversies leading to this Court's Orders of March 1 and March 23, 2005. *See* CPH Pet. Exs. A & B. Among other things, Mr. Riel signed the June 23, 2004 Certification of Compliance with this Court's April 16, 2004 Agreed Order regarding e-mail

production — a certification that this Court eventually found Morgan Stanley had submitted even though it knew that the affidavit was false. *See* CPH Pet. Ex. B, 3/1/05 Order, at 10. As initially drafted, Morgan Stanley's February 11, 2005 brief stated that Morgan Stanley had "dismissed" Mr. Riel "for integrity issues." Ex. 2, 2/11/05 MS Supp. Opp'n to CPH's Adverse-Inference Mot., at 10. But those typed words were crossed out, and interlineated above them was the handwritten explanation that Mr. Riel had instead been "placed on administrative leave." *Id.*; *see* CPH Pet. Ex. B, 3/1/05 Order, at 4. Ms. Allison Gorman, who replaced Mr. Riel when he was involuntarily put on leave in August 2004, testified in this Court that she had been instructed to describe the circumstances of Mr. Riel's replacement as having been "placed on administrative leave." CPH Pet. Ex. B, 3/1/05 Order, at 4. But as this Court noted in its March 1, 2005 Order, Morgan Stanley "presented no evidence to explain why Mr. Riel would have been placed on administrative leave rather than terminated" or to rebut CPH's suggestion that Morgan Stanley designed this maneuver "to deprive CPH of the ability to contact him directly." *Id.*

Following Morgan Stanley's final termination of Mr. Riel, we were able freely to interview him for the first time. And it has now become obvious why Morgan Stanley did not want him talking to CPH or to this Court before or during the trial. His affidavit, attached to this motion as Exhibit 1, contains four significant, new revelations.

First, Mr. Riel quotes verbatim from a "Priority Project Status Report" that was e-mailed in early July 2004 to several attorneys within the Law Division, including managing director David Elston, the head of Morgan Stanley's global compliance. Ex. 1, Affidavit of Arthur Riel, 10/19/05, at ¶¶ 10, 14 [hereinafter "Riel Aff."] & Reil Aff. Ex. D. Mr. Elston, a former partner at the law firm of Kirkland & Ellis, reported directly to Respondent Mr. Kempf, Morgan Stanley's chief legal officer and another former Kirkland partner. *See* Ex. 3, 10/12/05 Article

from InHouseCounsel.com. That July 2, 2004 e-mail explained that the Brooklyn Tapes' format differed from that of the other e-mail backup tapes, which required the outside vendor to modify its computer code in order to extract the e-mail messages from the Brooklyn Tapes. Riel Aff. Ex. D. And it further stated that Morgan Stanley would start receiving the extracted e-mail messages from these Brooklyn Tapes "the week of 7/5" (*i.e.*, the week of July 5, 2004). *Id.* (emphasis added). Thus, for the first time, we have documentary evidence that Law Division attorneys at the very highest levels were aware in early July 2004 that the Brooklyn Tapes contained e-mail. That date was just days after Morgan Stanley submitted its false Certification of Compliance. And it was more than three months before the first date on which (prior to the June 17, 2005 retraction Notice) Respondents admitted to knowing this critically important fact (*i.e.*, in late October 2004).

Second, Mr. Riel's affidavit finally explains the circumstances under which Morgan Stanley got him to sign the June 23, 2004 Certification of Compliance. *See* Ex. 1, Riel Aff. ¶ 13. According to the affidavit, Respondent Mr. Doyle initially approached a very junior employee in Mr. Riel's organization and asked her to sign the Certification of Compliance. *Id.* Feeling uncomfortable with that request, she showed it to her supervisor, who in turn showed it to his supervisor, Mr. Riel. *Id.* Mr. Riel recognized that this sort of certification was not the kind of document that a junior employee appropriately should be asked to sign, so he took responsibility for it himself. *Id.* But — and this is critically important here — Mr. Riel knew that Mr. Doyle and others in the Law Division were fully aware at that time that older e-mail had to be searched in two locations: in Mr. Riel's e-mail archive and in backup tapes that were under the control of Mr. Robert Saunders's separate operation. *Id.*; *see also id.* ¶¶ 3-12. Thus, Mr. Riel understood that he was signing the Certification to show only that he believed that e-mail already contained

in his e-mail archive had been properly searched and produced. *See id.* ¶ 13. He understood, as Mr. Doyle and the other Respondents surely must have understood, that e-mails from the Brooklyn Tapes and from other e-mail backup tapes were still being processed by Mr. Saunders's organization and could not possibly be searched by Mr. Riel or anyone in Mr. Riel's organization. *See id.*

Third, for the first time, we now know that back in April 2005 — long before this Court settled on the final wording of the Litigation Misconduct Statement and read it to the jury at the start of the trial's punitive-damages phase — Mr. Riel and his personal attorneys had told Morgan Stanley's Law Division that it was simply untrue that the Law Division had been unaware in July 2004 that the Brooklyn Tapes contained e-mail. *See id.* ¶ 14. The response of the Law Division attorneys was shocking: They removed the plainly false language from Mr. Riel's "proffer," but left it fully intact in the proffers filed for Respondents Mr. Cusick and Ms. Lee. *See id.* (describing the Law Division's initial draft of the Riel proffer, which Mr. Riel and his attorneys rejected because it falsely stated that he had never "advise[d] the Law Division . . . that there were e-mails contained on the Brooklyn tapes and 8mm tapes"); Ex. 4, Riel Proffer, as filed 5/12/05 and re-filed 5/17/05, at 1-2 (deleting that false statement); *compare* CPH Reply Br. Ex. I & J (filed versions of the Cusick and Lee proffers, both of which contain that false statement). In other words, Respondents continued to file knowingly false statements with this Court, rather than come clean before the trial was completed.

Indeed, Morgan Stanley continued to present this lie to the Court and to CPH not only in those two Respondents' proffers (both filed on May 12, 2005, and re-filed on May 17, 2005), but also in Morgan Stanley's own offer of proof (also filed and re-filed on May 12 and 17, 2005) and in oral argument to this Court on May 16 and May 18, 2005, when the Court was crafting the

final version of the Litigation Misconduct Statement to be read to the jury. *See* CPH Pet. Ex. F, 5/16/05 Tr., at 15266; CPH Pet. Ex. G, 5/18/05 Tr., at 15607-08; *see also* CPH Pet. at 7-8 (listing no fewer than nine statements from Morgan Stanley's May 12, 2005 Summary of Offer of Proof about communications involving the timing of Morgan Stanley's in-house attorneys' awareness that the Brooklyn Tapes contained e-mail and that the 8-millimeter tapes existed); *id.* at 3 (describing Morgan Stanley's oral misrepresentations to this Court on May 16 and 18, and noting similar misrepresentations in a brief Morgan Stanley filed on June 6, 2005 — just 11 days before issuing the retraction Notice).

In other words, Respondents were engaging in litigation misconduct precisely to frustrate this Court's effort to craft for the jury an accurate Litigation Misconduct Statement. Morgan Stanley and the other Respondents intentionally sat on this revelation until June 17, 2005 — after the trial was completed, when it could no longer affect the amount of punitive damages the jury might award.

Fourth, Mr. Riel's affidavit points the way to a simple computer search that could reveal additional documentary evidence that likely will be of great interest to the Court. As described above, the fact that Mr. Riel and his attorneys told the Law Division back in April 2005 that Morgan Stanley had repeatedly made false statements is more than enough to find probable cause that Respondents intentionally and obstructively delayed filing the June 17 Notice until after the trial. And now Mr. Riel explains, in his affidavit, a previously unrevealed technological capacity: Every e-mail message in the archive has a "message ID," and a quick and simple computer command will print out a list of every search of the archive that has ever resulted in that particular message being located. Ex. 1, Riel Aff. ¶ 17; *see also id.* ¶ 16. Thus, each of the July 2004 e-mails that supposedly triggered the filing of the June 17, 2005 Notice has a unique

message ID; and the Court can easily find out when Morgan Stanley conducted an archive search that first located each of those July 2004 e-mails. *Id.* ¶ 17. All the Court needs to get this process rolling is a complete list, under oath, from each Respondent, of the July 2004 e-mails that supposedly triggered the June 17, 2005 Notice (as well as a straightforward chronology of what archive searches were conducted, what e-mail messages were retrieved, and who knew about the searches and their results). With that information in hand, a simple computer command will reveal when one or more of these critical e-mails was first pulled from the archive. Perhaps the fear of what might result from this simple check explains why Respondents have flatly rejected CPH's requests to identify the July 2004 e-mails that supposedly triggered filing of the June 17, 2005 Notice. *See* CPH Reply Br. at 11 & n.3; CPH Reply Br. Ex. D (letter from Morgan Stanley's counsel refusing to produce the July 2004 e-mails).

In sum, these four revelations confirm the sworn allegations set forth in CPH's Verified Petition and Verified Reply Brief. And they also confirm that the investigation into the matters presented in the Petition can be conducted quickly, efficiently, and definitively. Because Mr. Riel made these revelations under oath and based on his personal knowledge, *see* FLA. R. CRIM. P. 3.840(a) (West 2005), and because they were not known to Petitioner until after it filed its Verified Reply Brief on October 11, 2005, CPH respectfully requests leave to file this supplemental affidavit from Mr. Riel immediately, and asks the Court to give his affidavit the full consideration it merits at the hearing to be held on Friday, October 21, 2005.

Dated: October 19, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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I hereby swear under penalty of perjury that the facts stated above are true and correct.

_____

Sworn before me this 19th day of October, 2005.

_____
Notary Public

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MY COMMISSION # DD347345
EXPIRES: November 04, 2008
Fl. Notary Discount Assoc. Co.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and overnight delivery to all counsel on the attached list on this 19th day of October, 2005.

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COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO: 2003 CA 005045 AI

AFFIDAVIT OF ARTHUR RIEL

Arthur Riel, being first duly sworn, on oath states as follows:

1. From September 11, 2000 through September 27, 2005 I was employed by Morgan Stanley & Co., Inc. ("Morgan Stanley"); my title was Executive Director of Technology. I was placed on administrative leave by Morgan Stanley on August 18, 2004 and my employment was terminated by Morgan Stanley on September 27, 2005.

2. In the spring of 2001, I occupied the position of Executive Director in charge of the Law and Compliance IT Organization ("Law IT Organization"). The Law IT Organization handles technology solutions for Morgan Stanley's Law Division ("Law Division"). The Law Division is comprised of several units, including Litigation and Compliance, all of which report directly to the Chief Legal Officer, Donald Kempf. Throughout my tenure within the Law IT Organization, I interacted with Morgan Stanley attorneys in Litigation and Compliance of the Law Division

including, Donald Kempf, David Elston, Scott Rockoff, Robert Koppenol and Mihal Nahari in Compliance, and James Cusick, Soo-Mi Lee, Zach Stern, James Magnan, Mary Lou Peters and James Doyle in Litigation.

3. In January 2001 Shelley Leibowitz, who I reported to at the time, requested that I architect a solution to the e-mail retention issues as requested by Donald Kempf which had previously been analyzed by the Institutional IT Division of Morgan Stanley. This project was de-prioritized by Compliance of the Law Division in the Spring of 2001, at which time the Law IT Organization stopped analyzing the project. In early 2002, Compliance of the Law Division restarted the project and David Elston assigned to the Law IT Organization the responsibility to develop and manage an e-mail archive system designed to capture, save and maintain in searchable form all Morgan Stanley e-mail created after January 1, 2003. Initially a date was not set as to when the total project was to be accomplished. However, in May 2002 the Law IT Organization created a schedule with an internal deadline of October 2002 and a "published" deadline of January 1, 2003. An SEC order against Morgan Stanley required the archive be operational by March 1, 2003.

4. In Spring of 2002 I became aware of 39,000 back-up tapes while attending meetings with William Hollister and Robert Saunders of the Institutional IT Storage Group ("Saunders' Group") in order to prepare for a meeting with the SEC concerning e-mail production requirements.

5. During the first quarter of 2003 I was requested by James Cusick of Litigation of the Law Division to architect a solution that would allow Morgan Stanley to integrate into the archive e-mails dated earlier than January 1, 2003 contained in Morgan Stanley back-up tapes. The Law IT Organization was first to target the approximately 35,000 back-up tapes, that Mr. Hollister indicated were known to contain some e-mail data. In the Spring of 2003 Mr. Hollister explained in a meeting that the 4,000 tape discrepancy was due to his review of the 39,000 tapes revealed that 4,000 did not have any e-mail data within the tape and were therefore recycled. So in Mr. Hollister's and Mr. Saunders' view the total number of back-up tapes was 35,000. I presented an integration plan directly to Donald Kempf sometime toward the end of the second quarter 2003, which included specific information relating to the existence of over 35,000 back-up tapes that needed to be processed and placed in the archive as part of the project. Mr. Kempf approved the integration plan and signed a multi-million dollar expense request to fund the project.

6. The Law IT Organization did not have the responsibility at Morgan Stanley to locate, control or otherwise inventory pre-2003 back-up tapes containing e-mail. The responsibility to locate, control or otherwise inventory pre-2003 back-up tapes was the responsibility of the Saunders' Group headed by Robert Saunders or William Hollister who was Robert Saunders' superior at the time that the solution was designed. As the Saunders' Group located the back-up tapes, they sent the tapes to an

outside vendor to restore and "de-dupe" (eliminate duplicative messages) the e-mails. The vendor would then return the culled e-mail messages on SDLT tapes to Ms. Gunn within the Saunders' Group who in turn would arrange for the data to be entered on a disk in order to provide it to the Law IT Organization for loading in the archive. Until the data was placed on a disk the Law IT Organization, had no access, control or responsibility for e-mail data or back-up tapes not processed as of that time.

7. By May 2004 the Saunders' Group and the vendor had restored in excess of 300,000,000 pre-2003 e-mails from 35,000 back-up tapes, although the restoration process was not complete at that time. In May of 2004, I became aware that the Saunders' Group had acknowledged the existence of in excess of 1,000 DLT tapes located in a Brooklyn Security Office ("Brooklyn tapes"). I believe it was the fall 2003 that the Saunders' Group disclosed the existence of a cache of 8mm tapes, all of which might contain e-mail. (Exhibit A, E-mail Archive Meeting Minutes, 5/6/04)

8. On June 7, 2004 I advised James Cusick and Soo-Mi Lee in Litigation of the Law Department of the existence of the Brooklyn tapes and the fact that they may contain e-mail:

> The storage folks found an additional 1,600 backup tapes in a closet. We are not sure if they have email on them, but it is expected that they predate 1/2000. Unless you say otherwise, I have told the storage team to process them like the other backup tapes (i.e. dump them, screen for email, dedupe the email, and give it to us). I will inform you if any pre-2000 email tapes are found in this batch.

(Exhibit B, E-mail, 6/7/04)

9. As early as July 2, 2004, I knew that the Brooklyn and 8mm tapes contained e-mail dating back at least to 1998:

> We looked at the "found" tapes we were able to restore and 90 of them had mail. We got the label (manual) off 4 of them and the dates are 8/12/98, 5/14/99, 8/03/99, and 2/18/01. Obviously there is pre 2000 mail.
>
> We also catalogued 2 of the 8mm test tapes we have and the dates on those are 6/16/98 and 6/7/99 so again there is pre 2000 mail there.

(Exhibit C, E-mail, 7/2/04)

10. In this regard, in a report to Compliance of the Law Division relating to issues existing as of July 2, 2004, Mr. Elston and members of Compliance of the Law Division was forwarded information and I informed Mr. Elston and many of his direct reports that e-mail was contained in the Brooklyn tapes. I made a presentation in this regard directly to Mr. Elston and many of his direct reports who attended the meeting held on or about July 8, 2004:

> Notes: All tapes in the original project have been archived. Currently working on [illegible] additional tapes.
>
> 7/2/2004: [illegible] tapes have different format from others. Vendor had to modify tools. Will start receiving data from tapes this week of 7/5.

(Exhibit D, Priority Project Status Report, 7/2/04)

11. I have been informed that Allison Gorman has asserted that "unexpected delays" in producing e-mails were caused by "unknown software clichés." To my knowledge, two software issues indicated by Ms. Gorman arose regarding the project for which the Law IT Organization was responsible, which was

with respect to (i) pre-2003 e-mails that were rejected during initial processing by the Law IT Organization and (ii) less than accurate group membership data. With respect to (i) above Compliance of the Law Division was informed of this software issue early in the project by January 2004 and decided that corrective action if at all, would take place at the end of the project. This software issue was again discussed and reported in the August 2004 Compliance Status meeting. With respect to (ii) above I was informed by Ms. Zhang of Institutional IT, that e-mail group membership data prior to January 1, 2003 was not available. I immediately notified Compliance of the Law Division, specifically Scott Rockoff, who determined the Law IT Organization should use the January 2003 e-mail group membership data for pre-January 2003 e-mail production. Therefore, Ms. Gorman's assertion be it directly or indirectly, that these two issues were unknown to Morgan Stanley as of October 2004 are false.

12. In the August 2004 Compliance Status meeting I attended with Mr. Elston and many of his direct reports, I reported on the status of the pre-2003 e-mail migration to the archive. I informed them at this meeting that the archiving of the e-mail data from the Brooklyn tapes was ongoing and expected to be completed by August 30, 2004. This status report was formalized in writing and distributed that month.

13. On June 23, 2004 I executed a Certification of Compliance ("Certification") at the request of either Jim Doyle, Jim Magnan or Zach Stern, which I

ultimately determined was Jim Doyle. Mr. Doyle had not initially sought me to execute the Certification, but rather addressed the request to Anush Danilyan, a college student who performed data entry functions, a relatively junior and a low level position within the Law IT Organization. Ms. Danilyan sought guidance from Christopher Muscatella, her supervisor, who promptly brought the Certification to my attention. I determined that Ms. Danilyan was too junior to execute such a document. My understanding of what I was certifying was that a search of the archive had been conducted and that everything responsive that resulted from the search had been produced. I did not understand that by signing the Certification I was certifying that all responsive e-mail from any Morgan Stanley source whatsoever, including any particular set of back-up tapes was produced. Indeed, I could not make such a certification nor should Morgan Stanley even request such of the Law IT Organization, because it was known that the Saunders' Group possessed a substantial quantity of as yet unprocessed tapes. I would have been surprised that anyone connected to the Law Division particularly Litigation ask any person employed in the Law IT Organization to make such a certification since the Law Division was aware that the Law IT Organization was not in a position to do so. The Saunders' Group, not the Law IT Organization, controlled the collection, processing and inventorying of tapes for pre-2003 e-mail, so only the Saunders' Group could certify whether all

possible tapes had been located, processed and produced. The Law IT Organization could only attest to what it had done with the data provided by the Saunders' Group.

14. On or about April 26, 2005 it was requested by Zach Stern within Litigation of the Law Division to review a draft of a proffer of testimony. The draft proffer submitted by Mr. Stern included a paragraph that stated I did not advise the Law Division after June 7, 2004 about any knowledge I may have that there were e-mails contained on the Brooklyn tapes and 8mm tapes. On or about April 28, 2005 Mr. Stern's proffer was rejected and he was informed that I had recalled informing Mr. Elston and many of his direct reports in Compliance of the Law Division on July 8, 2004, both orally and in writing, that the Brooklyn tapes contained e-mail data. While I do not have absolute recollection of advising Mr. Cusick in Litigation of the Law Division, it is my strong conviction that he requested e-mail data from the Brooklyn tapes be placed on a separate SDLT tape. This would have been requested by Litigation of the Law Division in my experience at Morgan Stanley, although I had already informed Compliance of the Law Division. The Morgan Stanley monthly Compliance Status meeting will document my recollection of informing Compliance of the Law Division in this regard.

15. I have been made aware that Morgan Stanley has, on June 17, 2005, retracted a number of statements it previously made, and now concedes that its Law

Division was aware in July 2004 that the Brooklyn tapes contained e-mail and that the 8mm tapes existed:

> 1. In the filed offers of proof and related statements, Morgan Stanley asserted that its Law Division was not aware that any of the Brooklyn Tapes contained e-mail until October 2004 and was not aware of certain 8-mm tapes until November 2004.
>
> 2. As a result of a review of e-mails discovered by a new e-mail search, Morgan Stanley has determined that the offers of proof and related statements should be corrected to state that the Law Division was aware in July 2004 that some of the Brooklyn Tapes contained e-mail and that certain 8-mm tapes existed.

16. Morgan Stanley's current claim of finding e-mail(s) in a "new search" of the archive does not make sense to me. Any e-mail dated January 1, 2003 or later was captured in near real-time from Morgan Stanley's mail hubs. Unlike e-mail dated before January 1, 2003, to the best of my knowledge there can not be a more complete source of data than the archive.

17. Any search for 2004 e-mails made in 2005—whether in February, March, April or June – should have identified exactly the same search results. There is a simple, inexpensive way to verify exactly when Morgan Stanley did discover the e-mail or e-mails that it represents led it to the June 17, 2005 retraction. The archive is designed so that every e-mail is assigned a unique message ID number. The archive is further designed to log all searches and the message ID's of all returned results. Thus armed with the message ID of the subject e-mail, it is a simple process to generate a

log which will show exactly when the message was first identified in a search, as of my last day of active employment or August 18, 2004.

18. I am ready and willing to appear for live testimony to affirm or supplement the matters addressed in this affidavit.

Arthur Riel

Dated:

Subscribed and sworn to before me
this 19 day of Oct., 2002

Notary Public

KAREN L. PATTERSON
NOTARY PUBLIC
MY COMMISSION EXPIRES JULY 31, 2010

Priority Project Status Report: June

** Updated Through Friday, July 2*

Position Monitoring(Regulatory Reporting Phase II)			175	35 %	6/11/2003	9/30/2004	Current	[redacted]
					6/13/2003	8/22/2003	Baseline	
Notes: 7/1/03 - Some LH Sales and Trading screens are waiting for user testing. Continuing development on the security testing screens. Sent fair to George to begin user testing.	Fung	Client Manager						Dec Jan Feb Mar Apr May Jun Jul Aug Sep Oct Nov
	Saleh	Client Manager						
	Greenwood	Client Manager						
	Zhou	Project Manager						
Sent preliminary China screens to HK control group for test.								
Initiative: Electronic Compliance								
Completed								
Bloomberg ID mapping			10	100 %	6/13/2003	4/30/2004	Current	[redacted]
					6/15/2003	8/1/2003	Baseline	
	Rockoff	Client Manager						Dec Jan Feb Mar Apr May Jun Jul Aug Sep Oct Nov
	Rist	Project Manager						
Inquiry Tool for Asia Pacific			38	100 %	2/3/2004	5/16/2004	Current	[redacted]
					12/15/2004	3/1/2004	Baseline	
	Rockoff	Client Manager						Dec Jan Feb Mar Apr May Jun Jul Aug Sep Oct Nov
	Ralph	Project Manager						
In Progress								
E-Mail Archiving Tape Restoration			388	85 %	6/15/2003	7/31/2004	Current	[redacted]
					6/15/2003	3/15/2004	Baseline	
Notes: All tapes in the original project have been archived. Currently working on 1600 additional tapes.	Rockoff	Client Manager						Dec Jan Feb Mar Apr May Jun Jul Aug Sep Oct Nov
	Rist	Project Manager						
7/1/04: 1600 disc versid tapes have different format from others, vendor had to modify code. Will start receiving data from tapes the week of 7/5.								
Initiative: Employee Trading Compliance								
Completed								
PST Decommission			65	100 %	12/1/2003	6/9/2004	Current	[redacted]
					12/15/2003	1/7/2004	Baseline	
	Stonfield	Client Manager						Dec Jan Feb Mar Apr May Jun Jul Aug Sep Oct Nov
	Bentley	Project Manager						
In Progress								
Employee Trading Surveillance			450	10 %	4/22/2004	10/30/2004	Current	[redacted]
					4/1/2004	10/19/2004	Baseline	
Notes: Currently working on Mutual Fund surveillance reports.	O'Neill	Client Manager						Dec Jan Feb Mar Apr May Jun Jul Aug Sep Oct Nov
	Rockoff	Client Manager						
	Kumar	Project Manager						

tabbies' EXHIBIT D

16div-018827

10/19/2005 14:54 FAX

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,
Defendant.
_____/

MORGAN STANLEY'S SUPPLEMENTAL OPPOSITION TO CPH'S MOTION FOR ADVERSE INFERENCE INSTRUCTION

INTRODUCTION

As ordered by the Court, Morgan Stanley now has processed and produced responsive emails from the additional tapes. Moreover, the testimony of witnesses deposed pursuant to the Court's Order shows that Morgan Stanley acted with good faith and diligence in searching for and processing data from these tapes.

I. CPH'S MOTION IS MOOT BECAUSE THE TAPES HAVE NOW BEEN PROCESSED AND THE RESPONSIVE E-MAILS HAVE NOW BEEN PRODUCED.

During the February 2, 2005 hearing on CPH's motion for an adverse inference instruction, this Court recognized that "it would be a mistake to impose evidentiary sanctions when if we wait two weeks we'll know whether there's any prejudice or not. I mean we've come this far. I'm not interested in doing that." (Ex. 1, 2/2/05 Tr. at 150). That is precisely the case.

Since the hearing on February 5th, Morgan Stanley has reviewed thousands of e-mails for privilege and responsiveness and has produced a total of 21 documents. (Ex. 2, T. Clare Aff. at ¶ 6) Out of these 21 documents, 10 are exact duplicates of documents previously produced to CPH. (*Id.* at ¶ 6(a)) One of the 21 documents contains the same text as an e-mail

document Morgan Stanley previously produced to CPH but bears a different date. (*Id.* at ¶ 6(b)) Two of the 21 e-mails are duplicates of each other with the only difference that they contain a message that the e-mail was not delivered to one of the intended recipients. (*Id.* ¶ 6(c)) One of the 21 e-mails is a computer-generated e-mail message informing the recipient that Sunbeam made a public form 10-K/A filing. (*Id.* at ¶ 6(d)) And two more of the 21 documents are substantial duplicates of e-mails Morgan Stanley already produced to CPH with the only slight difference being the inclusion of a reply message. (*Id.* at ¶ 6(e))

As a result, Morgan Stanley produced only 8 documents that contain e-mail threads that were not produced, in whole or in substantial part, to CPH. (*Id.* at ¶ 7) And none of the e-mail threads in this production are dated between February 1998 and April 30, 1998. (*Id.* at ¶¶ 7-8)

II. THE EVIDENCE IS CLEAR THAT THE LAWYERS IN THIS LITIGATION WERE RESPONSIBLE FOR SPEEDIN G UP THE PROCESSING OF THE TAPES AT ISSUE

Affidavit of Counsel

Morgan Stanley has previously submitted an affidavit of James F. Doyle, the lawyer with responsibility for the Coleman case, attesting that it was only at the end of October, 2004, that he first "learned that additional e-mail backup tapes had been located within Morgan Stanley, and that the data insert on those tapes had not been restored or searched prior to Morgan Stanley's May 14, 2004 e-mail production." (Ex. 3, Doyle Aff. at ¶ 3) He further states that "[u]pon learning that information, I directed that the electronic searches described in the April 16, 2004 Agreed Order be conducted for any backup tapes that had not been restored and made searchable at that point, and that the process of restoring the remaining backup tapes continue as expeditiously as possible." (Doyle Aff. at ¶ 3) From this October discovery by Mr. Doyle, Morgan Stanley outside counsel reviewed the output of this work and produced the first batch of

additional documents in November. The reason that the outside counsel and the in-house lawyer responsible for this case did not learn until October/November of a limited number of additional backup tapes is because of a series of missteps by a Morgan Stanley employee, issues that did not come to light until after he was placed on administrative leave in August 2004. The employee is Arthur Riel, who was the architect of Morgan Stanley's newly implemented optical disk e-mail archivel system. Unknown to Morgan Stanley, this employee took advantage of access to the emails of other employees. (Ex. 4, 02/09/05 A. Gorman Dep. at 13). His replacement, Ms. Allison Gorman, discovered a number of issues with Mr. Riel's work in connection with the email archiving project—problems which hampered her ability to more quickly process the emails into the archive system.

The Testimony of Allison Gorman – Replacement for the Employee Placed on Administrative Leave

As described by Ms. Gorman, Mr. Riel and his team were placed on administrative leave for taking advantage of access to people's emails without authorization. (Gorman Dep. at 12-13) She took over certain of his responsibilities in August of 2004 and brought in her own team. The result was a nearly complete turnover in the entire group responsible for setting up and using Morgan Stanley's archive system to review e-mails. (Gorman Dep. at 13-14) Mr. Riel's team designed the tools that allowed the archive system to be searched. (Gorman Dep. at 28) When Ms. Gorman's team took over the system in 2004, they were faced with lots of time sensitive and critical issues left from Mr. Riel's performance. (Gorman Dep. at 51) She discovered that the system was out of disk space, that the code which was written to allow searches to be run had technical issues, and the system was dangerously close to not capturing live content. (Gorman Dep. at 52) Throughout September and October,

16div-018830

Ms. Gorman and her team worked diligently to try to correct these issues. Ms. Gorman and her team were able to create "space" for additional archives in October 2004 with the purchase of new hardware which allowed them to store more data. (Gorman Dep. at 53) Allowing the system to run out of space was one of the problems that occurred under Mr. Riel. (Gorman Dep. at 58) In addition, Mr. Riel did not keep a proper development environment, such that when the new group took over they did not know where the source codes used to run the system were located. (Gorman Dep. at 58).

One of the issues facing Ms. Gorman was a large amount of data in the "staging area." The "staging area" is a part of the e-mail archive system that is used after backup tapes are processed by a third-party vendor, National Data Conversion, inc. ("NDCI") The data returned from NDCI is stored in this "staging area" until the system is properly programmed to allow the new data to be migrated into the e-mail archive. Because of the numerous challenges she faced in just keeping the current system operating when she first came on the job, Ms. Gorman did not make the processing of data in the "staging area" a priority until after an October meeting with Morgan Stanley's counsel. (Gorman Dep. at 64-65, 69-70) After her conversations with counsel, Ms. Gorman made it a priority to ensure that all data currently in the "staging area" would be migrated to the e-mail archive system as soon as possible. (Gorman Dep. at 66-67)

Among the data in the "staging area" at this time, were e-mails harvested from backup tapes in a security room in Brooklyn. (Gorman Dep. at 65-66) The total data in the staging area was approximately 600 gigabytes of data. (Gorman Dep. at 66-67) There would have been no way for Ms. Gorman to migrate this data from the "staging area" in August 2004 because of the instability and lack of space in the system at that time. (Gorman Dep. at 55) As

noted above, Ms. Gorman and her team worked diligently in August, September and October to correct these issues.

Processing the data required the use of scripts, which are computer programming "that index the context on [Morgan Stanley's] database" that assist in inserting the data into Morgan Stanley's file system.[1] (Gorman Dep. at 39-40) The data in the "staging area" could not be completely migrated into the e-mail archive system because of problems with the "scripts" needed to complete the task. (Gorman Dep. at 67) Ms. Gorman's predecessor had not properly documented where the "scripts" were located and they could not be found until November 2004 -- where they were found in a completely different directory than would be expected. (Gorman Dep. at 70-71) When Ms. Gorman's team tested these "scripts," they realized they did not process the data in the "staging area" correctly. (Gorman Dep. at 71) Ms. Gorman and her team did more testing on the scripts in December and by January had completely debugged the system by recoding the piece that was not working properly. On January 14, 2005, Ms. Gorman's team started processing the data. (Gorman Dep. at 71)

Simply put, Ms. Gorman and her team worked diligently to correct the issues that they inherited from a previous team. Ms. Gorman was provided with all the resources she needed to complete the task. Processing e-mail into the e-mail archive system is a time-

[1] As Mrs. Gorman explained in her deposition: "All the e-mail content is sitting on a file system, just in a regular file directory structure. And so we run a set of code, what I would call a script, that reads through the content, creates entries on a key database which acts as our index. These entries would contain header date, 'to,' 'from,' 'cc,' 'subject line,' 'date.' Then the address or the file system location path, really being the proper word, of the content were it's been inserted into the file system. And the file system represents where the actual content, which is e-mails and attachments, sits." (Gorman Dep. at 40)

consuming and technical task. Indeed, it would take anyone doing the work two to three months to even get up to speed on the various technicalities inherit in the project. (Gorman Dep. at 71)

Mr. Riel's responsibilities included apprising legal staff of the existence of emails on back-up recovery tapes. But this was another of his failings. He learned of the existence of additional tapes in approximately May of 2004 and learned that they contained email in July 2004, but it was only after his departure, and replacement by Ms. Gorman that legal staff learned of the existence of additional backup tapes that needed to be migrated onto the e-mail archive system. (Doyle Aff. at ¶ 3; Gorman Dep. at 69-70) After learning that there was additional data that needed to be migrated into the e-mail archive system, Morgan Stanley's in-house legal staff made sure that the IT staff understood that this task needed to be completed accurately and as soon as practicable. (Doyle Aff. at ¶ 3.)

III. ALTHOUGH MORGAN STANLEY'S INFORMATION TECHNOLOGY DEPARTMENT EXPERIENCED SOME SET-BACKS IN ITS ATTEMPT TO COMPREHENSIVELY IDENTIFY, AND RETRIEVE BACKUP E-MAILS FROM BEFORE 2003, THE EVIDENCE SHOWS IT SUCCESSFULLY IMPLEMENTATED A NEW AND IMPROVED MIGRATION SYSTEM

Development of the Email Archive System

On April 16, 2004, this Court entered an Agreed Order governing the search and production of Morgan Stanley e-mail messages restored from e-mail backup tapes. The Agreed Order was necessary because due to the passage of time and technical limitations, Morgan Stanley only was able to reliably restore electronic documents on backup tapes created after January 2000. Nevertheless, pursuant to the Agreed Order, Morgan Stanley agreed that it would undertake an electronic search of data from the oldest available backup tapes for certain employees' e-mail accounts, using certain agreed-upon keywords.

Before this Agreed Order, Morgan Stanley, for reasons unrelated to this particular litigation, had set in motion a process by which it could more efficiently and quickly restore and review these older backup tapes -- those from before January 1, 2003. Discussed more fully below, these efforts coincided with the requirements outlined in the Agreed Order.

As background, beginning in the 2001 and 2002 timeframe, Morgan Stanley frequently received "ad hoc requests" to search its backup tapes for e-mail responsive to various and sundry litigation and regulatory matters. (Ex. 5, 02/10/05 Saunders Dep. at 11, 48) In response to these requests, Morgan Stanley used its in-house resources to retrieve e-mails from backup tapes that it believed captured data relevant to the particular litigation or regulatory matter at issue. The result, however, was that the Company was often unsuccessful in retrieving significant data, often reinvented the wheel -- searching time and again the same backup tapes on an individual basis -- and often did so at a pace perceived by the Company to be too slow to satisfy its legal and regulatory obligations. (Saunders Dep. at 48)

As a result of these inefficiencies, the company implemented what it believed at the time were two improvements to the retrieval and review process. First, Morgan Stanley contracted with an outside vendor, NDCI, to extract from raw backup tapes (known as "DLT Legato tapes") relevant information and place that information on a SDLT tape. NDCI would then return those tapes to Morgan Stanley's back-up and restore group ("BURP"), which would arrange to load the SDLTs onto a disk and into a staging area where Arthur Riel's group would take over and further process the tapes. Morgan Stanley implemented this process because it believed it would allow it to "more expeditiously provid[e] search capability of e-mail prior to

2003 for litigations or for regulatory requests." (Saunders Dep. at 11, 17)[2] This e-mail restoration project is what is referred to as the "migration process." (Saunders Dep. at 6-8)

The second improvement related to the uploading and review of those tapes. As noted earlier, Arthur Riel, on behalf of the company, had designed a program that Morgan Stanley at the time believed would allow the Company to upload information into a searchable archive system where, with search terms, Morgan Stanley could locate potentially relevant e-mails housed anywhere in the *ENTIRE* e-mail backup collection. (Saunders Dep. at 11 (noting the benefits of a "comprehensive" process)) No longer would individual tapes have to be searched; instead, *ALL* e-mails collected in Morgan Stanley backup tapes would be housed in an archived and searchable database.

The Migration Process From December 2003 to May 2004

The migration process for these DLT Legato tapes began in approximately December, 2003. (Saunders Dep. at 10) Morgan Stanley monitored this process through a group dubbed the E-mail Archive group, comprised of representatives from BURP, Arthur Riel's group and NDCI. For a period of time, the group met almost every week to review and record its own progress. (Saunders Dep. at 16; Ex. 6, 02/10/05 Seickel Dep. at 88-89.)

The process began with the BURP group. It brought back backup tapes being housed at Recall, its outside storage vendor, and forwarded those tapes to its e-mail retrieval vendor, NDCI. At the beginning of the process, Morgan Stanley had approximately 35,000 backup tapes at Recall, which it endeavored to bring back and forward to NDCI. The backup

[2] Morgan Stanley has identified both Glenn Seickel, the operational manager of BURP, and his boss, Robert Saunders, as individuals with knowledge about this process. Both have been deposed.

tapes were at Recall because Morgan Stanley had sent them there over the course of the past several years as part of its standard backup business practices. (Saunders Dep. at 34.) At the time, Morgan Stanley believed that the 35,000 tapes represented the complete universe of Morgan Stanley backup tapes. (Saunders Dep. at 35.)

With the approximately 35,000 tapes in hand, NDCI worked on retrieving and de-duping e-mail data from the tapes during the early months of 2004. Although this process was fraught with problems (broken tapes, read errors, etc.), NDCI was able to report by May 6, 2004, that it had finished processing 32,832 of 35,000 tapes, resulting in the restoration of 114 SDLTs. (MS 0112286, attached as Ex. 7) As Robert Saunders noted, by the summer of 2004, the "project had been moving along . . . at a run rate capacity." (Saunders Dep. at 16.) And NDCI's performance had been "timely" and "very satisfactory." (Saunders Dep. at 89) Pursuant to the Morgan Stanley protocol, these tapes were then placed in a staging area where Arthur Riel's group was tasked with the responsibility of uploading the data into the new optical disc e-mail archive system for review.

The Brooklyn Tapes

Although Morgan Stanley believed during this early phase of the restoration process that it had identified all the backup tapes that needed to be converted (i.e., those that had, over time, been sent to Morgan Stanley's Recall off-site facility), on or around May 6, 2004, over a thousand additional unlabeled DLT tapes were found in a security room in Brooklyn. (Saunders Dep. at 33-34.) According to Glenn Seickel, a facilities worker at the security room alerted John Pamula, a member of the E-Mail Archive group, that tapes had been found and needed to be moved. Pamula then notified Mr. Seickel. (Seickel Dep. at 37) Being unlabeled, it was unclear how old these tapes were, whether the tapes contained e-mails, and whether those e-

mails were recoverable. The tapes were found in a bin in a cage in a locked room. (Seickel Dep. at 43.) After this discovery, the BURP group did a sweep and physically looked for any additional tapes that may have been missed or misplaced. (Saunders Dep. at 32, 37-38; Seickel Dep. at 44.) They found none.

Having found these "Brooklyn" tapes, Morgan Stanley tasked John Pamula, a contract employee from Siemens, to ship them to NDCI for processing. (Ex. 8, May 20, 2004 Minutes; 0112291) By June 18, 2004, the minutes to the E-mail archive group meeting reflect that these additional tapes (determined to number 1423 DLTs) had, in fact, been shipped to NDCI for processing. (Ex. 9, June 18, 2004 Minutes, 0112296) It is not clear when NDCI finished restoring and converting these tapes to SDLTs, but a mid-summer e-mail from NDCI's Bruce Buchanan to Arthur Riel suggests that by July 2, 2004, NDCI had restored at least some of the tapes and determined that 90 of those found in Brooklyn contained e-mails. Of the 90, Buchanan was able to determine dates for four of those tapes, three of the four falling in the May or August, 1999 timeframe, and one in 2001. (Ex. 10, MS 0112327) By July 2, 2004, NDCI had not yet identified any tapes with e-mails dated from February 15th to April 15th, 1998 -- the relevant timeframe identified in this Court's April Order.

By July 16, 2004, NDCI reported that it had identified an additional 22 tapes that contained e-mails data, bringing the total tally to 112 DLTs that contained e-mail data (Ex. 11, MS 0112889) The processed data from these tapes were in the staging area when Arthur Riel was placed on administrative leave in August 2004. (Gorman Dep. at 66-67)

16div-018837

The 8 mm Tapes

In addition to the Brooklyn tapes, there were also 738 8 mm tapes that were not uploaded into the e-mail archive system until ~~the Fall of~~ February 2004. Like the Brooklyn tapes, these tapes were placed at the end of the NDCI processing queue, and their processing progress was tracked during each of the E-mail archive meetings. (*See, e.g.*, Ex. 12, MS 0112286, 0112291, 0112296, 0112301, 0112306, 0112311, 0112312, 0112313, 0112314) As Allison Gorman noted, once the script problems with the archival system were resolved, these tapes were promptly reviewed and any responsive documents produced.

The 168 Tapes Found at Recall

In November or December, 2004, Glenn Seickel and John Pamula came to believe that there might be some backup tape containers at Recall that had not yet been processed by NDCI. (Seickel Dep. at 64-66) They learned this after identifying some discrepancies between boxes retrieved from Recall and those on the Recall Inventory List. (*Id.*) Legal counsel was alerted within no more than two days. (Seickel Dep. at 65) By ~~mid-January~~ February, NDCI had processed the tapes found within these misplaced boxes and returned them to Morgan Stanley for uploading and archival review. (Seickel Dep. at 74).

CONCLUSION

The Morgan Stanley E-mail Restoration And Review Process was a major undertaking, and has been a success. It has resulted in the production of thousands of pages of email messages in this litigation. The fact that the tapes found in the Brooklyn security room, the 8 millimeter tapes, and the tapes at Recall yielded virtually nothing is testament that Morgan Stanley was right in its prioritization, organization and processing of tapes as a part of the comprehensive E-mail Restoration and Review Process. Moreover, rather than delaying the

processing of tapes potentially relevant to this case, the Morgan Stanley lawyers actually sped up the processing of those tapes. Accordingly, Plaintiff's motion should be dismissed as moot and without merit.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and hand delivery on this 11th day of February 2005.

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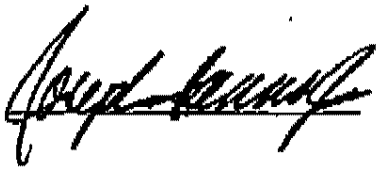
BY: 

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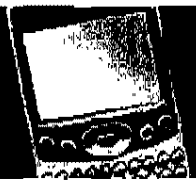

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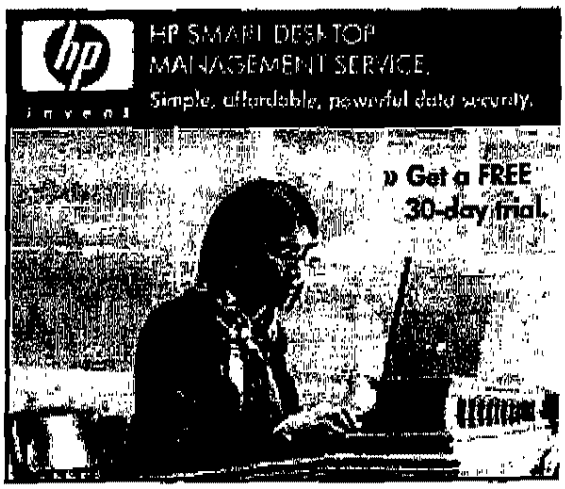
Who's Coming Out Ahead in Morgan Stanley Culture Wars ?

Michael Aneiro
Corporate Counsel
October 12, 2005



After staging its own version of the War of the Roses for nearly a decade, Morgan Stanley -- and its legal department -- is back under the rule of the House of Mack. In July the bank's board welcomed former CEO John Mack from a four-year exile at Credit Suisse First Boston and restored him to the throne. Within three weeks of his return, Mack moved to revamp the legal department by hiring Gary Lynch as chief legal officer.

Mack recruited Lynch from CSFB. The two worked together there from 2001 to 2004, while Mack was CEO. Lynch started at CSFB as global general counsel in October 2001, and a year later was named executive vice chairman and head of research and compliance. Before Mack hired him at CSFB, Lynch spent a dozen years as a partner at Davis Polk & Wardwell. He began his career in government, ultimately rising to director of the enforcement division at the Securities and Exchange Commission. Lynch, who is scheduled to start work on Oct. 18, declined requests for an interview.

Lynch replaces Donald Kempf, who announced his retirement in June. Kempf nabbed the top law job in 1999, following a 34-year career at Kirkland & Ellis. His arrival came two years after the merger of investment bank Morgan Stanley Group Inc. and retail brokerage Dean Witter Discover & Co. During his tenure, Kempf remade the law department. In the aftermath of the merger, a deep cultural rift formed between the Morgan Stanley personnel, including Mack, and the Dean Witter veterans, including former Morgan Stanley CEO Philip J. Purcell. The clash played out in the legal department, with demotions and departures of senior Morgan Stanley hands.

In recent months, Morgan Stanley had been in the news for its open internal warfare, as a group of eight former executives led a growing chorus calling for Purcell's ouster. During that same time, Kempf's legal department featured prominently in a suit brought by financier Ronald Perelman, who accused Morgan Stanley of defrauding him in a 1998 deal. Kempf fired Kirkland & Ellis, Morgan Stanley's lead counsel, from the case in March after the judge reprimanded the bank for discovery abuses during the high-profile trial.

EXHIBIT
3

In May the jury ordered Morgan Stanley to pay Perelman $1.45 billion. Morgan Stanley has said it plans to appeal the verdict. In May, looking to steady the ship, the Morgan Stanley board brought in David Heleniak as vice chairman and managing director. Heleniak was a longtime partner at Shearman & Sterling, an outside counsel to Morgan Stanley. With Lynch now aboard, Heleniak will remain at Morgan Stanley, but he will focus on strategic issues and the company's investment banking business. The legal department will report to him until Lynch's arrival. In July, Morgan Stanley brought in Davis Polk & Wardwell partner Jeffrey Small to serve as the bank's interim counsel, presaging his firm's possible return as Morgan Stanley's lead outside counsel.

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Also in July, Morgan Stanley rehired Stuart Breslow, who had followed Mack to CSFB. He again became Morgan Stanley's chief compliance officer, the same title he held at CSFB. Kempf had hired former Kirkland partner David Elston as managing director and head of global compliance. A Morgan Stanley spokesman confirms that Elston decided to leave the bank in early August.

Under Kempf, Dean Witter lawyers came to rule the department, while Kirkland & Ellis supplanted Davis Polk as main outside counsel. The question now becomes how far the pendulum will swing in the other direction. Several current members of the department either did not return phone calls or declined to comment on the record. One former department member, who did nc want to be identified, believes more top Dean Witter lawyers will be forced out, as will Kirkland. But he expresses general optimism, saying the department will become more of a meritocracy, where talent -- not bloodlines -- governs who stays and who goes.

Defendant's Offer of Proof re: Arthur Riel

If permitted to testify, Arthur Riel would state under oath in accordance with the portions of his deposition of March 8, 2005, attached hereto as Exhibit A, and as follows:

Mr. Riel is an Executive Director in Morgan Stanley's Information Technology Department and has worked at Morgan Stanley for over four years. His responsibilities at the time he was placed on administrative leave by Morgan Stanley in August 2004 included managing Morgan Stanley's online e-mail archive system (the "Archive"), Anti-Money Laundering Program, Broker Surveillance Program, Electronic Training and Distribution System, among other related duties. With respect to the migration of Morgan Stanley's backup tapes to the Archive, Mr. Riel's responsibilities involved managing the project's budget, acting as a liaison to the Legal Department for this project, and archiving e-mails received from the Institutional IT Department. Mr. Riel was not responsible for identifying and sending Morgan Stanley's backup tapes to National Data Conversion Institute ("NDCI") for processing.

Mr. Riel's team first became involved in this litigation when the Morgan Stanley employees he supervised were charged with retrieving e-mails pursuant to the Court's Agreed Order of April 16, 2004 ("Agreed Order").

Mr. Riel believed in April 2004 that Morgan Stanley had loaded, or "migrated," to the Archive the e-mails from the oldest backup tapes in existence, which he understood dated from January 2000. He continued to hold this belief as of June 23, 2004.

Mr. Riel understood that emails restored and migrated from tens of thousands of back-up tapes had been included in the Archive. Accordingly, he

understood, as a general matter, that the most efficient and comprehensive way to search for emails was to search the Archive.

On or about May 6, 2004, Mr. Riel became aware of over a thousand unlabeled DLT tapes that had been found in a storage area of the security room in Morgan Stanley's offices in Brooklyn, NY (the "Brooklyn Tapes"), when the discovery of the tapes was mentioned in an e-mail he received.

Mr. Riel is not aware of anyone at Morgan Stanley who knew prior to July 2, 2004 that the Brooklyn Tapes contained e-mail.

Mr. Riel is not aware of anyone at Morgan Stanley who knew prior to July 2, 2004 that over 700 unlabelled 8-millimeter tapes located at another Morgan Stanley facility in New York contained e-mail.

Mr. Riel would testify that since he became aware of this litigation his desire has been to meet Morgan Stanley's discovery obligations to CPH and the Court. Mr. Riel would testify that at no time in the history of this litigation did he have any desire to conceal or withhold documents from CPH or the Court.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 502003CA005045XXXXMB

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

_____/

ORDER NOTICE OF HEARING

THIS CAUSE came before the Court for a Status Conference on October 19, 2005, with all counsel either present or participating by speaker telephone. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED hearing on CPH's Verified Petition for Show Cause Order set October 21, 2005 is cancelled and reset to November 3, 2005 at 3:00 p.m. (2 hours reserved). It is further

ORDERED AND ADJUDGED hearing on CPH's Verified Motion for Leave to File Supplemental Affidavit from Arthur Riel shall be held October 25, 2005 at 8:45 a.m. in Courtroom 11A, 205 N. Dixie Hwy, WPB, FL 33401.

Any counsel may participate at either hearing scheduled herein by speaker telephone. MS & Co.'s counsel shall be responsible for arranging a conference call if more than one attorney elects to participate by speaker telephone.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 20 day of October, 2005

ELIZABETH T. MAASS

Circuit Court Judge

copies furnished:

Joseph Ianno, Jr., Esq.
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West Palm Beach, Florida 33401

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Jerold S. Solovy, Esq.
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Washington, DC 20036

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number 561-355-2431 within two (2) working days of your receipt of this notice; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si usted es una persona incapacitada que necesita de un servicio especial para participar en este proceso, usted tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinator de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida 33401, telefono 561-355-2431, dentro de los (2) proximos dias habiles despues de recibir esta notificacion; si tiene incapacidad de oir o hablar llame al 1-800-955-8771.

CREOLE

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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 502003CA005045XXXXMB

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

_____/

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Any counsel may participate at either hearing scheduled herein by speaker telephone. MS & Co.'s counsel shall be responsible for arranging a conference call if more than one attorney elects to participate by speaker telephone.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 20 day of October, 2005

ELIZABETH T. MAASS

Circuit Court Judge

copies furnished:

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Washington, DC 20036

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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 502003CA005045XXXXMB

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

_____/

ORDER OF NOTICE OF HEARING

THIS CAUSE came before the Court on Morgan Stanley & Co. Incorporated's Motion to Seal CPH's Verified Motion for Leave. Based on a review of the Motion, it is

ORDERED AND ADJUDGED that a hearing on the motion shall be held October 21, 2005 at 8:30 a.m. in Courtroom 11A, 205 N. Dixie Hwy, WPB, FL 33401. Any counsel may participate by speaker telephone. Counsel for MS & Co. shall be responsible for arranging a conference call, if more than one attorney elects to participate by speaker telephone, and for properly notifying all attorneys of the hearing scheduled herein.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 20th day of October, 2005

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

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Client/Matter No.: 47877/14092 **Employee No.:**

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Message:

Coleman v. Morgan Stanley & Co. Inc.

To follow please find a copy of Joe Ianno's letter to Judge Maass of today's date and Morgan Stanley's Motion to Seal CPH's Verified Motion for Leave and Request for Expedited Consideration.

☐ ***Original to follow Via Regular Mail*** ☐ ***Original will Not be Sent*** ☑ ***Original will follow via Overnight Courier***

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October 20, 2005

The Honorable Elizabeth Maass
Palm Beach County Courthouse
205 North Dixie Highway, Room 11.1208
West Palm Beach, Florida 33401

VIA HAND-DELIVERY

Re: *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co. Incorporated*
Case No: CA 03-5045 AI

Dear Judge Maass:

Enclosed please find Morgan Stanley's Motion for Leave to Seal CPH's Verified Motion for Leave to File a Supplemental Affidavit from Arthur Riel. If possible, we would request that Your Honor give our Motion expedited consideration. We will be available at the Court's convenience and can arrange for a conference call to allow out of state counsel to participate via telephone if necessary.

If there is anything further Your Honor requires, please contact the undersigned. Thank you.

Respectfully,

Joseph Ianno, Jr.

/jed

Enclosure

cc: Counsel of Record (w/encl. via facsimile and Federal Express)

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

MORGAN STANLEY & CO. INCORPORATED'S MOTION TO SEAL CPH'S VERIFIED MOTION FOR LEAVE AND REQUEST FOR EXPEDITED CONSIDERATION

Defendant, Morgan Stanley & Co. Incorporated ("Morgan Stanley"), by and through its undersigned counsel, hereby moves that this Court seal CPH's Verified Motion for Leave to File a Supplemental Affidavit from Arthur Riel, Morgan Stanley's Former Executive Director of Technology ("CPH's Motion"), and states:

1. CPH's Motion was served on the undersigned counsel on October 19, 2005 at approximately 3:00 p.m. CPH's Motion requests leave to file an affidavit from Arthur Riel, a former Executive Director of Morgan Stanley.

2. The Court has set a hearing on CPH's Motion for October 25, 2005 at 8:45 a.m. during Uniform Motion Calendar.

3. Riel's affidavit appears to include unauthorized disclosures of confidential communications subject to the attorney-client privilege held by Morgan Stanley. Florida law recognizes that opposing counsel may not obtain privileged information from a former employee of an opposing party. *See, H.B.A. Management, Inc. v. Estate of Schwartz*, 693 So.2d 541

(Fla.1997). Until the Court has an opportunity to hear argument of counsel concerning this issue, it would be inappropriate for CPH's Motion to be filed in the Court file.

WHEREFORE, Morgan Stanley respectfully requests that the Court direct that the Clerk of Court seal CPH's Motion, together with such other and further relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 20th day of October, 2005.

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Client/Matter No.: 47877/14092 **Employee No.:**

Total Number of Pages Being Transmitted, Including Cover Sheet: 4

Message:

Coleman v. Morgan Stanley & Co. Inc.

To follow please find a copy of the Re-Notice of Hearing on CPH's Verifed Motion for Leave as discussed at this morning's hearing.

☐ ***Original to follow Via Regular Mail*** ☐ ***Original will Not be Sent*** ☑ ***Original will follow via Overnight Courier***

****
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TELECOPIER OPERATOR: _____

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

RE-NOTICE OF HEARING
(Cancels hearing set for October 25, 2005)

NOTICE IS HEREBY GIVEN that a hearing has been set in the above-styled case as follows:

DATE:	October 26, 2005
TIME:	8:45 a.m.
PLACE:	Palm Beach County Courthouse, Courtroom 11A 205 North Dixie Highway West Palm Beach, Florida 33401
BEFORE:	Judge Elizabeth T. Maass
CONCERNING:	CPH's Verified Motion for Leave to File a Supplemental Affidavit from Arthur Riel, Morgan Stanley's Former Executive Director of Technology

KINDLY GOVERN YOURSELVES ACCORDINGLY.

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no costs to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, Palm Beach County Courthouse, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number (561) 355-2431 within two (2) working days of your receipt of this notice; if you are hearing or voice impaired, call 1-800-955-8771.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 21st day of October, 2005.

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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 502003CA005045XXXXMB

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

_____/

ORDER ON MORGAN STANLEY & CO. INCORPORATED'S MOTION TO SEAL CPH'S VERIFIED MOTION FOR LEAVE

THIS CAUSE came before the Court on October 21, 2005 on Morgan Stanley & Co. Incorporated's Motion to Seal CPH's Verified Motion for Leave, with all counsel present or participating by speaker telephone. Based on the proceedings before the Court, it is

ORDERED AND ADJUDGED that the Motion is DENIED.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 21 day of October, 2005

ELIZABETH T. MAASS
Circuit Court Judge

copies furnished:

service list attached

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator in the Administrative Office of the Court, 205 North Dixie Highway, Room 5.2500, West Palm Beach, Florida 33401; telephone number 561-355-2431 within two (2) working days of your receipt of this notice; if you are hearing or voice impaired, call 1-800-955-8771.

SPANISH

Si usted es una persona incapacitada que necesita de un servicio especial para participar en este proceso, usted tiene derecho a que le provean cierta ayuda sin costo alguno. Por favor pongase en contacto con el Coordinator de la Oficina Administrativa de la Corte ADA, situada en el 205 North Dixie Highway, Oficina 5.2500, West Palm Beach, Florida 33401, telefono 561-355-2431, dentro de los (2) proximos dias habiles despues de recibir esta notificacion; si tiene incapacidad de oir o hablar llame al 1-800-955-8771.

CREOLE

Si ou se yon moun ki infim, ki bezwen ninpot akomodasyon pou ka patisipe nan pwose sa-a, ou gen dwa, san'l pa koute'w anyin, pou yo ba'w kek sevis. Tanpri kontakte koordinate ADA ya nan Biro Administratif Tribinal nan cite Palm Beach la, ki nan 205 North Dixie Highway, Cham 5.2500, West Palm Beach, Florida 33401, nimero telefonn-nan se 561-355-2431, rele de (2) jou de le ou resevwa notis sa-a; si ou bebe ou byen soud rele 1-800-955-8771.

FRENCH

Si vous etes infirme, et en besoin de n'importe accommodation pour pouvoir participer a ces procedures, vous pouvez gratuitement recevoir, certains services. S'il-vous-plait contactez le coordinator du Bureau Administratif du Tribinal de Palm Beach, situee a 205 North Dixie Highway, Chambre 5.2500, West Palm Beach, Florida 33401, numero de telephone 561-355-2431 durant deux (2) jours suivant la reception de cette note; si vous etes muets ou sourds, appelez 1-800-955-8771.

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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

CASE NO. CA 03-5045 AI

vs.

MORGAN STANLEY & CO., INC.,

Defendant.
_____/

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: November 1, 2005

TIME: 8:45 a.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

CPH'S VERIFIED MOTION FOR LEAVE TO FILE A SECOND SUPPLEMENTAL AFFIDAVIT FROM ARTHUR RIEL, MORGAN STANELY'S FORMER EXECUTIVE DIRECTOR OF TECHNOLOGY

Coleman (Parent) Holdings Inc. vs. Morgan Stanley & Company
Case No.: CA 03-5045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Federal Express to all Counsel on the attached list, this 28th date of October, 2005.

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IN THE FIFTEENTH JUDICIAL COURT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,
Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,
Defendant.
_____/

CASE NO. CA 03-5045 AI

CPH'S VERIFIED MOTION FOR LEAVE TO FILE A SECOND SUPPLEMENTAL AFFIDAVIT FROM ARTHUR RIEL, MORGAN STANLEY'S FORMER EXECUTIVE DIRECTOR OF TECHNOLOGY

Coleman (Parent) Holdings Inc. ("CPH") hereby moves for leave to file a second supplemental affidavit of Mr. Arthur Riel in support of CPH's Verified Petition and Verified Reply Brief seeking a criminal-contempt show-cause order against Respondents Morgan Stanley & Co., Incorporated ("Morgan Stanley"), Donald G. Kempf, Jr., James P. Cusick, Soo-Mi Lee, and James F. Doyle. This second affidavit of Mr. Riel is attached hereto as Exhibit 1.

Since moving for leave to file the first Riel Affidavit last week, CPH has learned from Mr. Riel that Morgan Stanley's June 17, 2005 retraction Notice was itself false and misleading in suggesting that Morgan Stanley's Law Division was not aware of certain 8-mm email back-up tapes until July 2004. In fact, Morgan Stanley's Law Division was aware of this cache of 8-mm tapes in 2003 (or at the very latest, by January 2004). CPH has further learned from Mr. Riel that Morgan Stanley's e-mail archive contains an easily-downloaded set of monthly "Compliance Status" reports that document what the Law Division attorneys knew about the email back-up tapes and when they knew it. These monthly reports will show definitively that Respondents again misled this Court on June 17, 2005, when they falsely suggested that the Law

Division was unaware of the 8-mm tapes until July 2004. Moreover, because these critically important monthly reports indisputably were responsive to this Court's discovery Order of February 3, 2005, Morgan Stanley's failure previously to produce these reports is yet another act of contempt.

BACKGROUND AND ARGUMENT

Morgan Stanley's June 17, 2005 Notice retracted Respondents' previous statements "that [Morgan Stanley's] Law Division . . . was not aware of certain 8-mm tapes until November 2004" and instead stated "that the Law Division was aware in July 2004 . . . that certain 8-mm tapes existed." Ex. 2, Retraction Notice at 1-2, 6/17/05. Although inserting the adjective "certain" may have been designed to give Morgan Stanley wiggle room later, there can be no serious doubt about which 8-mm tapes are being referred to here. The June 17 Notice corrects at least 15 false statements, two of which describe these "certain 8-mm tapes" in some detail. Morgan Stanley's "Summary of Offer of Proof" (filed on May 12, 2005, and re-filed on May 17, 2005) expressly defines the term "8-mm Tapes" as "over 700 8-millimeter tapes" that "[b]uilding maintenance personnel located . . . in the 'comm room' of the Morgan Stanley facility at 1221 Avenue of the Americas in Manhattan." Ex. 3, MS Summary of Offer of Proof at 25, 5/12/05 (re-filed 5/17/05). Morgan Stanley's June 17, 2005 Notice did not retract this definition of the "8-mm Tapes." But Morgan Stanley's June 17 Notice did retract the sentence on the next page of the Summary of Offer of Proof stating that Respondents Mr. Cusick and Ms. Lee "did not learn of the existence of the 8-mm Tapes . . . until November 2004." *Id.* at 26. The June 17 Notice likewise retracted the reference in a March 15, 2005 Morgan Stanley pleading to "The 738 8-mm Tapes." Ex. 4, MS's Overnight Response at 6, 3/15/05. In that pleading, Morgan Stanley had taken CPH to task for "fail[ing] to supply any evidence that the Law Division knew

about the 8-mm tapes before November 2004." *Id.* at 5-6. In retracting that statement on June 17, however, Morgan Stanley replaced it with yet another falsehood: that the Law Division was unaware of the 8-mm tapes until July 2004.

As Mr. Riel makes clear in Paragraph 2 of his attached Affidavit, *see* Ex. 1 ¶ 2, soon after he learned about the existence of the then-unprocessed 8-mm email back-up tapes, Mr. Riel not only informed the attorneys in the Compliance unit of the Law Division (including David Elston, who reported directly to Respondent Mr. Kempf); Mr. Riel also informed Respondent Mr. Cusick, in the Law Division's Litigation unit. That probably occurred in late 2003, but certainly no later than January 2004, Mr. Riel attests. This sworn allegation by Morgan Stanley's former Executive Director of Technology cannot be squared with any straight-faced reading of Morgan Stanley's June 17, 2005 Notice.

Furthermore, Mr. Riel, in Paragraph 3 of his new Affidavit, *see* Ex. 1 ¶ 3, explains how to verify these facts quickly and easily. Morgan Stanley's e-mail archive contains, in one place, a series of three monthly "Compliance Status" reports that collectively will document his sworn allegations about the 8-mm tapes. And perhaps even more important, these monthly Compliance Status reports will provide a clear chronology about what the Law Division attorneys (including Respondents Messrs. Kempf, Cusick, and Doyle, and Ms. Lee) knew about the 8-mm tapes and the Brooklyn Tapes, and when they knew it.

Thus, it is not surprising — though it certainly is disturbing — that Morgan Stanley has withheld these monthly reports from CPH and this Court. Respondent Morgan Stanley's failure to produce these critically important monthly reports directly violated this Court's February 3, 2005 Order. *See* CPH Verified Reply Br. Ex. A, 2/3/05 Order Specially Setting Hearing, at 1. That Order required Morgan Stanley to produce to CPH "all documents within [Morgan

Stanley's] care, custody, or control **addressing or related to the additional e-mail back up tapes, including matters relating to** the time or manner in which they were discovered; by whom they were discovered; **who else learned of their discovery and when**; and the manner and timetable by which they were to be restored and made searchable, including any correspondence to or from outside or prospective outside vendors." *Id.* (emphasis added). Clearly, the monthly Compliance Status reports described in Paragraph 3 of Mr. Riel's new Affidavit are not only critically important to uncovering what Respondents knew and when they knew it, but also are the linchpin to yet another massive and contumacious violation of this Court's discovery Orders. Prompt production of these monthly Compliance Status reports should be an integral part of this Court's investigation if the Court issues the criminal-contempt show-cause order requested in CPH's Verified Petition and Verified Reply Brief. CPH's counsel stand ready to assist the Court with this investigation at its earliest possible convenience.

CONCLUSION

In sum, these latest revelations confirm the sworn allegations set forth in CPH's Verified Petition and Verified Reply Brief. And they further confirm that the investigation into the matters presented in the Petition can be conducted quickly, efficiently, and definitively. Because Mr. Riel made these revelations under oath and based on his personal knowledge, *see* FLA. R. CRIM. P. 3.840(a) (West 2005), and because they were not known to Petitioner until after it moved for leave to file the first Riel Affidavit on October 19, 2005, CPH respectfully requests leave to file this second supplemental affidavit from Mr. Riel immediately, and asks the Court to give his affidavits the full consideration they merit at the hearing to be held Thursday afternoon, November 3, 2005.

Dated: October 27, 2005

Respectfully submitted,

COLEMAN (PARENT) HOLDINGS INC.

By: _____
One of Its Attorneys

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I hereby swear under penalty of perjury that the facts stated above are true and correct.

_____

Sworn before me this 27th day of October, 2005.

_____
Notary Public

"OFFICIAL SEAL"
LINDA J. HOLMES
Notary Public, State of Illinois
My Commission Expires Oct. 23, 2006

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and overnight delivery to all counsel on the attached list on this 28th day of October, 2005.

Jeffrey T. Shaw

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COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO: 2003 CA 005045 AI

SECOND AFFIDAVIT OF ARTHUR RIEL

Arthur Riel, being first duly sworn, on oath states as follows:

1. I have been made aware that Morgan Stanley & Co., Inc. ("Morgan Stanley") filed a Notice in this case on June 17, 2005 that retracted Morgan Stanley's previous statements "that its Law Division . . . was not aware of certain 8-mm tapes until November 2004" and instead stated "that the Law Division was aware in July 2004 . . . that certain 8-mm tapes existed." My understanding is that these statements refer to a cache of 8mm tapes that had been located in the Morgan Stanley facility at 1221 Avenue of the Americas (Sixth Avenue), in New York City.

2. As I stated in my prior Affidavit (dated October 19, 2005), I believe it was the fall 2003 when Robert Saunders' Institutional IT Storage Group disclosed the existence of this cache of 8mm tapes, all of which might contain e-mail. Sometime in late 2003 or perhaps early 2004 – but certainly no later than January 2004 – I became

EXHIBIT
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aware that these 8mm tapes existed but had not yet been processed. In that same time frame – sometime in late 2003 or perhaps early 2004, but certainly no later than January 2004 – I informed more than three attorneys in Morgan Stanley's Law Division of the existence of these 8mm tapes. Specifically, first I informed David Elston and his direct reports (including Scott Rockoff) in Compliance of the 8mm tapes' existence. And soon after that (but again, certainly no later than January 2004), I informed James Cusick in Litigation of the 8mm tapes' existence. In this same time frame, I may have provided similar information to other Law Division attorneys, too. These communications centered on the appropriate prioritization of tapes in the restoration process. Thus, Morgan Stanley's Law Division was aware that the 8mm tapes existed long before July 2004.

3. The facts set out in Paragraph 2 above with regard to the timing of the Compliance attorneys' awareness of the 8mm tapes, as well as many of the facts set out in my prior Affidavit, could be easily documented by downloading from Morgan Stanley's e-mail archive, or the Compliance IT document repository, a set of standard, formalized monthly reports prepared for Morgan Stanley's monthly Compliance Status meetings. One page of one of these monthly reports was attached to my prior Affidavit as Exhibit D. Beginning in 2003 and continuing through the end of my period of active employment in August 2004, my Law and Compliance IT Organization was responsible for producing, and e-mailing to Mr. Elston and other

members of Compliance of the Law Division, a monthly Priority Project Status Report. Our team also produced a Monthly Status Update listing highlights/accomplishments for the previous month and expected accomplishments for the following month. And our team also produced a version of that Update that contained talking points that I would present directly to Mr. Elston and many of his direct reports who attended our monthly Compliance Status meetings. The complete set of these three monthly reports – the monthly Priority Project Status Reports, the Monthly Status Updates, and the Monthly Status Updates with my talking points – would help to provide a chronology regarding the issues addressed in my prior Affidavit, the issues addressed in this Affidavit, and any issues with regard to when the Law Division became aware that the 8mm tapes existed and that the Brooklyn Tapes contained e-mail.

4. There exists additional, easy to retrieve documents containing chronological data on these topics including the Law IT section of the Company IT End-of-year Presentation (2003) reviewed with Donald Kempf and David Elston (also known as "The Company IT Blue Book"); issues logs maintained, and emailed, by Annalise Eberhart on the weekly Electronic Communications Status Meeting attended by myself, Scott Rockoff, Annalise Eberhart, and several members of my team; and the minutes of the tape restoration meetings from fall 2003.

5. I am ready and willing to appear for live testimony to affirm or supplement the matters addressed in this affidavit.

Arthur Riel

Dated: 10-28-05

Subscribed and sworn to before me
this 28 day of October, 2005

Notary Public

AZHER A. KIDWAI
Notary Public
STATE OF CONNECTICUT
MY COMMISSION EXPIRES FEB. 28, 2008

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

NOTICE

Morgan Stanley & Co. Incorporated ("Morgan Stanley") hereby notifies the court and Plaintiff that it retracts, withdraws and corrects certain statements in the offers of proof, declaration, and related statements more fully described and listed below.

1. In the listed offers of proof and related statements, Morgan Stanley asserted that its Law Division was not aware that any of the Brooklyn Tapes contained e-mail until October 2004 and was not aware of certain 8-mm tapes until November 2004.

2. As a result of a review of e-mails discovered by a new e-mail search, Morgan Stanley has determined that the offers of proof and related statements should be corrected to state that the Law Division was aware in July 2004 that some of the Brooklyn Tapes contained e-mail and that certain 8-mm tapes existed.

3. Morgan Stanley submits this Notice to: (a) correct Defendant's Offers of Proof from James P. Cusick, Soo-Mi Lee, and James F. Doyle (the first sentence of paragraph 4 and the entirety of paragraph 5); (b) withdraw the Declaration of James F. Doyle of January 31,

EXHIBIT 2

2005; and (c) correct related statements that reference or were based on the foregoing submissions[1].

4. Morgan Stanley does not limit this notice and correction to the specific documents described or listed herein. Morgan Stanley retracts, withdraws and corrects any and all statements, written or oral, made or submitted on its behalf, to the effect that its Law Division was not aware that any of the Brooklyn Tapes contained e-mail until October 2004 and was not aware of certain 8-mm tapes until November 2004.

[1] The related statements include: paragraph 4 on pages 2-3 of Morgan Stanley's Opposition to CPH's Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, dated January 31, 2005; the first two sentences of the second full paragraph on page 2 of Morgan Stanley's Supplemental Opposition to CPH's Motion for Adverse Inference Instruction, dated February 11, 2005; the last paragraph on page 6 that carries over to page 7 of Morgan Stanley Opposition to CPH's Motion for a Default Judgment, dated February 28, 2005; the last clause of the fourth sentence from the bottom and the last two sentences on page 20, and the first two sentences of the second full paragraph on page 31 of Morgan Stanley's Opposition to CPH's Motion for a Default Judgment (corrected version filed March 13, 2005 and original version served March 12, 2005); the second sentence in the second full paragraph on page 7 of Morgan Stanley's Submission of Proposed Statement to be Read to the Jury Pursuant to Court's March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment, dated March 28, 2005; the second sentence of the first full paragraph on page 24, the second sentence on page 26, the heading for Section C and the second and third sentences in that section on page 26, the last clause in the second to last sentence and the last sentence in that section on page 27, the final sentence on page 33 that carries over to the top of page 34, and the first clause of the second sentence of the first full paragraph on page 35 of the Summary of Offer of Proof Regarding Defendant's Alleged Litigation Misconduct (Addendum to Morgan Stanley's Opposition to Coleman (Parent) Holdings Inc.'s Second Renewed Motion for Correction and Clarification of the Litigation-Misconduct Statement) ("Summary of Offer of Proof"), originally filed May 12, 2005 and re-filed on May 17, 2005 in Phase II; February 2, 2005 Hr'g Tr. 132:1-7, 133:6-11, 147:22-25 (statements by counsel); the second half of the heading for Section C on page 15 and the first paragraph of page 17 of Morgan Stanley's Response to CPH's Chronology of Purported Discovery Abuses, dated March 15, 2005; the second, third and fifth rows (first sentence) on page 6 of Morgan Stanley & Co. Inc.'s Overnight Response to CPH's Additional Submission in Support of its Motion for Default, dated March 15, 2005; May 16, 2005 Hr'g Tr. 15266:4-8; and May 18, 2005 Hr'g Tr. 15607:4-8, 11-13, 15608:8-13, 17-19.

Respectfully submitted,

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BY: _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 17th day of June, 2005.

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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

SUMMARY OF OFFER OF PROOF REGARDING DEFENDANT'S ALLEGED LITIGATION MISCONDUCT

INTRODUCTION

As judges nationwide have come to understand, discovery of electronic information such as e-mail and backup tapes can present unusual, even daunting, technological and logistical obstacles. Report of the Advisory Committee on the Federal Rules of Civil Procedure (Aug. 3, 2004). Here, the evidence establishes that Morgan Stanley's shortcomings with respect to e-mail production resulted from mistakes made in the course of a good-faith attempt to respond fully and quickly to discovery requests, not an effort to conceal fraud. The record shows that Morgan Stanley made substantial voluntarily efforts to process its historical e-mails in a good-faith effort to facilitate collection and production of e-mails responsive to Coleman (Parent) Holdings, Inc.'s ("CPH's") discovery requests. The very nature of the mistakes made during those efforts – the belated discovery of additional backup tapes and unforeseen computer programming errors – makes plain that Morgan Stanley did not intend to hide evidence, much less direct evidence of the Sunbeam fraud.

EXHIBIT 3

2. The 8-mm Tapes

Building maintenance personnel located over 700 8-millimeter tapes (the "8-mm Tapes") in the "comm room" of the Morgan Stanley facility at 1221 Avenue of the Americas in Manhattan. After finding the tapes, the maintenance personnel notified John Pamula, a Siemens contractor and head of the Backup and Restore Team. (Seickel 2/10/05 Dep. at 43:19-44:6; 2/14/05 Hr'g Tr. at 128:2-7.) One employee in Morgan Stanley's IT department, Glenn Seickel, "believe[s]" this event occurred in 2002. (Seickel 2/10/05 Dep. at 74:8.) Riel recalls it occurring in "late 2003, 2004." (Riel 03/08/05 Dep. at 78:4-7.) No one at Morgan Stanley knew at the time whether the 8-mm Tapes contained e-mail.

The 8-mm Tapes were sent to NDCI for processing in the middle of 2004. (2/14/05 Hr'g Tr. at 128:4-7.) As with the Brooklyn Tapes, on July 2, 2004, Riel learned from NDCI that e-mails, some dating back at least to 1998, had been found on certain of the 8-mm Tapes. (MS 960 (Ex. 17).) The 8-mm Tapes were all incremental backups, rather than full backup tapes. (3/14/05 Hr'g Tr. at 3510:19-25.) Ultimately, approximately 1.3 million unique e-mails were harvested from the 8-mm Tapes for migration to the Archive, which was migrated in February 2005. (Def.'s Offer of Proof, Anfang at 4; 3/14/05 Hr'g Tr. 3510:4-8.) Even though not required to be searched by the Agreed Order (because they were not full backups), once the 8-mm Tapes were added to the Archive, any unique e-mails on them were included in subsequent searches of the Archive.

Although the Court took issue with Riel's Certification, Arthur Riel's conduct is not evidence of fraud or an intent to withhold relevant evidence from CPH. At the time he signed his Certification of Compliance with the Court's April 2004 Order, Riel believed the Archive contained e-mail from Morgan Stanley's oldest backup tapes when his team ran the searches.

(Def.'s Offer of Proof, Riel at 1.) Although he knew of the existence of the Brooklyn Tapes and the 8-mm Tapes at the time he signed his Certification, Riel did not learn that some of those tapes contained e-mail until later. (Riel 3/8/05 Dep. at 81:16-19.) Upon learning there was e-mail on some of those tapes, he did not inform in-house counsel. (Def.'s Offer of Proof, Cusick at 1; Lee at 1; Riel 3/08/05 Dep. 142:6-11.) He also did not make any connection between the news and the searches his team had previously performed or the Certification he had previously signed. (*Id.* at 66:14-20, 67:14-17, 68:5-13, 82:23-83:10.) It apparently did not occur to him that the existence of some e-mail on these tapes might be inconsistent with the statements he had made in his Certification, depending on whether the tapes included an oldest full backup tape for one or more of the 36 individuals. Riel's conduct was not evidence of fraud or an intent to withhold material from CPH, much less direct evidence of the Sunbeam fraud.

C. Morgan Stanley Attorneys Learn in October 2004 that There Was Some E-Mail on Some of the Brooklyn Tapes

As noted above, two lawyers in Morgan Stanley's Law Division, Cusick and Lee, learned of the existence of the Brooklyn Tapes on or about June 7, 2004. It was not until late October 2004, however, that they and other lawyers in Morgan Stanley's Law Division learned that there was e-mail on some of these back-up tapes. (Def.'s Offer of Proof, James Doyle (Ex. 5) at 1; Lee at 1; Cusick at 1.) Additionally, these lawyers did not learn of the existence of the 8-mm Tapes or that e-mail existed on some of those tapes until November 2004. (Def.'s Offer of Proof, Doyle at 1; Def.'s Offer of Proof, Lee at 1; Def.'s Offer of Proof, Cusick at 1.)

In connection with later briefing, James Doyle, a lawyer in Morgan Stanley's Law Division, submitted a declaration stating that he had learned of the existence of e-mail backup tapes (the Brooklyn Tapes) at the end of October 2004. (Declaration of James F. Doyle ("Doyle Decl.") ¶ 3.) In its March 23, 2005 Order, the Court took issue with Doyle's Declaration of

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Defendant.

MORGAN STANLEY & CO., INC.'S OVERNIGHT RESPONSE TO CPH'S ADDITIONAL SUBMISSION IN SUPPORT OF ITS MOTION FOR DEFAULT

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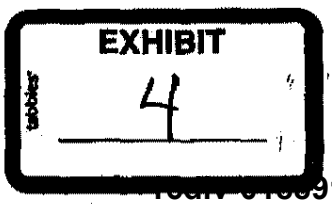

CPH's "Issue"	What CPH Represented to this Court	What CPH Misrepresented or Omitted
Can we have any confidence that Morgan Stanley has located, much less searched and processed all relevant existing email?	CPH correctly notes that Morgan Stanley has found a number of new tapes since May 14, 2004. CPH also claims that various statements of Mr. Clare, Mr. Saunders and Morgan Stanley in February 2005 that all back-up tapes had been found were untrue when made.	While subsequent events have shown that additional tapes existed, there is no evidence that these statements were known or suspected to be false when made.
What do we know about Morgan Stanley's willful destruction of email? In violation of Federal law, Morgan Stanley overwrote – destroyed – emails after one year. Morgan Stanley supposedly put an end to that systematic destruction in January 2001. But did it?	CPH contends that Morgan Stanley has admitted to the SEC that more than 10% of its back-up tapes continued to be overwritten despite Federal law and its own directive.	Morgan Stanley's analysis of 7,482 tapes for the SEC showed that 53, fewer than 1%, were overwritten. And, the substantial duplication inherent in the back-up tapes likely means that few unique emails were lost. (Feb. 10, 2005 Letter at 15-16.)
		SEC Rule 17a-4 only requires the retention of documents for three years, so that relevant 1997-1998 emails would have been recycled in any event before CPH filed suit.
CPH moves to compel email production in October 2003. *Was Morgan Stanley's response in good faith?*	CPH suggests Morgan Stanley has lied about the cost and extreme burden of restoring email, contrasting one statement that it is burdensome and expensive with a different statement that it is quickly accessible.	CPH's own chart belies its false comparison. One statement (cost and extreme burden) relates to restoring email off back-up tapes, while the other statement (quickly accessible) relates to restoring email off the Archive.
	CPH claims Morgan Stanley misled the Court and CPH by not disclosing that it had begun building an Archive in January 2003.	No good deed goes unpunished. In 2003, the Archive only captured and contained email ***from 2003 forward***, and, thus, could not be used to produce relevant *Coleman* email. (Feb. 10, 2005 Letter at 25.) It was only in 2004, when Morgan Stanley voluntarily migrated email from its old back-up tapes to the Archive, that the Archive became useful in this litigation -- at which time Morgan Stanley used it to produce emails to comply with (and go well beyond) the Agreed Order. (Feb. 10, 2005

OCT-28-2005 14:09 JENNER BLOCK LLP P.25/34

CPH's "Issue"	What CPH Represented to this Court	What CPH Misrepresented or Omitted
		Letter at 7, 20; Riel Dep. at 50-56.)
How complete/reliable was the Archive when Morgan Stanley used it in May 2004 to produce documents and certify completeness?	CPH asserts that Morgan Stanley failed to disclose to CPH and the Court that, as of June 7, 2004, only 120 of the 143 SDLT output tapes produced by NDCI had been processed into the Archive. CPH suggests Mr. Riel's Certificate of Compliance was, therefore, false.	It is uncontroverted that Morgan Stanley understood that NDCI was processing, and the Archive was being loaded with, the ***oldest*** tapes first. (Riel Dep. at 67-68; 139-140.) The Agreed Order required Morgan Stanley to produce emails off the ***oldest*** full back-up tapes. Thus, when Mr. Riel searched the Archive for old emails in April-May 2004, he reasonably believed it contained the emails from the earliest full backup tape available for each person identified. (Riel Dep. at 57-58; 65-66.)
How complete/reliable was the Archive at the time of the February 14 Hearing?	CPH points out that Mr. Saunders was mistaken when he expressed confidence a month ago that all back-up tapes had been found, and that Morgan Stanley was likely mistaken when it told the SEC that all recoverable pre-2003 email had been migrated to the Archive.	There is no evidence that Mr. Saunders or Morgan Stanley knew or should have known that their statements were false when made. It is true that additional back-up tapes have been found since mid-February, which may contain recoverable email. But it is not known whether any of these tapes contain responsive email under the Agreed Order. (Mar. 14, 2005 Tr. at 258-263.) Previous new-found tapes have not resulted in many new, unique responsive emails because of the substantial redundancy inherent in Morgan Stanley's back-up tapes. (Mar. 14, 2005 Tr. at 255-256.)
What problems existed at the time the May search was made which affected the completeness of the search?	CPH claims every time it asks, it gets a different list of problems.	There is no questions that coding errors and other glitches existed in the Archive when searches were run in May 2004. (Feb. 14, 2005 Tr. at 41-42, 52.) As Microsoft Corporation's many product patches demonstrate, software

OCT-28-2005 14:10 JENNER BLOCK LLP P.26/34

CPH's "Issue"	What CPH Represented to this Court	What CPH Misrepresented or Omitted
		glitches are common in large, complex IT projects. (Mar. 7, 2005 Gorman Dep. at 53.) Morgan Stanley has worked hard to identify and resolve these problems, and in any event, its Archive search was much more robust than the search required by the Agreed Order. (Mar. 14, 2005 Tr. at 256.)
	CPH cites Mr. Riel for the notion that 10,138 tapes that did not contain email had been recycled.	Morgan Stanley, in its SEC Wells submission, analyzed these 10,138 tapes and determined that only 31 were non-redundant back-ups of email servers that had been overwritten in violation of Morgan Stanley's January 2001 directive. And, even on those 31 tapes, statistical analysis indicates that it is likely that only a tiny fraction (around 1%) of unique emails were lost. (Feb. 10, 2005 Letter at 15-16.) There is no evidence that any of these emails related to this case, and it remains undisputed that none of Morgan Stanley's email retention or retrieval practices was driven by this case.
Why did Morgan Stanley create the email Archive?	CPH claims Morgan Stanley attempted to curry favor with the SEC by claiming voluntarily to have migrated old email to its Archive, while at the same time telling CPH and the Court that it should not be required to make full production because of the burden of searching back-up tapes.	Morgan Stanley did not simply ***claim*** voluntarily to have migrated old email to its Archive, it ***had*** voluntarily migrated old email to its Archive. (Mar. 13, 2005 Anfang Dep. at 74-75.) And, CPH's fiction that Morgan Stanley cried "burden" to limit its email production to a handful of tapes is remarkable given that it is undisputed that Morgan Stanley used its comprehensive Archive, not individual back-up tapes, to produce emails in this case. (Riel Dep. at 54, 67-68.)
	CPH claims "Morgan Stanley never told the SEC that it had obligations under the April Order which	Morgan Stanley has no obligation to inform the SEC how it intends to meet its discovery

OCT-28-2005 14:11 JENNER BLOCK LLP P.27/34

CPH's "Issue"	What CPH Represented to this Court	What CPH Misrepresented or Omitted
	it intended to meet by using the Archive."	obligations in civil litigation. Also, the Archive was not created, updated or loaded with new tapes to satisfy Morgan Stanley's obligations in this case, although Morgan Stanley did choose to capitalize on this investment for plaintiff's benefit.
Was there anything extraordinary about Morgan Stanley's decision to create an Archive?	CPH claims that Morgan Stanley's statements that "everybody on the street was building an email archive" and that "no other firm [was] taking similar steps to migrate email" "cannot [both] be true. One is false."	CPH's statement is disingenuous. The simple truth is that everyone on the street was building an Archive for ***current/future*** email, but Morgan Stanley is the only firm (of which it is aware) that has voluntarily and at great expense elected to migrate its ***old*** emails from back-up tapes to its new Archive to make them more accessible. (Feb. 10, 2005 Letter at 8, 20.)
Was the June 23, 2004 Completeness Certificate true or false?	CPH contends that Mr. Riel's Certificate of Completeness was false when made because 1,423 DLT and 738 8mm tapes had not been processed. CPH goes so far as to suggest that Mr. Riel only signed the Certificate to keep Morgan Stanley's lawyers happy.	It is undisputed that Mr. Riel did not know or suspect that the Brooklyn and 8mm tapes contained email, much less responsive email, when he signed his Certificate (Riel Dep. at. 75-78), and that he believed then, and now, that his Certificate was accurate (Riel Dep. at 50-58; 64-68; 162).
	CPH suggests that Mr. Riel's deposition supports the notion that Mr. Riel's Certificate was false because he did not search back-up tapes, as required by the Agreed Order.	Another remarkable statement. Mr. Riel made clear at his deposition, over and over again, that he believed emails from Morgan Stanley's oldest back-up tapes were migrated to the Archive before he ran his search, so that his search picked up responsive emails from back-up tapes. (Riel Dep. at 53-54; 57-58; 67-68.)
What is Arthur Riel's status?	CPH suggests that Morgan Stanley changes its view of Mr. Riel from "trusted employee" to "untrustworthy" to suit its purposes.	Morgan Stanley trusted Mr. Riel when he signed the Certificate in June 2004, but lost faith in his trustworthiness when it learned

OCT-28-2005 14:11 JENNER BLOCK LLP P.28/34

CPH's "Issue"	What CPH Represented to this Court	What CPH Misrepresented or Omitted
		months later that Mr. Riel had been secretly monitoring the emails of his supervisors, without authorization and in violation of Morgan Stanley's Code of Conduct. (Riel Dep. p. 16; 146-154.)
Where did the 8,000 pages of production made in November 2004 come from?	CPH correctly points out that Morgan Stanley's representations about the November 2004 production of 8,000 pages have been confused.	Morgan Stanley apologizes for unintentionally confusing CPH and the Court. Past misstatements have resulted from haste, honest misunderstandings, and the difficulty of determining which pages of the production came from which of the tapes whose email had been migrated into the Archive. As adduced at this week's hearing, the evidence is that, of the 8000 pages, most are duplicates of emails and attached reports, with only 13 unique emails (some with attachments) in the production. Of these 13 unique emails, three were inserted into the Archive in May-August 2004, nine were captured by the May 2004 search of the Archive but withheld as non-responsive by Kirkland & Ellis, and one was in the Archive in May 2004 but not captured by the query. (Mar. 14, 2005 Tr. at 174-75.)
When were the "newly discovered" tapes actually discovered? *The 1423 Brooklyn "Found" Tapes*	CPH claims that Morgan Stanley's representations about the timing of the discovery of the Brooklyn tapes vary slightly from internal IT meeting minutes.	The "discrepancy" between "sometime during the summer" and "May 6" is insignificant.
When were the "newly discovered" tapes actually	CPH highlights the difference between when Morgan Stanley's IT department learned of the	While the miscommunication is unfortunate, CPH has failed to supply any evidence that the

OCT-28-2005 14:12 JENNER BLOCK LLP P.29/34

CPH's "Issue"	What CPH Represented to this Court	What CPH Misrepresented or Omitted
discovered? *The 738 8mm Tapes*	8mm tapes (2002) and when the Law Division did (2004).	Law Division knew about the 8mm tapes before November 2004.
When did Morgan Stanley learn that the newly discovered tapes actually contained email?	CPH correctly notes that the IT Department learned that a portion of the Brooklyn tapes contained some email in July 2004, while the Law Division only learned in October 2004.	Again, while the miscommunication is regrettable, CPH offers no evidence that IT told the Law Division before October 2004 that email existed on some Brooklyn tapes.
When did Morgan Stanley learn that the newly discovered tapes actually contained 1998 email?	CPH notes that IT determined in July 2004 that one or more Brooklyn tapes had some email from 1998 and 1999, and then purports to contrast that with statements in January and February 2005 that Morgan Stanley could not determine the type or time period of data that might be recovered from tapes that had yet to be restored.	The IT Department did not inform the lawyers that it had found pre-2000 email on the Brooklyn tapes until October 2004. (Feb. 10, 2005 Letter at 25.) And, knowledge that the Brooklyn tapes had some pre-2000 email is not inconsistent with the statements that only by restoring new-found tapes could Morgan Stanley determine what email, if any, was on them.
Not that it matters, but when did Mr. Riel share with lawyers what Morgan Stanley knew, that the found tapes contained email?	CPH cites Mr. Riel's deposition for the suggestion that Mr. Riel may have had a conversation with Morgan Stanley's lawyers after June 2004 in which he may have told them that the Brooklyn tapes contained email.	CPH's surmise is flatly contradicted by Mr. Riel's testimony. He does not recall telling Morgan Stanley's lawyers that the Brooklyn tapes had email (Riel Dep. 86-87; 142), and, indeed, he voluntarily retracted the testimony CPH cites later in his deposition and said he was not sure he had ***any*** conversation with Morgan Stanley's lawyers after June 2004 (Riel Dep. 123-124).
When did Morgan Stanley disclose the existence of the found tapes and the fact that they contained email?	CPH claims Morgan Stanley delayed telling CPH that the found tapes contained email.	The delay between when the Law Division learned (late October 2004) and when Kirkland & Ellis wrote CPH's counsel (November 17, 2004) was minor and did not prejudice CPH.

OCT-28-2005 14:13 JENNER BLOCK LLP P.30/34

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CPH's "Issue"	What CPH Represented to this Court	What CPH Misrepresented or Omitted
When did Morgan Stanley counsel know that the Archive was not complete as of May 14, 2004?	CPH suggests that Morgan Stanley's counsel knew the Archive was not complete in May 2004, rather than October 2004.	Morgan Stanley's counsel learned from Mr. Riel that "tapes" had been found in June 2004, but Mr. Riel specifically told them that he did not know whether the tapes were email tapes. It is uncontroverted that counsel did not learn that some of the found tapes contained email until late October 2004. (Feb. 10, 2005 Letter at 50.)
When – and why – did Morgan Stanley put any priority on getting the data in staging into the Archive?	CPH suggests that the only reason Morgan Stanley prioritized moving email data from "staging" into the Archive in October 2004 was because the SEC initiated an inquiry into Morgan Stanley's alleged destruction of email back-up tapes.	Ms. Gorman testified that the migration of email data from "staging" into the Archive stopped shortly after Mr. Riel was placed on administrative leave in late August 2004. (Feb. 14, 2005 Tr. at 50.) Morgan Stanley began to prioritize the process of migrating email data again in October 2004, after the Law Division was alerted. (Feb. 14, 2005 Tr. at 50, 61.)
Why did it take so long to process the data in staging?	CPH cites Mr. Riel's self-serving testimony for the notion that ***he*** could have speeded up the processing of the email data in "staging."	As noted above, Mr. Riel was placed on administrative leave in August 2004 for unauthorized monitoring of his superiors' emails in violation of Morgan Stanley's Code of Conduct. (Riel Dep. at 16.) The Firm's actions with regard to Mr. Riel may have slowed the migration process, but were an unfortunate and unavoidable consequence of his misconduct.
	CPH suggests that the processing of email data would have gone faster had Morgan Stanley simply accepted CPH's proposal to use a third-party vendor to process and search back-up tapes.	CPH's self-serving speculation, which parrots the bravado of its expert, Quintin Gregor from eMag Solutions, at the February 14, 2005 hearing, is belied by events of the last month. Mr. Gregor claimed that email data could be completely extracted from 2,160 back-up tapes within six weeks -- or four weeks, if expedited. (Feb. 14, 2005 Tr. at 229.) However, after having the tapes an entire month, Renew Data

OCT-28-2005 14:14 JENNER BLOCK LLP P.31/34

CPH's "Issue"	What CPH Represented to this Court	What CPH Misrepresented or Omitted
		was able to process only 1-2% of the data. (Mar. 13, 2005 Wolfe Dep. at 50-54.) Morgan Stanley was quick by comparison, largely processing more than 35,000 tapes in about six months. (Feb. 10, 2005 Letter at 8, 25-26.)
How much data – how much potential email – is on the "found" tapes?	CPH tries to make much of Morgan Stanley's varying descriptions of the quantity of information in "staging."	Morgan Stanley regrets that it has given different estimates of the amount of email in "staging." Any miscommunication was unintentional and did not prejudice CPH. Moreover, regardless of the precise amount of email data in the staging area, all of the data that was in "staging" at the time Ms. Gorman assumed Mr. Riel's responsibilities was migrated to the Archive by early February 2005. (Mar. 14, 2005 Tr. at 197.)
The Bottom Bottom-Line	Morgan Stanley has made a considerable investment to create a more accessible and searchable Archive out of hundreds of millions of unique e-mails from tens of thousands of cumbersome and unwieldy magnetic tapes. Those efforts have enabled Morgan Stanley, in this case, to search an Archive containing emails from tens of thousands of back-up tapes rather than just the thirty-six tapes required by the Agreed Order. CPH cannot begin to defend its own discovery practices, when it expressly recognized the likelihood of Sunbeam litigation but then carried out a systematic campaign to "purge" its files of emails and electronic documents until "everything was long gone..." (Jan. 21, 2004 Fasman Dep. at 156.)	

OCT-28-2005 14:15 JENNER BLOCK LLP P.32/34

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by hand delivery on this 15th day of March 2005.

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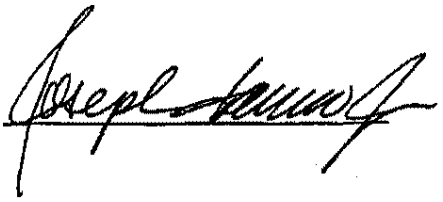
BY: 

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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO.: CA 03-5045 AI

vs.
MORGAN STANLEY & CO., INC.,

Defendant,
_____/

RE-NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: November 1, 2005

TIME: 9:30 a.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

CPH'S VERIFIED MOTION FOR LEAVE TO FILE A SUPPLEMENTAL AFFIDAVIT FROM ARTHUR RIEL, MORGAN STANLEY'S FORMER EXECUTIVE DIRECTOR OF TECHNOLOGY

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Case No.: CA 03-5045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Federal Express to all Counsel on the attached list, this 31st day of October, 2005.

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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO.: CA 03-5045 AI

vs.
MORGAN STANLEY & CO., INC.,

Defendant,
_____/

RE-NOTICE OF HEARING

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TIME: 9:30 a.m.

JUDGE: Hon. Elizabeth T. Maass

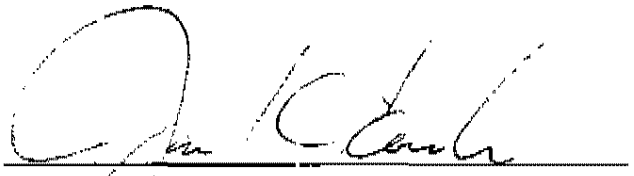
PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

CPH'S VERIFIED MOTION FOR LEAVE TO FILE A SECOND SUPPLEMENTAL AFFIDAVIT FROM ARTHUR RIEL, MORGAN STANLEY'S FORMER EXECUTIVE DIRECTOR OF TECHNOLOGY

Coleman (Parent) Holdings Inc. vs Morgan Stanley & Company
Case No.: CA 03-5045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Federal Express to all Counsel on the attached list, this 31st day of October, 2005.



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DATE: November 1, 2005

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FROM: ROBERT D. CRITTON, JR., ESQ.

RE: Coleman v. Morgan Stanley

FILE NO. 05-098

NUMBER OF PAGES BEING TRANSMITTED: 7 (INCLUDING THIS COVER SHEET)

MESSAGE: Enclosed is Brief.

ORIGINAL DOCUMENTS TO FOLLOW VIA:

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November 1, 2005

BY HAND DELIVERY TO
JUDGE MAASS ON NOVEMBER 2, 2005

Honorable Elizabeth T. Maass
Fifteenth Judicial Circuit
Palm Beach County Courthouse
205 North Dixie Highway
Courtroom 11A
West Palm Beach, FL 33401

Re: **Coleman v. Morgan Stanley**
Hearing Special Set November 3, 2005, 3:00 p.m.
Preliminary Hearing on CPH's Verified Petition For A Show-Cause Order
Case No. CA -03-5045 AI

Dear Judge Maass:

Enclosed please find Non-Party Respondent's, James P. Cusick, Supplemental Brief in Opposition to CPH's Verified Petition for a Show-Cause Order, which is special set for hearing on Thursday, November 3, 2005 at 3:00 p.m. You had indicated that we could deliver a copy of the enclosed Brief to your Bailiff at your 8:45 a.m. Uniform Motion Calendar, in order for you to review it prior to the hearing on Thursday.

Respectfully submitted,

Robert D. Critton, Jr.

RDC/bmm
Enclosure
cc: Counsel of record via fax 11/1/05

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC., Plaintiff, - against - MORGAN STANLEY & CO. INCORPORATED, Defendant.	Case No.: CA 03-5045-AI

NON-PARTY RESPONDENT JAMES P. CUSICK'S SUPPLEMENTAL BRIEF IN OPPOSITION TO CPH'S VERIFIED PETITION FOR A SHOW-CAUSE ORDER

James P. Cusick submits this supplemental brief in response to the filings by Coleman (Parent) Holding Inc. ("CPH") dated October 19, 2005 and October 27, 2005 ("CPH Supplemental Filings"). The CPH Supplemental Filings offer, in the way of two affidavits from Arthur Riel dated October 19, 2005 and October 28, 2005 (the "First Riel Affidavit" and "Second Riel Affidavit," respectively), additional evidence that CPH contends demonstrates probable cause that Mr. Cusick committed contempt against this Court. Mr. Cusick respectfully disagrees.

Mr. Cusick previously argued that the CPH Petition for an Order to Show Cause fails because it provides no evidence that the statements by Mr. Cusick were known to him personally to be false at the time the proffer was submitted to this Court in May 2005. Mr. Riel's two new affidavits provide no evidence that addresses this facial inadequacy. In the new affidavits, Mr. Riel relates not a single communication or

conversation with Mr. Cusick or with anyone else demonstrating that Mr. Cusick knowingly submitted a false proffer in May 2005.

The First Riel Affidavit mentions Mr. Cusick only once. Mr. Riel concedes that he "do[es] not have an absolute recollection of advising Mr. Cusick in Litigation of the Law Division" that the Brooklyn Tapes contained e-mail data. Changing subjects and substituting reconstruction for recollection, he then states that it is his "strong conviction that [Mr. Cusick] requested e-mail data from the Brooklyn tapes be placed on a separate SDLT tape." First Riel Affidavit, ¶ 14. Even fully crediting Mr. Riel's "conviction," the statement provided no evidence that Mr. Cusick's proffer was intentionally false.

Nor does Mr. Riel's account of his edits to his proffer in May 2005 provide evidence that Mr. Cusick believed at the time that his own proffer was false. Mr. Riel recalls reviewing a draft proffer stating that he "did not advise the Law Division after June 7, 2004" about e-mails on the Brooklyn Tapes and the 8-mm Tapes. First Riel Affidavit, ¶ 14. Mr. Riel goes on to state that he rejected the draft proffer and informed Morgan Stanley that he recalled telling "Mr. Elston and many of his direct reports in Compliance of the Law Division on July 8, 2004, both orally and in writing, that the Brooklyn Tapes contained e-mail." *Id.* Assuming that Mr. Riel's account is entirely correct, it does not prove that Mr. Cusick believed his own proffer was in error when he made it.

The Second Riel Affidavit's few statements about Mr. Cusick similarly provide no evidence about Mr. Cusick's mental state when he prepared his proffer. Mr. Cusick's May 2005 proffer stated that he first learned that the 8-mm Tapes existed in November 2004. Cusick Proffer, ¶4. However, Mr. Riel states that "sometime in late 2003 or

perhaps early 2004 . . . but again, certainly no later than January 2004 . . . I informed James Cusick in Litigation of the 8mm tapes' existence." Second Riel Affidavit, ¶2. Mr. Riel's affidavit offers no evidence proving that Mr. Cusick made a knowing false statement when his May 2005 proffer was prepared over 17 months later.

In light of the absence of adequate evidence of knowledge or intent, Mr. Cusick respectfully submits that an Order to Show Cause should not issue in this case.

Date: November 1, 2005

Respectfully submitted,

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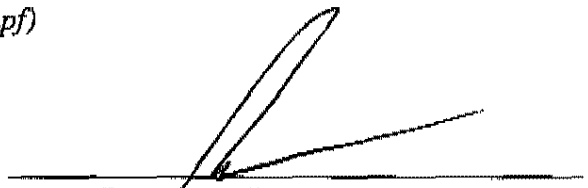

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Date: November 1, 2005
Pages: 2, including this cover sheet.

COMMENTS: See attached

****

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November 1, 2005

BY HAND DELIVERY TO JUDGE MAASS ON NOVEMBER 2, 2005

Honorable Elizabeth T. Maass
Circuit Court Judge
Palm Beach County Courthouse
205 N. Dixie Highway
West Palm Beach, FL 33401

Re: **CPH v. Morgan Stanley & Co., Inc.**
Hearing Special Set November 3, 2005, 3:00 p.m.
Preliminary Hearing on CPH's Verified Petition for A Show-Cause Order
Case No. CA-03-5045 AI

Dear Judge Maass:

Enclosed please find Non-Party Respondent Donald Kempf's Response to Arthur Riel's Supplemental Affidavits. You had indicated during the hearing on Tuesday, November 1, 2005, that we could deliver a copy of the enclosed Response to your Bailiff at your 8:45 a.m. Uniform Motion Calendar on November 2, 2005, in order for you to review it prior to the scheduled hearing on Thursday, November 3, 2005.

Respectfully yours,

ROTH & DUNCAN, P.A.

DOUGLAS DUNCAN

DD/gdk
enclosure
cc: Counsel of record via fax-11/1/05

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RE: *Coleman vs. Morgan Stanley*

COMMENTS

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November, 2005

VIA FEDERAL EXPRESS
Honorable Elizabeth T. Maass
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205 N. Dixie Highway, Rm. 11.1208
West Palm Beach, Florida 33401

Re: *Coleman (Parent) Holdings, Inc. vs. Morgan Stanley & Co., Inc.*
Case No. CA 03-5045 AI

Dear Judge Maass:

Enclosed please find for your review a courtesy copy of Non-Party Respondent Soo-Mi Lee's Memorandum Regarding Coleman (Parent) Holdings Inc.'s Verified Motions for Leave to File Supplemental Affidavits from Arthur Riel.

Very truly yours,

Morris Weinberg, Jr.

MW:kmo
Enclosure

Cc: John Scarola
Jerold Solovy

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH
COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff,

vs. CASE NO: CA 03-5045 AI

MORGAN STANLEY & CO. INC.,
Defendant.

NON-PARTY RESPONDENT SOO-MI LEE'S MEMORANDUM REGARDING COLEMAN (PARENT) HOLDINGS INC.'S VERIFIED MOTIONS FOR LEAVE TO FILE SUPPLEMENTAL AFFIDAVITS FROM ARTHUR RIEL

Non-party respondent Soo-Mi Lee respectfully submits this memorandum regarding the Verified Motions For Leave To File Supplemental Affidavits From Arthur Riel, dated October 19, 2005 and October 28, 2005 (collectively, the "Riel Affidavits" and individually, the "10/19/05 Riel Affidavit" and the "10/28/05 Riel Affidavit"), by plaintiff Coleman (Parent) Holdings, Inc. ("CPH"), and in further support of Ms. Lee's Opposition to CPH's Verified Petition seeking an order to show cause why Ms. Lee should not be held in indirect criminal contempt.

The two new Riel Affidavits do not add to the record a single new fact having any bearing on Ms. Lee and why she should be the subject of any criminal contempt proceeding. The 10/19/05 Riel Affidavit only references Ms. Lee in two paragraphs, while the 10/28/05 Riel Affidavit does not refer to Ms. Lee at all.

In the first reference to Ms. Lee in the 10/19/05 Riel Affidavit, Mr. Riel merely attests that throughout his tenure within the Law IT Organization, he generally interacted with many individuals in both the Litigation and Compliance units of Morgan Stanley's Law Division, including Ms. Lee, who was in the Litigation unit. *See* Motion, Ex. 1 at ¶ 2. That fact adds nothing of import as to Ms. Lee. The second reference to Ms. Lee in

the 10/19/05 Riel Affidavit recites the content of the June 7, 2004 e-mail advising Ms. Lee and James Cusick of the existence of the Brooklyn tapes, not yet determined to contain e-mail. *See* Motion, Ex. 1 at ¶ 8. This e-mail has been part of the record since March of 2005. Mr. Riel's reference to the e-mail in his affidavit adds nothing new to the record, which remains insufficient to warrant a determination that Ms. Lee engaged in conduct intended to obstruct or to mislead the Court.

As stated in our Opposition to the Verified Petition, the facts as to Ms. Lee contained in the Verified Petition, even as now supplemented and even if taken as true, do not provide a basis for issuing an order to show cause as to Soo-Mi Lee.

Date: November 1, 2005

Respectfully submitted,

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Counsel for non-party respondent Soo-Mi Lee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by First Class Mail and facsimile this 1st day of November, 2005, to:

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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

_____/

CASE NO: 2003 CA 005045 AI

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S VERIFIED MOTION FOR LEAVE TO FILE A SECOND SUPPLEMENTAL AFFIDAVIT FROM ARTHUR RIEL, MORGAN STANLEY'S FORMER EXECUTIVE DIRECTOR OF TECHNOLOGY

THIS CAUSE having come to be considered upon Coleman (Parent) Holdings Inc.'s Verified Motion for Leave to File a Second Supplemental Affidavit From Arthur Riel, Morgan Stanley's Former Executive Director of Technology, and the Court having reviewed the file and being fully advised in the premises, it is hereby,

ORDERED and ADJUDGED: the Motion Granted. Plaintiff may file the second Supplemental Affidavit. Defendant and non-party respondents shall serve any responsive argument by 5:00 pm Nov. 1, 2005

~~DONE~~ AND ORDERED at West Palm Beach, Palm Beach County, Florida, this 1 day of November, 2005.

ELIZABETH T. MAASS
CIRCUIT COURT JUDGE

Copies have been furnished to all counsel on the attached counsel list.

16div-018925

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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

CASE NO: 2003 CA 005045 AI

ORDER ON COLEMAN (PARENT) HOLDINGS INC.'S VERIFIED MOTION FOR LEAVE TO FILE A SUPPLEMENTAL AFFIDAVIT FROM ARTHUR RIEL, MORGAN STANLEY'S FORMER EXECUTIVE DIRECTOR OF TECHNOLOGY

THIS CAUSE having come to be considered upon Coleman (Parent) Holdings Inc.'s Verified Motion for Leave to File a Supplemental Affidavit From Arthur Riel, Morgan Stanley's Former Executive Director of Technology, and the Court having reviewed the file and being fully advised in the premises, it is hereby,

ORDERED and ADJUDGED: The Motion is Granted. Plaintiff may file the Supplemental Affidavit. Defendant and non-party respondents shall serve any responsive argument by 5:00pm Nov. 1, 2005.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, this 1st day of November, 2005.

ELIZABETH T. MAASS
CIRCUIT COURT JUDGE

Copies have been furnished to all counsel on the attached counsel list.

16div-018928

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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS, INC.'S VERIFIED PETITION FOR A SHOW-CAUSE ORDER REGARDING MORGAN STANLEY'S CRIMINAL CONTEMPT OF COURT

THIS CAUSE came before the Court November 3, 2005 on CPH's Verified Petition for a Show-Cause Order Regarding Morgan Stanley's Criminal Contempt of Court, with counsel for CPH, MS & Co., and non-party respondents Donald G. Kempf, Jr., James P. Cusick, Soo-Mi Lee, and James F. Doyle present.

CPH sued MS & Co. for aiding and abetting and conspiring with Sunbeam Corporation to perpetrate a fraud. Early in the case, CPH was concerned that MS & Co. was not thoroughly looking for emails responsive to its discovery requests. On April 16, 2004, the Court entered an Agreed Order that required MS & Co. to search its oldest full backup tapes for emails subject to certain search parameters and certify compliance ("Agreed Order"). MS & Co. served a certificate of compliance signed by Arthur Riel, an Executive Director of Technology, on June 23, 2004 ("Certificate of Compliance").

On November 17, 2004 CPH learned that MS & Co. had found some backup tapes that had not been searched. Over the next ten weeks it sought more information about both how and when the tapes were found and when they would be searched. When MS & Co. failed to provide meaningful responses, on January 26, 2005 CPH served its Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Agreed Order ("Adverse Inference Motion.")

On January 31, 2005, MS & Co. served the Declaration of James F. Doyle ("Doyle Declaration"), an Executive Director in its Law Division, in support of its opposition to the Adverse Inference Motion. The Doyle Declaration was signed under penalty of perjury. In it, Doyle averred that "(a)t the end of October 2004, I learned that additional e-mail backup tapes had been located within Morgan Stanley, and that the data on those tapes had not been restored or searched prior to Morgan Stanley's May 14, 2004 e-mail production."

The court held an evidentiary hearing on the Adverse Inference Motion on February 14, 2005. In preparation for that hearing, on February 3, 2005 the court ordered MS & Co. to produce by noon on February 8, 2005 all documents within its "care, custody, or control, addressing or related to the additional email back up tapes, including matters relating to the time or manner in which they were discovered; by whom they were discovered; who else learned of their discovery and when; and the manner and timetable by which they were to be restored and made searchable . . ." ("February 3, 2005 Order"). The court issued its ruling on the Adverse Inference Motion March 1, 2005 ("Adverse Inference Order"), finding MS & Co. had engaged in discovery abuses and shifting the burden of proof on two elements of CPH's claims.

Thereafter, CPH discovered that MS & Co. had not been candid with it or the court at the February 14, 2005 hearing, prompting it to serve its Renewed Motion for Entry of Default Judgment ("Renewed Motion"). The court held an evidentiary hearing on the Renewed Motion on March 14 and 15, 2005. On March 23, 2005 it issued its Order on CPH's Renewed Motion for Entry of Default Judgment ("Default Order"), which built on the Adverse Inference Order. The Default Order found that MS & Co. had deliberately violated numerous discovery requests and orders, to the permanent prejudice of CPH. The violations included MS & Co.'s failure to timely notify CPH and the court that Riel's Certificate of Compliance was false because, among other deficiencies, 1,423 tapes found in a store room in Brooklyn (the "Brooklyn tapes") and 738 8 millimeter backup tapes ("8 millimeter tapes") had not been searched. The Default Order removed certain facts to

which the discovery had been directed from dispute and provided that a statement of MS & Co.'s failures would be read to the jury to consider in determining the propriety of a punitive damage award. The Default Order left the exact wording and content of the statement to be read open and invited counsel to submit proposals.

Kempf was general counsel for MS & Co. at all pertinent times. Cusick was Co-Head of Global Litigation. Lee was an Executive Director in MS & Co.'s Law Division and Doyle's supervisor. In May of 2005 in connection with the court's consideration of the litigation misconduct statement to be read to the jury, MS & Co. filed Offers of Proof for Lee, Doyle, and Cusick. In general, the Offers asserted that each first learned[1] there was email on the Brooklyn tapes in late October 2004 and on the 8 millimeter tapes in November 2004. Cusick and Lee asserted that each knew of no one in the Law Division who knew the information earlier.[2]

Based on the Offers of Proof, counsel for MS & Co. asked the court to instruct the jury that MS & Co.'s counsel did not know there was email on the Brooklyn and 8 millimeter tapes until October 2004. CPH contends that Kempf was sitting in the courtroom at the time of those arguments on May 16 and 18, 2005. The jury returned verdicts in CPH's favor for compensatory and punitive damages. The court rendered its Final Judgment in CPH's favor based on the verdicts on June 23, 2005. MS & Co. served its Notice of Appeal and posted a supersedeas bond June 27, 2005.

On June 17, 2005 MS & Co. served a document entitled "Notice".[3] The Notice

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[1]Lee's Offer qualifies her statements by asserting they are based on recollection.

[2]The Offer of Proof for Doyle stated that if called to testify he would state that he did not learn of the existence of email on the Brooklyn tapes until late October 2004 and that he "did not learn of the existence of 8 millimeter tapes containing emails until November 2004." It is unclear whether Doyle's proffered testimony is that he was unaware of the existence of the 8 millimeter tapes until November 2004, when he learned both that they existed and that some contained email, or that he may or may not have been aware of the tapes' existence, but was not aware that they contained email, prior to November 2004. Unlike Cusick and Lee, Doyle's Offer did not state that he knew of no one in the Law Division who knew that tapes contained email before he did.

[3]The Notice's legal effect, if any, on the proceedings is unclear to the court.

stated that

1. In the listed offers of proof and related statements, Morgan Stanley asserted that its Law Division was not aware that any of the Brooklyn Tapes contained e-mail until October 2004 and was not aware of certain 8-mm tapes until November 2004.

2. As a result of a review of emails discovered by a new email search, Morgan Stanley has determined that the offers of proof and related statements should be corrected to state that the Law Division was aware[4] in July 2004 that some of the Brooklyn Tapes contained email and that certain 8-mm tapes existed.

3. Morgan Stanley submits this Notice to: (a) correct Defendant's Offers of Proof from James P. Cusick, Soo-Mi Lee, and James Doyle (the first sentence of paragraph 4 and the entirety of paragraph 5);[5] (b) withdraw the Declaration of James F. Doyle of January 31 2005; and (c) correct related statements that reference or were based on the foregoing submissions. (footnote omitted).

4. Morgan Stanley does not limit this notice and correction to the specific documents described or listed herein. Morgan Stanley retracts, withdraws and corrects any and all statements, written or oral, made or submitted on its behalf, to the effect that its Law Division was not aware that any of the Brooklyn Tapes contained email until

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[4]The court asked MS & Co. to clarify whether the Notice was to be interpreted to state that MS & Co. first became aware that there was email on some of the Brooklyn tapes and that the 8 millimeter tapes existed in July 2004, or simply that MS & Co. knew those things in July 2004, without regard to whether it first learned them. While initially acknowledging that the Notice implied that MS & Co. first became aware of the items in July 2004, MS & Co. chose to stand on the language in the Notice, leaving unresolved whether it first learned of the items in July 2004 or simply knew of them as of that time.

[5]It would not be inconsistent for MS & Co. to assert that (i) Cusick, Lee, and Doyle did not know the Brooklyn tapes contained email or that the 8 millimeter tapes existed and contained email until late October and early November 2004, respectively; (ii) Cusick, Lee, and Doyle did not think any one else in the Law Division knew those facts before they did; and (iii) others in the Law Division did know those facts in July 2004. Counsel for MS & Co. clarified at the hearing that the Notice was intended to convey MS & Co.'s belief that Cusick, Lee, and Doyle themselves knew that some of the Brooklyn tapes had email and the 8 millimeter tapes existed in July 2004, though not convey that MS & Co. believes Cusick, Lee, or Doyle intentionally misstated their recollections when the Offers and Declaration were prepared.

October 2004 and was not aware of certain 8-mm tapes until November 2004.

In response to the Notice, CPH filed its Verified Petition for a Show-Cause Order Regarding Morgan Stanley's Criminal Contempt of Court, taking the position that by the Notice MS & Co. admitted it made false statements to the Court.

CPH filed, too, an Affidavit and Second Affidavit of Arthur Riel. Riel avers that in the first quarter of 2003 Cusick asked him to design the historical email archive; that Kempf approved the plan late in the second quarter of 2003; that MS & Co. knew of the Brooklyn tapes by May of 2004; that he believes that MS & Co. knew of the existence of the 8 millimeter tapes in the fall of 2003; that he knew by July 2, 2004 that the Brooklyn and 8 millimeter tapes had email dating back to at least 1998; that he told an attorney in MS & Co.'s Compliance of the Law Division and others within the division in a meeting on July 8, 2004 that the Brooklyn tapes contained email; that he told MS & Co.'s counsel on or about April 28, 2005 that he had told the Law Division that there was email on the Brooklyn tapes on July 8, 2004; that he told Cusick and others that the 8 millimeter tapes existed no later than January 2004; that Doyle asked him to sign the Certificate of Compliance after first asking a college student who performed data entry functions to sign it; and, finally, that MS & Co. had monthly reports and meeting minutes which could show when people within MS & Co. were notified of the existence of the tapes and the fact that some contained email.

CPH seeks to have this court initiate criminal contempt proceedings against MS & Co., Kempf, Cusick, Lee, and Doyle. It contends that MS & Co. is in contempt of court for (i) offering the Declaration and Offers of Proof with knowledge they contained false information; (ii) repeatedly arguing for favorable rulings based on the allegedly false information; and (iii) failing to comply with the Court's discovery orders. It contends Kempf is in contempt for failing to correct the misrepresentations of fact made to the Court in his presence on May 16 and 18, 2005. It contends Lee and Cusick are in contempt for

proffering allegedly false statements to the court with the intention the court rely on them. Finally, it contends Doyle is in contempt for the same, together with signing the allegedly false Declaration with knowledge it would be submitted to the court. It contends each of these acts was intended to and did obstruct the administration of justice.[6]

Here, the allegedly contemptuous acts fall within two general classes. First, CPH contends that MS & Co. failed to comply with the court's orders to produce documents relating to the email issue, including the February 3, 2005 Order requiring it to produce all documents addressing or related to the backup tapes. It asserts that Riel's affidavit would allow a reasonable person to conclude that reports and minutes were generated that were responsive to the court's February 3, 2005 Order and that MS & Co. deliberately failed to produce those items.[7] Second, CPH contends that MS & Co.'s assertions in the Notice together with Riel's affidavits would allow a reasonable person to conclude that Kempf, Cusick, Lee, and Doyle knew that Law Division personnel were aware of the existence of email on some of the Brooklyn tapes and the 8 millimeter tapes in July 2004 and that representations to the contrary were intended to mislead the Court and obstruct the administration of justice. As a subcategory, CPH contends that Doyle's Declaration was perjurious.

It is reasonable to assume that on appeal MS & Co. will question both the factual findings in the Default Order and the sanctions imposed. This will, of necessity, implicate the Offers and the assertions of counsel, which were used in argument about the jury statement given as a result of the Default Order; the Declaration, which was used to oppose the Adverse Inference Motion; and the propriety of and level of compliance with the

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[6]See, e.g., Milian v. State, 764 So. 2d 860 (Fla. 4th DCA 2000), rev. den. 786 So. 2d 579 (Fla. 2001); M.W. v. Lafthiem, 855 So. 2d 683 (Fla. 2d DCA 2003); Murrell v. State, 595 So. 2d 1049 (Fla. 4th DCA 1992); see, also, Duff v. Southern Bell Telephone and Telegraph Co., 386 So. 2d 253 (Fla. 5th DCA 1980) (action can be obstructionist even if ultimate outcome unaffected); Milian; Thomson v. State, 398 So. 2d 514 (Fla. 2d DCA 1981).

[7]CPH argues, too, that the Notice itself refers to yet other emails responsive to the February 3, 2005 Order not timely produced.

February 3, 2005 Order, among others, violation of which were used to support the Default Order.

Once an appellate court's jurisdiction attaches the trial court is divested of jurisdiction to consider matters that may affect the matters on appeal. See Willey v. W.J. Hoggson Corp., 89 Fla. 446, 105 So. 126 (1925); Waltham A. Condominium Association v. Village Management, Inc., 330 So. 2d 227 (Fla. 4th DCA 1976). While post-judgment proceedings collateral to and independent of the subject matter may proceed while a judgment is on appeal, the trial court lacks jurisdiction where the matter is "directly intertwined" with the matter on appeal. Amlan, Inc. v. Detroit Diesel Corporation, 651 So. 2d 701, 706 (Fla. 4th DCA 1995); Publix Supermarkets, Inc. v. Griffin, 837 So. 2d 1139 (Fla. 2d DCA 2003); cf. Miseveth v. Stafford, 667 So. 2d 1012 (Fla. 3d DCA 1996).

If the court were to pursue criminal contempt as requested,[8] it could alter the current record of what MS & Co. knew and when it knew it. It could add to the judicial response to MS & Co.'s litigation misconduct The current record of MS & Co.'s litigation misconduct, and the propriety and correctness of this court's rulings based on it, are presently before the appellate court. Indeed the argument that the appeal divested in court of jurisdiction to consider contempt of court based on discovery violations is stronger here than in Amlan. In Amlan, all requested documents were eventually produced, albeit at extraordinary cost, thus the record before the appellate court on the point was complete. Here, CPH argues all discovery was not made and, therefore, pursuit of the contempt allegations could result in a separate record of discovery abuses, perhaps one inconsistent with the record currently before the appellate court. The court determines, then, that the allegedly contemptuous conduct is directly intertwined with the matters on appeal, and that this court lacks jurisdiction to consider CPH's Verified Petition for a Show-Cause Order Regarding Morgan Stanley's Criminal Contempt of Court. Based on the foregoing, it is

[8]The Court has made no determination that it could or should. MS & Co. and the non-party respondents vigorously contend that they are not guilty of contempt.

ORDERED AND ADJUDGED that this court declines to rule on CPH's Verified Petition for a Show-Cause Order Regarding Morgan Stanley's Criminal Contempt of Court pending disposition of the primary action on appeal.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 10th day of November, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiffs,

vs.

MORGAN STANLEY & CO., INC.,

Defendant,

_____/

CASE NO.: 2003 CA 005045 AI

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned has called up for hearing the following:

DATE: November 22, 2005

TIME: 8:45 a.m.

JUDGE: Hon. Elizabeth T. Maass

PLACE: Palm Beach County Courthouse, Room #11.1208, 205 North Dixie Highway, West Palm Beach, FL 33401

SPECIFIC MATTERS TO BE HEARD:

MOTION FOR ENTRY OF JUDGMENT ON CPH'S MOTION TO TAX COSTS

Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and Fedex to all Counsel on the attached list, this 16th day of November, 2005.

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Coleman Holdings, Inc. vs Morgan Stanley & Company
Case No.: 2003 CA 005045 AI
Notice of Hearing

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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO.: 2003 CA 005045 AI

MORGAN STANLEY & CO., INCORPORATED,

Defendant.
_____/

MOTION FOR ENTRY OF JUDGMENT ON CPH'S MOTION TO TAX COSTS

Pending before the Court is Coleman (Parent) Holdings Inc.'s Motion to Tax Costs, which was filed on July 25, 2005. Coleman (Parent) Holdings Inc. ("CPH") now moves for entry of a judgment for taxable costs in the amount of $950,000.00. CPH has agreed to forebear for thirty (30) days from any attempt to collect or otherwise execute on the judgment on CPH's Motion to Tax Costs so to allow Morgan Stanley the opportunity to file its Notice of Appeal and to post an appropriate superseadeas bond pursuant to Florida Rule of Appellate Procedure 9.310.

WHEREFORE, Coleman (Parent) Holdings Inc. ("CPH") moves this Court to enter the attached proposed Judgment on CPH's Motion to Tax Costs, which awards CPH a judgment in the amount of $950,000.00.

NOV. 16, 2005

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Counsel for Coleman (Parent) Holdings Inc.

[Proposed]

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO.: 2003 CA 005045 AI

MORGAN STANLEY & CO., INCORPORATED,

Defendant.
_____/

JUDGMENT ON CPH'S MOTION TO TAX COSTS

THIS CAUSE having come before the Court upon the motion of Coleman (Parent) Holdings Inc. ("CPH") to enter judgment on CPH's Motion to Tax Costs, filed July 25, 2005,

IT IS ADJUDGED that Plaintiff CPH shall recover, as the prevailing party pursuant to Fla. Stat. § 57.041, from defendant Morgan Stanley the amount of Nine Hundred Fifty Thousand ($950,000) dollars. Execution of this Judgment shall be stayed for thirty (30) days to allow Morgan Stanley the opportunity to post an appropriate bond pursuant to Florida Rule of Appellate Procedure 9.310.

DONE AND ORDERED in the West Palm Beach, Palm Beach County, Florida this ___ day of October, 2005.

_____
Elizabeth T. Maass
Circuit Court Judge

cc: Counsel of Record on attached Service List

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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

vs. CASE NO.: 2003 CA 005045 AI

MORGAN STANLEY & CO., INCORPORATED,

Defendant.
_____/

JUDGMENT ON CPH'S MOTION TO TAX COSTS

THIS CAUSE having come before the Court upon the motion of Coleman (Parent) Holdings Inc. ("CPH") to enter judgment on CPH's Motion to Tax Costs, filed July 25, 2005, and the parties have agreed CPH incurred $950,000.00 in costs that are taxable if it is the prevailing party,

IT IS ADJUDGED that Plaintiff CPH shall recover, as the prevailing party pursuant to Fla. Stat. § 57.041, from defendant Morgan Stanley the amount of Nine Hundred Fifty Thousand ($950,000) dollars. Execution of this Judgment shall be stayed for thirty (30) days to allow ~~Morgan Stanley the opportunity to~~ post an appropriate bond pursuant to Florida Rule of Appellate Procedure 9.310. Recover judgment held in

DONE AND ORDERED in the West Palm Beach, Palm Beach County, Florida this 22 day of October, 2005.

Elizabeth T. Maass
Circuit Court Judge

cc: Counsel of Record on attached Service List

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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

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NOTICE

Defendant, Morgan Stanley & Co. Incorporated, by and through its undersigned counsel, hereby files this Notice and states as follows:

At the November 3, 2005 contempt hearing the Court inquired about the meaning of certain language in the Notice filed on June 17, 2005. The Notice is attached as Appendix "A." A copy of the colloquy with the Court is attached as Appendix "B." The Court's November 10, 2005 Order noted that the colloquy left the issue unresolved. See Appendix C. p.4, n.4. This Notice resolves any ambiguity. Morgan Stanley's Law Division was aware of the existence of the referenced e-mail back-up tapes and the presence of e-mail on some of those tapes prior to July 2004.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 21st day of December, 2006.

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BY Joseph Ianno, Jr.
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APPENDIX A

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

CASE NO: CA 03-5045 AI

vs.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.

_____/

NOTICE

Morgan Stanley & Co. Incorporated ("Morgan Stanley") hereby notifies the court and Plaintiff that it retracts, withdraws and corrects certain statements in the offers of proof, declaration, and related statements more fully described and listed below.

1. In the listed offers of proof and related statements, Morgan Stanley asserted that its Law Division was not aware that any of the Brooklyn Tapes contained e-mail until October 2004 and was not aware of certain 8-mm tapes until November 2004.

2. As a result of a review of e-mails discovered by a new e-mail search, Morgan Stanley has determined that the offers of proof and related statements should be corrected to state that the Law Division was aware in July 2004 that some of the Brooklyn Tapes contained e-mail and that certain 8-mm tapes existed.

3. Morgan Stanley submits this Notice to: (a) correct Defendant's Offers of Proof from James P. Cusick, Soo-Mi Lee, and James F. Doyle (the first sentence of paragraph 4 and the entirety of paragraph 5); (b) withdraw the Declaration of James F. Doyle of January 31,

2005; and (c) correct related statements that reference or were based on the foregoing submissions[1].

4. Morgan Stanley does not limit this notice and correction to the specific documents described or listed herein. Morgan Stanley retracts, withdraws and corrects any and all statements, written or oral, made or submitted on its behalf, to the effect that its Law Division was not aware that any of the Brooklyn Tapes contained e-mail until October 2004 and was not aware of certain 8-mm tapes until November 2004.

---

[1] The related statements include: paragraph 4 on pages 2-3 of Morgan Stanley's Opposition to CPH's Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 16, 2004 Agreed Order, dated January 31, 2005; the first two sentences of the second full paragraph on page 2 of Morgan Stanley's Supplemental Opposition to CPH's Motion for Adverse Inference Instruction, dated February 11, 2005; the last paragraph on page 6 that carries over to page 7 of Morgan Stanley Opposition to CPH's Motion for a Default Judgment, dated February 28, 2005; the last clause of the fourth sentence from the bottom and the last two sentences on page 20, and the first two sentences of the second full paragraph on page 31 of Morgan Stanley's Opposition to CPH's Motion for a Default Judgment (corrected version filed March 13, 2005 and original version served March 12, 2005); the second sentence in the second full paragraph on page 7 of Morgan Stanley's Submission of Proposed Statement to be Read to the Jury Pursuant to Court's March 23, 2005 Order on CPH's Renewed Motion for Entry of Default Judgment, dated March 28, 2005; the second sentence of the first full paragraph on page 24, the second sentence on page 26, the heading for Section C and the second and third sentences in that section on page 26, the last clause in the second to last sentence and the last sentence in that section on page 27, the final sentence on page 33 that carries over to the top of page 34, and the first clause of the second sentence of the first full paragraph on page 35 of the Summary of Offer of Proof Regarding Defendant's Alleged Litigation Misconduct (Addendum to Morgan Stanley's Opposition to Coleman (Parent) Holdings Inc.'s Second Renewed Motion for Correction and Clarification of the Litigation-Misconduct Statement) ("Summary of Offer of Proof"), originally filed May 12, 2005 and re-filed on May 17, 2005 in Phase II; February 2, 2005 Hr'g Tr. 132:1-7, 133:6-11, 147:22-25 (statements by counsel); the second half of the heading for Section C on page 15 and the first paragraph of page 17 of Morgan Stanley's Response to CPH's Chronology of Purported Discovery Abuses, dated March 15, 2005; the second, third and fifth rows (first sentence) on page 6 of Morgan Stanley & Co. Inc.'s Overnight Response to CPH's Additional Submission in Support of its Motion for Default, dated March 15, 2005; May 16, 2005 Hr'g Tr. 15266:4-8; and May 18, 2005 Hr'g Tr. 15607:4-8, 11-13, 15608:8-13, 17-19.

Respectfully submitted,

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BY: _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record on the attached service list by facsimile and Federal Express on this 17th day of June, 2005.

Mark C. Hansen (*pro hac vice*)
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APPENDIX B

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 03 CA 005045 AI

COLEMAN (PARENT) HOLDINGS, INC.,

Plaintiff,

vs.

MORGAN STANLEY & CO., INC.,

Defendant.

- - -

TRANSCRIPT OF THE PROCEEDINGS BEFORE
THE HONORABLE ELIZABETH T. MAASS

- - -

West Palm Beach, Florida
Thursday, November 3, 2005
2:56 p.m. - 6:10 p.m.

APPEARANCES:

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APPEARANCES (continued):

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BY: ROBERT CRITTON, ESQUIRE

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BY: AUDREY STRAUSS, ESQUIRE

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KRONISH, LIEB, WEINER
& HELLMAN, LLP
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Counsel for James Doyle
BY: ALAN LEVINE, ESQUIRE and
STEVEN COHEN, ESQUIRE

BE IT REMEMBERED that the foregoing proceedings were had before the HONORABLE ELIZABETH T. MAASS, in Chambers, in the Palm Beach County Courthouse, West Palm Beach, Florida, on Thursday, November 3, 2005 starting at 2:56 p.m., with appearances as hereinabove noted, to wit:

* * *

THE COURT: Good afternoon. Have a seat.

MR. IANNO: Afternoon, Your Honor.

MR. SCAROLA: Good afternoon, Your Honor.

THE COURT: And we're here on Coleman's verified petition for show cause order regarding Morgan Stanley's criminal contempt of court. Why don't we all introduce ourselves. Front row I know.

MR. SCAROLA: Do we have enough time, Your Honor? We'll skip our introductions.

THE COURT: The folks I don't know or haven't met personally probably should introduce themselves, maybe starting in the back row. Mr. Shaw, obviously I know you.

MR. SCHWARTZ: Barry Schwartz.

MR. HIRSCH: Sam Hirsch.

THE COURT: I know you.

MR. DUNCAN: Douglas Duncan.

MR. SIFFERT: John Siffert from New York, Your Honor, for Don Kempf.

MS. STRAUSS: Audrey Strauss from New York for Soo Mi-Lee.

MR. WEINBERG: Sandy Weinberg from Tampa for Soo Mi-Lee.

THE COURT: Okay.

MR. FISKE: Bob Fiske from New York for Jim Cusick.

MR. LUBIN: Richard Lubin, Your Honor, for James Doyle.

MR. LEVINE: Alan Levine for James Doyle.

MR. CRITTON: Bob Critton for Jim Cusick.

THE COURT: Did they not give you a chair?

MR. CRITTON: They relegated me.

THE COURT: We can find you a chair. That's --

MR. CRITTON: That's okay. Would you prefer that I be here?

THE COURT: I don't care. I don't want you to think we didn't have room for you.

MR. CRITTON: I get better service here than I do at my office.

THE COURT: I'm assuming that says a lot. Thank you.

MR. CRITTON: It does. Thank you.

THE COURT: About your office.

I don't know how you want to best proceed or how you want to divide up your time. I -- in reviewing the papers, it strikes me that a large part of Coleman's argument is based on the notice that was filed by Morgan Stanley. I have some questions about some of the statements in the notice and what they mean, and I don't know if Morgan Stanley is able to clarify those first. And then maybe we can talk about how we want to divide up time and go forward. Are you willing --

MR. SCAROLA: We would be happy to proceed in that fashion, Your Honor.

THE COURT: And, Mr. Hansen, I'm not suggesting your client -- Let me ask you what my questions are first on the notice and maybe you can help.

MR. HANSEN: Yes, Your Honor.

THE COURT: Do you have a copy in front of you?

MR. HANSEN: I will have one, Your Honor.

THE COURT: Okay, great. Thanks. As I said at a prior hearing, I'm still a little befuddled

about the purpose of the notice. If we're going to have -- I'd like to at least understand it. Paragraph two, all right, it says, as a result of review of e-mails discovered by a new e-mail search, Morgan Stanley determined that the offers of proof and related statements should be corrected to state the law -- and then corrected to state something. Sort of I guess I have two questions. First I want to understand specifically what's being corrected in the offers of proofs, because it strikes me that what Morgan Stanley is saying here is that it has since discovered its law division was aware of e-mail on the Brooklyn tapes and the eight-millimeter tapes in July of 2004, correct?

MR. HANSEN: Yes, Your Honor.

THE COURT: That's not inconsistent with what's in the offers of proof as I understand them. And I want to know are you withdrawing -- tell me what you're withdrawing in the offers of proof.

MR. HANSEN: Your Honor, I think you put your finger on it. I don't want to go beyond the words. I just want to be clear on what the notice says and what we think it does. We

wanted to withdraw any suggestion to the court that had previously been made, whether an offer of proof or argument of counsel the law division was not on notice of those facts in July of '04.

THE COURT: Sure, but, for instance, if you go to paragraph three, it submits the notice to, A, correct Defendant's offers of proof from the three individuals. Although when it -- sort of has the parenthetical, the first sentence paragraph four and the entirety of paragraph five, is that only the offer of proof as to Mr. Doyle, or is it all three?

MR. HANSEN: All three, Your Honor.

THE COURT: On the offers of proof all you're amending is the first sentence of paragraph four and the entirety of paragraph five?

MR. HANSEN: That's where that subject was addressed, I believe, Your Honor.

THE COURT: Okay. Then if we go to the offers of proof, I didn't see a paragraph five, unless we're counting paragraphs differently. So tell me exactly when you say the first paragraph of -- first sentence of paragraph four what we're talking about, what verbiage we're

speaking of.

MR. HANSEN: We've withdrawn the offers of proof, I believe, totally, Your Honor. The Doyle one must be the one that refers to the fifth paragraph.

THE COURT: I have an offer of proof as to three, as I understand it. I also have the declaration as to Mr. Doyle. The declaration as to Mr. Doyle is paragraph 3B of your motion. I'm talking about of the notice.

MR. HANSEN: There's also a proffer for Mr. Doyle.

THE COURT: Right. And isn't that the offer of proof?

MR. HANSEN: Yes, Your Honor.

THE COURT: Right. So what I'm talking about now is 3A. Do you have that in front of you with the notice?

MR. HANSEN: I do have it, Your Honor.

THE COURT: Okay. The parenthetical, is that meant to apply only to the offer of proof for Mr. Doyle or as to all three?

MR. HANSEN: I believe that's as to Mr. Doyle, Your Honor.

THE COURT: Okay. So if we go to Mr. Doyle,

I want to make sure first I understand what you're withdrawing as to him. You're withdrawing the first sentence of one, two, three -- you're withdrawing the statement Mr. Doyle did not learn of the existence of the e-mail backup tapes which had been referred to as the Brooklyn tapes until late October, 2004.

MR. HANSEN: Yes, Your Honor.

THE COURT: And you're withdrawing the statement Mr. Doyle did not learn of the existence of the eight-millimeter tapes containing e-mail until November 2004.

MR. HANSEN: Morgan Stanley is withdrawing those things, yes, has withdrawn those.

THE COURT: Okay. Now as to the other two, you're withdrawing them in their entirety as to Cusick and Lee, or are you withdrawing still just -- I'm trying to figure out what you're withdrawing first.

MR. HANSEN: The gist of it is what we're withdrawing is anything that relates to the subject matter.

THE COURT: I'm still sort of trying to clarify it. To me it's not inconsistent for Miss Lee to say I didn't know about it until

October 2004; to the best of my knowledge, nobody in the law division knew about it until October of 2004; and then have it turn out, oh, somebody in the law division did actually know in July of 2004. Those are not three inconsistent statements.

So I'm trying to figure out when you say you're correcting... for instance, when you withdraw Miss Lee's statement that she didn't know until October of 2004, I'm assuming you are now saying she did know before then or simply that she was mistaken in believing nobody in the law division knew before then.

MR. HANSEN: Your Honor, I would leave that to Miss Lee's counsel. From Morgan Stanley's standpoint we didn't want to make any representation. We're withdrawing any suggestion from any witness proffered to the court that members of the law division, and that includes all those people, didn't know.

THE COURT: What are you affirmatively representing now, that Morgan Stanley is correcting the record to show these three individuals did know in July of 2004 or simply some unnamed person in the law division knew?

MR. HANSEN: Your Honor, I think the proffer through the notice --

THE COURT: I don't understand. Again, if I understood it, I wouldn't ask the questions. I mean, if you're saying that that's not something you're prepared to clarify, that's fine, we can go forward.

MR. HANSEN: Your Honor, I guess I'm not prepared to go beyond what the notice says. To the extent it's unclear, I apologize. But we have withdrawn any suggestion on the subject from those proffers. In other words -- there's no -- in other words, Your Honor, previously there was a representation and a proffer from Miss Lee on that subject. Take her for example.

THE COURT: Miss Lee said I didn't know before October. I'm using her as an example. I didn't know before October of 2004. And to the best of my knowledge, nobody from the law division did.

MR. HANSEN: And that's withdrawn.

THE COURT: But now you've said you've corrected that to say someone in the law division did know in July of 2004. Well, those three statements are not inconsistent with each

other, so I'm not sure why -- I'm not sure -- By withdrawing the first two, are you telling me they were simply wrong, or are you just saying you want to just take them out of the record, you're not telling me whether they're wrong or right?

MR. HANSEN: Well, I think what we're saying, Your Honor, is several things. Maybe there's some things we're saying, some things we're not saying. What we're saying is we want no representation to the Court from Morgan Stanley about any members of the law division and when they were aware of those subjects. We've taken them out. There were proffers on that subject. We've withdrawn the proffers on that subject. They don't exist in the record. We have not made affirmative representation on behalf of the individuals as to what they knew and when they knew it.

THE COURT: So you're not taking out when Miss Lee said she didn't know until October of 2004. You're not prepared to admit that was incorrect. You're just taking -- we're taking it out of the record? How are we doing that?

MR. HANSEN: We're correcting the record,

Your Honor.

THE COURT: Then I need to know what -- are you saying we submitted a proffer from Miss Lee that said she didn't know until October 2004. We have an ethical obligation. We recognize that that's erroneous, and we're now correcting it to say she did know July of 2004, or are you saying we made a proffer; it's in the record Miss Lee knew in October 2004. We're not prepared to say that was wrong, but we want to somehow open up the record and remove that piece of paper --

MR. HANSEN: We've withdrawn the representation.

THE COURT: Then -- We can talk procedurally what that means, but I had understood from a prior discussion that Morgan Stanley felt it had an ethical obligation to correct erroneous -- it's in the testimony, but erroneous proffers in the record. Now what you're telling me is you're not correcting an erroneous proffer because you're not suggesting what she said was wrong. You simply want to remove a part of proffer.

MR. HANSEN: No, Your Honor, we're

affirmatively representing the members of the law division were aware. We previously made an argument based on that.

THE COURT: But what you want to do is remove the proffer that Miss Lee did not know until October 2004. And I need to know are you just trying to reopen the proffer and remove that and put it to the side and not tell me anything about the subject, or are you telling me that was wrong?

MR. HANSEN: Your Honor, we have stated that we did not believe those proffers and those subjects should be relied upon by the Court, so we've withdrawn them.

THE COURT: But you're not prepared to say --

MR. HANSEN: I can't make a representation.

THE COURT: -- you believe it was wrong --

MR. HANSEN: I can't make representation of Miss Lee's knowledge or lack of knowledge.

THE COURT: But it was a notice filed by Morgan Stanley. I'm trying to figure out what you meant.

MR. HANSEN: We've asked Your Honor not to credit that. We've said it is erroneous.

THE COURT: I can think of a bunch of procedural questions, but I understand what, I think, you're telling me, and that's you're not willing to add what we have.

MR. HANSEN: No, Your Honor. Let me see if I can be more clear. I don't think we can stand here and supplement, I don't, frankly, think we're required or should be required to provide additional evidence. The question is whether there's a record about a lie. So I don't want to get bypassed.

THE COURT: I understand.

MR. HANSEN: But if you're asking what the technical -- what we have done here, we have said, as Morgan Stanley, not as Miss Lee or her counsel --

THE COURT: No, I understand.

MR. HANSEN: -- we have said, Your Honor, these proffers were made on this subject, and we don't believe you should rely on them. Members of the law department were aware of these facts in July of '04.

THE COURT: That's a little bit different than what -- and maybe I misunderstood what you told me at a prior hearing. I thought what

Morgan Stanley was saying -- and, again, I'm a little confused by the whole notice, but I thought what Morgan Stanley was saying is we made representations to you. We now know as officers of the Court and a party before the Court they were incorrect, and we want to make them correct. What you're now telling me is, well, I'm not really prepared to say they were incorrect, but we just want to remove them.

MR. HANSEN: From Morgan Stanley's standpoint, Your Honor, we believe they were incorrect and we take them back. But, Your Honor, I just don't think it's appropriate to ask me to represent Miss Lee's knowledge.

THE COURT: I'm not at all.

MR. HANSEN: I can tell you as Morgan Stanley's lawyer we put in a proffer from her. We've told the Court that's inaccurate. We don't want it relied upon.

THE COURT: All I'm asking -- And let me ask a simple question. In submitting the notice, is it Morgan Stanley's position that Ms. Lee's proffer that she was not aware of the existence of the e-mail or the tapes until October or November of 2004, is that incorrect?

MR. HANSEN: That is Morgan Stanley's position, Your Honor.

THE COURT: That that was not a correct statement?

MR. HANSEN: That there would be evidence to suggest notice to the people for proffers submitted. Yeah, we're not talking about --

THE COURT: Notice to Miss Lee. Not just that somebody in the law department knew about it.

MR. HANSEN: Not just somebody. As to Miss Lee's representation, we believe that was inaccurate, and we have sought to have it, as Morgan Stanley, withdrawn. But I can't say, Your Honor, and I don't have Miss Lee's state of mind or what she knew and when she knew it.

And I assert in the strongest terms that there is nothing to suggest that Ms. Lee or any other Morgan Stanley person deliberately misstated their knowledge. But I am stating that from Morgan Stanley's standpoint we have corrected the prior representations to take out things we believe to be inaccurate. And Ms. Lee's representation about her knowledge of the e-mail, Mr. Doyle, Mr. Cusick have been

withdrawn in their entirety because we believe them to be inaccurate on that subject.

THE COURT: The second question I had about the notice, and you tell me, is you say you want to correct the record to state the law division was aware in July of 2004 that some Brooklyn tapes contained e-mail and certain eight-millimeter tapes existed. Do you mean to say "first aware" or do you mean simply to say "aware"?

MR. HANSEN: Your Honor, it says what it says. The prior discussion had been whether July or October. Those were the suggested dates. And this says that -- it says what it says.

THE COURT: So you're not attempting to say that was when Morgan Stanley was first aware? You're simply saying they were aware?

MR. HANSEN: We have said they were aware at that time.

THE COURT: Okay.

MR. HANSEN: And that was the focus of the issue before us, so we've addressed the focus of the issue before. Again, this is not a representation -- I wish to be very clear --

THE COURT: I just don't want to misapprehend what it is the notice is saying. The notice is not saying we were first aware in July 2004. It's not saying it was. It's just saying we were aware in July of 2004.

MR. HANSEN: It's -- Certainly the implication of notice would suggest first aware, Your Honor.

THE COURT: It is, and that's why I want to -- before I accept that implication as what you intended to convey I want to know what that --

MR. HANSEN: That's the implication of the notice. I suspect the way -- again, we're getting into the drafting of it. That was the issue before July versus October. So I think the implication of the notice is that was when it came, the new information came --

THE COURT: But is Morgan Stanley standing on that implication that what you intend to say is that you, Morgan -- the law division was first aware in July of 2004? Because that is the implication. And before we argue from that I want to make sure we're all clear on what we're talking about.

MR. HANSEN: Your Honor, on that particular point, this notice corrected previous statements. I'm aware Mr. Reil comes into Court on his third affidavit and says he told people in January of '04 about the eight-millimeter tapes, for example. That's a recent allegation by Mr. Riel.

THE COURT: As I said, when I first read this, to me what it said was that the law division was first aware in July of 2004. And, again, I agree with you, that was the implication. If that's not what Morgan Stanley intends it to say, that's fine. I just need to know what it says.

MR. HANSEN: I think that's the fair reading of the notice, Your Honor.

THE COURT: But is that what you intend -- is Morgan Stanley telling me the law division was first aware July of 2004 of the existence of the e-mail and the eight-millimeter tapes?

MR. HANSEN: Morgan Stanley is making that representation to the Court based on its knowledge at the time.

THE COURT: Right here now?

MR. HANSEN: Right here now? Your Honor --

THE COURT: Or as of even the day you filed this, June 17th of 2005?

MR. HANSEN: As of the day we filed it Morgan Stanley -- this was the correction Morgan Stanley sought to make.

THE COURT: Okay. Again, I just want to make sure we're both really clear. Are you telling me I should read this and Morgan Stanley intends me to read it as saying it's corrected to state that the law division was first aware in July of 2004?

MR. HANSEN: I think that's the fair reading of it, Your Honor.

THE COURT: Is that the reading Morgan Stanley wants me to accept for purposes of this hearing?

MR. HANSEN: Your Honor, I think for purposes of this hearing we should stand on what we've provided.

THE COURT: If you just want to say stand on the words, that's fine. Anything more?

MR. HANSEN: I don't want to provide any more or less.

THE COURT: That's fine. The final question I have, and it's a minor point, in some of your

opposition papers you talk about the law division being informed in July of 2004. Was that just a -- well, I mean informed -- that there was some affirmative act in July of 2004. Although I didn't see that from the notice. Is that -- are we just parsing words or?

MR. HANSEN: Was aware -- they were on notice. I think, you know, that could be a number of things.

THE COURT: When you say informed can we just say they knew?

MR. HANSEN: Could have been from a conversation, could have been from an e-mail.

THE COURT: Sure.

MR. HANSEN: They were on notice. They were made aware. They are informed.

THE COURT: We agree the notice doesn't tell me something specific happened in July of 2004 to inform Morgan Stanley's law division of the e-mail or the tapes?

MR. HANSEN: Judge, again, I think all we can do is stand on what we filed as the notice.

THE COURT: I appreciate that.

MR. HANSEN: As to the extent there are any new -- I don't want to provide additional

testimony. I'm not in a position to make representations of fact as to what's true and what's not true. This was the notice supplied by Morgan Stanley.

THE COURT: Again, I just want to understand what you meant. That's all. So as I understand it, you are telling me that it's Morgan Stanley's position that the statements by Mr. Cusick, Mr. Doyle and Miss Lee that they were unaware of the e-mail or the eight-millimeter tapes until October, November of 2004 was simply incorrect. And we can talk about whether it was an intentional or -- I'm not -- was simply incorrect. That their statements to the best of their knowledge nobody in the law division even knew about the e-mail or eight-millimeter tapes until October or November 2004 was simply incorrect. And, in addition, a third fact was at least somebody in the law division knew of the e-mail and eight-millimeter tapes in July of 2004.

MR. HANSEN: It says the law division.

THE COURT: Right. We don't know -- we don't know who.

MR. HANSEN: Not further specified.

That's --

THE COURT: Is that what you're telling me?

MR. HANSEN: That's accurate.

THE COURT: And what you're saying is that the law division or someone in it was aware of the e-mail and the tapes in July of 2004, but that doesn't necessarily imply when it was first learned?

MR. HANSEN: I just don't think I can do any better than -- say any other words.

THE COURT: I appreciate the clarification. Thanks. That's all I needed to know.

How do you want to divide up time?

MR. SCAROLA: May I make a suggestion, Your Honor, that perhaps one additional clarification would be helpful?

THE COURT: And what would that be?

MR. SCAROLA: In the June 17 notice there is a reference to a new e-mail search and a review of e-mails discovered by new e-mail search. I'm wondering whether Morgan Stanley would like to tell us what that means.

THE COURT: That's not -- I understand your client's curiosity, and I don't think that's material to what I'm doing today.

any kind of intent.

THE COURT: Other than Mr. Hansen's -- if I accept the clarification from Morgan Stanley today that at least there is an e-mail that would suggest that he knew it was false --

MR. LUBIN: In other words, if we were in a different courtroom on a different matter and that had been included, this the verified petition --

MR. HANSEN: Your Honor, that's not what I said.

THE COURT: Are you saying that they -- I understood you to say Lee, Cusick and Doyle Morgan Stanley believed knew in July of 2004 the Brooklyn tapes had e-mail and the eight-millimeter tapes existed.

MR. HANSEN: We're saying that there was notice to them at that time. That does not mean then they submitted subsequent false --

THE COURT: Right, but you're saying in July of 2004 they knew of those items. They may have forgotten them in January of 2005 or May of 2005.

MR. HANSEN: Morgan Stanley's view is -- We don't want the Court to rely on the

misrepresentations on a contrary basis from Morgan Stanley's view what they were informed on in July of 2004. But we did not, I want to be absolutely clear, we do not make any representation or any sort of suggestion they intentionally did anything false.

THE COURT: Yes, but that they did make misstatements in at least the offers of proof.

MR. HANSEN: It was inaccurate. The statement as to when they first learned was inaccurate. I'm not sure there's evidence to the contrary at an earlier time. That's all I have.

THE COURT: Okay.

MR. LUBIN: But if you follow it along the way, Counsel isn't going to be a witness at a final hearing. And when we're talking about how could we ever prove that James Doyle had knowledge or that he intentionally lied to the court? Not from an argument of counsel. I mean, from evidence. And there's no evidence alleged by CPH here. There's no evidence.

THE COURT: Well, that goes back to the statement I asked you before. Were you contending that the information conveyed by

APPENDIX C

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CA 03-5045 AI

COLEMAN (PARENT) HOLDINGS, INC.,
Plaintiff(s),
vs.

MORGAN STANLEY & CO., INC.,
Defendant(s).
_____/

ORDER ON COLEMAN (PARENT) HOLDINGS, INC.'S VERIFIED PETITION FOR A SHOW-CAUSE ORDER REGARDING MORGAN STANLEY'S CRIMINAL CONTEMPT OF COURT

THIS CAUSE came before the Court November 3, 2005 on CPH's Verified Petition for a Show-Cause Order Regarding Morgan Stanley's Criminal Contempt of Court, with counsel for CPH, MS & Co., and non-party respondents Donald G. Kempf, Jr., James P. Cusick, Soo-Mi Lee, and James F. Doyle present.

CPH sued MS & Co. for aiding and abetting and conspiring with Sunbeam Corporation to perpetrate a fraud. Early in the case, CPH was concerned that MS & Co. was not thoroughly looking for emails responsive to its discovery requests. On April 16, 2004, the Court entered an Agreed Order that required MS & Co. to search its oldest full backup tapes for emails subject to certain search parameters and certify compliance ("Agreed Order"). MS & Co. served a certificate of compliance signed by Arthur Riel, an Executive Director of Technology, on June 23, 2004 ("Certificate of Compliance").

On November 17, 2004 CPH learned that MS & Co. had found some backup tapes that had not been searched. Over the next ten weeks it sought more information about both how and when the tapes were found and when they would be searched. When MS & Co. failed to provide meaningful responses, on January 26, 2005 CPH served its Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Agreed Order ("Adverse Inference Motion.")

On January 31, 2005, MS & Co. served the Declaration of James F. Doyle ("Doyle Declaration"), an Executive Director in its Law Division, in support of its opposition to the Adverse Inference Motion. The Doyle Declaration was signed under penalty of perjury. In it, Doyle averred that "(a)t the end of October 2004, I learned that additional e-mail backup tapes had been located within Morgan Stanley, and that the data on those tapes had not been restored or searched prior to Morgan Stanley's May 14, 2004 e-mail production."

The court held an evidentiary hearing on the Adverse Inference Motion on February 14, 2005. In preparation for that hearing, on February 3, 2005 the court ordered MS & Co. to produce by noon on February 8, 2005 all documents within its "care, custody, or control, addressing or related to the additional email back up tapes, including matters relating to the time or manner in which they were discovered; by whom they were discovered; who else learned of their discovery and when; and the manner and timetable by which they were to be restored and made searchable . . ." ("February 3, 2005 Order"). The court issued its ruling on the Adverse Inference Motion March 1, 2005 ("Adverse Inference Order"), finding MS & Co. had engaged in discovery abuses and shifting the burden of proof on two elements of CPH's claims.

Thereafter, CPH discovered that MS & Co. had not been candid with it or the court at the February 14, 2005 hearing, prompting it to serve its Renewed Motion for Entry of Default Judgment ("Renewed Motion"). The court held an evidentiary hearing on the Renewed Motion on March 14 and 15, 2005. On March 23, 2005 it issued its Order on CPH's Renewed Motion for Entry of Default Judgment ("Default Order"), which built on the Adverse Inference Order. The Default Order found that MS & Co. had deliberately violated numerous discovery requests and orders, to the permanent prejudice of CPH. The violations included MS & Co.'s failure to timely notify CPH and the court that Riel's Certificate of Compliance was false because, among other deficiencies, 1,423 tapes found in a store room in Brooklyn (the "Brooklyn tapes") and 738 8 millimeter backup tapes ("8 millimeter tapes") had not been searched. The Default Order removed certain facts to

which the discovery had been directed from dispute and provided that a statement of MS & Co.'s failures would be read to the jury to consider in determining the propriety of a punitive damage award. The Default Order left the exact wording and content of the statement to be read open and invited counsel to submit proposals.

Kempf was general counsel for MS & Co. at all pertinent times. Cusick was Co-Head of Global Litigation. Lee was an Executive Director in MS & Co.'s Law Division and Doyle's supervisor. In May of 2005 in connection with the court's consideration of the litigation misconduct statement to be read to the jury, MS & Co. filed Offers of Proof for Lee, Doyle, and Cusick. In general, the Offers asserted that each first learned[1] there was email on the Brooklyn tapes in late October 2004 and on the 8 millimeter tapes in November 2004. Cusick and Lee asserted that each knew of no one in the Law Division who knew the information earlier.[2]

Based on the Offers of Proof, counsel for MS & Co. asked the court to instruct the jury that MS & Co.'s counsel did not know there was email on the Brooklyn and 8 millimeter tapes until October 2004. CPH contends that Kempf was sitting in the courtroom at the time of those arguments on May 16 and 18, 2005. The jury returned verdicts in CPH's favor for compensatory and punitive damages. The court rendered its Final Judgment in CPH's favor based on the verdicts on June 23, 2005. MS & Co. served its Notice of Appeal and posted a supersedeas bond June 27, 2005.

On June 17, 2005 MS & Co. served a document entitled "Notice".[3] The Notice

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[1]Lee's Offer qualifies her statements by asserting they are based on recollection.

[2]The Offer of Proof for Doyle stated that if called to testify he would state that he did not learn of the existence of email on the Brooklyn tapes until late October 2004 and that he "did not learn of the existence of 8 millimeter tapes containing emails until November 2004." It is unclear whether Doyle's proffered testimony is that he was unaware of the existence of the 8 millimeter tapes until November 2004, when he learned both that they existed and that some contained email, or that he may or may not have been aware of the tapes' existence, but was not aware that they contained email, prior to November 2004. Unlike Cusick and Lee, Doyle's Offer did not state that he knew of no one in the Law Division who knew that tapes contained email before he did.

[3]The Notice's legal effect, if any, on the proceedings is unclear to the court.

stated that

1. In the listed offers of proof and related statements, Morgan Stanley asserted that its Law Division was not aware that any of the Brooklyn Tapes contained e-mail until October 2004 and was not aware of certain 8-mm tapes until November 2004.

2. As a result of a review of emails discovered by a new email search, Morgan Stanley has determined that the offers of proof and related statements should be corrected to state that the Law Division was aware[4] in July 2004 that some of the Brooklyn Tapes contained email and that certain 8-mm tapes existed.

3. Morgan Stanley submits this Notice to: (a) correct Defendant's Offers of Proof from James P. Cusick, Soo-Mi Lee, and James Doyle (the first sentence of paragraph 4 and the entirety of paragraph 5);[5] (b) withdraw the Declaration of James F. Doyle of January 31 2005; and (c) correct related statements that reference or were based on the foregoing submissions. (footnote omitted).

4. Morgan Stanley does not limit this notice and correction to the specific documents described or listed herein. Morgan Stanley retracts, withdraws and corrects any and all statements, written or oral, made or submitted on its behalf, to the effect that its Law Division was not aware that any of the Brooklyn Tapes contained email until

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[4]The court asked MS & Co. to clarify whether the Notice was to be interpreted to state that MS & Co. first became aware that there was email on some of the Brooklyn tapes and that the 8 millimeter tapes existed in July 2004, or simply that MS & Co. knew those things in July 2004, without regard to whether it first learned them. While initially acknowledging that the Notice implied that MS & Co. first became aware of the items in July 2004, MS & Co. chose to stand on the language in the Notice, leaving unresolved whether it first learned of the items in July 2004 or simply knew of them as of that time.

[5]It would not be inconsistent for MS & Co. to assert that (i) Cusick, Lee, and Doyle did not know the Brooklyn tapes contained email or that the 8 millimeter tapes existed and contained email until late October and early November 2004, respectively; (ii) Cusick, Lee, and Doyle did not think any one else in the Law Division knew those facts before they did; and (iii) others in the Law Division did know those facts in July 2004. Counsel for MS & Co. clarified at the hearing that the Notice was intended to convey MS & Co.'s belief that Cusick, Lee, and Doyle themselves knew that some of the Brooklyn tapes had email and the 8 millimeter tapes existed in July 2004, though not convey that MS & Co. believes Cusick, Lee, or Doyle intentionally misstated their recollections when the Offers and Declaration were prepared.

October 2004 and was not aware of certain 8-mm tapes until November 2004.

In response to the Notice, CPH filed its Verified Petition for a Show-Cause Order Regarding Morgan Stanley's Criminal Contempt of Court, taking the position that by the Notice MS & Co. admitted it made false statements to the Court.

CPH filed, too, an Affidavit and Second Affidavit of Arthur Riel. Riel avers that in the first quarter of 2003 Cusick asked him to design the historical email archive; that Kempf approved the plan late in the second quarter of 2003; that MS & Co. knew of the Brooklyn tapes by May of 2004; that he believes that MS & Co. knew of the existence of the 8 millimeter tapes in the fall of 2003; that he knew by July 2, 2004 that the Brooklyn and 8 millimeter tapes had email dating back to at least 1998; that he told an attorney in MS & Co.'s Compliance of the Law Division and others within the division in a meeting on July 8, 2004 that the Brooklyn tapes contained email; that he told MS & Co.'s counsel on or about April 28, 2005 that he had told the Law Division that there was email on the Brooklyn tapes on July 8, 2004; that he told Cusick and others that the 8 millimeter tapes existed no later than January 2004; that Doyle asked him to sign the Certificate of Compliance after first asking a college student who performed data entry functions to sign it; and, finally, that MS & Co. had monthly reports and meeting minutes which could show when people within MS & Co. were notified of the existence of the tapes and the fact that some contained email.

CPH seeks to have this court initiate criminal contempt proceedings against MS & Co., Kempf, Cusick, Lee, and Doyle. It contends that MS & Co. is in contempt of court for (i) offering the Declaration and Offers of Proof with knowledge they contained false information; (ii) repeatedly arguing for favorable rulings based on the allegedly false information; and (iii) failing to comply with the Court's discovery orders. It contends Kempf is in contempt for failing to correct the misrepresentations of fact made to the Court in his presence on May 16 and 18, 2005. It contends Lee and Cusick are in contempt for

proffering allegedly false statements to the court with the intention the court rely on them. Finally, it contends Doyle is in contempt for the same, together with signing the allegedly false Declaration with knowledge it would be submitted to the court. It contends each of these acts was intended to and did obstruct the administration of justice.[6]

Here, the allegedly contemptuous acts fall within two general classes. First, CPH contends that MS & Co. failed to comply with the court's orders to produce documents relating to the email issue, including the February 3, 2005 Order requiring it to produce all documents addressing or related to the backup tapes. It asserts that Riel's affidavit would allow a reasonable person to conclude that reports and minutes were generated that were responsive to the court's February 3, 2005 Order and that MS & Co. deliberately failed to produce those items.[7] Second, CPH contends that MS & Co.'s assertions in the Notice together with Riel's affidavits would allow a reasonable person to conclude that Kempf, Cusick, Lee, and Doyle knew that Law Division personnel were aware of the existence of email on some of the Brooklyn tapes and the 8 millimeter tapes in July 2004 and that representations to the contrary were intended to mislead the Court and obstruct the administration of justice. As a subcategory, CPH contends that Doyle's Declaration was perjurious.

It is reasonable to assume that on appeal MS & Co. will question both the factual findings in the Default Order and the sanctions imposed. This will, of necessity, implicate the Offers and the assertions of counsel, which were used in argument about the jury statement given as a result of the Default Order; the Declaration, which was used to oppose the Adverse Inference Motion; and the propriety of and level of compliance with the

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[6]See, e.g., Milian v. State, 764 So. 2d 860 (Fla. 4th DCA 2000), rev. den. 786 So. 2d 579 (Fla. 2001); M.W. v. Lafthiem, 855 So. 2d 683 (Fla. 2d DCA 2003); Murrell v. State, 595 So. 2d 1049 (Fla. 4th DCA 1992); see, also, Duff v. Southern Bell Telephone and Telegraph Co., 386 So. 2d 253 (Fla. 5th DCA 1980) (action can be obstructionist even if ultimate outcome unaffected); Milian; Thomson v. State, 398 So. 2d 514 (Fla. 2d DCA 1981).

[7]CPH argues, too, that the Notice itself refers to yet other emails responsive to the February 3, 2005 Order not timely produced.

February 3, 2005 Order, among others, violation of which were used to support the Default Order.

Once an appellate court's jurisdiction attaches the trial court is divested of jurisdiction to consider matters that may affect the matters on appeal. See Willey v. W.J. Hoggson Corp., 89 Fla. 446, 105 So. 126 (1925); Waltham A. Condominium Association v. Village Management, Inc., 330 So. 2d 227 (Fla. 4th DCA 1976). While post-judgment proceedings collateral to and independent of the subject matter may proceed while a judgment is on appeal, the trial court lacks jurisdiction where the matter is "directly intertwined" with the matter on appeal. Amlan, Inc. v. Detroit Diesel Corporation, 651 So. 2d 701, 706 (Fla. 4th DCA 1995); Publix Supermarkets, Inc. v. Griffin, 837 So. 2d 1139 (Fla. 2d DCA 2003); cf. Miseveth v. Stafford, 667 So. 2d 1012 (Fla. 3d DCA 1996).

If the court were to pursue criminal contempt as requested,[8] it could alter the current record of what MS & Co. knew and when it knew it. It could add to the judicial response to MS & Co.'s litigation misconduct The current record of MS & Co.'s litigation misconduct, and the propriety and correctness of this court's rulings based on it, are presently before the appellate court. Indeed the argument that the appeal divested in court of jurisdiction to consider contempt of court based on discovery violations is stronger here than in Amlan. In Amlan, all requested documents were eventually produced, albeit at extraordinary cost, thus the record before the appellate court on the point was complete. Here, CPH argues all discovery was not made and, therefore, pursuit of the contempt allegations could result in a separate record of discovery abuses, perhaps one inconsistent with the record currently before the appellate court. The court determines, then, that the allegedly contemptuous conduct is directly intertwined with the matters on appeal, and that this court lacks jurisdiction to consider CPH's Verified Petition for a Show-Cause Order Regarding Morgan Stanley's Criminal Contempt of Court. Based on the foregoing, it is

[8]The Court has made no determination that it could or should. MS & Co. and the non-party respondents vigorously contend that they are not guilty of contempt.

ORDERED AND ADJUDGED that this court declines to rule on CPH's Verified Petition for a Show-Cause Order Regarding Morgan Stanley's Criminal Contempt of Court pending disposition of the primary action on appeal.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 10th day of November, 2005.

ELIZABETH T. MAASS
Circuit Court Judge

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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO: CA 03-005045 AI

COLEMAN (PARENT) HOLDINGS INC.,

Plaintiff,

v.

MORGAN STANLEY & CO. INCORPORATED,

Defendant.
_____/

ORDER GRANTING STIPULATION FOR SUBSTITUTION OF COUNSEL

THIS CAUSE, having come before the Court upon the Stipulation for Substitution of Counsel in the above-styled action, and the Court having reviewed the Stipulation and otherwise being fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

The law firm of Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C. and Mark Hansen are relieved from any further responsibilities in this lawsuit and that Attorney Faith E. Gay and the law firm of Quinn Emanuel Urguhart Oliver & Hedges, LLP shall be substituted as co-counsel for Defendant, Morgan Stanley & Co. Incorporated in this action. All further pleadings, correspondence or other documents directed to the Defendant shall also be directed to Faith E. Gay, Quinn Emanuel Urguhart Oliver & Hedges, LLP, 51 Madison Ave., 22nd Floor, New York, NY 10010.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____ day of January, 2007.

SIGNED & DATED
JAN 0 2 2007
JUDGE ELIZABETH T. MAASS

ELIZABETH T. MAASS
Circuit Court Judge

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2008 WL 7324191 (Fla.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Florida.
Fifteenth Judicial Circuit
Palm Beach County

COLEMAN (PARENT) HOLDINGS INC., Plaintiff,
v.
MORGAN STANLEY & CO., INC., Defendant.

No. CA 03-5045 AJ.
March 25, 2008.

Coleman (Parent) Holdings Inc.'s Verified Motion to Vacate the Judgment and Grant a New Trial on Damages

Jerold S. Solovy, Ronald L. Marmer, Jenner & Block LLP, 330 North Wabash Avenue, Suite 4400, Chicago, Illinois 60611, (312) 222-9350, Attorneys for Coleman (Parent) Holdings Inc.

Plaintiff Coleman (Parent) Holdings Inc. ("CPH"), by its attorneys and pursuant to Rule 1.540(b) of the Florida Rules of Civil Procedure, respectfully requests that this Court vacate the judgment of dismissal entered in favor of Morgan Stanley & Co. Incorporated, enter a total default as to all elements of CPH's claims, order a new trial on damages as more fully described below, and provide such further relief as the Court deems just and proper.

PRELIMINARY STATEMENT

CPH asks the Court to vacate the recently entered judgment in favor of Morgan Stanley because Morgan Stanley has now admitted that it committed a massive fraud on the Court. Morgan Stanley's fraud on the Court was part of a scheme designed to conceal Morgan Stanley's role as a co-conspirator in the largest securities fraud in Florida history.

Prior to trial, some aspects of Morgan Stanley's fraud on the Court -- including the destruction and nonproduction of key e-mail evidence -- came to light. That led the Court to enter a partial default against Morgan Stanley, but not the total default that CPH had requested. Now, however, it has become clear that the scope of Morgan Stanley's fraud on the Court was far broader than previously realized. In a series of cryptic but revealing "Notices" filed with this Court, Morgan Stanley has admitted that, in its efforts to forestall a total default, it repeatedly lied to the Court and CPH about what Morgan Stanley's in-house lawyers knew about the e-mails and when they knew it.

Morgan Stanley waited until after the trial had concluded and the jury had announced its verdict before issuing the first of these "Notices." And Morgan Stanley released its most recent Notice only after this Court was divested of jurisdiction over the case and the appeal had been fully briefed and argued before the Fourth District. Even with the admissions contained in these Notices, the full scope of Morgan Stanley's fraud on the Court has yet to be revealed. But there is already more than enough evidence to conclude that this case was adjudicated under false pretenses and that Morgan Stanley thereby escaped proper sanctions for its perjurious litigation misconduct. Therefore, the recently entered judgment favoring Morgan Stanley cannot stand.

In 1997 and 1998, Morgan Stanley conspired with Sunbeam Corporation to defraud CPH and others of billions of dollars. CPH sued Morgan Stanley for conspiracy to commit fraud and sought production of relevant documents, including e-mails. Claiming that e-mails from the late 1990s were no longer retrievable, Morgan Stanley offered what turned out to be perjurious testimony from its information-technology (IT) staff. Those lies soon began to unravel. As

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it became clear that Morgan Stanley had willfully disobeyed this Court's discovery orders and in some instances had destroyed e-mail evidence, Morgan Stanley tried to contain the scandal by scapegoating the IT staff and claiming that Morgan Stanley's in-house lawyers had been completely unaware of the e-mail fiasco.

Morgan Stanley emphatically and repeatedly drew a sharp distinction between its business and IT people and its in-house lawyers. In the briefing and arguing of the sanctions motions that CPH filed, in evidentiary proffers submitted to the Court, and in hearings about what CPH could argue to the jury with respect to punitive damages, Morgan Stanley was adamant: Its in-house lawyers knew nothing about the misconduct. Morgan Stanley pressed that argument because it correctly surmised that the Court and the jury would mete out a harsh punishment if they knew that the in-house lawyers ostensibly responsible for ensuring Morgan Stanley's compliance with the law actually were assisting Morgan Stanley's business people in subverting the justice system.

We now know that Morgan Stanley's in-house lawyers *did* know about the misconduct and *were* culpable participants in it. Our knowledge of those facts comes from Morgan Stanley's grudging and piecemeal acknowledgements -- which were delivered in cryptic "Notices" filed over a nearly two-year period and are as dramatic for what they concede as they are appalling for what they still attempt to conceal. As we explain more fully below, there is now no doubt that Morgan Stanley's in-house counsel knew about the misconduct of which they repeatedly professed ignorance.

But Morgan Stanley's "our lawyers were not in the loop" defense largely succeeded, leading the Court to enter only a partial default against Morgan Stanley, rather than the total default as to all elements that CPH had requested. Because the Court entered only a partial default, CPH retained the burden of proving at trial both the fact of damage and the amount of damages. This lesser sanction turned out to be critically important on appeal, when the Fourth District instructed this Court to enter judgment for Morgan Stanley after rejecting CPH's method for calculating the amount of damages and implicitly holding that CPH had thus failed to prove actual damage, an essential element of CPH's fraud claims against Morgan Stanley. Had this Court been fully apprised of Morgan Stanley's fraud and had it therefore granted CPH's motion for a total default as to all elements, there would have been no question about the adequacy of CPH's proof of actual damage and thus no basis to enter judgment for Morgan Stanley. The prejudice that CPH has suffered as a direct result of Morgan Stanley's fraud on the Court could not be clearer: the loss of hundreds of millions of dollars in compensatory damages, as well as interest and punitive damages. Unless this Court grants this motion and imposes the sanction that Morgan Stanley has always deserved, Morgan Stanley will succeed in its fraud against the Court and will not be called to account, either for its complicity in a securities fraud of enormous proportion or for the egregious litigation misconduct with which it sought to conceal that complicity before, during, and after trial.

But there is more at stake here. Left unchecked, the kind of egregious litigation abuses that Morgan Stanley carried out during this litigation are devastating to the integrity of our justice system and public confidence in it. Indeed, the Court expressly recognized that point when, based on its incomplete knowledge of Morgan Stanley's misconduct, the Court entered the partial default prior to trial. For the Court now to allow a final judgment for Morgan Stanley to stand -- in the wake of Morgan Stanley's post-verdict and post-judgment "Notices" admitting its fraud upon the Court --would not only injure CPH and grant a windfall to Morgan Stanley, but would send a troubling message to every litigant whose rights are entrusted to this Court and the Florida justice system. CPH therefore respectfully requests relief from the judgment, a judgment that Morgan Stanley obtained not on the merits, but by disobeying, disrespecting, and defrauding this Court.

STATEMENT OF FACTS

CPH brought suit against Morgan Stanley for aiding and abetting, and conspiring with, Sunbeam Corporation to perpetrate a massive fraud in connection with Sunbeam's purchase of CPH's interest in The Coleman Company, Inc. As part of the consideration for the sale of that interest, CPH received unregistered Sunbeam stock that had an expected value of $680 million but proved to be worthless. Morgan Stanley denied any complicity in the fraud and denied damages.

CPH App. 1 (6/23/03 Answer of MS, at 1, 17-19). Accordingly, Morgan Stanley documents relating to both liability and amount of damages was critically important. On the damages issue, for example, Morgan Stanley may well have had documents showing its own valuation of Sunbeam on the closing date of the transaction. CPH App. 19 (3/15/05 Tr. at 3944).

But Morgan Stanley lied to the Court, defied Court orders, concealed and destroyed documents and electronic data, and engaged in other misconduct to defeat the truth-seeking processes of discovery. CPH moved for sanctions against Morgan Stanley, including a total default. CPH's motion was based in part on Morgan Stanley's false certification on June 23, 2004 that it had produced all relevant e-mail messages -- a certification Morgan Stanley made with full knowledge that relevant e-mail backup tapes had not even been searched. In response to CPH's remedial motion, Morgan Stanley argued that it should not be severely punished because its ***in-house counsel*** were not aware until months later, in October or November 2004, of the existence of potentially relevant e-mail messages on these backup tapes. In March 2005, this Court issued two remedial rulings, ultimately determining that Morgan Stanley's knowledge of the underlying fraud and collusion with Sunbeam should be deemed established.

Although those rulings took account of some portion of Morgan Stanley's misconduct, other misconduct continued during the proceeding itself, ***after*** the sanctions were imposed, and even ***after*** the conclusion of the jury proceedings on reliance, the fact of damage, and the amount of damages. In December 2006, while its appeal from the judgment was pending in the Fourth District, Morgan Stanley acknowledged that its in-house attorneys were indeed aware "prior to July 2004" of the existence of e-mail on the backup tapes, and that these e-mails dated to the time of the Sunbeam-Coleman merger. Notwithstanding Morgan Stanley's artfulness in using the phrase "prior to July 2004," the only fair reading of Morgan Stanley's statements is that Morgan Stanley's in-house lawyers knew these facts on June 23, 2004, when Morgan Stanley falsely certified that it had produced all relevant e-mail messages. In addition, those statements show that Morgan Stanley's in-house lawyers clearly knew that numerous statements made to the Court in 2004 and 2005, including those contained in sworn declarations, were false.

A. Misconduct Leading to 2005 Remedial Proceedings.

Morgan Stanley's disregard for the integrity of the judicial process and for its obligations to the plaintiff continued unabated throughout the period leading up to the 2005 remedial rulings, taking a variety of different -- but consistently reprehensible -- forms.

First, Morgan Stanley repeatedly lied to the Court. Morgan Stanley has not challenged this Court's ruling that at least 35 of Morgan Stanley's statements to the Court -- including statements made under oath -- were "false" or "misleading." *See* CPH App. 20 (3/23/05 Order at 8-16 (listing statements)); CPH App. 13 (3/2/05 Order at 3-10 (same)). Morgan Stanley also submitted false interrogatory answers signed by a corporate representative who had not read them, and falsely represented on numerous occasions that it was unable to retrieve electronic data concerning the authorship and drafting history of important documents. CPH App. 20 (3/23/05 Order at 15); CPH App. 12 (2/28/05 Order at 2).

Second, Morgan Stanley repeatedly defied Court orders. As the Court found, Morgan Stanley defied at least seven orders entered between December 2003 and March 2005. CPH App. 20 (3/23/05 Order at 9-16 & n.10). For example, Morgan Stanley withheld documents regarding the discovery and restoration of e-mail backup tapes, thus defying an April 2004 "Agreed Order" as to electronic discovery as well as a February 2005 order requiring Morgan Stanley to produce its documents. *Id.* Morgan Stanley also defied a March 2005 discovery order because, as this Court expressly found, Morgan Stanley "desperately wanted to hide an active SEC inquiry" into Morgan Stanley's continued practice of overwriting backup tapes, in violation of an outstanding SEC cease-and-desist order. *Id.* at 10 & n. 10, 12-14, 16. In addition, among other orders that Morgan Stanley violated were the following: (1) a February 2005 order requiring discovery on the authenticity, business-record status, and authorship of certain documents that showed Morgan Stanley's involvement in misleading aspects of the underlying Sunbeam transaction, (2) a February 2005 order mandating e-mail production

from certain backup tapes, and (3) a March 2004 order requiring production of certain performance evaluations of Morgan Stanley personnel involved in the transaction, which production would have revealed serious, repeated internal expressions of concern about the candor and ethics of William Strong, the senior Morgan Stanley banker in charge of the Sunbeam deal. *Id.* at 11-16. This Court concluded that those violations of court orders were "deliberate[] and contumaciousl[]." *Id.* at 16.

Third, Morgan Stanley "routinely assert[ed] unfounded privilege claims." *Id.* For example, Morgan Stanley did not reveal a relevant criminal prosecution against William Strong, and then obstructed discovery by claiming privilege with respect to approximately 700 documents related to that prosecution -- many under supposed joint defense agreements that the Court later found did not exist. *Id.* at 14-16 & n. 17. After this Court ordered Morgan Stanley to submit those documents for *in camera* review, Morgan Stanley withdrew its privilege claim with respect to more than 260 of the documents. *Id.* Following an *in camera* review, this Court found that 200 more documents were not privileged. *Id.*

Fourth, Morgan Stanley engaged in massive fraud with respect to e-mail production. Because the underlying transaction between Sunbeam and CPH was completed in 1998, documents from the 1990s were obviously critical. In response to a motion to compel, Morgan Stanley told the Court in December 2003 that all of its pre-January 2000 e-mail backup tapes had been erased. CPH App. 20 (3/23/05 Order at 3-5); CPH App. 2 (12/17/03 Tr. at 20). A corporate representative likewise testified at deposition that Morgan Stanley's recently constructed e-mail archive did not contain e-mail from the 1990s, claiming that the archive captured e-mails only "going forward." CPH App. 20 (3/23/05 Order at 4-5 & n.3, 10-11 & n.12). Both of those representations were false. In fact, Morgan Stanley had e-mails from at least 9,000 backup tapes from the 1990s that it had not searched in response to CPH's discovery requests. CPH App. 17 (3/14/05 Tr. at 3462); CPH App. 16 (3/14/05 Hr'g Ex. 1, Tab 87). Moreover, Morgan Stanley was loading these tapes into its e-mail archive for its own internal purposes -- and the person leading that effort was the very same corporate representative who committed perjury at the deposition. CPH App. 20 (3/23/05 Order at 8-10 & nn.7-12, 13). But based on Morgan Stanley's false representations, the Court entered an Agreed Order on April 16, 2004, requiring Morgan Stanley to search only the oldest full backup tape that it had for each of 36 individual employees, and then to certify compliance. Of course, the Agreed Order made no mention of the archive, because Morgan Stanley's corporate representative had falsely testified that the archive contained no pre-2003 e-mails. *Id.* at 4 n.3, 5 n.12.

Purporting to comply with that Agreed Order, Morgan Stanley provided CPH with a few additional e-mails on May 14, 2004, but did not submit the required certification of compliance until June 23, 2004, following CPH's repeated demands. CPH App. 20 (3/23/05 Order at 5-6). As CPH discovered in subsequent contempt proceedings, Morgan Stanley's legal staff inappropriately attempted to have this certificate signed by a college student who performed data-entry functions. CPH App. 28 (10/20/05 Affidavit of Arthur Riel, filed Nov. 1, 2005). The certificate, as ultimately signed by Arthur Riel, Morgan Stanley's Executive Director of Technology, stated that Morgan Stanley had produced all the e-mail from the oldest full backup tapes as required, but in fact, as Mr. Riel knew, e-mails from thousands of existing tapes -- including more than 1,400 e-mail backup tapes that Morgan Stanley found in a store room in Brooklyn (the "Brooklyn tapes") and more than 700 8-millimeter e-mail backup tapes (the "8-mm tapes") -- had not been searched or produced. CPH App. 20 (3/23/05 Order at 9-10).

In November 2004 (after the SEC, unbeknownst to CPH and the Court, had uncovered the truth that Morgan Stanley was loading its archive with e-mails from the late 1990s), Morgan Stanley produced to CPH some additional e-mails, which it said were from "newly discovered" tapes. *Id.* at 5, 10 & nn.7-12; CPH App. 13 (3/2/05 Order at 5-6). That representation was false; Morgan Stanley had not "newly discovered" any tapes at that time. But Morgan Stanley continued its efforts to avoid any admission that massive quantities of 1990s e-mails were being uploaded to its archive, where they could be quickly and inexpensively searched. CPH App. 20 (3/23/05 Order at 10 & n.11). Morgan Stanley made the misrepresentation that the produced e-mails were from newly discovered tapes in five separate letters to CPH, and then in a sworn declaration, in testimony in court, and in at least a dozen separate representations by counsel. *E.g.*,

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CPH App. 4 (1/31/05 MS Opp. re Adv. Inference at 2-4); CPH App. 20 (3/23/05 Order at 5-11); CPH App. 26 (6/17/05 MS Notice at 1-2).

Subsequently, in the weeks preceding the scheduled trial date in early 2005, Morgan Stanley repeatedly made new announcements that it had just discovered hundreds or thousands of backup tapes, each containing massive numbers of potentially responsive e-mails, none of which had been processed or analyzed. CPH App. 20 (3/23/05 Order at 7-8, 10, 14); CPH App. 13 (3/2/05 Order at 7-10). As we now know, the existence of those tapes was known to Morgan Stanley long before those announcements were made.

B. The Court's 2005 Pre-Trial Remedial Rulings.

1. The March 1, 2005 Order.

On January 26, 2005, CPH moved for an adverse-inference instruction on the ground that Morgan Stanley had failed to produce responsive e-mails and to comply with this Court's April 2004 Agreed Order. CPH App. 13 (3/2/05 Order at 6); CPH App. 7 (2/4/05 Order re Add'l Search of E-Mail Tapes); CPH App. 6 (2/3/05 Order Setting Evid. Hr'g). One key issue was when Morgan Stanley's Law Division had learned that Morgan Stanley's June 23, 2004 certificate of compliance with the Agreed Order was false. Morgan Stanley argued that the certification was not false (or at least not knowingly false) because (1) Arthur Riel, the Morgan Stanley Executive Director of Technology who signed the certificate, did not learn until several days after it was filed that the unsearched tapes actually contained e-mails, and (2) Morgan Stanley's in-house lawyers did not learn about the existence of e-mail on the tapes until months later, in October 2004.

Morgan Stanley supported its response with a sworn declaration of James F. Doyle, who was a lawyer and an Executive Director in its Law Division. Doyle's declaration averred that "[a]t the end of October 2004, I learned that additional e-mail backup tapes had been located within Morgan Stanley, and that the data on those tapes had not been restored or searched prior to Morgan Stanley's May 14, 2004 e-mail production." CPH App. 3 (1/31/05 Declaration of J. Doyle, at 1). The pleading to which this declaration was attached likewise stated: "At the end of October 2004, James F. Doyle, the attorney at Morgan Stanley who directed Morgan Stanley's prior search for e-mail messages, learned that additional e-mail backup tapes had been located within Morgan Stanley, and that the data on those tapes had not been restored or searched prior to the May 14, 2004 e-mail production." CPH App. 4 (1/31/05 MS Opp'n to CPH's Mot. for Adverse Inference Instruction at 2). Lest there be any doubt about the significance of the Doyle declaration, two days later Morgan Stanley told the Court at a hearing: "The headline is that the first time that anyone -- that anyone at Morgan Stanley knew that there was recoverable e-mail data that might fall within the Court's order was not until late October 2004 consistent with Mr. Doyle's declaration." CPH App. 5 (2/2/05 Tr. at 132).

Nine days later, Morgan Stanley filed a supplemental opposition to CPH's motion, again quoting verbatim from this key passage of the Doyle declaration. *See* CPH App. 8 (2/11/05 MS Supp. Opp'n to CPH's Mot. for Adverse Inference Instruction, at 2). Later that month, Morgan Stanley quoted from the Doyle declaration again, this time resorting to bold italics: "Morgan Stanley has consistently contended that no one in its Law Division knew of the existence of ***additional recoverable e-mail data on the tapes before October 2004***." CPH App. 11 (2/28/05 MS Opp'n to CPH's Mot. for a Default Judgment, at 6 (emphasis in original)).

At an evidentiary hearing on February 14, 2005, as the Court later found, Morgan Stanley continued "to hide ... its violations and coach witnesses." CPH App. 20 (3/23/05 Order at 16). For example, one executive's sworn testimony directly contradicted sworn statements she had given the SEC only three days before. *Id.* at 12. Despite these evasions and lies, the hearing finally established that the e-mail archive, contrary to Morgan Stanley's representations, contained large amounts of 1990s e-mails that could be easily searched, but had not been produced. CPH App. 9 (2/14/05 Tr. at 26-130); CPH App. 20 (3/23/05 Order at 10 & n.11). CPH then amended its adverse-inference request to seek a default judgment. CPH App. 9 (2/14/05 Tr. at 242-95); CPH App. 14 (3/9/05 CPH Renewed Mot. for Entry of Default Judgment).

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On March 1, 2005, this Court ruled on CPH's motion. The Court concluded that Morgan Stanley had willfully violated court orders and had acted "knowingly, deliberately, and in bad faith" to "thwart discovery" and "conceal[] its role in the Sunbeam transaction." CPH App. 13 (3/2/05 Order at 10-11, 14). Calling its chosen sanction the "most conservative available," this Court shifted the burden of proof on the issues of Morgan Stanley's knowledge of the fraud and collusion with Sunbeam, but continued to require CPH to prove reliance, the fact of damage, and the amount of damages. *Id.* at 12-14. When that decision was rendered, this Court had no access to information that would have contradicted Morgan Stanley's claim that in-house counsel was not aware of the recoverable e-mail until October 2004. This Court's remedial order was therefore based on an assumption that Morgan Stanley's in-house lawyers were not participants in Morgan Stanley's misconduct.

2. The March 23, 2005 Remedial Order.

Despite the March 1 ruling, Morgan Stanley's misconduct continued unabated, and CPH moved for a total default on liability. CPH App. 14 (3/9/05 CPH Renewed Mot. for Entry of Default Judgment). Morgan Stanley again reiterated its story that in-house counsel lacked knowledge or culpability, once more resorting to bold italics: "When Mr. Riel signed his Certification of Compliance in June 2004, he did not know or suspect that there was ***any*** e-mail on the so-called 'Brooklyn tapes'.... Mr. Riel also testified that ... he learned that ***some*** of the Brooklyn tapes contained ***some*** e-mail ..., [but] he does not recall ever communicating that fact to anyone in the Law Division." CPH App. 15 (3/13/05 MS Opp'n to CPH Mot. for a Default Judgment (Corrected Version), at 11-12 (emphasis in original)). Morgan Stanley made this point repeatedly throughout its opposition, also stating that, "[w]hile it is true that Mr. Riel and other members of the IT Staff knew in early July 2004 (after Mr. Riel signed his certification) that some of those tapes contained some e-mails going back to the late 1990s, neither Mr. Riel nor anyone else in the IT department informed Morgan Stanley's lawyers of that fact.... It was not until late October 2004, when Morgan Stanley's Law Division was working with Ms. Gorman (Mr. Riel's successor) on some issues regarding an unrelated regulatory production of e-mails, that the Law Division learned, for the first time, that some of the tapes contained e-mails." *Id.* at 20. Morgan Stanley insisted that this alleged state of affairs "accounts for Morgan Stanley's representation to this Court that late October 2004 marks the first time that the in-house legal staff was aware of this fact." *Id.*

In addition, rather than relying solely on Mr. Doyle's word, Morgan Stanley also enlisted James P. Cusick, Morgan Stanley's Co-Head of Litigation, to oppose the sanctions motion. Morgan Stanley argued: "[W]hether the affidavit had come from Mr. Doyle, Mr. Cusick, or any other member of Morgan Stanley's Law Division, the content would have been the same: the Law Division did not learn that some of the newly discovered tapes contained some e-mails until October 2004. While Morgan Stanley did not formally withdraw the May [*sic*] 2004 Certification of Compliance at that time, it did promptly alert outside counsel, which promptly alerted CPH that new e-mail tapes had been discovered and that they would be searched for responsive documents." *Id.* at 31.

Three days later, Morgan Stanley told the Court that "[t]he delay between when the Law Division learned [that the found tapes contained e-mail] (late October 2004) and when [Morgan Stanley's counsel] wrote CPH's counsel (November 17, 2004) was minor and did not prejudice CPH." CPH App. 18 (3/15/06 Morgan Stanley's Overnight Response to CPH's Additional Submission in Support of its Motion for Default, at 6).

On March 23, 2005, after a further evidentiary hearing, this Court declined to grant the sanction that CPH requested, but imposed a second, carefully calibrated remedial order, which was not intended to punish Morgan Stanley, but to "level the playing field." CPH App. 20 (3/23/05 Order at 17-18). After stating that Morgan Stanley's "discovery abuses and misrepresentations ... would take a volume to recites" the Court expressly found that Morgan Stanley, still hoping to conceal evidence, had violated two orders entered since March 1 and had coached witnesses to withhold critical information. *Id.* at 15-16. The Court identified 23 additional recent instances of misconduct. *Id.* at 11-14, 16. The Court also found that Morgan Stanley had failed to notify CPH and the Court in a timely manner concerning the falsehood

of the June 2004 certificate of compliance, which averred that all relevant e-mails had been produced -- even though, among other deficiencies, the "Brooklyn tapes" and the "8-mm tapes" had not even been searched.

While the Court found that in-house counsel knew at the time the June 2004 certificate of compliance was served that it was false because they knew about "additional unsearched backup tapes," the Court did not find that these lawyers knew that the "additional unsearched backup tapes" contained e-mails. CPH App. 20 (3/23/05 Order at 5 n.4, 13). At that point, despite the extensive revelations of misconduct committed by Morgan Stanley, the Court did not have evidence that contradicted Morgan Stanley's repeated assertions and sworn statements that its in-house counsel did not know until October 2004 about the e-mails contained in the unsearched tapes.

Accordingly, the Court declined to enter the total default that CPH had requested. *Id.* at 16-18. Instead, the Court found that Morgan Stanley's "acts in depriving CPH of crucial documents and discovery to prove its claims require that certain facts be removed from dispute, in order to level the playing field." CPH App. 22 (5/16/05 Order). It was necessary, in this Court's view, to deem "established for all purposes" those elements as to which the Court previously had reversed the burden of proof. CPH App. 20 (3/23/05 Order at 17). The Court continued, however, to require CPH to prove reliance, as well as the fact and amount of damages. In addition, the Court relieved Morgan Stanley of any further obligation to produce e-mails. Without evidence of Morgan Stanley's lawyers' misconduct, the Court chose to afford relief that was remedial rather than punitive, and designed to "level the playing field," rather than vindicate the authority of the Court.

3. Morgan Stanley's False Statements in Conjunction with the Litigation-Misconduct Statement.

The Court's partial-default order also mandated that a statement describing Morgan Stanley's e-mail misconduct would be read to the jury for its consideration in determining the propriety of punitive damages. CPH App. 20 (3/23/05 Order at 17). On May 12, 2005, when the Court was shaping the precise wording of the litigation-misconduct statement, Morgan Stanley filed a 235-page proffer that made a number of additional important misrepresentations to the Court. Morgan Stanley contended that its failure to comply with court orders relating to e-mail production was merely the result of a series of unfortunate "mistakes," not a systematic effort to conceal fraud. And Morgan Stanley again claimed that its in-house counsel did not know that there was e-mail on the Brooklyn tapes and the 8-mm tapes until October 2004. CPH App. 21 (5/12/05 MS Addendum to Opposition to CPH Second Renewed Mot. for Correction). Three high-ranking in-house attorneys for Morgan Stanley-- James P. Cusick (Morgan Stanley's co-head of litigation), Soo-Mi Lee (executive director in Morgan Stanley's Law Division), and James F. Doyle (the executive director in the Law Division who had filed the false declaration in January 2005) -- submitted offers of proof asserting that they had first learned there was e-mail on the Brooklyn tapes in late October 2004 and on the 8-mm tapes in November 2004. Cusick and Lee both asserted that they knew of no one in Morgan Stanley's Law Division who knew this information earlier. CPH App. 21 (Def.'s Offer of Proof re James P. Cusick at ¶¶ 3-4; Def.'s Offer of Proof re Soo-Mi Lee at ¶¶ 3-4 (filed 5/12/05)).

Morgan Stanley continued to press these false contentions at a hearing on May 16, 2005, in the context of an argument about how the Court should instruct the jury with regard to punitive damages. Morgan Stanley asked the Court to tell the jury that " '[t]here is no evidence that any lawyer in Morgan Stanley's Law Division was aware prior to October 2004 that any of the tapes contained any e-mail.' " CPH App. 23 (5/16/05 Tr. at 15266). The Court did not accept Morgan Stanley's proposal verbatim. *Id.* at 15266, 15267. The Court told the jury that Morgan Stanley's in-house lawyers knew about the ***existence*** of the backup tapes before October 2004. In fact, however, Morgan Stanley's in-house lawyers also actually knew, long before October 2004, that the tapes contained e-mails -- a fact which also should have been brought to the jury's attention, as CPH requested. Because the Court accepted Morgan Stanley's assertions and sworn statements (later shown to be false) that the lawyers knew at that time that there were backup tapes, but not that they contained e-mail, the Court denied CPH's request. CPH App. 24 (5/17/05 Tr. at 15459).

Two days later, on May 18, in vetting the PowerPoint presentation that CPH planned to use in its closing argument on punitive damages, Morgan Stanley repeated the same false story, again achieving Morgan Stanley's desired results.

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Morgan Stanley told the Court that there was evidence "that people in Morgan Stanley's Law Division" knew in October 2004 of "backup tapes but not that the backup tapes contained e-mail. And it's undisputed that they learned that these contained e-mail in October 2004." CPH App. 25 (5/18/05 Tr. at 15607). When the Court responded that "It turned out they did contain e-mail," Morgan Stanley replied, "They didn't know it, Your Honor." *Id.* at 15607. The Court then turned to CPH's counsel and asked: "Can you change it [to] '... did not know about unsearched backup tapes later found to contain e-mail' or something?" *Id.* at 15607. When CPH balked at this suggestion, Morgan Stanley persisted: "Your Honor, it's undisputed in the record that the lawyers at Morgan Stanley learned that e-mail was on these tapes in October 2004. There's been no contrary evidence to this.... They knew about the tapes in June, but they didn't know they contained e-mail." *Id.* at 15608. The Court required CPH to redo its closing PowerPoint presentation, explaining: "We don't know if [the Morgan Stanley in-house lawyers] knew [the backup tapes] contained e-mail." *Id.* at 15608. Morgan Stanley had succeeded in convincing the Court that Morgan Stanley's in-house lawyers, while aware of the tapes' existence, had somehow remained unaware that the tapes contained e-mail until October 2004. Morgan Stanley's arguments to that end, as we now know, were part of the fraud, but those arguments succeeded in ensuring that the arguments made to the jury were deliberately and improperly skewed in Morgan Stanley's favor.

The jury nonetheless found Morgan Stanley liable. The jury found that CPH had relied on Sunbeam's false statements, found that these false statements had damaged CPH, and awarded both compensatory and punitive damages to CPH. The jury found that CPH had suffered $604,334,000 in actual damages, and it awarded CPH $850 million in punitive damages.

C. Post-Trial Revelations of Previously Undisclosed Morgan Stanley Misconduct.

1. The June 17, 2005 Notice.

On June 17, 2005, after the jury had rendered its verdicts, and only days after Morgan Stanley, in post-trial motions, had repeated its false assertions as to when Morgan Stanley's in-house counsel learned of e-mail on the Brooklyn and 8-mm tapes, Morgan Stanley filed a document which it styled a "Notice." The Notice expressly retracted 15 statements, including the entirety of the Doyle declaration filed in conjunction with Morgan Stanley's January 2005 opposition to sanctions and various parts of the May 12, 2005 proffer. Each of the retracted statements had asserted that Morgan Stanley's "Law Division was not aware that any of the Brooklyn Tapes contained e-mail until October 2004 and was not aware of certain 8-mm tapes until November 2004." Without elaboration, the Notice recited that in fact "the Law Division was aware in July 2004 that some of the Brooklyn Tapes contained e-mail and that certain 8-mm tapes existed." CPH App. 26 (6/17/05 MS Notice at 1-2 & n.1).

By acknowledging that the Law Division knew in July 2004 that the Brooklyn tapes contained e-mail, the June 17, 2005 Notice admitted that Morgan Stanley's repeated representations to the Court about when its Law Division knew of the existence of unsearched e-mail -- which critically affected both the severity of the sanctions imposed and the evidence and argument provided to the jury -- were false. The June 17 Notice further claimed, without any sworn basis and without even supplying the pertinent documents, that "Morgan Stanley ... determined" that its prior statements were false "[a]s a result of a review of e-mails discovered by a new e-mail search." *Id.* at 1. The Notice contained no explanation of how "Morgan Stanley" could be said to have previously lacked knowledge of facts that were known to its own in-house counsel, including those high-ranking in-house lawyers who made false statements to the Court. Nor did the Notice purport to explain the circumstances of this "new e-mail search" or when exactly it had occurred. Morgan Stanley chose not to identify what "new" information had come to light, how it came to light, when it came to light, or who within Morgan Stanley was aware of it.

2. The Criminal Contempt Proceedings.

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About one month after this Court entered the original final judgment and Morgan Stanley filed its notice of appeal, CPH filed a criminal contempt petition against Morgan Stanley, its general counsel, and three in-house lawyers who had offered false proffers in May 2005 as to when they learned that the Brooklyn tapes contained e-mails and when they learned of the existence of the 8-mm tapes. CPH App. 27 (7/27/05 CPH Petition re Criminal Contempt). In defense of the contempt proceedings, each of the three in-house lawyers claimed, in unsworn statements, that they realized the falsity of their proffers only after an e-mail search uncovered e-mails showing the state of their knowledge in July 2004. They did not explain why each of them had forgotten the date in so short a period (between July 2004 and the March 2005 date of Morgan Stanley's assertions about the knowledge of in-house counsel), or why they all believed the same false fact (that they had only learned in October 2004 that the Brooklyn tapes contained e-mails and only learned in November 2004 that the 8-mm tapes existed). CPH App. 29 (11/3/05 Tr. at 33-36); CPH App. 26 (6/17/05 MS Notice at 1). It was also supposedly coincidental that they all remembered in June 2005, after the remedial decisions and the trial, that they in fact were aware by July 2004 that the Brooklyn tapes contained e-mails and that the 8-mm tapes existed. There has not yet been any discovery into the circumstances of the e-mail search that purportedly led to the June 17, 2005 Notice, or about what that search showed as to who at Morgan Stanley knew the key facts about the tapes.

After a hearing, but with the foregoing questions still unanswered, this Court issued an order on November 10, 2005 declining to rule on the criminal contempt petition pending disposition of Morgan Stanley's appeal. The Court concluded that the allegedly contumacious conduct was sufficiently intertwined with the matters on appeal, including the propriety of the March 2005 remedial rulings, to divest the Court of jurisdiction.

The Court also noted that, during the hearing on the petition, Morgan Stanley had refused repeated requests to take a clear stand on the meaning of the June 17, 2005 Notice -- specifically, whether it should be read to state that Morgan Stanley's in-house lawyers first became aware ***in*** July 2004, or ***no later than*** July 2004, that there was e-mail on some of the Brooklyn tapes and that the 8-mm tapes existed. CPH App. 29 (11/3/05 Tr. at 9-25); CPH App. 20 (3/23/05 Order at n.4). The distinction was important because Morgan Stanley certified on June 23, 2004, that all relevant e-mails had been produced -- even though the Brooklyn and 8-mm tapes had not yet been searched. And Morgan Stanley had previously justified this false certification on the basis that its in-house attorneys were unaware at the time of the certification that the Brooklyn tapes contained e-mail or that the 8-mm tapes existed. If Morgan Stanley's in-house lawyers were aware of e-mail on any of these various tapes prior to July 2004, this justification would simply evaporate.

3. The December 21, 2006 Notice.

More than a year later, and some six months after the Fourth District had heard oral argument in Morgan Stanley's appeal from the judgment, Morgan Stanley filed a further "Notice" addressing (but not curing) its studied imprecision. The December 21, 2006 Notice stated for the first time that "Morgan Stanley's Law Division was aware of the existence of the referenced e-mail back-up tapes" -- by which Morgan Stanley apparently meant both the Brooklyn tapes and the 8-mm tapes -- "and the presence of e-mail on some of those tapes prior to July 2004." CPH App. 30 (12/21/06 MS Notice).

In filing this December 21, 2006 Notice, Morgan Stanley effectively demonstrated that the peculiar phrasing of its June 17, 2005 Notice -- and all the equivocating that it triggered at the criminal contempt hearing -- had been no accident. Before, during, and after trial, and, indeed, even now, Morgan Stanley refused to come clean about when its Law Division first learned that the Brooklyn and 8-mm tapes contained e-mail. Instead, Morgan Stanley's December 21, 2006 Notice--when it finally came (on the eve of a holiday weekend) one year after the criminal contempt hearing -- came with no sworn affidavit, no pertinent document, no explanation of any new information that triggered the Notice, and no explanation of how or when that information came to light. Moreover, it "clarified" only one portion of the prior submission, and it did that in a way that raised more questions than answers.

Morgan Stanley's admission that its in-house counsel knew of unsearched e-mails prior to July 2004 shows the falsity of the claims Morgan Stanley made -- in its remediation proceedings briefs, in the Doyle declaration, and in its repeated

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statements in May and June 2005 (after this Court had issued its remedial orders) -- that Morgan Stanley's in-house counsel were not aware of the falsity of the June 2004 certificate of compliance at, or soon after, the time it was filed. In other words, this Court's remedial orders were based on only a part of Morgan Stanley's sanctionable conduct. Morgan Stanley committed additional sanctionable conduct after this Court entered its remedial orders and continues to conceal its misconduct even today.

There may well be much more sanctionable conduct that Morgan Stanley continues to conceal through the obviously intended imprecision of its "Notices." We do not yet know, for example, how the decision to submit the false June 2004 certificate of compliance came about -- something that potentially could be revealed by the e-mails Morgan Stanley now has in its possession but has not disclosed. We do not yet know whether Morgan Stanley was already aware, at the time of the June 2005 Notice and the November 2005 contempt hearing, that in-house counsel knew "prior to July 2004" that the tapes contained e-mails. We do not yet know whether the searches Morgan Stanley conducted revealed that even more people within the company were aware that Morgan Stanley was submitting a false certificate of compliance, presenting false facts to the Court, and arguing that these false facts were sufficient to make sanctions inappropriate. And we do not yet know whether Morgan Stanley is even now being truthful in explaining when it found the e-mails showing the knowledge of its in-house counsel. Morgan Stanley's latest version of its evolving story states that in-house counsel knew "prior to July 2004." Does that mean that Morgan Stanley had the e-mails demonstrating this knowledge at the time of the remedial order hearings in February and March 2005?

In any event, the post-trial disclosures that already have been made show that the Court was unaware of egregious misconduct by Morgan Stanley's in-house legal staff at the time the Court entered its remedial orders, and even at the time of trial. Morgan Stanley's misconduct was more widespread, more shocking, more needful of remediation, and more deserving of punishment than the Court knew. Further investigation into what Morgan Stanley knew, and when it knew it, will demonstrate even more conclusively the extent to which Morgan Stanley corrupted the judicial process, and, hence, the need for relief under Section 1.540(b).

D. Fourth District Court of Appeal's Ruling.

On appeal, the Fourth District reversed the trial court's judgment, on the sole ground that CPH had not adequately established its damages because it had not proven the value of the Sunbeam stock on the date of the transaction. The Fourth District did not disturb this Court's remedial orders and did not address the misconduct by Morgan Stanley that came to light only long after those sanctions were imposed. Tellingly, on appeal, Morgan Stanley never challenged any of this Court's factual findings about its extensive and egregious litigation misconduct.

ARGUMENT

I. RULE 1.540(b) PROVIDES AN APPROPRIATE AVENUE OF RELIEF FROM MORGAN STANLEY'S FRAUD, AND A RULE 1.540(b) MOTION IS PROPERLY BROUGHT AT THIS TIME.

For business executives to hide or destroy evidence is a serious affront to the administration of justice. But when lawyers -- officers of the court -- connive, conceal, or cooperate in hiding or destroying evidence, the justice system simply cannot work, and the severest of sanctions must be imposed on those who are caught.

Thus, while the Court was considering appropriate remedial orders for Morgan Stanley's discovery misconduct, Morgan Stanley repeatedly argued for leniency on the specific ground that its in-house lawyers were not involved in the misconduct, and, indeed, were not aware until "late October 2004" that Morgan Stanley's unsearched backup tapes contained emails. Morgan Stanley repeated that story -- which was not true -- through the end of the trial. After the trial was over, Morgan Stanley acknowledged that its in-house lawyers actually knew about the email "in July 2004." That was not true either -- at least insofar as the statement was meant to imply that the in-house lawyers acquired this

knowledge in July 2004, which the statement clearly was meant to do. Many months later, Morgan Stanley once more revised its story, telling a bit more of the truth: its in-house lawyers actually knew that the backup tapes contained emails sometime "prior to July 2004."

To this day, Morgan Stanley has not told the Court or CPH exactly when it was -- in the days, months, or years "prior to July 2004" -- that its in-house lawyers actually learned these facts. [1] But the point is that Morgan Stanley, in an effort to avoid serious sanctions, lied -- repeatedly -- to the Court about what its in-house lawyers knew and when they knew it. The fraud that Morgan Stanley practiced on the Court and CPH is precisely the kind of fraud that Florida Rule of Civil Procedure 1.540(b) was meant to address.

Rule 1.540(b)(3), which allows the setting aside of a judgment infected by fraud or other serious misconduct, provides that:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons: ... (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party .... The motion shall be made within a reasonable time, and ... not more than 1 year after the judgment, decree, order, or proceeding was entered or taken ... This rule does not limit the power of a court ... to set aside a judgment or decree for fraud upon the court.

The purpose of this part of Rule 1.540(b), like that of Federal Rule 60(b), upon which it is modeled, is to "provid[e] relief for judgments that were unfairly obtained, not those that are factually inaccurate. The rule is an 'escape valve to protect the fairness and integrity of litigation in federal courts.' " 12 J. Moore et al., Moore's Federal Practice, § 60[1][d] (Matthew Bender 3d ed. 2007) (footnotes omitted). [2] Rule 1.540(b) permits the court to set aside a judgment based on a fraud perpetrated by the prevailing party, whether the fraud is directed against only the adverse party or against the judicial process. Here, the fraud perpetrated by Morgan Stanley was both "a fraud upon the court" and a fraud against CPH, and the judgment should be set aside for each of these reasons.

CPH's motion is properly brought at this time. The fact that a case has been the subject of an appeal does not alter the authority of a trial court to entertain a motion for relief from judgment on remand. *See, e.g., Ohio Casualty Group v. Parrish*, 350 So. 2d 466, 469 (Fla. 1977) (citing *Standard Oil Co. of California v. United States*, 429 U.S. 17, 17-18 (1976)); *Sellers v. General Motors Corp.*, 735 F.2d 68, 69 (3d Cir. 1984) ("Our affirmance on [the existing record] did not limit the power of the district court to consider Rule 60(b) relief."). [3]

Some types of Rule 1.540(b) motions must be brought within a year from the entry of the judgment from which relief is sought. [4] If that requirement is applicable to this case, it is clearly met. In a case like this one, where an earlier judgment has been reversed on appeal, the one-year period runs from the date of the new judgment entered pursuant to the appellate court's mandate. That is because it is the new judgment, rather than the previous, now-reversed judgment, from which relief is being sought. *See Molinos*, 947 So. 2d at 524-25 (reversing denial of Rule 1.540(b) motion).

In *Molinos,* trial court judgments in favor of the plaintiffs had been reversed on appeal. The plaintiffs then filed Rule 1.540(b)(2) motions based on newly discovered evidence of defendants' discovery violations. *Molinos*, 947 So. 2d at 523-24. (Motions for relief from a judgment based on newly-discovered evidence are among those that must be made within one year of the entry of judgment.) Because the Rule 1.540(b)(2) motions in *Molinos* were filed more than a year after the original judgments had been entered, the Circuit Court denied the motions as untimely. *Id.* On appeal, the Fourth District reversed, holding that the Rule 1.540(b)(2) motions were timely because the relevant judgments "were those entered after [the defendant's] successful appeals." *Id.* at 525; *cf. Gegenheimer v. Galan*, 920 F.2d 307, 310 (5th Cir. 1991) ("[i]f an appeal results in a substantive change [in the judgment], then the time [for filing a Rule 60(b)(1) motion]

would run from the substantially modified order entered on mandate of the appellate court") (quoting *Transit Cas. Co. v. Security Trust Co.*, 441 F.2d 788, 791 (5th Cir. 1971)).

As in *Molinos*, there was no adverse judgment from which CPH could have sought relief until this Court entered the judgment mandated by the Fourth District. Accordingly, this is the appropriate time to address CPH's motion for relief from the judgment based on Morgan Stanley's fraud.

II. THE JUDGMENT IN THIS CASE SHOULD BE SET ASIDE UNDER RULE 1.540(b).

The fraud committed by Morgan Stanley was both a fraud upon the Court and a fraud on CPH, and it must be redressed for each of these reasons. First, Morgan Stanley and its attorneys committed a fraud upon the Court, which perverted the course of justice and was an affront to the proper administration of justice and the integrity of the judicial system. Second, the fraud committed by Morgan Stanley and its attorneys also constituted a massive fraud that severely impacted CPH and deprived it of its right to a fair and effective adjudication of its claims against Morgan Stanley. Because this case involves a fraud upon the Court, the law does not require that actual prejudice be established. The very fact of the fraud mandates remedial action. Even if prejudice were relevant, however, the law would assign to Morgan Stanley the burden of proving that CPH was not prejudiced by Morgan Stanley's fraud. In fact, the prejudice to CPH is manifest.

A. Morgan Stanley Concealed From The Court And CPH The Fact That Its Law Division Knew And Participated In The Concealment And Destruction Of Evidence, Thereby Misrepresenting The True Scope Of Its Wrongdoing.

It is beyond dispute that, on each of the occasions when this Court attempted to "level the playing field," Morgan Stanley had committed sanctionable conduct that warranted corrective action. On appeal, Morgan Stanley did not challenge any of the Court's findings in that regard; Morgan Stanley challenged only the severity of the final pre-trial sanction order, imposed on March 23, 2005-- which the Fourth District did not disturb. As the Court's unchallenged findings show, Morgan Stanley contumaciously defied numerous Court orders and lied repeatedly to CPH and the Court, even in sworn statements, about the existence and availability of emails and other evidence.

Morgan Stanley committed fraud on the Court in connection with the sanctions motions by repeatedly telling the Court, in pleadings, arguments, offers of proof, and sworn statements, that its in-house lawyers were not aware of the existence of unsearched and unproduced emails (or of the improper destruction of emails) until "late October 2004" -- four months after Morgan Stanley's false June 2004 certification that its search and production were complete. After repeatedly using these false representations to support its pleas for leniency, Morgan Stanley admitted, in June 2005 (one month after the return of the jury's verdict), that the Morgan Stanley Law Division was actually aware in July 2004 that the unsearched Brooklyn tapes contained email. But even this "admission" continued Morgan Stanley's deceit that the in-house lawyers did not know -- until after the certification was made -- that the Brooklyn tapes contained email (or that the 8-mm tapes existed). In December 2006, however, Morgan Stanley finally added the admission that "Morgan Stanley's Law Division was aware of the existence of the [Brooklyn and 8-mm] email backup tapes and the presence of email on some of those tapes *prior to* July 2004" (emphasis added). The only reasonable inference to be drawn from these tortured "admissions" is that the Law Division knew of unsearched emails, and thus knew that the June 23, 2004, certification was false, at the time the certification was made. Indeed, even with these two additional "Notices," Morgan Stanley has refused to disclose precisely when its Law Division -- supposedly charged with ensuring compliance with applicable law -- actually learned for the first time about the existence of email on the Brooklyn or 8-mm tapes. It seems plausible that the Law Division was aware of these facts from the very beginning of this litigation and lied from the date of its first, fraudulent response to CPH's Notice to Produce Documents in June 2003.

B. Morgan Stanley's Actions Constitute Fraud Upon The Court And Therefore Require The Setting Aside Of The Judgment Without Any Need To Demonstrate Prejudice To CPH.

Morgan Stanley repeatedly lied about the Law Division's knowledge of the discovery misconduct to ensure that the Court would not impose the more substantial sanctions that would have been imposed for lawyer, rather than simply lay, misconduct. That pattern of lies and concealment as to the Law Division's knowledge constituted a fraud upon the Court warranting relief from the judgment under Rule 1.540(b). In cases of fraud upon the court, the granting of relief does not require proof of prejudice, but such proof is abundant here in any event.

1. The Involvement Of Morgan Stanley's Law Division In Its Unconscionable Scheme To Conceal Documents And Misrepresent Their Existence Resulted In A Fraud Upon The Court Sufficient To Set Aside The Judgment Under Rule 1.540(b).

Under the saving clause of Rule 1.540(b), courts retain the power to "set aside a judgment or decree for fraud upon the court." Fla. R. Civ. P. 1.540(b). Fraud upon the court is a ground for relief that may be raised at any time, including in a Rule 1.540(b) motion. *DeClaire v. Yohanan*, 453 So. 2d 375 (Fla. 1984), *superseded by rule on other grounds as recognized in Cerniglia v. Cerniglia*, 679 So. 2d 1160, 1163 n. 3 (Fla. 1996). Fraud upon the court occurs where "a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." *Andrews v. Palmas De Majorca Condominium*, 898 So. 2d 1066, 1069 (Fla. 5th DCA 2005) (citing *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989)). Morgan Stanley's own admissions to the Court -- that it misrepresented its in-house attorneys' knowledge of the email back-up tapes -- demonstrates that Morgan Stanley sought to influence the Court improperly and to effectuate an unconscionable scheme designed to interfere with the Court's ability to adjudicate the original case fairly, impartially, and with full knowledge of all relevant facts.

Although Florida courts have not previously addressed a situation identical to that presented here, other jurisdictions have set aside judgments because of frauds upon the court nearly identical to that perpetrated by Morgan Stanley. For example, in *Chewning v. Ford Motor Co.*, 579 S.E.2d 605 (S.C. 2003), the South Carolina Supreme Court held that an attorney's subornation of perjury or intentional concealment of documents constituted a fraud upon the court that warranted setting aside a prior judgment under the South Carolina version of Rule 1.540(b). *Id.* at 610-11. Ford's attorneys and expert witness had devised a secret strategy that involved paying an expert witness substantial sums of money to give favorable testimony for Ford, with Ford's attorneys concealing documents concerning this arrangement as well as other documents damaging to Ford's case. *Id.* at 611-12.

The *Chewning* court emphasized that the misconduct was especially egregious because of the involvement of Ford's lawyers: "Attorney fraud calls into question the integrity of the judiciary and erodes public confidence in the fairness of our system of justice. Accordingly, where an attorney embarks on a scheme to either suborn perjury or intentionally conceal documents, ... a fraud upon the court occurs." *Id.* at 611. Unlike perjury or document concealment by a party or witness, "where an attorney -- an officer of the court -- suborns perjury or intentionally conceals documents, he or she effectively precludes the opposing party from having his day in court," thereby interfering with the court's ability to adjudicate a case impartially. *Id.* at 611.

Similarly, in *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1131 (9th Cir. 1995), the U.S. Court of Appeals for the Ninth Circuit vacated a judgment because the defendant, through Edward Bartlett, its in-house general counsel, had worked "an unconscionable scheme" designed to defraud the court through "misleading, inaccurate, and incomplete responses to discovery requests, the presentation of fraudulent evidence, and the failure to correct the false impression created by [the defense expert's] testimony." *Id.* at 1131-32. The Ninth Circuit found that Bartlett, who had "participated significantly" in the original litigation, by "attending the trial on [the defendant's] behalf, gathering information to

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respond to discovery requests and framing the answers," was responsible to the court for his actions during discovery, even though he was not admitted to practice in the state, did not "enter an appearance in [the original litigation], was not admitted pro hac vice, and did not sign any documents filed with the court." *Id.* Nonetheless, the court treated his misconduct as that of an "officer of the court" and thus sufficient to warrant relief from the judgment. *Id.*

As *Chewning* and *Pumphrey* demonstrate, the involvement of a party's in-house lawyers in a deliberate scheme to conceal evidence and misrepresent its existence constitutes fraud upon the court and warrants setting aside a judgment. *See also Synanon Foundation, Inc. v. Bernstein*, 502 A.2d 1254 (D.C. 1985) (where plaintiff's in-house attorneys concealed, altered, and destroyed evidence responsive to defendants' discovery requests and later misrepresented its existence to the trial court, plaintiff and its attorneys perpetrated a fraud upon the court).

Here, there is no question that Morgan Stanley, with substantial involvement from its in-house attorneys, deliberately concealed responsive discovery and lied and misrepresented the existence of responsive discovery to the trial court and CPH. Several high-ranking lawyers in Morgan Stanley's Law Division submitted offers of proof or sworn statements to the trial court, asserting that no one in the Law Division was aware until October 2004 that numerous back-up tapes contained email from relevant time periods. Morgan Stanley itself later admitted that these declarations and offers of proof were false and that Morgan Stanley's in-house attorneys actually knew the back-up tapes contained emails "prior to July 2004." Furthermore, the fraud Morgan Stanley perpetrated on this Court was so pervasive and so well-planned that it fully and completely interfered with both the jury's and the Court's ability to provide a fair and impartial adjudication of the matter. Morgan Stanley's repeated misrepresentations, effectuated through its Law Division's offers of proof and sworn statements, improperly influenced the Court's decisions regarding sanctions and jury instructions. Morgan Stanley's conduct clearly amounted to a fraud upon the trial court and CPH is entitled to relief from the judgment.

2. Because Morgan Stanley And Its In-House Lawyers Perpetrated A Fraud On The Court, CPH Need Not Show That Morgan Stanley's Fraudulent Conduct Caused Prejudice To CPH To Secure Relief From The Judgment.

As numerous courts have held, fraud upon the court is such "an affront to the administration of justice" that "a litigant who has been defrauded need not establish prejudice" to secure relief from the judgment. *Chewning*, 579 So. 2d at 611 n.7 (citation omitted); *see also Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 247 (1944) (litigant who attempts to defraud the court cannot deny effectiveness of fraud after the fact), *overruled on other grounds by Standard Oil Co. of California v. United States*, 429 U.S. 17 (1976); *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1120 (1st Cir. 1989) (same); *In re Intermagnetics America, Inc.*, 926 F.2d 912 (9th Cir. 1991) (prejudice is not relevant to inquiry regarding whether judgment should be set aside for fraud on the court); *Pumphrey*, 62 F.3d at 1132-1133 (same); *Dixon v. C.I.R.*, 316 F.3d 1041, 1046 (9th Cir. 2003) ("Prejudice is not an element of fraud on the court.").

Rather, "the inquiry as to whether a judgment should be set aside for fraud upon the court focuses on . . . whether the alleged fraud harms the integrity of the judicial process." *In re Intermagnetics America, Inc.*, 926 F.2d at 917. In *Pumphrey*, for example, the Ninth Circuit held that the defendant's in-house counsel undermined the judicial process when he failed to disclose responsive discovery materials, mischaracterized test results in response to plaintiff's discovery requests, and failed to correct false and misleading testimony given by the defense expert witness at trial. *Pumphrey*, 62 F.3d at 1133. Quoting the district court, the Ninth Circuit emphasized that the lawyer, as a "licensed attorney," was aware of the "damage failure to abide by [discovery rules] and the rules of professional responsibility can wreck . . . [on] the larger framework of confidence in the adversary trial system." *Id.* (citation omitted). It did not matter, the Ninth Circuit emphasized, whether the plaintiff could show that it would have prevailed in the original litigation if the lawyer had not perpetrated a fraud on the court. *Id.* at 1132. Because of the damage done to the integrity of the judicial process itself, the plaintiff was entitled to relief from the fraudulently procured judgment and a new trial on all issues. *Id.* at 1133-34.

Like the misconduct of the attorneys in *Pumphrey* and *Chewning*, Morgan Stanley's in-house attorneys engaged in fraudulent conduct that not only severely hampered CPH's access to responsive discovery materials, but also interfered

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with the Court's ability to adjudicate the original action impartially. Morgan Stanley cannot now be heard to claim that its conduct did not have the consequences it intended. CPH is entitled to a fair, impartial trial, and is therefore entitled to relief from the judgment.

C. Morgan Stanley's Fraud Had A Prejudicial Effect on the Outcome of the Litigation And Prevented CPH From Fully and Fairly Presenting Its Case.

As we have shown, the granting of relief from a judgment procured by fraud upon the court does not require a showing of prejudice to the non-prevailing party. The harm to the justice system is enough. Even in those few cases in which courts have found prejudice to be relevant, however, they have held that the existence of prejudice should be presumed, and that the party defending the judgment should be required to prove the absence of prejudice by clear and convincing evidence. *See, e.g., Anderson v. Cryovac, Inc.* 862 F.2d 910, 925-26 (1st Cir. 1988) (showing of knowing or deliberate misconduct creates presumption of prejudice sufficient to decide the issue unless rebutted by clear and convincing evidence, with any uncertainties "redound[ing] to the movant's benefit"); *Venture Indus. Corp. v. Autoliv ASP, Inc.*, 457 F.3d 1322, 1332-34 (Fed. Cir. 2006) (same).

In any event, it is clear beyond doubt in the present case that Morgan Stanley's fraudulent conduct had a prejudicial effect on the outcome of the litigation and prevented CPH from fully and fairly presenting its case. Under any relevant standard, therefore, CPH is entitled to relief.

1. Morgan Stanley's Fraud With Respect To What Its Law Division Knew Was Critical To The Resolution Of The Sanctions Motions, And, Hence, To The Outcome Of The Case.

It was clear, when the Court made its sanctions decisions, that Morgan Stanley had committed serious, sanctionable misconduct. The only question was *how* substantial the sanction should be. Thus, Morgan Stanley needed to portray itself in as good a light as possible. That is why, in its March 13, 2005 opposition to CPH's motion for default, Morgan Stanley drew a sharp distinction between what its IT staff knew and what its legal staff (allegedly) knew:

> While it is true that Mr. Riel [the IT manager who signed the e-mail certification] and other members of the IT Staff knew in early July 2004 (after Mr. Riel signed his certification) that some of those tapes contained some e-mails going back to the late 1990s, neither Mr. Riel nor anyone else in the IT department informed Morgan Stanley's lawyers of that fact... It was not until late October 2004, when Morgan Stanley's Law Division was working with Ms. Gorman (Mr. Riel's successor) on some issues regarding an unrelated regulatory production of e-mails, that the Law Division learned, for the first time, that some of the tapes contained e-mails. That accounts for Morgan Stanley's representation to this Court that late October 2004 marks the first time that the in-house legal staff was aware of this fact.

CPH App. 15 (3/13/05 MS Opp'n to CPH Mot. for a Default Judgment at 20); see also id. at 20, 31 ("[W]hether the affidavit had come from Mr. Doyle, Mr. Cusick, or any other member of Morgan Stanley's Law Division, the content would have been the same: the Law Division did not learn that some of the newly discovered tapes contained some emails until October 2004.").

That is also why Morgan Stanley repeated this contention to the Court both during and after the sanctions proceedings. *See, e.g.*, CPH App. 11 (2/28/05 Morgan Stanley's Opp'n to CPH's Mot. for a Default Judgment, at 6) ("Morgan Stanley has consistently contended that no one in its Law Division knew of the existence of additional recoverable email data on the tapes before October 2004."); CPH App. 21 (5/12/05 MS Addendum to Opposition to CPH Mot. for Correction) (May 12, 2005 proffer stating that in-house counsel did not know that there was email on the Brooklyn tapes until

October 2004 and did not know of the existence of 8-mm tapes containing emails until November 2004); CPH App. 23 (5/16/05 Tr. at 15266) (May 16, 2005 Morgan Stanley argument to Court that " '[t]here is no evidence that any lawyer in Morgan Stanley's Law Division was aware prior to October 2004 that any of the tapes contained any e-mail' "); CPH App. 25 (5/18/05 Tr. at 15607) (May 18, 2005 Morgan Stanley argument that "it's undisputed that [in-house counsel] learned that these [backup tapes] contained e-mail in October 2004").

Of course, all of these representations were false, as Morgan Stanley's December 21, 2006 Notice eventually made clear. They were all part of a lie. And the lie was critical to Morgan Stanley's defense of the sanctions motions -- a defense that was aimed at avoiding the severe sanctions that Morgan Stanley truly deserved. It was bad enough that Morgan Stanley's employees were engaged in misconduct relating to the production of emails. But one of the principal responsibilities of in-house counsel is to see that the company and its employees comply with the law. It would have been devastating to Morgan Stanley's defense if the Court had known that the Law Division not only had failed to ensure compliance with the Court's Orders, but that the Law Division had actually known about the noncompliance even at the very time the Court was being assured that compliance had occurred. The facts would have been particularly devastating because the Law Division lawyers who lied to the Court were not junior, inexperienced lawyers; the in-house lawyers who lied to the Court included at least three of the most senior lawyers in company (and perhaps others whose identities Morgan Stanley continues to conceal). But Morgan Stanley went even further: Morgan Stanley traded on the Court's willingness to presume that in-house counsel would comply with the law (which they did not do) to argue that the Court, as a matter of fairness, should not impose the sanctions that CPH had requested. That ploy worked.

If CPH had known in early 2005 (when it moved for sanctions) that these sworn statements and representations about in-house counsel's knowledge were false -- indeed, if CPH had known that Morgan Stanley's in-house lawyers, portrayed as enablers of the truth, were actually enablers of deceit-- CPH would have urged sanctions more severe than those it requested. CPH not only would have asked the Court to enter a total default as to liability (which CPH unsuccessfully urged), but CPH also would have asked for a remedial order with respect to damages. Indeed, at oral argument on the request for sanctions, CPH argued that the withholding of the truth about the email went to every element of the claim, including the fact of damages. CPH App. 19 (3/15/05 Tr. at 3944). If CPH had known at the time of the sanctions hearing that Morgan Stanley's in-house lawyers had known about the fraud, and had been active participants in it, Morgan Stanley could not have succeeded in its central argument for leniency, which was based on its lawyers' lack of participation in any wrongdoing.

Based on the incomplete and deceptive picture presented by Morgan Stanley, the Court limited the severity of its remedial orders. Based on what it did know, the Court commented that Morgan Stanley's misconduct was so serious that *"[t]he judicial system cannot function this way."* CPH App. 20 (3/23/05 Order at 16) (emphasis in original). But the Court and CPH were aware of only part of the story. If the Court had known that Morgan Stanley was lying about what the Law Division knew, or that Morgan Stanley's lawyers had deliberately chosen to lie to the Court to secure a less severe remedy for Morgan Stanley's misconduct, the Court undoubtedly would have responded to those facts by imposing the more serious sanctions Morgan Stanley deserved rather than the purely remedial measures the Court actually imposed. *See, e.g., Webb v. District of Columbia*, 189 F.R.D. 180, 191 (D.D.C. 1999) (party may be penalized for in-house counsel's conduct because party "has an unusually broad influence [over in-house lawyers] because of the power to control litigation policies and the entirety of the lawyer's resources. This consideration, together with the [client's] own unlawful actions, make the imposition of a default judgment in part for the misconduct of counsel an entirely just and appropriate result.").

In the circumstances, it would have been appropriate for the Court to have imposed a total default as to liability and to have altered the burden of proof as to damages. If the Court had imposed the serious sanction that, we now know, Morgan Stanley has always merited, the outcome of this case would have been different, and the granting of relief under Rule 1.540(b) is warranted for that reason.

2. Morgan Stanley's Fraud On The Court Infected The Jury's Deliberations.

There can be no doubt as to the importance of Morgan Stanley's fraud with respect to how the trial was conducted--Morgan Stanley used its misrepresentations to avoid the likelihood of a remedy more severe than the partial default the Court ordered. But Morgan Stanley did more: it used its misrepresentations to secure a change in the arguments presented to the jury.

On May 18, 2005, outside the presence of the jury, the Court heard arguments from the parties concerning the use of demonstrative aids in support of the parties' respective closing arguments in the punitive damages phase of the trial. Morgan Stanley asked the Court to order CPH to change its closing argument and the PowerPoint presentation that supported it. Morgan Stanley told the Court that "it's undisputed in the record that the lawyers at Morgan Stanley learned that email was on these tapes in October 2004. There's been no contrary evidence to this .... They knew about the tapes in June, but they didn't know they contained e-mail." CPH App. 25 (5/18/05 Tr. at 15608). The Court, unaware of the truth at that time, required CPH to redo its presentation, explaining: "We don't know if [the Morgan Stanley in-house lawyers] knew [the backup tapes] contained e-mail." *Id.*

In other words, Morgan Stanley persuaded the Court to change what the jury was to hear, and it succeeded in doing so by misrepresenting to the Court that its in-house attorneys had somehow remained ignorant until October 2004 of the fact that the unsearched Brooklyn tapes contained email (and that they remained unaware until November 2004 of even the existence of the 8-mm tapes). That, of course, was false. As Morgan Stanley unequivocally admitted after jurisdiction of the case had been transferred to the Fourth District -- and, indeed, the case had been argued and submitted in that court -- the in-house lawyers were aware of the existence of email on the unsearched Brooklyn tapes prior to July 2004. In addition, it is now clear that sometime before July 2004 members of the Law Division were aware that the 8-mm tapes existed, and that some of those tapes contained emails.

Where, as here, the misconduct has actually changed what the jury was allowed to hear, there can be no doubt that relief is warranted under Rule 1.540(b).

III. THE COURT SHOULD ORDER DISCOVERY AND BRIEFING ON CPH'S RULE 1.540(b) MOTION, AND SET THE MATTER FOR AN EVIDENTIARY HEARING.

Where a Rule 1.540(b) motion presents a "colorable entitlement to relief," the Court must conduct an evidentiary hearing to determine whether the motion should be granted. *See Schlege v. Stebelsky*, 957 So. 2d 71, 73 (Fla. 4th DCA 2007) (evidentiary hearing required unless allegations and accompanying affidavits fail to show colorable entitlement to relief); *Robinson v. Weiland*, 936 So. 2d 777, 781 (Fla. 5th DCA 2006) (evidentiary hearing required where motion under Rule 1.540(b) "pleads fraud or misrepresentation with particularity, and shows how that fraud or misrepresentation affected the judgment").

Under Florida law, the presentation of a colorable entitlement to relief also requires that the movant be afforded permissible discovery prior to the hearing. *See Southern Bell Tel. & Tel. Co. v. Welden*, 483 So. 2d 487, 489 (Fla. 1st DCA 1986) (applying Rule 1.540(b)). Here, the need for discovery is obvious. Morgan Stanley has deceived and misled the Court and CPH since virtually the beginning of the litigation, starting with Morgan Stanley's response to CPH's first request to produce documents. Morgan Stanley affirmatively misrepresented the extent of its misconduct until long after the verdict; and even now, nearly three years after the trial, Morgan Stanley continues to conceal the full magnitude of its misconduct and that of its Law Division.

As shown above, Morgan Stanley argued forcefully that it should escape the most severe consequences of its actions on the ground that its in-house lawyers did not knowingly participate in the discovery misconduct that Morgan Stanley

argued was confined to certain personnel in its IT department. *See supra* pages 10 to 16. Although Morgan Stanley's argument succeeded, it was based upon facts that we now know to be false -- facts that Morgan Stanley knew to be false at the time Morgan Stanley made the argument. But we do not yet know the full extent of the Law Division's complicity. Morgan Stanley's June 17, 2005 Notice, its presentation at the November 3, 2005 criminal-contempt hearing, and its December 21, 2006 Notice all reflect a consistent attempt to game the system by creating intentional ambiguities that mask the full extent of its in-house lawyers' misconduct. Justice will not be done in this case until those responsible are required to answer questions under oath and have their testimony subjected to this Court's most rigorous scrutiny. The need for discovery could not be more acute.

Moreover, this Court should not allow Morgan Stanley to stymie discovery once again by improperly invoking the attorney-client privilege. There is now a resounding factual basis for applying the crime/fraud exception to the privilege. Under Florida law, the crime/fraud exception bars any party from claiming as privileged any communications with a lawyer when the lawyer's services "were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud." Fla. Stat. § 90.502(4)(a); *see also American Tobacco Co. v. State*, 697 So. 2d 1249, 1252-56 (Fla. 4th DCA 1997). When a party engages in discovery misconduct and abuses the attorney-client privilege, Florida courts do not hesitate to reject the party's claims of privilege and require disclosure of information that the party otherwise would continue to cloak in the privilege by having its lawyers participate in the wrongful conduct. *See, e.g., General Motors Corp. v. McGee*, 837 So. 2d 1010, 1032 (Fla. 4th DCA 2002).

Here, CPH asked the Court to pierce the privilege based on the crime/fraud exception on February 21, 2005, when CPH sought to depose Morgan Stanley's in-house counsel about the withholding or destruction of e-mail evidence. CPH App. 10 (2/21/05 CPH Mot. to Compel Further Discovery). In its March 1, 2005 sanctions order the Court denied that request. CPH App. 13 (3/2/05 Order). But at that time, of course, Morgan Stanley had insisted that only its IT personnel and not the members of its Law Division were responsible for the misconduct, and the Court did not yet know about the Law Division's complicity. Had the Court known what we know now, it would have had a clear basis for finding that the privilege was defeated by the crime/fraud exception. Otherwise privileged communications involving Morgan Stanley's Law Division attorneys might well contain important admissions relating to all aspects of the case, including admissions that Morgan Stanley's and Sunbeam's fraudulent statements damaged CPH -- an essential element of CPH's claims against Morgan Stanley and an element that Morgan Stanley contends CPH failed to prove at trial.

CPH believes that this Court will decide, after allowing for appropriate discovery and then conducting the evidentiary hearing required to resolve a Rule 1.540(b) motion, that the judgment in favor of Morgan Stanley should be vacated. Accordingly, CPH respectfully asks this Court to set a briefing schedule, with adequate time for discovery, to be followed by an evidentiary hearing.

IV. THE JUDGMENT IN FAVOR OF MORGAN STANLEY SHOULD BE VACATED AND APPROPRIATELY SEVERE SANCTIONS SHOULD BE IMPOSED AGAINST MORGAN STANLEY.

Given the record of litigation abuse and deception in this case, CPH respectfully submits that this Court should vacate the judgment in favor of Morgan Stanley and then go on to impose additional, more severe sanctions against Morgan Stanley. Specifically, CPH respectfully requests that the Court (a) enter a complete default on all elements of liability, including reliance and the fact of damage; (b) shift the burden of proof on damages; (c) order a new trial on compensatory and punitive damages; and (d) provide such further relief as the Court deems just and proper.

A. Entering a Complete Default on All Elements of Liability.

The Court should enter a complete default order on all elements of liability (including the fact of damage), rather than only a partial default order on some (but not all) elements of liability.

In opposing both CPH's rehearing petition in the Fourth District and its jurisdictional brief in the Florida Supreme Court, Morgan Stanley repeatedly argued that a retrial on damages was unavailable because the jury's finding as to the fact of damage -- not simply the amount -- was tainted by the methodology CPH used for proving the amount of compensatory damages. See CPH App. 33 (Resp.'s Notice Respecting Supp. Authority, at 1 (Nov. 20, 2007)); CPH App. 32 (Resp.'s Answer Br. in Opp'n to Jurisdiction, at 1, 5-8 (July 24, 2007)); CPH App. 31 (Resp. to Mot. for Reh'g *En Banc*, at 11 (May 7, 2007)). Had Morgan Stanley received the sanction it deserved based upon all the information we now know, Morgan Stanley would not have been in a position to urge the grounds for reversal upon which the Fourth District decided the appeal. As even Morgan Stanley surely must concede, an undisturbed finding of liability must be followed by proceedings to determine the proper remedy.

There is no question that this Court has the power to enter a complete default judgment as to all elements of liability. The Florida Rules of Civil Procedure authorize trial courts to issue default judgments against parties that willfully and contumaciously disobey discovery orders. *See* Fla. R. Civ. P. 1.380(b)(2)(C). And courts throughout the State have long recognized that such a default judgment may extend to all elements of liability, including the fact of damage. *See, e.g., Levine v. Del American Properties, Inc.*, 642 So. 2d 32, 32-34 (Fla. 5th DCA 1994) (default judgment as to all elements of fraud, breach of contract, and conversion); *Williams v. Direct Dispensing, Inc.*, 630 So. 2d 1195, 1196-97 (Fla. 3d DCA 1994) (default judgment as to all elements of negligent misrepresentation, breach of contract, and conspiracy to defraud); *Far Out Music, Inc. v. Jordan*, 502 So. 2d 523, 523-24 (Fla. 3d DCA 1987) (default judgment as to all elements of fraud and breach of contract). Such a remedy is clearly appropriate where, as here, the party's misconduct is extreme, and the party has used every means possible to conceal that misconduct.

B. Ordering a New Trial on Damages and Shifting the Burden of Proof.

Florida case law makes clear that sanctions for discovery misconduct may extend beyond the liability phase of the proceeding and into the damages phase. For example, the Florida Supreme Court has recognized that, in entering "a default against a defendant for violation of discovery orders in a negligence action," a trial court must have the discretion to "preclude that defendant from reducing the amount of his liability by proof of the plaintiff's comparative negligence." *Harless v. Kuhn*, 403 So. 2d 423, 424 (Fla. 1981) (internal quotation marks omitted).

Florida courts likewise have held that a defendant that commits discovery misconduct not only may be held liable, but also can be barred from introducing any evidence at the trial on damages. In *Delta Information Services, Inc. v. Joseph R. Jannach M.D. & Associates*, 569 So. 2d 1353 (Fla. 3d DCA 1990), litigation misconduct (including the violation of five discovery orders) led the trial court to find the disobedient party liable and then to prohibit that party from introducing any evidence during the damages trial that should have been disclosed to the other party through court-ordered discovery. *Id.* at 1354 n.4. The Third District affirmed unanimously. *Id.* at 1355.

Similarly, in *Rose v. Clinton*, 575 So. 2d 751 (Fla. 3d DCA 1991), the trial court imposed discovery sanctions that precluded defendants from presenting any evidence whatsoever to controvert plaintiff's proof of damages (though defendants were permitted to cross-examine plaintiff's witnesses and to make objections). *See id.* at 752. After conducting the damages trial, the court entered a final judgment in plaintiff's favor. *Id.* Although the Third District reversed that judgment, it did so solely because the trial judge had not entered written findings that defendants had willfully and deliberately disobeyed a court order to comply with discovery; such written findings are required by the Florida Supreme Court's decision in *Commonwealth Federal Savings & Loan Association v. Tubero*, 569 So. 2d 1271, 1272 (Fla. 1990). *See Rose v. Clinton*, 575 So. 2d at 752. Importantly, the Third District held that the trial court, on remand, would be free to reinstate both its sanctions order and its final judgment awarding damages so long as it conducted the required hearing and entered the required written finding. *Id.* Thus, the Third District approved the trial court's decision to bar defendants from presenting their own damages evidence -- and the appellate court expressly found that the trial court's "sanctions were commensurate with the [defendants'] discovery violations." *Id.* at 752 n.3 (citing *Delta Info. Servs., supra*); *see also*

Joint Committee of the Trial Lawyers Section of the Florida Bar and the Conferences of Circuit and County Judges, Handbook on Discovery Practice 16 & n.64 (2007 ed.) (citing *Rose v. Clinton* for the proposition that Florida trial courts can allow the award of damages as part of a default sanction for discovery abuse), *available at* http://www.flatls.org/Handbook/Handbook.pdf.

The Court could also take a more limited step. Rather than barring Morgan Stanley from introducing evidence at a new trial on damages, the Court could require Morgan Stanley to show "negative causation" -- that is, make Morgan Stanley bear the burden of proving that something other than fraud caused a decline in the value of CPH's 14.1 million shares of Sunbeam stock. *See Akerman v. Oryx Communications, Inc.*, 810 F.2d 336, 340-43 (2d Cir. 1987). [5] This request comports with the Fourth District's decision focusing on "the actual, 'fraud-free' value of the Sunbeam stock on the date of the transaction." 955 So. 2d at 1131. The negative-causation defense proposed here and the loss-causation burden that the Fourth District imposed on CPH are mirror-image methods of establishing the actual, fraud-free value on the date of the transaction. "[I]n the former [method], the burden of proving negative causation is on the defendant, and in the latter, the burden of proving the existence of loss causation is on the plaintiff." *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288, 2005 WL 375314, at *6 (S.D.N.Y. Feb. 17, 2005). The new trial on damages will arrive at that fraud-free value. But at the new trial, Morgan Stanley will bear the burden of proving negative causation.

Given Morgan Stanley's repeated, willful, and contumacious disregard for this Court's orders and Morgan Stanley's destruction and nonproduction of evidence -- potentially including contemporaneous evidence about the value that Morgan Stanley placed on the Sunbeam stock on the date of the transaction -- this Court should place the burden on Morgan Stanley to attempt to prove what, if any, portion of the stock's collapse can be attributed to non-fraud-related causes.

After the parties have presented their evidence under this evidentiary burden, after the jury has calculated the compensatory damages that Morgan Stanley owes CPH, and after the Court has added the appropriate amount of prejudgment interest to compensate CPH in current dollars, the jury then could determine whether punitive damages are warranted and, if so, what amount is to be assessed. In considering whether punitive damages are warranted, the jury should be instructed about Morgan Stanley's efforts to destroy and withhold evidence of its collusion with Sunbeam, including the important role of Morgan Stanley's in-house counsel.

CONCLUSION

Plaintiff CPH respectfully requests that this Court vacate the judgment of dismissal, enter a default judgment as to all elements of liability, order a new trial on damages with Morgan Stanley bearing the burden of proving that something other than the fraud caused part of CPH's loss, and provide such further relief as the Court deems just and proper.

Dated: March *25th*, 2008
Respectfully submitted,

By: <<signature>>

John Scarola

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Footnotes

1 Morgan Stanley's artful lack of precision as to the exact date on which its in-house lawyers learned this fact cries out for further investigation, given the June 23, 2004 date of the false certification.

2 *See Molinos Del S.A. v. E.I. DuPont de Nemours and Co.*, 947 So. 2d 521, 524 (Fla. 4th DCA 2006) (Rule 1.540(b) follows Rule 60(b) of the Federal Rules of Civil Procedure, and the Florida courts look to federal law in construing it).

3 The Fourth District's direction to enter the judgment in favor of Morgan Stanley was itself an outgrowth of Morgan Stanley's successful concealment of the true magnitude and extent of its litigation misconduct. Had the falsity of Morgan Stanley's representations concerning the involvement of its in-house attorneys been known in 2005, this Court certainly could have imposed contempt sanctions, which, among other things, could have precluded Morgan Stanley from pursuing any appeal until it had purged itself of its contempt by complying fully with the Court's orders. *See, e.g., Davidson v. District Court of Appeal, Fourth Dist.*, 501 So. 2d 603, 604 (Fla. 1987); *Gazil v. Gazil*, 343 So. 2d 595, 597 (Fla. 1977); *Pasin v. Pasin*, 517 So. 2d 742, 742 (Fla. 4th DCA 1987).

4 As we show below, motions for relief from a judgment based on fraud against a party must be made within one year of the entry of the judgment to which the motion relates. However, a motion for relief from a judgment based on fraud against the court may be made at any time. While this distinction is immaterial to the facts of the present case, the distinction is important insofar as it figures in some of the cases discussed in the Motion.

5 Although CPH asks the Court, as a sanction, to require Morgan Stanley to prove negative causation here, that is how the burden of proof is allocated for claims under the Florida Securities and Investor Protection Act. *See* Fla. Stat. §§ 517.211(4), 517.301; *see also E.F. Hutton & Co. v. Rousseff*, 537 So. 2d 978, 978-81 (Fla. 1989) (plaintiff need not prove loss causation). The federal securities laws also impose upon the defendant the burden of proving negative causation in claims arising under Section 11 of the Securities Act of 1933. *See* 15 U.S.C. §§ 77k(e); *see also* 2 Thomas Lee Hazen, Treatise on the Law of Securities Regulation § 7.5[2][b], at 104 (5th ed. 2005) (under the doctrine of "negative causation," if the "value (or price) of the security [has declined] since the purchase, the defendant has the burden of proving that the plaintiff's loss was not attributable to the misrepresentations or omissions").

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